SELECTIVE ADAPTATION AND LEGITIMACY: PUBLIC-PRIVATE DYNAMICS IN CHINA’S TRIPS COMPLIANCE

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A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF

DOCTOR OF PHILOSOPHY

in

THE FACULTY OF GRADUATE STUDIES

(Law)

THE UNIVERSITY OF BRITISH COLUMBIA

(Vancouver)

May 2009

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ABSTRACT

This dissertation examines China’s compliance with the WTO’s intellectual property regime – the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) – and its theoretical implications.

The dissertation’s critical review of contemporary intellectual property philosophy at the beginning suggests that justifying intellectual property protection through Locke or Hegel’s property theories internalizes a theoretical paradox. While being recognized as self-sufficient private rights gives intellectual creations constitutional significance, it also traps the legal regime in an intrinsic dilemma of private-public confrontation. In contrast to WTO’s private-oriented perspective, China’s response to this private-public dynamics indicates a clear public interest orientation. This is evident in imperial China’s reliance on criminal and administrative but not civil protection for intellectual endeavors, in contemporary protection of Olympic Marks, and in the Ex Officio action system of enforcement in China’s TRIPS implementation. In addition, an empirical survey study suggests that China’s public-oriented cultural imperative shapes people’s ways of perceiving private rights from their social embedment, and further constructs people’s perception of intellectual property protection.

Further jurisprudential analysis reveals that the self-sufficient ontology since the Enlightenment that constructed the modernity of law has shaped TRIPS’ self-sufficient private rights perspective. When private rights are made self-sufficient and the intellectual property regime becomes indifferent to public concerns and development, modern law becomes “self-evident” and legitimacy collapses into legality. This public-private orientation contrast between China and the WTO not only explains the “how” and the “why” of China’s TRIPS compliance, but also reveals a compliance paradox. While foreign pressure on China for establishing an omnipotent administration to protect private-rights-in-nature intellectual property is squaring a circle in vain, China’s effort to embrace the private rights oriented regime is cutting off its toes to fit into foreign shoes.

The dissertation proposes a jurisprudential reconstruction building on a relational instead of self-sufficient ontology to restore international compliance to the process of constant “selective adaptation” and dynamic growth of legitimacy. During this process, the dynamics between international norms and local imperatives provides a driving force for law’s development, where “to be” meets with “ought to be,” through which international norms and local regimes evolve.
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ACKNOWLEDGEMENTS

I sincerely thank my parents and my wife. Without their love and support, the success of my study at UBC would not have been possible.

I am greatly indebted to my advisors, Dr. Pitman Potter, Dr. Joost Blom, Dr. Ljiljana Biukovic, and Dr. Mira Sundara Rajan from UBC Law School, and Dr. Ilan Vertinsky from UBC Sauder School of Business. Their enthusiastic guidance has always been the source of my academic inspiration, which took me through the four years of this Ph.D. and exposed me to the beauty of legal research. I would also like to thank the faculty and administration of UBC Law School, in particular Dr. Ruth Buchanan, Dr. Jenifer Beard, Ms. Joanne Chung, and Ms. Veronica Uy. Their generous support and assistance have made my time in UBC Law School a great experience.

I am also grateful for the generous support from the Asia Pacific Dispute Resolution (APDR) project at the Institute of Asian Research, University of British Columbia. A commissioned research paper from the APDR project has become part of Chapter 3 of this dissertation. APDR’s generous support also allowed me to participate in some international conferences, through which ideas were exchanged and my academic experiences grew. This undoubtedly contributed to the success of this dissertation research. I would like to thank Karen Jew, Rozalia Mate, Donna Yeung, and Meera Bawa, for their generous support and assistance which made my involvement in the APDR a great experience.

My dissertation research project has benefitted greatly from other support within and outside of UBC, for which I would like to take this opportunity to express my deep gratitude. Prof. Geping Rao, Prof. Ping Zhang, Zhao Liu, and Hengquan Zhang from Peking University, and Prof. Weidong He from Shanghai Academy of Social Science provided great support for my survey study in Beijing and Shanghai. Many friends in UBC have also provided generous support and assistance to the research project. Heng Ju, Yan Liu, Mo Li, and Pai Xu provided invaluable assistance in the backtranslation of the survey questionnaire. I also want to thank Henny Yeung, Carl Falk, and my wife Emma Buchtel for helpful comments on earlier drafts of this dissertation. Without all this support and help, the dissertation research would not be possible.

Last but not least, I would like to thank Hong Kong Law Journal and Global Jurist for their generous support and approval of the inclusion of my previously published papers into this dissertation.
INTRODUCTION: PUZZLE, METHODOLOGY, AND HYPOTHESIS

Ever since China began economic reform and its “open door” policy in the late 1970s, the development of China’s legal regime and its relation with international norms has been an important focus of legal scholars with comparative interests. Perspectives on China’s interaction with foreign norms have been very diverse and even conflicting. In particular, China’s accession to the World Trade Organization (WTO) has been a spotlight issue of the world trading system for many years. The dynamics between China and the WTO around China’s 2001 entry has generated a substantial amount of literature, in which China’s non-compliance to or conflict with WTO norms has been the centre of debate and scrutiny.¹

Quite often China scholars are relatively pessimistic about China’s integration into the international regime and the future development of China’s legal system. Lubman’s critique of China, examining the dynamic interplay of legal institutions and economic reform in post-Mao China, is one example. Lubman starts his analysis from an examination of the fundamental differences between Western and Chinese legal traditions in terms of “the concepts of rights” and “the use of formal legal institutions to vindicate rights.”² For Lubman, legal rights or duties in China are “contextual” and depend on social relations in which “conflict must be addressed in terms of the alternative consequences with a view to finding a basis for cooperation and harmony.”³ Thus law in China, Lubman points out, “was not formally differentiated from other forms of exercise of state power, in striking contrast with the West,” which leads to a weak judicial system and compromise-based institutions.⁴ Furthermore, as “the depth of traditional values presents a considerable obstacle to the deepening of legal consciousness and the strengthening of legal institutions,” and control of the Party-state remains while judicial power is still subject to administrative authority,

² STANLEY B. LUBMAN, Bird in a Cage: Legal Reform in China after Mao (Stanford University, 1999), 12.
³ See id., at 19. Lubman points out in the conclusion that “[a] striking characteristic of Chinese legal culture has been the primacy of interpersonal relations over legal relationships.” See id., at 303.
⁴ See id., at 23, 31.
Lubman’s assessment of the future of the rule of law in China remains pessimistic.⁵ Thus for Lubman, due to “the absence of a unifying concept of law and a considerable fragmentation of authority,” and weak differentiation of the judicial system from the administrative bureaucracy, China does not have an effectively functioning legal system, and is unable to fulfill international obligations.⁶

Some other researchers question China’s conformity to international norms through a different path of reasoning. In his examination of China’s legal system and WTO compliance, Donald Clarke suggests that China’s motivation towards WTO accession is more to use the WTO to facilitate China’s domestic economic system reform, rather than to increase international market access.⁷ This means China’s accession to the WTO is domestic-oriented rather than international-oriented. Clarke further suggests that “[r]eforms simply imposed from outside are unlikely to go beyond surface compliance,” and “the main driver of change in the Chinese legal system will be internal developments in China, not foreign legal assistance programs.”⁸

Contrarily to the above doubts and skepticism towards China’s international compliance, some China scholars are quite optimistic, and suggest that China is heading towards rule of law and integrating with international regimes regardless of any domestic impediments. Peerenboom’s research on China’s legal reforms and efforts establishing rule of law is a good example. Peerenboom himself clearly stays away from traditional research approaches in this area, such as the Weberian theory of rational bureaucracy, North’s theory that emphasizes the role of property rights for economic growth, or modernization, globalization, and cultural theories. He argues that “[r]elying in a comparative law context on predetermined theories drawn from the experiences of very different countries is dangerous,” as this will miss “what is important within the Chinese legal system,” and “opportunities for exploring different roles that law might play given China’s particular context…”⁹ Peerenboom therefore starts with a Geertzian “thick description” of what was actually happening on the ground to examine the role and rule of law in China. He argues that rule of

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⁵ See id., at 299-304.
⁶ See id., at 317-8.
⁸ See id., at 97-8, 118.
⁹ RANDALL PEELENBOOM, China’s Long March toward Rule of Law (Cambridge University Press, 2002), xi.
law with Chinese characteristics—which might be an alternative to liberal democratic rule of law—“is still rule of law.”10 “Despite numerous obstacles,” Peerenboom argues that China’s legal reform indicates “a shift from a legal regime best characterized as rule by law toward a system that complies with the basic elements of a thin rule of law,” a rule of law with Chinese characteristics that is different from and an alternative to a Liberal Democratic rule of law.11

Quite different from either the pessimistic or the optimistic perspective of China’s integration with international legal regimes, Potter instead looks the dynamic mediation process between the international norms and China’s local cultural norms. In The Chinese Legal System, Potter examines the function of China’s legal system by reference to the dynamics of interplay between international legal norms and China’s local legal culture. Potter argues that the two decade’s development of legal system in China before its WTO accession has been a process of “selective adaptation” by which “conditions of local legal culture” constantly mediate the application of “legal norms associated with forms of law borrowed from abroad,” in particular in the fields of “legal institutions, contract, property, human rights, and foreign economic relations.”12

According to Potter, while globalization—the current world-wide “spread of liberal ideals of free markets and private law relations” – is accompanied by the notion of popular sovereignty and norms restraining state power, China’s local context means the interplay of governance and society between “official legal culture” and “popular legal culture” on the theatre of traditional norms that is hierarchical and against private law.13 While the Chinese government’s legal approach is fundamentally instrumentalist and formalist, popular legal culture values “informal relationships and autonomy.”14 Potter argues that “[t]he influences of tradition, governance, and society suggest diverse perspectives on the role of law that will affect reception of global legal norms,” and “[e]xpectations about the performance of the institutions and rules of PRC law should proceed with due recognition that what is at work in the Chinese legal reform effort is a process of selective adaptation.”15 For example, Potter

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10 See id., at xiv.
11 See id., at 558.
12 POTTER, Chinese Legal System, 2, 3.
13 See id., at 5, 8.
14 See id., at 10-3.
15 See id., at 14-5.
reveals that China’s intellectual property regime “reflects a dynamic interaction between international norms and local legal and political culture,” and “[t]he tensions over development and dependency provide the international context for China’s foreign business law regime” in which local legal culture remains as an important mediating force.16

In another article, “Legal Reform in China,” Potter focuses on the theoretical puzzle of China’s legal reform: how law functions during China’s legal reform while China’s “fealty to socialism” both qualifies and at the same time diminishes rule of law.17 Building on his analysis of the interplay between institutional capacity and local legal culture, Potter argues that selective adaptation depends on factors of perception, complementarity, and legitimacy, which furthers our “understanding of the challenges that institutional capacity and legal culture pose for legal reform.”18 Selective adaptation explains China’s attempt to manage the content and direction of laws within the context of challenges from the interplay between institutional capacity and legal culture.19 Potter therefore argues that as legal reform in China will continue to reflect the tensions of policy and performance within the interplay of institutional capacity and legal culture, ideas of “selective adaptation and attendant features of perception, complementarity, and legitimacy” further our understanding of China’s attempt to mediate the tension between imported rules and local norms.20 Therefore, Potter suggests that China’s response to norms of globalized liberalism has been a process of selective adaptation, a “consistent pattern by which foreign legal norms and institutional arrangements are adjusted to meet local political and ideological imperatives.”21 However, how China can “achieve compliance with GATT/WTO requirements” and remain “true to its local cultural and developmental imperatives” presents a challenge for China.22

Among these different perspectives, the question of legitimacy regarding China’s integration into international norms has been either implicitly or explicitly the focus of attention. On the one hand, WTO legitimacy has been challenged whenever WTO norms were mediated by China’s laws and practice. On the other hand, the legitimacy of China’s

16 See id., at 69, 109, 135.
18 See id., at 478-9, 486.
19 See id., at 480-6.
20 See id., at 486.
21 Potter, Chinese Legal System, 137.
22 See id., at 142.
domestic legal regime has been under question when China’s WTO compliance—in particular in the field of intellectual property rights protection—reveals contradictions. In both pessimistic and optimistic perspectives, the differences in evaluation of China’s conformity towards international norms presuppose a normative standard of the rule of law. Lubman’s perspective questions China’s legitimacy as China fails to meet the international standard of the rule of law. As for Peerenboom’s perspective, although he predicts the future triumph of the rule of law in China, his characterization of the rule of law with Chinese characteristics as a “thin” rule of law still presents a “thin” yet real doubt of China’s conformity. In each of these two perspectives, legitimacy is something that is either given or presupposed. The theory of selective adaptation, on the other hand, addresses the issue of legitimacy by reference to the dynamic mediation between foreign norms and local imperatives, and therefore gives us a different perspective in looking at the legitimacy issue regarding China’s WTO compliance.\(^\text{23}\) All these different perspectives lead us to the puzzle of this dissertation research: the “how” and the “why” of the dynamics between China and the WTO, in particular in the area of intellectual property, and its theoretical implications.

There are both significant advantages and limitations to examining China’s international compliance with a focus on the dynamics between China and the WTO’s intellectual property regime, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). On the one hand, there are important reasons to undertake such a focus in this research. By incorporating intellectual property into the international trading framework, TRIPS is undoubtedly one of the most significant developments in the history of the world trading system. However, TRIPS’ potential negative effect on international development has also been one of the most serious concerns in post-TRIPS WTO negotiations. Developing and least developed countries’ dissatisfaction with TRIPS’ potential negative effects on development was one of the key reasons for the failure of the Doha Round negotiations.\(^\text{24}\) The controversy around TRIPS makes TRIPS compliance as a research

\(^\text{23}\) For more detailed discussion of the theory of selective adaptation and its jurisprudential implications, see infra Chapter 5.

field theoretically and empirically significant, and rich in implications for law and development, WTO jurisprudence, and contemporary legal theory.

On the other hand, this dissertation research has also its limitations. Given the significance of the contemporary intellectual property regime in our society, research on intellectual property has been exceptionally rich in theories and diverse in perspectives. While the somewhat traditionalist Drahos reveals the theoretical foundation of intellectual property through a philosophical perspective, Maskus’ economic perspective unveils the economics of the international intellectual property regime.  

From a human rights perspective, Sundara Rajan reveals the significant connections between intellectual property rights and human rights, in particular the tension in copyright law between “creative freedom” and protections of copyrights from a commercial perspective. Some critical theorists like May and Sell, however, reveal the political dimension of the intellectual property regime.

Examining China’s TRIPS compliance will not cover and address all theoretical perspectives in intellectual property research. Also, by taking systems of patent, trademark, and copyrights homogeneously under the framework of intellectual property, the focus on the dynamics between the international regime and the domestic legal frameworks will not address subtle differences between these sub-systems of the intellectual property regime. To balance the limitations of this approach and avoid theoretical over-generalization, analysis of the policy dynamics and social implications will be built on case analyses and empirical studies.

Through an integration of theoretical critique and an empirical study, this dissertation examines the perplexing dynamics between China and the WTO, in particular the TRIPS regime. The dissertation starts first in the next Chapter with a critical examination of our contemporary intellectual property philosophy. The examination reveals that the application of Hegel and Locke’s property theories to contemporary intellectual property philosophy was


of great significance to modern views on intellectual property, but also creates problems. While the formation of intellectual property makes private rights self-sufficient as well as self-isolated, the alienation of intellectual property through licensing makes private rights indifferent to public concerns. Contemporary intellectual property philosophy has therefore become trapped in the abyss of the private-public confrontation. In the following two chapters, the dissertation examines the private-public dynamics in China’s intellectual property regime both from ancient to modern and from normative construction to social perception. In Chapter 3, this dissertation suggests that both the development of China’s intellectual property regime and China’s contemporary enforcement infrastructure clearly indicate China’s public-oriented perspective towards intellectual property. The examination of protections of intellectual endeavors in imperial China and the evolving recognition of individual creations in contemporary China suggests that individual creations in China—both in ancient and modern times—are mainly perceived through their embedment in public good. A discussion of Olympic marks protection and ex officio action of intellectual property enforcement reveals China’s public oriented approach towards intellectual property protection in both domestic and in bilateral and multi-national frameworks. Through a questionnaire survey conducted in China and Canada, the dissertation in Chapter 4 reveals the interrelations between the private rights perspective, social perception of interdependence, and certainty of legal regimes.²⁸ The survey data indicates that social perception of interdependence in China significantly shapes people’s ways of perceiving private rights from their embedment of social good, and also influences people’s tolerance towards piracy. Social perceptions of interdependence also significantly color the complexity of people’s perceptions of social relations and thus lead to “legal relativism,” in which people tend to believe that legal norms are sensitive to circumstance and situationally determined. Building on the findings above, Chapter 5 as the theoretical chapter of this dissertation provides a critique of China’s WTO compliance and its jurisprudential implications. The dissertation suggests that the self-sufficient private rights perspective underpinning the WTO is constructed on a self-sufficient ontology that was born together with modern law. When private rights are made self-sufficient and the intellectual property regime becomes

²⁸ Details of the questionnaire design, data collection and other methodological issues of the survey will be provided at the beginning of Chapter 4 below.
indifferent to public concerns and development, modern law becomes self-evident and legitimacy collapses into legality. At the end of Chapter 5, this dissertation suggests that legitimacy theory in contemporary jurisprudence can be reconstructed. Building on the discussion, Chapter VI provides some concluding remarks on the policy and theoretical implications of this dissertation research.

In contrast with the traditional formalist perception of legitimacy as a static concept of “textual authority,” this research examines the evolution of legitimacy in “practice reality.”29 The critical yet empirical examination of China’s adaptation to TRIPS suggests that the evolution of China’s intellectual property regime reflects a struggle between adaptation to private-oriented foreign intellectual property norms and loyalty to local public-oriented cultural imperatives.30 The dissertation research invites us to think of the question of legitimacy when local imperatives challenge foreign norms during law’s evolution. Through examining China’s “selective adaptation” to TRIPS as a process constantly transgressing yet also confirming and contributing to WTO legitimacy, this research locates legitimacy in a process through which the TRIPS as well as China’s intellectual property regime evolves. Selective adaptation as the process of intermediation between TRIPS and China’s domestic system constitutes a constant reexamination of the limit/legitimacy, by which China’s consent is given and by which justice as well as WTO legitimacy is attained. The dissertation argues that legitimacy is a constant process of “selective adaptation” where “to be” meets with “ought to be,” and facts meet with norms, through which law evolves.

29 These terms are borrowed from Potter’s work, where he examines the tension between “textual authority” and “the realities of performance” in selective adaptation and suggests looking beyond textual authority to practice reality through a cultural lens. See POTTER, Legal Reform in China, 470.

30 In this dissertation, “Cultural Imperative” refers to some fundamental cultural beliefs or values of a culture which are so compelling as well as distinct from others that they differentiate the culture from others.
2 PRIVATE-PUBLIC DYNAMICS: THE PARADOX OF INTELLECTUAL PROPERTY PHILOSOPHY

Intellectual property generally refers to creative ideas or knowledge—“creations of the mind”—which include copyright and industrial property such as patents, trademarks, and industrial designs. Although the history of intellectual property protection in the West could be traced back to as early as Roman law which offered “maker’s marks” legal protection, the first formal intellectual property rights protection is said to come from a decree in Venice between 1544 and 1545 which protected copyrights against piracy. Contemporary international protection of intellectual property rights is based on an integrated international treaty framework, which goes back to the 1883 Paris Convention protecting industrial property and the 1886 Berne Convention protecting copyrights. Its latest development is the establishment of the World Trade Organization (WTO) and the conclusion of the TRIPS Agreement in 1995. Under the TRIPS framework, protection of intellectual property has both domestic as well as international significance.

Despite the long history of intellectual property protection, the justification for intellectual property rights has been under fierce debate for many years. Various theoretical justifications have been framed in terms of different relationships between individual recognition and social welfare promotion. Hughes argues that intellectual property could be justified with a theoretical synthesis merging Lockean labor theory with Hegelian personality theory. Drahos, however, regards intellectual property rights as “liberty-inhibiting privileges,” and suggests that “talk about rights in intellectual property should be replaced by

34 L. Bently & B. Sherman, Intellectual Property Law (Oxford University Press, 2001), 4; WIPO, WIPO Intellectual Property Handbook: Policy, Law and Use (2004), available online at <http://www.wipo.int/about-ip/en/iprm/index.htm> (visited 26 August 2008). According to WIPO, there are two reasons to protect intellectual property rights. One is to serve as statutory recognition of creators’ moral and economic rights in their creations, as well as the public’s rights of access; the other is to promote economic and social development. Bently and Sherman argue likewise that there are two justifications for intellectual property. The “instrumental justification” argues that it promotes social welfare and prosperity, and another justification is motivated by an ethical and moral recognition of the productive labor of creation.
talk about privilege.’’ The central tension of intellectual property rights is also variously categorized. Some suggest that intellectual property internalizes a tension between rights and privileges consonant with the confrontation between the public and the private. Others perceive the tension of intellectual property as either a confrontation between private control over knowledge and public need for diffusion of knowledge, or an inherent tension between protection and limitation. From an economic perspective, Maskus suggests that intellectual property law reflects a tension between “static efficiency” requiring wide user access at marginal social cost and “dynamic efficiency” requiring incentives for innovation when social value surpasses development cost.

In this chapter, this dissertation examines the underpinning theories and theoretical issues of contemporary intellectual property philosophy. In the next section, this dissertation first provides a brief account of why intellectual property rights have come to be strongly protected under the contemporary legal system. This dissertation then goes further to examine the application of Locke and Hegel’s property theories in intellectual property philosophy and its implications. Following the critical examination of the formation and alienation of intellectual property, this dissertation discusses the theoretical issues arising from the self-others/private-public dynamics in intellectual property. The view that private-public dynamics is the key issue in contemporary intellectual property philosophy is the core thread that runs throughout the discussion in the rest of this dissertation, which leads us further to the legitimacy issue in contemporary jurisprudence.

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36 DRAHOS, 200, 220.
37 SELL, Private Power, Public Law, 5.
39 United States v. Jean Martignon, 346 F Supp. 2d 413, 416 (District Court for the Southern District of New York 2004). At footnote 2. In response to the debate about the purpose of the Copyright Clause (U.S. Const. art. I, § 8, cl. 8), the court acknowledged that there is an inherent tension between protecting an author’s right to his creative work and the public’s right of access to that work. See also, JOHN D. SHUFF & GEOFFREY T. HOLTZ, Copyright Tensions in Digital Age, 34 Akron Law Review 555, 556 (2001).
40 MASKUS, Intellectual Property Rights in the Global Economy 29. See also JEFFREY L. HARRISON & JULES THEEUWES, Law and Economics (W. W. Norton & Company. 2008), 143. It is suggested that there will always be an inherent tension in protecting intellectual property between “the right to compensation to stimulate creative people and the need of society to have wide access to creations to build and expand on them.”
41 By taking recognition/formation of intellectual property rights as a legal construction and alienation of intellectual property rights as legal deconstruction, the chapter reveals the social relations between self and others or between private and public that have been constructed in contemporary intellectual property philosophy. The perspective taken in this critical examination has been influenced by poststructuralists, Foucault and Derrida in particular.
2.1 INTELLECTUAL PROPERTY: ROOTS IN LOCKE’S AND HEGEL’S PROPERTY THEORIES

2.1.1 Intellectual Property as Private Rights

Intellectual property rights in general are recognized as private rights.\(^{42}\) Building on our long tradition of the protection of private property rights, this recognition firmly places intellectual property rights on the ground of being strongly protected under contemporary legal systems.\(^{43}\) This to some extent is because private property is as vital as, if not more vital than, life and liberty. In the US Constitution for example, private property has been given the same significance as life and liberty, and is protected from unfairly compensated appropriation from the government.\(^{44}\) Under this constitutional framework, patent rights have been long recognized as private property rights and given constitutional protection. In the case of *James v. Campbell* in 1882, the US Supreme Court asserted that:

> [T]he government of the United States when it grants letters-patent for a new invention or discovery in the arts, confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser.\(^{45}\)

The concept of patent rights as inviolable private property rights, even against governmental appropriation, was again reiterated in *Hollister v. Benedict & Burnham Mfg. Co.*\(^{46}\) The significance of the protection of patent rights as private property was not only reaffirmed in the case of *Diamond v. Chakrabarty*, but the scope of patentability was

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\(^{42}\) WTO, Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), (1995). TRIPS’ “Preamble” states that WTO members recognize that “intellectual property rights are private rights.”

\(^{43}\) See infra discussion 2.1.2.2.

\(^{44}\) *U.S. Const. amend., V.* states that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.


\(^{46}\) *Hollister v. Benedict & Burnham Mfg. Co.*, 113 U.S. 59, 67 (1885). The Supreme Court stated that:

> [T]he right of the patentee, under letters patent for an invention granted by the United States, was exclusive of the government of the United States as well as of all others, and stood on the footing of all other property, the right to which was secured, as against the government, by the constitutional guaranty which prohibits the taking of private property for public use without compensation.
expanded. In this case, the US Supreme Court asserted that US Congress intended patentable subject matter to include “anything under the sun that is made by man.”

Not only patent rights, but copyrights and trademark rights, have also been recognized as private rights and strongly protected under the modern legal system. The clear recognition of copyrights as private property rights can be found in the so-called “sweat of the brow” doctrine and its later development in the protection of databases. The case of *Jeweler’s Circular Pub. Co. v. Keystone Pub. Co.* is an excellent illustration. In this case, the Jeweler’s Circular compiled a directory of trademarks related to the jewelry business, and Keystone came up with a similar, but longer, directory afterwards. The court awarded in favor of the Jeweler’s Circular and stated that a person who by his labor produces a “meritorious composition” acquires that material as its author, and thus obtains the “exclusive right” of multiplying copies of the material no matter whether the materials show literary skill or originality. The “sweat of the brow” doctrine, however, was rejected by the US Supreme Court in *Feist Publication Inc* which denied copyright to a white pages directory. Something that should be borne in mind however is that the Supreme Court reversed the “sweat of the brow” doctrine not because of any doubt about the exclusive private rights nature of copyrights, but rather because “originality” is necessary for something to be protected under copyright law. The Canadian Supreme Court too in recent cases denied the “sweat of the brow” doctrine on the same grounds that originality is required for something to be protected under copyright law. The exclusive private rights nature of copyrights is also evident in the protection of “original” works of compilation. In *Key Publication Inc*, a post-*Feist* case, the Court of Appeals for the 2nd Circuit asserted the copyrightability of a compilation of directories when a collection of preexisting data involves

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48 *Drahos*, 208.
   
   The right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials … show literary skill or originality, either in thought or in language, or anything more than industrious collection. The man who goes through the streets of a town and puts down the names of each of the inhabitants, with their occupations and their street number, acquires material of which he is the author. He produces by his labor a meritorious composition, in which he may obtain a copyright, and thus obtain the exclusive right of multiplying copies of his work.
51 *See id.*, at 1291-2. The *Feist* case however stated clearly that a factual compilation is copyrightable as long as it “features an original selection or arrangement of facts.” *See id.*, at 1290.
a particular arrangement and selection; this apparently results in an original work.\footnote{\textbf{Key Publications, Inc. v. Chinatown Today Publishing Enterprises, Inc. et. al.}, 945 F.2d 509, 512-514 (1991). For pre-	extit{Feist} databases protection, see \textit{West Publishing Company v. Mead Data Central, Inc}, 799 F.2d 1219, 1227-1228 (8th Cir. 1986). The court asserted that, as the compiler’s arrangement and expression, West’s comprehensive pagination when linked to the compiled text is copyrightable.} Similarly, the protection of databases in the EU under the “\textit{sui generis rights}” doctrine under copyright law is also a good illustration of the private rights’ protection given to copyrights.\footnote{\textbf{Hasan A. Deveci}, \textit{Databases: Is Sui Generis a Stronger Bet than Copyright?} 12 International Journal of Law & Information Technology 178 (2004).} Indeed, this doctrine has been characterized as a “reinvention” of the “sweat of the brow” doctrine.\footnote{\textbf{Drahos}, 208.}

Trademark rights too are recognized as private rights whose significance has been given constitutional protection. In \textit{San Francisco Arts & Athletics} case, trademarks were clearly recognized as private property.\footnote{\textit{San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.}, 483 U.S. 522 (1987). \textit{See infra discussion 3.3.1 for more details.}} In this case, the Ninth Circuit Court affirmed the District Court’s order of permanent injunction and stated that “the word ‘Olympic’ and its associated symbols and slogans are essentially property.”\footnote{\textit{International Olympic Comm. v. San Francisco Arts & Athletics, Inc.}, 781 F.2d 733 (9th Cir. 1986), at 737.} This was further supported by the Supreme Court. According to the Supreme Court, the USOC through “its own efforts” has distinguished the word “Olympic” and made the word its own distinctive “goods in commerce” under US trademark law.\footnote{\textit{San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.}, at 534-35.} The Supreme Court also stated that public access or use of a word like “Olympic” must be balanced against a limited “property right” acquired by an entity for a word when the word acquires value “as the result of organization and the expenditure of labor, skill, and money” by the entity concerned.\footnote{\textit{See id.}, at 532. This might imply that the ownership of private property sets some sort of limit on freedom of speech. You are free to express your ideas, but cannot use other people’s “private property” such as the word “Olympic” to do so. \textit{See also, Keith Aoki}, \textit{Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain II}, 18 Columbia-VLA Journal of Law & the Arts 261 (1993-4).}

From the above brief introduction of how intellectual property rights have come to be strongly protected as private rights, we can clearly see that the contemporary intellectual property regime grounds itself firmly on traditional property rights theory. In \textit{CCH Canadian Ltd.} for example, the Supreme Court of Canada directly built its discussion of the “sweat of the brow” doctrine on Lockean theory of “just desserts,” and at the same time its emphasis of
originality signaled an implicit shift towards Hegel’s property theory. Not surprisingly among theoretical debates, Locke and Hegel’s works have also created the most dominant discourses of justification for intellectual property. In the next section, this dissertation will start its examination of the philosophy of intellectual property with a critical examination of Lockean and Hegelian theories of private property.

2.1.2 The Birth, the Significance, and the Limit of Property Rights

2.1.2.1 The Birth of Property Rights

Locke starts his analysis of property from a “positive community.” For Locke, “the earth and all inferior creatures” are given by God to “mankind in common.” What Locke needs then is a tool to enable individuals to distinguish something from the common into his/her own without obtaining the consent of the others. For Locke, this is “labor.” Locke states:

Whatsoever then he removes out of the state that nature has provided and left it in, he has mixed his labor with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature has placed it in, it has by this labor something annexed to it that excludes the common right of other men.

Starting from a common which belongs to all, labor makes all the difference. It is labor that differentiates something from the commons and excludes the common rights of others, therefore transforms it into private property. The Lockean story of property is a labor oriented theory.

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60 CCH Canadian Ltd. v. Law Society of Upper Canada, at para. 15.
61 HUGHES. Hughes examines the justifications of intellectual property based on an analysis of Lockean “labor theory” and Hegelian “personality theory.” See also S. BALGANESH. Copyright and Free Expression: Analyzing the Convergence of Conflicting Normative Frameworks, 4 Chicago-Kent Journal of Intellectual Property 45 (2004). Balganesh claims that “The most commonly advocated philosophical justifications for intellectual property are the Lockean labor theory and the Hegelian personality theory.” However, Drahos examines the contemporary theory of intellectual property beginning with interpretations of Locke, Hegel, and Marx’s writings on property. See DRAHOS, 1.
62 “Positive community,” according to Drahos, “is defined in terms of a common which belongs to all.” DRAHOS, 46.
63 JOHN LOCKE, The Second Treatise of Government 25, 27 (Prentice-Hall, 1997). The references are to the numbered sections of Locke’s text.
64 See id., at sect. 27.
In contrast to Locke’s labor oriented theory of property, Hegel’s is a free will oriented property theory. He starts from “negative community” instead of positive community.\textsuperscript{65} He begins analysis with an absolute, infinite free will. For Hegel, “the basis of right is, in general, mind; its precise place and point of origin is the will.”\textsuperscript{66} But the will is wholly abstract, undetermined and infinite, thus needs something external, “pure and simple…something not free, not personal, without rights” to render it objective. In this regard, Hegel’s theory of property is a story of “I own, therefore I am.”

… A person must translate his freedom into an external sphere in order to exist as Idea….this sphere distinct from the person, the sphere capable of embodying the freedom, is likewise determined as what is immediately different and separable from him.\textsuperscript{67}

I as free will am an object to myself in what I possess and thereby also for the first time am an actual will, and this is the aspect which constitutes the category of property, the true and right factor in possession.\textsuperscript{68}

Property for Hegel then is “the first embodiment of freedom.” Instead of labor, free will makes all the difference. Although for Hegel “occupancy”—possibly analogous to Locke’s “labor”—is necessary to ensure the embodiment of “free will” in a thing to make it “my property”—it is free will that is ultimately most important.\textsuperscript{69}

While Locke’s property theory is labor oriented, Hegel’s is a free will oriented property theory. However, the difference in approach does not prevent them from sharing points of view on the significance of private property. Specifically, they share with each other views on the significance and limit of private property rights.

\textsuperscript{65} According to Drahos, “negative community is defined in terms of a commons belonging to no one, parts of which may be appropriated.” DRAHOS, 46.
\textsuperscript{66} G. W. G. HEGEL, The Philosophy of Right (T. M. Knox trans., Oxford University Press. 1967), 4. The references are to the numbered paragraphs of Hegel’s text.
\textsuperscript{67} See id., at para. 41. In the addition of para. 41, Hegel argues that “The rationale of property is to be found not in the satisfaction of needs but in the supersession of the pure subjectivity of personality. In his property a person exists for the first time as reason.”
\textsuperscript{68} See id., at para. 45.
\textsuperscript{69} See id., at the addition to para.50. Hegel argues, “[T]he first person to take possession of a thing should also be its owner is an inference from what has been saSee id.. The first is the rightful owner, however, not because he is the first but because he is a free will, for it is only by another’s succeeding him that he becomes the first.”
2.1.2.2 The Significance: the Birth of the Autonomous Self

Both Lockean and Hegelian theories of property are stories of the birth of an autonomous self. Instead of “I think, therefore I am,” both Locke and Hegel imply “I own, therefore I am.” For Locke, the rights to private property are the foundation of his analysis of the governance framework and the thesis of separation of powers. Property is also the starting point and foundation of Hegel’s analysis of the Philosophy of Right. For Hegel, property is “the embodiment of personality,” and a person can only “exist as Idea” through “translat[ing] his freedom into an external sphere.”

Furthermore, for both Locke and Hegel property rights come from a separation: a break-up or dissolution of the relationship between the self and others. This separation depends on a limit or a boundary— for Locke this is labor, and for Hegel the infinite, abstract, free will— demarcating the self from others. The separation of the self from others went through different routes but reached the same ends for Locke and Hegel. For Locke, it is labor that “in the beginning” removed something from the common and made it private property. Thus labor here then, is a boundary between the self and others, between private and common. In this very beginning—the founding moment—labor, which is the self, something not common, was injected into the common. The injection of labor not only changes part of the common into private domain and extracts or detaches a part from a whole; but also separates the self from others and causes the dissolution of the relationship between the private from the public. This injection produces something that the self can defend against others—a limit of the self that excludes others, and is a basis for rights. In this regard, property rights, and rights in general, come all from a separation and dissolution of the relationship between the self and others.

Hegel’s theory of property travels along much the same theoretical route to sketch the formation of private property. Hegel also grounds his framework of private property on a private, unique, finger-print-like element: “abstract, infinite, free will.” However instead of starting with an idea of a “common,” Hegel starts with res nullius, something that belongs to no one. “Will” for Hegel serves exactly the same function as does Locke’s “labor.” The “will” is also a limit delimiting the self from others, an instrument separating something from

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71 Hegel, at paras. 51, 41.
res nullius and giving rise to a right, something independent from any other entity’s consent. The formation of property for Hegel is also a separating injection, a process that separates the self from the others.

This separation of the self from others through acquisition of private property has two intertwined theoretical implications for our examination, which travel far beyond this current study and penetrate contemporary jurisprudence. On the one hand, upon the separation of the self from others, the self gains its true autonomy and makes possible the defense of singularity, which protects the self from being subsumed and consumed by the collective, the common. This separation thus challenges and prevents the collective from becoming an authoritative totality that limits and erases the individuality and autonomy of the self. It is also this separation that makes possible the independence of individuals from the family’s paternalistic power, as well as making possible the development “from Status to Contract” of modern law. On the other hand, this separation of the self from others raises the possibility of self-alienation. As the self gains its true independence, the self becomes self-sufficient and alienated from others. When this property perspective is applied to intellectual property, creations and innovations are then viewed as highly individual intellectual endeavors, from which arises the flawed ontology of contemporary intellectual property philosophy.

As the separation has significant implications for defending the singularity against totality and facilitating the social movement “from Status to Contract,” the association of private property with the separation of the self from others justifies the inviolability of private property. Thus both Lockean and Hegelian theses indicate that private property rights that separate the self from the public are at the heart of our society. This belief is well-attested in our social institutions. Bentham argues, for example, that “[p]roperty and law are born together, and die together.” In his examination of the evolution of social institutions, F. A. Hayek emphasizes the importance of “Several Property”—which Hayek uses to mean

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72 As for singularity (the oneness) as opposed to totality, we mean the property of an individual as being independent and enjoying the right of being different.

73 For totality (the wholeness) as opposed to singularity, we mean the modification of a collective that clears out every difference or oneness of individuals through internalized totalizing power to set up an oppressive whole. For the jurisprudential significance of the defense of the singularity against the totality, see infra discussion 2.3.3.

74 Henry Maine, Ancient Law (J. M. Dent & Sons Ltd., 1917), 100.

75 See infra further discussion 5.2.2.

individual property—by insisting that “several property is the heart of the morals of any advanced civilization, …. the prior development of several property is indispensable for the development of trading, …. [and] the adoption of several property marks the beginning of civilization.”  

Not only are rights to private property essential to the evolution of social institutions, but rights to private property also serve as the foundation of individual freedoms. Hayek argues that “freedom of individual decision is made possible by delimiting distinct individual rights, such as the rights of property.” Private property is thus argued to be the precondition of the development of liberal, democratic social political institutions.

2.1.2.3 The Limit: the Needs of Others and the Needs of Deconstruction

However, one thing that should not be forgotten (but has been) is that, however important they might be, private property rights should have their own limit. Both Lockean and Hegelian theses implicitly or explicitly imply limitations on owning private property. Locke, for example, sets a clear limit on private property rights:

>The same law of nature that does by this means give us property does also bound that property, too. … (God has given us all things) [a]s much as any one can make use of to any advantage of life before it spoils, so much he may by this labor fix a property in; whatever is beyond this is more than his share and belongs to others.

This clearly indicates Locke’s limit on property rights, which sets the measure of property nature by the extent of people’s labor and the convenience of their life. So anyone can claim land, gather fruit, or hunt animals as their private property for their convenience of life. However, if people allow their private properties to perish without due use, e.g. the fruits they picked rotted before they could use them, then this is punishable. Locke calls this the “common law of nature.” Most importantly, any property beyond this limit belongs to others, which means that the limit of private property rights comes from the needs of others.

For Hegel, the modifications of property are determined in the course of the free will’s relation to the thing from “taking possession,” to “use,” then to “alienation,” upon

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77 F. A. HAYEK, The Fatal Conceit: The Errors of Socialism (Routledge. 1988), 30-1, 34. “Several property” is a word Hayek borrowed from Henry Maine to described private property.
78 CHARLES HAYEK, The Fatal Conceit: The Errors of Socialism (Routledge. 1988), 30-1, 34. “Several property” is a word Hayek borrowed from Henry Maine to described private property.
79 LOCKE, at sect. 31.
80 See id., at sect. 37.
which the free will that was put into external thing is “back from the thing into itself.”  
While acquisition is positive and use is negative, alienation is a negation of the negative, which demonstrates the final and infinite judgment and authority of the free will on property. This is true inasmuch as only an infinite judgment or authority of the free will has over the property will give the self the right to alienate it. Moreover, only through the alienation of property can the will become truly free, as the self does not depend on the property any more. Therefore, the modifications of property set a limit, though in a different sense, on private property rights. To truly own a thing as property is to alienate it. As Hegel insists, it is the “prerogative and the principle of the organic” that the property we take possession of must be destroyed or alienated in order to preserve the self. More importantly, Hegel indicates that private property also has “a bearing on the anticipated relation to others.” While taking possession separates property from others, alienation returns property to others. This Hegelian modification of property in relation to others to some extent endorses the Lockean implicit limitation of private property rights from the needs of others.

This reading of Locke’s and Hegel’s theories of private property sends us mixed messages in regard to our understanding of contemporary intellectual property philosophy. On the one hand, since private property is vital to our social institutions as means to defend self-autonomy, ownership is considered a private right and entitles intellectual property rights strong protection under our legal system. This has been the key reason why intellectual property has come to be so strongly protected in our legal system. The cases introduced in the beginning of the chapter ground themselves on private property rights theory through either a Lockean or a Hegelian route. Consider cases of copyright protection mentioned above, for example. While the “sweat of the brow” doctrine is clearly a Lockean labor-oriented thesis, the originality requirement of compilation and database protection as a sui generis right indicates the shift towards a Hegelian personality realization thesis. In the SFAA case, the trademark protection of the word “Olympic” derived from USOC’s “expenditure of labor, skill, and money” is a mixture of both the Lockean and Hegelian theses.

81 HEGEL, at para. 53.
82 See id., at the addition of para. 59. See also infra discussion 2.3.1.
83 See id., at para. 51.
On the other hand, two aspects in the application of traditional property theory to an intellectual property regime pose problems: the physical limitation of tangible property, and needs of others in limiting of private property rights. This does not mean, however, that contemporary intellectual property laws do not acknowledge limits. Many forms of intellectual property law do recognize limitations, e.g. fair use and duration in copyrights, and compulsory licensing in patent rights. However, as intellectual property can be duplicated infinitely and reach every corner of the world, contemporary philosophy provides almost no limit for private intellectual property rights. Neither is the complete alienation of intellectual property necessary, as the contemporary licensing system allows right owners to retain control while they are realizing their creations through the use of others. Therefore the implicit limitation of private property from the needs of others is not well reflected in intellectual property law. The trademark protection of USOC’s exclusive right of the word “Olympic,” for example, does not leave room for the needs of others in terms of freedom of speech. Copyright protection of the “sweat of the brow” and originality of compilation to some extent make copyright into a “private tax on basic information exchanges.”

More importantly, the possibility of self-alienation arising from the separation of the self from others in property acquisition does transfer into the domain of intellectual property when we apply traditional property theory. The autonomous, yet self-isolated character of private rights contributes to the self-alienation tendency of the legal voluntarism in the contractual legitimacy theory. More importantly, once private rights become self-sufficient, there arises a challenge to the self-realization of others through acquisition of private rights. This further reveals to us the private vs. public contention inherent to intellectual property rights. In the next section, this dissertation will discuss relevant problematic intellectual property philosophy in detail, from the formation and the alienation of intellectual property rights, to the problem of intellectual property philosophy in reality.

84 Drahos, 208.
85 See infra discussions 5.3 and 5.4.
2.2.1 Historical Construction: from Privileges to Rights

From a historical perspective, intellectual property rights used to be grants of privilege by the sovereign.86 The development of intellectual property rights as private rights has been a process of social construction, turning “creations of the mind” from granted privileges into private rights. Up until the early 17th century, patents and copyrights “were awarded by the state (or Monarch) as privileges or indulgences based on individual grants.”87 At the international level, even until the second half of the 19th century there was still a “tension between free trade and its limitation represented by intellectual property,” but later on it was marked by “the full development of the discourse justifying IPRs as an acceptable and legitimate form of monopoly,” which was embodied in TRIPS much later.88 What is central in the TRIPS agreement is “fictionalization,” which provides a powerful construction of a “metaphorical link between property in knowledge and the legal mechanisms that have been developed to protect material property rights.”89 The justifications of intellectual property are not outside of time, nor “transhistorical.”90 Rather, it is a historical construction process.

This construction is a process in the disadvantaging of others, the public. Drahos makes it clear that from a historical point of view, “[i]ntellectual property rights are a distinctive form of privilege that rely on the creation of a common disadvantage.”91 According to Drahos, trademarks in traditional common law are meant to indicate information of origin, serving “consumer and public interests,” as trademarks’ commercial existence depend on the investment of “meaning and recognition” from consumers in the market.92 However, the influence of proprietarianism has gradually made the protection of the interests of traders the dominant purpose of trademark law, and “statutory privilege now comes to serve private interests and private use.”93 The protection of copyrights and patent

86 SELL & MAY, Moments in Law, 468, 476.
87 See id., at 479.
88 See id., at 483.
89 MAY & SELL, 18.
90 See id., at 41.
91 DRAHOS, 213. His emphasis.
92 See id., at 204-5.
93 See id., at 206.
rights has gone through a similar process. The continual process of reference of trademarks, copyrights, and patent rights to the “aggregated term of rights” is a process of relocation of intellectual property rights “in the language of private property [that] has obscured their origins in public privilege.”

Therefore, the historical development process of how intellectual property has come to be protected as private rights is a gradual construction process through which independently granted privileges became legal rights, and the “creations of the mind” became intellectual property. Intellectual property rights are created, as opposed to being natural rights. In White-Smith Music Publishing Co., Justice Holmes pointed out that copyright property is different from the traditional notion of property, and is a right that “hardly can be conceived except as a product of statute, as the authorities now agree.” Justice Frankfurter endorses this reading. In Commissioner v. Wodehouse, Justice Frankfurter argues that the “illumination of the intrinsic and legal nature of property rights in a copyright” is “scant.” Therefore, the making of “creations of the mind” into private property is a historical construction, “as the authorities now agree.”

The historical construction of intellectual property as private rights is an inescapable social construction, which at its heart is an attempt of replacing subjectivity with transcendental objectivity. Recall that according to the present analysis of Lockean and Hegelian theories of property, private property was realized through objectification of the self—subjectivity—into an external object. Abstract and subjective will is injected into an

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94 See id., at 206-10.
95 See id., at 213.
97 White-Smith Music Publishing Company v. Apollo Company, 209 U.S. 1, 19 (1908). Justice Holmes argues that: The notion of property starts, I suppose, from confirmed possession of a tangible object and consists in the right to exclude others from interference with the more or less free doing with it as one wills. But in copyright property has reached a more abstract expression. The right to exclude is not directed to an object in possession or owned, but is in vacuo, so to speak. It restrains the spontaneity of men where but for it there would be nothing of any kind to hinder their doing as they saw fit. It is a prohibition of conduct remote from the persons or tangibles of the party having the right. It may be infringed a thousand miles from the owner and without his ever becoming aware of the wrong. It is a right which could not be recognized or endured for more than a limited time…
98 Commissioner of Internal Revenue v. Wodehouse, 337 U.S. 369, 419 (1948). Dissenting opinion of Mr. Justice Frankfurter (joined by Mr. Justice Murphy & Mr. Justice Jackson).
99 See infra discussion 2.2.2 about Cohen’s thesis.
objective thing through the demarcation of private property. Thus in the formation of private property, the objective object, outside of the subject—the self, the will—becomes the source of subjectivity and even hides the subjectivity of private property. The formation of private property then is a process of replacing subjectivity with objectivity, and private rights thus become objective and transcendental. Replacing “transcendental subjectivity with transcendental objectivity,” as Gary Peller argues, is a socially constructed process, and no private intent or consent—in our case, private intellectual property rights—can escape its socially constructed nature. Furthermore, the historical construction from privileges to rights, and replacing subjectivity with transcendental objectivity, is an ontological pursuit of immortal totality. Therefore, the move from privileges to rights—replacing subjectivity with transcendental objectivity—is a social construction process.

2.2.2 The Circular Construction of Intellectual Property Rights

What kind of construction, then, makes “creations of the mind” a type of private property? If we look at this issue and assume that the formation of the private property is the realization of the autonomous self and its separation from the public, we find immediately a circularity in construing “creations of the mind” as private property. Since the mind is the self, making an idea or knowledge private property is to ground the realization of the self on the self: a circular construction.

In Philosophy of Right, Hegel does talk about something we call “intellectual property” nowadays: the “product of mind.” In his discussion of property alienation, Hegel argues that something alienable must be a thing “external by nature” to “me.” Therefore, goods or “substantive characteristics” that constitute one’s “own private personality and the universal essence of” one’s “self-consciousness are inalienable and my right to them is imprescriptible.” Thus, Hegel states, it is “in perplexity” in law whether certain

101 See infra discussion 5.2.3 for further analysis.
102 HEGEL, paras. 65, 66. He goes on to give examples of things inalienable, such as intelligence, rationality, morality, ethical life, and religion. Only slavery or serfdom would alienate those personalities. Those personalities are themselves free mind rather than something owned by free mind. Once these personalities are taken away, mind is no longer free, and self is not self either. This becomes clear in Hegel’s discussion against suicide. The right to commit suicide is self-contradictory for Hegel, since “I, as this individual, am not master of my life, because life, as the comprehensive sum of my activity, is nothing external to personality, which itself is the immediate personality.” HEGEL, at addition of para. 70.
“attainments” like “mental aptitudes, erudition, artistic skill, even things ecclesiastical, inventions” are “things;” also in confusion is whether the artist, scholar, or inventor “from the legal point of view [is] in possession of his art, erudition, ability to preach a sermon, sing a mass, &c.”\textsuperscript{103} For Hegel, these sorts of attainments—we might call them “creations of the mind” nowadays—need to be expressed into an external embodiment before they can be owned as property and be alienated as things. Hegel clearly states,

\begin{quote}
Attainments, eruditions, talents, and so forth, are, of course, owned by free mind and are something internal and not external to it, but even so, by expressing them it may embody them in something external and alienate them, and in this way they are put into the category of “things.”\textsuperscript{104}
\end{quote}

Therefore, it is clear that, for Hegel, some personal traits can be separated from the self, and others cannot. What is also clear is that those personal “attainments” that can be separated from the self only become property and alienable once they are “expressed” into an external embodiment, otherwise, they are neither property nor even “things.” Misreading or confusion occurs if we take “creations of the mind” to be property before they have been “expressed” into an external embodiment. Here comes the circular construction of the contemporary conception of intellectual property: when “creations of the mind” become private property on which self realization depends, the self depends on the self instead of something external for self realization.

Some realist critiques go even further to argue that property rights in general are a circular social construction: we protect private property because it is a private right owned by the owner, but at the same time it is our protection that makes the person the owner of the private right. The circular nature of rights philosophy was discussed by F. Cohen in his essay \textit{Transcendental Nonsense}. In his examination of legal protection of trade names, Cohen argues that there is a “vicious circle” inherent in the legal reasoning around this question. He states that:

\begin{quote}
[O]ne who induces “consumer responsiveness to a particular name” through advertisements creates “a thing of value; a thing of value is property; the creator of property is entitled to protection against third parties... The vicious circle inherent in
\end{quote}

\textsuperscript{103} \textit{HEGEL}, para. 66, remarks.
\textsuperscript{104} See id., at para. 66, remarks. Emphasis mine.
this reasoning is plain. It purports to base legal protection upon economic value, when, as a matter of actual fact, the economic value of a sales device depends upon the extent to which it will be legally protected.”

Singer has a similar view that all property is produced by a public regulatory system, and the boundary between public and private is a problem of “whose interests market regulations should protect, and what distribution of power the rules in force should foster.” Therefore the value of a property depends on how much the regulatory system wants to protect, or how much “as the authorities now agree.” Cohen thus argues that “the hypostatization of ‘property rights’ conceals the circularity of legal reasoning.” Tracing this to its root, we can find a similar circular logic in positivist legal theory, which argues that we obey law because what we obey is law—orders from the sovereign—regardless of the fact that what makes something sovereign is the fact that we obey it; there is no *prima facie* notion of sovereignty itself. Laws thus become something “out there” and rights become something static, or owned by someone. What was traditionally claimed to be the tension of law between the fact that we obey the law and the legitimacy of the law we obey—Habermasian tension “between facts and norms”—is concealed. Fact is the norm and the norm is derived from fact—thus closing a perfectly circular argument.

As it is a circular construction, it explains itself; law therefore becomes a seamless system and gains its integrity upon its detachment from social relation. Thus transcendental property theory becomes self-sufficient, and systematic. By making “creations of the mind” private property, the self achieves self-realization through itself, and intellectual property is then justified by nothing but itself. In making “creations of the mind” into a type

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107 See supra 2.2.1, discussion of Justice Holmes’ opinion in White-Smith Music Publishing Co.
108 Cohen, 817.
110 There are some counter arguments against Cohen’s thesis however. See for example J. Waldron, “*Transcendental Nonsense*” and System in the Law, 100 Columbia Law Review 16 (2000). Waldron offers a critique of Cohen’s thesis. He argues that technical legal vocabulary is not just “word-jugglery,” rather something that functions to integrate legal concepts and doctrines together and sustains the systemacity of law. However, this actually is not a valid critique and as it fails to capture Cohen’s real thesis. To my understanding, Cohen will never deny that law gains its systemacity through the mediation of technical legal concepts. Rather, it is this systemacity that makes law self-sufficient and lifts law out of social relations that is the real target of Cohen’s functional approach.
of private property, we then find a force that both establishes and justifies itself: a “founding violence.”\(^{111}\)

### 2.2.3 The Injection of the “Founding Violence”

What happened, then, in the very beginning which allowed the circular construction of intellectual property rights or property rights in general? It is worth bearing in mind that the reason Locke sets up the labor oriented property theory to defend the birth of the autonomous self is to build up his social contract theory to explain governmental legitimacy.\(^{112}\) To examine the circular construction of intellectual property rights, it might be helpful if we trace the issue further, down to the original legal construction: Rousseauian social contract theory.

For Rousseau, we as free individuals are looking for a collective association under which each individual, “while uniting himself with the others, obeys no one but himself, and remains as free as before.”\(^{113}\) The solution he found is a social contract, a paradoxical imagination. For example, in his discussion of legislation, Rousseau argues that the legislator of a constitution must be someone who understands human passions “without feeling any of them;” someone who has no affinity with human nature yet knows it very well, someone who is concerned about our happiness yet whose happiness is independent of ours.\(^{114}\) Rousseau notices these contradictory problems and worries that ordinary people might not understand the language of these legislators. To solve this problem, Rousseau argues:

For a newly formed people to understand wise principles of politics and to follow the basic rules of statecraft, the effect would have to become the cause; the social spirit which must be the product of social institutions would have to preside over the

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\(^{111}\) “Founding Violence” is a Derridean concept, which means a force to establish a regime that cannot be justified by any other laws but itself. See infra 5.3.1 for a discussion of Founding Violence’s mechanism of repetition.

\(^{112}\) **LOCKE**, sect. 34 onwards. In this treatise, Locke discusses the legitimacy and limit of government, in which property is the key that separates people from the state of nature and also sets the limit of government power. But Lockean social contract is an agreement between the sovereign and the people, which is different from Hobbes or Rousseau’s thesis. See also discussions below regarding the merits and limits of the contractual legitimacy theory at 5.4.1 and 5.4.2 where the dissertation reveals how the circular and paradoxical Rousseauian social contract theory creates the legitimacy deficit problem of modern law.


\(^{114}\) See id., at 84.
setting up of those institutions; men would have to have already become before the advent of law that which they become as a result of law.  

This exactly shows the circular construction of the social contract theory. In this social contract, people are both the subject of law and object of law. Modern law thus is founded on itself, since people are both the source and the destination of law. Law is valid because of itself, and we command ourselves, in the same way that self realization depends on the self in the circular construction of intellectual property rights. Since law is founded on itself without resorting to any other justification, this is a force that founds itself without any justification, a violent force. Since it happens at the very beginning of the formation of law or formation of intellectual property rights, it is a Derridean founding violence.

Derrida’s analysis of founding violence starts with a deconstruction of the relation between the force of law and violence. He argues that law was founded in the very moment when justice and force were put together to “make sure that what is just be strong, or what is strong be just.” Derrida insists that this very moment produces a “‗mystical foundation’ of the authority of laws,” and force is indispensable to the formation of law. The force that is inscribed into law at the very founding moment, serving as the “origin of authority, the foundation or ground, the position of the law,” is a violence grounded on nothing else but itself. Since there is no law before that moment that could legitimatize or illegitimatize the founding force, it is neither legal nor illegal; the force belongs to non-law but defines the law. In this regard, the force is the limit of the legal system, the founding violence and original sin of the law. Similarly, what happens in the very beginning of the formation of intellectual property rights or property rights in general is the injection of a founding violence. The historical construction of intellectual property from privileges to rights is the exercise of this founding violence of law.

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115 See id., at 86-7.
116 J. DERRIDA, Force of Law: The Mystical Foundation of Authority, in Deconstruction and the Possibility of Justice (DAVID G CARLSON et al. eds., 1992), 11.
117 See id., at in 12-4. Derrida argues that there exists an original sin of law in this very moment of formation, a moment when law was neither legal nor illegal and exceeded “the opposition between founded and unfounded.”
118 The characteristic of the force being neither legal nor illegal, and being something non-law but that defines law, makes the force self-evident—a force that cannot be proved nor disapproved— which leads further to the self-sufficient legitimacy deficit. See infra discussions for more detail, 5.2.2 on the self-sufficiency ontological myth of intellectual property, and 5.3.3 on modern law’s self-sufficient legitimacy deficit.
2.3 ALIENATION OF INTELLECTUAL PROPERTY: THE VIOLENCE AGAINST FOUNDING VIOLENCE

If construing “creations of the mind” as intellectual property inevitably injects a founding violence into that property, is justice still possible? What does alienation mean to the founding circular construction? For example, if making the word “Olympic” a trademark also affects people’s freedom of speech, and if copyrighting a white pages directory limits people’s use of the related information, then how should a legal system resolve this conflict? Here we are at the heart of intellectual property philosophy confronted with the puzzle of justice. In this section, we will examine the theoretical implications of the alienation of intellectual property, and discuss how alienation as a force against the founding violence allows for the possibility of justice.

2.3.1 Alienation as Violence: the Second Violence

The analysis above of the injection of the founding violence during the formation of intellectual property indicates that immediately after their formation, the intellectual property rights are restless and the founding violence remains. The isolated self is craving to return to the social, and intellectual property is longing for alienation, through which rights can get back to their context. Locke does not really deal with the alienation of property, though he is aware of the limit of private rights from the needs of others.\footnote{See supra discussion 2.1.2.3.} In this regard, Lockean theory of property is an incomplete story.\footnote{HUGHES, 329. He argues that “a labor theory of intellectual property is powerful, but incomplete,” and that the Hegelian personal expression thesis is an ideal support for that incompleteness.} However, in Hegel’s depiction of a dynamic unity of property from possession, to use, to alienation, alienation is central to his theoretical framework of property.

Alienation is a vital stage in Hegel’s theory of property. Firstly, alienation is the path to true possession of property and real expression of the self, the free will. For Hegel, alienation as “an expression of my will” is “seen to be a true mode of taking possession.”\footnote{HEGEL, addition of para. 65.} Hegel argues that “to take possession of the thing directly is the first moment in property. Use is likewise a way of acquiring property. The third moment then is the unity of these two,
taking possession of the thing by alienating it.”\textsuperscript{122} In this regard, only alienation shows that we are the true owner of the property and demonstrates that we are using it. Mere possession without alienation means that we are used by the property rather than using it.

Secondly, alienation brings the property back to the social relation that was cut off in the very founding moment of the property. Remember that at the very founding moment, labor or free will delimited and separated a thing from others to create the private property for the defense of the autonomous self. For Hegel, through alienation not only does the alienator realize his/her identity, but the alienee will also achieve the reification and objectivization of his/her abstract free will via the acquisition of the alienated property. Only through alienation are property rights brought into social existence. Hegel argues,

A person by distinguishing himself from himself relates himself to another person, and it is \textit{only as owners that these two persons really exist for each other}. Their implicit identity is realized through the transference of property from one to the other in conformity with a common will and without detriment to the rights of either.\textsuperscript{123}

Hegel’s analysis of alienation brings our attention to something central to property rights: property rights exist only through alienation. The acquisition of a \textit{res nullius} or something part of a commons did not create property rights for Robinson Crusoe when he lived alone on an isolated island, because his “rights” did not exist in relations, and no alienation occurred. This indicates that, on the one hand, realization of the property rights of an owner—the alienator—needs the engagement of alienees; on the other hand, objectivization of the free will of an alienee depends on the full alienation of the property. A complete story of property is a story of the relationship between owners and buyers. Traditional rights philosophy, by focusing right owners and suggesting self-sufficiency of property rights, covers up and suppresses the second half of the story.

When it comes to alienation of intellectual property, what he calls the “product of mind,” Hegel is very cautious and even suspicious of it. In general, Hegel advocates the dissemination of science and knowledge rather than protection of private ownership. He

\begin{flushleft}
\textsuperscript{122} See id., at addition of \textit{para.} 65. Hegel explains that “Taking possession is \textit{positive} acquisition. Use is the \textit{negation} of a thing’s particular characteristics. Alienation is the synthesis of positive and negative; it is negative in that it involves spurning the thing altogether; it is positive because it is only a thing completely mine which I can so spurn.”
\end{flushleft}

\begin{flushleft}
\textsuperscript{123} See id., at \textit{para.} 40. Emphasis mine.
\end{flushleft}
argues that the “purpose of a product of mind” is for people other than the author to learn; to understand it and make it a possession of their own knowledge.124 To “guarantee scientists and artists against theft and to enable them to benefit from the protection of their property” is the “primary” but “purely negative” “means of advancing the science and arts.”125 Starting from here, Hegel reaches a very important conclusion about alienation of intellectual property and its copies:

What is peculiarly mine in a product of my mind may, owing to the method whereby it is expressed, turn at once into something external like a “thing” which eo ipso may then be produced by other people. The result is that by taking possession of a thing of this kind, its new owner may make his own the thoughts communicated in it or the mechanical invention which in contains, and it is ability to do this which sometime (i.e. in the case of books) constitutes the value of these things and the only purpose of possessing them. But besides this, the new owner at the same time comes into possession of the universal methods of so expressing himself and producing numerous other things of the same sort.126

What we buy from the author or publisher is the embodiment of an expressed “creations of the mind”—a capital asset, rather than the way of expression, the “creations of the mind,” which for Hegel remains personal and is never alienable.127 However, by selling a copy of a product of mind, the author may still retain the authorship, using the product of mind as a method of personal expression, but it is no more than just a right to signature; to claim the fame of being the inventor. The author is a carrier of privileges rather than owner of rights. The new owner of the copy, however, “has complete and free ownership of that copy qua a single thing.”128 An alienated copy of a product of mind is “not merely a possession but a capital asset” which comes with the “power to produce facsimiles.” This is against the licensing mechanism of contemporary intellectual property regime, and obviously

124 See id., at para. 69, remarks. Hegel states, The purpose of a product of mind is that people other than its author should understand it and make it the possession of their ideas, memory, thinking, etc. Their mode of expression, whereby in turn they make what they have learnt into a “thing” which they can alienate, very likely has some special form of its own in every case. The result is that they may regard as their own property the capital asset accruing from their learning and may claim for themselves the right to reproduce their learning in books of their own.

125 See id., at para. 69, remarks.

126 See id., at para. 68.

127 Recall that Hegel argues that some personal traits can be separated from the self only when they are expressed into an external embodiment, and the other personal traits can never be separated from the self. See supra discussion 2.1.2.2.

128 Hegel, para. 69.
proposes a principle of exhaustion of rights—rights are exhausted when alienation occurs. In this regard, Hegel does not really respect copyrights or intellectual property in general in a modern sense.  

Alienation thus for Hegel is the negation of the free will’s attachment to the externality (the property), and is the return of the free will to itself. The free will injected into the external object in the very founding moment of property then is separate from its original embodiment. Labor, for Locke, or free will for Hegel, that functioned as the limit or boundary demarcating the self from the others, was dissolved and the limit of the property rights was transgressed. Through alienation the invasion of the self of the first owner into the others then formed the property is thus nullified. This is the new violence—the violence against the founding violence.

2.3.2 Alienation as Justice: the Violence against Founding Violence

Here seemingly rises a contradiction between arguing that property is an expression of free will and at the same time proposing property’s complete alienation, a nullification of free will. Hughes argues that Hegel’s theory of property “suffers from internal inconsistency in its somewhat incoherent account of alienation,” a “paradox of personality and alienation” in intellectual property in particular. Hughes thus proposes a limited alienation—actually incomplete alienation—of intellectual property copies, in which the creator retains control of alienated products against any unintended or unauthorized change. However, Hughes’ argument is flawed, building on a misreading of Hegel.

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129 Hegel’s “disrespect” for copyrights can also be found in his discussion of the legitimacy of new intellectual work building on someone else’s work. He states:

To what extent is such repetition of another’s material in one’s book a plagiarism? There is no precise principle of determination available to answer these questions, and therefore they cannot be finally settled either in principle or by positive legislation. Hence plagiarism would have to be a matter of honour and be held in check by honour. He further argues that copyright law only works in a very restricted sense. He insists that “copyright legislation attains its end of securing the property rights of author and publisher only to a very restricted extent, though it does attain it within limits.” See id., at para. 69, remarks.

130 HUGHES, 339. Hughes argues that there is a “paradox of alienation” under Hegel’s theory of property. Furthermore, since the selling of an idea might just be “alienation of personality,” Hughes argues that Hegel considers the complete alienation of intellectual property to be morally wrong - comparable to slavery or suicide. See HUGHES, 347.

131 HUGHES, 350. He argues that “[t]he personality theory provides a better, more direct justification for the alienation of intellectual property, especially copies;” and proposes two conditions for intellectual property
Alienation in Hegel’s theory of property serves as the realization of the identities of the alienator and alienee.\textsuperscript{132} From the first owner’s point of view, alienation must be complete in order for the free will to return back to itself (its original embodiment); from the point of view of the alienee, alienation must also be complete in order for him/her to actualize his/her free will. In the case of incomplete alienation, the alienee then will be always subject to the restriction of alienator. The abstract self of the alienee’s realization through property ownership will never be possible. The product I bought—the book—is never my own because within it there remains the otherness—the author’s ownership. As Hughes indicates, “[b]y using a restriction, [e.g. covenant, servitude, or easement,] a person retains the specific stick(s) in the bundle of property rights which will ‘contain’ his continuing personality stake.”\textsuperscript{133} Restraint on alienation of this kind, in order to maintain control of alienated products, is usually unacceptable. In \textit{Dr. Miles Medical Co. v. John D. Park & Sons Co.}, the US Supreme Court dismissed the action of Miles Medical, a manufacturer of proprietary medicines who adopted restrictive agreements to control the entire trade of its product throughout its wholesale dealers and retail dealers.\textsuperscript{134} The Supreme Court stated:

Thus a general restraint upon alienation is ordinarily invalid. The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand.\textsuperscript{135}

Hegel’s discussion of intellectual property alienation indicates that incomplete alienation, in which the creator retains control of an alienated product, is undesirable.\textsuperscript{136} In his analysis of the use of property, Hegel argues that when we are using property,

\begin{itemize}
  \item alienation: “first, the creator of the work must receive public identification, and, second, the work must receive protection against any changes unintended or unapproved by the creator.”
  \item See \textit{supra} analysis 2.3.1.
  \item \textsc{Hughes}, 346.
  \item \textit{Dr. Miles Medical Co. v. John D. Park & Sons Co.}, 220 U.S. 373 (1911).
  \item See \textit{id.}, at 404.
  \item See \textit{supra} discussion 2.3.1, where we reveal that Hegel’s discussion of alienation of the “product of mind” suggests an exhaustion of rights doctrine which is clearly against the contemporary licensing mechanism.
\end{itemize}
... I and the thing meet, an identity is established and therefore one or other must lose its qualitative character. But I am alive, a being who wills and is truly affirmative; the thing on the other hand is something physical. Therefore the thing must be destroyed while I preserve myself. This, in general terms, is the prerogative and the principle of the organic.  

In order to “destroy” the property to preserve the “I,” we have the choice either to consume it or alienate it. For Hegel, only true possession gives the right of alienation, and to achieve the true possession, complete alienation is necessary. Otherwise, the realization of this “true possession” will never be completed, and the alienee’s possession of the property will be incomplete as well. If the alienation is incomplete, not only is it impossible for the first owner to realize his/her identity, but it is also impossible for the alienee to achieve objectivization of his/her abstract free will through acquisition of property. Incomplete alienation simply means that a new will is injected into the same object and thus brings in the otherness, the boundary demarcating the private property dissolve, and neither the alienator nor the alienee is really free and autonomous.

Hughes’ misreading occurs in forgetting to take into consideration that dialectics is the soul of Hegel’s philosophy. Contrary to Hughes’ “internal inconsistency” assessment, alienation as the violence against the founding violence forms a circle and completes Hegel’s theory of property, a dynamic unity of property from possession, to use, to alienation.  

Most importantly, this unity is a dynamic, never-ending circle driven by the negating force of constant alienation. In a dialectical point of view, “I” as the self today is neither the self yesterday nor the self tomorrow either. In this regard, the self today is the negation of the self yesterday but will be negated by the self tomorrow. For the self to continue, the negating force should not be stopped. Similarly, alienation as the negating force serves the same purpose for property. Once alienation stops, property does not exist. To return to Hegel’s conception of the self, the self will be restless because it has no means to express itself. Therefore, the self truly exists only in a constant alienation chain of property. Alienation not only realizes the first owner’s ownership, bringing externalized free will back to the self through nullifying the possession, but also relates the self to another person—the others, the social—where the self gets back to social relation like a fish back to its river. Once alienation

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137 **HEGEL**, addition to para. 59.
138 Hegel says, “[p]hilosophy forms a circle…it circles back to itself.” See id., at addition to para. 2.
is incomplete or the constant circle of alienation stops, the self is either restless or dissolved. Therefore, alienation needs to be complete and is only perceivable in a constant and dynamic process. This brings us to Derridean constant deconstruction.

### 2.3.3 Constant Deconstruction as Justice

Not only does Hegelian dialectics of property find that complete alienation is necessary, but from the point of view of the function of legal force in property rights, only complete alienation is just. As Hegel argues, “just as force exists only in manifesting itself.” Complete alienation, as a manifestation of the offsetting force counter to the force injected into the property at its founding moment, is a new violence against the founding violence which makes justice. Through its injection to form the property, the free will is actualized into others which are temporarily away from the self, and the unity of “I” is uncertain at this stage of possession of the property. This uncertainty comes from the founding violence remaining in the property, which is the fundamental characteristic of the founding legal force. Alienation as a deconstruction force against the force of the founding violence nullifies the relation between the owner and the property. Free will thus returns into the self, the uncertainty dissolves, and the unity of the self is back on track again. In this regard, alienation as the deconstruction force against the founding force is just. Hegel meets with Derrida at this point, both suggesting that complete alienation as constant deconstruction is just.

As we reviewed above, property rights in general and intellectual property rights in particular are socially constructed relations. Since property rights are constructed, they are deconstructible. As Derrida argues, “law (droit)—in our case the property rights—is essentially deconstructible” because “it is founded, constructed on interpretable and transformable textual strata … or because its ultimate foundation is by definition unfounded.” Derrida argues that “[d]econstruction is justice.”

If we take the above as it stands, law in general or intellectual property rights in particular are deconstructible, and deconstruction is justice. This has a very important

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139 See id., at addition to para. 61.
140 DERRIDA, 15.
141 See id., at 14.
142 See id., at 15.
implication. Laws or property rights themselves are not justice. Justice is only a possible trait of the laws such as the squareness of a table.\textsuperscript{143} We can perceive the squareness of the table similarly to how we can perceive the justice of laws, but neither does squareness ever become the table itself nor does justice ever become laws. We thus need to perceive the justice of property rights in a process of alienation, the deconstruction of the founding violence of property. Derrida argues that,

\[ \text{[D]econstruction takes place in the interval that separates the undeconstructibility of justice from the deconstructibility of droit (authority, legitimacy, and so on). It is possible as an experience of the impossible, there where, even if it does exist (or does not yet exist, or never does exist), there is justice.}\textsuperscript{144} \]

Just as deconstruction is justice, alienation as the deconstruction of property rights—the violence against the founding violence inscribed into the property in the very beginning of its formation—is justice. If we look at the function of founding violence, this will become clearer.

The function of the founding violence is to constantly repeat itself throughout the legal system.\textsuperscript{145} As Derrida argues, the founding violence—the force inscribed into law in the founding moment—is “revolutionary,” “the violence in progress.” The “revolutionary instant” is ungraspable and “belongs to no historical, temporal continuum.”\textsuperscript{146} It is obvious then that the force inscribed into law in the founding moment is a dynamic power, arising over and over again.\textsuperscript{147} Margaret Davies puts it more clearly, saying that founding violence as the limit of law is dynamic and maintained though repetition, the constant reification of

\begin{itemize}
\item \textsuperscript{143} This is inspired by Yu-Lan Fung who uses the metaphor of the perceptible table and imperceptible squareness to explain that philosophy as knowledge transcends our experience and \textit{Li} is something that “can only be thought but not sensed.” \textit{See} YU-LAN FENG, A Short History of Chinese Philosophy (Derk Bodde ed., Macmillan Co. 1948), 337.
\item \textsuperscript{144} DERRIDA, at 15.
\item \textsuperscript{145} The repetition of the founding violence indeed also creates modern law’s obsession with origin. \textit{See} also discussion 5.3.1 below on modern law’s constant return to origin.
\item \textsuperscript{146} DERRIDA, at 35, 41.
\item \textsuperscript{147} \textit{See id.}, at 36. He points out, for the founding moment, “[I]t is, in droit, what suspends droit. It interrupts the established droit to found another. This moment of suspense, this \textit{ēpokhē}, this founding or revolutionary moment of law is, in law, an instant of non-law. But it is also the whole history of law. \textit{This moment always takes place and never takes place in a presence.}” His emphasis. \textit{See} also PETER FITZPATRICK, Modernism and the Grounds of Law (Cambridge University Press. 2001), 81. Fitzpatrick endorses this reading that the founding violence pertaining to law is “an incessant violence.”
\end{itemize}
the force.\textsuperscript{148} This has a very important implication for our analysis. If the founding violence functions through the repetition of the force, this means that the founding construction of the legal system, of property rights, and even of intellectual property rights is a constant repetition.\textsuperscript{149} The constant repetition of the founding construction of intellectual property is indeed the manifesto of the author function that is rooted in the self-sufficient ontology. Furthermore, this constant construction requires constant deconstruction. Deconstruction of property rights in general means alienation, the violence against the founding violence.\textsuperscript{150} When alienation occurs, the founding construction of the alienator is deconstructed and at the same time the founding violence of the alienee occurs, the repetition of the founding violence. Therefore, for property rights justice is only available through constant alienation.

Since the founding violence functions through constant repetition, in order to be just, the deconstruction of the founding violence—alienation—must be complete. Incomplete alienation interrupts the constant repetition of the deconstruction and thus will render justice impossible. Complete alienation of intellectual property, as the negation of the authenticity of the author, is thus the defense of the singularity against the totality, the return of the oppressed and otherness, the justice.\textsuperscript{151} As we revealed above, the acquisition of private property upon the separation of the self from others is the birth of true autonomy, the triumph of singularity.\textsuperscript{152} However, the self’s power over property through incomplete alienation stretches far and consumes others, and turns into a totalizing power. Once the self is taken over by the totalizing power of property, both the singularities of the self and of others are defeated.

\textsuperscript{148} Davies regards the moment of a “decision” as the founding moment of a legal system. She argues that the founding decision of the legal system which “establishes its limits and coerces conformity” is homogeneous with the juridical decision, where the founding decision is repeated continually “in order for the limits of law to be maintained.” She thus proposes to perceive law as repeatability, as a “process which can never be reduced to a static system of norms.” Thus she reaches her thesis of the function of the founding violence through constant repetitions. MARGARET DAVIES, Delimiting the Law: Postmodernism and the Politics of Law (Pluto Press, 1996), 100, 107.

\textsuperscript{149} The constant repetition of the founding construction of intellectual property is indeed the manifesto of the “author function” of the intellectual property regime which is rooted in the self-sufficient ontology. See infra discussions 5.2.2 and 5.2.3 for more details.

\textsuperscript{150} Deconstruction of property rights in contemporary intellectual property regime would mean the practice of compulsory licensing and the principle of exhaustion of rights. See infra discussion in 2.4 on exhaustion of rights and compulsory licensing issues under TRIPS.

\textsuperscript{151} For the definitions of singularity and totality in the context of this paper, see supra discussion 2.1.2.2.

\textsuperscript{152} See supra discussion 2.1.2.2).
Building on a critical reexamination of Locke and Hegel’s property theories, the dissertation so far has revealed to us the dynamics of legal force in intellectual property, from founding violence to violence against the founding violence. The circular construction of “creations of the mind” into self-sufficient private rights as the founding violence defends our autonomy at the cost of self alienation, which renders self realization impossible. However, alienation as a force realizing the ownership while at the same time nullifying its authenticity provides a possibility of achieving justice within the intellectual property regime. Complete alienation brings the private-public dynamics into justice, which can be justified from the Hegelian perspective as well as from the Derridean deconstructionist perspective.

However, the contemporary intellectual property regime covers up the self-others confrontation of the founding construction which makes intellectual property rights self-sufficient. The self thus remains restless because of self-alienation; and as for the others, the public is unsettled as well when the intellectual property regime is indifferent to public concerns. The force inscribed into intellectual property at the very founding moment gains injustice as the will of its own, and corrupts the right owners through making them indifferent to public interests. The autonomous self as the foundation of property rights has been lost in the history of intellectual property, becoming merely legend and myth. The examples discussed below, both domestic and international, will disclose the myth.

*Monsanto Canada Inc. v. Schmeiser* was a patent rights infringement case heard in the Supreme Court of Canada in 2004.\(^{153}\) Monsanto Canada developed and patented a glyphosate-tolerant gene and cell in 1993. Canola containing these kinds of genes and cells is resistant to Roundup herbicide. Monsanto’s Roundup, a glyphosate herbicide, can kill all other plants, which makes controlling weeds a lot easier. The Schmeiser family had farmed and grown Canola in Saskatchewan for years and usually saved and developed its own seeds. Most of the farmers around Schmeiser’s fields obtained licenses from Monsanto to plant Roundup resistant Canola in 1990s, but Schmeiser did not switch to Monsanto seeds. In 1997, Schmeiser found that Canola plants in several of his fields were Roundup resistant; he then saved the seeds and planted them in all of his Canola fields. It was discovered in 1998 that 95

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to 98 percent of his Canola were Roundup resistant. Monsanto brought an action for patent infringement against Schmeiser which was allowed by the Trial Court and Court of Appeal and the case was then brought by Schmeiser to the Supreme Court. The Supreme Court of Canada ruled against Schmeiser, saying that planting seeds containing patented genes and cells deprived Monsanto of “the full enjoyment of its monopoly” and thus constituted patent infringement.

What Monsanto claimed for protection were the modified genes and the cells that make up the glyphosate-resistant Canola. The realization of this patented right depends on licensed farmers’ Canola. In this case, no one knows how the Roundup resistant Canola came into Schmeiser’s field. When Schmeiser claimed that this was unsolicited “blow-by” and grounded their appeals on “the ancient common law property rights of farmers to keep that which comes onto their land,” it was disallowed. The Supreme Court simply says that “the issue is not property rights, but patent protection. Ownership is no defence to a breach of the Patent Act.”154 The Supreme Court states that:

Monsanto’s patent gives it a monopoly over the patented gene and cell. The patent’s object is production of a plant which is resistant to Roundup herbicide. Monsanto’s monopoly enabled it to charge a licensing fee of $15 per acre to farmers wishing to grow canola plants with the patented genes and cells. The appellants cultivated 1030 acres of plants with these patented properties without paying Monsanto for the right to do so. By cultivating a plant containing the patented gene and composed of the patented cells without licence, the appellants thus deprived Monsanto of the full enjoyment of its monopoly.155

This is obviously rights-centred and one-sided talk which upholds the self-sufficiency of intellectual property rights. The story focuses solely on the rights owner. However, without Schmeiser’s Canola, Monsanto’s “creations of the mind,” the patented genes and cells can not be realized. Monsanto’s patented genes and cells got into Schmeiser’s Canola without invitation. This is clearly an invasion of property, intended or not. From Schmeiser’s point of view, the self, the unity of his property was dissolved with the presence of the otherness—Monsanto’s patented genes and cells. In this case, the presence of Monsanto’s patented genes and cells within Schmeiser’s Canola, invited or not, is lawful from the

154 See id., at para. 96.
155 See id., at para. 72.
Supreme Court’s perspective. With the lawful presence of the otherness within, is the self still self? If the cells are not mine, am I still myself and am I still autonomous?

This case reveals that an ironic situation will occur if we take rights as something self-sufficient and recognize incomplete alienation. As a matter of fact, the “creations of the mind” and “the full enjoyment of its monopoly” need to be realized through others, and incomplete alienation renders the incompleteness of the others. The autonomy of the licensee is dissolved. This reminds us that, if we take rights to be static and without context or relation, then that very autonomous self—that we establish as the foundation of our social institution and that we try to protect by delimiting property—might be at risk.

Under the international framework, exhaustion of rights and compulsory licensing issues reflect the paradoxical dynamics between private and public in intellectual property. In international trade, the principle of exhaustion of rights is related to our discussion of the fundamental paradox in intellectual property alienation. This principle holds that once an owner’s goods enter the market, the owner’s right to protection is exhausted, and the owner is no longer able to control the further use of or even resale of the product.\textsuperscript{156} This doctrine allows parallel importation. When a product is sold both in areas A and B at a different price but B’s price is higher, the principle of exhaustion of rights allows whoever retains the product in area A to sell it in area B. The exhaustion of rights would make the intellectual property rights owner unable to control the destination of the products. To the extent that the exhaustion of rights ensures the true separation of the rights owner’s control over the products and gives the retainer full control of it, the exhaustion of rights avoids the fundamental paradox of intellectual property’s incomplete alienation.

However, international practice of exhaustion of rights doctrine is quite diverse. International exhaustion of intellectual property rights, while it is recognized by US Supreme Court for copyrights and applies to patented goods under Japanese law, applies to copyrights and trademark rights but not patent rights under Swiss law.\textsuperscript{157} Regarding the exhaustion of intellectual property rights, the WTO stands in an ambiguous position. The TRIPS states,

\begin{footnotesize}
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For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.\textsuperscript{158}

This provision means that the WTO is open to different practices, which implies recognition of the exhaustion of rights principle and possibility of accepting parallel importation based on principles of National Treatment and Most-Favoured-Nation (MFN) Treatment.\textsuperscript{159} However, parallel importation is always a controversial issue in international trade.

In 1997, since public health was under a fierce challenge from HIV/AIDS, South Africa promulgated the Medicines and Related Substances Control Amendment Act. This Act provides that “the Minister may prescribe conditions for the supply of more affordable medicines in certain circumstances so as to protect the health of the public,” in particular the conditions by which any medicine sold by the patent holder or with the holder’s consent may be imported by a third party into South Africa.\textsuperscript{160} The US government and big international pharmaceutical companies tried to force the South Africa government to change the legislation. In late 1999, under fierce criticism from international civil society and NGOs, the US Clinton Administration removed South Africa from its “Special 301” list and issued an Executive Order offering a flexible policy about HIV/AIDS and TRIPS for South African countries.\textsuperscript{161}

As we discussed above, the first paradox of intellectual property philosophy— the circular construction of intellectual property— upholds a self-sufficient point of view of intellectual property rights. Intellectual property rights then are legal rights statically retained by the right owners. The compulsory licensing practice then might revoke a legal issue of infringement of private property rights, and has thus become another hot issue in

\textsuperscript{158} TRIPS, art. 6. See also TRIPS, art. 51.

\textsuperscript{159} TRIPS, footnote 13, under art. 51. In requiring member states to adopt procedures to protect a right holder against counterfeit importation, it provides that “[i]t is understood that there shall be no obligation to apply such procedures to imports of goods put on the market in another country by or with the consent of the right holder, or to goods in transit.”

\textsuperscript{160} C. M. Correa, Pro-competitive Measures under TRIPS to Promote Technology Diffusion in Developing Countries, in Global Intellectual Property Rights: Knowledge, Access and Development (P. Drahos & R. Mayne eds., 2002), 45.

\textsuperscript{161} See id.
international trade. One WTO case between the U.S. and Brazil, the Brazil – Measures Affecting Patent Protection case which involves confrontation between private rights and public health concerns, is related to the compulsory licensing issue.

Interestingly, also concerned with controlling the HIV/AIDS situation, Brazil’s 1996 Industrial Property Law contained a “local working” requirement provision targeting foreign pharmaceutical companies, which stated that “a patent shall be subject to compulsory licensing if the subject matter of the patent is not ‘worked’ in the territory of Brazil.”

Driven by the big drug companies, the US government brought the case to the WTO panel in June 2000, challenging Brazil’s patent law. Mainly under the pressure from international society, in July 2001, the US government withdrew the case from the WTO based on Brazil’s commitment “to hold prior talks” with the US with “sufficient advance notice to permit constructive discussions” when Brazil deems it is necessary to grant a compulsory license on US companies’ patents.

The indifference of the intellectual property regime to the public concerns about the health situations in developing and least-developed countries has triggered fierce attacks on the protection of intellectual property rights. This has finally facilitated the birth of an international declaration concerning the relation between TRIPS and public health. In November 2001, the Fourth Session of the WTO Ministerial Conference held in Doha adopted the Declaration on the TRIPS Agreement and Public Health (hereafter Doha Declaration). The Doha Declaration states that the TRIPS agreement should be implemented in a manner supportive “to promote access to medicines for all.” The Doha Declaration in particular addresses the compulsory licensing issue and the exhaustion of intellectual property rights issue. The declaration insists that each member “has the right to grant compulsory licences” and is “free to establish” its own legal framework for the exhaustion of intellectual property rights as long as it does not violate MFN and national treatment requirements. The declaration is only a moral statement and raises no legally binding obligation over any governments, but it to some extent echoes our critique of the

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162 Compulsory License, called also Statutory License, refers to a license to use patented or copyrighted content under reasonable and non-discriminatory conditions defined by law. For example, a radio station with this kind of license may play copyrighted music without permission from its right’s owner but must pay the owner reasonable usage fees in accordance with law.
164 See id.
165 WT/MIN(01)/DEC/2, Declaration on the TRIPS Agreement and Public Health, Doha, Qatar (2001).
contemporary intellectual property regime as a self-sufficient and one-sided framework. The declaration is a rethinking of international practice, which endorses our critique of the poverty of contemporary intellectual property philosophy.

The diverse international practice concerning the exhaustion of intellectual property rights under TRIPS clearly illustrates the paradoxical dynamics between private and public in intellectual property philosophy. The South Africa Case and the Brazil Case we mentioned above demonstrate that rents-seeking private interest groups can disguise themselves as victims of property right violations and thus construct the confrontation between the private and the public into rights talk. These two cases also show that intellectual property rights protection is a function of authorship constituting “the privileged moment of individualization” of ideas, knowledge, and the sciences. This “individualization of knowledge creation” constructs scarcity of knowledge at the cost of the public interest. Rights narratives cover up this ideological construction. In our two final case studies, the eventual seeming victory of the public came from the mercy of the “right owners” instead of being a legal victory. The core of the confrontation is the paradoxical dynamics between the private and public, the tension between the individualization of and public control of the knowledge. Through licensing— the incomplete alienation of the intellectual property— the private (the right owners) maintains his/her presence in others, and thus takes over the public. The moral dilemma of those cases between private rights protection and public health concerns is rooted in this fundamental paradox.

In the next two chapters, the dissertation examines how this private-public dynamics reveals itself in China’s intellectual property regime and how this dynamics influences China’s adaptation to TRIPS. Building on that examination, the dissertation further discusses the private-public dynamics’ theoretical implications for our reconstruction of the legitimacy theory of contemporary jurisprudence.

167 SELL & MAY, Moments in Law, 473. They argue that common elements which are shared among different intellectual properties are “the construction of scarcity, temporal limitations, and the individualization of knowledge creation.” See also SOL PICCIOOTTO, Defending the Public Interest in TRIPS and the WTO, in Global Intellectual Property Rights: Knowledge, Access and Development (P. Drahos & R. Mayne eds., 2002), 224. Picciotto regards intellectual property rights as “artificially created scarcity.”
This chapter examines how the private-public dynamics of intellectual property reveals itself in the development of protection of intellectual endeavors in China from ancient to modern times. A brief historical account at the beginning of the chapter reveals that imperial China’s protection of intellectual creations was social-administration oriented instead of private rights oriented, as it heavily relied on administrative and criminal procedure rather than civil procedure. Imperial China’s public-oriented perspective has been carried on to modern China as will be shown in the dissertation’s further discussion of the evolving recognition of individual intellectual endeavors and the comparative study of Olympic Logo protection. The study of the evolution of the contemporary intellectual property regime from the early period of modern China to the post-reform era indicates China’s public oriented perspective on the recognition of individual intellectual endeavors. The dissertation further examines the private-public dynamics in a comparative framework through comparison of Olympic marks protection in the US, Canada, and China. The comparative examination reveals the distinctive public-oriented cultural imperative of China towards intellectual property protection. The dissertation’s following examination of the Ex Officio action under China’s intellectual property regime further sketches China’s public oriented perspective as shown in her enforcement infrastructure. The dissertation’s examination in this chapter indicates that, although the private-public dynamics might seem to be universal, China’s intellectual property protection reveals a distinctive and perpetual public-oriented perspective. Building on these findings, this chapter addresses the “How” of China’s adaptation to foreign norms of intellectual property.

3.1 INTELLECTUAL CREATIONS IN ANCIENT CHINA: A BRIEF HISTORICAL ACCOUNT

3.1.1 Intellectual Property Law in China: from Ancient to Modern

As one of the oldest continuous civilizations in the world, China’s technology and economic development led the world for several centuries. Some of the inventions first developed in China, such as printing techniques and use of paper, made significant contributions to the social development of the rest of the world. Over time, imperial China
developed certain mechanisms to recognize and protect intellectual creations which to some extent resemble our contemporary intellectual property regime.

In the areas of Trademarks and Patents, imperial China developed certain mechanisms of basic protection that are similar to our modern intellectual property regime. For example, the first well-documented trademark is found in use about 800 years ago in the Song Dynasty, a mark of a white rabbit used by a needle manufacturer in Jinan, Shandong Province.\textsuperscript{168} The first case dealing with unfair use of trademark was documented in 1736 mid-Qing Dynasty, a criminal case in which a cloth manufacturer was punished for selling his goods under another’s trademark.\textsuperscript{169} Certain business associations established rules of horizontal competition restraints for protection of trademarks in Shanghai as early as 1825.\textsuperscript{170} In the field of patent production, royal monopolies over production and trade in iron and salt that resemble the monarch granted privileges in some medieval European countries can be found in China in the Western Han Dynasty of about 2,300 years ago.\textsuperscript{171} However, the patent system in its modern form is believed to have been set up in China by Hong Rengan in 1859 during the Taiping Heavenly Kingdom movement.\textsuperscript{172} In 1881, a capitalist entrepreneur Zheng applied for a patent for his textile machine technology and was granted a ten year patent right by the Qing Emperor in 1882.\textsuperscript{173}

Probably due to the early development and use of printing techniques and paper, the mechanism that developed in imperial China to deal with copyrights is closer to the modern intellectual property system than a patent or trademark system. Although Gutenberg, a German living in the 15th century, is commonly credited as the inventor of type printing techniques in the West, Bi Sheng in Song Dynasty China developed type printing as early as in the 11th century. Moreover, long before Bi Sheng’s invention of type printing, books were printed in China through block printing –the technique of printing with carved wood blocks – since the Sui Dynasty (about 1,400 years ago), and ownership of books was protected against

\textsuperscript{168} CHENGSI ZHENG, Chinese Intellectual Property and Technology Transfer Law (Sweet & Maxwell. 1987), 21.
\textsuperscript{169} See id., The local government also carved the notice of prohibiting unfair use in stone to inform the public. See CHENGSI ZHENG, Zhishi Chanquan Lun (On Intellectual Property) (Law Press. 1998), 12.
\textsuperscript{170} ZHENG, Chinese Intellectual Property and Technology Transfer Law, 21. See also ZHENG, Zhishi Chanquan Lun (On Intellectual Property), 14.
\textsuperscript{171} ZHENG, Chinese Intellectual Property and Technology Transfer Law, 51.
\textsuperscript{172} See id. The Taiping Heavenly Kingdom movement is also known as the Taiping Rebellion.
\textsuperscript{173} ZHENG, Zhishi Chanquan Lun (On Intellectual Property), 9-10.
theft through criminal law.\textsuperscript{174} However, the earliest documentation of the protection of a book producers’ right against unauthorized reproduction that is close to the copyright in a modern sense can only be found in the Song Dynasty. In 1068, the central government issued an order to prevent unauthorized reprints of the Nine Classics, and stated that any reprint of the Nine Classics would need permission from the \textit{Guozijian} – the Imperial Academy in the Chinese dynasties after the Sui (581-618 AD).\textsuperscript{175} Most of the prohibitions of reprint found in Song Dynasty documentations were to protect the original producers of the books. One historical record also shows that the \textit{Guozijian} of the Song Dynasty indicated that the protection covered both the producer as well as the author for his intellectual endeavors, which resembles the protection coverage of the famous “Statute of Anne” of 1710.\textsuperscript{176} In another book from Song Dynasty, the author attached a government notice indicating prohibition of unauthorized reprint and author’s right to prosecute the offender, destroy the printing tools, and stop the infringement in case unauthorized reprints were found.\textsuperscript{177} However, the first law in imperial China for the purpose of the controlling of publishers was not promulgated until early Qing Dynasty in 1779.\textsuperscript{178}

The above mentioned mechanisms that developed in imperial China to protect trademarks, patents, and copyrights to some extent resemble our contemporary intellectual property protection system. However, as the Qing Dynasty (ended in 1911) – the last empire of China – was defeated by foreign powers during the Opium War in the 1840s, these mechanisms, along with all other legal systems, did not continue into modern China. Prior to the establishment of the People’s Republic of China (PRC) in 1949, there were three Trademark Laws promulgated in China: one by the Qing Dynasty in 1904, the second by the Northern Warlords Government in 1923, and the third one by the Kuomingtang Government

\textsuperscript{174} ZHENG, Chinese Intellectual Property and Technology Transfer Law, 86-7.
\textsuperscript{176} See id., at 18-19, 23.
\textsuperscript{177} See id., at 23-24. The book, “Fanyu Lanshen,” is a local geographical record of the Zhejiang area published in 1239. See also TAN YE, \textit{The Press Business and Copyright Protection in the Song Dynasty}, China Study (Japan) (May 1995). This essay in Chinese is provided by the author online at a website dedicated to research on the Song Dynasty: <http://www.songdai.com> (visited 28 July 2008).
\textsuperscript{178} ZHENG, Chinese Intellectual Property and Technology Transfer Law, 87.
of the Republic of China (ROC) in 1930. The situation was similar in the fields of patent and copyright laws. A short-lived Patent Law was promulgated in the Qing Dynasty in 1898, which was followed by a second one from the Northern Warlords Government in 1912, and then the Kuomingtong ROC one in 1944. Similarly, China’s first Copyright Law in modern sense was promulgated by the Qing Empire in 1910, followed by similar laws from the Northern Warlords Government in 1915 and the Kuomingtong ROC government in 1928. The intellectual property laws in this period in China were mostly directly adopted from either Germany or Japan, but also affected by bilateral treaties between the ROC government and the US and the UK. However, due to the Japanese invasion during the two World Wars and then the outbreak of the civil war between the Communists and Nationalists, these laws had limited effect in this period of time and ceased to have effect within Mainland China upon the Kuomingtong ROC government’s retreat to Taiwan in 1949.

Since the establishment of the People’s Republic of China (PRC) in 1949, China mainly took inspiration from Soviet models to build its intellectual property regime, until China started its economic reform and open door policy in the late 1970s. Since the late 1970s, China turned to the West for inspiration in reforming China’s intellectual property regime, and gradually integrated into the international framework. During this process, bilateral negotiation with countries from the West, the U.S. in particular, has had significant influence on the development of China’s intellectual property regime. China’s effort to integrate with the international framework, in particular its effort to join the WTO in the 1990s, has been another driving force behind the reconstruction of China’s intellectual property regime. Table 3.1 below (Chapter 3) detailing China’s accession to the major treaties of the World Intellectual Property Organization (WIPO) indicates the efforts China put forth to adapt to the WIPO framework before China’s WTO entry in 2001. Upon the accession to the WIPO Convention in 1980, China became a member of WIPO, which

179 See id., at 21-22.
180 See id., at 52.
181 See id., at 87.
inaugurated its contact with the international intellectual property regime. China’s adaptation to the Paris Convention, Berne Convention, and Madrid Agreement laid down the fundamental framework of China’s modern intellectual property regime. At the same time, China actively participated in the negotiation process of the TRIPS agreement, and adopted its model 10 years before China’s WTO entry. To ensure smooth integration, China significantly amended its Patent Law in 1992 according to the 1991 Dunkel Text of the TRIPS agreement even before the WTO’s establishment in 1995. By the time of China’s WTO entry in 2001, China’s intellectual property laws had been completely remodeled to satisfy the TRIPS agreement and adapted to the Western intellectual property framework.

3.1.2 “Elegant Offense” vs. “Fair Use”

Due to the early advances in technology such as printing techniques and use of paper, imperial China developed certain mechanisms to protect intellectual creations. However, for most of the time when China led the development of the world, these protection mechanisms remained fairly underdeveloped, and introduction of these technological advances failed to lead imperial China into a strong intellectual property regime. Why these technological advances did not lead to a strong intellectual property mechanism in imperial China remains a central puzzle of the development of China’s intellectual property regime. This puzzle is also the focus of a debate between William Alford and Chengsi Zheng, two eminent scholars on China’s intellectual property law.

Highlighting an appealing Chinese saying, “To steal a book is an elegant offense,” Alford’s research suggests that “imperial China did not develop a sustained indigenous counterpart to intellectual property law, in significant measure because of Chinese political culture.” For Alford, the protections of prints in ancient China were just simply “imperial efforts to control the dissemination of ideas” instead of constituting copyright. Alford’s work has become one of the most cited and influential books in the research field of China’s intellectual property.

184 China did not join any international intellectual property conventions during the ROC era. See ZHENG, Chinese Intellectual Property and Technology Transfer Law, 87-88.
186 For more details of China’s accession to major WIPO treaties and TRIPS compliance, see infra discussion 3.4.3.1.
187 ALFORD, 2.
188 See id., at 18.
Other researchers have argued that “[t]he Chinese proverb ‘To steal a book is an elegant offense’ gives insight into the mentality of the Chinese toward intellectual property piracy.”

Professor Chengsi Zheng disagrees with Professor Alford mainly for three reasons. First of all, Zheng disagrees with Alford’s understanding of the message of “elegant offense.” Zheng points out that the message suggests tolerance towards a poor intellectual who steals a book for personal knowledge learning, not encouragement of stealing a book for commercial purposes. Similar to how “fair use” nowadays will not suggest transformation of ownership of intellectual property rights, the “elegant offense” message does not at all encourage stealing the intellectual property rights inherent to the book. According to Zheng, Alford’s interpretation confuses the book as a tangible carrier of intangible intellectual creation with the content of the book – the intellectual creation as intellectual property rights.

Secondly, Zheng argues that underdevelopment of copyright protection is closely related or

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> The failure to reduce or eradicate piracy of intellectual property in China is also due to the serious misperceptions of the very notion of ownership by the Chinese people and by their government leaders. It is more than likely that people do not perceive copying a CD as an illegal act, for they do not understand the very nature of the ownership of a copyright or possession of a proprietary interest in property. For many years before and even after the 1979 transition to a market economy, China had adopted a socialist ideology which inculcates state ownership of the means of production and discourages private ownership of property. To some people in communist countries owning property is tantamount to a sin. Thus, stealing an object that is owned by someone else is less corrupt than owning it outright yourself. The lack of supply of goods in China resulted in theft, bribery, graft, corruption and a never ending search for devious means to go around the system as a way of survival.


> One important element of the misunderstanding of Confucian values is the intentionally or unintentionally misattributed proposition “To Steal a Book is an Elegant Offense” (Qie Shu Bu Suan Tou). This is a concept unknown to Confucianism and was only popularized with the 1919 publication of the popular fictional book Kong Yi Ji, written by the famous novelist Lu Xun. In his book, Lu exemplifies his belief that literature should be socially relevant, and attempts to avoid the “clichés” of traditional Chinese linguistics that, in his view, had hampered and restrained people’s creative thinking for centuries. In Lu Xun’s portrayal, Kong Yi Ji was depicted as a poor harlequin, who was “a big, pallid man whose wrinkled face often bore scars,” and was made fun of by everybody. He earned a living from copying manuscripts for rich patrons and sometimes stole books to trade for wine. His behavior drew on his being soundly beaten. “To Steal a Book Is an Elegant Offense” was his argument when he was taunted. His personal character and way of thinking are thus far removed from the Confucian values. ... Indeed, the phrase “To Steal a Book Is an Elegant Offense” was unknown to Chinese until Kong Yi Ji as a fictional character appeared in the early twentieth century and, interestingly, it was unpopular with foreigners until Professor Alford’s book, *To Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilization*, made its debut in the mid 1990s.
even caused by underdevelopment of commodity economy. The quotes from Xunzi, Mencius and historical documents cited by Alford are from a time a thousand years before the discovery of printing technology and advances of commerce, and thus naturally do not reflect the need for copyright protection. Zheng also suggests that being the means to control idea dissemination does not necessarily exclude press administration from being a mechanism of basic copyright protection. Finally, Zheng suggests that just as China’s heavy reliance on criminal and administrative law instead of civil law does not exclude the existence of civil rights; “imperial control” did in fact allow basic protection of copyright private ownership.

The debate between Alford and Zheng provides an important perspective for our examination of China’s attitude toward intellectual property protection. Both Zheng and Alford point out that imperial China relied heavily on criminal and administrative laws and the management of the printing business was mainly for purposes of political order and social harmony instead of private rights. This suggests that imperial China would protect private owned copyrights only to the extent that this would benefit public order and social harmony. The imperial copyright protection of the Song dynasty is a good example. According to Deng’s research, instead of existing for the purpose of promoting commerce, the copyright protection from the government throughout the Song Dynasty was for those books related to the calendar, agriculture, codifications of law, and canonical books of Confucianism for learning. To protect copyright for public order instead of commercial abundance or private rights promotion indicates a public oriented perspective toward intellectual property, a clear collective culture perspective.

Furthermore, both Zheng and Alford’s discussions mention the linkage between perceptions of the importance of commerce with development of intellectual property protection. Zheng suggests that the underdevelopment of the commodity economy in imperial China might have led to the underdevelopment of intellectual property protection. Alford also suggests that the “Confucian disdain for commerce” led to attributing less

191 ZHENG, Zhishi Chanquan Lun (On Intellectual Property), 22.
192 See id., at 24.
193 See id.
194 See id., See also ALFORD, 10, 24.
195 JIANPENG DENG, The Copyright Issue in the Song Dynasty: comment on debates between Zheng Chengsi and William Alford, Huanqiu Falu Pinglun (Global Law Review), 71 (2005). See also YE.
importance to intellectual and imaginative endeavors. This leads us further to the examination of the puzzle of disassociation between technology advances and strong intellectual property protection in imperial China. Given imperial China’s dominance in technological advances in several hundred years, what caused the underdevelopment of commerce in ancient China? A Weberian analysis of religious influence on the rise of capitalism suggests an answer lies in religious culture. According to Max Weber’s analysis, Protestant Asceticism contributed to the rise of the capitalism in the West, while Confucianism’s corresponding ethic of adapting to the given world rather than transforming it was the cause of the failure of capitalism to appear in China.

This Weberian analysis of the linkage between the Protestant ethic and the spirit of capitalism has become a classic of culture’s influence on economic development. According to Weber, the Protestant ethic made an independent and important contribution to the rise of capitalism in the West. Weber recognizes that the spirit of capitalism was present before the capitalistic order. However, the Protestant ethic made two significant contributions to the rise of the capitalism through asceticism’s facilitation of the accumulation of capital and the accumulation of skilled, disciplined labor. First of all, as capitalism cannot make use of undisciplined labor, a Protestant religious upbringing contributed to the conception of labor as a calling, and Protestant ethic’s “ascetic educative influence” on the “modern economic man” contributed significantly to the creation of a rational and disciplined labor force. Secondly, the Protestant ethic’s ascetic restraints on consumption of wealth contributed to the accumulation of capital and made possible the productive investment of capital. By reference specifically to English Puritanism and German Pietism, Merton suggests that the values of ascetic Protestantism were strongly compatible with scientific enterprise, thus providing a powerful impetus to the development of modern science. Therefore, the Protestant ethic significantly contributed to the pursuit of science and technology and the rise of capitalism.

196 ALFORD, 28-29.
198 See id., at 63, 174-176.
199 See id., at 172.
As for China, Weber acknowledges that in terms of material conditions Chinese social structure contained a mixture of elements both favorable and unfavorable to a capitalist economy, and thus could not have been a decisive factor in China’s failure to develop capitalism. Rather, it was the consistently traditionalist nature of Confucianism that enjoined adaptation to the given world and not the transformation of it that was the main contributor to the failure of capitalism to appear in China.\textsuperscript{201} For the classical Puritan, who was characterized by a central, religiously determined, and rational method of life, economic success was not an ultimate goal or end in itself but still a valid means of proving oneself.\textsuperscript{202} In contrast, for the Confucian, wealth was insecure and could upset the equilibrium of the genteel soul.\textsuperscript{203}

The difference between China and the West of adjusting the self for adaptation to the given world versus transforming the world to prove the self may have made all the difference for the rise of capitalism in the West. This difference also has fundamental implications for our current research as it provides the key to unlock the myth about why technological advances did not come with a strong intellectual property mechanism in imperial China. From a transformative perspective, intellectual and imaginative endeavors can serve as the means of proving the self instead of serving the society, thus requiring individualization or privatization of the intellectual endeavor. The commercialization of the privatized intellectual creation then provides a powerful driving force for the development of capitalism. Capitalist development and commercial success in turn proves the success of the self and strengthens the private ownership of the intellectual creation.\textsuperscript{204} However, from a “given world” adaptive perspective, making the intellectual endeavor for the public will facilitate the adaptation of the self to society and to the world, which avoids the isolation of the self. Protection of intellectual property for the maintenance of social order and harmony thus becomes a reasonable choice as seen in imperial China. To make intellectual creations in service of the public instead of the self however limits the commercial success of the self and constrains the

\textsuperscript{202} See \textit{id.}, at 243-244.
\textsuperscript{203} See \textit{id.}, at 245-246.
\textsuperscript{204} This however will also create the isolation of the self. Furthermore, from an ontological point of view, the transformative perspective is highly related to the self-sufficient and other-reducing/assimilating mechanism of the individual oriented private rights approach. See \textit{infra} 5.3.2 for a more detailed discussion of the other-reducing/assimilating mechanism and the self-sufficient deficit of modern law.
development of capitalism. The underdevelopment of the commerce and capitalism in turn undermines or attributes less importance to the private ownership of intellectual endeavor, which leads to the underdevelopment of the intellectual property regime.

Therefore, the linkage between public vs. private oriented perspectives toward intellectual endeavors with weak vs. strong intellectual property regimes has its cultural roots. Following the examination of the public-private dynamics in China’s contemporary intellectual property regime in the next section, the unfolding of the cultural roots of different intellectual property perspectives will lead us to the examination of the core issue, the legitimacy dynamics of our contemporary intellectual property regime.

3.2 THE EVOLVING RECOGNITION OF INDIVIDUAL INTELLECTUAL ENDEAVOURS

3.2.1 1950/1954 Regulations: Collective Oriented Balance between Private and Public

Although the PRC’s first Patent Law was not promulgated until 1984, the PRC government has been dealing with inventions and innovations ever since its establishment in 1949. Art. 43 of the first constitutional document of the PRC, the Common Program of the Chinese People’s Political Consultative Conference, states that the country is committed to “reward scientific discoveries and inventions and popularize scientific knowledge.” In 1950, the Provisional Regulations Governing Invention and Patent Rights (hereafter, 1950 Provisional Regulation) was adopted, and the first “intellectual property” system ever in PRC history was set up.

According to the 1950 Provisional Regulation, an invention refers to “a new production measure that can either improve productivity or generate a new product of enhanced utility,” and is limited only to those that can be realized in industrial or agricultural production. Also, an inventor must report the invention to the Central Administration Bureau for review and approval, and then can apply for invention right or patent right as the inventor wills. The 1950 Provisional Regulation clearly states that the right of adopting or refusing an invention belongs to the country. Accordingly, an inventor can either become the

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205 A version of this section has been submitted for publication. WENWEI GUAN (2008), Legitimacy Dynamics: Rights, Norms, and Local Cultural Imperatives – the Evolving Recognition of Individual Creation in China’s IP Law.
207 See id., at Art. 2.
holder of invention right or the holder of patent right depending on whether the government uses the invention or not. In the case that the government deems it necessary to adopt an invention, the inventor will be granted an invention certificate and become the holder of the invention right, holding inheritable rights to material and honorary awards and the right to name the invention. Otherwise, according to the regulation, the inventor will be granted a patent certificate and become the holder of the patent right, with inheritable rights to industrialize, license, or transfer the patent right. The difference between invention certificate and patent certificate indicates a different extent of ownership. While an invention certificate reflects a moral recognition of an individual intellectual endeavor, a patent certificate indicates both moral and economic recognition of an invention, which resembles the full ownership of current patent rights.

This regulation clearly shows that it is a society- or collective-oriented patent system but at the same time attempts to achieve a certain balance between the needs of society and individual inventors. On the one hand, for an invention to even be eligible to apply for invention right or patent right, the innovation needs to be able to improve industrial or agricultural production. Also, the country retains the right of “first refusal,” adopting or refusing the invention in whatever manner the government deems necessary. All this clearly shows the social utility oriented perspective of this invention award system. On the other hand, this patent system ensures the inheritable individual rights of the inventor: to material and honorary awards or to name the invention in the case of being granted an invention certificate, or to industrialize, license, or transfer the patent right in case of being granted a patent certificate. Therefore, individual rights to the invention do exist, but they only exist in the context of inventions that are useful to society, and their specific content depends on to what degree society requires the invention. This means that individual rights to invention are grounded on their contributions to the society—they are socially embedded rights.

This dynamic between the social welfare and individual rights can also be found in the regulation’s stipulation about the rights attached to an “employee invention.” According to the regulation, an invention created by someone who is working at a factory, mine, research institute, laboratory, or other research units of the State and is related to the person’s job, or an invention that is commissioned and paid for by state organs, enterprises, or social

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208 See id., at Art. 6.
organizations, will only be granted an invention certificate instead of patent certificate.\footnote{See \textit{id.}, at Art. 8.} This means the inventor of a job-related invention or commissioned invention has the right to material and honorary awards and the right to name the invention, but not the right to industrialize, license, and transfer the invention. Furthermore, the Central Administration Bureau may assign certain enterprises or research organs to provide experimental convenience and material assistance to any citizen who has a practical plan that is deemed useful and with good potential to succeed.\footnote{See \textit{id.}, at Art. 17.} This was reiterated by the 1954 \textit{Provisional Regulations on Innovation Awards}, a regulation that clarifies the method of awarding and amount of awards described in the 1950 \textit{Provisional Regulation}.\footnote{Art. 30, \textit{PRC Provisional Regulations on Awards for Inventions, Technical Improvements, and Rationalization Proposals Concerning Production} (1954).} This implies that an invention is considered as a collective goal instead of individual activity, as it is inventor’s right to get and the society’s duty to provide support for the process of invention.

The 1954 \textit{Provisional Regulation} further details the amount of the awards to be given, being a percentage of the money the invention saved within 12 months from adopting the invention, ranging from 30 percent of a saved value that is less than one million yuan to 2 percent of a saved value that is more than one billion yuan.\footnote{See \textit{id.}, at Art. 7.} The 1954 \textit{Provisional Regulation} also states that all inventions, even if they are job-related inventions, should entail awards in accordance to the regulation.\footnote{See \textit{id.}, at Art. 10.}

China’s intellectual property regime in the ‘50s has important implications for how China at that time perceived individual rights. Individual rights, such as invention rights or patent rights, are firmly grounded on their contributions to the social welfare. Individual rights thus exist only through their connection with the society. Without social prosperity, individual realization is meaningless.

### 3.2.2 1963 Regulations and Amendments: the Dominance of the Public Concern

The above mentioned 1950/54 invention award regime did not last very long. From 1953 to 1956, the whole of China underwent a government-directed “socialist transformation” of the national economy. By the end of 1956, 99 percent of the industrial and
85 percent of the commercial enterprises had been incorporated into the socialist public ownership system. On November 3rd, 1963, China abolished the 1950/54 invention award system and promulgated two separate sets of regulations: the Regulations on Awards for Inventions (hereafter, the 1963 Invention Regulation) and the Regulations on Awards for Technical Improvements (hereafter, the 1963 Tech-improvement Regulation).

The 1963 invention awards system significantly amended the 1950/54 system in many aspects. First of all, according to the 1963 Invention Regulation, the percentage awards system was replaced with a static one time award, with 10 thousand yuan as the top award, except for awards for especially significant inventions which were to be individually decided by the National Science Committee and approved by the State Council.214 Secondly, the element of encouraging individual innovation and achievement was completely eliminated. The 1950 Provisional Regulation clearly states that its legislative intention is to encourage individual scientific research as well as promote national economic development.215 The 1963 Invention Regulation, however, only emphasizes the need to encourage and popularize inventions and to promote the development of scientific technology and national economy.216 The recognition of individual endeavors was eliminated. Inheritable individual rights as an invention certificate holder or a patent certificate holder disappeared, as did the individual rights to job-related inventions. Finally, protection from illegal use of inventions and patents was eliminated. In other words, the degree of balance between the public and the individual evident in the 1950 regulation was completely broken. The 1963 Invention Regulation states that:

All inventions belong to the state. No individual or unit should pursue monopoly of any invention. Any unit in the whole nation, including collective units, may use any invention that is deemed necessary.217

These 1963 Regulations were later slightly amended. The 1963 Invention Regulation was amended and republished in December 1978 and the Tech-improvement Regulation was replaced with The Regulations on Awards for Rationalization Suggestions and Technological

216 Art. 1, PRC Regulations on Awards for Inventions.
217 See id., at Art. 23.
*Improvement* (hereafter, the 1982 Regulation) in March 1982. Changes were minimal, and the state ownership and public use of inventions was reiterated. However, in the 1978 *Invention Regulation*, inventions were clearly divided into collective inventions and individual inventions, and it was emphasized that awards for individual inventions should go to the individual. 218 Similarly according to the 1982 Regulation, the rationalization suggestions were also divided into those proposed by a collective of employees vs. an individual employee instead of being only referred to as the masses.219 This indicates that the 1978 and 1982 amendments were trying to incorporate some elements of individual recognition to balance the completely public oriented perspective, although not to a great extent.

China’s 1963 invention award system was clearly collective oriented. The individual element in inventions was dismissed to the point of becoming almost invisible, while the public interests gained complete dominance. The 1963 invention award system appears to come out of nowhere, with a surprising lack of recognition for individual intellectual endeavors. However, if we trace its origin back to the 1950/54 award system, we can see that while the 1963 invention award system is one very big step towards public concerns from individual recognition, it still recognizes that it is caught between the public and private contention that is inherent in intellectual property.

More importantly, the remnants of the recognition of individual intellectual creation through minor material awards as well as honorary awards indicate that the 1963 invention regime was still caught between public concerns and private recognition no matter how collective oriented it was. Furthermore, the amendments in 1978 and 1982, by bringing more individual elements back to invention recognition, signaled an attempt to restore the unbalanced relationship between public concerns and private recognition. Later developments in China’s intellectual property laws and China’s journey to the WTO show that China’s 1978/82 amendments of invention award regime was the beginning of the restoration of individual recognition and part of a new attempt to balance public concerns and private recognition of intellectual creations.

218 Art. 8, PRC Regulations on Awards for Inventions (amend. 1978).
3.2.3 Post-1984 Evolution: Restoring the Balance between Private and Public

In 1984, the first Patent Law existing in the PRC was promulgated by the Standing Committee of China’s National Peoples’ Congress. Although it was amended twice, in 1992 and in 2000, its basic framework has remained intact. The 1984 patent law restored the PRC’s early years’ perspective towards invention and creation, a perspective attempting to achieve a balance between public concerns and individual recognition towards intellectual creation endeavor.

On the one hand, the post-1984 patent law system indicates a very clear public interest oriented perspective towards inventions and creations. First of all, the 1984 Patent Law makes its public-oriented legislation intent very clear: that the Law is to protect and encourage innovations and “facilitate their popularization and application, to promote the development of sciences and technologies” for the interest of society. As for “employee inventions” (job-related inventions/creations), the 1984 Patent Law states:

For a job-related invention or creation done by any person in pursuing assigned tasks from the unit to which he belongs or primarily using the material resources of the unit, the right to apply for a patent shall belong to the unit. … Once the application is approved, if it was filed by a state-owned unit, the patent right shall be held by that unit; if it was filed by a collective-owned unit or an individual, the patent right shall be owned by such unit or individual.

Accordingly, the state’s interests are the first consideration in determining ownership of an employee invention. This clearly indicates a collective-oriented perspective to invention and creation. This is particularly clear in regards to using inventions or creations for public interest. According to the 1984 Patent Law, departments of the State Council or provincial governments, “in accordance with State plan,” may assign designated units the right to use patents that are owned by other state-owned units. Also, those departments and provincial governments may do so to patents even when they are owned by individuals or collective-owned units, as long as the patents concerned “are of great significance to the State or public interests,” and as long as this use is reported to and approved by the State Council. This means that public exploitation of inventions has a higher priority over the

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221 See id., at Art. 6.
222 See id., at Art. 14.
recognition of the individual endeavor of invention. As long as the “consistency with State plan” or “State or public interests at stake” criteria are met, all patents, no matter if they are state-owned, collective-owned, or owned by individuals, are subject to public exploitation with royalties in return.

On the other hand, the post-1984 patent law system also clearly shows its recognition of individual intellectual endeavor. Although the patent right of employee inventions will belong to the unit the inventor works for, the inventor’s intellectual endeavor is still recognized. In an attempt to balance public exploitation with individual recognition, the 1984 Patent Law states that:

The unit owning or holding the patent right on a job-related invention or creation shall reward the inventor or designer, and upon exploitation of the patented invention or creation, shall reward the inventor or designer in accordance with the application scope or generated economic benefits.\(^{223}\)

This 1984 Patent Law got rid of the 1963 regime’s static one time award system, and replaced it with an annual percentage awards system. Inventors or designers of a job-related invention or creation will be awarded annually with a certain percentage of the after-tax profits from the use of the invention or design concerned. According to the 1985 Rules for Implementation of the Patent Law, this will be 0.5-2% for invention and utility models and 0.05-0.2% for industrial designs; or 5-10% of a licensing fee if the rights holding unit chooses to license to others the right to use the patent.\(^ {224}\) These percentages remained unchanged in 1992’s amendment of the Patent Law, but were increased in the year 2001’s Implementation Rules of the year 2000 amendment of the Patent Law to no less than 2% annually for inventions and utility models and no less than 0.2% for industrial designs, and no less than 10% of the license fee in the case of licensing.\(^ {225}\)

The 1984 Patent Law lay down the basic framework of China’s regulations concerning job-related inventions and creations, which basically remained unchanged in its two amendments in 1992 and 2000. In the 1984 Patent Law, job-related inventions or creations are all defined as inventions or creations done by an employee “in execution of the

\(^{223}\) See id., at Art. 16.


task” from his/her unit or “by primarily using the material resources” of his/her unit. According to the 1984 Patent Law and its 1992 amendment, for all job-related inventions or creations, the right to apply for patent and the resulting patent rights belong to the unit that the inventor or designer works for.226 However, in the 2000 amendment of the Patent Law, for employee inventions or creations done by primarily using the material resources of the unit, the rights to apply for patent and the patent rights could either belong to the unit or the individual inventor/designer, depending on the contract between the unit and its employee.227

Another change in the 2000 Amendment of the Patent Law that reflects the shifting balance between public concerns and private recognition is its tightening of the public use of patent rights held by state-owned enterprises. In the 1984 Patent Law and its 1992 amendment, competent departments of the State Council or provincial governments had the right to authorize the use of patent rights held by state-owned enterprises within their administrative jurisdiction in accordance with State plan. This is not the case anymore in the 2000 amended Patent Law which states that not only is the approval from the State Council necessary, but also this exploitation of the patent right concerned must be “of great significance to the interests of the State or the public.”228 The tightened criteria for public exploitation of patents held by state-owned enterprises, collective enterprises, or individuals indicates a shift away from public concerns towards individual recognition.

As we described above, China’s 1963 invention award regime was a system that over-emphasized the public concerns aspect of intellectual property, whereas the recognition of individual intellectual endeavors was minimized to the extent of near-invisibility. Its 1978 and 1982 amendments gave a very weak sign of reincorporation of individual recognition. However, the 1984 Patent Law constituted a significant move in China’s balance of the public/individual contention and brought in recognition of individual elements of invention. The 1988 Yuan Chonghua Graft Case reflects this new perspective towards invention.229

Yuan Chonghua was an employee of the Fine Alloy Research Institute of the Ministry of Metallurgy Industry. From May 1982 to February 1983 and upon the request of the Beijing Hat Factory and Yongfeng Industry Company, Yuan signed two separate agreements,

228 See id., at Art. 14.
229 PRC SUPREME COURT, Yuan Chonghua Graft Case, Supreme Court Gazette 1988.
using the stamp of the Fine Alloy Institute, for development research on a Magnetic Therapy Hat and Magnetic Therapy Bra. The Beijing Hat Factory and Yongfeng Company provided research funding and other material support. Some of the research funding was used by Yuan to buy stereos, cameras, a color TV monitor, and other research equipment. Some of these materials were put in Yuan’s home for both personal and research uses. Research was finished during March and April of 1983 and the products were manufactured and sold. As he used the funding to buy personal materials, Yuan was arrested in September 1985 for Crime of Graft by the Prosecutorate of Beijing Haidian District. Yuan was found guilty and sentenced to three years imprisonment for the first instance. Yuan appealed to the Intermediate People’s Court of Beijing for the second instance. The Beijing Intermediate Court stated that the research funding from the commissioning parties is not public property and agreements Yuan concluded were essentially personal contracts, although he used the stamp of the Fine Alloy Institute. Although his research took up his working hours, Yuan had compensated the Fine Alloy Institute in a way that was common and acceptable at that time. Yuan’s use of the research funding for personal uses without going through proper financial procedure was inappropriate but did not constitute a criminal offence. Beijing Intermediate Court thus ruled that Yuan’s research achievements were a non-job-related technological achievement and overturned the ruling of the first instance, and allowed the appeal.

This case happened at a time when China was restoring a new balance between public interests orientation and the recognition of individual intellectual endeavors. Although China is not a case law legal system, judgments published in the Supreme Court’s Gazette always have a significant influence on judicial practice throughout the whole country. This case well reflects China’s attempt to balance the dominance of public concern with an emphasis on recognition of individual intellectual achievement in inventions and creations.

In June 1994, the Supreme Prosecutorate together with the National Science and Technology Committee issued a judicial interpretation aiming at facilitating scientific innovation. This judicial interpretation distinguished employees who were job-related technological achievement developers from other employees in technology transfer activity. According to this interpretation, if an employee of a state or collective organization or

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230 PRC SUPREME PROSECUTORATE & PRC NATIONAL SCIENCE AND TECHNOLOGY COMMITTEE, Opinions concerning Economic Criminal Cases in Scientific-technological Activities (1994). It was abolished on February 25th, 2002 for the reason that it had been incorporated into Criminal Code amendment.
someone who engages in public affairs, through career convenience unscrupulously benefits from or usurps profits of the illegal transfer of a job-related technological achievement, he or she will be accused of either Graft or Bribery. However, to protect technology experts’ interests in technology transfer, for employees who are job-related technological achievement developers and who benefit from the unauthorized transfer of that developed technological achievement, this benefit might not constitute a criminal offense, and will only be handled by the relevant department according to relevant rules of the State. This clearly indicates the recognition of individual achievement in job-related intellectual innovation.

3.3 PRIVATE-PUBLIC DYNAMICS IN OLYMPIC MARKS PROTECTION: ONE WORLD DIFFERENT DREAMS

The evolution of the concept of “employee invention” throughout the development of the PRC’s intellectual property regime indicates that China has always been caught within the contention between public interests and private recognition concerning intellectual property. During the development of China’s invention award regime from 1950/54 to 1963, the public concern perspective gained dominance and private rights were perceived almost only through their contribution to social welfare. China’s post-1984 patent laws re-incorporated the emphasis on the recognition of individual endeavors, and the balance between public concerns and private recognition has been somewhat restored. This back-and-forth development suggests that the contention between the private and the public is intrinsic to intellectual property. In this section, the dissertation will discuss some cases of Olympic logo protection in US, Canada, and China to reveal the private-public dynamics in different countries from a comparative perspective.

3.3.1 US & Canada: Private Rights with Private Teeth

In the US, the 1981 San Francisco Arts & Athletics case indicates a clear tension between public and private in intellectual property protection. In 1981, the San Francisco

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231 See id., at Art. 3.
232 A version of this section has been submitted for publication. WENWEI GUAN (2008), The Public-Oriented Imperative in China’s Selective Adaptation to TRIPS: A Comparative Case Study of Olympic Marks Protection and Beyond.
Arts & Athletics (SFAA) started promoting an international “Gay Olympic Games,” and planned to sell posters, T-shirts, buttons and stickers. However, SFAA’s plans were in conflict with the Amateur Sports Act of 1978 that authorized the United States Olympic Committee (USOC) to prohibit promotional and commercial uses of the word “Olympic.” When this case was heard in the courts, the district court granted the USOC a permanent injunction prohibiting SFAA from using the word “Olympic,” and the Ninth Circuit Court affirmed this decision. This was further supported by the US Supreme Court. The Supreme Court supported that the word “Olympic” and its associated slogans and symbols are property right merits protection as “goods in commerce” under US trademark law. Most important and relevant to our examination here is that the United State Olympic Committee (USOC) is clearly recognized as a non-governmental, private corporation by the Supreme Court. In this case, in addition to its challenge of the unconstitutionality of granting exclusive use of generic words to the USOC, the SFAA argued that the USOC’s enforcement of the exclusive right is discriminatory and in violation of Fifth Amendment of the US Constitution. However, the Supreme Court rejected this and argued that the USOC is a private corporation set up under Federal law instead of a governmental actor to whom the prohibitions in the Constitution apply. The Supreme Court states:

The fact that Congress granted it a corporate charter does not render the USOC a government agent. All corporations act under charters granted by a government, usually by a State. They do not thereby lose their essentially private character. Even extensive regulation by the government does not transform the actions of the regulated entity into those of the government. Nor is the fact that Congress has granted the USOC exclusive use of the word “Olympic” dispositive. All enforceable rights in trademarks are created by some governmental act, usually pursuant to a statute or the common law. The actions of the trademark owners nevertheless remain private. Moreover, the intent on the part of Congress to help the USOC obtain funding does not change the analysis. The Government may subsidize private entities without assuming constitutional responsibility for their actions.

236 However, Justice Brennan, joined by Justice Marshall, dissents. They argue that the action concerned constitutes Government action because what the USOC performs are important governmental functions and also because of the sufficient and close “nexus between the government and the challenged action of the USOC.” See id., at 548-560.
237 See id., at 543-544.
Furthermore, the Supreme Court argues that how the USOC would “enforce its exclusive right to use the word ‘Olympic’” is simply not a matter of governmental decision. The Supreme Court states,

There is no evidence that the Federal Government coerced or encouraged the USOC in the exercise of its right. At most, the Federal Government, by failing to supervise the USOC’s use of its rights, can be said to exercise “mere approval of or acquiescence in the initiatives” of the USOC. This is not enough to make the USOC’s actions those of the Government. 238

This case provides a good example of how “the expenditure of labor, skill, and money” of a private corporation –the USOC in this case –can make something from the public domain –generic words like “Olympic” in this case –into private property. The expressive instead of purely commercial use of these terms by the SFAA is characterized by the Supreme Court as “appropriat[ing] to itself the harvest of those who have sown” that violates the USOC’s legitimate property right. 239 However, Justice Brennan disagrees. In his dissenting opinion, Justice Brennan states:

The statute [the Amateur Sports Act] is overbroad on its face because it is susceptible of application to a substantial amount of non-commercial speech, and vests the USOC with unguided discretion to approve and disapprove others’ noncommercial use of “Olympic.” Moreover, by eliminating even noncommercial uses of a particular word, it unconstitutionally infringes on the SFAA’s right to freedom of expression. The Act also restricts speech in a way that is not content neutral. The Court’s justifications of these infringements on First Amendment rights are flimsy. 240

This case reveals a tension between the protection of the USOC’s private property rights and the rights to freedom of expression of the public. The Supreme Court in this case shows a clear favor of the private in this private-public dynamics in property rights.

Some Olympic logo cases in Canada show some similarity in this regard. Canada hosted the 1976 Summer Olympic Games in Montreal and 1988 Winter Olympics in Calgary, and will host the 2010 Winter Olympics in Vancouver. Protection of the Olympic logo stirs

238 See id., at 547. The Supreme Court states that “a government normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the government.” See id., at 546.
239 See id., at 541.
240 See id., at 561.
up legal issues every time. In Organizing Committee of the 1976 Olympics Games (the COJO) v. Exclusive Leather Products Corp., the COJO –the Committee’s popular name –is the exclusive licensee of two trademarks containing the words “Montreal 76”, of which the City of Montreal is the proprietor. The Exclusive Leather Products Corp. is a private company specializing in producing sport and flight bags. Finding that Exclusive was making flight bags displaying the phrase “Olympic Montreal 1976”, the COJO, the plaintiff, brought the case to court and sought an injunction to enjoin Exclusive Corp. from infringing on its trademarks. Exclusive, the defendant, submitted that it applied for the registration of trademark “Olympic Montreal 1976 - Olympique Montréal 1976” with a design of two men engaged in athletic pursuit in 1974 before the COJO’s application for the mark “Montreal 76”. The Court found that COJO’s use of “Montreal 76” was prior to Exclusive’s use of “Montreal 1976”.241 The Court concluded that the mark used by Exclusive Corp. was likely to be mistaken for the mark for which COJO had acquired the exclusive right. The action was maintained, and the Court ordered the injunction. COJO was entitled to restrain Exclusive from using the mark “Montreal 1976” or any other marks that might be so similar as to be mistaken. The Court stated that:

[T]he matter which Defendant added to the expression Montreal 1976 ... is not sufficient to remove the possibility of confusion between its wares and those manufactured under licence from Plaintiff. On the contrary the word ‘Olympic’ and a figure bearing the internationally known Olympic torch add to the confusion. Not only do they add to the confusion but it is clear from the evidence that the confusion is deliberate. Defendant; having failed to obtain a licence from Plaintiff to manufacture flight bags identified with the Olympic games and thus ostensibly barred from participation in what is expected to be a profitable trade in Olympic souvenirs, decided to market flight bags obviously identified with those games. In marketing articles marked with the expression ‘Montreal 1976’ Defendant intended to deceive a substantial number of potential purchasers of souvenir flight bags.242

On 11th July 1975, the House of Commons of Canada passed Bill 63, an Act to amend the Olympic (1976) Act. The Bill states that “[t]he Olympic Corporation is and always has been a public authority in Canada for the purpose of the Trade Marks Act.”243 According to

242 See id., at para. 46.
this regulation, the words Montreal when used in conjunction with 1976 or 76 are marks of
the Olympic Corporation and prohibited others from using them unless licensed to do so.\textsuperscript{244}
This Act also prohibits any unauthorized use of Olympic related symbols during the half year
around the time of the Olympic Games even if you used it before. The Act states:

Where before June 14, 1975, a person adopted any mark, word, abbreviation, expression, symbol, emblem, insignia or design described in paragraph (2)(a) or (b), as a trade mark or otherwise, in association with goods or services or in connection with any business or any establishment or premise in which a business is carried on, that person shall not, after June 13, 1975, and before January 1\textsuperscript{st}, 1977, use such mark, word, abbreviation, express, symbol, emblem, insignia or design, as a trade mark or otherwise, in association with goods or services or in connection with any business or any establishment or premise in which a business is carried on, except in accordance with the terms and conditions set forth in any licence issued by the Olympic Corporation in that behalf or except as permitted by any by-law of the Olympic corporation.\textsuperscript{245}

This Act was passed by the House of Commons at the time after the dispute between
the parties happened but before the Court’s judgment was made. The Court mentioned the
Act in the judgment and did not claim to follow this Act in the case.\textsuperscript{246} However, the spirit of
the Act was followed by the Court.

In a 1987 case \textit{Canadian Olympic Assn. v. Hipson}, the plaintiff Canadian Olympic
Association (COA) sought a permanent injunction to enjoin the defendant William Hipson
from manufacturing, distributing, and selling six lapel pins which were thought to be
infringing on COA’s trademarks. The COA is the owner of official marks such as “Calgary
88,” “Olympic Torch,” “Winter Games”, and the “Interlocking ring design.” The defendant
Hipson runs the Calgary Souvenir Imports Ltd. specializing in manufacturing, importing, and
marketing lapel pins. Some of the pins Hipson distributed had a white bear holding a torch
with the number 88 resembling the interlocking rings, with the word “Calgary” also
appearing above the numerals. The Plaintiff sent an application to Hipson in January 1985
but got no response, and thus brought the case to court. The injunction was granted as
Hipson’s pins so nearly resemble the official marks of COA that they could be mistaken for
the official marks of COA. The Court stated:

\textsuperscript{244} \textit{See id.}, at Art. 14.
\textsuperscript{245} \textit{See id.}, at Art. 15(5).
\textsuperscript{246} \textit{Organizing Committee of the 1976 Olympics Games v. Exclusive Leather Products Corp.} At para. 23.
In my view a word as general as “winter” standing alone should not be protected as an official mark and no public authority should be able to gain the protection of an official mark of the name of a season of a year. I hold the same view with respect to a year (i.e. 1988) standing alone - that is to say a year not preceded or succeeded by the name of a city or a word or words descriptive of a particular event.

Certainly Winter Olympics or Winter Olympic Games merit protection as an official mark of the public authority. If a year is preceded by the name of a city such as Calgary 1988 or Calgary ’88, then in my view the numerals read in conjunction with the name of the city clearly suggest an event or a special meaning that will obviously take place in that particular year and merit protection.\(^{247}\)

Something relevant to our analysis here worth mentioning is that the Court clearly recognized the COA as a “public authority.”\(^{248}\) This is consistent with the above discussed Bill 63 that was passed by the House of Commons of Canada in 1975. The internal logic of the judgment was quite the same as before. However, things changed a little bit when Canada was about to host the 2010 Winter Olympic Games in Vancouver.

In December 1998, Vancouver was chosen to be the Canadian candidate city over Calgary and Quebec to run the competition for hosting the 2010 Winter Olympic Games and won the bidding process at the 115\(^{th}\) IOC Session in July 2003 in Prague. Ever since then, Olympic logos protection as well as attention to small businesses using Olympic related or similar names in Vancouver has become spotlight issues.\(^{249}\) Among them, the downtown Olympia Pizza & Pasta Restaurant and Olympic First-Aid Services are the two most famous cases. Olympia Pizza is a long established family business in downtown Vancouver, while the Olympic First-Aid Services is relatively new but set up before Vancouver won the bid to host the 2010 Winter Olympic. They were both contacted by the Vancouver Organizing Committee (VANOC) asking for name changes. On 25\(^{th}\) January 2006, VANOC issued a press release stating that companies that were set up before January 1998 using the Olympic name might have to change their names, and companies that were established after January 1998 would face lawsuits if they don’t change their name. VANOC declared in its release that “[i]ntentional and unintentional steps taken to make false associations with the Olympic Games, and unauthorized use of the Olympic Brand, undermines the rights of Canadian


\(^{248}\) See id., The Court states, “[i]t is true that by adopting an official mark the public authority (COA) prevents that mark from becoming the trade mark of a person to be used exclusively or monopolistically in association with that person’s particular wares and services.” Emphasis mine.

companies that have committed significant financial resources to become Olympic sponsors and support the ambitions of Canadian athletes.”

In 2007, the Federal Government of Canada introduced a new legislation to protect the Olympic trademarks. The proposed legislation was described as “aggressive,” and its expansion of the protection that is available under current copyright law and trademark laws is thought to be “running the risk of violating freedom of expression rights,” as the roots of the Olympic Games “lie in a common culture, a common shared experience.” The legislation, *Olympic and Paralympic Marks Act*, was passed by the Parliament and came into effect as of December 17, 2007.

However, if compared with Bill 63 of 1975, this Act is obviously trying to accommodate public needs more while at the same time giving the Olympic Organizing Committee some teeth. According to the Act, in addition to approved or licensed users, trademarks used before 2 March 2007; public authorities; Wine or Spirit Labels; personal names or addresses; news criticism and reporting; and artistic works on a non-commercial scale are allowed to use the Olympic or any resembling marks. For example, the use of a trademark by an owner or licensee of the trademark if the owner/licensee used it before March 2, 2007 may continue to use the trademark under the Act, provided that the subsequent use is in association with the “same wares or services” or “any other wares or services of the same general class” as that was used before. This obviously leaves room for the owners of resembling marks that used before the Vancouver Winter Olympics. If the *Canadian Olympic Assn. v. Hipson* were tried under this Act, it would not be surprising at all to have different result.

Whether the Act treats the VANOC as a public authority or not is unclear. What is clear is that this legislation “gives the Vancouver Organizing Committee of the 2010 Olympic … considerable powers to prevent the use of Olympic marks by businesses or individuals seeking to profit from an unauthorized association with the 2010 Games.”

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250 See id.
253 See id., at Section 3(4)(b), (c).
According to Colin Carrie, Parliamentary Secretary to the Minister of Industry (the sponsor of the Bill C-47),

Bill C-47 will give Vanoc the authority it needs to deal with people and business that are using marks they do not have the right to use. It gives Vanoc the authority to deal with companies or organizations that try to link themselves to the Olympics without having earned that privilege as others have.  

Also, this Act substantially amended the test one must meet to obtain an interim injunction under Canada’s current Trade-Mark Act to privilege the VANOC. Under current Trade-Mark Act, satisfactorily meeting a three-part test is necessary before a court will grant the interim injunction: a serious issue to be tried, irreparable harm, and the balance of convenience must be in its favor. The Act however waives the onus on VANOC from proving the second, and the most difficult part of the test, that of proving an irreparable harm. This makes the VANOC at least a quasi- if not full public authority.

3.3.2 China: Public Protection for Private Rights

From a comparative perspective, the laws on Olympic Marks protection in China might at first glance not seem very different from the laws in the U.S. and Canada. In July 2001, Beijing as China’s candidate city won the bid to host the 2008 Summer Olympic Games. As the host of the 2008 Olympic Game, China also enacted a specific regulation to “strengthen the protection of Olympic logo, protect rights holder’s legal interest in Olympic logo, and defend the dignity of the Olympic Movement.” On paper, this Olympic Logo Protection Act does not look very different from the Canadian one. The regulation clearly states that those who have used logos resembling the Olympic logo before the law may continue to use it. The Chinese Olympic Logo Protection Act states:

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255 House of Commons Debates, No. 171 (14 June 2007) at 1255 (Mr. Colin Carrie).
256 Section 6 of the Act (S.C. 2007, c. 25, s. 6) states:
   If an interim or interlocutory injunction is sought during any period prescribed by regulation in respect of an act that is claimed to be contrary to section 3 or 4, an applicant is not required to prove that they will suffer irreparable harm.
257 PRC Regulations on the Protection of Olympic Logo, Art. 1(2002). This law was approved by the PRC State Council and promulgated on 4 February 2002 (State Council Order No. 345), and came into force on 1 April 2002.

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Any organization or individual who has already used Olympic logo in accordance to law before the implementation of this regulation may continue to use within the original scope.  

Several things are made clear in this provision. Firstly, the Olympic Protection Act does not have any retroactive effect. Secondly, for continued use to be allowed, the prior use of the Olympic logo or resembling marks must have been legal. Thirdly, continued use must not exceed the original scope. Therefore, VANOC’s argument against the Olympic First-Aid and the Olympic Pizza might not be valid under this Chinese law. However, illegal use of Olympic logo would not be permitted either before or after this law, as was well indicated in a famous trademark infringement case, *Chinese Olympic Committee v. Shantou Jinwei Food Ltd.*

In *COC v. Jinwei*, the Chinese Olympic Committee (COC) found Shantou Jinwei Food Ltd. from 1996 to 1998 without COC’s authorization used the Olympic Five-Ring Interlocking Mark on the package of their cereal products, and in outdoor and cable TV advertisements as well, even after COC’s contact which tried to stop the infringement. COC thus brought the case to the First Intermediate People’s Court of Beijing. The action was allowed and the Court ordered Jinwei to pay compensation at an amount of RMB 5 million Yuan for trademark infringement. Jinwei appealed to the High People’s Court of Beijing. Jinwei questioned the COC’s standing and argued that the owner of the Olympic Marks is the International Olympic Committee (IOC) instead of the COC, and the personal letter from the Legal Department of the IOC that the COC provided did not constitute a valid authorization. Even if the authorization were valid, the respondent should only be representing the IOC rather than filing the action on their own behalf. Jinwei also argued that no trademark infringement occurred according to trademark law, since using the Mark on cereal packages does not fall into the exclusive range of rights to use the Olympic Marks. Also Jinwei paid RMB 65,000 Yuan to the Revenue Committee of the Chinese Gymnastic Representative Group of the 26th Olympic Games and was licensed to use the Olympic interlocking mark.

The court rejected Jinwei’s appeal of COC’s standing, stating that under Chinese law and according to the Olympic Charter and Charter of the Chinese Olympic Committee, the

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258 See id., at Art. 9.
COC is also the proprietor of Olympic Marks which justifies COC’s standing in the case. The court asserted that what Jinwei got from the authorization of the Revenue Committee of Chinese Gymnastic Representative Group of the 26th Olympic Games is the right to use the representative group’s marks instead of Olympic Marks and did not constitute any authorization from the COC. The injunction was granted and Jinwei was ordered to pay damage at an amount of RMB 5 million Yuan.

In COC v. Jinwei, COC’s property rights regarding the Olympic interlocking logo were recognized and protected. The protection mechanism by which proprietors resort to civil procedures for protection was not at all different from the Canadian or American approaches. However, the 2002 Olympic Logo Protection Act moves a big step forward. Significantly different from the Canadian approach that gives teeth to the Organizing Committee and the Canadian Olympic Committee to protect the Olympic logo, the Chinese Olympic Protection Act clarifies and assigns a government branch responsible for the Olympic Logo protection. The Chinese Olympic Protection Act states:

The department of industrial and commercial administration of the State Council will be responsible for nation-wide protection of Olympic logo under the stipulation of the Regulation. The local department of industrial and commercial administration above the county level will be responsible for the protection of Olympic logo of the administrative area under the stipulation of the Regulation.260

Where import or export goods are suspected of infringing the exclusive rights of Olympic symbols, the Customs shall investigate into and deal with the case, with reference to the powers and procedures laid down in PRC Customs Law and PRC Regulations on the Customs Protection of Intellectual Property. 261

According to this regulation, the national or local Industry and Commerce Administration Bureau has the right to initiate investigation, carry out on-spot checkups, and to detain wares that violated the intellectual property rights of the Olympic logo.262 Under this regulation, Customs Authorities in China are responsible for these border measures. The Customs Authority also has the right of Ex Officio action of suspension of release and to confiscate detained goods if it determines the goods infringed patents through investigation in the Ex Officio action of suspension of release. According to the “Implementing Rules”

261 See id., at Art. 12.
262 See id., at Art. 11.
issued by the General Administration of Customs, when a Customs Authority launches Ex Officio Action ordering suspension of release of goods:

[w]here the consignor or consignee lodges a request, which is in conformity with the preceding paragraph, to the Customs for releasing the goods suspected of infringing a patent, the Customs shall handle the matter in accordance with Article 19 of PRC Regulations on the Customs Protection of Intellectual Property [to release the goods]. While the goods are determined to be infringing the patent by the Customs investigation, the Customs shall handle the matter in accordance with Article 27 of PRC Regulations on the Customs Protection of Intellectual Property [to confiscate the infringing goods].

This is made clear by a notice issued by the General Administration of Customs in 2002 regarding customs protection of Olympic related intellectual property rights. According to this Notice, as of April 2002, Customs Authorities started to implement protection over right holder’s exclusive rights of Olympic symbols that have been registered in the Customs according to the Olympic Logo Protection Act. According to the Notice:

When it is suspected that the import and export of goods are involved with violations of the Olympic symbols, the Customs should detain the goods. After Customs Authority’s investigation, the import and export of goods that violate the exclusive rights of the Olympic symbols shall be confiscated and the consignee or consigner shall be fined.

The omnipotent power of Ex Officio action by the Administration Bureau of Industry and Commerce and the Customs Authorities in Chinese law obviously indicates that China takes a clear public rights approach while recognizing the private ownership of the Olympic Marks. In Canada however, in the case of prohibited use or ambush marketing, court’s orders for injunctions, compensations, or destruction, exportation, and dispositions of infringing wares can only be initiated upon application from the COC, the Organizing Committee, or a private party authorized by the COC or the Organizing Committee. This reveals an interesting and significant difference between Chinese and Canadian approaches towards the

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265 See id., Art. 3.
266 See id., Art. 4.
267 Olympic and Paralympic Marks Act, Section 5.
nature of the intellectual property rights of the Olympic logo. China’s Olympic Logo Protection Act clearly recognizes the COC and the Organizing Committee as the proprietors of the intellectual property rights of the logo. The COC and the Organizing Committee are legal persons under Chinese corporate law, and neither of them is a public authority. However, the automatic initiation of the protection by the government branch indicates that the law takes the intellectual property rights as public rights. This is different from the Canadian approach, by which the intellectual property rights of the Olympic logo are clearly recognized as private rights yet armed with strong quasi public teeth. Furthermore, both the Chinese approach and the Canadian approach are quite different from the American approach, an approach of private rights protected with private teeth.

Looking from the public-oriented perspective that is so deeply implanted into China’s culture, it should not be surprising at all to find this aggressive administrative enforcement mechanism developing in China. As we examined above, imperial China’s protection of intellectual creations heavily relied on criminal and administrative procedures, which reveals imperial China’s public oriented perspective to intellectual creations. The above examination of modern China’s evolving recognition of individual intellectual endeavors also clearly indicates China’s contemporary public-oriented perspective to intellectual property. However, bilateral dynamics between China and the U.S. and international framework such as TRIPS have also significantly shaped the development of China’s aggressive administrative enforcement infrastructure.

3.4 CHINA’S PUBLIC ORIENTATION: U.S.-CHINA DYNAMICS AND CHINA’S TRIPS COMPLIANCE

3.4.1 U.S.-China Dynamics: the Birth of China’s Aggressive IPR Administration

The dynamics between the U.S. and China concerning intellectual property protection in the 1990s significantly shaped China’s contemporary intellectual property regime. In 1991, the U.S.’ dissatisfaction with China’s intellectual property protection and threat of

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268 PRC Regulations on the Protection of Olympic Logo. Art. 3, 4. The Act states that “the right holder of the Olympic Logo in this law refers to International Olympic Committee, Chinese Olympic Committee, and the Organization Committee of the 29th Olympic Games,” and “under this Act, the right holder has exclusive rights over the Olympic Logo.”

269 See supra discussion 3.1.1 for details.

270 See supra discussion 3.2 for details.
trade sanctions brought the two together and led to the conclusion of a “Memorandum of Understanding (MOU) on the Protection of Intellectual Property” in January 1992. According to this 1992 MOU, China is under obligations to substantially amend its patent law, copyright law, and develop a trade secret protection mechanism:

- Patent: China expands patent protection in terms of patentable subject matter, rights conferred, and term of protection, and substantially dilutes previous compulsory licensing provisions (art. 1); China provides administrative protection to U.S. pharmaceutical and agricultural chemical product inventions which were not subject to protection before or have not been marketed in China (art. 2);
- Copyright: China promises to extend copyright protection to foreign software, books, firms, sound recordings, and other media previously unprotected, and is required to join the Berne Convention and Geneva Convention for the Protection of Producers of Phonograms (art. 3);
- Trade Secrets: China is required to enact legislation to protect trade secrets by January 1994 (art. 4).

In return for China’s commitments, the U.S. agreed to “terminate the investigation initiated pursuant to the ‘Special 301’ provisions of U.S. trade law and China’s designation as a priority foreign country will be revoked effective on the date of signature of this MOU.”


Despite all these efforts, the U.S. changed the direction of its critiques to “the reality of the protection – on whether the laws on the statute books were being applied” instead of on “the scope of IP protection available in China.” More importantly, the rampant piracy

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272 See id., at 677-683.
273 See id., at 683-684.
274 ENDESHAW, 313.
in China was thought to be responsible for the U.S. mounting trade deficit with China.\(^{275}\) China once again was put on the U.S. “Special 301” sanction list in 1994. The two countries entered negotiations again, which led to the 1995 agreement. The U.S. particularly requested China to shut down 29 factories allegedly manufacturing pirated CDs, and announced on February 4, 1995 that trade sanctions would be imposed against Chinese goods if the two could not agree with each other by February 26, 1995.\(^{276}\) In the meantime, some U.S. anti-piracy groups such as the Business Software Alliance (BSA) accompanied police in Guangdong Province where the alleged pirated CDs and software were seized. By the time the Agreement was reached on February 26, 1995, 2 out of the 29 listed factories had been shut down.\(^{277}\)

The agreement, “China-U.S.: Agreement regarding Intellectual Property Rights,” was concluded through an exchange of letters between the United States Trade Representative (USTR) and the PRC Minister of the Ministry of Foreign Trade and Economic Cooperation (MOFTEC). The letter from China contained an attached “Action Plan for Effective Protection and Enforcement of Intellectual Property Rights.”\(^{278}\) The 1995 Agreement significantly enhanced enforcement measures and provided greater market access for U.S. intellectual property producers in Chinese markets.

In the area of trade and market access, the Agreement confirms that:

- Exports of infringing products have been banned;
- China will not impose quotas, import license requirements, or other restrictions on the importation of audiovisual and published products;
- China will allow U.S. individuals and entities to establish joint ventures with Chinese entities in China in the audiovisual sector;
- China will continue to permit U.S. individuals and entities to enter film products into revenue sharing arrangements with Chinese entities.\(^{279}\)

Most importantly, this agreement significantly shaped China’s intellectual property enforcement mechanism. The agreement acknowledges China’s effort that “[r]ecently seven plants producing infringing products have been closed, business licenses revoked, and more

\(^{275}\) See id., at 314.
\(^{276}\) See id., at 315.
\(^{277}\) See id., at 321-322.
\(^{279}\) See id., at 883-884.
than two million infringing CDs, LDs and copies of computer software have been seized and destroyed.” The agreement expanded existing authority to set forth both immediate and long-term plans for the effective enforcement of intellectual property rights. The immediate project established a six-month “special enforcement period” campaign beginning on March 1, 1995 to root out alleged counterfeiters of U.S. movies, music and software, which was aimed directly at those 29 listed factories. The most significant part was the arrangement of the intellectual property right enforcement structure, through which the administration authorities from central to local were vested omnipotent power of intellectual property enforcement. The agreement set up a dual-track enforcement structure including a “Working Conference on Intellectual Property Rights” system paired with aggressive and powerful “Enforcement Task Forces,” which significantly reconstructed China’s enforcement infrastructure for intellectual property protection.

The IPR Working Conference system includes both central and sub-central levels. The Agreement describes the composition, purpose, and duties of the State Council Working Conference on Intellectual Property Rights in great detail:

- **Composition:** The State Council IPR Working Conference is comprised of “the State Council’s departments in charge of science, technology, foreign trade and economic cooperation, foreign affairs, press and publication, culture, broadcast, film, television, justice, public security, patent, copyright, industrial and commercial administration, and customs, as well as the departments in charge of the relevant industries;”

- **Purpose:** “Through forceful measures,” the State Council IPR Working Conference “centrally organizes and coordinates protection and enforcement of all intellectual property rights throughout the country, and will ensure that effective protection is provided and infringement of intellectual property rights is substantially reduced;”

- **Missions:** The State Council IPR Working Conference’s missions include: (1) major policy coordination to ensure “uniform and effective protection and enforcement of intellectual property rights;” (2) monitoring intellectual property law implementations; (3) instructing and organizing the relevant authorities to improve the education and publicity of intellectual property laws; and (4) ensuring the harmonization of administrative, civil, and criminal protection of intellectual property rights.282

280 See id., at 883.
281 See id., at 892. See also ENDESHAW, 325.
Under this agreement, the sub-central Working Conference system working under direct supervision of the State Council IPR Working Conference covers most of the provinces and major cities to ensure that “effective enforcement is achieved throughout the country.”

The “Enforcement Task Forces (ETFs)” under this agreement are intellectual property enforcement bodies working under the coordination of the working conference system. ETFs are comprised of administrative and other authorities responsible for intellectual property protection and enforcement including the National Copyright Administration (NCA), the State Administration for Industry and Commerce (AIC), the Patent Office, police at the national and provincial levels, and customs officials. Under this agreement, the ETFs are vested with omnipotent enforcement powers. The Agreement states:

- Each ETF has all necessary legal authority and will use its resources to initiate and carry out investigations of any suspected IPR infringement;
- In situations in which there is reason to believe or suspect that there has been an IPR infringement, each ETF has the power to: (1) “enter and search any premises;” (2) “review books and records for evidence of infringement and damages;” and (3) “seal suspected goods and the materials and implements directly and predominantly used to make them;”
- If infringement is found, the ETF has the authority to impose fines, order the termination of the production, reproduction, and sale of audio-visual products, revoke the related permits, and confiscate and destroy infringement goods and production tools without any compensation.

Moreover, the Agreement requires China’s all sub-central level authorities participating in the ETFs to “undertake aggressive ex officio actions against all types of infringement of intellectual property rights and investigate all complaints from right holders, their representatives or their exclusive licensees filed with the relevant administrative agency.”

Under this Agreement, the U.S. again agreed to “immediately revoke China's designation as a ‘Special 301’ priority foreign country, and will terminate the section 301 investigation of China’s enforcement of intellectual property rights and market access for

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283 See id., at 888. According to the Agreement, the sub-central Working Conferences system covers “at least 22 provinces, directly administered municipalities and autonomous regions, and major cities including Guangdong, Beijing, Shanghai, Tianjin, Wuhan, Nanjing, Shenzhen, Jiangsu, Zhejiang, and Fujian.”

284 See id., at 890.

285 See id., at 891.
persons who rely on intellectual property protection and rescind the order issued by the U.S. Trade Representative on February 4, 1995, imposing increased tariffs on Chinese exports.”

Despite the significant changes in the enforcement infrastructure of intellectual property protection, difficulties with effective enforcement still disappointed the U.S., and China once again was put on the “Special 301” priority watch list by the Clinton Administration on April 30, 1996. An agreement between the two was concluded on June 17, 1996 at the very last minute again to avoid reciprocal trade sanctions of billions of dollars. Unlike the previous two agreements between the two, the 1996 Accord does not set forth any new terms, except for reaffirming commitments secured under previous agreements.

The 1996 Accord documented that intellectual property protection actions had been taken by China in the areas of “CD Factories,” “Special Enforcement Period,” “Border Enforcement,” “Market Access,” and “Monitoring and Verification.” In the area of CD piracy control for example, the 1996 Accord acknowledged that China shut down 15 CD factories, each of which had an estimated annual production capacity of 30-50 million units. In closing these 15 factories, China followed the specific manner that was outlined in the 1995 Agreement, including the following steps:

- Revoking audiovisual permits and local business licenses;
- Seizing and confiscating materials and machinery used to manufacture pirated products, including destruction of the CD molds and liquidation of other equipment; and
- Investigating and prosecuting those accused of criminal activity in connection with the plants, including at least 70 people in Guangdong Province alone.

During the Special Enforcement Period, China on June 12, 1996 in a major enforcement action announced a prohibition on establishing new CD plants, importing CD

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286 See id., at 886.
presses, and using unauthorized import presses. China’s crack-down had also gone beyond factories to CD distribution markets, and over 5,000 “laser disc showing rooms” –mini-theaters alleged to be a major source of infringement activity—were shut down.

These three rounds of negotiation backed with the threatening guns of trade war have significantly shaped China’s contemporary intellectual property regime and its enforcement infrastructure. However, the late 1990s have seen the gradual fading out of direct confrontations over intellectual property trade negotiations between the U.S. and China. Since the establishment of the WTO in 1995 and China’s eager efforts towards WTO entry in the late 1990s, bilateral confrontation has given way to the multilateral framework of WTO negotiation. Around China’s WTO entry in 2001, China once again significantly amended its Copyright Law (2nd rev.), Patent Law (3rd rev.), and Trademark Law (3rd rev.) to satisfy TRIPS requirements. In 2004, the Chinese central government set up a National Working Group for Intellectual Property Rights Protection. The Working Group was chaired by Vice Premier WU Yi and comprised of the vice ministers/directors or deputy heads from the other seventeen government agencies that are in charge of intellectual property affairs. The Working Group is commissioned to oversee and lead the national intellectual property protection as a whole, including: promoting the construction of intellectual property laws and regulations, establishing and facilitating coordination mechanisms for cross-department cooperation of intellectual property protection, smoothing the connection between administrative enforcement and criminal enforcement, and improving public awareness of intellectual property norms. Since 2006, the State Office of Intellectual Property Protection

290 However, this “fruit” does not come without any criticism. Peter Yu characterizes these three rounds as “cycle[s] of futility” that are beneficial neither for the U.S. nor for China. Yu argues that the U.S. approach in the negotiations wasted U.S. “hard-earned political capital” that could have been used on issues like terrorism, nonproliferation etc., and “jeopardized the United States’ longstanding interests in promoting free trade, human rights, and the rule of law.” See Yu, Still Dissatisfied After All These Years, 149-150.


292 These 17 government agencies are: the Publicity Department of the CCP Central Committee (commonly known as Propaganda Department), the Ministry of Public Security, the Ministry of Justice, the Ministry of Information Industry, the Ministry of Commerce, the Ministry of Culture, the State-owned Assets Supervision and Administration Commission of the State Council, the General Administration of Customs, the State Administration for Industry and Commerce, the General Administration of Quality Supervision, Inspection and Quarantine, the National Copyright Administration, the State Food and Drug Administration, the State Intellectual Property Office, the Legislative Affairs Office of State Council, the Information Office of the State Council, the Supreme People’s Court and the Supreme People’s Procuratorate.

(SOIPP) – the office set up to handle the routine work of the Working Group – has published a comprehensive “Action Plan on Intellectual Property Rights Protection” annually. In these Action Plans, regular campaigns and aggressive administration actions to protect intellectual property rights have become a norm. The *China’s Action Plan on Intellectual Property Rights Protection 2008* for example states:

On the enforcement side, 16 dedicated campaigns targeting key linkage points of print and duplication, Internet and publications will be carried out, reinforced by 11 standing crackdown measures to deter and punish piracy and counterfeiting and Internet-based infringements. 294

Therefore, the U.S.-China dynamics regarding intellectual property protection in the 1990s have significantly shaped China’s contemporary intellectual property enforcement infrastructure. The omnipotent power of the administration distinguishes China from the private oriented approach of the U.S. and Canada. In fact, the strength of China’s enforcement infrastructure now significantly exceeds TRIPS’ requirements in the WTO framework.

### 3.4.2 *Ex Officio* Action under TRIPS

Under the system of *Ex Officio* action, China’s administration gained strong powers of enforcement in the area of Olympic marks protection. China’s preemptive protection of this sort is actually not limited to the intellectual property rights of Olympic Logos only, nor is it limited to border measures. To comply with WTO entry commitments, China amended its *1994 Foreign Trade Law* in 2004 to include a whole chapter on “intellectual property protection related to foreign trade.” 295 According to the *Foreign Trade Law* (amended 2004), the State “shall protect intellectual property rights related to foreign trade, in accordance with laws and administrative regulations on protection of intellectual property rights.” 296 The Law states:


Where goods which are produced and sold by a party in violation of intellectual property rights are imported and undermine the order of foreign trade, the foreign trade department of the State Council may adopt measures to prohibit the import of such goods for a specific period of time.\footnote{See id., at Art.29.}

This indicates that \textit{Ex Officio} action of protection not only covers a much broader range of intellectual property products, but also provides stronger and more active protection. As long as the \textit{prima facie} infringement is found and the criteria of undermining the order of foreign trade are met, the Ministry of Commerce can launch the \textit{Ex Officio} action of embargo on importation of goods for certain period of time. Compared with the suspension of release or confiscation of goods, the provision provides more aggressive protection in case of distortion of trading order. This protection of “foreign trade related” intellectual property rights has a clear implication of public interest consideration, the “order of foreign trade.”

Also through this 2004 amendment, China’s Foreign Trade Law added a new provision to comply with Article 40 of the TRIPS agreement, “control of anti-competitive practices in contractual licences.”\footnote{Article 40(2) of TRIPS agreement states: Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.} China’s Foreign Trade Law vests the power of \textit{Ex Officio} action to the Ministry of Commerce to limit abuses of intellectual property rights and ensure fair competition.\footnote{Art. 30, \textit{PRC Foreign Trade Law}. The Foreign Trade Law states: Where an intellectual property rights owner prevents a licensee from querying the validity of intellectual property rights contained in a license contract, implement compulsory blanket licensing, or stipulate exclusive grant back conditions in a license contract and thus creating a negative impact on fair competition and the order of foreign trade, the foreign trade department of the State Council may adopt necessary measures to eliminate such impact.} Therefore, the combination of the active and aggressive power of the Ministry of Commerce as revealed above, the \textit{Ex Officio} Action power of the General Bureau of Industry and Commerce, and the border measure powers of the Customs Authority, together constitute a seamless web of protection. This seamless web provides aggressive protection of intellectual property rights under China’s contemporary regime, and at the same time clearly shows China’s public oriented approach towards intellectual
property rights. This approach differs from TRIPS’ requirements under the WTO framework, and yet at the same time exceeds those requirements.

The TRIPS regime takes a private oriented rights approach that is similar to those of the US and Canada. The TRIPS Agreement has a whole section devoted to protection of intellectual property rights. According to the TRIPS Agreement, all methods of remedies to violation, no matter if they are “civil and administrative procedures and remedies,” “provisional measures,” or “border measures,” are stipulated to be initiated by the right holders. For civil and administrative procedures and remedies related to enforcement of intellectual property rights, the TRIPS Agreement states that “Members shall make available to rights holders civil judicial procedures concerning the enforcement of any intellectual property right covered by this Agreement.”

This to some extent clarifies that it is the right holders instead of others who have the right to initiate the procedures. As for the provisional measures preventing the entry of intellectual property infringement into the channels of commerce and preserving relevant evidence of infringement, the TRIPS Agreement states:

The judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant’s right is being infringed or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse.

For border measures of “suspension of release by Customs Authorities,” the TRIPS Agreement states:

Members shall … adopt procedures to enable a right holder, who has valid grounds for suspecting that the importation of counterfeit trademark or pirated copyright goods may take place, to lodge an application in writing with competent authorities, administrative or judicial, for the suspension by the customs authorities of the release into free circulation of such goods. Members may enable such an application to be made in respect of goods which involve other infringements of intellectual property rights, provided that the requirements of this Section are met.

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301 Art. 42, TRIPS.
302 See id., at Art. 50.3.
303 See id., at Art. 51.
The only situation in which public authorities can initiate an action upon their own – *Ex Officio Action* – under the TRIPS Agreement is a border measure to “suspend the release of goods” if:

- the authorities “have acquired *prima facie* evidence that an intellectual property right is being infringed;” and
- the importer and the right holder are promptly notified of the suspension; and
- the action is “taken or intended in good faith.”

Furthermore, the TRIPS Agreement posts strict limitation of duration on the *Ex Officio* action to 10 working days in a normal situation. After this time period, the *Ex Officio* action to suspend the release of goods is either revoked or ceases to have effect, or must be carried forward to a judicial proceeding. The Customs Authorities however have no more power other than ordering the suspension of release of goods under the TRIPS Agreement. It is worth mentioning here that the TRIPS Agreement explicitly does not require Members to provide stronger protection. The TRIPS Agreement states:

> It is understood that this Part [Part III: Enforcement of Intellectual Property Rights] does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.

This has been made even clearer in TRIPS’ basic principles. While all Members of TRIPS are required to “give effect to the provisions of this [TRIPS] Agreement,” they remain free to choose the appropriate way of implementation. The TRIPS Agreement states:

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304 See *id.*, at Art. 58.
305 See *id.*, at Art. 55. It states:
> If, within a period not exceeding 10 working days after the applicant has been served notice of the suspension, the customs authorities have not been informed that proceedings leading to a decision on the merits of the case have been initiated by a party other than the defendant, or that the duly empowered authority has taken provisional measures prolonging the suspension of the release of the goods, the goods shall be released, provided that all other conditions for importation or exportation have been complied with; in appropriate cases, this time-limit may be extended by another 10 working days. If proceedings leading to a decision on the merits of the case have been initiated, a review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period, whether these measures shall be modified, revoked or confirmed.

306 See *id.*, at Art. 41.5.
Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.  

However, China’s law as we discussed above exceeds this limit in TRIPS and arms intellectual property rights with very strong public teeth. This leads us to the paradoxical foreign criticisms of China’s insufficient intellectual property protection. In addition to the previously mentioned cultural and historical obstacles (e.g. Confucian ethics of knowledge), the absence of top leadership involvement, unbalancing effects of bureaucratic politics, and a fragmented political structure are also thought to have significantly hindered intellectual property protection in China. Mertha argues that the “direct impact of exogenous pressure on the organizational and institutional structure of the State” has significantly contributed to the development of China’s intellectual property regime, and the three U.S.-China MOUs in 1990s are a successful result of “top-down external pressure” on the Chinese government.

However, our analysis above indicates that resorting to the powerful and aggressive administration for private rights’ protection has stemmed from China’s public oriented approach, which is in sharp contrast to the private oriented rights perspective underlying the TRIPS Agreement. Foreign pressures on China to strengthen the administration’s involvement will also strengthen China’s public-oriented cultural imperative, which in turn strengthens China’s cultural and historical background obstacles to effective intellectual property protection. The three bilateral MOUs have been the result of strong pressure from the US on the Chinese Administration to enhance intellectual property protection. This has created an ironic dilemma: the private rights oriented US government has been unstinting in its efforts to push the Chinese administration to strengthen its administrative influence through a public approach, which in turn facilitates China’s public oriented approach and thus pushes it further away from the private rights oriented goal of the US government. The harder the US government pushes, and the more the Chinese government accepts, the further China’s intellectual property regime moves away from the US.

307 See id., at Art. 1.1.  
309 MERTHA.
3.4.3  China’s TRIPS Implementation: Legitimate Non-uniform Compliance

3.4.3.1 China’s TRIPS Implementation

The last several decades’ international integration, of which the U.S.-China dynamics is one part, has been the driving force behind the development of China’s intellectual property regime. Since the 1980s, China has acceded to most of the major international treaties on the protection of intellectual property rights (Table 3.1). China actively takes part in intellectual property rights related activities in APEC, WIPO, and the WTO.

Table 3.1: China’s Membership of International Intellectual Property Rights Conventions, 2007

<table>
<thead>
<tr>
<th>Convention</th>
<th>Date of accession</th>
</tr>
</thead>
<tbody>
<tr>
<td>Berne Convention for the Protection of Literary and Artistic Works</td>
<td>1992</td>
</tr>
<tr>
<td>Convention Establishing WIPO</td>
<td>1980</td>
</tr>
<tr>
<td>Convention for the Protection of Producers of Phonographs Against Unauthorized Duplication of their Phonograms</td>
<td>1993</td>
</tr>
<tr>
<td>International Convention for the Protection of New Varieties of Plants</td>
<td>1999</td>
</tr>
<tr>
<td>Locarno Agreement Establishing an International Classification for International Design</td>
<td>1996</td>
</tr>
<tr>
<td>Madrid Agreement Concerning International Registration of Marks</td>
<td>1989</td>
</tr>
<tr>
<td>Nice Agreement Concerning the International Classification of Goods and Services for the Purpose of the Registration of Marks</td>
<td>1994</td>
</tr>
<tr>
<td>Paris Convention for the Protection of Industrial Property</td>
<td>1985</td>
</tr>
<tr>
<td>Protocol Relating to the Madrid Agreement concerning the International Registration of Marks</td>
<td>1995</td>
</tr>
<tr>
<td>Strasbourg Agreement Concerning International Patent Classification</td>
<td>1997</td>
</tr>
<tr>
<td>Universal Copyright Convention</td>
<td>1992</td>
</tr>
<tr>
<td>WIPO Copyright Treaty</td>
<td>2007</td>
</tr>
<tr>
<td>WIPO Performances and Phonograms Treaty</td>
<td>2007</td>
</tr>
</tbody>
</table>


China also cooperates with many countries and regions for the purpose of enhancing the protection of intellectual property rights. In addition to the bilateral dialogue with the U.S., a six year long EU-China IP Co-operation Programme was started in 1996. China and the EU then signed an agreement in October 2003 to set up a China-EU Dialogue on Intellectual Property. China maintained regular dialogue and set up information exchange mechanisms on intellectual property with many other countries and regions, including ASEAN, Australia, Austria, Germany, Hong Kong, South Korea, Japan, New Zealand, Russia, Spain, Switzerland, and the UK.\(^{311}\)


Chart 3.1: The Structure of IPR Administration and Enforcement in China

State Council

State Intellectual Property Office
- Administration of patents nationwide, including accepting and granting patent applications and integrated circuit designs;
- also in charge of handling and coordinating IPR-related international affairs

State Patent Office
- In charge of receiving patent applications and granting patents

Local IPR administrative offices
- In charge of patent disputes

State General Administration, Industry and Business
- Deals with trademark registration and administration, and infringements and geographical indications

State Trademark Office
- In charge of registration and enforcement of trademarks and geographical indications

Local trademark offices
- In charge of administration of trademarks and geographical indications

Administration of Quality Supervision, Inspection & Quarantine (AQSIQ)
- Also deals with the administration of geographical indications

State Copyright Office
- Deals with copyright administration on a national scale, and copyright cases

Local copyright offices
- In charge of local copyright registration and administration of copyright

Forest Industry Office of the Agriculture Department
- In charge of the protection of new plant varieties

Customs
- In charge of supervising and enforcing IPRs at the border

Public Security and Procuratorate
- In charge of investigating and prosecuting criminal activities involving IPRs

National Working Group on Intellectual Property

State Office of IPRs, Ministry of Commerce


Note: 2006 TPR China Report, p. 146, Chart III.7, *The structure of IPR administration and enforcement.*
During the process of China’s international integration, WTO entry and hence the gauge of TRIPS has played a significant role in shaping China’s modern regime of intellectual property rights. Around the time of China’s WTO entry in 2001, China fitted itself into TRIPS through a comprehensive scheme of amending its intellectual property rights legislative framework. Changes made include the Patent Law (2000), the Copyright Law (2001) and the Trademark Law (2001), as well as new regulations regarding the protection of computer software (2001), new plant varieties (2001), and layout designs of integrated circuits (2001).\textsuperscript{313} To strengthen the protection of intellectual property rights, China further established a comprehensive framework of administration and enforcement of intellectual property rights (Chart 3.1). Under this organic central-local integrated framework, the administrative bodies at the central level examine and grant or register intellectual property rights, while the local administrative authorities are responsible for the administration and enforcement of intellectual property rights at the local level.

As its regulations have achieved this literal compliance with TRIPS through comprehensive amendments, China has shifted the focus of intellectual property rights protection from formulating laws to enhancing law enforcement. The following paragraph from a Trade Policy Review (TPR) report by the Secretariat of the WTO TPR Body (TPRB) sketches out the change:

In October 2003, a new IPR Leading Group was formed to tackle the problem of IPR enforcement. A one-year campaign to promote IPR protection across the country was also launched in August 2004; the campaign was extended to the end of 2005. In addition, in May 2005, a State Intellectual Property Working Group was established, led by a Vice Premier. The Working Group, which is based in MOFCOM and administered by the State Office of Intellectual Property Rights, consists of 12 administrative and judicial departments related to IPR protection that are responsible for the planning and coordinating IPR protection across the country and supervising “material cases.” The Supreme Court and Supreme Procuratorate also jointly issued an “Interpretation on Several Issues of Concrete Application of Laws in Handling Criminal Cases of infringing Intellectual Property” on 22 December 2004... [T]his Interpretation clarifies certain aspects of the criminal law dealing with intellectual property rights, including lowering the criminal responsibility thresholds, and further defining the penalties for different types of IPR infringement crimes.\textsuperscript{314}

\textsuperscript{313} See id., p. 145.
\textsuperscript{314} See id., p. 153.
In general, intellectual property rights can be enforced through either judicial measures or administrative actions. Judicial measures include civil actions (mediations or litigations) as well as criminal prosecutions. Enforcement through civil actions can be achieved through litigation in courts and is often accompanied by compensation or monetary fines under China’s current intellectual property regime. These processes are not new; in fact, as early as 1986, the PRC General Principles of the Civil Law (GPCL) has provided legal channels to safeguard enforcement of intellectual property rights. The GPCL states that:

If the rights of authorship (copyrights), patent rights, rights to exclusive use of trademarks, rights of discovery, rights of invention or rights for scientific and technological research achievements of citizens or legal persons are infringed upon by such means as plagiarism, alteration or imitation, they shall have the right to demand that the infringement be stopped, its ill effects be eliminated and the damages be compensated for.\(^\text{315}\)

Under China’s current intellectual property regime, intellectual property infringement may result in various fines or compensation. Under Patent Law (2000) and Regulations on Computer Software Protection (2001), fines up to RMB 50,000 are applicable, and can reach RMB 100,000 under Copyright Law (2001); compensation for violations can reach up to RMB 500,000 under Trademark Law (2001).\(^\text{316}\)

Judicial enforcement of intellectual property rights can also be achieved through criminal prosecutions. Under China’s 1979 Criminal Code, there is only one type of infringement—acts infringing trademark regulation—that is regarded as crime, which may be punished with up to 3 years imprisonment.\(^\text{317}\) Under the current Criminal Law (1997), seven types of intellectual property rights infringement are regarded as crimes and may be punished for up to 7 years imprisonment. These criminal acts are: counterfeiting registered trademarks, selling goods bearing counterfeited registered trademarks, illegally producing and selling representations of registered trademarks, forging another person’s patent, copyright infringement, selling infringing reproductions, and infringing commercial secrets.\(^\text{318}\) The ceiling of 7 years imprisonment is very high if compared with American or

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Canadian Criminal Laws. However, upon China’s WTO entry in 2001, WTO members expressed concerns about the effectiveness of China’s criminal prosecutions of intellectual property rights infringement. The Accession Report states that:

Some members of the Working Party expressed concerns that criminal procedures could not be used effectively to address piracy and counterfeiting. In particular, the monetary thresholds for bringing a criminal action, as currently applied, were very high and seldom met. Those thresholds should be lowered so as to permit effective action that would deter future piracy and counterfeiting.

In response, Chinese administration committed to recommend that the judicial authority make necessary changes to lower the thresholds so as to address this issue. In December 2004, PRC Supreme Court and Supreme Procuratorate jointly issued a judicial interpretation to clarify certain aspects of the Criminal Code dealing with intellectual property rights, and lower the criminal responsibility thresholds. However, China’s enforcement of intellectual property rights still raised concerns and doubts at the first Trade Policy Review (TPR) on China in 2006. In particular, Japan suggested that China “ease the criteria of prosecution and to strengthen penalties against perpetual offenders,” and the EC expressed hope that China could make efforts “to improve penal prosecution in case of piracy.”

The WTO 2006 TPR Report suggests that, although steps have been taken to

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319 For example, copyright infringement may be subject to up to 7 years of imprisonment in China, but only 5 years of imprisonment at the maximum in the U.S. and Canada. See Section 42, Canadian Copyright Act, R.S.C. 1985, c. C-42; U.S. Code, Crimes and Criminal Procedure, 18 USC Sec. 2319. Under the U.S. law, however, second or subsequent offense may lead to a sentence of up to 10 years of imprisonment. Similarly, recidivists are subject to heavier punishment under Chinese law. See Article 65, PRC Criminal Law (1997).


321 Supreme Court and Supreme Procuratorate, Interpretation on Several Issues of Concrete Application of Laws in Handling Criminal Cases of Infringing Intellectual Property (22 December 2004, Fashi 19 [2004]). This judicial interpretation indicates China’s effort to lower the thresholds of crimes against intellectual property rights and to strengthen the protection of intellectual property rights. Under this interpretation, thresholds of four of the seven crimes against intellectual property rights were lowered, including counterfeiting registered trademarks, selling goods bearing counterfeited registered trademarks, illegally producing and selling representations of registered trademarks, and copyright infringement (Arts. 1-3; Art. 5). The interpretation specifies monetary or other thresholds of criminal penalty in detail, which makes the rules very practical, e.g. those using a counterfeit trademark in retail value of RMB 250,000 or more or resulting profit more than RMB 150,000 could be fined and sentenced to 3 to 7 years imprisonment for Crimes of Counterfeiting Registered Trademarks (Art. 1). See also Art. 5, where duplicating or selling duplicate works without authorization in an amount of 5000 or more could be fined and sentenced 3 to 7 years imprisonment (Art. 5). The interpretation also specifies certain acts to be punishable. It affirms that acts of using others’ patent number on one’s own product without authorization, acts to forge or counterfeit others’ patent certificate, patent documents, or patent application, constitute Crimes of Counterfeiting Patents (Art. 10).

ensure better enforcement and enforcement coordination between government agencies, “relatively low fines and other penalties that appear insufficient to deter IPR violations remain among the significant problems to be addressed.”

In April 2007, the Supreme Court and Supreme Procuratorate issued a second judicial interpretation, in which the threshold for criminal charges against piracy was lowered from 1,000 to 500 illegal copies.

### Table 3.2: Enforcement of Intellectual Property Rights, 2001-06

<table>
<thead>
<tr>
<th></th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Patents</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number of disputes</td>
<td>977</td>
<td>1,442</td>
<td>1,517</td>
<td>1,455</td>
<td>1,597</td>
<td>1,270</td>
</tr>
<tr>
<td>of which:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- related to inventions</td>
<td>80</td>
<td>104</td>
<td>..</td>
<td>..</td>
<td>..</td>
<td>..</td>
</tr>
<tr>
<td>- related to utility models</td>
<td>426</td>
<td>622</td>
<td>..</td>
<td>..</td>
<td>..</td>
<td>..</td>
</tr>
<tr>
<td>- related to design patents</td>
<td>471</td>
<td>716</td>
<td>..</td>
<td>..</td>
<td>..</td>
<td>..</td>
</tr>
<tr>
<td>Number concluded</td>
<td>888</td>
<td>1,291</td>
<td>1,237</td>
<td>1,215</td>
<td>..</td>
<td>973</td>
</tr>
<tr>
<td>of which:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- through decisions by local IPOs</td>
<td>223</td>
<td>262</td>
<td>..</td>
<td>..</td>
<td>..</td>
<td>..</td>
</tr>
<tr>
<td>- through intermediation</td>
<td>487</td>
<td>711</td>
<td>..</td>
<td>..</td>
<td>..</td>
<td>..</td>
</tr>
<tr>
<td>- settled by other means or withdrawn</td>
<td>178</td>
<td>318</td>
<td>..</td>
<td>..</td>
<td>..</td>
<td>..</td>
</tr>
<tr>
<td><strong>Copyright</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number of disputes</td>
<td>4,420</td>
<td>6,408</td>
<td>23,013</td>
<td>9,691</td>
<td>9,644</td>
<td>10,599</td>
</tr>
<tr>
<td>Number concluded</td>
<td>4,306</td>
<td>6,107</td>
<td>22,429</td>
<td>..</td>
<td>9,380</td>
<td>10,344</td>
</tr>
<tr>
<td>of which:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- imposition of fine</td>
<td>3,650</td>
<td>5250</td>
<td>21,032</td>
<td>7,986</td>
<td>7,480</td>
<td>8,524</td>
</tr>
<tr>
<td>- intermediation</td>
<td>633</td>
<td>721</td>
<td>1,173</td>
<td>..</td>
<td>..</td>
<td>..</td>
</tr>
<tr>
<td>- cases transferred to judicial agencies</td>
<td>66</td>
<td>136</td>
<td>224</td>
<td>..</td>
<td>366</td>
<td>235</td>
</tr>
<tr>
<td><strong>Trade marks</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number of disputes</td>
<td>41,163</td>
<td>39,105</td>
<td>37,489</td>
<td>51,851</td>
<td>49,412</td>
<td>50,534</td>
</tr>
<tr>
<td>of which:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- trade mark infringements</td>
<td>22,813</td>
<td>..</td>
<td>26,488</td>
<td>40,171</td>
<td>39,107</td>
<td>..</td>
</tr>
<tr>
<td>- other</td>
<td>18,350</td>
<td>..</td>
<td>11,001</td>
<td>11,680</td>
<td>10,305</td>
<td>..</td>
</tr>
<tr>
<td>- cases transferred to judicial agencies</td>
<td>86</td>
<td>59</td>
<td>45</td>
<td>96</td>
<td>236</td>
<td>252</td>
</tr>
<tr>
<td>- value of fine (Y million)</td>
<td>210</td>
<td>214</td>
<td>242</td>
<td>268</td>
<td>342</td>
<td>398</td>
</tr>
<tr>
<td><strong>IPR cases handled by Customs at the border</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- value (US$ million)</td>
<td>..</td>
<td>..</td>
<td>..</td>
<td>1,051</td>
<td>1,210</td>
<td>2,475</td>
</tr>
</tbody>
</table>

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323 2006 TPR China Report, p. xii.
324 Article 1, Interpretation on Several Issues of Concrete Application of Laws in Handling Criminal Cases of Infringing Intellectual Property II (Fashi 6 [2007]), issued jointly by the Supreme Court and Supreme Procuratorate on 5 April 2007. This Interpretation, for the very first time, also allows the infrigee of a criminal offense of intellectual property rights to launch a private prosecution. See Article 5 of the Interpretation II.
325 This table is a combination of the following two tables from WTO documents: Table III.18, Enforcement of intellectual property rights, 2001-04 at 2006 TPR China Report (p. 154); Table III.14, Enforcement of intellectual property rights, 2004-06 at 2008 TPR China Report (p. 106).
Despite the attention paid to them, judicial measures— whether civil litigations or criminal prosecutions— do not play as important a role as administrative actions do in the enforcement of intellectual property rights in China. A salient feature of intellectual property rights protection in China is the heavy reliance on administrative actions (Table 3.2). A large percentage of disputes involving intellectual property rights infringement are handled through administration actions: in the case of trademarks, more than 90% of the disputes are handled through this method.

Among administrative actions, the importance of the *ex officio* actions by Customs authorities at the border is another key feature. To enhance intellectual property rights protection, China’s Customs authorities have been increasingly involved in seizures and investigation of goods infringing intellectual property rights. From 2005 to 2006, the number of cases of alleged IPR infringing imports and exports handled by Customs doubled (Table 3.2). In 2007, 8,348 self-initiated customs actions and another 67 on request customs actions were taken against IPR infringing imports/exports; 330 million pieces of infringing goods (RMB 420 million worth) were investigated and seized through *ex officio* actions, accounting for 99% of the total seizures of the year (97% of the year value). Also, to strengthen IPR border protection, Customs launched a three-month campaign from October 2007 onwards targeting IPR-infringing goods being exported to the EC, Hong Kong, the U.S., and the United Arab Emirates. In this campaign, the “*Dragon Boat Action*,” Customs authorities seized and dealt with 2,411 batches of IPR infringing exports (RMB 94.8 million worth), which presents an increase of 226% (105% increase in value) if compared with the same period of 2006.

Intellectual property enforcement’s heavy dependence on administration can also be seen in China’s efforts to increase public awareness of intellectual property rights protection through a series of government-led campaigns. The following paragraph from 2008 Trade Policy Review (TPR) report by the Secretariat of the WTO TPR Body (TPRB) provides a clear picture:

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… On 30 March 2006, several government agencies including the National Copyright Administration and MOFCOM jointly issued a notice that required computers sold domestically to be loaded with a copyright operating system. Further, in June 2006, the National Copyright Administration launched a three-month campaign to stop the illegal preloading of software onto computers, so that all computers used by the Government and SOEs are loaded with legal software. SIPO has been publishing annual Action Plans on IPR Protection since 2006, to provide guidance on IPR enforcement. By end-August 2006, 50 IPR service centres had been set up all over the country with the hotline “12312.” A Chinese-English bilingual IPR protection government web portal was launched by SIPO in 2006.329

During the 2006 WTO Trade Policy Review, in response to Japan’s request to describe efforts “to promote IPR protection in local areas and to educate local authorities,” China states that:

… [W]e [the Chinese Authority] will push ahead the integration of IPR protection into the government working schedule as a significant issue and into the overall planning on the local economic and social development across the country. The responsibility system and the responsibility assigning system of IPR protection should be implemented, as well as the well-protected supervision and reporting system for IPR protection.330

This statement, in consideration together with the fact that enforcement of intellectual property rights depends heavily on administrative measures, illustrates China’s public-oriented perspective towards intellectual property rights. Intellectual property rights have been taken as socially embedded— as public rights instead of private property rights. Under China’s 1986 GPCL, intellectual property rights as civil rights are independent from other civil rights such as property rights, creditor’s rights, and personal rights. Under China’s Criminal Law, copyright infringement as well as other intellectual property infringements is categorized under Crimes Undermining the Socialist Economic Order instead of Crimes of Property Violation.331 Under the U.S. Criminal Code, however, criminal infringement of a

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329 2008 TPR China Report, p. 107. For the function of IPR service centres, according to Chinese Authority (p. 329):
In 2006, the Chinese Government established comprehensive Service Centers for Intellectual Property Protection (SCIPP) in 50 large and medium-sized cities and launched the nationwide hotline of the number of “12312,” set up a national IPR protection e-platform that facilitates the right owners’ filing, complaining and counseling. By the end of April, 2008, the 50 Centres had received nearly 3500 reports and complaints of various IPR violations and provided counseling services for 120,000 person times.


copyright is categorized under Crimes of Stolen Property together with Transportation of Stolen Vehicles, Sale or Receipt of Stolen Goods, Transportation, Sale, or Receipt of Livestock etc.\textsuperscript{332} This public vs. private perspective contrast between China and the U.S. is consistent with our analysis above.\textsuperscript{333}

Judging from the above discussion, China fulfils its TRIPS compliance obligations through a unique pattern of laws and administration which indicates a public oriented instead of private oriented perspective to intellectual property rights. From the legislative framework, legal institution, and enforcement point of view, China’s TRIPS compliance is not unsatisfactory at all. Upon WTO entry, China’s legislative reconstruction efforts have brought its laws in line with TRIPS, and a comprehensive administration and enforcement institutional framework has since been gradually established. If we compare the Report by the WTO Working Party on China’s accession in 2001, with WTO’s first Trade Policy Review (TPR) Report on China in 2006 and the second TPR report on China in 2008, we can see a clear trace of improvement of the enforcement of intellectual property rights in China. While the 2001 accession report raises significant concerns about China’s legislative inconsistency and institutional insufficiency regarding intellectual property protection, the 2006 TPR report concentrates on China’s enforcement of intellectual property rights.\textsuperscript{334} Compared with that of the 2006 one, the concerns about intellectual property rights enforcement in the WTO 2008 TPR Report have substantially decreased.\textsuperscript{335} The 2008 Report

\textsuperscript{332} 18 USC Sec. 2319.
\textsuperscript{333} See mainly supra discussion 3.3.2 & 3.4.1.
\textsuperscript{334} The 2001 China Accession Report (WT/ACC/CHN/49) dedicates almost one-third of the report to addressing the “Trade-Related Intellectual Property Regime” issue, which covers issues of “substantive standards of protection,” “measures to control abuse of intellectual property rights,” and “enforcement.” Under the “enforcement” section, the Report covers issues of “civil judicial procedures and remedies,” “provisional measures,” “administrative procedures and remedies,” “special border measures,” and “criminal procedures.”
\textsuperscript{335} The 2006 TPR China Report devotes a substantial part of the report (from para. 272 on page 145 to para. 313 on page 157) to intellectual property rights, in which from paragraph 302 on page 153 onwards the enforcement issue is addressed. The Report states that (para. 313): Despite these efforts, it appears that enforcement remains weak and infringement of intellectual property rights widespread. In addition to inadequate deterrents provided through the prosecution system, it is also claimed that “local protectionism” is a major cause of IPR infringement. Local protectionism may be the result of discretionary actions that give preference to local traders and producers, and of local corruption, which may provide local manufacturers or traders of counterfeit goods advance notice of police raids; there is also concern that regional administrative agencies lack sufficient knowledge and training in IPR enforcement. The overall discussion of the 2008 TPR China Report on intellectual property rights focuses on seeking clarification of some specific provisions and policy. The Report devotes a much more limited space (from para.
recognizes that “[t]he enforcement of IPR protection has been strengthened, although questions remain about the sufficiency of fines and criminal penalties to deter IPR violations.” These remaining questions to some extent are due to the increasing cases of infringement (Table 3.2), and the Chinese authority has argued that the increase in the number of cases dealt by judicial agencies simply illustrates the increasing effectiveness of the protection mechanisms for intellectual property rights. In summary, China’s enforcement of intellectual property rights has achieved impressive movement towards international standards in the past decade. However, there are still some salient characteristics of China’s enforcement that may reflect a different conception of intellectual property rights.

3.4.3.2 “Legitimate Non-uniform Compliance”

While China’s enforcement of intellectual property rights has grown by leaps and bounds within the less than one decade’s time in TRIPS, something to bear in mind is that the enforcement progress comes through an administration-centered and public-oriented path. This administration-centered enforcement framework that deepens government’s engagement is substantially different from the private right oriented perspective from the West. Actually, concerns about this administration-centered and public-oriented approach have been raised – though indirectly – during the last two trade policy reviews. In the 2006 Trade Policy Review, the EC expressed its concern about how the Chinese authorities can “ensure that Chinese companies can freely [without any interference from the government] and in good faith enter

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218 on page 102 to para. 244 on page 107) to intellectual property rights, which from paragraph 241 on page 105 onwards addresses the enforcement issue. The Report suggests that (para. 241):

Despite a detailed legal framework on IPR protection, some of China’s trading partners, as well as some domestic businesses, consider that its IPR enforcement remains weak. The authorities state, however, that China has established a relatively complete legal framework on IPR protection, and has made great achievements and progress on IPR enforcement. Realizing the importance of IPR protection in facilitating innovation in the economy, China has shifted the focus from formulating legislation to enhancing law enforcement.

336 2008 TPR China Report, p. xii.
337 2006 China Review Minutes, pp. 96-97. During the Trade Policy Review, in response to Japanese authority’s concern about an increasing number of cases being transferred to the courts, the Chinese authority states that:

The effective implementation of the above measures was a main cause for the increase in the number of IPR infringing cases, especially piracy cases, accepted and handled by the judicial organs... The fact that the number of cases accepted by the judicial organs increased has fully proven that the IPR protection in China is effective. It can be foreseen that as the IPR protection mechanism in China continues to improve, all IPR infringing actions will be brought to justice. The rights of the owners of IPR will be effective protected.
into negotiation with European patent holders of technologies that are used in China in the framework of open standards." The issue was raised again by the EC in the 2008 Trade Policy Review. A second example comes from the debates between China and other WTO members regarding the issue of IPR protection and standardization. Arguing from a public-oriented perspective, China suggests that “the improper combinations of IPRs and standards will hinder the dissemination and application of new technologies and constitutes a barrier to international trade,” and are “detrimental to the world economic development.” While Mexico raised concerns about this argument, the EC disagreed and suggested that “the incentive to develop new products and processes on which to base future standardization will be lost if the standard-making process is carried out without due regard for IPR.” These examples indicate a potential of compliance variation even if the enforcement of intellectual property rights is based on the same rules and similar institutional framework.

We are thus led to the concept of “legitimate non-uniform compliance”: recognizing a model of international compliance that fulfils international obligations yet retains local characteristics through compliance variations. At its very foundation, the concept of “Legitimate Non-uniform Compliance” reflects the tension between sovereign independence and international interdependence. This tension is an unavoidable “classic theme” of a paradox that, “in order to exercise their functions and to remain as independent as possible, states are forced to cooperate due to the unavoidable reality of interdependence and globalization.” By accessing to the WTO, Members are obligated to ensure the conformity of its laws, regulations, and administrative procedures with their WTO obligations yet to the extent that they have fulfilled those obligations, still retain the right to comply in a non-uniform way: “legitimate non-uniform compliance.”

Legitimate non-uniform compliance, as revealed in the case of China’s WTO engagement, has a firm foundation on theory and practice of international law. First of all,

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341 See id.
342 The use of the concept “legitimate non-uniform compliance” should be credited to Dr. Pitman Potter, who suggested the term.
344 Under Article 16.4 of the WTO Agreement and Article 24.12 of GATT 1994, Members have the obligation to ensure their domestic conformity with WTO norms.
WTO obligations are normal treaty obligations which require compliance in good faith but not uniform compliance. To some extent, WTO obligations of domestic conformity under Article 16.4 of WTO Agreement and Article 24.12 of GATT 1994 are nothing completely new, but rather something usually reflected in treaties, derivating from the treaty principle of “Pacta sunt servanda.” Under the UN Charter and 1969 Vienna Treaty Convention, contracting parties of any international treaties have the same domestic conformity obligations.\textsuperscript{345} Treaty implementation in good faith in no way implies absolutely uniform compliance. Moreover, under international treaty law, there is a possibility of modifying multilateral treaties between certain of the contracting parties only, which opens up a possibility of more compliance flexibilities.\textsuperscript{346} Therefore, it has been argued that WTO obligations are not absolute rather have the nature of a contract that allows room for flexibility between members.\textsuperscript{347}

Secondly, voluntary accession to the WTO does not undermine the sovereign independence of the Members, nor does it at all preclude room for compliance flexibility of the Members. Countries retain the rights of safeguard actions under special circumstances to protect domestic industries, and can withdraw from the WTO anytime they like.\textsuperscript{348} Countries, rather than the DSU, have the right to define their essential security interests.\textsuperscript{349} Even under the WTO Dispute Settlement mechanism, a mechanism commonly categorized as the strictest constraint on Members, countries still retain certain flexibility. The “Standard of Review” mechanism under WTO Antidumping Agreement is a good example. According to the Agreement, when investigating the nullification or impairment of benefit under the Antidumping Agreement or the impediment of achieving Agreement’s objectives, or the facts are in dispute:

\[\ldots\text{in its assessment of the facts of the matter, the [WTO dispute settlement] panel shall determine whether the authorities’ establishment of the facts was proper and}\]

\textsuperscript{345} See Article 2.2 of UN Charter, Article 26 and 27 of the 1969 Vienna Convention on the Law of Treaties.
\textsuperscript{346} See Article 41 of the 1969 Vienna Convention on the Law of Treaties, “Agreements to modify multilateral treaties between certain of the parties only.”
\textsuperscript{347} WEITIAN ZHAO, The Legal System of the World Trade Organization (Shimaozuzhi de Falu Zhida, Jilin People’s Press, 2000), 214.
\textsuperscript{348} See Article 20 “General Exceptions” and Article 21 “Security Exceptions” under GATT 1994, and Article 15 “Withdrawal” in WTO Agreement.
whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned:

[T]he panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities’ measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.\(^{350}\)

This “standard of review” clearly indicates that WTO Dispute Settlement Body (DSB) should pay deference to Members’ flexibility in the specifics of their WTO compliance, which clearly endorses the concept of “legitimate non-uniform compliance.” Not only the antidumping dispute settlement mechanism in particular, but also the WTO dispute settlement mechanism in general provides standard-of-review-like limitation on the DSB thus confers deference to Members in compliance. As Jackson suggests, Article 3.2 of the WTO DSU Agreement, which states that “[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements,” has the similar “standard of review” effect.\(^{351}\) In the area of intellectual property rights, Article 1.1 and Article 41.5 under TRIPS have the same implication.\(^{352}\) Similarly, the GATS Agreement states that:

The provisions of subparagraph (a) [requiring remedies of judicial, arbitral, or administrative review to be made available to any affected suppliers] shall not be construed to require a Member to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system.\(^{353}\)

All these standard of review or similar mechanisms under WTO framework constrain the DSB into a “self-contained” body, and therefore clearly recognize the flexibility of compliance of the Members. The standard of review related mechanism endorses the notion of “legitimate non-uniform compliance.”

\(^{350}\) Article 17.6, WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement).


\(^{352}\) See discussion above 3.4.2.

\(^{353}\) Article 6.2, GATS.
Thirdly and most importantly, WTO obligations are obligations of result instead of obligations of means, which again supports the notion of legitimate non-uniform compliance. Under the WTO DSU framework, the right to determine whether certain Members violate WTO obligations belongs only to the DSB. DSB’s exclusive right to determine any “violation of obligations or other nullification or impairment of benefits under” or “impediment to the attainment of any objective of” the WTO Agreements has been confirmed in Panel practice. Under DSU Agreement, the circumstances under which a Member can resort to the dispute settlement mechanism are result oriented, i.e. in which any benefits accruing to a Member “directly or indirectly under the covered agreements are being impaired by measures taken by another Member.” GATT 1994 details that:

If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of
(a) the failure of another contracting party to carry out its obligations under this Agreement, or
(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
(c) the existence of any other situation,
the contracting party may … make written representations or proposals to the other contracting party or parties which it considers to be concerned.

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354 Article 23.1 and Article 23.2(a) of the DSU Agreement state that:
When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.
In such cases, Members shall not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding.

355 Panel Report, United States — Sections 301-310 of the Trade Act 1974, WT/DS152/R (22 December 1999) [hereinafter, Section 301 Panel Report], para. 7.38. The Panel suggests that “[i]t is for the WTO through the DSU process – not for an individual WTO Member – to determine that a WTO inconsistency has occurred.”
356 Article 3.3, DSU Agreement. Emphasis mine.
357 Article 23, GATT 1994. Emphasis mine. Article 12 of the Tokyo Round Subsidies Code, the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT, provides that (emphasis mine):
1. Whenever a signatory has reason to believe that an export subsidy is being granted or maintained by another signatory in a manner inconsistent with the provisions of this Agreement, such signatory may request consultations with such other signatory.
2. A request for consultations under paragraph 1 above shall include a statement of available evidence with regard to the existence and nature of the subsidy in question.
This clearly indicates that WTO obligations are result oriented obligations instead of means oriented obligations. This reading is also reflected in a well-established GATT jurisprudence that a discretionary (but not mandatory) legislation even if is inconsistent with GATT obligations will not be found in violation of GATT/WTO obligations before it is actually implemented. In *EEC—Regulation on Imports of Parts and Components*, Japan challenges the EEC’s measures taken under its anti-circumvention provision imposing tax on products made in the EEC by companies related to Japanese companies. The measures taken by the EEC were found in violation of the EEC’s obligations under GATT. However, when Japan suggests requesting that the EEC not only revoke the measures taken under the anti-circumvention provision but also to withdraw the provision itself, the Panel states:

"[T]he mere existence of the anti-circumvention provision in the EEC’s anti-dumping Regulation is not inconsistent with the EEC’s obligations under the General Agreement. Although it would, from the perspective of the overall objectives of the General Agreement, be desirable if the EEC were to withdraw the anti-circumvention provision, the EEC would meet its obligations under the General Agreement if it were to cease to apply the provision in respect of contracting parties." 358

This has become a well-established GATT jurisprudence confirmed by many other GATT panel reports. 359 In *US — Anti-Dumping Act of 1916*, this jurisprudence was further confirmed by the WTO Appellate Body. 360 E. U. Petersmann recognizes this jurisprudence and explains that “[t]he reason for this interpretation is the fact that the trade laws of most countries apply also to non-member countries of GATT and the WTO, and authorize governments to deviate from their GATT obligations e.g. in relations with third countries.” 361


The Panel noted that the anti-circumvention provision does not mandate the imposition of duties or other measures by the EEC Commission and Council; it merely authorizes the Commission and the Council to take certain actions. Under the provisions of the General Agreement which Japan claims to have been violated by the EEC contracting parties are to avoid certain measures; but these provisions do not establish the obligation to avoid legislation under which the executive authorities may possibly impose such measures.


This jurisprudence indicates that GATT is concerned with the result of violations rather than the possibility of violation, which further opens up the possibility of compliance variation and supports the notion of “legitimate non-uniform compliance.”

What we have been trying to do in this dissertation is to examine a form of compliance variation as shown in China’s case of TRIPS compliance rather than defend non-compliance of TRIPS or violation of intellectual property rights. Having revealed China’s administration-centred and public-oriented, distinct yet legitimate non-uniform compliance, in the next Chapter we turn to the examination of the driving forces and cultural imperatives behind this form of compliance.
4 IP PERCEPTIONS SURVEY: THE DYNAMICS IN REALITY

4.1 THE LEGAL SYSTEM AS SOCIALLY DERIVED CULTURAL PRODUCT

The examination of imperial China’s protection of intellectual creations, the evolving recognition of individual intellectual endeavors, and the aggressive administrative enforcement infrastructure in the last Chapter reveals clearly the public-oriented cultural trait of China’s intellectual property regime. As a matter of fact, it has long been recognized that different legal systems are deeply embedded in the cultures from which the legal systems evolve. Montesquieu argues that the laws of each nation “should be adapted in such a manner to the people for whom they are framed that it should be a great chance if those of one nation suit another.”[^362] For Montesquieu, different social as well as geo-environmental conditions prescribe the bounds of different systems and cultures. For example, Montesquieu indicates that those people who don’t cultivate the land enjoy great liberty as they are not fixed.[^363] Not only political systems, but also religions are products of the natural selection process in response to distinctive social geo-environmental conditions. Montesquieu suggests that this is the reason why Islamism was established in the Mid-East but not in Europe, and Christianity is maintained in Europe but is almost impossible to be established in China.[^364]

The legal system in China is also the socially derived product of the distinctive Chinese culture. Legal cultures as socially derived products shape different legal systems in different countries, and collectivistic or individualistic cultures will have different preferences for the norms of tradition and religion on the one hand and formal procedures and guidelines on the other.[^365] Many contemporary legal researchers, such as Stanley Lubman, William Alford, and others, have revealed China’s distinctive legal tradition in perceiving individual rights through their collective embedment and believing private interests to be inextricably embedded in public good.[^366] The distinctive perspective of perceiving private rights from a public oriented social context has been the product of the

[^363] See id., at 277.
[^364] See id., at 252, 302.
natural selection in response to the social and geo-environmental conditions surrounding the Chinese.

China’s public oriented cultural imperative that distinguishes China’s legal regime from the private rights oriented liberal legal tradition has long been discussed by sociology and cultural psychology research. In his examination of China’s traditional social structure, FEI Xiaotong argues that the Chinese agriculture-based tradition, in which the people are attached to cultivating the land, is a non-floating culture from the perspective of human-environment relationships, and results in groups being isolated into family-like rural units in terms of the relationships among peoples. According to Fei, this fosters a collectivist-oriented and Gemeinschaft-like social structure, where social relations between individuals are based on kinship or geo-proximity, and individuals are valued through their collective embedment and contribution. This agriculture-based tradition necessitates substantial cooperation with neighbors to carry out economic activities in an effective way. Harmony, social order and collective orientation are central to this cultural tradition. Social scientists since Marx have observed that economic and social arrangements such as these are generally associated with “collectivist” or “interdependent” social orientations as distinguished from the “individualistic” or “independent” social orientations that are characteristic of societies with economies based on hunting, fishing, trading, or the modern market economy. Cultural psychology research in last two decades also suggests that, in contrast to the West, Chinese tend to perceive the individual through interrelations and social embedment.

Deriving from this public oriented cultural imperative, the Chinese Confucian tradition shows a quite different perspective from the West in taking individual intellectual


368 FEI, 3.

369 See id., at 5-6.

370 NISBETT, et al., Culture and systems of thought: holistic versus analytic cognition, 303.

371 NISBETT, The Geography of Thought.
endeavors as private rights. Firstly, private interest is believed to be inextricably embedded in public good. According to Confucius, the highest end of governance—i.e. the dominance of ren or benevolence—will be achieved when everyone “return[s] to the observance of the rites through overcoming the self.”\textsuperscript{372} A noble person is required to uphold the highest moral standards through self-cultivation. This meant that a noble person would at all times be expected to do away with selfish desires and to serve the public interest.\textsuperscript{373} Even human-relatedness must be an integral part of one’s quest for self-realization.\textsuperscript{374} Harmony and social welfare were to be achieved by each person engaging in a rigorous regimen of learning and self-examination, namely, incessant self-cultivation.\textsuperscript{375} Secondly, Confucianism is against indulgence in material pleasures and considers material profit as something dangerous which is just for the “small man.”\textsuperscript{376} To return to the observance of the rites, wealth and rank are not desirable or should even be abandoned.\textsuperscript{377} The sovereign of a state should have distribution of justice rather than material abundance as his goal, for where there is even distribution there is no such thing as poverty.\textsuperscript{378} Building on this Confucian tradition, to recognize individual intellectual endeavors as private rights is possible in China only when the private rights will be beneficial to the whole society at large.

Chinese tradition not only takes the private rights of intellectual endeavors as socially embedded, but also historically embedded, constituting a part of a historically continuous whole. In general, Confucianism has a holistic and continuous view of history and tradition. As Confucius says, a noble person should be able to acquire new knowledge by reviewing what he has learned before.\textsuperscript{379} This means there is nothing completely new at any time in our society, and any innovation must be based on exploitation of our old knowledge. An

\textsuperscript{373} Young-Bae Song, Crisis of Cultural Identity in East Asia: on the Meaning of Confucian Ethics in the Age of Globalization, 12 Asian Philosophy 111 (2002).
\textsuperscript{374} W. Tu, Humanity and Self-Cultivation: Essays in Confucian Thought (Cheng & Tsui Company, 1998), 19.
\textsuperscript{375} Song, 119.
\textsuperscript{376} According to the Analects, if one is guided by profit in one’s actions, one will incur much ill will (Confucius, 31.). The gentleman is versed in what is moral, while the small man is versed in what is profitable (Confucius, 33.).
\textsuperscript{377} According to the Analects, the gentleman devotes his mind to attaining the way and not to securing food…the gentleman worries about the Way, not about poverty (Confucius, 157.). Wealth and rank attained through immoral means have as much to do with me as passing clouds (Confucius, 61.).
\textsuperscript{378} Confucius, 161.
\textsuperscript{379} Confucius, The Book of Rites: The Doctrine of the Mean.
innovator must at the same time be a copier of the past. This describes to us a clear collective oriented intellectual property perspective which recognizes individual intellectual endeavors as something inextricably embedded in the social as well as historical context.

How this public-oriented cultural imperative shapes the protection of intellectual property rights in China differently than the private-oriented liberal rights tradition does in the West remains as a puzzle. This chapter explores the puzzle from a comparative framework through a survey of the social perceptions of intellectual property protection both in China and in Canada.

4.2 AN OVERVIEW: HYPOTHESIS AND METHODS

4.2.1 Hypothesis: Cultural Imperatives, Legal Orientations, and IPR Protection

Building on the general understanding that legal systems are socially derived cultural products, this questionnaire examines intellectual property protection by reference to the dynamic interplay between legal practice and the local legal culture from which the legal practice evolves. We expect that social perceptions of intellectual property protection in China must have been shaped by the local public-oriented legal culture. Thus, we expect that cultural differences between China and Canada will result in different perspectives on intellectual property protection.

To reveal the dynamics between the cultural imperatives and perceptions of intellectual property protection, this questionnaire focused on three dimensions: (1) Cultural Imperatives, (2) Legal Orientations, and (3) Intellectual Property Protection. The research hypothesis expects that the public-oriented cultural imperative in China leads to high legal relativism and to a public interest oriented perspective on private rights, which predicts and explains high tolerance towards piracy. Participants in Canada from an individualistic culture, however, are expected to show low legal relativism and a private interest oriented perspective on intellectual property rights, including low tolerance towards piracy.

The following chart reflects the hypothetical dynamics between cultural imperatives, legal orientations, and protection of intellectual property that we expect to be found in the questionnaire data.
Chart 4.1: Cultural Imperatives, Legal Orientations, and IPR Protection

<table>
<thead>
<tr>
<th>Cultural Imperatives</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Public-Oriented Culture (China)</strong></td>
</tr>
<tr>
<td>- High in Collectivism</td>
</tr>
<tr>
<td>- High in Social Interdependence</td>
</tr>
<tr>
<td><strong>Private-Oriented Culture (Canada)</strong></td>
</tr>
<tr>
<td>- Low in Collectivism</td>
</tr>
<tr>
<td>- Low in Social Interdependence</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Legal Orientations</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Low Rule of Law</strong></td>
</tr>
<tr>
<td><strong>High Legal Relativism</strong></td>
</tr>
<tr>
<td><strong>High Perceived Overlap between Past &amp; Present, New &amp; Old Knowledge, and Private &amp; Public Interests</strong></td>
</tr>
<tr>
<td><strong>High Rule of Law</strong></td>
</tr>
<tr>
<td><strong>Low Legal Relativism</strong></td>
</tr>
<tr>
<td><strong>Low Perceived Overlap between Past &amp; Present, New &amp; Old Knowledge, and Private &amp; Public Interests</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>IPR Protection</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>High Private Property for Social Good</strong></td>
</tr>
<tr>
<td><strong>High Piracy Tolerance</strong></td>
</tr>
<tr>
<td><strong>Low Private Property for Social Good</strong></td>
</tr>
<tr>
<td><strong>Low Piracy Tolerance</strong></td>
</tr>
</tbody>
</table>

In general, we expect that a collectivistic culture will tend to be public-oriented and perceive individual rights through their contributions to public good more than an individualistic culture does. For cultural imperatives, this questionnaire tested participants’ levels of collectivism/individualism, and their perception of various issues of social interdependence. These issues of social interdependence cover relationships between self and other, past and present, private interest and public utility, and old knowledge and new innovation. We expect that these four types of interdependence reflect different aspects of public orientation. Among these four, the relation between self and other has been a common interpretation of one type of interdependence/collectivism in cultural psychology.\(^{380}\) As we have revealed above that there is always a tension between private and public in intellectual property protection, the questionnaire thus also test participants’ responses to the tension between private interest and public utility. For the final two types, while the relation between past and present can allow us to test how a participant’s view of tradition and the past affects

his or her perspective on intellectual property, the relation between old knowledge and new innovation tests the similar influence of ontological views of creation.381

As for other legal orientations, this questionnaire tested participants’ individual belief in Rule of Law, legal relativism, and private property protection. We expect that individuals from a more collectivistic culture should be low in Rule of Law but high in legal relativism, as collectivistic cultures tend to attribute less importance to general formal rules and procedures, and view the certainty of laws to be dependent on the situation.382 The variation in legal orientations across different cultural environments—either collectivistic or individualistic culture—further affect legal practice in a particular legal system.383 Through the survey study, we will then reveal how cultural imperatives through legal orientations shape legal practice differently in China and in Canada.

To find out participants’ perceptions of intellectual property protection, this questionnaire tested participants’ tolerance of various pirating practices, such as peer to peer software sharing, free music downloads, or pirating to enhance entertainment or technology accessibility for the public or the developing world. We expect participants from a public oriented culture and who perceive private property more from its contribution to social good will have higher tolerance towards piracy. Participants from a private oriented culture and who endorse private property rights more should have low tolerance towards piracy.

4.2.2 Research Methods: Method and Participants Overview

The questionnaire was originally written in English and translated to Chinese. The back-translation method was used to ensure accurate translation, with the initial translation from English to Chinese carried out by the author and backtranslation from Chinese to

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381 For the influence of the view of tradition and past, see ALFORD, 19, 20. He argues that at the heart of traditional Chinese society’s view of intellectual property is “the dominant Confucian vision of the nature of civilization and of the constitutive role played therein by a shared and still vital past.” In this vision, the past serves “dual functions” through which on the hand individual moral development was attained, and on the other hand power legitimacy was born and guidance of social structure was constituted, which justifies “broad access to the common heritage” as well as “demanding more controlled access.” See also WILLIAM P. ALFORD, Making the World Safe for What? Intellectual Property Rights, Human Rights and Foreign Economic Policy in the Post-European Cold War World, 29 International Law and Politics (1996-1997). For the ontological views of the relationship between new creation and old knowledge, see Drahos’ discussion of an inventor as a creator as well as borrower, DRAHOS, 61.

382 FEI; HOFSTEDE, Cultures and Organizations: Software of the Mind.

383 BIERBRAUER.
English carried out by four graduate students fluent in English and Chinese. The questionnaire collected demographic information (including gender and legal education background) and included several measures of cultural imperatives, general legal orientations, and attitudes towards private property protection, described in detail below.

Participants were recruited on university campuses and all participation was voluntary and anonymous. The survey in China was conducted both in Shanghai and Beijing, where voluntary participants were asked in-person to fill out the questionnaire on paper. After the questionnaires were completed, data entry and double-checking of the data entry were done separately by different persons to ensure the accuracy of the data. The survey in Canada was conducted through an online survey and voluntary participants were asked to fill out the questionnaire online.

Research subjects in both China and Canada were university students. Considering that legal education might influence people’s legal orientations and further change their understanding of legal practice, the survey focused on both law students and non-law students. In total, 302 valid questionnaires were collected, of which 205 were collected in China and 97 were collected in Canada. Among them, there were 168 law students and 134 non-law students from various disciplines. In the following analyses, the effect of gender, legal background, and country were examined simultaneously for their effect on the measures of interest.

<table>
<thead>
<tr>
<th>Country</th>
<th>Legal Background</th>
<th>Gender</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Female</td>
<td>Male</td>
</tr>
<tr>
<td>China</td>
<td>No legal background</td>
<td>63</td>
<td>48</td>
</tr>
<tr>
<td></td>
<td>Legal background</td>
<td>34</td>
<td>59</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>97</td>
<td>107</td>
</tr>
<tr>
<td>Canada</td>
<td>No legal background</td>
<td>14</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td>Legal background</td>
<td>39</td>
<td>36</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>53</td>
<td>44</td>
</tr>
</tbody>
</table>
The questionnaire survey altogether collected 302 valid questionnaires, of which 205 were collected in China and the other 97 were collected in Canada. Among them, there were 168 law students and 134 non-law students from various disciplines.

4.3 **MEASURES, RELIABILITIES & MEAN DIFFERENCES**

Building on the above mentioned hypotheses, this questionnaire used the following scales to examine the dynamics between cultural imperatives, legal orientations, and intellectual property protection. As shown in the above chart, we examined sets of questions addressing each level of how culture influences perceptions of IPR protection. We first examine our samples to show that they are different on collectivism and social interdependence; to examine cultural differences in Legal Orientations, we assessed participants’ endorsement of Rule of Law, Legal Relativism, and to what extent Past and Present, Private Interest and Public Utility, and Old Knowledge and New Innovation overlap; and to address questions of perception of IPR protection, we used a Piracy Tolerance scale and a scale designed to test the belief that private property’s purpose is to promote the social good (Private Property for Social Good).

4.3.1 **Cultural Imperatives**

4.3.1.1 Collectivism/Individualism Scale

The questionnaire used Yamaguchi’s Collectivism/Individualism scale to test participants’ levels of collectivism. Participants were asked to rate their agreement with each of the following statements on the scale from 1 (“Disagree Strongly”) to 7 (“Agree Strongly”). Participant’s Collectivism scores were calculated by taking the average of the following items, with “(R)” indicating items that were reverse scored:

- (R) I don’t sacrifice self-interest for my group.
- (R) I don’t think it necessary to act as fellow group members would prefer.

\[ \text{Note that the survey collected 205 questionnaires altogether in China but the Table here indicates the sum of males and females is 204 in China. This is because that there was one participant in China did not identify his or her gender in the questionnaire.} \]

\[ \text{S. YAMAGUCHI, Collectivism among the Japanese: a perspective from the self, in Individualism and Collectivism: Theory, Method, and Applications (U. Kim, et al. eds., 1994), 188.} \]
I stick with my group even through difficulties.
I maintain harmony in my group.
(R) I don’t change my opinion in conformity with those of the majority.
(R) I don’t support my group when they are wrong.
I respect decisions made by my group.
I remain in my group if they need me, even though dissatisfied with them.
(R) I assert my opposition when I disagree strongly with the members of my group.
I make an effort to avoid disagreements with my group members.

The reliability of the scale was adequate in the Canadian data (α = .68), though rather low in the Chinese data (α = .53). A univariate ANOVA controlling for gender and legal background showed that Chinese participants were higher on this Collectivism scale than Canadian participants, F (1,293), = 12.92, p < .001. Gender and legal background did not influence collectivism scores.

This result indicated that our Chinese sample was more collectivistic than the Canadian sample, allowing us to further explore the implications of this cultural difference for legal orientations and IPR protection.

4.3.1.2 Overlap between Self and Other

In addition to the Collectivism scale, a common measure of interdependent self-concept (the Inclusion of Other in the Self Scale) was also used to show that our Chinese participants perceived a higher overlap between their own self and others than our Canadian participants. Participants were asked to choose the most suitable one of seven overlapping Venn-like diagrams that represents their understanding of the relationship between the Self and Others, from entirely separated (1) to highly overlapping (7), as illustrated below:

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386 Because this is a previously published and validated scale, we did not change the scale despite the low reliability among our Chinese sample. However, it should be noted that similar country-level differences appear with a subset of items that have better scale reliability among our participants. Repeated deletion of the items with lowest interitem correlations to create a scale with the highest reliability among both Chinese and Canadian data resulted in a 4-item scale, containing items 2, 3, 6, and 7 of the scale. Alpha levels for this scale were α = .72 among Chinese and α = .67 among Canadians. An ANOVA controlling for gender and legal background found that Chinese were also marginally higher on this Collectivism subscale than Canadians, F (1,293) = 3.33, p = .07.
An ANOVA examining the effect of country, gender, and legal background on the Self/Other Overlap item showed a significant effect of country, $F(1,293) = 14.97, p < .001$, with Chinese participants scoring higher than Canadian participants, indicating that Chinese participants view their self-concept to be more overlapping with others than Canadian participants. Like the Collectivism scale, this suggests that our samples of Chinese participants are embedded in a socially interdependent world view.

<table>
<thead>
<tr>
<th>Country</th>
<th>Collectivism</th>
<th>Self /Other Overlap</th>
</tr>
</thead>
<tbody>
<tr>
<td>China</td>
<td>4.48**</td>
<td>4.48**</td>
</tr>
<tr>
<td></td>
<td>.53</td>
<td>n/a</td>
</tr>
<tr>
<td>Canada</td>
<td>4.13**</td>
<td>3.73**</td>
</tr>
<tr>
<td></td>
<td>.68</td>
<td>n/a</td>
</tr>
</tbody>
</table>

** = Means differ significantly by Country (p<.001), controlling for Gender and Legal Background

### 4.3.2 Legal Orientations

#### 4.3.2.1 Legal Interdependence

The degree to which one believes that new inventions and knowledge are connected to the past may increase one’s perception of property rights as socially embedded. Using a similar set of Venn diagrams, participants were asked to choose the most suitable one of seven overlapping Venn-like diagrams that represents their understanding of the relationship between Past and Present, between Private Interest and Public Utility, and between Old
Knowledge and New Innovation in a given invention, as illustrated below (each category was asked in a separate question):

Diagram 4.2: Legal Orientation Interdependence

An ANOVA examining the effect of country, gender, and legal background on Past/Present Overlap showed a significant interaction between country and gender on this item, F(1, 293) = 6.97, p = .009. Within-gender ANOVAs controlling for legal background showed that among males, country did not influence item scores, but among females, Canadian females endorsed this item more than Chinese females, F(1, 93) = 19.86, p < .001.

An ANOVA examining the effect of country, gender, and legal background on Private Interests and Public Utility Overlap showed the predicted significant effect of country, F(1, 292) = 4.22, p = .04, indicating that Chinese participants endorsed this item more than Canadian participants.

However, as for the overlap between Old Knowledge and New Innovation, an ANOVA examining the effect of country, gender, and legal background showed a surprising significant effect of country, F(1, 292) = 3.99, p = .05, indicating that Canadian participants endorsed this item more than Chinese participants.

Chinese were expected to endorse all three of these items more than Canadians, but this hypothesis was only corroborated for the overlap between Private Interests and Public
Utility, which Chinese participants rated as more highly overlapping than Canadian participants. The relationship of these items to other legal orientations and perceptions of IP rights will be discussed more below (under Further Discussion).

4.3.2.2 Legal Relativism Scale

A new Legal Relativism scale was constructed, based on a Moral Relativism scale developed by Forsyth, to examine participants’ perception of legal relativism: the degree to which legal principles validly vary across societies and situations.\(^{387}\) The questionnaire asked the participants to rate their agreement with the following statements:

- There are no legal principles that are so important that they should be obeyed in every circumstance.
- What is legitimate varies from one situation and society to another.
- Laws from different countries cannot be compared as to “rightness”.
- Universal justice can never be possible since what is just or unjust is up to the individual.
- Moral standards are simply personal rules that indicate how a person should behave, and are not to be applied in making judgments of others.
- Justice considerations in international relations are so complex that countries should be allowed to formulate their own codes.
- Rigid interpretation of laws that prevents certain types of actions could stand in the way of better human relations and adjustment.
- Moral standards should be seen as being individualistic; what one person considers to be moral may be judged to be immoral by another person.
- No general rule concerning just behavior can be formulated; whether a behavior is judged to be just or unjust depends upon the circumstances surrounding the action.

This scale showed good reliability in both the Chinese and Canadian data (\(\alpha = .76\) overall; \(.75\) for China, \(.77\) for Canada). As expected, Chinese participants were higher on legal relativism than Canadian participants. The survey data showed that the mean of legal relativism in China (\(M=4.74\)) was significantly higher than the mean of legal relativism in Canada (\(M=4.37\)), \(t(300) = 3.36, p = .001\). This difference indicates that our Chinese participants considered legal norms and principles to be circumstance sensitive and situationally determined.

However, an ANOVA examining the effect of country, gender, and legal background on Legal Relativism scores showed that legal background had a significant effect, \(F(1,293) =\)

5.58, p = .02, indicating that legal education generally encourages less Legal Relativism. This effect was mitigated by a marginally significant (p = .09) interaction between legal background and country, an interaction that increases in significance when gender is removed from the ANOVA (to the p= .04 level). Though this interaction is not strongly statistically significant, the uneven ratios of participants with and without legal education in China vs. Canada may have artificially reduced its statistical significance. Separate within-country tests indicate that in China, legal education has no effect on Legal Relativism scores, but in Canada, law students had lower Legal Relativism scores than those non-law students, F(1,93) = 5.44, p = .02. This suggests that while legal education in Canada encourages a drop in Legal Relativism (or that those who choose to study law tend to be lower in Legal Relativism), legal education in China has no such effect.

Graph 4.1: Legal Relativism Scale

4.3.2.3 Rule of Law Scale

This scale was developed on a set of Rule of Law characteristics as described by Tai and was meant to capture participants’ endorsement of various characteristics of Rule of
Participants responded to the below statements in a 1 (“Strongly Disagree”) to 7 (“Strongly Agree”) scale. Though the 10-item scale had acceptable reliability in the Chinese sample ($\alpha = .70$), reliability was relatively low among the Canadian sample ($\alpha = .58$). This lack of reliability appears to be due to a near ceiling effect and low variability in the Canadian sample (by Levene’s test, the Canadian sample had significantly lower variance than the Chinese sample, $F(1, 288.85) = 8.49, p = .004$). An ANOVA examining the effect of country, gender, and legal background on the 10-item Rule of Law scale showed no effect of any of these variables on Rule of Law scale scores. Both China and Canada had very high mean scores ($M = 6.04$ and 5.93 respectively).

- Laws should apply to general classes but not to specific persons or entities.
- Laws should be open so that people who are to be affected are able to find out what it is.
- Laws should remain stable and clear.
- Governmental powers should be based on and delimited by law.
- Government officials should not be granted arbitrary powers.
- Everyone is equal before the law.
- The enforcement of laws should be impartial.
- The judiciary should remain independent and free from interferences by the executive, legislature, or any other authority.
- Everyone should be entitled adequate access to justice.
- Every criminal suspect is presumed to be innocent before being proved guilty and should be entitled a fair trial.

4.3.3 IP Right Protection

4.3.3.1 Piracy Tolerance Scale (PTS)

A Piracy Tolerance Scale (PTS) was developed to measure participants’ perception of piracy, the typical infringement of intellectual property rights. The participants were asked to rate their agreement (from 1 = “Strongly Disagree” to 7 = “Strongly Agree”) with the following statements:

- Pirating gives people who cannot afford legal copies access to entertainment or the convenience of new technology (20e).
- Pirating actually helps to spread new ideas and technology (20f).
- Pirating helps those countries that are behind in development by giving them more access to new technology (20g).
- Peer to peer music or movie sharing through the internet should be tolerated (20h).

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Free music downloads through the internet do no harm to society (20i).

The scale showed acceptable reliability in both samples (α = .74 among Chinese, α = .82 among Canadians). An ANOVA examining the effect of country, gender, and legal background on this 5-item Piracy Tolerance Scale showed no effect of any of these variables on scale scores, though there is a trend towards higher agreement among Chinese.

4.3.3.2 Protection of Private Property as Social Good

To assess participants’ perceptions of the importance of private property protection for our society, the questionnaire asked the participants to rate their agreement (from 1 = “strongly disagree” to 7 = “strongly agree) with the following statements of how protection of private property leads to and is limited by social good (13a/13d/13g/13h):

- Protection of private property contributes to social prosperity (13a).
- Protection of private property is important to efficient market operation (13d).
- Protection of private property should be limited by considerations of public interests such as concerns of national security or public health (13g).
- The degree of protection of private property should be based solidly on its impact on public welfare and social development (13h).

An ANOVA examining the effect of country, gender, and legal background on Protection of Private Property as Social Good scale showed a marginally significant effect of country, F(1, 293) = 3.59, p = .06, indicating that Chinese participants endorsed this scale more than Canadian participants. However, as described below, this result is not strongly interpretable due to the low reliability of the scale among Canadian participants.

As Table 4.3 below shows, in the Chinese data these four items are highly positively correlated with each other. Accordingly, this Private Property for Social Good Scale (PPSGS) has acceptable reliability within the Chinese sample (α = .71). This result suggests that our Chinese participants found it easy and coherent to associate protection of private property rights with social good, and to view social good as a proper limit of private property protection. This confirms our finding above of China’s public-oriented rights perspective in
both the examination of the evolution of “employee invention” and the study of the intellectual property protection of Olympic Logos in China.\textsuperscript{389}

However, the Canadian data indicates otherwise. Although 13a and 13d are still positively correlated (at $r = .53$), these items are not positively correlated with 13g and 13h, as they are in China. In Canada, as can be seen in the below Table 4.3, while 13g and 13h are also positively correlated with each other, they are both negatively correlated with 13a and 13d. This results in very low reliability of these four items in the Canadian sample, suggesting that these four items do not constitute a scale among the Canadian sample ($\alpha = .13$). Though 13a and 13d both refer to positive “side-effects” of private property on the social good, 13g and 13h describe private property rights as being properly limited by and fully based on the social good. This significant contrast suggests that Canadians who have positive attitudes about the results of private rights still do not believe that private rights should be restricted if they do not contribute to social welfare. While to Chinese, support for private rights is based fully on their benefits for the public, for Canadians, support for protection of private rights does not entail restriction by nor is based on the public interest. This further confirms the contrasting perspectives between China and Canada in above Olympic Logo cases. Although both recognize Olympic Logos as private rights, while China protects them through a strong governmental mechanism indicating a clear public interest oriented perspective, Canada only arms private rights with strong private teeth.\textsuperscript{390}

\begin{center}
\textbf{Table 4.3: PPSGS Correlations (China and Canada)}
\end{center}

\begin{center}
\begin{tabular}{|c|c|c|c|}
\hline
\hline
 & Pearson Corr. (Canada) & .528(**) & -.140 & -.264(**) \\
\hline
 & Pearson Corr. (Canada) & & -.175 & -.220(*) \\
\hline
 & Pearson Corr. (Canada) & & & .533(**) \\
\hline
\end{tabular}
\end{center}

\textsuperscript{**} Correlation is significant at the 0.01 level (2-tailed).
\textsuperscript{*} Correlation is significant at the 0.05 level (2-tailed).

\textsuperscript{389} See supra discussion 3.2 & 3.3.
\textsuperscript{390} See supra discussion 3.3.
Table 4.4: Summary of Scales and Items

<table>
<thead>
<tr>
<th>Country</th>
<th>Mean</th>
<th>Past/Present Overlap</th>
<th>New/Old Knowledge Overlap</th>
<th>Private/Public Interests Overlap</th>
<th>LRS: Legal Relativism Scale</th>
<th>Rule of Law</th>
<th>PTS: Piracy Tolerance Scale</th>
<th>PPSGS (13a, d, g, &amp; h)</th>
</tr>
</thead>
<tbody>
<tr>
<td>China</td>
<td>4.56</td>
<td>5.42*</td>
<td>4.81*</td>
<td>4.74</td>
<td>6.04</td>
<td>5.04</td>
<td>5.36</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Alpha n/a</td>
<td>n/a</td>
<td>n/a</td>
<td>0.75</td>
<td>0.70</td>
<td>0.74</td>
<td>0.71</td>
</tr>
<tr>
<td>Canada</td>
<td>5.14</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Alpha n/a</td>
<td>n/a</td>
<td>n/a</td>
<td>0.77</td>
<td>0.58</td>
<td>0.84</td>
<td>0.13</td>
</tr>
</tbody>
</table>

* = Means significantly differ by Country, after controlling for Gender and Legal Education (p ≤ .05)

4.4 FURTHER DISCUSSION: CULTURE, LEGAL ORIENTATIONS, AND IPRs

4.4.1 The Dynamics between Private Property, Legal Relativism, and IP Protection

4.4.1.1 Different Perspectives on Protection of Private Property

A further look at the cultural differences in correlations between the scales indicates some significant implications for our research.

Table 4.5: Scale Correlations (China and Canada)

<table>
<thead>
<tr>
<th></th>
<th>Rule of Law</th>
<th>LRS: Legal Relativism Scale</th>
<th>PTS: Piracy Tolerance Scale</th>
<th>PPSGS</th>
<th>Positive Private Property (13a, d, g, &amp; h)</th>
<th>Limit Private Property (13g, h)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Past/Present Overlap</td>
<td>China</td>
<td>.020</td>
<td>.043</td>
<td>-.014</td>
<td>.145(∗)</td>
<td>.113</td>
</tr>
<tr>
<td></td>
<td>Canada</td>
<td>-.031</td>
<td>.150</td>
<td>.144</td>
<td>.085</td>
<td>.097</td>
</tr>
<tr>
<td>New/Old Knowledge</td>
<td>China</td>
<td>.222(∗∗)</td>
<td>-.040</td>
<td>.124</td>
<td>.314(∗∗)</td>
<td>.323(∗∗)</td>
</tr>
<tr>
<td>Overlap</td>
<td>Canada</td>
<td>.010</td>
<td>.103</td>
<td>.232(∗)</td>
<td>.037</td>
<td>-.062</td>
</tr>
<tr>
<td>Private/Public</td>
<td>China</td>
<td>.135</td>
<td>-.003</td>
<td>.068</td>
<td>.229(∗∗)</td>
<td>.186(∗∗)</td>
</tr>
<tr>
<td>Interests Overlap</td>
<td>Canada</td>
<td>.061</td>
<td>.103</td>
<td>.335(∗∗)</td>
<td>.204(∗)</td>
<td>.111</td>
</tr>
<tr>
<td>Rule of Law</td>
<td>China</td>
<td>1</td>
<td>.098</td>
<td>.237(∗∗)</td>
<td>.525(∗∗)</td>
<td>.484(∗∗)</td>
</tr>
<tr>
<td></td>
<td>Canada</td>
<td>-.066</td>
<td>.103</td>
<td>-.116</td>
<td>.113</td>
<td>.181</td>
</tr>
<tr>
<td>LRS</td>
<td>China</td>
<td>1</td>
<td>.216(∗∗)</td>
<td>.257(∗∗)</td>
<td>.263(∗∗)</td>
<td>.167(∗)</td>
</tr>
<tr>
<td></td>
<td>Canada</td>
<td>.222(∗)</td>
<td>-.041</td>
<td>-.194</td>
<td>.452(∗∗)</td>
<td></td>
</tr>
<tr>
<td>PTS</td>
<td>China</td>
<td>1</td>
<td>.231(∗∗)</td>
<td>.179(∗)</td>
<td>.202(∗∗)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Canada</td>
<td>.338(∗∗)</td>
<td>-.038</td>
<td>.452(∗∗)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>PPSGS: Private</td>
<td>China</td>
<td>1</td>
<td>.809(∗∗)</td>
<td>.845(∗∗)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Property for Social</td>
<td>Canada</td>
<td></td>
<td>.615(∗∗)</td>
<td>.594(∗∗)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Good Scale (13a, d, g, &amp; h)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Positive Private</td>
<td>China</td>
<td>1</td>
<td>.369(∗∗)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Property (13a, d)</td>
<td>Canada</td>
<td></td>
<td>-.269(∗∗)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

** Correlation is significant at the 0.01 level (2-tailed).
* Correlation is significant at the 0.05 level (2-tailed).
As we revealed above, the fact that items 13a, 13d, 13g, and 13h work together nicely among Chinese indicates that participants in China perceived private property protection from its social contributions, such as social prosperity (13a) and efficient market operation (13d). Private property protection is also thought by the participants in China to be subject to constraints of public interests (13g) and should be based on its impact on public welfare and social development (13h). Among participants in Canada, these items are not positively correlated and putting these items together indicates a bad reliability ($\alpha = .13$).

The fact that the PPSG scale works in China but not in Canada leads us further to look at the different perception of private property rights between China and Canada. In the questionnaire, we tested participants’ agreement with positive attitude towards private property with the following questions (Positive Private Property, 13a and 13d):

- Protection of private property contributes to social prosperity (13a).
- Protection of private is important to efficient market operation (13d).

We also tested participants’ agreement to limiting private property for social consideration (Limit Private Property, 13g and 13h):

- Pirating helps those countries that are behind in development by giving them more access to new technology (20g).
- Peer to peer music or movie sharing through the internet should be tolerated (20h).

These four items were combined to create the PPSG scale. The survey data shows that within Canada, positive attitudes towards private property (Positive Private Property, 13a and 13d) are negatively correlated with limiting private property ($r = -.269$) and not correlated with piracy tolerance (PTS). This result indicates that for the Canadian participants, the more they think of private property positively in terms of its effect on social prosperity and market operation, the less they would agree with limitations on private property, but it has no effect on piracy tolerance. However, the survey data indicates that for Chinese participants, positive attitudes towards private property (Positive Private Property, 13a and 13d) are positively correlated with limiting private property for public interests and social welfare (Limit Private Property, 13g and 13h; $r = .37$, $p < .01$) and positively correlated with piracy tolerance (PTS, $r = .18$, $p < .05$). This means that Chinese participants
who positively perceive private property assume that private property is limited by social welfare and public interests. Thus in China, positive attitudes towards property rights are in fact associated with tolerance towards piracy, where piracy might help public knowledge accessibility and diffusion of technology. The reason that the PPSG (private property for social good) scale works in China but not in Canada is simply because only Chinese participants perceive private property from their relation with social welfare and public interests; Canadians do not assume that private property is naturally limited by public interests.

4.4.1.2 Legal Relativism and Private Property Protection

As we mentioned above, the Legal Relativism Scale (LRS) in this survey shows a very good reliability (α = .76 overall; .75 for China, .77 for Canada). The data also shows that the mean of legal relativism among participants in China (4.74) is higher than that of participants in Canada (4.37), largely because of low Legal Relativism among participants with legal education in Canada.

The correlations above show that the LRS scale is positively correlated with PTS among both participants in China and participants in Canada. More importantly, the LRS scale is also positively correlated with the PPSGS scale only among participants in China but not those in Canada. This indicates that the more that our Chinese participants perceive private property from the perspective of social good, the less certitude they attribute to the legal regime. This is explainable as a socially oriented perspective on private rights, which increases the complexity of considerations on the purpose of private property and thus at the same time increases uncertainty as well. Therefore, this reveals that the relational perspective, instead of an individualistic or self-sufficient perspective, affects the private rights perspective among the participants in China.

The positive correlations between PPSGS and question 15 (overlap between past and present), 16 (overlap between private interest and public utility), and 17 (overlap between old knowledge and new innovation) among participants in China also indicate this. The survey data indicates that Question 15, 16 and 17 are all highly positively correlated with each other (significant at the 0.01 level) among participants in China not among participants in Canada. Also, Question 15 (significant at the p < 0.01 level), 16 (significant at the p < 0.05
level), and 17 (significant at the p < 0.05 level) are all positively correlated with PPSGS (Private Property for Society Good Scale) among participants in China but, but only Question 16 correlates with PPSGS among participants in Canada.

The fact that the PPSGS is positively correlated with LRS (legal relativism scale) and questions 15, 16, and 17 among participants in China indicates that the more connectivity they see between past and present, public utility and private interest, and between old knowledge and new innovation, the more they perceive private property from a public perspective. Furthermore, the more connections get into play, the more complexly they perceive the relation between private property and public interest, and therefore the more legally relativist they will be.

4.4.2 Perception Dynamics: Interdependence, Private Rights, and Certainty of Law

Among participants in China, perceiving the protection of private property for social good has significantly contributed to the higher tolerance toward piracy. Also for participants in China, high agreement with the positive effects of private property rights can coexist with high sympathy with piracy. On the contrary, participants in Canada do not share the perception of protection of private property for social good, and being positive towards private property does not increase tolerance towards piracy.

For participants in China, the data also indicates that the more they see the connectivity between social relations, the more they perceive private property rights from a social context. The high complexity of perceptions of legal interdependence has also contributed to high legal relativism among participants in China. For participants in Canada however, people’s perception of private property is relatively self-sufficient and not affected by perceptions of social relations, and the complexity of legal interdependence does not contribute to legal relativism as much as it does among participants in China.

In this survey study, the differences between Chinese and Canadian participants shape and explain their different attitudes towards intellectual property protection. Among the Chinese participants in this study, perceiving private rights from its embedded social context not only contributes to higher sympathy towards piracy, but also takes them further to legal relativism which challenges the certitude of the international intellectual property regime. The survey study also exposes to us to more perspectives on the complexity of intellectual
property rights instead of perceiving intellectual property rights through a black-or-white or a yes-or-no clear-cut limit. This further implies that successful implementation of international intellectual property norms needs to take into account the local cultural imperatives and ignorance of the local culture may result in implementation failures.
5 TRIPS’ LEGITIMACY DEFICIT AND THE MYTH OF MODERN LAW

Our critical examination in Chapter 2 suggests that the classical idea of preserving private property for the defense of the autonomous self is distorted when we apply Locke and Hegel’s property theories to intellectual property. Since ideas or knowledge constitute an inseparable part of the self, taking ideas or knowledge as private property is a circular construction that creates self-alienation, as it makes self-realization depend on the self. In order to defeat the danger of self-alienation, even from the moment of its formation private property is looking for complete alienation. However, this becomes difficult under the contemporary intellectual property regime because of the common practice of licensing. Licensing as incomplete alienation not only makes the return of the selfhood from property attachment to the author/inventor impossible, but also renders incomplete the self-realization of the alienee through acquisition. The self thus remains restless and the public is unsettled as well. The self-others or private-public contention reveals the fundamental paradox of the private rights oriented contemporary intellectual property philosophy.

This intrinsic private-public dynamics of intellectual property of course is not unique to China, but rather something universal as we revealed above. For example, the “intellectual property bargain” underlying the U.S. Federal framework for intellectual property law, a tradeoff between “private incentives and social benefits,” reflects this private-public dynamics. However, as we discussed above, China’s clear public oriented

391 A version of a substantial part of this chapter (5.1-5.3) has been published. WENWEI GUAN, Development Deficit and Modern Law’s Myth of Origin, Global Jurist, Vol. 8: Iss. 1 (Advances), Article 2 (2008). Available at: http://www.bepress.com/gj/vol8/iss1/art2. Article included with permission from the publisher, Berkeley Electronic Press, ©2008.
392 See supra discussion in Chapter 2. See for example DUTFIELD, 29; HARRISON & THEEUWES, 143. The private-public dynamics is commonly categorized as an inherent tension in protecting intellectual property. See also SUNDARA RAJAN, 165. In her examination of the conflict between copyright and free expression, Sundara Rajan recognizes that copyright as a “hybrid sphere of law” that combines “private and public-law concepts, individual and social interests, and commercial and cultural dimensions.”
U.S. patent and copyright laws define limited monopoly rights granted to creators of certain classes of “works and inventions.” In this country, these monopoly rights are not viewed as “natural” or “inherent” rights of creators: rather, they are granted by the government in order to promote the public interest and are designed within a framework involving an economic tradeoff between private incentives and social benefits.
perspective in response to the intrinsic private-public dynamics distinguishes China from other countries. In fact, how the public rights oriented China could integrate with the private rights oriented TRIPS regime presents us with a serious theoretical puzzle. This chapter first examines TRIPS’ influence on developing countries and China, then further explores the theoretical implications of China’s TRIPS compliance for contemporary jurisprudence.

5.1 TRIPS AND THE DEVELOPMENT DEFICIT: THE CULT OF KNOWLEDGE AND PROGRESS

5.1.1 TRIPS’ Negative Consequences for Developing Countries

To examine the problematic intellectual property theory in practice, we are led to the question of what TRIPS really means in the world trading system, in particular to developing countries. TRIPS, the WTO’s intellectual property regime, was born together with the WTO’s inauguration in 1995. The potential negative consequences of the TRIPS regime on the development of emerging market economies have been a prevailing concern of international society for many years. Some research indicates that the Uruguay Round negotiation did not pay enough attention to development, and the TRIPS Agreement is costly to developing countries.\(^{394}\) In 1999, the UN Economic and Social Council’s statement to WTO third Ministerial Conference (Seattle, 1999) expressed the UN’s concerns about the consequence of free trade liberalization. According to the Statement, the UNDP Human Development Report 1999 “signals a strong warning against the negative consequences” of the TRIPS Agreement, “particularly on food security, indigenous knowledge, bio-safety and access to health care…”\(^ {395}\) The continuing opposition of “the developing countries and the failure of the developed countries to address the concerns of these countries” finally led to the breakup of the Seattle Ministerial Meeting.\(^ {396}\) Even the still-ongoing Doha Round’s emphasis on development has not yet been realized into actual gains for the developing countries, and it still remains important for developing countries to be adept at using multilateral negotiation and bargaining effectively.\(^ {397}\)

\(^{394}\) NIGEL GRIMWADE, *The GATT, the Doha Round and Developing Countries*, in *The WTO and Developing Countries* (Homi Katrak & Roger Strange eds., 2004), 16-23.


\(^{396}\) GRIMWADE, at 23-5.

\(^{397}\) See id., at 36.
dissatisfaction with the TRIPS regime is one of the key reasons for the deadlock of the Doha negotiation, which makes the examination of the TRIPS regime a perfect cut-in to elaborate on the law and development deficit in the WTO.

The TRIPS regime is particularly controversial when it is examined in the context of North-South development discourse. An independent study carried out by the British Commission on Intellectual Property Rights reveals a striking picture of the interrelation between intellectual property protection and people in developing countries. In its examination of intellectual property and development, the report reveals that “the globalisation of IP protection will result in very substantial additional net transfers” from developing countries (as net technology importers) to developed countries, and “[t]he benefits to developing countries from IP protection would have to come from an offsetting dynamic stimulus to trade, the development of technology, investment, and growth.”

Unlike the situation in developed countries, “there is much less evidence from developing countries indicating that IPR systems are a key stimulus for innovation,” rather “the evidence on trade, foreign investment, and growth suggests IP protection will have little impact,” and the benefits of intellectual property protection will unlikely outweigh the costs in the near future.

According to this research, among others, institutional capacity and international architecture are the two most prominent issues. For institutional capacity, the report indicates the constraint of human resources and finance confronting the developing countries. The report points out that for developed countries the intellectual property regimes evolved along with laws promoting competition, but developing countries have relatively weak or ineffective legal frameworks regulating anti-competitive practices. As for the international architecture of intellectual property, the report argues that developing countries have not always fully utilized the flexibilities available to them under TRIPS, and that the dates by which developing and least developed countries are required to adopt the TRIPS protection

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398 The Commission on Intellectual Property Rights (CIPR), was an independent committee set up by the British government to examine how intellectual property rights might work better for the poor and developing countries. The Commission started on May 2001 and ended on September 2002 upon the completion of its final report. The CIPR final report and other background papers are available online at CIPR permanent website: <http://www.iprcommission.org/home.html> (accessed 20 October 2008).
400 See id., at 4.
401 See id., at 17.
standard are “arbitrary” and will “incur significant costs” for them. The report concludes that “[a]ctive participation by developing countries in discussions of the future of the IP system is essential to ensure both the legitimacy of standard setting and its appropriateness and relevance to nations at very different levels of development.”

Similarly, an empirical study of over 70 developing and least developed countries on their TRIPS implementation reveals that although nearly all those countries are fully aware of the flexibility provided to developing countries under TRIPS, only a few of them appear to have taken all possible advantages. Central to this problem is the institutional capacity issue. A study by Leesti and Pengelly indicates that two important issues—insufficient intellectual expertise and low awareness of the importance of the intellectual property regime—are common for developing countries. The most prominent challenges to developing countries’ institutional capacities that TRIPS presents range from the capacity for policy and legislation development, the capacity for participation in international rule-making, administration capacity, and the capacity for enforcement and regulation.

This institutional capacity impotence further makes it impossible for developing countries to fully express themselves in international standard-setting. According to Drahos, while pre-TRIPS standard-setting and spread of the intellectual property notion to developing countries was simply “the outcome of processes of empire-building and colonization,” TRIPS negotiation’s efficiency as well as legitimacy is just as problematic since it does not meet the minimal condition of democratic bargaining. Moreover, the post-TRIPS international intellectual property standard-setting has witnessed a dominant use of bilateral instead of multilateral trade negotiations which the US or EU have used to “intervene in a

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402 See id., at 19. The date required to adopt the TRIPS protection standard for the least developed countries is 2006 but 2016 for pharmaceutical protection.
403 See id., at 19.
404 Phil Thorpe, Study on the Implementation of the TRIPS Agreement by Developing Countries, CIPR Background Paper, at http://www.iprcommission.org/. A striking example in the study shows that although according to the TRIPS Agreement and 2001 Doha Declaration least developed countries are allowed to defer patents for pharmaceutical protection until at least January 2016, all but three of the 30 least developed countries in Africa are already providing this kind of protection.
405 Mart Leesti & Tom Pengelly, Institutional Issues for Developing Countries in Intellectual Property Policymaking, Administration & Enforcement, CIPR Background Paper.
406 See id., at 24-36.
407 Peter Drahos, Developing Countries and International Intellectual Property Standard-setting, CIPR Background Paper. For democratic bargaining, Drahos means a negotiation that meets the minimal condition of: full representation of all relevant interests, full information for all negotiators, and no-domination among negotiating parties. See id., at 10-14.
detailed way in the regulation of a developing country’s economy.” According to Drahos, developing countries are “encircled in the IP standard-setting process” through which minimum standards set by TRIPS continue to be raised bilaterally, and moreover, “the global IP ratchet will continue to be worked by the US and EU in their economic interests… [with] only minimal consideration being given to the development interests of developing countries.”

With no input into international intellectual property standard-setting, developing countries simply become the followers of developed countries. The consent from the developing countries that constitutes the legitimacy of the TRIPS regime becomes merely something pre-given and the TRIPS regime bears its own legitimacy. TRIPS is simply indifferent towards development concerns.

5.1.2 TRIPS and the “Tech-Knowledgization” of the Development Deficit

Their own institutional capacity barriers and the international standard-setting architecture prevent the full participation of developing countries in the construction of the international intellectual property regime. As a matter of fact, the “technologization” of knowledge, of which TRIPS is the key mechanism, is the driving force of the development deficit.

The contemporary development paradigm that emerged right after the Second World War can be further traced back to the French and English revolutions, when the idea of progression was first formulated. Research shows that development is not a natural process but rather a construction developed from the notion of the perfection of progress from the

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408 See id., at 16-8. Drahos argues that the post-TRIPS negotiation is a “ratcheting process.” He argues that bilateral negotiation is part of “a ratcheting process” driven by the US and the EU “that is seeing intellectual property norms globalise at a remarkable rate”, by which minimum standards set up by multilateral agreement were brought to a higher standard through subsequent bilateral or multilateral agreement, a endless “use being made of this global IP ratchet.” See id., at 21-2.
409 See id., at 29.
410 As a concept of social programming, development is often traced back to Truman’s reference to a “fair deal” in his 1949 State of the Union address, in which he proposed “a program of development based on the concepts of democratic fair dealing” to benefit the lives of those people in the “underdeveloped areas” of the world. See ARTURO ESCOBAR, Encountering Development: the Making and Unmaking of the Third World (Princeton University Press, 1995) 3; RUTH E. GORDON & JON H. SYLVESTER, Deconstructing Development, 22 Wisconsin International Law Journal 9-10 (2004).
Enlightenment.\textsuperscript{411} The French and English revolutions, in a historical period of the emergence of industrial capitalism and modern economy, were the cradle of the contemporary development paradigm.\textsuperscript{412} In the Enlightenment and with the transition to capitalism from feudalism, the advances of the productive forces facilitated, for the first time in history, people’s imagination of “progress.”\textsuperscript{413} Moreover, the idea of progression was forged in “evolutionary terms” which has been deeply intertwined with the “belief in linear progress, absolute truths,” social planning and knowledge standardization.\textsuperscript{414} Starting from this linear notion of progression, history becomes an uphill movement from the savage to the civilized with an intention of its own. Differences between human societies then become “differences in their level of development.”\textsuperscript{415} From the way we categorize differences between societies as developing and developed, we found the logic of the perfection of progress that categorizes different ways of production as fair and unfair in the WTO framework, and categorizes different technologies as advanced and backward in the TRIPS framework. The core idea of the contemporary development paradigm, the notion of progression, was born together with the Enlightenment.

Furthermore, science/knowledge and development/progress are twins in the era of Enlightenment. There has been much research showing the intimate relationships between science, law and development. In their research on the law and development crisis, Trubek and Galanter argue that there is an “aspiration to science” among law and development scholars, a key belief in law and development studies as a neutral science, systematic research of which can allow us to discover a universal theory of the Third World’s legal

\textsuperscript{413} EDELMAN & HAUGERUD, 50.
\textsuperscript{414} TUCKER, at 4. See also, M. SARUP & T. RAJA, Identity, Culture and the Postmodern World (University of Georgia Press, 1996), 94. Sarup and Raja suggest:

Modernity is usually perceived as positivistic, technocratic and rationalistic. It has been identified with the belief in linear progress, absolute truths, the rational planning of ideal social orders, and the standardization of knowledge and its production. The modernity project came into focus during the eighteenth century, and was an extraordinary intellectual effort on the part of Enlightenment thinkers to develop objective science, universal morality and autonomous art. Enlightenment thinkers embraced the idea of progress; they believed in justice and in the possibility of happiness of human beings.

reality.\textsuperscript{416} When this belief is subjected to strong attack on epistemological, practical and political grounds, the break with liberal legalism creates the self-estrangement of the law and development scholars.\textsuperscript{417} Escobar argues that the development discourse as a regime of representation is an ideological construction process operating through the problematization of the Third World and through the management of poverty. During the problematization process, science and technology played an important role in justifying the development discourse.\textsuperscript{418} Advances and intellectual property divide the world into developed and developing countries. Therefore, Escobar argues that “development is the last and failed attempt to complete the Enlightenment” in the Third World.\textsuperscript{419} Similarly, Carty traces the legal theory crisis of the vacuity of the development rights concept to the alienation of the self since the Enlightenment.\textsuperscript{420} Alienation has its roots in a philosophy of physics from the early Renaissance, a Cartesian reduction of all human experience with the world and other human beings into an experience between man and himself, and into logical relations between symbols.\textsuperscript{421} Tucker also points out that development is not a natural process but rather a construction rooted in the notion of the perfection of progress from the Enlightenment.\textsuperscript{422}

If we further trace the roots of the self-sufficient private rights philosophy of the contemporary intellectual property regime, we will also reach the Enlightenment era, the origins of modern jurisprudence, and a time when the cult of knowledge was built. The belief that protection of intellectual property rights can “promote the Progress of Science and useful Arts” and is “conducive to social and economic welfare” to some extent can be traced back to


\textsuperscript{417} See id.

\textsuperscript{418} ESCOBAR, 35. According to Escobar, “[s]cience and technology had been the markers of civilization par excellence since the nineteenth century, when machines became the index of civilization, ‘the measure of men.’ … Technology, it was believed, would not only amplify material progress, it would also confer upon it a sense of direction and significance. … technology was theorized as a sort of moral force that would operate by creating an ethics of innovation, yield, and result.” ESCOBAR, 36.

\textsuperscript{419} ESCOBAR, 221.

\textsuperscript{420} The term “alienation” used here in a philosophical sense refers to the isolation of the self from others. It is different from the term we used above when we discussed Locke and Hegel’s property theories, in which “alienation” refers to a “conveyance” of property.


\textsuperscript{422} TUCKER, at 4-6.
our belief in knowledge promoted in the Enlightenment.\textsuperscript{423} Enlightenment as a project “liberating human beings from fear and installing them as masters” was meant to “dispel myths, to overthrow fantasy with knowledge.”\textsuperscript{424} This belief is clearly illustrated in the statement from Bacon, the father of modern experimental science, that knowledge is power that knows no limit.\textsuperscript{425}

However, this faith in knowledge has fallen into something mysterious in its extreme and modern law has become mythology, as “the Enlightenment appears to have failed in its own terms.”\textsuperscript{426} The Enlightenment has failed in defeating myths and become totalitarian, and in fact “the myths which fell victim to the Enlightenment were themselves its products.”\textsuperscript{427} Rousseau’s social contract theory, as the jurisprudential move of the Enlightenment project which marks the beginning of modern law, borrows wholesale from mediaeval theology.\textsuperscript{428} It is in this sense that modern law is claimed to be a mythology which can be traced back to the Enlightenment.\textsuperscript{429} All this brings us to question the faith in knowledge and the authenticity of the Author.\textsuperscript{430}

Institutional capacity and international standard-setting architecture barriers frame developing countries in the follower position in the contemporary intellectual property regime. The model from the developed is then confirmed as the leading example in the game of progression, the point of origin for TRIPS’ constant return. The TRIPS regime then is the driving force rather than the cure of the development deficit of the WTO.

5.2 THE SELF-SUFFICIENT ONTOLOGICAL MYTH AND THE AUTHOR FUNCTION

5.2.1 TRIPS for China: Economic Opportunity or Ontological Challenge

The discussion in the section above indicates that TRIPS regime produces negative consequences for developing countries. China is not an exception. Often, there is an

\textsuperscript{423} U.S. Const. art. 1, and TRIPS art. 7.
\textsuperscript{425} See id., at 2.
\textsuperscript{427} HORKHEIMER & ADORNO, 5.
\textsuperscript{428} CARTY, Introduction: Post-Modern Law, 15.
\textsuperscript{429} PETER FITZPATRICK, The Mythology of Modern Law (Routledge, 1992).
\textsuperscript{430} See infra discussion 5.2.3, “Author Function and the Enlightenment’s Obsession with Origin.”
assumption of the linkage between protection of technological innovation and economic development.\textsuperscript{431} Not only does the analysis of the TRIPS regime’s impact on development prove otherwise, but so also does China’s case contradict with this “common sense.” The analysis below indicates that TRIPS brings more of an ontological challenge than an economic opportunity to China.

As the discussion above revealed, TRIPS recognizes intellectual property rights as private rights and is firmly grounded on Western traditional property theories, Lockean and Hegelian property theory in particular.\textsuperscript{432} Lockean labor or Hegelian free will therefore as the limit or boundary demarcates the private from the public and creates the autonomous self. They however also make private rights self-sufficient and indifferent to public concerns, and therefore bear their own legitimization. This self-sufficient private rights approach implies a latent ontological assumption that the creation or invention is a highly individual behavior and without social context, and that “[i]ndividuals are whole and they extend themselves in various ways to make up parts of social life.”\textsuperscript{433} In this regard, the contemporary intellectual property regime indulges itself deeply into modern law’s self-sufficient ontology.

However, as has been indicated by many researchers, Chinese culture reveals a clear collective or public orientation. In Chinese tradition, private interest is believed to be inextricably embedded in public good. Legal research as well as sociology and cultural psychology research has revealed China’s distinctive way of perceiving individual rights through their collective embedment.\textsuperscript{434} Our examinations above of imperial China’s intellectual creation protection, modern China’s evolving recognition of individual intellectual endeavors and the aggressive administration enforcement mechanism indicate China’s public interest oriented perspective to private rights.\textsuperscript{435} Our questionnaire survey of the social perception of intellectual property protection in China further suggests that China’s distinctive rights approach is deeply embedded in its millennium old collective oriented

\textsuperscript{432} See supra discussion 2.1.1.
\textsuperscript{433} DRAHOS, 61.
\textsuperscript{434} See supra discussion 4.1.
\textsuperscript{435} See supra discussion 3.1 and 3.2.
cultural imperative. The self-sufficient TRIPS regime therefore presents a very intensive ontological challenge to Chinese social development.

Ignorance of this ontological contention has failed the attempt of transplanting intellectual property norms into China in history. Alford’s study reveals the failure of the attempts of the West to introduce intellectual property law into China at the turn of the 20th century. He argues that the failure was because such laws “presumed a legal structure, and indeed, a legal consciousness, that did not then exist in China and most likely, could not have flourished there at that time.” Even mainland China’s efforts in creating the intellectual property legal framework, particularly in the ’80s, were just squaring circles in vain or an “unwitting reprise” of the failure of the early 20th century, in which China sought to “articulate a ‘socialist legality with Chinese characteristics’ that strove to adapt foreign legality to Chinese circumstances.” Butterton’s examination of the dynamics of China’s intellectual property protection shows that only when law reform is coupled with changes in social norms, in particular intellectual property norms, and driven by social, economic or other reform measures, can law reform lead to better protection of intellectual property. Deep in these conflicts, we find the ontological challenge that TRIPS presents to China’s social development.

Moreover, within the contemporary global context, the negotiation process of the international intellectual property regime has become a “ratcheting process” driven by dominant use of bilateral negotiation by which minimum standards set up by multilateral agreement are then brought to a higher standard via bilateral negotiation. This has presented a serious challenge to China’s development. Alford’s examination of China’s protection of intellectual property through Sino-American policy framework provides a striking example. He argues that U.S. policy “has displayed a disturbing indifference both to the legacy of the Chinese past and the implications of its current political, legal, and

436 See supra discussion Chapter 4.
437 ALFORD, To Steal a Book Is an Elegant Offense, 45, 53.
438 See id., at 70.
440 See supra discussion 5.1.2.
economic circumstances.” Alford reveals that, on the one hand, U.S. policy shows Washington’s unfamiliarity with China’s millennia-long imperial history which has long been pro knowledge dissemination and with China’s social attitude towards the past and creativity that is against the notion of intellectual property rights. On the other hand, U.S. policy shows Washington’s indifference to current political, legal, and economic circumstances within China. This policy deficiency of U.S. intellectual property policy toward China is because U.S. government has not taken greater account of its own “historic indifference to the intellectual property rights of others,” nor considered the fuller range of opinion in the U.S., instead being driven by a “small but significant subset of American industry” and electoral politics. This study indicates the negative impacts of the international intellectual property regime through bilateral negotiation channels on China’s social development, ranging from administration, human rights, judicial independence, and national long-term vital interests. The influence of international intellectual property norms has generated disturbing effects on China’s social development.

Deep within the difficulties of China’s adoption of the Western intellectual property norms is an ontological dilemma. Hoping that TRIPS compliance will contribute to social development in China is to ask China to achieve collective social welfare through a self-sufficient private approach. William Alford provides us with an in-depth account of the challenge of the international intellectual property regime to social development in China. Alford reveals that the contemporary intellectual property regime constitutes a deep contrast to China’s “political culture” developed from the dominant Confucian tradition which views the past as the source as well as the constraint of contemporary progress and values knowledge and ideas as common heritage. While the international intellectual property regime regards a creation or innovation as a highly individual behavior, China’s “political culture” is against taking a product of intellectual endeavor as private property. Alford’s

441 ALFORD, Making the World Safe for What? Intellectual Property Rights, Human Rights and Foreign Economic Policy in the Post-European Cold War World, 140. See also supra discussion 3.4.2 about the “ironic dilemma” resulting from the U.S.-China dynamics in intellectual property protection.
442 See id., at 146-150. Alford argues that a fundamental flaw of the US policy lies in its failure to take account of the “larger national interest” of the U.S. and consequently runs the risk of heightening mutual distrust between the U.S. and China.
443 See e.g. Lubman’s analysis of the fundamental differences between Western and Chinese legal traditions between “the concepts of rights” and “the use of formal legal institutions to vindicate rights,” or between individualistic vs. contextual notions of rights indicates this deep rooted ontological difference between the West and China. LUBMAN, 12, 19.
analysis here not only reveals China’s cultural dynamics which explains the absence of the concept of a private rights oriented intellectual property rights throughout China’s history, but also brings us into the core of the ontological confrontation between the self-sufficient private rights of the *self* and the collective concern of social development of *others*.

Therefore, more than just an institutional capacity and international structural problem, China faces an ontological dilemma: how can China promote its collective social development welfare and at the same time endorse the TRIPS regime and facilitate the protection of self-sufficient private rights? In the examination of China’s integration into the global framework in the last two decades, Potter indicates that China’s need to both “achieve compliance with GATT/WTO requirements” and remain “true to its local cultural and developmental imperatives” presents a challenge for China. Therefore, deep in the ontological level, the international intellectual property regime—and the TRIPS regime in particular—presents a challenge instead of an opportunity to China’s social development.

5.2.2 The Self-Sufficient Ontological Myth of Intellectual Property Philosophy

The above analysis reveals the negative impact of the contemporary international intellectual property regime on development. The analysis of China’s case further shows that deep inside this negative impact is the ontological contention between private-oriented and public-oriented approaches towards intellectual property. This invites us to examine the question of justice and legitimacy when the public rights oriented local imperatives challenge the private rights oriented foreign norms during law’s evolution. This section suggests that the founding violence of law not only gives rise to the circular construction of intellectual property rights, but also by making self-realization depend on the self implies an ontological flaw that constructs intellectual property rights themselves to be self-sufficient.

Let us first look at an example, the *US Constitution* “Copyrights and Patents” clause. It states that:

> The Congress shall have 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.”

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445 U.S. Const. art. I, Sec. 8, Cl. 8.
At first glance, this is a very normal legal rights statement which we have long taken for granted. Intellectual property rights are something retained or owned by the author or inventor. However, if we look at the ontological assumption behind the statement, we find that it implies that the creation or invention is a highly individual behavior and without social context, and also implies that “[i]ndividuals are whole and they extend themselves in various ways to make up parts of social life.”  

Unfortunately, this is ontologically flawed. We are social animals in an Aristotelian sense; individuals cannot live without social context. Creation also has its social context, and does not start from zero. Remember that in our discussion above, while Locke’s theory sets a limit on private property rights building on the needs of the others, Hegel necessitates the alienation of property which returns property that was separated from others back to others. Private properties of the self are intrinsically related to others. As Drahos argues, “the link between tradition and creativity” suggests that individuals as the author and inventor of a creation also play another role of “the borrower and copier.” The individualistic conception of creativity of contemporary intellectual property regime covers up the “duality of roles”—both as author/inventor and borrower/copier—that the right holders have played. If we look at this issue from a historical perspective, every contemporary creation becomes simply a conjuncture between past knowledge and future improvement.  

Self-sufficiency of rights without context is an ontological myth of contemporary jurisprudence which covers up the inherent confrontation between private and public, the self with others. Neither Lockean nor Hegelian theory suggests that private rights can escape from being related to others. When an industry design is patented and a patent right established, this specific industry design is detached from public domain and put out of the reach of the others, thus becoming private property. Further design or possible independent identical design is blocked. The patented right becomes a self outside of relations enclosed by a boundary, a limit called “creations of the mind.” Private control of knowledge dominates diffusion of knowledge into the public. This is an attempt bound to fail, since the

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446 DRAHOS, 61.
447 See supra discussions 2.1.2.2 and 2.3.2.
448 DRAHOS, 62.
449 See id., at 62.
450 See supra discussion 2.1.2.2.
confrontation is unmediatable and inescapable. As Duncan Kennedy reveals, the traditional legal theoretical dichotomy between “community vs. autonomy, regulation vs. facilitation, and paternalism vs. self-determination” affirms the “existence of a core of legal freedom,” and thus insists on autonomy, facilitation and self-determination which marginalizes the existence of countertendencies. Contrary to the traditional either-or approach to core or periphery, Kennedy argues that “each of the conflicting versions claims universal relevance,” while each “is unable to establish hegemony anywhere.”451 The confrontation between the private and the common, the self and the other is fundamental, cannot be mediated, and is inherent in the legal system in general and the intellectual property rights regime in particular. The traditional rights philosophy, by avoiding the perception of rights in context and relation, attempts to cover up the fundamental contradiction inherent in the legal system and make it into a one-sided story. However, this confrontation is inescapable and unmediatable.452 The constant tension throughout the history of intellectual property between “protection/exclusion and dissemination/competition”—the conflict between individual interests and public good—indicates this inescapable fundamental confrontation that Kennedy unveiled.453

The self-sufficient private rights approach underlining the contemporary intellectual property regime has its roots in the Enlightenment. In his examination of the right to self-determination and development, Carty reveals that making legal rights abstract and self-sufficient has its roots in the European Renaissance. Carty argues that the abstraction and self-alienation belong to a legal tradition from the European Renaissance which “take[s] the individual as a starting point, rather than seeing him as a part of a wider social body,” whose legal inquiry begins with “the will of the individual subject, rather than with his social context.”454 Carty argues that “the vacuity of the legal language of the right to development is attributable not to the concept of development itself, but to the nature of the Western concept of law.”455 Western culture, according to Carty, “supposes nature to be infinitely malleable

452 See id., at 1776.
453 See supra discussion 2.2.1, re: Sell & May’s examination of the constant tension throughout the history of intellectual property.
454 CARTY, From the Right to Economic Self-Determination to the Right to Development, 76.
455 See id., at 80.
and man to be capable of perpetually redefining himself."\textsuperscript{456} The starting point of laws then becomes the self-sufficient individual subject who is out of any binding context. This is the alienation of the self from reality, from the world. Carty argues that this alienation has its roots in a philosophy of physics from the early Renaissance: the abstraction of man from society and nature is just like Descartes’ reduction of all human experience with the world and other human beings to experience between man and himself, and reducing real relationships into logical relations between symbols.\textsuperscript{457} The process of the abstraction of legal rights is also the process of the “Western alienation” of the self from the world, the process of the making of the self-sufficient subject. Once subject becomes self-sufficient and law is grounded on itself, the self bears its own legitimization, and legitimacy collapses into legality which presents a deep legitimacy crisis.

To take legal rights as something self-sufficient is nothing more than an ontological myth. Legal rights are indeed all relational. In his deep critique of the traditional conceptualism as transcendental nonsense, Cohen argues that a legal concept is not a substance which contains certain inherent properties, but is rather a “real relation subsisting between an antecedent and a consequent.”\textsuperscript{458} Foucault’s critique of rights theory might be helpful here to understand the necessity of this ontological shift from traditional isolated perception. According to Foucault, power— in the traditional theory of rights, and in social contract theory in particular— makes itself up as a transferable right and thus produces a “truth” that the society is a just result of “free and equal” interactions among “autonomous” individuals, which conceals power dominance and oppression. The social contract theory thus dresses up the feudal authoritarian monarchy as a parliamentary democratic sovereign and effaces the domination intrinsic to power, thus fixing the legitimacy of power.\textsuperscript{459} However, power for Foucault is a relation of force which circulates and functions in the form of a chain or net-like organization, and “is never localized here or there, never in anybody’s hands, never appropriated as a commodity or piece of wealth.”\textsuperscript{460}

\textsuperscript{456} See id., at 80.
\textsuperscript{457} See id., at 80-1.
\textsuperscript{458} COHEN, 828.
\textsuperscript{459} MICHEL FOUCAULT, Power/Knowledge: Selective Interviews and Other Writings 1972-1977 (Pantheon Books, 1980), 95.
\textsuperscript{460} See id., at 98.
power has constituted is at the same time its vehicle,” “not its point of application.” Legal rights are therefore all relational and can never escape from confrontation.

The revealed problems of the self-sufficiency of intellectual property rights indicates that the formation of intellectual property rights through a separation process in which the self detaches from the others must render the property in an unstable situation. This is because when property is formed and rights created, the property right itself is detached from relations and exists only under the control of the self. It actually becomes the self. As rights only exist in relations, the property right and the self at this stage is out of relation, in a restless stage, and the right is uncertain. Only when a violation or exchange occurs, forcing the self and the rights back into a relationship, will the self and the rights truly exist. Before alienation, the founding violence remains and the rights are uncertain. Without selling or licensing to the public—the processes that bring the “creations of the mind” into social relations—no rights exist. When Robinson Crusoe lived alone in an isolated island, no matter how many “creations of the mind” he had, without returning back to social relations, no intellectual property rights occurred for him. Alienation that makes private property rights alive therefore is central to the theoretical justification of intellectual property, by which the self-sufficient founding violence dissolves and self is no longer isolated. Therefore, relation is truth and self-sufficiency is only an ontological myth of the private property rights. What then is the function mechanism of this self-sufficient ontological myth?

5.2.3 Author Function and the Enlightenment’s Obsession with Origin

In the last two sections, we revealed that the TRIPS regime endorses the perfection of progression notion of the Enlightenment and constitutes the driving force of the development deficit. We also revealed that the private rights theory underling the TRIPS regime internalizes a self-sufficient ontological myth stemming from the Enlightenment. In this section, we will examine the function mechanism of this self-sufficient ontological myth, the Author Function that indicates the Enlightenment’s obsession with origin.

The perfection notion of progress from the Enlightenment not only establishes the foundation of contemporary development paradigm and justifies the authority of the
advanced technology under the TRIPS framework, but also internalizes the Enlightenment’s obsession with origins, an eternal return to the origin. Fitzpatrick argues that “progress also evokes origins,” and “[p]rogress does not just go somewhere, it comes from somewhere.”\footnote{Fitzpatrick, The Mythology of Modern Law, 51.} He thus argues that “[p]rogression is the continuity of an origin, of the passage from pre-creation to the manifest.”\footnote{See id., at 51.} The eternal return to origins thus sets up mystical authorities: in the development paradigm there is the Eurocentric model of development for the Third World to catch up to, and in law there is the authority of precedent. The mystical authorities are confirmed and reified through the constant return to origins. This is achieved through a mechanism we may name the author function in the contemporary intellectual property regime.

As we revealed above, intellectual property rights are not natural rights but a historical social construction from privileges to rights protecting the Author.\footnote{See supra analysis 2.2.1.} Foucault’s research confirms this point, arguing that “the notion of ‘author’ constitutes the privileged moment of individualization in the history of ideas, knowledge, literature, philosophy, and the sciences.”\footnote{Foucault, What Is an Author? At 101.} According to Drahos, proprietarianism— which holds that “ownership privileges should trump community interests”— has strong links with individualism, and is “deeply involved in a complex causal process that results in a pattern of increasing individual ownership of abstract objects.”\footnote{Drahos, 202, 203.} Through our legal protection, any idea or knowledge which has an author and becomes intellectual property will disappear from public domain and be under the author’s control, by whose will its change or future development is blocked from the public. Thus Foucault argues that “the author is the principle of thrift in the proliferation of meaning” through impeding “the free circulation, the free manipulation, the free composition, decomposition, and recomposition.”\footnote{See id., at 118-9.} Intellectual property then is a regime of the author function through constant return to the original authenticity of the author to establish an eternal authority. At the heart of this is our fear of the otherness or difference, our obsession with origins, and our desire for immortality, which again can be traced back to modern law or in general to the Enlightenment project’s obsession with origins and
immortality.\textsuperscript{468} Intellectual property—this obsession with origins and fear of otherness—thus maintains “authenticity” at the cost of oppressing singularity and difference.

When it comes to TRIPS and development, the author function reveals itself clearly during the development of the TRIPS regime. The discussion above indicated that the international intellectual property regime has always challenged and negatively impacted social development in developing countries in their legislation, judicial operation, administration and enforcement. Superficially, the problematic TRIPS compliance in developing countries is a problem of institutional capacity and the international standard-setting architecture. However, the summarization of the institutional capacity rhetoric in fact institutionalizes the “capacity impotence” of developing countries and nails down the developing countries to the catching-up position forever. It further legitimizes the authority of the contemporary TRIPS regime and the contemporary international standard-setting architecture. The developed as the Author of these creative ideas and knowledge—the intellectual properties—thus gains the authority over this game of progression. Under this filtering mechanism, other models of social existence are characterized as primitive and underdeveloped, as models which should be replaced. Traditional knowledge, as not satisfying the utility, originality, and non-obviousness criteria, is thus open for free exploitation. The filtering mechanism of the TRIPS regime operates as an oppressive assimilating force of modern law, and is the “author function” in action. Deep within the institutional capacity rhetoric’s problematization of developing countries is the problematic self-sufficient ontology. This self-sufficient ontology is internalized in the TRIPS regime and indicates that the WTO regime bears its own legitimacy.

Most importantly, the Enlightenment’s obsession with origin is also the main force that created the alienation of the self. In the progression notion’s obsession with origin, progress becomes constant references back to the \textit{self}, to what I \textit{was}. Progress becomes a game the self plays with the \textit{self}, and \textit{others} can only get into the game of progress if they become one who is like the \textit{self}.\textsuperscript{469} Nature becomes meaningful only when it is to be used by


\textsuperscript{469} \textsc{GUAN}, \textit{Development Deficit and Modern Law’s Myth of Origin}, 8-11. The article reveals that development paradigm as an egocentric framework is at the same time also an other-reducing force. In the contemporary development paradigm, once the populations in the Third World become the information of the knowledge of
the self to dominate both nature and human beings. Probably on this regard, Horkheimer and Adorno argue that, “the Enlightenment has eradicated the last remnant of its own self-awareness.”470 Under this so-called “scientific spirit” of progression in the Enlightenment, self-preservation became the first principle, and the Self became “the reference point of reason, the legislating authority of action.”471 This creates modern law as a self-sufficient system in which the self is split into the subject who reasons as well as the object of reason’s contemplation. This has a very important implication for us. The split of the self gives birth to the Otherness in oneself with which the self fights in vain forever. Self-estrangement becomes the truth and self-emancipation becomes myth and legend. This is why development is no longer or has never been a project of emancipation for the developing countries, but rather a project of self-estrangement of the developed countries. This also reveals to us the secret of the legitimacy deficit of the social contract theory, in which the self contracts with the self and modern law become self-sufficient and becomes self-justified.472

As this obsession with origin created the alienation of the self, the Enlightenment finally turned into myth. In their classic critique Dialectic of Enlightenment, Horkheimer and Adorno argue that Enlightenment as the progress of thought aiming at “liberating human beings from fear and installing them as masters” has failed on its own terms: “Enlightenment is totalitarian,” and “the myths which fell victim to the Enlightenment were themselves its products.”473 They thus reveal the dialectics of the Enlightenment that “[m]yth is already enlightenment, and enlightenment reverts to mythology.”474 The dialectics, and the fact that the development as liberating program turns into a destructive force for the Third World, justify Escobar’s argument that “development is the last and failed attempt to complete the

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470 HORKHEIMER & ADORNO, 2.
471 See id., at 22.
472 See infra discussion 5.3 and 5.4.
473 HORKHEIMER & ADORNO, 1, 4-5.
474 See id., at xviii.
Enlightenment in the Third World.”

Therefore the Enlightenment’s obsession with origins internalizes oppression, an original sin.

This brings us back to Lévinas’ critique of the Western philosophy, through which we found out how the self alienates itself as well as legitimizes itself through the process of assimilating others. Building on a self-sufficient circular construction, intellectual property as private rights becomes isolated and the self can only justified by the self, through which the self-sufficient legitimacy deficit of the contemporary intellectual property regime was born. This indeed is not a problem for the intellectual property regime only, but rather is a legitimacy deficit problem for modern law.

5.3 THE SELF-SUFFICIENT LEGITIMACY DEFICIT OF MODERN LAW

5.3.1 The Power of Precedent: Law’s Constant Return to Origin

Modern law gained its modernity through the Enlightenment and shares with the Enlightenment its obsession with origin. Although common law as a case law system had been established long before the Enlightenment, it was the Enlightenment project, and social contract theory in particular, that justified the legitimacy of law and inaugurated the era of modern law. As Carty argues, it is through an “internally complete system” that we achieved this “self-sufficient modernity of law.” Modern law becomes modern as it is self-sufficient and subject to no other authority except law itself. In the case law tradition in particular, the authority of precedent that has been well established in modern law shares with the Enlightenment project the constant return to origin through the mechanism of repetition.

Repetition is the key mechanism of the Enlightenment’s constant return to origin. The “origin” is not just the beginning of something, but also the very first injection of a founding violence. More importantly, the function of the founding violence is to constantly repeat itself throughout the legal system. As Derrida argues, the founding violence—the force

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475 ESCOBAR, 221.
476 EMMANUEL LÉVINAS, Totality and Infinity: An Essay on Exteriority (Alphonso Lingis trans., Duquesne University Press. 1969), 118. Western philosophy, according to Lévinas, “has most often been an ontology: a reduction of the other to the same by interposition of a middle and neutral term that ensures the comprehension of being.”
477 CARTY, Introduction: Post-Modern Law, 6, 15. For discussion of the self-sufficient ontology of the social contract theory, see infra analysis 5.3.3.
478 See also supra discussion 2.2.3.
inscribed into law in the founding moment—is “revolutionary,” “the violence in progress.” The “revolutionary instant” is ungraspable and “belongs to no historical, temporal continuum.”479 It is obvious then that the force inscribed into law in the founding moment is a dynamic power, arising over and over again through constant repetition.480 The transformation of the development paradigm from modernization to poverty alleviation, to privatization and marketization, to globalization has always been the exercise of this founding violence of law, a constant return to origin.

As it is in the Enlightenment, repetition is also the key mechanism in the case law tradition. It maintains modern law’s integrity through defending the authority of precedent that operates through the process of analogical reasoning. Stare Decisis (Latin, meaning “let the decision stand”) as the doctrine of precedent is the fundamental principle of our common law that requires judges follow the rules formulated in earlier decisions. By treating like cases alike, the power of precedent avoids arbitrary decisions and ensures consistency and certainty in the law. The power of precedent in case law operates through the mechanism of analogy in legal reasoning, a process of constant return to origin.

Analogical reasoning stands at the heart of legal reasoning, without which inductive or deductive reasoning is groundless, and legal rules remain as theoretical constructs inapplicable to particular facts. By analogical reasoning, we refer to “finding the solution to a problem by reference to another similar problem and its solution,” or simply “reasoning from case to case.”481 It is a fundamental pattern of legal reasoning. Analogical reasoning, through weaving together a particular characterization of facts and interpretation of rules, is a necessity instead of a convenience in adjudication.482 Through this mechanism of analogical

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479 DERRIDA, 35, 41.
480 See id., at 36. He points out, for the founding moment,
[It] is, in droit, what suspends droit. It interrupts the established droit to found another. This moment of suspense, this épokhē, this founding or revolutionary moment of law is, in law, an instant of non-law. But it is also the whole history of law. This moment always takes place and never takes place in a presence.

His emphasis. See also FITZPATRICK, The Mythology of Modern Law, 81. Fitzpatrick endorses this reading that the founding violence pertaining to law is “an incessant violence.” Margaret Davies too, argues that founding violence is maintained though repetition, the constant reification of the force. Moreover, she proposes to perceive law as repeatability, as a “process which can never be reduced to a static system of norms.” DAVIES, 100, 107.
482 One of the examples Weinreb uses is Adams v. New Jersey Steamboat Co., in which a steamboat is analogous to a “floating inn” in which steamboat operator as an insurer is responsible for passenger’s loss of
reasoning, “when[ever] a case arises, however unusual it may be, the outcome is to be found within the law.”\(^{483}\) The analogical reasoning mechanism serves as the indispensable glue of our legal system, through which law stretches very far and becomes a “seamless web.”\(^{484}\) This brings us to Dworkin’s perspective. For Dworkin, law as integrity “begins in the present and pursues the past … in the way its contemporary focus dictates.”\(^{485}\) Under this framework of law as integrity, a judge is one of the chain of authors of a developing story, and through these authors’ interpretations, law maintains its integrity.\(^{486}\)

Through analogical reasoning, every adjudication connects law’s past with law’s future and thus maintains law’s consistency. Law becomes a seamless web because of law’s constant return to the origin which assimilates others and excludes all differences. In this regard, legal reasoning maintains law’s purity through the return to the origins. In her examination of Austin’s positivist statement, laws “properly so called,” Davies argues that laws “properly so called” sets a limit to jurisprudence, a limit both as an end and a beginning where various non-legal challenges end and legitimacy begins.\(^{487}\) The function of this limit is an “exercise of purity” which is produced by the “culture of dominance.”\(^{488}\) Furthermore, this positivist view of law creates a myth of legal transcendence serving as the “ultimate power to determine, define and exclude,” as “legally-sanctioned oppression” showing law’s inability to appreciate difference.\(^{489}\) Modern law’s constant return to origin, or law’s repeatability as Davies describes, is “an economy of sameness.”\(^{490}\) The constant return to origin is internalized as the oppressive, exclusory force of modern law, a force of assimilation.

\(^{483}\) See id., at 101-2. Interestingly, Anthony D’Amato has almost the same argument. He argues that “an ‘analogy’ is something that can stretch very far … [which] can truly make law appear as a seamless web.” He also argues that, in theory, “there is no such thing as … ‘case of first impression.’” See ANTHONY D’AMATO, Jurisprudence: A Descriptive and Normative Analysis of Law (Martinus Nijhoff Publishers, 1984), 129.

\(^{484}\) D’AMATO, 129.


\(^{486}\) See id., at 226.

\(^{487}\) DAVIES, 18.

\(^{488}\) See id., at 20.

\(^{489}\) See id., at 40-1.

\(^{490}\) See id., at 110.
5.3.2 The Oppressive Assimilation Force and Modern Law’s Legitimacy Deficit

The Enlightenment’s constant repetition as the eternal return to origin inscribed modernity into modern law, but also made modern law self-sufficient, and further turned into an oppressive force. Social contract theory has been one of the key players contributing to the formation of this oppressive assimilation force.

The establishment of modern law’s authority by social contract theory was through a self-sufficient and internally complete mechanism, through which the self keeps returning to the self and escaping from others. In Rousseau’s social contract theory for example, we as free individuals are looking for a collective association under which each individual, “while uniting himself with the others, obeys no one but himself, and remains as free as before.”491

The solution he found is a social contract, a paradoxical imagination, by which the subject contracts with him/herself and “the effect would have to become the cause.”492 For the social contract to be realized, the self must be split into parties of the contract, by which the self contracts with himself, demands and obeys himself.493 Carty argues that “[t]o contract is both to include and to repress that which cannot be included,” and “Enlightenment created Civilisation which in turn created the ‘Primitive.’”494 Most importantly, the limits of the legal order within the civilization of the Enlightenment were “defined in terms of the boundaries” of the civilized and “rested upon the uncivilized and the primitive as a shadow, engaged in a compulsive and obsessive contradiction of suppression and incorporation.”495 This reveals

491 ROUSSEAU, 60.
492 In his discussion of legislation, Rousseau argues that the legislator of a constitution must be someone who understands human passions while at the same time “without feeling any of them,” someone who has no affinity with human nature yet knows it very well, and also someone who is concerned about our happiness yet whose happiness is independent of ours (See id., at 84.). Rousseau notices the problem of self-contradiction. To solve this problem, Rousseau argues:

For a newly formed people to understand wise principles of politics and to follow the basic rules of statecraft, the effect would have to become the cause; the social spirit which must be the product of social institutions would have to preside over the setting up of those institutions; men would have to have already become before the advent of law that which they become as a result of law (Id., 86-7.).

493 CARTY, Introduction: Post-Modern Law, 23. See also PETER GOODRICH, Contractions: Rousseau in the Year Two Thousand, in Post-Modern Law: Enlightenment, Revolution and the Death of Man (A. CARTY ed., Edinburgh University Press, 1990), 60. Goodrich argues that since the contracting parties are actually one, the communication process involves “a relationship of internality” and “the contract internalises both origin and end.”

495 See id.
the repressive nature of the Enlightenment in general and the self-sufficient, other-assimilating social contract in particular.496

Rather than restraining power and protecting the governed, social contract theory could be used to justify an omnipotent power and endanger the governed. According to Hobbes’ analysis in The Leviathan, once the “social contract” establishes a form of governance,

[f]rom this Institution of a Common-wealth are derived all the Rights, and Facultyes of him, or them, on whom the Soveraigne Power is conferred by the consent of the People assembled.

... [B]ecause they Covenant, it is to be understood, they are not obliged by former Covenant to any thing repugnant hereunto. ... And therefore, they that are subjects to a Monarch, cannot without his leave cast off Monarchy, and return to the confusion of a disunited Multitude; nor transferre their Person from him that beareth it, to another Man, or other Assembly of Men: for they are bound every man to every man, to own, and be reputed Author of all, that he that already is their Soveraigne, shall do, and judge fit to be done... 497

Hobbes’ analysis demonstrates the origin of a paternalistic power that consumes everything through a “social contract.” It brings us back to Locke’s argument that “the government commonly began in the father.”498 Maine puts it more clearly, saying that “[t]he composition of the state, uniformly assumed to be natural, was nevertheless known to be in great measure artificial,” and is an artificially created “Legal Fiction” of a family relations.499 This paternalistic consumption reveals the other side of the social contract theory: its destructive effect upon the governed. People as the governed were simply just born into this

496 Stauffer approaches the self-sufficiency and oppression of social contract theory through a reexamination of the “state of nature” notion. Stauffer argues that “the state of nature arise as a spectre to be reckoned with whenever we face a form of justice that wants to transcend or challenge the boundaries of sovereignty.” She argues that the social contract theory through the notion of the state of nature creates the margins of the world which constitutes a threat to the centre and as well as provides a legitimate grounding for law, authority and power. Sovereignty then depends on a “twofold exclusion: of its outside (other nations, the stateless), and of its condition of possibility (the state of nature),” which means that sovereignty “cannot admit exteriority except as threat” or “danger[s] of war.” According to Stauffer, this further creates a “dilemma of origins” for liberalism, which recognizes the priority of free individual but could not justify that individual’s obligation to others. This not only reveals the exclusive nature of the social contract theory, but also indicates how self-sufficient modern law is constructed through the exclusive mechanism of social contract theory and functions as an oppressive instrument. JILL STAUFFER, The Fiction of the State of Nature in Real Time: the Social Contract, International Human Rights and the Refugee, in Critical Beings: Law, Nation and the Global Subject (PETER FITZPATRICK & P. TUTT eds., 2004).


498 LOCKE, sect. 105.

499 MAINE, 77.
social contract, rather than making the contract through consent. Therefore, modern law justifies itself and becomes self-evident through social contract theory.

The Enlightenment project in general as well as the modern law in particular is obsessed with the myth of origin. Origin as a point to host the constant returns is not just a peaceful beginning, rather is a moment of violent revolution when power becomes justice, the past of the self is set as the future of others, and the precedent gains its authority in law. In the search for descent, Foucault argues that “[e]mergence is thus the entry of forces; it is their eruption…”500 Similarly, Derrida argues that law was founded in the very moment when justice and force were put together to “make sure that what is just be strong, or what is strong be just.”501 He insists that this very moment produces a “‘mystical foundation’ of the authority of laws,” and force is indispensable to the formation of law.502 The force that is inscribed into law at the very founding moment, serving as the “origin of authority, the foundation or ground, the position of the law,” is a violence grounded on nothing else but itself. Since there is no law before that moment that could legitimatize or illegitimatize the founding force, it is neither legal nor illegal; the force that belongs to non-law but defines the law is the original sin of law. Derrida’s thesis of “founding violence” further reveals the oppressive nature of the return to origin.

This repressive and other-assimilating mechanism of modern law brings us back to the other-reducing mechanism of the development paradigm, which indicates the intertwined relationship between the development deficit and modern law’s myth of origin.503 It also brings us back to the author function of the intellectual property regime which establishes the eternal self through constant return to the original authenticity of the author.504 However, this oppressive assimilation force through assimilating others for the benefit of the self eventually alienates the self. The obsession to the return to origin then bears the self-sufficient legitimacy deficit of modern law and turns modern law into myth.

500 M. FOUCAULT, Language, Counter-Memory, Practice: Selected Essays and Interviews (D. F. BOUCHARD ed., Cornell University Press, 1977), 149. He further argues that “emergence designates a place of confrontation but not as a closed field offering the spectacle of a struggle among equals… it is a ‘non-place,’ a pure distance, which indicates that the adversaries do not belong to a common space.” FOUCAULT, Language, Counter-Memory, Practice, 150.
501 DERRIDA, 11.
502 See id., at 12–4. Derrida argues that there exists an original sin of law in this very moment of formation, a moment when law was neither legal nor illegal and exceeded “the opposition between founded and unfounded.”
503 See supra discussion 5.1.2 for analysis of the development paradigm’s other-reducing mechanism.
504 See supra discussion in 5.2.3 for more details.
5.3.3 Mythology of Modern Law: The Self-sufficient Legitimacy Deficit

The failure of social contract theory has been built on a misconception of social development. Maine argues that this theory is lawyers’ ahistoric “superstition,” a misuse of the “Roman jurisprudence of Contract.” By making the social contract into the first mover of social development, the theory is contradictory to the fact that social development is a gradual and imperceptible process and that there has been no sudden leap from the state of nature to the state of civil society. Rather than being a product of intentional contract, a social institution is a “spontaneously self-extended order” without any human design or intention.

By setting up the eternal spirit of law, what constructivists such as Montesquieu or Rousseau are trying to prove is that Man or people as legal subjects could be self-determining and infinite. However, as the social contract is nothing more than a self-sufficient contract that is concluded by the split self, what defines Man inevitably escapes Man. Modern law thus is founded on itself, since people are both the source and the destination of law. Law is valid because of itself, just as the development paradigm bears its own legitimization. Modern law is grounded on itself and has no origin—this is modern law’s myths of origin: a constant return to the “no origin.” Probably in this regard, postmodern deconstructionists argue that death instead of infinity is at the heart of Man, and that “the law has no foundation.”

The problems that arise due to the circular social contract theory, the defense of the authority of precedent, and the author function of intellectual property regime all travel further in modern law, and turn modern law into myth. Peter Fitzpatrick argues that modern law in general is a mythology, as modern law grounds the transcendence of law on its negation of “what law is not,” and the negative transcendence—modernity’s negation of myth—is itself part of the myth. And myth as limits is about “the resolution of inconsistencies, the resolution of opposition,” is an “eternal return” through “unvarying repetition.”

505 MAINE, 52-3, 203.
506 See id., at 68; ROBERT NOZICK, Anarchy, State, and Utopia (Basic Books. 1974), 133.
510 See id., at 24, 28.
Through this constant repetition of origin, the notion of the “perfection of progress” resolves the contradiction between law’s order and changes in law not only through uniting them in the same origin but also through their denial of the same target: the “state of nature” or savagery and underdevelopment. Through this constant repetition of origin, the perfection of progress notion also endorses the authority of the author and resolves the contention between the private and public in the intellectual property regime. It is this similarity of negation together with the notion of the perfection of progress that mediates between the opposition of modern law between law’s autonomy and law’s social dependence, between individual and totality. Modern law gains its integrity through this mechanism of negation.

It is also through negation of others that progression necessitates the constant return to origin: while progression operates through negation of others and the underdeveloped, the return to origin is also an escape from others and the underdeveloped, a negation. Through the constant return to origin, just as law denies non-law under the modern law framework, the developed denies the savage in the development paradigm, the author denies the reader in the intellectual property regime, and the self eventually denies others. It is in this regard that transcendent modern law, the myth of progression, the development program, the intellectual property regime, and the Enlightenment in general converge together upon the negation of others through a constant return to origin. The mythic relation between modern law’s myth of origin, the development deficit, and TRIPS’ indifference to issues of development lies in their shared mechanism of negation, a mechanism facilitating the return to origin through negating others.

Therefore, building on the Enlightenment’s myths of origin and upon the negation of others, it is inevitable that modern law is grounded on itself and turned into myth. To liberate the subject from mythology, the Enlightenment replaces God with the autonomous self who commands and obeys him/herself at the same time. This holy subject gains its eternity from the Enlightenment. To preserve the eternity of the self, not only is a constant return to

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511 See id., at 91-3.
512 See id., at 5-6, 126.
513 Fitzpatrick argues that “Enlightenment replaces God with nature.” See id., at 51. However, building on our examination of the social contract and modern law in general, I would argue that Enlightenment replaces God with the self instead of with nature.
514 For discussion of how the Enlightenment project seeks to preserve the eternity of the self, see Carty, Introduction: Post-Modern Law, 7. Carty also argues that the eternity, or the abolishment of death, is “survival
the origin needed, but also is a complete negation of others necessary. However, the complete negation of others in return alienates the self and puts the eternity in a void. To ground the authority of law on the autonomous self, however, situates law on a void. This is modern law’s myth of origin: the origin of law is emptiness.

As intellectual property rights are trapped into a self-sufficient ontological myth, the TRIPS regime is never shy to show its indifference to development concerns. When the self justifies itself through negation of others and modern law justifies itself through constant return to origin, norms collapse into facts and legitimacy collapses into legality. Modern law thus encounters a serious legitimacy deficit. This demands a reconstruction of modern law’s legitimacy theory.

5.4 “SELECTIVE ADAPTATION” AS A THEORY OF LEGITIMACY

5.4.1 Contractual Legitimacy and the Significance of Consent

Legitimacy generally means “the quality or state of being legitimate,” and legitimate means “being in accordance with law”. T. Franck simply puts the quality and state together, and defines legitimacy as the property of a rule or institution demanding compliance because of being believed to be in accordance with generally accepted principles. The concept of legitimacy then captures the two sides of law: the fact or state of law being obeyed on the one hand, and the quality of law being claimed to be rationally acceptable on the other. This leads us to Habermas’ inquiry about modernity’s legitimacy problem of the tension between the two sides of law, law’s positivity on the one side and law’s “claim to rational acceptability” on the other. It also brings us back to Kelsen, who examined the normative system within the tension between the “ought” and “is” of law. This can even bring us even further back to Hume’s inquiry into human nature, where he argues that there is a key tension in every system of morality between “is/is not” and

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in terms of religion, accumulation in terms of economy, and truth in terms of science.” Carty, Post-Modernism in the Theory and the Sociology of Law, or Rousseau and Durkheim as Read by Baudrillard, 87.

517 HABERMAS, 38.
“ought/ought not.”519 The concept confronts us a set of questions. Why do people obey law? Does the fact that people obey law contribute to law’s normative quality? Can we assert law’s rational acceptability only through the fact that law is being followed? All of these questions crowd into a single capsule called “legitimacy.” This in fact indicates that the legitimacy issue is located at the heart of legal philosophy.

As the centre of legal philosophy, legitimacy had its own historical development. According to Merquior, neither ancient Rome nor Greece possessed a special concept of legitimacy. Legitimacy as a concept developed as the result of the vanishing of direct democracy, and did not appear till the Middle Ages.520 Legitimacy as a concept refers to the “quality of the title to rulership” and thus was established in medieval legal philosophy.521 Ever since then, the problem of legitimacy in power relations has been the core of enquiry for theorists, from early modern philosophers like Grotius, Hobbes, Locke and Rousseau to modern theorists Kelsen and Hart.522

The historical fact that legitimacy theory stemmed from the vanishing of the direct democracy to justify the right to govern has several important implications for our research. First of all, legitimacy then is located in a relationship between the ruler and the ruled, in which the ruler depends on the ruled and vice versa. Neither the ruler nor the ruled is self-sufficient. As Coicaud argues, the fundamental idea of right assumes the existence of a reciprocal relationship, which allows consent to play a major role and make legitimacy possible.523 The further implication herein is that any self-sufficient rights approach would break this reciprocal relationship and make legitimacy unattainable. We will get back to this later on.

Secondly, it indicates that the centre of legitimacy theory is the asymmetric power relationship between the ruler and the ruled. The vanishing of direct democracy resulted in a delegation of power from citizens, the ruled, to their government, the ruler, by which the asymmetric power relationship between the ruler and the ruled is established. This is

521 MERQUIOR, 2.
522 See id., at 3-4.
523 COICAUD, 11.
probably why Coicaud argues that legitimacy presupposes an asymmetric relationship and an “unequal distribution of power” between the governor and the governed. 524

There is another further implication. The fact that legitimacy theory resulted from the vanishing of direct democracy also indicates that the “right to govern” is not a natural and self-evident right, rather a right that needs to be proved and justified. This means that legitimacy internalizes something uncertain and problematic. By defining legitimacy as the “recognition of the right to govern,” Coicaud argues that the “fundamental political problem” of legitimacy theory is to justify “political power and obedience” simultaneously. 525 To justify power and obedience simultaneously is a very difficult mission if not impossible, as power usually transcends any limits and demands submission rather than negotiates or waits for obedience. This is the inherent tension internalized in legitimacy theory. Rousseau describes the “fundamental problem” of legitimacy theory in another way. To solve this problem, Rousseau worked out a solution:

… to find a form of association which will defend the person and goods of each member with the collective force of all, and under which each individual, while uniting himself with the others, obeys no one but himself, and remains as free as before. 526

The solution for Rousseau is a social contract through consent that creates a power to govern the governed for and only for the governed. The consent from the governed is undoubtedly the key of the legitimacy of the power to govern. As the right to govern is a created rather than natural and self-evident right; in order to justify power and submission simultaneously, legitimacy must come from the governed. Consent from the governed then became the most reasonable explanation. According to Merquior, to derive governmental legitimacy from consent is due to William of Occam from the first half of the 14th century, which was based on a medieval maxim quod omnes tanget – what touches all must be approved by all. 527 The idea to build a constitutional power on consent can at least be traced back to two centuries ago. The Federalist, for example, asserts that,

524 See id., at 25, 35.
525 See id., at 10.
526 ROUSSEAU, 60.
527 MERQUIOR, 3.
The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority.528

The principle of consent is also the foundation of international law, as international law is binding on a state only through its consent. Henkin states that:

State consent is the foundation of international law. The principle that law is binding on a state only by its consent remains an axiom of the political system, an implication of state autonomy.529

As for how this consent has been given to constitute the governmental legitimacy, many theorists, such as Locke, Rousseau, and Kant all boil it down to a social contract.530 Social contract theory has long become the foundation of the legitimacy of domestic as well international governance. In the domestic sphere, it has become the foundation of the contemporary constitutionalism. Henkin argues that:

“[a] legitimate political society is based on the consent of the people, reflected in a social contract among the people to institute a government. The Social contract generally takes the form of a constitution, which also establishes a framework of government and a blueprint for its institutions.531

Social contract theory is also the foundation of the legitimacy of international governance. In his discussion of the relationship of individuals to the state under the framework of sovereignty in the international legal system, Brand suggests that the international legal framework is a “two-tiered social contract,” “under which the individual relates to the state in domestic law, and only the state relates to the international legal order in international law.”532 In his discussion of the “Mythology of Sovereignty,” Henkin argues

528 A. HAMILTON, et al., The Federalist (J. M. Dent & Sons Ltd., 1948), 110.
531 LOUIS HENKIN, Constitutionalism, Democracy, and Foreign Affairs (Columbia University Press, 1990), 5.
that “states are subject to the International Social contract, and the end of World War II saw a new social contract in the UN Charter.”533

Through building legitimacy on consent, the centuries old social contract theory makes its significant contribution to the evolution of modern law. Social contract theory is one of the key components of the Enlightenment project, and marks the beginning of the modernity of law.534 Being legitimatized through the consent of the governed, law as the social contract therefore becomes “autonomous from history, tradition and ultimately, from any religious source.”535 Because of consent, law also escapes from the mythology of the divine order and thus becomes modern in the era of the Enlightenment.536

5.4.2 Critique: Something More Than Consent

Although social contract theory marks the beginning of the modernity of law, its seeking consent through a contract that is concluded by a split self inevitably traps modern law into the self-sufficient legitimacy deficit. Contractual theorists from Montesquieu to Locke, Kant, and Rousseau all to a certain extent participate in the Enlightenment project, a social movement to liberate human beings from superstition, passion, and myth by empowering them with knowledge, reason, and truth. To ensure autonomy and independence of the self from any constraints, contractual legitimacy theory made the self into the subject and author of law at the same time. Right at the time when the self gains its complete autonomy, the self however became alienated and the legal voluntarism tradition was born. This legal voluntarism tradition “take[s] the individual as a starting point, rather than seeing him as a part of a wider social body,” and legal inquiry begins with “the will of the individual subject, rather than with his social context”.537 Accordingly, the starting point of laws is the self-sufficient individual subject who is out of any binding context. Carty attributes this “Western alienation” to a philosophy of physics from the early Renaissance: the abstraction of man from society and nature is just like Descartes’ reducing all human experience with the

535 See id.
537 CARTY, From the Right to Economic Self-Determination to the Right to Development, 73, 76.
world and other human beings to the experience between man and himself, thus reducing real
relationships into logical relations between symbols. Legal rights thus become self-
sufficient.

This Cartesian self-alienation however in return creates legal right’s self-undermining
nature. Once the subject becomes self-sufficient, the self makes contracts with the self, and
thus commands and obeys him/herself at the same time. Not only does the social contract
become a circular construction, but so also does consent become unnecessary and power
become self-evident, as the self is the subject and the author of the laws at the same time.
This self-sufficient ontology of legal rights makes it impossible to justify power and
obedience simultaneously. The legitimacy of law becomes unattainable. As the power of the
rule and the rights of the ruled are mutually interdependent and inseparable, once power
cannot be justified, legal rights cannot be realized either. Self-sufficient rights thus become
self-undermining. Coicaud also reveals that in seeking the universality of the ideals of
modernity, theorists since the Enlightenment have constituted legitimacy as a point of origin
and as a line on the horizon at the same time. These theorists have however turned the ideals
against themselves, and legitimacy has become a key problem of modernity. Here we
found the self-sufficient ontological myth stemming from the Enlightenment. An
emancipation project turns into a self-destructive force—this is the fundamental paradox of
the Enlightenment. There must be something that has been lost in the Enlightenment, and the
Enlightenment needs to be reconstructed.

Foucault’s piece, *What is Enlightenment*, unlocks the myth of the Enlightenment. Foucault
argues that Enlightenment is an “exit” or a “way out,” that is a break from our
immature status, a historical turning point when we started using reason and questioning
contemporary reality. Enlightenment thus is the beginning of the critique. For Foucault,
“[t]he critique is, in a sense, the handbook of reason that has grown up in Enlightenment; and
conversely, the Enlightenment is *the age of the critique.*” Developing from here, Foucault
argues that modernity, rather than a period of history, is an attitude: the “will to ‘heroize’ the

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538 See id., at 80-1.
540 COICAUD, 97-128.
542 See id., at 38. Emphasis mine.
present,” an ironical heroization, a form of relationship to the present and with oneself.\textsuperscript{543} We thus connect with the Enlightenment only in the constant reactivation of a “philosophical ethos,” a “permanent critique of our historical era.”\textsuperscript{544} On the one hand, this philosophical ethos implies a refusal of the “blackmail of the Enlightenment,” but on the other hand as a “limit-attitude” it is a practical critique that “takes form of a possible transgression,” and a “work carried out by ourselves upon ourselves as free beings.”\textsuperscript{545}

Therefore, Enlightenment is an ongoing process of the critique of the present and of ourselves as free beings, an ever shifting limit reified and confirmed through constant possible transgressions. The critique of the present and the attention to the limit remind us that a critique of the intellectual property regime or modern law in general, the present, requires at the same time a critique of the Enlightenment. The key of the critique is to work on the limit where justice is possible only after our deconstruction of contemporary legal theory. What has been lost in the Enlightenment is the spirit of critique, the attention to the limit. Emancipation exists and only exists in the process of constant critique, continuous examination of the limit. Where there is no critique, there is no legitimacy.

This reexamination of the Enlightenment has significant implications for our research. Critique thus contributes more to the construction of legitimacy than consent does. As critique brings in differences to confirm and enrich legitimacy, not only does legitimacy become possible, but the legal system as a whole becomes alive. Traditional legal theory’s attention to concept instead of process has been the key reason for the vacuity of legal rights, by which law becomes ideology, facts are confused with norms, and legitimacy collapses into legality. Intellectual property rights therefore become self-sufficient, as creations and knowledge are isolated from the social public.

Paying attention to process instead of concept brings us closer to the fact that law has never stopped evolving, as time can never be interrupted. The dynamics of law or law’s evolution have long been recognized by different legal theorists, such as the naturalist Aquinas, positivist Hart, or someone in between like Dworkin. For example, the analytical positivist Hart’s argument that law is the union of primary and secondary rules as well as his analysis of the “Core and Penumbra” problem in the interpretation of law suggests a legal

\begin{itemize}
\item \textsuperscript{543} See id., at 39-42.
\item \textsuperscript{544} See id., at 42.
\item \textsuperscript{545} See id., at 42-7. His emphasis.
\end{itemize}
developmental perspective. Hart argues that all systems compromise between two “social needs”: the need for certain rules and the need to leave certain things open.\textsuperscript{546} Aquinas emphasizes law’s duality and argues that laws “both sprang from nature and were approved by custom.”\textsuperscript{547} This indicates that laws are at the same time an intended creation and an involuntary result that have a life of their own. Also, his recognition of laws as an evolving system driven by improving human reason and shifting human conditions reveals a dynamic picture of law.\textsuperscript{548} Dworkin’s interpretation of contemporary legal practice as “an unfolding political narrative” implies a similar dynamic developmental viewpoint of legal institutions.\textsuperscript{549} Similarly, Hayek argues that a social institution does not result from human design or intention, but is instead a spontaneous “self-extended order.”\textsuperscript{550} His theory recognizes the complexity of law’s evolution and historicity.

Taking Enlightenment as the ongoing process of the critique on the present, legal concepts become alive when they return to process, legitimacy becomes attainable on the return of critiques and injection of differences, and Enlightenment then regains its power of emancipation.

5.4.3 Selective Adaptation: the Quest for Legitimacy

China’s TRIPS compliance presents us with a vivid picture of mediation between China’s public oriented cultural imperative and TRIPS’ private intellectual property norms. As opposed to the private rights oriented intellectual property approach underlining the TRIPS regime, China takes a public rights oriented approach, as shown in the evolving recognition of individual creation and the administrative enforcement infrastructure. Even if China offers the same or even stronger protection of intellectual property than the U.S. or Canada as discussed in the Olympic Logo cases, China reaches it through a public rights oriented instead of private rights oriented path. Upon China’s accession, the WTO’s TRIPS regime has embraced two distinctive and contrasting perspectives of intellectual property

\textsuperscript{548} See id., at 41, 63-4. Aquinas examines the “mutability” of natural law and how “temporal law” is revised in according to the step-by-step advancement in human reason and changing human conditions.
\textsuperscript{549} DWORKIN, 225.
\textsuperscript{550} HAYEK, The Fatal Conceit, 6.
rights: the self-sufficient private rights approach and the contextual perspective of perceiving individual rights through their social embedment.

More importantly, research has shown that collective and individualistic perspectives associate differently with attitudes towards power distribution—such as “power distance”—and rules formalization—such as “uncertainty avoidance.” This indicates that private oriented or public oriented legal cultures will have different and even contrasting views on the substantive (power distribution) and procedural (rules formalization) legitimacy of a regime. Our survey of the social perception of intellectual property in China and in Canada indicates that the relational perception of private rights from their social embedment contributes to legal relativism and undermines the certainty of absolute private rights. This reveals the complexity as well as uncertainty of WTO legitimacy.

However, China’s challenge through WTO entry at the same time endorses the WTO legitimacy, as embracing differences is something fundamental to the WTO regime. As the most sophisticated world trading system in history, the WTO is grounded on Ricardo’s theory of comparative advantage, the fundamental theoretical assumption that underpins liberal trade policies. According to this principle, free trade makes every participating country better off because of the existence of differences in production. Something fundamental in the theory of comparative advantage is that difference is the fundamental feature of the constitution of international trade system. To some extent, it is even self-explanatory and intuitive that we trade because we are different. When it comes to the question of fairness of international trade law, Jackson argues that some of the “unfairness”

551 HOFSTEDE & BOND, The Confucius Connection. See also BIERBRAUER.
552 See supra discussion 4.4.1.
554 For the theory of comparative advantage, see WTO, The Case for Open Trade: comparative advantage. (2008), available at <http://www.wto.org/English/thewto_e/whatis_e/tif_e/fact3_e.htm> (accessed, 26 July 2008). According to this webpage, the theory of comparative advantage is one of the most widely accepted and insightful theories in economics. While it’s obvious that in a case of absolute advantage—different countries are good at making different things—open trade makes everyone better off, the theory suggests that it is also the case in a case of comparative advantage:
   [C]ountries A and B still stand to benefit from trading with each other even if A is better than B at making everything. If A is much more superior at making automobiles and only slightly superior at making bread, then A should still invest resources in what it does best — producing automobiles — and export the product to B. B should still invest in what it does best — making bread — and export that product to A, even if it is not as efficient as A. Both would still benefit from the trade. A country does not have to be best at anything to gain from trade. That is comparative advantage.
problems are in fact “difference” problems. To maintain the differences is fundamental to WTO legitimacy.\textsuperscript{555}

Hudec also emphasizes the fundamental significance of differences to the WTO in his case study of complaints that resort to the “level-playing-field” fairness concept in order to protest imports from developing countries with lower environmental standards. According to Hudec, the fairness concept in international trade law is almost completely a U.S. contribution that comes from U.S. domestic antitrust laws building on “fair competition” concept of “level-playing-field,” in which the fairness or unfairness concept was treated as an administrable concept.\textsuperscript{556} However, Hudec argues that the ideas of fair competition “do not make the same kind of sense when applied to international competition,” and the fairness concept “does not offer a plausible distinction” between the sort of competitive advantage from unfair measures like subsides and the competitive advantage from other differences in regulatory policy.\textsuperscript{557} He further argues that it is widely agreed that “some differences in competitive conditions between countries are both natural and proper,” and are “universally considered to be a fair and proper basis of international trade”.\textsuperscript{558} This endorses Jackson’s argument that some of the fairness issues in WTO are in fact difference issues. Arup too in his examination of the role of WTO agreements in the globalization of law argues that difference and diversity are inevitable and invaluable during the process of globalization. According to Arup, while globalization “produces convergence or homogeneity in law,” “difference remains sustainable;” moreover, globalization as a process of “unity in diversity,” is a “negotiated and contingent” process of global “structuration.”\textsuperscript{559}

In the case of China’s WTO compliance, China’s adaptation to the TRIPS regime not only brings in differences and uncertainty, but also indicates China’s consent and confirms WTO legitimacy. As this flexibility dissolves the certitude of WTO rules, the legitimacy of the international trading regime becomes a dynamic and ever shifting limit, an issue of inclusion and exclusion. While inclusion could make transgression legitimatized, exclusion

\textsuperscript{555} Jackson, 30, 248.
\textsuperscript{556} Robert E. Hudec, Essays on the Nature of International Trade Law (Cameron May, 1999), 257-61.
\textsuperscript{557} See id., at 260, 263.
\textsuperscript{558} See id., at 272.
creates outlaws or transgression. Foucault’s analysis of the dynamics of limit describes this situation well. According to Foucault,

The limit and transgression depend on each other for whatever density of being they possess: a limit could not exist if it were absolutely uncrossable and reciprocally, transgression would be pointless if it merely crossed a limit composed of illusions and shadows …

Transgression contains nothing negative, but affirms limited being – affirms the limitedness into which it leaps as it opens this zone to existence for the first time. 560

Legitimization then becomes a dynamic process constantly re-working on limits, a process of mediation between international norms and local legal systems through implementation as revealed in the discussion above in Chapter III. As Jackson argues, the “close interaction of national and international institutions” is the “persistent theme” of the international trade law. 561 For Jackson, “the domestic and international rules and legal institutions of economic affairs are inextricably intertwined,” and moreover, the world trading system is “a complex interplay of both national and international norms, institutions, and policies.” 562 During this process of mediation, not only does the international trade regime shape domestic institutions such as China’s intellectual property legal regime, but also the evolving domestic systems affect and constitute the legitimacy dynamics of the international trade regime such as through China’s WTO entry. The process of China’s WTO compliance is a dynamic process of “selective adaptation.”

“Selective adaptation,” a theory developed by Pitman Potter, explains China’s legal reform and integration into international regimes, in particular the WTO. By examining the interplay between international legal norms and China’s local legal culture during China’s WTO accession, Potter argues that the development of the legal system in China in the two decades before its WTO accession has been a process of “selective adaptation” by which “conditions of local legal culture” constantly mediate the application of foreign norms. 563 The above examination of China’s TRIPS compliance reveals the complexity of China’s selective adaptation to international intellectual property norms, a complex mediation

560 FOUCALUT, Language, Counter-Memory, Practice, 34-5.
561 JACKSON, 29.
562 See id., at 26, 341.
between China’s public-oriented legal tradition and the private-oriented legal tradition of the West underlying the TRIPS regime. The WTO’s underlying normative values have been constantly mediated by China’s local legal culture in the process of implementation, through which WTO legitimacy also constantly evolves. China’s selective adaptation to foreign norms as the response of the local to the global is a constant reexamination of the limit of the international trade regime.

The theory of Selective Adaptation not only recognizes the fact of the mediation between the foreign and the local, but also provides the normative explanation of the evolution of law. Selective adaptation as a process of consent is the resistance of the other, what legitimacy all about. As Lévinas argues, “[t]he ‘resistance’ of the other does not do violence to me, does not act negatively; it has a positive structure: ethical.” 564 Through this process of “selective adaptation,” not only is the self-alienated subject no longer isolated and do the self-sufficient private rights return to the social and come alive, but also critique as consent makes legitimacy possible and attainable. Development of law then is not just an abstract transformation between legal concepts, but rather a dynamic process constantly reworking the limits. Consent through real time participation becomes possible and individuals as contractors regain their rights to contract rather than being deprived by a presupposed social contract. Only in this process when legitimacy becomes alive is the process from “status to contract” possible. Therefore, the theory of selective adaptation is not just something that explains China’s international compliance, but is rather a theory of legitimacy.

As selective adaptation brings law back on the track of evolution, justice becomes attainable through social and legal transformation. In order for social as well as legal transformation to become justice, the “critique of totality,” “the return of the negated,” is essential to our reconstruction of contemporary liberal analytic jurisprudence. 565 Legal theories such as that of general will in Rousseauian contractarian theory, or communicative consensus in Habermasian deliberative democracy theory, or even the Two Principles of Rawlsian justice as fairness theory, all uphold a grand “truth” of jurisprudence regardless of its oppression of singularity. This grand justice filters out all singular differences and

564 LÉVIGNAS, 197.
subsumes all the facts into a single truth. Individuals as autonomous self disappear. Modern jurisprudence fails to defend the autonomous self when totality defeats singularity. However, communication does not need to aim at consensus. Only when we are allowed to disagree are we truly autonomous individuals. In this regard, complete alienation of intellectual property as the negation of author’s authenticity then becomes what Lyotard means by “un-mastering” the mastery of the author, which is a defence of the singularity against totality, the renaissance of little narratives against the grand narrative. It is a theory of legitimacy.

5.4.4 Cultural Relativism’s Limit and Limit’s Cultural Relativism

To understand China’s TRIPS compliance through the appreciation of China’s collectively-oriented cultural imperatives has undoubtedly brought us to the uncomfortable and slippery question of “cultural relativism.” Being a relativist in contemporary academic discourse is generally viewed as something to be condemned and scorned. This makes it necessary for us to clarify how “relativist” our thesis is and what the implications are.

Cultural relativism, according to a well-known relativist anthropologist, M. J. Herskovits, suggests a principle that “[j]udgments are based on experience, and experience is interpreted by each individual in terms of his own enculturation.” This has been thought to be an excuse for individual disobedience of social norms. According to Herskovits, however, cultural relativism does not negate the force of a set of values that prevail at a given time in a given culture. Herskovits suggests that:

Cultural relativism, in all cases, must be sharply distinguished from concepts of the relativity of individual behavior, which would negate all social controls over conduct. Conformity to the code of the group is a requirement for any regularity in life. Yet to say that we have a right to expect conformity to the code of our day for ourselves.

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569 M. J. HERSKOVITS, Cultural Relativism: Perspectives in Cultural Pluralism (F. HERSKOVITS ed., NY: Vintage Books, 1973), 15. See also JOHN W. COOK, Morality and Cultural Differences (New York: Oxford University Press, 1999), 3. According to Cook, Moral relativism, sometimes called “cultural relativism,” … [suggests] that morality is relative to each culture, which implies, among other things, that we cannot rightly pass moral judgment on members of other cultures except by their own cultural standards, which may differ from ours.
does not imply that we need expect, less impose, conformity to our code on persons who live by other codes. The very core of cultural relativism is the social discipline that comes of respect for differences—of mutual respect. Emphasis on the worth of many ways of life, not one, is an affirmation of the values in each culture.  

The main criticism of cultural relativism arises from its amoral potential of undermining some common values such as human rights and gender equality, even the rule of law in general. “Taken to extremes,” F. Raday argues, “cultural relativism is another name of moral nihilism; if cultural relativism were to be taken as the dominant value basis of a legal system, it would be impossible to justify any moral criticism of the system’s norms.”571 For Herskovits, however, cultural relativism is in no way proposing legal nihilism. Herskovits argues that,

Cultural relativism … in no wise gives over the restraints that every system of ethics exercises over those who live in accordance with it. To recognize that right and justice … may have as many manifestations as there are cultures is to express tolerance, not nihilism.  

However, John Cook argues that Herskovits’ interpretation above “turns relativism into an endorsement of tyranny,” as cultural relativism “amounts to the view that the code of any culture really does create moral obligations for its members, that we are obligated by the code of our culture—whatever it may be.”573 This debate indicates that cultural relativism has its own merits as well as limitations. If we further look at the historical evolution of the dynamics between ethical relativism and absolutism, the merits and limits of cultural relativism become very clear.

The above endorsements and criticisms of cultural relativism are nothing modern, but rather something that can be traced back to as early as the beginning of the recorded history of ethical thought. Research suggests that the amazing story of variation of customs in different cultures in Herodotus’ (485-430 BC) book History (Book 3) has illustrated “how

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different cultures may have radically different moral judgments or practices.\textsuperscript{574} The cultural relativist view is believed to be formulated philosophically by a Greek sophist, Protagoras of Abdera, whose view “Man is the measure of all things” indicates that “there are no universal standards of value, and all of our moral principles are created by us.”\textsuperscript{575} This relativist view of morality was carried down through the Renaissance era by French philosopher Montaigne, and through seventeenth and eighteenth centuries was revised “with great force and depth” by Nietzsche, as well as encouraged by the rise of modern anthropology in the early twentieth century.\textsuperscript{576}

Alongside with this historical evolution of thoughts of ethical relativism, there has always been a belief in moral absolutism or universalism which suggests that there are moral principles that are universal and can be applied everywhere regardless of the diversity of cultures. The sharp dichotomy between relativism and absolutism locks our moral reasoning in a dilemma, and indicates our anxiety before diversity and differences.

To some extent, relativism and absolutism are natural responses to the anxiety of difference and fear of being challenged, either as the ancient Greeks experienced through trade, travel, and wars, or as what we are confronted by during the process of globalization and the meeting of the East and the West. Exposure to cultural diversity sets us up in front of a choice between “cultural relativism” or “ethnocentrism” that leads to “cultural absolutism.” Drengson suggests that: “exposure to other cultures often results in either fervent assertion of the values of one’s own culture and condemnation of alien practices, or skepticism about the values of one’s own cultural practices and the belief that no lasting independent standards of behaviour exist.”\textsuperscript{577}

The contention between cultural relativism and moral absolutism has also revealed itself in the bilateral relationships between the U.S. and China. When concluding his examination of China’s post-Mao legal reform, Lubman discussed concerns about the apparent relativism vs. absolutism contention between the U.S. and China. According to Lubman, while some Chinese “cultural and political relativism” sentiments suggest that

\textsuperscript{575} See id., 34.
\textsuperscript{576} See id., 36-39.
Western values like due process and the rule of law are irrelevant to China, “some Americans insist on pronouncing censorious judgments on China and would require the United States to place at the center of US policy relentless insistence that China must become a law-based society.” He suggests that “[t]he difference between Chinese and Western ideas—and ideals—of law has long vexed Sino-Western relations generally, and different ideas about rights under law will continue to trouble Sino-American relations.” Lubman thus seems walking towards middle line and suggests that we should understand China’s legal development “not from the determination of the CCP to retain its rule and power, but from the lasting influences of tradition and the pre-reform Communist past, limited resources, and structural developments in state-society relations that have been caused by economic reform.”

The restless and long history of contention between relativism and absolutism reveals the complexity of moral thinking and judgment, as well as necessitates a compromise between the two. By proposing tolerance and respect for cultural difference and diversity, moral relativism gives every culture its due. However, taking moral relativism to its logical extreme leads to unconditional and universalized tolerance which becomes self-contradictory to relativism. Cook argues that neither have anthropologists succeeded in supporting relativism with evidence of cultural diversity, nor have absolutists been able to refute it successfully. Although arguing that “there are no grounds, scientific or otherwise, for adopting moral relativism,” Cook also insists that “[a]t the same time we must avoid the opposite mistake, that of thinking we can lay down principles that must be followed everywhere, regardless of a people’s history, customs, environment, and the like.”

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578 LUBMAN, Bird in a Cage, 311. He also suggests that George Kennan’s observation is “enlightening” in this regard (emphasis original):

I am extremely skeptical of the relevance and applicability of our moral principles to the problems and outlooks of others, and I suspect that what passes as the ‘moral’ approach to foreign policy in our country is often only another expression of the serious American tendency to smugness, self-righteousness and hypocrisy.

579 See id., 312.

580 See id.

581 DRENGSON, Cultural Relativism: introduction, 274.

582 COOK, Morality and Cultural Differences.

583 See id., 169. Interestingly, though intending to give serious scrutiny to and a powerful attack on moral relativism, Cook however falls into a relativist trap, as he suggests that our judgment on other cultures should be situational and conditional. He suggests that (p. 163):
As a famous relativist attempting to ease the contention, David Wong proposes the concept of “pluralistic relativism” as an alternative to extreme relativism and absolutism. According to Wong,

[Pluralistic Relativism] agrees with one implication of relativism as it is usually defined: that there is no single true morality. However, it recognizes significant limits on what can count as a true morality. There is a plurality of true moralities, but that plurality does not include all moralities. This theory occupies the territory between universalism—the view that there is a single true morality—and the easy target typically defined as relativism: the view that any morality is as good as any other. 

This contention between relativist and absolutist is directly related to and has significant implications for our current research. David Wong points out that the difference between “rights-centered moralities” and “virtue-centered moralities” is one of the main sources of moral relativity. These different moralities have different perspectives on rights. While a rights-centered morality grounds rights on autonomy, a virtue-centered morality grounds rights in community. The relativist vs. absolutist contention between the virtue-centered moralities and rights-centered moralities is perfectly resonant with our examination of the contrast between collective-oriented and private-oriented approaches to intellectual property rights. As absolutists indicate anxiety and fear in front of differences and cultural diversity, those who condemn China’s WTO compliance without due recognition of its progress indicate an inability to understand the variance in legitimate international compliance methods. They promote an absolutist faith in a single true way of complying with the WTO and insist on a conservative approach —“like it or lump it” —to WTO compliance.

[T]he question whether we ought to interfere with the practice of another culture is not a philosophical question but a practical, moral one and is to be answered, therefore, not in a general and abstract way, but in the light of the details of each particular case.

WONG, Natural Moralities, xii.

See id., xiii. According to Wong,

One of the main sources of relativity … [is] the difference between rights-centered moralities and virtue-centered moralities. The latter are concerned with a good common to all members of a community, a good partially constituted by a shared life and structured by a set of norms specifying the contribution of each member to the sustenance of that life. Notions of a common good and shared life are not central to the former. Instead there is an emphasis on what each member of a community is entitled to claim from the others. Though not all moralities exemplifying these types are adequate moralities, some from each type are. That is, the rules from some of each type satisfy all universally valid criteria for adequate moral systems, and they satisfy the local criteria that flesh out a society's ideal for moralities.

See id., 87.
This absolutist approach to WTO compliance fails to address the “moral ambivalence” which Wong categorizes as the phenomenon of “coming to understand that one shares in common important beliefs, desires, and values, but that [others] can resolve the tensions among these elements in ways different from the ways we have resolved them.”\textsuperscript{587} Moral ambivalence recognizes “severe conflicts” between important values, and suggests that “there is no single true morality,” though also acknowledging that “the overlap of values between different moralities implies that there are limits on the range of true moralities.”\textsuperscript{588}

Our examination of China’s TRIPS compliance to some extent echoes Wong’s “pluralistic relativism” that suggests a denial of a single true morality and at the same time a recognition of the existence of significant limits on the plurality of true moralities. On the one hand, China fulfills its TRIPS obligations yet indicates a clear compliance variation, in which intellectual property rights are protected more as socially-embedded public rights rather than private rights.\textsuperscript{589} As TRIPS is concerned more about the ends rather than means of intellectual property rights protection, China’s compliance variation falls under the category of “legitimate non-uniform compliance” that suggests a denial of a single true morality.\textsuperscript{590} This denial suggests that the limit—i.e. the absolutist single truth’s denial of variations—needs to be refined with a balance of cultural relativism. On the other hand, China’s compliance varies only on \textit{how} to protect but not on \textit{whether} intellectual property rights should be protected. China’s TRIPS implementation in no way endorses non-compliance, which recognizes the limit on conventional “cultural relativism.” In our examination, cultural relativism has a significant limit, as the public-oriented cultural imperative has only been used to help us understand the variation in how to protect rather than justify non-compliance. Our examination of the public-private dynamics in China’s TRIPS compliance endorses Wong’s “pluralistic relativism” that confirms the role of the “value of accommodation” in coping with serious moral disagreement.\textsuperscript{591} As Wong suggests,

\begin{quote}
[C]ommunity-centered moralities must come closer to rights-centered moralities in offering some important protections and opportunities for individuals, even if the
\end{quote}

\textsuperscript{587} See id., 6.
\textsuperscript{588} See id., xiv.
\textsuperscript{589} See supra discussion 3.4.3.1.
\textsuperscript{590} See supra discussion 3.4.3.2 on “Legitimate Non-uniform Compliance.”
\textsuperscript{591} WONG, Natural Moralities, xvii.
moral ground for such protections and opportunities is not the same… [R]ights-centered moralities must recognize the importance of community.  

Wong thus argues that “the worth of other ways of life is not a threat to be avoided but an opportunity for enrichment.” The “legitimate non-uniform compliance” of China’s case suggests a balance between cultural relativism’s limit and the limit’s cultural relativism, which calls for a mutual recognition and accommodation between the public oriented and private oriented perspectives of TRIPS compliance.

As cultural relativism and moral absolutism both have their limits, it is not the dissertation’s interest at all to justify failure of compliance with TRIPS by virtue of different cultural heritage. However, the mutual understanding between cultural relativism and moral absolutism, the recognition of different alternatives of compliance, and the mutual adaptation between private interest and public concerns would enrich the moral foundation of our contemporary jurisprudence. Through this recognition, law regains the dynamics of life and legitimacy resumes its process of growth.

592 See id., 92.
593 See id., xvi-xvii.
6 CONCLUSION: ONTOLOGY, LEGITIMACY, AND TIME

Private-public dynamics arise inevitably whenever ideas and knowledge are made into private rights and move away from the domain of public access. The intrinsic private-public contention of intellectual property is not unique to China, but rather something universal. As our discussions revealed, however, China is unique in its clear public-oriented perspective towards intellectual creations from ancient to modern times and from normative construction to enforcement infrastructure. Our empirical survey study shows that this public oriented perspective has been culturally imprinted on China’s social perception of intellectual property protection. Deeply grounded on Locke and Hegel’s property theories, the contemporary intellectual property regime is imprinted with a private rights oriented perspective. The private rights oriented perspective however traps the intellectual property regime in a self-sufficient myth which reveals the regime’s inability to perceive and welcome differences. This inability creates difficulties for the WTO regime as well as for China as shown in our discussion of China’s TRIPS compliance.

There are two forces working together that have shaped contemporary China’s intellectual property regime. While foreign pressures—in particular that of the U.S.—come through bilateral and multilateral frameworks, China’s domestic drive to develop intellectual property protection comes from China’s struggle for international recognition through economic reform. However, no evidence has shown that enough attention has been paid to the confrontation between the private vs. public oriented perspectives toward intellectual property. Establishing an omnipotent administrative power to protect private-rights-in-nature intellectual property is neither in the interest of China nor in the interest of the international regime. While the foreign pressure on China’s TRIPS compliance is squaring a circle in vain, China’s effort to embrace the private rights oriented regime is cutting off its toes to fit into foreign shoes. Both are walking with great effort and in good faith but towards undesirable directions.

During the time of the final revisions of this dissertation, a WTO panel delivered the very first WTO judgement regarding the intellectual property protection dispute between the U.S. and China. In the dispute, the U.S. claims that:

1) China’s thresholds for criminal procedures and penalties are not sufficient to address “willful trademark counterfeiting or copyright piracy on a commercial scale” and thus fail to meet its TRIPS obligations;

2) Chinese customs authorities “lack the authority to order destruction or disposal of infringing goods” under Article 46 of TRIPS, and China’s customs measures of disposing confiscated infringing goods are inconsistent with its obligations under Article 59 of TRIPS; and

3) China’s Copyright Law (Article 4) denies copyright and related rights protection and enforcement to works that have been authorized for publication or distribution within China and thus violates related provisions in TRIPS. 595

The issue of thresholds for criminal procedures and penalties has been a popular topic that can be found in the 2001 accession report and the first and second TPRB report in 2006 and in 2008. 596 However, the Panel Report suggests that the U.S. failed to establish that “the criminal thresholds are inconsistent with China’s obligations under the first sentence of Article 61 of the TRIPS Agreement.” 597 Something notable in this case is that the U.S. indicates its ambivalence towards criminal penalties and administrative measures in the protection of intellectual property rights. On the one hand, when it comes to customs measures, the U.S. insists that customs authorities “should have the power to choose among any legitimate options” and be granted full authority to dispose of or destroy confiscated infringing goods. 598 On the other hand, proposing an all-powerful criminal enforcement, the U.S. argues that “only criminal procedures and penalties” can fulfil TRIPS obligations in Article 61, and administrative enforcement is not a substitute. 599 However, the Panel suggests
that “administrative sanctions, including fines, are available for intellectual property infringement falling below the criminal thresholds in China,” and thus “the [criminal] thresholds do not create a ‘safe harbour’.”¹⁶⁰⁰ For the customs measures in dispute, China’s measures cover both imports and exports; in the Panel’s opinion these measures need only cover imports, and thus have been higher than TRIPS’ requirement. The Panel suggests that:

In this respect, China’s border measures provide a level of protection higher than the minimum standard required by Section 4 of Part III of the TRIPS Agreement. The practical effect of this is that, according to uncontested statistics prepared by China Customs, 99.85 per cent by value of infringing goods disposed of or destroyed under the measures at issue in the years 2005 to 2007 were destined for exportation.¹⁶⁰¹

The Panel suggests that “[a]rticle 59 of the TRIPS Agreement is not applicable to the Customs measures [in dispute] insofar as those measures apply to goods destined for exportation,” and the U.S. fails to establish that “the Customs measures are inconsistent with Article 59 of the TRIPS Agreement, as it incorporates the principles set out in the first sentence of Article 46 of the TRIPS Agreement.”¹⁶⁰² However, the Panel also finds that the Customs measures that potentially allow counterfeit trademark goods’ re-entering “the channels of commerce” through auction only after simple “elimination of infringing features” are inconsistent with Article 46 as incorporated in Article 59 of TRIPS.¹⁶⁰³

Canada submits that China’s thresholds may make available administrative remedies, but they preclude the application of criminal penalties in cases that fall below the thresholds for criminal liability. The thresholds create “safe harbours” in which professional infringers are free to carry out wilful trademark counterfeiting and copyright piracy without risk of imprisonment or monetary fine. Rather than deterring infringement, the thresholds provide infringers clear parameters for committing wilful trademark counterfeiting or copyright piracy with immunity.

¹⁶⁰⁰ See id., para. 7.479.
¹⁶⁰¹ See id., para. 7.229. Emphasis original. See also supra discussion 3.4.2, where we revealed China’s Ex Officio system has exceeded TRIPS’ framework.
¹⁶⁰³ See id. The measures in dispute here refer to Article 27, Regulations on Customs Protection of Intellectual Property Rights, which reads as:

Where the confiscated goods which infringe on intellectual property rights can be used for the social public welfare undertakings, Customs shall hand such goods over to relevant public welfare bodies for the use in social public welfare undertakings. Where the holder of the intellectual property rights intends to buy them, Customs can assign them to the holder of the intellectual property rights with compensation. Where the confiscated goods infringing on intellectual property rights cannot be used for social public welfare undertakings and the holder of the intellectual property rights has no intention to buy them, Customs can, after eradicating the infringing features, auction them off according to law. Where the infringing features are impossible to eradicate, Customs shall destroy the goods.
As for the Copyright Law issue, the Panel’s judgment is highly problematic. In the case, the measure under scrutiny is Article 4.1 of China’s Copyright Law which states:

Works the publication and/or dissemination of which are prohibited by law shall not be protected by this Law.

The U.S. suggests that the law denies minimum rights protection that is specially granted by the Berne Convention Article 5.1 and 5.2 as incorporated in TRIPS Article 9.1, in which the real concern is that Chinese government might allow pirated circulation of those movies or music available in the U.S. yet not published or in distribution in China.\(^{604}\) The Chinese government argues that under China’s Copyright Law (Article 2), copyright protection vests upon creation of works and Article 4 only limitedly denies protection to works whose content is entirely “unconstitutional or immoral.”\(^{605}\) The Chinese government argues that this is consistent with the sovereign exception under Article 17 of the Berne Convention.\(^{606}\) Third party’s opinions are somewhat polarized. While Argentina and Chinese Taipei share the view that China has the right to conduct content review or prohibit the publication or distribution of certain kinds of works, Canada and the EC insist that Members can prohibit the publication and distribution of work yet “do not have a right to deny copyright protection to them.”\(^{607}\) However, the Panel concludes that “notwithstanding China’s rights recognized in Article 17 of the Berne Convention (1971), the Copyright Law,

\(^{604}\) The U.S. suggests that this law denies protection to “(a) works never submitted for content review in China; (b) works awaiting the results of content review in China; (c) the unauthorized versions of works edited for distribution in China; and (d) works that have failed content review.” See China Patent Measures Panel Report, \textit{para.} 7.85.

\(^{605}\) The subsection right next to the law in dispute under China’s Copyright Law states that “[c]opyright owners, in exercising their copyright, shall not violate the Constitution or laws or prejudice the public interests.” The Article 2 of China’s \textit{Copyright Law} reads as:

Chinese citizens, legal entities or other organizations shall enjoy copyright in their works in accordance with this Law, whether published or not.

The copyright enjoyed by foreigners or stateless persons in any of their works under an agreement concluded between China and the country to which the author belongs or in which the author has his habitual residence, or under an international treaty to which both countries are parties, shall be protected by this Law.


It covers the right of governments to take the necessary steps to maintain public order. On this point, the sovereignty of member countries is not affected by the rights given by the Convention. Authors may exercise their rights only if that exercise does not conflict with public order. The former must give way to the latter. The Article therefore gives Union countries certain powers to control.

The Panel states that it “agrees with this interpretation.” See \textit{id.}, \textit{para.} 7.133.

\(^{607}\) See \textit{id.}, paras. 7.25 – 7.28.
specifically Article 4(1), is inconsistent with Article 5(1) of the Berne Convention (1971), as incorporated by Article 9.1 of the TRIPS Agreement." Unfortunately, after suggesting that countries should provide copyright protection to works “whose content are entirely unconstitutional or immoral,” the Panel has not explained in what sense Members of the Berne Convention under Article 17 would enjoy the right “to take the necessary steps to maintain public order” and how it is possible that authors’ exercise of their rights given by the Convention “must give way to public order.” The following sentence might reveal why the Panel has this difficulty:

The Panel notes that copyright and government censorship address different rights and interests. Copyright protects private rights, as reflected in the fourth recital of the preamble to the TRIPS Agreement, whilst government censorship addresses public interests.\(^{609}\)

From a public-oriented perspective, China suggests that “public censorship renders private enforcement unnecessary, that it enforces prohibitions on content seriously, and that this removes banned content from the public domain more securely than would be possible through copyright enforcement.”\(^{610}\) However, the Panel finds “these assertions, even if they were relevant, are not substantiated.”\(^{611}\) To some extent, the Panel appears to be quite sensitive about censorship, and shows no hesitation in its preference for private rights protection in the face of the private-public dynamics of intellectual property rights protection. This preference has been shown in other decisions not involving China, such as the Canada — Pharmaceutical Patents case, in which a WTO Panel made a similar decision.\(^{612}\) In this case, the measures at issue were the “regulatory review provision” and “stockpiling provision” under Canadian Patent Law. While the review provision allowed general manufacturers to produce samples of patented product for use during the regulatory review process, the stockpiling provision permitted producers of generic drugs to make and start stockpiling the drugs six months prior to the expiration of the patent. Both measures have a clear public oriented policy intention to provide low-cost medications to consumers as soon

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\(^{608}\) See id., para. 7.140.

\(^{609}\) See id., para. 7.136.

\(^{610}\) See id., para. 7.138.

\(^{611}\) See id.

as possible. The Panel ruled that only the review measure but not the stockpiling measure were consistent with Canada’s obligations under TRIPS. 613 As Trebilcock and Howse rightly point out, the Panel’s judgment is made “solely from the perspective of the rights-holder, and without regard to the policy goals or purpose of the exception,” and shows Panel’s “myopic focus on the interests of the rights-holder.” 614 These cases perfectly reflect the inherent private-public contention in the protection of intellectual property rights that has been revealed and discussed in our current thesis.

However, we should not over-emphasize or exaggerate China’s compliance variation. China’s TRIPS compliance varies only on its public instead of private rights oriented perspective on intellectual property rights protection, yet in no way indicates any justification of non-compliance or endorsement of intellectual property rights violation. From an analytical point of view, the intellectual property protection issue in China comprises two layers of problems. The first layer of the phenomena of wide-spread intellectual property rights violation is actually not our focus. 615 Our focus is the second layer— the issue of China’s TRIPS compliance— in which our focus is on what legislative, institutional, and judicial response China offers to cope with intellectual property rights infringements. This current thesis offers no justification for non-compliance of TRIPS. Nor does the current thesis suggest that intellectual property rights or intellectual property protection is illegitimate. Yet the contemporary intellectual property regime falls into an inevitable practical legitimacy deficit when it fails to accommodate public concerns domestically and to address development needs internationally. In addition to this practical legitimacy deficit, the contemporary intellectual property regime encounters a theoretical legitimacy deficit too

613 See id., para. 8.1.
615 In China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights, the Panel indicates a similar position in the “Concluding Remark” of the case (para. 8.1.):

In this dispute, the Panel’s task was not to ascertain the existence or the level of trademark counterfeiting and copyright piracy in China in general nor to review the desirability of strict IPR enforcement. The United States challenged three specific alleged deficiencies in China’s IPR legal system in relation to certain specific provisions of the TRIPS Agreement. The Panel’s mandate was limited to a review of whether those alleged deficiencies, based upon an objective assessment of the facts presented by the parties, are inconsistent with those specific provisions of the TRIPS Agreement.
when its absolutist belief in private rights orientation sees no alternative forms of compliance and is unable to address “moral ambivalence” and cultural diversity.

The examination of China’s property rights culture in this dissertation has further implications. Often China’s intellectual property protection issues are attributed to economic underdevelopment. This economic explanation however can not explain the disassociation between China’s economic boom and its slower development of intellectual property protection in last several decades. Our discussion suggests another explanation. Central in the issue of China’s TRIPS compliance is the private-public dynamics. This predicts public concerns in China will still arise even if eventually China crosses the development threshold. The domestic as well as international regimes should not ignore the public concerns in China during the process of constructing, enforcing, and developing an intellectual property regime in China.

Our research not only reveals the above policy implications, but has jurisprudential implications as well. Our analysis above reveals that the ontology underlining TRIPS is a self-sufficient and other-reducing mechanism, in which the existence of others and the world is possible only when they become the knowledge of the self. I think therefore I am, and I see therefore they are. Once private rights become self-sufficient, the public becomes the means of the self to realize private rights. This is how the public is under the consumption of right owners under the contemporary intellectual property regime.

Once the private rights are made self-sufficient, the over-emphasis of the self-sufficiency of the self not only creates self-alienation, but also presents us with a fragmented society and a discontinuous and ruptured time-line. The continuity of the history of knowledge has become a dotted line interrupted with countless patented selves. A world of self-sufficient private rights is a world of self-alienated, isolated subjects, and a world that has only isolated authors without any readers. This world is a fragmented existence, as history is discontinued and time is suspended. While the suspension of time gives us an illusion of eternity, the assimilation of others gives us a false sense of legitimacy. This self-sufficient legitimacy sets up the authority of the rights holder, and law keeps returning back to the origin, therefore becoming static and seeing no need of change and no sign of evolution.
As law is constantly evolving and private rights can never be really self-sufficient, legitimacy can only be perceived in a constantly evolving context, a process of continuous selective adaptation as we revealed above. Therefore, the relational ontology that necessitates ethical relations between the private and public, the dynamic legitimacy through reworking the limits, and the continuity of time meet together. As Lévinas argues:

… Time is the non-definitiveness of the definitive, an ever recommencing alterity of the accomplished—the “ever” of this recommencement. The work of time goes beyond the suspension of the definitive which the continuity of duration makes possible. There must be a rupture of continuity, and continuation across this rupture. … Resurrection constitutes the principle event of time. There is therefore no continuity in being. Time is discontinuous; one instant does not come out of another without interruption, by an ecstasy. In Continuation the instant meets its death, and resuscitates; death and resurrection constitute time. But such a formal structure presupposes the relation of the I with the Other and, at its basis, fecundity across the discontinuous which constitutes time.616

The self-sufficient ontology must be defeated and replaced by the relational ontology. Only upon the triumph of the relational ontology will the author embrace readers, and will the self welcome others and no longer be isolated. The evolution of law will be back on track, and the flow of time will then never be interrupted again. Enlightenment will regain its power of emancipation. Thus selective adaptation, as a process defending singularity against totality, is the only way that we can fight off the sense of self-alienation, and the only way that will expose us the true sense of legitimacy, a dynamic process where “to be” meets with “ought to be,” and “facts” meet with “norms,” through which law evolves.

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616 LÉVINAS, 283-284.
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