

TAMING THE COUNTERFEIT DRAGON: THE WTO, TRIPS AND CHINESE AMENDMENTS TO INTELLECTUAL PROPERTY LAWS

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INTRODUCTION

China¹ was formally admitted as a member of the World Trade Organization (WTO) on December 1, 2001.² The announcement of China as a full trading partner ended fifteen years of contentious political wrangling and intense diplomatic negotiations.³ Proponents in favor of Chinese membership cited the enormous potential benefit of having the nation as an economic trading partner.⁴ Critics of the proposed accession were equally vociferous, pointing to China's poor enforcement of intellectual property (IP) rights and failures in controlling domestic counterfeiting as reasons for opposition.⁵ Ultimately, the decision to allow the Asian nation into the economic supergroup turned on the promise of the Chinese government to bring its existing IP provisions into closer alignment with WTO laws (articulated in the TRIPS agreement) and to take stronger measures to deter and punish domestic counterfeiting.⁶

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¹ "China" refers to the People's Republic of China (P.R.C.), excluding Hong Kong. Despite Hong Kong's return to Chinese rule in 1997, China's intellectual property laws will not extend to Hong Kong until 2047. Tom Hope, *Agreement on IP Regime for Hong Kong Post 1997*, IP ASIA, Feb. 1996, at 24.

² China actually joined the WTO on November 11, 2001, but was not formally admitted until December 1, 2001. Brendan Pearson, *EU Isolated in Trade Talks*, AUSTIN FIN. REV., Nov. 13, 2001, available at 2001 WL 27350099.

³ Indira A.R. Lakshmanan, *Along with Opportunities Come Tremendous Risks for China*, BOSTON GLOBE, Nov. 11, 2001, available at 2001 WL 3961236.

⁴ Proponents touted China's enormous population as a main reason for opening up trade to the Asian nation. *U.S. China Trade Relation: Hearing on the Renewal of MFN Status for China Before the House Ways and Means Trade Subcommittee*, 104th Congress (June 17, 1997) (statement of U.S. Trade Representative Charlene Barshefsky), available at 1997 WL 11233854.

⁵ Joseph Kahn & Helen Cooper, *China Plans to Cut Tariffs, End Quotas in Bid to Join Trade Group*, WALL ST. J., Nov. 20, 1995, at A10.

⁶ *Id.* at A12.

The piracy⁷ problem in China currently affects international and domestic businesses in all areas of consumer goods such as automotive parts, medicinal products and foodstuffs.⁸ While these areas deserve thorough discussion, the principle concern of this Note is the illegal piracy of intellectual property, including trademark, patent and copyright infringement. More specifically, this Note addresses the historical obstacles faced by the Chinese, the nature and effects of the counterfeiting problem and recent changes in national IP laws made to bring China in accordance with the TRIPS agreement.

Finally, this Note will summarize various predictions on the effects of China's WTO accession (and TRIPS compliance) and offer additional changes needed to mitigate the counterfeiting menace. This Note first recommends that China should increase penalties for IP infringement. Second, the burden on prosecutors trying IP cases should be decreased by lessening the evidentiary standard and lowering the dollar amount threshold required to bring "serious" charges against counterfeiters. Finally, China should provide better education for Chinese legal professionals in the area of IP enforcement and offer incentives to attract more people into the legal profession.

I. HISTORICAL OBSTACLES TO COMBATING CHINESE COUNTERFEITING

A. Chinese Cultural Conflicts

The concept of intellectual property rights is relatively recent in Chinese culture.⁹ Historically, China has recognized personal property and accorded its holders legal rights to buy, sell or trade it as a commodity.¹⁰ However, neither Imperial China, nor the P.R.C. throughout most of the 1900s, recognized such a parallel right for the producers of intellectual endeavors.¹¹ In fact, key dimensions of Imperial Chinese culture were opposed to the

⁷ In this Note, piracy and counterfeiting are used synonymously. Piracy is defined as the illegal theft, manufacture, copying and selling of high-tech products. Edward Iwata, *Increase in Software Piracy Could Blight Financial Future*, USA TODAY, Aug. 1, 2001, available at 2001 WL 5468158.

⁸ As of 2000, China ranked as the world's number one counterfeiter, with the amount of faked goods sold by Chinese pirates totaling over 16 billion dollars. Miriam Donohoe, *China Faces Up to its Counterfeiters*, IRISH TIMES, June 29, 2001, at 52, available at 2001 WL 23509594.

⁹ Julia Cheng, *China's Copyright System: Rising to the Spirit of TRIPS Requires an Internal Focus and WTO Membership*, 21 FORDHAM INT'L L.J. 1941, 1952 (1998).

¹⁰ See *id.*

¹¹ See *id.*

private appropriation of ideas because the government was often concerned with defining the acceptable realm of expression and facilitating access to ideas as a way of connecting ordinary citizens with the traditions of the Empire.¹²

Chinese culture was dominated by Confucian principles from about 100 B.C. until A.D. 1911.¹³ Confucian idealism emphasized the good of society over the pursuit of individual reward.¹⁴ Additionally, the belief that human beings were interconnected, and that previous generations called "Ancients" had discerned the essence of human understanding, created an emphasis on disseminating the written word.¹⁵ Thus, copying was a practice widely encouraged by Imperial rulers and it did not have the negative connotation as in the West.¹⁶

When the Maoists came to power in China, they reaffirmed many of these Confucian principles.¹⁷ First, like Confucianism, Maoist philosophy focused on the good of society over individual moral development.¹⁸ The Maoists regarded the legal system as frustrating this end because of its focus on individual rights.¹⁹ Consequently, little emphasis was placed on legal education and the adjudication of disputes.²⁰ Second, the Maoists continued the tradition that copying was a highly honored practice because they wanted ordinary people to have access to creative works of art.²¹ Finally, the Maoists outlawed the private acquisition of property because traditional Marxism considered the renunciation of private property as essential to the promotion of economic development.²² Consequently, the concept of intellectual property, with rights exclusive for authors or inventors, and the creation of

¹² William P. Alford, *GATT Intellectual Property, Trade and Taiwan: A GATT-Fly's View*, 1992 COLUM. BUS. L. REV. 97, 104 (1992).

¹³ See Cheng, *supra* note 9, at 1979.

¹⁴ See *id.* at 1979-80.

¹⁵ See *id.* at n.278.

¹⁶ *Id.* (discussing Confucius' emphasis on the need to interact with the past to promote individual moral and collective social development).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Glenn R. Butterton, *Pirates, Dragons and U.S. Intellectual Property Rights in China: Problems and Prospects of Chinese Enforcement*, 38 ARIZ. L. REV. 1081, 1089 (1996).

²¹ See Mao Tse-tung, *Talks at the Yenan Forum on Literature and Art* (May 1942), reprinted in 3 COLLECTED WORKS OF MAO TSE-TUNG 69, 84 (1975) (articulating Mao's belief that literature and art were for the masses of the people, and in the first place for the workers, peasants and soldiers).

²² *Id.*

legal mechanisms to enforce such rights, were considered antithetical to the tenets of traditional Chinese culture.²³

Chinese cultural attitudes about intellectual property began to change with the promulgation of the National "Open Door" Policy of 1979.²⁴ Once the Asian nation opened its borders to outside trade, it quickly realized that national IP laws needed to be created to attract foreign investors.²⁵ To make its markets more appealing to international retailers, the Chinese government began to adopt many of the Western provisions governing IP rights.²⁶ These changes directly resulted in the enactment of a Trademark Law in 1982, a Patent Law in 1984 and a Copyright Law in 1992.²⁷ Ironically, it was this very "Open Door" policy that originally attracted counterfeiters into the country, as many rushed in to take advantage of the cheap Chinese labor market.²⁸

B. The Administrative Difficulties of "Localism"

Administrative obstacles also posed significant barriers to the protection of intellectual property rights. Commencing with Beijing's 1979 decision to enhance local autonomy as a means to facilitate the transformation of China from a planned economy to a market economy, the term "localism" became synonymous with the emergence of a Kafkaesque²⁹ system of administrative bureaucracy.³⁰ Because decentralization led to the erosion of Beijing's control, China was faced with the rise of corruption and regionalism as local officials and cadres filled the power vacuum.³¹ This rise of localism had many important consequences for IP protection.

²³ Jing Kai-Syz, *Expanding the Patent Law of the People's Republic of China: A Proposal for Patent Protection of Computer Programs*, 5 J. CHINESE L. 349, 353 (1991) (presenting dilemma faced by Chinese government in promoting intellectual property rights while attempting to preserve non-individualistic society).

²⁴ Cheng, *supra* note 9, at 1941.

²⁵ *Id.* at 1942.

²⁶ The Trademark Law was amended by the National People's Congress in 1993 and the Patent Law was amended by the National People's Congress in 1992. *Id.*

²⁷ *Id.* at 1943.

²⁸ *Id.*

²⁹ This is a general reference to author Franz Kafka, whose novel, *The Castle*, detailed the enigmatic complexities of a fictional 19th century bureaucracy.

³⁰ Jeffrey W. Berkman, *Intellectual Property Rights in the PRC: Impediments to Protection and the Need for the Rule of Law*, 15 UCLA PAC. BASIN L.J. 1, 17 (1996).

³¹ *Id.*

First, the proliferation of counterfeit goods began to penetrate even the highest levels of these regional governments.³² A recent study indicated that ninety percent of the software used by government agencies in China in 2000 was illegal.³³ Moreover, many local officials directly profited from piracy through kickbacks and bribes, while other high-ranking officers were involved firsthand in the production of illegal goods and services.³⁴

A second problem with localism was the lack of financial resources allocated to the administrative departments charged with enforcing IP laws. Local governments were required to provide the necessary money and personnel to enable these agencies to operate, but they were often reluctant to do so because it was more financially beneficial for them to allow pirates to continue operations.³⁵ Indeed, local governments were more apt to facilitate the lucrative business of piracy because of the substantial revenue often generated for their town or locality.³⁶

Finally, the lack of coordination between the different administrative agencies created problems with piracy claim adjudication. Under this system of localism, when a dispute involved more than one IP right, separate agencies would investigate the issues according to their respective area of expertise.³⁷ Additionally, when an infringer acted in multiple locations, each regional department would handle the claim according to its own procedures.³⁸ Opposition by these regional governments to cross-locality enforcement also frustrated efforts to coordinate claim adjudication.³⁹ Overall, these inefficiencies and conflicts of interest greatly hindered efforts to curtail domestic counterfeiting.⁴⁰

³² Arthur Weinburg, *The Close of Round Two*, CHINA BUS. REV., July-Aug. 1995, at 20 (citing statistics for 2000).

³³ *Id.*

³⁴ U.S. Trade Representative, 1994 National Trade Estimate Report on Foreign Trade Barriers 51 (1994).

³⁵ *Snags Hit IPR Fight*, S. CHINA MORNING POST, Apr. 13, 1995, at 11, available at 1995 WL 7524734.

³⁶ Steve Friess, *Product Piracy Poses Biggest Threat to China's Economic Status*, USA TODAY, June 28, 2001, available at 2001 WL 5465743 (noting generally that local officials were more concerned about providing food for citizens than in protecting intellectual property rights).

³⁷ Agnes Cheung, *U.S. 'Failed' on Copyright Help*, S. CHINA MORNING POST, Feb. 5, 1996, at 9, available at 1996 WL 3752290.

³⁸ See Berkman, *supra* note 30, at 21.

³⁹ *Id.*

⁴⁰ *Id.*

C. Impediments to Judicial Enforcement

The most striking problems in the enforcement of IP regulations in China under the old regime were the lack of impartiality of the court system and the ineffectiveness of enforcement procedures.⁴¹ First, judges presiding over intellectual property hearings were often influenced by the same pressures that tainted the administrative system.⁴² Economic pressure from local cadres and political influence from governmental authorities hindered the ability of judges to remain disinterested when resolving disputes.⁴³ Moreover, like the administrative agencies, courts were often dependant on local officials for resources and their own jobs.⁴⁴

China's court system was arranged so that individual "Adjudication Committees" had the power to review the decisions of local judges.⁴⁵ While individual judges were granted the authority to make unilateral decisions in "minor" cases, in disputes involving important legal or economic questions, Adjudication Committees were vested with the authority to direct the "proper" verdict or to grant appeals to higher courts.⁴⁶ Members of these Adjudication Committees were often Communist Party sympathizers or individuals with ties to local businesses.⁴⁷ This conflict of interest often created inconsistent and self-motivated decisions by judges and Adjudication Committees.⁴⁸

Second, Chinese judges often faced administrative recalcitrance from officials charged with enforcing court decrees. Because courts did not always have the necessary authority to compel the police to carry out their orders, they often had to make concessions with local officials before their decisions would be enforced.⁴⁹ Chinese judges had limited powers to redress these problems as they did not have the authority to issue criminal contempt orders, and it was unclear whether the failure to enforce a court verdict would have even been considered a crime.⁵⁰ Moreover, many regional authorities refused to

⁴¹ *Id.* at 23.

⁴² *Id.* at 24.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 23.

⁴⁶ *Id.* at 22.

⁴⁷ *Id.* at 23.

⁴⁸ *Id.*

⁴⁹ Donald Clark, *Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments*, 10 COLUM. J. ASIAN L. 1, 7 (1996).

⁵⁰ *Id.* at 71. Article 157 of the Chinese Criminal Law governs actions for contempt and the enforcement of judicial decrees. While it is unlawful to use threats or violence to prevent

recognize “foreign” court decisions even though they were technically binding in all relevant jurisdictions.⁵¹ These bureaucratic obstacles created many inconsistencies, inefficiencies and costly legal delays.⁵²

A third troubling problem, and one that continues to plague the Chinese judicial system, is the scarcity of attorneys educated about the intricacies of national and international IP laws.⁵³ A legal career in China has never had the importance or prestige that it has enjoyed in the West. As a result, Chinese universities historically turned out an average of only 700 lawyers a year.⁵⁴ In the mid 1990s, the country had a total of only 90,000 certified attorneys.⁵⁵ The lack of competent legal counsel is especially problematic considering the widespread illiteracy of ordinary Chinese citizens who rely on the professional expertise of qualified lawyers.⁵⁶

The dearth of capable attorneys is also conspicuous in the field of corporate law, where domestic businesses and the 110,000 foreign-funded enterprises that operate within China’s borders are forced to scramble to locate sufficient representation.⁵⁷ Another important consequence of the paucity of legal training is the lack of qualified judges.⁵⁸ This allows governmental bureaucrats to assume more direct authority in “interpreting” their own regulations.⁵⁹ Consequently, while the Chinese government publicly touted its system of “judicial independence” and “division of authority” to the rest of the world, in practical application, these phrases existed only in Chinese legal fiction.

personnel from enforcing the law, it is unclear whether the failure to obey a court order is a punishable crime under this Article. *Id.*

⁵¹ See Berkman, *supra* note 30, at 25.

⁵² See generally Clark, *supra* note 49.

⁵³ See Berkman, *supra* note 30, at 25. See also William P. Alford, *Tasseled Loafers for Barefoot Lawyers: Transformation and Tension in the World of Chinese Legal Workers*, 141 CHINA Q. 22, 30 (1995) (compared to more than one million certified attorneys in the United States—a country with one-fourth the total population of China).

⁵⁴ Alford, *supra* note 53, at 22, 30.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Paula Lyon Andruss, *Slow Boat to China*, MARKETING NEWS, Vol. 35, Is. 19, Sept. 10, 2001, available at 2001 WL 6706877.

II. GLOBAL AND DOMESTIC EFFECTS OF CHINESE COUNTERFEITING

A. *International Costs*

The failures in enforcing IP laws and the rise of counterfeiting have had an enormous negative impact on international businesses in the past several years. In 1999 alone, illegal piracy of intellectual property cost international corporations \$645 million in lost revenue.⁶⁰ That figure rose dramatically in 2000, topping \$1.12 billion.⁶¹ The Business Software Alliance (BSA), an industry group monitoring the proliferation of illegal software, also estimated that ninety-four percent of the software used in China in 2000 was counterfeit, a three percent increase from the previous year.⁶²

The explosion of the Internet in recent years has also facilitated the growth of this menace and created additional obstacles for IP enforcement. Online auction houses are often replete with counterfeit products and the Business to Business revolution⁶³ on the World Wide Web has allowed manufacturers to combine with online retailers to more efficiently produce bogus goods.⁶⁴ There is currently an entire industry in China devoted to the packaging, labeling and transporting of counterfeit products obtained through online buying and trading sites.⁶⁵ Additionally, the advancement of the Business to Consumer market has made coordination between illegal online wholesalers and customers easier and more economical.⁶⁶ To complicate matters, cyber-criminals are often able to evade authorities by falsifying email headers, using anonymous post office boxes and disguising identification sources.⁶⁷ These

⁶⁰ Rachel Morarjee, *The WTO Welcomes The World's Biggest Counterfeiter Into the Fold*, AGENCE FR.-PRESSE, Nov. 5, 2001, available at 2001 WL 25055167.

⁶¹ *Id.*

⁶² *E-business: Signs of Progress in China's Anti-Piracy Push*, BIRM. POST, Oct. 23, 2001, available at 2001 WL 27963539 [hereinafter *E-business*].

⁶³ Business to Business (B2B) is a method by which different operating sectors, such as marketing, production or innovation, coordinate their efforts in assembling products. This can be distinguished from Business to Consumer (B2C), which focuses on the interchange of companies with the general populace.

⁶⁴ Samuel D. Porteous, *China's Trade Advantage Undermined by Counterfeiting Menace*, WORLD TRADE, available at 2001 WL 6716807 (discussing the very large and sophisticated sub-sector of support businesses offering counterfeit printing and packaging services that has emerged with the Internet).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Iwata, *supra* note 7.

collaborations and evasion techniques have greatly hindered the ability of authorities to prevent counterfeit products from reaching consumers.⁶⁸

The time, expense and manpower devoted to hunting down illegal software profiteers costs businesses nearly as much as the lost revenue from counterfeiting.⁶⁹ In recent years, the software industry has spent millions investigating and searching for the producers of illegal products.⁷⁰ For example, the Microsoft Corporation recently hired former federal investigators to set up stings and transmit information to prosecutors on hundreds of infringement cases.⁷¹ Microsoft has also recently implemented upgraded security measures, including the installation of software holograms, in an attempt to help consumers better delineate authentic products from counterfeit ones.⁷² Many software companies have also established programs that electronically prowl web sites for faked goods.⁷³ Once they identify web sites with illegal software, these programs relay information to authorities authorized to take legal action against violators.⁷⁴

Many software corporations also face less tangible, but equally devastating, problems from the sale of pirated goods. Because consumers are often inundated with counterfeit software, they tend to associate the frequently shoddy and defective goods produced illegally with the name of the brand on the package.⁷⁵ As a result, software companies suffer an erosion of public trust and confidence.⁷⁶ To combat this problem, many software companies have waged expensive publicity campaigns aimed at educating consumers about how to spot counterfeit goods and warning illegal producers of the penalties for piracy violations.⁷⁷ Other companies have opted for the opposite approach, however. Fearing a backlash by consumers who may be leery of buying their products in the future, some corporations have gone to elaborate lengths to downplay the amount of illegal software bearing its name.⁷⁸ Many companies are also afraid to directly confront the Chinese government about the problem

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* (noting that software manufacturer Adobe also hired investigators to surf websites for counterfeit products sold online).

⁷⁴ *Id.*

⁷⁵ See Andruss, *supra* note 59.

⁷⁶ Iwata, *supra* note 7.

⁷⁷ See Andruss, *supra* note 59.

⁷⁸ *Id.*

because of a belief that it might hurt their chances for domestic expansion.⁷⁹ Many software companies also face the potential of mass tort liability from product malfunctions and design defects from illegally produced goods.⁸⁰ The resources expended to combat this problem divert attention away from the creation of new technologies and reduce the financial return for shareholders.

B. Domestic Effects

While the international consequences of this epidemic are staggering, the domestic implications are even more unsettling. Currently, around 80 percent of the counterfeit goods found in China are knockoffs of Chinese brands.⁸¹ Many venture capitalists are therefore reluctant to invest financial resources into the more than 6.5 million domestic Chinese businesses.⁸² Widespread domestic counterfeiting also has the effect of driving up the price of name brand products because retailers are forced to internalize the costs of fighting piracy.⁸³ In a nation plagued by country-wide middle and lower class destitution,⁸⁴ the real tragedy is the inability of ordinary Chinese citizens to purchase properly functioning and affordable consumer goods.⁸⁵

Legitimate Chinese companies are also being impeded from being sources of new commercial innovation.⁸⁶ The pervasiveness of domestic counterfeiting has fostered an environment of mistrust and tension where innovators often refrain from creating new technologies because of a fear of illegal duplication.⁸⁷ Piracy also threatens the knowledge economy and hinders potential technology transfers with companies in developed nations.⁸⁸ The end result is that Chinese businesses and the nation itself are being punished for the actions of infringers and are thus hindered from assuming a more influential role in world trade and manufacturing.

⁷⁹ *Id.*

⁸⁰ Porteous, *supra* note 64.

⁸¹ *Id.*

⁸² Friess, *supra* note 36.

⁸³ Porteous, *supra* note 64.

⁸⁴ Andruss, *supra* note 59 (noting that the average yearly income of Chinese residents outside the cities of Beijing and Shanghai in 2000 was \$US 847).

⁸⁵ *Id.*

⁸⁶ Porteous, *supra* note 64.

⁸⁷ *Id.*

⁸⁸ *E-business, supra* note 62.

C. U.S. and Chinese Clashes Over IP Enforcement

The pernicious problem of illegal piracy has also greatly affected relations between the United States and China.⁸⁹ On three different occasions in recent years, the United States threatened economic sanctions against the Chinese for failure to adequately protect intellectual property rights.⁹⁰ In 1992, the United States government's threat of a trade embargo against the Chinese was triggered by China's serious neglect in enforcing copyright protection of U.S. works, particularly computer software programs.⁹¹ Again in 1995 and 1996, the United States considered imposing multi-billion dollar penalties on China as punishment for failing to quell the production and proliferation of pirated American goods within its borders.⁹²

In 1992, the United States had agreed not to impose trade sanctions on China after the two countries signed the Memorandum of Understanding on the Protection of Intellectual Property (MOU).⁹³ The MOU required China to adopt the terms of the Berne Convention for the Protection of Literary and Artistic Works (Berne Agreement) and the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms.⁹⁴ While the signing of these agreements averted a trade embargo against China, it had little impact on reducing infringement.

In 1995, the failure of the Chinese government to abide by the international agreements signed in 1992 again caused a rift between the two nations.⁹⁵ China barely avoided a one billion dollar trade sanction by reaching an agreement (1995 Accord) less than two hours before the embargo was to take effect.⁹⁶ In threatening sanctions, the United States was acting in accordance with International Agreement Special 301.⁹⁷ Special 301 was passed in 1988,

⁸⁹ June Cohan Lazar, *Protecting Ideas and Ideals: Copyright Law in the People's Republic of China*, 27 LAW & POL'Y INT'L BUS. 1185, 1188-91 (1996).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ Memorandum of Understanding Between China (PRC) and the United States on the Protection of Intellectual Property, Jan. 17, 1992, art. 3(3)-(4), 34 I.L.M. 676, 681 (1985).

⁹⁴ *Id.* art. 3(1)-(2), at 681-82.

⁹⁵ Kim Newby, *The Effectiveness of Special 301 in Creating Long Term Copyright Protection for U.S. Companies Overseas*, 21 SYRACUSE J. INT'L L. & COM. 29, 41-42 (1995).

⁹⁶ See Judith H. Bello & Alan F. Homer, "Special 301": *Its Requirements, Implementation and Significance*, 13 FORDHAM INT'L L.J. 259, 275 (1990).

⁹⁷ 19 U.S.C. § 2411(c)(1) (1988).

and allowed the U.S. to take unilateral action against any trading partner not meeting its IP enforcement obligations.⁹⁸

The 1995 Accord consisted of an Agreement Letter from the Chinese Minister of Foreign Trade and Economic Cooperation and an Action Plan.⁹⁹ The Agreement Letter greatly expanded market access to U.S. companies in the audio-visual sector, as China agreed not to limit the importation of audio-visual products and publications.¹⁰⁰ The agreement also allowed American companies to establish joint ventures with Chinese corporations concerning the production, reproduction and sale of audio-visual products and computer software, and to execute revenue sharing agreements relating to film products.¹⁰¹

The Action Plan was an effort by the Chinese to tighten enforcement of existing IP laws.¹⁰² The Plan implemented four new mechanisms for combating piracy.¹⁰³ First, it set up new intra-agency Intellectual Property Working Conferences (IWPCs) and task forces to provide new channels for investigating and handling copyright infringement cases.¹⁰⁴

Second, the plan identified regions where piracy was especially rampant.¹⁰⁵ To combat piracy in these regions, the government initiated a special enforcement period, commencing in March 1995, during which, authorities were to intensify efforts to identify infringers.¹⁰⁶ The special period was to last six months, except in areas where problems persisted, in which case the enforcement period could extend indefinitely.¹⁰⁷

Third, the plan instituted a new licensing and ownership verification system designed to help authorities identify pirated goods.¹⁰⁸ The new licensing requirements, known as Source Identification Codes, or SIDs, were to be

⁹⁸ *Id.*

⁹⁹ See Joseph T. Simone, *301 Agreement Strengthens IPR Enforcement*, IP ASIA, Apr. 1995, at 2.

¹⁰⁰ *See id.*

¹⁰¹ See *China-United States: Agreement Regarding Intellectual Property Rights*, Letter from Wu Yi, Minister of Foreign Trade and Economic Cooperation, People's Republic of China, to Michael Cantor, U.S. Trade Representative, United States of America (Feb. 26, 1995), 34 I.L.M. 881 [hereinafter Action Plan].

¹⁰² Tom Hope, *A Victory for IPR?*, IP ASIA, Mar. 1995, at 12.

¹⁰³ See Action Plan, *supra* note 101, arts. 1(C)(1)-(3), at 892.

¹⁰⁴ *See id.*

¹⁰⁵ *Id.*

¹⁰⁶ *See id.*

¹⁰⁷ *See id.*

¹⁰⁸ *See id.*

mandatory on all software produced domestically.¹⁰⁹ Finally, the Plan implemented new customs procedures to prevent counterfeit materials from reaching the channels of commerce.¹¹⁰

The Action Plan did not have the desired impact on the counterfeiting industry. Many of the IWPCs and regional task forces were never established.¹¹¹ Additionally, when the enforcement period ended, many of the factories that had been closed simply reopened.¹¹² Likewise, the new SIDs were never uniformly established and numerous retailers continued to sell goods without the required labels.¹¹³ Overall, the 1995 Accord proved woefully inadequate as production of illegal compact discs doubled, illegal producers multiplied and violence was intimated against several officials who attempted to enforce these new regulations.¹¹⁴

The failures of the 1995 Accord led to the signing of another agreement in 1996. While substantively, the 1996 agreement differed little from the 1995 version, it had a much more conspicuous initial impact on domestic piracy.¹¹⁵ In the years immediately following the agreement, Chinese authorities shut down thirty-nine plants that illegally produced U.S. movies, music and software, arrested more than 250 individuals, and confiscated 1.9 million illegally produced video compact discs.¹¹⁶ Moreover, the Chinese government closed fifteen illegal compact disc (CD) manufacturing operations, briefly suspended the establishment of new CD production enterprises and prohibited the importation of machinery for the manufacture of audio-visual products.¹¹⁷ Again, these crackdowns proved ephemeral, as domestic counterfeiters found

¹⁰⁹ See *id.*

¹¹⁰ See *id.* art. I(D)(2)(b) at 895 and I(H) at 903; see also *id.* art. I(G) at 900 (listing customs obligations).

¹¹¹ Maggie Farley & James Gerstenzang, *China Piracy of US Products Surges Despite Accord*, L.A. TIMES, Oct. 10, 1995, at A1.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Shirley Kwok, *The PRC Makes Slow But Steady Progress*, IP ASIA, Dec. 1996, at 18; see also Joseph Kahn & Helen Cooper, *China Plans to Cut Tariffs, End Quotas in Bid to Join Trade Group*, WALL ST. J., Nov. 20, 1995, at A10.

¹¹⁵ Seth Faison, *China Turns Blind Eye to Pirated Discs*, N.Y. TIMES, Mar. 28, 1998, at D1, D2. See also *Trade Report Cites Chinese Progress on Piracy*, HOUSTON CHRON., May 1, 1997, at 2 (noting generally the trade report of Chinese crackdowns on piracy operations following the 1995 Agreement).

¹¹⁶ *Trade Report Cites Chinese Progress on Piracy*, *supra* note 115.

¹¹⁷ *Statement by Acting TR Charlene Barshevsky on Trade Talks with China on Intellectual Property Rights, Fact Sheet on Chinese Implementation of 1994 IPR Enforcement Agreement*, 13 INT'L TRADE REP. 1036.

new and more effective ways to circumvent the laws.¹¹⁸ It was this cycle of broken promises and failures in enforcing existing laws that caused many to oppose Chinese membership into the WTO.

III. TRIPS: THE IP LAW GOVERNING THE WTO

The WTO is currently governed by several important international IP agreements. Most important among these is the Trade Related Aspects of Intellectual Property Rights (TRIPS) which incorporated most of the provisions of The Paris Convention on the Protection of Industrial Property (Paris Convention) and the Berne Agreement.¹¹⁹ The WTO has been governed by the Paris Convention and Berne Agreements since its inception in the 1970s.¹²⁰ However, many Western nations were dissatisfied with the enforcement mechanisms of these conventions, and starting in 1986, negotiators continually worked on revisions that would provide for a more comprehensive and effective system of adjudicating intellectual property disputes.¹²¹ These discussions culminated in the TRIPS agreement which was formally adopted into the WTO system at the Uruguay Round in 1994.¹²²

TRIPS is the "first international agreement to link Intellectual Property Rights with trade and to comprehensively incorporate the protection of intellectual property rights into the WTO system."¹²³ With the exception of "moral rights," TRIPS covers all aspects involved in the protection of IP, from patents, trademarks and copyright laws to the proper adjudication of disputes.¹²⁴ TRIPS requires WTO member countries to enact substantive legislation to protect against counterfeiting and ensure that critical enforcement procedures will be available in each member country to safeguard IP rights.¹²⁵

¹¹⁸ Faison, *supra* note 115, at D1-2.

¹¹⁹ Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIPS Agreement: The Case For a European Human Rights Analogy*, 39 HARV. INT'L L.J. 357, 358 (1998).

¹²⁰ *See id.* at 367.

¹²¹ *See id.* at 377.

¹²² *See id.* at 412.

¹²³ Yang Yeping, *China Has Set Up Intellectual Property Rights Legal System Which Basically Meets the Requirements Of TRIPS*, WORLD NEWS CONNECTION, Oct. 3, 2001, available at 2001 WL 29646036.

¹²⁴ *Id.*

¹²⁵ *Official Statement of Administrative Action Regarding Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS")*, in ALEXANDER LINDEY, ENTERTAINMENT, PUBLISHING AND THE ARTS: AGREEMENTS AND THE LAW (2d ed. 2000) (noting the most

A. Organizational Structure and Patent Protections

TRIPS is organized into seven sections.¹²⁶ Section I deals with general principles.¹²⁷ Section II provides standards for protection of various forms of IP including copyrights, patents, trademarks and commercial secrets.¹²⁸ Sections III and IV are concerned with the enforcement and maintenance of IP rights.¹²⁹ Section V covers the procedural mechanisms for dispute resolution, and Sections VI and VII focus on transitional provisions.¹³⁰

The most comprehensive coverage of IP rights in TRIPS is in the area of patent law. Articles 27-34 articulate the scope, duration and restrictions on the issuance of governmental patents.¹³¹ Article 27 proffers a three step process that must be met before a patent can be granted.¹³² To qualify for a patent, an invention must be new, involve an inventive step and must be capable of industrial application.¹³³ Article 27 also places important parameters on the issuance of new patents, forbidding governments from discriminating on the basis of area of technology, place of invention, or whether products are imported or locally produced.¹³⁴ This Article also allows Members to deny patents for inventions which may result in a disruption to public order.¹³⁵ This includes the right to exclude patents which may threaten the ecological balance of a Member Nation's resources or cause hazards to human, animal or plant life.¹³⁶

Article 28 specifies the rights conferred on patent owners.¹³⁷ This Article prevents third parties from making, using, offering for sale or importing for these purposes a patented product without consent.¹³⁸ Where the patent is a

important aspect of claim adjudication is authorization of member nation judges to grant injunctions, levy heavy monetary fines against infringers and to dispose of confiscated materials).

¹²⁶ Agreement on Trade-Related Aspects of Intellectual Property Rights, Dec. 15, 1993, art. 27, § 1, 33 I.L.M. 81, 93-4.

¹²⁷ *Id.* art. 27, § 1, at 94.

¹²⁸ *Id.* art. 27, § 2, at 94.

¹²⁹ *Id.* art. 27, §§ 3-4, at 94.

¹³⁰ *Id.*

¹³¹ *Id.* arts. 27-34, at 94.

¹³² *Id.*

¹³³ *Id.* art. 27, § 1.

¹³⁴ *Id.* art. 27, § 1, at 94.

¹³⁵ *Id.* art. 27, § 2, at 94.

¹³⁶ *Id.*

¹³⁷ *Id.* art. 28, at 94.

¹³⁸ *Id.* art. 28, § 1(a), at 94.

process, subsection (1)(b) prevents the using, offering for sale, selling or importing any product made through the patented process.¹³⁹ Subsection (2) of this Article also allows the rightful owner of the patented product or process to assign, transfer by succession and conclude licensing contracts.¹⁴⁰ The patent owner is therefore allowed wide latitude in controlling the use of the patented product or process by third parties.

Article 29 stipulates the requirements for the patent application process.¹⁴¹ Member nations may require applicants to disclose in plain language the type of invention, how the invention will be made and to indicate the best method for carrying out the invention.¹⁴² Subsection (2) holds that Members may require an applicant to disclose information concerning any foreign applications for the same invention.¹⁴³

Article 34 of TRIPS articulates the burden of proof scheme for the adjudication of patent process disputes. This Article requires each Member country to provide its judicial authorities with the power to order a party accused of patent infringement to prove that the questioned product was produced with a process different from the patented process.¹⁴⁴ Furthermore, in the absence of affirmative proof to the contrary, the holder of an identical product shall be deemed to have obtained the product through the patented process.¹⁴⁵ This presumption against the accused shifts the burden to the defendant to justify the process through which the product was made and reduces the onus on the patent holder to establish product infringement.

B. Copyright and Trademark Protections

The substantive text of copyright protection is specified in Section II, Articles 9-14, of the TRIPS agreement. By its terms, this section only applies to the protection of expression and not to ideas, methods of operation or mathematical concepts.¹⁴⁶ The definition of expression includes all types of computer programs, as well as compilations of data or other materials that are

¹³⁹ *Id.* art. 28, § 1(b), at 94.

¹⁴⁰ *Id.* art. 28, § 2, at 94.

¹⁴¹ *Id.* art. 29, at 94.

¹⁴² *Id.* art. 29, § 1, at 94.

¹⁴³ *Id.* art. 29, § 2, at 94.

¹⁴⁴ *Id.* art. 34, § 1, at 96.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* art. 9, § 2, at 87.

original by reason of their selection or arrangement.¹⁴⁷ Additionally, Article 11 requires member countries to provide exclusive rental rights (the right to authorize or prohibit commercial rental of original or copied works) with respect to computer programs and cinematographic works.¹⁴⁸

Article 12 provides that the length of copyright protection is the life of the author plus fifty years unless the term of protection is not linked to the author, in which case, the term is a minimum of fifty years.¹⁴⁹ Excluded from coverage are works of applied art and photographs.¹⁵⁰ Article 14 allows a similar fifty year ban against reproducing sound recordings and allows producers of such works the right to authorize or prohibit the reproduction and commercial rental of their recordings.¹⁵¹

The black-letter protections of trademark rights are located in Articles 15-20 of TRIPS. Article 16 requires each member country to apply provision 6 of the Paris Convention concerning the protection of well-known trademarks.¹⁵² Article 18 requires that the initial registration of a trademark must be for a term of not less than seven years and that the registration of a trademark must be renewable indefinitely.¹⁵³ Articles 19-20 outline the usage of trademarks in conjunction with other trademarks.¹⁵⁴

C. Dispute Resolution and Claim Adjudication

The enforcement and liability provisions of TRIPS are detailed in Articles 41-49. Article 44 authorizes the use of injunctions by judicial authorities to prevent the entry of infringed goods into the channels of commerce in their jurisdiction.¹⁵⁵ In addition to the injunctive power, Article 45 expressly grants Member nation judges the authority to award money damages to injured parties.¹⁵⁶ Fiscal remedies for violation of these laws include adequate

¹⁴⁷ *Id.* art. 10, §§ 1-2, at 87.

¹⁴⁸ *Id.* art. 11, at 87.

¹⁴⁹ *Id.* art. 12, at 88.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* (Article 16 also clarifies the definition of the phrase "well known" as used in the Paris Convention).

¹⁵³ *Id.* art. 16, at 90.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

compensation for unauthorized use, the recovery of attorney's fees and the award of expectancy damages to the claimant.¹⁵⁷

This Article also allows judges to award the IP holder damages even where the infringer did not knowingly, or with reasonable grounds to know, engage in prohibited activity.¹⁵⁸ Consequently, this last section essentially makes TRIPS a no-fault agreement whereby the infringer is subject to liability without any culpability requirement.¹⁵⁹ Besides the injunctive power and the authority to authorize no fault money damages, judges are also granted the right to destroy the infringed materials without compensating the producer.¹⁶⁰ This punitive measure was designed to ensure that pirates were not able to continue profiting from their counterfeit materials.¹⁶¹ By placing the burden of proof on accused infringers, establishing a no-fault system for adjudicating disputes and granting judges the power to levy harsh monetary penalties and dispose of counterfeit goods, TRIPS goes a long way in meeting its goal of deterring potential pirates.

IV. CHINESE CHANGES TO THE NATIONAL PATENT LAW

As a condition of WTO membership, China promised to undertake a massive rewriting and amending of its national IP laws to bring them into closer alignment with TRIPS. This Herculean task was significantly advanced in July, 2001, when the most recent modification of the national "Patent Law" went into effect.¹⁶² The new amendments were drafted by the State Intellectual Property Office (SIPO) over two years (from 1998 to 2001), with the final draft passed by the National People's Congress on August 25, 2000.¹⁶³ The changes in the amended law fall into three spheres: new judicial and administrative protections, upgraded application procedures and streamlined enforcement mechanisms.¹⁶⁴

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ LINDEY, *supra* note 125.

¹⁶² Jiwen Chen, *The Amended PRC Patent Law*, CHINA BUS. REV. 3841 (2001) (marking the second time in nine years that the original 1985 patent law had been amended, the other revision occurring in 1992).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

A. New Judicial and Administrative Protections

Article 11 of the amended patent law brings the new Chinese regulations into closer alignment with TRIPS by allowing patent owners the right to prohibit unauthorized "offering for sale."¹⁶⁵ This means that patent holders now have the exclusive authority to advertise, display or sell their products and any third parties endeavoring to use patented products must obtain the express permission of the patent holder before proceeding.¹⁶⁶ This change is especially important in cases where the product is for private use, because the manufacturers of such products are not always easy to identify.¹⁶⁷ Under the previous law, prohibiting unauthorized third party "offering for sale" was not the exclusive right of the patent holder.¹⁶⁸ The most important consequence of this alteration is allowing the patent holder to prevent illegally pirated goods from reaching the market.¹⁶⁹

Article 60 of the amended patent law specifies the amount of monetary damages awarded in cases of illegal patent infringement.¹⁷⁰ This was a change from the previous law, where no set standard for the calculation of infringement damages existed.¹⁷¹ Article 60, in accordance with TRIPS, maintains that damages shall be calculated according to the loss incurred by the patent owner, or the profit received by the infringer, as a result of the theft.¹⁷² When the loss or profit is difficult to determine, the damages shall be a multiple of the patent royalties.¹⁷³ Before this change, Chinese courts would use the general tort standard of infringement remedies in the general principles of Chinese Civil Law.¹⁷⁴ In practice, this meant that courts were free to calculate infringement damages based on the patent holder's loss, the infringer's profit or a royalty method.¹⁷⁵ Under the royalty method, the damages were a reasonable amount not lower than the amount made from the patented product or process.¹⁷⁶

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

Allowing these different calculations resulted in inconsistent judgments and inadequate deterrence.¹⁷⁷

The new law also expands the jurisdiction of local authorities investigating patent disputes.¹⁷⁸ Articles 3 and 57 grant local authorities the power to handle claims of unpatented products and processes.¹⁷⁹ These agencies may impose a fine of between US\$121 and US\$6,040, or one to three times the illegal income, confiscate the passed-off products, and order violators to cease their illegal activities.¹⁸⁰ By allowing local agencies to intervene earlier in the process and to settle patent disputes in a more expeditious manner, the new Chinese law makes considerable advances in deterring potential violators of patent rights.

Perhaps the most significant change in the amended patent law is the adoption of a modified no fault system similar to the one articulated in Article 34 of TRIPS. The new amendment, Article 57, shifts the burden to the accused infringer to prove that the product was produced through a legitimate, unpatented process.¹⁸¹ Under the previous system, ignorance was a sufficient defense to exempt an accused infringer from prosecution. The new changes allow the patent owner to better protect the product by shifting the onus to the accused to prove legitimacy.

Similar to Article 44(1) of TRIPS, Article 61 of the amended Chinese patent law allows a patent owner to seek injunctive relief.¹⁸² The law provides that when a patent holder can prove that someone is infringing or will infringe on their rights, and that without timely intervention they will suffer losses, the patent holder may seek an order of injunction from the court and take measures to preserve the property.¹⁸³ The inclusion of a preliminary injunction complies with the expeditious remedy requirement in TRIPS and is the first time such a provision has appeared in Chinese patent law.¹⁸⁴

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Thomas T. Moga, *China Changes Patent Law to Comply with TRIPS*, NAT'L L.J., July 23, 2001.

¹⁸² See Chen, *supra* note 162.

¹⁸³ *Id.*

¹⁸⁴ The procedures for securing such an injunction, such as proof requirements for preservation of property, are detailed in the P.R.C. Civil Procedure Law. *Id.*

B. Upgraded Application Procedures

The upgraded application procedures specified in Articles 52 and 53 provide a stricter standard for the issuance of compulsory patent licenses.¹⁸⁵ Compulsory licenses are issued when an individual or company makes an important technical advance of considerable economic significance and the exploitation of the later invention depends on the exploitation of the earlier patented model.¹⁸⁶ The award of a compulsory license overrides the exclusive rights of the original patent holder.¹⁸⁷ While the previous Chinese patent law was in accordance with the Paris Convention, it was not in harmony with the TRIPS agreement, which tightly regulated the granting of compulsory licenses.¹⁸⁸

The Paris Convention's liberal requirements for the granting of compulsory licenses incurred the scorn of developed nations.¹⁸⁹ Fearing that lax requirements in developing countries would encourage "trumping" of patent holder rights, the international community incorporated tightened procedures for the issuance of such licenses into TRIPS.¹⁹⁰ While Member nations are technically allowed to adopt their own issue requirements, heavy political pressure exists for incoming Members to adopt TRIPS standards.¹⁹¹ The stricter Chinese requirements spelled out in Article 52 include limitations on the scope and duration of compulsory licenses.¹⁹² In addition, original patent holders are now permitted to petition the patent administration department of the State Council to terminate compulsory license decisions.¹⁹³ If denied, the claimant has the option of appealing to the People's Court for review of the decision, or as an alternative, can challenge the amount of compensable royalties awarded.¹⁹⁴ In modeling these requirements on those of TRIPS, the Chinese government sent an important signal to developed nations that it was committed to protecting the rights of original patent holders.

¹⁸⁵ Moga, *supra* note 181.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

Besides making it more difficult for domestic claimants to secure compulsory patents, the amended Chinese patent law makes it easier for foreign patent applicants to obtain patents from the Chinese government. Article 36 relaxes many of the previously complex filing requirements, and requires patent authorities to examine the application within a reasonable timeframe.¹⁹⁵ Moreover, the amendment removes many of the limitations on international applications filed by domestic applicants.¹⁹⁶

C. Streamlined Enforcement Mechanisms

Several important legal enforcement procedures have also been promulgated in the new Chinese laws. One important change is the requirement that the adjudicating body determine the rightful owner of the patent before infringement proceedings begin.¹⁹⁷ While this may seem self evident, the old Chinese law did not require this dispute to be settled first.¹⁹⁸

Under the previous law, invalidation disputes and infringement proceedings were commonly litigated in different courts, so it was possible for one court to grant infringement liability only to have another court hold that the original patent was invalid.¹⁹⁹ This resulted in costly simultaneous litigation with often conflicting outcomes.²⁰⁰ Under the new law, if a defendant petitions for invalidity within fifteen days, the infringement proceeding will be enjoined until the invalidity issue is resolved.²⁰¹ This streamlined procedure should appreciably reduce the number of patent cases heard yearly.²⁰²

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² In 2000, more than 38,000 patent infringement disputes were litigated in Chinese courts. Asia Intelligence Wire, *China Well Protects Intellectual Property*, CHINA BUS. INFO. NETWORK, June 27, 2001, available at 2001 WL 21497075.

V. OTHER RECENT CHANGES TO CHINESE IP LAWS

A. Copyright Amendments

Other key changes in IP laws have been effectuated in recent years. The most recent revisions of IP laws took place on October 31, 2001, when the 24th Session of the Standing Committee of the Ninth National People's Congress codified amendments to the Copyright Law.²⁰³ The original Copyright Law took effect in 1992 and played a vital role in protecting the legal rights and interests of copyright holders, inspiring creativity and promoting the development of science and technology in the Chinese economy.²⁰⁴

Among the changes in the new version of the copyright law include expanding coverage to acrobatic performances, architectural designs and literary and artistic works published on the Internet.²⁰⁵ Protection of these works includes both live performance and performance by mechanical means.²⁰⁶ In addition, the amendment also includes provisions designed to better protect the marketing of intellectual property.²⁰⁷ The new law secures both the right of information network dissemination and the nature and legal status of collective copyright administration organizations.²⁰⁸ These revisions are expected to help owners advertise copyrighted products, including cultural and software goods, in domestic and international markets.²⁰⁹ Overall, the Amendment has eliminated most of the remaining vestiges of the planned economy that pervaded the old law, and represents a substantial step toward bringing copyright protection into closer accord with TRIPS.

²⁰³ *Id.*

²⁰⁴ *Historic Progress-Written on the Occasion of Examining and Approving the "Copyright Law" (Amendment)*, WORLD NEWS CONNECTION, Oct. 31, 2001, available at 2001 WL 29878825.

²⁰⁵ *China Amends Copyright Law to Greet WTO Accession*, WORLD NEWS CONNECTION, Nov. 7, 2001, available at 2001 WL 29881735.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *China Amends Copyright Laws to Greet WTO Accession*, WORLD NEWS CONNECTION, Nov. 7, 2001, available at 2001 WL 29881735.

²⁰⁹ *Id.*

B. Trademark Amendments

In 1993, China amended the national Trademarks Law for the first time since 1984 by incorporating service-related trademarks into the scope of protection.²¹⁰ The amendment was again modified in November, 2001.²¹¹ This newest redrafting is expected to have many important ramifications on the more than 220,000 trademark applications filed annually.²¹²

One important change promulgated by the new law is the codification of a new trademark application process.²¹³ The new law prevents the issuance of trademarks for improper purposes even when the application has been filed before others.²¹⁴ These changes also prevent parties from using illegal means to register trademarks.²¹⁵ Stipulations on the application, examination and verification of trademark registration will also have a substantial effect on preventing the expansion of illegal trademarks.²¹⁶

Another important change is in the area of legal liabilities for trademark violations. The new law details specific situations in which the industrial and commercial administration may enforce the law if evidence is proffered concerning the illegal use of trademarks.²¹⁷ This change was implemented to deter the obstruction of infringement investigations, which was a common practice under the old regime.²¹⁸ Modifications of the appellate process will also likely enhance the ability of judicial authorities to mete out justice in cases of trademark infringement.²¹⁹ Cumulatively, these modifications should significantly advance the policy goals of the Chinese government: improving the quality of trademark investigations; strengthening enforcement mechanisms; and to better protecting the rights of trademark owners.

²¹⁰ *Protecting Trademarks in Accordance With the Law*, WORLD NEWS CONNECTION, Nov. 5, 2001, available in 2001 WL 29881663.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *See id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *See id.*

²¹⁹ *Id.*

VI. PREDICTIONS ON THE IMPACT OF CHINA'S IP LAW REVISIONS

A. *Problems Faced by WTO Accession*

Membership in the WTO presents a dilemma for the Chinese government. On one side, accession guarantees the opening of Chinese markets and the elimination of barriers to foreign products and services reaching the mainland. Conversely, entry also means that domestic industries, especially the farming, banking and automotive sectors, will now be competing with global mega-firms for business. In the months to come, the Chinese government will face the difficult task of balancing an anticipated rise in domestic unemployment and potential for social unrest with the pressure to abide by international regulations governing the WTO.²²⁰ Many predict that joining the WTO will actually worsen the piracy problems in China.²²¹ Among the reasons cited for skepticism include the increased sophistication of piracy operations, the current lack of education about WTO regulations, and other various economic, administrative and judicial obstacles in enforcing IP laws.²²²

Some current software pirating organizations have evolved into sophisticated operations. Whereas in the past, software pirates operated as a group of isolated individuals manufacturing software in back alleys, the counterfeiting industry today is a multi-billion dollar business.²²³ Some illegal producers have the capability of producing thousands of fake CDs that look and work so well that only trained professionals can identify them as counterfeit.²²⁴ Additionally, officials often have difficulty locating these operations because production facilities can be hidden in remote areas or protected by armed personnel.²²⁵

Second, the government may not be doing enough to educate the general public about these new changes. Especially in rural China, the region that will be most impacted by the nation's entry into the WTO, eight of ten people living in the countryside do not know of the accession.²²⁶ There are also signs that the counterfeiters are better informed about the new regulations than are

²²⁰ *Id.*

²²¹ Iwata, *supra* note 7.

²²² *Id.*

²²³ *See id.*

²²⁴ *See id.*

²²⁵ *See id.*

²²⁶ Lakshmanan, *supra* note 3.

most government officials.²²⁷ One report recently noted that domestic counterfeiters are busy preparing fake labels in anticipation of the onslaught of new foreign goods.²²⁸

China's entry into the WTO may also frustrate the ability of customs officials to prevent pirated goods from reaching the channels of commerce. Like drug traffickers, infringers routinely go to elaborate lengths to smuggle their bogus products across borders and into developed countries.²²⁹ Opening global markets to Chinese products may further improve the ability of pirates to smuggle their goods without detection by customs officials. This will mean an increase in the amount of faked goods that reach member nations of the WTO.

The economic disincentives of combating piracy also remain a primary reason why WTO membership may exacerbate, rather than impede, the illegal industry. First, while the nation itself has an economic incentive to liberalize its tariff and market policies following WTO accession, the same incentives do not exist in protecting intellectual property rights.²³⁰ Stronger IP rights actually hurt many domestic consumers and businesses.²³¹ Consumers are injured because they have to pay higher prices because of the increased market powers of intellectual property holders.²³² Domestic businesses are damaged because many of these companies use pirated goods as intermediary products in manufacturing.²³³ Furthermore, because China's technological innovation capabilities currently lag behind those in the West, China might be better off free-loading on the inventions of more advanced nations.²³⁴

Second, even if China commits to IP enforcement, strong local incentives make execution of these laws less likely. Radical drops in tariffs on cheaper and better quality international products will drive many area industries out of business.²³⁵ Local governments, which have a history of resistance to central authority, may try to offset the loss of these prosperous industries by

²²⁷ *Chinese Counterfeiters Preparing Fake Labels Ahead of WTO Entry*, AGENCE FR.-PRESSE, Nov. 16, 2001, available at 2001 WL 25064433.

²²⁸ *Id.*

²²⁹ Iwata, *supra* note 7.

²³⁰ Edwin Lun-cheung Lai, *Pirates Stalking WTO Entry*, S. CHINA MORNING POST, Aug. 29, 2001, available at 2001 WL 25742627.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

encouraging piracy.²³⁶ Some economists also predict that up to thirty million domestic jobs could disappear as a result of increased market access in China.²³⁷ The loss of these jobs and the resulting exodus of people from rural to urban commercial centers might provide a strong incentive for local governments to turn a blind eye to lucrative businesses, such as piracy, that manufacture wealth for their region.²³⁸

B. Encouraging Signs of WTO Accession

Despite these challenges, there are indications that WTO membership will facilitate the war on counterfeiting. First, in addition to significant changes to the black letter law of intellectual property protection, the revisions serve a more symbolic purpose. Many officials in China see these changes as transforming Chinese IP laws from a system affecting mostly writers and artisans, to a set of laws acknowledged by all citizens and affirmed as guarantees for personal rights.²³⁹ One commentator recognized the importance of this fundamental change in public perception, noting

[t]his is not merely a change in the law, it is through such a change that we can deeply feel the never-ending changes of our society and our deepening respect for knowledge, and feel the firm and sturdy steps taken in the construction of our socialist democracy and the legal system.²⁴⁰

Additionally, he believes that WTO accession will be a catalyst in forcing ordinary Chinese citizens to reevaluate their views on IP rights and the value of creative endeavors generally.²⁴¹

The cumulative effect of the new Chinese amendments has also been extended outside the legislative sphere for the first time. Li Shunde, an IP professor at the Law Institute under the Chinese Academy of Social Sciences, noted that “the profound impact of China’s entry into the WTO has not only

²³⁶ Lakshmanan, *supra* note 3 (noting that a famous Chinese proverb, “[t]he heavens are high and the emperor is far away” symbolized the historic local defiance of Chinese central authority).

²³⁷ *Id.*

²³⁸ *Id.* (noting that in the months immediately preceding China’s entry into the WTO, eighty million peasants flooded urban economic centers in search of jobs).

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

been reflected in its legislative sector, but also in its judicial and administrative organizations."²⁴² Moreover, he stated that, "tougher measures have been taken to prevent further IPR infringement, such as increasing local agency investigatory powers before adjudication of individual cases."²⁴³

Another important international implication of China's WTO accession is the reduction of many of the transaction costs of doing business in the Asian nation. While Chinese manual labor could be easily acquired in years past, the availability of qualified and affordable office personnel was relatively limited.²⁴⁴ Companies seeking to circumvent the hiring of domestic Chinese managers encountered obstacles stemming from the "old world" way of conducting business, which predicated success on connections and relationships with Chinese businesspeople.²⁴⁵ The opening of Chinese borders is expected to facilitate joint ventures between Western firms and Chinese corporations which could help reduce this rigidity and allow a closer and more direct monitoring of counterfeiting operations by WTO Member Nations.

Modifications in the judicial system are also expected to deter counterfeiters and mitigate the influence of localism in settling disputes. First, the WTO allows for a review of Chinese court decisions to determine if disputes were adjudicated impartially.²⁴⁶ This check should reduce political tampering with court decisions and mitigate some of the corruption that currently clouds the judicial system.²⁴⁷ Second, this appellate process should insure that WTO rules and regulations are applied more consistently in courts.²⁴⁸ Increased uniformity in judicial decisions could also decrease the power of local cadres over IP litigation.²⁴⁹

Finally, the adoption of new IP laws is forcing judicial officials to revise and update many antiquated opinions. The Supreme People's Court of China (SPC) is currently sorting through more than 1,200 judicial explanations in an effort to eliminate inconsistencies and close loopholes.²⁵⁰ Additionally, the

²⁴² Meng Yan, *Efforts on IPR Security Intensify*, CHINA DAILY, Nov. 5, 2001, available at 2001 WL 7484767.

²⁴³ *Id.*

²⁴⁴ Andruss, *supra* note 59.

²⁴⁵ *Id.*

²⁴⁶ Xiao Rui, *Efforts Made to Act in Line With WTO Rules*, WORLD NEWS CONNECTION, Nov. 13, 2001, available at 2001 WL 30217677.

²⁴⁷ *Id.*

²⁴⁸ Andy Ho, *Is China's Legal Standard Up to WTO Standards?*, THE STRAITS TIMES (Singapore), Nov. 20, 2001, available at 2001 WL 28644221.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

SPC is busy drafting interpretive guidelines on both the new national IP laws and the WTO regulations.²⁵¹ These interpretive guidelines, which are often cited by attorneys as persuasive authority in Chinese court proceedings,²⁵² will help clarify many of the legal rights of IP holders. Authorities hope that these affirmative steps will lead to a more consistent and transparent body of common law that will aid prosecutors in trying piracy claims.²⁵³

C. Additional Changes Needed

While predictions are split on the precise effect that WTO membership will have on the counterfeiting business, most agree that China is still a long way from eradicating the epidemic.²⁵⁴ Tougher criminal and civil laws, additional enforcement personnel and increased education for authorities are among the most commonly cited priorities.²⁵⁵

First, China needs to increase its criminal penalties for IP infringement.²⁵⁶ As established in articles 213 to 220 of the Criminal Code of China, criminal sanctions are available only in cases considered "serious" or in cases where sales by counterfeiters are "relatively large."²⁵⁷ "Serious" and "relatively large" are defined as when the value of infringing goods is \$6,024 or higher.²⁵⁸ Consequently, many local distributors are ostensibly immune from prosecution. This amount should be reduced to give authorities more leeway in bringing counterfeiters to trial.

Second, the amount of evidence needed to prosecute IP crimes also allows many infringers to escape convictions.²⁵⁹ The current law places the burden on the police to obtain evidence that the threshold amount (\$6,024) has been reached.²⁶⁰ Because infringers rarely keep documented evidence of the amount of faked goods produced or trafficked, prosecutors are often unable to prove that the threshold amount has been met.²⁶¹

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ Morarjee, *supra* note 60.

²⁵⁵ *Id.*

²⁵⁶ Moga, *supra* note 181.

²⁵⁷ *Id.*

²⁵⁸ Jia Hepeng & Cui Ning, *Discussion on IPR Emphasize Protection Laws*, CHINA DAILY, Nov. 17, 2001, available at 2001 WL 7484972.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

Additionally, requiring police to gather this evidence creates inefficiencies and strains on the system because of the amount of time, effort and manpower involved.²⁶² Judicial authorities in China propose a relaxation of this burden on prosecutors and a more efficient way of calculating the value of infringed goods so that the amount of evidence needed will be reduced.²⁶³

Finally, more education for judges and professionals administering the laws is needed.²⁶⁴ Complying with TRIPS and the newly codified changes to the national IP laws will greatly increase the number of cases adjudicated in Chinese courts. The current supply of 90,000 domestic Chinese lawyers (only a small percentage of whom are IP attorneys) is insufficient to handle the massive flood of litigation that should ensue.²⁶⁵ China will first need to offer more incentives to encourage students to study law, will then have to give more continuing legal education seminars to educate certified attorneys who currently have little IP training and finally will need to collaborate with other nations to relieve the predicted demand on the court system.²⁶⁶ Taken together, these steps should help Chinese authorities handle the onslaught of new IP disputes that should provide more tangible deterrents to potential counterfeiters.

VII. CONCLUSION

China's entry into the WTO has been an issue of intense debate for the past fifteen years. Those in favor argued that admitting China will help expand trade globally while those in opposition feared that opening China's borders would worsen the nation's counterfeiting problem. Eventually the proponents got their way, as China was formally admitted as a trading partner to the WTO in December, 2001. The admittance was accompanied by promises from the Chinese government to revise existing IP laws and abide by the provisions of TRIPS, the governing IP law of the WTO.

In compliance with TRIPS, the Chinese made radical overhauls to their system of IP laws. China added new judicial and administrative protections, upgraded their application procedures and streamlined their enforcement mechanisms. First, the Chinese gave IP creators the exclusive right to control

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ Zhang Yong & Meng Yan, *IPR Stressed To Follow WTO Rules*, CHINA DAILY, Nov. 15, 2001, available at 2001 WL 7484930.

²⁶⁵ *See id.*

²⁶⁶ *Id.*

their product and enjoin the use by others without permission. Second, the new laws specify the amount of money damages to be awarded in cases of infringement. Third, the jurisdiction of local authorities was expanded to decrease the overlap of power between agencies. Fourth, judges were given the injunctive power and were able for the first time to destroy pirated goods or forbid their use in the open market. Finally, the Chinese adopted a similar no fault system for claim resolution that exists in TRIPS.

The upgraded application procedures provide stricter standards for the issuance of compulsory licenses. By limiting the scope and duration of these licenses, original patent holders have more incentive to distribute and sell their goods without having to worry that their patent will be trumped. The streamlined enforcement procedures require courts to determine the rightful owner of the patent before the start of infringement proceedings. This has decreased superfluous simultaneous litigation that was common under the old system.

The copyright and trademarks laws have also undergone dramatic changes in recent years. First, the scope of protected copyrights and trademarks has been greatly increased. Second, the new laws have helped to better protect the marketing of IP over the Internet and other mediums. Last, the trademark application process has been made more efficient and several channels of illegal registration have been eliminated.

These changes are a step in the right direction, but fears abound that WTO accession might facilitate, rather than impede, the counterfeiting epidemic. Customs officials may have more difficulty preventing counterfeit goods from entering and leaving the nation once Chinese borders are opened. Additionally, many worry that counterfeiters are might be better equipped than the government to handle the proliferation of new goods. Finally, the infiltration of Western goods into the Chinese marketplace might drive out jobs and serve as an economic disincentive for authorities to enforce the existing regulations.

Conversely, there are many signs that WTO entry will help counteract the counterfeiting problem. First, there have been significant changes to the black-letter IP law. This has closed many loopholes and created a more consistent application of existing laws. Second, the number of jurisdictional disputes between agencies has been reduced. Finally, the opening of Chinese borders is expected to drive down the transaction costs of doing business in China which should encourage the relocation of international businesses.

While opinion is split about the effect WTO accession will have on the piracy industry, most agree about what still needs to be done. First, China needs to increase its criminal penalties for IP enforcement. Second, the nation

needs to decrease the burden on prosecutors trying IP cases. This might be accomplished by lessening the evidentiary standard and decreasing the dollar amount threshold required to bring "serious" charges against counterfeiters. Finally, legal professionals need to be better educated about the new laws and incentives need to be offered to attract more people into the legal profession. Only time will tell which side will be proven accurate and whether WTO accession will help tame the Chinese counterfeiting dragon.