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China's Copyright Law and the Trips Agreement

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Cover Page Footnote

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CHINA'S COPYRIGHT LAW AND THE TRIPS AGREEMENT

REIKO R. FEAVER*

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I. INTRODUCTION

In recent years, the United States has been particularly concerned with the intellectual property rights and general trade policies of the People's Republic of China.¹ Between 1990 and 1994, U.S. exports to China doubled from \$4.8 billion to \$9.6 billion,² making China the United States' fourteenth largest export market.³ Direct investment in China by U.S. firms has also grown and in 1993 reached \$877 million, a 70% increase over 1992.⁴ During this same period, however, the U.S. trade deficit with China has expanded continually,

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1. The United States has taken the lead in delineating China's "unfair" trading practices, using the Section 301 provisions of the Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978, 2041 (codified as amended 19 U.S.C. § 2411 (1994)), to institute investigations and create pressure for bilateral negotiations. See Patrick Hu, *The China 301 on Market Access: A Prelude to GATT Membership?*, 3 MINN. J. GLOBAL TRADE 131 (1994). The United States has also issued complaints and threatened trade sanctions in reaction to other aspects of China's activities including human rights violations and the use of prison labor. *Id.*

2. OFFICE OF THE U.S. TRADE REPRESENTATIVE, 1995 TRADE POLICY AGENDA AND 1994 ANNUAL REPORT OF THE PRESIDENT OF THE U.S. ON THE TRADE AGREEMENTS PROGRAM OFFICE OF THE U.S. TRADE REPRESENTATIVE 19 tbl. 2 (1995); OFFICE OF THE U.S. TRADE REPRESENTATIVE, 1994 TRADE POLICY AGENDA AND 1993 ANNUAL REPORT OF THE PRESIDENT OF THE U.S. ON THE TRADE AGREEMENTS PROGRAM 23 tbl. 2 (1994).

3. OFFICE OF THE U.S. TRADE REPRESENTATIVE, 1995 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 47 (1995).

4. *Id.*

reaching a level of \$29.5 billion in 1994.⁵ In the world market, the United States offsets its trade deficits with exports of intellectual property products.⁶ The United States' emphasis on China's intellectual property rights protection stems from a desire to see a similar benefit in the Chinese market.⁷

This Comment will discuss the current state of China's intellectual property rights protection as it relates to copyrights. China has expressed a strong desire to join the World Trade Organization ("WTO"), and this Article will examine China's copyright law in light of the WTO's Agreement on Trade-Related Aspects

5. *Id.* United States trade officials have recently estimated the 1995 trade deficit with China at \$38 billion. Charlene Barshefsky, Deputy United States Trade Representative, has stated that "[i]f current trends continue, China's trade surplus with the U.S. will ultimately exceed that of Japan's." *GATT/WTO: Chinese Market Access Decisions Needed before WTO Talks Progress, Official Says*, INT'L TRADE REP., Nov. 15, 1995, available in WESTLAW, BNA-ITR File.

The United States and China reach significantly different figures on the trade deficit. The disparities can be partly explained by the countries' varying methodologies of counting re-exports from Hong Kong of goods made or processed in China, or by difficulties in measuring the share of profits retained by Hong Kong or Taiwanese manufacturers in transshipment to the United States. See Jan Prybyla, *How Should the U.S. Handle Trade Issues with China?*, 15 E. ASIAN EXEC. REP., Apr. 15, 1993, at 9. Another factor contributing to the disparities is disagreement between Chinese and United States' officials as to how to measure the output of Hong Kong and Taiwanese firms that have relocated to China in order to take advantage of low labor costs. See Hu, *supra* note 1, at 138.

6. See Alan S. Gutterman, *The North-South Debate Regarding the Protection of Intellectual Property Rights*, 28 WAKE FOREST L. REV. 89 (1993). In the period since World War II, U.S. exports which "rely heavily on intellectual property . . . protection (chemicals, pharmaceuticals, computers, software, sound recordings, books, movies, and scientific equipment) ha[ve] more than doubled . . ." *Id.* at 104 n.104 (quoting Harry B. Ensley, *Intellectual Property Rights in the GATT*, 15 NEW MATTER 1, 10 (1990)). In 1990, the United States had a \$12 billion trade surplus in intellectual property products with the rest of the world. *The Special 301 Investigation of China's Software Protection Laws: Cautious Optimism Leads for a Successful Exercise in Dispute Resolution*, 6 SOFTWARE L.J. 293, 295 (1993). The United States Commerce Department indicates that the United States supplies 75% of the \$77 billion world computer software market. This market is projected to grow at 12% annually through the year 2000. *Export Policy: U.S. Export Growth Likely to Continue Over Five-Year Period, Commerce Says*, INT'L TRADE REP., Apr. 26, 1995, available in WESTLAW, BNA-ITR File. In addition, equal U.S. exports of information services have grown at an annual rate of 22% since 1989 and currently equal \$3.2 billion. *Id.*

7. See Yuanyuan Shen, *China's Protection of Foreign Books, Video Tapes and Sound Recordings*, 12 LOY. L.A. INT'L & COMP. L.J. 78 (1989). The International Intellectual Property Alliance estimates that U.S. industries lost more than \$800 million to Chinese "pirates" in 1993 with \$322 million in losses related to software. Carl Goldstein, *Pirate's Lair: U.S. Pressures Beijing Over Copyright Protection*, FAR E. ECON. REV., May 19, 1994, at 55. Chinese piracy of compact discs resulted in an estimated \$866 million loss to U.S. industry in 1995. Paul Blustein, *U.S. Warns China to Step up Efforts Against 'Piracy'*, WASH. POST, Nov. 30, 1995, at B13. While these numbers are generally accepted, it should be remembered that monetary calculations of losses can be highly speculative. Estimates are designed to reflect lost revenue opportunities and, therefore, depend on assumptions of otherwise unaffected revenues. See Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273, 274 n.6 (1991).

of Intellectual Property Rights ("TRIPS").⁸ The Comment attempts to demonstrate that, while certain aspects of Chinese copyright protection remain problematic, China's system essentially meets the requirements outlined in the TRIPS Agreement. In addition, despite its recent economic growth, China remains a developing country, and as such it should be extended the concessions for developing-country members outlined in the TRIPS Agreement. China's copyright protection should not hinder its accession to the WTO. Furthermore, the integration of China into the WTO and China's consequent adherence to the TRIPS Agreement may be the best means of ensuring future improvements.

II. RECENT HISTORY OF CHINA'S COPYRIGHT PROTECTION

China implemented its "Open Door Policy" in 1979.⁹ The Third Plenary Session of the Eleventh Central Committee of the Chinese Communist Party ushered in an era of reform marked by an expansion to the outside world.¹⁰ Delegates to the Session also announced the development of a new socialist legal system, with the Communiqué of the Session proclaiming that legislation was necessary to ensure "that democracy be systematized and written into law in such a way as to ensure that [sic] stability, continuity and full authority of this [China's] democratic system and these [Chinese] laws."¹¹ The Chinese government has since lived up to its mandate by

8. AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS [hereinafter TRIPS Agreement], reprinted in OFFICE OF THE U.S. TRADE REPRESENTATIVE, URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: GENERAL AGREEMENT ON TARIFFS AND TRADES 319 (1994) [hereinafter URUGUAY ROUND AGREEMENTS]. The TRIPS Agreement was signed as part of a broad series of multilateral agreements stemming from the Uruguay Round of multilateral trade negotiations (1986-1994). Among these agreements are a reworked General Agreement on Tariffs and Trade, 1994, which consists of the following components: the original General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 55 U.N.T.S. 187, as rectified, amended, and modified [hereinafter GATT]; the GATT's attached tariff and accession protocols, waivers, and decisions; and several understandings on GATT articles negotiated during the Uruguay Round. See URUGUAY ROUND AGREEMENTS, *supra*, at 23-24. For a general analysis of the Uruguay Round negotiations, see 1-3 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992) (Terence P. Stewart ed., 1993).

9. The United States and the People's Republic of China normalized relations in 1979. Joint Communiqué on the Establishment of Diplomatic Relations, U.S.-P.R.C., Jan. 1, 1979, 79 DEP'T ST. BULL., Jan. 1979, at 25. Several months later, the United States and China signed an Agreement on Trade Relations. Agreement on Trade Relations, July 7, 1979, U.S.-P.R.C., 31 U.S.T. 4651.

10. Richard J. Goossen, *An Introduction to Chinese Law: Does It Exist? What Is It? How Is It Interpreted?* 27 OSGOODE HALL L.J. 93, 103 (1989). For discussion on what the Open Door Policy has entailed, see Janiece Marshall, *Current Developments in the People's Republic of China: Has China Changed?*, 1 TRANSNAT'L LAW 505 (1988).

11. Goossen, *supra* note 10, at 103.

revising its civil¹² and criminal¹³ laws and by enacting laws and regulations governing foreign contracts.¹⁴

The 1979 Agreement on Trade Relations signed by the United States and China contained several provisions addressing intellectual property.¹⁵ In part to fulfill the requirements outlined in the Agreement, and in part to further evidence its movement onto the international stage, China adopted a trademark law in 1982¹⁶ and a patent law in 1984.¹⁷ However, copyright legislation was slower in coming

12. CIVIL PROCEDURE LAW OF THE PEOPLE'S REPUBLIC OF CHINA (FOR TRIAL IMPLEMENTATION) (adopted by Standing Comm., 5th Nat'l People's Cong., 22d Sess., promulgated by Standing Comm. Order No. 8, Mar. 8, 1982), *reprinted in* THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA (1979-1982) at 259 (Foreign Languages Press, Beijing, 1987) [hereinafter LAWS OF CHINA].

13. Criminal Law of the People's Republic of China, (adopted 5th Nat'l People's Cong., 2d Sess., July 1, 1979, promulgated by Standing Comm. Order No. 5, July 6, 1979), *reprinted in* LAWS OF CHINA, *supra* note 12, at 87.

14. *E.g.*, LAW OF THE PEOPLE'S REPUBLIC OF CHINA ON ECONOMIC CONTRACTS INVOLVING FOREIGN INTEREST (adopted by Standing Comm., 6th Nat'l People's Cong., 10th Sess., promulgated by Pres. Order No. 22, Mar. 21, 1985), *reprinted in* 1 LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA GOVERNING FOREIGN-RELATED MATTERS (1949-1990), at 483 (The China Legal System Publishing House, Beijing, 1991) [hereinafter LAWS AND REGULATIONS (1949-1990)]; Regulations of the People's Republic of China on Administration of Technology-Introduction Contracts (promulgated by State Council, May 24, 1985), *reprinted in* 1 LAWS AND REGULATIONS (1949-1990), *supra*, at 550; DETAILED RULES AND REGULATIONS FOR THE IMPLEMENTATION OF THE REGULATIONS ON ADMINISTRATION OF TECHNOLOGY IMPORT CONTRACTS OF THE PEOPLE'S REPUBLIC OF CHINA, *available in* WESTLAW, CHINALAW File No. 0305.

15. Article 1 of the Agreement set forth the broad goals to "undertake to adopt all appropriate measures to create the most favorable conditions for strengthening, in all aspects, economic and trade relations between the two countries so as to promote the continuous, long-term development of trade between the two countries." Agreement on Trade Relations, *supra* note 9, 31 U.S.T. at 4652. Provisions in Article 6 dealt specifically with intellectual property: "Both Contracting Parties in their trade relations recognize the importance of effective protection of patents, trademarks and copyrights." *Id.* at 4657. Subparagraph 5 of Article 6 outlined procedures for the protection of copyrights: "Both Contracting Parties agree that each Party shall take appropriate measures, under its laws and regulations and with due regard to international practice, to ensure to legal or natural persons of the other Party protection of copyrights equivalent to the copyright protection correspondingly accorded by the other Party." *Id.* at 4658.

16. TRADEMARK LAW OF THE PEOPLE'S REPUBLIC OF CHINA (adopted by Standing Comm., 5th Nat'l People's Cong., 24th Sess., promulgated by Standing Comm., 5th Nat'l People's Cong., Order No. 10, Aug. 23, 1982), *reprinted in* 2 LAWS AND REGULATIONS (1949-1990), *supra* note 14, at 1171; DECISION TO AMEND THE TRADEMARK LAW OF THE PEOPLE'S REPUBLIC OF CHINA (adopted by Standing Comm., 7th Nat'l People's Cong., 30th Sess., promulgated by Pres. Order, Feb. 22, 1993), *reprinted in* Trademark Law Amendments, 15 E. ASIAN EXEC. REP., Mar. 15, 1993, at 24.

17. PATENT LAW OF THE PEOPLE'S REPUBLIC OF CHINA (adopted by Standing Comm., 6th Nat'l People's Cong., 4th Sess., Mar. 12, 1984, amended by Standing Comm., 7th Nat'l People's Cong., 27th Sess., Sept. 4, 1992), *reprinted in* LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA GOVERNING FOREIGN-RELATED MATTERS (1991-1992), at 565 (The China Legal System Publishing House, Beijing, 1993) [hereinafter LAWS AND REGULATIONS (1991-1992)]; RULES FOR THE IMPLEMENTATION OF THE PATENT LAW OF THE PEOPLE'S REPUBLIC OF CHINA (approved and amended by State Council, Dec. 12, 1992, promulgated by the P.R.C. Patent Office, Decree No. 3, Dec. 21, 1992), *reprinted in* LAWS AND REGULATIONS (1991-1992), *supra*, at 576. For a more detailed discussion of China's patent system, see David Hill & Judith Evans, *Chinese Patent Law:*

and China did not enact a copyright law until 1991.¹⁸ The Copyright Law was followed by the Regulations for the Implementation of the Copyright Law ("Implementing Regulations")¹⁹ and Regulations for the Protection of Software ("Software Regulations").²⁰

These initial laws failed to appease leaders of the international community and United States' officials, who characterized China's Copyright Law and Implementing Regulations as "not completely up to the standards of the multilateral conventions."²¹ In April 1991 the U.S. Trade Representative placed China (together with India and Thailand) on a "priority watch list" for failing to adequately protect intellectual property rights, particularly computer software rights.²² The United States and China settled their trade dispute by signing a Memorandum of Understanding on the Protection of Intellectual Property ("MOU") in January 1992.²³

Recent Changes Align China More Closely with Modern International Practice, 27 GEO. WASH. J. INT'L L. & ECON. 359 (1993-1994) and Laurence P. Harrington, *Recent Amendments to China's Patent Law: The Emperor's New Clothes?*, 17 B.C. INT'L & COMP. L. REV. 337 (1994).

18. COPYRIGHT LAW OF THE PEOPLE'S REPUBLIC OF CHINA (adopted by Standing Comm., 7th Nat'l People's Cong., 15th Sess., Sept. 7, 1990, promulgated by Pres. Order No. 31, Sept. 7, 1990) [hereinafter COPYRIGHT LAW], reprinted in 3 LAWS AND REGULATIONS (1949-1990), *supra* note 14, at 1800. For a general analysis of the Copyright Law, see Jianming Shen, *The P.R.C.'s First Copyright Law Analyzed*, 14 HASTINGS INT'L & COMP. L. REV. 529 (1991). China enacted this law partially in response to U.S. pressure.

19. REGULATIONS FOR THE IMPLEMENTATION OF COPYRIGHT LAW OF THE PEOPLE'S REPUBLIC OF CHINA (approved by State Council, May 24, 1991, promulgated by Nat'l Copyright Admin., May 30, 1991) [hereinafter IMPLEMENTING REGULATIONS], reprinted in LAWS AND REGULATIONS (1991-1992), *supra* note 17, at 642.

20. REGULATIONS FOR THE PROTECTION OF COMPUTER SOFTWARE (adopted by State Council, 83th Exec. Sess., May 24, 1991, promulgated by State Council Decree No. 84, June 4, 1991) [hereinafter SOFTWARE REGULATIONS], reprinted in LAWS AND REGULATIONS (1991-1992), *supra* note 17, at 612.

21. Yiping Yang, *The 1990 Copyright Law of the People's Republic of China*, 11 UCLA PAC. BASIN L.J. 260, 261 (1993) (quoting *Lawyers Wary of China's New Software Protection Rules*, UPI, June 14, 1991, available in LEXIS, News File). The Director General of the World Intellectual Property Organization, however, stated that China's new Copyright Law is "excellent, modern, in harmony with present trends in the countries that have the most advanced legislation in this field, and is compatible with the Berne Convention." *Asian Intellectual Property Update*, 5 J. PROPRIETARY RTS., Nov. 1993, at 34 (1993).

22. See Yang, *supra* note 21, at 260. Under the Section 301 procedures of the Trade Act of 1974, to prevent the denial of U.S. rights under trade agreements or to combat practices that unjustifiably burden or restrict U.S. commerce, the U.S. Trade Representative has the authority to initiate investigations and possibly take retaliatory action. 19 U.S.C. § 2411 (1994). The U.S. Trade Representative actually placed China on this list after the enactment of the Copyright Law and before the adoption of the Computer Software Regulations. Yang, *supra* note 21, at 260. Because the U.S. Trade Representative and American businesses viewed the new regulations as failing to provide sufficient protection to computer software, China remained on the list. *Id.*

23. Memorandum of Understanding on the Protection of Intellectual Property, Jan. 17, 1992, U.S.-P.R.C. arts. 3(1), (2), (6), available in WESTLAW, USTREATIES File No. 1992 WL 466269 [hereinafter MOU]. For a general discussion of the MOU, see Richard L. Thurston, *Country Risk Management: China and Intellectual Property Protection*, 27 INT'L LAW. 51 (1993).

The MOU provided that China join the Berne Convention for the Protection of Literary and Artistic Works²⁴ ("Berne Convention"),²⁵ which it did in July 1992,²⁶ and the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms²⁷ ("Geneva Convention"), which it did in June 1993. China also agreed to protect computer software as a "literary work" under the Berne Convention without required formalities, and for a term of fifty years.²⁸ Under the MOU, if a contradiction exists between Chinese copyright laws and the Berne Convention or Geneva Convention, the international conventions generally prevail.²⁹

Following the signing of the MOU, China did much to bring its substantive law into conformance with international practice; however, Chinese enforcement of the legislation was weak and, in general, copyright violations continued unabated. In 1994 tensions between the United States and China again rose, and in July the United States brought another Section 301 investigation.³⁰ This latest investigation concluded in February 1995 with the signing of the Agreement Regarding Intellectual Property Rights ("IP Agreement"), a last-minute accord which prevented the imposition of trade sanctions.³¹ The IP Agreement primarily addresses enforcement issues.³²

24. MOU, *supra* note 23, art. 3(1), (2).

25. Berne Convention for the Protection of Literary and Artistic Works, as revised at Paris, 1971, art. 2, [hereinafter Berne Convention], *reprinted in* INTERNATIONAL TREATIES ON INTELLECTUAL PROPERTY 339 (Marshall A. Leaffer ed., 1990) [hereinafter TREATIES].

26. Thurston, *supra* note 23, at 55 n.10.

27. Convention for the Protection of Performers, Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Geneva Convention), Oct. 29, 1971, *reprinted in* TREATIES, *supra* note 24, at 430. Note that in the vernacular of modern copyright law, the term "sound recording" is used interchangeably with the term "phonogram."

28. MOU, *supra* note 23, art. 3(6). China also agreed to make several changes to its protection of patents and trade secrets. *See id.* arts. 1, 2.

29. *Id.* art. 3(3).

30. *See* Kari Huus, *Back to Normal: U.S.-China Trade War Looms Closer*, FAR E. ECON. REV., Jan. 19, 1995, at 52. In 1994, Michael Kantor, the U.S. Trade Representative, labeled China a "priority foreign country" under Section 301 for failure to provide adequate protection for intellectual property. *China Designated a "Priority Foreign Country"*, 6 J. PROPRIETARY RTS., August 1994, at 36. Kantor described enforcement of China's intellectual property legislation as "sporadic at best and virtually non-existent for copyright works." *Id.* Chinese officials criticized the designation, calling it "irrational and unacceptable." *Id.*

31. Agreement Regarding Intellectual Property Rights, Feb. 26, 1995, U.S.-P.R.C., 34 I.L.M. 881 (1995) [hereinafter IP Agreement]. For an analysis of the agreement, see *Announcement: Summary by U.S. Trade Representative of U.S.-China Intellectual Property Accord Released Feb. 26, 1995*, INT'L TRADE REV., March 1, 1995, available in WESTLAW, BNA-ITR File [hereinafter *Announcement*]. The IP Agreement takes the form of an "action plan" by which the State Council's Working Conference on Intellectual Property will "effectively crack down on infringement of intellectual property rights in China." IP Agreement, *supra*, at 887. Prior to the signing of the agreement, the United States threatened sanctions which included the imposition of a 100% tariff on selected products. *See* Determination of Action Concerning the People's

III. CHINA'S COPYRIGHT PROTECTION AND THE TRIPS AGREEMENT

China's lack of effective intellectual property rights protection has frustrated its efforts to rejoin the GATT³³ and accede to the WTO.³⁴ With the signing of the IP Agreement, the United States and China have reached a consensus on both the substantive and procedural aspects of China's copyright legislation.³⁵ A question remains whether these agreements bring China's protection up to international standards and the requirements outlined in the TRIPS Agreement.

While the TRIPS Agreement does little to affect the substance of most of the existing international copyright protections, it does make changes in the areas of computer programs and neighboring rights. With the exception of moral rights, the TRIPS Agreement incorporates the minimum standards of and the Appendix to the Berne Convention.³⁶ However, the TRIPS Agreement expands these provisions by adding computer programs and compilations of data to the list of protectable literary and artistic works.³⁷ In addition, while the Berne Convention does not specifically protect broadcasts, sound

Republic of China's Protection of Intellectual Property and Provision of Market Access to Persons Who Rely on Intellectual Property Protection, 60 Fed. Reg. 7230, 7231 (1995).

32. See generally IP Agreement, *supra* note 31; see also *Announcement*, *supra* note 31. Eric H. Smith, the president of the International Intellectual Property Alliance, is quoted as saying: "this agreement is right on point with enforcement [and] . . . is what we see as a real beginning of a crackdown on piracy." *Intellectual Property: U.S., China Announce Broad Agreement on Intellectual Property Protection*, INT'L TRADE REV., March 1, 1995, available in WESTLAW, BNA-ITR File [hereinafter *Broad Agreement*].

33. GATT, *supra* note 8, 55 U.N.T.S. at 187.

34. While the U.S. Trade Representative commented that the recent U.S.-China negotiations did not affect China's bid to join the WTO, he did note that China's adoption of international standards "will help clear away the problems many countries had with China's accession to the world body." *Broad Agreement*, *supra* note 32. More recently, the Deputy U.S. Trade Representative has expressly linked Chinese performance in implementing the IP Agreement with progress in its bid to join the WTO: "We have told the Chinese that their implementation of this agreement is a litmus test of their desire and ability to live up to the bilateral agreements that they conclude . . . [and that] the atmosphere for the concluding of other agreements, including with respect to WTO accession, is significantly hampered by the extent to which China does not live up to agreements we already have on the books." *Intellectual Property: U.S. Sets Deadlines for China for Intellectual Property Compliance*, INT'L TRADE REV., Dec. 6, 1995, available in WESTLAW, BNA-ITR File [hereinafter *U.S. Sets Deadlines*].

35. See IP Agreement, *supra* note 31, 34 I.L.M. at 881. For further discussion, see *infra* notes 139-154 and accompanying text.

36. "Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom." TRIPS Agreement, *supra* note 8, art. 9(1).

37. *Id.* art. 10. Article 2 of the Berne Convention provides a non-exhaustive list of "literary and artistic" material that is protectable through copyright, broadly including "production[s] in the literary, scientific and artistic domain, whatever may be the mode or form of . . . [their] expression." Berne Convention, *supra* note 25, art. 2(1).

recordings, and performance art, article 14 of the TRIPS Agreement does extend protection to these so-called "neighboring rights."³⁸

In 1992, China responded to its obligation under the MOU to bring its copyright law into compliance with the Berne Convention³⁹ by enacting the Provisions on the Implementation of the International Copyright Treaties⁴⁰ ("ICT Provisions"), which addressed disparities between the Copyright Law with its Implementing Regulations and the Berne Convention. With the addition of the ICT Provisions, China's copyright protection system substantially meets international standards as outlined in the Berne Convention, and now in the TRIPS Agreement.

The objective of the Copyright Law, as outlined in Article 1, is to "encourag[e] the creation and dissemination of works which would contribute to the building of an advanced socialist culture and ideology and to socialist material development, and . . . [to] promot[e] the development and flourishing of socialist culture and sciences."⁴¹ As part of these goals, protection is not granted for "[w]orks the publication or distribution of which is prohibited by law," and copyright holders "shall not violate the Constitution or laws or prejudice the public interests."⁴²

38. TRIPS Agreement, *supra* note 8, art. 14. "Neighboring rights," or "rights neighboring on copyright," refer to "the rights of performing artists in their performances, the rights of producers of phonograms . . . in their phonograms, and the rights of broadcasting organisations [sic] in their radio and television programs." J.H. Reichman, *The TRIPS Component of the GATT's Uruguay Round: Competitive Prospects for Intellectual Property Owners in an Integrated World Market*, 4 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 171, 216-17 n.176 (1993) (quoting World Intellectual Property Organization (WIPO), *Basic Notions of Neighboring Rights—International Conventions in the Field of Neighboring Rights*, at 2, WIPO Doc. WIPO/CR/GE/92/3 (Aug. 20, 1992)). Prior to TRIPS, these rights had been "experimentally protected" in the international arena under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations ("Rome Convention"). See *id.* at 216 (citing International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention), Oct. 26, 1961, *reprinted in* TREATIES, *supra* note 25, at 415). Neither China nor the United States is a member. *Id.* For further discussion, see *infra* III.B.2.c.

39. MOU, *supra* note 23, art. 3.

40. PROVISIONS ON THE IMPLEMENTATION OF THE INTERNATIONAL COPYRIGHT TREATIES (promulgated by State Council Decree No. 105, Sept. 30, 1992) [hereinafter ICT PROVISIONS], *reprinted in* LAWS AND REGULATIONS (1991-1992), *supra* note 17, at 651. The ICT Provisions apply only to the Berne Convention because China's existing law already conformed to the Universal Copyright Convention and the Geneva Convention. *Id.* art. 3. The MOU provides that if there is an inconsistency between existing regulations and the regulations implementing the international conventions, such as the ICT Provisions, the regulations implementing the MOU and international conventions will govern. MOU, *supra* note 23, art. 3(4).

41. COPYRIGHT LAW, *supra* note 18, art. 1.

42. *Id.* art. 4.

Despite the ideological slant, the language used to describe the objectives of the Copyright Law parallels that used in the TRIPS Agreement:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.⁴³

Additionally, the principles of the TRIPS Agreement allow a Member country to "adopt measures necessary to protect public health and nutrition" and to take measures to "prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology."⁴⁴ The breadth of these provisions provides latitude in the implementation and structure of intellectual property laws that may forgive weaknesses in China's system of protection.

A. Subject Matter

Article 3 of the Copyright Law provides a list of copyrightable works which essentially matches the subject matter of the Berne Convention.⁴⁵ Computer software is expressly included within the list of protectable works.⁴⁶ Works excluded from protection under the Copyright Law include "laws; regulations; resolutions, decisions and orders of state organs; other documents of legislative, administrative

43. TRIPS Agreement, *supra* note 8, art. 7.

44. *Id.* art. 8.

45. [T]he term "works" includes works of literature, art, natural science, social science, engineering technology and the like which are created in the following forms:

- (1) written works; (2) oral works; (3) musical, dramatic, *quyi* and choreographic works; (4) works of the art and photographic works; (5) cinematographic, television and video-graphic works; (6) drawings of engineering designs, and descriptions thereof; (7) maps, sketches and other graphic works; (8) computer software; (9) other works as provided for in law and administrative rules and regulations.

COPYRIGHT LAW, *supra* note 18, art. 3.

Note that if scientific works fit within the scope of both the Copyright Law and the Patent Law, as well as the Technology Contract Law "or similar laws," the provisions of those laws apply. *Id.* art. 7.

46. *Id.* art. 3(8). The Copyright Law provides that "[m]easures for the protection of computer software shall be established separately by the State Council." *Id.* art. 53. Thus, despite its inclusion in the Copyright Law's list of subject matter, computer software receives primary protection through the Software Regulations. See SOFTWARE REGULATIONS, *supra* note 20.

and judicial nature . . . ; news of current affairs; . . . calendars, numerical tables, forms of general use and formulas."⁴⁷

The ICT Provisions further clarified the coverage of the Copyright Law and its Implementing Regulations. Under the ICT Provisions, China now clearly extends protection to published or unpublished works of foreign authors,⁴⁸ works of applied art for a term of twenty-five years,⁴⁹ and computer programs as literary works for a term of fifty years with no registration requirements.⁵⁰

B. Authors' Rights

1. China's Grant of Rights

China protects both the moral and economic rights of an author, although it does not expressly distinguish between these two types of rights.⁵¹ An author has the right to decide whether to publish a work, the right to be identified or to affix his name to a work, the right to revise or authorize revisions of a work, and the right to protect the integrity of a work.⁵² In addition, an author retains the right of "exploitation" and the right to receive remuneration for a work.⁵³ The right of "exploitation" includes, but is not limited to, the right to

47. COPYRIGHT LAW, *supra* note 18, art. 5. The Berne Convention permits China's exclusion of legislative, administrative and judicial documents from protected subject matter. Berne Convention, *supra* note 25, art. 2(4). If the term "current events" is interpreted to extend beyond "news of the day" or "mere items of press information," this exclusion is not allowed under the Berne Convention. *Id.* art. 2(8).

48. ICT PROVISIONS, *supra* note 40, art. 5; *see also* COPYRIGHT LAW, *supra* note 18, arts. 20, 21. The Copyright Law, by itself, does not clearly protect unpublished works. COPYRIGHT LAW, *supra* note 18, art. 2. The ICT PROVISIONS also protect the work of an author who is not a citizen or permanent resident of a "country party to international copyright treaties," if the work is first or simultaneously published in a Member country. ICT PROVISIONS, *supra* note 40, art. 4. The Implementing Regulations adopt the thirty-day standard of the Berne Convention to determine when a work is first published. IMPLEMENTING REGULATIONS, *supra* note 19, art. 25; Berne Convention, *supra* note 25, art. 3(4).

49. ICT PROVISIONS, *supra* note 40, art. 6. Under the Berne Convention, the extent and conditions for protection of applied-art works is left to domestic law; however, the term of protection must be at least twenty-five years. Berne Convention, *supra* note 25, arts. 2(7), 7(4).

50. ICT PROVISIONS, *supra* note 40, art. 7. Under the ICT Provisions, the term of protection commences at the end of the year of first publication. *Id.* The extension of protection irrespective of registration modified in the Software Regulations which required registration before the commencement of an administrative action or lawsuit. SOFTWARE REGULATIONS, *supra* note 20, art. 24.

51. *See* COPYRIGHT LAW, *supra* note 18, art. 10. Under the Copyright Law, an author's economic rights are subject to restrictions that are not applied to moral rights. *See also* Yang, *supra* note 21, at 266 (classifying the protection of economic rights as "only moderate").

52. COPYRIGHT LAW, *supra* note 18, art. 10(1)-(4).

53. *Id.* art. 10(5).

reproduce, perform, broadcast, exhibit, distribute, televise, make audiovisual recordings of, translate and adapt a work.⁵⁴

The Copyright Law permitted, in certain situations, the use of a work without prior authorization from the author and without the payment of remuneration.⁵⁵ The Implementing Regulations, however, modify several of the most expansive of these allowances.⁵⁶ First, under the Implementing Regulations, a quotation used from a published work, must be "made solely for the purpose of introduction to, or comment on, a work or demonstration of a point," cannot form a "substantial part of the work of the quoter," and cannot prejudice the rights of the owner of the copyright in the work being quoted.⁵⁷ Second, newspapers, periodicals, radio and television programs, and producers of newsreels, can only use a copyrighted work without authorization or remuneration to the extent that it is included unavoidably "as is justified by the purpose of reporting current events."⁵⁸ Third, the translation or reproduction of small quantities of works for use in teaching or scientific research,⁵⁹ and the "use of a published work by a state organ for the purpose of performing its official duties"⁶⁰ cannot interfere with the normal use of the work nor "prejudice the lawful rights and interests of the copyright owners."⁶¹ Fourth, while the Copyright Law permitted the "free performance of a published work" without the author's permission and without remuneration,⁶² the Implementing Regulations qualify this provision by requiring that "no fees shall be charged on the audience and no payments shall be made to the performers."⁶³ Finally, the Implementing Regulations provide that translations of a published work into a language of a national

54. *Id.*

55. *Id.* art. 22.

56. Implementing Regulations, *supra* note 19, arts. 26-31.

57. *Id.* art. 27. Under the Copyright Law, the main qualification for using a quotation from a published work is that the quotation be used "for the purposes of introduction to, or comment on, a work, or demonstration of a point." COPYRIGHT LAW, *supra* note 18, art. 22(2).

58. IMPLEMENTING REGULATIONS, *supra* note 19, art. 28. The Copyright Law does not contain the "unavoidable inclusion" qualifier. Copyright Law, *supra* note 18, art. 22(3). For further discussion, see *infra* notes 71-73 and accompanying text.

59. This was allowed under the Copyright Law if the translations or reproductions were not published or distributed. COPYRIGHT LAW, *supra* note 18, art. 22(6).

60. *Id.* art. 22(7). This limitation addressed an area of particular concern to foreigners, because "state use" was considered dangerously broad. See *PRC Copyright Law: A Step Forward But Not Far Enough*, BUSINESS CHINA, Oct. 8, 1990, available in LEXIS.

61. IMPLEMENTING REGULATIONS, *supra* note 19, art. 29.

62. COPYRIGHT LAW, *supra* note 18, art. 22(9).

63. IMPLEMENTING REGULATIONS, *supra* note 19, art. 30.

minority without authorization or remuneration can *only* be made if the work was "originally created" in Chinese.⁶⁴

For foreign works, the ICT Provisions further qualify certain provisions of the Copyright Law and its Implementing Regulations. Foreign owners of copyright in cinematographic works, television works, video recordings, and sound recordings have the right to authorize public performances of their works.⁶⁵ Under the ICT Provisions, author permission must be obtained before a work originally created in Chinese can be translated into the language of a minority nationality.⁶⁶ Similarly, newspapers and periodicals must obtain prior authorization before reprinting foreign works, "except the reprinting of articles on current political, economic and social topics."⁶⁷ Finally, copyright owners may authorize or prohibit the rental of works after entering into a distribution agreement⁶⁸ and can prohibit the importation of infringing works or works from countries that do not protect the owner's rights.⁶⁹

2. Comparison with the TRIPS Agreement

a. Rights of Reproduction

In adopting the ICT Provisions, China essentially tailored its protection of authors' rights of reproduction to fulfill the requirements of the Berne Convention. China now substantially meets those requirements (as incorporated into the TRIPS Agreement).⁷⁰ One specific area of uncertainty, however, is the ability of various media forms to reprint published works. By permitting newspapers and periodicals to use published works for the reporting of current political, economic, and social topics, the ICT Provisions create a potentially broad limitation on an author's right to control reproduction of copyrighted work,⁷¹ even with the "unavoidable inclusion" requirement set forth in Implementing Regulations.⁷² For example,

64. *Id.* art. 31. This provision complies with Article 8 of the Berne Convention, which provides that authors retain an exclusive right to authorize translations of their works during the term of protection. Berne Convention, *supra* note 25, art. 8.

65. ICT PROVISIONS, *supra* note 40, arts. 12, 18.

66. *Id.* art. 10.

67. *Id.* art. 13. The ICT Provisions apparently substitute "current political, economic and social topics" for the "current events" or "current affairs" discussed in the Copyright Law and its Implementing Regulations. See COPYRIGHT LAW, *supra* note 18, art. 22(3); IMPLEMENTING REGULATIONS, *supra* note 19, art. 28; see also *supra* note 47 and accompanying text.

68. ICT PROVISIONS, *supra* note 40, art. 14.

69. *Id.* art. 15.

70. See *supra* note 36 and accompanying text.

71. ICT PROVISIONS, *supra* note 40, art. 13.

72. IMPLEMENTING REGULATIONS, *supra* note 19, art. 28.

since neither "reporting" nor "unavoidable inclusion" is defined,⁷³ this provision could be interpreted to allow the reproduction of an entire copyrighted work if the work deals with current topics.

Ultimately, the question of whether China's grants of rights of reproduction comply with the TRIPS Agreement depends on the extent any restrictions and limitations of those rights "conflict with a normal exploitation of the work" or "unreasonably prejudice the legitimate interests of the right holder."⁷⁴ In fact, China has already clarified some of its most expansive restrictions with essentially identical language.⁷⁵ A basic unresolved issue, then, is how the interpretation of "normal exploitation" and "unreasonably prejudice" will compare under the TRIPS Agreement and under China's copyright system. As was noted earlier,⁷⁶ the objectives and principles of the TRIPS Agreement possibly represent an escape through which China might justify limitations on rights of reproduction.⁷⁷

b. Rental Rights

The TRIPS Agreement includes provisions governing two areas of authors' rights—rental rights and neighboring rights⁷⁸—that previously had not received wide protection internationally and that may not be adequately protected under Chinese law. Article 11 of the TRIPS Agreement provides that copyright holders of computer programs and their successors in title have the right to authorize or prohibit the commercial rental of originals or copies of their works.⁷⁹ For cinematographic works, the TRIPS Agreement permits unauthorized rental unless such rental "has led to widespread copying . . . which is materially impairing the exclusive right of reproduction" of the author or successor in title.⁸⁰ Similarly, producers of sound recordings retain rental rights although, if a member state maintains a system of "equitable remuneration" for unauthorized rental, such

73. *Id.*

74. TRIPS Agreement, *supra* note 8, art. 13. The Berne Convention also grants a state flexibility in determining "fair use" provisions, generally requiring that such use be restricted by an author's legitimate interests or "fair practice." See, e.g., Berne Convention, *supra* note 25, arts. 9(2), 10(2), 10bis, 11bis, 13.

75. See *supra* notes 57-61 and accompanying text.

76. See *supra* notes 44 and accompanying text.

77. TRIPS Agreement, *supra* note 8, arts. 7, 8.

78. See Reichman, *supra* note 38, at 216-17. For a definition of neighboring rights, see *supra* note 38. For further discussion, see *infra* part III.B.2.c.

79. TRIPS Agreement, *supra* note 8, art. 11.

80. *Id.* Reichman notes that this is the first time a concept of "material injury" has been read into intellectual property rights law. Reichman, *supra* note 38, at 216 n.175.

system will be allowed to continue unless copying materially impairs the exclusive rights of reproduction.⁸¹

Several sections of China's copyright legislation address the rental of copyrighted works. As part of the right to exploit and receive remuneration for a copyright, China's Copyright Law grants authors the right to "distribute" their works.⁸² The Implementing Regulations define "distribution" as "the provision of a certain number of copies of a work to the public through selling, renting or other means, insofar as the said number of copies satisfy the reasonable needs of the public."⁸³ In addition, the ICT Provisions enable foreign authors to control the rental of their works after entering into a distribution agreement.⁸⁴

Because China has elected to protect computer software apart from other copyrighted works, any rental rights for owners of computer software must be granted in the Software Regulations. Owners of copyrights in computer software have the vaguely defined "right of publication," "right of exploitation," and the right to authorize exploitation and to receive remuneration.⁸⁵ The Software Regulations, however, contain two significant limitations to these rights. Article 22 permits the "making of a few copies of a piece of software for noncommercial purposes such as classroom teaching, scientific research or performance of official duties by a state organ" without authorization from or remuneration to the copyright holder.⁸⁶ Article 31 authorizes the use of copyrighted software to enforce the technical standards, policies, law, regulations and rules of the State. Where "there is a limited number of available forms of expression,"

81. TRIPS Agreement, *supra* note 8, art. 14(4).

82. COPYRIGHT LAW, *supra* note 18, art. 10(5).

83. IMPLEMENTING REGULATIONS, *supra* note 19, art. 5(5).

84. ICT PROVISIONS, *supra* note 40, art. 14.

85. SOFTWARE REGULATIONS, *supra* note 20, art. 9(1), (3), (4). The right of publication is defined as "the right to decide whether to make the software available to the public"; the right of exploitation is defined as "the right of exploiting the software by reproduction, demonstration, distribution, alteration, translation, annotation and the like on the premise of not harming the public interest"; and the right of authorization and remuneration is defined as "the right of authorizing others to exploit the software in part or all of the manners stipulated . . . [under the right of exploitation] and the right of receiving remuneration therefor." *Id.* Article 9 also provides for the right of developership, defined as the "right to claim developer's identity and to have the developer's name mentioned in connection with the software," and for the right to assign to others rights of exploitation and remuneration. *Id.* art. 9(2), (5).

86. *Id.* art. 22. Because many businesses are owned by the state, this limitation is potentially huge. See Henry Hong Liu, *Legislative Update—Legal Aspects of Software Protection in China: The Computer Software Protection Regulations*, 9 SANTA CLARA COMPUTER & HIGH TECH. L.J. 469, 481 (1993).

the use of the software will not constitute an infringement on the rights of copyright holders.⁸⁷

The practical meaning of the above provisions related to rental rights is ambiguous. The MOU between the United States and China required that China clarify in its ICT Provisions that the "exclusive right of distribution that applies to all works and sound recordings includes making copies available by rental and that this . . . right survives the first sale of copies."⁸⁸ For works of American copyright holders, article 14 of the ICT Provisions was apparently meant to fulfill this mandate. However, as written, article 14 could permit the rental of works in the absence of an agreement to distribute.⁸⁹ An additional uncertainty exists over whether a copyright holder can enter into an umbrella distribution agreement that would cover *any* distribution within China, or whether a copyright holder is required to seek agreements with each potential distributor. The current lack of an effective centralized copyright agency suggests that a copyright holder must obtain individual agreements to receive rental rights protection. Such an interpretation gains legitimacy with the realization that it would give China a means to prevent the nonuse of a copyrighted work or the exercise of what China perceives as monopoly power by the rights holder.⁹⁰

A consideration of the meaning of the MOU and of retail conditions in China yields a contrasting interpretation of article 14. The language of article 3(4) of the MOU appears to require absolute rental rights protection. Such an express grant of protection would invalidate the distribution agreement clause. In addition, the dominance in China of small stores in the marketing of relevant copyrighted material makes a requirement to obtain individual agreements unfeasible and, consequently, undermines any practical meaning of the MOU. But again, China might counter these challenges with an argument of administrative necessity—the

87. SOFTWARE REGULATIONS, *supra* note 20, art. 31.

88. MOU, *supra* note 23, art. 3(4)

89. "Copyright owners of foreign works may authorize or prohibit rental of copies of their works after authorizing others to distribute such copies." ICT PROVISIONS, *supra* note 40, art. 14.

90. Language in the Software Regulations suggests that China does indeed have this concern, at least with regard to computer software. See SOFTWARE REGULATIONS, *supra* note 20, art. 31 (allowing unauthorized use when "there is a limited number of available forms of expression"); *id.* art. 9(3) (premising the right of exploitation on "not harming the public interest"). A willingness by China to overlook unauthorized use of copyrighted works is analogous to the grant of a compulsory license for a patented work. Interestingly, commentators state that TRIPS does not prohibit the grant of compulsory licenses of patents. See, e.g., Reichman, *supra* note 38, at 207. TRIPS does, however, expressly prohibit the compulsory licensing of trademarks. TRIPS Agreement, *supra* note 8, art. 21.

requirement for distribution agreements is not intended to eviscerate rental rights, but rather to ensure their effective enforcement.

For non-American copyright holders, Chinese protection of rental rights is perhaps more uncertain. Article 10(5) of the Copyright Law is silent on whether copyright holders can prohibit the rental of their works.⁹¹ And because the provisions of the MOU do not extend to other countries,⁹² non-American copyright holders must obtain distribution agreements to protect their rental rights.⁹³

Rental rights in copyrighted computer software were not expressly provided for in the MOU, and the ICT Provisions do not alter the Software Regulations in this regard.⁹⁴ Because the Berne Convention does not grant rental rights, China's protection of computer software as a literary work under this Convention does not entail the extension of rental rights. The Software Regulations do provide for a contractual right to license computer software⁹⁵ and state that "distributing or revealing a piece of software to the public" without authorization will be an infringement of the copyright.⁹⁶ However, these provisions do not expressly grant rental rights, and the widespread piracy of computer software in China indicates that rental rights are not enforced.⁹⁷

A country can avoid extending rental rights to owners of cinematographic works and sound recordings if it can establish that its current protection system fits within the TRIPS Agreement's exceptions.⁹⁸ The recent tensions between the United States and China over the unchecked copying of compact and laser discs and CD-ROMS in China suggests that China will not be able to avail itself of

91. COPYRIGHT LAW, *supra* note 18, art. 10(5).

92. Authors from countries other than the United States receive protection beyond that of the Copyright Law and its Implementing Regulations only through the Berne Convention and bilateral agreements. See ICT PROVISIONS, *supra* note 40, art. 3. However, China's willingness to afford protection under Chinese copyright laws to U.S. authors might establish a precedent for the extension to all other foreign authors. Japan has already indicated a desire to obtain the same enforcement protection that China recently granted to the United States in their Intellectual Property Agreement. See *Intellectual Property: Japan Seeks Same Protection From China That U.S. Obtained in Recent Agreement*, INT'L TRADE REV., Apr. 5, 1995, available in WESTLAW, BNA-ITR File.

93. ICT PROVISIONS, *supra* note 40, art. 14.

94. Article 3(4) of the MOU, which contains the language relating to rental rights, specifically addresses the right of distribution defined in the Implementing Regulations. See MOU, *supra* note 23, art. 3(4); IMPLEMENTING REGULATIONS, *supra* note 19, art. 5(5).

95. SOFTWARE REGULATIONS, *supra* note 20, art. 18.

96. *Id.* art. 30(7).

97. During the recent Congressional debate over the imposition of trade sanctions against China, figures for software piracy in China were estimated at between 94% to 100%. See 141 CONG. REC. S3226-01 (Feb. 27, 1995) (Statement of Sen. Thomas); see also *supra* note 7.

98. See TRIPS Agreement, *supra* note 8, arts. 11, 14(4); see also *supra* notes 74-71 and accompanying text.

these exceptions.⁹⁹ Furthermore, the TRIPS Agreement does not extend these exceptions to the grant of rental rights to authors of computer software.¹⁰⁰

It appears that in order to completely comply with the TRIPS Agreement, China will need to clarify its protection of rental rights. However, because rental rights are a new area of international copyright protection, China's current failure to enforce such rights should not translate into a finding that its overall copyright protection scheme does not comply with the TRIPS Agreement.¹⁰¹

c. Neighboring Rights¹⁰²

Article 14 of the TRIPS Agreement provides that performers "shall have the possibility of preventing" the unauthorized fixation of performances, the reproduction of such fixed performances, and the unauthorized wireless broadcasting or communication to the public of performances.¹⁰³ Producers of sound recordings have the right to "authorize or prohibit the direct or indirect reproduction of their . . . [sound recordings]"¹⁰⁴ and the rental rights¹⁰⁵ discussed above.¹⁰⁶ Finally, broadcasting organizations retain exclusive rights over the fixation, reproduction, and rebroadcasting of their broadcasts.¹⁰⁷

The laws defining neighboring rights are found in the Copyright Law and its Implementing Regulations;¹⁰⁸ the ICT Provisions do not specifically address neighboring rights. China grants performers, firstly, the right to authorize live broadcasts and sound and video recordings of performances and, secondly, the right to receive remuneration for such recordings.¹⁰⁹ The two rights correspond to those set out in the TRIPS Agreement. Similarly, China gives producers of

99. See *Broad Agreement*, *supra* note 30-32 and accompanying text.

100. There might be an argument that some limitations on rental rights for computer software would be allowed under Article 13. TRIPS Agreement, *supra* note 8, art. 13. However, the conspicuous absence of exceptions for rental rights of computer software within Article 11 (while exceptions for cinematographic works and sound recordings are expressly provided) suggests that rental rights for computers were meant to be absolute. *Id.* art. 11.

101. It is also important to note that, as a developing country, China has a five-year transition period to conform to TRIPS. See *infra* notes 155-159 and accompanying text.

102. For a definition of neighboring rights, see *supra* note 38.

103. TRIPS Agreement, *supra* note 8, art. 14(1).

104. *Id.* art. 14(2).

105. *Id.* at (4).

106. See *supra* part IV.B.2.b.

107. TRIPS Agreement, *supra* note 8, art. 14(3).

108. See COPYRIGHT LAW, *supra* note 18, arts. 35-44; IMPLEMENTING REGULATIONS, *supra* note 19, art. 36.

109. COPYRIGHT LAW, *supra* note 18, art. 36.

sound recordings and radio and television broadcasters the right to authorize reproduction and distribution of their works.¹¹⁰

The language of articles 39 and 42 of the Copyright Law, however, does not prohibit reproduction and distribution of works, and, as previously noted, the status of rental rights for producers of sound recordings in China is ambiguous.¹¹¹ Again, the recent dispute between the United States and China highlights the escalating value placed on protecting producers of sound recordings, and the inclusion in the TRIPS Agreement of article 14, devoted to neighboring rights, indicates the growing importance of all of these rights.¹¹² China will have to adjust its system to adequately protect the rights of broadcasting organizations and of producers of sound recordings if it desires accession to the GATT and WTO.¹¹³

C. Enforcement

International protection of intellectual property rights has faltered in the past, not so much from lack of substantive law but from lack of enforcement.¹¹⁴ For several reasons, existing protection regimes, such as the Berne Convention, have generally been ineffective at preventing and remedying intellectual property violations. Under the Berne Convention, the International Court of Justice ("ICJ") retained jurisdiction to settle disputes between countries.¹¹⁵ Each Member country, however, could elect not to be bound by the decisions of the ICJ. By 1989, only sixty Berne Convention Members

110. *Id.* arts. 39, 42.

111. See *supra* notes 88-97 and accompanying text.

112. The final provision in article 14 somewhat weakens the protections extended: Members are permitted to impose restrictions and limitations on neighboring rights as allowed under the Rome Convention. TRIPS, *supra* note 8, art. 14(6). Therefore, Members may be able to "deny a public performance right to producers and performers of sound recordings; to impose reciprocity, rather than national treatment, on foreign phonogram producers; and to permit both private use and use for the purposes of teaching or scientific research without remuneration." Reichman, *supra* note 38, at 217.

113. In the IP Agreement with the United States, China has agreed to institute broad actions to restrict the production of unauthorized compact and laser discs. IP AGREEMENT, *supra* note 31, 34 I.L.M. at 892-93. The IP Agreement also includes enforcement efforts to prevent "infringement" of audio visual works. *Id.* at 893-95. Uruguay Round participants were not able to reach a consensus in this area, and the TRIPS Agreement does not contain provisions relating to audio-visual materials or movies. See Tara Kalagher Giunta & Lily H. Shang, *Ownership of Information in a Global Economy*, 27 GEO. WASH. J. INT'L L. & ECON. 327 (1993-1994).

114. See Gutterman, *supra* note 6. Gutterman composes a list of frequently cited enforcement problems, including lack of effective relief from infringements, inadequate court processes, inadequate criminal liabilities, discrimination against and bias towards foreigners, and corruption. *Id.* at 100.

115. Berne Convention, *supra* note 25, art. 33.

remained subject to the jurisdiction of the ICJ.¹¹⁶ In addition, judgments were enforced only through voluntary means or by a resolution of the Security Council.¹¹⁷ Finally, the complaint process and subsequent investigation were "long, complex and cumbersome."¹¹⁸

The TRIPS Agreement seeks to resolve these issues by requiring a standard set of minimum enforcement measures "so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringement."¹¹⁹ At a basic level, Members must provide: "fair and equitable" enforcement of intellectual property rights; decide cases on the merits, preferably via written, reasoned decisions; and grant parties to an action the right to judicial review of administrative rulings.¹²⁰ More specifically, the TRIPS Agreement mandates civil and administrative procedures,¹²¹ provisional measures,¹²² criminal penalties,¹²³ and border measures.¹²⁴

China's Copyright Law and the Implementing Regulations do address infringements of intellectual property rights. The Copyright Law lists actions that will result in "civil liability for such remedies as ceasing the infringing act, eliminating its ill effects, making a public apology or paying compensation for damages, etc., depending on the circumstances"¹²⁵ The Copyright Law also establishes a category of violations that might result in both of the above remedies as well as certain administrative penalties.¹²⁶ The Implementing Regulations define the administrative penalties as "warning, injunction in relation to production and distribution of infringing copies, confiscation of unlawful gains and seizure of infringing copies and equipments used for making infringing copies, as well as a fine."¹²⁷ The amount of any fines is determined according to a scale created in the Implementing Regulations.¹²⁸ Finally, the Copyright Law and

116. See Monique L. Cordray, *GATT v. WIPO*, 76 J. PAT. TRADEMARK OFF. SOC'Y 121, 131 (1994).

117. *Id.* at 132. Commentators have noted that enforcement by the Security Council was a very remote possibility. *Id.*

118. *Id.* at 131.

119. TRIPS Agreement, *supra* note 8, art. 41(1).

120. *Id.* art. 42(2)-(4).

121. *Id.* arts. 42-49.

122. *Id.* art. 50.

123. *Id.* art. 61.

124. *Id.* arts. 51-60.

125. COPYRIGHT LAW, *supra* note 18, art. 45.

126. *Id.* art. 46.

127. IMPLEMENTING REGULATIONS, *supra* note 19, art. 50.

128. *Id.* art. 51. This scale sets the minimum and maximum fines.

the Implementing Regulations outline the procedure for bringing an infringement action (parties may attempt mediation or institute an action in a people's court¹²⁹) and designate jurisdictional agencies.¹³⁰

The legislative foundation for enforcement exists in China; in the past, it simply has not been rigorously applied. The experiences of several companies illustrate the difficulties encountered in trying to protect intellectual property rights. In 1992, Microsoft Corporation discovered unauthorized copying of more than 650,000 of its trademark holograms by the Shenzhen Reflective Materials Institute of Shenzhen University.¹³¹ After a two-year lapse, the Institute was fined 2,200 yuan (\$252 (U.S.)).¹³² Walt Disney Corporation has experienced similar paltry fines—in one case it was awarded a \$100 (U.S.) fine for an infringing use of Mickey Mouse.¹³³ However, China will impose severe penalties for certain types of violations, particularly those related to China's public welfare. Thus, in the past, Chinese courts have imposed the death penalty for trading in counterfeit Maotai, a famous Chinese liquor, and for selling counterfeit cigarettes.¹³⁴ In the cigarette case, the legitimate factory was awarded compensation of 1 million yuan (\$115,000 (U.S.)).¹³⁵

In recent years, China has made several overtures indicating a desire to strengthen enforcement. In July 1993, China established the Intellectual Property Rights Tribunal of the Beijing Intermediate People's Court. In its first year, the tribunal reportedly heard seventy cases on copyright, trademark and patent violations, and settled forty.¹³⁶ In July 1994, China implemented the Resolution on Punishing Crime of Copyright Violations, allowing prosecution of

129. COPYRIGHT LAW, *supra* note 18, art. 48.

130. IMPLEMENTING REGULATIONS, *supra* note 19, art. 52.

131. See *China: New Laws Fail to Bite: (Micro)soft on Offenders*, Feb. 21, 1994, available in LEXIS [hereinafter *New Laws Fail*].

132. *Id.* Microsoft contends that the Institute continued to copy its holograms during the two-year interval. See Goldstein, *supra* note 7. This fine was later increased to \$2,500. *Id.* Microsoft alleges that 98% of the software sold under the name "Microsoft" in China is fake. *Id.*

133. See *China Update*, 6 J. PROPRIETARY RTS., May 1994, at 26.

134. *New Laws Fail*, *supra* note 131.

135. *Id.* Differences in the disposition of cases involving foreign copyright holders and Chinese copyright holders might also reflect a systemic bias towards Chinese nationals. In 1993, a Chinese software company was awarded 46,000 yuan (\$8,000 (U.S.)) in a copyright-infringement action. See *Purging the Pirates: China Beefs up Protection of Property Rights*, BUS. CHINA, May 17, 1993, available in LEXIS. A Hong Kong company has also been awarded a relatively large measure of damages, 100,000 yuan (\$11,848 (U.S.)), for unauthorized use of its name. See *Chinese Firm Ordered to Pay in Piracy Case*, J. COMMERCE, Feb. 16, 1995, at 5A. This possibly preferential treatment is consistent with other privileges granted Hong Kong nationals, Taiwanese, and overseas Chinese.

136. *Intellectual Property Protection in China: New Criminal Penalties for Copyright Violators, U.S. Software Producers' Lawsuit*, 16 E. ASIAN. EXEC. R., Jul. 15, 1994, at 4 [hereinafter *Criminal Penalties*].

violators under China's Criminal Law.¹³⁷ Sanctions included jail terms up to seven years and possible fines. The Resolution also permitted confiscation of illegal profits, copied items and the tools used in copyright infringement.¹³⁸

The IP Agreement represents China's latest commitment to stricter enforcement of intellectual property rights laws. The Agreement requires China to take immediate steps to curb piracy and, in particular, required China to implement a Special Enforcement Period with resources dedicated to specific actions against major offenders.¹³⁹ The IP Agreement also attempts to redress perceived shortcomings in current legal protection and mandates long-term changes to enhance protection.¹⁴⁰ For instance, unauthorized governmental use of intellectual property goods is limited, and a Chinese governmental body must take actions to ensure that it purchases and uses only legitimate computer software.¹⁴¹ Intellectual property rights conferences and working groups will be established at the central, provincial, and local governmental levels to ensure coordinated protection.¹⁴² Furthermore, a custom enforcement system similar to that of the United States will be established in China,¹⁴³ and a title verification system will be created to protect the rights of owners of audio-visual works.¹⁴⁴ In addition, the IP Agreement clarifies the procedures by which copyright holders may seek investigations of alleged infringements and enforcement of their rights.¹⁴⁵

137. *Id.* The application of criminal penalties in certain situations is required as part of the TRIPS Agreement's enforcement provisions. TRIPS, *supra* note 8, art. 61.

138. *Criminal Penalties, supra* note 136. Infringing acts covered by the Resolution included duplication, distribution and marketing of books, fine art, audio visual works and computer software. *Id.*

139. *See* IP Agreement, *supra* note 31, 34 I.L.M. at 892. The Special Enforcement Period commenced on March 1, 1995 and continued for a period of six months. *Id.* Chinese efforts during the Special Enforcement Period, however, apparently fell short of the expectations of the United States. *See* Blustein, *supra* note 7, at B13.

140. IP Agreement, *supra* note 31, 34 I.L.M. at 892-93.

141. *Id.* at 895-96. These provisions are apparently designed to narrow the exception provided for unauthorized "state" use of computer software. *See* SOFTWARE REGULATIONS, *supra* note 20, arts. 22, 31. *See also supra* notes 86-87 and accompanying text. The agreement goes further than simply requiring the cessation of the use of unauthorized software by also requiring that "[a]ll public, private and not-for-profit entities using computer software shall provide resources sufficient to purchase legitimate software." IP Agreement, *supra* note 31, 34 I.L.M. at 896.

142. IP Agreement, *supra* note 31, 34 I.L.M. at 887-89.

143. *Id.* at 900-03.

144. *Id.* at 903-04.

145. *Id.* at 891, 898-99. Under the provisions, copyright holders are "permitted to submit petitions to initiate investigations and enforcement action" to national and local administrative bodies and to enforcement "task forces." *Id.* at 891, 898. Petitions will be accepted "according to published, uniform criteria that are limited to determining whether there is a reason to

On its face, the IP Agreement addresses the major concerns expressed in the past by developed countries regarding China's enforcement of intellectual property rights and appears to bring China into compliance with the enforcement provisions of the TRIPS Agreement. Nonetheless, the question remains whether the required actions will bring about measurable change.¹⁴⁶ It is important to remember that the trade crisis between the United States and China which precipitated the IP Agreement was partially the result of China's failure to adhere to the 1992 MOU.¹⁴⁷ However, it is also significant that China has been willing to capitulate to United States' demands in each of the last two trade disputes. This may suggest only that China will agree to anything to avoid trade sanctions.¹⁴⁸ A more accurate assessment is that China is genuinely desirous of participating in the international market and realizes that to do so it must move to integrate its policies and actions to international standards of acceptability.

Recent actions by the Chinese government support this interpretation. China has established a United Intellectual Property Investigation Center, which reports to the State Council and works with foreign companies to prosecute violators of intellectual property rights.¹⁴⁹ The government has also committed itself to establishing a high court solely for the enforcement of intellectual property rights.¹⁵⁰ Even before the signing of the IP Agreement, in late

believe that the petitioner is the right holder or that person's authorized representative and there is a reason to believe or suspect that a right has been or may be infringed." *Id.* at 898. These provisions were seemingly designed to address past difficulties experienced by copyright holders in obtaining official recognition of possible copyright violations. However, the provisions by no means ensure investigation; their efficacy depends on the manner in which "reason to believe" is interpreted.

146. Note that the TRIPS Agreement expressly provides that a separate legal system for the enforcement of intellectual property rights is not required. TRIPS Agreement, *supra* note 8, art. 41(5). The exact meaning of this provision, however, is questionable considering the substantial procedural and remedial requirements for enforcement required elsewhere in the TRIPS Agreement. A country like China that currently does not follow these procedures is effectively required to create a new system.

147. See *Announcement*, *supra* note 31.

148. It has been reported, however, that the economic sanctions threatened by the United States would have little real economic effect on China. On the other hand, the responding sanctions that China threatened to impose against U.S. products may have done more damage. The U.S. business community also has worried over the possible adverse impact on efforts to establish new operations in China. See *U.S. Business Leaders See Truce in China Trade War*, *ASIAN WALL ST. J. WEEKLY*, Feb. 13, 1995, at 1.

149. Marcus W. Brauchli & Joseph Kahn, *Dispute Highlights Scope of China Piracy Problem*, *ASIAN WALL ST. J. WEEKLY*, Jan. 9, 1995, at 1. The Center's clients include Walt Disney Co., Unilever Group, and Proctor & Gamble Co. According to its Director, Li Changxu, the Center has pursued 100 cases of counterfeit products. *Id.*

150. *Intellectual Property: China to Establish Court to Enforce IPR Protections*, *INT'L TRADE REV.*, Nov. 22, 1995, available in WESTLAW, BNA-ITR File [hereinafter *China to Establish Court*].

1994, China had begun to enforce laws requiring the stamping of a factory origination mark on compact discs made in Chinese factories.¹⁵¹ China has raided and shut down several of the largest counterfeiting factories, including the infamous Shenfei Laser Optical Systems Company,¹⁵² and recently a major distributor of software was found guilty of pirating personal computer software.¹⁵³ These developments suggest a reformist attitude on the part of the Chinese government and have even forced some U.S. trade officials to admit to an improvement.¹⁵⁴ A continuation of these enforcement activities, combined with the institution of the IP Agreement, would form a solid foundation from which to bring China into the world market and into the new intellectual property rights protection system of the TRIPS Agreement.

D. China and the TRIPS Agreement's Provisions Related to Developing Countries

A comparison of China's system of intellectual property rights protection with that outlined in the TRIPS Agreement must include a discussion of the TRIPS Agreement's provisions relating to developing countries. Under the TRIPS Agreement, all member countries must, within one year of accession, comply with national treatment and most favored nation requirements.¹⁵⁵ Developing countries, and

Shortly following the Deputy United States Trade Representative's comments that the IP Agreement represented a "litmus test," the Chinese announcement was flavored with the rhetoric common to the verbal struggle between the United States and China. *Id.* See also *U.S. Sets Deadlines*, *supra* note 34. Ren Jianxin, the president and chief judge of the Supreme People's Court of China, compared intellectual property violations to "smuggling, bribery, swindling, embezzlement of public funds and other crimes that have led to 'serious disruptions of the country's economic order' and warranted severe punishment." *China to Establish Court*, *supra*.

151. *Id.* A mark of origin facilitates legal proceedings against illegal copier of compact discs and CD-ROMs.

152. See *Broad Agreement*, *supra* note 32. The IP Agreement also requires that China institute long-term measures to ensure that counterfeiting factories do not reopen in the future. IP Agreement, *supra* note 31, 34 I.L.M. at 892-93.

153. Louise Kehoe, *Software Groups Hail Piracy Win in China*, *FIN. TIMES*, Oct. 31, 1995, at 1; *Chinese Firm Found Guilty in Copyright Case; Asia: Microsoft Is Hoping for Punitive Damages and More Action to End Software Piracy*, *L.A. TIMES*, Oct. 31, 1995, at 2.

154. See *Intellectual Property: U.S. Raises Concerns with China on Compliance with Copyright Pact*, *BNA INT'L TRADE DAILY*, Sept. 1, 1995, at D4 (quoting a U.S. trade official as saying that "[i]f you compare where we are now with where we were a year ago, there's been a substantial change for the better . . ." and noting a "significant change" in the attitudes towards intellectual property rights protection among Chinese officials). Reports suggest that awareness of intellectual property rights is also increasing among the Chinese population. See Henry Sender, *See You in Court: In China, Some Newfound Respect for Copyrights*, *FAR E. ECON. REV.*, June 22, 1995, at 80.

155. TRIPS Agreement, *supra* note 8, art. 65(1).

economies in transition,¹⁵⁶ however, are granted an additional four years to implement the remainder of the TRIPS Agreement's provisions.¹⁵⁷ Least-developed countries have ten years to apply the TRIPS Agreement, and may in some cases, seek extensions.¹⁵⁸

In addition to the transitional periods, the TRIPS Agreement includes article 67, which contains broad language discussing "technical cooperation." Developed countries must provide "technical and financial cooperation in favor of developing and least-developed country Members." "Cooperation" includes "assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and . . . support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel."¹⁵⁹ As with the objectives and principles of the TRIPS Agreement, this language suggests that countries which do not fully comply with the TRIPS Agreement, like China, should still be allowed to join the WTO. After accession, areas of nonconformity can be resolved with the assistance of developed countries.

The TRIPS Agreement leaves undefined the threshold question as to which countries fall into which categories. Commentators have advanced two possible classification systems—the United Nations' definitions, which are used to determine levels of foreign aid, and the World Bank definitions, which are based on per capita income.¹⁶⁰ China would be included as a least developed country under the World Bank definition, but not under the United Nations system.¹⁶¹ It is unlikely that the developed countries would accept the categorization of China as a least developed country, but there should be little question that China remains a developing country¹⁶² and is

156. Economies in transition are defined as countries "in the process of transformation from a centrally-planned into a market, free-enterprise economy and which [are] undertaking structural reform of its intellectual property system and facing special problems in the preparation and implementation of intellectual property laws and regulations." *Id.* art. 65(3).

157. *Id.* art. 65(2), (3). Article 65 also includes an additional five-year period for countries that are required to extend product patent protection to areas not currently protected under their laws. *Id.* art. 65(4).

158. *Id.* art. 66.

159. *Id.* art. 67. Perhaps in anticipation of this obligation, the United States agreed to assist China in implementing the IP Agreement. See Letter from Wu Yi, Minister of Foreign Trade and Economic Cooperation, to Michael Kantor, U.S. Trade Representative (Feb. 26, 1995), reprinted in IP Agreement, *supra* note 31, 34 I.L.M. at 885.

160. See Marco C.E.J. Bronckers, *The Impact of TRIPS: Intellectual Property Protection in Developing Countries*, 31 COMMON MKT. L. REV. 1245 (1994).

161. *Id.* at 1255-56.

162. See *id.* at 1257, 1261. Bronckers also notes that for international political reasons, countries such as China and India would resist being classified as least developed. Unlike "least developed," "developing" status has resisted definition.

entitled to receive the benefits attached to that status. China's developing country status further supports a conclusion that its laws and regulations essentially comply with the TRIPS Agreement and weakens a claim by the United States that China's inadequate protection of intellectual property rights impede its accession to the WTO.

IV. ADDITIONAL CONCERNS RELATED TO THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS IN CHINA

As noted above, the reestablishment of a court system and a body of laws has been a major component of China's economic reform.¹⁶³ The official recognition of this goal was stated by Deng Xiaoping in a 1978 speech:

In order to safeguard people's democracy, the legal system must be strengthened. Democracy needs to be institutionalized and legalised [sic] so that such a system and such laws would not change merely because of a change of leadership or a change in the leaders' views and attention. The present problem is that the laws are incomplete; many laws have not yet been enacted. Leaders' words are often taken as 'law', and if one disagrees with what the leaders say, it is called 'unlawful'. And if the leaders change their words, the 'law' changes accordingly.¹⁶⁴

This ambitious movement to a rule of law, however, has not been without difficulties, and several areas of the Chinese legal system create potential problems for foreign parties.

A. Transparency

One of the most frequently cited "shortcomings" of Chinese law is its lack of transparency.¹⁶⁵ Because China does not routinely publish its rules and regulations, applicable laws are difficult to determine.¹⁶⁶ China's legal system is also characterized by the existence of internal (*neibu*) rules, which are unavailable to foreigners and which may supersede published regulations.¹⁶⁷ As one Chinese legal

163. See *supra* notes 10-14 and accompanying text. The movement from a system characterized by "ad hoc bargaining" between individuals to a system of universally applicable rules is considered to be crucial to the successful implementation of true economic reform. See Donald C. Clarke, *What's Law Got to Do With It? Legal Institutions and Economic Reform in China*, 10 UCLA PAC. BASIN L.J. 1 (1991).

164. ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 33 (1992) (quoting DENG XIAOPING, COLLECTED WORKS (1975-1982) 136-37 (1983)).

165. See, e.g., OFFICE OF THE U.S. TRADE REPRESENTATIVE, 1992 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 52 (1992).

166. See Hu, *supra* note 1, at 144.

167. *Id.*

scholar writes: "Some regulations are publicly promulgated and others are for internal circulation only."¹⁶⁸

China must overcome several obstacles to create a transparent legal system. Currently, laws and regulations vary across regions and localities; transparency will require that a central body identify and compile these various laws. Past attempts by the Chinese government to centrally control the enforcement of intellectual property rights have met with local resistance.¹⁶⁹ However, the central government's recent success in shutting down counterfeiting operations and implementing judicial reform perhaps indicates a willingness and an ability to exercise more effective control.¹⁷⁰ Furthermore, because China is entitled to the five-year transition period under the TRIPS Agreement, lack of immediate change should not be translated into complete noncompliance.

B. The Judiciary

Legal education in China is generally poor;¹⁷¹ consequently, qualified judges are rare. Judges are not required to be trained attorneys, and there is no established system of qualification or competence.¹⁷² Although the Chinese government has recently embarked on campaigns to enhance the quality of the judiciary,¹⁷³ for the immediate future, lack of expertise may negatively impact judicial decisions.¹⁷⁴

168. Shen, *supra* note 7, at 79. The IP Agreement broadly addresses transparency in intellectual property rights laws, requiring China to compile and publish a body of laws and provisions on intellectual property rights to make publicly available the laws, provisions, regulations, standards, edicts, decrees, and interpretations regarding the authorization, management, and implementation of intellectual property rights. All intellectual property laws, regulations, provisions, standards, edicts, decrees, and interpretations will be published, and those that are not published and made readily available will not be enforced. IP Agreement, *supra*, 34 I.L.M. at 906.

The TRIPS Agreement requires the publication of "laws and regulations, and final judicial decisions and administrative rulings of general application" pertaining to intellectual property "in such a manner as to enable governments and right holders to become acquainted with them." TRIPS Agreement, *supra* note 8, art. 63(1). As a developing country, China would have five years to meet this standard. *Id.* art. 65(1), (2).

169. See *China's Piracy Crackdown Measures Meet Opposition*, ASIAN ECON. NEWS, Aug. 1, 1994, available in WESTLAW, File No. 1994 WL 2087778.

170. See *supra* notes 132-135, 151-154 and accompanying text.

171. The Cultural Revolution had a significant adverse impact on legal education and education in general. See CHEN, *supra* note 164, at 122; Clarke, *supra* note 163, at 21.

172. Clarke, *supra* note 163, at 22. Clarke presents figures for Hunan province showing that, of 8,308 judges, only 756 (9.1%) have completed education past high school. Of these, only 300 (3.6% of total) specialized in law.

173. See CHEN, *supra* note 164, at 122. The Chinese government has also engaged in public education campaigns aimed at increasing the public's awareness of the law. *Id.*

174. The link between awareness and protection is recognized in the IP Agreement, which requires that China improve the dissemination of information related to intellectual property

A related issue is the independence of the judiciary. The Chinese Constitution states that "The People's Republic of China is a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants."¹⁷⁵ This ideology mutates the law into a tool for proletarian rule and requires that it not supersede the authority of the Chinese Communist Party.¹⁷⁶ Although the government has made proclamations of judicial independence, in practice, the Party maintains a policy of reviewing "important, difficult or politically sensitive" matters of law.¹⁷⁷ The Party's apparent control over the courts is important because intellectual property rights violations are often perpetuated by local governments.¹⁷⁸

V. CONCLUSION

Since the early 1990s, concerns over China's protection of intellectual property rights have moved to the forefront of China's trade disputes with the United States. During this same period, international attention to intellectual property rights protection increased and resulted in the inclusion of the TRIPS Agreement within the WTO. Therefore, as one of the steps to join the WTO, China must conform its intellectual property rights protection system to that outlined in the TRIPS Agreement.

Under its 1992 MOU with the United States, China agreed to reform its legal system to enhance protection of copyrighted works. The resulting substantive rules and regulations essentially meet international standards and, consequently, now conform to many of the requirements outlined in the TRIPS Agreement. However, China's respect for the rights of copyright holders falters in the new areas of international protection—rental rights, neighboring rights, and computer software. Absolute compliance with the TRIPS Agreement will require China to strengthen the protection extended to these rights. However, because of the novelty of these rights and China's developing-country status, current weak protection should not prevent China's accession to the WTO.

rights and enhance national training regarding the protection of such rights. IP Agreement, *supra* note 31, 34 I.L.M. at 906.

175. PEOPLE'S REPUBLIC OF CHINA CONST. art. 1.

176. See CHEN, *supra* note 164, at 117. Chen points out that judicial independence has never really been a tradition in China. *Id.*

177. *Id.* at 119.

178. See *Pirates Kidnap Walt Disney: A Few Firms Jeopardize China's Economy*, FAR E. ECON. REV., Jan. 19, 1995, at 5.

China has also failed to adequately enforce existing laws and regulations, which has obstructed meaningful protection of copyrighted works. As with the new rights, however, enforcement difficulties should not forestall China's inclusion in the WTO. By signing the recent IP Agreement, China has once again agreed to restructure its protection system to accord with internationally accepted principles. When implemented, these reforms will substantially advance China's enforcement of intellectual property rights.

The United States has repeatedly blocked China's attempts to rejoin the GATT, and now the WTO. Perhaps, a significant motivation behind the United States' persistent reluctance to allow China's accession is Section 301's success in securing changes in China's trade policies and legal system. International reaction to the Section 301 procedures has become increasingly hostile. As a consequence, Section 301 investigations may not be available as trade policy tools towards members of the WTO in the future; China's accession would effectively require the United States to sacrifice Section 301 as a means of influencing China. The dispute resolution agreements of the WTO, however, were designed to obviate the need for unilateral tools such as Section 301. All WTO disputes must proceed through the mechanisms of the WTO before unilateral action can be instituted. If the WTO works as intended, the dispute resolution procedures would serve as a viable alternative to Section 301 investigations as a means of resolving trade disputes with China.

China's system of intellectual property rights protection is only thirteen years old, and its system of copyright protection is only four years old. In this period of time, China has established laws and regulations that match those of the most advanced countries. Recent good-faith efforts by the Chinese government to safeguard the rights of copyright holders suggest continued improvement in the protection of intellectual property rights in China.

The WTO and its TRIPS Agreement represent an ambitious effort to coordinate trade policies on a multilateral basis. The success of this endeavor depends on the participation of the major trading countries. China is rapidly emerging as one of the largest economies in the world. Failure to include China within the WTO negates the principles underlying the formation of a world trade body.