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Intellectual Property Law Enforcement in China: Trade Issues, Policies and Practices

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Cover Page Footnote

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Intellectual Property Law Enforcement in China: Trade Issues, Policies and Practices

Naigen Zhang*

INTRODUCTION

The People's Republic of China ("China") is on the road to a new era of protection for intellectual property rights as it learns how to enforce its own intellectual property laws. During the past twenty years, China has experienced vast change in its intellectual property rights system, but those positive reforms still provide less protection than desired by many foreign countries, especially the United States. Nevertheless, the modernization of China's system is underway, and its advances cannot be discounted.

In the late 1970s, China began modernizing its basic legal system to protect intellectual property rights. This effort has resulted in a series of regulations, including the 1982 Trademark Law ("Trademark Law"),¹ the 1984 Patent Law ("Patent Law"),² the

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1. Zhonghua Renmin Gongheguo Shangbiaofa [Trademark Law of the People's Republic of China] FAGUI HUIBIAN 1993, *translated in* 2 China L. Foreign Bus. (CCH) ¶ 11-500 (1993) [hereinafter Trademark Law]. The Trademark Law was adopted on August 23, 1982, at the 24th Session of the Standing Committee of the 5th National People's Congress. *See id.* It was amended by decision of the Standing Committee of the National People's Congress concerning Amendments to the Trademark Law on February 22, 1993, and came into effect on July 1, 1993. *See id.*

2. Zhonghua Renmin Gongheguo Zhuanlifa [Patent Law of the People's Republic of China] FAGUI HUIBIAN 1992, *translated in* 2 China L. Foreign Bus. (CCH) ¶ 11-600 (1993) [hereinafter Patent Law]. The Patent Law was adopted on March 12, 1984 at the

1990 Copyright Law (“Copyright Law”),³ the 1991 Computer Software Protection Regulation (“Software Protection Regulation”),⁴ the 1993 Law Against Unfair Competition (“Unfair Competition Law”),⁵ and the 1995 Regulations for Customs Protection of Intellectual Property (“Customs Regulations”).⁶ Meanwhile, China has joined nearly all of the important international treaties for protection of intellectual property, including the Convention Establishing the World Intellectual Property Organization (“WIPO Convention”) in 1980, the Paris Convention for the Protection of Industrial Property (“Paris Convention”) in 1985, the Madrid Agreement for the International Registration of Marks (“Madrid

4th Session of the Standing Committee of the 6th National People’s Congress. *See id.* It was amended on September 4, 1992, in accordance with the decision made at the 27th Session of the Standing Committee of the 7th National People’s Congress. *See id.*

3. Zhonghua Renmin Gongheguo Zhuzuoquanfa [Copyright Law of the People’s Republic of China] FAGUI HUIBIAN 1990, *translated in* 2 China L. Foreign Bus. (CCH) ¶ 11-700 (1993) [hereinafter Copyright Law]. The Copyright Law was adopted on September 7, 1990, at the 15th Session of the Standing Committee of the 7th National People’s Congress. *See id.*

4. Jisuanji Ruanjian Baohu Tiaoli [Computer Software Protection Rules], FAGUI HUIBIAN 1991, *translated in* 2 China L. Foreign Bus. (CCH) ¶ 11-704 (1993) [hereinafter Software Protection Rules].

5. Zhonghua Renmin Gongheguo Fan Buzhengdang Jingzhengfa [Law of the People’s Republic of China Against Unfair Competition] FAGUI HUIBIAN 1993, *translated in* 3 China L. Foreign Bus. (CCH) ¶ 16-640 (1994) [hereinafter Unfair Competition Law]. The Unfair Competition Law was adopted on September 2, 1993, at the 3rd Session of the Standing Committee of the 8th National People’s Congress. *See id.*

6. Zhonghua Renmin Gongheguo Haiguan Zhishi Chanquan Baohu Tiaoli [Regulations for Customs Protection of Intellectual Property], FAGUI HUIBIAN 1995, [hereinafter Customs Regulations] (enacted pursuant to the Agreement Regarding Intellectual Property Rights, Feb. 26, 1995, U.S.-P.R.C., 34 I.L.M. 881 (1995) [hereinafter IPR Agreement]).

7. Convention Establishing the World Intellectual Property Organization (“WIPO”), July 14, 1967, 21 U.S.T. 1770, 828 U.N.T.S. 3 [hereinafter WIPO Convention]. WIPO is an international organization whose objective is to “promote the protection of intellectual property throughout the world and to ensure administrative cooperation among [member] states.” H.R. REP. NO. 609, at 13 (1988). China became a signatory of WIPO on June 3, 1980. *See Monthly Review of the World Intellectual Property Organization*, INDUS. PROP., Jan. 1992, at 3 [hereinafter *Monthly Review*].

8. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, revised at Stockholm, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention]. China acceded to the Paris Convention in 1985. *See Monthly Review*, *supra* note 7, at 6.

Agreement”)⁹ in 1989, the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”)¹⁰ in 1992, and the Patent Cooperation Treaty (“PCT”)¹¹ in 1994.

To resolve conflicts between domestic law and the provisions of an international treaty, China has provided, in accordance with article 142 of the General Principle of the Civil Law of the People’s Republic of China (“General Principle”),¹² that any international treaty will become Chinese domestic law, if China is a contracting party to or accedes to the treaty.¹³ China took just a decade to finish a legal task that took several decades—or even centuries—in most developed countries. Clearly, protection of intellectual property rights has become a priority in China’s national policy. But statutes are only statutes until enforced effectively.

This Essay explores the trade issues, policies, and practices associated with intellectual property law enforcement in China. Part I provides an overview of China’s basic intellectual property enforcement system. Part II describes China-United States trade is-

9. Madrid Agreement Concerning the International Registration of Marks, Apr. 14, 1891, last revised at Stockholm, July 14, 1967, 828 U.N.T.S. 389 [hereinafter Madrid Agreement]. China acceded to the Madrid Agreement on October 4, 1989. See *Monthly Review*, *supra* note 7, at 10.

10. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on Nov. 13, 1908, completed at Berne on Mar. 20, 1914, revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at Paris on July 24, 1971, 1161 U.N.T.S. 3 [hereinafter Berne Convention]. China acceded to the Berne Convention in October 1992. See Paul B. Birden, Jr., *Technology Transfers to China: An Outline of Chinese Law*, 16 LOY. L.A. INT’L & COMP. L.J. 413, 417 n.9 (1994) [hereinafter Birden II].

11. Patent Cooperation Treaty, Washington, D.C., June 19, 1970, 28 U.S.T. 7645, 1160 U.N.T.S. 231 (entered into force Jan. 24, 1978) [hereinafter PCT]. China acceded to the Patent Cooperation Treaty on January 1, 1994. See *China to Obey Patent Rules*, CHINA DAILY, Dec. 22, 1993, at 2 (noting that once China acceded to the Patent Cooperation Treaty on January 1, 1994, China could accept and examine patent applications and have the examination results recognized by other treaty member countries).

12. Zhonghua Renmin Gongheguo Minfa Tongze [General Principle of the Civil Law of the People’s Republic of China] FAGUI HUIBIAN 1986, translated in 3 China L. Foreign Bus. (CCH) ¶ 19-150 (1993). The General Principle was adopted on April 12, 1986, by the 4th Session of the Sixth National People’s Congress. See *id.*

13. According to the General Principle: “In the event of a difference between the provisions of an international treaty concluded or acceded to by the People’s Republic of China and the civil law of the People’s Republic of China, the provisions of the international treaty shall apply . . .” *Id.* at 107.

sues. Part III examines China's enforcement policies. Part IV discusses China's enforcement practices. This Essay concludes that, in time, China's system will provide adequate protection for intellectual property rights.

I. CHINA'S BASIC INTELLECTUAL PROPERTY ENFORCEMENT SYSTEM

In the last decade, China has made substantial efforts to enforce intellectual property laws. Those efforts fall into two broad enforcement areas: judicial and administrative. Both enforcement mechanisms are still in the intermediate stages of development.

A. *Judicial Enforcement*

China has established a mechanism for adjudication of intellectual property disputes—a critical step toward improved enforcement. In general, Chinese People's Courts have four divisions: (1) a civil trial division, (2) an economic trial division, (3) a criminal trial division, and (4) an administrative trial division.¹⁴ The civil trial division is in charge of civil cases, including copyright disputes, in accordance with the civil procedural laws. The economic trial division deals with economic matters, and is charged with the enforcement of economic contract laws and industrial property laws. Industrial property laws include Patent Law,¹⁵ Trademark Law,¹⁶ and the Unfair Competition Law.¹⁷ The criminal trial division, which has exclusive jurisdiction over all criminal cases, may hold defendants liable under criminal law for intellectual property violations. The administrative trial division handles all intellectual property cases arising under administrative law, in accordance with the administrative procedural law.

Efforts to enhance the judicial enforcement of intellectual property rights have also led to the establishment of the intellectual property rights trial division,¹⁸ which has exclusive jurisdiction

14. See THOMAS CHIU ET AL., *LEGAL SYSTEMS OF THE PRC* 68-70 (1991).

15. Patent Law, *supra* note 2.

16. Trademark Law, *supra* note 1.

17. Unfair Competition Law, *supra* note 5.

18. See Henry J.H. Wheare, *Enforcement Still a Problem for Trademarks*, IP ASIA, Dec. 1996, at 28.

over all intellectual property cases not involving criminal or administrative law. In effect, it unifies the functions of the civil and economic trial divisions in intellectual property matters.¹⁹

Since 1993, intellectual property trial divisions have been set up in the High People's Courts of Beijing, Shanghai, Tianjin, and the Guangdong, Fujian, Jiangsu, and Hainan Provinces; and in the Intermediate People's Courts of cities where those high people's courts are located. Additionally, those courts have been founded in the Special Economic Zones within the jurisdictions of those high people's courts.²⁰

In addition to that judicial reform, special tribunals have been established in both the civil and economic trial divisions of all other high people's courts and intermediate people's courts in the cities where these high people's courts sit. They deal primarily with copyright disputes and industrial property cases. These developments have spurred an increase in intellectual property litigation. Between 1991 and 1995, the total number of civil lawsuits concerning intellectual property rights totaled 15,543; ninety-six percent of which reached a final judgment.²¹

Recently, the Supreme People's Court of China established the Intellectual Property Rights Office,²² chaired by the vice president of the court, Judge Li Guoguang. Prior to this appointment, he was the head of the intellectual property trial division of the Shanghai High People's Court. In his new position, Judge Li is in charge of guiding all judicial issues in intellectual property trials nationwide.

Also of great importance is the recent establishment of intellectual property tribunals within the economic trial divisions in all of the district people's courts Shanghai. These tribunals handle intellectual property cases that do not involve criminal or administra-

19. *See id.*

20. *See* Amy E. Simpson, Copyright Law and Software Regulation in the People's Republic of China: Have the Chinese Pirates Affected World Trade? 20 N.C. J. INT'L L. & COM. REG. 575, 594 (1995).

21. *See* Thom Beal, *China Urges Courts for Piracy Claims*, U.P.I., June 5, 1996, available in NEXIS, UPI Database.

22. *See* Kathryn Hanes, *Signs of the Times—IP Registrations on the Rise*, IP ASIA, Dec. 1996, at 29.

tive law matters.²³ Furthermore, two of the district people's courts in Shanghai have established intellectual property divisions, which function similarly to their counterparts in the high and intermediate people's courts.²⁴ The two divisions have jurisdiction over intellectual property cases, including those involving matters of criminal and administrative laws.²⁵

It is expected that China will develop a unique judicial system, with special trial divisions from the supreme people's courts to the district people's courts,²⁶ which will have unified, exclusive jurisdiction over all cases relating to the protection of intellectual property rights.

B. Administrative Enforcement

Administrative enforcement is more widely used than judicial enforcement. The administrative system in China is divided into four distinct areas, which share authority over Chinese intellectual property.

In the patent area, the China Patent Office is the national administrative authority under the State Council, which may grant patents, according to article 3 of the Patent Law.²⁷ Additionally, more than fifty local patent offices have the authority to settle patent right disputes and issue orders prohibiting patent infringement, if the plaintiff does not file a lawsuit in court.²⁸ This is quasi-judicial enforcement of patent laws.

According to article 2 of the Trademark Law, the Trademark Office, under the China State Administration of Industry and Commerce ("SAIC"),²⁹ is responsible for the nationwide registra-

23. See Paul B. Birden, Jr., *Trademark Protection in China: Trends and Directions*, 18 LOY. L.A. INT'L & COMP. L.J. 431, 481-82 (1996) [hereinafter Birden II].

24. See *id.*

25. See generally Chen Yanni, *IPR Cases Get Close Scrutiny by Law Courts*, CHINA DAILY, Jan. 9, 1997 (describing the high and intermediate people's courts' intellectual property trial divisions), available in 1997 WL 8258286.

26. See generally Wheare, *supra* note 18, at 28 (describing specialist intellectual property courts).

27. Patent Law, *supra* note 2, art. 3.

28. See *id.* art. 60.

29. Trademark Law, *supra* note 1, art. 2.

tion and administrative control of trademarks.³⁰ Chinese trademarks are registered at different levels within the trademark administrative offices. The trademark offices also have the power to handle trademark infringement cases and to impose fines when the infringing activity does not constitute a criminal offense.³¹ Like the patent system under the China Patent Office, the trademark authority is also a quasi-judicial enforcement mechanism.

Article 7 of the Copyright Law Implementing Regulations³² provides that the China National Copyright Administration (“NCA”) shall be the State Council’s copyright administrative department. The NCA has the power to investigate copyright infringement cases that have a major effect on the whole country.³³ The provincial copyright offices and the centrally governed municipalities are responsible for localized copyright affairs. The local offices are responsible for investigating copyright infringement cases within their administrative areas.³⁴

Article 8 further provides that, beginning in 1995, computer software copyrights must be registered within the NCA, rather than in the administrative department of the electrical industry.³⁵ This change in jurisdiction was brought about by China’s newly unified administrative enforcement regime for the protection of copyrights.³⁶

The Chinese Customs Agency has special administrative powers to protect intellectual property rights, including the recording of patents, trademarks, and copyrights; investigation of imported and exported goods suspected of violating Chinese intellectual property laws; detention of goods that are suspected to be infringing products; and confiscation of any goods confirmed to be in-

30. *Id.*

31. See Shangbiao Yinzhi Guanli Zanxing Banfa [Provisional Measures for the Administration of the Reproduction of Trademarks], FAGUI HUIBIAN 1990, art. 8, *translated in* 2 China L. Foreign Bus. (CCH) ¶ 11-526(8), at 14,165 (1993).

32. See Zhonghua Renmin Gongheguo Zhuzuoquanfa Shishi Xize [Copyright Law Implementing Regulations], FAGUI HUIBIAN 1990, art. 7, *translated in* 2 China L. Foreign Bus. (CCH) ¶ 11-702(7) (1993).

33. *See id.*

34. *See* Copyright Law, *supra* note 3, art. 8.

35. *See* Birden II, *supra* note 23, at 441-42.

36. *See id.*

fringing goods.³⁷ To strengthen administrative enforcement, the State Council established a Working Conference on Intellectual Property Rights (“Working Conference”). The Working Conference is chaired by a council member, who is the director of the State Scientific and Technology Commission. This conference is in charge of guiding the affairs of intellectual property enforcement on a national scale.³⁸

Even though China has made great efforts to enforce intellectual property laws, there are still many unresolved problems in the enforcement mechanism. For example, most Chinese judges are unfamiliar with intellectual property law, especially the cases relating to international treaties. Therefore, it is not surprising that the United States is dissatisfied with the level of intellectual property law enforcement in China. Likewise, many Chinese intellectual property rights holders also complain that their rights are not effectively protected.

It is not easy to predict how these problems will be resolved. In order to gain insight into these problems, one must first understand why China wants to modernize its legal system of intellectual property protection, and how Chinese laws are enforced in practice.

II. CHINA-UNITED STATES TRADE ISSUES

Since the late 1970s, China-United States trade issues have dominated the course of modernizing Chinese intellectual property legislation and improving its enforcement mechanisms. After the end of the “Cultural Revolution” in 1979, while taking steps to build a society according to the basic principles of democracy, China implemented its “Open Door Policy,” aiming to modernize the Chinese economy.³⁹ By 1978, during negotiations with the

37. See Customs Regulations, *supra* note 6; see also Jianyang Yu, *Current Developments and Practical Strategies for Protecting Intellectual Property in China*, 26 TOPICS-AM. CHAMBER COM. TAIPEI, Dec. 1, 1996, available in 1996 WL 11764517.

38. See *Shanghai to Promote Education on IPR Protection*, XINHUA ENGLISH NEWSWIRE, May 9, 1996, available in 1996 WL 10245727.

39. See Uli Schmetzer, *China's “Supreme” Reformer Dies, His Life, 1989 Massacre Tarnished His Achievements*, CHI. TRIB., Feb. 20, 1997, available in 1997 WL 3522379.

United States on science and technology cooperation as well as trade issues, China began to consider protecting intellectual property rights in accordance with international standards. Thus, on January 31, 1979, China and the United States signed the Implementing Accord on Cooperation in the Field of High Energy Physics (the "Energy Accord").⁴⁰ Article 6 of the Energy Accord provides that "the parties recognized the need to agree upon provisions concerning protection of copyrights and treatment of inventions or discoveries made or conceived in the course of or under this Accord."⁴¹

Although the Energy Accord was limited to protecting intellectual property only in scientific cooperation,⁴² it was an important first step toward developing a broad system for the protection of intellectual property. This was the first bilateral agreement signed by China in this respect. At that time, there were few administrative rules protecting copyrights and inventions in China.

On July 7, 1979, China and the United States reached the Agreement on Trade Relations ("Trade Agreement"),⁴³ which specifically provided for reciprocal treatment of intellectual property rights in both countries. Both countries acknowledged the importance of effective intellectual property protection and pledged to enforce or enact patent, trademark, and copyright laws for their respective countries, and afford a level of protection to the foreign party equal to that of its own party.⁴⁴

40. Implementing Accord on Cooperation in the Field of High Energy Physics, Jan. 31, 1979, U.S.-P.R.C., 18(2) I.L.M. 346 [hereinafter Energy Accord].

41. *Id.* at 348.

42. *Id.* at 346.

43. Agreement of Trade Relations Between the United States of America and the People's Republic of China, July 7, 1979, U.S.-P.R.C., 31 U.S.T. 4651.

44. Article VI of the Agreement on Trade Relations Between the United States of America and the People's Republic of China, states in part:

1. Both Contracting Parties in their trade relations recognize the importance of effective protection of patents, trademarks and copyrights.
2. Both Contracting Parties agree that on the basis of reciprocity legal or natural persons of either Party may apply for registration of trademarks and acquire exclusive rights thereto in the territory of the other Party in accordance with its laws and regulations.
3. Both Contracting Parties agree that each Party shall seek, under its laws and with due regard to international practice, to ensure to legal or natural per-

In order to implement the above agreements, especially the Trade Agreement, China joined WIPO in 1980⁴⁵ and enacted the 1982 Trademark Law,⁴⁶ the 1984 Patent Law,⁴⁷ and the 1990 Copyright Law.⁴⁸ Without doubt, China had to implement a legal system that protected intellectual property rights, if China were to follow through on its “Open Door Policy.” Thus, enactment of these laws was in China’s own interests.

There has been internal and external pressure on China to establish a new system to protect intellectual property rights, corresponding with China’s move toward a free-market orientation. The United States had, for its part, been influencing China to improve its intellectual property legislation through the threat of trade sanctions pursuant to the “Special 301” provision of United States trade law.⁴⁹ In order to promote trade relations, the two countries reached a Memorandum of Understanding on the Protection of Intellectual Property (“Memorandum of Understanding”) on January 17, 1992.⁵⁰

sons of the other Party protection of patents and trademarks equivalent to the patent and trademark protection correspondingly accorded by the other Party.

4. Both Contracting Parties shall permit and facilitate enforcement of provisions concerning protection of industrial property in contracts between firms, companies and corporations, and trading organizations of their respective countries, and shall provide means, in accordance with their respective laws, to restrict unfair competition involving unauthorized use of such rights.

5. Both Contracting Parties agree that each Party shall take appropriate measures, under its laws and regulations and with due regard to international practice, to ensure to legal or natural persons of the other Party protection of copyrights equivalent to the copyright protection correspondingly accorded by the other Party.

Id. at 4657.

45. WIPO Convention, *supra* note 7.

46. Trademark Law, *supra* note 1.

47. Patent Law, *supra* note 2.

48. Copyright Law, *supra* note 3.

49. Trade Act of 1974, Pub. L. No. 98-618, § 182, as added by Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1303(b), 102 Stat. 1107 (Aug. 23, 1988) (codified as amended at 19 U.S.C.A. § 2242 (West 1998 & Supp. 1998)). See generally Frank J. Garcia, *Americas Agreements—An Interim Stage in Building the Free Trade Area of the Americas*, 35 COLUM. J. TRANSNAT’L L. 63, 128 n.324 (1997) (explaining that “Special 301” “requires the United States Trade Representative to identify countries which deny adequate and effective protection of intellectual property rights, and designate those countries for investigation and possible retaliation”).

50. Memorandum of Understanding on the Protection of Intellectual Property, Jan.

The Memorandum of Understanding was the first bilateral trade-related intellectual property agreement signed by China, which focused on legislation. It required China to revise the Patent Law to (1) cover patent subject matter on all chemical inventions, whether products or process; (2) extend the term of protection for a patent of invention to twenty years from the date of filing the patent application, the same term requirement as in the United States; and (3) limit the use of compulsory licenses.⁵¹ Also under the Memorandum of Understanding, China was required to accede to the Berne Convention⁵² and the Geneva Convention,⁵³ and issue new regulations to comply with these conventions and the Memorandum of Understanding.⁵⁴ Finally, the Memorandum of Understanding obligated China to enact a law against unfair competition as provided for in article 10^{bis} of the Paris convention.⁵⁵ China fully implemented the Memorandum of Understanding with passage of the 1992 Revision of Patent Law,⁵⁶ the 1992 Implementing International Copyright Treaties Provisions⁵⁷—after accession to the Berne and Geneva Convention—and the 1993 Law Against Unfair Competition.⁵⁸

Nonetheless, China has experienced difficulty in providing effective enforcement of these new laws within a short period of time. Those difficulties have been the greatest in the area of protecting foreigners' copyrights. This is due to the short history of copyright law in China, the lack of Chinese officials with experience in the enforcement of copyright law, and the general igno-

17, 1992, U.S.-P.R.C., 34 I.L.M. 676 (1995) [hereinafter Memorandum of Understanding].

51. *Id.* at 677-80.

52. *Id.* at 680; *see supra* note 10 (detailing China's accession to the Berne Convention).

53. The Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, Oct. 28, 1971, 25 U.S.T. 309.

54. *See* Memorandum of Understanding, *supra* note 50, at 683.

55. *Id.*; *see also* David Hill & Judith Evans, *Chinese Patent Law: Recent Changes Align China More Closely With Modern International Practice*, 27 GEO. WASH. J. INT'L L. & ECON. 359 (1994).

56. Patent Law, *supra* note 2 (outlining the legislative history of the statute).

57. Shishi Guoji Zhuzuochuan Tiaoyue de Guiding [Regulations on the Implementation of Provisions of International Copyright Treaties], *translated in* China L. Foreign Bus. (CCH) ¶ 11-703 (1992).

58. Unfair Competition Law, *supra* note 5.

rance of copyright law among many Chinese.

Despite such difficulties, the United States was eager for China to enforce these new intellectual property laws as soon as possible. The United States wanted to protect the American companies that were losing profits in China due to intellectual property piracy—especially copyright piracy. In 1994 and 1996, the United States initiated an investigation under “Special 301”⁵⁹ and threatened to impose a one hundred percent duty on Chinese imports, equivalent to the estimated losses to American companies caused by China’s failure to enforce intellectual property laws. China retaliated by threatening trade sanctions against United States imports⁶⁰ because China believed that the United States failed to consider the speedy progress China had made in protecting foreign intellectual property rights.⁶¹ Instead of trade sanctions, however, China was willing to continue this progress through negotiations or consultations with the United States.

In order to avoid a trade war, China and the United States reached an Agreement Regarding Intellectual Property Rights (“IPR Agreement”)⁶² on February 26, 1995, which included an Annex entitled “Action Plan for Effective Protection and Enforcement of Intellectual Property Rights.”⁶³ On June 17, 1996, China and the United States reached another agreement that included a Report on Chinese Enforcement Actions, under the 1995 IPR Agreement,⁶⁴ and Annex on Intellectual Property Rights Enforce-

59. 19 U.S.C.A. § 2242; see Garcia, *supra* note 49; Gregory S. Kolton, *Copyright Law and the People’s Courts in the People’s Republic of China: A Review and Critique of China’s Intellectual Property Courts*, 17 U. PA. J. INT’L ECON. L. 415, 452 (1996) (discussing background to the investigations and tensions between the United States and China).

60. See Lorraine Woellert, *China Threatens to Ban Some U.S. Imports*, WASH. TIMES, Nov. 13, 1996, at B6, available in 1996 WL 2970948.

61. See Garcia, *supra* note 49.

62. IPR Agreement, *supra* note 6.

63. *Id.* at 887.

64. See Yiqiang Li, *Evaluation of the Sino-American Intellectual Property Agreements: A Judicial Approach to Solving the Local Protectionism Problem*, 10 COLUM. J. ASIAN L. 391, 424 n.3 (1996) [hereinafter Enforcement Action Report] (stating that the 1996 Agreement contains the Report on Chinese Enforcement Actions under the 1995 Agreement).

ment and Market Access Accord.⁶⁵ These two agreements focus on administrative enforcement of copyright law and market access for American audio-visual and published products as well as computer software in China.

The 1995 IPR Agreement provides that China will establish a nationwide administrative intellectual property rights enforcement structure, including (1) a state council working-conference on intellectual property rights and sub-central working-conferences, (2) enforcement task forces, (3) a special enforcement period, (4) enforcement efforts in specific fields, (5) enforcement directly through administrative agencies and departments, (6) additional administrative actions, (7) customs enforcement, (8) establishment of copyright verification systems, and (9) administrative and regulatory matters.⁶⁶

The 1996 Agreement is composed of a report and market access accord ("Access Accord"). The report includes (1) actions taken by the Chinese government to stop piracy in CD factories, (2) a concentrated enforcement period, (3) border enforcement, and (4) monitoring of CD factories.⁶⁷ The Access Accord provides that China will open its markets more widely for American cultural products, subject to Chinese censorship requirements.⁶⁸

It is obvious that China-United States intellectual property disputes are a trade issue. For its part, China wants to keep the Open Door policy and develop trade relations with the United States. On the other hand, the United States wants to increase its market share in China as much as possible. Thus, it is in the best interest of both countries to protect intellectual property rights.

Despite recent intellectual property rights disputes between China and the United States, trade has quickly increased between the two countries. In 1995 alone, total United States exports to China increased by nearly twenty-seven percent.⁶⁹ At \$12 billion, these exports were more than double the level of the exports in

65. *See id.*

66. *See* IPR Agreement, *supra* note 6, at 887-907.

67. *See* Enforcement Action Report, *supra* note 64.

68. *See id.*

69. *See* Terry Atlas, *U.S. Moves to Extend Benefits for China*, CHI. TRIB., May 21, 1996, at 7, available in 1996 WL 2673637.

1990.⁷⁰ Disputes still remain, but it is certain that China will continue to improve the enforcement of intellectual property rights.

III. CHINA'S INTELLECTUAL PROPERTY LAW ENFORCEMENT POLICIES

China's policy regarding enforcement of intellectual property rights can be understood as one of guiding or basic principles. Although it is difficult to define China's particular guidance policies for intellectual property rights enforcement, the constitutional law may reveal some of the policy issues. The Constitution of China⁷¹ has three articles relating to the protection of intellectual property.

Article 20 of the Constitution of China provides that, "[t]he state promotes the development of the natural and social sciences, disseminates scientific and technical knowledge, and commends and rewards achievements in scientific research as well as technological discoveries and inventions."⁷² To modernize its economy, China must promote the development of science and technology. Promoting this development is the basic principle for patent legislation and enforcement.

Enforcement of Chinese patent rights is much more effective than other areas of intellectual property, and thus it is relatively difficult to infringe on a valid patent. As one of the major patent offices in the world,⁷³ the China Patent Office is recognized as a highly qualified administration. There are no ideological obstacles to overcome before enforcing patent laws and Chinese leadership regards development of science and technology as a top priority. This might explain why the first China-United States intellectual property rights-related agreement was the Energy Accord,⁷⁴ regarding cooperation in the field of high energy physics.

70. *See id.*

71. ZHONGHUA RENMIN GONGHEGUO XIANFA [Constitution of the People's Republic of China] (1982) [hereinafter Constitution of China].

72. XIANFA, art. 20, (1982), *translated in* 4 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., Oceana Pubs. 1992).

73. *See* Hamideh Ramjerdi & Anthony D'Amato, *The Intellectual Property Rights Laws of the People's Republic of China*, 21 N.C. J. INT'L L. & COM. REG. 169, 171 (1995).

74. Energy Accord, *supra* note 40.

Like the United States Constitution, the Constitution of China has no specific articles solely related to trademark protection. It should be mentioned that the 1982 Trademark Law⁷⁵ was adopted before the new Constitution was ratified by the National People's Congress on December 4, 1982.⁷⁶ Article 7 of the 1993 Amendments of the Constitution revises article 15 of the 1982 Constitution, which now provides that "[t]he State practices a socialist market economy The state strengthens economic legislation and perfects macrocontrol The state prohibits, according to the law, disturbance of society's economic order by any organization or individual."⁷⁷ Article 7 is mostly related to the protection of trademarks because article 1 of the Trademark Law defines its purpose as the promotion of a socialist commodity economy, i.e., a market economy. This is the basic principle of trademark legislation and enforcement. In July 1992, China implemented a nationwide crackdown on fake and poorly made goods, and in February 1993, amended its Trademark Law.⁷⁸ It seems as though there are no ideological obstacles to China enforcing trademark laws and protecting registered trademarks, which is crucial for promoting a socialist market economy.

The more difficult problem is the enforcement of copyright laws. In accordance with article 22 of the Constitution, "[the] State promotes the development of literature and art, the press, broadcasting and television undertakings, publishing and distribution services, libraries, museums, culture centers, and other cultural undertakings, that serve the people and socialism"⁷⁹ This is the basic principle of copyright law. Theoretically, China wants to protect copyrights to enhance their culture and society. But copyright protection—unlike patent or trademark rights—is

75. Trademark Law, *supra* note 1.

76. Compare Constitution of China, *supra* note 72, with Trademark Law, *supra* note 1 (indicating that the Trademark Law preceded the Constitution of China by several months).

77. XIANFA, art. 15, (1982). The Constitution of China was adopted on December 4, 1982 by the 5th Session of the 5th National People's Congress. *See id.* It was amended on April 12, 1988, and subsequently on March 29, 1993, at the First Session of the 8th National People's Congress. *See id.*

78. Trademark Law, *supra* note 1.

79. XIANFA, art. 20.

related to ideological issues.

China is very concerned with any publication that does not serve the people and socialism. China controls the publications and press with censorship. This power belongs to the Publication and Press Administration, rather than the National Copyright Administration. In effect, the propaganda department of the Chinese Communist Party controls publication and the press.

China conducts this form of censorship because they are concerned about cultural influences from Western countries. Obviously, controlling Western cultural influences while protecting foreigners' copyrights is a significant challenge for China. Nevertheless, in an attempt to overcome this obstacle, article 2 of the Copyright Law⁸⁰ provides that a foreigner's copyright will be protected if the work is first published in China.⁸¹ If it is not first published in China, it will be protected according to a bilateral agreement, such as the one signed by China and the United States, or an international agreement acceded to by China.⁸² Furthermore, because China is now a member of the Berne Convention,⁸³ any foreigner's work must be protected by Chinese copyright law if the foreign country is a member of the Berne Convention.⁸⁴ Despite these laws, it will still be difficult for Americans to export audiovisual products into China even though the 1995 and 1996 IPR Agreements on Market Access are in force.⁸⁵

Copyright piracy, on the other hand, is an issue of making money, rather than an ideological problem. In general, China wants to crack down on all copyright piracy, regardless of who owns the copyright, but in the area of copyright the Chinese government is more concerned about how to control the publication and press while serving the people and socialism. If the Chinese government paid more attention to the economic interests of copyright holders than to controlling the publication and press, the issue

80. Copyright Law, *supra* note 3.

81. *See* Kolton, *supra* note 59, at 422.

82. *See id.* at 421-22.

83. Berne Convention, *supra* note 10.

84. *See* Kolton, *supra* note 59, at 422.

85. *See* John Richards, *Recent Patent Law Developments in Asia*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 599 (1997).

of copyright piracy could be resolved more efficiently. Furthermore, paying attention to the economic interests of copyright holders is not only in the best interests of foreign copyright holders, but also of Chinese copyright holders.

In short, it is relatively difficult for China to enforce copyright laws, in some cases, due to China's ideological policy. China wants to open the door for foreign technology while preventing the penetration of Western ideology. Enforcement measures against piracy, however, should be easier to implement.

IV. CHINA'S JUDICIAL ENFORCEMENT PRACTICES FOR INTELLECTUAL PROPERTY LAW

As judicial enforcement is the last resort, Chinese People's Courts possess significant responsibility for enforcing intellectual property laws. Although the People's Courts do not handle cases according to precedent,⁸⁶ case law is becoming more important in current judicial practice.⁸⁷ It may help to understand how Chinese intellectual property laws, especially the copyright laws, are enforced in practice and what are the unresolved problems concerning some copyright infringement cases involving United States parties.

The first copyright case in China involving an United States party was *Walt Disney Co. v. Beijing Youngsters and Children Publishing House*.⁸⁸ In January 1994, the Walt Disney Company ("Disney"), filed a lawsuit in the intellectual property trial division of Beijing People's Intermediate Court against a group of Chinese entities which included the Beijing Youngsters and Children Publishing House, Beijing Publishing House, and the Beijing circulation department of Xinhua Bookshop.⁸⁹ The plaintiff claimed that

86. See Kolton, *supra* note 59, at 435 (citing Jianyang Yu, *Protection of Intellectual Property in the PRC: Progress, Problems, and Proposals*, 13 U.C.L.A. PAC. BASIN L.J. 140, 158 (1994)).

87. See Nanping Liu, "Legal Precedents" With Chinese Characteristics: *Published Cases in the Gazette of the Supreme People's Court*, 5 J. CHINESE L. 107 (1991) (arguing that publication of decided opinions in the Gazette of the Supreme People's Courts may eventually carry force as precedent).

88. See *Walt Disney Wins in Copyright Case*, CHINA L. & PRAC., Sept. 13, 1995, at 17.

89. See *id.*

the defendants were involved in the illegal production and distribution of children's books using well-known Disney characters, such as Mickey Mouse and Goofy, without Disney's permission. Disney sought an injunction, an accounting of profits, a public apology, and the equivalent of \$77,000 in damages in accordance with article 46 of the Chinese Copyright Law.⁹⁰ In May 1995, the court issued a judgment in favor of Disney and awarded Disney the equivalent of approximately \$27,000 in damages, to be paid in a lump sum by the defendants. Additionally, the defendants were ordered to give a public apology and to stop their illegal publishing activities.⁹¹

The first United States software copyright owner to file copyright infringement claims in China was Business Software Alliance, an industry group that includes Microsoft.⁹² In July 1994, three United States software companies sued five Beijing-based computer companies for pirating and selling copies of their software. The plaintiffs alleged that the defendants had committed ten separate acts of copyright infringement and demanded between \$10,000 and \$30,000 for each infringing act. In April 1996, the Beijing Intermediate People's Court ordered the defendants to pay approximately \$53,000 in damages to the plaintiffs.⁹³ The court also confiscated computers and software seized from the Beijing Juren Computer Company, one of the defendants. During the investigation of its pirating activities, the company was enjoined from continued piracy of Microsoft, Autodesk, and WordPerfect products, and ordered to make a public apology to the plaintiffs.

Although these cases indicate that foreign intellectual property holders could obtain remedies by judicial enforcement in China, some Americans complain that "the Court did not publish an opinion,"⁹⁴ and "the small amount of damages and delays in the court system reduced the deterrent effect."⁹⁵ These comments are re-

90. See Kolton, *supra* note 59, at 442.

91. See *id.*

92. See *id.* at 446-47.

93. See *Beijing Court Awards Damages to U.S. Firms in Software Piracy Suit*, WEST'S LEGAL NEWS, Apr. 23, 1996, available in 1996 WL 260085 [hereinafter *Beijing Court*].

94. See Kolton, *supra* note 59, at 450-51.

95. See *Beijing Court*, *supra* note 93.

lated to some practical issues.

One serious problem concerns a foreigner's ability to know the Chinese judge's legal reasoning. China follows the civil law tradition, in which judges decide cases according to statutes rather than case law. The judgment normally is composed of three parts: (1) fact statements by both parties, (2) ratified facts by the judge, and (3) laws regarding the facts and decision. The judge does not give the court's reasoning, as would a court in the United States. From an American attorney's perspective, a Chinese court's judgment is too fact specific, therefore it cannot be used to predict what will happen in the next case.

Although it is not realistic to criticize Chinese judicial practice from the viewpoint of the American legal tradition, it should be recognized that legal reasoning requires a judge's jurisprudential knowledge and trial experiences. It is expected that Chinese judges, especially those in appellate courts, are able to provide their legal justifications. Even though there is no requirement to publish judgments in China,⁹⁶ a lot of cases have been published recently, some of which were edited by the Chinese Supreme People's Court. It should be mentioned that the Chinese Supreme People's Court has published some cases regularly in its monthly publication since 1985.⁹⁷ These cases are in fact like precedent and have always supplied a function of guiding judicial enforcement nationwide.

Recovery of damages in copyright infringement, however, is an entirely separate problem. Articles 45 and 46 of the Copyright Law provide that an infringer should be responsible for damages.⁹⁸ It is not clear, however, how to calculate the damages. There are some rules regarding calculating damages in patent infringement,⁹⁹ which may provide some clues in applying damages calculations for copyright infringement.

In 1992, the Chinese Supreme People's Court issued judicial

96. See Liu, *supra* note 87, at 116.

97. See *id.* at 107.

98. Copyright Law, *supra* note 3.

99. See Intellectual Property Law Services, *Intellectual Property Law of the People's Republic of China* (visited Oct. 6, 1997) <<http://www.hk.super.net/~dingli/ip-inf.htm>>.

rules for trials of patent dispute cases.¹⁰⁰ The rules provide that the principle for determining damages in patent infringement is fairness, and therefore, a patentee should obtain the reasonable damages for actual loss due to the infringement. The method used to calculate the damages is (1) the patentee's actual economic loss due to the infringement, or (2) the illegal total profits made by the infringer, or (3) a reasonable amount no less than the royalty of patent licensing. It is not unusual for the parties and the court to calculate damages for copyright infringement differently because China lacks a clear rule. Special research, however, is being done in the intellectual property trial division of the Shanghai High People's Court, which focuses on calculating damages in intellectual property infringement cases, especially in copyright infringement. It is expected that China will find a solution, and will continue to study the experience of other countries in this regard.

CONCLUSION

China has taken great strides in modernizing its intellectual property rights system. Critics charge that these strides have not produced the necessary results, namely, sufficient protection of intellectual property interests. In contrast, advocates of China's new system are quick to note that China has made significant advances in a relatively short period of time. In any case, if China maintains its present course of development and continues to learn from the laws, policies, and practices of other countries, critics will be forced to recognize the drastic improvement in China's intellectual property rights system.

100. See Intellectual Property Law Services, *PRC I.P. Law and Regulations Service* (visited Dec. 21, 1997) <<http://www.hk.super.net/~dingli/ipl-main.htm#Patent>> (providing the judicial rules regarding patent disputes).