AN EXAMINATION OF CHINA'S EMERGING INTELLECTUAL PROPERTY REGIME: HISTORICAL UNDERPINNINGS, THE CURRENT SYSTEM AND PROSPECTS FOR THE FUTURE

Geoffrey T. Willard[*]

INTRODUCTION

In the past decade, the People's Republic of China (PRC or China) has significantly upgraded its intellectual property rights protection regime.[1] Despite the advent of a legal framework designed to protect intellectual property, however, infringement of intellectual property rights remains pervasive throughout the PRC.[2] This fact arouses serious concern in the international community about the Chinese government's commitment and ability to enforce its intellectual property laws and to provide adequate protection to legitimate manufacturers and rights holders in China.[3]

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* J.D., Washington College of Law, American University, May 1996; B.A., East Asian Studies & International Politics, New York University, 1993. The author will join Jones, Day, Reavis & Pogue as an associate in September 1996. Thanks are extended to: Professor Yongxin Song of the Hangzhou University School of Law for his helpful comments and criticisms of this piece, Professor Julie Higashi for her constant encouragement, Eileen Lee for her editing assistance and support of this endeavor, and Simon Luk, Esq., who taught me the importance of an eye for detail. The topic for this article was suggested during a discussion in Hong Kong with attorneys Stephanie Mitchell and Ann Elizabeth Bang.

1. *See* WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE 1 (1995) (noting Chinese efforts to promulgate formal legal protections for intellectual property); Jesse T.H. Chang & Charles J. Conroy, *Trade Mark Law in the People's Republic of China*, FOREIGN TRADE, *in* INVESTMENT & LAW IN THE PEOPLE'S REPUBLIC OF CHINA 427, 448 (Michael J. Moser, ed. 1987) (stating that development of China's trademark system has brought it closer "to common international practice"); Michael J. Moser & David Y.W. Ho, *The Registration and Protection of Patents in China*, *in* FOREIGN TRADE, INVESTMENT & LAW IN THE PEOPLE'S REPUBLIC OF CHINA 453, 470 (Michael J. Moser, ed. 1987); JARI E. VEPSÄLÄINEN, FOREIGN INVESTMENT IN THE PEOPLE'S REPUBLIC OF CHINA, 272-73 (declaring that "there have been significant improvements in [intellectual property] legislation since introduction of the open-door policy").

2. Alford, *supra* note 1, at 1. Alford declares that "[a]lthough scholars . . . credit the Chinese with having contributed paper, movable type, and ink to humankind, China has yet to develop comprehensive protection for what is created when one applies inked type to paper." *Id.* He concludes that, notwithstanding recent developments, "protection for intellectual property remains closer to rhetoric than reality" in mainland China. *Id.*

3. Regardless of this situation, and although China opened to foreign investment less than 20 years ago, there is already more foreign investment in China than in Japan. *A World Trade Ordeal*, THE ECONOMIST, Nov. 4, 1995, at 38.

This article offers an overview of the state of intellectual property protection in China. In order to provide a background for evaluating intellectual property in modern China, Part I looks at the history of intellectual property protection in both imperial China and the early years of the PRC.[4] Part II examines the significant new intellectual property laws enacted by China in the 1980s and early 1990s.[5] Part III discusses the main difficulties faced by China's central government as it attempts to enforce these laws and discusses trade friction with the U.S. resulting from the enforcement dilemma.[6] Finally, Part IV reports on future prospects for the protection of intellectual property in China, concluding that intellectual property rights will not be fully protected in China until the nation educates its citizens about the need to protect such rights and creates viable mechanisms to deal with infringing activities.[7]

I. INTELLECTUAL PROPERTY RIGHTS IN TRADITIONAL CHINA AND THE EARLY YEARS OF THE PRC

A. *Intellectual Property Rights Before 1949*

Certain forms of intellectual property were recognized and protected at various times throughout the history of imperial China.[8] No Chinese government, however, had enacted comprehensive laws governing the protection of such rights until the PRC began to strengthen its intellectual property framework in the 1980s.[9] A brief examination of the development of rights related to trademarks,[10] patents,[11] and copyrights[12] in traditional China follows.

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4. *See infra* part I. For purposes of this article, Imperial China will refer to the myriad dynasties before the birth of the Republic of China in 1912; the Republic of China lasted until the Communist rule of China began in 1949 with the People's Republic of China.

5. *See infra* part II.

6. *See infra* part III.

7. *See infra* part IV.

8. *See* ZHENG CHENGSI, CHINESE INTELLECTUAL PROPERTY AND TECHNOLOGY TRANSFER LAW 21-22, 51-52, 86-88 (1987) (discussing historical development of intellectual property rights in traditional China); *but see* William P. Alford, *Don't Stop Thinking About . . . Yesterday: Why There Was No Indigenous Counterpart to Intellectual Property Law in Imperial China*, 7 J. CHINESE L. 1, 4-5 (1993) (concluding that imperial China never developed an indigenous counterpart to intellectual property law as understood in the United States, despite "evidence of restrictions on the unauthorized reproduction of certain books, symbols and products").

9. *See infra* part II (describing these intellectual property reforms).

10. As used herein, the term "trademark" refers to any word, name, symbol, device or combination thereof used by a merchant or manufacturer to identify its goods from those sold or produced by others. DONALD A. GREGORY ET AL., INTRODUCTION TO INTELLECTUAL PROPERTY LAW 81 (1994). Trademarks can thus include "symbols, numbers, slogans, nicknames of products," and so forth. *Id.*

11. As employed herein, a "patent" is a right of exclusive use over a particular invention or innovation, which is granted to a person or entity (the "patentee"). A patent

1. *Trademarks*

The first known trademarks surfaced in China nearly 3000 years ago, during the reign of the Zhou Dynasty.[13] Yet despite a long history of trademark use in China, direct government involvement in trademark protection largely has been a recent development.[14] The first recorded case involving trademarks did not appear until the 1730s, during the rule of Qing Emperor Qian Long.[15] In that case, local authorities forbade a cloth merchant to sell his wares under another merchant's trademark and set their decision in stone to ensure against a recurrence of such activity.[16] Although government officials were involved in this case, private measures to protect trademarks were more typical during the imperial era. For example in 1825, a group of Shanghainese merchants, without government involvement or affiliation, banded together to protect each other's trademarks — pledging not to use similar marks to identify similar products.[17]

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gives the patentee the privilege to make, sell or use a particular invention to the exclusion of all others for a specified period of time. ARTHUR R. MILLER & MICHAEL H. DAVIS, INTELLECTUAL PROPERTY: PATENTS, TRADEMARKS & COPYRIGHT 10 (1983). Two main justifications underlie the notion of patent protection. The "contract theory" suggests that people will be encouraged to create new inventions if they are given an incentive. *Id.* at 14. The second justification founded on a "natural rights" theory, emphasizes that "the product of mental labor is by right the property of the person who created it." *Id.* at 15. Under this theory, the inventor possesses all title to the invention and has the right to be compensated for any use thereof. *Id.*

12. As used herein, "copyright" refers to exclusive privileges granted to publishers of text. GREGORY ET AL., *supra* note 10, at 165.

13. ZHENG, *supra* note 8, at 21; Chang & Conroy, *supra* note 1, at 427. Zheng cites the PEOPLE'S DAILY, July 13, 1982, at 3. Alford notes that one of the earliest surviving trade symbols known in China was a "white rabbit" mark used by the Liu clan of Jinan, Shandong, evidence of which appears in records of the Northern Song dynasty. Alford, *supra* note 8, at 15-16.

14. This is not to say that no marks were protected, as certain imperial symbols were protected under Qing dynasty law. *See* Da Qing Lü Li [Laws of the Great Qing Dynasty] art. 429, *translated in* THE GREAT QING CODE 408 (William C. Jones, ed./trans. 1994) (declaring punishment for non-imperials who weave dragon and phoenix symbols in silk); *see also* ALFORD, *supra* note 1, at 15 (noting that although imperial laws did little to protect "proprietary symbols," dynastic codes restricted use of "certain symbols associated with either the imperial family . . . or officialdom"). Alford also mentions that forgery of the marks employed by craftsmen "making goods for exclusive imperial use" was prohibited. *Id.*

15. ZHENG, *supra* note 8, at 21.

16. *Id.*

17. *Id.* According to Alford, various sources indicate that producers of goods (including tea, cloth, medicine, silk, and paper) sought to protect their trade symbols and marks by declaring that others could not use such markings, and by registering them with local officials or guilds. Alford, *supra* note 8, at 16. He notes, however, that the goal of protecting "proprietary marks" was difficult to accomplish. *Id.*

Although seen only rarely in the purely domestic realm, trademark issues arose fairly prominently in 19th and early 20th century treaties concluded between the Qing and Western nations.[18] In a representative treaty, the Qing government agreed to protect "British trade-marks against infringement, imitation, or colourable imitation by Chinese subjects."[19] Unfortunately, the Qing Code[20] did not contain a national trademark law at the time many of these treaties were entered into, leaving unanswered the question of how best to effect protection of foreign-owned trademarks.[21] Finally, in the waning years of Qing rule, an imperial decree established the first Chinese trademark law.[22] Surprisingly, this law afforded little protection to native trademark holders and primarily benefitted foreign businessmen,[23] particularly the Japanese.[24]

Republican-era governments enacted two more trademark laws after the 268-year rule of the Qing came to an end in 1912.[25] China's first trademark office was established in 1923, by Northern Chinese warlords, under a trademark law which granted trademark protection for twenty years (with possible extension for the same term) and which created a registration framework involving a first-use priority system.[26] The Nationalist Government published a similar, but more comprehensive trademark law in 1930.[27] The Nationalist law was amended in 1935,[28] and by 1946, approximately 40,000 trademarks obtained registration thereunder.[29]

Despite some efforts to protect trade symbols and marks, the overall record of trademark protection in pre-1949 China was quite poor.[30] Well-

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18. *See* ALFORD, *supra* note 1, at 36 (stating that "[t]rademark protection was the centerpiece of the intellectual property issues addressed in commercial agreements" with major powers).

19. ALFORD, *supra* note 1, at 36-37.

20. For a comprehensive translation, see THE GREAT QING Code, *supra* note 14.

21. ALFORD, *supra* note 1, at 37.

22. Prior to the imperial decree, certain traders were able to protect their brands, often seeking the assistance of local officials to prevent unauthorized counterfeiting. Any protections achieved were purely local and "in any event, unavailable to foreigners." ALFORD, *supra* note 1, at 35.

23. Joshua R. Floum, *Counterfeiting in the People's Republic of China: The Perspective of the "Foreign" Intellectual Property Holder*, 28 J. WORLD TRADE 35, 44 (1994).

24. ZHENG, *supra* note 8, at 21-22. The Emperor's decree was entitled, "Trial Implementing Regulations for the Registration of Trademarks." *Id.* at 21.

25. ZHENG, *supra* note 8, at 22.

26. ALFORD, *supra* note 1, at 51.

27. 1930 Trademark Law.

28. ALFORD, *supra* note 1, at 51 n.141.

29. ZHENG, *supra* note 8, at 22.

30. Out of fairness to the Chinese, it should be noted that American protection of intellectual property during the 18th and much of the 19th centuries was also poor.

known products and their trademarks were frequently counterfeited.[31] Although appeals were sometimes made to local magistrates, official help was limited[32] because often no formal legal provisions specifically prohibited the pirating activities.[33] Thus, despite some efforts by the Chinese, and assurances made in treaties with the West, trademark protection in pre-Communist China was largely illusory and, to the extent that it existed at all, it was available "more in name than fact."[34]

2. *Patents*

The Chinese characters used today to represent the English word "patent" came into use nearly three millennia ago in the Zhou Dynasty and correspond more closely to "monopoly."[35] Patents as understood in a modern sense did not appear in China until approximately 100 years ago.[36] The idea of a modern patent system first surfaced during the Taiping Rebellion era,[37] but no legislation in this area was drafted until the close of the 19th century, when one of the last Qing rulers issued a set of "Regulations to Promote Industrial Technology."[38] In 1912, the Republican government enacted China's second patent law, under which 692 patents were granted by 1944.[39] In 1949, the Guomindang published China's third patent law.[40] Because of the influence of various Japanese invasions,[41] World War II,[42] and civil war,[43] patents in China received

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31. ALFORD, *supra* note 1, at 16 (declaring that "[t]here appears to have been massive counterfeiting").

32. *See supra* notes 15-16 and accompanying text (noting general lack of official protection).

33. *See* ALFORD, *supra* note 1, at 16 (stating that appeals to local officials were based on principles of fairness and prevention of deception and not specific legal provisions); ZHENG, *supra* note 8, at 21 (noting that self-help activities of Shanghai merchants "did not involve local authority or law").

34. ALFORD, *supra* note 1, at 41.

35. ZHENG, *supra* note 8, at 51.

36. *Id.*

37. *See* ZHENG, *supra* note 8, at 51-52 (describing development in 1858 of a "petty patent system" by a Taiping leader).

38. Regulations to Promote Industrial Technology (1899). According to Zheng, this "first true . . . patent law in China" existed "in law for less than two months." ZHENG, *supra* note 8, at 52.

39. ZHENG, *supra* note 8, at 52.

40. Patent Law of the Republic of China (1949). The law, as amended, is still in use in Taiwan. Patent Law of the Republic of China (1986), *translated in* 9 EAST ASIAN EXEC. REPS. 20-23 (1987).

41. For a thoughtful discussion of Japanese machinations and involvement in China during the 1920s and 1930s, see JONATHON D. SPENCE, THE SEARCH FOR MODERN CHINA 388-434 (1990).

42. *See id.* at 443-83 (discussing the impact of World War II in and on China).

43. *See id.* at 438, 484-515 (detailing events in civil war period from 1945-49).

little real protection during this era.[44] Therefore, despite the actual existence of patent laws during this period, China had virtually no tradition of patent protection entering the modern era.

3. *Copyrights*

As with the other forms of intellectual property in China, copyright has been recognized in some sense for many years.[45] For instance, during the Tang Dynasty (which saw the birth of printing), imperial decrees banned the unauthorized copying of legal pronouncements, calendars, and other materials.[46] There is also evidence that during the Song Dynasty, authors would state on the final page of their publication that "reproduction was prohibited."[47] However, in reality such admonitions against unauthorized reproduction were largely ineffective, and compliance with "copyright" was quite limited.[48] This failure might be attributed to Chinese tradition and the widespread notion that "[d]etailed replication of art and written texts is considered the highest form of hon[or] to the master."[49]

In the last years of the Qing, an effort was made to formalize protection of authors' interests through the enactment of a limited copyright law.[50] This first "true" copyright law was short lived, however, as the Qing government was overthrown only one year after its promulgation.[51] Two subsequent copyright laws were published in pre-Communist China, one by the warlords,[52] and the other by the Republican government in 1928.[53] The Guomindang's "Law on Authors' Rights" provided for copyright registration, and the protection of foreign authors' works, but only if each particular foreign author's country protected Chinese works.[54]

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44. *See* ZHENG, *supra* note 8, at 52 (suggesting that only paucity of patents were granted on mainland under Nationalist's patent).

45. Professors Zheng and Pendleton assert that copyright originated in China with the development of printing. ZHENG CHENGSI & MICHAEL PENDLETON, COPYRIGHT LAW IN CHINA ii (1991). Professor Alford, however, writes that he finds "neither a formal nor informal counterpart to copyright . . . law." ALFORD, *supra* note 1, at 9.

46. Alford, *supra* note 8, at 11-12.

47. Yiping Yang, *The 1990 Copyright Law of the People's Republic of China*, 11 UCLA PAC. BASIN L.J. 260, 263 (1993).

48. *See* Zheng Chengsi, *Chinese Copyright Law, in* CHINA FOREIGN ECONOMIC LAW 16 (Hong Kong Int'l Law Inst. 1994) (noting that prior to 1978, even the rights of Chinese authors were virtually meaningless).

49. Floum, *supra* note 23, at 35; *see* ALFORD, *supra* note 1, at 29 (stating that in China's Confucian tradition, "true scholars wrote for edification and moral renewal rather than profit").

50. Authors' Rights in the Great Qing Empire (1910).

51. ZHENG, *supra* note 8, at 87.

52. Law on Authors' Rights (1915).

53. Republic of China, Law on Authors' Rights (1928).

54. ZHENG, *supra* note 8, at 87.

4. *The Overall Intellectual Property Framework Before 1949*

As the passages above suggest, respect for intellectual property rights in China was minimal prior to 1949. Although both Imperial and Republican regimes recognized some rights,[55] intellectual property laws were enforced infrequently. As a consequence, such rights were violated regularly and aggrieved parties were left with virtually nothing in the way of legal recourse or redress.

B. *Early Attitudes Toward Intellectual Property in the PRC*

The situation of intellectual property rights in China did not change immediately with the founding of the PRC. When the Chinese communists assumed power in 1949, they rejected and rescinded the entire corpus of Guomindang law,[56] and began to develop a new legal system based largely on the Soviet model.[57] With regard to intellectual property, the Soviet experience proved satisfactory to the fledgling Chinese communists because in large measure "the values . . . underl[ying] the Soviet model reflected traditional Chinese attitudes toward intellectual property."[58] Thus, as a result of both cultural and political influences, the intellectual property regime which emerged in the early years of the PRC rested heavily on the notion that individual accomplishments belonged to all of society.[59]

The Cultural Revolution[60] ground to a halt the development of intellectual property laws in China.[61] During this era, many intellectuals, including jurists and attorneys, suffered greatly.[62] Starting in 1966, the

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55. *See generally infra* part II.A.

56. LAW IN THE PEOPLE'S REPUBLIC OF CHINA: COMMENTARY, READINGS AND MATERIALS 8 (Ralph H. Folsom & John H. Minan eds., 1989) [hereinafter LAW IN THE PRC: COMMENTARY].

57. *Id.* at 5, 9; ALFORD, *supra* note 1, at 56.

58. ALFORD, *supra* note 1, at 56. *See* Brian Barron, *Chinese Patent Legislation in Cultural and Historical Perspective*, 6 INTELL. PROP. L. J. 313, 314 (1991) (discussing influence of Marxist thought on development of Chinese patent law); Laurence P. Harrington, Comment, *Recent Amendments to China's Patent Law: The Emperor's New Clothes?*, 17 B.C. INT'L & COMP. L. REV. 337, 342 (1993).

59. *See* ALFORD, *supra* note 1, at 56-57 (discussing influence of Marxist thought on development of early intellectual property law in PRC and comparing elements of Marxism and Confucianism to demonstrate certain ideological affinities between the two).

60. Called the "Great Proletariat Revolution," and lasting from 1966-1976, this movement began as an attack by Mao on his rivals within the Party and intellectuals and bureaucrats who were separated from "the hardships of peasant work." LAW IN THE PRC: COMMENTARY, *supra* note 56, at 10. For more on the Cultural Revolution, see SPENCE *supra* note 41, at 603-17; LUCIAN W. PYE, CHINA: AN INTRODUCTION 287-306 (1984).

61. *See* ZHENG, *supra* note 8, at 90 (commenting that "the Cultural Revolution brought everything to a standstill, including the preparation of ideas for establishing a copyright system").

62. LAW IN THE PRC: COMMENTARY, *supra* note 56, at 11.

government shut down law schools and sent legal workers to the countryside for "re-education" in revolutionary values.[63] As a consequence of Mao's policies, "law and legal institutions were dismembered in a frenzy of hysterical fanaticism."[64] The destruction of China's legal system[65] necessarily resulted in a dismantling of virtually all protection for intellectual property from 1966 until formal legal institutions and mechanisms began to resurface after Mao's death in 1976 and the fall of the "Gang of Four" later that year.[66]

Following are brief descriptions of the intellectual property laws extant during the formative years of the PRC.

1. *The Early Patent Laws of the PRC*

The PRC originally promulgated patent legislation in the 1950s,[67] creating a system under which inventors were given the option of taking a patent (entitling the inventor to exclusive rights of use) or a certificate entitling the inventor to honorific and monetary awards, but with either election, title to the invention passed to the government.[68] Dramatic political changes, however, soon led to a situation where "the idea of granting proprietary rights in inventions to individuals had become politically unpalatable."[69] Consequently, in 1963, the State Council adopted "Regulations on Awards for Inventions,"[70] which stated that "[a]ll inventions are the property of the state, and no person . . . may claim a monopoly over them . . . . All units may make use of [Chinese] inventions . . . ."[71]

With the arrival of the Cultural Revolution,[72] the climate for registration of patents severely chilled. It was not until the late 1970s that

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63. *Id.* at 12. For a discussion of how China functioned without lawyers and how it has continued to function with a very limited number of legal practitioners, see generally VICTOR H. LI, LAW WITHOUT LAWYERS (1978).

64. LAW IN THE PRC: COMMENTARY, *supra* note 56, at 12.

65. *See* Wu Jianfan, *Building New China's Legal System, in* CHINA'S LEGAL DEVELOPMENT 13 (John R. Oldham, ed., 1986) (declaring that China's legal system suffered such great damage that some "termed it a 'disaster area'").

66. Post-Cultural Revolution legal reconstruction is discussed *infra* part II.A.

67. Baozhang Famingquan [Provisional Regulations on the Protection of Invention & Patent Rights] (1950).

68. *See* Gary Watson, *Business Law in the People's Republic of China*, 27 AM. BUS. L.J. 315, 343 (1989) (describing 1950's patent system in PRC). Apparently, the "two-track" system was created as a means of soothing the anxieties of Chinese rights-holders and intellectuals, while still ensuring state access to needed technologies. ALFORD, *supra* note 1, at 58.

69. Watson, *supra* note 68, at 344.

70. Faming Jiangli Tiaoli [Regulations on Awards for Inventions] (1963).

71. *Id.* art. 23.

72. *See supra* notes 60-66 (discussing impact of Cultural Revolution on Chinese legal system).

the PRC's new leadership undertook efforts to revive the old patent laws. In 1978, the 1963 Patent Regulations were reinstated, allowing inventors to again receive pecuniary rewards for their work.[73] These developments set the stage for the creation of a new patent regime for China in the early 1980s.[74]

2. *Trademark Law Following the Communist Revolution*

Soon after the founding of the PRC, the nation adopted its first regulations relating to trademark.[75] Subsequently, new regulations were passed in 1963.[76] These regulations were not particularly useful to foreign parties who were given only limited opportunities thereunder to register marks in the PRC.[77] This limitation resulted largely because Chinese authorities wished to register only the marks of foreigns whose native countries recognized Chinese marks and had signed reciprocity agreements with China. However, in 1978, China waived these restrictions, finally opening the trademark registration process to all foreign parties.[78]

3. *Copyright Law in the Early Years of the PRC*

Prior to the start of the "open-door policy," copyright law in the PRC was the least developed of the recognized forms of intellectual property.[79] In the early 1950s, China's National Publication Conference established a set of preliminary guidelines dealing with certain copyright issues.[80] The first efforts to draft copyright legislation occurred later that decade when the Ministry of Culture wrote several documents dealing with copyright.[81] Although these documents laid the foundation for future copyright legislation, the drafts were never published, possibly because of ongoing political movements at the time.[82]

In general, China's post-1949 copyright provisions were "in the form of administrative orders or internal regulations"[83] and primarily dealt with

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73. ALFORD, *supra* note 1, at 65.

74. *See infra* part III.

75. Provisional Regulations Governing Trademark Registration (1950). *See* Chang & Conroy, *supra* note 1, at 427-28 (discussing early PRC trademark legislation).

76. Regulations of the People's Republic of China Governing the Control of Trademarks (1963). *See* Chang & Conroy, *supra* note 1, at 428-29 (reporting on 1963 Trademark Regulations).

77. Chang & Conroy, *supra* note 1, at 428-29.

78. *Id.* at 429.

79. WEI JIA, CHINESE FOREIGN INVESTMENT LAWS AND POLICIES: EVOLUTION & TRANSFORMATION 136 (1994).

80. ZHENG, *supra* note 8, at 88.

81. *Id.* at 90.

82. *Id.*

83. Yang, *supra* note 47, at 263.

remuneration issues.[84] Even this weak system of regulation, however, was dismantled during the Cultural Revolution[85] and did not re-emerge until the late 1970s.[86] By any measure, however, it is obvious that before 1990 the PRC's copyright laws were seriously inadequate.

II. THE ECONOMIC REVOLUTION AND THE EMERGENCE OF THE NEW CHINESE INTELLECTUAL PROPERTY REGIME

A. *The Economic Reform*

Soon after Deng Xiaoping's return to power in July of 1977,[87] China embarked on an ambitious program of economic reform.[88] Chinese officials realized that legal reform was a necessary co-requisite for economic transition and began a major overhaul of the nation's legal system.[89] Within a short time, the government started drafting and implementing significant and ambitious pieces of new legislation.[90] During this era, the

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84. *Id.*

85. *See* ZHENG, *supra* note 8, at 90 (discussing retarding effects of Cultural Revolution on development of copyright system in PRC).

86. Yang, *supra* note 47, at 263.

87. U.S. DEP'T OF STATE, BACKGROUND NOTES ON CHINA 5 (Bureau of East Asian & Pacific Affairs, Office of Chinese & Mongolian Affairs 1993). After a period of internal exile, Deng was rehabilitated and reinstated as vice-chairman of the Standing Committee of the Politburo. PYE, *supra* note 60, at 327.

88. *See* KENNETH LIEBERTHAL, GOVERNING CHINA, FROM REVOLUTION THROUGH REFORM 243-59 (1995) (detailing economic reforms); PYE, *supra* note 60, at 337-52 (discussing policy changes implemented by Deng). Deng's reforms began with the idea that Communist principles and certain capitalist ideas might work together for the good of the nation. Summarizing his philosophy toward reform, Deng declared, "[i]t doesn't matter if the cat is black or white, as long as it catches mice." STEVEN WARSHAW, CHINA EMERGES, 155 (1990).

89. *E.g.*, William R. Baerg, *Judicial Institutionalization of the Revolution: The Legal Systems of the People's Republic of China and the Republic of Cuba*, 15 LOY. L.A. INT'L & COMP. L.J. 233, 242 (1992); LIEBERTHAL, *supra* note 88, at 151. Lieberthal notes that the first foreign firms seeking to invest in the PRC were asked and required to sign contracts subject to regulations and rules that were kept secret and not published. *Id.*

90. The overall legal reform efforts were extensive and included the drafting of a new constitution for China. XIANFA [PEOPLE'S REP. OF CHINA CONST.] (1982), *translated in* THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 1979-1982 (1987). Major economic laws enacted during the reform era include: Law of the People's Republic of China on Chinese-Foreign Equity Joint Ventures (1979), *translated in* THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA, 1979-1982 150 (1987); Income Tax Law of the People's Republic of China for Chinese-Foreign Equity Joint Ventures (1980), *translated in* THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA, 1979-1982 190 (1987); Economic Contract Law of the People's Republic of China (1981), *translated in* THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA, 1979-1982 219 (1987); Income Tax Law of the People's Republic of China for Foreign Enterprises, *translated in* THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA, 1979-1982 237 (1987).

PRC took its first steps toward the creation of a comprehensive intellectual property regime. The leadership thus acknowledged the fact that foreign investors would be more willing to invest in China if the nation protected investors' rights, particularly in the area of intellectual property.[91]

B. *Intellectual Property Reforms - The New Legislation*

1. *The Trademark Law*

The 1983 "Trademark Law of the People's Republic of China"[92] was the first reform-era intellectual property law enacted by China.[93] Subsequently amended,[94] this legislation: 1) replaced China's "1963 Regulations Governing Trademarks," 2) established an administrative framework for the registration of trademarks,[95] 3) detailed the rights of trademark holders,[96] 4) outlined activities constituting trademark infringement,[97] and 5) provided legal remedies and sanctions for violation of a holder's rights under this law.[98]

Overall, China's new trademark laws provide a viable framework for the protection of most marks, designs, and symbols within the PRC.[99] In addition to the changes mentioned above, the law is notable in that it establishes certain priority rights for registrants who are nationals of countries party to the Paris Convention, includes a new process for

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91. PITMAN R. POTTER, FOREIGN BUSINESS LAW IN THE PRC: PAST PROGRESS AND FUTURE CHALLENGES 41 (1995). *See* Tara Kalagher Giunta & Lily H. Shang, *Ownership of Information in a Global Economy*, 27 GEO. WASH. J. INT'L L. & ECON. 327, 347 (1993-94) (arguing that the PRC is "eager to begin instituting a new 'world class' intellectual property regime so that it can attract foreign investment"). Giunta and Shang declare that "absent adequate protection, foreign firms will less readily transfer technology to local companies." *Id.* at 354.

92. Zhonghua Renmin Gongheguo Shangbiaofa [Trademark Law of the People's Republic of China] (1982), *translated in* THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 1979-1982, at 305 (1987).

93. POTTER, *supra* note 91, at 41.

94. Zhonghua Renmin Gongheguo Shangbiaofa (1993 Nian Xiuding Ben) [Trademark Law of the People's Republic of China (1993 Revision)], *translated in* CHINA LAWS FOR FOREIGN. BUS.: BUS. REG. (CCH Austr.) 14,001 (1993)[hereinafter Trademark Law of the PRC (Revised)].

95. *Id.* arts. 2-22

96. *Id.* arts. 23-26.

97. *Id.* art. 38.

98. *Id.* arts. 39-40. There is also a criminal penalty for infringement of a registered trademark. Criminal Law of the People's Republic of China, art. 127 (1979), *translated in* THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA, 1979-1982, at 87, 109 (1987). The criminal sanction for counterfeiting is imprisonment for a maximum of three years, a fine, or criminal detention. *Id.* *See* POTTER, *supra* note 91, at 41.

99. *But see* Chang & Conroy, *supra* note 1, at 429 (insinuating that limited protection for service marks in China is problematic for foreign service industries).

publication of and opposition to marks,[100] and contains provisions for a party disputing a registered mark to apply for its cancellation.[101] Finally, the law incorporates a broad definition of infringement, which should make it easier for injured mark holders to prosecute infringers and eliminate infringing activities.[102]

2. *The Advent of Modern Patent Law in China*

In 1980, as the economic reforms began to take hold, China joined the World Intellectual Property Organization as a Member State.[103] Then, on March 12, 1984, the National People's Congress (NPC) enacted the "Patent Law of the People's Republic of China."[104] Later that year, China signed the Paris Convention for the Protection of Industrial Property.[105] Subsequently, the Patent Law was amended, by a September 4, 1992 act of the NPC.[106]

The Patent Law, as amended, evidences a commitment on the part of the PRC to encourage foreign investment and technology transfer.[107] Importantly, the revised law addresses many concerns voiced by the U.S. during negotiations to resolve a Section 301 investigation of Chinese intellectual property practices.[108] As now formulated, the Chinese patent laws contain many provisions very similar to U.S. law. Importantly, China

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100. Trademark Law of the PRC (Revised), *supra* note 94, arts. 19-20.

101. *Id.* art. 22.

102. *Id.* art. 38. Under this article, infringing activities include: unauthorized use of a mark "identical or similar to the registered trademark," sale of goods bearing a "fake trademark being passed off as a registered trademark," forgery of a registered trademark, or acts causing "prejudice to the exclusive right to use the registered trademark of another person." *Id.*

103. CORPORATE COUNSEL'S GUIDE TO DOING BUSINESS IN CHINA § 11.002 (Kenneth A. Cutshaw & Jianyi Zhang eds., 1995); Tong Cai, *Legal Protection for Foreign Trade Marks in China: A Practical Note*, 27 WORLD COMPETITION 115 (1994).

104. Zhonghua Renmin Gongheguo Zhuanlifa [Patent Law of the People's Republic of China] (1984), *translated in* THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA, 1983-1986, at 65 (1987). This law was implemented one year later, after the publication of administrative regulations. Zhonghua Renmin Gongheguo Zhuanlifa Shishi Xize [Implementing Regulations of the Patent Law of the People's Republic of China] (1985) *translated in* CHINA LAWS FOR FOREIGN. BUS.: BUS. REG. (CCH Austr.) 14,001 (1993).

105. Paris Convention for the Protection of Industrial Property, 1968, 6 I.L.M. 981; *see* POTTER, *supra* note 91, at 42 (discussing China's signing of the convention).

106. Zhonghua Renmin Gongheguo Zhuanlifa (1992 Nian Xiuding Ben)[Patent Law of the People's Republic of China (1992 Revision)][hereinafter PRC Patent Law], *translated in* CHINA LAWS FOR FOREIGN. BUS.: BUS. REG. (CCH Austr.) 14,201 (1993). The amended legislation modified Articles 11, 25, 29, 30, 34, 39-45, 48, 50-52, and 63 of the PRC Patent Law.

107. Harrington, *supra* note 58, at 337.

108. *See* Harrington, *supra* note 58, at 357-69 (discussing American demands and amendments to China's patent law in 1992). *See also infra* part III.B (discussing U.S.-China intellectual property disputes).

now affords protection to patented inventions for 20 years (an increase from 17),[109] has eliminated many unconditional compulsory licensing requirements,[110] and has finally afforded protection to pharmaceuticals, agricultural goods, and chemical products.[111]

3. *The 1990 Copyright Law*

Despite the fact that Deng Xiaoping personally instructed the Committee on Legal Affairs of the NPC to begin work on a copyright law,[112] the NPC did not enact one until September 1990. Passage of the long-awaited "Copyright Law of the People's Republic of China"[113] was a major milestone on the road to protection of written works in China.[114] The groundwork for this law was laid in the 1982 Constitution[115] and with the enactment of China's 1986 Civil Law.[116] Under the 1986 Civil Law, citizens and legal Chinese persons are entitled to rights of authorship.[117] Moreover, the Civil Law authorizes copyright infringement actions, allowing authors to seek compensation from or receive civil injunctions against infringers.[118]

As formulated, the Chinese Copyright Law of 1990 is designed to:

> [P]rotect the copyright of authors of literary, artistic, and scientific works, as well as to safeguard their copyright-related rights and interests, to encourage the creation and publication of works which contribute to the development the socialist . . . culture and to promote the development and prosperity of socialism's cultural and scientific institutions.[119]

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109. PRC Patent Law, *supra* note 106, art. 45.

110. *Id.* arts. 51-52.

111. *Id.* art. 25.

112. ALFORD, *supra* note 1, at 76.

113. Zhonghua Renmin Gongheguo Zhuzouquan Fa [Copyright Law of the People's Republic of China] (1990) [hereinafter Copyright Law], *translated in* CHINA LAWS FOR FOREIGN. BUS.: BUS. REG. (CCH Austr.) 14,561 (1993). The State Copyright Bureau put the law into effect by promulgating a set of implementing rules under the new copyright law. Zhonghua Renmin Gongheguo Zhuzuo Qunfa Shishi Tiaoli [Implementing Rules for the Copyright Law of the People's Republic of China] (1990), *translated in* CHINA LAWS FOR FOREIGN. BUS.: BUS. REG. (CCH Austr.) 14,621 (1993).

114. *See* Jianming Shen, *The P.R.C.'s First Copyright Law Analyzed*, 14 HASTINGS INT'L & COMP. L. REV. 529, 529 (1992) (declaring that new enactment represents a "step toward greater legal certainty in the area of intellectual property law").

115. XIANFA, *supra* note 90, art. 47. This provision declares State support and encouragement for works beneficial to the development of the country.

116. Zhonghua Renmin Gongheguo Minfa Tongze [General Principles of the Civil Law of the People's Republic of China] (1986), *translated in* THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 1983-1987, at 225 (1987) [hereinafter Civil Law of the PRC].

117. *Id.* art. 94.

118. *Id.* art. 118.

119. Copyright Law, *supra* note 113, art. 1.

Although seen as a useful addition to the Chinese intellectual property regime, the Copyright Law, unfortunately, is of somewhat limited utility to foreigners.[120] Perhaps the most inequitable aspect of the law is that, under its terms, Chinese authors are protected whether their works are published in China or not,[121] whereas foreign authors, unless covered by a treaty granting them more extensive rights, must be published in China in order to gain protection from copyright infringers.[122]

Subsequent to the enactment of the Copyright Law in 1990, China joined the Berne and Universal Copyright Conventions in 1992,[123] and signed on to the Geneva Phonogram Convention in April 1993.[124] By joining these international agreements, China signaled its intention to provide greater protection to copyrighted works.[125] Moreover, China has agreed to amend its laws to make them consistent with these agreements,[126] evidencing a significant commitment to move toward protection of foreign copyrights.

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120. For an examination of the strengths and weaknesses of the Copyright Law, see ALFORD, *supra* note 1, at 78-81. With particular regard to the issue of whether foreigners receive only limited protection under the Copyright Law, see ZHENG & PENDLETON, *supra* note 45, at 112-14 (arguing that Chinese law provides foreign copyright holders greater protection than the laws of most other countries); *but see* Shen, *supra* note 114, at 557 (stating that China's Copyright Law "is one of the most complete in the world").

121. Copyright Law, *supra* note 113, art. 2, ¶ 1. The law states, "[w]orks of Chinese citizens . . . shall enjoy copyright protection . . . whether or not the[ir] works are published." *Id.*

122. Copyright Law, *supra* note 113, art. 2, ¶¶ 2-3. According to Article 2:

> Works of foreigners that are first published in Chinese territory shall enjoy copyright protection pursuant to this Law. Works of foreigners published outside Chin[a] . . . shall enjoy copyright protection in accordance with agreements signed between China and the relevant country or international treaties to which they are joint participants and shall receive protection pursuant to this law.

Id.

123. China was obligated to join the Berne and Geneva Conventions under the terms of an 1992 agreement with the United States. USTR, *China, United States Conclude Intellectual Property Agreement: Protection for U.S. Computer Software, Patented Products Enhanced*, Press Release 92-3, Jan. 6, 1992, at 1 [hereinafter USTR Press Release 92-3](available from USTR's Flash-Fax Service)(copy on file with author).

124. USTR, 1995 TRADE POLICY AGENDA AND 1994 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM, 59 (1995) [hereinafter 1995 TRADE POLICY AGENDA/REPORT].

125. *See id.*; USTR Press Release 92-3, *supra* note 123, at 2 (noting that 1992 agreement showed China's willingness to bring its trading regime closer to international norms).

126. 1995 TRADE POLICY AGENDA/REPORT, *supra* note 124, at 31; USTR, *China IPR Fact Sheet*, Jan. 17, 1995, at 1 [hereinafter *IPR Fact Sheet*] (available from USTR's Flash-Fax Service) (copy on file with author).

4. *The Software Protection Regulations*

In the late 1980s and early 1990s, China received increasing pressure, especially from the U.S., to provide adequate protection for computer software developers.[127] Foreign manufacturers and software developers sought to protect software from ever-expanding software pirating operations in the PRC.

Because of the relatively new nature of the computer software industry, China had no precursor laws governing the protection of computer programs. Like many other nations, China decided to base its software protection regime on copyright. Thus, only three days after enacting its Copyright Law, government authorities released the PRC's "Computer Software Protection Rules."[128]

Similar to the Copyright Law,[129] "the seemingly broad statement of rights [in the Computer Software Rules] is subject to a variety of qualifications."[130] Moreover, as with copyright, Chinese citizens are eligible for protection whether they release their software in China or not, while foreigners must release their programs in China in order to gain protection.[131]

The rules go on to enumerate specific rights of software copyright holders[132] and establish rules governing rights to software developed jointly by two or more units or individuals.[133] The Rules also address rights for parties (a) working on commission to develop software[134] or (b) developing software as a work task assigned by a work unit or government

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127. *See infra* part III.B (discussing pirating of software in PRC and U.S. response to this and other problems with intellectual property protection in PRC).

128. Jisuanji Ruanjian Baohu Tiaoli [Computer Software Protection Rules] (1991) [hereinafter Computer Software Protection Rules], *translated in* CHINA LAWS FOR FOREIGN. BUS.: BUS. REG. (CCH Austr.) 14,681 (1993). The Rules were implemented by Jisuanji Ruanjian Zhuzouquan Dengji Banfa (1991) [Measures for Computer Software Copyright Registration], *translated in* CHINA LAWS FOR FOREIGN. BUS.: BUS. REG. (CCH Austr.) 14,751 (1993). According to the regulations, the Computer Software Rules were:

> formulated in accordance with the Copyright Law of the [PRC] to protect the rights of persons holding computer software copyright, to regulate the beneficial impact occurring from the development, transmission and usage of computer software, to encourage the development and circulation of computer software and to promote the expansion of undertakings using computers.

Id. art. 1.

129. *See supra* note 120 (discussing limitations on protection of foreigners' copyrights).

130. ALFORD, *supra* note 1, at 80.

131. Computer Software Protection Rules, *supra* note 128, art. 6.

132. *Id.* art. 9. These rights include those: of publication (¶1), acknowlegdement (¶2), usage (¶3), licensing (¶4), and assignment (¶5).

133. *Id.* art. 11. What this provision applies to is software developed by one or more persons or entities not of Chinese origin.

134. *Id.* art. 12.

department.[135] The rules create a twenty-five year protection period for copyrighted software, and allow a one-time extension of a registered software copyright for an additional twenty-five years.[136] Although the Chinese recently agreed to increase copyright protection for software to a period of fifty years, apparently, authorities have yet to amend the relevant provision of the software protection rules.[137]

It is noteworthy that the Computer Software Protection Rules allow state authorities (whether engaged in teaching, scientific research, or carrying out State duties) to make a limited number of copies of computer programs in their possession if necessary to conduct non-commercial activities.[138] This exception, which clearly aims at allowing the government to continue technological advancement while limiting its cost exposure,[139] greatly disturbs foreign software manufacturers and developers.[140] Indeed, software producers' concerns seem valid, as the special government exception does little to encourage others (particularly those in the private sector) to obey the letter or spirit of the Rules.[141]

Finally, the Computer Software Rules are of lessened utility because of several provisions limiting the scope of rights granted to software developers on "national interest" grounds.[142] On this basis, the Rules prohibit Chinese nationals from licensing software developed in China to foreigners without prior approval from the relevant "software registration

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135. *Id.* art. 13.

136. *Id.* art. 15. However, the copyright period for the right of acknowledgement, *id.* art. 9, ¶ 2, is not subject to any time limitation.

137. *China IPR Fact Sheet, supra* note 126, at 1. Surprisingly, the implementing rules for software registration, issued in April 1992, three months after the agreement, make no mention of extending the protection period.

138. Computer Software Protection Rules, *supra* note 128, art. 22.

139. *See* Amy E. Simpson, Comment, *Copyright Law and Software Regulations in the People's Republic of China: Have the Chinese Pirates Affected World Trade?*, 20 N.C. J. INT'L L. & COM. REG 575 (1995) (noting that while the Chinese government hopes to curb piracy, it does not want enforcement of intellectual property laws to stifle economic development); *cf.*, William P. Alford, *How Theory Does—And Does Not—Matter: American Approaches to Intellectual Property Law in East Asia*, 13 UCLA PAC. BASIN L.J. 8, 22 (1994) (suggesting that in dealing with China, balance must be struck between protection of intellectual property and need for access to data allowing "further innovation"); Dennis S. Karjala, *Copyright, Computer Software and the New Protectionism*, 28 JURIMETRICS J. 33, 94 (1987) (arguing that an "appropriate balance between incentive and efficient diffusion of technology" is necessary to limit the scope of protection of copyrighted software).

140. *IPR Industry to Offer USTR Mixed Assessment of Chinese Enforcement*, INSIDE U.S. TRADE, Aug. 11, 1995, at 20.

141. Attempts have been made to rectify this situation. For example, in the recent US-China intellectual property rights accord, the Chinese agreed to ensure that unauthorized copies of computer software are removed from the computer systems of public entities. USTR, *United States and China Reach Accord on Protection of Intellectual Property Rights, Market Access*, Press Release 95-12, Feb. 26, 1995 (available from USTR's Flash Fax Service). It remains to be seen what progress has been made on this front.

142. ALFORD, *supra* note 1, at 81.

control organ."[143] More troubling is Article 31 of the Rules, which eviscerates many of the rights granted in other sections of the Rules. This provision states that the development of software "similar to existing software . . . shall not . . . constitute an infringement of the existing software's copyright"[144] if the similar software is essential for "implementing relevant State policies, laws, rules [or] regulations"[145] or "implementing State technological standards,"[146] or "when the various forms of expression available for selection and use are limited."[147] By not defining "state policies" or "technological standards," the Rules leave open ample room for the infringement of software developers' rights under the guise of "national interest."[148]

Thus, although China has made great strides toward the creation of an effective software protection regime, the law itself contains several suspect provisions. Until these legal loopholes are closed, it will remain difficult, if not impossible, to protect software developers' rights in the PRC.

III. THE PROBLEM OF ENFORCEMENT AND CONFLICT WITH THE UNITED STATES

A. *The Difficult Road to Enforcement*

In recent years, China clearly has made serious efforts to enhance its intellectual property legislation.[149] Although the new laws may not be ideal from the perspective of all foreign businesses and investors in China,[150] they represent elements of a comprehensive movement to modernize the PRC's legal regime. Laws alone, however, cannot solve the problem of intellectual property abuse in China. The largest barrier to the protection of intellectual property rights in China is now the lack of viable mechanisms to enforce the country's intellectual property laws and regulations.[151] This author contends that the PRC's current inability to enforce its intellectual property laws is largely the result of 1) the lack of a

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143. Computer Software Protection Rules, *supra* note 128, art. 28.

144. *Id.* art. 31.

145. *Id.* art. 31, ¶ (1).

146. *Id.* art. 31, ¶ (2).

147. *Id.* art. 31, ¶ (3). This broadly worded provision seems to imply that the government can copy software and make minor changes therein without violating a holder's copyright virtually without justification.

148. *See* ALFORD, *supra* note 1, at 81 (pointing out these substantive deficiencies).

149. *See supra* part II (discussing new patent, trademark, and copyright laws).

150. *See* Copyright Law, *supra* note 113, art. 2 (limiting ability of foreigners to obtain protection for their copyrights in China).

151. *See infra* part III.B (detailing U.S. dissatisfaction with Chinese implementation of MOU and Chinese domestic intellectual property laws). According to Alford, China's "post-Cultural Revolution law reform efforts in general were characterized by the creation of rights without adequate provision for their realization." ALFORD, *supra* note 1, at 117.

tradition respecting the sanctity of intellectual property rights, 2) provincial, local, and military involvement in counterfeiting, and resistance to the enforcement of national laws, and 3) the lack of viable and impartial judicial and administrative systems for dealing with intellectual property disputes.

1. *Lack of a Tradition of Respect for Intellectual Property Rights*

Although various forms of intellectual property rights have existed throughout China's history, true respect for these rights and legal recognition thereof has been slow to evolve.[152] The lack of a strong tradition of respect for intellectual property rights makes it very difficult for willing authorities to stamp out piracy and counterfeiting.[153] Because of China's massive economic boom, such pirating activities are so widespread and anti-counterfeiting forces so limited, that it is virtually impossible to combat retail level activities.[154] Moreover, even when illegal manufacturing bases are shut-down, their facilities often re-open in a new locale.[155]

A related problem is the lack of public awareness of intellectual property issues. Many of the concepts created by recent intellectual property legislation in the PRC are new, or even "peculiar to [Chinese] judges, lawyers" and citizens.[156] Media coverage of recent intellectual property lawsuits has increased public awareness of the issue, but domestic involvement in support of the system is still low.[157] Until China moves closer to a market economy, and economic incentives for the protection of intellectual property grow, it will be difficult to increase enthusiasm for intellectual property protection.[158]

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152. *See generally* ALFORD, *supra* note 1 (considering why the notion of intellectual property has not taken root in China).

153. For example, officials of the NPC's Education, Science, Culture & Public Health Committee recently reported that "some . . . people are still not fully aware of the importance of patent protection." Xinhua News Agency, *China Makes Progress in Patent Protection*, May 6, 1995, *available in* LEXIS, NEWS Library, CURNWS file.

154. Despite some "steps in the right direction," by the government, individual dealers are lured into selling pirated goods by "profit margins as high as 40%." Amy Borrus, et al., *Counterfeit Disks, Suspect Enforcement*, BUS. WEEK, Sept. 18, 1995, at 29. The massive economic growth which China continues to experience greatly exacerbates this problem. Limited police forces must combat piracy at an ever-growing host of retail establishments, which makes enforcement exceedingly difficult.

155. *Id.* (noting that after authorities have halted production and moved-on, factories often re-open).

156. Jianyang Yu, *Protection of Intellectual Property in the P.R.C.: Progress, Problems, and Proposals*, 13 UCLA PAC. BASIN L.J. 140, 160 (1994).

157. *Id.*

158. *See id.* (arguing that establishment of market economy is ultimate solution to problems with intellectual property infringement).

2. *The Role of Regionalism and Impact of Infringing Activities by Government Owned Entities*

The growth of regional power bases has always been a fear of the central leadership in China.[159] Today, that fear has never been more justified, as massive economic growth in the southern coastal provinces has allowed provincial and military leaders to create entrenched power bases far from Beijing.[160] Indeed, despite concerns in the central government, the spread of regionalism may have been inadvertently fostered by Beijing, which encouraged growth in certain areas before others.[161] Some have suggested that the massive economic disparities now in place may result in "political particularism and separatism," as was seen during the Warlord Era.[162] Localized "trade wars" have erupted between some provinces,[163] suggesting that the provincial authorities are far more concerned with developing their local economies than with participating in a national scheme for economic growth.[164] This situation obviously does not bode well for the enforcement of national laws and international obligations undertaken by the central government.[165]

Centralized enforcement efforts have been hampered by a related situation: ownership or stake holdings by provincial organs, the military, and government cadres in numerous economic ventures,[166] particularly those involving piracy.[167] With an obvious economic stake in such illicit activities, it is highly unlikely that provincial and military leaders will be

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159. LIEBERTHAL, *supra* note 88, at 321-23 (discussing the growing problem of regionalism in China and noting concern that this phenomena threatens "nation's territorial integrity").

160. *See generally* CHINA DECONSTRUCTS: POLITICS, TRADE AND REGIONALISM (David S.G. Goodman & Gerald Segal eds., 1994) (analyzing growth of regionalism in China stemming from uneven economic development and decentralization of power).

161. David S.G. Goodman, *The Politics of Regionalism, in* CHINA DECONSTRUCTS: POLITICS, TRADE AND REGIONALISM 1 (David S.G. Goodman & Gerald Segal eds., 1994).

162. *Id.* at 1, 3.

163. *Id.* at 7.

164. *Id.*

165. *See* LIEBERTHAL, *supra* note 88, at 335 (positing that Beijing's ability to ensure compliance with international economic agreements has been limited by rapid economic growth and reforms).

166. Although apparently acting without endorsement from Beijing, various provincial governments permitted official units and cadres to engage in economic activities before the crackdown on corruption in 1993. WILLY WO-LAP LAM, CHINA AFTER DENG XIAOPING 81 (1995). While not facially troublesome, the entry of low-level government bodies into the economic sphere created a atmosphere highly conducive to corruption.

167. *See* James Cox, *U.S. Firms: Piracy Thrives in China*, USA TODAY, Aug. 23, 1995, at 2B (reporting that many factories suspected of piracy are wholly or partly owned by local governments or those with strong Communist Party connections).

scrupulous enforcers of China's intellectual property laws.[168] Because of the major profits that can be achieved through pirating activities, Beijing can also expect to face great difficulty wresting control of illicit operations from the hands of the military and various lower-level governmental bodies.

3. *A Judiciary Inadequate to Deal Effectively With These Problems*

The legal and administrative systems in China are generally ill-prepared to deal with piracy problems.[169] Administrative fines are often viewed as "paltry" and infringers often continue illegal operations even after official sanctions.[170] Other pirates openly flaunt the law by relying on protection from friends in government.[171]

The court system is widely regarded as ineffectual,[172] and although China recently established courts in major cities to deal specifically with intellectual property cases,[173] these courts are "still relatively inexperienced in the interpretation and implementation of intellectual property related laws."[174] Many of the courts are also understaffed and have few resources.[175] Moreover, many of the judges appointed to the special courts

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168. *See* Borrus, *supra* note 154, at 29 (noting that Beijing is willing to combat piracy, but that its clout is diminished because local officials now have increased autonomy in managing economic affairs); Yu, *supra* note 156, at 157 (noting that local protectionism and governmental intervention make enforcement of intellectual property laws difficult).

169. Tan Loke Khoon, *Counter Feats: The Art of War Against Chinese Counterfeiters*, CHINA BUS. REV., Nov. 1994, at 12. *See* Seth Faison, *Razors, Soap, Cornflakes: Piracy Spreads in China*, N.Y. TIMES, Feb. 17, 1995, at A1 (reporting that counterfeiting of consumer goods is "so widespread that restraining it appears to be far beyond Beijing's grasp").

170. *See IPR Industry to Offer USTR Mixed Assessment of Chinese Enforcement*, *supra* note 140, at 20 (noting that some pirate plants closed in government crackdown have restarted operations).

171. Borrus, *supra* note 154, at 29. Faison, *supra* note 169, at A1.

172. *See* Donald C. Clarke, *Justice and the Legal System in China*, *in* CHINA IN THE 1990S 91-92 (1995) (discussing limited role played by courts and noting that courts in PRC "are just one bureaucracy among many" and finding that limited competence of courts stems naturally from traditional Chinese views of relationship between government and law).

173. These courts where first placed in: Beijing, Tianjin, Shanghai, Guangzhou, Shenzhen, Zhuhai, and Shantou. *See* Xinhua News Agency, *Round Up: China Stresses Protection of Intellectual Property Rights*, Aug. 23, 1995, *available in* LEXIS, NEWS Library, CURNWS File (discussing measures taken by government to protect intellectual property rights). The creation of special courts began in Beijing, where Intellectual Property Divisions were created in the Municipal High People's Court and the Municipal Intermediate People's Court. Yu, *supra* note 156, at 147.

174. Tan, *supra* note 169, at 12.

175. The PRC has a serious shortage of lawyers, particularly those trained in intellectual property law. Yet, even those qualified to handle intellectual property cases could improve their services and raise their levels of competency. Yu, *supra* note 156, at 161.

have had little experience dealing with intellectual property issues,[176] while others "lack the necessary background" to try and rule on cases under their jurisdiction.[177]

As a consequence, until China provides stiff administrative penalties, invigorates its judiciary, and provides it with much needed resources, training,[178] and manpower, the bulk of intellectual property cases likely will be bogged down in the courts, handled by inexperienced personnel, or left to the vagaries of political solutions.

B. *Intellectual Property Protection in China: A U.S. Perspective*

Intellectual property rights issues have long been a focus of U.S.-China trade considerations and negotiations.[179] Officials in the U.S. (and U.S. businesspersons) perceive the Chinese government's failure to enforce foreign intellectual property rights as a significant market access barrier which discourages many U.S. firms from exporting products and technology.[180] Moreover, they view the illegal use of U.S.-owned intellectual property as substantially contributing to the continuing and widening trade deficit with China.[181]

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176. *Cf.* Yu, *supra* note 156, at 161 (advocating system of regular programs and seminars to help educate judges dealing with intellectual property disputes and keep them abreast of changes in field).

177. Tan, *supra* note 169, at 12.

178. One author notes that "legal education on intellectual property in universities has improved" with some schools even offering second degrees in intellectual property law. Yu, *supra* note 156, at 149-50. As educational and training opportunities for attorneys and jurists in the PRC expand, there is a hope that the protection of intellectual property in China will improve.

179. ALFORD, *supra* note 1, at 113; 1995 TRADE POLICY AGENDA/REPORT, *supra* note 124, at 58. According to Alford, during the Bush administration, "intellectual property protection became a defining issues in relations with the PRC." ALFORD, *supra* note 1, at 113. Alford notes that the Clinton administration has followed a route substantially similar to that of Bush, purposefully pursuing the issue with the Chinese. *Id.* at 114-15. The USTR reports that it has engaged in detailed discussions with the Chinese in an effort to improve the protection of intellectual property in the PRC. 1995 TRADE POLICY AGENDA/REPORT, *supra* note 124, at 58.

180. *See* Wallace Collins, *Protecting U.S. Copyrights in China and Elsewhere*, N.Y. L.J. Mar. 31, 1995, at 5 (noting lack of protection of U.S. intellectual property rights and reporting that Chinese demand for pirated goods is fueled in part by government restrictions on the importation of certain entertainment products); 1995 TRADE POLICY AGENDA/REPORT, *supra* note 124, at 58 (noting that Special 301 investigation of Chinese IPR practices focused on issue of "market access for IP-based products").

181. Collins, *supra* note 180, at 5 (declaring that piracy of copyrighted material "substantially contribut[es] to the trade imbalance"). According to Alford, intellectual property protection issues have become a central feature of PRC-U.S. relations because of the "manner in which affected American industries have brought such concerns to the foreground politically." ALFORD, *supra* note 1, at 115. Alford writes:

Some U.S. companies, particularly high technology and pharmaceutical firms, are wary of entering the Chinese market because of fears that their intellectual property rights, although purportedly recognized by the PRC,[182] are meaningless and unprotected within China's borders.[183] According to estimates by the International Intellectual Property Alliance, piracy of U.S. copyrighted works had reached an annual level of approximately $1 billion by 1994; piracy of patented and trademarked products greatly increased that total.[184] Despite their magnitude, these

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> Although counterfeiting had long been a problem, it was [during the mid-1980's] . . . that key domestic industries succeeded in fostering a politically potent perception that their losses were linked to the nation's larger trade difficulties. Calculating losses on the presumption that current infringers would buy at list price rather than cease using their products, they contended that infringement accounted for much of the burgeoning U.S. trade deficit—especially in East Asia—and, moreover, that it threatened the very service and high-technology industries on which a rosier future was supposed to be based.

Id. (citation omitted).

182. In 1992, the U.S. and China concluded an historic agreement covering this issue. *Memorandum of Understanding Between the Government of the People's Republic of China and Government of the United States of America on the Protection of Intellectual Property* [hereinafter MOU], Jan. 17, 1992, *reprinted in* 34 I.L.M. 676 (1995). Pursuant to the MOU, the Chinese government implemented legislation for the protection of intellectual property rights within China. However, the U.S. government believed that China did not take the necessary steps to guarantee that this new intellectual property regime would be enforced. UNITED STATES INTERNATIONAL TRADE COMMISSION, THE YEAR IN TRADE 1993: OPERATION OF THE TRADE AGREEMENTS PROGRAM 96-97 (USITC 1995)[hereinafter 1993 OTAP].

183. *See, e.g.*, Borrus, *supra* note 154, at 29 (discussing endemic piracy of CD's, CD-ROM's, and computer software in China and lack of effective government action to shut down counterfeiters); *Software Piracy Still Critical, Despite Sino-US Pact in China*, BUS. CHINA, Sept. 18, 1995 (Economist Intelligence Unit Report)(stating that "the bulk of China's software pirates continue to slip through the . . . largely ineffectual-dragnet thrown out by the government's . . . enforcement agencies"); James Cox, *U.S. Firms: Piracy Thrives in China*, USA TODAY, Aug. 23, 1995, at 2B (reporting that China is waging war against peddlers of bootleg software but ignoring software pirates). In addition to its recent agreements with the U.S. dealing with the enforcement of intellectual property laws in the PRC, China joined both the Berne Convention and the Universal Copyright Convention in October 1992. USTR, 1995 NATIONAL TRADE ESTIMATES REPORT 55 (1995).

184. USTR, *Fact Sheet: Special 301 Investigation*, at 1 (Dec. 31, 1994)(available from USTR's Flash Fax Service)(copy on file with author). Other estimates on the value of goods pirated and sold by China bootleggers vary widely. Trade and industry groups estimate that piracy cost U.S. businesses between $830 million and $ 870 million in 1994. *See* Jeffrey Parker, *As U.S. Looks In, China Software Pirates Flourish*, THE REUTER EUROPEAN BUS. REP., Aug. 23, 1995 (*available in* LEXIS, NEXIS library, CURNWS file)(supporting $830 million figure for software alone, based on data supplied by the Business Software Alliance); James Cox, *U.S. Firms: Piracy Thrives in China*, USA TODAY, Aug. 23, 1995, at 2B (alleging losses of $866 million, broken down as follows: software, $351 million; recorded Music, $345 million; books, $120 million; videos, $50 million). According to the USTR,

American firms stand to lose nearly $2 billion a year from the sales of pirated goods in

estimates may be far too low. For example, Nintendo Corporation estimates that it alone loses $1.2 billion per year to counterfeiters in the PRC, and the Chinese government itself has conceded that "95 percent of all CD's sold in China are pirated."[185] Moreover, these figures do not take into account the trade diversion effects of piracy, which may, in one narrow area alone, result in the export from China of over seventy million pirated CD's per year.[186]

Although the U.S. and China concluded an important memorandum of understanding concerning intellectual property rights in early 1992,[187] concerns about the protection of intellectual property rights in China continued to mount. As a consequence, on December 1, 1993 the USTR placed the PRC on a "priority watch list,"[188] alleging that China was not enforcing intellectual property rights.[189] Six months later, after identifying China as a "priority foreign country" under Special 301, USTR Kantor began an investigation of China's intellectual property rights enforcement practices.[190] Numerous rounds of bilateral discussions took place between Chinese and American negotiators in the ensuing half-year. On December 31, 1994, Kantor released a proposed determination finding that China's intellectual property enforcement mechanisms were inadequate, unreasonable, and burdensome or restrictive to U.S. commerce. Because the two sides still sought to reach an acceptable settlement, the investigation was

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China. *Id.*

185. M. Margaret McKeown et. al., *IP Protection in China: Reality or Virtual Unreality?*, LEGAL TIMES, May 15, 1995, at 24.

186. *See* 1995 TRADE POLICY AGENDA/REPORT, *supra* note 124, at 58 (reporting that Chinese CD factories are capable of producing over 75 million CD's per year, when the Chinese market can absorb only 5 million CD's). According to one source, the Business Software Alliance, CD's bootlegged in China now cut into sales as far off as South America. Borrus, *supra* note 154, at 29.

187. MOU, *supra* note 182. The USTR touted the 1992 MOU as an agreement under which "China w[ould] make significant improvements in its patent, copyright, and trade secret laws," and as demonstrating a willingness on the part of China to "take important steps toward bringing its trade regime closer to international norms." USTR Press Release 92-3, *supra* note 123, at 1-2. For a thorough overview of the background events relating to this document and the U.S. position on intellectual property protection by the Chinese, see ALFORD, *supra* note 1, at 112-23.

188. *See* Seth Goldberg, *Internal and External Forces: Why and How the Major Record Companies Will Successfully Access the Chinese Market*, 7 N.Y. INT'L L. REV. 51 (1994) (noting that despite this action, formal investigation of Chinese practices was not begun).

189. *See* International Trade Administration, *China Issues Summary*, at 1 (available from the Dep't of Commerce - "Flash-Fax Service") (copy on file with author). The ITA notes that although China had taken significant steps to improve protection of U.S. rights in the areas of copyrights, patents, and trade secrets, the PRC's enforcement of these rights was a "growing problem." *Id.*

190. USTR, *USTR Announces Special 301 Decision*, Press Release 94-38, June 30, 1994; USTR, *Initiation of Investigation*, 59 Fed. Reg. 35,558 (1994).

extended to February 4, 1995.[191] Subsequent to this action, however, the USTR issued a preliminary list of imports from China under consideration for retaliation in the event that no agreement could be reached by the new deadline.[192] On that date, the USTR published a final retaliation list, targeting over $1 billion worth of Chinese imports for increased tariffication.[193]

After a protracted series of negotiations, and threats of counter retaliation by the Chinese against U.S. exports, the two sides reached an agreement to end their intellectual property dispute.[194] USTR Kantor and China's Minister for Foreign Trade and Economic Cooperation, Wu Yi, concluded the investigation through an exchange of letters. The writings included an annex titled "Action Plan for Effective Protection and Enforcement of Intellectual Property Rights" which established a detailed agenda for intensified Chinese protection of intellectual property rights and enforcement of Chinese laws related thereto.[195] The head of the U.S. negotiating team, Deputy USTR Barshevsky, enthusiastically declared that this agreement was one of the most "comprehensive IPR agreements" ever achieved by the U.S..[196]

Despite the alleged strengths of the most recent agreement reached with China and the PRC's alleged commitment to root out counterfeiting and infringing activities, violation of intellectual property rights continues virtually unabated.[197] For example, although Chinese officials have raided and closed down a number of illegal factories manufacturing pirated CD's, CD-ROM's, and computer software,[198] reports indicate that many of the factories which had been shut down are now operating again.[199] Moreover, enforcement efforts in the area of software protection have even

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191. USTR, *Extension of 301 Investigation*, 59 Fed. Reg. at 1,830 (1994) (noting that complex issues in negotiations could not be resolved before the statutory deadline and extending investigation).

192. 60 Fed. Reg. 7,230 (1995).

193. USTR, *United States and China Reach Accord on the Protection of Intellectual Property Rights, Market Access*, Press Release 95-12, Feb. 26, 1995 (available from USTR's Flash Fax Service)(copy on file with author).

194. 60 Fed. Reg. 12,583 (1995) (announcing end of investigation).

195. *Measures by the Government of the People's Republic of China and the Government of the United States of America Regarding Intellectual Property Rights*, Feb. 26, 1995, *reprinted in* 34 I.L.M. 881 (1995) [hereinafter *1995 IPR Measures*]; *see USTR Announces Agreement on IPR with China*, INSIDE U.S. TRADE, Mar. 3, 1995, at 1, 4.

196. *USTR Announces Agreement on IPR with China*, *supra* note 195, at 1.

197. *See, e.g.*, Borrus, *supra* note 154, at 29 (reporting that six months after accord, "[t]here are even signs the bootleg boom will get worse"); Cox, *supra* note 184, at 2B (stating that costs of piracy "show no sign of abating"); Economist Intelligence Unit, *Software Piracy Still Critical, Despite Sino-U.S. Pact*, CHINA BUS., Sept. 18, 1995, *available in* LEXIS, NEWS Library, CURNWS File .

198. *IPR Industry to Offer USTR Mixed Assessment of Chinese Enforcement*, *supra* note 140, at 20.

199. *Id.*; Borrus, *supra* note 154, at 29.

been hampered by the lack of a government decree instructing government ministries not to pirate such programs for their own use.[200] These new reports are especially disturbing given the recent commitments to bolster China's intellectual property enforcement measures and mechanisms.[201] These indicators suggest that intellectual property rights issues will remain a thorn in the side of U.S.-China trade relations for some time to come.[202]

IV. FUTURE PROSPECTS - MOVING TOWARD INTERNATIONAL STANDARDS OF INTELLECTUAL PROPERTY PROTECTION

By most accounts, recent Chinese efforts to strengthen the nation's intellectual property rights protection regime are encouraging.[203] On paper, China's intellectual property laws are now among the world's most comprehensive and modern.[204] However, laws without enforcement are meaningless, as are rights without remedies.[205] The next step for the Chinese is to establish mechanisms for the enforcement of legal rights under

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200. *See IPR Industry to Offer USTR Mixed Assessment of Chinese Enforcement*, *supra* note 140, at 20; McKeown, *supra* note 185, at 26 (stating that provincial governments' ties to pirating operations complicate enforcement efforts).

201. *See generally*, *1995 IPR Measures*, *supra* note 195 (outlining China's obligations relating to the protection of intellectual property rights).

202. *See* Arthur Wineburg, *The Close of Round Two: Intellectual Property Rights Protection In China*, CHINA BUS. REV., July 1995, at 20 (discussing problems involving protection of intellectual property in China and providing overview of *1995 IPR Measures*).

203. *See* Giunta & Shang, *supra* note 91, at 353 (declaring that China "is implementing its intellectual property commitments in good faith" and that increased protection has boosted foreign confidence and attracted foreign investment); McKeown et al., *supra* note 185, at 24 (discussing encouraging developments in IP protection). Among recent measures taken by China were the creation of specialized courts, in eight Chinese cities, to deal with intellectual property matters, as well as the adoption of new laws increasing fines and possible prison sentences for copyright violators. *Id.*

204. *See, e.g.*, Chang & Conroy, *supra* note 1, at 447 (declaring that China's trademark system is approaching "common international standard"); Giunta & Shang, *supra* note 91, at 347 (mentioning Chinese efforts to build "world-class" intellectual property regime); Shen, *supra* note 114 (asserting that PRC's copyright law is among world's most complete); Simpson, *supra* note 139, at 627 (calling China's software and copyright regulations some of world's most sophisticated).

205. For example, representatives of American intellectual property rights holders recently reported that despite the recent US-China IPR Agreement, enforcement efforts in the PRC "lack aggressive raids, announcement of criminal prosecutions, and administrative fines." One source claims that such actions would prove a strong deterrence to piracy. *IPR Industry to Offer USTR Mixed Assessment of Chinese Enforcement*, *supra* note 140, at 20. A serious problem in the past has been lack of adequate remedies in Chinese courts. However, U.S. companies [are now beginning] to test the limits of the Chinese legal system on the protection of intellectual property," despite the fact that "it has been difficult to win such cases" in the past and that previous victories have typically been dampened by mere token penalties. Jeffrey Parker, *China Targets Users of Illegal Software*, WASH. POST, Apr. 15, 1995, at A11. *See supra* part III.A.3 (identifying inadequate judicial system as obstacle to enforcement Chinese laws).

its new intellectual property laws.[206] Moreover, it is critically important that the Chinese strengthen the position of an independent judiciary to facilitate enforcement of legal rights, including those involving intellectual property.[207] Yet, before these changes can be achieved, a fundamental development must occur in China; that is, the notion of "rights consciousness" must be instilled in the Chinese people and ingrained in their legal institutions.[208] In essence, this means that the people need to believe "individuals are endowed with rights that they are entitled to assert even with respect to those in positions of authority."[209]

As a result of major changes over approximately the last sixteen years, China now has viable intellectual property laws in place. Therefore, current and future efforts must be aimed at educating the public about the costs of infringement and strengthening China's legal institutions to ensure that these laws are executed and enforced.[210] It is important to remember that Chinese courts have only recently begun to grapple with the administration and enforcement of intellectual property laws which, as alluded to above,

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206. *See* ALFORD, *supra* note 1, at 117 (discussing post-Cultural Revolution legal reform in China and noting that "law reform efforts in general were characterized by creation of rights without adequate provision for their realization"). Alford concludes that even the 1990s revisions of Chinese intellectual property law:

> [E]ither still fails to sufficiently address the issue of remedies, as in the case of patent and copyright, or remains heavily dependent on administrative remedies redolent of the days of the controlled economy, as in the case of trademark. But even if the remedies that parties could invoke and shape were stated more fully, the institutional vehicles through which these might be realized—be they administrative or judicial—remain insufficiently independent and professional.

Id.

207. *See, e.g.*, ALFORD, *supra* note 1, at 88 (noting hesitation on part of courts to proceed in copyright actions directed at colleagues in PRC's procuracy); 1995 TRADE POLICY AGENDA/REPORT, *supra* note 124, at 58 (1995) (reporting that U.S. has discussed with China, in detail, enforcement of its intellectual property laws); Economist Intelligence Unit, *Software Piracy Still Critical, Despite Sino-US Pact*, BUS. CHINA, Sept. 18, 1995, at 1, *available in* LEXIS, NEWS Library, CURNWS File (declaring that "more cases are finding a greater sympathy in the intellectual property court system"); Arthur Wineburg, *The Close of Round Two: Intellectual Property Rights Protection in China*, CHINA BUS. REV., July 1995, at 20 (stating that "the lack of a strong, independently functioning judicial system . . . presents problems for effective IPR protection"); *but see* Editorial, *Fulfilling Obligations*, SOUTH CHINA MORNING POST, Aug. 7, 1995, at 16 (lauding China's first conviction for violation of intellectual property rights). According to Parker, the Chinese courts are being watched closely to determine whether China shows "signs of greater determination . . . to deal with . . . infringement." Parker, *supra* note 205, at A11.

208. ALFORD, *supra* note 1, at 117.

209. *Id.*

210. Alford identifies as one particularly difficult obstacle, the fact that meaningful protection of intellectual property rights is not even available for the Chinese themselves. He observes that "it is inconceivable that a system designed largely to protect [foreign property interests] . . . could be sustained in modern China, given the bitter legacy of more than a century of foreign privilege." *Id.* at 17.

"have little cultural grounding."[211] This process has proven, and will remain, difficult.[212] Yet, with time, change will come.[213] According to an ancient Chinese proverb, *"even a journey of 1,000 miles must begin with a first step."* Today, China has completed the first steps of a long journey toward full protection of intellectual property[214]— the journey, however, must continue.

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211. *See* ALFORD, *supra* note 1, at 119 (mentioning the "late appearance and relative insignificance of intellectual property in the Chinese world"). Alford posits that the enactment of intellectual property laws with a foundation in Western, not Chinese, tradition, will likely prove to be of limited utility, unless there is "a concomitant nurturing of the institutions, personnel, interests, and values capable of sustaining a liberal, rights-based legality." *Id.* at 118.

212. *See, e.g.*, Cox, *supra* note 167, at 2B (discussing difficulties encountered by government in efforts to control piracy).

213. Lately, there have been many encouraging signs that the Chinese government has become serious about enforcing its intellectual property laws. Evidence has come in the form of stepped-up raids, the creation of special intellectual property courts (see above), and the devotion of greater resources to violations of the law. For a sampling of these encouraging changes, see Borrus, *supra* note 154, at 29 (stating that Beijing has made some moves in right direction); Editorial: *Fulfilling Obligations*, *supra* note 207, at 16 (lauding first conviction by Chinese authorities of man selling bootlegged CD's); Tan, *supra* note 169, at 12 (discussing strategies for combating piracy in China and noting small success in China's campaign to "clamp down" on infringing activities); Gene Koprowski, *Mickey Kantor*, FORBES, Aug. 28, 1995, at 68 (noting that recent enforcement efforts by China are "real" and that U.S. will continue to support PRC's attempts to combat counterfeiting).

214. *Cf.* Borrus, *supra* note 154, at 29 (stating that with regard to eliminating piracy in China, "we're on the one-yard line—with 99 yards to go") (quoting executive at Business Software Alliance).