

# THE SKY IS HIGH AND THE EMPEROR IS FAR WAY: THE ENFORCEMENT OF INTELLECTUAL PROPERTY LAW IN CHINA\*

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**RESUMEN:** Si bien es cierto que a partir de los años setenta China ha desarrollado una regulación interna y ha suscrito diversos tratados en materia de propiedad intelectual, no ha podido proveer de una protección efectiva a tal tipo de propiedad. De esta forma, la autora explica cuáles son las causas de esta situación y las posibles alternativas. Luego de determinar que el problema tiene su origen en la ineficiencia de algunas autoridades, más que en cuestiones culturales, la autora analiza las limitaciones de las autoridades judiciales y administrativas en esta materia. Asimismo, explica cómo es que las autoridades permiten la violación a la propiedad intelectual en aras de la protección de la economía nacional. Finalmente, destaca que la Organización Mundial de Comercio puede desempeñar un papel importante en la consolidación de una protección efectiva de la propiedad intelectual en China.

**Palabras clave:** propiedad intelectual, comercio internacional, tratados internacionales.

**ABSTRACT:** *In spite of the fact that since the 1970s China has passed domestic regulations and has signed several international treaties in connection with intellectual property, that country has not been able to provide effective protection to said kind of property. In this way, the author explains the causes of this situation and the possible alternatives. After explaining that the problem has its origins in the lack of efficiency of Chinese authorities, more than in cultural factors, the author examines the limitations of judicial and administrative authorities related to this matter. Moreover, she explains how it is that such authorities allow the violation of intellectual property rights, in order to protect the Chinese economy. Finally, she argues that the World Trade Organization can play an important role in the consolidation of effective protection of intellectual property in China.*

**Descriptors:** *intellectual property, international trade, international treaties.*

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## I. INTRODUCTION

Intellectual property rights are becoming increasingly important in international trade and development. In recent years, some international and multinational agreements have included intellectual property provisions, for instance, TRIPs (Trade-Related Aspects of Intellectual Property Rights) and NAFTA (North American Free Trade Agreement). However, most developing countries still fail to provide intellectual property with adequate protection, and this failure has facilitated the rampant piracy of goods.<sup>1</sup> China is one of these countries that have been heavily criticized by the western countries, especially the United States, for failing to enforce intellectual property protection.

For some people in Western countries, China is an old country full of mysteries and currently under strict communist control. However, in the last two decades, China has stopped the isolation and tried very hard to get onto the international track of economic development. To participate in the international economic exchanges, the developing and newly developed countries find it necessary to play according to the rules formulated mainly by the leading industrialized countries and/or manifested in the legal framework of major international economic organizations.<sup>2</sup> Without many exceptions, China has to accept most international standard of behaviors. Chinese IP law is such an example.

1 See, i. e. Niemeyer, Kailan M., "Protecting Foreign Copyright in the People's Republic of China, Currents", *Int'l Trade L. J.*, 10 (Fall 1995).

2 Man, Thomas Yunlong, *National Legal Restructuring in Accordance with International Norms: GATT/WTO and China's Foreign Trade Reform* (1998), <http://www.law.indiana.edu/glsj/vol14/no2/manpgp.html>, visited 01/24/01.

Since the end of the 1970s, in fact, China has joined most of the major international treaties and enacted a corpus of intellectual property laws in a remarkably short period of time.<sup>3</sup> China has taken these actions partly in response to international pressure and partly by the desire to attract foreign investment and technology. Despite all the progress China has made at the legislative level, the unauthorized reproduction and distribution of goods, such as computer software and movies, are still widespread in China. According to the report by the Business Software Alliance, the piracy rate for software in China in 1997 was 96%.<sup>4</sup> As described by the *New York Times* on December 12, 2000, "Videodiscs shops, kiosks and sidewalk hawkers, meanwhile, have saturated the major cities with pirated videodiscs... Even if a (pirate) factory is found and closed down, the equipment is sometimes simply moved and production starts up again... 'It's just like drawing water with a bamboo basket'".

Since the formal IP law in China is relatively good, the question boils down to the enforcement: Why cannot the IP law be enforced well? Is there any chance for improvement of the future enforcement? To answer these questions, this paper examines whether cultural resistance is still a serious obstacle to the enforcement of Chinese IP law in Part I. Part II reviews the institutional arrangement of the enforcement of Chinese IP law and its limits. Part III considers the marginalization of the law via local protectionism, and explores the factors leading to local protectionism in the context of IP enforcement. Part IV tries to illustrate what are the internal forces for enforcement. Part V considers whether external factors, such as, the World Trade Organization (WTO), can resolve or help resolve the current inefficiency of Chinese intellectual property enforcement.

3 For example, China acceded to the Paris Convention in 1985 and to the Berne Convention in October 1992. China has enacted the 1982 Trademark Law, the 1984 Patent law, the 1990 Copyright Law, the 1993 Anti-Unfair Competition Law.

4 News from <http://www.copyinfo.com/forum1.htm>, visited 01/22/01.

## II. TRANSPLANT OF IP LAW AND CHANGES IN LEGAL CULTURE

Simply speaking, legal transplant means the moving of a rule or a system of law from one country to another or from one people to another.<sup>5</sup> Chinese intellectual property law is an example of a taking from various countries' legislation models and international conventions. Intellectual property is not an indigenous concept in Chinese legal history. In the late 1800s, copyrights, patents and trademarks first arrived in China, but due to the decades of wars, famines and revolutions, they never had a chance to take root in China.<sup>6</sup> Until the late 1970s, the new China (the People's Republic of China) did not begin to make modern IP law. The question arises whether China's lack of enforcement of IP law is because the imported IP law does not fit the Chinese domestic circumstance.

Some commentators have argued that Chinese cultural tradition resists the idea of intellectual property law.<sup>7</sup> As the interesting title of Alford's book, adapted from a Chinese saying, suggests, "the stealing of a book" is regarded as "an elegant offense" in China.<sup>8</sup> This is because the purpose of the "stealing" is to have access to a book and to knowledge, which is valued by the society. Therefore, the stealing could be forgiven. The implication is that if stealing a book can be forgiven, why not the stealing of the intangible property, IP?

China was for centuries the world's most scientifically and technologically advanced country. It is the place where gunpowder, paper and compass were innovated, but it did not generate intellectual property protection for its scientific, technological, and artistic creations. There are certainly economic and technological re-

5 Waston, Alan, *Legal Transplants*, 21 (1974).

6 Alford, William P., *To Steal a Book is an Elegant Offense, Intellectual Property Law in Chinese Civilization* (1995).

7 For example, *idem*; Wang, Liwei, "The Chinese Traditions inimical to the Patent Law", 14 *Northwestern Journal of International Law & Business* (1993); Wingrove N., China Traditions Oppose War on IP Piracy, *Research Technology Management*, vol. 38, núm. 3, mayo de 1995.

8 See Alford, *supra* note 6.

asons for the lack of such protection. More attention, however, was given to the cultural explanation. "Lying at the core of traditional Chinese society's treatment of intellectual property was the dominant Confucian vision of the nature of civilization and of the constitutive role played therein by a shared and still vital past".<sup>9</sup> This vision dictates that there should be broad access to the common heritage of all the Chinese and is against thinking of the fruits of intellectual endeavors as private property. Additionally, in Confucianism-dominated Chinese society, there had been a strong emphasis on learning by copying the past, thus "the copying of works of almost any kind has for centuries been regarded as honorable and necessary".<sup>10</sup>

After the establishment of the People's Republic of China, the Chinese Communist Party initiated a set of revolutionary movements to break away from feudal or traditional society. In 1974, there was a movement called "down Confucianism". Its aim was to replace the Confucian value with the Communistic value. Since then the Communist regime had mandated for more than thirty years the idea of sharing creative works. The Communist regime stated that all wealth and property belonged to the state. Thus, creative ideas and expressions were also part of state property and could be used without the need for authorization.<sup>11</sup> It appears that both the Confucian and Communist ideas rejected treating intellectual property as a base to establish private ownership interests even though they have different ideological foundations. Moreover, both the Confucian and Communist ideas emphasize the subordination of individual interests to social good.<sup>12</sup>

However, culture is not static, especially in our time when the world is becoming smaller and more connected by the amazing development of transportation and communication. Since the "reform and opening" started in the late 1970s, dramatic changes

<sup>9</sup> *Ibidem*, at 19.

<sup>10</sup> Wingrove, *supra* note 7.

<sup>11</sup> Ho, Kenneth, *Problem of Software Piracy in Hong Kong and China* (1995) <http://www.info.gov.hk/ipd/piracy.html>, visited on 01/24/01.

<sup>12</sup> Cheng, Julia, "China's Copyright System, Rising to the Spirit of Trips Requires an Internal Focus and WTO Membership", 21 *Fordham Int'l L. J.* 1941, 1974-1977 (1998).

have taken place in China. With the development of a market economy and the process of privatization, people today care more about their individual economic well-being and rights. The Communist regime tried to replace the Confucian value in the Chinese society, and now the Communist value is gradually replaced by the market-oriented value. It has been pointed out that perhaps the most significant social change brought on by economic reform has been the loss among many Chinese of whatever faith they may have had in the ideology of Marxism Leninism Mao Zedong Thought.<sup>13</sup> The Chinese people are now pursuing private wealth as hard as people in any other place, and the idea that IP is common property has also declined. These obstacles are thus not as serious as they were when IP law was first introduced into China at the beginning of the economic reform.

This change can be illustrated by the increasing number of the intellectual property (IP) cases in China. From 1991 to June 1996, 18,637 intellectual property cases were litigated and 90% of them reached a judgment.<sup>14</sup> From January 1996 to June 1998, 9,531 intellectual property cases were heard by the courts, and 9,018 were given judgments.<sup>15</sup> In 1997 alone, the China Patent Office accepted 114,208 patent applications, including 21,676 from abroad.<sup>16</sup> A total of 148,755 trademarks were registered in 1997, with 118,577 domestic ones, 21,676 foreign country-by-country registrations, and 8,502 as territory extensions of the Madrid International Registration of trademarks. In the same year, Chinese courts tried more than 4,000 IPR related lawsuits.<sup>17</sup> There were already copyright infringement lawsuits over Internet publication a couple of years ago. In 1999, six writers sued Beijing On Line for publishing their works on line without their consent.<sup>18</sup>

13 Lubman, Stanley B., *Bird in a Cage, Legal Reform in China after Mao*, 121 (1999).

14 *Intellectual Property Protection in China*, <http://www.humanrights-china.org/xiezhen/china/chanquan/091501.htm>.

15 Jiang, Zhipei, *Intellectual Property Protection in China and WTO* (2000), <http://www.chinai-prlaw.com/fgri/fgri26.htm>, visited on 01/22/01.

16 Yang, Lincun, *Progress on Intellectual Property Rights Issues*, julio de 1998, <http://www.china2thou.com/9807p6.htm>, visited on 01/24/01.

17 *Idem*.

18 News from <http://www.gznet.com/news/gzdl.one/mp114/p102.htm>, visited on 03/29/01.

At the legal infrastructure level, China has enacted the 1982 Trademark Law, 1984 Patent Law, 1990 Copyright Law, and 1993 Anti-Unfair Competition Law among others.<sup>19</sup> The Trademark Law was amended in 1993 and 2001. The Patent Law was amended in 1992 and 2001. The revision of the Copyright Law was also under way. Meanwhile, China has joined the main international treaties of intellectual property protection, such as the Paris Convention in 1982,<sup>20</sup> and the Berne Convention in 1989.<sup>21</sup> Article 142 of the General Principles of the Civil Law of China provides that an international treaty will become Chinese domestic law if China is a contracting party to or accedes to the treaty.<sup>22</sup> To date, the Chinese court system has generated a notable number of IPR decisions, involving domestic as well as foreign parties.<sup>23</sup>

Although some critics may still question the concrete and tangible advantages that IPRs can bring for China, Chinese officials and some commentators seem to have perceived an array of long-term benefits. For example, Mr Shen, Rengan, a deputy director of NCA (National Copyright Administration), pointed out that the establishment of IPR could foster enterprise and market efficiency, foreign trade and investment, cultural propaganda and national reunification.<sup>24</sup> Moreover, the Report on the Intellectual Property Rights Protection in China in 1999 by the Chinese government also gave five reasons for such protection. They are (1) for establishing a socialist market economy; (2) for achieving scientific progress and technological innovation; (3) for building a socialist country ruled by law; (4) for carrying out the reform and opening

19 These laws can be found respectively in the *People's Republic of China Fagui Huibian* 1993, 1992, 1990 and 1993.

20 China acceded to the Paris Convention in 1985, see *Monthly Review of the World Intellectual Property Organization*, Indus. Prop. (enero de 1992), at 6.

21 China acceded to the Berne Convention in October 1992. See Birden (1994), 417.

22 The *People's Republic of China Fagui Huibian* 1986, at 107.

23 Jiang, Zhipei, *Intellectual Property Protection in China and WTO* (2000), <http://www.chinaiprlaw.com/fgrt/fgrt26.htm>, visited on 01/22/01.

24 Shen, Rengan, "Conditions of China's Copyright Protection", en Supreme People's Court Training Class for Judicial Protection of Foreign-related Copyrights (ed.), *Minshi shenpan ruogan wenti de lilun yu shiwu jiangzuo* [Lectures on Theory and Practice Concerning Certain Questions of Civil Adjudication] 3-4 (1995).

up policy; and (5) for the construction of spiritual civilization.<sup>25</sup> Since these justification and explanations are from authoritative sources, they have been gradually accepted through training and propaganda.<sup>26</sup> This emerging legal culture initiated by the enactment of a series of intellectual property laws and the establishment of the judicial and administrative agencies, as well as other promotional activities such as large-scale publicity for IP law has created a climate in which indigenous Chinese attitudes toward intellectual property is challenged and changing.

Actually, Chinese culture is reasonably flexible and has experienced changes throughout history. German and Soviet law have in particular served at different times as models for the re-invention of China's legal order.<sup>27</sup> In the last century, many new laws have been introduced into China and have transformed Chinese society dramatically. For example, even the Marriage and Family Law, whose spirits and regulation are contrary to long rooted Chinese family forms and norms, can take root and function well in Chinese society.<sup>28</sup>

At least, assumptions about the force of history and culture cannot adequately explain the lacking of enforcement of IP law in China today. The nonexistence of a modern IP counterpart in Chinese history does not necessarily lead to permanent resistance because even in the western countries, IP law was born only a few centuries ago as a consequence of the development of technology. Some commentators blame that the Chinese people lack a so-called "right consciousness".<sup>29</sup> It is reported, however, that in the ten years after the enactment of 1989 Administrative Law, all le-

25 Report on the Intellectual Property Rights Protection in China in 1999, <http://www.copyinfo.com/ipr99.htm>.

26 Feng, Peter, *Intellectual Property in China* 5 (1997).

27 German law served as model in the early 20th century and soviet law served in the 1950s. See Keller, Perry, "Sources of Order in Chinese Law", *American Journal of Comparative Law* 42, 711 (1994: 712).

28 The Chinese Marriage and Family Law was enacted in may, 1950 and amended in january 1980, available at <http://www.qis.net/chinalaw/lawchin/htm>. This law provides that a family adopts the form of "one husband, one wife" and the women enjoy the same rights as the men in the society.

29 Wang, Liwei, "The Chinese Traditions Inimical to the Patent Law", 14 *Northwestern Journal of International Law & Business* 15 (1993).



vels of People's courts in China have heard 586,000 cases of "Min Gao Guan", individuals against the government.<sup>30</sup> Such litigation demonstrates that people's awareness of their rights is rising after the law was made. The reason people seem indifferent to their right relies more on the fact that there is not an available system for people to realize their rights and there is not a strong enough interest group to push for the establishment of a better mechanism to realize their rights. The sidewalk hawkers and other infringers in China are also very clear that their activities are illegal. However, they are motivated by the high profit and the low risk of being caught. This desire for monetary gain is not cultural-specific to China.

Therefore, instead of placing much emphasis on the cultural hurdles to the observance of IP law in China, this paper will focus on the analysis of the current inefficient legal institutions to afford IP protections. It will also explore the need for an internal incentive structure for the enforcement of IP laws in China.<sup>31</sup>

### III. INSTITUTIONAL FRAMEWORK AND ITS LIMITS

Chinese law provides both judicial and administrative protection in cases concerning the infringement of intellectual property rights. Any citizen, legal entity or other organization, including any foreigners, may seek administrative and judicial protections.<sup>32</sup>

<sup>30</sup> News from <http://www.lawyer-group.com/news/fgclub/0070.htm>, visited on 01/22/01.

<sup>31</sup> People can argue that institutions and interest groups are also products of culture. Here, for the convenience of explanation, I use the "culture" as a narrow concept and separate from institutions.

<sup>32</sup> Arbitration is also an option, but the enforcement of both judicial awards and arbitral awards is carried out by the People's Court. Article 217 of the Chinese Civil Procedure Law provides that if a People's Court decides that an arbitration decision cannot be enforced and all parties to the arbitration agree, the matter may be arbitrated again or else litigated. This means the enforcement of an arbitration is fundamentally integrated into the judicial enforcement system.

## 1. *Judicial System and Its Limits*

Chinese judicial system provides IPR owners or the public prosecutors with a forum in which civil claims or criminal lawsuits may be raised against intellectual property infringers. An unsatisfied party in an intellectual property administrative decision can also bring an administrative litigation in the court for review.<sup>33</sup>

Since 1993, intellectual property trial divisions have been set up in the High People's Courts of Beijing, Shanghai, Tianjin, and the Guandong, Fujian, Jiangsu, and Hainan Province. These trial divisions are also formed in the Intermediate People's Courts in major cities such as the capital of provinces. In 1996, the Supreme People's Court of China established the Intellectual Property Rights Division. In recent years, these courts at various levels have accepted and decided a number of IPR related cases. For example, between January 1996 and June 1998, people's courts accepted 2,948 patent disputes and decided 2,642; 858 trademark disputes and decided 780; 1126 copyright disputes and decided 1105; 2,720 technology contract disputes and decided 2,678; and 1,879 cases of trade secrets and other IP related disputes and decided 1,813 (Jiang, 2000).<sup>34</sup> During the same period of time, the courts have accepted 435 criminal cases relating to intellectual property and have decided them (Jiang, 2000).

Chinese courts make their decisions mainly on the basis of legislation, while following the judicial Explanations of Supreme People's Courts as well. The statistics have showed that the Chinese courts have made much achievement especially considering that the modern IP law came to China only one decade ago. Chinese court have increased greatly their power of intellectual property protection against "various IP infringement conducts and acts that wrecked the order of science and technology market, such as plagiarizing, illegally copying, passing off and breaching of contract, etc."<sup>35</sup> However, the coming of a mature system takes

33 Jiang, *supra* note 23.

34 *Idem*.

35 *Idem*.

time. Litigating IPRs in China still has its own set of problems, as discussed in the subsections below.

### A. Damages

Although full litigation of an intellectual property or unfair competition claim is ordinarily possible in China, the compensation awarded is very controversial. Guidelines for determining the amount of damages awarded by the People's Supreme Court contain three standards. First, damage is measured by the actual economic loss to the proprietor. This is calculated by taking the amount of profit from each infringed product multiplied by the decrease in sales because of the infringement. Second, the court can take the total profit obtained by the infringer as damages suffered by the plaintiff. The amount is calculated by multiplying profit gained through the sale of an infringed product by the number of infringed products sold equals the damages. Third, the court can come up with a reasonable amount, no less than the license fee, as damages. However, if both parties agree to some other method for calculating damages, the court is likely to accept their formula.<sup>36</sup> Although these methods are usually similar to those used in most courts throughout the world, the damages awarded in reality are criticized as not giving the plaintiffs adequate and just compensation.<sup>37</sup>

It was reported that both Disney and Microsoft have tried in taking legal actions against trademark infringements in China several years, but the awards for compensation were only US\$91 and US\$2,600 respectively, even though Microsoft claimed that it lost US\$20-30 million through unauthorized production of over 650,000 copies of Microsoft's trademark hologram. In recent years, the damages awarded have been increased a little. However, they are not satisfying yet. In a landmark verdict in 1996, the Beijing

<sup>36</sup> *Idem*.

<sup>37</sup> Simpson, Amy E., "Copyright Law and Software Regulation in the People's Republic of China: Have the Chinese Parties Affected World Trade?", 20 *NCJ Int'l L. & Com. Reg.* 575, 576 (1995).

núm. 1 Intermediate Court delivered judgment in favor of the Business Software Alliance (BSA) awarding, among other things, the defendant over RMB 600,000 (US\$ 70,000) in damages, including court costs and accounting.<sup>38</sup> Usually the damage that the foreigners' claim is a result of multiplying the retail unit price by the number of infringing items plus other fees. However, considering the fact that this price is much higher than the price of an infringing item and the volume of sales has to decrease, Chinese authorities often think the foreigners' large claims are unconvincing.<sup>39</sup>

### B. *Difficulties of Proof*

To sue an infringer in court, IP owners must first obtain evidence, such as infringing products, as well as the identity and location of infringing manufacturers and sellers. Gathering such evidence is not an easy task. Studies have reported that much of the illegal production is done by small underground operations that challenge the IP owners to find evidence and to use the dispute resolution bodies to enforce their rights.<sup>40</sup>

Moreover, the process of manufacturing, assembling, packing, and labeling is often handled by different people in different locations.<sup>41</sup> It is hard for the IP rights holders to find even the location of infringing activities, not to mention proof of such "mobile" activities. Even if the location is identified, a search of the

38 Spierer, Jonathan C., "Intellectual Property in China: Prospectus for New Market Entrants", *Harvard Asia Quarterly* (1999), available at <http://www.fas.harvard.edu/~asiactr/haq/199902/9902a010.htm>, visited on 01/23/01.

39 For example, in the "Microsoft/MS-Dos" case, a Shenzhen University reflective materials factory was found to be counterfeiting anti-counterfeit holograms of "Microsoft" and "MS-Dos" labels. The Shenzhen Industry and Commerce Bureau awarded the complaint Microsoft Corp. 22,375.97 yuan illegal gains, as opposed to the "unconvincing" figure of compensation the complainant demanded: 182,696,259.yuan. Chang, Wen, *Comments on the 'Microsoft/Dos' trademark infringement case* [1995:3], quoted from Feng (1997): 32.

40 See April 30 1996 Announcement by the acting United States Trade Representative Charlene Barskefsky regarding the U. S. Administration annual review under the title VII of the 1988 Omnibus Trade.

41 Argyris, Anne, *Protecting Intellectual Property Rights in China* September 1996, 6 (1996), <http://strategis.ic.gc.ca/SSG/it03466e.html>, visited on 01/23/01.

defendant's premises is often required.<sup>42</sup> Under the current practice, the plaintiff must apply for the court to do the search by providing a security deposit with the court. The court will then balance the merits of the case and order a search or reject the application.<sup>43</sup>

Although the retailers and street vendors who sell the counterfeit products obviously conduct infringement activities, they are usually not sued due to their lack of money. Additionally, it is fairly easy for these individuals to relocate quickly. In general, it is not easy for the right holders to realize their claims through courts.

### C. *Criminal Sanctions*

In many countries, criminal sanctions are adopted to punish IP law infringement activities. Chinese law also stipulates that criminal sanctions can be imposed on some serious IP infringing activities. The Regulation on Punishment for Crimes against the Copyright Law, effective as of July 1st 1994, enables the confiscation of the infringers' illegal profits and any items, materials and tools involved in the piracy. In addition, persons convicted of manufacturing or distributing infringing goods for commercial purposes can face fines and a maximum prison sentence of 7 years. According to Article 40 of the Trademark Law, persons found guilty of using registered trademark as their own, making representation about the registered trademarks, or selling commodities having counterfeit registered trademarks will be subject to imprisonment of up to 7 years. For example, two individuals were convicted of illegally using the registered trademark SANTANA held by the German Volkswagen Company. The first defendant was sentenced by the Fengxian County Court of Shanghai to six years and six months in prison and a fine of 30,000 yuan.<sup>44</sup> The second

<sup>42</sup> Feng, *supra* note 26, at p. 37.

<sup>43</sup> *Idem*.

<sup>44</sup> Lu, Guoqiang, "Advances in the Protection of Intellectual Property Rights in China", *Harvard China Review*, vol. 1, núm. 1, (1998), available at <http://harvardchina.org/magazine/article/intell-property1.html>, visited 01/23/01.

defendant was also sentenced with an imprisonment of three years and six months and a fine of 15,000 yuan.<sup>45</sup> Similarly, an individual in Beijing was convicted of illegally reprinting the book, "General Method for Entering Chinese Characters Into Computers: Five Strokes". He was sentenced by the Haidian District Court of Beijing to prison for one year and six months and was fined 100,000 yuan.<sup>46</sup>

Despite the forgoing legislative and judicial efforts in imposing criminal prosecution against intellectual property infringement, it has not been easy to enforce criminal sanctions. Local prosecutors conduct most criminal prosecution. For instance, criminal investigations into trademark infringement cases are handled by the "Economic Crimes and Corruption Division" in the prosecutors' office at the local level.<sup>47</sup> In theory, actions can be initiated by the prosecutors without any complaint from the IP owners, but in practice criminal investigations usually commence upon receipt of a complaint from the IP owner or upon transfer of cases deemed serious by the administrative authorities.<sup>48</sup> Upon the completion of investigations and raids, the prosecutors may refer the cases to the court, which may then impose fines and prison terms. IP owners may attach civil actions to criminal cases in order to obtain compensation. However, there is a perception among many people, including the prosecutors, that counterfeiting is a low grade or harmless crime.<sup>49</sup> Moreover, due to the complexity and size of the country, investigating intellectual property rights infringement in China is a daunting and expensive task.<sup>50</sup> Therefore, even though the criminal prosecution and investigation authorities accept private complaints, there is no assurance that they will actually be investigated and/or prosecuted due to their relatively low priority and drain on investigative resources.

45 *Idem.*

46 *Idem.*

47 Argyris, *supra* note 41, 5at.

48 *Idem.*

49 Riley, Mary L., *Protecting Intellectual Property Rights in China*, 8 (1997).

50 Ho, *supra* note 11.

Furthermore, it has been pointed out that, "Penalties levied against infringers are rarely sufficient to deter piracy they are now simply part of the cost of doing business".<sup>51</sup> However, it is hard for the courts and administrative agencies to impose a high fine. As Todd Dickinson, the U. S. Undersecretary of Commerce for Intellectual Property, said, "the deterrent effect that sanctions provide does not exist at the level that's appropriate (Chinese officials) understand the problem, although they suffer resource constraints".<sup>52</sup> One of the constraints is that some of the infringers are state units responsible for maintaining benefits and the interests of their workers. Therefore, workers' interests are at stake. Punishment inflicted on work units will affect the workers interests and has to be lenient. Work units are only held to be criminally liable in trademark cases where there is a large volume of activity or significant illegal gains are being made.<sup>53</sup> This situation cannot be changed dramatically until the state-owned economy further shrinks or the social benefit system reforms. Knowing this, complainants usually do not seek criminal liabilities.<sup>54</sup>

#### D. Shortcomings of Judges

Finally, the common problems of the whole judicial system have also weakened judicial enforcement of intellectual property law. Lubman has argued that, "Structural weakness, ideology, rigidity, entrenched interests, localism, and corruption limit the functions and autonomy of the courts and undermine their legitimacy".<sup>55</sup> Moreover, the lack of experienced judges and the absence of independence undermine the authority of the judicial system. Alan Ng, Corporate Legal & Tax Counsel, Hewlett-Packard (HP), has said that, most judges have no legal training and are also not

51 *Fact Sheet: Intellectual Property Rights Enforcement in China*, 15 de mayo de 1996, available at [http://www.usembassy-israel.org.il/publish/press/trade/archive/may/et2\\_5-16.htm](http://www.usembassy-israel.org.il/publish/press/trade/archive/may/et2_5-16.htm).

52 China Urged Get Tougher on Intellectual Property, *The Times of India Online*, 10/17/00, <Http://www.timesofindia.com/171000/17intel12.htm>, visited on 01/24/01.

53 Feng, *supra* note 26, at 26.

54 *Idem*.

55 Lubman, *supra* note 13, at 317.

high-tech oriented or experienced.<sup>56</sup> Therefore it is difficult to demonstrate violation of IP matters to them.

In light of the general weakness of the whole Chinese judiciary and the specific limitations of the enforcement of intellectual property law, the role of the courts in stopping piracy or counterfeiting is limited. Moreover, in China, there continues to be a xenophobia and distrust on the Chinese court that undermines the willingness of many foreigners to use the Chinese court. This has made the court's role more limited for the purpose of protecting foreigners' IP rights.

## 2. *Administrative Agencies*

Chinese administrative agencies provide another channel for pursuing IP infringement. Quite a number of disputes are not resolved by judicial proceedings, but by the administrative agencies. For example, in the area of trademark infringement, between 1986-1993, the People's Court handled 554 cases. In contrast, from 1983 to 1993, the AICs (Administration of Industry and Commerce) handled 130,000 trademark infringement cases.<sup>57</sup> There is a general perception, especially among the foreign companies, that the People's Courts are slow, inexperienced and not well versed in IP law.<sup>58</sup> Both the attorneys for Hewlett Packard and Microsoft have said that they preferred IP enforcement through the Chinese administrative processes to legal proceedings in court.<sup>59</sup>

### A. *The Authority of Various Agencies*

In the area of patents, the Patent Authorities and the People's Court share concurrent jurisdiction over patent infringement cases. The Patent Authorities can mediate disputes, conduct investigations, grant money damages, and order injunctions.<sup>60</sup> Although the

<sup>56</sup> *Argyris*, *supra* note 41, at 8.

<sup>57</sup> *Idem*.

<sup>58</sup> *Idem*.

<sup>59</sup> *Idem*.

<sup>60</sup> Article 60 Chinese Patent Law.



patent offices have power to order cessation of infringing activities and compensation, they cannot normally impose fines or confiscate infringing products like the NCA (National Copyright Administration) and SAIC (State Administration of Industry and Commerce).

According to Article 2 of the Trademark Law, the Trademark Office, under the SAIC, is responsible for nationwide registration. This office also has the power to handle trademark infringement cases, and to impose fines when the infringing activity does not constitute a criminal offense.<sup>61</sup> Moreover, it has a set of rights to investigate as showed in the following Table 1. They have extensive administrative powers to search suspect companies, shops or any business premises.<sup>62</sup>

The Copyright Law Detailed Implementing Regulation, effective on June 1, 1991, delegates to the NCA responsibility for the administrative enforcement of copyright throughout China. The NCA is empowered to order the offender to cease any infringing activities and pay compensation to the owners of copyright for loss sustained. The NCA also has the power to seize the infringing products and evidences, as well as to impose administrative fines.<sup>63</sup>

In the next page, the table depicts the administrative agencies' power over intellectual property protection.

In addition to the foregoing authority under the intellectual property laws and regulations, the Chinese government sometimes delegates more detailed rights through special documents. For example, in February 1995, the United States announced the imposition of 100% tariffs on \$2 billion dollars worth of Chinese imports because the USTR determined that China was not enforcing its intellectual property laws, particularly with respect to copyrightable materials such as computer software and CDs, and reassigned Chi-

61 Zhang, Naigen, "Intellectual Property Law Enforcement in China: Trade Issues, Policies and Practices", 8 *Fordham Int'l LJ.* 63, 65 (1997).

62 Feng, *supra* note 26, at 19.

63 Zhang, *supra* note 61, at 67.

TABLE 1. AUTHORITY OF ADMINISTRATION AGENCIES IN CHARGE OF PROTECTING INTELLECTUAL PROPERTY

	PATENT INFRINGEMENT	TRADEMARK INFRINGEMENT	COPYRIGHT INFRINGEMENT
ADMINISTRATION ORGANS	Patent Offices	Administration of Industry and Commerce	Copyright Administration
ADMINISTRATIVE METHODS	<ol style="list-style-type: none"> <li>1. Order to cease infringement</li> <li>2. Order to pay damages</li> </ol>	<ol style="list-style-type: none"> <li>1. Order to cease sales</li> <li>2. Confiscate and destroy infringing labels</li> <li>3. Eliminate the infringing labels on products</li> <li>4. Confiscate tools for infringement</li> <li>5. Order and supervise destroying infringing products</li> <li>6. Make a fine</li> <li>7. Order to pay damages</li> </ol>	<ol style="list-style-type: none"> <li>1. Warning</li> <li>2. Order to cease production and distribution of infringing reproductions</li> <li>3. Confiscate illegal incomes</li> <li>4. Confiscate infringing reproductions and equipment</li> <li>5. Impose a fine</li> <li>6. Accompanied with administrative punishment, order to pay the damages.</li> </ol>
RIGHTS FOR INVESTIGATIONS	Local Patent Administrations can investigate patent infringement cases, while China Patent Office (CPO) only offers guidance on policy matters rather than advice in specific cases.	<ol style="list-style-type: none"> <li>1. Questioning</li> <li>2. Checking and order to seal products</li> <li>3. Investigations</li> <li>4. Inspecting and photocopying commercial documents.</li> </ol>	Investigating infringement cases, NCA in charge of investigating copyright infringement with a national impact.
MAIN LEGAL BASIS	Article 60 of <i>China Patent Law</i>	Article 39 of <i>China Trademark Law</i> Rule 42 & 43 of the <i>Detailed Implementing Trademark Law Regulation</i>	Article 46 of <i>China Copyright Law</i> Rule 7, 50 & 53 of the <i>Detailed Implementing Copyright Law Regulation</i>

SOURCE: Liu, Lucy Lei, "Longcheng & Co. (Patent, Trademark & Intellectual Property Law)", 2000, <http://www.liulch.com/function.htm>, visited on 01/24/01.

na to the Special 301 priority foreign country list.<sup>64</sup> A day before the tariffs were to go into effect, Minister of Foreign Trade and Economic Corporation Wu Yi signed a third MOU (Memorandum of Understanding)<sup>65</sup> with the United States and annexed an “action plan”<sup>66</sup> detailing the measures to be taken to enforce and upgrade the protection of IPRs.<sup>67</sup> The MOU and “action plan” committed the two sides to an extraordinary list of measures that were intended to reduce the problem significantly with twelve months.<sup>68</sup> This action plan stipulates that if an infringement of intellectual property rights is suspected or reported, the NCA, AIC, the Patent Office or the police may (1) enter and search any premises, (2) review books and records for evidence of infringement and damages, (3) seal up suspected goods and materials or equipment used to make such goods, or (4) take other appropriate measures, including criminal prosecution where warranted.<sup>69</sup>

The Public Security (police department) also plays an important role in enforcing intellectual property law in China. In June 1996, China agreed to employ the Ministry of Public Security to investigate piracy.<sup>70</sup> Interestingly, the government usually puts together the investigation of pirated products with that of pornographic products, and the Public Security Organs carry out most of this task that is named “Sao Huang”.<sup>71</sup> According to statistics for the year 1999, the public security organs at various levels across the nation investigated and handled 49, 000 cases concerning the production and sales of pirated and pornographic products, captured 72, 000

64 Oksenberg, Michel, Potter Pitman, B. & Abnett, William B., *Advancing Intellectual Property Rights: Information Technologies and the Course of Economic Development in China*, 8, copy from Asia/Pacific Scholars Program at Stanford University (2000).

65 The previous two MOU was respectively signed in May 1989 and January 1992.

66 The full title is “Action Plan for Effective Protection and Enforcement of Intellectual Property Rights” to the 1995 Memorandum. The text of the Action Plan is available at <http://www.info.gov.hk/ipd/ustr.html>.

67 Oksenberg, *supra* note 64.

68 *Idem*.

69 Riley, *supra* note 49, at 70.

70 The 1996 Agreement was reached on June 17, 1996 by the U. S. and China, see Berkman (1996: 21).

71 It means crackdown of pornographic products.

offenders, confiscated 73.5 million pirated discs/books, and seized 6 illegal disc production lines.<sup>72</sup>

To address the problem of the export of pirated products, Chinese Customs has been empowered to refuse the import or export of infringing items.<sup>73</sup> In 1995, the State Council issued the Regulation on Customs Protection of Intellectual Property Rights that allows intellectual property rights holders to apply to Customs for detention of both import and export goods suspected of intellectual property infringement.<sup>74</sup> In 1999, Customs offices across China investigated and deal with a total of 225 IPR infringement and piracy cases, involving a value of 92.02 million yuan. 178 cases (worth 98 million RMB yuan) were related to trademark-infringement, 5 cases (750, 000 RMB yuan) to patent, and 42 cases (29.29 million RMB yuan) to copyright.

### *B. Pros and Cons of Administrative Handling*

Many Chinese and foreign IP rights holders prefer to use the administrative bodies to handle their IPR disputes. There are several reasons for this situation. First, The People's Courts are hampered by their lack of expertise in the face of a tremendous increase of IPR cases,<sup>75</sup> while the officers of AICs are more experienced in handling IP matters and therefore more receptive and responsive to requests for actions.<sup>76</sup> Second, in most cases, the AICs will conduct raids at a minimal cost, making such action cheaper for the IPR holders than enforcing their rights in a judicial proceeding. Third, informal handling of cases by agencies also saves time and embodies a more reconciliatory approach than litigation.

<sup>72</sup> Report on the Intellectual Property Rights Protection in China in 1999, 16 <http://www.copy-right.com/ipr99.htm>, visited on 01/23/01.

<sup>73</sup> The General Administration of Customs (GAC) announced on September 1st 1994, effective as of September 15 1994, that goods that infringe IPRs are not allowed for import and export.

<sup>74</sup> Regulation on Customs Protection of IPRS, art. 3.

<sup>75</sup> Feng, *supra* note 26, at 20.

<sup>76</sup> Argyris, *supra* note 41, at 8.

Generally, courts are passive institutions in society and have to be moved by citizens.<sup>77</sup> Likewise, the courts in China cannot exercise powers crucial for stopping piracy like investigating or crack-down actively on violators. Efforts from the administrative agencies that can actively attack piracy are terribly needed. For example, in Taiwan, the Intellectual Property Office coordinates the activities of all parties working to improve IPR protection in Taiwan: the police forces, the public prosecutors and the rights-holders' associations. The office gathers information on piracy through its Anti-Counterfeiting Committee and participates in raids along with the police and the rights holders.<sup>78</sup> In China, given the limited role of the court and people's preference for administrative handling, the administrative agencies in China are carrying out most of the responsibilities to enforce the IP law.

On the other hand, the administrative agencies' power is sometimes insufficient, especially for some serious cases. For instance, in China, the agencies cannot take compulsory measures, such as preservation of evidence or property, even in cases where claimed damages are large and the facts of infringement are clear. Another negative factor is that administrative bodies are usually unwilling to decide on matters of civil compensation and would rather impose fines or confiscate infringing products and equipment.

IP protection should not be too difficult, even if the performance of the agencies are not that satisfactory, if they enforce the law within the institutional limits already discussed. However, the institutions sometimes deliberately bypass the law. In other words, they will ignore infringements or even support them. "Local protectionism" is an example of such an institutional failure. The following section will explore the problems of local protectionism as an illustration of the incentives and abilities to ignore the formal law to protect local counterfeiting activities.

<sup>77</sup> Galanter, Marc, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change", 8 *L. & Soc'y Review*, 95, 119-120 (1974).

<sup>78</sup> Dimitrov, Martin, *Pirates Go Home: Hoisting the IPR Flag in Taiwan* (2000), <http://www.chinaonline.com>, visited on 12/24/00.

#### IV. MARGINALIZATION OF LAW: LOCAL PROTECTIONISM

Local protectionism is said to be the most serious barrier to the enforcement of intellectual property law in China.<sup>79</sup> Basically, local protectionism means that the local government has a tendency to protect counterfeiters and infringers on the basis that such economic activity is helpful to the local economy or the local officials can benefit from the activity even if such protection obviously violates the laws and regulations made by the central government. Despite the seriousness of this problem, little has been done to curtail local protectionism. This lack of effort can be explained by (1) the central government's attitude toward local protectionism; (2) the central government's inability to enforce IP law at the local levels; and (3) the local government's lack of incentive to protect IPR.

##### 1. *Role of the Central Government*

In common Chinese parlance, law is a "concrete formation of the party's policy".<sup>80</sup> As Lubman pointed out, "Although the Chinese leadership has articulated concepts of legality and the function of law that are consistent with Western concepts, they also continue to use law as an instrument for the short term implementation of policy".<sup>81</sup> The driving force behind the enactment of the Chinese intellectual property law is the "Opening Policy", which was aimed at modernizing the Chinese economy after the end of the "Cultural Revolution" in 1979.<sup>82</sup> Since then, China-United States trade issues have dominated the course of modernizing Chinese intellectual property legislation and improving its enforcement mechanisms.<sup>83</sup> On January 31, 1979, after lengthy negotiation, China and the United States signed the Implementing

79 For example, Chow 2000, Cheng 1998.

80 Feng, *supra* note 26, at 10.

81 Lubman, *supra* note 13, at 102.

82 Schmetzer, Uli, "China's 'Supreme' Reformer Dies. His Life, 1989 Massacre Tarnished his Achievements", *Chi. Trib.*, 20 de febrero de 1997.

83 Zhang, *supra* note 61, at 67.

Accord on Cooperation in the Field of High Energy Physics.<sup>84</sup> On July 7, 1979, China and the United States reached the Agreement on Trade Relations, which specifically provided for reciprocal treatment of intellectual property rights in both countries.<sup>85</sup> Subsequently, China enacted the Trademark Law, Patent Law and Copyright Law as I have discussed in Part One. Although the enactment of the intellectual property laws was also in China's interests because it helped China to follow through its "Opening Policy", the real reason behind the adoption of these laws is more a response to international pressure rather than to desire for domestic reform.<sup>86</sup> The question, then, is why the central government in China has failed to address its local protectionism problem despite continuous foreign pressure. The next section will address this issue.

#### A. *Lack of Incentive to Check Local Protectionism*

In the international community, the United States has been the leading force in influencing China to improve its intellectual property protection through the threat of using Special 301. Special 301, part of the Omnibus Trade and Competitiveness Act of 1988 (Trade Act of 1988), is aimed at protecting American intellectual property rights in foreign countries. It empowers the United States Trade Representative (USTR), (1) to monitor international piracy and, (2) to impose sanctions or to bring international disciplinary proceedings against countries that have failed to implement and enforce intellectual property laws in accordance with international agreements.<sup>87</sup>

84 Implementing Accord on Cooperation in the Field of High Energy Physics, 31 de enero de 1979, U. S.PRC, 18 (2) ILM 346. See Zhang *supra* note 61.

85 Agreement of Trade Relations Between the United States of America and the People's Republic of China, 7 de julio de 1979, U. S.-PRC, 31 UST 4651, see Zhang *supra* note 61.

86 See, e. g. Yang, Yiping, "The 1990 Copyright Law of the People's Republic of China", 11 *UCLA Pac. Bas. LJ* 260, 260 (1993) ("Since... the 1970's China has felt strong pressure from Western nations, the United States in particular, enacted more protective intellectual property law"); Alford, William, "Don't Stop thinking about... Yesterday: why There was No Indigenous Counterpart to Intellectual Property Law in Imperial China", 7 *J. Chinese Law* 1, 5-6 (Claiming that China agreed in 1992 to revise the intellectual property laws to "meet American concern").

87 See 19 *USCA* 2411.

The United States annually evaluates China's progress, and China is usually in its Special 301 Submission for failure to enforce anti-piracy laws. For example, in 1991, China was put on the list of the first three "Priority Foreign Countries". After hard negotiation, the Memorandum of Understanding 1992 (MOU 1992) was reached just hours before the United States implemented retaliatory measures.<sup>88</sup> During the 1992 Senate Hearing on Special 301, Senate Max Baucus called this result with China "the most important Special 301 victory to date".<sup>89</sup> However on November 30 1993, China was upgraded from the Watch List to the Priority Watch List, and was designated as a Priority Foreign Country again in 1994.<sup>90</sup> The reason for this stems from China's continued lack of enforcement and the absence of satisfactory progress in achieving enforcement measures.<sup>91</sup> Subsequently, China agreed in a 1995 Intellectual Property Rights Agreement to meet certain requirements enumerated by it and the United States. In the "1996 Agreement", China and the United States agreed again that China would increase copyright protection under its laws.<sup>92</sup> All these agreements prompted by Special 301 were reached as compromises after the

88 Intellectual Property Rights Protection Under Special 301: Hearings Before the Subcomm. On International Trade of the Comm. On Finance, 102d Cong., 2d Sess. 50 (1992) (Testimony of Robert W. Holleyman II, Managing Director, Business Software Alliance).

89 Intellectual Property Rights Protection Under Special 301: Hearings Before the Subcomm. On International Trade of the Comm. On Finance, 102d Cong., 2d Sess. 2 (1992).

90 Each year the USTR identifies and publishes "priority watch list" and "watch list" countries to alert these countries that their practices are being monitored by the USTR. Once identified as a Priority Foreign Country, the USTR must initiate an "investigation" against that country and its offending practice within three days unless the initiation of investigation "would be detrimental to United States economic interests". If the USTR finds that the violations that initiated the investigation do in fact exist, and if no substantial progress has been taken by the Priority Foreign Country within the period of investigation, the USTR must take actions. The USTR has broad discretion in deciding what actions to take against a Priority Foreign Country. In general the USTR may suspend trade benefits, impose duties or other import restrictions, and enters into a binding agreement that commit the country either to stop the offending practices or to provide the United States with compensatory trade benefits. 19 USC 2412 (b) (2) (A) & (B), 19 U. S. C. 2411 (a) (1) & (c) (1) (1988).

91 Crothall, Geoffrey, "Beijing Slams 'Irrational' U. S. Policy", *South China Morning Post Int'l Weekly*, julio de 1994 9-10, Business, at 4.

92 Griffin, Eric M., "Stop Relying on Uncle Sam!-A Proactive Approach to Copyright Protection in the People's Republic of China", 6 *Tex. Intell. Prop. L. J.* 169, 174 (1998).



United States threatened trade sanctions, and China countered with threats of retaliatory sanctions.<sup>93</sup>

Virtually all Chinese sources admit that foreign pressure has resulted in various MOUs, influenced institutional development, and resulted in some improved compliance. Nonetheless, China continues to fall short of its obligations to establish efficient copyright system, especially in the area of enforcement. Piracy problems plagued China throughout the 1980s and the 1990s. Pirates have films on streets as little as two days after their debut in American theaters, while legitimate distributors must wait nine months or more for video release.<sup>94</sup> Competing pirated versions of the same film circulate in the market. Due to piracy in China, it was estimated in late 1993 that the United States industries lost about \$ 415 million a year to copyright infringements with software companies alone losing at least \$ 225 million a year.<sup>95</sup> Estimates for loss in 1995 have mushroomed to US\$ 1.835 billion, exclusive of losses due to piracy of business software applications.<sup>96</sup> In contrast, foreign investment in China during the same period did not decrease due to its weak enforcement of intellectual property protection. In fact actual investment in China maintained an increasing trend and the piracy did not appear to change the role of China as an emerging place for attracting foreign investments.<sup>97</sup>

It is clear that the Chinese government was motivated by the desire to attract more foreign investment and technology transfer rather than to seriously protect the IPR holders' rights.<sup>98</sup> So long

93 Oksenberg, *supra* note 64.

94 *New York Times*, 12-12-00.

95 US Decision to Place China on Priority Watch List Criticized, *International Trade Daily (BNA) (Intellectual Property Dec. 3, 1993)*. This estimate was made by the International Property Alliance, a Washington-based watch group comprised of eight trade associations. However, such estimate may be questioned. The losses resulting from piracy in foreign countries are usually calculated as the estimated number of pirated copies sold times the United States price. Since the price for the copyrighted goods is much higher than that of a pirated copy, the volume of sales has to shrink quite significantly. See Chang, Y. Kurt, "Special 301 and Taiwan: A Case Study of Protecting United States Intellectual Property In Foreign Countries", 15 *J. INTL. BUS* 206, 224.

96 International Intellectual Property Alliance, 1996 Special 301 Submission 3 (1996).

97 See Table 2 *infra* Annexe.

98 Information Office of the State Council, *Intellectual Property Protection in China in 1994 (White Paper)*, available in Westlaw, Int-News Database, "Intellectual property protec-

as the amount of such investments is not adversely affected, the Chinese government does not have the incentive to enforce IP law. Accordingly, the IP issue has become more like a political game between the Chinese central government and the American government. On the part of the U. S., its efforts have produced some results but at the cost of considerable acrimony by the Chinese government towards the U. S. investors and government officials alike. During the negotiation prompted by Special 301 with the United States, China got angry and frustrated not only because China perceived the U. S. as meddling in internal Chinese affairs but also because of the impatience the U. S. has shown. Li Chang-xu, head of the China United Intellectual Property Investigation Center stated, "It's like building a house. You can have the house structure all set up, very beautiful. But then you need electricity and water pipes. That takes more time".<sup>99</sup> This time factor is also part of the reason why it is hard to achieve and maintain substantive changes in China even although every agreement under the threat of Special 301 may be seen as a short-term victory for the U. S. industry. Some Chinese administrators even wonder whether their efforts to enforce IPR are undermined by the impression that to enforce IP law is a foreign driven initiative.<sup>100</sup>

Moreover, without having to engage in the effort to extract enforcement promises while enjoying the improved environment for intellectual property protection, investors from other countries benefit more from the U. S. efforts. Therefore, it is unclear how long the U. S. will keep up the pressure. During the negotiation of China's WTO accession, the counterfeiting issue was not raised as part of the WTO and TRIPs compliance negotiations.<sup>101</sup> As it was pointed out, "Changes in targeted countries (by Special 301) often will be just sufficient to prevent the United States from re-

tion functions... as one of the basic environments and conditions for conducting international exchange and cooperation in science, technology, economy and culture".

<sup>99</sup> Brauchli, Marcus W. y Kahn, Joseph, "China Moves Against Piracy as U. S. Trade Battle Looms", *Asian Wall St. J.*, Jan. 6-7, at 1 (1995).

<sup>100</sup> Oksenberg, *supra* note 64, at 30.

<sup>101</sup> Layman, Jeffrey, "IPR Protection after WTO: Copyright Law and Enforcement Under the TRIPs Agreement", *WTO China* 136, 136 (2000).

taliating. And after the threat of retaliation has passed, it is possible that little will be done in the way of follow up that is until the U. S. returns the next year to complain".<sup>102</sup> It is also true that in China, after crackdown, many of the seized factories quickly return to production and continue to overproduce.<sup>103</sup>

It seems that as long as the central government can deal with the problem, it will continue to close its eyes to the local protectionism. Local protectionism, in terms of IP protection, does not challenge the central government's authority seriously because the central government does not have the incentive to enforce the IP law in the first place and is in agreement or at least, acquiescent with local government on the tolerance of the IP infringements. The condition is that the local government must cooperate with the central government at some specific periods in time such as when a Special 301 review is imminent.

### B. *Weak Control by the Central Government*

Even if the Chinese government is committed to improve its intellectual property protection, it is still doubtful whether the government can achieve its goal due to a decentralized power structure and resource constraints. As a commentator pointed out, "until the government of a country has the political power and will to strengthen its copyright regimes, little will change".<sup>104</sup> Specifically, the problem of China lies in the fact that China has effectively decentralized much of its economic powers to reduce the level of bureaucracy and to empower the provinces with a higher degree of autonomy since the end of the 1970s.<sup>105</sup>

At the beginning of the economic reform, the central government gave local governments the right to retain certain tax and non-tax revenues and minimized its own claims to revenue gene-

<sup>102</sup> Newby, Kim, "The Effectiveness of Special 301 in Creating Long Term Copyright Protection for U. S. Companies Overseas", 21 *Syracuse J. Int'l L. & Com.* 29, 50 (1995).

<sup>103</sup> Otten, Adrian & Wager, Hannu, "Compliance with TRIPS: the Emerging World View", 29 *Vand. J. Transnat'l* 391, 560 (1996).

<sup>104</sup> Newby, *supra* note 102, at 50.

<sup>105</sup> Ho, *supra* note 11, at 5.

rated locally. The development of local enterprises including township and village enterprises has likewise expanded the power of local government. The 1982 Constitution confers the local People's Congress the power to elect and dismiss officials at its own level.<sup>106</sup> Consequently, central government does not have absolute control over personnel management at the local level. Elected by the local People's Congress, a local leader is tempted to place local interests over state policies making political judgments.<sup>107</sup> As Lubman said, "as central government weakened, local cadres not only promoted illicit activities, they also skirted fiscal and budgetary regulations in order to increase local development".<sup>108</sup>

As a result of the decentralization, much of China's IP enforcement measure takes place at the provincial and local levels. Any attempts to implement a policy of proper enforcement at the national level would be extremely costly and troublesome, and the national government lacks both the resource and the control to effectively monitor these activities. Investigation is an example. It is very hard to trace the details of the suspected companies and is common for pirated materials to be moved around in several areas (*mobile stores*) in attempts to stay one step ahead of the enforcement officials.<sup>109</sup> Moreover, inadequate infrastructure such as poor telecommunications, as well as the vastness of the country makes the investigators' problems even more challenging. Added difficulties for Beijing to foster a national IP protection program arise because much of the infringing activity takes place in the most developed and independently acting regions, such as Guangdong.<sup>110</sup>

It is not rare to see some policies stated by the central government undermined at the local level in China. Some scholars have

<sup>106</sup> Article 10 of the Constitution.

<sup>107</sup> Li, Yiqiang, "Evaluation of the Sino-American Intellectual Property Agreements: A Judicial Approach to Solving the Local Protectionism Problem", 10 *Colum. J. Asian L.* 391, 400 (1996).

<sup>108</sup> Lubman, *supra* note 13, at 106.

<sup>109</sup> Spierer, *supra* note 38, at 4.

<sup>110</sup> Hembery, Doug, *Enforcement and "Education" are Key Elements Clinton Administration Touts China Intellectual Property Pact as Landmark in Bilateral Trade Ties*, marzo de 1995, available at <http://www.arentfox.com/quickGuide/businessLines/intllng/inllngRelatedArticle/9a4/0a4.html>, visited on 01/23/01.

observed the gap between what is promised or articulated by Chinese central government and what is delivered by the local government.<sup>111</sup> With respect to the IP protection, the gap is partly caused by the lack of incentives and abilities for the central government to enforce its policies.

## 2. *The Local Government IP Law Enforcement*

As already stated, with respect to IP protection, the Chinese administrative agencies enforce most of the laws, occupying a more significant position than the judiciary in China.<sup>112</sup> Local administrative agencies could improve the enforcement of IPRs in China if they take this issue seriously. As discussed in Part Two, not only do they initiate administrative enforcement, but they also conduct investigation, gather evidence of infringing activities, and gain access to information to which a private individual or organization cannot get access. However, these administrative agencies often take an inactive attitude toward IP protection or even support the infringing activities. Mr. Feng pointed out that local protectionism is a disadvantage of administrative handling arguing that:

Regional protectionism and corruption are a third factor (against administrative handling). The general jurisdiction rule is that the case is handled by the administration of the place of infringement. If the alleged infringer happens to be a local revenue and employment contributors (as is usually the case) the relevant administration is likely to be influenced by pressure from the local government, business and other interested parties.<sup>113</sup>

However local protectionism is not only a problem haunting the administrative handling, it is also a problem existing in the Chinese judiciary. In "the People's Court Five Year Reform Outline," (Oct., 1999) it has been pointed out "the emergence and spread of local protectionism within judiciary activities has seriously threatened the unity and authority of our country's socialist

111 O'Brien, Kevin J., "Rightful Resistance", *49 World Politics* 31 (1996).

112 Zhang, *supra* note 61, at 68-70.

113 Feng, *supra* note 26, at 21.

legal system".<sup>114</sup> The judges have much discretion and are not sufficiently independent. Local political and economic force can influence the outcome of judgments as well as create formidable obstacles to enforcing a judgment against a local individual or enterprise.<sup>115</sup> For example, local government can employ local police to resist the enforcement of judgments against local enterprises. As discussed in Part Two, the initiation of criminal prosecution also relies heavily on cooperation the local prosecutors. Therefore, both the prosecution and the judgment are likely influenced by the pressure from the local government and business.

As for the cause of local protectionism, obviously deficiencies in the rule of law are at least part of the reason why the government can put aside the formal law or can refuse to respect limits on their discretion. A Chinese political culture in which each hierarchy makes vigorous efforts to protect its turf can also help us to understand the roots of local protectionism.<sup>116</sup> Imperial China was also unable to control the authority of local elites and there was a Chinese saying to describe such situation: "The sky is high, and the emperor is far away".

Some scholars have also pointed out other specific reasons for the inefficient enforcement of IP law in China:

The greatest problems for effective protection of IPRs (in China) reside at the local level. Short term economic and political interest often move leaders in many localities to tolerate or encourage IPR infringement... In addition to the direct economic benefits flowing to local officials who have relations with local enterprises, the political evaluation of these cadres places a premium on economic growth and employment, rather than-and in most instances in contradiction to-protection of IPR.<sup>117</sup>

We can see that the main reasons for the local protectionism are economic interests rising from infringing activities and the lack

<sup>114</sup> Reading materials of "Rule of Law Workshop", primavera de 2001 at Stanford Law School.

<sup>115</sup> Lubman, *supra* note 13, at 268.

<sup>116</sup> *Idem*.

<sup>117</sup> Oksenberg, *supra* note 64, at 24.

of political interest in the enforcement of IP protection at the local level. Probably because the administrative agencies play a more active role than the judiciary in anti-piracy, local protectionism in the administrative system has been received more attentions with respect to IP enforcement.

### A. *Economic Interests of Local Protectionism*

Corruption is one source of the government officials' economic interests in China and it also contributes to the rise of IP infringement (Birden, 1996: 476).<sup>118</sup> One scenario of local protectionism is that counterfeiting operations, such as illegitimate duplication of computer software, are owned or run by Chinese businessmen who are well connected to the local governments that are supposed to be monitoring pirating activities. Officials permitting these activities to take place receive monetary gains in return.<sup>119</sup> In some other instances, if the infringers have connections with the officials, such officials would even hamper efforts to eliminate infringing products by obstructing investigation and confiscation of such goods, or by asking law enforcement officials to treat offenders leniently once they are caught. Indeed, corruption has become a serious problem in China following China's shift from a centrally planned economy to market economy.<sup>120</sup> Recent punishment of both local and national officials demonstrates that the Chinese government is waging a war on corrupt activities.<sup>121</sup> However it is too early to predict whether the central government will be successful.

In addition to the corruption, the fines and fees can also be an economic incentive for the local government officials. Some of the fines and fees can be used as officials' bonus or to improve the employees' welfare. Therefore, by generating substantial fines and fees

<sup>118</sup> Birden, Paul B, "Trademark Protection in China: Trends and Directions", 18 *Loy. L. A. Int'l & Comp. L. J.* 431, 476 (1996).

<sup>119</sup> Ho, *supra* note 11, at 7.

<sup>120</sup> *China Daily*, 06-13-93, at 1.

<sup>121</sup> For example, "Hu Changqing 1999", "Cheng Kejie 2000", "Yuanhua 2001".

for cash-hungry government offices, punitive measures create strong economic incentives for different legal and administrative agencies to see that violations continue.<sup>122</sup>

Moreover, local governments now, as a whole, increasingly depend on the local enterprises. Under previous central planning, central authorities allotted revenues for the local governments' expenses, thus relieving local government from depending on local economic circumstances.<sup>123</sup> Since 1978, as a result of the central government's desire to promote reform by retaining authority over macroeconomic issues while allowing the localities to handle the vagaries of microeconomic management, part of the central government' administrative and economic power was devolved to the local governments.<sup>124</sup> From then, the local governments' power to manage and develop their local economies has expanded, as has their stake in the development and economic return of local enterprises.<sup>125</sup> The local business pillars that make profit from piracy usually serve as an important source for local revenue and employment.<sup>126</sup> The lack of financial resources available for local enforcement bodies has made it more obvious that the local government is more interested in protecting profitable, although illegitimate, local businesses than expending resources to shut them down.<sup>127</sup>

Additionally, in the IPR regime, most Chinese people may well be infringing pirates or more commonly unwitting consumers of pirated materials. They might, therefore, stand in an adverse relation to a rights holder. In such a situation, an enforcer's decision to refrain from any action would have benefit all local parties concerned.<sup>128</sup> The cost of poor enforcement would be shifted to the non-local, typically, foreign right holders.<sup>129</sup> Theoretically,

122 Oksenberg, *supra* note 64, at 21.

123 *South China Morning Post*, 02-27-94, at 6.

124 Berkman, Jeffrey W., "Intellectual Property rights in P. R. China: Impediments to Protection and the Need for Rule of Law", 15 *UCLA PAC. BASIN L. J.* 1, 34 (1996).

125 *South China Morning Post*, 02-27-94, at 6.

126 USTR, 1994 National Trade Estimate Report on Foreign Trade Barriers 51, 51-52 1994.

127 Berkman, *supra* note 124, at 19.

128 Butterson, Glenn R., Pirates, "Dragon and U. S. Intellectual Property Rights in China: Problems and Prospects of Chinese Enforcement", 38 *Ariz. L. Rev.* 1081, 1117.

129 *Idem*.



some long-term costs would be partly borne locally if piracy ultimately extinguishes foreign investment or distribution of the products in question in China.<sup>130</sup> However, the local governments do not have to be bothered with these long-term consequences because they do not have to deal with these problems directly.

### B. *Lack of Political Force behind IP Protection*

At the political level, IPR protection is not yet a priority. As Lubman said, “for the achievement of law reform to be deepened, a number of forces must operate favorably: economic growth and economic reform must continue, and the leadership must also perceive Chinese society to be stable enough and their control secure enough to encourage the growth of legality”.<sup>131</sup> Correspondingly, what the local officials really care about is their contribution to the maintenance of national stability and the growth of local economy, rather than IPR protection. These officials’ promotions are also determined by their contributions to the growth of local economy and employment.<sup>132</sup> As discussed previously, sometimes the enforcement of IPRs is even in contradiction with the local economic development and employment. It is understandable that limited government resources are being devoted to more urgent issues such as unpaid farmers’ riots or discovering ways to achieve economic development. Therefore, maximizing the protection of intellectual property rights in China is not a priority for the local government.

### 3. *Solutions: Top-down and Bottom-up Approaches to Local Protectionism*

To solve the local protectionism problem, it has been pointed out that “no real progress can be made against counterfeiting unless China makes a political commitment at the highest level of government, a firm political will is necessary because there are

<sup>130</sup> *Idem.*

<sup>131</sup> Lubman, *supra* note 13, at 298.

<sup>132</sup> Oksenberg, *supra* note 64, at 24.

serious political and social costs associated with any real crack-down on counterfeiting.<sup>133</sup> This point suggests a top-down approach to enforce copyright. However, the central government's commitment is useful but not decisive, due to the Chinese central government's weak control over local affairs. Furthermore it is unclear how to force the central government to form a "firmer will". In other words, this suggestion did not answer what the incentive is for the central government to enforce the law. As discussed above, international pressure alone is not sufficient to effectuate this change, and the central government has to strike a balance between dealing with foreign pressure and local interest.

The resolution to the local protectionism problem relies more on changes to the incentive structure for the government, especially the local government. It has been observed:

(In China), some bureaucrats favor IPR and responsible for enforcing it. Others benefit from infringement and seek to block development of an IPR regime in China... Despite the regulatory climate in Beijing, the gains the local officials secure from allowing IPR-infringing manufacturers to operate in their territory outweigh the risks and costs of closing these operations, especially in those locales where there is no indigenous IPR to protect. Key to improving IPR protection in China, therefore, is changing the incentive structure at the local level.<sup>134</sup>

If the incentive structure at the local level can be changed, the central government will face both international pressure and internal force. Therefore, a shift in the incentive structure is more likely to change both the central and the local governments' attitudes toward IPRs enforcement.

It has been observed that until a country itself decides that it is worth scarce resources to take a stand on increased copyright protection, changes will be incremental and mainly formalistic.<sup>135</sup>

133 Chow, Daniel C. K., *Counterfeiting in the People's Republic of China* (2000), <http://papers.ssrn.com>.

134 Oksenberg, *supra* note 64, at 24.

135 Newby, *supra* note 102, at 50.

Therefore, without internal forces for the improvement of intellectual property law in China, these IP laws will only be on the books, and all the institutions in charge of intellectual property protection will still be attacking piracy half-heartedly. To explore further the importance of the incentive structure and what an incentive structure is, the next section will discuss the difference between the enforcement of copyright and trademark law in China to answer these questions.

## V. THE GROWING INTERNAL INCENTIVE STRUCTURE

The counterfeiting market in China has included almost everything from sneakers to liquor, shampoo to software. Between 1990 and 1997, the piracy issue had pushed the U. S. and China to the verge of major trade wars three times, in 1992, 1995 and 1996 respectively.<sup>136</sup> For example, the trade sanction by the U. S. in 1992 was instigated by the United States' disappointment with China's neglect in enforcing copyright protection of U. S. works, particularly computer software programs.<sup>137</sup> From the following analysis of the internal incentive structure, including the policy concerns, interest groups and institutional arrangement, we can see that the enforcement of copyright law will be even harder than trademark law. Since the infringement of patent is not so serious as that of copyright or trademark, the paper will focus on the analysis of copyright and trademark.

### 1. *Policy Concerns for Enforcement*

In general, the justification for copyright protections is actually weak and unstable. The public has the right to get access to more knowledge, while the creators have the right as well to get remuneration for their works.<sup>138</sup> The policy underlying copyright law

<sup>136</sup> Lazar, June Cohan, "Protecting Ideas and Ideals: Copyright Law in the People's Republic of China", 27 *Law & Pol'y Int'l Bus* 1185, 1188-1191 (1996).

<sup>137</sup> Newby, *supra* note 102, at 41-42.

<sup>138</sup> Goldstein, Paul, *Copyright's Highway: From Gutenberg to the Celestial Jukebox* (1994).

states that the society should give the creators some economic benefits in order to encourage individuals to strive for more intellectual achievements.<sup>139</sup> However, problems arise how much the public should pay, how much money is necessary to encourage people to continue intellectual exploration, and more subtly, who should pay. Copyright protection always has to strike a balance between public and private interests.

In China, the justification for copyright protection can be more problematic. Deputy director of the National Copyright Administration (NCA), Shen, once argued that the establishment of copyright protection in China could kill two birds with one stone: preventing western cultural “junk” that would harm the younger generation and promoting Chinese cultural exports which “in the past main western countries regarded as communist propaganda and shut the door to us”.<sup>140</sup> It appears that the main justification for copyright protection in China is more an ideological consideration than for the purpose of protecting people’s private property and rights. This view is embodied in the constitution of China, where Article 22 of the Constitution provides that “the State should promote the development of literature and art, the press, broadcasting and television undertakings, publishing and distribution services, libraries, museums, culture centers, and other cultural undertakings, that serve the people and socialism...”.<sup>141</sup> This is the basic principle underlying the copyright law in China.

In contrast, justification for trademark law is stronger in China. Trademark is an indication of the source and the quality of goods. It is the symbol of an enterprise’s prestige and standards, distinguishing one product from another on the market. Therefore, trademark infringement usually relates to unfair competition among enterprises and misleading customers. In other words, trademark law protects not only the IPR holders’ right but also the public’s interest. Article One of Chinese Trademark Law provides that the trademark law has broad, general purposes, including the impro-

139 *Ibidem*, at 15.

140 Shen, *supra* note 24, at 3-4.

141 Xianfa (Constitution of the People’s Republic of China) art. 20.

vement of trademark administration, protection of exclusive rights to use trademarks, and encouragement of producers to warrant the quality of their goods and maintain the reputation of their trademarks. There is not much serious conflict between public and private interests in the trademark field as in the copyright field. This difference can also explain why the Chinese Trademark Law was promulgated in 1982, while the copyright law did not come into effect until June 1, 1991. The Chinese officials justifiably regard the trademark laws as playing a key role in promoting China's commodity economy, ensuring product quality, and protecting consumer interests.<sup>142</sup> Moreover, trademark infringements often come along with the inferior quality of products that harm public health, resulting in angry consumers or even riots, which is the most sensitive issue for the current Chinese government. It was recognized, "in a sense, to protect a famous trademark means to protect the life of an enterprise as well as the legitimate rights and interests of millions of consumers".<sup>143</sup>

The harm resulting from poorly made counterfeits has become a major concern of the current Chinese government. Accordingly, in July 1992, China implemented a nationwide crackdown on these goods.<sup>144</sup> By September 1993, the courts have heard 68,989 cases involving counterfeit or shoddy goods, sentenced 50 people to prison, one person to death and five people to life imprisonment.<sup>145</sup> In October 1993, the court gave a factory manager a life sentence and an assistant manager a seventeen-year sentence for manufacturing fake medicines.<sup>146</sup> Six officials who accepted bribes for covering up illegal activities were also jailed.<sup>147</sup> The government's recent effort in enforcing the 1993 Product Quality Law is also an indication of the same concern. In addition,

<sup>142</sup> "Legislators Move to Revise the Trademark Law", *China Daily*, 26 de diciembre de 1992.

<sup>143</sup> "China Protects Intellectual Property Rights", 1996, <http://www.humanrights-china.org/xiezh-hen/china/chanquan/091501.htm>.

<sup>144</sup> Zhang, *supra* note 61, at 71.

<sup>145</sup> "Counterfeiting Cigarette Seller Receives Death Penalty", *China L. & Prac.*, 14 de octubre de 1993, at 24.

<sup>146</sup> "Fake Cure Men Jailed", *South Morning Post*, 17 de octubre de 1993, at 8.

<sup>147</sup> *Idem*.

the Law on Protection for Customers' Rights has been promulgated in 1993 and took effect in January 1, 1994.<sup>148</sup>

## 2. *Interest Groups*

Obedience and enforcement of law are related to the interests of people and participants in the legal process. "How can law be obeyed?... Generally speaking, the direct motivation of obeying or resorting to law is that the law can bring to people convenience or benefits, including the psychological or emotional benefits... In this sense, law must have the nature of utility... while it is not the only nature".<sup>149</sup> "The Chinese obey laws and observe rights if they are persuaded that it will be in their best interest to do so, just as people everywhere do".<sup>150</sup> Therefore it is crucial to analyze whether there are any people in China who can benefit from IP protection.

### A. *Copyright Regime*

#### a. The Media and Entertainment Industries

It has been argued that if the Chinese government paid more attention to the economic interests of copyright holders than to controlling the publication and press, the issue of copyright piracy could be resolved more efficiently.<sup>151</sup> Actually, such control also restricts the economic interests of copyright holders. For example, in the media and entertainment industries, most of the domestic copyright holders are state-owned, and the government strictly controls the number of participants in these industries because the government is always attempting to strengthen the control of these industries. Usually the directors of state-owned enterprises care

<sup>148</sup> The amended Product Quality Law took effect in September 1, 2000.

<sup>149</sup> Zhu, Suli, *How Can Laws be Obeyed? A Review of Law and Religious* (2001), <http://www.chinalawinfo.com/fxsk/YDSG/reviewcontentasp?fid=14337>, visited on 02/23/01.

<sup>150</sup> Riley, *supra* 49, at 4.

<sup>151</sup> Zhang, *supra* note 61, at 72.

more about their political promotion than the economic interests of the enterprises. Even if they do care about the IPRs, they are not always powerful enough to push the government to enforce these rights because the deeply entrenched censorship system has stifled the directors' ability and freedom to develop the enterprises. It was reported that government monopolies have essentially controlled all aspects of the Chinese film industry, from production to distribution and exhibition, by way of the Ministry of Culture and related agencies.<sup>152</sup> As for the other individual interested parties, namely, the writers, performers and directors, though they can usually choose between a fixed remuneration or a return based on sales, after having regard to the piracy, they often choose to get fixed remuneration. Therefore, there is yet not a powerful group of domestic copyright holders who are eager to protect their copyright.

In addition, there are serious barriers for foreign IPR owners to access the Chinese market. According to the Motion Picture Exhibitors Association of America (MPEAA), China has also had an unofficial, unwritten, "shadowy" system of quotas for foreign films, video and television. This system has effectively excluded direct participation by foreign interests and has provided a fertile ground for piracy.<sup>153</sup> If the Chinese government relaxes or lifts the barriers to market access by foreign IPR owners, the foreign owners could sell their own goods in China and thereby displace, at least to some extent, pirated products. Moreover, absent such barriers, some U. S. producers could both sell their "authentic" products in Chinese market, and monitor, if not police, infringement themselves.<sup>154</sup> The control of market access has thus also weakened the potential force of foreign right holders as a group to enforce the copyright laws.

With the development of technology, the pirated items are of increasingly high quality. It is natural for the customers to prefer the cheaper counterfeit rather than the expensive authentic pro-

<sup>152</sup> Butterson, *supra* note 128, at 1104.

<sup>153</sup> MPEAA, 1993 Trade Barriers Report, 1994 Special 301 Submission at 12.

<sup>154</sup> Butterson, *supra* note 128, at 1104.

duct. According to the K. Y. General Manager of Shanghai CAV Home Entertainment Ltd., a ChineseSingapore joint venture and China's largest distributor of Hollywood films on video, "Chinese consumers don't want to pay 36 yuan for a VCD, see it once or twice and give it away... They would rather pay 6, 8, 10 yuan to see a pirated copy and then throw it away".<sup>155</sup>

Additionally, the Chinese copyright protection in the media industry is currently encountering much pressure from other industries, i. e. VCD/DVD players. "Some people say the government has been reluctant to crack down on the pirates because the steady stream of cheap American movies has helped keep alive the state-owned factories producing videodisc players by millions".<sup>156</sup> Without the availability of widespread pirated VCD/DVD, the market for VCD/DVD players could not have emerged and prospered. "According to government reports, by the end of 1998, about 50 million Chinese families owned CVD/DVD players and were regular buyers of movie discs... China produces 20 million VCD/DVD players annually, but current market demand is only half that amount".<sup>157</sup> If the government enforced the copyright law strictly, the VCD/DVD player industry would collapse.

### b. The Software Industry

As for the software industry, it is very much at its infancy in China. This is also why there has not been much resistance from the domestic manufacturers concerning piracy. Nonetheless, it is a growing industry, and continued piracy will not only harm the foreigners' interests but also the development of the domestic software industry. However, some foreign software manufacturers' strategies in China also impede the development of domestic industry. These manufacturers realized that even if piracy did not exist, they might not gain a significant amount of business. This is because people are unwilling to pay high prices for genuine

<sup>155</sup> *New York Times*, 12-12-00.

<sup>156</sup> *Idem*.

<sup>157</sup> *Idem*.



software resulting in a decrease in sales. Therefore, for the time being they do not attempt to combat piracy, but instead deliberately allow such activities to take place, hoping that their software can occupy a monopoly position in the market and become a necessity in many organizations.<sup>158</sup> They hope to stop piracy when such a time comes, and they can become the only legitimate suppliers of such software and any future revisions.<sup>159</sup> However, these foreign manufacturers do not realize that without the development of a domestic interest group for copyright protection, it is hard to push the Chinese government to stop the piracy completely. Therefore, their strategy is indirectly slowing down the improvement of IP protection.

### B. *Trademark Regime*

With the development of a market economy, more and more domestic private sectors have become trademark owners, such as, Jianlibao (drink), Wahaha (drink), Sanxiao (tooth brush), Yuanda (air conditioner) and Lining (sports attire) etc. They are often important sources of local revenue and employment. Thus, these trademark owners are able to have good connections with both local and national administrations, and have become an important force for the enforcement of trademark law. It was reported that the revenue from private enterprises in Beijing in 2000 was 110 times of that in 1994.<sup>160</sup> The private sector accounts for 18% of gross value industrial output (GVIO) today while zero in 1978.<sup>161</sup> With the Chinese market becoming more open, more and more foreign trademark owners have come into China. A lot of foreign trademarks have gained considerable shares of the Chinese market successfully, such as Coca-Cola, McDonalds, IBM, Panasonic, Motorola, and P & G. These foreign trademark owners have also

<sup>158</sup> Ho, *supra* note 11, at 9.

<sup>159</sup> *Idem*.

<sup>160</sup> [Http://news.muzi.com/ll/chinese/1027886.shtml](http://news.muzi.com/ll/chinese/1027886.shtml), visited on 02/26/01.

<sup>161</sup> Groombridge, Mark A., "The Case for China's accession to the WTO", *Harvard Asia Quarterly*, primavera de 2000, available at <http://www.fas.harvard.edu/~asiactr/haq/200001/0001a001.htm>, visited on 01/24/01.

adopted a strategy of setting up joint venture or licensing their products in China. For example, in January 2000 Colgate and Sanxiao set up their joint venture, Colgate Sanxiao in China. The joint venture model could create the immediate economic incentive for Chinese enforcement of IP because the Chinese partners will certainly defend their mutual IPRs. The Chinese partner is more likely to have a better understanding of the nuances of political life in China, be more aware of impending upheavals, and maintain proper government contacts to safeguard joint venture's investments.<sup>162</sup> Also, a local government is more willing to take action when a foreign investor has a governmentlinked partner and the government's own interest is at stake.<sup>163</sup>

From the perspective of the consumers, Chinese consumers are more and more "brand-name" conscious.<sup>164</sup> Name brand shops have mushroomed in big cities such as Shanghai.<sup>165</sup> The country's increasingly aggressive advertising industry has also boosted public awareness of brand.<sup>166</sup> Trademark recognition, just as in the United States, often motivates a consumer's decision to buy a certain product in China.<sup>167</sup> Although there are still large amount of counterfeit products in the Chinese market, they have more or less lost the original meaning of trademark infringement. Usually both the seller and the buyer know clearly that the goods are counterfeit because the buyer who purchases the counterfeit does not belong to the group of people who prefer to buy the authentic goods.

The individual's awareness of the benefits from trademark protection is also very important from a collective action perspective. For copyright, we assume that the collective will enjoy benefits over the long term as long as its members adhere to the law. However, for any individual member like the consumer, the incentive to defect from the law will still be great, since the indivi-

162 Cheng, *supra* note 12.

163 Li, *supra* note 107, at 299.

164 "Consumers Pay More Attention to Trademarks", *China Daily*, 14 de diciembre de 1992, at 8.

165 Pan, Qing, "Name Brand Shops Mushroom in Shanghai", *Econ. Rep.* 23 (China) 1993.

166 Bian, Zizhen, *Intellectual Property Protection in China* (1996), <http://www.usis.usemb.se/ERT/e19/zizhen.html>, visited on 01/23/01.

167 Linn, Gene, "High Returns for Image Building", *Asia Bus.*, 9 de marzo de 1994.

dual who does defect by indulging in piracy will very often be better off in the short term than if he does not. Therefore it is difficult to encourage consumer collective action to protect copyright. As for trademark infringement, since fake goods are passed off as authentic goods, they involve cheating the consumers and it is relatively easy to organize them to protest against trademark infringement. Early in 1983 the China Association for Protecting Consumers' Rights was established to protect consumers against fake goods and goods of inferior quality.<sup>168</sup>

### 3. *Institutional Arrangements*

The administrative agency in charge of trademark, SAIC, is very powerful, more powerful than that of copyright, NCA. Because the NCA's authority was derived from the State Administration for Publication and Press, the regional copyright bureaus at the provincial level are affiliated with the local press and publication administrations. They are a "functional department" of the local government, rather than an administrative subsidiary of the NCA, except that they regularly receive "professional guidance" from the NCA.<sup>169</sup> In contrast, the SAIC that handles the trademark issues is a much larger agency than the NCA. It has a powerful network of local industry, commerce bureaus and departments at the grassroots level throughout the country (Feng, 1997: 15).<sup>170</sup> Although the local trademark bureaus officially report to the local governments rather than to the SAIC, the SAIC traditionally has maintained much greater control over their work than the NCA over the local copyright administration. Originally the power of SAIC also helped it grab a larger share of power from courts, as Feng indicated:

168 News from <http://www.315.com.cn/news/0008/2942.htm>, visited on 02/20/00.

169 Copyright Law Implementing Regulation, art. 8. See Yang, Zhenshan (1991, 275-276).

170 Feng, *supra* note 26, at 15.

Legal reform (in China) is politically a game of reallocation of existing jurisdiction as well as the awarding of new jurisdiction, among the powers that rule. Therefore government agencies must settle who... takes charge of enforcement for each new IP system. Considering all of the fiscal and political implications, the People's Court in the early 1980s was in no position to grab a larger share of power from other players, hence the earlier laws awarded more administrative duties to more powerful agencies such as the SAIC, and the later laws reduced administrative duties allocated to patent and copyright administrations.<sup>171</sup>

In the field of trademark infringement, many foreign companies have chosen the administrative channel and have filed actions through the local AICs. The AICs are even willing to proceed with raids within one day of presentation of the case.<sup>172</sup> When infringement is found, effective measures are used, such as sealing up or confiscation of the goods.<sup>173</sup> Decisions usually would follow within few months and generally involve stop orders or imposition of fines.<sup>174</sup>

In contrast, in the area of copyright law enforcement, it is a regime not supported by a network as extensive as that provided by the local AICs. Therefore, companies are concerned about the availability of effective enforcement.<sup>175</sup> Moreover, the foreign copyright owners are required to direct administrative actions to the NCA at the national level. The NCA's powers and resources are presently not sufficient to handle the bulk of infringements effectively and efficiently.<sup>176</sup> It was reported that the NCA is severely under-funded and under-staffed and it only employed as few as five people to tackle the task.<sup>177</sup>

Usually, the NCA has to unite with other agencies to reinforce its power, and acts in the name of anti-pornography to get stron-

<sup>171</sup> *Idem.*

<sup>172</sup> *Ibidem*, at 16.

<sup>173</sup> Argyris, *supra* note 41, at 8.

<sup>174</sup> *Idem.*

<sup>175</sup> *Idem.*

<sup>176</sup> *Idem.*

<sup>177</sup> Spierer, *supra* note 38, at 4.

ger justification for its enforcement efforts. For example, in February 2000, four agencies, namely, Ministry of Finance, Ministry of Public Security (police department), State Information and Publication Bureau, National Copyright Administration and the State "Sao Huang" (Anti-pornography) Task Force, jointly issued a rule entitled "Awarding Measures for the Reporting of Manufacturing and Selling of Pornography, Piracy and Other Illegal Publishing Activities".<sup>178</sup> The National Working Group in charge of "anti-pornography" and "anti-piracy and other illegal publishing activities" consists of officials from 14 national departments and Beijing City Council and is led by the State Press and Publishing Administration. In practice, if an infringer copied pornography items, the penalty might be much more serious. For example, in December of 1995, Shenzhen police cracked down a large amount of pirated audiovisual products illegally replicated by Q Company,<sup>179</sup> and 15 suspects from the company including its manager-general were arrested on the spot. The local prosecutor filed a lawsuit with local same level Court. The court found that Q Company had been engaging in replication activities of pornographic and pirated VCD copies without any license of owners since May of 1994. Up to December of 1995, Q Company had made 8 millions pirated and pornographic laser discs and videodiscs, with a huge illegal gains of more than 10 millions RMB yuan. The court made a verdict as following: sentenced the manager-general to 12 years' imprisonment for two crimes: Infringing Copyright Crime and Replicating Pornographic Products Crime, and imposed a fine of 300,000 yuan. The other 14 culprits were also sentenced to imprisonment ranging from 2-7 years.<sup>180</sup>

It is also highly possible that NCA may come into conflict with other agencies at its bureaucratic level regarding the administration of the copyright law. For example, the Press and Publication Administration officially shared administration and enforcement res-

<sup>178</sup> News from Asia Pacific Legal Institute, <http://www.apli.org/aplinews.html>, visited on 01/23/01.

<sup>179</sup> When Judge Jiang cited this case in his article, he concealed the real name of the company. Here I followed him.

<sup>180</sup> Jiang, *supra* note 15.

possibilities for the copyright law.<sup>181</sup> The Ministry of Film, Radio, and Television formerly had exclusive responsibility for copyright matters and even conducted raids on suspected violators.<sup>182</sup> The fact that several agencies are responsible for the same task usually means every agency can shift its responsibility to others, which leads to more inefficiency. The lack of coordination among these agencies also decreases the NCA's authority and willingness to enforce the copyright law.

#### 4. *Changes in the Incentive for the IP Protection*

The change of domestic incentive structure will be the key to the improvement of IP protection. Using Taiwan as an example, as Professor Alford asked:

Were foreign pressure as certain an answer as its proponents believe, why was the ROC (Taiwan) able to resist it for decades during which the island state was highly dependent on U. S. economic and military support, only to yield to it at a time when Taiwan has the world's largest per capita foreign currency reserves and has carved out its own position in international community?<sup>183</sup>

An answer to this question, according to Alford, lies in the extraordinary economic, political, technological and diplomatic changes that have occurred in Taiwan in the past decade and their implications for Taiwan's society and culture. Taiwan's explosive economic expansion, increasing awareness of the need of indigenous technology, ever-more-pluralistic political and intellectual life, growing commitment to formal legal process, and international aspirations have made evident the need for intellectual property law and nurtured domestic constituencies with good reasons for supporting it.<sup>184</sup>

181 Butterson, *supra* note 128, at 1096.

182 International Intellectual Property Alliance, 1993 Special 301 Submission, at 40.

183 Alford, *supra* note 6, at 108.

184 *Idem*.

Correspondingly, we cannot ignore the emergence of the new forces in China. China is now changing rapidly. The cultural industry is also becoming commercialized, especially in those areas that have little to do with politics. For example, there are emerging interest groups in the copyright regime. The Chinese computer industry grew 56 percent in 1996, and is expected to have grown another 50 percent in 1997 and 1998 according to China's Ministry of Information Industry.<sup>185</sup> The domestic software industry is valued at US\$1-1.5 billion and is growing at 32 percent per annum.<sup>186</sup> As the violation of Chinese IPR and resulting losses to Chinese right-holders increase, so will domestic pressure for better IPR protection.

The entertainment industry is also becoming a little more open and commercial as well. A deal reached by the United States and China on China's WTO accession on Nov. 16, 1999,<sup>187</sup> did increase U. S. access to the Chinese film market. The number of American films allowed will be increased from ten films to fifty films in three years.<sup>188</sup> The United States also gained the right for the American entertainment industry to distribute videos and sound recordings in China.<sup>189</sup>

Indigenous right holders also suffer much from the weak copyright protection. For example, even the Communist Party's own anti-corruption propaganda film, "Life and Death Choice", is widely available in pirated copies across the country.<sup>190</sup> There were also complaints from domestic singers. Tian Zhen, a famous Chinese singer, said to reporters, "I was busy with the promotion for my new works, but it is so depressing because of the sweeping piracy market... People used to think authentic tapes and CDs are available in Xinhua Bookstore, but now even Xinhua Bookstore

185 Spierer, *supra* note 38, at 5.

186 *Idem*.

187 The November 1999 trade deal was signed by the U. S. Trade Representative (USTR) and Chinese officials and paved the way for China to enter the WTO.

188 Barry, Tom, *What's This Organization (WTO): China and the WTO* (1999), [http://www.foreignpolicy-infocus/wto\\_china.html](http://www.foreignpolicy-infocus/wto_china.html), visited on 01/24/01.

189 *Idem*.

190 *New York Times*, 12-12-00.

sells pirated works...".<sup>191</sup> According to research by the Business Software Alliance, in 1997 the software industry provided China with 60,000 jobs and paid \$219.8 million revenue.<sup>192</sup> For every decrease of 10% in the piracy rate, the software industry will provide China with 13,170 more jobs and \$77.7 million revenue.

The domestic right holders have begun to actively promote the intellectual property law and conduct anti-piracy activities by themselves. After the interview Tian Zhen's agents and the officials from the Beijing Cultural Bureau inspected several audio-visual shops to investigate the piracy.<sup>193</sup> In 2000 some hottest singers in China gathered in the Shanghai International Art Festival whose thesis is anti-piracy.<sup>194</sup> In addition, on May 26, 2000, the director of Shanghai Phrase Book Press announced that the Press would give awards up to 150,000 yuan to people who provide evidence of pirating their book, *Phrase Sea*. Many intellectual elite expressed their anger for pirating this Chinese authoritative dictionary.<sup>195</sup>

We cannot dismiss the influence of these emerging IP holders in Chinese society. In the legislation process of Copyright Law and the discourse of China's accession to Berne Convention, many famous writers and musicians such as Jiang Zilong, Ye Peiyong and Wang Liping made great efforts to ensure more copyright protection.<sup>196</sup> Since these individuals are influential in Chinese society, political leaders tend to pay more attention to them. For example, Mr. Wang, Liping, a highly-respected musician in China, once wrote a letter to the National People's Congress, calling for copyright protection in China, before the enactment of Copyright Law. Copies of this letter were sent to all the members of the Standing Committee of the National People's Congress.<sup>197</sup> Moreover, some of the IP holders have natural connections with the

191 News from <http://dailynews.musi.com/11/chinese/83269.shtml>, 08/21/00, visited on 01/22/01.

192 News from <http://www.Chinesebsa.org/news/news007.html>, 12/07/98, visited on 01/22/01.

193 News from <http://dailynews.musi.com/11/chinese/83269.shtml>, 08/21/00, visited on 01/22/01.

194 News from <http://news.fm365.com/yule/20001022/165689.htm>, visited on 01/22/01.

195 News from <http://dailynews.muzi.com/11/chinese/70334.shtml>, 05/26/00, visited on 01/22/01.

196 Wu, Hairmin, *Walking toward BerneMemorandum of China's Copyright*, <http://www.tohome.net/book/jishi/other/zxben.html>.

197 *Ibidem*, at 34.



media or they are the media themselves, for example, the press, the writers, and singers. This character has made them more capable of using the media to influence the policy making or to promote the IP protection. Such largescale publicity has been the main force for improving the Chinese people's awareness of IP rights. Early in the 1990s, there were some magazines that focused on IP protection in China. For example, "*Quality Guarantee in China*" (*Zhonguo Zhiliang Wali Xing*), started in 1993, has claimed that the publicity of IP protection is its focus.<sup>198</sup>

Regarding the future enforcement of intellectual property protection, we should also pay attention to the association of IP interest holders. According to the experience of Taiwan, the private sector can be more effective than the government in battling counterfeits. As it was reported in the United Daily, when the government was launching an intensified campaign to crack down on piracy and counterfeiting in February 2000 for the coming Special 301 review, the Anti-Counterfeiting Coalition of Information Products, a local business alliance devoted to anti-piracy efforts, confiscated 83,640 illegal software CDs and 85,268 copies of illegal video games.<sup>199</sup> China also has numerous associations established by professional and industrial interest groups, including writers' associations, film producers, film distributors, audio-visual publishers, book publishers and software manufacturers.<sup>200</sup> However, these associations have broad administrative functions rather than focusing on IP rights protection. In February 1993, the Music Copyright Society of China was established to protect the copyright of the industry. In 1999, anti-piracy alliances were also established in Beijing, Shanghai, Guangdong, Sichuan, Chongqing and Jiangsu.<sup>201</sup> They are partly designed to fill the manpower shortage of the NCP.<sup>202</sup> The association should be more successful because they

198 News from <http://www.snweb.com/gb/cqs/2000/03/a0301004.htm>, visited on 01/22/01.

199 News from Asia Pacific Legal Institution, *Government Anti-counterfeiting Efforts Intensified at Dawn of Special 301 Review*, febrero de 2000, <http://www.apli.org/apline.html>, visited on 01/23/01.

200 Feng, *supra* note 26, at 137.

201 News from <http://www.copyinfo.com/ipr99.htm>, visited on 01/23/01.

202 News from Asia Pacific Legal Institution, *The Chinese Government Issued Its 1999 IPR White Paper*, mayo de 2000, <http://apli.org/apline.html>, visited on 01/23/01.

are more powerful than individuals to influence the government and can push them to enforce IP protection in China.

### 5. *A Brief Conclusion on the Incentive Structures for IP Enforcement*

In conclusion, we can see that trademark law has paved a relatively smoother way for enforcement than copyright in China but both are changing toward a good direction. Generally speaking, to enforce IPRs in China, the following three factors are crucial. First, there should be a sufficient number of domestic right holders who have a stake in protecting their rights such as the private trademark owners or some joint-venture right holders. Secondly, such owners should get involved with the local economy, establish good connections with the government, and have the power to push the agencies to enforce their rights. However such power is sometimes restricted by political policies such as censorship and localism. Thirdly, there should be an efficient and independent institution in charge of the enforcement that is regarded as legitimate and necessary and willing to enforce these laws. Simply speaking, incentives are needed for the people to observe a new law and for the government to enforce the law.

## VI. FINAL REMARKS AND CONCLUSION

### 1. *Final Remarks about the WTO*

Some remarks should be given to China's accession to the WTO after 15 years of trying. Under the TRIPs Agreement, one agreement under the WTO, China's obligations are not limited to merely enacting and amending formal laws. TRIPs, also administered by the WTO, require all the WTO members to comply with the provisions of the enforcement requirement although a certain period of transition is granted.<sup>203</sup> As a result, China's intellectual

<sup>203</sup> TRIPs, art. 61.

property enforcement regime will come under greater scrutiny within the WTO dispute procedure and the international community. Given the serious problem of piracy and the lack of effective measures, China's enforcement mechanism still has a significant way to go to achieve full compliance with the TRIPs enforcement obligations.

The WTO enforcement will make more easily for the domestic interests to get privileges from the central government. For example, Article X of the GATT requires that member nations must publish their laws on trade and administer them in a "uniform, impartial and reasonable manner". Local protectionism with respect to the enforcement of IP law is obviously against this rule. However, this standard is very general and is not maintained by other GATT members either.<sup>204</sup> The incentive structure at the local level, which is more decisive to improve the IP protection in China, is much more complicated. Most likely, the central government must still give privileges to local interests after a balance of international and domestic pressure, and its commitment to enforcement obligations remains difficult.

Moreover, there are also enforcement problems with the WTO rules. We cannot, in any means, expect the WTO to resolve the IP protection problem in China immediately or completely. It might be able to help China to reform its systems, including the legal, economic and political, and thus nurture the ingredients required to cure the piracy problem. However, compliance with intellectual property rights legislation does not happen overnight. The WTO cannot substitute the formation of domestic incentives though it may help their formation.

## 2. Conclusion

Since the adoption of the "reform and opening" as national policy in the late 1970s, China has been trying to develop foreign-related business, join the international economic community and

<sup>204</sup> Ostry, Sylvia, "China and the WTO, the Transparency Issue", 3 *UCLA Journal of International Law and Foreign Affairs* 1 (1998).

modernize some of its laws. Legal transplant has been an important way to achieve modernization and globalization in China. However, law is not "out of context." It cannot operate by itself. It is widely accepted that a foreign legal rule will not be transplanted successfully if it does not fit into a nation's social, political, and economic context. As Montesquieu (1751) said, "The political and civil laws of each nation must be proper for the people for whom they are made, so much so that it is a very great accident if those of one nation can fit another...". After the transplant in the sense of legislation, the effectiveness of the law depends mainly on the domestic context.

This paper uses the transplant of IP law in China as a case to study the real force of a successful legal transplant and of globalization. It shows that the introduction of IP law in China has brought with changes in the Chinese society, such as rights awareness and social value toward IP. However, there remains the problem of ineffectiveness in the enforcement of the law. This paper illustrates that the problems with the ineffectiveness are mainly (1) the defects of the current system and (2) the "marginalization" of the current system, for example, local protectionism. The cause of the problem is the lack of domestic incentives for people to observe the law and for the government to enforce the law.

This paper concludes that a successful legal transplant cannot be a mere project of the enactment of law. The establishment of efficient institutions, and the changes of the conditions for enforcement are more important. In contemporary China, there are hopes for the improvement of the enforcement of IP law. For example, the domestic IP holders are becoming more and more powerful with the establishment of a market economy and the process of privatization. China's accession to the WTO can also be expected to hasten this process and promote the rule of law in China. It can also provide foreigners with more opportunities to get involved with the local economy and get more legal protection.

From the case of the Chinese IP law, we can see that although there is a global force working in our time, the effectiveness of the modernization of law and the real strength of globalization come from the domestic constituents. Although multinational organizations might add legitimacy to the international standard and help domestic reform, international pressure cannot substitute for internal will to legal reform. Since it is very complicated to change the domestic circumstance, and such changes usually take a long time, the success of the legal transplant cannot be achieved quickly. This will require, not a project, but a lengthy process.

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## ANNEXE

TABLE 2. FOREIGN INVESTMENT IN CHINA FROM 1979  
TILL JUNE 1999

YEAR	PROJECT	CONTRACTUAL INVESTMENT (billion RMB)	ACTUAL INVESTMENT (billion RMB)
1979-1982	920	4.9580	1.769
1983	630	1.9717	9.160
1984	2166	2.8750	1.419
1985	3073	6.3330	1.956
1986	1498	3.3300	2.244
1987	2233	3.7090	2.314
1988	5945	5.2970	3.194
1989	5779	5.6000	3.393
1990	7273	6.5960	3.487
1991	12978	11.9770	4.366
1992	48764	58.1240	11.008
1993	83437	111.4400	27.515
1994	47549	82.6800	33.760
1995	37011	91.2820	37.521
1996	24556	73.2760	41.726
1997	21001	51.0030	45.250
1998	19848	52.1320	45.582
Jan. to June of 1999	8052	20.3040	19.537

SOURCE: Yu, Donghui, *Foreign Investment in China*, 1999, <http://www.china-news.com.cn/china2000/gtg/news/waizi.htm>, visited 02/12/01.