



Contemporary Chinese Legal System

Dr. Haihong Liu, SISU
Spring Semester, 2016-2017

Week	Date	Topic
1	Feb 23	No Class
2	March 2	Topic 1: Chinese legal system in general-Chinese Legal Culture and Traditions
3	March 9	Topic 1 Chinese legal system in general - Experience of Law in PRC
4	March 16	Topic 2: Chinese Constitutional Law & Rule of Law-Chinese Constitution
5	March 23	Topic 2: Chinese Constitutional Law & Rule of Law-Legal Institutions and the Administration of Justice and Law
6	March 30	Topic 2: Chinese Constitutional Law & Rule of Law-Sources of Law and Law-making
7	April 6	No Class
8	April 13	Topic 3: Chinese laws in operation- public law
9	April 20	Topic 3: Chinese laws in operation-Foreign Investment Law
10	April 27	Internship: Visit the legal department of a multinational company in Shanghai (The time may be changed)
11	May 4	Topic 3: Chinese Laws in Operation – IP Law and Legal Transplant
12	May 11	Topic 4: Dispute Resolutions
13	May 18	Topic 5-Implementation and Enforcement of Law

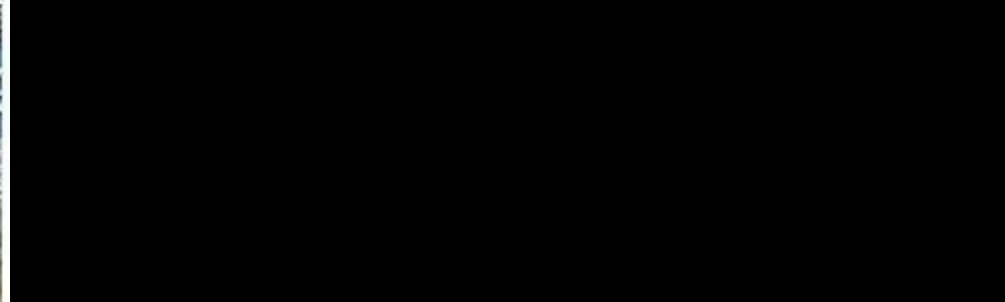
Topic 3 Chinese Laws in Operation: Legal Transplant & Protection of IP in China

What is Your Impression?

Shan
Zhai







假



真



假



返回

商标列表

阿里叔叔

阿里巴巴集团控股有限公司
商标注册申请中

6277675

第9类



阿里伯伯;ALIUNCLE

阿里巴巴集团控股有限公司
商标注册申请中

6277676

第9类



阿里弟弟

阿里巴巴集团控股有限公司
商标注册申请中

6277677

第9类



阿里哥哥

阿里巴巴集团控股有限公司
商标注册申请中

6277678

第9类



阿里兄弟;ALIBROTHER

阿里巴巴集团控股有限公司
商标注册申请中

6277679

第9类



阿里爷爷;ALIGRANDPA

阿里巴巴集团控股有限公司
商标注册申请中

6277680

第9类



阿里奶奶;ALIGRANDMA

阿里巴巴集团控股有限公司
商标注册申请中

6277681

第9类



返回

商标列表

变更商标申请人/注册人名义/地址完成

玉米

小米科技有限责任公司
变更商标申请人/注册人名义/地址完成

10539565

第9类



爆米花

小米科技有限责任公司
变更商标申请人/注册人名义/地址完成

10539632

第9类



米线

小米科技有限责任公司
变更商标申请人/注册人名义/地址完成

10542727

第9类



紫米

小米科技有限责任公司
变更商标申请人/注册人名义/地址完成

10542835

第9类



虾米

小米科技有限责任公司
变更商标申请人/注册人名义/地址完成

10543189

第9类



黑米

小米科技有限责任公司
变更商标申请人/注册人名义/地址完成

10543375

第9类



米粉

10543438



Shanghai Starbucks Co., Ltd. v. Starbucks Corp.
(2006) 沪高民三(知)终字第32号



Any justification?



Balance of Interests



Kieron Dwyer “Consumer Whore” Graphic, 1999

<http://www.illegal-art.org/index.html>

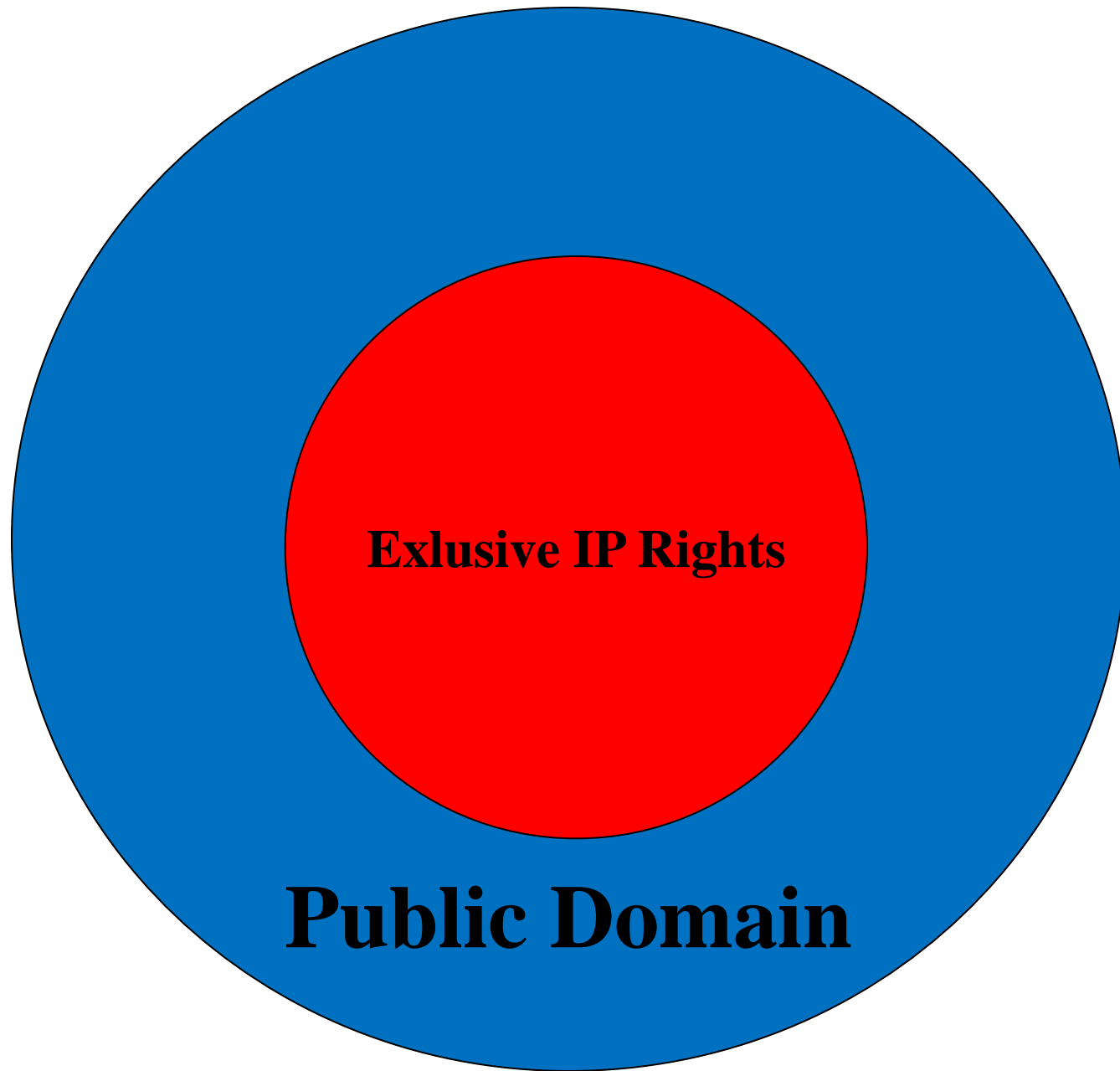
What is IP?



Products of
mind -
intangible

nonrivalrous consumption: one party's use of the good does not interfere with another party's use

nonexcludability – once the good is produced, there's no way to exclude others from enjoying its benefits



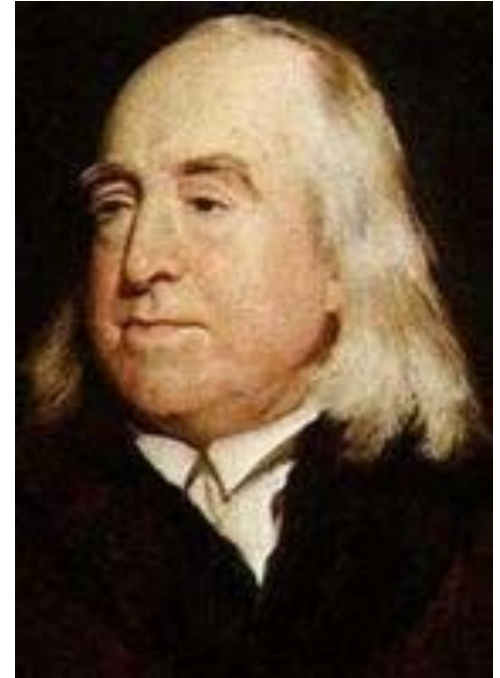
Justification for IP System



John Locke:
Labor theory



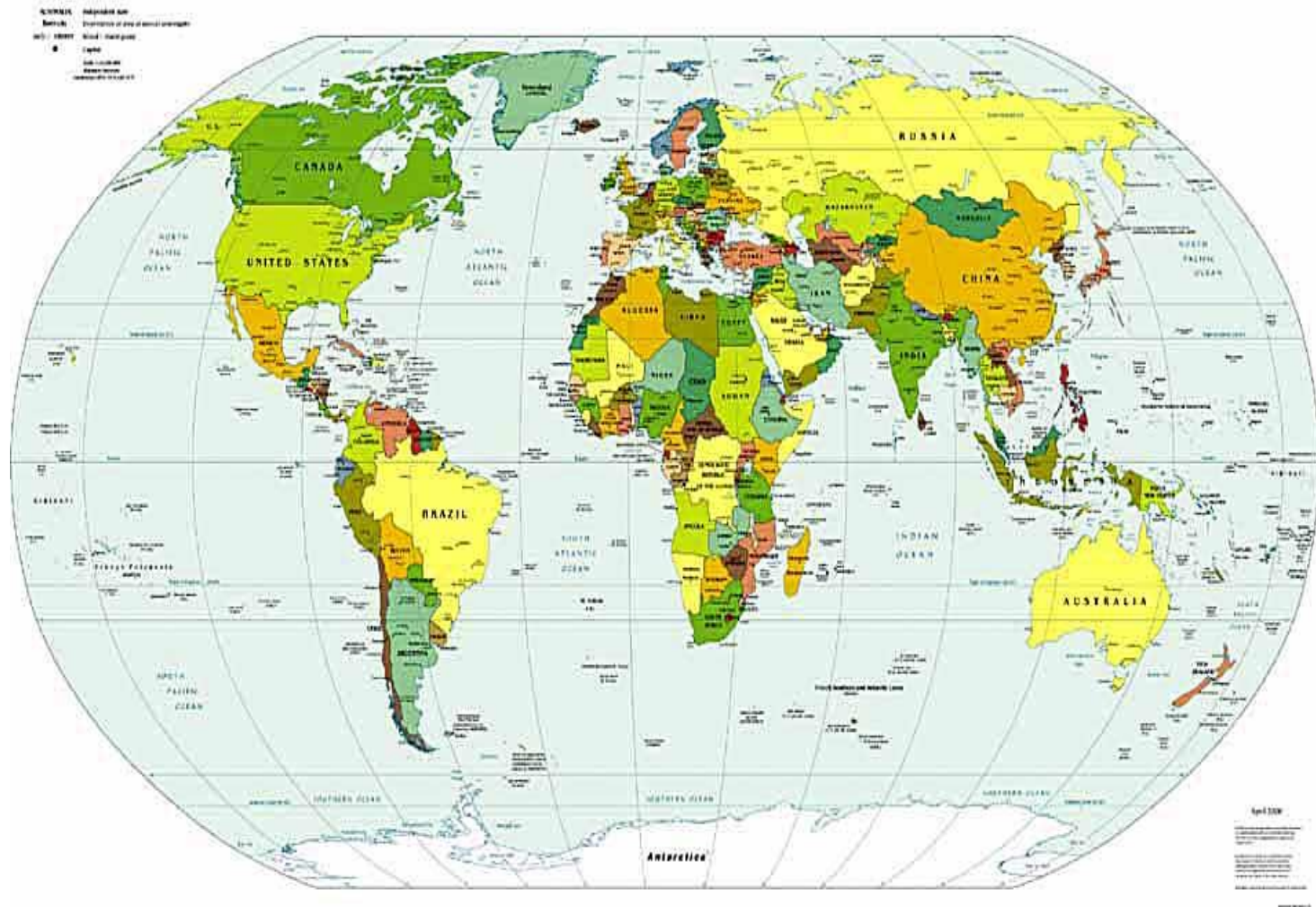
Georg Wilhelm
Friedrich Hegel :
Personhood



Jeremy
Bentham:
Utilitarianism

IP rights are territorial

Political Map of the World, April 2000



Culture Basis for Western IP Legal Regime

1

- Individualism: right-aware citizens

2

- Liberty

3

- Rationalism

Chinese Legal Culture

1

- Collectivism (obligation-aware individual within a family, society)

2

- “Li”(order within family, society)

3

- Inward rationalism

Introduction of IP into China

1898, the first Patent Regulation of Qing Dynasty failed.

1902, 1903 IP clauses in commercial treaties with UK and USA.

1904 “Interim Procedures for Trademark Registration “

1910 “Copyright Law of Qing Dynasty”



The Establishment of the IP System in PR China

Before 1980's, no systematic IP legislation nor IP administrative authorities existed

Argument on whether IP system should be established

- transition from planned economy to market economy
- benefit or harm
- concept of intellectual property

The Establishment of the IP System in PR China



External
Pressure

Legal
instrumentalism

Major Current IP Laws

Patent law

- Put into force on April 1, 1985, amended respectively in 1992 and 2000

Trademark law

- entered into effect on March 1, 1983, amended respectively in 1993, 2001, 2013

Copyright law

- Enforced in 1990, amended in 2001

1993: Anti-Unfair Competition Law

1995: Regulation of Customs on Protection of IPRs

Catalyst for Change: WTO

Good News:

- China has amended its IP laws substantially.
- The TRIPs Agreement keeps China accountable.
- Other WTO Members can use TRIPs as leverage with China

Problems:

- Cutting edge legal issues require further legislation.
- Enforcement of IP laws is still to be improved.

3 Rs for IP Protection

Registration

Recordation

Remedies



Patents



- Must file patent applications with State IP Office (SIPO)**
- SIPO Regional Offices provide administrative enforcement**
- Rights are territorial**
- China is “first to file” country**
- Use of registered patent agent.**

Trademark

- ◆ Must file trademark applications with the Chinese Trademark Office (CTO), which is part of the State Administration for Industry and Commerce (SAIC)
- ◆ CTO is the most active TMO in the world
- ◆ SAIC's local bureaus provide administrative enforcement of trademarks throughout China



Tips for Protecting Your Trademarks

- **China does not grant trademark rights on use without registration (“first-to-file” system)**
- **Do a trademark search**
- **Have the trademark registered in Chinese and English**
- **Secure other rights such as domain names and company names**

Copyright

- Copyright protection is automatic: available for all works upon completion of creation.
- There may still be reasons to register.
 - Registration puts others on notice
 - A registration may help to provide evidence in Chinese court.



Recordation

- You can record your patent, registered trademarks and copyrights with the Chinese Customs office to obtain customs and boarder protection(CBP)
- *This information is recorded (for a fee) and entered into an electronic database accessible by customs officers across the country. The Customs offices use the information to actively monitor shipments and prevent the importation or exportation of infringing goods.*

Trade Secret

- Secret
- Commercial Value

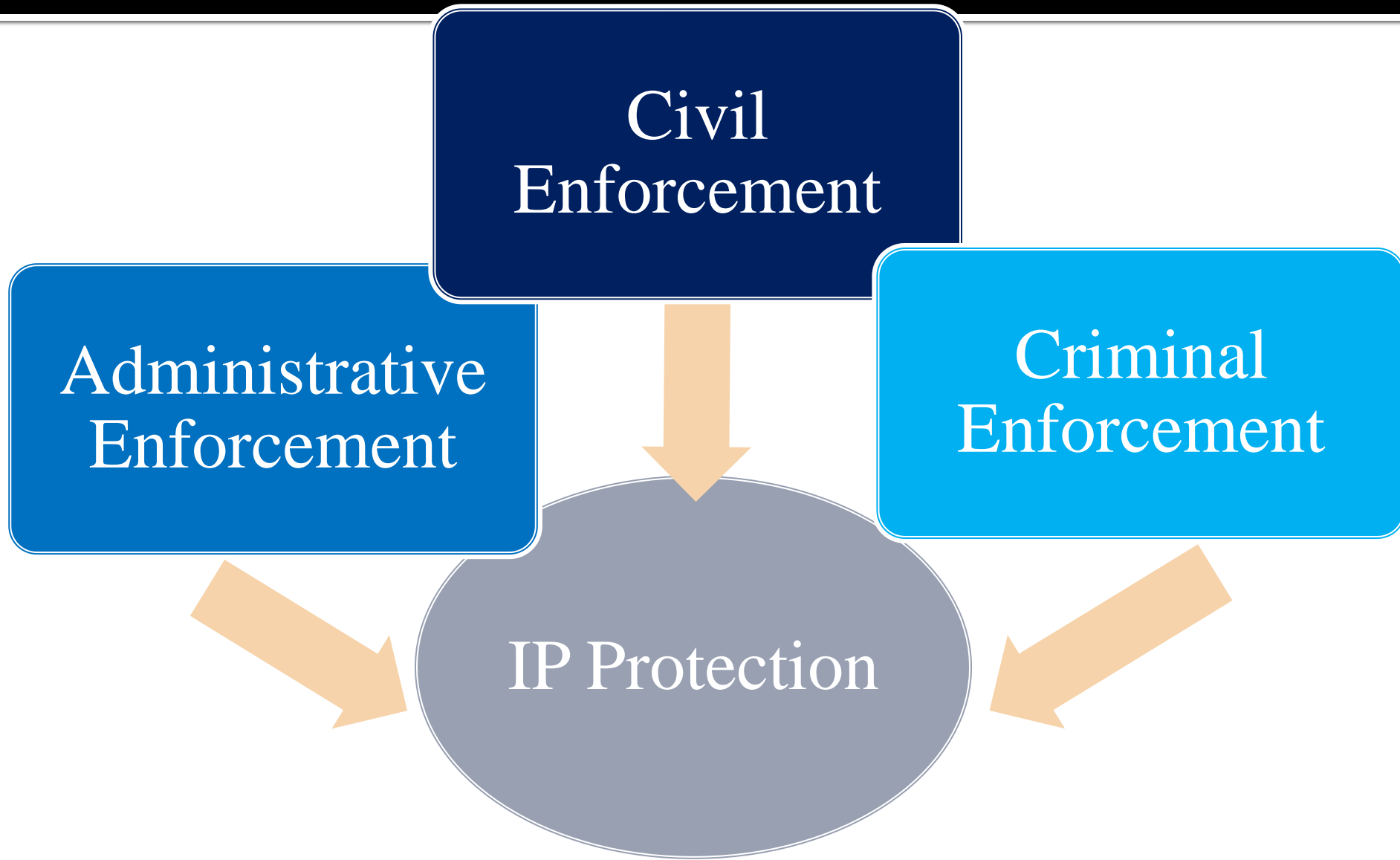


Trade Secret

- Trade secrets do not require registration.
- Principle law regarding trade secrets is “Law to Counter Unfair Competition”
- Principle administrative enforcement agency: Fair Trade Bureau of SAIC.



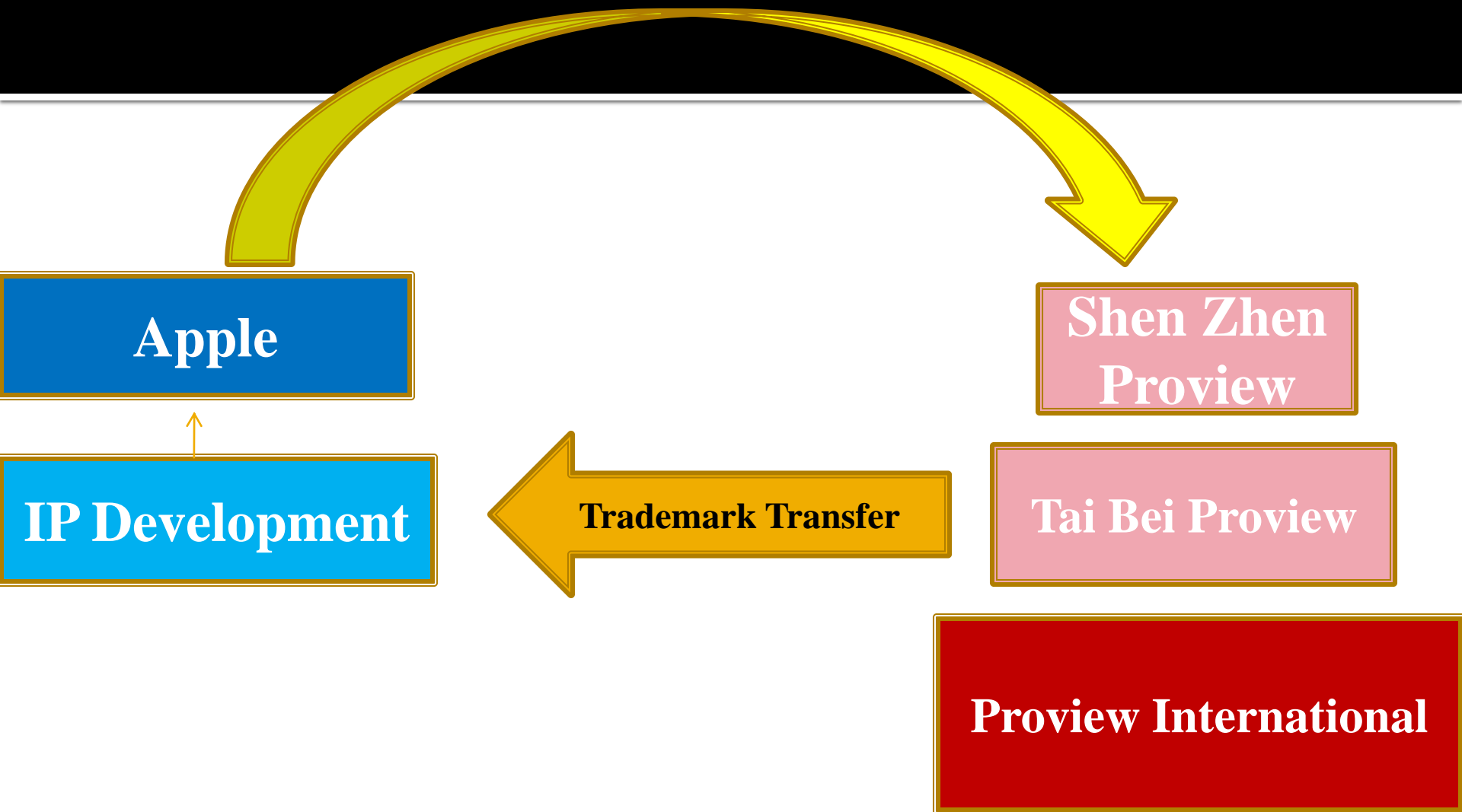
Remedies




IP Strategies for business Due Diligence




Apple vs. Proview



商标的详细信息

注册号/申请号	1590557	国际分类号	9	申请日期	2000-01-10
申请人名称(中文)	唯冠科技(深圳)有限公司		申请人地址(中文)	广东深圳市沙头角保税区21,23北	
申请人名称(英文)			申请人地址(英文)		
		商品/服务列表 计算机;计算机周边设备;显示器(电子);光通讯设备;电视机;收音机;照相机(摄影);电子防盗装置;摄像机;电池; 查看详情信息...	类似群 0901 0907 0908 0909 0920 0922		
初审公告期号	776	注册公告期号	788		
初审公告日期		注册公告日期			
专用权期限	2001年06月21日至2011年06月20日		年		
后期指定日期		国际注册日期			
优先权日期	无	代理人名称	深圳市精英商标事务所		
指定颜色		商标类型	普通商标		
是否共有商标	否	备注			
商标流程	撤销三年不使用 续展 转让				

商标的详细信息

注册号/申请号	7775770	国际分类号	42	申请日期	2009-10-22
申请人名称(中文)	苹果公司		申请人地址(中文)	美国加利福尼亚州库佩蒂诺因芬蒂环道1号	
申请人名称(英文)	APPLE INC.		申请人地址(英文)	1 INFINITE LOOP,CUPERTINO,CALIFORNIA 95014,UNITED STATES OF AMERICA	
		商品/服务列表 工业分析及研究服务;计算机硬件及软件设计;开发;计算机硬件及软件咨询;多媒体和影音软件咨询服务;计算机编程;由全球电脑网络或互联网在线提供计算机硬件及软件的信息 查看详情信息...	类似群 4209 4220		
初审公告期号		注册公告期号			
初审公告日期		注册公告日期			
专用权期限			年		
后期指定日期		国际注册日期			
优先权日期	2009-07-16	代理人名称	北京英特普罗知识产权代理有限公司		
指定颜色		商标类型	普通商标		
是否共有商标	否	备注			
商标流程	驳回复审 转让				

商标的详细信息

注册号/申请号	1590557	国际分类号	9	申请日期	2000-01-10
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申请人名称(中文)	唯冠科技(深圳)有限公司	申请人地址(中文)	广东深圳市沙头角保税区21,23北
申请人名称(英文)		申请人地址(英文)	

商 标 图 像		商 品 / 服 务 列 表	计算机;计算机周边设备;显示器(电子);光通讯设备;电视机;收音机;照相机(摄影);电子防盗装置;摄像机;电池; 查看详细信息 ...	类 似 群	0901 0907 0908 0909 0920 0922
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初审公告期号	776	注册公告期号	788
初审公告日期		注册公告日期	
专用权期限	2001年06月21日 至 2011年06月20日		年

Apple Lost The Suit



Proview sued for injunction



Opinion Poll

iPad

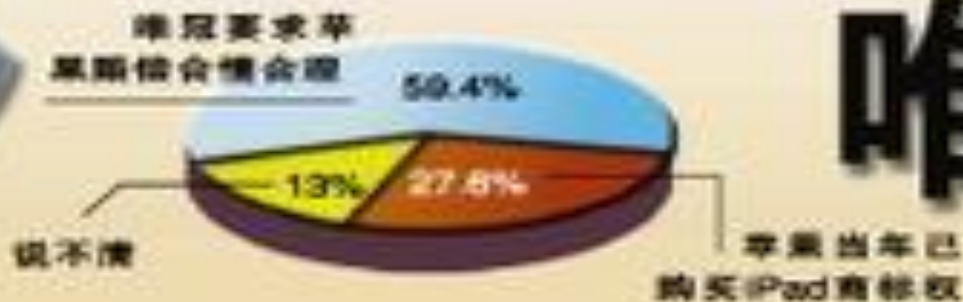
(腾讯网调查)

你认为iPad在华商标权属于谁?



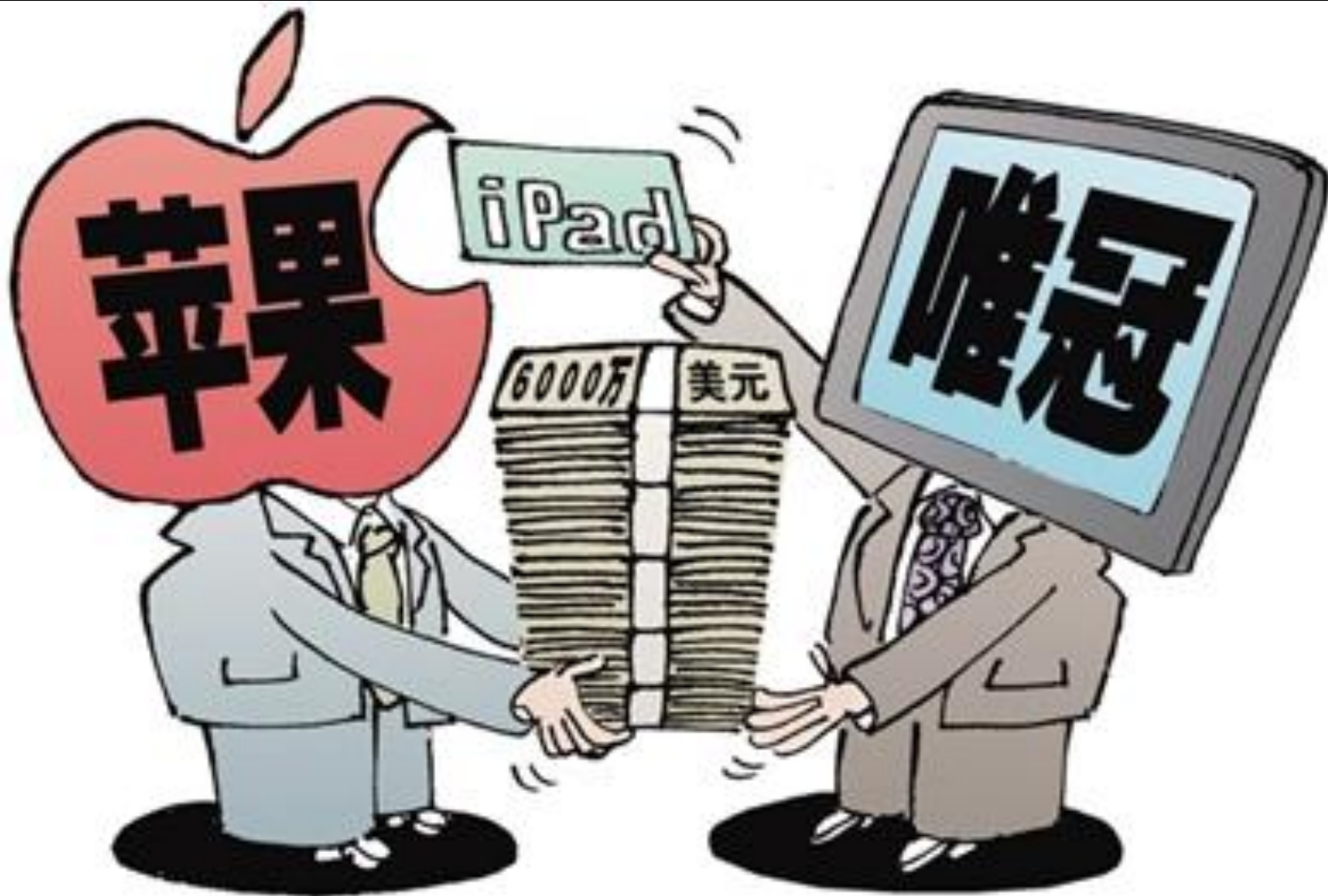
(新浪网调查)

你如何看待苹果唯冠iPad商标权之争?



唯冠

Final Settlement



iPhone Trademark Dispute

2016) 京行终第1630号



Apple:

May 20, 2004: No. 4073735 i-phone & drawing, class 9- telephone, mobile phone, approved on Oct. 7, 2006

Oct. 18, 2002: No. 3339849 I-PHONE & drawing, Class 9- telephone, mobile phone, approved on Nov. 21, 2003

Xintong Tiandi:

Sep. 29, 2007, No. 6304198, Class 18 leather, bags, wallets, leather strings

Opposition by Apple denied by TMO (Reward No. 36529-2012)

Application for review by Apple denied by TRB (Reward No. 135654-2013)

Administrative lawsuit denied by Beijing No 1 Intermediate People's Court

Claim and legal grounds

Art. 13

I. Legal Basis

Art.16 (2) TRIPS

Article 6*bis* of the Paris Convention (1967) shall apply, *mutatis mutandis*, to services. In determining whether a trademark is well-known, Members shall take account of the knowledge of the trademark in the relevant sector of the public, including knowledge in the Member concerned which has been obtained as a result of the promotion of the trademark

- China joined the Paris Convention in 1985
- China began observing the Paris Convention's standards in 1987, but did not include the provision on well-known marks until the amendments in the 2001 Trademark Law.

- In 1996, SAIC the Interim Well-Known Mark Provisions as a framework for administrative determination and well-known mark protection
- In 2003, the Provisions on the Determination and Protection on Well-Known Trade Marks (“WKTM”) replaced the Interim Well-Known Mark Provisions and defined well-known marks as those that are widely known to the relevant public and have a strong reputation within China.

Unregistered Well-known marks

Paragraph 1, Article 13 of 2013 Trademark Law:

“Where a trademark in respect of which the application for registration is filed for use for **identical or similar goods** is a reproduction, imitation or translation of another person's well-known trademark not registered in China and likely to cause confusion, it shall be rejected for registration and prohibited from use.”

Registered Well-known marks

Paragraph 2, Article 13 of 2013 Trademark Law:

“Where a trademark in respect of which the application for registration is filed for use for **non-identical or dissimilar goods** is a reproduction, imitation or translation of the well-known mark of another person that has been registered in China, misleads the public and is likely to create prejudice to the interests of the well-known mark registrant, it shall be rejected for registration and prohibited from use.”

Factors for Establishing well-known marks

Article 14 of 2001 Trademark Law:

Account shall be taken of the following factors in establishment of a well-known mark:

- (1) reputation of the mark to the relevant public;
- (2) time for continued use of the mark;
- (3) consecutive time, extent and geographical area of advertisement of the mark;
- (4) records of protection of the mark as a well-known mark; and
- (5) any other factors relevant to the reputation of the mark.

Trade Mark Authorities

Administrative Authorities:

- (1) TMO: opposition / cancellation (3 year non-use)
- (2) TRAB: appeal / cancellation (well-known mark)
- (3) Local AIC: Infringement

Judicial Authorities:

Local intermediate courts (in hundreds)

Note:

- (1) Court may order damages, while administrative authorities may not;
- (2) Judicial review of well-known mark recognition

Well-known Trademark Protection

- Requirement: Fame in China
- Registered well-known mark:
cross class protection
- Unregistered well-known mark:
same class protection

Fame Limitation for Recognition of Famous Trademark

- China- Only recognize the fame in China
- US – Worldwide fame, not necessarily limited in US
- Need to harmonize the trade mark laws in terms to recognize the famous mark

Process of globalization

Development of Internet connection

International Protection of IP



WIPO

(International)

TRIPS

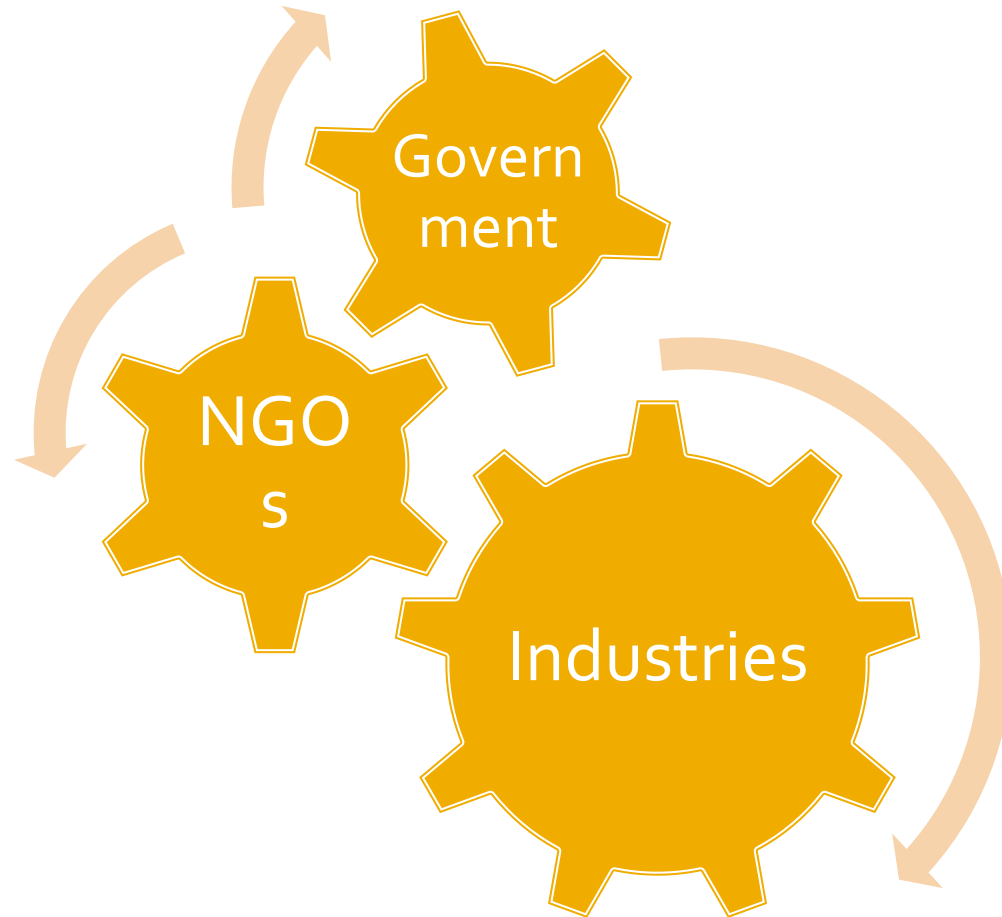
(multinational)

TPP

(bilateral)

Susan K. Sell: Cat And Mouse: Forum-shifting In The Battle Over Intellectual Property Enforcement

Driving Force for International Protection



Susan K. Sell: *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge University Press, 2003; published by China Renmin University Press, 2007)

Further Thinking on “Shan Zhai”

Why Shan Zhai?

Why are some Shan Zhai companies successful?

How to deal with Shan Zhai Companies?

Further Thinking on “Shan Zhai”

“Fearless Experimenter”

Weak policy/regulation

Immature market

Slow response to market change

“Shan Zhai”

From Imitation to Innovation



Tencent
QQ

Successful “Shan Zhai”

An ability to break into a market and establish a significant position quickly

An ability to upgrade core capabilities and migrate up the value chain

Investment in the future

IP Cultural Literacy

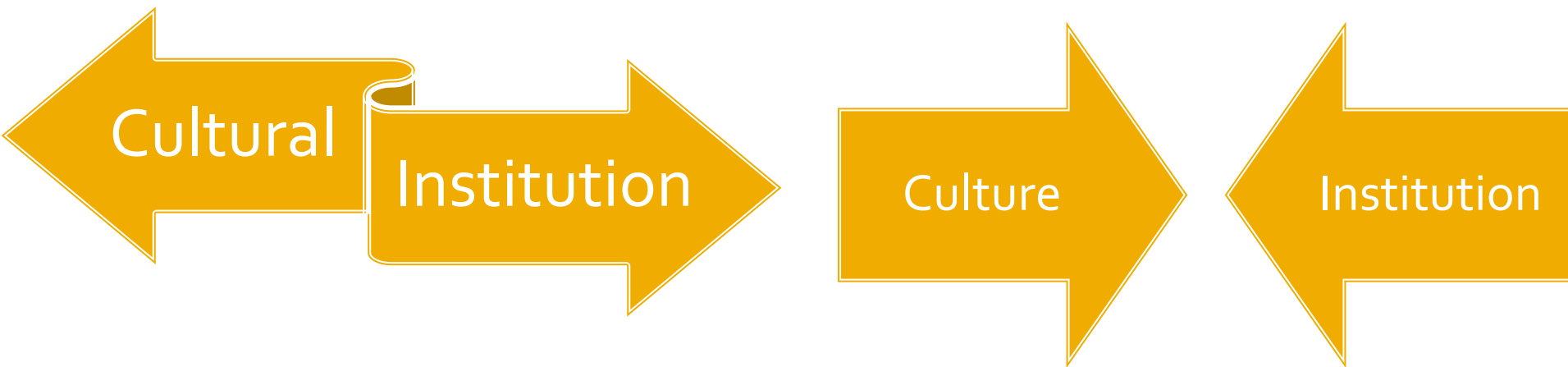
The Survey on Public Cultural Literacy on Intellectual Property in China (2009)

- The overall index of public cultural literacy on intellectual property is 42.1(on 100 scale)

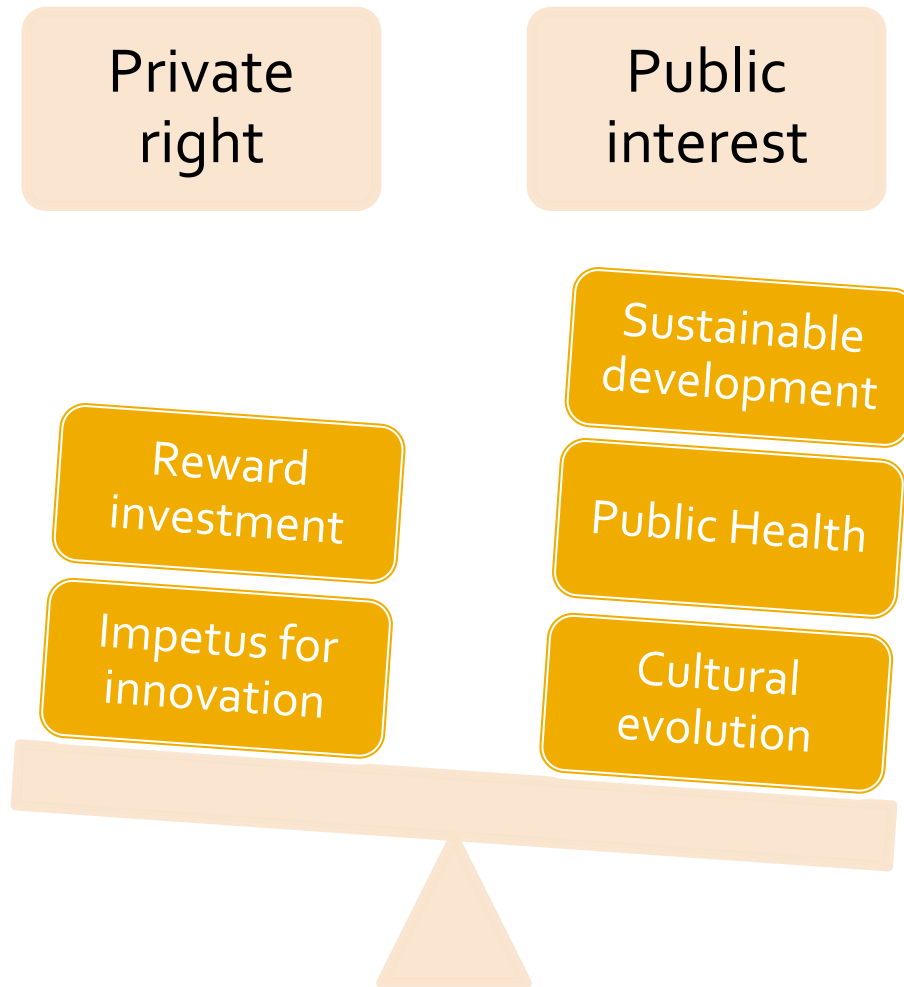
The Evaluation of the Effect of Public Notion for Intellectual Property on the Victimization of Intellectual Property (2007)

- 53.1% of buyers know that the product is an infringing one
- 73.8% of buyers who have bachelor degrees or higher degrees know that the product is infringing product

Solution?



Balance



Balance

