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Three Questions that Will Make You Rethink the U.S.-China Intellectual Property Debate

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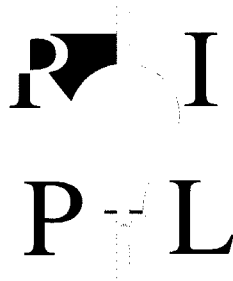
Recommended Citation

Peter K. Yu, *Three Questions that Will Make You Rethink the U.S.-China Intellectual Property Debate*, 7 J. Marshall Rev. Intell. Prop. L. 412 (2008).

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THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



THREE QUESTIONS THAT WILL MAKE YOU RETHINK THE U.S.-CHINA INTELLECTUAL PROPERTY DEBATE

PETER K. YU

ABSTRACT

Commentators have attributed China's piracy and counterfeiting problems to the lack of political will on the part of Chinese authorities. They have also cited the many political, social, economic, cultural, judicial, and technological problems that have arisen as a result of the country's rapid economic transformation and accession to the WTO. This provocative essay advances a third explanation. It argues that the failure to resolve piracy and counterfeiting problems in China can be partly attributed to the lack of political will on the part of U.S. policymakers and the American public to put intellectual property protection at the very top of the U.S.-China agenda. The essay illustrates the argument by examining three questions that the author has asked when he engages in debate with U.S. scholars and policymakers over intellectual property protection in China. The essay underscores the policy complexities involved in the U.S.-China intellectual property debate.

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*Cite as Peter K. Yu, Three Questions That Will Make You Rethink the
U.S.-China Intellectual Property Debate, 7 J. MARSHALL REV. INTELL.
PROP. L. 412 (2008).*

THREE QUESTIONS THAT WILL MAKE YOU RETHINK THE U.S.-CHINA INTELLECTUAL PROPERTY DEBATE

PETER K. YU*

INTRODUCTION

The debate on China's piracy and counterfeiting problems has been ongoing for more than two decades. However, in the past few years, this debate has taken on a new sense of urgency and significance. In August 2008, the City of Beijing will host the Summer Olympic Games.¹ Two years later, the 2010 World Expo will be held in the City of Shanghai.² In addition, two World Trade Organization ("WTO") dispute settlement panels were recently established to resolve disputes between China and the United States over inadequate enforcement of intellectual property rights³ and inadequate market access to U.S. media products.⁴ All of these developments, of course, take place against a background of China's rise to emerging world power status.⁵

* Copyright © 2008 Peter K. Yu. Kern Family Chair in Intellectual Property Law & Director, Intellectual Property Law Center, Drake University Law School; Wenlan Scholar Chair Professor, Zhongnan University of Economics and Law; Visiting Professor of Law, Faculty of Law, University of Hong Kong. Ideas in this Essay have been presented at the 65th Anniversary of the Center for Intellectual Property Law at John Marshall Law School and as part of the Law School's Distinguished Professor Speakers Series. They have also been explored at the 14th and 15th Fordham Annual International Intellectual Property and Policy Conferences at Fordham University School of Law and the 2008 Scholarly Symposia Series at the University of Dayton School of Law. The Author would like to thank Richard Gruner, Hugh Hansen, Kelly Henrici, and Doris Long, for their kind invitations; and Jonathan Soike for excellent research and editorial assistance.

** Available at www.jmripl.com.

¹ For the author's earlier discussion of intellectual property protection in China in relation to the Beijing Olympics, see Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, 55 AM. U. L. REV. 901, 991-99 (2006) [hereinafter Yu, *From Pirates to Partners II*]. For other discussions, see Jeffrey F. Levine, *A Golden Opportunity for Global Acceptance? How Hosting the Olympic Games Impacts a Nation's Economy and Intellectual Property Rights with a Focus on the Right of Publicity*, 15 SPORTS LAW. J. 245 (2008); Jennifer L. Donatuti, Note, *Can China Protect the Olympics, or Should the Olympics Be Protected from China?*, 15 J. INTELL. PROP. L. 203 (2007); Stacey H. Wang, Note, *Great Olympics, New China: Intellectual Property Enforcement Steps Up to the Mark*, 27 LOY. L.A. INT'L & COMP. L. REV. 291 (2005).

² See Yu, *From Pirates to Partners II*, *supra* note 1, at 999 (discussing intellectual property protection in China in relation to the 2010 World Expo in Shanghai).

³ Request for the Establishment of a Panel by the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/7 (Aug. 21, 2007) [hereinafter DS 362 Panel Request].

⁴ Request for the Establishment of a Panel by the United States, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/5 (Oct. 11, 2007) [hereinafter DS 363 Panel Request].

⁵ For discussions of China's rise to emerging world power status, see, for example, JASPER BECKER, *DRAGON RISING: AN INSIDE LOOK AT CHINA TODAY* (2006); C. FRED BERGSTEN ET AL., *CHINA: THE BALANCE SHEET: WHAT THE WORLD NEEDS TO KNOW NOW ABOUT THE EMERGING SUPERPOWER* (2006); *CHINA'S CENTURY: THE AWAKENING OF THE NEXT ECONOMIC POWERHOUSE* (Laurence J. Brahm ed., 2001); JAMES KYNGE, *CHINA SHAKES THE WORLD: A TITAN'S RISE AND TROUBLED FUTURE—AND THE CHALLENGE FOR AMERICA* (2006); ODED SHENKAR, *THE CHINESE*

Although the Olympics, the World Expo, and the two WTO dispute settlement panels all constitute new developments in the U.S.-China intellectual property debate, the existing debate is not that different from the debate in the late 1990s when I began studying intellectual property protection in China. While some commentators have attributed China's piracy and counterfeiting problems to the lack of political will on the part of Chinese authorities,⁶ others have cited the many political, social, economic, cultural, judicial, and technological problems that have arisen as a result of the country's rapid economic transformation and accession to the WTO.⁷

This Essay, however, advances a different explanation, which I briefly touched upon in previous writings. It argues that the failure to resolve piracy and counterfeiting problems in China can be partly attributed to the lack of political will on the part of U.S. policymakers and the American public to put intellectual property protection at the very top of the U.S.-China agenda.⁸ In other words, *it is not only the Chinese who lack political will, as many critics have claimed, but the Americans as well.* To illustrate this argument, this Essay examines three questions I have asked when I engage in debate with U.S. scholars and policymakers over intellectual property protection in China. It is the hope that the ensuing discussion will underscore the policy complexities involved in the U.S.-China intellectual property debate.

CENTURY: THE RISING CHINESE ECONOMY AND ITS IMPACT ON THE GLOBAL ECONOMY, THE BALANCE OF POWER, AND YOUR JOB (2005).

⁶ See Peter K. Yu, *Still Dissatisfied After All These Years: Intellectual Property, Post-WTO China, and the Avoidable Cycle of Futility*, 34 GA. J. INT'L & COMP. L. 143, 155 (2005) (discussing the common criticism that Chinese authorities lack political will).

⁷ For discussions of the ramifications for China's entry into the WTO, see generally GORDON G. CHANG, *THE COMING COLLAPSE OF CHINA* (2001); NICHOLAS R. LARDY, *INTEGRATING CHINA INTO THE GLOBAL ECONOMY* (2002); SUPACHAI PANITCHPAKDI & MARK CLIFFORD, *CHINA AND THE WTO: CHANGING CHINA, CHANGING WORLD TRADE* (2002); Symposium, *China and the WTO: Progress, Perils, and Prospects*, 17 COLUM. J. ASIAN L. 1 (2003).

⁸ As Timothy Trainer reminded me, the failure to resolve piracy and counterfeiting problems in China can also be attributed to the lack of *corporate* will. Indeed, many rights holders seem to be playing both sides of the game. While they heavily criticize China for its lack of respect for intellectual property rights, they remain reluctant to provide information to the U.S. government concerning China's lack of compliance with its WTO commitments—partly out of fear that taking political action would hurt their bottom line. See Yu, *From Pirates to Partners II*, *supra* note 1, at 929–30. Some rights holders even consider piracy losses as promotional expenses that are needed to capture an emerging market. See *id.* at 982. As Microsoft's founder Bill Gates famously noted on PBS in an exchange with Warren Buffett, chairman of Berkshire Hathaway Inc.:

Although about three million computers get sold every year in China, people don't pay for the software. Someday they will, though. And as long as they're going to steal it, we want them to steal ours. They'll get sort of addicted, and then we'll somehow figure out how to collect sometime in the next decade.

Brent Schlender et al., *The Bill & Warren Show*, FORTUNE, July 20, 1998, at 48.

I. QUESTION 1

Q: If China promised to honor one of the United States' many requests for very dramatic improvements in a short period of time, would the United States focus that request on nuclear nonproliferation, currency exchange, or intellectual property protection?

A: Probably nuclear nonproliferation or currency exchange. I don't think it would be intellectual property protection.

In a recent symposium celebrating the sixty-fifth anniversary of the Center for Intellectual Property Law at John Marshall Law School, Ralph Oman, the former Register of Copyrights, shared with the participants his analysis of the piracy problem in China.⁹ As he recalled, before China resumed sovereignty over Hong Kong, British diplomats who were stationed in Hong Kong used to say, "China could take Hong Kong with a telephone call."¹⁰ If those diplomats were right, Oman argued, the lack of intellectual property protection could also be only a phone call away.¹¹ As he maintained, "The same is true about copyright piracy. China could end piracy with a telephone call. All that is needed is the political willpower."¹²

Unfortunately, those diplomats were not correct, and the piracy and counterfeiting problems in China are much more complicated—in terms of their relation to both domestic Chinese politics and the U.S. foreign policy.¹³ Even if they were right, it is unclear whether the United States would necessarily ask for improvements in the intellectual property area if it were allowed only *one* phone call. In fact, this fictitious call would be more likely to focus on nuclear nonproliferation or currency exchange, as the question suggests. If the call was made last year, the discussion of tainted foods and pharmaceuticals might even precede that of intellectual property protection.¹⁴

In the past few years since I started asking this particular question, I have yet to meet a U.S. policymaker who picks "intellectual property protection" over the other two choices.¹⁵ As one former government official candidly told me, intellectual

⁹ Ralph Oman, *Copyright Piracy in China*, 5 J. MARSHALL REV. INTELL. PROP. L. 583 (2006).

¹⁰ *Id.* at 587.

¹¹ *See id.*

¹² *Id.*

¹³ For earlier discussions of the complexity of the piracy and counterfeiting problems in China, see generally Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131 (2000); Yu, *From Pirates to Partners II*, *supra* note 1; Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle*, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS PLUS ERA 173 (Daniel J. Gervais ed., 2007) [hereinafter Yu, *The China Puzzle*].

¹⁴ *See* Steven R. Weisman, *Food Safety Joins Issues at U.S.-China Talks*, N.Y. TIMES, May 23, 2007, at C3 (reporting that the safety of Chinese food exports became a new concern in U.S.-China talks).

¹⁵ The answers from policymakers contrast interestingly with that of a representative of a leading nongovernmental organization. When asked the same question, Sophie Richardson, the Asia Advocacy Director of the Human Rights Watch, responded, if China could successfully resolve its piracy and counterfeiting problems, it likely would have made improvements in many other areas. She therefore would pick intellectual property protection over the other two choices. Interview with Sophie Richardson, Human Rights Watch, in Charlottesville, Va. (Mar. 27, 2008).

property protection is always “at the top of the second list.” If that is the case, one has to imagine how persuasive U.S. government officials were, are, or will be when they negotiate with their Chinese counterparts. After all, both sides understand full well the limitations of the intellectual property discussions and the place of those discussions within the larger U.S.-China agenda.

The preference by U.S. policymakers for nuclear nonproliferation to stronger intellectual property protection is easy to understand. Nuclear nonproliferation has always been a major issue in the U.S. foreign policy, and most government officials, including those from China and the United States, consider national security to be of utmost importance.¹⁶ There is also no denial that China plays a very important role in the nuclear nonproliferation debate. China has military capabilities that allow it to sell nuclear weapons and other weapons of mass destruction to countries that are hostile to the United States.¹⁷ China is also “a permanent member of the U.N. Security Council, with veto power over all binding U.N. actions.”¹⁸ With respect to countries that are interested in developing nuclear weapons, China was instrumental in bringing North Korea to the Six Party talks, which have significantly relieved international tension caused by North Korea’s active nuclear weapons program.¹⁹ Most recently, China reportedly has also “provid[ed] the United Nations with intelligence on Iran’s efforts to acquire nuclear technology.”²⁰

However, not all U.S. policymakers would pick nuclear nonproliferation as an answer to this question. Many, for example, consider it equally, if not more, important to explore trade issues within the U.S.-China agenda. Those who pick currency exchange over nuclear nonproliferation are likely to subscribe to the belief that economic development will hold the key to China’s future political transformation, as well as the United States’ improved relationship with this emerging power.²¹ Among the many top issues in the economic policy agenda, policymakers often consider intellectual property protection to be of lower priority than other general trade agenda items, such as a reduction of the U.S.-China trade deficit or the reevaluation of *renminbi*.²² As noted by Fred Bergsten and his colleagues in the Center for Strategic and International Studies and the Institute of International Economics, “China’s failure to protect intellectual property . . . is

¹⁶ Cf. Jide Nzelibe, *Are Congressionally Authorized Wars Perverse?*, 59 STAN. L. REV. 907, 931 (2007) (observing that “in polls conducted after the terrorist attacks, a super-majority of Americans ranked terrorism and national security as the most important issues confronting the United States”).

¹⁷ See JAMES MANN, *ABOUT FACE: A HISTORY OF AMERICA’S CURIOUS RELATIONSHIP WITH CHINA, FROM NIXON TO CLINTON* 228 (2000).

¹⁸ BERGSTEN ET AL., *supra* note 5, at 140.

¹⁹ See *id.* at 147.

²⁰ Damien McElroy, *China Reveals Iran’s Nuclear Secrets to UN Inspectors*, DAILY TELEGRAPH (London), Apr. 3, 2008, at 19.

²¹ See JAMES MANN, *THE CHINA FANTASY: HOW OUR LEADERS EXPLAIN AWAY CHINESE REPRESSION* 1–7 (2007) [hereinafter MANN, *THE CHINA FANTASY*] (discussing the scenario in which China’s rapid economic growth will lead to far-reaching political change).

²² See Edmund L. Andrews, *U.S. Warns China About Currency*, N.Y. TIMES, May 18, 2005, at A1 (reporting that “the Bush administration warned China . . . that its currency policies were distorting world trade, and it brandished the threat of retaliation against the country’s exports if Chinese leaders did not change course in the next year”); see also BERGSTEN ET AL., *supra* note 5, at 92–95 (discussing how China’s currency regime may pose problems for the global economy).

probably the *second* most important source of friction in the bilateral U.S.-China economic relationship.”²³

The choices made by these policymakers are understandable when one takes into account the policymaking process in the domestic arena. Even in the United States—or, for that matter, any other developed country—the protection of intellectual property rights is generally considered to be of lower priority than the resolution of such domestic problems as the prevention of murders, burglaries, robberies, thefts, arsons, assaults, and distribution of narcotics and child pornography.²⁴ In a major U.S. city like New York, for example, it is not uncommon to find street vendors selling pirated CDs and DVDs in the presence of police officers; Canal Street, the Counterfeit Alley in the Garment District, and the Harlem district are known sanctuaries for pirates and counterfeiters.²⁵ Likewise, federal prosecutors in the United States remain reluctant to take piracy and counterfeiting cases seriously.²⁶ As an industry representative told me, some district attorneys’ offices in the United States have simply refused to prosecute those cases.²⁷ Even if the federal prosecutors attempt to do so, the legal and technical constraints within the enforcement infrastructure may prevent them from taking full-scale enforcement action.²⁸ There may also be serious financial concerns. In New York, for example, it is “simply impossible to raid all the warehouses all of the time without swallowing the entire NYPD anti-counterfeiting budget and taking officers off other duties.”²⁹

If one travels from meat space to digital space, one will even find a large number of American teenagers and college students whom the entertainment industries have now labeled as “pirates,” notwithstanding the fact that they look and behave quite differently from the Asian pirates thousands of miles away. Since the emergence of

²³ BERGSTEN ET AL., *supra* note 5, at 95 (emphasis added).

²⁴ Compare U.S. DEP’T OF JUSTICE, PROGRESS REPORT OF THE DEPARTMENT OF JUSTICE’S TASK FORCE ON INTELLECTUAL PROPERTY 24 (2006), available at <http://149.101.1.32/opa/documents/ipreport61906.pdf> (stating that 177 defendants were charged with intellectual property offenses in 2004), with Bureau of Justice Statistics, U.S. Dep’t of Justice, Federal Justice Statistics, <http://www.ojp.usdoj.gov/bjs/fed.htm> (last revised Dec. 20, 2007) (stating that “criminal cases were commenced against 92,645 defendants” in 2004).

²⁵ See TIM PHILLIPS, KNOCKOFF: THE DEADLY TRADE IN COUNTERFEIT GOODS 31–41 (2005); Jonathan M. Barnett, *Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis*, 91 VA. L. REV. 1381, 1381 (2005); Sam Cocks, Note, *The Hoods Who Move the Goods: An Examination of the Booming International Trade in Counterfeit Luxury Goods and an Assessment of the American Efforts to Curtail Its Proliferation*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 501, 503 (2007).

²⁶ See Yu, *From Pirates to Partners II*, *supra* note 1, at 936.

²⁷ Other commentators have made similar observations. As Tim Phillips wrote, a U.S. attorney reportedly told an attorney working on behalf of Hermès, “We’re a bit too busy looking after terrorist threats at the moment.” PHILLIPS, *supra* note 25, at 50.

²⁸ Commenting on an earlier draft of this Essay, Rich Kuslan, the author of Asiabizblog, pointed out that the lack of effectiveness of enforcement efforts in Manhattan may be attributable to the high threshold required for crackdowns on counterfeit products in the borough. Enforcement efforts in Queens, by contrast, have been much more effective, due partly to a lower threshold. While the differences in thresholds may help explain the varying effectiveness in these two boroughs, the irony, of course, is that the United States is currently challenging the thresholds for criminal procedures and penalties in China before the WTO Dispute Settlement Body. See DS 362 Panel Request, *supra* note 3, at 1. One therefore cannot help but wonder when thresholds for enforcement are considered acceptable.

²⁹ PHILLIPS, *supra* note 25, at 36.

Napster, Aimster, KaZaA, Morpheus, and other file-sharing technologies, the industries have greatly struggled with the massive unauthorized copying problems within the domestic market.³⁰ In the past few years, the industries have filed many rounds of lawsuits throughout the world against individuals distributing copyrighted works illegally via peer-to-peer networks.³¹ Courts in the developed world, including Australia, Canada, and the United States, have also been inundated with cases addressing secondary copyright liability.³²

Given the massive online “piracy” in the United States and other developed countries, it is therefore no surprise that many Chinese find the expectations of the U.S. government and American rights holders highly unrealistic. How can they expect the Chinese authorities to be able to address a problem that they themselves cannot address on their home soil?! Moreover, the current focus on the difference between optical disc piracy (which happens mostly in China and other less developed countries) and online piracy (which happens extensively in developed countries) may have skewed the public perception of the piracy and counterfeiting problems in China. As Aaron Schwabach recently pointed out, the fact that “China has a lower percentage of people able to pirate DVDs online” may have forced piracy into the open, thus creating the misimpression that intellectual property piracy is only or primarily a problem in China or other less developed countries in East Asia.³³ As he explained:

People see street vendors selling DVDs, and they see images of the vendors in the media. They don’t see online downloading, which happens inside private homes and would be fairly boring to watch. Online piracy may lead to lawsuits, but rarely to arrests. Even when it does, the arrests are rarely spectacular. But arrests of DVD pirates and vendors are mediagenic; they present the spectacle of thousands of videos scattered on the ground, crushed beneath the feet of police officers. These images—card tables covered with obviously pirated DVDs, street vendors being led away in handcuffs, huge piles of DVDs being destroyed—stand out in the memory. And when the images come mostly from East Asia, the impression left in

³⁰ For discussions of the massive unauthorized copying problem created by peer-to-peer technology, 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) [hereinafter Yu, *P2P and the Future*].

³¹ See, e.g., Yu, *P2P and the Future*, *supra* note 30, at 658–76 (discussing the enforcement tactics used by the U.S. recording industry in 2003).

³² See, e.g., *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 941 (2005) (holding that the distributors of peer-to-peer file-sharing technologies could be liable for copyright infringement committed by individuals using their products if they had “induced” their users to undertake infringing activities); *BMG Canada Inc. v. John Doe*, [2005] F.C. 193 (Can.) (addressing the issue of whether setting up the facilities to allow copying amounts to authorizing infringement); *Universal Music Austl. Pty Ltd v. Sharman License Holdings Ltd.* (2005) 65 I.P.R. 289 (Austl.) (holding the defendant liable for authorizing users to infringe on music copyrights and directing it to modify the software application to reduce infringement).

³³ Aaron Schwabach, *Intellectual Property Piracy: Perception and Reality in China, the United States, and Elsewhere*, 2 J. INT’L MEDIA & ENT. L. 65, 77–78 (2008).

the public mind is that IP piracy is an East Asian problem, rather than a North American, European, or world problem.³⁴

Finally, there has yet to be any international consensus on how the enforcement of intellectual property rights should compare to enforcement in other areas. As stated explicitly in article 41(5) of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs Agreement"), a WTO member state is not required to devote more resources to intellectual property enforcement than other areas of law enforcement.³⁵ It is, indeed, very hard to imagine *any* country—China included—putting intellectual property protection ahead of, say, tax collection, not to mention that the problem of tax collection remains very serious in China.³⁶ As I explained in a previous article, this provision has presented a major barrier to a WTO challenge concerning the lack of *general* enforcement of intellectual property rights in China.³⁷ In light of this potential obstacle, the present complaint sidestepped the provision by focusing on the lack of compliance with *specific* provisions of the TRIPs Agreement.³⁸ The complaint focuses, instead, on the high thresholds for criminal procedures and penalties in the intellectual property area, the failure of the Chinese authorities to properly dispose of confiscated infringing goods, and the denial of copyright protection to works that have not been authorized for publication or distribution within the country.³⁹

To be certain, one could object to this question by stating that a choice among intellectual property protection, nuclear nonproliferation, and currency exchange is a "false conflict" that U.S. policymakers need not resolve. As a representative of the U.S. Chamber of Commerce reminded the U.S.-China Economic and Security Review Commission in its recent hearing, "We can walk and chew gum [at the same time]."⁴⁰ That representative, to a large extent, was right. People walk and chew gum all the time. Many U.S. professional athletes even chew gum when they compete in sports.

³⁴ *Id.* at 78.

³⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights art. 41(5), 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].

³⁶ See JOHN L. CHAN, CHINA STREETSMART: WHAT YOU MUST KNOW TO BE EFFECTIVE AND PROFITABLE IN CHINA 103 (2003) (noting that "in a developing economy like China, where tax rules are constantly changing, the loopholes are plenty and enforcement and interpretation vary from area to area"); see also PANITCHPAKDI & CLIFFORD, *supra* note 7, at 162–63 (discussing how local protectionism, or "warlordism," has affected the development of the auto industry); John H. Jackson, *The Impact of China's Accession on the WTO, in CHINA AND THE WORLD TRADING SYSTEM: ENTERING THE NEW MILLENNIUM* 19, 27 (Deborah Z. Cass et al. eds., 2003) ("China's implementation of WTO obligations is partly an adjustment problem. It is also partly a problem of the central government's power vis-à-vis local governments.").

³⁷ See Yu, *From Pirates to Partners II*, *supra* note 1, at 935 (discussing how article 41(5) of the TRIPs Agreement may present a major barrier to a successful WTO challenge concerning the lack of *general* enforcement of intellectual property rights in China).

³⁸ See DS 362 Panel Request, *supra* note 3.

³⁹ See *id.*

⁴⁰ *Intellectual Property Rights Issues and Imported Counterfeit Goods: Hearing Before the U.S.-China Economic and Security Review Commission*, 109th Cong. 95 (2006) (remarks of Myron Brilliant, Vice President—East Asia, U.S. Chamber of Commerce, Washington, D.C.).

However, when distracted, people have been known to choke on or swallow their gum by mistake.⁴¹

Today, the protection of intellectual property rights is no longer a narrow issue that concerns only intellectual property rights holders, their investors, and their lawyers;⁴² rather, it has impacted many other areas, such as trade, agriculture, health, the environment, education, culture, competition, free speech, democracy, and the rule of law.⁴³ At the international level, the negotiations in the intellectual property area have also spilled over into other issue areas, creating what I have described as the “international intellectual property regime complex.”⁴⁴ As I defined, this larger conglomerate regime includes not only the traditional area of intellectual property laws and policies, but also the overlapping areas in related regimes or fora, such as those governing public health, human rights, biological diversity, food and agriculture, and information and communications.⁴⁵

In light of these growing complexities, determining what to negotiate as part of the foreign intellectual property policy is no easy task. More revealing, if intellectual property is really like chewing gum—as compared to, say, walking—one has to wonder how important the protection of intellectual property rights really is!

II. QUESTION 2

Q: If the problems for intellectual property enforcement in China were largely attributed to the country's heavy and continuous decentralization, would the United States be willing to help China develop a stronger central government?

A: Definitely not.

As mentioned earlier, commentators have widely attributed the lack of intellectual property protection and enforcement in China to the lack of political will on the part of Chinese authorities.⁴⁶ One policy analyst, for example, wrote:

It 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

⁴¹ See *Boy Critical After Choking on Gum*, BBC NEWS, Oct. 10, 2007, http://news.bbc.co.uk/2/hi/uk_news/wales/north_east/7037493.stm.

⁴² See Peter K. Yu, *Teaching International Intellectual Property Law*, 52 ST. LOUIS U. L.J. 923, 924 (2008) (noting that intellectual property has come of age today).

⁴³ See Peter K. Yu, *International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia*, 2007 MICH. ST. L. REV. 1, 2 (2007) [hereinafter Yu, *International Enclosure, Regime Complex*].

⁴⁴ Symposium, *The International Intellectual Property Regime Complex*, 2007 MICH. ST. L. REV. 1.

⁴⁵ See Yu, *International Enclosure, Regime Complex*, *supra* note 43, at 14.

⁴⁶ See, e.g., Oman, *supra* note 9, at 587; James Shinn, *The China Crunch*, WASH. POST, Feb. 18, 1996, at C1.

copies of “The Lion King”—the factory managers would be sharing a cell with other dissidents in a heartbeat.⁴⁷

In recent years, this “political will” argument has been extended to cover the 2008 Beijing Olympics. As a journalist wrote a few years ago in the *South China Morning Post*:

[P]rotecting intellectual property is . . . a matter of national will. Nothing offers a better example than the job Chinese officials have so far done to protect the Olympic symbols. Since China won the right to host the 2008 Games three years ago, they have passed a series of national laws protecting copyright of the Olympic images and more than 100 phrases like “Green Olympics”, “Hi-tech Olympics” and “People’s Olympics” that the city will use to promote the Games. They have conducted a national public education campaign encouraging citizens to turn in offenders, and have ordered commerce ministry officials to seize pirated Olympic merchandise.⁴⁸

Interestingly—and perhaps disappointingly from the rights holders’ standpoint—pirated and counterfeit Olympic merchandise has already appeared in China, especially in markets further away from Beijing.⁴⁹ The only difference between the protection of Olympic symbols and that of foreign trademarks seems to be the difference between the protection of movies produced by Zhang Yimou, the famous Chinese film director, and that of movies produced by Disney, Paramount, Warner Brothers, and other foreign movie studios.⁵⁰ Although there is stronger protection for local works when they are first released, piracy occurs shortly afterwards, and the difference in the long run is minimal.⁵¹

In fact, if one could draw *any* lesson from the protection of Olympic symbols in China, it is how serious and entrenched the piracy and counterfeiting problems are in the country. This is what I have described as “the flip side of the Beijing Olympics.” Due to the country’s rapid decentralization, the central government does not have the ability to fully protect the Olympic symbols throughout the country.⁵² It would,

⁴⁷ Shinn, *supra* note 46.

⁴⁸ Craig Simons, *Faking It*, S. CHINA MORNING POST, Jan. 10, 2005, at 18.

⁴⁹ See, e.g., Robert Watts, *Fakes Are a Real Headache*, SUNDAY TELEGRAPH (London), July 16, 2006, at 8 (reporting that European customs officials have seized fake Beijing Olympics merchandise as early as July 2006).

⁵⁰ See Joseph Kahn, *The Pinch of Piracy Wakes China Up on Copyright Issue*, N.Y. TIMES, Nov. 1, 2002, at C1 (discussing the impact of unauthorized DVDs on the action adventure movie *The Touch*); Mark Magnier, *A Tiger Still Crouching*, L.A. TIMES, Aug. 22, 2004, at E4 (reporting about how box office receipts of Zhang Yimou’s *The House of Flying Daggers* had decreased dramatically after pirated copies appeared on the street).

⁵¹ See Magnier, *supra* note 50.

⁵² See Tao Jingzhou, *Problems and New Developments in the Enforcement of Intellectual Property Rights in China*, in INTELLECTUAL PROPERTY AND TRIPS COMPLIANCE IN CHINA: CHINESE AND EUROPEAN PERSPECTIVES 107, 109 (Paul Torremans et al. eds., 2007) (listing local protectionism as “the greatest barrier to intellectual property rights protection in the PRC”); Daniel C.K. Chow, *Counterfeiting in the People’s Republic of China*, 78 WASH. U. L.Q. 1, 26 (2000) (noting that “local protectionism in China is widespread and poses probably the single most significant problem in enforcement against counterfeiting”); Yiqiang Li, *Evaluation of the Sino-American Intellectual Property Agreements: A Judicial Approach to Solving the Local Protectionism Problem*,

therefore, take more than a few WTO complaints, several rounds of intellectual property lawmaking and international treaty negotiation, many public awareness and education campaigns, and a considerable amount of active cooperation between the Chinese and Western stakeholders to resolve these problems.

To understand why China has great difficulty in enforcing intellectual property rights, one has to appreciate the country's size and heterogeneity. China is large, complex, diverse, and "sometimes internally contradictory."⁵³ The Chinese speak different languages, enjoy different cuisines, grow up with different cultures, and subscribe to different historical and philosophical traditions.⁵⁴ Conditions in Beijing are often very different from those in Guangzhou; intellectual property strategies that are effective in Shanghai are likely to fail in a village in western China; and the trade patterns found in the coastal areas contrast significantly with those found in the inland areas.⁵⁵

To make matters worse, local protectionism has been a dominant problem in China throughout its millennial dynastic history. As Oded Shenkar noted, one of the imprints of China's Imperial past is "the persistence of local interests that compete for power with each other and especially with the center."⁵⁶ During the late Qing dynasty, for example, provincial leaders were more eager to strengthen the foundation of their personal power than to cooperate with each other to modernize their country.⁵⁷ Despite foreign attacks, "[t]heir sense of regionalism and their eagerness for self-preservation persisted so strongly" that the Peiyang and Nanyang fleets refused to rescue the Fukien fleet during the Sino-French war of 1884–1885.⁵⁸ For similar reasons, the Nanyang fleet and two provincial squadrons maintained their "neutrality" during the Sino-Japanese war of 1894–1895, leaving the Peiyang fleet behind to fight the Japanese navy alone.⁵⁹ A few years later, during the Boxer Uprising in 1900, "the provincial authorities in Southeast China refused to follow the court order of supporting the Boxers, and out of 'self-preservation' independently entered into agreements with foreign powers."⁶⁰ When Sun Yat-sen's revolutionary forces took Wuchang after launching the 1911 Revolution, "the provincial authorities declared their support of the revolution and by so defying the court hastened the downfall of the [Qing] dynasty."⁶¹

In the republican era, regionalism gave way to warlordism, creating one of the most chaotic periods in modern Chinese history.⁶² Although the subsequent founding of the People's Republic of China in 1949 helped centralize the country to a certain

10 COLUM. J. ASIAN L. 391, 395–401 (1996) (discussing the problems of local protectionism in the context of intellectual property enforcement).

⁵³ John J. Hamre & C. Fred. Bergsten, *Preface* to BERGSTEN ET AL., *supra* note 5, at ix.

⁵⁴ See Yu, *International Enclosure, Regime Complex*, *supra* note 43, at 23.

⁵⁵ See *id.*; MICHAEL J. ENRIGHT ET AL., *REGIONAL POWERHOUSE: THE GREATER PEARL RIVER DELTA AND THE RISE OF CHINA* 8 (2005).

⁵⁶ SHENKAR, *supra* note 5, at 30.

⁵⁷ See IMMANUEL C.Y. HSÜ, *THE RISE OF MODERN CHINA* 287–88 (6th ed. 2000) (discussing how the problem of regionalism has resulted in only limited modernization in China in the late Qing dynasty).

⁵⁸ *Id.* at 288.

⁵⁹ See *id.* at 340.

⁶⁰ *Id.* at 252.

⁶¹ *Id.*

⁶² See *id.* at 482–86 (discussing the period of warlordism in Republican China).

extent, strategic planning in the country's formative years⁶³ and the rapid economic development in China within the past two decades have led to greater economic development in certain parts of China at the expense of others.⁶⁴ In Deng Xiaoping's words, "some people have to get rich first."⁶⁵ As a result, there are now enormous disparities across the country in the levels of wealth and income, the purchasing power of local consumers, and the stages of economic and technological development.⁶⁶

As far as intellectual property enforcement goes, the proverb "the mountains are high, and the Emperor is far away" (*shān gāo huángdì yuǎn*) remains fairly accurate.⁶⁷ That proverb is illustrated well by the experience of a senior United States Trade Representative ("USTR") official who visited the Guangdong province shortly after the signing of the 1992 memorandum of understanding between China and the United States.⁶⁸ As Joseph Massey, the former Assistant USTR for Japan and China, recounted, that official "was [literally] told by a senior provincial government leader that 'Beijing's agreement' with the US was 'mei you guanxi' (irrelevant) in that southern province."⁶⁹

Moreover, as Andrew Mertha pointed out, the complex bureaucracies related to intellectual property protection and enforcement have resulted in considerable differences among protections at the national, provincial, and local levels.⁷⁰ The less developed parts of the country are also likely to present considerable structural problems for intellectual property enforcement, including inefficient administration, low penalties, shortage of funds, local protectionism, and severe conflicts of interests.⁷¹ Sadly, despite all of these regional differences and the country's heavily

⁶³ See BECKER, *supra* note 5, at 120 (noting that, in Chairman Mao's time, "economic planners concentrated investment in the Northeast and the interior of the country, sometimes for strategic reasons"); ENRIGHT ET AL., *supra* note 55, at 5–6 (noting that during the Mao era, "[i]ndustries were decentralized away from the coasts, creating heavy industrial centers in the western part of the country to supplement those in the traditional heavy industrial areas in the north-east, as the country was divided into three 'fronts', approximately corresponding to coastal, central, and western regions").

⁶⁴ For excellent discussions of the uneven regional developments in China, see generally CHINA DECONSTRUCTS: POLITICS, TRADE AND REGIONALISM (David S.G. Goodman & Gerald Segal eds., 1994) [hereinafter CHINA DECONSTRUCTS]; YEHUA DENNIS WEI, REGIONAL DEVELOPMENT IN CHINA: STATES, GLOBALIZATION, AND INEQUALITY (2007).

⁶⁵ BERGSTEN ET AL., *supra* note 5, at 31.

⁶⁶ See Yu, *The China Puzzle*, *supra* note 13, at 203.

⁶⁷ See ANDREW C. MERTHA, THE POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA 94 (2005) (noting that decentralization has allowed local governments "to wield more power over . . . local functional units and to bend the policy stream more effectively in a direction that is consistent with their own preferences"); Joseph A. Massey, *The Emperor Is Far Away: China's Enforcement of Intellectual Property Rights Protection, 1986–2006*, 7 CHI. J. INT'L L. 231, 232–33 (2006) (noting that "Chinese provincial authorities, 'far away over the mountains,' benefit financially or politically from the proceeds of piracy or, instead, turn a blind eye to powerful local interests that do").

⁶⁸ Memorandum of Understanding on the Protection of Intellectual Property, P.R.C.–U.S., Jan. 17, 1992, 34 I.L.M. 677.

⁶⁹ Massey, *supra* note 67, at 235.

⁷⁰ See MERTHA, *supra* note 67, at 90–100.

⁷¹ See Keith E. Maskus et al., *Intellectual Property Rights and Economic Development in China*, in INTELLECTUAL PROPERTY AND DEVELOPMENT: LESSONS FROM RECENT ECONOMIC RESEARCH 295, 309 (Carsten Fink & Keith E. Maskus eds., 2005).

decentralized state, intellectual property developments in China are often analyzed as if the country were homogeneous.⁷² Such an analysis, no doubt, was easier to conduct; however, its end result also presented a misleading, if not inaccurate, picture.

In the near future, China is likely to remain what I have described as “a country of countries.”⁷³ Under this scenario, stronger intellectual property protection will appear in Beijing, Shanghai, Guangzhou, and other major cities and coastal regions.⁷⁴ Meanwhile, the massive piracy and counterfeiting problems will stay in China, migrating from the country’s developed parts to its less developed parts.⁷⁵ To strike a compromise between the different regional needs, interests, and development goals, Chinese leaders may take some rather “schizophrenic,” or pragmatic, positions in designing their intellectual property policies.⁷⁶ The resulting regional conflicts and rivalries may also become major factors affecting the future development of intellectual property protection in China.⁷⁷

If U.S. policymakers and rights holders are to increase protection in China, they have two choices. First, they can undertake a more complete and deeper analysis of the country’s regional developments and develop a strategy that will better protect intellectual assets under the divergent regional conditions. There is no guarantee that this strategy will result in stronger overall protection in the country, but a lack of attention to the growing regional disparities in China is very likely to result in continued failure and frustration.

In the alternative, they can help the Chinese government become an even stronger central government. That was the reason why I asked this particular question in the first place. Such an effort, however, would have significant impacts in many areas, ranging from military affairs to environmental protection and from the protection of human rights and civil liberties to the much-needed reform of state-owned enterprises. It was, therefore, no surprise that many shook their heads when I asked this question.

⁷² The rare exception is when the USTR undertook a special provincial review of intellectual property protection in China. See Office of the U.S. Trade Representative, *Special Provincial Review of Intellectual Property Rights Protection in China: Request for Public Comment*, 71 Fed. Reg. 34,969, 34,970 (June 16, 2006); see also Yu, *The China Puzzle*, *supra* note 13, at 204 (discussing the benefits of this special provincial review).

⁷³ Yu, *From Pirates to Partners II*, *supra* note 1, at 963; see also ENRIGHT ET AL., *supra* note 55, at 5 (“[M]ost opportunities and challenges in China today are driven as much by regional issues and regional concerns as they are by national issues and national concerns. Many of the best opportunities and toughest challenges for China are regional in nature.”).

⁷⁴ See Yu, *International Enclosure, Regime Complex*, *supra* note 43, at 25.

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ Cf. ENRIGHT ET AL., *supra* note 55, at 5 (“Competition between regions and between individual jurisdictions have been played out in the corridors of power in Beijing, as well as in the regions themselves.”); David S.G. Goodman, *The Politics of Regionalism: Economic Development, Conflict and Negotiation*, in CHINA DECONSTRUCTS, *supra* note 64, at 1, 7 (noting that “[c]ompetition between provinces can be fierce, and there are numerous tales of ‘commodity wars’ between provinces over, amongst other items, rice, wool, soy, beans, tobacco, coal, and steel”); Yu, *The China Puzzle*, *supra* note 13, at 207 (noting that “[a]s regional and local governments fight hard to attract FDI, the picture we will see in China is likely to be more complicated in the near future than it is today”).

In fact, contrary to common beliefs,⁷⁸ stronger intellectual property protection may not always benefit the United States. First, stronger intellectual property protection may eventually take away the United States' competitive advantage. As China offers stronger intellectual property protection, more American and multinational firms will relocate to China to take advantage of its lower production costs and considerable market potential.⁷⁹ More technology will be transferred as a result, and more domestic jobs will be "outsourced."⁸⁰

More importantly, as James Mann wrote in his recent book, there is a tendency to assume that stronger economic development will result in the political transformation of China.⁸¹ However, as he observed, few have looked at the scenario in which "China manages to continue on its current economic path, yet its political system does not change in any fundamental way."⁸² Indeed, greater economic development may lead to an even stronger central government in China.⁸³ Thus, by promoting economic development, the push for stronger intellectual property rights may lead to a stronger central government in China that many Americans have found undesirable.

III. QUESTION 3

Q: Would the United States be interested in promoting the distribution and reproduction of censored information in China?

A: You bet.

Commentators have widely discussed the tension between intellectual property protection and the protection of free speech.⁸⁴ In a recent book, Neil Netanel described this copyright-free speech conflict as the "copyright's paradox."⁸⁵ Although the United States Supreme Court described copyright as the "engine of free expression"⁸⁶ and pointed out that the U.S. copyright scheme "incorporates its own speech-protective purposes and safeguards,"⁸⁷ there is significant tension between

⁷⁸ See, e.g., Daniel C.K. Chow, *Why China Does Not Take Commercial Piracy Seriously*, 32 OHIO N.U. L. REV. 203, 204 (2006) (noting that "[a] nationwide crackdown on counterfeiting will . . . result in significant economic and social costs that may pose a threat to the central government in Beijing").

⁷⁹ See Peter K. Yu, *Trade Barriers Won't Contain China's Cars*, DETROIT NEWS, Oct. 25, 2007, at 15A.

⁸⁰ See *id.*

⁸¹ See MANN, *THE CHINA FANTASY*, *supra* note 21, at 1–7.

⁸² *Id.* at 10–12.

⁸³ See *id.* at 10.

⁸⁴ For a recent treatment of the tension between intellectual property protection and the protection of free speech, see generally NEIL WEINSTOCK NETANEL, *COPYRIGHT'S PARADOX* (2008). See other sources cited in Yu, *The Escalating Copyright Wars*, *supra* note 30, at 927 n.145.

⁸⁵ NETANEL, *supra* note 84; see also Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1181 (1970) (describing the conflict as "a largely ignored paradox").

⁸⁶ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

⁸⁷ *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

the protection of copyright and that of free speech in many less developed countries.⁸⁸ The tension is particularly acute in countries where information flows are heavily regulated.⁸⁹ In countries with strict information control, the lack of protection of intellectual property rights may eventually help promote the wide distribution of censored materials.⁹⁰

To be certain, unauthorized reproduction and distribution will result in wider dissemination of not only the censored materials, but also entertainment products in general. The dissemination—or, worse, the exportation—of the latter would therefore hurt the rights holders, taking away the potential incentives for future creations. Nonetheless, it is important not to overlook the important spillover effects in promoting democratic transition that may be created by the wide distribution of American entertainment products. Even though many of these products may seem uncontroversial, they do have the ability to feature the American way of life and therefore suggest the possibility for a different, if not better, life.⁹¹ It is, indeed, not uncommon to find Hollywood movies or American television programs filled with discussions of the American government, the need for checks and balances or the separation of powers, and the protection of constitutional rights and civil liberties.⁹² Even the latest installments of *Star Wars* are filled with issues concerning corruption, slavery, federalism, democracy, racial tension, and the American government.⁹³

⁸⁸ See Michael D. Birnhack, *Global Copyright, Local Speech*, 24 CARDOZO ARTS & ENT. L.J. 491, 544–46 (2006).

⁸⁹ See *id.*

⁹⁰ See Neil Weinstock Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217, 253–57 (1998) [hereinafter Netanel, *Asserting Copyright's Democratic Principles*] (noting that the wide dissemination of alternative sources of information and opinion may help induce transitions from authoritarian to democratic government).

⁹¹ See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 350 (1996). As Neil Netanel explained:

Many creative works have broad political and social implications even if they do not appear or even seek to convey an explicit ideological message. Literature and art may be subtle, but powerful, vehicles for attitude change or reinforcement. Even what may seem to be abstract, “pure” artistic expression may challenge accepted modes of thought and belie the efforts of governments or cultural majorities to standardize individual sensitivities and perceptions. For that reason totalitarian regimes have prohibited styles of art and music that might be seen as politically innocuous in other contexts—and for that reason a democratic polity committed to the dialogic interchange of independent-minded individuals must protect them from official or private censorship.

Id.; see also Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 96–101 (1996) (providing examples to illustrate the destabilizing potential of art and the relationship between art censorship and totalitarian regimes); Netanel, *Asserting Copyright's Democratic Principles*, *supra* note 90, at 253–57 (discussing how the commercial media help “undermine authoritarian rule by providing a window to the democratic West and presenting a rosy portrait of life in a more open and materially prosperous society”).

⁹² See e.g., *ABSOLUTE POWER* (Columbia Pictures 1997); *THE PEOPLE VS. LARRY FLYNT* (Columbia Pictures 1996); *Law & Order* (NBC television broadcast 1990–Present); *The West Wing* (NBC television broadcast 1999–2006).

⁹³ *STAR WARS: EPISODE I—THE PHANTOM MENACE* (Twentieth Century Fox 1999); *STAR WARS: EPISODE II—ATTACK OF THE CLONES* (Twentieth Century Fox 2002); *STAR WARS: EPISODE III—REVENGE OF THE SITH* (Twentieth Century Fox 2005).

When Internet distribution is involved, the tension between copyright protection and free dissemination of ideas becomes even greater.⁹⁴ Thanks to the high speeds and low costs of reproduction and distribution, the anonymous architecture, and the many-to-many communication capabilities, the Internet has become a particularly effective means of communication.⁹⁵ For example, “[t]he growth of the Internet, in tandem with other technologies such as short messaging services, has . . . engendered a phenomenon of increasingly relevant ‘public opinion’ in China, where incidents not necessarily prioritized by traditional media receive national attention and frequently lead to calls for government action and response.”⁹⁶ In addition, the Internet provides individual users with information about how people live in other countries while enabling them to make informed judgment about the possibilities for life.⁹⁷ At times, the Internet may even paint a vivid, and sometimes brutal, picture of the enormous disparities between the developed and less developed worlds.⁹⁸ It is, therefore, no surprise that many countries see the Internet as a political threat.⁹⁹ While the Taliban regime in Afghanistan banned the use of the Internet,¹⁰⁰ North Korea “allows only a small community of elites and foreigners online.”¹⁰¹

In China, despite its accession to the WTO in 2001, information remains heavily censored, and media distribution channels are tightly controlled.¹⁰² As Jonathan Zittrain and John Palfrey wrote recently, in the digital environment, “China institutes by far the most extensive filtering regime in the world, with blocking occurring at multiple levels of the network and spanning a wide range of topics.”¹⁰³

⁹⁴ See A. Michael Froomkin, *The Internet as a Source of Regulatory Arbitrage*, in BORDERS IN CYBERSPACE: INFORMATION POLICY AND THE GLOBAL INFORMATION INFRASTRUCTURE 129, 129 (Brian Kahin & Charles Nesson eds., 1997) (contending that “the more a nation pursues a restrictive Internet policy, the less value it will derive from the network and the more it risks being left out of the information revolution”); Peter K. Yu, *Bridging the Digital Divide: Equality in the Information Age*, 20 CARDOZO ARTS & ENT. L.J. 1, 2 (2002) [hereinafter Yu, *Bridging the Digital Divide*] (noting that the information revolution has created a tremendous amount of political, social, economic, educational, and career opportunities).

⁹⁵ See Froomkin, *supra* note 94 (discussing the difficulties of censorship on the Internet).

⁹⁶ *China (Including Hong Kong)*, in ACCESS DENIED: THE PRACTICE AND POLICY OF GLOBAL INTERNET FILTERING 263, 265 (Ronald Deibert et al. eds., 2008) [hereinafter ACCESS DENIED]; see also Benjamin L. Liebman, *Watchdog or Demagogue? The Media in the Chinese Legal System*, 105 COLUM. L. REV. 1, 82–91 (2005) (discussing the Sun Zhigang case in the context of popular opinion and the Internet in China).

⁹⁷ See Yu, *Bridging the Digital Divide*, *supra* note 94, at 23.

⁹⁸ See *id.* at 27.

⁹⁹ For discussions of global online censorship, see generally ACCESS DENIED, *supra* note 96; SHANTHI KALATHIL & TAYLOR C. BOAS, OPEN NETWORKS, CLOSED REGIMES: THE IMPACT OF THE INTERNET ON AUTHORITARIAN RULE (2003).

¹⁰⁰ See Yu, *Bridging the Digital Divide*, *supra* note 94, at 37.

¹⁰¹ Stephanie Wang, *Internet Filtering in Asia*, in ACCESS DENIED, *supra* note 96, at 155, 156.

¹⁰² See Henry S. Gao, *The Mighty Pen, The Almighty Dollar, and the Holy Hammer and Sickle: An Examination of the Conflict Between Trade Liberalization and Domestic Cultural Policy with Special Regard to the Recent Dispute Between the U.S. and China on Restrictions on Certain Cultural Products*, 2 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 313, 319 (2007). See generally Peter K. Yu, *Piracy, Prejudice, and Perspectives: Using Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate*, 19 B.U. INT'L. L.J. 1, 28–32 (2001) [hereinafter Yu, *Piracy, Prejudice, and Perspectives*] (discussing the impact of China's censorship and information control policy on the country's intellectual property protection).

¹⁰³ Jonathan Zittrain & John Palfrey, *Introduction* to ACCESS DENIED, *supra* note 96, at 1, 3.

Indeed, the lack of market access to Western media products was among the issues raised by the two recent complaints the United States filed against China before the WTO Dispute Settlement Body.¹⁰⁴ In the first complaint, the United States claimed that article 4 of the Chinese copyright law was inconsistent with the TRIPs Agreement.¹⁰⁵ As the United States contends, materials that are subject to prepublication and predistribution reviews will lose copyright protection,¹⁰⁶ even though the Berne Convention for the Protection of Literary and Artistic Works and the TRIPs Agreement prohibit the use of formalities to prevent the enjoyment and exercise of copyrights.¹⁰⁷ In the second complaint, the United States further claimed that China failed to honor the commitments it made in the Accession Protocol that the country will “fully open the right to trade, with some limited exceptions . . . , within three years after accession.”¹⁰⁸

The United States’ complaints are understandable, and the fact that the two complaints were filed on the same day provides a strategic reminder of the interrelationship between intellectual property protection and market access.¹⁰⁹ A strong information control policy will result in the reduced competitiveness of U.S. media products. Because of censorship and distribution restrictions, many foreign media products, movies in particular, fail to obtain approval despite their success in

¹⁰⁴ See e.g., Request for Consultations by the United States, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/1 (Apr. 16, 2007) [hereinafter DS 362 Complaint]; Request for Consultations by the United States, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/1 (Apr. 16, 2007) [hereinafter DS 363 Complaint].

¹⁰⁵ See DS 362 Panel Request, *supra* note 3, at 3–6; see also Copyright Law of the People’s Republic of China art. 4 (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, amended Oct. 27, 2001, effective Nov. 1, 2001) (P.R.C.), http://www.sipo.gov.cn/sipo_English/laws/relatedlaws/200204/t20020416_34754.htm (“Works the publication or distribution of which is prohibited by law shall not be protected by this Law.”).

¹⁰⁶ See DS 362 Panel Request, *supra* note 3, at 5–6 (stating that “it appears that the measures at issue establish different pre-distribution and pre-authorization review processes for Chinese nationals’ works, performances (or their fixations) and sound recordings than for foreign nationals’ works, performances (or their fixations) and sound recordings”).

¹⁰⁷ See Berne Convention for the Protection of Literary and Artistic Works art. 5(2), Sept. 9, 1886, *revised at Paris* July 24, 1971, 25 U.S.T. 1341, 1161 U.N.T.S. 3 (stipulating that “[t]he enjoyment and the exercise of these rights shall not be subject to any formality”); TRIPs Agreement, *supra* note 35, art. 9(1) (stating that WTO member states “shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto”). *But cf.* Berne Convention, *supra*, art. 17:

The provisions of this Convention cannot in any way affect the right of the Government of each country of the Union to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right.

Id.

¹⁰⁸ DS 363 Panel Request, *supra* note 4, at 2; see also Gao, *supra* note 102 (providing an excellent discussion of the market access dispute).

¹⁰⁹ See DS 362 Complaint, *supra* note 104; DS 363 Complaint, *supra* note 104. Both complaints were filed on April 10, 2007. See DS 362 Complaint, *supra* note 104; DS 363 Complaint, *supra* note 104. However, the establishment of WTO dispute settlement panels was requested at different times: August 21, 2007, for the intellectual property enforcement dispute and October 11, 2007, for the market access dispute. See DS 362 Panel Request, *supra* note 3; DS 363 Panel Request, *supra* note 4.

other markets.¹¹⁰ As a result, their rights holders are unable to distribute the products in China, and consumers have to resort to other channels of dissemination, settling for black market products or pirated goods. Although these substitutes are often inferior to the genuine products, many consumers do not have counterparts to compare with or select from. As time passes, the Chinese market becomes saturated with unauthorized substitutes. Even if market barriers are finally removed, foreign copyright holders may have a very tough time entering the market.¹¹¹

Although the ideal solution to this market access problem is to increase market access and strengthen copyright protection at the same time,¹¹² one has to wonder whether it would always be beneficial to push for stronger protection of intellectual property rights if market access, unfortunately, remains limited in China. After all, just like in Russia and other former Soviet republics, the lack of intellectual property protection in China—or what some commentators have described as “benign neglect”¹¹³—may result in greater distribution of Western media products, which in turn may result in further political developments and perhaps even stronger intellectual property protection in the near future.¹¹⁴ As Neil Netanel maintained:

[I]mposing copyright protection for foreign works in the authoritarian state could drastically diminish the supply of such works in that country. Such protection may well put many foreign works beyond the price range of that country's consumer public. It would also give dictatorial authorities an internationally acceptable justification for suppressing the works' dissemination. . . . Since the vast majority of those works would continue to be created even without copyright protection in the authoritarian state, the result, at least in static terms, would be a significant welfare loss. As far as the availability of foreign democracy-inducing expression is concerned, the imposition of copyright protection for that expression in authoritarian states would seem to have a detrimental, not positive, effect on democratic transition.¹¹⁵

The Chinese leaders face a similar, yet different, dilemma. From the standpoint of economic development, stronger copyright protection is likely to result in reduced

¹¹⁰ For discussions of the quota on the importation of foreign movies to China, see generally Mary Lynne Calkins, *Censorship in Chinese Cinema*, 21 HASTINGS COMM. & ENT. L.J. 239, 291–96 (1999); Carl Erik Heiberg, Note, *American Films in China: An Analysis of China's Intellectual Property Record and Reconsideration of Cultural Trade Exceptions Amidst Rampant Piracy*, 15 MINN. J. INT'L L. 219, 234–38 (2006).

¹¹¹ See Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 102, at 32.

¹¹² See Netanel, *Copyright and a Democratic Civil Society*, *supra* note 91, at 285 (noting that “[i]f copyright is cast too narrowly, authors may have inadequate incentives to produce and disseminate creative works or may be unduly dependent on the support of state or elite patrons”).

¹¹³ See, e.g., Frederick M. Abbott, *Toward a New Era of Objective Assessment in the Field of TRIPS and Variable Geometry for the Preservation of Multilateralism*, 8 J. INT'L ECON. L. 77, 100 (2005).

¹¹⁴ See generally RUSSIAN MEDIA LAW AND POLICY IN THE YELTSIN DECADE: ESSAYS AND DOCUMENTS (Monroe E. Price, Andrei Richter & Peter K. Yu eds., 2002) (discussing the background on the changing Russian media landscape as a result of the disintegration of the former Soviet Union).

¹¹⁵ Netanel, *Asserting Copyright's Democratic Principles*, *supra* note 90, at 255–57.

access to information and knowledge and the limited availability of foreign computer technologies. Except for selected industries, which will obtain direct benefits from stronger protection, the lack of protection may result in greater benefits to other economic sectors and a larger part of the country.¹¹⁶ Thus, until China reaches a crossover point where stronger protection is in its self-interests, the country may remain reluctant to offer stronger intellectual property protection.¹¹⁷

From the standpoint of information control, however, stronger copyright protection may help control the flow of information. From restrictions on the distribution of copyrighted materials developed by Chinese authorities to the ban on domestic distribution of sensitive materials that have been developed and copyrighted by foreign authors, copyright protection is likely to help legitimize China's information control policy. For example, by relying on the TRIPs Agreement or U.S. intellectual property laws as the model for information control, such protection would promote censorship of politically-sensitive information while at the same time preventing human rights and civil liberties groups from criticizing the Chinese authorities for their actions. As William Alford noted a decade ago:

[I]t is no wonder that stories are now circulating among well-informed observers in China that some of the more staunchly authoritarian of the PRC's leaders were only too happy to satisfy Washington's latest demands to crack down on printing houses and producers of films and CDs, as it provided a convenient legitimization for repressive measures they intended to take in any event while simultaneously constraining America's capacity to complain about such actions.¹¹⁸

It is important to remember that copyright was introduced as a response to the printing press—a modern reprographic technology.¹¹⁹ In a little more than two centuries following the invention of the Gutenberg press, both the Church and the Crown used printers' privileges to suppress heretical thoughts.¹²⁰ Although the origin of the modern notion of copyright is often linked to the English statute of Anne,¹²¹ historians have traced the notion back to the Star Chamber and the

¹¹⁶ See Maskus et al., *supra* note 71, at 302–06 (noting that stronger intellectual property protection would incur significant costs, such as administrative and enforcement costs, adjustment costs due to labor displacement, social costs associated with monopoly pricing, higher imitation and innovation costs and potential costs resulting from the abuse of intellectual property rights); Yu, *The China Puzzle*, *supra* note 13, at 183–84 (discussing the costs of strengthening intellectual property protection).

¹¹⁷ See Yu, *The China Puzzle*, *supra* note 13, at 202 (discussing the proverbial crossover point at which China will consider stronger intellectual property protection in its self-interests).

¹¹⁸ 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*, 29 N.Y.U. J. Int'l L. & Pol. 135, 144–45 (1997).

¹¹⁹ See Peter K. Yu, *Of Monks, Medieval Scribes, and Middlemen*, 2006 MICH. ST. L. REV. 1, 15–20 (2006).

¹²⁰ See *id.* at 17.

¹²¹ An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies, During the Times Therein Mentioned, 8 Anne, c. 19 (1709) (Eng.).

Stationers' Company in England.¹²² Given the interrelationship between copyright and censorship in the early days of copyright development, it is more than coincidence that the parent body of the National Copyright Administration in China is the Press and Publications Administration, the agency in charge of propaganda and information control.¹²³ Interestingly, despite this bureaucratic structure, the Chinese authorities have yet to succeed in using copyright effectively to censor politically-sensitive expressions. Thus, if these authorities are as eager to control information as commentators have alleged, one cannot help but notice how extensive and entrenched the Chinese piracy problem is. Indeed, it would be very difficult, if not impossible, for the central government to eradicate the problem in a short period of time. The government needs more than just political willpower!

The conundrum concerning the tension between intellectual property protection and the protection of free speech equally affects U.S. policymakers, though for different reasons. Consider, for example, the tension, or potential conflict, between the proposed Global Online Freedom Act ("GOFA")¹²⁴ and the enacted Digital Millennium Copyright Act ("DMCA").¹²⁵ As GOFA declared:

It shall be the policy of the United States—

- (1) to promote the ability of all to access and contribute information, ideas, and knowledge via the Internet and to advance the right to receive and impart information and ideas through any media and regardless of frontiers as a fundamental component of United States foreign policy;
- (2) to use all instruments of United States influence, including diplomacy, trade policy, and export controls, to support, promote, and strengthen principles, practices, and values that promote the free flow of information; and
- (3) to prohibit any United States businesses from cooperating with officials of Internet-restricting countries in effecting the political censorship of online content.¹²⁶

The proposed statute "would establish 'minimum corporate standards for online freedom' and would impose export controls on the sales of any item 'to an end user in an Internet-restricting country for the purpose . . . of facilitating Internet

¹²² For comprehensive discussions of the Star Chamber and the Stationers' Company, see generally AUGUSTINE BIRRELL, SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS (1899); CYPRIAN BLAGDEN, THE STATIONERS' COMPANY: A HISTORY, 1403–1959 (1960); LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 28–77 (1968).

¹²³ See MERTHA, *supra* note 67, at 140.

¹²⁴ Global Online Freedom Act of 2006, H.R. 4780, 109th Cong. (2006) [hereinafter GOFA].

¹²⁵ Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified in scattered sections of 17 U.S.C.).

¹²⁶ GOFA, *supra* note 124, § 101.

censorship.”¹²⁷ Meanwhile, the DMCA prohibits the circumvention of copy-protection technologies that have been used to protect copyrighted content.¹²⁸ The recent Supreme Court decision of *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*¹²⁹ also encouraged the development of filtering technologies as part of the strategy to reduce secondary copyright liability.¹³⁰ Interestingly, and perhaps coincidentally, China “blocks access not only to known circumvention sites, but sites that are known to provide information and tutorials about censorship circumvention.”¹³¹

Worse still, the United States has sometimes “exported” these conflicting policy goals, and therefore the conundrum, to other countries through its aggressive push for copyright reforms in the American image. As I noted in a recent article,¹³² the Hong Kong government is currently confronted with a catch-22 situation in which it has to decide whether to “provide a specific mechanism under the law for copyright owners to compel [Internet service providers] to disclose their clients’ information and to impose a requirement under the Copyright Ordinance for [these providers] to keep logs.”¹³³ If the government does not offer stronger copyright protection, it is likely to be criticized by the Western press for inadequate response to the massive file-sharing activities conducted online by local Internet users.¹³⁴ Unsurprisingly, such criticisms would resonate well with those who are concerned about the lack of respect for the rule of law and intellectual property rights in China. However, if the government increases copyright protection, the Western press is likely to criticize Hong Kong for its lack of protection of privacy, free speech, and other individual liberties.¹³⁵ Such criticisms were particularly troublesome in light of the heightened media scrutiny following the tenth anniversary of China’s resumption of sovereignty over Hong Kong. Regardless of the action it takes, the Hong Kong government is likely to become a target of criticism by the Western press—ironically, for its efforts to respond to Western concerns.

¹²⁷ Jonathan Zittrain & John Palfrey, *Reluctant Gatekeepers: Corporate Ethics on a Filtered Internet*, in ACCESS DENIED, *supra* note 96, at 103, 118 (quoting GOFA, *supra* note 124, tit. 2 & § 301).

¹²⁸ See 17 U.S.C. § 1201 (2006). See generally Peter K. Yu, *Anticircumvention and Anti-anticircumvention*, 84 DENV. U. L. REV. 13, 24–25 (2006) (discussing the anticircumvention provision of the DMCA).

¹²⁹ 545 U.S. 913 (2005).

¹³⁰ See *id.* at 939 (stating that “[t]he evidence of unlawful objective is given added significance by MGM’s showing that neither company attempted to develop filtering tools or other mechanisms to diminish the infringing activity using their software”). But see *id.* at 939 n.12 (noting, nevertheless, that “in the absence of other evidence of intent, a court would be unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement, if the device otherwise was capable of substantial noninfringing uses”).

¹³¹ Ronald Deibert & Rafal Rohozinski, *Good for Liberty, Bad for Security? Global Civil Society and the Securitization of the Internet*, in ACCESS DENIED, *supra* note 96, at 123, 134.

¹³² See Yu, *International Enclosure, Regime Complex*, *supra* note 43, at 30–31.

¹³³ COMMERCE, INDUS. & TECH. BUREAU, HKSAR GOV’T, COPYRIGHT PROTECTION IN THE DIGITAL ENVIRONMENT (2006), available at <http://www.cedb.gov.hk/ci-tb/ehhtml/pdf/consultation/Consultationdocument.pdf>. For the author’s response to the Hong Kong government’s consultation paper, see PETER K. YU, DIGITAL COPYRIGHT REFORM IN HONG KONG: PROMOTING CREATIVITY WITHOUT SACRIFICING FREE SPEECH (2007), available at <http://jmsc.hku.hk/cms/images/stories/jmscdigitalcopyright.pdf>.

¹³⁴ See Yu, *International Enclosure, Regime Complex*, *supra* note 43, at 31.

¹³⁵ See *id.*

In sum, copyright and free speech may pose significant conflict in countries where safeguards, balancing tools, and correction mechanisms are not present or well developed. While stronger copyright protection may better protect the economic, and at times moral, interests of copyright holders, it does raise serious concerns among human rights and civil liberties groups. By significantly reducing the reproduction and distribution of Western ideas, copyright protection may stifle political developments in other countries. The promotion of stronger copyright protection therefore may jeopardize the United States' longstanding policy in promoting human rights, civil liberties, and the rule of law. At some point, the benefits of greater dissemination of copyrighted information may outweigh the copyright system's "free speech burdens."¹³⁶

CONCLUSION

When piracy and counterfeiting problems in China are discussed, there is a tendency to simplify the issues to black and white. As James Boyle noted more than a decade ago, the issues are often presented as a morality play:

For a long time, the evil pirates of the East and South have been freeloading on the original genius of Western inventors and authors. Finally, tired of seeing pirated copies of *Presumed Innocent* or Lotus 1-2-3, and infuriated by the appropriation of Mickey Mouse to sell shoddy Chinese toys, the Western countries—led by the United States—have decided to take a stand. What's more, . . . the United States is standing up for more than just filthy lucre. It is standing up for the rights of creators, a cause that has attracted passionate advocates as diverse as Charles Dickens and Steven Spielberg, Edison and Jefferson, Balzac and Victor Hugo.¹³⁷

Unfortunately, despite a decade of developments, progresses, and reforms in the intellectual property field in China, the debate we have today remains as unsophisticated, unnuanced, and oversimplified as it was a decade ago. Oftentimes, the outcome of this debate depends on whether China is considered a friend or a foe; whether those engaged in the debate are China optimists or China pessimists; and whether the debaters place high values on exclusive rights or public access.

The three questions examined in this Essay demonstrate why the piracy and counterfeiting problems in China are much more complex than what has hitherto been presented in the U.S.-China intellectual property debate. Until U.S. policymakers and the American public can make up their minds over how to resolve these complexities, it is unrealistic to expect the American intellectual property policy toward China to result in dramatic improvements in intellectual property protection in the country—no matter how many Olympic Games or World Expos China will host and how many WTO complaints the United States will file.

¹³⁶ See generally NETANEL, *supra* note 84, at 109–53 (discussing the "free speech burdens" of the copyright system).

¹³⁷ JAMES BOYLE, SHAMANS, SOFTWARE & SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 123 (1996).