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Still Dissatisfied after All These Years: Intellectual Property, Post-WTO China, and the Avoidable Cycle of Futility

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STILL DISSATISFIED AFTER ALL THESE YEARS: INTELLECTUAL PROPERTY, POST-WTO CHINA, AND THE AVOIDABLE CYCLE OF FUTILITY

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TABLE OF CONTENTS

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I. INTRODUCTION

Every year, the United States is estimated to lose billions of dollars due to piracy and counterfeiting in China alone. As the *2005 National Trade Estimate Report on Foreign Trade Barriers* stated: "According to some reports, inadequate enforcement has resulted in infringement levels in China that have remained at 90% or above in 2004 for virtually every form of intellectual property, while estimated U.S. losses due to the piracy of copyrighted materials alone range between $2.5 billion and $3.8 billion annually."[1]

Commentators have already widely discussed the piracy and counterfeiting problems in China. Instead of repeating this discussion or challenging the misleading figures supplied by U.S. business groups, this Essay focuses on the recent debate about whether the U.S. administration should file a formal complaint against China with the Dispute Settlement Body of the World Trade Organization (WTO) over inadequate enforcement of intellectual property rights.

Taking a position contrary to some policymakers and business groups, this Essay begins by explaining why the administration should not file a formal complaint against China with the WTO Dispute Settlement Body. It then discusses the consequences of filing such a complaint. It contends that such action is likely to result in a new "cycle of futility," similar to the cycles created by the American intellectual property policy toward China in the 1980s and early 1990s. To avoid these cycles, the Essay highlights four remedial areas on which the administration and the business community should focus. The Essay concludes with three observations that provide insight into the piracy and counterfeiting problems in China and the difficulty in alleviating those problems.

II. THE WTO COMPLAINT

There are at least four reasons why the U.S. administration should not file a formal complaint against China with the WTO Dispute Settlement Body over inadequate enforcement of intellectual property rights. First, although the

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[1] OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2005 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 97 (2005), http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_NTE_Report/asset_upload_file383_7446.pdf.

Agreement on Trade-Related Aspects of Intellectual Property Rights[2] (TRIPs Agreement) stipulates that each WTO member state needs to provide effective intellectual property enforcement, it does not define what constitutes "effective" protection. There is no doubt that a software piracy rate of 90%, as stated in a recent study by the Business Software Alliance, provides strong evidence of ineffective enforcement.[3] However, critics have challenged the accuracy of these figures. As Gary Shapiro, the president of the Consumer Electronics Association, described in *The Economist* magazine, the list of figures was "[a]bsurd on its face" and "patently obscene."[4] Because the figures were controversial and were supplied by a self-interested trade group, the WTO Dispute Settlement Panel is very unlikely to take them at face value.

Even if the panel could come up with a figure that can be used to determine "effective" enforcement, the United States might ultimately lack sufficient non-anecdotal evidence to show that China has failed its obligations. As of this writing, U.S. companies have been uncooperative in supplying to the United States Trade Representative (USTR) piracy and counterfeiting data in China. Small and midsize companies, in particular, remain reluctant to disclose information, lest they wreck their hard-earned *guanxi* (personal connections) and face political or business repercussions. While some disagree with the administration's WTO-based strategy, others find it wise to free ride on the enforcement efforts of their competitors and partners. Indeed, a WTO action would be a win-win for companies that choose to stay out of the conflict: If the United States prevails, they will benefit from the ruling. If the United States fails, however, they will have demonstrated loyalty to their Chinese connections throughout the process.

Second, even if the United States were able to amass the needed evidence, the WTO process poses structural challenges to a general complaint about inadequate intellectual property enforcement. Virtually all of the existing WTO cases focus on the nonimplementation of specific provisions, rather than a lack of general enforcement. The closest cases were those filed by the United States against Greece and the European Communities, in which the

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[2] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1197 (1994) [hereinafter TRIPs Agreement].

[3] *See* BUS. SOFTWARE ALLIANCE & INT'L DATA CORP., SECOND ANNUAL BSA AND IDC GLOBAL SOFTWARE PIRACY STUDY 3 (2005), http://www.bsa.org/globalstudy/upload/2005-Global-Study-English.pdf.

[4] *Software Piracy: BSA or Just BS?*, ECONOMIST, May 21, 2005, at 93.

United States claimed that Greece violated articles 41 and 61 of the TRIPs Agreement by not providing effective enforcement of intellectual property rights.[5] The cases were eventually settled.

If the United States challenges China on nonimplementation grounds, it is likely to be very difficult, as most of the laws required under the TRIPs Agreement are already on the books. In the wake of WTO accession, China revamped its copyright, patent, and trademark laws while introducing new implementing regulations, administrative measures, and judicial interpretations. It also made many substantial revisions to its intellectual property laws in response to agreements signed with the United States in the early 1990s.

If the United States goes after China on nonenforcement grounds, however, the TRIPs Agreement might even be on China's side. Under article 41(5) of the Agreement, a WTO member state is not required to devote more resources to intellectual property enforcement than to other areas of law enforcement.[6] If China were able to show that their enforcement problems with piracy and counterfeiting were no more excessive than their problems with, say, tax collection (which are very serious), China would be likely to prevail. It is hard to imagine any country putting intellectual property protection ahead of tax collection. Nor does the WTO require it to do so.

To some extent, the intellectual property problems in China are not that different from those experienced in the United States and other developed countries, which have been struggling with massive unauthorized copying problems since the emergence of Napster and other file-sharing technologies. In the past two years, the recording and movie industries have filed many rounds of lawsuits against individuals distributing copyrighted works illegally via peer-to-peer networks. The file-sharing problems are so important that courts around the world are now inundated with cases addressing secondary copyright liability.

At some point, we just need to recognize that intellectual property, due to its abstract nature, is generally treated differently from physical property. It does not matter whether it is in China or in the United States. Even in major U.S. cities, it is not uncommon to notice street vendors selling pirated CDs and DVDs in the presence of police officers. Obviously, the officers are not

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[5] Request for Constitutions by the United States, *Greece—Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, WT/DS125/1 (May 7, 1998); Request for Consultations by the United States, *European Communities—Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, WT/DS124/1 (May 7, 1998).

[6] *See* TRIPs Agreement, *supra* note 2, art. 41(5).

buying the fake products. However, the fact that they have no problems—moral or legal—with the street vending activities has greatly weakened the United States' case against China.[7] Moreover, many intellectual property rights holders have complained about the difficulty of convincing federal prosecutors to take piracy and counterfeiting cases seriously. Some district attorneys' offices, they maintain, just refuse to take those cases.

Third, the WTO dispute settlement process does not guarantee victory for the United States. For example, in June 2000, the United States lost its WTO dispute with the European Union over section 110(5) of the U.S. Copyright Act, which enables restaurants and small establishments to play copyrighted music without compensating copyright holders.[8] In another ruling, although the WTO Dispute Settlement Panel upheld sections 301-310 of the Trade Act of 1974, it curtailed the ability of the U.S. administration to pursue retaliatory actions before exhausting all remedies permissible under the WTO rules.[9] Most recently, the Caribbean islands of Antigua and Barbuda successfully challenged U.S. laws on Internet and telephone gambling.[10]

To be certain, the United States and the European Union dominated the dispute settlement process in the first few years of the WTO's existence. Indeed, many of the United States' losses came from its archrival, the European Communities. However, in recent years, less developed countries have had more frequent use of the WTO process. If the WTO rules are on their side, even tiny Caribbean islands can prevail over a trading giant like the United States. We could only imagine what it would be like when an emerging trading power like China decides to face off with the United States.

As in most WTO cases, it is unlikely that either China or the United States will win the entire case. Because of the customary length and detail of the WTO panel reports, both the winning and losing parties are likely to score some important points. This works in China's favor: Even if it loses on a majority of claims, it would still score some wins it can use in future WTO litigation. But if the United States loses, any minor points it scores will not be

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[7] Arguably, state police officers can claim that it is not within their jurisdiction to combat the federal crimes of commercial piracy and counterfeiting. However, their behavior remains troubling and greatly weakens the moral strength of the United States' arguments against China.

[8] *See* Panel Report, *United States—Section 110(5) of the U.S. Copyright Act*, WT/DS/160/R (June 15, 2000).

[9] *See* Panel Report, *United States—Sections 301-310 of the Trade Act of 1974*, WT/DS152/R (Dec. 22, 1999).

[10] *See* Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (Nov. 10, 2004).

sufficient to compensate for the symbolic effect of losing the first WTO case against China. Such a loss would also have a devastating impact that would spill over into other areas of international trade.

Finally, the WTO dispute settlement process, if used improperly, will hurt the United States' long-term interests in promoting international trade. Because China is currently undergoing a transition to full compliance with WTO rules, well-conceived challenges are needed to provide guidance. Indeed, foreign pushes are sometimes needed to fuel China's intellectual property reforms, and WTO challenges can help maximize the benefits created by China's accession to the WTO by breaking up local monopolies and entrenched piracy interests. If the right complaint is brought, the United States might even be able to enlist the support of local companies, which are equally concerned about the anticompetitive behavior of these monopolies and entrenched players.

China spent fifteen years negotiating exhaustively for its entry into the WTO. While policymakers and commentators initially expressed reservations about the country's joining the international trading body, most of them, by now, have agreed that China's accession to the WTO will benefit the international trading system in the long run. It is, therefore, important that the U.S. administration be patient and provide guidance as China learns to become a respectable member of the international trading body. A bad WTO case will not only be unhelpful in liberating trade, but could potentially backfire on the entire international community. It would be worse than not bringing the case at all.

III. THE NEW CYCLE OF FUTILITY

The recent debate about intellectual property protection in China is reminiscent of the debate American policymakers had a decade ago. In the 1980s, the United States had a significant trade deficit against China, as it does today. Because intellectual property-based goods are among the key exports that could help reduce the deficit, the first Bush and Clinton administrations sought to induce China to strengthen its intellectual property protection by threatening the country with economic sanctions, trade wars, non-renewal of most-favored-nation status, and opposition to entry into the WTO.

That policy had been largely ineffective.[11] While it helped develop a new intellectual property system and the accompanying enforcement infrastructure, it had become largely futile once those goals were achieved. In fact, it had wasted the United States' hard-earned political capital that could have been spent on other difficult cross-border issues, such as terrorism, nuclear nonproliferation, illegal arms sales, environmental degradation, drug trafficking, refugees, illegal immigration, and corruption. The policy also jeopardized the United States' longstanding interests in promoting free trade, human rights, and the rule of law.

Even worse, the policy had resulted in what I have termed the "cycle of futility"—a stalemate that advanced the interests of neither China nor the United States. That cycle went as follows: The United States began by threatening China with trade sanctions (often with an ancillary threat of nonrenewal of China's most-favored-nation status). China responded with threats of retaliatory sanctions of a similar amount. After several months of negotiations, both countries agreed to an eleventh-hour compromise that usually led to a written document. While intellectual property protection improved during the first few months immediately following the agreements, piracy and counterfeiting problems worsened once international attention was diverted. Within a short period of time, American businesses again complained to the U.S. government, and the cycle repeated itself.

The first cycle began when the United States placed China on the Priority Watch List in the late 1980s. This cycle resulted in the 1992 Memorandum of Understanding Between China (PRC) and the United States on the Protection of Intellectual Property (1992 MOU),[12] which revamped the Chinese intellectual property system. The second cycle emerged two years later, leading eventually to the 1995 Agreement Regarding Intellectual Property Rights (1995 Agreement),[13] which included a detailed action plan that laid the foundation of the current enforcement infrastructure. Notwithstanding this action plan and the "special enforcement" efforts taken by the Chinese authorities, a third cycle emerged in less than a year. This time, China and the United States were unable to reach a new agreement. Instead, they agreed to a document that mostly reaffirmed China's commitments previously made

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[11] *See* Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131, 136-54 (2000).

[12] Memorandum of Understanding Between China (PRC) and the United States on the Protection of Intellectual Property, P.R.C.-U.S., Jan. 17, 1992, 34 I.L.M. 677.

[13] Agreement Regarding Intellectual Property Rights, P.R.C.-U.S., Feb. 26, 1995, 34 I.L.M. 881.

under the 1995 Agreement while adding only minor provisions to save face for both parties.[14]

There is no doubt that these cycles and the repeated negotiation sessions had raised the awareness of intellectual property rights among the Chinese. However, the repetition had cost the U.S. government credibility and the support of its business constituency, which increasingly criticized the government for having a counterproductive U.S.-China bilateral trade policy. Even worse, the policy had fostered resentment among the Chinese and had made American ideas and institutions unappealing at a time when transition countries were busy modeling their laws, institutions, and policies after the United States.

Today, the U.S. administration is in a similar situation. Although the WTO rules prevent the United States from effectively threatening China with unilateral sanctions, the administration could create a new cycle of futility by threatening to take, or by taking, formal WTO action on a weak case of inadequate intellectual property enforcement. This new cycle of futility could develop in one of the following four scenarios.

Scenario One. The United States threatens to file a formal complaint with the WTO Dispute Settlement Body. China responds by undertaking short-term "special enforcement" of intellectual property rights. While the crackdown efforts initially satisfy American businesses, the piracy and counterfeiting problems soon return. Businesses again complain to the USTR, and the cycle repeats itself.

Scenario Two. The United States files a complaint with the WTO Dispute Settlement Body. A formal consultation process begins, and China negotiates with the United States. During the negotiations, China undertakes short-term "special enforcement" of intellectual property rights that satisfies American businesses. Because the United States does not have a strong case, it quickly settles the dispute, lest a bad WTO precedent be established. Although the piracy and counterfeiting problems initially subside, they return a few months after the settlement. American businesses again complain to the USTR, and the cycle repeats itself.

Scenario Three. The United States files a complaint with the WTO Dispute Settlement Body. Although China negotiates with the United States and has undertaken several large-scale crackdowns on piracy and counterfeiting, the

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[14] *See* People's Republic of China Implementation of the 1995 Intellectual Property Rights Agreement, P.R.C.-U.S., June 17, 1996, *available at* http://www.tcc.mac.doc.gov/cgi-bin/doit.cgi?204:64:4f93f3ace2c666f04018d7e9716bff4c50cf35130b0d6def7a7efc473989c29b:190.

United States is not satisfied with the results. It requests the establishment of the dispute settlement panel. The established panel finds for the United States on most issues concerning intellectual property enforcement. However, it also allows China to score some important points on public health and public interests safeguards, as well as on the limitations of the enforcement provisions of the TRIPs Agreement. China appeals the panel decision to the Appellate Body, which upholds some of the findings in the lower decision while rejecting the others. Eager to demonstrate its intention to be a respectful member of the WTO, China quickly implements the decision of the Appellate Body. Although intellectual property protection improves initially, piracy and counterfeiting become rampant again a few months afterwards. American businesses complain to the USTR, and the cycle repeats itself.

Scenario Four. The United States files a complaint with the WTO Dispute Settlement Body, which establishes a dispute settlement panel. The panel finds for the United States, and China appeals to the Appellate Body. After losing the appeal, China and the United States agree to pursue arbitration to determine the penalty award. Although the panel determines the award, China follows the precedent of not paying the penalty as set by the United States in *United States—Section 110(5) of the U.S. Copyright Act.*[15] After many failed negotiations, the United States files another complaint with the WTO Dispute Settlement Body. This cycle repeats itself.

Of course, there are many other possible permutations of this new cycle of futility. Whatever the permutations are, the message is clear: A strategy that does not result in sustained intellectual property protection will be ineffective. It does not matter whether China is a WTO member or not. The cycle appeared in the 1990s, just as it will appear today. In both instances, the dispute would end up in a stalemate that advances the interests of neither country. While the United States may have temporary relief, the short-term improvements in the intellectual property area are insufficient to allow its businesses to make long-term market decisions.

IV. HOW TO AVOID THE CYCLE OF FUTILITY?

To provide sustained intellectual property protection in China, the U.S. administration and the American business community need to focus on four remedial areas.[16] The first area, obviously, covers laws and enforcement

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[15] *See* Panel Report, *supra* note 8.

[16] *See* Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 428-37 (2003).

mechanisms, which were the primary focus of most of the administration's past bilateral efforts. If the 1992 Memorandum of Understanding and the 1995 Agreement are evaluated for effectiveness, setting up the legal regime and the accompanying enforcement infrastructure were among their major accomplishments.

The second area is education. Many Chinese are unfamiliar with intellectual property rights and the benefits of such an "alien" concept. The administration and the business community therefore need to ensure the Chinese understand what intellectual property is and how it is protected. They also need to show them the benefits of intellectual property protection and the disadvantages of not having such protection.

Notwithstanding their importance, educational efforts are often ignored due to the short-sightedness of policymakers and business executives. American presidents are limited to two four-year terms, and most CEOs of American companies do not even last that long. As a result, both the government and the business community are very reluctant to undertake long-term education efforts that will not yield immediate results. As policymakers and business executives would say, quoting John Keynes, "In the long run, we are all dead. Why would we care?"[17]

Fortunately, there has been gradual improvement in awareness among the Chinese of intellectual property rights. If you go to China today, there is a good chance that a taxi driver could tell you what *zhishi chanquan* (or intellectual property) is.[18] This was not the case a decade ago. There is still no guarantee that people will respect intellectual property rights once they know what those rights are and why they should protect them. However, it is quite certain that people will *not* respect intellectual property rights if they do not know what intellectual property is and if they believe those rights will hurt them, rather than help them.

The third area concerns the development of local stakeholders in the form of either indigenous industries—such as a local computer industry or a local pharmaceutical industry—or local artists and inventors. Even though the stockholders will benefit the Chinese economy, the U.S. administration and the business community need to help these local industries foster their developments. They are particularly important, because they will provide the internal push for legal reforms and will protect the reformist leaders from being criticized for kowtowing to foreign interests. They also may help hold the

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[17] *Cf.* JOHN M. KEYNES, MONETARY REFORM 88 (1924) ("In the long run, we are all dead.").

[18] *Zhishi chanquan* is the Chinese translation of *intellectual property rights*.

local authorities accountable should the authorities ignore the piracy and counterfeiting problems—or, worse, participate in such illegal activities.

Today, there are a number of emerging local industries in China, focusing on such areas as entertainment, software, biotechnology, and semiconductors. Because of these booming industries, future Chinese intellectual property policies are likely to be very interesting. Indeed, China is likely to be "schizophrenic" over those policies.[19] On the one hand, because of the booming indigenous industries, it wants to have stronger protection of movies, computer programs, biotechnology, and computer chips. On the other hand, it wants to limit protection of pharmaceuticals, chemicals, and foodstuffs, due to its large population, concerns about public health issues, and heavy reliance on agriculture.

The final area focuses on the need for the administration and the business community need to provide the Chinese with legitimate alternatives—or at least to help develop an environment that is conducive to the development of these alternatives. This is particularly true in areas where basic products are needed, but unaffordable by the local people. Education, scientific research, and public health are among the prime examples.

Although we might have questioned a decade ago why a Chinese parent would photocopy a textbook for his or her child when the book was sold for only US$20, their actions became understandable when we took into account the fact that many Chinese made less than US$40 per month. After all, very few Americans would be willing to spend half of their monthly salary on a textbook, no matter how important it was.

There is no doubt that times have changed, and the economic conditions in China are much better today than they were a decade ago. However, the Chinese still have very limited disposable income, and Western prices remain quite high for the local people, especially when their purchasing power is taken into consideration. Even more problematic, the prices charged in China are sometimes higher than those charged in the United States—partly due to a lack of economy of scale and partly due to the rights holders' eagerness to use higher prices to compensate for the piracy and counterfeiting losses they suffered in China. In those situations, providing legitimate alternatives is very important.

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[19] *See* Peter K. Yu, *Intellectual Property and the Information Ecosystem*, 2005 MICH. ST. L. REV. 1, 9; Peter K. Yu, *The Trust and Distrust of Intellectual Property Rights*, 16 REVUE QUEBECOISE DE DROIT INT'L (forthcoming 2005).

Hollywood understands the importance of these alternatives. Most of the movie studios in China now release low-priced audiovisual products dubbed in the local language with added foreign-language subtitles. On the one hand, these bargain products provide an affordable alternative that accommodates local needs. On the other hand, by dubbing the original products in the local language or including subtitles, the studios successfully make the discounted products unappealing to consumers in the English-speaking world. This strategy, therefore, prevents the products from entering other countries as parallel imports.

Skeptics may still question why the Chinese would buy higher-priced legitimate copies when the pirated versions are sold for only half of the discount price. The answer is simple: The customers are getting a better product—or, at least, they are certain that they are getting the officially released version of the product. If you get a pirated DVD around the time of the theatrical release, there is a good chance that the movie was taken using a camcorder inside a theater. The sound and visual quality is low, the images are moving around, and you can hear the conversation or laughter of people sitting nearby. Even if the DVD version of the movie has been officially released, there is no guarantee that you will be purchasing the high-quality pirated version duped from the original disc, as compared to a highly-compressed low-quality copy—or worse, a blank disc. The fact that you are unlikely to see the vendor again makes it even more difficult for you to protect yourself against fraudulent activities.

As the Chinese have more disposable income, they are increasingly unlikely to be satisfied with this type of low-quality entertainment. Instead, they will be eager to buy higher-priced legitimate goods. Indeed, some commentators have suggested that China's accession to the WTO will increase the local living standards to the point that the Chinese will become interested in buying genuine and luxury products. As forecasted by Ernst & Young, the Chinese luxury market "is expected to grow 20%, annually until 2008 and then 10% annually until 2015, when sales are expected to exceed US$11.5 billion."[20]

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[20] ERNST & YOUNG, CHINA: THE NEW LAP OF LUXURY (2005), http://www.ey.com/global/download.nsf/China_E/050914_Report_E/$file/China-The%20New%20Lap%20of%20Luxury_Eng%20(Final).pdf.

V. CLOSING OBSERVATIONS

Let me close this Essay with three observations. First, there are many causes of piracy and counterfeiting in China, and it is a mistake to focus only on the leaders' lack of political will. Commentators and pundits have often criticized the Chinese authorities for their lack of political will to crack down on piracy and counterfeiting activities. As one policy analyst put it,

> [i]t is laughable to hear excuses from Beijing that they can't control the 50 pirate CD factories. If they were turning out thousands of copies of the BBC documentary on the Tiananmen Square protest—rather than bootleg copies of "The Lion King"—the factory managers would be sharing a cell with other dissidents in a heartbeat.[21]

However, the situation is more complicated than these commentators have acknowledged. It is naive to believe that governments will consider the protection of foreign interests a top priority without a related immediate foreign threat. Even with such a threat, governments are unlikely to provide continuing protection when the threat is removed. Indeed, if acclaimed Chinese director Zhang Yimou were to complain about the widespread unauthorized downloading of his movies by American Internet users, the U.S. authorities would be unlikely to search the suspects' homes for unauthorized copies the same way they had searched the homes of suspected terrorists, which the administration had considered a significant national security threat.

Moreover, as I discussed above, many issues are considered of a higher priority than intellectual property protection. Two issues that have dominated the U.S.-China debate thus far are the currency peg and intellectual property protection. What was seldom mentioned, and yet lurking in the background, is nuclear nonproliferation—in particular, China's role in the nuclear dispute between North Korea and the United States.[22] If the U.S. government only has the political capital to take action on one issue, I wonder whether intellectual property protection would trump the other two issues.

Second, the legal system is not the only option available to protect intellectual assets, and the litigious approach taken by many American

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[21] James Shinn, *The China Crunch*, WASH. POST, Feb. 18, 1996, at C1.

[22] *See* Michael Hirsh & Melinda Lin, *North Korea Hold 'em*, NEWSWEEK, Oct. 3, 2005, at 42 (noting Beijing's critical role in the six-party talks over North Korea's nuclear arms program).

businesses may not be the most effective strategy in every case.[23] For example, an attorney hired by a Western food manufacturer to combat counterfeits will find consumer protection laws just as effective a remedy as intellectual property laws. While commentators are quick to criticize the Communist system for contributing to the lack of respect for intellectual property rights, they sometimes overlook the significant emphasis the system has placed on the protection of the people's well-being. Understanding this emphasis could benefit many American companies.

H.J. Heinz Company provides an illustrative example.[24] When the Chinese authorities raided the factories that produced counterfeit Heinz baby food, the company brought with it reporters and a camera crew from the local media. In doing so, it not only exposed the counterfeiters and created evidence for the authorities, but also showed the local community the shoddy quality of the fake products and the unsanitary facilities at the factories. Once consumers knew how unhealthy and dangerous these products were to little children, they were reluctant to purchase the products. As a result, the counterfeiting problem was greatly reduced after a series of well-publicized raids.

Foreign businesses sometimes forget that Chinese officials have to wear many hats and juggle many different responsibilities. This is especially true for those working outside the major cities, as they often have to deal with not only intellectual property issues, but also crime, public health, unemployment, social welfare, and other economic problems. By focusing on public health, Heinz successfully converted a foreign problem into a local one, thereby convincing the local officials to crack down on the problem.

Compared to governments, these businesses are in a stronger position to combat piracy and counterfeiting in China, as they need only worry about protecting themselves. If they are able to take a proactive approach that drives offenders to target their competitors instead, they may not need to worry about the overarching problem at all. This is similar to putting locks on a house in a crime-infested neighborhood. Governments, in comparison, have a much more difficult job. Just like the police or the legislature, they need to think about the overall protection for the constituents of the entire community—in this case, all of the American businesses in China.

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[23] For the discussion of alternative strategies used to protect American intellectual assets, see generally Peter K. Yu, From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China (2005) (unpublished manuscript, on file with author).

[24] *See* John Donaldson & Rebecca Weiner, *Swashbuckling the Pirates: A Communications-Based Approach to IPR Protection in China*, *in* CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE 409, 426 (Mark A. Cohen et al. eds., 1999).

Finally, the piracy and counterfeiting problems in China are very similar to the digital piracy problem on the Internet, and what we learn about the latter may provide insight into the former, and vice versa. When I compare intellectual property piracy in China to the piracy in the United States in the eighteenth and nineteenth centuries, people always respond by noting the unfairness of the comparison. As they contend, piracy, like slavery, was a past phenomenon in the United States.[25] The fact that the country once condoned slavery does not mean that it should not complain about human trafficking or serious violations of human rights today.

However, when I mention MP3 piracy, people usually have a more difficult time responding to the comparison. Oftentimes, they remark that MP3 piracy is different from piracy in China, because it involves people with a Net culture who abide by different social norms. If deviations in social norms provide justification for nonprotection of intellectual property rights, we have to wonder why we cannot make the same argument for China, which historically did not abide by the Western norms of intellectual property protection.

To be fair, the piracy problem in China is not the same as the unauthorized copying problem on the Internet. While the former largely focuses on commercial copying, the latter consists primarily of private copying. However, U.S. courts have been reluctant to embrace this public-private, commercial-noncommercial distinction. In fact, the United States District Court for the Northern District of California stated clearly in *A&M Records, Inc. v. Napster, Inc.* that the use of a file-sharing service could not be considered private use or "personal use in the traditional sense," partly because the users reap economic benefits by "get[ting] for free something they would ordinarily have to buy."[26] Commentators have widely criticized the court's interpretation of the word "commercial." However, the court's reasoning seems to suggest that there are remarkable similarities between the Chinese piracy problem and the unauthorized copying problem on the Internet.

Two years ago, when the recording industry began actively suing individual end-users whom it suspected of illegally trading music,[27] some commentators and members of the public suggested that the industry should go after China instead. This suggestion troubles me greatly, because if we believe that the

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[25] *See* Peter K. Yu, *Four Common Misconceptions About Copyright Piracy*, 26 LOY. L.A. INT'L & COMP. L. REV. 127, 138-40 (2003) (challenging the common misconception that copyright piracy is a past phenomenon for technologically-advanced countries).

[26] 114 F. Supp. 2d 896, 912 (N.D. Cal. 2000).

[27] *See generally* Peter K. Yu, *The Escalating Copyright Wars*, 32 HOFSTRA L. REV. 907 (2004); Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653 (2005).

industry should not target American file-sharers due to their lack of understanding or belief in the copyright system, we should do the same with respect to those Chinese who might have similar difficulties. Asking the industry, or the U.S. Government, to subject a foreign country to treatment that we oppose happening to ourselves would make a hypocritical foreign intellectual property policy.

VI. CONCLUSION

The Chinese intellectual property system did not re-emerge until the early 1980s. The United States, by contrast, has a well-established system with more than two centuries of development. Yet, despite this centuries-old system, American individuals have had great difficulty understanding why it is illegal to reproduce and distribute music online without the copyright holders' authorization. We could only imagine how much more difficult it is for the Chinese to understand why they should not reproduce and distribute intellectual-property-protected works without the rights holders' authorization. China needs more time, and twenty-five years are just not enough.