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China's Copyright System: Rising to the Spirit of Trips Requires an Internal Focus and WTO Membership

Julia Cheng*

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Julia Cheng

Abstract

This Note examines the current state of China's intellectual property rights protection as it relates to copyright. Part I evaluates existing measures used in enforcing copyright protection in China, such as the General Agreement on Tariffs and Trade ("GATT"), the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs"), and various U.S. trade sanctions. Part II describes major policies affecting China's copyright system and address the inherent factors underlying China's inability to enforce copyright protection, including a lack of cultural and economic incentives and difficulties in administrative enforcement. Part II then proceeds to discuss China's judicial system and education as alternative methods to solving China's problem of copyright piracy. In addition, Part II introduces joint ventures as defined in China's laws and implicated in Sino- U.S. intellectual property agreement. Finally, Part II explores the mechanisms involved in WTO's dispute resolution system. Part III argues that TRIPs and U.S. trade sanctions are no longer the appropriate tools for combating China's piracy problems. In light of the country's present intellectual property environment, strategies such as education and joint ventures, and the enhancement of the judicial system will serve as effective cures to the piracy problem. Part III further argues that WTO membership is beneficial to the future enforcement of copyright protection in China.

CHINA'S COPYRIGHT SYSTEM: RISING TO THE SPIRIT OF TRIPS REQUIRES AN INTERNAL FOCUS AND WTO MEMBERSHIP

*Julia Cheng**

We take copyright violations very seriously, but when it comes to copying a disk, most Chinese people don't see what's wrong.¹

INTRODUCTION

With the adoption of the Open Door Policy² in 1979, the People's Republic of China³ ("China") was ready to come out of

* J.D. Candidate, 1999, Fordham University School of Law. This Note is dedicated to my parents, Sik Fai and Margaret Cheng, for their unconditional love and encouragement. Special thanks to Dr. Thomas Chan and Dr. Peter K.F. Cheung, without whose assistance my Note's research in Hong Kong would not have been possible. The author gratefully acknowledges the MCI International Law Fellowship for its financial support.

1. See Seth Faison, *China Turns Blind Eye to Pirated Disks*, N.Y. TIMES, Mar. 28, 1998, at D2 (quoting Xu Guoji, senior official in Shanghai's Industrial and Commercial Administration commenting on recent boom in movie piracy).

2. See Symposium by Shanghai Foreign Investment Commission, *Opportunities for Foreign Investment and the Process in Shanghai* (Sept. 9, 1988) [hereinafter Shanghai Symposium] (proposing that China's economic structure has ripened for foreign investment). The Open Door Policy, implemented by the Chinese government in 1978, was a policy of reform geared toward opening China's economy to the outside world. *Id.* Beginning in 1979, China opened up the southern coastal provinces of Guangdong and Fujian to foreign investment. *Id.* Later on, in 1980, China set up Special Economic Zones in Shan Tou, Shen Zhen, Xia Men, and Zhu Hai to attract foreign investment and technology transfer. *Id.* In 1984, the Chinese permitted foreign investors to form enterprises in several coastal cities. *Id.*

3. In this Note, "China" refers to the People's Republic of China excluding Hong Kong. See MING K. CHAN & DAVID J. CLARK, THE HONG KONG BASIC LAW 3-5 (1991) (explaining that after some 140 years under British colonial rule, Hong Kong would revert to China in 1997 and be treated as Special Administrative Region of China from 1997 to 2047). Having a population of over 1.2 billion, China is the fastest growing major economy in the world, with growth rates averaging more than 10% beginning in the early 1990s. See U.S. *China Trade Relation* (June 17, 1997) (reporting statement of U.S. Trade Representative Charlene Barshefsky to House Ways and Means Trade Subcommittee), available in 1997 WL 11233854 [hereinafter *U.S. China Trade Relation*] (briefing China's economic status). Despite Hong Kong's return to China in 1997, China's intellectual property regime does not extend to Hong Kong. See Tom Hope, *Agreement on IP Regime for Hong Kong Post 1997*, IP ASIA, Feb. 1996, at 24 (discussing state of Hong Kong's laws for protection of patents, registered designs, and copyrights after 1997). Instead, Hong Kong has its own set of copyright laws that are modeled closely to the British system. *Id.*

economic isolation and welcome foreign investment, trade, and the transfer of technology.⁴ As a developing nation struggling to modernize, China recognized the importance of international trade to its effort to develop economically.⁵ The Chinese government was anxious to strengthen its intellectual property system because failure in this area had hindered its efforts in promoting international trade, including gaining entry into the World Trade Organization (“WTO”).⁶ To make the business environment more attractive to foreign investors, China began to remodel its economic and political infrastructures based on in-

4. See Janiece Marshall, *Current Developments in the People's Republic of China: Has China Changed?*, 1 *TRANSNAT'L L.* 505, 508-09 (1988) (explaining that after Mao Tse-Tung's death in 1976, Deng Xiaoping and his allies had decided to revitalize China's faltering economy through incorporation of foreign technology and investment). This policy is antithetical to China's previous policies of isolation and exclusion under Mao Tse-Tung's regime. *Id.*

5. *Id.* at 543. During the period starting with the Communist Revolution in 1949 and continuing until 1978, Chinese economy resorted to self-reliance, and limited its foreign trade relationships to a only a few other nations that had similar political interests, such as Albania, North Korea, and North Vietnam. See Sang Bin Xue & George D. Wilson, *Capital and Techonology: China Rejoins the Modern Business World – An Analysis of China's Equity Joint Venture Law*, 25 *U.S.F. L. REV.* 511, 514 (1991) (describing China's economic reform in light of its ideology and history). As the government embarked on its modernization program in 1978, however, China realized the importance of foreign trade as the source of foreign capital necessary to finance the importation of foreign technology which the government considered crucial to China's economic development. See Marshall, *supra* note 4, at 508-09 (discussing the events preceding China's decision to attract foreign participation in its economic development).

6. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, *LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND* vol. 1 (1994), 33 *I.L.M.* 1125 (1994). The successor to GATT, the World Trade Organization (“WTO”), is an umbrella institution with a firm constitutional basis whose duties include administering all relevant GATT codes, agreements, and understandings. *Id.* at 1144-45. See Andreas F. Lowenfeld, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 *AM. J. INT'L L.* 477, 478-79 (1994) (discussing status of WTO in international trade community). Although the WTO replaced the GATT as the foremost watchdog of world trade, the GATT still exists as a provisional trade agreement with its authority grounded in the President's treaty making powers. *Id.*; see Joseph Kahn & Helene Cooper, *China Plans to Cut Tariffs, End Quotas in Bid to Join Trade Group*, *WALL ST. J.*, Nov. 20, 1995, at A10 (reporting that China's poor efforts at enforcing intellectual property rights posed obstacle to gaining entry to WTO). During the Asia-Pacific Economic Co-operation Organization meeting in Tokyo, the United States mentioned China's poor intellectual property enforcement as one of its two reservations (the other being market access) about China's bid to join the WTO. *Id.* China believed that WTO membership would enhance its status in the global economic environment and reduce foreign trade barriers against its exports. See Clifton Wharton Jr., Editorial, *Admitting China to WTO*, *J. COM.*, Oct. 30, 1997, at 6A (questioning degree of WTO membership's attractiveness to China in terms of making it conform to WTO's rules).

ternationally accepted principles of the Western⁷ world.⁸ Among the results were China's enactment of the Trademark Law⁹ in 1982, the Patent Law¹⁰ in 1984, and the Copyright Law in 1992.¹¹

Intellectual property piracy¹² had pushed the United States and China to the verge of major trade wars three times between 1990 and 1997.¹³ While U.S. investment in China had grown since the 1980s, its trade deficit with China had also continually expanded.¹⁴ Relying heavily on the export of intellectual property products to offset its trade deficits in the world market, the United States had ample reason to see that its intellectual property products served a similar function in the Chinese market.¹⁵

7. See THE OXFORD ENGLISH DICTIONARY 165 (2d ed. 1989) (defining Western as that which is "of or pertaining to the non-Communist states of Europe and America.")

8. See Marshall, *supra* note 4, at 543 (critiquing China's stance on developing its economic system).

9. Trademark Law of the People's Republic of China (1982), as amended by Decision of the Standing Committee of the National People's Congress Concerning Amendments to the Trademark Law (1993), translated in CHINA LAW REFERENCE SERVICE ref. no. 5100/93.07.01 [hereinafter Trademark Law].

10. Patent Law of the People's Republic of China (1984), as amended by the Standing Committee of the National People's Congress (1992), translated in CHINA LAW REFERENCE SERVICE ref. no. 5100/92.09.04 [hereinafter Patent Law].

11. Copyright Law of the People's Republic of China (1990), translated in CHINA LAW REFERENCE SERVICE ref. no. 5100/90.09.07 [hereinafter Copyright Law].

12. See Rengan Shen, *Combat Piracy and Safeguard the Rights and Interests of Authors*, 4 CHINA PAT. & TRADEMARKS 5, 5 (1994) (defining piracy in light of intellectual property). According to the author, piracy, in its legal context, refers to the stealing of other people's mental labor for profit-making purpose. *Id.* Note, however, that the U.S. legal norm accords a broader definition of piracy. See BLACK'S LAW DICTIONARY 482 (6th ed. 1990) (defining piracy as "unauthorized and illegal reproduction or distribution of materials protected by copyright, patent, or trademark law.").

13. See June Cohan Lazar, *Protecting Ideas and Ideals: Copyright Law in the People's Republic of China*, 27 LAW & POL'Y INT'L BUS. 1185, 1188-91 (1996) (noting that U.S.'s dissatisfaction with China's intellectual property enforcement had invoked U.S. threats of trade sanctions in 1992, 1995, and 1996, respectively). The trade sanction in 1992 was instigated by the United States' disappointment with China's serious neglect in enforcing copyright protection of U.S. works, particularly computer software programs. See Kim Newby, *The Effectiveness of Special 301 in Creating Long Term Copyright Protection for U.S. Companies Overseas*, 21 SYRACUSE J. INT'L L. & COM., 29, 41-42 (1995) (delineating China's history with U.S. trade sanctions). In late 1994 and 1995, the United States threatened multi-billion dollar trade sanctions for Chinese products as punishment for China's poor enforcement of its intellectual property laws. *Id.*

14. See OFFICE OF THE U.S. TRADE REPRESENTATIVE, 1995 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 43 (1995) (reporting that U.S. trade deficit with China grew from US\$18.3 billion in 1992 to US\$22.8 billion in 1993).

15. See Alan S. Gutterman, *The North-South Debate Regarding the Protection of Intellectual Property Rights*, 28 WAKE FOREST L. REV. 89, 104 (1993). In the period since World

China also recognized the importance of intellectual property rights protection for the development of its science, technology, and culture, and for the proper functioning of its social-market economy.¹⁶ Despite the recognition by both the United States and China of the need to enhance China's intellectual property system, China's piracy condition worsened.¹⁷

This Note examines the current state of China's intellectual property rights protection as it relates to copyright. Part I evaluates existing measures used in enforcing copyright protection in China, such as the General Agreement on Tariffs and Trade¹⁸

War II, U.S. exports which "rely heavily on intellectual property . . . protection (chemicals, pharmaceutical, computers, software, sound recordings, books, movies, and scientific equipment) ha[ve] more than doubled . . ." *Id.* at n.104 (quoting Harry B. Ensley, Intellectual Property Rights in GATT, 15 *NEW MATTER* 1, 10 (1990)). See *Export Policy: U.S. Export Growth Likely to Continue Over Five-Year Period, Commerce Says*, *INT'L TRADE REP.* (BNA), Apr. 26, 1995, at d10 (reporting U.S. exports to emerging markets such as China and India will surpass combined exports to European Union and Japan by year 2000). The United States Commerce Department indicated that despite predicted strong growth in exports over the next five years, the nation's trade deficit is unlikely to decrease. *Id.* Consequently, U.S. policy on exports will focus heavily on reducing the U.S. trade deficit through increasing the United States' market access to countries that maintain chronic trade surpluses with the United States, particularly China and Japan. *Id.*

16. See Rouse & Co., Hong Kong, *PRC: Eleven Intellectual Property Decisions*, *IP ASIA*, Oct. 31, 1994, at 9 (setting forth reasons for strengthening intellectual property protection in China).

17. See Andrew J. McCall, *Copyright and Trademark Enforcement in China*, 9 *TRANS-NAT'L LAW* 587, 594-95 (1996) (discussing U.S. efforts to curb piracy in China between 1991 and 1994). Estimated losses for U.S. industries in China due to copyright infringement for 1993 were US\$415 million, with software companies alone losing US\$225 million. See *U.S. Decision to Place China on Priority Watch List Criticized*, *INT'L TRADE DAILY* (BNA) (Intellectual Property Dec. 3, 1993). This estimate was made by the International Intellectual Property Alliance ("IIPA"), a Washington-based watch group comprised of eight trade associations. *Id.* In 1994, the total estimated losses due to Chinese copyright infringement totaled US\$866 million. See *Enforcement News*, *IP ASIA*, April 1995 at 43 (presenting chart depicting IIPA estimated trade losses due to copyright piracy). In 1995, estimated losses due to Chinese piracy climbed to US\$1.84 billion, with business software losses accounting for US\$250 million of that total. See Marcus W. Brauchli, *China Could Face U.S. Trade Sanctions of Over \$2 Billion Due to Piracy Losses*, *WALL ST. J.*, Feb. 26, 1996, at A9 (using estimates from the IIPA on total losses and from Software Publishers' Association for estimated software losses).

18. General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 (1950) [hereinafter GATT]. The GATT is an international arrangement under which over 100 governments have negotiated agreed-upon norms for international trade. See JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 9-17 (1969) (positing GATT as arising out of need to cure chaotic restrictions in over-all level of international trade stemming from unilateral acts by nations to promote trade). The GATT's goal is to liberalize trade in a multilateral context. *Id.*

("GATT"), the Agreement on Trade-Related Aspects of Intellectual Property Rights¹⁹ ("TRIPs"), and various U.S. trade sanctions. Part II describes major policies affecting China's copyright system and address the inherent factors underlying China's inability to enforce copyright protection, including a lack of cultural and economic incentives and difficulties in administrative enforcement. Part II then proceeds to discuss China's judicial system and education as alternative methods to solving China's problem of copyright piracy. In addition, Part II introduces joint ventures as defined in China's laws and implicated in Sino-U.S. intellectual property agreement. Finally, Part II explores the mechanisms involved in WTO's dispute resolution system. Part III argues that TRIPs and U.S. trade sanctions are no longer the appropriate tools for combating China's piracy problems. In light of the country's present intellectual property environment, strategies such as education and joint ventures, and the enhancement of the judicial system will serve as effective cures to the piracy problem. Part III further argues that WTO membership is beneficial to the future enforcement of copyright protection in China.

I. COPYRIGHT LAW AND CHINA

Since the enactment of its first set of Copyright Laws in 1991, China has taken numerous steps toward setting up a copyright system comparable to international standards.²⁰ Copyright protection at an international level had its inception in 1886 with the Berne Convention,²¹ which creates a union of member nations for multilateral protection of each state's literary and artistic works.²² Beginning in the 1970s, several Western nations undertook the effort to revise the existing conventions to

19. Agreement on Trade-Related Aspects of Intellectual Property Rights, 33 I.L.M. 1197, in *General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations*, Apr. 15, 1994, 33 I.L.M. 1125, Annex 1C [hereinafter TRIPs].

20. See Lulin Gao, *China and the TRIPs Agreement*, 1 CHINA PAT. & TRADEMARKS 5, 6-9 (1997) [hereinafter *China & TRIPs*] (describing China's efforts to enhance intellectual property protection between 1983 and 1997).

21. Berne Convention for the Protection of Literary and Artistic Works, as revised at Paris 1971, 828 U.N.T.S. 221 [hereinafter Berne Convention].

22. See CRAIG JOYCE ET AL., COPYRIGHT LAW 611 (3d ed. 1994) (discussing Berne Convention).

strengthen intellectual property protection.²³ One of the results of such efforts is TRIPs, an international agreement that includes provisions protecting a wide range of intellectual property rights.²⁴ Despite China's unfamiliarity with the concept of copyright,²⁵ China managed to closely model its copyright laws on the TRIPs standard.²⁶ In creating its copyright system, China experiences both internal and external pressures pushing the country in opposite directions along the path of copyright enforcement.²⁷

A. *International Agreements on Copyright*

The history of international intellectual property protection conventions dates back to the late 1800s.²⁸ The Berne Convention provided the first comprehensive set of international standards for copyright protection.²⁹ Concluded at the Uruguay Round of GATT in 1994, TRIPs incorporates the substantive provisions of the Berne Convention, and serves as the present benchmark for international protection of intellectual property.³⁰

23. See THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986 - 1992) 2249 (Terence P. Stewart ed., 1993) [hereinafter Stewart] (describing efforts by developed countries to revise intellectual property treaties).

24. See Lulin Gao, *TRIPs and Intellectual Property Studies in China*, 4 CHINA PAT. & TRADEMARKS 10, 11 (1994) [hereinafter *TRIPs and IP Studies*] (providing background on TRIPs and its requirements).

25. See Shen, *supra* note 12, at 6 (analyzing mentality of people carrying on pirating activities in China).

26. See Michael N. Schlesinger, *Intellectual Property Law in China: Part I - Complying with TRIPs Requirements*, 19 E. ASIAN EXEC. REP. 1, 9 (1997) (arguing that China's copyright laws substantively comply with requirements in TRIPs).

27. See Michael Yeh, *Up Against a Great Wall: The Fight Against Intellectual Property Piracy in China*, 5 MINN. J. GLOBAL TRADE 503, 524 (1996) (mentioning U.S. use of trade sanctions in pressuring China to establish intellectual property system that would be costly for China).

28. See Paris Convention for the Protection of Industrial Property, March 20, 1883, 13 U.S.T. 1, T.I.A.S. No. 4931, revised, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention] (indicating that Paris Convention was opened for signature in 1883 and last revised in 1967); see also Berne Convention, *supra* note 21, 102 Stat. 2853, 828 U.N.T.S. 221 (indicating that Berne Convention was opened for signature in 1886).

29. See JOYCE ET AL., *supra* note 22, at 984 (providing brief overview on history and provisions in Berne Convention).

30. See Stewart, *supra* note 23, at 2245 (stating that goal of TRIPs was to "formulate a multilateral agreement on minimum levels of protection for intellectual property rights").

1. The Berne Convention for the Protection of Literary and Artistic Works

Established in 1886, the Berne Convention was the earliest attempt to protect copyright at an international level.³¹ The Berne Convention created a union of member nations for multi-lateral protection of each member state's literary and artistic works.³² While the Berne Convention does not govern the protection of a work in its country of origin, it requires that the work be protected without formalities outside its country of origin.³³ Finally, the Berne Convention requires its signatories to protect certain exclusive economic³⁴ and moral rights,³⁵ with a minimum protection of life plus fifty years, or fifty years from publication for anonymous and pseudonymous works.³⁶

2. Agreement on Trade-Related Aspects of Intellectual Property Rights

Through TRIPs, Western nations seek to bolster intellectual property protection at the international level.³⁷ The agreement provides protection for intellectual property rights such as copyrights³⁸ and trademarks.³⁹ TRIPs also stresses on the domestic enforcement of intellectual property laws in its member countries.⁴⁰

31. See JOYCE ET AL., *supra* note 22, at 984 (providing brief overview of Berne Convention).

32. Berne Convention, *supra* note 21, art. 1, at 225. Scientific works, architecture, and works of applied art also qualify as "literary and artistic works" for protection under the Berne Convention. *Id.* art. 2(1) at 227. The Convention, however, excludes from protection "news of the day or . . . miscellaneous facts having the character of mere items of press information." *Id.* art. 2(8) at 229.

33. *Id.* art. 5(2) at 232.

34. *Id.* arts. 8, 9(1), 11(1), 11ter, and 12 at 239, 239, 241, 243, and 243. Economic rights refer to the right to translation, reproduction, public performance, and adaptation. *Id.*

35. *Id.* arts. 6bis(1) and (2) at 235. Moral rights refer to the right to attribution and the right of integrity. *Id.* art. 6bis(1) at 235.

36. *Id.* arts. 7(1) and (3) at 235 and 237.

37. See Stewart, *supra* note 23, at 2249 (reporting that Western nations believed their domestic intellectual property interests had been undermined by piracy and counterfeiting in foreign markets).

38. TRIPs, *supra* note 19, arts. 9-14, at 33 I.L.M. 1202-03.

39. TRIPs, *supra* note 19, arts. 15-21, at 33 I.L.M. 1203-05.

40. See *TRIPs & IP Studies*, *supra* note 24, at 11 (discussing how China should implement its intellectual property legislation to bring its intellectual property system in compliance with TRIPs).

a. Origin of TRIPs

Concluded at the Uruguay Round of GATT in 1994,⁴¹ TRIPs was the result of efforts by several Western nations⁴² to provide a unified set of standards for international intellectual property protection.⁴³ TRIPs stemmed from the United States and other Western countries' dissatisfaction with existing intellectual property conventions during the 1970s.⁴⁴ Believing that these conventions failed to adequately protect intellectual property rights, the Western countries insisted that upon strengthening the treaties with amendments providing more effective enforcement of intellectual property laws and formal dispute mechanisms to assure compliance with its terms.⁴⁵ The Western nations, however, were unsuccessful in their attempts to strengthen international intellectual property conventions.⁴⁶ Consequently, in 1986, the delegates to the Uruguay Round negotiations placed trade-re-

41. See Judith H. Bello & Alan F. Holmer, "Special 301": *Its Requirements, Implementation, and Significance*, 13 *FORDHAM INT'L L.J.* 259, 275 n.2 (1990) (discussing function of Uruguay Round). The Uruguay Round refers to a series of multilateral trade negotiations aimed at strengthening GATT. *Id.* Launched on September 29, 1986, in Punta del Este, Uruguay, and concluded on December 15, 1993, the Uruguay Round negotiations replaced GATT with WTO. See Jared R. Silverman, *Multilateral Resolution Over Unilateral Retaliation: Adjudicating the Use of Section 301 Before the WTO*, 17 *U. PA. J. INT'L ECON. L.* 233, 294 n.100 (providing comprehensive background on Uruguay Round).

42. See Stewart, *supra* note 23, at 2249 (noting Western nations that sought to revise existing intellectual property conventions included United States, Canada, and countries from Europe).

43. See *China & TRIPs*, *supra* note 20, at 6 (summarizing events leading to TRIPs). The suppression of trade in counterfeit goods appeared for the first time on the agenda of GATT negotiations in 1973 its Tokyo Round. *Id.* The negotiation continued at the Uruguay Round of GATT, which began in 1986 and ended in 1994, and led to the conclusion of TRIPs. *Id.*

44. See Stewart, *supra* note 23, at 2247-59 (describing efforts by Western nations to revise non-GATT related intellectual property conventions). The United States, Canada, and countries from Europe attempted to revise the Paris Convention. *Id.* Signed in 1883 and last revised in 1967, Paris Convention requires each member state to offer the same protection to the inventions, trademarks, and other subject matter of industrial property of the nationals of the other member States as it accords to those of its own nationals. *Id.* Berne Convention was the other treaty heavily criticized by the developed countries for its lack of effective enforcement and formal dispute settlement provisions. *Id.*

45. *Id.* at 2249.

46. *Id.* at 2249-50. Attempts to revise the Paris Convention failed due to contrasting views of the patent system held by the developed and developing countries. *Id.* Although the World Intellectual Property Organization had drafted a treaty on dispute settlement to govern all the treaties it administers, including the Berne Convention, the signatory parties never formally adopted the treaty. *Id.*

lated intellectual property on its agenda as one of the principal new topics for discussion, and concluded with the WTO's agreement on TRIPs in 1994.⁴⁷

b. Requirements Embodied in TRIPs

Overall, TRIPs focuses on the domestic legislation and enforcement of intellectual property rights in its member countries.⁴⁸ With the exception of moral rights,⁴⁹ TRIPs incorporates both the minimum standards of, and the Appendix to, the Berne Convention.⁵⁰ TRIPs, however, extends its area of protection by adding computer programs⁵¹ and compilations of data⁵² to the list of protectable literary artistic works.⁵³ In addition, while the Berne Convention does not explicitly protect neighboring rights,⁵⁴ TRIPs does extend protection to these rights, including

47. See *China & TRIPs*, *supra* note 20, at 6 (describing emergence of intellectual property protection as important topic in GATT negotiations).

48. See *TRIPs & IP Studies*, *supra* note 24, at 11 (discussing China's effort to comply its intellectual property system with TRIPs).

49. See JOYCE ET AL., *supra* note 22, at 610 (defining elements of moral rights). Moral rights refer to the rights to attribute, disseminate, and the right to prevent distortions, modifications or changes. *Id.*

50. TRIPs, *supra* note 19, art. 9(1), at 1201. For copyright and related works, TRIPs states that "[m]embers shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto." *Id.* See JOYCE ET AL., *supra* note 22, at 985 (discussing provisions in Berne Convention). The Convention sets forth the substantive provisions in its main text, and addresses special provisions for developing countries in its appendix. *Id.*

51. TRIPs, *supra* note 19, art. 10(1) at 1201. Article 10(1) provides that "[c]omputer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971)." *Id.*

52. *Id.* art. 10(2) at 1201. Article 10(2) reads:

Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.

Id.

53. *Id.* art. 9(1) at 1201. Article 2 of the Berne Convention requires members to protect the copyright of "literary and artistic works [which] shall include every production in the literary, scientific, and artistic domain, whatever may be the mode or form of its expression," which includes scientific works, architecture, and works of applied art. Berne Convention, *supra* note 21, art. 2 at 227.

54. See WIPO GLOSSARY OF TERMS OF THE LAW OF COPYRIGHT AND NEIGHBORING RIGHTS 164 (1980) [hereinafter WIPO Glossary] (defining neighboring rights). Neighboring rights generally refer to the rights of performers in their performances, the rights of producers of phonograms (i.e. sound recordings) in their phonograms, and the rights of broadcasting organizations in their radio and television programs. *Id.*

broadcasts,⁵⁵ sound recordings,⁵⁶ and performance art.⁵⁷ Furthermore, TRIPs contains measures on the enforcement of intellectual property⁵⁸ and guidelines for dispute prevention and settlement.⁵⁹ TRIPs also sets forth transitional arrangements outlining the periods within which the least-developed countries,⁶⁰ developing countries,⁶¹ and countries with economies in transition⁶² would be obligated to apply the TRIPs provisions.⁶³ Mem-

55. TRIPs, *supra* note 19, art. 14(3), at 1202. Broadcasting organizations have the right to prevent the fixation, reproduction, and re-broadcasting of their broadcasts. *Id.*

56. *Id.* art. 14(2) at 1202. Article 14(2) states that “[p]roducers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.” *Id.*

57. *Id.* art. 14(1) at 1202. TRIPs provides that performers have the means to prevent other people from fixing, reproducing, wireless broadcasting, or publicly communicating their performances without their permission. *Id.*

58. *Id.* arts. 41-61 at 1213-20. TRIPs requires that:

Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

Id. art. 41(1) at 1213-14.

59. *Id.* arts. 63-64 at 1221.

60. See Marco C.E.J. Bronckers, *The Impact of TRIPs: Intellectual Property Protection in Developing Countries*, 31 *COMMON MKT. L. REV.* 1246, 1255-61 (1994) (discussing characteristics of least-developed and developing countries and their potential benefits under TRIPs). While TRIPs leaves undefined the question as to which countries fall into which categories, legal scholars have proposed two methods. *Id.* To determine levels of foreign aid, the United Nations identifies a list of countries considered least developed based on factor such as per capita income, quality of life, economic diversification, and structural characteristics. *Id.* In addition, the list excludes countries with populations exceeding 75 million inhabitants. *Id.* Another approach would be to classify countries based on per capita income. *Id.* The World Bank classifies countries with a gross national product (“GNP”) of US\$675 or less as low income and those with GNP of US\$676 – 8355 as middle income. *Id.* China would be a least-developed country under the World Bank approach, but not under the United Nations system. *Id.* It is unlikely that developed countries would accept China as a least-developed country considering its high technological achievements, but there is little doubt that China remains a developing country. *Id.*

61. *Id.* at 1261. Unlike least developed, developing countries have resisted definitions that would help determine when a country is entitled to developing country status. *Id.*

62. TRIPs, *supra* note 19, art. 65(3) at 1222. Economies in transition are defined as countries “in the process of transformation from a centrally-planned into a market, free-enterprise economy and which [are] undertaking structural reform of its intellectual property system and facing special problems in the preparation and implementation of intellectual property laws and regulations” *Id.*

63. *Id.* arts. 65-66 at 1222. Article 65 of TRIPs gives all member countries a time

ber countries should accord national treatment⁶⁴ and most favored-nation treatment⁶⁵ to works created by other member countries. Finally, TRIPs allows member countries to set limitations on the exercise of intellectual property rights in the event that such exercise would impose an unreasonable restraint on trade and technology transfer.⁶⁶

B. *Law in China*

China is a newcomer to the legislative arena of copyright protection.⁶⁷ The idea that property rights can be attached to the intangible workings of the mind is new to Chinese culture.⁶⁸ With the concept of intellectual property still fresh in people's minds, China enacted its first copyright law in 1991.⁶⁹ In an effort to bring its copyright legislation into compliance with the TRIPs standard, China later promulgated the Regulations on the Implementations of the International Copyright Treaties⁷⁰ ("ICT Provisions") and the Implementing Rules for the Copyright Law

limit of one year within accession to implement the provisions of TRIPs. *Id.* art. 65(1) at 1222. Developing countries and countries undergoing economic transformation, however, have an additional four years to comply with the remainder of TRIPs' provisions. *Id.* art. 65(2)&(3) at 1222. Finally, the least-developed countries have ten years to implement the TRIPs agreement, and may seek further extension. *Id.* art. 66 at 1222.

64. *Id.* art. 3(1) at 1199. "Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property . . ." *Id.*

65. *Id.* art. 4 at 1200. "With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other members." *Id.*

66. *Id.* art. 8(2) at 1201. As one of its principles, TRIPs states that:

Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices, which unreasonably restrain trade or adversely affect the international transfer of technology.

Id.

67. See Shen, *supra* note 12, at 6 (noting that China did not have copyright system until enactment of its Copyright Law in 1991).

68. See PETER FENG, INTELLECTUAL PROPERTY IN CHINA 3-4 (1997) (explaining justifications behind establishing intellectual property regime in China).

69. See Yiping Yang, *The 1990 Copyright Law of the People's Republic of China*, 11 U.C.L.A. PAC. BASIN L.J. 260, 263 (1993) (noting that according to accepted international definition of copyright, China did not have set of copyright laws until enactment of Copyright Law in 1991).

70. Regulations on Implementation of International Copyright Treaties (1992) translated in CHINA L. & PRAC., Jan.14, 1993, at 36 [hereinafter ICT Provisions].

of the People's Republic of China⁷¹ ("Implementing Rules") to harmonize its laws with the Berne Convention.⁷² While the ICT Provisions and the Implementing Rules brought China's copyright system closer to fulfilling the Berne Convention as incorporated in TRIPs, specific areas of uncertainty exist which warrant further clarification.⁷³

1. Chinese View of Property

The concept of copyright is foreign to Chinese thinking.⁷⁴ While China recognized the right to personal and real property, Chinese culture did not view works of the mind as property, therefore authors did not have ownership rights to their creation.⁷⁵ Furthermore, in ancient China, granting authors ownership rights would have frustrated the emperor's goal of making ideas widely accessible to the people.⁷⁶

2. Legislation to Comply With TRIPs

China has taken numerous steps toward bringing its copyright law into compliance with the TRIPs standard.⁷⁷ The country enacted its first copyright law in 1991,⁷⁸ and addressed the disparities⁷⁹ between the Copyright Law and the Berne Convention by enacting the ICT Provisions in 1992.⁸⁰ Copyright owners

71. Implementing Rules for the Copyright Law of the People's Republic of China (1990) translated in CHINA LAW REFERENCE SERVICE ref. no. 5100/91.05.30 [hereinafter Implementing Rules].

72. See Reiko R. Feaver, *China's Copyright Law and the TRIPs Agreement*, 5 J. TRANSNAT'L L. & POL'Y 431, 434-38 (1996) (discussing China's legislative development in area of intellectual property from 1979 to 1992).

73. *Id.* at 432-33.

74. See William P. Alford, *Forum: Taiwan and the GATT: Panel Three: Intellectual Property Trade and Taiwan: A GATT-Fly's View*, 1992 COLUM. BUS. L. REV. 97, 104 (1992) (discussing difficulties U.S. and European countries encountered in introducing intellectual property law to China in early 1900s).

75. *Id.*

76. *Id.*

77. See Shlesinger, *supra* note 26, at 9 (arguing United States had downplayed China's substantive compliance with requirements in TRIPs and focused on China's shortcomings in enforcing its judicial measures).

78. Copyright Law, *supra* note 11.

79. See Joseph T. Simone, *Implementing International Copyright Treaties Provisions*, CHINA L. & PRAC., Jan. 14, 1993, at 36, 39 (noting that China's copyright legislation did not provide copyright owners in films, sound recordings, and musical works right to public performances, right which is required under Articles 11 and 14bis of Berne Convention).

80. Memorandum of Understanding on the Protection of Intellectual Property,

under the Copyright Law have the right to publication,⁸¹ attribution,⁸² revision,⁸³ receiving enumeration and using their own works,⁸⁴ and protection of the integrity of their own works.⁸⁵ The Copyright Law also provides the right owner with neighboring rights, including the rights of performers,⁸⁶ producers of sound and video recordings,⁸⁷ radio and television broadcasters,⁸⁸ and publishers of books and periodicals.⁸⁹ The copyright protection period for economic rights is the author's lifetime plus fifty years,⁹⁰ or in perpetuity for moral rights.⁹¹ The Copy-

Jan. 17, 1992, art. 3(3)-(4), 34 I.L.M. 676, 681 (1995) [hereinafter 1992 MOU]. The 1992 MOU provides that if there is an inconsistency between existing regulations and the regulations implementing the international conventions, such as the ICT Provisions, the regulations implementing the 1992 MOU and international conventions will govern. *Id.* The ICT Provisions were promulgated by the Chinese government to fulfill its promise in the 1992 MOU to give works created by nationals of Berne Convention the same level of protection as they otherwise would receive under the Berne Convention. *Id.*

81. Copyright Law, *supra* note 11, art. 10(i), at 2-3. Right to publication refers to the right to decide whether or not to publish a work. *Id.*

82. *Id.* art. 10(ii) at 2-3. Right to attribution includes the right to "affix one's name to a work in order to indicate the author's identity." *Id.*

83. *Id.* art. 10(iii) at 2-3. Right to revise refers to the right to "revise or authorize others to revise one's work." *Id.*

84. *Id.* art. 10(v) at 2-3. Right to use one's work and the right to receive is stated as:

[T]he right to use one's work through such forms as reproduction, performance, broadcasting, projecting, exhibition, distribution or cinematization, televising or video taping, or through adaptation, translation, annotation, or compilation; the right to permit others to use one's work in the above-mentioned ways and the right to receive remuneration for such use.

Id.

85. *Id.* art. 10(iv) at 2-3. Right to protect the integrity of one's work refers to the right to "protect one's work against misrepresentation and distortion." *Id.*

86. *Id.* arts. 35-36 at 8-9.

87. *Id.* arts. 37-39 at 9.

88. *Id.* arts. 40-44 at 10-11.

89. *Id.* arts. 29-34 at 7-8.

90. *Id.* art. 21 at 5. Economic rights include the right to authorize the publication, performance, broadcast, televising, distribution, and adaptation of a work. *See Latest Draft of Copyright Law*, 1 ASIA L. & PRAC. 7, 30, Sept. 4, 1989 [hereinafter *Latest Draft*] (analyzing provisions of latest draft of Copyright Law).

91. Copyright Law, *supra* note 11, art. 20, at 5. Article 20 provides that "[t]he duration of an author's right to attribution, right to revise, and right to protect the integrity of his work shall be perpetual." *Id.* Compare Berne Convention, *supra* note 21, art. 6bis(1), at 235 (article covering moral rights). An author is entitled to moral rights even after the transfer of his economic rights. *Id.* U.S. copyright law, however, recognizes moral rights only in the context of unfair competition and defamation law. *See JOYCE ET. AL.*, *supra* note 22, at 987 (recounting role of moral rights in legislative history of U.S. copyright law).

right Law treats works that individuals have created within the scope of their employment as professional works that the employer has a priority right to use.⁹² China's Copyright Law also contains fair use provisions allowing reasonable use of a published work for which no authorization or remuneration is necessary.⁹³ Examples include works used for translation,⁹⁴ personal enjoyment,⁹⁵ and official state purposes.⁹⁶ Finally, because

92. Copyright Law, *supra* note 11, art. 16, at 4. Article 16 reads in relevant part:

A work created by a citizen in order to accomplish a task assigned to him by a legal person or non-legal person work unit shall be an occupational work. Except as provided in the second paragraph of this Article, the copyright in such work shall vest in the author, provided that the legal person or non-legal person work unit shall have the right of priority in using such work within its scope of business.

Id.

93. *Id.* art. 22 at 5. The Copyright Law provides exceptions which allow reasonable use "without a license from, and without payment of remuneration to, the copyright owner." *Id.*

94. *Id.* art. 22(vi) at 6. Article 22(vi) allows for the:

translation, or reproduction in a small quantity, of a published work, where such translation or reproduction is made for the purpose of classroom teaching or scientific research and is to be used by teachers or scientific researchers, provided that such translation or reproduction is not published and distributed

Id. Article 22(xi) further provides for the translation of works previously published in the Han ethnic group language into a domestic minority ethnic group's language, as well as the publication and distribution within China of such translations. *Id.* art. 22(xi) at 7.

95. *Id.* art. 22(i) at 5. Article 22(i) reads:

In the following cases, a work may be used without a license from, and without payment of remuneration to, the copyright owner. However, the name of the author and the title of the work shall be indicated and the other rights enjoyed by the copyright owner by virtue of this Law may not be prejudiced:

i. use of a previously published work where such use is for the purpose of individual study, research, or enjoyment.

Id.

96. *Id.* art. 22(vii) at 6. The Copyright Law allows the "use by a state entity of a published work," without license or payment, "where such use is for the purpose of carrying out official duties." *Id.* This exception had aroused much concern among the Western business communities based on their assumption that every state-owned enterprise in China is a state entity. See Chengsi Zheng, *Zhuzuoquan fa shishi qian yingdang mingque de ruogan wenti* [Some Issues to be Clarified Before the Implementation of the Copyright Law], 1 *ZHUZUOQUAN* [COPYRIGHT] 19, 20 (1991) (discussing Nov. 1990 report published by Baker & McKenzie, prominent U.S. international law firm, commenting that state-entity exception weakened copyright protection in China). Contrary to the Western assumption, the term "state-entity," as used in the Copyright Law, only applies to such organizations as the National People's Congress and the Ministries, not the myriad collectively-owned businesses. *Id.*

Chinese judges can not create laws or set precedents,⁹⁷ China's Copyright Law defines infringing acts.⁹⁸

3. How China's Copyright Law Measures Against the TRIPs Standard

The ICT Provisions contain limitations on an author's exclusive rights⁹⁹ in the area of reproduction by the press.¹⁰⁰ As delineated in Article 13 of the ICT Provisions, the press must obtain prior authorization from copyright owners before reprinting foreign works.¹⁰¹ The second part of Article 13, however, provides an exemption for articles involving current social topics such as political and economic issues,¹⁰² an exemption not present in the Berne Convention.¹⁰³ By allowing newspapers and periodicals to use published works as a source for reports on current political, economic, and social topics,¹⁰⁴ the ICT Provi-

97. See ALBERT HUNG-YEE CHENG, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 33-35 (1991) (noting that Supreme People's Court has limited power to set precedent, but lower courts do not have power to set precedent).

98. Copyright Law, *supra* note 11, arts. 45-47, at 11-12. There are two types of infringement under China's Copyright Law. *Id.* Ordinary infringement is typified by acts which include the unauthorized publication of works, nonpayment of remuneration when required, and claiming authorship to a work for the purpose of personal gain without having made any contributions to the work. *Id.* Original infringement is subject to civil liabilities such as public apologies, payment of damages, cessation of the infringement, and the elimination of the act's effects. *Id.* Acts which constitute serious infringements include plagiarism, sale of forged artworks, and unauthorized publication of works. *Id.* In addition to the civil liabilities mentioned above, serious infringements are also subject to administrative penalties such as the confiscation of illegal profits or the imposition of fines. *Id.*

99. Berne Convention, *supra* note 21, arts. 8, 9(1), 11(1), and 12, at 239, 239, 241, and 243. Under the Berne Convention, which is incorporated into TRIPs, exclusive rights include the right to translation, reproduction, public performance, and adaptation. *Id.*

100. See Feaver, *supra* note 72, at 442 (arguing that language in ICT Provisions may not confer publication rights as extensive as that required by Berne Convention).

101. ICT Provisions, *supra* note 70, art. 13, at 37. Article 13 provides that "[r]eproduction by the press of foreign works shall be subject to prior authorization of the copyright owners, except in the case of reproduction of articles on current social topics such as political and economic issues." *Id.*

102. *Id.*

103. Berne Convention, *supra* note 21, art. 9(1), at 239. Article 9(1) states that "[a]uthors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form." *Id.*

104. See Feaver, *supra* note 72, at 442 (pinpointing potential loophole in ICT Provisions with regard to copyright owner's ability to control media from reprinting their works without permission).

sions set limits on an author's right to control the reproduction of his work.¹⁰⁵ A legal commentator suggested that Article 13 could be read as permitting the unauthorized reproduction of an entire copyrighted work if the work dealt with current topics.¹⁰⁶

Whether or not China's expansive grant of reproduction rights falls within the boundaries of TRIPs depends upon one's interpretation of Article 13 on limitations and exceptions in TRIPs.¹⁰⁷ The Article allows exceptions to the extent that they are within the bounds of normal exploitation, provided that they are not unreasonably prejudicial to the legitimate interests of the author.¹⁰⁸ One legal scholar has pointed out that TRIPs is no more clear on the meaning of the terms normal exploitation and legitimate interest than is the Berne Convention which uses the same language in Article 9(2).¹⁰⁹ While previous interpretations of Article 9(2) of the Berne Convention suggest that normal exploitation may refer to cases where the infringer engages in massive amounts of photocopying, particularly for profit-making purposes, it is up to the member country's discretion to determine what constitutes normal.¹¹⁰ With respect to legitimate interests, the member country, again, has the discretion to determine what constitutes a legitimate interest, because the legitimacy of an interest depends upon a country's legal interpre-

105. ICT Provisions, *supra* note 70, art. 13, at 37. Under the copyright law of the United States, limitations to the exclusive right of reproduction do not include the exemption on current social topics. Copyright Act of 1976, *as amended*, 17 U.S.C. §§ 106-118 (1997).

106. See Feaver, *supra* note 72, at 443 (arguing that ambiguity in language of Chinese copyright laws on reproduction rights creates potential for abuse by Chinese newspapers and periodicals in use of foreign published works).

107. *Id.*

108. TRIPs, *supra* note 19, art. 13 at 1202. Article 13 provides that "[m]embers shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder." *Id.*

109. See Ruth L. Gana, *Prospects For Developing Countries Under the TRIPs Agreement*, 29 *VAND. J. TRANSNAT'L L.* 735, 760-61 (1996) (arguing that TRIPs imposes limitations on exclusive rights to reflect concerns of developing countries over availability and cost of protected work). Article 9(2), the relevant section in the Berne Convention, reads "[i]t shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." Berne Convention, *supra* note 19, art. 9(2), at 239.

110. *Id.*

tation of rights accorded to copyright owners.¹¹¹

Article 11 of TRIPs explicitly deals with the rental of copyrighted works.¹¹² With the exception of cinematographic works, TRIPs provides that copyright owners and their successors-in-title have the right to authorize or prohibit the commercial rental of original versions or copies of their works.¹¹³ TRIPs allows the unauthorized rental of cinematographic works to the extent that such rentals do not lead to widespread copying, thereby materially injuring the exclusive rights of the copyright owner.¹¹⁴ Unauthorized rentals of sound recordings, however, are allowed where signatories of TRIPs maintain a system of equitable remuneration for such rentals and the rentals do not materially impair the exclusive rights of reproduction.¹¹⁵

The language of the ICT Provisions is equivocal as to whether China's copyright system accords the same kind of absolute rental right protection as TRIPs does.¹¹⁶ Under the ICT Provisions, owners of copyright in foreign works can control the rental of their works after entering into a distribution agreement.¹¹⁷ The provision, however, does not prohibit rentals by

111. *Id.* For example, while continental countries consider moral rights to constitute legitimate interests of the author, countries practicing common law do not grant such treatment to moral rights. *Id.*

112. TRIPs, *supra* note 19, art. 11, at 1204.

113. *Id.* Article 11 reads:

In respect of at least computer programs and cinematographic works, a Member shall provide authors and their successors in title the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works. A Member shall be excepted from this obligation in respect of cinematographic works unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors and their successors in title. In respect of computer programs, this obligation does not apply to rentals where the program itself is not the essential object of the rental.

Id.

114. *Id.* One legal scholar noted that this is the first time that the concept of "material injury" is introduced to intellectual property rights law. See J.H. Reichman, *The TRIPs Component of the GATT's Uruguay Round: Competitive Prospects for Intellectual Property Owners in an Integrated World Market*, 4 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 171, 216 n.175 (1993) (describing rental rights provision in TRIPs).

115. TRIPs, *supra* note 19, art. 14(4), at 1202.

116. See Feaver, *supra* note 72, at 445 (discussing how protection of rental rights under China's Copyright Law may not be as extensive as that provided under TRIPs).

117. ICT Provisions, *supra* note 70, art. 14, at 37. Under Article 14, "[a]fter owners of copyright in foreign works have authorized other persons to distribute copies of their works, they may authorize or prohibit the rental of copies of their works." *Id.*

people who have not entered into distribution agreements with copyright owners.¹¹⁸ Furthermore, retail conditions in China make the requirement to obtain individual distribution agreements nearly unfeasible.¹¹⁹ Without collective copyright administration¹²⁰ enabling a copyright owner to enter into an umbrella distribution agreement covering distribution within China, the exercise of rental rights remains limited.¹²¹

Article 14 of TRIPs sets forth the protections for neighboring rights.¹²² TRIPs requires the performers to have the means to prevent other people from fixing,¹²³ reproducing, wireless broadcasting or publicly communicating performances without the performer's permission.¹²⁴ Producers of sound recordings

118. See Feaver, *supra* note 72, at 445 (reasoning that Article 14 could be read literally as allowing rental of works without entering into distribution agreement with copyright owner).

119. Interview with Jui-Chian Giouw, Regional Director of International Federation of the Phonographic Industry, in Hong Kong (July 8, 1997). While the distribution patterns were becoming more streamlined in southern China, small stores were still the dominant retailers in northeastern China, resulting in several layers of distributors and wholesalers. See Justin Zubrod et al., *The Challenges of Logistics within Asia*, 37 *TRANSP. & DISTRIBUTION* 2, Feb. 1, 1996 (reporting research findings on distribution systems for consumer products in China).

120. See, Chao Xu, *On the Importance and Necessity of Establishing the System of Collective Administration of Copyright*, 2 *CHINA PAT. & TRADEMARKS* 84, 84-85 (1996) (explaining concept of collective administration of copyright). The concept of collective administration refers to the instance where it is impossible for the copyright owner to exercise the rights conferred by law, in which case the owner may entrust that right with an organization, which exercises the copyright "in the manner of trust." *Id.* at 85.

121. See Feaver, *supra* note 72, at 445 (explaining that current lack of collective administration of copyright allows China to prevent decrease in use of copyright works due to copyright enforcement). Legal scholars in China had already pondered the idea of collective administration of copyright. See, Chao Xu, *supra* note 120, at 86 (suggesting that separate chapter be devoted to collective administration in event that Copyright Law is revised). In fact, China had already established a similar entity known as the Music Copyright Society of China back in 1992. *Id.* The organization failed to run smoothly due to lack of legal basis. *Id.* However, the advent of China's first State-owned audio-video leasing chain store company in 1997 may facilitate China's path toward establishing a collective administration. See *Audio-Video Chain Stores to Be Built in Post Offices*, *XINHUA ENG. NEWswire*, Jan. 9, 1997 (reporting on opening of China's first state-owned audio-video rental chain store).

122. TRIPs, *supra* note 19, art. 14, at 1202-03.

123. See WIPO GLOSSARY, *supra* note 54, at 116 (defining fixation). Fixing a work refers to "capturing a work in some form of enduring physical expression, be it writing, printing, photography, sound or visual recording, carving, engraving, building, graphic representation or any other appropriate method allowing subsequent identification and reproduction of the author's creation." *Id.*

124. TRIPs, *supra* note 19, art. 14(1), at 1202. Article 14(1) states that:

In respect of a fixation of their performance on a phonogram, performers

may authorize or prohibit the direct or indirect reproduction of such recordings.¹²⁵ In addition, under TRIPs, broadcasting organizations may prevent the fixation, reproduction, and re-broadcasting of their broadcasts.¹²⁶

While the Copyright Law and its Implementing Rules for the Copyright Law of the People's Republic of China do not specifically address neighboring rights, they do provide similar rights to performers, producers of sound recordings, and broadcasting organizations.¹²⁷ Performers have the right to permit live broadcasts and sound and video recordings of performances, and secondly, the right to receive remuneration for such recordings.¹²⁸ Similarly, producers of sound recordings and radio or television stations may allow the reproduction and distribution of their works.¹²⁹

shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation. Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance.

Id.

125. *Id.* art. 14(2) at 1202. Art. 14(2) states that "[p]roducers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms." *Id.*

126. *Id.* art. 14(3) at 1202. Art. 14(3) provides as follows:

Broadcasting organizations shall have the right to prohibit the following acts when undertaken without their authorization: the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. Where Members do not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971).

Id.

127. Copyright Law, *supra* note 11, arts. 35-44, at 8-11; Implementing Rules *supra* note 71, art. 36, at 8.

128. Copyright Law, *supra* note 24, art. 36, at 9-10. Article 36 provides that:

A performer shall have the following rights in its performance:

- i. the right to indicate the identity of the performer
- ii. the right to protect the form of his performance from distortion
- iii. the right to permit others to make live broadcasts; and
- iv. the right to permit others to make, for profit, sound or video recordings, and to receive remuneration for such recordings.

Id.

129. *Id.* arts. 39 & 42(iii), at 9-10. Art. 39 provides:

A producer of sound or video recordings shall have the right to permit others to reproduce and distribute a sound or video recording produced by it and

Previous international attempts at protecting intellectual property rights overlooked the enforcement aspect of the law.¹³⁰ To address this problem, TRIPs established a standard set of minimum enforcement measures to instigate effective action against any act of infringement of intellectual property rights covered by TRIPs, including quick remedies to prevent infringements and remedies capable of deterring further infringements.¹³¹ Article 41, setting forth general enforcement obligations, requires members to provide fair and equitable procedures, and reasoned decisions preferably in writing.¹³² Article 41 also requires members to decide the merits of a case utilizing only the evidence that parties have previously had the opportunity to present.¹³³ With respect to initial judicial decisions, parties have the opportunity to appeal and request a review by the court.¹³⁴ In the case of final administrative decisions, parties should under all circumstances have the opportunity to request

the right to receive remuneration. Such rights shall be protected for a period of 50 years, ending on December 31 of the 50th year after the first publication of such recording.

Id. Article 42(iii) provides "[a] radio or television station shall have the following rights in a radio or television program produced by it . . . to permit others to reproduce and distribute the program, and to receive remuneration for the broadcast." *Id.* at 10.

130. See Gutterman, *supra* note 15, at 100 (providing list of frequently cited enforcement problems, among them lack of effective relief from infringements, inadequate court processes, inadequate criminal liabilities, discrimination against and bias toward foreigners, and corruption).

131. TRIPs, *supra* note 19, art. 41(1), at 1213. Article 41(1) reads:

Members shall ensure that enforcement procedures specified in this Part are available . . . so as to permit effective action against any act of infringement . . . including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements

Id.

132. *Id.* art. 41(3) at 1213. Article 41(3) states that:

Decisions on the merits of a case shall preferably be in writing and reasoned. They shall be made available at least to the parties to the proceeding without undue delay. Decisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard.

Id.

133. *Id.*

134. *Id.* Article 41(4) provides that:

Parties to a proceeding shall have an opportunity for review by a judicial authority of final administrative decisions and, subject to jurisdictional provisions in national laws concerning the importance of a case, of at least the legal aspects of the initial judicial decision on the merits of a case. However, there shall be no obligation to provide an opportunity for review of acquittals in criminal cases.

Id.

judicial reviews.¹³⁵ TRIPs also requires its members to provide civil and administrative procedures,¹³⁶ provisional measures,¹³⁷ criminal penalties,¹³⁸ and border measures.¹³⁹ Finally, TRIPs allows members to implement its provisions in a manner appropriate to their own legal system.¹⁴⁰

Enforcement measures set forth in China's Copyright Law and the Implementing Regulations are generally consistent with TRIPs.¹⁴¹ The Copyright Law lists actions that will result in civil liability and provides remedies such as public apologies or monetary compensation by the infringer, immediate cessation of the infringement, and the elimination of the act's effects.¹⁴² The

135. *Id.*

136. *Id.* arts. 42-49 at 1213-16. TRIPs delineates civil procedures with respect to evidence, injunctions, damages, remedies, copyright owner's right of information regarding third party-infringers, and indemnification of the defendant. *Id.* arts. 42-48, at 1213-16. Administrative procedures are set forth in Article 49. *Id.* art. 49, at 1216.

137. *Id.* art. 50 at 1216.

138. *Id.* art. 61 at 1220. Among the criminal penalties that TRIPs requires are imprisonment and/or monetary fines sufficient to deter further infringing activities. *Id.* TRIPs also requires that materials and equipment used in committing the infringing activities be seized, forfeited, and destroyed in cases where appropriate. *Id.*

139. *Id.* arts. 51-60 at 1217-20. In this section, TRIPs sets out the rights of copyright owners, custom authorities, and defendants with respect to imported goods. *Id.* Copyright owners have the right to request the custom authorities to suspend the release of certain goods into free circulation if they have valid reasons to believe that such goods are pirated. *Id.* art. 51, at 1217. The importer shall be promptly notified of the suspension, and upon the order of relevant authorities, be entitled to compensation from the applicant for losses incurred through the wrongful detention of their goods. *Id.* arts. 54 & 56, at 1218-19. TRIPs sets forth provisions regarding ex officio action (where authorities can act upon their own initiative) in Article 58. *Id.* art. 58 at 1219.

140. *Id.* art. 1(1) at 1198. Article 1(1) states that:

Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.

Id.

141. See Feaver, *supra* note 72, at 449 (explaining how provisions in China's Copyright Law and Implementing Rules fulfill TRIPs standard set of minimum enforcement measures).

142. Copyright Law, *supra* note 11, art. 45, at 11. The operative clause of Article 45 provides that "[p]arties that commit any of the following infringing acts shall be ordered to cease the infringement, eliminate the effects, offer a public apology, and pay damages, depending on the circumstances . . ." *Id.* Actions which constitute infringing acts include unauthorized publication, affixation of one's name to a work without actual contribution, misrepresentation of a work, using another party's work without remuneration, and infringements of neighboring rights. *Id.*

Copyright Law also establishes a category of violations that might result in the above remedies, as well as certain administrative penalties.¹⁴³ The Implementing Rules define such possible administrative penalties as warnings, injunctions relating to production and distribution of infringing copies, confiscation of unlawful gains, seizure of infringing copies and equipment used for making infringing copies, and fines.¹⁴⁴ In addition, China's Copyright Law does not give competent administrative authorities any power to establish final attribution of copyrights.¹⁴⁵

With regard to damages, TRIPs requires authorities to provide the right to order infringers to pay damages to copyright owners, including attorney's fees, as well as the right to recover illegal profits from infringing acts.¹⁴⁶ Article 46 further requires

143. *Id.* art. 46 at 11. The operative clause of Article 46 states that:

Any party that commits any of the following torts shall bear civil liability such as the liability to cease the infringement, eliminate the effects, offer a public apology or pay damages, depending on the circumstances. In addition, a copyright administration department may impose such penalties as confiscation of unlawful income or the imposition of fines on the party

Id. Acts that will result in administrative penalties include plagiarism, unauthorized reproduction/distribution for profit-making purposes, unauthorized publication of a book, production/sale of a work of fine art on which other party's signature is "passed off" and the production and distribution of sound or video recordings of a performance without permission from the performer, producer of recording, or radio/television station which produced it. *Id.*

144. Implementing Rules, *supra* note 71, art. 50, at 9-10. Article 50 reads as follows:

Copyright administration departments may impose the administrative penalties of issuance of a warning, issuance of an order to cease production and distribution of infringing reproductions, confiscation of unlawful income, confiscation of infringing reproductions and production equipment, and imposition of fines, for the infringements described in Article 46 of the Copyright Law.

Id.

145. See Ying Li, *Procedural Provisions for Intellectual Property in GATT and the Legislation in China*, 4 *CHINA PAT. & TRADEMARKS* 17, 17 (1994) (discussing how China's Copyright Law measures to TRIPs standard with regards to judicial examination of administrative decisions).

146. TRIPs, *supra* note 19, art. 45, at 1215. Article 45 reads as follows:

1. The judicial authorities shall have the authority to order the infringer to pay the right holder adequate damages to compensate for the injury the right holder has suffered because of an infringement of that person's intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity.
2. The judicial authorities shall also have the authority to order the infringer to pay the right holder expenses, which may include appropriate attorney's fees. In appropriate cases, Members may authorize the judicial au-

that judicial authorities have the right to dispose of infringing goods.¹⁴⁷ TRIPs also stipulates that these remedies should be effective in deterring further infringing activities.¹⁴⁸

Due to the lack of specific provisions in China's Copyright Law requiring that remedies be appropriate, judges may exercise discretion in deciding the damage amounts.¹⁴⁹ The absence of a stated formula for determining damage amounts,¹⁵⁰ together with the judges' inexperience with copyright issues, has led to inconsistencies in the methods judges employ to determine compensation.¹⁵¹ Consequently, cases exist where the damage award

thorities to order recovery of profits and /or payment of pre-established damages even where the infringer did not knowingly or with no reasonable grounds to know, engage in infringing activity.

Id.

147. *Id.* art. 46 at 1215. Article 46 reads in relevant part:

In order to create an effective deterrent to infringement, the judicial authorities shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or, unless this would be contrary to existing constitutional requirements, destroyed.

Id.

148. *Id.* art. 41(1) at 1213.

149. See Li, *supra* note 145, at 21 (noting that lack of specific remedial provisions in China's law prevents China's enforcement measures from achieving deterrent effect required by TRIPs).

150. See Yiqiang Li, *Evaluation of the Sino-American Intellectual Property Agreements: A Judicial Approach to Solving the Local Protectionism Problem*, 10 COLUM. J. ASIAN L. 391, 408 (1996) (describing formula for determining monetary award used in China's intellectual property laws). While the adjudicating body may consider either profits earned by infringers or damages suffered by the complainant in determining monetary awards for trademark infringement cases and, with respect to patent cases, that the amount be not less than a reasonable sum of royalty payments, no such guidelines exist in the area of copyright infringement. *Id.*

151. See Shirley Kwok, *The PRC Makes Slow But Steady Progress*, IP ASIA, Dec. 1996, at 18 (discussing recent developments in regulation and enforcement of intellectual property laws in China). In April 1996, in a case where Microsoft won a software infringement claim against Beijing Giant Computer, the Beijing Municipal High People's Court discounted attorney's fees in its calculation of damages, reasoning that legal costs do not apply to lawyers who are not qualified to appear before the Chinese courts. *Id.* In an earlier case involving domestic parties concerning computer software infringement, however, the Beijing Intermediate People's Court ruled that attorney's fees should be accounted for in plaintiff's award of damages. See *Local Software Developer Wins RMB 150,000 For Infringement*, CHINA L. & PRAC., Apr. 11, 1994, at 19 [hereinafter *Golden Dawn*] (reporting China Golden Dawn Safety Technology Co. v. Beijing Shiyingshan District Zhiye Electronics Ltd.). The same year, the Sichuan Provincial High Court, in a software infringement case involving two local companies, took the first step in awarding compensation for drop in the price of a plaintiff's products due to a defendant's supply of fakes. The result was a damage award totaling US\$1.67 million. *Id.*

is not commensurate with the actual damages suffered by the owner.¹⁵² However, there is a recent trend among courts to impose harsher damage awards.¹⁵³

C. *Pressures Affecting Copyright Law in China*

China's path toward establishing an effective copyright system has been a constant struggle between conflicting interests from abroad and within.¹⁵⁴ While U.S. threats of trade sanctions propelled China toward copyright protection,¹⁵⁵ China's lack of incentives to enforce copyright deteriorated its efforts to combat piracy.¹⁵⁶ The result was the cyclic U.S. threats of trade sanctions followed by sporadic enforcement by the Chinese government.¹⁵⁷

152. See Mitchell A. Silk, *Cracking Down on Economic Crime Will China's Latest Anti-Corruption Campaign Have Any Impact?*, CHINA BUS. REV., May 1, 1994, at 25 (briefing Chinese government's effort at curbing intellectual property piracy). In a recent case brought by Microsoft against a Shenzhen company's production of over 650,000 pirated copies of its products, Microsoft was awarded a mere US\$260 in damages by the Chinese courts for its alleged losses of US\$20 million. *Id.*

153. See Michael N. Schlesinger, *Intellectual Property Law in China: Part II - Evolving Judicial Role in Enforcement*, E. ASIAN EXEC. REP., Mar. 15, 1997, at 9 (arguing that although damage awards remain inadequate by international standards, fines have been increasing since passage of Copyright Law in 1990). In a 1993 case involving unauthorized marketing of computer software products, the Beijing Court ordered the infringer to pay the domestic copyright owner RMB 46,000 in compensation and RMB 7,000 in auditing expenses. See *Landmark Computer Software Dispute: Court Penalizes Infringement*, CHINA L. & PRAC., June 3, 1993, at 19 (reporting Beijing Wei Hong Computer Software Research Institute v. Beijing Zhong Ke Yun Wang Technology Co.). Later, in another computer software infringement case decided in 1994, the Intellectual Property Division of the Beijing Intermediate People's Court awarded RMB 100,000 to the software copyright owner for economic damages and loss of reputation, plus RMB 50,000 for litigation costs. See *Golden Dawn*, *supra* note 151, at 19 (digesting China Golden Dawn Safety Technology Co. v. Beijing Shiyingshan District Zhiye Electronics Ltd.). Finally, in a 1996 case involving copyright piracy of high-speed modems, on appeal the Supreme Court in Chengdu raised compensatory damages from RMB 6.95 million to 13 million. See *Computer Software Piracy Case in Sichuan Settled with Record Compensation*, XINHUA NEWS AGENCY, Jan. 9, 1996 (discussing Maipu Electronics Co. v. Taile Electronic Technology Co.).

154. See Lazar, *supra* note 13, at 1185-91 (tracing development of China's copyright system from its inception in 1990 up until 1996).

155. See Yeh, *supra* note 27, at 503-504 (describing role of trade sanctions in U.S. fight against piracy of its products in foreign countries).

156. See Li, *supra* note 150, at 395-96 (discussing how lack of incentives affects enforcement of intellectual property rights in China).

157. See Kathy Chen & Helene Cooper, *U.S. and China Reach an Agreement, Averting Trade Sanctions by Both Sides*, WALL ST. J., June 18, 1996, at A2 (reporting U.S. intellectual property industry's skepticism toward China's promises to enforce intellectual property protection made subsequent to U.S. threats of trade sanctions).

1. External Pressures: U.S. Trade Sanctions

Trade sanctions have been the primary weapon used by the United States in fighting against piracy because many foreign countries depend upon the U.S. market for exports.¹⁵⁸ In 1988, Congress passed the Omnibus Trade and Competitiveness Act¹⁵⁹ ("1988 Trade Act"), which contained a provision known as Special 301¹⁶⁰ authorizing the U.S. Trade Representative¹⁶¹ ("USTR") to use trade sanctions or other limits on market access to retaliate against inadequate protection of intellectual property rights.¹⁶² Since then the United States has frequently used Special 301 against such countries as China, Taiwan, and India.¹⁶³ Sino-U.S. disputes over copyright protection caused the United States to use threats of Special 301 against China in 1992, 1995, and 1996.¹⁶⁴ The two countries concluded each threat

158. See Y. Kurt Chang, *Special 301 and Taiwan: A Case Study of Protecting United States Intellectual Property in Foreign Countries*, 15 NW. J. INT'L L. & BUS. 206, 212 (1994) (delineating policy behind United States' use of trade sanctions). The author posited that the United States considered foreign countries' tolerance of intellectual property piracy a non-tariff barrier with trade distortion effects. *Id.* Intellectual property piracy in foreign countries is not only detrimental to the economic interests of the United States, but also undermines the creativity, invention, and investment that are essential to economic and technological growth. *USTR Fact Sheets on Super 301 Trade Liberalization Priorities and Special 301 on Intellectual Property*, released May 15, 1989, 6 INT'L TRADE REP. (BNA) 715 (May 31, 1989) [hereinafter 301 USTR Fact Sheet]. Consequently, starting in the mid-1980s, the United States adopted the trade policy of conditioning continued market access on improved intellectual property rights enforcement regimes, with specific directions set forth in the 1986 Administration Statement on the Protection for U.S. Intellectual Property Rights Abroad, through which the United States enacted the Omnibus Trade and Competitiveness Act of 1988. See Chang, *supra* note 158, at 212 (discussing U.S. response to foreign piracy of its intellectual property products.)

159. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988) (codified as amended in scattered sections of 19 U.S.C.) [hereinafter 1988 Trade Act].

160. *Id.* §§ 1301, 1303, 102 Stat. at 1164-76, 1179-81 (1988) (amending the Trade Act of 1974, Pub. L. No. 93-316, §§302(b),182 (1974)) [hereinafter Special 301].

161. See DICTIONARY OF INTERNATIONAL TRADE TERMS 172-73 (1996) (defining roles of United States Trade Representative). The United States Trade Representative ("USTR") is a cabinet-level official serving as advisor to the President on trade policy. *Id.* The USTR coordinates the development of U.S. trade policy initiatives, leads U.S. international trade negotiations, and seeks to expand U.S. exports by promoting removal or reduction of foreign trade barriers. *Id.*

162. Special 301, *supra* note 160.

163. See *Intellectual Property: Kantor Singles Out Brazil, India, Thailand for Special 301 Designation*, 10 INT'L TRADE REP. (BNA) 726 (May 5, 1993). The United States named India a priority foreign country in 1991, 1992, and 1993 and Taiwan in 1992. *Id.*

164. See Lazar, *supra* note 13, at 1188-91 (providing brief history on intellectual property dispute between United States and China from 1992 to 1996).

with the signing of trade agreement where China vowed to further enforce copyright protection.¹⁶⁵

a. Special 301

As part of the 1988 Trade Act, Special 301 allows the United States to employ unilateral retaliation to persuade and motivate trade partners to reform inadequate intellectual property acts, policies or practices.¹⁶⁶ To institute a Special 301 action, the United States places a country on one of three lists: the priority foreign country list,¹⁶⁷ the priority watch list,¹⁶⁸ or the watch list.¹⁶⁹ Upon releasing the list, the USTR must initiate an investigation into the acts, policies, or practices of priority foreign countries within thirty days,¹⁷⁰ and seek consultations with the foreign country to discuss the offending practices and a resolution of the situation.¹⁷¹ Special 301 gives the USTR six months to complete the investigation and negotiate a solution.¹⁷² If the intellectual property issues remain unresolved, the USTR may suspend trade benefits, impose duties or other restrictions and enter into binding agreements requiring priority foreign countries to cease any offending practices or to compensate the United States.¹⁷³

In 1979, prior to the enactment of Special 301, the United States and China signed the 1979 Agreement on Trade Rela-

165. *Id.*

166. See Bello & Homer, *supra* note 41, at 259 (describing objective of Special 301 as promoting the enhancement of intellectual property protection regimes in foreign countries).

167. 19 U.S.C. § 2242(b)(1). Countries that have committed more onerous or egregious acts, policies, or practices in the area of intellectual property, have the greatest adverse economic impact on the United States, and have failed to enter into good faith negotiations or to make significant progress in bilateral or multilateral negotiations fall under the priority foreign country category. *Id.*

168. 301 USTR Fact Sheet, *supra* note 158, at 719. Countries on the priority watch list are similar to priority foreign countries, except that these countries have negotiated in good faith or are making significant progress in their negotiations. *Id.*

169. UNITED STATES TRADE REPRESENTATIVE, 1995 TRADE POLICY AGENDA AND 1994 ANNUAL REPORT 58, 98 (1994) [hereinafter 1995 TRADE POLICY]. Countries on this list, the least serious of the three categories, are identified by the United States due to their questionable intellectual property systems. *Id.*

170. 19 U.S.C. § 2412(b)(2)(A) (1988).

171. *Id.* at § 2413(a)(1) (1988).

172. *Id.* at § 2414(a)(3)(A) (1988).

173. *Id.* at § 2411(c)(1) (1988).

tions¹⁷⁴ ("1979 Agreement on Trade"), which contained several provisions addressing intellectual property.¹⁷⁵ Partly to fulfill the requirements outlined in the 1979 Agreement on Trade and partly to advance itself on the international stage, China adopted the Trademark Law¹⁷⁶ in 1982, the Patent Law¹⁷⁷ in 1984, and the Copyright Law in 1991.¹⁷⁸ The Copyright Law was followed by the Implementing Rules and Regulations for the Protection of Software ("Software Regulations").¹⁷⁹ Despite China's efforts at incorporating international copyright norms into Chinese law,¹⁸⁰ the Western business community was dissatisfied with the law's attempt to balance the Marxist aims of Chinese society with the economic goals of the United States.¹⁸¹ Barraged by a series of complaints from the U.S. business sector,¹⁸² the United States

174. Agreement on Trade Relations, July 7, 1979, U.S.-P.R.C., 31 U.S.T. 4651 [hereinafter 1979 Agreement on Trade].

175. See Feaver, *supra* note 72, at 458 n.15 (describing Articles 1 and 6 of 1979 Agreement on Trade, which address importance of strengthening measures such as intellectual property protection in promoting Sino-U.S. trade relationship).

176. Trademark Law, *supra* note 5.

177. Patent Law, *supra* note 6.

178. Copyright Law, *supra* note 7.

179. Computer Software Protection Regulations (1991), translated in CHINA L. PRAC., Aug. 19, 1991, at 55 [hereinafter Software Regulations].

180. See Amy E. Simpson, *Copyright Law and Software Regulations in the People's Republic of China: Have the Chinese Pirates Affected World Trade?*, 20 N.C. J. INT'L L. & COM. REG. 575, 580-81 (1995) (noting that China, in effort to accommodate needs of international trade arena, acceded to several international conventions requiring signatories to adopt certain laws and regulations). By 1992, China joined both the Universal Copyright Convention and the Berne Convention. *Id.* China also joined the Geneva Phonograms Convention in June 1993. *Id.*

181. See Lazar, *supra* note 13, at 1188 (noting that China's enactment of Copyright Law in 1991 failed to appease Western business community, United States in particular). Marxist theory stresses the importance of society over individuals. *Id.* Under this theory, the Chinese government views the protection of intellectual property rights as a mechanism "to rapidly develop social productive forces, promote overall social progress, meet the needs of developing a socialist market economy and expedite China's entry into the world economy." P.R.C. State council, White Paper: Intellectual Property Protection in China (June 20, 1994), available in LEXIS, World Library, BBCSWB File. On the other hand, the United States adopted the economic model which views copyright as a means of promoting efficient allocation of resources and ensures that copyrights will end up in the hands of the person who values them most. See William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325-26 (1989) (defining goal of copyright law as striking balance between incentive to create and dissemination of information to public).

182. Lazar, *supra* note 13 at 1196. U.S. business and political representatives complained about China's copyright system in China's Copyright Law's inability at meeting U.S. standards of adequate copyright protection for copyright owners; the inefficiency of sanctions at deterring potential violators, the lack of government efforts to enforce

placed China on the priority foreign country list and threatened to enact trade sanctions against China unless it provided more protection for U.S. intellectual property works, particularly computer software.¹⁸³

b. The 1992 Memorandum of Understanding On the Protection of Intellectual Property

The trade dispute between the United States and China led to the signing of the Memorandum of Understanding on the Protection of Intellectual Property¹⁸⁴ ("1992 MOU") in January 1992.¹⁸⁵ The terms of the 1992 MOU¹⁸⁶ required China to join the Berne Convention and the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms¹⁸⁷ ("Geneva Phonograms Convention"), which China joined on October 30, 1992 and April 30, 1993, respectively.¹⁸⁸ In addition, China promulgated the ICT Provisions to implement these conventions and the terms of the 1992 MOU into its copyright law.¹⁸⁹ To substantiate China's agreement to protect computer programs as literary works under the terms of the Berne Convention, China implemented the Software Regulations¹⁹⁰ in October, 1991, extending such protection to computer software programs for a term of fifty years.¹⁹¹

the law, and the lack of experienced legal personnel dealing with intellectual property issues. *Id.*

183. See *Lawyers Wary of China's New Software Protection Rules*, UPI, June 14, 1991, available in LEXIS, Nexis Library, UPI File [hereinafter *Lawyers Wary*] (reporting Western attorneys' reaction to China's newly enacted regulations on software protection). The USTR actually placed China on this list after the enactment of the Copyright Law and before the adoption of the Computer Software Regulations. *Id.* When the Computer Software Regulations came out in June 1991, the Western business community remained dissatisfied, therefore China remained on the list. *Id.*

184. 1992 MOU, *supra* note 80.

185. *Id.*

186. *Id.* art. 3(1)-(2) at 681-82.

187. Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Geneva Convention), Oct. 29, 1971 (World Intellectual Property Organization 1974) [hereinafter Geneva Phonograms Convention].

188. See Glenn R. Butterson, *Pirates, Dragons and U.S. Intellectual Property Rights in China: Problems and Prospects of Chinese Enforcement*, 38 ARIZ. L. REV., 1081, 1089 (1996) (describing legislative efforts taken by China to fulfill requirements of 1992 MOU).

189. ICT Provisions, *supra* note 70, arts. 1 & 3.

190. Software Regulations, *supra* note 179.

191. *Id.* art. 15 at 59. Article 15 states that:

Despite China's progress in bringing its substantive law into conformance with international standards, widespread piracy of U.S. computer software and audio-visual products continued due to lax enforcement by the Chinese government.¹⁹² Only a fraction of Chinese intellectual property violations reached Chinese courts.¹⁹³ Continued widespread piracy resulted largely from the fact that pirates were able to destroy crucial evidence because Chinese authorities delayed in responding to allegations of piracy by infringing stores, factories, and distribution centers.¹⁹⁴

c. The 1995 China-United States: Agreement Regarding Intellectual Property Rights

Dissatisfaction with China's progress in enforcement measures caused the United States to place China back on the priority foreign countries list in 1994.¹⁹⁵ The Chinese government was angry with the United States because it felt that China had worked very hard at building its copyright system and that the United States had not allowed China sufficient time to produce results.¹⁹⁶ As of January 1995, China had stated its intention not

Copyright in software shall be protected for a term of 25 years, ending on December 31 of the 25th year after the first publication of the software. Prior to the expiration of the term of protection, a software copyright owner may apply to the organization for the administration of software registration for a 25-year extension. The maximum term of protection may not exceed 50 years.

Id.

192. See Simpson, *supra* note 180, at 577 (discussing China's struggle in implementing provisions of its newly-established Copyright Law).

193. See *id.* at 604 (stating that on August 3, 1994, in *Walt Disney of United States v. Beijing Publishing Press, etc.*, Beijing Intermediate court's ruling in favor of Walt Disney Co. against prominent Beijing children's book publisher was one of only twenty civil cases filed in two years to receive judgement). See Guangliang Zhang, *Analysis of Walt Disney of the United States v. Beijing Publishing Press, etc. for Infringement of Copy Rights*, CHINA L. 78 (February 1996) (briefing *Walt Disney of the United States v. Beijing Publishing Press*). The first copyright infringement case brought by a U.S. party to a Chinese court after the signing of the 1992 MOU, this case attracted great attention from both the legal and business communities of the United States and China. *Id.*

194. See Amy Borrus et al., *Will China Scuttle Its Pirates?*, BUS. WK., Aug. 15, 1994, at 40 (reporting that it took Chinese authorities four months to respond to evidence presented by Business Software Alliance on stores selling pirated softwares).

195. See Newby, *supra* note 13, at 43 (noting that China's ineffectiveness in executing measures it has implemented caused it to be redesignated as priority foreign country by United States in 1994). The United States took China off the list of priority foreign countries when China signed the 1992 MOU. *Id.*

196. *Id.* at 44. Li Changxu, Chief Director of the China-United States Intellectual

to sign any document relating to protection of intellectual property rights.¹⁹⁷ The parties thus did not reach an agreement until two hours before U.S. trade sanctions on US\$1 billion worth of Chinese imports and countersanctions by the Chinese would have taken effect.¹⁹⁸ The 1995 China-United States: Agreement Regarding Intellectual Property Rights¹⁹⁹ ("1995 Accord"), signed in Beijing on February 26, 1995, called for both enhanced enforcement measures by the Chinese and greater market access for U.S. intellectual property producers in Chinese markets.²⁰⁰

i. The Agreement Letter

The 1995 Accord consisted of two documents: a letter from the Chinese Minister of Foreign Trade and Economic Cooperation to the USTR²⁰¹ ("Agreement Letter"), and an Action Plan for Effective Protection and Enforcement of Intellectual Property Rights in China ("Action Plan").²⁰² In addition to summarizing the major provisions of the Action Plan, the Agreement Letter included language that significantly liberalized market access for U.S. companies in the audio-visual sector.²⁰³ In the Agreement Letter, China acknowledged that cooperation and trade in products protected by intellectual property rights com-

Property Protection Center, analogized the situation to building a house, saying that "[y]ou can have the house structure all set up, very beautiful. But then, you need electricity and water pipes. That takes more time." *Id.*

197. See Tom Hope, *A Victory for IPR?*, *ASIA L.*, March 1995, at 12 (describing events leading to signing of China-United States: Agreement Regarding Intellectual Property Rights).

198. *Id.*

199. China-United States: Agreement Regarding Intellectual Property Rights, Feb. 26, 1995, 34 I.L.M. 881 [hereinafter 1995 Accord].

200. See Joseph T. Simone, *301 Agreement Strengthens IPR Enforcement*, *IP ASIA*, April 1995, at 2 (analyzing provisions of 1995 Accord).

201. China-United States: Agreement Regarding Intellectual Property Rights, Feb. 26, 1995, Letter from Wu Yi, Minister of Foreign Trade and Economic Cooperation, People's Republic of China, to Michael Kantor, United States Trade Representative, United States of America, 34 I.L.M. 881 [hereinafter Agreement Letter].

202. China-United States: Agreement Regarding Intellectual Property Rights, Feb. 26, 1995, Annex, 34 I.L.M. 881, 887 [hereinafter Action Plan].

203. Simone, *supra* note 200. The Agreement Letter states that "China confirms that it will not impose quotas, import license requirements, or other restrictions on the importation of audio-visual and published products, whether formal or informal." Agreement Letter, *supra* note 201, at 884. See OFFICE OF THE U.S. TRADE REP., NATIONAL TRADE ESTIMATE, PEOPLE'S REPUBLIC OF CHINA 43, 51 (1994) (noting piracy to be rampant in China, particularly in areas of audio-visual materials).

prised an important aspect of its decision to increase economic growth and market access.²⁰⁴ China also conceded that it would refrain from limiting the importation of audio-visual products and publications, and would allow U.S. entities to establish joint ventures with Chinese entities concerning the production, reproduction, and sale of audio-visual products and computer software, and to permit U.S. entities to execute revenue sharing agreements relating to film products.²⁰⁵

ii. The Action Plan

Instead of implementing new laws, the 1995 Accord focused on enforcing China's existing intellectual property laws.²⁰⁶ The Action Plan focused mainly on enforcement measures to be undertaken by administrative authorities, including customs authorities, the Administrations for Industry and Commerce²⁰⁷ ("AIC"), the National Copyright Administration²⁰⁸ and its local agencies, the China Patent Office²⁰⁹ ("CPO"), and the police.²¹⁰

204. Agreement Letter, *supra* note 201, at 883. The section of the Agreement Letter indicates that "[a]nother aspect of China's decision to develop its economy and open its markets further is increased cooperation and trade in products protected by intellectual property right." *Id.*

205. *Id.* at 884. The relevant section of the Agreement Letter reads as follows: China confirms that it will not impose quotas, import license requirements, or other restrictions on the importation of audio-visual and published products, whether formal or informal. China will permit U.S. individuals and entities to establish joint ventures with Chinese entities in China in the audio-visual sector for production and reproduction. These joint ventures will be permitted to enter into contracts with Chinese publishing enterprises to, on a nationwide basis, distribute, sell, display and perform in China.

Id.

206. See Hope, *supra* note 197, at 12 (pointing out highlights of Action Plan).

207. Trademark Law, *supra* note 9, art. 2. The Administration for Industry and Commerce ("AIC") is in charge of registration and administration of trademarks. *Id.*

208. See LAURENCE J BRAHM, *INTELLECTUAL PROPERTY AND TECHNOLOGY TRANSFER IN CHINA*, 108 (2d ed. 1994) (providing overview of administrative organs responsible for overseeing matters related to copyright). The National Copyright Administration ("NCA") is in charge of authorizing the use of copyrighted works, issuing licenses for the reprinting and translation of foreign works, and handling copyright disputes. *Id.*

209. Patent Law, *supra* note 10, art. 3. Article 3 reads "[t]he Patent Office of the People's Republic of China receives and examines patent applications and grants patent rights for inventions-creations that conform with the provisions of this Law." *Id.*

210. Action Plan, *supra* note 202, art. (I)(B), at 890. Art. (I)(B) provides:

Administrative and other authorities responsible for intellectual property protection and enforcement including the National Copyright Administration ("NCA"), State Administration for Industry and Commerce ("AIC"), the Patent Office, and police at the national, provincial, autonomous region, and

The Action Plan made little mention of enforcement by Chinese courts or prosecutors or their role in supporting enforcement actions.²¹¹ With respect to copyright enforcement, the Action Plan outlined four enforcement mechanisms.²¹² There would be a new inter-agency Intellectual Property Working Conference ("IWPC") and task forces at the national and regional levels designed to increase the effectiveness of existing enforcement measures and provide new channels for investigating and handling copyright and other serious infringements.²¹³ The Chinese government would also initiate a special enforcement period, commencing March 1995, during which enforcement authorities would be encouraged to intensify enforcement efforts²¹⁴ and educational activities²¹⁵ in regions suffering from

directly administered municipality and cities . . . and customs officials will coordinate their activities under the working conference system and participate in enforcement task forces.

Id.

211. See Simone, *supra* note 200, at 3 (reporting that Chinese government is reportedly reluctant to involve its judicial organ in Special 301 negotiations). The author further notes, however, that the Supreme People's Procuratorate seemed to convey a contrary message. *Id.*

212. *Id.* at 2.

213. Action Plan, *supra* note 202, art. (I)(A)(1), at 34 I.L.M. 887. Article (I)(A)(1) provides that:

The State Council has established a Working Conference on Intellectual Property Rights which through forceful measures centrally organizes and coordinates protection and enforcement of all intellectual property rights throughout the country, and will ensure that effective protection is provided and infringement of intellectual property rights is substantially reduced.

Id.

214. *Id.*, art. I(C)(1) at 892. Article I(C)(1) states:

The working conferences and enforcement task forces will operate over the long-term. In addition, beginning on March 1, 1995, the Special Enforcement Period will be intensified for the next six months. During this period, the number of investigations will be increased and other actions taken to ensure the elimination of piracy, counterfeiting and other infringements of intellectual property rights.

Id.

215. *Id.*, art. I(C)(2) at 892. Article I(C)(2) reads:

During the Special Enforcement Period, the State Council's Working Conference on Intellectual Property will direct and coordinate enforcement efforts which all working conferences and enforcement task forces established under this Action will undertake. The State Council's Working Conference on Intellectual Property will also coordinate with the relevant departments in launching a nation-wide information and education campaign on intellectual property rights.

Id.

high levels of piracy.²¹⁶ This special period would last for six months and longer in regions where significant infringements persisted.²¹⁷ The Action Plan also called for the institution of new licensing and ownership verification regime, intended to bring rampant piracy of audio-visual works, software, and publications under control.²¹⁸ Finally, the Action Plan contained customs enforcement provisions to better protect intellectual property rights for all imports and exports.²¹⁹

Chinese efforts to implement the Action Plan were far from adequate.²²⁰ To begin with, task forces which were supposed to be established in twenty-two regions never came into existence.²²¹ Compact disc factories that were shut down during the special enforcement period reopened shortly after the campaign ended.²²² The U.S. business community alleged that Chinese officials used the term loosely when the officials claimed to have closed a CD plant because the plant would just close for reorganization and then reopen after having changed its catalogue.²²³

216. *Id.*, art. I(C)(3) at 892. Article I(c)(3) provides:

Particular emphasis will be placed on achieving effective enforcement in key regions, cities, and entities with a high level of infringing activity with a focus on pursuing significant cases so as to eliminate piracy and counterfeiting, deter future infringement, and require use of legitimate products.

Id.

217. *Id.* art. I(C)(6) at 893. Article I(C)(6) provides:

If infringements of intellectual property rights in a specific area are not substantially reduced by 31 August 1995, or if significant increases occur at any time in the future, then the Special Enforcement Period in that area will be extended or reinstated accordingly. If piracy is substantially reduced in a particular area, then that area can terminate the special enforcement effort before August 31, 1995.

Id.

218. *Id.* art. I(D)(2)(b) and I(H), at 895, 903.

219. *Id.* art. I(G), at 900. Article I(G) provides that "[a]ll customs offices will further intensify the protection of intellectual property rights of all imports and exports and they will be subject to customs enforcement." *Id.* art. I(G)(1).

220. *See* McCall, *supra* note 17, at 603-06 (arguing that despite 1995 Accord, piracy in China continued because of lack of enforcement).

221. *See* Kwok, *supra* note 151, at 19 (describing USTR's assessment of China's progress in intellectual property enforcement in light of 1995 Accord).

222. Maggie Farley & James Gerstenzang, *China Piracy of US Products Surges Despite Accord*, L.A. TIMES, Oct. 10, 1995, at A1 (reporting increase in production of illegal music and software compact discs despite China's promise to clamp down on piracy in its 1995 Accord signed six months previously).

223. *See* Kwok, *supra* note 151, at 18 (discussing International Intellectual Property Alliance's report to U.S. Congressional committees on China's effort to enforce 1995 Accord).

The production of illegal compact discs doubled.²²⁴ Sales of pirated computer software continued, and U.S. software companies claimed that twenty-eight of the twenty-nine Chinese pirate CD factories were still operating.²²⁵ Despite the 1995 Accord requirement that all CDs manufactured in China carry source identification ("SID") codes²²⁶ millions of Chinese CDs did not.²²⁷ Moreover, according to the USTR, most of China's customs enforcement efforts were still inadequate, and a series of customs regulations remained which did not conform with the 1995 Accord.²²⁸

The campaign also instigated violence within the CD industry.²²⁹ In December 1995, a staff member on the anti-piracy unit of the International Federation of the Phonographic Industry²³⁰ ("IFPI") was kidnapped by hitmen to halt the staff's operations.²³¹ The threat was apparently delivered by an officer of the Guangdong State Security Bureau, a local arm of the secret police.²³² Although the victim was eventually released unharmed, the event led the IFPI to close its Guangzhou, China office and send its employees into hiding.²³³ The IFPI received more threats when it named several CD factories as makers of porno-

224. See Farley, *supra* note 222, at A1 (reporting condition of music and software piracy during six month period following 1995 Accord).

225. See Kahn, *supra* note 6, at A10 (reporting U.S. officials' awareness of China's failure to effectively implement terms of 1995 Accord).

226. See *Statement by Acting USTR Charlene Barshefsky on Trade Talks with China on Intellectual Property Rights*, 13 INT'L TRADE REP. (BNA) 1036 (June 19, 1996) [hereinafter 1996 Agreement] (setting forth content of agreement between U.S. and China which averted U.S. trade sanctions scheduled to take effect in June 1996). Source Identification Code ("SID") identifies the CD press that produced a particular CD, thereby allowing inspectors to trace its manufacturer. *Id.* Consequently, pirates do not place SID codes on their products, making their products obvious infringing goods. *Id.*

227. See Kwok, *supra* note 151, at 18-19 (noting International Federation of the Phonographic Industry's ("IFPI") extreme disappointment with China's lack of progress in combating music piracy). IFPI figures indicated that pirate sales of compact discs and video products manufactured in China totaled to US\$250 million, making China the largest international pirate market. *Id.*

228. See Charles Abbott, *U.S. Puts China Goods on Tentative Retaliation List*, REUTERS WORLD SERVICE, Dec. 31, 1995 available in LEXIS, News Library, News File (quoting Deputy USTR Kantor).

229. See Giouw, *supra* note 119 (recounting on kidnap of staff member at International Phonographic Industry's Guangzhou office).

230. *Id.* The industry group represents 1100 record producers in 70 countries and opened three offices in China to monitor music bootlegging earlier in 1995. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

graphic CD-ROMS.²³⁴

Dissatisfied by China's failure to abide by the terms of the 1995 Accord, the United States, for the third time in five years, threatened to impose economic sanctions upon China.²³⁵ After the United States threatened China with US\$2 billion in punitive tariffs in May 1996, China responded by making multi-billion dollar threats of its own.²³⁶ The Chinese government felt that it had already taken action to protect intellectual property rights through legislation, especially regarding audio and video products, a particular concern of the United States.²³⁷ Furthermore, China considered it unfair for the United States to single out China when statistics from the Business Software Alliance showed that China was only sixth among major nations responsible for the United States' losses due to copyright infringement.²³⁸

d. The 1996 U.S.-China Agreement on Intellectual Property Rights

Following a U.S. threat to impose sanctions upon China, formally made in May 1996, but openly discussed for several months previously, the United States and China signed the 1996 U.S.-China Agreement on Protection of Intellectual Property Rights²³⁹ ("1996 Agreement") on June 17, 1996, averting another trade war.²⁴⁰ The 1996 Agreement contains a fact sheet which sets forth actions already taken or to be taken by the Chinese authorities under the 1995 Agreement.²⁴¹ These actions in-

234. *Id.*

235. See Paul Blustein, *Hopes Raised for Ending China Copyright Dispute*, WASH. POST, June 13, 1996, at D10 (reporting USTR Charlene Barshefsky's trip to Beijing for negotiations aimed at averting U.S. imposition of sanctions on Chinese products).

236. See *List of China's Possible Counter-sanctions Against the U.S.*, AGENCE FRANCE PRESSE, May 16, 1996 (summarizing list of Chinese counter-sanctions, which includes 100% tariff on U.S. imports, ban on imports of U.S. audio-visual products, and suspension of applications for U.S. investment).

237. See Kwok, *supra* note 151, at 19 (presenting China's assessment of its performance in enforcing intellectual property rights subsequent to signing 1995 Accord).

238. *Id.* Nations that contributed to a greater extent to U.S. copyright infringement losses than did China included Germany, Italy, Japan, and the United States itself. *Id.*

239. 1996 Agreement, *supra* note 226.

240. See Kwok, *supra* note 151, at 18 (tracing development of China's intellectual property protection system in 1996).

241. *Statement by Acting USTR Charlene Barshefsky on Trade Talks with China on Intellec-*

cluded the closure of fifteen compact disk²⁴² ("CD") factories and seizure of their equipment, increased monitoring of CD factories and distribution centers, and the prohibition of import machinery for the manufacture of audio-visual products.²⁴³ Also, the Public Security Bureau²⁴⁴ launched a special campaign against intellectual property infringement.²⁴⁵ Until further notice, the Chinese government would suspend the establishment of new CD production enterprises.²⁴⁶ Another enforcement period would be launched, for a period of seven months, aimed at eradicating factories, wholesalers, retailers and show centers involved in counterfeit CDs.²⁴⁷ The 1996 Agreement also provides for greater market access for U.S. companies in the audio-visual sector.²⁴⁸ Overall, the 1996 Agreement reiterates provisions of the 1995 Accord and adds more promises to keep up the fight against copyright piracy.²⁴⁹

China made significant progress in combating piracy after the signing of the 1996 Agreement.²⁵⁰ Chinese authorities closed thirty-nine factories making illegal copies of U.S. music,

tual Property Rights, Fact Sheet on Chinese Implementation of 1995 IPR Enforcement Agreement, 13 INT'L TRADE REP. 1036 (June 19, 1996) [hereinafter *Fact Sheet*].

242. See SHERMAN ET AL., *COMPUTER SOFTWARE PROTECTION LAW 101-25* (1989) (discussing laser-based media). Employing laser technology to record information, compact disks are digital optical disks capable of storing great quantities of digitized data. *Id.* A compact disk on the market can easily store several hundred thousand pages of printed text, six hours of master recording quality music, or two hours of full-motion, television quality video. See U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, *INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION*, OTA-CIT-302, at 103 (1986) (describing optical disk project at Library of Congress where large volume of information were made available on-line at low cost for storage).

243. *Fact Sheet*, *supra* note 241.

244. See CHIU ET AL., *LEGAL SYSTEMS OF THE PRC 93-97*(1991) (describing duties and functions of Public Security Bureau). The Public Security Bureau is in charge of criminal law enforcement and public administration. *Id.* With the exception of minor crimes and corruption cases which are dealt with by the courts and procuratorates respectively, the Public Security Bureau handles all crimes from the stage of investigation to the initial determination of liability. *Id.*

245. *Fact Sheet*, *supra* note 241. The Ministry of Public Security vowed to make piracy a focus of its sweeping nationwide anti-crime campaign, thereby adding tens of thousands of enforcement officials to the anti-piracy effort. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. See Kwok, *supra* note 151, at 20 (reporting that compared to 1995 Accord, public response to 1996 Agreement was less enthusiastic and more cautious).

250. See *U.S. China Trade Relation*, *supra* note 3 (briefing on U.S.-China relationship in area of intellectual property from 1995-1997).

movies, and business software, and more than 250 arrests were made.²⁵¹ During the 1997 winter crackdown on piracy, enforcement authorities confiscated 1.9 million illegal video compact disks²⁵² ("VCD"), leading to the closure of forty illegal VCD production lines in southern Guangdong Province.²⁵³

The USTR noted that while China had made significant progress in combating piracy, certain problems remain.²⁵⁴ Computer software piracy is as rampant as ever.²⁵⁵ Pirate CD factories have affected Hong Kong with its smuggling activities of pirated products and CD production line equipment in and out of the city's port.²⁵⁶ Moreover, movie piracy is on the rise, with VCD copies of the "Titanic" selling for US\$2 in Shanghai a month before its theatrical release in the United States.²⁵⁷ Foreign copyrighted products have not been able to meet its market demand under the current level of market access.²⁵⁸ In midst of the ebbs and flows of Chinese intellectual property enforcement, the USTR warned that the United States would not hesitate to reimpose trade sanctions should China loosen its leash on intellectual property infringers.²⁵⁹

The United States' repetitive use of trade sanctions led one legal scholar to question the strategy's actual effectiveness in combating China's copyright piracy.²⁶⁰ A report by trade groups also indicated that U.S. trade sanctions might no longer pose a

251. See *Trade Report Cites Chinese Progress on Piracy*, HOUSTON CHRON., May 1, 1997, at 2 [hereinafter *Trade Report*] (discussing China's efforts to protect intellectual property rights since signing of 1996 Agreement).

252. See Faison, *supra* note 1, at D2 (reporting rampant movie piracies in China). Unknown to most U.S. households and introduced to Chinese consumers several years ago, video compact disks ("VCD") look identical to CDs and are capable of storing up to seventy minutes of movie per disk. *Id.*

253. See *China: Southern China to Set Up Big Disc-Producing Base*, CHINA BUS. INFO. NETWORK, July 30, 1997, at 1 (reporting China's decision to establish its own compact disc production base as a means of attacking pirate disc's market share).

254. *U.S. China Trade Relation*, *supra* note 3 (discussing China's progress in intellectual property enforcement since 1996 Agreement).

255. *Id.*

256. *Id.*

257. See Faison, *supra* note 1, at D1-2 (reporting boom in movie piracy).

258. *U.S. China Trade Relation*, *supra* note 3.

259. *Id.*

260. See Yeh, *supra* note 27, at 503 (examining how strategy of using economic influence as leverage failed to establish effective intellectual property regime in China).

threat to China.²⁶¹ The current high level of trade between China and the United States,²⁶² China's trade potential,²⁶³ and cooperation in other international issues²⁶⁴ have made stable Sino-U.S. relations important to the United States.²⁶⁵ Repetitive threats of trade sanctions might cause China to lose patience with the United States and switch to Europe, Japan, and Russia for trade and technology transfers.²⁶⁶ The United States also has a lot at stake if sanctions were to take effect because the United States is heavily dependent on Pacific Rim trade.²⁶⁷ Finally, notwithstanding China's compliance with TRIPs, the United States' continued use of unilateral trade sanctions had already

261. See Robert S. Greenberger, *Chinese Moves Press U.S. Into a Corner*, WALL ST. J., Feb. 8, 1996, at A10 (reporting conclusions of Business Coalition for U.S.-China Trade).

262. *Id.* In 1995, U.S. exported more than US\$12 billion in goods and services to China, supporting 200,000 U.S. jobs. *Id.* As of 1997, China was the United States' fifth largest trading partner. See *U.S. China Trade Relation*, *supra* note 3 (briefing on China's role in world economy).

263. See Greenberger, *supra* note 261, at A10. The World Bank estimated that for modernization, China may expend US\$750 billion on aircraft, power generation, telecommunications, and computer equipment. *Id.* In the realm of intellectual property, Chinese officials estimated that China's audiovisual sales will reach US\$2.2 billion by 2001. See Lisa Atkinson, *What's Entertainment?*, CHINA BUS. REV., Mar. 1, 1997 (discussing prospects of U.S. entertainment industry in China's market).

264. See *U.S. China Trade Relation*, *supra* note 3 (delineating scope of U.S. involvement with China on international issues). The United States have worked closely with China in the areas of nuclear arms, global environment, and human rights. *Id.* During the political crisis between North and South Korea, China assisted U.S. efforts in maintaining stability on the Korean peninsula by bringing North Korea into peace talks. *Id.* Furthermore, the two countries have a strong bilateral program geared toward combating alien smuggling, narcotics trafficking and terrorism. *Id.*

265. Greenberger, *supra* note 261, at A10.

266. See Paul Blustein & R. Jeffrey Smith, *Economic, Political Concerns Put Clinton on the Spot in China Policy*, WASH. POST, Feb. 11, 1996, at A26 (reporting that economists and diplomats in Clinton administration questioned effectiveness of economic sanctions as weapons against China on issues such as human rights and illegal arm sales to Pakistan). See Tony Walker et al., *Li Peng Backs Trade with 'More Lenient' Europeans*, FIN. TIMES, June 11, 1996, at 1 (discussing interview with Li Peng on U.S. threat of trade sanctions against China made in May 1996). Considering U.S. trade policies toward China as being too restrictive, Li Peng warned that "[i]f the Europeans adopt more cooperation with China in all areas, not just in economic areas but also in political and other areas, then I believe the Europeans can get more orders from China." *Id.*

267. *Trade War Averted - or Postponed?*, NEWS TRIB., June 19, 1996, at A10 (discussing how Clinton administration has much at stake in long-running dispute over China's massive piracy of U.S. software and entertainment titles). Had the U.S.-Chinese trade war kicked in, Boeing Co. would incur a loss of US\$4 billion worth of jetliner orders. See Chen & Cooper, *supra* note 157, at A2 (reporting that bilateral trade sanctions would hurt major industries of both countries, including Chinese textiles, and U.S. cars and agriculture).

instigated criticism from other countries.²⁶⁸

2. Internal Pressures

China faces domestic resistance in its effort to promote copyright protection.²⁶⁹ The idea of copyright protection goes against the country's social-political culture and current economic development.²⁷⁰ In addition, local governments pose significant hindrance to the administrative enforcement of copyright laws.²⁷¹

a. Lack of Incentives to Enforce Copyright Laws

China lacks the genuine impetus to enforce copyright protection.²⁷² Private appropriation of expressions of ideas contradicts Chinese culture's emphasis on the subordination of individual interests to societal good.²⁷³ Moreover, providing intellectual property protection at the level delineated in TRIPs does not render any present economic benefits to China.²⁷⁴

i. Cultural Disincentives

China's legal system incorporated the concept of social order propounded in Confucian philosophy.²⁷⁵ Confucianism, the ideology which dominated China from 100 B.C. to A.D. 1911, placed a strong emphasis on the good of society instead of the

268. See *Intellectual Property: GATT Bill Brings Major Reforms to Domestic Intellectual Property Law*, 11 INT'L TRADE REP. (BNA) 50 (Dec. 21, 1994) (noting that foreign countries were dissatisfied with U.S. implementing legislation for Uruguay Round because it allows USTR to identify a country "for Special 301 treatment notwithstanding its compliance with TRIPs" - during the transition period).

269. See Li, *supra* note 150, at 393-94 (arguing lack of cooperation among local officials contributed to ineffective enforcement of intellectual property laws).

270. See Lazar, *supra* note 13, at 1208 (setting forth inherent factors opposing enforcement of copyright protection in China).

271. See Jeffrey Berkman, *Intellectual Property Rights in the P.R.C.: Impediments to Protection and the Need for the Rule of Law*, 15 U.C.L.A. PAC. BASIN L.J., 1, 19 (1996) (discussing how resistance from local governments erodes effectiveness of administrative enforcement).

272. Lazar, *supra* note 13, at 1208.

273. See FENG, *supra* note 68, at 4 (noting establishment of intellectual property regime requires major changes in China's social institutions).

274. See Yeh, *supra* note 27, at 516-17 (arguing that China is not at stage of economic development to enforce protection of intellectual property rights).

275. See DERKE BODDE & CLARENCE MORRIS, *LAW IN IMPERIAL CHINA* 50 (1973) (describing gradual Confucianization of law in China beginning around 100 B.C.).

pursuit of personal reward.²⁷⁶ This philosophy encouraged moral development of the individual as a means of promoting social order, and viewed the legal system as disruptive of this order due to its litigious nature.²⁷⁷ The emphasis on the good of society also led to the belief that previous generations had discerned the essence of human understanding.²⁷⁸ The act of copying did not carry the dark connotation that it does in the West.²⁷⁹ In fact, the act exemplified the user's comprehension of and devotion to the core of civilization itself.²⁸⁰ Consequently, copying was a highly honored and accepted process in China.²⁸¹ The greatest compliment that an author could receive was having someone copy his work.²⁸²

Maoist ideology²⁸³ exerted a major impact on the shaping of the modern Chinese legal system.²⁸⁴ Early socialism, as practiced under Mao Tse-Tung's leadership, viewed the law as a tool for the oppression of a class of people.²⁸⁵ Mao Tse-Tung also

276. See Butterson, *supra* note 188, at 1109 (explaining rationale behind Confucianism's subordination of personal interests to societal good). The author summarized Confucius' vision of society as that constituting of a set of relationships with reciprocal responsibilities and expectations that the parties are morally bound to fulfill. *Id.* Consequently, one who insists on individual rights disrupts the reciprocity, thereby disrupting the harmony that holds the group together. *Id.*

277. See BODDE & MORRIS, *supra* note 275, at 50 (describing Confucianization as naturalization of law). "Law was fitted into the wider doctrine of the oneness of man and nature, which maintained that man should shape his institutions in harmony with the forces of nature." *Id.*

278. See WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE* 25, (1995) (discussing Confucius' emphasis on need to interact with past to promote individual moral and collective social development). "The essence of human understanding had long since been discerned by those who had gone before, and in particular, by sage rulers collectively referred to as the Ancients, who lived in a distant 'golden age'." *Id.*

279. *Id.* at 28-29. Through copying, one can interact with the past, which is a distinctive mode of intellectual and imaginative endeavor in traditional Chinese culture. *Id.*

280. *Id.*

281. *Id.*

282. See Susan Orenstein, *Disney Duels with Chinese "Pirates" Over Mickey: Case Goes to New Beijing Court*, *LEGAL TIMES*, July 25, 1994 at 2 (quoting Anna Han, as assistant professor at Santa Clara University).

283. See Richard Goldstein, *Copyright Relations Between the United States and the People's Republic of China: An Interim Report*, 10 *BROOK. J. INT'L L.* 403, 410-11 (1984) (discussing political and economic roles of Chinese government under Maoist regime from 1949 to 1976). The Maoist ideology considers private capital to be a means of exploitation, and that the renunciation of private property is essential to the success of the class struggle and the economic growth of the nation. *Id.*

284. *Id.*

285. See LASZLO LADANY, *LAW AND LEGALITY IN CHINA, THE TESTAMENT OF A CHINA-*

believed that the masses should have access to creative works.²⁸⁶ China is not alone in its hostile attitude toward art as belonging to the author.²⁸⁷ The acquisition of private property was largely forbidden in China because traditional Marxism considered the renunciation of private property essential to economic growth.²⁸⁸ Consequently, the concept of copyright as a private property right conflicted with the basic tenets of Marxism.²⁸⁹

The language in China's Copyright Law demonstrates the country's emphasis on the subordination of an individual's interests to the goal of society.²⁹⁰ The purpose of protecting copyright was to encourage the creation and dissemination of works which would contribute to the building of an advanced socialist culture and ideology and to socialist material development, as well as the development and advancement of socialist culture and sciences.²⁹¹ As part of these goals, the Copyright Law prohibits copyright holders from violating China's Constitution and

WATCHER 62 (1992) (describing Mao Tse-tung's use of laws to suppress counter-revolutionaries).

286. See Mao Tse-tung, *Talks at the Yen-an Forum on Literature and Art* (May 1942), reprinted in 3 *SELECTED WORKS OF MAO TSE-TUNG* 69, 84 (1975) (arguing that artists and writers gather their inspiration from lives of people to create works serving masses of people).

287. *Id.* Mao believed that "literature and art are for the masses of the people, and in the first place for the workers, peasants and soldiers; they are created for the workers, peasants and soldiers and are for their use." *Id.* The belief holds ground in Russia as well, where officials have found it difficult to convince their citizens that copying or buying pirated software is wrong, because, according to old communist ideals, intellectual property belongs to the public at large. See Rob Guth et al., *S.O.S. (save our software)*, *COMPUTER WORLD*, July 31 1995, at 88 (providing overview of piracy situation in Russia).

288. Goldstein, *supra* note 283, at 411.

289. See Jing-Kai Syz, Note, *Expanding the Patent Law of the People's Republic of China: A Proposal for Patent Protection of Computer Programs*, 5 *J. CHINESE L.* 349, 353 (1991) (presenting dilemma faced by Chinese government in promoting intellectual property rights while attempting to preserve nonindividualistic socialist society). Marxism views individuals as elements of the society, and therefore treats individual inventions as social products. *Id.* at 353 n.18. Giving an individual the exclusive rights to reap benefits from an invention contradicts socialist ideals. *Id.*

290. See Lazar, *supra* note 13, at 1206 (arguing that principles of social order had shaped China's Copyright Law).

291. Copyright Law, *supra* note 11, art. 1. Article 1 provides:

This Law is formulated in accordance with the Constitution in order to protect the copyrights and neighbouring rights and interests of authors of literary, artistic and scientific works, to encourage the creation and propagation of works that are beneficial to the development of socialist spiritual and material civilization, and to promote the development of a flourishing socialist scientific and cultural environment.

Id.

laws, or prejudicing the public interests.²⁹²

ii. Economic Disincentives

China shares economic disincentives to the vigorous enforcement of intellectual property rights with many other developing countries.²⁹³ As a developing nation struggling to modernize after years of isolation from the international market, China could not afford to provide the high level of economic protection delineated in TRIPs.²⁹⁴ In the short run, intellectual property rights inhibited China's ability to obtain and use the technological information necessary for her economic growth.²⁹⁵ The Chinese referred to pirated programs as patriotic software,²⁹⁶ because such programs could accelerate China's effort to modernize at minimal costs.²⁹⁷ Pirates could help a country obtain successful products and technology without incurring research and development costs.²⁹⁸ In the short term, piracy could also provide a means of livelihood for Chinese citizens depending completely on the production of pirated goods for a living.²⁹⁹ While rigorous intellectual property protection could drive many domestic enterprises out of business, domestic

292. *Id.* art. 4. Article 4 states that "[w]orks that may not lawfully be published or disseminated shall not be protected under this Law. The exercise by a copyright owner of his copyrights may not violate the Constitution or the law and may not harm the public interest." *Id.*

293. See Yeh, *supra* note 27, at 516-18 (discussing why China would not benefit economically from having an effective intellectual property regime).

294. See Robert M. Sherwood, *The TRIPs Agreement: Implications for Developing Countries*, 37 *IDEA: J.L. & TECH.* 491, 537 (1997) (positing that provisions in TRIPs required developing countries to make costly adjustments in their judicial systems, civil and criminal procedures and border measures). The author accounted for costs by taking into consideration the resources, legislative time, and official attention necessary for implementing TRIPs. *Id.*

295. See Tara Kalagher Guinta & Lily H. Shang, *Ownership of Information in a Global Economy*, 27 *GEO. WASH. J. INT'L L. & ECON.* 327, 330-31 (1993) (describing major benefits developing nations gain from allowing piracy).

296. See James Cox, *U.S. Firms: Piracy Thrives in China*, *USA TODAY*, Aug. 23, 1995, at 2B (explaining why software industry faced greater resistance than entertainment companies in combating Chinese piracy).

297. See Guinta & Shang, *supra* note 295, at 330-31 (explaining how intellectual property piracy produces short-term benefits for developing countries). Most developing countries believe that the efficient use of knowledge is crucial to a nation's economic growth. *Id.* Pirates can provide such knowledge at much lower costs than legitimate producers, and copying only the successful products facilitates the nation's process at absorbing useful knowledge. *Id.*

298. *Id.*

299. See Farley, *supra* note 222, at A1 (quoting David Buxbaum, U.S. attorney spe-

owners of intellectual property rights would profit little from such protections because their limited financial and technical capabilities would prevent them from investing in expensive research and marketing efforts.³⁰⁰

b. Problems with Administrative Enforcement

Administrative enforcement, while the highlight of both the 1995 Accord and 1996 Agreement for combating Chinese piracy, is subject to influences of local protectionism.³⁰¹ Through the economic reform of the 1980s local governments have acquired substantial control over their administrative bodies.³⁰² Consequently, administrative officials can hardly be considered neutral actors in their enforcement of copyright protection.³⁰³

i. Emphasis on Administrative Enforcement in the 1995 Accord and the 1996 Agreement

The 1995 Accord and the 1996 Agreement focus mainly on administrative measures as a means of intellectual property enforcement.³⁰⁴ The 1995 Accord contains guidelines for coordinating investigations,³⁰⁵ factory raids,³⁰⁶ and the prosecution of such cases.³⁰⁷ A foreign owner or his local representatives may submit a petition supported by substantiating evidence to a local

cializing in protecting copyright of U.S. products in China). The local police would be reluctant to shut down an illicit industry if an entire village depended on it. *Id.*

300. See Lu Yimao, *Jiji Youxiao Di Jiasu Jinji Yu Keji De Jiehe* [Speedy and Effective integration of China's Economy with Science and Technology], 11 GUOJI MAOYI [INTERNATIONAL TRADE] 8 (noting that China's general level of technology remains similar to that of 1950s and 1960s in Western countries, that knowledge and skills of scientific and technical personnel are generally obsolete, and that Chinese government has decreased its research and development funding for business enterprises in recent years).

301. See Li, *supra* note 150, at 391-94 (introducing relation between enforcement of provisions in 1995 Accord and 1996 Agreement and local protectionism).

302. See Donald C. Clarke, *What's Law Got to Do With It? Legal Institutions and Economic Reform in China*, 10 U.C.L.A. PAC. BASIN L.J. 1, 13-15 (1991) (describing how change in fiscal system tilted balance of power away from central to local government).

303. See Berkman, *supra* note 271, at 4 (positing that local governments intervened in enforcement activities of administrative officials).

304. See Li, *supra* note 150, at 412 (noting that foreign corporations generally favor administrative over judicial recourse with respect to enforcement of intellectual property rights). While administrative recourse is more expeditious and less expensive, the solution works only when the infringer has no close ties with the local government. *Id.*

305. Action Plan, *supra* note 202, art. I-B(1)(a), at 34 890.

306. *Id.* art. I-B(1)(b) at 890.

307. *Id.* art. I-B(3) at 891.

enforcement authority.³⁰⁸ The responsible agency would then review the petition.³⁰⁹ Upon approval, the local agency would draft an action plan, which would be carried out by local enforcement officials.³¹⁰ The 1996 Agreement reinstated the enforcement measures provided in the 1995 Accord, with the additional involvement of China's Ministry of Public Security.³¹¹ The Ministry of Public Security made piracy a centerpiece of its sweeping nationwide anti-crime campaign, thereby adding tens of thousands of enforcement officials to the anti-piracy effort.³¹²

One of the highlights of the 1995 Accord was the establishment of the IPWC, a special body created to assist provincial, regional, and local administrative agencies in their work.³¹³ The main office of the IPWC functions as a central administrative authority with primary responsibility for policy-making, while its regional offices formulate plans for enforcement actions against infringing operations taking place within their jurisdictions.³¹⁴ The enforcement authority of each jurisdiction assumes responsibility for executing factory raids, arrests, and subsequent prosecutions as requested by the local IPWC.³¹⁵ Each enforcement authority is comprised of regional branches of administrative agencies overseeing intellectual property protection, such as the AIC, the Patent Office, and the Public Security Bureau.³¹⁶

ii. Local Protectionism

One legal scholar has suggested that a key factor of the misunderstanding in Sino-U.S. relations lies in the perceived power or lack thereof of the Chinese government to control the intel-

308. *Id.* arts. I-B(6), I-B(7) at 891.

309. *Id.*

310. *Id.* arts. I-A(5), I-B(1)(a) & I-F(4) at 888, 890, and 900.

311. *See* Chen & Cooper, *supra* note 157, at A2 (reporting series of measures taken by China in early 1996 that were recognized by United States). Other measures included the shutting down of 15 factories found to be manufacturing pirate compact disks, laser disks, and CD-ROMs, heightened enforcement of intellectual property rights in the southern province of Guangdong, and increased cooperation between Chinese and U.S. customs officials in preventing the export of pirated products. *Id.*

312. *Id.*

313. Action Plan, *supra* note 202, arts I-A(4), I-A(6) at 888-89.

314. *Id.* Regional and local IPWC will be set up in 22 provinces and major cities including Guangdong, Beijing, Shanghai, Tianjin, Wuhan, Nanjing, Shenzhen, Jiangsu, Zhejiang, and Fujian. *Id.* art. I-A(4) at 888.

315. *Id.* arts. I-A(5)(a), I-B(1)(a) & I-F(4) at 888, 890, & 900.

316. *Id.* art. (I)(B) at 890.

lectual property situation in China.³¹⁷ The USTR believed that China's problem with copyright piracy resulted not from the country's inability to enforce copyright protection, but rather, its unwillingness to do so.³¹⁸ In fact, the Chinese central government did recognize the critical link between the protection of intellectual property and economic reform.³¹⁹ Although Chinese government directives generally are implemented without question, protection of intellectual property rights is one area where government support alone was not sufficient.³²⁰ China's inability to tackle piracy arose in large part from the Chinese government's 1979 decision to decentralize power from the federal government to local and provincial governments as a means of facilitating the country's transition from a planned to a market economy.³²¹ Since 1979, the Chinese government has granted more authority to local governments to attract direct foreign investment by means of the creation of Special Economic Zones.³²²

Along with decentralization of the central government comes the inevitable consequence of local protectionism.³²³ Today, central government officials no longer dictate the decisions of local officials.³²⁴ The governing body of each jurisdiction is the Local People's Congress³²⁵ ("LPC"), to which the 1982 Con-

317. See Lazar, *supra* note 13, at 1198 (explaining how decentralization of Beijing government limited its ability to enforce intellectual property protection).

318. See David E. Sanger, *In Trade Rift, U.S. Outlines Penalties, and So Does China*, N.Y. TIMES, May 16, 1996, at D6 (reporting U.S. reaction to China's threat of counter-sanctions against United States made in May 1996). In the article, acting USTR Charlene Barshefsky stated that the control of piracy is "not a question about China's capability. It is a simple matter of political will." *Id.*

319. See Berkman, *supra* note 271, at 44 n.68 (stating that aside from U.S. pressure, China has its own reason to enhance its intellectual property system). China is unlikely to receive the foreign technology and investment necessary for its economic reform if foreign right holders find China's intellectual property protection system inadequate. *Id.*

320. *Id.* at 17.

321. *Id.*

322. *Id.* The central government gave local governments of the Special Economic Zones the power to establish institutions necessary to implement, guide, and regulate investment. *Id.* See Shanghai Symposium, *supra* note 2 (discussing China's Open Door Policy and cities designated as Special Economic Zones).

323. See Li, *supra* note 150, at 399 (tracing development of local protectionism). Local protectionism refers to the situation where local officials, in making their political judgements, place the interest of the local community over the state. *Id.*

324. *Id.*

325. See CHIU ET AL., *supra* note 244, at 53-54 (setting forth structure of local gov-

stitution confers the power to elect and dismiss officials at its own level.³²⁶ Consequently, central authorities do not have absolute control over personnel management for the LPC.³²⁷ In fact, with deputies becoming more active in the election process, the LPC draws most of its members from the local pool, which consists of native political elite and well-connected senior local officials.³²⁸

Elected by the LPC, a local leader is tempted to place local interests over state policies in making political judgments.³²⁹ The fiscal system established in the early 1980s required local governments to surrender only a portion of their revenues to the central Chinese government.³³⁰ The remaining portion of local revenues allowed local governments to function as independent fiscal entities responsible for managing local expenditures.³³¹ As a result, local officials could intervene in court judgments that would seriously jeopardize local business enterprises, because such officials would be directly accountable for the judgements' negative political, economic, and social ramifications.³³²

ernments). Closely linked to the government at its own level, the Local People's Congress ("LPC") can enact and promulgate local regulations. *Id.* Members of the LPC are elected directly by the citizens. *Id.*

326. Xianfa [P.R.C. Constitution], art. 101 (1982) *translated in* LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA GOVERNING FOREIGN MATTERS 295 (1991). Article 101 states:

Local people's congresses at their respective levels elect have the power to recall governors and deputy governors, or mayors and deputy mayors, or heads and deputy heads of counties, districts, townships and towns. Local people's congresses at and above the county level elect, and have the power to recall, presidents of people's courts and chief procurators of people's procuratorates at the corresponding level. The election or recall of chief procurators of people's procuratorates shall be reported to the chief procurators of the people's procuratorates at the next higher level for submission to the standing committees of the people's congresses at the corresponding level for approval.

Id.

327. *See* Li, *supra* note 150, at 399 (discussing central government's decreasing role in LPC).

328. *Id.*

329. *Id.* at 400.

330. *See* Clarke, *supra* note 302, at 13-15 (describing how change in financial system tilted balance of power away from central to local governments). The central government receives a substantial portion of its revenues from agreements described as financial contracting with local governments. *Id.* These agreements set up a system similar to tax farming where the central government assumes a passive role. *Id.*

331. *Id.*

332. *See* Wang Xinxin, *Shilun Puochanfa De Tiaozheng Jizhi Yu Shishi Wenti* [Problems

Local protectionism poses a major hindrance to administrative enforcement.³³³ Administrative officials must confront powerful local officials who profit from piracy and military officials who actually run illegal factories.³³⁴ In addition, local agencies and departments entrusted with the responsibility for enforcing intellectual property laws are staffed with the same officials wishing to impede the enforcement.³³⁵ Finally, the lack of financial and technological resources available to local enforcement bodies further subjects copyright enforcement to local protectionism.³³⁶

II. ALTERNATIVES TO TRADE SANCTIONS, TRIPS, AND ADMINISTRATIVE ENFORCEMENT AS CURES TO CHINA'S COPYRIGHT PROBLEMS

In order to cure China's copyright problems, China and

in *Implementing Bankruptcy Law*], 4 ZHONGGUO FAXUE [CHINESE LEGAL STUDIES] 85 (1991) (arguing lack of judicial independence as one of major impediments to implementing Chinese bankruptcy laws).

333. See Berkman, *supra* note 271, at 19 (discussing how localism erodes effectiveness of administrative enforcement).

334. *Id.* Such officials are often unwilling to enforce laws against prominent local businesses that generate the majority of local revenues. *Id.* Consequently, the enforcement of intellectual property rights depends not on legal imperatives, but rather on the interests of the local authorities. *Id.* For example, Cai Ling Audio and Video Company, a major pirate disk factory, houses its office in a Chinese Air Force military compound and pays monthly rent to the military landlords. See Seth Faison, *Copyright Pirates Prosper in China Despite its Promises*, N.Y. TIMES, Feb. 20, 1996 at A1 (reporting Chinese copyright pirate's view toward piracy). Furthermore, CD plants in Guandong are known to have local backers such as units of the People's Liberation Army and Public Security Bureau, who share the profits from the sale of CDs that cost US\$0.36 to make and sell for US\$4.30 each in Hong Kong. See Joyce Barnathan et al., *A Pirate Under Every Rock*, BUS. WK., June 17, 1996, at 50 (reporting on Chinese central government's lack of power to curtail piracy in southern China).

335. See Berkman, *supra* note 271, at 19 (describing infiltration of local protectionism into administrative enforcement). For instance, while the 1995 Accord established the IPWC as a presumably independent body aimed at overseeing enforcement measures implemented at all levels, local task forces are responsible for actually implementing such measures. *Id.* The administrative authority having jurisdiction over the area in which the infringer is located had the exclusive power to grant preliminary injunctions and award remedies. *Id.*

336. *Id.* at 20. The 1995 Accord required local government to bear the cost and expense of implementing enforcement measures. *Id.* A conflict of interest arises when a local government has to choose between protecting profitable, although illegitimate, local businesses and expending the resources to close such businesses down. *Id.* Consequently, enforcement officials can not act neutrally where a local government directly controls the recruitment, finance, and management of a region's enforcement authority. *Id.*

other countries have relied on TRIPs,³³⁷ trade sanctions,³³⁸ and administrative enforcement.³³⁹ However, there are several other approaches that can be taken.³⁴⁰ These include employing the judicial system,³⁴¹ education,³⁴² and joint ventures.³⁴³ Aside from TRIPs, the WTO also provides a set of rules for dispute settlement that will govern China's international copyright disputes upon the country's accession to WTO.³⁴⁴

A. *Enhancement of the Judicial System*

Since the enactment of the Copyright Law in 1991, China created mechanisms within the judicial system to cope with copyright piracy.³⁴⁵ The Chinese government established specialized intellectual property courts³⁴⁶ and approved new criminal penalties for copyright violators.³⁴⁷ Unfortunately, local protectionism and the lack of legal professionals within the judicial system pose obstacles to the judicial enforcement of intellectual property rights.³⁴⁸ Nevertheless, the nature of judicial proceedings and remedies available may still make the judicial system an attractive recourse to copyright holders.³⁴⁹

337. See *China & TRIPs*, *supra* note 20, at 6-9 (briefing China's efforts at implementing provisions of TRIPs).

338. See Lazar, *supra* note 13, at 1185-91 (describing role of trade sanctions in U.S. fight against piracy in China from 1990 to 1996).

339. See Li, *supra* note 150, at 412 (noting that great emphasis was placed on administrative enforcement in both 1995 Accord and 1996 Agreement as means to curb Chinese piracy).

340. See Berkman, *supra* note 271, at 26-34 (arguing that lack of competence among legal personnel, business agencies, and Chinese citizenry at addressing piracy problems within China's copyright system impedes its enforcement).

341. See *China & TRIPs*, *supra* note 20, at 7 (discussing China's efforts to enforce intellectual property rights in judiciary realm).

342. Action Plan, *supra* note 202, art. II(A)(1)&(2) at 34 I.L.M. 905.

343. Agreement Letter, *supra* note 201, at 34 I.L.M. 884.

344. Understanding on Rules and Procedures Governing the Settlement of Disputes, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, Legal Instruments – Results of the Uruguay Round vol. 1 (1994) 33 I.L.M. 1125, 1226 (1994) [hereinafter Dispute Procedures].

345. See *China & TRIPs*, *supra* note 20, at 7 (discussing China's progress in judicial enforcement of intellectual property rights).

346. *Id.*

347. *Id.* at 8.

348. See Berkman, *supra* note 271, at 23-26 (delineating weaknesses within judicial enforcement in China).

349. See Li, *supra* note 150, at 413 (advocating judicial recourse to addressing copyright violations).

1. The Present State of China's Judicial System

China's judicial system has four levels of courts.³⁵⁰ The *zui-gao renmin fayuan*, the Supreme People's Court, is the highest court of China.³⁵¹ Below that there are thirty *gaoji renmin fayuan*, Higher Level People's Courts, one for each province, autonomous region, and municipality such as Shanghai and Beijing.³⁵² Below the Higher Level People's Courts are 389 *zhongji renmin fayuan*, Intermediate Level People's Courts, that sit at the district level in Beijing, Tianjing, and Shanghai, and at the prefecture and municipality level in the rest of the country.³⁵³ At the lowest level are some three thousand *jiceng renmin fayuan*, Basic Level People's Courts, which sit at the county level.³⁵⁴ A total of 106,000 Chinese judges are chosen by the People's Congress or the appropriate level standing committee.³⁵⁵ Unlike U.S. federal judges, Chinese judges do not have tenure, and thus are not im-

350. See Georgory S. Kolton, *Copyright Law and the People's Courts in the People's Republic of China: a Review and Critique of China's Intellectual Property Courts*, 17 U. PA. J. INT'L ECON. L. 415, 427 (1996) (setting forth court structure in China). The People's Courts have the duty to adjudicate issues in areas including criminal matters pursuant to the Criminal Law of China, civil matters pursuant to the Civil Law of China, economic matters, and administrative matters. *Id.* at 426-27.

351. Xianfa [P.R.C. Constitution], *supra* note 326, arts. 123-35. The Supreme People's Court hears cases that are of national dimension and reviews decisions of both the Higher People's Courts and the Special People's Courts. See Kolton, *supra* note 350, at 428 (describing role of Supreme People's Court).

352. See Donald C. Clarke, *Power and Politics in the Chinese Court System: The Enforcement of Civil Judgements*, 10 COLUM. J. ASIAN L. 1, 7 (1996) [hereinafter *Power & Politics*] (describing court structure in China). Autonomous regions include Tibet and Xinjiang. See Kolton, *supra* note 350, at 428 (describing role of Highest People's Courts). The Highest People's Courts have original jurisdiction over priority issues within a province, autonomous region, or municipality, and hear appeals taken from the Intermediate People's Courts. *Id.*

353. See Kolton, *supra* note 350, at 427-28 (describing hierarchical level of Intermediate People's Courts). Intermediate People's Courts function as both court of original and appellate jurisdiction. *Id.*

354. *Id.* at 427-28. The Basic People's Courts operate as lower courts of original jurisdiction only. *Id.* In remote areas of the country, Basic People's Courts have branch courts known as People's Tribunals (*renmin fating*) whose decisions have the same binding power as that of the Basic People's Courts'. See *Power & Politics*, *supra* note 352, at 7 (describing court structure in China). There are over 18,000 People's Tribunals in the country. *Id.*

355. See *Power & Politics*, *supra* note 352, at 6-7 (providing statistics on number of courts and judges in China). Aside from judges, China's courts are also staffed with assistant judges. *Id.* Unlike judges, who are appointed by the local People's Congress or its Standing committee, assistant judges are appointed by the court, and may perform the same function as judges. *Id.* at 6 n.14.

mune from external pressures and localism.³⁵⁶

One entity foreign to the U.S. judicial system is China's Adjudication Committee.³⁵⁷ While individual judges, or a collegiate bench of judges and lay people, can handle minor non-politically sensitive cases on their own, they do not have such independence in important cases.³⁵⁸ Decision-making power for such cases rests with the court's Adjudication Committee, which has the power to override the judges' decisions and direct them to enter a different verdict.³⁵⁹ Adjudication Committee members include the president of the court, the vice-president, the head and deputy head of the various specialized chambers, and the judges, most of whom may be Communist Party members as well.³⁶⁰

China established new intellectual property Courts to cope with the increasing number of intellectual property litigation.³⁶¹ By early 1994, the country established specialized intellectual property courts in Beijing, Shanghai, Fujian, Xiamen, Shenzhen, Haikou, Zhuhai, and Guangdong.³⁶² By January 1996, eighteen

356. *Id.* at 8. Aside from judges on the Supreme People's Court, who are appointed by the central government, other judges are chosen by the corresponding People's Congress Standing Committee, which, in turn act as rubber stamps for the local Communist Party. *Id.*

357. See Berkman, *supra* note 271, at 22-23 (providing brief overview of China's Adjudication Committees).

358. *Id.* Cases that may be deemed important include those that involve complex legal issues, significant economic disputes, highly charged public issues, or sensitive political matter. *Id.*

359. *Id.* While an individual judge will hear a case, following consultation, the Adjudication Committee may direct the judge to enter a particular verdict, advise the judge to seek more information from the parties, or submit the case to a higher level court for guidance. *Id.* Consequently, there have been reports of Adjudication Committees routinely deciding cases, leading to the saying "those who try the case do not decide it, and those who decide the case do not try it" (*shenzhe bu pan, panzhe bu shen*). See Clarke, *supra* note 302, at 61 n.261 (listing articles criticizing Adjudication Committee's practice of deciding before trial).

360. See Berkman, *supra* note 271, at 23 (describing China's Adjudication Committees).

361. See Kolton, *supra* note 350, at 435-36 (discussing China's decision to set up specialized intellectual property courts). Prior to the establishment of specialized intellectual property courts, intellectual property cases were handled either by the Civil or Economic Divisions of People's Courts. *Id.*

362. See Chenguang Ma, *China: More Courts to Protect Trademarks and Patents*, CHINA DAILY, Mar. 29, 1994, available in LEXIS, World Library, Txtln File (reporting judicial aspect of China's efforts at enforcing intellectual property rights). Within one month of its inception in February 1994, special courts in Shanghai had already handled more than 600 cases. *Id.* An official with the Supreme People's Court interpreted the setting

such courts had come into existence.³⁶³ The Chinese government also established an intellectual property appellate division in the Beijing Municipal Higher People's Court that has exclusive appellate jurisdiction for the entire nation in the manner in which the U.S. Courts of Appeals for the Federal Circuit have jurisdiction for the United States.³⁶⁴

In 1994, China's legislature, the National People's Congress, approved new criminal penalties for copyright violators, leading to the enactment of the Resolution on Punishing the Crime of Copyright Violations ("Resolution on Crime").³⁶⁵ The new law added provisions to the Criminal Law of the People's Republic of China³⁶⁶ ("Criminal Law") providing for fines and jail terms of up to seven years for violators.³⁶⁷ In 1995, China enacted a new Judges Law³⁶⁸ to clarify the qualifications, training, and responsibilities of judges.³⁶⁹ One year later, the Na-

up of new intellectual property courts as part of the country's progressive approach to strengthening the protection of intellectual property. *Id.*

363. See IPR Laws Bolstered by Addition of Courts, XINHUA NEWS AGENCY, Aug. 23, 1995, available in LEXIS, News Library, Wires File (reporting China's progress within legal system in protecting intellectual property rights). Infringement cases have been increasing at an annual rate of 30% between 1992 and 1995, constituting 70% of the 2000 property rights infringement cases every year. *Id.* The courts have imprisoned approximately 350 people each year for violating intellectual property rights. *Id.*

364. See Butterton, *supra* note 188, at 1101 (providing overview of China's intellectual property courts and judges).

365. See *Intellectual Property Protection in China: New Criminal Penalties for Copyright Violators*, E. ASIAN EXEC. REP., July 15, 1994, available in LEXIS, Asiapc Library, Easian File [hereinafter *New Criminal Penalties*] (providing highlights of New Criminal Penalties). Prior to the enactment of the New Criminal Penalties, copyright violation was only a civil liability. *Id.*

366. Criminal Law of the People's Republic of China (1979) translated in STATUTES AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA code no. 790706 (1987) [hereinafter *Criminal Law*].

367. See *New Criminal Penalties*, *supra* note 365 (briefing provisions of New Criminal Penalties). The new law also calls for the confiscation of illegal profits, pirated products, and equipment used in the piracy. *Id.* Crimes that are punishable include the reproduction, distribution and marketing of books, fine art, audio/visual products and computer software. *Id.* Retail sellers will receive jail sentences that are one year less than the makers and distributors of pirated products. *Id.* For company violators, the top manager will be subject to both jail sentencing and fines, whereas the company will be subject to fines. *Id.*

368. See *China Law: China Issues Laws on Judges, Procurators, Police*, XINHUA NEWS AGENCY, Feb. 28, 1995 (describing purposes of new Chinese laws on judges, procurators, and police effective July 1, 1995).

369. *Id.* The Judges Law solidifies the responsibilities and duties of judges by setting forth the duties, rights, obligations, qualifications, appointment, dismissal, ranking, examination, training, awards, penalties, employment treatment, and resignation of

tional People's Congress passed amendments to the Criminal Procedure Law of the People's Republic of China³⁷⁰ ("Criminal Procedure Law") allowing civil prosecution by individuals.³⁷¹

2. Problems within the Judicial System

There are several flaws in the Chinese judicial system that deter the enforcement of intellectual property rights.³⁷² One problem concerns the courts' inability to render impartial judgments.³⁷³ Chinese judges and court officers do not always enjoy sufficient independence to avoid the intervention of such interested parties as do local officials, senior government officials, and influential local businesses.³⁷⁴ Local officials derive their power to shape the outcome of a case from the fact that those officials control the expenditures of the courts as well as the housing and employment opportunities of the judges' children.³⁷⁵ Succumbing to local pressures, judges may unreasona-

judges. See *New Law Digest - National: Legal System*, CHINA L. & PRAC., Mar. 31, 1995, at 9 (briefing developments in China's legal system to enhance intellectual property protection).

370. Criminal Procedure Law of the People's Republic of China (1979) translated in STATUTES AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA code no. 790707 (1987) [hereinafter Criminal Procedure Law].

371. See Shirley Kwok, *New PRC Criminal Procedures Enable Private Prosecutions*, IP ASIA, May-June 1997, at 62 (introducing new criminal provisions). Prior to the enactment of the new criminal provisions in March 1996, an intellectual property right owner may initiate action against the infringer by filing complaints with the AIC or bringing a law suit to the People's Court as a civil matter. *Id.* In cases where the quantity of infringing goods and the quantum of illegal profits are substantial, the intellectual property rights owner may report to the People's Procuratorate as a criminal case. *Id.* However, it is up to the People's Procuratorate to decide whether or not to prosecute the case. *Id.*

372. See Berkman, *supra* note 271, at 22-26 (detailing weaknesses in China's legal system, such as ability to render impartial judgments and to enforce their orders). The author pointed out that the court's reliance on local officials to enforce court orders may subject the court to local protectionism. *Id.* Note, however, that administrative enforcement is also subject to local protectionism. See *id.* at 18-21 (discussing problem of localism in the context of administrative enforcement).

373. *Id.*

374. *Id.* Local governments rely on local enterprises for revenues and employment. See *Power & Politics*, *supra* note 352, at 42-43 (explaining local protectionism as external obstacle to execution of court orders). In fact, some of the local enterprises are run by local political leaders. *Id.*

375. See *id.* at 42 (delineating practical basis behind court's deference to wishes of local leaders). As one legal reporter noted, "[e]very aspect of local courts, including personnel, budgets, benefits, employment of children, housing, and facilities, is controlled by local Party and government organs, as are promotions and bonuses." *Id.* Generally, courts are required to turn a portion of the fees collected either to a higher

bly deny motions for transfer of forum, render judgments highly favorable to local parties and refuse to respect former judgments by other courts.³⁷⁶

Another concern relates to the lack of legal training among Chinese judges.³⁷⁷ When the Chinese Communist Party came into power in 1949, all property, including intellectual property, became collectively owned by the state.³⁷⁸ Official Marxist doctrine viewed artistic work to be without value,³⁷⁹ and intellectual property had no place in a society where law and the judicial system became secondary to state interest and government policy.³⁸⁰ The contempt for intellectual property culminated in the Cultural Revolution, when the Chinese government abolished all intellectual property rights along with China's legal system.³⁸¹ The destruction led to the current legal system that is so new that many of the Chinese who do have a working knowledge of the system are too young to serve as judges.³⁸² Therefore, the legal system is run primarily by judges who are retired army ser-

court or the local government's treasury. *Id.* The fees that remain are not sufficient to cover salaries and other expenses, which must be met with funding from the local government. *Id.*

376. See Li, *supra* note 150, at 399 (discussing adverse effect of local protectionism on China's judicial system).

377. See Kolton, *supra* note 350, at 450 (noting that legal system in China is so new that there is a shortage of persons qualified to serve as judges). *But cf.* Iris Yokoi, *Chinese Jurist in U.S. to Study Laws*, L.A. TIMES, Apr. 3, 1994, at 9 (reporting on Chinese judge's visit to Los Angeles). Justice Zongyi Fei, a member of the Supreme People's Court, is extremely well-trained in intellectual property law. *Id.* In early 1994, for example, he traveled to Los Angeles for four days to meet with U.S. legal and business professionals to discuss intellectual property matters. *Id.*; see also Li, *supra* note 150, at 413 (noting that in 1992, the Supreme People's Court and twenty high courts offered special training session for judges).

378. See Kristie M. Kachuriak, *Chinese Copyright Piracy: Analysis of the Problem and Suggestions for Protection of U.S. Copyrights*, 13 DICK. J. INT'L L. 599, 603 (1995) (explaining that communists believe property should be collectively owned by state to eliminate class inequities).

379. *Id.*

380. See Simpson, *supra* note 180, at 583 (discussing copyright's role in China's society under Mao Tse-tung's regime). During that time, copyright existed only in the form of administrative regulations governing remuneration between copyright owners and publishers. *Id.*

381. *Id.* at 583-84; see Berkman, *supra* note 271, at 35 (providing brief discussion on Cultural Revolution).

382. See Donalde C. Clarke, *Dispute Resolution in China*, 5 J. CHINESE L. 245, 257 (1991) [hereinafter *Dispute Resolution*] (pointing out lack of qualification among people serving as judges). Judges have been known to use their law clerks as "substitute judges" to fill in where there are shortages of available judges. *Id.*

geants having no formal legal training.³⁸³

Aside from a lack of legal training of judiciary personnel, China also suffers from a scarcity of lawyers.³⁸⁴ Currently, the country has 90,000 lawyers with the educational system producing only about 700 lawyers a year and the Government stressing the need for 150,000 attorneys by the year 2000.³⁸⁵ Accompanying the strain on legal personnel is the increasing rate of lawsuits from 1996 to 1997.³⁸⁶ The lack of trained and experienced lawyers has a deleterious effect on court proceedings, especially in China where the court follows the inquisitorial system.³⁸⁷

3. Advantages of the Judicial System

Chinese courts offer advantages to business owners that are not available from administrative agencies.³⁸⁸ Chinese courts re-

383. *Id.*

384. *Id.* at 29 (citing to William P. Alford, *Tasselled Loafers for Barefoot Lawyers: Transformation and Tension in the World of Chinese Legal Workers*, 141 *CHINA Q.* 22, 30 (Mar. 1995)). At the inception of economic reform in 1980, China had only three thousand lawyers. *Id.* As of 1996, there were ninety thousand Chinese lawyers. See Chenguang Ma, *Role of Lawyers to be Expanded*, *CHINA DAILY*, June 24, 1996, at 13, available in 1996 WL 8531404 (reporting on resurgence in number of lawyers since abolishment of legal system in 1959).

385. See Berkman, *supra* note 271, at 29 (pointing out lack of trained legal professionals in China).

386. See *China Courts Handle More IPR Suits*, *CHINA BUS. INFO. NETWORK*, July 17, 1997 (reporting rise of intellectual property disputes in China, with quarter of cases occurring in prosperous areas such as Beijing, Shanghai, Jiangsu, and Guangdong). Statistics show that the number of court battles over IPR violations in 1996 was 11.8% higher than in 1995, and the figure for the first five months in 1997 had rocketed by 15.3%. *Id.*

387. See *Dispute Resolution*, *supra* note 382, at 258-59 (addressing lack of guidance for judges in making their decisions). In China, laws and regulations are enacted by a wide range of governmental and quasi-governmental bodies with no comprehensive and up-to-date indexes available. *Id.* Furthermore, there is no case-reporting system, and very often judges may not find any statutory rule on point. *Id.* Consequently, judges are left to their own initiative in acquiring the information necessary for making their decisions. *Id.* But cf. NANPING LIU, *JUDICIAL INTERPRETATION IN CHINA* 38 (1997) (discussing role of Supreme People's Court in China's legal and political systems). Beginning in 1985, the Supreme People's Court of China publishes some of its decided cases in the Gazette. *Id.* The decisions reported in the Gazette may actually carry force as precedents, depending on the comments the Court makes as well as the sensitivity of the issues involved. *Id.* at 145-48.

388. See Li, *supra* note 150, at 412-13 (advocating judicial approach toward resolving intellectual property infringement cases). Aside from the promptness in court actions, the author also mentioned the superior level of education and lesser degree of corruption among judicial personnel as reasons for choosing a judicial over an administrative recourse. *Id.*

spond more promptly than administrative agencies.³⁸⁹ In a civil case, a complainant can obtain preliminary injunctive relief from a court within forty-eight hours.³⁹⁰ A complainant can also request a search of an infringer's business premises if the complainant can prove that such action is necessary to preserve evidence or protect his or her property interests.³⁹¹ If a complainant can produce sufficient evidence to require immediate action, a court may issue preliminary measures prior to the complainant's submission of court papers.³⁹²

Forum shopping and criminal prosecution enable a court to overcome some local influences that have hindered administrative enforcement efforts.³⁹³ While an administrative agency can only take action against local infringers, a court, using proper procedures, may institute preliminary actions against infringers with place of business located outside the locality.³⁹⁴ Criminal action poses a powerful threat to the potential infringers.³⁹⁵ Due

389. *Id.*

390. *Id.*

391. Code of Civil Procedure of the People's Republic of China (1991), translated in CHINA LAW REFERENCE SERVICE ref. no. 1420/91.04.09, arts. 74 and 93. Article 74 states that "[w]here there is a possibility that evidence may be destroyed or lost or be difficult to take at a later time a participant in an action may apply to the People's Court for preservation of the evidence. The People's Court may also take measures to preserve such evidence on its own initiative." *Id.* The relevant portion of Article 93 provides:

Where, due to urgent circumstances, the lawful rights and interests of an intermediary person would be irreparably harmed if he did not immediately apply for preservation of property, such person may apply to the People's Court requesting measures for the preservation of property prior to the institution of an action. The applicant shall provide security. If applicant fails to provide security, his application shall be rejected.

Id.

392. *Id.*

393. See Li, *supra* note 150, at 413 (pointing to availability of forum shopping and criminal action in judicial proceedings that are absent in administrative context). Forum shopping becomes especially powerful where the foreign owner has investments in the area. *Id.*

394. *Id.* at 414. In a breach of contract case, Yanbian Leather Factory vs. Mishan City Shoe Factory, a city court was able to detain a suspect and confiscate his properties without the consent of the suspect's local court. *Id.* The Supreme People's Court has recently waived the requirement of consent out of consideration of undue influence of local protectionism. *Id.*

395. See *New Chinese Copyright Law Introduced China: Establishes Copyright Law Introducing Criminal Provisions for Infringement*, MORGAN-GRAMPIAN, Sept. 1, 1994, available in WL 14021462 [hereinafter *Criminal Provisions for Infringement*] (reporting on introduction of criminal provisions to China's copyright law). According to Jui Chian Giouw, regional director Asia of the IFPI, experiences in enforcing intellectual property in

to the fact that criminal procedures afford many coercive measures that are not available in civil cases, criminal action grants Chinese law enforcement officials more investigative power than their civil counterparts.³⁹⁶

Criminal proceedings enhance the courts and administrative agencies' jurisdictional power under forum shopping.³⁹⁷ An owner may choose either the forum where the crime was committed or the forum where the accused resides.³⁹⁸ Although the courts have not defined what is meant by the forum where the crime was committed, Chinese legal scholars have interpreted it as the place where the crime was prepared, where the crime was committed, where the crime has caused consequences, or where the illegal property was sold, and this interpretation has been followed by trial courts.³⁹⁹

Until 1994, copyright infringement remained only a civil, not criminal, offense.⁴⁰⁰ To further eradicate illegal reproduction activities and other aggravated acts of copyright, China adopted the Resolution on Crime.⁴⁰¹ The Resolution on Crime provided criminal penalties of three to seven years imprisonment for acts of reproduction of other people's works without prior authorization, where the amount of illegal income is large, or where other particularly serious circumstances existed.⁴⁰²

other countries have shown criminal sanctions to be "the only effective deterrent to copyright infringement." *Id.*

396. See Li, *supra* note 150, at 424 n.129 (noting that prosecutors have been taking advantage of criminal procedures to force third party's payment resulting from civil adjudication).

397. *Id.* at 420.

398. Criminal Procedure Law, *supra* note 370, art. 19.

399. See ZHIPEI ZHANG, XING SHI SU SONG FA JIAO CHENG [TEXTBOOK OF CRIMINAL PROCEDURE LAW] 112 (1982) (analyzing forum selection under Article 19 of Criminal Procedure Law). Forum where the accused resides can be the place where the accused lives, works, or studies. *Id.*

400. See Ping Yang, *An Analysis of the Punishment for Crimes of Intellectual Property Infringement in China*, 4 CHINA PAT. & TRADEMARKS 74, 74-75 (1996) (describing efforts of People's Courts of China in protecting intellectual property rights through criminal punishment). Prior to the enactment of the Resolution on the Punishment of Crimes of Copyright Infringement in 1994, copyright infringement was not considered a criminal offense, because the Chinese Copyright Law does not contain provisions for criminal punishment. *Id.*

401. *Id.*

402. See Shen, *supra* note 12, at 7 (introducing Resolution on Crime). The Resolution on Crime, however, does not specify what figure of the amount of illegal income constitutes large, nor does it define circumstances that would come under serious. See Yang, *supra* note 400, at 75 (defining criteria for constituting a crime). The closest

Acts of selling such infringing articles, fully knowing they are illegally reproduced, are also criminal acts, for which the actors, in addition to being fined, may be sentenced to fixed terms of imprisonment ranging from two to five years.⁴⁰³ Since 1997, the China have added new provisions to its Criminal Law introducing civil prosecution to individual copyright owners,⁴⁰⁴ and criminal sanctions for infringements of registered trademarks, copyright, patents and breach of trade secrets.⁴⁰⁵ With respect to copyright infringement, the new provisions distinguish between illegal income that are large from those that are very large, and circumstances that are serious from those that are very serious, and reduces the maximum period of imprisonment for the former category from seven to three years.⁴⁰⁶ The new provision also reduced the maximum period of imprisonment from five to

reference available is the Supreme People's Court's interpretation, which defines the amount as illegal income exceeding Rmb 20,000 (US\$2,400) for the individual, and Rmb 100,000 (US\$12,100) for an entity. *Id.* Where the infringer had been held administratively or civilly liable two times or more before, or the value of the illegal business exceeds Rmb 100,000 (US\$12,100) for an individual or Rmb 500,000 (US\$60,500) for an entity, they should be regarded as coming under "serious, or especially serious" circumstances. *Id.*

403. See Shen, *supra* note 25, at 7 (briefing criminal penalties provided by Resolution on Crime). Aside from jail sentences, infringers will also be liable for losses incurred by the right owner due to the infringement. *Id.*

404. See Kwok, *supra* note 371, at 62 (discussing new criminal provisions that have been added to China's 1979 Criminal Law). To be entitled to the right to private prosecution, the right owner must prove that the infringing acts concerned warrant criminal sanctions under China's laws, the harm incurred is protectable in China, and that the case has not been previously investigated or prosecuted by the People's Procuratorate. *Id.*

405. See August Zhang, *New Criminal Law Addresses IP Infringement*, IP ASIA, August 1997, at 36 (summarizing highlights of amendments made to China's criminal law scheduled to come into effect on October 1, 1997).

406. *Id.* at 38. In Article 217 concerning copyright infringement, the Chinese government distinguishes between infringers whose profits are large and those that are very large, as well as circumstances that are serious and those that are exceptionally serious. *Id.* at 38. Article 217 limits the maximum period of imprisonment to three years for infringers whose amount of illegal income is large (Rmb 20,000 – 100,000 (US\$2,500 – 12,500) for individual, Rmb 100,000 – 500,000 (US\$12,500 – 62,500) for legal entity) or if circumstances are serious (value of business Rmb 100,000-100 million (US\$12,500-12.5 million) for individual, and Rmb 500,000-500 million (US\$62,500-62.5 million) for legal entity). *Id.* Infringers may be subject to three to seven years of imprisonment only when their amount of illegal income is very large, in other words, exceeding Rmb 100,000 (US\$12,500) for individual, Rmb 500,000 (US\$62,500) for legal entity, or when the circumstance is exceptionally serious (value of business exceeding Rmb 100 million (US\$12.5 million) for individual, and Rmb 500 million (US\$62.5 million) for legal entity. *Id.*

three years for sellers of infringed products.⁴⁰⁷

The Chinese courts did not hesitate to impose criminal penalties on intellectual property violators.⁴⁰⁸ Recently, the Supreme People's Court sentenced two managerial staffs to seventeen and eleven years of imprisonment respectively for their company's production of US\$1.45 million worth of pirate video and audio CDs.⁴⁰⁹ The People's Court in Chengdu sentenced a man to two and a half years in prison for selling US\$361,000 worth of pirated software.⁴¹⁰ The court's decision was important in that it was the toughest criminal sanction yet imposed for selling counterfeit software.⁴¹¹

B. *Education*

The vast majority of Chinese officials and citizenry are unfamiliar with the general principles of copyright law.⁴¹² Copyright infringers tend to fall into two categories.⁴¹³ One kind of infringer knows little about the law in general, and much less about intellectual property laws.⁴¹⁴ The other kind of infringer is a lawless individual who makes his living by illegal copying.⁴¹⁵

In theory, China recognized the importance of education to the enforcement of intellectual property rights.⁴¹⁶ In the second part of the Action Plan, China promised to initiate education and training concerning intellectual property rights.⁴¹⁷ The Government agreed to incorporate intellectual property laws into the country's current law popularization plan.⁴¹⁸ The Gov-

407. *Id.* at 39.

408. *See IPR Violator Gets 17 Years*, *IP ASIA*, May-June 1997, at 5 [hereinafter *IPR Violator*] (reporting on case where China's Supreme People's Court past 17-year prison sentence to one of violators).

409. *Id.*

410. *Id.*

411. *Id.*

412. *See Shen*, *supra* note 25, at 6 (noting that although China's efforts in establishing copyright system have attracted international attention, Chinese society is still hazy on concept of copyright).

413. *Id.*

414. *Id.* People who fall into this group believe that "writers in the world always copy one another's work," and "stealing books does not count as stealing," and justifies their profits as money gained from labor. *Id.*

415. *Id.* This kind of individual misinterprets the concept of market economy as making money without regard to the legality of means employed. *Id.*

416. Action Plan, *supra* note 202, art. II(A)(1)&(2) at 905.

417. *Id.*

418. *Id.* at art. II(A)(1) at 905. Article II(A)(1) reads that "[r]elevant authorities

ernment also agreed to improve the training of officials responsible for the protection of intellectual property rights, including administrative, judicial, prosecutorial, and customs personnel.⁴¹⁹ China also promised to launch a national training and educational program with respect to intellectual property rights.⁴²⁰ In addition, China stated that the media would play a role in this heightened awareness of intellectual property rights, by publicizing positive efforts in the protection of these rights and by exposing infringement and local protectionism.⁴²¹

In January 1997, China began its construction of the China Intellectual Property Training Centre⁴²² ("IPTC") in Beijing.⁴²³ Aiming at becoming China's intellectual property rights training and research base, the IPTC will offer courses on patents, trademarks, and copyrights to government officials, lawyers, patent and trademark agents, and business people.⁴²⁴ The IPTC will also help upgrade China's research in the field.⁴²⁵ Over forty universities in China now offer courses in intellectual property.⁴²⁶ The Government now encourages state-employed lawyers to form private law firms to help enforce intellectual prop-

will conduct training and education on intellectual property protection across the country and . . . incorporate intellectual property laws into the state's knowledge-of-law popularization scheme" *Id.*

419. *Id.* art. II(A)(2) at 905. Article II(A)(2) states that:

Relevant authorities will conduct training and education on intellectual property protection across the country and make special efforts to improve and expand the training of officials responsible for administering and enforcing intellectual property rights. These officials include . . . customs and police who are charged with enforcing patents, trademarks rights, and copyrights, The government will cooperate with local judicial bodies' actions to improve the professional quality of judicial and prosecutorial personnel, and provide Customs officers with training courses in identifying products that infringe copyrights, including methods of inspecting computer software, products that infringe trademarks and other intellectual property rights.

Id.

420. *Id.* art. II(A)(3) at 905. The Action Plan requires publicity campaigns through the news media, establishment or expansion of institutions of higher learning, and training of management personnel at entities that produce or sell protected products. *Id.*

421. *Id.* art. II (C) at 906.

422. See *China: Training Centre to Help Strengthen IPR Protection*, CHINA BUS. INFO. NETWORK, Jan. 17, 1997 (reporting establishment of China's first government-sponsored intellectual property training center).

423. *Id.*

424. *Id.*

425. *Id.*

426. See Jianyang Yu, *Protection of Intellectual Property in the P.R.C.: Progress, Problems*

erty rights in the new market economy.⁴²⁷ To educate the general populace, in 1985 China embarked on a campaign for popularization of law education designed to elevate legal awareness among the Chinese citizens.⁴²⁸ In 1995, the Chinese government involved the media on a twenty-day national tour to cover activities on popular legal education in the country's provinces and municipalities.⁴²⁹ In July 1997, Shanghai founded an intellectual property rights training center that is open to attorneys and personnel from foreign enterprises and companies.⁴³⁰ The Center's goal is to inform such individuals about Chinese laws and regulations on intellectual property rights, including patent law, trademark law and copyright law, as a means of better protecting their companies' property rights in China.⁴³¹

C. *Joint Ventures*

China uses joint ventures as a means of pursuing the goal of foreign investment under the government's Open Door Policy.⁴³² Currently China recognizes two forms of joint ventures, the equity joint venture and contractual joint ventures.⁴³³ Governed by the Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures⁴³⁴ ("Joint Ventures Law") in 1979,

and Proposals, 13 U.C.L.A. PAC. BASIN L.J. 140, 149 (1994) (discussing China's development in legal education on intellectual property).

427. *Id.* at 150.

428. See *Chinese Media to Focus on Education in Law*, XINHUA ENG. NEWSWIRE, Oct. 19, 1995 (reporting that Chinese government acknowledged law education among masses crucial to China's development). Justice Minister Xiao Yang said that "promoting the rule of law has always been one of China's major tasks." *Id.*

429. *Id.*

430. See *Training Center for Intellectual Property Right Founded in Shanghai*, XINHUA NEWS AGENCY, July 17, 1997 (reporting on opening of intellectual property training center in Shanghai). Invited lecturers include university professors and officials from the government's patent office. *Id.*

431. *Id.*

432. See Xue & Wilson, *supra* note 5, at 511 (providing background on China's enactment of laws authorizing joint Chinese-foreign business ventures). Transfer of foreign technology is the other major goal of China's Open Door Policy. *Id.*

433. See Daniel J. Brink & Xiao Lin Li, *A Legal and Practical Overview of Direct Investment and Joint Ventures in the "New" China*, 28 J. MARSHALL L. REV. 567, 573-74 (1995) (presenting structural features of equity and contractual joint ventures).

434. The Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures (1979), translated in LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA GOVERNING FOREIGN-RELATED MATTERS 513 (1991) [hereinafter *Joint Ventures Law*]. *Joint Ventures Law* is China's first set of laws which explicitly authorizes joint Chinese-foreign business ventures. See Xue & Wilson, *supra* note 5, at 511 (providing

equity joint ventures take the form of limited liability companies.⁴³⁵ Joint Ventures Law requires that foreign investors contribute at least twenty-five percent of the company's capital,⁴³⁶ and that the parties involved share the risks and losses in proportion to their contribution.⁴³⁷ Laws governing contractual joint ventures,⁴³⁸ on the other hand, do not prescribe the amount of foreign contribution.⁴³⁹ Participants in contractual joint ventures may freely negotiate and prescribe the terms for allocating profits, earnings, risks and losses,⁴⁴⁰ and the method of business management in the joint venture contract.⁴⁴¹ Also, contractual joint ventures can take the form of a contractual relationship, partnership, project, or limited liability company.⁴⁴²

Despite China's overall support for joint ventures, the support did not apply to all sectors of the industry.⁴⁴³ Foreign enti-

background on Joint Ventures Law). Prior to 1979, few laws existed within the area of foreign investment. *Id.* For example, no statutory system of contract law existed before the contract law relating to foreign parties was promulgated in 1985. *Id.* at 549 n.2.

435. Joint Ventures Law, *supra* note 434, art. 4, at 513. In a company where there is limited liability, each party to a joint venture is only liable to the extent of its equity contribution to the joint venture. *Id.*; see Xue & Wilson, *supra* note 5, at 528 (analyzing Article 4 of Joint Ventures Law with regard to form and capital).

436. Joint Ventures Law, *supra* note 434, art. 4, at 513. Article 4 provides that "[t]he proportion of the foreign joint venturer's investment in an equity joint venture shall be, in general, not less than 25 percent of its registered capital." *Id.* Registered capital is the capital that the parties to the venture must agree to invest before the venture is formed. *Id.*

437. *Id.*

438. Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures (1988), translated in LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA GOVERNING FOREIGN-RELATED MATTERS 507 (1991) [hereinafter Contractual Joint Ventures Law].

439. Contractual Joint Ventures Law, *supra* note 438, art. 2, at 507. Article 2 provides:

In establishing a contractual joint venture, the Chinese and foreign parties shall, in accordance with the provisions of this Law, prescribe in their contractual joint venture contract such matters as the investment or conditions for cooperation, the distribution of earnings or products, the sharing of risks and losses, the manners of operation and management and the ownership of the property at the time of the termination of the contractual joint venture

Id.

440. *Id.*

441. *Id.*

442. *Id.*

443. See LETTER FROM ERIC H. SMITH, EXECUTIVE DIRECTOR AND GENERAL COUNSEL, INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, TO FREDERICK MONTGOMERY, CHAIRMAN, TPSC, OFFICE OF U.S. TRADE REPRESENTATIVE 3-6 (July 13, 1994) (reporting public comments on China's market access in light of its participation in GATT and WTO).

ties could not enter into joint ventures to produce and distribute recorded music.⁴⁴⁴ The Chinese government also imposed de facto bans on foreign ownership in joint ventures for publishing.⁴⁴⁵

In the Agreement Letter of the 1995 Accord China mentions joint ventures as a means through which greater market access would be provided to U.S. companies.⁴⁴⁶ China agrees to permit U.S. individuals and entities to establish joint ventures with Chinese domestic entities to produce audio-visual related goods.⁴⁴⁷ China will allow these joint ventures to enter into contracts with Chinese publishing enterprises to distribute, sell, display, and perform on a nationwide basis in China.⁴⁴⁸ Joint ventures can establish operations in Shanghai and Guangzhou, and China agrees to allow expansion to eleven other as yet undetermined cities by the year 2000.⁴⁴⁹ China will also allow U.S. individuals and entities to enter into joint ventures with Chinese companies for the production and sale of U.S. computer software products in China.⁴⁵⁰

China shows further commitment to promoting joint ventures with its signing of the 1996 Agreement with the United States.⁴⁵¹ As a result of the 1996 Agreement, U.S. record companies can now enter into sales, production, display, and performance agreements with Chinese publishing houses in the sound recording and motion picture industries.⁴⁵² Six weeks after the

444. *Id.* at 3.

445. *Id.* at 5.

446. Agreement Letter, *supra* note 201, at 884.

447. *Id.* "China will permit U.S. individuals and entities to establish joint ventures with Chinese entities in China in the audio-visual sector for production and reproduction." *Id.*

448. *Id.* "These joint venturers will be permitted to enter into contracts with Chinese publishing enterprises to, on a nationwide basis, distribute, sell, display and perform in China." *Id.*

449. *Id.* "China will immediately permit such joint ventures to be established in Shanghai, Guangzhou, and moreover, other major cities, and will then expand the number of cities, in an orderly fashion, to thirteen (13) by the year 2000." *Id.*

450. *Id.* "China will also permit U.S. individuals and entities to establish computer software joint ventures and those joint ventures will be permitted to produce and sell their computer software and computer software products in China." *Id.*

451. See *Fact Sheet*, *supra* note 241 (reporting U.S. progress in gaining market access to China for U.S. audiovisual and computer software products).

452. *Id.* "A key goal of our record companies was to enter into cooperative relationships with Chinese publishing houses to sign artists, produce them and ultimately – through those publishing houses – to sell, produce, display and perform." *Id.*

1996 Agreement, Warner Home Video, a division of the media conglomerate Time Warner Inc., signed an agreement with the Shenzhen Advanced Science Enterprise Group to distribute cartoons and Oscar-winning feature films.⁴⁵³

D. *The WTO Dispute Settlement*

The WTO charter contains an Understanding on Rules and Procedures Governing the Settlement of Disputes⁴⁵⁴ ("Dispute Procedures"), which sets out a settlement system for resolving international trade disputes.⁴⁵⁵ The Dispute Procedures creates a single entity, the Dispute Settlement Body⁴⁵⁶ ("DSB"), that oversees all disputes. The Dispute Procedures expect disputing parties to make a good faith effort in settling their differences prior to bringing a case.⁴⁵⁷ If disputing parties fail to reconcile within sixty days, the complaining party may request a panel.⁴⁵⁸

453. See Lisa Atkinson, *What's Entertainment?*, CHINA BUS. REV., Mar. 1, 1997 available in 1997 WL 9618724 (reporting U.S. entertainment industry's activities in China subsequent to 1996 Agreement).

454. Dispute Procedures, *supra* note 344.

455. See Glen T. Schleyer, Note, *Power to the People: Allowing Private Parties to Raise Claims Before the WTO Dispute Resolution System*, 65 FORDHAM L. REV. 2275, 2285-86 (1997) (explaining how WTO's dispute settlement system is more powerful than its GATT predecessor). Drafted in the mid-1940s, dispute procedures under GATT have been criticized for their ad hoc character, making the system vulnerable to political gamesmanship and diplomatic struggles among nations. *Id.* at 2276. The GATT system entails four major steps: negotiation and consultation among parties to a complaint, establishment of an expert panel to investigate the claim, analysis and determination by the panel, and adoption or dismissal of the panel report. *Id.* at 2282-83. The lack of a time schedule and the ability of a losing party to veto adoption of the panel report rendered the GATT system ineffective in solving international trade disputes. *Id.* at 2282-84.

456. Dispute Procedures, *supra* note 344, art. 2(1), 2(4), at 1226-27. Composed of representatives from every nation that signed the treaty or code at issue, the Dispute Resolution Board ("DSB") has the sole authority, by consensus, to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation, and authorize suspension of concessions in cases of nonimplementation of recommendations. *Id.*

457. *Id.* art. 4 at 1228. Article 4 states that "[e]ach Contracting Party undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Contracting Party concerning measures affecting the operation of any covered agreement taken within the territory of the former." *Id.*

458. *Id.* art. 4(3) at 1228. The Secretariat will nominate the panelists, whether from the government or outside the government, and parties may not oppose the nomination without compelling reasons in which case the Director-General will appoint these panelists. *Id.* art. 8(6), (7) at 1231. Dispute Procedures also list panel qualifications. *Id.* art. 8(1), (2) at 1231. Panel establishment is automatic, unless the DSB decides by consensus against the establishment. *Id.* art. 12(3) at 1233.

The panel will then have six months⁴⁵⁹ to conduct discovery and deliberation before which the panel will submit a written report to the DSB.⁴⁶⁰ The Dispute Procedures requires that the DSB adopt panel decisions by default, unless all the member nations, including the winning nation, agree by consensus not to adopt it or unless one of the parties requests an appeal.⁴⁶¹ The Appellate Body⁴⁶² will then conduct a review of the panel report that is limited to questions of law and legal interpretation.⁴⁶³ Like panel reports, Appellate Body decisions are adopted automatically unless the DSB, by consensus, votes otherwise.⁴⁶⁴

Upon finding of violation of international trade rules, the contracting parties have three options.⁴⁶⁵ The contracting parties may conform to the relevant agreement by withdrawing the offensive act or rectifying the relevant omission.⁴⁶⁶ If the contracting party in violation decides not to comply, or fails to comply within a reasonable period of time,⁴⁶⁷ the complaining party may call for negotiations to determine compensation.⁴⁶⁸ In the event that no compensation is agreed upon, the complaining party may request the DSB to authorize suspension of concessions.⁴⁶⁹ The authorization is automatic unless all member nations, including the winning nation, by consensus, vote to deny the request for such suspension.⁴⁷⁰ The DSB, however, cannot

459. *Id.* art. 8(8) at 1232. Under exceptional circumstances, the deadline may be extended to nine months. *Id.* art. 8(9) at 1232.

460. *Id.* art. 12(7) at 1233.

461. *Id.* art. 16(4) at 1235.

462. *Id.* art. 17(1) at 1236. The Appellate Body is composed of seven Contracting Parties who are appointed by the DSB to serve four year terms. *Id.* art. 17(2) at 1236.

463. *Id.* art. 17(6) at 1236. Deliberations of the Appellate Body must be completed and a written decision submitted within sixty days, or if exception is granted, within ninety days. *Id.* art. 17(5) at 1236.

464. *Id.* art. 14 at 1235.

465. See Judith Hipper Bello, *The WTO Dispute Settlement Understanding: Less is More*, 90 AM. J. INT'L L. 416, 411996) (interpreting compliance with WTO as choice rather than mandatory obligation).

466. Dispute Procedures, *supra* note 344, art. 21(3), at 33 I.L.M. 1238.

467. *Id.* art. 21(3)(a)-(c) at 1238. The Contracting Party in violation is entitled to propose the reasonable period of time to the DSB. *Id.*

468. *Id.* art. 22 at 1239. Contracting Parties have twenty days to agree on upon a compensation. *Id.*

469. *Id.* Concessions which are to be suspended should be prioritized in the following order: first, in the same sector in which the violation by the other party occurred, second, in different sectors covered by the same agreement, or third in areas covered by other agreements. *Id.* art. 22(3)(a)-(d) at 1239.

470. *Id.* art. 22(6) at 1240.

authorize suspension of concessions if the covered agreement prohibits such suspension.⁴⁷¹ The respondent may also request arbitral review of the appropriateness of the authorized retaliation.⁴⁷²

III. FUTURE ENHANCEMENT OF CHINA'S COPYRIGHT SYSTEM REQUIRES AN INTERNAL FOCUS AND WTO MEMBERSHIP

The future of copyright protection in China lies in using the existing tools present in China's and the international community's intellectual property regimes. Implementing the tools, however, requires the incentives to use the tools, which are altogether lacking in China. Protecting copyright is not a remnant in Chinese culture, nor does it serve any economic benefits to the Chinese people in the short term. Alleviating China's piracy problem, therefore, requires solutions that address these incentives. Admitting China into the WTO will encourage China to enforce its copyright protection and enhance the international community's position to contain China's piracy problem.

A. *Current Measures Are No Longer the Appropriate Tools For Future Enforcement of Copyright Protection in China*

Within ten years, China's legal environment for copyright protection has gone from virtual nonexistence to the present state where the country has a comprehensive set of laws,⁴⁷³ specialized courts,⁴⁷⁴ training centers, and agencies⁴⁷⁵ dealing especially with copyright issues. Undeniably, China owes much of its progress in copyright to external pressures.⁴⁷⁶ China's desire to enter WTO motivated the country to adopt a set of laws to bring its intellectual property system into compliance with TRIPs. U.S. threats of trade sanctions have pushed China to putting its laws

471. *Id.* art. 22(5) at 1240.

472. *Id.* art. 22(6) at 1240.

473. *See supra* notes 77-98 and accompanying text (discussing copyright legislation in China).

474. *See supra* notes 361-62 (discussing establishment of new intellectual property courts in China).

475. *See supra* notes 422-29 (reporting China's actions at promoting legal education on intellectual property rights).

476. *See supra* notes 174-259 (discussing China's progress in establishing copyright system under U.S. threats of trade sanctions).

into practice.⁴⁷⁷ While TRIPs and U.S. trade sanctions succeeded in setting up the foundation for copyright protection in China, a question remains as to whether these two measures will also be the effective tools for future copyright enforcement in China.

1. The TRIPs Agreement Has Fulfilled its Role in Strengthening the Substantive Aspect of China's Copyright System

Overall, TRIPs has been successful in bringing the substantive aspect of China's copyright system into compliance with the international standards. While certain areas of Chinese copyright protection remain problematic under TRIPs,⁴⁷⁸ such as defining neighboring rights in an enabling rather than prohibitive context,⁴⁷⁹ the objectives and principles of TRIPs provide an escape through which China can justify its limitations on rights. China will not violate TRIPs as long as the limitations do not constitute a normal exploitation of the work or unreasonably prejudice the legitimate interests of the right holder.⁴⁸⁰ Under TRIPs, China is free to implement TRIPs' provisions in the manner that is appropriate to its own legal system.⁴⁸¹ Moreover, as a developing country, China has an additional four years upon WTO admittance to implement the remainder of TRIPs.⁴⁸² China's status as a developing country further justifies the conclusion that its laws and regulations essentially comply with TRIPs. Consequently, TRIPs has reached its limit in impeding

477. *See supra* notes 195-253 and accompanying text (discussing U.S. threats of trade sanctions in 1995 and 1996 and their effects in curbing Chinese piracy).

478. *See supra* notes 99-22 and accompanying text (discussing China's compliance with TRIPs standard in area of reproduction and rental rights). By permitting newspapers and periodicals to use, without authorization, published works as source for reports on current political, economic, and social topics, China's copyright laws create a potentially broad limitation on an author's right to control the reproduction of copyrighted work. *Id.*

479. *See supra* notes 122-30 and accompanying text (comparing China's copyright provisions on neighboring rights to that of TRIPs). While TRIPs defines neighboring rights as the right to prohibit other people from infringing, China's copyright laws define neighboring rights as the copyright owner's right to permit reproduction and distribution of their works. *Id.*

480. *See supra* notes 107-12 and accompanying text (analyzing TRIPs provision on limitations and exceptions).

481. *See supra* note 140 and accompanying text (describing Article 1(1) of TRIPs).

482. *See supra* note 63 and accompanying text (discussing TRIPs provision on transitional arrangements).

China's entry into the WTO, and therefore, in strengthening the substantive aspect of copyright enforcement in China.

2. U.S. Trade Sanctions Are No Longer the Appropriate Tools to Fight China's Piracy Problem

While Sino-American negotiations in 1995 and 1996 indicated that trade sanctions might be a way to focus China's attention on enforcing its intellectual property laws, the strategy is not the appropriate one to achieve its goals. First, although the stepped-up police raids and factory closures poses an immediate curb on piracy, such gains are ephemeral if not accompanied by straightforward domestic enforcement of intellectual property rights. Next, U.S. trade sanctions may no longer pose a threat to China when the countries' increased cooperation in other international issues make stable Sino-American relations important to the United States.⁴⁸³ Moreover, the USTR's ability to continue pressuring developing nations with regard to intellectual property issues stands in violation of the transitional arrangements⁴⁸⁴ of TRIPs.

B. An Inherent Problem with China's Copyright System is its Lack of Incentives to Protect Copyright

Although economic and cultural disincentives have not prevented China from drafting a copyright system that meets international standards, these disincentives to protect have seriously hampered China's efforts to enforce the rules and regulations. The concept of copyright is not found among China's cultural and socio-political values, nor does it serve to render any present economic benefit to China.⁴⁸⁵ Consequently, motivated by the external pressure to meet international standards and threats of U.S. trade sanctions, China has erected a skeletal protection system⁴⁸⁶ resulting in the occasional closure of CD factories and last

483. See *supra* notes 260-68 and accompanying text (discussing feasibility of U.S. trade sanctions in countering future Chinese piracy).

484. See *supra* notes 60-63 and accompanying text (discussing transitional arrangements).

485. See *supra* notes 272-303 and accompanying text (discussing China's lack of incentives to enforce copyright protection).

486. See *supra* notes 184-95 and accompanying text (discussing 1992 MOU and its impact on intellectual property enforcement in China). Overall, the 1992 MOU is responsible for bringing China's copyright laws into conformance with international standard. *Id.*; see *supra* notes 200, 249 and accompanying text (summarizing objectives of

minute promises made to the United States.⁴⁸⁷ Existing measures that place a strong emphasis on administrative proceedings leave intellectual property enforcement in the hands of local administrative officials,⁴⁸⁸ whose livelihood depends upon the economic well-being of their communities, not upon the implementation of national policies.⁴⁸⁹ Considering that the concept of intellectual property rights is not endemic to China and that protecting such rights would pose an impediment to the country's economic growth, the Chinese government sees no legitimate reason to support such protections. Therefore, while external pressures have succeeded in triggering copyright enforcement activities in China, the Chinese people do not have the incentives to continue the enforcement once the pressures are lifted.

C. Future Measures Should Focus on Providing China with Incentives to Protect Copyright

A comprehensive intellectual property system in China is vital to the economy of both the world and specifically China's. Unfortunately, that fact is not obvious to the Chinese people. China's present economic development has prevented the country from reaping immediate benefits from intellectual property protection.⁴⁹⁰ Solutions must be made to introduce the Chinese people to the concept of intellectual property rights, overcome the present barrier posed by economic disincentives, and decrease the influence of localism on intellectual property enforcement. Education and joint ventures will nurture these incentives motivating China to protect copyright.

1. Education is a Cure for Cultural Disincentives Against Protecting Copyright

Education is the key toward achieving the impetus of setting

1995 Accord and 1996 Agreement). Lack of enforcement, however, brought China back to the trade negotiating table with the United States in 1995 and 1996. *Id.*

487. *See supra* notes 195-99, 239-43 and accompanying text (discussing situations under which 1995 Accord and 1996 Agreement were signed).

488. *See supra* notes 304-17 and accompanying text (discussing 1995 Accord and 1996 Agreements' emphasis on administrative enforcement by local officials).

489. *See supra* notes 329-36 and accompanying text (discussing impact of local protectionism on administrative officials' ability to enforce intellectual property laws).

490. *See supra* notes 295-300 and accompanying text (discussing China's economic disincentives against protecting intellectual property rights).

up a comprehensive intellectual property system. The process should occur at three levels, the legal personnel, the popular mass, and foreign trading partners. The lack of trained and experienced lawyers has a deleterious effect on court proceedings. Moreover, the law is useless unless enforced. Both sophisticated business persons and the general population must recognize that a legal system creates rights and imposes obligations beyond those arising from normal expectations of social interaction. One of the causes for China's piracy problems is the lack of legal awareness among the citizenry.⁴⁹¹

Chinese citizens may not know that making or selling unauthorized copies of movies or CDs is unlawful, or that they can and should seek redress from people who manufacture goods resembling their products. At another level, as the usual victims of the infringement activities, foreign enterprises and companies should also be informed of their legal options when their rights are violated.

Since 1985, the Chinese government has acknowledged the importance of law education.⁴⁹² In the second part of the Action Plan of the 1995 Accord, China promised to initiate education and training concerning intellectual property rights.⁴⁹³ China has also made progress in educating various participants within the intellectual property field regarding their legal rights and obligations.⁴⁹⁴ Altogether, these activities, while sporadic, indicate China's belief in the importance of education and its willingness to act accordingly.

2. Joint Ventures are Cures to Economic Disincentive Against Protecting Copyright

Joint ventures would create an immediate economic incentive for Chinese enforcement of intellectual property rights⁴⁹⁵

491. See *supra* note 412 and accompanying text (noting lack of understanding on intellectual property rights among Chinese citizenry).

492. See *supra* note 428 and accompanying text (discussing China's campaign on law popularization in 1985).

493. See *supra* notes 417-19 and accompanying text (discussing Action Plan's provisions on education).

494. See *supra* notes 422-29 and accompanying text (discussing actions taken by China at promoting education on intellectual property rights).

495. See *supra* note 432 and accompanying text (discussing rationale behind China's support toward joint ventures).

and increase market access for international trade partners.⁴⁹⁶ The business structure of joint ventures may even move potential Chinese pirates to the opposite side of the infringement equation. The Chinese partners will certainly defend their mutual intellectual property rights when it has become their economic interest to do so. In addition, entering a joint venture allows a non-Chinese partner to access the distribution network of the Chinese partner in order to build a market in the local economy.⁴⁹⁷

Joint ventures can also assist foreign enterprises in overcoming local protectionism. Foreign enterprises can reduce local protectionism by forming joint ventures with their Chinese opponents. The Chinese partner is more likely to have a better understanding of the nuances of political life in China, be more aware of impending upheavals, and maintain the proper government contacts to safeguard joint venture's investments. Also, a local government is more willing to take action when a foreign investor has a government-linked partner and the government's own interest is at stake.⁴⁹⁸

D. *Copyright Owners Should Make More Use of the Judicial System in Addressing Their Rights*

While administrative recourse provides a more expeditious and less expensive solution for copyright infringement cases, such a solution would only be effective where an infringer does not have a close relationship with a local government. On the other hand, equipped with the tools of forum shopping and criminal action, the judicial system would be less susceptible to local protectionism.⁴⁹⁹ Although inconsistency in damage awards may deter copyright owners from filing legal claims, recent trends among Chinese courts for harsher damage awards and strengthened criminal enforcement have shown that such

496. *See supra* notes 446-47 and accompanying text (discussing 1995 Accord's provisions on joint ventures).

497. *See supra* note 447-46 and accompanying text (stating that foreign enterprises in audio-visual sector can enter into joint ventures with Chinese entities to distribute, sell, and display in China).

498. *See supra* notes 323-35 and accompanying text (discussing power of local government over copyright enforcement activities within its locality).

499. *See supra* notes 393-94 and accompanying text (explaining how forum shopping and criminal proceeding assist courts in countering local influences).

courts are becoming increasingly capable of handling intellectual property disputes.⁵⁰⁰

Present developments within the legal field allow the judiciary to be more effective in addressing future piracy than administrative enforcement. Similar to its administrative counterpart, the judicial system is also susceptible to local protectionism as shown by the courts' questionable impartiality in rendering judgements.⁵⁰¹ Unlike the area of administrative enforcement, where Chinese authorities have pursued the problem of local protectionism half-heartedly through the implementation of the 1995 Accord and the 1996 Agreement, the Chinese government has passed a set of laws to specifically address local protectionism within the judicial area.⁵⁰² Although implementation of the Judges Law⁵⁰³ remains uncertain, the fact that China enacted the Judges Law on its own initiative indicates greater will on the government's part in fighting local protectionism as within the judicial system.

Western criticism of the lack of legal training among Chinese judges⁵⁰⁴ still favors judicial over the administrative enforcement. Although judges on other courts may be retired army sergeants with no formal legal training,⁵⁰⁵ judicial officials serving the intellectual property courts may be better trained in the intellectual property regime than their administrative counterparts.⁵⁰⁶ While judges sitting at the Supreme People's Court and high courts receive special training in intellectual property issues, no similar legal education program exists within the administrative system. Therefore, relative to their administrative counterparts, the judicial personnel are more knowledgeable at handling intellectual property disputes.

500. *See supra* notes 149-54 and accompanying text (discussing damage awards in Chinese courts).

501. *See supra* notes 373-74 and accompanying text (addressing Chinese judges' lack of independence in rendering judgements).

502. *See supra* notes 368-67 and accompanying text (describing China's new Judges Law enacted in 1995).

503. *Id.*

504. *See supra* notes 377-81 and accompanying text (discussing present level of legal education among Chinese judges).

505. *See id.* (comparing level of legal training among Chinese judges in general and those serving on high level courts).

506. *Id.*

*E. Admitting China into the WTO Will Help Improve China's
Copyright System*

China's accession to the WTO will strengthen the international community's ability to enforce copyright protection in China. Under the auspices of the DSB,⁵⁰⁷ China will be subject to multilateral adjudication by the member states instead of unilateral tools such as Special 301. The WTO Dispute Procedures' imposition of time limits on the disputants, the panel, the Appellate Body, and the DSB at every stage of the proceedings ensures prompt execution of the dispute settlement.⁵⁰⁸ Considering China's present status as a developing country, China is more likely to choose to comply with the dispute settlement rulings because not doing so will inflict damage to its economic interests through compensation or retaliation.⁵⁰⁹ Noncompliance may also jeopardize international cooperation with China on other issues.⁵¹⁰ Furthermore, the DSU rule of reverse consensus⁵¹¹ extinguishes most of China's chance to block the complainant's request for retaliation.

CONCLUSION

The future of copyright enforcement in China lies in the will of the Chinese people to protect copyright. As of today, China has succeeded in establishing a copyright regime that has the legal framework of TRIPs, but not its spirit. The reasons behind this deficiency entail both cultural and economic underpinnings. Although results from addressing these factors will take years to achieve, foreign copyright owners can nevertheless employ short-term solutions such as joint ventures to protect their rights. In addition, the Chinese government has already expressed its will to enforce copyright through enhancing the judicial system, and it is up to the Chinese citizenry as well as the

507. *See supra* notes 454-55 and accompanying text (introducing DSB and its functions).

508. *See supra* notes 457-62 and accompanying text (describing Dispute Procedures).

509. *See supra* notes 465-67 and accompanying text (discussing options available to contracting parties upon finding of violation by DSB).

510. *See supra* note 469 and accompanying text (describing scope of suspending concessions).

511. *See supra* note 470 and accompanying text (describing process through which retaliation is authorized).

foreign parties to make use of this recourse in resolving copyright disputes.

As a developing country, China should not be alone in its effort to establish a comprehensive intellectual property system, because such a system would benefit many of its Western trade partners. One of the means by which Western nations could assist China would be to allow China to join the WTO. Accession to the WTO would serve as a great boost to China's morale in its efforts to enforce intellectual property rights. Admitting China into the WTO would help accelerate the country's economic development to the point where China would recognize that intellectual property rights benefit not only Westerners, but China's own people as well.