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Norms and Property in the Middle Kingdom

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Thank you. It’s a pleasure to be here. And thank you for coming out on this rainy weekend. I’m going to talk in abstractions in some of what follows, so in order to get our feet planted firmly on the ground, let me begin with three stories of modern China.

The first concerns Ms. Li. In the Haidian district of Beijing on the streets adjacent to Beijing University, Ms. Li runs a business. She has an old 42-gallon oil drum, you know the kind, in which she makes a charcoal fire, and on top of the drum she bakes sweet potatoes which she buys in quantity at nearby free-markets where farmers come to sell surplus production to the highest bidder. As it turns out, sweet potatoes are hot in Beijing, and Ms. Li has done very well. She expanded her business, hired help, bought more oil drums, potatoes and fuel. While she has no work unit and so lacks the benefits typically conferred by a unit—a job, housing, education, medical care, child care, subsidies for food, fuel, transportation, and so on—the joke used to be that, standing out in the cold, wearing her drab green somewhat threadbare People’s Liberation Army overcoat and hawking sweet potatoes, she made more money—a great deal more—than the president of Beijing University. In fact, she has even bought a car and her own apartment on the private housing market. When she eats out, she likes to go to Kentucky Fried Chicken restaurants, partly because they have a foreign mystique. Her favorite is the world’s largest, on the perimeter of Tiananmen Square just adjacent to Mao Zedong’s Mausoleum.

The second story is about Mr. Hu. Educated at Qinghua, one of China’s leading institutions of higher education in technical subjects, Hu is a successful Chinese entrepreneur and inventor. He invented a special way to enter Chinese characters into computers, and secured a Chinese patent for the invention. Sadly, however, Hu’s invention was pirated by a Beijing-based Chinese firm called Chinatech Trading Company. But this was not the end of the story. Hu proceeded to sue Chinatech in Beijing Intellectual Property Court, where he eventually won a judgment against Chinatech and

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was awarded US$60,000 in damages.

The third story, perhaps embellished in unimportant ways after extensive retelling, concerns a former foreign trade negotiator and a Chinese street vendor named Zhang. By day, Mr. Zhang did a brisk business on the busier shopping avenues of Beijing selling copies of pirated foreign movies, compact discs and computer software. By night he worked in the production end of piracy, helping to churn out new supplies in an underground factory. The foreign official was in Beijing at a negotiating session with his Chinese counterparts attempting to secure Chinese compliance with recent bilateral intellectual property agreements. When faced with insistent Chinese claims that the PRC had met all of its obligations under the agreements and that piracy of foreign intellectual property essentially no longer existed in China, the frustrated negotiator excused himself, went to a nearby street corner and purchased from Zhang an armful of pirated goods, including CDs by Madonna and Eric Clapton; video cassettes of The Lion King and Terminator II; and copies of Microsoft Office on CD-ROM. The official brought his bounty back to the negotiating table and presented it as the next item on the agenda. Thus, we have Ms. Li, Mr. Hu and Mr. Zhang, buying and selling property, and otherwise exercising, defending and infringing rights in such property. We shall meet these very important Chinese economic actors again in due course.

Any discussion of intellectual property in Asia would be remiss without some mention of China. This is not because China is a significant consumer of intellectual property ("IP"), though it is that; nor is it because China is a significant producer, though it is that as well. Rather, it is because China is, in fact, the leading pirate of intellectual property in the world today. It was not always so. Only a decade ago we would likely not have been making this same point, indeed, we would likely not even have been discussing China at such a symposium. Today, however, Chinese piracy of U.S. intellectual property, not to mention that of Japan, Europe and other large producers, has climbed steadily and dramatically, even after the U.S. and China signed two very substantial agreements designed to safeguard rights in such property in 1992 and 1995.1 For example, according to industry estimates, the value of U.S. property pirated by Chinese entities in copyright categories alone rose dramatically from US$400 million in 1992,2 to US$866 million in 1994,3 and mushroomed to

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2 INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, 1993 SPECIAL 301 SUBMISSION (1993).

US$2.309 billion in 1996.4

I want to speak today about the modern roots of intellectual property and piracy in China, beginning with some of the socio-economic reforms that have remade the country right down to its foundations in the last two decades. As is well-known, the reforms have been extraordinary and their results breathtaking. Equally well-known is that the policies of China's very recently deceased paramount leader, Deng Xiaoping, have been directly responsible for the reforms and much of their success.5 Passing by airport newsstands on the way to Madison yesterday, one had to be impressed but hardly surprised by the number of magazines featuring Deng's likeness on the cover. Any discussion of property reform in modern China, intellectual or otherwise, must naturally begin with some account of Deng's role in shaping it. In this connection, given the broad and largely non-Chinese backgrounds of those in our audience this morning--with interests ranging from South to Southeast and East Asia--I want to use a broad brush to sketch some highlights of China's reforms, before observing some ways in which they are connected to contemporary Chinese social norms and attitudes toward property and piracy. With a little luck, by the end of the day we will be better able understand the dynamics of IP piracy in China and how it might be diminished. My view can be simply put. While reform of China's intellectual property laws has been extensive, law reform alone has not and will not curb piracy significantly. However, law reform coupled with well-developed changes in intellectual property norms may well succeed where law simpliciter has not. Thus, inasmuch as Deng's reforms have begun to lead to important changes in Chinese social norms, including rudimentary changes in intellectual property norms, any social, economic, or other measures which inspire, enhance or accelerate such norm changes, may lead to significantly diminished levels of piracy.

II.

First, then, a few words about and in memory of Deng Xiaoping. While the great thaw in Sino-American relations began, of course, with Richard Nixon's historic visit to the Middle Kingdom in 1972,6 the normalization of relations occurred six years later in 1978 during the Carter

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4 INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, 1997 SPECIAL 301 SUBMISSION (1997).
5 Deng's death was reported by Chinese authorities on February 19, 1997, ten days before the present Symposium. See Deng Xiaoping Passes Away, XINHUA NEWS AGENCY, No. 0219013, February 19, 1997, and Seth Faison, Deng Xiaoping, Architect of Modern China, Dies at 92, N.Y. TIMES, February 20, 1997 at A1.
administration, and the first modern Sino-American agreement covering intellectual property rights ("IPRs") dated from the 1979 U.S.-China Agreement on Trade Relations. But that trade agreement was only partly concerned with intellectual property, and was in fact only coincident with the seminal event which led to sweeping changes on the Chinese intellectual property frontier.

That event was the political rehabilitation and rise to political pre-eminence of Deng, and his initiation in 1978 of the first of many far-reaching economic reforms which in the course of the last twenty years have profoundly altered China's internal socio-economic architecture and its external place among leading nations, including of late leading trading nations of the world. Of necessity, the reforms reworked much of the political and ideological foundation poured by Mao Zedong. How do the Chinese people view that reworking? I am reminded of the day in 1989 when I stood on the beautiful lawn in front of the Beijing University Library, gazing at the detritus of a broken pedestal upon which a large concrete statue of Mao had earlier been mounted. This particular Mao statue had been recently removed, and when I inquired about the reasons for the removal, I was told by a poker-faced Communist Party official that it had been necessitated by "foundation" problems. Whether the official had intended a double entendre, I cannot be sure, though I did note that he also told me Westerners systematically misunderstood the expression "Great Helmsman" which has been commonly used to refer to Mao; the adjective "great" did not refer to skill in guiding the ship of state, he said, but rather to the fact that Mao had become rather rotund in later life.

In any case, the bulk of Chinese today cheerfully acknowledge that Mao's leadership was hardly short of imperfections. Indeed, while it is fair to say that Mao generally is seen as an extraordinarily capable revolutionary whose leadership was indispensable in bringing the Communist Party to power in 1949, his political leadership was at best undistinguished through

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8 See Agreement on Trade Relations, July 7, 1979, United States-China, 31 U.S.T. 4651, T.I.A.S. no. 9630.


1957, and thereafter calamitous right up until his death in 1976. The historical record for that period will certainly mark as his two greatest socio-economic failures The Great Leap Forward and The Cultural Revolution. In an effort to bridge Mao’s successes and the market-oriented reforms which overtook China in his wake, while still acknowledging his shortcomings, the Party officially characterized Mao’s leadership as 70% good and 30% bad.11

By contrast, while history will also record Deng as an important political figure in the 1949 revolution, his greatest success will be seen in his socio-economic vision for China, a vision which largely reversed many of the abysmal failures of his predecessor. Not unreasonably, some may find the origins of that vision in Deng’s early travels to the West. As a teenager, he went to France in the 1920s on a work-study program, and eventually labored full time in various French cities over a period of five years before spending a sixth year studying Marxism in Moscow. We know that his fondness for bridge-playing, French wine, bread and cheese, potatoes, coffee, Western classical music, and European football dated from that period and endured throughout his long life.12 But one suspects that his exposure to Western European ways had pragmatic, policy-oriented effects on his thinking as well, effects which before his ultimate rise to power earned him the appellation "Capitalist Roader" and periodic condemnation, ostracism, and arrest at Mao’s direction.

Mao too had traveled to Moscow, but was ambivalent, to say the least, about foreign influence. In this regard, it is somewhat surprising that in 1956, less than a decade after bringing the People’s Republic into existence atop Tiananmen Gate, Mao opined in his "Talk to Music Workers" that "It's wrong to oppose 'foreign devils' as the Empress Dowager Ci Xi did" and urged that "[w]e should learn from abroad and use what we learn to create things Chinese."13 Ironically, Mao proceeded to throw the nation headlong into a deep and devastating isolation. And only twenty years later did Deng bring that isolation to a determined close. One could,

11 As Fairbank has noted, this was the same proportion of good and bad that Mao had found in Stalin’s leadership. JOHN KING FAIRBANK, CHINA: A NEW HISTORY 408 (1992).
13 Mao Zedong, A Talk to Music Workers 5 (August 24, 1956). In nineteenth and early twentieth century China there was considerable interest in the West and in the Westernization of China. About this trend Mao wrote that "Chinese who then sought progress would read any book containing new knowledge from the West. The number of students sent to Japan, Britain, the United States, France and Germany was amazing. At home, the Imperial Examinations were abolished and . . . every effort was made to learn from the West. In my youth, I too was engaged in such studies." Mao Tse-Tung, On the People’s Democratic Dictatorship, in IV SELECTED WORKS OF MAO TSE-TUNG 411, 412 (1975). "Only modernization could save China, only learning from foreign countries could modernize China. Among the foreign countries, only the Western capitalist countries were then progressive" and "[t]he Chinese in those days regarded Russia as backward." Id. at 413. But by 1949, Mao declared that "Imperialist aggression [had] shattered the fond dreams of the Chinese about learning from the West." Id.
again, reasonably suggest that Deng’s early transnational perspective was forcefully in evidence as he set out to transform and revive China with a policy of "opening to the outside world," almost as if in obedience to Mao’s exhortation of two decades before. The “opening” was based squarely on the belief that China’s economic revival would depend on injections of foreign capital, technology and know-how. To bring those injections about, he launched a long series of well-known reforms, virtually all of which could be collected under the rubric of the so-called Four Modernizations which guided China’s rebuilding effort in the wake of Mao’s death and the end of the Cultural Revolution: Agriculture, Industry, Science and Technology, and Defense.⁴ He arranged for passage of a Foreign Investment Law, sent Chinese students overseas for study, and made a highly publicized tour of the United States himself in 1979. He created Special Economic Zones and Special Coastal Zones designed to attract foreign investment and transfer technology with tax incentives, labor concessions, and other inducements. Perhaps the most celebrated and successful of his many initiatives consisted in the creation of markets in agriculture with the very successful Contract Responsibility System, a scheme which permitted peasants to sell agricultural produce in excess of state quotas in free markets for profit and led to dramatic increases in production. While these and many other reforms did not wholly displace the state-subsidized industries which still account for roughly half of all economic activity, they did eventually pave the way for a robust private sector economy which today includes everything from stock brokers to free-market lawyers, from hairdressers to restauranteurs, from software designers to computer manufacturers, from privately owned grocery stores to privately owned taxis, from for-profit tutors to for-profit medical doctors.

In the most abstract terms we can see that China’s economic reforms began with, and have continued to center around far reaching, if largely de facto, changes in property rights. From a theoretical point of view these changes have extended exclusive ownership rights from the state, which had previously held a virtual monopoly of such rights, to individuals, collectives and even to state organs, such as the People’s Liberation Army and the

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⁴ For some of Deng’s thoughts on these subjects, see Deng Xiaoping, Some Comments on Work in Science and Education. (August 8, 1977), in SELECTED WORKS OF DENG XIAOPING 61 (1984); Deng Xiaoping, Emancipate the Mind Seek Truth from Facts and Unite as One in Looking to the Future (December 13, 1978), in SELECTED WORKS OF DENG XIAOPING 151 (1984). Some Chinese dissidents, most notably Wei Jingsheng, have urged that democracy be seen as a “Fifth Modernization” but, of course, none of the official reforms contemplated or permitted any formal liberalization of political rights. To the contrary, in 1979 Deng issued the so-called Four Cardinal Principles to guide PRC decision making which could be construed as devices designed to silence both Party criticism of the economic reforms and pleas from ‘pro-democracy’ elements for political reform: (1) The Socialist Road, (2) The People’s Democratic Dictatorship, (3) The Leadership of the Communist Party, and (4) Marxism-Leninism-Mao Zedong Thought. Deng Xiaoping, Uphold the Four Cardinal Principles (March 30, 1979), in SELECTED WORKS OF DENG XIAOPING 166 (1984).
Public Security Bureau. They have embraced a liberalization of user-rights, or rights to transform assets; income rights or rights to earn income from assets and contract over terms; and, to an extent, transfer rights or rights to transfer permanently ownership rights of an asset. Of course, it is the exercise of precisely these novel property rights which we see exemplified in the actions of Ms. Li, Mr. Hu and Mr. Zhang, our three thoroughly modern Pekinese entrepreneurs. To be sure, they are in different lines of work insofar as one sells potatoes, another creates and prospers from intellectual property and the third sells such property illegally, but at one very basic level these are irrelevant differences. The significant similarity which binds their activities is that they all are exploiting property rights, including intellectual property rights, made possible directly by Deng's reforms.

Deng fashioned himself a pragmatist. He cared about results, and sought to improve the lot in life—to maximize the well-being—of the greatest number, with little regard for names or labels or theories. Where his economic reforms looked an awful lot like capitalism to many observers, foreign and domestic, Deng was happy enough with the vague description "Socialism with Chinese Characteristics". Where Mao, the ideologue, achieved disastrous economic results with such slogans as "Put politics in command" and "Red not expert," Deng, the pragmatist, achieved dazzling if uneven results with such declarations as "It doesn't matter if we put profits in command a bit," and "I don't know anything about economics, but I know a good economy when I see one," as well as the oft-quoted "To get rich is glorious," "Seek truth from facts" and "It's no matter whether a cat is black or white, as long as it catches mice."}

III.

Having observed that Chinese citizens now enjoy a breathtaking range of new property rights under Deng's reforms, let us now turn to consider some of the connections between those rights, social norms, and

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15 Indeed, under Deng's guidance China made extraordinary gains: between 1980 and 1995, the Gross National Product quadrupled from RMB 452 billion to an inflation-adjusted RMB 1,913 billion. The total contracted foreign investment through 1995 rose to US$395 billion, and actual funds invested were US$135 billion, while more than 258,000 foreign-invested enterprises were registered with Chinese authorities. China Country Commercial Guide 1996-97, U.S. DEP'T OF STATE (1997). Exports had been a modest US$5.5 billion in 1975; but by 1995 they had swollen dramatically to US$148.8 billion. People's Republic of China - Economy, U.S. CENTRAL INTELLIGENCE AGENCY COUNTRY REPORTS (Internet Edition) (1997). Since 1978, the poverty rate has declined 60% as 170 million of 270 million Chinese in great poverty were raised above the poverty threshold, and infant mortality declined from 48 to 35 per 1,000 live births. China - Economic Background, WORLD BANK CHINA REPORT (1997).
intellectual property piracy. Among the leading industrialized nations, IP piracy in China tends to be seen narrowly as a problem of foreign rights holders because so much piracy is effectively targeted at their nominally protected property. This is a mistake. Chinese rights holders, such as Mr. Hu, are just as vulnerable to Chinese pirates as foreign traders if not more so, and they therefore have a great deal of incentive to do what they can to enhance efforts to enforce those rights. This incentive must be the linchpin of any U.S. policy aimed at successfully curbing piracy and enforcing IPRs in China.

Given the evident fact that piracy in China is still so extensive, one wants to know what a rights holder, Chinese or foreign, can do about it, how, if at all, can one protect one's IPRs. What Mr. Hu did was to take advantage of the recent introduction of Western-style rule of law institutions in China by pursuing a complaint against his infringer in intellectual property court. Thanks in large part to the coercive pressure brought by foreign governments on behalf of rights holders, especially pressure brought by the United States, there is now a quite substantial system of such specialized IP courts and a web of Chinese domestic law which in theory offers considerable protection to Chinese citizens such as Mr. Hu, as well as foreign entities, such as Disney and Microsoft, who have suffered substantial losses at the hands of China's sophisticated pirates. Hu, Microsoft and Disney have brought successful claims in those IP courts, but the judicial system is in its infancy and as such has very many shortcomings which one hopes will be ironed out in the fullness of time. I, for one, am confident they will be.

But however well-developed the procedural machinery of litigation becomes in China, it cannot stand alone in the resolution of IPR disputes; it must be complemented by other socio-cultural changes. I now want to discuss just one of those, namely, changes in social norms. To begin with, how do we go about discussing the problem of IP piracy in terms of norms? The word "norm" is a bit slippery because it means different things in different settings to different people. As I am using it, the expression 'norm' refers to a standard of guidance for conduct or behavior, as in the statements "You should not take the property of another without permission," "No one may eat sweet potatoes after six o'clock," and

16 Through 1996, China had established 18 such courts.
"Children are not to address their own parents by their first names." Norms are used in effect to make prescriptions or prescribe action and are typically stated or can be paraphrased in sentences using verbs such as "should", "ought", "may", "must" or other expressions of obligation, prohibition or permission. Typically norms are associated with a particular source of authority which creates, issues, conveys or manages the norm; thus, one can have legal or moral authority, cultural or family or community authority, and so on.

By virtue of such prescriptive character and authoritative weight, norms in a sense control, for example, table manners, personal hygiene, and fashion. They determine what counts as polite social discourse and what will make one refined, pedestrian or boorish. They tell one how to ask a question of a stranger, a child or a spouse, how to maintain an acceptable distance with an interlocutor, and how to answer an inquiry without saying too much or too little. They shape dating and intimate behavior. They will characterize interaction with co-workers as overly friendly, stand-offish, high-handed, helpful, aggressive, businesslike or officious. Norms establish standards for selfishness and altruism, generosity and miserliness, devotion and sacrilege. They tell one what to value, what goals to set, what principles to hold firm.

Of course, there may or may not be points of convergence between norms emanating from various authorities, between norms of family and norms of faith, between norms of law and those of community or workplace sub-culture, and so on. It may be, for example, that laws prohibiting certain kinds of pollution dovetail or conflict with the way a given community values the environment; that laws prohibiting theft of property reflect or run counter to community commitments to private property; that statutes banning discrimination on the basis of national origin or race square with or antagonize deeply held values of those who have fought arduous social battles over such statutes. Moreover, the fact of convergence or the lack thereof is linked to another crucial attribute of the norm phenomenon which is transformation. Norms will shift, evolve and change character, sometimes considerably, in time. Norms governing smoking, for example, have shifted quite dramatically in recent years in some countries, as have those governing women's rights, social drinking, consumption of high fat foods, sexual harassment in the workplace, homosexuality, racial discrimination, birth control, child rearing, and sexually transmitted diseases, to name a few.

Finally, let us also say a word about coercive sanctions. Where certain conduct is prescribed, there will typically be a price to pay if the prescription is not followed, that is, where there is a breaking of a rule, a violation of the law, some deviation from a recognized norm. One might describe all such actions as abnormal behavior. Sanctions will vary by norm and type of transgression. Indulging for a moment in a convenient, if partial, taxonomy, one could sort sanctions according to the relationship between
the actor and the origin of the norm. Taking this tack, one might have a
category of, say, antecedently existing norms. What links these norms
together is that one doesn't choose them so much as one is just thrown into
them. Call these Thrown Norms. I include in this category matters of
custom or culture or habit, family values, implied rules of conduct, and other
common practices. We will find here such cultural norms as maintaining a
certain distance when conversing with another, the commercial norm of
refunding the money of unsatisfied customers, family norms such as greeting
family members with a kiss, or moral norms such as always telling the truth
or never taking the property of another without permission. Antecedently
existing norms tend to be widely held and adhered to by members of given
social groups. In cases of breach, the norm tends to be enforced through
such reputation coloring devices as criticism and shaming, and in some
cases through comparatively extreme measures such as corporeal
punishment, ostracism or banishment.

Beyond Thrown Norms, one might also have a category of
Agreement Norms. In this category, by contrast with the first, we find
norms which in some sense one does explicitly and consciously choose.
This category will include, for example, the rule-norms one adopts when
playing a game, or the constraints one adopts by going to work in an
institution with a particular dress code, or required hygiene rituals, or
standards of ethical conduct, customary titles or forms of address. In these
cases, one has a contractual or quasi-contractual relationship with the norm
authority. One who causes a breach in these cases can, as with some
Thrown Norms, be compelled to endure criticism or shame and may even be
expelled from the community, that is, thrown out of the bridge game,
dismissed from the scouts, or fired from the staff of the brokerage or the
restaurant kitchen.

Finally, one would need a category of Legal Norms as well, which
would in some respects be a hybrid of the first two. In legal cases, where for
example statutes are concerned, the norm is created by others--those with
lawmaking authority--in quite explicit ways. In some sense, this is a norm
of agreement, but one is not generally a direct party to that agreement. It
may even have been determined long before one's birth or arrival in a
jurisdiction. Thus, each driver must drive at or below the posted speed
limit; each taxpayer must file and pay tax due on April 15, and so on. But
in the typical case, one will be subject to the norm without ever having
explicitly agreed to it. Since the authority is that of the state, in cases of
breach the state may in theory bring one or more highly coercive sanctions
against an offender, such as fines, imprisonment, torture, dismemberment or
death.

Thus, different forms of enforcement are favored for different
norms. If one breaches a formal contract, one can be sued and may suffer
significant costs; or if one uses the wrong spoon for the soup or the wrong
form of address when meeting dignitaries, one can suffer the indignity of embarrassment and may even be ashamed of one's poor social skills. In general, harsher measures are not necessary to police, deter or punish such norm transgressions. On the other hand, certain other norm breaches—take robbery, burglary, kidnaping, rape, torture or murder, for example—these breaches demand that the full force of the state's coercive power be brought to bear on the wrongdoer. Such extreme measures would be too costly in actions to enforce, say, breaches of etiquette, and other lesser norm breaches; likewise mere expressions of shame or disapproval would be woefully and dangerously inadequate for addressing serious norm breaches in the form of violent criminal acts.

In Deng Xiaoping's China, we have seen that a change in property practices—principally, the creation of free markets in conjunction with the transfer of various ownership rights from the state to individuals—has led to a change in property norms. Where such behavior as private ownership of property was once despised and seen as deviant, it now represents a Legal Norm which has had and will continue to have important effects on Thrown Norms, Agreement Norms and others; not only is private ownership not prohibited, it is actively encouraged. Ms. Li's sweet potato business is emblematic of this change in the agricultural sector; indeed, she could just as easily be the farmer who grows the sweet potato or the wholesale free market distributor who makes it available to retail merchants and street sellers. Mr. Hu with his patented computer system is, of course, Ms. Li's counterpart in the realm of intellectual property, and he could just as easily be producing, distributing to the community and profiting from copyrighted products, trademarked goods, trade secrets and the like. The endeavors of Li and Hu conspicuously represent the dramatic changes in property practices and property norms which have swept the People's Republic in recent years.

But one might well wonder what then of Mr. Zhang with his sidewalk vending of pirated compact discs? What norm does he represent? Isn't he, too, a product of the extraordinary changes in property practices under Deng's reforms? In a certain sense, yes, Mr. Zhang is a product of the reforms: he is an enterprising businessman who happens to be on the wrong side of the law. However, if we see Zhang as a simple thief in violation of ordinary Legal Norms of property, he will have almost as much in common with pre-Deng or pre-communist thieves as post-Deng thieves. And this crude similarity would obscure the possibility that he may represent an altogether different norm from that of the simple property thief, a Thrown Norm not just a Legal Norm, a norm which is different because it authorizes the practice of selling, and of making, copies of products created by another. That Thrown Norm, rooted in common cultural practices, may not even recognize such a thing as an intellectual property right owned by the creator of the work or those who may have 'acquired' the creator's original rights
in the product. This is one version of what we may call the "Cultural Relativity Thesis." The Thesis is an important one which goes to the heart of our most basic property concepts; indeed, one may well find it worth exploring in the context of infringement in some Lesser Developed Countries. However, it is, I think, very important to note that in the course of the long recent history of Sino-American intellectual property negotiations, the Chinese have rather tended to steer clear of these particular, and quite powerful, Cultural Relativity arguments. The Chinese have tended instead to argue not that they have a different conception of property or of rights, but rather that it takes time to create an appropriate Legal Norm, an infrastructure of laws and enforcement devices, and to educate the general population, steps which are, in any society, prerequisites to the effective functioning of a system of such rights. China, it is argued, was stuck in feudalism for so long that it has not had time yet to develop the sophisticated socio-economic and legal concepts associated with IPRs.\(^8\) I realize that for certain purposes, this Chinese argument (which in a culturally clumsy way some call a defensive tack or set of excuses) may amount to yet another variation of the "Cultural Relativity Thesis." But the official Chinese perspective has another feature which is essential for this immediate discussion, namely, it makes clear that the Chinese are willing to make explicit commitments, beyond those embodied in bilateral and multilateral agreements, to protect the intellectual property rights of those who ostensibly hold such rights, whether citizens of China or a foreign state. Having undertaken such commitments though, how do the Chinese enforce such intellectual property rights given the radical changes engineered by Deng? What kind of enforcement is appropriate?

It is easy to see in Ms. Li's case that her sweet potatoes belong to her, and that anyone who dispossesses her of them improperly is a thief; state sanctions for crimes of tangible property are well-established, well-understood, and reasonably effective in China. But the situation for Mr. Zhang, and his confederates in piracy, is, alas, a different one. Even if all parties are willing to call Mr. Zhang's act a crime of theft, and enact a battery of statutes outlawing it as China has done, still the road to enforcement will likely be a long one. There are at least two closely related normative reasons for this. The first is that to a great degree, cultural norms in China presently permit rather than prohibit intellectual property piracy. Call this the generic version of the "Cultural Relativity Thesis." Even a large, dedicated police apparatus and court system in China or anywhere else, cannot effectively combat piracy or any other crime, where the crime does

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\(^8\) See e.g., the analysis of Shen Rongan, Deputy Director of the State Copyright Administration. *China Defends Its Copyright Protection Record*, 1995 BBC Monitoring Service - Far East 1:10, rep'g *RENMIN RIBAO OVERSEAS EDITION*, January 9, 1995, at 3 (explaining widespread piracy in terms of China's feudal, semifeudal and semicolonial history).
not constitute a breach of a widely shared norm. The second is that while economic norms which encourage wealth-maximization or the pursuit of individual well-being (that is, they encourage individual actors to maximize benefits and minimize costs) are increasingly prevalent in China for whatever reason; they have not so far attached to intellectual property rights to a significant degree, notwithstanding the success of Mr. Hu, Disney, Microsoft, and others in protecting such rights in Chinese intellectual property courts.

I want to suggest that the best method for enforcing intellectual property rights at this stage in Chinese development is the enhancement of economic norms which favor Chinese property rights, thus giving Chinese actors a stake in the fate of IPR enforcement. In this way, over the long term, economic norms can, I believe, reshape Thrown Norms. Norms are powerful tools precisely because in effect they do the work of law, and in some respects the power of norms is far more important than the rule of law. A family norm which tells you how to behave at the dinner table is far more powerful than any state sponsored law of manners, precisely because the family norm carries the weight of the family if not the entire local community behind it, with all of the attendant consequences of deviation, such as shame, banishment, etc. In this respect, statutes outlawing piracy, which now abound in China, are hard pressed to be effective without a consistent socio-cultural norm on the ground to back them up. As such norms gain adherents and eventually widespread support, it will of course be in the long term interest of the larger society, and therefore the state, to uphold them and to police defectors from the norm. The greater the Chinese benefit from endorsing and protecting intellectual property rights, the more they will endorse and protect those rights with enthusiasm in the marketplace, the Chinese judiciary, the National People's Congress, and in the counsels of the Party.

IV.

Let me close with a few more words about the economic character of intellectual property which makes this kind of norm-based approach attractive. The most striking economic feature of the problem of IP piracy is that in most cases the original products which are being pirated--movies, books, musical recordings, computer software, pharmaceuticals, well-known brand names--are expensive to create but very inexpensive to copy. A movie might cost its producers US$50 million to make and another US$50

million to market, but making an illicit copy will cost little more than the
price of a blank videotape, a little electricity and a few moments on some
video recording equipment. This is the "public good" aspect of intellectual
property. Once an item of intellectual property is publicly available, it
becomes relatively easy and cheap for users to make copies of it, whether
authorized or not. If such users become retail pirates, like Mr. Zhang with
his illicit compact discs, and begin selling their copies, they can make a
profit simply by selling at a price barely greater than the cost of copying.
The original producer, on the other hand, must recoup the costs of creation
as well as copying, and so must sell the product at a price which covers
those costs, as well as generating a profit.

Thus, there will typically be a considerable gap between the retail
prices of the pirate and legitimate products which will enable the pirate to
capture market share from the legitimate producer. This creates a downward
market pressure which can ultimately reduce retail prices to nearly the cost
of copying. In such a circumstance, the original producer can neither recoup
the costs of creation, nor enjoy a profit. He may also be denied some
measure of other ancillary benefits such as developing relationships with
promoters, distributors and other commercial intermediaries; he may even
suffer additional costs if, for example, his reputation is tarnished when his
firm is erroneously assumed to be the source of inferior pirate products. In
the aggregate, illicit copying creates a powerful disincentive to innovation:
why should I invest money, time and creative energy in a project that is
unlikely to bring net benefits?\textsuperscript{20}

The leading solution to the general problem is the creation in law of
a system of intellectual property rights. These will in theory safeguard
incentives by safeguarding profits and thus promote creativity. But while
systems of such rights prohibit others from making unauthorized copies of
a legitimate owner's work, they are not cost-free. For example, to be
effective they tend to require the creation of a fairly elaborate and expensive
system of administration and enforcement; the Chinese experience is, in
part, evidence of just how burdensome such a project can be. Furthermore,
as the Cultural Relativity Thesis claims in one variation, they grant effective
monopolies. Such monopolies may create significant inefficiencies because
they prevent others from creating new works which use, build upon and

\textsuperscript{20} Even when pirates are likely to copy one's product, there may be other reasons for
the legitimate producer to make the requisite investment in research and introduce the
product into commerce. For example, in some circumstances he may enjoy substantial
benefits just by being first to market: since it takes time to make and distribute illicit copies,
he may have the market to himself for some time, and so may be able to recover a portion
of production costs by charging a high price. Moreover, he may be able to establish a
standard of quality for the product such that when pirate versions do become available, they
will appear to consumers to be of markedly inferior quality and so undesirable.
develop the original. The trade-off between access and monopoly is critically important in the areas of patent and copyright. As Kenneth Dam puts it: "If giving too broad protection today arrests future innovation, then we will not have an optimum rate of innovation over time, and the economy will suffer. This is particularly the case because in the overwhelming majority of instances each innovation builds on past innovations. Each innovator stands on the shoulders of the innovators of the past.... Hence, to obtain an appropriate balance between innovation today and innovation tomorrow, it is essential to allow access." Monopolies or quasi-monopolies in the IP area also keep prices higher and production lower since they outlaw direct competition and weaken incentives to reduce production costs. If a consumer will not pay the going price of the legitimate producer's product, but would pay more than the simple cost of copying, this creates what the economists call a deadweight or social loss. What is needed is the right mix of access and protection, a mix that will encourage creativity and competition while insuring that rights-holders can appropriate the benefits of their labors.

The need for such a well-apportioned mixture is all the more critical in the context of lesser-developed countries with rampant piracy such as China. While new or 'follow-on' creative products, as well as directly competitive products, can only be fashioned where industries exist to support appropriate research, Lesser Developed Countries tend to be lacking in just such industries. They want to develop them, at least in rudimentary or 'infant' forms, and want technology transfer from advanced countries to assist in the process. But lax enforcement of intellectual property rights creates a huge disincentive for advanced industries to invest in, and transfer technology to states which tolerate or even sponsor piracy.

Viewed retrospectively, the past behavior of each Chinese IPR actor can be seen to have been partly a function of the system of costs and benefits in place, or believed by the actor to be in place, at the time the action was performed. Given China's overall record of poor enforcement, the benefits of indulging in piracy seem in the aggregate to have clearly outweighed its costs, and thus established a norm of permission. Viewed prospectively, however, one would be wise to predict that adjustments in available costs and benefits may bring about a commensurate change in the behavior of IPR actors affected by those adjustments. If the costs of piracy rise--if reputational costs and legal bills go up, while income shrinks--reducing net gain to the point at which alternative investments become more profitable, one would expect piracy to decline; correlatively, if the net benefits of IPR ownership and enforcement rise relative to costs, making

IPR investment more profitable than alternative investments, one would expect to see an increase in IPR ownership and enforcement, built upon sturdy new norms prohibiting piracy and encouraging legitimate profit.

Now, from a collective action perspective, the behavior today of Chinese IPR actors vis-à-vis these various economic, legal and cultural norms is proving especially difficult to manage. China is in the middle of a complex transformation from a system of norms which effectively subsidizes piracy and taxes adherence to IPR law and related norms, to one which effectively subsidizes adherence to such law and norms, and taxes piracy. Where the collective adopts the IPR and legal norms of the West, the collective will enjoy substantial benefits over the long term as long as its members adhere to those norms. But for any individual member, the incentives to defect from the norms will be great since the individual who does defect by indulging in piracy will very often be better off in the short term than if he does not. Where defection is widespread, however, the Legal Norms may collapse in deference to socio-cultural norms favoring piracy. Thus, if one wants to sustain the Legal Norms, it will very much in the collective interest to see to it that members are sufficiently monitored and defectors adequately penalized.

Simply put, the upshot is that the Chinese can be expected to enforce IPRs when it is in their economic interest—broadly construed in terms of culture, community, cash income, and so on—to do so. This will be true of the central government, too: over the long term, the costs to the government of creating a system of rights administration and enforcement, will be swallowed by the potentially enormous gains to be had from growing a domestic intellectual property industry. The greater the Chinese stake is in protecting IPRs, and the greater the ability is of Chinese institutions to carry out enforcement work, the greater will be overall IPR enforcement levels. The development in these ways of a Chinese government interest in new IPR norms will generate, willy-nilly, a reasoned reliance on, and a commensurate respect for legal institutions and the rule of law generally. This will promote confidence among foreign intellectual property producers in the Chinese legal system, and increase their willingness to market their products in China and to enter into technology transfer agreements with Chinese partners.

From a planning point of view, to motivate such developments one would theoretically do well to encourage private U.S. industry programs and U.S. government policies that create incentives appropriate to these goals.

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22 Even Deng Xiaoping’s daughter is said to have been furious when she discovered her biography of her father, supra note 12, was being distributed in a Chinese pirate edition. Digital Pirates From China, THE ECONOMIST, Apr. 23, 1994. Like Hu, she too resorted to the Beijing IPR court to stop the piracy of her book. Intellectual Property Protection In China, E. ASIAN EXEC. REP., July 15, 1994.
Such programs and policies would work to increase Chinese ownership of or benefits from IPRs, and facilitate, in ways envisioned by the 1995 Sino-American IPR Agreement, Chinese government enforcement abilities. As for specific methods of enhancing the Chinese stake, U.S. industries could increase their efforts to license their products in the PRC, and to enter into joint ventures with Chinese partners, thus creating incentives for the partners to defend their mutual IPR interests as well as the interests of the partnership generally. At the same time, U.S. industries could provide information, advice and even resources to independent Chinese businesses producing indigenous Chinese products that must themselves fight the competition of Chinese pirates. As regards aid to Chinese government enforcement efforts, since all indications are that the relevant Chinese administrative agencies and their local and regional analogues are short of resources, U.S. government offices and IPR-based businesses would do well to provide them with as much technical, logistical, and personnel support as is practicable. There are, I am happy to report, encouraging signs that programs already underway are good beginnings in this direction.

V.

In conclusion, I would say that while all parties will likely agree that the Chinese have done an admirable job with IPR law reform, for the purposes of solving the long-term problem of enforcement the emphasis going forward should be on norms rather than law. While law may well become increasingly prevalent in Chinese dispute settlement, especially in IPR matters—to the extent necessary there will be more and more successful Chinese litigants like Mr. Hu, alongside successful foreign litigants like Disney and Microsoft—it will, I believe, ultimately be the economic tail that wags the legal dog by transforming norms among the people of the People's Republic. Thank you.

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23 See 1995 Enforcement Agreement, supra note 1.