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## Cracks in the Great Wall: Why China's Copyright Law Has Failed to Prevent Piracy of American Movies Within its Borders

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# Cracks in the Great Wall: Why China's Copyright Law Has Failed to Prevent Piracy of American Movies Within its Borders

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In the summer of 2005, the 100,000 members of the Hong Kong Boy Scouts Association were engaged in their regular camping, cooking and hiking activities. As with scouts the world over, they were eager to earn merit badges memorializing various levels of knot-tying and fire-building abilities. However, these scouts also worked for a merit badge that was the first of its kind in any country—an “IPR Badge” awarded for participation in an educational course on intellectual property rights and the wrongs of film piracy.<sup>1</sup> The badge was sponsored in part by Strategy Targeting Organized Piracy (STOP!), an organization backed by the U.S. Department of Justice, the Motion Picture Association of America (MPAA), and the Hong Kong Intellectual Property Department, to “counter cultural thinking on piracy.”<sup>2</sup>

Such is the new face of the war against film piracy in the People’s Republic of China (PRC). A world away from the World Trade Organization’s (WTO) contentious roundtables in Switzerland, the seeds of a cooperative effort between U.S. and Chinese forces are taking root in a classroom.<sup>3</sup> This is a novel reaction to the present movie piracy crisis that costs the U.S. motion picture industry \$5.4 billion worldwide and \$2.1 billion a year in China alone.<sup>4</sup> Every day in China, illegal factories churn out copies of American Digital Versatile Discs (DVDs) or videocassettes, and if one buys an American film in China today, there is a ninety three percent chance that it is pirated.<sup>5</sup>

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1. Douglas Crets, *Scouts Unveil Anti-Piracy Badge*, STANDARD (Hong Kong), May 4, 2005, available at <http://www.thestandard.com.hk/stdn/std/Metro/GE04Ak06.html>.

2. *Hong Kong Boys Scout Out Piracy Badges*, BUS. REP. (S. Afr.), May 4, 2005, available at <http://www.busrep.co.za/index.php?fSectionId=553&fArticleId=2506716>.

3. See Crets, *supra* note 1.

4. MOTION PICTURE ASSOCIATION OF AMERICA, WORLDWIDE STUDY OF LOSSES TO THE FILM INDUSTRY AND INTERNATIONAL ECONOMIES DUE TO PIRACY; PIRATE PROFILES (2006), available at [http://www.fact-uk.org.uk/site/media\\_centre/documents/2006\\_05\\_03leksumm.pdf](http://www.fact-uk.org.uk/site/media_centre/documents/2006_05_03leksumm.pdf) [hereinafter MOTION PICTURE ASSOCIATION OF AMERICAN WORLDWIDE STUDY].

5. *Id.*

Additionally, China has commenced exporting these movies to other countries, thus increasing the alarming financial loss to the American motion picture industry.

This crisis persists even though China presently has a robust set of copyright laws and substantial international treaty obligations intended to combat piracy.<sup>6</sup> Upon liberalizing its economic policies after the Cultural Revolution, China strove to join the WTO, but the United States threatened to oppose China's membership unless it caught up to global standards for intellectual property protection.<sup>7</sup> Keen on harnessing China's enormous trading potential, the United States was instrumental in helping China craft its body of copyright laws.<sup>8</sup> When China subsequently failed to enforce these laws, however, this auspicious beginning degenerated into a series of trade sanctions.<sup>9</sup> Using threats of trade sanctions as its proverbial stick, the United States compelled China to enter into a number of agreements requiring progressively greater protections against piracy and increasing levels of enforcement of its copyright laws.<sup>10</sup> By the time China finally joined the WTO in 2001, it was a party to a collection of watershed agreements designed to orchestrate a veritable crackdown

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6. Brent T. Yonehara, Comment, *Enter the Dragon: China's WTO Accession, Film Piracy and Prospects for the Enforcement of Copyright Laws*, 9 UCLA ENT. L. REV. 389, 390 (2002).

7. Peter K. Yu, *Toward a Nonzero-Sum Approach to Resolving Global Intellectual Property Disputes: What We Can Learn From Mediators, Business Strategists, and International Relations Theorists*, 70 U. CIN. L. REV. 569, 641 (2002); see also Peter K. Yu, *The Second Coming of Intellectual Property Rights in China*, 11 OCCASIONAL PAPERS IN INTELL. PROP. FROM BENJAMIN N. CARDOZO SCHOOL OF LAW 1, 30 (2002), available at [http://www.cardozo.yu.edu/news\\_events/papers/11.pdf](http://www.cardozo.yu.edu/news_events/papers/11.pdf) (indicating that "it would not be too far-fetched to argue that China might still remain outside the WTO had it not strengthened its protection of intellectual property rights"); Assafa Endeshaw, *A Critical Assessment of the U.S-China Conflict on Intellectual Property*, 6 ALB. L.J. SCI. & TECH. 295, 298 (1996) (noting that the agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) became a treaty obligation of WTO members).

8. See Yu, *supra* note 7, at 8-9.

9. *Id.* at 13.

10. See Eric Priest, *The Future of Music and Film Piracy in China*, 21 BERKELEY TECH. L.J. 795, 809 (2006); see also KENT HUGHES, GANG LIN & JENNIFER TURNER, CHINA AND THE WTO: DOMESTIC CHALLENGES AND INTERNATIONAL PRESSURES 6 (2002), available at <http://www.wilsoncenter.org/topics/pubs/WTO rpt.pdf> (stating that China's joining the WTO signified "[b]road Chinese acceptance of WTO standards on . . . intellectual property" and noting that China's quest to join the WTO began in 1986, when China first expressed an interest in joining GATT); *id.* at 9 ("Chinese accession [to the WTO] also means that it will be required to abide by existing WTO codes on intellectual property . . ."); World Trade Organization, Understanding the WTO, Intellectual Property: Protection and Enforcement, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm7\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm) (last visited Jan. 17, 2007).

on piracy in China.<sup>11</sup> Yet, piracy of American movies in China has persisted throughout this process and is on the rise today.

The problem is not that China lacks copyright laws, but that it lacks the will and the legal structures to enforce them.<sup>12</sup> Several factors account for this. The first is *culture*. Two thousand years of Confucian influence have produced a society that values *Li* (a "moral code") over *Fa* ("positive law"), and is consequently unprepared for the sudden imposition of Western-style rule of law.<sup>13</sup> In addition, Chinese tradition favors, even encourages, copying and imitation over creativity and innovation, making the concept of "piracy" difficult to digest.<sup>14</sup> Second, Chinese *political ideology* is vastly different from that of the United States. China's information control policy, aimed at keeping out Western films that espouse ideals that are anathemas to the PRC, has had the unintended effect of spawning a black market for pirated versions of these works.<sup>15</sup> Furthermore, the PRC's political system is built on a concept of collectivity that is contrary to the notion of generating profit for oneself through one's artistic work—a notion which does not square well with the economic incentive model of U.S. copyright law.<sup>16</sup> Third, China's *judiciary* is only a couple of decades out of its near atrophy during the Cultural Revolution and suffers from a dearth of lawyers, judges, and general familiarity with the new copyright laws.<sup>17</sup> In addition, the judiciary is severely crippled by a lack of both transparency and independence from other political branches.<sup>18</sup> Fourth, China lacks the *administrative*

11. Priest, *supra* note 10, at 809-10.

12. Yonehara, *supra* note 6, at 391-92.

13. SHAO-CHUAN LENG, JUSTICE IN COMMUNIST CHINA: A SURVEY OF THE JUDICIAL SYSTEM OF THE CHINESE PEOPLE'S REPUBLIC xiii (1967).

14. Susan Tiefenbrum, *A Hermeneutic Methodology and How Pirates Read and Misread the Berne Convention*, 17 WISC. INT'L L.J. 1, 11 (1999).

15. Laikwan Pang, *Piracy/Privacy: The Despair of Cinema and Collectivity in China*, 31 BOUNDARY 2 102, 110 (Fall 2004).

16. See Yu, *supra* note 7, at 8.

17. See Charles Baum, *Trade Sanctions and the Rule of Law: Lessons from China*, 1 STAN. J. EAST ASIAN AFFAIRS 46, 49 (2001), available at <http://www.stanford.edu/group/sjeaa/journal1/china4.pdf>; see also Qizhi Luo, *Autonomy, Qualification and Professionalism of the PRC Bar*, 12 COLUM. J. OF ASIAN L. 1, 8-9 (1998), available at <http://www.columbia.edu/cu/asiaweb/v12n1Luo.htm> (describing the absence of lawyers from the Chinese social and political scene under Mao, when lawyers were seen as "undesirables because of their role in defending alleged criminals and counter-revolutionaries against the state").

18. M. Ulric Killion, *Post-WTO China and Independent Judicial Review*, 26 HOUST. J. INT'L L. 507, 509-10 (2004) (noting that the implementation of the rule of law and the need to reform the Chinese legal system is a necessity which even China recognizes); see also THE AMERICAN CHAMBER OF COMMERCE IN HONG KONG, INTELLECTUAL PROPERTY COMMITTEE, CHALLENGES IN PROTECTING IP RIGHTS THROUGH CIVIL LITIGATION IN THE

mechanisms to enforce its laws. National plans to combat piracy fall prey to local protectionism when instituted at the ground level, as local officials thwart efforts to sanction or shut down illegal businesses that generate profits for the community.

This note examines the current state of China's intellectual property rights protection as it relates to movie piracy. Part I examines the different types of film piracy occurring in China and the current severity of the problem for the United States motion picture industry. Part II traces the history of copyright law in China and examines China's commitments under the international copyright treaties it has signed with the United States and other nations through its recent accession to the WTO. Part III discusses why movie piracy in China is still on the rise despite these commitments and highlights why cultural, ideological, judicial and administrative problems impede their enforcement. Part IV argues that pressure tactics in the form of U.S. trade sanctions against China are ineffective to combat these problems and proposes solutions that can operate effectively from within China, obviating the need for outside pressure.

## I. THE NATURE OF FILM PIRACY

As developers vie to build plush new movie theaters in China's booming cities, a class of film viewers is growing that has no intention of ever entering a cinema.<sup>19</sup> China already has the greatest number of movie theaters in the world at 65,000.<sup>20</sup> However, "[e]ven in relatively wealthy Beijing, a movie ticket is a luxury beyond the reach of most of the capital's 15 million residents, who earned on average 15,700 yuan (\$1,900) [in 2004]."<sup>21</sup> "China's national average price for a movie ticket is about 20 yuan (\$2.40). In big cities tickets can run as high as

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PRC (Oct. 31, 2002), [http://www.amcham.org.hk/pr/position\\_papers/civilLitigationinIPCases.pdf](http://www.amcham.org.hk/pr/position_papers/civilLitigationinIPCases.pdf) [hereinafter AMERICAN CHAMBER OF COMMERCE]; UNITED STATES TRADE REPRESENTATIVE, 2005 SPECIAL 301 REPORT: RESULTS OF OUT-OF-CYCLE REVIEW ON CHINA (2005), [http://www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2005/2005\\_Special\\_301/asset\\_upload\\_file835\\_7647.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_Special_301/asset_upload_file835_7647.pdf) [hereinafter USTR OUT-OF-CYCLE REVIEW].

19. *Survey: Foreign Investment and China's Media Market*, in CHINA IT & TELECOM REPORT, Dec. 24, 2004, available at Interfax News Agency database on LEXIS.

20. Gloria Goodale, *Oscar's Elegant Home - In a Shopping Mall*, CHRISTIAN SCI. MONITOR (Boston), Mar. 22, 2002, at 13. Compare this to the U.S., which with 37,185 has the second highest number of movie theaters. *Id.*

21. Jonathan Landreth, *China: U.S. Companies Confident Patience Will Pay Off*, HOLLYWOODREPORTER.COM, Jul. 19, 2005, [http://www.hollywoodreporter.com/hr/search/article\\_display.jsp?vnu\\_content\\_id=1000980879](http://www.hollywoodreporter.com/hr/search/article_display.jsp?vnu_content_id=1000980879).

80 yuan (\$9.60).<sup>22</sup> Clearly, when the same movie is available for 8 yuan (\$0.96) on a pirated DVD, the cost calculus easily favors the DVD over the movie theater.<sup>23</sup> Moreover, means of illegally accessing movies at even cheaper prices continue to flourish in China.<sup>24</sup>

### A. Types of Film Piracy

Pirate optical disks, which include Laser Discs, Video Compact Discs (VCDs) and DVDs are inexpensive to manufacture and easy to distribute,<sup>25</sup> making them an obvious choice for piracy in China. Optical discs are of a much better quality than those produced by the less sophisticated mechanism of analog piracy and unwitting users are unlikely to even recognize the disc as a counterfeit.<sup>26</sup> The threat of optical disc piracy is demonstrably severe; in 2001 it was cited as the reason an entire Hong Kong movie theatre chain went out of business.<sup>27</sup> The danger is aggravated by the ease of production of illegal optical discs—pirates with the right CD pressing equipment can produce thousands of perfect VCDs or DVDs daily.<sup>28</sup>

Internet piracy is another major means of distributing films in violation of copyright laws.<sup>29</sup> It is a natural draw in China, where 103 million people were online in 2004, making the PRC the second biggest user of internet facilities in the world following the United States.<sup>30</sup>

Internet Piracy is the downloading or distribution of unauthorized copies of works such as movies, television and music via the Internet. . . . [I]llegal downloads occur in many forms, including file sharing networks, pirate servers . . . and hacked computers. Each file posted on the internet can result in millions of downloads.<sup>31</sup>

22. *Id.*

23. *Survey: Foreign Investment and China's Media Market*, *supra* note 19.

24. See INT'L INTELLECTUAL PROPERTY ALLIANCE, 2005 SPECIAL 301 REPORT: PEOPLE'S REPUBLIC OF CHINA 188 (2005), available at <http://www.iipa.com/rbc/2005/2005SPEC301PRCrev.pdf>. For example, the average cost of a pirate VCD is \$0.60 to \$1.20. *Id.*

25. Yonehara, *supra* note 6, at 393.

26. *Id.*

27. *Id.*

28. Mary Catherine O'Connor, *Group Studies RFID to Stop Digital Piracy*, RFID J., May 12, 2005, <http://www.rfidjournal.com/article/articleview/1589>.

29. Yonehara, *supra* note 6, at 393.

30. Enrique de Argaez, *Internet World Stats, China Ends 2004 with 103 Million Internet Users*, <http://www.internetworldstats.com/articles/art045.htm> (last visited Jan. 17, 2007).

31. Motion Picture Association of America, *Internet Piracy*, [http://www.mpaa.org/piracy\\_internet.asp](http://www.mpaa.org/piracy_internet.asp) (last visited Jan. 17, 2007).

Today, internet piracy in China is growing rapidly.<sup>32</sup>

Videocassette piracy is the “illegal duplication, distribution, rental or sale of copyrighted videocassettes” with various devices.<sup>33</sup> Often, a pirate will simply use a hand-held video camera to record a theatre screen and then copy the film onto blank videocassettes for illegal distribution.<sup>34</sup>

Theatrical print theft involves the theft of a 35 or 16mm film print from a theater, studio, or other industry-related facility.<sup>35</sup> This “allows the pirate to make a relatively high quality videotape from the theatrical print, which then serves as the master” from which duplicates can be made.<sup>36</sup>

Piracy can also take place over the air waves.<sup>37</sup> Broadcast piracy involves the illegal on-air broadcasting of a film without permission from the copyright holder.<sup>38</sup> The film itself is usually a bootleg.<sup>39</sup> This problem is “mostly unchecked in Chinese hotels, clubs, mini-theatres and even government facilities.”<sup>40</sup> Equally problematic is the practice of illegally viewing movies by tapping into television cable systems and stealing satellite signals without authorization.<sup>41</sup>

### *B. Current Severity of the Piracy Problem in China*

In 2005, the U.S. motion picture industry lost an estimated \$2.1 billion due to copyright piracy in China, the nation with the worst piracy record in the world.<sup>42</sup> Industry estimates suggest that 93 percent of the potential market in China is “lost due to piracy.”<sup>43</sup> Statistics on the number of DVDs that have been seized in China help to illustrate the enormity of the problem, and the fact that it is escalating. In 2003, the National Anti-Piracy and Pornography Working Committee (NAPPWC) seized 64 million pirated optical discs in China.<sup>44</sup> In 2004, the number of discs seized by the NAPPWC was

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32. INT’L INTELLECTUAL PROPERTY ALLIANCE, *supra* note 24, at 189.

33. Motion Picture Association of America, Other Piracy, [http://www.mpa.org/piracy\\_other.asp](http://www.mpa.org/piracy_other.asp) (last visited Jan. 3, 2006).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *See id.*

40. INT’L INTELLECTUAL PROPERTY ALLIANCE, *supra* note 24, at 189.

41. Motion Picture Association of America, Other Piracy, *supra* note 33.

42. MOTION PICTURE ASSOCIATION OF AMERICA WORLDWIDE STUDY, *supra* note 4.

43. *Id.*

44. INT’L INTELLECTUAL PROPERTY ALLIANCE, *supra* note 24, at 187.



up to 165 million.<sup>45</sup> At the same time, Chinese customs officials claimed to have seized a further 79.6 million optical discs. "In 2004 there were reportedly 83 licensed plants in China, with 765 operating production lines."<sup>46</sup> This was "up from 71 plants and 569 lines reported in 2003."<sup>47</sup> Former President of the Motion Pictures Association of America (MPAA), Jack Valenti, indicated in June 2004 that piracy in China has reached a level "not seen since 1995 when it was 100 percent."<sup>48</sup>

Not only is piracy rampant in China, but the illegal DVDs distributed there are now being exported to other countries in the region, which will naturally exacerbate damage to the U.S. film industry.<sup>49</sup> In 2004, Jack Valenti noted that China was "once again becoming a source of pirate discs circulating in world markets."<sup>50</sup> The NAPPCW echoed this dire message, indicating that China is emerging as a major world exporter to the United States, the United Kingdom and other countries.<sup>51</sup> For example, the number of pirated discs from China seized by United Kingdom customs officials in 2004 totaled 78,666, "compared with 1,238 pirated discs seized in the same period [in] 2003 (a rapid increase of 6,254 percent)."<sup>52</sup>

## II. THE EVOLUTION OF CURRENT CHINESE COPYRIGHT LAW AND COPYRIGHT AGREEMENTS BETWEEN THE UNITED STATES AND CHINA

In order to appreciate the challenges involved in fighting film piracy in China, it is important to understand the country's current body of copyright law, as well as the difficult tug-of-war between the United States and China that led to its creation. Historically, China and the United States have had radically different degrees of copyright protection.<sup>53</sup> From its founding, the United States codified

45. *Id.*

46. *Id.*

47. *Id.*

48. *Evaluating International Intellectual Property Piracy: Hearing Before the S. Comm. On Foreign Relations*, 108th Cong. 4 (2004) (statement of Jack Valenti, President & CEO, Motion Picture Association of America), available at <http://www.senate.gov/~foreign/testimony/2004/ValentiTestimony040609.pdf>.

49. *See id.* at 2.

50. *Id.* at 5.

51. INT'L INTELLECTUAL PROPERTY ALLIANCE, *supra* note 24, at 188-89.

52. *Testimony Before the S. Comm.. on Foreign Relations* (2004) (statement of Jack Valenti, President & CEO, Motion Picture Association of America), available at <http://www.senate.gov/~foreign/testimony/2004/ValentiTestimony040609.pdf>.

53. 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, 601 (1995).

into law the protection of literary and artistic work, whereas China's copyright law only dates back to the 1970s.<sup>54</sup> At this time, the new generation of Chinese leaders who sought to open China economically understood that intellectual property laws were a prerequisite to attracting foreign investment and establishing good standing among the major players in the world economy.<sup>55</sup> Apparently reconciled to playing by a new set of rules, the Chinese joined a number of international copyright agreements and bilateral treaties with the United States, but its endeavor to match world standards in intellectual property rights enforcement has been marked by serious growing pains.

*A. A Brief History of Copyright Law in the United States and China*

In the United States, the protection of one's ideas was recognized as a fundamental right and was included in the Constitution over 200 years ago.<sup>56</sup> Article I, Section 8 gives Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>57</sup> Between 1790 and the 1960s, more than three million patents and ten million copyrights were issued under the authority of this constitutional clause.<sup>58</sup> By 2006, the United States Patent Office was issuing an average of 476 patents a day, "propelled" by growth in the electronics industry.<sup>59</sup> Such large scale distribution of copyrights and patents is in line with two basic tenets of U.S. intellectual property law: "(1) that the products of original and creative thought confer benefit upon society, and (2) that such creative thought is stimulated to greater activity when offered governmental protection of rights in its products as an incentive."<sup>60</sup> Today, the United States continues to benefit from a sophisticated body of copyright law that grants authors exclusive rights to reproduce, prepare, distribute, perform and display their works, or to authorize others to do so.<sup>61</sup>

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54. *Id.* at 601-02.

55. Priest, *supra* note 10, at 805.

56. U.S. CONST. art. I, § 8, cl. 8.

57. *Id.*

58. BRUCE W. BUGBEE, GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 2 (1967).

59. Posting of Emil Protalinsk to Neowin.net, U.S. Issues Record Number of Patents in 2006, <http://www.neowin.net/index.php?act=view&id=37141> (Jan. 13, 2007, 02:51).

60. BUGBEE, *supra* note 58, at 9.

61. 17 U.S.C. § 106 (2006).

By contrast, China's copyright law only came into existence 30 years ago, cultivated in an ideological environment opposing ownership of ideas.<sup>62</sup> During the Cultural Revolution, individual artistic expression not only was ascribed no value, but also was only permitted to the extent that it embodied state ideology.<sup>63</sup> When China adopted a socialist system, "authors were salaried employees of the State [with] no incentive to produce" and "could have no expectation of receiving [ . . . ] remuneration for the republication of their works."<sup>64</sup> Today, however, copyright protection "has taken on new importance" as authors depend on their creations, rather than the State, for their income<sup>65</sup> and as foreign investment in China is tagged increasingly to effective copyright protection.<sup>66</sup>

### *B. Modern Copyright Law in China and U.S.-China Treaties*

#### 1. The Creation of Chinese Copyright Law

China forged its first copyright agreement with the United States in 1979.<sup>67</sup> The U.S.-China Trade Agreement called for each nation to offer copyright, patent and trademark protection "equivalent" to the "protection correspondingly accorded by the other."<sup>68</sup> "Pursuant to this agreement, China became a member of the World Intellectual Property Organization (WIPO) in 1980. . . ."<sup>69</sup> However, despite strong international pressure, most notably from the United States, the enactment of a formal copyright law was delayed because of infighting among the drafters stemming from ideological differences over the meaning of copyright in China.<sup>70</sup>

In 1990 the PRC finally created a copyright law that explicitly protects the copyright and other legitimate rights and interests of the authors of literary, artistic and scientific works, including the

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62. See LAURENCE J. BRAHM, *INTELLECTUAL PROPERTY & TECHNOLOGY TRANSFER IN CHINA* 103-04 (2d ed. 1994).

63. *Id.* at 103.

64. *Id.* at 104.

65. *Id.*

66. Priest, *supra* note 10, at 805.

67. *Id.* at 806.

68. Agreement on Trade Relations Between the United States of America and the People's Republic of China art. VI(3), U.S.-P.R.C., July 7, 1979, 31 U.S.T. 4651.

69. Yu, *supra* note 7, at 8.

70. Michael N. Schlesinger, Note, *A Sleeping Giant Awakens: The Development of Intellectual Property Law in China*, 9 J. CHINESE L. 93, 113 (1995).

protection of films.<sup>71</sup> The law defines acts that are considered “infringement” if done without the copyright owner’s permission.<sup>72</sup> These include: (1) making public a work created by another person; and (2) exploiting a copyright owner’s work without paying her according to the provisions of the law.<sup>73</sup> Acts considered “serious infringements” include producing and distributing recordings of another producer.<sup>74</sup> The penalties imposed for this behavior include confiscation of illegal income, fines, and civil or criminal liability.<sup>75</sup> A copyright owner’s available remedies for these infringing acts are damages, an injunction, and an apology.<sup>76</sup>

While the creation of the 1990 copyright law was an important foundational step, it reflected the severe tension that shaped the drafting process, described as “the ‘most complicated’ in the PRC’s history” by one high ranking official.<sup>77</sup> The laws “undeniably reaffirmed the central role of the state in a socialist [system],” providing “broad exceptions for use by government actors.”<sup>78</sup> The state was permitted to publish works without permission and without providing the author any remuneration.<sup>79</sup> Likewise, television and broadcast stations were given *carte blanche* to broadcast sound recordings for non-commercial purposes without compensating or consulting the author.<sup>80</sup>

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71. INFORMATION OFFICE STATE COUNCIL OF THE PEOPLE’S REPUBLIC OF CHINA, *China Has a High-Grade Legal System for Intellectual Property Protection*, in INTELLECTUAL PROPERTY PROTECTION IN CHINA (1994), [http://english.people.com.cn/whitepaper/9\(2\).html](http://english.people.com.cn/whitepaper/9(2).html) [hereinafter INFORMATION OFFICE STATE COUNCIL OF THE PEOPLE’S REPUBLIC OF CHINA].

72. *Id.*

73. *Id.*

74. Kachuriak, *supra* note 53, at 607-08.

75. INFORMATION OFFICE STATE COUNCIL OF THE PEOPLE’S REPUBLIC OF CHINA, *supra* note 71.

76. *Id.*

77. Priest, *supra* note 10, at 808.

78. *Id.*

79. Copyright Law of the People’s Republic of China art. 22(7) (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, effective June 1, 1991) (P.R.C.), available at [http://www.wipo.int/clea/docs\\_new/pdf/en/cn/cn001en.pdf](http://www.wipo.int/clea/docs_new/pdf/en/cn/cn001en.pdf).

80. *Id.* art. 43.

## 2. China's Route to the WTO and Compliance with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

"In July 1986, China applied for admission to the WTO's predecessor, the General Agreement on Tariffs and Trade (GATT)."<sup>81</sup> That same year, efforts began to introduce intellectual property rules into the multilateral trading system for the first time as the 1986-1994 Uruguay Round negotiated the TRIPS Agreement, later adopted by the WTO.<sup>82</sup>

The WTO's TRIPS Agreement is an attempt to narrow the gaps in the way intellectual property rights are protected around the world and to bring them under common international rules. It establishes minimum levels of protection that each government must afford to the intellectual property of fellow WTO members.<sup>83</sup>

TRIPS specifically mandates that countries give adequate intellectual property rights, imposes minimum standards for how those rights should be enforced domestically, and instructs how disputes between countries should be settled.<sup>84</sup> In order to join GATT, and later the WTO, China needed to upgrade its copyright laws to meet these requirements.

## 3. U.S. Trade Sanctions and the MOU

While the Chinese effort at creating a copyright law had gained some momentum, the effectiveness of the laws were questioned over time. Once pacified by a desire to lure China into the "family of nations," U.S. businesses grew increasingly impatient with the escalating piracy and counterfeiting problems in China.<sup>85</sup> In 1991, U.S. Trade Representative (USTR) Carla Hills identified China as a "Priority Foreign Country" pursuant to a 1988 statute requiring the USTR to annually identify countries that deny "adequate and effective" intellectual property protection and "fair and equitable" market access to American companies that depend on intellectual

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81. United States Trade Representative, Background Information on China's Accession to the World Trade Organization (Dec. 11, 2001), [http://www.ustr.gov/Document\\_Library/Fact\\_Sheets/2001/Background\\_Information\\_on\\_China's\\_Accession\\_to\\_the\\_World\\_Trade\\_Organization.html](http://www.ustr.gov/Document_Library/Fact_Sheets/2001/Background_Information_on_China's_Accession_to_the_World_Trade_Organization.html).

82. *Id.* See also World Trade Organization, Understanding the WTO, Intellectual Property: Protection and Enforcement, *supra* note 10.

83. World Trade Organization, Understanding the WTO, Intellectual Property: Protection and Enforcement, *supra* note 10.

84. *Id.*

85. Yu, *supra* note 7, at 8-9.

property protection.<sup>86</sup> Hills further instigated a Special 301 investigation of China's intellectual property rights enforcement practices and policies.<sup>87</sup> After claims and counterclaims, and threats of sanctions and countersanctions by both countries, discussions finally resulted in the signing of the watershed 1992 Memorandum of Understanding on Intellectual Property (MOU).<sup>88</sup>

As required by the terms of the 1992 MOU, China acceded to the Berne Convention on October 15, 1992, and to the Geneva Phonograms Convention on October 30, 1992.<sup>89</sup> Article 1 of the Berne Convention created a union of member nations for multilateral protection of each member state's literary and artistic works.<sup>90</sup> China's copyright law, standing alone, afforded protection to U.S. works only if they were "first published" in China.<sup>91</sup> Significantly, Article 5 of the Berne Convention extends protection to authors who are not nationals of countries where their works are produced.<sup>92</sup> Therefore, after China's accession to the Berne Convention, U.S.

86. Baum, *supra* note 17, at 55; see also 19 U.S.C. §2242 (a)(1)(A)-(B) (2000).

87. Office of United States Trade Representative Fact Sheet—Subject: China-United States Failure To Reach Intellectual Property Accord, FED. NEWS SERVICE, Nov. 27, 1991, available at LEXIS, News Library, Federal News Service file.

88. US, China Said to be Close to Pact on Intellectual Property Protection, J. COMMERCE, Oct. 28, 1991, available at LEXIS, News Library, Journal of Commerce file; see also Memorandum of Understanding Concerning Market Access, U.S.-P.R.C., Oct. 10, 1992, 31 I.L.M. 1274 (1992) [hereinafter MOU].

89. The relevant terms of the MOU are:

1. The Chinese Government will accede to the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) (Paris 1971). The Chinese Government will submit a bill authorizing accession to the Berne Convention to its legislative body by April 1, 1992 and will use its best efforts to have the bill enacted by June 30, 1992. Upon enactment of the authorizing bill, the Chinese Government's instrument of accession to the Berne Convention will be submitted to the World Intellectual Property Organization with accession to be effective by October 15, 1992.

2. The Chinese Government will accede to the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Geneva Convention) and submit a bill to its legislative body authorizing accession by June 30, 1992. The Chinese Government will use its best efforts to have the bill enacted by February 1, 1993. The Chinese Government will deposit its instrument of ratification and the Convention will come into effect by June 1, 1993.

MOU, art. 3, §§ 1-2.

90. Berne Convention for the Protection of Literary and Artistic Works (Paris Text) art. 1, July 24, 1971, S. TREATY DOC. NO. 99-27, 828 U.N.T.S. 221, available at <http://www.law.cornell.edu/treaties/berne/overview.html> [hereinafter Berne Convention].

91. Copyright Law of the People's Republic of China art. 3 (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, effective June 1, 1991) (P.R.C.), available at [http://www.wipo.int/clea/docs\\_new/pdf/en/cn/cn001en.pdf](http://www.wipo.int/clea/docs_new/pdf/en/cn/cn001en.pdf).

92. Berne Convention, *supra* note 90, art. 5(1) & (3).

works produced in China are entitled to the same level of protection as Chinese works.<sup>93</sup>

#### 4. The 1995 China-U.S. Agreement Regarding Intellectual Property Rights

In 1995, China committed itself to improving the enforcement of its intellectual property laws in a Letter of Agreement with the United States.<sup>94</sup> The Agreement was China's response to having once more been designated a "Priority Foreign Country" by the USTR.<sup>95</sup> The key short-term project included the institution of a special enforcement period during which task forces would conduct raids on manufacturing and retail facilities, with efforts primarily directed against piracy activities involving motion pictures.<sup>96</sup> Factories engaged in infringing activities would have their business licenses revoked, be punished through seizure and forfeiture of infringing products, be required to compensate the infringed party's loss, and be subject to serious fines.<sup>97</sup>

Significantly, China also pledged to assist aggrieved foreign copyright holders in redressing their injuries.<sup>98</sup> Foreign and domestic right holders could "submit petitions for investigations and enforcement actions to an enforcement task force."<sup>99</sup> Petitions would be accepted according to published, uniform criteria limited to determining whether the petitioner was a right holder (or that person's authorized representative) and whether the suspicion of infringement was valid. Foreign right holders were further permitted to collect by legal means any information relevant to the issue of

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93. *See id.* A distinction is made between the extent of protection in the country of origin and the Union: protection in the country of origin is governed by domestic law, but in countries other than the country of origin, the author is given not only the rights which afforded under that country's domestic laws, but also the rights granted by the Convention. *See id.* In theory, therefore, an author can be worse off in the country of origin than in other countries of the Union. *See* E.P. SKONE JAMES ET AL., *COPINGER & SKONE JAMES ON COPYRIGHT* 551-52 (13th ed. Sweet & Maxwell, Ltd. 1991) (1870).

94. *See* Letter from Wu Yi, Minister of Foreign Trade and Economic Cooperation of the People's Republic of China, to Michael Kantor, U.S. Trade Representative (Feb. 26, 1995), *reprinted in* 34 I.L.M. 881, 882 (1995) [hereinafter Wu Yi Letter]; Letter from Wu Yi, Minister of Foreign Trade and Economic Cooperation of the People's Republic of China, to Michael Kantor, U.S. Trade Representative, Annex I (Feb. 26, 1995), *reprinted in* 34 I.L.M. 881, 887 (1995) [hereinafter Wu Yi Annex].

95. Yu, *supra* note 7, at 10-11.

96. Wu Yi Letter, *supra* note 94, at 883.

97. *Id.*

98. *See id.*

99. Wu Yi Annex, *supra* note 94, at 891.

infringement.<sup>100</sup> In an effort at prevention, the agreement also pledged to publicize the intellectual property laws throughout the country, to offer classes on intellectual property rights at institutes of higher learning, and to train judicial and prosecutorial personnel to better deal with infringements.<sup>101</sup>

On an economic front, the 1995 Agreement also addressed the rights of foreigners to enter the Chinese market. China confirmed that it would not “impose quotas, import license requirements, or other restrictions on the importation of audio-visual and published products, whether formal or informal.”<sup>102</sup> China further agreed to permit U.S. individuals and entities to establish joint ventures with Chinese entities in the audio-visual sector.<sup>103</sup> These joint ventures could contract with Chinese publishing enterprises to distribute, sell, display and perform works in China.<sup>104</sup>

Addressing the critical issue of enforcement, the 1995 Agreement provided for a long-term (three to five year) plan for sustained enforcement of China’s copyright laws.<sup>105</sup> This plan would be carried out by the “State Council’s Working Conference on Intellectual Property Rights, other working conferences on intellectual property, enforcement task forces and ad hoc groups,” who would coordinate to provide effective enforcement and punishment of infringement throughout the country.<sup>106</sup> Other administrative authorities would join this effort, including the National Copyright Administration, the State Administration for Industry and Commerce, the Chinese Patent Office, Chinese Customs, and all Chinese police agencies.<sup>107</sup> Thus, a body of enforcement personnel assembled to carry out the quotidian tasks involved in implementing China’s intellectual property laws.<sup>108</sup>

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

Despite the seemingly promising strides made with the 1995 Agreement, China was yet again designated a “Priority Foreign

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100. *Id.* at 898-99.

101. *Id.* at 905-06.

102. Wu Yi Letter, *supra* note 94, at 884.

103. *Id.*

104. *Id.*

105. Wu Yi Annex, *supra* note 94, at 887.

106. *Id.*

107. *Id.* at 890.

108. *See id.* at 887.



Country” in 1996.<sup>109</sup> The Clinton Administration announced its intention to impose approximately \$2 billion worth of trade sanctions on Chinese goods, only to be met thirty minutes later with a retaliatory announcement by the Chinese threatening similar sanctions on U.S. goods.<sup>110</sup> The compromise the countries reached principally affirmed the substance of the 1995 Agreement, rather than setting out new terms.<sup>111</sup> While the utility of the 1996 Agreement thus looked dubious, China made significant progress in combating piracy after signing it, including the closure of 39 factories pirating U.S. CDs and the arrest of more than 250 people.<sup>112</sup> However, the event highlighted for some the possible futility of trade sanctions.<sup>113</sup>

## 6. China Joins the WTO

China finally became a member of the WTO on December 11, 2001.<sup>114</sup> It simultaneously shouldered the WTO requirement that its members operate with openness and transparency, in keeping with the organization’s emphasis on the central role of markets and private enterprise.<sup>115</sup> With regard to copyright protection specifically, China is bound to the TRIPS standards of regulation and enforcement.<sup>116</sup> Although China’s accession to the WTO involved many factors, one legal scholar has noted that “it would not be too far-fetched to argue that China might still remain outside the WTO had it not strengthened its protection of intellectual property rights.”<sup>117</sup>

Unfortunately, even before China’s accession to the WTO, critics noted that it might not be the panacea that the U.S. was hoping for and warned that the West might be optimistically exaggerating the institutional capacity of the WTO to check China’s abuse of intellectual property rights.<sup>118</sup> Hindsight has demonstrated the wisdom of these predictions: a 2006 USTR report to Congress on

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109. Yu, *supra* note 7, at 13.

110. *Id.*

111. *Id.* at 14.

112. Julia Cheng, Note, *China’s Copyright System: Rising to the Spirit of TRIPS Requires an Internal Focus and WTO Membership*, 21 FORDHAM INT’L L.J. 1941, 1976-77 (1998).

113. *See id.* at 1977-78.

114. World Trade Organization, Understanding the WTO, Members and Observers, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Jan. 3, 2006).

115. United States Trade Representative, *supra* note 81.

116. *See* World Trade Organization, Understanding the WTO, Intellectual Property: Protection and Enforcement, *supra* note 10.

117. Yu, *supra* note 7, at 30.

118. Baum, *supra* note 17, at 63-64.

China's WTO obligation requirements noted China's lamentable intellectual property rights enforcement record, even now that China's five year transition period into the WTO has passed.<sup>119</sup> In particular, the USTR Report noted that China's enforcement of its laws protecting the intellectual property rights covered by the TRIPS agreement has been "ineffective" and that China "continues to deflect calls from the United States and other WTO members" to combat infringement despite being placed on the U.S. Priority Watch list in 2005.<sup>120</sup> Clearly, China's ability to maintain satisfactory levels of copyright enforcement is an ongoing concern.<sup>121</sup>

### III. WHY PIRACY IN CHINA IS INCREASING DESPITE LEGISLATIVE MECHANISMS TO PREVENT IT: THE PROBLEM OF ENFORCEMENT

Movie piracy in China should be declining. China drafted its copyright law in conformity with WTO and international treaty requirements and, in some areas, such as moral rights protections for authors, included protections even broader than those provided by the U.S. Copyright Act.<sup>122</sup> Why then has piracy in China grown dramatically since the signing of these agreements? Unlike in the 1980's and 1990's, when inadequate laws were to blame, piracy in China today is on the rise because of deficiencies in the current enforcement system.<sup>123</sup> The problem manifests itself at various levels of society—from cultural predispositions held by the public at large, to an incompetent judiciary and an administrative apparatus captured by local interests.

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119. UNITED STATES TRADE REPRESENTATIVE, 2006 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 70 (2006), available at [http://ustr.gov/assets/Document\\_Library/Reports\\_Publications/2006/asset\\_upload\\_file688\\_10223.pdf](http://ustr.gov/assets/Document_Library/Reports_Publications/2006/asset_upload_file688_10223.pdf) (citing a "chronic underutilization of deterrent criminal remedies" as a particularly egregious failure on China's part).

120. *Id.* at 6.

121. *See id.*

122. *See* Jonathan C. Spierer, *Intellectual Property in China: Prospectus for New Market Entrants*, HARV. ASIA Q., Summer 1999, available at <http://www.asiaquarterly.com/content/view/44/40/>; *see also* Yonehara, *supra* note 6, at 395.

123. *Piracy of Intellectual Property: Hearing Before the Subcomm. on Intellectual Prop. Of the S. Comm. on the Judiciary*, 109th Cong. (2005) (statements of Eric H. Smith, President, International Intellectual Property Alliance).

### A. Cultural Differences Between the U.S. and China

China's modern cultural predispositions have had a long gestation period—a history spanning thousands of years in which successive generations of Chinese have been ingrained with values often contrary to Western social norms. Cultural differences between the United States and China account for the different value placed on U.S. principles of intellectual property law and may seriously impede the “will” of the Chinese people to protect U.S. intellectual property rights.<sup>124</sup>

#### 1. Tradition of Imitation

“For over 2000 years, the Chinese had been heavily influenced by Confucianism,” a doctrine that reveres the past and deems it the ultimate tool for understanding future behavior.<sup>125</sup> Therefore, throughout Chinese history, materials and information about the past were put in the public domain for people to study and pass on to future generations.<sup>126</sup> The practice of copying this material as an educational tool was encouraged.<sup>127</sup> Confucius himself proudly acknowledged that he had “transmitted what was taught [him] *without making up anything of [his] own.*”<sup>128</sup>

Traditional Chinese writers were “compilers rather than composers”—“[they] memorized vast sequences of the classics and histories, [and] they constructed their own works by extensive cut-and-paste replication of phrases and passages from those sources.”<sup>129</sup> While the West would classify such works as mere “plagiarism,” the Chinese respected them as “preservers” of the historical record.<sup>130</sup> Indeed, copying was considered a laudable “manifestation of respect

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124. Katherine C. Spelman, *Combating Counterfeiting*, 417 PLI/PAT 309, 326 (Oct. 1995).

125. Yu, *supra* note 7, at 16-17.

126. *Id.* at 17.

127. Ramona L. Taylor, *Tearing Down the Great Wall: China's Road to WTO Accession*, 41 IDEA 151 (2001). See also RAY HUANG, CHINA: A MACRO HISTORY 236 (1997) (noting that these Chinese civil service exams, which required memorization, were palatable to the state in historical times as they “subtly delivered materialistic incentives for the subscription of orthodox social values handed down [from the past] to keep rural communities in line.”).

128. Yu, *supra* note 7, at 17 (alteration in original) (internal quotation marks omitted).

129. JOHN KING FAIRBANK, CHINA: A NEW HISTORY 100-01 (1992).

130. *Id.* at 101.

related to ancestor worship.”<sup>131</sup> Intellectual property rights run contrary to this notion of freely sharing information to better oneself and society, and therefore contradict traditional Chinese moral standards.<sup>132</sup>

## 2. Aversion to Litigation

Against this backdrop of a tradition that encourages copying is a historical disdain for the law and lawsuits. “Rights” in China are typically developed through tradition and custom, rather than law.<sup>133</sup> Traditionally, *Fa* (positive law) was considered less important than *Li* (moral code or customary law) in Confucian China.<sup>134</sup> In other words, “rigid codes and severe punishment” had less utility in regulating human behavior and society than did “good moral example and persuasion.”<sup>135</sup> While the imperial Chinese created a code of law, that code embodied the ethics of Confucius and was “invoked only when moral persuasion and social sanction failed.”<sup>136</sup>

Furthermore, the Chinese traditionally eschewed the courts and viewed litigation as a “last resort.”<sup>137</sup> “In line with the spirit of social harmony and compromise [advocated by Confucius], the informal means of mediation became the prevailing form of dispute resolution” and were held in higher regard than the court system.<sup>138</sup> Even when the Chinese Nationalist government of the 1930’s established an independent judicial hierarchy, “the tendency was to disregard *Fa* in favor of *Li*” where the two conflicted.<sup>139</sup> Thus, the institution in China of a legal infrastructure in line with Western style

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131. J. DAVID MURPHY, *PLUNDER AND PRESERVATION: CULTURAL PROPERTY LAW AND PRACTICE IN THE PEOPLE’S REPUBLIC OF CHINA* 30 (1995). Interestingly, in the sixteenth and early seventeenth centuries, increased collecting of antique artifacts led to an increase in forgeries. *Id.* at 31. “Chinese dealers [of ancient artifacts] used to feel that if the prospective purchaser could not see the difference [between an original and a copy] he may as well have a copy.” *Id.* at 31-32 (quoting Anthony du Boulay, *Attributions, Fakes, and Forgeries*, in *CHRISTIE’S GUIDE TO COLLECTING* 62 (Robert Cumming, ed. 1984)).

132. Yu, *supra* note 7, at 17.

133. Spelman, *supra* note 124, at 326.

134. LENG, *supra* note 13, at xiii.

135. *Id.* In addition, “[t]his view is well illustrated by one of Confucius’ statements: ‘If the people are guided by laws and regulated by punishment, they will try to avoid the punishment but have no sense of shame; if they are guided by virtue and regulated by *Li*, they will have the sense of shame and also become good.’” *Id.* (quoting *THE ANALECTS*, Book 2, Chapter 3).

136. *Id.* at xiv.

137. *Id.*

138. *Id.* at xv.

139. *Id.*

rule of law did not necessarily guarantee a comparable notion of justice. To this day, the Chinese regard laws as “inefficient, arbitrary and cumbersome instrument[s] for government interference.”<sup>140</sup>

### *B. Ideological Problems*

The PRC’s notorious censorship of information has had the unintended, albeit predictable, effect of creating a booming black market for illegal versions of censored movies.<sup>141</sup> Imported films, portraying (if not idealizing) Western culture and political views are a natural target of the PRC’s information control policy.<sup>142</sup> The logic behind such control is that the media can serve as a conduit for political indoctrination, as well as a vehicle for mobilization of the masses—both potentially destabilizing elements to the Communist regime.<sup>143</sup>

“The Motion Picture Exhibitors Association of America has alleged that ‘China has an unofficial, unwritten, “shadowy” system of quotas for films, video, and television.’”<sup>144</sup> Indeed, films “undergo very stringent scrutiny under China’s information censorship regulations.”<sup>145</sup> For example, the 1998 film “Red Corner” (depicting a wealthy American businessman framed for murder by corrupt Chinese officials while working on a joint venture with the PRC government) was not even allowed into China because its political theme was deemed distasteful.<sup>146</sup> Walt Disney was told that its film “Kundun” (which shows a Chinese invasion of Tibet and has a notable bias in favor of the latter country) could not come in unless Disney “better cooperated with China in relevant areas.”<sup>147</sup> Interestingly, Disney’s “Mulan” (depicting a Chinese girl who dresses as a man and enlists in the Emperor’s army to keep her aging father from being sent to the front line and certain death) was only distributed after rumors that Disney was planning on building a Disneyland theme park in Southeast China.<sup>148</sup>

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140. Yu, *supra* note 7, at 24.

141. Pang, *supra* note 15, at 110.

142. *Id.* at 119.

143. *See id.*

144. Yu, *supra* note 7, at 23 (citing Glenn R. Butters, *Pirates, Dragons and U.S. Intellectual Property Rights in China: Problems and Prospects of Chinese Enforcement*, 38 ARIZ. L. REV. 1081, 1105-06 (1996)).

145. Yonehara, *supra* note 6, at 413.

146. *Id.* at 413 & n.203.

147. *Id.* at 413.

148. *Id.*; *see also* Wikipedia.org, *Mulan*, <http://en.wikipedia.org/wiki/Mulan> (last visited Jan. 17, 2007).

Unfortunately, while the Chinese government's censorship policies ignore the public's appetite for entertaining movies, the masses turn to the black market for their entertainment demands.<sup>149</sup> Thus, the result of such tight control is simply "Chinese cinema's metamorphosis from a collective public event to a piracy-privacy activity."<sup>150</sup>

### C. The Judiciary

Inherent flaws in China's nascent judiciary, and public perception of the system as a whole, seriously undermine this potentially ideal recourse for redressing and deterring copyright abuses. The problem is both ideological and practical—China has a long history of subordinating law to dominant political philosophy,<sup>151</sup> notably evidenced when Mao decimated the judiciary in the Cultural Revolution.<sup>152</sup> The court system which has evolved since Mao's death is still very new and lacks many of the procedural safeguards, such as transparency and independence from other branches of government, which would enable efficient resolution of copyright disputes.<sup>153</sup>

#### 1. Lack of Adequate Legal Personnel

A principle problem with enforcing copyright laws in China today is the lack of education among legal professionals. In the 1960s, during the Cultural Revolution in China, judges were considered enemies of the people and sent to forced labor camps for "re-education."<sup>154</sup> Lawyers were jailed for defending clients charged with political subversion, and judges were persecuted for placing law above

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149. Pang, *supra* note 15, at 110.

150. *Id.* at 103; see, e.g., *id.* at 119 (describing the government's control of the cinema industry). As early as the 1930's, the Communist Part, as early seized on the cinema as its major pedagogical tool. *Id.* at 105. The China Film Corporation was established and charged with coordinating all film-related units in China, as well as selected foreign distributors. *Id.* The power of China Film Corporation was absolute, as it had exclusive control over film imports, exports, and national distribution. *Id.* The state has since shown little enthusiasm for replacing the policy of cinema centralization. *Id.* at 106.

151. LENG, *supra* note 13, at 53 (observing that many existing laws were changed to reflect changes in the political or economic conditions).

152. Baum, *supra* note 17, at 49.

153. Chris X. Lin, *A Quiet Revolution: An Overview of China's Judicial Reform*, 4 *ASIAN-PACIFIC L. & POL'Y J.* 180, 183 (2003); see also Baum, *supra* note 17, at 63.

154. See Gregory S. Kolton, Comment, *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, 425 (1996).

the People's Revolution.<sup>155</sup> At the height of the Cultural Revolution, the legal system as a distinct entity effectively ceased to exist.<sup>156</sup>

China has since rebuilt its legal system, but insufficient time has elapsed since its atrophy to cultivate individuals with enough experience to sit on the bench.<sup>157</sup> The fact that Chinese judges are political appointees who very often have no formal legal training only exacerbates the problem.<sup>158</sup> For example, in an effort to rapidly expand the number of judges in China many retired army officers without legal training were recruited to the bench.<sup>159</sup> This is particularly problematic in China's inquisitorial judicial system where judges must determine the facts themselves rather than supervise adversarial lawyers' presentation of the story.<sup>160</sup> With little knowledge of the law, knowing the relevant questions to ask in a complex copyright action is clearly a challenge. Indeed, throughout the 1980's, the People's Court itself complained about lack of training and experience.<sup>161</sup> The subsequent creation of intellectual property courts in an effort at compliance with its international treaty obligations has not been the panacea China claims, and problems of technical competence persist.<sup>162</sup>

## 2. No Familiarity with Copyright Laws

Another problem with the judiciary is the dearth of lawyers genuinely qualified to practice law in general, let alone handle complex copyright issues involving new Chinese law. In 1982, there were "fewer than 10,000 lawyers in a country of nearly one billion."<sup>163</sup> Historically, the requirements for admission to the "people's bar" were rather irregular and established minimum educational requirements far below the floor set by the American Bar Association.<sup>164</sup> For

155. Baum, *supra* note 17, at 49.

156. *Id.*

157. *See id.* at 61.

158. *See id.*

159. *Id.* at 61.

160. Kolton, *supra* note 154, at 450.

161. PETER FENG, INTELLECTUAL PROPERTY IN CHINA 15 (1997).

162. Butterson, *supra* note 144, at 1101.

163. RONALD C. BROWN, UNDERSTANDING CHINESE COURTS AND LEGAL PROCESS: LAW WITH CHINESE CHARACTERISTICS 24-25 (1997). Even before the Communist regime took power, "the Chinese never held the bar in the same esteem as the people in the West." LENG, *supra* note 13, at 127.

164. LENG, *supra* note 13, at 138; *see also* NATIONAL CONFERENCE OF BAR EXAMINERS & AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 3-16 (2007), available at [http://www.ncbex.org/fileadmin/mediafiles/downloads/Comp\\_Guide/](http://www.ncbex.org/fileadmin/mediafiles/downloads/Comp_Guide/)

example, a person who had not “graduated from a senior law school” or “been trained in a legal professional subject” could apply for admission to a Lawyer’s Association if he possessed “similar ability and ha[d] graduated from a university.”<sup>165</sup> In May 1996, the Lawyer’s Law of the PRC was promulgated to develop a “more professional and accountable legal community.”<sup>166</sup> A subsequent growth spurt saw the number of lawyers rise to 170,000 by the end of 1997.<sup>167</sup> However, the growth in numbers has not been matched by a concomitant increase in quality of legal training.<sup>168</sup>

### 3. Lack of Independence

The Chinese judiciary traditionally enjoys no more independence than the bounds imposed by the dominant political philosophy of the day. “During the Mao era, formal laws were denounced” as “defective” on a number of grounds, including their

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2007CompGuide.pdf (setting standards for character and fitness determinations, requirements for completion of certain courses and skills training during law school and registration requirements for lawyers in each U.S. jurisdiction); American Bar Association, Mandatory Continuing Legal Education (MCLE), <http://www.abanet.org/cle/mandatory.html> (last visited Jan. 17, 2007) (noting that 43 jurisdictions require lawyers to undergo continuing legal education in order to practice law in that jurisdiction).

165. ZHENG CHENGSI, CHINESE INTELLECTUAL PROPERTY AND TECHNOLOGY TRANSFER LAW 5 (1987) (quoting articles 8 and 9 of the *Interim Rules Concerning Lawyers*).

Under the Lawyers Law, there are two avenues by which a person may qualify as a lawyer. The first is to pass the national bar examination (NBE). Qualified candidates include: (a) those who have studied in law faculties of universities and obtained diplomas at tertiary level (*zhuanke*) or higher; (b) those who hold the same level of professional skills as in (a); and (c) those who have received a Bachelor’s degree or above in other university subjects. The second avenue is to be granted the title of “lawyer” upon assessment and approval (*kaohe*) by the judicial administrative department of the State Council. Eligible candidates include those who have obtained a Bachelor’s degree or higher from law faculty of a university, and are engaged in research or teaching law with senior professional titles, or who have attained the same level of professional skills. . . .

. . . The Minister of Justice defended this dual system by claiming that candidates qualified through the *kaohe* system “are of a higher cultural level and have engaged in legal professional work for a longer period of time and are of a higher level of legal proficiency”. Many do not view this as a satisfactory institution of qualification.

Li Yuwen, *Lawyers in China: A “Flourishing” Profession in a Rapidly Changing Society?* CHINA PERSP., Jan.-Feb. 2000, at 20, available at [http://www.cefc.com.hk/uk/pc/articles/art\\_ligne.php?num\\_art\\_ligne=2702](http://www.cefc.com.hk/uk/pc/articles/art_ligne.php?num_art_ligne=2702) (citations omitted). Note also that the American Bar Association even requires Mandatory Continuing Legal Education (MCLE) courses in the first several years of practice. See American Bar Association, Summary of State MCLE Requirements, <http://www.abanet.org/cle/mclevew.html> (last visited Jan. 3, 2006).

166. Luo, *supra* note 17, at 1.

167. *Id.* at 2.

168. *Id.*



“rigidity,” and were replaced with socialist laws that would “operate within the boundaries of policy directives.”<sup>169</sup> Thereafter, until Mao’s death in 1976, law was simply a vehicle for implementation of his political policy.<sup>170</sup> Post-Mao leadership relaxed political control of the law to some degree, but the state of the law still lags far behind Western norms required by the WTO.<sup>171</sup> To this day, no principle, however normatively stated in the Constitution or law, is permitted to conflict with the policy needs of the Communist Party.<sup>172</sup> Though the law generally operates in a predictable manner, it is still considered a “concrete formulation of the Party’s policy” and is intended to be flexible.<sup>173</sup>

#### 4. Lack of Transparency

Transparency of the legal process, while a fundamental underpinning of the U.S. legal system, is sorely lacking in China and poses another obstacle to redressing copyright abuses in China through resort to the judiciary.<sup>174</sup> Despite the TRIPS Agreement requirement that law, regulations and final judicial decisions of general application “pertaining to [intellectual property rights] infringement be made publicly available to rights holders,” the USTR reported in 2005 that China is acutely lagging behind its treaty obligations.<sup>175</sup> “[L]ack of transparent information on [intellectual property rights] infringement levels and enforcement activities in China continues to be an acute problem.”<sup>176</sup> Government entities responsible for drafting rules only solicit comments from pre-selected industry and trade associations rather than the public at large, despite numerous pledges to the United States that they would consult the general population.<sup>177</sup> Moreover, certain laws are not available to the public even when enacted, and “numerous local rules

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169. Yu, *supra* note 7, at 25 (citing FENG, *supra* note 161, at 10) (internal quotation marks omitted).

170. *Id.*

171. Lin, *supra* note 153, at 214-15.

172. See Yu, *supra* note 7, at 25.

173. Peter K. Yu, *Piracy, Prejudice and Perspectives: An Attempt to Use Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate*, 19 B.U. INT’L L. J. 1, 35-36 (2001) (quoting FENG, *supra* note 161, at 3).

174. USTR OUT-OF-CYCLE REVIEW, *supra* note 18.

175. *Id.*

176. *Id.*

177. *Id.*

. . . are inconsistent with national law . . . resulting in uncertainty and confusion.”<sup>178</sup>

### 5. Low Damage Awards

While many institutional problems clearly frustrate foreigners’ litigation of intellectual property claims in China, the unavailability of sufficient damage awards discourages would-be litigants from even bringing suit in the first place. “[D]amages [for counterfeit and pirated goods] are often assessed based on the infringer’s profits,” rather than the loss by the petitioner of the actual retail value of the copied film.<sup>179</sup> Inevitably, the pirated goods are sold at a price much lower than the retail value of the original, and the paltry damage award therefore “frequently does not justify the cost of litigation.”<sup>180</sup>

The addition of statutory damage provisions to China’s recently revised intellectual property laws are a step in the right direction. Changes in the intellectual property laws now permit “awards up to RMB500,000 (US\$62,000) in trademark and copyright infringement cases where the right holder’s actual losses or the infringer’s profits are difficult to prove.”<sup>181</sup> However, even with these revisions, it is difficult to enforce the judgments issued by Chinese courts in many cases.<sup>182</sup> Over half of civil and economic judgments in China require coercive enforcement procedures to be implemented.<sup>183</sup> The winning party often spends extra time, effort and money to enforce judgments with no guarantee of any compensation at all.<sup>184</sup> Indeed, enforcement

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178. *Id.*

179. AMERICAN CHAMBER OF COMMERCE, *supra* note 18.

180. *Id.*

181. *Id.* “Such difficulties in proving prior profits or damages are the norm . . . in most counterfeiting and copyright piracy cases”—particularly since there is no formal discovery mechanism in China. *Id.* In fact, Chinese parties “can easily conceal, distort, or even destroy evidence before or during trial, because parties typically are not required to produce relevant materials upon request,” nor are they subject to criminal sanctions for such behavior. *Id.* To remedy this problem, the Civil Procedure Code and Evidence law must be amended. *Id.*

182. See Donald C. Clarke, *The Execution of Civil Judgments in China*, CHINA Q. (SPECIAL ISSUE), Mar. 1995, at 65.

183. Posting of Donald Clark to Chinese Law Professor Blog, Wan Exiang: Over Half of Civil and Economic Judgments Require Coercive Enforcement, [http://lawprofessors.typepad.com/china\\_law\\_prof\\_blog/2005/07/wan\\_exiang\\_over.html](http://lawprofessors.typepad.com/china_law_prof_blog/2005/07/wan_exiang_over.html) (July 8, 2005).

184. Lindsay Wilson, *Investors Beware: The WTO Will Not Cure All Ills With China*, 2003 COLUM. BUS. L. REV. 1007, 1021.

continues to be described by many as “harder than reaching the sky.”<sup>185</sup>

#### *D. Administrative*

Beijing’s agreements with the United States are of little import if they are not enforced at the local level. The problem of local protectionism has been touted by one legal scholar as “the single most significant problem for those seeking [to enforce] their rights” in China.<sup>186</sup> In 1979, the Chinese government “decentralize[d] 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.”<sup>187</sup> Today, “[l]ocal governments play an increasingly active role in politics,” and “it is often hard to implement a national plan without local governments’ consent and cooperation.”<sup>188</sup> Moreover, individuals seeking redress confront a maze of individual governments, each with its own interests in mind.<sup>189</sup>

Local protectionism poses a major obstacle in combating movie piracy since provincial governments have the task of enforcing the copyright laws at the local level.<sup>190</sup> In making political judgments, local interests often trump the exigencies of state policy.<sup>191</sup> Local officials are tempted to “intervene in court judgments that would seriously jeopardize local business enterprises” in order to avoid potential political and economic fallout.<sup>192</sup> “The trade in counterfeit goods has become a ‘vital portion of some local economies, providing employment of otherwise unemployable workers and generating significant revenue for the local economy.’”<sup>193</sup> Because the administrative enforcement offices have limited budgets, they are often no match for the wealthy and fiscally independent, “politically powerful local government[s].”<sup>194</sup> Furthermore, enforcement officials

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185. See *Enforcement of Civil Judgments: Harder Than Reaching the Sky*, CHINA L. & GOV. REV., June 2004, <http://www.chinareview.info/issue2/pages/legal.htm>.

186. Baum, *supra* note 17, at 58.

187. Cheng, *supra* note 112, at 1985.

188. 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, 401 (1996).

189. Yonehara, *supra* note 6, at 415.

190. *Id.* at 414-15.

191. Cheng, *supra* note 112, at 1986.

192. *Id.*

193. Baum, *supra* note 17, at 58 (quoting Daniel C.K. Chow, *Counterfeiting in the People’s Republic of China*, 78 WASH. U. L.Q. 3, 26-27 (2000)).

194. Yonehara, *supra* note 6, at 415.

are generally not neutral to begin with, "since local government directly controls the recruiting, financing and management of the region's enforcement authority."<sup>195</sup>

#### IV. PROPOSED REMEDIES TO CURB MOVIE PIRACY IN CHINA

In the late 1980s and early 1990s, the United States "relied heavily on pressure and ultimata" to force the Chinese to create and reform their copyright laws.<sup>196</sup> However, the Chinese have been most vigilant about intellectual property protection when the U.S. government and American businesses backed away from these coercive tactics.<sup>197</sup> What accounts for this seemingly counterintuitive result? First, American threats of trade sanctions do more harm than good: they hinder the relationship between the United States and China, and they "defeat the cooperative style of the WTO."<sup>198</sup> By virtue of its membership in the WTO, China is already obligated to abide by its rules, including TRIPS.<sup>199</sup> China's interest in continued membership is a more effective incentive to curb piracy than the threat of trade sanctions.<sup>200</sup> Furthermore, "[r]epetitive threats of trade sanctions might cause China to lose patience with the United States and switch to Europe, Japan and Russia" for its trade.<sup>201</sup> Not only would the current profitable level of trade between the United States and China thus be lost, but the international criticism the United States has already suffered for its continued use of unilateral trade sanctions would increase.<sup>202</sup> Fortunately, while trade sanctions fall short of effectively curbing Chinese piracy, more benign measures may prove effective.<sup>203</sup> Skeptics argue that pressure tactics only result in short-term, well-publicized raids of factories, while fundamental changes will affect these same results without foreign coercion.<sup>204</sup> Below, I propose that instituting a combination of educational initiatives, judicial reform and economic incentives is a workable and effective strategy to tackle the problem of movie piracy in China.

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195. Li, *supra* note 188, at 401.

196. Yu, *supra* note 7, at 26.

197. *Id.*

198. Yonehara, *supra* note 6, at 420.

199. *Id.*

200. *See id.*

201. Cheng, *supra* note 112, at 1978.

202. *See id.* at 1978-79.

203. *See* Butters, *supra* note 144, at 1083.

204. *Id.*

### *A. Education*

In order to enforce China's existing set of intellectual property right laws, it is critical to educate both legal professionals and the public about their existence, how to use them, and the ills they seek to prevent. The 1995 Action Plan called for an education campaign which has, at least recently, gained momentum. In May 2004, the Shanghai Municipal People's Government and Shanghai Intellectual Property Administration signed a seven-year agreement with the American International Education Foundation (AIEF) to strengthen the city's intellectual property rights standards.<sup>205</sup> The AIEF will facilitate intellectual property rights reform in China's largest city by providing integrated education and training programs to "Shanghai policy makers, administrators, educators, judges, customs officers, business owners and enforcement agents."<sup>206</sup> "China already has established intellectual property departments at several top universities"; both Beijing University and Shanghai University opened intellectual property departments over a decade ago.<sup>207</sup>

Educating the lay public is equally important since these are obviously the main culprits for the current piracy problem—both in terms of creating and buying pirated movies. The State Intellectual Property Office (SIPO) released a report on January 16, 2006 highlighting experimental intellectual property rights education initiatives to "accelerate social development," such as teaching children about intellectual property rights and that infringement is wrong, as well as "encourage[ing adults] to be creative."<sup>208</sup> The report noted that many of the other government-instituted projects thus far have only been temporary solutions.<sup>209</sup> According to SIPO, a "final, comprehensive approach would be for China to include [intellectual property rights] education in its national development strategies."<sup>210</sup>

It is clear that China has much work to do before it reaches the level of education needed to effectively curb piracy. Piracy is so commonplace in China that it does not strike the public consciousness;

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205. American International Education Foundation, Shanghai IPR Workshop 2004, Elevating Intellectual Property Rights (IPR) in China's Largest City and Leading Industrial Center, [http://www.ief-usa.org/ipr/workshop/shanghai\\_2004.htm](http://www.ief-usa.org/ipr/workshop/shanghai_2004.htm) (last visited Jan. 3, 2006).

206. *Id.*

207. Kolton, *supra* note 154, at 457.

208. *Knowledge is Key*, CHINA BUS. WKLY., Jan. 16, 2006, [http://www.chinadaily.com.cn/english/doc/2006-01/16/content\\_512553.htm](http://www.chinadaily.com.cn/english/doc/2006-01/16/content_512553.htm).

209. *Id.*

210. *Id.*

pirated DVDs are sold not only on street corners by individual vendors, but in fixed stores brazenly displaying their illegal wares.<sup>211</sup> In the same way that the U.S. public did not believe smoking to be unhealthy until aggressive educational and advertising campaigns assaulted the nation with images of black lungs and mute patients in hospital beds, the Chinese public should be educated about how film piracy can wreck the careers of individual artists and cripple the movie industry as a whole. Educational campaigns should target youth in elementary and middle schools, so that children learn early that buying a pirated DVD is the same as stealing a physical object from a store, and that the seriousness of the offense in the eyes of the law is no less severe.

### B. Judicial Reform

China must remedy the poor state of its judiciary if civil litigation is ever to effectively deter copyright infringement. In its 2005 report, the USTR noted that a lack of transparency in the Chinese intellectual property law remains an “acute problem.”<sup>212</sup> It proposed that China immediately “[m]ake publicly available case rulings and [intellectual property rights]-related statistical data, including data on government compliance with software copyright licensing, and on administrative and judicial decisions, including penalties imposed.”<sup>213</sup>

As far as penalties are concerned, it is imperative that China’s recent progress in increasing damage awards for civil lawsuits be maintained, if not augmented. In September 2003, “the Beijing-based New Oriental Education Group, China’s leading private English language school, was ordered by a local court to pay 10 million yuan (1.2 million US dollars) in compensation to two US plaintiffs for copyright and trademark infringements.”<sup>214</sup> In October 2003, the China Music Copyright Society sued a Chinese mobile phone manufacturer, claiming 12.8 million yuan (\$1.55 million) in damages for the unauthorized use of copyrighted music.<sup>215</sup> The Copyright

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211. William Lash, Assistant Sec’y of Commerce for Mkt. Access and Compliance, Press Conference at the U.S. Embassy in Beijing (Apr. 12, 2005), *available at* <http://www.usembassy-china.org.cn/press/release/2005/041405las.html>.

212. USTR OUT-OF-CYCLE REVIEW, *supra* note 18.

213. *Id.*

214. Ding Zhisong & Jiang Xueli, *Roundup: Chinese Businesses Pay for Lack of IPR Awareness*, XINHUA NEWS AGENCY (Beijing), Oct. 23, 2003.

215. *Id.* Note that “[s]hortly after the commencement of the court proceedings, both parties agreed to mediate instead of proceeding with their court case.” *TCL’s Use of Pop Songs as Ring Tones*, SFKS GREATER CHINA IP BULLETIN (Sit, Fung, Kwong & Shum,

Society noted that it wanted to use its case “as a warning to other companies that [it is] serious about protecting intellectual property rights.”<sup>216</sup> With the increase in civil suits, Chinese businesses worry that a multi-million dollar intellectual property rights war is looming.<sup>217</sup> A noted Beijing expert on intellectual property law has commented, “[a]s an imminent [intellectual property rights] and patent war is looming large, domestic companies should learn to do business in the long term. . . . You make some money by infringing upon others’ copyrights and patents in the short term, but sooner or later you will pay dearly for it.”<sup>218</sup> This is precisely the desired result of high damage awards, and efforts to maintain, if not increase, them should be pursued vigorously by the U.S. government and movie industry.

### *C. Implement Economic Incentives*

An indispensable element in the effort to improve China’s enforcement of its copyright laws is its own economic self-interest. The 1995 Agreement Letter proposed joint ventures as a means of facilitating market access for U.S. companies doing business in China, and the Chinese committed to promoting these joint ventures in the 1996 follow-up Agreement.<sup>219</sup> Participants in equity and contractual joint ventures share risks and losses as well as profits.<sup>220</sup> With the Chinese as “stakeholders,” intellectual property rights, and the curbing of their abuse by extension, will gain new importance, and Chinese interests will align with those of the U.S. movie industry.<sup>221</sup>

Joint ventures are also a powerful tool against local protectionism.<sup>222</sup> A Chinese party to a joint venture will understand the “nuances of political life in China” better than its U.S. counterpart and can maintain the proper government contacts to safeguard the joint venture’s investment.<sup>223</sup> Local governments will naturally

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Hong Kong), Dec. 2003, at 3-4, *available at* <http://www.sfks.com.hk/English/ip/2003/eIP05-200312.pdf>.

216. Rfg.info (Rader, Fishman & Grauer PLLC), Copyrights, Chinese Copyright Group Sues Mobile Phone Maker for Infringement (Nov. 4, 2003), *available at* [http://www.raderfishman.com/RFGinfo/2\\_11.html](http://www.raderfishman.com/RFGinfo/2_11.html).

217. Ding Zhisong & Jiang Xueli, *supra* note 214.

218. *Id.*

219. Cheng, *supra* note 112, at 2002.

220. *Id.* at 2001.

221. See Yu, *supra* note 7, at 30.

222. Cheng, *supra* note 112, at 2010.

223. *Id.*

respond more favorably to requests for assistance from a semi-Chinese supplicant than from a total outsider.<sup>224</sup>

A similar practice is that of “partnering” with local Chinese trade associations, local government, and industry representatives.”<sup>225</sup> “Partnering” means: “establishing an active relationship or alliance . . . to obtain a stated or common goal.”<sup>226</sup> The Software Publishing Association touts “partnering” as the best method of “assuring cultural acceptance of the anti-piracy message” and of reducing the “ugly American image which may otherwise hinder local market penetration.”<sup>227</sup> This is also an effective means of pooling resources to detect, investigate and prosecute local acts of piracy.<sup>228</sup> Thus, partnering not only bolsters grass-roots efforts to deter piracy but additionally tackles the more intangible obstacles of cultural differences and suspicions by promoting “normalized relations with the Chinese.”<sup>229</sup> In the future, U.S. companies should continue to partner with Chinese companies and enter into joint ventures, rather than forging into the marketplace alone.

As China’s free market evolves, the effects of piracy are no longer merely hurting foreigners or a select group of wealthy Chinese businessmen, but the population at large. The free trade in counterfeit goods encourages many customers to purchase them “at cheap prices with the intention of getting refunds from distributors of licensed goods for full value.”<sup>230</sup> Thus, legitimate Chinese businesses are the ultimate victims, making it difficult to build national brands or invest in research and development.<sup>231</sup> Additionally, the saturation of the market with fake goods, often indistinguishable from genuine goods, creates a disincentive for Chinese companies to create new products. This in turn reduces China’s ability to develop its own industries and cuts its chances of emerging as a prestigious player in the global marketplace.<sup>232</sup> In addition, counterfeit goods result in billions of losses in tax revenue for the nation each year and China’s poor copyright enforcement record deters some foreign investors from

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224. *Id.*

225. Spelman, *supra* note 124, at 327.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 327-28.

230. Spierer, *supra* note 122.

231. *Id.*

232. *Id.*



entering the Chinese market.<sup>233</sup> The United States should capitalize on these negative effects of piracy and highlight them in their education campaigns. By communicating to the Chinese that piracy is not just a question of robbing a distant foreign company, but a pervasive problem with real consequences at home, the incentive to combat piracy will increase dramatically.

Economic incentives are also an important way to deal with the problems inherent in the above proposed solutions of educational and judicial reform. Education is an effective tool in combating piracy but obviously entails a large commitment of capital and resources on the part of the Chinese: housing and staffing classes for lawyers, judges and lay people in a country as large as China is no small undertaking. Likewise, judicial reform will entail much work and expense if the Chinese are to create the clear system of judicial case reporting called for by the USTR.<sup>234</sup> However, shouldering such responsibilities will clearly be far less unpleasant if the Chinese themselves can benefit from these endeavors.

The key is to implement all three solutions at once. The Chinese may see little reason to enter into joint ventures if they predict piracy will eat away at their profits, and this complacency will only create a more permissive environment in which piracy will flourish. However, if the Chinese commit to proactively combat piracy through education and judicial reform, and also enter into joint ventures, they will earn profits sufficient to sustain the battle against piracy and create a society-wide recognition of the benefits to be earned from doing so. Their success will enable further ventures and greater profit maximization, which in turn will create more resources and vigilance to continually combat the problem of piracy.

## V. CONCLUSION

In just two and a half decades, China has made enormous progress in copyright protection, yet movie piracy in China is more rampant than ever. Early U.S. efforts to curb the piracy problem were

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233. International Chamber of Commerce, Deterioration of Tax Base, [http://88.208.193.7/bascap/Extracts/Loss\\_of\\_Tax.htm](http://88.208.193.7/bascap/Extracts/Loss_of_Tax.htm) (last visited Jan. 17, 2007) (explaining that since "those producing counterfeit and pirated goods never pay tax on their goods when importing or when selling them, this deteriorates the tax revenues of the country where the goods are being sold. The decline in sales of the genuine, taxable product also compounds the problem causing the government to lose out doubly"); see also Peggy B. Hu & Berta Gomez, *Chinese Counterfeits Hurting Industry in China, Experts Say*, USINFO.STATE.GOV, May 18, 2005, <http://usinfo.state.gov/eap/Archive/2005/May/19-596040.html>.

234. See USTR OUT-OF-CYCLE REVIEW, *supra* note 18.

coercive in nature and, to some degree, effective. In just twenty years, China created a body of intellectual property law that met international standards and facilitated China's accession to the WTO. On the other hand, the ultimate U.S. objective of eliminating piracy was not satisfied. Today, a new approach is needed.

A critical element in combating movie piracy is not only *implementing* a body of laws to deter people from stealing and distributing foreign films, but actually *enforcing* those laws stringently. Several facets of Chinese society make enforcement of copyright laws even more difficult than their implementation. The Chinese have an ingrained tradition of emulating works; copying is glorified rather than condemned. In addition, they have a deep-rooted aversion to litigation and to the rule of positive law. In order to maintain its ideological tenets, the PRC resorts to a strict information control policy that prohibits many foreign films from entering the country legally, creating a healthy black market for these goods. The Chinese judiciary is making a strong recovery from its near non-existence in the 1970s, but it is still not comparable to Western legal systems, nor yet capable of establishing a similar rule of law. The fact that the enforcement of copyright law has fallen captive to local interests that often conflict with the law's deterrent and punitive purposes further aggravates the problem.

If the rate of movie piracy in China is ever to be reduced, the United States must recognize that the above-mentioned factors are not easily countered with coercive measures, such as trade sanctions. Rather, the key is to work cooperatively with the Chinese and educate them on the ways copyright enforcement serves their own interests. The United States needs to enter into joint ventures with the Chinese so that the latter become stakeholders and have an economic incentive to curb piracy. Both the U.S. government and private U.S. organizations, such as the MPAA, need to "partner" with the Chinese to combat the effects of local protectionism and secure allies in efforts to raid local factories churning out illegal discs. The United States should also educate the Chinese so that the legitimate business owners who are losing money because of counterfeiting can actually take advantage of the protections the law provides. Education must be provided to those judges and lawyers who are still grappling with the complex set of copyright laws. In addition, the Chinese judiciary needs to continue to give high damage awards in copyright infringement cases, sending a message across the country that piracy does not pay. Some progress is already underway, but the U.S. and Chinese governments, as well as private organizations, need to make much more headway into Chinese society to resolve this problem at

the ground level. Handing out merit badges to boy scouts is just the beginning.

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