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## China's Accession to the Berne Convention: Bandaging the Wounds of Intellectual Property Piracy in China

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# COMMENTS

## China's Accession to the Berne Convention: Bandaging the Wounds of Intellectual Property Piracy in China

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## INTRODUCTION

On June 1, 1991, the first copyright law in the history of the People's Republic of China entered into effect.<sup>1</sup> Given the socialist principles of traditional communist ideology,<sup>2</sup> this was a landmark development in copyright protection in China. Yet, to the disappointment of United States industry and the copyright bar, the new law and implementing regulations fell short of Berne Convention standards for intellectual property protection and offered no solution to the rampant piracy of U.S. works in China.<sup>3</sup>

To protect their interests, industry leaders actively lobbied the U.S. Trade Representative ("USTR")—Ambassador Carla Hills—demanding sanctions against China under U.S. trade laws.<sup>4</sup> Recognizing the significance of trade losses in China due to piracy of U.S. intellectual property,<sup>5</sup> the USTR announced formal sanctions against China on December 2, 1991, to take effect on January 17, 1992.<sup>6</sup> Just hours before the sanctions were implemented, the U.S. and China signed a Memorandum of Understanding<sup>7</sup> ("MOU") in which China committed to join the Berne Convention by October 15, 1992, and to issue implementing

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1. *Copyright Law Enacted*, IP ASIA, Oct. 18, 1990, at 10 [hereinafter *Copyright Law Enacted*].

2. See generally THE CHINESE COMMUNIST REGIME DOCUMENTS AND COMMENTARY (Theodore H.E. Chen ed., 1967) (analyzing the organization and principles of the Chinese Communist Party) [hereinafter THE CHINESE COMMUNIST REGIME]; see also MU FU-SHENG, THE WILTING OF THE HUNDRED FLOWERS: THE CHINESE INTELLIGENTSIA UNDER MAO 149-207 (1962).

3. See *infra* notes 96-99 and accompanying text.

4. *China, Thailand, Indonesia Among Countries Criticized For Inadequate Protection of Intellectual Property*, E. ASIAN EXECUTIVE REPS., Mar. 15, 1991, at 8 [hereinafter *Countries Criticized*].

5. See *infra* note 156.

6. See Letter from Eric H. Smith, Executive Director & General Counsel, International Intellectual Property Alliance, to Dorothy Balaban, Section 301 Committee, Office of the U.S. Trade Representative app. at 64 n.1 (Feb. 25, 1992) (on file with the *Fordham Entertainment, Media & Intellectual Property Law Forum*) [hereinafter IIPA Letter].

7. Memorandum of Understanding Between the Government of the United States of America and the Government of the People's Republic of China on the Protection of Intellectual Property, Jan. 16, 1992 (on file with the *Fordham Entertainment, Media & Intellectual Property Law Forum*) [hereinafter MOU].

regulations by October 1, 1992.<sup>8</sup>

This comment traces the history behind the January 17 MOU between the U.S. and China and analyzes China's proposed method of implementing the Convention. Part I explains the conflict between communist ideology and copyright protection, highlighting the recent modernizations and the development of a formal legal system in China. Part II outlines the U.S. copyright industry's efforts to protect U.S. works in China and the promulgation of China's first copyright law. It also enumerates the incompatibilities between China's domestic law and the Berne Convention and traces the negotiations leading up to China's agreement to accede to the Berne Convention. Part III analyzes the requirements for accession to the Berne Convention and China's plan for implementing the Convention. This comment concludes that the January 17 MOU is a bandage rather than a cure for the lack of clear rules U.S. citizens—corporate and private—may follow regarding copyright protection in China. In addition, it concludes that the lack of a system of checks and balances between the Communist Party and the Chinese Court exacerbates the situation.<sup>9</sup>

## I. THE HISTORY OF AUTHORS' RIGHTS IN CHINA

### A. *Socialist Ideology and Copyright Protection*

Since the birth of the People's Republic of China ("PRC") in 1949 until the death of Mao Tse-Tung in September 1976, the Chinese Communist Party attempted to restructure Chinese society to conform to its Marxist-Leninist beliefs.<sup>10</sup> Prior to 1949 the

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8. See *infra* notes 130-141 and accompanying text.

9. The lack of checks and balances in China's legal system is mentioned only in the context of its impeding implementation of the Berne Convention. A specific analysis of the requirements for instituting such a system in China is beyond the scope of this comment.

10. Richard Goldstein, Note, *Copyright Relations Between the United States and the People's Republic of China: An Interim Report*, 10 BROOK. J. INT'L L. 403, 410 (1984). The Chinese constitution explicitly incorporates Marxist-Leninist political doctrine. *Id.* at 410 n.42 (citing J.E. WANG, *SELECTED LEGAL DOCUMENTS OF THE PEOPLE'S REPUBLIC OF CHINA 67-71* (1976)). See also THE CHINESE COMMUNIST REGIME, *supra* note 2, at 21-54; JAMES C.F. WANG, *CONTEMPORARY CHINESE POLITICS: AN INTRODUCTION* 44-61 (1980) [hereinafter *CONTEMPORARY CHINESE POLITICS*].

Republic of China had enacted several copyright laws.<sup>11</sup> However, in 1949, under Mao's leadership, the new Chinese government<sup>12</sup> repealed all the laws of the Republic of China and instituted in their place a body of law consistent with Marxist-Leninist ideology.<sup>13</sup> "The Chinese Communists believe that property must be collectivized to advance political goals such as the elimination of class inequities, economic elites and capitalistic tendencies."<sup>14</sup> Literary, artistic and scientific works are not considered personal property under the system, but are collectively owned by the State.<sup>15</sup> Chinese Communists also believe that "a codified legal system is characteristic of bourgeois law."<sup>16</sup> A corollary to this belief is the contention that the need for codified laws will atrophy and disappear from non-use as the socialist revolution advances.<sup>17</sup>

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11. See Dietrich A. Loeber, *Copyright Law and Publishing in the People's Republic of China*, 24 *UCLA L. REV.* 907, 907 n.3 (1977) (citing Law of May 23, 1928, Concerning Copyrights and Regulations for the Enforcement of Copyright Law, superseded by Law of April 27, 1944, Concerning Copyrights and Enforcement of Copyright Law).

The first copyright treaty between the United States and China was signed in 1903 and committed the Chinese to protecting books, maps, prints, and engravings. Jon A. Baumgarten, *Copyright Relations Between the U.S. and the P.R.C.*, 27 *BULL. COPYRIGHT SOC'Y* 419, 421 (1980). Such protection applied only to material prepared especially for use by the Chinese people. *Id.* The 1946 Treaty of Friendship, Commerce and Navigation Between the United States and the Government of the Republic of China superseded the 1903 Treaty. *Id.* These treaties currently govern copyright relations between the United States and the Republic of China. *Id.*

12. In 1949, the Chinese Communists came into power after winning a military victory over the Northern Warlord and Kuomintang (Nationalist) governments, thereby establishing the People's Republic of China. See Mark Sidel, *Copyright, Trademark and Patent Law in the People's Republic of China*, 21 *TEX. INT'L L.J.* 259, 261 (1986) (citing SHEN REN'GAN & ZHONG YINGKE, *BANQUANFA QIANTAN [A DISCUSSION OF COPYRIGHT LAW]* 100-04 (1982) (Mark Sidel's translation of title).

See FU-SHENG, *supra* note 2, at 42-45, for a detailed discussion of this takeover; EDWARD E. RICE, *MAO'S WAY* 83-119 (1972). Chiang Kai-Shek and the Nationalists fled the mainland and relocated the Republic of China on Taiwan. *Id.* at 118-19.

13. See Goldstein, *supra* note 10, at 410.

14. RICE, *supra* note 12, at 20.

15. See generally CHINA UNDER MAO: POLITICS TAKES COMMAND 99-118 (Roderick MacFarquhar ed., 1966).

16. Goldstein, *supra* note 10, at 412 (citing P. CHEN, *LAW AND JUSTICE IN CHINA: 2400 B.C. TO 1960 A.D.* 55-56, 87-91 (1973)).

17. *Id.*

Adherence to communist ideology explains the absence of an established system of legal protection for copyright in China. However, the Communists have demonstrated some interest in protecting the rights of authors. In 1950, "Decisions Concerning the Improvement and Development of Publishing" was adopted at the first National Publications Conference.<sup>18</sup> These resolutions provided that "copyright and the right to publication must be respected, *i.e.*, plagiarism, manuscript changes, and printing without prior consent should be prohibited . . ."<sup>19</sup> Royalties were based on the nature of the work, the number of Chinese characters, and the number of copies printed.<sup>20</sup>

Nevertheless, the resolutions failed to provide effective protection to Chinese authors, as demonstrated by the Dalian Bookstore incident in 1950.<sup>21</sup> The Dalian Bookstore reprinted 5,000 copies of a previously published work without obtaining the original publisher's permission.<sup>22</sup> The publisher appealed to the General Publishing Office in Beijing, which closed the case by issuing a report criticizing the reproduction as "extremely improper."<sup>23</sup> No penalty was imposed nor pecuniary compensation awarded. The Dalian Bookstore incident was a clear example of the need for stricter regulations and remedies for their violation.<sup>24</sup>

In 1952, the General Publishing Office issued new regulations on book publishing, printing and distribution, and established a system of contracts for the publishing industry.<sup>25</sup> Under the system, publishers and authors were to "sign contracts, with their

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18. See ZHENG CHENGSI, CHINESE INTELLECTUAL PROPERTY AND TECHNOLOGY TRANSFER LAW 88 (1987).

19. *Id.*

20. See Sidel, *supra* note 12, at 263.

21. *Id.* at 261-62.

22. "The Bookstore compounded its error by printing 'First Edition Dalian' and 'All Rights Reserved, No Reproduction Allowed' on the book's copyright page." *Id.* at 261.

23. See *id.* (quoting REN'GAN & YINGKE, *supra* note 16, at 106).

24. See *id.* at 262.

25. See *id.* The rules were entitled "Rules Concerning Editors and the Structure and Working System of State Owned Publishing Houses." See CHENGSI, *supra* note 18, at 88.

principal contents to include the number of [Chinese] characters in the original manuscript, the due date [for the manuscript, and] the amount of royalties and other provisions, and [the contracts were to] be signed personally by the publisher, editor-in-chief, [or] manager . . . and the author."<sup>26</sup> The contract system was ineffective, however, as it only regulated the relationship between authors and publishers. Unauthorized reproduction by third parties could not be controlled by contract. As a result, the need for stronger legislation and enforcement mechanisms lingered into the early 1960s.<sup>27</sup>

Communist extremists, led by Mao, launched a series of political movements in the summer of 1957. First, the Hundred Flowers Campaign, designed to encourage relatively free criticism of Party policies, was terminated.<sup>28</sup> Next, Mao and his supporters

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26. See Sidel, *supra* note 12, at 262 (quoting REN'GAN & YINGKE, *supra* note 16, at 107).

27. See *id.* In 1957, the Ministry of Culture drafted unified royalty regulations, providing more generous royalty payments to authors based on the number of characters and copies printed. The regulations were entitled "The Unified Measures Governing Payment Given by the People's Press for Manuscripts." Goldstein, *supra* note 10, at 263; CHENGSI, *supra* note 18, at 90. These rules were never openly published but were entitled "Interim Regulations Concerning the Protection of Copyright in Published Works." Sidel, *supra* note 12, at 263 n.13. An "Explanation of the Regulations" later states:

All works published within the territory of the People's Republic of China shall enjoy copyright, regardless of the nationality of the author. Protection of copyright also extends to works published outside the territory of the People's Republic of China, provided that the author is a Chinese national.

CHENGSI, *supra* note 18, at 90 (citing YAO ZHUANG & RHEN JISHENG, *INTERNATIONAL PRIVATE LAW FUNDAMENTALS* 175 (1981)). Arguably, if these documents had been published, China would currently have a 30 year old copyright law similar to that of most foreign countries. *Id.*

28. See RICE, *supra* note 12, at 136-48. See also Tao-tai Hsia & Wendy I. Zeldin, *Recent Legal Developments in the People's Republic of China*, 28 HARV. INT'L L.J. 249, 252 (1987) (citing 1 RODERICK MACFARQUHAR, *THE ORIGINS OF THE CULTURAL REVOLUTION* (1974)). During the Hundred Flowers Campaign, liberal jurists advocated changes in judicial policy, including adoption of "the principles of judicial independence, equal justice before the law, presumption of innocence and due process." *Id.* The system of limited checks and balances that existed between the courts and procuracies before 1957 virtually disappeared after the termination of the Hundred Flowers Campaign and the launching of the Anti-Rightist movement. *Id.* at 253 (citing *Teaching and Research Office for the Theory of the State and Legal Power*, in LUN RENIM MINZHU ZHUANZHENG

within the Chinese Communist Party, seeking to expedite China's transition to full communism, launched the "Anti-Rightist Movement"<sup>29</sup> and the "Great Leap Forward."<sup>30</sup> As a result, royalty rates dwindled to the point of their elimination when the Cultural Revolution began in 1966.<sup>31</sup> The Cultural Revolution lasted from 1966 to 1976.<sup>32</sup> During this time, private ownership of intellectual property was eliminated. Many authors and intellectuals were imprisoned by the State or sent to the countryside for "re-education." For some, this included torture and death.<sup>33</sup> Works previously protected by contract were acquired by the State and the publishing contract system was dismantled.<sup>34</sup>

Publishing regulations were reinstated in 1972, but required those reproducing another's work only to "note the name of the original publisher on the edition or . . . make some other explanation."<sup>35</sup> The author's permission to reprint and the payment of

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HE RENMIN MINZU ZHUANZHENG HE RENMIN MINZHU FAZHI [ON THE PEOPLE'S DEMOCRATIC DICTATORSHIP AND THE PEOPLE'S DEMOCRATIC LEGAL SYSTEM] 205, 206 (1958)). Informal, nonjudicial mediation committees handled most civil disputes and in 1959 the Ministry of Justice was disbanded and many law schools were dissolved. Political theory courses replaced specialized law courses and legal research was terminated. *Id.* (citing Chen Shouyi, *Thirty Years of Chinese Legal Science*, in 1 ZHONGGUO FAXUE WENJI (DI YI JI) [COLLECTED ESSAYS ON CHINESE LEGAL SCIENCE] 17 (1984)).

29. Hsia & Zeldin, *supra* note 28, at 252. Before the Cultural Revolution, the state of "law" in China fluctuated between communist ideological extremism and attempts by moderates to codify a modern set of laws. Moderate attempts were labeled "rightist," and the extremism resulting in the Cultural Revolution is now known as "ultra-leftist." *Id.*

30. Sidel, *supra* note 12, at 263. See also RICE, *supra* note 12, at 159-81.

31. Hsia & Zeldin, *supra* note 28, at 252.

32. The Cultural Revolution severely effected copyright protection and other rights of authors. Some argue that the elimination of private ownership of intellectual property destroyed Chinese literary culture. See Tao-Tai Hsia & Kathryn A. Haun, *Law of the People's Republic of China of Industrial and Intellectual Property* 38 LAW & CONTEMP. PROBS. 274, 290 (1973) (arguing that "the belles-lettres are at a nadir [in 1973] in the People's Republic of China"). See generally HONG YUNG LEE, *THE POLITICS OF THE CHINESE CULTURAL REVOLUTION* (1978), for a detailed account of the Cultural Revolution.

33. Sidel, *supra* note 12, at 263. See also LEE, *supra* note 32, at 244-64.

34. Sidel, *supra* note 12, at 264 (citing interviews with members of the Institute of Law, Chinese Academy of Social Sciences, in Beijing (Aug. 1984)).

35. *Id.* (quoting *National Plan for Unified Numbering of Books*, in ZHONGGUO

royalties were simply not required.<sup>36</sup>

*B. Developments from 1977 to 1986*

After Mao Tse-Tung's death, China instituted a new policy of "strengthening the legal system," designed to accelerate economic development.<sup>37</sup> The policy's goal has been to achieve "the four modernizations" of industry, agriculture, science and technology, and national defense.<sup>38</sup> Successful modernization requires rules and regulations and an orderly environment.<sup>39</sup> Pursuant to this new policy, the rights of authors have been slowly restored since 1977.<sup>40</sup> In October 1977, the State Publishing Administration issued the "Directive on Trial Methods for News and Publishing Royalties," providing limited royalties to writers.<sup>41</sup> Restoration of the royalty levels available in the 1950s<sup>42</sup> did not occur until 1980, with the issuing of "Provisional Regulations on Book Royalties."<sup>43</sup>

Prior to 1979, the PRC had no formally codified laws.<sup>44</sup> In 1979, under the leadership of Deng Xiaoping, two codes and five major laws were enacted, including a criminal code and a criminal procedure law, an electoral law, and a law governing joint ventures and foreign investments.<sup>45</sup> Trademark and Patent Laws were

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CHUBAN NIANJIAN 1980 [CHINESE PUBLISHING YEARBOOK 1980] 629 (Mark Sidel trans., 1981)).

36. *Id.* (arguing "the new rules only codified the elimination of copyright protection which followed the Cultural Revolution").

37. *See* Hsia & Zeldin, *supra* note 28, at 254.

38. *Id.* Premier Zhou Enlai first introduced this program in a speech to the Fourth National People's Congress in 1975. *See id.* at 254 n.33 (citing *Communique of the Third Plenary Session of the 11th CCP Central Committee*, PEKING REV. 6-16 (Dec. 29, 1978)).

39. Zhou Enlai asserted that modernization requires rules and regulations, and Deng Xiaoping is the leading advocate of Zhou's views on modernization. *See id.* at 254 n.34 (citing *Report to the Tenth National Congress of the Communist Party of China*, PEKING REV. 25 (Sept. 7, 1973)).

40. *See id.* at 254.

enacted in 1982 and 1984, respectively.<sup>46</sup> However, no regulations recognized copyright protection.<sup>47</sup>

Several factors surrounded China's hesitancy in passing a copyright law. First, there were fears associated with a new copyright law, such as the complex questions a detailed copyright law would pose to inadequately educated judges, lawyers, publishers, distributors and creators,<sup>48</sup> and the potential for increased litigation in the already overburdened Chinese courts.<sup>49</sup> Second were the communist ideological barriers of distrust of intellectuals as a class and rejection of the concept of private property.<sup>50</sup> Third, a domestic copyright law would put greater pressure on China to accede to one of the international conventions.<sup>51</sup> Finally, as a lesser developed country, China viewed the protection of foreign works as "an unacceptable economic burden to publishers and consumers, [which would] impair access to needed educational and scientific works for students and researchers and unnecessarily drain the country's foreign exchange holdings."<sup>52</sup> Hence, China believed that it should postpone enactment of a domestic copyright law until its economic and administrative capabilities with regard to protection of foreign copyrights improved.<sup>53</sup>

In lieu of a copyright law, China created other methods for protecting copyrights during the 1980s. In 1980, it published rules dealing with taxation of individuals and joint ventures which mentioned copyright as a source of taxable income, but which

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46. The Trademark Law of the People's Republic of China became effective on March 1, 1983, and the Patent Law of the People's Republic of China on March 1, 1985. See Sidel, *supra* note 12, at 273-74, 282-83.

47. *But see* CHENGSI, *supra* note 18, at 90. The rules dealing with taxation of individuals and joint ventures issued in 1980 did mention copyright as a source of taxable income although no details were given. *Id.* at 91.

48. See Joseph T. Simone, *Copyright in the People's Republic of China: A Foreigner's Guide*, 7 CARDOZO ARTS & ENT. L.J. 1, 8 (1988).

49. *See id.* at 9.

50. *See id.* at 9 nn.31-34.

51. *See id.* at 10.

52. *Id.*

53. *See id.*

provided few details.<sup>54</sup> In 1982, China issued the "Interim Provisions On Audio and Video Recordings," "to control distribution of illegal works," which was the first regulation to deal substantively with the copyright issue.<sup>55</sup> Subsequently, regulations governing the copyrights of books and periodicals were issued in 1985, and a circular dealing with copyrights on audio and video products was published in 1986.<sup>56</sup> Also in 1985, the State Council established the National Copyright Administration, and in 1986, the National People's Congress enacted the General Principles of the Civil Code, which include broad provisions for the protection of copyrights.<sup>57</sup> However, these interim measures protected only works of Chinese nationals. No protection was available to foreign authors.

### *C. Development of Trade Relations With China*

Paralleling the trend toward codification of laws in China was a trend away from isolationism. Until the mid-1970s, the PRC did not maintain significant diplomatic or commercial ties with non-communist nations. In fact, formal diplomatic relations were only established between the U.S. and PRC in 1978<sup>58</sup> in response to

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54. See CHENGSI, *supra* note 18, at 90-91.

55. See *id.*

56. The circular was jointly published by the Ministry of Radio, Film and Television, the Ministry of Commerce and the State Administration of Industry and Commerce. See CHENGSI, *supra* note 18, at 91-92.

57. See Simone, *supra* note 48, at 4. The General Principles of the Civil Code contains 156 articles in nine chapters. It includes provisions regarding property rights, intellectual property, personal rights and other civil rights. See Hsia & Zeldin, *supra* note 28, at 263.

58. See Goldstein, *supra* note 14, at 403 n.1. On December 15, 1978, United States President Jimmy Carter announced the signing of the "Joint Communiqué on the Establishment of Diplomatic Relations Between the United States and the People's Republic of China." *Id.* (citing DEP'T ST. BULL., Jan. 1979, at 25-26).

A new era of diplomatic relations with the PRC began after the PRC was seated in the United Nations in the fall of 1972. Contemporary Chinese Politics, *supra* note 10, at 255. On February 28, 1972, United States President Richard M. Nixon and Premier Zhou Enlai signed the Joint Communiqué or the Shanghai Communiqué, recognizing that, "there is but one China and that Taiwan is a part of China." *Id.* at 256. This was a giant step for the U.S., which had previously dealt with the Republic of China ("ROC") on Taiwan as the legitimate government of all of China. THE INTERNATIONAL POSITION OF

the growing volume of trade between the two countries.<sup>59</sup>

Yet, the establishment of formal relations did not change the fact that the PRC had no formal copyright law, had no copyright treaty with the U.S., and was not a party to either of the two major international copyright conventions.<sup>60</sup> China's total lack of protection for intellectual property became a serious obstacle for American authors exporting their literary and scientific work. The informal Chinese legal system provided the opportunity for the PRC to reproduce intellectual property without authors' consent, to distribute works cheaply to its massive population, and even to sell it to other countries.<sup>61</sup>

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COMMUNIST CHINA 28-9 (Lyman M. Tondel, Jr. ed., 1965). The Joint Communiqué of December 15, 1978, calling for the establishment of normal diplomatic relations on January 1, 1979, codified the breakthrough in Sino-U.S. negotiations. CONTEMPORARY CHINESE POLITICS, *supra* note 10, at 260. According to the Communiqué, the U.S. would recognize the government of the PRC as the sole and legal government of China on January 1, 1979, while continuing to maintain "cultural, commercial and other unofficial relations with the people of Taiwan." *Id.* at 261; see ROSS TERRILL, CHINA IN OUR TIME 146-76 (1992), for an account of events leading up to the U.S.'s formal recognition of the People's Republic of China.

59. Trade between the U.S. and PRC increased dramatically between 1972 and 1981. U.S. exports rose from \$0.2 billion in 1972 to \$3.6 billion in 1981, and U.S. imports from the PRC rose from \$.05 billion to \$2.0 billion during this same time period. See Goldstein, *supra* note 14, at 404 n.9.

60. These conventions are the Universal Copyright Convention, *as last revised*, July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868 [hereinafter UCC], and the Berne Convention for the Protection of Literary and Artistic Works, *as last revised*, July 24, 1971, 828 U.N.T.S. 221 (Paris Revision) [hereinafter Berne Convention]. The Berne Convention has developed as follows: September 9, 1886, Berne Convention; May 4, 1896, Additional Act of Paris; November 13, 1908, Berlin Revision; March 20, 1914, Additional Protocol of Berne; June 2, 1928, Rome Revision; July 14, 1967, Stockholm Revision; July 24, 1971, Paris Revision. See CLAUDE MASOUEY, WIPO—GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (William Wallace trans., 1978) [hereinafter WIPO GUIDE]. See generally Kim Feuerstein, Note, *Chips Off The Old Trade Block: International Harmonization of the Laws on Semiconductor Chips*, 2 FORDHAM ENT., MEDIA & INTELL. PROP. L.F. 137 (1992) (discussion of the Berne Convention and the protection of semiconductor chips).

61. See Goldstein, *supra* note 10, at 407. The unauthorized reproduction and use of foreign works is commonly known as piracy. The term "counterfeiting" is also used to describe this form of "reaping without sowing." SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986 18 (1987). Initially, most countries did not consider unauthorized exploitation of foreign works unfair or immoral. Rather, piracy was seen as a noble and cost effective

#### *D. The 1979 Agreement*

The increase in trade between the U.S. and China was coupled with an increase in economic losses due to piracy of American works.<sup>62</sup> Unfortunately, the obvious ideological differences between the foundations of American and Chinese copyright protection<sup>63</sup> made the prospect of a bilateral agreement between the countries grim. However, the 1979 "Agreement on Trade Relations Between the United States and the People's Republic of China"<sup>64</sup> ("1979 Agreement") did include a commitment by both countries to take steps to improve copyright protection.<sup>65</sup>

The 1979 Agreement sought to strengthen legal and economic ties between the U.S. and China by granting most favored nation ("MFN") trading status to China.<sup>66</sup> As a collateral matter, Article 6 of the agreement provided: "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

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contribution to learning and the enlightenment of society. In addition, pirate copies were profitably circulated as exports, often back to the country of origin, since the cheap reproductions could undercut the price of original copies of the work. *See id.* "The prevention of this international piracy was the principle reason for the gradual development of international copyright relations during the nineteenth century." *Id.* at 19.

62. The increase in losses is inferred from the formation of and the self-declared *raison d'être* of the International Intellectual Property Alliance. *See infra* notes 78-79 and accompanying text.

63. U.S. Const. art. I, § 8, cl. 8 (Congress empowered to "promote progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries"). Pursuant to this constitutional provision, current American copyright law prescribes the exclusive rights granted to authors for a limited duration. *See* 17 U.S.C. § 101 (1988 & West Supp. 1992). These are alienable rights and the author is entitled to legal redress for their infringement. *Id.*

64. *See* Agreement on Trade Relations Between The United States of America and The People's Republic of China, July 7, 1979, U.S.-P.R.C., T.I.A.S. No. 9630 [hereinafter 1979 Agreement].

65. *See id.*, art. 6, at 7-8.

66. Most Favored Nation status entitles all countries that are parties to a trade agreement equal duty rates. *See generally* Charles A. Vanik, *Prospects For Approving a Trade Agreement Granting Most Favored Nation Status to the People's Republic of China*, 11 J. INT'L L. 231 (1979). The 1974 Trade Act gives the President authority to enter into bilateral agreements and to extend MFN status. *See* 19 U.S.C. §§ 2434(a), 2435(a) (1988). Article 2 of the 1979 agreement grants MFN status to the PRC. *See* 1979 Agreement, *supra* note 64, at 3.

to legal or natural persons of the other Party protection of copyrights equal to the copyright protection correspondingly afforded by the other Party."<sup>67</sup>

Serious problems exist with the agreement itself and the legal relationship it established with China. First, the agreement contradicts its enabling statute.<sup>68</sup> The 1974 Trade Act explicitly states that MFN status may not be granted to countries that do not provide copyright protection equivalent to the level prescribed by the Universal Copyright Convention<sup>69</sup> ("UCC"). Since China, in 1979, had no copyright law and its regulations—both published and unpublished—failed to meet the UCC standards for protection, the granting of MFN status and the agreement itself were arguably illegal.<sup>70</sup>

Second, granting protection to works of Chinese nationals under the 1979 Agreement circumvents U.S. copyright law.<sup>71</sup> Under section 104(b) of the 1976 Copyright Act,<sup>72</sup> protection only extends to foreign nationals if: (1) there is a bilateral copyright treaty between the two nations; (2) the work was first published by the United Nations; (3) the work is protected by the UCC; or (4) the work comes within the scope of presidential proclamation.<sup>73</sup> Works published under the PRC's authority do not meet the first three requirements, and the 1979 Agreement was not a presidential proclamation.<sup>74</sup>

In addition, the language of Article VI of the agreement is ambiguous as it merely commits both sides to "take measures" that accord with "international practice." This language imposed no

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67. *Id.*

68. See Simone, *supra* note 53, at 13 (citing Hartshorn, *Copyright Laws Could Be Difficult to Enforce*, S. CHINA MORNING POST, Nov. 7, 1987, at 5). See also Goldstein, *supra* note 14, at 427.

69. See UCC, *supra* note 60.

70. *Id.*

71. See Goldstein, *supra* note 14, at 428.

72. 17 U.S.C. § 104 (1988).

73. *Id.*

74. See Goldstein, *supra* note 14, at 428. The 1979 Agreement is an executive agreement issued by presidential proclamation, but it does not fall under the presidential proclamation clause. *Id.* (citing Proclamation No. 4771, 45 Fed. Reg. 45,247 (1980)).

immediate obligation on China to protect U.S. copyrights, since "take appropriate measures" could be read to require further Chinese legislation implementing the agreement.<sup>75</sup> By virtue of this ambiguity, China was able to avoid protecting U.S. copyrights by claiming the agreement was neither self-executing nor a bilateral copyright treaty.<sup>76</sup> In sum, the 1979 Agreement failed to provide protection for American works in China because its status as a legally binding bilateral copyright agreement was so tenuous.<sup>77</sup>

## II. DEVELOPING CHINA'S FIRST COPYRIGHT LAW

### A. *Reaction from U.S. Industry and the Copyright Bar*

The failure of the 1979 Agreement to protect American works in China allowed piracy to flourish, to the outrage of U.S. copyright holders. In 1984, eight trade associations, each representing a significant portion of the copyright industry in the U.S., merged to protect their interests abroad. They formed the International Intellectual Property Alliance<sup>78</sup> ("Alliance" or "IIPA"). By highlighting the significance of the copyright industries to the U.S. economy,<sup>79</sup> the Alliance prompted the USTR to act to stop the

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75. Baumgarten, *supra* note 11, 11, at 430.

76. *Id.* at 431. Not surprisingly, in August 1990, a National Copyright Administration official announced what appeared to be the current PRC government view that the language of the 1979 Agreement is "too theoretical" and therefore inadequate to establish copyright relations between the U.S. and China. See *Copyright Law Finally Enacted*, IP ASIA, Nov. 22, 1990, at 22.

77. See Goldstein, *supra* note 14, at 430; Simone, *supra* note 48, at 13.

78. The IIPA consists of the American Film Marketing Association, the Association of American Publishers, the Business Software Alliance, the Computer and Business Equipment Manufacturers Association, the Information Technology Association of America, the Motion Picture Association of America, the National Music Publishers' Association, and the Recording Industry Association of America. See *International Intellectual Property Alliance, IIPA Applauds Settlement of Intellectual Property Dispute with the People's Republic of China*, IIPA Press Release 3 (Jan. 16, 1992) [hereinafter *IIPA Applauds Settlement*] (press release on file with *Fordham Entertainment, Media & Intellectual Property Law Forum*).

79. These industries accounted in 1989 for over \$173 billion in revenues from their copyright-related activities, or 3.3% of the U.S. GNP. *Id.* at 3. A 1990 report prepared for the Alliance states that "these industries grew at more than twice the rate of the economy as a whole between 1977 and 1989 (6.9% v. 2.9%), and employed new workers at a greater rate (5% between 1977-1989) than any other comparably sized sector of the

rampant piracy of U.S. works in China.

### B. *Special 301*

In dealing with China, the USTR's major negotiating tools were the investigatory and punitive measures available under section 301 of the 1988 amendments to the Trade Act of 1974.<sup>80</sup> These measures become available when the USTR identifies a country as engaged in unfair trade practices as regard intellectual property rights.<sup>81</sup> This identification procedure and remedial framework is nicknamed "Special 301," apparently in reference to the operative section of the trade law amendments act.<sup>82</sup> In particular, Special 301 requires the USTR to identify countries which, inter alia, "deny adequate and effective protection" to U.S. intellectual property<sup>83</sup> or deny "fair and equitable market access to United States persons that rely upon intellectual property protection."<sup>84</sup>

Special 301 designates three categories under which countries failing to protect U.S. copyrighted works adequately may be identified: (1) Priority Foreign Countries, (2) Priority Watch List, and (3) Watch List.<sup>85</sup> After identifying a "Priority Foreign Country" the USTR has 30 days to initiate an investigation of the country's intellectual property rights, policies and practices.<sup>86</sup> The investigation is to be completed in six months, with a possible three month extension. If the unfair trade practice is not terminated by the end of this period, the USTR will determine whether or not

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U.S. economy." IIPA Letter, *supra* note 6, at 2 (citing Economists, Inc., *The Copyright Industry in the U.S. Economy* (1990)).

80. Omnibus Trade and Competitiveness Act of 1988 § 301, 19 U.S.C. § 2411 (1988 & West Supp. 1992).

81. *Id.* § 182, 19 U.S.C. § 2242.

82. Although the nickname appears in numerous USTR releases and documents, it proved difficult to get a precise etymology or source of the term.

83. 19 U.S.C. § 2242(a)(1)(A).

84. 19 U.S.C. § 2242(a)(1)(B).

85. See IIPA Letter, *supra* note 6, at 2.

86. See *USTR's Tough Stance on IP Rights Violations May Help Protect MNCs*, BUS. ASIA, May 6, 1991 [hereinafter *USTR's Tough Stance*].

to impose trade sanctions against the country.<sup>87</sup>

Interested parties may submit information to the USTR regarding the policies and practices to be considered in designating countries as Priority Foreign Countries pursuant to Special 301.<sup>88</sup> In 1989, the IIPA submitted reports asking that China be named as a major copyright pirate nation.<sup>89</sup> The IIPA claimed trade losses due to piracy in China were approximately \$418 million in 1988.<sup>90</sup> Noting the significance of these losses, the USTR placed China on the Priority Watch List in both 1989 and 1990.<sup>91</sup>

### C. *China's First Copyright Law*

On September 7, 1990, the Standing Committee of the National People's Congress enacted the first copyright law in Chinese history, which entered effect on June 1, 1991.<sup>92</sup> The law, written

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87. See *U.S., China Trade Negotiations "Frank" But No Major Progress Made*, *USTR Says*, 8 Int'l Trade Rep. (BNA) 1569 (Oct. 30, 1991). Examples of punitive action the USTR may take include: a ban on imports of certain products, imposition of import quotas, or a rise in import tariffs. Whatever the sanction, it may not cause greater losses to the named country than those suffered by the complainant. *USTR Trade Barriers Report Finds Asia's Worst Obstacles in Japan, Korea, China*, *BUS. INT'L*, April 15, 1991 [hereinafter *Worst Obstacles*].

88. 19 U.S.C. § 2242(b)(2)(B).

89. See *How China's Likely To Fare When Washington's Hit Lists Are Published*, *BUS. CHINA*, May 8, 1989 [hereinafter *Hit List*].

90. IIPA Letter, *supra* note 6, app. at 64, n.1 (citing IIPA's *Trade Losses Report* (April 1989)). According to the IIPA report, distributions for 1988 losses were as follows: computer software, \$300 million; books, \$100 million; motion pictures, \$15 million; and sound recordings, \$3 million. *Id.*

91. See *id.* at app. at 64 n.3. The IIPA revised the estimated losses for 1989 to \$373 million: computer software, \$225 million; books, \$100 million; motion pictures, \$12 million; and sound recordings, \$16 million. *Id.* at 67 n.4. Also effecting the USTR's decision was the fact that China promised to submit a copyright law to its National People's Congress Standing Committee for approval by the end of 1989, but a draft of the law was never seen by U.S. negotiators until April. See *The Leading IPP "Sinners"*, *BUS. ASIA*, June 11, 1990.

92. *Copyright Law Enacted*, *supra* note 1, at 10. The law comprises six chapters and 56 articles. The actual drafting process began in 1985 with the establishment of the State Copyright Administration, and rumors of the new law began appearing in the media in 1986. See *Copyright Law at Last?*, *IP ASIA*, Sept. 13, 1990, at 21 [hereinafter *Copyright Law At Last!*] ("[H]eadlines reading 'Copyright Law to be Enacted Soon' must be viewed with some skepticism, as such headlines have appeared periodically over the past

by various government commissions and organizations,<sup>93</sup> was the result of multiple drafts and revisions.<sup>94</sup> Although it ignored several fundamental questions regarding the subject matter and scope of available protection, Chinese officials promised that these issues would be addressed in implementing regulations over the following two years.<sup>95</sup>

Though recognized as a step in the right direction, the new law was not well-received by the U.S. copyright industry,<sup>96</sup> as it failed to meet international norms established under the Berne Convention.<sup>97</sup> The IIPA continued to lobby for increased trade pressure on China and submitted its report to the Office of the USTR in February of 1991, requesting that China's Special 301 classification be raised to "Priority Foreign Country."<sup>98</sup> On April 26, 1991, Ambassador Carla Hills named China a "Priority Foreign Country,"

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four years.").

93. Article 8 of the copyright law states control over national copyright matters will vest in "copyright administration departments of the state council." *PRC Copyright Law, CHINA L. & PRAC.*, Oct. 29, 1990, at 26 [hereinafter *PRC Copyright Law*]. "Copyright officials have suggested that these 'departments' refer not only to the National Copyright Administration (NCA), but also to other government bodies with an interest in copyright, such as the National Publishing Administration (under the Ministry of Culture) for books and periodicals, the Ministry of Radio, Television and Film, for sound recordings and films and the Ministry of Machine Building and Electronics Industry for computer software." *Copyright Law Finally Enacted, supra* note 76, at 21. As may be inferred from Article 8, these various ministries were responsible for drafting the law, and "future implementing rules are likely to be issued by these various ministries separately, rather than solely by the NCA." *Id.* The State Council will give all implementing regulations final review. *Id.*

94. *See Copyright Law At Last, supra* note 92, at 21. The Law Committee of the National People's Congress (NPC) submitted a new revised draft law to the Fifteenth Session of the NPC's Standing Committee on August 30, 1990. The draft law had been presented at three previous sessions of the Standing Committee. *Id.*

95. *See Copyright Law Enacted, supra* note 1, at 10.

96. One trade magazine reported: "While the law . . . represents a step forward in Chinese commercial law, foreign firms should not get too excited. The law does not add significantly to their protection at present, and until its implementing regulations are promulgated, the exact nature of the protection afforded will remain unclear." *PRC Copyright Law: A Step Forward But Not Far Enough*, *BUS. CHINA*, Oct. 8, 1990 [hereinafter *Not Far Enough*].

97. *See Countries Criticized, supra* note 4, at 8.

98. *Id.* The IIPA estimated \$4.17 billion in trade losses due to piracy in 1990. *Id.*

citing the lack of intellectual property protection in China.<sup>99</sup>

Subsequently, China's State Council promulgated "Copyright Law Implementing Regulations" on June 1, 1991, to take effect the same day.<sup>100</sup> The State Council also promulgated "Regulations for the Protection of Computer Software" ("Software Regulations") on June 4, 1991, effective October 1, 1991.<sup>101</sup> Nonetheless, several provisions within the new law and implementing regulations remain incompatible with the Berne Convention and the UCC.<sup>102</sup>

Most egregious is the law's failure to commit China to protecting foreign works.<sup>103</sup> Article 2 of the copyright law states that works of "foreign persons" may enjoy protection "in accordance with agreements between their countries and China or in accordance with international treaties."<sup>104</sup> China has not entered a bilateral agreement with the United States and is not a party to either major international copyright convention.<sup>105</sup>

Protection of computer software poses another major problem, since the law does not protect it as a literary work.<sup>106</sup> Article 53

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99. In its 1991 *National Trade Estimate Report on Foreign Trade Barriers*, the USTR stated "despite the passage of China's first Copyright law in September, 1990, implementing regulations are not slated to be released until the day the law takes effect—June 1, 1991. Until then, 'it is impossible to determine the extent of protection afforded to software.'" *Worst Obstacles*, *supra* note 87. Also prompting Ambassador Hills to name China a "Priority Foreign Country" was an increasing concern about the trade situation with China. *Id.* In 1990, the U.S. trade deficit with China rose \$4.2 billion to \$10.4 billion. *Id.* Imports from the U.S. fell by 17.2% to \$4.8 billion, while exports to the U.S. rose by 27% to \$15.2 billion. *Id.*

100. See *PRC, Copyright Law Implementing Regulations*, CHINA L. & PRAC., July 15, 1991, at 28 [hereinafter *Implementing Regulations*]. See also *Copyright Law Enters Into Effect*, IP ASIA, July 4, 1991, at 18.

101. See *Computer Software Protection Regulations*, CHINA L. & PRAC., Aug. 19, 1991, at 55 [hereinafter *Software Regulations*]. See also *Copyright Law Enters Effect*, *supra* note 100, at 18.

102. See *Copyright Law Enters Effect*, *supra* note 100, at 19.

103. See *PRC Copyright Law*, *supra* note 93, at 26.

104. *Id.*

105. See *supra* note 60 and accompanying text.

106. *PRC Copyright Law*, *supra* note 93, at 26. In addition, Article 53 of the law detracts from the protection afforded, as it provides that copyrights in software will be governed by separate regulations. Reports from Chinese copyright officials also indicate

of the copyright law states that the scope of protection for computer software is governed by the Software Regulations.<sup>107</sup> Article 24 of the Software Regulations makes registration of software a precondition to filing an infringement action in China's courts or administrative departments.<sup>108</sup> This provision is directly incompatible with Article 5(2) of the Berne Convention, which provides automatic protection, free of any formalities.<sup>109</sup> The provision of only 25 years of protection for computer software under Article 15 of the Software Regulations is also Berne-incompatible.<sup>110</sup>

Likewise, the unlimited right to copyright use for "state organizations" and a similar right to use for "individual enjoyment," trouble United States industry.<sup>111</sup> Article 22 of the law contains a broad list of fair use exceptions, allowing use of works without permission of or remuneration to the copyright owner.<sup>112</sup> This article presumably applies to all subject matter, as it does not specify any limitations on what types of works are subject to fair use. Such a broad fair use exception may also be incompatible with Berne.<sup>113</sup>

Article 10 of the copyright law gives copyright owners the right

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that any future software regulations will extend protection for only 25 (as opposed to 50) years, may impose registration as a condition to protection, and will not protect computer programs created before June 1, 1991. See *PRC Copyright Law*, *supra* note 93, at 44. See also *Countries Criticized*, *supra* note 4, at 8.

107. See *PRC Copyright Law*, *supra* note 93, at 42.

108. See *Software Regulations*, *supra* note 101, at 61.

109. See Berne Convention, *supra* note 60, art. 5(2), 828 U.N.T.S. at 233. The U.S. had a similar incompatibility problem with its registration requirements, leading it to drop the requirement for foreign works prior to its accession to Berne. See *Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 10 COLUM.-VLA J.L. & ARTS 513, 565-74 (1986) [hereinafter *Final Report*].

110. See *Software Regulations*, *supra* note 101, at 59.

111. *Not Far Enough*, *supra* note 96. Foreign businesses, including several U.S. computer manufacturers, lobbied heavily against provisions in China's copyright law allowing the unlimited right to use for "state organizations" and a similar right to use for "individual enjoyment." "They say that in a socialist state such as China, the concept of 'state organization' is too broad for comfort and might be extended to any state enterprise." *Id.*

112. See *PRC Copyright Law*, *supra* note 93, at 32.

113. *Id.* at 47.

to license others to use their works.<sup>114</sup> Yet, articles 35, 37, and 40 provide for a qualified compulsory licensing<sup>115</sup> of works under the following circumstances: (1) Commercial performances of published works,<sup>116</sup> (2) Use of published musical works to produce sound recordings,<sup>117</sup> and (3) Use of published work to produce a radio or television program.<sup>118</sup> Each of these articles contains the following qualifying language: "Such a work may not be used if the copyright owner has declared that its use is not permitted."<sup>119</sup> Literal interpretation of this language requires foreign copyright owners to make a public declaration generally prohibiting use of their work to avoid compulsory licensing. This prohibition would include use of works previously licensed by the owner, and thus it would be incompatible with the Berne Convention. China needs to clarify what form of declaration is required to preempt compulsory licensing.<sup>120</sup>

It is unclear whether unpublished foreign works will enjoy protection in China.<sup>121</sup> Article 2 of the copyright law mentions only *published* foreign works as eligible for protection, while works of Chinese nationals are protected whether published or not.<sup>122</sup> This same ambiguity applies to Article 6 of the Software Regulations.<sup>123</sup> Such intentional discrimination between national and foreign works directly violates the principle of national treatment established in Article 5(1) of the Convention.<sup>124</sup>

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114. *Id.* at 28. This means that licensees must obtain prior authorization from the owner and pay remuneration at a negotiated rate. *Id.* at 46.

115. *Id.* at 36-38. Compulsory licensing allows the work to be used without prior authorization of the owner, where remuneration is paid at a level fixed by the government. *Id.* at 46.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 36-38.

120. *Id.* at 46.

121. *See Copyright Law Enacted, supra* note 1, at 10; *see also supra* text accompanying note 1.

122. *See PRC Copyright Law, supra* note 93, at 26.

123. *See Software Regulations, supra* note 101, at 56. This article suggests foreign unpublished software is ineligible for protection. *Id.* at 67.

124. *See Implementing Regulations, supra* note 100, at 40.

Whether public performances of films and sound recordings are protected under the copyright law also needs to be clarified. Officials of China's National Copyright Administration have implied that the term "performance" is meant to cover only live performances of dramatic and musical works.<sup>125</sup> This interpretation would exclude film and sound recording performances from the scope of both Article 22(9), permitting unauthorized use of works in non-commercial performances, and Article 35's compulsory licensing provision.<sup>126</sup> However, failure to protect such performances would serve as a major deterrent to the sale and licensing of video and sound recordings to China.<sup>127</sup>

Although Article 25 of the implementing regulations adopts the Berne Convention definition for "first publication"<sup>128</sup> of foreign works, such publication must be through "lawful means." This implies that appeasing censors or obtaining other approvals may well be a precondition to achieving first publication; of course, this too would be incompatible with Berne.<sup>129</sup>

#### *D. Memorandum of Understanding*

Recognizing the many problem areas in China's domestic law, USTR and Chinese officials held talks in Beijing in mid-June pursuant to the Special 301 investigation.<sup>130</sup> On June 15, 1991, Assistant USTR Joseph Massey announced China's intention to join the Berne Convention before the end of 1992, although no concrete date for accession was set.<sup>131</sup> Massey also indicated that the USTR would not reverse its designation of China under Special 301 until the PRC made "significant improvements" in its copy-

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125. *See Copyright Law Enters Effect, supra* note 100, at 20.

126. *Id.*

127. *Id.* "The PRC reportedly has well over 30,000 fixed and mobile 'video theaters' at which video cassettes are displayed to paying and non-paying audiences. Both video and sound recordings are also increasingly played in public places such as hotels and restaurants, particularly in southern China." *Id.*

128. *Implementing Regulations, supra* note 100, at 35. "First publication" means publication in China within 30 days of first publication elsewhere. *Id.* at 40-41.

129. *See Copyright Law Enters Effect, supra* note 100, at 19.

130. *Id.* at 18.

131. *Id.* at 19.

right law.<sup>132</sup>

China's Special 301 deadline for reaching an agreement with the U.S. was set for November 26, 1991.<sup>133</sup> On December 2, USTR Hills announced a list of Chinese products that would be subject to higher duties in the U.S. and extended the deadline to January 17, 1992.<sup>134</sup> On January 16, 1992, just hours before the sanctions were to take effect, the U.S. and PRC reached an agreement.<sup>135</sup> The agreement was memorialized in a Memorandum of Understanding<sup>136</sup> ("MOU") which committed China to granting full copyright protection to U.S. authors' works (and other foreign works) at internationally acceptable levels.<sup>137</sup> China agreed to accede to the Berne Convention (1971 text) by October 15, 1992,<sup>138</sup> and to the Geneva Phonograms Convention by June 1, 1993.<sup>139</sup> To the extent the PRC's copyright law and imple-

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132. *Id.*

133. *Further Talks Possible Before U.S. Imposes Levies on Chinese Goods*, Int'l Trade Daily (BNA), Nov. 29, 1991 [hereinafter *Further Talks Possible*]. A three month extension of the November 26 deadline is possible under Special 301. See *supra* note 87 and accompanying text.

134. IIPA Letter, *supra* note 6, app. at 64. The list of products, worth \$1.5 billion, included: beer; leather suitcases, handbags, or containers; leather clothes, and a variety of other clothing accessories; footwear; tube and pipe fittings; metal cassette players; televisions; and watches. *Further Talks Possible*, *supra* note 133.

135. See Keith Bradsher, *U.S. and China Reach Accord on Copying*, N.Y. TIMES, Jan. 17, 1992, at D14. See also Stuart Auerbach, *China, U.S. Reach Trade Accord*, WASH. POST, Jan. 17, 1992, at A24. Since the Special 301 investigation began in May 1991, six rounds of intensive negotiations were held. In the last round, lasting from January 10 to January 16, the agreement was reached. See Office of United States Trade Representative, *China, United States Conclude Intellectual Property Agreement; Protection for U.S. Computer Software, Patented Products Enhanced 5* (Jan. 16, 1992) (press release on file with *Fordham Entertainment, Media & Intellectual Property Law Forum*).

136. See MOU, *supra* note 7. The MOU becomes effective 60 days after its signing, or March 17, 1992. See IIPA Letter, *supra* note 6, app. at 66.

137. *Id.*

138. MOU, *supra* note 7, art. 3(1). The PRC will submit a bill to its legislative body by April 1, 1992, and will use "its best efforts" to have the bill enacted by June 30, 1992. Upon enactment, an instrument of accession will be submitted so accession is effective by October 15, 1992. See IIPA Letter, *supra* note 6, app. at 64-65.

139. MOU, *supra* note 7, art. 3(2). By June 30, 1992, the PRC will submit a bill to its legislative body, will use its "best efforts" to enact the bill by February 1, 1993, and then will deposit its instrument of ratification so the Convention becomes effective by

menting regulations are inconsistent with the Berne Convention, the Geneva Phonograms Convention, or the MOU, the PRC agreed to issue new regulations to address these inconsistencies by October 1, 1992.<sup>140</sup> The U.S. was not able to set a specific date by which the PRC will amend its copyright law to be Berne-compatible. China promised merely to submit an amendment bill and to use its "best efforts" to enact and implement the legislation "within a reasonable period of time."<sup>141</sup>

In the meantime, the MOU states that where any inconsistencies between the Berne and Geneva Conventions and PRC's domestic law and regulations arise, the international conventions will prevail.<sup>142</sup> Until the PRC's copyright law is amended, then, a "two-tier" system of copyright protection will exist in China: one for domestic works, as prescribed by domestic law, and one for foreign works—at a higher level—as prescribed by the Berne Convention.<sup>143</sup>

In the expectation that the commitments contained in the MOU will be fully implemented, the USTR terminated the Special 301 investigation of China and withdrew its designation as a "Priority Foreign Country."<sup>144</sup> However, the IIPA requested that China remain on the "Watch List" to ensure that the terms of the MOU are properly executed.<sup>145</sup>

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June 1, 1993. IIPA Letter, *supra* note 6, app. at 65.

140. MOU, *supra* note 7, art. 3(2). The new regulations are intended to clarify existing ambiguities and make the law Berne-compatible. *Id.*

141. *Id.*

142. MOU, *supra* note 7, art. 3(3). Article 3(3) of the MOU states that "these Conventions will be international treaties within the meaning of Article 142 of the General Principles of the Civil Code of the People's Republic of China." This means that where inconsistencies exist between provisions of the Berne Convention and Chinese domestic law and regulations, "the international Conventions will prevail . . ." *Id.*

143. Telephone Interview with Marybeth Peters, Policy Planning Advisor, United States Copyright Office (Mar. 9, 1992) [hereinafter Telephone Interview]. Experience shows that it is nearly impossible to get a higher level of copyright protection for foreign works in any country. *Id.*

144. MOU, *supra* note 7, art. 7.

145. IIPA Letter, *supra* note 6, app. at 68. Eric Smith, General Counsel for the IIPA, commented "any benefits we see, of course, will depend on China's good faith implementation of the agreement and on enforcement. We fully expect scrupulous and

### III. CHINA'S ACCESSION TO THE BERNE CONVENTION

#### A. *The Requirements of Accession*

China's first action in compliance with the January 17, 1992, MOU will be accession to the Berne Convention. The provisions of the Convention can be divided into two categories for the purpose of analysis. First are the substantive provisions, found in Articles 1 to 21 of the Convention's current text and appendix.<sup>146</sup> Second are the administrative provisions and final clauses, contained in Articles 22 to 38.<sup>147</sup> A non-Union country must accede to the most recent 1971 Paris Text of the Convention with no reservations to any of its provisions.<sup>148</sup> However, Union

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vigorous compliance with the commitments made in this MOU." *IIPA Applauds Settlement, supra* note 78, at 3.

146. WIPO GUIDE, *supra* note 60, arts. 1-21, app. Articles 1 to 21 describe the classes of work and persons protected, extent of protection, etc. The appendix describes these rights for developing countries. *Id.* at 8-105, 148-176.

147. *Id.* at 5. Articles 22 to 26 cover the administrative provisions of the Convention. They establish the Union's policy-making bodies and its secretariat; they outline how it is to be financed; and they enumerate the tasks allocated to the Union's various organs. *Id.* at 106.

148. *Id.* at 122. Article 28(1) deals with acceptance of the Convention by Union countries. *Id.* A Union country is one that either signed the text at the end of the Diplomatic Conference adopting it or signed within the time limit established in Article 37(2) (i.e. by January 31, 1972). *Id.* at 122.

There is no difference in effect between ratification and accession. However, Article 28(1)(b) permits Union countries to exclude the substantive provisions and confine acceptance to the administrative provisions. *Id.* Article 28(1)(c) allows Union countries that originally accept only the administrative provisions to accept all provisions later, by depositing a declaration with the Director General. *Id.* at 123.

The 28(1)(b) and (c) provisions were designed to encourage early acceptance of the revised text following the Stockholm Revisions in 1967. *Id.*; Berne Convention, *supra* note 60, art. 28(1)(b)-(c), 28 U.N.T.S. at 269-71. Union countries could accept the 1967 administrative reforms with little effect on their domestic laws. The substantive reforms, on the other hand, might have required legislative amendment to the national laws of some Union countries. If the two were treated as individual for acceptance purposes, operation of the new administrative system would have been delayed. Thus, Union countries were given the right to reserve acceptance of the substantive provisions. WIPO GUIDE, *supra* note 60, at 122-23.

Article 29 covers non-Union countries that wish to join the Convention. Berne Convention, *supra* note 60, 828 U.N.T.S. at 271, 273. Non-Union countries have no reservation option and must accede to the entire Convention as amended by the Paris Revision. *See* WIPO GUIDE, *supra* note 60, at 126. This is entirely logical, since the

countries, may accept the 1971 text, either by ratification or accession, without accepting the substantive provisions.

The World Intellectual Property Organization ("WIPO"), established in 1967, is the framework within which Berne and all other intellectual property Unions operate.<sup>149</sup> WIPO's Member States determine its general policies and courses of action, but each Union has its own organs empowered to regulate matters concerning the Union.<sup>150</sup> The Berne Union has an Assembly which maintains and develops the Union and implements the Convention.<sup>151</sup> The government of each Union country is allowed one delegate to the Assembly, who may represent and vote in the name of the country.<sup>152</sup> The Assembly meets once every three years, in an ordinary session, but may be convened by the Director General of WIPO<sup>153</sup> at the request of one-quarter of the member countries or the Executive Committee.<sup>154</sup>

Union countries pay contributions to the Union, in accordance with the class to which they belong.<sup>155</sup> "[T]he class for contribution purposes is not determined by the population or national revenue per head of the inhabitants."<sup>156</sup> Rather, each country chooses freely which class it shall belong to.<sup>157</sup> Regardless of

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substantive provisions are the essence of the Convention and there is no point in allowing non-Union countries to join without accepting them. *Id.*

149. WIPO GUIDE, *supra* note 60, at 106.

150. *Id.*

151. *Id.* at 108. "The Assembly has no power to interfere in matters within the sole competence of sovereign states." *Id.*

152. Berne Convention, *supra* note 60, arts. 22(1)(b), 22(3)(f), 828 U.N.T.S. at 253, 255, 257.

153. *Id.* The Director General is the highest WIPO official who represents the Organization, and in turn, the Union. WIPO GUIDE, *supra* note 60, at 114.

154. Berne Convention, *supra* note 60, art. 22(4)(b), 828 U.N.T.S. at 257. The Executive Committee of the Union is responsible for preparing the Assembly's work and supervising the execution of its decisions. *Id.* art. 23(6), 828 U.N.T.S. at 259. It meets once a year and may meet more often if necessary. The Committee consists of members elected by the Assembly. *Id.* art. 23(7), 828 U.N.T.S. at 259.

155. *See* WIPO GUIDE, *supra* note 60, at 117. There are seven classes, with the lowest paying only 4% of the amount paid by countries that have chosen the highest class. *Id.*

156. *Id.*

157. *Id.* Economic and financial considerations usually determine a country's choice

the amount of annual contribution, each country has the same influence on the Union's affairs.<sup>158</sup>

Any country outside the Union may accede to the Convention and become a party to the Union simply by filing Instruments of Accession with the Director General.<sup>159</sup> Since its inception in 1886, the Convention has never imposed conditions on the admission of new member countries.<sup>160</sup> It is an open Convention which any country may join.<sup>161</sup>

The only requirement on entry to the Convention is an undertaking to adopt the measures necessary to ensure its application.<sup>162</sup> The necessary measures may be legislative, administrative, or both, depending on the constitution of the joining country.<sup>163</sup> Some countries claim the Convention is self-executing and becomes part of the law of the land. Others require that legislation be passed giving effect to the Convention's obliga-

of class, as well as the importance the country places on copyright matters. *Id.* at 117-18.  
158. *Id.* at 118.

159. Article 29(1) states, "[a]ny country outside the Union may accede to this Act and thereby become a member of the Union. Instruments of accession shall be deposited with the Director General." Berne Convention, *supra* note 60, art.29(1), 828 U.N.T.S. at 271.

An instrument of accession is a document stating that the acceding country believes its laws are sufficient to implement the Convention and committing its government to enforcing the Convention. Telephone Interview, *supra* note 143.

160. WIPO GUIDE, *supra* note 60, at 126.

161. *Id.* at 9. Article 1 provides, "[t]he countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works." Berne Convention, *supra* note 60, art. 1, 828 U.N.T.S. at 225.

The original draftsmen sought to underline that it was not a matter of merely negotiating a contractual agreement between a number of countries, . . . but one of creating a genuine 'society' of states, able to go on existing even after the departure of one or more of them, open to all countries of the world and capable, by means of periodic revision, of keeping pace with juridical, technical and economic change.

WIPO GUIDE, *supra* note 60, at 9.

162. *Id.* at 141. Article 36(1) states, "[a]ny country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention. Berne Convention, *supra* note 60, art. 36(1), 828 U.N.T.S. at 277.

163. See WIPO GUIDE, *supra* note 60, at 141.

tions.<sup>164</sup> If an acceding country requires implementing legislation, it must be instituted by the time the obligations of the Convention are undertaken.<sup>165</sup> Unfortunately, the International Bureau which administers the Convention has no procedure for reviewing the Instrument of Accession filed by a prospective member to determine whether its laws are compatible with Berne.<sup>166</sup> In fact, no Instrument of Accession has ever been rejected on the grounds of incompatibility.<sup>167</sup>

### B. Implementing Berne

There are three possible ways U.S. works may be protected in China pursuant to the Berne Convention.<sup>168</sup> First, China can apply the law of the nation in which publication first took place (viz. U.S. law).<sup>169</sup> Second, China can treat the work the same way it treats works of its own authors. That is, China can apply its copyright law to the foreign work.<sup>170</sup> Third, China can directly

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164. *Id.* "[A]ll Union countries, not only those joining, must adopt the measures necessary to ensure its application . . ." *Id.* (emphasis in original).

165. *Id.*

166. *Final Report, supra* note 109, at 518 (comment by WIPO Director General Arpad Bogsch).

167. *Id.* Complaints by the U.S. that China's law is incompatible with Berne would have to be settled under Article 33(1) of the Convention. This Article requires that disputes between members regarding the Convention's interpretation or application be brought before the International Court of Justice. *Id.*; Berne Convention, *supra* note 60, art. 33(1), 828 U.N.T.S. at 275, 277.

168. *See RICKETSON, supra* note 61, at 193-94.

169. *See id.* at 193. Although this approach provides the same treatment of a work in every country which has signed the Convention, difficulties can arise when national courts attempt to apply foreign laws. *Id.* at 194.

170. *See id.* This is known as the principle of national treatment or "assimilation." It is the most practical form of protection, since national courts need only apply their own laws. *Id.*

National treatment is the fundamental principle on which protection of foreign work under the Convention is based. Article 5(1) of the Convention requires foreigners be treated the same way as nationals in regard to protection of their work. It states, "[a]uthors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention." Berne Convention, *supra* note 64, art. 5(1), 828 U.N.T.S. at 231, 233.

apply the rules and standards stated in the Berne Convention.<sup>171</sup>

China has chosen the third protection option, claiming that the Berne Convention is self-executing.<sup>172</sup> This means that the treaty will become part of China's domestic law and confer rights directly to individuals, who may bring an action based on the Convention itself to enforce them.<sup>173</sup> Chinese officials assert that incompatible provisions of China's domestic law will be superseded by direct implementation of the terms of the Convention.<sup>174</sup>

### *C. The United States' Accession to Berne*

The U.S. reached a much different conclusion regarding execution of Berne when it contemplated accession to the Convention in 1986. The final report, prepared by the Ad Hoc Working Group on U.S. Adherence to the Berne Convention<sup>175</sup> ("Ad Hoc Group" or "Group"), concluded that the Convention was an "executory" treaty, which would not, of itself, give rise to rights or rights of action in the U.S. Rather, "[t]he protection it stipulates for authors and their successors could only be enforced here to the extent provided by existing U.S. law or by further legislation

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Treatment of works will differ in each Convention country, creating imbalances, or more favorable treatment in certain countries. See RICKETSON, *supra* note 61, at 194. This could be corrected by requiring material reciprocity of protection. But, such reciprocity will require interpretation of a foreign law to provide equal protection. *Id.*

171. See RICKETSON, *supra* note 61, at 194. The problem is that the Convention does not provide comprehensive protection, thereby leaving the question of which law to apply in order to fill the gaps in its provisions. *Id.* at 195.

172. IIPA Letter, *supra* note 6, app. at 65; Telephone Interview, *supra* note 143. China is literally applying Article 142 of its General Principles of the Civil Code, which provides that international treaties prevail over domestic legislation. See Joseph Simone, *Memorandum of Understanding on Intellectual Property*, CHINA L. & PRAC., Feb. 27, 1992, at 12 [hereinafter *MOU on IP*].

173. See WIPO GUIDE, *supra* note 60, at 21.

174. IIPA Letter, *supra* note 6, app. at 65; *MOU on IP*, *supra* note 172, at 12.

175. The Group consisted of several individuals with extensive experience in the copyright field, formed at the request of the State Department to "identify those basic provisions of U.S. law relevant to U.S. adherence to the Berne Convention, and to analyze their compatibility with Berne." *Final Report*, *supra* note 109, at 514. The issue addressed by the Group was: "does the [Copyright Act of 1976], other Federal and State statutes, and common law provide protection of the nature required by the Convention for works originating in other Berne member-countries?" *Id.*

Congress enacted to implement ratification of the Convention."<sup>176</sup>

Although the Group acknowledged that the U.S. Constitution authorizes treaties as the supreme Law of the Land,<sup>177</sup> it distinguished self-executing from executory treaties. The Group determined that the status of a treaty is "primarily a domestic question of construction for the courts,"<sup>178</sup> and looked to U.S. case law for contextual factors to consider. Specifically, the Group analyzed "the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self- or non-self-execution."<sup>179</sup>

Applying these factors, the Group noted that incompatible provisions of the U.S. Copyright Act and Berne Convention made domestic procedures inappropriate for direct implementation of the treaty. The Group stated that "[b]ecause both Berne and the U.S. Copyright Act contain so many detailed provisions that give rise to private rights of action (and, sometimes, criminal penalties), it appears that the 'social consequences' of self execution would be unacceptable under U.S. principles of construction."<sup>180</sup> In addition, the Group concluded the treaty was not self-executing because Article 36 of the Convention "expressly provides for legislative

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176. *Id.* at 597.

177. U.S. CONST. art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . ."). The Group also cited Article II, section 2, clause 2, of the Constitution, which provides that the President "shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur . . ." *Final Report*, *supra* note 109, at 598.

178. *Final Report*, *supra* note 109, at 599 (citing *British Caledonian Airways v. Bond*, 665 F.2d 1153, 1160 (D.C. Cir. 1981); *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 154 (1965)).

179. *Id.* at 600 (quoting *People of Saipan v. Department of Interior*, 502 F.2d 90, 97 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975)).

180. *Id.* (citing *United States v. Postal*, 589 F.2d 862, 877 (5th Cir. 1979); *The Over The Top*, 5 F.2d 838, 845 (D. Conn. 1925)).

action.”<sup>181</sup>

#### *D. China's Implementation Plan*

Chinese officials believe that declaring the Convention self-executing is the solution to the existing incompatibilities between the treaty and China's domestic law. This position is less than satisfactory for three reasons. First, many provisions of the Convention are clearly executory and require further measures in national legislation for their implementation.<sup>182</sup> Second, even the self-executing provisions of the Convention do not accord complete protection to works, as the scope of national treatment is limited.<sup>183</sup> Third, direct implementation of the Convention is unrealistic, as it will provide a higher level of protection to foreigners than to Chinese nationals.<sup>184</sup> Although theoretically feasible, this is not practical.

#### *E. Executory Provisions Within the Convention*

The substantive provisions found in Articles 1-21 of the Convention can be sub-divided into two categories: “conventional rules” and “rules of referral.”<sup>185</sup> Conventional rules list requirements or standards which members must apply to protect works

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181. *Id.* at 601. The Group found the Third Circuit decision in *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1298 (3d Cir. 1979), controlled their decision. In *Mannington Mills*, the court held that the 1883 Paris Convention for the Protection of Industrial Property was not a self-executing treaty because its language did not give rise to a private right of action. Article 17 of the treaty provided:

Every country party to this convention undertakes to adopt, in accordance with its constitution, the measures necessary to insure the application of this Convention. It is understood that at the time an instrument of ratification or accession is deposited on behalf of a country, such country shall be in a position under its domestic law to give effect to the provisions of this Convention.

595 F.2d at 1298-99 (citing Paris Convention, 13 U.S.T. 1, 41 (1962)). The Group found these provisions nearly identical to Article 36 of the Berne Convention. See *supra* note 65 and accompanying text; see also *Final Report*, *supra* note 109, at 601.

182. See RICKETSON, *supra* note 61, at 826.

183. *Id.* at 208.

184. IIPA Letter, *supra* note 6, at 65; Telephone Interview, *supra* note 143.

185. See WIPO GUIDE, *supra* note 60, at 143.

under the Convention.<sup>186</sup> Article 7,<sup>187</sup> for example, states the general term of protection for works under the Convention. This provision can be regarded as a self-executing norm, since it is directly applicable by national courts.<sup>188</sup>

Rules of referral, however, leave matters in question to be dealt with by each member state individually. A rule may prescribe certain limitations within which discretion is to be exercised, "but simply refer[] the matter back to each country to resolve as it wishes."<sup>189</sup> These rules require domestic legislation to give them effect and are almost never self-executing.<sup>190</sup> For example, Article 10(2) is a rule of referral, as it allows each country to permit, by legislation, the reproduction of literary and artistic works in "certain special cases."<sup>191</sup> Issues addressed by rules of referral are "matter[s] for legislation in the countries of the Union,"<sup>192</sup> or "for national legislation."<sup>193</sup>

186. *Id.*

187. Article 7(1) provides: "[t]he term of protection granted by this Convention shall be the life of the author and fifty years after his death." See Berne Convention, *supra* note 64, art. 7(1), 828 U.N.T.S. at 235.

188. See RICKETSON, *supra* note 61, at 143.

189. See WIPO GUIDE, *supra* note 60, at 5.

190. RICKETSON, *supra* note 61, at 143.

191. See Berne Convention, *supra* note 60, art. 10(2), 828 U.N.T.S. at 239. Article 10(2) states:

It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

*Id.*

192. Berne Convention, *supra* note 60, art. 9(2), 828 U.N.T.S. at 239. The language quoted in text appears in Article 9(2), which states:

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

*Id.* Another example is Article 10*bis*(2) which provides, "It shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events . . . literary and artistic works . . . may . . . be reproduced and made available to the public." Berne Convention, *supra* note 60, art. 10*bis*(2), 828 U.N.T.S. at 241.

193. Berne Convention, *supra* note 60, art. 14*bis*(2)(a), 828 U.N.T.S. at 247

The subject matter protected is also left largely to the discretion of Union countries. The list of protected works in Article 2(1) covers the principal categories recognized under the majority of national copyright laws.<sup>194</sup> If a Union country protects a category of work not on this list, it must accord the same protection to authors from other Union countries pursuant to the principle of national treatment. However, the decision to accord additional protection is only a unilateral national judgment, and other Union countries are not required to adopt similar or reciprocal provisions.<sup>195</sup>

#### *F. The Limited Scope of National Treatment*

The Convention is "far from comprehensive in the protection which it accords."<sup>196</sup> There are essentially five elements to protection under the Berne Convention: "(1) the identification of the persons who are eligible to claim this protection (namely, Union and non-Union authors in particular circumstances); (2) the subject matter protected (namely literary and artistic works); (3) the substantive rights protected; (4) the duration of this protection; [and] (5) the exceptions to this protection."<sup>197</sup> These elements serve to define and limit application of the principle of national

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("Ownership of copyright in a cinematographic work shall be a matter for legislation in the country where protection is claimed.").

194. RICKETSON, *supra* note 61, at 234.

195. *See id.* at 235-36. This is exactly the case with computer software protection. Article 2(1) of the Convention does not mention computer software. However, the U.S. protects it as a literary work. China, in its Software Regulations, characterizes software as an industrial work. This is problematic for the U.S., as it severely limits the scope of protection, permitting all but literal copying. *See Draft Software Implementing Regulations*, IP ASIA, Apr. 25, 1991, at 23.

Other subject-matter remaining outside the Convention are television broadcasts, sound recordings and interpretations of performing artists. *See RICKETSON, supra* note 61, at 307. Omission of these matters is explicit, as they are protected by two separate multilateral conventions: The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961 (the "Rome Convention") and the Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of Their Phonograms of 1971 (the "Phonograms Convention"). *Id.* at 294 n.346.

196. RICKETSON, *supra* note 61, at 208.

197. *Id.* at 209.

treatment.<sup>198</sup> An author claiming protection under the Convention, then, should benefit from national laws regarding these matters to the extent they exceed what is required by a specific Convention rule.<sup>199</sup> "These matters can be briefly described as relating to the creation or acquisition of rights, their scope and their duration or termination."<sup>200</sup>

However, when a provision of national law falls completely outside these matters, the member state is not required to accord national treatment.<sup>201</sup> For example, national laws regarding the ownership and exploitation of literary and artistic works are matters outside the scope of national treatment,<sup>202</sup> since they are not covered in the Convention. The choice of law governing these matters, then, is made according to the principles of private international law applied in the country where protection is claimed.<sup>203</sup> Public lending and distribution rights are other examples of matters outside the scope of national treatment.<sup>204</sup>

In addition, under the principle of national treatment, a Union country providing greater protection to its nationals' work should apply the same level of protection to foreign works. This, however, is not an express duty within the Convention, but an implied obligation.<sup>205</sup>

### G. A Higher Level of Protection to Foreigners

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198. *Id.*

199. *Id.*

200. *Id.* (citing E. ULMER, *INTELLECTUAL PROPERTY RIGHTS AND THE CONFLICT OF LAWS* 1-3, 28-35 (1978)). These matters are often governed by municipal laws relating to contracts and proprietary rights. *Id.* at 904.

201. *Id.* at 209. Article 19 embodies the basic principle of national treatment, confirming that the Convention only provides the minimum protection accorded to Union authors, and that these authors may then claim any additional protection provided to nationals. WIPO GUIDE, *supra* note 60, at 103.

202. See Berne Convention, *supra* note 60, art. 14*ter*, 828 U.N.T.S. at 249. Article 14*ter* vaguely deals with rights in cinematographic works.

203. See RICKETSON, *supra* note 65, at 209. This is where bilateral treaties between countries are key.

204. *Id.* at 210.

205. *Id.* at 677-78.

China's current domestic copyright law provides a lower level of protection than that prescribed by the Berne Convention. Since Chinese officials have declared the Convention self-executing, foreigners seeking protection under the Convention will receive a higher level of protection than Chinese nationals. Ironically, this violates the principle of national treatment in favor of foreign authors. More pertinently, it is nearly impossible to attain a higher level of protection for foreign works in any country.<sup>206</sup> U.S. authors have nothing to go by but the word of Chinese officials in securing Berne-level protection for their works in China.

### CONCLUSION

China's first copyright law and implementing regulations are just over one year old. Although they are a good effort on China's part, they do not meet Berne Convention standards for copyright protection.<sup>207</sup> Nonetheless, the U.S. exerted tremendous pressure on China under Special 301 to accede to the Convention. China agreed to join Berne, but refused to amend its brand new domestic law.<sup>208</sup> The U.S. accepted China's agreement to join Berne knowing China has no legislation in place sufficient to implement the Convention. China was permitted to skirt the legislative issue by declaring the treaty self-executing and superior to its domestic law. This does not, however, fulfill the need for a clear set of rules U.S. citizens may follow regarding copyright protection in China.

China has agreed to issue implementing regulations addressing the inconsistencies between the Convention and its domestic law by October 1, 1992.<sup>209</sup> Fortunately, China will allow "consultations" by the U.S. in the drafting process.<sup>210</sup> This is a significant concession on China's part given its admitted lack of legal experts.<sup>211</sup> However, the U.S.'s role as consultant is limited.

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206. See Telephone Interview, *supra* note 143.

207. See *supra* notes 96-129 and accompanying text.

208. See *supra* notes 130-145.

209. See *supra* note 140 and accompanying text.

210. See IIPA Letter, *supra* note 6, app. at 66.

211. See Hsia & Zeldin, *supra* note 28, at 280.

China is a sovereign nation, steeped in tradition and entitled to issue its own regulations. Once the implementing regulations are issued the U.S. may react, but not before.

In the meantime, Chinese officials have promised that U.S. works will receive Berne-level protection in China, despite the incompatibilities with its domestic law. Ironically, this violates the principle of national treatment under the Convention, as foreign works will receive more favorable treatment than domestic works in China. This promise accentuates the underlying problem of the commingling of policy and law in China.<sup>212</sup> Until Party leaders fully understand and accept the concept of judicial independence and allow for a system of checks and balances between the Party and the courts,<sup>213</sup> codified laws and regulations will only be effective on an ad-hoc basis.

Thus, China's agreement to accede to Berne and issue implementing regulations by October 1, 1992, is illusory. It may appease the copyright industry and quell lobbying efforts for the time being, but it is no guarantee of consistent and lasting copyright protection, given the status of the legal system in China.

The U.S. is in the unfortunate position of reacting to China's action. But it is in a strong position to react. The U.S. has the benefit of Special 301 and the granting of MFN status, which have proven to be powerful bargaining tools with China. In addition, the U.S. has the advantages of the Berne Union, namely, the International Court of Justice,<sup>214</sup> the support of other Union countries, and the option to form further bilateral agreements with China.<sup>215</sup>

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212. *See id.* at 281-82.

213. *See id.* at 281.

214. Berne Convention, *supra* note 60, art. 33(1), 828 U.N.T.S. at 275 ("Any dispute between two or more countries of the Union concerning the interpretation of application of this Convention, not settled by negotiation, may, by any one of the countries concerned, be brought before the International Court of Justice [ICJ] . . ."). However, the ICJ will only become involved when disputes cannot be settled through negotiations, or parties cannot agree to international arbitration. *See* WIPO GUIDE, *supra* note 144, at 137.

215. Berne Convention, *supra* note 60, art. 20, 828 U.N.T.S. at 249 ("The Governments of the countries of the Union reserve the right to enter into special

The changes in the Chinese legal system since the death of Mao Tse-Tung are dramatic, but China is still in a process of evolution. The outlook for legal development in China is positive, as the modernizations are well under way and unlikely to be reversed.<sup>216</sup> In addition, “[a]ged and unproductive bureaucrats are being eased out of office, even at the highest levels, to make way for younger, more vigorous, and better-educated people in their forties and fifties, many of whom seem likely to be more enthusiastic supporters of the new legal policy.”<sup>217</sup> Like China’s first copyright law, Berne-level protection for intellectual property in China will have to develop with time.<sup>218</sup>

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agreements among themselves, insofar as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention.”).

216. See Hsia & Zeldin, *supra* note 28, at 285.

217. *Id.* at 286.

218. China has been taking dramatic and unexpected steps to develop Berne-level protection for foreign works even as this comment was being published. In compliance with the March 17, 1992, Memorandum of Understanding, China deposited its instrument of accession to the Berne Convention on July 10, 1992, and became the 91st member of the Berne Union on October 15, 1992. *New Member of the Berne Union*, COPYRIGHT: MONTHLY REVIEW OF THE WORLD INTELLECTUAL PROPERTY ORGANIZATION 145 (July-Aug. 1992); see also *New Copyright Regulations on Berne Accession Issued*, IP ASIA 31 (Joseph T. Simone, ed. Oct. 17, 1992).

On September 25, 1992, the State Council issued Regulations for the Implementation of International Copyright Treaties (“Regulations”), which entered into effect on September 29, 1992. *Id.* The Regulations raise the level of protection accorded to foreign works to meet the minimum standards accorded under the Berne Convention, and “[t]hey appear to address most of the concerns expressed by American Copyright Industries over the contents of the PRC’s Copyright Law, the Implementing Regulations thereto and the Regulations for the Protection of Computer Software (‘Software Regulations’).” *Id.* However, domestic works will have to await amendment to the Copyright Law and Software Regulations to receive the equivalent level of protection. *Id.* No date has been set as to when such amendments will be implemented. *Id.*

China’s provision of Berne-level protection for foreign works in the new Regulations is encouraging. It should still be noted, however, that China has not yet set forth a plan for enforcing these Regulations. As evidenced by its continuing refusal to amend its domestic copyright law, China has not changed its perception of the importance of copyright protection. This fact raises questions about China’s ability and willingness to enforce the Regulations. Since no actions have been filed in China pursuant to the Regulations, their effectiveness remains to be tested.