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**THE EVOLUTION OF INTELLECTUAL PROPERTY**

**AND THE PHENOMENON OF THE COUNTERFEITING IN CHINA**

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*The counterfeiting of trademarks and other forms of intellectual property in the People’s Republic of China is now the most serious counterfeiting problem in the history of the world.[[1]](#footnote-1)*

The development of today's notion of intellectual property in the Chinese system dates back to the second half of the 1800s. Although the existence of imperial editorials for the control of publications since the Tang dynasty was known, the text control system was improved during The Song period, with the edict of Emperor Zhengzong, who ordered to submit documents drawn up by private printers and intended for circulation, to the necessary revision of imperial officials, to verify their suitability for publication. Until the advent of Qing Dynasty, the reproduction of documents relating to sensitive subjects such as astronomy and state affairs was reserved for the Imperial Court. The justification for such censorship stringency lies in the teachings of Confucianism, which emphasized the obligation of the sovereign to provide the material and moral well-being of the subjects.

Claimed by foreign companies since the forced opening of various Chinese ports to international trade, the protection of intellectual property was officially incorporated into the clauses of each treaty concluded by foreign powers with the Chinese Empire after the Boxer Rebellion.[[2]](#footnote-2)

The most significant intellectual property right issued during the Qing Dynasty was the *Law on Copyright* in 1910, modeled on the Convection of Bern, which attributed to the author the exclusive right to exploit the economic life of his work for the rest of his life And in the thirty years following the death, contemplating personal rights to the paternity of the work and its integrity.[[3]](#footnote-3)

Following the fall of the Empire, the Government of the Republic of China, opened to the influences of the juridical systems of the day, intervened on the subject of intellectual property, issuing in 1923 the *Rules on Registration and Administration of Trademarks*. These rules recognized the protection of the trademark holder for twenty-year that could be acted upon in court. Foreigners were also allowed to enjoy the protection of their own distinctive signs in China, subject to reciprocity. In 1928, the nationalist government issued a new Copyright *law* that, following some of the solutions adopted in 1910, established a modern system of protection for artistic and literary works, which could be acted upon by the author who had registered his exclusive right to the Ministry of Internal Affairs.

Despite the initiatives undertaken during the nationalist period, the intellectual property protection system was unable to function for two reasons: firstly, being modeled on Western ordinances, it seemed inadequate with regard to the social conditions and Chinese culture of the beginning of 900 , there was also the lack of an appropriate administrative organization to manage the registration system and lack of technical competence of the judiciary. Finally, the repeated internal and international conflicts that crossed the country in the 1930s and 40s naturally made it impossible to consolidate the legislative framework.[[4]](#footnote-4)

Following the founding of the People's Republic of China, the provisions of the Nationalist Government on intellectual property were replaced by regulations inspired by the Soviet model. In the field of technological innovations, the *Provisional Provisions on the Protection of Inventions and Patent Rights* were promulgated in 1950, granting inventors the choice between two safeguard mechanisms. On the basis of the first, the persons concerned could qualify for a certificate to which they received a remuneration in cash, based on the saving of the resources allowed by the invention: the State assumed the right to exploit economic of the innovation for the public interest. Alternatively, the inventor who considered it preferable could obtain a patent, reserving the right to personally implement the economic hunt for the invention. On the other hand, it was for the State to implement the inventions made to the public enterprises, which were related to security or national interest.

In 1950, the State Council of Ministers promulgated *Provisional Provisions for the Registration of Trademarks*: while recognizing the right to exclusive use after registration, the application of these rules was largely ineffective, as doubts as to the remedies available in the event of infringement and Increased interest in the distinctive function of the brand in a communist State.[[5]](#footnote-5)

As far as copyright is concerned, moral rights were granted to the paternity of the work and to the claim of its integrity, and the unauthorized reproduction and alteration of protected works were prohibited.

The repression of anti-socialist tendencies, which characterized the late 1950s, exacerbated the already obvious limitations of the intellectual property protection system. The 60s sanctioned the abandonment of material incentives and exclusive exploitation rights by abolishing the patent right for the inventor, qualifying inventions as national assets freely usable for the public interest. With the Cultural Revolution, every form of protection of intangible rights became less and less: the fixed remuneration for technological innovations ceased and the distinctive function of the brand became irrelevant. Finally, ideological campaigns against intellectuals paralyzed the mechanisms of protecting the author's prerogatives.[[6]](#footnote-6)

With the rise of Deng Xiaoping, the PRC undertook the realization of the project of the "four modernizations", including the scientific and technological sector, national defense, industry and agriculture.

Since 1978, the measures in force prior to the Cultural Revolution were reintroduced in the field of technical innovation and trademarks, and the provisions on the remuneration of authors for artistic and literary works were restored.

In 1980, the PRC joined the World Intellectual Property Organization and adopted the Law on Trademarks and the Patent Law at the level of domestic law. At the beginning of the 1990s, the foundations for the development of an intellectual property rights protection system were laid. The most important factor was the pressure exerted by the US on the basis of the powers conferred on the Trade Representative by the *US Omnibus Trade and Competitiveness Act*: the *Special 301* empowerment authorized the US Trade Representative to initiate an investigation into Of states responsible for widespread violations of intellectual property rights, in order to adopt rational economic measures.[[7]](#footnote-7)

In the 1990s, the use of this mechanism affected Sino-American trade relations, creating a recursive pattern that saw the US threatening the imposition of economic sanctions on Chinese exports, due to the losses suffered for the violations Of Intellectual Property Rights in the affiliate Country. China responded by countering countermeasures on US products, so that the parties, after months of tension, came to an agreeable agreement for both, but not resolving. This cycle led to three rounds of negotiations, marked by the signing of the same intentions: the *Memorandum of Understanding* in 1992, following by the *Agreement Regarding Intellectual Property Right* in 1995, whose commitments were confirmed the following year in a third agreement. With the beginning of the new millennium, the World Trade Organization membership objective was achieved in December 2001, a key development director for the Chinese order in the 1990s. Participation in the WTO has involved adaptation to the rules of the agreement on Trade Related Aspects of Intellectual Property Rights: which recognizes the increasing importance of intellectual property rights for economic development and their relationship with international trade.

Economic development and the progressive rise of high-tech industrial sectors have strengthened awareness of the role of industrial property rights to ensure high levels of growth in the country, which has become an imitator of innovation.[[8]](#footnote-8)

Although public institutions are active in promoting Intellectual Property Rights, through awareness raising initiatives and campaigning to suppress violations in specific areas, serious limits still affect the functioning of the system.

At first approximation, international sources distinguish intellectual property rights violations in *counterfeiting* and *piracy.* The term *piracy* refers to the violation of copyright on artistic and literary works, while for *counterfeiting* is the violation of a registered trademark right.[[9]](#footnote-9)

Under the agreement TRIPS are considered counterfeits: any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validity registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question.

The phenomenon, which affects every product category, is on a global scale.

The Organization for Economic Co-operation and Development estimates that international trafficking in counterfeit goods has reached $ 250 billion in 2007, equivalent to 1.95% of world trade. This assessment is a mere approximation by default, as it refers exclusively to tangible goods trade and does not consider distributing Internet-protected content or internal counterfeiting to individual states. In fact, according to the figures of the International Chamber of Commerce, counterfeit turnover in 2011 amounted to approximately $ 600 billion, or 5% to 7% of world trade. The People's Republic of China is the first producer of counterfeit goods: in 2011, 73% of the items seized by Customs in the European Union were Chinese, like 62% of the items seized by the US Customs and Border Administration.

Despite the initiatives taken by the Chinese Government to protect industrial deprivations, the losses caused to foreign companies in the Asian country have grown steadily in recent years, legitimizing the skepticism of the partners on the effectiveness of the protection scheme.

Despite the participation in the WTO, counterfeiting of counterfeit activities in China is hindered by local protectionism, a term that indicates various forms of public authority tolerance over infringements of industrial property rights.

The phenomenon manifests itself primarily in the corruption of administrative bodies: in this case, counterfeiters urge the officers responsible for protecting trademarks and patents to accept cash payments to be informed of imminent control operations or not to be reported to the authorities of public security.[[10]](#footnote-10)

The same local government authorities demonstrate tolerance to those responsible, as they directly hold shares of privatized companies that carry out or distribute counterfeit products, fueling a considerable amount of service companies.[[11]](#footnote-11)

The distribution network of these products is based on wholesale markets, employing thousands of people, generating profitable profits and contributing to the growth of the surrounding area through tax revenues.[[12]](#footnote-12)

These sites are often the main taxpayers of the municipality and represent the key trading links, as they supply retail centers on national territory and oversee export activities.

International sources point out that the phenomenon of counterfeiting in China is not limited to the most well-known sectors, such as the international fashion brands, but extends to the patented medicinal products traffic, to include consumer goods.

This often leads to the production of goods potentially harmful to consumer health or poor quality, carried out by themselves as a criminal offense.

The areas most affected by trademark or patent infringement in China are: clothing, whose use of improper materials or harmful chemicals in the manufacture of counterfeit products affects the quality of garments and can be harmful to health; accessories and footwear, whose use of poor materials in the production of counterfeit footwear results in the poor quality of the product; food, whose false or misleading indications of the ingredients put at risk the health of consumers; sanitary ware, whose unauthorized production of medical equipment and sanitary products poses serious risks to public health; batteries, whose use of poor quality materials in the manufacture of batteries for consumer products can cause its explosion; consumer electronics, whose use of defective components involves the placing on the market of inferior quality products, with potential risks also for consumer safety; pharmaceuticals, whose overdose or insufficient dose of the active substance in relation to the original drug seriously threatens public health; jewelry and watchmaking, whose use of defective mechanical elements results in the rapid wear of the product; electrical equipment, whose diffusion of counterfeit electrical equipment against safety standards creates a serious danger to the health of the consumer; perfumery and cosmetics, whose the possible use of harmful substances threatens the health of consumers; Cars and motorcycles, whose production of lower spare parts than the original components compromises the safety of the vehicle; tobaccos, whose production of tobacco by unauthorized persons and non-compliance with the law creates extreme health risks to consumers.

The phenomenon of counterfeiting in China is manifested in four models: Firstly, the subcontractor of a foreign company may violate the contractual terms, exceeding the agreed production levels, or by exploiting the skills acquired to continue the production of registered trademark assets or By patented components, following the expiration of the contract.[[13]](#footnote-13)

Secondly, counterfeiting can be carried out by the same employees of the enterprise or former collaborators who take advantage of the skills acquired to start the production of counterfeit goods personally.

In addition, third parties with the appropriate technical skills can realize the faithful reproduction of the original product based on the visual observation of its structure.

Finally, if the foreign company has entrusted the production process to a Chinese partner, there is a risk that the product-eligible specimens, inferior to the qualitative standards, will not be disposed but stored and sold at a lower price.

The distribution of counterfeit goods across the country takes place at wholesale markets that host hundreds of retailers who exhibit such goods directly or hide it in stores, making it available at buyers' request.

The distribution network reaches the major national city centers, forming a triangle that has the tops Guangzhou to the south, Shanghai to the east, and Beijing to the northeast.

Electronic commerce is a powerful vehicle for the spread of counterfeit goods, as it allows the dispatch of modest amounts of goods directly to the final consumer, who has requested them with an online transaction. A particular threat is the collaboration between the administrators of an e-commerce site and counterfeit business executives, where the former act as collectors of unscrupulous consumer orders, sending requests received to the second, meeting them with counterfeit products .

The perception of foreign companies regarding the effective protection of industrial property rights on the Chinese market is represented by investigations conducted by Chambers of Commerce of the European Union and the US in China, which cares about their interests in dealing with local authorities.

In conclusion, it is reasonable to assume that Chinese economic growth contributes to the progress of the trademark and patent protection system. The link between effective protection of industrial property and increased investment can no longer be captured according to the pattern in the 1980s and 1990s when China was the largest recipient of foreign direct investment among developing countries, And the realization of a legal order with Chinese characteristics was a goal.

The early stages of the Chinese economic growth process, in fact, have been determined by the development of the manufacturing industry for export purposes, taking advantage of the comparative advantage of the wide availability of cost-effective and shortage of capital.[[14]](#footnote-14)

Given that China is already the country with the highest dispute over industrial property rights, the greater effectiveness of the remedial framework will be boosted by the international rise of Chinese companies in the high-tech sectors such as IT and electronics that reach their brands with foreign markets and are the main players in innovation.

For these reasons, the strengthening of the industrial property rights system is a primary national interest that the country is called upon to pursue, recalling Deng Xiaoping's warning of "seizing opportunities, improving oneself and, above all, developing the economy".

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