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Copyright Law of China: Can It Effectively Protect U.S. Works?

Chong Zheng Ren

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I. INTRODUCTION

Despite the existence of a formal copyright law in China and the fact that it has comparable sophistication to its United States counterpart, American investors express serious concerns about China's lack of copyright protection.[1] The United States has claimed losses of more than one billion dollars annually to piracy in China as a result of intellectual property violations.[2] Using what the United States government regards as a powerful tool to pressure the Chinese government into providing more effective protection of United States intellectual property, United States Trade Representative Mickey Kantor announced in June 1994 that the United States government "had placed China on a watch list of countries suspected of tolerating intellectual property violations under the 'Special 301' section of the U.S. Trade Act."[3]

In response to the United States' allegations, the Chinese government promptly issued a document in June 1994, entitled "Intellectual Property Protection in China." In it, China outlined its basic intent to strengthen intellectual property protection, but maintained that the country has a "high-grade legal system" and a "[c]omplete [l]aw [e]nforcement [s]ystem for [i]ntellectual [p]roperty [p]rotection."[4]

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1. Sheila Tefft, *U.S. Delegation to Tackle Copyright Piracy in China*, CHRISTIAN SCI. MONITOR, Aug. 23, 1994, at 9.

2. Giles Hewitt, *Copyright Accord Offers No Guarantees for China's Trade Partners*, AGENCE FRANCE PRESSE, Feb. 27, 1995, at Financial Pages.

3. *China Claims Success in Copyright Crackdown*, REUTER BUS. REP., Aug. 3, 1994.

4. INFORMATION OFFICE, STATE COUNCIL OF THE PEOPLE'S COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, INTELLECTUAL PROPERTY PROTECTION IN CHINA 17 (1994) [hereinafter INFORMATION OFFICE]. Although this document did not explicitly state that it was a response to the United States' allegation, such conclusion can be drawn based on the content and timing of

In addition, Chinese intellectual property scholars have criticized the United States' investigation as being one-sided and unfair.[5] According to Jiyang Liu, Secretary-General of the China Copyright Society, the United States government's action indicated an ignorance of Chinese intellectual property protection.[6] According to Secretary-General Jiyang, the People's Courts in China have heard 3505 intellectual property cases from 1986 to 1993, and have been highly praised for their prompt and just disposition of intellectual property disputes.[7]

With the new flux of investment from the United States into China following Commerce Secretary Ronald Brown's visit in the summer of 1994,[8] it is crucial that the two countries reach a constructive solution on the issue of intellectual property protection in China to promote trade and to reduce conflicts between China and the United States.

On February 26, 1995, after nine rounds of intense negotiations on intellectual property rights between China and the United States, the two governments reached an agreement on the protection of intellectual property rights, thereby averting a trade war between the two countries.[9] Under this agreement, China agreed to take immediate steps to reduce infringements of American copyrights, to improve enforcement methods, to prevent future abuses, and to increase American producers' access to markets in China.[10]

Despite China's commitment, skepticism remains high. Some doubt exists regarding whether the Chinese government will actually increase enforcement of intellectual property law.[11] Others believe it will take

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the document. In an attempt to show the "Chinese government's sincerity in its efforts to scrupulously abide by international conventions and bilateral agreements regarding the protection of intellectual property rights, and its capacity to fully implement its international obligations," the white paper quoted a favorable statement made by Dr. Arpad Bogsch, Director-General of the World Intellectual Property Organization ("WIPO") that "China had accomplished all this at a speed unmatched in the history of intellectual property protection." *Id.* at 6.

5. *Zhong Guo Zhi Shi Qian Chuan Zhe Ren Wei Diao Qia Ji Bu Gong Zheng* [*Chinese Intellectual Property Experts Think Investigation Extremely Unfair*], REN MIN RI BAO [PEOPLE'S DAILY], July 8, 1994, at 1.

6. *Id.*

7. *Zhi Shi Qian Chuan Bao Hu - Xian Zhang Yu Wei Lai* [*Intellectual Property Protection-Presence and Prospect*], FA ZHI RI BAO [LAW & ORDER DAILY], June 30, 1994, at 2.

8. Uli Schmetzer, *Rights Lose Out as U.S., China Deal on Trade*, CHI. TRIB., Aug. 30, 1994, at 1. The visit resulted in $3 billion in contracts and the United States expects $25 billion in projects in the next few years. *Id.*

9. *Trade War Averted: Chinese Officials, Individuals Welcome Sino-U.S. Copyright Accord*, BBC Summary of World Broadcasts, Feb. 28, 1995, at part 3.

10. *See* David E. Sanger, *Japan's Ghost in China Pact: U.S. Tries to Avoid Old Trade Mistakes*, N.Y. TIMES, Feb. 27, 1995, at D1.

11. *See* Hewitt, *supra* note 2, at Financial Pages.

several years before the United States government will know whether the commitments in the agreement are fulfilled.[12]

The author contends that to determine whether American copyrights can be efficiently protected in China, it is necessary to have a better understanding of the Chinese copyright law, its compatibility with both international conventions and United States copyright laws, the enforcement mechanism of the Chinese copyright law and the problems related to the enforcement process.

This Article will briefly examine the history of China's copyright law, the present copyright law, and its compatibility with both international conventions and with the United States Copyright Act. In addition, this Article will focus on the enforcement process of the existing Chinese law and associated problems, and suggest possible solutions. The author concludes that the Chinese copyright law matches international and United States standards for copyright protection. To achieve its goal of full copyright protection under the Chinese copyright law, however, China needs to make substantial improvements in its copyright enforcement process. It is equally important for American investors to learn to maneuver through the administrative and judicial branches of the Chinese government in order to obtain the maximum protection provided under the Chinese copyright law.

II. SUBSTANTIVE STUDY BETWEEN THE CHINESE AND UNITED STATES COPYRIGHT LAWS

Substantively, there are many similarities between the present Chinese and United States copyright laws. These similarities are not coincidental, having existed since the inception of Chinese copyright law. A review of Chinese legal history reveals that China experienced a relatively short period of confusion in its legislative history. China's formal copyright protection system was formed in 1990 and was modeled after international standards.

A. Legislative History: Prior to Enactment of the 1990 Copyright Law

Despite the rapid development of copyright protection in the 1950s, the Chinese copyright system was demolished in the Cultural Revolution

12. *A Promising U.S.-China Trade Pact*, CHI. TRIB., Feb. 28, 1995, Editorial at 14.

between 1966 and 1976.[13] Authors' moral and economic rights ran counter to the proletariat ideology and the efforts to eliminate private property. Consequently, authors generally lost their copyrights.[14]

This situation began to change around April 1979, as the Cultural Revolution ended and the private property rights were reestablished.[15] In particular, the issue of remuneration for the publication of a Dictionary of Etymology came up before the National Copyright Administration in 1979.[16] A Chinese publisher, the Business Affairs Publishing House, sought the Administration's opinion on the propriety and standard of remuneration to be paid to authors.[17] The Administration held that authors' rights for reproductions and translations should be protected to the same extent as in the 1950s.[18] Thereafter, in 1980, the Administration issued the Trial Implementing Rules Concerning Remuneration for Book Writing.[19] The rules were revised twice, in 1984 and 1990, and were regarded by the World Intellectual Property Organization ("WIPO") as the sole law concerning authors' rights in China until 1990.[20]

B. The 1990 Copyright Law and Its U.S. Counterpart

1. Conformity with International Standards

In September 1990, the National People's Congress passed the Copyright Law ("Copyright Law"),[21] which went into effect June 1, 1991.[22] This signified China's commitment to protect intellectual property as required in two Sino-American bilateral treaties.[23] The drafting process

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13. Zheng Chengsi, *Chinese Copyright Law*, *in* CHINESE FOREIGN ECONOMIC LAW, ANALYSIS AND COMMENTARY 16-1, 16-3 (Rui Mu & Wang Guiguo eds., Int'l L. Inst. 1993 Supp. No. 3, 1994).

14. *Id.*

15. *Id.* In 1979, China decided to adopt a policy of openness with the outside world and began to rebuild its legal system which had been destroyed in the Cultural Revolution. *Id.*

16. *Id.*

17. Zheng, *supra* note 13.

18. *Id.* In 1950, the Decisions Concerning the Improvement and Development of Publishing were adopted at the first National Publications Conference, with provisions directly related to copyright. Printing of an author's work without prior consent is prohibited, and the name of the author or translator should be exactly recorded. *See* ZHENG CHENGSI & MICHAEL PENDLETON, COPYRIGHT LAW IN CHINA, ¶ 2-400 (1991).

19. Zheng, *supra* note 13.

20. *Id.*

21. INFORMATION OFFICE, *supra* note 4, at 4-5.

22. *Id.*

23. *Id.*

and actions by the Chinese government subsequent to the passage of the 1990 Copyright Law indicate that the Chinese government has made efforts to achieve conformity with international standards.

In June 1985, the State Council decided to adapt its copyright system to the two international copyright conventions, the Berne Convention and the Universal Copyright Convention ("UCC").[24] The purpose was to facilitate China's adherence to international standards within the two conventions and thereby provide protection to copyrights owned by foreigners.[25] In 1985, the Chinese National Copyright Administration was assigned the task of drafting the Copyright Law.[26] The Drafting Committee under the Administration, which included many domestic and international legal scholars, used the Berne Convention as a model in the drafting process.[27] Additionally, in December 1986, the Chinese government submitted for comment[28] a document entitled *Ten Main Points of the Copyright Law* ("*Ten Main Points*") to Dr. Bogsch, the Director-General of WIPO.[29]

Differences can be readily identified between this document and the later enacted Copyright Law. For example, *Ten Main Points* did not protect computer software.[30] In response to concerns of foreign governments and enterprises with respect to computer software, the Copyright Law listed computer software as a separate and distinct category of protectable works.[31] Additional protection was provided by the 1991 Regulations for the Protection of Software, in order to bring China's intellectual property laws more in line with international standards.[32]

On June 1, 1991, the same day the Copyright Law came into effect, the State Council promulgated the Regulations for the Implementation of the Copyright Law, in which more detailed provisions were included to

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24. *Id.*

25. *Id.*

26. INFORMATION OFFICE, *supra* note 4, at 4-5.

27. ZHENG & PENDLETON, *supra* note 18, ¶ 2-720, at 65-66.

28. It should be noted that the Chinese government often solicits comments and critiques from foreign legal experts when drafting a new law, especially in the areas where the Chinese legislature lacks experience. This is to insure that the Chinese law will conform with international standards and common practice. For example, in the drafting process of China's Corporation Law, legal experts from Hong Kong were invited to participate and give comments in the process. Interview with JinHong Jiao, Associate Dean of University of International Business & Economics, Beijing, China, in L.A., Cal. (Mar. 25, 1995).

29. ZHENG & PENDLETON, *supra* note 18.

30. *Id.* at 66.

31. *Id.* ¶ 15-100, at 193.

32. *Id.* ¶ 15-300, at 200.

interpret the Copyright Law.[33] On June 4, 1991, the Regulations for the Protection of Computer Software were also adopted to provide specific rules with respect to software protection.[34] To address the concern that China did not have a copyright registration system for software protection,[35] the Ministry of Machinery and Electronics Industry issued the Measures for the Registration in Computer Software on April 6, 1992.[36] By this time, the Chinese copyright legislation process was complete.

However, four years after the passage of the Copyright Law, complaints from American investors of insufficient protection of their works reached such severity that the United States government threatened retaliation. Although complainants may not have resorted to all of the available remedies under the Chinese Copyright Law, the law itself may be ineffective for two reasons: (1) its incompatibility with the United States concept of copyright, or (2) its built-in, inefficient enforcement mechanism. A comparative study between the substantive contents of the Copyright Law and its United States counterpart will assist in finding the causes of the complaints.

2. Comparison between the 1990 Chinese Copyright Law and the 1976 United States Copyright Act

Surprisingly, a textual comparison shows few differences between the Chinese Law and the United States Copyright Act in areas of major concern for American copyright holders doing business in China. The following subsections will analyze the similarities and differences between the two laws as well as how these similarities and differences may affect the protection of United States copyrighted works in China.

a. Works Eligible for Copyright Protection

Article 3 of the Copyright Law defines the scope of works eligible for copyright protection as follows:

(1) literary works;
(2) oral works;

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33. *See* REGULATIONS FOR THE IMPLEMENTATION OF THE COPYRIGHT LAW (P.R.C.), *translated in Copyright Regulations*, CHINA CURRENT LAWS, Oct. 1991, at 4, 5.

34. Jia Zhao, *Computer Software Protection: New Regulations Go into Effect*, ASIAN EXECUTIVE REP., Oct. 15, 1991, at 9.

35. *See* Alan W.S. Ng, *Practice Notes; Intellectual Property*, CHINA L. & PRAC., Oct. 29, 1990, at 21, 22.

36. Tan Loke Khoon, *Computer Software Copyright Registration Procedures Announced*, ASIA L. & PRAC., July 2, 1992, at 29.

(3) musical works operatic and dramatic, works of *quyi* [folk art forms], and choreographic works;
(4) works of fine art and photographic works;
(5) cinematographic, television, and video works;
(6) drawings of engineering designs and product designs, and explanations;
(7) works in the form of drawings such as maps and schematic drawings;
(8) computer software; [and]
(9) other works as stipulated in laws and administrative regulations.[37]

These nine categories of protectable works along with works of folklore under Article 6 form the copyrightable subject matter under the Copyright Law.[38]

Section 102(a) of the United States Copyright Act sets forth eight categories of works of authorship:

(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works;
(7) sound recordings; [and]
(8) architectural works.[39]

On its face, the Chinese Copyright Law covers a broader scope of protectable works than the United States Copyright Act. Although the lists of protectable categories in both the Chinese and the United States provisions are illustrative rather than exhaustive,[40] one should not overlook the difference. When a work does not neatly fall into one of the enumerated protectable categories under the Chinese Copyright Law, it is more difficult for a litigant to convince the court that the work should be

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37. COPYRIGHT LAW art. 3 (P.R.C.), *translated in PRC, Copyright Law*, CHINA L. & PRAC., Oct. 29, 1990, at 26-27.

38. *Id.* art. 6, *translated in PRC, Copyright Law*, at 26, 27-28.

39. 17 U.S.C. § 102(a) (1994).

40. *See, e.g.*, COPYRIGHT LAW art. 3 (P.R.C.), *translated in PRC, Copyright Law, supra* note 37, at 26-27. In 17 U.S.C. § 102(a), Congress intentionally used the term *works of authorship* and left it undefined. Legislative history indicates that "the reason for this omission was to provide for an extensive and flexible coverage of copyright subject matter, adaptable to new technologies and new ways in which authors find to express themselves." MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 60 (1989).

protected. Under the civil law system in China, judges have no power to create a new category of protectable work.[41]

b. Remedies and Sanctions

In comparison to the plaintiff-oriented approach of the Copyright Act of the United States which guarantees full recovery of actual damages and any additional profits or statutory damages,[42] Chinese Law is less plaintiff-friendly. The Copyright Law's remedies have been limited to administrative penalties consisting of fines or other civil liabilities, such as public apologies.[43] Serious doubts exist as to the adequacy of public apologies, administrative penalties, or even damages which are, as indicated by the result in some cases, disproportionate to the harms suffered by the copyright holder and the profits gained by the infringer.[44] The inadequacy of the Copyright Law's remedies may inhibit many copyright owners from initiating litigation that may last for two to three years, resulting in little gain. Therefore, unless the Copyright Law requires the confiscation of all profits from unlawful use of a copyrighted work,[45] "potential offenders are tempted to take the risk and simply include possible fines and compensation as part of their projected 'costs.'"[46]

However, this trend of awarding low monetary damages is rapidly changing in China. In a decision entered on December 16, 1993, a Guangdong computer firm was fined $36,000 for pirating a Beijing company's software, one of the largest fines on record.[47]

In another recent computer software infringement case involving Chinese parties, the Beijing Intermediate People's Court held that the defendants must cease their infringement, pay damages of Rmb 100,000 ($11,765) to the plaintiff for economic losses and loss of reputation, loss incurred as a result of obtaining an investigation permit, and costs arising

41. *See* discussion *infra* part II.B.3.

42. 17 U.S.C. § 504(c)(1) (1994).

43. COPYRIGHT LAW art. 45 (P.R.C.), *translated in PRC, Copyright Law*, *supra* note 37, at 26, 39.

44. For example, the Walt Disney Co. recently brought suit against eight Chinese infringers. After spending $15,000 in legal costs, it has won only a single fine totaling $91. Susan Orenstein, *Disney Duels With Chinese 'Pirates' over Mickey: Case Goes to New Beijing Court*, LEGAL TIMES (Wash., D.C.), July 25, 1994, at 1.

45. Under Article 46 of the present Chinese Copyright Law, a copyright administration department *may* confiscate the unlawful income, COPYRIGHT LAW art. 46 (P.R.C.), *translated in PRC, Copyright Law*, *supra* note 37, at 40 (emphasis added).

46. Ng, *supra* note 35, at 22.

47. Mike Laris, *In China, Challenging the Pirates: Software Companies Test New Laws, Courts*, WASH. POST, Jan. 3, 1994, at F13, F16.

from the court proceedings.[48] The plaintiff was also awarded Rmb 50,000 ($5,882) for any costs incurred in an effort to mitigate the damage brought about by defendants' activities.[49] Although the dollar amount of the court's award was still significantly less than that of United States judgments, the itemized damage award demonstrates a willingness by the Chinese court to assess relatively large damages proven at trial.

Foreign investors are also critical of the inefficiency of the sanction process in the enforcement of copyright. Article 45 of the Chinese Law provides the following sanctions: to eliminate the effects, to offer a public apology, and to pay damages.[50] More serious infringement, including counterfeiting, unauthorized reproduction and distribution of works, or publication of a work in breach of an exclusive contract may also give rise to administrative penalties and confiscation of unlawful income by the copyright administrative department under Article 46.[51] Until very recently,[52] no criminal liability could be attached to copyright infringement activities. This is a significant deviation from the United States Copyright Act.[53]

c. Computer Software Protection

Article 53 of the Copyright Law states that regulation for computer software protection shall be formulated separately.[54] Accordingly, the Regulations on the Protection of Computer Software ("Software Regulations") were adopted on June 4, 1991, and came into effect on

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48. *Case Digest; Local Software Developer Wins Rmb 150,000 Award for Infringement*, CHINA L. & PRAC., Apr. 11, 1994, at 19.

49. *Id.*

50. COPYRIGHT LAW art. 45 (P.R.C.), *translated in PRC, Copyright Law*, *supra* note 37, at 26, 39.

51. COPYRIGHT LAW art. 46 (P.R.C.), *translated in PRC, Copyright Law*, *supra* note 37, at 26, 40.

52. In July, 1994, the Regulation on Punishing Copyright Violators was passed, under which an infringer may be imprisoned. *China's Stance Toward Protection*, BEIJING REV., Jan. 16-22, 1995, at 8, 9.

53. No provision in the "Liability" part of the Copyright Law of the People's Republic of China provides for criminal penalties. Under 17 U.S.C. § 506(a) of the United States Copyright Act, any person who infringes a copyright willfully and for the purpose of commercial advantage shall be guilty of a misdemeanor under federal law, which carries maximum penalties of $10,000 and one year imprisonment. *See also* discussion *infra* part II.B.3.

54. COPYRIGHT LAW art. 53 (P.R.C.), *translated in PRC, Copyright Law*, *supra* note 37, at 26, 42.

October 1, 1991.[55] On April 6, 1992, the Computer Software Copyright Registration Procedures ("Procedures") were announced.[56]

The Software Regulations provide different protection than the Copyright Law in some instances, resulting in a dual system of copyright enforcement. The most important right under the Software Regulations is software copyright owners' explicit right to transfer or assign their copyright,[57] a right which is not provided in the Copyright Law. Second, registration of software, though not a requirement for copyright protection, is a prerequisite for initiating an administrative or legal proceeding against infringement, whereas there is no such precondition for other copyrightable works.[58] Since the Copyright Law does not require registration, authors of other copyrighted works need not register while software copyright holders must register before enforcing their rights. Third, the duration of protection for computer software is twenty-five years, subject to extension of another twenty-five years. For other copyrightable works, copyright protection extends for the author's lifetime, plus fifty years after his or her death.[59] Fourth, the Software Regulations provide a specific definition of fair use in software cases, based on software's distinctive nature, compared to other copyrighted works.[60]

In the United States, copyright protection provisions on computer software were incorporated into the present Copyright Act.[61] While the United States Copyright Act can be traced back to 1909, copyright in computer software was not recognized in the Copyright Act until 1980 by an amendment to the 1976 Act.[62] Compared to the United States Copyright Act, China's 1991 Software Regulations and the 1992 Procedures provide more precise and specific protection for computer software. As stated by a United States federal court, "copyright registration — with its indiscriminating availability — is not ideally suited to deal with the highly dynamic technology of computer science. Thus far, many of the decisions in this area reflect the courts' attempts to fit the proverbial square

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55. Zhao, *supra* note 34, at 9.

56. Tan, *supra* note 36, at 29.

57. REGULATIONS ON THE PROTECTION OF COMPUTER SOFTWARE (P.R.C.) art. 9(5), *translated in* CHINA CURRENT LAWS, Oct. 1991, at 13, 14.

58. Zheng, *supra* note 13, at 16-20.

59. REGULATIONS ON THE PROTECTION OF COMPUTER SOFTWARE (P.R.C.) art. 15, *translated in* CHINA CURRENT LAWS, *supra* note 57, at 15; *see also* COPYRIGHT LAW (P.R.C.) art. 21, *translated in PRC, Copyright Law*, *supra* note 37, at 31-32.

60. Zheng, *supra* note 13, at 16-21 to 16-22.

61. *See, e.g.*, 17 U.S.C. §§ 101, 117 (1994).

62. Act of Dec. 12, 1980, Pub. L. No. 96-517, § 10(b), 94 Stat. 3028.

peg in a round hole."[63] This sentiment indicates the United States courts' frustration in dealing with copyright protection of computer software in the absence of specialized provisions and regulations. However, in a common law country where case law and statutory law play an equally important role, the enactment of a special law for computer software protection may involve more structural difficulties than in a civil law country such as China.[64]

3. The Chinese Copyright Law and Its Compatibility with the United States Copyright Act

The comparative study in Part II.B.2. demonstrates that the Chinese Copyright Law is in many important aspects similar to the United States Copyright Act of 1976. The similarities include the scope of works eligible for copyright protection, remedies and sanctions, and computer software protection, which are all major concerns of American copyright holders.[65]

These similarities are not merely coincidental since the Chinese government intended the Copyright Law to comply with international standards. The preparation for drafting the Copyright Law began when the United States government and the Chinese government signed two Sino-American bilateral treaties in the fields of science and foreign trade, which included obligations for China to protect United States copyrights.[66] The Drafting Committee of the Copyright Law used the Berne Convention as a model.[67] Early drafts of the law were provided to the United States government.[68]

With this background in mind, American copyright owners should not overemphasize the differences between the copyright laws of the two countries. Many of the differences are indeed deviations in terminology as a result of China's civil law system. With respect to almost every important issue in the Chinese Copyright Law, the Drafting Committee considered copyright laws in both the common law and civil law systems as references when drafting the law.[69] In many cases, the Drafting

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63. Computer Assocs. Int'l v. Altai, Inc., 982 F.2d 693, 712 (2d Cir. 1992).

64. The conflict between a newly enacted statute and the existing case law will be one of such difficulties.

65. *See* discussion *supra* part II.B.2.

66. ZHENG & PENDLETON, *supra* note 18, ¶ 2-720, at 65.

67. *See* discussion *supra* part II.B.1.

68. ZHENG & PENDLETON, *supra* note 18, ¶ 4-100, at 73.

69. The Committee referred to the laws of civil law countries such as France, West Germany, and Japan, and common law countries including the United States and United Kingdom. *See generally* ZHENG & PENDLETON, *supra* note 18, ¶¶ 3-100 to 16-400, at 67-205.

Committee majority adopted the civil law versions.[70] The result, however, may be more favorable to Unites States copyright owners since the law provides greater protection and more specific provisions and regulations.[71] However, United States copyright owners should not overlook the differences in the two laws, as they may be significant in the application and enforcement of the Chinese Copyright Law.

For example, despite the catch all provision regarding works eligible for copyright protection in the Chinese Copyright Law,[72] the extension of the scope of protectable works is not unlimited. In China's civil law system, "only laws published by the National People's Congress or its Standing Committee, and rules published by the State Council, have the power to designate as protectable works those which are not included in categories (1)-(8) of Art[.] 3."[73]. These legislative agencies will publish such laws and regulations only on "very rare occasions"[74] when it is necessary to adjust to new developments in information technology or when "new subject matters [are] recognized as deserving protection by the copyright laws of major countries."[75] Therefore, when an owner's work does not neatly fit into any of the enumerated protectable categories, it is almost impossible for the owner to win in a Chinese court because there is no judicial authority to create a category of protectable works.

Until very recently, the lack of criminal punishment in the Chinese Copyright Law was a significant difference from its United States counterpart.[76] In order to promote the efficiency of copyright protection, on July 5, 1994, the Standing Committee of the National People's Congress passed the Decision on Punishment of Crimes Involving Copyright Infringement ("Decision").[77] Under this Decision, an infringer may be sentenced to imprisonment from three to seven years, and may have criminal fines imposed.[78] Corporate infringers may also be punished according to the Decision.[79]

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70. *Id.*

71. *See* discussion *supra* part II.B.2.

72. *See* COPYRIGHT LAW art. 3 (P.R.C.), *translated in PRC, Copyright Law*, *supra* note 37, at 26, 27.

73. ZHENG & PENDLETON, *supra* note 18, ¶ 4-100, at 78.

74. *Id.*

75. *Id.*

76. *See* discussion *supra* part II.B.2.b.

77. *Guo Wu Yuan Qeng Li Zhi Shi Qan Chuan Ban Gong Hui Yi Zhi Du* [*State Council Established Intellectual Property Administration Office*], NAN FANG RI BAO [S. CHINA DAILY NEWS], July 20, 1994, at 1.

78. *Id.*

79. *Id.*

The term of imprisonment under the Decision is longer than that provided in the United States Copyright Act.[80] However, the deterrent effect of such criminal punishment for copyright infringement remains to be seen. In China's trademark law practice in the last decade, which has provided criminal penalties for trademark infringement, criminal charges have not been lodged often because of the lack of incentive for the plaintiff to bring the case to the procuratorial office.

Despite the differences in the two copyright laws, the Chinese Copyright Law, in general, is compatible with the United States Copyright Act. There are many similarities in the important aspects of the copyright laws of the two countries. In some instances, the Chinese law provides greater protection.[81] Since its adoption of an open door policy in 1979, the Chinese government, due to the significance of Sino-U.S. trade relations, has responded to criticism from the United States government and has made special efforts to protect United States copyrighted works in China from time to time.[82] In fact, the recent United States "Special 301" investigation of China's insufficient protection of United States copyrighted works in China focused on the issue of enforcement rather than on the content of the law itself.[83]

A study of the enforcement mechanism in China can help answer the question of whether or not China can effectively protect United States copyrighted works in China.

III. CHINA'S COPYRIGHT ENFORCEMENT MECHANISM PRIOR TO 1990

Under the United States Copyright Act, copyright cases may only be heard in the federal courts.[84] The Chinese Copyright Law, on the other hand, provides more avenues for recovery of damages. Article 46 and 48 provide that a plaintiff may submit the case to either the copyright

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80. *See* 17 U.S.C. § 506(a) (1994). The maximum prison term under the United States Copyright Act is five years. 18 U.S.C. § 2319 (1994).

81. *See generally* discussion *supra* part II.B.2-3.

82. *See, e.g.*, Agreement on Trade Relations, July 7, 1979, U.S.-P.R.C., 31 U.S.T. 4651 (the first agreement between the United States and China regarding intellectual property). *See also* U.S. DEP'T OF STATE, MEMORANDUM OF UNDERSTANDING BETWEEN THE UNITED STATES AND CHINA REGARDING THE PROTECTION OF INTELLECTUAL PROPERTY, Doc. No. 92-29 (1992) [hereinafter MEMORANDUM]; *U.S.-China Intellectual Property Agreement*, E. ASIAN EXECUTIVE REP., Jan. 15, 1992, at 4. The MEMORANDUM touches all areas of intellectual property protection and according to the MEMORANDUM, China agreed to upgrade the level of protection provided to foreign copyrighted works.

83. *See China Reports Copyright Step*, N.Y. TIMES, Aug. 4, 1994, at D2; *see also China Claims Success in Copyright Crackdown, supra* note 3.

84. 28 U.S.C. § 1338 (1994).

administration department or the People's Court.[85] Administrative intervention exemplifies the unique nature of copyright enforcement in China. Part III and the following Part IV study the correlation between administrative and judicial enforcement mechanisms and their evolution in the two periods prior to and subsequent to the enactment of the 1990 Copyright Law.

A. Copyright Enforcement in China Prior to the 1990 Law

As discussed in Part II.A., post-Cultural Revolution Chinese copyright protection began in 1979 through administrative agencies under internal measures. This left the Chinese copyright enforcement process with two characteristics: (1) administrative agencies were active in the enforcement process;[86] and (2) courts had considerable discretion, but little guidance, in hearing copyright cases in the absence of a formal Copyright Law.[87] Consequently, inconsistencies between court decisions and administrative decisions incapacitated copyright enforcement. It was an experimental period when neither the courts nor the administrative agencies had confidence in coping with this new concept of copyright in the context of the previously dismissed concept of property. The extensive discussion on the propriety of remuneration to authors in the Dictionary of Etymology case[88] reveals the primitive shape of the Copyright Law.

1. Court's Function in the Enforcement Process

A review of the important cases that influenced the Copyright Law indicates that many cases in this period were decided by courts of various levels all over China.[89] Most of these cases focused on the issue of "literary works, a few related to film works and artistic works, but none were related to computer software, designs or other categories of work."[90]

One important characteristic of the judicial practice in this period was the courts' frequent invocation of the 1986 General Principles of Civil Law, since it was the only law with relevant provisions on copyright. Articles

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85. *See* COPYRIGHT LAW arts. 46, 48, (P.R.C.), *translated in PRC, Copyright Law*, *supra* note 37, at 26, 40-41.

86. Zheng, *supra* note 13, at 16-3.

87. For example, in *Jiang v. Qiao*, the first decision concerning copyright by a court in the People's Republic of China, the court had to decide the case in the absence of any specific copyright legislation. ZHENG & PENDLETON, *supra* note 18, ¶ 2-600, at 35.

88. *See* Zheng, *supra* note 13, at 16-3.

89. ZHENG & PENDLETON, *supra* note 18, ¶ 2-680, at 60-64.

90. *Id.* at 61.

94-97 of the General Principles of Civil Law concern intellectual property.[91] Article 94, in particular, provides that "[c]itizens and legal persons enjoy the right of authorship (copyright) . . ." and shall be entitled to sign their names as authors, publish their works, and obtain remuneration in accordance with the law.[92] Although the law recognized the copyright concept, such general language did not provide guidance to courts in deciding copyright cases.

In some cases, the courts not only failed to protect the authors' rights, but also failed to define what were protectable works. For example, in *Gao Cheng De v. UBTV*,[93] the court found that reproducing 20,000 sets of sound recording cassettes for teaching purposes without license or payment to the author was not a copyright infringement.[94] The court reasoned that since the purpose of reproduction was solely for teaching, the defendant obtained almost no profit from the reproduction, and since there was no showing the defendant falsely represented himself as the author, the reproduction should be regarded as "fair dealing."[95] The court further held that even if there was infringement, it was not infringement of the author's copyright because China had no law granting copyright protection to sound recordings.[96] In terms of remedies, the court held that an apology and a willingness to pay the author $600 would suffice.[97]

This case indicates that Article 94 of the General Principle of the Civil Law does not provide adequate guidance to courts for many important copyright issues. Without a formal copyright law, authors' rights could not effectively be enforced and protected by the courts.

2. Administrative Intervention in Enforcement

Many cases in this period were heard and decided by administrative agencies, such as the National Copyright Administration or its local copyright offices.[98] In some cases, the administrative agencies issued Suggestions for Decision.[99] Although administrative agencies have

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91. *See* GENERAL PRINCIPLES OF CIVIL LAW arts. 94-97 (P.R.C.), *translated in* LAW IN THE PEOPLES'S REPUBLIC OF CHINA 1053, 1068-69 (Ralph H. Folsom & John H. Minan eds., 1989).

92. *Id.* art. 94, *translated in* LAW IN THE PEOPLES'S REPUBLIC OF CHINA, at 1068.

93. ZHENG & PENDLETON, *supra* note 18, ¶ 2-640, at 46.

94. *Id.* at 47.

95. *Id.* at 47-48.

96. *Id.* at 47.

97. *Id.*

98. *See generally* ZHENG & PENDLETON, *supra* note 18, ¶¶ 2-600 to 2-680.

99. *Id.*

extensive jurisdiction under the administrative regulation system, a court may still hear a case decided by an administrative agency.[100]

In a case involving a dispute of authorship and copyright ownership of the work *From Emperor to Citizen*, the National Copyright Administration issued Suggestions for Decision in November 1985.[101] It named Li Wen Da as a co-author of the work where Li researched historical archives and re-wrote the autobiography of Pu Yi, subject to Pu Yi's check and approval.[102] However, the Supreme People's Court held to the contrary in a similar case.[103] Relying on this legal precedent, Pu Yi's spouse challenged the above administrative decision in October 1988 by bringing the case before the Beijing Intermediate People's Court.[104] The court heard the case and did not disturb the administrative decision due to the difficult nature of the case.[105] This case indicates that the court system has the final word in copyright cases. Nevertheless, administrative intervention in enforcement may easily create inconsistencies in the copyright decisions.

3. Inconsistencies in the Copyright Decisions

Under its civil law system, China does not follow stare decisis.[106] Thus, court decisions do not have any precedential value except for certain decisions issued by the Supreme People's Court which serve as judicial guidance.[107] Certain decisions of the Supreme People's Court and the National Copyright Administration on copyright in this period have been closely followed by lower courts and administrative departments at lower levels.[108] Clearly, in the absence of a copyright law before 1990, parties litigating issues never decided by the Supreme People's Court faced great uncertainty and unpredictability. "The Court and the Copyright Administration were in effect creating copyright law in the absence of specific copyright legislation."[109] Theoretically, this might have impinged upon the Chinese Constitution which vests the legislative power solely in the Standing Committee of the National People's Congress. However, the

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100. *Id.*
101. *Id.* at 51.
102. *Id.* at 51-52.
103. ZHENG & PENDLETON, *supra* note 18, ¶ 2-660.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id* at 9-10.
108. ZHENG & PENDLETON, *supra* note 18, ¶ 2-100, at 10.
109. *Id.*

administrative and judicial decisions were covered by the copyright concept embodied in Article 94 of the General Principles of the Civil Law.[110] The flexible application of a general law to a specific case is within the Court's constitutional power and should not be considered an encroachment on the Constitution.

Since the administrative system is independent from the court system, the two systems might not reach the same conclusion in similar factual situations.[111] This problem of inconsistency was not solved until the passage of the Copyright Law in 1990.

B. More Effective Enforcement After the 1990 Law?

The answer is yes and no. The 1990 law clarifies many important issues related to copyright, such as which works are eligible for protection, copyright owners' rights and limitations, fair use, infringements and sanctions, and assignments and licenses.[112] The 1992 Rules for Implementing International Copyright Treaties provide specific regulations for protecting foreign authors' copyrights in accordance with international treaties. All of these regulations provide specific and helpful guidance to the parties in copyright litigation as well as to the court hearing the case. This, in turn, improves the level of enforcement.

Article 48 of the Copyright Law explicitly provides that copyright proceedings may be instituted directly in the People's Court.[113] In practice, judicial institutions for copyright protection are more effective and preferable since "[t]he people's courts exercise judicial power independently according to law, are subordinate only to the law itself, and are not subject to interference by any administrative organ, public organization or individual."[114]

However, according to many Americans doing business in China, although all these enforcement procedures may look good, they are "far from effective."[115] "The trouble is they closed their eyes to the scams for years. Now it's common practice and hard to stamp out."[116] Indeed,

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110. GENERAL PRINCIPLES OF CIVIL LAW art. 92 (P.R.C.), *translated in* LAW IN THE PEOPLES'S REPUBLIC OF CHINA, *supra* note 91, at 1053.

111. *See supra* notes 103-106 and accompanying text.

112. *See* discussion *supra* part II.B.2.a-c.

113. COPYRIGHT LAW art. 48 (P.R.C.), *translated in PRC, Copyright Law*, *supra* note 37, at 26, 41.

114. INFORMATION OFFICE, *supra* note 4, at 17.

115. Uli Schmetzer, *China Taking the Wind Out of Copyright Pirates' Sales*, CHI. TRIB., Aug. 10, 1994, at 1, 2.

116. *Id.*

despite the Chinese government's efforts and determination to protect foreign copyrighted works, many factors still hinder effective enforcement, including ignorance of the law, accustomed infringement practice, and disrespect toward the long-abandoned but newly-restored legal system.[117] Consequently, the deficiency in protecting United States copyrighted works in China has been repeatedly criticized, and it has sometimes even caused trade wars between China and other countries.[118] In Part IV, the author will further discuss the enforcement mechanisms of copyright law in China.

IV. ENFORCEMENT MECHANISMS UNDER THE 1990 COPYRIGHT LAW

In order to improve the effectiveness of present copyright enforcement mechanisms, it is necessary to analyze the enforcement mechanisms of the Copyright Law, and the problems which impede efficient enforcement. In addition to the legal factors, there are cultural and social factors which may not be readily identifiable to, and handled by, foreign copyright holders.

A. Basic Legal Structure of the P.R.C.

The government of the People's Republic of China consists of a number of institutions, including the National People's Congress ("NPC"), the legislative body;[119] the State Council, an executive body including the Public Security Ministry which enforces the laws enacted by the NPC;[120] the People's Procuracy; and the courts.[121]

Under such a structure, the NPC enacted the Copyright Law, and the State Council established the State Copyright Administration ("SCA") to enforce the Copyright Law. The SCA, in turn, promulgated the Implementing Rules for the Copyright Law.[122] The SCA also performs other holding administrative functions in copyright enforcement, such as administrative hearings of copyright infringement cases, rendering decisions

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117. *State Council Adopts Measures to Strengthen Intellectual Property Rights Protection*, PEOPLE'S DAILY (Overseas Edition), July 30, 1994 at 1.

118. *See* Ronald Brownstein & Rone Tempest, *U.S. Plans China Trade Sanctions*, L.A. TIMES, Feb. 5, 1995, at A1, A8.

119. CONST. art. 58 (P.R.C.), *translated in* LAW IN THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 91, at 955.

120. CONST. art. 85 (P.R.C.), *translated in* LAW IN THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 91, at 960. The function of the Public Security Ministry is the equivalent to that of the police in the United States.

121. CONST. art. 123 (P.R.C.), *translated in* LAW IN THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 91, at 966.

122. While the definition of a "state" in the United States means the individual states, it refers to the whole nation in the Chinese Constitution.

to compensate injured copyright holders, and imposing administrative penalties on infringers.[123]

As a parallel enforcement mechanism, courts hear and decide cases in accordance with the Copyright Law, the Implementing Rules, other applicable laws and regulations, treaties of which China is a party, and in some cases, administrative policies.[124] The People's Procuracy prosecutes copyright infringers who also are suspected of criminal violation.[125] Finally, the Public Security Ministry and its local representative bureaus are under the jurisdiction of the State Council and will assist in the enforcement processes when necessary.[126]

B. The Enforcement Mechanism of the 1990 Copyright Law

Chapter Five of the Copyright Law provides for a dual, coexisting copyright enforcement mechanism — administrative and judicial.[127] An injured copyright holder may file a complaint against the infringer either with the administrative agency in charge, or with the People's Court that has jurisdiction over the particular case.[128] The functions of the administrative and judicial mechanism in the enforcement process will be discussed in the following sections.

1. Administrative Framework for Copyright Enforcement

China has administrative agencies on both the state and local levels handling copyright matters.[129] For copyright holders, these agencies

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123. CONST. art. 89 (P.R.C.), *translated in* LAW IN THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 91, at 966.

124. INFORMATION OFFICE, *supra* note 4, at 15.

125. *Id.*

126. *News Briefing by the State Copyright Administration*, PEOPLE'S DAILY (Overseas Edition), Jan. 2, 1995, at 4.

127. Article 46 provides the prerequisites for administrative penalties and Articles 49 and 50 provide for filing a complaint in the People's Court. COPYRIGHT LAW arts. 46, 49-50 (P.R.C.), *translated in PRC, Copyright Law*, *supra* note 37, at 40-41.

128. COPYRIGHT LAW arts. 45, 48 (P.R.C.), *translated in PRC, Copyright Law*, *supra* note 37, at 41.

129. REGULATIONS FOR THE IMPLEMENTATION OF THE COPYRIGHT LAW art. 52 (P.R.C.), *translated in Copyright Regulations*, *supra* note 33, at 11. Administrative agencies on the local level include the copyright administration departments of the People's Governments of all provinces (which are equivalent to the individual states in the United States), Autonomous Region, and centrally governed municipalities (which are equivalent to the District of Columbia in the United States). COPYRIGHT LAW art. 8 (P.R.C.), *translated in PRC, Copyright Law*, *supra* note 37, at 28.

provide an alternative forum to the court system for adjudication of their copyright cases.

a. State and Local Copyright Administrative Departments

The State Council is defined in Article 85 of the Constitution of the People's Republic of China ("Constitution") as "the Central People's Government, of the People's Republic of China[;]" "the executive body of the highest organ of state power;" and "the highest organ of state administration."[130] The SCA is one of the agencies the State Council established to oversee enforcement of the Copyright Law on a national level.

Article 8 of the Copyright Law provides as follows: "The copyrights administration departments of the State Council shall be responsible for the administration of copyrights. The copyright administration departments of the People's Governments of all provinces, Autonomous Region and centrally governed municipalities shall be in charge of the administration of copyrights in their respective administrative regions."[131]

Accordingly, the SCA is the highest administrative body at the national level for copyright matters. Its function is to supervise national enforcement of the Copyright Law.[132] In addition, there are the Local Copyright Administrative Departments ("LCAD") at the provincial, regional, and municipal levels. Article 7(6) of the Implementing Rules sets forth the relationship between the SCA and LCADs, under which the SCA "directs and guides"[133] the work of the LCADs.[134] However, Article 8 of the Implementing Rules states that the local governments shall determine the duties of the LCADs.[135] Thus, the Implementing Rules place the LCADs directly under the authority of the local governments instead of the SCA.[136]

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130. CONST. art. 85 (P.R.C.), *translated in* LAW IN THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 91, at 960.

131. COPYRIGHT LAW art. 8 (P.R.C.), *translated in PRC, Copyright Law*, *supra* note 37, at 26, 28.

132. REGULATIONS FOR THE IMPLEMENTATION OF THE COPYRIGHT LAW art. 52 (P.R.C.), *supra* note 33, at 11.

133. REGULATIONS FOR THE IMPLEMENTATION OF THE COPYRIGHT LAW art. 7(6) (P.R.C.), *supra* note 33, at 7. This is a literal translation from the Chinese words *zhi dao* used in the Copyright Law. Based on the literal meaning of these words it is not clear whether the role of the SCA is to supervise the LCAD or merely to advise. *Id.*

134. REGULATIONS FOR THE IMPLEMENTATION OF THE COPYRIGHT LAW art. 7(6) (P.R.C.), *supra* note 33, at 7.

135. *Id.*

136. *Id.*

The reason for such ambiguity in the Copyright Law may be attributed to the subtle relationship between the central and local governments in China.[137] As a practical matter, the conflict between the central and local governments diminishes the supervisory function of the central government over local copyright enforcement and creates much doubt over the adequacy of the SCA's nonbinding guidance rendered to the LCADs, which owes its allegiance to the local government.[138]

Consequently, the integrity of the LCADs is tested whenever local interests are at stake. The SCA, representing the national government, may consider that it is in the nation's best interest to protect foreign copyright while the local governments' major concern is to protect local interests. Therefore, the local government may be less enthusiastic in protecting a foreign copyright holder against a local infringer who generates important revenue and provides employment opportunities for the local population.

In recent copyright protection disputes between the United States and China, criticism has focused on local governments' overprotection of local infringing manufacturers.[139] For example, factories backed or owned by the local government, such as the Shenfei Laser & Optical System Co., which is owned by Shenzhen City and the People's Liberation Army, and is a manufacturer of pirated Compact Discs ("CDs"), were not shut down until just hours before the midnight deadline for the United States to impose 100% tariffs on Chinese goods.[140] Such protection occurred despite allegations by the United States government that Shenfei is among the most flagrant violators of the Copyright Law.[141] The problem may be twofold: the local government may not want to shut down its own businesses; and even if it did, the local government does not have jurisdiction and power to shut down businesses owned by the military.

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137. Under Article 3 of China's Constitution, "[t]he division of functions and powers between the central and the local state organs is guided by the principle of giving full play to the initiative and enthusiasm of the local authorities under the unified leadership of the central authorities." CONST. art. 3 (P.R.C.), *translated in* LAW IN THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 91, at 945. However, it is a long existing problem that the central and local governments are sometimes in conflict when local interests are at stake. This conflict is even more obvious in the copyright enforcement process, which may wipe out a major source of local revenue and significant employment opportunities.

138. CHINA BUS. L. GUIDE (CCH Int'l), ¶ 64,001, at 61-720 (1992).

139. James Gerstenzang & Rone Tempest, *China Pact Leaves Many Questions*, L.A. TIMES, Feb. 27, 1995, at A1.

140. Maggie Farley, *Industries Applaud U.S.-China Trade Pact*, L.A. TIMES, Feb. 27, 1995, at D1.

141. Dusty Clayton, *Copyright Talks Remain Stalled*, S. CHINA MORNING POST, Feb. 16, 1995, at B4.

The attitude of the LCADs is critical for adequate copyright enforcement because in most cases the LCADs deal with the infringers directly. There are cases in which pirate CD peddlers were released with their merchandise after paying a Yuan 700 (less than $100) fine, or alternatively, were released without penalty except the loss of their merchandise.[142] When the Beijing LCADs raids infringing shops, it merely seizes the infringing goods[143] and suspends the business licenses of the shops for a few days[144] without imposing more severe penalties as provided by the Copyright Law or the Implementing Rules.[145] If the Beijing LCADs, which is seemingly better "guided" by the SCA since it is located in the same city, enforces the Copyright Law with such flexibility, it can be imagined what degree of leniency or latitude the LCADs would exercise in places more remote from the SCA. Although this is not a great deviation from the position of the Copyright Law,[146] the severity of the piracy problems clearly requires imposing the tougher penalties allowed by the Copyright Law and the Implementing Rules.

In the event that a foreign copyright holder is involved, the local bias problem is remedied, to some extent, by the allocation of jurisdiction between the SCA and the LCAD under Article 52 of the Implementing Rules. Article 52 provides that: "The copyright administrative departments of the local People's Governments shall be responsible for . . . investigating and handling infringements . . . taking place in their own district. The

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142. *Sino-US Talks Fail to Dampen CD Pirates*, S. CHINA MORNING POST, Feb. 14, 1995, at B4.

143. Such penalty is provided in Article 50 of the Implementing Rules. However, Article 51 of the Implementing Rules provides for a more severe penalty, i.e., a fine of two to five times of the total fixed price of the goods. *See* REGULATIONS FOR THE IMPLEMENTATION OF THE COPYRIGHT LAW arts. 50 and 51 (P.R.C.), *translated in Copyright Regulations*, *supra* note 33, at 11.

144. Note that neither the Copyright Law nor the Implementing Rules give the LCADs authority to suspend business licenses. *See* COPYRIGHT LAW art. 50 (P.R.C.), *translated in PRC, Copyright Law*, *supra* note 37, at 26. *See also* REGULATIONS FOR THE IMPLEMENTATION OF THE COPYRIGHT LAW (P.R.C.), *translated in Copyright Regulations*, *supra* note 33.

145. REGULATIONS FOR THE IMPLEMENTATION OF THE COPYRIGHT LAW art. 50 (P.R.C.), *translated in Copyright Regulations*, *supra* note 33.

146. Article 50 of the REGULATIONS FOR THE IMPLEMENTATION OF THE COPYRIGHT LAW (P.R.C.) provides that "[i]n the instances of infringement of rights . . . , copyright administrative departments may impose administrative punishments such as giving a warning, ordering to cease production and distribution of the infringing reproductions, confiscating the unlawful income, confiscating the infringing reproductions and production equipment, and imposing fines." REGULATIONS FOR THE IMPLEMENTATION OF THE COPYRIGHT LAW art. 50 (P.R.C.), *translated in Copyright Regulations*, *supra* note 33, at 11.

State Copyright Administration shall be responsible for investigating and handling . . . infringements relating to foreigners. . . ."[147]

Accordingly, the SCA assumes jurisdiction when a foreigner is involved, even when the entire case occurs in a remote province far from the SCA office in Beijing. It is not clear whether the SCA will dispatch personnel to handle the case or if it will delegate the case to the local governing LCADs to handle. In its recent efforts to crack down on piracy, the State Council has directly "dispatched inspectors to scrutini[z]e production lines in Guangdong and Jiangsu provinces."[148] However, such practice is not only inefficient, but also expensive. On the other hand, if the SCA delegates its investigatory function to the LCADs, and renders its decisions based on the fact-finding report filed by the LCAD, the SCA may still face the problem of local bias.[149] This situation is more controllable than situations where the entire case is left to the sole discretion of the LCAD.

More significantly, despite the SCA's role in the LCADs' work, the two agencies function like different lines of business because they are accountable to different supervisors. Since the Copyright Law allows concurrent jurisdiction over infringement cases by the LCADs and the SCAs, there is a possibility that when a copyright infringement case involving a foreigner occurs within the jurisdiction of a particular LCAD, that LCAD may assume jurisdiction and rule against the foreigner before the case is brought to the attention of the SCA. The foreign party then may attempt to appeal the LCAD's decision to the SCA.[150] However, under the Copyright Law, the LCAD is not accountable to the SCA.[151] Thus, the SCA has no appellate jurisdiction over the LCAD's decisions.[152] The question then is whether the SCA can reinvestigate the case and issue a ruling that contradicts the LCAD's decision. If so, this ruling is equivalent to an appellate decision. However, under Article 50 of the Copyright Law, a party who disagrees with an administrative decision (e.g., a decision of the LCAD) should lodge a complaint directly with the

147. REGULATIONS FOR THE IMPLEMENTATION OF THE COPYRIGHT LAW art. 52 (P.R.C.), *translated in Copyright Regulations*, *supra* note 33, at 11.

148. Clayton, *supra* note 141.

149. *See* discussion *supra* part IV.B.1.a.

150. Telephone Interview with Baochun Rose Zeng, Resident Associate with Deacons, Graham & James, Guangzhou, China (Nov. 5, 1994) [hereinafter Zeng Interview].

151. *See supra* note 133 and accompanying text.

152. *See supra* notes 132 & 133 and accompanying text.

court rather than with the SCA.[153] Therefore, as the SCA does not have appellate jurisdiction over the LCAD, it follows that the SCA's guiding function over the work of the LCAD is very limited.

The best solution to this problem would be to establish an independent national mechanism to enforce the Copyright Law throughout the nation in accordance with a set of unified standards. LCADs should be directly accountable to the SCA so that they can be shielded from local interests and free to consider their decisions based on national policy instead of local interests.

b. Operations of the SCA

Directly under the State Council, the SCA is the governmental agency[154] in charge of copyright administration for the entire nation. Its main powers and functions are provided by Article 7 of the Implementing Rules as follows:

(1) to implement copyright laws and regulations and to formulate measures related to copyright administration;
(2) to investigate and deal with cases of copyright infringement which have caused great influence in the whole country;
(3) to approve the establishment of collectively-administered organizations of copyright, copyright agents for foreigners and arbitration organizations for contract disputes, and to supervise and direct their work;
(4) to be responsible for the administration of copyright involving foreigners;
(5) to be responsible for the administration of copyrights owned by the State;
(6) to direct the work of the local copyright administrative departments;
(7) to undertake other copyright administrative work assigned by the State Council.[155]

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153. COPYRIGHT LAW art. 50 (P.R.C.), *translated in PRC, Copyright Law*, *supra* note 37, at 26, 41.

154. COPYRIGHT LAW art. 50 (P.R.C.), *translated in PRC, Copyright Law*, *supra* note 37, at 26, 28. *See also* REGULATIONS FOR THE IMPLEMENTATION OF THE COPYRIGHT LAW art. 7 (P.R.C.), *translated in Copyright Regulations*, *supra* note 33, at 6-7.

155. *See also* REGULATIONS FOR THE IMPLEMENTATION OF THE COPYRIGHT LAW art. 7 (P.R.C.), *translated in Copyright Regulations*, *supra* note 33, at 6-7.

In addition to the duty imposed by the Copyright Law on the SCA to investigate and deal with cases of copyright infringement that have a detrimental effect on the nation, specific guidelines have been issued as to how the administrative agencies should deal with the infringers. Article 50 of the Copyright Law provides that the administrative agencies may levy sanctions on infringers, including administrative penalties such as warnings; order the production or issuance of copyright infringing duplicates to cease; confiscate illegal earnings, copyright infringing duplicates, and related production equipment; and levy fines.[156]

In practice, however, since the SCA is neither a market participant nor an active economic regulator, its enforcement power is very limited.[157] For example, the enforcement process does not involve the Administration of Industries and Commerce ("AIC"), an agency which has the sole power to suspend business licenses or to deny renewal of business licenses to infringers.[158] However, infringers are not very concerned about the rulings of the SCA or the LCAD because the monetary fine is low compared to the profits earned from manufacturing infringing products.[159] Nor do infringers depend on the SCA or the LCAD for the renewal of their business licenses. Neither the SCA nor the LCAD can strip the infringer of its business license or prosecute the infringer without the cooperation of other governmental agencies such as the AIC and the Procuratorate Office. Unfortunately, cooperation between intergovernmental agencies has yet to be achieved in many cases.

To achieve effective copyright enforcement, the Chinese government needs a well-organized and comprehensive mechanism under which an infringing manufacturer cannot continue to do business once it is caught infringing. A provision should be added to the Copyright Law and the Implementing Rules under which a major economic regulator, such as the AIC, becomes involved, and the courts play a more active role. For instance, if the SCA or the LCAD renders an administrative decision

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156. REGULATIONS FOR THE IMPLEMENTATION OF THE COPYRIGHT LAW art. 50 (P.R.C.), *translated in Copyright Regulations*, *supra* note 33, at 11.

157. *See supra* notes 132 & 133 and accompanying text. The SCA's power of enforcement thus depends on the cooperation of the local and other governments and governmental agencies.

158. Zeng Interview, *supra* note 150.

159. The highest monetary fine for reproducing and distributing a work for profit without a license from the owner of the copyright in the work is Yuan 10,000 to 100,000 ($1,200 to $12,000), or two to five times of the total fixed price. However, in the event that an infringer continues to manufacture infringing products, since the infringer still holds the business license, it does not take long for the infringer to recoup the cost of the fine from the profits. Zeng Interview, *supra* note 150.

against a copyright infringer, the AIC could then suspend or refuse to renew the business license of the infringer. The court could then freeze the corporate account or seize the assets of the infringer to assist a victim in collecting damages and to assist the government in collecting penalties from the infringer.

2. Judicial Framework for Copyright Law Enforcement

The major bodies in the judicial framework for copyright enforcement are the procuracy system, the court system, and the public security system.[160] They cooperate with the SCA and the LCAD in the process of investigation, prosecution, and enforcement.

a. The Function of the Procuracy System

Article 5 of the Law for the Organization of the People's Procuracies of 1979 ("LOPP"), provides that the people's procuratorates shall "carry out investigation of criminal cases" and "represent the State in criminal proceedings."[161] In copyright infringement cases, the procuratorate becomes involved when it decides to investigate criminal acts of infringement either on its own initiative, or upon the request of a complainant, or upon the request of a public security organ. Under Article 11 of the LOPP, the procuratorate will initiate public prosecution if it decides that a crime has been committed and that it is necessary to hold the offender criminally liable.[162]

Under this dual requirement, not all copyright infringement cases are prosecuted. The complainant is often more concerned with recovering damages than with deterring the copyright infringer. A prosecution may be too public and may, in turn, harm the complainant's *guanxi* (connection) with local authorities and business partners. This may explain why private parties have not requested the involvement of the procuratorate.

b. Functions of the Court System

The Law for the Organization of the People's Courts ("LOPC") of 1979 provides for the establishment of a system of People's Courts to hear

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160. *See* Qi Shin, *Copyright Expert's Comments on the Protection System for Intellectual Property Rights in China*, PEOPLE'S DAILY (Overseas Edition), Jan. 9, 1995, at 3.

161. ORGANIC LAW OF THE PEOPLE'S PROCURATE art. 5 (P.R.C.), *translated in* LAW IN THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 91, at 255-56.

162. ORGANIC LAW OF THE PEOPLE'S PROCURATE art. 11 (P.R.C.), *translated in* LAW IN THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 91, at 255-56.

and decide lawsuits.[163] Despite the fact that the People's Courts, at various levels, are accountable to the People's Congress at the corresponding levels, the People's Courts are required to exercise independent judicial authority in accordance with the law. In theory, the People's Courts are free from interference by governmental bodies, social organizations, and individuals.[164] Article 3 of the LOPC governs the functions of the court system, which include trying both criminal and civil cases, punishing offenders, and resolving civil disputes in accordance with the general principles of the State.[165] Under Articles 10 and 12, the People's Courts adopt the collegiate system and the system of rendering final judgment after two trials.[166]

For the purpose of copyright enforcement, both the copyright holder and the procuracy may file a complaint with the People's Court.[167] Since court enforcement mechanisms may take longer and are more costly, most foreign copyright holders still find that, in spite of its problems, the administrative enforcement mechanism is a better alternative.[168] This is especially so when the actual damage resulting from the infringement is minor and the complainant's primary goal is to prevent further infringement. In such situations, an administrative order from the SCA or the LCAD to cease production and distribution of the infringing goods may satisfy the complainant's needs. In addition, the SCA and the LCAD may order the infringing party to compensate the aggrieved party for losses, which entitles the successful complainant to the same remedies as he or she would be able to obtain from a court.[169] More importantly, the SCA and the LCAD are staffed by personnel with expertise in copyright law, whereas an individual judge assigned to decide a copyright case may know very little, if anything at all, about copyright law.[170]

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163. ORGANIC LAW OF THE PEOPLE'S PROCURATE art. 4 (P.R.C.), *translated in* LAW IN THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 91, at 174-75.

164. *Id.*

165. ORGANIC LAW OF THE PEOPLE'S PROCURATE art. 3 (P.R.C.), *translated in* LAW IN THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 91, at 174.

166. ORGANIC LAW OF THE PEOPLE'S PROCURATE arts. 10 & 12 (P.R.C.), *translated in* LAW IN THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 91 at 175-76.

167. COPYRIGHT LAW art. 50 (P.R.C.), *translated in PRC, Copyright Law*, *supra* note 37, at 26, 41.

168. *See* discussion *supra* part IV.B.2.a.

169. REGULATIONS FOR THE IMPLEMENTATION OF THE COPYRIGHT LAW art. 53 (P.R.C.), *translated in Copyright Regulations*, *supra* note 33, at 11-12.

170. It is still a common situation that most judges, especially those at the trial level, are former military officers honorably discharged. They learn the law while they are hearing the cases.

Nevertheless, under Article 50 of the Copyright Law, a "party which objects to an administrative penalty may institute proceedings in the People's Court within three months from the date of receiving the written decision on the penalty."[171] Thus, either party may consider filing a complaint with the court after the administrative body renders a decision on the case. The administrative proceeding is a speedier and cheaper game to play, with a second chance in the court system should one lose in the first round of the game.

Another function of the People's Court is to enforce an administrative decision that is not appealable within the three month period.[172] Both the copyright administrative department and the successful party may apply to the court for enforcement of the decision.[173] Also, the People's Court, through its enforcement division, will enforce the administrative decision either by seizing the assets of the infringer for the purpose of paying the damages and penalties, or by suspending or terminating the infringer's illegal business operation.

c. Functions of the Ministry of Public Security

The Ministry of Public Security is the central police authority in charge of the administration of justice.[174] In the area of copyright enforcement, the Public Security system is mainly responsible for investigating criminal activities and arresting suspected criminal infringers.[175] Under Article 11 of the LOPP, the procuratorates may initiate investigation proceedings or may turn the file over to the Public Security system for investigation.[176] The procuratorate will decide whether to prosecute the suspect upon the Public Security system's completion of its investigation.[177] The decision to arrest, prosecute or to relieve from prosecution may be reviewed by the same procuratorate and

171. COPYRIGHT LAW art. 50 (P.R.C.), *translated in PRC, Copyright Law*, *supra* note 37, at 26, 41.

172. *Id.*

173. *Id.*

174. CHINA BUS. L. GUIDE (CCH Int'l), ¶ 4-550, at 4,803.

175. Interview with JinHong Jiao, Associate Dean of the University of International Business & Economics, Beijing, China, in L.A. Cal. (Mar. 25, 1995) [hereinafter JinHong Interview].

176. ORGANIC LAW OF THE PEOPLE'S PROCURATE art. 11 (P.R.C.), *translated in* LAW IN THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 91, at 255-56.

177. CRIMINAL PROCEDURE CODE art. 39 (P.R.C.), *translated in* LAW IN THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 91, at 974.

appealed to the higher procuratorates upon application by the Public Security system.[178]

In practice, the role of the Public Security system in copyright enforcement is very limited and passive. An aggrieved copyright holder cannot request that the Public Security system conduct an investigation. Copyright infringement investigation is not a traditional function of the Public Security system, which focuses its attention on public security and crime prevention. Therefore, the lack of knowledge, experience, and incentives significantly weakened the role of the Public Security system in the copyright enforcement mechanism.

3. Problems in the Present Enforcement Mechanism

a. Cultural Factors

The concept that copying is wrong did not exist in the Chinese culture. "The greatest compliment that a Chinese artist can receive is having someone copy their [sic] work," notes Anna Han, assistant professor of law at Santa Clara University, who specializes in Chinese law.[179] In late 1990, this author saw a reprinted *Black's Law Dictionary* in the Guangzhou Foreign Languages Bookstore. The dictionary cost only two dollars and was for sale in a specially designated area in the bookstore where only Chinese citizens would be admitted. Many foreign copyrighted works were reprinted and were denoted "internal exchange,"[180] despite the fact that they presumably were sold for profit. This author noticed, ironically, that the words "[a]ll rights reserved" had also been reprinted.

This cultural ignorance of copyright is so deeply rooted that there have even been occasions when Chinese officials actually took foreign business associates with whom they are seeking to establish joint ventures to visit state-owned factories that pirated foreign copyrighted works.[181] The purpose of the trips was to show the factories' ability to make high quality products comparable to the genuine ones despite the illegal conduct in which the factories were engaging.

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178. *Id.*

179. Orenstein, *supra* note 44, at 14.

180. This was printed on the dictionary's inside back cover. It is not clear what "internal exchange" really means. This may imply that the distribution of the dictionary is limited, and the purpose is just for education.

181. Zeng Interview, *supra* note 150.

b. Social Factors

Social factors affecting protection of American copyrighted works in China include: (1) the general public's ignorance of copyright laws and regulations; (2) the established infringement practice for decades in absence of any deterrence; (3) the courts' and other relevant administrative agencies' limited knowledge of copyright law; (4) the unwillingness of local authorities to cooperate in the crackdown of local counterfeit manufacturers due to their importance as a revenue source; and (5) corruption of public officials.

i. Ignorance and Disrespect of the Copyright Law

The Chinese legal system was re-established in the late 1970s following the end of the Cultural Revolution.[182] Chinese people, more used to administrative orders than court orders, regard litigation as bad conduct regardless of the truth of the allegations. Under such circumstances, the integrity, authority, and enforcement of the Copyright Law will remain lacking for a long time. This breakdown in the system is aggravated by poor quality education, communication, and a lack of news media involvement.[183]

The concept of copyright is so new that most people, including judges who received their legal training before the Copyright Law was enacted in 1990, are not familiar with the Copyright Law. Not surprisingly, American lawyers often find their Chinese colleagues undertrained in copyright law.[184]

ii. Interests of the Local and Central Governments

As discussed above, in certain cases, local governments may maintain different interests from those of the central government. For example, they may be reluctant to shut down the infringing factories, which are profitable revenue sources for the local government despite the illegal conduct.

Second, shutting down infringing factories would cause unemployment, which is already a serious problem in China and feared as a cause of social unrest.[185] Because of these concerns, the local

182. In the Cultural Revolution between 1966 to 1976, the entire legal system in China was demolished. *See* Zheng, *supra* note 13.

183. *See China's Stance Toward Protection*, BEIJING REV., Jan. 16-22, 1995, at 8, 9.

184. *See* Orenstein, *supra* note 44, at 1.

185. Schmetzer, *supra* note 115, at 14.

government and Communist Party officials are likely to resist copyright enforcement and interference in the administrative and judicial processes.

Third, many of these infringing factories are owned by the State or the military[186] and are thus often beyond the authority of the SCA or the LCADs. Therefore, unless the central government gives the SCA and the LCAD permission to impose penalties on the state-owned factories enforcement is practically impossible. It appears that, so far, such permission by the central government is given, on a case by case basis, and only when the infringement is extremely serious and the central government is under pressure from the United States. In granting such permission to the SCA and the LCAD, the central government must balance the national interests with the local interests.

iii. Corruption Problems

Although bribery is a universal phenomenon, low salaries make Chinese officials and judges more susceptible to bribes.[187] Additionally, Chinese lawyers are not as heavily regulated by ethical codes as their counterparts are in the United States.[188] Lawyers are generally paid a certain percentage of the value of the subject matter in the litigation, plus hourly fees. Lawyers who win a defense case will normally receive five to ten percent of the amount of damage claimed by the plaintiff, on top of the hourly fee charged.[189] This encourages defendants or their lawyers to find a "connection" (*guanxi*) to unduly influence or bribe the judge for a favorable result.

Another concern discouraging American companies from bringing cases to the court is the worry that legal confrontation "could wreck the infamous *guanxi*, or personal contacts and favors, that make or break business ventures" in China.[190]

iv. Market Supply and Demand

The ever increasing market demand for, and the sizable profits from, American style goods are a strong counter force to effective enforcement.

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186. In China, despite rapid privatization in recent years, most of the factories are still owned by the State. These state-owned factories are supervised by and are accountable to different Ministries at the national level and their subordinates at the local levels. *China Speeds Up Privatization of its Enterprises*, U.S.-CHINA TRIB., Oct. 6-12, 1995, at 1.

187. Schmetzer, *supra* note 115.

188. JinHong Interview, *supra* note 175.

189. *Id.*

190. Laris, *supra* note 47, at F16.

American products are popular targets for duplication because they are considered by the Chinese public as a guarantee of quality. More importantly, many duplicated products bring the Chinese population in contact with completely new ideas and lifestyles to which they have never been exposed or experienced. Therefore, the demand for infringed products is tremendous.

Counterfeited goods are more affordable: the *Black's Law Dictionary* previously referred to would cost at least twenty times more if it were imported from the United States. Given the fact that the average per capita earning in China is less than $100 per month, it should be no surprise that counterfeited goods are popular.

The market demand of a population of 1.3 billion is enormous, while the supply of genuine goods is limited due to the Chinese government's restrictions on imports. Naturally, infringers fill the gap.

c. Legal Factors

As discussed in Part II.B.2.b., the Chinese Copyright Law did not provide for criminal penalties against copyright infringers until July 1994. This lack of criminal penalties greatly reduced the effectiveness of copyright protection because there was no true deterrent. Whether the newly added criminal sanctions will change this situation remains to be seen. In the meantime, the comparatively low monetary fine has proven to be ineffective since the infringer can easily recoup the loss from its profits.[191]

i. Lack of Deterrence

The minuscule penalties imposed by Chinese courts in other intellectual property cases dissuade American companies from bringing their cases to the copyright courts.[192] Walt Disney's recent litigation in copyright infringement is the first copyright case brought by an American company in China. After spending more than $15,000 in legal costs and attorney's fees in the case, Disney has won only one damage award, totaling $91, from one of the defendants.[193] According to Disney, it

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191. *See* REGULATIONS FOR THE IMPLEMENTATION OF THE COPYRIGHT LAW (P.R.C.), *translated in Copyright Regulations*, *supra* note 33.

192. Orenstein, *supra* note 44, at 1.

193. *Id.*

intends to test China's promise to put more teeth into its intellectual property laws.[194]

The recently passed Decision on Punishment of Crimes Involving Copyright Infringement may further deter violators.[195] However, lack of incentives on the part of plaintiffs to transfer the case to the Procurator may mitigate against the effectiveness of the decision, unless the SCA or the LCADs maintain jurisdiction to issue an administrative penalty to the infringer even after the case has been transferred.[196]

ii. Difficulty in Obtaining Evidence

Collecting evidence to satisfy the burden of proof is also a difficult task for American companies. A case will not proceed unless infringement and damages are somehow proven by the plaintiff. As intellectual property is a new concept in China, there are few investigators in China capable of handling these kind of cases.[197] The practice of the local investigation firms is limited to more traditional business, such as marital infidelity. This is partly because many of these private investigators are former police officers, and they do not have the knowledge and experience to conduct a copyright infringement investigation.[198]

Bringing in investigation firms from Hong Kong or the United States may be too costly to be an option. Cultural and social factors mentioned earlier, as well as lack of *guanxi*, also create extra and almost insurmountable hardships for foreign investigators to collect evidence in China. One solution is for a foreign law firm to hire and train a local investigator.

iii. Legal Services Provided by Local Lawyers

Incompetence of local lawyers can be frustrating. For example, in the Disney litigation, a local firm was hired to represent Disney at trial because foreign lawyers are barred from practicing before the Chinese courts. At the preliminary hearing, the local lawyers ignored Disney's instruction and missed the essence of Disney's argument, focusing instead on another unsuccessful argument.[199]

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194. *Id.*

195. Qi, *supra* note 160, at 3.

196. The possibility of a bigger penalty ordered by the administrative agency is often the only incentive for the infringer to settle with and compensate the plaintiff. *See* discussion *supra* part II.B.3.

197. Zeng Interview, *supra* note 150.

198. *Id.*

199. Orenstein, *supra* note 44, at 1.

Lack of training in the area of copyright among local lawyers is partly because the Copyright Law and the concept of copyright are new to them. It takes time for them to gain the necessary knowledge and experience to handle copyright cases. In addition, since many cases in the past were adjudicated by administrative agencies, lawyers were not involved and thus did not have opportunities to gain experience in copyright practice. This situation will probably change as more parties bring their cases to the courts.[200]

4. Possible Solutions and Measures Taken by the Chinese Government

First, the Chinese government should uproot the concept in Chinese culture that copying is complimentary and acceptable. The government should put more effort into publicizing the Copyright Law and the policy reasons behind it. The government should teach the public that copying is not only illegal, but also is subject to sanctions, including criminal punishment. Only when the law is enforced will people realize that such conduct is illegal.[201]

In fact, the Chinese government has already stepped up its efforts to educate the public. Widespread publicity through the media and distribution of a large number of educational videotapes and booklets on the Copyright Law followed the publication of every intellectual property law.[202] Governments at all levels conducted seminars and training classes to make the Copyright Law known to the public.[203] However, due to China's vast population and underdeveloped communication infrastructure in many areas of the country, this process is slow and ongoing.

Second, the central government should hold the local government officials personally responsible for serious copyright infringement. In addition, corporate directors and officers should be held responsible in their personal capacity for copyright infringement by their corporations. Sanctions for government officials should include removal from office, demotion, or reduction in salary for those failing to enforce the law. Sanctions for corporate directors and officers should include personal liability for civil damages and administrative fines. These changes would pressure the local governments and their officials to become more

200. Zhong An-Gang, *Convincing Facts and Important Development*, FA ZHI DAILY, Jan. 15, 1995, at 1.

201. *See Guo Wu Yuan Qeng Li Zhi Shi Qan Chuan Ban Gong Hui Yi Zhi Du*, *supra* note 77 and accompanying text.

202. INFORMATION OFFICE, *supra* note 4, at 7.

203. *Id.*

concerned about copyright infringement in their jurisdiction, and to become actively involved in the enforcement process. This will also deter corporations from engaging in copyright infringement.

Third, in addition to educating judges and lawyers about the new law, the government should promulgate an ethical code governing the conduct of judges and lawyers. Bribery should be strictly prohibited and severely punished. To effectively enforce the Copyright Law, judges and lawyers must be free from undue influence. It has been reported that central authorities are working on a law to make the judiciary more independent.[204]

A recent measure adopted by the Chinese government was the establishment of Intellectual Property trial courts in coastal provinces and cities to gain expertise in handling intellectual property cases.[205] These courts have been established in Beijing, Shanghai, Guangdong, Hainan, and Fujian.[206] Qualified judges will be assigned to these specialized courts to hear intellectual property cases.[207]

The statistics show increasing, albeit slow, success in copyright protection. The People's Courts heard 4098 intellectual property case from 1986 to November 1994. Forty cases involving foreigners were heard in 1994 alone.[208] According to the President of the Intellectual Property Division of the Beijing Intermediate People's Court, of the thirty-five cases filed by American companies in his court, preliminary injunctions were granted in thirteen cases to preserve evidence for litigation purposes.[209] In many of these cases, the Chinese party's activities were found to be copyright infringements.[210]

Additional measures taken by the Chinese government include drafting an ethical code for its growing legal profession using the 1993 Anti-Unfair Competition Law in an effort to strengthen intellectual property rights protection.[211] The government has also relaxed restrictions on foreign law firms practicing in China.[212] More foreign law firms are establishing branch offices in China to provide better service to their clients. Hong

204. Orenstein, *supra* note 44, at 1.

205. *Zhi Shi Qian Chuan Bao Hu - Xian Zhang Yu Wei Lai*, *supra* note 7.

206. These are cities and provinces where foreign investments are highly concentrated.

207. *Zhi Shi Qian Chuan Bao Hu - Xian Zhang Yu Wei Lai*, *supra* note 7.

208. Zhong, *supra* note 200, at 1.

209. *Id.*

210. *Id.*

211. JinHong Interview, *supra* note 175; *see also* Qi, *supra* note 160, at 3.

212. According to Professor JinHong Jiao, the Chinese government will permit up to 100 foreign law firms to open branch offices in China by the year 2000. JinHong Interview, *supra* note 175.

Kong residents can now take the Chinese bar to qualify to be a lawyer in China.[213]

Recently, the State Council established the Intellectual Property Administrative Office headed by Councilman Song Jian.[214] One of the office's tasks is to coordinate central and local governments to provide effective copyright protection.

5. What a Foreign Copyright Holder Can Do to Protect Its Copyright

Copyright enforcement depends on the effort and cooperation of the Chinese and United States governments. At the governmental level, the United States has two powerful means to press the Chinese government to improve its copyright protection. One is sanctions that the United States government may impose under the "Special Section 301" of the United States Trade Act.[215] The other is China's desire to join the General Agreement on Tariffs and Trade ("GATT"). In 1994, the United States and other Western countries blocked China's entry to GATT as a bargaining device to pressure China into improving its copyright protection.[216] It remains to be seen what new political leverage the United States government can find to ensure that the Chinese government will keep its promise under the February 1995 agreement between the United States and China, once China becomes a member of GATT.

United States copyright holders doing business in China should collectively seek the cooperation of the United States government and speak with one voice. By doing so, pressure on the Chinese government can be uniformly maintained, and not be destroyed by public differences between the administration and the business community.

Moreover, foreign copyright holders and foreign governments should become more involved in the enforcement process in China. A way to avoid the pitfalls of social disrespect for the law is to seek administrative resolution as well as administrative supervision of the lower courts. Intense pressure from higher levels of administrative agencies and from the higher courts, which are more detached from local interests, is often helpful in the

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213. Only lawyers with Chinese citizenship can appear before Chinese courts. Therefore, although Hong Kong residents can qualify as lawyers in China, they are not allowed to appear before the Chinese courts. Orenstein, *supra* note 44, at 1.

214. *Guo Wu Yuan Qeng Li Zhi Ding Zhi Shi Qan Chuan Ban Gong Hui Yi Zhi Du* [*State Council Established Intellectual Property Administrative Office*], NAN FANG RI BAO [S. CHINA DAILY NEWS], July 20, 1994, at 1.

215. *See China Claims Success in Copyright Crackdown*, *supra* note 3.

216. Benjamin Kang Lim, *U.S. Sees China Joining World Trade Organization*, REUTER EUR. BUS. REP., Mar. 1, 1995, *available in* LEXIS, NEWS library, CURNWS file.

enforcement process.[217] This pressure will focus the government's attention on infringement, and will consequently lead to the crackdown of counterfeiting factories. In the first half of 1994, Chinese authorities in various parts of China raided numerous factories involved in piracy.[218] Unfortunately, American companies have not yet been joined by companies from Europe and Japan in the fight for more effective enforcement.[219]

As for individual actions by foreign copyright holders, this author believes that developing good connections at various levels of the Chinese government and in various governmental agencies is always essential. Good connections and working relations with the government and its various agencies will facilitate the process of preventing infringement, collecting evidence when infringement does occur, filing the complaint, and adjudicating the complaint in favor of the foreign copyright holder.

In deciding between the administrative or judicial enforcement mechanisms, the foreign copyright holder should first determine the goal of its complaint. If the goal is to obtain equitable relief, such as a preliminary injunction to stop infringement, it may be better to file a complaint with the SCA, since this is faster and less costly. If the goal is to obtain damages, it may be better to file the complaint in an intellectual property court, since a court judgment is easier to enforce. It may also be wise to first evaluate any connections with either administrative or judicial enforcement mechanisms before making a decision.

V. CONCLUSION

The Chinese copyright protection system is a recent legal development in response to China's need to join the international economic community. From the Chinese government's perspective, it is a miracle that China's intellectual property legislation textually matched the minimum international standard within such a short time. The Chinese government is also proud to affirm its unique characteristics of governmental intervention in the copyright enforcement process.

However, partly due to the recent emergence of the Copyright Law, there are numerous structural obstacles in the enforcement process. Many

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217. In the telephone interview with Attorney Baochun R. Zeng, she said that one Justice of the Supreme People's Court indicated to her that the Court has initiated investigation on some cases *sua sponte* when foreign investors complained to it without following the normal appellate procedures. The Justice encouraged such practice so that the Court may supervise the local courts more closely. Zeng Interview, *supra* note 150.

218. *See* INFORMATION OFFICE, *supra* note 4, at 22-23.

219. Schmetzer, *supra* note 115, at 1,2.

factors, such as the nonexistence of a legal system before 1976, the general public's lack of basic legal knowledge, local protectionism, and the central government's occasional loss of control contribute to enforcement deficiencies.

In light of the above analysis of substantive Chinese Copyright Law and its enforcement mechanisms, this author believes that the Chinese government is dedicated to building an efficient copyright protection system, but lacks practical experience in enforcing the Copyright Law. This inexperience, plus China's different legal culture of strong administrative intervention, presents a challenge to foreign businesses to find the most efficient way to maximize their limited resources. This author also believes that administrative intervention may work to the advantage of foreign copyright holders in China because the environment is such that there is little legal consciousness, but strong governmental control. In addition, sufficient motivation exists on the part of the Chinese government to promote copyright protection in the interest of economic development.

Therefore, it is very important that foreign copyright holders understand Chinese culture, especially its legal culture, and accept unfamiliar enforcement mechanisms through local and state copyright bureaus. In fact, administrative enforcement may be the only viable option in cases where a difficult trial is expected, or the costs and attorney's fees cannot be paid off with the expected damage awards.

With this understanding, it may be easier for the United States and China to settle their differences in a friendly way and allow more influence by the United States in building a more efficient enforcement mechanism that realistically fits into China's legal culture. This is the ultimate goal that the two countries should work hard to achieve. Some sacrifice of certain imminent interests may be necessary, but the result will be beneficial to all in the long term.