

## I

## Intellectual Property and the State

In 2001, I found myself in Beijing, speaking to a private investigator about cigarette counterfeiting in China. I already knew something about the scale of the problem. What I had not expected was the investigator's blunt cynicism about the raids he helped organize. "The work we do is simple," he said. "We are hired by a tobacco company to find out who is faking their cigarettes, we investigate whatever leads our paid informants give us, we find a government agency willing to enforce, and then we go along with its representatives to raid the site. Counterfeiting is so entrenched in China that we're able to raid the same place over and over, usually with success. Last year, for example, we organized more than a hundred raids in Da'ao alone." Da'ao is a nondescript village of twenty thousand inhabitants in Raoping county of Guangdong, a province that is known as a center for the production of counterfeit and pirated goods. "Did the hundred raids solve the problem?" I asked. He smiled. "You know," he said, "raids are not always effective. If we pay a bribe, the agency will conduct a raid, but that doesn't mean they seize or destroy the fake cigarettes. Sometimes, the goods disappear right before the raid. Sometimes, the goods are seized, but then sold back to the counterfeiters. It is very rare for fakes to be destroyed. So, we pay the agencies to raid the same counterfeiters again and again."

The logic eluded me. Didn't the companies want to know that the goods had been destroyed? "Companies that have to worry about their bottom line usually pay us just to organize a basic raid," the investigator said. "Destruction would involve paying an additional bribe for the enforcement agency to seize and destroy the goods." Why not go to a more reliable agency, then? "It's true," he said, "that there are a number of government agencies that can provide enforcement. But we find that you can't really go back and forth between them. They don't like being played off against one another. So once we establish a relationship with one enforcement agency, we rarely switch over to another. Our clients want enforcement, and that's what we give them, even if it is imperfect."

*Piracy and the State* is an attempt to understand the causes and consequences of the kind of enforcement debacle the Beijing investigator described to me. His

story illustrates the pitfalls of *routine* enforcement of the laws governing intellectual property rights (IPR) in China. When right holders suffer infringement of the valuable intellectual property they own, they are indeed able to seek enforcement from a number of different government agencies. Although these agencies do respond, the enforcement they provide seems to have little or no impact on the levels of copyright piracy and trademark counterfeiting. Anyone who has visited China knows how easy it is to obtain pirated Beatles CDs or knockoff Gucci bags or fake Viagra. But this is only the tip of the problem. Da'ao village is not alone in producing counterfeits. On the contrary, ineffective enforcement has allowed counterfeiting to emerge as the main source of income for many midsized towns and, sometimes, even for entire counties.<sup>1</sup> The lack of effective oversight by the state has allowed whole sectors of the economy to become addicted to piracy and other IPR violations.

The central government is aware of such centers of endemic counterfeiting, but its response has been to address the problems only at the point of crisis, when radical enforcement measures have to be taken. The story of Da'ao village, which has long been known to government officials and private investigators as a major source of cigarette counterfeiting, is again instructive. Since the early 1990s, hundreds of routine small-scale raids have been conducted by various enforcement agencies here every year, without stemming the tide of counterfeiting. In 2004, the central government, eventually admitting that there was a crisis situation in Da'ao, dispatched three thousand enforcement personnel to the village, with orders to unleash a “tsunami” enforcement campaign. The result? The authorities arrested some counterfeiters and confiscated counterfeit tobacco products worth 56 million yuan (US\$7 million).<sup>2</sup> This outcome was considered so exceptional as to merit inclusion on the list of major enforcement accomplishments of the State Tobacco Monopoly Administration (STMA), one of the many agencies with an IPR mandate in China.<sup>3</sup>

Was this a good use of resources or an adequate response to a systemic problem? Sending three thousand enforcement personnel to a village of twenty thousand is an example of *campaign-style* enforcement in response to a crisis situation. Campaign-style enforcement typically features more than one enforcement agency (in the case of Da'ao, enforcement was provided by the STMA and the police) and is aimed at the rapid resolution of a major problem. But the need for this kind of response to address counterfeiting in a single village underscores the state's inability to nip this problem in the bud. It is neither feasible nor in the end desirable for government agencies to expend so much energy on crisis management. In sum, Da'ao illustrates the basic enforcement problem facing the Chinese government in the area of IPR. Routine enforcement raids are ineffective; that

<sup>1</sup> There are five hierarchically organized levels of government in China: center, provinces, prefectures, counties, and townships/towns. Villages are located below the townships/towns but are not considered an official level of government.

<sup>2</sup> Instead of RMB, I use the more widely accepted yuan to refer to China's currency.

<sup>3</sup> *Zhongguo yancao nianjian 2004* (China Tobacco Yearbook 2004) (Beijing: Jingji ribao chubanshe, 2006), 160.

means that relatively small-scale problems eventually require the unleashing of enforcement campaigns. Even worse, these campaigns are not necessarily effective at resolving the problem: counterfeiting operations are merely moved to the next village or the next town, and the fakes continue to be churned out until the next crisis, in a predictable cyclical pattern, results in the next campaign.

The puzzle I have been describing is this: why, in spite of its high volume, is China's enforcement of IPR laws typically ineffective in resolving the problems of copyright piracy and trademark counterfeiting? The question requires us to turn to the state.

As a window onto state capacity, this book focuses on the full range of bureaucracies that provide enforcement of IPR laws in China. My basic premise is that a strong state is capable of enforcing laws and regulations, whereas a weak state is not. To assess state capacity in a given area, we need to know what agencies are empowered to provide enforcement and how well they do it. This book insists that both the volume and the quality of IPR enforcement are relevant for this assessment. It argues that under some conditions the Chinese state can provide high-quality enforcement of IPR laws. Most of the time, nevertheless, there is a high volume of enforcement, which, however, is of a low quality. This is characteristic of both campaign-style enforcement and most routine enforcement.

This research has three implications for our understanding of state capacity in reform-era China. The first is that any assessment of state capacity based on the volume of enforcement alone will be erroneous. We can evaluate state capacity only when we have data about both the quantity and the quality of enforcement. In other words, a state that provides a high volume of low-quality enforcement is not strong, even though it is doing a lot. A second implication is that state capacity varies by issue area. As we will see, even within IPR, one subtype (patents) benefits from high-quality enforcement, whereas other subtypes (copyrights and trademarks) are subject to ineffective enforcement of the kind that plagues Da'ao. Blanket assessments of state strength or state weakness may be misleading. A third and final implication is that reliable predictions about the direction in which the Chinese state is headed cannot be made until we have a better map of *how* the state does what it does in different issue areas. IPR is one of hundreds of issue areas regulated by the Chinese state. In most of these (as in IPR), the gaps in our knowledge are such as to require a comprehensive study of both the organization and the operation of the numerous actors who provide enforcement. Without first adequately filling in these gaps, we will not be able to assess with accuracy whether China is moving toward rationalization and the rule of law.

#### STATE STRENGTH AND ENFORCEMENT CAPACITY

One of the key functions of a modern state is to enforce contracts that protect property rights.<sup>4</sup> Property rights are enshrined in laws, and the state has

<sup>4</sup> Margaret Levi, "The State of the Study of the State," in *Political Science: The State of the Discipline*, ed. Ira Katznelson and Helen V. Milner (New York: W. W. Norton, 2002), 33–55.

responsibility for enforcing these laws. However, the state does not enforce the laws directly, but rather creates and maintains institutions to supply enforcement when necessary. In general, there are three main channels for providing enforcement within a country's territory – civil courts of law, administrative agencies, and the criminal justice system. In addition, the Customs Administration can provide border enforcement. Some types of property are protected only through a single channel. For example, disputes over land ownership are adjudicated through civil courts of law. Other types of property may be protected through multiple channels. Personal property, for example, is protected by the police and criminal courts in a case of burglary or by a civil court of law in an ownership dispute. Intellectual property (copyrights, trademarks, and patents) is one of the rare forms of property protected through all four main channels. In China, the courts of law, administrative agencies, police, and Customs Administration are all empowered to protect IPR. The breadth of IPR enforcement options therefore provides us with an unusually comprehensive lens through which we can evaluate the capacity of the state to enforce its laws and regulations.

How can we assess the enforcement capacity of states? A natural response is to look at the volume of enforcement provided, and to conclude that a higher volume of enforcement suggests a stronger enforcement capacity. A model here is the scholarship on extractive capacity that associates a higher level of tax collection with state strength. However, as this book demonstrates, a high volume of enforcement does not necessarily mean that the state has the capacity to ensure a high quality of enforcement. The tradeoff between volume and quality is nicely illustrated by the example of manufactured goods in the Soviet Union, where plan fulfillment was based on the quantity of goods produced rather than on their quality. As is well known, this led to the voluminous production of shoddy goods, hardly an indicator of state strength. This book maintains that a similar dynamic in the enforcement of laws governing IPR in China makes quality and quantity equally relevant for the measurement of state capacity.

What kind of enforcement is high-quality enforcement? This is enforcement that is consistent, transparent, and procedurally fair. More extensive definitions of these terms will be provided later in this chapter. It is sufficient here to say that consistent enforcement is predictable enforcement: it exists when similar penalties are applied to similar cases, regardless of the status of the plaintiff. Consistency is the opposite of arbitrary enforcement. Transparent enforcement is open enforcement, which may involve the holding of public trials or open administrative hearings, as well as the publication of court decisions or the issuance of written punishment decisions by administrative agencies. Transparency reduces the opportunities for corruption. Finally, procedural fairness exists when the law is justly applied and when those who feel that they have been treated unjustly have the right to appeal the decision of the court or of the administrative agency. In this book, I often refer to enforcement that is consistent, transparent, and procedurally fair as “rationalized enforcement” or “high-quality enforcement.” A state with a strong enforcement capacity is a state capable of providing rationalized enforcement.

Taking a step back, we can ask how important the *enforcement* of property rights is for our account of state capacity. Of course, modern states have other responsibilities and functions: they provide defense and security for their citizens, they collect taxes, and they supply public goods like roads, education, and welfare. These areas of state activity, especially taxation and the provision of public goods, have received a great deal of scholarly attention.<sup>5</sup> Particularly notable is their prominence in the literature about the weaknesses of the postcommunist states in Eastern Europe and China. Scholars who focus on Eastern Europe have produced a long list of problems: regional defiance of the center,<sup>6</sup> a rise in crime and criminality,<sup>7</sup> and wholesale “capture” of the state by a handful of oligarchs able to “purchase” laws and regulations that are favorable to them.<sup>8</sup> All of this occurred against the background of declining tax capacity and deteriorating provision of social services.<sup>9</sup> Though on a smaller scale, China scholars have also identified a decline in extractive capacity,<sup>10</sup> which has been accompanied by increased corruption and criminality.<sup>11</sup> There

<sup>5</sup> This literature is immense. On taxation, see especially Margaret Levi, *Of Rule and Revenue* (Berkeley: University of California Press, 1988). On the rise of the welfare state in the United States, see especially Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge, MA: Belknap Press of Harvard University Press, 1992).

<sup>6</sup> Kathryn Stoner-Weiss, *Resisting the State: Reform and Retrenchment in Post-Soviet Russia* (New York: Cambridge University Press, 2006).

<sup>7</sup> Vadim Volkov, *Violent Entrepreneurs: The Use of Force in the Making of Russian Capitalism* (Ithaca, NY: Cornell University Press, 2002).

<sup>8</sup> Joel Hellman, Geraint Jones, and Daniel Kaufmann, *Seize the State, Seize the Day: State Capture, Corruption, and Influence in Transition*, World Bank Policy Research Paper, no. 2444 (September 2000); Venelin Ganey, *Preying on the State: The Transformation of Bulgaria after 1989* (Ithaca, NY: Cornell University Press, 2007).

<sup>9</sup> On taxation in Russia, see Alexei Lavrov and Alexei Makushkin, *The Fiscal Structure of the Russian Federation: Financial Flows between the Center and the Regions* (Armonk, NY: M. E. Sharpe, 2001). For recent changes, see Gerald Easter, “Building Fiscal Capacity,” in *The State after Communism: Governance in the New Russia*, ed. Timothy J. Colton and Stephen Holmes (Lanham, MD: Rowman & Littlefield, 2006), 21–52. On social services, see Linda J. Cook, *The Soviet Social Contract and Why It Failed: Welfare Policy and Workers’ Politics from Brezhnev to Yeltsin* (Cambridge, MA: Harvard University Press, 1993) and Linda J. Cook, *Postcommunist Welfare States: Reform Politics in Russia and Eastern Europe* (Ithaca, NY: Cornell University Press, 2007).

<sup>10</sup> Shaoguang Wang and Angang Hu, *The Chinese Economy in Crisis: State Capacity and Tax Reform* (Armonk, NY: M. E. Sharpe, 2001), and Kai-Yuen Tsui and Youqiang Wang, “Between Separate Stoves and a Single Menu: Fiscal Decentralization in China,” *The China Quarterly*, no. 177 (2004), 71–90.

<sup>11</sup> For recent studies, see Elizabeth Perry, “Crime, Corruption, and Contention,” in *The Paradox of China’s Post-Mao Reforms*, ed. Merle Goldman and Roderick MacFarquhar (Cambridge, MA: Harvard University Press, 1999), 308–329; Xiaobo Lü, *Cadres and Corruption: The Organizational Involution of the Communist Party* (Stanford: Stanford University Press, 2000); Yan Sun, *Corruption and Market in Contemporary China* (Ithaca, NY: Cornell University Press, 2004); Melanie Manion, *Corruption by Design: Building Clean Government in Mainland China and Hong Kong* (Cambridge, MA: Harvard University Press, 2004); Minxin Pei, *China’s Trapped Transition: The Limits of Developmental Autocracy* (Cambridge, MA: Harvard University Press, 2006).

has been a vigorous and ongoing debate about the waning of the Chinese state and about the possibility of its eventual demise.<sup>12</sup>

As rich as the literature on the postcommunist state is, by and large it does not emphasize the degree to which the execution of state functions depends on the successful enforcement of laws and regulations. Laws structure the operation of the police, mandate proper punishments for tax evasion, and stipulate when citizens have access to social insurance benefits. But existing studies of defense, taxation, and public goods provision tend to treat enforcement in passing, rather than making it a central line of inquiry. In contrast, this study maintains that a focus on the quality of enforcement allows us to ask different and important questions about state capacity. Take tax collection, again, as an example. Focusing exclusively on the amount of taxes collected might well encourage one to associate a high level of tax collection with a high degree of extractive capacity. But if one were to examine how those taxes are collected, a different conceptualization of state capacity might emerge. Questions would have to be asked about the consistent application of the tax collection laws, about the transparency of the collection methods, and about the procedural fairness of the tax collection. Should it be discovered that tax collection is arbitrary and corrupt and that officials are extracting unreasonable or illegal taxes and levies from taxpayers, then we would be forced to conclude that although the volume of taxes collected is high, the quality of tax collection is low, and enforcement is not rationalized.<sup>13</sup> This, in turn, will have implications for our assessment of the extractive capacity of the state.

In short, enforcement capacity has broad significance for our understanding of state strength, most of all if we allow for the possibility that the degree of rationalization matters. A strong state is capable of providing high-quality enforcement of laws and regulations, irrespective of whether those laws protect intellectual property rights (the focus of this book) or apply in areas like tax collection and public goods provision. Although this study is geared toward explaining IPR, its arguments are methodologically and theoretically relevant to our understanding of state capacity in other areas as well.

<sup>12</sup> For arguments about decline, see Andrew Walder, ed., *The Waning of the Communist State: Economic Origins of Political Decline in China and Hungary* (Berkeley: University of California Press, 1995); Wang and Hu, *The Chinese Economy in Crisis*; and Pei, *China's Trapped Transition*. For studies emphasizing state strength, see Dali L. Yang, *Remaking the Chinese Leviathan: Market Transition and the Politics of Governance in China* (Stanford: Stanford University Press, 2004) and Barry J. Naughton and Dali L. Yang, eds., *Holding China Together: Diversity and National Integration in the Post-Deng Era* (New York: Cambridge University Press, 2004). See also Randall Peerenboom, ed., *Is China Trapped in Transition? Implications for Future Reforms* (Oxford: The Foundation for Law, Justice, and Society, 2007).

<sup>13</sup> For an analysis of the excesses of rural tax collection, see Thomas Bernstein and Xiaobo Lü, *Taxation without Representation in Contemporary Rural China* (New York: Cambridge University Press, 2003).

## RATIONALIZED ENFORCEMENT: DEFINITION AND MEASUREMENT

There are three stages in the life cycle of a law: promulgation, institutionalization, and internalization. In the initial stage, laws are promulgated and put on the books, in the absence of institutions to enforce them. When laws exist in a general environment of lawlessness, there is little voluntary compliance. In the final stage of the life cycle, laws are internalized and self-enforcing. The rate of voluntary compliance is high because individuals feel that they have been treated fairly by those who enforce the laws.<sup>14</sup> Compliance is also high if individuals consider the law to be substantively fair and just. Some enforcement is necessary at this stage, of course, but for the most part laws are self-enforcing. The rule of law emerges in this final stage. But knowing the nature of the initial and final stages of legal development does not tell us how a country moves from lawlessness to voluntary compliance with the law. Institutionalization, the middle stage in the life cycle of a law during which laws come to be implemented and enforced in a predictable pattern, is crucial. The key variable during this stage is enforcement. A sustained level of consistent, transparent, and procedurally fair enforcement helps make individuals aware of the costs of noncompliance. It also strengthens the legitimacy of the law. It needs stressing that internalization is impossible without the kind of rationalized enforcement that institutionalization can deliver.<sup>15</sup> It is by understanding enforcement therefore that we can get leverage over the process whereby newly promulgated laws become self-enforcing.

Despite its importance, rationalized enforcement has not received extensive scholarly attention. Typically, studies of enforcement analyze its volume.<sup>16</sup> In contrast, as already noted, this book focuses on the relation of volume to quality of enforcement. For example, my subsequent case studies demonstrate that in spite of its high volume, enforcement in the area of trademarks in China is capricious and corrupt. In patents, by contrast, enforcement is of a low volume but is usually of a high quality. Such unevenness across the IPR subtypes is significant. When we make assessments about consistency, transparency, and fairness, we need to look at the substance of the enforcement, not just its volume. Furthermore, because each IPR subtype can be protected through

<sup>14</sup> Tom R. Tyler, *Why People Obey the Law* (New Haven: Yale University Press, 1990).

<sup>15</sup> Of course, enforcement is not the only necessary component for ensuring internalization. Individuals also have to become familiar with the law and decide whether it is substantively fair and just. Efforts by the government and nongovernmental organizations to publicize the law can expedite this process.

<sup>16</sup> A welcome exception is provided by studies on the *quality* of the implementation of the single-child policy in China. See Yanzhong Huang and Dali L. Yang, "Population Control and State Coercion in China," in *Holding China Together: Diversity and National Integration in the Post-Deng Era*, ed. Barry J. Naughton and Dali Yang (New York: Cambridge University Press, 2004), 193–225; Susan Greenhalgh and Edwin A. Winckler, *Governing China's Population: From Leninist to Neoliberal Biopolitics* (Stanford: Stanford University Press, 2005); Tyrene White, *China's Longest Campaign: Birth Planning in the People's Republic, 1949–2005* (Ithaca, NY: Cornell University Press, 2006).

different channels (civil, administrative, criminal, Customs), the consistency, transparency, and fairness of IPR protection through each of these channels will be relevant to our assessment of whether rationalized enforcement definitively exists in IPR. This technique can be applied to assess progress toward rationalization in any area of the law. The uneven or “patchy” appearance of higher- and lower-quality enforcement across those different areas may help us identify the processes through which an entire legal system may be able to move from lawlessness toward rationalization.

### Measuring Consistency, Transparency, and Procedural Fairness

The consistency, transparency, and fairness of enforcement cannot be observed directly, so proxies are required. When assessing the consistency of enforcement, we are looking for evidence that laws are applied similarly in similar situations, without regard to the plaintiff’s status; for that reason, our proxies relate to judicial expertise and professionalism. In the area of civil enforcement, higher-level courts and specialized courts are more likely to be consistent in their interpretations of the law because they generally have better-trained judges than lower-level courts; higher-level courts also have to produce better-reasoned decisions, because they are subject to greater scrutiny than lower-level courts.<sup>17</sup> Professionalism is similarly crucial for administrative enforcement. As we can observe in the area of patent enforcement (Chapter 9), agencies with better-trained personnel are more likely to provide consistent law enforcement than agencies with poorly qualified personnel.

A clearly defined enforcement jurisdiction may also contribute to the rise of consistent law enforcement, since jurisdictional ambiguities obscure responsibility for enforcement and can thus produce unpredictable enforcement. Jurisdictional ambiguity also makes it harder to appeal enforcement decisions: because an agency did not have to get involved in a case in the first place, it is difficult to sue it for abuse of discretion or for inaction. All else being equal, centralization (when it is accompanied by clearly defined enforcement mandates and by effective external supervision) may also increase consistency by limiting the opportunities for lower-level bureaucrats to use legal ambiguities as an excuse to shirk or engage in haphazard enforcement.<sup>18</sup>

Finally, consistency is likely to increase when judicial interpretations of decisions in key cases acquire the value of precedent. Even though China has a civil-law system, precedent is becoming very important in the area of IPR. The decisions of courts in Beijing and Shanghai are frequently cited when IPR cases

<sup>17</sup> Mei Y. Gechlik, *Protecting Intellectual Property Rights in Chinese Courts: An Analysis of Recent Patent Judgments* (Washington, DC: Carnegie Endowment for International Peace, 2007), 7–9.

<sup>18</sup> A growing literature details how decentralization may encourage poor provision of public goods and corruption. This literature is reviewed in Chapter 2.

are resolved in other parts of the country. In addition, judicial interpretations of the Supreme People's Court now effectively have precedential value as well. A norm of deference to precedent makes individual decisions more predictable, both for the professionals hearing the cases and for the right holder who needs to determine a legal course of action.

For transparency, our initial proxy is the frequency with which open trials (*kaiting shenli*) and open administrative hearings (*tingzheng hui*) are held, since open trials make judicial collusion and judicial bias more difficult. Another proxy for transparency is the publication of court decisions and administrative punishment decisions. Ideally, one would be able to ascertain for any court in China both what percentage of judicial decisions are published and whether these decisions contain extensive legal reasoning or just a short statement of the facts of the case. A recent empirical study of the courts in three Chinese provinces represents an important first step in this kind of scholarship, since the researchers were able to sample court records and establish what kinds of decisions were made public.<sup>19</sup> In relation to IPR, Gechlik's important study analyzes recent patent cases handled by two courts in Beijing and finds that a large number of the decisions in these patent disputes were made publicly available and, moreover, contained lengthy legal reasoning (lengthy legal reasoning makes it more difficult for a judge to engage in arbitrary or corrupt decision making).<sup>20</sup> A continuous commitment to publish judicial decisions in full is a sign of greater transparency, since published decisions make it more difficult for judges to engage in behind-the-scenes particularistic behavior in favor of one side or the other.

The concept of fairness can refer to either substantive fairness or procedural fairness. Substantive fairness exists when the laws are just, a legal and philosophical question that is beyond the scope of this project. Procedural fairness exists when the requirements for a fair trial are met. In general, these requirements include having access to legal representation and to a fair judge, the absence of intimidation during the trial, and the right of appeal. It is impossible to measure directly and systematically most indicators of procedural fairness. The rate of appeal is a useful proxy. As a matter of procedural fairness, right holders should not be prevented from appealing the outcome of a case.

The problem with this proxy is that it is difficult to establish baseline indicators of the frequency of appeal that is too low, the frequency that is normal, and the frequency that is too high. We might reasonably expect that the appeals rate would vary, depending on the professionalism of the enforcers. For example, given the widespread perception of the high professionalism of judges in IPR tribunals, and of the low professionalism of bureaucrats

<sup>19</sup> Margaret Y. K. Woo and Yaxin Wang, "Civil Justice in China: An Empirical Study of Courts in Three Provinces," *The American Journal of Comparative Law* 53:4 (2005), 911–940.

<sup>20</sup> Gechlik, *Protecting Intellectual Property Rights in Chinese Courts*.

supplying administrative enforcement for trademarks,<sup>21</sup> we would expect the decisions of IPR tribunals to be appealed less often than those of the bureaucracies that provide trademark administrative enforcement. In practice, however, the exact opposite has occurred: the appeals rate for court cases is thirty times higher than the appeals rate for the decisions of trademark administrative bureaucracies.<sup>22</sup> This suggests that, whereas courts seem not to discourage appeals, administrative agencies are imposing undue burdens on those who attempt to appeal. In their operation, the courts come closer than the administrative agencies to fulfilling the requirements of procedural fairness.

Two caveats about the high appeals rates of court cases are in order. Under some circumstances, high appeals rates could indicate not fairness, but judicial incompetence. This is clearly not the case for civil IPR cases, which are handled by some of the best judges in China. Second, since appeals are costly, plaintiffs may be willing to appeal only when the monetary claims in the case are relatively high. But courts in China still do not routinely issue damage awards that would justify the expense of additional litigation. In most cases, appeals are aimed at getting the infringer to stop the infringing act, not at collecting damage awards. Overall, then, the appeals rate remains the best available proxy for the degree of procedural fairness of IPR enforcement.

### Kinds of Enforcement and Rationalization

There are five different kinds of enforcement in China: judicial enforcement, three kinds of routine enforcement, and campaign-style enforcement (see Table 1.1). Each of these has a different potential for developing rationalization.

Judicial enforcement is provided exclusively by courts of law in response to requests from plaintiffs. Judicial enforcement is conducted in public and concludes with a written punishment decision that can be appealed. This study demonstrates that judicial enforcement is consistent, transparent, and procedurally fair, although at the moment it is of a low volume.

There are three kinds of routine enforcement. The first subtype is quasi-judicial enforcement provided in response to a request from the right holder or some other party that has a legitimate interest in the case. In China, this enforcement is habitually provided by the patent bureaucracy (the State Intellectual Property Office [SIPO]) or by the copyright bureaucracy (the National Copyright Administration of China [NCAC]), but it does not exist in the area of

<sup>21</sup> On the low professionalism of bureaucrats engaged in trademark enforcement, see Daniel C. K. Chow, *A Primer on Foreign Investment Enterprises and Protection of Intellectual Property Rights in China* (The Hague and New York: Kluwer Law International, 2002); Loke-Khoon Tan, *Pirates in the Middle Kingdom: The Art of Trademark War* (Hong Kong: Sweet & Maxwell Asia, 2004); and Rebecca Ordish and Alan Adcock, *China Intellectual Property Challenges and Solutions: An Essential Business Guide* (Singapore: John Wiley, 2008).

<sup>22</sup> On average, about 30 percent of the cases handled by the IPR tribunals are appealed (see Chapter 4). On average, fewer than 1 percent of the cases handled by the administrative agencies are appealed (see Chapters 2, 5, 7, 8, and 9).