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The Trademark as a Novel Innovation Index

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THE TRADEMARK AS A NOVEL INNOVATION INDEX

BRIAN J. FOCARINO*

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I. PUDDING, PARKS, AND PRODUCTS OF THE INTELLECT

Products of the intellect are different from a bowl of pudding.¹ In economic terms, pudding is considered “rivalrous,” not in the way that the Hatfields and the McCoys are rivals, but by virtue of the fact that if I get to a bowl of pudding and eat it before someone else, it is “used up.” There is no more of it. Ideas, on the other hand, are economically “non-rival,” which is to say that one person’s consumption of an idea does not necessarily reduce the amount of the idea available to another person. My use of English syntax in this sentence prevents no one from simultaneously using syntax to write

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¹ Marc Meola, *Non-Rival is Non-Relevant*, ACRLLOG (Mar. 26, 2009), <http://acrlog.org/2009/03/26/non-rival-is-non-relevant/>.

another sentence somewhere else. Language, unlike pudding, planes, and puppies, trades for nothing in a market economy.² But just like products of the intellect are different from pudding, they are also, generally speaking, different from public parks. In addition to being non-rival, public parks are “non-excludable” – a public park is freely available to all (taxes notwithstanding). The risk of treating ideas like we treat public parks is that many of the entrepreneurs amongst us would be unable to recoup the costs of inventing or creating. We would say that an entrepreneur does not innovate because she, or he, or it, or they, has no *incentive* to innovate.³ We recognize that just because some ideas *can* be traded at a zero price does not mean that arriving at all ideas incurs *zero cost*. To discourage free riding, and to incentivize innovation by ensuring that certain species of ideas are entitled to excludability for a period of time, we treat some *ideas* like we treat *property*, but of the intellect.⁴

The study of “entrepreneurship seeks to understand how opportunities are identified and exploited.”⁵ Valuable research in the field of entrepreneurship, therefore, involves “the scholarly examination of how, by whom, and with what effects opportunities to create future goods and services are discovered and evaluated.”⁶ When studying the relationship that exists between entrepreneurship and intellectual property, patents receive the most scholarly attention.⁷ The attention makes sense when we consider that patents are closely associated with technical progress, grant temporary monopolies that incentivize investment in research & development (R&D), and function as vectors of technological dissemination in and of themselves.⁸ In a number of

² See generally RICHARD CORNES & TODD SANDLER, *THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS* (2d ed. 1996).

³ See generally MICHELE BOLDRIN & DAVID K. LEVINE, *AGAINST INTELLECTUAL PROPERTY* (2008).

⁴ See generally WILLIAM J. BAUMOL, *WELFARE ECONOMICS AND THE THEORY OF THE STATE* (1952) (discussing the economics of the free rider problem).

⁵ Jeroen P.J. de Jong & Orietta Marsili, Schumpeter versus Kirzner: An Empirical Investigation of Opportunity Types 5 (Jan. 2010) (unpublished working paper) (on file with EIM Research Reports), <http://www.ondernemerschap.nl/pdf-ez/H201004.pdf>.

⁶ Scott Shane & S. Venkataraman, *The Promise of Entrepreneurship as a Field of Research*, 25 ACAD. MGMT. REV. 217 (2000), <http://www.sjsu.edu/people/john.estill/courses/158-s15/The%20Promise%20of%20Entrepreneurship%20as%20a%20Field%20of%20Study.pdf>.

⁷ A Dec. 9, 2014 Google Scholar (scholar.google.com) search for “patents and entrepreneurship” yields 61,400 results, compared to a similar search for “trademarks and entrepreneurship,” which yields 16,100 results. A search for “copyright and entrepreneurship” yields 326,000 results, but this is due to Google highlighting every article’s copyright notice as relevant to the query.

⁸ Jean-Pierre Centi & Nathalie Rubio, *Intellectual Property Rights and Entrepreneurship: On The Precedence of Trademarks* (Int’l Ctr. for Econ. Research, Working Paper No. 29, 2005), <ftp://ftp.repec.org/opt/ReDIF/RePEc/icr/wp2005/ICERwp29-05.pdf>.

industries, however, “conventional forms of invention (associated with patenting) are minimal[,] so we must look elsewhere [to discern] innovative behavior.”⁹ This is particularly true in our service sectors and consumer goods industries, including food and drink, fashion, and cosmetics. Trademarks¹⁰ are particularly vital in industries where production technologies tend to be standardized, and where technological innovation is not in itself a condition for firm success.¹¹ Further, while firm R&D expenditures and patent portfolios can sometimes provide a reliable litmus test for innovation and entrepreneurship, these proxies map most readily onto the firms, sectors of the economy and countries with high financing capacities.¹² In other words, they only help us understand a small – and shrinking – share of global entrepreneurship.¹³

This Essay advances the premise that trademarks can function as complementary indexes of entrepreneurship (1) in small or developing economies and (2) in service sectors and other low-tech industries. This Essay illustrates both functions through the examination of trademark application activity in China as opposed to European industrialized nations at various points over the past thirty years. This Essay then discusses various ways in which trademarks can impact the lifecycle of firms engaged in everything from social networking to men’s fragrances. In so doing, this Essay explores the varied relationship trademarks have with entrepreneurial activity in developed and developing nations, as well as in high and low technology industries. The result is a novel look at novel behavior, taking us beyond the Silicon Valley hacker house and into the farmhouses of China, the public houses of Ireland, and the fashion houses of Germany.

⁹ Teresa da Silva Lopes & Mark Casson, *Entrepreneurship, Brands and the Development of Global Business 3* (Queen Mary Univ. London Ctr. for Globalization Research, CGR Working Paper No. 2, 2007), <http://webspaces.qmul.ac.uk/pmartins/CGRWP02.pdf>.

¹⁰ A trademark is a word, phrase, symbol, and/or design that identifies and distinguishes the source of the goods and/or services of one party from those of others. *Trademark, Patent, or Copyright?*, U.S. PAT. & TRADEMARK OFF., <http://www.uspto.gov/trademarks/basics/definitions.jsp>.

¹¹ da Silva Lopes & Casson, *supra* note 9, at 8–9.

¹² Centi & Rubio, *supra* note 8, at 5.

¹³ Carl Haub, *Fact Sheet: World Population Trends 2012*, POPULATION REFERENCE BUREAU (July 2012), <http://www.prb.org/Publications/Datasheets/2012/world-population-data-sheet/fact-sheet-world-population.aspx>.

II. TRADEMARK REGISTRATION ACTIVITY AS AN INDEX OF
ENTREPRENEURSHIP ACROSS INDUSTRIES IN LESS AND LEAST DEVELOPED
NATIONS: CHINA CASE STUDY

A. *Economic Growth, Trademark Registration and Product
Differentiation*

A positive relationship exists between the size of an economy and product variety.¹⁴ Increased imitation and rivalry lead to a proliferation of trademarks as entrepreneurial firms seek to diversify their products through the creation of new brands.¹⁵ While patents may stimulate innovation, “trademarks are used for other purposes, in particular to stimulate product differentiation and business diversification.”¹⁶ This is because “[b]rands are recognised by consumers as a signal that the product [or service] satisfies basic requirements for consistency and quality (so-called vertical differentiation) and that it embodies a unique combination of characteristics that differentiates it from other brands (so-called horizontal differentiation).”¹⁷ Increased horizontal differentiation in a market can demonstrate that entrepreneurs are developing “sophisticated and careful [market] segmentation strategies” and using “selected channels of distribution” to reach emerging niches.¹⁸ Vertical differentiation, on the other hand, may signal that entrepreneurs recognize an emerging market potential to position their brand as “up-market” vis-à-vis another firm’s brand or another brand in the firm’s own portfolio.¹⁹ In both instances firms act entrepreneurially *and* intraprenurially, identifying and exploiting new opportunities through the introduction of new products or services.²⁰

In many cases, trademark registration data can provide researchers with the kind of real-time information about the current state of entrepreneurial activity in a market that patent acquisition or R&D expenditure information

¹⁴ Centi & Rubio, *supra* note 8, at n.5 (noting that a higher GDP increases the number of varieties of products rather than the quantity produced per variety).

¹⁵ See generally Montserrat Llonch-Casanovas, *Trademarks, Product Differentiation and Competitiveness in the Catalan Knitwear Districts During the Twentieth Century*, 54 BUS. HISTORY 179–200 (2012). See also Centi & Rubio, *supra* note 8, at 3 (noting that even the “prospect of differentiation boosts up the market dynamic” by encouraging price and other forms of competition).

¹⁶ Centi & Rubio, *supra* note 8, at 14.

¹⁷ da Silva Lopes & Casson, *supra* note 9, at 7.

¹⁸ *Id.* at 26.

¹⁹ *Id.* at 27.

²⁰ de Jong & Marsili, *supra* note 5, at 5.

cannot. This is because registration is possible for almost every conceivable product or service being offered in a market and, unlike patents, most countries limit grants of registration to products and services that are already being commercialized or will be commercialized in the very near future.²¹ In the United States, for example, trademark applicants may file a “use in commerce” application under §1(a) of the Lanham (Trademark) Act,²² which requires that the applicant prove use of the mark in commerce in connection with *all* the goods and services listed in the application as of the application *filing date*.²³ Applicants may also file an “intent-to-use” application under §1(b) when the applicant has “a bona fide intention . . . to use [the] trademark in commerce” *after* the filing date.²⁴ In order to perfect an intent-to-use application and be granted registration, however, the applicant must provide evidence within six months that the mark has been put into actual use.²⁵ The same is not true in China, whose “first-to-file” system grants applicants trademark rights upon registration regardless of whether the applicant has used the trademark or not,²⁶ although China does allow for registration challenges against unused or abandoned trademarks.²⁷

B. Trademarks’ Role in Spurring and Measuring Entrepreneurship in China

As the world’s most important emerging market, China’s experience with trademark law over the past thirty-five years offers a myriad of lessons about the interesting interplay that exists between trademark and entrepreneurship if we consider trademark law as both (1) an institution that can hinder and facilitate innovation and (2) as an innovation index.

1. Chinese Trademark Law From 1978 Through Present Day

China “initiat[ed] market reforms in 1978” following its Cultural

²¹ Centi & Rubio, *supra* note 8, at 14.

²² 15 U.S.C. §§ 1051–1141n.

²³ *Id.* §1051(a).

²⁴ *Id.* §1051(b).

²⁵ *Id.* §1051(d).

²⁶ Huang Hui & Guo Shoukang, *China Trademark Laws & Cases*, EU-CHINA PROJECT ON PROTECTION INTELL. PROP. RTS. (IPR2) 12 (May 2011), www.ipr2.org/.../Trademark_Laws_&_Cases-EN-110504-final1006.pdf.

²⁷ Hatty Cui, *Brief Review of ‘Non-Use’ Trade Mark Cancellation Proceedings in China*, MINISTRY COM. CHINA, http://ipr.chinadaily.com.cn/2012-06/14/content_15502882.htm (last updated June 14, 2012).

Revolution, "shift[ing] from a centrally[-]planned to a market[-]based economy", and has since "experienced rapid economic and social development."²⁸ Contemporaneous with its move to a market economy, China began drafting its first modern trademark law²⁹ and established a state agency to handle trademark registration.³⁰ In fact, of the three dominant forms of intellectual property, trademark law was the first to be reintroduced following the Cultural Revolution.³¹ A decade after adopting its first modern trademark law in 1982, China strengthened its intellectual property system once more, in response to pressure from the United States, and strengthened it a third major time in preparation for the country's accession to the World Trade Organization in 2001.³² As will be shown, China's simultaneous move to a market economy and adoption of trademark law precipitated a surge of economic growth and entrepreneurial activity that has to a large extent been tied to China's trademark policy over the last thirty years.

China's most recent overhaul of its trademark law occurred in 2001 when China acceded to the World Trade Organization, bringing its trademark law into greater conformity with international standards. Several amendments in particular are worth highlighting as demonstrations of trademark law's ability to be adapted to incentivize entrepreneurs and deter free riding that might otherwise hinder innovation in a young market economy. Among the most noteworthy changes to Chinese trademark law were new provisions protecting well-known global trademarks not already registered in China, providing an exception to China's aforementioned "first-to-apply" registration system by denying registrations to Chinese applications that are identical, similar to, or imitate pre-existing, famous trademarks.³³ The 2001 amendments also

²⁸ Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle*, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS PLUS ERA 173 (Daniel Gervais ed., 2007); *China Overview*, WORLD BANK, <http://www.worldbank.org/en/country/china/overview> (last visited Dec. 9, 2014).

²⁹ *Trademark Law of the People's Republic of China*, TRADEMARK OFF. ST. ADMIN. FOR INDUSTRY & COM. CHINA (Oct. 27, 2001), http://www.saic.gov.cn/sbjenglish/flfg1_1/flfg/201012/t20101227_103092.html (noting that China's first modern trademark laws were adopted in August 1982, revised again in 1993, and revised for a third time in 2001).

³⁰ Hui & Shoukang, *supra* note 25, at 10.

³¹ Yu, *supra* note 28, at 213.

³² Hui & Shoukang, *supra* note 26, at 10; *China and the WTO*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/countries_e/china_e.htm (last visited Dec. 9, 2014).

³³ Hui & Shoukang, *supra* note 26, at 17. For example, while I was the legal intern for trademarks at Google during my 1L summer, I was responsible for trying to have Google's ANDROID operating system trademark classified by the Chinese government as well known, because the classification is extremely useful in preventing infringement and counterfeiting across all classes of goods and services.

extended to local Chinese trademark tribunals the necessary powers to seize and destroy allegedly infringing goods as well as the tools used to manufacture them,³⁴ and increased infringement fines from the 1982 levels of “fifty percent of illegal sales” to “three times the amount of illegal sales or a statutory fine.”³⁵

China’s economic growth has directly impacted the government’s focus on trademark law, more so than any other form of intellectual property.³⁶ 2002–2007, for example, coming on the heels of China’s 2001 trademark law revision, Chinese tribunals handled over 25,000 infringement cases per year, made possible in large part by increased government investment in trademark enforcement.³⁷ China now also offers trademark owners the ability to pursue infringement actions through administrative rulings rather than the court system, offering rights-holders a fast, efficient, and cheaper avenue to pursue claims.³⁸ To deter would-be infringers and to encourage rights-holding firms, the government has also attached criminal liability to serious counterfeiting.³⁹

Beyond a desire to facilitate greater levels of Chinese entrepreneurship and economic development in its new economy, trademarks have become the form of intellectual property most closely associated with economic development in China over the past thirty years because out of the three dominant forms of intellectual property, trademark reform is the easiest to affect.⁴⁰

2. Chinese Trademark Registration as an Index of Entrepreneurship

China is the world’s fastest growing consumer market,⁴¹ and “conventional wisdom holds that . . . firms seeking to establish markets for

³⁴ *Id.* at 25.

³⁵ *Id.*

³⁶ Joff Wild, *The Truth About Trademarks in China*, WORLD TRADEMARK REV., Jan./Feb. 2007, at 52, <http://www.worldtrademarkreview.com/Magazine/Issue/05/Roundtable/The-truth-about-trademarks-in-China>.

³⁷ *Id.*

³⁸ *Id.* at 55.

³⁹ *Id.* at 53.

⁴⁰ Yu, *supra* note 28, at 212 (noting that copyright reform can be associated with “propaganda, thought work, and information control” and that patent reform is difficult “due to [patents’] considerable impact on technology transfer and the potential for slowing down the country’s modernization efforts by draining foreign exchange reserves in the form of royalty and license fee [agreements].”).

⁴¹ Steven Barnett, *China: Fastest Growing Consumer Market in the World*, INT’L MONETARY FUND DIRECT (Dec. 2, 2013), <http://blog-imfdirect.imf.org/2013/12/02/china-fastest-growing-consumer-market-in-the-world/>.

finished products need . . . trademark protection”⁴² China is also the world’s largest exporter of goods,⁴³ and “trademark protection . . . is particularly important to an export-driven economy.”⁴⁴ China’s trademark application numbers have reflected the country’s rapid economic development and strengthened trademark protection.⁴⁵ China received just over 25,000 initial trademark registration applications in 1980 and over 1.4 million applications in 2011,⁴⁶ with non-Chinese applicants accounting for 142,958 applications, or approximately 10% of the total number.⁴⁷ The 2011 figures illustrate that from 1980 through 2011, the overwhelming majority of

⁴² Yu, *supra* note 28, at 177.

⁴³ David Sims, *China Widens Lead as World’s Largest Manufacturer*, THOMASNET.COM (Mar. 14, 2013), <http://news.thomasnet.com/IMT/2013/03/14/china-widens-lead-as-worlds-largest-manufacturer>.

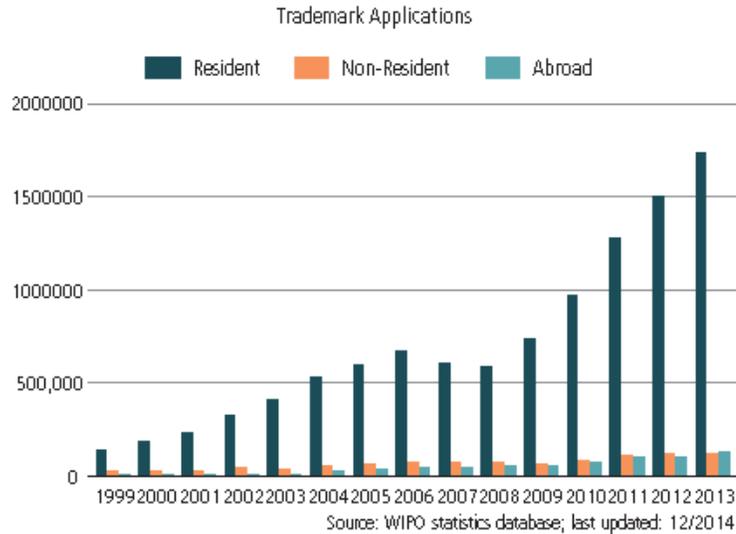
⁴⁴ Yu, *supra* note 28, at 199.

⁴⁵ Wild, *supra* note 36, at 52.

⁴⁶ *Annual Development Report on China’s Trademark Strategy 2011*, TRADEMARK OFF./TRADEMARK REV. & ADJUDICATION BD. ST. ADMIN. FOR INDUSTRY & COM. CHINA 099 (May 7, 2012) http://www.saic.gov.cn/sbjEnglish/tjxx_1/201205/P020120507691517978449.pdf. There are several explanations, pessimistic and optimistic, for why Chinese firms may have taken to trademark to such an extent. See Wild, *supra* note 35, at 52–53. On the pessimistic side, free riding may have motivated many Chinese initially because of the country’s unique “first-to-file” system. *Id.* at 54. Chinese entrepreneurs, because of a lack of any real intellectual property infrastructure in the country prior to 1982, see Yu, *supra* note 27, at 197, may have “consider[ed] it a smart business strategy to free-ride on other people’s trademarks and reputation.” Wild, *supra* note 36, at 53. Because “[a] large majority of the mainland Chinese population did not speak English,” Chinese entrepreneurs could also opt to register Chinese translated or transliterated versions of pre-existing trademarks before the firms that owned the foreign rights to those trademarks would notice. *Id.* at 54. Taking the optimistic view, some practitioners believe that between trademark, patent, and copyright in China that “trademarks are . . . the most widely understood and appreciated form of intellectual property.” *Id.* at 53. Pragmatically, “[f]rom the standpoint of internal [entrepreneurship] in China, trademark protection is even more beneficial than the protection afforded by other forms of intellectual property.” Yu, *supra* note 27, at 200. This is because “develop[ing] . . . recognized trademarks requires neither considerable technological expertise or initial heavy capital investment.” *Id.* Enhancing trademark protection “encourage[s] local companies to catch up and compete with famous Western brands.” *Id.* at 201. This is particularly true “[i]n the dynamic [and] immature market” of a developing country, where “consumers are still experimenting, and brands come and go with great speed.” *Id.* “As a result, local firms [empowered by trademark law] have the opportunity to attain market position and develop the next promising brands.” *Id.* Witnessing successful Chinese brands compete with famous Western brands could encourage more Chinese entrepreneurship, resulting in a trademark-driven entrepreneurial feedback loop. See *id.* Trademark violations were likely easier to pursue in China because Chinese authorities perceived patent infringement merely as a kind of “technology transfer [that] help[ed] to meet national technology development goals.” *Id.* at 212.

⁴⁷ See *Annual Development Report on China’s Trademark Strategy 2011*, *supra* note 44, at 099. Note that in calculating the number of non-Chinese applicants, I combined “International” applicants (foreign firms applying for trademark protection in China specifically) with “Madrid” applicants (foreign firms applying for trademark protection in China as well as a number of other countries simultaneously through the Madrid Protocol process). *Id.*

trademark applications in China originated with Chinese firms and citizens introducing new products and services into the marketplace, engaging in entrepreneurial activity.⁴⁸ The most recently available statistics from the World Intellectual Property Organization (WIPO) bear out this trend:

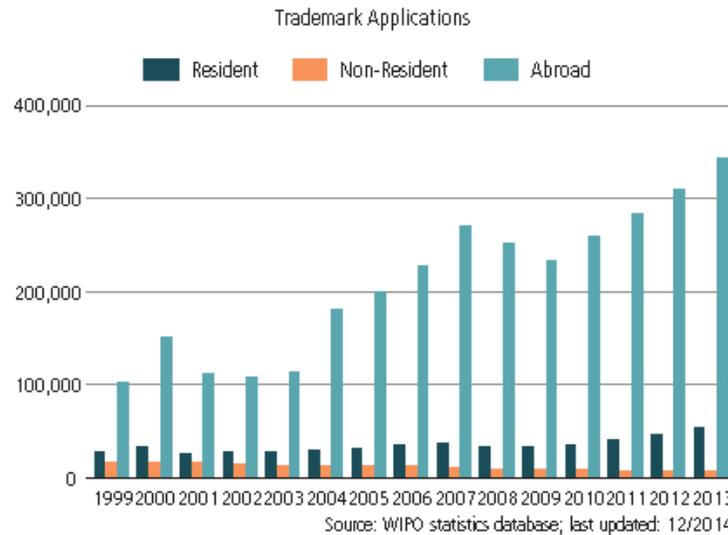


Graph 1: Chinese Trademark Applications by Residency 1999–2013⁴⁹

Compare Chinese residents' application numbers with domestic trademark applications filed by citizens of the United Kingdom during the same period:

⁴⁸ See *id.*; see also Wild, *supra* note 36, at 52.

⁴⁹ *Statistical Country Profiles: China*, WORLD INTEL. PROP. ORG., http://www.wipo.int/ipstats/en/statistics/country_profile/profile.jsp?code=CN (last updated Dec. 2014). Although I have not researched this, I imagine that application rates in 2008 were potentially impacted by the global economic crisis, though I will not speculate as to the reasons for the dip in 2007 as well. China's improved performance in 2009 makes sense given that China's economy grew, while many other developed countries were in a recession. See Graeme Wearden, *Chinese Economic Boom Has Been 30 Years in the Making*, GUARDIAN (Aug. 16, 2010, 9:25 AM), <http://www.theguardian.com/business/2010/aug/16/chinese-economic-boom>.

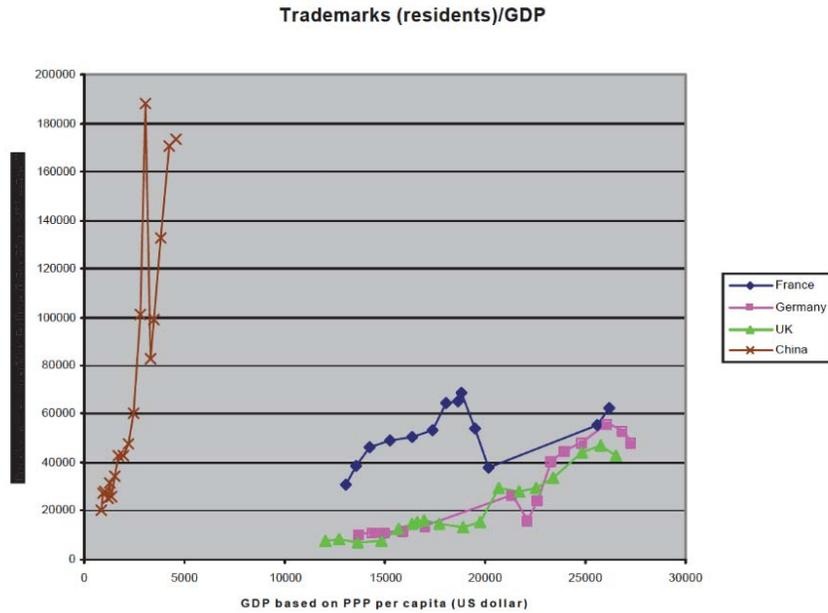


Graph 2: UK Trademark Applications by Residency 1999–2013⁵⁰

During 2012, for example, UK firms filed 45,607 domestic trademark applications as compared with Chinese firms' 1.5 million domestic trademark applications. Even when one controls for population differences between the two countries, the difference is striking.⁵¹ Centi & Rubio also highlight that in 2002, for example, Chinese trademark application rates by residents thrived at lower levels of GDP as compared with resident applications in more developed European countries.

⁵⁰ *Statistical Country Profiles: UK*, WORLD INTELL. PROP. ORG., http://www.wipo.int/ipstats/en/statistics/country_profile/profile.jsp?code=GB (last updated Dec. 2014). Again, although I have not researched this, you do not see the same drop in application activity for the UK during 2007–2008 that you saw in China. I submit (but am speculating) this may be because trademark activity is already depressed in developed countries as opposed to developing countries, and therefore less prone to financial “shock.” The UK’s 2009 numbers, in any event, reflect a decline from 2008, which makes sense given that UK’s economy that year suffered one of the worst real GDP growth rates of any developed nation. See *GDP Growth (Annual %)*, WORLD BANK, http://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?order=wbapi_data_value_2009+wbapi_data_value+wbapi_data_value-last&sort=asc&page=1 (last visited Sept. 29, 2015).

⁵¹ *Compare Statistical Country Profiles: China*, *supra* note 49, with *Statistical Country Profiles: UK*, *supra* note 50.

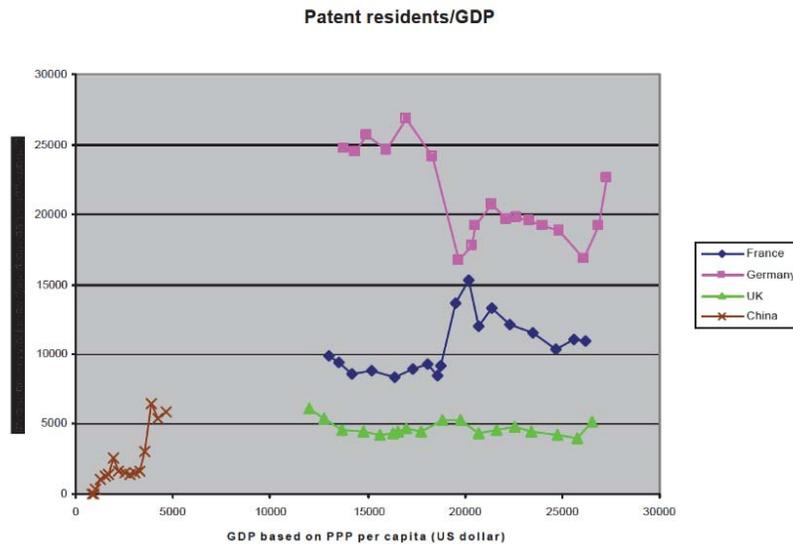


Graph 3: Resident Trademark Applications by GDP in 2002⁵²

While trademark applications filed by Chinese residents thrived at a lower GDP, Chinese patent applications during the same time were far lower than applications filed by residents in France, Germany and the UK during the same period.⁵³

⁵² Centi & Rubio, *supra* note 8, at 7 graph.2(b).

⁵³ *Id.* at 8–9.



Graph 4: Resident Patent Applications by GDP in 2002⁵⁴

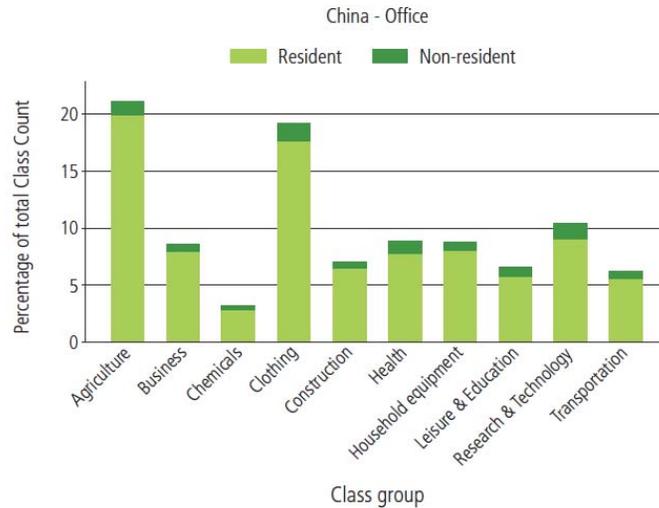
At low GDP per capita, China experiences less quantity of registered patents than the selected European member states.⁵⁵ Having looked at whether foreign or domestic entrepreneurs are availing themselves of Chinese trademark law and having examined trademark versus patent registration rates weighted by GDP per capita, one final aspect that deserves our attention is whether the distribution of trademark applications across various products and services differs in China when compared with more developed countries.⁵⁶ The most recently available WIPO statistics indicates that it does.⁵⁷

⁵⁴ *Id.* at 8 graph.3(b).

⁵⁵ *Id.* at 9.

⁵⁶ See *World Intellectual Property Indicators 2014*, WORLD INTELL. PROP. ORG. 80 fig.B24, http://www.wipo.int/edocs/pubdocs/en/wipo_pub_941_2014.pdf (last visited Sept. 29, 2015).

⁵⁷ *Id.*

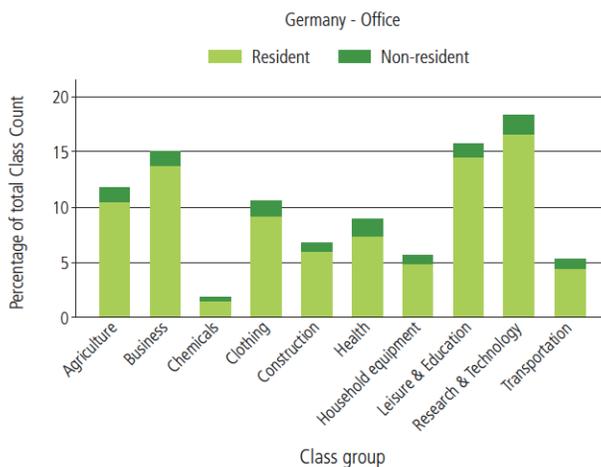


Graph 5: Chinese Trademark Applications by Sector in 2013⁵⁸

Current domestic Chinese trademark activity is highest in the agriculture and consumer goods sectors, given China's lower levels of purchasing power parity per capita, as we might expect.⁵⁹ Chinese entrepreneurial activity is more depressed in capital-intensive. Germany, however, shows greater entrepreneurial activity in these same industries at higher levels of GDP.

⁵⁸ *World Intellectual Property Indicators 2013*, WORLD INTELL. PROP. ORG. 120 fig.B.4.2.1, http://www.wipo.int/edocs/pubdocs/en/intproperty/941/wipo_pub_941_2013.pdf (last visited Dec. 10, 2014).

⁵⁹ Compare Centi & Rubio, *supra* note 8, at 8 graph.3(b), with *World Intellectual Property Indicators 2013*, *supra* note 58.



Graph 6: German Trademark Applications by Sector in 2013⁶⁰

Considering the above data, is it possible to distinguish patent and trademark as different vectors of growth? As the China case study demonstrates, we see higher levels of trademark registration activity by residents at lower levels of GDP in less capital-intensive economic sectors. This activity directly relates to entrepreneurship because the “[r]egistration (applications for registration) of trademarks indicates that new kinds of products will be supplied on the market.”⁶¹ Application activity demonstrates that entrepreneurs are developing new products with new characteristics to meet potential demand that has not yet been satisfied.⁶²

The dominance of industrialized countries in worldwide intellectual property ownership is well established, but is most pronounced in the case of patents, where less than five percent of worldwide patents 1994–1995 were granted to residents of developing countries.⁶³ During the same period, however, thirty-two percent of domestic trademark registrations worldwide were granted to residents of developing countries.⁶⁴ Trademarks, therefore, offer us a different index for understanding and measuring entrepreneurship in

⁶⁰ *Id.* at 119 fig.B.4.2.1.

⁶¹ Centi & Rubio, *supra* note 8, at 4.

⁶² *Id.*

⁶³ Carlos A. Primo Braga, Carsten Fink & Claudia Paz Sepulveda, *Intellectual Property Rights and Economic Development* 25 (The World Bank, World Bank Discussion Paper No. 412, 2000), https://books.google.com/books?id=lW-Ym7HfB90C&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false.

⁶⁴ *Id.*

developing economies.

III. THE LIFECYCLE OF A TRADEMARK ACROSS INDUSTRIES AND ECONOMIES

John Stewart, the former CEO of the Quaker Oats Company, once told a friend that “[i]f this business were split up, I would give you the land and the bricks and mortar, and I would take the brands and trademarks, and I would fare better than you.”⁶⁵

Brand considerations can impact the lifecycle of a firm in interesting ways, highlighting a relationship between entrepreneurship, the life of individual trademarks and the life of a firm itself. A brand’s impact on lifecycle decisions and other corporate activity is particularly pronounced in “consumer goods” industry firms, many of which are multi-brand (e.g. Proctor & Gamble, Unilever), which differ from the many high tech and manufacturing industry firms that market under a single brand name (e.g. Apple).⁶⁶ For those segments of the economy that do not rely on advanced technologies and are dominated by multi-brand firms, there is a greater ability to separate the ownership of a firm on the one hand with the ownership of a brand on the other hand, allowing for separate trade of the two.⁶⁷ This Section will discuss several notable ways trademarks may impact the lifecycle of a firm and how firms can affect various intrapreneurial or entrepreneurial goals through innovative brand activity.

A. Trademarks’ Impact on Exit Activity and Inter-Firm Partnership

Trademarks may impact a firm’s decision to merge in order to “achieve economies in distribution and product development” for its brand(s) that would be impossible to achieve alone, allowing a larger firm to exploit a brand fully.⁶⁸ Unexpected or accelerated popularity of a brand may force a firm’s hand to merge, requiring a smaller firm (or encouraging a smaller firm’s financial backers) to seek out a larger partner that can support a global market or distribution system.⁶⁹ Brands may also influence firms’ decisions to merge

⁶⁵ *Interbrand’s Top Global Brands*, ADVERTEAZE LIVE (June 10, 2008), <https://adverteazelive.wordpress.com/2008/06/10/interbrand%E2%80%99s-top-global-brands/>.

⁶⁶ *The Company Behind the Brand: In Reputation We Trust*, WEBER SHANDWICK (July 2012), http://www.webershandwick.com/uploads/news/files/InRepWeTrust_ExecutiveSummary.pdf.

⁶⁷ da Silva Lopes & Casson, *supra* note 9, at 41.

⁶⁸ *Id.* at 28.

⁶⁹ *Id.* at 21.

because in some instances, “acquiring a [strong] brand essentially involve[s] the acquisition of a set of loyal customers.”⁷⁰ Facebook’s failed offer to acquire Snapchat, a company with no revenues, for \$3 billion last year illustrates the point well. Despite Facebook reaching over 1.2 billion people around the world, Snapchat had a loyal following of teenagers, a group Facebook was struggling to connect with.⁷¹ Snapchat had developed a loyal user base around its brand, and loyal user bases increasingly “loom large in valuation considerations.”⁷² Because trademarks and loyal user bases are connected, “[p]opular new networks may not kill the [competitors] that came before [them],” and instead opt to acquire and keep a pre-existing brand intact, as Facebook did with both Instagram and WhatsApp.⁷³ After Snapchat rebuffed Facebook’s offer, Facebook released its own app, Slingshot, which is identical to Snapchat in nearly every meaningful way.⁷⁴ On their face, Facebook’s actions are curious – why would the largest social media company in the world offer \$3 billion for a company whose service is virtually effortless to duplicate, generates no revenue, and has a user base that is dwarfed by Facebook’s own in an industry where success is largely tied to network effects? The answer becomes clear if we consider that Facebook was willing to pay \$3 billion solely for Snapchat the brand, rather than Snapchat the firm. Facebook must have known that it could produce the same or arguably an even better app than Snapchat ever could, given Facebook’s dominance in social networking, for far less than \$3 billion. Nevertheless, Facebook must have reasoned that it would not be able to compete with the Snapchat brand and the loyal following cultivated around that brand. As a result of a trademark, Facebook attempted to engage in a multi-billion dollar acquisition, which would have been a waste of corporate assets otherwise. To go back to the very first point made in this Essay: social networks, like language, are not only non-rival, but are *anti-rival*. Not only are people not harmed when another person uses an anti-rival good, but the more valuable the good becomes to everybody.⁷⁵ Social networks,

⁷⁰ Kai A. Konrad, *Merger Profitability in Industries with Brand Portfolios and Loyal Customers*, 26 KOR. ECON. REV. 1, 9 (2010).

⁷¹ Julianne Pepitone, *Facebook Admits Young Teens Are Losing Interest in the Site*, CNN MONEY (Oct. 31, 2013, 10:00 AM), <http://money.cnn.com/2013/10/30/technology/social/facebook-earnings/>; Ryan Tate, *Why Facebook Would Pay \$3 Billion for Snapchat (And Why It Shouldn't)*, WIRED (Nov. 13, 2013, 6:38 PM), <http://www.wired.com/2013/11/facebook-snapchat/>.

⁷² Richard Waters, *Loyal Users Key to Snapchat and Twitter Fortunes*, FIN. TIMES (July 31, 2014, 4:57 PM), <http://www.ft.com/cms/s/0/097ad3ee-185c-11e4-a82d-00144feabdc0.html#axzz3LLTBob8f>.

⁷³ *Id.*

⁷⁴ Jordan Crook, *Is Facebook Slingshot Third Time's A Charm or Strike Three?*, TECHCRUNCH (June 17, 2014), <http://techcrunch.com/2014/06/17/facebook-snapchat-slingshot/>.

⁷⁵ Lawrence Lessig, *Do You Floss?*, 27 LONDON REV. BOOKS 16 (Aug. 18, 2005),

therefore, require loyal users, and loyal users congregate around brands.

Relatedly, a firm may choose to merge for brand expansion purposes, where the merger is primarily affected so that one firm's well-known brand can be appended to another firm's less-recognized but nevertheless desirable underlying product or service.⁷⁶

However, because of trademarks' ability to be licensed, a brand might also influence a company to refrain from M&A altogether while still allowing companies in traditionally unrelated industries to recognize entrepreneurial synergies around a single brand in innovative, non-permanent ways.⁷⁷ Hugo Boss had been a successful men's apparel brand since 1923, but in 1993, anticipating an increased willingness by men to wear fragrances, Hugo Boss entered into a licensing agreement with American multinational consumer goods company Proctor & Gamble to produce fragrances under the Hugo Boss brand name.⁷⁸ Although the licensing agreement was Proctor & Gamble's first investment in the fragrance business, the success of the initial Hugo Boss cologne eventually led Proctor & Gamble to achieve global leadership in men's fragrance.⁷⁹ Licensing a brand rather than engaging in M&A activity can allow firms to produce and distribute different products, or reach different geographic markets, for fixed periods of time.⁸⁰

Individual brands, as intellectual property, may also be traded independently of a firm through acquisitions.⁸¹ Large firms may opt to acquire individual brands from smaller firms because they have the organizational skills and financial resources to rejuvenate or reposition pre-existing brands.⁸² Bombay Sapphire gin, for example, was launched in 1987 by International Distiller and Vinters (IDV), which eventually became a subsidiary of Grand Metropolitan.⁸³ After acquiring Bombay Sapphire, Grand Metropolitan horizontally differentiated Bombay Sapphire by using "attractive ingredients, innovative design (blue bottle) and a new recipe (more spicy and more lemon than competitor [gin] brands such as Gordon) to capture market share."⁸⁴ However, when Grand Metropolitan decided to merge with Guinness to form

<http://web.archive.org/web/20061210095140/http://www.lrb.co.uk/v27/n16/less01.html>.

⁷⁶ da Silva Lopes & Casson, *supra* note 9, at 27–28.

⁷⁷ *Id.* at 29–33.

⁷⁸ *Id.* at 30.

⁷⁹ *Id.* at 30.

⁸⁰ *Id.*

⁸¹ da Silva Lopes & Casson, *supra* note 9, at 28.

⁸² *Id.* at 31.

⁸³ *Id.* at 28–29.

⁸⁴ *Id.*

Diageo, the resulting firm's potential market dominance in the alcoholic beverage industry led to antitrust concerns in the U.S.⁸⁵ In order to avoid sanction by the Federal Trade Commission, Diageo's management decided to sell the Bombay Sapphire brand to Bacardi.⁸⁶ Bacardi retained the essential components of the brand, such as the distinctive blue bottle and recipe, but vertically differentiated the brand in a way Diageo hadn't through heavy advertising and higher prices, emphasizing Bombay Sapphire's status as a premium gin.⁸⁷ Because Bacardi was a smaller multinational than Diageo, Bombay Sapphire was relatively more important to the firm's overall brand portfolio, and received more attention from top management.⁸⁸ Following Bacardi's acquisition and vertical differentiation, Bombay Sapphire sales grew from 0.5 million bottles in 1998 to 1.4 million bottles in 2004.⁸⁹

China provides another interesting example of how brands can influence corporate entrepreneurship. As of December 2014, China leads all of the world's emerging markets with ninety-five companies appearing on *Fortune's* Global 500 list of the world's largest companies ranked by revenue.⁹⁰ Yet China has only one representative on Interbrand's list of 100 Best Global Brands as measured by brand worth.⁹¹ Huawei (#94), the Chinese telecommunications and network equipment provider, appeared for the first time this year and is the first Chinese company ever to appear on Interbrand's list.⁹² The company is currently the third largest smartphone manufacturer in the world.⁹³ Furthermore, despite China's increased outward-bound foreign direct investment of \$3 billion to more than \$60 billion from 2005-2011, only one third of Chinese companies report international revenue developing in line

⁸⁵ *Id.* at 29.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Global 500 2014*, FORTUNE, <http://fortune.com/global500/wal-mart-stores-1/> (last visited Oct. 27, 2015).

⁹¹ When determining the top 100 most valuable brands each year, Interbrand (whose brand valuation formula was the first of its kind to be certified by the International Organization for Standardization) examines three key aspects that contribute to a brand's value: (1) the financial performance of the branded product and service; (2) the role the brand plays in influencing customer choice; and (3) the strength the brand has to command a premium price or secure earnings for the company. *Interbrand's 15th Annual Best Global Brands Report*, INTERBRAND (Oct. 9, 2014), <http://interbrand.com/newsroom/interbrands-15th-annual-best-global-brands-report/>.

⁹² *Id.*

⁹³ *Id.*

with their expectations.⁹⁴ The *Harvard Business Review* notes that this is because “[t]o many skeptical consumers in developed markets, Brand China still means lower quality,” and that most Chinese companies have traditionally focused on physical assets and low-cost manufacturing at the expense of strengthening intangible resources such as brands.⁹⁵ To compensate for this, the *Review* recommends that Chinese companies form joint ventures, merge with or acquire western brands to grow.⁹⁶ Tellingly, in November 2013, a full year before Huawei’s first appearance in October 2014 on Interbrand’s list, the *Review* highlighted Huawei as a brand to watch, noting that, “[a] significant part of . . . Huawei’s leap from regional player to global leader . . . [is] due to [] partnerships with Motorola . . . and Symantec,” both U.S. headquartered companies.⁹⁷

IV. THE TRADEMARK AS A NOVEL INNOVATION INDEX

Trademarks do not guarantee that entrepreneurs will be successful, but trademarks offer entrepreneurs the ability to exploit profit opportunities by allowing consumers to identify, distinguish, and reward talented firms. Strong trademark regimes offer all countries—developed or developing—the opportunities to both incentivize domestic entrepreneurship and attract foreign investment. The study of entrepreneurship seeks to understand how new opportunities are identified and exploited. This Essay argues that trademarks function as a novel innovation index because they symbolize firms’ exploitation of new opportunities through the introduction of new products or services. This Essay also argues that in the context of entrepreneurship, trademarks can serve a unique complementary role as indexes for innovative activity (1) in small or developing economies and (2) in service sectors and other low-tech industries traditionally under-studied in the entrepreneurship literature. Finally, this Essay demonstrates how trademarks, as increasingly valuable intangibles, can impact the lifecycles—and life styles—of firms in unique ways. By doing so, this Essay illustrates how trademarks can provide us with a fresher picture of global entrepreneurship, wherever it takes place.

⁹⁴ *Growth Journeys: Helping Asian Companies Realize the Value of their International Expansion Strategies*, ACCENTURE 7 (2013), <http://www.accenture.com/Microsites/asia-go-global/Documents/pdfs/home-slider/Accenture-Growth-Journeys-Final.pdf>.

⁹⁵ Martin Roll, *How Chinese Companies Can Develop Global Brands*, HARV. BUS. REV. (Nov. 20, 2013), <https://hbr.org/2013/11/how-chinese-companies-can-develop-global-brands/>.

⁹⁶ *Id.*

⁹⁷ *Id.*

