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ARTICLES

A CULTURAL AND HISTORICAL PERSPECTIVE TO TRADEMARK LAW ENFORCEMENT IN CHINA

CHARLES L. MILLER, II†

I.
INTRODUCTION

At a recent meeting of the American Society of International Law,1 it was pointed out that the vast majority of computer programs, video discs, video tapes, music CDs and similar intellectual property products being sold in the People's Republic of China (PRC)2 were, in fact pirated.3 In recent years China has made large public shows of seizing vast quantities of pirated CDs and other illegally obtained or produced products, such as watches, and crushing them under steam rollers to show their nation's commitment to the enforcement of the intellectual property law within China, including the rights of foreigners.

As the Chinese are well aware, foreign firms are worried about the level of protection for all aspects of their intellectual properties

† Charles L. Miller, II, earned his J.D. at the University at Buffalo School of Law where he concentrated in Intellectual Property and International Law. As with many things this work would not be possible without the help of colleagues and friends. In particular, the author wishes to thank Shubha Ghosh of the University at Buffalo Law School for his support and guidance, and Dr. Don Liu, Professor, Ophthalmology, at the University of Missouri for his sage comments on the initial drafts and his suggestions as to the subtleties of Chinese history and society that affect how intellectual property is seen in that ancient and complex culture. Phonetic Romanization of Chinese terms in this work is done using the pinyin system, the official phonetic system of the Peoples Republic of China. Please address questions to Charles Miller at clmiller@mejlawpublishers.com.

1 American Society of International Law, Spring Meeting, Washington, D.C. (March 17-21, 2002).

2 In this work, “China,” when referring to the modern era, denotes the People's Republic of China (PRC), also known as Mainland China. Hong Kong, once a British Crown Colony, has been reintegrated into China and is now part of the PRC and is included in that term unless otherwise specified. Hong Kong is noteworthy in that it retains a special status within the PRC as a result of repatriation negotiations worked out between the United Kingdom and the PRC prior to the colony's repatriation in 1999. In the modern era, the term “Taiwan” will refer to The Republic of China (ROC), also known as Nationalist China.

whether it is patents, copyrights or trademarks. This concern extends to the effects on their trade due to "knock offs" or pirated goods being made in China and sold on the local or world market, as well as to the practicalities of actually doing business in China and keeping control of one's intellectual properties. A firm doing business in China and suffering domestic infringement of its intellectual property is likely to seek redress for intellectual property infringements initially in the domestic courts. Clearly, for a firm considering trading with, or even setting up facilities in China, the predictability of the Chinese domestic legal regime would be one of the important considerations for anyone undertaking this kind of business commitment.

Note that when discussing any given legal regime, one has to keep in mind that there are two separate and vastly different components. First is the realm of legislative enactments, laws and regulations actually passed and on the books. The second, and in many if not most cases the far more important component, is the predictability of their enforcement of law through the courts. China has done much to enhance both. This plunge into the realm of Trademark Law in China will compare the trademark laws China now has on the books with specific aspects of Chinese history and culture, to explore the underlying basis for the current laws. In short, the goal is to try and elucidate the cultural background of these laws and hopefully provide a gauge for the nature of the mindset that a Chinese court would bring to question involving enforcement of China's trademark laws.

II. Method

As part of its entry into the world economic regime, especially its admission to the World Trade Organization, China has entered into treaty obligations that require it to provide protection for intellectual property\(^4\), and China has indeed passed intellectual property protection legislation.\(^5\) These changes are new for China in every sense of the word. According to some commentators, these laws still do not quite meet China's obligations under international treaties.\(^6\) For this reason, the effect of these new laws, more particularly their enforce-

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\(^4\) Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, *Legal Instruments—Results of the Uruguay Round* Vol. 31, 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement]. This includes, for the purposes of this discussion, the provision for transparency of legal rights (TRIPS Agreement Article 68), as well as the provision for adequate legal machinery to address cases that arise (TRIPS Agreement Article 42).

\(^5\) See infra note 45.

\(^6\) As will be seen, this is not true with respect to trademarks.
ment in Chinese courts, is hard to assess because Chinese case law is not generally accessible.\textsuperscript{7} This makes assessing the predictability of the Chinese court system with respect to any area of law, difficult at best.\textsuperscript{8}

There are other ways to approach the problem of evaluating the predictability of the Chinese legal system. As Abraham Lincoln once observed about the events leading to the American Civil War, "[W]e cannot escape history."\textsuperscript{9} This is also true, and especially true, of the Chinese. With this notion as the methodological premise, this paper will undertake an examination of the cultural and historical background of how Chinese trademark law arose. This method should provide clues as to the kind of thinking and underlying intellectual background that a Chinese court would bring to a trademark law case, and thus provide an analytical framework from which to gauge how this history could influence how Chinese courts would be likely to approach and assess a trademark infringement case. It will also provide insights into how this history articulates with China's international obligations, again with a view of assessing the approach and outlook of a Chinese court with respect to a trademark case.

Thus the goal of this paper is to acquaint the reader with some of the deep cultural roots underlying China's modern excursion into what is, essentially, a profoundly Western jurisprudential exercise of intellectual property. To begin with, there will be a brief synopsis of the cultural and historical context for China's present day trademark infringement statutes. Then the intersections of Chinese trademark laws and Chinese culture and history will be discussed.

This synopsis will examine the developmental history of some of the key aspects of intellectual property law in China, both historically and in the modern era. To do this the present work will first sketch out four relevant areas of Chinese history and culture.\textsuperscript{10} The first area

\textsuperscript{7} China is a Civil Code legal regime, and case law is therefore not binding as precedent. Furthermore, accessibility of Chinese court decisions is episodic. Summaries of Chinese law exist in English, but these are usually on specialty fee-for-service web sites such as www.isinolaw.com.

\textsuperscript{8} See, e.g., Commentary on the availability of Chinese case law in general is available at the Chinalaw web site maintained by the University of Maryland, \textit{at} http://www.qis.net/chinalaw/lawtran1.htm (last visited Apr. 30, 2002).


\textsuperscript{10} These four areas are chosen by the author on two bases. The first is the author's own familiarity with the Chinese culture through long, personal contact with a wide variety of informants. Over time, their discussions of China's history ran to several major themes, which are the primary bases for the selection of the material presented here. The second basis is the general literature on Chinese history and culture.
is the Chinese philosophy of government with particular reference to the relation of the individual to the State.

The second item will be to look at China’s historic attitudes to commerce and industry. As will be seen, China’s ancient views on industrial and commercial enterprise under the Empire, echoes today.

The third topic for discussion is the idea of one’s personal image in China, and how this idea relates to the Chinese trademark law.

Fourth, a brief history of China’s international relations will be presented. This excursion is crucial to understanding some aspects of Chinese trademark law per se, as well as China’s compliance, or lack of it, with the present day international intellectual property regime in general, and trademark law in particular. Along the way, several aspects of doing business in China that relate to trademark law will be examined.

The short sketch of these topics will provide the background for the cultural attitudes China has towards intellectual property, which this author believes is crucial to understanding how a Chinese court would tend to approach an intellectual property case. The present day trademark protection statues of the PRC will be examined against this historic and cultural background, with the specific goal of assessing what may be thought of as the macro-factors underlying a Chinese court. This will be done by examining the Chinese trademark law in the context of the four aspects of Chinese history and culture as sketched in this paper to see how they are reflected in the statutes and in such tribunal decisions as are available.

Using this approach it should be possible to get a feel for what concepts and ideas would be important in a trademark case in a Chinese court since understanding the nature of these historical imperatives should provide guidance on how a Chinese court would interpret the applicable law.

III.

THE HISTORICAL BACKGROUND

A. Chinese Governing Philosophy or Who Owes What to Whom?

China as a political and cultural entity has never really had a notion of what we in the Occident now recognize as intellectual prop-

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11 A respected American jurist pointed out what may be considered a universal truism for the breed in that, “The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. Oliver Wendell Holmes, Jr., The Common Law, 1, (Dover, 1991) (1881) (emphasis added).
The political and economic evolution of China over the course of its two thousand year history led to very different considerations of what was protectable by a private person. In particular there is a great gulf between the "East" and the "West" when the question arises as to what an individual person's rights are. In a tightly integrated society, such as is the case in China, the notion of personality is in some senses, very rudimentary. As will be seen, this is an especially important consideration with respect to China's moves to create an internationally acceptable intellectual property regime.

Chinese society, and more particularly, the philosophy of governing that society, can trace its intellectual roots back to the time of Confucius, his later exponent Mencius, and about two centuries later, Han Fei. These philosophers provided the two main theories underpinning the Chinese approach to governance to this day.

Until the fall of the Ching Dynasty in 1912, Chinese government was deliberately modeled on the family. This was the view promulgated and upheld by Confucius and his followers. Under this idea, the Emperor was the ultimate head of the Chinese household and his subjects were members of the Chinese "family." This governmental approach carries with it certain crucial social and political concepts with respect to the nature of the relationship of individuals to each other, and to the State, notions that still play in modern China today.

In Chinese history it is difficult to discern the occurrence of any ideas along the lines of what came to be known in the West as inalienable individual personal rights, such as life, liberty, and the pursuit of happiness. To be sure there are tales of individual heroism and dar-

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12 William P. Alford, To Steal A Book Is An Elegant Offense 2 (Stan. Univ. Press 1995) (asserting that China does not have a "sustained, indigenous counterpart to [Western] intellectual property law"). This really is a problem since China also has some twenty-two centuries of more or less continuous historical existence as a national polity. The underlying culture is even older. The impact and depth of these roots on present day China is immense. Western intellectual property law with regard to patents and copyrights, for example, can be traced back to the 15th century; see, e.g., Venetian Patent Law of 1494 or the English Statute of Monopolies 21 James I, Ch. 3, just over a century later; see also Mark Rose, Authors and Owners: The Invention of Copyright (1993). Trademark protection, at least in the United States, is extremely recent (see, e.g., The Trademark Cases, 100 U.S. 82, and the subsequent passage of trademark protection in 1905 (see 33 Stat. 724). As seen from the historical perspective of an ancient culture such as China, these dates are almost laughably recent. This translates into China, as a culture, seeing no need to rush into the kinds of protection for intellectual property we in the West have come to take for granted.

13 In Romanized Chinese - Kung Fu Tzu, 551-479 B.C.
14 In Romanized Chinese - Meng Tzu, 390-305 B.C.
15 Whose major work is the Han Fei Tzu.
ing, but much as with Robin Hood, these are tales about people who operate outside of the mainstream of society and are not indicative of the broad currents of the culture which determined the rules of life for the vast majority of the population. In historic China, a person was born into a web of obligations, a vast skein of social debts and responsibilities owed to that individual, and owed by the individual to others, but mostly owed by the newborn to the family. This was true of any person from any social class. This sense of responsibility to others is manifested most famously in the well known obligation of children to support and take care of their parents. In pre-Communist China, this also meant taking care of them after they passed on via veneration through ancestor worship.

This notion of one's life as consisting of a web of obligations means that concepts of what is personal and private, especially a concept such as that of natural personal rights, is not strong in Chinese culture. That is to say, an individual was seen by Chinese culture as owing all things in this life to his parents, and by extension, to the nation personified by the Emperor. This obligation could never be repaid even though ideally one spends one's entire life trying to pay back this obligation. The corollary to this obligation of children to parents was the rights of the parent over their children, which were absolute. In the same vein, the emperor as the supreme head of the entire "Chinese family," and the one person in the Empire to whom

17 Traditional Chinese kinship is based on a clan structure and ancestry is traced in the male line. Within umbra of the clan however, were numerous families, usually extended families, which were reasonably autonomous within the clan. Within such these extended families the male head of household reigned absolute.

18 See P.R.C. CONST. premb. available at www.chinalaw.org (last visited April 30, 2002) (this tradition lives on in Article 49 of the Chinese Constitution, "Parents have the duty to rear and educate their children who are minors, and children who have come of age have the duty to support and assist their parents").

19 See Emily M. Ahern, The Cult of the Dead in a Chinese Village (Stan. 1973); (there are many variations on this theme depending on the "formal" religious practices of individuals (Buddhist, Taoist, Confucian, etc.), but the underlying concept of taking care of one's parents, even after death, has been one of the consistent cultural traits of China since at least the Shang Dynasty (1523 - 1028 BC); the practice of ancestor worship performed important corporate functions in Chinese community life).

20 The perceptive reader will note the similarity between this sense of obligation to the State, and that of serfs to their liege lords in feudal Europe.


22 See id. (one thousand years ago it was a capital offense for a child to raise his hand against his father, even testifying against one's parent was a criminal offense in Confucian China).
everything was owed, could, and did, dispose of the persons and property of his subjects at will.\textsuperscript{23}

There were no real checks\textsuperscript{24} on the absolutist rulership which grew out of the cauldron in which the Chinese Empire was formed. The governmental philosophizing that provided the foundation for over two thousand years of Chinese statecraft took place during a long period of vicious, sanguinary, internecine wars which erupted in the eighth century B.C. This period of strife wore on for five centuries.\textsuperscript{25}

Under the pressure of these incessant wars, China eventually coalesced into a motley collection of small, but more or less stable states that survived for over two hundred years.\textsuperscript{26} Ultimately, these states were finally, and forcibly, unified into a single empire.\textsuperscript{27}

During these blood soaked centuries, as events drove these small states to explore ways and means of keeping their independence in a time of constant strife, there was a prolonged and profound intellectual debate on how best to govern. This was no idle intellectual debate, but a real struggle between competing theories of government. The harsh realities of unremitting war in these times meant that the rulers of the era needed every tool of statecraft to recruit and keep a loyal following in order for their states to survive, let alone prosper. So, into the political and military realities of this era, philosophers interjected their views on the relationship that could, or at least should, exist between rulers, and the ruled in a state society, with the goal of providing a stable and powerful state that could survive the turmoil of the age. Rulers paid close attention as in a real sense, they pinned the survival of their state on making the right choice.

The debate was primarily between what is known as the Confucian school on one side, and what are now known as Legalists\textsuperscript{28} on the other. In the aftermath of the unification of China under the Em-

\textsuperscript{23} This could be disastrous if overdone. \textit{See infra} note 34 (regarding the concept of the "Mandate of Heaven").
\textsuperscript{24} \textit{See infra} note 33 (the Emperor was always an absolute monarch whose word was law; However, as students of their own history and philosophy, the wise Chinese emperors well understood that anything can be carried too far).
\textsuperscript{25} \textit{See The Chinese Looking Glass} at 417 (this period is divided into two portions; the Spring and Autumn Period, 722 - 481 B.C., and the Warring States Period 481-221 B.C.).
\textsuperscript{26} \textit{See John K. Fairbank, et al., East Asia Tradition & Transformation} 55-56 (1978) (these states were Qi, Zhao, Wei, Qin, Chu, Han, and Yan, all of which were situated in what is now the northern part of China between the Huang Ho and Yangtze Rivers).
\textsuperscript{27} This was in 221 B.C. under Shi Huang Ti who ruled the State of Ch'in. The term 'China' derives from the state of Ch'in. The Chinese name for China is Zhung Guo, which translates as "middle kingdom."
\textsuperscript{28} Who took their inspiration from Han Fei (280-233 B.C.), reputed author of the Han Fei Tzu; \textit{see Dennis Bloodworth & Ching Ping Bloodworth, The Chinese
peror Shi Huang Ti, as in the beginning and middle of this period, the problem of what a government should be was not just a topic for idle theoretical speculation. It was, in fact, a question of the first moment.

The thread of the debate that came from the Confucians was in providing an ideal of how best to govern; what may be considered a theory of "good government by example." Under this concept the ruler must exercise, among other things, compassion and righteousness. In particular, the ruler had to take care for the welfare of the people in order that they would not be driven to crime, for which they would then be punished by bad conditions over which they had no control. In a sense, this is an early example of a sort of moral "trickle down" theory of government: good at the top leads to good at the bottom.

The Confucians' modeled their idea of government on the family. They were also of the opinion that people were basically good, and good government set the example for the people to follow. As may be imagined, the hard and unforgiving circumstances of the times in which Kung Fu Tzu lived, sorely tried this benevolent, not to say paternalistic, theory of the ideal relationship between the governors and the governed that he espoused. Kung Fu Tzu was for the most part ignored.

The other major thread of governmental theory came from a group collectively known as the Legalists, and they took a radically different approach. In the Legalist view, humanity was narrowly self-interested and could not be trusted to do the right thing without there being a clearly defined set of rewards and punishments. Motivation for action per se was not considered in their considerations of rewards and punishments. Only actions counted. Under the Legalist theory, absolute obedience to the ruler was required since only the ruler knew what was good. For the Legalists, the Emperor's whim was, literally, the Law.

Overarching both of these schools was a concept known as the "Mandate of Heaven." This was a remarkable bit of political philos-

MACCHIARELLI: 3,000 YEARS OF CHINESE STATECRAFT at 89-93. (Laurel ed., Dell Publ'g 1976) [hereinafter BLOODWORTH & BLOODWORTH].
29 221 BC, see EAST ASIA TRADITION & TRANSFORMATION at 43.
30 See BLOODWORTH & BLOODWORTH, supra note 31, at 35.
31 See e.g., id. (the intellectual standard bearer for this theory was Han Fei; his main work is the Han Fei Tzu, a biting criticism of the Confucian outlook).
32 See BLOODWORTH & BLOODWORTH, supra note 28, at 66 (this is the translation of the compound term "tianming." The term is made up of the characters for heaven (tian) and ming meaning life, fate or destiny. The Chinese emperor was the "Son of Heaven." The notion of the "Mandate of Heaven" is attributed to the Chinese philosopher Mencius
ophy that said the ruler ruled as long as he ruled well. If the ruler wielded his power poorly, then Heaven would withdraw its favor. With the Mandate withdrawn, the ruler would be overthrown, usually by revolution from below. While still preserving the notion of a family, this political philosophy injected the idea of merit, and a very distant relative of the idea of the "consent of the governed." When the first emperor of China, Shi Huang Ti, came to power, he sided with the Legalists in the belief their approach to government would both keep him in power and help weld the country together. One of the solutions arrived at by the Legalists to insure obedience to the throne was to enforce collective responsibility on the people. This approach to governance would reinforce the notion that a subject of the empire was part of a community with few, if any individual rights at all.

This somewhat purist approach to governance did not last as the Chin Dynasty outlived its founder by only a few years. With the rise of the Han Dynasty, Confucian theory rose again, but was much tempered by Legalist influence. Since that time, the Chinese polity has seen the Confucian and Legalist notions of government run side by side. A paternalistic, example-setting government is to be backed up by draconian laws and brutal punishments. This ethos is part of the Chinese State to the present day.

Again note must be taken that these philosophies of government are "top down" philosophies. It is the State that leads in being "good" by the example emanating from the ruler, it is also the State to whom all obligations are owed and that punishes failures in these duties. The individual merely conforms. This historic relationship between

(Meng Tzu). The story goes that upon hearing that the last ruler of the state of Chou had been assassinated Mencius is reputed to have said, "Assassination? I have heard only that a fellow called Chou was killed").

33 There is an oddly democratic twist in this theory of the Mandate of Heaven. As noted, when the ruler does wrong by his responsibilities, the Mandate is withdrawn. This loss of heavenly favor was usually announced by signs and portents in nature and generally finished off in the form of bloody civil war and the installation of a new emperor and a dynasty. The democratic note in this process is that, culturally speaking, there was no stigma attaching to anyone of "low birth" winning the throne by the sword. In China, success succeeds; thus, the saying in China that "even a peasant can straddle the Dragon Throne."

34 In this variant the governed chose only their dynasty, and the "election process" was usually by bloody war or revolution. After the new rulers settle in, the people per se are not heard from again until the ruling dynasty outlives its "Mandate."

35 Ruled 221 -210 B.C.
36 The Chin Dynasty was overthrown in 207 B.C.
38 With both of these being influenced by Taoism and Buddhism.
39 See Bloodworth & Bloodworth, supra note 28, at 95.
the Chinese people and the Chinese State underpins the notion that, as a matter of Chinese culture and history, personal identity, let alone, personal individual "natural" rights are in a real sense, something of conceptual a novelty. The ramifications of this with respect to intellectual property concepts are equally novel.

B. The Individual

Though a person was born into a web of relationships and obligations, there was still considerable room for personal development. In China there is the concept of the Tao, "the way." This is an ancient notion in China, dating back to the sage Lao Tzu. Much like certain forms of Buddhism, the philosophy of Lao Tzu, known as Taoism, focuses on the development of the individual. It teaches that humans are part of nature and that understanding nature could lead to one's own advantage. This strong emphasis on personal enlightenment through understanding one's place in the natural world has had some interesting consequences.

For one thing, the Taoist outlook actually led to a great deal of fundamental research by the Chinese into natural phenomenon. This led to such things as basic research in the field of magnetism, which in turn led to the invention of the magnetic compass. This trend of investigative research also lead to the invention of such things as gunpowder, and gave the pharmacopoeia of Chinese traditional medicine. However, this investigative research was done in the context and confines of the overall Chinese society and the Chinese State. Stories abound of religious orders of monks, and enlightenment seeking hermits, actually withdrawing from society to monasteries and caves becoming apart from the world; and this included the state.

So this philosophy of personal enlightenment did not carry with it an ethic of personal material aggrandizement. This is not to say that...
findings and discoveries weren’t jealously guarded, they were. There was however, no ethic in China that saw advantage in the state defending an individual’s personal monopoly over this type of knowledge, which concept is the basis of modern intellectual property law.

C. The Chinese Commercial Outlook

There is a solid historical reason for this lack of interest in monopolizing the exploitation of intellectual discoveries. In the Occident, patent and copyright laws grew out of merchants and manufactures of various stripes looking to protect their private commercial interests. More accurately, governments began to realize, or at least believe, that by protecting private commercial interests through the granting of “exclusive rights to their writings and discoveries,” they could promote the general economy, the dissemination of knowledge, and the invention of new products and processes by giving their creators a chance to make good.

In China, commerce per se was not an honored endeavor. Very early on, China subscribed to a vision of society divided into four broad classes of people. In descending order of status they were: the warrior-administrators, the peasants (meaning farmers), then artists and artisans, and last and lowest of all — merchants. While individ-

Citizens of the People’s Republic of China have freedom to engage in scientific research, literary and artistic creation and other cultural pursuits. The State encourages and assists creative endeavors conducive to the interests of the people that are made by citizens engaged in education, science, technology, literature, art and other cultural work. [Emphasis added.] available at www.chinalaw.org (last visited April 29, 2002).

To this day the Chinese are quite defensive of what may be called trade secrets. But up until recently, there was no legal protection as a matter of intellectual property law per se. Rather the matter was one of personal obligations. For example, the author is personally party to several non-disclosure agreements regarding traditional Chinese physical culture. This is done by affirmation and a signed contract. It is not clear historically that non-disclosure agreements were legally enforceable even if there were signed contracts.

There was however, a well developed sense of private property. Private individuals such as merchants could and did buy huge country estates and expended large sums on palatial homes in the cities. Even with this however, their rights were notional with respect to anything such as “life, liberty and the pursuit of happiness.”

And thus enhance their tax revenues.

See, e.g., The Laws of City of Venice in 1474, G R A E M E B . D I N W O O D I E ET AL., INT’L Policy and Intellectual Prop. Law and Policy 371 (LexisNexis 2001) (which allowed the granting of protection to “each person who will make in this city any new and ingenious contrivance, not made heretofore in our dominion...shall give notice to the [equivalent of the Venetian Patent office]...it being forbidden for any other...to make any other contrivance in the form and resemblance thereof, without the consent and license of the author up to ten years”).

This division arose in period of the Chou Dynasty (1027 - 256 BC), and persisted throughout the next three millennia.
ual merchants would rise and become wealthy in spite of officially being "lower class," their allotted position in the Chinese economic and social hierarchy did not encourage any special protection for them.

Artisans were of a higher social status, as they produced art and artifacts of use to people. Unlike merchants, artisans actually were perceived to do "real" work. Nevertheless, even these more valued members of the Chinese economic society were socially below the peasantry who, it must be remembered, has always formed the vast majority of the Chinese population. It was from the peasantry that the Empire exacted its taxes, far more than from the merchants and artisans, who were never more than a very small, if prosperous, minority of the population.

D. Industry in Imperial China

China has always had state owned enterprises. The Chinese government at one time or another has owned all the major industries that arose over the course of history. These included government monopolies on salt, silk, iron, liquor, tea and incense, to name a few.

Some Chinese goods had been finding their way out of China for a very long time. However, with the T'ang Dynasty, there was evidence of nascent international trade. As time went on, this burgeoning foreign commerce began to increase. In the period of the Sung Dynasty, merchants assumed a more economically important role as Chinese exports brought money into the coffers of the Empire. It is at this time that a Chinese aptitude for commerce really started to assert itself.

As commerce outside the Empire grew, let alone the sale of basic goods by the imperial monopolies within the Empire, the Chinese began to realize an interest in identifying the sources of goods being

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51 See H.J. BLI, GEOGRAPHY, REALMS, REGIONS AND CONCEPTS, 433 (8TH ED.) (1997) (China is still a developing country, and despite huge migrations into urban areas in the last decade, primarily a rural and agricultural country).
52 618 - 906 AD.
53 See MICHAEL SULLIVAN, THE ARTS OF CHINA, at 146 (1977) [hereinafter SULLIVAN] (referencing Chinese porcelain found in Samarra dating to the 9th century A.D.); see also SULLIVAN at 184 (referencing the imperial kilns at the Sung capital city of Hangchow); see also SULLIVAN at 186 (noting that [Sung Dynasty, 960-1279 AD] China exported "large quantities" of ceramics).
54 See SULLIVAN (during the Sung Dynasty the northern portion of China was conquered by the Jurchen. In 1127 the Emperor was captured by raiders and the crown prince and court fled south of the Yang Tze River, which formed an effective barrier to the invaders, and set up a new capital city at Hangchow (southeast of modern Shanghai)).
sold, especially to customers overseas. Thus, the Chinese began using marks to distinguish the makers of various items. This use of distinctive markings applied both to the central government in its capacity as the monopolistic manufacturer of certain products and to the makers and vendors of those things not controlled by the imperial monopoly, such as jewelry or local grocery stores.

Under Chinese law, these distinctive marks went on specific goods. That is to say, that the trademark would be on a specific good or range of goods. Thus the buyer would know what he was buying as well as who made it. It was thus crucial for the Empire to produce quality marketable wares and ensure that the recipients understood their source.56

At this period the Chinese government also issued currency, paper notes, as well as coins.57 The paper currency was specially marked with serial numbers, series numbers, and inscriptions as to the punishment that awaited counterfeiters, death for instance, and the nature of the reward for the “whistle blower” who turned in the counterfeiter58

E. Image in China: The Name Game

Most people tend to value their good reputation. This can be good or bad for society, depending on the nature of those having a reputation.59 In general, the desire is to maintain a “good name.” In China there is a gloss on the idea of one’s good name rendered in the West as “face.” In Chinese, the character for face, in this sense of good name, is in fact translated as ‘character’ or ‘reputation’. Concepts such as mortification, shame, disgrace are rendered as a compound of two characters, one of which is the “face” character.60

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56 Just as with the modern concerns of trademark law, these marks acquired meaning and were associated with “good will” which had to be maintained by production of quality wares.

57 See GERNET, DAILY LIFE, supra note 55 at 80 (this practice actually began among private merchants in the 8th century AD, and became the sole prerogative of the State in the 10th century AD).

58 See GERNET, DAILY LIFE, supra note 55, at 81.

59 An example of this conundrum in China can be seen in the existence of Escort Companies. These were protection service firms that provided contingents of bodyguards for travelers and merchants moving about the country. The company “trademark” was a banner with the device of the company owner or founder whose business reputation was based on a mix of sound commercial probity, which is very good, and the firm’s perceived ability to intimidate potential thieves and robbers. This latter reputation was based on the fighting skill of a firm’s employees. In essence this was a reputation for sheer physical fighting power, which was not thought of very highly by polite society. To this day a significant segment of the Chinese people has seen practitioners of the physical defense arts as nothing more than ruffians.

Probably the closest conceptual cognate, which would be intuitively familiar to the West, is that of "image." 61

This concept of image was not lost on foreigners, such as the British, when they pressed issues such as admission of themselves to "off limits" parts of Canton in 1851. 62 The British realized that being kept out of the city humiliated them in the eyes of the Chinese. 63

For the Chinese there is an almost maniacal need to preserve and enhance one's "face." 64 This is true even with respect to foreigners. 65 In commercial dealings, this need to keep and enhance good "face" meant honest dealings and good value for money. It also meant rules and organizations. Imperial China's trades formed themselves into guilds. Within these guilds there was a dean or head, whose duties included insuring the absolute integrity of guild members. Over the centuries the Chinese have built up an enviable reputation as scrupulously honest businessmen. 66

61 See THE CHINESE LOOKING GLASS, supra note 21, at 299 (noting that face is a matter of reputation and appearance, while honor is a matter of conscience and reality); see also THE CHINESE LOOKING GLASS at 301 (analogizing face in the way of young Europeans or Americans who live as if they were always "on camera" in front of a huge audience).

62 See THE CHINESE LOOKING GLASS, supra note 21, at 476.

63 The British refrained from aggressive behavior at this time believing such action would only foster unrest in China and hinder trade. The Taiping Rebellion (1841-1863) was under way and the British at the time had no wish to add to the problem.

64 See THE CHINESE LOOKING GLASS, supra note 21, at 299 (noting that [Chinese] parents "will ruin themselves and their families" [emphasis added] to give a son an impressive wedding, how poor merchants "will burn lights late in their offices to show how successful they are."); see also THE CHINESE LOOKING GLASS at 300 (noting that in modern times a paper with a small circulation will charge the same advertising rates as the largest one in the country (while privately giving huge discounts)).

65 As non-Chinese are considered to be at a disadvantage by dint of not being Chinese, the good Confucian Chinese will treat foreigners well and honestly, thus setting the good example to the non-Chinese.

Probably the most famous examples for this sort of condescension are the known opinions of Chinese emperors regarding the English ambassadors sent to open permanent diplomatic relations with China. Lord George Macartney visited China in 1793. Though he did meet the Emperor, Qianlong, he failed in his mission with regard to establishing a diplomatic residence in Beijing, tariff reform, the opening of new ports etc., and had to return to the UK empty handed. However, the route he was required to take took him through the coastal provinces of China to the province of Canton (Guandung). At every stop he and his retinue were treated to the finest foods and accommodations China could offer. Special effort was made to provide western style foods such as cheese to show the emperor's benevolence; see JONATHAN D. SPENCE, THE SEARCH FOR MODERN CHINA 122 (1990); see also THE CHINESE LOOKING GLASS, supra note 21, at 356 (later lord Amherst came to China and went home with a message from the Chinese Emperor that England should send no more presents to prove their vassalage. Still later, Lord Napier, the Viceroy of Hong Kong was described as of reasonable intelligence who "if he applies himself, with perseverance, may yet distinguish right from wrong").

66 See J. SAUVAGET, RELATION DE LA CHINE ET DE L'INDE REDIGEEEN 851 at 19 (Paris 1948) (this is according to Arab traders in the 9th century); see also GERNET, DAILY LIFE,
This idea of the reputation of the source of goods is clearly in harmony with the basic notion underpinning the idea of trademarks as it is found in the West. The Chinese State took a very deep interest in this too. Marco Polo noted that “in so far as manufacture of goods was concerned, the State saw to it that certain standards were complied with.”\textsuperscript{67} The Chinese clearly have a long standing history of being very conscious that there was profit in being recognized as a source of quality products and that it behooved them both to keep up standards, and insure that the customers knew from where these marvels originated.\textsuperscript{68}

\textbf{F. China and International Relations}

China is a truly ancient nation, and has had a wide variety of contacts with the world beyond its borders stretching back millennia. In the early days of the Empire, China was in some respects like the nineteenth century United States; both were boisterous cultures that expanded westward and filled up the land. For the Unites States, this expansion ended at the Pacific Ocean. For China, expansion tailed off in the vast, barren reaches of central Asia and the Himalayan Mountains.

China was also a place of invention and advancement. The work of the Taoists in chemistry and physics has been mentioned. The Chinese are also justly famous for paper, printing, ship design, metallurgy,\textsuperscript{69} advanced ceramics such as porcelain, as well as consummate achievements in the arts. China’s technological achievements kept it far in advance of medieval and early Renaissance Europe.

China’s incredible imperial and material success has also been matched by immense defeats and humiliations, the memories of which still affect how the Chinese people see and relate to the outside world. Even at the beginning of the Empire there were external threats to the country in the form of the various tribes of nomads that roamed the lands north and west of China’s boundary.\textsuperscript{70} The Chinese held these potential invaders at bay for over a thousand years. However, with the beginning of the Sung Dynasty, China began to suffer incredible blows to its national sovereignty from foreign invaders. The three

\textsuperscript{67} Yule at 207.

\textsuperscript{68} Both with respect to national origin and actual manufacturer.

\textsuperscript{69} See Kwang-Chih Chang, The Archeology of Ancient China 353 (3rd ed.) (1977) (China pioneered cast iron for example).

\textsuperscript{70} See Bloodworth & Bloodworth, supra note 28, 94-95 (it was the threat from these nomads that prompted the construction of the Great Wall; the Chinese people living south of the Great Wall are known as the Han Chinese to this day).
episodes having the greatest effect on China are the Mongol invasions of the twelfth century, the invasion of the Manchus in the seventeenth century, and the incursions of the Western Europeans in the nineteenth century.

The Mongols succeeded in destroying the Sung Dynasty in 1279. They took over China and ruled it for just over 100 years. The Chinese never adapted to the Mongols and the Mongols turned out to be one of the few groups that China could never assimilate. In the end, the Mongol rulers were finally overthrown.

The incoming rulers of the Ming Dynasty, with one exception, restarted the process of inward turning and cultural narcissism that had begun under the Sung. During the Ming Dynasty, the Chinese were still technologically far ahead of the West. This fact and the nearly instinctive Chinese aversion to foreign people, things, and entanglements led China to turn away from the outside world.

This policy was continued under the Manchus who conquered China in 1644 and founded the Qing Dynasty. The Manchus started the custom of the queue. This hair style was a badge of servitude to remind the Chinese of who was in charge. The Manchus adapted to China and became “Sinified” in most respects. Nevertheless, they were always seen as “foreigners” to the “Han” Chinese. It was also in the Qing Dynasty that China’s confrontations with the West began. The process began roughly at the end of the eighteenth century with the persistent attempts by the British to establish formal diplomatic ties with China.

The Chinese wanted no part of this and the Emperor Qianlong blandly dismissed the British attempts at formal diplomatic and trade

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71 The Yuan Dynasty 1260-1368 A.D. This was the Dynasty of Kublai Khan whom Marco Polo met in his travels.
72 1368-1644 A.D.
73 See Louise Levathes, When China Ruled the Seas (Oxford, 1994) (this exception occurred between 1405 and 1433 A.D., during the reign of the second Ming Emperor, Zhu Di. The Chinese mounted an extremely ambitious series of sea born explorations to the west. These explorations were undertaken by fleets of some of the most technologically advance ships of the day led by the eunuch Zheng He. One of these voyages reached as far as the east coast of Africa. The program was brought to an abrupt halt by Emperor Zhu Zhanji (who ascended the throne in 1426). Subsequently laws were passed restricting the size of vessels to be constructed by Chinese shipyards, and the vessels used in the voyages were broken up. This era saw the end of China’s technological superiority).
74 See Bloodworth & Bloodworth, supra note 28, at 261.
75 The Qing Dynasty, 1644 - 1912.
76 L. Carrington Goodrich, A Short History of the Chinese People 230 (1959) [hereinafter Goodrich].
77 See generally Goodrich, supra note 76 (the term applies to Chinese born south of the Great Wall).
78 See The Chinese Looking Glass, supra note 65.
relations with the quip "the Celestial Empire possesses all things in prolific abundance." In their view, the Chinese clearly did not need to trade with the British, as the British, and the West in general, had nothing the Chinese needed. This was indeed true. China, on the other hand, had a very profitable export trade in selling such things as tea, porcelain and silks to the West. This was strictly a cash transaction for the Chinese. Business was so brisk that it actually resulted in a considerable specie drain from Europe to China until Europeans could invent competitive products, such as hard paste porcelain or mechanical silk weaving.

This one way relationship begins to change when the British finally found a product the Chinese would buy, opium. The habit had long been extant, coinciding more or less with the arrival of tobacco in China, but in the early nineteenth century the habit grew tremendously when the British vastly expanded the importation of opium into China from India in the early 1800s. Business was so good that after a while the specie drain was reversed. China sought to prohibit the import of this commodity which resulted in two disastrous wars with Britain. The peace settlements for these wars humiliated China and inaugurated a new pattern of foreign territorial, economic and political incursions into China spanning the entire nineteenth century.

Under the various peace settlements that grew out of the Chinese inability to militarily defend its sovereignty, foreigners gained access to previously prohibited parts of China. At the end of the nineteenth century, the Chinese had lost so much ground that that foreigners actually ran some branches of the Chinese government, such as the Customs Collection at the port of Shanghai. The Chinese were ruled by what to them was a foreign dynasty, and administered in part by even more alien peoples from Europe and America.

This helplessness led to the overthrow of the Qing Dynasty and the establishment of a Republic in 1912. However, things did not really improve and in the 1920s large portions of the country fell under the control of local warlords of varying degrees of rapaciousness and governmental competence. The Japanese incursions in the 1930s,

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79 Fairbank, supra note 26, at 257.
80 This drain was also true in the days of the Roman Empire, when sumptuary laws were passed to curb the purchase of Chinese silk which took metal out of the Roman world.
81 See Fairbank, supra note 26, at 455.
82 Id.
83 The Opium Wars. 1839-1842 and 1856-1860.
84 Fairbank, supra note 26, at 561 (which was actually in the hands of the British).
showed again, the helplessness of China against modern Western style powers.

This nearly thousand year history of foreign incursion and outright conquest has left its mark on the Chinese psyche. As a culture, the Chinese are all but obsessed with now making sure that China is run by and for the Chinese.85

G. The Threads in Trademark Law

As noted at the beginning, the intent of the brief sketch of Chinese history is to highlight those events that have a bearing on how the Chinese would approach a concept such as intellectual property, and how they would adjust and adapt to the standards and requirements of the international intellectual property legal regime that governs trademarks.

IV. THE MODERN ERA

Under the present constitution of the People’s Republic of China, the Chinese Communist Party retains control of China while ostensibly allowing for more democratic participation and differing views as represented by new political parties.86 The Chinese Constitution has nothing in it analogous to the “intellectual property clause” of the United States Constitution.87 The Chinese Constitution makes no mentions of inventors or writings and certainly nothing about exclusive rights for these people. This accords well with China’s historic theory of government and governed.

The Chinese Constitution does confer total governmental power to the National People’s Congress. This body can make any laws needed or amend the Constitution.88 So the potential exists to create new rights as occasion makes necessary.

85 The Chinese are another group for whom the phrase, “never again,” has special significance. They are intensely concerned to be masters in their own house.

86 See P.R.C. CONST. premb., available at www.chinalaw.org (last visited April 30, 2002). (“Multi-party cooperation and the political consultation system under the leadership of the Communist Party of China shall continue and develop for the extended future”)

87 U.S. CONST. art I, § 8, cl. 8.

88 See P.R.C. CONST., ch. 3, §1, art. 57 (“The National People’s Congress of the People’s Republic of China is the highest organ of state power. Its permanent body is the Standing Committee of the National People’s Congress”; see also art. 62 (the National People’s Congress can amend the Constitution, supervise the enforcement of the Constitution, and enact and amend basic laws governing criminal offenses, civil affairs, the state organs and other matters).
A. The First Trademark Law

At the very end of the Empire, China did actually pass laws regarding the economic goodwill that is built up in a company's marks. After the founding of the People's Republic in 1949, the existing trademark laws were repealed and new trademark laws were passed. These laws, unlike their United States' counterparts, look to protect the consumer by making retention of the trademark depend on the trademark owner keeping up the quality of whatever the trademark covered. This law has since been amended to bring it in-line with China's international treaty obligations. To those laws we now turn.

B. The Current Law

There are two basic ways to conduct business overseas. Straight export with goods sent to the customer country and with no branch office locally, or the creation of a foreign branch or subsidiary.

Wholly foreign owned businesses are not allowed in China. A business wishing to set up domestic offices and do business in China must have a domestic partner. Foreign branches are also not legal persons in China "and therefore [are] not capable of bearing civil liabilities or conducting civil acts on its own behalf." Just what this means is a bit murky judicially, but this condition reflects a deep abiding concern on the part of China about keeping very tight control over the nature and level of foreign intrusion into China. In either business regime however, the foreign firm will want to seek protection for its trademarks when they are sent to, or used in China.

Here is where there are some features of Chinese trademark law that distinguish it from their United States counterpart, and appear to render China's compliance under TRIPS hazy.

C. Registration

Chinese law, with respect to subject matter for trademarks, is straightforward and would seem familiar to anyone conversant with the TRIPS. Similarly, the nature of things prohibited from use as

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89 This was in 1904; see Michael N. Schlesinger, Sleeping Giant Awakens: The Development of Intellectual Property Law in China, 9 J. CHINESE L. 93, 100 (1995) (noting that this was drafted with the help of non-Chinese).

90 "Chinese [law] authorizes only the establishment of limited companies, wholly State-owned companies and joint stock companies. It does not authorize the establishment of a wholly foreign-owned company or a subsidiary company by a foreign company. A foreign company, i.e., a company incorporated in a foreign jurisdiction, may however establish a branch company in China." Chinese Company Law, available at www.isinolaw.com (last visited April 20, 2002).

91 Id.

92 TRIPS Agreement, April 15, 1994, § 2, art. 15(1).
trademarks\textsuperscript{93} is very much in-line with the provisions of the Lanham Act.\textsuperscript{94} In December 1994, the State Administration of Industry and Commerce promulgated the Measures for Registration and Administration of Collective Marks and Certification Marks (the "Collective and Certification Marks Measures"). The new laws allowing the use of these types of trademarks brought the Chinese trademark law up to the international standards required by the Paris Convention and the Madrid Agreement.\textsuperscript{95}

As noted, wholly foreign owned businesses are not allowed in China. This idea also extends to registration for trademarks in that foreigners cannot register in their own right\textsuperscript{96} and the applications must be in Chinese.\textsuperscript{97}

There are other areas of inconsistency as well. Unlike most practices elsewhere, trademarks in China are assigned to goods.\textsuperscript{98} This harks back to the types of marks used under the Empire as well as to the earlier trademarks laws of the PRC,\textsuperscript{99} and it continues today.\textsuperscript{100}

\textsuperscript{93} Chinese Trademark Law, art. 8. In trademarks, the following words or devices shall not be used:
\begin{enumerate}
\item those identical with or similar to the national name, national flag, national emblem or militia medals of the People's Republic of China;
\item those identical with or similar to the national name, national flag, national emblem or military flags of foreign countries;
\item those identical with or similar to the flag, emblem or name of any international intergovernmental organizations;
\item those identical with or similar to the symbol or name of the Red Cross or the Red Crescent;
\item the generic name or design of the goods concerned;
\item those directly indicating the quality, main raw materials, function, use, weight, quantity or other characteristics of the goods concerned;
\item those having the nature of discrimination against any nationality;
\item those constituting exaggerated and deceitful advertising; and
\item those detrimental to socialist morality or customs, or having other harmful influences.
\end{enumerate}

\textsuperscript{96} "Any foreigner or foreign enterprise intending to apply for the registration of a trademark or for any other matters concerning a trademark in China shall entrust any of such trademark agencies as designated by the State Administration for Industry and Commerce to act as his or its agent." Implementing Regulations of the Trademark Law of the P.R.C., art. 3 (1993), available at http://www.lehmanlaw.com/lib/library/Laws_regulations/IP/imp_tr_law.htm (last visited Aug. 10, 2004).
\textsuperscript{97} Id., art. 14.
\textsuperscript{98} Id., art. 9. Goods are now classified according to the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks. See China Intellectual Property Law, Rights, Protection - Trademark Law, Evolution of the Trademark System, supra note 96.
\textsuperscript{99} See, e.g., Measures for the Control of Trade Marks, art. 11 (1963) (providing that registrations could be canceled if the quality of goods was not maintained at a prescribed
Under TRIPS, however, this kind of linkage is not allowed. So far, there does not seem to be any kind of protest actions and the Chinese do not seem to have amended their law as of yet.

The requirement of tying trademarks to goods, however, is extremely consistent with the Chinese concept of what needs to be protected. As noted above, this need for the State to insure the quality of goods goes back to at least the Sung Dynasty. The current trademark law expressly states that it was enacted for the "purposes of improving the administration of trade marks, protecting the exclusive right to use a trademark, and of encouraging producers to guarantee the quality of their goods and maintain the reputation of their trademarks."

What is somewhat disingenuous of Chinese trademark law is the notion that explicitly stated this is done to protect the consumer. Article 1 of the Trademark Law specifically notes that the law was passed "with a view to protecting consumers' interests and to promote the development of socialist commodity economy." This drive for quality control is reinforced elsewhere in the trademark law.

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101 "When applying for the registration of a trademark, the applicant shall file one application in respect of each class of goods according to the Classification of Goods as published." Implementing Regulations of the Trademark Law of the Peoples Republic of China, Chapter II Application for Trademark Registration, Rule 9 (1993), available at www.Chinalaw.org (last visited April 27, 2002).

102 See TRIPS Agreement, supra note 93, art. 15(4) (providing that "the nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark"); see also id., art. 20 (addressing use requirements: "This [article] will not preclude a requirement prescribing the use of the trademark identifying the undertaking producing the goods or services along with, but without linking it to, the trademark distinguishing the goods or services in question of that undertaking").


104 See World Trade Organization, Review of Implementing Legislation, available at http://www.wto.org/english/tratop_e/trips_e/intel8_e.htm#how_to (last visited May 1, 2002) (the WTO began a review of members with respect their legislation in the area of trademarks in 1996. Legislation in the area of enforcement is scheduled for review in the third week of November 1997. In 2000, reviews began of the state of compliance with the international legal regime of countries that had delayed notifying the WTO of changes in their domestic laws until 2000. These documents are initially circulated on a restricted basis, and generally considered for restriction six months after the date of their circulation. Any documents covering China's review and response have not yet been made available).


106 Id.

107 See Trademark Law of the People's Republic of China, art.VI (1982, 1993) ("Any user of a trademark shall be responsible for the quality of the goods in respect of which the
thor maintains that the underlying concern, despite the representations in the statute, is the reputation of China qua China.

Recall, for example, that under Chinese trademark law, local registration in China must be done by a domestic representative. Already a step has been added to registration which removes the alien from direct participation in the application process. Thus, even if the foreign business presence in China is limited only to the goods as they come into the country on an import-export basis, with no other business presence in China, the Chinese agents for the applicants need to be involved.

China also has a two tier system of trademark registration application. Applications for trademarks are made first to a provincial office. If the provincial office approves, the application is passed up to a national office for final approval, recording in a Trademark Register, and publication in the Trademark Gazette. Thus there are two "bites at the apple" for China to refuse to register a trademark at the provincial and national level. For foreigners, there might actually be a third bite beginning with the representation needed to apply for registration in the first place.

D. Compliance with International Obligations

China has amended its trademark law, and adopted several new implementing regulations specifically designed to bring China into line with its treaty obligations. With respect to other considerations such as priority and reciprocity, China has amended the trademark law to bring it into line with the Paris and Madrid Conventions. At present, the WTO is reviewing the level of Chinese compliance with its treaty obligations.

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110 See World Trade Organization, Review of Implementing Legislation at http://www.wto.org/english/tratop_e/trats_e/intel8_e.htm#how_to (last visited May 1, 2002) (the WTO now says that foreigners are now allowed to register at the provincial level).
E. Enforcement

China is reputed to have a spotty record with respect to the enforcement of intellectual property law in general. In anticipation of its entry into the WTO, enforcement was stepped up. Infringement actions have been mounted by several foreign concerns against domestic infringers. The infringements\(^{113}\) ranged from translation of a foreign trade name into Chinese characters,\(^{114}\) causing confusion,\(^{115}\) trade dress,\(^{116}\) and outright piracy.\(^{117}\) In all these cases, the adjudicating body, being a court or Trademark Review and Adjudication Board, found in favor of the foreign plaintiff.

V. Conclusion

Chinese history and culture all suggest that China has a tremendous motivation to defend any trademarks it allows to be registered. As a matter of their culture and history, they understand the good name. They have also had a long history of protecting sources of production, both through direct ownership by the State controlling the production process, or via the mechanism of monitoring production to insure quality. As trademarks are approved by the State, this is an act of sovereignty. Thus the Chinese have a lot of "face" invested at every level of the trademark application and registration process.

This same concept of "face" applies to the Company Law requiring a domestic joint venture partner in order to establish a firm in China. These are chartered by the State. So here again, there is a tremendous amount of "face" bound up by the Chinese State in getting into one of these arrangements in the first place. And, as noted, the State takes an interest in maintaining the quality of goods to which a trademark will be affixed.

It is equally clear that China has no intention of losing control of the economy within its own borders. Having suffered this once, they

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\(^{113}\) The following cases are summarized from this author's notes, and handouts from **Guizeng Liu**, *Trademark Protection and Enforcement in P. R. China*, and presentation made at the American Intellectual Property Law Association Spring Meeting, 2000.

\(^{114}\) Coca Cola alleged violation of Chinese Trademark Law, (1993) (Ch.), which makes it actionable "to violate the principles of honesty and credit and plagiarize, counterfeit or translate any well-known trademark of another party in the registration".

\(^{115}\) See supra note 114 (Romantique v. Ranomoliphe, This representation is reasonably accurate as to the actual appearance of the plaintiff foreign firm's trade name Romantique, and that of the infringer).

\(^{116}\) See supra note 114.

\(^{117}\) See supra note 114 (Lee v. Loe).
are not about to let it happen again. The "not a legal person" status of foreign concerns under the Chinese Company Law clearly reflects this outlook.

At base, it is clear that the current Chinese trademark law has deep roots in China's history and development. Unlike the concepts underlying patents and copyrights, trademarks, in the sense of good name and as a source maker of goods, have a long history in China. It is set securely within the bedrock of China's history.

This same history also informs Chinese attempts at compliance with the international legal regime, it should also inform those doing business in China. In that event, this author believes it is extremely significant that China is participating of its own will. It is not being coerced at gunpoint into unequal treaties. It is a major power and enjoys a good bargaining position. Thus, the Chinese can treat their compliance with international standards as a contract among equals which removes from the Chinese government any rationalization it may have to "shield" its people from unequal foreign laws.

The few cases available suggest quite strongly that this is indeed what is happening. Modern China, like Sung Dynasty China, knows it has a good name to protect both as a source of quality merchandise, and as a place known for fair laws administered with an even hand. Thus, with regard to trademark, China has both a deep rooted understanding of the concept, and has come to the international table on its own terms. For both these reasons, China is deeply committed to living up to its international commitments in trademark law enforcement.

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119 This sense of the ability to maintain control is crucial. That China apparently feels it can do this is exemplified by the existence of the Special Economic Zones (SEZs). The evolution of these Zones is a topic for research in its own right. For the purposes of this discussion, the fact that the Chinese have established these zones to encourage foreign business to locate in China is, in a word, amazing. The historian can take note that the location of these zones tends to corresponds to the location of the "Treaty Ports" of the nineteenth century. As anyone with even a modest acquaintance with Chinese history knows, the nineteenth century saw a general dismemberment of China as it lost effective political control of much of its coastline to foreigners. This is exemplified by the "Unequal Treaties" of the era which gave foreigners virtually sovereign rights in these ports. The sense of degradation and humiliation heaped on China by these events is still a deep scar on the Chinese psyche. Viewing the SEZs against this background is to see how far China has come in the modern era. The SEZs, along with China's accession the WTO, exemplify modern China's sense of security in its territory and its culture, and a willingness to engage the outside world on terms equality not seen since the Sung Dynasty.