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LEAD ARTICLE

ENTER THE DRAGON: CHINA'S WTO ACCESSION, FILM PIRACY AND PROSPECTS FOR ENFORCEMENT OF COPYRIGHT LAWS

Brent T. Yonehara*

I. INTRODUCTION

On November 8, 2001, the World Trade Organization (“WTO”) adopted the People’s Republic of China’s accession agreement at its Ministerial Conference in Doha, Qatar.¹ The People’s Republic of China is the third-largest economic power in the world.² It had exports of \$249.2 billion in 2000, the seventh largest in the world.³ Currently, China is the eleventh-largest export market for American goods.⁴ With a population of roughly 1.3 billion people,

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¹ See World Trade Organization, *WTO News Press Release/252: WTO Ministerial Conference Approves China’s Accession* (visited Nov. 12, 2001), available at http://www-chil.wto-ministerial.org/english/news_e/pres01_e/pr252_e.htm.

² See Warren H. Maruyama, *U.S.-China IPR Negotiations: Trade, Intellectual Property, and the Rule of Law in a Global Economy*, in *CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE* 165 (Mark A. Cohen, A. Elizabeth Bang, et al. eds, 1999). According to the International Monetary Fund, China ranks behind only the United States and Japan. *Id.*

³ See *supra* note 1.

⁴ See OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 2001 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS: PEOPLE’S REPUBLIC OF CHINA 42 (2001) (“USTR REPORT”).

it offers the commercial allure for foreign investment.⁵ It is widely speculated, and anticipated, that China at some point during the first-half of this century will eclipse the United States as the largest economic power in the world.⁶ The Chinese government realized early on that the growth impact on China's economy would be enormous if its accession bid into the WTO were approved.⁷ Naturally, this has been a priority of the Chinese government for nearly 15 years.⁸ China's long-awaited bid for acceptance into the global trading community finally reached fruition with the highly expected adoption of China's accession agreement. With the anticipated accession of China into the WTO now a mere formality, there is much fanfare and tribulation for the world's most populous country joining the global trading community.⁹

Intellectual property protection has been a contentious, and somewhat misguided, trade issue between the United States and

⁵ See generally USTR REPORT 42-69. See also ASSAFA ENDESHAW, INTELLECTUAL PROPERTY IN CHINA: THE ROOTS OF THE PROBLEM OF ENFORCEMENT 80 (1996).

⁶ See GORDON G. CHANG, THE COMING COLLAPSE OF CHINA XV (2001) (commenting that China's socialist market economy might rocket it to the top of the economic world by 2010). But see CALLUM HENDERSON, CHINA ON THE BRINK 243 (2001) (arguing that China will not replace the United States as the largest economic power because of challenges posed by modernization, based on the backwardness of the rural provinces and the abject poverty prevalent in the major cities).

⁷ See Long Yongtu, *Meeting of the Working Party on Accession of China* (visited Oct. 17, 2001), available at http://www.wto.org/english/news_e/news01_e/wpchina_longstat_17sept01_e.htm. Chinese President Jiang Zemin stated that it was a strategic decision for China to enter the world trade arena, and was in step with the Chinese government's goals of reforming the economy to a socialist economic system.

⁸ *Id.*

⁹ See Michael N. Schlesinger, *A Sleeping Giant Awakens: The Development of Intellectual Property Law in China*, 9 J. CHINESE L. 93, 113 (1995). In his speech before the WTO's 18th Session of the Working Party on China, H.E. Vice Minister Long Yongtu, the head of the Chinese delegation, described China's accession into the WTO as a "win-win" situation and an "all-win" situation for China and the world. See *supra* note 7.

China.¹⁰ There are a variety of reasons for this. Until very recently China's intellectual property laws did not exist.¹¹ However, in order to gain acceptance into the WTO, China had to enact a series of laws protecting the various intellectual properties, in order to conform to existing international conventions and treaties.¹² These include the promulgation of the Trademark Law in 1982, Patent Law in 1984, Copyright Law in 1990, Anti-Unfair Competition Law of 1993, and the Rules on the Prohibition of Infringement of Trade Secrets in 1995.¹³ China has also joined the major international organizations protecting intellectual property rights, including the World Intellectual Property Organization in 1980, Paris Convention in 1985, Madrid Agreement in 1989, Berne Convention in 1992, and the Patent Cooperation Treaty in 1994.¹⁴ China's efforts are truly remarkable considering China's emergence onto the world trading stage was only about twenty years ago.¹⁵ Yet, in spite of its efforts, certainly China cannot expect that with its accession into the WTO, its intellectual property obligations will immediately vanish upon the Doha

¹⁰ See Michael Yeh, *Up Against a Great Wall: The Fight Against Intellectual Property Piracy in China*, 5 MINN. J. GLOBAL TRADE 504, 505 (1996) (criticizing the U.S.'s policy of trade sanctions against China). See also Endeshaw, *supra* note 5, at 13-14 (commenting that the rancorous U.S./China trade dispute is based primarily on misplaced American attitudes as to what constitutes intellectual property rights, which may not comport with other nations' attitudes on intellectual property rights).

¹¹ See Maria C.H. Lin, *China After the WTO: What You Need to Know Now*, 817 PLI/COMM. 177, 185 (2001) (chronicling the history of promulgation of intellectual property laws in China over the course of the last twenty years).

¹² See Naigen Zhang, *Intellectual Property Law Enforcement in China: Trade Issues, Policies and Practices*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 63, 64 (1997).

¹³ See Lin, *supra* note 11, at 185.

¹⁴ See Zhang, *supra* note 12, at 64. Other copyright-related treaties which China is a member include the Universal Copyright Convention, which China joined in 1992, and the Geneva Convention for the Protection of Producers of Phonograms, which China joined in 1993. See ROBERT HAIBIN HU, *GUIDE TO CHINA COPYRIGHT LAW STUDIES* 19-20 (2000); Yiping Yang, *The 1990 Copyright Law of the People's Republic of China*, 11 UCLA PAC. BASIN L.J. 260, 261 (1993).

¹⁵ See Zhang, *supra* note 12, at 63.

ministers' vote.¹⁶ The Chinese government faces myriad problems. Upon accession, China must comply with the WTO's Trade-Related Aspects of Intellectual Property Rights agreement ("TRIPs") in order to gain complete acceptance into the global community of which it had so strenuously endeavored to become a member.¹⁷

One particular problem of intellectual property is the issue of film piracy, which remains rampant in China.¹⁸ According to the latest industry reports, film piracy costs the American motion picture industry \$3 billion.¹⁹ The problem with the Chinese intellectual property laws is not the fact that its laws are lacking, but rather that it lacks the mechanisms and legal structures to

¹⁶ See Scott J. Palmer, *An Identity Crisis: Regime Legitimacy and the Politics of Intellectual Property Rights in China*, 8 IND. J. GLOBAL LEG. STUD. 449, 450 (2001) (commenting that "the future of intellectual property protection in China depends on how China will contend with a host of social, political and economic challenges, which will not miraculously disappear upon accession to the WTO").

¹⁷ See Serri E. Miller, *The Posse Is Coming to Town . . . Maybe: The Role of United States Non-Governmental Organizations in Software Anti-Piracy Initiatives as China Seeks WTO Accession*, 7 ILSA J. INT'L & COMP. L. 111, 112 (2000).

¹⁸ See USTR REPORT 55 (noting that piracy of videos is sophisticated and widespread due to the ease of pirates obtaining digital copies of first-run motion pictures almost immediately after release in the United States).

¹⁹ See MPAA Web Site, *Anti-Piracy* (visited Oct. 19, 2001), available at <http://www.mpaa.org/anti-piracy/index.htm>. According to reports of the Motion Picture Association of America ("MPAA"), the U.S. motion picture trade organization, the losses do not include Internet film piracy losses. *Id.* Despite prevailing attitudes that Hollywood movies are profitable, four out of ten movies actually fail to net a profit; the average cost to produce and market a film is around \$80 million, thus making piracy a major problem for the commercial viability of American filmmaking. *Id.* The MPAA comprises Hollywood's seven largest motion picture production and distribution companies, including The Walt Disney Company, Columbia TriStar Film Distributors International, Inc., Metro-Goldwyn-Mayer Inc., Paramount Pictures Corporation, Twentieth Century Fox International Corporation, Universal International Films, Inc., and Warner Bros. International Theatrical Distribution. See MPAA Web Site, *Statement of Jack Valenti Before Committee on Ways and Means Committee on Trade Regarding US-China Trade Relations* (visited Sept. 17, 2001), available at http://www.mpaa.org/jack/99/99_6_8a.htm.

enforce the laws.²⁰ However, with China's emergence as an economic power and its accession into the WTO, it must abide by international treaties dealing with various intellectual property protections.

This paper will review China's historical and cultural indifference towards pirated goods, the current need to protect American film from piracy overseas, and review and critique the enforcement mechanisms in place in China's current legal system to properly monitor and enforce international intellectual property (*i.e.*, copyright) treaties and agreements as it specifically applies to the piracy of American films. Part II reviews the various methods of film piracy. Part III will examine the legal structure as it exists in China, including a review of China's copyright laws. Part IV will examine the Chinese cultural and historical indifference toward piracy, including an examination of China's lack of a predisposition toward the protection of creative efforts. Part V will examine the enforcement techniques available in China, and assess these techniques' effectiveness. Readers familiar with the recitations in Parts III, IV, and V may opt to continue Part VI, or use these sections for reference purposes. Part VI will discuss some actions which can be pursued by China and the United States, as China makes its transition from seclusion behind the Bamboo Curtain to center stage in the international economic theater. In the global context, China can demand the respect of the world, namely the United States, through its enforcement of copyright laws in the protection of American films. Part VII will conclude that despite China's hard work to achieve a free market-based socialist economy through admission into the WTO, its future will be a bumpy road because of its inefficient system of enforcement of copyright laws. The criticism of Chinese enforcement is premised on the fact that China will become the next major economic power, and there are good indications that

²⁰ See Lin, *supra* note 11, at 194 (noting that China's most pressing problem is in enforcement of its intellectual property laws); Zhang, *supra* note 12, at 66 (observing that "enforcement mechanisms are still in the intermediate stages of development").

this will take place.²¹ Only a major power, one which will set the course of action for the rest of the world, is one which respects, and enforces, through a just administration, the rule of law.

II. NATURE AND TYPES OF FILM PIRACY

In this new age of high technology, piracy of motion pictures no longer occurs by means of a pirate using hand-held video cameras to record the film directly from the screen.²² According to industry estimates, all types of film piracy occur at a rate of one million per day, at a cost of \$3 billion annually.²³ The modern day Blackbeard has a variety of means by which to pirate films.

Optical disc piracy is the manufacture of counterfeit laser discs, video compact discs ("VCD"), and digital versatile discs ("DVD"), which are fairly easy to manufacture and distribute.²⁴ Optical discs are of a much better quality than the typical analog piracy, thus making it more difficult for the average person to ascertain its authenticity. The threat of optical disc piracy is enormous. A movie theater chain company in Hong Kong sold its assets and exited the Hong Kong market, blaming piracy for destroying its business.²⁵ At the time, it was cheaper for the typical Hong Kong resident to get a pirated compact disc ("CD") video, at \$4.40 each, compared to buying a movie ticket, roughly the equivalent of \$14.00 a ticket.²⁶ Also, factories exist throughout China, especially in southern China and Hong Kong.²⁷

²¹ See Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131, 159 (2000) (hereinafter "Yu, *From Pirates to Partners*") (hypothesizing that China will become a superpower counterpart of the United States by the early twenty-first century).

²² See *supra* note 19.

²³ *Id.*

²⁴ *Id.*

²⁵ See The Age Online, *Film Pirates Send Village Retreating From Hong Kong* (visited Nov. 21, 2001), available at <http://www.theage.com.au/bus/20000804/A48202-2000Aug3.html>.

²⁶ *Id.*

²⁷ See Ramona L. Taylor, *Tearing Down the Great Wall: China's Road to WTO Accession*, 41 IDEA J.L. & TECH. 151 (2001).

Internet piracy represents a growing catastrophe for the motion picture industry. It is the unauthorized use of motion pictures on the Internet.²⁸ Much of Internet piracy occurs through illegal file transfers. Various file transfers include File Transfer Protocol (“FTP”), a network of private servers accessible by invitation only, and Internet Relay Chats (“IRC”), an Internet protocol based on real-time communications, typically popular among programmers and hackers.²⁹ The United States has prosecuted under the Internet film piracy statutes of the Copyright Act.³⁰ In one case, an American defendant plead guilty for reproduction and distribution copies of the major release *Star Wars: The Phantom Menace* via the Internet.³¹ Copies of *The Phantom Menace* found its way into various Asian countries.³² Internet access in China is about 27 million, up from just four million only two years ago.³³ Internet use is anticipated to grow, in the next ten years.³⁴

Videocassette piracy is the traditional duplication, distribution and rental or sale of copyrighted videocassettes.³⁵ Methods include camcording, screening, and back-to-back copying.³⁶

Public performance piracy is an unauthorized public performance where a commercial establishment shows a film to

²⁸ See *supra* note 19.

²⁹ See Arabia News Online, *Film Piracy Rampant on Internet* (visited Nov. 21, 2001), available at <http://arabia.com/business/article/english/0,1690,26291,00.html>.

³⁰ 17 U.S.C. §§ 506(a)(1) & (a)(2); 18 U.S.C. §§ 2319(b)(3) & (c)(3).

³¹ *United States v. Spatafore* (N.D. Cal. 2000), background and indictment available at <http://www.usdoj.gov/criminal/cybercrime/spatafore.htm>, and the plea agreement available at <http://www.techlawjournal.com/alert/200012/20001218.asp>.

³² See *supra* note 19.

³³ See CNN.com, *Survey: China Internet Use Soaring* (visited Nov. 28, 2001), available at <http://www.cnn.com/2000/TECH/computing/01/25/china.net.use.idg>.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Camcording is the traditional hand-held video piracy of a film during the screening. *Id.* Screening is the illegal copying from legitimate advance copies used for marketing purposes. *Id.* Back-to-back copying is pirating videocassettes made between two VCRs and copying an original video onto a blank cassette. *Id.*

paying customers without receiving permission from the copyright holder.³⁷ In the Chinese provinces, there are many of these “mini-theaters,” which offer unauthorized showings of copyrighted films for a fee.³⁸

Theatrical print theft, signal theft, and broadcast theft are other means of piracy.³⁹ However, these are extremely rare, due to the fact that vast majority of Chinese do not have access to the technology to conduct these types of piracy.

III. LEGAL STRUCTURE IN THE PEOPLE’S REPUBLIC OF CHINA

A. Copyright Law

China promulgated its Copyright Law in 1990, the last of the three intellectual property laws which were legislated in conformity to the WTO and international treaty requirements.⁴⁰

The Copyright Law was crafted on the Berne Convention and

³⁷ *Id.*

³⁸ See Yu, *From Pirates to Partners*, *supra* note 21, at 149; Glenn R. Butterton, *Pirates, Dragons and U.S. Intellectual Property Rights in China: Problems and Prospects of Chinese Enforcement*, 38 ARIZ. L. REV. 1081, 1096-97 (1996).

³⁹ Theatrical print theft is the theft of the 35 or 16mm film print from a theater for purposes of making illegal copies. See *supra* note 19. Signal theft and broadcast theft are the illegal tapping into cable systems to receive satellite signals without proper authorization, and the illegal copying of over-the-air broadcasts, respectively. *Id.*

⁴⁰ See Lin, *supra* note 11, at 185. The Trademark Law was enacted in 1982 and the Patent Law was enacted in 1984. *Id.* See also Schlesinger, *supra* note 9, at 119 (arguing that China’s copyright laws are substantially in compliance with TRIPs, and its deficiencies are of minor consequence); but see Jill Chiang Fung, *Can Mickey Mouse Prevail in the Court of the Monkey King? Enforcing Foreign Intellectual Property Rights in the People’s Republic of China*, 18 LOY. L.A. INT’L & COMP. L.J. 613, 632 (1996) (arguing that China’s copyright laws are below the Berne Convention standards with respect to unpublished works and exclusive rights for public performance of films and recordings). It should be noted that Ms. Fung’s article was written prior to China’s admittance into the WTO and the approval of the 2001 Amendments to the Copyright Law.

TRIPs.⁴¹ The Berne Convention is perhaps the premier international treaty on the protection of author's literary and artistic works.⁴² The Berne Convention safeguards foreign protection of works without restrictive formalities outside the author's country of origin.⁴³ TRIPs is a part of the WTO, and provides trade-related protection for, *inter alia*, copyrights, and emphasizes enforcement in the member nations.⁴⁴

The Copyright Law is designed to provide copyright protection to authors but is contained within specific ideological boundaries.⁴⁵ According to Article 1, copyright law is meant to protect authors "conducive to a socialist spiritual and material construction," and promote socialist culture and sciences.⁴⁶ The scope of the Chinese Copyright Law is quite impressive, considering the brevity of its existence. Copyrightable works include both published and unpublished materials, and constitute written and oral works; musical, dramatic, choreographic works, and *quyi*;⁴⁷ fine art and photographic works; cinematographic, television, and videographic works; maps; computer software; and engineering and product designs.⁴⁸ There are provisions for publication rights, derivative works, works for hire, term of lifetime plus fifty years, fair use exceptions, and remedies for infringement.⁴⁹ There are even provisions which are more extensive than under the U.S. Copyright Act.⁵⁰ In addition, in an effort to comply with WTO accession requirements, China's

⁴¹ See Julia Cheng, *China's Copyright System Rising to the Spirit of TRIPS Requires an Internal Focus and WTO Membership*, 21 *FORDHAM INT'L L.J.* 1941, 1946 (1998).

⁴² See *id.* at 1947.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See Yang, *supra* note 14, at 264.

⁴⁶ *Id.*

⁴⁷ *Quyi* is a type of Chinese opera, which includes ballads, story telling, and comic dialogues. See Hu, *supra* note 14, at 2, 54.

⁴⁸ *Id.*

⁴⁹ *Id.* at 2-6.

⁵⁰ For example, China's Copyright Law contains moral rights protections, including rights of attribution, integrity, and withdrawal. See *id.* at 2. The U.S. Copyright Act does not contain extensive moral rights protections for authors.

Standing Committee of the Ninth National People's Congress approved amendments to the Copyright Law on October 27, 2001.⁵¹ Amendments include copyright protections for compilations of data, architectural designs, and applied arts, and an expanded provision discussing assignments.⁵²

B. Judicial System

Enforcement of copyright laws falls under the joint aegis of China's judicial and administrative systems.⁵³ The judicial system is newly restored after being almost totally destroyed by the Cultural Revolution in the 1960s, when judges were considered bourgeois and enemies of the people, sent to forced labor camps, for "re-education."⁵⁴

The court system in China is fairly well-structured. Claims may be brought to one of four People's Court, or trial court, divisions: civil, economic, criminal, and administrative.⁵⁵ Intellectual property cases may be heard before any of these four courts. Civil claims may be brought before the civil courts through regular civil procedural rules.⁵⁶ Criminal copyright violations are heard through the criminal court, which retains exclusive jurisdiction over all criminal cases.⁵⁷ Economic contract cases are handled before the economic courts, and are limited to patent and trademark cases.⁵⁸ Finally, all copyright claims resulting in violations of administrative procedural rules are heard before

⁵¹ *China Revises Copyright Law for WTO Entry*, Xinhua News Agency, Nov. 7, 2001, LEXIS, Nexis Library, BBC Worldwide Monitoring file.

⁵² *Legislative Standing Committee Decision on Amending Copyright Law*, Xinhua News Agency, Nov. 4, 2001, LEXIS, Nexis Library, BBC Worldwide Monitoring file.

⁵³ See Zhang, *supra* note 12, at 66; Lin, *supra* note 11, at 195.

⁵⁴ See Lin, *supra* note 11, at 194-95; see also Butterton, *supra* note 38, at 1120 (analyzing the impact of the Cultural Revolution's destruction of the legal system and the growth of the post-Mao Chinese legal profession).

⁵⁵ See Zhang, *supra* note 12, at 66; Lin, *supra* note 11, at 195.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

administrative courts.⁵⁹

The intermediate courts are the Intermediate People's Courts and High People's Courts.⁶⁰ Intellectual property trial divisions of the high courts exist in Beijing, Shanghai, Hainan, Jiangsu, Guangdong, and Fujian.⁶¹ Additionally, intellectual property trial courts exist at the intermediate level in these cities, and Shenzhen and Guangzhou.⁶²

The highest court in China, the Supreme People's Court, hears appeals from the High People's Court, and supervises and manages trials at the intermediate level.⁶³

Throughout the 1990s, there has been a high amount of traffic of intellectual property cases litigated in these courts.⁶⁴ It is assumed that China's judicial system will become a very unique system designed to facilitate the hearing of all intellectual property-related cases.⁶⁵

C. Copyright Administrative System

According to the Copyright Amendments Implementing Law, the China National Copyright Administration ("NCA") was created to investigate copyright infringement claims with a national impact, while local copyright offices handle regional infringement investigations.⁶⁶ The NCA also is responsible for providing guidance to local copyright administrative offices, implementing national copyright regulations, and administering

⁵⁹ *Id.*

⁶⁰ See Zhang, *supra* note 12, at 66.

⁶¹ See Susan Finder, *The Protection of Intellectual Property Rights Through the Courts*, in CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE 255, 260 (Mark A. Cohen, A. Elizabeth Bang *et al.* eds., 1999).

⁶² *Id.*

⁶³ See Lin, *supra* note 11, at 195-96.

⁶⁴ See Finder, *supra* note 61, at 257-58 (noting a total of 16,894 intellectual property cases were adjudicated between 1992 and 1997 at all levels of the Chinese judicial system).

⁶⁵ See Zhang, *supra* note 12, at 68.

⁶⁶ *Id.* at 64.

foreign-related copyright registration.⁶⁷

IV. CHINESE PREDISPOSITIONS AND PROBLEMS TOWARD ENFORCEMENT

Chinese history stretches back thousands of years. During this time, China was a flourishing empire rich in scientific invention and cultural development.⁶⁸ Confucian thought has been a staple of Chinese society and culture; the Chinese persona has been shaped by concepts of the simple spiritual monk. The favoring of society over the individual, cooperative effort, and moral authority are generally at odds with Western attitudes.⁶⁹ Confucianism, therefore, has shaped the Chinese people's views, which has been developed over the course of tens of centuries. The following is a brief discussion of the Chinese predispositions that affect piracy of copyrighted goods, in cultural, historical, and economic terms.

A. Cultural Predispositions

Under traditional Confucian thought, people's conduct and proper etiquette is governed by the concept of *li*.⁷⁰ *Li* covers one's conduct with regard to the interactions with family, political establishments, and society at large.⁷¹ Individuals knew their

⁶⁷ See Hu, *supra* note 14, at 7.

⁶⁸ See Fung, *supra* note 40, at 623 (noting Chinese inventions of gunpowder, paper and the compass, and the development of Confucian thought during this era).

⁶⁹ See Butterton, *supra* note 38, at 1107-08. See also William P. Alford, *Making the World Safe for What? Intellectual Property Rights, Human Rights, and Foreign Economic Policy in the Post-European Cold War World*, in CHINESE INTELLECTUAL PROPERTY LAW & PRACTICE 147, 151-52 (Mark A. Cohen, A. Elizabeth Bang *et al.* eds., 1999) (noting that Americans have displayed a general indifference to Chinese cultural, legal, and economic circumstances in the U.S.-China intellectual property debate).

⁷⁰ See 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, 33 (2001) (hereinafter "Yu, *Piracy, Prejudice and Perspectives*"); Butterton, *supra* note 38, at 1109.

⁷¹ *Id.*; *Id.*

normative roles, responsibilities, and obligations to others in their interactions, adjusting their selfish behaviors for the sake of others.⁷² Through proper following of *li*, individuals contribute to a society of harmony, free from strife, discord, disagreement and tension.⁷³ In essence, *li* is more of a subconscious, spiritual and moral belief.

Directly opposite to *li* is the concept of *fa*, developed by the Confucian polar opposite, Legalism.⁷⁴ *Fa* is a penal concept, associated with punishment to maintain order, and conducted through means of force or physical threat.⁷⁵ Whereas *li* governs people through moral understanding, *fa* dictates through law, and is viewed as rigid and unyielding.⁷⁶ The concept of *fa*, as the rule of law, is viewed unfavorably by the Chinese people.⁷⁷ This view has survived thousands of years, and is permanently engraved in the Chinese psyche.⁷⁸

These *yin-yang* concepts induced three primary attitudes relative to copyright infringement. First, *li*, as the balancer of interests for the harmony of society, introduced the notion of equality.⁷⁹ Equality of classes has had a long tradition in Chinese history.⁸⁰

⁷² *Id.*; *Id.*; see also Shin-yi Peng, *The WTO Legalistic Approach and East Asia: From the Legal Culture Perspective*, 1 *ASIAN-PAC. L. & POL'Y J.* 1, 13 (2000) ("a person preoccupied with his own personal gains was discriminated against by the whole society").

⁷³ See Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 70, at 33; Butterson, *supra* note 38, at 1109; see also Palmer, *supra* note 16, at 472-73 (noting that *li* involves a balancing of interests).

⁷⁴ See Yu, *Piracy, Prejudice and Perspectives*, *supra* note 70, at 34; Butterson, *supra* note 38, at 1110.

⁷⁵ *Id.*; *Id.* (discussing history of *fa* from the Qin Dynasty (221-209 B.C.) when legal codes were first developed, and Qin emperors ruled through harsh and brutal enforcement of the codes).

⁷⁶ *Id.*; *Id.*

⁷⁷ See Yu, *Piracy, Prejudice and Perspectives*, *supra* note 70, at 34.

⁷⁸ See Fung, *supra* note 40, at 619 (positing Confucianism cannot be severed from Chinese legal thought because of centuries of use and development of *li* and *fa*).

⁷⁹ See Yang, *supra* note 14, at 275-76.

⁸⁰ *Id.* at 275 (tracing the history of equalization to the peasant revolt during the Song Dynasty (960-1279), which was based on eliminating disparities between rich and poor).

The overthrow of the Empire by Sun Yat-sen and founding of the Republic of China in 1910 was based on equality.⁸¹ In addition, the Communist takeover under Mao Zedong in 1949 was based on support of rural peasants and farmers, who deemed the Communist cause as a vehicle to bring equality to the masses.⁸² The idea of copyright licensing and royalties disgusts this equality.⁸³ Viewed as a profit-making venture for authors, fees and royalties only create more inequality and are contrary to the ingrained notion of equality in Chinese history.⁸⁴

Second, *li* fosters the notion of non-competition.⁸⁵ Because harmony is treasured, and cooperation and accommodation are necessary to maintain this harmony, Chinese cultural behaviors gravitate toward a gentlemanly doctrine of moderation in conduct and opinion.⁸⁶ This is illustrated by the contentious trade battles of the 1990s between the U.S. and China.⁸⁷ With the high level of piracy in China, the USTR employed a variety of tactics to compel Chinese enforcement of its copyright laws, and crackdown on piracy, including threats of sanctions, “Special 301” status, and rejection of “Most Favored Nation” status.⁸⁸ Chinese notions,

⁸¹ *Id.* at 276.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Yang, *supra* note 14, at 276.

⁸⁶ *Id.*

⁸⁷ See generally Matthew W. Cheney, *Trading With the Dragon: A Critique of the Use of Sanctions by the United States Against China*, 6 D.C.L.J. INT’L L. & PRAC. 1, 4-26 (1997) (arguing sanctions by the U.S. has largely failed); see also Yu, *From Pirates to Partners*, *supra* note 21, at 131 (focusing on cooperation, rather than sanctions, as a means of combating piracy).

⁸⁸ See Patrick H. Hu, “Mickey Mouse” in China: *Legal and Cultural Implications in Protecting U.S. Copyrights*, 14 B.U. INT’L L.J. 81, 85 (1996). A “Special 301” action is a unilateral reaction by the USTR to inadequate intellectual property protections by other countries. *Id.* For an extensive review of the “Special 301” procedures, see Judith H. Bello & Alan F. Holmer, “Special 301:” *Its Requirements, Implementation, and Significance*, 13 FORDHAM INT’L L.J. 259 (1989). For a synopsis of the “Special 301” procedures, see United States Trade Representative, *USTR Fact Sheets: Special 301 on Intellectual Property Rights* (visited Nov. 20, 2001), available at <http://www.ustr.gov/html/factsheets.html>.

based on *li*, are predisposed to cooperation, and under that belief, produce better results than under situations made through threats and duress.

Third, there is the *fa* notion of state control over the individual.⁸⁹ The harshness of state supremacy has long been ingrained in the Chinese people through centuries of imperial rule.⁹⁰ Basically, the individual's interests are subjugated to the interests of the state and society as a whole.⁹¹ On a grander scale, each of the Chinese shares the glories and agonies of the state, attributing state success or failure as a personal trait.⁹² This is most exemplified in the current Copyright Law. The purpose of copyright protection is to encourage socialist culture and science.⁹³ The Communist Party apparatchik maintains itself supreme to the Constitution.⁹⁴ The concept of an expressed idea being owned by one person – hence, a monopoly – when it should be owned by the state was deeply troubling to Communist ideals.⁹⁵ As such, the original Copyright Law reflected this subordination of the individual to the needs of the society by limiting the scope of authors.⁹⁶

Traditional Chinese thought, then, presents a major obstacle toward piracy prevention in China.⁹⁷ The Chinese view society as a community of fundamental roles.⁹⁸ People have obligations to

⁸⁹ See Yang, *supra* note 14, at 274.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 275 (commenting that twin events occurring in late 1991 typified this predisposition: the first Chinese woman's victory in the world chess championships, and the first mainland Chinese scientist's win at a UNESCO Science competition; both attributed their wins to the motherland and the Chinese people).

⁹³ See Hu, *supra* note 14, at 53.

⁹⁴ See Fung, *supra* note 40, at 620.

⁹⁵ See Endeshaw, *supra* note 5, at 113 (commenting the concept of property in the copyright sense is really a monopoly of an expressed idea, which theoretically is contrary to Chinese political thought).

⁹⁶ See Schlesinger, *supra* note 9, at 114 (noting that the original Copyright Law of 1990 left many unanswered questions for international claimants).

⁹⁷ See Butterson, *supra* note 38, at 1108 (noting that Confucian thought is fundamentally at odds with the Western concept of rule of law).

⁹⁸ *Id.* at 1109.

everyone else in society.⁹⁹ Societal roles dictate a co-dependent relationship between a superior member of society and an inferior member, where each owes the other a duty of loyalty and support.¹⁰⁰ This correlative relationship inhibits prosecution of copyright infringement because people are less prone to make any efforts to stamp out piracy. A local village member where a proprietor of a public mini-theater showing bootlegged first-run American films would not report such activities to local copyright administrative officials because it would upset the balance of society and undermine the sense of loyalty which exists between the proprietor and the village.¹⁰¹ This predisposition is premised on the centuries-old traditional acceptance of piracy, buttressed by traditional Chinese thought.¹⁰²

B. Historical Predispositions

Confucianism has also had an effect on Chinese history with respect to intellectual property rights protection. Traditional Chinese belief is that copying is a hallowed act. For centuries, artists were trained as copyists rather than as originators of new ideas.¹⁰³ Creative effort was measured not by the originality involved in the production of the work, but rather the amount of

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ This goes to the notion that Confucian thought emphasizes local, as opposed to national, interests. See Fung, *supra* note 40, at 617.

¹⁰² See John Donaldson & Rebecca Weiner, *Swashbuckling the Pirates: A Communications-Based Approach to IPR Protection in China*, in CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE 409, 410 (Mark A. Cohen, A. Elizabeth Bang *et al.* eds., 1999) (outlining traditional acceptance of piracy because of traditional reverence of pirates, rather than revilement, as Robin Hood-like figures who protected the local village against the governmental overlords).

¹⁰³ *Id.* at 411. This view is contrasted by the Song Dynasty (960-1279) statutes which made copying of a publisher's manuscript without the publisher's consent subject to fines and corporal punishment. See Yang, *supra* note 14, at 262. This would be indicative of the prevailing *fa* concept which favored the strict rule of law over Confucian virtues of copying.

memorization and duplication of the work.¹⁰⁴ The more memorization of the long passages of an original work, the more esteemed and wiser the copier became.¹⁰⁵ Rather than being seen as plagiarism, copying denoted wisdom. Wisdom through copying was a scholarly effort which proscribed respect because it was beneficial to one's life and society as a whole.¹⁰⁶

Historically, copyright law development in China has been sketchy, at best. The first copyright law was enacted in 1910 during Emperor Xuantong's reign during the Qing Dynasty, although it was never effectively implemented because of the Nationalist revolution of 1911.¹⁰⁷ A second copyright law was promulgated in 1928 by the Nationalist government.¹⁰⁸ This law, in turn, was abolished by Mao Zedong during the Communist takeover in 1949.¹⁰⁹

During the Maoist era, there were little intellectual property rights laws, let alone copyright laws.¹¹⁰ In his efforts to create a utopian Communist society, Mao destroyed all vestiges of external influence, including all copyright laws.¹¹¹ This was based on the fact that China is one of only a few Marxist-Leninist countries.¹¹² Marxist-Leninist theory assumes that private capital is a means to

¹⁰⁴ See Donaldson & Weiner, *supra* note 102, at 411.

¹⁰⁵ *Id.*

¹⁰⁶ See Yang, *supra* note 14, at 274.

¹⁰⁷ *Id.* at 262.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* Upon its ascension in 1949, the Communist Party abolished all laws of the Nationalist government, under the rationale that a socialist regime would not inherit laws from an illegitimate predecessor. *Id.*

¹¹⁰ *Id.* at 263. While the People's Republic of China maintained some standards for per-copy and per-word royalties for authors and translators, this system of was dismantled by Mao during the Cultural Revolution because of Mao's strict elimination of personal rewards in order to emphasize the subordination of the individual to the state. *Id.* See also Fung, *supra* note 40, at 624.

¹¹¹ 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, 583 (1995).

¹¹² See Yang, *supra* note 14, at 269.

exploitation.¹¹³ Thus, the very notion of granting intellectual property rights to authors undermines Communist thought. This animosity toward private property was followed through with Mao's decades-long campaign in an attempt to end class distinction, and culminated with the Cultural Revolution.¹¹⁴ As a consequence of this mass indoctrination, China developed a strong nationalistic and xenophobic attitude toward Western institutions, including the concept of intellectual property rights.¹¹⁵ The end result was that a prevalent perception arose in China that intellectual property rights are nothing more than a foreign concept which only benefits Western interests.¹¹⁶

C. Economic Predispositions

Chinese will not become predisposed to the notion of protecting intellectual property rights until they realize that it will be in their best economic interests to do so.¹¹⁷ By joining the various international intellectual property treaties, China's leaders knew it was in China's interest to pursue the course, first set out by Deng Xiaoping's "Open Door" policy.¹¹⁸

¹¹³ *Id.* Karl Marx saw intellectual property as nothing more than part of the society at large, he sought elimination of private ownership in creative efforts. See Donaldson & Weiner, *supra* note 102 at 411-12. Marx wrote, "What I myself produce, I produce for society." *Id.*

¹¹⁴ See Yu, *Pirates, Prejudice and Perspectives*, *supra* note 70, at 21-22.

¹¹⁵ *Id.* at 24-25 (recounting the historical reasons for China's xenophobia and nationalism, going back to the mid-1800s when China was defeated by Great Britain in the Opium War, and Chinese came to believe Westerners were "dirty, vulgar, and beneath their dignity").

¹¹⁶ See Donaldson & Weiner, *supra* note 102, at 412.

¹¹⁷ See Butterton, *supra* note 38, at 1120-21.

¹¹⁸ See Zhang, *supra* note 12, at 72. The "Open Door" policy was adopted in 1980 by Deng Xiaoping, with the purpose of opening China's markets to foreign investment. See Gerardo Lara, *The Piracy of American Films in China: Why the U.S. Art Form Is Not Protected by Copyright Laws in the People's Republic of China*, 2 UCLA J. INT'L L. & FOR. AFF. 343, 347 (1998). The "Open Door" policy has its roots in Deng's "Four Modernizations" program, an ambitious political and economic program designed to revive China's faltering economy, through modernization of agriculture, industry, national defense, and science and technology. See Palmer, *supra* note 16, at 451 n.3. To understand the

In spite of these efforts, a truly effective intellectual property system will only increase the standard of living in a society where the average income is \$100 a year in rural areas, and \$400 a year in the coastal cities.¹¹⁹ Many villages engaged in piracy depend on the production of pirated goods for the livelihood of the village.¹²⁰ This is coupled with the cultural attitude that promotes piracy, and weak respect for intellectual property rights only makes the piracy at the local level an endless cycle.¹²¹ Because copyright is a means to profit the copyright holder, traditional Chinese cultural norms militate against this, and piracy achieves the traditional norm of promoting the village, or society, over the individual.¹²² As a developing country, there is really no incentive for a Chinese village to cease its pirating activities.¹²³

Additionally, because most Chinese authors and writers are employed by the State on fixed salaries, many do not rely on copyright royalties for their livelihood.¹²⁴ Thus, these individuals have no incentive to advocate for an intellectual property regime for the advancement of their interests, because these authors are

nature of the "Open Door" policy and the "Four Modernizations" program, one must go back to the Maoist policy of self-reliance and isolationism, which closed China to external influence. See Hamideh Ramjerdi & Anthony D'Amato, *The Intellectual Property Rights Laws of the People's Republic of China*, 21 N.C.J. INT'L L. & COM. REG. 169, 175 (1995). Cultural life was dictated by Mao's wife, Jiang Qing, and her "Gang of Four" which only allowed "revolutionary" art because, according to Jiang, Marxist thought deemed all creative works as reflective of one's class status. See Connie Neigel, *Piracy in Russia and China: A Different Reaction*, 63-FALL L. & CONTEMP. PROBS. 179, 191 (2001). Consequently, creative efforts were almost completely curtailed under the Mao regime. *Id.* Creative endeavors were only revived by Deng and the "Open Door" policy, and, thus, was directly responsible for the passages of the various intellectual property laws and entrance of China into international intellectual property regimes.

¹¹⁹ See Yeh, *supra* note 10, at 516; CNN.com, *China Moves to Avert Unemployment Crisis* (visited Nov. 18, 2001), available at <http://www.cnn.com/WORLD/asiapcf/east/08/17/china.labor/index.html>.

¹²⁰ See Yeh, *supra* note 10, at 516-17.

¹²¹ See Butterson, *supra* note 38, at 1116.

¹²² See Yang, *supra* note 14, at 273-74.

¹²³ See Butterson, *supra* note 38, at 1116.

¹²⁴ See Yang, *supra* note 14, at 269.

insulated from the need to procure copyright royalties.

Another problem is that what happens at the upper echelon of China's government in Beijing may not comport with what happens at the local or provincial level. When Deng ascended to leadership in 1976, he began a decentralization program in China, with the central government in Beijing retaining control over national issues, while leaving issues of a local nature to the individual localized governments.¹²⁵ Decentralization has expanded to the point that local villages retain governing power at the lowest echelon of the governing mechanism, known as *jiceng zhengquan* (basic level regimes).¹²⁶ Essentially, under this policy of decentralization, local villages have autonomy to determine certain local political, economic and social issues, free from interference from the county-wide or provincial governments.¹²⁷ Because of China's decentralized system of government, many regulatory powers over economic issues are now handled by these local and provincial governments.¹²⁸ The traditional Chinese saying, "The mountains are high, and the Emperor is far away," rings true for these local governments.¹²⁹ Local authorities have a distinct agenda of their own, pursuing whatever course which will better the economic position of their community, or worse, better the economic position of their own personal wealth. With thousands of local and provincial governments, these really are too numerous for a decentralized Beijing to literally control.¹³⁰ Regulations issued by Beijing are not guaranteed implementation at the local level.¹³¹ As a result, this system of decentralization has created nearly autonomous fiefdoms, complicating efforts at effective intellectual property rights protection.¹³²

Until the system is changed to provide incentives for the

¹²⁵ See Cheng, *supra* note 41, at 1985-86.

¹²⁶ See CHIH-YU SHIH, COLLECTIVE DEMOCRACY: POLITICAL AND LEGAL REFORM IN CHINA 255 (1999).

¹²⁷ *Id.* at 300.

¹²⁸ See Donaldson & Weiner, *supra* note 102, at 412.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 413.

¹³² *Id.*

Chinese people, intellectual property regimes will remain a foreign and mostly disregarded concept.

V. ASSESSMENT OF CURRENT ENFORCEMENT MECHANISMS IN CHINA

Enforcement of copyright laws is really a result of a well-established adherence to the rule of law.¹³³ The rule of law consists of predictability and uniformity.¹³⁴ Incompetence, localism, and inconsistency have undermined the enforcement mechanism in China.¹³⁵ This goes back to Mao's rule, where law was merely a tool of the Communist Party in silencing dissent and arresting counterrevolutionaries.¹³⁶ The law oscillated according to Mao's whims; the policies eventually developed a state of unpredictability in the law.¹³⁷ Attempts to correct this non-adherence to the law began under Deng's modernization programs.¹³⁸ However, in spite of these efforts, there remain cracks in the copyright enforcement mechanism in place in China. The following is an assessment of the copyright enforcement mechanism, in terms of legislative, judicial, and administrative action.

A. Legislative Enforcement Mechanism

Issues revolving around concerns regarding China's legislation include compliance with TRIPs and updating of the Copyright Law. TRIPs has been criticized as an imperialist model for

¹³³ See Jeffrey W. Berkman, *Intellectual Property Rights in the People's Republic of China: Impediments to Protection and the Need for the Rule of Law*, 15 UCLA PAC. BASIN L.J. 1, 41 (1996).

¹³⁴ *Id.* It should be noted that an adherence to a rule of law should be determined by clear rules and stability of the law. *Id.* at 34.

¹³⁵ *Id.*

¹³⁶ *Id.* at 35.

¹³⁷ *Id.*

¹³⁸ See Eric W. Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT'L L. 43, 44 (2001) (noting that Deng recognized Mao's infuscation of the law, and made constructive attempts to correct the destruction of the legal system in China).

intellectual property rights protection.¹³⁹ Despite these criticisms, TRIPs is still the intellectual property component of the WTO, and developing countries, like China, are afforded “maximum flexibility” in domestic implementation of TRIPs-conforming laws.¹⁴⁰ In order to gain membership in the WTO, a nation must maintain the minimum standards established under the TRIPs regime.

TRIPs focuses on domestic national legislation and enforcement of intellectual property rights of its Member nations.¹⁴¹ TRIPs mandates Member nations to comply with articles 1 through 21 of the Berne Convention, exclusive of the moral rights provision of article 6^{bis}.¹⁴²

Enforcement measures have already been implemented in compliance with TRIPs under the Copyright Law and Implementing Regulations.¹⁴³ The Copyright Law also provides for penalties for civil and criminal liabilities, remedies for public apology, monetary compensation for the infringement victim, injunction relief, and immediate destruction of the infringing act’s effects.¹⁴⁴ In short, the Chinese Copyright Law has taken major steps toward complete compliance with TRIPs requirements, inducing some commentators to call China’s steps as substantial¹⁴⁵

¹³⁹ See, e.g., Marci A. Hamilton, *The TRIPs Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT’L L. 613, 615 (1996) (asserting that TRIPs is “old-fashioned, Western-style imperialism” that imposes a Western system of intellectual property on the world); Evelyn Su, *The Winners and the Losers: The Agreement on Trade-Related Aspects of Intellectual Property Rights and Its Effects on Developing Countries*, 23 HOU. J. INT’L L. 169, 171 (2000) (asserting that TRIPs, while benefiting developed countries, simultaneously discourages access to technology needed for economic growth in developing countries).

¹⁴⁰ See World Trade Organization, *Preamble: Agreement on Trade-Related Aspects of Intellectual Property Rights* (visited Oct. 8, 2001), available at http://www.wto.org/english/tratop_e/trips_e/t_agm1_e.htm.

¹⁴¹ See Cheng, *supra* note 41, at 1949.

¹⁴² See Schlesinger, *supra* note 9, at 113.

¹⁴³ See Cheng, *supra* note 41, at 1961.

¹⁴⁴ *Id.*

¹⁴⁵ See Schlesinger, *supra* note 9, at 119 (arguing that China has enacted a copyright law in substantial compliance with TRIPs).

and numerous.¹⁴⁶ The 2001 Amendments to the Copyright Law also include provisions apparently aimed at curbing Internet and videocassette piracy problems. The amended article 46(8) criminalizes the rental of cinematographic works with the purpose of producing unauthorized copies.¹⁴⁷ Also, articles 46(3)-(4) criminalize reproduction and distribution of videographic performances and transmissions through the Internet or other information networks without the copyright holder's permission.¹⁴⁸

In spite of recently promulgated amendments to the Copyright Law, there remain some questions of validity as to some of the provisions. Article 13 of TRIPs allows for certain limitations and exceptions to copyright protection, which are limited to "special cases" which do not conflict with the "normal exploitation of the work" and do not "unreasonably prejudice the legitimate interests" of the copyright holder.¹⁴⁹ Article 13 of TRIPs is consistent with article 9(2) of the Berne Convention.¹⁵⁰ This is normally regarded as the fair use exception provision in copyright. Fair use generally excludes reasonable use of copyrighted works lawfully made available to the public, without the consent of the copyright holder.¹⁵¹

The Chinese Copyright Law allows for twelve fair uses. Under the recent 2001 Amendments to the Copyright Law, article 22 enunciates the fair use exceptions.¹⁵² These fair use exceptions

¹⁴⁶ See Cheng, *supra* note 41, at 1952 (stating that China has taken numerous steps to bring its copyright law into compliance with TRIPs).

¹⁴⁷ See *supra* note 52.

¹⁴⁸ *Id.*

¹⁴⁹ Art. 13 of TRIPs reads, "Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."

¹⁵⁰ See Berne Convention for the Protection of Literary and Artistic Works (July 24, 1971), art. 9(2).

¹⁵¹ See Yang, *supra* note 14, at 268.

¹⁵² The fair use exceptions include exceptions for uses for one's private study, research or "self-entertainment;" academic or commentary purposes; current events reporting; reprinting and rebroadcasting of radio, television or print media articles; speeches made at a public gathering; educational, scientific, or teaching use; uses for collection in libraries, archives, museums, or art galleries;

place undue restrictions on an author's economic rights in the copyright.¹⁵³ China's fair use exceptions have been criticized as being overly broad.¹⁵⁴ The concept of self-entertainment is ambiguous. It can be broadly interpreted as being a village movie house which shows pirated movies, where the proprietor of the movie house is showing the movies for the proprietor's own personal "self-entertainment," but also for the benefit of the entire village, as a whole. There have been instances of pirated films entering the Chinese market just after their theatrical release in the United States.¹⁵⁵ The American motion picture industry is being "unreasonably prejudiced" as a result of these more than isolated events of piracy. Cultural and historical indifferences should not be used as a hindrance to copyright protection enforcement.

Also, a fair use exception allowing a "state organ" – hence, the Communist Party apparatchik – to use copyrighted works for its own "official duties" leaves an extensive loophole which can be interpreted as broadly and in such undefined terms as the government official deems necessary to pursue the official duties.

With these discrepancies, China must undergo fine-tuning of its Copyright Law. The fair use exceptions are vaguely drafted, and allow for abuse, especially by government officials, the same officials who are charged with ensuring the enforcement of these intellectual property laws.¹⁵⁶ Additionally, there must be concrete and well-drafted provisions for the common Chinese person to understand the scope and magnitude of each fair use exception, to

free-of-charge live performances of published works; copying of works in a public display; and uses for a "state organ" for fulfilling of its "official duties." See *supra* note 52. By comparison, § 107 of the U.S. Copyright Act of 1976 allows a fair use affirmative defense, based on four factors. See 4 NIMMER ON COPYRIGHTS, §§ 13.05[A][1-5].

¹⁵³ See Yang, *supra* note 14, at 268.

¹⁵⁴ See Jim E. Bullock, *IP Protection in China*, 18 No. 10 ACCA DOCKET 16, 20 (Nov./Dec. 2000); Lin, *supra* note 11, at 192; but see Yang, *supra* note 14, at 277-78 (acknowledging the scope of China's fair use exceptions as being broader than Berne and other Western countries, but determining the scope is not overly broad).

¹⁵⁵ See USTR REPORT 55.

¹⁵⁶ See Cheng, *supra* note 41, at 1986.

prevent further abuse by the public.

B. Judicial Enforcement Mechanism

A truly effective judicial system is essential in the enforcement of intellectual property laws. The United States judicial system has a plethora of well-informed and knowledgeable jurists at multi-levels of the federal and state judiciary, who can interpret and render a well-reasoned opinion on intellectual property rights enforcement issues. The administration of the courts, while heavily docketed, is relatively free from external pressures and political influences.¹⁵⁷ Under the Chinese judicial system, enforcement of copyright laws is hindered for a variety of reasons related to the judges, lawyers, and the administration of justice.

1. Court System

First, there is the concern with the court system. The Supreme People's Court of China is not an entirely independent, separate branch of government, like it is in the United States. The Supreme People's Court is responsible to the Standing Committee of the National People's Congress – the Chinese legislature.¹⁵⁸ The Standing Committee has the authority to override any ruling of the Supreme People's Court.¹⁵⁹ Thus, it is not immune from the political winds of the highest organ of Communist China's state power. At the lower court level, Communist Party officials may

¹⁵⁷ *Contra* Anthony Champagne, *National Summit on Improving Judicial Selection: Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391, 1408 (interpreting results of a survey to mean that most people believe the judicial process is influenced by external factors).

¹⁵⁸ See NANPING LIU, *OPINIONS OF THE SUPREME PEOPLE'S COURT: JUDICIAL INTERPRETATION IN CHINA* 29 (1997). The relationship between the National People's Congress and the Supreme People's Court is based on the concept of *yixing heyi*, or combination of the legislative and administrative functions of government. *Id.* According to Karl Marx, the highest authority in a Communist state, the legislative body, was to perform both legislative and judicial functions.

Id.

¹⁵⁹ *Id.* at 31.

involve themselves during the course of the litigation.¹⁶⁰ If a case is deemed to merit the attention of the government, Party opinion may be introduced to the court president or division chief, who in turn will notify the trial judge of the Party's particular view.¹⁶¹ This concept would be deemed highly unethical in an American court, but in a Chinese court, it is just seen as a channel in which to funnel Party views into litigation proceedings.¹⁶² In these instances, cases turn toward the direction of the opinions requested by the Party.¹⁶³ This phenomenon remains problematic because a truly effective judiciary must be allowed to act independent of either the legislative or executive branches of government.

Another problem involving China's court system in general is the inability to get court judgments enforced by the local authorities.¹⁶⁴ The root of this problem goes to the strong bias in favor of the local economy, otherwise known as local protectionism.¹⁶⁵ China's courts are understaffed and underfunded, with judges who have strong personal ties with their local communities.¹⁶⁶ Local enforcement authorities are usually beholden to these same local officials who control the purse strings to their offices, and are allowing the piracy efforts to continue.

2. Transparency

Another concern of the judicial system is the rendering of its opinions, and transparency of the judicial decision-making process.¹⁶⁷ China made general commitments to transparency in its Memorandum of Understanding ("MOU") with the United

¹⁶⁰ See Finder, *supra* note 61, at 266.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ See Yiquiang Li, *Evaluation of Sino-American Intellectual Property Agreements: A Judicial Approach to Solving the Local Protectionism Problem*, 10 COLUM. J. ASIAN L. 391, 401 (1996). Only 60% of court judgments are enforced by local authorities. *Id.*

¹⁶⁵ See Endeshaw, *supra* note 5, at 145-47.

¹⁶⁶ See Palmer, *supra* note 16, at 465-66.

¹⁶⁷ See Yang, *supra* note 14, at 82.

States in 1992.¹⁶⁸ Currently, judicial decisions are published in the government publication, *Gazette*.¹⁶⁹ However, the only opinions published are those which the Supreme People's Court deems relevant, and there is no precise standard to determine which opinion is deemed a relevant case for publication.¹⁷⁰

There are also questions as to whether the *Gazette*'s published opinions are precedential in value.¹⁷¹ The fact that the Court does not regularly publish lower court decisions, and when one is deemed appropriate for publication, it is often revised or edited to make the opinions "exemplary models" for lower court reasoning.¹⁷² These pose instant problems for judges making rulings based on nothing more than their own experience and knowledge.¹⁷³ The purpose of publication of opinions is to preserve a body of legal authority upon which future decisions can be based. There are reports that the *Gazette* will become more like an official government journal along the lines of the Federal Register, but such reports could just be mere speculation.¹⁷⁴ This publication problem contributes to the lack of an adherence to a

¹⁶⁸ See Maruyama, *supra* note 2, at 192. The MOU was negotiated between China and the United States in 1992, after the USTR initiated a "Special 301" action against China. See Hu, *supra* note 88, at 84. The MOU was first in a series of trade-related agreements between the two countries regarding China's commitments to intellectual property protections and development of Western-style rule of law. See Butterton, *supra* note 38, at 1083. These included the 1995 Enforcement Agreement, committing China to improvements in its enforcement mechanisms through implementation of raids on pirate factories, elimination of local protectionism, and clarification of its intellectual property laws, rules, and regulations. *Id.* at 1090.

¹⁶⁹ See Liu, *supra* note 158, at 38.

¹⁷⁰ *Id.* at 39.

¹⁷¹ *Id.* at 142.

¹⁷² *Id.* at 144.

¹⁷³ There has been some confusion as to the nature of the *Gazette* as to whether published opinions are to offer guidance as to the law or precedence in the interpretation of the law. *Id.* at 142. However, it has been noted that several Chinese scholars deemed that the *Gazette*'s opinions do not carry the weight of precedence. *Id.*

¹⁷⁴ See USTR REPORT 49. The *Gazette* would function as a centralized source relevant to foreign trade and intellectual property for national, provincial, and local laws and regulations. *Id.*

consistent and predictable rule of law, and creates chaotic decisions at the judge's whim.

Additionally, the Court's doctoring of a lower court opinion flies in the face of *stare decisis*; a lower court, when faced with a case of similar facts, will need to undergo its own judicial scrutiny of the case in order to render a proper decision. A movie studio attempting to seek compensation for loss in revenue of its films due to piracy will be left with inconsistent judgments and poses strategic dilemmas for the studio in determining whether to pursue legal enforcement remedy options in China. This in turn will affect trade with China, which is the entire purpose of its fevered efforts at gaining entrance into the WTO.

The transparency issue is not limited to judicial opinions. The NCA regulations, judicial rules promulgated by the Supreme People's Court and other official government memoranda, are not regularly published.¹⁷⁵ In addition, these regulations are changed according to the broad discretion of the respective government official.¹⁷⁶ This in turn creates conflicting rules and regulations, causing conflicts for the judge, advocate and studio executive alike. The lack of transparency increases misinterpretation in China's laws. It also creates an inconsistent application of law from one province to another.

3. Judges

Third, there are the Chinese judges. Judges, even in the United States, are not immune to political pressures. The situation for judges in China is exacerbated by the highly strict Communist Party's need to control information and the outcomes that affect the prestige of the Party.¹⁷⁷ Judges in China are not appointed to life tenure, unlike their American federal counterparts.¹⁷⁸ The lack of a life tenureship increases the chances that Chinese judges will

¹⁷⁵ See Palmer, *supra* note 16, at 471 (arguing the lack of dissemination of legislative enactments has created a legitimacy problem in China).

¹⁷⁶ See Yu, *Piracy, Prejudice and Perspectives*, *supra* note 70, at 69-70.

¹⁷⁷ *Id.* at 28-29. See also *infra* Part V.C.1.

¹⁷⁸ See Berkman, *supra* note 133, at 22.

be open to political pressures and opinions.¹⁷⁹ This in turn leads to increasingly partial judgments. The partial judgments, compounded with a non-transparent system of publication of cases, and Chinese government alteration of lower court opinions, shows a disrespect for Chinese judges' rulings.

Another concern is the lack of knowledge in intellectual property matters.¹⁸⁰ This is partly due to the fact that intellectual property laws have only existed for about twenty years in China.¹⁸¹ Recently, while it has been noticed that the judges sitting in the Beijing and Shanghai courts have rather sophisticated training in intellectual property laws, the same cannot be said for judges in the outer regions and provincial courts.¹⁸² The lack of intellectual property knowledge renders more difficult a legally sound judgment.¹⁸³

A third problem with the role of judges in Chinese courts is the reported high corruption rates amongst judges and other officials in China.¹⁸⁴ Rampant collusion between business interests and opportunistic officials have been reported.¹⁸⁵ Judicial graft includes misappropriation of funds, bribery, abuse of power, and embezzlement.¹⁸⁶ Beijing has not ignored the problem of judicial corruption. An extreme example is the execution of a former provincial vice governor for his role in a corruption scandal.¹⁸⁷ The judicial corruption has been attributed to customary Confucian-influenced law-blindness, where officials who were responsible for taking care of the corruption problems were the exact same officials committing the corruption.¹⁸⁸ Whatever the case may be, judicial corruption will continue to undermine long-

¹⁷⁹ *Id.*

¹⁸⁰ See Finder, *supra* note 61, at 259.

¹⁸¹ See Lin, *supra* note 11, at 185.

¹⁸² See Finder, *supra* note 61, at 259.

¹⁸³ See Cheng, *supra* note 41, at 1992.

¹⁸⁴ See USTR REPORT 68. Chinese officials admitted that corruption is one of the most serious problems facing the judicial system. *Id.*

¹⁸⁵ See Orts, *supra* note 138, at 70.

¹⁸⁶ See USTR REPORT 68.

¹⁸⁷ See Orts, *supra* note 138, at 71.

¹⁸⁸ *Id.*

term domestic and foreign interests in China.¹⁸⁹

Thus, judges in China are generally behind their counterparts in the United States on experience in basing their decisions on a reasoned rule of law and *stare decisis*, and expertise on intellectual property matters, and independence from political influence and external meddling.

4. Lawyers

Fourth, there is the state of the Chinese lawyer. The Cultural Revolution had all lawyers rounded up as members of the intelligentsia, inapposite to Mao's Communist ideals.¹⁹⁰ In its efforts at modernization, there was a realization for a greater need for lawyers.¹⁹¹ The Chinese government had identified the need for 600,000 legal professionals.¹⁹² However, China's legal education system only produces roughly 700 new attorneys a year.¹⁹³ The need for formally trained attorneys in China is exacerbated by the growing rate of intellectual property-related lawsuits being filed in Chinese courts.¹⁹⁴ Additionally, the lack of training among existing lawyers complicates the Chinese court proceeding that follows an inquisitorial system.¹⁹⁵

There are some promising movements in China toward a professional class of lawyers. Chinese law schools include seminars on complex business and intellectual property issues.¹⁹⁶ Also, Chinese lawyers are encouraged to seek out foreign legal

¹⁸⁹ See USTR Report 69 (noting that government contracts are not awarded based on commercial merits, but rather based on bribes or other underhanded deals, putting American businesses at a competitive disadvantage).

¹⁹⁰ See Berkman, *supra* note 133, at 29. See also Yu, *From Pirates to Partners*, *supra* note 21, at 214.

¹⁹¹ See Berkman, *supra* note 133, at 29.

¹⁹² *Id.*

¹⁹³ See Cheng, *supra* note 41, at 1994.

¹⁹⁴ See Finder, *supra* note 61, at 255.

¹⁹⁵ See Berkman, *supra* note 133, at 29.

¹⁹⁶ *Id.* at 30. The inquisitorial system is similar to the United States' system, in which all participants in the court process, including the judge, is capable of questioning parties and witnesses. *Id.*

education.¹⁹⁷ This presumably would create a class of professional lawyers capable of tackling the intricacies of intellectual property issues which are bound to appear in the near future as foreign investment grows in China as a result of WTO accession.

Despite its shortfalls, this is not the forum to place blame. China has only had a fairly well-functioning judicial system for a couple of decades. Miraculous changes cannot occur over such a short span of time. Yet, upon its entrance into the WTO, these problems remain. As China's role in the WTO grows, and its share of world trade increases, the leadership in China must at some point re-examine and update its laws, policies and regulations in the judicial system. These have posed problems, and will continue to pose problems, to those seeking intellectual property rights protection in China.

C. Administrative Enforcement Mechanism

1. Information Control Policy

Another problem goes to the heart of the Communist Party dogma. The issue of control over information, especially political information that is critical to the Chinese political leadership, presents problems on film piracy crackdowns. The theory goes that the Party's control over communications and broadcasting media are necessary to maintain the Communist Party in Beijing.¹⁹⁸ Recently, Chinese officials ordered a shut down of Internet cafes, issued more than sixty sets of regulations governing Internet access, and arrested those individuals downloading politically sensitive Webpages.¹⁹⁹

¹⁹⁷ *Id.*

¹⁹⁸ See Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 70, at 29. For a good analysis of the reasons for the information control policy, see Endeshaw, *supra* note 5, at 158-59 (noting that the purpose of China's information control policy goes to protection of national security).

¹⁹⁹ See Human Rights Watch (Nov. 28, 2001), *available at* <http://www.hrw.org/press/2001/08/china-0801.htm>. The problem for American

Currently, the Chinese government has allowed American film companies to import twenty films on a revenue-sharing system.²⁰⁰ However, the concern is that American films are sometimes too controversial politically in the eyes of Party officials. The theory is that these films may present themes that would give the Chinese populace ideas which conflict with basic Communist tenets. The films must undergo very stringent scrutiny under China's information censorship regulations.²⁰¹ In 1996, Beijing vociferously opposed the production of the film *Kundun*, a fictionalized account of the Chinese invasion of peaceful Tibet, with a slant toward the Tibetan side of history.²⁰² Chinese officials made innuendoes that the production company, The Walt Disney Company, would not be allowed to expand its distribution base into the Chinese market unless Disney "better cooperated with China in relevant areas."²⁰³ In 1998, the film *Red Corner* was not even allowed into China because of its political theme.²⁰⁴ The same censorship threat faced Disney's *Mulan*, which was distributed only after rumors that Disney was exploring plans to build a Disneyland theme park in southern China.²⁰⁵ Such threats of censorship by Beijing are unproductive in an era in which China

technology and motion picture companies is that they will have to decide between removing the controls on Internet use or continue censorship by selling Internet policing technology to the Chinese government. *Id.*

²⁰⁰ See Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 70, at 30-31.

²⁰¹ *Id.* at 31.

²⁰² (Buena Vista Distribution Co. 1997).

²⁰³ See CNN.com, *China Denies Pressuring Disney Over Dalai Lama Film* (visited Nov. 18, 2001), available at <http://www.cnn.com/WORLD/9612/12/disney.china/index.html>.

²⁰⁴ (Metro-Goldwyn-Mayer 1997). The film's plotline centers around a General Counsel for a large movie studio who is sent to China to negotiate a major entertainment deal, and is consequently accused and arrested for a murder he did not commit. See *Red Corner, Story* (visited Nov. 18, 2001) available at <http://www.redcorner.com/Story/index.html>. The movie is an indictment of the political system in China. See *Red Corner, Making Of* (visited Nov. 26, 2001), available at <http://www.redcorner.com/Making/content.html>.

²⁰⁵ See E! Online News, *Mulan Freed From Release by China* (visited Nov. 18, 2001), available at <http://www.eonline.com/News/Items/0,1,4301,00.html>.

Mulan is based on the story of a young Chinese woman who disguises herself as a man to lead the Chinese people against an invading horde. *Id.*

should allow expansion into its markets.

The Chinese information control policy is problematic because even if the copyright enforcement mechanism is effective in the post-WTO China, market access of films would be still severely limited as a result of the Chinese censors.²⁰⁶ If Chinese people are not allowed access to the films, they will opt to choose a black market version of the film's video.²⁰⁷ Such a scenario would only increase the piracy problem, because the lack of an open market for American films would drive the Chinese demand to the pirated goods.²⁰⁸ In theory, WTO accession would eliminate this scenario because of the WTO's requirement that member nations drop trade barriers and bring regulations into conformity with WTO regulations.²⁰⁹ However, in practice, a solution is far away because the information control policy is by definition a trade barrier, limiting the number of films entering into China.²¹⁰ This in turn implicates copyright infringement issues because American studios will be unable to distribute films in China, increasing piracy due to Chinese demand, and thus creating a vicious cycle of censorship and piracy.²¹¹

This lack of movie distribution in China would certainly be antithetical to the basic propositions of the WTO. It thus presents a major ideological issue for Party officials in this new WTO era, who must now determine whether such a strict information control policy is actually in the best interests of China.²¹²

²⁰⁶ See Mary L. Riley, *The Regulation of the Media in China*, in CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE 355, 364-65 (Mark A. Cohen, A. Elizabeth Bang *et al.* eds., 1999). China maintains an artificially small market for foreign films in order to support the domestic film industry. *Id.*

²⁰⁷ See Yu, *Piracy, Prejudice and Perspectives*, *supra* note 70, at 31.

²⁰⁸ *Id.*; but see Lara, *supra* note 118, at 357 (reaching the conclusion that China deliberately limits market access to American films in order to reap the benefits of piracy).

²⁰⁹ See USTR REPORT 43.

²¹⁰ Reduction of this barrier would open up the Chinese market to American films, and could result in increased policing by the American film companies of copyright infringements. See Butterson, *supra* note 38, at 1105.

²¹¹ See Yu, *Piracy, Prejudice and Perspectives*, *supra* note 70, at 31.

²¹² See Butterson, *supra* note 38, at 31-32 (questioning whether China's information control policy is productive because it creates a need for the

2. Local Protectionism

An additional problem facing copyright enforcement in China is the power of the local governments in overseeing and directing the enforcement efforts.²¹³ As a result of the Copyright Law Implementation Regulations, the NCA was developed.²¹⁴ Also, the local and provincial governments were deemed responsible for the administration of enforcement of the Copyright Law at the local and provincial levels.²¹⁵ This grant of authority has developed to the point of creating numerous fiefdoms throughout China, in which a movie studio seeking redress for copyright infringement must negotiate a tortuous maze of individual governments, each with their own specific procedures and regulations in dealing with copyright enforcement.²¹⁶

In addition to the sheer amount of local governments, each local government is granted authority of local issues by the central government in Beijing.²¹⁷ This includes authority to confer power and reject officials at its own level.²¹⁸ With the broad powers granted by Beijing, the local governments also have control over their own purse strings, in which each local entity can maintain its own fiscal independence.²¹⁹ Coastal and border cities have also been encouraged to take their own initiatives to create foreign investment in their local communities.²²⁰ Consequently, local government officials are given more power to conduct business

Chinese to favor black market videos over the actual videos, and thus actually increasing the copyright infringement problem with piracy).

²¹³ See Palmer, *supra* note 16, at 468 (commenting that the administration of copyright enforcement in China is stymied by the development of local “duke economies”).

²¹⁴ See Zhang, *supra* note 12, at 69.

²¹⁵ *Id.*

²¹⁶ See Shih, *supra* note 126, at 255.

²¹⁷ See Cheng, *supra* note 41, at 1985-86. The 1982 Chinese Constitution conferred the authority of the local governments to the Local People’s Congresses, which effectively took control of politics at the local level from the central government. *Id.*

²¹⁸ *Id.* at 1986.

²¹⁹ *Id.*

²²⁰ See Palmer, *supra* note 16, at 469.

which affects their local affairs.²²¹ As a result, these officials could inject their opinions and judgments into court proceedings that affect their local business interests.²²² In addition, due to the administrative enforcement offices' limited budgets, administrative enforcement is severely affected by the more well-funded, and politically more powerful, local government officials.²²³

Thus, local protectionism is a major obstacle for copyright administrative enforcement procedures.²²⁴ It clogs the enforcement system because local officials control the hiring and management of the enforcement bureaus.²²⁵ Such powerful regionalism serves effectively to neutralize national efforts at copyright enforcement because of the tensions of local protections which are exerted upon the enforcement mechanism. In spite of Chinese accession into the WTO, local protectionism is likely to continue in the near future.²²⁶

²²¹ See Li, *supra* note 164, at 399-400. Local protectionism is really a corollary of decentralization. *Id.*

²²² See Cheng, *supra* note 41, at 1986.

²²³ *Id.* at 1987; Li, *supra* note 164, at 400. Local governments have fiscal authority to manage local expenditures. *Id.*

²²⁴ *Id.*; see also Palmer, *supra* note 16, at 470 (positing that Beijing's inability to control the local governments is a result of a difference in ideology between Beijing's socialist ideals and local governments' concept of justice).

²²⁵ See Li, *supra* note 164, at 401.

²²⁶ *Id.* There is a popular maxim which reflects this local protectionism problem, known as "*Shang You Zhen Che, Xia You Dui Che*," or whenever Beijing institutes a national policy, local governments undermine it with their own local policies. *Id.*

VI. WHAT NOW? EFFORTS THAT NEED TO BE DONE

A. Efforts Needed by China

1. Copyright Law Revisions

The Copyright Law was recently updated to conform to the specifications of TRIPs and the Berne Convention.²²⁷ Perhaps the most important aspect of the amendments was the lack of amending the definitions and scope of the fair use exceptions.²²⁸ There are problems with the fair use exception's scope, including the "State Organ" exception.²²⁹ Because all state-owned enterprises are deemed state organs under the Copyright Law, copyright protection is severely weakened.²³⁰ Also, additional funding for the NCA administrative enforcement effort is direly needed. Amendments to the Copyright Law to meet the compliance standards of the WTO is one thing; allowing the necessary funds to combat piracy and make enforcement of copyright laws is another entirely different matter.

There are some good aspects of the Copyright Law, including the criminal provisions, and increased protections against Internet and videocassette piracy. Nevertheless, the Copyright Law should be viewed as a work in progress, and not a completed work. The People's Congress still must fine-tune the Copyright Law in order to avoid derailing the Chinese enforcement efforts as a result of faulty law.

2. Education

Second, Chinese officials must educate the general population, Chinese local judges and lawyers as to the benefits of WTO

²²⁷ See *supra* note 52.

²²⁸ *Id.*

²²⁹ See Yang, *supra* note 14, at 279-80.

²³⁰ *Id.* at 279.

membership and the boons of copyright rights protections.²³¹ Enforcement cannot be based on only penalization, but also must emphasize education. China should emulate Malaysia's efforts to educate its populace to not support piracy.²³² There are some indications that the anti-piracy message has settled in the minds of the Chinese populace. For example, after pirated copies of her book were distributed, Deng's daughter pursued a copyright infringement suit against the pirates.²³³ Also, \$1 million was recently budgeted toward an anti-piracy education program in Hong Kong.²³⁴ As a result, Chinese people are realizing the consequences for the failure to protect intellectual property rights.²³⁵ Moreover, when Chinese judges meet with their American and European counterparts, they must pass this information along to others in the government agencies, the Party, and the Chinese legal profession.

One segment of the Chinese population, and perhaps most important, which has been largely ignored is the general masses. While education on intellectual property rights protections is essential at the governmental level, the common citizenry must also be educated with the same intensity as government officials and the legal community. The typical pirate lives amongst the masses. As a result, China must direct its resources to educating people of the negative aspects of piracy, especially in rural areas and the provinces.²³⁶

²³¹ See Cheng, *supra* note 41, at 2009 (arguing that education is the "cure for cultural disincentives against protecting copyrights").

²³² See Billboard, *Malaysia to Educate on Piracy* (visited Nov. 21, 2001), available at <http://www.grayzone.com/901.htm#busts>.

²³³ See Butterton, *supra* note 38, at 1120, n.193. Den Rong sought judicial relief in the Beijing Intellectual Property Court for the distribution of a pirated version of her biography about her father. *Id.*

²³⁴ See Asiamedia, *\$1M Set Aside to Promote Law on Film Piracy* (visited Nov. 26, 2001), available at <http://www.asiamedia.ucla.edu/Weekly/11.22.2000/HongKong3.htm>.

²³⁵ See Butterton, *supra* note 38, at 1120.

²³⁶ See Cheng, *supra* note 41, at 2000. China's leaders embarked on a campaign to educate the provinces on popular legal education in 1997. *Id.* It is unclear if this campaign is an ongoing process, or was just a one-time event.

3. *Centralized Copyright Enforcement*

Third, copyright enforcement must be directed from Beijing, and not at the local level. While other areas of local concern should be handled at a local level, copyright infringement and piracy is a national problem, not isolated to various provincial factories. Beijing must reassert its centralized form of governance, and direct a national copyright enforcement effort. While efforts to decentralize were attempts by Beijing at democratization by giving the localities more decision-making powers, this abrogation of power only reinforced local protectionism.²³⁷ Beijing must reel in the local governments through direction of the copyright enforcement process. While this notion may be antithetical to the efforts at democratization in China, it must be noted that enforcement reforms will not take place instantaneously. Specific efforts will include directing raids at piracy factories.²³⁸ In addition, raids must occur with regularity and specificity, instead of the randomness of previous raids on pirate factories.²³⁹ Raids must occur at community viewing rooms or “mini-theaters,” as well, which charge for viewing pirated versions of recently released films.²⁴⁰ A course of gradualism may be the best method at this point in time. Of course, as local jurisdictions become more predisposed to rule of law adherence and acceptance of national enforcement policies, Beijing’s reins can be loosened.

4. *Transparency*

Fourth, the maintenance of a case reporting system for judges on which judges can rely upon when deciding intellectual property cases is an absolute necessity. Without such a system, judges will

²³⁷ See Shih, *supra* note 126, at 300; Donaldson & Weiner, *supra* note 102, at 413.

²³⁸ See Yu, *From Pirates to Partners*, *supra* note 21, at 151. American officials should also be present to monitor the destruction of the pirate factories. *Id.*

²³⁹ See Li, *supra* note 164, at 404. The 1995 MOU only required periodic and random inspections only in CD factories. *Id.*

²⁴⁰ See Butterton, *supra* note 38, at 1082.

be left with nothing but their own, sometimes misguided, interpretation of the Copyright Law in deciding cases. Also, the government's legal gazette lacks notice of changes in administrative rules and regulations.²⁴¹ These do little to create an ambiance for a rule of law. An ambiance for a rule of law encompasses rationality and legitimacy of processes.²⁴² Public distribution and exposure to judges' decisions give local governments and the public insight into a still-emerging judicial system. It also fosters understanding of legal rationales in determining copyright issues. Public distribution of copyright statutes, rules and regulations goes a long way at educating local authorities and the general public on the needs for protecting copyrights.²⁴³

5. Adherence to Rule of Law

Finally, tying all of the previous discussions together, there must be an adherence to a rule of law.²⁴⁴ Through such adherence to law, local protectionism can be prevented.²⁴⁵ This is based on the fact that these local interests would not be compelled to make decisions for the betterment of their own local, or even personal, interests, but rather domestic interests. Local governments following established national rules enhance a rule of law. Some commentators have argued a course of action within the WTO's dispute resolution that compels China into strict adherence to a rule of law.²⁴⁶ However, this approach fails to consider the

²⁴¹ See Palmer, *supra* note 16, at 465. Also, there is a lack of public consultation which is an important concept for transparency. *Id.*

²⁴² See Orts, *supra* note 138, at 112.

²⁴³ *Id.* at 113. Fair notice and hearings, public promulgation of statutes and availability of legal information are hallmarks of proper transparency issues relevant to a rule of law. *Id.*

²⁴⁴ See Berkman, *supra* note 133, at 37.

²⁴⁵ *Id.* at 38.

²⁴⁶ See Butterton, *supra* note 38, at 1123 (arguing that a strict rights consciousness must be accepted by the Chinese in order to properly address the piracy issue); *but see* Palmer, *supra* note 16, at 474-75 (arguing that WTO

Chinese experience. In light of the very idiosyncratic nature of Chinese Confucian culture, which advocates group harmony over tête-a-tête negotiations, copyright enforcement in China should center around harmonious and flexible consultations.²⁴⁷

Such an adherence to a rule of law will unlikely happen in the near future.²⁴⁸ With assistance from American film studios, China could adapt a mindset to a rule of law. More international trade will spur cultural attitudes on beliefs on the importance of the law.²⁴⁹ For example, Japan is a very economically advanced East Asian country with a strong respect of a rule of law.²⁵⁰ Japan is also highly influenced by Confucianism, like China.²⁵¹ Through its political and judicial processes, Japanese culture has reconciled Confucian tradition with Western notions for legalism and rules of law.²⁵² The same is certainly possible for China. Indications of a trend towards a rule of law in China were reinforced by the passage of an amendment to the Chinese Constitution which places governance by law to the highest level.²⁵³

B. Efforts Needed by the United States

There is a need for increasing efforts for judicial, legal, and corporate cooperation between the two nations.²⁵⁴ American

accession will not bring about the desired intellectual property rights protections).

²⁴⁷ See Yu, *From Pirates to Partners*, *supra* note 21, at 233-34; Peng, *supra* note 72, at 22.

²⁴⁸ *Id.* The WTO is a “victory for Legalism,” or the *fa* concept. *Id.* at 23.

²⁴⁹ See Orts, *supra* note 138, at 109.

²⁵⁰ See Peng, *supra* note 72, at 32.

²⁵¹ *Id.* at 20.

²⁵² Most segments of Japanese society live by the Confucian-influenced idea of natural order and social arrangement known as *giri-ninjo*, or rules of behavior. See Surya Prakash Sinha, *An Axiology of the International Bill of Rights*, 1 PACE Y.B. INT’L L. 21, 26 (1989). This is similar to the Chinese concept of *li*.

²⁵³ See China Daily, *China: “Rule of Law:” Backed with Amendment*, Mar. 4, 2000, available at 2000 WL 4115271.

²⁵⁴ See Yu, *From Pirates to Partners*, *supra* note 21, at 183-88 (presenting a model which the United States can better understand Chinese institutions); Yu, *Pirates, Prejudice, and Perspectives*, *supra* note 70, at 71 (commenting on the

judges and practitioners must assist Chinese judges and practitioners in their efforts to essentially rebuild a Chinese legal system dismantled by years of Maoist persecution. American legal professionals knowledgeable in intellectual property matters should conduct meetings and training sessions for the Chinese legal community.²⁵⁵ Finally, American corporate interests, and more notably the motion picture industry, must contribute to the well-being of China's market structure.

1. *Ending Trade Sanctions*

First, it probably goes without saying that American threats of trade sanctions is not conducive to a productive relationship between China and the United States.²⁵⁶ American trade sanctions would also tend to defeat the cooperative style of the WTO.²⁵⁷ By inclusion in the WTO, China will have to abide by WTO trade rules, including TRIPs.²⁵⁸ Also, trade sanctions in this new era of cooperative international efforts are really just dinosaurs from a Jurassic age of fractured understanding and disunity between the two countries.²⁵⁹ Such use of trade sanctions by the United States

American failure to educate Chinese judges, government officials and the general public on the benefits of intellectual property rights protections).

²⁵⁵ See Yu, *From Pirates to Partners*, *supra* note 21, at 219.

²⁵⁶ See Cheney, *supra* note 87, at 25-26. The threat of sanctions really has only limited success, and in some instances actually places the United States in a worse position than before sanctions occurred. *Id.* The U.S.-China Business Council, an umbrella organization representing American business interests in China, observed that unilateral American trade sanctions has had little effect on policy changes in China. See Yu, *From Pirates to Partners*, *supra* note 21, at 167.

²⁵⁷ *Id.* at 169 (positing that the United States' coercive trade sanctions only leads to retaliation by China, which could precipitate a global trade war).

²⁵⁸ See Palmer, *supra* note 16, at 474-75. China's WTO membership would effectively neutralize both China's isolationist tendencies and the United States' militaristic unilateral trade actions by placing any disputes into a neutral forum.

Id.

²⁵⁹ See Cheng, *supra* note 41, at 2007. It should be noted that the United States is not an angel in the WTO community. In one trade dispute with the European Union, and upon an unfavorable decision from the WTO's Dispute Settlement Body, the United States refused to agree to the ruling. Such action would

is quite ineffective in this new era of a WTO regime.

2. American Legal Assistance

Second, the American legal community must provide education for the Chinese legal community.²⁶⁰ American judges must meet with their Chinese counterparts in order for the Chinese judges to gain insights into intellectual property rights protections.²⁶¹ Judges are people, and people cannot make informed decisions unless they are taught. Along with education goes leadership, and the United States must lead by example. The United States has shown a willingness to drive a course inconsistent with fair global principles, shown by the recent WTO decision against the United States in dispute settlement resolution proceedings.²⁶² United States cannot expect China to follow a global course, when the United States will not follow the same course.²⁶³ Such double talk by the United States does little to foster cooperation and to create inroads in enforcement of copyright laws in China.

American judges appear to be behind compared to European judges when it comes to advising the Chinese judicial community. Recently, European Union judges met with Chinese judges in Beijing and Shanghai to discuss various issues involving enforcement of intellectual property rights laws, and assisted in the draft proposal to improve law enforcement.²⁶⁴ More of this kind of dialogue must exist, especially from the American judicial

inherently undermine the United States' credibility and reputation to force China to enforce its own laws and conform to the world community standards. See Laurence R. Helfer, *World Music on a U.S. Stage: A Berne/TRIPs and Economic Analysis of the Fairness in Music Act*, 80 B.U. L. REV. 93, 101 (2000).

²⁶⁰ See Yu, *From Pirates to Partners*, *supra* note 21, at 219.

²⁶¹ *Id.* (presenting various methods which American judges can conduct training and education of Chinese judges include videoconference meetings and web site bilingual technical assistance of intellectual property adjudication).

²⁶² See Helfer, *supra* note 259, at 101.

²⁶³ *Id.*

²⁶⁴ See China.org.cn, *Enforcement of IPR Laws to Improve* (visited Nov. 20, 2001), available at <http://www.china.org.cn/english/2001/Jun/13894.htm>.

community.

3. *Assistance from Hollywood*

Third, the American motion picture companies must step up to the plate and provide significant education and cooperation to their budding Chinese counterparts. Film studios cannot expect to profit from a 1.3 billion-person market without making some investment into the Chinese economic infrastructure. There are some signs of a Hollywood move into China. The Walt Disney Company released information of a proposal for a new Disneyland outside Hong Kong.²⁶⁵ A new theme park on the scale of Disneyland would naturally attract huge revenues for the local economy and inject a boost into the fledgling Chinese film industry. Prospects for film production could be endless. Another instance involves Warner Bros.' agreement with the Shenzhen Advanced Science Group to distribute animated films in China.²⁶⁶ However, of course, all of this cannot occur unless China's copyright laws are enforced to ensure Disney's and Warner Bros.' presence in China to overcome the prevalence of piracy.

4. *Joint Ventures*

Fourth, and related to cooperative efforts of American film companies, American corporations must form joint ventures with Chinese companies.²⁶⁷ These joint ventures could accomplish the creation of economic incentives for the Chinese.²⁶⁸ In doing so, the Chinese partners would be prone to taking a stronger stance

²⁶⁵ See Canadian Broadcasting Corporation, *It's a Small World After All* (visited Nov. 20, 2001), available at

http://www.infoculture.cbc.ca/archives/misc/misc_01061999_disney.html.

Interestingly, Disney Chairman and Chief Executive Officer Michael Eisner noted that the Chinese people "love Mickey Mouse no less than the Big Mac," obviously referring to the successful entrance of McDonald's into the Chinese market. *Id.*

²⁶⁶ See Cheng, *supra* note 41, at 2003.

²⁶⁷ *Id.* at 2009.

²⁶⁸ See Yu, *From Pirates to Partners*, *supra* note 21, at 209.

against piracy where their economic interest in the outcome of the business ventures is affected.²⁶⁹

5. Pro-Active Motion Picture Industry Stance

Fifth, the United States must adopt a proactive stance on film piracy.²⁷⁰ In other words, the United States motion picture industry cannot stand by and push for anti-piracy efforts in China. Rather, it should utilize its vast resources and access to technology to its advantage. Studios must use encryption to prevent Internet piracy.²⁷¹ Copy protection, scrambling, and Macrovision technologies should be used to cut down on videocassette piracy.²⁷² In addition, the MPAA should fund an advertising campaign to encourage American movie-going audiences to report camcorder usage in theaters.²⁷³

6. Patience

Sixth, the United States' dealings with China must be tempered by the fact that China is technically still a developing nation.²⁷⁴ Americans must be mindful that intellectual property access is important for economic development, but enforcement of intellectual property rights is considered an impediment on

²⁶⁹ *Id.*

²⁷⁰ See Eric M. Griffin, *Stop Relying on Uncle Sam! A Proactive Approach to Copyright Protection in the People's Republic of China*, 6 TEX. INTELL. PROP. L.J. 169, 186 (1998). Although somewhat outdated, Mr. Griffin raises an important issue which still applies post-accession.

²⁷¹ See Strategic Advantage E-Commerce News, *Film Piracy on the Rise* (visited Nov. 21, 2001), available at

<http://www.strategicadvantage.com/nwfilm piracy.html>.

²⁷² See *supra* note 19. Copy protection technology includes content scrambling, digital encryption, and Macrovision. *Id.* Macrovision is an encryption technology for videocassettes. *Id.*

²⁷³ See Canadian Broadcasting Corporation, *NY to Fight Movie Pirates* (visited Nov. 21, 2001), available at

http://www.infoculture.cbc.ca/archives/filmtv/filmtv_12161998_pirates.html.

²⁷⁴ See Griffin, *supra* note 270, at 186.

development.²⁷⁵ An American mindset must change from one of an almost militaristic approach to Chinese intellectual property rights protections, to one which promotes cooperation.²⁷⁶ Progress on enforcement will not occur overnight: America was once a developing nation, and was a rogue nation notorious for pirating British works.²⁷⁷

VII. CONCLUSION

The rule of law is a nascent concept for legal practitioners in China, and is met with skepticism.²⁷⁸ This is based on its history and culture which generally distrusts the rules of law over the rules of Confucianism. However, China role in the WTO at the dawn of the twenty-first century makes it a major player on the global trading stage. The motion picture industry will remain a powerful American cultural force which will have reciprocal benefits for both China and Hollywood alike.

Everything really boils down to a proper adherence to a rule of law. Yet, rule of law adherence must be somewhat on China's terms, and not based on Western ideals, because the Chinese approach to copyright protection is fundamentally different than the West's. Any requirement to adhere to a rule of law must reflect China's traditions, culture, and history.²⁷⁹ Some commentators are not optimistic about China's ability to adhere to

²⁷⁵ *Id.* (citing Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273, 282 (1991)).

²⁷⁶ See Yu, *From Pirates to Partners*, *supra* note 21, at 183-86 (commenting that American institutions have little knowledge or understanding of the Chinese political institutions and decision-making processes, and that American assistance with China will enhance this knowledge and understanding).

²⁷⁷ See Griffin, *supra* note 270, at 187; Peter K. Yu, *Three Stories of Copyright Law in Transition: 19th Century America, 20th Century China, and 21st Century Cyberspace* 4-5 (Sept. 17, 2001) (unpublished manuscript, on file with the author).

²⁷⁸ See Shih, *supra* note 126, at 51.

²⁷⁹ See Yu, *Pirates, Prejudice, and Perspectives*, *supra* note 70, at 69 (criticizing the West for ignoring China's distinctive cultural history and political system in assessing intellectual property rights protection mechanisms).

a rule of law, making the necessary changes in its laws and creating an ambiance for which enforcement of laws can flourish.²⁸⁰ Yet, China has shown a desire to join the global stage, and a willingness to play by a different, even foreign, set of rules. This will involve China to undergo a tortuous path, even a painful one, as it navigates from an isolated socialist country to a market-oriented, centrally-planned regime.²⁸¹

Nonetheless, no one can doubt that with China's accession into the WTO, the Dragon has entered the world intellectual property arena. What happens from this moment forward will depend on both American assistance taking into consideration China's distinctive political, historical, and cultural institutions, and Chinese openness to ideas contrary to its cultural and political history.

²⁸⁰ See Palmer, *supra* note 16, at 474 (echoing the sentiments of William Alford in that China will not succeed in its efforts to create a rule of law because its leaders are ideologically opposed to the rights which they have been creating). Professor Alford doubts creation of laws will by itself create lasting changes in China's political landscape. *Id.*

²⁸¹ See Taylor, *supra* note 27, at 151 (noting that Chinese culture will continually challenge economic legitimacy while China undergoes social and economic changes).