

# Intellectual property law and China

## Evaluating and comparing the fight against infringement of intellectual property in China and the EU

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### INTRODUCTION

DEFINING THE PROBLEM - Copycat China has been around for a long time. The concept of imitating and making counterfeit goods even has its own name in Chinese: 'Shanzhai' (山寨).<sup>1</sup> This term refers to bandits that the government is not able to control.<sup>2</sup> However, 'Shanzhai' is not without consequences. The infringement of intellectual property rights (IPR) gives rise to certain negative consequences. For a start, IPR infringement has an impact on the global economy, thus affecting world trade. Secondly, it is an industry that mainly employs the weakest groups of society, and that keeps these inequalities in place. Finally, while these problems might seem far away from us as consumers, counterfeiting can harm us and our society as well. Therefore, it is clear that it is important to act against IPR infringement. Chapter 1 will discuss these reasons for protecting IPR.

Stopping IPR infringement is not as simple as it may sound. The European Union (EU) and China have always had different interests when it comes to protecting intellectual property (IP). While China wanted to jumpstart its economy by infringing IPR, the EU was looking to protect its economy by protecting IPR. At least, that is the story that we often hear. This story does not take into account the fact that China was basically forced to adopt a system of protecting IPR that did not fit into its cultural and political tradition at the time. In order to comply with the needs of Western society, it transplanted the laws of that society into its own legislation, without taking into account the vast contextual differences. Nevertheless, as China's traditions are adapting to the new order, we can see that it is now on its way to becoming an innovation

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<sup>1</sup> L. PANG, *Creativity and its discontents: China's creative industries and intellectual property rights offenses*, Durham, Duke University Press, 2012, 222-223.

<sup>2</sup> G. HAOUR and M. VON ZEDTWITZ, *Created in China: how China is becoming a global innovator*, London, Bloomsbury, 2016, 79; L. PANG, *Creativity and its discontents: China's creative industries and intellectual property rights offenses*, Durham, Duke University Press, 2012, 222-223; G. S. YIP and B. MCKERN, *China's next strategic advantage: from imitation to innovation*, Massachusetts, The MIT Press, 2016, 13.

superpower, that noticed the importance of efficient IPR protection. Chapter 2 discusses these reasons for IPR infringement.

The current IP law in China is not the same as it was before. China is moving on from being a norm taker, to becoming a norm creator. While international pressure and negotiations are effective for providing new legislation in China, they are not as effective in promoting efficient enforcement. This research aims to see if, by becoming a norm creator, China can also efficiently enforce its norms, and increase the level of IPR protection. In this aspect, it is also important to look at the harmonization of EU IP law, to see what the EU is doing to combat counterfeiting and enforce IPR. The current IP law of China and the EU is discussed in Chapter 3.

China is clearly trying to show the outside world that it is improving its protection of IPR, and while there is progress, it is still insufficient. The enforcement of IPR in both China and the EU still lacks effectiveness. This research looks at what is done at the level of enforcement of IPR. Firstly, regarding customs enforcement, it will discuss new developments that make this type of enforcement even more difficult. Secondly, a particularity in Chinese IPR enforcement, which is administrative enforcement. Finally, judicial enforcement in China and the EU, which is split up in both criminal and civil enforcement. There are different issues that arise before the courts, that make efficient judicial enforcement more difficult. This shows that there are still major challenges on both the side of the EU and China to improve their enforcement of IPR. Chapter 4 discusses the current issues regarding the different types of enforcement in China and the EU.

Nevertheless, there are still some other challenges that are specific to China to consider. These challenges make efficient enforcement of IPR more difficult. They are: corruption, (which leads to) local protectionism, the theft of IP, the establishment of Free Trade Zones (FTZ's) and State-Owned Enterprises (SOE's). These challenges will be discussed in Chapter 5.

There are promises for the future of IPR protection. China appears to be moving towards an economy with more emphasis on innovation and quality.<sup>3</sup> It is determined to create its own brands, and to do so, it needs efficient IPR protection.<sup>4</sup> Chapter 6 discusses the future of IPR protection in China.

CENTRAL RESEARCH QUESTION – The central research question of this research is the following:

- 1) Why is it necessary that we protect IPR, what are the consequences of IPR infringement? (Chapter 1)

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<sup>3</sup> G. C. K. CHEUNG, *China in the global political economy: from developmental to entrepreneurial*, Cheltenham, Edward Elgar Publishing, 2018, 104.

<sup>4</sup> *Ibid.*

- 2) What are the causes of IPR infringement and the lack of protection of IPR in China? (Chapter 2)
- 3) How have China and the EU improved their legislation, in order to provide for better protection of IPR? (Chapter 3)
- 4) What are the different types of enforcement of IPR in China and the EU, and what are the challenges relating to them? (Chapter 4)
- 5) What are some other challenges that make enforcement of IPR in China less effective? (Chapter 5)
- 6) Is China shifting towards becoming an innovative society, that fully protects IPR? (Chapter 6)

**RELEVANCE** –The relevance of this research is that it provides an evaluation of IPR protection in China and compares it to the EU. To understand the importance of effective IPR protection, this research lists the negative effects IPR infringement brings with it. In order to understand why IPR protection lacks its effect, it is important to look at how Western IP law was implemented in China without regards to the different traditions and economic factors. Looking at current IP law in both the EU and China, and the cooperation between the two, it is important to understand what is being done, and where we are now. Since there is a gap between the law in the books and the law in action, it is also necessary to look at the different types of enforcement and the deficiencies they face. However, it would not be sufficient to only improve the enforcement mechanisms, since there are other challenges regarding effective IPR enforcement as well. It is important to understand China’s move towards more IPR protection as an evolution, with regards to the relationship between IPR protection and innovation.

**RESEARCH METHOD** – Firstly, the central research question is an evaluating question. The global aim of this research is to evaluate whether IPR enforcement in China is still ineffective and inefficient. Secondly, this is a descriptive question that sets out the consequences of IPR infringement, the causes of IPR infringement and also looks at how the law is being improved. Thirdly, it is also a comparative question, that compares the ways that IPR is enforced in China and the EU, and compares the challenges that lead to inefficient enforcement. Finally, it is an explanatory question, explaining why China is moving towards more IPR protection.

# 1. REASONS FOR PROTECTING INTELLECTUAL PROPERTY RIGHTS

**1. IMPACT** - The majority of counterfeit and copied goods that are intercepted at the EU borders originate from China. Even in China, counterfeit goods can be found all around you. On Taobao, the largest online marketplace in the world that caters to Chinese customers, counterfeit products are very common.<sup>5</sup> Many consumers seem to accept IPR infringement, but they do not always see the full impact of this practice. We may not always notice it, but IPR infringement has a negative impact on our daily lives and society as a whole (*section I*). It endangers consumers and businesses, and funds criminal activity. IPR infringement also has an impact on the economy of both China and the EU (*section II*). It is the product of a society that is based on inequalities and is a contributing factor to sustaining these inequalities (*section III*).

**2. RESEARCH QUESTION** - This first Chapter aims to answer the sub-question: “Why is it necessary that we protect IPR, what are the consequences of IPR infringement?”

## 1.1. DANGERS

**3. DANGERS** - Counterfeit goods not only harm the economy and sustain inequalities, they also endanger consumers, businesses and governments. According to Regulation (EU) 608/2013 of the European Parliament and the Council concerning customs enforcement of IPR (Customs Regulation), the marketing of goods infringing IPR damages the EU economy in several ways. It damages not only right holders and manufacturers, but also consumers by deceiving them or endangering their health and safety.<sup>6</sup>

### 1.1.1. Consumers

**4. HARM TO CONSUMERS** - The majority of counterfeit products detained in the EU were imported from China. These products are not always harmless to their consumers. Not only European consumers are at risk, but also Chinese consumers.<sup>7</sup> Counterfeit goods pose risks to consumer welfare, because there are no quality controls or certifications.<sup>8</sup> The biggest risk is found in the pharmaceutical sector, where counterfeit goods can have deadly consequences. China alone accounts for approximately 60% of counterfeit medicines on the

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<sup>5</sup> H. SCHULZE and E. PETERS (eds.), *Intellectual property infringement and indigenous innovation in China*, New York, Nova, 2012, 202.

<sup>6</sup> Recital 2, Regulation (EU) No. 608/2013 of the European Parliament and of the Council concerning customs enforcement of intellectual property rights, 12 June 2013.

<sup>7</sup> D. C. FLEMING, “Counterfeiting in China”, *University of Pennsylvania East Asia Law Review*, 2014, (14) 17.

<sup>8</sup> EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 12.

global market.<sup>9</sup> Examples of dangerous pharmaceuticals are antibiotics that were made of talcum powder, birth control pills that were filled with rice flour and life-threatening fake cancer medication.<sup>10</sup> Counterfeit cigarettes can also contain dangerous substances. In 2015, 27% of all detained articles at the EU external border were cigarettes.<sup>11</sup> Other examples are chemical damages to scalps from counterfeit shampoo, and self-igniting counterfeit batteries.<sup>12</sup> However, consumers are not always aware of the dangers of counterfeit goods.

**5. AWARENESS OF CONSUMERS** – Consumers should be aware of the negative impact and damaging effect these goods can have on them.<sup>13</sup> In recent years, consumers in the EU have developed a tolerance towards the crime of counterfeiting.<sup>14</sup> They are attracted by the lower prices, easy accessibility and a high degree of social acceptance associated with buying counterfeit goods.<sup>15</sup>

**6. MAINLY YOUNG PEOPLE** – A 2016 survey shows that an average of 7% of Europeans of all age groups combined admit to having intentionally purchased counterfeit goods.<sup>16</sup> This number was only 4% in 2013.<sup>17</sup> Amongst those who admitted to this, there is an over-representation of people between 15 and 24 years old, since 15% of this group admitted to having intentionally bought counterfeit goods.<sup>18</sup> In 2013, this number was only 6%.<sup>19</sup> This might show an increasing level of tolerance of youngsters towards counterfeit goods and a need for education on the dangers they can hold.

**7. EDUCATING ON IPR** – It is necessary to educate consumers on the dangers that counterfeit goods can hold.<sup>20</sup> In China, consumers are raising their standards due to the influence of the media.<sup>21</sup> The media is heavily influenced by the government. Like this, the government can support its policy goals, such as IPR protection, through the media. IPR are actually becoming an advertising tool to impress Chinese customers, as they are an indication of high-tech, high-class or

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<sup>9</sup> L. TOOHEY, C. B. PICKER and J. GREENACRE (eds.), *China in the international economic order: new directions and changing paradigms*, Cambridge University Press, 2015, 294.

<sup>10</sup> D. C. FLEMING, "Counterfeiting in China", *University of Pennsylvania East Asia Law Review*, 2014, (14) 16; EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 37.

<sup>11</sup> EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 37.

<sup>12</sup> EUIPO, *2019 Status report on IPR infringement*, 2019, 12.

<sup>13</sup> G. C. K. CHEUNG, *China in the global political economy: from developmental to entrepreneurial*, Cheltenham, Edward Elgar Publishing, 2018, 104.

<sup>14</sup> EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 43; EUIPO, *2019 Status report on IPR infringement*, 2019, 4.

<sup>15</sup> EUIPO, *2019 Status report on IPR infringement*, 2019, 14.

<sup>16</sup> EUIPO, *European citizens and intellectual property: perception, awareness and behaviour*, 2017, 26.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 8.

<sup>21</sup> *Ibid.*

international products.<sup>22</sup> Nevertheless, a recent survey shows that while most respondents think that they have a good knowledge of IP, in practice they lack actual knowledge on the subject.<sup>23</sup> While China seems to have the perfect infrastructure to provide education on the importance of protecting IPR, it is not fully effective. The Chinese society is still fairly tolerant of counterfeiting and copying.<sup>24</sup>

### 1.1.2. Governments

**8. FUNDING ORGANIZED CRIME** - Another problem for governments is that criminals involved in IPR infringement are often part of organized crime groups.<sup>25</sup> They tend to control every step of the process, from the production part to the sales part.<sup>26</sup> Groups that are composed of members of Asian origin remain the most active in IPR infringement and are often poly-criminal.<sup>27</sup> They engage in other criminal activities, such as human trafficking or drug trafficking.<sup>28</sup> The profits that are made in counterfeit goods most likely help them in expanding their other criminal activities.<sup>29</sup> The funds that are generated by IPR crimes have actually been linked to other organized crimes.<sup>30</sup> Governments can also lose out on tax revenue due to counterfeiting.<sup>31</sup>

### 1.1.3. Businesses

**9. LOSS OF REVENUE** - IPR-intensive industries in the EU are an important asset in terms of their total contribution to external trade and gross domestic product (GDP).<sup>32</sup> It was estimated that these industries contribute to approximately 42% of GDP of the EU and 28% of employment during the period of 2011-2013.<sup>33</sup>

<sup>22</sup> Q. HE, “The limits to law: how intellectual property are used and protected in Chinese industries”, *Asian Journal of Law and Society* 2018, (1) 15.

<sup>23</sup> L. LI, *Intellectual property protection of traditional cultural expressions: folklore in China*, London, Springer, 2014, 62-73.

<sup>24</sup> L. ZHANG and N. BRUUN, “Legal transplantation of intellectual property rights in China: resistance, adaptation and reconciliation”, *IIC* 2017, 4 (30).

<sup>25</sup> Q. HE, “The limits to law: how intellectual property are used and protected in Chinese industries”, *Asian Journal of Law and Society* 2018, (1) 32; A. R. TANIELIAN, “East-West intellectual property enforcement partnerships: dream and reality”, *National Taiwan University Law Review* 2014, (49) 63.

<sup>26</sup> Q. HE, “The limits to law: how intellectual property are used and protected in Chinese industries”, *Asian Journal of Law and Society* 2018, (1) 39.

<sup>27</sup> EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 32; EUIPO, *2019 Status report on IPR infringement*, 2019, 12.

<sup>28</sup> EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 32.

<sup>29</sup> EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 32; A. R. TANIELIAN, “East-West intellectual property enforcement partnerships: dream and reality”, *National Taiwan University Law Review* 2014, (49) 64.

<sup>30</sup> EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 43; A. R. TANIELIAN, “East-West intellectual property enforcement partnerships: dream and reality”, *National Taiwan University Law Review* 2014, (49) 64.

<sup>31</sup> EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 12.

<sup>32</sup> EUIPO and European Patent Office, *Intellectual property rights intensive industries and economic performance in the European Union*, 2016, 8-11.

<sup>33</sup> EUIPO, *2019 Status report on IPR infringement*, 2019, 6.

This shows the importance of these industries to the economy of the EU. The negative side of this is that the profitability of these industries, combined with low penalties for IPR infringement, leads to counterfeiting becoming a global industry on itself.<sup>34</sup> As such, since counterfeiters tend to copy only the products that are most successful, IPR-intensive businesses lose revenue that could be reinvested into research and development (R&D).<sup>35</sup> Foreign companies are losing their confidence in China due to IPR infringement, since they lose out on profits.<sup>36</sup> Their legal costs are also rising. On average, a company will spend EUR 115.317 a year on enforcement-related costs.<sup>37</sup>

**10. BUSINESS CONFIDENCE SURVEY** – Every year, the European Union Chamber of Commerce in China releases its business confidence survey to assess IPR enforcement in China. In 2019, 33% of European businesses that were surveyed answered that they had suffered IPR infringements in China in the past.<sup>38</sup> Of these companies, 69% answered that the infringement happened in the past two years. In 2018, the number of companies that responded that their IPR had been infringed was 60%, showing that improvements have been made on this level.<sup>39</sup>

**11. REPUTATION AND EMPLOYMENT** – IPR infringement is not only a purely financial issue for these businesses. Counterfeit goods can also damage the reputation of a company as a producer of quality products.<sup>40</sup> Since Chinese products are associated with counterfeit products of inferior quality, the reputation of genuine goods produced by Chinese businesses can be influenced.<sup>41</sup> There is also a risk for the people that are employed in the company, since they risk losing their jobs due to counterfeiting.<sup>42</sup>

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<sup>34</sup> EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 11; EUIPO, *2019 Status report on IPR infringement*, 2019, 4.

<sup>35</sup> EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 11; N. WYZYCKA and R. HASMATH, “The impact of the European Union’s policy towards China’s intellectual property regime”, *International Political Science Review* 2016, (549) 550.

<sup>36</sup> Y. N. MAN, “Intellectual property law and competition law in China – Analysis of the current framework and comparison with the EU approach”, *IALS Student Law Review* 2014, (28) 30.

<sup>37</sup> EUIPO, *2019 Status report on IPR infringement*, 2019, 25.

<sup>38</sup> European Chamber, “European business in China: Business confidence survey 2019”, 2019, 47.

<sup>39</sup> *Ibid.*

<sup>40</sup> D. C. FLEMING, “Counterfeiting in China”, *University of Pennsylvania East Asia Law Review*, 2014, (14) 18; Y. N. MAN, “Intellectual property law and competition law in China – Analysis of the current framework and comparison with the EU approach”, *IALS Student Law Review* 2014, (28) 30.

<sup>41</sup> K. E. T. CUNNINGHAM JR., “Fine China? A look into Chinese intellectual property infringement, treaty obligations, and international responses”, *JPTOS* 2017, (279) 281.

<sup>42</sup> EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 11.

## 1.2. THE ECONOMIC IMPACT OF INTELLECTUAL PROPERTY INFRINGEMENT

**12. IMPACT ON THE IMPORTS OF CHINESE GOODS** – Overall, IPR infringement has a huge impact on the economy of both China and the EU.<sup>43</sup> The total economic impact of counterfeit and IPR-infringing goods on EU imports was estimated to be 5% in 2013, or approximately EUR 85 billion.<sup>44</sup> This number rose to 6.8% or EUR 121 billion in 2016<sup>45</sup>, which shows a worrying development over the past few years. In the EU, Chinese exports amount to 56% of all recoveries by caseload, while exports from Hong Kong amount to 26% by caseload.<sup>46</sup> Many of the goods that were exported, are believed to have been manufactured in China, with Hong Kong acting as an access point.<sup>47</sup> In 2008, it was estimated that 75% of counterfeit goods came from mainland China and Hong Kong combined.<sup>48</sup> In 2016, these two countries together were the provenance of 88% of global counterfeiting.<sup>49</sup> China is the key country of provenance for counterfeit goods in the EU.<sup>50</sup> Both China and the EU have an interest in enforcing IPR, since it impacts both their markets.

**13. IMPACT ON EU** – The EU as an importer of these goods has an interest in efficient IPR enforcement, since counterfeiting impacts its own domestic market and producers. While China is trying to show that it is improving its IPR protection, the issue seems to be only getting worse. However, the blame is not only on China, since the EU as an importer faces its own challenges in protecting its domestic market against counterfeits through customs enforcement (*infra* nr. 76).

**14. IMPACT ON CHINA** – China has an interest in enforcing IPR, since counterfeiting has an impact on its domestic market, its exports and its reputation with trading partners. An average of 20% of all products available to consumers on the Chinese domestic market is counterfeit.<sup>51</sup> Counterfeiters do not only infringe foreign IPR. There is a trend of counterfeiting Chinese brands

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<sup>43</sup> Y. N. MAN, “Intellectual property law and competition law in China – Analysis of the current framework and comparison with the EU approach”, *IALS Student Law Review* 2014, (28) 30.

<sup>44</sup> EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 11.

<sup>45</sup> EUIPO, *2019 Status report on IPR infringement*, 2019, 17.

<sup>46</sup> EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 18.

<sup>47</sup> EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 19; EUIPO, *2019 Status report on IPR infringement*, 2019, 19.

<sup>48</sup> H. SCHULZE and E. PETERS (eds.), *Intellectual property in the 21st century: Intellectual property infringement and indigenous innovation in China*, 2012, Nova Science Publishers, 47.

<sup>49</sup> European Commission, “*Bilateral interactions with China*”, 2018, [trade.ec.europa.eu/doclib/docs/2013/april/tradoc\\_150992.pdf](https://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150992.pdf); EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 7; EUIPO, *2019 Status report on IPR infringement*, 2019, 18.

<sup>50</sup> EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 7; EUIPO, *2019 Status report on IPR infringement*, 2019, 18.

<sup>51</sup> D. C. FLEMING, “Counterfeiting in China”, *University of Pennsylvania East Asia Law Review*, 2014, (14) 15.

as well.<sup>52</sup> IPR holders from China and Hong Kong also have to deal with IPR infringement.<sup>53</sup> A more effective enforcement of IPR in China could not only restore the confidence of its domestic businesses, but also its trading partners.<sup>54</sup> As has been proven recently, theft of IP can even lead to trade wars.<sup>55</sup> Moreover, this problem of IPR infringement is also linked to inequalities within China, and it also has an impact on the daily lives of the Chinese public.

### 1.3. THE SOCIO-ECONOMIC IMPACT OF INTELLECTUAL PROPERTY INFRINGEMENT

**15. ENFORCING IPR: PREYING ON THE WEAK?** – Counterfeiting employs around three to five million people in China.<sup>56</sup> For this reason, it will be difficult to enforce counterfeiting without hurting the economy and the weakest groups of society.<sup>57</sup> In fact, enforcement of IPR could even provide for bigger inequalities.<sup>58</sup> The coastal regions of China account for a higher GDP and a higher rate of exports compared to the impoverished interior regions.<sup>59</sup> In 2014, the government decided to set up the Specialized IP Courts in the coastal regions, which further adds to the fact that these regions can provide a higher level of enforcement and protection of IPR.<sup>60</sup> In my opinion, since coastal regions have a higher protection of IPR compared to the poorer interior regions, they will also attract more investments. In the long run, a higher inequality in the level of IPR enforcement will translate to a higher inequality in socio-economic terms as well.

**16. COUNTERFEIT MARKETS** – An example of this growing inequality can be found in the different counterfeit markets of China. In China's counterfeit markets, migrants from poorer provinces remain the primary target of enforcement.<sup>61</sup> Since they have little other skills or schooling and no social or economic protection, they have no better choice than to rely on counterfeiting

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<sup>52</sup> G. C. K. CHEUNG, *Intellectual property rights in China: Politics of piracy, trade and protection*, New York, Routledge, 2009, 77.

<sup>53</sup> OECD and EUIPO, *Illicit trade: trends in trade in counterfeit and pirated goods*, 2019, OECD Publishing, 32; N. WYZYCKA and R. HASMATH, "The impact of the European Union's policy towards China's intellectual property regime", *International Political Science Review* 2016, (549) 550.

<sup>54</sup> G. C. K. CHEUNG, *China in the global political economy: from developmental to entrepreneurial*, Cheltenham, Edward Elgar Publishing, 2018, 90.

<sup>55</sup> [www.bbc.com/news/business-45899310](http://www.bbc.com/news/business-45899310).

<sup>56</sup> D. C. FLEMING, "Counterfeiting in China", *University of Pennsylvania East Asia Law Review*, 2014, (14) 27.

<sup>57</sup> *Ibid.*

<sup>58</sup> L. H.-L. SU, "Resistance, evasion, and inequality: legal consciousness of intellectual property laws in two Chinese markets", *Asian Journal of Law and Society* 2018, (69) 70.

<sup>59</sup> K. E. T. CUNNINGHAM JR., "Fine China? A look into Chinese intellectual property infringement, treaty obligations, and international responses", *JPTOS* 2017, (279) 296.

<sup>60</sup> D. PRUD'HOMME and T. ZHANG, *China's intellectual property regime for innovation: risks to business and national development*, Springer, 2019, 136; K. E. T. CUNNINGHAM JR., "Fine China? A look into Chinese intellectual property infringement, treaty obligations, and international responses", *JPTOS* 2017, (279) 296.

<sup>61</sup> L. H.-L. SU, "Resistance, evasion, and inequality: legal consciousness of intellectual property laws in two Chinese markets", *Asian Journal of Law and Society* 2018, (69) 70; X. FU, "Book review: The Oxford Companion to the Economics of China", *World Trade Review* 2016, (709) 709.

to provide for their families.<sup>62</sup> Because their counterfeiting is the most visible, these people are the main subject of enforcement to appease international pressure.<sup>63</sup> Meanwhile, in other markets, there are the local market owners that also sometimes own their own IPR.<sup>64</sup> They continue to sell counterfeit goods since this could bring them an extra income, but they maintain the appearance of a lawful practice to avoid prosecution.<sup>65</sup>

**17. SELECTIVE IPR ENFORCEMENT** – Both groups try to maintain personal relationships and give gifts to the market managers or regulators, in order to be warned of upcoming raids in return.<sup>66</sup> Market owners with a higher social status that have connections with higher-level officials are often able to avoid the criminal penalties.<sup>67</sup> There is an inequality between the two groups, and a selective enforcement of IPR without keeping in mind the socio-economic difficulties will only make the inequality gap grow.<sup>68</sup> The propertied group is empowered, while the unpropertied group is impoverished, aggravating the differences between the two.<sup>69</sup> There is economic growth, but it is unequally distributed.

**18. INEQUAL DISTRIBUTION** – While there is economic growth and poverty reduction, there is an increasing inequality between regions and a distribution inequality.<sup>70</sup> The country's Gini coefficient has increased from 32.2 in 1990, to 43.7 in 2010 and has decreased again to 38.6 in 2015.<sup>71</sup> In my opinion, a contributing element to the rising inequality is the increasing demand for innovation and new technology in China. The demand for new technology leads to a demand for higher education, which causes higher levels of inequality. China does not want to continue encouraging economic growth at an immense speed by being the manufacturer of the world. It wants to become a leader in technology and produce higher-quality goods. It wants to take a more balanced approach and to consider the impact of economic growth on growing inequalities in its society.<sup>72</sup> It has an ambition to transit into a high income country.<sup>73</sup> To do this in a sustainable way, it will have to take into account the

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<sup>62</sup> L. H.-L. SU, "Resistance, evasion, and inequality: legal consciousness of intellectual property laws in two Chinese markets", *Asian Journal of Law and Society* 2018, (69) 76.

<sup>63</sup> *Ibid.*, 77.

<sup>64</sup> *Ibid.*, 76.

<sup>65</sup> *Ibid.*, 70-76.

<sup>66</sup> *Ibid.*, 78.

<sup>67</sup> *Ibid.*

<sup>68</sup> D. C. FLEMING, "Counterfeiting in China", *University of Pennsylvania East Asia Law Review*, 2014, (14) 27; L. H.-L. SU, "Resistance, evasion, and inequality: legal consciousness of intellectual property laws in two Chinese markets", *Asian Journal of Law and Society* 2018, (69) 70-80.

<sup>69</sup> L. H.-L. SU, "Resistance, evasion, and inequality: legal consciousness of intellectual property laws in two Chinese markets", *Asian Journal of Law and Society* 2018, (69) 83.

<sup>70</sup> X. FU, "Book review: The Oxford Companion to the Economics of China", *World Trade Review* 2016, (709) 709-710; B. HOFMAN and J. WU, *Explaining China's development and reforms*, Commission on Growth and Development, 2009, (1) 15.

<sup>71</sup> [data.worldbank.org/indicator/SI.POV.GINI?locations=CN](http://data.worldbank.org/indicator/SI.POV.GINI?locations=CN).

<sup>72</sup> K. THOMAS, "The product liability system in China: recent changes and prospects", 2014, *ICLQ*, (755) 774.

<sup>73</sup> X. FU, "Book review: The Oxford Companion to the Economics of China", *World Trade Review* 2016, (709) 709-710.

inequalities that exist, and how economic growth is distributed. Improving working conditions and increasing minimum wages could be an effective way of decreasing IPR infringement, since it is essentially caused by low labor costs and a poor labor market.<sup>74</sup>

**19. EFFECTS OF IPR INDUSTRIES ON EQUALITY** – In my opinion, efficient protection of IPR and the move towards a more innovative economy could assist in reducing social inequalities. The benefits of more IPR-intensive industries are a higher level of employment, higher wages and a higher contribution to GDP.<sup>75</sup> The problem would be how these benefits are allocated. Allocating them in a fair manner could be a way to reduce inequalities. Since IPR infringement is caused by, amongst others, low labor costs and a poor labor market,<sup>76</sup> a fair allocation of these benefits would also reduce IPR infringement. In my opinion, increasing minimum wages and improving working conditions in China could help to ensure the fair allocation of these benefits in the future.

#### 1.4. WHY INTELLECTUAL PROPERTY IS STILL INFRINGED

**20. ONLY NEGATIVE EFFECTS** – This chapter gives an answer to the first sub-question. It is necessary to protect IPR, since IPR infringement brings with it a lot of negative effects. It is dangerous for consumers, businesses and governments (*section I*). Consumers are not always aware of the impact of buying counterfeit goods on their health, their security and the economy, which calls for a need on education on these dangers (*§1*). IPR infringement is often an operation of large organized crime groups, which use these profits to expand their other criminal activities (*§2*). IPR-intensive businesses in both China and the EU make a large contribution to the economy but face huge losses due to counterfeiting and the resulting loss of reputation or jobs (*§3*). China is the largest exporter of counterfeit goods, harming the confidence of its trading partners and the domestic markets of China and the EU, but also right holders within China (*section II*). Counterfeiting is also a product of rising inequalities, mainly between different regions in China (*section III*). There is economic growth, but that growth does not seem to be attributed in a fair way. The move towards a more innovative economy could help reduce inequalities, if the welfare resulting from this move is allocated in a fair way.

**21. REASONS FOR INFRINGEMENT** – IPR infringement has a lot of negative impacts, but sometimes it seems like not much is being done by the Chinese Communist Party (CCP) to stop IPR infringement. This can be explained by several factors, which will be pointed out in the next chapter.

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<sup>74</sup> EUIPO, *2019 Status report on IPR infringement*, 2019, 20.

<sup>75</sup> K. M. L. ACRI, “Economic growth and prosperity stem from effective intellectual property rights,” *George Mason Law Review* 2017, (865) 874; K-C. LIU and U. S. RACHERLA (eds.), *Innovation and IPRs in China and India: myths, realities and opportunities*, Singapore, Springer, 2016, 29-30.

<sup>76</sup> EUIPO, *2019 Status report on IPR infringement*, 2019, 20.

## 2. REASONS FOR INTELLECTUAL PROPERTY INFRINGEMENT

**22. INTRODUCTION** – In order to understand the current challenges that the enforcement of modern IP law faces, it is important to briefly look at the history of IPR protection in both China and Europe (section I). In Europe, IP had already existed for some time before it was brought to China. The adoption of IP law in China was mainly a forced adoption of legal transplants, which faced problems regarding its acceptance due to cultural and political differences (section II). Confucian culture reduces the importance of the law, and declares that the best way to learn something new is by copying someone else (§1). The socialist background of the PRC, legal instrumentalism and (a lack of) rule of law also have an influence on IPR protection (§2). Nevertheless, one of the main historic reasons for China to infringe IPR was to stimulate its economic development (section III).

**23. RESEARCH QUESTION** – This second chapter gives an answer to the sub-question: “What are the causes of IPR infringement and the lack of protection of IPR in China?”

### 2.1. A BRIEF HISTORY OF INTELLECTUAL PROPERTY PROTECTION IN CHINA AND EUROPE

**24. ORIGINS OF IP LAW** – Modern IP laws are thought to have originated in Venice in the late fifteenth century.<sup>77</sup> The Venetian Senate’s 1474 Act is seen as the first law regarding the protection of IPR.<sup>78</sup> This new Venetian concept of IPR protection would later spread throughout Europe.<sup>79</sup> Mainly in the 19<sup>th</sup> century, European countries started to see IPR protection as an incentive for businesses to innovate.<sup>80</sup>

**25. LACK OF PROTECTION IN PRE-MODERN CHINA** – In China, things went a bit different. Before modern times, China had a huge potential of innovation and brought new inventions to the world.<sup>81</sup> For example, movable printing was invented in China many years before it was invented in Europe.<sup>82</sup> However, being

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<sup>77</sup> R. P. MERGES, “The economic impact of intellectual property rights: an overview and guide”, *Journal of cultural economics* 1995, (103) 103-105.

<sup>78</sup> C. MAY, “The hypocrisy of forgetfulness: the contemporary significance of early innovations in intellectual property”, *Review of International Political Economy* 2007, (1) 3; R. P. MERGES, “The economic impact of intellectual property rights: an overview and guide”, *Journal of cultural economics* 1995, (103) 105.

<sup>79</sup> C. MAY, “The hypocrisy of forgetfulness: the contemporary significance of early innovations in intellectual property”, *Review of International Political Economy* 2007, (1) 8; R. P. MERGES, “The economic impact of intellectual property rights: an overview and guide”, *Journal of cultural economics* 1995, (103) 106.

<sup>80</sup> R. P. MERGES, “The economic impact of intellectual property rights: an overview and guide”, *Journal of cultural economics* 1995, (103) 107.

<sup>81</sup> L. LIN (ed.), *Interpreting China’s legal system*, Singapore, World Scientific, 2018, 234.

<sup>82</sup> C. MAY, “The hypocrisy of forgetfulness: the contemporary significance of early innovations in intellectual property”, *Review of International Political Economy* 2007, (1) 15.

good at innovating does not necessarily mean that you protect those innovations. While a general protection of IPR emerged in Europe, it did not appear in China, mainly due to cultural and political reasons.<sup>83</sup> Ancient influences like Confucianism, together with collectivism, played a big role in shaping the modern Chinese society and the thought behind infringing IPR.<sup>84</sup> The protection of IPR was not compatible with Chinese tradition. In modern times, this lack of IPR and the protection thereof, led to a slow growth of China's technology at first.<sup>85</sup> Since inventions are not protected, there is little to no economic incentive to innovate.

**26. FIRST IP LAWS IN CHINA** – At the end of the 19<sup>th</sup> century, Western powers invaded Qing China. With them, they brought the idea of protecting IPR.<sup>86</sup> They forced the Qing government to adopt laws protecting IP as it was conceived in the West.<sup>87</sup> As such, the first Copyright Act was established in 1910.<sup>88</sup> This law was produced with the help of British officers, due to which it almost completely copied the British law on some aspects.<sup>89</sup> The Qing Empire collapsed in 1912, and was followed by the Republic of China. The Republic of China established a Copyright Act, Trademark Act and Patent Act that were based on Western laws.<sup>90</sup> A large number of regulations of German law and Japanese law were transplanted into these Chinese laws.<sup>91</sup> However, in practice, these laws were not effective, since they did not take into account the differences between the Western and Chinese traditions.<sup>92</sup> Eventually, these laws were abolished when the People's Republic of China (PRC) was founded.

**27. PEOPLE'S REPUBLIC OF CHINA 1949** – When the PRC was founded and the CCP came to power in 1949, all past legal traditions and connections with the

<sup>83</sup> *Ibid.*, 16.

<sup>84</sup> K. HO, "A study into the problem of software piracy in Hong Kong and China", 1995, [www.ipd.gov.hk/eng/intellectual\\_property/study\\_aids/piracy\\_hk\\_china\\_copyrt/piracy\\_hk\\_china\\_c.htm#2.1](http://www.ipd.gov.hk/eng/intellectual_property/study_aids/piracy_hk_china_copyrt/piracy_hk_china_c.htm#2.1); N. WINGROVE, "China traditions oppose war on IP piracy", 1995, *Research Technology Management*, 6.

<sup>85</sup> L. LIN (ed.), *Interpreting China's legal system*, Singapore, World Scientific, 2018, 234-235.

<sup>86</sup> L. LI, *Intellectual property protection of traditional cultural expressions: folklore in China*, London, Springer, 2014, 92.

<sup>87</sup> L. LI, *Intellectual property protection of traditional cultural expressions: folklore in China*, London, Springer, 2014, 92; L. ZHANG and N. BRUUN, "Legal transplantation of intellectual property rights in China: resistance, adaptation and reconciliation", *IIC* 2017, (4) 8.

<sup>88</sup> L. ZHANG and N. BRUUN, "Legal transplantation of intellectual property rights in China: resistance, adaptation and reconciliation", *IIC* 2017, (4) 8.

<sup>89</sup> L. LI, *Intellectual property protection of traditional cultural expressions: folklore in China*, London, Springer, 2014, 92.

<sup>90</sup> M. A. MARCUCCI, "Navigating unfamiliar terrain: reconciling conflicting impressions of China's intellectual property regime in an effort to aid foreign right holders", *Fordham Intellectual Property Media and Entertainment Law Journal* 2013, (1395) 1411; L. ZHANG and N. BRUUN, "Legal transplantation of intellectual property rights in China: resistance, adaptation and reconciliation", *IIC* 2017, (4) 8.

<sup>91</sup> L. LI, *Intellectual property protection of traditional cultural expressions: folklore in China*, London, Springer, 2014, 92; K. THOMAS, *Assessing intellectual property compliance in contemporary China: the World Trade Organisation TRIPS Agreement*, Singapore, Palgrave Macmillan, 2017, 13.

<sup>92</sup> L. LI, *Intellectual property protection of traditional cultural expressions: folklore in China*, London, Springer, 2014, 92.

Western world were abolished.<sup>93</sup> This also meant that the novel IP laws that were adopted under the Qing government were revoked. Some new laws providing a very low level of IPR protection were adopted, but eventually abolished again.<sup>94</sup> Not much changed until the late 1970's, when Deng Xiaoping came to power.

**28. AFTER 1978** - The year 1978 might be the most important in modern Chinese history. It marks the opening up of China to the West under Deng Xiaoping, as part of the "Four Modernizations" program.<sup>95</sup> The objective of this was to recover lost connections with the West, and as such develop its national economy.<sup>96</sup> Naturally, the West pressured China to rebuild a fully operational set of IP laws in order to partake in the global economy. The politics of IPR protection in China is mostly reactive, since IP laws are adopted based on foreign pressure.<sup>97</sup> The problem, however, is the validity of these laws in the specific Chinese tradition.

**29. VALIDITY** - Since China did not have a long tradition of IPR protection, its laws were again based substantially on the laws of Western countries.<sup>98</sup> Since China had no real prior experience with adopting IP law on its own, it was only natural to copy successful models from other countries.<sup>99</sup> While transplanting these Western laws in its own legal system, China did not pay enough attention to the validity of this transplanted law in the specific Chinese context.<sup>100</sup> That is also a reason why the Chinese IP system is less effective than the Western IP system.<sup>101</sup> Moreover, since China adopted these laws at a very rapid pace, its

<sup>93</sup> Z. CHU and X. XINGXIANG, *China patent legal system and practice*, China, Lexisnexis, 2010, 4; K. THOMAS, *Assessing intellectual property compliance in contemporary China: the World Trade Organisation TRIPS Agreement*, Singapore, Palgrave Macmillan, 2017, 13; W. SHI, *Intellectual property in the global trading system: EU-China perspective*, Berlin, Springer, 2008, 70. L. ZHANG and N. BRUUN, "Legal transplantation of intellectual property rights in China: resistance, adaptation and reconciliation", *IIC* 2017, (4) 8.

<sup>94</sup> L. LI, *Intellectual property protection of traditional cultural expressions: folklore in China*, London, Springer, 2014, 93.

<sup>95</sup> R. H. HU, *Research guide to Chinese patent law and practice*, New York, William S. Hein & Co. Inc., 2002, 5; Z. CHU and X. XINGXIANG, *China patent legal system and practice*, China, Lexisnexis, 2010, 5; W. GUAN, *Intellectual property theory and practice: a critical examination of China's TRIPS compliance and beyond*, Hong Kong, Springer, 2014, 48.

<sup>96</sup> L. LI, *Intellectual property protection of traditional cultural expressions: folklore in China*, London, Springer, 2014, 94.

<sup>97</sup> M. K. DIMITROV, *Piracy and the State: The Politics of Intellectual Property Rights in China*, Cambridge, Cambridge university press, 2009, 26; M. LEE, J. D. ALBA and D. PARK, "Intellectual property rights, informal economy, and FDI into developing countries", *Journal of Policy Modeling* 2018, (1067) 1067-1068.

<sup>98</sup> L. YINLIANG, "Justification of the criminal and administrative enforcement of intellectual property rights in China: historical contexts and contemporary scenes", *Peking University Journal of Legal Studies* 2012, 195; L. ZHANG and N. BRUUN, "Legal transplantation of intellectual property rights in China: resistance, adaptation and reconciliation", *IIC* 2017, (4) 8.

<sup>99</sup> Z. MA and Y. ZHANG, "TRIPS Agreement and enforcement of the intellectual property rights in China", *JEAIL* 2012, (407) 430; L. ZHANG and N. BRUUN, "Legal transplantation of intellectual property rights in China: resistance, adaptation and reconciliation", *IIC* 2017, (4) 5.

<sup>100</sup> L. LI, *Intellectual property protection of traditional cultural expressions: folklore in China*, London, Springer, 2014, 91; L. PANG, *Creativity and its discontents: China's creative industries and intellectual property rights offenses*, Durham, Duke University Press, 2012, 99.

<sup>101</sup> L. LI, *Intellectual property protection of traditional cultural expressions: folklore in China*, London, Springer, 2014, 91.

tradition was not given the time to adjust itself to these changes.<sup>102</sup> The transplanted legal framework conflicts with both cultural and political traditions.

## 2.2. A FORCED ADOPTION WITH NO REGARD TO TRADITION

### 2.2.1. *A culture of infringing intellectual property*

**30. CONFUCIANISM** – While Confucian culture might have lost its strength<sup>103</sup>, it continues to have an influence on the Chinese legal order.<sup>104</sup> As such, the practice of infringing IPR can be traced back to Confucianism. There are two reasons for this. The first reason is that Confucianism places personal relationships above the law. The second reason is that Confucianism views creating and copying intellectual products as a process of self-improvement.

**31. PERSONAL RELATIONSHIPS ABOVE THE LAW** – In Confucianism, law has a secondary position compared to personal relationships.<sup>105</sup> Confucianism is of strong importance in the legal system and governance of China, influencing the decisions of judges and party officials.<sup>106</sup> Individuals should try to avoid courts, in order to protect personal relationships. However, the fact that applications and lawsuits for protecting IP are being filed by domestic parties in China shows that the law is gaining importance, and that Confucianism is losing its influence.<sup>107</sup> Therefore, it seems like the public is now recognizing the importance of law.

**32. LEARNING BY COPYING** – According to Confucianism, superiority can be attained by learning.<sup>108</sup> The best way to learn something new is by copying.<sup>109</sup>

<sup>102</sup> L. ZHANG and N. BRUUN, “Legal transplantation of intellectual property rights in China: resistance, adaptation and reconciliation”, *IIC* 2017, (4) 6.

<sup>103</sup> W. SHI, *Intellectual property in the global trading system: EU-China perspective*, Berlin, Springer, 2008, 113.

<sup>104</sup> L. TOOHEY, C. B. PICKER and J. GREENACRE (eds.), *China in the international economic order: new directions and changing paradigms*, Cambridge University Press, 2015, 32-33; L. ZHANG and N. BRUUN, “Legal transplantation of intellectual property rights in China: resistance, adaptation and reconciliation”, *IIC* 2017, (4) 15.

<sup>105</sup> L. TOOHEY, C. B. PICKER and J. GREENACRE (eds.), *China in the international economic order: new directions and changing paradigms*, Cambridge University Press, 2015, 32-33; B. J. SAFRAN, “A critical look at Western perceptions of China’s intellectual property system”, 2012, *U.P.R. Business Law Journal*, (135) 170.

<sup>106</sup> L. TOOHEY, C. B. PICKER and J. GREENACRE (eds.), *China in the international economic order: new directions and changing paradigms*, Cambridge University Press, 2015, 66.

<sup>107</sup> K. HO, “A study into the problem of software piracy in Hong Kong and China”, 1995, [www.ipd.gov.hk/eng/intellectual\\_property/study\\_aids/piracy\\_hk\\_china\\_copyrt/piracy\\_hk\\_china\\_c.htm#2.1](http://www.ipd.gov.hk/eng/intellectual_property/study_aids/piracy_hk_china_copyrt/piracy_hk_china_c.htm#2.1);

N. WINGROVE, “China traditions oppose war on IP piracy”, 1995, *Research Technology Management*, 6.

<sup>108</sup> H. DAVIES and M. RASKOVIC, *Understanding a changing China: key issues for business*, 2018, Routledge, New York, 54.

<sup>109</sup> G. C. K. CHEUNG, *China in the global political economy: from developmental to entrepreneurial*, Cheltenham, Edward Elgar Publishing, 2018, 87; K. E. T. CUNNINGHAM JR., “Fine China? A look into Chinese intellectual property infringement, treaty obligations, and international responses”, *JPTOS* 2017, (279) 284; N. WINGROVE, “China traditions oppose war on IP piracy”, *Research Technology Management* 1995, 6.

Creating intellectual products should be done only to improve yourself.<sup>110</sup> For centuries, copying works of others has been regarded as necessary and honorable in China.<sup>111</sup> While in the West counterfeit goods are perceived as inferior imitations, Chinese culture views it as a compliment to faultlessly copy other works.<sup>112</sup> The Chinese public does not view the act of copying as stealing.<sup>113</sup> This concept has existed for a long time, and so it was only natural that these principles were applied to products protected by IPR.<sup>114</sup> Since Chinese culture never had a concept of private rights for intellectual achievements, it is difficult for the public to recognize IPR as legal rights.<sup>115</sup>

**33. NOT A JUSTIFICATION** – Confucian culture can be used to explain, but not to justify IPR infringement and the lack of enforcement. It is clear that China continues to infringe IPR mainly for economic reasons. Confucianism cannot be seen as a cause for IPR infringement, since there are other countries with a Confucian tradition which have greater IPR protection and enforcement.<sup>116</sup> For example, Japan and South-Korea were equally, if not more, influenced by Confucianism but continued to establish a sound system of IPR protection with low rates of counterfeiting.<sup>117</sup>

**34. POLITICAL AND ECONOMIC REASONS** – In my opinion, IPR infringers recognize the worth of a product that is protected by IPR and want to copy it because of its value, and therefore they recognize IPR and their value. The cultural background of China cannot be used as a justification for infringing IPR. Therefore, it is important to look at political and economic reasons for IPR infringement. Socialist influences and the lack of rule of law play a bigger role in explaining the reasons for IPR infringement than culture. It is necessary as well

<sup>110</sup> L. LI, *Intellectual property protection of traditional cultural expressions: folklore in China*, London, Springer, 2014, 114; L. ZHANG and N. BRUUN, “Legal transplantation of intellectual property rights in China: resistance, adaptation and reconciliation”, *IIC* 2017, (4) 14.

<sup>111</sup> G. C. K. CHEUNG, *China in the global political economy: from developmental to entrepreneurial*, Cheltenham, Edward Elgar Publishing, 2018, 87; K. E. T. CUNNINGHAM JR., “Fine China? A look into Chinese intellectual property infringement, treaty obligations, and international responses”, *JPTOS* 2017, (279) 284; N. WINGROVE, “China traditions oppose war on IP piracy”, *Research Technology Management* 1995, 6; L. ZHANG and N. BRUUN, “Legal transplantation of intellectual property rights in China: resistance, adaptation and reconciliation”, *IIC* 2017, (4) 14.

<sup>112</sup> K. HO, “A study into the problem of software piracy in Hong Kong and China”, 1995, [www.ipd.gov.hk/eng/intellectual\\_property/study\\_aids/piracy\\_hk\\_china\\_copyrt/piracy\\_hk\\_china\\_c.htm#21](http://www.ipd.gov.hk/eng/intellectual_property/study_aids/piracy_hk_china_copyrt/piracy_hk_china_c.htm#21); J. L. MENZIES, L. XYNAS et al., “Intellectual property, business and China: taking a stand”, *Deakin Law Review* 2013, (89) 105.

<sup>113</sup> L. LI, *Intellectual property protection of traditional cultural expressions: folklore in China*, London, Springer, 2014, 114.

<sup>114</sup> N. WINGROVE, “China traditions oppose war on IP piracy”, 1995, *Research Technology Management*, 6.

<sup>115</sup> L. LI, *Intellectual property protection of traditional cultural expressions: folklore in China*, London, Springer, 2014, 114; L. ZHANG and N. BRUUN, “Legal transplantation of intellectual property rights in China: resistance, adaptation and reconciliation”, *IIC* 2017, (4) 14.

<sup>116</sup> W. SHI, “The paradox of Confucian determinism: tracking the root causes of intellectual property rights problem in China”, *The John Marshall Review of Intellectual Property Law* 2008, (454) 457.

<sup>117</sup> W. SHI, *Intellectual property in the global trading system: EU-China perspective*, Berlin, Springer, 2008, 143; W. SHI, “The paradox of Confucian determinism: tracking the root causes of intellectual property rights problem in China”, *The John Marshall Review of Intellectual Property Law* 2008, (454) 457.

to look at economic reasons, to explain what happened in the past and why the Chinese stance on IPR is changing.

### 2.2.2. Different political traditions

#### a. Socialist influences and legal instrumentalism

**35. SOCIALISM AND COLLECTIVISM** – Another influence is the fact that the PRC has a socialist background. Since the reform in 1949, sharing has been the mandate in China.<sup>118</sup> Under communism, private property rights are limited.<sup>119</sup> Communism in China is linked with collectivism, which is based on Confucian thinking.<sup>120</sup> It stresses that the needs of an individual are subordinate to those of the group.<sup>121</sup> Within a collectivist culture, one person is able to build on the achievements of others, as it is a product of society.<sup>122</sup> Therefore, the very idea of individual ownership rights cannot be reconciled with the communist ideology.<sup>123</sup> The collectivist mentality that communism is based on, undermines the idea of individual intellectual property rights.<sup>124</sup>

**36. RECOGNITION OF IPR AS PRIVATE RIGHTS** - Nevertheless, the concept that IPR are private rights is gradually becoming more and more accepted by the public, and China has attached importance to developing its IPR strategies.<sup>125</sup> China is trying to show the world that it is making an effort to protect IPR, but this seems to be mostly driven by international pressure. It often amends its IP laws, in order to comply with international treaties and respond to international pressure.<sup>126</sup> Intellectual property is a Western concept that contradicts China's culture and politics. Even Deng Xiaoping warned that simply copying the West

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<sup>118</sup> K. HO, "A study into the problem of software piracy in Hong Kong and China", 1995, [www.ipcl.gov.hk/eng/intellectual\\_property/study\\_aids/piracy\\_hk\\_china\\_copyrt/piracy\\_hk\\_china\\_c.htm#2.1](http://www.ipcl.gov.hk/eng/intellectual_property/study_aids/piracy_hk_china_copyrt/piracy_hk_china_c.htm#2.1); L. ZHANG and N. BRUUN, "Legal transplantation of intellectual property rights in China: resistance, adaptation and reconciliation", *IIC*2017, (4) 15.

<sup>119</sup> G. C. K. CHEUNG, *China in the global political economy: from developmental to entrepreneurial*, Cheltenham, Edward Elgar Publishing, 2018, 87; L. ZHANG and N. BRUUN, "Legal transplantation of intellectual property rights in China: resistance, adaptation and reconciliation", *IIC*2017, (4) 15.

<sup>120</sup> R. GUO, *How the Chinese economy works*, Palgrave Macmillan, 2017, 412; L. HARRISON, "Comparisons of the rule of law of China with the West", *Asian Journal of Law and Society* 2018, (480) 481.

<sup>121</sup> R. GUO, *How the Chinese economy works*, Palgrave Macmillan, 2017, 412; S. HAN, "Chinese use of administrative proceedings to enforce intellectual property rights: evaluating and improving ADR in China", *Cardozo Journal of Conflict Resolution* 2012, (195) 200; L. HARRISON, "Comparisons of the rule of law of China with the West", *Asian Journal of Law and Society* 2018, (480) 481.

<sup>122</sup> R. GUO, *How the Chinese economy works*, Palgrave Macmillan, 2017, 412; L. ZHANG and N. BRUUN, "Legal transplantation of intellectual property rights in China: resistance, adaptation and reconciliation", *IIC*2017, (4) 14-15.

<sup>123</sup> W. SHI, "The paradox of Confucian determinism: tracking the root causes of intellectual property rights problem in China", *The John Marshall Review of Intellectual Property Law* 2008, (454) 462.

<sup>124</sup> W. SHI, "The paradox of Confucian determinism: tracking the root causes of intellectual property rights problem in China", *The John Marshall Review of Intellectual Property Law* 2008, (454) 462.

<sup>125</sup> L. LIN (ed.), *Interpreting China's legal system*, Singapore, World Scientific, 2018, 235.

<sup>126</sup> L. ZHANG and N. BRUUN, "Legal transplantation of intellectual property rights in China: resistance, adaptation and reconciliation", *IIC*2017, (4) 9.

would not be suitable for China, and would betray its Confucian traditions.<sup>127</sup> The adoption of IP law in China seems to be a form of legal instrumentalism.

**37. LEGAL INSTRUMENTALISM** – While China provided its own IP laws for the first time, its motivation is not purely to protect IPR.<sup>128</sup> The development of IP law in China is a form of legal instrumentalism, since it follows the will of political and economic development.<sup>129</sup> In my opinion, the motivation behind the adoption of these IP laws is actually driven by the fact that China wants to develop its international trade. As such, these laws have to correspond with Western standards of IPR protection. Since the motivation of these laws is not really to protect IPR, they are not fully effective, and lack validity. This is a reason why the transplantation of Western IP law failed in China. However, things are changing, and it seems like the importance of protecting IPR in relation to innovation and economic growth is being acknowledged by the CCP. In order to do this, China would need to distance itself from its usual legal instrumentalism and work towards implementing the rule of law.

#### **b. Implementing the rule of law in China**

**38. A FIRST ATTEMPT** – China is seen as a country operating by the “*rule by law*”, where the Party rules over the law and the courts.<sup>130</sup> It should be noted that in the 1980s, China already tried to separate the party from the state.<sup>131</sup> While this resulted in a miraculous economic growth, it also exposed regulatory failures, which resulted in corruption and a growing social inequality.<sup>132</sup> Together with the liberal thoughts that were imported from the West, this originated in the democratic movement in 1989.<sup>133</sup> As the Party felt threatened, the evolution towards a “rule of law” was immediately halted.<sup>134</sup> Since then, there is a dual normative system where the Party places its will above the state.<sup>135</sup>

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<sup>127</sup> L. HARRISON, “Comparisons of the rule of law of China with the West”, *Asian Journal of Law and Society* 2018, (480) 481.

<sup>128</sup> L. LI, *Intellectual property protection of traditional cultural expressions: folklore in China*, London, Springer, 2014, 96.

<sup>129</sup> L. LI, *Intellectual property protection of traditional cultural expressions: folklore in China*, London, Springer, 2014, 97 ; P. SNEL, personal communication (interview) 11th of April 2019.

<sup>130</sup> L. LI, “Rule of law” in a Party-State: a conceptual interpretive framework of the constitutional reality of China”, *Asian Journal of Law and Society* 2015, (93) 94; P. SNEL, personal communication (interview) 11th of April 2019.

<sup>131</sup> L. LI, “Rule of law” in a Party-State: a conceptual interpretive framework of the constitutional reality of China”, *Asian Journal of Law and Society* 2015, (93) 98; V. WAYE and P. XIONG, “The relationship between mediation and judicial proceedings in China”, *Asian Journal of Comparative Law* 2011, (1) 4.

<sup>132</sup> L. LI, “Rule of law” in a Party-State: a conceptual interpretive framework of the constitutional reality of China”, *Asian Journal of Law and Society* 2015, (93) 98.

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*, 99.

<sup>135</sup> *Ibid.*, 99.

**39. WESTERN CONCEPT** – The concept of the rule of law is seen as being of unique European origin.<sup>136</sup> In its modernization, China was exposed to norms from Western legal systems, including the concept of the rule of law.<sup>137</sup> A Western standard of rule of law cannot be reconciled with the current system of governance in China.<sup>138</sup> The Chinese system today is a competitive meritocracy, as opposed to the Western systems knowing the rule of law, where there is “rule by the people, for the people”.<sup>139</sup>

**40. REACHING JUDICIAL INDEPENDENCE** – Instead of trying to enforce this Western meaning of rule of law, China’s efforts in meeting the goal of judicial independence should be encouraged and supported.<sup>140</sup> The fact that it is not plausible that China becomes a democracy with separation of powers,<sup>141</sup> does not mean that judicial independence with regards to the state cannot be achieved.<sup>142</sup> China recognizes that maintenance of the rule of law is impossible unless there is an effective and impartial judicial system.<sup>143</sup> It is actively trying to reconcile the Western principles of the rule of law with their own principles.<sup>144</sup>

**41. LAW AS AN INSTRUMENT FOR IMPLEMENTING POLICY GOALS** – China has made efforts to promote the rule of law.<sup>145</sup> However, by using the law as a tool to fulfill its policy goals, as it has done with its IP law, China is undermining its development of rule of law.<sup>146</sup> Legal instrumentalism cannot be reconciled with the development of rule of law. This might be a reason why Chinese IP laws are so ineffective.

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<sup>136</sup> Q. WU., “How has China formed its conception of the rule of law? A contextual analysis of legal instrumentalism in ROC and PRC law-making”, *International Journal of Law in Context* 2017, (277) 277.

<sup>137</sup> *Ibid.*

<sup>138</sup> C. E. SCHULTZ, “Placing power in the cage of law: judicial independence in China”, 2016, *Capital University Law Review*, (393) 395.

<sup>139</sup> H. DAVIES and M. RASKOVIC, *Understanding a changing China: key issues for business*, 2018, Routledge, New York, 54.

<sup>140</sup> C. E. SCHULTZ, “Placing power in the cage of law: judicial independence in China”, 2016, *Capital University Law Review*, (393) 397.

<sup>141</sup> [www.scmp.com/news/china/article/1586307/xi-jinping-rules-out-western-style-political-reform-china](http://www.scmp.com/news/china/article/1586307/xi-jinping-rules-out-western-style-political-reform-china).

<sup>142</sup> C. E. SCHULTZ, “Placing power in the cage of law: judicial independence in China”, 2016, *Capital University Law Review*, (393) 397.

<sup>143</sup> V. WAYE and P. XIONG, “The relationship between mediation and judicial proceedings in China”, *Asian Journal of Comparative Law* 2011, (1) 1.

<sup>144</sup> L. HARRISON, “Comparisons of the rule of law of China with the West”, *Asian Journal of Law and Society* 2018, (480) 480; V. WAYE and P. XIONG, “The relationship between mediation and judicial proceedings in China”, *Asian Journal of Comparative Law* 2011, (1) 1.

<sup>145</sup> W. CAI and A. GODWIN, “Challenges and opportunities for the China International Commercial Court”, *ICLQ* 2019, (869) 874.

<sup>146</sup> K. THOMAS, “The product liability system in China: recent changes and prospects”, 2014, *ICLQ*, (755) 771; Q. WU., “How has China formed its conception of the rule of law? A contextual analysis of legal instrumentalism in ROC and PRC law-making”, *International Journal of Law in Context* 2017, (277) 277.

**42. LITTLE IMPROVEMENT** - From the point of view of the international community, China has made little progress in achieving the rule of law.<sup>147</sup> The World Justice Project Rule of Law Index that is released every year, shows us that, despite the efforts that are made, China is still struggling to improve on this subject. Each country is given a factor from 0 (poor rule of law) to 1 (strong rule of law). The index of 2012 gives China a factor of 0.48, while the index of 2019 gives China a factor of 0.49.<sup>148</sup> These numbers show little improvement in recent years.

### 2.3. ECONOMIC REASONS

**43. COPYCAT CHINA** - The traditional view of China is that it is a copycat nation that depends on foreigners for technological advances.<sup>149</sup> This infringement, at least in the beginning, had a positive impact on its economic development. It is clear that historically, China has relied on infringement of IPR to grow its economy.<sup>150</sup> For poor countries, stronger IPR have a negative impact on their international trade, and have no effect on the amount of innovation.<sup>151</sup> An example is that at the end of the 1970s, SOE's generated most industrial output, but to do so, relied on the imitation of foreign technologies to improve their technology.<sup>152</sup>

**44. FOREIGN INVESTMENTS AND TECHNOLOGY TRANSFERS** - Western investments and technology transfers into a market with abundant, cheap and efficient labor made China the largest manufacturer of low-value goods.<sup>153</sup> These technology transfers and foreign investments are an important way to stimulate economic development in developing countries.<sup>154</sup> In order to receive this, China had to respond to international pressure by improving its IPR protection.<sup>155</sup> The first response of China was to create laws protecting IP, but without sufficient enforcement these laws did not have the desired effect. In 2005, when China

<sup>147</sup> Q. WU., "How has China formed its conception of the rule of law? A contextual analysis of legal instrumentalism in ROC and PRC law-making", *International Journal of Law in Context* 2017, (277) 292.

<sup>148</sup> World Justice Project Rule of Law Index 2012-2013, [www.worldjusticeproject.org/our-work/publications/rule-law-index-reports/wjp-rule-law-index-2012-2013-report](http://www.worldjusticeproject.org/our-work/publications/rule-law-index-reports/wjp-rule-law-index-2012-2013-report); World Justice Project Rule of Law Index 2019, [www.worldjusticeproject.org/our-work/publications/rule-law-index-reports/wjp-rule-law-index-2019](http://www.worldjusticeproject.org/our-work/publications/rule-law-index-reports/wjp-rule-law-index-2019).

<sup>149</sup> H. DAVIES and M. RASKOVIC, *Understanding a changing China: key issues for business*, 2018, Routledge, New York, 86.

<sup>150</sup> K. E. T. CUNNINGHAM JR., "Fine China? A look into Chinese intellectual property infringement, treaty obligations, and international responses", *JPTOS* 2017, (279) 281; N. WYZYCKA and R. HASMATH, "The impact of the European Union's policy towards China's intellectual property regime", *International Political Science Review* 2016, (549) 551.

<sup>151</sup> K-C. LIU and U. S. RACHERLA (eds.), *Innovation and IPRs in China and India: myths, realities and opportunities*, Singapore, Springer, 2016, 6.

<sup>152</sup> L. ZHANG and N. BRUUN, "Legal transplantation of intellectual property rights in China: resistance, adaptation and reconciliation", *IIC* 2017, (4) 16.

<sup>153</sup> I. TSELICHTCHEV, *China versus the West: the global power shift of the 21st century*, Singapore, Wiley, 2012, 178.

<sup>154</sup> J. HOLLAND, "Intellectual property rights in China: patents and economic development", *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 2017, (40) 41-42.

<sup>155</sup> J. L. MENZIES, L. XYNAS et al., "Intellectual property, business and China: taking a stand", *Deakin Law Review* 2013, (89) 93.

had fully developed its IP law, it was even estimated that between 15 and 20 percent of its national income came from the sale of counterfeit goods.<sup>156</sup>

**45. TRADE-OFF** – This lack of IPR protection can be explained by the trade-off between the advantages and disadvantages of IPR protection. While more protection of IPR can lead to more innovation and attract foreign investment, there are also disadvantages. IPR protection leads to monopolies which make it difficult to build on previous innovations and as such lowers efficiency. When China was less developed, it relied on IPR infringement since it was far more behind on Western states in terms of innovation. In my opinion, the advantages of IPR infringement then were far greater compared to now, since China was able to catch up by copying Western innovations. In recent years, this has shifted, and now efficient IPR protection can pose a larger advantage for China compared to IPR infringement.

**46. INNOVATION, TRADE AND IPR** – In the past, China might have had an economic incentive for infringing IPR, but now a lack of IPR protection could lead it to becoming less innovative and less competitive in the global economy.<sup>157</sup> If China wants to further stimulate economic growth, it needs to protect and enforce IPR more efficiently. As it invests more in R&D, the benefits of IPR protection could only grow.<sup>158</sup> The driver behind this reform will not be international pressure, as it was in the past, but domestic IP creators which need protection of their IPR.<sup>159</sup> How China is dealing with this move towards more innovation will be discussed further on, in the last chapter (*infra* nr. 184).

**47. SIMILAR DEVELOPMENT** - It is important to note that the United States (US), Japan, Korea and Hong Kong have followed a similar path compared to China.<sup>160</sup> The US, which is now a fierce critic of China's IP regime, in its early development for example did not protect foreign copyright or patents.<sup>161</sup> While China is now seen as the leading producer of counterfeit goods, that role was attributed to Japan in the 1960's.<sup>162</sup> South-Korea did not establish a well-functioning system of IPR protection until the late 1980's, and before that, relied heavily on stealing foreign IPR.<sup>163</sup> Now, this role has been attributed to China. Developing countries tend to rely on IPR infringement to grow their economy.

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<sup>156</sup> *Ibid.*, 106.

<sup>157</sup> K. M. L. ACRI, "Economic growth and prosperity stem from effective intellectual property rights", *George Mason Law Review* 2017, (865) 873.

<sup>158</sup> J. HOLLAND, "Intellectual property rights in China: patents and economic development", *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 2017, (40) 41.

<sup>159</sup> S. L. T. SERN, "Reevaluating foreign intellectual property protection in China", *Singapore Law Review* 2018-2019, (121) 132.

<sup>160</sup> S. L. T. SERN, "Reevaluating foreign intellectual property protection in China", *Singapore Law Review* 2018-2019, (121) 132.

<sup>161</sup> S. L. T. SERN, "Reevaluating foreign intellectual property protection in China", *Singapore Law Review* 2018-2019, (121) 133; P. K. YU, "The rise and decline of the intellectual property powers", *Campbell Law Review* 2012, (525) 530.

<sup>162</sup> W. SHI, *Intellectual property in the global trading system: EU-China perspective*, Berlin, Springer, 2008, 133; S. L. T. SERN, "Reevaluating foreign intellectual property protection in China", *Singapore Law Review* 2018-2019, (121) 134.

<sup>163</sup> W. SHI, *Intellectual property in the global trading system: EU-China perspective*, Berlin, Springer, 2008, 139.

In my opinion, it is only a matter of time until China transforms into one of the leading countries in protecting IPR.

## 2.4. CHINA AS A NORM CREATOR

**48. DIFFERENT REASONS** - This chapter gave an answer to the second research question. There are several causes of IPR infringement and lack of protection thereof. Explaining the history of IPR protection in China can partly explain the lack of protection (*section I*). Whereas in European countries the adoption of IP law was natural and fit into its culture and politics, in China, the adoption of IP laws was mostly a swift and forced adoption. This led to legal transplants, with China modelling its IP law after Western countries. It was a forced adoption, that had no regards for both its cultural and political traditions (*section II*). It is said that Confucian culture explains IPR infringement, due to its emphasis on personal relationships and learning by copying (§1). While Confucian culture can explain counterfeiting, it cannot be used to justify IPR infringement. Moreover, other countries with Confucian cultures were able to establish sound IPR systems. The PRC also has different political traditions that are irreconcilable with IPR, and the CCP often uses law as an instrument to achieve policy goals, resulting in lack of rule of law (§2). There were also economic reasons for IPR infringement (*section III*). While it relied on IPR infringement to grow its economy in the past, now China has changed its view and aims to become an innovative economy that protects IPR.

**49. TOWARDS CREATING NORMS** - While early IP law in China was mostly motivated by complying to foreign pressure, it now seems like China is becoming a norm creator on its own.<sup>164</sup> China does not only adhere to international IP norms, but also provides its own set of rules.<sup>165</sup>

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<sup>164</sup> L. ZHANG and N. BRUUN, “Legal transplantation of intellectual property rights in China: resistance, adaptation and reconciliation”, *IIC* 2017, (4) 7.

<sup>165</sup> *Ibid.*

### 3. CURRENT INTELLECTUAL PROPERTY IN CHINA AND THE EU

**50. INTRODUCTION** – The current law regarding IPR in China is not the same as it was before. China continues to change its laws on its own, to provide better protection of IPR (*section I*). In this aspect, it is also useful to look at how EU law regarding IPR and its enforcement is becoming increasingly harmonized (*section II*). Within the international framework (*section III*), China has to adhere to certain international treaties such as the Agreement on Trade-Related Aspects of IPR (TRIPS) (§1) and has established bilateral cooperation agreements and treaties with the EU (§2). While the framework of IP law has dramatically improved, this does not automatically lead to better enforcement (*section IV*).

**51. RESEARCH QUESTION** – This chapter answers the third sub-question: “How have China and the EU improved their legislation, in order to provide for better protection of IPR?”

#### 3.1. INTELLECTUAL PROPERTY LAW IN CHINA

**52. IMPROVING ITS LEGISLATION** – China has made substantial improvements to its IP laws in the past years. The main laws regarding IPR are the Trademark Law of 1982, the Patent Law of 1984 and the Copyright law of 1990.<sup>166</sup> While these laws might seem out of date, they are regularly amended. Before its accession to the World Trade Organization (WTO), China mainly responded to foreign pressure in order to amend its IP law. Especially after WTO accession, China has paid more attention to the protection of IPR and amended its legislation.<sup>167</sup> It became a norm creator, providing its own rules and becoming an innovator in IP law.<sup>168</sup>

**53. AMENDMENTS** – An example is the latest amendment of the Trademark Law on the 1<sup>st</sup> of November 2019. It implemented, for example, higher statutory damages (changed from 3.000.000 to 5.000.000 RMB) and higher damages in case of bad faith (changed from three to five times the assessed amount of damages).<sup>169</sup> The courts can now also destroy counterfeit goods and the equipment that was used to make them.<sup>170</sup> This shows that China is responding to the common criticism that the punishment of IP crimes often does not have a deterrent effect.

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<sup>166</sup> Z. MA and Y. ZHANG, “TRIPS Agreement and enforcement of the intellectual property rights in China”, *JEAIL* 2012, (407) 415.

<sup>167</sup> I. KRIZIC and O. SERRANO, “Exporting intellectual property rights to emerging countries: EU and US approaches compared”, *European Foreign Affairs Review* 2017, (57) 73; P. K. YU, “The rise and decline of the intellectual property powers”, *Campbell Law Review* 2012, (525) 544.

<sup>168</sup> L. ZHANG and N. BRUUN, “Legal transplantation of intellectual property rights in China: resistance, adaptation and reconciliation”, *IIC* 2017, (4) 7.

<sup>169</sup> Art. 63 Trademark Law of the People’s Republic of China.

<sup>170</sup> *Ibid.*

## 3.2. INTELLECTUAL PROPERTY IN THE EU

### 3.2.1. Vertical harmonisation

**54. IPR HARMONIZATION** - The harmonization of IPR in the EU is an important factor for it to maintain its strong position in the global economy.<sup>171</sup> Since IPR are territorial, national systems have established different systems of protecting IPR with often differences that are difficult to eliminate.<sup>172</sup> Nevertheless, the EU has implemented measures to harmonize certain aspects of IPR.

**55. EU TRADEMARK HARMONIZATION** - The most successful vertical harmonization of IPR was in the area of trademarks.<sup>173</sup> EU trademark legislation has become increasingly harmonized, in two ways. Firstly, the 2015/2436 directive regarding trademarks brought together the national laws of the EU member states. Secondly, the 2017/1001 regulation introduced the EU trademark. This regulation strengthened the protection of trademarks in the EU. Holders of an EU trademark can prevent all third parties from bringing in goods into the EU, without being released for free circulation there, when they bear a trademark without authorization.<sup>174</sup>

**56. UNITARY PATENT PROTECTION** - Another area of vertical harmonization is EU patent law. At the moment, every country in the EU has its own rules on patents and litigations on patents.<sup>175</sup> While it is possible to obtain a European Patent, these are not much more than a bundle of national patents.<sup>176</sup> Regulation 1257/2012 provides for the establishment of a Unitary Patent System. The new Unitary Patent System will make it possible to acquire a European patent with unitary effect in the 25 member states, and is expected to start at the end of 2020.<sup>177</sup> This Unitary Patent System comes with the establishment of a Unified Patent Court, provided by the Agreement on a Unified Patent Court.

### 3.2.2. Horizontal harmonisation

**57. HARMONIZATION OF CIVIL ENFORCEMENT** - An important directive regarding the horizontal harmonization of enforcement of intellectual property rights is Directive 2004/48/EG of the European Parliament and of the Council on the enforcement of IPR (Enforcement Directive). This directive harmonized

<sup>171</sup> C. SEVILLE, "Developments (and non-developments) in the harmonisation of EU intellectual property law", *Cambridge Yearbook of European Legal Studies* 2008-2009, (87) 89.

<sup>172</sup> *Ibid.*, 88.

<sup>173</sup> S. V. JAKOB, "Book review: European intellectual property", *JIPITEC* 2014, (64) 66.

<sup>174</sup> EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 23.

<sup>175</sup> W. A. HOYNG, "The Unified Patent Court and the Unitary Patent (UPC/UP)" in W. A. HOOYNG and F. W. E. EIJSVOGELS (eds.), *Global Patent Litigation*, Kluwer Law International, 2006 (Supplement No. 40, April 2019), (1) 1.

<sup>176</sup> *Ibid.*

<sup>177</sup> E.-J. MIN and J. C. WICHARD, "Cross-border intellectual property enforcement", in R. DREYFUSS and J. PILA (eds.), *The Oxford handbook for intellectual property law*, Oxford University Press, 2018, 716; [www.epo.org/law-practice/unitary/unitary-patent/start.html](http://www.epo.org/law-practice/unitary/unitary-patent/start.html).

civil enforcement, but not criminal or customs enforcement of IPR.<sup>178</sup> The aim of the directive is to make sure that IPR holders of all EU member states have a similar set of measures to protect their IPR.<sup>179</sup> It surpasses the requirements made by TRIPS regarding civil enforcement, and as such can be seen as TRIPS+.<sup>180</sup>

**58. HARMONIZATION OF CUSTOMS ENFORCEMENT** – The Customs Regulation is another example of horizontal harmonization of enforcement. It regards customs enforcement and sets out the conditions for the customs authorities to take action against any goods that could infringe IPR.<sup>181</sup> The goal of this regulation is to prevent counterfeit goods from being released into the EU internal market.<sup>182</sup>

**59. CRIMINAL ENFORCEMENT** – While the Commission has proposed a directive regarding criminal measures aimed at ensuring the enforcement of intellectual property, this directive was abandoned due to criticism.<sup>183</sup> So far, the only horizontal harmonization regarding the enforcement of IPR has been achieved in the areas of civil and customs enforcement.

### 3.3. INTERNATIONAL TREATIES

#### 3.3.1. China's membership of the WTO and compliance to TRIPS

**60. HOPES FOR BETTER IPR PROTECTION** – When China joined the WTO in 2001, the global community hoped that counterfeit goods from China would be a thing of the past.<sup>184</sup> Unfortunately, this has not happened, but China did strengthen its legal framework to comply with the TRIPS Agreement.<sup>185</sup> Despite this stronger protection by the law, China continues to be plagued by counterfeiting.<sup>186</sup> China's laws are consistent with the obligations provided by TRIPS.<sup>187</sup> However, China tries to interpret its commitments as narrowly as possible.<sup>188</sup> For example, while its laws are consistent with the TRIPS obligations

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<sup>178</sup> S. V. JAKOB, "Book review: European intellectual property", *JIPITEC* 2014, (64) 68; O. VRINS, *Regulation (EU) No 608/2013 of 12 June 2013 Concerning Customs Enforcement of Intellectual Property Rights and Repealing Regulation 1383/2003*, Kluwer, 2018, 61.

<sup>179</sup> D. JANKOVIC, "Different legal aspects of the intellectual property rights", *ECLIC* 2017, (143) 149.

<sup>180</sup> O. VRINS, *Regulation (EU) No 608/2013 of 12 June 2013 Concerning Customs Enforcement of Intellectual Property Rights and Repealing Regulation 1383/2003*, Kluwer, 2018, 61.

<sup>181</sup> *Ibid.*, 21.

<sup>182</sup> *Ibid.*

<sup>183</sup> S. V. JAKOB, "Book review: European intellectual property", *JIPITEC* 2014, (64) 68.

<sup>184</sup> D. C. FLEMING, "Counterfeiting in China", *University of Pennsylvania East Asia Law Review*, 2014, (14) 18.

<sup>185</sup> R. GUO, *How the Chinese economy works*, Palgrave Macmillan, 2017, 367; I. KRIZIC and O. SERRANO, "Exporting intellectual property rights to emerging countries: EU and US approaches compared", *European Foreign Affairs Review* 2017, (57) 73.

<sup>186</sup> R. GUO, *How the Chinese economy works*, Palgrave Macmillan, 2017, 367.

<sup>187</sup> *Ibid.*, 316.

<sup>188</sup> *Ibid.*

on paper, in practice they lack enforcement.<sup>189</sup> China seems to be willing to protect IPR, but its action indicates that it is not yet completely ready to embrace its obligations.<sup>190</sup> This leads to disputes being brought before the Dispute Settlement Body of the WTO.

**61. DISPUTE SETTLEMENT** – China has learned to settle its disputes through the Dispute Settlement Body of the WTO.<sup>191</sup> One of the main complaints raised by other members is the protection of IPR in China.<sup>192</sup> Compliance with TRIPS seems to be mostly in doubt regarding issues of damages and criminal penalties, as illustrated by the 2007 *China - Intellectual Property Rights* case.<sup>193</sup> It concerned thresholds for criminal prosecution, customs measures and copyright law.<sup>194</sup> A more recent example is the complaint raised by the US on the 23<sup>rd</sup> of March 2018 regarding forced technology transfers (FTT). The EU has also joined these consultations as of the 4<sup>th</sup> of April 2018. The case is currently still in its consultation phase. With the accession to the WTO, China had promised that it would not impose laws regarding the transfer of technology that were inconsistent with the TRIPS Agreement.<sup>195</sup>

**62. IMPLEMENTING THE RULINGS** – China modifies its domestic intellectual property laws to implement the rulings of the WTO settlement bodies.<sup>196</sup> For example, in *China - Intellectual Property Rights*, China's Copyright Law was amended to implement the ruling of this case.<sup>197</sup> This case marked the first time that China amended its legislation to implement a ruling of an international organization.<sup>198</sup>

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<sup>189</sup> K. THOMAS, *Assessing intellectual property compliance in contemporary China: the World Trade Organisation TRIPS Agreement*, Singapore, Palgrave Macmillan, 2017, 105.

<sup>190</sup> L. TOOHEY, C. B. PICKER and J. GREENACRE (eds.), *China in the international economic order: new directions and changing paradigms*, Cambridge University Press, 2015, 295.

<sup>191</sup> G. C. K. CHEUNG, *China in the global political economy: from developmental to entrepreneurial*, Cheltenham, Edward Elgar Publishing, 2018, 93.

<sup>192</sup> M. KENNEDY, "China's role in WTO dispute settlement", *World Trade Review* 2012, (555) 565.

<sup>193</sup> K. THOMAS, *Assessing intellectual property compliance in contemporary China: the World Trade Organisation TRIPS Agreement*, Singapore, Palgrave Macmillan, 2017, 99.

<sup>194</sup> E. GISCHE, "Repercussions of China's high-tech rise: protection and enforcement of intellectual property rights in China", *Hastings Law Journal* 2011, (1393) 1394-1395.

<sup>195</sup> P. I. LEVY, "The treatment of Chinese SOE's in China's WTO protocol of accession", *World Trade Review* 2017, (635) 644.

<sup>196</sup> L. LIN (ed.), *Interpreting China's legal system*, Singapore, World Scientific, 2018, 518.

<sup>197</sup> Y. GUOHUA, "WTO and rule of law in China: a view based on personal experience", *Global Trade and Customs Journal* 2016, (252) 256; Y. GUOHUA, "China in the WTO dispute settlement: a memoir", *Journal of World Trade* 2015, (1) 11.

<sup>198</sup> Y. GUOHUA, "WTO and rule of law in China: a view based on personal experience", *Global Trade and Customs Journal* 2016, (252) 256; B. J. SAFRAN, "A critical look at Western perceptions of China's intellectual property system", 2012, *U.P.R. Business Law Journal*, (135) 170; N. P. STOLANOFF, "The influence of the WTO over China's intellectual property regime", *Sydney Law Review* 2012, (65) 80.

### 3.3.2. Cooperation between China and the EU

#### a. Geographical indications

**63. DIFFERENT PROTECTIONS** – The EU and China differ in their protection of geographical indications (GI). In the EU, GI are protected only by a *sui generis* system, separated from trademarks, which actually gives them a higher level of protection compared to trademarks.<sup>199</sup> In China, there is a dual system for the protection of GI, consisting of *sui generis* protection and protection as trademarks.<sup>200</sup> There is a *sui generis* system for the protection of GI on agricultural products with the AQSIQ.<sup>201</sup> Agricultural goods can also be protected *sui generis* with the Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) or the Ministry of Agriculture.<sup>202</sup> GI can be protected as trademarks as well, with the State Administration for Industry and Commerce (SAIC).<sup>203</sup> Certain GI are registered with both the SAIC and the AQSIQ, which is a waste of resources and can give rise to counterfeiting disputes.<sup>204</sup> It is necessary to apply for GI protection under all the different systems in order to receive effective protection and to avoid disputes.<sup>205</sup>

**64. PROTECTING GI IN CHINA** – The value of GI infringing products in the EU remains high.<sup>206</sup> The Ministry of Agriculture has not yet accepted applications for foreign GI products, and the AQSIQ only began accepting foreign GI applications in 2016.<sup>207</sup> That is why it was necessary for the EU to conclude bilateral treaties with China. The first bilateral treaty regarding the protection of GI between China and the EU was concluded in 2005, protecting 10 GI on both sides.<sup>208</sup> On the 6<sup>th</sup> of November 2019, the EU and China concluded their

<sup>199</sup> K. KONIG and M. MURPHY, “EU and China sign Geographical Indications Agreement”, *Managing Intellectual Property* 2017, (13) 14; S. FENG, “Geographical indications: can China reconcile the irreconcilable intellectual property issue between EU and US?”, *World Trade Review* 2019, (1) 2.

<sup>200</sup> *Ibid.*, 3.

<sup>201</sup> S. FENG, “Geographical indications: can China reconcile the irreconcilable intellectual property issue between EU and US?”, *World Trade Review* 2019, (1) 3; European Commission, “Report on the protection and enforcement of intellectual property rights in third countries”, 2018, 54.

<sup>202</sup> S. FENG, “Geographical indications: can China reconcile the irreconcilable intellectual property issue between EU and US?”, *World Trade Review* 2019, (1) 4; European Commission, “Report on the protection and enforcement of intellectual property rights in third countries”, 2018, 54.

<sup>203</sup> European Commission, “Report on the protection and enforcement of intellectual property rights in third countries”, 2018, 54.

<sup>204</sup> S. FENG, “Geographical indications: can China reconcile the irreconcilable intellectual property issue between EU and US?”, *World Trade Review* 2019, (1) 4.

<sup>205</sup> European Commission, “Report on the protection and enforcement of intellectual property rights in third countries”, 2018, 55.

<sup>206</sup> EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 49.

<sup>207</sup> S. FENG, “Geographical indications: can China reconcile the irreconcilable intellectual property issue between EU and US?”, *World Trade Review* 2019, (1) 5.

<sup>208</sup> S. FENG, “Geographical indications: can China reconcile the irreconcilable intellectual property issue between EU and US?”, *World Trade Review* 2019, (1) 5; K. KONIG and M. MURPHY, “EU and China sign Geographical Indications Agreement”, *Managing Intellectual Property* 2017, (13) 15.

negotiations on a bilateral agreement protecting 100 European GI in China and 100 Chinese GI in the EU.<sup>209</sup>

**65. SETTING AN EXAMPLE** - This agreement is a great example for other countries experiencing problems regarding the protection of GI in China, and will contribute to the construction of a multilateral system recognizing GI.<sup>210</sup> GI in both the EU and China follow mainly a *sui generis* system of protection, which is different compared to traditional IPR. While they may be under a different regime compared to traditional IPR, this agreement shows how cooperation using bilateral agreements can be useful in order to improve the general protection of IPR.

**66. STRONGER ENFORCEMENT NEEDED** - While this is a positive step towards improving the protection of GI in China, the Chinese legislation needs to be updated and a stronger level of enforcement is needed to guarantee the same high level of protection that Chinese GI receive in the EU.<sup>211</sup> Some of the products protected by the new agreement cannot even be exported to China due to current regulatory requirements.<sup>212</sup>

## **b. Cooperation programs between China and the EU**

**67. SOFT POWER** - China and the EU have complementary, but different interests in the protection and enforcement of IPR.<sup>213</sup> However, they have mutual interests in achieving further economic development and innovation-led growth.<sup>214</sup> The EU has noticed that one of the best ways to shape its influence on China's IPR regime is by using soft power instruments.<sup>215</sup> According to Joseph Nye, soft power is "*the ability to affect others to obtain the outcomes one wants through attraction, rather than coercion or payment*".<sup>216</sup> Rather than using international pressure, which China already faces and proves to be inefficient, the EU is using soft power instruments and cooperation in order to achieve a common goal. In my opinion, soft power instruments can have a larger influence on China and are more accepted, because it fits better into Chinese culture and its values, especially the importance of sovereignty. In his speech last year regarding the 40<sup>th</sup> anniversary of the opening up policy, president Xi Jinping even

<sup>209</sup> European Commission, "Landmark agreement will protect 100 European Geographical Indications in China", 2019, [www.ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_6200](http://www.ec.europa.eu/commission/presscorner/detail/en/IP_19_6200).

<sup>210</sup> S. FENG, "Geographical indications: can China reconcile the irreconcilable intellectual property issue between EU and US?", *World Trade Review* 2019, (1) 7.

<sup>211</sup> European Union Chamber of Commerce in China, "European Chamber stance on the EU-China Agreement on the cooperation on, and protection of, geographical indications", 2019, [www.eurochamber.com/cn/en/press-releases/3075/european\\_chamber\\_stance\\_on\\_the\\_eu\\_china\\_agreement\\_on\\_the\\_cooperation\\_on\\_and\\_protection\\_of\\_geographical\\_indications/](http://www.eurochamber.com/cn/en/press-releases/3075/european_chamber_stance_on_the_eu_china_agreement_on_the_cooperation_on_and_protection_of_geographical_indications/).

<sup>212</sup> *Ibid.*

<sup>213</sup> N. WYZYCKA and R. HASMATH, "The impact of the European Union's policy towards China's intellectual property regime", *International Political Science Review* 2016, (549) 550.

<sup>214</sup> P. C. I. CROOKES, "EU soft power with China: technical assistance in the field of intellectual property rights", *European Foreign Affairs Review* 2014, (77) 84.

<sup>215</sup> *Ibid.*, 77.

<sup>216</sup> J. NYE, "Public diplomacy and soft power", *The Annals of the AAPSS* 2008, (94) 94.

stated that “no one else is in a position to dictate to the Chinese people what should or should not be done”.<sup>217</sup>

**68. TECHNICAL COOPERATION** - The EU has started several soft power technical cooperation programs in order to strengthen IPR protection in China: IPR1 (1999-2004), IPR2 (2007-2011), IP Key (2013-2017) and IP Key China (2017-2021).<sup>218</sup> These EU soft power cooperation instruments have been the most utilized way of directly influencing Chinese IP policy.<sup>219</sup> They are designed to address long-standing issues between both trade partners, but also include recent issues that are dealt with during the sessions.<sup>220</sup> It aims to do this mostly through dialogue, studies and education on IPR.

**69. IPR2** - The purpose of IPR2 was to improve effectiveness of IPR enforcement in China by providing technical assistance to Chinese legislative, judicial, administrative and enforcement agencies.<sup>221</sup> One of the core objectives at that time was to improve the Chinese legal framework on IPR.<sup>222</sup> IPR2 was successful in achieving this, especially due to the significant use of dialogue, workshops and forums with Chinese legislators, judges and academics.<sup>223</sup> It also had a positive effect on enforcement. For example, in 2010 the General Administration of China Customs reported a number of 20.000 batches of infringed goods seized, while in 2007 (at the start of IPR2) the number was only 8.000.<sup>224</sup> While significant progress was made, it was not sufficient, and the consecutive cooperation programs aimed at further reforming and improving China’s IP system.

**70. IP KEY CHINA** - The latest technical cooperation program is IP Key China. The concerns it wants to address are, amongst others: fair and non-discrimination treatment in cases against foreign right holders, access for EU companies to the Chinese administrative and judicial enforcement, and the rising phenomenon of online counterfeiting attributed to Chinese e-commerce platforms.<sup>225</sup> The overall objectives of IP Key China are to: (i) promote

<sup>217</sup> [www.bjreview.com/Beijing\\_Review\\_and\\_Kings\\_College\\_London\\_Joint\\_Translation\\_Project/2018/201901/t20190124\\_800154909.html](http://www.bjreview.com/Beijing_Review_and_Kings_College_London_Joint_Translation_Project/2018/201901/t20190124_800154909.html).

<sup>218</sup> Annex 9 of the Commission Implementing Decision on the 2016 Annual Action Programme for the Partnership Instrument; European Commission, “*Bilateral interactions with China*”, 2018, [trade.ec.europa.eu/doclib/docs/2013/april/tradoc\\_150992.pdf](http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150992.pdf).

<sup>219</sup> N. WYZYCKA and R. HASMATH, “The impact of the European Union’s policy towards China’s intellectual property regime”, *International Political Science Review* 2016, (549) 550.

<sup>220</sup> European Commission, “*Bilateral interactions with China*”, 2018, [trade.ec.europa.eu/doclib/docs/2013/april/tradoc\\_150992.pdf](http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150992.pdf).

<sup>221</sup> Delegation of the European Union to China, *EU-China project on the protection of intellectual property rights (IPR2)*, 2010, 1, [ceas.europa.eu/archives/delegations/china/documents/projects/ipr2\\_project\\_fiche.pdf](http://ceas.europa.eu/archives/delegations/china/documents/projects/ipr2_project_fiche.pdf).

<sup>222</sup> Delegation of the European Union to China, *EU-China project on the protection of intellectual property rights (IPR2)*, 2010, 1, [ceas.europa.eu/archives/delegations/china/documents/projects/ipr2\\_project\\_fiche.pdf](http://ceas.europa.eu/archives/delegations/china/documents/projects/ipr2_project_fiche.pdf).

<sup>223</sup> P. C. I. CROOKES, “EU soft power with China: technical assistance in the field of intellectual property rights”, *European Foreign Affairs Review* 2014, (77) 89.

<sup>224</sup> *Ibid.*, 90.

<sup>225</sup> Annex 9 of the Commission Implementing Decision on the 2016 Annual Action Programme for the Partnership Instrument.

convergence of China towards European standards in IPR legislation, protection and enforcement, (ii) support the interests of European right holders trading with China, (iii) achieve greater transparency and fair implementation of IPR protection and enforcement, avoiding barriers and (iv) increase public and political awareness of the importance of IPR protection.<sup>226</sup> The objectives of IP Key China are much more extensive, and are more specialized. It shows that the issues regarding IPR protection have shifted from IP law towards enforcement of IPR. Again, it aims to achieve its objectives using dialogue, raising awareness using conferences and workshops, and assistance to the public authorities.<sup>227</sup>

**71. COST-EFFICIENT** - In my opinion, technical cooperation programs are the most cost-efficient way of enhancing IPR enforcement in China. A shared consciousness on the damage IPR infringement has on the EU economy, but also the economy of China, is one of the principles on which these programs are based.<sup>228</sup> For example, IP Key China received a contribution of EUR 6 million.<sup>229</sup> This is a low cost compared to the effect less IPR infringement can have on the economy of the EU, and that of China.

### 3.4. DISCREPANCY BETWEEN THE LAW IN THE BOOKS AND THE LAW IN ACTION

**72. LACK OF EFFECTIVENESS** - China has a greater number of laws than most other countries.<sup>230</sup> Nevertheless, the mere enactment of a law alone does not lead to efficient enforcement.<sup>231</sup> In 2019, 35% of European businesses surveyed by the European Union Chamber of Commerce in China believed that the enforcement of China's written IP laws and regulations was adequate.<sup>232</sup> This is a tremendous improvement compared to for example 2013, where only 13% of the questioned companies believed that the enforcement was adequate.<sup>233</sup> Nevertheless, these numbers are still not satisfying and show that there is more room for improvement. It should also be noted that, compared to 2018 (where 34% answered adequate), the positive ratings only went up by 1%, making it seem like progress on this subject is slowing down.<sup>234</sup> While in theory, China has a

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<sup>226</sup> *Ibid.*

<sup>227</sup> *Ibid.*

<sup>228</sup> Delegation of the European Union to China, *EU-China project on the protection of intellectual property rights (IPR2)*, 2010, 2, [ec.europa.eu/archives/delegations/china/documents/projects/ipr2\\_project\\_fiche.pdf](https://ec.europa.eu/archives/delegations/china/documents/projects/ipr2_project_fiche.pdf).

<sup>229</sup> Annex 9 of the Commission Implementing Decision on the 2016 Annual Action Programme for the Partnership Instrument.

<sup>230</sup> B. J. SAFRAN, "A critical look at Western perceptions of China's intellectual property system", 2012, *U.P.R. Business Law Journal*, (135) 171.

<sup>231</sup> K. MOHAMED and R. WAHID, "Fighting counterfeiting: importance of enforcement of intellectual property", *Journal of International Commercial Law and Technology* 2014, (249) 257; B. J. SAFRAN, "A critical look at Western perceptions of China's intellectual property system", 2012, *U.P.R. Business Law Journal*, (135) 171.

<sup>232</sup> European Chamber, "European business in China: Business confidence survey 2019", 2019, 47.

<sup>233</sup> *Ibid.*

<sup>234</sup> *Ibid.*

perfect set of IP laws, these laws are not being implemented to their full effect. Making a law is easier than enforcing it.<sup>235</sup>

### 3.5. CONCLUSION

**73. NORM CREATOR** - This chapter gave an answer to the third research question. In order to improve IPR protection, China has become a norm creator, changing its own laws without much regard to foreign pressure (3.1). While there has been harmonization of IP law in the EU, much remains to be done in order to fully harmonize enforcement of IPR (3.2). China is also active in the international legal framework (3.3). While disputes brought before the WTO led China to amend its IP law (3.3.1), a cooperative approach is far more productive (3.3.2). The bilateral treaty regarding the protection of GI is a good example of how a win-win situation can be achieved for both parties. Soft power technical cooperation programs between the EU and China, such as IPR2 and IP Key China, also seem to have a positive influence. Nevertheless, while the law in the books may have improved, the law in action still lacks effectiveness (3.4).

## 4. ENFORCEMENT

**74. THREE TYPES** - There are three different ways of enforcing IPR once it has been infringed. The first way is customs enforcement, which aims at preventing the export or import of pirated and counterfeit goods (4.1). Due to different reasons and evolutions, customs enforcement remains ineffective (4.1.1). However, action is being taken in order to improve on this (4.1.2). The second way is administrative enforcement, which is a type of enforcement that is, together with mediation, particularly used in China, and has some advantages (4.2). The third way is judicial enforcement (4.3), which splits out in criminal (4.3.1) and civil litigation (4.3.2). In this context, both the EU and China have looked into the opportunity of establishing specialized intellectual property courts (4.3.3). There are also some specific issues regarding judicial enforcement (4.3.4).

**75. RESEARCH QUESTION** - This chapter provides an answer to the following sub-question: “What are the different types of enforcement of IPR in China and the EU, and what are the challenges relating to them?”.

### 4.1. CUSTOMS ENFORCEMENT

**76. REGULATION CONCERNING CUSTOMS ENFORCEMENT OF IPR** - Enforcement of IPR in the EU has always been important due to its heavy reliance on international trade.<sup>236</sup> The Customs Regulation aims to protect the

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<sup>235</sup> Z. MA and Y. ZHANG, “TRIPS Agreement and enforcement of the intellectual property rights in China”, *JEAIL* 2012, (407) 411.

<sup>236</sup> O. VRINS, *Regulation (EU) No 608/2013 of 12 June 2013 Concerning Customs Enforcement of Intellectual Property Rights and Repealing Regulation 1383/2003*, Kluwer, 2018, 22.

EU economy against both pirated and counterfeit goods.<sup>237</sup> Pirated goods are defined by the regulation as goods infringing a copyright or related right or a design.<sup>238</sup> Counterfeit goods are defined as goods that infringe trademarks or geographical indications.<sup>239</sup> Even packaging, labels, stickers, brochures, operating instructions, warranty documents and similar items fall under the scope of the Union Customs Code.<sup>240</sup>

**77. INCREASE** - During the period of 2014-2015, despite a decrease in caseload, the total number of counterfeit products that were detained at the EU borders had increased.<sup>241</sup> While transport by container ships is still the most used way of transporting counterfeit goods, the usage of postal traffic is rising.<sup>242</sup> Bulk cargo remains the main threat in number of volume and value of counterfeit goods.<sup>243</sup>

**78. PROCEDURE** - Chinese customs also prevents goods produced in China from being exported to the EU. There are two ways in which Chinese customs can act. Firstly, IPR holders can submit a request to detain a shipment of goods they believe are infringing their IPR, on the condition that they hold the required documentation and pay a bond.<sup>244</sup> Secondly, customs can also act *ex officio*, and give the IPR holder the option of filing a request to detain the goods.<sup>245</sup> The EU customs enforcement regulation also provides for a uniform procedure in all member states that is similar to the Chinese procedure.<sup>246</sup>

#### *4.1.1. Why customs enforcement remains ineffective*

##### **a. Insufficient funding**

**79. COUNTERFEITING INCREASES, FUNDING DECREASES** - Defense at the borders by custom authorities is considered far more effective than detaining the items once in circulation.<sup>247</sup> Customs enforcement receives only limited resources. Only 30-40% of fake items were detained at the EU borders, while 60-70% of fake items were detained within the EU market.<sup>248</sup> While the amount

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<sup>237</sup> *Ibid*, 23-24.

<sup>238</sup> Art. 2 (6), Regulation (EU) No. 608/2013 of the European Parliament and of the Council concerning customs enforcement of intellectual property rights, 12 June 2013.

<sup>239</sup> *Ibid*, art. 2 (5); This work uses the concept of counterfeiting in a broader sense, also to depict patent infringement and pirated goods.

<sup>240</sup> *Ibid*.

<sup>241</sup> EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 12.

<sup>242</sup> EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 12; EUIPO, *2019 Status report on IPR infringement*, 2019, 11.

<sup>243</sup> *Ibid*.

<sup>244</sup> M. A. MARCUCCI, "Navigating unfamiliar terrain: reconciling conflicting impressions of China's intellectual property regime in an effort to aid foreign right holders", *Fordham Intellectual Property Media and Entertainment Law Journal* 2013, (1395) 1413.

<sup>245</sup> *Ibid*.

<sup>246</sup> Art. 17-18 Regulation (EU) No. 608/2013 of the European Parliament and of the Council concerning customs enforcement of intellectual property rights, 12 June 2013.

<sup>247</sup> Preamble of Regulation (EU) No. 608/2013 of the European Parliament and of the Council concerning customs enforcement of intellectual property rights, 12 June 2013.

<sup>248</sup> EUIPO, *2019 Status report on IPR infringement*, 2019, 10.

of small packages sent by post is also rising, demanding more resources to investigate, customs are actually getting less resources.<sup>249</sup> Customs are a major contribution to the enforcement of IPR.

**80. FOCUS ON EFFECTIVENESS** - In my opinion, it would be better to tackle the source of the problems rather than trying to solve it after the products have been exported to the EU. International organizations and the EU should put more pressure on China, not focusing on the implementation of new laws, but more on the effectiveness of these laws and their enforcement. China itself has made it clear that it wants to reinforce customs law enforcement and protection at its borders.<sup>250</sup> Like this, it wants to improve the reputation of its export products.<sup>251</sup> According to China, international cooperation between customs is needed in order to crack down on these crimes.<sup>252</sup>

## b. New developments in the export and sale of counterfeit goods

### *b.1. Postal traffic*

**81. POST** - Another method that is increasingly used to transport the counterfeit goods is postal traffic. While container ships might be the most used way of transport in terms of value, in number of seizures, postal traffic has grown drastically and has become a significant problem for IPR enforcement.<sup>253</sup> Nearly 63% of seizures at the EU external borders now consists of postal traffic.<sup>254</sup> As mentioned before, while container shipments still are the most used way of transporting counterfeit goods, there is an increased use of postal traffic (*supra* nr. 77).<sup>255</sup>

**82. LITTLE TO NO RISK** - Postal transport is a low-risk opportunity for the counterfeiters. This is because these are mostly small packages, consisting of 10 items or less.<sup>256</sup> These small shipments reduce the risk of large losses when they are intercepted by customs.<sup>257</sup> They also adjust the volume of their shipments to

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<sup>249</sup> Preamble of Regulation (EU) No. 608/2013 of the European Parliament and of the Council concerning customs enforcement of intellectual property rights, 12 June 2013; EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 44.

<sup>250</sup> Recital V.A. (48), WIPO, *Outline of the National Intellectual Property Strategy*, 2014, [www.wipo.int/edocs/lexdocs/laws/en/cn/cn021en.pdf](http://www.wipo.int/edocs/lexdocs/laws/en/cn/cn021en.pdf).

<sup>251</sup> *Ibid.*

<sup>252</sup> *Ibid.*

<sup>253</sup> OECD and EUIPO, *Illicit trade: trends in trade in counterfeit and pirated goods*, 2019, OECD Publishing, 20.

<sup>254</sup> EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 12; OECD and EUIPO, *Misuse of small parcels for trade in counterfeit goods: facts and trends*, 2018, 79.

<sup>255</sup> EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 13; OECD and EUIPO, *Misuse of small parcels for trade in counterfeit goods: facts and trends*, 2018, 11.

<sup>256</sup> OECD and EUIPO, *Misuse of small parcels for trade in counterfeit goods: facts and trends*, 2018, 79.

<sup>257</sup> OECD and EUIPO, *Misuse of small parcels for trade in counterfeit goods: facts and trends*, 2018, 13.

reach the potential level of tolerance shown by customs.<sup>258</sup> This way of transport is facilitated by low shipping charges and a good infrastructure for postal traffic in China.<sup>259</sup>

**83. PREVENTION** - In my opinion the impact of postal traffic should not be underestimated, since it is harder to detect by customs and demands more resources to investigate. While this may provide a bigger cost to customs authorities, it might be better to act swiftly on this new development. It would also be better to increase the penalties of postal trafficking, in order to create a bigger deterrent effect. It is better to prevent it from becoming the major mode of transport, since it is much more difficult to intercept, and is facilitated by a good infrastructure for transportation. The Belt and Road Initiative (BRI) will even further improve this infrastructure, and as such could increase the ease of transporting counterfeit goods.

### *b.2. Belt and road initiative*

**84. BELT AND ROAD INITIATIVE** - The BRI is a program that aims to connect Asia with Africa and Europe, through several land and maritime routes.<sup>260</sup> By investing in infrastructure, it increases connectivity between the continents.<sup>261</sup>

**85. NEW RAILROAD CONNECTIONS** - The BRI could pose a new threat to IPR enforcement, due to the increasing use of rail transport to convey cargo between China and the EU.<sup>262</sup> Long-distance cargo trains between China and the EU offer a cheap and advantageous way of transporting counterfeit goods.<sup>263</sup> While a shipping container takes approximately 6 weeks to arrive, these trains can cross the distance in only 18 days.<sup>264</sup> In my opinion, this will even further facilitate the other new developments in transporting counterfeit goods as well, such as postal traffic.

**86. IPR ENFORCEMENT ALONG THE BELT AND ROAD** - Since China has long been struggling with counterfeits, it is not likely that the CCP will suddenly take an aggressive stance on IPR enforcement along the Belt and Road.<sup>265</sup> However, since its economy can benefit from stronger enforcement of IPR, it could lead

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<sup>258</sup> EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 42.

<sup>259</sup> EUIPO, *2019 Status report on IPR infringement*, 2019, 20.

<sup>260</sup> A. GEORGE, "Transcending territoriality: international cooperation and harmonization in intellectual property enforcement and dispute resolution", *Tsinghua China Law Review* 2018, (225) 240-241.

<sup>261</sup> A. GEORGE, "Transcending territoriality: international cooperation and harmonization in intellectual property enforcement and dispute resolution", *Tsinghua China Law Review* 2018, (225) 266; P. K. YU, "Building intellectual property infrastructure along China's Belt and Road", *University of Pennsylvania Law Review* 2019, (275) 286.

<sup>262</sup> EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 8.

<sup>263</sup> *Ibid*, 18.

<sup>264</sup> *Ibid*, 23-24.

<sup>265</sup> P. K. YU, "Building intellectual property infrastructure along China's Belt and Road", *University of Pennsylvania Law Review* 2019, (275) 311.

other countries along the Belt and Road to strengthen their IPR enforcement as well.<sup>266</sup> The Chinese government already mentioned it wants to enhance customs cooperation along the Belt and Road, using information exchange and mutual assistance in law enforcement.<sup>267</sup>

#### b.2.1. E-commerce

##### - Rise in e-commerce

**87. RISING USE** - The rise of e-commerce has also led to a dramatic increase in counterfeiting.<sup>268</sup> The problem with e-commerce is that it is much easier to lead customers to purchasing counterfeit goods.<sup>269</sup> Social media platforms are used to advertise their fake products and steer consumers towards the e-commerce platforms.<sup>270</sup> The goods sold on these websites are usually transported to the EU using postal traffic.<sup>271</sup>

**88. E-COMMERCE PLATFORMS** - These fake products are being sold on major trusted platforms that are widely available, both in China and the EU.<sup>272</sup> Therefore, it is hard to distinguish illegitimate sellers from legitimate sellers.<sup>273</sup> However, new websites that try to mislead consumers are also being established. A 2015 study by EUIPO conducted in Sweden, Germany, the United Kingdom and Spain, detected a total of 27.870 websites suspected of marketing IPR infringing goods.<sup>274</sup> It is likely that this occurs at a similar rate in other EU countries.<sup>275</sup> These websites often use domain names that contain third-party trademarks, and the website design resembles that of the brand owner.<sup>276</sup> This makes it harder for the consumer to distinguish legitimate websites from illegitimate websites.

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<sup>266</sup> *Ibid.*, 312.

<sup>267</sup> *Ibid.*

<sup>268</sup> L. TOOHEY, C. B. PICKER and J. GREENACRE (eds.), *China in the international economic order: new directions and changing paradigms*, Cambridge University Press, 2015, 294-295; EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 7.

<sup>269</sup> H. SCHULZE and E. PETERS (eds.), *Intellectual property in the 21st century: Intellectual property infringement and indigenous innovation in China*, 2012, Nova Science Publishers, 201.

<sup>270</sup> EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 37.

<sup>271</sup> EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 36; OECD and EUIPO, *Misuse of small parcels for trade in counterfeit goods: facts and trends*, 2018, 77.

<sup>272</sup> EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 36.

<sup>273</sup> H. SCHULZE and E. PETERS (eds.), *Intellectual property in the 21st century: Intellectual property infringement and indigenous innovation in China*, 2012, Nova Science Publishers, 201.

<sup>274</sup> EUIPO, *Research on online business models infringing intellectual property rights - phase 2*, 2017, 77.

<sup>275</sup> *Ibid.*

<sup>276</sup> EUIPO, *Study on legislative measures related to online IPR infringements*, 2018, 20.

- Prevention and liability of e-commerce platforms

**89. EU E-COMMERCE DIRECTIVE** - Directive 2000/31/EC of the European Parliament and the Council on certain legal aspects of information society services (E-Commerce Directive) contains some rules to regulate these e-commerce platforms. Since e-commerce platforms provide an internet service consisting in facilitating relations between sellers and buyers, according to the Court of Justice of the European Union, they fall under the scope of this directive.<sup>277</sup> Under this directive, they can receive exemption from secondary liability resulting from illegal behavior of their users.<sup>278</sup>

**90. EXEMPTION FROM LIABILITY** - Article 14 of the E-Commerce Directive provides for an exemption from liability that applies to these operators of online marketplaces, as long as they play a passive role.<sup>279</sup> In order to play a passive role, they must confine themselves to providing a neutral service, and automatic processing of the data provided by their customers.<sup>280</sup> They should not have knowledge or control over the data relating to the offers for sale, and should not provide assistance in optimizing the presentation of the offers for sale.<sup>281</sup>

**91. NO GENERAL OBLIGATIONS** - These passive intermediaries cannot be subjected to general obligations to monitor and search for IPR infringement. When the passive operator of an online marketplace becomes aware of concrete illegal activities on the platform, it has to act to remove or disable them, but only then.<sup>282</sup> Member states cannot impose monitoring obligations on the passive intermediaries.<sup>283</sup> Active intermediaries, such as search engines and social networks do not enjoy this exemption.<sup>284</sup>

**92. E-COMMERCE LAW OF THE PRC** - The Chinese government has also reacted to this evolution by enacting several laws and regulations on e-commerce, such as the E-Commerce Law.<sup>285</sup> This law came into effect on January 1, 2019. It applies also to non-traditional e-commerce channels, such as

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<sup>277</sup> CJEU 12<sup>th</sup> of July 2011, nr. C-324/09, ECLI:EU:C:2011:474, *L'Oréal / eBay*.

<sup>278</sup> CJEU 12<sup>th</sup> of July 2011, nr. C-324/09, ECLI:EU:C:2011:474, *L'Oréal / eBay*; Directorate-General for Internal Policies of the Union, *Providers liability: from the e-commerce directive to the future*, 2017, 4.

<sup>279</sup> Recital (42) Directive 2000/31/EC of the European Parliament and the Council on certain legal aspects of information society services; Art. 14 Directive 2000/31/EC of the European Parliament and the Council on certain legal aspects of information society services.

<sup>280</sup> CJEU 12<sup>th</sup> of July 2011, nr. C-324/09, ECLI:EU:C:2011:474, *L'Oréal / eBay*.

<sup>281</sup> *Ibid.*

<sup>282</sup> Recital (46) Directive 2000/31/EC of the European Parliament and the Council on certain legal aspects of information society services; Art. 14 Directive 2000/31/EC of the European Parliament and the Council on certain legal aspects of information society services; EUIPO, *Study on legislative measures related to online IPR infringements*, 2018, 25.

<sup>283</sup> Recital (47) Directive 2000/31/EC of the European Parliament and the Council on certain legal aspects of information society services; Art. 15 Directive 2000/31/EC of the European Parliament and the Council on certain legal aspects of information society services; EUIPO, *Study on legislative measures related to online IPR infringements*, 2018, 25.

<sup>284</sup> CJEU 12<sup>th</sup> of July 2011, nr. C-324/09, ECLI:EU:C:2011:474, *L'Oréal / eBay*.

<sup>285</sup> D. PRUD'HOMME and T. ZHANG, *China's intellectual property regime for innovation: risks to business and national development*, Springer, 2019, 97.

social media.<sup>286</sup> Article 41 of the law states that “*e-commerce platform operators shall establish their IPR protection rules, strengthen cooperation with IPR holders and legally protect the IPR*”.<sup>287</sup> The law obligates platform operators to react upon the notification by IPR holders that their IPR are being infringed, which needs to include evidence of infringement.<sup>288</sup> False notice by IPR holders can lead to civil liability.<sup>289</sup> When the platform operator knows or should know that there is an infringement upon IPR, it needs to take necessary measures. Failing to do so will lead to its liability.<sup>290</sup>

**93. COMPARISON** - While the regulations in both the EU and China are similar, they are not the same. Chinese e-commerce platforms have received a general obligation to act against IPR infringement on their platforms, but this is not true for e-commerce platforms in the EU. Chinese e-commerce platforms have a general obligation to act against IPR infringement even if they should have knowledge, while in the EU there is no such obligation. Passive e-commerce platforms in the EU do not have a general obligation to act, and must only do so when notified of infringement. In the EU, the reasoning is that imposing a general obligation on the intermediaries might lead them to impede the activities of lawful users by accident, since they fear sanctions.<sup>291</sup> While in the future the Chinese law might prove more effective against counterfeiting, in my opinion it could have negative effects on other rights, such as the right to free speech. It could result in a certain form of censorship by e-commerce platforms, in order to avoid liability.

#### b.2.2. Intra-EU production

**94. FINISHING PRODUCTS INSIDE THE EU INTERNAL MARKET** - Internal manufacture is another option for counterfeiters. It is becoming increasingly popular due to low costs of production and distribution, combined with lower risks of detection.<sup>292</sup> Counterfeiters send labels, packaging and non-labeled products to the EU separately in order to finish the counterfeit product when it is already within the EU.<sup>293</sup> For example, counterfeit stickers have been used to disguise low-end batteries as products of the leading brands.<sup>294</sup> Pharmaceuticals are also often repackaged when they enter the market.<sup>295</sup> They are also inserted

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<sup>286</sup> D. PRUD'HOMME and T. ZHANG, *China's intellectual property regime for innovation: risks to business and national development*, Springer, 2019, 97.

<sup>287</sup> Art. 41 of the E-commerce Law of the People's Republic of China.

<sup>288</sup> *Ibid.*, Art. 42.

<sup>289</sup> *Ibid.*

<sup>290</sup> *Ibid.*, Art. 43.

<sup>291</sup> Directorate-General for Internal Policies of the Union, *Providers liability: from the e-commerce directive to the future*, 2017, 4.

<sup>292</sup> EUIPO, *2019 Status report on IPR infringement*, 2019, 11.

<sup>293</sup> EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 16; EUIPO, *2019 Status report on IPR infringement*, 2019, 11.

<sup>294</sup> *Ibid.*

<sup>295</sup> EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 38.

into genuine packaging that was discarded to enter them into the legitimate supply chain.<sup>296</sup>

#### 4.1.2. *What is being done*

**95. SEIZURE OPERATIONS** - Law enforcement authorities from across the EU and the world often work together to fight counterfeiting and IPR infringement. One of the recent examples is *Operation in our sites IX*, which was held in 2018 and led to the seizure of over 33,600 domain names that were illegally selling counterfeit merchandise to consumers.<sup>297</sup>

**96. IPC3** - Europol and the EUIPO have joined forces to launch the Intellectual Property Crime Coordinated Coalition (IPC3) in 2016.<sup>298</sup> It has several functions, among which: (i) facilitate and coordinate cross-border investigations, (ii) monitor and report online crime trends and emerging 'modi operandi', (iii) raising public awareness and (iv) providing training to law enforcement.<sup>299</sup> IPC3 has for example participated in *Operation Aphrodite*, which led to the seizure of 20,000 counterfeit packages and the prosecution of 100 people.<sup>300</sup>

**97. CUSTOMS COOPERATION** - In 2005, the Agreement between the European Community and the Government of the PRC on Cooperation and Mutual Administrative Assistance in Customs Matters (Customs Cooperation Agreement) came into force. It provided a framework for cooperation amongst customs authorities.<sup>301</sup> In order to increase the effectiveness of this cooperation, Strategic Frameworks for Customs Cooperation were adopted for the periods of 2010-2012, 2014-2017 and 2018-2020.<sup>302</sup> These Strategic Framework for Customs Cooperation build upon the Customs Cooperation Agreement. The priorities of the Strategic Framework for Customs Cooperation 2018-2020 are amongst others to strengthen enforcement of IPR, and establish cooperation on matters concerning cross-border e-commerce.<sup>303</sup> This goal is to be achieved by, amongst others, strengthening communication between the customs authorities, detecting trends in seizures and facilitating legitimate e-commerce while ensuring efficient controls on IPR infringement.<sup>304</sup>

## 4.2. ADMINISTRATIVE ENFORCEMENT AND MEDIATION IN CHINA

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<sup>296</sup> *Ibid.*

<sup>297</sup> EUIPO, *2019 Status report on IPR infringement*, 2019, 28.

<sup>298</sup> EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 46.

<sup>299</sup> [www.europol.europa.eu/about-europol/intellectual-property-crime-coordinated-coalition-ipc3](http://www.europol.europa.eu/about-europol/intellectual-property-crime-coordinated-coalition-ipc3).

<sup>300</sup> EUIPO, *2019 Status report on IPR infringement*, 2019, 28.

<sup>301</sup> Preamble of the Agreement between the European Community and the Government of the People's Republic of China on cooperation and mutual administrative assistance in customs matters.

<sup>302</sup> Council of the European Union, *Strategic Framework for Customs Cooperation 2018-2020 between the European Union and the Government of the People's Republic of China*, 2017, 4.

<sup>303</sup> *Ibid.*, 5.

<sup>304</sup> *Ibid.*, 7-11.

#### 4.2.1. Administrative enforcement

##### a. Main type of enforcement

**98. DUAL-TRACK SYSTEM** - China uses a dual-track system to enforce its IP laws, combining administrative and judicial enforcement.<sup>305</sup> IPR enforcement is mostly pursued through administrative action, instead of judicial enforcement.<sup>306</sup> As such, China relies mainly on a form of alternative dispute resolution (ADR) to solve IPR disputes.

**99. ADMINISTRATIVE TORT RULINGS** - In 2012, the administrative law enforcement departments already handled 325.271 cases of IPR infringement.<sup>307</sup> Administrative rulings are classified into affirmative administrative rulings and administrative tort rulings.<sup>308</sup> Affirmative administrative rulings are a form of dispute settlement where administrative organs see whether an IPR should be granted in accordance with the law.<sup>309</sup> Administrative tort rulings are the procedures where administrative organs impartially judge over an intellectual property tort dispute.<sup>310</sup> The following applies only to tort rulings. Administrative tort rulings can be instituted for trademark infringement, copyright infringement or patent counterfeiting.<sup>311</sup>

##### b. Resolving disputes

**100. TRADEMARKS** - For trademarks, the parties must first try to resolve their dispute through consultation.<sup>312</sup> If this fails, the trademark holder or interested party has two choices. They can either institute civil judicial proceedings directly with the courts, or require the Administration of Industry and Commerce to handle the trademark infringement case.<sup>313</sup> If an infringement was constituted according to the administrative authority, it can order the infringer to stop the infringing act, seize or destroy the products and equipment, and impose a fine.<sup>314</sup>

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<sup>305</sup> S. HAN, "Chinese use of administrative proceedings to enforce intellectual property rights: evaluating and improving ADR in China", *Cardozo Journal of Conflict Resolution* 2012, (195) 198; Z. MA and Y. ZHANG, "TRIPS Agreement and enforcement of the intellectual property rights in China", *JEAIL* 2012, (407) 418.

<sup>306</sup> H. SCHULZE and E. PETERS (eds.), *Intellectual property in the 21st century: Intellectual property infringement and indigenous innovation in China*, 2012, Nova Science Publishers, 21; N. WYZYCKA and R. HASMATH, "The impact of the European Union's policy towards China's intellectual property regime", *International Political Science Review* 2016, (549) 554.

<sup>307</sup> L. LIN (ed.), *Interpreting China's legal system*, Singapore, World Scientific, 2018, 235.

<sup>308</sup> *Ibid.*, 443.

<sup>309</sup> L. LIN (ed.), *Interpreting China's legal system*, Singapore, World Scientific, 2018, 443; L. YINLIANG, "Justification of the criminal and administrative enforcement of intellectual property rights in China: historical contexts and contemporary scenes", *Peking University Journal of Legal Studies* 2012, (189) 201.

<sup>310</sup> *Ibid.*, 444; *Ibid.*

<sup>311</sup> L. YINLIANG, "Justification of the criminal and administrative enforcement of intellectual property rights in China: historical contexts and contemporary scenes", *Peking University Journal of Legal Studies* 2012, (189) 201.

<sup>312</sup> Art. 60 Trademark Law of the People's Republic of China.

<sup>313</sup> *Ibid.*

<sup>314</sup> *Ibid.*

If a party is dissatisfied with this decision, it can institute an appeal with the courts.<sup>315</sup>

**101. PATENTS** - For patents, the situation is almost the same. First, the parties must try consultation to settle their dispute.<sup>316</sup> If this does not work, the holder of a patent may institute civil judicial proceedings directly or require an administrative authority to handle the case.<sup>317</sup> The administrative authority handling patent affairs can order the infringer to stop the infringing act immediately, and in some cases a fine can be imposed.<sup>318</sup> Both parties can appeal the decision before the courts.<sup>319</sup>

### c. Remedies

**102. QUASI-JUDICIAL AUTHORITIES, QUASI-CRIMINAL REMEDIES** - In both cases, the IPR holder has the choice of instituting administrative or civil proceedings. The administrations can be seen as quasi-judicial authorities.<sup>320</sup> In trademark cases, the administrative authorities are even able to impose damages on the infringing party.<sup>321</sup> In patent cases, the administrative authorities can only try to mediate in the amount of damages.<sup>322</sup> If this mediation fails, the parties can institute legal proceedings with the courts.<sup>323</sup> The administrative authorities can also impose quasi-criminal remedies, since they can order the seizure and destruction of products and equipment, and impose fines.<sup>324</sup> When a case is serious enough to constitute a crime, the administrative authority is responsible for transferring the case to the judicial authorities.<sup>325</sup>

**103. ADMINISTRATIVE PENALTIES** - Although administrative enforcement may be inexpensive and easy, it is generally limited.<sup>326</sup> The fines are usually low, and have little deterrent effect.<sup>327</sup> In trademark cases, when the amount of illegal earnings are greater than 50.000 RMB, a fine of up to 5 times the illicit earnings

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<sup>315</sup> *Ibid.*

<sup>316</sup> Art. 60 Patent Law of the People's Republic of China.

<sup>317</sup> *Ibid.*

<sup>318</sup> Art. 60 and 63 Patent Law of the People's Republic of China.

<sup>319</sup> *Ibid.*, Art. 60.

<sup>320</sup> L. YINLIANG, "Justification of the criminal and administrative enforcement of intellectual property rights in China: historical contexts and contemporary scenes", *Peking University Journal of Legal Studies* 2012, (189) 202.

<sup>321</sup> *Ibid.*, 204.

<sup>322</sup> Art. 60 Trademark Law of the People's Republic of China; Art. 60 Patent Law of the People's Republic of China.

<sup>323</sup> *Ibid.*

<sup>324</sup> L. YINLIANG, "Justification of the criminal and administrative enforcement of intellectual property rights in China: historical contexts and contemporary scenes", *Peking University Journal of Legal Studies* 2012, (189) 210.

<sup>325</sup> Art. 61 Trademark Law of the People's Republic of China; Art. 63 Patent Law of the People's Republic of China.

<sup>326</sup> H. SCHULZE and E. PETERS (eds.), *Intellectual property in the 21st century: Intellectual property infringement and indigenous innovation in China*, 2012, Nova Science Publishers, 21.

<sup>327</sup> S. HAN, "Chinese use of administrative proceedings to enforce intellectual property rights: evaluating and improving ADR in China", *Cardozo Journal of Conflict Resolution* 2012, (195) 209; H. SCHULZE and E. PETERS (eds.), *Intellectual property in the 21st century: Intellectual property infringement and indigenous innovation in China*, 2012, Nova Science Publishers, 21.

can be imposed. When there is no illicit revenue or if it is less than 50.000 RMB, a fine of up to 250.000 RMB can be imposed. When it occurs more than 2 times within a period of 5 years, a severe punishment shall be given.<sup>328</sup> When a patent is infringed, the illegal proceedings will be confiscated and the counterfeiter is fined up to 200.000 RMB.<sup>329</sup> With regards to damages, the same applies as in civil litigation.

#### 4.2.2. Mediation as alternative

**104. EVOLUTION** - In 1989 the mediation rate was 69% for civil cases and 76% for commercial cases.<sup>330</sup> Between 2004 and 2008 there was a total mediation rate of 26.7% for civil and commercial cases.<sup>331</sup> While the mediation rate dropped in this period, it went back up to 63.1% in 2013.<sup>332</sup> The explanation for this evolution could lie in the preference the civil justice system has for mediation.

**105. PRESSURE TO MEDIATE** - The Chinese civil justice system knows a preference for mediation over civil judicial litigation.<sup>333</sup> Consumers also tend to prefer resolving their disputes outside of the formal legal system, by mediation.<sup>334</sup> However, it has been warned that the now growing mediation rates could be evidence of political interference, to prevent for example IPR disputes from escalating.<sup>335</sup> Judges are pressured by incentive systems implemented by the Supreme People's Court (SPC) to get higher numbers of mediation.<sup>336</sup> If they don't achieve these numbers, sanctions could be imposed on them.<sup>337</sup> They need to focus on getting high numbers of mediation, all the while keeping it low-cost.<sup>338</sup> This raises concerns over the quality of mediation. It is not efficient, since judges have to close as many cases as possible using mediation, while this does not necessarily mean that the cases have the best results. This is an example of how

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<sup>328</sup> Art. 60 Trademark Law of the People's Republic of China.

<sup>329</sup> *Ibid.*, Art. 63.

<sup>330</sup> V. WAYE and P. XIONG, "The relationship between mediation and judicial proceedings in China", *Asian Journal of Comparative Law* 2011, (1) 4.

<sup>331</sup> *Ibid.*, 6.

<sup>332</sup> Y. LI, J. KOCKEN and B. VAN ROOIJ, "Understanding China's court mediation surge: insights from a local court", *Law & Social Inquiry* 2018, (58) 58.

<sup>333</sup> S. HAN, "Chinese use of administrative proceedings to enforce intellectual property rights: evaluating and improving ADR in China", *Cardozo Journal of Conflict Resolution* 2012, (195) 208; K. THOMAS, "The product liability system in China: recent changes and prospects", 2014, *ICLQ*, (755) 770.

<sup>334</sup> K. THOMAS, "The product liability system in China: recent changes and prospects", 2014, *ICLQ*, (755) 770.

<sup>335</sup> Y. LI, J. KOCKEN and B. VAN ROOIJ, "Understanding China's court mediation surge: insights from a local court", *Law & Social Inquiry* 2018, (58) 59.

<sup>336</sup> V. WAYE and P. XIONG, "The relationship between mediation and judicial proceedings in China", *Asian Journal of Comparative Law* 2011, (1) 6; Y. LI, J. KOCKEN and B. VAN ROOIJ, "Understanding China's court mediation surge: insights from a local court", *Law & Social Inquiry* 2018, (58) 68-72.

<sup>337</sup> V. WAYE and P. XIONG, "The relationship between mediation and judicial proceedings in China", *Asian Journal of Comparative Law* 2011, (1) 20.

<sup>338</sup> Y. LI, J. KOCKEN and B. VAN ROOIJ, "Understanding China's court mediation surge: insights from a local court", *Law & Social Inquiry* 2018, (58) 72.

the central government does have a big influence on the local courts, contrary to the idea of local protectionism (*infra* nr. 166).<sup>339</sup>

#### 4.2.3. Advantages of administrative enforcement

**106. JUDICIAL ENFORCEMENT ON THE RISE** - While administrative enforcement is still the most used type of enforcement, cases of judicial enforcement have risen at a tremendous rate. The SPC states that in 2018, in all Chinese courts 288.000 intellectual property cases were concluded, a number 41.8% higher compared to 2017.<sup>340</sup> In 2019, the SPC reported that all Chinese courts concluded more than 470.000 cases, a number 40% higher compared to 2018.<sup>341</sup> While this rising rate may be a sign of progress in achieving rule of law and better judicial IPR enforcement, in my opinion it is worrying. Firstly, to have an actual increase at this rate year on year seems highly doubtful. Secondly, if these numbers are accurate, an average 40% increase raises questions regarding the quality of these judgments.

**107. ADVANTAGES OF ADMINISTRATIVE ENFORCEMENT** - Therefore, in my opinion less formalized means of dispute resolution might be a better way of dealing with IPR conflicts in China. Administrative enforcement can also form a solution to some of the difficulties that judicial enforcement faces, at least in China.

**108. CULTURAL AND HISTORICAL ESTABLISHMENT** - Mediation and administrative enforcement have been culturally established for centuries in China.<sup>342</sup> Confucianism shows a preference for these forms of ADR over judicial litigation, since this is most beneficial to social relationships.<sup>343</sup> Under Mao, mediation was even legislatively mandated.<sup>344</sup> This is a clear difference with EU culture, where an established court system and judicial enforcement have long acted as a way to resolve disputes. In my opinion, utilizing these forms of ADR to resolve IPR disputes in China better reflects the Chinese tradition and Confucian values.

**109. COST-EFFECTIVE, PROFESSIONAL AND QUICK** - While there is a dramatic increase in litigation, administrative channels are still viewed as the quickest, least expensive way to handle IPR cases.<sup>345</sup> Administrative agencies do not require

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<sup>339</sup> *Ibid*, 77.

<sup>340</sup> [www.court.gov.cn/zixun-xiangqing-146142.html](http://www.court.gov.cn/zixun-xiangqing-146142.html).

<sup>341</sup> [english.court.gov.cn/2020-04/29/content\\_37535516.htm](http://english.court.gov.cn/2020-04/29/content_37535516.htm).

<sup>342</sup> V. WAYE and P. XIONG, "The relationship between mediation and judicial proceedings in China", *Asian Journal of Comparative Law* 2011, (1) 4.

<sup>343</sup> S. HAN, "Chinese use of administrative proceedings to enforce intellectual property rights: evaluating and improving ADR in China", *Cardozo Journal of Conflict Resolution* 2012, (195) 203.

<sup>344</sup> W. SHI, *Intellectual property in the global trading system: EU-China perspective*, Berlin, Springer, 2008, 70; V. WAYE and P. XIONG, "The relationship between mediation and judicial proceedings in China", *Asian Journal of Comparative Law* 2011, (1) 4.

<sup>345</sup> S. HAN, "Chinese use of administrative proceedings to enforce intellectual property rights: evaluating and improving ADR in China", *Cardozo Journal of Conflict Resolution* 2012, (195) 204; S. L. T. SERN, "Reevaluating foreign intellectual property protection in China", *Singapore Law Review* 2018-2019, (121) 126-127.

lawyers for litigation, which also makes them more cost-effective.<sup>346</sup> The agencies dealing with these cases often have more expertise than judges handling these cases, which is important due to the technical nature of some IPR cases.<sup>347</sup> Each branch of IP has its own agency,<sup>348</sup> resulting in a larger degree of specialization. Moreover, these forms of ADR can release judges from the increasing workload that results from the increase of cases.<sup>349</sup>

### 4.3. JUDICIAL ENFORCEMENT IN THE EU AND CHINA

#### 4.3.1. Criminal enforcement

##### a. Prosecution

**110. CRIMINAL PROSECUTION** - Certain acts that infringe IPR can also be the subject of criminal prosecution in China.<sup>350</sup> The crimes for infringing IPR are found in Chapter III of the specific provisions in the Criminal Law of the PRC. The Crimes of infringing on intellectual property rights are found in articles 213 to 220 of the Criminal Law of the PRC.<sup>351</sup>

**111. IPR CRIMES** - Article 213 to 215 constitute the three crimes regarding the infringement of trademarks: (i) using an identical or similar trademark on the same kind of commodities within serious circumstances, (ii) selling commodities bearing counterfeit trademarks and (iii) forging or making a representation of a trademark or sell such representations. There are two crimes regarding the infringement of copyrights, contained in article 217 and 218: (i) the reproduction, publishing or distribution of certain copyrighted works, and (ii) the person that sells these reproduced works. The crime of patent counterfeiting is stated in article 216. There is also the crime of infringing on business secrets, stated in article 219. The crimes listed in the criminal law are designed not only to punish the person creating the counterfeit goods, but also the person that is selling them.

**112. OTHER CRIMES** - Other crimes are also applicable in certain cases. Articles 140 to 150 talk about the crimes of producing and marketing fake or

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<sup>346</sup> S. L. T. SERN, "Reevaluating foreign intellectual property protection in China", *Singapore Law Review* 2018-2019, (121) 127.

<sup>347</sup> S. HAN, "Chinese use of administrative proceedings to enforce intellectual property rights: evaluating and improving ADR in China", *Cardozo Journal of Conflict Resolution* 2012, (195) 207.

<sup>348</sup> S. L. T. SERN, "Reevaluating foreign intellectual property protection in China", *Singapore Law Review* 2018-2019, (121) 127.

<sup>349</sup> D. PRUD'HOMME and T. ZHANG, *China's intellectual property regime for innovation: risks to business and national development*, Springer, 2019, 145.

<sup>350</sup> F. GODEMENT and A. VASSELLIER, *La Chine à nos portes: une stratégie pour l'Europe*, Paris, Odile Jacob, 2018, 22; H. XUE, *China*, Wolters Kluwer, 2015, 68.

<sup>351</sup> Art. 213-220 Criminal Law of the People's Republic of China; R. WANG, "Chapter 2 People's Republic of China" in A. LIBERMAN, P. CHROCZIEL et al. (eds.), *International licensing and technology transfer: practice and the law*, Kluwer Law International, 2008 (Supplement No. 18, March 2017), (3) 12.

substandard commodities, such as fake pharmaceuticals and foodstuffs that can endanger the health of consumers.<sup>352</sup>

**113. THRESHOLDS FOR CRIMINAL PROCEEDINGS** - Nevertheless, criminal enforcement of IPR infringement is not that common, except for some higher-profile cases.<sup>353</sup> This is mostly due to the fact that the criminal law of the PRC places certain thresholds in order for criminal prosecution.<sup>354</sup> All articles of the criminal law defining IPR crimes state in very vague terms that these crimes only apply when certain thresholds are met. Either when the circumstances are serious (for someone producing counterfeit goods), or the amount of sales is large (for someone selling counterfeit goods).

**114. WTO DISPUTE** - These vague thresholds were one of the reasons why the US brought the *China - Intellectual Property Rights* case before the WTO Dispute Settlement Body in 2007. The US claimed that these thresholds were inconsistent with the requirements of article 41 and 61 TRIPS, since these thresholds impede enforcement through criminal procedures.<sup>355</sup> The panel report that followed this case explained when an infringement of IPR qualifies as a crime in Chinese law.<sup>356</sup> When these thresholds are met, the administrative authorities will refer the case to the criminal court.<sup>357</sup>

**115. FRAGMENTATION IN THE EU** - As mentioned before, there is no harmonization of criminal enforcement of IPR in the EU. All member states provide for different penalties, which leads to fragmentation in terms of criminal enforcement.<sup>358</sup> In my opinion, as a consequence counterfeiters will choose the member states with the lowest penalties or lower chance of getting caught in order to import their product. Once the counterfeit product has entered the EU internal market, the chance of criminal prosecution is far lower, since it has passed customs. Moreover, some EU countries have similar corruption rates compared to China, and customs officials are often easy to corrupt in order to import the goods (*infra* nr. 164). Therefore, choosing the forum with the lowest penalties or least effective criminal enforcement is far more advantageous to counterfeiters. Countries could also have an economic incentive to lower their standards of criminal enforcement. If they would increase their efforts, this could result in less imports and less traffic through for example their ports.

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<sup>352</sup> Art. 140-150 Criminal Law of the People's Republic of China.

<sup>353</sup> H. SCHULZE and E. PETERS (eds.), *Intellectual property in the 21st century: Intellectual property infringement and indigenous innovation in China*, 2012, Nova Science Publishers, 22.

<sup>354</sup> WTO Report of the Panel, *China - measures affecting the protection and enforcement of intellectual property rights*, 2009, 89.

<sup>355</sup> E. GISCHE, "Repercussions of China's high-tech rise: protection and enforcement of intellectual property rights in China", *Hastings Law Journal* 2011, (1393) 1399.

<sup>356</sup> WTO Report of the Panel, *China - measures affecting the protection and enforcement of intellectual property rights*, 2009, 89.

<sup>357</sup> Art. 61 Trademark Law of the People's Republic of China; Art. 63 Patent Law of the People's Republic of China.

<sup>358</sup> J. PILA and L. C. TORREMANS, *European Intellectual Property Law*, Oxford, Oxford University Press, 2019, 571.

## b. Penalties

**116. PENALTIES IN CHINA** – When a crime infringing IPR has been committed in China, the criminal will be sentenced to a penalty depending on the severity of the case.<sup>359</sup> Only when the circumstances are serious, the counterfeiter will receive a criminal punishment.<sup>360</sup> If the circumstances are serious, the criminal faces imprisonment with a maximum of three years, and a fine is imposed.<sup>361</sup> According to the WTO panel report, the threshold for this is an amount of sales of not less than 50.000 RMB (around EUR 6.500).<sup>362</sup> If the circumstances are especially serious, the criminal faces a minimum of three years and maximum of seven years in jail, and will be fined.<sup>363</sup> According to the WTO panel report, the threshold for this is either producing more than 20.000 pieces, having an illegal business operation volume of over 50.000 RMB or illegal gains of over 30.000 RMB (around EUR 4.000).<sup>364</sup> In criminal cases, the infringing party will still have to refund damages as well.<sup>365</sup>

**117. PENALTIES IN THE EU** - In the EU, the average maximum sentence for trademark infringement is four years, while the average fine is EUR 126.691.<sup>366</sup> These penalties apply only in the most severe cases. The less severe cases often face no risk of imprisonment and an average fine of EUR 38.<sup>367</sup> For example in Belgium, crimes related to IPR are punished with a sentence of imprisonment ranging from one to three years, and a fine of EUR 500 to EUR 100.000.<sup>368</sup> Counterfeiters face significantly lower prison sentences and fines compared to drug trafficking or human trafficking, while the revenue from this kind of illegal activity is high.<sup>369</sup> Due to the low penalties that counterfeiters face, it is not appealing for the authorities to pursue these cases.<sup>370</sup> Police and prosecutors are more likely to focus on higher profile crimes, such as terrorism, arms trade and human trafficking.<sup>371</sup> Enforcement authorities are not taking into account the possible influence of counterfeiting on other crimes, since the revenue from counterfeiting is often used to finance other crimes (*supra* nr. 8).

**118. COMPARISON** – To be able to compare the severity of criminal penalties of China and the EU, it is important to also look at the administrative (criminal)

<sup>359</sup> Art. 213-219 Criminal Law of the People's Republic of China.

<sup>360</sup> WTO Report of the Panel, *China - measures affecting the protection and enforcement of intellectual property rights*, 2009, 89.

<sup>361</sup> Art. 213-219 Criminal Law of the People's Republic of China.

<sup>362</sup> WTO Report of the Panel, *China - measures affecting the protection and enforcement of intellectual property rights*, 2009, 84.

<sup>363</sup> Art. 213-219 Criminal Law of the People's Republic of China.

<sup>364</sup> WTO Report of the Panel, *China - measures affecting the protection and enforcement of intellectual property rights*, 2009, 84.

<sup>365</sup> Art. 67 Trademark Law of the People's Republic of China.

<sup>366</sup> EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 44.

<sup>367</sup> *Ibid.*

<sup>368</sup> Art. XV.103 of the Code of Economic Law of Belgium.

<sup>369</sup> EUIPO, *2019 Status report on IPR infringement*, 2019, 12.

<sup>370</sup> EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 7.

<sup>371</sup> EUIPO, *2019 Status report on IPR infringement*, 2019, 12.

penalties discussed above. Administrative criminal proceedings are used much more than judicial criminal proceedings in China. When comparing both, it is clear that the EU criminal enforcement system, although it is not harmonized, has a larger deterrent effect. The fines that IPR infringers are usually ordered to pay by administrative authorities are low, and have little deterrent effect.<sup>372</sup> Due to the low deterrent effect of these fines, counterfeiters would even calculate these fines as part of their essential costs of doing business.<sup>373</sup> Furthermore, since the thresholds for criminal prosecution in China are rather high, not many criminal cases come before the court. As mentioned above, administrative authorities have to refer their cases to the criminal court only if the thresholds are met. In my opinion, this high threshold, together with the fact that administrative authorities cannot sentence counterfeiters to imprisonment, leads to a small deterrent effect. Courts are able to sentence counterfeiters to other types of punishments, and as such can have a stronger deterrent effect. In the EU, the fines of IPR infringement are relatively higher and the maximum sentence of imprisonment is also higher than in China, and as such these penalties have a larger deterrent effect. However, in my opinion, improvement on harmonizing these penalties in the EU is still necessary, since it could lead counterfeiters to choose the forum with the lowest penalties.

**119. ACCORDANCE WITH TRIPS** – According to the TRIPS Agreement, criminal procedures and penalties should be available in all cases of trademark counterfeiting and copyright infringement, with the remedies including imprisonment and/or monetary fines.<sup>374</sup> While TRIPS does not include these remedies for patent counterfeiting and theft of trade secrets, China has supplied criminal procedures and penalties for these crimes.<sup>375</sup> As mentioned above, the severity of these punishments is not enough to lead counterfeiters to stop violating IP laws.<sup>376</sup> It should be noted, however, that this provision leaves a lot of leeway for states to decide whether or not criminal punishment is appropriate.<sup>377</sup>

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<sup>372</sup> EUIPO, *2019 Status report on IPR infringement*, 2019, 12; Z. MA and Y. ZHANG, “TRIPS Agreement and enforcement of the intellectual property rights in China”, *JEAIL* 2012, (407) 432.

<sup>373</sup> S. HAN, “Chinese use of administrative proceedings to enforce intellectual property rights: evaluating and improving ADR in China”, *Cardozo Journal of Conflict Resolution* 2012, (195) 211.

<sup>374</sup> Art. 61 TRIPS Agreement; L. YINLIANG, “Justification of the criminal and administrative enforcement of intellectual property rights in China: historical contexts and contemporary scenes”, *Peking University Journal of Legal Studies* 2012, (189) 206.

<sup>375</sup> L. YINLIANG, “Justification of the criminal and administrative enforcement of intellectual property rights in China: historical contexts and contemporary scenes”, *Peking University Journal of Legal Studies* 2012, (189) 206-207.

<sup>376</sup> Z. MA and Y. ZHANG, “TRIPS Agreement and enforcement of the intellectual property rights in China”, *JEAIL* 2012, (407) 432.

<sup>377</sup> S. P. SINGH, “Criminal enforcement and international intellectual property law”, *Kathmandu School of Law Review* 2014, (134) 141.

### 4.3.2. Civil litigation

#### a. Prosecution

**120. CIVIL PROCEEDINGS -** Civil litigation is another option for IPR owners in China. They can make use of China's judicial system to enforce their IPR. Often, IPR owners do not count on formal protections through the courts, leading to a lack of motivation to protect their IPR.<sup>378</sup> Nevertheless, there are more civil IP cases being filed in China than anywhere else in the world.<sup>379</sup>

**121. HARMONIZATION IN THE EU -** The Enforcement Directive harmonized the civil enforcement of intellectual property rights.<sup>380</sup> It was adopted to make sure that IPR holders of all EU member states have a similar set of measures to protect their IPR.<sup>381</sup> It contains minimum requirements regarding the enforcement of IPR. When the directive was implemented by the member states in 2008, it became clear that they were interpreting these rules in a drastically different way.<sup>382</sup> Because of this, the directive lost part of its effectiveness.

#### b. Damages

**122. THREE KINDS OF DAMAGES IN CHINA -** There are three kinds of damages awarded in Chinese IP litigation. The first is compensatory damages.<sup>383</sup> The court first assesses damages on the basis of the losses suffered by the patentee, or when this cannot be determined, the profit that the infringer has accumulated.<sup>384</sup> Secondly, there are punitive damages.<sup>385</sup> For example in trademark cases, when there was bad faith, the damages can go up to five times the compensatory damages since the latest amendment of the trademark law in 2019.<sup>386</sup> Finally, there are statutory damages, and they are the most used.<sup>387</sup> When the losses or the profits cannot be determined, the damages are based on the reasonable

<sup>378</sup> Q. HE, "The limits to law: how intellectual property are used and protected in Chinese industries", *Asian Journal of Law and Society* 2018, (1) 3.

<sup>379</sup> D. PRUD'HOMME and T. ZHANG, *China's intellectual property regime for innovation: risks to business and national development*, Springer, 2019, 143

<sup>380</sup> S. V. JAKOB, "Book review: European intellectual property", *JIPITEC* 2014, (64) 68; O. VRINS, *Regulation (EU) No 608/2013 of 12 June 2013 Concerning Customs Enforcement of Intellectual Property Rights and Repealing Regulation 1383/2003*, Kluwer, 2018, 61.

<sup>381</sup> D. JANKOVIC, "Different legal aspects of the intellectual property rights", *ECLIC* 2017, (143) 149.

<sup>382</sup> M. MEJER, B. VAN POTTELSBERGHE DE LA POTTERIE, "Economic incongruities in the European patent system", *European Journal of Law and Economics* 2012, (215) 223.

<sup>383</sup> S. FENG and X. MA, "To increase damages of intellectual property infringement in China: a double-edged sword for the market", *Journal of World Trade* 2019, (39) 42.

<sup>384</sup> Art. 63 Trademark Law of the People's Republic of China; Supreme People's Court of China, 2015, Civil Retrieval nr. 38, *Liangzhou / Anhui Caidixuan Cake Group*; T. WU and X. WANG, "Supreme People's Court Annual Report on Intellectual Property Cases (2016) (China), Translated", *Washington International Law Journal Association* 2017, (295) 303.

<sup>385</sup> S. FENG and X. MA, "To increase damages of intellectual property infringement in China: a double-edged sword for the market", *Journal of World Trade* 2019, (39) 42.

<sup>386</sup> Art. 63 Trademark Law of the People's Republic of China.

<sup>387</sup> S. FENG and X. MA, "To increase damages of intellectual property infringement in China: a double-edged sword for the market", *Journal of World Trade* 2019, (39) 42.

amount that would be paid for a licensing royalty.<sup>388</sup> When all of these factors cannot be determined, the law determines an upper limit of the fine.<sup>389</sup> The damages can generally go up to 1.000.000 RMB (around EUR 129.000) in patent infringement cases. For trademark infringement cases this is 5.000.000 RMB (around EUR 387.000) since the latest amendment of the trademark law.<sup>390</sup>

**123. DAMAGES IN THE EU** - The Enforcement Directive provides that all member states should ensure that the right holder is paid damages appropriate to the actual prejudice suffered as a result of the infringement.<sup>391</sup> When the counterfeiter was acting in bad faith or had reasonable grounds to know he was infringing IPR, he must pay the right holder damages appropriate to the actual prejudice suffered.<sup>392</sup> If the infringer was not acting in bad faith or did not have reasonable grounds to know he was infringing IPR, member states have a possibility to order the recovery of profits or the payment of damages.<sup>393</sup> The damages that are awarded should in any case be appropriate to compensate the actual prejudice. There are two ways to set these damages: either by taking into account all appropriate aspects (such as lost profits and moral prejudice) or by setting a lump sum.<sup>394</sup> As such, the Enforcement Directive makes it so that member states mainly rely on compensatory or statutory damages. The Enforcement Directive does not introduce an obligation for punitive damages, but allows for compensation based on objective criteria.<sup>395</sup>

**124. RELATIVELY LOW DAMAGES** - One of the problems with civil IPR litigation in China was the relatively low damages the courts can award.<sup>396</sup> They were argued to be too small to efficiently deter IPR infringement.<sup>397</sup> While the possibility of awarding damages in the books has improved, in practice these high amounts were not reached. For example, a 2012 study conducted by a Chinese law professor found that the average amount of damages granted by the courts in patent cases was 159.000 RMB (around EUR 20.500).<sup>398</sup>

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<sup>388</sup> Art. 63 Trademark Law of the People's Republic of China.

<sup>389</sup> *Ibid.*

<sup>390</sup> *Ibid.*

<sup>391</sup> Art. 13 Directive 2004/48/EC on the enforcement of intellectual property rights.

<sup>392</sup> European Commission, *Communication from the commission: guidance on certain aspects of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights*, 2017, 3.

<sup>393</sup> *Ibid.*

<sup>394</sup> Art. 13 Directive 2004/48/EC on the enforcement of intellectual property rights.

<sup>395</sup> European Commission, *Communication from the commission: guidance on certain aspects of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights*, 2017, 3.

<sup>396</sup> D. C. FLEMING, "Counterfeiting in China", *University of Pennsylvania East Asia Law Review*, 2014, (14) 32; S. FENG and X. MA, "To increase damages of intellectual property infringement in China: a double-edged sword for the market", *Journal of World Trade* 2019, (39) 40.

<sup>397</sup> D. C. FLEMING, "Counterfeiting in China", *University of Pennsylvania East Asia Law Review*, 2014, (14) 32.

<sup>398</sup> J. MA, "Patent litigation in China from a comparative perspective", *East Asia Law Review* 2014, (62) 71.

**125. INCREASING DAMAGES IN CHINA** - The Specialized IP Courts are awarding increasingly high damages compared to other courts.<sup>399</sup> The damages for IP infringement in China have increased drastically in recent years, mostly due to judicial policy.<sup>400</sup> A study on the Beijing Specialized IP Court has found that the awarded damages in IP cases were almost six times greater in 2015 compared to 2012.<sup>401</sup> The SPC has also indicated in a judicial interpretation that higher damages can be awarded when the losses of IPR owners are proven to be higher.<sup>402</sup> Therefore, courts are using significant discretion to achieve increased damages, which might be good for the IPR owner, but is harmful to the rule of law.<sup>403</sup> Chinese courts need to develop unified principles to determine damages that focus on objective criteria.<sup>404</sup> Damages need to be deterrent, but not arbitrary.<sup>405</sup> Even if damages are increasing, the impression still remains that the awarded damages are not sufficiently deterrent, and that they are often not enough to compensate the owners of IPR.<sup>406</sup>

**126. COMPARISON** - One of the main differences regarding awards of civil damages in China and the EU, is that the Enforcement Directive does not provide an obligation for punitive damages. The infringer who acts in bad faith only has to pay damages that compensate any prejudice to the IPR holder. In my opinion, this lack of punitive damages can lead to a smaller deterrent effect. In China, courts are even awarding damages far greater than stipulated by the law. While this may be harmful to the rule of law, it provides for a higher deterrent effect.

**127. ACCORDANCE WITH TRIPS** - The TRIPS Agreement only requires that the awarded damages are adequate and that they should be available when the infringer was acting in bad faith.<sup>407</sup> It seems like both China and the EU are in accordance with this rule. The rules in the EU are even said to surpass TRIPS, and are seen as TRIPS+.<sup>408</sup>

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<sup>399</sup> [patentblog.kluweriplaw.com/2017/04/10/chinas-specialized-ip-courts/](http://patentblog.kluweriplaw.com/2017/04/10/chinas-specialized-ip-courts/).

<sup>400</sup> S. FENG and X. MA, "To increase damages of intellectual property infringement in China: a double-edged sword for the market", *Journal of World Trade* 2019, (39) 39.

<sup>401</sup> L. PAGE, "Goodbye shanzhai: intellectual property rights and the end of copycat China", *University of Western Australia Law Review* 2019, (185) 194.

<sup>402</sup> *Ibid.*, 50.

<sup>403</sup> S. FENG and X. MA, "To increase damages of intellectual property infringement in China: a double-edged sword for the market", *Journal of World Trade* 2019, (39) 39.

<sup>404</sup> C. ZHANG, "Enhancing the standards of civil damages remedies to fight copyright piracy in international trade: A commentary on the proposed TRIPS-Plus damages reforms in the Third Amendment to the Copyright Law of the PRC through comparison with the US and EU", *Journal of World Trade* 2017, (131) 157.

<sup>405</sup> *Ibid.*

<sup>406</sup> K. THOMAS, *Assessing intellectual property compliance in contemporary China: the World Trade Organisation TRIPS Agreement*, Singapore, Palgrave Macmillan, 2017, 145.

<sup>407</sup> Art. 45 TRIPS Agreement.

<sup>408</sup> O. VRINS, *Regulation (EU) No 608/2013 of 12 June 2013 Concerning Customs Enforcement of Intellectual Property Rights and Repealing Regulation 1383/2003*, Kluwer, 2018, 61.

### 4.3.3. Specialized Intellectual Property Courts in China and the EU

#### a. China's Specialized Intellectual Property Courts and Tribunals

**128. HIERARCHIC COURT SYSTEM** - China has a multilayered court system. It consists of the Supreme People's Court, the Local People's Courts (Higher, Intermediate and Basic People's Courts) and the Specialized People's Courts.<sup>409</sup> The highest court is the Supreme People's Court, which supervises the local courts and the specialized courts.<sup>410</sup> Special People's Courts have jurisdiction only in certain matters.<sup>411</sup> The establishment, organization, powers and functions of these Special People's Courts are governed by the Standing Committee of the National People's Congress.<sup>412</sup>

**129. IMPROVING ON JUDICIAL IPR ENFORCEMENT** - The outline of the 2008 National Intellectual Property Strategy of China (NIPS) proposed to improve judicial enforcement in cases regarding intellectual property.<sup>413</sup> The outline noted that the trial system for intellectual property had to be improved in order to have better enforcement.<sup>414</sup> The outline notes that studies should be conducted for implementing a jurisdiction specialized in cases involving IPR.<sup>415</sup>

**130. ESTABLISHING SPECIALIZED IP COURTS** - This was followed up by the Fourth Five-Year Reform outline of the SPC that was published on the 9th of July 2014. The outline states that it wants to promote the establishment of specialized intellectual property courts.<sup>416</sup> The specific characteristics of intellectual property cases make it necessary to establish new specialized courts with special rules and procedures.<sup>417</sup> On August 31 of the same year, the Standing Committee of the National People's Congress of China decided to establish three specialized intellectual property courts<sup>418</sup> in the cities that had a high concentration of cases involving IP law.<sup>419</sup> These cities were Beijing, Shanghai and Guangzhou.<sup>420</sup> The Beijing court was established in November of 2014, the courts in Shanghai and Guangzhou in December of that year.<sup>421</sup> According to Wang Chuang, deputy chief judge of the Intellectual Property Court of the SPC,

<sup>409</sup> Art. 12 Organizational law of the People's Courts in the People's Republic of China (中华人民共和国人民法院组织法), [www.npc.gov.cn/zgrdw/npc/xinwen/2018-10/26/content\\_2064483.htm](http://www.npc.gov.cn/zgrdw/npc/xinwen/2018-10/26/content_2064483.htm).

<sup>410</sup> *Ibid.*, Art. 10.

<sup>411</sup> *Ibid.*, Art. 15.

<sup>412</sup> *Ibid.*, Art. 14.

<sup>413</sup> Recital V.4. (45), WIPO, *Outline of the National Intellectual Property Strategy*, 2014, [www.wipo.int/edocs/lexdocs/laws/en/cn/cn021en.pdf](http://www.wipo.int/edocs/lexdocs/laws/en/cn/cn021en.pdf).

<sup>414</sup> *Ibid.*

<sup>415</sup> *Ibid.*

<sup>416</sup> Recital 3, Outline for the Fourth Five-Year Reform of the People's Courts (2014-2018), [www.court.gov.cn/zixun-xiangqing-13520.html](http://www.court.gov.cn/zixun-xiangqing-13520.html).

<sup>417</sup> *Ibid.*

<sup>418</sup> H. XUE, *China*, Wolters Kluwer, 2015, 17; D. C. FLEMING, "Counterfeiting in China", *University of Pennsylvania East Asia Law Review*, 2014, (14) 29.

<sup>419</sup> [www.ip-watch.org/2014/11/11/chinas-first-intellectual-property-court-makes-its-debut-two-more-to-follow/](http://www.ip-watch.org/2014/11/11/chinas-first-intellectual-property-court-makes-its-debut-two-more-to-follow/).

<sup>420</sup> [www.legal.people.com.cn/n/2014/1105/c188502-25978507.html](http://www.legal.people.com.cn/n/2014/1105/c188502-25978507.html).

<sup>421</sup> *Ibid.*

the courts would also have different priorities.<sup>422</sup> While the Beijing court mainly tries administrative cases, the Shanghai and Guangzhou courts would mainly handle civil cases.<sup>423</sup>

**131. IP TRIBUNALS** - Many IP tribunals were also established later on.<sup>424</sup> Currently, 19 tribunals handling cases related to IPR have been established to assist the Specialized IP Courts and aid in a better protection of IPR.<sup>425</sup>

**132. JURISDICTION** - The Specialized IP Courts are responsible for first instance civil and administrative cases involving patents, trade secrets, computer software copyrights and well-known trademarks.<sup>426</sup> They are also responsible for appeal cases against administrative decisions regarding copyrights and trademarks.<sup>427</sup>

**133. LEAPFROG APPEAL MECHANISM** - In 2018, a decision was issued by the Standing Committee of the National People's Congress to establish a new IP Tribunal of Appeals at the national level within the SPC.<sup>428</sup> After its establishment, it will provide a "leapfrog appeal mechanism", giving litigants the ability to bypass the trial at the provincial higher court for patent cases.<sup>429</sup> It is expected that this will solve the problem of non-uniformity in IP cases, improve the quality and efficiency of IP trials, and strengthen the judicial protection of IPR.<sup>430</sup>

**134. POPULARITY** - The SPC's 2015 Work Report states that in 2015 alone, 9,872 cases were concluded by the Specialized IP Courts.<sup>431</sup> This popularity could be due to the fact that foreign companies are more prepared to litigate in China.<sup>432</sup>

## b. The Unified Patent Court

**135. UNITARY LITIGATION** - The current system of patent litigation in Europe knows some challenges. When litigation arises on a patent that is registered in different member states, there is a risk of different and conflicting decisions from

<sup>422</sup> *Ibid.*

<sup>423</sup> *Ibid.*

<sup>424</sup> D. PRUD'HOMME and T. ZHANG, *China's intellectual property regime for innovation: risks to business and national development*, Springer, 2019, 142; S. FENG and X. MA, "To increase damages of intellectual property infringement in China: a double-edged sword for the market", *Journal of World Trade* 2019, (39) 56.

<sup>425</sup> [www.eft.com/efe/english/world/chinese-courts-tried-288-000-intellectual-property-cases-in-2018/50000262-3921816](http://www.eft.com/efe/english/world/chinese-courts-tried-288-000-intellectual-property-cases-in-2018/50000262-3921816).

<sup>426</sup> D. PRUD'HOMME and T. ZHANG, *China's intellectual property regime for innovation: risks to business and national development*, Springer, 2019, 142; H. XUE, *China*, Wolters Kluwer, 2015, 17.

<sup>427</sup> *Ibid.*

<sup>428</sup> D. PRUD'HOMME and T. ZHANG, *China's intellectual property regime for innovation: risks to business and national development*, Springer, 2019, 142.

<sup>429</sup> *Ibid.*

<sup>430</sup> *Ibid.*

<sup>431</sup> K. THOMAS, *Assessing intellectual property compliance in contemporary China: the World Trade Organization TRIPS Agreement*, Singapore, Palgrave Macmillan, 2017, 144.

<sup>432</sup> *Ibid.*

national courts.<sup>433</sup> To minimize these risks, it has been the goal of many countries to establish a court that can decide on cases regarding European Patents and the soon-to-be Unitary Patents. When one of these patents is infringed, the patent holder will have the chance to institute proceedings with the UPC.<sup>434</sup> This will give way to a Europe-wide enforcement of patents.<sup>435</sup>

**136. COMPETENCES** - The proposed UPC is composed of both a court of first instance, and a court of appeal.<sup>436</sup> It will have exclusive competence in civil litigation on matters involving European patents with unitary effect and classical European patents.<sup>437</sup>

**137. EU: FRAGMENTATION VS. CENTRALIZATION** - In the EU, the current system of litigation on European patents leads to parallel litigation and sometimes conflicting decisions, and a very costly and inefficient enforcement system.<sup>438</sup> The UPC aims at improving the transparency of decision-making, since several conflicts can be dragged into one single procedure.<sup>439</sup> The hopes are that it will unify jurisprudence throughout member states and increase predictability.<sup>440</sup> There are concerns, however, that the UPC might lead to further fragmentation between member states.<sup>441</sup> The fact that Croatia and Spain are not members to the agreement will not help in the centralization of decision-making.

<sup>433</sup> M. DE COCK BUNING, "Intellectual property: the 21st century most compelling legal domain", *Utrecht Journal of International and European Law* 2016, (1) 3.

<sup>434</sup> R. VERNOUT, K. BECKS et al., "European Union", in ARNOLD and SIEDSMA (eds.), *Manual for the handling of applications for patents, designs and trade marks throughout the world*, Kluwer Law International, 2019, 5.

<sup>435</sup> K. WEATHERALL, "Intellectual property in the TTP: not 'the new TRIPS'", *Melbourne Journal of International Law* 2016, (257) 268.

<sup>436</sup> R. VERNOUT, K. BECKS et al., "European Union", in ARNOLD and SIEDSMA (eds.), *Manual for the handling of applications for patents, designs and trade marks throughout the world*, Kluwer Law International, 2019, 5.

<sup>437</sup> E.-J. MIN and J. C. WICHARD, "Cross-border intellectual property enforcement", in R. DREYFUSS and J. PILA (eds.), *The Oxford handbook for intellectual property law*, Oxford University Press, 2018, 716.

<sup>438</sup> J. PILA and L. C. TORREMANS, *European Intellectual Property Law*, Oxford, Oxford University Press, 2019, 534-535; W. A. HOYNG, "The Unified Patent Court and the Unitary Patent (UPC/UP)", in F. W. E. EIJSVOGELS (ed.), *Global patent litigation*, Kluwer Law International, 2018.

<sup>439</sup> M. DE COCK BUNING, "Intellectual property: the 21st century most compelling legal domain", *Utrecht Journal of International and European Law* 2016, (1) 3.

<sup>440</sup> J. SMITS and W. BULL, "The Europeanization of Patent Law: Towards a Competitive Model" in A. OHLY and J. PILA (eds.), *The Europeanization of Intellectual Property Law*, Oxford, Oxford University Press, 2013, 51; E.-J. MIN and J. C. WICHARD, "Cross-border intellectual property enforcement", in R. DREYFUSS and J. PILA (eds.), *The Oxford handbook for intellectual property law*, Oxford University Press, 2018, 716.

<sup>441</sup> E.-J. MIN and J. C. WICHARD, "Cross-border intellectual property enforcement", in R. DREYFUSS and J. PILA (eds.), *The Oxford handbook for intellectual property law*, Oxford University Press, 2018, 716-717.

#### 4.3.4. Specific issues regarding judicial enforcement of intellectual property rights

##### a. Centralized and transparent judiciary

**138. EU: FRAGMENTATION VS. CENTRALIZATION** – In the EU, the current system of litigation on European patents leads to parallel litigation and sometimes conflicting decisions, and a very costly and inefficient enforcement system.<sup>442</sup> The UPC aims at improving the transparency of decision-making, since several conflicts can be dragged into one single procedure.<sup>443</sup> The hopes are that it will unify jurisprudence throughout member states and increase predictability.<sup>444</sup> There are concerns, however, that the UPC might lead to further fragmentation between member states.<sup>445</sup> The fact that Croatia and Spain are not members to the agreement will not help in the centralization of decision-making.

**139. CHINA: CENTRALIZING JURISDICTION** – Like the Belgian courts,<sup>446</sup> Chinese courts are not bound by precedents according to the principle of *stare decisis*, but they do consider the decisions made by other courts.<sup>447</sup> However, the establishment of Specialized IP Courts gives us a clear precedent system.<sup>448</sup> China wants to centralize jurisdiction over cases involving IPR, which improves the quality and transparency of cases involving IPR.<sup>449</sup>

**140. OPENING UP TO THE PUBLIC** – The Chinese courts are becoming more transparent. Predictability and transparency within the Chinese courts could greatly benefit foreign cases brought before them.<sup>450</sup> While in the past court proceedings could not be attended, now most of the proceedings are open to all, even to foreigners.<sup>451</sup> Judgements are now published online in Chinese, and some even in English.<sup>452</sup>

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<sup>442</sup> J. PILA and L. C. TORREMAN, *European Intellectual Property Law*, Oxford, Oxford University Press, 2019, 534-535; W. A. HOYNG, “The Unified Patent Court and the Unitary Patent (UPC/UP)”, in F. W. E. EIJSSVOGELS (ed.), *Global patent litigation*, Kluwer Law International, 2018.

<sup>443</sup> M. DE COCK BUNING, “Intellectual property: the 21st century most compelling legal domain”, *Utrecht Journal of International and European Law* 2016, (1) 3.

<sup>444</sup> J. SMITS and W. BULL, “The Europeanization of Patent Law: Towards a Competitive Model” in A. OHLY and J. PILA (eds.), *The Europeanization of Intellectual Property Law*, Oxford, Oxford University Press, 2013, 51; E.-J. MIN and J. C. WICHARD, “Cross-border intellectual property enforcement”, in R. DREYFUSS and J. PILA (eds.), *The Oxford handbook for intellectual property law*, Oxford University Press, 2018, 716.

<sup>445</sup> E.-J. MIN and J. C. WICHARD, “Cross-border intellectual property enforcement”, in R. DREYFUSS and J. PILA (eds.), *The Oxford handbook for intellectual property law*, Oxford University Press, 2018, 716-717.

<sup>446</sup> Art. 6 Judicial Code of Belgium.

<sup>447</sup> H. XUE, *China*, Wolters Kluwer, 2015, 19.

<sup>448</sup> [www.patentblog.kluweriplaw.com/2017/04/10/chinas-specialized-ip-courts/](http://www.patentblog.kluweriplaw.com/2017/04/10/chinas-specialized-ip-courts/).

<sup>449</sup> *Ibid.*

<sup>450</sup> C. E. SCHULTZ, “Placing power in the cage of law: judicial independence in China”, 2016, *Capital University Law Review*, (393) 397.

<sup>451</sup> R. ORDISH and A. ADCOCK, *China intellectual property challenges and solutions: an essential business guide*, 2008, Wiley, 183.

<sup>452</sup> W. CAI and A. GODWIN, “Challenges and opportunities for the China International Commercial Court”, *ICLQ* 2019, (869) 874.

## b. Judicial independence in China

### *b.1. The duality of Chinese courts*

**141. JUDICIAL AND POLITICAL CHARACTER OF THE COURTS** - In Chinese language, the word that is used to define politics (政, pinyin: zhèng) and the word used to talk about the law (法, pinyin: fǎ) can also be used conjointly, and that is not a coincidence. The word 政法, literally meaning politics-law, is used to depict the institutions that deal with both law and order, such as the judiciary.<sup>453</sup> It is widely known that China's judiciary has a political character.<sup>454</sup> The participation of the Party in judicial decision-making is kept as an internal record, so that litigants and the public do not have access to it.<sup>455</sup> This is also a problem for the transparency of the courts.

**142. LOCAL GOVERNMENTS** - The central government also tries to minimize the excessive power that local governments have on the judiciary.<sup>456</sup> Doing this, the courts could become more impartial, and they could independently handle cases. One of the ways local governments can have an influence on the courts, is by managing the budget of the courts.

### *b.2. Financial independence*

**143. INDEPENDENCE FROM LOCAL GOVERNMENTS** - In the past, local leaders tended to treat local judges as subordinates of the local government.<sup>457</sup> Local judges received their budget and salary from the local governments, which made them rule in favor of parties that were supported by local leaders.<sup>458</sup> The amount of resources that was given to the judicial authorities was inadequate<sup>459</sup>, which facilitated local protectionism. In 2015, the CCP and State Council enacted a reform that centralized financing of the courts at a provincial level, which alleviates concerns regarding the financial dependence of the courts on local governments.<sup>460</sup> The salary and the status of the judges were also low, which made it more likely for them to take bribes and rule in favor of the counterfeiting

<sup>453</sup> L. LI, "Political legal order and the curious double character of China's courts", *Asian Journal of Law and Society*, 2019, (19) 20.

<sup>454</sup> *Ibid.*

<sup>455</sup> L. LI, "Rule of law" in a Party-State: a conceptual interpretive framework of the constitutional reality of China", *Asian Journal of Law and Society* 2015, (93) 108.

<sup>456</sup> LUSITA, "Counterfeiting in China: A great challenge in intellectual property protection", *Indonesian J. Int. L.* 2012, (326) 331.

<sup>457</sup> *Ibid.*, 330.

<sup>458</sup> LUSITA, "Counterfeiting in China: A great challenge in intellectual property protection", *Indonesian J. Int. L.* 2012, (326) 330; V. WAYE and P. XIONG, "The relationship between mediation and judicial proceedings in China", *Asian Journal of Comparative Law* 2011, (1) 13; D. CLARKE, P. MURRELL and S. WHITING, "The role of law in China's economic development" in T. RAWSKI and L. BRANDT (eds.), *China's great economic transformation*, Cambridge University Press, 2008, 395.

<sup>459</sup> LUSITA, "Counterfeiting in China: A great challenge in intellectual property protection", *Indonesian J. Int. L.* 2012, (326) 331.

<sup>460</sup> W. CAI and A. GODWIN, "Challenges and opportunities for the China International Commercial Court", *ICLQ* 2019, (869) 874.

party.<sup>461</sup> Low salaries facilitated judicial corruption.<sup>462</sup> Therefore, China has also adopted reforms to increase the salary of its judges.<sup>463</sup>

**144. LACK OF RESOURCES IN CHINA** - The limited resources are also still a big challenge for the Specialized IP Courts of China. The average number of cases decided by each judge increased threefold in the period of 2012 to 2015.<sup>464</sup> Each judge in the Beijing IP Court gets a quota of over 200 IP cases that they have to meet each year.<sup>465</sup>

### c. Professionalization and resources

**145. PROFESSIONALIZATION IN CHINA - JUDGING ON CASES INVOLVING IPR REQUIRES MORE PROFESSIONAL KNOWLEDGE.**<sup>466</sup> The first IPR training center was not established until 1996.<sup>467</sup> In 2009, the SIPO launched their policy requiring 130 Chinese districts and counties to give better education on IPR, as to promote IPR protection.<sup>468</sup> The establishment of the Specialized IP Courts also helps in professionalizing the judges.

**146. PROFESSIONALIZATION IN THE EU** - One of the aims of the UPC is to have judges that are specialized and trained in patent law, which can also help in achieving uniform judgments.<sup>469</sup> This can lead to efficiency and less backlog of cases, legal certainty and a better quality of judgments.<sup>470</sup>

### d. Impartiality: are foreign parties treated in the same way

**147. IMPARTIALITY IN INTERNATIONAL DISPUTES** - In the context of international disputes, it is often questioned whether the national court of the domestic party will be neutral.<sup>471</sup> Appointing more international judges in the cases where a foreign party is present could be a good solution to ensure

<sup>461</sup> LUSITA, "Counterfeiting in China: A great challenge in intellectual property protection", *Indonesian J. Int. L.* 2012, (326) 331.

<sup>462</sup> V. WAYE and P. XIONG, "The relationship between mediation and judicial proceedings in China", *Asian Journal of Comparative Law* 2011, (1) 14.

<sup>463</sup> W. CAI and A. GODWIN, "Challenges and opportunities for the China International Commercial Court", *ICLQ* 2019, (869) 874.

<sup>464</sup> L. PAGE, "Goodbye shanzhai: intellectual property rights and the end of copycat China", *University of Western Australia Law Review* 2019, (185) 194.

<sup>465</sup> [www.patentblog.kluweriplaw.com/2017/04/10/chinas-specialized-ip-courts/](http://www.patentblog.kluweriplaw.com/2017/04/10/chinas-specialized-ip-courts/).

<sup>466</sup> Recital V.4. (46), WIPO, *Outline of the National Intellectual Property Strategy*, 2014, [www.wipo.int/edocs/lexdocs/laws/en/cn/cn021en.pdf](http://www.wipo.int/edocs/lexdocs/laws/en/cn/cn021en.pdf).

<sup>467</sup> R. GUO, *How the Chinese economy works*, Palgrave Macmillan, 2017, 366.

<sup>468</sup> G. C. K. CHEUNG, *China in the global political economy: from developmental to entrepreneurial*, Cheltenham, Edward Elgar Publishing, 2018, 92.

<sup>469</sup> J. SMITS and W. BULL, "The Europeanization of Patent Law: Towards a Competitive Model" in A. OHLY and J. PILA (eds.), *The Europeanization of Intellectual Property Law*, Oxford, Oxford University Press, 2013, 51.

<sup>470</sup> J. SCHOVSBO, T. RIIS and C.S. PETERSEN, "The Unified Patent Court: pros and cons of specialization - is there an end of the tunnel(vision)?", *IIC* 2015, (271) 274.

<sup>471</sup> W. CAI and A. GODWIN, "Challenges and opportunities for the China International Commercial Court", *ICLQ* 2019, (869) 876.

neutrality of the Specialized IP Courts.<sup>472</sup> Since China is increasingly being selected as the forum of choice for foreign litigants, we can see that there is a positive evolution in the trust foreign parties have in the Chinese courts.<sup>473</sup>

**148. DIFFERENT TREATMENT** - Foreigners have always had a different treatment in China compared to its own citizens. However, the different treatment of foreign parties could be beneficial to them. Chinese judges seem to be more cautious when dealing with a case where foreigners are involved.<sup>474</sup> Currently, 68% of foreigners win their case in the Beijing IP court.<sup>475</sup> Foreigners also have favorable procedural rules. For example, while Chinese defendants have 15 days to file a defense after they received a civil complaint,<sup>476</sup> foreign parties have 30 days to do the same.<sup>477</sup> When a domestic party is dissatisfied with their judgement, they have 15 days to file an appeal<sup>478</sup>, while a foreign party has 30 days.<sup>479</sup> These longer delays give them an advantage in preparing evidence.<sup>480</sup> It could even be argued that foreigners are awarded higher damages when they win compared to domestic parties.<sup>481</sup> A reason for complaint among foreigners is the higher costs associated with filing and enforcing IPR in China.<sup>482</sup> While they have more time, this can be explained by the fact that they have different rules of evidence.

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<sup>472</sup> *Ibid.*, 876-880.

<sup>473</sup> PAGE, "Goodbye shanzhai: intellectual property rights and the end of copycat China", *University of Western Australia Law Review* 2019, (185) 194.

<sup>474</sup> W. CAI and A. GODWIN, "Challenges and opportunities for the China International Commercial Court", *ICLQ* 2019, (869) 882.

<sup>475</sup> M. ALDERSON, "Foreigners win 68% of cases in Beijing IP Court: how to use this to your advantage", 2019, [www.chinalawblog.com/2019/11/foreigners-win-68-of-cases-in-beijing-ip-court-how-to-use-this-to-your-advantage.html](http://www.chinalawblog.com/2019/11/foreigners-win-68-of-cases-in-beijing-ip-court-how-to-use-this-to-your-advantage.html).

<sup>476</sup> Art. 113 of the Civil Procedure Law of the People's Republic of China.

<sup>477</sup> *Ibid.*, Art. 248.

<sup>478</sup> *Ibid.*, Art. 147.

<sup>479</sup> *Ibid.*, Art. 249.

<sup>480</sup> R. ORDISH and A. ADCOCK, *China intellectual property challenges and solutions: an essential business guide*, 2008, Wiley, 12; B. J. SAFRAN, "A critical look at Western perceptions of China's intellectual property system", 2012, *U.P.R. Business Law Journal*, (135) 155.

<sup>481</sup> G. C. K. CHEUNG, *Intellectual property rights in China: Politics of piracy, trade and protection*, New York, Routledge, 2009, 77.

<sup>482</sup> B. J. SAFRAN, "A critical look at Western perceptions of China's intellectual property system", 2012, *U.P.R. Business Law Journal*, (135) 155.

## e. Problems regarding evidence

### e.1. Procedures before Chinese courts

**149. DIFFERENT RULES OF EVIDENCE FOR FOREIGNERS** – While foreigners have favorable procedural rules, there are rules for submitting evidence that they are not used to. If documents in a foreign language are submitted to a Chinese court, a translation in Chinese is required for the evidence to be admissible.<sup>483</sup> Contrary to this, in the case of *ZTE Corporation v. Patent Reexamination Board of SIPO*, the SPC held that in patent invalidation cases separate Chinese translations are not always necessary.<sup>484</sup> Article 242 of the Civil Procedure Law notes that foreign documents also need to be both notarized and legalized if a party wishes to use them as evidence in a civil procedure.<sup>485</sup> However, this process is fairly easy and straightforward, since it only requires a signature by a local notary public and a submission of the document to a Chinese embassy or consulate.<sup>486</sup> Some judges have even accepted other evidence, such as photographs, instead of requiring notarized documents.<sup>487</sup>

**150. ELECTRONIC EVIDENCE** - The SPC has mentioned recently that it wants to perfect the evidence rules in IPR cases, in order to better protect the IPR of entrepreneurs according to law.<sup>488</sup> One of these improvements was the introduction of electronic evidence. Electronic evidence can be submitted since the amendment to the Civil Procedure Law in 2013.<sup>489</sup> This is important for IPR disputes, since electronic evidence is often the only kind of evidence the right owner can acquire.<sup>490</sup> In order to be admissible, it must be legitimate (obtained in a lawful way), authentic (either accepted by both parties, containing an electronic signature, secured by technological measures, or based on the opinion of an expert) and relevant to the question at stake.<sup>491</sup>

**151. LOWER BARRIER** - In my opinion, the admissibility of electronic evidence and other new rules regarding evidence can be of great help to foreign parties that want to litigate in China, and lowers the barrier for them to institute proceedings. It lowers the difficulty in obtaining evidence, in a country where this practice is defined by different languages and a distinct legal culture. Nevertheless, IPR holders can still face difficulties regarding the collection of

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<sup>483</sup> Art. 68 of the Civil Procedure Law of the People's Republic of China.

<sup>484</sup> Supreme People's Court of the People's Republic of China, 2017, administrative retrial nr. 4798, *ZTE Corporation / Patent Reexamination Board of SIPO*, I. L. KNOX, R. XU and W. ZHU, "The Supreme People's Court Annual Report on Intellectual Property Cases (2017) (China), Translated", *Washington International Law Journal Association* 2019, (157) 175.

<sup>485</sup> Art. 242 of the Civil Procedure Law of the People's Republic of China.

<sup>486</sup> B. J. SAFRAN, "A critical look at Western perceptions of China's intellectual property system", 2012, *U.P.R. Business Law Journal*, (135) 157.

<sup>487</sup> *Ibid.*

<sup>488</sup> [www.court.gov.cn/zixun-xiangqing-76142.html](http://www.court.gov.cn/zixun-xiangqing-76142.html).

<sup>489</sup> Art. 63 of the Civil Procedure Law of the People's Republic of China.

<sup>490</sup> J. HE, "Electronic evidence in intellectual property litigation: from the Chinese perspective", *Digital Evidence and Electronic Signature Law Review* 2013, (59) 59.

<sup>491</sup> *Ibid.*, 61.

evidence to prove infringement, actual losses and profits earned by the infringer.<sup>492</sup>

## *e.2. Problematic discovery*

**152. PREVENTED DISCOVERY BY CHINA** - Discovery is becoming increasingly difficult for companies based in the US. China itself does not have a discovery procedure as the US does.<sup>493</sup> An example of difficult discovery can be found in the case of *Gucci America, Inc. v. Weixing Li*.<sup>494</sup> This case regarded the sale of counterfeit handbags bearing the trademark of Gucci. The counterfeiters had wired their proceeds to bank accounts at the Chinese headquarters of Bank of China. Bank of China questioned the jurisdiction of the US courts and relied on the bank secrecy laws of China to prevent the discovery of evidence. The court rejected the arguments of Bank of China, and stated that even though the evidence is physically located in China, it did have personal jurisdiction over Bank of China.

**153. LEGAL FIREWALL** - State secrecy laws make it so that Chinese firms are often unwilling to hand over documents, providing an additional buffer for Chinese companies.<sup>495</sup> Chinese financial institutions can operate behind a legal firewall of state and banking secrecy laws, which keeps them immune from the jurisdiction of the US courts.<sup>496</sup> Financial institutions deny that they are subject to US jurisdiction, reject discovery requests and in that way they can knowingly be withholding crucial evidence.<sup>497</sup> Since the state ownership of these financial institutions is significant, it is unlikely that they would face any action in China for failure to comply with these requests of discovery.<sup>498</sup>

**154. IMPROVEMENTS** - As mentioned before, the SPC announced that it wanted to perfect its rules regarding evidence. An example of this, regarding discovery is that in trademark cases, when the IPR owner has presented as much proof as

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<sup>492</sup> J. MA, "Patent litigation in China from a comparative perspective", *East Asia Law Review* 2014, (62) 70.

<sup>493</sup> D. PRUD'HOMME and T. ZHANG, *China's intellectual property regime for innovation: risks to business and national development*, Springer, 2019, 146; J. MA, "Patent litigation in China from a comparative perspective", *East Asia Law Review* 2014, (62) 70.

<sup>494</sup> United States District Court, S.D. New York, 29<sup>th</sup> of September 2015, *Gucci America, Inc./Weixing Li*.

<sup>495</sup> United States District Court, S.D. New York, September 25, 2018, 349 F.Supp.3d310, *Nike Inc. / Wu*; United States District Court, S.D. New York, 29<sup>th</sup> of September 2015, *Gucci America, Inc./Weixing Li*; L. ASHLEY, "Legal firewall highlights China risk", *International Financial Law Review* 2015, (1) 2.

<sup>496</sup> K. ROSIER, "China's great legal firewall: extraterritoriality of Chinese firms in the United States", *US-China Economic and Security Review Commission Staff Research Report* 2015, (1) 3.

<sup>497</sup> United States District Court, S.D. New York, September 25, 2018, 349 F.Supp.3d310, *Nike Inc. / Wu*; United States District Court, S.D. New York, 29<sup>th</sup> of September 2015, *Gucci America, Inc./Weixing Li*; K. ROSIER, "China's great legal firewall: extraterritoriality of Chinese firms in the United States", *US-China Economic and Security Review Commission Staff Research Report* 2015, (1) 3.

<sup>498</sup> K. ROSIER, "China's great legal firewall: extraterritoriality of Chinese firms in the United States", *US-China Economic and Security Review Commission Staff Research Report* 2015, (1) 7.

possible, the courts may order the infringer to submit all evidence.<sup>499</sup> If he refuses to submit his account books and other information, or if he submits a false version, the court may determine the amount of damages with reference to the claims and proof of the IPR owner.<sup>500</sup>

**155. DISCOVERY IN THE EU** – In the EU, the Enforcement Directive provides for certain rules regarding discovery. Firstly, member states should enable the judicial authorities to order to be provided of all communication of banking, financial and commercial documents that the opposing party controls.<sup>501</sup> Specific rules for preserving evidence are also provided, such as descriptive seizures by customs.<sup>502</sup> Secondly, the Enforcement Directive stipulates that when a party presented reasonable evidence supporting its claim, the authorities may order evidence to be presented by the opposing party.<sup>503</sup>

**156. COMPARISON** – While China seems to be improving its laws regarding discovery, it still proves major deficiencies. State secrecy laws prevent foreign parties from discovering vital evidence to support their claim. The situation is opposite in the EU, where it is stipulated that member states should enable judicial authorities to order these documents to be provided to the opposing party. Nevertheless, on some parts, China has improved its rules regarding discovery to be congruent with EU rules.

#### 4.4. CONCLUSIONS

**157. ENFORCEMENT OF IPR** – This chapter answered the fourth research question. It is clear that all different types of enforcement in China and the EU face their own challenges. Customs are faced with an increasing number of cases and worrying new developments, that require more resources to act against, but meanwhile they receive inadequate funding (*section D*). The rise of e-commerce, the belt and road initiative, postal traffic and intra-EU production can lead to an increased amount of counterfeiting cases. There are seizure operations and customs cooperation, but the question is whether this is enough. While its remedies have little deterrent effect, administrative enforcement, and with this, mediation, still pose significant advantages (*section II*). Criminal enforcement in China faces a high threshold and low penalties, while in the EU criminal enforcement lacks harmonization (*section III, §1*). In civil proceedings, while in the EU damages are only awarded to compensate the IPR holder, judges in China are awarding increasingly high damages (*§2*). Specialized IP Courts are becoming increasingly popular in China, while the EU is still waiting on the establishment of the UPC (*§3*). There are also some specific issues in China and the EU, such as the centralization of IP cases, judicial independence and impartiality, professionalization and resources, and problems regarding

<sup>499</sup> Art. 63 Trademark Law of the People's Republic of China.

<sup>500</sup> Art. 63 Trademark Law of the People's Republic of China; J. YU, "China" in W. A. HOYNG and F. W. E. EIJSVOGELS (eds.), *Global patent litigation*, Kluwer Law International, 2006 (Supplement No. Online Update 2019), (1) 31.

<sup>501</sup> Art. 6 Directive 2004/48/EC on the enforcement of intellectual property rights.

<sup>502</sup> *Ibid.*, Art. 7.

<sup>503</sup> *Ibid.*, Art. 6.

evidence and discovery (§4). Even when these problems are solved, there are still some other challenges to consider.

## 5. OTHER CHALLENGES REGARDING ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

**158. OTHER CHALLENGES** - There are still some other problems which make it so that the protection and enforcement of IPR is not effective. These challenges are first of all institutional (*section I*). President Xi Jinping is leading the campaign against corruption, but the question is if this campaign is achieving its goal (§1). Local protectionism is linked with corruption, and can also prejudice efficient IPR protection (§2). Another challenge is theft of IP, which shows a worrying development (*section II*). Some other challenges are the rapid establishment of FTZ's (*section III*), and the different treatment of SOE's (*section IV*).

**159. RESEARCH QUESTION** - This chapter will give an answer to the fifth sub-question: "What are some other challenges that make enforcement of IPR in China less effective?"

### 5.1. INSTITUTIONAL CHALLENGES

#### 5.1.1. Corruption

**160. FIGHTING AGAINST CORRUPTION** - Corruption is still a big concern for China. Not only for its administration, but also for the judicial system in a broader sense. President Xi Jinping already made it clear that he is keen to take decisive action against corruption within the courts. His plans for an anti-corruption reform were mainly targeted at government officials, judges and SOE's. It is likely that the higher level of anti-corruption efforts gives less insight into what happens behind the scenes, as most corrupt acts remain undetected. Therefore, there are not many academic sources available on the topic of judicial corruption, especially since the topic has such a sensitive nature.

**161. SMALL IMPROVEMENTS** - It is hard to say that the fight against corruption led by Xi Jinping is a tremendous success. The lack of improvement on this subject can be shown by the Corruption Perceptions Index. The Corruption Perceptions Index is an index that is released by Transparency International, that shows the level of corruption in 180 countries. Every year, a score is given to each country, which ranges from 0 (highly corrupt) to 100 (very clean). In 2019, China received a score of 41 ranked 80 among 180 countries sampled. In 2018, China received a score of 39 and ranked 87 among the 180 countries that were sampled. In 2013, the year Xi Jinping became president, China received a score of 40 and was ranked 80 among the 175 sampled countries.<sup>504</sup> Despite

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<sup>504</sup> [www.transparency.org/cpi2013/results](http://www.transparency.org/cpi2013/results).

the fight against corruption under Xi Jinping, China continues to face widespread corruption.

**162. RESTORING IMAGE** - It should be noted that these campaigns against corruption could just be a way of restoring the image of the CCP both in the international community as with the people. Every year, the SPC releases figures on the number of court personnel that is investigated and punished for corruption. If we look at the number the SPC released in 2006, we can see that it is not at all in proportion to the numbers that are reported by local media.<sup>505</sup> In 2006 the SPC reported a total of 292 court personnel that were investigated and punished, while local courts in only five provinces reported a total figure of 585 to the media.<sup>506</sup> Of the 292 that were investigated and punished according to the SPC, 109 actually faced criminal prosecution.<sup>507</sup> In 2018, the SPC reported a number of 1.064 court staff being investigated and punished for corruption charges.<sup>508</sup> Only 76 were held criminally responsible.<sup>509</sup> It is important to note that the English version of the report does not mention this last number, while the Chinese version does.

**163. MISLEADING NUMBERS** - The fact that the number of investigated court staff is much higher than before could lead people to think that President Xi is leading a more effective fight against judicial corruption. However, in my opinion this is not the case. The higher number could be explained by the fact that the number of judges that are operative in China's courts has risen tremendously in the past decades. Even then, the number is not very high and does not seem in proportion to actual corruption in China. The number of court staff that were held criminally responsible is lower than in 2006, which increases the doubts on the efficiency of the fight against corruption. A reason for altering the numbers would be to restore the image of China's judicial system to the outside world. A number this low seems unlikely. It either shows the ineffectiveness of the fight against corruption, or that this fight is just a façade for what is really going on behind the scenes of the courts.

**164. CONTINUED IMPUNITY** - It can be said that there is a gap between the law in the books and the law in action regarding corruption in Chinese courts.<sup>510</sup> Legal reforms have not achieved sufficient success, since corruption continues to be practiced with impunity.<sup>511</sup> China still operates using the rule by law, which is why the political interests of the party can be safeguarded along with the possibility of corruption within the courts.<sup>512</sup> This also poses serious concerns

<sup>505</sup> L. LI, "Corruption in China" in R. PEERENBOOM (ed.), *Judicial independence in China: lessons for global rule of law promotion*, Cambridge University Press, 2009, 201-202.

<sup>506</sup> *Ibid.*

<sup>507</sup> [www.gov.cn/2007lh/content\\_556959.htm](http://www.gov.cn/2007lh/content_556959.htm).

<sup>508</sup> [english.court.gov.cn/2019-03/12/content\\_37449108.htm](http://english.court.gov.cn/2019-03/12/content_37449108.htm), [www.xinhuanet.com/english/2019-03/12/c\\_137887561.htm](http://www.xinhuanet.com/english/2019-03/12/c_137887561.htm); [www.ccdi.gov.cn/yaowen/201903/t20190312\\_190342.html](http://www.ccdi.gov.cn/yaowen/201903/t20190312_190342.html).

<sup>509</sup> [www.xinhuanet.com/politics/2019lh/2019-03/13/c\\_1124227406.htm](http://www.xinhuanet.com/politics/2019lh/2019-03/13/c_1124227406.htm); [www.ccdi.gov.cn/yaowen/201903/t20190312\\_190342.html](http://www.ccdi.gov.cn/yaowen/201903/t20190312_190342.html).

<sup>510</sup> L. LI, "The "production" of corruption in China's courts: judicial politics and decision making in a One-Party State", *Law & Social Inquiry*, 2012, (848) 877.

<sup>511</sup> *Ibid.*, 848-870.

<sup>512</sup> *Ibid.*, 872.

regarding the impartiality of the courts. However, in IPR cases, corruption is said to be lower. These cases are often directly referred to courts which are located within large cities, which have a higher level of IPR enforcement.<sup>513</sup>

**165. CORRUPTION IN THE EU** – Corruption in its courts is not only a problem for China, but also the EU. Some countries in the EU have similar rates of corruption compared to China. In 2019, Hungary and Romania scored 44 on the Corruptions Perceptions Index, while Bulgaria scored 43.<sup>514</sup> In 2018, Bulgaria scored 41, Romania scored 43 and Hungary scored 54.<sup>515</sup> This is not much of a difference compared to the numbers of China. While the fight against corruption in China may lack its wanted effect, the EU needs to focus on its own corruption rates as well. Corrupting public servants in the EU enables the import and transit of counterfeit products to and within the EU.<sup>516</sup> In my opinion, countries like these that have high corruption rates, only facilitate the efforts of counterfeiters to bring their products into the internal market.

**166. CORRUPTED PUBLIC SERVANTS** - Local police will sometimes even ask hefty fees to assist in enforcement raids. There are cases where police warn the counterfeiters of raids.<sup>517</sup> In China's counterfeit markets, regulators often accept bribes or take confiscated counterfeit goods for their personal use, while in theory they should be confiscated and destroyed.<sup>518</sup> In this way, corruption can lead to local protectionism.

### *5.1.2. Local protectionism*

**167. CONSEQUENCE OF CORRUPTION** - Corruption is linked to another challenge, which is local protectionism. Corruption is facilitated by the informal relationships that government officials have with local businesses.<sup>519</sup> We call this local protectionism, where the local governments, police force and businesses try and work together to go around the laws and regulations that were made at the central level.<sup>520</sup>

**168. PROTECTING GOVERNMENT INTERESTS** - The reasoning behind local protectionism is that the local governments fear that by implementing these

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<sup>513</sup> B. J. SAFRAN, "A critical look at Western perceptions of China's intellectual property system", 2012, *U.P.R. Business Law Journal*, (135) 157-158.

<sup>514</sup> [www.transparency.org/cpi2019](http://www.transparency.org/cpi2019).

<sup>515</sup> [www.transparency.org/cpi2013/results](http://www.transparency.org/cpi2013/results).

<sup>516</sup> EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 40.

<sup>517</sup> D. C. FLEMING, "Counterfeiting in China", *University of Pennsylvania East Asia Law Review*, 2014, (14) 28.

<sup>518</sup> L. H.-L. SU, "Resistance, evasion, and inequality: legal consciousness of intellectual property laws in two Chinese markets", *Asian Journal of Law and Society* 2018, (69) 79.

<sup>519</sup> D. PRUD'HOMME and T. ZHANG, *China's intellectual property regime for innovation: risks to business and national development*, Springer, 2019, 142.

<sup>520</sup> H. SCHULZE and E. PETERS (eds.), *Intellectual property infringement and indigenous innovation in China*, New York, Nova, 2012, 7; S. E. WU, "Effective enforcement of intellectual property rights in China: a real possibility", *Dartmouth Law Journal* 2006, (30) 35.

centralized policies against counterfeiting, they might harm the local industry.<sup>521</sup> Since the profits that can be made in the trade of counterfeit goods are so high, local governments establish companies to act as outlets for these fake goods.<sup>522</sup> These enterprises also maintain employment in the area. Even some of the notorious fake markets are partially owned by the government, or have close ties with the government.<sup>523</sup> Businesses that are operating in the fake markets often are previously state-owned enterprises.<sup>524</sup> There is also preferential treatment of Chinese companies due to concerns over foreign dominance and a desire to grow Chinese businesses.<sup>525</sup> The local police and officials sometimes receive bribes from the counterfeiters, or they have a direct ownership interest in the counterfeit business.<sup>526</sup> Since the profits that can be made in the trade of counterfeit goods are so high, local governments sometimes even establish their own companies that produce and trade fake goods.<sup>527</sup> The local governments that are supposed to implement the laws have gone on to develop their own 'local autonomy'.<sup>528</sup>

**169. OPPOSED INTERESTS** - Local protectionism can take away the strength of both central legislation and law enforcement.<sup>529</sup> These local leaders have a responsibility to adhere to and implement the national laws in their territory.<sup>530</sup> Local governments sometimes do not want to support the people that fight against counterfeiters.<sup>531</sup> They create obstacles during the investigation and assist the counterfeiters by letting them hide their production lines.<sup>532</sup> When counterfeiters have good connections with their local governments or law enforcement officials, they can escape prosecution.<sup>533</sup> While the central government tries to tackle the problem of inefficient enforcement of IPR laws,

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<sup>521</sup> Z. MA and Y. ZHANG, "TRIPS Agreement and enforcement of the intellectual property rights in China", *JEAIL* 2012, (407) 430; H. SCHULZE and E. PETERS (eds.), *Intellectual property infringement and indigenous innovation in China*, New York, Nova, 2012, 7; K. THOMAS, "The product liability system in China: recent changes and prospects", 2014, *ICLQ*, (755) 773; S. E. WU, "Effective enforcement of intellectual property rights in China: a real possibility", *Dartmouth Law Journal* 2006, (30) 35; V. WAYE and P. XIONG, "The relationship between mediation and judicial proceedings in China", *Asian Journal of Comparative Law* 2011, (1) 13.

<sup>522</sup> D. C. FLEMING, "Counterfeiting in China", *University of Pennsylvania East Asia Law Review*, 2014, (14) 28.

<sup>523</sup> L. H.-L. SU, "Resistance, evasion, and inequality: legal consciousness of intellectual property laws in two Chinese markets", *Asian Journal of Law and Society* 2018, (69) 75.

<sup>524</sup> *Ibid.*, 77.

<sup>525</sup> Y. N. MAN, "Intellectual property law and competition law in China - Analysis of the current framework and comparison with the EU approach", *IALS Student Law Review* 2014, (28) 29.

<sup>526</sup> P. BECONCINI, *Rules of engagement: trademark strategies, protection and enforcement in China*, Ch. 1, Alphen aan den Rijn, Kluwer Law International, 2017, 196; B. D. KNAUPP, "United States-China trade relations: the intellectual property protection problem", *Int'l. Trade & Bus. L. Ann.* 1997, (107) 115.

<sup>527</sup> D. C. FLEMING, "Counterfeiting in China", *University of Pennsylvania East Asia Law Review*, 2014, (14) 28.

<sup>528</sup> LUSITA, "Counterfeiting in China: A great challenge in intellectual property protection", *Indonesian J. Int. L.* 2012, (326) 330.

<sup>529</sup> R. GUO, *How the Chinese economy works*, Palgrave Macmillan, 2017, 366.

<sup>530</sup> S. E. WU, "Effective enforcement of intellectual property rights in China: a real possibility", *Dartmouth Law Journal* 2006, (30) 35.

<sup>531</sup> R. GUO, *How the Chinese economy works*, Palgrave Macmillan, 2017, 366.

<sup>532</sup> *Ibid.*

<sup>533</sup> *Ibid.*

the local governments work against them. Local protectionism is the biggest reason why local IPR enforcement is so weak. The huge size of the country is an impediment to the efficient enforcement, since it is necessary to delegate the enforcement to a local government.<sup>534</sup> At that level, the interests of the local and central governments are simply not aligned.<sup>535</sup> Following this, the enforcement of IPR relies more on the will of local officials than the law that is promulgated in Beijing.

**170. DISADVANTAGED FOREIGN PARTIES** - Local protectionism is a big concern for foreign parties trying to defend their IPR before China's judges.<sup>536</sup> Local officials could try to influence the decisions of the Specialized IP Courts in order to protect their own interests.<sup>537</sup> Foreign parties are at a great disadvantage, when faced with corrupted courts influenced by the local government. The local government does not have the same interests as the central government in protecting IPR, and therefore the foreign party which wishes to protect its IPR, is at a disadvantage. The central government needs to make an effort in taking back control over the local governments, which is also a necessary step in ending corruption.<sup>538</sup> One of the main causes of local protectionism is the low risk of being prosecuted or incriminated for corruption charges.<sup>539</sup> If the central government wishes to provide sufficient IPR enforcement, that does not discriminate against foreign parties, it needs to regain control over the local governments. It needs to lead a more aggressive fight against corruption, which would also lead to less informality and less local protectionism. This fight should not only happen in China, but also the EU. As mentioned before, some countries in the EU still face a level of corruption similar to China. The EU needs to attain a more centralized, stringent view on corruption in order to improve its own enforcement of IPR as well.

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<sup>534</sup> K. THOMAS, "The product liability system in China: recent changes and prospects", 2014, *ICLQ*, (755) 773.

<sup>535</sup> B. D. KNAUPP, "United States-China trade relations: the intellectual property protection problem", *Intl. Trade & Bus. L. Ann.* 1997, (107) 115.

<sup>536</sup> W. CAI and A. GODWIN, "Challenges and opportunities for the China International Commercial Court", *ICLQ* 2019, (869) 873.

<sup>537</sup> *Ibid.*

<sup>538</sup> S. E. WU, "Effective enforcement of intellectual property rights in China: a real possibility", *Dartmouth Law Journal* 2006, (30) 35.

<sup>539</sup> P. BECONCINI, *Rules of engagement: trademark strategies, protection and enforcement in China*, Ch. 1, Alphen aan den Rijn, Kluwer Law International, 2017, 196.

## 5.2. THEFT OF INTELLECTUAL PROPERTY

### 5.2.1. Trade secrets and forced technology transfers

**171. THEFT OF TRADE SECRETS** - China has stolen IPR both explicitly and implicitly.<sup>540</sup> Theft of trade secrets is an explicit way of stealing IPR. An example is the IP that has allegedly been stolen from Western aerospace companies by the state-owned aerospace manufacturer Commercial Aircraft of China.<sup>541</sup> Through FTT, foreign firms can also be forced to disclose their trade secrets, often in order to receive regulatory approval to sell certain products (such as pharmaceuticals).<sup>542</sup>

**172. FORCED TECHNOLOGY TRANSFERS** - FTT are an implicit way of stealing IPR, and they are becoming a major challenge for an efficient protection of IPR in China. The CCP is adopting certain strategies in order to achieve a higher rate of innovation (*infra* nr.184). The problem is that it is doing so by creating unequal policies for domestic and foreign businesses.<sup>543</sup> China has implemented FTT policies, which compels foreign companies to transfer their technology through the threat of negative repercussions if they do not comply.<sup>544</sup> The most known kind of FTT policy is compelling the foreign firm to transfer its technology as a precondition for market access.<sup>545</sup> The approval procedures of imported products have been made more difficult on purpose as to make it possible to learn the foreign technologies.<sup>546</sup> Instead of having domestic businesses do their own original research, the Chinese government helps them by facilitating the process of stealing technologies and forcing foreign companies to share technologies.<sup>547</sup>

**173. WORRYING DEVELOPMENT** - In 2019, 20% of European businesses that were surveyed reported that they felt compelled to transfer technology in order to gain market access.<sup>548</sup> In 2017 this number was only 10%.<sup>549</sup> Of the businesses that answered that they felt compelled, 63% answered that it happened in the last two years.<sup>550</sup> This shows a worrying development. FTT are an obstacle for

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<sup>540</sup> B. J. SAFRAN, "A critical look at Western perceptions of China's intellectual property system", *U.P.R. Business Law Journal* 2012, (135) 178.

<sup>541</sup> [www.economist.com/gulliver/2018/11/05/america-accuses-china-of-stealing-aerospace-trade-secrets](http://www.economist.com/gulliver/2018/11/05/america-accuses-china-of-stealing-aerospace-trade-secrets) ; [www.fortune.com/2019/10/19/chinese-hacking-plane-stolen-tech-cyber-saturday/](http://www.fortune.com/2019/10/19/chinese-hacking-plane-stolen-tech-cyber-saturday/) ; [www.rollcall.com/news/policy/hackers-spies-helped-china-steal-jet-secrets-report-says](http://www.rollcall.com/news/policy/hackers-spies-helped-china-steal-jet-secrets-report-says) .

<sup>542</sup> D. PRUD'HOMME and T. ZHANG, *China's intellectual property regime for innovation: risks to business and national development*, Springer, 2019, 80.

<sup>543</sup> I. TSELICHTCHEV, *China versus the West: the global power shift of the 21st century*, Singapore, Wiley, 2012, 182.

<sup>544</sup> D. PRUD'HOMME and T. ZHANG, *China's intellectual property regime for innovation: risks to business and national development*, Springer, 2019, 78.

<sup>545</sup> *Ibid.*, 79.

<sup>546</sup> I. TSELICHTCHEV, *China versus the West: the global power shift of the 21st century*, Singapore, Wiley, 2012, 182.

<sup>547</sup> I. TSELICHTCHEV, *China versus the West: the global power shift of the 21st century*, Singapore, Wiley, 2012, 182.

<sup>548</sup> European Chamber, "European business in China: Business confidence survey 2019", 2019, 30.

<sup>549</sup> *Ibid.*

<sup>550</sup> *Ibid.*

businesses willing to develop themselves in China.<sup>551</sup> Moreover, these FTT impede domestic innovation, since foreign firms are often discouraged from transferring their technology voluntarily to Chinese firms.<sup>552</sup>

**174. FOREIGN INVESTMENT LAW** – The new Foreign Investment Law came into effect on the 1<sup>st</sup> of January 2020. This law provides that the State will protect the IPR of foreign enterprises, and will pursue legal liability for IPR infringements.<sup>553</sup> Article 22 of the law even explicitly states that “*administrative agencies and their staff shall not use administrative means to force the transfer of technology*”. These administrative agencies must also keep confidential all business secrets they get to know during the performance of their duties.<sup>554</sup> If they are in breach of these prohibitions, article 39 states that they shall be punished in accordance with the law and held criminally responsible.<sup>555</sup> If this law proves its effect in the future, the worries regarding theft of trade secrets and FTT could be reduced significantly.

### *5.2.2. Patent trolls and trademark squatters*

**175. PATENT TROLLS** – In the past, the Chinese Patent Law made it possible for Chinese firms to obtain false patents that are issued quickly and without an in-depth examination.<sup>556</sup> Chinese companies were able to successfully register junk patents to claim IPR of others as their own in court.<sup>557</sup> With these false patents, they were able to retaliate against foreign IPR lawsuits.<sup>558</sup> China has tried to improve patent quality in the past years, in order to limit lawsuits based on junk patents.<sup>559</sup> The fact that courts are increasing damages unjustifiably also encourages the emergence of patent trolls, since they have more to win.<sup>560</sup> It leads to more civil litigation, and a higher number of empty patent applications. While the number of patent applications in China may rise, in my opinion this is for a small part due to patent trolls which do not contribute to innovation (*infra* nr. 192).

**176. PATENT TROLLS IN THE EU** – Patent trolls have been a known problem in the US and the EU for a while. It does not seem like this problem is going away

<sup>551</sup> F. GODEMENT and A. VASSELIER, *La China à nos portes: une stratégie pour l'Europe*, Paris, Odile Jacob, 2018, 63; C. MEYER, *L'Occident face à la renaissance de la Chine*, Paris, Odile Jacob, 2018, 203.

<sup>552</sup> D. PRUD'HOMME and T. ZHANG, *China's intellectual property regime for innovation: risks to business and national development*, Springer, 2019, 81.

<sup>553</sup> Art. 22 Foreign Investment Law of the People's Republic of China.

<sup>554</sup> *Ibid.*, Art. 23.

<sup>555</sup> *Ibid.*, Art. 39.

<sup>556</sup> I. TSELICHTCHEV, *China versus the West: the global power shift of the 21st century*, Singapore, Wiley, 2012, 182.

<sup>557</sup> B. J. SAFRAN, “A critical look at Western perceptions of China's intellectual property system”, 2012, *U.P.R. Business Law Journal*, (135) 179.

<sup>558</sup> I. TSELICHTCHEV, *China versus the West: the global power shift of the 21st century*, Singapore, Wiley, 2012, 182.

<sup>559</sup> D. PRUD'HOMME and T. ZHANG, *China's intellectual property regime for innovation: risks to business and national development*, Springer, 2019, 145.

<sup>560</sup> S. FENG and X. MA, “To increase damages of intellectual property infringement in China: a double-edged sword for the market”, *Journal of World Trade* 2019, (39) 39.

either. Earlier this year, in a letter to the European Commission a group of 35 tech companies (including Apple, Microsoft and BMW) called upon it to act against patent trolls.<sup>561</sup> The application requirement for patents to be a new invention is one of the hardest to check due to the increasingly expansive number of known technologies.<sup>562</sup> Therefore, patent trolls inevitably are able to slip through the net, calling for correction of these errors after the patent has been granted using revocation procedures.<sup>563</sup> This can be done through the European Patent Office for European Patents, but it is mostly done through review by individual national patent offices, which pose legal uncertainty due to varying rules.<sup>564</sup> In the future, the establishment of the UPC could improve this by using a centralized revocation action for unitary patents and European patents.<sup>565</sup>

**177. TRADEMARK SQUATTERS** - Trademark squatting in China in the future will become an increasingly big problem, since it is facilitated by the difference in languages.<sup>566</sup> Since most Chinese consumers do not know English, counterfeiters and trademark squatters profit by registering trademarks in Chinese characters that have a similar sound.<sup>567</sup> In Chinese language, there are many characters that have similar sounds, so there are possibilities for trademark squatters to mislead Chinese consumers. There are already some cases where the SPC has come across this, and where it decided how to determine infringements.<sup>568</sup> The latest amendment to the Trademark Law has also instituted punishments for trademark squatters. Applications for trademarks in bad faith that are not

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<sup>561</sup> [www.ft.com/content/26230960-37a7-11ea-a6d3-9a26f8c3cba4](http://www.ft.com/content/26230960-37a7-11ea-a6d3-9a26f8c3cba4).

<sup>562</sup> J. I. TIETZ, "The Unified Patent Court and patent trolls in Europe", *Michigan Technology Law Review* 2019, (303) 305-306.

<sup>563</sup> *Ibid.*, 306.

<sup>564</sup> *Ibid.*, 310.

<sup>565</sup> *Ibid.*, 316-317.

<sup>566</sup> Supreme People's Court of the People's Republic of China, 2014, Civil Retrial nr. 24, 'Wang Suiyong / Shenzhen Ellasay Fashion Co. Ltd. & Hangzhou Intime Retail Co. Ltd'; Supreme People's Court of the People's Republic of China, 2014, IP Administrative Retrial nr. 49, *De Beers Forevermark Ltd. / Trademark Review and Adjudication Body of State Administration for Industry & Commerce*; H. LAI, X. LOU, D. Z. N. WANG and I. WU, "Supreme People's Court Annual Report on Intellectual Property Cases (2014) (China), Translated", *Washington International Law Journal Association* 2015, (151) 164-167.

<sup>567</sup> Supreme People's Court of the People's Republic of China, 2016, Administrative Retrial nr. 27, *Michael Jeffery Jordan / Trademark Review and Adjudication Body of State Administration for Industry and Commerce*; T. WU and X. WANG, "Supreme People's Court Annual Report on Intellectual Property Cases (2016) (China), Translated", *Washington International Law Journal Association* 2017, (295) 306-307.

<sup>568</sup> Supreme People's Court of the People's Republic of China, 2014, Civil Retrial nr. 24, *Wang Suiyong / Shenzhen Ellasay Fashion Co. Ltd. & Hangzhou Intime Retail Co. Ltd*; Supreme People's Court of the People's Republic of China, 2014, IP Administrative Retrial nr. 49, *De Beers Forevermark Ltd. / Trademark Review and Adjudication Body of State Administration for Industry & Commerce*; H. LAI, X. LOU, D. Z. N. WANG and I. WU, "Supreme People's Court Annual Report on Intellectual Property Cases (2014) (China), Translated", *Washington International Law Journal Association* 2015, (151) 164-167.

intended to be used will now be refused.<sup>569</sup> Filing a trademark application in bad faith will now result in administrative penalties such as warnings or fines.<sup>570</sup>

### 5.3. FREE TRADE ZONES

**178. MISUSE OF FTZ'S** - FTZ's pose a threat to efficient enforcement of IPR. They provide exemptions from duty and taxes, simpler administrative procedures and duty-free import of raw materials and machinery.<sup>571</sup> An additional FTZ within an economy is associated with a 5.9% increase in the value of the export of counterfeit goods.<sup>572</sup> Nevertheless, new areas are being established at an enormous speed.<sup>573</sup> On August 26 of 2019, China announced it would raise its number of FTZ's from 12 to 18.<sup>574</sup> FTZ's might be good for stimulating the economy, but they are being misused by industrial-scale IPR infringers, who wish to produce counterfeit goods.<sup>575</sup> These zones are hardly regulated, making it attractive to counterfeiters, who wish to use this to their advantage.<sup>576</sup>

### 5.4. STATE OWNED ENTERPRISES

**179. LEGAL INFORMALITY** - Legal informality between the state and SOE's has led to lower transaction costs in contracts and lower administrative costs for governments.<sup>577</sup> These SOE's prospered because they have connections with the state.<sup>578</sup> There is often informality because the particular transactions are prohibited by law.<sup>579</sup> This informality facilitated growth of SOE's and the Chinese economy.<sup>580</sup> In my opinion, these informal ties between the state and its enterprises have also facilitated IPR infringement.

**180. LESS INNOVATIVE** - SOE's are linked with FTT, and own a lot less patents compared to private enterprises,<sup>581</sup> which could be a sign of IPR infringement.

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<sup>569</sup> Art. 4 Trademark Law of the People's Republic of China; Supreme People's Court of the People's Republic of China, 2014, Civil Retrieal nr. 24, *Wang Suiyong/Shenzhen Ellasay Fashion Co. Ltd. & Hangzhou Intime Retail Co. Ltd.*

<sup>570</sup> Art. 68 Trademark Law of the People's Republic of China.

<sup>571</sup> EUIPO, *2019 Status report on IPR infringement*, 2019, 12.

<sup>572</sup> OECD and EUIPO, *Trade in counterfeit goods and Free Trade Zones*, OECD Publishing, 2018, 73.

<sup>573</sup> EUROPOL and EUIPO, *2017 Situation report on counterfeiting and piracy in the European Union*, 2017, 25.

<sup>574</sup> [www.china-briefing.com/news/china-free-trade-zones-six-provinces/](http://www.china-briefing.com/news/china-free-trade-zones-six-provinces/).

<sup>575</sup> OECD and EUIPO, *Trade in counterfeit goods and Free Trade Zones*, OECD Publishing, 2018, 74; D. JANKOVIC, "Different legal aspects of the intellectual property rights", *ECLIC* 2017, (143) 150.

<sup>576</sup> OECD and EUIPO, *Trade in counterfeit goods and Free Trade Zones*, OECD Publishing, 2018, 74.

<sup>577</sup> R. CHEN, "Legal informality and human capital development in China", 2015, 1.

<sup>578</sup> C. J. MILHAUPT and W. ZHENG, "Reforming China's State-Owned Enterprises" in B. L. LIEBMAN and C. J. MILHAUPT (eds.), *Regulating the visible hand?*, Oxford University Press, 2016, 176.

<sup>579</sup> R. CHEN, "Legal informality and human capital development in China", 2015, 5.

<sup>580</sup> *Ibid*, 16.

<sup>581</sup> L. TOOHEY, C. B. PICKER and J. GREENACRE (eds.), *China in the international economic order: new directions and changing paradigms*, Cambridge University Press, 2015, 293; I.

Often, technologies purchased by SOE's are also freely used by private firms in China.<sup>582</sup> State enterprises seem to be violating IPR while they should be policing them.<sup>583</sup> While this legal informality has facilitated economic growth in the past, it is not sure if it will do so in the future.<sup>584</sup> In my opinion, since the Chinese government has made clear that it wants to become a more innovative society, this model of legal informality is sustainable. Instead, SOE's should have an exemplary role in innovating and enforcing IPR, to show its importance.

**181. SHIFT TOWARDS THE PRIVATE SECTOR** – China's innovation landscape seems to be shifting more and more towards the private sector.<sup>585</sup> In my opinion this is the result of legal informality, lack of innovation and lack of IPR protection by SOE's. While SOE's play a big role in the Chinese economy, they do not create a significant amount of high-quality IPR.<sup>586</sup> Private companies apply for the largest number of patents, and as such can be deemed more innovative.

## 5.5. CONCLUSION

**182. NEW AND OLD CHALLENGES** – This chapter answers the fifth sub-question. There are still some other challenges pertaining to the effective enforcement of IPR in China. Institutional challenges, such as corruption and local protectionism continue to preclude efficient enforcement of IPR (*section I*). Even though Xi Jinping pledged to eradicate corruption, it still seems to be widespread and posing a problem for the efficient enforcement of IPR (*§1*). However, some EU countries are facing similar rates of corruption, which could also lead to less efficient enforcement. Local protectionism is still happening, taking away the strength of central legislation in enforcing IPR (*§2*). While there are hopes that new legislation will put an end to it, FTT are still a big problem for foreign businesses (*section II, §1*). Meanwhile, a rising number of patent trolls in China reflects a known problem in the EU (*§2*). The number of FTZ's that are being established is rapidly growing, providing new opportunities for counterfeiters (*section III*). Legal informality between the state and SOE's has led to IPR infringement, but now the innovation landscape is shifting towards the private sector (*section IV*). While there are still major challenges that need to be dealt with, China seems to be shifting towards becoming a more innovative nation.

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TSELICHTCHEV, *China versus the West: the global power shift of the 21st century*, Singapore, Wiley, 2012, 181.

<sup>582</sup> S. L. T. SERN, "Reevaluating foreign intellectual property protection in China", *Singapore Law Review* 2018-2019, (121) 125.

<sup>583</sup> D. C. FLEMING, "Counterfeiting in China", *University of Pennsylvania East Asia Law Review*, 2014, (14) 28.

<sup>584</sup> R. CHEN, "Legal informality and human capital development in China", 2015, 19.

<sup>585</sup> K-C. LIU and U. S. RACHERLA (eds.), *Innovation and IPRs in China and India: myths, realities and opportunities*, Singapore, Springer, 2016, 23; M. ZHANG, "Innovation management in China" in M. DODGSON, D. M. GANN and N. PHILLIPS (eds.), *The Oxford handbook of innovation management*, New York, Oxford University Press, 2014, (355) 367.

<sup>586</sup> K-C. LIU and U. S. RACHERLA (eds.), *Innovation and IPRs in China and India: myths, realities and opportunities*, Singapore, Springer, 2016, 168.

## 6. PROMISES FOR THE FUTURE

**183. MOVING UP THE VALUE CHAIN** – As mentioned before, while China might often be seen as a producer of low-value and low-quality goods, it is now slowly becoming more adept at producing higher-end products of higher quality.<sup>587</sup> The Chinese government understood that the economy cannot continue developing by being a low-level producer, and that it should move up the value chain.<sup>588</sup> To do this, China needs to do two things (*section I*). Firstly, it needs to invest in R&D (*§1*), and secondly, it needs to further develop effective IPR protection (*§2*). A correlation can be seen between welfare and innovation (*section II*). The increasing capacity for innovation can also be monitored through the amount of patent applications (*section III*).

**184. SUB-QUESTION** – This last chapter answers the last sub-question: “Is China shifting towards becoming an innovative society, that fully protects IPR?”

### 6.1. FROM INFRINGEMENT TO INNOVATION

#### 6.1.1. Investing in innovation

**185. INVESTING IN INDIGENOUS INNOVATION** – In the past, some forms of IPR protection were necessary in order to attract foreign investors and technology transfers to stimulate innovation. Now, China has accumulated enough capital and technologies to do all its innovation by itself.<sup>589</sup> According to a 2015 study, China has already surpassed the US in total spending on R&D.<sup>590</sup> Authorities are pouring more resources into innovation than ever before, as indigenous innovation is becoming a hot topic.<sup>591</sup> These investments have a good reason. IPR protection in a given country becomes much more beneficial to it when its GDP increases, and when more of that GDP is spent on R&D.<sup>592</sup>

**186. 2006 DEVELOPMENT PLAN** - In 2006, the “Medium-to-Long Term Plan for Development of Science and Technology” (Development Plan) came into action, aiming to improve R&D spending. Its intent was to transform China into an innovative society by 2020, and to make it the leading country in science and

<sup>587</sup> L. TOOHEY, C. B. PICKER and J. GREENACRE (eds.), *China in the international economic order: new directions and changing paradigms*, Cambridge University Press, 2015, 293; I. TSELICHTCHEV, *China versus the West: the global power shift of the 21st century*, Singapore, Wiley, 2012, 181.

<sup>588</sup> H. DAVIES and M. RASKOVIC, *Understanding a changing China: key issues for business*, 2018, Routledge, New York, 86 (230 p.); L. TOOHEY, C. B. PICKER and J. GREENACRE (eds.), *China in the international economic order: new directions and changing paradigms*, Cambridge University Press, 2015, 293.

<sup>589</sup> I. TSELICHTCHEV, *China versus the West: the global power shift of the 21st century*, Singapore, Wiley, 2012, 178.

<sup>590</sup> L. PAGE, “Goodbye shanzhai: intellectual property rights and the end of copycat China”, *University of Western Australia Law Review* 2019, (185) 190.

<sup>591</sup> H. DAVIES and M. RASKOVIC, *Understanding a changing China: key issues for business*, 2018, Routledge, New York, 86.

<sup>592</sup> J. HOLLAND, “Intellectual property rights in China: patents and economic development”, *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 2017, (40) 41.

technology by 2050.<sup>593</sup> With this plan, China was aiming to step up its efforts on the topic of indigenous innovation, by pouring more resources into innovation.<sup>594</sup> While the EU invests about 3% of their GDP in R&D (in Belgium this is 2.76%), China wanted to invest 2.5% of its GDP in R&D by 2020.<sup>595</sup> The most recent available data shows that in 2018, China invested 2.19% of its GDP in R&D, compared to 1.37% in 2006.<sup>596</sup>

### 6.1.2. Using intellectual property to stimulate innovation

**187. IPR AND INNOVATION** - In the past, China was partly relying on IPR infringement to steadily grow its economy. Now, Chinese society is changing, and it is acknowledging the importance of IPR protection for innovation. It is moving towards a more innovative, high-tech society that sufficiently protects IPR in order to become a global economic power. Since strong IPR protection correlates with innovative economies,<sup>597</sup> it is vital for China to continue its efforts regarding IPR in order to become an innovation superpower. It could even be argued that this move towards more innovation is more beneficial to its level of IPR protection than the international pressure it has faced in the past, and is facing even now.<sup>598</sup> In my opinion this is a form of legal instrumentalism, since the goal of the CCP in making IPR enforcement effective in economic development. China continues its economic development, and uses effective IPR protection to boost the transformation from being the factory of the world to the factory of knowledge and ideas.<sup>599</sup> It does so, by adopting certain strategies.

**188. NIPS** - The NIPS was adopted in 2008. Like the 2006 Development Plan, its global aims were to make China an innovative country by 2020. The means of achieving this goal are different. The NIPS aimed to achieve this mainly by improving its capacity to protect IPR.<sup>600</sup> The outline of the NIPS explicitly

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<sup>593</sup> M. ZHANG, "Innovation management in China" in M. DODGSON, D. M. GANN and N. PHILLIPS (eds.), *The Oxford handbook of innovation management*, New York, Oxford University Press, 2014, (355) 360.

<sup>594</sup> G. C. K. CHEUNG, *China in the global political economy: from developmental to entrepreneurial*, Cheltenham, Edward Elgar Publishing, 2018, 81; I. TSELICHTCHEV, *China versus the West: the global power shift of the 21st century*, Singapore, Wiley, 2012, 181; M. ZHANG, "Innovation management in China" in M. DODGSON, D. M. GANN and N. PHILLIPS (eds.), *The Oxford handbook of innovation management*, New York, Oxford University Press, 2014, (355) 360; C. MCELWAIN and L. GRUBMAN, "The world's laboratory: China's patent boom, IT standards and the implications for the global knowledge economy", *Santa Clara Journal of International Law* 2016, (441) 443-444.

<sup>595</sup> L. TOOHEY, C. B. PICKER and J. GREENACRE (eds.), *China in the international economic order: new directions and changing paradigms*, Cambridge University Press, 2015, 296; X., "China's 15 year Science and Technology Plan", *Research Technology Management* 2007, (70) 70; [data.oecd.org/rd/gross-domestic-spending-on-r-d.htm](http://data.oecd.org/rd/gross-domestic-spending-on-r-d.htm).

<sup>596</sup> [data.oecd.org/rd/gross-domestic-spending-on-r-d.htm](http://data.oecd.org/rd/gross-domestic-spending-on-r-d.htm).

<sup>597</sup> K. M. L. ACRI, "Economic growth and prosperity stem from effective intellectual property rights", *George Mason Law Review* 2017, (865) 873.

<sup>598</sup> E. GISCHE, "Repercussions of China's high-tech rise: protection and enforcement of intellectual property rights in China", *Hastings Law Journal* 2011, (1393) 1413.

<sup>599</sup> G. C. K. CHEUNG, *China in the global political economy: from developmental to entrepreneurial*, Cheltenham, Edward Elgar Publishing, 2018, 90.

<sup>600</sup> WIPO, *Outline of the National Intellectual Property Strategy*, 2014, [www.wipo.int/edocs/lexdocs/laws/en/cn/cn021en.pdf](http://www.wipo.int/edocs/lexdocs/laws/en/cn/cn021en.pdf); X. SONG, "Chinese intellectual property

acknowledges that in order to further develop its economy, China will have to make an effort on IPR protection to make the country more innovative.<sup>601</sup> It even states that this provides for a win-win situation between China and the rest of the world.<sup>602</sup> While this ambitious goal of innovation in my opinion has not been achieved yet, it will be achieved in the near future. It is clear that China is making an effort in order to achieve this goal. An example is that in the outline, China pledged to look into the opportunity of establishing specialized tribunals handling IPR cases.<sup>603</sup> This was achieved in 2014, with the establishment of the Specialized IP Courts.

**189. 13<sup>th</sup> FIVE-YEAR PLAN** - The 13<sup>th</sup> Five-Year Plan of China (2016-2020) is based on the 2006 Development Plan, and noticed the importance of high-tech development for further economic development. To improve its innovation capacities, the 13<sup>th</sup> Five-Year Plan has doubled the available resources for R&D.<sup>604</sup> However, it noticed that high-tech innovations cannot exist without an adequate protection of IPR.<sup>605</sup> The Chinese government knows this, and therefore this 13<sup>th</sup> Five-Year Plan mentions that China will deepen reform related to IPR and strengthen their judicial protection.<sup>606</sup> According to the plan, China's next phase of economic development is linked with innovation, creativity and entrepreneurship.<sup>607</sup> If the protection of IPR can be improved, the chance of developing the economy by way of innovation is increased.<sup>608</sup>

## 6.2. INNOVATION AND WELFARE

**190. GLOBAL INNOVATION INDEX** - The effects of China's efforts in becoming an innovative economy are paying off. The Global Innovation Index of 2019 ranks China as the 14<sup>th</sup> most innovative economy (out of 129 economies).<sup>609</sup> In 2018, it ranked as the 17<sup>th</sup> most innovative economy.<sup>610</sup> Ten years ago, in 2010, China was only ranked as the 43<sup>rd</sup> most innovative economy.<sup>611</sup> The increasing innovation can be linked to the economic development of the country.

**191. CORRELATION** - According to a research conducted by McKinsey, China's middle class could grow to 75% of its population by 2022, compared to only 4% back in 2000.<sup>612</sup> In my opinion, it could be argued that the rising middle class

rights", in L. GOLOTA, J. HU et al., *Perspectives on Chinese Business and Law*, Cambridge, Intersentia, 2018, 320.

<sup>601</sup> Recital I., WIPO, *Outline of the National Intellectual Property Strategy*, 2014, [www.wipo.int/edocs/lexdocs/laws/en/cn/cn021en.pdf](http://www.wipo.int/edocs/lexdocs/laws/en/cn/cn021en.pdf).

<sup>602</sup> *Ibid.*

<sup>603</sup> *Ibid.*, Recital V.4. (45)

<sup>604</sup> *Ibid.*

<sup>605</sup> H. DAVIES and M. RASKOVIC, *Understanding a changing China: key issues for business*, 2018, Routledge, New York, 81.

<sup>606</sup> *Ibid.*

<sup>607</sup> G. C. K. CHEUNG, *China in the global political economy: from developmental to entrepreneurial*, Cheltenham, Edward Elgar Publishing, 2018, 59.

<sup>608</sup> *Ibid.*

<sup>609</sup> [www.globalinnovationindex.org/userfiles/file/reportpdf/GII\\_2019\\_EN\\_English.pdf](http://www.globalinnovationindex.org/userfiles/file/reportpdf/GII_2019_EN_English.pdf).

<sup>610</sup> *Ibid.*

<sup>611</sup> [www.globalinnovationindex.org/userfiles/file/GII-2009-2010-Report.pdf](http://www.globalinnovationindex.org/userfiles/file/GII-2009-2010-Report.pdf).

<sup>612</sup> [www.mckinsey.com/industries/retail/our-insights/mapping-chinas-middle-class](http://www.mckinsey.com/industries/retail/our-insights/mapping-chinas-middle-class).

shows a correlation with an increased amount of investment in innovation together with a better protection of IPR, leading to economic development. The effects of these IPR plans and investments on innovation can be seen in the Global Innovation Index and growing middle class. Meanwhile, it can also be seen in the rising number of patent applications in recent years.

### 6.3. RISING NUMBER OF PATENT APPLICATIONS

**192. MORE APPLICATIONS FOR PATENTS** - The NIPS stated as one of its goals: “China will rank among the advanced countries in terms of annual numbers of invention patents granted to Chinese applicants.”<sup>613</sup> It is clear now that this goal has been achieved. The number of patent applications in China has been rising for years.<sup>614</sup> In 2018, a total of 3.3 million patent applications were filed across the globe.<sup>615</sup> A record 1.54 million of these applications were received by China’s Intellectual Property office (SIPO), making it a global leader.<sup>616</sup> China is not only the leader with patents, it is also the number one receiver of applications for trademarks and designs.<sup>617</sup>

**193. MORE CHINESE-BASED PATENTS** - In 2001, the share of patents that were filed in China by Chinese residents was only 47%.<sup>618</sup> In 2018, the Chinese patent office received 90.4% of their patent applications from residents.<sup>619</sup> Compared to foreign entities, an increasing majority of domestic Chinese entities are applying for patents.<sup>620</sup> These numbers show a positive evolution, from counterfeiting and stealing foreign IP, to creating indigenous innovation. However, since these are statistics provided by the government, it should be noted that the Chinese government may be intentionally boosting this data to show that they are becoming more innovative.<sup>621</sup> The rising number of patent trolls, as mentioned before, could also be a cause for the higher number of patent applications.

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<sup>613</sup> Recital II.2. (7), WIPO, *Outline of the National Intellectual Property Strategy*, 2014, [www.wipo.int/edocs/lexdocs/laws/en/cn/cn021en.pdf](http://www.wipo.int/edocs/lexdocs/laws/en/cn/cn021en.pdf).

<sup>614</sup> G. C. K. CHEUNG, *China in the global political economy: from developmental to entrepreneurial*, Cheltenham, Edward Elgar Publishing, 2018, 90-91.

<sup>615</sup> WIPO, “World Intellectual Property Indicators: Filings for Patents, Trademarks, Industrial Designs Reach Record Heights in 2018”, 2019, [www.wipo.int/pressroom/en/articles/2019/article\\_0012.html](http://www.wipo.int/pressroom/en/articles/2019/article_0012.html); WIPO, “World intellectual property indicators 2019”, [www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_941\\_2019.pdf](http://www.wipo.int/edocs/pubdocs/en/wipo_pub_941_2019.pdf).

<sup>616</sup> *Ibid.*

<sup>617</sup> WIPO, “World intellectual property indicators 2019”, [www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_941\\_2019.pdf](http://www.wipo.int/edocs/pubdocs/en/wipo_pub_941_2019.pdf).

<sup>618</sup> D. PRUD’HOMME and T. ZHANG, *China’s intellectual property regime for innovation: risks to business and national development*, Springer, 2019, 51.

<sup>619</sup> WIPO, “World intellectual property indicators 2019”, [www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_941\\_2019.pdf](http://www.wipo.int/edocs/pubdocs/en/wipo_pub_941_2019.pdf).

<sup>620</sup> K-C. LIU and U. S. RACHERLA (eds.), *Innovation and IPRs in China and India: myths, realities and opportunities*, Singapore, Springer, 2016, 23.

<sup>621</sup> B. J. SAFRAN, “A critical look at Western perceptions of China’s intellectual property system”, 2012, *U.P.R. Business Law Journal*, (135) 170-171.

**194. GOVERNMENT INCENTIVES** - The rise in patent applications reflects more low-quality applications rather than innovative applications.<sup>622</sup> These low-quality patents do not contribute to the amount of innovation, and can hinder China in becoming an innovative economy.<sup>623</sup> This rise is mostly due to incentives provided by the government, that can have a negative impact on the quality of patent applications.<sup>624</sup> China tries to pursue higher numbers of applications by using incentive systems and policies, but this leads to a large amount of low-quality applications.<sup>625</sup>

**195. MORE PATENTS, MORE BENEFITS** - The most prominent policy that China uses to encourage innovation is the High and New Technology Enterprise program, which provides a 10% corporate income tax deduction and a 150% deduction for R&D expenses to qualifying companies.<sup>626</sup> When a company is certified as a high-tech company, it receives tax preferences, subsidies and administrative supports.<sup>627</sup> This certification requires a certain number of patents.<sup>628</sup> This leads to businesses applying for empty patents, just to receive these benefits.<sup>629</sup> The companies that receive these tax benefits tend to own patents of much lower quality.<sup>630</sup> Other tax incentives tied to IP requirements also exist.<sup>631</sup> In my opinion, while this so-called incentive system might create an economic incentive to apply for low-quality patents, it does not create an incentive to actually innovate. This incentive system should be changed, as to provide rewards only for actual innovation, and not for empty patents. In my opinion, these policies seem to be designed only to project higher than actual numbers of innovation to the public, while the reality may be different.

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<sup>622</sup> D. PRUD'HOMME and T. ZHANG, *China's intellectual property regime for innovation: risks to business and national development*, Springer, 2019, 53; L. S. OSBORN, "Globalization, intellectual property, and prosperity", *Campbell Law Review* 2012, (517) 524; K. THOMAS, *Assessing intellectual property compliance in contemporary China: the World Trade Organization TRIPS Agreement*, Singapore, Palgrave Macmillan, 2017, 147.

<sup>623</sup> D. PRUD'HOMME and T. ZHANG, *China's intellectual property regime for innovation: risks to business and national development*, Springer, 2019, 54.

<sup>624</sup> K. E. MASKUS, "China's uneasy engagement with intellectual property reforms during its globalization", *Brown Journal of World Affairs* 2016, (137) 150; C. MCELWAIN and L. GRUBMAN, "The world's laboratory: China's patent boom, IT standards and the implications for the global knowledge economy", *Santa Clara Journal of International Law* 2016, (441) 446.

<sup>625</sup> K-C. LIU and U. S. RACHERIA (eds.), *Innovation and IPRs in China and India: myths, realities and opportunities*, Singapore, Springer, 2016, 173; K. E. MASKUS, "China's uneasy engagement with intellectual property reforms during its globalization", *Brown Journal of World Affairs* 2016, (137) 150; C. MCELWAIN and L. GRUBMAN, "The world's laboratory: China's patent boom, IT standards and the implications for the global knowledge economy", *Santa Clara Journal of International Law* 2016, (441) 446.

<sup>626</sup> D. PRUD'HOMME and T. ZHANG, *China's intellectual property regime for innovation: risks to business and national development*, Springer, 2019, 63.

<sup>627</sup> Q. HE, "The limits to law: how intellectual property are used and protected in Chinese industries", *Asian Journal of Law and Society* 2018, (1) 14.

<sup>628</sup> *Ibid.*

<sup>629</sup> *Ibid.*

<sup>630</sup> D. PRUD'HOMME and T. ZHANG, *China's intellectual property regime for innovation: risks to business and national development*, Springer, 2019, 63.

<sup>631</sup> *Ibid.*

## 6.4. CONCLUSION

**196. ANSWER** – This chapter gave an answer to the last sub-question. China seems to have understood that it cannot continue developing its economy while being one of the largest infringers of IPR. It aims at becoming an innovation superpower, and is stepping up its efforts (*section I*) both by increasing R&D spending (*\$1*) and adopting strategies to achieve a higher level of IPR protection (*\$2*). The fact that more welfare correlates with more innovation shows that China’s efforts are paying off (*section II*). While the rise in patent applications shows a growth in innovation potential, it also shows some failed government incentives that unjustly augment the number of patent applications (*section III*).

## 7. CONCLUSION

**197. CENTRAL RESEARCH QUESTION** – This conclusion will answer the central research question:

“Is there still an ineffective or inefficient protection and enforcement of IPR in China compared to the EU, and if so, what are the causes of this and what is being done?”

In order to give an answer to this question, I will first give an answer to the sub-research questions.

**198. CHAPTER I** – “Why is it necessary that we protect IPR, what are the consequences of IPR infringement?”

Counterfeiting is a dangerous practice that has consequences for our health, our security and businesses. Dangerous substances and lack of quality control can lead to health hazards. By purchasing counterfeit goods, consumers are indirectly funding organized crime. Businesses lose out on revenue due to lost sales and harm to reputation, harming the whole economy. While these harms exist, not enough is being done in order to educate (mainly young) unaware consumers on the dangers of this practice. Counterfeiting has a large impact on both the economy of China and the EU, and while both parties have an interest in more effective IPR enforcement, not enough is done on either side. Moreover, counterfeiting has a background of increasing inequality and inadequate distribution of wealth between regions in China. More IPR protection could be a way to reduce inequalities, as long as the welfare resulting from this is distributed in a fair way. While all these negative consequences exist, China remains the major exporter of counterfeit goods to the EU, which raises questions on the reasons for IPR infringement.

**199. CHAPTER II** – “What are the causes of IPR infringement and the lack of protection of IPR in China?”

The story of China as a major copycat fails to take into account the other side of the story. As a result of international pressure, China had to adopt legislation that did not fit into its tradition. Unlike Western countries, China has

only spent 40 years on building its modern IP law. Its tradition did not have time to adjust, resulting in a lack of acceptance. The notion of intellectual property is said to contradict its tradition of Confucian culture, but while this may be an explanation, it does not justify IPR infringement. Other countries with a similar cultural tradition have flourished in terms of IPR protection. The political tradition in China was far different from the West. The CCP has used the adoption of IP law only as an instrument to further its economic development, in two ways. In the beginning, IP law was an instrument to please Western countries, in order to receive technology transfers and foreign investments to develop the economy. In reality these laws lacked effectiveness. Now, it seems like China is shifting towards more effective protection in order to foster innovation, and as a result economic development.

**200. CHAPTER III - “How have China and the EU improved their legislation, in order to provide for better protection of IPR?”**

International pressure was a reason for China to amend its laws in the past, but now it is improving its legislation on its own accord. In my opinion, this is a sign China is moving towards more effective IPR protection. The EU has made significant efforts to harmonize its protection and enforcement of IPR. While more streamlined rules regarding (criminal) enforcement could prove beneficial, this is not adopted due to disagreement. IPR in China has been the subject of several proceedings initiated before the WTO by the US, and even a trade war. While China does change its law to implement these decisions, constructive dialogue and cooperation can prove far more beneficial in improving actual IPR protection. Good examples of this are the bilateral agreement on GI, and the technical cooperation programs conducted between China and the EU. However, while there are laws protecting IPR, the enforcement still lacks its wanted effect.

**201. CHAPTER IV - “What are the different types of enforcement of IPR in China and the EU, and what are the challenges relating to them?”**

There are three types of enforcement. The first type is customs enforcement. Customs enforcement is increasingly faced with worrying new developments that make it easier to import counterfeit products. While this asks for more funding, customs are receiving less resources. However, customs in China and the EU are increasingly cooperating in order to act against these developments. The second type of enforcement is administrative enforcement, which is mainly used in China. While it proves to be insufficiently deterrent, it fits perfectly into the Chinese tradition and has the edge over judicial enforcement, which is the third type of enforcement. Judicial enforcement splits up in both criminal and civil enforcement. Criminal enforcement in China faces high thresholds, while in the EU it faces fragmentation due to lack of harmonization. Both civil and criminal remedies in China and the EU do not seem to have the deterrent effect necessary to act against counterfeiting. However, in China judges are awarding higher civil damages, which may be

detrimental to the rule of law but proves larger deterrent effect. There are other issues regarding judicial enforcement, such as the need for centralization, the need for judicial and financial independence, professionalization, impartiality and problems regarding evidence. Both Europe and China have tried centralizing litigation on IP disputes in order to act against some of these issues that judicial enforcement faces. While in China this worked, Europe is still waiting on the establishment of the UPC.

**202. CHAPTER V - “What are some other challenges that make enforcement of IPR in China less effective?”**

Next to the judicial challenges, there are also some other challenges to consider. Even though pledges are made, corruption, and as a result of this, local protectionism, still form major challenges for China in order to achieve effective IPR protection. The central government needs to regain control over local governments who have opposite interests, and act against corruption. This is also true for the EU, similar levels of corruption in some countries could, together with fragmented enforcement, lead to forum shopping by counterfeiters. While FTT have been a worry for foreign businesses, there are hopes that the new Foreign Investment Law will make it a thing of the past. Patent trolls in China have been on the rise, together with trademark squatters, but this is not something unknown in the EU. FTZ's have lax rules that can attract counterfeiters, while SOE's are linked to theft of IP and are less innovative than private companies.

**203. CHAPTER VI - “Is China shifting towards becoming an innovative society, that fully protects IPR?”**

While it relied on counterfeiting and theft of IP in the past, now China is shifting towards economic development through innovation. In order to achieve its goal of becoming an innovative society, it is increasingly investing in R&D, and improving its IPR protection. It has adopted certain strategies, with which it aims to improve its IPR protection to become an innovative country. This is resulting in higher innovation, correlating with more welfare. An example that shows how innovative China has become is the rising number of patent applications in the country. However, this high number is not only due to increasing innovation, but also due to government incentive systems and patent trolls that incorrectly boost this data.

**204. ANSWER -** Now that I answered these sub-research questions, I can give an answer to the central research question. To this day, there is still an ineffective and inefficient protection and enforcement of IPR in both China and the EU. While the premise that China still lacks effective IPR protection is not contested, that premise fails to take into account the factors which have caused this ineffective IPR protection. This problem will solve itself through the desire of becoming an innovation superpower and cooperation with other countries and the EU, rather than through international pressure. Nevertheless, it is not that

simple. Both China and the EU will have to improve on the challenges that remain, in order to achieve a fully functioning system of IPR protection.