
Shanzhai, Sumptuary Law, and Intellectual Property Law in Contemporary China

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INTRODUCTION

This Article seeks to make sense of three related phenomena in contemporary China. The first is the Chinese central government’s recent revival of direct, top-down sumptuary law. Up through at least the early-modern period, nearly every society in human history imposed some form of sumptuary law designed to regulate the consumption of distinctive goods, particularly luxury goods.¹ China was no exception. Indeed, Chinese sumptuary laws stood out as especially detailed and carried force well into the nineteenth century.²

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¹ See JOHN HENRY GRAY, CHINA: A HISTORY OF THE LAWS, MANNERS, AND CUSTOMS OF THE PEOPLE 362 (William Gow Gregor ed., 1878) (noting with respect to sumptuary law that “[i]n almost all ages and nations there have been such laws”). See generally ALAN HUNT, GOVERNANCE OF THE CONSUMING PASSIONS: A HISTORY OF SUMPTUARY LAW (1996) (exploring the political, sociological, and historical linkages between sumptuary law and governance across various cultures).

² See GRAY, *supra* note 1, at 362-76; GEOFFREY MACCORMACK, THE SPIRIT OF TRADITIONAL CHINESE LAW 113-14 (1996); Wallace S. Johnson, *Sumptuary Laws in*

The purpose of such laws in China, as elsewhere, was two-fold: first, to prevent wasteful competitive consumption that might drain the nation's resources and through its extravagance incite social unrest, and second, to preserve the integrity of the society's sumptuary code, its system of consumption-based social differentiation.³ The most recent example of Chinese sumptuary law comes to us from the Political Bureau of the Central Committee of the Communist Party of China, more commonly known as the Chinese Politburo. In December 2012, the Politburo issued its Eight Provisions meant to improve party member conduct.⁴ Several of these provisions called for party members to curtail extravagant displays of wealth and privilege, which had begun to assume absurd proportions: "Officials have been known to compete over who could build the biggest offices and host the most extravagant parties."⁵ As one report summarized the Politburo's

Chinese Law, in 5 OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY 409-10 (Stanley N. Katz ed., 2009). Even a brief excerpt from Gray's discussion of the regulation of sedan chairs in late-nineteenth-century China may give some idea of the level of detail of such regulations:

The state sedan-chair of an official, whether civil or military, of all ranks, must be covered with green cloth. . . . For the first three ranks, the ends of the poles or shafts may be tipped with brass moulded in the form of dragons' heads. For the fourth and fifth ranks, the ends of the poles may be tipped with brass moulded in the form of lions' heads. The ends of the poles of the sedan-chair of an official of any of the four remaining ranks, may be tipped with brass on which is engraven in relief representations of the clouds. . . . Blue cloth is to be used for the chair of a private gentleman, and the ends of the poles must be tipped with plain ferules of brass. Sedan-chairs, used by persons in the humbler walks of life, must be covered with cloth of a dark colour, and the ends of the poles or shafts perfectly plain.

GRAY, *supra* note 1, at 374. For an idiosyncratic interpretation of Chinese sumptuary law, see CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* bk. VII.6., at 119-20 (Thomas Nugent trans., Batoche Books rev. ed. 2001) (1748). See, e.g., SUZANNE GREENE MARSHALL & MARY KEFGEN, *INDIVIDUALITY IN CLOTHING SELECTION AND PERSONAL APPEARANCE* 50 (2000) (equating the development of the "Mao suit" norm in Maoist China with twentieth century forms of Chinese sumptuary law).

³ See Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 812-13 (2010) [hereinafter *Sumptuary Code*] (defining the "sumptuary code").

⁴ See *Buzz-Words in China in First Half of 2013: Eight Provisions*, PEOPLE'S DAILY ONLINE (July 10, 2013), <http://english.people.com.cn/90782/8318989.html>. A summary of the Eight Provisions and of measures being taken by China's various provinces to implement them is available at *Party Bans Extravagance, Bureaucracy*, CHINA DAILY (Jan. 21, 2013), http://www.chinadaily.com.cn/china/2013-01/21/content_16150123.htm.

⁵ *New Rules Tell Chinese Officials How to Behave*, NTD TELEVISION (Dec. 5, 2012), <http://www.ntd.tv/en/news/china/20121205/76039-new-rules-tell-chinese-officials->

December decrees: “Every official must adopt a more realistic approach and be on guard against pomp and circumstance; lighter luggage and fewer attendants should be favored, and reception simplified. Banners, red carpets and flowers together with dinner parties should be avoided at all costs.”⁶ Lest anyone believe these admonitions to be merely aspirational or too vague to carry force, officials have already been terminated for violating their terms.⁷

The Eight Provisions are consistent with other, stranger governmental efforts in China to restrain extravagance. For example, certain municipalities have condemned various forms of luxury goods advertising as “not conforming to the demands of socialist spiritual civilization” and, slightly more to the point, as “unhelpful for social harmony.”⁸ Beijing is reported to have banned the use of such words as “royal,” “imperial,” “supreme,” “high class,” and “luxury” in billboard advertising.⁹ More ambitiously, Chongqing has banned the use of such terms as “best,” “irreplaceable,” and most interestingly, “unique.”¹⁰

how-to-behave.html.

⁶ *The Eight Provisions*, CHINA WIKI, http://wiki.china.org.cn/wiki/index.php/The_Eight_Provisions (last updated Feb. 5, 2013).

⁷ See Laurie Burkett, *China's Frugality Fight Claims New Casualties*, WALL ST. J. (Feb. 6, 2013), <http://blogs.wsj.com/chinarealtime/2013/02/06/local-figures-tv-ads-take-hit-from-corruption-push/>; Chen Tian, *Officials Sacked for Breaking Xi's 8 Frugal Work Provisions*, GLOBAL TIMES (Mar. 20, 2013), <http://www.globaltimes.cn/content/769229.shtml>; see also *From the Chinese Press*, CHINA DAILY, Feb. 26, 2013, at 9, available at 2013 WLNR 9810355 (“Many officials were prone to hypertension or at risk of diabetes because of the frequent social activities and banquets they enjoyed. Such a ‘wine culture’ also gave rise to power-for-money deals under the table. Fortunately, the eight measures to reduce official extravagance and waste have bunged a cork in the traditional alcohol-lubricated activities prior to the Spring Festival and officials had the time and energy to concentrate on their duties.”); *Pursuing a Dream for 1.3 Billion Chinese*, CHINA DAILY, Mar. 18, 2013, at 5, available at 2013 WLNR 9821437 (reporting positive impact of Eight Provisions, including on the conduct of President Xi himself, who “turned down suggestions for him to stay at a better hotel when he inspected Fuping county in Hebei province in late December. ‘Do not make a fuss over where to stay,’ he said. ‘It’s alright.’”).

⁸ *Beijing Targets Luxury Housing Billboards*, CHINA DAILY (May 20, 2007), http://www.chinadaily.com.cn/2008/2007-05/20/content_876319.htm; see also Wang Wen, *Ads Promoting Wealthy Goods, Lifestyles Banned*, CHINA DAILY (Mar. 21, 2011), http://www.chinadaily.com.cn/cndy/2011-03/21/content_12199764.htm.

⁹ See Malcolm Moore, *China Bans Luxury Advertising in Beijing*, TELEGRAPH (Mar. 22, 2011), <http://www.telegraph.co.uk/news/worldnews/asia/china/8398097/China-bans-luxury-advertising-in-Beijing.html>; Dexter Roberts, *China's Ad Business Faces a Crackdown*, BLOOMBERG BUSINESSWEEK (Apr. 7, 2011), http://www.businessweek.com/magazine/content/11_16/b4224011340471.htm.

¹⁰ See Moore, *supra* note 9.

In contrast to, but nevertheless deeply consonant with, these top-down laws is a second, more grassroots development in contemporary China: the rapid and widespread emergence in the past decade of “shanzhai” (山寨, pronounced shan-chai).¹¹ Originally a term for a fortified mountain hamlet perhaps populated by virtuous bandits,¹² shanzhai is now the term given to a wide array of sometimes licit but usually illicit copying and appropriationist practices in China. Shanzhai is often commercial in nature: for example, the “HiPhone”¹³ or the “BlockBerry” phone advertised by President Obama;¹⁴ shoes bearing something resembling the Nike swoosh and the word marks “Like,”¹⁵ “Hike,”¹⁶ or “Dike,”¹⁷ apparel bearing a “Kuma”¹⁸ mark with a leaping bear or the mark “Dolce & Banana”;¹⁹ a belt labeled with a kind of “Gucci” word mark as well as a logo in the form of interlocking G’s outfacing in the manner of Chanel.²⁰ Instead of “Tide” laundry detergent, there is “Tids”;²¹ instead of “Oil of Olay” shampoo

¹¹ See generally William Hennessey, *Deconstructing Shanzhai — China’s Copycat Counterculture: Catch Me if You Can*, 34 CAMPBELL L. REV. 609 (2012) (discussing the emergence and meaning of shanzhai practices in China); Haochen Sun, *Can Louis Vuitton Dance with HiPhone?: Rethinking the Idea of Social Justice in Intellectual Property Law*, 15 U. PA. J.L. & SOC. CHANGE 389 (2012) (discussing the conflict between shanzhai practices and luxury consumption in China).

¹² YU HUA, CHINA IN TEN WORDS 181 (Allan H. Barr trans., 2012) (“The word rendered here as ‘copycat’ [shanzhai] originally denoted a mountain hamlet protected by a stockade or other fortifications; later it acquired an extended meaning as a hinterland area, home to the poor. It was also a name once given to the lairs of outlaws and bandits, and the word has continued to have connotations of freedom from official control.”).

¹³ See Tim Stevens, *HiPhone 5 Is Just a Few Curves Away from KIRF*, ENGADGET (Mar. 16, 2011), <http://www.engadget.com/2011/03/16/hiphone-5-is-just-a-few-curves-away-from-kirf-video>.

¹⁴ See Brendon Chase, *Shanzhai Ji: All You Need to Know About Fake Phones*, CNET AUSTRALIA (July 10, 2009), <http://www.cnet.com.au/shanzhai-ji-all-you-need-to-know-about-fake-phones-339297258.htm>.

¹⁵ See Alvin Tsang, *Fake Friday: Like*, CHINALERT (Feb. 25, 2011), <http://chinalert.com/category/fake-stuff/page/2/>.

¹⁶ See Olivia, *Photo Hunt Game of Chinese Shanzhai Products*, CHINAHUSH (July 31, 2011), <http://www.chinahush.com/2011/07/31/photo-hunt-game-of-chinese-shanzhai-products/>.

¹⁷ See *Shanzhai Eye: Dike Shoes*, SHANGHAI GINGER GUY (Jan. 19, 2009), <http://shanghaingerguy.com/2009/01/19/shanzhai-eye-dike-shoes/>.

¹⁸ See Olivia, *supra* note 16.

¹⁹ See Kunal Sinha, *Shanzhai: China’s Brand Copycats*, SPARKSHEET (Feb. 7, 2012), <http://sparksheet.com/shanzhai-chinas-brand-copycats/>.

²⁰ See Olivia, *supra* note 16.

²¹ See Joe, *Funny and Clever Chinese “Shanzhai” Brands*, CHINASMACK (Nov. 4, 2008), <http://www.chinasmack.com/2008/pictures/funny-clever-chinese-shanzhai-brands.html>.

there is “Okay” shampoo in a similar trade dress;²² instead of “Starbucks” there is “Sunbucks.”²³ Sometimes shanzhai is noncommercial and takes the form of deliberate culture jamming, as in Hong Huang’s brilliant appropriations of fashion magazine covers.²⁴ Shanzhai may also be overtly political in intent, as with the Shanzhai Olympic Torch Relay²⁵ or the Shanzhai National Spring Gala.²⁶ Sometimes it is vaguely Rabelaisian, as in automobile mud mats featuring the repeating-monogram pattern of Louis Vuitton²⁷ or toilet seat covers featuring the bitten-apple logo of Apple²⁸ or pigs inexplicably tattooed with the Louis Vuitton pattern.²⁹ And sometimes shanzhai is, at its grandest, simply unfathomable, as in the many simulated European monuments and towns in China, like the “Mediterranean shopping village” recently built within the world’s largest building in Chengdu.³⁰ Whatever form it takes, shanzhai is

²² See Olivia, *supra* note 16.

²³ See Peter, *Funny Fake Chinese Brands Play Word Games*, CHINA WHISPER (Dec. 11, 2010), <http://www.chinawhisper.com/funny-fake-chinese-brands-play-word-games/>; see also Paul Ertel, *Shanzhai: Kopierkultur in China*, PAPERBLOG (June 7, 2012), <http://de.paperblog.com/shanzhai-kopierkultur-in-china-von-paul-ertel-374259/> (displaying photo of “Star Fucks Coffe” store sign); Sinha, *supra* note 19 (displaying photo of “Buckstar Coffee” store sign).

²⁴ See Hong Huang *Interprets Shanzhai in Her Own Way*, CHINA DAILY (Apr. 29, 2009), http://www.chinadaily.com.cn/showbiz/2009-04/29/content_7730403.htm.

²⁵ See Sun, *supra* note 11, at 416-17 (describing the “Shanzhai Olympic Torch Relay” in Henan Province, which rural villagers organized to protest the degree to which the official Olympic Torch Relay excluded ordinary Chinese); see also HUA, *supra* note 12, at 189-90.

²⁶ See Sun, *supra* note 11, at 421-22 (describing the Shanzhai Spring Festival Gala, which was organized to protest the official Spring Festival Gala, an annual televised variety program designed to pay tribute to the Communist Party); see also HUA, *supra* note 12, at 187-88.

²⁷ See *Does This Chinese Cabbie Love Louis Vuitton? Or Hate Them?*, THE KNOCKOFF ECON. (Aug. 29, 2012), <http://www.theknockoffeconomy.com/does-this-chinese-cabbie-love-louis-vuitton-or-hate-them/>.

²⁸ See Jin Ge, *Shanzhai State of Mind*, 88 BAR (May 15, 2012), <http://www.88-bar.com/2012/05/shanzhai-state-of-mind/>.

²⁹ See *Louis Vuitton Tattoos for Chinese Pigs*, CINA PIG (June 29, 2011), <http://cinapig.com/2009/06/29/louis-vuitton-tattoos-for-chinese-pigs/>; see also David Burn, *Pigs Endure Logo Treatment*, ADPULP (July 22, 2005), http://www.adpulp.com/pigs_endure_log/ (“The pigs are owned by Belgian artist Wim Delvoye, who has a staff of local farmers and tattoo artists raising sows to use them as canvases for skin art.”). For a Bakhtinian reading of shanzhai, see Anqi Hu, *Copycatting Culture Study: A Perspective of Bakhtin’s Carnival Theory*, 7 J. CAMBRIDGE STUD. 120 (2012).

³⁰ See Oliver Wainwright, *Largest Building in the World Opens in China — Complete with Indoor Seaside*, GUARDIAN (July 9, 2013), [http://www.guardian.co.uk/artanddesign/architecture-design-blog/2013/jul/09/largest-building-world-china-seaside](http://www.guardian.co.uk/artanddesign/architecture-design-blog/2013/jul/09/largest-building-world-china-seaside;);

pervasive in contemporary China. As Yu Hua observes, “The force and scale of copycatting demonstrate that the whole nation has taken to it as a form of performance art.”³¹

A third recent development in China is the increasing number and effectiveness of intellectual property lawsuits and administrative enforcement actions brought by foreign luxury goods producers against Chinese defendants. Luxury brand owners have been especially aggressive in seeking to suppress counterfeiting activity, and for good reason, since the Chinese now constitute the largest luxury goods market in the world.³² But luxury brands have also aggressively sought to suppress shanzhai practices directed towards them, which often fail to rise to the level of outright identical-mark-on-identical-goods counterfeiting but can still significantly damage the targeted brand. These efforts seem to be paying off. Hermès, Burberry, Cartier, and Coach have each recently won significant cases against infringers, with Coach making headlines for its award of \$257 million in damages.³³ Meanwhile, in a first for the two countries, the United States and China recently collaborated to shut down a massive counterfeiting operation in Guangdong province valued at \$802 million.³⁴ Authoritative media reports even suggest that “[t]he tide may be turning against forgers of fakes operating in China.”³⁵

I present together these three developments — the Politburo’s Eight Provisions, the rapid emergence of shanzhai, and the somewhat less rapid emergence of intellectual property law actions directed against shanzhai status goods — because of the strange similarities and differences that run among them. The Eight Provisions and shanzhai status goods are similar in that they are both reactions against competitive consumption. The important difference, of course, is that the Eight Provisions are a reaction by social elites seeking to preserve

Oliver Wainwright, *Seeing Double: What China’s Copycat Culture Means for Architecture*, GUARDIAN (Jan. 7, 2013), <http://www.guardian.co.uk/artanddesign/architecture-design-blog/2013/jan/07/china-copycat-architecture-seeing-double>. See generally YI-CHIEH JESSICA LIN, FAKE STUFF: CHINA AND THE RISE OF COUNTERFEIT GOODS 66-70 (2011) (discussing the production and consumption of counterfeit status goods in China).

³¹ HUA, *supra* note 12, at 188.

³² See discussion *infra* Part I.A.

³³ See Casey Hall, *Cartier Wins Case in Shanghai*, WOMEN’S WEAR DAILY, Apr. 11, 2013, at 17 [hereinafter *Cartier Wins*]; Alexandra Steigrad, *Coach Wins \$257M Counterfeit Case*, WOMEN’S WEAR DAILY (Nov. 2, 2012), <http://www.wwd.com/business-news/legal/coach-wins-cybersquatting-suit-6467590?module=hp-business>.

³⁴ Casey Hall & Kristi Ellis, *China and U.S. Team for Counterfeit Sting*, WOMEN’S WEAR DAILY, Nov. 20, 2012, at 11.

³⁵ *Id.*

social stability, while shanzhai status goods are a reaction primarily by the non-elite that is at least symptomatic of, if not an incitement to, social instability. The former attacks competitive consumption through top-down controls on consumption; the latter attacks competitive consumption through bottom-up appropriation and recoding. But more interesting is the similarity between the Eight Provisions and intellectual property laws directed against shanzhai — more interesting because of what this similarity reveals about contemporary intellectual property law not simply in China but around the world. Both, in short, are forms of sumptuary law, and both seek to preserve social stability. The difference is that while the Eight Provisions seek to preserve social stability by limiting socially-destabilizing forms of competitive consumption, intellectual property law directed against counterfeit and shanzhai status goods seeks to preserve social stability by defending the internal integrity of the society's system of consumption-based social differentiation. The former seeks to limit the system's excesses; the latter seeks to ensure its smooth functioning.

In what follows in this brief Article, I will further consider the degree to which Chinese intellectual property law, like intellectual property law elsewhere, has come to take on, among its many functions, the function of sumptuary law. I will also consider, more speculatively, whether Chinese intellectual property law can hope to succeed in this new role and what the implications of its success or failure might be. To do so, I will draw upon previous work³⁶ to propose two images of the future of shanzhai and its impact on Chinese and even global consumer culture. One image of the future of shanzhai, which I take to be the pessimistic and perhaps more probable future, is that intellectual property law will succeed in suppressing shanzhai, or in any case, that shanzhai will fail to disrupt the new system of consumption-based social differentiation taking root in China. The other, more optimistic and improbable image of the future is that intellectual property law will fail to suppress shanzhai practices and the damage they inflict on China's new sumptuary code. Part I reviews the rise of status consumption and the emergence of shanzhai practices in China. Part II considers in more detail the two images of the future of shanzhai.

³⁶ See Beebe, *Sumptuary Code*, *supra* note 3. See also Barton Beebe, *Fair Use and Legal Futurism*, 25 *LAW & LITERATURE* 10 (2013) (discussing legal "images of the future").

I. STATUS GOODS AND SHANZHAI IN CHINA

A. *The Rise in Chinese Luxury Goods Consumption*

Chinese luxury goods consumption has exploded in the past decade, which goes far towards explaining China's recent turn to sumptuary law, be it in the form of the Eight Provisions or enhanced intellectual property enforcement. The statistics are amazing.³⁷ Only in 2003 did Chinese consumers first begin to account for more than one percent of global luxury purchases, but from 2003 through 2011, Chinese luxury good consumption grew at annual rates above, by some estimates well-above, thirty percent.³⁸ As of 2012, one-in-four luxury goods consumers in the world are Chinese, which means that Chinese luxury goods purchasers have now edged out their European and American counterparts to become the world's largest population by nationality (or region) of luxury goods consumers.³⁹ Because as much as sixty percent of Chinese luxury purchases occur outside of mainland China and its regime of high duties and taxes on luxury goods,⁴⁰ luxury shops around the world have had to adjust quickly, with the hiring of Mandarin speakers, the expansion of VIP rooms to

³⁷ They are also quite varied and ambiguous. News reports may use the term "China" to refer to the Chinese, who make a significant proportion of their luxury purchases outside of China. See, e.g., *Beyond Bling*, *ECONOMIST* (June 8, 2013), <http://www.economist.com/news/business/21579015-life-getting-harder-purveyors-luxury-china-growth-prospects-are-still> ("Measured by the nationality of the buyer, China is now the world's biggest luxury market, and growing fast."). News reports may also use the term "China" to refer only to mainland China or to a greater China including Hong Kong, Macau, and even Taiwan. See, e.g., *id.* (arguing that the new round of sumptuary law-making globally taking place is driven by intellectual property concerns).

³⁸ See HSBC, *GLOBAL LUXURY GOODS 7* (2011) ("[S]ince the Chinese luxury market became relevant ([i.e.,] in 2003 when China started to account for more than 1% of luxury groups' sales), it has grown at rates above 30% without interruption . . .").

³⁹ See BAIN & CO. & FONDAZIONE ALTAGAMMA, *2012 LUXURY GOODS WORLDWIDE MARKET STUDY 2* (11th ed. 2012) [hereinafter *LUXURY GOODS WORLDWIDE*], available at www.ipmark.com/pdf/lujo_2012.pdf.

⁴⁰ See BAIN & CO., *BAIN POINT OF VIEW, 2012 CHINA LUXURY STUDY 2* (2012), available at http://www.fccihk.com/files/dpt_image/5_committees/Luxury%20Committee/121212-2012%20Luxury%20study_Media%20release.pdf; see also *Luxury Market Takes Hit*, *WORLD FIN.* (Nov. 7, 2012), <http://www.worldfinance.com/home/special-reports-home/luxury-market-takes-hit> ("Every luxury item imported into China is subject to customs tariffs that range between 4.4 percent and 60 percent, in addition to standard value added tax (VAT) of 17 percent, and a one off consumption tax of 30 percent."). Luxury producers have also simply been charging higher prices in China. See Wei Gu, *Luxury-Goods Firms' Little China Secret*, *WALL ST. J.* (Apr. 25, 2013), <http://online.wsj.com/article/SB10001424127887324474004578444090260265834.html>.

accommodate large tour groups, and the deployment of payment systems that can process Chinese credit cards.⁴¹ This has especially been the case in Europe, where Chinese tourists make nearly one-third of luxury purchases.⁴² Even with significantly lower growth rates (of about six to eight percent) predicted for Chinese luxury consumption in 2013, Greater China (including Taiwan, Hong Kong, and Macau) is expected to account for \$35 billion in luxury sales this year, making it the second largest market for luxury goods in the world, behind only the United States.⁴³

The scale of this expansion in Chinese luxury spending may be especially surprising given that Chinese per capita GDP ranked 93rd in the world in 2011, at \$5,447, just behind Iraq, Namibia, Turkmenistan, and the Dominican Republic.⁴⁴ It becomes less surprising — and shanzhai practices directed at status goods become more understandable — when one considers the extent of the wealth-gap in present-day China. Recent estimates suggest that there are approximately 700,000 households in China with assets greater than \$1 million, and at 0.2% of the population, they control 48% of China's wealth.⁴⁵ In January 2013, the Chinese government released for the first time in twelve years an official estimate of China's Gini coefficient,⁴⁶ which it pegged at 0.474 in 2012.⁴⁷ Many believe the true figure to be significantly higher, however, possibly as high as 0.61 or more,⁴⁸ which would put China near the top of the list of the most

⁴¹ See *Beyond Bling*, *supra* note 37.

⁴² See BAIN & CO., LUXURY GOODS WORLDWIDE, *supra* note 39, at 2.

⁴³ See *Beyond Bling*, *supra* note 37.

⁴⁴ WORLD BANK, DATA CATALOG, GDP PER CAPITA (CURRENT US\$), available at http://data.worldbank.org/indicator/NY.GDP.PCAP.CD?order=wbapi_data_value_2011+wbapi_data_value&sort=desc (last visited Sept. 21, 2013).

⁴⁵ See Kenneth Rapoza, *For China's Wealthy, A New "Post-Luxury" Luxury*, FORBES (Apr. 24, 2013), <http://www.forbes.com/sites/kenrapoza/2013/04/24/for-chinas-wealthy-a-new-post-luxury-luxury/> ("In China, Boston Consulting Group (BCG) estimates that there are around 700,000 households with assets greater than \$1 million. They make up China's 0.2 percenters. And they control 48% of China's wealth.").

⁴⁶ The Gini coefficient, named after its creator Corrado Gini, measures inequality in a society. A coefficient of 1.00 describes a society of extreme wealth inequality, where, for example, one person possesses all of the wealth of that society. A coefficient of 0.00 describes a society of perfectly equal wealth distribution, where, for example, each member possesses the same amount of wealth. Countries with a Gini coefficient over 0.4 are generally considered to be countries with a high — and destabilizing — degree of economic inequality.

⁴⁷ *Gini Out of the Bottle*, ECONOMIST (Jan. 26, 2013), <http://www.economist.com/news/china/21570749-gini-out-bottle>.

⁴⁸ Jennifer Duggan, *Income Inequality on the Rise in China*, AL JAZEERA (Jan. 12,

unequal countries in the world.⁴⁹ Such concentrations of wealth and extremes of inequality drive the global luxury goods industry generally. In China more specifically, they help to explain how a country where sixty-eight percent of the population lives on less than five dollars a day⁵⁰ can outpace North America and Europe in total luxury goods purchasing.

Other factors have also contributed to China's extraordinary increase in luxury consumption. Commentators frequently point to Chinese culture's emphasis on maintaining face and on projecting respectability — or in Weberian terms, on maintaining and projecting “status honor”⁵¹ — to explain why the newly rich have begun to engage so aggressively in luxury consumption,⁵² particularly in the consumption of merchandise bearing large and easily-legible logos.⁵³

2003), <http://www.aljazeera.com/indepth/features/2012/12/2012122311167503363.html>. The Chinese Bureau of Labor Statistics recently estimated China's Gini coefficient to be 0.474 in 2012, but few apparently believe this statistic. See Didi Kirsten Tatlow, *China's Lamborghini Coefficient: Who's Getting Richer and Who Poorer?*, INT'L HERALD TRIB. (Jan. 20, 2013), <http://rendezvous.blogs.nytimes.com/2013/01/20/chinas-lamborghini-coefficient-whos-getting-richer-who-poorer/>.

⁴⁹ See WORLD BANK, GINI INDEX, <http://data.worldbank.org/indicator/SI.POV.GINI?page=1> (last visited Oct. 20, 2013). Chinese inequality is characterized above all by an extreme rural-urban wealth gap. See Damian Tobin, *Inequality in China: Rural Poverty Persists as Urban Wealth Balloons*, BBC NEWS (June 29, 2011), <http://www.bbc.co.uk/news/business-13945072>. See generally ONE COUNTRY, TWO SOCIETIES: RURAL-URBAN INEQUALITY IN CONTEMPORARY CHINA (Martin King Whyte ed., 2010) (discussing different facets and theories of the rural-urban income gap in China).

⁵⁰ WORLD BANK, CHINA, POVERTY & EQUITY COUNTRY DASHBOARD, <http://povertydata.worldbank.org/poverty/country/CHN> (last visited July 17, 2013). The 68% figure is for 2009.

⁵¹ See Michael Pinches, *Cultural Relations, Class, and the New Rich of Asia*, in CULTURE AND PRIVILEGE IN CAPITALIST ASIA 1, 8 (Michael Pinches ed., 1999) [hereinafter CULTURE AND PRIVILEGE].

⁵² See, e.g., Julie Juan Li & Chenting Su, *How Face Influences Consumption: A Comparative Study of American and Chinese Consumers*, 49 INT'L J. MARKETING RES. 237 (2007) (explaining the concept of “face” as distinguished from “prestige” and showing how face impacts East Asian consumption practices); Pinches, *supra* note 51 (discussing cultural representations and interpretations of the newly rich in Asia); Nancy Y. Wong & Aaron C. Ahuvia, *Personal Taste and Family Face: Luxury Consumption in Confucian and Western Societies*, 15 PSYCH. & MARKETING 423 (1998) (using self-concept theory to explain the cultural factors that motivate East Asian luxury consumption); Nan Zhou & Russell W. Belk, *Chinese Consumer Readings of Global and Local Advertising Appeals*, 33 J. ADVERT. 63 (2004) (using a reader-response approach to analyze upscale Chinese consumers' understanding of advertising); see also Sun, *supra* note 11, at 401.

⁵³ See Xavier Dréze, Young Jee Han & Joseph C. Nunes, *First Impressions: Status Signaling Using Brand Prominence* 21-22 (Marshall Sch. of Bus., Working Paper No. MKT 15-09, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1262479; see

Chinese culture also relies heavily on gift-giving to develop and maintain “social reciprocity,”⁵⁴ with business interests routinely engaging in gift-giving to government bureaucrats to obtain favorable treatment — a practice which was another target of the Eight Provisions.⁵⁵ The strange result is that China remains the only male-dominated luxury market in the world.⁵⁶ Finally, members of China’s newly enriched class, particularly its “princelings,”⁵⁷ tend to be relatively young and thus apparently “more knowledgeable about global brands, and less value-for-money driven than their elders.”⁵⁸ As for why Chinese consumers purchase foreign rather than local luxury brands, the general explanation is that there are not yet any Chinese luxury brands that can compete against well-established brands from Europe (e.g., Chanel, Louis Vuitton, Rolex) and even the United States (e.g., Tiffany, Coach, Ralph Lauren). Relatedly, Chinese consumers also remain heavily biased against the “Made in China” label,⁵⁹ especially for luxury goods.⁶⁰

also KPMG, CONSUMER MARKETS, LUXURY EXPERIENCES IN CHINA 7 (2011), available at <http://www.kpmg.com/DK/da/nyheder-og-indsigt/nyhedsbreve-og-publikationer/publikationer/brancher/consumer-markets/Documents/luxury-experience-China.pdf> (“[L]uxury consumption continues to fulfill a strong status and social function need. Luxury executives may be reluctant to admit it openly, but many conceded that products with visible logos often sell more strongly, we believe for this reason.”); Lingjing Zhan & Yanqun He, *Understanding Luxury Consumption in China: Consumer Perceptions of Best-Known Brands*, 65 J. BUS. RES. 1452, 1455 (2012). Chinese consumers’ preference for prominent logos is apparently evolving, however, with more experienced consumers opting for more subtle displays of distinction. See BAIN & CO., LUXURY GOODS WORLDWIDE, *supra* note 39, at 17.

⁵⁴ See Christopher Buckley, *How a Revolution Becomes a Dinner Party: Stratification, Mobility and the New Rich in Urban China*, in CULTURE AND PRIVILEGE, *supra* note 51, at 208, 225.

⁵⁵ See Casey Hall, *China Crackdown Could Hit Men’s*, WOMEN’S WEAR DAILY, Feb. 14, 2013, at 10b [hereinafter *China Crackdown*].

⁵⁶ See HSBC, *supra* note 38, at 15; see also Hall, *China Crackdown*, *supra* note 55, at 10b (“According to research from brokerage CLSA, men account for about 55 percent of China’s luxury goods market, well above the global average of 40 percent.”).

⁵⁷ See David Barboza & Sharon LaFraniere, “Princelings” in China Use Family Ties to Gain Riches, N.Y. TIMES, May 17, 2012, at A1, available at http://www.nytimes.com/2012/05/18/world/asia/china-princelings-using-family-ties-to-gain-riches.html?pagewanted=all&_r=0 (reporting examples of sons and daughters of party officials profiting from nepotism).

⁵⁸ See HSBC, *supra* note 38, at 7.

⁵⁹ See Daniel Gross, *Consumers Love the Made in the U.S.A. Brand*, DAILY BEAST (Nov. 20, 2012), <http://www.thedailybeast.com/articles/2012/11/20/consumers-love-the-made-in-the-u-s-a-brand.html>.

⁶⁰ See Bruno Godey et al., *Brand and Country-of-Origin Effect on Consumers’*

B. The Rise of Shanzhai

The conventional history of shanzhai traces its emergence to Shenzhen, Zhejiang, and Jiangsu provinces, where in the mid-2000s small factories took advantage of the availability of low-cost chip sets to produce inexpensive knockoffs of well-known high-technology products, particularly cell phones.⁶¹ Shanzhai cell phone manufacturers could also keep costs and prices low because they ignored the requirement that they purchase a cell phone manufacturing license (a requirement which the Chinese government abandoned in 2007 largely because it had become unenforceable).⁶² Much to the chagrin of other, legitimate cell phone manufacturers in China and around the world, shanzhai cell phone sales skyrocketed. In 2008, for example, it is estimated that 150 million, or 20%, of the 750 million cell phones produced in China were shanzhai phones, and almost 100 million of these were shipped abroad.⁶³ Shanzhai cell phone producers were highly innovative in the features they built into their phones (e.g., a cell phone with a built-in electric razor, advertised with a picture of David Beckham using it to shave,⁶⁴ or a Louis Vuitton cell phone belt buckle⁶⁵), and in the degree to which they customized their phones for particular consumer populations (e.g., a cell phone with a built-in flashlight for use by consumers in rural areas without reliable electricity,⁶⁶ or a cell phone with four SIM card slots⁶⁷). They were also innovative, in a way, in how they branded their phones. Some producers modified the famous brand names they were copying, so that “Nokia” became “Nokir” or “Nckia,” “Samsung”

Decision to Purchase Luxury Products, 65 J. BUS. RES. 1461, 1468 (2012).

⁶¹ See generally LIN, *supra* note 30, at 13-14, 17 (discussing “shanzhai” copycat cell phones, cars, and a variety of other products); LI WUWEI, HOW CREATIVITY IS CHANGING CHINA 33 (2011) (exploring the origin of shanzhai).

⁶² See Zhimin Liao & Xiaofang Chen, *Why the Entry Regulation of Mobile Phone Manufacturing in China Collapsed: The Impact of Technological Innovation*, 54 J. LAW & ECON. S207, S208 (2011).

⁶³ Lara Farrar, *China's “Bandit Phones” Making Big Scores*, CNN (Aug. 3, 2009), <http://www.cnn.com/2009/TECH/07/29/china.fake.phones/>.

⁶⁴ See *Shanzhai State of Mind*, CYBER LABOR (May 15, 2012), <http://cyber-labor.org/?p=65>.

⁶⁵ See *Ostentatious Louis Vuitton Belt Buckle Phone w/built in Fashion Police Alarm*, GIZCHINA.COM (Jan. 9, 2011), <http://www.gizchina.com/2011/01/09/ostentatious-louis-vuitton-belt-buckle-phone-wbuilt-fashion-police-alarm/>.

⁶⁶ See, e.g., LIN, *supra* note 30, at 18, 20 (discussing various shanzhai cell phone designs); see also Steven Millward, *Chinese Shanzhai Phone Sales in India Are Nose-Diving*, TECHINASIA (Mar. 6, 2012), <http://www.techinasia.com/chinese-shanzhai-phones-india/> (discussing “gimmick-packed” shanzhai cell phone sales in India).

⁶⁷ See Ge, *supra* note 28.

became “Samsing,” “Sony” became “Scny,” and “Sony-Ericsson” became “Sunny-Ericsson.”⁶⁸ (As for the iPhone, it continues to attract numerous copiers, who have used marks like “HiPhone,” which is currently a registered mark at the Chinese Trademark Office,⁶⁹ as well as “Mini iPhone,” “iPhone Air,” and “APhone”).⁷⁰ Shanzhai cell phone producers also appropriated brand names from very different industries, as with the “Ferrari” and “Porsche” cell phones vaguely shaped like sports cars.⁷¹ And one producer famously developed the “Obama”-branded cell phone, with the phrase “Yes We Can” printed on its back and included radio and flashlight functions, for sale in 2008 in Kenya.⁷²

Shanzhai practices soon spread beyond cell phones to encompass, as they do now, a wide array of shanzhai products, including all manner of goods bearing marks appropriated from luxury and other status goods producers. One finds “iPhone” gas burners featuring Apple’s bitten-apple mark,⁷³ “iPhone 5” ice cream,⁷⁴ “Lexus” children’s bicycles,⁷⁵ “Ferrari” athletic shoes,⁷⁶ “BMW” plastic slippers,⁷⁷ a “Gucci” watch whose face consists of something resembling the familiar outline of Mickey Mouse,⁷⁸ the “Hiyatt Boutique Hotel” still operating in Shenyang,⁷⁹ or a vehicle resembling a Lamborghini Countach built by a truck driver from Hunan Province.⁸⁰

⁶⁸ See LIN, *supra* note 30, at 33, 14-25; Bai Gao, *The Informal Economy in the Era of Information Revolution and Globalization: The Shanzhai Cell Phone Industry in China*, 31 CHINESE J. SOC. 1, 8 (2011) (cited by Sun, *supra* note 11, at 396 n.39).

⁶⁹ *Top 10 Shanzhai Phenomena in 2009*, CHINA DAILY (Jan. 11, 2010), www.chinadaily.com.cn/china/09tentopnews/2010-01/11/content_9301764.htm.

⁷⁰ See Sun, *supra* note 11, at 406; Justin Bergman, *Top 10 Chinese Knockoffs*, TIME (June 22, 2010), http://www.time.com/time/specials/packages/article/0,28804,1998580_1998579_1998575,00.html.

⁷¹ See LIN, *supra* note 30, at 16, 20.

⁷² *Id.* at 20-21. Lin notes that the producer sold as many as 1,000 such phones in a single week.

⁷³ See *Pictures of the Day: 24 February 2012*, TELEGRAPH (Feb. 24, 2012), <http://www.telegraph.co.uk/news/picturegalleries/picturesoftheday/9103319/Pictures-of-the-day-24-February-2012.html?image=11>.

⁷⁴ See Michael Santo, *iPhone 5 Already a Smash in China: Ice Cream That Is*, EXAMINER (Aug. 19, 2012), <http://www.examiner.com/article/iphone-5-already-a-smash-china-ice-cream-that-is>.

⁷⁵ See Sinha, *supra* note 19.

⁷⁶ See *id.*

⁷⁷ Brad Kuhl, *Shanzhai*, KUHLE & LEYTON, <http://www.bradkuhl.com/shanzhai/shanzhai.html#> (last visited Sept. 22, 2013).

⁷⁸ Victoria Camblin, *Shanzhai Anxiety*, DIS, <http://dismagazine.com/discussion/14213/shanzhai-anxiety/> (last visited Sept. 22, 2013).

⁷⁹ See *Hiyatt Boutique Hotel Shenyang*, 51766.COM, <http://english.51766.com/detail/>

Indeed, as many have noted, foreign status brands appear to attract the special attention of shanzhai producers. The explanations for this are quite varied and go directly to the difficult question of the broader cultural meanings of shanzhai, a question made all the more difficult because so many different practices have come to be given the shanzhai honorific — so that *China Daily* listed Michael and Tareq Salahi's crashing of a White House State Dinner as among the top ten shanzhai phenomena of 2009.⁸¹ Undoubtedly, shanzhai producers are attracted to foreign status brands largely because the copying of such brands is simply more profitable. But regardless of what may motivate shanzhai producers, the cultural meaning of their conduct is essentially oppositional and anti-elitist in nature. Arising out of the “displacements of exile” from mainstream, establishment culture,⁸² shanzhai openly challenges the inequalities in power and wealth that establishment culture perpetuates. Yu Hua, for example, asserts that shanzhai “represents a challenge of the grassroots to the elite, of the popular to the official, of the weak to the strong.”⁸³ He continues:

Over the past twenty years our development has been uneven rather than comprehensive, and this lopsided development is compromising the health of our society. It seems to me that the emergence — and the unstoppable momentum — of the copycat phenomenon is an inevitable consequence of this lopsided development. The ubiquity and sharpness of social contradictions have provoked a confusion in people's value systems and worldview, thus giving birth to the copycat effect, when all kinds of social emotions accumulate over time and find only limited channels of release, transmuted constantly into seemingly farcical acts of rebellion that have certain anti-authoritarian, anti-mainstream, and anti-monopoly elements.⁸⁴

hotel_custdetail.jsp?ent_id=syjyuyue (last visited Sept. 22, 2013).

⁸⁰ Annie Lee, *Shanzhai Lamborghini by a Post-80s Chinese*, CHINAHUSH (Apr. 27, 2010), <http://www.chinahush.com/2010/04/27/shanzhai-lamborghini-by-a-post-80s-chinese/>.

⁸¹ See *Top 10 Shanzhai Phenomena in 2009*, *supra* note 69.

⁸² Stephanie Hemelryk Donald, *Introduction: Why Mobility Matters: Young People and Media Competency in the Asia-Pacific*, in *YOUTH, SOCIETY, AND MOBILE MEDIA IN ASIA* 3, 5-6 (Stephanie Hemelryk Donald, Theresa Dirndorfer Anderson & Damien Spry eds., 2010) (discussing the common themes of *Outlaws of the Marsh* and contemporary shanzhai).

⁸³ HUA, *supra* note 12, at 188.

⁸⁴ *Id.* at 189.

It makes sense, then, that status goods would be among the primary targets of shanzhai practices, particularly those that are commercial in nature. Such goods embody and even celebrate (or, more precisely, aestheticize) the inequalities that shanzhai seeks to attack (and de-aestheticize). To their purchasers, shanzhai status goods offer a different kind of status: “[W]hile big brands may embody a ‘status’ in a conventional way, shanzhai phones may imply a ‘status’ of rebellion.”⁸⁵ At its core, this is at least in part a “rebellion” against China’s newly emerging sumptuary code, its new system of consumption-based social differentiation based on the consumption of global status brands.

There is nevertheless a competing and admittedly plausible interpretation of the phenomenon of shanzhai status goods, one that distinguishes the cultural meaning or effect of such goods from that of other shanzhai practices. This view holds that while the Shanzhai Olympic Torch Relay or the Shanzhai National Spring Gala may well be anti-establishment in nature, shanzhai status goods are not. In fact, they work to reinforce established hierarchies. The argument is that the widespread propagation of, for example, inauthentic Louis Vuitton bags creates widespread desire for the authentic. In this way, shanzhai status goods simply promulgate the new sumptuary code, and as Chinese consumers grow wealthier, they will shift their consumption from the simulation to the real.⁸⁶ Attacks on the code, in other words, only make it stronger. In a recent blog entry, Rob Horning formulates this “free advertising” argument especially incisively:

It would be great if counterfeit chic damaged the integrity of the brands it copied — if IP piracy and détournement worked

⁸⁵ Donald, *supra* note 82, at 5 (emphasis omitted) (citing Chandy Yang & Lisa Li, *Decoding Shan Zhai Ji (Bandit Cell Phone) — The Opposite Side of Brand Chasing*, CHINA YOUTHOLGY (Nov. 17, 2008), <http://chinayouthology.com/insights/27>).

⁸⁶ See, e.g., RADHA CHADHA & PAUL HUSBAND, *THE CULT OF THE LUXURY BRAND: INSIDE ASIA’S LOVE AFFAIR WITH LUXURY* 281 (2006) (“Evil as they are, fakes have played a role in spreading the luxury brand cult in Asia. They have acted as a ‘trial pack,’ giving a taste of these brands to millions, who slowly but surely over time seek out the real thing.”); Kal Raustiala & Chris Sprigman, *Fake It Till You Make It: The Good News About China’s Knockoff Economy*, FOREIGN AFF., July-Aug. 2013, at 25, 28, available at <http://www.foreignaffairs.com/articles/139452/kal-raustiala-and-christopher-sprigman/fake-it-till-you-make-it> (arguing that copies of Western products “often serve as effective advertisements for the originals: gateway products that, in the long run, might spur demand for the real thing as China’s burgeoning middle class grows.”); see also Jonathan Barnett, *Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Inventive Thesis*, 91 VA. L. REV. 1381, 1385 (2005).

as an attack on consumer capitalism — but it doesn't. It just strengthens the hold of chic over the consumer imagination. You can't travesty your way to revolution. . . . Shanzhai strengthens the status hierarchies articulated by possession of "real" luxury goods and makes those goods more desirable. It makes "the genuine" seem even more rarefied by comparison.⁸⁷

Kal Raustiala and Chris Sprigman point to a good example of this thinking in practice. They note that the U.S. fast food chain Subway is the target of several copyists in China, but "Subway's executives, wisely, are not overreacting. Alexander Moody-Stuart, the managing director of the chain, recently told *The Wall Street Journal* that for a Western brand like Subway, which is trying to build awareness for a type of food that Chinese don't usually eat, 'mimicking isn't exactly a bad thing.'"⁸⁸

Though the argument is certainly plausible with respect to many goods and services, I do not think it is persuasive in the context of status goods — and if the luxury goods industry's persistent calls for more effective enforcement of their intellectual property rights in China are any indication, the luxury goods industry does not find it persuasive either. To succeed, status goods must project an aura of exclusivity, and in the extremely competitive luxury goods sector, the slightest tarnishment of this aura, even by counterfeit goods, can be devastating. Burberry learned this to its dismay a decade ago. As *The Economist* tells the story:

By the early 2000s the company's distinctive camel-coloured check had become the uniform of the "chav," the stereotypical white working-class delinquent looking for trouble. Bouncers and taxi drivers learned to turn away young men sporting Burberry baseball caps and jackets. When Daniella Westbrook, a soap actress, was photographed with the Burberry check adorning herself, her daughter and her pushchair, the brand's elite reputation seemed to be lost.⁸⁹

⁸⁷ Rob Horning, *Shanzhai*, MARGINAL UTIL. ANNEX (June 23, 2013), <http://marginalutilityannex.wordpress.com/2013/06/25/shanzhai/>.

⁸⁸ Raustiala & Sprigman, *supra* note 86, at 28 (quoting from Laurie Burkett & Loretta Chao, *Made in China: Fake Stores*, WALL ST. J. (Aug. 3, 2011), <http://online.wsj.com/article/SB10001424053111904292504576484080863377102.html>).

⁸⁹ *Burberry and Globalisation: A Checkered Story*, ECONOMIST (Jan. 20, 2011), <http://www.economist.com/node/17963363>.

Indeed, one of the most interesting problems facing status goods producers in the Chinese market is how to overcome the paradox of mass-produced rarity. Their challenge is how to project an aura of uniqueness while at the same time selling tens of thousands of items of merchandise bearing their marks. Research by Lingjing Zhan and Yanqun He suggests that this is already a serious problem for the most well-known brands: “As consumers learn more about different luxury brands, they evaluate the best-known brands more negatively as uniqueness-seeking becomes a more important goal.”⁹⁰ This helps to explain why Louis Vuitton has recently announced plans to de-emphasize its monogrammed products to reduce the risk — or to repair the damage — of overexposure.⁹¹ For Louis Vuitton, as for other “Veblen brands,”⁹² the pervasiveness of shanzhai goods can only exacerbate this fundamental problem.

II. TWO POSSIBLE FUTURES OF SHANZHAI

Consider a party that Louis Vuitton held in Taipei several years ago, as described by Yi-Chieh Jessica Lin:

On April 26, 2006, the world’s largest Louis Vuitton party was held in the Chiang Kai-Shek Memorial Hall in Taipei. Said to be an ambitious attempt by Louis Vuitton in expanding its business in East Asia, Louis Vuitton purposely organized the event by social status. Guests were categorized into three groups designated to enter the venue at 9 pm, 10 pm, and 11 pm respectively. At the designated time, most guests took golf carts from the main gate of Chiang Kai-Shek Hall to their seats. Only the most famous celebrity guests were invited to enter the “VIP Boxes.” The celebrities then carried their collection of brand name accessories for photographers to take glamorous shots to be reported in the newspapers the next day. In the months that followed, fashion critics commented

⁹⁰ Zhan & He, *supra* note 53, at 1452; see also Casey Hall, *Changing China Forces Shift in Strategies*, WOMEN’S WEAR DAILY, Mar. 25, 2013, at 11 (quoting luxury consultant Charles de Brabant that: “[O]verexposure of some early-moving brands means opportunities for newer brands to enter the market. There is a real desire for newness.”).

⁹¹ See Roberto A. Ferdman, *The Classic Louis Vuitton Logo May Be Killing the Company’s Handbag Sales*, QUARTZ (Oct. 16, 2013), <http://qz.com/135639/the-classic-louis-vuitton-logo-may-be-killing-the-companys-handbag-sales/>.

⁹² See Jeremy Sheff, *Veblen Brands*, 96 MINN. L. REV. 769, 772-76 (2012).

that the party was key to Louis Vuitton's successful brand marketing.⁹³

In its own modest way, whether consciously or not, Louis Vuitton was here partaking of the finest traditions of Western imperialism. Generally speaking, upon entering a new area to be exploited, Western imperialist powers did not seek to upset the social hierarchies it found there. On the contrary, it offered new means to reinforce those hierarchies provided that all recognized who was now at the top of whatever hierarchy already existed. Of course, there are fundamental differences between how, for example, the British opened up China and how Louis Vuitton has done so, not least in the nature of the goods being sold. But in this limited respect, in the status goods industry's readiness to reinforce — and exploit — local hierarchies, the general spirit remains the same. The industry offers new forms of power — in this case, cultural power — by which the local elite can assert their local supremacy. Ultimately, the local elite can entertain ambitions of broader supremacy. As Radha Chadha and Paul Husband record the sentiment, “If I buy you, then I am superior.”⁹⁴ They go on: “If a lovely French saleswoman plying a French brand is showering you with sweet attention, then who's boss?”⁹⁵ Such are the workings of the luxury goods industry.

It should thus not be surprising how quickly the Chinese have fallen. Chinese elites may resent many kinds of foreign influence, but when that influence works to reinforce their status in a newly-emerging consumer culture, an exception can apparently be made. Radha Chadha and Paul Husband may not be exaggerating when they write: “Air meets vacuum. Knife meets butter. Gucci meets tai-tai.”⁹⁶ Extremes of inequality, a gifting culture, and an emphasis on maintaining face have all no doubt played an important role, but at bottom, what is driving the luxury goods boom in China, as once in Japan, is the extraordinary skill, developed over centuries in the West, of the luxury goods industry itself in exploiting these local characteristics of a new territory. And the industry is carried forward by the universal adaptability of its message: it offers a new, more powerful sumptuary order, a new system of consumption-based social differentiation, that promises to preserve and even intensify established hierarchies.

⁹³ LIN, *supra* note 30, at 31.

⁹⁴ CHADHA & HUSBAND, *supra* note 86, at 172.

⁹⁵ *Id.* at 172-73.

⁹⁶ *Id.* at 67.

This new sumptuary code is what shanzhai status goods threaten and what intellectual property controls on such goods seek to defend. The question to which I now turn is how we can expect, or hope, this struggle to play out.

A. *A Pessimistic View: Intellectual Property Law as Sumptuary Law*

Intellectual property owners around the world have long complained about the inefficacy of intellectual property protection in China and have gone so far as to accuse the Chinese government, as the bipartisan Congressional *Commission on the Theft of American Intellectual Property* recently did, of deliberately encouraging intellectual property “theft.”⁹⁷ Nevertheless, Chinese intellectual property protection has improved dramatically in the past decade, particularly with respect to trademark infringement and counterfeiting. Admittedly, it has not approached anything near satisfactory levels, but the momentum is in the right direction. In its 2013 Special 301 Report, the U.S. Trade Representative noted that: “Rights holders report a significant increase in administrative and criminal enforcement against trademark counterfeiting in China. They indicate that the number of administrative enforcement actions more than doubled in 2012 compared to the prior year, and that the number of criminal convictions appears to have doubled as well.”⁹⁸ Chinese trademark case law is also improving,⁹⁹ and the Third Amendment to the Trade Mark Law, which the National People’s Congress adopted

⁹⁷ COMM’N ON THE THEFT OF AM. INTELLECTUAL PROP., THE IP COMMISSION REPORT 3 (Nat’l Bureau of Asian Research 2013) (“National industrial policy goals in China encourage IP theft, and an extraordinary number of Chinese in business and government entities are engaged in this practice.”). See generally Merrill Goozner, *Report: Time to Confront China over Tech Thievery*, FISCAL TIMES (Feb. 29, 2012), <http://www.thefiscaltimes.com/Articles/2012/02/29/Report-Time-to-Confront-China-over-Tech-Thievery> (discussing the Information Technology and Innovation Foundation’s report ROBERT D. ATKINSON, INFO. TECH. & INNOVATION FOUND., ENOUGH IS ENOUGH: CONFRONTING CHINESE INNOVATION MERCANTILISM (2012), available at <http://www2.itif.org/2012-enough-enough-chinese-mercantilism.pdf>).

⁹⁸ DEMETRIOS MARANTIS, U.S. TRADE REP., 2013 SPECIAL 301 REPORT 32-33 (2013), available at <http://www.ustr.gov/sites/default/files/05012013%202013%20Special%20301%20Report.pdf>.

⁹⁹ See, e.g., Linda Chang, *How to Tackle Chinese Trade Mark Squatters*, MANAGING INTELL. PROP. (Dec. 7, 2012), <http://www.managingip.com/Article/3128602/How-to-tackle-Chinese-trade-mark-squatters.html> (discussing *Landrover Co. v. Geeley Grp.*, in which the Beijing Intermediate and High Courts found that Geeley had registered in bad faith the Chinese equivalent of Land Rover); Hall, *Cartier Wins*, *supra* note 33, at 17 (discussing Cartier’s successful trademark infringement lawsuit against two Beijing-based jewelry companies and the online marketplace Yihaodin.com).

this year,¹⁰⁰ is expected to improve the position of foreign trademark owners seeking to cancel bad faith registrations by trademark squatters.¹⁰¹

These are all salutary trends, but they raise the question of what the next stage of Chinese trademark law will look like and how it will address not counterfeiting, but shanzhai. Though they rarely qualify as line-for-line counterfeits, there can be no question that most of the shanzhai goods identified above are infringing on foreign firms' trademark rights, and that in a world of perfect enforcement nearly all shanzhai status goods would be suppressed. And yet there can also be no question that such goods carry political content, even when their producers are motivated entirely by profit and their consumers are motivated entirely by the desire simply to deceive. In their mere existence, such goods embody a form of "rebellion" against China's newly-imported sumptuary code and the inequalities that undergird it. Just as nearly every society in history has instituted sumptuary law, so nearly every society has seen its sumptuary law defied,¹⁰² and contemporary China is no exception.

This is not to suggest that shanzhai status goods should be allowed, for most of them are indeed a form of "theft" of intellectual property. But it is to suggest that we recognize what social function we are calling upon Chinese intellectual property law to perform with respect to such goods, and what the normative contours of this social function are. Intellectual property law is in many ways economically and technologically progressive, but in its peculiar role as sumptuary law, it is socially and culturally reactionary.¹⁰³ Intellectual property law may perhaps claim some degree of responsibility for the technological progress that has enabled shanzhai producers so quickly and inexpensively to produce their goods, but now in the context of shanzhai status goods we are calling upon intellectual property law to defend our established system of consumption-based social distinction against that very technology.¹⁰⁴ Now in China, as it has for many years in the West, intellectual property law will perform a conflicted, dual

¹⁰⁰ See *China Adopts New Trademark Law*, CHINA BRIEFING (Sept. 11, 2013), <http://www.china-briefing.com/news/2013/09/11/china-adopts-new-trademark-law.html>.

¹⁰¹ See Jinchen Song & Jiayan Xie, *How China's New Trademark Law Will Improve Protection*, MANAGING INTELL. PROP. (Mar. 1, 2013), <http://www.managingip.com/Article/3181496/How-Chinas-new-trade-mark-law-will-improve-protection.html>.

¹⁰² See generally HUNT, *supra* note 1 (discussing sumptuary law and its demise).

¹⁰³ See generally Beebe, *Sumptuary Code*, *supra* note 3 (discussing the juncture and possible conflicting goals of intellectual property law and sumptuary law).

¹⁰⁴ *Id.* at 814.

role. It will help to create technological progress certain social implications of which it will also seek to suppress. As enforcement efforts continue to improve, the production and consumption of shanzhai status goods, meanwhile, will likely slowly be reduced to manageable and non-threatening levels.

I have called this a pessimistic image of the future of shanzhai, or at least of shanzhai status goods, which is a characterization that many readers may find odd. After all, in this possible (and in my view, probable) future, China will finally satisfactorily enforce intellectual property rights against practices that are clearly infringing on those rights. More specifically, the purchaser of, for example, a Louis Vuitton tchotchke will finally be reasonably confident not only that he is purchasing (or receiving as a gift) an authentic, but more importantly, that the Louis Vuitton brand (and his own status) will not be diluted or tarnished by the widespread existence of counterfeits or shanzhai parodies. But it is a pessimistic prediction because of the implications of this state of affairs for Chinese consumers' consumption practices, particularly in a country that is now trying to orient its economy towards consumption as a matter of national policy.¹⁰⁵ It has long been recognized that status consumption is zero-sum. The possession of a status good yields primarily "relative utility," which can be extinguished by a competitor's purchase of the same or a hierarchically superior good. To be sure, status consumption may yield membership in a status group, but given the ever-changing cycles of fashion and the underlying competitiveness of the game, even this reward is likely transitory, offering not lasting solidarity, but momentary cliquism. In time, the possession of certain positional goods, as with the possession of Louis Vuitton in Tokyo, just gets the possessor to normal, and she, like everyone else, must move on to other goods to excel. Status consumption is, in short, profoundly wasteful and, in a severely unequal society, socially destabilizing — as the Politburo has recognized with respect to its own party members but has lacked the will to recognize with respect to the rest of Chinese society.

Of course, luxury industry apologists dismiss this common critique as born from the paternalism of "moralistic scolds"¹⁰⁶ or perhaps as insensitive to the recent history of men who by dint of extraordinary hard work and ambition (and cunning) "have gone from surviving in

¹⁰⁵ See Victoria Ruan, *China's Slower Growth Raises Rebalancing Stakes*, S. CHINA MORNING POST (July 23, 2013), <http://www.scmp.com/business/economy/article/1283509/slower-growth-raises-rebalancing-stakes>.

¹⁰⁶ CHADHA & HUSBAND, *supra* note 86, at 178.

one Mao suit, often without the means to wash it clean, to wearing only the finest Italian suits with a thread count of 120+.”¹⁰⁷ Coming from the luxury goods industry, these objections ring hollow, however. It is always strange to hear the charge of paternalism directed against critics of consumerism who seek through persuasion to alter the consumption preferences of others when that charge is coming from an industry that spends hundreds of millions of dollars each year seeking to do exactly the same thing.

B. *An Optimistic View: The “Shanzhai Attitude”*

Among the various images of shanzhai goods that populate the internet, two are especially interesting. One portrays a children’s backpack bearing, in bold multicolored capital letters, the word “Obama” next to a cartoon image of a kind of superhero mouse with the number “10” on his chest. Above this on the backpack is imprinted in highlighted red script the words “Harry Potter.”¹⁰⁸ The other image portrays plastic slippers branded on the upper with the Adidas word mark and three-stripe logo and on the insole with the Nike word mark and swoosh logo, apparently on the assumption that two status symbols are better than one.¹⁰⁹ What these two shanzhai goods convey especially clearly is the strange sensibility of shanzhai, which seems to take all the intellectual properties of global consumerism as so many random “floating signifiers”¹¹⁰ available for free appropriation. To those already assimilated to this global system, such products, apparently completely innocent of knowing art world irony, are absurd. At best, they are the subject of countless blog posts and magazine articles recounting the silliness bordering on infantilism of the not-yet-assimilated Chinese. But to their producers and consumers, such products are no doubt quite meaningful. They are initial forms of participation, however rudimentary, in the language of global consumerism.

Though such goods will likely eventually be suppressed in China as effectively as their equivalents have been suppressed in the United States, one hopes that their example and the sensibility that brought them forth may at least be remembered. Appropriationist practices

¹⁰⁷ *Id.* at 155.

¹⁰⁸ See Jiashan Wu, *Nothing New in Shanzhai: More than Fake Apple Stores and Knock-off Nikes*, CREATORS PROJECT (Aug. 3, 2011), <http://thecreatorsproject.vice.com/blog/nothing-new-in-shanzhai-more-than-fake-apple-stores-and-knock-off-nikes>.

¹⁰⁹ See Tsang, *supra* note 15.

¹¹⁰ See Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 667-69 (2004).

have long been commonplace in the United States and elsewhere, but shanzhai is different, and not just because of its grassroots spontaneity and pervasiveness. Shanzhai is also distinctive for the peculiar quality of its irreverence. Georg Simmel spoke a century ago of the “blasé attitude” of the modern metropolitan, an attitude that “consists in the blunting of discrimination,”¹¹¹ an “affectation of cold indifference,”¹¹² in which “the meaning and differing value of things, and thereby the things themselves, are experienced as insubstantial. They appear to the blasé person in an evenly flat and gray tone; no one object deserves preference over any other.”¹¹³ Shanzhai practices, by contrast, may be symptomatic of an entirely different mentality; rather than the “blasé attitude,” we have what might be called the “shanzhai attitude.” Far from being cool, ironic, and dismissive, this attitude is marked by a fervid, even carnivalesque engagement with and irreverence towards the norms and hierarchies of global consumerism.¹¹⁴ At times, it seeks illicitly to partake of these hierarchies; at other times, it seeks to ridicule them; at other times still, it is not at all clear what its point, if any, is. But at its best, it reduces this system of consumption-based distinction to so much unintelligible noise, overloading it with hybridized re-codings, mounting an argument ad absurdum against its claims of distinction.

¹¹¹ GEORG SIMMEL, *The Metropolis and Mental Life*, in *THE SOCIOLOGY OF GEORG SIMMEL* 413-14 (Kurt H. Wolff ed. & trans., 1950) (quoted in Beebe, *Sumptuary Code*, *supra* note 3, at 828).

¹¹² RENÉ GIRARD, *DECEIT, DESIRE, AND THE NOVEL: SELF AND OTHER IN LITERARY STRUCTURE* 162 (Yvonne Freccero trans., Johns Hopkins Univ. Press ed. 1965) (quoted in Beebe, *Sumptuary Code*, *supra* note 3, at 883).

¹¹³ SIMMEL, *supra* note 111, at 414 (quoted in Beebe, *Sumptuary Code*, *supra* note 3, at 883).

¹¹⁴ Cf. Winnie Wong, *The Panda Man and the Anti-Counterfeiting Hero*, 11 *J. VISUAL CULTURE* 20 (2012) (discussing the rebellion against trademark hierarchy). Wong educes the examples of the appropriationist artist Zhao Bandi and the social activist Wang Hai to question the conventional account of shanzhai practices as somehow oppositional or rebellious. She explains:

Remembering the heroism of the anti-counterfeiting vigilante [Wang Hai] and the panda doll celebrity [Zhao Bandi], we might see how the distinctly Chinese alternative of *shanzhai* became safe and cute, socially creative, and effectual through figures like Zhao and Wang, who redrew the boundaries of consumption and citizenship in ways that were appropriationist, but far from oppositional or antagonistic. Rather, after their art and activism, we might say that this newly nationalistic term for “appropriation” in the Chinese homeland is rooted in that gradual awareness of the performativity of consumption and citizenship

Id. at 35.

This may help to explain why shanzhai phenomena remain such an object of fascination outside of China. The same innumerable blog posts that seem to make fun of shanzhai also typically betray a degree of admiration for the audacity and eccentricity of the conduct, as if far from being clueless wannabes, Chinese shanzhai producers and consumers have seen the West's sumptuary code for the hollow language that we ultimately know it to be. The modern's laughter that invariably attends exposure to the bizarre world of shanzhai merchandise is akin, to borrow from a commentator writing of a much grander subject, to "the laughter that shattered . . . all the familiar landmarks of thought — our thought, the thought that bears the stamp of our age and our geography — breaking up all the ordered surfaces and all the planes with which we are accustomed to tame the wild profusion of existing things."¹¹⁵ Shanzhai is akin to "another system of thought," in which we see "the limitation of our own, the stark impossibility of thinking *that*."¹¹⁶ And yet it is this possibility of seeing the sumptuary code as the shanzhai producer and consumer sees it that represents the most profound challenge to our system of consumption-based distinction, whose intelligibility and coherence — and imperatives — we otherwise typically take for granted.¹¹⁷ In its daily acts of enforcement and reinforcement, wherever they may occur now around the world, sumptuary intellectual property law functions to suppress this challenge and discipline our thinking. The optimistic hope is that it will somehow fail.

CONCLUSION

I have focused in this Article on what are among the easiest forms of shanzhai to celebrate. But there is another side, of course, to China's copying culture, the side to which the luxury goods industry typically tries to shift attention when it seeks to emphasize the harms of counterfeiting. This is the side in which we find counterfeit pharmaceuticals, counterfeit aerospace spare parts, and counterfeit food. No one can seriously applaud these forms of copying as somehow liberatory or socially progressive, and all must agree that

¹¹⁵ MICHEL FOUCAULT, *THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES*, at xv (1994).

¹¹⁶ *Id.* (emphasis added).

¹¹⁷ See Camblin, *supra* note 78 ("Counterfeits and hybrids are surreally aware of the symbolic terms of the game of snakes and ladders we play as inhabitants of a Western democracy — a game in which we are as upwardly mobile as we are prone to social slide. Objects that register and embrace the dizziness of that freedom, though, may make for a fortunate fall.").

intellectual property law should be used to its fullest extent to suppress these practices. The problem is that the law we use to prevent counterfeit pharmaceuticals is the same law we use to prevent counterfeit and shanzhai status goods. There is no coherent way to use intellectual property law to prevent the one without also enabling its prevention of the other.¹¹⁸

This is why one may reasonably expect that China's latest form of sumptuary law will likely succeed. Henry Gray, in his account of nineteenth-century China mentioned above, noted that the Chinese sumptuary laws of his time were as ineffective as such laws had always proven to be:

The sumptuary laws of China, however, like its civil and common laws, are very badly executed. This is, doubtless, due not to maladministration only, but in part to the reason which [Henry] Hallam assigns for the desuetude of sumptuary laws among western nations — that they are attempts to restrain what cannot be restrained.¹¹⁹

But Gray could not have anticipated the strange form that Chinese sumptuary law would eventually take in the twenty-first century, and that it would be a subject of discussion at the very highest levels between the major trading blocks of the world. Perhaps this new attention to sumptuary law is a side effect of how important intellectual property law more generally has become. But perhaps it is also a measure of how important the maintenance of a clear and coherent system of consumption-based social differentiation, with all of its attendant waste and irrationality, is to the continued viability of global capitalism in its current form. Under the rubric of “rebalancing,” the latest news from China is that, in essence, it needs its own people to consume more so that their consumer demand will create more opportunities for them to work more.¹²⁰ Sumptuary

¹¹⁸ In the United States, we sometimes rely on our broad tradition of freedom of expression to allow products that parody status goods. *See, e.g.,* *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252 (4th Cir. 2007) (finding that the defendant's parodies of the plaintiff's luxury goods do not infringe the plaintiff's trademarks). But our First Amendment tradition has proven to be an unreliable filtering device and, in any case, we cannot expect China to follow this example anytime soon.

¹¹⁹ GRAY, *supra* note 1, at 362.

¹²⁰ *See* Nick Edwards, *Rebalancing Reforms May Close China's Wealth Gap*, S. CHINA MORNING POST (Sept. 2, 2013), <http://www.scmp.com/business/economy/article/1301479/rebalancing-reforms-may-close-chinas-wealth-gap>.

intellectual property law will no doubt help to create the conditions for more consumption and more work.