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Not In It For The Long Run: China's Solution For Compliance With TRIPS Requires More Than A Nine-month Campaign

Devon Spencer

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NOT IN IT FOR THE LONG RUN: CHINA'S SOLUTION FOR
COMPLIANCE WITH TRIPS REQUIRES MORE THAN A
NINE-MONTH CAMPAIGN

Devon Spencer

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I. INTRODUCTION

From the beginning of the Communist era in 1949, China has seen its economy develop into what it is today, a global power. In 2009, China was the United States' (hereinafter U.S.) second-largest trading partner, accounting for 14.5 percent of the U.S.'s total trade market.¹ In 2010, China boasted the world's third largest economy,² laying claim to a market that attracts roughly 23 billion in foreign investments.³ China is also the world's largest holder of foreign exchange reserves.⁴ China's continued economic growth is in part due to its accession into the World Trade Organization (hereinafter WTO) on December 11, 2001.⁵ Along with WTO membership, China also became part of the Agreement on Trade-related Aspects of Intellectual Property (hereinafter TRIP or TRIPS),⁶ requiring it to adopt minimum standards of Intellectual Property Rights (hereinafter IPR or IPRs) with the goal of reducing international trade barriers.⁷ While China amended its copyright laws to meet minimum requirements set by the WTO and TRIPS,⁸ many commentators believe that China's enforcement of those standards is still lacking the force necessary to bring it into compliance with the protection offered in other leading nations.⁹

¹ China: Intellectual Property Infringement, Indigenous Innovation Policies, and Frameworks for Measuring the Effects on the U.S. Economy, Inv. No. 332-514, USITC Pub. 4199, 2-3 (Nov. 2010) (Amended), available at <http://www.usitc.gov/publications/332/pub4199.pdf> [hereinafter "USITC"].

² Pasha L. Hsieh, *China's Development of International Economic Law and WTO Legal Capacity Building*, 13 J. INT'L ECON. L. 997, 997 (2010).

³ *Id.* at 998.

⁴ *Id.* at 997.

⁵ Warren Newberry, *Copyright Reform in China: A "TRIPS" Much Shorter and Less Strange Than Imagined?*, 35 CONN. L. REV. 1425, 1425 (2003).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* (stating that "In some ways, China has achieved staggering success in reforming its copyright regime to meet international standards. In other ways, namely, enforcement of those standards, China still has a long way to go."); see also Jung Yun (Jennifer) Yang, *Bringing the Question of Chinese IPR Enforcement to the WTO Under Trips: An Effective Strategy of a Meaningless and Overused Tactic by the U.S.?*, 10 PITT. J. TECH. L. & POL'Y, Spring 2010, at 3 (arguing that "China

Numerous outdoor markets and malls dedicated solely to the distribution and sale of both pirated and counterfeit items¹⁰ – including, but not limited to, movies, music, designer bags, shoes, wallets, pharmaceuticals and even motorcycles¹¹ – contributes to the belief that piracy levels in China will not materially decrease in the near future.¹² In 2009, the International Intellectual Property Alliance estimated \$3.5 billion in U.S. trade losses in China as a result of copyright infringement.¹³ In addition, the U.S. International Trade Commission estimated that American businesses lost \$48 billion and 2.1 million jobs in 2009 due to Intellectual Property (hereinafter IP) violations in China.¹⁴ In that same year, 79% of counterfeit and pirated items seized at the U.S. border were from China.¹⁵ China's rampant piracy also affects the European Union, as 53 million pirated CDs, DVDs and cassettes from China made their way into the E.U. in 2008.¹⁶ In fact, many individuals in China have largely relied on income generated from the sale of infringing goods in their local city to support themselves, their families and the overall community.¹⁷

should be allowed time to develop into a country which is better equipped to enforce IPRs and fully comply with its TRIPS obligations.”).

¹⁰ Paulina Rezler, *Breaking Through the Great Wall: Problems of Enforcement of Intellectual Property Rights in China*, 14 *TOURO INT'L. L. REV.* 194, 194 (2010); *What is the Difference between Piracy and Counterfeiting?*, STOPFAKES.GOV, <http://www.stopfakes.gov/faqs/what-difference-between-piracy-and-counterfeiting> (last visited Apr. 10, 2012) (using “counterfeit” to describe fake goods, whereas “piracy” is used to describe the reproduction of copyrighted items without the owner’s permission, such as movies, music, and books).

¹¹ Rezler, *supra* note 10, at 194.

¹² *But see China Vows Tougher Punishments for Copyright Piracy*, REUTERS, Jan. 10, 2011, available at <http://www.reuters.com/article/2011/01/11/china-piracy-idUSTOE70A03F20110111> [hereinafter *Tougher Punishments*] (China has created campaigns aimed at punishing IP violators of counterfeit books, music, DVDs and software).

¹³ *Id.*

¹⁴ *China Claims Victory in 9-Month Anti-Piracy Campaign*, ROCKEFELLER NEWS OF THE WORLD MAGAZINE (July 12, 2011), <http://www.rockefellernews.com/21778/china-claims-victory-in-9-month-anti-piracy-campaign/>.

¹⁵ USITC, *supra* note 1 at 2-10.

¹⁶ *See id.* (“The global scale of physical infringement is suggested by the 79 million individual CDs, DVDs, and cassettes detained for suspected copyright violation by EU customs authorities in 2008, 68 percent of which originated in China.”).

¹⁷ Rezler, *supra* note 10, at 253.

For years, the U.S. has been the primary force pushing for stronger IPR protection and enforcement to place a stranglehold on the rampant piracy and counterfeiting that occurs in China.¹⁸ The United States Trade Representative (hereinafter USTR) placed China on its Priority Foreign List multiple times for repeatedly failing to provide adequate IPR protection or enforcement.¹⁹ In 1991, 1995 and again in 1996, China was listed as one of the “Priority Foreign Countries” in the USTR’s annual Special 301 report.²⁰ In each instance, the U.S. also threatened China with unilateral trade sanctions.²¹ However, as we will see, these attempts did nothing to curtail China’s IP issues, and as a result, the U.S. turned to the Dispute Settlement Body (hereinafter DSB) of the WTO in hopes that a resolution to infringement issues plaguing China could be reached. Therefore, in April 2007, the U.S. filed a complaint with the WTO against China, alleging that China was not in compliance with TRIPS.²² On January 26, 2009, the DSB released its decision on the complaint,²³ finding China not to be in compliance with various aspects of the TRIPS Agreement,²⁴ giving China a deadline of March

¹⁸ Yang, *supra* note 9, at 17-18 (“In the late 1980s and early 1990s, ‘the U.S. government repeatedly threatened China with a series of economic sanctions, trade wars, non-renewal of Most-Favored Nation [] status, and opposition to [China’s] entry into the [WTO].’”).

¹⁹ Yang, *supra* note 9, at 18.

²⁰ Jiarui Liu, Article, *The Tough Reality of Copyright Piracy: A Case Study of the Music Industry in China*, 27 CARDOZO ARTS & ENT. L.J. 621, 624-625 (2010) (stating that China has been placed on the Priority Foreign Countries list three times: 1991, 1995 & 1996); see Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978 (1975) (codified as amended in 19 U.S.C. § 2411 (2006) (Under Special 301 provisions of the 1974 Trade Act, the United States Trade Representative (“USTR”) must identify those countries that have “onerous or egregious” acts or policies that deny adequate intellectual property rights or deny fair and equitable protections to persons relying upon such protection. These countries will be deemed “Priority Foreign Countries” and will be subject to further investigation and possible sanctions. In addition, Special 301 provisions have led to the creation of a “Priority Watch List” and “Watch List.” Countries on either of these lists will receive increased bilateral attention in regards to their intellectual property protection.)

²¹ Liu, *supra* note 20, at 625.

²² *Id.*; Kim, *infra* note 92, at 104.

²³ Kevin C. Lacey, *China and the WTO: Targeting China's IPR Record*, 2 No. 3 LANDSLIDE 33, 33 (2010).

²⁴ Yang, *supra* note 9, at 2.

2010 to bring its IPR and enforcement of such rights into compliance with TRIPS.²⁵

Just one day before the DSB's deadline,²⁶ China announced that the Standing Committee of the 11th National People's Congress had approved various amendments to the Chinese Copyright Law as recommended by the DBS in 2009.²⁷ In addition, the Standing Committee of the 11th National People's Congress implemented its own amendments to China's Copyright Law.²⁸ By doing so, China's IP laws were now in compliance with TRIPS. More importantly, Chon Quan, China's vice minister of commerce, announced the Chinese State Council institution of a six-month campaign entitled, "Special Campaign to Combat IPR Infringement and the Manufacture and Sales of Counterfeit and Shoddy Commodities" (hereinafter Campaign) to fight IPR infringement.²⁹

²⁵ *Id.*; see also Daniel Pruzin, *China Cites Full Compliance with WTO Rulings on Intellectual Property Rights*, 79 PAT. TRADEMARK & COPYRIGHT J. 644 (2010) (noting that the actual deadline is March 20, 2010).

²⁶ Pruzin, *supra* note 25.

²⁷ The panel requested China make amendments to its Copyright Law to bring it into compliance with Articles 9.1 and 59 of TRIPS. Specifically, the panel concluded that China's Copyright Law . . . was inconsistent with its "obligations under: (i) Article 5(1) of the Berne Convention (1971), as incorporated by Article 9.1 of the TRIPS Agreement; and (ii) Article 41.1 of the TRIPS Agreement . . . [and that] the Customs measures are inconsistent with Article 59 of the TRIPS Agreement." Report of the Panel, *China – Measures Affecting The Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009) [hereinafter *WTO Report*].

²⁸ Pruzin, *supra* note 25 (Chinese officials stated that this amendment would improve the disposal procedures for seized products, one of the United States' main concerns in its original complaint filed with the WTO in 2007).

²⁹ Williams & Mihalkanin, *infra* note 139, at 43; Amy Tsui, *Chinese Official Touts China's Campaign to go to Source of Counterfeit Good*, 81 PAT. TRADEMARK & COPYRIGHT J. 119 (2010); see also *Overview of the Special Campaign against IPR Infringement and Counterfeits*, EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA IN THE KINGDOM OF DENMARK (Dec. 10, 2010), <http://dk.china-embassy.org/eng/News/t777199.htm> (the decision to launch the campaign was actually made on October 19, 2010 during an executive meeting on the State Council, but was not announced until November 2010 during a U.S. Chamber of Commerce Meeting); see also Lara Farrar, *Can China Become An Intellectual Property Powerhouse?*, CNN (Feb. 15, 2011), <http://edition.cnn.com/2011/BUSINESS/02/14/china.intellectual.property/index.html> (China has also outlined a plan to increase their annual patent filings to two million by 2015).

During a January 2011 news conference,³⁰ Geo Feng, China's deputy director of the Ministry of Public Security's Economic Crimes Investigation Bureau announced that since the launch of the Campaign in November, they have uncovered over 2,000 cases of IPR violations resulting in more than 4,000 arrests.³¹ The Chinese Ministry of Public Security's Economic Crimes Investigation Bureau estimates that new cases uncovered so far during the Campaign have an estimated value of over \$348 million,³² approximately three times the value of all IPR infringement in China during 2010.³³

Even with an increase in the number of IPR cases, many commentators still believe China's troubles begin and end with its punishments, and enforcements of such punishments, for IPR violators.³⁴ For example, the music industry is concerned with a level of music piracy in China that is triple the worldwide average.³⁵ Since 2000, the advent of peer-to-peer file sharing networks has contributed to a steady decline in global music sales.³⁶ More importantly, in a country where over 83% of consumers prefer foreign music,³⁷ it may come as no surprise that China's illegal music market is dominated by foreign music.³⁸ The increased demand for foreign music can be seen as one of the reasons the music industry has become even more concerned with China's IPR protection.

While China has had issues with enforcing and protecting all forms of IPRs, including both trademarks and copyrights, this paper will better address the issues revolving around copyright protection, as the majority of complaints from intellectual property right holders deal with copyright issues involving music, literature and movies.

³⁰ Tougher Punishments, *supra* note 12.

³¹ *Id.*

³² *Id.* (approximately 2.3 billion Yuan).

³³ *Id.*

³⁴ *Id.* (while China has promised to achieve "concrete results" from the six month campaign, U.S. groups maintain that without a sustained effort, there will be no change in the level of IP violations.); *see generally* Lacey, *supra* note 23.

³⁵ Liu, *supra* note 20, at 625-27 (the level of music piracy in China was between 85% to 90% from 2000 to 2007, while the average for the world was approximately 34%).

³⁶ *Id.* at 631.

³⁷ *Id.* at 630.

³⁸ *Id.*

However, that is not to say that other aspects of IPR protection have not been, and continue to be, under scrutiny in China. As we will see, there are countless issues with fake merchandising and the improper use of trademarks on such merchandising.³⁹ Furthermore, more likely than not, when there is infringement of one's copyright, there may likely be an infringement on one's trademark right. For example, as with illegal music made and sold on the streets, they are often packaged with printed images containing the band's name. As most bands, if not all, register their names with the U.S. Trademark Office, there is likely to be trademark infringement in the use of the name, in addition to copyright infringement by making an unauthorized duplication of the CD. In addition, China's Campaign was mostly structured to address copyright infringement, including the manufacturing of counterfeit goods.⁴⁰ However, as the U.S.'s claims involved disposal methods used by China, including the removal of infringing *labeling*, it is clear that trademark issues are also prevalent in China.⁴¹ The solutions proposed in this paper will be applicable to not only copyright, but to all other forms of IPRs, as the lack of adequate protection and enforcement is an issue predominant among all IPRs in China. Issues involving the protection of IPRs extend further than that of only copyright issues, but even in solely that respect, the harm is great.

Together, we will explore the effects of piracy in China, its legal structure, the U.S.'s 2007 TRIPS complaint against China and its response to the complaint, as well as the Campaign's shortcomings. In addition, this article also suggest ways China can bring protection and enforcement of China's IPRs up to par with that of other countries in the WTO. Part II tackles the effect on the music industry resulting from IPR infringement in China and its new initiatives to protect and enforce IPRs. Part III briefly describes the U.S.'s TRIPS complaint against China and the history behind it. Part IV evaluates China's resolution to bring itself into compliance with TRIPS by examining the Campaign initiated by China's State Council. Part V examines China's legal system to evaluate whether or not it is adequate enough to promote the IPR protection requested of China.

³⁹ See *infra* Part VI.

⁴⁰ See *infra* Part IV.

⁴¹ See *infra* Part III.

Finally, part VI focuses on ways China, with the assistance of developed nations, can bring its IPR standards and enforcement up to par with the WTO and TRIPS. While assistance from developed nations may seem as a foreign concept to China considering its beliefs in sovereignty, recent comments from China's President Hu Jintao at the CEO summit of the Asia-Pacific Economic Cooperation, indicates a shift from these beliefs; President Jintao asked for both developed and developing countries to work together in order to achieve "balanced, inclusive, sustainable, innovative and secure growth of the world economy."⁴²

II. PIRACY AND THE ENTERTAINMENT INDUSTRY IN CHINA

A. *An Industry Backdrop*

More than 2.2 million middle-class Americans depend on the entertainment industry alone for jobs; many millions more rely on other IP driven industries for jobs.⁴³ However, globally, the music industry has seen a 31% decrease in monetary value from 2004 to 2010.⁴⁴ As a country with rampant IPR violations and few enforcement mechanisms in place to deter future violators, China leads the way in digital music piracy. The International Intellectual Property Alliance (hereinafter IIPA) estimates that 99% of all music downloaded in China is pirated.⁴⁵ The IIPA also estimates that from 2000 to 2007, an average of nearly 87.5% of China's music industry was dominated by pirated music,⁴⁶ with a high of 93% in 2000 and a low of 85% from 2004 to 2006.⁴⁷ When compared with music piracy rates worldwide, these numbers are even more astonishing. According to the International Federation of the Phonographic

⁴² See *infra* Part VII.E.

⁴³ Press Release, Motion Picture Association of America, Inc., MPAA Statement on Strong Showing of Support for Stop Online Piracy Act (Dec. 16, 2011), available at <http://mpaa.org/resources/5a0a212e-c86b-4e9a-abf1-2734a15862cd.pdf>.

⁴⁴ *IFPI Digital Music Report 2011: Music at the Touch of a Button*, INT'L FED'N OF THE PHONOGRAPHIC INDUS. (2011), available at <http://www.ifpi.org/content/library/DMR2011.pdf>.

⁴⁵ USITC, *supra* note 1, at D-12.

⁴⁶ Liu, *supra* note 20, at 625.

⁴⁷ *Id.* at 626-27.

Industry (hereinafter IFPI), the worldwide music piracy rate is roughly 35%,⁴⁸ making China's level of music piracy almost three times the world average. Since 2001, the number of Internet users in China has grown at an annual rate of 39%,⁴⁹ culminating in 384 million users in December 2009.⁵⁰ Considering that China's population was 1.3 billion by mid-2011,⁵¹ the number of Internet users is sure to increase as the population grows and Internet usage becomes more common, paving the way for an even larger numbers of IPR violations.

China's rampant levels of music piracy can be directly attributed to the weak IPR protection of the Internet. Where individuals in most other countries must use peer-to-peer file sharing networks or bit-torrent networks to share illegal music files, Chinese infringers can simply use their web browsers to find any music they wish to download.⁵² For example, Baidu, one of China's largest search engines, offers users the ability to download music using its search engines.⁵³ All a user has to do is type in the name of the song, and Baidu will return a query of results listing links for direct downloads.⁵⁴ This is unlike traditional peer-to-peer networks or bit-torrent methods in which users have to download additional software to access the song.⁵⁵ Through this business model, Baidu MP3 is able to offer a more extensive catalog of songs than that of any legitimate music provider.⁵⁶ Originally founded in 1999,⁵⁷ Baidu now

⁴⁸ *Id.* at 627.

⁴⁹ USITC, *supra* note 1, at 3-4.

⁵⁰ *Id.*

⁵¹ *Background Note: China*, U.S. DEP'T OF STATE (Sept. 6, 2011), <http://www.state.gov/r/pa/ei/bgn/18902.htm>.

⁵² *See* Liu, *supra* note 20, at 628 – 629 (noting that because of such heavy restrictions outside of China, these Chinese-based search engines typically block access from IP addresses outside of China to limit their possible exposure to foreign jurisdictions. Therefore, all of these music files originate from within the country.).

⁵³ *Id.*

⁵⁴ *Id.* at 628.

⁵⁵ Carmen Carmack, *How BitTorrent Works*, HOW STUFF WORKS, <http://computer.howstuffworks.com/bittorrent.htm> (last visited Apr. 11, 2012).

⁵⁶ Liu, *supra* note 20, at 628.

⁵⁷ *Copyright Infringement in China: The War Against Baidu*, FIELD FISHER WATERHOUSE (Sept. 9, 2008), <http://www.ffw.com/publications/all/articles/copyright-infringement-china.aspx> [hereinafter *The War Against Baidu*].

holds over 75% of China's search engine market,⁵⁸ and was ranked the world's 13th most popular website in 2008 by Alexa Internet, Inc., a company that specializes in monitoring website traffic.⁵⁹ In 2009, Pali Research, the equity research division of Pali Capital Inc., estimated that roughly 80% of all searches on Baidu were for music files.⁶⁰

B. Limited Effectiveness of Past Action Taken by the Music Industry Against Digital Piracy in China

Efforts by members of the music industry to shut down Baidu have failed. In 2005 the four major U.S. record labels – Warner, Sony BMG, EMI, and Universal – along with three Chinese companies – Gold Label, Cinepoly, and Go East – brought a copyright infringement claim against Baidu in the Beijing First Intermediate Court.⁶¹ The plaintiffs argued that by providing links to websites from which illegal music could be downloaded, Baidu was committing copyright infringement.⁶² Ultimately, the Court sided with Baidu, holding that by only providing links, and not the actual infringing content, the search engine should not be held liable.⁶³ On appeal, the court stated that Baidu could only be liable for copyright infringement under one of two circumstances: (1) if Baidu failed to remove the infringing links after notification; or (2) if the company had actual knowledge that the links contained pirated music.⁶⁴ Because Baidu never received any removal notices of infringing links and actual knowledge was not proved, the appeals court affirmed the

⁵⁸ Lance Whitney, *China Launches New State-Run Search Engine*, CNET NEWS (Feb. 22, 2011), http://news.cnet.com/8301-1023_3-20034748-93.htm; see also *Charts: China 2011 Q2 Search Engine Market Update*, CHINA INTERNET WATCH (July 19, 2011), <http://www.chinainternetwatch.com/1187/search-engine-market-q2-2011/>.

⁵⁹ *The War Against Baidu*, *supra* note 57.

⁶⁰ Leena Rao, *Watch Out Baidu, China Clamps Down On Music Piracy* (Sept. 4, 2009), <http://techcrunch.com/2009/09/04/watch-out-baidu-china-clamps-down-on-music-piracy/>; USITC, *supra* note 1, at 3-5.

⁶¹ *The War Against Baidu*, *supra* note 57.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

Intermediate Court's decision, finding Baidu not guilty of copyright infringement.⁶⁵ While the case against Baidu was still being decided, IFPI, EMI, Mercury Records, Sony BMG, and Warner Music brought a similar suit against Yahoo! China in the Beijing People's High Court.⁶⁶ There, the Court found Yahoo! China to be guilty of contributory infringement.⁶⁷ On appeal, the decision was affirmed and Yahoo! China was ordered to remove any and all links to infringing music.⁶⁸ The judgment against Yahoo! China was a major victory for the music industry.

In 2010, a lawsuit was filed by the IFPI against Baidu and Sohu, another search engine that provides links to infringing content.⁶⁹ There, the Beijing Court found Sohu liable for infringement, but Baidu was once again found not liable.⁷⁰ While this case did not result in the complete removal of all infringing content on Baidu, it does display the impact judicial enforcement can have in fighting IPR infringement in China, as Baidu abided by the ruling in its earlier case without question. However, as tremendous amounts of pirated material still remained on Baidu's servers, record companies decided to pursue other methods to minimize Baidu's influence in music piracy.

With the understanding that Baidu generates most of its revenue through advertising, record companies decided to attack the site's advertising channels.⁷¹ In 2008, the Music Copyright Society of

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Yimei Guo, "Safe Harbor" Doctrine: A Panacea for Chinese Search Engine's Copyright Infringement Liability or Not, 2010 INT'L CONF. ON E-BUS. & E-GOV'T 1982, 1983 (2010) (Three main reasons can be used to explain the different outcomes: (i) the 2006 *Ordinance on the Protection of the Right to Network Dissemination of Information* was not applicable in the Baidu case; (2) Yahoo! China was faced with charges of both contributory and direct liability whereas Baidu only faced direct liability; and (3) Baidu was never provided notice regarding the illegality of the links of their website, whereas Yahoo! China had notice but only removed the links provided and nothing more).

⁶⁹ USITC, *supra* note 1, at 3-5.

⁷⁰ *Id.* This time, Baidu had followed the ruling from their 2005 case and removed all infringing links from its website once they received notice. *Id.*; see also *The War Against Baidu*, *supra* note 57.

⁷¹ *The War Against Baidu*, *supra* note 57.

China, IFPI, Universal Music, EMI, Sony BMG Entertainment, Warner-Chappell Music, Seed Music, R2G, and Zhu Shu Fang Music sent letters to all major advertisers in China, urging them to not advertise with Baidu, as doing so will support music piracy.⁷²

Most recently, China has taken other actions to decrease Baidu's contributions to piracy by creating its own search engine to divert traffic from Baidu. In February 2011, China launched a new government-run search engine, Panguso, which will allow people to search for news, websites, videos, images, and audio.⁷³ The search engine will be operated by China Mobile, a telecom company, and Xinhau, a state-run news agency.⁷⁴ Panguso's goal is to minimize Baidu's dominance of the Chinese search engine market,⁷⁵ which in turn should decrease Internet piracy, as Baidu is one of the main contributors. As this search engine is government run, it is expected that undesirable results, such as illegal music, will be blocked.⁷⁶ On that same note, one may question its effectiveness, as Internet regulation is nothing new to China.⁷⁷ In addition, this added regulation may only further increase China's already great control over Internet content, whereby it attempts to limit any and all content the State deems to be negative or unfavorable to itself or its interest.⁷⁸ For example, as the CNET article mentions, when Reuters attempted to search politically sensitive China topics on the search engine, only results expressing the government's viewpoints were returned.⁷⁹

⁷² *Id.*

⁷³ Whitney, *supra* note 58.

⁷⁴ *Id.*

⁷⁵ *See id.*

⁷⁶ *Id.*

⁷⁷ *See generally* Lyombe Eko, Anup Kumar & Qingjiang Yao, *Google This: The Great Firewall of China, the IT Wheel of India, Google Inc., and Internet Regulation*, 15 J. INTERNET L. 3 (2011).

⁷⁸ *Id.* at 5 (Various Chinese laws and regulations prohibit information from being placed on the Internet if the government believes it may damage or endanger: state security, national unity and power; state honor and interests; or instigates ethnic or religious hatred. They also prohibit content that promotes superstitious ideas, pornography, gambling, or violence).

⁷⁹ Whitney, *supra* note 58.

C. *Is There Really a Problem?*

While the WTO and other organizations have continued to press China to increase its protection over IPRs, few are challenging whether or not increased protection is even beneficial to society. Art Brodsky, an employee of digital rights group Public Knowledge, questions the numbers provided by the movie industry regarding infringement, arguing that “[t]he movie business is fond of throwing out numbers about how many millions of dollars are at risk and how many thousands of jobs are lost . . . [yet Public Knowledge doesn’t think] it correlates to the state of the industry.”⁸⁰ In addition, Tim O’Reilly, an investor and chief executive of tech-book publisher O’Reilly Media, argues “the losses due to piracy are far outweighed by the benefits of the free flow of information, which makes the world richer, and develops new markets for legitimate content.”⁸¹ Relying on his own books sales as an example, Tim O’Reilly further states that “most of the people who are downloading unauthorized copies of [my] books would never have paid us for them anyway.”⁸² While O’Reilly injects a good dose of realism to the argument for stronger IPR protection, there are a few exceptions that can be taken.

While it may be true that the free flow of information helps to develop richer content worldwide and the evolution of market content, this cannot be said to apply for all industries and companies. While many people who have illegally downloaded his book would not have paid for it, this may not be true for popular authors or artists. For example, artist such as U2, Lady Gaga, Prince, or other well established, highly sought after acts, are likely to have fans that may have been just as probable to purchase their music if they were not able to download it for free. Furthermore, in relation to companies such as Apple, whose products are being sold by

⁸⁰ Jenna Wortham & Amy Chozyck, *The Piracy Problem: How Broad?*, N.Y. TIMES, Feb. 9, 2012, at B1.

⁸¹ *Id.* Tim O’Reilly is considered as the best computer book publisher in the world. *School of Information Science – Hall of Fame*, UNIV. OF PITT. SCH. OF INFO. SCI., http://www.sis.pitt.edu/~mbsclass/hall_of_fame/oreilly.html (last visited Apr. 12, 2012).

⁸² Wortham & Chozyck, *supra* note 80.

unauthorized dealers or are being copied for sale,⁸³ it may be hard to argue that individuals would not have paid full price for their product simply because they were able to get a counterfeit version.

One of the main underlying fallacies of O'Reilly's argument is that he fails to take into account the impact that readily available counterfeit goods and pirated content has had on peoples' view of having to pay for something. As easy as it may be argued that people would not have paid for his book regardless, this is extremely difficult to prove, as society has grown more accustomed to "getting something for nothing."⁸⁴ One could say that a simple survey asking a question such as, "would you have paid for this book if it were not available for free download" may help in proving his statement. However, there is no measureable means to determine the effect of the ability to download illegal items has played in one's belief of not wanting to pay for the book if it was not available illegally.

In addition, it can be argued that entertainment companies such as Viacom and ABC have gone ahead and made much of their content available for free on their websites in an attempt to curb infringement. Popular Comedy Central shows such as "South Park," "The Daily Show," and "The Colbert Report" can all be streamed online for free.⁸⁵ ABC now offers the ability to stream its most popular and successful television shows, such as "The Bachelor," "Desperate Housewives," and "Modern Family," at no charge on their website.⁸⁶ While one may argue that ABC is "free-TV" and as such, they suffer no hardship from placing their shows on the Internet, this simply is not true. For both ABC and Comedy Central, syndication rights are very important, as the station's ability to sell the rights to show the series can generate revenue for years to come, even after the show is no longer on its station.⁸⁷ In addition, there is

⁸³ *Infra* Part VI.

⁸⁴ See Wortham & Chozick, *supra* note 80.

⁸⁵ Wortham & Chozick, *supra* note 80, at 3. See also COMEDY CENTRAL, <http://www.comedycentral.com/> (last visited Mar. 30, 2012) (listing all its content available for free online streaming).

⁸⁶ ABC, <http://abc.go.com/watch> (last visited Apr. 7, 2012).

⁸⁷ Syndication refers to the ability to sell the rights of a show to another station. This usually happens once a show has gone off the air, and will continue to run on another station. For example, after *Seinfeld* went off the air on NBC, reruns continued to be showed on other stations through syndication, and have reportedly

likely a loss of advertising revenue, as there will be fewer viewers watching the original broadcast due to the fact that they can stream it online. This issue is somewhat addressed as the streams and websites usually provide for advertising during, before and/or after the show, yet one may sometimes skip or fast-forward through the advertisements after a specific amount of time has passed.⁸⁸ In addition, the reach available to markets may be greater for TV as opposed to online streaming, so it is not the case that stations have a greater benefit from advertising on-line as opposed to on TV; Dave Kaplan has even stated that “[i]t appears that leveraging the large reach of TV in combination with the standalone impact and amplifying effect of online video makes for a successful marketing strategy,” implying that online-advertising alone, cannot make up for the lost ground from TV advertising.⁸⁹

III. AN OVERVIEW OF THE WTO AND THE US’S 2007 TRIPS COMPLAINT

The WTO was officially created on January 1, 1995,⁹⁰ and provides a common forum for negotiations between signatory

grossed \$2.7 billion in syndication since 1998. See David K. Li, *Seinfeld Rakes in \$2.7 Bil.*, N.Y. POST (June 7, 2010), http://www.nypost.com/p/entertainment/tv/seinfeld_rakes_in_bil_RFu9j0StArywzQ8I5rSvAJ; see also Wortham & Chozick, *supra* note 80 (stating that CBS’s “The Big Bang Theory” sold for \$2 million as episode to TBS and Fox”).

⁸⁸ See *Looking at Lift: Inside Online Video Advertising*, NIELSENWIRE (Apr. 19, 2010), http://blog.nielsen.com/nielsenwire/online_mobile/looking-at-lift-inside-online-video-advertising/. Research done by Nielsen, the leader in measurement for market trends, shows that online television ads have actually out performed Television ads. However, even Nielsen acknowledges this may be misleading, as web views are often required to click to initiate the content they are trying to watch, making them, by no choice of theirs, to be more engaged and attentive to the ads and programs. *Id.*

⁸⁹ See *id.* Dave Kaplan is the Senior Vice President of Product Leadership at Nielsen IAG. *Id.*

⁹⁰ Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement]; Peter Van den Bossche, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION* 76 (2d ed. 2008) (stating that the “World Trade Organization was established and became operational on 1 January 1995”).

countries, a set of international commerce rules for any such negotiations, and assistance to settle trade disputes that cannot be solved through ordinary negotiation.⁹¹ TRIPS was also implemented at the same time, introducing a set of international intellectual property rules for the WTO.⁹² TRIPS applies to both the trade of goods and services, with a purpose of "narrow[ing] the gaps in the way these [intellectual property] rights are protected around the world and to bring them under common international rules,"⁹³ requiring member states to adopt minimal standards of IPR protection.⁹⁴ Also created during the same time at the WTO were the dispute settlement system and the DSB, whose main purpose is to resolve disputes among member countries.⁹⁵

⁹¹ Van Den Bossche, *supra* note 90, at 87-93; *see generally* Hwan Kim, *The World Trade Organization Dispute Settlement System: China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, 23 N.Y. Int'l L. Rev. 83, 83-90 (2010) (the creation of the WTO, which includes TRIPS & the DSB, occurred during the Uruguay rounds of the General Agreement on Tariffs and Trade negotiations, which lasted from 1986 till 1994).

⁹² Van Den Bossche, *supra* note 90, at 742-43; *see also* Kim, *supra* note 91, at 102; *see* Marrakesh Agreement, *supra* note 90, at Annex 1C; Agreement on Trade-Related Aspects of Intellectual Property Rights, 1869 U.N.T.S. 299 [hereinafter TRIPS].

⁹³ Kim, *supra* note 91, at 102 (citing World Trade Organization, *Understanding the WTO* 39 (4th ed. 2008) ("acknowledging that the internationally accepted rules for protecting intellectual property in the TRIPS Agreement have created uniformity") *id.* at 103 & n.115; Van Den Bossche, *supra* note 90, at 743-44 (stating that the main objective of TRIPS is found in its Preamble, which is to "reduce distortions and impediments to international trade...taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure measures and procedures to enforce intellectual property rights do not themselves become barriers to trade").

⁹⁴ Newberry, *supra* note 5, at 1432-33; *see also* Brad L. Bacon, *The People's Republic of China and the World Trade Organization: Anticipating a United States Congressional Dilemma*, 9 MINN. J. GLOBAL TRADE 369, 399 (2000) (emphasizing that the standard set by the TRIPS Agreement is a floor, not a ceiling, for intellectual property rights).

⁹⁵ The WTO dispute settlement system is provided for in the WTO Agreements, which was negotiated during the Uruguay Round and became operational at the same time as TRIPS, Jan. 1, 1995. Van Den Bossche, *supra* note 90, at 169-70.

On December 11, 2001, China became a member of the WTO and therefore adopted TRIPS.⁹⁶ In order to show its commitment to the WTO, China implemented many amendments to its copyright laws before even becoming a member of the WTO.⁹⁷ However, the enforcement of these IPRs remained a serious problem for China.

As China and the U.S. are now both parties to the WTO, the U.S. could no longer threaten China with unilateral trade sanctions without taking other actions first.⁹⁸ Instead, they were now required to initiate a formal complaint with the WTO's DSB for any issues they had with China,⁹⁹ including claims of inadequate protection and enforcement of IPRs. In 2005, a report from the USTR found that "China has not resolved critical deficiencies in IPR protection and enforcement and, as a result, infringements remain at epidemic levels."¹⁰⁰ As a result, China was placed on the USTR's Priority Watch List for the first time due to its failure to comply with various provisions of TRIPS and previous commitments made at the 2004 meeting of the Joint Commission on Commerce and Trade.¹⁰¹

⁹⁶ *Understanding The WTO: The Organization Members and Observers*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Apr. 7, 2012) [hereinafter *Members and Observers*]; TRIPS, *supra* note 92, at preamble & art. 1 (Member countries are required to adopt TRIPS as part of the WTO's goal to have more uniformed standards for the protection of IPRs.).

⁹⁷ Newberry, *supra* note 5, at 1425 (TRIPS permits trade sanctions, but a country must first exhaust all their possible remedies under WTO's dispute resolution process. As the U.S. had not done so, they could not simply bring sanctions against China. In addition, the WTO favors settlements over trade sanctions.).

⁹⁸ *Id.* at 1434.

⁹⁹ *Id.*

¹⁰⁰ *Out-Of-Cycle Review Results*, OFF. OF THE U.S. TRADE REPRESENTATIVE 15 (2005), http://www.ustr.gov/archive/Document_Library/Reports_Publications/2005/2005_Special_301/Section_Index.html (follow "View the Full Version of the 2005 Special 301 Report" hyperlink).

¹⁰¹ *Id.* Originally, the USTR created a "priority foreign countries" list to identify countries "(i) whose acts, practices, or policies are the most onerous or egregious, and have the greatest adverse economic impact on the United States; and (ii) that are not entering into good faith negotiations or making significant progress in bilateral or multilateral negotiations to provide adequate and effective protection of intellectual property rights." Judith H. Bello & Alan F. Holmer, Articles, "*Special 301*": *Its Requirements, Implementation, and Significance*, 13 *FORDHAM INT'L L.J.* 259, 261 (1989-90). However, the USTR later changed this to create a new list, the

Initially, the U.S. did not file a formal complaint after the release of the USTR's report.¹⁰² However, after requests from U.S. businesses,¹⁰³ a resolution introduced by Senator Byron Dorgan¹⁰⁴ and an ever-increasing trade deficit with China,¹⁰⁵ the U.S. filed a formal complaint in 2007 against China with the WTO for alleged violations of TRIPS.¹⁰⁶

The complaint set forth three arguments.¹⁰⁷ First, the U.S. claimed that by failing to provide protection to works that had been banned for distribution and/or publication by Chinese law, Article 4 of China's Copyright Act was inconsistent with its obligation to provide copyright protection to all works enumerated in Article 9.1 of TRIPS.¹⁰⁸ Therefore, the U.S. accused China of failing to afford copyright protection to works that should be granted protection under TRIPS.¹⁰⁹ The DSB arrived at a judgment in favor of the U.S., stating that Article 9.1 incorporates the national treatment obligation of Article 5(1) of the Berne Convention, requiring all works deemed protectable subject matter under Article 5 of the Berne Convention be given copyright protection, including many works that had once

“priority watch list,” for countries that were “lax in their protection of intellectual property rights or that have imposed barriers to market access.” *Id.* at 267.

¹⁰² Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO China*, 55 AM. U. L. REV. 901, 925 (2005-06).

¹⁰³ *Id.* at 926.

¹⁰⁴ *Id.* See also Omario Kanji, Note, *Paper Dragon: Inadequate Protection of Intellectual Property Rights in China*, 27 MICH. J. INT'L L. 1261, 1263 (2006) (noting that, in 2005, fourteen Senators requested that President Bush “take action against China’s rampant IPR infringement.”).

¹⁰⁵ Kanji, *supra* note 104, at 1262.

¹⁰⁶ Request for Consultations by the United States, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, 3-6, WT/DS362/1/IP/D/26/G/L/819 (Apr. 16, 2007) [hereinafter *WTO Complaint*]; see Lacey, *supra* note 23, at 33; see also Kim, *supra* note 91, at 104 (the U.S. was not alone in its complaint against China. “Argentina, Australia, Brazil, Canada, European Communities, India, Japan, Korea, Mexico, Chinese Taipei, Thailand, and Turkey joined” the U.S. in its initial request for consultation with China on April 10, 2007).

¹⁰⁷ See generally *WTO Complaint*, *supra* note 106; Kim, *supra* note 91, at 104-08.

¹⁰⁸ *WTO Complaint*, *supra* note 106, at 3-6; Lacey, *supra* note 23, at 33; Yang, *supra* note 9, 6-7.

¹⁰⁹ *WTO Complaint*, *supra* note 106, at 3-6.

failed content review or had portions deleted in order to meet the requirements under Article 4(1) of China's Copyright Act.¹¹⁰

Furthermore, as Article 4(1) of China's Copyright Act denied copyright protection to works that otherwise should be granted protection under Article 9.1 of TRIPS, the DSB also found Article 4 of China's Copyright Act incompatible with Article 41.1 of TRIPS, which requires the availability of proper enforcement actions to works afforded copyright protection under TRIPS.¹¹¹

Second, the U.S. argued that China's Customs laws, which allowed customs authorities the ability to donate or sell counterfeited merchandise instead of destroying them, thereby allowing the goods to re-enter the market after the infringing markings have been striped away, violated Article 46 and 59 of TRIPS.¹¹² Article 46 and 59 of TRIPS require infringing goods to be disposed, without any compensation, "outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or, unless this would be contrary to existing constitutional requirements, destroyed."¹¹³ Here, the DSB agreed in part with the U.S., finding that in situations where counterfeit trademark goods were sent back into channels of commerce, TRIPS requires more than simply removing the trademark, and thus China was in violation of Article 46 of TRIPS in

¹¹⁰ WORLD TRADE ORGANIZATION, WTO DISPUTE SETTLEMENT: ONE-PAGE CASE SUMMARIES 1995-2009 139 (2010) [hereinafter *WTO Summaries*]; Yang, *supra* note 9, at 7-8 (article 9.1 of TRIPS states that "[m]embers shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto."); Lacey, *supra* note 23, at 33-34 (works that were deemed to be "prohibited by law" were not afforded copyright protection under the Chinese Copyright Act, which reflects the general belief that China likes to strictly censor certain works that it may not find beneficial to its government, i.e., politically sensitive works, and the failure to afford copyright protection to certain works has limited the ability of U.S. copyright holders to assert their rights in China against potential infringers).

¹¹¹ *WTO Summaries*, *supra* note 110; see Yang, *supra* note 9, at 6-7.

¹¹² *WTO Complaint*, *supra* note 106, at 3; see also Lacey, *supra* note 23, at 34; Yang, *supra* note 9, at 9 (China has three methods for dealing with the confiscated goods, which include "(1) donating the goods to public welfare bodies or assigning the goods to the IP rights holder with compensation; (2) auctioning the goods after completely eradicating the infringing features and packaging of the goods; and (3) destroying the goods if the infringing features cannot be eradicated.").

¹¹³ TRIPS, *supra* note 92, at art. 59.

that respect.¹¹⁴ However, the DSB did not completely agree with the U.S.'s assertions, finding that Article 59 of TRIPS only required authorities to *have the right* to either destroy or dispose of goods, and that disposal "in such a manner as to avoid any harm caused to the right holder[s]" only applied with infringing products disposed outside the channels of commerce.¹¹⁵ The DSB went on to say that as China sold goods for charitable distribution, the goods were "not in fact charitably disposed of outside the channels of commerce but into the channels of commerce."¹¹⁶ Furthermore, the fact that goods donated to the charitable organizations are distributed and are later circulated back into channels of commerce, "does not alter the fact that the goods were disposed outside the channels of commerce, in the ordinary sense of 'disposal.'"¹¹⁷

Finally, the U.S. challenged China's high thresholds for prosecution of copyright infringers, claiming this violated Articles 41 and 61 of TRIPS.¹¹⁸ Using Article 1.1 and 41.5 of TRIPS to determine its obligations under Article 61,¹¹⁹ China argued that the measures in place were "reasonable and appropriate" under its interpretation of

¹¹⁴ *WTO Report*, *supra* note 27, ¶¶ 7.393-7.394.

¹¹⁵ *WTO Report*, *supra* note 27, ¶ 7.249.

¹¹⁶ *WTO Report*, *supra* note 27, ¶ 7.279.

¹¹⁷ *Id.*

¹¹⁸ *WTO Complaint*, *supra* note 106, at 1-2; *see also* Yang, *supra* note 9, at 12-13 (Article 61 of TRIPS requires members to "provide for criminal procedures and penalties . . . at least in cases of wilful [sic] trademark counterfeiting or copyright piracy on a commercial scale;" Article 41 requires member countries to provide the means by which effective preventative results are derived from the enforcement.).

¹¹⁹ TRIPS, *supra* note 92, at art. 1.1 ("Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice."); *id.* at 41.5 ("does not create any obligation to put in place a judicial system for the enforcement of [IPRs] distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general.").

TRIPS Agreement, art 1.1 ("Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice."); TRIPS Agreement, art 41.5 ("does not create any obligation to put in place a judicial system for the enforcement of [IPRs] distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general.").

the “commercial scale” language in Article 61.¹²⁰ While the panel did find that some acts of infringement may fall below all thresholds in place by China and are thus never enforceable by criminal proceedings, this did not necessarily result in a violation of Article 61.¹²¹ First, the panel determined the proper construction to give the “commercial scale” language, stating that it “refers to counterfeiting or piracy carried on at the magnitude or extent of typical or usual commercial activity with respect to a given product in a given market,” and therefore, the effectiveness of any measures would have to be examined given the “magnitude or extent [of counterfeiting or piracy] typical or usual with respect to such a product in [China].”¹²² In conclusion, the panels found the measures in place under China's Copyright Act “on their face, they did not exclude certain commercial activity from criminal procedures and penalties.”¹²³ The panel, as well as many other supporters, criticized the U.S. for failing to proffer sufficient evidence against China.¹²⁴

China was given until March 2010 to comply with the DSB's recommendations.¹²⁵ While this appeared to be a major victory for the U.S., the effects of the ruling were marginal at best. As history shows, China has already made significant changes to their IPR laws to comply with TRIPS,¹²⁶ yet many U.S. entities still perceive a serious lack of protection and enforcement of IPRs. In addition, as the U.S. failed to succeed on its third claim, copyright holders will likely gain no additional assistance in enforcing their IPRs.

¹²⁰ *WTO Report*, *supra* note 27, ¶¶7.425, 7.481; Yang, *supra* note 9, at 6 (relying on Articles 1.1 and 41.5 of TRIPS, China interpreted “Commercial Scale” to mean “a significant magnitude of infringement activity”).

¹²¹ *WTO Report*, *supra* note 27, ¶ 7.669.

¹²² *WTO Report*, *supra* note 27, ¶ 7.577.

¹²³ *WTO Report*, *supra* note 27, ¶ 7.609.

¹²⁴ *WTO Report*, *supra* note 27, ¶¶ 7.616-.617, 7.681-.682.

¹²⁵ Communication from China and the United States, *China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights - Communication from China and the United States Concerning Article 21.3(b) of the DSU*, WT/DS362/13 (Mar. 7, 2009), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm.

¹²⁶ See Yang, *supra* note 9, at 15.

IV. CHINA'S RESOLUTION TO TRIPS COMPLIANCE

As previously mentioned, China adopted various amendments to its Copyright Law and its Customs Protections of Intellectual Property Rights to bring itself into compliance with the DSB's ruling.¹²⁷ The National People's Congress Standing Committee added a new clause to Article 27 and revised Article 4 to China's Copyright Law.¹²⁸ Article 4 was amended to read: "Copyright owners must not act in breach of the Constitutional Law and other laws or in conflict with the public interests in exercising their copyrights. This Country shall lawfully supervise publications and circulations of work."¹²⁹ This change was made in response to the first argument in the U.S.'s formal complaint that protection was not offered to all works that should be granted protection under TRIPS. As amended, copyright protection will now be formally afforded to all works regardless of whether or not they are cleared for publication or distribution in China.¹³⁰ Thus, holders of IPRs can now pursue infringers, even if the work is not approved for publication or distribution in China.¹³¹ In addition, the new Article 26 reads: "To pledge a copyright, the pledger and pledgee concerned shall complete the pledge registration with the copyright authority under

¹²⁷ Pruzin, *supra* note 25 (while the announcement came on March 19th, the actual amendments took place earlier, with China's Copyright law being amended on February 26 and their Customs regulations on March 17).

¹²⁸ Christopher Corr, *Regulation of Business, Trade and Competition in China*, WHITE & CASE 1, 2 (May 2010), http://www.whitecase.com/files/Uploads/Documents/China_Regulation_Business_Trade_and_Competition_Bulletin_May_2010.pdf (as with the initial concerns with China's IP laws, many observers still believe that regardless of the amendments made or created, adequate protection will not happen until the authorities responsible can effectively implement and enforce the amendments.).

¹²⁹ Jingyuan Sun, *China's National People's Congress Amends the Copyright Law*, MARTINDALE.COM (Mar. 31, 2010), http://www.martindale.com/international-law/article_Sheppard-Mullin-Richter-Hampton-LLP_964964.htm (noting that originally, Article 4 stated: "Works for which publication or distribution is prohibited by law shall not be protected by this law. Copyright owners, in exercising their copyright, shall not violate the Constitution or laws or prejudice public interests.>").

¹³⁰ Corr, *supra* note 128, at 2.

¹³¹ *Id.*

the State Council.”¹³² Although this new article does not address any argument made by the U.S. in its official complaint, it is evidence of China’s willingness to improve its copyright laws.

In addition, China made various amendments to its Customs laws.¹³³ Among them, the amended Article 27 addressed the U.S.’s concerns relating to the treatment of confiscated items, and was amended to read as follows:

Where confiscated goods that have infringed upon Intellectual Property Rights can be used for public welfare customs shall transfer the goods to relevant public welfare organizations to be used for public welfare. Where the owner of the Intellectual Property Rights wishes to acquire the goods customs may transfer the goods to the owner of the Intellectual Property Rights for compensation. Where confiscated goods that has infringed upon Intellectual Property Rights cannot be used for public welfare and the owner of the Intellectual Property Rights does not wish to acquire the goods customs may auction off the goods according to law after removing the infringing characteristics, but imported counterfeit trademark goods should not be permitted to enter commercial channels only after the removal of the trademark label on them unless special situation occurs. Where infringing characteristics cannot be removed customs shall destroy the goods.¹³⁴

This amendment brings China’s disposal rules for confiscated items into compliance with its obligations under TRIPS.¹³⁵ While

¹³² Sun, *supra* note 129 (this amendment was in response to 1996 measures from the National Copyright Administration in relation to copyright transfer; the amendment clears up confusion between its law and administrative measures to secure transfers).

¹³³ *The State Council Decided to Amend IPR Customs Protection Regulations*, INTELL. PROP. PROT. IN CHINA (Mar. 30, 2010), http://www.chinaipr.gov.cn/lawsarticle/laws/lawsar/others/201003/632083_1.html (explaining that five articles were amended: Article 11; Article 23; Article 24; Article 27; and Article 28).

¹³⁴ *Id.*

¹³⁵ Corr, *supra* note 128, at 2.

some believe this amendment will make it harder for customs officials to simply auction off goods, recent statistics show that seized goods are usually destroyed and are rarely released back into commerce.¹³⁶ Therefore, it is unclear how the amendment will accomplish the U.S.'s goal of better protection and enforcement of IPRs in China.

In addition, the Campaign, which ran until June 2011, revolved around the protection of trademark, copyright, patent, and new plant variety, including: Internet piracy of both music and movies; sale of pirated material; pirated software; trademark infringement in the area of mobile phones, auto parts, bulk commodity exports, and pharmaceuticals.¹³⁷ Led by Chinese Vice Premier Wang Qishan,¹³⁸ there was a heavy emphasis placed on holding local governments responsible for infringement within their municipality.¹³⁹ The Campaign occurred in three phases: mobilization (October 2010); implementation (November 2010 - February 2011); and acceptance and inspection (March - June 2011).¹⁴⁰ Furthermore, the Chinese government set forth six strategies for the Campaign: (1) strengthen the governance at the source of production; (2) reinforce market supervision; (3) strengthen IPR protection of international trade and over the Internet; (4) reinforce judicial enforcement; (5) promote the use of genuine software in governmental offices; and (6) educate its citizens about the importance of IPR protection.¹⁴¹

¹³⁶ *Id.*

¹³⁷ Ronald Kirk, *2011 Special 301 Report - Section II. Country Reports*, CONSULATE GENERAL OF THE U.S., http://hongkong.usconsulate.gov/uscn_t_ipr_2011050204.html (last visited Apr. 8, 2012).

¹³⁸ *Id.*

¹³⁹ *Id.* See also Brad Williams & Danielle Mihalkanin, *China's Special Campaign to Combat IPR Infringement*, CHINABUSINESSREVIEW.COM 42, 45 (Oct.-Dec. 2011), available at http://www.bakerbotts.com/file_upload/documents/ChinaBusinessReview_October-December2011.pdf (originally the Campaign was slated to last 6 months until March 2011, but the State Council extended the campaign until June 2011, effectively extending the "acceptance and inspection" period).

¹⁴⁰ Williams & Mihalkanin, *supra* note 139, at 43-44.

¹⁴¹ *Program for Special Campaign on Combating IPR Infringement and Manufacture and Sales of Counterfeiting and Shoddy Commodities*, INTELL. PROP.

A. *The Creation of a Separate Group for Enforcement*

To ensure proper implementation of the Campaign throughout the participating localities, the State Council created the Leading Group of the National Campaign (hereinafter Leading Group) to head the fight against IPR infringement.¹⁴² The office of the Leading Group is located in China's Ministry of Commerce, with localities setting up their own leading groups structured similarly to the Leading Group.¹⁴³ In addition, the Leading Group worked with authorities in each locality to create communication channels to enhance the flow of information between the national and local level, with the hope of making implementation more effective and efficient.¹⁴⁴ Furthermore, both the Leading Group and local leading groups collected statistical data to judge the effectiveness of the Campaign.¹⁴⁵ Finally, special hotlines at legal aid centers were available to answer questions relating to the Campaign, IPR infringement, complaints, and potential crimes.¹⁴⁶

B. *Campaign Timeline*

During the first phase – mobilization – provincial, municipal and central administrations in different regions created and submitted their plans for implementation to the Leading Group. During the second phase – implementation – plans created during the first phase were implemented in each locality by their respective authorities. At the time, the Leading Group supervised the implementation progress in different regions to assure compliance, while provincial administrators conducted spot checks in their respective localities to assure proper implementation.¹⁴⁷ Finally,

PROT. IN CHINA (Nov. 11, 2010), http://www.chinaipr.gov.cn/newsarticle/news/government/201011/976869_1.html.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Kirk, *supra* note 137.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

during the last phase - acceptance - departments in each participating region summarized their effectiveness of the program to the Leading Group, addressing any issues or lessons learned during the Campaign.¹⁴⁸ After all the results are calculated, the Leading Group will grant honorable titles and reward regional departments for an outstanding performance in implementing the Campaign.¹⁴⁹ The Leading Group will ultimately report the Campaign's results to China's State Council.¹⁵⁰ However, before we take a closer look at the true impact of the Campaign, we will first briefly discuss certain portions of China's legal structure and history to analyze whether these changes are short-lived or long-term resolutions.

V. AN OVERVIEW OF CHINA'S JUDICIAL AND LEGISLATIVE HISTORY

In China, the highest legislative powers rest in the hands of The National People's Congress and its executive body, the Standing Committee.¹⁵¹ Under the National People's Congress, there are three primary administrative bodies: (1) the State Council, which acts in an executive capacity; (2) the Supreme People's Procuratorate, which is the prosecutor and supervisor of the law; and (3) the Supreme People's Court, which is tasked with "interpret[ing] questions concerning specific application of laws and decrees in judicial proceedings."¹⁵² Furthermore, China's court structure is broken down into three categories: (1) basic, intermediate, and higher levels of the local people's courts; (2) special people's courts including military, railway transport courts, water transport courts, and others; and (3) the Supreme People's Court.¹⁵³

The basic local people's court is responsible for ordinary criminal and civil cases of first instances, while the intermediate local people's court handles appeals and protests, as well as cases

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ RONALD C. BROWN, UNDERSTANDING CHINESE COURTS AND LEGAL PROCESS: LAW WITH CHINESE CHARACTERISTICS 51 (1997).

¹⁵² *Id.* (quoting Organic Law, art. 33).

¹⁵³ *Id.*

transferred from the basic court and cases of “first instance.”¹⁵⁴ In addition, the intermediate local people’s court handles “cases of confirming patent rights of invention and cases handled by the Customs.”¹⁵⁵ Finally, the higher local people’s court is responsible for hearing all those cases transferred or assigned from either the basic or intermediate courts, as well as appeals and protests against any judgments or orders of those courts.¹⁵⁶

The Supreme People’s Court has jurisdiction over any cases “assigned by laws or which it deems it should try,” as well as appeals involving decisions made by any of the special courts of the high local people’s court.¹⁵⁷ In addition, the Supreme People’s Court answers questions of interpretation regarding the application of laws and decrees in specific cases.¹⁵⁸

A. *China's Undeveloped Legal System Leaves Much to be Desired*

As most of China’s legal profession was abolished at the beginning of the communist era, its current legal system is only thirty years old.¹⁵⁹ When the Chinese Communist Party gained control in 1949, the efforts of the previous political powers to develop IP laws quickly became a thing of the past.¹⁶⁰ While the 1950 Publishing Resolution provided authors a method of recovering money from infringing publishers with whom they were under contract with, the

¹⁵⁴ *Id.* app. Criminal Procedure Law of the People’s Republic of China at art.15 (the following criminal cases are those of “first instance” for the people’s intermediate court: “(1) counterrevolutionary cases; (2) ordinary criminal cases punishable by life imprisonment or the death penalty; and (3) criminal cases in which the offenders are foreigners or in which Chinese citizens have infringed upon the lawful rights of foreigners.”).

¹⁵⁵ *Id.* app Admin. Proc. Law at art. 14.

¹⁵⁶ *Id.* at 53.

¹⁵⁷ *Id.* app Organic Law at art. 32.

¹⁵⁸ *Id.* app Organic Law at art. 33.

¹⁵⁹ Kate Colpitts Hunter, *Here There Be Pirates: How China is Meeting its IP Enforcement Obligations Under TRIPS*, 8 SAN DIEGO INT’L L.J. 523, 530 (2006-2007).

¹⁶⁰ *Id.* (As the Communist party emphasized national control over personal rights, they quickly eliminated previous efforts to establish IP laws, eliminating trademark, copyright and patent laws made by the Nationalist Party during its control over China from 1911-1949.).

resolution failed to address infringement from third parties and generally provided little help to authors attempting to enforce their IPRs.¹⁶¹ In addition, the Anti-Rightist Movement and the Great Leap forward of 1958 ended high royalty payments and the Great Proletarian Cultural Revolution of 1966 effectively ended any form of royalty payments in China.¹⁶² Furthermore, many academics, writers and other creators of intellectual property were also imprisoned, tortured or even killed during the Cultural Revolution.¹⁶³ The first sign of change came in the late 1970s, where authors of various works were once again afforded limited IP rights.¹⁶⁴ Yet, the Communist Party's emphasis on national control over private ownership¹⁶⁵ fostered hostility towards the idea of individual rights, as such an interest was deemed "'incompatible with the Chinese practice of putting societal interests before those of individuals.'"¹⁶⁶ However, when Deng Xiaoping became leader it was clear to him that China's power rests in its economic strength.¹⁶⁷ As a result, a new emphasis was placed on improving China IPRs and joining the WTO, as China acceded several IP treaties and even enacted its own IPR legislation.¹⁶⁸

In 1990, the new Copyright Law of China was enacted, followed by the amendment of Patent laws in 1992 and Trademark Laws in 1993.¹⁶⁹ In addition, China also averted a 1992 trade crisis with the U.S. by signing the Memorandum of Understanding.¹⁷⁰ Furthermore, China also increased its participation in IPR

¹⁶¹ Marc H. Greenberg, *The Sly Rabbit and the Three C's: China, Copyright and Calligraphy*, 7 LOY. U. CHI. INT'L L. REV. 163, 176 (2010).

¹⁶² *Id.* (Mao Zedong launched these programs in order to quicken the implementation of state socialism in China).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Hunter, *supra* note 159, at 532.

¹⁶⁶ Greenberg, *supra* note 161, at 177 (quoting The Manifesto of the Communist Party); see also Hunter, *supra* note 159, at 531 (stating that "Confucius encouraged people to learn by copying and imitation, which is the antithesis of IP protection.").

¹⁶⁷ Hunter, *supra* note 159, at 532.

¹⁶⁸ *Id.*

¹⁶⁹ Wei Shi, *Globalization and Indigenization: Legal Transplant of a Universal TRIPS Regime in a Multicultural World*, 47 AM. BUS. L.J. 455, 500 (2010).

¹⁷⁰ Ryan P. Johnson, *Steal this Note: Proactive Intellectual Property Protection in the People's Republic of China*, 38 CONN. L. REV. 1005, 1013 (2006).

conventions and its cooperation with foreign nations and international organizations regarding IPR.¹⁷¹ Even with China's attempt to increase its protection for IP, many problems still loomed on the horizon in regards to its IPRs.¹⁷²

After USTR declared China a Priority Foreign Country in 1994, China and the U.S. reached another agreement in 1995, entitled the Agreement Regarding Intellectual Property Rights (hereinafter Agreement), mutually agreeing to provide training, information, and consultation on the best methods to implement an IPR system.¹⁷³ Unfortunately, for an Agreement once called "'the single most comprehensive and detailed [intellectual property] enforcement agreement the United States had ever concluded,'" its effects were short lived,¹⁷⁴ as China and the U.S. reached yet another agreement in 1996.¹⁷⁵ At that time, China had already closed over twenty-nine factories producing pirated compact discs and their corresponding distribution channels, as well as 5000 theaters that charged individuals to watch pirated movies.¹⁷⁶

¹⁷¹ Shi, *supra* note 169, at 500-01 (During the early 1990s, "China acceded to the Berne Convention for the Protection of Literary and Artistic Works in 1992, the Convention for the Protection of Procedures of Phonograms Against Unauthorized Duplication of Their Phonograms in 1993, the Patent Cooperation Treaty in 1994, and the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of this Registration of Marks in 1995, the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure in 1995 [In addition,] "China joined the Locarno Agreement on Establishing an International Classification for Industrial Designs in 1996 and the Strasbourg Agreement Concerning the International Patent Classification in 1997." *Id.* n.251. Furthermore, China also "enacted the Decision on IPR Protection in 1994, the Regulation on Customs Protection of Intellectual Property in July 1995, the Regulation on the Protection of New Plant Varieties in 1997, and the Regulation on the Protection of the Layout and Design of Integrated Circuits in 2001." *Id.*

¹⁷² Johnson, *supra* note 170, at 1013-14 (The USTR deemed China to be a Priority Foreign Country in 1991 and again in 1994).

¹⁷³ *Id.* at 1014.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

B. *China's Enforcement Mechanisms and Decentralized Government Present a Roadblock to the Level of IPRs Longed for by Developed Nations*

As previously mentioned, China's current judicial system is relatively new.¹⁷⁷ A dearth of experienced lawyers and judges, coupled with very little case law interpreting IP law, creates a lack of qualified individuals to interpret and enforce IPRs.¹⁷⁸ Furthermore, most lower court decisions go unpublished, creating an uncertainty about the enforceability of IPR and making it harder for IPR holders to challenge infringers.¹⁷⁹ In addition, China also faces uphill battles against widespread corruption through favoritism and protectionism among local municipalities.¹⁸⁰

Many governments in China depend on local businesses that focus on the production and sale of counterfeit goods as a source of economic income.¹⁸¹ By setting economic growth targets and rewarding localities that meet those targets with government subsidies, one can argue that China's national government contributes to corruption at the local level.¹⁸² Various local governments have created corporations, many of which are run by local government officials, to manage and sell counterfeit goods.¹⁸³ In addition, local officials are unable to do much as they are appointed and can just as easily be removed if they fail to follow the orders of

¹⁷⁷ See *supra* Part IV.B.

¹⁷⁸ Mark Liang, *A Three-Pronged Approach: How the United States can Use WTO Disclosure Requirements to Curb Intellectual Property Infringement in China*, 11 CHI. J. INT'L L. 285, 293 (2010) (stating "IP cases require an understanding of IP laws (which are perhaps not always intuitive), an understanding of economic market conditions affecting IP-protected goods and, in patent cases, an understanding of the relevant technology.").

¹⁷⁹ *Id.* at 293-94.

¹⁸⁰ *Id.* at 294-95.

¹⁸¹ *Id.* at 294.

¹⁸² Daniel Chow, *Anti-Counterfeiting Strategies of Multi-National Companies in China: How a Flawed Approach is Making Counterfeiting Worse*, 41 GEO. J. INT'L L. 749, 756 (2010) (It is believed that many sellers of pirated and counterfeit materials pay local taxes on such sales, allowing local governments to meet economic growth targets set by national authorities, which result in government subsidiaries if they are to meet those targets).

¹⁸³ *Id.* at 754-55.

local government and party leaders.¹⁸⁴ As one Chinese Customs official said in 2005, "we have to strike the right balance between enforcing anti-piracy and encouraging economic development."¹⁸⁵ Unfortunately, local governments are not given stricter guidelines or restrictions to discourage such activity, as evidenced by China's very broad IP legislation.¹⁸⁶ China's IP legislation contains many undefined terms, which necessarily allows local authorities to use their discretion and leeway when selectively interpreting the legislation to let infringers escape without punishment.¹⁸⁷

Likewise, the activities of the local government and administrations, such as the bodies responsible for handling infringement cases, are usually left unsupervised.¹⁸⁸ Government officials and members of the People's Liberation Army control many of the factories responsible for manufacturing counterfeit goods, essentially forcing local officials of lesser power to turn a blind eye to their illegal activities.¹⁸⁹ In addition, China's judicial system as well as

¹⁸⁴ *Id.* at 755.

¹⁸⁵ Hunter, *supra* note 159, at 531 & n.57 (citing Anthony Lawrence, *Pirates of the PRD*, SOUTH CHINA MORNING POST, Sept. 16, 2005, at 18 (quoting Pang Jingyue, director of the legal department of Shenzhen Customs)).

¹⁸⁶ See Hunter, *supra* note 159, at 533-541; see generally, Rezler, *supra* note 10.

¹⁸⁷ See Rezler, *supra* note 10, at 254-55. For example, a copyrighted work may be exploited without the owner's permission as long as the title and author of the original work are attributed to the new work, and no other of the owner's rights are "prejudiced" in the process. However, the statute does not provide a means of determining whether the owner has been "prejudiced." *Id.* at 213-14. See also *Copyright Law of the People's Republic of China*, WORLD INTEL. PROP. ORG., art. 28 (promulgated by the Standing Comm. of the Nat'l People's Cong., Feb. 26, 2010, effective Apr. 1, 2010), http://www.wipo.int/wipolex/en/text.jsp?file_id=186569. (In addition, unlike U.S. copyright law which imposes a statutory amount for damages, China provides remedies such as "ceasing the infringement, eliminating the bad effects of the act, making an apology or paying compensation for damages; where public rights and interests are impaired, the administrative department for copyright may order the person to discontinue the infringement, confiscate his unlawful gains, confiscate or destroy the copies produced through infringement, and may also impose a fine; where the circumstances are serious, the said department may, in addition, confiscate the material, tools and instruments mainly used to produce copies through infringement; and where a crime is constituted, criminal liabilities shall be investigated in accordance with the law."). *Id.* at art. 48.

¹⁸⁸ See Rezler, *supra* note 10, at 255-56.

¹⁸⁹ Hunter, *supra* note 159, at 531.

many of its administrative bodies, such as the General Administration of Customs, the State Intellectual Property Office (hereinafter SIPO), the State Administration for Industry and Commerce, and the Technical Supervision Bureau, lack qualified personnel and uniformity between the agencies.¹⁹⁰

Furthermore, the structure of China's enforcement methods (administrative enforcement, criminal prosecution, customs enforcement, and civil litigation) has come under scrutiny.¹⁹¹ While administrative enforcement may be cost effective and quick, there are many limitations.¹⁹² First, no monetary awards are available; only injunctive relief, seizure of counterfeit items, and small fines.¹⁹³ Monetary awards may make infringers more hesitant to commit infringement as this can directly impact their economic standing, whereas seizing counterfeit items and issuing small fines may not be as strong of deterrents.¹⁹⁴ Even in this inadequate structure, between 2005 and 2009, nearly 800 administrative actions were brought.¹⁹⁵ However, fewer than half of those actions resulted in fines, with the average fine being \$2500.¹⁹⁶ Furthermore, officials in charge of the hearings have very limited investigatory powers, leaving individuals with the expensive and tedious task of conducting the entire investigation themselves.¹⁹⁷ In addition, those who are successful complain that the penalties available through administrative action are ineffective because many IPR infringers see administrative action as simply a cost of business.¹⁹⁸

Under Chinese law, criminal prosecution may be initiated against individuals for certain acts of trademark counterfeiting,

¹⁹⁰ Liang, *supra* note 178, at 294 (For example, most lower court decisions are not published, creating a lack of transparency and making it more difficult for the losing party to appeal as they are unsure of why they lost. This lack of disclosure also contributes to uncertainty regarding the interpretation of IP laws and what rights and restrictions are actually afforded.).

¹⁹¹ USITC, *supra* note 1, at 1-8.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 1-9.

¹⁹⁶ *Id.*

¹⁹⁷ USITC, *supra* note 1, at 1-9.

¹⁹⁸ *Id.*

copyright piracy, and trade secret theft.¹⁹⁹ Much like the guidelines for local government enforcement, rules for criminal prosecution are unclear, leading to inconsistency with enforcement.²⁰⁰ Moreover, the high thresholds for an act to be considered criminal – counterfeit goods must be worth more than \$7497, illegal gains from such activities must be more than \$4498, or distribution of 500 or more unauthorized copies²⁰¹ – leave many small, yet still important, acts of infringement unpunished.²⁰² While infringement cases in China can be initiated by police or through private-enforcement, most only begin after being transferred from an administrative agency. However, administrative agencies are reluctant to transfer cases for criminal prosecution because they can only keep a portion of fines issued and cannot do so through criminal prosecution.²⁰³ Geography also plays a role, as the willingness to enforce criminal punishments varies based on the location.²⁰⁴

In regard to customs enforcement in China, the General Administration of Customs (hereinafter GAC) focuses on preventing counterfeit items from being exported.²⁰⁵ IPR owners can either alert the GAC of known shipments containing counterfeit items or register their IP with the GAC for a small fee.²⁰⁶ Regardless, there is a cost of enforcement to IPR holders because a bond must be placed to detain any shipments they report to the GAC as containing counterfeit

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 1-10.

²⁰¹ *Id.* (To clarify, for copyright infringement to be considered criminal, any of the three mentioned thresholds may be met. However, in regard to trademark infringement, either of the first two thresholds may be met to bring criminal action.).

²⁰² *See generally id.* (While one could argue that small acts of infringement are not important, as there is no serious monetary harm from copying one image, it is still the case that copyright infringement should not be permissible to certain dollar values. As an individual right, copyright protection should not discriminate simply because your copyright is less valuable to someone else. Everyone should have equal opportunity to protect his or her IP, regardless of its value.).

²⁰³ *Id.* (“For example, less than 1 percent of trademark cases were transferred from administrative agencies to the criminal system each year during 2005-07.”).

²⁰⁴ *Id.* at 1-11 (in addition, most of the cases brought for criminal prosecution are located in the coastal regions (citing Dimitrov, *Piracy and State*, 2009, 158; industry officials, interviews by USITC staff, Hong Kong, Sept. 21, 2010).

²⁰⁵ *Id.* at 1-14.

²⁰⁶ *Id.*

items.²⁰⁷ However, what about those who cannot afford the cost of the bond? Should the GAC not provide support to those who have registered with them at no additional cost? Furthermore, should the GAC not screen ships when they are entering or use tips to detain or search certain ships as they enter customs areas? Even though the GAC encourages registration and assistance from IPR holders in stopping counterfeit items, customs enforcement is still viewed by IP owners as an ineffective solution to combating IPR infringement as only a small percentage of infringing goods can be seized before entering the stream of commerce.²⁰⁸

Finally, civil litigation allows both Chinese and foreign holders of IPRs to enforce their rights through the Chinese court system. However, there are many procedural difficulties with China's litigation system for IPRs, including a very limited discovery process and the requirement that foreign IPR holders have all evidence notarized where it was originally located and verified by the Chinese embassy.²⁰⁹ Despite over 30,000 IPR infringement cases being filed in 2009, civil litigation is seen as less effective than what developed nations hoped for in regards to IPRs. For example, damages are often calculated based upon the IPR holder's lost profits or the value of the unjust enrichment of the infringer; proving either becomes quite difficult due to the limited discovery process.²¹⁰ Furthermore, courts can issue preliminary and permanent injunctions; however, the courts rarely ever do so.²¹¹

²⁰⁷ *Id.* (this becomes a problem especially for smaller companies).

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 1-12, 1-13 (as the USITC notes, "there is no robust system for evidentiary discovery; litigants cannot require the other side to produce evidence in its possession. The lack of discovery poses substantial problems for IPR holders...without the ability to compel a defendant to disclose information about its production processes, method patents...are virtually impossible to enforce." Furthermore, "the lack of discovery is exacerbated by the Chinese courts' lack of power to hold uncooperative defendants in contempt or, where such power exists, the refusal to exercise it...[leading to] serious concern that Chinese defendants, particularly smaller defendants, can commit perjury and falsify records without risk of punishment.").

²¹⁰ *Id.* (As previously mentioned, "there is no robust system for evidentiary discovery; litigants cannot require the other side to produce evidence in its possession.").

Id. at 1-12.

²¹¹ *Id.* at 1-13.

VI. A BREAKTHROUGH AT LAST? AN EXAMINATION OF CHINA'S CAMPAIGN

In November 2010, the State Council issued the “Notice on Further Strengthening the Management of the Software Assets of Central Administrative Entities and Public Institutions” (hereinafter Legalized Software Act), marking the first time in China’s history the central government has been required to budget money specifically for the purchase of legitimate software.²¹² As a result of the Legalized Software Act, the PRC reports that all of its 135 central governmental agencies spent \$22.1 million (¥140.9 million) for 176,763 copies of legitimate software.²¹³ Yet, despite China’s assertion regarding the effectiveness of the Legalized Software Act, the software industry claims to have seen no changes in legitimate software sales or software-related enforcement in China.²¹⁴

In December 2010, China's Ministry of Culture took the first great stride in its fight against digital music piracy by sending out notifications to local provinces listing 237 music websites containing illegal works and asking these provinces to shut down or clear infringing works from the websites.²¹⁵ One-third of the websites listed were almost immediately suspended and the Ministry of Culture gave the remaining websites until January 10, 2011 to comply with the notice to remove content infringing on others’ copyright or violating the laws of China.²¹⁶ In a follow-up released February 2011, enforcement agencies were asked to investigate and shut down any

²¹² Kirk, *supra* note 137.

²¹³ Williams & Mihalkanin, *supra* note 139, at 45.

²¹⁴ Kirk, *supra* note 137 (The software industry maintains that Chinese’s efforts to purchase legal software have been focused on low-end and pirated domestic software).

²¹⁵ *China's Ministry of Culture to Clear Illegal Music Websites*, CHINA TECH NEWS (Dec. 31, 2010), <http://www.chinatechnews.com/2010/12/31/12944-chinas-ministry-of-culture-to-clear-illegal-music-websites> (one-third of the websites listed were almost immediately suspended, and they rest of the websites were given until January 10, 2011 to be completed, the same month China released its list of hundreds of music songs that had to be taken down from websites).

²¹⁶ *Id.* (In addition, these websites will be required to acquire licenses and register with the proper administrations in China to avoid being shut down.).

of the original 237 websites reported that had not yet removed the illegal content as originally requested.²¹⁷ Furthermore, in January 2011 the Ministry of Culture provided notices to various websites of over 100 illegal songs that had to be removed as they were not authorized or cleared by the Ministry of Culture.²¹⁸ At the same time, the Supreme People's Court, the Supreme People's Procuratorate, and the Ministry of Public Security issued a joint document modifying the proof requirement in cases involving multiple copies of infringing works.²¹⁹

Change is even becoming apparent for Baidu. On December 9, 2010, more than 100 writers and publishers jointly filed a lawsuit against Baidu with the hopes of shutting down Baidu's illegal music library.²²⁰ Instead of fighting the claims in court,²²¹ Baidu negotiated with book publishers to charge for books offered on their online bookstore, and to share income from book sales and advertisements with the publishers.²²² In addition to creating a paying system for copyright work, Baidu has also deleted all unauthorized literary works from their e-books collection.²²³ This is a monumental step because Baidu's free online library of books contained over nine million documents as of October 2010, and only required the use of virtual money earned by sharing or submitting other documents to the Baidu e-books collection.²²⁴

²¹⁷ *The Ministry of Culture Investigated Music Websites*, CHINA INTELL. PROP. (Mar. 24, 2011), <http://www.chinaipmagazine.com/en/news-show.asp?id=2786>.

²¹⁸ Jia Xu, *Ministry of Culture Removes 100 Songs from Web*, CHINA DAILY, http://www.chinadaily.com.cn/china/2011-01/11/content_11826643.htm (last updated Jan. 1, 2011, 11:22) (the list included both domestic and foreign artists, including Eminem, Bruno Mars, and Jay Zhou, and were singled out as they are not registered with the China Ministry of Culture).

²¹⁹ Kirk, *supra* note 137 (the name of the document is entitled "Opinion on Handling Several Issues in IP Criminal Cases").

²²⁰ Cai Muyuan, *Baidu may be Sued for Copyright Infringement*, CHINA DAILY, http://www.chinadaily.com.cn/business/2010-12/09/content_11679276.htm (last updated Dec. 9, 2010, 17:57).

²²¹ *Id.*

²²² *Id.*

²²³ *Authors Score Victory as Baidu Deletes Unauthorized Works*, PEOPLE'S DAILY ONLINE (Apr. 1, 2011, 16:15), <http://english.peopledaily.com.cn/90001/98649/7338013.html>.

²²⁴ *Id.*

Baidu did more than only license its online book catalog, leading many to believe that China is actually tightening its grasp around digital piracy.²²⁵ Baidu also implemented many changes to its music search engine. Most of the music on Baidu is not only licensed, but also operates through a Flash player, helping promote licensed streaming, and not the illegal downloading of copyrighted material.²²⁶ In its biggest move yet to legitimize its music search engine, Baidu has signed a joint venture agreement with three major U.S. record labels – Universal Music, Warner Music, and Sony Music – for access to their catalogs and new releases for streaming purposes, with revenue being generated on a per-play and per-download basis.²²⁷ This is a major step for China, as record companies earned only \$64 million in revenues from China in 2010, as compared to \$4.2 billion from the U.S. market.²²⁸ The International Federation of Phonographic Records Chief Executive, Frances Moores, views this as “an important step forward for Baidu now to be working with three of the major companies on a licensed model in China.”²²⁹ In addition, Baidu has now launched Ting, a social music platform, with the hopes that it will replace its search engine platform. Baidu has also added incentives for individuals to pay for legitimate copies of music,²³⁰ and its own video site, Qiyi.com, containing only licensed movies and television shows.²³¹

Baidu is not the only provider of pirated digital media initiating reform actions; Youku, Tudou, and Ku6, China's three biggest video websites, have already deleted infringing American

²²⁵ Steven Millward, *Digital Piracy Clampdown in China? This Time it's Actually Happening*, CNET ASIA (Jan. 12, 2011), <http://asia.cnet.com/blogs/sinobytes/post.htm?id=63022498>.

²²⁶ *Id.*

²²⁷ Melanie Lee, *Baidu in Landmark Deal with Record Labels*, REUTERS (Jul. 19, 2011, 7:14 PM), <http://www.reuters.com/article/2011/07/19/us-baidu-music-idUSTRE76I0WN20110719>.

²²⁸ *Id.*

²²⁹ *See id.*; *see generally* IFPI, <http://www.ifpi.org/> (last visited Apr. 10, 2012) (the IFPI represents the recording industry worldwide with around 1400 members in 66 countries and affiliate associations in 45 countries).

²³⁰ Lee, *supra* note 227.

²³¹ Millward, *supra* note 225 (Baidu's new video site is comparable to the website Hulu.com).

and Chinese TV shows and movies.²³² The peer-to-peer network PPSstream has also deleted a large amount of infringing material.²³³ In January 2011, VeryCD, one of China's largest illegal content providers, disabled all links to infringing music and movie content.²³⁴ In addition, new services are being created to provide legal movies and television shows for the fraction of the cost of a pirated DVD.²³⁵

Furthermore, more sentences have been by handed down Chinese Courts. For example, in ten cases of IPR violations, eighteen people received sentences ranging from six months to six years in jail.²³⁶ In addition, illegal music websites Qishi.com and 5754.com were shut down and their operators were subjected to fines and criminal sanctions.²³⁷ However, not all the results have been favorable.

Shortly after the conclusion of the Campaign, 22 full-scale counterfeit Apple stores were found in Kunming, a remote city in China.²³⁸ Even more startling is that authorities in Kunming did not know of any counterfeit stores until pictures of one store surfaced in an Internet blog posted by an American blogger.²³⁹ As described in

²³² *Id.* (popular American television shows such as Desperate Housewives have vanished from online video sites).

²³³ *Id.*

²³⁴ Williams & Mihalkanin, *supra* note 139.

²³⁵ Millward, *supra* note 225 (noting YouKu's premier service offers free and pay-per-view movies for as little as \$3 USD); *see also* Lee, *supra* note 227 (in addition to Youku, Tudou and Ku6 Media are also attempting to buy and stream legitimate content online).

²³⁶ *Chinese Courts Give Tough Sentence for IPR Infringements*, XINHUANET (July 29, 2011, 10:18:24), http://news.xinhuanet.com/english2010/china/2011-07/29/c_131017329.htm (Eighteen people were convicted of trying to sell and/or print illegal textbooks, movie copies or discs containing obscene content. In addition, one individual named Zhang Xinfeng was sentenced to five years in jail and a 100,000 yuan fine after being found guilty of selling more than 30,000 illegal textbooks to twenty-five schools in nineteen Tibetan cities and countries; Zhang Lin and Li Chunlei were found guilty of making 90,000 illegal copies of the movie "Let the Bullets Fly" by Chinese director Jiannng Wen.).

²³⁷ Williams & Mihalkanin, *supra* note 139 (one of Qishi.com's operators received a five year imprisonment and a fine of \$234,750.00 (¥1.5 million yen)).

²³⁸ *Chinese Authorities Find 22 Fake Apple Stores*, BBC NEWS (Aug. 12, 2011), <http://www.bbc.co.uk/news/technology-14503724> [hereinafter *Fake Apple Stores*].

²³⁹ *Id.* (noting "[a]uthorities in Kunming began searching out the copycats after pictures of one convincing replica were circulated on the web."); *see also* Jeffrey

the blog, it was a “beautiful rip-off” of an authentic Apple store, ranging from having the precise store décor to the employees wearing the same uniforms.²⁴⁰ Upon investigation, Chinese officials notified the stores to cease the use of Apple’s logos.²⁴¹ However, the first unauthorized Apple store was actually not shut down, as Chinese officials determined the store had a license to trade and sold only genuine Apple products.²⁴² However, it is unclear why the store was not shut down since they were in fact selling unauthorized Apple products.²⁴³ Considering these stores were found immediately after the Campaign, China should have approached the situation in a stricter manner, such as pursuing the source of the unauthorized Apple products. In addition, the effectiveness of the Campaign is under question because a walk down any commercial street in Shanghai will reveal an abundance of shops still selling counterfeit merchandise.²⁴⁴

VII. LONG-TERM IPR CAMPAIGN AND FOREIGN ASSISTANCE WILL HELP FOSTER THE IP CULTURE DESIRED BY DEVELOPED NATIONS IN CHINA

While there are many issues surrounding China's weak IPR, a decentralized government²⁴⁵ and a lack of qualified individuals²⁴⁶

Boxer, *Mission Accomplished? Not So Fast, China*, CAMPUS PROGRESS (July 22, 2011)

http://www.campusprogress.org/articles/mission_accomplished_not_so_fast_china/# (referencing an American blogger named BirdAbroad living in Kunming discovered three stores near her home, all within a ten minute walk of each other; she posted the story on her blog and Apple confirmed that the stores were “unauthorized.”).

²⁴⁰ *Fake Apple Stores*, *supra* note 238.

²⁴¹ *Id.*

²⁴² *China Officials Close Fake Apple Stores in Kunming City*, BBC NEWS (July 25, 2011), <http://www.bbc.co.uk/news/technology-14273444>.

²⁴³ *Apple Retail Store List*, APPLE, <http://www.apple.com/retail/storelist> (last visited Apr. 10, 2012) (listing only five authorized Apple stores in China; three in Shanghai and two in Beijing).

²⁴⁴ Elliot Papageorgiou, *China's Anti-Piracy Measures 'Inconsistent'*, *Lawyer Argues*, BBC NEWS (Apr. 26, 2011, 3:27 ET), <http://www.bbc.co.uk/news/13185241>.

²⁴⁵ *Supra* Part IV.A. & B.

²⁴⁶ *Supra* Part IV.B.

appear to be the biggest contributors. Furthermore, China's amendments to the People's Republic of China's Copyright Law and Customs IPR Regulation do nothing more than bring its laws up to compliance with the WTO's ruling; the effectiveness of implementing and enforcing such amendments will be the true test. In order to reach the levels of protection for IPRs requested by other nations, China must consider restructuring its legal system to protect IPRs and implement a long term program aimed at educating citizens about the importance of IPRs, as well as the possible consequences to both infringers and holders of IPRs that occur when those rights are infringed. Moreover, other developed nations that want China to increase its enforcement of IPRs can lend assistance during the entire process. By doing so, developed nations would have the opportunity for both a first-hand look at the effectiveness of the improvements, as well as to gather feedback from China's citizens. Thereafter, they can use such feedback to tailor their assistance to help China develop a Campaign about IPRs likely to have the greatest impact. Finally, China can also work closely with IPR holders, such as musicians, to teach fans the importance of IPR.

A. A Long-Term Centralized Plan of Attack

It can be argued that China's Campaign failed to provide any set guidelines to fight IP infringement by not creating clearer objectives, as the majority of the Campaign goals and focal points are very broad, mostly asking different agencies and localities to "intensify quality supervision," "reinforce market inspection," and "fight against imported and exported counterfeiting and shoddy commodities."²⁴⁷ In addition, China's State Council created the Leading Group to guarantee the implementation of the program and for creating other leading groups within each locality to implement and supervise the effectiveness of the Campaign in their respective localities.²⁴⁸ However, in a country where corruption and favoritism are prevalent among local governments, it is unclear why China

²⁴⁷ *Supra* Part III.

²⁴⁸ *Supra* Part III.B.

would allow those same local governments such great control over a Campaign with such vague requirements.

The structure of the Campaign would only further contribute to the possibility of favoritism if, for example, one locality decides to "reinforce market inspections" differently than another locality, if it would be detrimental to their local economy. Furthermore, with no set guidelines in place, especially in regards to "intensifying criminal and judicial crackdown," China is not chipping away at the different levels of IPR enforcement between different localities; it has only added confusion to an already unclear area of its law. As discussed, a national program with tailored benchmarks for each locality - depending on each locality's history with counterfeit items and troubles with IPR protection and enforcement - in addition to cohesive Campaign materials to deliver a uniform message, may be helpful in curbing IPR infringement in China.

In regard to national objectives, China could have set an "acceptable" maximum percentage of IP infringement nationwide. Next, as it may be unfair to require all localities to drop below the nationwide percentage, since each may have different levels of infringement and different issues with infringement, it may be easier to create specific target percentages for each locality based on the locality's history of infringement, which would result in the national level desired. In essence, the State Council would be dividing the national requirement over all the localities by creating different levels for each based upon their past history with infringement. In addition, instead of having local leading groups implementing the program and reporting the results back to the National Leading Group, the two groups could work together to best determine how to implement and enforce the Campaign; this would encourage coordination between the national and local agencies in IP related matters. Moreover, a national campaign targeted at normalizing the notion of private IPR could make it more socially acceptable, and thus more likely to be obeyed.²⁴⁹

²⁴⁹ Greenberg, *supra* note 161, at 183 - 84 (discussing different approaches to enforcement, Greenberg presents research that "most people obey the law most of the time because they think it is the right thing to do").

B. Other Developed Nations Should Assist China with Implementation of the Campaign

Other member countries of the WTO, including the U.S., could provide assistance to China with developing and enforcing the Campaign. For example, the U.S. could send officials – such as members of the Copyright or Patent and Trademark Office, judges and other distinguished members of the IP community – to not only assist with planning the Campaign, but more importantly, to provide guidance, experience, and training on how to properly handle IPR violations as they surface. U.S. Customs officials could also be sent to China to provide assistance to businesses and Chinese Customs officials, sharing ways in which they can more easily and effectively spot counterfeit goods and the appropriate measures to take when counterfeit items are found.²⁵⁰ Such action would not only be low cost, but could also serve as a motivating factor for China, since it would be helping, rather than criticizing them for their failures. In fact, this would not be the first time that the U.S. and China have cooperated to enforce IPR; in 2008, the U.S. Federal Bureau of Investigation and China's Ministry of Public Security worked together to investigate and convict a criminal organization for pirating nearly identical copies of Microsoft products.²⁵¹

While one can argue that helping China establish its judiciary will be difficult because the laws vary, assistance from developed countries will show a willingness to help China cure a problem that

²⁵⁰ While there may be no established proof that American citizens may be able to better spot counterfeit items, the familiarity many Americans have with different products in the U.S. market can lead one to believe that they may be able to better tell the differences between authentic and illegal items. This view is expressed by the author of the BirdAbroad blog who was the first to find the unauthorized Apple stores in Kunming. Jess, *Are You Listening, Steve Jobs?*, BIRDAABROAD (July 20, 2011), <http://birdabroad.wordpress.com/2011/07/20/are-you-listening-steve-jobs/> (As the author notes, “so when we strolled down a street a few blocks from our house a couple weeks ago, I was only sort of surprised to see this new place, one that any American of my generation can probably recognize instantaneously.”).

²⁵¹ USITC, *supra* note 1, at 3-6.

has been ongoing for the past twenty years.²⁵² With an understanding on how to properly adjudicate IPR infringement cases in both an efficient and effective manner, China's judiciary can begin to take on more cases, leading to a developed legal system with case law to help both possible infringers and IPR holders understand what they can and cannot do with IP.

C. Cooperation with IPR Holders Will Help Promote Enforcement

In addition to working with other WTO member countries, China can also work directly with IPR holders. Currently, artists in China have been successful in fostering a culture of fans that "accept, observe and even help with enforcement of the copyright rights of the bands."²⁵³ To do so, artists have allowed their live performances to be recorded and even aided their fans in sharing and trading them; in exchange, fans are asked to not infringe the band's commercially released music and not profit from any live performances recorded.²⁵⁴ China can work directly with IPR holders, such as performing musicians and recording companies, to implement similar programs. Also, they can establish a centralized website and government organization to regulate and facilitate the trading of live recordings, which can help create a more centralized government. While artists may be hesitant to allow individuals to record their performances, a program such as this can help break the negative stigmas about recording companies contributing to IPR infringement.²⁵⁵ The goal would be to create a society where the norm is to respect IPRs and the rights of individuals. As a result, this would provide greater motivation for authors to continue to create, and in turn, would provide society the ability to further derive the benefits acquired through others' creations.

²⁵² Liang, *supra* note 178, at 306 (arguing that "creating a competent judiciary is a decades-long process...having US representatives provide pointers will not perceptibly speed up the process.").

²⁵³ Greenberg, *supra* note 161, at 185.

²⁵⁴ *Id.* at 185-86.

²⁵⁵ *Id.* (arguing that fans typically engage in downloading illegal music because of profiting music companies).

D. Other Positive Effects from Stronger Protection of IPRs in China

If China is able to further increase its protection and enforcement measures, and thereby decrease the amount of IPR infringement claims to levels that foreign companies are more comfortable with, both their legal infrastructure and economy stand to grow tremendously. It is well documented that high infringement rates detract companies from engaging in business, thus hindering innovation and possible economic growth. Because of the stronger and clearer laws relating to IPRs, it is likely that foreign companies will conduct more of its own business in China, helping bolster China's economy.²⁵⁶

Furthermore, China's relationships with other foreign nations stand to improve. While some may argue that this is less of a relevant point, given China's beliefs in sovereignty, recent actions by its government would suggest otherwise. Speaking at the CEO summit of the Asia-Pacific Economic Cooperation, Chinese President Hu Jintao delivered a speech entitled "Strengthening Confidence in Cooperation and Revive the World Economy," indicating China's desire to increase economic growth and stability both within China and beyond.²⁵⁷ President Jintao is calling on both developed and developing countries to work together in order to achieve "balanced, inclusive, sustainable, innovative and secure growth of the world economy."²⁵⁸ In making his proposition, he set forth four areas of interest for China, which include: "[(1)] deepen economic structural reform and improve business and investment environment; (2)] grow a green economy and promote the conservation culture; (3)] step up protection of IPRs and make China a country driven by innovation; and (4)] open wider to the outside world and take an active part in global economic governance and regional

²⁵⁶ See Patricia L. Judd, *Toward a TRIPS Truce*, 32 MICH. J. INT'L L. 613, 623-626.

²⁵⁷ President H.E. Hu Jintao, *Strengthen Confidence in Cooperation and Revive World Economy* (Nov. 13, 2009), available at <http://www.fmprc.gov.cn/eng/wjdt/zyjh/t627684.htm>.

²⁵⁸ Wang Shanshan, *Chinese President Addressing APEC CEO Summit: Work Together to Shape Future*, CRIENGLISH.COM (Nov. 14, 2011, 09:14:06), <http://english.cri.cn/7146/2011/11/14/2702s667069.htm>.

cooperation.”²⁵⁹ In setting forth these points of interest, President Jinato touched on intensifying economic and technical cooperation, and reducing man-made barriers to technology transfer in the hope of narrowing the technology gap. He stated, “we should speed up scientific and technological innovation and industrial upgrading . . . and rely on scientific and technological advancements to build up the internal dynamism of the world economy.”²⁶⁰ While his comments do not specifically denote that China is willing to be more influenced by foreign nations, his goal of increasing the global economic growth, as well as his statement that “it was incumbent upon developed nations to help developing members gain access to the capital and technology needed for the transformation of economic development patterns, thus contributing a balanced and orderly development of the world economy,”²⁶¹ indicate otherwise. It is generally understood that stronger IPRs can lead to increased economic growth, and as such, a willingness on China’s part to receive outside assistance and cooperate with developed nations to increase its IPRs, falls in line with its goals of increasing its own economic growth, and reviving the world’s economy.

²⁵⁹ *Id.*

²⁶⁰ President H.E. Hu Jintao, *supra* note 257.

²⁶¹ *Id.*

