

HIST 680 Intellectual Property Rights in the People's
Republic of China

By Francis Ku

Introduction

In modern times, the People's Republic of China (PRC) is well known for intellectual piracy and cheap knock-offs. From shoddy recordings of movies, to knock-off copies, illicit goods from China flooded markets around the world. However, as time progressed, the quality of these products grew in sophistication and increasingly posed a challenge to foreign businesses. Not only were the Chinese able to successfully replicate advanced models of the latest technology, they sometimes outright stole the patents and designs. To the fury of these businesses, legal actions against these entities often failed in China, prompting cries and accusations against the Chinese leadership for facilitating the thefts. To protect their Intellectual Property (IP) from being stolen in Chinese manufacturing centers in the first place, many businesses have turned to manufacturing key components outside of China and making sure no Chinese employees know the full extent in the manufacturing process.¹ This paper will explore the topic of Chinese Intellectual Property Rights (IPR) and piracy in the People's Republic of China.

Background

This subject interested me after I found my knock-off copies of Warhammer 40K (40K) models. The main drive for these purchases was the prohibitive cost of 40K models. For a relatively small model, prices can reach up to sixty to seventy dollars when converted from the British pound. Games Workshop, the business that created and sold 40K goods, had been steadily decreasing in quality control and increasing prices. In this condition, it was attracting less and less followers and thus decided to heavily exploit their fanbase. Having no particular

¹ Crane, Keith, Jill E. Luoto, Scott Warren Harold, David Yang, Samuel K. Berkowitz, and Xiao Wang. "The Role of Foreign Companies in China's Commercial Aircraft Manufacturing Industry." In *The Effectiveness of China's Industrial Policies in Commercial Aviation Manufacturing*, (SANTA MONICA, CA; WASHINGTON, DC; PITTSBURGH, PA; NEW ORLEANS, LA; JACKSON, MS; BOSTON, MA; CAMBRIDGE, UK; BRUSSELS, BE: RAND Corporation, 2014), 43.

sense of brand loyalty and being cheap, I decided to look for less costly alternatives. Through online searches, I was able to find some sources that sold Chinese copies at a fraction of the standard price. When I was younger, my family often avoided Chinese knock-offs made in mainland China for fear of their shoddy quality. Not only were “Made in China” goods easily broken, but they were sometimes toxic. Fast forward to the 2010’s, a large majority of purchasable goods are made in the Chinese mainland have decent to great quality. Knowing this and having bought a few terrible quality legitimate models from Games Workshop, I decided to risk it and buy some counterfeit models. To my satisfaction, most of the knock-offs I received were of excellent quality and most deficiencies could either be sculpted off or painted over. When remembering this experience, I realized that it had parallels in more important products. While Warhammer 40k counterfeit operations never intended to become legitimate, others did. Selling products that look suspiciously similar to other industry leaders, businesses like Huawei and Xiaomi are currently amongst the most profitable companies in the world. These Chinese companies, having manufactured technology for companies Samsung and Apples for years, were able to duplicate and build upon modern industrial structure, producing cheaper high-quality products that many are willing to buy.

Counterfeits and Copies

Before beginning, there are a few distinctions that should be made clear. The operation that I personally experienced is counterfeiting while companies like Xiaomi are copying products. These are two separate and distinct forms of IP theft. Counterfeiting is essentially operations that attempt to pass fake as the real brand items while copies make their own distinct companies to sell item that have been copied and slightly tweaked.² This is an extremely

² Raustiala, Kal, Christopher Sprigman, and Steven Tepp. *How to Copy Right: Is Piracy Productive?* (*Foreign Affairs* 92, no. 6, 2013), 170.

important distinction since counterfeits care far less about the quality of their products as opposed to manufacturers of copies.

My purchase of 40K models is a less harmful example of counterfeiting. The forum communities behind 40K warned potential customers that some of these Chinese knock-offs used toxic materials in the resin. However, in this case, the counterfeiters knew that their products could never be mistaken for real copies. From the distinct resin colors to legitimate copies only being sold on the Games Workshop website and sponsored stores, customers could easily differentiate between real and fake copies. Instead, counterfeiters offered cheap and identifiably fake products as alternatives, rather than the real deal. Amusingly, competition between counterfeiters drastically improved their techniques and resins to the point where some knock-offs were of higher quality than legitimate models made by Games Workshop. However, other examples of counterfeiting are far more harmful. Such examples are counterfeit drugs that have been passed off and sold as legitimate brand products, causing severe adverse reactions in patients.³ This type of piracy can cause significant damage to society as well as the legitimate brand's reputation.

As for Chinese enterprises in the business of making copies, their attempt at legitimacy usually calls for a standard of quality. Although making slight tweaks to other products and calling it their own is a rather unscrupulous behavior, these businesses can usually be counted on to provide good quality control and innovations. Their brand image, already carrying the “fake” tag, try hard to accomplish the “real fake” tag, indicating that their product is comparable to the

³ Kal, Sprigman, and Tepp. *How to Copy Right*, 168.

brand names.⁴ While nothing is absolute, it's safe to say that businesses who intend to sell copies as their own are far more likely to impose decent standards than counterfeiters.

Intellectual Property Rights

The traditional reasoning for the enforcement of IPR argues that to innovators need government protection to reap the benefits of their ingenuity. This encourages innovation and fuels the country's economy. In a country without strong IPR enforcement, these innovators will be far less motivated to present their genius to society and, as a result, the country will be less competitive in the world economy.⁵ While there are benefits to reproducing the inventions in far more efficient methods, such as being far cheaper in costs to consumers, the loss of incentives for innovations would ultimately be fatal for that society. However, not all believe IPR to be completely beneficial. The classic argument against overpowering IPR are cases where larger corporations are favored against small firms in obtaining IPR.⁶ For example, if a small firm happens to contest a large corporation in the legal arena, the large corporation can simply extend the legal battle until the small firm exhausts its resources. Games Workshop is notorious for using this tactic when they believe a start up company has made models too similar to theirs. In addition, as will be seen later, weak protection of IPR may not necessarily be detrimental to innovation.

There is even an argument that reasons that outright piracy, not including copy businesses, can help rather than hurt the economy. This rationale posits that pirated sales do not translate to lost sales for legitimate businesses since consumers of pirated goods never had

⁴ Raustiala, Kal, and Christopher Sprigman. "Fake It Till You Make It: The Good News About China's Knockoff Economy." (*Foreign Affairs* 92, no. 4, 2013), 26.

⁵ Cheung, Gordon C.K. *Intellectual Property Rights in China: Politics of Piracy, Trade and Protection*. (London; New York; Routledge, 2009), 7.

⁶ Cheung, *Intellectual Property Rights in China*, 18.

enough income to purchase legitimately in the first place. However, exposure through pirated copies could give positive impressions within the minds of consumers, leading them to eventually purchase legitimate items once they gain the necessary income.⁷

Reasons and Origins of IP Theft and Piracy

China is neither the first, nor is it unique in imitating and copying foreign corporations and products. Like other nations, such as Brazil or India, China has long been a major manufacturing center and businesses have been eager to exploit the immense labor force. In establishing these manufacturing centers, they have also allowed these developing nations to learn technical expertise in manufacturing advanced technology.⁸ Having access to the technical expertise, entrepreneurs will reverse engineer or outright copy the latest technologies and set up their own businesses. The savings in R&D allows for investments in low-cost alternative technologies with emphasis on open architectures over foreign close proprietary ones. This results in a large variety of cheap products free from the burdening costs of proprietary architecture.⁹ Furthermore, being a domestic entity allows for logistical issues to be more easily identifiable and dealt with. For example, government permissions, market information, material sources, and distribution methods are all information that domestic entities have an easier time obtaining. These variety of factors result in large volumes of low cost products that are easily accessible by the market and provide sharp domestic competition against their more legitimate and expensive counterparts. Then comes the process of changing their image from being a copy business to an innovative business.¹⁰ After establishing a share in the domestic market, these

⁷ Kal, and Sprigman, *Fake it Till You Make It*, 28.

⁸ Luo, Yadong, Jinyun Sun, and Stephanie Lu Wang. "Emerging Economy Copycats: Capability, Environment, and Strategy." (*Academy of Management Perspectives* 25, no. 2, 2011), 38.

⁹ Luo, Sun, Wang, *Emerging Economy Copycats*, 39-40.

¹⁰ *Ibid.*, 41.

entities then need to look for ways to enter the global market. However, entering the global market can be extremely difficult for copy businesses. In many countries with strong IPR, it is very difficult for these businesses to even present their products to foreign markets without suffering from severe enforcement. It is here where copy businesses must innovate and create distinct products to become legitimate and compete in the world market. In this case, weak IPR does not necessarily curb the need for innovation, but postpones it.

International Pressure and the Chinese Leadership

There is common belief that the Chinese government resists foreign pressure, particularly the United States, and does not legally protect IPR. This, however, is false as China routinely gives up substantial IPR concessions and ratifies them in their legislature.¹¹ The most important international pressures came from the Sino-American Memorandum of Understanding on the Protection of Intellectual Property Rights in 1992, the Accord of Intellectual Protection in 1995, and China's entrance into the World Trade Organization in 2001, which created further impetus for IPR adoption.¹² From then on, several Joint Commissions on Commerce and Trade sessions were held to pressure China to uphold its commitment to IPR. As we can see, the Chinese government, at least on the surface, is willing to comply with the IPR standards of the United States. The issue, then, lies not in the state agreement, but in enforcement.

Critics often point to such as the SARS epidemic or the One Child Policy as evidence of the central leadership's capability. In contrast, the enforcement, or lack thereof, of IPR merely shows that the Communist Party is unwilling to protect it. However, in both the SARS and the One Child Policy, central authorities stepped in to act only when they realized that the events

¹¹ Mertha, Andrew C. *The Politics of Piracy: Intellectual Property in Contemporary China*. (Cornell University Press, 2005), 8.

¹² Cheung, *Intellectual Property Rights in China*, 33.

could harm economic and social stability.¹³ Overpopulation was such a serious concern that central authorities turned to highly controversial and intrusive One Child Policy to prevent national collapse in the future. Similarly, the SARS outbreak threatened China's newly adopted economic reforms and had to be handled properly to show China as a rising power.¹⁴

Culture and Enforcement

To understand the difficulties of IPR enforcement, scholars have studied the historical culture surrounding IP theft. Chinese argument against stringent IPR have come from the traditional philosophy of Confucianism, where students are encouraged to copy works of Masters. While the Communist Revolution threw off feudal ways of thought, they believed that IPR was a tool of exploitation¹⁵ and knowledge was a property of the State and people. An argument against ingrained Confucian doctrine came from violence against the Qing government in Guandong Province. The violence is thought to have resulted from the Qing dynasty's lack of respect for economic institution and property rights.¹⁶ However, drawing upon the multitudes of Chinese peasant rebellions and violence, I find it hard to accept the conclusion that Buoye draws. While it is certainly possible that violent disputes and economy change were linked, the extent where property rights rather than the lack of resources (food in particular) were the impetus for violence seems a bit far-fetched. But perhaps these scholars were mistaken in studying historical culture in the first place. After all, the top five most egregious violators of IPR are Taiwan, Mexico, Korea, Brazil, and China.¹⁷ In addition, during their rise to wealth and power, the

¹³ Mertha, *The Politics of Piracy*, 226.

¹⁴ Mertha, *The Politics of Piracy*, 226.

¹⁵ Cheung, *Intellectual Property Rights in China*, 21.

¹⁶ Buoye, Thomas. *Manslaughter, Markets, and Moral Economy: Violent Disputes over Property Rights in Eighteenth Century China*. (Cambridge; New York: Cambridge University Press, 2000), 220.

¹⁷ Cheung, *Intellectual Property Rights in China*, 27.

United States was one of the most notorious pirate nations in the world.¹⁸ As we can see, there is no particular cultural correlation that can be attributed to all these nations. Taiwan and Korea are no longer true developing nations, but still heavily infringes on IPR. While both are traditionally Confucian cultures, the addition of Brazil and Mexico makes that distinction rather meaningless.

The more important study of culture is perhaps the current culture behind IPR enforcement and judicial rulings. As China becomes even more important to the world economy, foreign powers, especially the United States, have been desperate in trying to nudge China to adopt stringent IPR. Among the first step is to educate and train a judiciary system in IPR legal protection. While there are plenty of excellent judges in China, legal ambiguity and lack of knowledge can have severe consequences on enforcement of IPR. A rather amusing case is shown where a Chinese automotive maker, Shuanghuan, blatantly copied three famous car designs, but won a lawsuit in a Chinese local court.¹⁹ While cases like these are relatively rare, when offending parties are brought to judgement, the punishment is quite light. For example, when a Chinese company allowed the illegal download of music from the Warner Music Group, they were only fined 15,000 yuan. While the Chinese company was fined, the low penalty serves more as encouragement rather than a deterrent.²⁰ If we believe in the theory of IPR, then infringement of IPR ultimately hurts the world's welfare and should be prosecuted heavily with harsh fines and prison sentences.

Enforcement of IPR in China is extremely difficult and, not for the lack of trying, have not been particularly successful. Having established strong legal IPR standards due to outside pressure, opponents of China have often accused the Chinese government of reluctance in

¹⁸ Kal, and Sprigman, *Fake it Till You Make It*, 29.

¹⁹ Luo, Sun, Wang, *Emerging Economy Copycats*, 46.

²⁰ Cheung, *Intellectual Property Rights in China*, 77.

enforcing these laws. However, there is evidence that, although ineffective, there is actually a high volume of enforcement.²¹ Of these agencies, only a few organizations end up being effective at their duty. The theory behind the basis of effective enforcements are three things: consistency, transparency, and procedural fairness.²² Consistency provides dependable mode of rules that people can depend on, transparency allows for investigation into corruption, and procedural fairness creates an atmosphere of legitimacy and invites compliance. The first tenet, consistency, is already challenged due to the nature of Chinese IPR enforcement. In accordance to foreign demands, even more Chinese bureaucratic apparatuses were created in addition to already existing agencies, causing multiple agencies with overlapping jurisdictions and bureaucratic competition.²³ In fact, as of 2004, the tally of China's baffling number of enforcements agencies stands at twelve.²⁴ As expected, IPR standards from each agency differed and sometimes even ran counter to IPR protection.²⁵ The logical solution would be consolidate and set clearly defined roles for each agency, but foreign demands for immediate and visible acts of enforcement often prevent such a course.²⁶ These high profiled acts of IPR enforcement, generally referred to as "campaign-style" enforcement, tend to flood enforcement personnel into areas infested with counterfeiting and piracy operations. The resource and personnel requirements in launching such campaigns prevents central authority from consolidating and combining agencies together. In addition to costing a significant amount of resources, they are also quite ineffective, with the counterfeiters simply moving their operations to the next

²¹Dimitrov, Martin K. *Piracy and the State: The Politics of Intellectual Property Rights in China*. (New York; Cambridge University Press, 2009), 5.

²² Dimitrov, *Piracy and the State*, 6.

²³ *Ibid.*, 22.

²⁴ *Ibid.*, 116.

²⁵ Mertha, *The Politics of Piracy*, 15.

²⁶ Dimitrov, *Piracy and the State*, 271.

village.²⁷ This example shows how too much external pressure can be extremely detrimental to IPR protection.

The few agencies capable of effective enforcements were created relatively recently and are under the authority of the central government.²⁸ One of such agencies, the State Intellectual Property Office (SIPO), has exclusive jurisdiction in patent administrative enforcement and follow comprehensible procedures. These conditions, along with SIPO's concentration on areas of exclusive jurisdictions allows it to be among the few capable IPR protection agency. In addition, specialized tribunals dealing solely in IPR have been given central support and staffed with the best available judicial talents, creating another effective form of IPR protection. More impressively, the creation of these tribunals was a domestic decision and not influenced by foreign demands. This suggests that the development of rationalized enforcement can occur without the meddling of foreign powers.²⁹

Conclusion

In conclusion, even though IP theft and piracy has benefitted the Chinese economy, there are steps being taken to punish excesses and promote IPR. While foreign pressure is important in forcing the Chinese government in adopting IPR protection, excess pressure can be counterproductive and prevent the establishment of effective enforcement. While these steps may not necessarily be satisfactory at the moment, the Chinese government is taking the protection of IPR very seriously and it is quite possible that China's course will eventually parallel the United States'.

²⁷ Dimitrov, *Piracy and the State*, 5.

²⁸ *Ibid.*, 21.

²⁹ *Ibid.*, 108.

On a more personal note, unlike IPR proponents, I do not believe that IPR infringement is necessarily bad for innovation and society. Although inventors should be rewarded for their ingenuity, IPR infringement generally delays innovation rather than skips it entirely. IPR also does not always protect inventors, but rather the corporation they currently work for. While an inventor may come up with a brilliant and original idea or product, due to work contracts, it is usually the company they work for that takes the reward and credit. Also, as someone who takes interest in military conflicts, the argument for stringent IPR leaves a lot to be desired. In conflicts, there are plenty of instances where a faction learns another's war machine or formation and incorporates these into their own army. Napoleon's innovative form of organization and usage of the cannon comes to mind. Seeing his success, the armies of Europe tweaked and adopted after the French model and ultimately defeated them. In this example, copying is the ultimate form of flattery and competition. In an era with massive conflict, factions unable to innovate will eventually be defeated by those most capable of copying and adapting. To be honest, no economic model should ever follow this form of competition since it usually leaves all but the most brilliant innovators in the dust, but proponents of stringent IPR usually twists competition to benefit large corporations rather than small firms. It is here where innovation suffers under the oppressive weight of those with more resources to spare.

Bibliography

-Buranen, Lise, and Alice Myers Roy. *Perspectives on Plagiarism and Intellectual Property in a Postmodern World*. Albany; State University of New York Press, 1999.

-Buoye, Thomas. *Manslaughter, Markets, and Moral Economy: Violent Disputes over Property Rights in Eighteenth Century China*. Cambridge; New York: Cambridge University Press, 2000.

-Cheung, Gordon C.K. *Intellectual Property Rights in China: Politics of Piracy, Trade and Protection*. London; New York; Routledge, 2009.

-Crane, Keith, Jill E. Luoto, Scott Warren Harold, David Yang, Samuel K. Berkowitz, and Xiao Wang. "The Role of Foreign Companies in China's Commercial Aircraft Manufacturing Industry." In *The Effectiveness of China's Industrial Policies in Commercial Aviation Manufacturing*, 35-44. SANTA MONICA, CA; WASHINGTON, DC; PITTSBURGH, PA; NEW ORLEANS, LA; JACKSON, MS; BOSTON, MA; CAMBRIDGE, UK; BRUSSELS, BE: RAND Corporation, 2014. <http://www.jstor.org.proxy-bc.researchport.umd.edu/stable/10.7249/j.ctt6wq85j.11>.

-Dimitrov, Martin K. *Piracy and the State: The Politics of Intellectual Property Rights in China*. New York; Cambridge University Press, 2009.

-Luo, Yadong, Jinyun Sun, and Stephanie Lu Wang. "Emerging Economy Copycats: Capability, Environment, and Strategy." *Academy of Management Perspectives* 25, no. 2 (2011): 37-56. <http://www.jstor.org.proxy-bc.researchport.umd.edu/stable/23045064>.

-Mertha, Andrew C. *The Politics of Piracy: Intellectual Property in Contemporary China*. Cornell University Press, 2005.

-Raustiala, Kal, and Christopher Sprigman. "Fake It Till You Make It: The Good News About China's Knockoff Economy." *Foreign Affairs* 92, no. 4 (2013): 25-30. <http://www.jstor.org.proxy-bc.researchport.umd.edu/stable/23526905>.

-Raustiala, Kal, Christopher Sprigman, and Steven Tepp. "How to Copy Right: Is Piracy Productive?" *Foreign Affairs* 92, no. 6 (2013): 167-70. <http://www.jstor.org.proxy-bc.researchport.umd.edu/stable/23527024>.