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## The Second Coming of Intellectual Property Rights in China

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*Occasional Papers in*  
INTELLECTUAL  
PROPERTY  
*from Benjamin N. Cardozo School of Law*  
*Yeshiva University*

*Number 11*

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RIGHTS IN CHINA

*Peter K. Yu*



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This Article is adapted from the author's forthcoming book, *Reinventing U.S.-China Intellectual Property Policy: Forging a Sustainable Partnership in the Twenty-first Century*, to be published by Kluwer Law International. The Article was presented at the Tenth Annual Conference on International Intellectual Property Law and Policy at Fordham University School of Law and the 2002 Annual Conference of the U.S.-China Lawyers Society. The title of the Article was inspired by, and borrowed from, PETER FENG, INTELLECTUAL PROPERTY IN CHINA (1997). Portions of the article originally appeared in the *American University Law Review* and the *Boston University International Law Journal*.

## THE SECOND COMING OF INTELLECTUAL PROPERTY RIGHTS IN CHINA

*Peter K. Yu\**

At the Doha Ministerial Conference, member states of the World Trade Organization (“WTO”) approved China’s admission to the international trading body.<sup>1</sup> After fifteen years of exhaustive negotiations, China finally became a member of the WTO on December 11, 2001.<sup>2</sup> While the WTO membership will undoubtedly bring new challenges to the Chinese intellectual property system, this historic milestone provides us with an opportunity to reflect on the past development of intellectual property rights in China.

Throughout the Chinese imperial history, the country had not developed any notion of intellectual property rights. Although that notion was imported into China in the late nineteenth century, substantive intellectual property protection did not emerge until the early twentieth century. Unfortunately, with decades of wars, warlordism, famines, revolutions, and political struggles, China was unable to develop an intellectual property system until it reopened its market to foreign trade in the late 1970s.<sup>3</sup>

By that time, information and high-technology goods have already become a major sector of the American economy.<sup>4</sup> To protect its economic interests, the United States aggressively pushes for a universal intellectual property regime that offers information and high-technology goods uniform protection throughout the world. During the past two decades, the United States repeatedly threatened China with a series of economic sanctions, trade wars, non-renewal of most-favored-nation (“MFN”) status, and opposition to entry into the WTO.

This Article traces the development of intellectual property rights in China since the country’s reopening in the late 1970s. Part I provides a brief history of the Chinese intellectual property system and examines the various intellectual property disputes between China and the United States in the late 1980s and the early 1990s. This Part argues that the

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contemporary Chinese intellectual property system was not developed until intellectual property rights reemerged in China in the late 1970s. Part II discusses the causes of the piracy and counterfeiting problem in China. By focusing on the significant political, social, economic, cultural, and ideological differences between China and the West, this Part argues that China's problem can be attributed to the Confucian beliefs ingrained in the Chinese culture, the country's socialist economic system, the leader's skepticism toward Western institutions, the xenophobic and nationalist sentiments of the populace, the government's censorship and information control policy, and the significantly different Chinese legal culture and judicial system. Part III examines the various improvements in intellectual property protection in China since the mid-1990s, including the recent amendments to the Chinese copyright, patent, and trademark laws. This Part explains why intellectual property protection has improved even though the U.S. government and American businesses have backed away from their earlier coercive tactics. This Part concludes by offering insight into the impact of the WTO membership on intellectual property protection in China.

## I. A BRIEF HISTORY OF THE CHINESE INTELLECTUAL PROPERTY SYSTEM

### A. *The First Coming of Intellectual Property Rights in China*

Throughout China's millennia-long imperial history, the country had not developed any notion of intellectual property rights. As Professor William Alford pointed out in his seminal work, *To Steal a Book Is an Elegant Offense*,<sup>5</sup> the earliest effort to regulate publication and reproduction was through an edict issued by Emperor Wenzong of the Tang dynasty in A.D. 835.<sup>6</sup> This edict "prohibited the unauthorized reproduction by persons of calendars, almanacs, and related items that might be used for prognostication."<sup>7</sup> Because the Chinese considered the emperor to be the link between human and natural events, this prohibition was needed to protect the emperor against findings that would have undermined the dynasty or predicted its downfall.<sup>8</sup> By the end of the Tang dynasty, the edict was further expanded to "prohibit[] the unauthorized copying and distribution of state legal pronouncements and

official histories, and the reproduction, distribution, or possession of 'devilish books and talks' (*yaoshu yaoyan*) and most works on Buddhism and Daoism.<sup>9</sup> Rather than fostering creation and promoting authorship, this edict was designed to sustain imperial power.

The Song dynasty expanded this portion of the Tang Code<sup>10</sup> to include prepublication review and registration by "order[ing] private printers to submit works they would publish to local officials."<sup>11</sup> The principal goal of this institution was "to halt the private reproduction of materials that were either subject to exclusive state control or heterodox."<sup>12</sup> In addition to works covered by the Tang edict, prohibited materials included authorized versions of the classics, model answers to imperial service examinations, maps, materials concerning the inner workings of government, politics, and military affairs, pornography, and writings using the names of members or ancestors of the imperial family in "inappropriate" literary styles or in writings that were "not beneficial to scholars."<sup>13</sup> Like the British Stationers' Company,<sup>14</sup> this review and registration system was mainly instituted to control the dissemination of ideas.

In the trademark context, the dynastic codes "restrict[ed] the use of certain symbols associated with either the imperial family (such as the five-clawed dragon) or officialdom."<sup>15</sup> They also "barred the imitation of marks used by the ceramists of Jingdezhen and others making goods for exclusive imperial use" and forbid certain craftspersons from exporting their works.<sup>16</sup> In addition, guild regulations, clan rules, and local laws protected producers of tea, silk, cloth, paper, and medicines by registering their brand names and symbols they had developed.<sup>17</sup> Tight family control and screening of employees also were used to protect the confidentiality of vital manufacturing processes.<sup>18</sup> Nonetheless, the dynastic codes and the various regulations and control efforts did not result in any formal, centralized intellectual property protection.<sup>19</sup>

Indeed, China did not attempt to introduce substantive intellectual property protection until the early twentieth century. Such protection arrived "with such inventions and novel ideas as the gunboat, opium, 'most favoured nation' trading status, and extraterritoriality."<sup>20</sup> When China first opened its coastal ports to Western trade in the 1840s, "there was little foreign investment in China, and trade was confined to items such as opium, tea, and raw silk, sold as bulk commodities, rather than under brand names."<sup>21</sup> While "there were periodic allegations of inferior grades of tea being passed off as their more costly counterparts,"<sup>22</sup> substantial problems of intellectual property piracy did not arise until



decades later. By the turn of the twentieth century, foreign imports and investment had increased substantially, and intellectual property piracy had become a serious problem.<sup>23</sup>

To protect the intellectual property rights of its nationals, the United States, which had recently acceded to the Paris Convention for the Protection of Industrial Property<sup>24</sup> and had enacted the Chace Act<sup>25</sup> to provide formal intellectual property protection to foreigners, used its military and economic strengths to induce China to sign a commercial treaty in 1903.<sup>26</sup> This treaty represented the United States's first attempt to build a Western intellectual property regime in China.<sup>27</sup> It granted copyright, patent, and trademark protection to Americans in return for reciprocal protection to the Chinese.<sup>28</sup>

Despite the 1903 treaty and similar commercial treaties with Britain and Japan,<sup>29</sup> China did not introduce a substantive copyright law until 1910, a substantive patent law until 1912, and a substantive trademark law until 1923.<sup>30</sup> Although these laws appeared on paper, they offered foreigners very limited intellectual property protection.<sup>31</sup> In fact, due to increasing industrialization, the growth of the urban elite, and the spread of literacy, the piracy problem worsened despite the introduction of new intellectual property laws.<sup>32</sup>

The failure of the 1903 treaty can be attributed to several factors. First, the United States failed to consider the relevance of its intellectual property model to China and premised the new regime on registration.<sup>33</sup> Hampered by problems that were uniquely Chinese, such as geographical difficulties, high corruption, and strong regional protectionism, the registration system turned out to be substantially ineffective, rendering the new intellectual property laws virtually unenforceable. Second, the United States was unable to convince the Chinese government why intellectual property laws could benefit China.<sup>34</sup> Indeed, most Chinese officials, including the very powerful Empress Dowager, were skeptical of the need for legal reforms. To these officials, law reforms were merely "an unfortunate short-term expedient needed to calm the restive masses and appease the treaty powers before Qing power could be reasserted in its proper form."<sup>35</sup> Finally, the United States did not rally the support of Chinese holders of intellectual property rights behind the new intellectual property regime.<sup>36</sup> The United States also failed to train Chinese officials with responsibilities in the field and to educate the Chinese populace about the importance of, and rationales behind, intellectual property rights.<sup>37</sup>

Instead, the United States “presumed that foreign pressure would suffice to induce ready adoption and widespread adhesion to [the new intellectual property] laws.”<sup>38</sup> In the beginning, China was willing to comply with the treaty because it naïvely assumed that introducing intellectual property laws would put an end to the unequal treaties signed in the latter half of the nineteenth century, in particular the extraterritoriality provisions,<sup>39</sup> which allowed foreigners accused of crimes against Chinese subjects to be tried in China according to their own laws by the representatives of their home government.<sup>40</sup> Once the Chinese government realized that legal reforms would not affect China’s semi-colonial status, it lost interest in pursuing those reforms. In fact, the Chinese government took advantage of the Western position and used legal reforms to provide leverage against the treaty powers.<sup>41</sup>

During the Republican era, which immediately followed the fall of the Qing dynasty, intellectual property rights managed to receive some legislative attention. Shortly after Guomindang took power in 1928, they promulgated a new copyright law, affording protection to books, music, photographs, designs, sculpture, and other technical, literary, and artistic works.<sup>42</sup> The Nationalist government also issued a new trademark law<sup>43</sup> and promulgated the Measures to Encourage Industrial Arts, which afforded protection to indigenous inventions.<sup>44</sup> Notwithstanding these efforts, “the decades of wars, famines and revolutions scarcely gave [intellectual property rights] a chance to take root in China.”<sup>45</sup> Moreover, implementation of the new laws was significantly hampered by the fact that the laws were transplanted from abroad with scant alteration and presumed a legal structure and consciousness that did not exist in China at that time.<sup>46</sup>

After the Second World War, the prospects of intellectual property protection became even gloomier. In 1949, the Chinese Communist Party established the People’s Republic of China. By the early 1950s, the government had “nationalized industry and commerce, collectivized agricultural production and embarked on a socialist command economy.”<sup>47</sup> In such a politico-juridical environment in which formal law and administrative bureaucracy were denounced,<sup>48</sup> “the very notion of privately owned monopolies or exclusive rights in the use of expressions, ideas and names became meaningless.”<sup>49</sup> Even though China reopened its markets in 1979 and allowed people to own limited private property, the Chinese had yet to develop a respect for intellectual property rights.

## B. *The Second Coming of Intellectual Property Rights in China*

Immediately after the reopening, China and the United States signed the Agreement on Trade Relations Between the United States of America and the People's Republic of China,<sup>50</sup> marking the beginning of Western intellectual property protection in post-Mao China. This Agreement provided that "each party shall seek, under its laws and with due regard to international practice, to ensure to legal or natural persons of the other Party protection of patents and trademarks equivalent to the patent and trademark protection correspondingly accorded by the other Party."<sup>51</sup> The Agreement also provided that "each Party shall take appropriate measures, under its laws and regulations and with due regard to international practice, to ensure to legal or natural persons of the other Party protection of copyrights equivalent to the copyright protection correspondingly accorded by the other Party."<sup>52</sup> Pursuant to this Agreement, China became a member of the World Intellectual Property Organization ("WIPO") in 1980 and the Paris Convention for the Protection of Industrial Property<sup>53</sup> in 1984. China also promulgated a new trademark law<sup>54</sup> in 1982 and a new patent statute<sup>55</sup> in 1984 ("1984 Patent Law").

Even though the new trademark and patent laws granted individuals rights in their marks and inventions, these laws were designed mainly to promote "socialist legality with Chinese characteristics."<sup>56</sup> Uneasy about the introduction of private property and potential conflicts between intellectual property rights and the socialist economic system,<sup>57</sup> the Chinese government placed substantial limits on the rights granted under the new statutes. Consider for example Article 6 of the 1984 Patent Law.<sup>58</sup> While this provision granted patent protection to "job-related invention-creation," it limited ownership to the work unit (*dan-wei*), the enterprise, or the joint venture.<sup>59</sup> The implementing regulations further defined the term "job-related invention-creations" broadly to encompass virtually anything made on or in relation to one's job, using materials or data from one's unit, or within a year of leaving one's unit.<sup>60</sup> Given the importance of a work unit in a socialist economy<sup>61</sup> and the difficulty in securing sophisticated equipment or sizable capital at the time the statute was promulgated,<sup>62</sup> the statute had effectively frustrated individuals from holding job-related patents in their own names.

In the beginning, the United States was willing to compromise its intellectual property rights, because the country was eager to lure China into the "family of nations."<sup>63</sup> By the mid-1980s, however, attitudes of

U.S. businesses had changed.<sup>64</sup> Impatient with the lack of improvement in intellectual property protection in China, these businesses lobbied the U.S. government to take proactive action to eradicate the Chinese piracy and counterfeiting problem. Since the late 1980s, the United States has repeatedly threatened China with a series of economic sanctions, trade wars, non-renewal of MFN status, and opposition to entry into the WTO.

### 1. 1992 Memorandum of Understanding

In 1989, at the urging of American businesses,<sup>65</sup> the United States Trade Representative (“USTR”) placed China on the “priority watch list.”<sup>66</sup> By doing so, the United States gained leverage in negotiations with China while it did not need to initiate an investigation under section 301 of the Trade Act of 1974<sup>67</sup> (“section 301”), which permits the President of the United States to investigate and impose sanctions on countries engaging in unfair trade practices that threaten the United States’s economic interests.<sup>68</sup> In response to being placed on the priority watch list, China enacted a new copyright law<sup>69</sup> and issued new implementing regulations<sup>70</sup> in 1990. A separate set of computer software regulations<sup>71</sup> followed in 1991.

Notwithstanding these legislative efforts, the United States found intellectual property protection in China unsatisfactory. On April 26, 1991, the United States upgraded China to a “priority foreign country.”<sup>72</sup> A month later, the United States initiated a Special 301 investigation on China’s intellectual property rights practices.<sup>73</sup> To increase its leverage, the American government threatened to impose retaliatory tariffs of \$1.5 billion on Chinese textiles, shoes, electronic instruments, and pharmaceuticals.<sup>74</sup> China quickly responded with countersanctions of a similar amount on American commodities such as aircraft, cotton, corn, steel, and chemicals.<sup>75</sup> Hours before the deadline for imposing sanctions, both countries averted a potential trade war<sup>76</sup> by signing the Memorandum of Understanding Between China (PRC) and the United States on the Protection of Intellectual Property<sup>77</sup> (“1992 MOU”).

Pursuant to the 1992 MOU, China amended the 1984 Patent Law,<sup>78</sup> promulgated new patent regulations,<sup>79</sup> and acceded to the Patent Cooperation Treaty.<sup>80</sup> The new patent law extends the duration of patent protection from fifteen to twenty years, affords protection to all chemical inventions, including pharmaceuticals and agrichemical products, and sharply restricts the availability of compulsory licenses.<sup>81</sup>

In addition, China acceded to the Berne Convention for the Protection of Literary and Artistic Works<sup>82</sup> and ratified the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms.<sup>83</sup> To comply with these newly adopted multilateral treaties, the Chinese government amended the 1990 Copyright Law and issued new implementing regulations.<sup>84</sup> The amended copyright statute protects computer software programs as literary works for fifty years, removes formalities on copyright protection, and extends protection to all works originating in a member of the Berne Union, including sound recordings that have fallen into the public domain.<sup>85</sup> A year later, China updated its trademark law by including criminal penalties within the statute.<sup>86</sup> It also adopted a new unfair competition law that affords protection to trade secrets.<sup>87</sup>

Taken as a whole, the 1992 MOU was very successful in establishing a new intellectual property regime in China. However, a regime alone was not enough, especially when it was not properly implemented. By 1994, American businesses again complained about the lack of intellectual property protection in China and the significant losses incurred as a result.<sup>88</sup> The *1995 National Trade Estimate Report* estimated that U.S. industries suffered almost \$850 million in losses due to copyright theft alone.<sup>89</sup> The entertainment and business industries were greatly concerned because China exported its counterfeit products to other countries.<sup>90</sup> According to then-USTR Mickey Kantor, enforcement of intellectual property laws in China was “sporadic at best and virtually non-existent for copyrighted works.”<sup>91</sup> In addition to inadequate intellectual property protection, a study by the United States Semiconductor Industry Association identified other problems, such as “the imposition of ad hoc taxes and charges, corruption, smuggling, frequent sweeping changes in laws and regulations, and the blurring of lines of authority.”<sup>92</sup>

## 2. 1995 Agreement

On June 30, 1994, the USTR again designated China a “priority foreign country” and immediately initiated a Special 301 investigation.<sup>93</sup> By December 31, the two countries still had not reached an agreement.<sup>94</sup> To allow time for more negotiations, the Clinton Administration extended the negotiation period for sixty days.<sup>95</sup> The Administration also threatened to impose 100% tariffs on over \$1 billion worth of Chinese imports, which ranged from plastic picture frames to cellular telephones.<sup>96</sup> In

response, China retaliated with a counterthreat of 100% tariffs on U.S.-made compact discs, cigarettes, alcoholic beverages, and other products.<sup>97</sup> China also announced that it would suspend negotiations with American automakers over the creation of joint ventures in China for manufacturing mini-vans and passenger cars, one of the top trade priorities of the Clinton Administration.<sup>98</sup> According to the Xinhua News Agency, China's international news service, China needed to take such retaliatory measures "to protect its sovereignty and national dignity."<sup>99</sup> Both trade sanctions were slated to take effect on February 26, 1995.<sup>100</sup>

Despite these threats and counterthreats, the countries reached a compromise hours before the February 26 deadline. Through an exchange of correspondence, the two countries reached the Agreement Regarding Intellectual Property Rights<sup>101</sup> ("1995 Agreement"), averting another potential trade war.<sup>102</sup> While many attributed this last-minute compromise to the closure of twenty-nine CD factories, including the notorious Shenfei Factory in Shenzhen,<sup>103</sup> most China watchers were not surprised by the eleventh-hour agreement.<sup>104</sup> As one commentator noted, "[t]oo much was at stake for both countries. U.S. businesses did not want to lose deals or to be edged out of China's market, and China could ill afford to be shut out of the U.S. market, which absorbs a third of its exports."<sup>105</sup>

The 1995 Agreement comprised a letter from Chinese Minister of Foreign Trade and Economic Cooperation Wu Yi to then-USTR Mickey Kantor<sup>106</sup> ("Agreement Letter") and the Action Plan for Effective Protection and Enforcement of Intellectual Property Rights<sup>107</sup> ("Action Plan"). The Agreement Letter summarized the enforcement measures China had undertaken in the past few months or would undertake in the near future.<sup>108</sup> The letter also included a pledge to improve market access for American products<sup>109</sup> and to promote transparency by publishing all laws, rules, and regulations concerning limitations on imports, joint ventures, and other economic activities.<sup>110</sup> Suspiciously, the Action Plan did not contain any provisions regarding market access of American products.<sup>111</sup> Such omission strongly suggests that a compromise was struck between the two governments during the negotiations.

Moreover, the Agreement Letter delineated the mutual responsibilities that would be undertaken by both countries, which included training customs officers and bureaucrats, exchanging information and statistics, and undertaking future consultations.<sup>112</sup> The end of the Agreement Letter contained the United States's promise to terminate its

section 301 investigation of China and China's "priority foreign country" designation,<sup>113</sup> as well as a mutual agreement to rescind the order imposing retaliatory tariffs on the other country's exports.<sup>114</sup>

Unlike the Agreement Letter, the Action Plan was more detailed, focusing specifically on improving the enforcement structure<sup>115</sup> and the legal environment regarding intellectual property protection.<sup>116</sup> The Action Plan included short-term and long-term remedial measures<sup>117</sup> and a 6-month "special enforcement period," during which China would make intensive efforts to crack down on major infringers of intellectual property rights and to target regions in which infringing activity was particularly rampant at the time of the Agreement.<sup>118</sup>

The Action Plan also introduced a new enforcement structure known as the State Council Working Conference on Intellectual Property Rights ("Working Conference"), which was responsible for the central organization and coordination of protection and enforcement of all intellectual property laws throughout the country.<sup>119</sup> This Working Conference was designed specially to target local protectionism<sup>120</sup> and the vulnerability of the Chinese judicial system to that problem.<sup>121</sup>

In addition, the Action Plan created Enforcement Task Forces, which comprised administrative and other authorities responsible for intellectual property protection. Such authorities included the National Copyright Administration, the State Administration for Industry and Commerce, the Patent Office, police at various levels, and customs officials.<sup>122</sup> These Task Forces were authorized to enter and search any premises allegedly infringing on intellectual property rights, to review books and records for evidence of infringement and damages, to seal suspected goods, and to confiscate materials and implements directly and predominantly used to make infringing goods.<sup>123</sup> If the Task Forces found infringement, they had authority to impose fines; to order a stoppage of production, reproduction and sale of infringing goods; to revoke production permits; and to confiscate and destroy without compensation the infringing goods and the materials and implements used to manufacture the counterfeit products.<sup>124</sup>

To protect CDs, laser discs ("LDs"), and CD-ROMs, the Action Plan established a unique copyright verification system.<sup>125</sup> It proposed to punish by administrative and judicial means any manufacturer of audiovisual products who failed to comply with the identifier requirement.<sup>126</sup> It also called for title registration of foreign audiovisual products and computer software in CD-ROM format with the National Copyright

Administration and local copyright authorities.<sup>127</sup> Moreover, it contained provisions requiring all customs offices to intensify border protection for all imports and exports of CDs, LDs, CD-ROMS, and trademarked goods.<sup>128</sup>

Finally, the Action Plan stipulated that relevant authorities would conduct training and education on intellectual property protection throughout China.<sup>129</sup> The plan stated that the Working Conference would “make publicly available the laws, provisions, regulations, standards, edicts, decrees and interpretations regarding the authorization, management, and implementation of intellectual property rights.”<sup>130</sup> To foster a better understanding of the legal provisions and methods for protecting intellectual property rights in China, the Working Conference also would compile and publish guidelines regarding application and protection in the areas of copyright, patent, and trademark.<sup>131</sup>

Initially, many commentators considered the 1995 Agreement “the single most comprehensive and detailed [intellectual property] enforcement agreement the United States had ever concluded.”<sup>132</sup> U.S. government officials also found early implementation of the Agreement promising.<sup>133</sup> By November 1995, however, the Agreement had become apparently inadequate to induce effective intellectual property protection in China.<sup>134</sup>

### 3. 1996 Accord

On April 30, 1996, the Clinton Administration again designated China as a “priority foreign country” for its failure to protect intellectual property rights.<sup>135</sup> A couple of weeks later, the Administration announced its intention to impose approximately \$2 billion worth of trade sanctions on Chinese textiles, garments, consumer electronics, sporting goods, and bicycles.<sup>136</sup> Within thirty minutes of the announcement, China responded with a retaliatory sanction of a similar amount on American agricultural products, cars and car parts, telecommunications equipment, and CDs.<sup>137</sup>

While the two countries were posturing for a compromise, China closed down fifteen CD factories, six major CD distribution markets, and more than 5000 minitheaters that showed pirated videos for a fee.<sup>138</sup> China also “expanded permission for foreign music and movie companies to produce and sell their products inside China.”<sup>139</sup> In light of these remedial measures, the United States reached a new accord<sup>140</sup> with



China just before the June 18 deadline.<sup>141</sup> According to then-Acting USTR Charlene Barshefsky: “China’s actions over the past few weeks demonstrate that the core elements of an operational [intellectual property] enforcement system are in place. As a result of these actions, sanctions will not be imposed.”<sup>142</sup> Likewise, China rescinded its threatened countersanctions.<sup>143</sup>

As before, this eleventh-hour compromise did not surprise trade analysts and sinologists, who had anticipated such a compromise when the trade sanctions were first announced.<sup>144</sup> The retaliatory tariffs would have hurt both the Chinese textiles industry and the American aerospace, automobile, and agricultural industries.<sup>145</sup> The tariffs might even have closed the Chinese market to American cultural products while opening it up to products from Europe, Japan, Australia, Hong Kong, and Taiwan.<sup>146</sup> Thus, it would have been in the interest of both countries to reach an agreement that would avert a potential trade war. Nonetheless, for political and diplomatic reasons, it was important for both countries to take a firm stand regarding their positions before reaching a compromise.<sup>147</sup> Indeed, commentators have suggested that the last-minute compromise had benefited the Clinton Administration in the domestic political arena.<sup>148</sup>

Unlike the 1992 MOU and the 1995 Agreement, which spelled out new terms, the 1996 Accord mainly reaffirmed China’s commitment to protect intellectual property rights.<sup>149</sup> This Accord included measures China had undertaken in the past few months and those it would undertake in the near future. It also confirmed the market access arrangements concluded under the 1995 Agreement.<sup>150</sup>

In light of prior dealings and the two previous ineffective agreements, business executives and trade analysts were very skeptical of the effectiveness of this new Accord.<sup>151</sup> In fact, the Accord suggests the contrary, reflecting instead China’s increasing reluctance to bow down to American pressure in its intellectual property negotiations.<sup>152</sup> Even though the Accord stipulated that the Chinese government would close its piracy factories, the Accord did not contain any provisions allowing American officials to monitor or conduct on-site verification of factory closings.<sup>153</sup> Instead, to verify such closings, U.S. officials must “rely on the word of local officials, who may be beholden to local interests.”<sup>154</sup>

### C. *The Need for a New U.S.-China Intellectual Property Policy*

By 1996, it had become obvious that the existing U.S.-China intellectual property policy was ineffective, misguided, and self-deluding.<sup>155</sup> Although China initially had serious concerns about the United States's threats of trade sanctions, the constant use of such threats by the U.S. government has led China to change its reaction and approach. The United States not only lost its credibility,<sup>156</sup> but its constant use of trade threats had helped China improve its ability to resist American demands.<sup>157</sup> Such threats and bullying also created hostility among the Chinese people, making the government more reluctant to adopt Western intellectual property law reforms.<sup>158</sup>

Even worse, the ill-advised bilateral policy had created what I call the "cycle of futility," which, in retrospect, explains the events and brinkmanship surrounding the 1992 MOU, the 1995 Agreement, and the 1996 Accord.<sup>159</sup> The cycle begins when the United States threatens China with trade sanctions. China then retaliates with countersanctions of a similar amount. After several months of bickering and posturing, both countries come to an eleventh-hour compromise by signing a new intellectual property agreement. Although intellectual property protection improves during the first few months immediately after the signing of the agreement, the piracy problem revives once international attention is diverted and the foreign push dissipates. Within a short period of time, American businesses again complain to the U.S. government, and the cycle repeats itself.

To be fair, the coercive bilateral policy has strengthened intellectual property protection in China in various ways. For example, the 1992 MOU and 1995 Agreement were instrumental in establishing a new intellectual property regime in China<sup>160</sup> and the institutional infrastructure needed to protect and enforce rights created under that regime.<sup>161</sup> The trade threats and coercive tactics increased the awareness of intellectual property rights among the Chinese people, in particular government officials. These threats and tactics also put intellectual property at the forefront of the U.S.-China bilateral trade agenda, thus attracting interests of Chinese leaders in implementing legal reforms in the area. Finally, they provided the reformist leaders with the needed push that helps reduce resistance from their conservative counterparts.<sup>162</sup>

Nonetheless, most of the things that could be accomplished through a coercive bilateral policy have been achieved. A continuation of this

policy not only would be ineffective and futile, but also would jeopardize the United States's longstanding interests in other areas such as international trade and human rights.<sup>163</sup> Indeed, the United States would be better off saving its hard-earned political capital for other difficult cross-border issues, such as terrorism, nuclear nonproliferation, illegal arms sales, environmental degradation, drug trafficking, refugees, illegal immigration, and bribery and corruption. Thus, scholars, policy-makers, and commentators have called for a critical assessment and reformulation of the U.S.-China intellectual property policy.

## II. CAUSES OF THE PIRACY AND COUNTERFEITING PROBLEM IN CHINA

To understand why it is so difficult to eradicate the piracy and counterfeiting problem in China, one must focus on the significant political, social, economic, cultural, and ideological differences between China and the West. While it is true that some Chinese are eager to free ride on the creative efforts of Western authors and inventors and consider piracy and counterfeiting a low-risk, lucrative business, this fact explains only the causes of rampant criminal commercial piracy and counterfeiting in China.<sup>164</sup> It, however, does not explain the reluctance of Chinese leaders to implement intellectual property law reforms, the lack of consciousness of intellectual property rights among the Chinese public, and the significant institutional barriers that impair the protection and enforcement of intellectual property rights in China. Instead, one must focus on the Confucian beliefs ingrained in the Chinese culture, the country's socialist economic system, the leader's skepticism toward Western institutions, the xenophobic and nationalist sentiments of the populace, the government's censorship and information control policy, and the significantly different Chinese legal culture and judicial system.

### A. *Confucianism and Cultural Practices*

For more than 2000 years, the Chinese had been heavily influenced by Confucianism,<sup>165</sup> which provided “the blueprint of an ideal life”<sup>166</sup> and the yardstick against which human relationships were to be measured.<sup>167</sup> To the Chinese, the past was not only a reflection of contemporary soci-

ety, but also the embodiment of cultural and social values.<sup>168</sup> By encountering the past, one could understand the Way of Heaven,<sup>169</sup> obtain guidance to future behavior,<sup>170</sup> and find out the ultimate meaning of human existence.<sup>171</sup> One also could transform oneself and build his or her moral character through self-cultivation.<sup>172</sup> Thus, materials and information about the past had to be put in the public domain for people to borrow or to transmit to younger generations.<sup>173</sup> Because intellectual property rights allow a significant few to monopolize these needed materials, they prevent the vast majority from understanding their life, culture, and society. Intellectual property rights therefore “contradict[] traditional Chinese moral standards.”<sup>174</sup>

Unlike Westerners today, the Chinese in the imperial past did not consider copying or imitation a moral offense. Rather, they considered it “a noble art,”<sup>175</sup> a “time-honored learning process”<sup>176</sup> through which people manifested respect for their ancestors.<sup>177</sup> At a very young age, Chinese children were taught to memorize and copy the classics and histories.<sup>178</sup> On the one hand, such undertaking would instill in the youngsters familial values, filial piety, and respect for their cultural legacy. On the other hand, copying was practically needed to ensure success in the imperial civil service examinations,<sup>179</sup> which emphasized the knowledge of the Confucian Four Books and the Five Classics.<sup>180</sup> Success in those examinations would bring not only power and glory to the candidates, but also honor to their families, districts, and provinces.

When the Chinese grew up, they became by training compilers, as compared to composers.<sup>181</sup> “Having memorized vast sequences of the classics and histories, they constructed their own works by extensive cut-and-paste replication of phrases and passages from those sources.”<sup>182</sup> To the Chinese, the classics and histories constituted the universal language<sup>183</sup> through which they communicated.<sup>184</sup> Although their unacknowledged quotation may be considered plagiarism today, the Chinese in the imperial past regarded such a practice as an acceptable, legitimate, or even necessary, component of the creative process. Indeed, Chinese writers from early times saw themselves more as preservers of historical record and cultural heritage than as creators.<sup>185</sup> Even Confucius, one of the greatest philosophers of all time, proudly acknowledged that he had “transmitted what was taught to [him] *without making up anything of [his] own.*”<sup>186</sup>

To a very great extent, this compiling tradition was similar to that held by Westerners before the emergence of the contemporary notion of

authorship in the eighteenth century.<sup>187</sup> Unlike contemporary writers, “[m]edieval church writers actively disapproved of the elements of originality and creativeness which we think of as essential component of authorship. ‘They valued extant old books more highly than any recent elucubrations and they put the work of the scribe and the copyist above that of the authors.’”<sup>188</sup> Although writers in later periods changed their attitudes toward originality and creativeness, they did not espouse modern attitudes toward plagiarism. Rather, like the Chinese people, they regarded imitation as the sincerest form of flattery and a necessary component of the creative process.<sup>189</sup> For example, in *The Defence of Poesy*, Sir Philip Sidney maintained that poetry “is an art of imitation . . . [and] counterfeiting.”<sup>190</sup> Likewise, “Shakespeare engaged regularly in activity that we would call plagiarism but that Elizabethan playwrights saw as perfectly harmless, perhaps even complimentary.”<sup>191</sup>

Finally, the Chinese subscribed to the Confucian vision of civilization. Under this vision, the family constituted the basic unit of human community, and the world was an outgrowth of this basic unit.<sup>192</sup> Emphasizing familial values and collective rights,<sup>193</sup> the Chinese did not develop a concept of individual rights. They also did not regard creativity as individual property. Instead, they considered creativity as a collective benefit to their community and the posterity.<sup>194</sup> Having a strong disdain for commerce,<sup>195</sup> they greatly despised those who created works for sheer profit.<sup>196</sup>

### B. *Socialist Economic System*

While the Communist government did not emphasize Confucianism until very recently,<sup>197</sup> its view on the function of creative works is similar to that of the Confucianists.<sup>198</sup> Under the socialist economic system, property belongs to the State and the people, rather than private owners. Authors thus create literary and artistic works for the welfare of the State, rather than for the purpose of generating economic benefits for themselves.<sup>199</sup> Indeed, in a socialist society, “owning property is tantamount to a sin. Thus, stealing an object that is owned by someone else is less corrupt than owning it outright yourself.”<sup>200</sup>

This aversion of private property was particularly strengthened by the numerous mass campaigns and endless class struggles that took place during the Mao era. Among the various mass campaigns, the Great Proletariat Cultural Revolution was the most severe and devastat-

ing.<sup>201</sup> During the Cultural Revolution, the government heavily criticized scientists, writers, artists, lawyers, and intellectuals and routinely condemned them to harsh prison terms.<sup>202</sup> Fearing political repercussions, many Chinese became “unwilling to acknowledge their personal role in [creative and] inventive activity.”<sup>203</sup> Instead, they used pseudonyms and put pure and non-identifying labels, such as “Red Flag,” “East Wind,” and “Worker-Peasant-Soldier,” on their products.<sup>204</sup>

Even worse, many Chinese developed contempt for authorship and remuneration from creative efforts. As one comrade would argue during the Cultural Revolution, “[i]s it necessary for a steel worker to put his name on a steel ingot that he produces in the course of his duty? If not, why should a member of the intelligentsia enjoy the privilege of putting his name on what he produces?”<sup>205</sup> Even though Deng Xiaoping and other Chinese leaders tried to rehabilitate the intelligentsia after the Cultural Revolution by enhancing their positions and facilitating their endeavors,<sup>206</sup> these reforms have yet to cultivate respect for intellectual property rights.

### C. *Self-strengthening Worldview*

During the nineteenth and twentieth centuries, China was constantly attacked by Western powers. The first major attack came in the early 1840s, when Britain defeated China in the Opium War. Under the Treaty of Nanking of 1842, China ceded Hong Kong Island to Britain and was forced to open five coastal ports to Western trade.<sup>207</sup> Since the Opium War, China had experienced repeat attacks by Western imperialist powers and was forced to sign unequal treaties giving out significant economic and territorial concessions. Such submission eventually led to the “Scramble for Concessions” in 1898, in which foreign imperialist powers carved the country “into leased territories and spheres of interest, within which they constructed railways, opened mines, established factories, operated banks, and ran all kinds of exploitive organizations.”<sup>208</sup>

Desperate to save the country, the Chinese adopted a self-strengthening worldview, under which attaining independence and liberating the nation became the country's first priority.<sup>209</sup> In the beginning, self-strengthening was mainly limited to diplomatic, military, and industrial reforms.<sup>210</sup> After China's defeats in the Sino-French War in 1885 and the Sino-Japanese War in 1895, reformers in China realized the inade-

quacy of limited modernization and the need for drastic institutional changes. Inspired by successful reforms introduced by Peter the Great and Emperor Meiji, these reformers advocated radical reforms of the civil service examinations, education, and political institutions.<sup>211</sup> Unfortunately, due to the reformers' inexperience and the strong conservative opposition in the imperial court, these reforms remained largely futile.<sup>212</sup>

The 1911 Revolution led to the abdication of the Manchu Emperor, ending 268 years of Qing rule and more than 2000 years of imperial dynasties.<sup>213</sup> Notwithstanding the founding of the new republic, China had yet to experience peace, order, or unity. In fact, "the early republican years were characterized by moral degradation, monarchist movements, warlordism, and intensified foreign imperialism."<sup>214</sup> Frustrated by China's backwardness and its semi-colonial status, the new intelligentsia, many of whom were trained in the West or were influenced by Western philosophy, advocated "a radical change in the philosophical foundations of national life."<sup>215</sup> In particular, they "called for a critical re-evaluation of China's cultural heritage in the light of modern Western standards, a willingness to part with those elements that had made China weak, and a determination to accept Western science, democracy, and culture as the foundation of a new order."<sup>216</sup>

In 1949, the Chinese Communist Party established the People's Republic of China. Despite the change in government, the self-strengthening worldview persists. Subscribing to this worldview, many Chinese believed it was *right* to freely reproduce or to tolerate the unauthorized reproduction of foreign works that would help strengthen the country.<sup>217</sup> Some of them also believed that copying was needed, or even necessary, for China to catch up with Western developed countries. Thus, one could easily find bookstores containing "special" rooms selling pirated works from Western publishers.<sup>218</sup> One also could find Reference News (*Cankao Xiaoxi*) providing translated excerpts from foreign news materials published abroad.<sup>219</sup> Even today, the Chinese sometimes refer to pirated computer programs "as 'patriotic software,' out of a belief that it speeds the nation's modernization at little or no cost."<sup>220</sup>

#### D. *Skepticism, Xenophobia, and Nationalism*

Before the Opium War, the Chinese regarded foreigners as "outer barbarians" and believed the country had no need for foreign objects, man-

ufactures, and ideas.<sup>221</sup> Ignorant and complacent, Emperor Qianlong of the Qing dynasty told King George III of England: "We possess all things. I set no value on objects strange or ingenious, and have no use for your country's manufactures."<sup>222</sup> A couple of centuries later, the scientific progress and military prowess of Western powers had proven Qianlong wrong. In fact, they brought China two centuries of tremendous pain and humiliation. It was not until the resumption of sovereignty in Hong Kong in 1997 that China was able to recover from all the unequal treaties signed in the nineteenth and twentieth centuries.

Although China's defeats in the Opium War and the subsequent Arrow War had awakened the Chinese and made them aware of their country's backwardness, many Chinese, in particular those in the imperial court, were still skeptical of Western technology, ideas, and institutions.<sup>223</sup> Indeed, "[t]he great majority of the scholar-official class regarded foreign affairs and Western-style enterprises as 'dirty' and 'vulgar,' beneath their dignity."<sup>224</sup> As a result, China's early modernization efforts were limited to firearms, ships, machines, communications, mining, and light industries, and "[n]o attempts were made to assimilate Western institutions, philosophy, arts, and culture."<sup>225</sup> Indeed, the skepticism of the conservative Qing court was one of the main reasons for the failure of these modernization efforts.<sup>226</sup>

While skepticism toward Western objects and ideas made the Qing court reluctant to introduce modernization reforms, the xenophobic and nationalist sentiments among the Chinese populace<sup>227</sup> made implementation of those reforms difficult. To a very great extent, the Chinese nationalist and xenophobic sentiments were "a reaction to the humiliation that China suffered under the hands of Western imperialism."<sup>228</sup> These sentiments began to grow after China's defeat in the Opium War, which led to rapid inflation and an influx of foreign goods.<sup>229</sup> Subsequent foreign attacks and signings of unequal treaties also resulted in the unpopular invasion of Christianity and unwanted presence of foreign troops, ministers, consuls, missionaries and traders in China.<sup>230</sup>

By the turn of the twentieth century, foreign industries and investments had dominated almost all modern industries and enterprises in China.<sup>231</sup> Such domination disrupted the self-sufficient agrarian economy, displaced the native handicraft industries,<sup>232</sup> and shattered traditional family relationships.<sup>233</sup> Added to these hardships were floods in Shandong, Sichuan, Jianxi, Jiangsu, and Anhui and a severe drought in northern China.<sup>234</sup> Fueled by socio-economic distress and nationalist



sentiments, the Chinese vented their frustration on foreigners and foreign enterprises.<sup>235</sup> Notable outbursts of anti-foreign sentiments in the late Qing and Republican period included the Tianjin Massacre of 1870,<sup>236</sup> the Boxer Uprising in 1900,<sup>237</sup> and the May Fourth Movement in 1919.<sup>238</sup>

During the Mao era, xenophobia and nationalism were primarily used “to mobilize domestic resources to catch up with advanced Western powers and prevent China’s further victimization.”<sup>239</sup> Keenly aware of China’s misfortunes in the nineteenth and twentieth centuries, Mao and his followers were “national Communists at heart.”<sup>240</sup> Like the reformers in the Qing period, they had “a burning desire to restore China’s rightful position under the sun, to achieve the big power status denied it since the Opium War, and to revive the national confidence and self-respect that had lost during a century of foreign humiliation.”<sup>241</sup> Nonetheless, the repeated power struggles within the Chinese leadership made Mao’s dreams unfulfilled.

When Deng Xiaoping returned to power in the late 1970s, he adopted a different and more pragmatic approach. Instead of putting “politics in command,” Deng saw economic wealth as the foundation of China’s power.<sup>242</sup> “According to Deng, whether China could have a rightful place in the world of nations depended on China’s domestic economic development.”<sup>243</sup> Although his predecessors emphasized national unity, Deng believed that “national unity depended on whether China could catch up with the developed countries.”<sup>244</sup> Thus, he vigorously pushed for the Four Modernizations,<sup>245</sup> the renewal of diplomatic and commercial ties with the United States, Japan, and other Western developed countries,<sup>246</sup> and the establishment of Special Economic Zones.<sup>247</sup>

With the death of Deng Xiaoping in 1997, many commentators suggested that there might be a resurgence of xenophobic and nationalist sentiments. According to these commentators, “a new ideology is necessary as faith in Marxism or Maoism declines[,] and nationalism, if handled properly, can justify the political legitimacy of leadership.”<sup>248</sup> These commentators cited as evidence the two recent bestsellers, *China Can Say No*<sup>249</sup> and *Behind a Demonized China*,<sup>250</sup> the Chinese reaction to the United States’s bombing of their embassy in Belgrade,<sup>251</sup> and China’s recent standoff with the United States over the collision of its jet fighter and a U.S. reconnaissance plane.<sup>252</sup>

### E. *Censorship and Information Control Policy*

Since the establishment of the People's Republic of China in 1949, the Communist government has exercised very strict control over the dissemination of information and the distribution of media products.<sup>253</sup> The logic behind such control is that, as an instrument of political indoctrination and mass mobilization,<sup>254</sup> media not only has the ability to create an atmosphere conducive to political development, but also can help mobilize the masses and foster political struggle.<sup>255</sup> Thus, information control and content regulations are needed to ward off those politically sensitive materials that would destabilize the country and the Communist regime.<sup>256</sup> Today, the media business and the publishing industry remain the most heavily regulated industries in China.<sup>257</sup>

Consider imported films for example. As the Motion Picture Exhibitors Association of America alleged, "China has an unofficial, unwritten, 'shadowy' system of quotas for films, video, and television."<sup>258</sup> Initially, the Chinese authorities imposed a sales scheme in which all imported films would be licensed at a low, flat rate.<sup>259</sup> In 1994, they replaced this scheme by allowing ten recent blockbusters to be imported on a revenue-sharing basis.<sup>260</sup> During the U.S.-China intellectual property talks in 1996, the Chinese authorities further eliminated this ten-imports-per-year quota.<sup>261</sup> They also ended the monopoly of China Film Distribution and Exhibition Company over film distribution and allowed Chinese film studios to sign cooperative agreements with U.S. film producers to distribute foreign motion pictures.<sup>262</sup> Although the government soon backpedaled on its new policy,<sup>263</sup> the film industry is opening up as China enters the WTO. For example, under the U.S.-China Bilateral Market Access Agreement signed on November 15, 1999, China promised to "allow[] at least 20 films annually into China on a revenue-sharing basis . . . [and] to open theaters and distribution to foreign investment."<sup>264</sup>

Apart from imported films, Chinese authorities place heavy restriction on imported books and audiovisual products. Under Chinese regulations, wholly foreign-owned enterprises are forbidden to sell books, for "[s]uch activities might expose foreigners to 'internal' publications and other sensitive materials which foreigners are not permitted to see."<sup>265</sup> In addition, they "are not allowed to engage in the publication or reproduction sector."<sup>266</sup> Instead, they must form a joint venture with a state-approved Chinese publishing or reproduction unit.<sup>267</sup> As with other local

Chinese publishing or reproduction units, these joint ventures are subject to re-registration every two years.<sup>268</sup> They also must abide by the various censorship laws and regulations, which list in details the type of contents prohibited by the government.<sup>269</sup>

Due to this stringent information control policy, many media products are not available even if they are in great demand in the Chinese market.<sup>270</sup> As a result, consumers have to settle for black market products or pirated goods,<sup>271</sup> which are often inferior to, and are sometimes indistinguishable from, the genuine products.<sup>272</sup> As time passes, the Chinese market would become saturated with these infringing substitutes. Even when the market is finally open, it might be difficult for the foreign manufacturers and distributors to capture the market.<sup>273</sup>

#### F. Laws with Chinese Characteristics

Finally, the Chinese have an entrenched tradition of regarding laws as an inefficient, arbitrary, and cumbersome instrument for governance.<sup>274</sup> As Confucius explained in the *Analects*: “Govern the people by regulations, keep order among them by chastisements, and they will flee from you, and lose all self-respect. Govern them by moral force, keep order among them by ritual and they will keep their self-respect and come to you of their own accord.”<sup>275</sup> Although many considered this tradition a Confucian legacy, such an aversion to law can actually be traced back to the Western Zhou period (1122-771 B.C.), during which rituals were emphasized.<sup>276</sup>

Under this tradition, the Chinese lived by the concept of *li* (rites), rather than the concept of *fa* (law). Broadly defined, *li* extended beyond one’s proper conduct or etiquette and covered the whole range of political, social, and familial relationships that encompass a harmonious Confucian society.<sup>277</sup> People who were guided by this concept always understood their normative roles, responsibilities, and obligations to others. They also were ready to adjust their views and demands in order to accommodate other people’s needs and desires, to avoid confrontation and conflict, and to preserve harmony.<sup>278</sup> As a result, litigation and promotion of individual rights became unnecessary in a Confucian society.

In contrast to *li*, “*fa* is a penal concept; it is associated with punishment, serving to maintain public order through the threat of force and physical violence.”<sup>279</sup> Unlike the Confucianists, the Legalists believed

that it was impossible to teach people to be good. Thus, *fa* is needed to tell people what to do and to induce them to do what they should do. Except in the Qin dynasty in the third century B.C., *fa jia* (legalism) has never been the dominant Chinese ideology.<sup>280</sup> In fact, the Chinese always viewed *fa* unfavorably and associated it with the harsh and despotic Qin rule, which unified China and centralized its bureaucracy.<sup>281</sup> They assumed that “when government leans heavily on *fa* to reinforce its authority, it does so because it has no effective ability to rule by *li*.”<sup>282</sup> To the Chinese, *fa* should always be employed as the last resort.<sup>283</sup>

During the Mao era, formal laws were denounced as “inherently bureaucratic, hampered by legislative formalities and fed on professional interests, slow to come, rigid in procedure, prone to ramifying into technical details and yet unable to cover all the circumstances of the ever-changing social relationships.”<sup>284</sup> To replace this “defective” legacy, Mao instituted socialist laws that “operate within the boundaries of policy directives, under the guidance of policy principles and supplemented by various policy tools (such as a Party or government circular or notice).”<sup>285</sup> “Throughout the Cultural Revolution and until Mao’s death in 1976, law was simply a mechanism for implementing Party policy, interpreted and reinterpreted to reflect the direction of the prevailing political winds.”<sup>286</sup>

Even today, laws are still considered a “concrete formulation of the Party’s policy.”<sup>287</sup> As “a summary of practical administrative and judicial experience,”<sup>288</sup> laws do not “necessarily constitute a detailed, comprehensive and self-containing rule system, justifiable on ideological as well as jurisprudential grounds, with coherent principles and well-defined concepts.”<sup>289</sup> They also can be “incomplete, incoherent, ideologically compromising, as well as broadly and vaguely termed pending further administrative and judicial experience in its implementation.”<sup>290</sup>

Furthermore, laws are intended to be flexible<sup>291</sup> and can be formulated “on an interim or trial use basis.”<sup>292</sup> Given the rapid social and economic changes, laws will likely fall behind policies.<sup>293</sup> Statutory provisions that are effective in one year may therefore be outdated in the following year had a new policy or a new law been implemented in the relevant or related areas. To determine the applicability and effectiveness of a provision, one must examine *all* the laws and supplementary documents, including administrative rules and judicial interpretations, in all the relevant and related areas.<sup>294</sup> In most cases, the more specific and updated provisions prevail.

Chinese laws “are generally broadly drafted, leaving the detailed rules to be provided by the relevant administrations under the State Council.”<sup>295</sup> Thus, “it is often the detailed administrative implementing rules that provide the concrete information about the definition, limits, and practical implication of legal rights established in the laws.”<sup>296</sup> Contrary to Western beliefs and expectations, these rules sometimes exceed the explicit provisions of the laws they are supposed to explain. They also may add rights and rules that were not previously conceived by the legislature when it adopted the laws.<sup>297</sup> Nevertheless, the Chinese lacked a concept of separation of powers<sup>298</sup> and found these expansions and modifications acceptable.

### III. RECENT IMPROVEMENTS IN INTELLECTUAL PROPERTY PROTECTION IN CHINA

In light of the differences between China and the West, legal reforms in the intellectual property area would be highly ineffective unless they were sensitive to the characteristics of Chinese society and the local socio-economic conditions. In the late 1980s and the early 1990s, the United States relied heavily on pressure and ultimata to reform the Chinese intellectual property system in the image of American laws. Unfortunately, because the U.S. government failed to take into account the differences between China and the West, its policy had largely failed.

Ironically, however, intellectual property protection in China has improved significantly since the U.S. government and American businesses backed away from their earlier coercive tactics. Since 1996, the Chinese government has taken considerable measures to improve intellectual property protection in China. In August that year, China issued the Regulations on the Certification and Protection of Famous Trademarks,<sup>299</sup> thus bringing its laws into conformity with the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPs Agreement”).<sup>300</sup> China also issued the Regulations on the Protection of New Plant Varieties<sup>301</sup> and amended its Criminal Law to include a section on intellectual property crimes.<sup>302</sup> In April 2000, China became a member of the International Union for the Protection of New Varieties of Plants.<sup>303</sup> It also enacted a law to protect trademark holders from cybersquatters.<sup>304</sup>

Meanwhile, China conducted institutional reforms to improve the protection and enforcement of intellectual property rights. In April 1998, the Chinese government upgraded the State Patent Bureau to a ministry-level branch of the State Council, known as the State Intellectual Property Office.<sup>305</sup> This office replaced the State Council Working Conference on Intellectual Property Rights,<sup>306</sup> which was established by the 1995 Agreement. Working closely with the State Administration of Industry and Commerce and the State Press and Publication Administration,<sup>307</sup> the new office is responsible for improving intellectual property protection and coordinating regional intellectual property rights department to intensify enforcement of laws and regulations.<sup>308</sup> It is also responsible for building a patent information network,<sup>309</sup> assisting enterprises and research institutions to protect their own technology and products, and cooperating with other countries to speed up China's intellectual property protection to meet international standards.<sup>310</sup>

To facilitate research and provide training, the China Intellectual Property Training Center was established in Beijing in January 1997.<sup>311</sup> This Center provides a training and research base on intellectual property rights and offers copyright, patent, and trademark courses to government officials, lawyers, patent and trademark agents, and business people.<sup>312</sup> It also holds international and regional seminars and training courses with WIPO.<sup>313</sup> In April 1998, China opened the first government-run center for training special personnel for the country's intellectual property rights department.<sup>314</sup> In addition, many Chinese universities now offer courses on intellectual property,<sup>315</sup> and some even have intellectual property departments or offer degrees in intellectual property law.<sup>316</sup>

Most recently, as China was preparing to enter the WTO, it revamped its entire intellectual property system, amending copyright, patent, and trademark laws and adopting a new regulation on the protection of layout designs of integrated circuits.<sup>317</sup> The new amendments to the patent law came into effect on July 1, 2001. These amendments aligned the patent law with the changing socialist market economy, strengthened patent protection, simplified examination and issuance procedures, and harmonized the law with international standards and treaties.<sup>318</sup> Under the revised patent law, enforcement authorities may confiscate income from infringing products and fine violators,<sup>319</sup> and the right to apply for a patent in an employment invention belongs to the employer unless a

contrary agreement exists.<sup>320</sup> Where damages cannot be determined, the revised law allows for the calculation of damages based on appropriate royalties.<sup>321</sup> It also prohibits the “offers for sale” of infringing products<sup>322</sup> and enables patent holders to request immediate suspension of potentially infringing acts before requesting a formal legal determination.<sup>323</sup> In addition, the law simplifies the application procedures,<sup>324</sup> allows for judicial review of patent revocations,<sup>325</sup> heightens the standard for compulsory license,<sup>326</sup> and requires innocent infringers to prove that the patented product comes from a legitimate source.<sup>327</sup>

Four months later, the amendments to the copyright law went into effect, strengthening copyright protection and improving the law’s compliance with the TRIPs Agreement. Under the revised copyright law, administrative agencies and courts are authorized to order confiscation of illegal gains, pirated copies, and materials, tools, and equipment used to conduct infringement activities.<sup>328</sup> Where the plaintiff’s damage or the infringer’s profits cannot be determined, the revised law allows for statutory damages of up to RMB 500,000.<sup>329</sup> In addition, the law provides access to preliminary injunctions<sup>330</sup> and places the burden on the accused infringer to prove the existence of a legitimate license.<sup>331</sup> It also addresses for the first time copyright issues on the Internet<sup>332</sup> and includes a reference to China’s contract law as a basis for the fulfillment of contractual obligations.<sup>333</sup>

Finally, the amendments to the trademark law became effective on December 1, 2001. The revised law delineates the factors needed to determine the “well-known” status of a trademark.<sup>334</sup> It provides access to preliminary injunctions<sup>335</sup> and allows for statutory damages of up to RMB 500,000 in cases where the plaintiff’s damage or the infringer’s profits cannot be determined.<sup>336</sup> In addition, it authorizes administrative agencies and courts to confiscate and destroy counterfeit products and materials, tools, and equipment used to manufacture these products.<sup>337</sup> It also requires enforcement authorities to transfer cases to judicial authority for criminal investigation.<sup>338</sup>

To strengthen intellectual property protection, China has, from time to time, launched large-scale crackdowns on pirated and counterfeit products. Most recently, as a follow-up to the anti-counterfeiting campaign that started in November 2000, China launched a major crackdown on counterfeit products, focusing primarily on products that pose health and safety risks, such as food, drugs, medical supplies, and agricultural products.<sup>339</sup> In addition, Chinese leaders stressed the impor-

tance of intellectual property as an economic strategy,<sup>340</sup> and “books, television talk shows, media articles, and government and academic reports have highlighted the importance of [intellectual property] protection to China’s economic development.”<sup>341</sup>

Notwithstanding these reforms and large-scale crackdowns, significant problems still exist with the enforcement of intellectual property laws in China, especially at the grassroots level and in rural areas. There are also other institutional problems like “local protectionism and corruption, reluctance or inability on the part of enforcement officials to impose deterrent level penalties, and a low number of criminal prosecutions.”<sup>342</sup> Nonetheless, intellectual property protection has improved considerably since the early 1990s. As the *2000 National Trade Estimate Report* stated: “Today, China has improved its legal framework—and it has virtually shut down the illegal production and export of pirated music and video CDs and CD-ROMS. Indeed, today it is an importer of such products from third countries.”<sup>343</sup>

One might wonder why intellectual property protection in China has improved even though the U.S. government and American businesses has backed away from their earlier coercive tactics. After all, the logic behind the coercive U.S.-China intellectual property policy is that the Chinese intellectual property regime cannot sustain itself and, therefore, requires foreign pushes to rejuvenate the system. While these foreign pushes were undoubtedly helpful in establishing the Chinese intellectual property system in the early 1990s, recent improvements in intellectual property protection in China can be largely attributed to three other factors.

First, thanks to the efforts of governments, intergovernmental and nongovernmental organizations, and foreign and local businesses, the Chinese people have become increasingly aware of the basic functions of, and the rationales behind, intellectual property rights. To many Chinese, these rights are no longer alien, abstract, and incomprehensible. Rather, they are closely related to one’s daily life and the country’s domestic growth and international reputation.

Second, the Chinese begin to see the benefits of intellectual property protection. In the past, many Chinese thought intellectual property rights were bad for the country. They considered intellectual property rights as exploitative devices that were designed specifically to protect the West’s dominant position and the United States’s hegemony.<sup>344</sup> Under a Trojan horse theory, these devices would drain away China’s



scarce economic resources,<sup>345</sup> divide the country, and erode its cultural identity.<sup>346</sup> They also would slow down China's economic progress and its rise in world affairs<sup>347</sup> and ensure that the country "follow the path of the former Soviet Union and Eastern Europe—toward economic decay, social unrest, and political instability."<sup>348</sup>

Third, and most important of all, many Chinese have become stakeholders, and intellectual property matters to them. While the importance of intellectual property rights to the growing computer software and high-technology industries are apparent,<sup>349</sup> piracy and counterfeiting hurt the country in many other ways. For example, the lack of intellectual property protection makes it difficult for governments to attract foreign investments<sup>350</sup> and technology transfer.<sup>351</sup> They also stifle creativity, reduce tax revenues,<sup>352</sup> impede the development of indigenous authors and local industries,<sup>353</sup> and pose grave threats to the health and safety of the local people.<sup>354</sup> Moreover, due to widespread piracy and counterfeiting, local businesses and educational centers are forced to pay higher prices for the needed foreign technologies and materials.<sup>355</sup> Consumers become reluctant to purchase in the open market<sup>356</sup> for fear of buying fake products despite paying the same price.<sup>357</sup> And worst of all, "the best and brightest" in China feel compelled to leave the country for the more remunerative systems abroad.<sup>358</sup>

At the international level, the lack of intellectual property protection has damaged China's reputation and delayed its entry into the WTO. On November 10, 2001, member states of the WTO approved China's accession to the international trading body.<sup>359</sup> After fifteen years of exhaustive negotiations, China finally became a member of the WTO.<sup>360</sup> Although the accession process was complicated and involved many different factors, it would not be too far-fetched to argue that China might still remain outside the WTO had it not strengthened its protection of intellectual property rights. Indeed, some commentators considered the WTO membership a major impetus for China's recent improvements in intellectual property protection.

Now that China has joined the WTO, one might wonder whether intellectual property protection will continue to improve. When commentators analyze the effects of China's entry into the WTO, they usually fall into one of two camps—the optimists or the pessimists—or a hybrid between the two, who considers China's entry a "double-edged sword."<sup>361</sup> While the optimists maintain that China's entry will benefit both the Chinese people and the global community and will allow China to

become an economic superpower, the pessimists argue that China's entry will exacerbate the existing social-economic problems,<sup>362</sup> thus resulting in the potential disruption, or even collapse, of the country and the global trading system.

In the intellectual property field, the optimists believe China's WTO membership will lead to stronger intellectual property protection in the country. As they argued, China's accession to the WTO will lead to better economic conditions in the country. As a result, consumers will no longer be attracted to low-priced counterfeits and, instead, will seek higher-priced genuine and luxury goods.<sup>363</sup> Using Taiwan as example, these observers predicted that "[p]irates and counterfeiters will . . . gradually move into legitimate businesses[,] and the focus of counterfeiting and piracy will shift away from China to lesser developing countries, such as Vietnam."<sup>364</sup>

By contrast, the pessimists believe that the piracy and counterfeiting problem will worsen in the first few years after China's entry into the WTO. As access to the Chinese markets increases, the increase of foreign investment and trade will enhance the economic conditions that give rise to the piracy and counterfeiting problem in the first place.<sup>365</sup> Reduced restrictions on export privileges also will allow pirates and counterfeiters to trade more aggressively with markets having "a strong appetite for low-priced counterfeit goods," such as southeast Asia and eastern Europe.<sup>366</sup>

Moreover, as the current legal reforms in China focus primarily on improving the compliance of existing laws with the WTO regime, China's recent accession to the WTO might create a disincentive for the country to carry out further immediate reforms, especially in areas where non-compliance is questionable, difficult to assess, or hard to prove before the Dispute Settlement Body of the WTO.<sup>367</sup> In fact, its "increased stature as a WTO member will increase its bargaining position and its leverage against any future pressure to improve its piracy problem."<sup>368</sup>

In light of the uncertainty and the complex nature of the international trading system, it is very difficult to forecast the impact of China's accession to the WTO. Nonetheless, as most commentators tend to agree, the Chinese economy likely will deteriorate in the first few years after China's accession to the WTO.<sup>369</sup> However, once China recovers from this difficult transitional period, the Chinese economy will improve, and China eventually might join the United States as an economic superpower.

## CONCLUSION

Although the notion of intellectual property rights was imported into China in the late nineteenth century, the contemporary Chinese intellectual property system was not developed until the late 1970s, when intellectual property rights reemerged after China reopened its market to foreign trade. Since then, the United States has been very aggressive in protecting its intellectual property interests and has threatened China with a series of economic sanctions, trade wars, non-renewal of MFN status, and opposition to entry into the WTO.

While the coercive bilateral policy succeeded initially in introducing a new intellectual property regime and establishing the institutional infrastructure needed to protect and enforce rights created under that regime, it has become ineffective, misguided, and self-deluding by the mid-1990s. Ironically, however, intellectual property protection has improved considerably since the U.S. government and American businesses backed away from their earlier coercive tactics. Such improvements can be largely attributed to the heightened awareness of intellectual property rights among the Chinese populace, the increasing recognition by Chinese leaders and the general public of the benefits of intellectual property protection, and the emergence of local stakeholders in the Chinese intellectual property system.

After fifteen years of exhaustive negotiations, China finally joined the World Trade Organization in December 2001. As China enters the WTO, it will face significant challenges in almost every aspect of its economy and socio-political system. During this critical transitional period, the influx of foreign goods and services and the resulting competition will likely exacerbate the existing socio-economic problems in China. As a result, the Chinese economy will deteriorate, and the piracy and counterfeiting problem will grow. Nonetheless, as the economy recovers, the living standards of the Chinese people will be raised, and consumers might prefer genuine and luxury products to lower-priced knockoffs. Under this scenario, stronger intellectual property protection will emerge, and China eventually might join the United States as an economic superpower.

<sup>1</sup> Paul Blustein & Clay Chandler, *WTO Approves China's Entry*, WASH. POST, Nov. 11, 2001, at A47; Joseph Kahn, *World Trade Organization Admits China, Amid Doubts*, N.Y. TIMES, Nov. 11, 2001, at 1A.

<sup>2</sup> For comprehensive discussions of the ramifications of 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); Peter K. Yu, *The Ramifications of China's Entry into the WTO: Will the Global Community Benefit?*, FINDLAW'S WRIT: LEGAL COMMENTARY, Dec. 4, 2001, at [http://writ.news.findlaw.com/commentary/20011204\\_yu.html](http://writ.news.findlaw.com/commentary/20011204_yu.html) [hereinafter Yu, *Ramifications of China's Entry into the WTO*].

<sup>3</sup> See discussion *infra* Part I.

<sup>4</sup> Professor McCarthy put insightfully:

We care because if no intellectual property protection exists regarding technical and entertainment information, then we have little to sell to the rest of the world. In the old days of selling cars, steel, and aluminum to the rest of the world, the kind of patent, trademark and copyright laws implemented by other nations did not make a lot of difference. Their intellectual property laws were their business. Now it is our business.

J. Thomas McCarthy, *Intellectual Property—America's Overlooked Export*, 20 U. DAYTON L. REV. 809, 813 (1995); see also INTELLECTUAL PROPERTY LAWS OF EAST ASIA 9 (Alan S. Gutterman & Robert Brown eds., 1997) (noting that the share of intellectual property-based exports in the United States has doubled since the Second World War); R. Michael Gadbow & Rosemary E. Gwynn, *Intellectual Property Rights in the New GATT Round*, in INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT? 38, 45 (R. Michael Gadbow & Timothy J. Richards eds., 1988) [hereinafter GLOBAL CONSENSUS, GLOBAL CONFLICT?] (“The new reality is that the U.S. economy is increasingly dependent for its competitiveness on its ability to protect the value inherent in intellectual property. United States exports are increasingly weighted toward goods with a high intellectual property content.”); Bruce A. Lehman, *Speech Given at the Inaugural Engelberg Conference on Culture and Economics of Participation in an International Intellectual Property Regime*, 29 N.Y.U. J. INT’L L. & POL. 211, 211 (1997) (“Many Americans have begun to derive their livelihoods from products of their minds, as opposed to products of manual labor, and much of [its] gross domestic product is attributable to new information and entertainment-based industries which have an interest in protecting their valuable products through intellectual property rights.”).

<sup>5</sup> WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* (1995).

<sup>6</sup> *Id.* at 13.

<sup>7</sup> *Id.*; see also TANG CODE art. 110 (“All cases of possession of astronomical instruments, maps of the heavens, esoteric books, military books, books on the seven days, the *Methods of the Great Monad*, or the *Methods of the God of Thunder* by private persons punish violators by two years of penal servitude.”), translated in 2 THE TANG CODE 78 (Wallace Johnson trans., Princeton Univ. Press 1997).

<sup>8</sup> ALFORD, *supra* note 5, at 13.

<sup>9</sup> *Id.* (footnote omitted).

<sup>10</sup> See generally 1-2 THE TANG CODE, *supra* note 7, for a collection and analysis of the Tang Code. The Tang Code was significant for two reasons. First, it was the oldest surviving code in China today. Although comprehensive legal codes were enacted in the Qin and Han dynasties, most of these codes have been lost except through scattered quotations found in other works. ALBERT H.Y. CHEN, *AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA* 12 (1998). Second, the Tang Code was

the basis on which the later codes of the Song, Yuan, Ming, and Qing dynasties were developed. *Id.*

<sup>11</sup> ALFORD, *supra* note 5, at 13.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 13-14.

<sup>14</sup> For comprehensive discussions of the British 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); MARCI A. HAMILTON, THE HISTORICAL AND PHILOSOPHICAL UNDERPINNINGS OF THE COPYRIGHT CLAUSE 4-8 (Benjamin N. Cardozo School of Law Occasional Papers in Intellectual Property No. 5, 1999).

<sup>15</sup> ALFORD, *supra* note 5, at 15.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 16. One commentator noted the limitation of clan rules:

The clan rules, as guidance toward ideal conduct, could not be very effective beyond a certain point, depending upon how well a given clan was organized and operated. It seems that even the clans which were sufficiently well organized and wealthy enough to have their genealogies printed did not have the necessary organizational strength and appeal to make the clan rules rigidly binding upon their members. The clan rules nonetheless had an impressive normative influence, even upon members with little education.

Hu-chen Wang Liu, *An Analysis of Chinese Clan Rules: Confucian Theories in Action*, in CONFUCIANISM AND CHINESE CIVILIZATION 16, 17 (Arthur F. Wright ed., 1964).

<sup>18</sup> ALFORD, *supra* note 5, at 16.

<sup>19</sup> *Id.* at 15.

<sup>20</sup> PETER FENG, INTELLECTUAL PROPERTY IN CHINA 3 (1997).

<sup>21</sup> ALFORD, *supra* note 5, at 33-34.

<sup>22</sup> *Id.* at 34.

<sup>23</sup> *Id.*

<sup>24</sup> Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as last revised in Stockholm July 14, 1967, 21 U.S.T. 1538, 828 U.N.T.S. 305 [hereinafter Paris Convention].

<sup>25</sup> Act of Mar. 3, 1891, ch. 565, 26 Stat. 1106. Under the Chace Act, foreign, non-resident authors could attain copyright protection in the United States if their countries offered Americans similar protection.

<sup>26</sup> Treaty for Extension of the Commercial Relations Between [China and the United States], reprinted in TREATIES AND AGREEMENTS WITH AND CONCERNING CHINA 1894-1919 (J.V.A. MacMurray ed., 1921).

<sup>27</sup> See 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, 138 (1997) [hereinafter Alford, *Making the World Safe for What?*] ("[The 1903 treaty represents] one of the first efforts by the United States anywhere to use its strength bilaterally to bring about greater intellectual property protection.").

<sup>28</sup> ALFORD, *supra* note 5, at 37-38.

<sup>29</sup> Interestingly, out of these three commercial treaties, the 1903 treaty with the United States was the only agreement that included patent protection. *Id.* at 37.

<sup>30</sup> *Id.* at 41-42.

- 31 *Id.* at 42.
- 32 *Id.* at 43.
- 33 *Id.* at 2.
- 34 *Id.* at 49.
- 35 *Id.* at 47; *see also* IMMANUEL C.Y. HSÜ, *THE RISE OF MODERN CHINA* 411 (6th ed. 2000) (“[The late Qing reforms were] a shrewd effort on the part of the dowager to disguise her shame over her role in the Boxer catastrophe.”).
- 36 ALFORD, *supra* note 5, at 49.
- 37 *Id.*
- 38 *Id.* at 2.
- 39 While China was negotiating the commercial treaties with Britain, Japan, and the United States, the treaty powers hinted that they might relinquish extraterritoriality if they were satisfied with the state of the Chinese law and the arrangement for its administration. *Id.* at 36.
- 40 *Id.* at 32. For a comprehensive discussion of the development of extraterritoriality in China, *see generally* 1-2 GEORGE W. KEETON, *THE DEVELOPMENT OF EXTRATERRITORIALITY IN CHINA* (1969).
- 41 ALFORD, *supra* note 5, at 49.
- 42 *Id.* at 50.
- 43 *Id.* at 51.
- 44 *Id.* at 52.
- 45 FENG, *supra* note 20, at 3.
- 46 As Professor Alford explained:
- Structurally, each of these laws granted rights only to those persons who had registered their intellectual property with the appropriate governmental agencies and further specified that such rights were to be enforced through recourse to the nation’s court system. Such a registration requirement may have made sense in the foreign context from which it was borrowed. It was, however, far less appropriate for China in the early twentieth century, given that, in the words of Chiang Kai-shek himself, “when something arrives at a government office it is *yamenized*—all reform projects are handled lackadaisically, negligently, and inefficiently,” and given the virtual absence of personnel trained to administer such a registration system.
- ALFORD, *supra* note 5, at 53 (footnote omitted).
- 47 FENG, *supra* note 20, at 3; *see also* HSÜ, *supra* note 35, at 652-55 (describing the economic policies, land revolution, and agricultural reforms in China in the early 1950s).
- 48 *See infra* text accompanying notes 284-86 (discussing the lack of rule of law in Maoist China).
- 49 FENG, *supra* note 20, at 3.
- 50 Agreement on Trade Relations Between the United States of America and the People’s Republic of China of 1979, July 7, 1979, P.R.C.-U.S., 31 U.S.T. 4652.
- 51 *Id.* art. VI (3), 31 U.S.T. at 4658.
- 52 *Id.* art. VI (5), 31 U.S.T. at 4658.
- 53 Paris Convention, *supra* note 24.
- 54 Trademark Law of the People’s Republic of China, *translated in* *THE LAW OF THE PEOPLE’S REPUBLIC OF CHINA 1979-1982*, at 305 (1987).

<sup>55</sup> Patent Law of the People's Republic of China, *translated in* THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 1983-1986, at 65 (1987) [hereinafter 1984 Patent Law].

<sup>56</sup> ALFORD, *supra* note 5, at 70. As noted in the White Paper released by the State Council in 1994, intellectual property laws aim "to rapidly develop social productive forces, promote overall social progress, meet the needs of developing a socialist market economy and expedite China's entry into the world economy." INFORMATION OFFICE, STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, INTELLECTUAL PROPERTY PROTECTION IN CHINA (1994), *translated in* BBC SUMMARY OF WORLD BROADCASTS, June 20, 1994, *available at* LEXIS, News Library, BCSWB File.

<sup>57</sup> See ALFORD, *supra* note 5, at 70.

<sup>58</sup> 1984 Patent Law, *supra* note 55, art. 6. Article 6 of the 1984 Patent Law provided, in pertinent part:

For a job-related invention-creation made by any person in execution of the tasks of the unit to which he belongs or by primarily using the material resources of the unit, the right to apply for a patent shall belong to the unit. For an invention-creation that is not job-related, the right to apply for a patent shall belong to the inventor or designer. After an application is approved, if it was filed by a unit owned by the whole people, the patent right shall be held by such unit; if it was filed by a collectively owned unit or an individual, the patent right shall be owned by such unit or individual.

For a job-related invention-creation made by any staff member or worker of a foreign-owned enterprise or a Chinese-foreign equity joint venture within the territory of China, the right to apply for a patent shall belong to the enterprise or joint venture. For an invention-creation that is not job-related, the right to apply for a patent shall belong to the inventor or designer. After the application is approved, the patent right shall be owned by the enterprise, joint venture or individual that applied for it.

*Id.*

<sup>59</sup> *Id.*

<sup>60</sup> ALFORD, *supra* note 5, at 71 (citing Rule 10 of the Implementing Regulations for the 1984 Patent Law).

<sup>61</sup> A unit typically provides industrial workers in a socialist economy with housing, welfare benefits, social context, and employment. *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> As Professor Alford explained:

The United States was willing to accept such broad language from a nation then lacking patent and copyright laws and with relatively little in the way of trademark protection because of its eagerness to "normalize" relations with the PRC and its attempts to generate support in the American business community for its China policy by suggesting a more favorable climate for doing business than existed. In this and a range of comparable steps designed to enlist support for normalization, however, the Carter administration raised undue expectations on the part of the business community, the American public more broadly, and the Chinese themselves as to the suitability of Chinese conditions for international business.

[Despite this agreement, t]he two sides have disagreed as to whether Article VI of the 1979 trade agreement actually committed the PRC to protect American intellectual property or merely to aspire toward such protection. For years, PRC commentators dismissed the notion that Article VI created an obligation to provide any specific protection. Interestingly, with the promulgation of the PRC's Copyright Law in 1990, some Chinese commentators argue that in fact Article VI constitutes a bilateral copyright agreement for purposes of that law, thereby enabling citizens of one nation to secure rights in the other,

regardless of which works are first published.  
*Id.* at 152-53 nn. 67-68.

<sup>64</sup> “At a 1985 meeting to the U.S. China Joint Committee on Commerce and Trade (JCCT), the U.S. for the first time expressed concerns about weak Chinese [intellectual property rights] standards. In 1987, the U.S. put [intellectual property] protection on the agenda for U.S.-China market access talks.” Warren H. Maruyama, *U.S.-China IPR Negotiations: Trade, Intellectual Property, and the Rule of Law in a Global Economy*, in *CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE* 165, 186 (Mark A. Cohen et al. eds., 1999).

<sup>65</sup> See Daniel Southerland, *U.S. Businesses Urge Trade Sanctions to Stop Piracy of Software in China*, *WASH. POST*, Apr. 11, 1989, at E7; see also JAMES MANN, *ABOUT FACE: A HISTORY OF AMERICA’S CURIOUS RELATIONSHIP WITH CHINA, FROM NIXON TO CLINTON* 131-32, 302-03 (2000) (comparing the relationships between the U.S. government and American business executives during the Reagan era and the Clinton era); Jeffrey E. Garten, *Business and Foreign Policy*, *FOREIGN AFF.*, May/June 1997, at 67, 69 (“Business was able to drive a good deal of foreign policy because of unique features of American society. Corporate leaders, lawyers, and investment bankers were able to move in and out of the highest levels of government.”); Paul C.B. Liu, *U.S. Industry’s Influence on Intellectual Property Negotiations and Special 301 Actions*, 13 *UCLA PAC. BASIN L.J.* 87, 87 (1994) [hereinafter Liu, *U.S. Industry’s Influence*] (“The influence of U.S. industries and industrial organizations is evident in recent legislative actions [concerning intellectual property protection]. Although Congress still accommodates different, and sometimes conflicting, interests in a given issue, industries have gained enough government recognition, if not sufficient protection, for their special interests.”). Dean Garten, the former Under Secretary of Commerce for International Trade, argued that business becomes more important to the U.S. government than it used to be:

Washington needs business more than ever to reinforce its goals. The executive branch depends almost entirely on business for technical information regarding trade negotiations, all the more so as the Washington bureaucracy is downsized even as it negotiates an even broader range of issues. In all emerging markets, America’s political and economic goals depend largely on the direct investments in factories or other hard assets that only business can deliver. It can make an enormous difference, too, if American business executives reinforce Washington’s human rights efforts with private diplomacy as well as public actions to improve working conditions.

Garten, *supra*, at 71.

“Under Section 301, industry representatives serve as advisors to the USTR and have direct input in U.S. international negotiation strategies.” *Id.* at 88; see also 19 U.S.C. § 2412(a)(2) (2000) (requiring the USTR to determine whether to initiate an investigation within forty-five days after receiving a petition regarding unfair foreign trade practices). Among the most active and influential industry participants in the Special 301 processes are International Intellectual Property Alliance, Business Software Alliance, International Anti-Counterfeiting Coalition, Pharmaceutical Manufacturers Association, International Trademark Association, Microsoft Corporation, and Nintendo Corporation. See Liu, *U.S. Industry’s Influence*, *supra*, at 88-89; see also *id.* at 97-110 (describing the operations of major U.S. interest groups and industries in the intellectual property industry); ROBERT G. SUTTER, *U.S. POLICY TOWARD CHINA: AN INTRODUCTION TO THE ROLE OF INTEREST GROUPS* (1998) (examining the growing influence of organized interests on the U.S. policy toward China).

<sup>66</sup> The “priority watch list” includes “countries whose actions, policies, and practices meet some, but not all, of the criteria for priority foreign country identification. These actions, policies, or practices warrant active work for resolution and close monitoring to determine whether further Special 301 action is necessary.” Liu, *U.S. Industry’s Influence*, *supra* note 65, at 95. The USTR also maintains a “watch list” of



countries whose intellectual property practices or market access barriers warrant special attention. *See id.*

<sup>67</sup> 19 U.S.C. §§ 2411-2420. Section 301 was developed in response to Congress's dissatisfaction with the outdated General Agreement on Tariffs and Trade (GATT) and the agreement's inability to protect U.S. economic interests. It aimed to eliminate unfair trade practices and to open foreign markets. *See* Jagdish Bhagwati, *Aggressive Unilateralism: An Overview*, in *AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM* 1, 4 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990) [hereinafter *AGGRESSIVE UNILATERALISM*]. As the legislative history of section 301 stated:

[T]he President ought to be able to act or threaten to act under section 301, whether or not such action would be entirely consistent with the General Agreement on Tariffs and Trade. Many GATT articles . . . are either inappropriate in today's economic world or are being observed more often in the breach, to the detriment of the United States. . . .

The Committee is not urging that the United States undertake wanton or reckless retaliatory action under section 301 in total disdain of applicable international agreements. However, the Committee felt it was necessary to make it clear that the President could act to protect U.S. economic interests whether or not such action was consistent with the articles of an outmoded international agreement initiated by the Executive 25 years ago and never approved by the Congress.

S. REP. NO. 93-1298, at 166 (1974), *reprinted* in 1974 U.S.C.C.A.N. 7186, 7304; *see also* Kim Newby, *The Effectiveness of Special 301 in Creating Long Term Copyright Protection for U.S. Companies Overseas*, 21 SYRACUSE J. INT'L L. & COM. 29, 33 (1995) ("The enacting of § 301 was seen as a direct result of Congressional dissatisfaction with the manner in which U.S. trade was being protected under GATT."); Susan Tiefenbrun, *Piracy of Intellectual Property in China and the Former Soviet Union and Its Effects upon International Trade: A Comparison*, 46 BUFF. L. REV. 1, 40 (1998) ("Section 301 for the Trade Act of 1974 arose from the need perceived by the United States to strike back against unfair trade practices that were not enforced by GATT panel condemnation." (footnote omitted)). Because of its effectiveness, section 301 has been referred by policymakers as "the H-bomb of trade policy." Judith Hippler Bello & Alan F. Holmer, *The Heart of the 1988 Trade Act: A Legislative History of the Amendments to Section 301*, in *AGGRESSIVE UNILATERALISM*, *supra*, at 49, 52 (quoting *Comparing Major Trade Bills: Hearings on S. 490, S. 636, and H.R. 3 Before the Senate Comm. on Fin.*, 100th Cong., pt. 1, at 19 (1987) (statement of former USTR Clayton Yeutter)).

<sup>68</sup> *See* 19 U.S.C. §§ 2411-2420. Section 301 provides for both mandatory and discretionary actions:

Action *must* be taken when trade agreements are being violated. Action is not required in five specific circumstances: if (1) a GATT panel concludes there is no unfair trade practice; (2) the USTR believes the foreign government is taking steps to solve the problem; (3) the foreign government agrees to provide compensation; (4) the action could adversely affect the American economy disproportionately to the benefit to be achieved; and (5) the national security of the United States could be harmed through action. The USTR has discretion to investigate foreign practices and impose sanctions on its own initiative or at the behest of domestic industries that petition for redress. To impose sanctions, the USTR must determine (1) that an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce; and (2) that action by the United States is appropriate.

A. Lynne Puckett & William L. Reynolds, *Rules, Sanctions and Enforcement Under Section 301: At Odds with the WTO?*, 90 AM. J. INT'L L. 675, 677-78 (1996) (footnotes omitted).

<sup>69</sup> Copyright Law of the People's Republic of China 1990, *translated* in 2 *China L. Foreign Bus.* (CCH) P 11-700 (1993) [hereinafter *Copyright Law*].

<sup>70</sup> Copyright Law Implementing Regulations 1990, *translated in 2 China L. Foreign Bus. (CCH) P 11-702(7)* (1993).

<sup>71</sup> Computer Software Protection Rules 1991, *translated in 2 China L. Foreign Bus. (CCH) P 11-704* (1993).

<sup>72</sup> OFFICE OF USTR, 1995 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 47, 54 (1995) [hereinafter 1995 NTE REPORT].

<sup>73</sup> Special 301 is a special provision under section 301 of the Trade Act of 1974 that requires the USTR to identify foreign countries that provide inadequate intellectual property protection or that deny American intellectual property goods fair or equitable market access. Upon either identification, the USTR will initiate within thirty days an investigation into the act, policy, or practice of the identified country and will request a consultation with the country regarding its offending practices. If the issues remain unresolved after six months, which may be extended to nine months under certain statutory conditions, the USTR may suspend or withdraw trade benefits, impose duties or other restrictions, or enter into binding agreements that require the offending country to eliminate or phase out its offending practice or to compensate the United States. Since the introduction of Special 301, the U.S. government has used it repeatedly to pressure foreign countries, primarily less developed countries, to reform their intellectual property regimes.

<sup>74</sup> Sheryl WuDunn, *Nonstate Plants in China at Risk in U.S. Talks*, N.Y. TIMES, Jan. 14, 1992, at A9.

<sup>75</sup> David Holley, *China Warns of Trade War with U.S. over Patents, Copyrights, Beijing Warns*, L.A. TIMES, Jan. 8, 1992, at A6.

<sup>76</sup> Stuart Auerbach, *China, U.S. Reach Trade Accord*, WASH. POST, Jan. 17, 1992, at A24; Keith Bradsher, *U.S. and China Reach Accord on Copying*, N.Y. TIMES, Jan. 17, 1992, at D1.

<sup>77</sup> Memorandum of Understanding Between China (PRC) and the United States on the Protection of Intellectual Property, Jan. 17, 1992, P.R.C.-U.S., 34 I.L.M. 677 (1995) [hereinafter 1992 MOU].

<sup>78</sup> Patent Law of the People's Republic of China 1992, *translated in 2 China L. Foreign Bus. (CCH) P 11-600* (1993); *see also* 1992 MOU, *supra* note 77, art. 1(2), T.I.A.S. No. 12,036, at 3 (agreeing that China would exert its best efforts to implement amendments to the Patent Law by January 1, 1993).

<sup>79</sup> Patent Law Implementing Regulations of the People's Republic of China 1992, *translated in 2 China L. Foreign Bus. (CCH) P 11-602* (1993).

<sup>80</sup> Patent Cooperation Treaty, June 19, 1970, 28 U.S.T. 7645, 1160 U.N.T.S. 231.

<sup>81</sup> *See* 1992 MOU, *supra* note 77, art. 1(1), 34 I.L.M. at 677-79.

<sup>82</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *as last revised in Paris* July 24, 1971, 828 U.N.T.S. 221; *see also* 1992 MOU, *supra* note 77, art. 3(1), 34 I.L.M. at 680-81 (stipulating that China would adhere to the Berne Convention and will submit legislation authorizing such accession).

<sup>83</sup> Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Oct. 29, 1971, 25 U.S.T. 309; *see also* 1992 MOU, *supra* note 77, art. 3(2), 34 I.L.M. at 681 (stipulating that China would accede to and ratify the Geneva Convention).

<sup>84</sup> *See* 1992 MOU, *supra* note 77, art. 3(4), 34 I.L.M. at 681.

<sup>85</sup> *See id.* arts. 3(6)-(8), 34 I.L.M. at 682.

<sup>86</sup> Trademark Law of the People's Republic of China of 1993, *translated in 2 China L. Foreign Bus. (CCH) P 11-500* (1993).

- 87 See *id.* art. 4, 34 I.L.M. at 683.
- 88 See Patrick H. Hu, "Mickey Mouse" in China: Legal and Cultural Implications in Protecting U.S. Copyrights, 14 B.U. INT'L L.J. 81, 84 (1996).
- 89 1995 NTE REPORT, *supra* note 72, at 54.
- 90 See Hu, *supra* note 88, at 93 (pointing out that American companies were particularly concerned about exports of counterfeits because those exports would deprive them of other foreign markets); Gregory S. Feder, Note, *Enforcement of Intellectual Property Rights in China: You Can Lead a Horse to Water, But You Can't Make It Drink*, 37 VA. J. INT'L L. 223, 242 (1996) ("The 'last straw' seems to have come when China began exporting pirated products in large volume."); Seth Faison, *Copyright Pirates Prosper in China Despite Promises*, N.Y. TIMES, Feb. 20, 1996, at A1 (highlighting the illicit export market as the most serious concern for international music and software companies).
- 91 Feder, *supra* note 90, at 242.
- 92 Assafa Endeshaw, *A Critical Assessment of the U.S.-China Conflict on Intellectual Property*, 6 ALB. L.J. SCI. & TECH. 295, 315 (1996) (quoting USA: SIA Warning-Chinese Chips Burn Fingers, REUTER TEXTLINE ELECS. WKLY., Feb. 22, 1995, at 10, available at LEXIS, World Library, TXTLINE File) (internal quotations omitted). Interestingly, the coercive American foreign intellectual property policy was partly responsible for the frequent sweeping changes in laws and regulations in China.
- 93 1995 NTE REPORT, *supra* note 72, at 54.
- 94 David E. Sanger, *U.S. Threatens \$ 2.8 Billion of Tariffs on China Exports*, N.Y. TIMES, Jan. 1, 1995, at A14 [hereinafter Sanger, *U.S. Threatens \$ 2.8 Billion of Tariffs*].
- 95 *U.S. Delay on China Move*, N.Y. TIMES, May 2, 1994, at D2.
- 96 Martha M. Hamilton, *U.S. to Hit China with Stiff Tariffs*, WASH. POST, Feb. 5, 1995, at A1.
- 97 *Id.*
- 98 David E. Sanger, *President Imposes Trade Sanctions on Chinese Goods*, N.Y. TIMES, Feb. 5, 1995, at A1.
- 99 Hamilton, *U.S. to Hit China with Stiff Tariffs*, *supra* note 96.
- 100 *Id.*
- 101 Agreement Regarding Intellectual Property Rights, Feb. 26, 1995, P.R.C.-U.S., 34 I.L.M. 881 (1995) [hereinafter 1995 Agreement].
- 102 See Seth Faison, *U.S. and China Sign Accord to End Piracy of Software, Music Recordings and Film*, N.Y. TIMES, Feb. 27, 1995, at A1; Steven Mufson, *Trade War Averted by U.S. China*, WASH. POST, Feb. 26, 1995, at A1.
- 103 U.S. negotiators singled out Shenfei Factory, a key plant in Shenzhen, as the most notorious maker of bootleg music and video tapes. See Martha M. Hamilton & Steven Mufson, *Clinton Hails Accord with China on Trade: Piracy Enforcement Provision Called Tough*, WASH. POST, Feb. 27, 1995, at A1; see also Mufson, *Trade War Averted by U.S. China*, *supra* note 102 (crediting the raid and closure of the Shenfei factory by the People's Liberation Army for ending the China-U.S. intellectual property dispute).
- 104 See Julia Chang Bloch, *Commercial Diplomacy*, in LIVING WITH CHINA: U.S./CHINA RELATIONS IN THE TWENTY-FIRST CENTURY 185, 197-98 (Ezra F. Vogel ed., 1997) [hereinafter LIVING WITH CHINA] (commenting that observers were not surprised when the copyright agreement finally came down despite having anxiety leading up to it).
- 105 *Id.*; see Sanger, *U.S. Threatens \$ 2.8 Billion of Tariffs*, *supra* note 94 (suggesting that sanctions could hurt both Chinese industries, including state-run factories closely linked to government leaders and their families, and injure American consumers due to price increases in Chinese-made goods, such as electronic products, toys, and

clothing).

<sup>106</sup> Letter from Wu Yi, Minister of Foreign Trade and Economic Cooperation, People's Republic of China, to Mickey Kantor, United States Trade Representative (Feb. 26, 1995), in 1995 Agreement, *supra* note 101, 34 I.L.M. at 882 [hereinafter Agreement Letter].

<sup>107</sup> Action Plan for Effective Protection and Enforcement of Intellectual Property Rights, in 1995 Agreement, *supra* note 101, 34 I.L.M. at 887 [hereinafter Action Plan].

<sup>108</sup> See Agreement Letter, *supra* note 106, 34 I.L.M. at 883.

<sup>109</sup> The relevant provision of the Agreement Letter provides:

China confirms that it will not impose quotas, import license requirements, or other restrictions on the importation of audio-visual and published products, whether formal or informal. China will permit U.S. individuals and entities to establish joint ventures with Chinese entities in China in the audio-visual sector for production and reproduction. These joint ventures will be permitted to enter into contracts with Chinese publishing enterprises to, on a nationwide basis, distribute, sell, display and perform in China. China will immediately permit such joint ventures to be established in Shanghai, Guangzhou, and moreover, other major cities, and will then expand the number of cities, in an orderly fashion, to thirteen (13) by the year 2000. U.S. individuals and entities will be permitted to enter into exclusive licensing arrangements with Chinese publishing houses to exploit the entire catalogue of the licensor and to decide what to release from that catalogue. China will also permit U.S. individuals and entities to establish computer software joint ventures and those joint ventures will be permitted to produce and sell their computer software and computer software products in China.

Agreement Letter, *supra* note 106, 34 I.L.M. at 884.

<sup>110</sup> See *id.*

<sup>111</sup> See Action Plan, *supra* note 107, pmb., IA[3], 34 I.L.M. at 887-88 (failing to include any provisions regarding market access for American products).

<sup>112</sup> See Agreement Letter, *supra* note 106, at 885-86.

<sup>113</sup> *Id.* at 886.

<sup>114</sup> *Id.*

<sup>115</sup> See Action Plan, *supra* note 107, pmb., I, 34 I.L.M. at 887-905.

<sup>116</sup> See *id.* at 905-07 (detailing actions that Chinese authorities would take to foster a more favorable environment for intellectual property laws).

<sup>117</sup> See *infra* text accompanying notes 119-31 for a discussion of the various short-term and long-term measures provided by the 1995 Agreement.

<sup>118</sup> See Action Plan, *supra* note 107, pmb., § I[C], 34 I.L.M. at 887, 892.

<sup>119</sup> *Id.* § I[A], 34 I.L.M. at 887-89.

<sup>120</sup> See RONALD C. BROWN, UNDERSTANDING CHINESE COURT AND LEGAL PROCESS: LAW WITH CHINESE CHARACTERISTICS 130 (1997) (describing the problem of local protectionism); Daniel C.K. Chow, *Counterfeiting in the People's Republic of China*, 78 WASH. U. L.Q. 1, 26-30 (2000) (same); see also CHEN, *supra* note 10, at 217 ("Judges who without fear or favour apply the law to the detriment of local interests may . . . suffer in terms of their career prospects or their employment benefits. Reduction of funding for the local court is also a threat that its members have to live with.").

<sup>121</sup> "In drafting the 1995 MOU, it appears that China and the U.S. understood that the weaknesses of China's judicial system made it especially susceptible to localism." Jeffrey W. Berkman, *Intellectual Property Rights in the P.R.C.: Impediments to Protection*

and the Need for the Rule of Law, 15 UCLA PAC. BASIN L.J. 1, 18 (1996). However, “[t]he lack of coordination among [the National Copyright Administration, Patent Offices, Trademark Offices, and the local agencies of each body] undermines unified enforcement actions.” *Id.* at 21.

<sup>122</sup> Action Plan, *supra* note 107, § I[B][1], 34 I.L.M. at 890.

<sup>123</sup> *Id.* § I[B][1][b], 34 I.L.M. at 890.

<sup>124</sup> *Id.* § I[B][1][c], 34 I.L.M. at 890.

<sup>125</sup> *Id.* § I[H], 34 I.L.M. at 903.

<sup>126</sup> *Id.* § I[H][1][b], 34 I.L.M. at 903.

<sup>127</sup> *Id.* § I[H][2][a], 34 I.L.M. at 903.

<sup>128</sup> *Id.* § I[G], 34 I.L.M. at 900-03.

<sup>129</sup> *Id.* § II[A]-[B], 34 I.L.M. at 905-06.

<sup>130</sup> *Id.* § II[C], 34 I.L.M. at 906.

<sup>131</sup> *Id.* § II[D], 34 I.L.M. at 906-07.

<sup>132</sup> Helen Cooper & Kathy Chen, *China Averts Trade War with the U.S., Promising a Campaign Against Piracy*, WALL ST. J., Feb. 27, 1995, at A3; see Hamilton & Mufson, *supra* note 103 (“This is a strong agreement for American companies and American workers.” (statement of U.S. President Bill Clinton)).

<sup>133</sup> See Feder, *supra* note 90, at 245 (noting that U.S. government officials regarded large-scale raids against intellectual property rights infringers in China as evidence that the Agreement initially was being implemented successfully).

<sup>134</sup> See Paul Blustein, *U.S. Warns China to Step Up Efforts Against ‘Piracy,’* WASH. POST, Nov. 30, 1995, at B13 (describing U.S. trade officials’ dissatisfaction with China’s efforts to crack down on piracy of American products). Testifying before the Senate Subcommittee on East Asian and Pacific Affairs, then-deputy USTR Charlene Barshefsky stated that, despite the raids on retailers of pirated goods and the efforts to establish intellectual property courts, “China’s overall implementation of the agreement falls far short of the requirements of the agreement.” *Id.*; see also OFFICE OF USTR, 1996 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 54 (1996) (asserting that the rate at which China exported pirated and counterfeit goods to third markets continued at the same or higher levels than before the conclusion of the 1995 Agreement).

<sup>135</sup> Richard W. Stevenson, *U.S. Cites China for Failing to Curb Piracy in Trade*, N.Y. TIMES, May 1, 1996, at D4.

<sup>136</sup> Helene Cooper & Kathy Chen, *U.S. and China Announce Tariff Targets as Both Nations Step Up Trade Rhetoric*, WALL ST. J., May 16, 1996, at A3 [Cooper & Chen, *U.S. and China Announce Tariff Targets*].

<sup>137</sup> *Id.*

<sup>138</sup> Kathy Chen & Helene Cooper, *U.S. and China Reach an Agreement, Averting Trade Sanctions by Both Sides*, WALL ST. J., June 18, 1996, at A2.

<sup>139</sup> Seth Faison, *U.S. China Agree on Pact to Fight Piracy*, N.Y. TIMES, June 18, 1996, at A1 [hereinafter Faison, *U.S. China Agree on Pact*].

<sup>140</sup> See People’s Republic of China Implementation of the 1995 Intellectual Property Rights Agreement, June 17, 1996, P.R.C.-U.S., available at <http://www.tcc.mac.doc.gov/cgi-bin/doi.cgi?204:64:932873030:190> (last visited May 26, 2002) [hereinafter 1996 Accord].

<sup>141</sup> The terms of the Accord include the closing of pirate plants, criminal prosecution for those who violate intellectual property laws, a special enforcement period

in which police assume responsibility for the investigation of piracy, improved border surveillance by customs officers, and a new registration system for CD manufacturers. See Faison, *U.S. China Agree on Pact*, *supra* note 139, at A6.

<sup>142</sup> Office of USTR, Statement by Ambassador Barshefsky (June 17, 1996), available at <http://www.ustr.gov/releases/1996/06/96-53.html>. But see CHENGSI ZHENG, INTELLECTUAL PROPERTY ENFORCEMENT IN CHINA: LEADING CASES AND COMMENTARY, at xxvi (1997) [hereinafter ZHENG, INTELLECTUAL PROPERTY ENFORCEMENT IN CHINA] (“In the 1996 Sino-U.S. negotiations, what the USTR really wanted was not the impossible short term elimination of pirate copies, but access to the Chinese markets for its cultural products.”).

<sup>143</sup> ZHENG, INTELLECTUAL PROPERTY ENFORCEMENT IN CHINA, *supra* note 142, at xxvii.

<sup>144</sup> See Cooper & Chen, *U.S. and China Announce Tariff Targets*, *supra* note 136; see also Marcus W. Brauchli & Joseph Kahn, *Intellectual Property: China Moves Against Piracy as U.S. Trade Battle Looms*, ASIAN WALL ST. J., Jan. 6, 1995, at 1 (“This is the way America does business. It puts on lots of pressure, acts very strong . . . . But just before the deadline, then there’ll be concessions and a compromise.” (quoting Li Changxu, head of the China United Intellectual Property Investigation Center)).

<sup>145</sup> See Editorial, *An Ultimatum on Chinese Piracy*, N.Y. TIMES, May 16, 1996, at A24 (noting that “[a] trade war between the United States and China could prove costly to both countries”); Chen & Cooper, *supra* note 138 (stating that retaliatory tariffs would have hurt major industries of both countries, including the Chinese textiles industry and American automobile and agricultural industries); Evelyn Iritani, *Boeing Likely Loser If U.S.-China Talks Fail*, L.A. TIMES, Feb. 24, 1995, at D1 (arguing that trade sanctions could cause Boeing to lose a \$2 billion deal to its European rival, Airbus Industrie).

<sup>146</sup> See ZHENG, INTELLECTUAL PROPERTY ENFORCEMENT IN CHINA, *supra* note 142, at xxvi.

<sup>147</sup> See Editorial, *An Ultimatum on Chinese Piracy*, *supra* note 145 (arguing that the Clinton Administration could not allow China to pirate intellectual property without weakening the United States’s credibility among other Asian countries and trade partners around the world).

<sup>148</sup> See Editorial, *Surprise! A Deal with China*, WALL ST. J., June 18, 1996, at A22 (noting that the last-minute compromise had helped the Clinton Administration gain “domestic political mileage”). The Clinton Administration has used copyright piracy as a political tactic to appear tough on China. One journalist explained this political tactic:

When United States-China relations were strained in 1996, the Clinton Administration wanted to appear tough on China, and copyright piracy was an obvious lever to pull.

This year, as President Clinton prepares to come to China for a summit meeting in June, pressuring China on trade disputes has receded as a political priority, as has enforcing the intellectual property rights agreement.

Seth Faison, *China Turns Blind Eye to Pirated Disks*, N.Y. TIMES, Mar. 28, 1998, at D1.

<sup>149</sup> See 1996 Accord, *supra* note 140.

<sup>150</sup> *Id.*

<sup>151</sup> See Chen & Cooper, *supra* note 138 (“Some trade analysts were more skeptical, saying that the shuttering of the 15 bootleg factories, which helped Beijing clinch the deal, may be the most the U.S. is going to get out of the latest saber-rattling. Anything beyond that, they said, may well require another battle next year.”); Faison, *U.S. China Agree on Pact*, *supra* note 139 (expressing skepticism toward pledges made by China); Editorial, *Surprise! A Deal with China*, *supra* note 148 (suggesting that the deal made in 1996 would be “only marginally more effective” than the one struck in the prior year);

see also Loke-Khoon Tan & Mabel M.B. Lau, *Enforcement of 1996 United States-China Intellectual Property Rights Agreement*, Pat. Trademark & Copyright L. Daily (BNA), at D4 (Oct. 21, 1997) (analyzing the enforcement of the 1996 Accord).

<sup>152</sup> See Faison, *U.S. China Agree on Pact*, *supra* note 139 (reporting the announcement by the Chinese government that attempted to dispel the perception that the United States had dictated the terms of the agreement).

<sup>153</sup> See 1996 Accord, *supra* note 140 (failing to include any provisions allowing U.S. officials to monitor or conduct on-site verification of factory closings).

<sup>154</sup> Faison, *U.S. China Agree on Pact*, *supra* note 139.

<sup>155</sup> As commentators, including myself, have pointed out, the culprit behind the Chinese piracy problem is the Confucian beliefs ingrained in the Chinese culture, the country's socialist economic system, the leaders' skepticism toward Western institutions, the xenophobic and nationalist sentiments of the populace, the government's censorship and information control policy, and the significantly different Chinese legal culture and judicial system. See, e.g., ALFORD, *supra* note 5; Glenn R. Butterton, *Pirates, Dragons and U.S. Intellectual Property Rights in China: Problems and Prospects of Chinese Enforcement*, 38 ARIZ. L. REV. 1081 (1996); Tiefenbrun, *supra* note 67; Peter K. Yu, *Piracy, Prejudice, and Perspectives: An Attempt to Use Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate*, 19 B.U. INT'L L.J. 1, 16-37 (2001) [hereinafter Yu, *Piracy, Prejudice, and Perspectives*]. Unfortunately, the existing American intellectual property policy toward China does not target any of these problems. Rather, it masks the ideological differences between the two countries and conceals the limited understanding American scholars, policymakers, the mass media, and the general public have about China. Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-first Century*, 50 AM. U. L. REV. 131, 165 (2000) [hereinafter Yu, *From Pirates to Partners*]; see also Yu, *Piracy, Prejudice, and Perspectives*, *supra*, at 67-77 (discussing the wrong-headed debate on U.S.-China intellectual property conflict).

<sup>156</sup> As Greg Mastel explained:

The stakes in this dispute, however, go far beyond just the dollar value of Chinese piracy. American credibility is on the line. Less than one year ago, U.S. and Chinese negotiators reached the second agreement in three years to end piracy of intellectual property, but that agreement appears to have had little, if any, effect. China also appears to have failed to comply with every major trade agreement it has struck with the United States in recent years. The United States has threatened China with trade sanctions for its many trade sins a half-dozen times in recent years without making good on its threats. In the eyes of the Chinese, continued empty U.S. threats have little credibility.

Greg Mastel, *Piracy in China: No Mickey Mouse Issue*, WASH. POST, Feb. 15, 1996, at A27; see also MANN, *supra* note 65, at 311 ("Clinton's retreat on human rights made matters worse than if he had never imposed his MFN conditions. . . . [I]t had shown that America would back down from the threats it made about human rights and democracy in cases where its commercial and strategic interests were jeopardized."); James Lilley, *Trade and the Waking Giant—China, Asia, and American Engagement*, in BEYOND MFN: TRADE WITH CHINA AND AMERICAN INTERESTS 36, 53 (James R. Lilley & Wendell L. Willkie II eds., 1994) [hereinafter BEYOND MFN] ("President Clinton does not seem entirely credible to foreign leaders because he has made threats without following up on them."); James D. Morrow, *The Strategic Setting of Choices: Signaling, Commitment, and Negotiation in International Politics*, in STRATEGIC CHOICE AND INTERNATIONAL RELATIONS 77 (David A. Lake & Robert Powell eds., 1999) (emphasizing the importance of credibility in international relations).

<sup>157</sup> See RICHARD BERNSTEIN & ROSS H. MUNRO, *THE COMING CONFLICT WITH CHINA* 82-129 (Vintage Books 1998). As Richard Bernstein and Ross Munro pointed out, China successfully inverted the American coercive approach:



The method used in the past by the United States was to threaten Beijing with high import duties on its products sold in America—resulting from a withdrawal of China's most-favored-nation status—unless the regime stopped jailing its political dissenters. That initiative, little more than a clumsy and ultimately transparent bluff, failed abysmally. China in its way inverted the American approach. Beijing threatened to impose the equivalent of economic sanctions against the United States—an effective boycott on the purchase of high-technology products and curbs on American investments in China—unless it dropped its policy of pressure and threats. The difference is that China's bluff was taken seriously, and its strategy has been remarkably successful.

*Id.* at 83.

<sup>158</sup> See Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 155, at 24-28 (discussing the prevailing skepticism and xenophobic and nationalist sentiments among the Chinese people and how the United States's coercive tactics have created resentment among these people).

<sup>159</sup> See Yu, *From Pirates to Partners*, *supra* note 155, at 140-51, 153-54 (discussing the cycle of futility); see also Feder, *supra* note 90, at 250-51 (noting the emergence of a cycle); Editorial, *Surprise! A Deal with China*, *supra* note 148 (“One of the Clinton Administration's specialties is threatening a trade war and then striking a deal at the 11th hour.”).

<sup>160</sup> See discussion *supra* text accompanying notes 78-87.

<sup>161</sup> See discussion *supra* text accompanying notes 119-31.

<sup>162</sup> See Michael E. DeGolyer, *Western Exposure, China Orientation: The Effects of Foreign Ties and Experience on Hong Kong*, in *THE OUTLOOK FOR U.S.-CHINA RELATIONS FOLLOWING THE 1997-1998 SUMMITS: CHINESE AND AMERICAN PERSPECTIVES ON SECURITY, TRADE AND CULTURAL EXCHANGE* 299, 300 (Peter Koehn & Joseph Y.S. Cheng eds., 1999) [hereinafter *OUTLOOK FOR U.S.-CHINA RELATIONS*] (“[Economic integration would] help the reformers tilt the internal Chinese debate in directions that would minimize, if not avoid, future economic conflicts. It would encourage and perhaps accelerate the inevitable transformation of China's political regime.” (internal quotations omitted)); David E. Sanger, *Playing the Trade Card*, *N.Y. TIMES*, Feb. 17, 1997, at 1 (reporting that the Clinton administration considers the WTO as a tool to foster political change in China); see also MARK A. GROOMBRIDGE & CLAUDE E. BARFIELD, *TIGER BY THE TAIL: CHINA AND THE WORLD TRADE ORGANIZATION* 41 (1999) (“[A]n international institution such as the WTO can help bolster China's reform leadership against powerful hard-liners. International institutions can tie the hands of leaders in ways that the ineffectual bilateral relationship is not able to do so.”); Yu, *From Pirates to Partners*, *supra* note 155, at 196 (arguing that greater economic integration will result in stronger intellectual property protection). *But see* James Mann, *Our China Illusions*, *AM. PROSPECT*, June 5, 2000, at 22 (“[H]elping the reformers' is a poor basis for American policy. It is too risky. It plays into (and, indeed, accentuates) China's internal political tensions.”).

<sup>163</sup> See Yu, *From Pirates to Partners*, *supra* note 155, at 174 (arguing that the coercive U.S.-China intellectual property policy “backfires and jeopardizes the United States's longstanding interests in promoting human rights and civil liberties in China”).

<sup>164</sup> DANIEL C.K. CHOW, *A PRIMER ON FOREIGN INVESTMENT ENTERPRISES AND PROTECTION OF INTELLECTUAL PROPERTY IN CHINA* 180 (2002) (arguing that “[c]ultural or historical concerns have little or no relevance in explaining the cause of commercial piracy in China today”).

<sup>165</sup> “Although Taoism and Buddhism were also influential in some periods and in some aspects of life, Confucianism had never been displaced as the basic philosophy of the Chinese state and society—until the beginning of the twentieth century.” CHEN, *supra* note 10, at 9. As Professor Yao pointed out insightfully:



On many occasions Confucianism gained strength and positive influence from [the general changes in political, social, economic, religious, and cultural life], yet on other occasions it suffered from the breakdown of the social fabric and responded by becoming either more flexible or more dogmatic. Throughout the history of the Chinese dynasties, Confucianism changed and adapted itself to new political and social demands, and these changes and adaptations are as important as the teachings of the early Confucian masters.

XINZHONG YAO, AN INTRODUCTION TO CONFUCIANISM 4 (2000). For excellent discussions of Confucianism, see generally CONFUCIANISM AND CHINESE CIVILIZATION, *supra* note 17; YAO, *supra*. For excellent collections of essays discussing Chinese philosophy and the Chinese mind, see generally THE PSYCHOLOGY OF THE CHINESE PEOPLE (Michael Harris Bond ed., 1986); UNDERSTANDING THE CHINESE MIND: THE PHILOSOPHICAL ROOTS (Robert E. Allinson ed., 1991).

166 YAO, *supra* note 165, at 50.

167 ALFORD, *supra* note 5, at 20.

168 *Id.* at 26.

169 YAO, *supra* note 165, at 50 (“Confucians believe that in the classics, heavenly principles are revealed to them and that by studying these classics and books they will be able to understand the Way of Heaven and by applying it to human life they can establish the Way of humanity.”).

170 ALFORD, *supra* note 5, at 26; see YAO, *supra* note 165, at 50 (“The customs and events of the past are believed to serve as a mirror of the present and the guide to the future.”).

171 ALFORD, *supra* note 5, at 25 (“The essence of human understanding had long since been discerned by those who had gone before and, in particular, by the sage rulers collectively referred to as the Ancients, who lived in a distant, idealized ‘golden age.’”); YAO, *supra* note 165, at 139 (“The Way (dao) is fundamental to the Confucian view of the world, concerning the question of the ultimate meaning of human existence.”); see also STEPHEN OWEN, REMEMBRANCES: THE EXPERIENCE OF THE PAST IN CHINESE LITERATURE 15 (1986) (“[T]he experience of the past roughly corresponds to and carries the same force as the attention to meaning or truth in the Western tradition.”).

172 See ALFORD, *supra* note 5, at 20 (noting that the past served as “the instrument through which individual moral development was to be attained”); THE ANALECTS OF CONFUCIUS bk. XVII, ¶ 4 (Arthur Waley trans., Vintage 1989) [hereinafter ANALECTS] (“A gentleman who has studied the Way will be all the tenderer towards his fellow-men; a commoner who has studied the Way will be all the easier to employ.” (internal quotations omitted)); YAO, *supra* note 165, at 30 (“Confucian Learning is the study of the Way of Heaven both in the inner self and in external practices. The only purpose of learning is the promotion of virtuous action and the cultivation of a moral character . . .”).

173 See ALFORD, *supra* note 5, at 20 (“The indispensability of the past for personal moral growth dictated that there be broad access to the common heritage of all Chinese.”).

174 Hu, *supra* note 88, at 104.

175 Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT’L L. 613, 619 (1996) [hereinafter Hamilton, *TRIPS Agreement*]. A case in point is the art of *linmo*, a technique of hand-copying a master’s work. As Professor Feng described:

Hand-copying (*linmo*) of a master’s work is a pedagogical regimen in traditional Chinese painting and calligraphy. As practised, *linmo* is usually done with the same tools and materials (brush, ink, pigments, paper, etc.) as the original. It differs from tracing, in that it involves not only demanding skills and disci-

pline, but vigorous mental process and effort to absorb and express the master's technique, style and spirit. Hence good *linmo* is considered an art on its own right.

FENG, *supra* note 20, at 62. Because of the importance of this art, the Copyright Law includes a special *linmo* exception. Copyright Law, *supra* note 69, art. 22(10).

176 Hu, *supra* note 88, at 104.

177 See J. DAVID MURPHY, PLUNDER AND PRESERVATION: CULTURAL PROPERTY LAW AND PRACTICE IN THE PEOPLE'S REPUBLIC OF CHINA 30 (1995); *see id.* ("Chinese writers, artists, and creators in all areas of knowledge had significant reverence and attachment for the past which resulted in legitimized copying."); *id.* at 31 ("[F]orgeries were not always stigmatized; emulation was regarded as a form of appreciation."); *see also* ALEXANDER LINDEY, PLAGIARISM AND ORIGINALITY 254 (1952) ("Admiration induces imitation; the closer the imitation, the narrower the dividing line between it and outright copying.").

178 See JOHN KING FAIRBANK, THE GREAT CHINESE REVOLUTION 1800-1985, at 28 (1987) ("To prepare for the [civil] examinations a boy began at age seven or so and in about six years memorized the *Four Books and Five Classics*, which totaled 431,000 characters."); *see also* YAO, *supra* note 165, at 50 (noting that Confucian followers were required to learn the texts by heart).

179 FAIRBANK, *supra* note 178, at 28. For an overview of the civil service examination in imperial China, see generally Hsü, *supra* note 35, at 75-80. For a comprehensive discussion of the civil service examination systems in the Tang, Song, Ming, and Qing dynasties, see MU CH'EN, TRADITIONAL GOVERNMENT IN IMPERIAL CHINA: A CRITICAL ANALYSIS 48-53, 77-80, 109-13, 134-37 (Chü-tu Hsüeh & George O. Totten trans., 1982).

180 This emphasis was mainly due to the Chinese belief that knowledge of the past demonstrated one's ability to resolve problems of the present. ALFORD, *supra* note 5, at 21-22. The Confucian Four Books include *The Analects*, *The Book of the Mean*, *The Book of Mencius*, and *The Great Learning*. The Five Classics refer to *The Book of Odes*, *The Book of History*, *The Book of Changes*, *The Book of Rites*, and *The Spring and Autumn Annals*.

181 JOHN KING FAIRBANK & MERLE GOLDMAN, CHINA: A NEW HISTORY 100-01 (1998).

182 *Id.* at 101.

183 See ALFORD, *supra* note 5, at 26 (noting that allusion and reference to the classics and histories constituted "a sophisticated cultural shorthand" that was potentially accessible throughout the Sinicized world); JOSEPH LEVENSON, CONFUCIAN CHINA AND ITS MODERN FATE: A TRILOGY, at xvii (1968) (noting that citation to the classics was "the very method of universal speech").

184 See ALFORD, *supra* note 5, at 26.

185 FAIRBANK & GOLDMAN, *supra* note 181, at 101; *see also* YAO, *supra* note 165, at 53 (noting that the Old Text School of Confucianism considered Confucius a preserver of early writings who transmitted those writings to later generations).

186 ANALECTS, *supra* note 172, bk. VII, ¶ 1 (emphasis added and internal quotations omitted).

187 See generally MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT (1993); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'*, 17 EIGHTEENTH-CENTURY STUDS. 425 (1984). For an excellent collection of essays examining the concept of authorship, see generally THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE (Martha Woodmansee & Peter Jaszi eds., 1994).

188 JAMES BOYLE, SHAMANS, SOFTWARE & SPLEENS: LAW AND THE CONSTRUCTION OF INFORMATION SOCIETY 53 (1996) (quoting ERNST P. GOLDSCHMIDT, MEDIEVAL TEXTS AND THEIR FIRST APPEARANCE IN PRINT 112 (1943)).

189 *See id.* at 54.

190 SIR PHILIP SIDNEY, *THE DEFENSE OF POESY* (1595), in *THE NORTON ANTHOLOGY OF ENGLISH LITERATURE* 479, 483 (M.H. Abrams ed., 6th ed. 1993) (footnote omitted); *see also* ROSE, *supra* note 187, at 13.

191 BOYLE, *supra* note 188, at 230 n.12; RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 382 & n.3 (1988) ("Shakespeare was by modern standards a plagiarist, but by the standards of his time not. . . . A competing playwright, Robert Greene, called Shakespeare 'an upstart Crow, beautified with our feathers.'"); *see also* LINDEY, *supra* note 177, at 72 ("Borrowing flourished in sixteenth-century England. It was often flagrant enough to constitute plagiarism. The Elizabethans did not bother to devise plots, incidents and characters; they lifted them from their predecessors and from each other."). As Professor Boyle pointed out, Shakespeare's "plagiarism" is the main reason why critics doubt the authorship of what we attribute to Shakespeare. *See* BOYLE, *supra* note 188, at 230 n.12; *see also* JOHN MICELL, *WHO WROTE SHAKESPEARE?* (1999) (examining questions concerning the authorship of Shakespeare's plays and sonnets); James Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 *AM. U. L. REV.* 625 (1988) (examining the similarities between textual indeterminacy and the notion of romantic authorship).

192 *See* YAO, *supra* note 165, at 33 ("[Confucian ethics] takes virtues as the cornerstone of social order and world peace. Its logic is that the family is the basic unit of the human community and that harmonious family relationships will inevitably lead to a harmonious society and a peaceful state.").

193 For discussions of the Chinese communitarian perspective, *see generally* DANIEL A. BELL, *EAST MEETS WEST: HUMAN RIGHTS AND DEMOCRACY IN EAST ASIA* (2000); *CONFUCIANISM AND HUMAN RIGHTS* (Wm. Theodore de Bary & Tu Weiming eds., 1998); WM. THEODORE DE BARY, *ASIAN VALUES AND HUMAN RIGHTS: A CONFUCIAN COMMUNITARIAN PERSPECTIVE* (1998); *HUMAN RIGHTS AND CHINESE VALUES: LEGAL, PHILOSOPHICAL, AND POLITICAL PERSPECTIVES* (Michael C. Davis ed., 1995); *THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS* (Joanne R. Bauer & Daniel A. Bell eds., 1999).

194 Hu, *supra* note 88, at 104; Jianyang Yu, *Protection of Intellectual Property in the P.R.C.: Progress Problems, and Proposals*, 13 *UCLA PAC. BASIN L.J.* 140, 160 (1994) [hereinafter Yu, *Progress, Problems, and Proposals*]; *see* ALFORD, *supra* note 5, at 29 ("[T]rue scholars wrote for edification and moral renewal, rather than profit.").

195 Merchants were considered the lowest among the four social classes in a traditional Chinese society. These four classes were, in descending order, scholar-official (*shih*), farmer (*nung*), artisan (*kung*), and merchant (*shang*).

196 ALFORD, *supra* note 5, at 29 ("[T]he Confucian disdain for commerce fostered an ideal . . . that true scholars wrote for edification and moral renewal rather than profit."); *see also* Liwei Wang, *The Chinese Traditions Inimical to the Patent Law*, 14 *Nw. J. INT'L L. & BUS.* 15, 36-56 (1993) (discussing how Confucianism smothered the impulse to commercial profit).

197 *See* Wm. Theodore de Bary, *Preface to CONFUCIANISM AND HUMAN RIGHTS*, *supra* note 193, at xvi-xvii (discussing the recent revival of Confucianism by the Chinese leaders); *see also* YAO, *supra* note 165, at 274-79 (describing the recent revival of Confucian values).

198 *See* ALFORD, *supra* note 5, at 56 (arguing that the Soviet model "reflected traditional Chinese attitudes toward intellectual property"); *see also* PETER HOWARD CORNE, *FOREIGN INVESTMENT IN CHINA: THE ADMINISTRATIVE LEGAL SYSTEM* 25 (1997) ("Mao had no wish to rid society of the many useful Confucian 'virtues'. Rather, he intended to retain them whilst removing their association with Confucianism.").

199 Hu, *supra* note 88, at 104; *see also* Tiefenbrun, *supra* note 67, at 11 ("The Soviet model reflected traditional Chinese attitudes toward intellectual property and

expounded the socialist belief that by inventing or creating, individuals were engaging in social activities based on knowledge that belonged to all members of society.”).

<sup>200</sup> Tiefenbrun, *supra* note 67, at 37-38.

<sup>201</sup> See CHEN, *supra* note 10, at 30-33, for a discussion of the impact of the Cultural Revolution on the Chinese legal system and profession. See generally JUNG CHANG, *WILD SWANS: THREE DAUGHTERS OF CHINA* 273-443 (1991), for an insightful personal account of the Cultural Revolution.

<sup>202</sup> ALFORD, *supra* note 5, at 63-64.

<sup>203</sup> *Id.* at 64.

<sup>204</sup> Mark Sidel, *Copyright, Trademark and Patent Law in the People's Republic of China*, 21 *TEX. INT'L L.J.* 259, 272 (1986).

<sup>205</sup> ALFORD, *supra* note 5, at 65.

<sup>206</sup> *Id.*

<sup>207</sup> Treaty Between China and Great Britain, Signed at Nanking, Aug. 29, 1842, China-Gr. Brit., reprinted in YASH GHAI, *HONG KONG'S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW* 504-07 (1997).

<sup>208</sup> Hsü, *supra* note 35, at 344.

<sup>209</sup> Xiang Rui Gong, *Constitutional Protection of Human Rights: The Chinese View Under the Notion of One Country, Two Systems*, in *THE HONG KONG BILL OF RIGHTS: A COMPARATIVE APPROACH* 492 (Johannes Chan & Yash Ghai eds., 1993).

<sup>210</sup> The Self-strengthening Movement lasted from 1861 to 1895. See Hsü, *supra* note 35, at 261-312, for a discussion of the Self-strengthening Movement.

<sup>211</sup> See *id.* at 355-86, 408-18, for a discussion of political reforms in the late Qing period.

<sup>212</sup> See *id.* at 380-84 for a discussion of the failure of the Reform Movement of 1898.

<sup>213</sup> *Id.* at 474.

<sup>214</sup> *Id.* at 493.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> See Sidel, *supra* note 204, at 271 (noting the use and application by the Chinese of technology, techniques, and products developed in more advanced countries without paying any royalties).

<sup>218</sup> See Butterson, *supra* note 155, at 1082 (describing “special” rooms in bookstores that sell pirated works to local Chinese people).

<sup>219</sup> See DANIEL C. LYNCH, *AFTER THE PROPAGANDA STATE: MEDIA, POLITICS, AND “THOUGHT WORK” IN REFORMED CHINA* 133 (1999).

<sup>220</sup> James Cox, *U.S. Firms: Piracy Thrives in China*, *USA TODAY*, Aug. 23, 1995, at 2B.

<sup>221</sup> See ALFORD, *supra* note 5, at 30-31; see also Hsü, *supra* note 35, at 142 (“The Chinese attitude toward foreign trade was an outgrowth of their tributary mentality. It postulated that the bountiful Middle Kingdom had no need for things foreign, but that the benevolent emperor allowed trade as a mark of favor to foreigners and as a means of restraining their gratitude.”). See *id.* at 130-34 for a discussion of the Chinese tributary mentality.

<sup>222</sup> Letter from the Qianlong Emperor to King George III of England, Oct. 3, 1793, quoted in Hsü, *supra* note 35, at 161.

<sup>223</sup> See Hsü, *supra* note 35, at 289 (“Western machines and industrial management were alien to the traditional Chinese mentality.”); see also *id.* 281-82 (discussing the conservative opposition within the imperial court).

<sup>224</sup> *Id.* at 289-90; see also *id.* at 289 (“[M]en of talent and integrity usually steered clear of foreign matters and enterprises; only the lesser characters were willing to associate with the modernization projects . . .”).

<sup>225</sup> See *id.* at 287.

<sup>226</sup> See *id.* at 289-90 (discussing the social and psychological inertia that hampered the Self-strengthening Movement).

<sup>227</sup> For discussions of nationalist sentiments in China, see generally CHINESE NATIONALISM (Jonathan Unger ed., 1996); YONGNIAN ZHENG, DISCOVERING CHINESE NATIONALISM IN CHINA: MODERNIZATION, IDENTITY AND INTERNATIONAL RELATIONS 154 (1999) [hereinafter ZHENG, DISCOVERING CHINESE NATIONALISM].

<sup>228</sup> ZHENG, DISCOVERING CHINESE NATIONALISM, *supra* note 227, at 154.

<sup>229</sup> See Hsü, *supra* note 35, at 223-24 (describing the socio-economic impact of the Opium War on the Chinese people).

<sup>230</sup> *Id.* at 388. The Treaties of Tientsin in 1858 allowed for the free propagation of Christianity in the interior. The Conventions of Peking in 1860 further granted missionaries the right to rent and buy land to build churches. Protected by the flag and the treaties, the missionaries moved about freely in China.

<sup>231</sup> See *id.* at 432-35 (describing the foreigners' dominating role in modern Chinese industries and enterprises). “84 percent of shipping, 34 percent of cotton-yarn spinning, and 100 percent of iron production were under foreign control in 1907, while 93 percent of railways were foreign-dominated in 1911.” *Id.* at 436.

<sup>232</sup> Professor Hsü described how the impact of foreign goods and investments on the Chinese economy:

The influx of foreign commodities under preferential customs and the right of foreigners after 1895 to engage in local manufacturing disastrously affected the native handicraft industries and agrarian economy. Foreigners dominated Chinese public utilities, communications, mining, banking, and other modern enterprises. Their factories, by virtue of vast capital and mass production, out-sold Chinese rivals even in distant villages. As common an agricultural product as cotton was marketed by foreigners more cheaply than the Chinese could produce it. Farm women who traditionally weaved as a secondary vocation were thrown out of work, and farmers had increasing difficulty eking out a living.

*Id.* at 427-28.

<sup>233</sup> Professor Hsü described the adverse impact of foreign goods and investment on familial relationships:

The clan and family could no longer provide help and comfort to those members who became unemployed, sick, and destitute. The displaced handicraft worker or the peasant left for the city, where he slipped from family and clan control; if lucky enough to find a new life, his meager income hardly sufficed to support his own dependents, let alone the clansmen. The ties between such a man and his clan became attenuated. Very often the wife and children of such a man were forced to work in a different city just to scabble out a living, thereby scattering further not only clansmen but even immediate family members. Little wonder that old familial relationships broke down under the impact of the foreign economic invasion.

*Id.* at 428.

<sup>234</sup> *Id.* at 390.

235 As Professor Hsü described:

By the end of the 19th century, the country was beset by bankruptcy of village industries, decline of domestic commerce, rising unemployment, and a general hardship of livelihood. Many [Chinese] attributed this sorry state of affairs to evil foreign influence and domination of the Chinese economy. . . . Victims of natural calamities as well as superstitious scholars and officials blamed the misfortune on the foreigners, who, they insisted had offended the spirits by propagating a heterodox religion and prohibiting the worship of Confucius, idols, and ancestors. Foreigners were accused of damaging the “dragon’s vein” (*lung-mai*) in the land when they constructed railways, and of letting out the “precious breath” (*pao-ch’i*) of the mountains when they opened mines. The gentry held foreigners responsible for destroying the tranquility of the land and interfering with the natural functioning of the “wind and water” (*feng shui*, *geomancy*), thus adversely affecting the harmony between men and nature.

*Id.* at 389-90.

236 The Tianjin Massacre arose out of rumors that French missionaries bewitched Chinese children, mutilated their bodies, and extracted their organs to make medicine. In response to those charges, a Qing official inspected the orphanage. After the official had found no truth to the wild charges, the French consul, armed with a pistol, confronted the Chinese, demanding justice for the priests and sisters. The mob soon went out of control, killed the French consul and his assistant, and burned the church and the orphanage. Ten sisters, two priests, and two French officials were killed. Three Russian traders lost their lives by mistake. And four British and American churches were destroyed. See *id.* at 299-302 for a description of the anti-Christian feelings among the Chinese that led to the Tianjin Massacre of 1870.

237 During the Boxer Uprising, members of a fin-de-siècle secret society, backed by Empress Dowager, brutally murdered missionary families, foreign ministers and diplomats, and Chinese converts. They also besieged embassies and burned churches and shops that sold foreign merchandise and books. See *id.* at 386-418 for an overview of the Boxer Uprising in 1900.

238 The May Fourth Movement began as a mass demonstration by students in Beijing protesting the verdict of the Versailles Peace Conference, which allowed Japan to retain Shandong, a territory leased to Germany in 1898 and occupied by Japan during the First World War. The demonstration was so powerful and far-reaching that it evoked an immediate national response. In addition to pressuring the Chinese delegation to reject the treaty, the Chinese boycotted Japanese products and stopped taking Japanese streamers. Dockhands in China also refused to upload Japanese goods. See *id.* at 501-05 for an overview of the May Fourth Movement in 1919.

239 ZHENG, DISCOVERING CHINESE NATIONALISM, *supra* note 227, at 17.

240 Hsü, *supra* note 35, at 660.

241 *Id.* at 660-61.

242 ZHENG, DISCOVERING CHINESE NATIONALISM, *supra* note 227, at 17.

243 *Id.*

244 *Id.*

245 The Four Modernizations aimed to develop China’s world-class strength in agriculture, industry, science and technology, and national defense by 2000. See Hsü, *supra* note 35, at 803-14, for a comprehensive overview of the Four Modernizations.

246 See *id.* at 858-69 for a discussion of the Open Door Policy adopted by the Chinese Communist Party in December 1978.

247 The special economic zones seek to experiment with new economic forms within the framework of “socialist modernization.” These zones allow for a substantial

role for foreign investment in the private economy. Peter K. Yu, *Succession by Estoppel: Hong Kong's Succession to the ICCPR*, 27 PEPP. L. REV. 53, 104 n.293 (1999) [hereinafter Yu, *Succession by Estoppel*]; see also George T. Crane, 'Special Things in Special Ways': *National Economic Identity and China's Special Economic Zones*, in CHINESE NATIONALISM, *supra* note 227, at 148 (exploring China's economic identity as revealed in debates surrounding the establishment and expansion of special economic zones).

248 ZHENG, DISCOVERING CHINESE NATIONALISM, *supra* note 227, at 2; see also *id.* at 17 (arguing that the rise of nationalism in post-Mao China is "a response to the 'Chinese problems' that post-Mao China has encountered").

249 QIANG SONG ET AL., ZHONGGUO KEYI SHUO BU [CHINA CAN SAY NO] (1996).

250 XIGUANG LI ET AL., YAOMOHUA ZHONGGUO DE BEIHOU [BEHIND A DEMONIZED CHINA] (1997).

251 Although the United States insisted that the bombing was accidental and apologized for the incident, many Chinese considered the bombing a deliberate attack to slow down China's rise in world affairs and to warn China against challenging American hegemony. STEVEN M. MOSHER, HEGEMON: CHINA'S PLAN TO DOMINATE ASIA AND THE WORLD 81 (2000); see also John Pomfret & Michael Lavis, *China Suspends Some U.S. Ties*, WASH. POST, May 10, 1999, at A1 (reporting on the anti-American protests outside the U.S. embassy after the bombing of the Chinese embassy in Belgrade).

252 See John Pomfret, *New Nationalism Drives Beijing*, WASH. POST, Apr. 4, 2001, at A1 (attributing the recent standoff with Washington to the growing nationalist sentiments among the Chinese people); Elisabeth Rosenthal, *Many Voices for Beijing*, N.Y. TIMES, Apr. 10, 2001, at A1 (noting that anti-American feelings are running high in China).

253 See YUEZHI ZHAO, MEDIA, MARKET, AND DEMOCRACY IN CHINA: BETWEEN THE PARTY LINE AND THE BOTTOM LINE 19 (1998) [hereinafter ZHAO, MEDIA, MARKET, AND DEMOCRACY] (noting that the Chinese Communist Party "exercised strict control over its publications from the very beginning"); Shaozhi Su, *Chinese Communist Ideology and Media Control*, in CHINA'S MEDIA, MEDIA'S CHINA 75, 77 (1994) (noting that the Chinese Communist Party "pays utmost attention to ideology"). But see generally LYNCH, *supra* note 219 (describing how a combination of property rights reforms, administrative fragmentation, and technological advance has caused the Chinese authorities to lose some of its control over propagandistic communication).

254 ZHAO, MEDIA, MARKET, AND DEMOCRACY, *supra* note 253, at 2.

255 Su, *supra* note 253, at 77.

256 Among the most politically sensitive materials at the moment are articles inciting the independence of Taiwan and Tibet, stories about political dissidents, materials promoting Falun Gong, and *The Tiananmen Papers*. THE TIANANMEN PAPERS: THE CHINESE LEADERSHIP'S DECISION TO USE FORCE AGAINST THEIR OWN PEOPLE—IN THEIR OWN WORDS (Andrew J. Nathan & Perry Link eds., 2001).

257 Anna S.F. Lee, *The Censorship and Approval Process for Media Products in China*, in PROTECTING INTELLECTUAL PROPERTY RIGHTS IN CHINA 127, 127 (Mary L. Riley ed., 1997); Mary L. Riley, *The Regulation of the Media in China*, in CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE, *supra* note 64, at 355 ("Media and all media products, are heavily regulated in China."); see also Peter K. Yu, *Barriers to Foreign Investment in the Chinese Internet Industry*, GIGALAW.COM, at <http://www.gigalaw.com/articles/2001/you-2001-03-p1.html> (Mar. 2001) (discussing content regulations in the Chinese Internet industry).

258 Butterton, *supra* note 155, at 1105-06. As one commentator explained:

Government monopolies have essentially controlled all aspects of the Chinese film industry, from production to distribution and exhibition, by way of the Ministry of Culture and related agencies. The China Film Distribution and Exhibition Bureau and its subsidiaries, in collaboration with the central gov-



ernment, have determined times, places, dates and terms under which films are shown in Chinese cinemas, and censorship has been performed by the Ministries of Culture, Information and Film, Television and Radio. Contrary to standard industry practice in most of the world, China until very recently refused to permit the licensing of foreign motion pictures in exchange for a percentage of gross receipts; instead, it imposed a flat sales scheme, demanding that it be allowed to pay US\$ 3000 for rights in each film, a figure that is astonishingly modest by world standards. Moreover, all prints of films so licensed have had to be made in Chinese film laboratories according to the regulations of the China Film Bureau. Nor have the Chinese observed the conventional distinction between authorization for home as opposed to commercial use, which has led to the widespread Chinese practice of showing home-licensed videos in public displays.

*Id.* at 1106 (footnotes omitted); Lee, *supra* note 257, at 137 (“Only work units with import authorization are allowed to engage in the import of foreign films.”); Riley, *supra* note 257, at 358 (“Only a publishing unit with the authorized capacity to import audio-visual products may import such products.”). See generally Mary Lynne Calkins, *Censorship in Chinese Cinema*, 21 HASTINGS COMM. & ENT. L.J. 239, 291-96 (1999), for a discussion of the importation and censorship of non-Chinese films in China.

<sup>259</sup> Butterson, *supra* note 155, at 1106.

<sup>260</sup> OFFICE OF USTR, 2001 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 42 (2001) [hereinafter 2001 NTE REPORT]; Calkins, *supra* note 258, at 291; see also Seth Faison, *A Chinese Wall Shows Cracks*, N.Y. TIMES, Nov. 21, 1995, at D1 (reporting on the liberalization of the Chinese film industry). “Among the movies imported under this new system were *The Lion King*, *The Fugitive*, and *True Lies*.” Calkins, *supra* note 258, at 291 (footnotes omitted).

<sup>261</sup> Lisa Atkinson, *What's Entertainment?*, CHINA BUS. REV., Mar.-Apr. 1997, at 38.

<sup>262</sup> *Id.*; Riley, *supra* note 257, at 365. As a result of this new policy, “the Changchun Film Studio won the rights to distribute *Waterworld*, and the Shanghai Film Studio signed a deal to distribute *Toy Story*. Movies such as *The Piano*, *Schindler's List*, *Forrest Gump*, and *True Lies* earned high revenues at Chinese box offices.” Calkins, *supra* note 258, at 293 (footnotes omitted).

<sup>263</sup> Shortly after the announcement of the new policy, the Central Propaganda Department issued an order demanding self-criticism of the policy of importing large quantities of U.S. movies. Bian He, *Why Prohibit the Importation of Foreign Movies*, CHINA FOCUS, Aug. 1, 1996, available at 1997 WL 11751443.

<sup>264</sup> 2001 NTE REPORT, *supra* note 260, at 62.

<sup>265</sup> Lee, *supra* note 257, at 148; Riley, *supra* note 257, at 377.

<sup>266</sup> Lee, *supra* note 257, at 132; Riley, *supra* note 257, at 373.

<sup>267</sup> Lee, *supra* note 257, at 132; Riley, *supra* note 257, at 373.

<sup>268</sup> Lee, *supra* note 257, at 132; Riley, *supra* note 257, at 361.

<sup>269</sup> Lee, *supra* note 257, at 129-30 (discussing the censorship procedures practiced by Chinese authorities); Riley, *supra* note 257, at 357-59 (same).

<sup>270</sup> See Robert B. Frost, Jr., Comment, *Intellectual Property Rights Disputes in the 1990s Between the People's Republic of China and the United States*, 4 TUL. J. INT'L & COMP. L. 119, 132 (1995) (“[W]hen China stalled the import of the film, ‘True Lies,’ because of the looming trade war, a cinema in Shenzhen had already begun showing a pirated copy.” (footnote omitted)); Erik Eckholm, *Spider-Man Springs into China with More Than Comics*, N.Y. TIMES, Aug. 31, 2000, at E2 (reporting that pirated video compact discs of *X-Men* were available in China even though the film itself was not approved for commercial screening); see also 2001 NTE REPORT, *supra* note 260, at 55 (“Pirates find ways to get VCDs and DVDs of blockbuster films into the Chinese market almost



immediately after the films are released theatrically in the United States.”).

<sup>271</sup> See Butterton, *supra* note 155, at 1105-06 (noting that the film import quota has “been a fertile ground for pirate practices”); Derek Dessler, Comment, *China’s Intellectual Property Protection: Prospects for Achieving International Standards*, 19 FORDHAM INT’L L.J. 181, 232 (1995) (“Commentators argue that . . . market access barriers facilitate intellectual property piracy and impede enforcement.”); Frost, *supra* note 270, at 132 (“The United States claims that this limitation produces a vacuum effect which creates a large demand for pirated films.”).

<sup>272</sup> See 2001 NTE REPORT, *supra* note 260, at 55 (noting that “consumers are often unaware that they are purchasing [intellectual property right]-infringing goods”); Alford, *Making the World Safe for What?*, *supra* note 27, at 137 (noting that the piracy problem in Shanghai “has reached such proportions that officials in Shanghai have found it necessary to take to the airwaves to inform citizens of where they can shop without fear of purchasing fakes”).

<sup>273</sup> As one commentator explained:

If the Chinese more fully relaxed or lifted barriers to market participation by foreign [intellectual property rights] owners, those foreign owners could sell their own goods in China and thereby displace, at least to some extent, pirate products that now have Chinese markets to themselves. Moreover, absent such barriers, some U.S. producers could both sell their “authentic” products in the Chinese market, and also monitor, if not police, infringement themselves on an in-country basis. Such market access adjustments would have application in a number of areas.

Butterton, *supra* note 155, at 1105.

<sup>274</sup> See, e.g., CHEN, *supra* note 10, at 93 (“[T]he concept and doctrines of legality, unlike the precepts of Confucianism, had never occupied a central role in traditional imperial China. There has not existed a legal culture with elements like officials’ fidelity to law or citizens’ consciousness of their legal rights . . . .”); *id.* at 128 (pointing out that the legal profession was despised, stigmatized, or sometimes even outlawed in imperial China); FENG, *supra* note 20, at 10 (“[T]here is . . . an entrenched Confucian-strategist tradition which regards formal law as an inefficient and cumbersome instrument for governance.”); Berkman, *supra* note 121, at 39 (noting the Chinese “preference for death rather than bringing a lawsuit”). *But see* PHILIP C.C. HUANG, CIVIL JUSTICE IN CHINA: REPRESENTATION AND PRACTICE IN THE QING (1996) (pointing out that state law and Qing courts played a very important role on community mediation and noting that parties would resort to courts when community or kin mediation failed); William P. Alford, *Law, Law, What Law? Why Western Scholars of China Have Not Had More to Say About Its Law*, in THE LIMITS OF THE RULE OF LAW IN CHINA 45 (Karen G. Turner et al. eds., 2000) [hereinafter LIMITS OF THE RULE OF LAW] (exploring why Western scholars of Chinese history and society have neglected or mischaracterized the effect of law upon Chinese life).

<sup>275</sup> ANALECTS, *supra* note 172, bk. II, ¶ 3 (footnote omitted). “The Confucianists criticized the hedonistic pleasure-pain psychology relied on by the Legalists, which, the Confucianists argued, would lead people to think only in terms of their self-interest and make them litigious, trying to manipulate the laws to suit their own interests.” CHEN, *supra* note 10, at 9.

<sup>276</sup> William P. Alford, *The Inscrutable Occidental? Implications of Roberto Unger’s Uses and Abuses of the Chinese Past*, 64 TEX. L. REV. 915, 930 (1986) (tracing the Chinese aversion to litigation to the Western Zhou period); Berkman, *supra* note 121, at 39 n.177 (“The normative aversion to litigation stretches back to pre-unified China, as indicated in the Book of Changes, dated approximately 1000 B.C.” (citing I CHING, OR BOOK OF CHANGES 28-30 (Richard Wilhelm trans., Princeton Univ. Press, 3d ed. 1967))); Butterton, *supra* note 155, at 1108 (“The concept, though it is widely identified with the teachings of Confucius (551-479 B.C.), antedated him and appears to have been estab-

lished in Chinese bureaucratic thought and the larger culture during the Western Zhou Period (1122-771 B.C.), if not before.”); *see also* GRAY L. DORSEY, *JURISCUITURE: CHINA* 87 (1993) (discussing the need for new philosophy created by the disintegration of feudal society in the Western Zhou period).

<sup>277</sup> As one commentator explained:

The “relationships” of Confucian society consist of connections between various types of political, social and familial roles. The roles are also normative, embodying prescriptions that tell those who play the roles how they ought to act when playing them. Thus, the role of father embodies a norm of proper fatherly behavior; the role of friend embodies a norm of friendship; and similarly, other norms are expressed for the other fundamental roles of wife, child, ruler, subject, elder brother and younger brother. Eventually, Confucianism reduced all relationships to a finite set of fundamental relationships that were presumed to be exhaustive, the so-called Five Relations which obtained between father and child, husband and wife, elder and younger brother, ruler and subject, and friend and friend. The *li* expressed the rules of conduct involved in all of these basic relationships, and, at bottom, the *li* were about the obligations between parties to relationships.

Butterton, *supra* note 155, at 1109-10.

<sup>278</sup> *Id.* at 1109; *see also* Benjamin Schwartz, *On Attitudes Toward Law in China, in GOVERNMENT UNDER LAW AND THE INDIVIDUAL* (Milton Katz ed., 1957) (“The proper disposition with regard to one’s interests is the predisposition to yield rather than the predisposition to insist.”), *quoted in* JEROME A. COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE’S REPUBLIC OF CHINA, 1949-1963: AN INTRODUCTION* 62, 65 (1968); Alice Tay, *The Struggle for Law in China*, 21 *U. BRIT. COLUM. L. REV.* 561, 562 (1987) (“Chinese tradition personalizes all claims, seeing them in the context of social human relationships.”); Margaret Y.K. Woo, *Law and Discretion in Contemporary Chinese Courts, in LIMITS OF THE RULE OF LAW, supra* note 274, at 163, 168 (“Today, litigation in the public courts is still viewed with disfavor in China, for it represents a breakdown in relationships that should be avoided. Ideally, broken relationships should be restored, but litigation makes restoration difficult.”).

<sup>279</sup> Butterton, *supra* note 155, at 1110.

<sup>280</sup> Nevertheless, the adoption of Confucianism as the orthodoxy and the rejection of Legalism did not mean the abolition of laws. “All the dynastic empires subsequent to the Qin dynasty continued to develop codes of law and legal institutions. There was thus a coexistence of both *li* and *fa* in traditional China . . . .” CHEN, *supra* note 10, at 11.

<sup>281</sup> Butterton, *supra* note 155, at 1108; *see also* DORSEY, *supra* note 276, at 125-30 (discussing legalism in the State of Qin). As one commentator explained:

The intellectual roots of *fa* are in the Legalist movement—a group of political philosophers primarily active in the China of the fourth and third century B.C., who held that social order could only be maintained by the use of law as a tool for manipulating society. The Qin dynasty adopted the Legalist philosophy and effectively integrated and centralized the whole of the Chinese Empire in the third century B.C. (221-209 B.C.). The Qin ruled with the aid of a harsh penal law and brutal tactics, and developed a vast administrative law bureaucracy to manage the empire they had created. They thus shaped an image of the “rule of law” as brutal and rigid, and that image endured throughout the greatest period of Confucian influence from the first century A.D. to the development of civil-law criminal codes during the late nineteenth-century portion of the Qing dynasty (1644-1912 A.D.) and the beginning of the Republican period following the 1912 [sic] revolution, when the last incarnation of those codes was enacted.

Butterton, *supra* note 155, at 1110 (footnote omitted).

282 Butterson, *supra* note 155, at 1110.

283 See ALFORD, *supra* note 5, at 10 (“Public, positive law was meant to buttress, rather than supersede, the more desirable means of guiding society and was to be resorted to only when these other means failed to elicit appropriate behavior.”); CHEN, *supra* note 10, at 11 (“[Fa] is to be employed as a last resort to maintain social order when *li* has failed to do so.”); Berkman, *supra* note 121, at 32 n. 144 (“The Confucian ideology . . . saw law as an instrument of last resort necessary to punish those who could not follow the normative ideal of social harmony arising from the many social relationships within society.”).

284 FENG, *supra* note 20, at 10; see also CHEN, *supra* note 10, at 93 (“[T]he ideology of Marxism-Leninism, not even to mention Mao Zedong Thought, is ambivalent about the positive contributions of law, particularly outside the realm of the struggle against counter-revolutionaries, class enemies and criminals.”).

285 FENG, *supra* note 20, at 10.

286 Berkman, *supra* note 121, at 35; see also Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMP. L. 711, 713 (1994). As one commentator explained:

Law became an instrument of Mao and the CCP and was used to suppress “counterrevolutionaries” and protect Mao’s power. The seemingly daily fluctuations in Mao’s political, economic, and social policies destroyed any sense of predictability in law. On the eve of Deng Xiaoping’s reform movement, China was a nation of rule by men—or more specifically by one man, Mao—rather than law. Equally important, the Cultural Revolution had instilled in the masses the cynical view that law was a concern of the government, not the people, and a tool to create social stability and advance political agendas rather than a mechanism to protect rights.

Berkman, *supra* note 121, at 35; see also RONALD C. KEITH, *CHINA’S STRUGGLE FOR THE RULE OF LAW* 1 (1994); Jerome Alan Cohen, *The Criminal Process in the People’s Republic of China: An Introduction*, 79 HARV. L. REV. 469, 470-71 (1966); Shao-Chuan Leng, *The Role of Law in the People’s Republic of China as Reflecting Mao-Tse Tung’s Influence*, 68 J. CRIM. L. & CRIMINOLOGY 356 (1977).

287 FENG, *supra* note 20, at 10. As Professor Feng explained:

The CCP policy . . . is more than a political guideline. It is a strategy of social control maintained by a set of long-standing propaganda, training, experiment, inspection and enforcement procedures, with its own formality, etiquette, pedigree and convention. Its objective is that all operators or decision-makers (administrators and judges included) can “unify thinking” and act pursuant to the policy “spirit” where concrete rules are inadequate, in conflict or lacking. As a result, new analyses, interpretations, applications and initiatives are formed, giving rise to new concrete rules. Some of the rules eventually mature into statutory provisions. That is why “policy and strategies are”, in Mao’s words, “the Party life”.

*Id.*

288 *Id.* at 11.

289 *Id.*

290 *Id.*; see also CHEN, *supra* note 10, at 90 (“[N]o effective system has yet been evolved to deal with the problem of inconsistencies between legal norms derived from different sources.”); CORNE, *supra* note 198, at 55 (“[I]n the PRC there is no concept, as exists in Western legal systems, that law or delegated legislation can be struck down on the basis of uncertainty.”); Claudio Ross & Lester Ross, *Language and Law: Sources of Systemic Vagueness and Ambiguous Authority in Chinese Statutory Language*, in *LIMITS OF THE RULE OF LAW*, *supra* note 274, at 221 (regarding vagueness as a structural characteristic of Chinese law).

<sup>291</sup> See CORNE, *supra* note 198, at 93-145 (discussing flexibility as a characteristic of Chinese laws); Woo, *supra* note 278 (examining how the historic Chinese preference for discretion and informality in the distribution of justice has been retained and reflected in the judicial decisionmaking process and in the procedural rules); see also Butterton, *supra* note 155, at 1113 (“To many, the shifting sands of ‘flexibility’ and ad hoc adjustments are synonymous with a host of corrupt business practices.”).

<sup>292</sup> FENG, *supra* note 20, at 11. “[A]mong the 713 pieces of laws and administrative regulations enacted in the period 1979-1985, 25% were of . . . provisional nature.” CHEN, *supra* note 10, at 89.

<sup>293</sup> FENG, *supra* note 20, at 11; see also CORNE, *supra* note 198, at 189 (“[L]aw in China tends to take on the colour of policy in the course of its implementation. Those who implement law are the same as those who were responsible for the implementation of policy under the pre-legal order.”).

<sup>294</sup> FENG, *supra* note 20, at 11.

<sup>295</sup> *Id.* at 12; see also CORNE, *supra* note 198, at 54 (“The laws [in China] are expressed in terms of general standards which fail to deal with obvious problems of implementation. Real clarity exists only at the level of administrative rules and circulars.”).

<sup>296</sup> FENG, *supra* note 20, at 12; see also CORNE, *supra* note 198, at 239 (“The existence of discretion allows administrative bodies to apply laws in a way that is consistent with underlying normative expectations held by the regulators. The manner of implementation is completely different from what Westerners would expect from the ostensibly familiar principles that are embodied in the law.”).

<sup>297</sup> FENG, *supra* note 20, at 13; see also CORNE, *supra* note 198, at 147 (“The general principle of legislative consistency emphasizes consistency with the ‘spirit’ rather than with the ‘letter’ of the relevant higher law or laws. This is also true with respect to consistency with the PRC Constitution.”). As one commentator explained:

[I]n the Chinese legal system a rule or regulation is not considered to conflict with the Constitution *per se* or with rules or regulations enacted by other administrative or legislative bodies at the same or higher level, even if it appears to do so on its face, as long as it fulfills the primary condition of being within the enacting organ's entrusted or inherent power. It is this principle that defines the approach that judicial, administrative and legislative institutions have taken in respect of this issue.

*Id.* at 148.

<sup>298</sup> See XIANFA art. 128 (1982) (amended Mar. 29, 1993) (“The Supreme People's Court is responsible to the National People's Congress and its Standing Committee. Local People's courts at various levels are responsible to the organs of state power which created them.”); BROWN, *supra* note 120, at 8 (“[T]he governmental congresses and standing committees are comprised of members primarily selected by Party members through a separate Party congress mechanism. Party committees, such as the Political-Legal Committee, ‘supervise’ the public security (police), procuratorates, and the courts.”); *id.* at 35 (arguing that the constitutional basis of the judicial system in China “is not separation of powers, but on the contrary it is a ‘division of functions and responsibilities’ under the unified guidance of the organs of state power, i.e., the people's congresses, as guided by the Chinese Communist Party, ‘in accordance with the law’”); CHEN, *supra* note 10, at 48 (“The orthodox view expressed in textbooks is that . . . the Chinese socialist political system manifests the principle of the unity of deliberation and execution (*yixing heyi*) which Marx used in discussing the Paris Commune Movement of 1871.”); CORNE, *supra* note 198, at 141 (“Administrative interpretation is not only the most important mode of legal interpretation in the PRC, it is in effect an authoritative supplement and accretion to legislation.”); *id.* at 253 (“The trial judge is very susceptible to [outside] pressures, both internal and external to the court, as his

decision is only preliminary and may at any time be overridden by an adjudication committee within the local people's court under the principle of democratic centralism."); Berkman, *supra* note 121, at 23 ("When Chinese officials speak of judicial independence they may be using a lexicon familiar to westerners, but they certainly do not intend to connote the separation of powers usually equated with the democratic definition."); *see also* CORNE, *supra* note 198, at 287 ("China's lack of an independent legal tradition and the current low status of the courts will make it very difficult to extricate the courts from the webs of party and governmental influence which permeate their decision making processes and undermine their value as a supervisory institution.").

One commentator explained the operation of the adjudication committee and the intertwining relationship between the Party and the judiciary:

An institutional aspect clearly foreign to students of American constitutional law are China's Adjudication Committees. Minor, non-politically sensitive cases can be handled by individual judges, or a collegiate bench of judges and lay persons, generally free from interference by other court officials. However, cases deemed to be of importance, perhaps those involving difficult legal issues, significant economic disputes, sensitive political matters, or highly charged public issues, are handled by individual judges on advice of the particular court's Adjudication Committee. While the individual judge will hear the case, following consultation the Committee may direct the judge to enter a particular verdict, invite the judge to seek more information from the parties, or report the case to a higher level court for guidance. The Committee consists of the president of the court, the vice-president, the head and deputy head of the various specialized chambers, and some ordinary judges. Members of the Committee are also likely to be Party members, and thus the influence of the CCP should be assumed in all decisions.

Berkman, *supra* note 121, at 22-23.

<sup>299</sup> *China: Laws Being Promulgated to Protect IPR*, CHINA DAILY, Nov. 10, 1997, available at 1997 WL 13647865 [hereinafter *China: Laws Being Promulgated*].

<sup>300</sup> 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 vol. 31, 33 I.L.M. 1197 (1994).

<sup>301</sup> *China: Laws Being Promulgated*, *supra* note 299.

<sup>302</sup> *Id.*; *see also* Mary L. Riley, *Criminal Sanctions in the Enforcement of Intellectual Property Rights*, in PROTECTING INTELLECTUAL PROPERTY RIGHTS IN CHINA, *supra* note 257, at 91, 96-97 (discussing the 1997 amendments to the criminal law).

<sup>303</sup> Shoukang Guo, *China: Status Report on the Protection of New Varieties of Plants in the PRC*, Pat. Trademark & Copyright L. Daily (BNA), at D5 (Sept. 1, 2000). For discussions of intellectual property protection for new plant varieties in China, *see generally* Lester Ross & Libin Zhang, *Agricultural Development and Intellectual Property Protection for Plant Varieties: China Joins the UPOV*, 17 UCLA PAC. BASIN L.J. 226 (2000); Chengfei Ding, Note, *The Protection for New Plant Varieties of American Businesses in China After China Enters the WTO*, 6 DRAKE J. AGRIC. L. 333 (2001).

<sup>304</sup> Noah Smith, *China: New Chinese Law Protects Trademarks from Internet Squatters; Patent Law Revised*, Pat. Trademark & Copyright L. Daily (BNA), at D2 (Aug. 29, 2000).

<sup>305</sup> The website of the State Intellectual Property Office is available at <http://www.sipo.gov.cn/>.

<sup>306</sup> *See supra* text accompanying notes 119-21 (discussing the State Council Working Conference on Intellectual Property Rights).

<sup>307</sup> *China: New IPR Commissioner Interviewed*, CHINA BUS. INFO. NETWORK, Apr. 14, 1998, available at 1998 WL 7561417.

- 308 *Id.*
- 309 This information network will establish databases providing laws and regulations, patent cases, and information about organizations involved in handling patent disputes. See *China to Launch Nationwide Patent Information Network*, CHINA BUS. INFO. NETWORK, Jan. 18, 2000, available at 2000 WL 3888595.
- 310 *China: New IPR Commissioner Interviewed*, *supra* note 307.
- 311 *China: Training Centre to Help Strengthen IPR Protection*, CHINA BUS. INFO. NETWORK, Jan. 17, 1997, available at 1997 WL 9840723.
- 312 *Id.*
- 313 *Id.*
- 314 *China: First IPR Protection Personnel Center Opens in Beijing*, CHINA BUS. INFO. NETWORK, Apr. 17, 1998, available at 1998 WL 7561463.
- 315 Yu, *Progress, Problems, and Proposals*, *supra* note 194, at 149 (“The People’s University, the Huazhong Science and Technology University, and the Zhejiang University now offer a second bachelor degree in intellectual property law.”); Liangjun Xie, *New School Starts on Rights Track*, CHINA DAILY, Dec. 16, 1993, available at 1993 WL 10866676 (reporting the opening of the Intellectual Property Rights School at Beijing University); *Shanghai Protects Intellectual Property*, AGENCE FRANCE PRESSE, Oct. 31, 1994, available at LEXIS, News Library, ALLNWS File (reporting that Shanghai University has decided to open an intellectual property department and to communicate with foreign universities in the field).
- 316 Universities offering second bachelors degrees in intellectual property law include the People’s University, the Huazhong Science and Technology University, and the Zhejiang University. See Yu, *Progress, Problems, and Perspectives*, *supra* note 194. Also, the Beijing University has a school dedicated to intellectual property. See *id.*
- 317 Regulations on the Protection of Layout-Designs of Integrated Circuits of the People’s Republic of China, translated in State Intellectual Property Office of the People’s Republic of China, Laws and Regulations, available at [http://www.sipo.gov.cn/sipo\\_English/flfg\\_e/zlflfg\\_e/200204020002.htm](http://www.sipo.gov.cn/sipo_English/flfg_e/zlflfg_e/200204020002.htm).
- 318 Louis S. Sorell, *A Comparative Analysis of Selected Aspects of Patent Law in China and the United States*, 11 PAC. RIM L. & POLY 319, 323 (2002) (quoting Ma Lianyuan, Deputy Commissioner of State Intellectual Property Office of the People’s Republic of China). For discussions of recent amendments to the Chinese patent law, see generally *id.*; Jiwen Chen, *Better Patent Law for International Commitment—The Amendment of Chinese Patent Law*, 2 RICH. J. GLOBAL L. & BUS. 61 (2001).
- 319 Patent Law of the People’s Republic of China art. 58, available at [http://www.sipo.gov.cn/sipo\\_English/flfg\\_e/zlflfg\\_e/200203270002.htm](http://www.sipo.gov.cn/sipo_English/flfg_e/zlflfg_e/200203270002.htm) [hereinafter Revised Patent Law].
- 320 *Id.* art. 6.
- 321 *Id.* art. 60.
- 322 *Id.* art. 11.
- 323 *Id.* art. 61.
- 324 See Chen, *supra* note 318, at 67-70 (discussing the improved application procedure).
- 325 Revised Patent Law, *supra* note 319, art. 46.
- 326 *Id.* arts. 48-55.
- 327 *Id.* art. 63.
- 328 Copyright Law of the People’s Republic of China arts. 47, 51, available at

[http://www.sipo.gov.cn/sipo\\_English/flfg\\_e/xgfg\\_e/200204160012.htm](http://www.sipo.gov.cn/sipo_English/flfg_e/xgfg_e/200204160012.htm).

329 *Id.* art. 48.

330 *Id.* art. 49.

331 *Id.* art. 52.

332 *Id.* arts. 10(12), 37(6), 41, 47.

333 *Id.* art. 53.

334 In determining the “well-known” status of a trademark, one must take into consideration the following factors:

- (1) reputation of the mark to the relevant public;
- (2) time for continued use of the mark;
- (3) consecutive time, extent and geographical area of advertisement of the mark;
- (4) records of protection of the mark as a well-known mark; and
- (5) any other factors relevant to the reputation of the mark.

Trademark Law of the People's Republic of China art. 14, *available at* [http://www.sipo.gov.cn/sipo\\_English/flfg\\_e/xgfg\\_e/200204160013.htm](http://www.sipo.gov.cn/sipo_English/flfg_e/xgfg_e/200204160013.htm).

335 *Id.* art. 57.

336 *Id.* art. 56.

337 *Id.* art. 53.

338 *Id.* art. 54.

339 OFFICE OF USTR, 2002 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 44, 58-59 (2002).

340 *Id.* at 57.

341 *Id.*

342 OFFICE OF USTR, 2000 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 50 (2000) [hereinafter 2000 NTE REPORT]; *see also* Chow, *supra* note 120, at 11 (“Although the level of copyright piracy seems to have decreased recently in China due to aggressive campaigning by copyright owners, trademark counterfeiting continues to increase.” (footnote omitted)); Tom Korski, *AV Piracy Still “Rampant” Despite Crackdowns, Chinese Authorities Say*, Pat. Trademark & Copyright L. Daily (BNA), at D3 (Jan. 21, 1998) (“[P]iracy of audio-visual products in China remains ‘rampant’ despite expanded police raids on black marketeers . . .”).

343 2000 NTE REPORT, *supra* note 342, at 50.

344 *See* David M. Lampton, *A Growing China in a Shrinking World: Beijing and the Global Order*, in *LIVING WITH CHINA*, *supra* note 104, at 120, 121; Yue Ren, *China's Perceived Image of the United States: Its Sources and Impact*, in *OUTLOOK FOR U.S.-CHINA RELATIONS*, *supra* note 162, at 247, 251 (“From the Chinese point of view, Washington is sensitive to any power that might pose a challenge to its hegemonic position.”).

345 As commentators explained:

[D]eveloping countries tend to have scarce government resources. As a result, they resist spending on the enforcement of foreign intellectual property rights. As with the importation of capital, developing countries often view the importation of intellectual property as a means of dominating and exploiting the economic potential of the importing country. Paying for imports or royalties is thus seen as an economic burden fostering a negative balance of trade.

Tara Kalagher Giunta & Lily H. Shang, *Ownership of Information in a Global Economy*, 27 *GEO. WASH. J. INT'L L. & ECON.* 327, 331 (1993) (footnotes omitted); Edgardo Buscaglia, *Can Intellectual Property in Latin America Be Protected*, in *INTELLECTUAL PROPERTY RIGHTS*



IN EMERGING MARKETS 96, 111 (Clarisa Long ed., 2000) (noting that Latin American countries “have traditionally used intellectual property rights as an instrument for regulating technology transfer and avoiding royalty payments on innovations from the developed world”).

<sup>346</sup> See SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 223 (1996) (“By 1995, a broad consensus reportedly existed among the Chinese leaders and scholars that the United States was trying to divide China territorially, subvert it politically, contain it strategically and frustrate it economically.” (internal quotations omitted)); Lee H. Hamilton, *Introduction* to *BEYOND MFN*, *supra* note 156, at 1, 7 (“[T]he United States must avoid creating the impression within China’s elite that it intends to bring down the current system or divide the country. That, of course, is not the U.S. objective.”).

<sup>347</sup> See Elizabeth C. Economy, *China’s Environmental Diplomacy*, in *CHINA AND THE WORLD: CHINESE FOREIGN POLICY FACES THE NEW MILLENNIUM* 264, 281 (Samuel S. Kim ed., 4th ed. 1998) [hereinafter *CHINA AND THE WORLD*] (“[T]here was increasing discussion in the Chinese media suggesting that sustainable development was part of a master plan by the advanced industrialized countries (and especially the United States) to contain China by forcing it to slow the pace of economic growth in order to protect the environment.”); Paul H.B. Godwin, *Force and Diplomacy: China Prepares for the Twenty-first Century*, in *CHINA AND THE WORLD*, *supra*, at 171, 178 (“Beijing is convinced that at the heart of U.S. strategy is the intent to delay, if not prevent, China’s emergence as great power in the twenty-first century; that the United States views China as the principal contender for the predominant position of the United States in Asia.”); Michel Oksenberg, *Taiwan, Tibet and Hong Kong in Sino-American Relations*, in *LIVING WITH CHINA*, *supra* note 104, at 53, 56 (“[The Chinese leaders] believe that foreign leaders tend to be reluctant to welcome China’s rise in world affairs and would prefer to delay or obstruct its progress.”). *But see* BERNSTEIN & MUNRO, *supra* note 157, at 204 (“The goal of the United States is not a weak and poor China; it is a China that is stable and democratic, that does not upset the balance of power in Asia, and that plays within the rules on such matters as trade and arms proliferation.”); Hamilton, *Introduction*, *supra* note 346, at 5 (“The U.S. interest is served by China’s continuing economic development, for the sake of both improving the material welfare of the Chinese people and fostering political liberalization.”).

<sup>348</sup> Harry Harding, *Breaking the Impasse over Human Rights*, in *LIVING WITH CHINA*, *supra* note 104, at 165, 172. *But see* BERNSTEIN & MUNRO, *supra* note 157, at 204 (“The goal of the United States is not a weak and poor China; it is a China that is stable and democratic, that does not upset the balance of power in Asia, and that plays within the rules on such matters as trade and arms proliferation.”); Hamilton, *Introduction*, *supra* note 346, at 4 (“China’s stability is in the U.S. interest.”).

<sup>349</sup> For discussions of the blossoming software industry in China and the leaders’ eagerness to develop science and technology parks, see generally *China: Guangzhou to Establish “Silicon Valley,”* CHINA BUS. INFO. NETWORK, Dec. 4, 1998, available at 1998 WL 22707603 (reporting the municipal government’s intention to develop an international science and technology park); *China: Sales of Software Stay Strong Despite Fakes*, ASINFO DAILY CHINA NEWS, June 20, 2000, available at LEXIS, News Library, ASINFO File (“Despite the damage done by piracy, China’s software industry is still moving ahead with sales in 1999 hitting 17.6 billion RMB yuan (US\$ 2.13 billion), an increase of 27.5 percent over 1998.”); *China: Software Industry Booms in China*, CHINA BUS. INFO. NETWORK, Oct. 30, 1997, available at 1997 WL 12878806 (reporting a 50% annual growth rate in the software industry over the past several years).

<sup>350</sup> A survey of major U.S. companies conducted by a World Bank affiliate demonstrated the correlation between intellectual property rights and foreign investment:

48 percent said [the strength or weakness of intellectual property protection] has a “strong effect” on whether to set up facilities to manufacture components,



59 percent said it was a determining factor in building overseas facilities to manufacture complete products, and 80 percent of them said the presence of such laws was a key factor in whether they would establish research and development facilities in a given country.

Josh Martin, *Copyright Law Reforms Mean Better Business Climate*, J. COM., Mar. 7, 1996, at 2C; see EDWIN MANSFIELD, INTELLECTUAL PROPERTY PROTECTION, FOREIGN DIRECT INVESTMENT AND TECHNOLOGY TRANSFER (1994) (discussing the correlation between intellectual property and foreign investment); Gordon C.K. Cheung, *Social Cost Analysis in Sino-American Disputes over Intellectual Property Rights*, in OUTLOOK FOR U.S.-CHINA RELATIONS, *supra* note 162, at 229, 231 (“[I]nfringement discourages U.S. industries from product investment, distribution, and marketization.”); Thomas Lagerqvist & Mary L. Riley, *How to Protect Intellectual Property Rights in China*, in PROTECTING INTELLECTUAL PROPERTY RIGHTS IN CHINA, *supra* note 257, at 7, 8 (listing the loss of foreign investment and know-how as a cost of counterfeiting); Antonio Medina Mora Icaza, *The Mexican Software Industry*, in GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS IN SCIENCE AND TECHNOLOGY 232, 236 (Mitchel B. Wallerstein et al. eds., 1993) [hereinafter GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS] (“Intellectual property rights protection in a country is a way to seek the trust of foreign investors in the country that will allow its economy to grow.”); A.R.C. Westwood, *Preface* to GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS, *supra*, at v, vi (discussing how corporations will be hesitant to do business in countries that do not provide intellectual property); see also Robert M. Sherwood, *Intellectual Property Systems and Investment Stimulation: The Rating of Systems in Eighteen Developing Countries*, 37 IDEA 261, 265 (1997) (using foreign investment as one of the variables in measuring intellectual property protection in a less developed country); *Mickey Mouse Back in China*, N.Y. TIMES, June 3, 1993, at D4 (reporting that Disney bought Mickey Mouse back to China after a self-imposed four-year absence due to copyright infringements). But see A. Samuel Oddi, *The International Patent System and Third World Development: Reality or Myth?*, 1987 DUKE L.J. 831, 849 (noting that patent protection seems an unlikely determinative factor for deciding whether or not to invest in a foreign country).

<sup>351</sup> See MANSFIELD, *supra* note 350, at 20 (“[T]he strength or weakness of a country’s system of intellectual property protection seems to have a substantial effect, particularly in high-technology industries, on the kinds of technology transferred by many U.S. firms to that country.”); SUSAN K. SELL, POWER AND IDEAS: NORTH-SOUTH POLITICS OF INTELLECTUAL PROPERTY AND ANTITRUST 214 (1998) (arguing that an operational intellectual property regime will promote foreign investment); Edmund W. Kitch, *The Patent Policy of Developing Countries*, 13 UCLA PAC. BASIN L.J. 166, 175-76 (1994) (same). Technology transfer is very important to a less developed country:

[Without technology transfer], the country will have to try to develop its own technological capability without sharing in the common pool of existing technology developed by others. This in turn will mean that its nationals and firms will develop technological solutions, methods, and products which are different from prevailing international standards. This will isolate the domestic economy from the international economy, and deny the country the advantages of international exchange of both goods and services. Such economic isolation in turn increases the difficulty of enhancing the national technological base.

*Id.* at 176. However, Professor Oddi suggested that the granting of intellectual property protection such as patents may actually retard technology transfer. As he explained:

The foreign owner may have little incentive to transfer technical information related to that patent invention if the owner is deriving significant profits from having an import monopoly on that invention. Moreover, even though sources other than the patent owner may be willing to transfer adequate technical information into the country, domestic enterprises would be foolish to pay for such technology because the patent owner could bar domestic production on

the basis of the patent. The existence of the patent therefore precludes competition in technology available from third-party sources.  
Oddi, *supra* note 350, at 852.

<sup>352</sup> See Lagerqvist & Riley, *supra* note 350, at 9; PRICEWATERHOUSECOOPERS, CONTRIBUTION OF THE SOFTWARE INDUSTRY TO THE CHINESE ECONOMY 4 (1998) (estimating that a 60% decrease in piracy would translate into more than \$466 million in tax receipts).

<sup>353</sup> See Alford, *Making the World Safe for What?*, *supra* note 27, at 136-37 (noting that emerging entrepreneurs, authors, and creative artists will be unable to capture the benefits of their inventions, innovations, and creative endeavors); Robert Merges, *Battle of the Lateralisms: Intellectual Property and Trade*, 8 B.U. INT'L L.J. 239, 246 (1990) ("A recording industry flourished in Hong Kong for the first time after the passage of a copyright act protecting sound recordings; the Indian software industry saw a growth surge after a copyright was extended to software . . . ."); Robert Sherwood, *Why a Uniform Intellectual Property System Makes Sense for the World* [hereinafter Sherwood, *Why a Uniform Intellectual Property System Makes Sense*], in GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS, *supra* note 350, at 68, 72 (noting that "immediately after Mexico reformed its patent law in June 1991, large numbers of patent applications were filed by Mexican nationals."); *id.* ("A small but striking before-and-after shift comes from Colombia when copyright protection for software took effect in 1989. More than 100 Colombian nationals have since produced application software packages that have been registered with the copyright office, with hundreds more written but not registered.").

<sup>354</sup> For example, adulterated drugs and counterfeit products will lead to illness, extended injuries, and unnecessary deaths. See Alford, *Making the World Safe for What?*, *supra* note 27, at 136.

<sup>355</sup> *Id.* at 137; see also Kenneth Ho, *A Study in the Problem of Software Piracy in Hong Kong and China* ¶ 2.6 (1995), available at [http://info.gov.hk/ipd/eng/information/studyaid/piracy\\_hk\\_china.htm](http://info.gov.hk/ipd/eng/information/studyaid/piracy_hk_china.htm) (last visited May 26, 2002) (noting that legitimate copies of software are 20% more expensive in Hong Kong than they are in the United States).

<sup>356</sup> As commentators explained:

Trademark protection provides various types of benefits to consumers which are important for a consumer-based economy that offers a wide range of goods. One such benefit is quality control, which can actually promote economic activity in a market. Trademarks tie responsibility for the content and quality of products to the specific producers of those products, and in this way can assure the consumer of a certain level of quality associated with a product.

If the consumer cannot distinguish between high and low quality products in the market, then the low quality merchandise may chase the high quality merchandise out of the market altogether as consumers become discouraged and buy less. The market then shrinks and may even disappear.

This informational asymmetry results in an externality to the market that can reduce economic activity. Lacking full information, potential buyers cannot discern the actual quality of individual products in the market but can discern the average quality in the market, and, therefore, are only willing to pay a price that reflects this average. Potential producers know the actual quality of their products, and at the price reflecting the average quality, potential producers of more costly, higher quality goods stay out of the market.

Janet H. MacLaughlin et al., *The Economic Significance of Piracy*, in GLOBAL CONSENSUS, GLOBAL CONFLICT?, *supra* note 4, at 89, 103 (footnotes omitted), see also George Akerloff, *The Market for Lemons: Qualitative Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970) (analyzing market dynamics when the supply of goods was subject to varying degrees of quality known only by the individual producers and not the consumers); Alford, *Making the World Safe for What?*, *supra* note 193, at 137 (stating that fake prod-

ucts were so prominent in Shanghai that government officials had to inform citizens over the airwaves where they could purchase legitimate products).

<sup>357</sup> See Giunta & Shang, *supra* note 345, at 341 ("Many of [the less developed] countries fail to realize that prices in countries that respect intellectual property are not necessarily higher than prices in those countries where piracy abounds."); Sherwood, *Why a Uniform Intellectual Property System Makes Sense*, *supra* note 353, at 82 ("In [some cases], notably pharmaceuticals, the price at which the imitation is sold is often nearly as high as the original."); James W. Peters, Comment, *Toward Negotiating a Remedy to Copyright Piracy in Singapore*, 7 NW. J. INT'L L. & BUS. 561, 589 (1986) ("Pirated works are not necessarily cheaper than the originals.").

<sup>358</sup> Richard E. Vaughan, *Defining Terms in the Intellectual Property Protection Debate: Are the North and South Arguing Past Each Other When We Say "Property"? A Lockean, Confucian, and Islamic Comparison*, 2 ILSA J. INT'L & COMP. L. 307, 345 (1996); see also ROBERT SHERWOOD, INTELLECTUAL PROPERTY AND ECONOMIC DEVELOPMENT 156 (1990) (describing a reverse "brain drain" in South Korea after its implementation of intellectual property laws in 1987). Robert Sherwood explained the impact of inadequate intellectual property protection on human resources as follows:

Students who have gone abroad, prefer to stay abroad. Researchers on the verge of innovation, leave for a protected environment to complete their work. Technically skilled people are not much stimulated to do creative work when assigned the task of copying and imitation. The research establishment does not flourish and patterns for financing new technology are not developed....

*Id.* at 174; see also Kitch, *supra* note 351, at 174 (arguing that technologically sophisticated students who obtain employment outside the country may, "over time, become comfortable in their place of employment and will resist ever returning to their country of origin"). This loss of talents is particularly devastating in light of the blossoming software industry and the country's eagerness to develop science and technology parks. See *China: Guangzhou to Establish "Silicon Valley"*, CHINA BUS. INFO. NETWORK, Dec. 4, 1998, available at 1998 WL 22707603 (reporting the municipal government's intention to develop an international science and technology park); *China: Sales of Software Stay Strong Despite Fakes*, ASIAINFO DAILY CHINA NEWS, June 20, 2000, available at LEXIS, News Library, ASINFO File ("Despite the damage done by piracy, China's software industry is still moving ahead with sales in 1999 hitting 17.6 billion RMB yuan (US\$ 2.13 billion), an increase of 27.5 percent over 1998."); *China: Software Industry Booms in China*, CHINA BUS. INFO. NETWORK, Oct. 30, 1997, available at 1997 WL 12878806 (reporting a 50% annual growth rate in the software industry over the past several years).

<sup>359</sup> Blustein & Chandler, *supra* note 1.

<sup>360</sup> China became the 143rd member of the WTO on December 11, 2001.

<sup>361</sup> See, e.g., GREG MASTEL, THE RISE OF THE CHINESE ECONOMY: THE MIDDLE KINGDOM EMERGES 176 (1997) (cautioning that China's accession to the WTO is "a double-edged sword").

<sup>362</sup> See Yu, *Ramifications of China's Entry into the WTO*, *supra* note 2 (discussing the optimistic and pessimistic views of China's entry into the WTO).

<sup>363</sup> CHOW, *supra* note 164, at 254.

<sup>364</sup> *Id.*

<sup>365</sup> *Id.*

<sup>366</sup> *Id.*

<sup>367</sup> Professor Chow discussed the difficulties of proving China's noncompliance of the enforcement obligations under the TRIPs Agreement:

Part III of TRIPs creates specific enforcement obligations and raising the coun-

terfeiting and piracy issue after China's admission into the WTO will most likely take place in the context of arguing that China's enforcement efforts fail to satisfy TRIPS enforcement obligations. The burden of proof and persuasion will be upon the complaining party. Meeting these burdens will require the complaining party to gather evidence of China's failure to meet its obligations—a task that could take years given the complexity of the enforcement environment in China today—and would also require the party to prove its case before the WTO's Dispute Settlement Body. Not only will this be a long process requiring several years, but there is no guarantee that the party raising the dispute would succeed given that it now has all of the burdens of proof and going forward.

*Id.* at 253-54.

<sup>368</sup> *Id.* at 254. As Professor Chow queried: “[I]f China can enter the world's foremost commercial law regime and be recognized as a member of the world trading community despite having the world's most serious piracy problem, what incentive is there to improve the problem and to commit the considerable resources that this would require?” *Id.*

<sup>369</sup> See Yu, *Ramifications of China's Entry into the WTO*, *supra* note 2 (arguing that the first five years after China's entry into the WTO are critical).



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