

## The Role Of Culture In Business Transactions And Protection Of Intellectual Property Rights Within Asian Countries Such As China And Japan

### Part I

By Martha Magdalena Kleyn, PhD.

#### 1. Introduction

This series of Part I and Part II will provide a brief overview of the differences in developing and implementing intellectual property strategy business models when considering exploiting intellectual property as part of your business strategy in Asian countries.

Culture is an important variable in relationship creation and network formation. It is likely to influence any transaction considered as well as the atmosphere in which a business negotiation takes place. Comprehending the differences between the Western and the Eastern Cultures is paramount, and without respecting these differences, the platform for any business undertakings may be disastrous. The focus of this paper is to provide a high level overview of the main cultural differences between Western and Eastern Cultures and how that specifically impacts the protection of Intellectual Property Rights (IPRs).

#### 2. China

To understand the culture embedded in China one has to recognize the deep-rooted nature of Confucianism<sup>1</sup> as it still forms the basis of much of China's business practice.<sup>2</sup> Although the Confucian system is not now in official vogue in China, the influence is still felt in many facets of Chinese life. Some of the more important aspects of this philosophy include

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1. Confucianism is an ancient Chinese ethical and philosophical system originally developed from the teachings of the early Chinese philosopher Confucius. It is a complex array of moral, social, political, philosophical, and quasi-religious thought that has had tremendous influence on the culture and history of East Asia. In essence Confucianism advocates *Li* (rites) as a basic doctrine and calls for maintaining the established social order. According to Confucius, everyone has a fixed position in society and, provided each person behaves according to rank, social harmony is achieved. A foreign business person must understand the implications of this strong sense of hierarchy to do business successfully in China. Small events, which might be irrelevant in another culture, can become important and breach of these "rules" may offend the group leader and cause loss of business opportunities.

rank and hierarchy; importance of family (and the extended family); business and business people are distrusted and formal contracts are disliked; authority and decisions of superiors should not be questioned; modernization is desired; cooperation between government and business; emphasis on education; and most importantly that 'face' must be maintained.<sup>3</sup>

Relationships (*Guanxi* 关系) are considered more important than laws and external structure and these 'special relationships' or 'connections' are tacitly embedded within the Confucius philosophy and subtly define the Chinese moral code; although there is the view that the value and effectiveness of the *Guanxi*, as the Chinese economy has become increasingly marketized, privatized and competitive, have greatly deteriorated. In industries that have been substantially deregulated or privatized, or where there is vigorous competition, business is business, and *Guanxi* has been neutralized or marginalized, and there are some views<sup>4</sup> that the role of relationships

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2. *Journal of Chinese Philosophy*, Vol. 19 No. 2, 1992, pp. 155-69, "Inherent limitations of the Confucian tradition in contemporary East Asian business enterprises" Oh, T.K.; also see a study by University of Aveiro, Portugal, "The Influence of Confucianism and Buddhism on Chinese Business: the Case of Aveiro, Portugal, *Tianbo Li, Gillian Owen Moreira*, see <http://www.immi.se/intercultural/nr19/tianbo.htm> (Last visited on 30 June 2010).

3. *Journal of International Management Studies*, Vol. 2, No. 2, August 2007, "Confucius on Management: Understanding Chinese Cultural Values and Managerial Practices," Charles A. Rarick, Purdue University Calumet to be viewed at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1082092](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1082092) (Last visited on 30 June 2010).

4. "China business culture: What part should "Guanxi" play in importing from China?," Shawn He Yuxun to be found at <http://www.smartchinasourcing.com/china-business-culture/china-business-culture-guanxi.html> (Last visited on 29 June 2010).

or connections now resembles that which we find elsewhere.

Doing business in China, on the surface, does not seem to be much different from doing business in the Western world. But in reality, the heavy reliance on relationship and collectivist way of thinking still prevails. Western companies have to make themselves known to the Chinese before any business can take place and this relationship is not simply between companies but includes a relationship between individuals at a personal level and most importantly, the relationship is an ongoing process that needs to be maintained.

Saving 'face' is an important concept to understand; a person's reputation and social standing rests on this concept. Causing embarrassment or loss of composure, even unintentionally, can be disastrous for business negotiations.

Seniority is very important to the Chinese especially if you are dealing with a State owned or government body, which is often the case, as most foreign investors have some form of interaction with the Chinese authorities and addressing the other party by correct title is important. Any handouts, such as documents for a meeting, brochures or business cards needs to start with the most senior person before moving down the line and there is a very specific way in which business cards are exchanged, *i.e.* stretching out with both hands and facing the card you are handing over in a manner such that the receiving party receives it facing him correctly.

A last brief point, foreign investors must realize that China is a 'fragmented' market. Experience in doing business in Beijing would be vastly different from that of doing business in Shanghai, or Shenyang; as such, generalizing the Chinese business culture<sup>5</sup> should be avoided.

### 3. Japan

The Japanese culture has evolved over millennia which combines culture and influences from Asia (and specifically the Chinese Culture) Europe and North America. It is guided by a basic philosophy deeply rooted in ancient Shinto<sup>6</sup> beliefs on human origins and relations with the spirit world, Buddhist concepts of karmic causation and an afterlife, modified by later

adaptations of Confucian ideas on societal relationships and order. The Japanese are very conscious of their position in society and the various roles that they are expected to play throughout their lives. They put a high premium on social harmony and will go the extra mile to avoid bringing disgrace on their families and other groups with which they are associated.

The cultural patterns found in particular industries, regions, economic classes, and of corporations themselves vary substantially. Preferred cultural practices have changed in response to globalization and the economic downturn in the 1990's.

The basic cultural concepts<sup>7</sup> which have strong implications for how Japanese companies do business include similar concepts as for China. The Japanese believe in cultivating long term relationships, with focus on interest of the other party rather than oneself. Loyalty, harmonization and the like<sup>8</sup> are important. Keeping face is a mark of personal dignity and means having high status with one's peers; nonverbal subtext means it is easier to deny or shift direction, and people give each other private space, they do not openly criticize, insult, or put anyone on-the-spot.

Japanese culture supports the idea of dependably assuming your place, role and rank, blending into the group and maintaining harmony,<sup>9</sup> this is reflected in their corporate culture and mentality. In Japan, rules, structure, and hierarchy are meant to be followed, and assuming and accepting a life that includes the daily risk of an entrepreneurial venture may not come easily. The Japanese believe in fol-

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7. "Confucian ethics and Japanese management practices," *Global Business Review*, Vol. 7 No. 8, 1988, pp. 575-84, Dollinger, M.J.

8. Sincerity to most Westerners means free from pretence or deceit; in other words, honest and truthful without reservations. But the typical Japanese, being *Makoto* (mah-koe-toe) means to properly discharge all of one's obligations so that everything will flow smoothly and harmony will be maintained. It also means being careful not to say or do anything that would cause loss of face. By extension, it further means that *Makoto* people will not be self-seeking; will not get excited or provoke others to excitement; will not reveal their innermost thoughts if they are negative; will not, in fact, do anything disruptive. This, obviously, does not necessarily include or require strict adherence to what Westerners like to call honesty and frankness, since harmony of a kind can be maintained indefinitely as long as both sides play according to the same rules. And the Japanese, just like the Westerners, tend to think and behave as if their rules were the ones being used.

9. Japan Times Online, June 3, 2004, *Changing The World One Byte At A Time: Internet Star Spreads The Blogging Gospel*, Yuri Kageyama, at <http://www.japantimes.co.jp/cgi-bin/getarticle.pl?nn20040603a8.htm> (Last visited on 29 June 2010).

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5. *Harvard Business Review*, Vol. 64 No. 4, 1986, pp. 75, 81-4, "The China trade: making the deal work," Hendryx, S.R.

6. *Wikipedia* "Shinto (神道 *Shintō*) is the native religion of Japan and was once its state religion. It is a polytheistic and animistic faith, and involves the worship of *kami* (神), or spirits."

lowing form, *i.e.* there is a correct way to do almost everything and work is done diligently with much detail, endurance and generally at a slow pace. From a business perspective, as the Japanese person often seem to be more concerned with form and manner than they are with the end results (although results are, of course, important) this attitude (opposite to typical Western thinking) naturally causes varying degrees of misunderstanding and friction between the parties involved.<sup>10</sup>

Decisions are made using the concepts called *nemawashi* and *uchiawase*. 'In Japan, if you do *nemawashi* while setting up a business relationship, if you take care of the roots and have made all of the necessary preparations, the deal will almost always succeed, but it takes time'.<sup>11</sup>

Japan has proven to be very successful in developing technology and in developing new ideas; hence, their deference to group interests and careful and conservative decision making is not necessarily incompatible with successful entrepreneurship.

#### 4. Impact of Cultural Differences on Business Deals

Working in a global commercial environment, knowledge of the impact of cultural differences is one of the keys to international business success. Improving levels of cultural awareness can help companies build international competencies and enable individuals to become more globally sensitive. In most negotiating sessions, business people will speak both their native language and English. Western negotiators should therefore have available a native speaker on the team.

Each country has its own cultural standards of being, thinking, and acting, and these cultural differences strongly influence working values and business communication. What may be considered perfectly acceptable and natural in the workplace of one country, can be considered confusing or even offensive in the workplace of the other country.

The most prominent cultural differences between

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10. The Japanese and 'Face' to be found at [http://www.my-japanphone.com/japan\\_business\\_servive/basic\\_business\\_environment/The\\_Japanese\\_and\\_Face.html](http://www.my-japanphone.com/japan_business_servive/basic_business_environment/The_Japanese_and_Face.html) (Last visited on 29 June 2010).

11. The concept of the wrapping the roots of a tree that is going to be transplanted. You dig around the roots very carefully. As each root is exposed, you wrap it in a damp cloth, and at the end of the process, the tree is easily transplanted and is ready to live, thrive and succeed." See Toshika Takenaka: "Does a Cultural Barrier to Intellectual Property Exist? The Japanese Example," 29 *N.Y.U.J. & Pol* 153 (1997).

the East and the West are the way of communication and the role of time. In the West, people (high-context culture) tend to feel rather uncomfortable with silences and verbalisation tends to be the norm. In the Asian countries, the so called low-context culture way of communication, and also decision making, and the unspoken word are very meaningful; and although verbalisation occurs, non-verbal communication in terms of body language, situation and timing, often gives a more accurate clue as to what the decision will be rather than what is said.<sup>12</sup> Thus when high-context culture is in negotiations with low-context culture, those things which were previously left unsaid now must be said. If they're not, the miscommunication that occurs at that point is often just the first of a long line of miscommunications yet to come. Adding to this complexity is the feature of saving face. Polite language is often used to cover face. This is very important in the Asian context, not only for communication between people, but also in terms of contractual obligations to companies and corporate decision making.

On the aspect of time, Western businesses tend to look for quick returns on their investments and, while a good working relationship with the local partner is thought of as a bonus, it is far from considered the most important part of the deal. To Western cultures the deal comes first, then the contract and then the relationship; this is the complete opposite of the high-context cultures of Asia. In much of Asia the entire partnership is built upon a good business relationship and a much longer-term view is taken regarding profits. Negotiations with Asian businesses can progress very slowly because of an inherent cultural attitude of considering each matter carefully and involving the participation of all those affected in the entire process of defining, solving and acting upon a problem. As a consequence foreign investors often underestimate the amount of time that will be required to establish a successful relationship with a business partner in Asia, which means they also underestimate the amount of money that will be required to invest in the partnership.

#### 5. Asian Cultural Barriers and Protection of Intellectual Property

Since the 1990s, in many cases catalysed by the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPs), IPRs have asserted their

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12. "Decision-making in Japan—A study of corporate Japanese decision-making and its relevance to Western companies" by Ruth Taplin, 1995—ISBN 1-873410-34-4.

legal presence in countries throughout Asia. The intellectual property (IP) legal framework has come, however, with complex, inescapable influences from Asian history, including religious factors, traditional bureaucracies, and the heritage of colonialism and communism.<sup>13</sup> It is often these distinct cultural aspects or barriers that continue to raise difficulties for businesses as they seek to protect their IPRs in these vibrant growing markets. In both China and Japan, despite all the changes in IP and related legislation, these countries still consider IP as an afterthought rather than integral part to business strategy. Although the recent development in both China<sup>14</sup> and Japan<sup>15</sup> has shown a marked shift in how technology companies view and treat IP, they still have a long way to go.<sup>16</sup> The drivers of change in Asia are not politicians, lawyers or the law itself, in most cases, legislation is a reaction to commercial desires, which in turn are influenced by a variety of factors, including industry changes, trade societal changes and changes in the way that IP is utilized in the primary markets such as Europe and the U.S. This is an important consideration in developing and implementing IP business models in Asia.<sup>17</sup>

## 5.1 China

As the oldest continuous civilization in the East, China has long been regarded as an exceptionally creative and inventive nation and has enjoyed

a remarkable history of technological and creative enterprise. It is common knowledge that the Chinese invented a number of items prior to the actual inventing or use thereof in the West.<sup>18</sup> The famous four great inventions, *i.e.* papermaking, typography, the compass, and gunpowder<sup>19</sup> which have profoundly impacted the world's economy and human culture, were all creations of China. Trademarks in China can be traced back to the Tang Dynasty (618-907 A.D.), when traders "started using marks and logos to distinguish goods."<sup>20</sup> During the Ming and Qing Dynasties an informal system of guild registration and protection of trademarks was instituted where a manufacturer could register his trademark with other guilds. The earliest (221 B.C) historical records dealing with IPRs in China indicate the concern of officials with publication and republication of works related to the imperial throne.<sup>21</sup>

China is conventionally depicted as one of the main offenders in the international IPR arena with a strong perception of legislative shortfalls.<sup>22</sup> The IP related economic development in China<sup>23</sup> was firstly piracy, when copying what is plainly visible helps to generate fast economic growth; secondly imitation, where a copied design is expanded, improved or made more efficient; thirdly innovation; fourthly the influence of Confucianism; and fifthly communism.

Confucian ethics places a relatively low value on terms based on individuals and profit, but it does place value on the concept of communal property. The

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13. *Intellectual Property Law in Asia*, December 2002, Christopher Heath, ISBN 9041198946.

14. "China Today: Intellectual Property Protection in China: Does it Warrant Worry?" by May 1, 2007 By Eric S. Langer, BioPharm International to be viewed, <http://biopharminternational.findpharma.com/biopharm/Article/China-Today-Intellectual-Property-Protection-in-Ch/ArticleStandard/Article/detail/423187> (Last visited on 29 June 2010).

15. *Intellectual Asset Management Magazine*, Maximising IP Value for business, December/January 2008, Issue 27, "Japanese Intellectual Property typhoon still not even a tropical storm," by Terry Ludlow.

16. See *Asian Intellectual Property, International Law & Management Review*, Issue 1, Spring 2005: "The Viability of Stimulating Technology-Oriented Entrepreneurial Activity in China, Taiwan, Japan, and South Korea: How Regulations and Culture Encourage the Creation, Development, and Exploitation of Intellectual Property," Goldberg, to be viewed at, [http://www.byuilmr.org/index.php?option=com\\_content&view=article&id=6%3Avolume1spring2005&Itemid=8](http://www.byuilmr.org/index.php?option=com_content&view=article&id=6%3Avolume1spring2005&Itemid=8) and <http://www.byuilmr.org/media/articles/goldberg-asianip.pdf> also see Center for Advanced Defence Studies, Defence Concepts Series, July 2006: "The Intellectual Property Challenge in China" at <http://www.articlesbase.com/affiliate-programs-articles/intellectual-property-protection-in-china-76016.html> (Last visited on 29 June 2010)

17. "Intellectual Asset Management, Protecting Intellectual Property in China," *Chemical Week*, January 18, 2006, pp 21-23.

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18. John R. Allison & Lianlian Lin, "The Evolution of Chinese Attitudes toward Property Rights Invention and Discovery," 20 *U. Pa. J. Int'l Econ. L.* 735, 742 (1999), obtainable from [international.westlaw.com](http://international.westlaw.com).

19. Joseph Needham, "Science and China's Influence on the World, in the Legacy of China," 234 (Raymond Dawson ed., 1971); Robert K. G. Temple, "The Genius of China: 3,000 Years of Science, Discovery, and Invention" (1986).

20. Hamideh Ramjerdi & Anthony D'Amato, "The Intellectual Property Rights Laws of The People's Republic of China," 21 *N.C. J. Int'l L. & Com. Reg.* 169, 172 (1995), obtainable from [international.westlaw.com](http://international.westlaw.com) (Last visited on 29 June 2010).

21. "Trade Sanctions and the Rule of Law: Lessons from China," 1 *Stan. J. E. Asian Aff.* 46, 51 (2001), Baum, Charles, see <http://www.stanford.edu/group/sjeaa/journal1/china4.pdf> (Last visited on 29 June 2010).

22. "Intellectual Property in the Global Trading System," Springer Berlin Heidelberg Publishers, ISBN 978-3-540-77736-6 (Chapter 4—"Intellectual Property in the Global Trading System EU-China Perspective" by Wei Shi" to be found at <http://www.springerlink.com/content/x6270086vw122167/> (Last visited on 12 June 2010).

23. Taiwan NCCU University in an article in *Intellectual Asset Management*, October/November 2008 "Inside the IP Markets of North Asia," Director Paul Lui.

prevailing point of view is that Confucianism provides a pervasive and unconscious influence on the comprehension of, and commitment to, intellectual property laws.<sup>24</sup> Under the set of Confucian ethics there appears no credible evidence of a link between honesty and loyalty on the one hand and counterfeiting and piracy on the other. While China shares the Confucian tradition with Japan, China's unique socialist ideology, administrative decentralization, inadequate judiciary and huge but inefficient bureaucracy have made intellectual property enforcement difficult.<sup>25</sup> Nonetheless, any approach to effectively analyze and clarify IPR issues in China must rest on a balanced interplay of political and cultural fundamentals.

IPRs were essentially created through the Western concept of private property rights and benefits.<sup>26</sup> At the international level, the objective of TRIPs is to support liberalization of the international trading system while protecting the private monopoly rights of IP owners by reducing piracy and eliminating 'free-riding.'<sup>27</sup> The preamble of the TRIPs Agreement highlights these objectives by explicitly emphasizing the need to protect private interests by committing members to a shared objective of desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of IP.<sup>28</sup>

In contrast to Western notions of property rights, communism, the extraordinary social experiment promising equality and freedom in the twentieth century, substantially impacted cultural perceptions

24. *North Carolina Journal of International Law and Commercial Regulation*, Fall 2006, "Cultural Perplexity In Intellectual Property: Is Stealing A Look An Elegant Offense?" By Wei Shi (PhD Candidate, St. John's College, University of Cambridge; Fellow of Cambridge Overseas Society, University of Cambridge; Visiting Fellow of Lauterpacht Centre for International Law, University of Cambridge. to be found at [http://law.upd.edu/ph/internet\\_society/session%205/Shi,%20Cultural%20Perplexity,%20Intellectual%20Property,%20Book%202006.doc](http://law.upd.edu/ph/internet_society/session%205/Shi,%20Cultural%20Perplexity,%20Intellectual%20Property,%20Book%202006.doc) (Last visited on 29 June 2010).

25. Which is seen to be one of China's greatest shortcomings as a trading partner, see "Intellectual Property Challenges for U.S. Companies operating in China," *Intellectual Property Today*, Dec. 2006, By AE Bates.

26. *Westlaw.com* website, "Stop Relying on Uncle Sam!—A Proactive Approach to Copyright Protection in the People's Republic of China," 6 *Tex. Intell. Prop. L.J.* by Eric M. Griffin, 169, 182 (1998) to be found at <http://international.westlaw.com> (Last visited on 29 June 2010).

27. "Agreement on Trade-Related Aspects of Intellectual Property Rights," Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments-Results of the Uruguay Round, 33 I.L.M. 81 (1994).

28. See TRIPs.

in modern China.<sup>29</sup> A notable characteristic of China's legal landscape is the government's establishment of the interrelated doctrines of legal equality and political inequality in the context of civil obligations, *i.e.* Chinese people do not, or dare not, believe that individuals are endowed with rights that they are entitled to assert, particularly with respect to those in positions of authority,<sup>30</sup> as such China still has a long way to go in order to fully protect private rights.

## 5.2 China and IP Law Reform

China has been engaged in IP protection for over two decades, which has resulted in comprehensive and substantive legislation. The protection of IPRs preceded recognition of general private rights. Within this context, the commitment to protection of intellectual property rights cannot be regarded as unalterable. Establishing a substantive private rights system in China and giving its citizenry private property rights are by no means a quick or easy solution to China's IPR enforcement problem. These should be regarded as long-term policies that need to be underpinned in order to create a sound basis for further economic development.<sup>31</sup>

Since the mid-1990s, China has introduced many new IP statutes and regulations, and has entered into various international treaties. In 1996, China issued the Regulations on the Certification and Protection of Famous Trademarks and the Regulations on the Protection of New Plant Varieties while amending its Criminal Law to include a section on intellectual property crimes.<sup>32</sup> China amended its Scientific and Technological Progress Law<sup>33</sup> which applies from 1 July 2008. This law deals with innovation in the coun-

29. Robert Weatherley, "The Discourse of Human Rights in China: Historical and Ideological Perspectives" (examining the relationship between private individual rights and the superiority of collective interests under the Marxist ideology), New York and London: St. Martin's Press, 1999. ix, 185 pp. ISBN 0-312-22281-5, pp 93, 104.

30. Scott J. Palmer, "An Identity Crisis: Regime Legitimacy and the Politics of Intellectual Property Rights in China," 8 *Ind. J. Global Le. Stud.* 449, 456 (2001).

31. See Frederick M. Abbott, "The WTO TRIPs Agreement and Global Economic Development," in *Public Policy and Global Technological Integration* 3, 4-12 (1997).

32. *China Daily*, Nov. 10, 1997 Issue, "China: Laws Being Promulgated to Protect IPR," available at 1997 WL 13647865 to be viewed at [http://article1.chinalawinfo.com/article/user/article\\_display.asp?ArticleID=20014#m26](http://article1.chinalawinfo.com/article/user/article_display.asp?ArticleID=20014#m26) (Last visited on 1 July 2010).

33. *Managing Intellectual Property*, "China gets ready for National IP Strategy"—Peter Ollier, Hong Kong to be found at <http://www.managingip.com/Article/1853384/China-gets-ready-for-National-IP-Strategy> (Last visited on 29 June 2010).

try and lead to the publication of the long-awaited National IP Strategy that was completed in June 2008 and lead to the Revised Law that was promulgated in December 2009.<sup>34</sup>

The change in China with regards to IPR protection can be ascribed mainly to the active promotion of IP awareness by foreign and local businesses, trade associations, and industry among the Chinese people; an example being Business Software Alliance and the Chinese Software Alliance to promote the use of original software in China<sup>35</sup> whereby the Chinese have become increasingly aware of the basic functions of, and the rationales behind, IPR related directly to the country's domestic growth and international reputation,<sup>36, 37</sup> and noticing the benefits associated with protection of IPR by Chinese leaders and Government. The Chinese government has assisted the establishment of various enterprises and institutes to which IPRs are particularly important and which focus on innovation.<sup>38</sup> The Chinese leaders no longer consider IPRs exploitative devices that help protect

the West's dominant position; they have begun to see how these tools can help promote national growth.<sup>39</sup> This is clear from patent statistics shown in a report by Thomson Reuters Scientific<sup>40</sup> *'China is set to dominate the patent landscape by 2012...to become the world's leading innovator.'*

Every economy reaches a point where it needs to create in order to advance, and at that point IP gains intrinsic value. Given China's progressive investment in high-tech and basic science Research and Development (R&D), the country will reach that point where it has established the necessary infrastructure and know-how to become the innovators and IP creators it once used to be.

Although China has created IP laws that generally adhere to international standards,<sup>41</sup> poor enforcement continues to frustrate the efforts of companies to protect IP in China. As copying is less expensive than creating original items and it takes less effort and time, the temptation of large profits, little capital, and vast opportunities for employment is a difficult combination to resist. Under this scenario, it is no exaggeration that counterfeiting and piracy have developed into a nationwide economy contributor.<sup>42</sup> Eliminating this would result in depriving communities of literally hundreds of jobs. By some estimates, piracy directly or indirectly employs three million to five million people, and provides national income of between nineteen and twenty-four billion dollars.<sup>43</sup>

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34. Kleyn, Martha Magdalena, "Intellectual property strategy: a comparative business perspective considering China, Japan, USA and certain European jurisdictions," PhD, UCT, Dec 2010, Chapter II.

35. In an effort to promote a safe and responsible digital world, BSA has developed global educational programmes for elementary and higher education students that emphasize the importance of being good cyber citizens and respecting the intellectual property of copyrighted works. These programmes also encourage students to use only legal software and to understand the impact of software theft, see <http://www.thefreelibrary.com/BSA+Commemorates+World+Intellectual+Proper+ty+Day%3B+Organization+Joins...a0131882848> (Last visited on 1 July 2010).

36. See as a reference *Khaleej Times Online*, "Can China's IP System Cope with the Rise in Patent Applications?" 16 January 2009, to be viewed at [http://www.khaleejtimes.com/DisplayArticleNew.asp?section=marketing&xfile=data/market-ing/2009/january/marketing\\_january18.xml](http://www.khaleejtimes.com/DisplayArticleNew.asp?section=marketing&xfile=data/market-ing/2009/january/marketing_january18.xml) (Last visited on 29 June 2010).

37. Leading to the Olympic Games in 2008, Chanel, Prada and three other luxury goods companies have won China's first copyright verdict against Silk Market shopping mall landlord indicating that China is a responsible member of the international business community that follows global norms. (See <http://www.asialaw.com/Article/1989377/Channel/16712/Big-brands-take-on-counterfeits-in-China.html>) (Last visited on 29 June 2010).

38. In 2006 to fully exhibit the intellectual property right protection achievements of China in 2006 coinciding with China's "National IPR Week 2007" and "China High-level Forum on Intellectual Property Rights Protection 2007," the top ten IPR Protection Events in China were announced, see [http://www.china.org.cn/china/national/2007-04/19/content\\_1207992.htm](http://www.china.org.cn/china/national/2007-04/19/content_1207992.htm) (Last visited on 30 June 2010).

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39. "Role of IP System in China's Social and Economic Development," Tian Lipu State Intellectual Property Office of China, April 2008, to be viewed at [http://www.lpv.vl/dl/pdf/Conference\\_Lipu.pdf](http://www.lpv.vl/dl/pdf/Conference_Lipu.pdf) (Last visited on 29 June 2010).

40. <http://tvnz.co.nz/technology-news/china-lead-in-patents-worldwide-2372113>.

41. China has accepted the World Trade Organisation's TRIPS (trade related aspects of intellectual property rights) agreement—see [http://www.wto.org/english/tratop\\_e/trips\\_e/trips\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/trips_e.htm) (Last visited on 1 July 2010).

42. See Congressional Research Service, China-U.S. Trade Issues 12 (July 1, 2005) (stating that counterfeit goods are estimated to account for approximately 8 percent of China's GDP); see also Press Release, European Commission, EU Strategy to Enforce Intellectual Property Rights in Third Countries-Facts and Figures (Nov. 10, 2004), to be found at [http://www.trade.ec.europa.eu/doclib/docs/2004/november/tradoc\\_119898.pdf](http://www.trade.ec.europa.eu/doclib/docs/2004/november/tradoc_119898.pdf) (Last visited on 1 July 2010).

43. See Robert Marquand, "China's Pirate Industry Thriving," *Christian Science Monitor*, Jan. 9, 2002, at 6. According to the Report of China State Counsel Development Research Centre, the estimated market value of counterfeit goods made in China was from \$19 billion to \$24 billion in 2001, which could well be a conservative figure. To be viewed at <http://www.highbeam.com/doc/1G1-95940444.html> (Last visited on 1 July 2010).

Shutting down counterfeiting and piracy will in many instances, bring about problems such as unemployment, dislocation, and social chaos, which are problems that the Chinese government monitors closely; but China is facing increasing international pressure to crack down on piracy.<sup>44</sup>

### 5.3 Japan

The Japanese believe in a social and hierarchical order and collectivist ideology. The character of Confucianism in Japan is much more significant than that in China. However, within the diversity of its culture, each economy attempts to reach the same goal by different routes. The infrastructure of Confucian philosophy, based on the cardinal relationship and hierarchical order, has played a significant role in Japan after the Second World War. It has made positive contributions, both in fostering domestic economic development and in maintaining intellectual property in different ways; it is just a matter of how to preserve the advantages of Confucian ethics while minimizing its shortcomings.<sup>45</sup> Confucian norms of social harmony and moral precepts have permeated the intellectual life of Japanese citizens and have played a pivotal role in moulding the Japanese culture as it exists today. To misunderstand the influence of Confucian values can create a misleading stereotype and form of cultural bias.<sup>46</sup>

Japan's economic progress is closely tied to its effective IP policy and management.<sup>47</sup> Japan is a high-tech economy and as such produces high numbers of patents. The patents are, as is evidenced in the patent statistics, concentrated in the hands of large Japanese corporations, which make entry of foreign licensors rather difficult.<sup>48</sup>

44. "China Retaliating for WTO Complaint by Withholding Cooperation on Copyright Protection," By Daniel Schearf, Beijing 24 October 2007 to be viewed at <http://www.voanews.com/english/archive/2007-10/2007-10-24-voa9.cfm> (Last visited on 1 July 2010).

45. *Supra* Shi.

46. *Supra* Bell, note 245.

47. Start-up ventures in late 19th century and early 20th century in Japan became industrial giants and pillars of the Japanese economy—Toyota, Matsushita, Sony and Honda—thanks to the patented inventions of their founders— "Hiramitsu Arai, Intellectual Property Policies for the Twentieth Century: the Japanese Experience in Wealth Creation, 1999" In "Intellectual Property: Source of innovation, creativity, growth and progress," ICC-BASCAP, 2005.

48. *Intellectual Asset Management*, October/November 2008 issue, "Inside the IP markets of North Asia," by Sachin Desia, pp. 57-62.

### 5.4 Japan and IP Law Reform

In Japan, economic development has been linked from the very start to the introduction of industrial property rights.<sup>49</sup> Under the strong nationalistic Meiji regime an attempt was made to bring Japanese society into parity with European and North American powers introducing legal systems, sciences, and technology from Western Europe and North America. The rapid growth of the 1960s was made possible in large part by the introduction of foreign technology.<sup>50</sup> At the end of the nineteenth century, Japan became a member of both the Paris Union for the Protection of Industrial Property and the Berne Union for the Protection of Literary and Artistic Works.<sup>51</sup> This paved the way for systemic IP legislation and indicated that intellectual property rights should play an important role in the country's national industrialization and cultural renaissance.

In terms of the legislation, although Japan has enjoyed the longest tradition of IPRs in Asia with a comparatively affirmed notion of IP laws, the major driving force for developing a western-style IPR legal system in Japan during the Meiji Period was to promote Japan to become "an advanced nation by copying the Western IPR legal systems."<sup>52</sup> Although an imitation of the Western systems, there are significant differences of approach between Japanese and European IP laws<sup>53</sup> due to the country being a cultural part of Eastern Asia, and as such legal implementation and enforce-

49. *Supra* Shi

50. *The Journal of Asian Studies*, Vol. 42, No. 4 (Aug., 1983), "Why Has Japan "Succeeded?" Western Technology and the Japanese Ethos," by Michio Morishima, pp. 966-967.

51. See The Paris Convention for the Protection of Industrial Property, July 14, 1967, 21 U.S.T. 1583; Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 211 (last revised at Paris, July 24, 1971).

52. "The Future of Intellectual Property Law: Japanese and European Perspectives Compared 1 (Working Papers of Oxford IP Research Centre, Working Paper No. 09/99)," by David Vaver, to be found at <http://www.oiprc.ox.ac.uk/EJWP0999.pdf> (Last visited on 1 July 2010).

53. *Supra* Vaver: "For example, in Japan an employer can be called the author of a work that is made by an employee on the job. In Europe, this would be rare: the employer will, as in Japan, usually own the copyright but the status of author is reserved to the human being who actually makes the work, not the entity which pays for the creation. The European rule may stem from a Romantic view of what it means to be an author or artist. This view emphasizes the individual, rather than the organization to which he belongs. The Japanese rule emphasizes the importance of the organization and teamwork, rather than the individual."

ment are strongly influenced by Asian philosophy.<sup>54</sup> For example in the 1960s, the United States Patent Office normally approved or disapproved an application for a patent within eighteen months, in contrast it took the Japanese Patent Office (JPO) an average of five to seven years; and although Japan had joined the Paris Union on July 15, 1899, patent terms in Japan could be shorter than 20 years (the minimum duration agreed to in the TRIPs Agreement). It was not until 1994 that the patent law was amended and improved to guarantee at least 20 years after the application for the patent.<sup>55</sup>

Strong IPR protection only came into being in Japan when external pressure was created by the United States and lobbying pressure was raised by the domestic industrial sectors.<sup>56</sup> In this sense, it was only recently (Japan joined WTO and signed up to TRIPS in 1994<sup>57</sup> effective 1 January 1995) that Japan substantially came into harmony with international standards and embarked on a national undertaking with a view to the construction of a nation built on IP.<sup>58</sup>

The IPR system developed essentially in three stages:<sup>59</sup> (1) attracting foreign investment and advanced technology from overseas, which is the stage when Japan did not have sufficient technology of its own; (2) enhancing Japan's domestic technological capability and having imported technology become

established in Japan, which is the stage when Japan gradually upgraded its technological development capabilities; (3) global technology competition mainly with self-developed technology, very strong internal R&D and internal technology transfer.<sup>60</sup>

Today the Japanese IP regime is well developed and provides an integrated system designed to IPRs<sup>61</sup> of local as well as foreign jurisdiction proprietors. The Japanese IPR protection system is considered to be one of the more complex systems.<sup>62</sup>

## 6 Overview of Chinese and Japanese Cultural Values on IP Enforcement

Although there is an increase in both Japan and China's aggressiveness to enforce IPRs, it will take some time to get the enforcement level on that known to the West.<sup>63</sup> It is not easy to change deeply held cultural values, even if these values impinge of business revenues, *i.e.* the less confrontational nature to engage in infringement litigation.

Hand in hand with this is the imitation culture; although the focus in Japan is more on application and improvement innovation, it does not go to say that Japan is not a technological innovative regime. On the side of China, its recent efforts in establishing large R&D centres for technological development, as well as the revised Scientific and Technological Progress Law in January 2008, supports its incentive to once again be known as the global technical leaders.<sup>64</sup> The establishment of various Western companies' industrial technology and research centres in China further shows that industry intends to ride the wave of the "new China." ■

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54. "Selected Aspects of Enforcement of Intellectual Property Rights in Japan and Vietnam—A comparative study with respect to TRIPS standards of enforcement" by Viet D. Phan, to be viewed at [http://www.iip.or.jp/e/summary/pdf/detail2002/e14\\_15.pdf](http://www.iip.or.jp/e/summary/pdf/detail2002/e14_15.pdf) (Last visited on 1 Jul 2010).

55. Richard E. Vaughan, "Defining Terms in the Intellectual Property Protection Debate: Are the North and South Arguing Past Each Other When We Say 'Property'?" A Lockean, "Confucian, and Islamic Comparison," 2 *ILSA J. Int'l & Comp. L.* 307, 316 (1996).

56. *Supra* Takanake.

57. Negotiations Committee Original: English JAPAN Statement, "Multilateral Trade Mtn.Tnc/40/St/20 Negotiations," 20 January 1994 Special Distribution The Uruguay Round (UR-94-0022) Trade by H.E. Mr. Nobutoshi Akao Ambassador to be found at [http://www.wto.org/gatt\\_docs/english/sulpdf/92150145.pdf](http://www.wto.org/gatt_docs/english/sulpdf/92150145.pdf) (Last visited on 1 July 2010).

58. "Intellectual Property Policy Outline," July 3, 2002, Strategic Council on Intellectual Property to be found at [http://www.kantei.go.jp/foreign/policy/titeki/kettei/020703taikou\\_e.html](http://www.kantei.go.jp/foreign/policy/titeki/kettei/020703taikou_e.html) (Last visited on 1 July 2010).

59. WIPO Asian Regional Forum on Intellectual Property Policy Development, Tokyo, October 5, 1998, "The Importance of Intellectual Property Policy Development for Developing Countries," Keynote Address by Mr. Takeshi Isayama Commissioner Japanese Patent Office, to be viewed at [http://www.jpo.go.jp/cgi/linke.cgi?url=/shiryou\\_e/toushin\\_e/kouenroku\\_e/19970910.htm](http://www.jpo.go.jp/cgi/linke.cgi?url=/shiryou_e/toushin_e/kouenroku_e/19970910.htm) (Last visited on 1 July 2010).

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60. *Supra* Desia.

61. Japan patent office website, [http://www.jpo.go.jp/cgi/linke.cgi?url=/seido\\_e/s\\_gaiyou\\_e/4houe.htm](http://www.jpo.go.jp/cgi/linke.cgi?url=/seido_e/s_gaiyou_e/4houe.htm) (Last visited on 4 July 2010).

62. "Selected Aspects of Enforcement of Intellectual Property Rights in Japan and Vietnam—A comparative study with respect to TRIPS standards of enforcement," by Viet D. Phan, to be viewed at [http://www.iip.or.jp/e/summary/pdf/detail2002/e14\\_15.pdf](http://www.iip.or.jp/e/summary/pdf/detail2002/e14_15.pdf) (Last visited on 4 July 2010).

63. *Supra* Ludlow.

64. "China & Hong Kong, recent Developments in Intellectual Property," by Cedric Lam, Janet Wong and Grace Wong, *IP Value* 2009, "Building and enforcing Intellectual Property value," 2009, pp.199-202.