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AMERICAN & CHINESE PERSPECTIVES

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Prepared for Penn Volume on the US, China & International Law

**INTELLECTUAL PROPERTY IN THE INFORMATION AGE:
AMERICAN & CHINESE PERSPECTIVES**

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Innovation is widely seen as a key driver of economic success in the 21st century—and therefore a key driver of national power. And while the secret sauce that yields a highly innovative economy is difficult to identify, let alone replicate, robust and broad intellectual property (IP) protection is widely believed to be an essential component. Yet how nations ought to protect IP and promote innovation is a matter of substantial debate. The relationship between IP and innovation is complex, and innovation and imitation can coexist more readily than conventional wisdom suggests.² Differing perspectives on optimal and appropriate IP policy have fueled substantial international conflict, whether those differences are grounded in contrasting theories of innovation or simply in differing assessments of the national interest in strong (or weak) IP rules in particular economic sectors or regions. Whether, when, and how IP protection in fact fosters innovation is not the precise focus of this chapter. But it is not unrelated to a chapter on American and Chinese perspectives on international law and IP, given the many differences in how the two great powers currently treat IP rights.

In a nutshell, the United States is the world's leading proponent of strict IP regulation. The US has consistently sought to strengthen IP law and enforcement in a range of international forums, including many trade and investment treaties. China, by contrast, has long been seen, by the West at least, as the world's leading IP scofflaw. This is not because Chinese IP law is especially weak in formal terms, but because Beijing tolerates—or perhaps cannot really control—the huge amount of infringement that takes place within Chinese borders. At the instigation of the US, IP is a frequent topic in US-China dialogues, such as the 2015 Sunnylands summit, where President Xi stated that “both governments will not be engaged in or knowingly support online theft of intellectual properties.”³ Yet many Chinese observers—indeed, many observers around the world—believe the US is an IP bully that pushes inappropriate legal standards on other nations in an effort to serve the

¹ My thanks to the editors of this volume, participants in the two workshops held in Philadelphia and Beijing, and to Doug Lichtman, Neil Netanel, Haochen Sun, Loke-Khoon Tan, Xiyin Tang, and Alex Wang for helpful comments on earlier drafts. Patrick Hulme, Lucy Jackson, and Nicolas Baltaxe of UCLA Law School provided able research assistance.

² See e.g. Kal Raustiala and Christopher Sprigman, *The Knockoff Economy: How Imitation Sparks Innovation* (Oxford, 2012) and Fake it Till You Make It: The Good News About China's Knockoff Economy, *Foreign Affairs*, (July/August 2013); Let Them Eat Fake Cake: The Rational Weakness of China's Anti-Counterfeiting Policy, in Beebe, Sun, and Sunder, eds., *The Luxury Economy and Intellectual Property: Critical Reflections* (Oxford 2016). Deep debates about the purpose and rationale for IP protection are endemic today. See e.g. Mark Lemley, Faith-Based Intellectual Property, *UCLA Law Review* (2015) and Robert Merges, *Justifying Intellectual Property* (Harvard 2011).

³ Joint remarks, as interpreted, <https://www.whitehouse.gov/the-press-office/2015/09/25/remarks-president-obama-and-president-xi-peoples-republic-china-joint>

narrow interests of a few key domestic constituencies, such as Hollywood film studios and major pharmaceutical manufacturers. Chinese practice suggests that the Chinese government and Chinese society prefer a more balanced (the US would say lax) approach to global IP protection. Even that balance is currently in flux, however. China has in recent years begun to devote much more attention to domestic IP protection.

Both perspectives reflect reality, even if they caricature what are often complex and evolving positions. In this brief chapter, I will first and primarily focus on American views and practice on IP, with some attention as well to related issues such as digital espionage. I will then briefly contrast that with Chinese articulated views and practice. My basic argument is simple: There is substantial (though shrinking) divergence in how the US and China approach IP today, and this contrast reflects major differences in national interest and economic conditions. At the same time, American history itself suggests that convergence in IP law and policy will continue to occur, and may well accelerate, as the Chinese economy expands and matures. This is especially true in the increasingly vital and contentious high technology sector. The line between IP policy and technology policy is often blurry, and increasingly the US and China are battling over global technological dominance. Recent tensions over the global growth of firms such as Huawei and ZTE,⁴ or China's "Made in China 2025" plan,⁵ illustrate the stakes and the ways technology strategies may impinge upon IP policy—and vice versa.

Ultimately, American and Chinese IP approaches to IP law and policy—and the battles over them—cannot be disentangled from the larger relationship between the world's two largest economies. National power is a function of economic size but also innovation. Unlike the Cold War, when the US and Soviet economic spheres had little economic contact, the US and China are deeply economically intertwined. Those pervasive economic ties define the relationship. Yet the two states remain politically and militarily competitive—increasingly so under the Xi and Trump administrations—and while true conflict is not on the immediate horizon, its prospect drives substantial concern in the US over China's acquisition of American IP and innovations and its overall approach to IP protection.

US Views on IP

IP policy in the US is broadly utilitarian in nature. The Copyright Clause of the US Constitution grants Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Incentives are at the core of this approach: IP rights exist to "promote...Progress", and not (at least in the orthodox account) for moral or ethical reasons or to simply enrich creators. This utilitarian grounding is important for several reasons. First, it explains some features of US IP law (such as the general lack of "moral rights" for creators.⁶) Second, it may have the effect of making US policymakers see alternative approaches to IP in other nations not as value-laden, culturally-influenced social choices, but instead as simply flawed or even devious policies. Third, it suggests that there are optimal levels of IP protection, that the optimum is almost surely somewhere below a complete level of propertization, and that more IP protection is not always better. IP rights (with the exception of trademark and trade secret) are time-limited monopolies guaranteed by the

⁴ E.g. Raymond Zhong, *US Huawei Restrictions Expose A High Tech Achilles Heel for China*, New York Times, May 21 2019. <https://www.nytimes.com/2019/05/21/technology/huawei-china-us-trade.html>

⁵ See *infra* at X.

⁶ The Visual Artists Rights Act of 1990 (VARA), 17 USC Sec 106A, is the rare exception that proves the rule, and was passed to align US law with provisions in the Berne Convention.

government.⁷ Proper IP policy should--though it often does not-- reflect a considered balance between the costs of this monopoly power and the benefits yielded by enhanced incentives to create and innovate.

Since at least the 1970s the US has made ever-stronger IP protection a key focus of its foreign economic policy.⁸ As a major trading nation, and the world's largest economy and highly research-intensive universities and firms, the US has long had an interest in ensuring that IP rights around the world broadly track American law and are enforced vigorously and without discrimination. When the US encountered resistance abroad in recent decades—as it often did—it used its considerable economic and political power to bulldoze others into acquiescence. As a practical matter global IP protection has been addressed largely through two paths: global trade agreements, whether bilateral or multilateral, and the work of the World Intellectual Property Organization, or WIPO.⁹ The US is party to 18 WIPO-administered treaties; China is party to 15.¹⁰ While WIPO is solely focused on the topic of IP, and its treaties widely ratified around the globe, many observers consider trade and investment law—which tends to have powerful enforcement mechanisms at its disposal—to be the more significant source of global IP rules. And for the US, which long was dissatisfied with WIPO as a forum, trade accords have offered an arena in which its relative power could be more fully brought to bear.

The US ratified its first IP treaty, the Paris Convention for the Protection of Industrial Property, in 1887.¹¹ The first sustained US effort to include IP rules within a major multilateral trade accord came almost a century later, in the 1970s—a time when China effectively had no domestic IP legislation but the US was increasingly focused on the importance of IP law domestically, and looking to expand that focus globally. The US sought to leverage the power of the General Agreement on Tariffs and Trade, the precursor to the World Trade Organization, to strengthen IP protection in foreign jurisdictions. During the Tokyo Round of negotiations of the GATT in the 1970s, the US and other interested parties proposed an accord on counterfeit goods, a then-growing problem in global trade. The GATT parties began negotiations on an “Agreement on Measures to Discourage the Importation of Counterfeit Goods.”

The US failed to get the counterfeit agreement adopted during the Tokyo Round. But the idea reappeared at the 1982 GATT ministers' meeting, where it faced continued opposition from many developing countries. Counterfeits were increasingly seen by US firms as a major threat to global market share. At the same time, IP protection was becoming a more central focus of many sectors, including the American technology industry, which was just taking off. (Microsoft was founded in 1975; the Commodore Vic-20, purportedly the first personal computer to sell more than one million units, debuted in 1980.)¹² The US approach to IP reflected both the relative power of American firms and the porous nature of the US Congress. Lobbyists for IP-dependent firms had easy access to Congress and, seemingly, a case Congress was happy to hear: more IP protection, so it was claimed, meant more profits for US firms and more jobs at

⁷ The incentive structure for trademark and trade secret is distinct, and both trademarks and trade secrets are of indefinite duration; for basics see generally WIPO, What is a Trademark? <https://www.wipo.int/trademarks/en/> and WIPO, What is a Trade Secret? https://www.wipo.int/sme/en/ip_business/trade_secrets/trade_secrets.htm

⁸ In what may be the first example of an IP provision in a US trade treaty, in 1868 the US and Russia added an article to their 1832 Treaty of Commerce stating that they “agree that any counterfeiting in one of the two countries of the trademarks affixed in the other on merchandize to show its origin and quality, shall be strictly prohibited and repressed, and shall give ground for an action of damages in favor of the injured party, to be prosecuted in the courts of the country in which the counterfeit shall be proven.” 11 U.S.T.I.A. 1220 1968.

⁹ WIPO administers 26 treaties. <http://www.wipo.int/treaties/en/>

¹⁰ https://www.wipo.int/treaties/en/ShowResults.jsp?country_id=38C

¹¹ add cite

¹² https://en.wikipedia.org/wiki/Commodore_VIC-20#cite_note-5

home. The US effort to bolster IP rights globally seemed like a win for Americans and, if a loss for anyone, only for foreigners—and foreigners did not vote in American elections.

The momentum toward the pursuit of ever-more stringent IP rights also reflected the fact that there was little to no organized domestic opposition. Rightsholders and their interests (which generally were ever-stronger IP rights) dominated the discussion in Washington. The largely one-sided nature of the IP conversation in Congress would only change meaningfully with the maturation of Silicon Valley, which often depends upon the widespread reproduction of content and which, by the 2010s, became an important counterweight against the strongly pro-rightsholder orientation of US copyright policy.¹³ Internationally, of course, there was significantly more opposition to the US approach, and that opposition only grew over time.

To return to the 1980s: the first step in the US strategy to use the global trading system to strengthen IP rules globally was to enhance domestic tools that the US could use to punish states that lacked adequate IP laws. The 1984 Trade and Tariff Act made the protection of IP in target states part of the process of evaluation for preferential access to the US market. Section 301 of the earlier Trade Act of 1974 had authorized the President to take action to address unreasonable acts, policies or practices that burdened or restricted US commerce. Section 301 was generally a powerful (if widely disliked globally) tool for US unilateral action in the trade arena. The 1984 Act for the first time made poor IP protection in foreign jurisdictions actionable under 301. In doing so, the 1984 Act dramatically increased the importance of IP to American trade policy and gave the executive branch a powerful hammer with which to attack states that failed to adequately protect and enforce IP.

With this hammer in hand, the next step was to multilateralize stronger IP rules. As a key US trade official recounts, achieving agreement on enhanced IP protection in the Uruguay Round of GATT negotiations, which began in 1986,

was a top offensive objective for the United States. The United States saw IP as the future for US high-tech industries and economic growth, and industry was able to identify significant economic harm resulting from lack of protection and enforcement of IPRs. In addition, US policy makers believed that including IP in the Uruguay Round negotiating package and achieving an outcome that set the stage for increased trade in IP-based goods would build support for the results of the Round as a whole, and help overcome domestic objections to a result that addressed sensitive issues for the United States, such as textiles, safeguards and anti-dumping.¹⁴

What was known as the “Special 301” provision of the Omnibus Trade and Competitiveness Act of 1988 continued this process. The United States Trade Representative releases an annual “Special 301” Report, which is a review of IP protection and enforcement in foreign jurisdictions.¹⁵ The original provision initially

¹³ See the debate over SOPA and PIPA, companion bills against online piracy introduced in Congress in 2011 that engendered significant public backlash, some of it facilitated by firms such as Google. <http://www.nytimes.com/2012/01/20/technology/public-outcry-over-antipiracy-bills-began-as-grass-roots-grumbling.html?pagewanted=1&ref=technology>

¹⁴ Catherine Field, Negotiating for the United States, in Jayashree Watal and Antony Taubman, *The Making of the TRIPS Agreement: Personal Insights from the Uruguay Round Negotiations* (WTO, 2015) at 132

¹⁵ *Special 301 Report*, Office of the United States Trade Representative, <https://ustr.gov/issue-areas/intellectual-property/Special-301>

focused on three countries: Japan, Brazil, and India,¹⁶ and since its inception, the provision has become “the most discussed trade rule in the world.”¹⁷

During the Uruguay Round negotiations, the US used these carrots and sticks to pressure other GATT parties on IP. This form of IP unilateralism engendered significant protest from other states, many of whom believed that more open and balanced IP rules were wholly appropriate, and the US was simply forcing rules preferential for its home industries on them. But the American approach often worked with important trading partners. Singapore enacted improvements to its copyright law, and Korea strengthened its protection of copyrights, patents and trademarks. And as the Uruguay Round continued, eventually leading to the creation of the World Trade Organization in 1994, the US was able to move toward its chief treaty-based accomplishment in the field: TRIPs, the Trade-Related Intellectual Property Agreement.¹⁸

The ostensible rationale for the TRIPs agreement was that the lack of IP protection in many jurisdictions was an increasingly-significant barrier to trade. TRIPs created a floor, detailing minimum standards for IP protection. And because the WTO was a “single undertaking,” prospective WTO members had to join TRIPs as part of the overall package of membership.¹⁹ The comprehensive advantages of joining the WTO were very high, and so many nations swallowed hard and accepted TRIPs despite their many previous concerns about American efforts to impose strict IP rights on them. In so doing, these states at times significantly altered their IP policies, generally strengthening the rights of rights-holders, lengthening terms of protection, and building in new and more encompassing enforcement systems. TRIPs led to substantially greater convergence in IP law around the world, convergence largely modeled on existing American law and preferences.

TRIPs was developed by the US partly as the apotheosis of its international trade-IP strategy and partly as a reaction to the rise of WIPO, which was seen by many in the US as too friendly to developing country interests and insufficiently focused on rightsholder interests. WIPO, based in Geneva, is a specialized agency of the United Nations and was founded in 1967. WIPO currently has 189 member states and administers some two dozen IP treaties, most recently the 2013 Marrakesh Treaty to facilitate access to copyrighted works by the blind and visually impaired.²⁰ WIPO is the home for a number of ongoing discussions over IP-related topics, such as traditional knowledge, competition policy, and the relationship between health and IP, and is a key site for dispute settlement processes for domain names on the Internet. While the US has long been active in WIPO, the new WTO was a more attractive forum for developing stricter disciplines around IP rules than was WIPO, where US power was more attenuated and traditional one-state one-vote rules prevailed.²¹ The US and its leading trade partners believed TRIPs would serve as a means to regain control of the global IP agenda. And

¹⁶ *Id.* at 257-62 (explaining that the original passage of the bill focused on these three countries, and that although none of them were retaliated against with the bill, the threat of retaliation affected how all three acted).

¹⁷ Ronald A. Cass, *Velvet Fist in an Iron Glove: The Omnibus Trade and Competitiveness Act of 1988*, CATO REV. OF BUS. & GOV'T, 50, 50 (1991).

¹⁸ See e.g. Carlos Correa, *Intellectual Property Rights, the WTO, and Developing Countries* (2000); Susan Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (2003).

¹⁹ Barton et al, *The Evolution of the Trade Regime* (2008)

²⁰ <http://www.wipo.int/publications/en/details.jsp?id=4047>

²¹ IP has become a paradigmatic example of a regime complex: an array of partially-overlapping, non-hierarchical regimes in a given topical domain. Regime complexes allow and indeed engender strategic use of parallel/overlapping regimes. See Kal Raustiala and David Victor, *The Regime Complex for Plant Genetic Resources*, *International Organization* (2004); *Global Governance* 2013 (special issue on regime complexes); Laurence Helfer, *Regime-Shifting: The TRIPs Agreement: The TRIPs Agreement and the New Dynamics of International Intellectual Property Lawmaking*, *Yale Journal of International Law*, (2004)

indeed, as one recent analysis notes, since the establishment of TRIPs “WIPO has struggled to remain relevant.”²²

One might well query (as many have) why the WTO was an appropriate vehicle for modifying IP law around the world, and precisely how stronger IP protection enhances trade. Weak IP protection clearly enables infringement and thereby reduces revenues for IP rights holders.²³ But its impact on trade is more ambiguous. Certainly some products will not be traded, or will be traded less, in the absence of effective IP rights. If a firm in State A has a new technology and State B does not effectively enforce patents, the firm may be reluctant to allow anyone to sell or use the technology—or even to produce specialized parts for it. On the other hand, many IP rules in trade accords actually restrict trade, as in trade in gray market goods—that is, legitimate goods that are unlicensed in a particular jurisdiction—or in knockoff goods. The overall effect is plausibly positive, but not clearly so.

This is not to say that IP has no role in trade accords; just that the rationale for including IP rules in multilateral treaties as a way to enhance *trade* is not overwhelming, and this was one reason for pushback from other nations. Global IP protection is really something the US, and many US industries, have wanted for other reasons. Trade accords are simply the most effective vessel for those efforts. The strategy of including TRIPS as a core part of the new WTO reflected that assessment. But the US interest in using trade and investment treaties to strengthen IP protection globally did not stop with TRIPs. So-called “TRIPS-plus” accords proliferated in the years after the WTO came into being.²⁴ These were multilateral as well as bilateral. For example, the Anti-Counterfeiting Trade Agreement, negotiated in 2011 but not yet in force, was only in the most nominal sense a trade accord; the fundamental focus was strengthened IP protection.

The most recent example of the use of trade treaties to strengthen IP is the Trans Pacific Partnership agreement. TPP as it originally was intended is defunct, after President Trump’s withdrawal from the process. But it lives on in an altered guise—minus the US—as the “Comprehensive and Progressive Agreement for Trans Pacific Partnership.” TPP contained elaborate IP provisions aimed at the upward harmonization of substantive IP regulations as well as strengthening enforcement. Indeed, alongside investor-state dispute settlement, IP was arguably the core economic agenda of the US with regard to TPP. Then-US Trade Representative Michael Froman described TPP as the “first trade agreement to really take on the digital economy, issues around e-commerce and the free flow of data across borders; pushing back on new forms of digital protectionism, with countries trying to put walls around the internet or require companies to move their infrastructure to a country in order to serve that country.”²⁵ With the astonishing growth of the modern internet, which now comprises over 3 billion users and 1 billion websites, securing global protection of IP rights, many of which live online, is widely perceived as even more valuable and imperative. How the Trump administration will pursue this agenda post-TPP is unclear, but the political pressures to do so will not abate.

TPP was seen by some trade observers as the most significant trade accord since the creation of the WTO, and perhaps the most significant driver of IP reform. As Peter Drahos wrote in 2016—before the election of Donald Trump-- TPP “may turn out to be the agreement that most transforms national regulatory

²² Morse and Keohane, Contested Multilateralism, *Review of International Organizations* (2014) at [no page numbers].

²³ Whether this results in more or less innovation, however, is a harder question: there is not a monotonic relationship between the stringency of IP rights and rates of innovation. At a basic level that is why patents are 20 years and not indefinite.

²⁴ See e.g Susan Sell, TRIPs: Fifteen Years Later (2011) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1900102##

²⁵ Transcript, interview with Merit Janow, Council on Foreign Relations. <http://www.cfr.org/trade/future-us-trade-trans-pacific-partnership-conversation-michael-froman/p37973>

systems, perhaps even more so than the Uruguay Round.”²⁶ The IP rules in TPP followed the template refined by the US over several administrations: use the carrot of greater US market access to demand stronger IP protection, and gradually increase those protections with each new bilateral and multilateral trade accord.²⁷ Post-TPP, one can expect the US to continue to seek these outcomes, whether via bilateral trade accords or, possibly, a new multilateral initiative or even accession to a lightly-altered but renamed TPP (much like the Trump administration has attempted to do with NAFTA and the USMCA).²⁸

Why is the US so concerned with strengthening IP rights globally? Simply put, IP is a huge part of the contemporary American economy. Although the following numbers should be taken with a very substantial grain of salt, according to the US Chamber of Commerce “America’s IP is worth \$5.8 trillion, more than the nominal GDP of any other country in the world.” Moreover, “IP-intensive industries account for over 1/3—or 34.8%—of total U.S. GDP...The direct and indirect economic impacts of innovation are overwhelming, accounting for more than 40% of U.S. economic growth and employment.”²⁹ These figures were largely drawn from a US Patent and Trademark Office report back in 2012, which claimed that nearly a 1/3 of all US jobs were related to IP-intensive industries.³⁰ While that fraction is likely inflated, even if the real figure is 1/4 or 1/5 it is still a very large number.

Whatever the exact figures, IP is plainly very important to the American economy, and numbers like these, however spurious or exaggerated, often drive the debate within the Beltway on IP policy. The US has huge medical, pharmaceutical, and technology industries that care deeply about patents and export their goods worldwide. Many American film, television, music, and video game firms see robust copyright protection as their lifeblood. And trademarks are critical to a very wide range of American businesses. Of the top ten brands in the Forbes list of the world’s most powerful brands, only one—#6, Toyota—is not primarily an American company.³¹ Apple, Google, Microsoft, Facebook, Disney, McDonald’s, and GM—and the rest of the top ten—may be multinationals, but they were founded and headquartered in the US. These IP-sensitive firms and industries have generally found a friendly reception in Washington, and have successfully lobbied to export the American approach to IP globally.

In short, there are powerful structural reasons the US pursues IP protection so vigorously in its foreign policy. And because access to the US market is so attractive to many states, we can expect the US government, whatever party is in power, to continue to use trade and investment treaties as a lever to push foreign jurisdictions toward stricter IP law.³²

²⁶ Drahos, China, TPP and IP (editorial), *International Review of Intellectual Property and Competition Law*, 47, 1 (Feb 2016) at 21

²⁷ In other work Drahos calls this the “Global IP Ratchet.”

<https://www.anu.edu.au/fellows/pdrahos/reports/pdfs/2003globalipratchet.pdf>

²⁸ The passage of the USMCA is uncertain as of this writing; <https://thehill.com/opinion/finance/443049-woe-is-the-united-states-mexico-canada-agreement>

²⁹ <http://www.theglobalipcenter.com/resources/why-is-ip-important/>

³⁰ <http://www.uspto.gov/learning-and-resources/ip-motion/intellectual-property-and-us-economy>

³¹ <http://www.forbes.com/powerful-brands/>

³² One area of potential change concerns the growing political power of technology firms. The SOPA/PIPA legislative debate in the US highlighted the divergence in views on certain forms of IP protection between, crudely put, Northern California (Silicon Valley) and Southern California (Hollywood.) The latter has long been a core driver of ever-stronger IP protection in Congress. The former, despite its huge size, was traditionally less active in Washington and less focused on IP generally. The proposed SOPA/PIPA bills focused on online piracy and contained especially strong provisions around [X]. Both were killed due to opposition largely flowing from Silicon Valley, and illustrating the nascent but rapidly growing political power of Northern California interests in IP policy and in Washington generally.

The US & China

It is no mystery that the jurisdiction of greatest concern to the US with regard to IP has long been China. Concern about Chinese IP practices is intense in Washington. Given the vast scale of the Chinese market, the US considers it vital to rein in Chinese copying, and it has exhorted China to bring Chinese rules and practices in line with international standards.³³ That exhortation has grown tremendously as US-China trade has likewise grown in the years since China began widely opening its economy in the 1990s. China's comparatively weak enforcement of its IP laws,³⁴ and the widespread copying and counterfeiting that takes place in China, have long confounded the United States and other Western governments.

American concern has been tied to the scale and scope of copying in China, but also to the Chinese policy of "indigenous innovation"—a policy that American business has seen as a green light for copying. According to past statements from Beijing, indigenous innovation can include "enhancing original innovation through co-innovation and re-innovation based on the assimilation of imported technologies" – in other words, innovation through copying. As high technology becomes ever more critical to economic success, China's technology policies have expanded—and come under continued attack. China's various joint venture rules, in which foreign firms seeking to enter the Chinese market must work with Chinese firms, and often share their IP in the process, are emblematic. China's "Made in China 2025" program seeks to have China dominate global technology markets by 2049. For many in the West, the intended path to that outcome runs through their IP.

The US first raised IP protection as an issue with China in the 1980s, shortly after the resumption of normal diplomatic relations in 1979.³⁵ By 1989 the US was focusing on China in the Special 301 process, and then-US Trade Representative Carla Hills named China to the "priority watch list."³⁶ Seeking to improve matters, China entered into an MOU with the US to create a copyright law. (China had created a patent law in 1984.) The MOU declared that

The U.S. Government and the Chinese Government, acting in the spirit of their Bilateral Agreement on Trade Relations, and wishing to develop further economic and trade relations between both countries on the basis of the principles of equality and mutual benefit as well as nondiscriminatory treatment, and to improve protection of intellectual property rights, have agreed as follows:

- 1. The Chinese Government will submit a draft of a copyright law, taking into account the trend of international practice...*

In addition, the MOU specified that software would be covered as a literary work, subject to the same rules governing other forms of copyrightable material. (The US had begun to treat software as copyrightable in

³³ See *Dispute DS362: China-Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WTO, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm (last visited Jan. 28, 2014). Among others, Argentina, Australia, Canada, the European Communities, India, Taiwan, Turkey, and Thailand all joined the suit against China as third parties.

³⁴ Chinese enforcement is changing; this issue is discussed below. While the magnitude of the change is debated, the political dynamics in Washington continue to reflect the view that China is a major pirate nation.

³⁵ See generally Warren Maruyama, *US China IPR negotiations: Trade, Intellectual Property, and the Rule of Law in a Global Economy*, in *Chinese Intellectual Property Law and Practice* (1999).

³⁶ *PRC Agrees to Push for Copyright Law That Will Protect Computer Software*, [Vol. 3] *World Intell. Prop. Rep. (BNA)* at 151-52 (July 1989).

the 1980s; in years to come software piracy would become a major source of friction with China.)³⁷ In 1990 China passed such a law, and in 1992 the Berne Convention on copyright entered into force in China.³⁸ China again amended its copyright law, as well as its earlier-promulgated patent law, as part of its entry package to the WTO. As this suggests, Chinese IP law was from the beginning subject to substantial foreign pressure, and the US—using the leverage of the international trading order—was a major part of that pressure.

American pressure did not let up after China joined the WTO. In 2007, for instance, the US pursued action within the WTO against China for its IP policies. The US alleged that China had violated a number of its TRIPs obligations (as well as the Berne Convention on copyright). The European Communities, Mexico, and Japan joined the case against China. The US and its allies prevailed on a number of the charges, but not all. The WTO Panel found it impermissible for China to provide for the removal of an infringing trademark as the only precondition for the sale of counterfeit goods seized by Chinese customs authorities. But the Panel did not support the broader and more significant US allegation that the thresholds for Chinese criminal penalties for willful IP infringement were set too high.³⁹ Most importantly, the Panel found China in violation of the requirement that foreign owners of creative works receive the same protection as domestic owners of similar material, as well as the requirement that WTO members have available laws “so as to permit effective action against any act of infringement of intellectual property rights covered by this agreement,” including remedies which “constitute a deterrent to further infringements.”

The US has nonetheless continued its drumbeat of pressure on Beijing. The 2013 report of the Commission on the Theft of American Intellectual Property, co-chaired by former Ambassador to China Jon Huntsman, focused extensively on China. The Commission declared that “China is the world’s largest source of IP theft.”⁴⁰ According to the report, China’s share of world “IP theft” is nearly 80%.⁴¹ Striking a similar chord, when briefing reporters at the White House in February 2013 Undersecretary of State Robert Hormats called China’s treatment of IP “a serious and highly troubling issue.”⁴² A January 2017 report of USTR to Congress highlighted how little progress the federal government believes has occurred in Chinese IP policy and practice. USTR stated that “inadequacies in China’s IPR protection and enforcement regime continue to present serious barriers to U.S. exports and investment.”⁴³ Moreover, “although the central government has modified China’s IPR laws and regulations in an effort to bring them into line with China’s WTO commitments, effective IPR enforcement has not been achieved, and IPR infringement remains a serious problem throughout China.”⁴⁴ (In 2019, the Commission on the Theft of American Intellectual Property released its most recent report, in which it applauded the Trump administration’s focus on China and called

³⁷ In 1980 Congress added “computer program” to section 101 of the US copyright code; Pub. L. 96-517 Section 10B. *Apple v. Franklin* (714 F2d 1240) was the first case upholding this approach.

³⁸ Yong Wan, China, the US and Intellectual Property Protection (paper prepared for Penn conference).

³⁹ https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=88505,81128,98579,97174,108768,68172,102473,80361,69480,77193&CurrentCatalogueIdIndex=8&FullTextHash=

⁴⁰ NATIONAL BUREAU OF ASIAN RESEARCH, THE REPORT OF THE COMMISSION ON THE THEFT OF AMERICAN INTELLECTUAL PROPERTY 2 (2013).

⁴¹ *See id.* at 3.

⁴² Quoted in Raustiala & Sprigman, *Fake It Till You Make It*

⁴³ 2016 USTR Report to Congress on China’s WTO Compliance, Executive Summary at 8 (January 2017)

⁴⁴ *Id.* At 134.

China “the most active and persistent perpetrator of economic espionage” and called for denial of access to the American banking system for any foreign entity that “steals IP.”⁴⁵

The Trump administration has ratcheted up the pressure still further. In August of 2017, US Trade Representative Robert Lighthizer formally initiated an investigation of China’s IP practices under Section 301. USTR’s investigation followed President Trump’s memorandum instructing USTR to consider initiating an investigation. The President asserted that “the United States is a world leader in research-and-development-intensive, high-technology goods,” and that “violations of intellectual property rights and other unfair technology transfers potentially threaten United States firms by undermining their ability to compete fairly in the global market.”⁴⁶ USTR’s 2018 Special 301 Report acknowledged some improvement but found that China had continuously failed to implement its promises to improve its IP law and enforcement.⁴⁷ The accelerating (as of May 2019) trade war with China is based on many contentious issues, but IP remains central.⁴⁸ In short, while China has significantly increased its domestic IP activity in recent years—such as the granting of patents—and seems to be focused more on enforcement,⁴⁹ the US government believes there is still a long road to go. (I will say more on China’s changing approach to IP below.)

It is important to note that US concerns over Chinese IP practices often cannot be disentangled from larger concerns over digital espionage and conflict. Chinese copying often is digital in nature and involves cyber espionage for commercial purposes—sometimes by agents that are part of, or are working closely with, the Chinese government. In criticizing this practice, President Obama argued that while normal, or political, espionage is OK, cyberespionage for commercial gain is not:

Every country in the world, large and small, engages in intelligence gathering....there is a big difference between China wanting to figure out how they can find out what my talking points are when I meet with the Japanese, which is standard...and a hacker directly connected with the Chinese government or Chinese military breaking into Apple’s software systems to see if they can obtain the designs for the latest Apple product. That’s theft. And we can’t tolerate that.”⁵⁰

This distinction between “good” and “bad” espionage is not always well received or comprehensible to outsiders. Even former American officials have noted the difficulty with American line drawing. Michael Hayden, former director of the CIA and NSA, characterized Obama’s position as “‘You spy, we spy, but you just steal the wrong stuff.’ That’s a hard conversation.”⁵¹ It is hard because it is not always clear that the US does not assist its own firms through its espionage, even if the US does not directly copy IP as part of this practice. And it is hard because for many nations the line between political and economic is not as clear as it is to Americans.

⁴⁵http://www.ipcommission.org/report/ip_commission_2019_review_of_progress_and_updated_recommendations.pdf

⁴⁶ Cite to memo

⁴⁷ <https://ustr.gov/sites/default/files/files/Press/Reports/2018%20Special%20301.pdf>

⁴⁸ See e.g. <https://www.scmp.com/economy/china-economy/article/3021024/new-red-scare-shrouds-us-china-tech-war-trump-cracks-down>

⁴⁹ See the discussion below at X

⁵⁰ Cited in Adam Segal, *The Hacked World Order*, at 133-4.

⁵¹ *Id.* at 134

Nonetheless the US government has continued to see Chinese copying of American technology as a major problem, and a security as well as an economic threat. For example, in 2018 the National Intelligence Council issued a report on China's "1000 Talents" program, which ostensibly targets US-based or trained Chinese nationals to bolster China's technology sector and stem brain drain. The underlying goal, according to the report, is "to facilitate the legal and illicit transfer of U.S. technology, intellectual property" to China—what the NIC termed "an unprecedented threat."⁵² The same week, the White House issued a report whose title sums up the state of affairs from the perspective of the Trump administration: *How China's Economic Aggression Threatens the Technologies and Intellectual Property of the United States and the World*.⁵³

Pirate Nation

The history of IP protection in the US is instructive when considering policy differences with China, as well as the likelihood of greater convergence between the two nations. That history is well-documented by historians but rarely noted in policy debates. Simply put, in the 18th and even in the 19th century, when it was a rising world power itself, the US was a major infringer of foreign IP rights. Like China today, the US frequently incurred the wrath of more established powers for this behavior. American IP policy and practice was not accidental, moreover. It was part of a strategy for economic success that ultimately fostered the tremendous rise of the American industrial machine. As a leading history of American IP policy describes,

Officially, the young republic pioneered a new criterion of intellectual property that set the highest possible standards for such claims—worldwide originality and novelty. At the same time, through a variety of measures, the government endorsed and supported the violation of intellectual property of European states and individuals. *The United States emerged as the world's leading industrial leader by illicitly appropriating mechanical and scientific innovations from Europe*.⁵⁴

American piracy in the 18th and 19th centuries was not limited to patentable inventions, though that was economically a critical part. For example, for much of its history the US excluded foreign books from copyright protection.⁵⁵ Early American law likewise prohibited foreign inventors from obtaining U.S. patents on inventions they had already patented elsewhere. The ban on copyrights for foreign authors was not lifted until 1891, and, even then, foreign authors were required to manufacture their books on American territory as a condition of protection. This domestic manufacturing requirement did not disappear entirely until Ronald Reagan was in the White House.

Strategically weak IP policies date back to the birth of the Republic. Indeed, this approach was central to Alexander Hamilton's famous 1791 Report on Manufactures. Hamilton believed that the U.S. could obtain many of the benefit of European technologies by simply replicating them. As Hamilton acknowledged, most manufacturing nations "prohibit, under severe penalties, the exportation of implements and machines, which they have either invented or improved." Many also prohibited the emigration of skilled machinists, who had

⁵² Anthony Capaccio, US Faces "Unprecedented Threat" from China On Tech Takeover," Bloomberg, June 21, 2018, <https://www.bloomberg.com/news/articles/2018-06-22/china-s-thousand-talents-called-key-in-seizing-u-s-expertise>

⁵³ <https://www.whitehouse.gov/wp-content/uploads/2018/06/FINAL-China-Technology-Report-6.18.18-PDF.pdf>

⁵⁴ Doron Ben-Atar, *Trade Secrets: Intellectual Piracy and the Origins of American Industrial Power* (Yale, 2004) at xxi. Emphasis added.

⁵⁵ For an extensive look at publishing in the 19th century and its relation to IP see Robert Spoo, *Without Copyrights: Piracy, Publishing, and the Public Domain* (Oxford, 2013).

practical knowledge about how manufacturing worked. Hamilton wanted both the machines and the men who knew how to operate them, and he advocated breaking foreign countries' laws to get them.

Hamilton was not the only founder who saw economic advantage in copying other nation's IP. Benjamin Franklin regularly re-published the works of British authors without seeking their permission or offering payment. (Franklin also was happy to borrow inventions when useful.)⁵⁶ The British lambasted the early Americans for copying their writers without permission. In language that, slightly tweaked, could have been inserted into Jon Huntsman's report of the 2013 Commission on the Theft of American Intellectual Property, Charles Dickens bewailed "the exquisite justice of never deriving sixpence from an enormous American sale of all my books."⁵⁷ Early Americans saw IP infringement as a way to prosper and gain advantage against the largest industrial power of the day, the British Empire. The result was "an all-out economic contest between the United States and its former ruler in which respect for individuals' and nation' intellectual property took a back seat to the nationalist developmental impulse."⁵⁸

In short, the current American obsession with stringent and global IP protection is not wholly new, but it is certainly not a traditional interest or focus of the nation. Quite the contrary, the US was happy to be a leading pirate vis-à-vis the great powers of the day when it suited American economic interests. As the US economy changed, and the US became a rising power, US IP policy also changed. IP protection is today a core US international interest because IP is central to the contemporary American economy and IP dependent firms in the US have substantial political power. (Though there are still a few significant areas of the US economy that operate without much IP protection.)⁵⁹ In a global economy in which US goods are often at a price disadvantage, IP-laden goods remain an area in which the US has notable comparative advantage. There are of course many wrinkles to the brief history of American IP policy I have presented. But the core trajectory is broadly accurate. This trajectory is instructive to bear in mind when considering the current and future policy of the US' greatest IP *bête noire*: China.

Chinese Views

While the focus of this chapter is US IP law and policy, it is essential to provide some context for American attitudes about China via a brief look at Chinese law and practice. Contemporary Chinese law is formally protective of IP and, on paper at least, comparable with existing international standards. Since 2001 China has been a member of the WTO and therefore a party to TRIPS. And while American complaints are sometimes overblown, Chinese enforcement of IP rights has nonetheless long been fairly weak and inconsistently applied. By nearly all accounts Chinese society and businesses engage in substantial imitation and copying, at least as compared to their Western counterparts. Copying is generally more tolerated in China than in the West.⁶⁰ This basic difference in attitudes and policies between the two great powers is widely accepted. The sources of this difference, and its magnitude and likely trajectory, are more contested.

⁵⁶ Ben-Atar, *supra* at Chap 3, gives extensive attention to Franklin. As Ben-Atar notes, however, Franklin had some idiosyncratic views about IP compared to his contemporaries.

⁵⁷ Cite from FA article

⁵⁸ Ben-Atar at 118.

⁵⁹ For example, fashion and food. See RAUSTLALA AND SPRIGMAN, *THE KNOCKOFF ECONOMY*, *supra*.

⁶⁰ I say more on this below. Copying is arguably valorized in China in some contexts. So-called "shanzhai" copying, for instance, is often depicted in China as admirable or justifiable, signifying the plucky ingenuity of the Chinese people. It can have a deep class dimension as well. The writer Yu Hua, for example, asserts that shanzhai "represents a challenge of the grassroots to the elite, of the popular to the official, of the weak to the strong." Yu Hua, *China in Ten Words* at 188. See also [Haochen Sun] and Barton Beebe,

Many analysts point to cultural factors to explain the persistence of widespread copying in China. (Though of course China is far from the only nation to have a more permissive view of IP than the US does.) One common argument looks to the powerful legacy of Confucian thinking, which is claimed to cast copying in a positive light—as more homage than piracy. As one scholar of Chinese history has argued, “the incorporation of elements of past works in one’s own was not undertaken with the intent to steal another author’s ideas. Rather, imitation [in historical China] was the means for authors to demonstrate their knowledge and mastery of history; it was a form of tribute to their predecessors.”⁶¹ A similar analysis suggests that IP law, at least as it has been conceived in the West, “goes firmly against the grain of Asian culture, which supports the concept of sharing, not protecting, individual creative work.”⁶² Countries such as China that are said to have a “collective” culture—“one that emphasizes sharing over individual ownership rights” —have significantly higher rates of copying and counterfeiting than do countries with “individualist” cultures.⁶³ These broad generalizations often attract ire, but they are widely believed—and arguably reinforced by practices such as the extensive Chinese craft industry in fine art copies (such as that famously associated with the “Dafen Oil Painting Village” in Shenzhen.⁶⁴) If indeed Chinese cultural traditions cast copying as sharing rather than stealing, and more homage than piracy, it is not surprising that Chinese IP policy differs from that of the more individualist United States. In this account, the difference between the two great powers is more a question of values than interests.

William Alford, in his influential *To Steal a Book is an Elegant Offense*, criticizes this cultural account of Chinese IP law as too strong and too simplistic. Nonetheless, Alford broadly agrees that the past was and remains a very important source of legitimacy in China, and that this reverence for the past has important implications for how IP rights are perceived today. “The indispensability of the past, for personal moral growth,” Alford writes, “dictated that there be broad access to the common heritage of all Chinese.” This, and other factors, “militated against thinking of the fruits of intellectual endeavor as private property.”⁶⁵ Like other analysts of China, Alford contrasts this perspective with the West, where the seventeenth and eighteenth centuries “witnessed the development of an approach toward intellectual property in Europe that had no counterpart in imperial Chinese history.”⁶⁶ He notes as well that many great Chinese painters tolerated or even welcomed forgery of their work “because such copying, in effect, bore witness to the quality of the work copied and to its creator’s degree of understanding and civility.”⁶⁷

To what degree culture in fact plays a role in China’s approach to imitation and innovation is unclear. But however imitation and innovation were understood in traditional China, it is incontrovertible that contemporary Chinese IP law is of relatively recent vintage. China passed its first post-revolutionary patent and

Shanzhai, Sumptuary Law, and Intellectual Property in Contemporary China, UC Davis Law Review (2014)

⁶¹ Thomas Tze-Hun Chou, *Private Copyright Investment in China*, 1 J. SMALL & EMERGING BUS. L. 375, 393 (1997)(emphasis added).

⁶² W.R. Swinyard et al., *The Morality of Software Piracy: A Cross-Cultural Analysis*, 9 J. BUS. ETHICS 655, 662 (1990).

⁶³ Donald B. Marron & David G. Steel, *Which Countries Protect Intellectual Property? The Case of Software Piracy*, 38 ECON. INQUIRY 159, 172 (2000). For a broader take on the philosophical roots of IP in China see Peter Yu, Intellectual Property, Asian Philosophy and the Yin-Yang School, *WIPO Journal* (2015)

⁶⁴ WINNIE WONG, *VAN GOGH ON DEMAND: CHINA AND THE READY-MADE* (Chicago, 2013). The story of Dafen is more complicated than simply copying, as Wong describes.

⁶⁵ WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE* 20 (1995).

⁶⁶ *Id.* at 18.

⁶⁷ *Id.* at 29.

trademark laws in the 1980s; its first copyright law in 1990.⁶⁸ At the time of these laws' passage, China was very poor—substantially poorer than it is now. The period between the birth of these domestic IP laws and today was of course one of astounding economic growth in China, some of it clearly involving IP infringement. Perhaps like the early US, China found its economic interests were best served by imitating, not innovating.

Yet China has been strengthening its IP laws and institutions. China has a number of new procedural innovations in the works which many foreign lawyers believe (or hope) will lead to more transparent and fair treatment of foreigner's IP rights.⁶⁹ An 2017 \$1.5 million trademark infringement ruling in Suzhou in favor of New Balance, along with a 2017 win by Under Armour against a Chinese firm with a very similar logo named “Uncle Martian,” have been viewed as auspicious signs that China is beginning to take IP infringement more seriously.

Chinese authorities have also revamped patent laws and created specialized courts to hear IP disputes.⁷⁰ Partly as a consequence, and to the surprise of many, China has surpassed the U.S. to become the world's top issuer of patents. As the *Wall Street Journal* has reported, China issued 359,000 new patents in 2015, up 54% from 2014. U.S. patents, meanwhile, slipped less than 1% to 298,400.⁷¹ Patent volume, in and of itself, is a fuzzy marker of innovation. The US PTO, as experienced and professional as any such agency in the world, issues many patents that are quite dubious and often invalidated in litigation. (It recently issued a patent to Apple for what is essentially a paper bag.)⁷² There is no reason to think China's patent office is any different, and indeed given China's higher levels of corruption, relative inexperience in patent approval, and vast and often uneven bureaucracy, more reason to think many of these new patents are suspect. But looked at in a broad context, the remarkable rise in Chinese patents and the incremental changes occurring in Chinese IP policy suggest that more stringent and consistent IP protection is increasingly seen as valuable for the Chinese economy.

Indeed, Chinese firms are more frequently using IP law to try to block rivals—a favorite tactic in the US that will surely continue to grow in China. For example, one Chinese firm received an injunction to block sales of the iPhone 6 and 6+ in Beijing, a potentially huge market for Apple. The outcome of the suit is uncertain, but it suggests the ways that foreign efforts to strengthen IP law in China may create some unintended effects, as Chinese firms learn to navigate and employ a more sophisticated IP regulatory apparatus to their benefit.

And as Chinese firms such as Alibaba, Xiaomi, Huawei, Tencent and HTC rapidly expand globally, their interest in strong IP protection has also grown. Indeed, it is striking how many recent commentators have declared a transformation in Chinese IP attitudes. Somewhat hyperbolically, perhaps, in 2017 the Silicon Valley site *Techcrunch* declared

⁶⁸ For a more extensive history see Peter Yu, *The Transplant and Transformation of Intellectual Property Laws in China*, in Lee et al, eds, *Governance of Intellectual Property Rights in China and Europe* (Edward Elgar, 2016)

⁶⁹ See e.g. Mayer Brown, IP and TMT Quarterly Review, Spring 2017 <https://www.mayerbrown.com/files/Publication/8f839a9a-104f-4942-afff-e9f0c3d81cbd/Presentation/PublicationAttachment/30e85e12-599b-4db7-b5b5-a68f8793457c/170914-ASI-IP-TMT-QuarterlyReview-2017Q3.pdf>

⁷⁰ <https://www.bloomberg.com/news/articles/2014-11-03/china-opens-intellectual-property-courts-to-improve-image>

⁷¹ Jack Nicas and Josh Chin, Stronger Chinese Patent Laws Also Help US Companies, WSJ, July 20 2016.

⁷² Cite

China is quickly becoming a (if not *the*) global leader in intellectual property protection and enforcement. And there too, just as Western democracies (especially the United States) have grown increasingly skeptical of the value of intellectual property and have weakened protection and enforcement, China has been steadily advancing its own intellectual property system and the protected assets of its companies and citizens.⁷³

More soberly, but broadly consistent with this claim of change, *The Economist* state that:

THERE was a time, not that long ago, when China's big internet companies were dismissed by investors in Silicon Valley as marginal firms with a tendency to copy Western products. Not any more. Today they are monsters with increasingly hefty international ambitions.⁷⁴

The Economist noted as well that Western companies had stymied some of these ambitions with a time-honored strategy often-deployed by Chinese firms: copying the best features of a given platform (e.g. WeChat) and fending off the invaders.

China's overall approach to IP rights may also reflect broader social concerns. Even though many Chinese remain very poor, China's inequality is extremely high, and recently it has become one of the world's largest markets for luxury goods. But it is also the world's leading workshop for counterfeit goods. A result China has for years been awash in "shanzhai" goods; that is, goods that mimic Western goods but are often tweaked for a Chinese market. As Barton Beebe has argued, IP law in China (and elsewhere) effectively functions as a form of sumptuary law, reinforcing social hierarchies by limiting the availability of desirable goods and brands to the elite.⁷⁵ "As [Chinese] enforcement efforts continue to improve," Beebe suggests, "the production and consumption of shanzhai status goods, meanwhile, will likely slowly be reduced to manageable and non-threatening levels."⁷⁶ It is hard to say how much of the impetus for stricter trademark protection in China is Chinese elites' own desire to rein in rampant aping of high end brands, in an effort to ensure that status distinctions are clarified. But given how few Chinese brands are significant outside China, it is not wholly implausible that this is a part of the story.

More broadly, the increasing stringency of Chinese IP law likely reflects China's incredibly rapid economic growth. China today is, as an economic matter, a completely different country compared to China in 2000. (According to World Bank data, China's GDP in this period rose by an astonishing 1000%.⁷⁷) Just as the US, once pilloried as an infringer, became a leading proponent of IP protection when that served its economic interests, so too may China increasingly see secure IP rights as a valuable tool to promote and protect innovation and profit. But this is likely to be a slow process, and not only because China may indeed have a different historical and cultural relationship to copying. There is still widespread poverty and tremendous economic inequality in China. The pursuit of foreign IP and technology is not only a way for China, as in early America, to grow its economy rapidly and catch up with powerful rivals; it is also a social salve that allows poorer Chinese access to some version, perhaps recast and shanzhai'd, of goods that they

⁷³ <https://techcrunch.com/2017/04/11/the-surprising-rise-of-china-as-ip-powerhouse/>

⁷⁴ <http://www.economist.com/news/business/21721203-tencent-leading-acquisition-sprees-alibaba-close-second-chinas-internet-giants-go>

⁷⁵ Beebe, *supra*.

⁷⁶ *Id.*

⁷⁷ <https://data.worldbank.org/country/china>

covet but cannot afford.⁷⁸ In short, the incentives for tolerance of copying remain in China, even if over the longer term we can expect a gradual tightening of IP law.

Conclusion

Intellectual property, once a small part of the international legal agenda, is now a core part of contemporary trade and investment treaties and the subject of some two dozen stand-alone treaties. Securing stronger IP rights and more robust enforcement mechanisms has been a goal of US foreign economic policy since at least the 1970s. China has been in the US crosshairs for many years when it comes to IP policy and enforcement. In nearly every US-China summit and strategic dialogue, at the WTO and other international forums, and in many reports from the US government and private actors, China's IP infringement is castigated by the US. The Trump administration has, since 2016, only intensified these attacks. As the US increasingly views China as a strategic threat economically, politically, and militarily, these attacks on Chinese IP and innovation practices are only likely to grow.

China's IP policy and practices are increasingly seen as improving, however. Not unrelatedly, China has in recent years become more focused on building an innovation-based economy and a powerful technology sector. Whatever the best descriptor of the current US-China relationship, the two states are deeply economically intertwined and China increasingly seeks to move up the value chain and soon become, as its "Made in 2025" strategy suggests, a major technology and innovation hub. Like the US before it, China may be transitioning its IP policy as its broader economy transitions. Powerful social and economic incentives still exist in China that encourage copying of Western products. Deeper divergences in values—surrounding individuality; the role of homage and copying; and reverence for the past—may shape the differing national approaches in fundamental ways. But convergence in American and Chinese IP law and practice is occurring, and further convergence is likely in the future.

⁷⁸ Raustiala and Sprigman, Let Them Eat Fake Cake, *supra*.