

Enter the Dragon: China's WTO Accession, Film Piracy and Prospects for the Enforcement of Copyright Laws

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I. INTRODUCTION

On November 8, 2001, the World Trade Organization ("WTO") adopted the People's Republic of China's accession agreement at its Ministerial Conference in Doha, Qatar.¹ The People's Republic of China is the third-largest economic power in the world.² It had exports of \$249.2 billion in 2000, the seventh largest in the world.³ Currently, China is the eleventh-largest export market for American goods.⁴ With a population of roughly 1.3 billion people, it offers the commercial allure for foreign investment.⁵ It is widely speculated, and anticipated, that China at some point during the first half of this century will eclipse the United States as the largest economic power in the world.⁶ The

¹ *Press Release 252*, World Trade Organization, *WTO Ministerial Conference approves China's accession* (Nov. 10, 2001), available at http://www.wto.org/english/news_e/pres01_e/pr252_e.htm (last visited May 24, 2002).

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

³ *Press Release 252*, World Trade Organization, *WTO successfully concludes negotiations on China's entry* (Sept. 17, 2001), available at http://www.wto.org/english/news_e/pres01_e/pr252_e.htm (last visited May 24, 2002).

⁴ OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 2001 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS: PEOPLE'S REPUBLIC OF CHINA 42 (2001), available at http://www.ustr.gov/html/2001_china.pdf (last visited May 24, 2002) [hereinafter USTR REPORT].

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

⁶ *See* GORDON G. CHANG, *THE COMING COLLAPSE OF CHINA* xv (2001) (commenting that China's socialist market economy might rocket it to the top of the economic world by 2010). *But see* CALLUM HENDERSON, *CHINA ON THE BRINK* 243 (2001) (arguing that China will not replace the United States as the largest economic power because of challenges posed

Chinese government realized early on that the growth impact on China's economy would be enormous if its accession bid into the WTO were approved.⁷ Naturally, this has been a priority of the Chinese government for nearly 15 years.⁸ China's long-awaited bid for acceptance into the global trading community finally reached fruition with the highly expected adoption of China's accession agreement. With the anticipated accession of China into the WTO now a mere formality, there is much fanfare and tribulation for the world's most populous country joining the global trading community.⁹ Intellectual property protection has been a contentious, and somewhat misguided, trade issue between the United States and China.¹⁰ There are a variety of reasons for this. Until the early 1980's, China's intellectual property laws did not exist.¹¹ However, in order to gain acceptance into the WTO, China had to enact a series of laws protecting the various intellectual properties to conform to existing international conventions and treaties.¹² These include the promulgation of the Trademark Law in 1982, Patent Law in 1984, Copyright Law in 1990, Anti-Unfair Competition Law of 1993, and the Rules on the Prohibition of Infringement of Trade Secrets in 1995.¹³ China has also joined the major international organizations protecting intellectual property rights, including the World Intellectual Property

by modernization, based on the backwardness of the rural provinces and the abject poverty prevalent in the major cities).

⁷ See Statement by H.E. Vice Minister Long Yongtu, Head of the Chinese Delegation, at the eighteenth session of the Working Party on China, to Pierre-Louis Girard, the Chairman of the Working Party, *Meeting of the Working Party on the accession of China* (Sept. 17, 2001), available at http://www.wto.org/english/news_e/news01_e/wpchina_longstat_17sept01_e.htm (last visited May 24, 2002) [hereinafter Yongtu]. Chinese President Jiang Zemin is credited with pointing out that it was a strategic decision for China to enter the world trade arena, and was in step with the Chinese government's goals of reforming the economy to a "socialist market economic system." *Id.*

⁸ *Id.*

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

¹⁰ See generally Michael Yeh, *Up Against a Great Wall: The Fight Against Intellectual Property Piracy in China*, 5 MINN. J. GLOBAL TRADE 503 (1996) (criticizing the U.S.'s policy of trade sanctions against China); see also Endeshaw, *supra* note 5, at 13-14 (commenting that the rancorous U.S./China trade dispute is based primarily on misplaced American attitudes as to what constitutes intellectual property rights, which may not comport with other nations' attitudes on intellectual property rights).

¹¹ See Maria C.H. Lin, *China After the WTO: What You Need to Know Now*, 817 PLI/COMM. 177, 185-86 (2001) (chronicling the history of promulgation of intellectual property laws in China over the course of the last twenty years).

¹² See Naigen Zhang, *Intellectual Property Law Enforcement in China: Trade Issues, Policies and Practices*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 63, 63-65(1997).

¹³ See Lin, *supra* note 11, at 185.

Organization in 1980, Paris Convention in 1985, Madrid Agreement in 1989, Berne Convention in 1992, and the Patent Cooperation Treaty in 1994.¹⁴ China's efforts are truly remarkable considering that China's emergence onto the world trading stage was only about twenty years ago.¹⁵ Yet, in spite of its efforts, China certainly cannot expect that with its accession into the WTO, its intellectual property obligations will immediately vanish upon the Doha ministers' vote.¹⁶ There is a myriad of problems that faces the Chinese government. Upon accession, China must comply with the WTO's Trade-Related Aspects of Intellectual Property Rights agreement ("TRIPs") in order to gain complete acceptance into the global community.¹⁷

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

¹⁴ Zhang, *supra* note 12, at 64-65. Other copyright-related treaties of which China is a member include the Universal Copyright Convention, which China joined in 1992, and the Geneva Convention for the Protection of Producers of Phonograms, which China joined in 1993. ROBERT HAIBIN HU, GUIDE TO CHINA COPYRIGHT LAW STUDIES 19-20 (2000); see also Yiping Yang, *The 1990 Copyright Law of the People's Republic of China*, 11 UCLA PAC. BASIN L.J. 260, 261, 283 (1993).

¹⁵ See Zhang, *supra* note 12, at 63.

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

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

¹⁸ See USTR REPORT 55 (noting that piracy of videos is sophisticated and widespread, and that pirates find ways of obtaining digital copies of first-run motion pictures almost immediately after they are released in the United States).

¹⁹ See Motion Picture Association of America, *Anti-Piracy*, <http://www.mpaa.org/anti-piracy/index.htm> (last visited May 24, 2002). According to reports of the Motion Picture Association of America ("MPAA"), the U.S. motion picture trade organization, these losses do not include Internet film piracy losses. *Id.* Despite prevailing attitudes that Hollywood movies are profitable, four out of ten movies actually fail to net a profit; the average cost to produce and market a film is over \$80 million, thus making piracy a major problem for the commercial viability of American filmmaking. *Id.* The MPAA comprises Hollywood's seven largest motion picture production and distribution companies, including The Walt Disney Company, Columbia TriStar Film Distributors International, Inc., Metro-Goldwyn-Mayer Inc., Paramount Pictures Corporation, Twentieth Century Fox International Corporation, Universal International Films, Inc., and Warner Bros. International Theatrical Distribution. Statement of Jack Valenti, Chairman and Chief Executive Officer, Motion Picture Association of America, before the Committee on Ways and Means Subcommittee on Trade, Regarding US-China Trade Relations and the possible accession of China to the World Trade Organization, http://www.mpaa.org/jack/99/99_6_8a.htm (last visited May 24, 2002).

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

This article reviews China's historical and cultural indifference towards pirated goods, examines the current need to protect American films from piracy overseas, and critiques the legal mechanisms in China which monitor and enforce international intellectual property treaties and agreements with regards to the piracy of American films. Part II reviews the various methods of film piracy. Part III examines the legal structure as it exists in China and reviews China's copyright laws. Part IV analyzes the Chinese cultural and historical indifference toward piracy, including an examination of China's lack of a predisposition toward the protection of creative efforts. Part V explores the enforcement techniques available in China and assesses the effectiveness of these techniques. Part VI discusses some actions that China and the United States can pursue as China makes its transition from seclusion behind the Bamboo Curtain to center stage in the international economic theater. In the global context, China can demand the respect of the world, and most importantly, the United States, through of its enforcement of copyright laws in the protection of American films. Part VII concludes that despite China's hard work to achieve a free market-based socialist economy through admission into the WTO, its future will be a bumpy road because of its inefficient system of enforcement of copyright laws. The criticism of Chinese enforcement is premised on the strong likelihood that China will become the next major economic power.²¹ A major power, however, one which will set the course of action for the rest of the world, must be one that respects, and enforces, a just administration of the rule of law.

II. NATURE AND TYPES OF FILM PIRACY

In this new age of high technology, piracy of motion pictures no longer occurs only by means of a pirate using hand-held video cameras to record the film directly from the screen.²² The modern day

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

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

²² See Motion Picture Association of America, *supra* note 19.

Blackbeard has a variety of means by which to pirate films, such as optical disc piracy and internet piracy. According to industry estimates, all types of film piracy occur at a rate of one million per day, at a cost of over \$3 billion annually.²³

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

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

²³ *Id.*

²⁴ See The Age Online, *Film Pirates Send Village Retreating From Hong Kong* (visited Nov. 21, 2001), available at <http://www.theage.com.au/bus/20000804/A48202-2000Aug3.html>.

²⁵ *Id.*

²⁶ See Ramona L. Taylor, *Tearing Down the Great Wall: China's Road to WTO Accession*, 41 IDEA 151 (2001).

²⁷ See *supra* note 19.

²⁸ See Arabia News Online, *Film Piracy Rampant on Internet* (visited Nov. 21, 2001), available at <http://arabia.com/business/article/english/0,1690,26291,00.html>.

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

³⁰ United States v. Spatafore (N.D. Cal. 2000), background and indictment available at <http://www.usdoj.gov/criminal/cybercrime/spatafore.htm>, and the plea agreement available at <http://www.techlawjournal.com/alert/200012/20001218.asp>.

³¹ See *supra* note 19.

million only two years ago.³² Internet use is anticipated to grow rapidly in the next ten years.³³

Another means of piracy is videocassette piracy, which is the traditional duplication, distribution, and rental or sale of copyrighted videocassettes.³⁴ Methods include camcording, screening, and back-to-back copying.³⁵

Public performance piracy is the unauthorized public performance of a film, where a commercial establishment shows the film to paying customers without receiving permission from the copyright holder.³⁶ In the Chinese provinces, there are many of these "mini-theaters" which offer unauthorized showings of copyrighted films for a fee.³⁷ Theatrical print theft, signal theft, and broadcast theft are other means of piracy.³⁸ However, these are extremely rare, due to the fact that a vast majority of Chinese do not have access to the technology to conduct these types of piracy.

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

A. *Copyright Law*

China promulgated its Copyright Law in 1990, the last of the three intellectual property laws which it legislated in conformity to the WTO and international treaty requirements.³⁹ The Copyright Law was

³² See CNN.com, *Survey: China Internet Use Soaring* (visited Nov. 28, 2001), available at <http://www.cnn.com/2000/TECH/computing/01/25/china.net.use.idg>.

³³ *Id.*

³⁴ See *supra* note 19.

³⁵ Camcording is the hand-held video piracy of a film during its viewing in a theater. *Id.* Screening is the illegal copying from legitimate advance copies used for marketing purposes. *Id.* Back-to-back copying is pirating videocassette made between two VCRs and copying an original video onto a blank cassette. *Id.*

³⁶ *Id.*

³⁷ See Yu, *From Pirates to Partners*, *supra* note 21, at 149; Glenn R. Butterton, *Pirates, Dragons and U.S. Intellectual Property Rights in China: Problems and Prospects of Chinese Enforcement*, 38 ARIZ. L. REV. 1081, 1095-96 (1996).

³⁸ Theatrical print theft is the theft of the 35 or 16mm film print from a theater for purposes of making illegal copies. See *supra* note 19. Signal theft and broadcast theft are the illegal tapping of cable systems to receive satellite signals without proper authorization, and the illegal copying of over-the-air broadcasts, respectively. *Id.*

³⁹ See Lin, *supra* note 11, at 185. The Trademark Law was enacted in 1982 and the Patent Law was enacted in 1984. *Id.* See also Schlesinger, *supra* note 9, at 119 (arguing that China's copyright laws are substantially in compliance with TRIPS, and its deficiencies are of minor consequence); but see Jill Chiang Fung, *Can Mickey Mouse Prevail in the Court of the Monkey King? Enforcing Foreign Intellectual Property Rights in the People's Republic of China*, 18 LOY. L.A. INT'L & COMP. L. REV. 613, 632 (1996) (arguing that China's copyright laws are below the Berne Convention standards with respect to unpublished works and exclusive rights for public performance of films and recordings). It should be noted that Ms. Fung's

crafted based on the provisions of the Berne Convention and TRIPs.⁴⁰ The Berne Convention is perhaps the premier international treaty on the protection of author's literary and artistic works.⁴¹ This Convention protects foreign protection of works without restrictive formalities outside the author's country of origin.⁴² TRIPs is a part of the WTO that provides trade-related protection for, *inter alia*, copyrights, and emphasizes the enforcement of copyrights in the member nations.⁴³

The Copyright Law is designed to provide copyright protection to authors but is contained within specific ideological boundaries.⁴⁴ According to Article 1, copyright law is meant to protect authors "conducive to [a] socialist spiritual and material construction," and to promote socialist culture and sciences.⁴⁵ The scope of the Chinese Copyright Law is quite impressive, considering the brevity of its existence. Copyrightable works include both published and unpublished materials, and constitute written and oral works; musical, dramatic, choreographic works, and *quyi*⁴⁶; fine art and photographic works; cinematographic, television, and videographic works; maps; computer software; and engineering and product designs.⁴⁷ There are provisions for publication rights, derivative works, works for hire, term of lifetime plus fifty years, fair use exceptions, and remedies for infringement.⁴⁸ There are even provisions which are more extensive than the provisions under the U.S. Copyright Act.⁴⁹ In addition, in an effort to comply with WTO accession requirements, China's Standing Committee of the Ninth National People's Congress approved amendments to the Copyright Law on October 27, 2001.⁵⁰ These amendments include copyright protections for

article was written prior to China's admittance into the WTO and the approval of the 2001 Amendments to the Copyright Law.

⁴⁰ See Julia Cheng, *China's Copyright System: Rising to the Spirit of TRIPS Requires an Internal Focus and WTO Membership*, 21 *FORDHAM INT'L L.J.* 1941, 1946 (1998).

⁴¹ See *id.* at 1947.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See Yang, *supra* note 14, at 264.

⁴⁵ *Id.*

⁴⁶ *Quyi* is a type of Chinese opera, which includes ballads, story telling, and comic dialogues. See HU, *supra* note 14, at 2, 54.

⁴⁷ *Id.*

⁴⁸ *Id.* at 2-6.

⁴⁹ For example, China's Copyright Law contains moral rights protections, including rights of attribution, integrity, and withdrawal. See *id.* at 2. The U.S. Copyright Act does not contain extensive moral rights protections for authors.

⁵⁰ *China Revises Copyright Law for WTO Entry*, Xinhua News Agency, Nov. 7, 2001, LEXIS, Nexis Library, BBC Worldwide Monitoring file.

compilations of data, architectural designs, and applied arts, and an expanded provision discussing assignments.⁵¹

B. *Judicial System*

Enforcement of copyright laws falls under the joint aegis of China's judicial and administrative systems.⁵² The judicial system is now newly restored after almost being totally destroyed by the Cultural Revolution in the 1960s, when judges were considered bourgeois and enemies of the people and sent to forced labor camps for "re-education."⁵³

The court system in China is fairly well-structured. Claims may be brought to one of four People's Court, or trial court, divisions: civil, economic, criminal, and administrative.⁵⁴ Intellectual property cases may be heard before any of these four courts. Civil claims may be brought before the civil courts through regular civil procedural rules.⁵⁵ Criminal copyright violations are heard through the criminal court, which retains exclusive jurisdiction over all criminal cases.⁵⁶ Economic contract cases are handled before the economic courts and are limited to patent and trademark cases.⁵⁷ Finally, all copyright claims resulting in violations of administrative procedural rules are heard before administrative courts.⁵⁸

The intermediate courts are the Intermediate People's Courts and High People's Courts.⁵⁹ Intellectual property trial divisions of the high courts exist in Beijing, Shanghai, Hainan, Jiangsu, Guangdong, and Fujian.⁶⁰ Additionally, intellectual property trial courts exist at the intermediate level in these cities, and Shenzhen and Guangzhou.⁶¹

⁵¹ *Legislative Standing Committee Decision on Amending Copyright Law*, Xinhua News Agency, Nov. 4, 2001, LEXIS, Nexis Library, BBC Worldwide Monitoring file.

⁵² See Zhang, *supra* note 12, at 66; Lin, *supra* note 11, at 195.

⁵³ See Lin, *supra* note 11, at 194-95; see also Butterson, *supra* note 38, at 1119-20 (analyzing the impact of the Cultural Revolution's destruction of the legal system and the growth of the post-Mao Chinese legal profession).

⁵⁴ See Zhang, *supra* note 12, at 66; Lin, *supra* note 11, at 195.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See Zhang, *supra* note 12, at 67.

⁶⁰ See Susan Finder, *The Protection of Intellectual Property Rights Through the Courts*, in CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE 255, 260 (Mark A. Cohen, A. Elizabeth Bang *et al.* eds., 1999).

⁶¹ *Id.*

The highest court in China, the Supreme People's Court, hears appeals from the High People's Court, and supervises and manages trials at the intermediate level.⁶²

Throughout the 1990s, there was a high amount of traffic of intellectual property cases litigated in these courts.⁶³ It is assumed that China's judicial system will become a particularly unique system designed to facilitate the hearing of all intellectual property-related cases.⁶⁴

C. *Copyright Administrative System*

According to the Copyright Amendments Implementing Law, the China National Copyright Administration ("NCA") was created to investigate copyright infringement claims with a national impact, while local copyright offices were designated to handle regional infringement investigations.⁶⁵ The NCA also is responsible for providing guidance to local copyright administrative offices, implementing national copyright regulations, and administering foreign-related copyright registration.⁶⁶

IV. CHINESE PREDISPOSITIONS AND PROBLEMS OF ENFORCEMENT

Chinese history stretches back thousands of years. During this time, China was a flourishing empire rich in scientific invention and cultural development.⁶⁷ Confucian thought has been a staple of Chinese society and culture; the Chinese persona has been shaped by concepts of the simple spiritual monk. The Chinese look highly upon cooperative effort, moral authority, and the favoring of society over the individual, which are all at odds with Western attitudes.⁶⁸ These Confucian ideals have shaped the Chinese people's views and are reflected in their society and laws. The following is a brief discussion of the Chinese predispositions that affect piracy of copyright goods in cultural, historical, and economic terms.

⁶² See Lin, *supra* note 11, at 195-96.

⁶³ See Finder, *supra* note 60, at 257-58 (noting a total of 16,894 intellectual property cases were adjudicated between 1992 and 1997 at all levels of the Chinese judicial system).

⁶⁴ See Zhang, *supra* note 12, at 68.

⁶⁵ *Id.* at 69.

⁶⁶ See Hu, *supra* note 14, at 7.

⁶⁷ See Fung, *supra* note 39, at 623 (noting Chinese inventions of gunpowder, paper and the compass, and the development of Confucian thought during this era).

⁶⁸ See Butterson, *supra* note 37, at 1107-08. See also William P. Alford, *Making the World Safe for What? Intellectual Property Rights, Human Rights, and Foreign Economic Policy in the Post-European Cold War World*, in CHINESE INTELLECTUAL PROPERTY LAW & PRACTICE 147, 151-52 (Mark A. Cohen, A. Elizabeth Bang *et al.* eds., 1999) (noting that Americans have displayed a general indifference to Chinese cultural, legal, and economic circumstances in the U.S.-China intellectual property debate).

A. *Cultural Predispositions*

Under traditional Confucian thought, people's conduct and proper etiquette is governed by the concept of *li*.⁶⁹ *Li* covers one's conduct with regard to the interactions with family, political establishments, and society at large.⁷⁰ Based on *li*, individuals are aware of their normative roles, responsibilities, and obligations to others in their interactions and accordingly adjust their selfish behaviors for the sake of others.⁷¹ Through the proper following of *li*, individuals contribute to a society of harmony, free from strife, discord, disagreement and tension.⁷² In essence, *li* is a subconscious, spiritual and moral belief.

Directly opposite to *li* is the concept of *fa*, developed by the Confucian polar opposite, Legalism.⁷³ *Fa* is a penal concept, associated with punishment to maintain order, and conducted through means of force or physical threat.⁷⁴ Whereas *li* governs people through moral understanding, *fa* dictates through law, and is viewed as rigid and unyielding.⁷⁵ The concept of *fa*, as the rule of law, is viewed unfavorably by the Chinese people.⁷⁶ Yet, this view has survived thousands of years and is permanently engraved in the Chinese psyche.⁷⁷

These *yin-yang* concepts induced three primary attitudes relative to copyright infringement. First, *li*, as the balancer of interests for the harmony of society, introduced the notion of equality.⁷⁸ The importance of the equality of classes has had a long tradition in Chinese history.⁷⁹ The overthrow of the Empire by Sun Yat-sen and the founding

⁶⁹ See Peter K. Yu, *Piracy, Prejudice and Perspectives: An Attempt to Use Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate*, 19 B.U. INT'L L.J. 1, 33 (2001) (hereinafter "Yu, *Piracy, Prejudice and Perspectives*"); Butterton, *supra* note 37, at 1109.

⁷⁰ *Id.*; *Id.*

⁷¹ *Id.*; *Id.*; see also Shin-yi Peng, *The WTO Legalistic Approach and East Asia: From the Legal Culture Perspective*, 1 ASIAN-PAC. L. & POL'Y J. 1, 13 (2000) ("A person preoccupied with his own personal gains and losses was discriminated against by the whole society").

⁷² See Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 69, at 33; Butterton, *supra* note 38, at 1109; see also Palmer, *supra* note 16, at 472-73 (noting that *li* involves a balancing of interests).

⁷³ See Yu, *Piracy, Prejudice and Perspectives*, *supra* note 69, at 34; Butterton, *supra* note 37, at 1110.

⁷⁴ *Id.*; *Id.* (discussing history of *fa* from the Qin Dynasty (221-209 B.C.) when legal codes were first developed, and Qin emperors ruled through harsh and brutal enforcement of the codes).

⁷⁵ *Id.*; *Id.*

⁷⁶ See Yu, *Piracy, Prejudice and Perspectives*, *supra* note 69, at 34.

⁷⁷ See Fung, *supra* note 39, at 619 (positing Confucianism cannot be severed from Chinese legal thought because of centuries of use and development of *li* and *fa*).

⁷⁸ See Yang, *supra* note 14, at 275-76.

⁷⁹ *Id.* at 275 (tracing the history of equalization to the peasant revolt during the Song Dynasty (960-1279), which was based on eliminating disparities between rich and poor).

of the Republic of China in 1910 was based on equality.⁸⁰ In addition, the Communist takeover under Mao Zedong in 1949 was based on support of rural peasants and farmers, who deemed the Communist cause as a vehicle to bring equality to the masses.⁸¹ The idea of copyright licensing and royalties disgusts this equality.⁸² Viewed as a profit-making venture for authors, fees and royalties only create more inequality and are contrary to the ingrained notion of equality in Chinese history.⁸³

Second, *li* fosters the notion of non-competition.⁸⁴ Because harmony is treasured, and cooperation and accommodation are necessary to maintain this harmony, Chinese cultural behaviors gravitate toward a gentlemanly doctrine of moderation in conduct and opinion.⁸⁵ This is illustrated by the contentious trade battles between the U.S. and China in the 1990s.⁸⁶ With the high level of piracy in China, the United States Trade Representative employed a variety of tactics to compel Chinese enforcement of its copyright laws, and crackdown on piracy, including threats of sanctions, "Special 301" status, and the rejection of China's "Most Favored Nation" status.⁸⁷ Chinese notions based on *li* are predisposed to cooperation, and under that belief, produce better results than those produced under situations made through threats and duress.

Third, there is the *fa* notion of state control over the individual.⁸⁸ The harshness of state supremacy has long been ingrained in the Chinese people through centuries of imperial rule.⁸⁹ Basically, the individual's interests are subjugated to the interests of the state and society as

⁸⁰ *Id.* at 275-76.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See generally Matthew W. Cheney, *Trading With the Dragon: A Critique of the Use of Sanctions by the United States Against China*, 6 D.C.L.J. INT'L L. & PRAC. 1, 4-26 (1997) (arguing sanctions by the U.S. has largely failed); see also Yu, *From Pirates to Partners*, *supra* note 21, at 131 (focusing on cooperation, rather than sanctions, as a means of combating piracy).

⁸⁷ See Patrick H. Hu, "Mickey Mouse" in China: Legal and Cultural Implications in Protecting U.S. Copyrights, 14 B.U. INT'L L.J. 81, 85 (1996). A "Special 301" action is a unilateral reaction by the USTR to inadequate intellectual property protections by other countries. *Id.* For an extensive review of the "Special 301" procedures, see Judith H. Bello & Alan F. Holmer, "Special 301": Its Requirements, Implementation, and Significance, 13 FORDHAM INT'L L.J. 259 (1989). For a synopsis of the "Special 301" procedures, see United States Trade Representative, *USTR Fact Sheets: Special 301 on Intellectual Property Rights* (visited Nov. 20, 2001), available at <http://www.ustr.gov/html/factsheets.html>.

⁸⁸ See Yang, *supra* note 14, at 274.

⁸⁹ *Id.*

a whole.⁹⁰ On a grander scale, each Chinese shares the glories and agonies of the state, attributing state success or failure as a personal trait.⁹¹ This is most exemplified in the current Copyright Law. The purpose of copyright protection is to encourage socialist culture and science.⁹² The Communist Party apparatchik maintains itself supreme to the Constitution.⁹³ The concept of an expressed idea being owned by one person – hence, a monopoly – when it should be owned by the state was deeply troubling to Communist ideals.⁹⁴ As such, the original Copyright Law reflected this subordination of the individual to the needs of the society by limiting the scope of authors' rights.⁹⁵

Traditional Chinese thought, then, presents a major obstacle toward piracy prevention in China.⁹⁶ The Chinese view society as a community of fundamental roles,⁹⁷ where people have obligations to everyone else in society.⁹⁸ Societal roles dictate a co-dependent relationship between a superior member of society and an inferior member, where each owes the other a duty of loyalty and support.⁹⁹ This correlative relationship inhibits prosecution of copyright infringement because people are less prone to make any efforts to stamp out piracy. A local village member where a proprietor of a public mini-theater showing bootlegged first-run American films would not report such activities to local copyright administrative officials because it would upset the balance of society and undermine the sense of loyalty which exists between the proprietor and the village.¹⁰⁰ This predisposition is premised on the centuries-old traditional acceptance of piracy, buttressed by traditional Chinese thought.¹⁰¹

⁹⁰ *Id.*

⁹¹ *Id.* at 274-75 (commenting that twin events occurring in late 1991 typified this predisposition: the first Chinese woman's victory in the world chess championships, and the first mainland Chinese scientist's win at a UNESCO Science competition; both attributed their wins to the motherland and the Chinese people).

⁹² See Hu, *supra* note 14, at 53.

⁹³ See Fung, *supra* note 39, at 620.

⁹⁴ See Endeshaw, *supra* note 5, at 113 (commenting the concept of property in the copyright sense is really an individual's monopoly of an expressed idea, which is both socially and culturally alien to the Chinese).

⁹⁵ See Schlesinger, *supra* note 9, at 113 (noting that the original Copyright Law of 1990 left many unanswered questions for international claimants).

⁹⁶ See Butterton, *supra* note 37, at 1108 (noting that Confucian thought is fundamentally at odds with the Western concept of rule of law).

⁹⁷ *Id.* at 1109.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ This goes to the notion that Confucian thought emphasizes local, as opposed to national, interests. See Fung, *supra* note 39, at 617.

¹⁰¹ See John Donaldson & Rebecca Weiner, *Swashbuckling the Pirates: A Communications-Based Approach to IPR Protection in China*, in CHINESE INTELLECTUAL PROPERTY

B. *Historical Predispositions*

Confucianism has also had an effect on Chinese history with respect to intellectual property rights protection. A traditional Chinese belief is that copying is a hallowed act. For centuries, artists were trained as copyists rather than as originators of new ideas.¹⁰² Creative effort was measured not by the originality involved in the production of the work, but rather by the amount of memorization and duplication of the work.¹⁰³ The more memorization of the long-passages of an original work, the more esteemed and wiser the copier became.¹⁰⁴ Rather than be seen as plagiarism, copying denoted wisdom. Copying was a scholarly effort that proscribed respect because it was beneficial to one's life and society as a whole.¹⁰⁵

Historically, copyright law development in China has been sketchy, at best. The first copyright law was enacted in 1910 during Emperor Xuantong's reign during the Qing Dynasty, although it was never effectively implemented because of the Nationalist revolution of 1911.¹⁰⁶ A second copyright law was promulgated in 1928 by the Nationalist government.¹⁰⁷ This law, in turn, was abolished by Mao Zedong during the Communist takeover in 1949.¹⁰⁸ During the Maoist era, there were few intellectual property rights laws, let alone copyright laws.¹⁰⁹ In his efforts to create a utopian Communist society, Mao destroyed all vestiges of external influence, including all copyright laws.¹¹⁰

LAW AND PRACTICE 409, 410 (Mark A. Cohen, A. Elizabeth Bang *et al.* eds., 1999) (outlining traditional acceptance of piracy because of traditional reverence of pirates, rather than revilement, as Robin Hood-like figures who protected the local village against the governmental overlords).

¹⁰² *Id.* at 411. This view is contrasted by the Song Dynasty (960-1279) statutes that made copying of a publisher's manuscript without the publisher's consent subject to fines and corporal punishment. See Yang, *supra* note 14, at 262. This would be indicative of the prevailing *fa* concept which favored the strict rule of law over Confucian virtues of copying.

¹⁰³ See Donaldson & Weiner, *supra* note 101, at 411.

¹⁰⁴ *Id.*

¹⁰⁵ See Yang, *supra* note 14, at 274.

¹⁰⁶ *Id.* at 262-63.

¹⁰⁷ *Id.* at 263.

¹⁰⁸ *Id.* Upon its ascension in 1949, the Communist Party abolished all laws of the Nationalist government, under the rationale that a socialist regime would not inherit laws from an illegitimate predecessor. *Id.*

¹⁰⁹ See *Id.* at 263. While the People's Republic of China maintained some standards for per-copy and per-word royalties for authors and translators, this system of was dismantled by Mao during the Cultural Revolution because of Mao's strict elimination of personal rewards in order to emphasize the subordination of the individual to the state. *Id.* See also Fung, *supra* note 39, at 624.

¹¹⁰ See Amy E. Simpson, *Copyright Law and Software Regulations in the People's Republic of China: Have the Chinese Pirates Affected World Trade?*, 20 N.C.J. INT'L L. & COM. REG. 575, 583 (1995).

This is based on the fact that China is one of only a few Marxist-Leninist countries.¹¹¹ The Marxist-Leninist theory assumes that private capital is a means to exploitation.¹¹² Thus, the very notion of granting intellectual property rights to authors undermines Communist thought. This animosity toward private property is reflected in Mao's decades-long campaign to end class distinction, which culminated with the Cultural Revolution.¹¹³ As a consequence of this mass indoctrination, China developed a strong nationalistic and xenophobic attitude toward Western institutions, including the concept of intellectual property rights.¹¹⁴ The end result was that a prevalent perception in China that intellectual property rights are nothing more than a foreign concept that only benefit Western interests.¹¹⁵

C. *Economic Predispositions*

Chinese will not become predisposed to the notion of protecting intellectual property rights until they realize that it will be in their best economic interests to do so.¹¹⁶ By joining the various international intellectual property treaties, China's leaders knew it was in China's interest to pursue the course, first set out by Deng Xiaoping's "Open Door" policy.¹¹⁷

¹¹¹ See Yang, *supra* note 14, at 269.

¹¹² *Id.* Karl Marx saw intellectual property as nothing more than part of the society at large, he sought elimination of private ownership in creative efforts. See Donaldson & Weiner, *supra* note 101 at 411-12. Marx wrote, "What I myself produce, I produce for society." *Id.*

¹¹³ See Yu, *Piracy, Prejudice and Perspectives*, *supra* note 69, at 21-22.

¹¹⁴ *Id.* at 24-25 (recounting the historical reasons for China's xenophobia and nationalism, going back to the mid-1800s when China was defeated by Great Britain in the Opium War, and Chinese came to believe Westerners were "dirty, vulgar, and beneath their dignity").

¹¹⁵ See Donaldson & Weiner, *supra* note 101, at 412.

¹¹⁶ See Butterton, *supra* note 37, at 1120.

¹¹⁷ See Zhang, *supra* note 12, at 72. The "Open Door" policy was adopted in 1980 by Deng Xiaoping, with the purpose of opening China's markets to foreign investment. See Gerardo Lara, *The Piracy of American Films in China: Why the U.S. Art Form Is Not Protected by Copyright Laws in the People's Republic of China*, 2 UCLA J. INT'L L. & FOR. AFF. 343, 347 (1998). The "Open Door" policy has its roots in Deng's "Four Modernizations" program, an ambitious political and economic program designed to revive China's faltering economy, through modernization of agriculture, industry, national defense, and science and technology. See Palmer, *supra* note 16, at 449 n.3. To understand the nature of the "Open Door" policy and the "Four Modernizations" program, one must go back to the Maoist policy of self-reliance and isolationism, which closed China to external influence. See Hamideh Ramjerdi & Anthony D'Amato, *The Intellectual Property Rights Laws of the People's Republic of China*, 21 N.C.J. INT'L L. & COM. REG. 169, 175 (1995). Cultural life was dictated by Mao's wife, Jiang Qing, and her "Gang of Four" which only allowed "revolutionary" art because, according to Jiang, Marxist thought deemed all creative works as reflective of one's class status. See Connie Neigel, *Piracy in Russia and China: A Different U.S. Reaction*, 63 LAW & CONTEMP. PROBS. 179, 191 n. 92 (2000). Consequently, creative efforts were

In spite of these efforts, a truly effective intellectual property system will only increase the standard of living in a society where the average income is \$100 a year in rural areas and \$400 a year in the coastal cities.¹¹⁸ Many villages engaged in piracy depend on the production of pirated goods for the livelihood of the village.¹¹⁹ This, coupled with a cultural attitude that promotes piracy and weak respect for intellectual property rights, only makes piracy at the local level an endless cycle.¹²⁰ Because copyright is a means to profit for the copyright holder, traditional Chinese cultural norms militate against profit-seeking activities, and piracy achieves the traditional norm of promoting the village, or society, over the individual.¹²¹ As a developing country, China really has no incentive to cease its piracy activities.¹²²

Additionally, because most Chinese authors and writers are employed by the State on fixed salaries, they do not rely on copyright royalties for their livelihood.¹²³ Thus, these individuals have no incentive to advocate for an intellectual property regime for the advancement of their interests.

Another problem is that what happens at the upper echelon of China's government in Beijing may not comport with what happens at the local or provincial level. When Deng Xiaoping ascended to leadership in 1976, he began a decentralization program in China, with the central government in Beijing retaining control over national issues, while relieving local issues to the individual localized governments.¹²⁴ Decentralization has expanded to the point that local villages retain governing power at the lowest echelon of the governing mechanism, known as *jiceng zhengquan* (basic level regimes).¹²⁵ Essentially, under this policy of decentralization, local villages have autonomy to determine certain local political, economic and social issues free from interference by the countywide or provincial governments.¹²⁶ Because of

almost completely curtailed under the Mao regime. *Id.* Creative endeavors were only revived by Deng and the "Open Door" policy, and, thus, was directly responsible for the passages of the various intellectual property laws and entrance of China into international intellectual property regimes.

¹¹⁸ See Yeh, *supra* note 10, at 516; CNN.com, *China Moves to Avert Unemployment Crisis*, available at <http://www.cnn.com/2001/WORLD/asiapcf/east/08/17/china.labor/index.html> (last visited June 7, 2002).

¹¹⁹ See Yeh, *supra* note 10, at 516-17.

¹²⁰ See Butterson, *supra* note 37, at 1116.

¹²¹ See Yang, *supra* note 14, at 273-74.

¹²² See Butterson, *supra* note 37, at 1117.

¹²³ See Yang, *supra* note 14, at 269.

¹²⁴ See Cheng, *supra* note 40, at 1985-86.

¹²⁵ See CHIH-YU SHIH, *COLLECTIVE DEMOCRACY: POLITICAL AND LEGAL REFORM IN CHINA* 255 (1999).

¹²⁶ *Id.* at 300.

China's decentralized system of government, many regulatory controls over economic issues are now handled by these local and provincial governments.¹²⁷ The traditional Chinese saying, "The mountains are high, and the Emperor is far away," rings true for these local governments.¹²⁸ Local authorities have a distinct agenda of their own, pursuing whatever course that will better the economic position of their community, or worse, better the economic position of their personal wealth. The thousands of local and provincial governments, are really too numerous for a decentralized Beijing to literally control.¹²⁹ Regulations issued by Beijing are not guaranteed implementation at the local level.¹³⁰ As a result, this system of decentralization has created nearly autonomous fiefdoms, complicating efforts at effective intellectual property rights protection.¹³¹

Until the system is changed to provide incentives for the Chinese people, intellectual property regimes will remain a foreign and mostly disregarded concept.

V. ASSESSMENT OF CURRENT ENFORCEMENT MECHANISMS IN CHINA

The enforcement of copyright laws is really a result of a well-established adherence to the rule of law.¹³² The rule of law consists of predictability and uniformity.¹³³ However, incompetence, localism, and inconsistency have undermined the enforcement mechanism in China.¹³⁴ This dates back to Mao's rule, where law was merely used as a tool of the Communist Party to silence dissent and arrest counter-revolutionaries.¹³⁵ The law oscillated according to Mao's whims; his policies eventually developed a state of unpredictability in the law.¹³⁶ Attempts to correct this non-adherence to the law began under Deng's modernization programs.¹³⁷ However, in spite of these efforts, there

¹²⁷ See Donaldson & Weiner, *supra* note 101, at 412.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 413.

¹³¹ See *Id.* 412-413.

¹³² See Jeffrey W. Berkman, *Intellectual Property Rights in the P. R. C.: Impediments to Protection and the Need For the Rule of Law*, 15 UCLA PAC. BASIN L.J. 1, 41 (1996).

¹³³ *Id.* It should be noted that an adherence to a rule of law should be determined by clear rules and stability of the law. *Id.* at 34.

¹³⁴ *Id.*

¹³⁵ *Id.* at 35.

¹³⁶ *Id.*

¹³⁷ See Eric W. Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT'L L. 43, 44 (2001) (noting that Deng recognized Mao's infuscation of the law and made constructive attempts to correct the destruction of the legal system in China).

remain cracks in the copyright enforcement mechanism in place in China. The following is an assessment of the copyright enforcement mechanism, in terms of legislative, judicial, and administrative action.

A. *Legislative Enforcement Mechanism*

Concerns regarding China's legislation include compliance with TRIPs and the updating of the Copyright Law. TRIPs has been criticized as an imperialist model for intellectual property rights protection.¹³⁸ Nevertheless, TRIPs is still the intellectual property component of the WTO, and a nation must maintain the minimum standards established under the TRIPs regime to gain membership into the WTO. Developing countries, like China, are afforded "maximum flexibility" in domestic implementation of TRIPs-conforming laws.¹³⁹

TRIPs focuses on national domestic legislation and the enforcement of its member nations' intellectual property rights.¹⁴⁰ TRIPs mandates member nations to comply with Articles 1 to 21 of the Berne Convention, exclusive of the moral rights provision of Article 6.¹⁴¹

Enforcement measures have already been implemented in compliance with TRIPs under the Copyright Law and Implementing Regulations.¹⁴² The Chinese Copyright Law has taken major steps towards complete compliance with TRIPs requirements, providing penalties for civil and criminal liabilities, remedies for public apology, monetary compensation for the infringement victim, injunction relief, and immediate destruction of the infringing act's effects.¹⁴³ The 2001 Amendments to the Copyright Law include provisions apparently aimed at curbing Internet and videocassette piracy problems. For example, amended Article 46(8) criminalizes the rental of cinematographic works with the purpose of producing unauthorized copies.¹⁴⁴ Also, Articles 46(3)-(4) criminalize reproduction and distribution of vide-

¹³⁸ See, e.g., Marci A. Hamilton, *The TRIPs Agreement: Imperialistic, Outdated, and Over-protective*, 29 VAND. J. TRANSNAT'L L. 613, 615 (1996) (asserting that TRIPs is "old-fashioned, Western-style imperialism" that imposes a Western system of intellectual property on the world); Evelyn Su, *The Winners and the Losers: The Agreement on Trade-Related Aspects of Intellectual Property Rights and Its Effects on Developing Countries*, 23 Hous. J. INT'L L. 169, 171 (2000) (asserting that TRIPs, while benefiting developed countries, simultaneously discourages access to technology needed for economic growth in developing countries).

¹³⁹ See World Trade Organization, *Preamble: Agreement on Trade-Related Aspects of Intellectual Property Rights*, http://www.wto.org/english/tratop_e/trips_e/t_agm1_e.htm (last visited June 7, 2002).

¹⁴⁰ See Cheng, *supra* note 40, at 1949.

¹⁴¹ See Schlesinger, *supra* note 9, at 113.

¹⁴² See Cheng, *supra* note 40, at 1961.

¹⁴³ *Id.*

¹⁴⁴ See Xinhau News Agency, *supra* note 51.

ographic performances and transmissions through the Internet or other information networks without the copyright holder's permission.¹⁴⁵ These various changes have induced some commentators to recognize China's steps as substantial¹⁴⁶ and numerous.¹⁴⁷

In spite of recently promulgated amendments to the Copyright Law, there remain some questions of validity as to some of the fair use provisions. For example, Article 13 of TRIPs allows for certain limitations and exceptions to copyright protection, which are limited to "special cases" that do not conflict with the "normal exploitation of the work" and do not "unreasonably prejudice the legitimate interests" of the copyright holder.¹⁴⁸ Article 13 of TRIPs is consistent with Article 9(2) of the Berne Convention.¹⁴⁹ This is normally regarded as the fair use exception provision in copyright. Fair use generally excludes reasonable use of copyrighted works lawfully made available to the public, without the consent of the copyright holder.¹⁵⁰

The Chinese Copyright Law allows for twelve fair uses under the recent 2001 Amendments to the Copyright Law, Article 22 enunciates the fair use exceptions.¹⁵¹ These exceptions restrict an author's economic rights in the copyright more tightly than Western copyright laws¹⁵² and have been criticized as being overly broad.¹⁵³ Self-entertainment is a listed fair use. The concept of self-entertainment is ambiguous. It can be broadly interpreted as being a village movie

¹⁴⁵ *Id.*

¹⁴⁶ See Schlesinger, *supra* note 9, at 119 (arguing that China has enacted a copyright law in substantial compliance with TRIPs).

¹⁴⁷ See Cheng, *supra* note 40, at 1952 (stating that China has taken numerous steps to bring its copyright law into compliance with TRIPs).

¹⁴⁸ Art. 13 of TRIPs reads: "Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."

¹⁴⁹ See Berne Convention for the Protection of Literary and Artistic Works (July 24, 1971), art. 9(2).

¹⁵⁰ See Yang, *supra* note 14, at 268.

¹⁵¹ The fair use exceptions include exceptions for uses of one's private study, research or "self-entertainment"; academic or commentary purposes; current events reporting; re-printing and rebroadcasting of radio, television or print media articles; speeches made at a public gathering; educational, scientific, or teaching use; uses for collection in libraries, archives, museums, or art galleries; free-of-charge live performances of published works; copying of works in a public display; and uses for a "state organ" for fulfilling of its "official duties." See Xinhua News Agency, *supra* note 51. By comparison, § 107 of the U.S. Copyright Act of 1976 allows a fair use affirmative defense based on four factors. See 4 NIMMER ON COPYRIGHTS §§ 13.05[A][1-5].

¹⁵² See Yang, *supra* note 14, at 268.

¹⁵³ See Jim E. Bullock, *IP Protection in China*, 18 No. 10 ACCA DOCKET 16, 20 (Nov./Dec. 2000); Lin, *supra* note 11, at 192; but see Yang, *supra* note 14, at 277-78 (acknowledging the scope of China's fair use exceptions as being broader than Berne and other Western countries, but determining the scope is not overly broad).

house which shows pirated movies, where the proprietor of the movie house is showing the movies for the proprietor's own personal "self-entertainment," but also for the benefit of the entire village. There have been instances of pirated films entering the Chinese market just after their theatrical release in the United States.¹⁵⁴ The American motion picture industry is being "unreasonably prejudiced" as a result of these more than isolated events of piracy. These cultural and historical indifferences should not be used as a hindrance to copyright enforcement.

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

With these discrepancies, China must fine-tune its Copyright Law. The fair use exceptions are vaguely drafted and allow for abuse, especially by government officials—the same officials who are charged with ensuring the enforcement of these intellectual property laws.¹⁵⁵ Additionally, the copyright provisions must be concrete and well-drafted in order for the common Chinese person to understand the scope and magnitude of each fair use exception, to prevent further abuse by the public.

B. *Judicial Enforcement Mechanism*

A truly effective judicial system is essential to the enforcement of intellectual property laws. The United States judicial system has a plethora of well-informed and knowledgeable jurists in the federal and state judiciary who can interpret and render well-reasoned opinions on intellectual property rights enforcement issues. The administration of the courts, while heavily docketed, is relatively free from external pressures and political influences.¹⁵⁶ Under the Chinese judicial system, in contrast, enforcement of copyright laws is hindered for a variety of reasons related to the judges, lawyers, and the administration of justice.

1. Court System

First, there is a concern with the Chinese court system because the Supreme People's Court of China is not an entirely independent, sepa-

¹⁵⁴ See USTR REPORT 55.

¹⁵⁵ See Cheng, *supra* note 40, at 1986.

¹⁵⁶ *Contra* Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391, 1408 (interpreting results of a survey to mean that most people believe the judicial process is influenced by external factors).

rate branch of government, like it is in the United States. Instead, the Supreme People's Court is responsible to the Standing Committee of the National People's Congress – the Chinese legislature.¹⁵⁷ The Standing Committee has the authority to override any ruling of the Supreme People's Court.¹⁵⁸ Thus, it is not immune from the political winds of the highest organ of Communist China's state power. Also, at the lower court level, Communist Party officials may intervene during the course of litigation.¹⁵⁹ If a case is deemed to merit the attention of the government, Party opinion may be introduced to the court president or division chief, who in turn will notify the trial judge of the Party's particular view.¹⁶⁰ This concept would be deemed highly unethical in an American court, but in a Chinese court, it is just seen as a channel in which to funnel Party views into litigation proceedings.¹⁶¹ In these instances, decisions tend to reflect Party opinion.¹⁶² This phenomenon remains problematic because a truly effective judiciary must be allowed to act independently of either the legislative or executive branches of government.

Another problem with China's court system is its inability to have local authorities enforce court judgments.¹⁶³ The root of this problem goes to the strong bias in favor of the local economy, otherwise known as local protectionism.¹⁶⁴ China's courts are understaffed and underfunded, with judges who have strong personal ties with their local communities.¹⁶⁵ Local enforcement authorities are usually beholden to the same local officials who control the purse strings to their offices and are allowing the piracy to continue. Thus, this remains problematic without resolution in the near future.

¹⁵⁷ See NANPING LIU, OPINIONS OF THE SUPREME PEOPLE'S COURT: JUDICIAL INTERPRETATION IN CHINA 29 (1997). The relationship between the National People's Congress and the Supreme People's Court is based on the concept of *yixing heyi*, or combination of the legislative and administrative functions of government. *Id.* According to Karl Marx, the highest authority in a Communist state, the legislative body, was to perform both legislative and judicial functions. *Id.*

¹⁵⁸ *Id.* at 31.

¹⁵⁹ See Finder, *supra* note 60, at 266.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ See Yiquiang Li, *Evaluation of Sino-American Intellectual Property Agreements: A Judicial Approach to Solving the Local Protectionism Problem*, 10 COLUM. J. ASIAN L. 391, 401 (1996). Only 60% of court judgments are enforced by local authorities. *Id.*

¹⁶⁴ See ENDESHAW, *supra* note 5, at 145-47.

¹⁶⁵ See Palmer, *supra* note 16, at 465-66.

2. Transparency

Another problem with the Chinese judicial system is the transparency of the judicial decision-making process.¹⁶⁶ In 1992, China made general commitments to transparency in its Memorandum of Understanding (“MOU”) with the United States.¹⁶⁷

Currently, judicial decisions are published in the government publication, *Gazette*.¹⁶⁸ However, this is problematic because the only opinions published are those that the Supreme People’s Court deems relevant, and there is no precise standard to determine which opinion is deemed a relevant case for publication.¹⁶⁹ There are also questions as to whether the *Gazette*’s published opinions are precedential in value.¹⁷⁰ The Court does not regularly publish lower court decisions, and when one is deemed appropriate for publication, it is often revised or edited to make the opinions “exemplary models” for lower court reasoning.¹⁷¹ These pose instant problems for judges making rulings based on nothing more than their own experience and knowledge.¹⁷² The purpose of publication of opinions is to preserve a body of legal authority upon which future decisions can be based. There are reports that the *Gazette* will become more like an official government journal along the lines of the Federal Register, but such reports might just be mere speculation.¹⁷³ This publication problem contributes to the lack of a consistent and predictable rule of law and allows judges to make decisions at whim. Additionally, the Court’s doctoring of a lower court opinion flies in the face of *stare decisis*; a lower court, when faced with a

¹⁶⁶ See Yu, *Piracy, Prejudice and Perspectives*, *supra* note 69, at 70.

¹⁶⁷ See Maruyama, *supra* note 2, at 192. The MOU was negotiated between China and the United States in 1992, after the USTR initiated a “Special 301” action against China. See Hu, *supra* note 87, at 84. The MOU was first in a series of trade-related agreements between the two countries regarding China’s commitments to intellectual property protections and development of Western-style rule of law. See Butterton, *supra* note 37, at 1083. These included the 1995 Enforcement Agreement, committing China to improvements in its enforcement mechanisms through implementation of raids on pirate factories, elimination of local protectionism, and clarification of its intellectual property laws, rules, and regulations. *Id.* at 1090.

¹⁶⁸ See LIU, *supra* note 157, at 38.

¹⁶⁹ *Id.* at 39.

¹⁷⁰ *Id.* at 142.

¹⁷¹ *Id.* at 143-44.

¹⁷² There has been some confusion about the nature of the *Gazette* as to whether published opinions are to offer guidance regarding the law or precedence in the interpretation of the law. *Id.* at 142. However, it has been noted that several Chinese scholars deemed that the *Gazette*’s opinions do not carry the weight of precedence. *Id.*

¹⁷³ See USTR REPORT 49. The *Gazette* would function as a centralized source relevant to foreign trade and intellectual property for national, provincial, and local laws and regulations. *Id.*

case of similar facts, will need to undergo its own judicial scrutiny of the case in order to render a proper decision. A movie studio attempting to seek compensation for loss in revenue due to film piracy will be left with inconsistent judgments. This will also pose strategic dilemmas for the studio in determining whether to pursue a legal remedy in China.

The transparency issue is not limited to judicial opinions. The NCA regulations, judicial rules promulgated by the Supreme People's Court and other official government memoranda, are not regularly published.¹⁷⁴ These regulations are changed with the broad discretion of the respective government official.¹⁷⁵ This creates conflicting rules and regulations, causing conflicts for the judge, advocate and studio executive alike. Thus, the lack of transparency increases misinterpretation in China's laws and creates an inconsistent application of law from one province to another.

3. Judges

Third, there is a concern with the Chinese judges. Judges, even in the United States, are not immune to political pressures. The situation for judges in China is exacerbated by the highly strict Communist Party's need to control information and the outcomes that affect the prestige of the Party.¹⁷⁶ Judges in China are not appointed to a life tenure, unlike their American federal counterparts.¹⁷⁷ The lack of a life tenure increases the chances that Chinese judges will be open to political pressures and opinions.¹⁷⁸ This in turn leads to increasingly partial judgments. These partial judgments are compounded by a non-transparent system of publication of cases where the Chinese government alters lower court opinions. This is essentially disrespect for rulings made by Chinese judges.

Another concern is the judge's lack of knowledge in intellectual property matters.¹⁷⁹ This is partly due to the fact that intellectual property laws have only existed for about twenty years in China.¹⁸⁰ Judges sitting in the Beijing and Shanghai courts have rather sophisticated training in intellectual property laws, but the same cannot be said for judges in the outer regions and provincial courts.¹⁸¹ The lack of intel-

¹⁷⁴ See Palmer, *supra* note 16, at 471 (arguing the lack of dissemination of legislative enactments has created a legitimacy problem in China).

¹⁷⁵ See Yu, *Piracy, Prejudice and Perspectives*, *supra* note 69, at 69-70.

¹⁷⁶ See *Id.* at 28-29. See also *infra* Part V.C.1.

¹⁷⁷ See Berkman, *supra* note 132, at 22.

¹⁷⁸ *Id.*

¹⁷⁹ See Finder, *supra* note 60, at 259.

¹⁸⁰ See Lin, *supra* note 11, at 185.

¹⁸¹ See Finder, *supra* note 60, at 260.

lectual property knowledge renders more difficult a legally sound judgment.¹⁸²

A third problem with the role of judges in Chinese courts is the reported high rate of corruption amongst judges and other officials in China.¹⁸³ Rampant collusion between business interests and opportunistic officials have been reported.¹⁸⁴ Judicial graft includes misappropriation of funds, bribery, abuse of power, and embezzlement.¹⁸⁵ Beijing has not ignored the problem of judicial corruption; an extreme example is the execution of a former provincial vice governor for his role in a corruption scandal.¹⁸⁶ This judicial corruption has been attributed to customary Confucian-influenced law-blindness, where officials who were responsible for resolving corruption problems were the exact same officials committing the corruption.¹⁸⁷ Whatever the case may be, judicial corruption will continue to undermine long-term domestic and foreign interests in China.¹⁸⁸

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

4. Lawyers

Fourth, there is the state of the Chinese lawyer. The Cultural Revolution rounded up all lawyers as members of the intelligentsia, inapposite to Mao's Communist ideals.¹⁸⁹ In China's efforts at modernization, there was a greater need for lawyers.¹⁹⁰ The Chinese government had identified the need for 600,000 legal professionals.¹⁹¹ However, China's legal education system only produces roughly 700 new attorneys a year.¹⁹² The need for formally trained attorneys in China is exacerbated by the growing rate of intellectual property-re-

¹⁸² See Cheng, *supra* note 40, at 1992.

¹⁸³ See USTR REPORT 68. Chinese officials admitted that corruption is one of the most serious problems facing the judicial system. *Id.*

¹⁸⁴ See Orts, *supra* note 137, at 70.

¹⁸⁵ See USTR REPORT 68.

¹⁸⁶ See Orts, *supra* note 137, at 71.

¹⁸⁷ *Id.*

¹⁸⁸ See USTR Report 69 (noting that government contracts are not awarded based on commercial merits, but rather based on bribes or other underhanded deals, putting American businesses at a competitive disadvantage).

¹⁸⁹ See Berkman, *supra* note 132, at 29. See also Yu, *From Pirates to Partners*, *supra* note 21, at 214.

¹⁹⁰ See Berkman, *supra* note 132, at 29.

¹⁹¹ *Id.*

¹⁹² See Cheng, *supra* note 40, at 1994.

lated lawsuits being filed in Chinese courts.¹⁹³ Additionally, the lack of appropriate training among existing lawyers complicates the Chinese court proceeding that follows an inquisitorial system, in that lawyers cannot sufficiently examine witnesses with a particular focus on intellectual property.¹⁹⁴

There are some promising movements in China toward a professional class of lawyers. Chinese law schools include seminars on complex business and intellectual property issues.¹⁹⁵ Also, Chinese lawyers are encouraged to seek out foreign legal education.¹⁹⁶ This presumably would create a class of professional lawyers capable of tackling the intricacies of intellectual property issues which are bound to appear in the near future as foreign investment grows in China as a result of WTO accession.

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

C. *Administrative Enforcement Mechanism*

1. Information Control Policy

Another problem that goes to the heart of the Communist Party dogma is the issue of control over information, especially political information that is critical to the Chinese political leadership's need to control the media in order to disseminate the party line.¹⁹⁷ Recently, Chinese officials ordered the shut down of Internet cafes, issued more than sixty sets of regulations governing Internet access, and arrested

¹⁹³ See Finder, *supra* note 60, at 255.

¹⁹⁴ See Berkman, *supra* note 132, at 29.

¹⁹⁵ *Id.* at 30. The inquisitorial system is similar to the United States' system, in which all participants in the court process, including the judge, are permitted to question parties and witnesses. *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ See Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 69, at 29. For a good analysis of the rationale behind information control policy, see ENDESHAW, *supra* note 5, at 158-59 (noting that the purpose of China's information control policy goes to protection of national security).

those individuals downloading politically sensitive webpages.¹⁹⁸ Thus, China's information control policies have curtailed the ability of American films to enter China.

The current Chinese government has allowed American film companies to import twenty films on a revenue-sharing system.¹⁹⁹ However, the concern is that American films are sometimes too politically controversial in the eyes of Party officials; these films may present themes that will give the Chinese populace ideas that conflict with basic Communist tenets. As a result, the films must undergo very stringent scrutiny under China's information censorship regulations.²⁰⁰ In 1996, Beijing vociferously opposed the production of the film *Kundun*, a fictionalized account of the Chinese invasion of peaceful Tibet, with a slant toward the Tibetan side of history.²⁰¹ Chinese officials made innuendoes that the production company, The Walt Disney Company, would not be allowed to expand its distribution base into the China market unless Disney "better cooperated with China in relevant areas."²⁰² In 1998, the film *Red Corner* was not even allowed into China because of its political theme.²⁰³ The same censorship threat faced Disney's *Mulan*, which was distributed only after rumors that Disney was exploring plans to build a Disneyland theme park in southern China.²⁰⁴ Such threats of censorship by Beijing are unproductive in an era of in which China should allow expansion into its markets.

The Chinese information control policy is problematic because even if the copyright enforcement mechanism is effective in post-WTO China, market access to films would still be severely limited by the

¹⁹⁸ See Human Rights Watch (Nov. 28, 2001), available at <http://www.hrw.org/press/2001/08/china-0801.htm>. American technology and motion picture companies will have to decide between removing the controls on Internet use or continuing censorship by selling Internet policing technology to the Chinese government. *Id.*

¹⁹⁹ See Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 69, at 30-31.

²⁰⁰ *Id.* at 31.

²⁰¹ (Buena Vista Distribution Co. 1997).

²⁰² See CNN.com, *China Denies Pressuring Disney Over Dalai Lama Film* (visited Nov. 18, 2001), available at <http://www.cnn.com/WORLD/9612/12/disney.china/index.html>.

²⁰³ (Metro-Goldwyn-Mayer 1997). The film's plotline centers around a General Counsel for a large movie studio who is sent to China to negotiate a major entertainment deal, and is consequently accused and arrested for a murder he did not commit. See *Red Corner, Story* (visited Nov. 18, 2001) available at <http://www.redcorner.com/Story/index.html>. The movie is an indictment of the political system in China. See *Red Corner, Making Of* (visited Nov. 26, 2001), available at <http://www.redcorner.com/Making/content.html>.

²⁰⁴ See E! Online News, *Mulan Freed From Release by China* (visited Nov. 18, 2001), available at <http://www.eonline.com/News/Items/0,1,4301,00.html>. *Mulan* is based on the story of a young Chinese woman who disguises herself as a man to lead the Chinese people against an invading horde. *Id.*

Chinese censors.²⁰⁵ If Chinese people are not allowed access to the films, they will opt for a black market version of the film.²⁰⁶ Such a scenario would only increase the piracy problem, because the lack of an open market for American films would drive Chinese demand for the pirated goods.²⁰⁷ In theory, WTO accession would eliminate this scenario because of the WTO's requirement that member nations drop trade barriers and bring regulations into conformity with WTO regulations.²⁰⁸ However, in practice, a solution is far away because the information control policy is by definition a trade barrier, limiting the number of films into China.²⁰⁹ This in turn implicates copyright infringement issues because American studios will be unable to distribute films in China, increasing piracy due to Chinese demand. Thus, this will create a vicious cycle of censorship and piracy.²¹⁰

This lack of movie distribution in China is certainly antithetical to the basic propositions of the WTO. It presents a major ideological issue for Party officials in this new WTO era, who must now determine whether such a strict information control policy is actually in the best interests of China.²¹¹

2. Local Protectionism

An additional problem facing copyright enforcement in China is that the local governments have much power in overseeing and directing the enforcement efforts.²¹² As a result of the Copyright Law Implementation Regulations, the NCA was developed.²¹³ Also, the local and provincial governments were deemed responsible for the administration of enforcement of the Copyright Law at the local and

²⁰⁵ See Mary L. Riley, *The Regulation of the Media in China*, in CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE 355, 364-65 (Mark A. Cohen, A. Elizabeth Bang *et al.* eds., 1999). China maintains an artificially small market for foreign films in China in order to support the domestic film industry. *Id.*

²⁰⁶ See Yu, *Piracy, Prejudice and Perspectives*, *supra* note 69, at 31.

²⁰⁷ *Id.*; but see Lara, *supra* note 117, at 357 (reaching the conclusion that China deliberately limits market access to American films in order to reap the benefits of piracy).

²⁰⁸ See USTR REPORT 43.

²⁰⁹ Reduction of this barrier would open up the Chinese market to American films and could result in increased policing of copyright infringements by the American film companies. See Butterton, *supra* note 37, at 1105.

²¹⁰ See Yu, *Piracy, Prejudice and Perspectives*, *supra* note 69, at 31.

²¹¹ See Butterton, *supra* note 37, at 31-32 (questioning whether China's information control policy is productive because it creates a need for Chinese to favor black market videos over the actual videos and thus actually increases the piracy problem).

²¹² See Palmer, *supra* note 16, at 468 (commenting that the administration of copyright enforcement in China is stymied by the development of local "duke economies").

²¹³ See Zhang, *supra* note 12, at 69.

provincial levels.²¹⁴ As a result of this grant of enforcement authority, innumerable fiefdoms have emerged throughout China. Because of this, a movie studio seeking redress for copyright infringement must negotiate a tortuous maze of individual governments, each with its own specific procedures and regulations in dealing with copyright enforcement.²¹⁵

In addition, each local government is granted authority over local issues by the central government in Beijing.²¹⁶ This includes the authority to confer power and reject officials at its own level.²¹⁷ With the broad powers granted by Beijing, the local governments also have control over their own purse strings, so that each local entity can maintain its own fiscal independence.²¹⁸ Coastal and border cities have also been encouraged to take their own initiatives to create foreign investment in their local communities.²¹⁹ Consequently, local government officials are given more power to conduct business, which affects their conduct of local affairs.²²⁰ As a result, these officials are able to inject their opinions into court proceedings that affect their local business interests.²²¹ In addition, due to the administrative enforcement offices' limited budgets, administrative enforcement is severely affected by well-funded politically powerful local government officials.²²²

Thus, local protectionism is a major obstacle to copyright administrative enforcement.²²³ It clogs the enforcement system because local officials control the hiring and management of the enforcement bureaus.²²⁴ Such powerful regionalism serves effectively to neutralize national efforts at copyright enforcement. In spite of Chinese accession

²¹⁴ *Id.*

²¹⁵ See SHIH, *supra* note 126, at 255.

²¹⁶ See Cheng, *supra* note 40, at 1985-86. The 1982 Chinese Constitution conferred the authority of the local governments to the Local People's Congresses, which effectively took control of politics at the local level from the central government. *Id.*

²¹⁷ *Id.* at 1986.

²¹⁸ *Id.*

²¹⁹ See Palmer, *supra* note 16, at 469.

²²⁰ See Li, *supra* note 163, at 399-400. Local protectionism is really a corollary of decentralization. *Id.*

²²¹ See Cheng, *supra* note 40, at 1986.

²²² *Id.* at 1987; Li, *supra* note 163, at 400. Local governments have fiscal authority to manage local expenditures. *Id.*

²²³ *Id.*; see also Palmer, *supra* note 16, at 470 (positing that Beijing's inability to control the local governments is a result of a difference in ideology between Beijing's socialist ideals and local governments' concept of justice).

²²⁴ See Li, *supra* note 163, at 401.

into the WTO, however, local protectionism is likely to continue in the near future.²²⁵

VI. WHAT NOW? EFFORTS THAT NEED TO BE MADE

A. *Efforts Needed by China*

1. Copyright Law Revisions

The Copyright Law was recently updated to conform to the specifications of TRIPs and the Berne Convention.²²⁶ Perhaps the most important aspect of its amendments was its failure to amend the definitions and scope of the fair use exceptions.²²⁷ There are problems with the fair use exception's scope, including the "State Organ" exception.²²⁸ Because all state-owned enterprises are deemed state organs under the Copyright Law, copyright protection is severely weakened.²²⁹ Also, additional funding for the NCA administrative enforcement effort is direly needed. Amendments to the Copyright Law to meet compliance standards of the WTO is one thing; allowing the necessary funds to combat piracy and make enforcement of copyright laws is another entirely different matter.

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

2. Education

In addition, Chinese officials must educate the general population, Chinese local judges and lawyers as to the benefits of WTO membership and the boons of copyright rights protections.²³⁰ Enforcement cannot be based on only penalization, but also must emphasize education. China should emulate Malaysia's efforts to educate its populace

²²⁵ *Id.* There is a popular maxim which reflects this local protectionism problem, known as "*Shang You Zhen Che, Xia You Dui Che,*" or whenever Beijing institutes a national policy, local governments undermine it with their own local policies. *Id.*

²²⁶ *See supra* note 51.

²²⁷ *Id.*

²²⁸ *See Yang, supra* note 14, at 279-80.

²²⁹ *Id.* at 279.

²³⁰ *See Cheng, supra* note 40, at 2009 (arguing that education is the "cure for cultural disincentives against protecting copyrights").

to reject piracy.²³¹ There are some indications that the anti-piracy message has settled in the minds of the Chinese populace. For example, after pirated copies of her book were distributed, Deng's daughter pursued a copyright infringement suit against the pirates.²³² Also, \$1 million was recently budgeted towards an anti-piracy education program in Hong Kong.²³³ As a result, Chinese people are realizing that there are consequences for the failure to protect intellectual property rights.²³⁴ Moreover, when Chinese judges meet with their American and European counterparts, they must pass this information along to others in the government agencies, the Party, and the Chinese legal profession in order to enlighten other government officials as to the benefits of intellectual property rights protections.

One, and perhaps most important, segment of the Chinese population which has been largely ignored is the general masses. While education on intellectual property rights protections is essential at the government level, the common citizenry must also be educated with the same intensity as government officials and the legal community. The typical pirate lives amongst the masses. As a result, China must direct its resources to educating people of the negative aspects of piracy, especially in rural areas and the provinces.²³⁵

3. Centralized Copyright Enforcement

Copyright enforcement must be controlled by Beijing, not by the local governments. While other areas of local concern should be handled at a local level, copyright infringement and piracy is a national problem. Beijing must reassert its centralized form of governance and direct a national copyright enforcement effort. While efforts to decentralize were attempts by Beijing at democratization by giving the localities more decision-making powers, this abrogation of power only reinforced local protectionism.²³⁶ Beijing must reel in the local governments by directing and coordinating the copyright enforcement process. While this notion may be antithetical to the efforts at democratization

²³¹ See Billboard, *Malaysia to Educate on Piracy* (visited Nov. 21, 2001), available at <http://www.grayzone.com/901.htm#busts>.

²³² See Butterson, *supra* note 37, at 1120, n.193. Den Rong sought judicial relief in the Beijing Intellectual Property Court for the distribution of a pirated version of her biography about her father. *Id.*

²³³ See Asiamedia, *\$1M Set Aside to Promote Law on Film Piracy* (visited Nov. 26, 2001), available at <http://www.asiamedia.ucla.edu/Weekly/11.22.2000/HongKong3.htm>.

²³⁴ See Butterson, *supra* note 37, at 1120.

²³⁵ See Cheng, *supra* note 40, at 2000. China's leaders embarked on a campaign to educate the provinces on popular legal education in 1997. *Id.* It is unclear if this campaign is an ongoing process or was just a one-time event.

²³⁶ See SHIH, *supra* note 126, at 300; Donaldson & Weiner, *supra* note 101, at 413.

in China, it must be noted that enforcement reforms will not take place instantaneously. Specific efforts will include directing raids at piracy factories.²³⁷ Such raids must occur with regularity and specificity, instead of with the randomness of previous raids on pirate factories.²³⁸ Raids must occur at community viewing rooms or “mini-theaters” as well, which charge for viewing pirated versions of recently released films.²³⁹ A course of gradualism may be the best method at this point in time. Of course, as local jurisdictions become more predisposed to rule of law adherence and acceptance of national enforcement policies, Beijing’s reins can be loosened.

4. Transparency

It is absolutely necessary to maintain a case reporting system for judges, so that judges can rely upon prior decisions when dealing with intellectual property cases. Without such a system, judges will be left with nothing but their own, sometimes misguided, interpretation of the Copyright Law in deciding cases. Also, the government’s legal gazette lacks notice of changes in administrative rules and regulations.²⁴⁰ This does little to create an ambiance for a rule of law. An ambiance for a rule of law encompasses rationality and legitimacy of processes.²⁴¹ Public distribution and exposure to judges’ decisions gives local governments and the public insight into a still-emerging judicial system. It also fosters understanding of legal rationales in determining copyright issues. Public distribution of copyright statutes, rules, and regulations goes a long way towards educating local authorities and the general public on the need for protecting copyrights.²⁴²

5. Adherence to Rule of Law

Finally, tying all of the previous discussions together, there must be an adherence to a rule of law.²⁴³ Through such adherence to law, local protectionism can be prevented.²⁴⁴ Local interests would not be compelled to make decisions for the betterment of their own local, or even

²³⁷ See Yu, *From Pirates to Partners*, *supra* note 21, at 151. American officials should also be present to monitor the destruction of the pirate factories. *Id.*

²³⁸ See Li, *supra* note 163, at 404. The 1995 MOU only required periodic and random inspections only in CD factories. *Id.*

²³⁹ See Butterson, *supra* note 37, at 1082.

²⁴⁰ See Palmer, *supra* note 16, at 465. Also, there is a lack of public consultation which is an important concept for transparency. *Id.*

²⁴¹ See Orts, *supra* note 137, at 112.

²⁴² *Id.* at 113. Fair notice and hearings, public promulgation of statutes and availability of legal information are hallmarks of transparency issues relevant to a rule of law. *Id.*

²⁴³ See Berkman, *supra* note 132, at 37.

²⁴⁴ *Id.* at 38.

personal, interests, but rather domestic interests. Local governments following established national rules enhance a rule of law. Some commentators have argued a course of action within the WTO's dispute resolution that compels China to strict adhere to a rule of law.²⁴⁵ However, this approach fails to consider the of China experience. In light of the very idiosyncratic nature of Chinese Confucian culture, which advocates group harmony over tête-à-tête negotiations, copyright enforcement in China should center around harmonious and flexible consultations.²⁴⁶

It is not likely that such an adherence to a rule of law will happen in the near future.²⁴⁷ However, with assistance from American film studios, China could adapt a mindset open to a rule of law. An increase in international trade will alter cultural attitudes towards the importance of law.²⁴⁸ For example, Japan is a very economically advanced East Asian country with a strong respect of a rule of law.²⁴⁹ Japan is also highly influenced by Confucianism, like China.²⁵⁰ Through its political and judicial processes, Japanese culture has reconciled Confucian tradition with Western notions for legalism and rules of law.²⁵¹ The same is certainly possible for China. Indications of a trend towards a rule of law in China were reinforced by the passage of an amendment to the Chinese Constitution which places governance by the rule of law to the highest level.²⁵²

B. *Efforts Needed by the United States*

There is a need to increase judicial, legal, and corporate cooperation between the China and the United States.²⁵³ American judges and practitioners must assist Chinese judges and practitioners in their ef-

²⁴⁵ See Butterson, *supra* note 37, at 1123 (arguing that a strict rights consciousness must be accepted by the Chinese in order to properly address the piracy issue); *but see* Palmer, *supra* note 16, at 474-75 (arguing that WTO accession will not bring about the desired intellectual property rights protections).

²⁴⁶ See Yu, *From Pirates to Partners*, *supra* note 21, at 233-34; Peng, *supra* note 71, at 22.

²⁴⁷ *Id.* The WTO is a "victory for Legalism," or the *fa* concept. *Id.* at 23.

²⁴⁸ See Orts, *supra* note 137, at 109.

²⁴⁹ See Peng, *supra* note 71, at 32.

²⁵⁰ *Id.* at 20.

²⁵¹ Most segments of Japanese society live by the Confucian-influenced idea of natural order and social arrangement known as *giri-ninjo*, or rules of behavior. See Surya Prakash Sinha, *An Axiology of the International Bill of Rights*, 1 PACE Y.B. INT'L L. 21, 26 (1989). This is similar to the Chinese concept of *li*.

²⁵² See China Daily, *China: "Rule of Law": Backed with Amendment*, Mar. 4, 2000, available at 2000 WL 4115271.

²⁵³ See Yu, *From Pirates to Partners*, *supra* note 21, at 183-88 (presenting a model which can enable the United States to better understand Chinese institutions); Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 69, at 71 (commenting on the American failure to

forts to essentially rebuild a Chinese legal system dismantled by years of Maoist persecution. American legal professionals knowledgeable in intellectual property matters should conduct meetings and training sessions for the Chinese legal community.²⁵⁴ Finally, American corporate interests, and more notably the motion picture industry, must contribute to the well-being of China's market structure.

1. Ending Trade Sanctions

First, American threats of trade sanctions are not conducive to a productive relationship between China and the United States.²⁵⁵ American trade sanctions tend to defeat the cooperative style of the WTO.²⁵⁶ By inclusion in the WTO, China will have to abide by WTO trade rules, including TRIPS.²⁵⁷ Trade sanctions in this new era of cooperative international efforts are really just dinosaurs from a Jurassic age of fractured understanding and disunity between the two countries.²⁵⁸ Such use of trade sanctions by the United States is quite ineffective in this new era of a WTO regime.

2. American Legal Assistance

Second, the American legal community must provide education for the Chinese legal community.²⁵⁹ American judges must meet with their Chinese counterparts in order for the Chinese judges to gain in-

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

²⁵⁴ See Yu, *From Pirates to Partners*, *supra* note 21, at 219.

²⁵⁵ See Cheney, *supra* note 86, at 25-26. The threat of sanctions really has only limited success and in some instances, actually places the United States in a worse off position than before sanctions occurred. *Id.* The U.S.-China Business Council, an umbrella organization representing American business interests in China, observed that unilateral American trade sanctions has had little effect on policy changes in China. See Yu, *From Pirates to Partners*, *supra* note 21, at 167.

²⁵⁶ *Id.* at 169 (positing that the United States' coercive trade sanctions only leads to retaliation by China, which could precipitate a global trade war).

²⁵⁷ See Palmer, *supra* note 16, at 474-75. China's WTO membership would effectively neutralize both China's isolationist tendencies and the United States' militaristic unilateral trade actions by moving any disputes to a neutral forum. *Id.*

²⁵⁸ See Cheng, *supra* note 40, at 2007. It should be noted that the United States is not an angel in the WTO community. In one trade dispute with the European Union, and upon an unfavorable decision from the WTO's Dispute Settlement Body, the United States refused to agree to the ruling. Such action would inherently undermine the United States' credibility and reputation to force China to enforce its own laws and conform to the world community standards. See Laurence R. Helfer, *World Music on a U.S. Stage: A Berne/TRIPs and Economic Analysis of the Fairness in Music Act*, 80 B.U. L. REV. 93, 101 (2000).

²⁵⁹ See Yu, *From Pirates to Partners*, *supra* note 21, at 219.

sight into intellectual property rights protections.²⁶⁰ Judges are people, and people cannot make informed decisions unless they are taught. Along with education comes leadership, and the United States must lead by example. However, the United States has shown a willingness to drive a course inconsistent with fair global principles, shown by the recent WTO decision against the United States in dispute settlement resolution proceedings.²⁶¹ The United States cannot expect China to follow a global course, when the United States does not itself follow the same course.²⁶² Such double talk by the United States does little to foster cooperation and to create inroads in the enforcement of copy-right laws in China.

European judges appear to be more progressive than American judges with regards to advising and educating the Chinese judicial community. Recently, European Union judges met with Chinese judges in Beijing and Shanghai to discuss various issues involving enforcement of intellectual property rights laws and assisted in the draft proposal to improve law enforcement.²⁶³ More of this kind of dialogue must exist, especially from the American judicial community.

3. Assistance from Hollywood

American motion picture companies must step up to the plate and provide significant education and cooperation to their budding Chinese counterparts. Film studios cannot expect to profit from a 1.3 billion person market without investing in China's economic infrastructure. There are some signs of a Hollywood move into China. The Walt Disney Company released information of a proposal for a new Disneyland outside Hong Kong.²⁶⁴ A new theme park on the scale of Disneyland would naturally attract huge revenues for the local economy and boost the fledgling Chinese film industry. Prospects for film production could be endless. Another instance involves Warner Bros.' agreement with the Shenzhen Advanced Science Group to distribute animated films in

²⁶⁰ *Id.* (presenting various methods which American judges can conduct training and education of Chinese judges include videoconference meetings and web site bilingual technical assistance of intellectual property adjudication).

²⁶¹ See Helfer, *supra* note 258, at 101.

²⁶² *Id.*

²⁶³ See China.org.cn, *Enforcement of IPR Laws to Improve* (visited Nov. 20, 2001), available at <http://www.china.org.cn/english/2001/Jun/13894.htm>.

²⁶⁴ See Canadian Broadcasting Corporation, *It's a Small World After All* (visited Nov. 20, 2001), available at http://www.infoculture.cbc.ca/archives/misc/misc_01061999_disney.html. Interestingly, Disney Chairman and Chief Executive Officer Michael Eisner noted that the Chinese people "love Mickey Mouse no less than the Big Mac," obviously referring to the successful entrance of McDonald's into the Chinese market. *Id.*

China.²⁶⁵ However, of course, all of this cannot occur unless China's copyright laws are enforced to ensure Disney's and Warner Bros.' presence in China.

4. Joint Ventures

In addition to the efforts of American film companies, American corporations must form joint ventures with Chinese companies.²⁶⁶ These joint ventures might create economic incentives for the Chinese.²⁶⁷ In doing so, the Chinese partners would be prone to taking a stronger stance against piracy where their economic interest in the outcome of the business ventures is affected.²⁶⁸

5. Pro-Active Motion Picture Industry Stance

The United States must also adopt a proactive stance on film piracy.²⁶⁹ In other words, the United States motion picture industry cannot stand by and push for anti-piracy efforts in China. Rather, it should utilize its vast resources and access to technology to its advantage. Studios must use encryption to prevent Internet piracy.²⁷⁰ Copy protection, scrambling, and Macrovision technologies should be used to cut down on videocassette piracy.²⁷¹ In addition, the MPAA should fund an advertising campaign to encourage American movie-going audiences to report camcorder usage in theaters.²⁷²

6. Patience

The United States' dealings with China must be tempered by the understanding that China is technically still a developing nation.²⁷³ Americans must be mindful that intellectual property access is important for economic development, but that enforcement of intellectual

²⁶⁵ See Cheng, *supra* note 40, at 2003.

²⁶⁶ *Id.* at 2009.

²⁶⁷ See Yu, *From Pirates to Partners*, *supra* note 21, at 209.

²⁶⁸ *Id.*

²⁶⁹ See Eric M. Griffin, *Stop Relying on Uncle Sam! A Proactive Approach to Copyright Protection in the People's Republic of China*, 6 TEX. INTELL. PROP. L.J. 169, 186 (1998). Although somewhat outdated, Mr. Griffin raises an important issue which still applies post-accession.

²⁷⁰ See Strategic Advantage E-Commerce News, *Film Piracy on the Rise* (visited Nov. 21, 2001), available at <http://www.strategicadvantage.com/nwfilmpiracy.html>.

²⁷¹ See *supra* note 19. Copy protection technology includes content scrambling, digital encryption, and Macrovision. *Id.* Macrovision is an encryption technology for videocassettes. *Id.*

²⁷² See Canadian Broadcasting Corporation, *NY to Fight Movie Pirates* (visited Nov. 21, 2001), available at http://www.infoculture.cbc.ca/archives/film/v/film/v_12161998_pirates.html.

²⁷³ See Griffin, *supra* note 269, at 186.

property rights is considered an impediment on development.²⁷⁴ An American mindset must change from one of an almost militaristic approach to Chinese intellectual property rights protections, to one that promotes cooperation.²⁷⁵ Progress for enforcement will not occur overnight: America was once a developing nation and was a rogue nation notorious for pirating British works.²⁷⁶

VII. CONCLUSION

The rule of law is a nascent concept for legal practitioners in China and has been met with skepticism.²⁷⁷ This is based on China's history and culture, which generally distrusts the rules of law over the rules of Confucianism. However, China's role in the WTO at the dawn of the twenty-first century makes it a major player on the global trading stage. The motion picture industry will remain a powerful American cultural force that will have reciprocal benefits for both China and Hollywood alike.

The solution boils down to a proper adherence to a rule of law. Yet, rule of law adherence must be somewhat on China's terms, and not based on Western ideals, because the Chinese approach to copyright protection is fundamentally different than the West's. Any requirement to adhere to a rule of law must reflect China's traditions, culture, and history.²⁷⁸ Some commentators are pessimistic about China's ability to adhere to a rule of law, make the necessary changes in its laws, and create an ambiance for which enforcement of laws can flourish.²⁷⁹ Yet, China has shown a desire to join the global stage and a willingness to play by a different, even foreign, set of rules. This will require China to journey on a tortuous, and even painful, path, as it navigates from an

²⁷⁴ *Id.* (citing Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273, 282 (1991)).

²⁷⁵ See Yu, *From Pirates to Partners*, *supra* note 21, at 183-86 (commenting that American institutions have little knowledge or understanding of the Chinese political institutions and decisionmaking processes, and that American assistance with China will enhance this knowledge and understanding).

²⁷⁶ See Griffin, *supra* note 269, at 187; Peter K. Yu, *Three Stories of Copyright Law in Transition: 19th Century America, 20th Century China, and 21st Century Cyberspace 4-5* (Sept. 17, 2001) (unpublished manuscript, on file with the author).

²⁷⁷ See SHIH, *supra* note 125, at 51.

²⁷⁸ See Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 69, at 69 (criticizing the West for ignoring China's distinctive cultural history and political system in assessing intellectual property rights protection mechanisms).

²⁷⁹ See Palmer, *supra* note 16, at 474 (echoing the sentiments of William Alford that China will not succeed in its efforts to create a rule of law because its leaders are ideologically opposed to the rights which they have been creating). Professor Alford doubts that the creation of laws will, by itself, create lasting changes in China's political landscape. *Id.*

isolated socialist country to a market-oriented, centrally-planned regime.²⁸⁰

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

²⁸⁰ See Taylor, *supra* note 26, at 151 (noting that Chinese culture will continually challenge economic legitimacy while China undergoes social and economic changes).