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## The China We Hardly Know: Revealing the New China's Intellectual Property Regime

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## THE CHINA WE HARDLY KNOW: REVEALING THE NEW CHINA'S INTELLECTUAL PROPERTY REGIME

XUAN-THAO NGUYEN\*

### ABSTRACT

The long-held and virtually unquestioned view about China from the United States and other Western nations is that China has a total disregard for intellectual property rights. Recent empirical data and translated Chinese judicial decisions, however, offer a startling new picture of China that directly contradicts the dominant negative view of China's approach to intellectual property rights. Specifically, quantitative studies of recent Chinese patent, copyright, and trademark infringements cases reveal that China has become a litigious society and that there are more intellectual property litigation cases in China than in the United States. Chinese intellectual property owners are not hesitant to enforce their rights against other Chinese infringers, as seen through the tens of thousands of cases filed and concluded annually in recent years. Yet these new trends in China and on intellectual property rights have not been recognized in academic literature or the popular press. This Article reveals a more accurate picture of China's intellectual property enforcements—one that would assist policy makers and legal scholars in their approaches to the New China. Further, this Article observes that China and the United States are at a crossroads with respect to intellectual property. Quantitative and qualitative studies of Chinese and U.S. intellectual property cases indicate that the New China is quickly moving to embrace a strong intellectual property rights system, while the United States is slowly moving towards a weaker intellectual property rights regime.

### INTRODUCTION

Whenever the words “China” and “intellectual property” appear in the same sentence, images of rampant piracy immediately dominate normative

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thinking, media headlines, trade negotiations, and policy statements.<sup>1</sup> The normative view of China, solidified over the years, is that private-property and intellectual property concepts are too foreign and abstract for China and its political and judicial systems to understand.<sup>2</sup> Concerns about China's inability to curb piracy of intellectual property owned by U.S. companies continue to be of primary interest to the U.S. government.<sup>3</sup>

Recent empirical data and translations of Chinese court decisions on intellectual property rights, however, offer a startling new picture of China that directly contradicts the long-held view of China by the United States and the West with respect to intellectual property.<sup>4</sup> The new data reveals that China has accelerated its embrace of intellectual property as an important asset.<sup>5</sup> The Chinese society has become very protective of intellectual property rights, as seen through the tens of thousands of cases that were brought in recent years by Chinese individuals and corporations against Chinese infringers.<sup>6</sup> Chinese intellectual property owners are not hesitant to enforce their rights by utilizing administrative and judicial means available in China.<sup>7</sup> China's embrace of intellectual property rights has not been thoroughly analyzed in either academic literature or in the popular press.<sup>8</sup>

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1. See Peter S. Goodman, *Pirated Goods Swamp China: Official Crackdown Has Little Effect*, WASH. POST, Sept. 7, 2004, at E1 (noting the "brazen and widespread" piracy of American intellectual property in China); *U.S. Takes China Piracy Cases to WTO*, NYTIMES.COM (Apr. 9, 2007), available at <http://www.nytimes.com/2007/04/09/business/worldbusiness/09iht-trade.5.5204152.html> (reporting actions taken by the United States against China after bilateral talks on piracy failed to resolve the widespread piracy of American media).

2. See Goodman, *supra* note 1 (explaining that in communist China, with 1.3 billion people, "the concept of private property is neither fully understood nor valued, let alone the abstract notion of intellectual property"). See also Barden Noel Gale, *The Concept of Intellectual Property in the People's Republic of China: Inventors and Inventions*, 74 CHINA Q. 334, 334-35 (1978) (tracing the Chinese Marxist view of property and intellectual property).

3. See, e.g., Michael Falvey, *Policy Options on Intellectual Property Rights: China Regional Study 1* (2003) (unpublished seminar paper, Industrial College of the Armed Forces), available at <http://handle.dtic.mil/100.2/ADA422083> (stating U.S. policy makers are concerned about China's inability to enforce international intellectual property rights).

4. See *infra* Part III, Tables 3 & 4.

5. See *infra* Part III, Table 7. The high volume of intellectual property litigation cases filed by Chinese against Chinese is even more remarkable given that in China the concept of intellectual property is relatively new. Cf. Goodman, *supra* note 1 (commenting that intellectual property concepts are abstract in China); *Online News Hour: Intellectual Piracy in China*, PBS.ORG (Oct. 13, 2005), [http://www.pbs.org/newshour/bb/asia/july-dec05/china\\_10-13.html](http://www.pbs.org/newshour/bb/asia/july-dec05/china_10-13.html) (reporting private property was banned in China for several decades and explaining that China does "not fully buy the concept of 'intellectual property'").

6. See *infra* Part III.

7. See *infra* Part III.

8. Scholarship on China thus far has focused primarily on piracy. See, e.g., Aaron Schwabach, *Intellectual Property Piracy: Perception and Reality in China, the United States, and*

The new revelation of China with respect to intellectual property cases is even more striking when the data is compared to that of the United States, a nation generally known for its litigious zeal and strong intellectual property protections.<sup>9</sup> In 2005, there were 12,159 patent, copyright, and trademark cases filed in the United States,<sup>10</sup> compared to 10,825 cases in China.<sup>11</sup> In 2006, the United States saw 11,486 cases,<sup>12</sup> while China witnessed 11,436 intellectual property cases.<sup>13</sup> The trend continues, as demonstrated by the fact that the number of intellectual property cases filed in 2007 for the United States totaled 10,761,<sup>14</sup> whereas China's was 15,159.<sup>15</sup>

Beyond the facial conclusion that there now are more intellectual property litigation cases filed per year in China than in the United States, what does the quantitative data show us? This Article goes beyond mere quantitative data; it examines the translations of written opinions rendered by courts across China on intellectual property rights and reaches the conclusion that China and the United States are at a crossroads with respect to intellectual property rights.

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*Elsewhere*, 2 J. INT'L MEDIA & ENT. L. 65 (2008); Angela M. Beam, Comment, *Piracy of American Intellectual Property in China*, 4 J. INT'L L. & PRAC. 335 (1995).

9. See, e.g., Philip G. Peters, Jr., *What We Know About Malpractice Settlements*, 92 IOWA L. REV. 1783, 1825–26 (2007) (quoting Valerie Q. Hans & William S. Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 LAW & SOC'Y REV. 85, 93 (1992)) (stating that many Americans believe “[p]eople are too quick to sue” in the United States) (alteration in original); Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 414 (2003); David G. Savage, *A Trial Lawyer on Ticket Has Corporate U.S. Seeing Red*, L.A. TIMES, Sept. 13, 2004, at A1 (reporting on a poll finding that 80% of Americans believe that the nation is too litigious with too many lawsuits).

10. See ADMIN. OFFICE OF THE U.S. COURTS, TABLE 4.7: COPYRIGHT, PATENT, AND TRADEMARK CASES FILED (2007) [hereinafter ADMIN. OFFICE OF THE U.S. COURTS (2007)], available at <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2007/Table407.pdf>. The totals comprised three categories: copyright, trademark, and patent. See *id.*

11. MINISTRY OF COMMERCE OF CHINA, CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2005 (2006) [hereinafter CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2005], available at [http://www.chinaipr.gov.cn/policyarticle/policy/documents/200606/235422\\_1.html](http://www.chinaipr.gov.cn/policyarticle/policy/documents/200606/235422_1.html). China's totals are actually higher when accounting for intellectual property cases outside of the three categories—copyright, trademark, and patent—used by the United States in reaching its data. See *id.* When comparing Chinese filings to the United States, this paper uses sums derived from those three categories unless otherwise noted.

12. ADMIN. OFFICE OF THE U.S. COURTS (2007), *supra* note 10.

13. See MINISTRY OF COMMERCE OF CHINA, REPORT ON CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2006 (2007) [hereinafter CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2006], available at [http://www.chinaipr.gov.cn/policyarticle/policy/documents/200706/236401\\_1.html](http://www.chinaipr.gov.cn/policyarticle/policy/documents/200706/236401_1.html).

14. ADMIN. OFFICE OF THE U.S. COURTS (2007), *supra* note 10.

15. See MINISTRY OF COMMERCE OF CHINA, CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2007 (2008) [hereinafter CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2007], available at [http://www.chinaipr.gov.cn/policyarticle/policy/documents/200804/237294\\_1.html](http://www.chinaipr.gov.cn/policyarticle/policy/documents/200804/237294_1.html).

As shown by an analysis of the pertinent data and the Chinese courts' written opinions, China's embrace of intellectual property rights runs counter to the normative assumption of China as the land of piracy.<sup>16</sup> More importantly, while China is developing a stronger intellectual property rights regime, advocates in the United States seek a weaker system.<sup>17</sup>

Part II focuses on the current shift towards weaker intellectual property rights unfolding in the United States. The United States is often viewed by people inside and outside the United States as a litigious society,<sup>18</sup> perhaps soon this view will no longer hold true when compared to intellectual property enforcement in the emerging New China. Claims like "there are too many frivolous lawsuits" and "it is too costly" to do business have become familiar in shaping tort litigation reform in the United States in the last decade.<sup>19</sup> Successful tort law reform has drastically curbed personal injury litigation.<sup>20</sup> In recent years, there has been a similar effort to reform intellectual property litigation.<sup>21</sup> Indeed, concerted lobbying activities from various sectors of the U.S. economy struck a similar chord for intellectual property litigation reform.<sup>22</sup>

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16. See *infra* Parts II–IV.

17. See *infra* Parts I, III. This Article is the first in a series of articles on the New China and intellectual property.

18. See Peters, *supra* note 9, at 1825–26; Savage, *supra* note 9. See also Michael R. Baye, Dan Kovenock, & Casper G. de Vries, *Comparative Analysis of Litigation Systems: An Auction-Theoretic Approach*, 115 *ECON. J.* 583, 583 (2005) (stating the United States is "internationally scorned as the 'litigious society'").

19. See Jeffrey Abramson, *The Jury and Popular Culture*, 50 *DEPAUL L. REV.* 497, 515 (2000) (citing Valerie P. Hans, *The Contested Role of the Civil Jury in Business Litigation*, 79 *JUDICATURE* 242, 244–45 (1996)) (analyzing a study claiming that more than eighty percent of jurors "believed that there were too many frivolous lawsuits"). See also Stephen Daniels & Joanne Martin, "The Impact that It Has Had is Between People's Ears": Tort Reform, Mass Culture, and Plaintiffs' Lawyers, 50 *DEPAUL L. REV.* 453, 463 (2000) (discussing poll results and the decades of tort war in the United States); Remarks in a Panel Discussion on the High Cost of Lawsuit: Abuse at the White House Conference on the Economy, 40 *WEEKLY COMP. PRES. DOC.* 2949, 2950 (Dec. 15, 2004) (describing effect on businesses from litigation costs).

20. See Julie Creswell, *So Small a Town, So Many Patent Suits*, *N.Y. TIMES*, Sept. 24, 2006, at 3-1 (recalling an anecdote that lawyers in Texas moved from personal injury to intellectual property after the state's tort reform capped medical malpractice damages and limited punitive damages). See also Alan Cohen, *From P.I. to I.P.: Personal Injury Lawyers in Texas Want to Get into Patent Litigation, and The Roth Law Firm Is Leading the Stampede*, *IP LAW & BUS.*, Nov. 2005, at 36, 36 (noting the successful move by a Texas law firm from personal injury to intellectual property after Texas "got serious about tort reform").

21. See, e.g., Xuan-Thao Nguyen, *Justice Scalia's "Renegade Jurisdiction": Lessons for Patent Law Reform*, 83 *TUL. L. REV.* 111, 113 (2008) (describing proposals to limit forum shopping in patent litigation).

22. See *id.* at 119 (discussing efforts to curb patent litigation costs). See also Editorial, *Stop the Attempt to Weaken Patent System*, *CONCORD MONITOR*, June 25, 2007, at B4 (describing efforts by major corporations to weaken patent protections).

Proponents for intellectual property litigation reform claim that a strong property regime has stifled competition<sup>23</sup> and increased litigation costs in the United States.<sup>24</sup> Some critics complain that intellectual property owners, particularly patent holders, abuse their rights by filing too many patent litigation suits across the United States.<sup>25</sup> This criticism of patent litigation is not supported by the evidence, which indicates that patent lawsuit filings have been relatively flat, averaging 2,819 patent cases filed yearly in the United States from 2002 to 2007.<sup>26</sup> Nonetheless, patent litigation reform has generated much attention in Congress.<sup>27</sup> While the number of patent litigation cases in the United States remains fairly steady, the pendulum's tempo quickens for China. In 2006, there were 3,196 patent litigation cases,<sup>28</sup> and in 2008, the number increased to 4,074 cases in China.<sup>29</sup> Nevertheless, many corporate officers, legislators, lobbyists, and commentators demand that Congress revamp the current system into a weaker, more constrained

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23. See, e.g., FRED WARSHOFSKY, *THE PATENT WARS: THE BATTLE TO OWN THE WORLD'S TECHNOLOGY* 111–12 (1994) (explaining how American and Japanese companies have been using patent litigation to prohibit competition). See also Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 *SCI.* 698, 699 (1998) (arguing that strong patent systems slow innovation in biotech). The view that strong patents prohibit innovation receives support outside the United States, particularly in Canada and Europe. See, e.g., James Morgan, *Patent System 'Stifling Science'*, *BBC NEWS* (Sept. 24, 2008, 8:56 PM), <http://news.bbc.co.uk/2/hi/science/nature/7632318.stm> (reporting on a study by Canadian-based consultants Innovation Partnership calling strong intellectual property rights “ultimately counter-productive for both industry and consumers”).

24. See JAMES BESSEN & MICHAEL J. MEURER, *PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK* 14–16 (2008) (suggesting litigation costs can limit profitability of patents). *But cf. generally* Craig Opperman, James Bessen & Michael J. Meurer, *The Patent System on Trial and Under Attack*, *INTELL. ASSET MGMT. MAG.*, Sept./Oct. 2008, at 36 (debating the assumptions and analysis underlying BESSEN & MEURER, *supra*).

25. See, e.g., Sarah Lai Stirland, *Will Congress Stop High-Tech Trolls?*, 37 *NAT'L J.* 612, 612 (2005) (discussing widespread patent litigation abuse).

26. See ADMIN. OFFICE OF THE U.S. COURTS (2007), *supra* note 10 (listing 2,680 patent suits filed in 2002); ADMIN. OFFICE OF THE U.S. COURTS, TABLE 4.7: COPYRIGHT, PATENT, AND TRADEMARK CASES FILED (2005) [hereinafter ADMIN. OFFICE OF THE U.S. COURTS (2005)], available at <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2005/Table407.pdf> (averaging 2,833 patent suits per year from 2003 through 2007).

27. See sources cited *infra* note 31.

28. CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2006, *supra* note 13.

29. See MINISTRY OF COMMERCE OF CHINA, CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2008 (2009) [hereinafter CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2008], available at [http://www.chinaipr.gov.cn/policyarticle/policy/documents/200906/263973\\_5.html](http://www.chinaipr.gov.cn/policyarticle/policy/documents/200906/263973_5.html).

intellectual property law regime, particularly regarding patent enforcement in the United States.<sup>30</sup>

Part II explains the entrenched view that equates China to the piracy of intellectual property. U.S. government officials, policy makers, and industry experts all criticize China for national and global problems relating to intellectual property piracy. None have recognized the drastic transformation in China with respect to intellectual property protection and litigation.

Part III quantitatively demonstrates through case analysis that China has embraced intellectual property rights on a massive scale. This section examines the number of cases filed each year involving trademark, copyright, and patent infringements. The high volume of cases filed in both lower and appellate courts in China from 2003 through 2007 demonstrates the enforcement trend. The upward trajectory shows China has come full circle in recognizing and enforcing intellectual property rights.

Part IV affirms the quantitative study of Chinese intellectual property litigation cases by examining the translations of written decisions opined by Chinese courts. The decisions reveal that Chinese owners of intellectual property rights *are* relying on the judicial system to adjudicate their rights. The decisions also show that Chinese intellectual property owners are similar to their U.S. counterparts: They assert their rights in typical intellectual property infringement and breach of contract cases involving patents, copyrights, and trademarks.

Part V identifies a puzzle which emerged from the quantitative and qualitative studies on Chinese intellectual property: there is a conspicuous absence of foreign intellectual property owners as litigants. Indeed, it is puzzling to discover that there are few intellectual property lawsuits brought by foreign intellectual property owners against the Chinese, since foreign intellectual property owners have persistently criticized Chinese violations of intellectual property rights. The absence of foreign intellectual property litigants perhaps results from long-held assumptions about China's intellectual property piracy—assumptions which also prevent the United States from recognizing the recent drastic changes in China with respect to intellectual property enforcement. It is time to develop a more accurate picture of China's intellectual property enforcement regime; such an image would assist policy

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30. See, e.g., *Patent Trolls: Fact or Fiction?: Hearing Before the Subcomm. on Courts, the Internet, & Intell. Prop. of the H. Comm. on the Judiciary*, 109th Cong. 26, 29–33 (2006) [hereinafter *Patent Trolls Hearing*] (statement of Chuck Fish, Vice President & Chief Patent Counsel of Time Warner, Inc.); STAFF OF H. COMM. ON THE JUDICIARY, 109TH CONG., COMMITTEE PRINT REGARDING PATENT QUALITY IMPROVEMENT 2, 2–3 (Comm. Print 2005) (statement of Rep. Howard L. Berman); *id.* at 133, 135 (statement of Richard C. Levin, Ph.D., President of Yale Univ. and co-chair of the Comm. on Intellectual Prop. Rights in the Knowledge-Based Econ. of the Nat'l Research Council); Heller & Eisenberg, *supra* note 23, at 701 (stating that policy-makers should establish coherent boundaries in patent law).

makers and legal scholars in developing their policies and approaches to the New China.

## I. UNITED STATES: REJECTING A STRONG INTELLECTUAL PROPERTY REGIME

### A. *Mobilizing for Fewer Intellectual Property Rights*

The United States has positioned itself in the last few decades as a country with strong intellectual property protections and enforcement systems.<sup>31</sup> Intellectual property owners enjoy a robust intellectual property rights regime recognized and supported by a transparent legal system.<sup>32</sup> Owners rely on the legal system to enforce their rights, enjoin infringers, and collect damages, either via pretrial settlements or jury awards.<sup>33</sup> However, the strong protection

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31. See WORLD ECON. FORUM, THE GLOBAL COMPETITIVENESS REPORT 2007–2008, at 12 (2007), available at <http://gcr07.weforum.org/> (follow “Explore the Report” hyperlink) (noting the United States strong intellectual property protection regime). The United States has also been a forceful advocate for strong intellectual property protection and requests trading partners to follow its demands because the United States sees strong intellectual property protection as a method of trade barrier reduction. See David W. Opderbeck, *The Penguin’s Paradox: The Political Economy of International Intellectual Property and the Paradox of Open Intellectual Property Models*, 18 STAN. L. & POL’Y. REV. 101, 135–36 (2007) (observing that because foreign software piracy may be accomplished almost costlessly, “strong intellectual property protection [provided by trade partners] is viewed as a significant way to reduce trade barriers”).

32. See A. Bryan Endres & Peter D. Goldsmith, *Alternative Business Strategies in Weak Intellectual Property Environments: A Law And Economics Analysis of The Agro-biotechnology Firm’s Strategic Dilemma*, 14 J. INTELL. PROP. L. 237, 263 (2007) (describing U.S. protection of intellectual property as “strong”); Dov Greenbaum, *Academia to Industry Technology Transfer: An Alternative to the Bayh-Dole System for Both Developed and Developing Nations*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 311, 318 (2009) (crediting the United States with a “strong and expansive” intellectual property regime). See also Keith E. Maskus, *The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment and Technology Transfer*, 9 DUKE J. COMP. & INT’L L. 109, 137 & n.182 (1998) (listing the United States as an example of a country with a transparent legal system); Adis M. Vila, *The Role of States in Attracting Foreign Direct Investment: A Case Study of Florida, South Carolina, Indiana, and Pennsylvania*, 16 LAW & BUS. REV. AMS. 259, 261 (2010) (quoting INT’L TRADE ADMIN., USA: OPEN FOR BUSINESS FACT SHEET (2008), available at <http://trade.gov/investamerica/usa-open-for-business.pdf>) (“[T]he United States offers a ‘predictable and transparent legal system.’”).

33. Intellectual property owners enjoy their federal rights codified in comprehensive statutes. See 15 U.S.C. §§ 1051–1141 (2006) (trademarks); 17 U.S.C. §§ 101–1301 (2006) (copyrights); 35 U.S.C. §§ 1–351 (2006) (patents). Congress sometimes acts to protect American intellectual property rights abroad by supplementing the existing domestic protection regime with new legislation. See, e.g., Press Release, Sen. Orrin Hatch, Hatch, Baucus Legislation Protects U.S. Intellectual Property, American Jobs (Sept. 10, 2008), available at [http://hatch.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease\\_id=4c9e06b4-1b78-be3e-e075-b6dc0a8537f1](http://hatch.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=4c9e06b4-1b78-be3e-e075-b6dc0a8537f1).



regime for intellectual property rights is losing steam due to criticism that the protection has gone too far.<sup>34</sup>

In recent years, there have been efforts to reduce protections of intellectual property rights. Opponents assert that intellectual property owners use abusive litigation tactics to enforce their rights, and consequently, intellectual property litigation, especially involving patented innovations, has gotten out of control.<sup>35</sup> In response, critics of intellectual property litigation demand changes that would weaken intellectual property rights.<sup>36</sup>

For example, the Committee on Intellectual Property Rights in the Knowledge-Based Economy of the National Research Council claims that the number of patent cases has been on the rise.<sup>37</sup> The Committee insists that the rise in litigation numbers has become a critical problem that must be addressed.<sup>38</sup> The Committee also advocates that established legal standards in patent law, such as “willful infringement,” disclosure of “best mode” for implementing an invention, and a patent attorney’s “inequitable conduct,” should be either eliminated or modified to reduce patent litigation costs.<sup>39</sup>

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34. See, e.g., FED. TRADE COMM’N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY 28 (2003), available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf> (listing criticisms from commentators); Timothy B. Lee, *Vonage is the Latest Victim of Patent Abuse*, AMERICAN (Apr. 24, 2007), <http://www.american.com/archive/2007/april-0407/vonage-is-the-latest-victim-of-patent-abuse> (asserting the U.S. patent system “seems to allow a deep-pocketed incumbent to drive an innovative competitor out of business”); Jonathan Schwartz, *Tech Issues That’ll Give You Creeps*, ZDNET (Oct. 29, 2004, 6:03 PM), [http://news.zdnet.com/2100-1009\\_22-139465.html](http://news.zdnet.com/2100-1009_22-139465.html) (“Companies that acquire (often questionable) patents and later wield them against new market participants unleash a destructive force that stifles innovation and prevents participation—the polar opposite of the purpose for which patents were created.”).

35. See *Patent Trolls Hearing*, *supra* note 30, at 27; FED. TRADE COMM’N., *supra* note 34, at 28; Stirland, *supra* note 25, at 612.

36. Cf. Anne Broache, *Senators Offer Sweeping Patent System Changes*, CNET NEWS (Aug. 4, 2006, 2:21 PM), [http://news.cnet.com/Senators-offer-sweeping-patent-system-changes/2100-1028\\_3-6102493.html](http://news.cnet.com/Senators-offer-sweeping-patent-system-changes/2100-1028_3-6102493.html) (noting concerns of investor groups that pending legislation would weaken patent rights).

37. See STAFF OF H. COMM. ON THE JUDICIARY, *supra* note 30, at 134 (statement of Richard C. Levin, on behalf of the National Research Council) (“[L]itigation costs are escalating rapidly and proceedings are protracted. Surveys conducted periodically by the American Intellectual Property Law Association indicate that litigation costs, millions of dollars for each party in a case where the stakes are substantial, are increasing at double-digit rates. At the same time the number of lawsuits in District Courts is increasing.”). The National Research Council is the operating arm of the National Academy of Sciences, National Academy of Engineering, and the Institute of Medicine of the National Academies. NAT’L RESEARCH COUNCIL, <http://sites.nationalacademies.org/NRC/index.htm> (last visited Jan. 7, 2011).

38. See STAFF OF H. COMM. ON THE JUDICIARY, *supra* note 30, at 134 (statement of Richard C. Levin, on behalf of the National Research Council).

39. See *id.* at 135–36 (statement of Richard C. Levin on behalf of the National Research Council) (advocating the need to “[m]odify or remove the subjective elements of litigation . . .

Numerous commentators claim that patent litigation in the United States “stifles substantial technological innovation” and that the patent litigation system is seriously “broken.”<sup>40</sup> At congressional hearings on patent law reform, testimony from industry experts maintained that the rise in patent cases and the breakdown of the patent litigation system lie with patent owners who aggressively litigate to uphold their patent rights.<sup>41</sup> The patent owners behave like “trolls” or extortionists,<sup>42</sup> “harming consumers and both small and large innovative companies.”<sup>43</sup> Specifically, the cost of litigation to defend against

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includ[ing] whether someone ‘willfully’ infringed a patent, whether a patent application included the ‘best mode’ for implementing an invention, and whether a patent attorney engaged in ‘inequitable conduct’ by intentionally failing to disclose all prior art when applying for a patent. Investigating these questions requires time-consuming, expensive, and ultimately subjective pretrial discovery. The committee believes that significantly modifying or eliminating these rules would increase the predictability of patent dispute outcomes without substantially affecting the principles that these aspects of the enforcement system were meant to promote”).

40. Ted Frank, *There is a Role for Congress in Patent Litigation Reform*, at 1, 5 (Am. Enter. Inst. Outlook Ser. No. 1, 2008), available at [http://www.aei.org/docLib/20080221\\_no1FebLO\\_g.pdf](http://www.aei.org/docLib/20080221_no1FebLO_g.pdf). See also, e.g., ADAM B. JAFFE & JOSH LERNER, *INNOVATION AND ITS DISCONTENTS: HOW OUR BROKEN PATENT SYSTEM IS ENDANGERING INNOVATION AND PROGRESS, AND WHAT TO DO ABOUT IT* 170 (2004) (comparing the patent system to an out-of-control freight train that is merely hanging on to its tracks).

41. See, e.g., *Perspectives on Patents: Post-Grant Review Procedures and Other Litigation Reforms: Hearing Before the Subcomm. on Intell. Prop. of the S. Comm. on the Judiciary*, 109th Cong. 40, 42 (2006) [hereinafter *Perspectives on Patents Hearing*] (statement of Mark Chandler, Vice President and General Counsel of Cisco Systems); *Patent Trolls Hearing*, *supra* note 30, at 27–28 (statement of Chuck Fish, Vice President and Chief Patent Counsel of Time Warner Inc.).

42. See Stirland, *supra* note 25, at 612 (discussing the origin of the phrase “patent troll”); Amol Sharma & Don Clark, *Tech Guru Riles the Industry By Seeking Huge Patent Fees*, WALL ST. J., Sept. 17, 2008, at A1 (“Nathan Myhrvold, renowned in the computer industry as a Renaissance man, has a less lofty message for tech companies these days: Pay up.”); Editorial, *supra* note 22.

43. *Patent Trolls Hearing*, *supra* note 30, at 26 (statement of Chuck Fish, Vice President and Chief Patent Counsel of Time Warner Inc.); *Patent Law Reform: Injunctions and Damages: Hearing Before the Subcomm. on Intellectual Property of the S. Comm. on the Judiciary*, 109th Cong. 79, 80–81 (2005) [hereinafter *Patent Law Reform Hearing*] (statement of Chuck Fish, Vice President and Chief Patent Counsel Time Warner, Inc.) (“To illustrate problems in the current remedy system, imagine a company (either a large or small company) that brings an exciting new information service to market. The company has invested tens of millions of dollars in research, equipment, marketing, etc. and may have negotiated license arrangements on a variety of patents needed for the service. Then, without warning, the company is hit with a patent infringement suit by another patent owner the company was previously unaware of who owns a patent that relates to a small part of the overall service. The patent owner demands as damages a portion of the monthly fee charged to subscribers for the overall service, including the new information service. In addition, the patent owner asks for an injunction, which would prevent the company from providing the service at all merely as a way to gain leverage and increase the likelihood of a favorable license fee. Thus, the new service can be essentially paralyzed until the patent dispute is resolved . . . . In the end, most companies settle with the patent owner rather than run the risk

these patent owners “sap[s] resources that would otherwise be available for research and innovation,” causing small companies to change their research agendas and large companies to develop mechanisms to fend off patent-infringement lawsuits.<sup>44</sup> Overall, commentators asserted that abusive patent litigation in the United States “deters innovation and harms our entire economy.”<sup>45</sup> They urged that Congress must immediately reform patent litigation.<sup>46</sup>

Critics declare that the patent system must be “restored to balance” in view of extortionist behavior of patent owners.<sup>47</sup> Consequently, they champion for weaker patent rights.<sup>48</sup> Specifically, they want to limit a patent owner’s right to obtain an injunctive relief against a defendant. Critics insist that an injunction should only be made available if the patent owner can demonstrate that it is “likely to suffer immediate and irreparable harm that cannot be remedied by the payment of money damages alone.”<sup>49</sup> They also propose to

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of litigating. Consumers are the real losers, as they either pay the price of the litigation through increases in retail prices, or, in many cases, are never offered the new service.”).

44. *Patent Trolls Hearing*, *supra* note 30, at 29 (statement of Chuck Fish, Vice President and Chief Patent Counsel of Time Warner, Inc.). See also *Perspectives on Patents Hearing*, *supra* note 41, at 43 (statement of Mark Chandler, Senior Vice President and General Counsel, Cisco Systems) (“As a result, a company creating a new product must consider whether that product will be sufficiently profitable to cover not only development and production costs, but also potential settlement payments on unjustified infringement claims. The risk of infringement lawsuits will cause some firms ‘to avoid the mine field altogether, that is, refrain from introducing certain products for fear of holdup.’”).

45. *Patent Trolls Hearing*, *supra* note 30, at 29 (statement of Chuck Fish, Vice President and Chief Patent Counsel of Time Warner, Inc.). See also *Perspectives on Patents Hearing*, *supra* note 41, at 43 (statement of Mark Chandler, Senior Vice President and General Counsel, Cisco Systems) (stating that patent litigation “deters innovation and thereby inflicts significant damage upon our entire economy”).

46. Frank, *supra* note 40, at 2 (“Current debate on patent reform is largely nonpartisan, but this is in large part because the organized plaintiffs’ bar does not currently have a vested interest in the status quo of patent litigation. Should they obtain such a vested interest, future legislative efforts will have a partisan tinge that will make constructive changes more difficult. The time for reform, if ever, is now.”).

47. *Patent Trolls Hearing*, *supra* note 30, at 28 (statement of Chuck Fish, Vice President and Chief Patent Counsel of Time Warner, Inc.) (“We urge that the [patent] system be restored to balance in view of the reality of a new breed of middlemen patent speculators.”).

48. *Perspectives on Patents Hearing*, *supra* note 41, at 40 (statement of Mark Chandler, Senior Vice President and General Counsel, Cisco Systems) (stating “Cisco favor[s] rule[] changes that some charge would decrease the value of patents” because the “patent litigation system is broken”).

49. *Patent Law Reform Hearing*, *supra* note 43, at 68, 72 (statement of Jonathan Band) (testifying on behalf of Visa U.S.A. and The Financial Services Roundtable). Mr. Band advocated the “immediate and irreparable injury” standard in lieu of the United Kingdom’s “complex compulsory license provision[s].” *Id.*

eliminate treble damages for willful patent infringement.<sup>50</sup> The concerted lobbying pressure on Congress to reject long-established intellectual property rights has resulted in several pieces of proposed legislation to overhaul the patent litigation system.<sup>51</sup>

The rejection of strong intellectual property rights is not confined to Congress; it has also spread to the Supreme Court. For example, the Court in *eBay v. MercExchange* eliminated the patent owner's right to automatic injunctive relief in patent infringement cases.<sup>52</sup> Before *eBay*, the patent owner, upon successfully showing that the defendant had infringed on the patent, was automatically entitled to injunction against the defendant.<sup>53</sup> That meant the patent owner did not have to prove whether an injunction should be granted after the infringement had been found. The patent owner was presumed irreparably harmed by the infringing conduct of the defendant.<sup>54</sup> The right to automatic injunctive relief was a powerful and potent weapon that the patent owner could utilize to force infringers to negotiate, because the defendants often did not want to stop selling the infringing products in the marketplace.<sup>55</sup> The Federal courts had long understood the importance of injunctive relief in

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50. See, e.g., *id.* at 10; Stirland, *supra* note 25, at 612 (advising treble damages only after malicious patent infringement).

While the Patent Act's provisions concerning injunctions and damages would need adjustment even if the Patent Office granted only valid patents, the patent quality problem makes the need for litigation reform all the more compelling. The possibility of a broad injunction and treble damages means that a financial services institution must take even the most frivolous patent infringement claim seriously.

The current rules regarding injunctions and damages place all the leverage in the hands of the patent owner, even if the patent is extremely weak . . . . If Congress does not correct the remedies under the patent law, the surge in the number of patents relating to financial services will lead to financial services institutions paying out ever-larger license fees to holders of suspect patents, to the detriment of our customers.

*Patent Law Reform, supra* note 43, at 9–10 (2005) (statement of Jonathan Band).

51. See, e.g., Patent Reform Act of 2007, H.R. 1908, 110th Cong. (as passed by House, Sept. 7, 2007); Patent Reform Act of 2007, S. 1145, 110th Cong. (2007); Patent Reform Act of 2006, S. 3818, 109th Cong. (2006); Patents Depend on Quality Act of 2006, H.R. 5096, 109th Cong. (2006); Patent Reform Act of 2005, H.R. 2795, 109th Cong. (2005).

52. *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 392–93 (2006).

53. See *MercExchange, LLC, v. eBay, Inc.*, 401 F.3d 1323, 1338 (Fed. Cir. 2005), *vacated*, 547 U.S. 388 (2006).

54. *Id.* Prior to the Supreme Court's *eBay* decision, the Federal Circuit automatically granted permanent injunctions and only "in rare instances exercised their discretion to deny injunctive relief in order to protect the public interest." *Id.* (quoting *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1547 (Fed. Cir. 1995)).

55. See Douglas Ellis et al., *The Economic Implications (and Uncertainties) of Obtaining Permanent Injunctive Relief after eBay v. MercExchange*, 17 FED. CIR. B.J. 437, 440 (2008) (analyzing how the power of patent holders has been greatly diminished after the *eBay* decision as patent holders face the uncertainties of no automatic injunctive remedies against defendants).

patent cases as “the essence of the concept of property” and, therefore, utilized the automatic rule to protect the property rights of the patent owner.<sup>56</sup>

The Supreme Court, in *eBay v. MercExchange*, reversed the well-established rule of automatic patent injunction, holding that patent owners no longer have a categorical right to injunction after prevailing in an infringement suit.<sup>57</sup> Instead, the patent owners must establish that they are entitled to an injunction under a difficult four-part test proving: 1) irreparable injury; 2) lack of adequate remedies at law; 3) the public’s interest lies in the injunction; and 4) by balancing the defendant’s and patentee’s interests.<sup>58</sup> The decision rejects the strong patent protections long enjoyed by patent owners in the United States, removing the threat of injunction that patent owners previously utilized to gain leverage over alleged infringers.<sup>59</sup>

### B. *Current Trends in Intellectual Property Litigation in the United States*

Statistics in recent years do not lend much support to the outcries from different corners of the United States seeking to reduce the rights of intellectual property owners and to curb litigation excesses.<sup>60</sup> There has been miniscule change in the number of patent and trademark cases filed in United States federal district courts during the period from September 30, 2001 to September 30, 2007.

An examination of patent, trademark, and copyright cases filed in federal district courts from 2001 to 2007 reveals the current state of litigation over intellectual property rights. Table 1, *infra*, shows that the number of intellectual property cases increased during that time. In the twelve-month period ending on September 30, 2002, there were 2,680 patent cases. In 2007, the number was 2,878, or a seven percent increase from 2002. For trademark cases, there was virtually no change. Indeed, in the 2001–2002 fiscal year

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56. *MercExchange*, 401 F.3d at 1338 (“Because the ‘right to exclude recognized in a patent is but the essence of the concept of property,’ the general rule is that a permanent injunction will issue once infringement and validity have been adjudged.”) (quoting *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1246–47 (Fed. Cir. 1989)).

57. *eBay*, 547 U.S. at 394.

58. *Id.* at 391, 394.

59. *See id.* at 396 (Kennedy, J., concurring) (“[A]n injunction, and the potentially serious sanctions arising from its violation, can be employed as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent.”). *But see* J. Gregory Sidak, *Holdup, Royalty Stacking, and the Presumption of Injunctive Relief for Patent Infringement: A Reply to Lemley and Shapiro*, 92 MINN. L. REV. 714, 718 (2008) (arguing that the extent of “held up” patents has been overstated).

60. *See, e.g., Perspectives on Patents Hearing*, *supra* note 41, at 42–43 (statement of Mark Chandler, Senior Vice President and General Counsel, Cisco Systems); *Patent Trolls Hearing*, *supra* note 30, at 27, 29 (statement of Chuck Fish, Vice President and Chief Patent Counsel of Time Warner, Inc.); Stirland, *supra* note 25, at 612–13 (noting that various trade groups are calling for patent reform).

there were 3,458 trademark cases filed and in the 2006–2007 fiscal year there were 3,483. Copyright cases saw the largest increase; in the fiscal year 2001–2002 there were 2,084 cases, whereas in the fiscal year 2006–2007 the number jumped to 4,400.

Table 1  
Patent, Trademark, and Copyright Cases Filed in  
U.S. District Courts During Fiscal Years 2002–2007<sup>61</sup>

Fiscal Year	Patent Cases	Trademark Cases	Copyright Cases	Total
2002	2,680	3,458	2,084	8,222
2003	2,788	3,657	2,448	8,893
2004	3,055	3,496	3,007	9,558
2005	2,706	3,657	5,796	12,159
2006	2,807	3,735	4,944	11,406
2007	2,878	3,483	4,400	10,761

Table 2  
Annual Change in Patent, Trademark and Copyright Cases  
Filed in U.S. District Courts During Fiscal Years 2002–2007<sup>62</sup>

Fiscal Year	Patent Cases	Trademark Cases	Copyright Cases
2002	—	—	—
2003	108 (4.0%)	199 (5.8%)	364 (17.5%)
2004	267 (9.6%)	-161 (-4.4%)	559 (22.8%)
2005	-349 (-11.4%)	161 (4.6%)	2,789 (92.8%)
2006	101 (3.7%)	78 (2.1%)	-852 (-14.7%)
2007	71 (2.5%)	252 (-6.7%)	-544 (-11.0%)
Average	1.7%	0.3%	21.5%

Table 2, *supra*, shows the percentage change for each fiscal year in cases filed for patents, trademarks, and copyrights. With respect to patent cases filed, the percentage change from 2002 to 2003 was 4%; from 2003 to 2004 patent filings increased by 9.6%. The number of patent cases dropped between 2004 and 2005 by 11.4%. From fiscal year 2005 to fiscal year 2006, the change was a modest 3.7%, and from 2006 to 2007 the increase was only

61. See ADMIN. OFFICE OF THE U.S. COURTS (2007), *supra* note 10; ADMIN. OFFICE OF THE U.S. COURTS (2005), *supra* note 26.

62. Calculations based on data provided in Table 1 (citing ADMIN. OFFICE OF THE U.S. COURTS (2007), *supra* note 10; ADMIN. OFFICE OF THE U.S. COURTS (2005), *supra* note 26).

2.5%. Overall, in the five-year period, the average annual percentage change for patent case filings was an insignificant 1.7%.

Similarly, numbers of trademark cases filed experienced very minor growth.<sup>63</sup> From fiscal year 2002 to fiscal year 2003, the filings increased 5.8%. The number of cases filed in fiscal year 2004 dropped 4.4% from 2003. The percentage change showed a positive growth of 4.6% in the fiscal year 2005 and 2.1% in the fiscal year 2006 compared to their respective prior years. Fiscal year 2007 showed a 6.7% decline in cases filed. Thus, the overall change for trademark cases in the five-year period was flat at 0.3%.

Copyright cases, on the other hand, showed larger, double-digit percentage changes.<sup>64</sup> Most notably, in 2005 there was a very large increase of 92.8% growth, due in large part to actions by the music industry to slow online song piracy.<sup>65</sup> During the five-year period, the yearly percentage change for copyright case filings averaged a 21.5% increase.

Overall, the number of intellectual property litigation cases in the United States from 2002–2007 remained relatively flat in both trademark and patent areas.<sup>66</sup> There were more litigation activities in the copyright field.<sup>67</sup> These numbers, as a whole, fail to support the demand for a reform to intellectual property litigation, particularly in the area of patent reform. Nevertheless, the reform demand, as discussed in Part I.A, has been relentless, as lobbyists and reformers portray the patent law and litigation systems to be broken and uncontrollable. In the United States, the pendulum of intellectual property protection has begun swinging from a strong protection regime for patent owners towards a weaker system due to the belief that more innovation can only be achieved when patent owners have *fewer* property rights. The pendulum in China is swinging in the opposite direction.

## II. THE OLD PIRACY VIEW OF CHINA

Countless books, reports, and comments present China as the brazen center of pirated goods and as having little respect for intellectual property rights.<sup>68</sup>

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63. *See supra* Table 2.

64. *See supra* Table 2.

65. *See* ADMIN. OFFICE OF THE U.S. COURTS (2005), *supra* note 26 (“Filings continued to increase in 2005 (up 27 percent overall), primarily due to a 93 percent increase in copyright filings that was likely due to music companies filing infringement cases against individuals for downloading copyrighted recordings.”).

66. *Supra* Table 1.

67. *Supra* Table 1.

68. *See, e.g.*, WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* (1995); ANDREW MERTHA, *THE POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA* (2005); Robert Marquand, *US Targets Chinese Piracy of US Goods*, CHRISTIAN SCI. MONITOR, Mar. 30, 2006, at 7; Henry Blodget, *How To Solve China’s Piracy Problem*, SLATE (Apr. 12, 2005, 6:37 PM),

These writings assert that the piracy problem has had a severe effect on multinational companies; some estimates show that perhaps a third of China's GDP is derived from counterfeit goods.<sup>69</sup>

Pirated products permeate virtually every industry in China. About 90% of software and 95% of video games in China are counterfeit;<sup>70</sup> 5 out of 6 Yamaha motorcycles sold in China are not genuine;<sup>71</sup> and more than 50% of all cell phones, shampoo, razor blades, chewing gum, and cigarettes sold are fakes.<sup>72</sup> Counterfeit DVDs and designer goods are available for significantly less than authentic items.<sup>73</sup> Over the years, counterfeiters have become more sophisticated and greedy as they have discovered, for example, that large profits can be made from counterfeited medicines like antimalarial and antibiotic drugs.<sup>74</sup> Likewise, counterfeit car parts are manufactured in China to replace genuine parts<sup>75</sup> and are used in both authentic and imitation cars;<sup>76</sup> this yields higher monetary returns than simpler items like counterfeit DVDs.

Not only are counterfeit products widely available in China, they are made for export worldwide and are estimated to be valued at approximately \$60 billion a year.<sup>77</sup> Counterfeited goods from China have appeared in Africa,

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<http://www.slate.com/id/2116629>; Louisa Lim, *Chinese Crackdown Fails to Stem Counterfeit Goods*, NAT'L PUB. RADIO (Aug. 23, 2006), <http://www.npr.org/templates/story/story.php?storyId=5693207>.

69. See, e.g., Blodget, *supra* note 68. See also Evelyn Iritani, *Bootleggers Raise Stakes in China's Piracy Fight*, L.A. TIMES, July 20, 2003, at C1 ("Copycat products account for as much as 15% to 20% of China's total production.").

70. Blodget, *supra* note 68. See also Shaun Rein, *How to Win the China Piracy Battle*, BLOOMBERG.COM (June 20, 2007, 7:28 AM), [http://www.businessweek.com/globalbiz/content/jun2007/gb20070620\\_006304.htm](http://www.businessweek.com/globalbiz/content/jun2007/gb20070620_006304.htm) ("[I]n 2005, 86% of all software used in China was pirated, accounting for a \$3.9 billion sales loss.").

71. *Yamaha's Attempt to Brake Fakes*, BLOOMBERG BUSINESSWEEK (Feb. 7, 2005), [http://www.businessweek.com/magazine/content/05\\_06/b3919013\\_mz001.htm](http://www.businessweek.com/magazine/content/05_06/b3919013_mz001.htm).

72. Blodget, *supra* note 68.

73. *Id.*

74. See Iritani, *supra* note 69 (reporting that "at least 50% of the drugs on the market in China are counterfeit").

75. See *Intellectual Property Rights Issues and Imported Counterfeit Goods: Hearing Before the U.S.-China Econ. & Sec. Review Comm'n.*, 109th Cong. 28, 29 (2006) (statement of Sen. Carl Levin) (claiming that "every automotive part has turned up in the counterfeit trade, including windshield glass, brake fluid, headlights, tail lights, emissions components, structural parts, sheet metal parts, suspension parts, tires, belts, hoses and alternators.").

76. See *id.* at 29 (statement of Sen. Carl Levin) ("[I]n China . . . an entire car was copied, manufactured and sold under a different name."). See also *GM Sues Chinese Firm for Copying*, BBC NEWS (May 9, 2005, 10:33 AM), <http://news.bbc.co.uk/2/hi/business/4528565.stm>.

77. Rein, *supra* note 70.



Southeast Asia, the European Union, Canada, and the United States.<sup>78</sup> Industry experts blame China's counterfeits for the loss of jobs in the United States.<sup>79</sup>

The piracy in China is so profound that multinational companies have begun experimenting with novel tactics to combat a problem that seems uncontrollable with conventional methods. For example, to fight bootleg DVDs, which typically cost less than \$1 each, Time-Warner reduced the price of authentic DVDs by 90% to a price of \$3 per DVD.<sup>80</sup> Microsoft, whose software programs are among the most popular items to pirate in China, worked with China's Lenovo Company to preinstall Microsoft Windows on Lenovo computers.<sup>81</sup>

The U.S. government has its own approach, albeit heavily influenced by U.S. intellectual property owners, to solve the Chinese piracy problem. Through consultations with intellectual property rights holders, the United States decided to shame China "for failure to effectively protect intellectual property rights and to meet its commitment to significantly reduce infringement levels."<sup>82</sup> On April 29, 2005, the Office of the United States Trade Representative announced that it was placing China on the "Priority Watch List," because it had "serious concerns" about China's compliance with its obligations under various agreements relating to intellectual property.<sup>83</sup> Subsequently, the United States government utilized World Trade Organization enforcement procedures to bring suit against China.<sup>84</sup>

Scholars, commentators, and industry experts have expounded many theories on Chinese piracy and have offered various explanations for and solutions to the Chinese piracy problem.<sup>85</sup> Some are adamant about denoting

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78. See Iritani, *supra* note 69 (Eastern Europe, Africa, and Southeast Asia); Grant Gross, *US, Canadian Agencies Seize Counterfeit Cisco Gear*, CIO.COM (Feb. 29, 2008), [http://www.cio.com/article/190651/US\\_Canadian\\_Agencies\\_Seize\\_Counterfeit\\_Cisco\\_Gear](http://www.cio.com/article/190651/US_Canadian_Agencies_Seize_Counterfeit_Cisco_Gear); EU, *U.S. Vow Crackdown on Computer Counterfeits*, REUTERS (Feb. 22, 2008, 1:00 PM), <http://www.reuters.com/article/2008/02/22/us-eu-usa-counterfeiting-idUSL2285388920080222>.

79. *Chinese Product Counterfeiting Causes US Job Layoffs*, GLOBAL BUS. CTR. (June 20, 2007, 11:31 PM), [http://global-business-center.com/r2741,Chinese\\_Product\\_Counterfeiting\\_Causes\\_US\\_Job\\_Layoffs.php](http://global-business-center.com/r2741,Chinese_Product_Counterfeiting_Causes_US_Job_Layoffs.php).

80. Blodget, *supra* note 68.

81. Rein, *supra* note 70.

82. Bureau of Int'l Info. Programs, U.S. Dep't of State, *U.S.: China Has High Rate of Intellectual Property Infringement*, AMERICA.GOV (Apr. 29, 2005), <http://www.america.gov/st/washfile-english/2005/April/20050429155355mbzemog0.5231745.html>.

83. *Id.*

84. Jennifer A. Crane, Comment, *Riding the Tiger: A Comparison of Intellectual Property Rights in the United States and the People's Republic of China*, 7 CHI.-KENT J. INTELL. PROP. 95, 118 (2008).

85. See, e.g., Joseph A. Massey, *The Emperor is Far Away: China's Enforcement of Intellectual Property Rights Protection, 1986-2006*, 7 CHI. J. INT'L L. 231 (2006).

“culture” as the root of the problem,<sup>86</sup> while others focus on economics as the key factor.<sup>87</sup> Still others claim use politics to explain the China piracy problem.<sup>88</sup>

Despite their different approaches to the China piracy problem, experts nonetheless agree that China’s piracy issue lies in China’s failure to recognize (or its lack of respect for) private intellectual property rights and the absence of a strong enforcement mechanism.<sup>89</sup> All seem to paint a picture of intellectual property anarchy in China, in which even the most minimal enforcement of intellectual property rights is lacking.

### III. EMBRACING THE INTELLECTUAL PROPERTY REGIME

#### A. *Defying the Normative View Through Recent Statistics*

While the United States continues to possess negative views about China and its intellectual property rights regime, recent statistics offer a startlingly different picture. The numbers representing litigation cases brought by Chinese intellectual property owners reveal that China has embraced intellectual property rights on an unprecedented scale. The data suggests that Chinese owners of intellectual property have come to highly value their property rights, recognize intellectual property as an important asset and utilize

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86. See generally ALFORD, *supra* note 68. Compare Crane, *supra* note 84, at 104–08 (arguing against the view that China’s culture underlies intellectual property piracy), with Daniel C.K. Chow, *Why China Does Not Take Commercial Piracy Seriously*, 32 OHIO N.U. L. REV. 203, 222–23 (2006) (stating that the lack of political will to stop piracy derives from economic reliance on piracy).

87. See, e.g., Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, 55 AM. U. L. REV. 901 (2006).

88. See, e.g., MERTHA, *supra* note 68; Doris Estelle Long, *Trademarks and the Beijing Olympics: Gold Medal Challenges*, 7 J. MARSHALL REV. INTELL. PROP. L. 433 (2008); Wei Shi, *The Paradox of Confucian Determinism: Tracking the Root Causes of Intellectual Property Rights Problem in China*, 7 J. MARSHALL REV. INTELL. PROP. L. 454 (2008).

89. See, e.g., Bureau of Int’l Info. Programs, *supra* note 82 (explaining the United States government placed China on the Priority Watch List for its failure to adequately enforce intellectual property rights pursuant to WTO requirements); Jennifer L. Donatuti, Note, *Can China Protect the Olympics, or Should the Olympics Be Protected from China?*, 15 J. INTELL. PROP. L. 203, 213–14 (2007) (noting that Chinese society has historically not valued intellectual property rights and protection of such rights is relatively new in China); David Barboza, *China’s Industrial Ambition Soars to High-Tech*, N.Y. TIMES, Aug. 1, 2008, at A1 (stating China has weak intellectual property rights enforcement and a culture of copying and stealing technology); *U.S. Places China on Trade Watch*, L.A. TIMES, April 30, 2005, at C3 (noting the head of the International Property Alliance believes China has failed to protect intellectual property due to ineffective enforcement). But see Donald C. Clarke, *Economic Development and the Rights Hypothesis: The China Problem*, 51 AM. J. COMP. L. 89, 107–08 (2003) (arguing that while China’s legal system fails to protect property rights, it is robust enough to provide systemic predictability).

the judicial system to adjudicate their disputes regarding intellectual property rights. In fact, there are now more intellectual property cases in China than in the United States.<sup>90</sup>

Table 3  
Total Intellectual Property Cases in China, 2004–2007<sup>91</sup>

Year	Total Cases Filed	Total Percent Increase	Total Disposed Cases
2004 <sup>92</sup>	12,205	31.7%	11,113
2005 <sup>93</sup>	16,583	35.9%	16,453
2006 <sup>94</sup>	16,947	2.2%	16,750
2007 <sup>95</sup>	20,781	23.0%	20,310

90. See *infra* Part III.B.

91. It should be noted that these totals comprise more than the sum of patent, copyright, and trademark cases, as the figures given by the Chinese Ministry of Commerce include other categories. See, e.g., CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2005, *supra* note 11.

92. MINISTRY OF COMMERCE OF CHINA, WHITE PAPER ON THE INTELLECTUAL PROPERTY RIGHTS PROTECTION IN CHINA 2004 (2006) [hereinafter WHITE PAPER 2004], available at [http://www.chinaipr.gov.cn/policyarticle/policy/documents/200604/233138\\_1.html](http://www.chinaipr.gov.cn/policyarticle/policy/documents/200604/233138_1.html) (listing data from 2004 and the percentage increase from 2003).

93. CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2005, *supra* note 11. The data represented for the "Total Percent Increase" in 2005 is different than the data provided by this source. The percentage given was calculated using the data contained in WHITE PAPER 2004, *supra* note 92 and CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2005, *supra* note 11.

94. See CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2006, *supra* note 13. The data represented for the "Total Percent Increase" in 2006 was not provided by this source. The percentage given was calculated using the data contained in CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2005, *supra* note 11 and CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2006, *supra* note 13.

95. CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2007, *supra* note 15. The data represented for the "Total Percent Increase" in 2007 was not provided by this source. The percentage given was calculated using the data contained in CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2006, *supra* note 13 and CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2007, *supra* note 15.

Table 4  
Intellectual Property Cases filed in Chinese Courts of First Instance,  
2003–2007<sup>96</sup>

Year	Total	Percent Increase	Disposed Cases
2003 <sup>97</sup>	6,988	—	6,860
2004 <sup>98</sup>	9,329	33.5%	8,332
2005 <sup>99</sup>	13,424	43.9%	13,393
2006 <sup>100</sup>	14,219	5.9%	14,056
2007 <sup>101</sup>	17,877	25.7%	17,395

These tables contain data collected from the Ministry of Commerce of the People's Republic of China.<sup>102</sup> Table 3 contains the total numbers of Chinese intellectual property cases and encompasses patent, trademark, and copyright, as well as, *inter alia* unfair competition, technology contract, and other intellectual property cases from the courts of first instance, second instance, and retrial proceedings for each of the calendar years from 2004 to 2007. Table 4 contains the intellectual property cases filed in courts of first instance for each of the calendar years from 2003 to 2007.

The People's courts, or courts of first instance across China, have witnessed a sizeable increase in the number of intellectual property litigation cases in recent years. From 1985 to 2002, the courts received only 53,319 intellectual property civil cases of first instance.<sup>103</sup> As indicated in Table 4, in

96. It should be noted that these totals comprise more than the sum of patent, copyright, and trademark cases, as the figures given by the Chinese Ministry of Commerce includes other categories. *See, e.g.*, CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2005, *supra* note 11.

97. *See* WHITE PAPER 2004, *supra* note 92 (listing data for 2004 and the percentage increase from 2003).

98. *See id.*

99. CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2005, *supra* note 11. The data represented for the "Percent Increase" in 2005 is different than the data provided by this source. The percentage given was calculated using the data contained in WHITE PAPER 2004, *supra* note 92 and CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2005, *supra* note 11.

100. CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2006, *supra* note 13.

101. CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2007, *supra* note 15.

102. The Ministry of Commerce of the People's Republic of China provides reports "designed to comprehensively report the IPR-related work undertaken by Ministry of Commerce, and to help domestic enterprises comply with the international IPR rules and safeguard their legitimate rights and interests." *About Us*, INTELLECTUAL PROP. PROT. IN CHINA (May 13, 2009), <http://www.chinaipr.gov.cn/AboutUs.shtml>.

103. WHITE PAPER 2004, *supra* note 92. The official report stated that from 1985 to 2004 there were 69,636 intellectual property cases filed in courts of first instance. *Id.* Among those

the subsequent five years, from 2003 to 2007, there were 61,837 total intellectual property cases filed in courts of first instance, constituting a 16% increase from the total number of intellectual property cases filed in the previous eighteen years.<sup>104</sup>

Table 3 shows that the Chinese courts received 12,205 intellectual property cases in 2004, including first instance, second instance, and re-trial proceedings.<sup>105</sup> The number reflects a 31.7% increase from 2003.<sup>106</sup> The courts disposed of a total of 11,113 intellectual property cases.<sup>107</sup> There were 9,329 first-instance intellectual property cases filed in 2004, and the courts of first instance disposed of 8,332 cases.<sup>108</sup>

In 2005, the number of Chinese intellectual property litigation cases filed continued to climb.<sup>109</sup> That year, the courts received 16,583 intellectual property cases from all court levels, or an increase of 35.9% from 2004.<sup>110</sup> The number of first-instance cases in 2005 was 13,424.<sup>111</sup> In total, the courts disposed of 16,453 cases.<sup>112</sup> Chinese courts concluded 13,393 first-instance intellectual property cases.<sup>113</sup>

Table 3 indicates that in 2006, intellectual property cases filed totaled 16,947.<sup>114</sup> The number reflects an increase of 2.2% over 2005.<sup>115</sup> Table 4 shows that there were 14,219 intellectual property cases of first instance filed in 2006.<sup>116</sup> The courts disposed of a sum of 16,750 intellectual property cases,<sup>117</sup> and the courts of first instance concluded 14,056 cases.<sup>118</sup>

Table 3 shows the statistics for the year 2007, which reveal that courts of all levels in China presided over 20,781 intellectual property cases, an increase

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cases, 18,654 involved patents, 14,708 pertained to copyrights, 6,629 involved trademarks, and 8,368 involved "other kinds" of intellectual property rights cases such as unfair competition, trade secret, and technology license disputes. *Id.* The data represented for the number of intellectual property civil cases of the first instance from 1985 from 2003 was not provided by this source. The number given was calculated using the data contained in WHITE PAPER 2004, *supra* note 92 (stating that in 2004 there were 9,329 intellectual property cases filed in courts of the first instance, a 33.51% increase from 2003).

104. *See supra* Table 4; text accompanying note 103.

105. *See supra* Table 3.

106. *See supra* Table 3.

107. *See supra* Table 3.

108. *See supra* Table 4.

109. *See supra* Table 3.

110. *See supra* Table 3; text accompanying note 93.

111. *See supra* Table 4.

112. *See supra* Table 3.

113. *See supra* Table 4.

114. *See supra* Table 3.

115. *See supra* Table 3; text accompanying note 94.

116. *See supra* Table 4.

117. *See supra* Table 3.

118. *See supra* Table 4.

of 23.0% from the previous year.<sup>119</sup> The courts disposed of 20,310 cases overall in 2007.<sup>120</sup> There were 17,877 cases of first instance, as stated in Table 4.<sup>121</sup> The courts concluded 17,395 intellectual property cases at the first instance level in 2007.<sup>122</sup>

Table 5  
First-Instance Patent Litigation Cases in China, 2003–2007

Year	Number of Cases	Percent Change
2003 <sup>123</sup>	2,110	—
2004 <sup>124</sup>	2,549	20.8%
2005 <sup>125</sup>	2,947	15.6%
2006 <sup>126</sup>	3,196	8.5%
2007 <sup>127</sup>	4,041	26.4%

Table 5 shows the recent pattern of patent litigation growth in China.<sup>128</sup> Patent litigation cases increased from 2,110 cases in 2003 to 2,549 in 2004, a 20.8% change.<sup>129</sup> The number of patent litigations rose to 2,947 cases in 2005, or approximately a 16% increase from the previous year.<sup>130</sup> In 2006, China saw patent litigation disputes increase to 3,196 cases of first instance, representing a positive change of 8.5% from 2005.<sup>131</sup> The year 2007 showed a

119. See *supra* Table 3; text accompanying note 95.

120. See *supra* Table 3.

121. See *supra* Table 4.

122. See *supra* Table 4.

123. See WHITE PAPER 2004, *supra* note 92 (giving 2004 data and the percentage increase from 2003).

124. *Id.*

125. CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2005, *supra* note 11.

126. CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2006, *supra* note 13. The data represented for the "Percent Change" in 2006 was not provided by this source. The percentage given was calculated using the data contained in CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2005, *supra* note 11 and CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2006, *supra* note 13.

127. The data represented for the "Number of Cases" and "Percent Change" in 2007 was calculated using the data contained in CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2008, *supra* note 29 (giving 2008 data and the percentage increase from 2007). In 2008, there were 4,074 first-instance patent litigation cases in China, up 0.82% since 2007. *Id.*

128. See *supra* Table 5.

129. See *supra* WHITE PAPER 2004, *supra* note 92 (giving 2004 data and the percentage increase from 2003); Table 5.

130. See *supra* Table 5.

131. See *supra* Table 5; text accompanying note 126.

significant movement in patent cases; Chinese Courts accepted 4,041 first-instance cases, an increase of 26.4%.<sup>132</sup>

Table 6  
First-Instance Copyright Litigation Cases Filed in China 2003–2007

Year	Number of Cases	Percent Change
2003 <sup>133</sup>	2,491	—
2004 <sup>134</sup>	4,264	71.2%
2005 <sup>135</sup>	6,096	43.0%
2006 <sup>136</sup>	5,719	-6.2%
2007 <sup>137</sup>	7,263	27.0%

The data in Table 6 indicate a tremendous rise in copyright litigation in China from 2003 to 2007. In 2003, there were 2,491 copyright litigation cases.<sup>138</sup> The number soared to 4,264 in 2004, an increase of 71% over the previous year.<sup>139</sup> The following year, 2005, showed a 43% increase in copyright cases, totaling 6,096—continuing the remarkable change.<sup>140</sup> In 2006, there were 5,719 copyright cases, a small decrease.<sup>141</sup> The total number of copyright litigation cases for 2007 totaled 7,263, representing a 27% increase from the previous year and almost 200% more than the number of copyright cases filed in 2003.<sup>142</sup>

132. See *supra* Table 5; text accompanying note 127.

133. See WHITE PAPER 2004, *supra* note 92 (giving 2004 data and the percentage increase from 2003).

134. *Id.*

135. CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2005, *supra* note 11.

136. CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2006, *supra* note 13. The data represented for the "Percent Change" in 2006 was not provided by this source. The percentage given was calculated using the data contained in CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2005, *supra* note 11 and CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2006, *supra* note 13.

137. The data represented for the "Number of Cases" and "Percent Change" in 2007 was calculated using the data contained in CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2008, *supra* note 29 (giving 2008 data and the percentage increase from 2007). In 2008, there were 10,951 first-instance copyright litigation cases in China, up 50.78% since 2007. *Id.*

138. See *supra* Table 6; WHITE PAPER 2004, *supra* note 92 (giving 2004 data and the percentage increase from 2003).

139. See *supra* Table 6.

140. See *supra* Table 6.

141. See *supra* Table 6; text accompanying note 136.

142. See *supra* Table 6; text accompanying note 137.

Table 7  
First Instance Trademark Litigation Cases Filed in China 2003–2007

Year	Number of Cases	Percent Change
2003 <sup>143</sup>	926	—
2004 <sup>144</sup>	1,325	43.1%
2005 <sup>145</sup>	1,782	34.5%
2006 <sup>146</sup>	2,521	41.5%
2007 <sup>147</sup>	3,855	52.9%

The information presented in Table 7 demonstrates that the number of first-instance trademark cases in China increased significantly, from 926 cases in 2003 to 3,855 cases in 2007, a roughly 320% increase.<sup>148</sup> Each year during that five-year period saw approximate increases in trademark cases ranging from 35% to 53%.<sup>149</sup>

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143. See WHITE PAPER 2004, *supra* note 92 (giving 2004 data and the percentage increase from 2003).

144. *Id.*

145. CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2005, *supra* note 11.

146. CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2006, *supra* note 13. The data represented for the "Percent Change" in 2006 was not provided by this source. The percentage given was calculated using the data contained in CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2005, *supra* note 11 and CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2006, *supra* note 13.

147. The data represented for the "Number of Cases" and "Percent Change" in 2007 was calculated using the data contained in CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2008, *supra* note 29 (giving 2008 data and the percentage increase from 2007). In 2008, there were 6,233 first-instance trademark litigation cases in China, up 61.69% since 2007. *Id.*

148. See *supra* Table 7; text accompanying notes 146–47.

149. See *supra* Table 7.



*B. Challenging the Old View of China and Intellectual Property*

Table 8  
 Totaled Trademark, Copyright, and Patent Cases of First Instance in the United States and China 2003–2007

Year	China IP Cases <sup>150</sup>	United States IP Cases <sup>151</sup>
2003	5,527	8,893
2004	8,138	9,558
2005	10,825	12,159
2006	11,436	11,486
2007	15,159	10,761

Table 8 compares the yearly totals for copyright, trademark, and patent cases in China to those of the United States for a five-year period.<sup>152</sup> The empirical data contradicts the normative view that Chinese culture makes protecting intellectual property rights an impossible task. In 2004, there were 8,138 intellectual property cases in China involving patents, copyrights, and trademarks.<sup>153</sup> In the same year, the United States had 1,420 more cases than China.<sup>154</sup> In 2005, China saw 10,825 new intellectual property cases in those categories; the United States had 12,159 cases.<sup>155</sup> The numbers, however, took a sharp turn in 2006 and 2007. Indeed, in 2006, China had 11,436 new intellectual property litigation cases of first instance, whereas the United States had 11,486.<sup>156</sup> In 2007, China overtook the United States, with 15,159 patent, copyright, and trademark cases; the United States had only 10,761 cases.<sup>157</sup>

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150. Calculations based on data provided in Tables 5–7, *supra*.

151. ADMIN. OFFICE OF THE U.S. COURTS (2007), *supra* note 10.

152. *See supra* Table 8.

153. *See supra* Table 8.

154. *See supra* Table 8.

155. *See supra* Table 8.

156. *See supra* Table 8.

157. *See supra* Table 8.

Table 9  
First-Instance Patent Litigation in China and United States 2003–2007

Year	China <sup>158</sup>	United States <sup>159</sup>
2003	2,110	2,788
2004	2,549	3,055
2005	2,947	2,706
2006	3,196	2,807
2007	4,041	2,878

With respect to patent litigation, one area which the United States Congress has recently spent valuable time attempting to reform by reducing the strong property rights enjoyed by patent owners,<sup>160</sup> there is a stark difference between the United States and China. Even though United States industries have been complaining that there are too many patent lawsuits, because patent owners have become too aggressive and abusive in bringing suits in the United States, the number of patent cases is significantly higher in China, as shown in Table 9, *supra*. There were more patent litigation cases filed in China from 2005 through 2007—10,184 cases, compared to 8,391 cases filed in the United States during the same three years.<sup>161</sup>

In summary, these numbers demonstrate that there is now more intellectual property litigation in China than in the United States, a country that has been known for both providing robust intellectual property protection and as a highly litigious nation in the area of intellectual property rights.<sup>162</sup> The increasing number of litigation cases in China, however, suggests that China has begun to value intellectual property rights. China has demonstrated its willingness to utilize the judicial systems to prosecute, defend, and solve intellectual property disputes. The overwhelming majority of intellectual property litigation in China is brought by *Chinese* companies and individuals.<sup>163</sup> For example, in 2006, only 2.5% of intellectual property cases in China involved foreign litigants.<sup>164</sup> The evidence seems to suggest that Chinese businesses and individuals have learned in a very short time to

158. Calculations based on data provided in Table 5, *supra*.

159. ADMIN. OFFICE OF THE U.S. COURTS (2007), *supra* note 10.

160. *See supra* Part II.A.

161. Calculations based on data provided in Table 9, *supra*.

162. *See supra* Part II.A.

163. *See* CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2006, *supra* note 13 (reporting that among the 14,219 total intellectual property cases decided by the judicial system, only 353 cases involved foreign intellectual property owners).

164. *Id.*

recognize and embrace the fruit of their intellectual endeavors and they are not hesitant to fight for their intellectual property rights.

Quantitative data, however, does not represent the full picture of the new China and its embrace of intellectual property rights and reliance on the judicial system to protect and enforce these rights. A review of actual cases provides a more complete picture.

#### IV. INTELLECTUAL PROPERTY OWNERS AS LITIGANTS: AN EXAMINATION OF CASES

Intellectual property decisions rendered by Chinese courts are available at [www.lawinfochina.com](http://www.lawinfochina.com), a site for English translations of Chinese statutes, cases, and other legal information.<sup>165</sup> The Legal Information Center of Peking University translates Chinese legal resources into English and maintains the website with up-to-date data.<sup>166</sup>

The cases in the database are translated from Chinese official sources,<sup>167</sup> of which the Gazette of the Supreme People's Court of China comprises the majority.<sup>168</sup> The case database, according to the website, contains typical cases approved and released by the Court in a number of areas, including intellectual property.<sup>169</sup> The cases are selected to reflect "both current and predicted future trends in Chinese legal practice."<sup>170</sup> The following are some representative samples of the cases and issues related to different types of intellectual property disputes.

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165. *Frequently Asked Questions*, LAWINFOCHINA, <http://www.lawinfochina.com/Faqs/index.asp> (last visited Aug. 29, 2010).

166. *Id.*

167. *Id.*

168. *Judicial Cases*, LAWINFOCHINA, <http://www.lawinfochina.com/Case/List.asp> (last visited Aug. 29, 2010).

169. *Products and Services*, LAWINFOCHINA, <http://www.lawinfochina.com/ProductsServices/index.asp#aboutus> (last visited Aug. 29, 2010) ("The Case Law Database contains English translations of typical judicial decisions approved and published by the Supreme People's Court or the Supreme People's Procuratorate in the areas of administrative disputes, civil disputes, criminal offences, economic disputes, intellectual property law and maritime disputes. Each case is an editorially-enhanced document that contains the case background, facts, parties, trial and appellate court procedure, reasoning and law application, and of course the court decision.").

170. *Id.*

*A. Enforcing Their Copyrights*1. *Huang Zhiyi v. Nanjing International Development Company*<sup>171</sup>

In this copyright infringement case, the plaintiffs (Huang Zhiyi and Xu Lingzhi) created, at the defendants' request, a television advertisement for "Be Le Electric Appliances," one of the defendants' clients.<sup>172</sup> The defendants subsequently used the plaintiffs' "design and conceptual creation" for their advertisement but did not compensate the plaintiffs for the creation.<sup>173</sup> No employment contract was executed between the parties.<sup>174</sup> The plaintiffs filed a copyright infringement action against the defendants in January 1994.<sup>175</sup> Upon reviewing the evidence, a panel of three judges determined that the defendants violated the plaintiffs' copyright and ordered the defendants pay 25,548 yuan in reparations.<sup>176</sup> Before rendering the decision, the court asked the Copyrights Bureau to conduct a comparison between the plaintiffs' and the defendants' advertising programs.<sup>177</sup> The Copyright Bureau concluded that "there exist obvious innate connections between the two, [sic] it can be confirmed that the advertising was manufactured following the Plaintiffs' conception."<sup>178</sup>

2. *Beijing Huaqi Multimedia Corp. v. Shandong TV Station*<sup>179</sup>

The plaintiffs, producers of the "Waiting All the Way" television series, brought a copyright infringement action against the defendants, Shandong TV Station, for broadcasting the series in China and other Asian countries without their authorization.<sup>180</sup> The defendants argued that they had obtained the right to broadcast the television series from the plaintiffs' agent, Hongzhou Fulaite Advertising Originality Center (Originality Center).<sup>181</sup> The defendants claimed that Originality Center had concluded a broadcasting contract for the television

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171. Huang Zhi Yi Deng (Yuangao) He Nanjing Guoji Kaifa Gongsi Deng (Beigao) (黄之等 (原告) 和南京国际开发公司等 (被告)) [Huang Zhiyi v. Nanjing Int'l Dev. Co.] (Nanjing Xuan Wu Dist. People's Ct. Sept. 7, 1996) (Lawinfochina).

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. Huang Zhiyi v. Nanjing Int'l Dev. Co.

177. *Id.*

178. *Id.*

179. Beijing Hua Qi Duomeiti Zhizuo Youxian Gongsi, Zhongguo Luyin Luxiang Chuban Zong She Su Shandong Dianshitai Qinfan Zhuzuoquan Jiufen An (北京华企多媒体制作有限公司、中国音像出版总社诉山东电视台侵犯著作·纠纷案) [Beijing Huaqi Multimedia Corp., China Audio, Video Publishing House v. Shandong TV Station] (Beijing Interm. People's Ct. Aug. 27, 1998) (Lawinfochina).

180. *Id.*

181. *Id.*

series with Hongzhi Corporation, who in turn entered into a broadcasting contract with the defendants for the television series on August 16, 1996.<sup>182</sup> On December 18, 1997, the Haidian District Court rejected the defendants' argument because the Originality Center was not the copyright owner of the television series and had only obtained a limited license to broadcast the non-satellite television series.<sup>183</sup> The Beijing No. 1 Intermediate Court affirmed the lower court's finding that the defendants failed to conduct due diligence verifying the scope of the contract at issue.<sup>184</sup> The court held that the defendants infringed upon the copyright owned by the plaintiffs and ordered the parties to enter mediation, which resulted in the defendants paying 720,000 yuan to the plaintiffs.<sup>185</sup>

3. *Liu Jingsheng v. Sohu Aitexin Information Technology (Beijing) Co.*<sup>186</sup>

Liu Jinsheng translated *Don Quixote*, and the translation was published in 1995 by LiJiang Publishing House.<sup>187</sup> In October 2000, Liu Jinsheng discovered that his translation appeared on the website of the defendant, Sohu Aitexin Information Technology [Beijing] Co. (Sohu), without a license agreement.<sup>188</sup> Since Liu Jinsheng held the copyright to his translation of *Don Quixote*, Liu Jinsheng brought a copyright infringement action against Sohu.<sup>189</sup> The defendant argued that it functioned as a web operator and never published the translation on Sohu's own website—www.sohu.com—but did admit that the translation was shown as published on www.shuku.net, www.cj888.com, and www.chenqinmyrice.com; the defendant also acknowledged that www.sohu.com linked to the three websites.<sup>190</sup> The evidence further established that the plaintiff had approached the defendant to take appropriate measures and cease linking to the three websites that had illegally uploaded his work, but Sohu had refused to comply.<sup>191</sup> On December 19, 2000, a panel of three judges for the Beijing Intermediate Court held that the defendant

182. *Id.*

183. *Id.*

184. Beijing Huaqi Multimedia Corp., China Audio, Video Publishing House v. Shandong TV Station.

185. *Id.*

186. Liu Jing Shengsu Souhu Ai Te Xin Xinxi Jishu (Beijing) Youxian Gongsu Qinfan Zhuzuoquan Jiufen An (刘京胜诉搜狐爱特信息技术(北京)有限公司侵犯著作·纠纷案) [Liu Jingsheng v. Sohu Aitexin Info. Tech. (Beijing) Co.] (Beijing Interm. People's Ct. Dec. 19, 2006) (Lawinfochina).

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. Liu Jingsheng v. Sohu Aitexin Info. Tech. (Beijing) Co.

infringed upon Liu Jinsheng's copyright and "caused the aggravation of the infringement."<sup>192</sup> The panel ordered Sohu to pay 3,000 yuan to Liu Jinsheng and make a written apology.<sup>193</sup>

In summary, these cases reveal that Chinese owners of copyrighted works such as advertisements, television series, and translations understand that the concept of intellectual property ownership and that the unauthorized use of copyrights causes economic loss. By ordering compensatory damages, the judicial system itself recognizes property rights and the losses incurred. These types of cases are no different than the types of copyright infringement cases brought in the United States.<sup>194</sup>

### C. Embracing Property Rights in Patents

#### 1. *Renda Building Materials Factory v. Xinyi Company*

The plaintiff, Renda, was the exclusive licensee of a patent for a "concrete thin-walled tubular member;" the license resulted from a contract between Renda and the inventor entered on February 16, 2001.<sup>195</sup> In early 2002, Renda discovered that Xinyi Company manufactured and sold products similar to the

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192. *Id.*

193. *Id.*

194. For example, in *Wrench, L.L.C. v. Taco Bell Corp.*, the appellants were creators of Psycho Chihuahua, a cartoon character of "a clever, feisty dog with an attitude; a self-confident, edgy, cool dog who knows what he wants and will not back down." 256 F.3d 446, 449 (6th Cir. 2001). The appellants made a formal presentation to Taco Bell about using Psycho Chihuahua as a marketing concept. *Id.* at 450. Subsequently, Taco Bell used a well-known advertising company to create a similar advertisement, but did not compensate the appellants for their creativity. *Id.* at 451. The appellants brought a breach of implied contract suit. *Id.* They did not bring a copyright infringement suit against Taco Bell because the remedies under a breach of contract, if successfully proven at trial, would be higher than the damages available under copyright law. *Id.* at 457.

Similarly, in *Scholastic Entertainment, Inc. v. Fox Entertainment Group, Inc.*, the plaintiff produced for the defendant the television series *Goosebumps* for a children's audience, pursuant to an agreement between them. 336 F.3d 982, 983 (9th Cir. 2003). The plaintiff alleged that the defendant violated the agreement by licensing the television series to others without obtaining the appropriate permission or compensating the plaintiff and brought a copyright infringement suit against the defendant. *Id.* at 984.

Likewise, in *Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, the plaintiff alleged copyright infringement against the defendant for disseminating an English translation of a Hebrew prayer book that he claimed was a verbatim copy of his prior English translation of the same Hebrew prayers. 312 F.3d 94, 96 (2d Cir. 2002) (per curiam). The Second Circuit held that the plaintiff's English translation of the Hebrew prayer book possessed the originality that qualified it for copyright protection. *Id.* at 97.

195. Ren Da Jiancai Chang Su Xin Yi Gongsi Zhuanli Qinquan Jiufen An (仁达建材厂诉新益公司专利侵权·纠纷案) [*Renda Bldg. Materials Factory v. Xinyi Co.*] (Sup. People's Ct. Aug. 22, 2005) (Lawinfochina).

patented invention.<sup>196</sup> The alleged infringing product contained some minor changes.<sup>197</sup> Upon a comprehensive infringement analysis, the Intermediate Court of Dalian Municipality held that there were no essential distinctions between the patent and the accused products.<sup>198</sup> The Intermediate Court ordered the defendant to pay 100,000 yuan to compensate the plaintiff for its losses.<sup>199</sup> The defendant appealed the case to Liaoning Higher Court.<sup>200</sup> On April 19, 2004, the court affirmed the Intermediate Court's decision.<sup>201</sup> The defendant then appealed the case to the Supreme People's Court, the highest court in China.<sup>202</sup> On August 22, 2005, the Court overruled the Intermediate Court's decision, stating that the decision was erroneous because it ruled to exclude certain technical features disclosed by the patentee in the independent description of the invention and had erred in finding certain features of the accused product equivalent to a corresponding element in the patent.<sup>203</sup>

## 2. *Dayang Company v. Huanghe Company*

On November 19, 1999, Huanghe Company and Dayang Company entered into a patent licensing agreement to exploit Huanghe's patent used in stone cutting, pressing, and mounding machines.<sup>204</sup> Thereafter, the parties engaged in a contractual dispute relating to payment.<sup>205</sup> Dayang filed an action to rescind the contract and requested Huanghe return a certain sum that was owed.<sup>206</sup> Dayang also alleged that the contract was invalid because the patent at issue illegally monopolized the technology and impeded future technological progress.<sup>207</sup> On June 16, 2004, the Supreme People's Court held that the patent license obtained by Dayang from Huanghe did not violate any laws, and therefore, the contract was valid.<sup>208</sup>

The above representative patent cases indicate that Chinese patent owners utilized their property rights by licensing the patents to others for the manufacture and distribution of the products based on the patents. Patentees

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196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *See* Renda Bldg. Materials Factory v. Xinyi Co.

201. *Id.*

202. *See id.*

203. *Id.*

204. Dayang Gongsu Su Huanghe Gongsu Zhuanli Shishi Xuke Hetong Jiufen An (大洋公司诉黄河公司专利实施许可合同纠纷案) [Dayang Co. v. Huanghe Co.] (Sup. People's Ct. June 16, 2004) (Lawinfochina).

205. *Id.*

206. *See id.* (noting that a lawsuit was filed and that Dayang Company requested rescission of the contract and a refund of the contract price).

207. *Id.*

208. *Id.*

and exclusive licensees enforced their patent rights against contracting parties and others whom breached license agreements and infringed on the patents. These cases also demonstrated that defendants understand their rights by asserting available defenses such as non-infringement under the doctrine of equivalents, patent invalidity, and patent misuse. Both parties utilized the judicial system and appealed all the way to the highest courts in China. The decisions in these cases reflected the courts' understanding of the technologies involved in regard to patent infringement issues. These types of cases are similar to the types of patent cases brought in the United States.<sup>209</sup>

#### D. Trademark Cases

##### 1. *Beijing Delifrance Food Co. v. Beijing Sun City Shopping Mall*

Plaintiff Beijing Delifrance is the owner of the Delifrance trademark registration for a bread product.<sup>210</sup> In October 1992, the plaintiff entered into an agreement to distribute its bread to defendant, Beijing Sun City, to be sold under the Delifrance trademark.<sup>211</sup> On April 14, 1993, the plaintiff stopped supplying the bread to the defendant.<sup>212</sup> The defendant, in the meantime, decided to sell bread provided by different suppliers but under Beijing Delifrance's trademark without authorization.<sup>213</sup> The bread offered by the defendant had a similar shape and appearance to that produced by Beijing Delifrance.<sup>214</sup> As a result, Beijing Delifrance brought a trademark

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209. For example, in *Gardendale, Inc. v. Woodstock Copperworks, Ltd.*, both the plaintiff and the defendant were in the business of selling lawn torches. 392 F. Supp. 2d 717, 719 (M.D.N.C. 2005). The plaintiff received a patent for its specific design of the copper lawn torches, while the defendant had a copyright on its own lawn torch design. *Id.* The plaintiff alleged that the defendant infringed on its patent. The district court issued a finding on the patent claim interpretations. *Id.* at 721–24. *County Materials Corp. v. Allan Block Corp.* provides another example of patent claims in the United States. 502 F.3d 730, 732 (7th Cir. 2007). The Allan Block Corporation owned the patent for the manufacturing of concrete blocks. *Id.* It entered into a production agreement for the patented blocks with County Materials. *Id.* Later, Allan Block terminated the production agreement. *Id.* at 733. County Materials then manufactured its own concrete block that would compete directly with the Allan Block product, in violation of a non-compete provision. *Id.* Allan Block brought an action to enforce the non-compete provision of the agreement. *Id.* County Materials, however, claimed that the inclusion of the non-compete provision was unlawful patent misuse and an improper result of patent leverage. The Seventh Circuit rejected County Materials' patent misuse argument. *Id.* at 737.

210. Beijing Bali Da Mofang Shipin Youxian Gongsu Beijing Taiyang Cheng Shangchang Shangbiao Qinquan Jiufen An (北京巴黎大磨坊食品有限公司诉北京太阳城商场商标侵权纠纷案) [*Beijing Delifrance Food Co. v. Beijing Sun City Shopping Mall*] (Beijing Interm. People's Ct. Oct. 30, 1993) (Lawinfochina).

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*



infringement suit against the defendant.<sup>215</sup> On October 30, 1993, the Beijing Intermediate Court enjoined the defendant from its infringing conduct with respect to the Delifance trademark, and ordered the defendant to pay 14,897.21 yuan.<sup>216</sup>

### 2. *Bi Feng Tang Company v. De Rong Tang Company*

The plaintiff claimed that its corporate name, Bi Feng Tang, functioned as its brand name through heavy advertising in the Shanghai catering service industry.<sup>217</sup> The plaintiff alleged that the defendant, De Rong Tang, beginning on August 13, 2002, misled the public with false publicity through using the name Bi Feng Tang without permission on its signboards and tables in its dining hall and in its advertisements.<sup>218</sup> The plaintiff brought an unfair competition and infringement action against the defendant.<sup>219</sup> On June 18, 2003, the Shanghai Intermediate Court found that the name Bi Feng Tang was the general name of a cooking method or the name of a dish.<sup>220</sup> The name Bi Feng Tang was not a distinctive mark of the plaintiff's catering services.<sup>221</sup> The court held that the plaintiff had no right to prohibit others from using the name Bi Feng Tang.<sup>222</sup>

### 3. *Nanjing Xuezhong Caiying Co. v. Shanghai Xuezhong Caiying Co.*

The plaintiff, Nanjing Xuezhong Caiying Company (NXC), a wedding photography service, obtained the trademark registration for "Xuezhong Caiying" (translated as "Snow-view Color Photo") in 1996.<sup>223</sup> The trademark registration was valid for ten years, from 1996 to 2006.<sup>224</sup> NXC received wide recognition for its services, and was awarded the Top 10 Brand Award of Global Chinese Professional Wedding Photography.<sup>225</sup> NXC discovered in August, 2004 that the defendant, Shanghai Xuezhong Caiying Company (SXC), was using "Xuezhong Caiying" as a trademark and enterprise name for

215. Beijing Delifrance Food Co. v. Beijing Sun City Shopping Mall.

216. *Id.*

217. Bifeng Tang Gongsu Su De Rong Tang Gongsu Bu Zhengdang Jingzheng Jiufen An (避风塘公司诉德权唐公司不正当竞争纠纷案) [Bi Feng Tang Co. v. De Rong Tang Co.] (Shanghai Higher People's Ct. June 18, 2003) (Lawinfochina).

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. Bi Feng Tang Co. v. De Rong Tang Co.

223. Nanjing Xue Zhong Cai Ying Gongsu Su Shanghai Xue Zhong Cai Ying Gongsu Ji Qi Fen Gongsu Shangbiao Qinquan, Bu Zhengdang Jingzheng Jiufen An (南京雪中彩影公司诉上海雪中彩影公司及其分公司商标侵权、不正当竞争纠纷案) [Nanjing Xuezhong Caiying Co. v. Shanghai Xuezhong Caiying Co.] (Jiangsu Higher People's Ct. Aug. 26, 2005) (Lawinfochina).

224. *Id.*

225. *Id.*

its own photography service.<sup>226</sup> NXC brought both trademark infringement and unfair competition claims against the defendant.<sup>227</sup> On May 30, 2005, the Nanjing Intermediate Court found that the defendant deliberately took advantage of the plaintiff's famed trademark, and that its conduct caused consumer confusion.<sup>228</sup> The court enjoined the defendant from using the name "Xuezhong Caiying" and ordered it to pay 20,000 yuan to the plaintiff.<sup>229</sup>

Like the patent and copyright cases, the trademark cases brought by Chinese individuals and entities against other Chinese individuals and entities are normative disputes relating to intellectual property rights. The trademark cases are typical of normative disputes because they are concerned with the uses of a mark similar or identical to someone else's name or registered trademark.<sup>230</sup> The sample disputes focused on whether the plaintiff owns a protectable trademark, whether the defendant's use causes consumer confusion, and whether the defendant intentionally copied the plaintiff's trademark and used it in connection with the defendant's goods and services.<sup>231</sup> These types of trademark cases are similar to the types of trademark cases litigated in the United States.<sup>232</sup> Indeed, on any given day, decisions related to

226. *Id.*

227. *Id.*

228. Nanjing Xuezhong Caiying Co. v. Shanghai Xuezhong Caiying Co.

229. *Id.*

230. See 15 U.S.C. § 1125(a) (2006) (giving rise to liability for one who uses in commerce any word, term, name, symbol, or device in connection with any good or service that is likely to cause confusion as to the origin or source of the good or service).

231. See, e.g., Nanjing Xue Zhong Cai Ying Gongsi Su Shanghai Xue Zhong Cai Ying Gongsi Ji Qi Fen Gongsi Shangbiao Qinquan, Bu Zhengdang Jingzheng Jiufen An (南京雪中彩影公司诉上海雪中彩影公司及其分公司商标侵、不正当竞争纠纷案) [Nanjing Xuezhong Caiying Co. v. Shanghai Xuezhong Caiying Co.] (Jiangsu Higher People's Ct. Aug. 26, 2005) (Lawinfochina) (intentional use); Bifeng Tang Gongsi Su De Rong Tang Gongsi Bu Zhengdang Jingzheng Jiufen An (避风塘公司诉德唐公司不正当竞争纠纷案) [Bi Feng Tang Co. v. De Rong Tang Co.] (Shanghai Higher People's Ct. June 18, 2003) (Lawinfochina) (consumer confusion); Beijing Bali Da Mofang Shipin Youxian Gongsi Su Beijing Taiyang Cheng Shangchang Shangbiao Qinquan Jiufen An (北京巴黎大磨坊食品有限公司诉北京太阳城商场商标侵、纠纷案) [Beijing Delifrance Food Co. v. Beijing Sun City Shopping Mall] (Beijing Interm. People's Ct. Oct. 30, 1993) (Lawinfochina) (protectable mark).

232. For example, in *Optimum Technologies, Inc. v. Henkel Consumer Adhesives, Inc.*, the plaintiff owned the trademark "Lok-Lift" for the manufacture and sale of its carpet adhesive tape products. 496 F.3d 1231, 1235 (11th Cir. 2007). The plaintiff entered into an agreement with the defendant for the distribution of the trademarked carpet adhesive tapes to retailers nationwide. *Id.* at 1235–36. The defendant then internally manufactured similar tapes that had a similar package design, quantity, bar code, and item number as the Lok-Lift products and began distributing them to retailers without informing the plaintiff. *Id.* at 1236–37. The plaintiff subsequently filed an action of trademark infringement and unfair competition against the defendant. *Id.* at 1238.

In *Boston Duck Tours, L.P. v. Super Duck Tours, Inc.*, both the plaintiff and the defendant were in the business of offering Boston land and water sight-seeing tours. 531 F.3d 1, 8 (1st Cir. 2008). The plaintiff brought a trademark infringement and unfair competition suit

trademark infringement and unfair competition claims are being rendered based on similar fact patterns in both countries.

Once more, the types of trademark cases in China are similar to those in the United States. The presence of Chinese trademark cases demonstrates that Chinese trademark owners view their trademarks as important assets in their business operations. They are not hesitant to enforce their trademark rights, they utilize judicial means to enforce their rights, and they rely on the judicial system to enjoin the alleged infringing conduct. In summary, the above examples of written decisions on copyright, patent, and trademark disputes show that the judicial system promptly resolved the cases.<sup>233</sup>

#### V. MISSING FOREIGN INTELLECTUAL PROPERTY OWNERS IN CHINA

While the statistics and translations of case databases reveal that Chinese intellectual property owners have recognized the importance of intellectual property, policed their rights, and employed the legal system to enforce their property rights, there is a peculiar absence of foreign intellectual property owners as litigants among the tens of thousands of cases involving intellectual property rights in China.<sup>234</sup> Foreign owners of intellectual property can hardly be found as plaintiffs, both qualitatively and quantitatively, among the statistics of cases and written opinions. Less than 5% of all intellectual

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against the defendant for using the words “duck tours” in connection with its services. *Id.* at 10. The First Circuit held that “duck tour” was a generic phrase for amphibious sightseeing tours, and enjoys no trademark protection. *Id.* at 18.

In *Ty, Inc. v. Softbelly's, Inc.*, the manufacturer of “Beanie Babies” brought an action against the defendant for deliberate and willful trademark infringement conduct. 517 F.3d 494, 496 (7th Cir. 2008). The defendant sold products looking very much like “Beanie Babies,” and called them “Screenie Babies.” *Id.* The Seventh Circuit affirmed that the defendant’s infringement was willful, because it had chosen the name “Screenie Beanies” and the design of its screen cleaners “with reckless disregard for the likelihood of consumer confusion.” *Id.* at 501.

233. The judges disposed the majority of the cases within one to two years. A chart tracking the disposition of the cases available through Law Info China is on file with the Author. Cases advanced to the appellate court were also promptly resolved. Perhaps judges in China can dispose of copyright cases in a much shorter timetable compared to the disposition length in the United States because the United States has longer and more complex discovery procedures, as well as pretrial, trial, and appeal processes. See Catherine E. Creely, Comment, *Prognosis Negative: Why the Language of the Hatch-Waxman Act Spells Trouble for Reverse Payment Agreements*, 56 CATH. U. L. REV. 155, 184 n.197 (2006) (citing H.R. REP. No. 98-857, at 9–10 (1984), reprinted in 1984 U.S.C.C.A.N. 2693–94) (noting that the average time of disposition for a patent case was thirty-six months and about 10% of those cases took an average of seventy-seven months). The median number for the length of cases litigated in the Trademark Trials and Appeal Board takes 3.2 years. See John M. Murphy, *Playing the Numbers: A Quantitative Look at Section 2(d) Cases Before the Trademark Trial and Appeal Board*, 94 TRADEMARK REP. 800, 801 (2004) (providing a comprehensive study of the litigation in recent years).

234. See CHINA’S INTELLECTUAL PROPERTY PROTECTION IN 2006, *supra* note 13 (noting that in 2006, only 353 of 14,219 IP cases of first instance involved foreign litigants).

property cases are filed by foreign intellectual property owners.<sup>235</sup> Examples of foreign litigants among the translated cases include Procter & Gamble Company,<sup>236</sup> Eli Lilly Company,<sup>237</sup> Walt Disney Company,<sup>238</sup> and Starbucks.<sup>239</sup>

Procter & Gamble Company (P&G) brought an unfair competition action against Shanghai Chenxuan Intelligence Technology Development Co. in 2000.<sup>240</sup> P&G had registered its SAFEGUARD trademark in 1976 in China for soap, washing and polishing preparation, and hair protecting preparation, among other uses.<sup>241</sup> P&G spent a considerable monetary sum to advertise its trademarked products.<sup>242</sup> It received several prestigious awards, such as the “Golden Bridge Award for Best-selling Domestic Goods,” “Ideal Brand,” and “Actually Purchased Brand.”<sup>243</sup> P&G’s trademarked soap products were ranked first in the soap market.<sup>244</sup> In 2000, the Guangzhou Administration Bureau of Industry and Commerce listed the plaintiff as one of the “key enterprises for trademark protection,” and the State Administration Bureau of Industry and Commerce listed the trademark SAFEGUARD “as one of [the] national key protected trademarks.”<sup>245</sup> Around this time the defendant obtained a domain name registration for safeguard.com.cn to be used for its electrical and security systems engineering business.<sup>246</sup>

Upon finding the SAFEGUARD trademark “well-known to the related public,” the lower court ruled in favor of the plaintiff, holding that the defendant was not entitled to any rights and interests of “safeguard” as a domain name.<sup>247</sup> The lower court found that the defendant’s registration of the

235. *Id.*

236. Shanghai Chen Xuan Zhineng Keji Fazhan Youxian Gongsi Wu Baojie Gongsi (上海陈璇智能科技发展有限公司五宝·公司) [Shanghai Chenxuan Intelligence Tech. Dev. Co. v. Procter & Gamble Co.] (Shanghai Sup. People’s Ct. July 5, 2001) (Lawinfochina).

237. Yi Lai Li Li Gongsi Su Hao Sen Zhi Yao Gongsi Zhuanli Qinquan Jiufen An (伊莱利利公司诉豪森制药公司专利侵权·纠纷案) [Eli Lilly & Co. v. Haosen Pharm. Co.] (Sup. People’s Ct. June 17, 2003) (Lawinfochina).

238. Meiguo Woerte Disini Gongsi Su Beijing Chuban She Deng Qinfan Zhuzuoquan Jiufen An (美国沃·特·迪斯尼公司诉北京出版社等侵犯著作·纠纷案) [Walt Disney Co., U.S. v. Beijing Publ’g Press] (Beijing Higher People’s Ct. Dec. 19, 1995) (Lawinfochina).

239. Xing Yuan Gongsi, Tongyi Xingbake Su Shanghai Xingbake, Shanghai Xingbake Fen Gongsi Shangbiao Qinquan Ji Bu Zhengdang Jingzheng Jiufen An (星源公司、统一星巴克诉上海·星巴克、上海星巴克分公司商标侵权·及不正当竞争纠纷案) [Starbucks Corp. v. Shanghai Starbucks Café Co.] (Shanghai Higher People’s Ct. Dec. 20, 2006) (Lawinfochina).

240. Shanghai Chenxuan Intelligence Tech. Dev. Co. v. Procter & Gamble Co.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. Shanghai Chenxuan Intelligence Tech. Dev. Co. v. Procter & Gamble Co.

246. *Id.*

247. *Id.*

“safeguard” name as a domain name was a “malicious” act which “damaged the interest of the holder of ‘safeguard’ registered trademark.”<sup>248</sup> The lower court also held that the defendant committed unfair competition.<sup>249</sup> Subsequently, the defendant appealed the decision to the Shanghai Superior Court, which then affirmed the lower court’s decision in 2001.<sup>250</sup>

In 2001, Eli Lilly & Company (Eli Lilly) asserted a patent infringement claim against Haosen Pharmaceutical Company.<sup>251</sup> The case centered on Eli Lilly’s technique for the manufacturing of Hydrochloric Gemcitabine.<sup>252</sup> The Higher People’s Court of Jiangsu Province admitted into evidence testing results from third parties to compare Eli Lilly’s products with the defendant’s products.<sup>253</sup> The Jiangsu court, however, failed to make the evidence available to Lilly for cross-examination.<sup>254</sup> Eli Lilly subsequently appealed the Jiangsu court’s decision to China’s Supreme People’s Court.<sup>255</sup> The Third Tribunal of the Supreme People’s Court reversed the Jiangsu court’s decision.<sup>256</sup>

Starbucks Corporation was successful in its trademark infringement and unfair competition action against a defendant coffee store for intentionally using the Starbucks trademark in Shanghai.<sup>257</sup> Starbucks Corporation entered the China market in 2000 with several coffee stores.<sup>258</sup> In 2003, the defendants began to use the name Starbucks for its own coffee shop stores.<sup>259</sup> In 2004, the Shanghai Intermediate Court ruled in favor of Starbucks Corporation, and subsequently in 2006, the Shanghai Higher Court also affirmed the lower court’s decision in favor of Starbucks.<sup>260</sup>

As a final example, in 1994 the Walt Disney Co. brought a copyright infringement action against Beijing Publishing Press, Children’s Publishing

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248. *Id.*

249. *Id.*

250. Shanghai Chenxuan Intelligence Tech. Dev. Co. v. Procter & Gamble Co.

251. Yi Lai Li Li Gongsi Su Hao Sen Zhi Yao Gongsi Zhuanli Qinquan Jiufen An (伊莱利利公司诉豪森制药公司专利侵权纠纷案) [Eli Lilly & Co. v. Haosen Pharm. Co.] (Sup. People’s Ct. June 17, 2003) (Lawinfochina).

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. Eli Lilly & Co. v. Haosen Pharm. Co.

257. Xing Yuan Gongsi, Tongyi Xingbake Su Shanghai Xingbake, Shanghai Xingbake Fen Gongsi Shangbiao Qinquan Ji Bu Zhengdang Jingzheng Jiufen An (星源公司、统一星巴克诉上海星巴克、上海星巴克分公司商标侵权及不正当竞争纠纷案) [Starbucks Corp. v. Shanghai Starbucks Café Co.] (Shanghai Higher People’s Ct. Dec. 20, 2006) (Lawinfochina).

258. *Id.*

259. *Id.*

260. *Id.*

Press and Grand World Company.<sup>261</sup> The plaintiff asserted that its Classic Value Stories (including Bambi, Peter Pan, and seven other books) were duplicated and distributed by the defendants without permission.<sup>262</sup> The Beijing Intermediate People's Court enjoined the defendants' infringement conduct, ordered the defendant Beijing Publishing Press to publicly apologize in one of the nationwide newspapers published in China, and pay a sum of 227,094 yuan to the Walt Disney Co.<sup>263</sup> In 1995 the appellate court, the Beijing Higher People's Court, affirmed most of the rulings rendered by the lower court.<sup>264</sup> The appellate court also held that defendant Beijing Publishing Press, not Children's Publishing Press, should bear the damages.<sup>265</sup> In addition, the appellate court held that other defendants were responsible to pay the damages, but not Grand World Company.<sup>266</sup>

The cases above brought by foreign intellectual property owners represent only a very small percentage of cases in China. In 2005 there were 13,424 intellectual property cases in the first instance, but only 449 cases, or 3.3%, were filed by foreign intellectual property owners.<sup>267</sup> Of the 449 cases, 108 were filed by intellectual property owners from Hong Kong.<sup>268</sup> The actual percentage of litigations filed by foreign intellectual property owners is even smaller, once the cases filed by Hong Kong excluded. These percentages did not change much in the following year of 2006. In that year, 14,219 intellectual property cases were filed in the first instance, but only 353 cases, or 2.5%, involved foreign litigants.<sup>269</sup>

## VI. CONCLUSION

The statistics and case databases clearly paint a new picture of the New China and intellectual property rights. Chinese individuals and businesses are now the owners of intellectual property rights and assets. China has created a vigorous enforcement environment for intellectual property. The tens of thousands of cases that have been brought to the courts and decided each year signify a sharp pendulum swing from a weak to a strong intellectual property

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261. Meiguo Woerte Disini Gongsi Su Beijing Chuban She Deng Qinfan Zhuzuoquan Jiufen An (美国沃·特·迪斯尼公司诉北京出版社等侵犯著作·纠纷案) [Walt Disney Co., U.S. v. Beijing Publ'g Press] (Beijing Higher People's Ct. Dec. 19, 1995) (Lawinfochina).

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. Walt Disney Co., U.S. v. Beijing Publ'g Press.

267. CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2005, *supra* note 11.

268. *Id.*

269. CHINA'S INTELLECTUAL PROPERTY PROTECTION IN 2006, *supra* note 13.

rights regime.<sup>270</sup> The rapid changes in China's intellectual property litigation through its judicial system is, indeed, confounding when the statistics are compared to the increasingly fewer intellectual property cases in the United States.<sup>271</sup> The statistics from both countries indicate that China is now rapidly moving from a weak to a stronger regime while the United States is taking the opposite stance by moving from a strong to a more moderate direction.

Moreover, Chinese statistics reveal another set of surprise results: The infinitesimally small number of foreign intellectual property owners as litigants in China.<sup>272</sup> The sparse nature of these cases is contradictory to the persistent outcry against Chinese piracy and the abuse of intellectual property rights belonging to foreign owners.<sup>273</sup> Why are so many Chinese cases, more than 95% of them,<sup>274</sup> brought by Chinese litigants against other Chinese? Why has there been an absence of reports or studies on the transformation in China with respect to intellectual property rights? Perhaps one of the reasons is that the long, beleaguered outcry about piracy and the long-established belief that China does not recognize, protect, or enforce intellectual property rights prevents most if not all in the United States and the West from acknowledging the rapid changes unfolding in China with respect to intellectual property litigations in recent years. This Article perhaps will provide a new window into China's current approach to intellectual property rights, enforcements, and litigation.

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270. This confirms the observation that there is an increase in intellectual protections in China as the Chinese have started to become intellectual property stakeholders. *See* Yu, *supra* note 9, at 370–71 (discussing the creation of government agencies that handle intellectual property affairs and the trend of Chinese becoming stakeholders in intellectual property).

271. *See supra* Part III.B.

272. *See supra* text accompanying notes 266–67.

273. *See supra* Part II.

274. *See supra* text accompanying notes 266–67.