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Issues and opinions

Insight into weak enforcement of intellectual property rights in China



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ABSTRACT

Based on the combination of institutional theory and a literature review, the paper contemplates the weak enforcement of intellectual property rights (IPRs) in China by legal, economic, political, social, and cultural institutions. It indicates that the legal system cannot be solely responsible for weak enforcement of IPRs. Only by changing the whole IP institutional environment over time will IPRs be well enforced. IP environment analysis and corresponding proactive actions are suggested for foreign companies to overcome institutional barriers in the environment. The paper also puts forward advice to Chinese policymakers on improving the whole IP environment.

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1. Introduction

Intellectual property rights (IPRs) refer to exclusive legal rights granted to an intangible subject matter deriving from human intellectual activity in the industrial, scientific, literary, and artistic field that contains copyright and neighboring rights, trademarks, patents, industrial designs, and trade secrets [6,37]. IPR protection has become a major concern for harmony across the global market, particularly in transitional economies such as China, the world's second largest economy. In general, China has a relatively high level of intellectual property (IP) infringement. In 2012, China still remained on the Office of the United States Trade Representative's [26] Priority Watch List and foreign companies have suffered huge losses. For example, Procter & Gamble's losses account for 20% of their annual revenue, which amounts to USD 150 million per year [32].

However, since 1980, the Chinese government has made consistent efforts to improve its IP environment by, for example, successively passing IP laws, burning pirated products, and shutting down underground factories. As both a member of the World Trade Organization (WTO) and

a signatory to Trade-related Aspects of Intellectual Property Rights (TRIPS), China is an active member in international conventions relating to IP and Chinese IP laws generally meet international standards.

The most common problem in emerging markets and transitional economies is inadequate law enforcement. In China's case, lax law enforcement of IPRs has been a problem [22,42], thus researchers have paid significant attention to the Chinese IP system framework. Yang [38] reviewed the positive and negative impacts of developing an IP system in China. Wang [35] described the existing IP framework and ineffective IPR enforcement in China from the legal system's perspective. Yang and Clarke [40] examined the IP legal system and IP activities in China under the global trend of legal harmony. Liu [20] discussed the IP system in the regime of technology protection in China. The explanations from these studies, mainly on characteristics of China's IP legal system within the stages of economic development, were unable to capture fully the complexities faced by a company engaged in IPR protection within the Chinese market. One major constraint is that dimensions, other than the legal dimension, in the institutional environment have been neglected in the studies. To date, very few studies have sought reasons for the immature legal system's weak enforcement of IPR in China

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from the economic [e.g., [31]] and socio-cultural [e.g., [3,17]] dimensions. Stevenson-Yang and DeWoskin [31] endeavored to expose China's failure to protect IP as having something to do with the government's ownership and control of the economy. Berrell and Wrathall [3] proposed that the cultural architecture facilitated by the Chinese political, business, and social environments played an important role concerning IPR in China. Lehman [17] examined the impact of traditional Chinese social and political philosophy (i.e., Neo-Confucianism) to traditional perspectives on IPR in Chinese society. Unfortunately, these studies merely addressed the problem from a single perspective. Only Kshetri's [15] study involved more than one dimension. However, while Kshetri employed neo-institutional theory to examine how the national elites' and customers' perceptions of IPR issues in China coexist and interact, he did not illustrate these issues from a foreign company's perspective. Moreover, previous studies have not put forward managerial implications.

In fact, enforcement is part of the main character of China's incomplete legal system in its institutional foundation. IP infringement cannot merely be ascribed to IP legal enforcement. The legal mechanism, as the main element in the basic institutional environment for IPR, cannot facilitate the IP environment within the boundaries of the corresponding economic, political, social, and cultural institutions. For example, these boundaries include local protectionism, low public IPR awareness, a shortage of indigenous technology, and also shortcomings in the judicial system, administrative offices, and the attitudes of those responsible within the legal enforcement mechanism [29].

This paper adopts North's [25] definition of institutional environment¹ and Williamson's [36] framework of the relation between informal constraints and formal rules to explore the role of "legal, economic, political, social, and cultural institutions" in China's IP environment (see Fig. 1), combined with a literature review of these institutions in China, to analyze existing problems in the IP environment. The objective is to shed light on the reasons for weak legal enforcement of IPR in China from the multiple institutional perspectives in the IP environment. The paper seeks to identify how each institution contributes to the IP environment, together with their reasoning and justification. To take such a holistic perspective, the paper builds on the results of previous studies that tend to approach issues in the IP environment from the perspectives of particular types of institution. Thus, this study can be characterized as conceptual. Along with the paper, the preliminary framework presented in Fig. 1 is elaborated to form a more detailed picture of the multifaceted institutional barriers presented in Fig. 2 (see Section 4).

This paper proposes that an insufficient IP legal system is not the only reason for weak legal enforcement of IPR in China. Without the supportive environments of institutional foundations, IPR enforcement in China will not function effectively. The managerial implications benefit

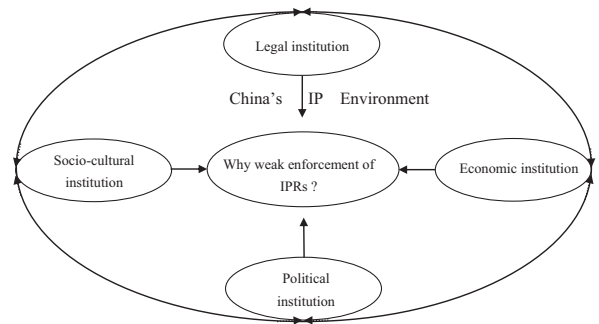


Fig. 1. Multiple institutional perspectives in the IP environment.

foreign managers by calling for the crafting of appropriate IP strategies in China. In addition, based on the preliminary model of the Chinese IP environment presented here, the researchers will be able to track the IP environment in China. This paper also has important implications for Chinese policymakers.

Section 2 briefly addresses concepts regarding institutions. Then, Section 3 analyzes institutional barriers to the IP environment in China. The final section puts forward theoretical, managerial, and policy implications.

2. Theory in brief: institution and institutional environment

Institutions as the "humanly devised constraints that structure political, economic, and social interactions" comprise both informal constraints (i.e., social and cultural rules such as sanctions, customs, traditions, ethics, social norms, and religion) and formal rules (i.e., constitutions, law, and property rights), and also the enforcement mechanisms that make up a particular institutional matrix or environment [25]. Informal constraints formed through a society's evolution are unwritten rules in daily life, while formal rules are those enacted and enforced by the polity. Although they are different, the interaction between informal constraints and formal rules in the institutional environment are identified by Williamson's [36] framework of social analysis. Informal constraints are social or cultural foundations, embedded in the formal rules, or so-called basic institutional environment, as the basis of a society's institutions. In other words, a society's social or cultural foundations constrain the basic institutional environment. Changes in the social and cultural foundations lag far behind changes in the basic institutional environment. Constrained by the slow adaptation of the social and cultural foundations, changes in the basic institutional environment are even slower.

A mature market and an independent and impartial legal system are the main features of an institutional environment that ensure the implementation of an individual's legal rights [25]. However, in emerging markets and transition economies, with their distinct institutional settings, things are not that simple as other institutional arrangements can play a significant role. Dysfunctional legal systems are often caused by either a deficiency in the law or its inadequate enforcement [1]. In China, further

¹ Institutional environment is an environment comprising institutions within which informal constraints and formal rules interact [25].

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