

# *Resistance, Evasion, and Inequality: Legal Consciousness of Intellectual Property Laws in Two Chinese Markets*

Lillian Hsiao-Ling SU\*

University of Wisconsin-Madison

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## **Abstract**

How does an intellectual property (IP) legal regime affect those who make their living on counterfeit commodities, and in return how do these people respond to the implementation of IP laws? In this ethnographic study, I analyze the effects of an IP legal regime in two Chinese markets, and use legal consciousness theories and methods to show how this legal regime results in greater social inequality. While the majority of business owners in my study engage in counterfeiting, their tactics in response to the enforcement of IP laws vary significantly. Small shopkeepers at one market, the primary target of enforcement, adopt the legal consciousness of resistance. Established trademark and logo owners at the other market adopt tactics of evasion to maintain the appearance of lawful practices. I argue that these two types of tactics embody different forms of legal consciousness. The divergent tactical responses strengthen the second group of business owners who have greater power and resources at the expense of the first group who have less, thus aggravating their socioeconomic disparities.

**Keywords:** legal consciousness, social inequality, intellectual property, trademark law, the state, China

## 1. INTRODUCTION

Xinyang Market (XM) in downtown Shanghai attracts overseas tourists with a wide range of counterfeit commodities—films, computer software, accessories, clothing, and the like—in its 800 shops. Despite banners touting the state’s *zunzhong* (“respect”) for intellectual

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property rights (IPR) and posters warning customers about “fakes,” the counterfeit business thrives. In contrast, 60 miles to the south, intellectual property (IP) regulation is enforced relatively strictly in Haining China Leather City (HCLC), which is considered the capital of China’s fashion industry. The HCLC market houses thousands of local enterprises that have positioned themselves to compete on an international scale through the creation of new brands. Despite HCLC’s emphasis on branding, counterfeit goods somehow find their way into the market and become intermixed with locally produced collections. The differences between XM and HCLC provide a comparative case-study to analyze differences in how Chinese IP laws have affected social groups that have fared differently under national development policies. The comparison is revealed through business owners’ legal consciousness regarding the regulation of counterfeit commodities.

On the two market floors, business owners’ legal consciousness varies according to the inconsistent enforcement of IP law within each market and across different markets. While control tightens at times for political reasons, particularly in HCLC, it can be arbitrarily lenient within both markets for economic reasons. Specifically, regulators engage in corruption and uneven enforcement to favour business owners with greater power and resources at the expense of those with less power and fewer resources. Irregular enforcement practices have led to the development of two types of legal consciousness: tactics of “resistance” on the part of those with less wealth and tactics of “evasion” on the part of the wealthier business owners.

The subject of resistance has long interested legal consciousness scholars.<sup>1</sup> Although definitions of resistance vary, many scholars have been influenced by de Certeau’s concept of the tactic of resistance as an “art of the weak” that operates within the spaces organized by hegemonic power. The tactic of resistance attempts to claim small victories in opposition to established authority. That is the definition of resistance I adopt in this article. Significantly, de Certeau observes that, even when acts of resistance succeed, the results are temporary and do not allow the resisting actor to “stockpile its winnings... What it wins it cannot keep.”<sup>2</sup> By contrast, my fieldwork identified a different form of legal consciousness I call “evasion.” Although some scholars might consider evasion to be merely another form of resistance, I distinguish these two forms of legal consciousness because they operate differently and lead to different results in practice. Evasion, as I use the term in this article, refers to combined acts of compliance and noncompliance that aim to circumvent IP regulation rather than oppose it. Evasion is characterized by shop owners’ co-operation with legal authority and with acts of accommodation and even co-optation that are actually illegal. Those who practise evasion, unlike those who engage in resistance, can “stockpile their winnings” and can keep them as they accumulate greater wealth and power.

It is important to recognize that the majority of business owners engage in counterfeiting. Within this group, however, the tactics vary greatly. Small shopkeepers at XM have adopted the legal consciousness of resistance. This group of peasant migrants from poorer neighbouring provinces remains the primary target of enforcement. At HCLC, on the other hand, established trademark and logo owners from local areas and across the country adopt tactics of evasion to maintain the appearance of lawful practices. As shopkeepers and trademark

1. See e.g. Sarat (1990); Handler (1992); Merry (1995); Ewick & Silbey (1998); Yngvesson (1988).

2. De Certeau (1984), p. 37.

owners participate in trademark law with the diverging responses that strengthen one group while diminishing the other, the inequality of their socioeconomic status is heightened.

This article brings legal consciousness theories and methods to bear on IP laws. Law and society scholars have examined legal consciousness issues in a variety of contexts, including civil rights, injuries, welfare, and even real property.<sup>3</sup> Little attention, however, has been paid to IP laws. This article will suggest that IP regulation and enforcement provide an ideal area for examining the production of socioeconomic inequality, as the information economy has begun to surpass land investment or manufacturing as the primary basis for accumulating wealth.<sup>4</sup> This is one of the first law and society studies, therefore, to provide an empirical view of the day-to-day shaping of an emergent IP regime. Furthermore, it argues that the intervention of global norms actually tends to exacerbate economic inequality in the settings that are targeted, as local actors respond to international demands for IP legal compliance. Although counterfeiting is an act of noncompliance that crosses class lines, the different forms of legal consciousness associated with “haves” and “have-nots” lead to unanticipated consequences for market actors from different social classes.<sup>5</sup> In sum, this study enriches legal consciousness research by exploring connections between social inequality and intangible notions of ownership in contemporary China.

I begin with a review of the relevant literature and introduce the methods I used to collect data in the two Chinese markets. Then I analyze my findings, which I have organized into three subsections: a description of the two markets, an account of the IP regulation in the two markets, and an analysis of their differential impact on the business owners in the two markets. Following this discussion of my empirical findings, I then examine the connection between legal consciousness and social inequality in light of my research, followed by a brief conclusion.

## 2. LITERATURE DISCUSSION

This study connects law and society scholarship and anthropological perspective of property by providing a case in which a non-Euro-American treatment of property has implications for how the law works in society. Legal consciousness is useful to analyze my findings because the concept explains well how the law is perceived and practised by members of various social groups, and how different perceptions and practices lead to social inequality—an issue of concern to both anthropologists and law and society scholars.

### 2.1 *Property in Anthropology*

Although “property” is predominantly associated with tangible private possessions, defined as goods to which an individual or corporation has exclusive title,<sup>6</sup> anthropologists understand property relations in a “social or community context.”<sup>7</sup> Using this approach,

3. Bumiller (1988); Chua (2016); Engel (2016); Engel (1984); Erie (2012); Merry (1990); Sarat, *supra* note 3; Şerban (2014).

4. Coombe (2004); Strang & Busse (2011); Verdery & Humphrey (2004).

5. The terms “have” and “have-not” are meant to refer to Galanter’s classic article, “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change” (1974).

6. Hann (1998), p. 4.

7. *Ibid.*, p. 25.

anthropologists have questioned the applicability of the concept and language of private property.<sup>8</sup> To test assertions that private property is absent in many cultures,<sup>9</sup> and that even the social/community approach is inadequate in post-socialist contexts,<sup>10</sup> researchers have explored the assumed boundaries of personhood, things, and relations as the key factors in property relations.<sup>11</sup> Some have used property as a “cover term” to analyze how humans regulate their relations with a broad range of valuable objects.<sup>12</sup> These scholarly efforts have led to studies of various property-related phenomena including the proliferation of new types of properties, such as cultural property<sup>13</sup> and information.<sup>14</sup>

In China, property relations are clearly embedded in social practices, because members of the same networks intensively exchange general resources and possessions. China scholars have observed significant changes in these exchange relationships in response to the changing political climate and property regimes. Clientelism existed among enterprise managers, party leaders, and supervisors in the socialist Mao decades (1949–76),<sup>15</sup> and it has persisted in the market economy, though with greater diversity and less stability than the “insular relations of dependence between peasants and team cadres.”<sup>16</sup> At the same time, anthropologists have closely examined *renqing* as “human feelings” and a “system of ethics, based on common sense, which consists of a set of norms and values.”<sup>17</sup> Among other things, to practice *renqing* is to reciprocate. Reciprocity has become more instrumental as the market transition has progressed,<sup>18</sup> as reflected in Yang’s term “*guanxi xue*”: the art of social relationships. Gifts, favours, and banquets are necessary aspects of this art.<sup>19</sup> Clientelism, *renqing*, and *guanxi xue* are all aspects of Chinese social relations that can be studied through property exchange. Liu’s research on symbiotic exchange between legal practitioners and state officials further suggests that the self-interested practice of social relationships has extended to urban locales and modernized professions.<sup>20</sup> My research in the XM and HCLC markets draws on these insights to explore the social underpinnings of legal consciousness that are manifested in the exchanges between regulators and business owners. Furthermore, these exchanges take place in a market-place that owes its very existence to the development of IP as a form of property.

Anthropologists have treated IP as a new form of property,<sup>21</sup> although its roots can be traced back to a ceremonial context of long standing.<sup>22</sup> Anthropologists’ treatment of IP issues has tended to focus on two kinds of concerns. The first involves issues of cultural

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8. Hallowell (1955); Hann, *supra* note 6; Nadasdy (2004).

9. Hann, *supra* note 6; Strathern & Whimp (2000).

10. Verdery and Burawoy (1999).

11. Strang & Busse, *supra* note 4; Hirsch (2010).

12. von Benda-Beckmann et al. (2006).

13. Brown (2005); Nesper (2011).

14. Verdery & Humphrey, *supra* note 4.

15. Walder (1988).

16. Oi (1989).

17. Yan (1996), p. 128.

18. Wank (1999).

19. Yang (1994).

20. Liu (2011).

21. Hann (2007).

22. Lowie (1928); Harrison (1992).

property, often in the context of indigenous groups.<sup>23</sup> The second involves controversy over the trade policy of the TRIPS (Trade-Related Aspects of Intellectual Property Rights) agreement. Scholars have found that, despite the global imposition of this policy through the World Trade Organization, which governs all member nations, the Euro-American hegemonic power has at times been contested.<sup>24</sup> Scholars have found that, in some social settings, the prevailing cultural perspectives do not regard possessions as private property. In such settings, copyright law has been adapted to serve different agendas.<sup>25</sup> Lin, for example, depicted a long-lasting grassroots subculture of “*shanzhai*” (counterfeit, or copycat), which arose from a rigorous entrepreneurial spirit in response to national economic policy.<sup>26</sup> Building on these works, my fieldwork explored in greater detail the power relations of IP that Lin has particularly raised.

## 2.2 *Legal Consciousness and Social Inequality*

Since the 1990s, legal consciousness scholars have aimed to understand how ordinary people make meanings, identities, and subjectivities through their relation to power, and their engagement or disengagement with the law.<sup>27</sup> Many of these scholars have observed ongoing interactive processes between individual choices and cultural conventions in various institutional contexts as actors shape their social space and in turn are shaped in that very space.<sup>28</sup> This study brings to light these dynamics that concern IP laws and the role of the state to explore widely noted yet little analyzed inequality in legal consciousness studies in China.

Because scholars have tended to view legal consciousness as a critical enterprise, they have documented various processes by which law affects inequality.<sup>29</sup> In Thailand and China, respectively, Engel and Engel as well as He et al. describe how injurers and workers develop notions of justice as they contend with pervasive patterns of social inequality.<sup>30</sup> Based on their fieldwork in Massachusetts, Ewick and Silbey<sup>31</sup> see law’s hegemonic power as a force through which inequality persists. In an earlier study, Galanter<sup>32</sup> had observed that the US legal system favours the haves, since “repeat players” often possess resources to achieve desired outcomes in their disputes with “one shotters.” Some legal consciousness scholars have continued to study courts,<sup>33</sup> but others have delved into the practices by which judges and attorneys screen out claims made by the working-class citizens characterizing their interpersonal disputes as “garbage cases.”<sup>34</sup> Furthermore, scholars have

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23. Brown (2003).

24. Coombe (1998); Coombe & Herman (2002).

25. Boateng (2011); Geismar (2005).

26. Lin (2011). See also Darian-Smith (2002); Pang (2004); Pang (2008) for analyses of IP law in China in relation to other countries in the era of globalization.

27. Ewick & Silbey, *supra* note 1; Merry, *supra* note 3; Nielsen (2004); Sarat & Kearns (1993).

28. Larson (2004); Marshall & Barclay (2003); McCann & March (1996).

29. Silbey (2005); Silbey & Sarat (1987).

30. Engel & Engel (2010); He et al. (2013).

31. Ewick & Silbey, *supra* note 1.

32. Galanter, *supra* note 5.

33. He et al. (2013); Silbey & Kritzer (2003).

34. Merry, *supra* note 27; Yngvesson (1993).

considered various forms of inequality that subdivide the disadvantaged through class,<sup>35</sup> class and gender,<sup>36</sup> and they have also explored the intersection of class, race, and gender.<sup>37</sup> These studies have tended to find that marginalized people exhibit an oppositional form of legal consciousness, for example, by refusing to appeal to legal remedies to redress their exclusion. In their analysis of the legal consciousness literature, McCann and Tracey frame these oppositional processes as acts of domination and resistance, and they examine how individuals resist domination in the struggles they face in their everyday lives.<sup>38</sup>

Despite this focus on inequality, legal consciousness research rarely considers IP laws, which has been a rich topic of interdisciplinary inquiry due to a broad interest in increasingly global inequalities.<sup>39</sup> Among the reasons for this omission, perhaps the most important is that legal consciousness studies “rely heavily on ethnographic methods, individual narratives, and interview data.”<sup>40</sup> This raises problems for research on IP laws, since disputes of this kind may involve highly sensitive activities that are difficult to access. That was certainly the case in the research giving rise to this article. Instead, legal consciousness scholars have considered property more broadly. They have focused on how it is that owning less property may affect ordinary people’s perceptions of the law,<sup>41</sup> including those who lost their homes to authoritarian states.<sup>42</sup>

In China, many law and society researchers, including those of legal consciousness, have acknowledged inequality without closely analyzing it, which is a lacuna addressed by this article. Legal consciousness scholars have examined the role of the Chinese state in various contexts,<sup>43</sup> including access to the formal legal system,<sup>44</sup> and how the marginalized perceive the law from their social locations.<sup>45</sup> Furthermore, recent studies have drawn on the rules-rights debate,<sup>46</sup> in which some have argued for an emergent rights consciousness in China despite the fact that “rights” as individual claims against the state have been largely absent.<sup>47</sup> Others, however, contend that the increasing numbers of peasant uprisings are “historically familiar” expressions of rules consciousness that in reality present no political threats.<sup>48</sup> This article builds on these works as it compares the legal consciousness of Chinese business owners of differing socioeconomic status to reveal how their differing forms of legal consciousness with respect to IP law enforcement reflects and reinforces their hierarchical relations with the state.

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35. Gilliom (2001).

36. Hernández (2010).

37. Nielsen, *supra* note 27; Seron & Munger (1996).

38. McCann & March, *supra* note 28.

39. Carruthers & Ariovich (2004); Gallagher (2009).

40. McCann & March, *supra* note 28, p. 211.

41. Ewick & Silbey, *supra* note 1; Galanter, *supra* note 32; Merry, *supra* note 27; Sarat, *supra* note 1; Yngvesson, *supra* note 34.

42. Erie, *supra* note 3; Şerban, *supra* note 3.

43. Michelson (2008).

44. Gallagher (2006).

45. He et al., *supra* note 30.

46. Boittin (2013).

47. Diamant et al. (2005); Li (2010).

48. Perry (2009).

### 3. METHODOLOGY

This study used a multi-sited ethnographic approach,<sup>49</sup> which gathered data via participant observation, interviews, and public text collection during fieldwork conducted over 25 months to compare XM and Haining China Leather Market. Despite the proximity of XM and HCLC, the two markets have notably different demographic compositions, IP practices and enforcement, varieties of counterfeit goods, constituents, business scales, and customers. In particular, development policies, including branding, differ between the two markets due to their different ownership structures. HCLC, which is partially owned by the Haining municipal government, became a listed company in 2001 and is affiliated with eight national branches all registered under the trademark of HCLC™. XM, in contrast, is privately owned, although the owner is closely related to certain government officials. These two distinct relationships with the state lead to uneven IP enforcement.

The data presented in this article were collected in the winter and summer of 2010, and from 2012 to 2014. For one year, I worked as a salesclerk respectively in two stores at HCLC and three shops at XM, ranging from five weeks to four months in each of them. On a daily basis, I worked and shared meals with the owners and clerks, and we celebrated holidays together. When business was slow, I visited neighbouring stores to observe sales practices and speak with the store personnel. For eight months, I circulated among 30 shops and stores in the two markets; my visits ranged from half an hour to a whole day, depending on how busy the market was, how much help I was able to provide, and my relationship with each shopkeeper or salesclerk. To stay updated on what was happening in the markets, I made regular brief trips to the other site during each residence, and was able to observe different activities and dynamics during the markets' high and low seasons. Participant observation is particularly important for a topic that explores the margins of legality such as counterfeiting. Being present and immersed at all times allowed me to detect furtive behaviours and differences between speech and action, which were very common.

Gaining access was a long process. The snowball sampling method worked sporadically. My education credentials helped, although my association with a US university made shopkeepers hesitant, and alarmed the majority of state-affiliated staff. Many were interested in me as a "country fellow" from a part of the country (Taiwan) they were less familiar with. I arranged frequent but short visits unless I was invited to stay longer, and I made myself available to help. As salesclerks and business owners became familiar with me, my sales skills began to work in my favour. I gradually became a valuable asset for the shop owners, as I got better at sales and increased the profits in the stores where I worked.

### 4. RESISTING AND EVADING TRADEMARK LAW IN THE TWO MARKETS

In this section, I introduce the two markets and the business owners, describe the irregular manner in which IP regulation is enforced, and depict two forms of legal consciousness: tactics of resistance and evasion. I also describe the interactive process that empowers some business owners while impoverishing others. This process involves the unequal state policies

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49. Marcus (1995); Merry (2000).

on the one hand and business owners' responses of evasion and resistance on the other, both of which lead to aggravated inequality. In the analysis that ends the section, I highlight the phenomenon of class mobility that demonstrates the importance of rethinking the role of class in the formation of legal consciousness.

#### *4.1 The Business Owners of Xinyang Market and Haining Chinese Leather City*

At a first glance, XM seems to be overrun by a wide and indistinguishable array of consumer goods in tight clusters of stalls, shops, and stores. Toys and electronic devices are stacked up and pushed against the wall on shelves; apparel on coat hangers is displayed in and outside the shops; gloves, socks, and umbrellas hang on the glass entrance doors, while small trolleys take up space in the narrow hallway. On busy weekends, shopkeepers and salesclerks hail customers in English, Spanish, Japanese, and even Russian. However, their vocabularies consist mainly of numbers and short sentences used to bargain. Owners and employees are well versed in the types of retail goods they carry, particularly the specific brands. When shoppers stroll by, salesclerks shout out an impressive collection of name brands to lure them in: Louis Vuitton, Gucci, Armani, Chanel, and Nike, to name a few. When business is slow, shopkeepers chat in small groups or shout back and forth in the hallway. One of the frequently discussed topics is Xiangyang Market, the precursor to XM.<sup>50</sup>

Since its opening in 2001, Xiangyang Market has become legendary for its sustained prosperity. In 2006, under increasing international pressure to control IPR violations, the market was shut down by the government. After the closure, more than 300 retail units relocated to XM, and the business continued. However, the new market has not thrived like the old one. Shopkeepers at XM have struggled to deal with the lost glory and with increased IP restrictions, specifically trademark law. IP protection has become a constant theme on the banner hanging above the main entrance, although no one seems to heed the message—the state-propagated importance of IPR protection.<sup>51</sup>

Migrants from neighbouring provinces with poor economic conditions, including Anhui and Jiangxi, compose the largest group at XM, and they are the main focus of this article. Most members of this group are peasant migrants and their children, who have been driven off the land by the marketization of the economy. With limited capital, skills, and schooling, they have little choice but to rely on counterfeiting as their main source of income to meet their basic needs and the needs of their families. In the metropolitan city of Shanghai, these individuals have no social or economic protections and are connected only to their kin. Consequently, local Shanghainese tend to look down on them.<sup>52</sup>

Unlike XM, which houses mostly peasant migrants, HCLC is home to business people from a wide range of backgrounds, who co-operated in building this exceptional market. Salesclerks are a mix of internal migrants and local residents, and the latter are often connected to their employers through kinship. Those with ability strive to start small shops of their own. If they manage to get a shop up and running, counterfeit goods, almost without exception, bring a more handsome income than a salesclerk's wage. Others are opportunistic owners of mid-sized businesses who use the capital gained from highly profitable

50. (Field notes, XM, D, 5 Jan 5, 2010). All participants included in this article are coded.

51. (Field notes, XM, S, Jun 8, 2012).

52. (Field notes, XM, H, Jan 4, 2013).



counterfeiting to add business lines and invest in manufacturing infrastructure. Still others are aspiring business elite, who actively participate in design competitions, fashion shows, and other activities to build their brand names. Their companies are supported by designers, factories with standardized production lines, and well-established internal policies and programmes. A number of these companies were previously state-owned enterprises (SoEs) and enjoy a variety of advantages including affiliation with state actors.<sup>53</sup>

The establishment in which these individuals carry out their entrepreneurial endeavours, HCLC, is located ten minutes by car to the south of downtown Haining. It began in 1994 in a building located in downtown, relocated to its current site in 2005, and has since served as the economic backbone of this affluent city. The mall impresses visitors with its scale—it is as if ten department stores sat relatively close to one another. The modern buildings hold one spacious store after another, and these stores carry a dazzling display of leather products, including an incredible selection of apparel, fur coats, handbags and purses, and shoes. While shopkeepers at XM stack up their commodities and fill every corner, those at HCLC make a genuine effort to present their offerings in a more appealing way. Most stores are renovated regularly to attract customers with their new looks.<sup>54</sup>

Partially state-owned, HCLC supports entrepreneurs politically and financially, encouraging them to engage in brand development activities such as production design, research, manufacturing, and trademark registration. Acclaimed and aspiring companies actively manage their brand images by participating in various activities, such as the “China Leather Fashion Week.” Initiated in 2008 in imitation of fashion weeks in Milan and Paris, “China Leather Fashion Week” is an annual series of events at which leather fashion collections are shown to buyers, the press, and the general public. These catwalks regularly attract crowds and media attention, and they are said to be very effective at spreading awareness of brand names. While HCLC’s political affiliation brings various advantages and opportunities, IP regulations are enforced relatively strictly for political reasons, too. Although HCLC initiated and developed its reputation by selling leather apparel, counterfeit handbags available here are in high demand for their premium quality.<sup>55</sup>

#### *4.2 IP Regulators and Enforcement in the Two Markets*

Both XM and HCLC are under the supervision of market management personnel, the local police forces, and bureaucrats employed by the Administration for Industry and Commerce (AIC). Among their responsibilities are the enforcement of IP regulations. Although individuals from all three of these entities are present at both markets, the structures and operations that guide their work at each market are markedly different because of the differing ownership structures.

In both markets, various measures were implemented as IP regulations. At the early stage of IP implementation, market management held meetings to educate salesclerks and business owners. In addition, market management personnel communicated and delivered policies and regulations to each shop by means of brochures on the relevant regulations. They also put up posters and public announcements in an effort to heighten awareness among both

53. (Field notes, HCLC, U, May 15, 2013).

54. (Field notes, HCLC, T, Apr 9, 2012).

55. (Field notes, HCLC, M, Aug 27, 2013).

market people and customers. Particularly at HCLC, posters of all sizes advocate the rule of law and proclaim the importance of IP protection. Public announcements advertising a hotline to report counterfeits are highly visible. Regulators, whom shopkeepers and clerks described as “those in uniforms,” occasionally stroll through each shop to inspect the goods. Regulators also appear in plain clothes. Shopkeepers and clerks at handbag stores are particularly watchful for unknown patrons who inquire about counterfeit goods—these “shoppers” could be AIC agents or policemen who are pretending to be customers. Once regulators have gathered enough information, they conduct raids. Rather than cleaning up the whole market, enforcers raid only one or a few stores that carry counterfeit goods.<sup>56</sup>

IP regulation differs in the two markets in a variety of ways, at both the market level and the individual level of bureaucratic practice. At XM, enforcement is primarily motivated by the political milieu and is aimed at appeasing international pressure. Regulators tighten their control at politically sensitive times, particularly when international conventions are in town. In contrast, HCLC, as a proclaimed national tourist resort, must maintain an exemplary market-place by being clear of fake goods at all times. For that reason, the presence of counterfeit goods cannot be openly recognized, although such goods are economically vital for local businesses, the market, and the government alike. Consequently, enforcement at HCLC seems part of a scheme to maintain a façade of lawfulness, despite the fact that the mall has been the subject of stronger legal campaigns and a heavier penalty for counterfeiting than XM.<sup>57</sup>

IP regulation is also inconsistent because it is enforced unevenly and is often affected by the business owner’s socioeconomic status and network connections. Most regulators hold business owners to more lenient standards when they have personal relationships with them. Regulators may also give them prior notice when control of counterfeit goods is about to be tightened or warn them before undercover operations commence, which means that such shopkeepers are less likely to be raided. At XM, regulators, particularly the market management personnel, often have close contact with shopkeepers during their long work shifts. On the market floor, some shopkeepers share food or cigarettes with and give gifts to market management personnel as tokens of deference. While some shopkeepers are simply following social norms, others take this as an opportunity to create a connection that will benefit them in times of need, such as during IP regulation enforcement. At HCLC, however, the more bureaucratic structure separates the powerful regulators from the shop floor. For that reason, the cultivation and maintenance of relationships occur at dinner banquets and karaoke bars, and thus remain invisible in the market itself.<sup>58</sup>

The standards applied to business owners whose stores are raided also differ according to the “have” or “have-not” status of the individual target. As a criminal offence, counterfeiting can have severe consequences: any fake goods found should be confiscated, a fine of half a million local currency (approximately \$73,500) or more can be assessed, and owners (or clerks if their employers are not present) can be arrested. When stores are raided, business owners who have network connections with higher-level state actors often have ways to avoid these penalties through gift giving. The practice is, of course, unfair to those who do

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56. (Field notes, XM, J, Oct 7, 12; Field notes, HCLC, O, Sept 18, 2012).

57. (Field notes, XM, N, Jun 7, 2013; Field notes, HCLC, Z, Apr 8, 2012).

58. (Field notes, XM & HCLC, Oct 8, 2012).

not have such connections and cannot afford to buy their way out. For example, one respondent, whom I call Zhang, described his parents' experience. A few years ago, they were charged with counterfeiting and both were imprisoned for more than a year. Zhang explained that they were punished "only because we had no money nor connection[s] to whom we could possibly turn for help!" According to Zhang, money is necessary but not always sufficient in times of trouble: "If you go to the wrong person for help, money could be taken but the issue may not be settled. So you need to know the right person or know how to find the right person" (Interview, 15 December 2013).<sup>59</sup> Although the way to work the system is not a secret, the resources required are not equally available to all. Those who do not have social and financial capital suffer a disadvantage, although they have violated the same regulations as those who fare better.<sup>60</sup>

In addition to these inconsistencies, the process of IP enforcement in both markets is perceived as frequently involving corruption by regulators from different units. One way the management staff benefits from their position is by taking confiscated counterfeit goods for personal use. In theory, any counterfeit commodities discovered in an investigation should be confiscated and destroyed. In practice, these goods are often appropriated by the regulators. For example, when a management staff accidentally found a box of fake watches on the floor and moved it to the office, there were more than 70 watches in the box. However, when the shopkeeper showed up to claim ownership, only 40 watches were left. The shopkeeper knew the rest had been taken, but there was little he could do because the fine was calculated by the number of counterfeit goods found. He would have paid higher fine if he had inquired about the missing watches.<sup>61</sup>

Sometimes market management personnel subtly hint at requests for gifts in exchange for protection to ensure the smooth daily operation of individual shops. Although market management has a general interest in protecting all the business units in the market, they usually pick one or two for enforcement in order to show that the regulations are being enforced and they are fulfilling their responsibilities. This form of selective enforcement gives management personnel power over shopkeepers, who are all in a vulnerable position because of the illicit nature of counterfeiting.<sup>62</sup> Police and AIC agents also engage in similar schemes to line their own pockets, in particular, as the Lunar New Year draws close, one participant explained, "they need extra bucks for the holiday [just] like we do."<sup>63</sup> A management member at XM complained to me that police officers would simply enter any store in plain clothes, claim to be the police without showing their IDs, search the shop, and then take away any counterfeit goods they found. As he lamented, "Any robber can do that!"<sup>64</sup> Police officers and AIC agents act together in formal operations, which makes it less easy for them to engage in corruption. Although the AIC is assigned the task of IP regulation, the police have the authority to enforce counterfeiting as a criminal offence. Therefore, police officers are the ones that may appropriate confiscated counterfeit goods or take cash for private settlements. These are unspoken understandings on the market floor.

59. When the location (market) is kept confidential, it is to protect the participants.

60. (Field notes, HCLC, E, Sept 28, 2013).

61. (Interview, A, Oct 15, 2013; Interview, P, Nov 18, 2013).

62. (Interview, XM, I, Jun 14, 2013).

63. (Interview, HCLC, F, Jan10, 2014).

64. (Interview, XM, E, Aug 26, 2013).

At both markets, IP regulation is the most direct and important aspect of business owners' experiences with the law. Thus, IP law is a very significant element in their legal consciousness. The experiences of business owners with legal agents—both in the punishment of corrupt practices and in unfair or selective enforcement of the regulations—result in business owners holding a largely negative view of the value of the law. They prefer profit to compliance, because wealth not only enables them to buy their way out of their illicit activities, but it also enhances their power and status. Regulators with whom they deal on a daily basis reinforce this cynical view of the law. Given the task of ensuring no IP infringement on the market floor, regulators abuse their power to frequently and almost openly appropriate business owners' properties and resources. While IP laws are generally opposed to business owners' interest, the selective enforcement of trademark law circumscribes the livelihood of those with lower socioeconomic status and imposes particular negative consequences on them, thus widening the gap between the “haves” and the “have-nots.” These processes have produced two distinct types of legal consciousness: resistance and evasion, which are the subjects of the discussion that follows.

### *4.3 Law's Intervention*

In this subsection, I explain resistance and evasion, how differently situated business owners deploy one tactic rather than the other, and how their choice aggravates social inequality. Exploring these contrasting forms of legal consciousness reveals the differential impact of IP regulation on the business owners in the two markets. Choosing between the tactics of evasion and resistance to cope with IP enforcement involves business owners in differing relations with regulators and with the state. Analysis of the business owners' experiences, perceptions, and various degree of legal competence thus highlights the interconnections between legal consciousness and inequality, since their choice of tactics tends to develop and divide along the lines of the business owners' socioeconomic positions.

#### *4.3.1 Tactics of Evasion and Resistance as Legal Consciousness*

In response to the inequitable enforcement of IP policies described above, the small shopkeepers tend to deploy resistance while trademark owners use tactics of evasion. Evasive acts indirectly deviate from, rather than openly oppose, IP regulation. Wealthy business owners strive to avoid irritating the regulators or tainting their relationships with them. Less wealthy business owners, on the other hand (most but not all of whom are at XM), take a number of deliberate measures—both overt and covert—to avoid getting caught by the regulators. Their efforts are directed not at maintaining relationships, but at subverting authority and evading detection. One form of overt resistance involves blatantly exhibiting and selling counterfeit goods to anyone who expresses interest, even though engaging in such risky transactions without bothering to screen the customers is certain to attract uninvited attention. Covert resistance, on the other hand, can involve many kinds of ruses and dodges. For example, some of the less wealthy shopkeepers use logos that can be removed and reattached at any time, maintain private rooms or ceilings to hide counterfeit inventory, transport prohibited items to the market surreptitiously (hidden, for example, in a baby stroller), hide goods in inconspicuous corners of the stores and constantly move them, or temporarily close the stores

when they get word of a potential inspection on the shop floor. All of these forms of overt and covert resistance go far beyond the mere evasive tactics of the wealthy and well-connected business owners. Those who are less wealthy verbalize the injustices they have experienced, although only to those they trust. With strong feelings, they describe unfair enforcement on the shop floor, including regulators' corrupt practices, and assert that frequent inspections slow business and make it harder to survive.<sup>65</sup> They are not merely engaging in accommodations with regulators designed to sustain their wealth; rather, their businesses are engaged in a life-and-death struggle with the state.

Most of those who employ tactics of evasion are successful entrepreneurs at HCLC who own brands and registered trademarks. To maximize profits, they continue counterfeiting on the one hand, while actively developing their businesses on the other. As they do so, they cover up their illicit activities by maintaining the appearance of lawful practices. For example, they exhibit official letters at the store entrance to demonstrate compliance. These letters guarantee that the goods are not counterfeit and affirm that the owners will not engage in excessive discounting that leads to vicious competition: a policy that the market management has struggled to implement for a long time. In these stores, there are no private rooms with counterfeit inventory; counterfeit goods are stored separately and shown discreetly only after shoppers have been carefully screened.<sup>66</sup>

Tactics of evasion also include efforts on business development. At HCLC, the business owners support state-organized activities through active participation and generous donations. They fully utilize state-sponsored programmes including trademark registration, as well as product design and research. Specifically, they strive to procure logos and trademarks of their own through various means. Many have completed the tedious official registration procedure, which takes two years. Some make the procurement process easier by purchasing logos and trademarks from companies that provide brochures with attractive pictures of registered logos and trademarks. Others, in an attempt to reduce time and costs, borrow brands from friends and business partners. Appearing to be co-operative makes it easier for these shopkeepers to benefit from various kinds of state support. Nevertheless, they still find counterfeiting to be an irresistible temptation from time to time.<sup>67</sup> Their practices are properly classified as evasion, since they fall somewhere between compliance on the one hand and outright resistance on the other.

#### 4.3.2 *Divided Experiences, Perceptions, and Competence*

Tactics of evasion and resistance are two forms of legal consciousness that develop through shopkeepers and trademark owners' different experiences, perceptions, and legal competence. Those who adopt tactics of resistance tend to exhibit a form of legal consciousness marked by feelings of powerlessness. They perceive their situation as unfair, and they become highly opportunistic when working in opposition to the norms and requirements of trademark law. As they struggle to better their lives by counterfeiting, the implementation of IP laws significantly frustrates their efforts, since their relationship with the regulators is

65. (Field notes, XM, L, March 12, 2012).

66. (Field notes, HCLC, B, Feb 28, 2012).

67. (Field notes, HCLC, B, Feb 28, 2012).

entirely oppositional. The illicit nature of counterfeiting and the regulators' corrupt practices place them in a vulnerable position—a position that makes them feel legally and politically powerless and leaves them with no recourse except resistance. Meanwhile, they also resent the feeling that unfair enforcement disfavours them because of their lesser economic status. The sense of powerlessness and frustration deepens accordingly. Circumscribed by increasingly tightened IP regulations and a fiercely competitive environment, these individuals face a dilemma: they can follow the law but fail to earn a decent living, or they can violate the law and earn enough to make ends meet. Although risky, counterfeiting provides an income. An opportunistic and even defiant mentality toward the law emerges from the choice between economic survival and legal violation. Indeed, because of their extreme circumstances, it is hardly a choice at all.

As a marginalized group, the less wealthy shopkeepers experience the law as a tool of oppression in the hands of the state that thwarts their livelihood, and they oppose it through non-compliance. On the market floor, the potential danger of getting caught is a constant lurking threat. Beneath the defiant acts hides the offenders' shame—a shame that is rarely revealed as a result of their internalization of the official discourse of counterfeiting. The majority of this group lives day by day, and grand concepts such as the law and the state do not often come into their view. When they do, however, those who share a legal consciousness of resistance see a chasm between the law and themselves. They view the unpredictable and dangerous regulators as driven by a predatory state, and they themselves as living a precarious life at the bottom of the food chain. As one small shopkeeper at XM commented to me, “He [the Chairman] oppresses them [state officials], so they [state officials] oppress us.” Seeing me pondering this statement, she added: “Don't you see it? Large fish eat small fish, and small fish eat tiny shrimp” (大鱼吃小鱼, 小鱼吃虾米). This shopkeeper experiences IP enforcement as the law of the jungle, and sees herself and those working in the market as occupying the lowest and most vulnerable position. Resistance is her only option.<sup>68</sup>

For those who exhibit the legal consciousness of evasion, on the contrary, the law seems to offer opportunities as well as constraints. By engaging in accommodations with the state, they gain many opportunities to maximize their interests. At the same time, they recognize that the state—specifically the upper-level management at HCLC—also imposes constraints by requiring business owners to comply with the no-counterfeiting policy, at least in appearance. To strike a balance between the immediate profit of counterfeiting and their chances for long-term business development, business owners engage in a carefully choreographed relationship with official regulators, policies, and legal norms to enhance their advantages and achieve their desired ends.

In addition to being strategic, business owners who share the legal consciousness of evasion are often proud and indifferent. They are proud of what they believe—with considerable self-deception—to be their law-abiding practices. They are also proud of their entrepreneurial success, despite the dishonest practices that make it possible. These successful business owners are also indifferent to the law's unfairness, because their lives are relatively less affected by IP regulations. They are less likely to be caught and, if they are, they have the resources and connections to turn to to find a way out.

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68. (Field notes, XM, O, Dec 8, 2012).

### 4.3.3 *Aggravation of Inequality*

The analysis of business owners' tactics of evasion and resistance also clarifies the process through which social inequalities among the business owners are aggravated. As previously described, small shopkeepers are predominantly peasant migrants with no means of producing the goods they sell and who therefore rely on counterfeiting for a living. Wealthy business owners who own their own trademark, however, also own the means of production. They are equipped, to various degrees, with capital, manufacturing plants, and in some cases full teams of staff including product designers. As small shopkeepers and wealthy trademark owners engage in resistance and evasion, respectively, members of the propertied group are empowered and those of the unpropertied group are impoverished, and they are separated further socioeconomically by the effects of their actions.

Starting out with limited capital, information, and legal competence, small shopkeepers' covert and overt resistance against state policies increases their disadvantage in the IP regulatory processes. Most of them do not understand either the content or the origin of IP law, and they are uninterested in learning more. At XM, when the management held meetings to discuss IP regulation, no one wanted to attend. A salesclerk said: "No one cared. Shopkeepers asked their salesclerks to go, and they pushed it back to their employers."<sup>69</sup> Their lack of interest and motivation arose partly from the fact that they possess little property to protect, and therefore the law did not seem useful to them. The small income they make on relatively inferior commodities leaves them few opportunities to accumulate capital for business development, including owning a brand. Owning little tangible property and having slim chances of acquiring a brand of their own then lead to fewer opportunities to work with state authorities of any kind. Finally, in their limited contact with state actors, they do not develop any networks that could serve them, such as connections with regulators that may bring a lower store rent and protection during times of need. In most of their encounters with the law, members of this group remain the target of enforcement and in an oppositional relationship with the law. Resistance by defying, non-complying, and being apathetic toward the law results in a form of legal consciousness with respect to IP law—and law in general—that dramatically contrasts with that of established business owners and trademark holders.

Wealthy business people who own trademarks, by comparison, are empowered in the IP regulation process by obtaining state support, becoming financially secure, and by establishing and strengthening connections with state actors. In deploying tactics of evasion, wealthy business owners accumulate multiple types of capital—social, financial, and legal—that increase the socioeconomic gap between themselves and less wealthy shopkeepers. First, they acquire financial capital through counterfeiting as part of a long-term business strategy. Counterfeit goods are generally highly profitable, so they are an ideal way to raise financial capital in a relatively short period of time. This profit is then used to acquire more property, such as trademarks. In addition to amassing financial capital, these merchants develop technical knowledge and legal competence in the process of procuring logos and trademarks and they can use this knowledge to protect their resulting intellectual properties (i.e. trademarks and logos). For trademark owners, their involvement in brand building provides them with opportunities to develop relevant legal and technical knowledge, and this knowledge leads them to identify and support IP regulation in the long term.

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69. (Interview, XM, Q, Jul 14, 2012).

While mid-sized company owners often procure logos and trademarks for the purpose of branding and business promotion, when a business scales up, the owner is exposed to further advantages from IP law. For members of this group, brands are imbued with legal rights, and legal notions of ownership translate brands into private property. For example, interviewees N and Z were well informed about this area of the law. N has spent the last 20 years managing several enterprises that sell fur and leather garments and handbags, and Z single-handedly built a brand with a special collection of bags, purses, wallets, and suitcases. Both are well versed in IP law, and understand technical terms such as “rights infringement” and the ideas behind them. According to N, top-ranked companies such as *Xuebao* do not put up stop signs or curtains on the windows at their stores to protect their designs from copiers. Instead, they send teams of private agents across the country to find those who are using their brands without authorization. N explained that, when the agents collect sufficient evidence, the companies “knock those counterfeiters down and make them bankrupt.” Smiling, he added, “Just like those foreign companies.”

Lastly, in the process of complying with trademark law via brand building and other acts aligned with market policy, wealthy business owners are likely to develop beneficial relationships with regulators and other state actors. Working together with regulators gives merchants the opportunities to cultivate and maintain personal relationships through gift giving or other exchange relations. As these relationships shift from oppositional to colluding partnerships, the merchants’ perceptions gradually change. Not only are they more able to participate in business development programmes organized by the market management, but doing so provides numerous advantages in the long term. In addition, their relationship with the law transforms as they gradually shift to predominantly lawful practices. Wealthy business owners are empowered as they continue the practice of counterfeiting yet avoid direct conflicts with regulations.

#### 4.3.4 *Legal Consciousness and Social Inequality*

This study underlines the role of the state in the connection between legal consciousness and social inequality. Although law and society scholars working in China have noted inequality in various contexts<sup>70</sup> and have stressed the importance of state power in influencing ordinary people’s perceptions of and participation in law,<sup>71</sup> there is no research to date showing how inequality is connected to individual legal consciousness on the one hand and the role of the state on the other. In the two markets described in this study, both the state’s regulatory practices and the business owners’ tactical responses exacerbate social inequality. The unequal policies implemented in the two markets—and the differing forms of legal consciousness observed in those markets—strengthen the political and economic power of the propertied while undermining the propertyless. Although the specific practices observed may be variable, nuanced, and complex, the general patterns distinguishing the “haves” from the “have-nots” appear to be stable and well-established.

Meanwhile, by responding to the state-initiated unequal IP policies through evasion and resistance, business owners participate in the reproduction of inequality as well. They do so as the propertied merchants collude with state actors for more political and economic

70. Boittin, *supra* note 46; Gallagher, *supra* note 44; He et al., *supra* note 30; Lee (2007).

71. Diamant et al., *supra* note 47; He et al., *supra* note 30; Lubman (1999); Michelson, *supra* note 43.



resources, and those without property are excluded and eventually turn away from engagement with the state. Business owners in the two markets continually act out the practices of evasion and resistance, as small shopkeepers and established entrepreneurs understand and participate in IP law in strikingly different ways.

This study also calls attention to the role of class in the construction of legal consciousness, which is particularly apparent because the fieldwork examined the experiences of both the propertyless shopkeepers and the rich and powerful business owners who are trademark holders. Among the latter group, participating in IP laws in a highly volatile economy could result in both upward and downward class mobility. Profitable counterfeiting could make some of them rich in a relatively short period of time, while the risks associated with the activity could make others lose everything overnight. In the two markets, IP law provided two possible courses of action for merchants: violation through trademark infringement and compliance through brand building. While brand building was not an option available to all, infringement occurred on a daily basis among both the propertied and the propertyless merchants—as is apparent in the examples already discussed. Yet it was the latter who were most likely to be caught and punished by agents of the state. The phenomenon of non-compliance across class lines, although it took different forms for different class actors, distinguishes these findings from those of previous studies that concluded that an oppositional legal consciousness was mostly confined to the poor and working class.<sup>72</sup> Specifically, Lin found that the majority of those involved in counterfeiting are the socioeconomically marginalized.<sup>73</sup> In the present study, by contrast, business owners across class lines all violated trademark law. How should this very broad pattern of legal transgression be explained? Is the relative ease or difficulty of class mobility a key factor in determining how class affects legal consciousness? Certainly class will continue to matter in the formation of legal consciousness. These findings suggest new possibilities for considering class as a social category when analyzing the relationship between legal consciousness and social inequality.

## 5. CONCLUSION

It is hoped that this study may contribute to law and society research by using the concept of legal consciousness to analyze law's power to reproduce inequality and notions of class. A comparison of the XM and HCLC markets revealed that IP regulations were unevenly enforced among business owners of different socioeconomic standing. The regulatory process had fostered two distinct forms of legal consciousness—some merchants resisted IP law while others evaded it. Business owners' responses, consistently with the two different forms of legal consciousness, aggravated social inequalities among themselves. To understand how law can aggravate inequality, it is essential to consider not only the state that enforces the law, but also the specific law being implemented. Of course, economists, legal scholars, and some law and society researchers have investigated IP-related inequalities since its global implementation as a trade policy. Yet little is known about the role of the state domestically in fostering inequality based on power differentials among individual actors. This study has revealed how inequality can arise and worsen through state regulation of IP ownership depending on two factors: first, the ability to

72. Hernández, *supra* note 36; Sarat, *supra* note 1; Seron & Munger, *supra* note 37.

73. Lin, *supra* note 26.

counterfeit without legal penalty because of illicit accommodations cultivated over time with regulators; and, second, the opportunity to own brands and develop them. Thus, by examining how inequality is reinforced and exacerbated in these two Chinese markets, this study connects prior research on IP-related inequality at the international level to developments at the national and subnational levels.

This is one of the first empirical studies to delve into the day-to-day shaping of an emergent IP regime. Although the implementation of a global IP regulatory system has been much debated across the disciplines, the topic has drawn attention from law and society researchers only quite recently. Until now, scholarship on the global IP regulatory regime —“one of the most significant developments in the last decades of the 20<sup>th</sup> century”<sup>74</sup>—has been criticized for being mostly “both hypothetical and abstract.”<sup>75</sup> By empirically examining the notions of intangible property through trademark infringement and brand building in two actual market settings, this study fleshes out the abstractions with ethnographic details that capture the perceptions, conceptions, and practices of IP among merchants and regulators in contemporary China.

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74. Gallagher, *supra* note 44, p. xviii.

75. Coombe, *supra* note 4, p. 369.

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