

THE PATENT TROLL OR DRAGON?: HOW QUANTITY ISSUES AND CHINESE NATIONALISM EXPLAIN RECENT TRENDS IN CHINESE PATENT LAW

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TABLE OF CONTENTS

I. INTRODUCTION 436

II. OVERVIEW OF CHINESE PATENT LAW..... 439

 A. Development of Chinese Patent Law 439

 B. Comparison Between Chinese and American Patent Law 442

 C. Recent Guidelines for Patent Examinations and Actual Patent Enforcement 444

 1. 2006 Guidelines for Patent Examination..... 444

 2. 2010 Guidelines for Patent Examination..... 444

 D. National Patent Development Strategy (2011-2020) 446

 E. Indigenous Innovation Policies..... 447

 F. International Intellectual Property Agreements 448

 1. Paris Convention for the Protection of Industrial Property 448

 2. WTO Agreement on Trade-Related Intellectual Property Rights 448

 3. Patent Cooperation Treaty..... 449

III. ANALYSIS 450

 A. Past Patent Enforcement Problem: Chinese Culture 450

 B. Chinese Patent Filings Are Up Dramatically the Last Seven Years 452

 C. Quantity Does Not Equal Quality..... 455

 1. Is the Patent Problem in China Overstated? 457

 2. Is it Fair to Criticize China’s Patent Quality? 459

 3. Evaluating Patent Quality Is Very Difficult 460

 D. Stronger Patent Enforcement for Domestic Holders Against Foreign Companies 461

 1. Changes in the Law Favor Domestic Companies 461

 2. An Increase of Patent Litigation in China 462

 3. A Rise in Chinese Nationalism 464

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IV. IMPLICATIONS	469
A. Why is China's Development So Concerning to the West?.....	469
B. A Patient Litigation Explosion	470
V. CONCLUSION	471

I. INTRODUCTION

For the last several decades, there has been a clash between Chinese intellectual property laws and Chinese culture. Specifically, the concept of *Shan Zhai*, Chinese businesses based on fake products, has undermined the veracity of the enforcement and meaning of Chinese intellectual property laws in the past.¹ However, as recently as 2006, then President of China, Hu Jintao stated, “[s]trengthening the building of China’s system of intellectual property rights and vigorously upgrading the capacity of creation, management, protection and application regarding intellectual property are our urgent need for the purpose of . . . building an innovation-oriented country.”² Statements such as these demonstrate that Chinese leaders over the past few years have begun to take notice of the importance of developing intellectual property, patents in particular, and have explored a variety of ways to incentivize the growth of patents. In particular, the Chinese State Intellectual Property Office (SIPO) has set very ambitious goals as part of its National Patent Development Strategy (2011-2020). For example, the 2015 target includes reaching two million total patents for inventions, utility models, and designs. This would make the SIPO the busiest patent office in the world. In 2012 alone, the total number of patent applications in China was 2,050,649.³ That number represented a growth rate of about 26%, up from 1,633,347 in 2011.⁴ Of these applications, 652,777 were for invention patents, 740,290 for utility models, and 657,582 for designs.⁵ In terms of granted patents, China reached 1,255,138 in 2012, which represented the most patents granted in the world.⁶ It also represented a 31% increase in the number of patents

¹ See William Hennessey, *Deconstructing Shanzai – China’s Copycat Counterculture: Catch Me If You Can*, 34 CAMPBELL L. REV. 609 (2012).

² Handong Wu, *One Hundred Years of Progress: The Development of the Intellectual Property System in China*, 1 WIPO J. 117, 120 (2009).

³ *Comparative Table 1 Contemporary Quantity Comparison of Three Kinds of Patents Received from Home and Abroad Between 2011 and 2012*, ST. INTELL. PROP. OFF. (Jan. 22, 2013), http://english.sipo.gov.cn/statistics/2012/12/201303/t20130315_788163.html [hereinafter *Comparative Table 1*].

⁴ *Id.*

⁵ *Id.*

⁶ *Comparative Table 2 Contemporary Quantity Comparison of Three Kinds of Patents Grants from Home and Abroad Between 2011 and 2012*, ST. INTELL. PROP. OFF. (Jan. 22, 2013), http://english.sipo.gov.cn/statistics/2012/12/201303/t20130315_788159.html [hereinafter *Comparative Table 2*].

granted in 2011.⁷ These huge numbers have brought about a new concern by some scholars that the quantity of patents produced by the National Patent Development Strategy will bring about a decline in the quality of Chinese patents.

This and other recent trends have changed dramatically in the field of Chinese patent laws with new Chinese policy, law, and enforcement.⁸ Thus, this Note makes four specific arguments. First, Chinese law is becoming more sophisticated in patent law.⁹ Second, Chinese culture is compatible with patent law and broader Western intellectual property norms, but it is not able to explain the recent trends in patent law.¹⁰ Third, the greater number of patents produced by China will bring about quantity issues that will lead to low quality patents and produce a patent troll problem previously unseen by the world. The patent troll term refers to “ventures that profit from innovation they themselves often had no hand in creating.”¹¹ In the analysis of the quality issues, the patent granting figures from the United States will be compared with what is currently taking place in China to assess if these concerns are valid or not. Judgments of whether the Chinese National Patent Development Strategy is good or bad will often depend on the eye of the beholder. Many scholars and governments from the West have strongly argued that this strategy is dangerous because it creates several low quality patents, which will result in a patent troll problem at a level previously unseen, and thereby making it very difficult for some companies to enter the Chinese market.¹² On the other hand, China has argued that the strategy is essential for its development.¹³ My analysis will demonstrate that this strategy is not only bad for foreign entities, but also bad for innovation within China. The strategy creates incentives to *file* patents, not to create successful patents. Also, it could dramatically increase patent litigation, which is not useful to long-term Chinese development.

Fourth, the current trend of Chinese nationalism is one of the major guiding forces behind the increase in patent enforcement in China.¹⁴ The consequences of these changes are far reaching because they have made China the

⁷ *Id.*

⁸ See *Third Revision of China's Patent Law: Legal Texts and Documents on the Drafting Process 2006-2008*, EU-CHINA PROJECT ON THE PROT. OF INTELL. PROP. RIGHTS (IPR2) (2009), available at <http://www.ipr2.org/patentlaw> [hereinafter *Third Revision*].

⁹ Sophistication refers to the use of the judiciary and administrative organizations to successfully examine patents and use the appeal process.

¹⁰ Western intellectual property norms in this Note refer to intellectual property laws and practices codified in the United States and other Western countries.

¹¹ Ashby Jones, *Patent 'Troll' Tactics Spread*, WALL ST. J., July 9, 2012, at B1.

¹² See Dan Prud'homme, *Dulling the Cutting-Edge: How Patent-Related Policies and Practices Hamper Innovation in China*, EUROPEAN UNION CHAMBER OF COM. IN CHINA 6 (2012), http://mpr.ub.uni-muenchen.de/47617/1/MPRA_paper_43299.pdf.

¹³ State Council, *Compendium of China National Intellectual Property Strategy*, CENT. GOV'T OF THE PEOPLE'S REPUBLIC OF CHINA (2008), http://english.gov.cn/2008-06/21/content_1023471.htm.

¹⁴ See PETER HAYS GRIES, *CHINA'S NEW NATIONALISM: PRIDE, POLITICS, AND DIPLOMACY* (2004).

most litigious country in terms of patent cases in the world.¹⁵ This has made it essential for any multi-national company that wishes to operate in China to obtain patents in China and pursue vigorous enforcement of those patents. These changes in Chinese patent law have made it just as important for individuals and companies that will do business in China to fully understand the current aspects of Chinese patent law and the causes of why it is taking place. The combination of the trends of nationalism and the growing number of patents and litigation has led to a dangerous combination that could bring about a patent troll problem not previously seen in the world. This leads one to wonder if it is time for China to develop legislation that would combat patent trolls similar to the Innovation Act that was passed the U.S. House in December 2013 and is currently being considered by the Senate.¹⁶

The situation for many years has been that China has not enforced its patent laws, and many attributed this to aspects of Chinese culture.¹⁷ However, in the last few years, the Chinese have begun to enforce their patent laws more vigorously in general, but especially in cases involving domestic companies against foreign companies.¹⁸ This Note will examine these situations to explain whether there is a trend towards more vigorous enforcement for all patents, just for Chinese domestic companies, or if this is merely an aberration and the Chinese will continue to not enforce many of their patent laws with much vigor. Also, this Note will examine the role of Chinese culture in Chinese enforcement of patent laws. Finally, this Note will analyze the growing number of domestic patents and the Chinese context that is shaping the uneven enforcement of Chinese intellectual property laws and what it means for American and international companies that will be doing future business in China.

¹⁵ Compare Table 4 *Distribution of Grants for Inventions Received from Home and Abroad*, ST. INTELL. PROP. OFF. (Jan. 16, 2013), http://english.sipo.gov.cn/statistics/2011/12/201201/t20120116_641766.html, with *U.S. Patent Statistics Chart: Calendar Years 1963–2013*, U.S. PAT. & TRADEMARK OFF. (Feb. 3, 2014), http://www.uspto.gov/web/offices/ac/ido/oeip/taf/us_stat.htm [hereinafter *U.S. Patent Statistics*].

¹⁶ Timothy B. Lee, *Patent Reform Bill Passes the House 325 to 90. Here's What You Need to Know*, WASH. POST (Dec. 5, 2013), <http://www.washingtonpost.com/blogs/the-switch/wp/2013/12/05/the-house-votes-on-patent-reform-today-heres-what-you-need-to-know/>.

¹⁷ WILLIAM ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 19-29 (1995).

¹⁸ *USCBC 2012 China Business Environment Survey Results*, THE US-CHINA BUS. COUNCIL (Oct. 10, 2012), <http://www.uschina.org/sites/default/files/uscbc-2012-member-survey-results.pdf>.

II. OVERVIEW OF CHINESE PATENT LAW

A. Development of Chinese Patent Law

China's Patent Law has been rapidly reformed from when it was first enacted in 1984.¹⁹ This was a very important development because it was the first patent law in Chinese history, and it established the bare-bone protections for patents in China.²⁰ Eight years later, the *First Revision of the China's Patent Law* of 1992 was enacted, and it developed from pressure from the United States and other foreign powers that had extensive trade with China.²¹ Foreign pressure has been a trademark of the modern evolution of Chinese patent law.²² The *Second Revision of the China's Patent Law (Second Revision)* took place in 2000 and was developed in preparation of China's ascension to the World Trade Organization (WTO) in addition to the intention of bringing China's patent law in line with WTO Agreement on Trade-Related Intellectual Property Rights (TRIPs).²³ A large part of the reasoning behind the revision was China's accession to the WTO.²⁴ China had been petitioning to join this international trading body since the founding of the international organization.²⁵ After exhaustive negotiations for more than fifteen years, China was finally admitted to the WTO in December 2001.²⁶ It is important to note that China was not allowed to join the WTO because the United States and other countries had concerns about whether China could really make its laws compatible with WTO requirements.²⁷ Once those concerns, including those dealing with intellectual property (IP) rights, were addressed through the development of a plan to bring Chinese law inline with WTO standards, then the United States dropped its objections to China joining.²⁸ Among all of the three major branches of intellectual property law, the Patent Law was the first to be revised to meet some of those complaints.²⁹

Many scholars argue that the *Second Revision* was put in place to adapt the Chinese patent law and system to WTO standards.³⁰ The ability of the Chinese to make these changes was expected because of China's desire "to gain

¹⁹ JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION 583 (2008).

²⁰ *Id.*

²¹ *See id.*

²² DANIEL C.K. CHOW & ANNA M. HAN, DOING BUSINESS IN CHINA: CASES AND MATERIALS 324 (2012).

²³ *See generally id.*

²⁴ *Id.* at 324.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *See generally* CHOW & HAN, *supra* note 22, at 31-32.

²⁸ *Id.* at 31-32, 324.

²⁹ The three major branches of intellectual property law are patents, trademarks, and copyrights.

³⁰ Samuel S. Kim, *China in World Politics, in* DOES CHINA MATTER? A REASSESSMENT: ESSAYS IN MEMORY OF GERALD SEGAL 37, 49 (Barry Buzan & Rosemary Foot eds., 2004).

WTO entry at almost any price.”³¹ The issue of the Chinese joining the WTO was more than just an economic issue, but it was one of nationalism and national pride. In particular, it involves China’s self-perceived rightful place in the world, which is very important for that country. For a century, parts of China were controlled by foreign powers, as if the country was a colony. The Chinese refer to this period as the “century of humiliation.”³²

While the *Second Revision* was constructed in part to meet WTO standards, many provisions were also introduced primarily to respond to the country’s rapidly changing local conditions.³³ For instance, the *Second Revision* focused on simplifying the application procedures and eliminating the duplication of the patent invalidation and revocation processes, even though the TRIPs Agreement did not require these provisions. The clarification over the protection for employee’s inventions also clearly reflected the changing nature of China’s economic conditions, in which a large number of employees of state-owned enterprises have entered the private sector.³⁴ Those conditions were very different from the 1980s and early 1990s, when state-owned enterprises dominated the Chinese economy.

The latest change took place in the form of the *Third Revision of the China’s Patent Law (Third Revision)* of 2008.³⁵ The new revision has many new changes. First, the law previously only required Chinese companies and individuals to file in China, but now it requires all companies, including foreign companies operating in China, to file first in China.³⁶ Second, before and after the *Third Revision* patent applications for inventions that were completed in China did not need to be filed first in China and could be filed directly outside of China in another country. However, under the pretense of protecting state secrets, the *Third Revision* requires that applicants have their invention reviewed by the SIPO before filing outside of China.³⁷ If one chooses not to follow the new regulations and file outside of China before the SIPO review then the applicant will lose their patent rights in China.³⁸ On the other hand, the SIPO drafted Implementing Regulations that govern the SIPO review process demonstrate that this review does not involve the same required level of disclosure of the invention for a patent filing. One of the large problems that remains in the statutory language is the lack of definition for inventions “completed in China,” however the current understanding of the term comprises inventions made in China including those

³¹ *Id.*

³² IMMANUEL C.Y. HSÜ, *THE RISE OF MODERN CHINA* 139-219, 295-350, 387-406 (6th ed. 2000).

³³ Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, 55 AM. U. L. REV. 901, 914-23 (2006).

³⁴ *Second Revision of the China’s Patent Law of 2000*, EU-CHINA IPR2 [hereinafter *Second Revision*].

³⁵ *Third Revision*, *supra* note 8.

³⁶ *Id.* art. 1.7.3.

³⁷ *Id.*

³⁸ *Id.*

inventions made together by non-Chinese and Chinese inventors.³⁹

The third major change was that the adoption of Absolute Novelty in the new revision makes “public use” outside of China a “considered issue.”⁴⁰ This is important because before this change, patent hijacking was possible in China because public use of an invention outside of China did not destroy novelty.⁴¹ Now, however, it can. The fourth change of note involves a codification of prior art defense, more than likely Chinese courts will follow the 2001 advisory opinion of the Chinese Supreme People’s Court where it laid out a doctrine that dealt with prior art defense.⁴² In the advisory opinion the Chinese Supreme People’s Court held, the prior art defense can be proven if it can be shown that the product or process, in question, is evident in view of or indistinguishable to the prior art.⁴³ Fifth, since 2007, the SIPO ended the widespread practice of double patenting for invention and utility patents for the same thing.⁴⁴ An applicant can still file a patent application for utility model and invention patents for the same invention at the same time, but the new change makes it that an invention patent is awarded only if the applicant abandons any utility model patent associated with the invention.⁴⁵ On the other hand, there are still many issues with double patenting. One of the problems is if a species claim and a genus claim would be viewed as double patenting. In addition, it is still an open question if the ban on double patenting applies to applications that are different, but the patent claims are nearly identical.

Sixth, under the *Third Revision* the novelty standard will apply to design patents in the same manner as they are currently applied to invention patents and design patents cannot be indistinguishable or evident from prior art.⁴⁶ This is a noteworthy change because the SIPO in their previous work had not instituted an obvious criterion when deciding if a design patent application would be granted.⁴⁷ Without an obvious criterion and the previous problems with the application of novelty standard, it created a situation where the SIPO issued many “junk” design patents.⁴⁸ Seventh, the *Third Revision* created a new requirement for patent applications dealing with genetic resources, the SIPO now requires that the genetic material source be listed in the patent application.⁴⁹ Furthermore, the SIPO requires the patent application to list the genetic material source and if this is not possible the application must explain what conditions will not allow it to

³⁹ *Id.*

⁴⁰ *Third Revision*, *supra* note 8, art. 1.7.1.

⁴¹ *Id.*

⁴² *Id.* art. 7.1.

⁴³ Chinese Supreme People’s Court Reply Letter No. 32 [2002] of February 2, 2001.

⁴⁴ *Third Revision*, *supra* note 8, art. 3.6.1.

⁴⁵ *Id.*

⁴⁶ *Id.* art. 10.2.1.

⁴⁷ *Second Revision*, *supra* note 34, art. 10.

⁴⁸ Prud’homme, *supra* note 12, at 6.

⁴⁹ *Third Revision*, *supra* note 8, art. 1.5.3.

identify the genetic material source.⁵⁰ The patent application is required to demonstrate that the genetic material was legally obtained.⁵¹ The eighth and final important change of the new revision increased the upper limit of statutory damages around U.S. \$145,000 (RMB 1,000,000) and codifies the process of awarding statutory damages.⁵² Furthermore, the *Third Revision* awards to the patentee reasonable expenses to halt infringement. Nevertheless, Chinese courts have a history of awarding very low reasonable expenses and there is nothing to indicate that this situation will change.

B. Comparison Between Chinese and American Patent Law

In the United States, a patent excludes others from making, selling, and importing a patented invention without the permission of the patent holder.⁵³ A patent in China is essentially the same.⁵⁴ The Chinese system has three different patent types: invention, utility model, and design patents.⁵⁵ An invention patent is similar to a utility patent in the United States and is good for twenty years from the date of filing.⁵⁶ For the invention to qualify for protection of a patent in China, it must display three characteristics: novelty, inventiveness, and practical application.⁵⁷ These three aspects of the law are based on the required qualities of TRIPs,⁵⁸ so they are very similar to the U.S. required standards of novelty, non-obviousness, and utility.⁵⁹

Chinese patents differ from U.S. patents in that the utility model and design patents do not have to meet all of the requirements for an invention patent.⁶⁰ This is because both patents are seen as lower versions of the invention patent and therefore only get ten years of protection from filing.⁶¹ Also, another important difference is that China follows a first-to-file system in the awarding of its patents, which is different from the old U.S. system of first-to-invent.⁶² Interestingly, the United States just changed to a first-to-file system with the America Invents Act, for patents filed on or after March 16, 2013.⁶³ This means

⁵⁰ *Id.*

⁵¹ *Id.* art. 1.5.3.

⁵² *Id.* art. 2.7.

⁵³ 35 U.S.C. § 154 (2012).

⁵⁴ CHOW & HAN, *supra* note 22, at 326.

⁵⁵ *Id.* at 326.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 327.

⁵⁹ CHOW & HAN, *supra* note 22, at 327; *see generally* JANICE M. MUELLER, PATENT LAW (3d ed. 2009).

⁶⁰ CHOW & HAN, *supra* note 22, at 327.

⁶¹ *Id.*

⁶² *Id.* at 328.

⁶³ *See* Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 3(n), 125 Stat. 284, 293 (2011).

that in China, it matters when you file the patent, and it is important that you file before any of your competitors or anyone that seeks to copy your invention.⁶⁴

In both China and the United States, there exist large administrative agencies that examine and issue patents. The SIPO in China has much more power than its equivalent in the United States, the USPTO (United States Patent and Trademark Office), because the SIPO can handle almost every type of patent related dispute.⁶⁵ In fact, in China, there are two paths to deal with patent infringement issues.⁶⁶ One is through the court system, which can often be a long process, but can wield some large damages, if the court finds in favor of a company.⁶⁷ The other path, which is not existent in the United States, is with an administrative process through the SIPO.⁶⁸ The SIPO can examine the appeal more quickly than the courts.⁶⁹ However, the administrative process has drawbacks since much smaller amounts of damages are awarded for infringement of the patents.⁷⁰ In addition, the administrative process can include appeals to the courts, so a company could obtain an administrative victory, but still lose if the courts do not agree with the result.⁷¹

Another very important difference between the two countries is that in China, the validity of a patent is not challenged entirely in the court system, but rather, it begins with the Patent Reexamination Board (PRB) of the SIPO.⁷² After a decision is made, it is then appealable to the Intermediate People's Court of the Beijing Municipality.⁷³ That decision is then appealable to Appeals Court in Beijing.⁷⁴ As the decision process has become centralized, this process has produced expertise on the validity of patents. However, this is not the only area that the Chinese courts are involved in during patent disputes and their expertise is not as great in the area of patent infringement.

Many of the problems that the Chinese courts have in the area of patent infringement comes from issues that range from incompetence to local protectionism.⁷⁵ The issues are so concerning that the preferred method of resolving business conflicts in China is not through the courts, but through arbitration.⁷⁶ In particular, foreign investors have become concerned with the competence of the Chinese judges. In areas outside the large coastal cities and Beijing, many judges lack the legal education to decide complex legal matters

⁶⁴ See CHOW & HAN, *supra* note 22, at 328.

⁶⁵ *Id.* at 330.

⁶⁶ *Id.*

⁶⁷ *Id.* at 330-31.

⁶⁸ *Id.* at 330.

⁶⁹ CHOW & HAN, *supra* note 22, at 330.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 329.

⁷³ *Id.* at 330.

⁷⁴ CHOW & HAN, *supra* note 22, at 330.

⁷⁵ *See id.* at 54-56.

⁷⁶ *Id.* at 55-56.

such as patent disputes.⁷⁷ Another area of concern is the impartiality and fairness of the judges because the Chinese Communist Party (CCP) still heavily influences the courts, and at times, trial courts take directions from political committees.⁷⁸ However, there are signs that this is changing, such as an increase in the number of well-reasoned opinions from Chinese courts.⁷⁹ In addition, another areas of concern with the Chinese judicial system are that civil decisions are vulnerable to a lack of finality. The Protectorate, an organ of the judicial system that supervises the system, can overturn any ruling at any time.⁸⁰ Furthermore, local protectionism continues to be a concern not only for foreign businesses, but also for Chinese domestic companies from different areas, because local judges' salaries are still set by local governments.⁸¹ Consequently, the Chinese judiciary still has many structural problems to overcome, but it has made progress over the last several years.

C. Recent Guidelines for Patent Examinations and Actual Patent Enforcement

1. 2006 Guidelines for Patent Examination

The *2006 Guidelines for Patent Examination* were significant because they attempted to integrate the changes that were put in place for the *Second Revision of the China's Patent Law*. The *Second Revision*, in turn, was significant because it brought the Chinese Patent Law in line with the TRIPs agreement because of the WTO agreement.⁸²

2. 2010 Guidelines for Patent Examination

These guidelines are in place to enforce the *Third Revision of the China Patent Law*. Consequently, within the new guidelines, how the new changes will be enforced is codified. While China was debating over which provisions were to be included in the *Third Revision*, it had also begun actively pursuing an intellectual property agenda. In June 2008, the State Council introduced a pioneering National Intellectual Property Strategy.⁸³ This strategy provided improvements to the security and administration of intellectual property rights

⁷⁷ *Id.* at 55.

⁷⁸ *Id.* at 55-56.

⁷⁹ *See, e.g.*, CHOW & HAN, *supra* note 22, at 345-53.

⁸⁰ *Id.* at 356.

⁸¹ *Id.*

⁸² *Id.* at 324.

⁸³ *See* State Council, *supra* note 13.

within a complete plan, while emphasizing the need for active development of independent or self-controlled intellectual property.⁸⁴

A few months later, China adopted the *Third Revision* to the Patent Law, completely revamping its patent system for the third time. Like the early 2000s, the patent law was the first to be revised. The *Revision* reflected the country's growing emphasis on the use of patents to help develop a knowledge-based economy. Unlike the previous two amendments, however, compliance with WTO or other multilateral norms played a rather insignificant role in the revision. For the first time, China adjusted its patent system based on its own needs, rather than constraints imposed by the international community. As Guo He observed: "The impetus for the early amendments came from outside, whilst the need for the third amendment originated from within China, that is to say, the majority of the *Third Revision* was to meet the need of the development of the domestic economy and technology originated in China."⁸⁵

Pursuant to the *Third Revision*, the Patent Law adopted the absolute novelty standard and introduced provisions concerning the protection of genetic resources. In response to the requirement to amend the TRIPs Agreement by adding Article 31, to which China acceded on November 28, 2007, the law provides new grounds for granting compulsory licenses.⁸⁶ The law also clarifies double patenting concerns over the filing of both an invention patent and a utility model patent. Under the amended law, an inventor can only hold a single patent, not both an invention patent and a utility model patent.⁸⁷ Also, the amended law increases the amount of damages and fines within the Chinese patent system, including statutory damages.⁸⁸ Moreover, it allows for parallel importation and introduces the Chinese equivalent of a Bolar exception, which allows generic pharmaceutical producers to import, manufacture, or test a patented product prior to the expiry of the patent "for the purpose of providing information required for administrative examination and approval."⁸⁹ Finally, the law abolishes the provisions concerning foreign patent agencies, which foreign inventors are required to use.⁹⁰

Notwithstanding these latest amendments, the levels of protection and enforcement of intellectual property rights in China have yet to completely satisfy foreign rights holders and their supportive governments. Virtually every year, the United States Trade Representative (USTR) puts China on its Watch List or Priority Watch List⁹¹—not as alarming as the time when China was deemed a

⁸⁴ See *id.* ¶ 7.

⁸⁵ Guo He, *Patents*, in CHINESE INTELLECTUAL PROPERTY AND TECHNOLOGY LAWS 25, 28 (Rohan Kariyawasam ed., 2011).

⁸⁶ *Third Revision*, *supra* note 8, art. 48.

⁸⁷ *Id.* art. 9.

⁸⁸ *Id.* art. 65.

⁸⁹ *Id.* art. 69.

⁹⁰ *Id.* art. 19.

⁹¹ The notable exception is during the so-called honeymoon period following China's accession to the World Trade Organization in December 2001. In April 2005, the

priority foreign country in the late 1980s and early 1990s, but still rather high on the list. The International Trade Commission recently estimated that “firms in the U.S. [intellectual property]–intensive economy that conducted business in China in 2009 reported losses of approximately [U.S.] \$48.2 billion in sales, royalties, or license fees due to IPR infringement in China.”⁹²

Dissatisfaction aside, however, the protection and enforcement of intellectual property rights have dramatically improved in the past decade. In fact, the biggest challenge for intellectual property rights holders in China today is no longer the low standards of protection, but the limited effectiveness in enforcement.⁹³ Such enforcement problems are well illustrated by the complaint the United States filed before the WTO Dispute Settlement Body in April 2007.⁹⁴ Although the complaint did not focus on China’s obligations in the patent area, it implicated customs and criminal provisions that are relevant to patent protection.⁹⁵

D. National Patent Development Strategy (2011-2020)

The Chinese leaders over the past few years have begun to take notice of the importance of developing patents and strong intellectual property protections. Premier Wen Jiabao observed: “One thing necessary to stress is the need to concretely strengthen IPR [intellectual property rights] protection. In the new era, world science and technology competition as well as economic competition is mainly competition of IPRs. Underscoring IP protection is underscoring and inspiring innovation.”⁹⁶ In particular, the SIPO set very ambitious goals for its National Patent Development Strategy (2011-2020). For example, the 2015 targets included the following goals:

USTR elevated China back to the Priority Watch List. *See generally* Donald P. Harris, *The Honeymoon is Over: The U.S. China WTO Intellectual Property Complaint*, 32 *FORDHAM INT’L L.J.* 96 (2008).

⁹² *China: Effects of Intellectual Property Infringement and Indigenous Innovation Policies on the U.S. Economy*, U.S. INT’L TRADE COMM’N, at xiv (May 2011), <http://www.usitc.gov/publications/332/pub4226.pdf>.

⁹³ OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2005 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 95 (2005).

⁹⁴ *See* Request for Consultations by the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/1 (Apr. 16, 2007).

⁹⁵ On further discussions of the dispute, see Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009); Peter K. Yu, *The TRIPs Enforcement Dispute*, 89 *NEB. L. REV.* 1046 (2011); Peter K. Yu, *TRIPs Enforcement and Developing Countries*, 26 *AM. U. INT’L L. REV.* 727 (2011).

⁹⁶ Quoted in *China’s Intellectual Property Protection in 2008*, ST. INTELL. PROP. OFF. (Apr. 27, 2009), http://english.sipo.gov.cn/laws/whitepapers/200904/t20090427_457167.html.

The annual quantity of applying for patents for inventions, utility models and designs [in China] will reach 2 million. China will rank among the top two in the world in terms of the annual number of patents for inventions granted to the domestic applicants, and the quality of patents filed will further improve. The number of owning patents every one million people and the number of overseas patent applications filed by Chinese applicants will double. The proportion of patent applications in industrial enterprises above designated size will reach 8% and the quantity of owning patent rights will significantly rise The patent transaction services will be established in major cities of China with annual patent transaction amounts reaching 100 billion yuan The patent examiner[s] will reach 9,000 The talents in the patent service industry will be greater and the professional categories will be more complete, with certified patent agents reaching 10,000.⁹⁷

Two million domestic patents is a large number that will be sure to have a substantial impact. However, in order to analyze the impact of this target, a strong understanding of how those patents will be enforced is needed. This will be examined closely later in this Note. One problem that currently exists is that Chinese patent law allows companies to get utility patents for inventions while there is a wait for the invention patents.⁹⁸ The problem is that utility patents are not strongly scrutinized, so there are issues with duplicates of previously patented inventions.

E. Indigenous Innovation Policies

A group of policies can best be identified in a 2006 Chinese government paper titled, *Guidelines for the Implementation of the National Medium-and-Long-Term Program for Science and Technology Development (2006-2020)*.⁹⁹ This policy was a major shift for economic policies in China because it called on the country to make “national champion” companies and Chinese firms to become “world leader[s] in innovation, technology, and IP.”¹⁰⁰ These policies have made it where the Chinese government procurement process that spends U.S. \$200 billion on private goods and service will favor the technology researched and

⁹⁷ State Intellectual Prop. Office, *National Patent Development Strategy (2011-2020)*, N.Y. TIMES (Nov. 2011), <http://graphics8.nytimes.com/packages/pdf/business/SIPONatPatentDevStrategy.pdf>.

⁹⁸ *Third Revision*, *supra* note 8, art. 9.

⁹⁹ See CHOW & HAN, *supra* note 22, at 396; Yangtze Yan, *China to Remarkably Increase Investment in Science, Technology*, GOV.cn (Feb. 9, 2006), http://english.gov.cn/2006-02/09/content_183777.htm.

¹⁰⁰ CHOW & HAN, *supra* note 22, at 396.

developed in China.¹⁰¹ There is a specific ban on purchasing technology developed in the United States.¹⁰²

The Chinese government recently issued statements that it would not discriminate against foreign companies as the 2006 paper laid out,¹⁰³ but there are concerns over whether this is correct. Despite this change, the Chinese government still disproportionately gives out contracts to Chinese domestic companies. The Chinese government's statement does not change its goals of making "national champions" among Chinese companies and promoting Chinese firms to become world leaders in a variety of important technological industries.

F. International Intellectual Property Agreements

1. Paris Convention for the Protection of Industrial Property

China is a member of the Paris Convention for the Protection of Industrial Property.¹⁰⁴ Under Article 4 of the Agreement, all applicants of Paris countries will receive the rights of priority in other signatory countries.¹⁰⁵ Consequently, if an applicant files an application in one Paris country, it will receive the right of priority for the same application for the same invention made in other Paris countries for twelve months from the first filing date.¹⁰⁶ This basically means that a U.S. company could file a patent in the United States, and as long as it filed a patent for the same invention within twelve months, it would receive the first filing date in the United States for an application made in China. This treaty is important for the full protection of intellectual property rights of foreign companies.

2. WTO Agreement on Trade-Related Intellectual Property Rights

The TRIPs agreements must be followed by China as a stipulation of membership in the WTO.¹⁰⁷ This has important consequences for Multi-national Corporations (MNCs) because TRIPs put into place the same recognition dates at

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ William Pentland, *China Pulls Back Indigenous Innovation Policies*, FORBES (July 3, 2011, 11:23 AM), <http://www.forbes.com/sites/williampentland/2011/07/03/china-pulls-back-indigenous-innovation-policies/>.

¹⁰⁴ The Paris Convention is an international treaty that protects intellectual property. It was signed in 1883 and was revised as recently as 1967. China is a signatory to the treaty and is obligated to follow the protections of foreign patent applications. See CHOW & HAN, *supra* note 22, at 328.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 324.

the Paris Convention agreement.¹⁰⁸ In addition, the agreement requires that countries that sign on must commit to making sure that all “field of technology” have the ability to obtain patents and they must be granted for “inventions” if they meet all patentability requirements.¹⁰⁹ Furthermore, signatories of the treaty commit to keeping the number of exclusive rights low by ensuring that the normal use of the work and the normal use of the patent do not conflict.¹¹⁰ Additionally, the treaty is clear that patent holders’ interests cannot face unreasonable prejudice.¹¹¹ Also under Article 30, when patent rights are created third parties’ interest must be taken into consideration.¹¹² One of the most important principles that the Paris Convention stands for are the principles of Articles 3 and 4 that each signatory country agrees that it will not create intellectual property laws that prejudice the citizens of other TRIPS countries or only benefits their own citizens.¹¹³

3. Patent Cooperation Treaty

Another important international treaty concerning patents that China is a party to is the Patent Cooperation Treaty (PCT), which focuses on assisting multiple patent filings in different countries around the world.¹¹⁴ The PCT allows for one international application to serve as an application in each nation.¹¹⁵ Also, the PCT extends the Paris priority for an additional eighteen months, so under the PCT an applicant has thirty months to file the second application in another Paris Convention country.¹¹⁶ If it is filed within thirty months, the first filing date will be used.¹¹⁷ In China, the patent application is required to be filed in Chinese, even if it is through the PCT.¹¹⁸ In the past, this has caused problems for foreign patent holders because they have obtained poor translations.¹¹⁹ Overall, the PCT with TRIPs and the Paris Convention obligate China to treat foreign patent applicants and holders with the same deference as domestic applicants and holders.

¹⁰⁸ *Id.* at 328.

¹⁰⁹ CHOW & HAN, *supra* note 22, at 324.

¹¹⁰ Agreement on Trade-Related Aspects of Intellectual Property Rights arts. 13, 30, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (1994).

¹¹¹ *Id.* art. 30.

¹¹² *Id.*

¹¹³ *Id.* arts. 3-4.

¹¹⁴ CHOW & HAN, *supra* note 22, at 329.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ CHOW & HAN, *supra* note 22, at 329.

III. ANALYSIS

A. Past Patent Enforcement Problem: Chinese Culture

Historical Chinese cultural attitudes towards intellectual property are weak in terms of enforcement and partially explain the lack of enforcement for intellectual property throughout history. It has been argued that one of the key reasons that the Chinese have been resistant to Western concepts of intellectual property is that the society has a close connection to Confucian values and principles.¹²⁰ Confucian attitudes towards intellectual property are harsh because there is no concept of private property on spiritual property or what the United States would call intellectual property.¹²¹ Consequently, stealing intellectual property is not as bad as stealing real property. The beginning of this debate about Confucianism begins with William Alford's important book, *To Steal a Book Is an Elegant Offense*.¹²² Alford's multipart argument begins by stating that the protection of intellectual property was not valued because of the traditions of Confucianism.¹²³ Alford identified the Confucian need to venerate the old traditions. The effect of this can be seen in the Chinese educational system, which emphasizes the need to memorize information and where copying another's work is often viewed as positive, rather than negative, behavior.¹²⁴

Alford's arguments are not without their detractors. To understand this important argument concerning the connection of Chinese values represented by Confucianism and the inability of the Chinese to pass strong measures for intellectual property, the argument needs to be broken down. First, Ken Shao has argued that there are several changes in China that Alford did not cover.¹²⁵ Shao uses the lack of discussion of changes in China by Alford to question if Alford is accurately depicting the situation in China. In addition, Shao argues that we should reconsider Confucian influence in the area of Chinese intellectual property protection and enforcement.¹²⁶

The robust version of Alford's argument is built upon the inability of China to institute needed intellectual property reforms proposed by the West and other intellectual property rights owners because of Confucianism. Although this is a very provocative claim, it is likely not supported by the reality on Chinese soil.

¹²⁰ ALFORD, *supra* note 17, at 19-29.

¹²¹ *Id.*

¹²² *Id.* (discussing how the Confucian culture prevented intellectual property protection from taking root in imperial China).

¹²³ *Id.*

¹²⁴ See Li Luo, *How Has Chinese Traditional Culture an Impact on China's Intellectual Property Legal System? Would This Influence Be a Problem in the Protection of Folklore by the Intellectual Property Legal System?*, 5 INT'L J. INTERDIS. SOC. SCI. 269 (2010).

¹²⁵ See Ken Shao, *The Global Debates on Intellectual Property: What if China Is Not a Born Pirate?*, 2010 INTELL. PROP. Q. 341.

¹²⁶ *Id.* at 344-45.

For example, the idea that Confucianism is incompatible with Western concepts of intellectual property is mistaken and one only needs to take note of the interesting parallels between what the West refers to as public domain and Confucianism.¹²⁷ Admittedly copying is important for Chinese Confucianism in order for its followers to retain records of important expertise and knowledge, understand human interactions, and to improve their lives through the gradual process of acquiring knowledge.¹²⁸ However, not all Chinese literary authorities agree if copying is need and how much copying is needed to accomplish those tasks.¹²⁹ Moreover, traditional Chinese culture, through Confucianism, has advocated for a flexible use of important traditional works that allows the user to transform the work to meet their needs. This is rather different that wholesale stealing and copying of text that is similar to piracy and other intellectual property violations that can be found in China.

In contrast to the more robust form of Alford's claim, its simpler form is closer to the real situation on the Chinese ground, but some Chinese scholars still disagree with even this simpler claim.¹³⁰ This simpler claim argues that Western intellectual property rights have not properly formed in Chinese culture because Confucianism has not allowed it, but it does not state that intellectual property rights and Confucianism are irreconcilable.¹³¹ In addition, the argument states that Confucianism does not advocate against Western ideas of intellectual property rights. Consequently, ideas from outside China may help with the development of China's intellectual property system and this has already started to happen with influence of the United States through trade.¹³² The importance place on the

¹²⁷ Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131, 224-25 (2000).

¹²⁸ ALFORD, *supra* note 17, at 28 ("Interaction with the past is one of the distinctive modes of intellectual and imaginative endeavor in traditional Chinese culture." (quoting ARTISTS AND TRADITIONS: USES OF THE PAST IN CHINESE CULTURE, at xi (Christian Murck ed., 1976)) (internal quotation marks omitted)). The Chinese believed that "the essence of human understanding had long since been discerned by those who had gone before and, in particular, by the sage rulers collectively referred to as the Ancients who lived in a distant, idealized 'golden age.'" *Id.*

¹²⁹ *See id.* at 26-29 (noting that Chinese poets and literary theorists disagreed on the appropriate use of past works).

¹³⁰ *See* Charles R. Stone, Comment, *What Plagiarism Was Not: Some Preliminary Observations on Classical Chinese Attitudes Toward What the West Calls Intellectual Property*, 92 MARQ. L. REV. 199, 199-200 (2008).

¹³¹ ALFORD, *supra* note 17, at 1 (considering why intellectual property law, and in particular copyright, has never taken hold in China); *id.* at 2 (noting that "imperial China did not develop a sustained indigenous counterpart to intellectual property law, in significant measure because of the character of Chinese political culture").

¹³² Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle*, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS PLUS ERA 173, 185-88 (Daniel J. Gervais ed., 2007) (discussing the establishment of the intellectual property regime in China in the 1980s and 1990s as a result of external pressure).

influence of external forces helps to explain why Alford emphasized foreign transplants and their impact in his book.¹³³ China still has much progress to make to satisfy the United States and other international observers, but China had made huge strides in intellectual property protection since the introduction of modern intellectual property right to China in 1985.

While the Confucian values have had a major influence on China, the communist traditions in China have led to a more communal sense of property compared to the West.¹³⁴ However, this has changed recently because of the capitalist reforms that have taken place in China since the death of Mao and the rise of Deng Xiaoping in the late 1970s and early 1980s.¹³⁵

B. Chinese Patent Filings Are Up Dramatically the Last Seven Years

Currently, China files the most domestic invention/utility patents in the world. In 2012, China issued 143,847 invention patents; in comparison, the United States issued 121,020 utility patents.¹³⁶ To reach this number, there have been large increases of invention patents granted in China, from 5,395 in 2001 to 143,847 in 2012.¹³⁷ This demonstrates the large amount of money that is being put into industries by the Chinese government to innovate and create new technological products. In addition to the implementation of the National Intellectual Property Strategy of 2008, the Chinese government has created incentives and subsidies that make it valuable to try to patent even ideas that have no value.¹³⁸ This has produced an environment in China where it is very easy to file patents, but good patents are very difficult to find.¹³⁹ Tony Chen, a patent attorney with Jones Day in Shanghai, contends: “[G]ems are hard to find in a mountain of junk.”¹⁴⁰ The current patent policy incentives in China have encouraged patents to be filed with the expectation that they do not have a chance of success.

Ken Shao argues that China’s activity in the intellectual property area is in part spurred by a Chinese cultural characteristic of innovation and national

¹³³ ALFORD, *supra* note 17, at 30-55 (discussing foreign transplants in the intellectual property area and how the Chinese “learn[ed] the law at gunpoint”).

¹³⁴ See generally CHEN, *supra* note 19, at 10-22.

¹³⁵ *Id.* at 54-55.

¹³⁶ Table 4 *Distribution of Grants for Inventions Received from Home and Abroad*, ST. INTELL. PROP. OFF. (Jan. 22, 2013), http://english.sipo.gov.cn/statistics/2012/12/201303/t20130315_788162.html [hereinafter Table 4]; *U.S. Patent Statistics*, *supra* note 15.

¹³⁷ Table 4, *supra* note 136; *Three Kinds of Patent Granted for Home and Abroad, 1985-2005*, ST. INTELL. PROP. OFF. (July 25, 2006).

¹³⁸ See generally Mark Liang, *Chinese Patent Quality: Running the Numbers and Possible Remedies*, 11 J. MARSHALL REV. INTELL. PROP. L. 478 (2012).

¹³⁹ *Id.* at 482.

¹⁴⁰ *Patents, Yes; Ideas, Maybe*, ECONOMIST (Oct. 14, 2010), http://www.economist.com/node/17257940?story_id=17257940.

strategies.¹⁴¹ However, the vast majority of literature on the subject disagrees with Shao because Chinese culture in the past has hindered innovation. In addition, patent and contract enforcement demonstrates the concept *Shan Zhai*, Chinese businesses based on fake products, which has taken a strong hold on China. My Note will further explore the increased patent enforcement that Shao does not discuss in his article.¹⁴² Government subsidies are distorting incentives, as there is a focus on filings, not on successful applications. Recently, Mark Liang questioned the National Intellectual Property Strategy and the effect it is having on the quality of Chinese patents:

[T]here is reason to doubt . . . the *quality* of the patents being applied for and granted in China. The burst in Chinese patenting activity is a product in large part from the Central Government's "innovation agenda,"—a leading component of which are generous incentives for patent filings. For example, Chinese companies who file above a certain number of patents receive significant tax breaks. Tenure is more likely for university professors who are able to obtain patents. Patent application fees for qualifying individuals and companies are entirely subsidized by local governments. These incentives, among others, are all part and parcel of the agenda's stated goal of 2 million patents (of any type) by 2015, making China's SIPO far and away the world's busiest patent office.¹⁴³

China's use of incentives is troubling for innovation because it focuses on filings of patents, rather than successful applications. These incentives can lead companies to boost their number of filings not to innovate and protect an invention, but rather to receive tax breaks. Likewise, other incentives that Liang mentions about the tenure for professors being linked to the amount of patents filed and patent application fees being paid for by local governments indicate that there is a strong push by the Chinese government to produce a high quantity of patents with a disregard for quality. In none of the incentives are there mentions of any financial rewards contingent on a successful patent application or quality.

The chart below highlights the explosion in domestic patent application that has taken place in China, and that number is sure to increase with the implementation of the National Patent Development Strategy. It is interesting to note that applications of domestic firms are up, but the percentage of domestic patents being accepted actually has fallen. This raises the question of whether the quality of Chinese patents is suffering in the rush to develop vastly more patent filings every year. This fact demonstrates the difficult situation that China and the

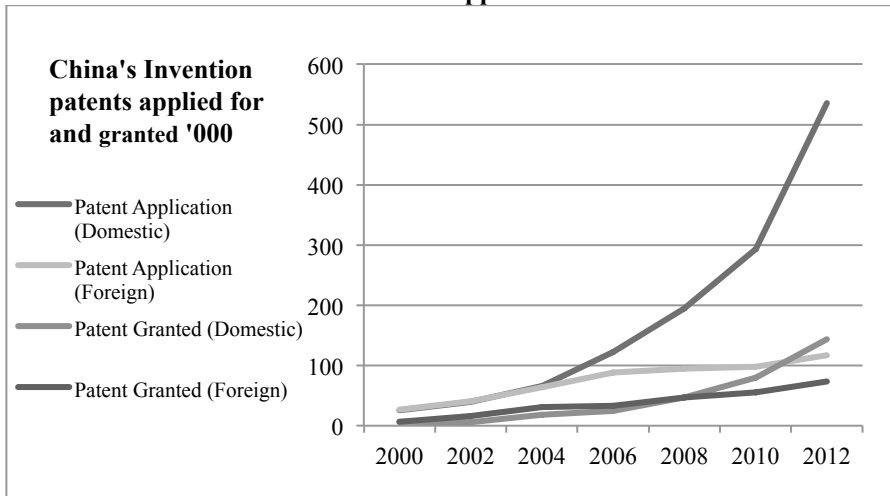
¹⁴¹ See Ken Shao, *Patent Law, National Strategies and Policy Incentives: China's Road to a Leading Innovator*, 14 INT'L TRADE & BUS. L. REV. 85 (2011).

¹⁴² See generally *id.*

¹⁴³ Liang, *supra* note 138, at 482 (alteration in original) (footnotes omitted).

SIPO are in because if the SIPO turns down several applications, as it has, critics will point to it as a sign that there are many bad patents being produced. On the other hand, if the SIPO grants a large number of the patents, and if the percentage were to rise dramatically, then critics would then contend that the SIPO is overburdened and not doing its job. In reality, the chart below seems to show that the SIPO is able to distinguish which patents are bad and thereby deny the application.

Growth of Chinese Patents Applied For and Granted¹⁴⁴



¹⁴⁴ *Three Kinds of Patent Granted for Home and Abroad, 2000-2006*, ST. INTELL. PROP. OFF. (June 11, 2007), http://english.sipo.gov.cn/statistics/200804/t20080416_380892.html; *Applications for Three Kinds of Patents Received from Home and Abroad, 2000-2006*, ST. INTELL. PROP. OFF. (June 11, 2007), http://english.sipo.gov.cn/statistics/200804/t20080416_380894.html; *Applications for Three Kinds of Patents Received from Home and Abroad (January 2008-December 2008)*, ST. INTELL. PROP. OFF. (Feb. 12, 2009), http://english.sipo.gov.cn/statistics/gnwsznb/2008/200904/t20090409_450035.html; *Grants for Three Kinds of Patents Received from Home and Abroad (January 2008-December 2008)*, ST. INTELL. PROP. OFF. (Feb. 12, 2009), http://english.sipo.gov.cn/statistics/gnwsqnb/2008/200904/t20090409_450141.html; *Applications for Three Kinds of Patents Received from Home and Abroad (January 2010-December 2010)*, ST. INTELL. PROP. OFF. (Jan. 25, 2011), http://english.sipo.gov.cn/statistics/gnwsznb/2010/201101/t20110125_570592.html; *Grants for Three Kinds of Patents Received from Home and Abroad (January 2010-December 2010)*, ST. INTELL. PROP. OFF. (Jan. 25, 2011), http://english.sipo.gov.cn/statistics/gnwsqnb/2010/201101/t20110125_570600.html; *Table 1 Distribution of Applications for Inventions Received from Home and Abroad*, ST. INTELL. PROP. OFF. (Jan. 22, 2013), http://english.sipo.gov.cn/statistics/2012/12/201303/t20130315_788166.html [hereinafter *Table 1*]; *Table 4*, *supra* note 136.

Recently, former USPTO Director David Kappos was interviewed by the *The New York Times* about China's National Patent Development Strategy. He commented that the 2015 target numbers were "mind-blowing."¹⁴⁵ The SIPO's strategy has a lot of goals to demonstrate where China's patent system is going; however, most of the focus has rightly been on the SIPO's projection that China will reach two million patents per year by 2015.¹⁴⁶ The scrutiny is proper because China will more than likely reach its goal and that means that ten million patent applications would be handled by the SIPO from 2015-2020.¹⁴⁷

C. Quantity Does Not Equal Quality

When one first looks at the huge number of patents forecasted by the SIPO, it leads many to question if the goal of two million patents by 2015 is even possible or realistic. Many of the critics have pointed out that the National Patent Development Strategy will bring about a decline in the quality of Chinese patents because when applications increase dramatically, they are accompanied by the granting of patents for weak reasons.¹⁴⁸ In 2011, domestic patent applications and grants of patents in China exceeded those in the United States, causing concern by some scholars that the quantity of patents produced by the National Patent Development Strategy will bring about a further deterioration of the quality of Chinese patents. One of the most alarming aspects of China's patent policy is that bad incentives are being created by the government, which are creating subsidies for filing patents, that will distort the total number of domestic applications.¹⁴⁹ In a recent Reuters article Elliot Papageorgiou, a Partner at the law firm Rouse Legal in China, said, "The idea of subsidizing patents is not bad in itself, however it is a blunt instrument because you get high figures for filings, but it does not tell you anything about the quality of the patents filed."¹⁵⁰ This is especially the case with China because it is offering subsidies for filing and not for the granting of the patent. Papageorgiou also contends that quantity is not quality: "One thing is volume, quality is quite another. The return, or the percentage of grants, of the patents is still not as high in China as, say, in the United States, Japan or some

¹⁴⁵ Steve Lohr, *When Innovation, Too, Is Made in China*, N.Y. TIMES, Jan. 2, 2011, at BU3, available at <http://www.nytimes.com/2011/01/02/business/02unboxed.html>.

¹⁴⁶ See, e.g., *id.*; Prud'homme, *supra* note 12, at 6.

¹⁴⁷ Yu, *supra* note 33, at 914-23.

¹⁴⁸ LERNER, INNOVATION AND ITS DISCONTENTS: HOW OUR BROKEN PATENT SYSTEM IS ENDANGERING INNOVATION AND PROGRESS, AND WHAT TO DO ABOUT IT 12 (2004) ("[T]he rapid increase in the rate of patenting has been accompanied by a proliferation of patent awards of dubious merit.")

¹⁴⁹ Lee Chyen Yee, *China Tops U.S., Japan to Become Top Patent Filer*, REUTERS (Dec. 21, 2011), <http://www.reuters.com/article/2011/12/21/us-china-patents-idUSTRE7BK0LQ20111221>.

¹⁵⁰ *Id.*

places in Europe.”¹⁵¹ These same concerns were reflected in an article in *The Economist* that agreed: “[T]here are reasons for skepticism. The bureaucrats in Chinese patent offices are paid more if they approve more patents, say local lawyers.”¹⁵² This leads to obvious problems with motivations of the examiners to make a decision and can lead them to approve an application with originality issues. Even more disturbing is that Chinese incentives and subsidies make it valuable to try to patent even ideas that have no value. As mentioned before, this has produced an environment in China where it is easy to file patents, but good patents are difficult to find, and the policy incentives have encouraged patents to be filed with the expectation that they do not have the chance of success.¹⁵³

A recently released report by Dan Prud’homme, the business manager of the IPR Working Group and R&D Forum at the European Union Chamber of Commerce in China, examined the situation in China. The report was negative in its analysis of the many problems that the Chinese patent system is facing.¹⁵⁴ In particular, the report focused on patent quality and argued:

While patents are exploding in China and certain innovation is also on the rise, patent quality has not proportionately kept up and in fact the overall strength of China’s actual innovation appears overhyped. Statistical analysis in this study not only reveals concerning trends in the quality of China’s patents at present, but suggests that while patent filings in China will likely continue to notably grow in the future, patent quality may continue to lag these numbers. In fact, projections in this study indicate there might be over 2.6 million less-than-“highest-quality” patents filed in China in 2015 alone, which is substantially more than estimated “highest-quality” patents filings in that year. With this in mind, and objectively considering its performance on additional innovation metrics, it is clear that China’s innovation ecosystem deserves a new type of scrutiny.¹⁵⁵

The report goes on to contend: “[A] network of patent-related policies, other measures, and practices in China collectively hamper both patent quality and innovation at large.”¹⁵⁶ The paper concludes: “[O]verall, China still lags behind many developed countries in terms of innovation at large and quality patents in particular, let alone breakthrough innovation and highest-quality patents.”¹⁵⁷

¹⁵¹ *Id.*

¹⁵² *Patents, Yes; Ideas, Maybe, supra* note 140.

¹⁵³ *See Liang, supra* note 138, at 482.

¹⁵⁴ Prud’homme, *supra* note 12, at 6.

¹⁵⁵ *Id.* at 1.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 19.

Prud'homme's report demonstrates that China still has much progress in the area of patent quality before the situation improves.

1. Is the Patent Problem in China Overstated?

The Chinese patent system deserves all the criticism it gets, but a myopic focus on patent metrics will make one pay too much attention to details and not understand the general situation. First, the often-cited goal of the Chinese to have two million patents by 2015 includes all three types of their patents: invention, utility model, and design. Invention patents in China are only approved after an examination by patent agents that look closely at the substance of the patent.¹⁵⁸ Utility model patents in China are examined differently and “[were] set up to invite broader participation in inventive enterprises, especially by smaller collective enterprises and private citizens who are less likely to have resources devoted to invention patents.”¹⁵⁹ China is not the only country that uses this patent strategy, and the Chinese utility model patent is similar to short-term patents in Hong Kong, Gebrauchsmuster in Germany, or utility models in Japan or South Korea.¹⁶⁰ These types of patents are used with the policy goal of broader participation and have much lower inventiveness requirements than invention patent applications.¹⁶¹

To understand the quality issue in China, comparisons must be made, and the most precise comparisons should be made between China and other countries like the United States. Also, it is important to focus on invention patents alone, and if possible, on patents for domestic inventions alone.¹⁶² Similarly, Mark Liang observed:

[I]n assessing the inventive prowess of the two countries, the relevant figure should be the number of indigenous patent filings. Foreign filings say nothing about each country's inventiveness and should therefore be excluded. In sum, a proper comparison is the number of Chinese-origin invention applications filed at

¹⁵⁸ See Patent Law of the People's Republic of China arts. 39-40 (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 12, 1984, amended Dec. 27, 2008, effective Oct. 1, 2009) (China), available at http://www.sipo.gov.cn/sipo_English/laws/lawsregulations/200804/t20080416_380327.html (requiring substantive examination for invention patents, but only preliminary examination for utility model and design patents).

¹⁵⁹ PETER FENG, *INTELLECTUAL PROPERTY IN CHINA* 170 (2d ed. 2003).

¹⁶⁰ See Uma Suthersanen, *Utility Models and Innovation in Developing Countries* 40-42, INT'L CENTRE FOR TRADE & SUSTAINABLE DEV. (No. 13, 2006); Peter K. Yu, *Intellectual Property and Asian Values*, 16 MARQ. INTELL. PROP. L. REV. 329, 389-90 (2012) (noting the importance of utility models and other alternative innovation models to developing countries).

¹⁶¹ Prud'homme, *supra* note 12, at 3 n.1.

¹⁶² Liang, *supra* note 138, at 490.

the SIPO versus the number of U.S.-origin utility applications at the PTO.¹⁶³

Following this best practice of comparing patent figures between countries (China and the United States), in 2012, the total number of applications for and grants of patents for domestic inventions in China were 535,313 and 143,847, respectively.¹⁶⁴ Those figures already exceeded the corresponding figures in the United States, which amounted to only 268,782 and 121,026, respectively.¹⁶⁵ This comparison demonstrates that inventiveness is strong domestically within China, but many will still question China's figures because of the 27% approval rate, which is low compared to the United States.

While one can argue that the approval rate for patents is better in the United States, so the quality of invention patents in the United States is better than in China, it is important to note the 28% increase in domestic inventions in China from 2011 to 2012. If this trend continues, as it is expected to, China will eventually produce such a large number of patents that quantity will become a larger and more pressing problem than quality to the West. Mark Cohen, a former senior intellectual property advisor at the U.S. Embassy in Beijing, has stated: "[S]ometimes quantity is quality in patents, at least in terms of litigation. Having a thicket of patents that one can assert can be very meaningful in driving a license or a settlement."¹⁶⁶ This is a concern in the larger economic situation because if China's so-called "national champions,"¹⁶⁷ such as Huawei Technologies, are enabled to be granted a large number of patents, they will obtain a substantial advantage over foreign firms that have far fewer Chinese patents. This quantity issue demonstrates that the Chinese patent problem is not overstated and represents a threat to foreign companies that wish to enter the Chinese market.

While the Chinese goal of two million granted patents by 2015 sounds "mind-blowing"¹⁶⁸ to some, it is actually a realistic number when the total number of current patent applications in China is taken into account. According to the official SIPO statistics, the total number of patent applications in 2012 in China already reached 2,050,649.¹⁶⁹ That number represented a growth rate of about 26%, up from 1,633,347 in 2011. Of these applications, 652,777 were for

¹⁶³ *Id.*

¹⁶⁴ *Table 1, supra* note 144; *Table 4, supra* note 136.

¹⁶⁵ *U.S. Patent Statistics, supra* note 15.

¹⁶⁶ Whitney Stenger, *Mark Cohen: Global Intellectual Property Ambassador*, 15 *SMU SCI. & TECH. L. REV.* 41, 45 (2011).

¹⁶⁷ See ODED SHENKAR, *COPYCATS: HOW SMART COMPANIES USE IMITATION TO GAIN A STRATEGIC EDGE* 158 (2010) (noting "the government's strategy of consolidating strategic industries . . . to create national champions that can hold their own in global markets and . . . to restore its imperial glory"); TOM DOCTOROFF, *WHAT CHINESE WANT: CULTURE, COMMUNISM AND THE MODERN CHINESE CONSUMER* 15-16 (2012) (discussing China's mobilization of resources for critical strategic undertakings at the national level).

¹⁶⁸ Lohr, *supra* note 145.

¹⁶⁹ All the figures herein are taken from *Comparative Table 1, supra* note 3.

invention patents, 740,290 for utility models, and 657,582 for designs. In terms of granted patents, China reached 1,255,138 in 2012, which represented the most patents granted in the world. It also represented a 31% increase in the number of patents granted in 2011. If China can maintain the level of patent growth, then it will reach its goal in 2014 of obtaining two million patents. China could even sustain growth as low as 18% annually for the next three years and reach the goal of two million patents granted before the end of 2015. These statistics demonstrate the robust growth of the Chinese patent system and that China will meet its goals for patent growth and continue to be one of the most important patent venues in the world.

2. Is it Fair to Criticize China's Patent Quality?

Although it is fair to criticize the quality of Chinese patents, those criticisms should not be based on comparisons to idealistic standards, but rather comparisons to actual patent quality across countries.¹⁷⁰ When looking for a template, the United States is a good case. There were repeated calls for reform of the U.S. patent process because the USPTO had granted low quality patents.¹⁷¹ The calls for reform ultimately led to a complete overhaul of the patent system in the United States with the implementation of the America Invents Act.¹⁷² Criticism of the U.S. patent system dates back to more than a decade ago when practitioners and scholars lamented over the low quality of U.S. patents, which has been blamed on “budgetary limitations, an exploding filing rate, and the increasing range of patentable subject matter.”¹⁷³ John Allison and Mark Lemley looked at the problem more closely in an extensively cited study that demonstrated that U.S. courts surprisingly found patents invalid in 46% of the 300 final validity decisions.¹⁷⁴ In addition, Carlos Correa also reported:

In the US . . . patent owner's likelihood of success in patent validity challenges is only 51 percent if the trial is heard before a judge alone. If the trial is heard before a judge and jury: 68 percent. Overall chances of success for the patent owner if the trial

¹⁷⁰ Cf. Peter K. Yu, *Enforcement, Economics and Estimates*, 2 WIPO J. 1, 13 (2010) (questioning whether researchers should “measure the countries against an idealised yardstick of effective intellectual property protection and enforcement” when they make cross-country comparisons of piracy and counterfeiting).

¹⁷¹ For discussions of problems within the U.S. patent system, see generally FED. TRADE COMM'N, *TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY* (2003); JAFFE & LERNER, *supra* note 148.

¹⁷² See Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011).

¹⁷³ John R. Thomas, *The Responsibility of the Rulemaker: Comparative Approaches to Patent Administration Reform*, 17 BERKELEY TECH. L.J. 727, 728 (2002).

¹⁷⁴ John R. Allison & Mark A. Lemley, *Empirical Evidence on the Validity of Litigated Patents*, 26 AIPLA Q.J. 185, 205 (1998).

is held in Massachusetts and Northern California, respectively:
30 per cent, 68 per cent.¹⁷⁵

If these reports are correct in demonstrating low validity rates and forum shopping that reflect the actual quality of U.S. patents, it raises the question if the situation of the quality of Chinese patents is meaningfully different from the criticism of low patent quality that other countries face. However, the Chinese patent situation is different and is being treated differently because of the astounding numbers of patents being granted and the threat those large numbers present to foreign entities that seek to do business in China.

3. Evaluating Patent Quality Is Very Difficult

One of the difficult problems in evaluating the Chinese patent system is defining the patent quality. One method of evaluating patent quality is the examination of the patent system's compliance with the legal statutory requirements for patentability.¹⁷⁶ Another evaluation system has put an emphasis on the profitability of patents and their ability to be commercialized.¹⁷⁷ On the other hand, many have argued that patents can still be of good quality if they meet the statutory requirements, even if they are not profitable.¹⁷⁸ Others have started using the number patent citation in patent and non-patent literature to determine the importance of the patent and hence its quality.¹⁷⁹ In the Chinese patent system context, many scholars have considered that invention patents are good quality and other patents (utility model and design) as low quality or junk patents.¹⁸⁰

In terms of the Chinese patent system, Mark Cohen further reported:

It is . . . very hard to benchmark the quality of individual patents. By China's own data, quality is improving. By certain patent quality surrogate data—such as the number of service versus non-service inventions, patents that are commercialized, field of use, whether patents are maintained throughout their useful life, type of patents (invention patent versus utility model or designs)—there are more and more patent grants that have commercial viability. However, there are no citation rates. So in other words, it cannot be determined if a particular patent has

¹⁷⁵ Carlos M. Correa, *The Push for Stronger Enforcement Rules: Implications for Developing Countries*, in INT'L CTR. FOR TRADE & SUSTAINABLE DEV., THE GLOBAL DEBATE ON THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS AND DEVELOPING COUNTRIES 27, 67 n.84 (2009).

¹⁷⁶ Prud'homme, *supra* note 12, at 22.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

been cited by subsequent patents. That would be a very important, perhaps the most important, indicator of patent quality. Whether patents are filed internationally through the Patent Cooperation Treaty (PCT) or through national phase filings would be another important indicator, as international filings are generally reserved for higher quality patents due to their cost and international significance.¹⁸¹

According to SIPO statistics, there were only 18,145 PCT domestic patent applications filed in 2012, which is an increase from the 16,089 PCT applications filed in 2011.¹⁸² This shows growth, but also that only 3% of the 535,313 of the domestic invention applications were seen as being high enough quality to be filed internationally.¹⁸³ Such a low number of PCT domestic patent applications indicate that China perhaps has a long way to go in terms of quality.

With the increase of patents, litigation and disputes will increase. In particular, the area of foreign versus domestic patent litigation will be a very interesting field of cases that needs to be examined closely.

D. Stronger Patent Enforcement for Domestic Holders Against Foreign Companies

1. Changes in the Law Favor Domestic Companies

With the *Third Revision of China's Patent Law* came laws that put domestic companies in a favorable position in comparison to foreign-held companies, in order to take advantage of the new régime of patent laws and enforcements. First, the *Third Revision* requires all companies, including foreign companies, to effectively file first in China.¹⁸⁴ This is different from the previous law that only required Chinese companies and individuals to file in China. In addition, the law hurts foreign applicants because patent applications under the pretense of protecting state secrets, require that applicants have their invention reviewed by the SIPO before being filed outside of China.¹⁸⁵ If one chooses not to follow the new regulations and file outside of China before the SIPO review then the applicant will lose their patent rights in China.¹⁸⁶ One of the large problems

¹⁸¹ Stenger, *supra* note 166, at 45-46.

¹⁸² *Table 14 Distribution of PCT International Applications Received in 2012*, ST. INTELL. PROP. OFF. (Jan. 22, 2013), http://english.sipo.gov.cn/statistics/2012/12/201303/t20130315_788151.html; *Table 14 Distribution of PCT International Applications Received in 2011*, ST. INTELL. PROP. OFF. (Jan. 16, 2012), http://english.sipo.gov.cn/statistics/2011/12/201201/t20120116_641744.html.

¹⁸³ *Table 1*, *supra* note 144; *Comparative Table 2*, *supra* note 4.

¹⁸⁴ *Third Revision*, *supra* note 8, art. 1.7.3.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

that remains in the statutory language is the lack of definition for inventions “completed in China,” however the current understanding of the term includes inventions made in China including those inventions made together by non-Chinese and Chinese inventors.

Since 2007, SIPO ended the widespread practice of double patenting for invention and utility patents for the same thing.¹⁸⁷ Thus, an applicant can still file a patent application for utility model and invention patents for the same invention at the same time, but the new change is that an invention patent will only be awarded if the applicant abandons any utility model patent associated with the invention.¹⁸⁸ On the other hand, there are still many issues with double patenting. One of the problems is if a species claim and a genus claim would be viewed as double patenting. In addition, it is still an open question if the ban on double patenting applies to applications that are different, but the patent claims are nearly identical.

The *Third Revision* also increased the upper limit of statutory damages to around U.S. \$145,000 (RMB 1,000,000) and codified the process of awarding statutory damages.¹⁸⁹ Furthermore, the *Third Revision* awards to the patentee reasonable expenses to halt infringement. Nevertheless, Chinese courts have a history of awarding very low reasonable expenses and there is nothing to indicate that this situation will change. When the Chinese doubled the highest statutory damages amount to RMB 1,000,000 with the *Third Revision* it sent a strong message that the Chinese government would be supporting domestic innovation and unfortunately many foreign firms have suffered from increased damage judgments.

2. An Increase of Patent Litigation in China

According to the People’s Republic of China’s *State Intellectual Property Office White Papers*, from 2004 to 2011, patent lawsuits increased dramatically from 2004 to 2010.¹⁹⁰ In 2004, 2,459 patent lawsuits were filled in China, and by the end of the decade in 2010, the number of lawsuits rose to 7,819.¹⁹¹ The current trend in Chinese courts is that they are increasingly likely to award higher damage awards if the claim in question is strongly supported. For example, Chinese domestic companies have been able to capitalize on this current trend to obtain huge damage awards. For example, in *Chint v. Schneider*, a court in Zhejiang province awarded Chint, a Chinese company, RMB 334 million, which

¹⁸⁷ *Id.* art. 3.6.1.

¹⁸⁸ *Id.*

¹⁸⁹ *Third Revision*, *supra* note 8, art. 2.7.

¹⁹⁰ See generally *White Papers on China’s Intellectual Property Rights Protection*, ST. INTELL. PROP. OFF., <http://english.sipo.gov.cn/laws/whitepapers/> (last visited Feb. 27, 2014).

¹⁹¹ *Id.*

was the highest award in China for a patent claim to that date.¹⁹² Admittedly, there have been cases where foreign companies have been successful in their claim. In the *Neoplan Bus GmbH* case, the First Instance Court awarded Neoplan, a German auto manufacturer, the equivalent of U.S. \$20 million for design patent infringement by three Chinese automakers.¹⁹³

In a close examination of China's patent enforcement régime within the Chinese courts, it needs to be recognized that China in many ways is a nation of nations.¹⁹⁴ China contains immense economic disparities between the different regions, and slower development has created lower intellectual property protections in those regions.¹⁹⁵ For example, the "stronger intellectual property protection will appear in Beijing, Shanghai, Guangzhou, and other major cities and coastal regions."¹⁹⁶ On the other hand, a different situation is taking place in the less developed part of China as counterfeiting and piracy move there.¹⁹⁷ A variety of judicial decisions have indicated that there is less enforcement in the interior provinces,¹⁹⁸ and "regional conflicts and rivalries may also become major factors affecting the future development of intellectual property protection in China."¹⁹⁹ China has improved its patent enforcement régime overall, but it has been an uneven improvement. While improved, the case statistics still demonstrate a disparity among domestic and foreign entities that are trying to enforce patent infringement. In particular, the win rates are better for domestic entities in patent litigation over the last ten years.²⁰⁰ In an analysis of the cases of the last three years data is accessible (2008-2011), the win rate for domestic companies against foreign firms in patent infringement cases is close to 60%.²⁰¹ However, the invalidation of patents has affected domestic firms more than foreign firms in gross numbers, which can be seen as more of a product of the quality of patents produced²⁰² than a commentary of the Chinese courts. On the other hand, the size of damages awarded to domestic firms as opposed to foreign firms does indicate a bias similar to domestic bias contained in the win rates.²⁰³

¹⁹² Harry Yang, *Chint v. Schneider on Patent Infringement*, CHINA INTELL. PROP. (Feb. 1, 2008), <http://www.chinaipmagazine.com/en/journal-show.asp?id=258>.

¹⁹³ Zhang Shuhua & Haiyan Wu, *NEOPLAN Loses an Important Infringement Lawsuit due to Invalidation of Its Design Patent*, LEXOLOGY (Oct. 25, 2012), <http://www.lexology.com/library/detail.aspx?g=69655dd6-9585-4bf4-98fb-883c8d3af8ad>.

¹⁹⁴ Yu, *supra* note 33; *see also* Shenkar, *supra* note 167, at 134 (pointing out that "China's enormous labor reserve, with pay scales radically lower in the hinterland than on the coast and in urban areas . . . , creates the equivalent of a country within a country").

¹⁹⁵ Peter K. Yu, *Three Questions that Will Make You Rethink the U.S.-China Intellectual Property Debate*, 7 J. MARSHALL REV. INTELL. PROP. L. 412, 422-23 (2008).

¹⁹⁶ *Id.* at 423.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Based on the author's review of the Chinese patent case data from 2001 to 2011.

²⁰¹ Based on the author's review of the Chinese patent case data from 2008 to 2011.

²⁰² For a more in-depth discussion on this topic, see discussion *supra* Part III.C.

²⁰³ Based on the author's analysis of the Chinese patent case data from 2001 to 2011.

The case data strongly indicates that there is favoritism for Chinese firms in patent litigation, and therefore, a closer examination is needed into the cause of this bias.

3. A Rise in Chinese Nationalism

a. Why Examine Nationalism?

With China's expanded involvement in the international arena, typified by what has been labeled by some as China's New Diplomacy,²⁰⁴ it is critical to examine the domestic influences and constraints on Chinese Law that affect international companies. One of the more fascinating of these constraints is the rise of nationalism and public opinion in China and how it has affected aspects of Chinese Law, specifically intellectual property law. The protection of intellectual property has become a very important foreign policy issue between China and the West. Consequently, it is very important to understand the relationship and influence of Chinese nationalism on Chinese foreign policy and in effect Chinese intellectual property law. An analysis of the rise of nationalism in China helps to explain the economic nationalism used by the government to support the government-controlled judiciary's enforcement of patents in favor of domestic companies.

Chinese nationalism has been on display as recently as when China hosted the Olympics in 2008. In particular, the Chinese people were angry at what they saw as the West trying to ruin the opportunity for China to demonstrate to the world that it had arrived as a major power through demonstrations during the international portion of the torch relay.²⁰⁵ The demonstrations against China's treatment of Tibet during the international leg of the Olympic torch relay produced a strong nationalistic response from the Chinese.²⁰⁶ Their anger took the form of public demonstrations, online petitions, newspaper editorials, and other Internet activism. In particular, the protests in Paris during the torch relay drew the fury of the Chinese people and led to calls for a boycott of French goods.²⁰⁷ However, flare-ups of nationalism are not new in recent Chinese history. In particular, events that have provoked strong nationalistic responses in relation to the United States have included the accidental bombing of a Chinese embassy in 1999 in Belgrade, Serbia, and the 2001 incident in which a Chinese fighter jet collided with a U.S. EP-3 spy plane off of China's coast. In examining these last two events, there is much disagreement about whether the nationalist reactions are

²⁰⁴ Evan S. Medeiros & M. Taylor Fravel, *China's New Diplomacy*, FOREIGN AFF., Nov./Dec. 2003, <http://www.foreignaffairs.org/20031101faessay82604/evan-s-medeiros-m-taylor-fravel/china-s-new-diplomacy.html>.

²⁰⁵ Andrew Jacobs, *Protests of the West Spread in China*, N.Y. TIMES (Apr. 21, 2008), http://www.nytimes.com/2008/04/21/world/asia/21china.html?_r=4&oref=slogin&.

²⁰⁶ *Id.*

²⁰⁷ Josie Liu, *Guest Blogger: Chinese Netizens Call for Boycott of Carrefour*, CHINA DIGITAL TIMES (Apr. 16, 2008), <http://chinadigitaltimes.net/2008/04/chinese-netizens-calling-on-boycott-of-carrefour-in-the-wake-of-troubled-olympic-torch-rely-josie-liu/>.

natural reactions or if the government instead facilitated these reactions. It is paramount that nationalism in China be more closely analyzed as its rise could pose challenges, not only for the United States and the West in coming to terms with a rising China, but also if the Chinese Communist Party wants to implement intellectual property law that is fair to both domestic and foreign companies.

b. The Nature of Chinese Nationalism and its Effect on Chinese Law

Recent trends in the enforcement of Chinese patent law have demonstrated that nationalism is present in patent administrative decisions, but does it additionally constrain the adjudication of Chinese patent law?²⁰⁸ Some scholars, such as Suisheng Zhao, argue that the Chinese government has been using and advocating pragmatic nationalism that assists the government in accomplishing its goals.²⁰⁹ It is important to note that Zhao believes that more than one type of nationalism exists in China.²¹⁰ He contends that the more dominant type, pragmatic nationalism, defends China's national interests by developing cooperative relations with major powers, unlike nativist and liberal nationalists.²¹¹ To paraphrase Zhao, pragmatic nationalists' tactics are flexible and their strategy is subtle.²¹² They do not want to appear confrontational, but are uncompromising when dealing with foreign demands on China's vital interests and territorial disputes.²¹³ Pragmatic nationalism is thus more reactive than proactive.²¹⁴ Zhao's characterization of nationalism would make it a tool of the government to promote its policies and would suggest a symbiotic relationship between nationalism, Chinese foreign policy, and Chinese intellectual property law. In spite of this, Zhao has actually acknowledged that in the bigger picture, China has not promoted nationalism in recent history, but in fact has suppressed it because of the many different strands of nationalism.²¹⁵ This is especially the case with the liberal strands of nationalism, as Beijing does not want protestors on the

²⁰⁸ In closely looking at the existing works on the subject, it was found that Suisheng Zhao and Peter Hays Gries are the key scholars who are providing insight on the interaction of nationalism, Chinese law, and foreign policy through events examined in this study. They present opposite views of how Chinese nationalism should be understood and are therefore the most useful scholars to focus on. There are other scholars, such as Jonathan Unger and Alan Whiting, that have made substantial contributions to the field, but Zhao and Gries stand out from others in the field.

²⁰⁹ Suisheng Zhao, *China's Pragmatic Nationalism: Is it Manageable?*, WASH. Q., Winter 2005-2006, at 131, 143.

²¹⁰ *Id.*

²¹¹ *Id.* at 133.

²¹² *Id.* at 139.

²¹³ *Id.*

²¹⁴ Peter Hays Gries, *Tears of Rage: Chinese Nationalist Reactions*, 46 CHINA J. 25, 31-32 (2001).

²¹⁵ Zhao, *supra* note 209, at 143.

street to dictate what the government should do in terms of foreign policy. Indeed, the government has partially used nationalism to inform some of its policies, but it only uses it to pacify nationalists.²¹⁶ The government in the future will seek to incorporate nationalism more in the formulation of its policy, but will give a preference to those ideas that are coming from sources that present themselves as working with the government and not against it.

Alternatively, some scholars, such as Peter Hays Gries, argue “nationalist opinion is increasingly constraining the ability of China’s elite to pursue China’s national interest.”²¹⁷ Gries highlights the 2005 anti-Japanese protest in arguing that after two weekends of protests and thirty million signatures on an Internet petition against the Japanese bid for a permanent seat on the United Nations Security Council, the Chinese government was forced to take a strong stance against the Japanese bid, when it normally would have instead taken a quieter approach.²¹⁸ While there is truth to the claim that Chinese nationalism did force the government to do something it would not normally do, the claim that it is constraining foreign policy is dubious. The efforts of the nationalists did not force a policy change, but instead forced the government to present its decisions and policy in a different way. Scholars with this mindset will argue that nationalism tends not to restrain Chinese foreign policy, but rather forces those that implement it to make superficial changes in how they present an issue to assuage the nationalists.

c. Is Chinese Nationalism Controlled by the Party?

*The Big Lie is alive and well in Beijing It should come as no surprise, after weeks of . . . internal propaganda, that ordinary Chinese now believe the embassy bombing was deliberate.*²¹⁹

– *Washington Post*, May 11, 1999

The above quote from the *Washington Post* displays the commonly held view by the West that the Chinese government controlled the popular outrage for its own purposes following the NATO Belgrade bombings. While the Chinese government has tried to take advantage of the nationalist protests, the CCP quickly had to suppress the protests when the protests endangered domestic stability and important economic relations with foreign countries. It is a mistake to think that all of the protests were controlled by the CCP and that the feelings

²¹⁶ *Id.*

²¹⁷ Peter Hays Gries, *Chinese Nationalism: Challenging the State*, 104 CURRENT HIST. 251, 255 (2005).

²¹⁸ *Id.* at 256.

²¹⁹ GRIES, *supra* note 14, at 100 (quoting *China’s True Colors*, WASH. POST, May 11, 1999, at A20).

displayed that day were not genuine. Gries argues that the anger felt by the Chinese people was genuine that day and it played on the victimization narrative that was produced from the Chinese experience of the “Century of Humiliation.”²²⁰ In particular, Gries examines a powerful collection of 281 letters, essays, and other forms of writing that were sent to the *Guangming Daily* newspaper.²²¹ His findings illustrate that there was and still is a popular form of nationalism alive in China and that it stems from the mistreatment of China in modern history. Also, this nationalist movement carries with it the ambition of restoring China to its rightful place in the world. The implications of this are very important because the movement suggests that there is a powerful domestic phenomenon within China that wants the government to pursue policies to strengthen domestic interests at the cost of foreign companies.

In the case of the 1999 Belgrade Bombing, Gries also argues, “China’s government could not respond to angry demands of protestors and wound up having to accommodate them.”²²² In examining the 1999 Belgrade Bombing, Gries believes that the protests were a bottom-up movement and not a top-down movement. The government would control and start a top-down movement, but the general population would start and control a bottom-up movement. Gries concludes: “Popular nationalists are not just influencing domestic politics; they are also beginning to influence the making of Chinese foreign policy.”²²³ This has very important implications for intellectual property law because it indicates that the public puts substantial pressure on issues related to foreign policy that attempts to get the government to hold strong nationalist positions.

On the other hand, Suisheng Zhao argues that there is an element of government control in Chinese nationalism that is characterized by pragmatic nationalism. This form of nationalism has “reinforced Chinese national confidence, turning past humiliation and current weakness into a force that propels modernization.”²²⁴ Zhao makes the important distinctions between popular “liberal” nationalism and state controlled nationalism; Zhao acknowledges that both exist in China, but that pragmatic nationalism is the dominant form that is expressed.²²⁵ The problem with Zhao’s claim is that pragmatic nationalism, as presented, reflects the policy that was implemented by the government to control the reaction to the 1999 Belgrade Bombing, rather than the visceral anger that was seen on the streets after. This leads one to question whether pragmatic nationalism, as argued by Zhao, should be considered a true form of nationalism or simply a puppet of the government. However, Zhao’s theory does capture an important reality in China: that there is both a state controlled “nationalism” and a popular form of nationalism competing for the populace’s support.

²²⁰ Gries, *supra* note 214, at 26.

²²¹ *Id.*

²²² GRIES, *supra* note 14, at 121.

²²³ *Id.* at 134.

²²⁴ Gries, *supra* note 214, at 32.

²²⁵ Zhao, *supra* note 209, at 143.

One problem with Zhao's view of the two types of nationalism is that the distinction it makes between government dominated nationalism and popular "liberal" nationalism is too stereotypical and simplistic. Zhao creates an unneeded "black and white" dichotomy between the forms of nationalism when in truth the two forms lie in shades of grey. Zhao views the pragmatic "party" dominated nationalism as very rational and as always looking at the situation to deploy national sentiments for its own purposes.²²⁶ However, he depicts the popular form of nationalism as filled with passion and that the masses are blinded by an irrational anti-foreign hatred.²²⁷ Both extremes are incorrect, as the government in the past has made many irrational decisions, such as ramping up nationalism on the morning of May 9th following the 1999 Belgrade Bombings after the protestors had already caused substantial damage. In terms of the Chinese populous, they should not be seen as a unitary group that is seeking to attack foreigners because many Chinese, nationalists included, recognize the benefits that foreign companies and expatriates have brought to China during its economic boom. This Note demonstrates that the CCP is doing its best to control and shape Chinese nationalism, but the Bombing and subsequent events demonstrate that the CCP does not have a monopoly on nationalism.

d. Does Nationalism Help or Hurt the Pursuit of National Interest?

As stated previously, Gries has argued in his case study of the 2005 anti-Japanese demonstrations that nationalism is constraining China's pursuit of national interest. Furthermore, Gries believes that the emergence of popular opinion in China is challenging the "authoritarian advantage" that China has enjoyed in the construction of foreign policy.²²⁸ Basically, Gries sees that China can no longer make decisions and takes the public's opinion for granted. Taking public opinion into consideration when forming foreign policy complicates the process and often causes a lack of uniform policy.

On the other hand, Zhao argues "the rise of nationalism in China has not made Beijing's foreign policy particularly uncooperative or irrational."²²⁹ He advocates this position because he views that nationalism as primarily being used in a pragmatic way to promote national interests. However, he admits that Chinese leaders "will be increasingly constrained by rising nationalist sentiments."²³⁰ Nationalism will in fact restrain and get in the way of national interest at times as the government becomes "more responsive to public opinion." Chinese citizens have been empowered by technology to gather information and

²²⁶ See generally *id.*

²²⁷ *Id.*

²²⁸ *China's True Colors*, *supra* note 219.

²²⁹ Zhao, *supra* note 209, at 143.

²³⁰ *Id.*

express their opinions. As it is becoming increasingly difficult for leaders to hide their decisions from the Chinese people, China needs to take into account the sentiments of the public when dealing with foreign countries if the CCP wishes to stem the tide of violent nationalism in China.

IV. IMPLICATIONS

A. Why is China's Development So Concerning to the West?

Great attention has been paid to China's patent policy because it threatens the economic position of other countries around the world. One concern is whether China would become even more successful in competing with the United States and members of the European Union. The factor that is determinative, but unknown, is the type of innovation that China will promote. There will not be a problem if the form of innovation China cultivates is similar to what is found in the current developed countries because it would be the same competition that has taken place before. It is likely to result in a positive-sum result for all countries involved because of the increased innovation, which is not zero-sum competition. However, there is a genuine worry that China will compete and innovate in a different way that could foster copying and low quality patents that would undermine the patent systems in other countries and create a zero-sum game.

One can argue that the two million patents China plans to produce annually are of a high enough quality so as to truly allow China to be even more competitive in the international economy.²³¹ However, the massive number of patents that China will grant in the next few years cannot be overlooked. If one were just to focus on the highest-quality invention patents filed by domestic inventors in China, the number has already exceeded the number of domestic inventor utility patents in the United States, which indicates that China is producing strong quality patents. In 2012, China issued 143,847 invention patents for domestic inventors, whereas the United States issued merely 121,026 utility patents.²³² As Mark Cohen has pointed out, the number of patents by themselves will give Chinese companies power to make very lucrative deals for licensing with foreign companies wishing to enter the Chinese market.²³³ The National Patent Development Strategy is part of a larger economic agenda to help Chinese domestic companies and strengthen the Chinese economy. So far, this strategy seems on its way to accomplish its goals.

²³¹ Prud'homme, *supra* note 12.

²³² Compare Table 4, *supra* note 136, with U.S. Patent Statistics, *supra* note 15.

²³³ Stenger, *supra* note 166, at 45.

B. A Patient Litigation Explosion

One of the problematic side effects of the patent explosion in China is that it will more than likely result in many patent lawsuits. Scholars have reported that this problem has already presented itself because China now has the greatest number of intellectual property cases in the world.²³⁴ As Xuan-Thao Nguyen reports:

In 2005, there were 12,159 patent, copyright, and trademark cases filed in the United States, compared to 10,825 cases in China. In 2006, the United States saw 11,486 cases, while China witnessed 11,436 intellectual property cases. The trend continues, as demonstrated by the fact that the number of intellectual property cases filed in 2007 for the United States totaled 10,761, whereas China's was 15,159.²³⁵

As patent filings have grown over the last several years, so too has patent litigation, and the same can be expected as China continues towards its goals of two million annual patents by 2015. This should be concerning to foreign entities in China because foreign companies do not use the Chinese court system much, with intellectual property litigation between foreign and Chinese firms amounting to less than 5%.²³⁶ Further patent litigation could hurt international and domestic Chinese companies with patent trolls abusing their patent rights and using frivolous lawsuits to extract large licensing fees.

If the patent growth in China continues, there exists a real possibility that patent litigation could explode in China, and in the process, a large patent troll problem could develop. If there were an explosion of patent lawsuits, then it would be a big obstacle for foreign or international firms that seek to enter the Chinese market.²³⁷ This development could produce a very interesting twist to Chinese-Western negotiations over intellectual property; foreign firms and their governments could ironically be arguing that there is too much enforcement and patent litigation in China. The irony stems from the active lobbying of foreign companies and governments over the last several years to force China to toughen its patent rights and enforcement. Despite this irony, increased patent litigation

²³⁴ J. Berkow, *Patent Dragon Awakes*, FIN. POST (Nov. 7, 2011), <http://business.financialpost.com/2011/11/07/patentdragon-awakes>; X. Nguyen, *The China We Hardly Know: Revealing the New China's Intellectual Property Regime*, 55 ST. LOUIS U. L.J. 773, 775 (2011); D. Tsuruoka, *Intellectual Property in China: Lots of Theft, but Hopeful Signs Beijing often Stands by or Abets IP Thievery, but Court Cases Surging*, INVESTOR'S BUS. DAILY, Mar. 29, 2010, at A1.

²³⁵ Nguyen, *supra* note 234, at 775.

²³⁶ Jiang Zhipei, *Foreword to CHINESE INTELLECTUAL PROPERTY AND TECHNOLOGY LAWS*, at xxv, xxv (Rohan Kariyawasam ed., 2011).

²³⁷ Peter K. Yu, *The Rise and Decline of the Intellectual Property Powers*, 34 CAMPBELL L. REV. 525, 546 (2012).

could be bad for most of the stakeholders in the Chinese patent system because it would be difficult for both domestic and foreign companies to prevent being taken advantage of by aggressive patent trolls that have a wide range of patents that the world has not seen before.

V. CONCLUSION

For many years, people have said that China's Confucian culture made it incompatible with Western ideas. Over the years, Western intellectual property laws have taken hold in China, but enforcement has been very weak. Recently, the Chinese have begun to enforce their patent laws more vigorously in cases involving domestic companies against foreign companies. The trend towards more vigorous enforcement predominantly for Chinese domestic companies is a trend that will continue for the foreseeable future, and it is heavily influenced by the rise of nationalism within China. Chinese culture has, in the past, held back the enforcement of patent law, but that has changed because of the growth of nationalism in general and specifically economic nationalism in China. The growth of nationalism has increased the enforcement of patents in favor of domestic companies in violation of the TRIPs agreement. Increasingly, the domestic discrimination of patent enforcement will be a tension in U.S.-China trade relations.

A long view of China's patent system needs to be taken to fully evaluate the National Patent Strategy and its effects. The Chinese patent laws and enforcement mechanisms have evolved quickly over the last three decades and have become very sophisticated. From the "four patents and six inventor certificates" that were granted between 1950 and 1963,²³⁸ to the world record of 3,455 applications filed on the first day of the modern patent law, April 1, 1985,²³⁹ to the over two million patent applications that the SIPO received in 2012, the Chinese patent system has made huge progress. During this evolution, the patent system has taken twists and turns that have not pleased many foreign governments and companies. It has almost become a cliché to blame China's past and present issues with patents and intellectual property for the problems of another country's economy and trade. It has almost become a cliché to blame China's past and present issues with the enforcement of patents and other intellectual property on Chinese culture.

However, rather than just issuing blame, we would be better served to examine the history of the strongest developed countries in the world currently. William Kingston correctly points out: "From the start of the industrial revolution, every country that became economically great began by copying: the Germans copied the British; the Americans copied the British and the Germans, and the

²³⁸ PETER GANEA & THOMAS PATTLOCH, *INTELLECTUAL PROPERTY LAW IN CHINA* 3 (Christopher Heath ed., 2005).

²³⁹ FENG, *supra* note 159, at 168.

Japanese copied everybody.”²⁴⁰ This trend may not be as dangerous as we think because the biggest violator of patents in the 18th century was the United States, and maybe China is on that same path now. However, this may be the reason why the United States and other countries are so concerned with China. They view China as a rising power that is on a path to eclipse their power and influence. When the views of Western governments and scholars are put in this light it hurts the credibility of the various reports and analysis that have been issued.

While Western views of Chinese patent development may be biased, the National Patent Development Strategy is not a step in the right direction for China or any other country that wants to pursue this type of policy. Furthermore, the National Patent Development Strategy is not good for China. The incentives are focused on applications for patents, not on successful applications, which has bloated the number of total applications. Admittedly the success of China’s strategy to overtake the rest of the world in patent applications and grants has worked, but the incentives could have been set up in a different manner that would have led to higher quality and left fewer questions by outside observers. Incentives need to be focused on successful applications and reward those individuals who produce inventive patents, as well as perhaps give even greater incentives to those inventions that have an impact on the Chinese economy.

The current strategy has led some to question the intentions of Chinese officials and whether China is willing to be responsible in its intellectual property and patent strategy. These questions have emerged because the strategy has encouraged large quantities of patents to be produced under a system that encourages junk patents to be filed that demonstrate that the quantity of patent applications does not equal quality in the patent system. However, if China were to institute proper incentives on successful applications then it would demonstrate that China is being responsible. Being realistic of international politics, more than likely, criticism of China’s patent system will not stop because of the substantial number of patents it will continue to create. The consequences of this will be that China will continue to develop a large amount of patent litigation with heavy patent troll issues. While quantity does not equal quality, quantity of patents granted does equal power. A large quantity gives an advantage to those domestic companies that hold those patents, and it can prevent foreign or other domestic companies from establishing themselves.

²⁴⁰ William Kingston, *An Agenda for Radical Intellectual Property Reform*, in *INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME* 658 (Keith E. Maskus & Jerome H. Reichman eds., 2005).



