

A comparative analysis of intellectual property rights protection in China and India in the XXI century

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Abstract. The protection of intellectual property still remains an important problem and a future challenge both for developed and developing countries. The international law has created many rules and recommendations connected with intellectual property protection. But even perfectly-created national legal system is worthless when the execution of law is inappropriate. The legal systems which are responsible for the protection of property rights in China and India are similar to systems implemented in Western economies and in the USA, however, there are some major differences. But the IPR protection in analyzed countries is perceived and evaluated negatively by all institutions and these countries are the main international sources of piracy and counterfeit goods. The article also tries to show and explain the differences in assessment of IPR protection in China and India and then lists and describes some of factors influencing the lack of appropriate protection of intellectual property rights in these countries in the twenty-first century.

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INTRODUCTION

Property and its protection are understood and protected differently in modern national economies. There are some countries where the level of property rights protection and intellectual property rights protection is high and does not cause any economic, legal or social problems and is very often considered as an important factor for growth and development. However, in some countries, the enforcement of property rights is undervalued or deliberately ignored. Unfortunately, some of these countries also develop very quickly and the piracy is threaten as the source of this growth.

The main aim of the paper is to compare the protection of property rights and intellectual property rights in China and India in the twenty-first century. In the first part the legal basis of property protection will be presented (both international agreements and national law) and significant issues related to the protection of intellectual property rights will be shortly described. In the second part the methodology of three main international institutions dealing with protection of property will be presented: the Heritage Foundation, the Fraser Institute and Property Rights. It is necessary because in the next part the values of final indexes and positions of China and India in these rankings will be shown and the differences in as-

assessment of property protection will be highlighted. In the last part the reasons of such differences in the assessment of intellectual property protection will be described and commented.

GENERAL INFORMATION ABOUT THE LEGAL SYSTEM CONNECTED WITH THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS IN CHINA AND INDIA

The history of intellectual property protection in China started with the legacy of the “four modernizations” policy, which was launched by Deng Xiaoping in 1978 (The Commission on the Theft of American Intellectual Property, 2013; Jilin X., 2000). With the development of Chinese economy and the emergence of Western investors, the Chinese government began to work on the implementation of intellectual property rights provisions relating to the Chinese legal system. In less than three decades, China has developed a comprehensive system of IPR protection, becoming a signatory to all major international conventions and creating a detailed national law. China also established a number of institutions responsible for the development and monitoring IPR compliance (Alfold W.P., 1998; Cheung G.C.K, 2011).

China has been the World Trade Organization (WTO) member since 2001 and it is also a signatory to the following international IP agreements:

- the Paris Convention
- the Berne Convention
- the Madrid Protocol
- the Patent Cooperation Treaty

China is not a signatory to the Hague Agreement, which allows the protection of designs in multiple countries through a single filing (Intellectual property Office, 2013a).

The concept of intellectual property started appearing in India during the British rule. During that time, such enactments like the Trade Mark Act of 1940, the Copy Right Act of 1709, which was later amended by the Acts of 1775, 1814, 1842, 1914 and the 1957 Act, the Designs Act of 1911 came into being. The first Patent Act was enacted in 1856, which was reenacted by another act in 1859. Nowadays in India, the Parliament alone is empowered to make laws dealing with Patents, Inventions, Designs, Copyrights, Trade Marks under Entry 49 List 1 of the Seventh Schedule and Under Article 246 of the Constitution of India (Ganea P., Garde T.V, 2009).

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INTELLECTUAL PROPERTY RIGHTS SYSTEM IN CHINA AND INDIA

China has been a member of the World Trade Organization (WTO) since 2001 and India since 1995. Membership in the WTO requires member nations to establish intellectual property (IP) laws whose effect is in line with minimum standards. As a result, there should be few major differences between Chinese and Indian laws and those of other developed countries.

China and India are signatories to the Berne Convention on copyright. Copyright legislation is based on Chinese 1990 Copyright Law, amended in 2001, and the Copyright Implementing Regulations of 2002. There is no requirement to register copyright in China and India. However, it is advisable to register it in case firms have to prove their ownership in any dispute or court case. In China, a registration is made with the National Copyright Administration, the authority responsible for the administration and enforcement of copyright and related issues in China. In India, the registration may help to prove ownership if there are criminal proceedings against infringers. In most cases though, the registration is not necessary to maintain a copyright infringement claim in India. The registration is made, in person or via a representative, with the Copyright Office. Internet piracy of films, music, books and software is still an important issue and a huge problem in India (the Australian Trade Commission, 2013a).

China's Patent Law deals with the protection of rights over technological inventions but it also covers utility models and designs (also known as 'design patents'). Invention patents give protection for a maximum of twenty years, utility models for ten, and each is the subject to the payment of annual fees. The Chinese Patent Law operates under the 'first to file' principle - that is, if two people apply for a patent on an identical invention, the first one to file the application will be awarded by the patent. Designs are covered by the Chinese Patent Law. The law's design rights provisions are similar to those for utility models, with protection for a maximum of ten years. The India's Patents Act of 1970 and the Patent Rules 2003 set out the law concerning patents (Intellectual Property Office, 2013b). As in China there is no provision for utility model patents. The regulatory authority for patents is the Patent Registrar within the department of the Controller General of Patents, Designs and Trade Marks, which is a part of the India's Ministry of Commerce and Industry. Patents are valid for twenty years from the date of filing an application, subject to an annual renewal fee. India's Patent Law operates under the 'first to file' principle too. In India the laws governing designs are the Designs Act 2000 and the Designs Rules 2001. Designs are valid for a maximum of ten years, renewable for a further five years (Intellectual Property Office, 2013b).

The Chinese trademark system gives protection for designs, symbols, colours or other devices, which identify products or services. Registration of foreign businesses under the Madrid Protocol takes about eighteen months, while a direct registration using the Chinese domestic system will usually take up to four years. A trademark is valid for ten years, after which it may be renewed indefinitely for further ten-year period. Indian trademark laws consist of the 1999 Trade Marks Act and the Trade Marks Rules of 2002, which became effective in 2003. A regulatory authority for patents is the Controller General of Patents, Designs and Trade Marks under the Department of Industrial Policy and Promotion. The police now have more robust powers in enforcing the Trademark Law, including the ability to search premises and seize goods suspected of being counterfeit without a warrant (the Intellectual Property Office, 2013a). Trade names also constitute a form of trademark in India, with protection, irrespective of existing trade names, for those wishing to trade under their own surname. The trademark in India is valid for ten years and can be renewed thereafter indefinitely for further ten-year period (Intellectual Property Office, 2013b).

INDEX OF PROPERTY RIGHTS (INDEX OF ECONOMIC FREEDOM, HERITAGE FOUNDATIONS)

The Index of Economic Freedom focuses on four main aspects of the economic environment over which governments usually exercise policy control: the rule of law, government size regulatory efficiency and market openness.

The property rights component is a part of the rule of law and it is a qualitative assessment of the extent to which a country's legal framework allows individuals to freely accumulate private property, which is secured by clear laws that are enforced effectively by the government. It measures the degree to which a country's law is able to protect private property rights and the extent to which those laws are respected. It also assesses the possibility that private property will be expropriated by the state. It also analyzes the independence of the judiciary, the existence of corruption within the judiciary, and the ability of individuals and businesses to enforce contracts. More effective legal protection of property means higher country's score (Miller T, Kim A.B., Holmes K.R. 2014). In 2015 index covers 10 freedoms – from property rights to entrepreneurship – in 186 countries.

Table 1

Property Rights Index for China and India between 2000-2015

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
China	30,0 (110)	30,0 (101)	30,0 (92)	30,0 (90)	30,0 (86)	30,0 (82)	30,0 (81)	20,0 (139)	20,0 (138)	20,0 (151)	20,0 (147)	20,0 (146)	20,0 (143)	20,0 (142)	20,0 (139)	20,0 (138)
India	50,0 (57)	50,0 (54)	50,0 (46)	50,0 (46)	50,0 (43)	50,0 (41)	50,0 (41)	50,0 (41)	50,0 (44)	50,0 (50)	50,0 (56)	50,0 (52)	50,0 (53)	50,0 (53)	50,0 (53)	55,0 (50)

Source: Miller T., Kim A.B., (2015), Miller T., Kim A.B., Holmes K.R. (2014), Miller T., Holmes K.R., Feulner E.J. (2013), Miller T., Holmes K.R., Feulner E.J. (2012), Miller T., Holmes K.R., (2011), Miller T., Holmes K.R., (2010), Miller T., Holmes K.R., (2009).

In the period between 2000 and 2006 China's protection of property right according to the International Property Rights Index (the Heritage Foundation) was rated as very poor and scored 30, which meant that property ownership was inadequately protected and that the court system was highly inefficient. In this period in China corruption was extensive, and the judiciary was strongly influenced by government decisions and even the expropriation was possible. China was ranked on 110th position in 2000 and moved to the 81st position in 2006. Then its position and score significantly deteriorated in 2007 and since then it equals 20. It means that private property is poorly protected, the court system is so inefficient and corrupted. Property rights are difficult to enforce and judicial corruption is extensive. Expropriation becomes a common tool used by the government. In 2014 Xi Jinping began his first year in power with an anti-corruption campaign but corruption still remains endemic. With Chinese cyber espionage visibly on the rise in 2014, the protection of property rights has even deteriorated. Additionally the China's weak judicial system is still highly vulnerable to political influence (Miller T, Kim A.B, 2015).

The property protection in India is better evaluated by international institutions than in China. But throughout the analyzed period remained at the same level and scored 50. The best places in the ranking India recorded in 2005, 2006 and 2007 (41st place), and the worst in 2000 (57th place) and in 2010 (56th place). It suggests that the court system in India is inefficient and subjects to delays. Corruption may be present, and the judiciary in many cases can be influenced by government decisions. Expropriation is possible but infrequent. In 2104 the Heritage Foundation Report noted that in a poll, 96 percent of Indians said that chronic corruption was holding back their country and corruption had a negative effect on government efficiency and economic performance. The judiciary was independent, but Indian courts were understaffed and suffered because of the lack of technology necessary to clear an enormous backlog, estimated by the U.N. to total 30 million–40 million pending cases (Miller T., Kim A.B, 2015).

The Heritage Foundation deals with property rights protection and does not distinguish between intellectual and physical property rights. So the most detailed research is necessary.

LEGAL SYSTEM AND PROPERTY RIGHTS (FRASER INSTITUTE)

Economic Freedom of the World is the index published yearly in Economic Freedom of the World by the Fraser Institute. It measures the degree to which the national policies and institutions are supportive of economic freedom. Forty-two data points are used to construct a summary index and measure the degree of economic freedom in five broad areas:

- size of government: expenditures, taxes, and enterprises;
- legal structure and security of property rights;
- access to sound money;
- freedom to trade internationally;
- regulation of credit, labor, and business.

According to the Report’s authors the protection of persons and their rightfully acquired property is a central element of economic freedom and a civil society. Indeed, it is the most important function of contemporary government. The key elements of a legal system consistent with economic freedom are: rule of law, security of property rights, an independent and unbiased judiciary, impartial and effective enforcement of the law. The primary sources used to compare different aspects of economic freedom are: the International Country Risk Guide, the Global Competitiveness Report created yearly by World Economic Forum, and the World Bank’s Doing Business project (Gwartney J., Lawson R., Hall J., 2013)

Security of property rights, protected by the rule of law, provides the foundation for both economic freedom and the efficient operation of markets and consequently for economic growth and development. Freedom to exchange, for example, is meaningless if individuals do not have secure rights to property, especially the results of their labor. When individuals and businesses lack confidence that contracts will be enforced and the results of their productive efforts will be protected, their incentive to engage in productive activity is destroyed. This area is essential for the efficient allocation of resources. Countries with major deficiencies in this area are unlikely to prosper regardless of their policies in the other four areas (Gwartney J., Lawson R., Hall J., 2014). In 2012 Economic Freedom of the World measured economic freedom in 157 nations.

Table 2

Legal System and Property Rights Indexes for China and India between 2000-2012

	2000		2005		2006		2007		2008		2009		2010		2011		2012	
	LSPR ¹	PPR ²	LSPR	PPR ²	LSPR	PPR ²	LSPR	PPR ²										
China	4,95 (77)	3,22	5,15 (77)	4,95	5,16 (72)	5,52	5,45 (68)	6,64	6,38 (43)	7,08	6,35 (44)	6,85	5,75 (67)	6,74	5,56 (71)	6,43	5,52 (71)	6,04
India	5,99 (55)	3,27	6,44 (47)	7,90	6,60 (42)	7,14	6,41 (46)	6,70	5,93 (61)	6,30	5,72 (64)	5,90	6,22 (53)	5,49	6,37 (52)	5,64	6,27 (50)	5,63

¹ Legal System and Property Rights – LSPR

² Protection of Property Rights – PPR- element LSPR

Source: Gwartney J., Lawson R., Hall J. (2014,2013,2012,2011,2010).

At first sight the protection of property in China and India is evaluated by the Fraser Institute similarly as by the Heritage Foundations. China received a worse assessment than India almost in the whole period. But surprisingly in 2008 and 2009 China noted both higher values of the LSPR index and higher position in the final ranking of Legal System and Property Rights. In these years India received the worst scores in the analyzed period and China the best. Protection of PPR comparison shows a similar relationship in the period between 2000 and 2008. But since 2008 China has reached better results in intellectual protection than India (Gwartney J., Lawson R., Hall J., 2014,2013,2012,2011,2010).

Similarly to the results obtained by the Heritage Foundation the assessment of property rights in China is really disappointed and it has been deteriorated since 2008. The Heritage Foundation noted some positive changes in the last few years in contrast to the Fraser Institute. The main difference between these two sources is the distance between analyzed countries. The protection of property rights in India is similarly assessed by both institutions but there are huge differences in valuation of property protection in China.

INTERNATIONAL PROPERTY RIGHTS INDEX (PROPERTY RIGHTS ALLIANCE AND AMERICANS FOR TAX REFORM FOUNDATIONS)

This part of article presents the concept of the International Property Rights Index (IPRI), another very popular measure which is used in global comparison of intellectual property rights protection. It is widely recognized as the most accurate and comprehensive comparative study of property rights protection. The IPRI was developed to serve as a barometer for the status of property rights across the world. The authors reviewed the literature on property rights in order to conceptualize a comprehensive characterization of this issue (Tiwari, 2012). The following components are the three core elements of the IPRI:

- Legal and Political Environment (LP)
- Physical Property Rights (PPR)
- Intellectual Property Rights (IPR).

The Legal and Political Environment (LP) component provides an insight into the impact of political stability and the rule of law in a given country. Consequently, the measures used for the LP are broad in scope. The authors of this index treat this component as significant to the right development and protection of physical and intellectual property rights. The other two components of the index: Physical Property Rights and Intellectual Property Rights (PPR and IPR) reflect two forms of property rights which are crucial to the economic development of a country. The items included in these two categories account for both de jure rights and de facto outcomes of the analyzed countries. The authors of index assume that the strong property rights regime strengthens the confidence of people in its effectiveness to protect private property rights and provides for trouble-free transactions related to registering property and allows access to credit necessary to convert property into capital.

Intellectual Property Rights (IPR) component evaluates the protection of intellectual property. It assesses protection of two major forms of intellectual property rights (patents and copyrights) from de jure and de facto perspectives, respectively. Protection of Intellectual Property Rights Index contains opinion survey outcomes reflecting a nation's protection of intellectual property. It is a crucial aspect of the IPR component (The International Property Rights Index, 2014). The 2015 IPRI ranks a total of 129 countries from around the world, up from 97 in 2014.

Table 3

International Property Rights Index and its components for China and India between 2008 and 2013

	2008				2009				2010				2011				2012				2013			
	IPRI	LP	PPR	IPR																				
China	5,0	5,1	5,5	4,4	4,7	4,0	5,6	4,4	5,1	4,4	6,1	4,8	5,5	4,5	6,8	5,1	5,5	4,3	6,9	5,2	5,5	4,3	6,8	5,4
India	6,2	5,9	7,4	5,2	5,6	4,9	6,7	5,1	5,5	4,8	6,6	5,3	5,6	4,7	6,6	5,5	5,4	4,4	6,5	5,4	5,5	4,4	6,6	5,5

¹International Property Rights Index (IPRI)

²Legal and Political Environment (LP)

³Physical Property Rights (PPR)

⁴Intellectual Property Rights (IPR)

Source: Lorenzo F. (2013) Tiwari G. (2012), Jackson K.A (2011), Dedigama A.C. (2009).

The International Property Right Index (IPRI) in China increased in 2008 and then deteriorated next year but since 2011 equals 5,5. In 2012 China was classified higher in this ranking than India. In 2014 both countries scored the final result of 5,5. The intellectual property protection is still better evaluated in India, but the distance between these countries decreases. In 2014 the difference in IPR values was 0,1. (The International Property Rights Index, 2014).

The analysis of data published by the Property Rights Alliance indicates different assessment of property rights protection in China and India in comparison to information published by the Heritage Foundation and the Fraser Institute. For example, the protection of intellectual property rights is better scored in China than in India by the Fraser Institute. The opposite results are showed by the Property Rights Alliance. Since 2008 the results of India has been better than results of China and consequently India has received higher positions in the final rankings of IPR protection.

The results of property protection and intellectual property protection of India and China which are published yearly by the Property Tax Alliances, the Fraser Institute and the Heritage Foundation are really different. Of course, it is impossible to compare values of indexes. But it is possible to compare relationships between China and India and their places in final rankings. It is necessary to indicate reasons of such differences. First of all, the assessment of property rights protection very often bases on surveys. The answers of respondents can vary greatly because of the differently formulated questions, other research samples or the data of research. The countries included in the analysis have got a massive population and an area of the country, so it is almost impossible that the surveys cover the same group of respondents in both countries. Also some methodologies put special attention to the structure of the legal systems, which in case of India and China is similar to systems implemented in well-developed countries (the Chinese system is based on American, the Indian on British). This part of analysis is usually evaluated high in rankings. The main problem in China and India causes the implementation of this system. Enforcement of IPR laws remains a serious problem in China and also is problematic in India. Significant structural and institutional impediments undermine effective IPR enforcement. These include a lack of coordination among government agencies, insufficient resources for enforcement, local protectionism, and a lack of judicial independence. Administrative IPR enforcement, consisting of raids and seizure of infringing goods, generally results only in temporary slowdowns in production; penalties are not sufficient to deter repeat offenders. Criminal prosecutions, which could have a deterrent effect, are rare. There are also difficulties in prosecuting civil IPR cases, including relatively low damage awards, the lack of a robust system for discovery of evidence, sporadic ap-

plication of contempt citations for uncooperative or dishonest defendants, an inexperienced judiciary, and onerous requirements for the use of evidence from abroad. However, there are some signs of improvement in IPR enforcement, especially with respect to courts in major cities in China. (The United States International Trade Commission Investigation, 2010).

Despite the fact that the assessment of protection of property is significantly different in analyzed rankings, it can be stated that the overall assessment of intellectual property rights protection in China and India in the twenty-first century is still very poor and unsatisfactory.

Some authors point that the problems with the lack of respect of property rights results from history and special attitudes towards intellectual property. Coming from a Socialist and Confucian viewpoint, in China ideas are shared and opened to usage by the community, rather than being owned by an individual. Chinese people believe that an idea, if good enough, should be shared. Therefore, everyone should benefit from this idea, rather than an individual gaining all the profit (Zhengzhi, 2014). In India, the concept that one could have property rights over the products of one's intellectual labor is difficult to understand because of the fact that traditionally India is a country where people never believe in asserting rights over intellectual properties. Factually, intellectuals were identified more with poverty than with property or prosperity and people took pride in proclaiming that the Goddess of Wealth and Goddess of Learning never co-existed. This is why most of the proud products of Indian culture and the contribution of Indian ancestors to arts, literature, social and natural sciences and technology, remained in anonymity and remains the reason for the loss of recognition on contribution of Indian ancestors towards intellectual labor and culture (Ramasubramania, 2010). The adequate legal system is necessary for right protection of property rights but the implementation of its rules and the attitude of the whole society members toward necessity of protection are also crucial. In China and India the social attitude toward protection of property right seems to be still very poor and much different than in Western countries (Chandra R., 2012). Other commentators state that the reason of poor protection of property rights is the profit gained by producers in China in India by selling counterfeit goods (Yu P.K, 2012). For example, in September 2013, the International Chamber of Commerce and the Federation of Indian Chambers of Commerce and Industry published a study analyzing seven key industry sectors vulnerable to counterfeiting, piracy. The study concluded that rights holders in 2012 suffered lost sales in India amounting to 21.7 percent or approximately \$11.9 billion due to these problems. Collectively, the Indian government's economic loss tied to these illicit activities totaled approximately \$4.26 billion (Froman F., 2014). In economy if someone loses, someone gains. The OECD study concluded that international trade in counterfeit and pirated goods could have accounted for up to USD 200 billion in 2005. The updated estimates, based on the growth and changing composition of trade between 2005 and 2007, suggest that counterfeit and pirated goods in international trade grew steadily over the period 2000 – 2007 and amount to up to USD 250 billion in 2007. The share of counterfeit and pirated goods in world trade is also estimated to have increased from 1.85% in 2000 to 1.95% in 2007 (OECD, 2009). A huge share of these products was produced in India and China. It is worth to add that attempting to measure the global value of counterfeit products is excruciatingly difficult. This is understandable given the illegal nature of this activity. The only real data are surrogate indicators such as seizures of pirate product by the police or the customs authorities. In addition, there is no agreement on factors that should be considered when calculating the scale of counterfeiting. Should the estimate include sales lost by specific brands and at what prices, damage to brand equity, total sales of counterfeits, or some combination of these factors? (Chaudhry P. Zimmerman A., 2009). The latest attempt to quantify the counterfeit goods market was completed by the US government's General Accountability Office (GAO) (Chaudhry P. Zimmerman A., 2013).

CONCLUSIONS

The main aim of the paper was to compare the property and intellectual property protection in India and China in the twenty-first century. To do that, the legal basis of this protection was shown and then the final results of rankings which evaluated protection of property in general and intellectual property were shown and described. Because of some significant differences in final results, the methodology of this institution was also shortly described. Unfortunately, the received results were so different, that it was impossible to compare the relationship between property protection in China and India (especially nowadays). But on the basis of presented data it was possible to evaluate the overall level of property protection and intellectual property protection, which still is very poor and remains unchanged from many years.

It is worth to mention that both countries have established right and similar to Western and American legal systems sufficient to protect these rights. Both countries have signed these same international agreements. But the main problem nowadays is the lack of adequate execution of this law. The history and culture can partly explain behavior of Chinese and Indian enterprises, normal people and even governments which do not respect the intellectual property rights. But it cannot be the only explanation. Human greed and huge profits and pervasive corruption are the other reasons.

The necessity of IPR protection comes from our human liberties and human rights and it is not directly connected with economic growth and development. This is almost impossible to find research which without any doubts show strong correlation between protection of property rights and economic growth and development. The example of China and India shows that even without this protection, countries are able to develop very quickly, sometimes even faster than others. The profits connected with piracy and counterfeit goods are so high that can easily compensate the lack of this protection.

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