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## China's Intellectual Property Protection: Prospects for Achieving International Standards

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# China's Intellectual Property Protection: Prospects for Achieving International Standards

Derek Dessler

## **Abstract**

This Comment presents the intellectual property protection laws of China and examines whether these laws, when combined with the 1995 Accord, will lead to improved intellectual property protection in China. Part I discusses the General Agreement on Tariffs and Trade's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), and the established standards for intellectual property rights protection. Part I also examines China's intellectual property laws and regulations. Part II analyzes the impediments to effective intellectual property rights enforcement in China. Part III argues that China's intellectual property rights laws fail to meet the international intellectual property rights standard embodied in TRIPs, and that the 1995 Accord ignores many of the impediments that currently inhibit effective intellectual property protection in China.

## COMMENTS

### CHINA'S INTELLECTUAL PROPERTY PROTECTION: PROSPECTS FOR ACHIEVING INTERNATIONAL STANDARDS

*Derek Dessler\**

#### INTRODUCTION

Despite China's ancient use of intellectual property and history of technological discoveries and innovations,<sup>1</sup> until 1982, it failed to provide any intellectual property protection comparable to that found in the United States and other Western<sup>2</sup> nations.<sup>3</sup> Since 1982, China has passed new laws,<sup>4</sup> joined various intellectual property conventions,<sup>5</sup> and in February, 1995, signed

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\* J.D. Candidate, 1996, Fordham University. This Comment is dedicated to my parents for their love, support and encouragement. I would particularly like to thank David I. Wilson, Esq., Arter & Hadden, Washington, D.C., for his invaluable help and insightful comments.

1. See Li Xiang Sheng, *Trade Mark Infringement in China*, 12 EUR. INTELL. PROP. REV. 448, 448 (1990) (stating that first trademark may have appeared in China 3000 years ago); see also Liwei Wang, *The Chinese Traditions Inimical to the Patent Law*, 14 NW. J. INT'L L. & BUS. 15 (1993) (stating that until fifteenth century Chinese technological discoveries and innovations often surpassed those in Europe); Li Xiang Sheng, *Waiting for Supplements: Comments on China's Copyright Law*, 13 EUR. INTELL. PROP. REV. 171 (1991) (noting that printing was first invented in China and that "publishing traditions date further back in China than in Europe").

2. See THE OXFORD ENGLISH DICTIONARY 165 (2d ed. 1989). "Western" indicates that which is "of or pertaining to the non-Communist states of Europe and America." *Id.*

3. See William P. Alford, *Don't Stop Thinking About . . . Yesterday: Why There Was No Indigenous Counterpart to Intellectual Property Law in Imperial China*, 7 J. CHINESE L. 3 (1993) (discussing history and development of intellectual property protection in China); see generally Wang, *supra* note 1 (arguing that some Chinese traditions are hostile to China's creating patent protection regime); Mark Sidel, *The Legal Protection of Copyright and the Rights of Authors in the People's Republic of China, 1949-1984: Prelude to the Chinese Copyright Law*, 9 COLUM. J. ART L. 477 (1985) (surveying China's history of regulating and protecting authors' rights).

4. See Michael D. Pendleton, *Chinese Intellectual Property - Some Global Implications for Legal Culture and National Sovereignty*, 15 EUR. INTELL. PROP. REV. 119 (1993) (listing several intellectual property laws China has enacted since 1982).

5. Gao Lulin, *Taking A Stand*, CHINA BUS. REV., Nov-Dec. 1994, at 9, 9-11. China acceded to the Paris Convention for the Protection of Industrial Property in March, 1985. Paris Convention for the Protection of Industrial Property of March 20, 1883, 13 U.S.T. 1, T.I.A.S. No. 4931, *revised*, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention]; China acceded to the Berne Convention for the Protection

the 1995 U.S.-China Intellectual Property Rights Accord (the "Accord" or "1995 Accord").<sup>6</sup> Yet, piracy<sup>7</sup> of intellectual property in China continues unabated: collectively, pirated records, computer software, books, and movies from China cost U.S. manufacturers an estimated US\$827 million annually.<sup>8</sup> Additionally, in June, 1995, China reopened factories that pirated U.S. compact discs ("CDs") and laser discs ("LDs"), in potential violation of the new agreement signed with the United States 120 days earlier.<sup>9</sup> Furthermore, while much of the controversy focuses on the pirating of CDs, LDs, and computer software,<sup>10</sup> counterfeiting<sup>11</sup> has included products such as Chrysler Jeeps,<sup>12</sup>

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of Literary and Artistic Works in June, 1993. Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, 168 Parry's T.S. 185, revised Nov. 13, 1908, 1 L.N.T.S. 218, revised June 2, 1928, 123 L.N.T.S. 233, revised June 26, 1948, 331 U.N.T.S. 217, revised July 14, 1967, 102 Stat. 2853, 828 U.N.T.S. 221 [hereinafter Berne Convention].

6. China-United States: Agreement Regarding Intellectual Property Rights, Feb. 26, 1995, 34 I.L.M. 881; Seth Faison, *U.S. and China Sign Accord to End Piracy of Software, Music Recordings and Film*, N.Y. TIMES, Feb. 27, 1995, at A1; Helene Cooper & Kathy Chen, *China Averts Trade War with the U.S., Promising a Campaign Against Piracy*, WALL ST. J., Feb. 27, 1995, at A3.

7. See G. HOFFMAN, *CURBING INTERNATIONAL PIRACY OF INTELLECTUAL PROPERTY, POLICY OPTIONS FOR A MAJOR EXPORTING COUNTRY* 8 (1989). Piracy has been defined as "the unauthorized taking of another person's intellectual property through substantial duplication or production of a substantially similar product or information for commercial purposes." *Id.*

8. Letter from Eric H. Smith, Executive Director and General Counsel, *International Intellectual Property Alliance*, to Irving A. Williamson, Chairman, *Section 301 Subcommittee, Office of the U.S. Trade Representative* 1 (Aug. 8, 1994) [hereinafter IIPA Special 301 Letter] (on file with *Fordham International Law Journal*) (regarding public comments on Special 301 Section Investigation on Intellectual Property and Market Access in People's Republic of China).

9. Richard Covington, *Ignoring Copyright Pact, China Reopens Factories That Pirated U.S. CDs*, INT'L HERALD TRIB., June 2, 1995, at A1 (Italy).

10. See *China Steps Up War on Copyright Piracy*, Reuters World Service, Oct. 14, 1994, available in LEXIS, News Library, CURNWS File (estimating that nearly 94% of computer software used in China is stolen).

11. See J.H. Reichman, *Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection*, 22 VAND. J. TRANSNAT'L L. 747, 771 (1989). Counterfeiting refers to "the practice of simulating brand-name products down to the last detail, including the originator's own trademarks, and then offering these products for sales as authentic goods on both domestic and export markets." *Id.*

12. Amy Borrus et al., *Eyeball to Eyeball With China*, BUS. WK., Feb. 20, 1995, at 32. When the President of Chrysler complained to Chinese authorities that China was producing counterfeit Jeeps, the Chinese response was "we're developing an auto industry, and you should help us." *Id.* In addition to the counterfeit Jeeps, General Motors Corporation ("GM") has said that approximately 40,000 GM cars on Chinese roads are smuggled in and carry fake approval papers. *GM Assails Fakes on China's Highways*, INT'L

Gillette razor blades,<sup>13</sup> and Kellogg's cornflakes.<sup>14</sup> Consequently, businesspeople, authors, and other interested parties are asking themselves if there is any likelihood that China will, in the foreseeable future, effectively enforce intellectual property rights within its borders.<sup>15</sup> Indeed, six months after the Accord was signed, serious concerns about China's commitment to implementing the Accord were already being raised.<sup>16</sup> While progress had been made in reducing piracy on the retail level,<sup>17</sup> the Chinese had failed to live up to the Accord in numerous areas.<sup>18</sup>

This Comment presents the intellectual property protection laws of China and examines whether these laws, when combined with the 1995 Accord, will lead to improved intellectual property protection in China. Part I discusses the General Agreement on Tariffs and Trade's<sup>19</sup> ("GATT") Agreement on Trade-Related As-

HERALD TRIB., Aug. 10, 1995, at 15 (Italy). These gray market GM cars contain reassembled parts, eliminating "all aspects of quality control, safety inspection and roadworthiness testing." *Id.* Additionally, Volkswagen AG's Audi unit and its Chinese joint venture partner, First Auto Works, have found at least 70 fake Audi cars and believe that thousands have been assembled in China. *Id.*

13. Seth Faison, *Razors, Soap, Cornflakes: Pirating Spreads in China*, N.Y. TIMES, Feb. 17, 1995, at A1.

14. *Id.*

15. Seth Faison, *Fighting Piracy and Frustration in China*, N.Y. TIMES, May 17, 1995, at D1.

16. See *Washington Wire*, WALL ST. J., Sept. 1, 1995, at A1 ("The U.S. doubts if Beijing enforces past agreements, notably on CD pirating"); see also Mark Felsenthal, *U.S. Raises Concerns with China on Compliance with IPR Agreement*, 12 Int'l Trade Rep. (BNA) 1466 (Sep. 6, 1995) (noting that United States has serious concerns with China's implementation of 1995 Accord). Additionally, one U.S. official has noted that "slow progress after an agreement is signed is a pattern in trade relations with China." *Id.*

17. Felsenthal, *supra* note 16, at 1466.

18. *Id.*; *China Makes Progress on Enforcing Patents*, ASIAN WALL ST. J., Aug. 31, 1995, at 2; Tony Munroe, *Action Aside, Chinese Intellectual Piracy Hasn't Slowed*, WASH. TIMES, August 31, 1995, at B7; James Cox, *U.S. Firms: Piracy Thrives in China*, USA TODAY, Aug. 23, 1995, at B2. A major issue of concern regarding enforcement of the Accord is that while piracy of U.S. CDs, computer software, videos, and other copyrighted material has decreased at the retail level, it has not declined at the distribution or manufacturing level. Felsenthal, *supra* note 16, at 1466. Other areas where China has failed to live up to its obligation under the 1995 Accord include customs regulations, molds to link compact discs and videos to the factories that produced them, and market access for U.S. products. *Id.* Concerning the implementation of intellectual property protection under the Accord, one U.S. official said that "[i]f you compare where we are now with where we were a year ago, there's been a substantial change for the better . . . . If you compare where we are now with where we expect to be, we have a long way to go." *Id.*

19. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 (1950) [hereinafter GATT].

pects of Intellectual Property Rights<sup>20</sup> ("TRIPs"), and the established international standards for intellectual property rights protection. Part I also examines China's intellectual property laws and regulations. Finally, Part I discusses the 1995 Accord and its enforcement structure. Part II analyzes the impediments to effective intellectual property rights enforcement in China. Part III argues that China's intellectual property rights laws fail to meet the international intellectual property rights standard embodied in TRIPs, and that the 1995 Accord ignores many of the impediments that currently inhibit effective intellectual property protection in China. This Comment concludes that because the 1995 Accord ignores many of the impediments to intellectual property protection in China, enforcement efforts, even if genuine, will be hampered or futile.

I. INTELLECTUAL PROPERTY PROTECTION:  
INTERNATIONAL STANDARDS, CHINA'S LAWS, AND  
THE 1995 ACCORD

The first international property protection conventions were instituted over one hundred years ago.<sup>21</sup> Beginning in the 1970's, several Western nations<sup>22</sup> began an effort to revise the existing conventions in order to bolster intellectual property protection.<sup>23</sup> One product of these efforts was TRIPs, an international agreement that includes provisions protecting a wide range of intellectual property rights.<sup>24</sup> In contrast, China began enacting intellectual property laws comparable to those of industrialized nations and began joining international intellectual

20. Agreement on Trade-Related Aspects of Intellectual Property Rights, 33 I.L.M. 1197, in *General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations*, April 15, 1994, 33 I.L.M. 1125, Annex 1C [hereinafter TRIPs Agreement].

21. See Paris Convention, *supra* note 5, 21 U.S.T. 1583, 828 U.N.T.S. 305 (indicating that Paris Convention was opened for signature in 1883); see also Berne Convention, *supra* note 5, 102 Stat. 2853, 828 U.N.T.S. 221 (indicating that Berne Convention opened for signature in 1886).

22. See *THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY* (1986-1992), at 2249 (Terence P. Stewart ed., 1993) [hereinafter Stewart]. The Western nations that sought to revise the existing intellectual property conventions included Canada and countries from western Europe. *Id.*

23. See *id.* at 2249-59 (discussing efforts by Western nations to revise non-GATT related intellectual property treaties).

24. *Id.* at 2245.

property conventions in 1982.<sup>25</sup> Intellectual property piracy, however, remained widespread in China, and on February 26, 1995, China and the United States averted a potential trade war by signing the 1995 Accord.<sup>26</sup>

#### A. TRIPs: The International Standard

TRIPs resulted from the efforts of several Western nations to provide more effective intellectual property protection.<sup>27</sup> TRIPs contains provisions protecting intellectual property rights, including copyrights and trademarks, and provisions strengthening enforcement of intellectual property rights.<sup>28</sup> As the instrument establishing international intellectual property protection standards, TRIPs is the benchmark for analyzing the adequacy of China's intellectual property protection laws.<sup>29</sup>

##### 1. The Events Preceding TRIPs

Beginning in the 1970's, the United States and other Western countries sought to revise the existing intellectual property conventions.<sup>30</sup> The Western countries believed these existing conventions failed to provide adequate protection of intellectual property, and that they lacked sufficient enforcement provisions.<sup>31</sup> Consequently, they insisted that the treaties be strength-

25. See Pendleton, *supra* note 4, at 119 (listing several intellectual property laws China has enacted since 1982); see also Lulin, *supra* note 5, at 10-11 (discussing international intellectual property conventions China has acceded to since 1982).

26. Faison, *supra* note 6, at A1; Cooper & Chen, *supra* note 6, at A3.

27. Stewart, *supra* note 22, at 2249.

28. See *id.* at 2287-313 (discussing intellectual property protection provided by TRIPs). TRIPs includes provisions for the protection of copyrights, trademarks, patents, industrial designs, appellations of origin, semiconductor chip layouts, trade secrets, and provisions for enforcement procedures and dispute prevention and resolution. *Id.*

29. See *id.* at 2245 (stating that goal of TRIPs was to "formulate a multilateral agreement on minimum levels of protection for intellectual property rights").

30. See *id.* at 2249-59 (discussing efforts by Western nations to revise non-Gatt related intellectual property conventions). Other Western nations that criticized and sought to revise the international intellectual property conventions included Canada and countries from western Europe. *Id.* at 2249. These countries attempted to revise the Paris Convention. *Id.*; Paris Convention, *supra* note 5, 21 U.S.T. 1583, 828 U.N.T.S. 305. The revisions sought included strengthening the treaty to provide effective enforcement of intellectual property laws and equipping the treaty with formal dispute mechanisms to assure compliance with its terms. Stewart, *supra* note 22, at 2249.

31. See Frank Emmert, *Intellectual Property in the Uruguay Round — Negotiating Strategies of the Western Industrialized Countries*, 11 MICH. J. INT'L L. 1317, 1339-1344 (1990) (discussing shortcomings of current international system for protecting intellectual prop-

ened and that future treaty revisions provide more effective enforcement of intellectual property laws.<sup>32</sup> This movement to strengthen the international intellectual property conventions, however, failed to achieve the desired results,<sup>33</sup> and left the Western countries' intellectual property interests unprotected.<sup>34</sup>

The United States, in particular, believed that its domestic interests were being threatened under the existing multilateral treaty system.<sup>35</sup> The United States, therefore, shifted its international intellectual property protection efforts to the GATT and the Uruguay Round negotiations.<sup>36</sup> These U.S.-led efforts resulted in TRIPs, an agreement for the international protection and enforcement of intellectual property rights.<sup>37</sup>

## 2. The Requirements Embodied in TRIPs

On December 20, 1991, in an effort to conclude the Uruguay Round, the Secretary General of GATT, Arthur Dunkel, submitted for consideration the *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*,<sup>38</sup> which included the text of TRIPs.<sup>39</sup> TRIPs contains provisions protecting a wide range of intellectual property rights, including: copyrights,<sup>40</sup> computer software,<sup>41</sup> trademarks,<sup>42</sup> geographi-

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erty); see also Monique L. Cordray, *GATT v. WIPO*, 76 J. PAT. & TRADEMARK OFF. SOC'Y 121, 122-124 (1994) (discussing advantages of GATT's protection of intellectual property rights over protection provided by treaties administered by World Intellectual Property Organization ("WIPO")); Convention Establishing the World Intellectual Property Organization, July 14, 1967, 21 U.S.T. 1749, 828 U.N.T.S. 3; Frederick M. Abbott, *Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework*, 22 VAND. J. TRANSNAT'L L. 689, 702-707 (1989) (discussing criticisms of WIPO-administered international intellectual property conventions).

32. Stewart, *supra* note 22, at 2249.

33. See *id.* at 2253 (discussing Western nations' efforts to revise existing international intellectual property treaties); see also Cordray, *supra* note 31, at 137 (arguing that voting block consisting of less developed countries prevented improvement of international intellectual property negotiations through WIPO).

34. Stewart, *supra* note 22, at 2253.

35. *Id.*

36. Cordray, *supra* note 31, at 122.

37. *Id.*

38. Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. No. MTN.TNC/W/FA (1991).

39. TRIPs Agreement, *supra* note 20, 33 I.L.M. at 1197; see Stewart, *supra* note 22, at 2282 (noting that text of TRIPs Agreement provides for arbitration of issues undecided by negotiators).

40. TRIPs Agreement, *supra* note 20, arts. 9-14, 33 I.L.M. at 1201-3.

41. *Id.* art. 10, 33 I.L.M. at 1201. "Computer programs, whether in source or ob-

cal indications,<sup>43</sup> industrial designs,<sup>44</sup> patents,<sup>45</sup> layout-designs of integrated circuits,<sup>46</sup> trade secrets,<sup>47</sup> and controls on anti-com-

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ject code, shall be protected as literary works under the Berne Convention (1971)." *Id.* art. 10(1), 33 I.L.M. at 1201.

42. *Id.* arts. 15-21, 33 I.L.M. at 1203-05. TRIPs provides in pertinent part:

Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use.

*Id.* art. 15(1), 33 I.L.M. at 1203.

43. *Id.* arts. 22-24, 33 I.L.M. at 1205-07. Geographical indications are "indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin." *Id.* art. 22(1), 33 I.L.M. at 1205.

44. *Id.* arts. 25-26, 33 I.L.M. at 1207. "Members shall provide for the protection of independently created industrial designs that are new or original." *Id.* art. 25(1), 33 I.L.M. at 1207.

45. *Id.* arts. 27-34, 33 I.L.M. at 1208-11. Generally, "patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application." *Id.* art. 27(1), 33 I.L.M. at 1208.

46. *Id.* arts. 35-38, 33 I.L.M. at 1211-12. "Members agree to provide protection to the layout-designs (topographies) of integrated circuits . . . in accordance with Articles 2 through 7 (other than paragraph 3 of Article 6), Article 12 and paragraph 3 of Article 16 of the Treaty on Intellectual Property in Respect of Integrated Circuits." *Id.* art. 35, 33 I.L.M. at 1211.

47. *Id.* art. 39, 33 I.L.M. at 1212. Article 39 states:

1. In the course of ensuring effective protection against unfair competition as provided in Article 10bis of the Paris Convention (1967) Members shall protect undisclosed information in accordance with paragraph 2 and data submitted to governments or governmental agencies in accordance with paragraph 3.

2. Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information:

(a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

(b) has commercial value because it is secret; and

(c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

3. Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclo-

petitive practices.<sup>48</sup> TRIPs also contains provisions that strengthen the enforcement of intellectual property rights,<sup>49</sup> and measures for dispute prevention and settlement.<sup>50</sup> TRIPs contains transitional arrangements outlining the periods within which developing countries, countries with centrally-planned economies, and least-developed countries would be obligated to apply the TRIPs provisions.<sup>51</sup> Additionally, TRIPs requires national treatment,<sup>52</sup> most-favored-nation treatment,<sup>53</sup> and incor-

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sure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.

*Id.* It has been noted that while only a small portion of the technology currently used is patented, "[a] major part of working technologies belongs to the category of secret know-how." TRANSNATIONAL CORPORATIONS AND MANAGEMENT DIVISIONS OF THE UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL DEVELOPMENT, INTELLECTUAL PROPERTY RIGHTS AND FOREIGN DIRECT INVESTMENT 32, U.N. Doc. ST/CTC/SER.A/24, U.N. Sales No. E.93.II.A.10 (Carlos M. Correa ed., 1993) [hereinafter Correa]. The importance of trade secrets is further highlighted by a U.S. International Trade Commission study that found that trade secrets are second in importance only to trademarks. *Id.* Additionally, trade secrets were reported to be "of great or very great importance for nearly 70 per cent of the affected sales and of moderate importance to another 25 per cent." *Id.* Furthermore, other "proprietary data," (information relevant for regulatory processes), was found to be "of great or very great importance for 51 per cent of the reported sales." *Id.*

48. TRIPs Agreement, *supra* note 20, art. 40, 33 I.L.M. at 1213. "Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market." *Id.* art. 40(2), 33 I.L.M. at 1213.

49. *Id.* arts. 41-61, 33 I.L.M. at 1213-20. TRIPs requires that:

Members shall ensure that enforcement procedures as specified . . . are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by [TRIPs], including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

*Id.* art. 41(1), 33 I.L.M. at 1213-14.

50. *Id.* arts. 63-64, 33 I.L.M. at 1221.

51. *Id.* arts. 66-67, 33 I.L.M. at 1222-23. TRIPs provides that developing countries and countries with centrally-planned economies are entitled to a four-year extension in the deadline to comply with the provisions of the TRIPs Agreement. *Id.* arts. 65(2), (3), 33 I.L.M. at 1222. Least-developed countries are entitled to a 10-year extension. *Id.* art. 66(1), 33 I.L.M. at 1222.

52. *Id.* art. 3, 33 I.L.M. at 1199. "Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property." *Id.* art. 3(1), 33 I.L.M. at 1199.

53. *Id.* art. 4, 33 I.L.M. at 1200. "With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the

porates parts of the Berne Convention into its text.<sup>54</sup>

TRIPs also contains provisions regarding the enforcement of intellectual property rights.<sup>55</sup> TRIPs requires that remedies for acts of infringement be decided on the merits of the case, preferably in writing, and based only on evidence that the parties have had an opportunity to present.<sup>56</sup> TRIPs also requires that defendants be given timely, detailed, and written notice, with all parties allowed to present all relevant evidence.<sup>57</sup> Fur-

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nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members." *Id.*

54. *Id.* art. 9(1), 33 I.L.M. at 1201; Berne Convention, *supra* note 5, 102 Stat. 2853, 828 U.N.T.S. 229. For copyright and related works, such as computer software, the TRIPs Agreement provides that "[m]embers shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto." *Id.* For trademarks, geographical indications, and industrial designs the TRIPs Agreement provides that "Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967)." *Id.* art. 2(1), 33 I.L.M. at 1199. For layout-designs of integrated circuits, the TRIPs Agreement provides that Parties will provide protection "in accordance with Articles 2 through 7 (other than paragraph 3 of Article 6), Article 12 and paragraph 3 of Article 16" of the Washington Treaty. *Id.* art. 35, 33 I.L.M. at 1211. TRIPs does not, however, provide for the protection of moral rights covered by Article 6*bis* of the Berne Convention. *Id.* art. 9(1), 33 I.L.M. at 1201; *see* Stewart, *supra* note 22, at 2288 (discussing U.S. position regarding inclusion of moral rights in TRIPs Agreement).

Copyright protection under TRIPs incorporates portions of the Berne Convention, including a term of protection that lasts for the life of the author plus no less than fifty years. TRIPs Agreement, *supra* note 20, art. 12, 33 I.L.M. at 1202. TRIPs, however, extends the Berne Convention to computer software, and, therefore also requires the protection of software as a literary work under the Berne Convention. *Id.* art. 10, 33 I.L.M. at 1201; *see* Berne Convention, *supra* note 5, 102 Stat. 2853, 828 U.N.T.S. 221.

TRIPs provides for the protection of other types of intellectual property that were not previously protected by international conventions. TRIPs Agreement, *supra* note 20, arts. 39, 40, 33 I.L.M. at 1212-13. For example, the TRIPs provisions on trade secrets, which requires Members to protect undisclosed information is the first international agreement of this kind. *Id.* art. 39, 33 I.L.M. at 1212; Stewart, *supra* note 22, at 2306.

55. TRIPs Agreement, *supra* note 20, arts. 41-61, 33 I.L.M. at 1213-20.

56. *Id.* art. 41, 33 I.L.M. at 1213-14. Article 41 provides that:

Decisions on the merits of a case shall preferably be in writing and reasoned. They shall be made available at least to the parties to the proceeding without undue delay. Decisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard.

*Id.* art. 41(3), 33 I.L.M. at 1213-14.

57. *Id.* art. 42, 33 I.L.M. at 1214. Article 42 states:

Members shall make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right covered by this Agreement. Defendants shall have the right to written notice which is timely and contains sufficient detail, including the basis of the claims. Parties shall be allowed to be represented by independent legal counsel, and procedures shall not impose overly burdensome requirements concerning mandatory per-

thermore, TRIPs requires that courts be authorized to order preliminary injunctive relief,<sup>58</sup> and that authorities have the right to order infringers to pay the right-holder damages to adequately compensate for injuries suffered.<sup>59</sup> Finally, TRIPs contains detailed provisions requiring border measures to stop the importation of infringing goods.<sup>60</sup>

### B. *China's Intellectual Property Protection Laws*

Since 1982, China has enacted several intellectual property protection laws and joined various international intellectual property conventions.<sup>61</sup> Growing pressure from Western nations,<sup>62</sup> and a desire on the part of the Chinese to improve protection of their own intellectual property, led to the enactment of such laws.<sup>63</sup> Accordingly, China enacted Trademark, Patent,

sonal appearances. All parties to such procedures shall be duly entitled to substantiate their claims and to present all relevant evidence. The procedure shall provide a means to identify and protect confidential information, unless this would be contrary to existing constitutional requirements.

*Id.*

58. *Id.* art. 44(1), 33 I.L.M. at 1215. "The judicial authorities shall have the authority to order a party to desist from an infringement, *inter alia* to prevent the entry into the channels of commerce in their jurisdiction of imported goods that involve the infringement of an intellectual property right, immediately after customs clearance of such goods." *Id.*

59. *Id.* art. 45, 33 I.L.M. at 1215. "The judicial authorities shall have the authority to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered." *Id.* art. 45(1), 33 I.L.M. at 1215. Additionally, TRIPs provides that courts shall have the authority to pay the right holder's expenses, including attorney's fees. *Id.* art. 45(2), 33 I.L.M. at 1215. TRIPs further provides that authorities be permitted to dispose of infringing goods. *Id.* art. 46, 33 I.L.M. at 1215. Regarding cases of trademark counterfeiting or copyright piracy on a commercial scale, TRIPs requires that criminal procedures and penalties be applied. *Id.* art. 61, 33 I.L.M. at 1220.

60. *Id.* arts. 51-60, 33 I.L.M. at 1217-1220. TRIPs provides in pertinent part: Members shall . . . adopt procedures to enable a right holder, who has valid grounds for suspecting that the importation of counterfeit trademark or pirated copyright goods may take place, to lodge an application in writing with competent authorities, administrative or judicial, for the suspension by the customs authorities of the release into free circulation of such goods.

*Id.* art. 51, 33 I.L.M. at 1217.

61. Pendleton, *supra* note 4, at 119.

62. *See id.* at 120 (stating that foreign pressure, particularly by United States, influenced China's last decade of intellectual property initiatives).

63. *See id.* "China's decade of intellectual property law has been largely instigated by two factors. First is the typical evolution . . . of both individuals and nations from predominately technology consumers to innovative competitors and consumers." *Id.*

and Copyright laws, as well as Computer Software Regulations.<sup>64</sup> China also enacted International Copyright Treaty Implementing Rules that modified portions of the Copyright Law and Computer Software Regulations, harmonizing these laws with the Berne Convention.<sup>65</sup> A separate Unfair Competition Law, enacted in 1993, provides additional protection for well-known or unique brand names.<sup>66</sup>

### 1. Trademark Protection

Several laws and provisions control trademark protection in China.<sup>67</sup> China's Trademark Law<sup>68</sup> ("Trademark Law") was adopted in 1982<sup>69</sup> and revised in 1993.<sup>70</sup> The related Implementing Rules of the Trademark Law<sup>71</sup> ("Trademark Implementing Rules") were issued in 1983 and subsequently revised in 1988 and 1993.<sup>72</sup> In 1993, China adopted the Supplementary Provisions for the Punishment of Crimes of Passing Off Registered Trademarks ("Supplementary Trademark Provisions").<sup>73</sup> Collectively, these laws provide for the registration, administration, and protection of trademarks in China.<sup>74</sup>

64. *Id.* at 119.

65. Tan Loke Khoo, *Recent Developments in Intellectual Property Law in the People's Republic of China*, 15 EUR. INTELL. PROP. REV. 176, 178 (1993).

66. Zheng Chengsi, *The First Unfair Competition Law of the PRC*, 16 EUR. INTELL. PROP. REV. 181, 181 (1994).

67. Khoo, *supra* note 65, at 176

68. Trademark Law of the People's Republic of China (1982), *as amended by* Decision of the Standing Committee of the National People's Congress Concerning Amendments to the Trademark Law (1993), *translated in* CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation, ¶ 11-500, 14,001 (CCH Int'l 1993) [hereinafter Trademark Law] (also translated in CHINA PAT. & TRADEMARKS, Apr. 1993, at 86).

69. Trademark Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), ¶ 11-500, at 14,001.

70. *Id.*

71. Detailed Rules for the Implementation of the Trademark Law of the People's Republic of China (1988), *as amended by* the State Council (1993), *translated in* CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation, ¶ 11-510, 14,081 (CCH Int'l 1993) [hereinafter Trademark Implementing Rules] (also translated in CHINA PAT. & TRADEMARKS, Oct. 1993, at 80).

72. Trademark Implementing Rules, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), ¶ 11-510, at 14,081.

73. Supplementary Provisions of the Standing Committee of the National People's Congress for the Punishment of Crimes of Passing Off Registered Trademarks, *translated in* CHINA PAT. & TRADEMARKS, Apr. 1993, at 91 [hereinafter Supplementary Trademark Provisions].

74. *See* Trademark Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), ¶ 11-500, 14,001 (providing for China's protection of trademarks); *see also*

The Trademark Law provides a trademark registrant with the exclusive right to use the trademark.<sup>75</sup> The Trademark Law and the Trademark Implementing Rules protect trademarks,<sup>76</sup> service marks,<sup>77</sup> defensive marks,<sup>78</sup> collective marks,<sup>79</sup> and certification marks.<sup>80</sup> Works are protected for a ten-year period,<sup>81</sup> which may be extended for an additional ten-year period.<sup>82</sup> The laws also define what constitutes an infringement of the trademark holder's rights.<sup>83</sup>

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Trademark Implementing Rules, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), ¶ 11-510, 14,081 (providing for China's registration and administration of trademarks); Supplementary Trademark Provisions, CHINA PAT. & TRADEMARKS, Apr. 1993, at 91 (providing criminal liabilities for trademark infringement).

75. Trademark Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 3, at 14,001.

76. *Id.* art. 4, at 14,001.

77. *Id.* A service mark is "a distinctive symbol composed of one or more words, a design or a combination thereof that is used for . . . services to distinguish the . . . supplier of the services." Benny Lee & Xavier Buffet Delmas, *Welcome Changes to the Trade Mark Law of the People's Republic of China*, 14 EUR. INTELL. PROP. REV. 67, 67 (1992).

78. Trademark Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 12, at 14,053. A defensive mark provides the registrant of a widely-known trademark the right to apply for a defensive trademark for goods in classes other than the classes of goods for which the use of the trademark has been approved. Lee & Delmas, *supra* note 77, at 67.

79. Trademark Implementing Rules, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 6, at 14,083. Collective marks may be applied for by industrial groups, commercial groups, or trade associations that are formed in their members' interests. Lee & Delmas, *supra* note 77, at 67.

80. Trademark Implementing Rules, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 6, at 14,083. Certification marks are authentication symbols that certify the place of origin, raw materials, method of manufacture, or other specific qualities of the good. Lee & Delmas, *supra* note 77, at 67-68. Certification marks may be applied for by "competent administrative authorities or organizations." *Id.*

81. Trademark Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 23, at 14,055. This period of protection is counted from the approval of the registration. *Id.*

82. *Id.* art. 24, at 14,055. The Trademark laws also specify words and signs that are prohibited, including "[t]hose detrimental to socialist morals or customs, or having other unhealthy influences." *Id.* art. 8, at 14,051.

83. *See id.* art. 38, at 14,063 (indicating acts that constitute trademark infringement); *see also* Trademark Implementing Rules, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 41, at 14,103 (providing infringing acts). Infringing practices include: (1) the counterfeiting or making of unauthorized representations of a registered trademark; (2) the selling of counterfeit representations of a registered trademark; (3) the using of a trademark that is similar or identical to a registered trademark without the right-holder's authorization; (4) the selling of goods the seller "clearly knows or should know are infringing;" and (5) intentionally providing facilities "such as storage, transportation, mailing and concealment" for an act of infringement.

Two options are available to a right-holder in cases of alleged infringement.<sup>84</sup> First, the right-holder can report the offense and request that the administrative authority, the Trademark Review and Adjudication Board (the "Board"),<sup>85</sup> handle the matter.<sup>86</sup> Second, the right-holder can institute proceedings directly in the People's Court.<sup>87</sup> A right-holder who seeks an administrative remedy and is dissatisfied with the decision may, within fifteen days from the notification of the decision, appeal to the next higher administrative level.<sup>88</sup> A right-holder who is dissatisfied with a decision at this level may also, within fifteen days from the notification of the decision, institute proceedings in the People's Court.<sup>89</sup>

The trademark laws also provide penalties for cases of trademark infringement.<sup>90</sup> These penalties include ordering the offender to immediately stop all sales,<sup>91</sup> seizing or destroying the infringing goods,<sup>92</sup> imposing a fine on the offender,<sup>93</sup> and/or ordering the infringer to compensate the right-holder for

Trademark Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 38, at 14,063; Trademark Implementing Rules, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 41, at 14,103.

84. Trademark Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 39, at 14,063; Trademark Implementing Rules, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 42, at 14,103.

85. See Trademark Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 20, at 14,055. "The Trademark Review and Adjudication Board, established under the administrative authority for industry and commerce under the State Council, shall be responsible for handling trademark disputes." *Id.*

86. *Id.* art. 39, at 14,063; Trademark Implementing Rules, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 42, at 14,103.

87. Trademark Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 39, at 14,063; Trademark Implementing Rules, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 42, at 14,103. The Trademark Review and Adjudication Board makes all final decisions and rulings on matters for review and adjudication. *Id.* art. 8, at 14,083.

88. Trademark Implementing Rules, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 44, at 14,105.

89. *Id.*

90. Trademark Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 40, at 14,065; Trademark Implementing Rules, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 43, at 14,105; Supplementary Trademark Provisions, CHINA PAT. & TRADEMARKS, Apr. 1993, at 91.

91. Trademark Implementing Rules, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 43(1), at 14,105.

92. *Id.* art. 43(2), at 14,105.

93. *Id.* art. 43, at 14,105.

losses.<sup>94</sup> The trademark laws also provide for the criminal prosecution of offenders<sup>95</sup> and the imposition of criminal penalties, including imprisonment.<sup>96</sup>

## 2. Patent Protection

China's Patent Law<sup>97</sup> ("Patent Law") was adopted in 1984<sup>98</sup> and revised in 1992.<sup>99</sup> The related Implementing Regulations of the Patent Law<sup>100</sup> ("Patent Implementing Regulations") became effective in 1985, and were revised in 1992.<sup>101</sup> Together, the Patent Law and Patent Implementing Regulations define what is patentable and provide the application, examination, and approval process for a patent,<sup>102</sup> and for the protection of patent rights.<sup>103</sup>

The Patent Law grants patent protection to inventions,<sup>104</sup>

94. *Id.*

95. Trademark Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 40, at 14,065.

96. Supplementary Trademark Provisions, CHINA PAT. & TRADEMARKS, Apr. 1993, at 91.

97. Patent Law of the People's Republic of China (1984), *as amended by* the Standing Committee of the National People's Congress (1992), *translated in* CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation, ¶ 11-600, 14,201 (CCH Int'l 1993) [hereinafter Patent Law] (also translated in CHINA PAT. & TRADEMARKS, Oct. 1992, at 97). See Feng Yun Liu, 1992 *Chinese Patent Law: A Comparative Study of the 1984 and 1992 Laws*, 75 J. PAT. & TRADEMARK OFF. SOC'Y 664 (1993) (discussing changes made to Patent Law); see also Zheng Chengsi, *The 1992 Amendment of the Chinese Patent Law*, 15 EUR. INTELL. PROP. REV. 26 (1993) (discussing Patent Law amendments).

98. Patent Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), ¶ 11-600, at 14,201.

99. *Id.*

100. Implementing Regulations of the Patent Law of the People's Republic of China (1992), *translated in* CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation, ¶ 11-603, 14,263 (CCH Int'l 1993) [hereinafter Patent Implementing Regulations] (also translated in CHINA PAT. & TRADEMARKS, Jan. 1993, at 86).

101. *Id.*

102. See Patent Law, CHINA LAW FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), arts. 22-44, at 14,207-21 (providing requirements for grant of patent right); see also Patent Implementing Regulations, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), arts. 16-64, at 14,273-313 (providing patent application process).

103. Patent Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), arts. 59-66, at 14,227-31. There are four public policies underlying enactment of the Patent Law: (1) "to protect patent rights for inventions creations," (2) "to encourage invention-creations," (3) "to foster the spreading and application of inventions-creations," and (4) "to promote the development of science and technology, for meeting the needs of the construction of socialist modernization." *Id.* art. 1, at 14,201.

104. Patent Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 2, at 14,201; Patent Implementing Regulations, CHINA LAWS FOR FOREIGN BUSINESS,

utility models,<sup>105</sup> and designs<sup>106</sup> and extends protection to pharmaceutical products and substances obtained by chemical processes.<sup>107</sup> A number of subject-matters, however, remain unpatentable,<sup>108</sup> including animal and plant varieties<sup>109</sup> and scientific discoveries.<sup>110</sup> The Patent Law provides a twenty-year term of protection for inventions<sup>111</sup> and a ten-year term of protection for utility models and designs.<sup>112</sup> The patent laws also provide for the compulsory licensing of a patent.<sup>113</sup>

The Patent Law contains specific provisions for the enforcement and protection of patents.<sup>114</sup> As with China's Trademark Law,<sup>115</sup> if a patent is used without the authorization of the patentee, the patentee has the right to either request that the administrative authority handle the matter, or directly institute proceedings in the People's Court.<sup>116</sup> The patentee must file an infringement action within two years from the date the patentee

2 Business Regulation (CCH), art. 2, at 14,263. Invention is defined as "any new technical solution relating to a product, a process or improvement thereof." *Id.*

105. Patent Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 2, at 14,201; Patent Implementing Regulations, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 2, at 14,263. Utility model is defined as "any new technical solution relating to the shape, the structure, or their combination, of a product, which is fit for practical use." *Id.*

106. Patent Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 2, at 14,201; Patent Implementing Regulations, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 2, at 14,263. Design is defined as "any new design of the shape, pattern, colour, or their combination, of a product, which creates an aesthetic feeling and is fit for industrial application." *Id.*

107. Chengsi, *supra* note 97, at 26. "Food, beverages and flavorings, pharmaceutical products and substances obtained by means of a chemical process' has been deleted from the original Article 25, the clause defining what subject-matter is unpatentable." *Id.* See Liu, *supra* note 97, at 666 (noting that patents will now be available for all chemical inventions, including pharmaceutical and agricultural chemicals).

108. See Patent Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 25, at 14,211 (listing unpatentable subject-matter).

109. *Id.* art. 25(4), at 14,211.

110. *Id.* art. 25(1), at 14,211.

111. *Id.* art. 45, at 14,221.

112. *Id.*

113. *Id.* arts. 51-58, at 14,225-07; Patent Implementing Regulations, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), arts. 68-69, at 14,315-7.

114. See Patent Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), arts. 59-66, at 14,227-31 (providing measures for protection and enforcement of patent rights).

115. Trademark Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), ¶ 11-500, at 14,001.

116. Patent Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 60, at 14,227.

became aware, or should have become aware, of the infringing activity.<sup>117</sup> If the patentee chooses to pursue the issue through administrative proceedings, the patentee has a right to appeal the decision to the People's Court within three months of notification of the administrative decision.<sup>118</sup> The administrative authority has the power to order the infringer to stop the infringing act and/or to compensate the patentee for damages.<sup>119</sup>

Under certain circumstances, the Patent Law also permits the criminal prosecution of infringers.<sup>120</sup> The Patent Law, however, also provides several exceptions to infringement.<sup>121</sup> For example, a person who uses or sells a patented product not knowing that it was made and sold without the patentee's authorization, is not deemed an infringer.<sup>122</sup>

### 3. Copyright Protection

China's Copyright Law<sup>123</sup> ("Copyright Law") and the Implementing Regulations of the Copyright Law<sup>124</sup> ("Copyright Implementing Regulations") were adopted in 1990, and became effective on June 1, 1991.<sup>125</sup> Additional measures, adopted in 1994, provide criminal penalties for commercial copyright piracy.<sup>126</sup>

117. *Id.* art. 61, at 14,227.

118. *Id.* art. 60, at 14,227.

119. *Id.*

120. *Id.* art. 63, at 14,229. The Patent Law provides that: "Where any person passes off the patent of another person . . . [i]f the circumstances are serious, any person directly responsible shall be shall be prosecuted for his criminal liability." *Id.* The Patent Law does not define "serious circumstances". *Id.*

121. *Id.* art. 62, at 14,229.

122. *Id.* art. 62(2), at 14,229.

123. Copyright Law of the People's Republic of China (1990), translated in CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation, ¶ 11-700, 14,561 (CCH Int'l 1993) [hereinafter Copyright Law] (also translated in CHINA PAT. & TRADEMARKS, Jan. 1991, at 65).

124. Implementing Rules for the Copyright Law of the People's Republic of China (1990), translated in CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation, ¶ 11-702, 14,621 (CCH Int'l 1993) [hereinafter Copyright Implementing Regulations] (also translated in CHINA PAT. & TRADEMARKS, July 1991, at 70).

125. Copyright Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 56, at 14,653.

126. Decision of the Standing Committee of the National People's Congress Concerning Punishment of the Crime of Copyright Infringement (1994), translated in CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation, ¶ 11-701, 14,597 (CCH Int'l 1995) [hereinafter Copyright Criminal Measures]. The Copyright Criminal Measures provide, in pertinent part, that:

A party which has committed any of the following infringements of copyrights

Together, these laws provide copyright protection and associated rights,<sup>127</sup> define the legal liabilities related to such protection<sup>128</sup> and provide penalties for acts of infringement.<sup>129</sup>

A copyright includes the right to control publication of a work, the right of an author to protect a work against destruction and mutilation, and the right of an author to receive remuneration for the use of a work.<sup>130</sup> In addition to these personal and proprietary rights, the Copyright Law also provides the author with neighboring rights.<sup>131</sup> Neighboring rights relate to copyrights, and include the rights<sup>132</sup> of performers,<sup>133</sup> producers

for profit-making purposes shall, in cases of relatively large amounts of illicit gains or in other serious cases, be sentenced to up to three (3) years imprisonment or to criminal detention and have a fine imposed singly or cumulatively; and shall, in cases of enormous amounts of illicit gains or other very serious cases, be sentenced to more than three (3) years and up to seven (7) years imprisonment or criminal detention and have fines imposed concurrently:

- (1) copying and publishing a written literary work, musical composition, film, television or musical work, computer software or other work without the consent of the copyright holder;
- (2) publishing a book for which another party has exclusive rights of publication;
- (3) copying and distributing an audio-visual recording without the consent of the audio-visual recorder who produced the recording;
- (4) producing and selling fake works of art which are copies of other people's famous works.

*Id.* art. 1, at 14,597. Additionally, anyone that "knowingly sells duplicates which infringe copyrights" can be imprisoned and have a fine imposed. *Id.* art. 2, at 14,597. The Copyright Criminal Measures further provide that anyone who has committed a criminal offense shall be required to compensate the right-holder for any losses incurred caused by the infringing activity. *Id.* art. 5, at 14,599.

127. See Copyright Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 1, at 14,561. The Copyright Law has three stated objectives: (1) "to protect the copyright of authors of literary, artistic and scientific works," (2) "to encourage the creation and dissemination of works conducive to the construction of socialist spiritual and material civilization," and (3) "to promote the development and flourishing of socialist culture and sciences." *Id.*

128. *Id.* arts. 45-50, at 14,587-93.

129. *Id.* arts. 45-46, at 14,587-91.

130. *Id.* art. 10, at 14,565. Two categories of rights are available to copyright holders in China: moral rights and economic rights. *Id.* arts. 9-10, at 14,563-655.

131. *Id.* arts. 29-44, at 14,577-87. Neighboring rights are rights relating to copyrights, including the rights of publishers of books and periodicals, performers, producers of sound and video recordings, and radio and television broadcasting. Jianming Shen, *The P.R.C.'s First Copyright Law Analyzed*, 14 HASTINGS INT'L & COMP. L. REV. 529, 536 (1991). Neighboring rights are primarily a matter of contract or licensing. *Id.*

132. Copyright Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), arts. 29-34, at 14,577-81.

133. *Id.* arts. 35-36, at 14,581-3.

of sound and video recordings,<sup>134</sup> radio and television broadcasters, and publishers of book and periodicals.<sup>135</sup> Under the Copyright Law, proprietary rights<sup>136</sup> are protected for the lifetime of the author plus fifty years, whether the work is published or not.<sup>137</sup> The protection of moral rights,<sup>138</sup> however, is perpetual.<sup>139</sup>

The Copyright Law grants protection to works of Chinese citizens whether or not they are published.<sup>140</sup> Works of non-Chinese persons, however, are extended copyright protection only when the work is first published in China.<sup>141</sup> When the work is first published outside China, it is given copyright protection if the work is published in China within thirty days of its first publication,<sup>142</sup> protection is provided by existing treaties between China and the author's country, or if protection is provided by an with any international convention mutually acceded to by China and the author's country.<sup>143</sup> Subject-matters that may be copyrighted include virtually any works of literature, art, science, engineering, and technology.<sup>144</sup> This includes oral, musical, and dramatic works, as well as works of fine art, photography, television, and cinematography.<sup>145</sup>

134. *Id.* arts. 37-39, at 14,583.

135. *Id.* arts. 40-44, at 14,585-7.

136. Shen, *supra* note 131, at 532-36. Proprietary rights include the right to authorize: publication, reproduction, performance, exhibition, translation, or dissemination of a work. *Id.* at 533. Proprietary rights also include the right to receive remuneration. *Id.*

137. Copyright Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 21, at 14,571.

138. Shen, *supra* note 131, at 532-36. Moral rights include the right of attribution, the right of dissemination, and the right to prevent distortions, modifications or changes. *Id.* at 533.

139. Copyright Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 20, at 14,571. The Copyright Law does not provide for the transfer of these moral rights by licensing, assignment, or succession. Shen, *supra* note 131, at 549-50. Thus, because "no citizen or nonnatural person ever acquires, inherits, or exercises moral rights after the death of an author," this provision effectively restricts moral rights to the lifetime of the author. *Id.*

140. Copyright Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 2, at 14,561.

141. *Id.*

142. Copyright Implementing Regulations, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 25, at 14,643.

143. Copyright Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 2, at 14,561.

144. *Id.* art. 3, at 14,561.

145. *Id.*

The Copyright Law also contains limitations on an author's exclusive rights.<sup>146</sup> These limitations provide several "fair use" provisions<sup>147</sup> under which works may be used in whole or in part without obtaining the authorization of the copyright holder or paying remuneration.<sup>148</sup> These limitations include permitting a copyrighted work to be used for personal use or enjoyment,<sup>149</sup> the translation or duplication of a published foreign work for classroom teaching or scientific research,<sup>150</sup> and the use of a copyrighted work by state organs carrying out their official duties.<sup>151</sup>

Under China's Copyright Law, there are two classes of infringing acts.<sup>152</sup> The first includes: the unauthorized publication of a work,<sup>153</sup> claiming authorship to a work for the purpose of personal gain without having made any contributions to the work,<sup>154</sup> and failing to pay royalties or remuneration where such payment is required.<sup>155</sup> Anyone found guilty of committing these acts is subject only to civil liabilities, such as making a public apology.<sup>156</sup> The second class of infringing acts includes: plagiarizing, pirating,<sup>157</sup> and the unauthorized commercial reproduction and distribution of a work.<sup>158</sup> In addition to civil liabilities, infringers of this second class of acts, in addition to civil liabilities, may be subject to administrative penalties imposed by copyright authorities, including confiscation of the unlawful in-

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146. *See id.* art. 22, at 14,573 (providing limitations on copyright holder's rights).

147. *Id.* The Copyright Law provides that, for the "fair use" provisions, "[p]ermission from the copyright holder shall not be required and remuneration shall not be paid." *Id.*

148. *Id.*

149. *Id.* art. 22(1), at 14,573. "Where the published work of another person is used for private study, research or appreciation." *Id.*

150. *Id.* art. 22(6), at 14,573.

151. *Id.* art. 22(7), at 14,575.

152. *See id.* arts. 45-47, at 14,587-91 (listing legal liabilities for acts of infringement).

153. *Id.* art. 45(1), at 14,587.

154. *Id.* art. 45(3), at 14,587.

155. *Id.* art. 45(6), at 14,587.

156. *Id.* art. 45, at 14,587.

157. *Id.* art. 46(1), (2), at 14,591.

158. *Id.* art. 46(2), at 14,591. Penalty provisions for copyright infringement are also provided in the Copyright Implementing Regulations. Copyright Implementing Regulations, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), arts. 50-53, at 14,651-53. Penalties include: issuing a warning, ordering a stop to the production and distribution of the infringing reproductions, confiscating the unlawful income or infringing products, and the imposition of a fine. *Id.* art. 50, at 14,651.

come or the imposition of a fine.<sup>159</sup>

The Copyright Law authorizes parties to settle disputes over copyright infringement by mediation,<sup>160</sup> proceedings instituted directly in a People's Court,<sup>161</sup> or arbitration.<sup>162</sup> If mediation is chosen and fails, or if a party changes its mind after a mediation agreement is reached, proceedings may be instituted in a People's Court.<sup>163</sup> The Copyright Law provides for arbitration to settle a copyright dispute, but only if such a clause is provided in the contract.<sup>164</sup>

#### 4. Computer Software Protection

Regulations regarding China's computer software protection are contained in two documents: the Regulations for the Protection of Computer Software<sup>165</sup> ("Software Regulations" or "Regulations") and the Measures for Computer Software Copyright Registration ("Software Registration Measures").<sup>166</sup> The

159. Copyright Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 46, at 14,591.

160. *Id.* art. 48, at 14,591.

161. *Id.*

162. *Id.* art. 49, at 14,591.

163. *Id.* art. 48, at 14,591. Additionally, if a party objects to an administrative sanction it may institute proceedings in a People's Court within three months of receipt of the decision. *Id.* art. 50, at 14,593.

164. *Id.* art. 49, at 14,591. If a party fails to comply with an arbitration award, the other party may apply to a People's Court for enforcement and execution. *Id.*

165. Computer Software Protection Rules (1991), translated in CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH Int'l 1993), ¶ 11-704, 14,681 [hereinafter Software Regulations]; David B. Kay, *PRC Regulations for the Protection of Computer Software*, IP ASIA, June 1991, at 22 (providing English translation); Henry Hong Liu, *Legislative Update—Legal Aspects of Software Protection in China: The Computer Software Protection Regulations*, 9 SANTA CLARA COMPUTER & HIGH TECH. L.J. 469, app. (1993) (providing English translation). The Software Regulations are not retroactive. Software Regulations, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 38, at 14,709. Infringing acts that occurred prior to 1991 are to be handled "in accordance with the relevant regulations in effect at the time of the infringing activity." *Id.*

166. Measures for Computer Software Copyright Registration (1992), translated in CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH Int'l 1993), ¶ 11-706, 14,751 [hereinafter Software Registration Measures]. The Software Regulations were approved and went into effect in 1991, in accordance with Article 53 of the Copyright Law, which required the drafting of separate regulations for computer software. Kay, *supra* note 165, at 22. Article 53 of the Copyright Law provides that: "[r]egulations for the protection of computer software shall be formulated separately by the State Council." Copyright Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 53, at 14,593. However, while the National Copyright Administration ("NCA") drafted the Copyright Law, the Software Regulations were drafted primarily by the Ministry of Machinery and Electronics Industries ("MMEI"). Kay, *supra* note 165, at 22.

Software Regulations grant copyright protection to works by Chinese citizens regardless of whether the software is published<sup>167</sup> or where it is published.<sup>168</sup> The Regulations protect non-Chinese persons' software if the software is first published in China or if a copyright protection agreement exists between the non-Chinese person's country and China, or if both China and the non-Chinese person's country are members of an international copyright protection convention.<sup>169</sup> Like the Copyright Law,<sup>170</sup> the Software Regulations provide both moral rights and property rights.<sup>171</sup> The Regulations permit the assignment of the stipulated property rights<sup>172</sup> and the right of a copyright holder's heirs or successors to inherit the copyright holder's property rights during the term of protection.<sup>173</sup>

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Consequently, the Software Regulations cover subject matter similar to that in the Copyright Law, but on a "stand-alone" basis. *Id.* The Software Registration Measures were issued in April, 1992, and were drafted in accordance with the Software Regulations to provide procedures for registering computer software. Software Registration Measures, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 1, at 14,751.

167. Software Regulations, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 6, at 14,683.

168. *Id.*

169. *Id.* The Regulations explicitly state what is not protected, and indicate that they "cannot be expanded to include the ideas, concepts, discoveries, principles, algorithms or methods of processing and operation used in the development of software." *Id.* art. 7, at 14,683.

170. *See* Copyright Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 10, at 14,565 (providing copyright holder's economic and moral rights).

171. Software Regulations, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 9, at 14,685. Moral rights include the right of publication, defined as the "right to determine whether software is made public." *Id.* art. 9(1), at 14,685. Moral rights also include the developer's right of identity, defined as the "right to make known the identity of the developer of the software and the right to state his name on the software." *Id.* art. 9(2), at 14,685. Property rights include the right of exploitation, defined as the "right of usage, namely, on the premise of not harming society's public interest, the right to use the software in reproductions, exhibitions, publication, or in adapted, translated, annotated or other forms." *Id.* art. 9(3), at 14,685. Property rights also include the right to license the use of the software and to receive remuneration. *Id.* art. 9(4), (5), at 14,685.

While an earlier draft of the Software Regulations defined *fa biao*, or publish, as "the act of disseminating the computer software or its duplicates to the general public," the current Regulations contains no such definition. *Kay, supra* note 165, at 23 n.8. It should be noted, however, that the current Regulations uses the term *fa biao* in connection with the right to decide whether or not to release the software to the public, and also uses the term *fa xing*, which is a broader term than *fa biao* and denotes to "issue," "publish" or "distribute." *Id.*

172. Software Regulations, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), arts. 9(5), 19, at 14,685, 14,689.

173. *Id.* art. 17, at 14,689. Unlike the Copyright Law, however, the Software Regu-

The Software Regulations address the ownership of software that is created jointly or is commissioned by another person or entity.<sup>174</sup> For software developed by two or more units or citizens, each of the co-developers jointly own the copyright.<sup>175</sup> If there is no prior written agreement, and the software can be separated into independent parts and exploited separately, each co-developer owns the copyright to the part he/she developed, provided that the exercise of such copyright does not encroach on the software copyright as a whole.<sup>176</sup> For software commissioned by another person or entity, the ownership of the software copyright is to be agreed upon in a written agreement between the parties.<sup>177</sup> If there is no such written agreement, the software copyright belongs to the commissioned party.<sup>178</sup>

The Software Regulations also address software developed by a Chinese citizen in the course of his or her employment.<sup>179</sup> If the software is produced during work performed for the position, then, generally, the software's copyright ownership belongs

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lations do not protect a software copyright holder's "right of integrity." *Kay, supra* note 165, at 24. *Cf.* Copyright Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 10(4), at 14,565. The right of integrity is defined as "the right to protect one's works against distortion and mutilation." *Id.*

174. *See* Software Regulations, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 11, at 14,685 (providing terms of copyright ownership for software that is developed by two or more "units or citizens"); *see also id.* art. 12, at 14,687 (presenting terms of copyright ownership for software that is commissioned to be developed by another person); *Id.* art. 13, at 14,687 (providing terms of copyright ownership for software developed under assignment or by government units); *Id.* art. 14, at 14,687 (outlining terms of copyright ownership for software developed in course of employment).

175. *Id.* art. 11, at 14,685.

176. *Id.* If the software cannot be separated into independent parts, the Regulations allow for the software co-developers to exercise their rights pursuant to "unanimous agreement" between the joint developers. *Id.* If unanimous agreement cannot be reached, the Regulations state that "no party shall, without due reason, prevent another party from exercising copyright claims other than the right of assignment" provided that "any resulting benefits shall be divided among the joint developers." *Id.*

177. *Id.* art. 12, at 14,687.

178. *Id.* If the software is developed under assignment "by a higher level unit" or governmental unit, the Regulations provide that such ownership shall be stipulated in a "project assignment" letter or a contract. *Id.* art. 13, at 14,687. If the assignment letter or contract is not explicit regarding copyright ownership, the Regulations state that the software's copyright ownership "shall belong to the unit assigned the work task." *Id.* For software that has "major significance to the State or public interest," and is developed "within its system or area of jurisdiction," the Government has the right to "determine which units shall be authorised to use the software." *Id.* The "unit" that uses the software is required to pay a use fee "pursuant to relevant State regulations." *Id.*

179. *Id.* art. 14, at 14,687.

to the employer.<sup>180</sup> If the software is not produced during work performed for the position, the software is not connected to the work engaged by the developer, and the employer's materials were not used then the copyright ownership in the software belongs to the employee.<sup>181</sup>

Under the Software Regulations, software is copyright protected for a period of twenty-five years after its first publication.<sup>182</sup> This period of copyright protection may be extended for an additional twenty-five-year term prior to the expiration of the original term, thereby providing a maximum period of protection of fifty years.<sup>183</sup> There is no limit, however, on the term of protection for the developer's right of identity.<sup>184</sup>

The Software Regulations contain several fair use exceptions.<sup>185</sup> The rights of lawful software owners include the right to make back-up copies of the software<sup>186</sup> and the right to revise the software for a particular computer application or to improve its functional performance.<sup>187</sup> Furthermore, Article 22<sup>188</sup> of the Regulations permits a small number<sup>189</sup> of software copies to be made for non-commercial purposes without obtaining the copyright owner's consent.<sup>190</sup> The production of new software that is similar to existing software does not constitute an infringement<sup>191</sup> if the similarity: (1) is necessary for executing national policies, laws, regulations and rules;<sup>192</sup> (2) is necessary for imple-

180. *Id.*

181. *Id.*

182. *Id.* art. 15, at 14,687.

183. *Id.*

184. *Id.* The right of identity is the right of the developer to include its identity and place its name on the software. *Id.* art. 9(2), at 14,685.

185. *Id.* arts. 21-22, 31, at 14,701, 14,707.

186. *Id.* art. 21(2), at 14,701.

187. *Id.* art. 21(3), at 14,701.

188. *Id.* art. 22, at 14,701.

189. *Id.* The Software Regulations provide that: "If it is necessary to make a small number of copies of software to meet the needs of non-commercial objectives . . . the approval of the software copyright holder or its legal assignee shall not be required and no remuneration need be paid." *Id.* The Software Regulations do not define "small number". *Id.*

190. *Id.* art. 22, at 14,701. If copies are made under this exception, the Regulations require that the name of the software and its developer be stated and that no other rights of the copyright holder are infringed. *Id.*

191. *Id.* art. 31, at 14,707.

192. *Id.* art. 31(1), at 14,707.

menting national technical standards;<sup>193</sup> or (3) results from the invention in the forms of expression that were available.<sup>194</sup>

The Software Regulations establish procedures for the administration of computer software registration.<sup>195</sup> Software published after the promulgation of the Regulations may be registered by the Software Registration Administration Agency<sup>196</sup> ("SRAA"), and such registration is a prerequisite for bringing enforcement actions, including administrative actions or law suits.<sup>197</sup> Requirements for registration include submitting a completed software copyright registration form, submitting materials that distinguish the software, and paying a registration fee.<sup>198</sup>

The Software Regulations also contain infringement penalties.<sup>199</sup> Infringing acts include: publishing works of software without the copyright holder's consent,<sup>200</sup> publishing software that has been developed by another as one's own work,<sup>201</sup> and publicly distributing or revealing copies of software without the consent of the software copyright holder.<sup>202</sup> Anyone caught infringing is subject to civil liabilities, including being required to cease the infringing activity, eliminating its effects, or making a public apology and compensating the copyright holder for any losses.<sup>203</sup> Any illegally obtained income may be confiscated, and the infringer may be required to pay fines and be subject to other administrative punishments.<sup>204</sup>

Like the Patent Law,<sup>205</sup> however, the Software Regulations contain a loophole, requiring a determination that the infringement be done knowingly before penalties may be imposed.<sup>206</sup>

193. *Id.* art. 31(2), at 14,707.

194. *Id.* art. 31(3), at 14,707.

195. *Id.* arts. 23-25, at 14,703.

196. *Id.* art. 23, at 14,703.

197. *Id.* art. 24, at 14,703.

198. *Id.* art. 25, at 14,703.

199. *Id.* art. 30, at 14,705.

200. *Id.* art. 30(1), at 14,705.

201. *Id.* art. 30(2), at 14,705.

202. *Id.* art. 30(7), at 14,705.

203. *Id.* art. 30, at 14,705.

204. *Id.*

205. See Patent Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 62(2), at 14,229 (providing exceptions to patent infringement).

206. Software Regulations, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 32, at 14,707.

Specifically, the Regulations stipulate that if an owner of a copy of software does not know, or has no reasonable basis for knowing that the software is an infringing product, then the software's supplier, and not the owner, is liable for the infringement.<sup>207</sup> If destroying the infringing software does not adequately protect the copyright holder's interests, then the supplier may have to compensate the copyright holder for any damages.<sup>208</sup>

The Software Regulations provide two methods for settling software copyright infringement disputes: mediation and bringing suit in a People's Court.<sup>209</sup> If the parties choose mediation, and the mediation fails, or if an agreement is reached through mediation and a party fails to abide by the agreement, then a suit may be brought in a People's Court.<sup>210</sup>

The Software Regulations also contain procedures for mediating contractual disputes relating to a software product's copyright.<sup>211</sup> First, the Regulations require the parties to the dispute to engage in binding arbitration. Then, if a party fails to comply with the arbitration judgement, the other party may apply to a People's Court for enforcement.<sup>212</sup>

### 5. Implementing Rules for China's International Copyright Treaties

The International Copyright Treaties Implementing Rules<sup>213</sup> ("Treaty Implementing Rules" or "Rules") became effective in September, 1992,<sup>214</sup> and apply to the Berne Convention and all bilateral copyright protection agreements entered into by China.<sup>215</sup> The Rules modify portions of the Copyright Law,

207. *Id.* Under this section of the Regulations, a supplier of infringing software includes anyone "who knowingly suppl[ies] infringing software to others." *Id.*

208. *Id.*

209. *Id.* arts. 34-36, at 14,707-09.

210. *Id.*

211. *Id.* art. 35, at 14,707.

212. *Id.* If a party is dissatisfied with the National Copyright Administration's administrative punishments for infringement, then that party may appeal by bringing suit in a People's Court within three months of receiving notice of the administrative punishment. *Id.* art. 36, at 14,709. See *supra* note 209 and accompanying text (defining requirements to bring suit in People's Court).

213. Regulations on Implementation of International Copyright Treaties (1992), translated in CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH Int'l 1993) ¶ 11-703, 14,661 [hereinafter Treaty Implementing Rules].

214. *Id.*

215. *Id.* art. 3, at 14,661.

the Implementing Regulations of the Copyright Law, and the Regulations on Computer Software Protection.<sup>216</sup> For example, whereas the Copyright Law<sup>217</sup> was previously silent regarding the protection of unpublished foreign works, the Treaty Implementing Rules provides that Articles 20 and 21 of the Copyright Law now govern the protection of unpublished foreign works,<sup>218</sup> granting a term of protection for the life of the author plus fifty years.<sup>219</sup> The Rules also improve the protection provided to non-Chinese computer programs.<sup>220</sup>

The Treaty Implementing Rules grant new rights for copyright owners of non-Chinese works.<sup>221</sup> These new rights include the right to authorize the public performance of the work,<sup>222</sup> control the renting of copies of their works after the authorized sale of such copies,<sup>223</sup> prohibit the importation of infringing copies of their works, or the importation of copies of their works from a country where such works are not protected.<sup>224</sup> The Rules also require the copyright holder's permission to translate a published non-Chinese work into the language of a minority nationality<sup>225</sup> and for newspapers and periodicals to reprint a non-Chinese work.<sup>226</sup> Chinese citizens, or those who owned and

216. *Id.*

217. Copyright Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), arts. 20-21, at 14,571.

218. See Treaty Implementing Rules, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 5, at 14,661. "The provisions of Article 20 and Article 21 of the Copyright Law shall apply when determining the copyright protection period for an unpublished foreign work." *Id.*

219. Copyright Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), arts. 20-21, at 14,571.

220. Treaty Implementing Rules, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 7, at 14,663. Under the Treaty Implementing Rules, foreign software is now protected as a literary work for a single fifty-year term. *Id.* In comparison, the Software Regulations protect software for an initial term of 25 years, which could be extended for an additional 25 years, with the maximum term of protection not to exceed 50 years. Software Regulations, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 15, at 14,687. Additionally, under the Treaty Implementing Rules, foreign software no longer must be registered. Treaty Implementing Rules, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 7, at 14,663.

221. Treaty Implementing Rules, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), arts. 11-15, at 14,663-65.

222. *Id.* arts. 11-12, at 14,663.

223. *Id.* art. 14, at 14,663.

224. *Id.* art. 15, at 14,665.

225. *Id.* art. 10, at 14,663.

226. *Id.* art. 13, at 14,663. The exception to this requirement is the reprinting of "a current affairs article on politics, economics or other social issues." *Id.*

used legally acquired foreign works before any international copyright treaties were implemented, may continue to use such works without liability.<sup>227</sup>

## 6. Unfair Competition Protection

The Law of the People's Republic of China for Countering Unfair Competition<sup>228</sup> ("Unfair Competition Law"), which became effective in December, 1993,<sup>229</sup> provides additional protection for well-known or unique brand names and remedies for acts of unfair competition.<sup>230</sup> Unfair acts prohibited by the Unfair Competition Law include: the passing off of the registered trademarks of others,<sup>231</sup> the unauthorized use of the name, packaging or decoration "peculiar to well known goods," and the use of a decoration that is similar to those of well-known goods in such a way that the goods are confused with the well-known goods.<sup>232</sup> The Unfair Competition Law also prohibits the unauthorized use of the enterprise name or personal name of another party that causes people to mistake the products of one party for the products of the other party.<sup>233</sup> Additionally, the Unfair Competition Law prohibits forging or falsely using quality symbols and symbols of famous and high-quality goods.<sup>234</sup>

The Unfair Competition Law provides remedies for the above infringing acts in addition to those provided for in the Trademark Law<sup>235</sup> and related laws.<sup>236</sup> Someone found guilty of damaging another party through any of the prohibited acts must compensate the injured party for such damages, as well as com-

227. *Id.* art. 17, at 14,665.

228. Law of the People's Republic of China Against Unfair Competition (1993), translated in CHINA LAWS FOR FOREIGN BUSINESS, 3 Business Regulation, ¶ 16-640, 21,851 (CCH Int'l 1994) [hereinafter Unfair Competition Law] (also translated in CHINA PAT. & TRADEMARKS, Oct. 1993, at 89).

229. Unfair Competition Law, CHINA LAWS FOR FOREIGN BUSINESS, 3 Business Regulation (CCH), ¶ 16-640, 21,851.

230. Stephen Hayward, *China: Practical Protection of IP Rights*, IP ASIA, May 1994, at 2, 5.

231. Unfair Competition Law, CHINA LAWS FOR FOREIGN BUSINESS, 3 Business Regulation (CCH), art. 5(1), at 21,853.

232. *Id.* art. 5(2), at 21,853.

233. *Id.* art. 5(3), at 21,853.

234. *Id.* art. 5(4), at 21,853.

235. Trademark Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), ¶ 11-500, 14,001.

236. Unfair Competition Law, CHINA LAWS FOR FOREIGN BUSINESS, 3 Business Regulation (CCH), arts. 20-32, at 21,859-65.

pensate the injured party for the costs of investigating the prohibited acts.<sup>237</sup> Additionally, the infringer can be ordered to stop the infringing act, any illegal income can be confiscated, and a fine may be imposed.<sup>238</sup> If the infringement is serious,<sup>239</sup> the infringer may lose its business license and be criminally prosecuted.<sup>240</sup> The Unfair Competition Law also permits appeals of administrative decisions to the next higher level within fifteen days from receipt of the decision or punishment; if still dissatisfied, a party may, within fifteen days of the decision, institute proceedings in the People's Court.<sup>241</sup>

### C. The 1995 Accord

Despite China's enactment of intellectual property protection laws, piracy continued unabated into 1995.<sup>242</sup> Piracy of items such as CDs and computer software was widespread.<sup>243</sup> Consequently, the United States threatened to retaliate by imposing tariffs on Chinese exports.<sup>244</sup> Further, China wanted to be a founding member of the GATT's successor organization, the World Trade Organization ("WTO").<sup>245</sup> The goal of the 1995 Accord was to open China's market to certain U.S. products, and to create a mechanism guaranteeing the vigorous enforcement of China's intellectual property laws.<sup>246</sup> The Accord contains an Agreement Letter enumerating certain mutual responsibilities and an Action Plan enumerating the steps China is to take to enforce its intellectual property laws.<sup>247</sup>

237. *Id.* art. 20, at 21,859.

238. *Id.* art. 21, at 21,859.

239. *Id.* "If the selling of inferior or fake goods is serious enough to constitute a crime, criminal liability shall be pursued in accordance with the law." *Id.* The Unfair Competition Law does not define "serious". *Id.*

240. *Id.*

241. *Id.* art. 29, at 21,863.

242. IIPA Special 301 Letter, *supra* note 8, at 1-2.

243. Faison, *supra* note 13, at A1.

244. David E. Sanger, *President Imposes Trade Sanctions on Chinese Goods*, N.Y. TIMES, Feb. 5, 1995, at A1; Helene Cooper & Kathy Chen, *Sanctions Put U.S., China On Course to Trade War*, WALL ST. J., Feb. 6, 1995, at A3 [hereinafter *U.S. Sanctions*].

245. Marcus W. Brauchli & Craig S. Smith, *China Sets Its Sights on Joining WTO After Averting Trade War with U.S.*, WALL ST. J., Feb. 28, 1995, at A17.

246. Faison, *supra* note 6, at A1; Cooper & Chen, *supra* note 6, at A3.

247. Faison, *supra* note 6, at A1.

### 1. History of the 1995 Accord

On February 4, 1995, the United States imposed the largest trade sanctions in U.S. history when it levied one hundred percent punitive tariffs on US\$1.08 billion of Chinese exports.<sup>248</sup> The action was prompted by China's refusal to crack down on the extensive piracy of American computer software, movies and music, and by China's inability or unwillingness to enforce laws protecting intellectual property.<sup>249</sup> China responded to the sanctions by announcing retaliatory tariffs against American exports, such as compact discs and cigarettes.<sup>250</sup> China further announced that it would suspend talks with U.S. companies regarding automobile joint ventures, and that it would withhold approval for U.S. manufacturers of audio-visual products to open branch offices in China.<sup>251</sup> Three weeks later, however, on February 26, 1995, the day both governments' sanctions were to take effect, a trade war was averted when the United States and China signed an accord on the protection of intellectual property rights and market access.<sup>252</sup> This Accord has been described as the most comprehensive copyright enforcement agreement the United States has ever negotiated,<sup>253</sup> and was hailed as a victory for the Clinton Administration's strategy with China.<sup>254</sup> The Accord promised a six-month crackdown by China on copyright violators, starting two days after the signing of the Accord.<sup>255</sup> The Accord also includes China's pledge to open its market to U.S. movies, music, and computer software by immediately removing all import quotas on these American products.<sup>256</sup>

American business leaders responded to the Accord with a combination of praise and caution.<sup>257</sup> While many welcomed

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248. Sanger, *supra* note 244, at A1; *U.S. Sanctions, supra* note 244, at A3. The U.S. trade sanctions imposed on China consisted of 100% punitive tariffs on \$1.08 billion of Chinese exports, which included items such as: plastic articles, cellular telephones and answering machines, sporting goods, bicycles, and other goods such as footwear, and winter apparel. Sanger, *supra* note 244, at A1.

249. Sanger, *supra* note 244, at A1.

250. *U.S. Sanctions, supra* note 244, at A3.

251. *Id.*

252. Faison, *supra* note 6, at A1; Cooper & Chen, *supra* note 6, at A3.

253. Faison, *supra* note 6, at A1.

254. Cooper & Chen, *supra* note 6, at A3.

255. Faison, *supra* note 6, at A1.

256. *Id.*; Cooper & Chen, *supra* note 6, at A3.

257. David C. Johnston, *U.S. Business Favors Deal, With Caution*, N.Y. TIMES, Feb. 27,

the Accord and predicted that it would lead to increased U.S. media company investment in China,<sup>258</sup> others warned that China's resolve to enforce the new anti-piracy laws would be crucial.<sup>259</sup>

In broad terms, five industry groups are most likely to directly benefit from the Accord: the U.S. computer software industry,<sup>260</sup> the U.S. audio-visual industry,<sup>261</sup> the U.S. publishing industry,<sup>262</sup> U.S. patent-based industries,<sup>263</sup> and U.S. manufacturers of well-known products.<sup>264</sup> The Accord contains three Chinese government commitments: to take immediate steps to address piracy throughout China, to make long-term changes to ensure effective enforcement of intellectual property rights,<sup>265</sup> and to provide U.S. rights-holders with enhanced access to the Chinese market.<sup>266</sup>

The 1995 Accord consists of two documents.<sup>267</sup> First, the Accord contains a letter from China's Minister of Foreign Trade and Economic Cooperation, Minister Wu Yi, to the United States Trade Representative, Michael Kantor ("Agreement Letter").<sup>268</sup> Second, the Accord contains an Action Plan for Effective Protection and Enforcement of Intellectual Property Rights in China ("Action Plan" or "Plan").<sup>269</sup>

## 2. The Agreement Letter

The Agreement Letter summarizes the intent and details of

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1995, at D6; Jeffrey A. Trachtenberg et al., *Software Companies, Entertainment Firms Welcome Agreement*, WALL ST. J., Feb. 27, 1995, at A3.

258. Trachtenberg, *supra* note 257, at A6.

259. Johnston, *supra* note 257, at D6.

260. *United States and China Reach Accord on Protection of Intellectual Property Rights, Market Access*, Office of the United States Trade Representative Press Release, Feb. 26, 1995, at 5.

261. *Id.*

262. *Id.* at 6.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.* at 3.

267. Faison, *supra* note 6, at A1.

268. China-United States: Agreement Regarding Intellectual Property Rights, Feb. 26, 1995, Letter from Wu Yi, Minister of Foreign Trade and Economic Cooperation, *People's Republic of China*, to Michael Kantor, United States Trade Representative, *United States of America*, 34 I.L.M. 881 [hereinafter Agreement Letter].

269. China-United States: Agreement Regarding Intellectual Property Rights, Feb. 26, 1995, Annex, 34 I.L.M. 881, 887 [hereinafter Action Plan].

the Action Plan, addresses several additional issues not contained in the Plan, and makes a number of assurances.<sup>270</sup> For example, China pledges to increase cooperation and trade in products protected by intellectual property rights,<sup>271</sup> and to approve the establishment of a representative office of the International Federation of Phonogram Industries ("IFPI").<sup>272</sup> Furthermore, China pledges not to impose quotas, import license requirements, or other formal or informal restrictions on the importation of audio-visual and published products<sup>273</sup> and promises to permit U.S. entities to establish joint ventures with Chinese entities in China for the production and reproduction of audio-visual products.<sup>274</sup> These joint ventures will be permitted to enter into contracts with Chinese publishing enterprises for distributing, selling, displaying, and performing throughout China.<sup>275</sup> Joint ventures will be permitted immediately in Shanghai, Guangzhou, and other major cities, with the number of cities expanding to thirteen by the year 2000.<sup>276</sup> Joint ventures will also be permitted in the computer software sector for the production and sale of computer software and computer software products.<sup>277</sup> The Agreement Letter also permits revenue sharing arrangements.<sup>278</sup>

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270. Agreement Letter, *supra* note 268, 34 I.L.M. at 882.

271. *Id.* at 883. "Another aspect of China's decision to develop its economy and open its markets further is increased cooperation and trade in products protected by intellectual property rights." *Id.*

272. *Id.* at 884. The Letter Agreement provides that:

China has recently approved the establishment of a representative office for the International Federation of Phonogram Industries (IFPI) and will examine and approve, when published requirements are met, the pending application of the relevant entity for the verification of motion picture copyright, as well as other entities involved in copyright verification.

*Id.*

273. *Id.* "China confirms that it will not impose quotas, import license requirements, or other restrictions on the importation of audio-visual and published products, whether formal or informal." *Id.*

274. *Id.* "China will permit U.S. individuals and entities to establish joint ventures with Chinese entities in China in the audio-visual sector for production and reproduction." *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.* "China will continue to permit U.S. individuals and entities to enter into revenue sharing arrangements with Chinese entities. Permissible arrangements will include, for example, licensing agreements under which the U.S. entity receives a negotiated percentage of revenues generated by film products." *Id.*

The Agreement Letter sets a deadline of October 1, 1995, for China to publish all laws, rules, and regulations relating to the Agreement Letter.<sup>279</sup> While the Agreement allows China to adopt or enforce measures for protecting public morals or for maintaining public order,<sup>280</sup> the publication and importation of audio-visual products that meet these censorship regulations will be approved without any quantity restrictions.<sup>281</sup> These censorship regulations must also be published.<sup>282</sup>

Finally, the Agreement Letter enumerates certain mutual responsibilities.<sup>283</sup> Beginning June 1, 1995, the United States is to assist China in its efforts to protect intellectual property rights by mutually exchanging information and statistics on a regular basis.<sup>284</sup> Consultation regarding the Action Plan's effectiveness is to continue for three years.<sup>285</sup> The United States is to immedi-

279. *Id.*

280. *Id.* "China will adopt or enforce measures necessary to protect public morals or to maintain public order, as long as such measures are applied consistently and in a non-discriminatory, non-arbitrary manner and do not operate as a disguised restriction on trade." *Id.*

281. *Id.* The Agreement Letter provides that:

The audio-visual departments under the State Council will intensify their efforts to formulate the regulatory rules on audio-visual products which will clarify the specific censorship regulations for publication and importation of audio-visual products. For audio-visual products that meet the provisions of the censorship requirements, their publication and import will be approved without any restrictions in terms of quantity.

*Id.*

282. *Id.*

283. *Id.* at 885. Concerning the responsibilities of the United States, the Agreement Letter states that:

[T]he United States will provide assistance to China with respect to the protection and enforcement of intellectual property rights. This work will be implemented mainly through the U.S. Customs Service, U.S. Department of Justice and the United States Patent and Trademark Office.

The U.S. Customs Service is prepared to provide cooperative and reciprocal assistance to China on providing improved enforcement of intellectual property rights. This assistance and coordination could include: (1) providing training, in China, by U.S. Customs personnel, of Chinese customs officers with responsibility for enforcing intellectual property rights, and (2) providing mutually agreed relevant technical equipment to assist in the enforcement of intellectual property rights . . . . The U.S. Patent and Trademark Office will also assist in training Chinese personnel, including through providing training and documents for the people who work on verification of well-known marks and mechanisms for establishing an administrative appeals process.

*Id.*

284. *Id.*

285. *Id.*

ately revoke China's "Special 301"<sup>286</sup> designation,<sup>287</sup> terminate its Section 301 investigation,<sup>288</sup> and rescind Michael Kantor's February 4, 1995, order imposing increased tariffs on Chinese exports.<sup>289</sup>

### 3. The Action Plan

The Action Plan is annexed to the Agreement Letter, and was developed to provide effective enforcement of intellectual property rights in China.<sup>290</sup> The Plan requires all levels of the Chinese Government to participate in its implementation.<sup>291</sup> Additionally, the Action Plan articulates immediate short-term and long-term projects.<sup>292</sup> The Action Plan is divided into two main sections, an intellectual property rights enforcement structure ("Enforcement Structure"),<sup>293</sup> and provisions for intellectual property rights' information dissemination and training.<sup>294</sup>

#### a. Enforcement Structure of the Action Plan

The Enforcement Structure specifies the steps and procedures that will constitute the core of China's intellectual property rights enforcement program.<sup>295</sup> The Enforcement Structure consists of nine subsections,<sup>296</sup> beginning with the establishment of a State Council Working Conference on Intellectual

286. See Omnibus Trade and Competitiveness Act of 1988 (including "Special 301" provisions), 19 U.S.C. §§ 2241-2242 (1988 & Supp. V 1993) (authorizing U.S. Trade Representative to act unilaterally against countries where widespread infringement of U.S. intellectual property occurs).

287. Agreement Letter, *supra* note 268, 34 I.L.M. at 886.

288. *Id.*

289. *Id.*

290. Action Plan, *supra* note 269, 34 I.L.M. at 887.

291. *Id.* "The Peoples Governments of provinces, directly administered municipalities, autonomous regions and cities as well as government ministries and departments are to participate in the substantial reduction of intellectual property rights infringement through effective implementation of this Action Plan." *Id.*

292. *Id.*

293. *Id.* art. I, 34 I.L.M. at 887.

294. *Id.* art. II, 34 I.L.M. at 905.

295. *Id.* art. I, 34 I.L.M. at 887.

296. *Id.* The nine subsections contained in the Enforcement Structure are: the State Council Working Conference on Intellectual Property Rights and Sub-Central Working Conferences, Enforcement Task Forces, a Special Enforcement Period, Enforcement Efforts in Specific Fields, Enforcement Directly Through Administrative Agencies and Departments, Additional Administrative Actions, Customs Enforcement, the Establishment of Copyright Verification Systems, and Administrative and Regulatory Matters. *Id.*

Property Rights ("Working Conference") and sub-central working conferences ("Sub-Central Working Conferences").<sup>297</sup>

### [1] The Working Conference and Sub-Central Working Conferences

The Working Conference's mission is to centrally organize and coordinate the protection and enforcement of intellectual property rights throughout the country.<sup>298</sup> It is also to ensure that the protection provided is effective and that the rate of intellectual property right infringement is reduced.<sup>299</sup> The Working Conference is to coordinate the policies for enforcing intellectual property rights,<sup>300</sup> monitor the implementation of the laws and regulations on intellectual property rights,<sup>301</sup> and instruct and organize the relevant authorities to publicize the laws regarding intellectual property.<sup>302</sup> The Working Conference must also ensure that administrative, civil, and criminal processes and sanctions are applied consistently and uniformly.<sup>303</sup>

### [2] Enforcement Task Forces

The Enforcement Structure establishes enforcement task forces.<sup>304</sup> Under the Accord, the administrative agencies responsible for intellectual property protection will coordinate their activities and participate in enforcement task forces.<sup>305</sup> Those agencies responsible for intellectual property protection in-

297. *Id.* art. I(A), 34 I.L.M. at 887.

298. *Id.* art. I(A)(1), 34 I.L.M. at 887.

299. *Id.*

300. *Id.* art. I(A)(3), 34 I.L.M. at 888.

301. *Id.*

302. *Id.*

303. *Id.* The immediate focus of the State Council will be "on selected key regions and problems where serious efforts shall be made to investigate and tackle major cases . . . including the punishment of criminals." *Id.* art. I(A)(5)(b), 34 I.L.M. at 889.

304. *See id.* art. I(B), 34 I.L.M. at 890. This sections provides:

Administrative and other authorities responsible for intellectual property protection and enforcement including the National Copyright Administration (NCA), State Administration for Industry and Commerce (AIC), the Patent Office, and police at the national, provincial, autonomous region, and directly administered municipality and cities . . . and customs officials will coordinate their activities under the working conference system and participate in enforcement task forces.

*Id.*

305. *Id.*

clude: the National Copyright Agency ("NCA"), the State Administration for Industry and Commerce ("AIC"), the Patent Office, police at various regional levels, and customs officials.<sup>306</sup> Each agency participating in a task force is required to assist in ensuring the effective enforcement of intellectual property laws, and is not permitted to withhold such assistance.<sup>307</sup> Additionally, the Action Plan requires all levels of the Chinese Government to guarantee sufficient personnel, working expenses, and conditions for the implementation of the Action Plan.<sup>308</sup> When an infringement is discovered, the task force is authorized to impose fines, stop production of the infringing materials, revoke the production permits, and/or destroy the infringing products.<sup>309</sup>

### [3] Special Enforcement Period

While the Sub-Central Working Conferences and enforcement task forces are designed to operate over the long-term, the Enforcement Structure pledges a special six-month enforcement period that began on March 1, 1995.<sup>310</sup> During this period, the number of investigations will be increased and additional actions

306. *Id.*

307. *Id.*

308. *Id.* The stated aims of the Action Plan are to ensure that:

Each enforcement task force has all necessary legal authority and will use its resources to initiate and carry out investigations of any suspected infringement of intellectual property rights . . . . Each enforcement task force's authority includes the authority, in situations in which there is reason to believe or suspect that there has been an infringement of an intellectual property right, to enter and search any premises; review books and records for evidence of infringement; and seal suspected goods and the materials used to make them.

*Id.*

309. *Id.* art. I(B)(1)(c), 34 I.L.M. at 890. The Action Plan also gives the task forces the authority to order the infringement to cease while the infringement cases are being processed. *Id.* art. I(B)(2), 34 I.L.M. at 890. The party seeking such relief, however, is required to provide a security deposit sufficient to protect against abuse. *Id.* Both non-domestic and domestic right-holders may submit petitions to an enforcement task force for investigations and enforcement actions. *Id.* art. I(B)(6), 34 I.L.M. at 891. In serious cases, enforcement task forces may establish *ad hoc* groups for immediate action against infringement. *Id.* art. I(B)(7), 34 I.L.M. at 891. These *ad hoc* groups take action in fields such as audio-visual products, computer software, publications, and trademarks. *Id.* In addition to administrative action, cases of alleged criminal infringement are to be given to prosecutors. *Id.* art. I(B)(3), 34 I.L.M. at 891. In such cases, the Plan states that "the relevant authority will seek severe penalties commensurate with the level of infringement" and will also impose penalties, accordingly. *Id.*

310. *Id.* art. I(C)(1), 34 I.L.M. at 892.

will be taken to ensure the elimination of piracy and counterfeiting.<sup>311</sup> This special enforcement period is designed to achieve effective enforcement in geographic regions with high levels of infringing activity.<sup>312</sup> The Working Conference is charged with directing and coordinating the enforcement efforts and task forces during this initial six-month period,<sup>313</sup> and is responsible for coordinating a national intellectual property rights' information and education campaign with all relevant governmental departments.<sup>314</sup>

#### [4] Enforcement Efforts in Specific Fields

The Action Plan outlines special enforcement efforts for audio-visual products, computer software,<sup>315</sup> books, periodicals and

311. *Id.*

312. *Id.* art. I(C)(3), 34 I.L.M. at 892. During the special enforcement period, four guidelines apply:

(1) the work of investigation and punishment of infringers will focus on regions and entities where the infringing products are produced, the places of distribution, and the points of sale;

(2) efforts will be primarily directed against piracy activities involving audio-visual products, computer software, books and other publications, sound recordings, trademarks, especially well-known trademarks, patent infringement and unfair competition;

(3) each of the CD, LD and CD-ROM factories now operating in China shall be investigated during the Special Enforcement Period to determine whether they have produced or are producing unauthorized CDs, LDs or computer software in CD-ROM format. Factories subject to investigation will not be provided prior notice of visits or inspections. Those factories found not to have engaged in infringing conduct shall be re-registered and monitored on a regular basis thereafter. Those that are found to be engaging in infringing conduct shall be subject to administrative and/or judicial penalties, commensurate with the level of infringement;

(4) in respect of trademark infringement, the focus will be on prosecuting some significant cases, imposing severe penalties and widely publicizing them to demonstrate the dignity of the legal system and to deter future infringements.

*Id.* art. I(C)(4), 34 I.L.M. at 892.

313. *Id.* art. I(C)(2), 34 I.L.M. at 892.

314. *Id.*

315. *Id.* art. I(D)(1), (2), 34 I.L.M. at 893. As part of the enforcement efforts in the fields of audio-visual products and computer software, the Action Plan provides that "[e]nforcement task forces will complete the investigation of production lines suspected of producing infringing CDs, LDs, and CD-ROMs including computer software . . . . [i]n addition, relevant units engaged in reproduction, publication, import, export, wholesale, leasing, operation, or public performance of these products will be investigated." *Id.* art. I(D)(1)(a), 34 I.L.M. at 893.

other printed works,<sup>316</sup> and trademarks.<sup>317</sup> The Plan calls for special enforcement efforts aimed at protecting the intellectual property rights of audio-visual products and computer software copyright holders.<sup>318</sup> For example, task forces were to complete their investigation of factories suspected of producing infringing products by July 1, 1995,<sup>319</sup> and investigate the relevant entities engaged in the reproduction, publication, import, export, wholesale, leasing, operation, or public performance of these products.<sup>320</sup> All audio-visual administration departments, copyright administration departments, and departments in charge of industry and commerce administration, are to join enforcement task force efforts to comprehensively investigate all production lines of CDs, LDs and CD-ROMs.<sup>321</sup> Repeat offenders<sup>322</sup> are to have their relevant permits revoked<sup>323</sup> and serious repeat offenders will have their business licenses revoked by the AIC.<sup>324</sup> After the AIC revokes a license another will not be granted for at least three years.<sup>325</sup>

Parallel enforcement efforts are also provided to combat

316. *Id.* art. I(D)(3), 34 I.L.M. at 896. Regarding books, periodicals, and other printed works, "supervision and monitoring of the distribution of publications will be improved since piracy of publications is absolutely banned." *Id.* art. I(D)(3)(a), 34 I.L.M. at 896.

317. *Id.* art. I(D)(4), 34 I.L.M. at 896. Regarding special efforts for trademarks, the Action Plan states that "[s]ince trademark counterfeiting and infringement is illegal, the working conferences and enforcement task forces will investigate and punish trademark infringement promptly and strictly." *Id.* art. I(D)(4)(a), 34 I.L.M. at 896.

318. *Id.* art. I(D)(1), 34 I.L.M. at 893.

319. *Id.* art. I(D)(1)(a), 34 I.L.M. at 893.

320. *Id.* Factories designated as having engaged in infringing activities "will be punished through seizure and forfeiture of infringing product and required to pay compensation adequate to compensate the loss which the infringed party suffered . . . and will pay serious fines commensurate with the level of infringement." *Id.* art. I(D)(1)(b), 34 I.L.M. at 893. Further, factories found to be engaging in "serious infringing production" will have their business licenses revoked. *Id.*

321. *Id.* art. I(D)(2), 34 I.L.M. at 893. The Action Plan makes it illegal to operate an audio-visual business without obtaining the necessary permits and licenses. *Id.* art. I(D)(2)(a)(i), 34 I.L.M. at 894. The Action Plan promises that the audio-visual administration and the copyright administration will conduct "comprehensive inspections and investigations . . . [of establishments] that publish, reproduce, wholesale, retail, rent out, or perform" audio-visual products. *Id.* art. I(D)(2)(a)(i), (ii), 34 I.L.M. at 894.

322. *See id.* art. I(D)(2)(a), 34 I.L.M. at 894 (defining repeat offenders as those infringing on more than one occasion).

323. *Id.*

324. *Id.*

325. *Id.*

computer software infringement.<sup>326</sup> The Working Conference is required to organize and coordinate the AIC, police, copyright administration, and other relevant departments in an effort to inspect, on a continual basis, any establishments that commercially reproduce, sell, or rent computer software.<sup>327</sup> Software retailers must be licensed<sup>328</sup> and maintain an accurate record of inventory, including the origin of any software.<sup>329</sup> If a retailer cannot show that it purchased the software from an individual or entity with a valid business license, then the product's source will be investigated,<sup>330</sup> and any individual or entity that reproduces or sells the unlicensed software will be punished through both judicial and administrative means.<sup>331</sup>

The Action Plan also mandates special enforcement efforts to protect books, periodicals, and other printed works from copyright infringement.<sup>332</sup> In order to improve the supervision and monitoring of the distribution of publications, all localities are required to consolidate printing firms within their areas of jurisdiction and to punish any enterprises that print pirated publications.<sup>333</sup> The business licenses of those engaged in such illegal activity are to be revoked.<sup>334</sup> Special enforcement actions for trademarks are also enumerated.<sup>335</sup> These include investigating and punishing trademark infringement promptly and strictly,<sup>336</sup> and authorizing trademark agents who act on behalf of Chinese individuals and entities to also act on behalf of foreign individuals and entities.<sup>337</sup>

326. *Id.* art. I(D)(2)(b), 34 I.L.M. at 895.

327. *Id.* art. I(D)(2)(b)(i), 34 I.L.M. at 895.

328. *Id.*

329. *Id.*

330. *Id.* art. I(D)(2)(b)(iii), 34 I.L.M. at 896.

331. *Id.* Serious offenders are to have their business licenses revoked by the AIC office. *Id.* New licenses will not be granted for another three years. *Id.* Repeat offenders are to be subject to all administrative and judicial penalties that are "commensurate with the violation." *Id.*

332. *Id.* art. I(D)(3), 34 I.L.M. at 896.

333. *Id.*

334. *Id.* All publishers and printers are to "check with the license issuing agency to verify the [legality of the] printing license prior to undertaking the printing of books or periodicals." *Id.* art. I(D)(3)(b), 34 I.L.M. at 896. Those who do not check with the license issuing authority will be punished through "administrative and judicial means." *Id.* Any printing houses that operate without licenses will be shut down. *Id.*

335. *Id.* art. I(D)(4), 34 I.L.M. at 896.

336. *Id.* art. I(D)(4)(a), 34 I.L.M. at 896.

337. *Id.* art. I(D)(4)(b), 34 I.L.M. at 896.

## [5] Enforcement By Administrative Agencies

The Enforcement Structure contains provisions for the enforcement of intellectual property rights directly through administrative agencies and departments.<sup>338</sup> The responsible administrative authorities, including the NCA, AIC, and administrative authorities for patent affairs, are granted enforcement authority under these provisions.<sup>339</sup> These administrative agencies are required, when there is a reasonable belief of an intellectual property right infringement, to order the infringer to immediately cease its illegal activity. When an infringement is found, fines may be levied against the infringer and the infringer may be required to compensate the right-holder for any loss suffered.<sup>340</sup>

Non-Chinese and Chinese right-holders have the right to seek enforcement directly through the administrative agencies.<sup>341</sup> The Action Plan permits right-holders to submit petitions to national or local administrative agencies in order to initiate investigations and enforcement action.<sup>342</sup> Foreign right-holders are also permitted, legally, to collect information concerning the infringement of their rights, and such information will be admissible as evidence.<sup>343</sup>

## [6] Additional Administrative Enforcement Responsibilities

The Action Plan contains additional enforcement requirements for administrative agencies.<sup>344</sup> All sub-central level admin-

338. *Id.* art. I(E), 34 I.L.M. at 897.

339. *Id.* art. I(E)(3), 34 I.L.M. at 898.

340. *Id.* The agencies must refer any cases that involve suspected criminal conduct to prosecutors and revoke the business licenses of repeat offenders, refusing to grant another such license for three years. *Id.* When enforcing the intellectual property laws, the administrative and judicial authorities are required to "accept information about infringements given by the holders of intellectual property rights . . . or by other interested persons," and are to promptly "conduct investigations into the reported cases." *Id.* art. I(E)(4), 34 I.L.M. at 898.

341. *Id.* art. I(E)(5), (6), 34 I.L.M. at 898-99.

342. *Id.* art. I(E)(5), 34 I.L.M. at 898.

343. *See id.* art. I(E)(6), 34 I.L.M. at 898-99.

Foreign right holders or their representatives will be permitted to collect information by legal means concerning infringement of their rights . . . . Such information will be admissible as evidence when administrative agencies initiate investigations and handle cases and this evidence will be treated as equal to evidence collected and provided by Chinese nationals.

*Id.*

344. *Id.* art. I(F), 34 I.L.M. at 899.

istrative departments throughout China are required to jointly institute intellectual property rights protection and enforcement systems with individuals and enterprises that manufacture or sell books and computer software, or that engage in trademark printing or publishing in order to investigate possible violations.<sup>345</sup> These departments are also required to combine enforcement measures with information dissemination and education programs, including training classes for manufacturers of intellectual property products to study the intellectual property laws.<sup>346</sup> These departments are further required to intervene promptly and effectively to stop copyright pirating, trademark counterfeiting, and other intellectual property right infringement.<sup>347</sup>

#### [7] Customs Enforcement

The Enforcement Structure contains customs enforcement<sup>348</sup> provisions to better protect the intellectual property rights of all imports and exports.<sup>349</sup> This seventh section establishes a period of intensified border protection, from March 1, 1995, to October 1, 1995, for imports and exports of CDs, LDs, CD-ROMs, and trademarked goods.<sup>350</sup> During this period, China's customs officers are required to detain suspected infringing products and, if the products were determined to be infringing, to seize, forfeit, and destroy such products.<sup>351</sup> Additionally, infringers were to be punished through administrative and/or judicial means.<sup>352</sup> Pursuant to the Plan's customs enforcement provisions, new customs regulations will enter into

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345. *Id.* art. I(F)(1), 34 I.L.M. at 899.

346. *Id.* art. I(F)(2), 34 I.L.M. at 899. Training classes have mandatory examinations. *Id.* Only those passing the required examinations are eligible to receive an intellectual property rights training certificate. *Id.* These certificates will be necessary for the registration of the special permits and annual business operating licenses, needed to manufacture or sell specified intellectual property products: *Id.*

347. *Id.*

348. *Id.* art. I(G), 34 I.L.M. at 900. This section provides that "[a]ll customs offices will further intensify the protection of intellectual property rights of all imports and exports and they will be subject to customs enforcement." *Id.* art. I(G)(1), 34 I.L.M. at 900.

349. *Id.* art. I(G)(1), 34 I.L.M. at 900.

350. *Id.*

351. *Id.*

352. *Id.*

force on October 1, 1995.<sup>353</sup> These customs regulations provide that goods infringing Chinese intellectual property rights laws are prohibited from being exported from, or imported to, China.<sup>354</sup> Additionally, these customs regulations provide: (1) the application for intellectual property rights protection;<sup>355</sup> (2) the procedure for investigating and punishing intellectual property rights infringements,<sup>356</sup> and (3) the legal responsibilities and liabilities related to goods infringing intellectual property rights.<sup>357</sup>

#### [8] The Establishment of Copyright Verification Systems

The Enforcement Structure requires the establishment of copyright verification systems,<sup>358</sup> in particular, a unique identifier system,<sup>359</sup> and a title verification system.<sup>360</sup> The identifier system will protect CDs, CD-ROMs, and LDs, and was to be avail-

353. Customs Regulations of the People's Republic of China Concerning the Protection of Intellectual Property (1995), reproduced in 17 GAZETTE OF THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA 661 (1995) [hereinafter Customs Regulations] (English translation on file with *Fordham International Law Journal*).

354. *Id.* art. 3. "It is prohibited to import or export those goods infringing IP rights under the protection of the laws and administrative regulations of the People's Republic of China." *Id.*

355. *Id.* arts. 12-16. The Customs Regulations provide, in pertinent part, that: Where the holder of the IP rights with record in the State Administration of Customs has found that the suspected infringing goods are to be imported or exported, he may file an application with the customs office of the exit port or entry port for adopting measures to protect the IP rights.

*Id.* art. 12. If an applicant requests the customs office to detain suspected infringing goods, the applicant must provide a guarantee deposit equal in amount to the CIF of the imported goods or the FOB of the exported goods. *Id.* art. 14.

356. *Id.* arts. 17-27. The Customs Regulations provide, in pertinent part, that "[w]here the customs office suspects the imported or exported goods of infringing IP rights with record in the State Administration of Customs, the customs office has the right to detain the suspected goods." *Id.* art. 18.

357. *Id.* arts. 28-32. The Customs Regulations provide that:

The consignee or the consignor, who knows or should know that the imported or exported goods have been involved in an infringement of the [intellectual property rights] . . . of another person, shall be imposed, by the Customs office, a fine not exceeding the value of the CIF of imports or the FOB of the exports.

*Id.* art. 28.

358. Action Plan, *supra* note 269, art. I(H), 34 I.L.M. at 903.

359. *Id.* art. I(H)(1), 34 I.L.M. at 903.

360. *See id.* art. I(H)(2), 34 I.L.M. at 903. "All individuals or entities engaged in reproduction, production, or publishing of foreign audio-visual products or computer software in CD-ROM format must register their contracts with the . . . NCA or local copyright authorities." *Id.*

able by March 1, 1995 for CDs and CD-ROMs, and by July 31, 1995, for LDs.<sup>361</sup> Any manufacturer of CDs, LDs, and CD-ROMs that fails to comply with this requirement will be punished by administrative and judicial means.<sup>362</sup>

### [9] Administrative and Regulatory Reform

The Enforcement Structure contains additional provisions regarding administrative and regulatory reform.<sup>363</sup> These include detailed guidelines regarding verification,<sup>364</sup> determination,<sup>365</sup> and protection<sup>366</sup> of well-known trademarks,<sup>367</sup> and provisions that list various activities constituting unfair competition.<sup>368</sup>

361. *Id.* art. I(H)(1)(a), 34 I.L.M. at 903.

362. *Id.* art. I(H)(1)(b), 34 I.L.M. at 903. The title verification system imposes two requirements on all entities or individuals that reproduce, produce, or publish foreign audio-visual products or computer software in CD-ROM format. *Id.* art. I(H)(2), 34 I.L.M. at 903. First, these entities or individuals must register their contracts with the NCA or local copyright authorities. *Id.* art. I(H)(2)(a), 34 I.L.M. at 903. Second, these entities must receive title verification from the NCA and a permit authorizing the specific activity from the relevant authority. *Id.* art. I(H)(2)(b), 34 I.L.M. at 903. Beginning March 1, 1995, entities that reproduce CDs, LDs, or CD-ROMS are required to maintain a copy of the license contract and certificate of registration, and may be punished by administrative or judicial means if they do not. *Id.* art. I(H)(2)(b), (3), 34 I.L.M. at 903-04.

363. *Id.* art. I(I), 34 I.L.M. at 904.

364. *Id.* art. I(I)(1)(a), 34 I.L.M. at 904. "The Trademark Office of the AIC, when verifying whether a mark is well-known, will make its examination on a case-by-case basis." *Id.*

365. *Id.* art. I(I)(1)(b), 34 I.L.M. at 904. The Action Plan provides that:

If a owner of the trademark requests a determination concerning whether a mark is well-known, either directly or through the Customs Office, for the purpose of preventing the import or export of goods, or in connection with an administrative or judicial proceeding to determine infringement, the Trademark Office will issue a determination concerning whether the trademark is well-known within 30 days after receipt of the request.

*Id.*

366. *Id.* art. I(I)(1)(c), 34 I.L.M. at 904.

Protection of a well-known mark will extend to products or services other than those on which the mark is registered or used, to the extent such use would indicate a connection between those goods and services and the owner of the mark may adversely affect the commercial reputation of the trademark owner.

*Id.*

367. *Id.* art. I(I)(1)(a), 34 I.L.M. at 904. The Action Plan defines well-known trademarks as "those known in the relevant sector of the public, including knowledge in China resulting from the international renown of the trademark." *Id.*

368. *Id.* art. I(I)(2), 34 I.L.M. at 905. Activities listed in the Action Plan as being competitively unfair include: (1) the adoption of the trade dress, trade name, commercial indication, or trade mark or service mark of a competitor; (2) false allegations in

### b. Information Dissemination and Training

In addition to the Enforcement Structure, the Action Plan contains a section dedicated to promoting enforcement procedures through educational efforts.<sup>369</sup> This section establishes procedures and guidelines regarding issues such as training and educating authorities regarding intellectual property protection,<sup>370</sup> and collaborating with press and publication organizations to heighten awareness of the importance of protecting intellectual property rights.<sup>371</sup> The Working Conference is also required to make publicly available all of the laws and related documents regarding the authorization, management, and implementation of intellectual property rights.<sup>372</sup> Along with the Chinese Patent Office, and other relevant departments, the Working Conference is also charged with compiling and publishing guidelines for the application of intellectual property protection in China.<sup>373</sup> These guidelines will clarify the standards and procedures for protecting intellectual property rights in order to give Chinese and non-Chinese right-holders an improved understanding of the legal provisions and methods for protecting intellectual property rights in China.<sup>374</sup>

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the course of trade so as to discredit the establishment, goods, services, or industrial or commercial activities of a competitor; and (3) indications or allegations that are liable to mislead the public concerning the nature, manufacturing process, characteristics, suitability, or quality of the goods or services. *Id.*

369. *Id.* art. II, 34 I.L.M. at 905.

370. *Id.* art. II(A), 34 I.L.M. at 905. "Relevant authorities will conduct training and education on intellectual property protection across the country." *Id.*

371. *Id.* art. II(B), 34 I.L.M. at 906.

372. *Id.* art. II(C), 34 I.L.M. at 906. This section provides that:

Prior to June 1, 1995, the State Council's Office for Working Conference on Intellectual Property Rights will have compiled and published a body of laws and provisions on intellectual property rights to make publicly available the laws, provisions, regulations standards, edicts, decrees, and implementation of intellectual property rights. All intellectual property laws, regulations, provisions, standards, edicts decrees, and interpretations will be published, and those that are not published and made readily available will not be enforced.

*Id.*

373. *Id.* art. II(D), 34 I.L.M. at 906-07.

374. *Id.* Article II(D) states that:

The State Council's Office for the Working Conference on Intellectual Property Rights is charged — together with the Chinese patent Office, the Trademark Office of the PRC State Administration for Industry and Commerce, the State Copyright Administration, and other concerned departments — with compiling and publishing the "Guidelines for Patent Application and Protection in China," the "Guidelines for Trademark Application and Protection in

## II. IMPEDIMENTS TO EFFECTIVE INTELLECTUAL PROPERTY RIGHTS ENFORCEMENT IN CHINA

China's laws governing intellectual property protection contain impediments to their effective implementation.<sup>375</sup> These impediments include: inherent ambiguities and "loopholes" in China's laws,<sup>376</sup> procedural impediments,<sup>377</sup> lax enforcement,<sup>378</sup> and market barriers.<sup>379</sup> China's Patent Law, Copyright Law, and Computer Software Regulations, are all vulnerable to these impediments.<sup>380</sup>

### A. Ambiguities and Loopholes in Intellectual Property Protection

China's intellectual property laws contain ambiguities and loopholes that may impede effective intellectual property rights enforcement.<sup>381</sup> Such impediments hinder enforcement and

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China," and the "Guidelines for Copyright Protection," in which they are to clarify standards and procedures for intellectual property rights protection, so that Chinese and foreign holders of intellectual property rights can have a better understanding of the legal provisions and methods for protecting intellectual property rights in [China]. Each set of guidelines shall clearly explain all procedures and standards related to the application for, maintenance of, and enforcement of intellectual property rights.

*Id.*

375. See Jianyang Yu, *People's Republic of China*, in INTERNATIONAL PATENT LITIGATION: A COUNTRY-BY-COUNTRY ANALYSIS 1, 2 (Michael N. Miller ed., 1994) (providing criticism of China's patent protection); see also Sheng, *supra* note 1, at 171 (criticizing China's copyright protection); Kay, *supra* note 165, at 22-30 (outlining Software Regulations' shortcomings).

376. See Jeanette L. Pinard & Lian Chun-Cheng, *Patent Protection Under Chinese Law*, 1 J. CHINESE L. 69, 86 (1987) (discussing ambiguities in China's Patent Law).

377. See Jianyang Yu, *Review of Patent Infringement Litigation in the People's Republic of China*, 5 J. CHINESE L. 297, 304-07 (1991) (discussing procedural impediments to effective intellectual property protection in China).

378. See UNITED STATES TRADE REPRESENTATIVE, 1994 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 51 (1994) (discussing China's lax enforcement of intellectual property protection) [hereinafter USTR REPORT].

379. See Letter from Eric H. Smith, Executive Director and General Counsel, *International Intellectual Property Alliance*, to Frederick Montgomery, Chairman, TPSC, *Office of the U.S. Trade Representative* 3-6 (July 13, 1994) [hereinafter IIPA Market Access Letter] (regarding public comments on market access issues related to China's participation in GATT and WTO).

380. See Yu, *supra* note 375, at 2 (providing criticism of China's patent protection); see also Sheng, *supra* note 1, at 171 (criticizing China's copyright protection); Kay, *supra* note 165, at 22-30 (outlining Software Regulations' shortcomings).

381. See Pinard & Chun-Cheng, *supra* note 376, at 86 (discussing Patent Law's ambiguous language).

erode protection.<sup>382</sup> These ambiguities and loopholes exist in China's Patent Law, Copyright Law, and Computer Software Regulations.<sup>383</sup>

### 1. The Patent Laws

Commentators have criticized China's Patent Law for containing ambiguities and loopholes.<sup>384</sup> First, infringement is not specifically defined in the Patent Law.<sup>385</sup> Additionally, the Patent Law contains ambiguous and broad language.<sup>386</sup> For example, if someone uses or sells a patented product not knowing that it was made and sold without the authorization of the patentee, that person is not liable for patent infringement.<sup>387</sup> Under this exception, only actual notice is sufficient to protect a patent.<sup>388</sup> Because such a showing frequently requires an extremely high, if not impossible, burden of proof, this exception seriously erodes patent protection.<sup>389</sup> The Patent Law's ambiguous definition of the scope of use under the exception for non-authorized use of a patent in scientific research also hinders enforcement.<sup>390</sup> The scarcity of lawyers in China, both in the profession and in the patent field, exacerbates these problems.<sup>391</sup>

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382. See Laurence P. Harrington, *Recent Amendments to China's Patent Law: The Emperor's New Clothes?*, 17 B.C. INT'L & COMP. L. REV. 337, 356-57 (1994) (discussing how ambiguities and loopholes in China's intellectual property protection laws hinder enforcement and erode protection); see also Pinard & Chun-Cheng, *supra* note 376, at 86 (discussing how enforcement is hampered by ambiguities in China's intellectual property protection laws).

383. See Yu, *supra* note 375, at 2 (criticizing of China's patent protection); see also Sheng, *supra* note 1, at 171 (criticizing China's copyright protection); Kay, *supra* note 165, at 22-30 (outlining Software Regulations' shortcomings).

384. See Pinard & Chun-Cheng, *supra* note 376, at 86 (noting Patent Law's loopholes and ambiguous language).

385. Yu, *supra* note 375, at 2.

386. Pinard & Chun-Cheng, *supra* note 376, at 86.

387. Patent Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 62, at 14,229.

388. Pinard & Chun-Cheng, *supra* note 376, at 86.

389. *Id.*; Harrington, *supra* note 382, at 357.

390. See Pinard & Chun-Cheng, *supra* note 376, at 86 (discussing how exceptions to infringement action make it difficult for non-Chinese patent holders to protect patent rights because exception allows "an unchallengeably broad range use of patented products or processes"). Another criticism faults the absence of specific reference to pharmaceutical and veterinary products protection even though protection is extended to these products under the revised Patent Law. USTR Report, *supra* note 378, at 52.

391. Harrington, *supra* note 382, at 356. This scarcity of trained lawyers creates problems in using the Chinese courts to enforce patent rights. *Id.*

## 2. The Copyright Laws

As with the Patent Law,<sup>392</sup> the Copyright Law's<sup>393</sup> ambiguous and overly broad language has been criticized.<sup>394</sup> For example, while the Copyright Law provides protection for works by non-Chinese authors, it is uncertain whether the definition of a non-Chinese person includes non-Chinese corporations.<sup>395</sup> Furthermore, many terms in the Law are not defined.<sup>396</sup> The Copyright Law is also silent regarding the status of citizens in Taiwan, Hong Kong, and Macau.<sup>397</sup> Additional criticisms address the Copyright Law's lack of the right of assignment.<sup>398</sup> This silence led to the accepted view that assignments of copyrights are prohibited in China.<sup>399</sup> Critics also point out that while the Copyright Law provides that disputes may be settled by mediation, there are no guidelines as to who may qualify as a mediator.<sup>400</sup>

## 3. Computer Software Regulations

Critics argue that China's Software Regulations<sup>401</sup> show many of the same shortcomings as the Patent and Copyright Laws.<sup>402</sup> Additionally, it is uncertain whether specific provisions

392. Patent Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), ¶11-600, at 14,201; see *supra* notes 384-91, and accompanying text (providing criticism of Patent Law).

393. Copyright Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), ¶11-700 at 14,561.

394. See Sheng, *supra* note 1, at 171. Regarding the Copyright Law, "[s]ome of its language is ambiguous, some fundamental questions are not answered and the commercial viability of exploiting copyright works is uncertain." *Id.*; see also Zheng Chengsi, *Special Features, Merits and Shortcomings of China's Laws for Intellectual Property Protection (Part II)*, CHINA PAT. & TRADEMARKS, April 1994, at 16 [hereinafter *Shortcomings*] (discussing Copyright Law's shortcomings).

395. Sheng, *supra* note 1, at 174.

396. *Shortcomings*, *supra* note 394, at 20. Terms left undefined in the Copyright Law include: "create," "videogram works," "non-legal person entities," and "plagiarize." *Id.*

397. Sheng, *supra* note 1, at 174.

398. *Id.*

399. *Id.*

400. Copyright Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 48, at 14,591. Sheng, *supra* note 1, at 176.

401. Software Regulations, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), ¶11-704, at 14,681.

402. See Kay, *supra* note 165, at 22 (noting shortcomings of Software Regulations); see also *supra* notes 384-391 and accompanying text (providing criticism of Patent Law); *supra* notes 392-400 and accompanying text (discussing shortcomings of Copyright Law).

of the Copyright Law apply to software.<sup>403</sup> Similarly, as with the Patent and Copyright Laws, many criticize the Regulations' ambiguous language and lack of definitions.<sup>404</sup>

The Regulations' numerous fair use exceptions are also criticized.<sup>405</sup> This criticism stems from the combination of ambiguous language and the fact that government institutions purchase large quantities of software.<sup>406</sup> Many fear that these large government purchases will result in future struggles surrounding the fair use exceptions.<sup>407</sup> Similarly, many fear that the fair use exception covering "similar software"<sup>408</sup> could be used as a defense in software infringement actions.<sup>409</sup> Critics also deride the Regulations' lack of retroactivity, and the inability of software developers to register software published prior to the enactment of the Regulations.<sup>410</sup> Indeed, the practice of software infringement is so widespread<sup>411</sup> that a loophole was created in the Regulations, exempting software published prior to the Regulations' enactment from the registration requirement.<sup>412</sup>

### B. *Procedural Impediments to Intellectual Property Protection*

Procedural impediments pose a hinderance to effective intellectual property rights protection, separate and distinct from that of the aforementioned criticisms.<sup>413</sup> The inadequacy of the procedures through which intellectual property disputes are handled may constitute a major impediment to effective protection.<sup>414</sup> For example, a conflict of interest may exist in the pat-

403. Kay, *supra* note 165, at 22.

404. *Id.* at 22, 23 n.8-9, 24 n.17, 25-26. Ambiguous language and undefined terms found in the Software Regulations include: "small number of copies" and "non-commercial purposes." *Id.* at 26.

405. *Id.* at 26.

406. *Id.*

407. *Id.*

408. See Software Regulations, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 31, at 14,707 (providing fair use exceptions).

409. Kay, *supra* note 165, at 29. There is concern over this fair use exception because "[t]he vicissitudes of 'national policies' and the uncertainty of what can or will constitute a 'national technical standard' leave a potentially huge loophole in the protection mechanism." *Id.*

410. *Id.* at 27, 30.

411. *Id.* at 30.

412. *Id.* at 27.

413. See Jianyang, *supra* note 377, at 304-07 (discussing procedural impediments to effective intellectual property protection in China).

414. *Id.*

ent administrative agency's defined roles as both administrator and adjudicator.<sup>415</sup> The Administrative Authority for Patent Affairs ("AAPA") must act as an administrative court for adjudicating patent disputes for those pursuing the AAPA route, and as a government agency for day to day patent administration.<sup>416</sup> If a patentee decides, therefore, to turn first to the AAPA to resolve a patent dispute, the patentee may be before a biased judiciary.<sup>417</sup> Furthermore, the AAPA is subordinate to the executive authority of the region and is, therefore, subject to local protectionist pressure,<sup>418</sup> compromising its impartiality.<sup>419</sup>

Administrative agencies also lack the procedural authority to handle patent infringement cases.<sup>420</sup> Thus, the AAPA lacks the power to investigate and collect patent infringement evidence and cannot issue preliminary injunctions.<sup>421</sup> Additionally, administrative agencies are not empowered to enforce their own decisions.<sup>422</sup>

Litigation proceedings in Chinese courts are also problematic.<sup>423</sup> For example, under China's Civil Procedure Law<sup>424</sup> ("Civil Procedure Law") the responsibility for discovering and collecting evidence rests primarily with the court.<sup>425</sup> The Civil

415. *Id.* at 304.

416. *Id.* at 302-3; see Patent Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 60, at 14,227 (defining Administrative Authority for Patent Affairs' ("AAPA") role).

417. Jianyang, *supra* note 377, at 304. The AAPA's involvement in patent administration may conflict with its role as an administrative court, and its impartial handling of patent infringement disputes may be "compromised due to its dual functions and its position in the administrative structure." *Id.*

418. *Id.*

419. *Id.*

420. *Id.*

421. *Id.*

422. *Id.* If an AAPA decision is appealed and error on the part of the AAPA is proven, the Court will refuse to enforce the order unless the AAPA rectifies the alleged error. *Id.* When the AAPA insists that its order was correct despite the Court's holding to the contrary, therefore, the AAPA order remains unenforced. *Id.* Further compounding this problem is that no procedure governs the resolution of such a disagreement between the AAPA and the court. *Id.*

423. *Id.* at 305-06.

424. Code of Civil Procedure of the People's Republic of China (1991), translated in CHINA LAWS FOR FOREIGN BUSINESS, 3 Business Regulation, ¶ 19-201, 23,891 (CCH Int'l 1992) [hereinafter Civil Procedure Law] (also translated in CHINESE L. & PRAC., June 17, 1991, at 15).

425. Civil Procedure Law, CHINA LAWS FOR FOREIGN BUSINESS, 3 Business Regulation (CCH), art. 64, at 23,919. This article reads in pertinent part: "if a people's court considers certain evidence to be of relevance to a case, the people's court shall itself

Procedure Law, however, requires a party to present evidence to support its claims.<sup>426</sup> Consequently, a party may need to rely on the court to order the opposing party to provide required evidence.<sup>427</sup> Since neither the party nor its lawyer are granted enforceable rights to collect evidence, the party's lawyer is limited to reviewing the court's records.<sup>428</sup> Critics also argue that procedural problems emerged as a result of the promulgation of China's Administrative Litigation Law<sup>429</sup> ("Administrative Law").<sup>430</sup> Specifically, when an AAPA decision is appealed to a court, neither the Administrative Law nor the Civil Procedure Law indicates which law applies.<sup>431</sup>

### C. *Lax Enforcement of Intellectual Property Protection Laws*

Lax enforcement is evident in the widespread piracy of copyrighted works.<sup>432</sup> Despite the new copyright regulations,<sup>433</sup> piracy in China remains rampant.<sup>434</sup> Critics of China's lax enforcement point to the existence of twenty-six CD and LD factories in Central and South China.<sup>435</sup> The production capacity of these factories is seventy-five million units per year, although the domestic demand is only five million units per year.<sup>436</sup> Critics,

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collect and examine evidence" *Id.*; see Jiangyang, *supra* note 375, at 10 (stating that under China's Civil Procedure Law responsibility for discovering and collecting evidence lies with court).

426. Civil Procedure Law, CHINA LAWS FOR FOREIGN BUSINESS, 3 Business Regulation, art. 64, at 23,919.

427. *Yu*, *supra* note 375, at 10.

428. *Id.* at 10-11.

429. Law of Administrative Litigation of the People's Republic of China (1989), translated in CHINA LAWS FOR FOREIGN BUSINESS, 3 Business Regulation, ¶ 19-558, 24,551 (CCH Int'l 1989) [hereinafter Administrative Litigation Law] (also translated in CHINESE L. & GOV'T, Fall 1991, at 22).

430. Jiangyang, *supra* note 377, at 305.

431. *Id.* This ambiguity is significant because the applicable law determines the parties on appeal. *Id.* For example, under the Civil Procedure Law, the patentee and the alleged infringer are the parties to both the patent infringement action and the appellate action. *Id.* Under the Administrative Law, however, the parties would be the party dissatisfied with the prior decision and the AAPA. *Id.* Therefore, the party prevailing in the first instance must rely on the AAPA to defend its interests. *Id.*

432. USTR REPORT, *supra* note 378, at 51.

433. See *supra* notes 123-64 and 213-27 and accompanying text (discussing China's Copyright Law and Treaty Implementing Rules).

434. USTR REPORT, *supra* note 378, at 51. In fact, pirated goods are "omnipresent in China's major commercial centers." *Id.*

435. *Id.*

436. IIPA Special 301 Letter, *supra* note 8, at 5.

therefore, believe that these factories export over fifty million pirated CDs and LDs annually.<sup>437</sup> Efforts to close these factories have failed.<sup>438</sup> Critics further speculate that many of these plants are closely connected to senior Chinese Government officials.<sup>439</sup>

Commentators also note that Chinese factories and State-Owned Enterprises ("SOEs") play a prominent role in producing and distributing pirated video games.<sup>440</sup> These SOEs openly advertise their infringing products throughout China<sup>441</sup> and, like the CD factories, are believed to export large quantities of infringing video games to the rest of the world.<sup>442</sup> Furthermore, the titles of many of the infringing games are based on U.S. movie or character titles, thereby infringing the trademarks and copyrights of many U.S. companies.<sup>443</sup>

Critics further argue that piracy is wide-spread in China's television industry.<sup>444</sup> There are over five hundred television stations in China that broadcast U.S. motion pictures without the authorization of the Motion Picture Association ("MPA").<sup>445</sup> Furthermore, pirated and/or unauthorized MPA products,<sup>446</sup> are openly used for programming by hundreds of cable systems and are routinely shown on the in-house movie systems of major Chinese hotels.<sup>447</sup> Infringing products are also shown in Chi-

437. USTR REPORT, *supra* note 378, at 51.

438. IIPA Special 301 Letter, *supra* note 8, at 5.

439. *Id.*

440. Letter from James L. Bikoff, Esq., *Arter & Hadden*, to Irving A. Williamson, Chairman, *Section 301 Committee, Office of the U.S. Trade Representative* 2 (Aug. 9, 1994) [hereinafter *Nintendo 301 Letter One*] (commenting on video game piracy in China, in response to the Special 301 investigation). Infringing Nintendo video games in China have caused losses to the video game industry estimated between US\$200 million and US\$1.2 billion. *Id.* at 1. It has also been estimated that over 20,000,000 counterfeit Nintendo video game 8-bit hardware and at least 60,000,000 counterfeit Nintendo 8-bit video games were sold in China before July 18, 1994. Letter from James L. Bikoff, Esq. and David I. Wilson, Esq., *Arter & Hadden*, to Carolyn Frank, Secretary, *Trade Policy Staff Committee, Office of the United States Trade Representative* 1 (July 18, 1994) [hereinafter *Nintendo 301 Letter Two*] (concerning market access problems regarding video games in China).

441. *Nintendo 301 Letter One*, *supra* note 440, at 2.

442. *Id.* at 3.

443. *Id.* at 2.

444. MOTION PICTURE ASSOCIATION, *TRADE BARRIERS TO EXPORTS OF U.S. FILMED ENTERTAINMENT: 1995 REPORT TO THE UNITED STATES TRADE REPRESENTATIVE* 153 (1995) [hereinafter *MPA REPORT*].

445. *Id.*

446. *Id.*

447. *Id.*

nese mini-theaters throughout China.<sup>448</sup>

According to the U.S. Trade Representative's office, the impotence of China's designated copyright enforcement agency, the NCA, compounds this lax enforcement.<sup>449</sup> The NCA is under-staffed and poorly funded, and has no clearly designated function.<sup>450</sup> Moreover, the NCA can only enforce laws and regulations with the assistance of local ministries, many of which often have a financial stake in the pirating activities.<sup>451</sup> Conflicts of interest exist throughout the entire enforcement structure, and, consequently, powerful local interests are able to rebuff Central Government investigations into piracy.<sup>452</sup> Even when local authorities are not directly involved in the pirating activities, enforcement is often hampered by local authorities who are more interested in encouraging investment and economic development than enforcing intellectual property laws.<sup>453</sup>

Similar problems persist in the enforcement of trademark protection despite the revised laws<sup>454</sup> and new criminal penalties.<sup>455</sup> Direct access to administrative remedies and the courts is denied to non-Chinese persons, with non-Chinese petitioners forced to work through five designated agents,<sup>456</sup> who often appear to have direct ties to the infringers.<sup>457</sup> Critics deplore both the prolonged duration of investigations, during which U.S. companies are denied information on the status of the investigation, and the practice of arriving at solutions through "back door" processes that ignore due process and principles of transparent justice.<sup>458</sup> As with copyright protection, the courts are often influenced by local interests, thus further eroding the courts' impartiality.<sup>459</sup>

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448. *Id.* Motion Picture Association member company titles can often be found in China within a few weeks of their theatrical release in the United States. *Id.*

449. USTR REPORT, *supra* note 378, at 51.

450. *Id.*

451. *Id.* at 51-52.

452. *Id.* at 52.

453. *Id.*

454. See *supra* notes 67-96 and accompanying text (discussing China's Trademark Law).

455. USTR REPORT, *supra* note 378, at 52.

456. *Id.*

457. *Id.*

458. *Id.*

459. *Id.*

D. *Market Barriers Undermine Intellectual Property Protection*

China maintains a shadowy and unwritten system of quotas for films, video, and television.<sup>460</sup> There are *de facto* bans on non-Chinese ownership in joint ventures for producing and distributing recorded music,<sup>461</sup> and also on establishing joint ventures for publishing.<sup>462</sup> There is also an informal quota on the number of non-Chinese recordings that can be released annually in China.<sup>463</sup> Additionally, while an import license is required to import books into China, these licenses are not available to non-Chinese publishers.<sup>464</sup> Non-Chinese publishers are not permitted to prepare translations of their books; instead, they must have their books translated and published locally.<sup>465</sup> China also imposes export performance requirements<sup>466</sup> on U.S. products manufactured in China, and imposes prohibitive tariff rates for many imported U.S. products.<sup>467</sup>

Commentators argue that these market access barriers facilitate intellectual property piracy and impede enforcement.<sup>468</sup> The prohibitive tariff rates discourage the importation into China of authentic goods, leading to the saturation of the Chinese market with infringing products.<sup>469</sup> Consequently, foreign licensees are unable to compete in China due to the presence of large quantities of these infringing products.<sup>470</sup> Preventing full

460. MPA REPORT, *supra* note 444, at 152.

461. See IIPA Market Access Letter, *supra* note 379, at 3.

462. *Id.* at 5.

463. *Id.* at 4. As of July, 1994, the quota was 120 foreign record releases per year. *Id.*

464. *Id.* at 5.

465. *Id.*

466. Nintendo 301 Letter Two, *supra* note 440, at 2. The export performance requirements reduce the numbers of genuine products manufactured in China which are retained for sale in China. *Id.* For example, only about thirty percent of the production of one of Nintendo's two manufacturing partners in China can be retained for sale in China. *Id.*

467. PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, SUBMISSION OF THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA FOR THE "SPECIAL 301" REPORT ON INTELLECTUAL PROPERTY PROTECTION 3 (Feb. 13, 1995). As of February, 1995, China's tariff rates for pharmaceutical products was approximately fifteen to twenty percent. *Id.* Similarly, as of July, 1994, there was a fifty percent tariff on video games and video game equipment. Nintendo 301 Letter Two, *supra* note 440, at 2.

468. Nintendo 301 Letter Two, *supra* note 440, at 2.

469. *Id.*

470. See *id.* at 3. "U.S. licensees are unable to compete in China because of the presence of vast quantities of infringing [products] . . . and the prohibitive tariffs on [products] . . . imported into China". *Id.*

market access thus limits supply in the face of a rising demand that can only be satisfied by pirated copies of the product.<sup>471</sup>

III. *THE 1995 ACCORD SHOULD BE MODIFIED BECAUSE IT FAILS TO ADDRESS MANY OF THE IMPEDIMENTS TO EFFECTIVE INTELLECTUAL PROPERTY PROTECTION IN CHINA*

China's laws and the enforcement of these laws do not meet the international standards in TRIPs.<sup>472</sup> Furthermore, the 1995 Accord is silent regarding impediments other than enforcement, such as ambiguities in the laws and fair use exceptions.<sup>473</sup> The 1995 Accord, however, does provide procedural reforms and expanded enforcement measures.<sup>474</sup> There is little prospect, however, that the 1995 Accord will immediately bring China's intellectual property protection up to international standards.<sup>475</sup>

A. *China's Intellectual Property Protection Laws Fail to Meet the International Standards Embodied in TRIPs*

China's intellectual property protection does not include many of the elements required in TRIPs:<sup>476</sup> China does not expressly extend Berne Convention protection to computer software,<sup>477</sup> China's laws are silent on trade secrets,<sup>478</sup> and the Patent Law probably will not provide for the protection of layout-designs of integrated circuits as required by TRIPs.<sup>479</sup> There

471. *Id.* at 2.

472. *See supra* notes 38-60 and accompanying text (providing TRIPs requirements); *see also supra* notes 61-241 and accompanying text (presenting China's intellectual property laws).

473. *See supra* notes 242-374 and accompanying text (discussing 1995 Accord); *see also supra* notes 375-471 (providing impediments to effective intellectual property protection in China).

474. *See supra* notes 242-374 and accompanying text (discussing provisions of 1995 Accord).

475. *See supra* notes 242-374 and accompanying text (presenting 1995 Accord's provisions).

476. *See supra* notes 61-241 and accompanying text (providing China's protection of intellectual property); *see also supra* notes 38-60 and accompanying text (discussing TRIPs requirements).

477. *See supra* notes 165-212 and accompanying text (providing China's computer software protection).

478. *See supra* notes 61-241 and accompanying text (presenting China's intellectual property protection laws).

479. *See supra* notes 97-122 and accompanying text (discussing China's patent protection).

are also several gaps between the enforcement standards articulated in TRIPs and China's enforcement provisions, particularly: procedures for remedying acts of infringement,<sup>480</sup> written decisions and evidence,<sup>481</sup> injunctive relief,<sup>482</sup> and damages.<sup>483</sup>

### 1. Berne Convention Protection of Computer Software

TRIPs requires parties to extend Berne Convention protection of literary works to computer software.<sup>484</sup> China does not, however, expressly extend Berne Convention protection to computer software.<sup>485</sup> While China's Copyright Law provides copyright protection for computer software,<sup>486</sup> such protection has been ineffective and impractical,<sup>487</sup> and contains no references to the Berne Convention.<sup>488</sup> While the Software Regulations aim to fill the loopholes left by the Copyright Law, again, no references are made to providing Berne Convention protection to computer software.<sup>489</sup> Although China acceded to the Berne

480. See *supra* note 57 and accompanying text (providing TRIPs civil and administrative procedures and remedies); see also *supra* notes 423-431 and accompanying text (criticizing China's litigation proceedings).

481. See *supra* note 57 and accompanying text (providing TRIPs requirements concerning timely, detailed, written notice); see also *supra* notes 423-431 and accompanying text (criticizing China's litigation proceedings).

482. See *supra* note 58 and accompanying text (discussing TRIPs injunctive relief); see also *supra* notes 61-241 and accompanying text (presenting China's protection of intellectual property).

483. See *supra* note 59 and accompanying text (discussing TRIPs damages provisions); see also Trademark Implementing Rules, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 43, at 14,105 (providing trademark damage provisions); Copyright Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), arts. 45-46, at 14,587-91 (presenting Copyright Law's provisions for legal liabilities and damages).

484. TRIPs Agreement, *supra* note 20, art. 10(1), 33 I.L.M. at 1201; see *supra* note 41 and accompanying text (providing TRIPs protection of computer software).

485. See Software Regulations, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), arts. 9-29, at 14,685-705 (outlining protection given to computer software); see also *supra* notes 165-212 and accompanying text (discussing China's protection of computer software).

486. Copyright Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 3(8), at 14,563; see Software Regulations, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), ¶ 11-704, 14,681 (providing China's computer software protection).

487. Liu, *supra* note 165, at 469; see *supra* notes 401-12 and accompanying text (discussing criticism of China's computer software protection).

488. See *supra* notes 165-212 and accompanying text (outlining China's computer software protection).

489. *Id.*

Convention in June, 1993,<sup>490</sup> the Berne Convention does not require that China, as a party to the Convention, extend such protection to computer software.<sup>491</sup> In light of China's failure to include references to the Berne Convention in either of its two principle software copyright protection laws, one may conclude that China does not extend Berne Convention protection.

## 2. Protection of Layout-Designs of Integrated Circuits

TRIPS requires intellectual property protection of layout-designs of integrated circuits.<sup>492</sup> China's laws, however, provide no such protection.<sup>493</sup> Because topographies are considered unique and distinct from patentable subject matters, they require a *sui generis* form of protection.<sup>494</sup> It is unlikely, therefore, that the Patent Law's protection of "inventions-creations," meaning inventions, utility models, and designs,<sup>495</sup> covers this *sui generis* subject-matter. Furthermore, unlike China's supplementary provisions for protecting computer software protection, no supplementary provisions have been enacted to protect layout-designs.<sup>496</sup> Consequently, topographies of integrated circuits continue to go unprotected in China.

## 3. Protection of Trade Secrets

TRIPS requires parties to provide protection for trade secrets.<sup>497</sup> China's intellectual property laws are silent on this issue, and no existing Chinese laws currently exist for protecting

490. See *supra* note 5 and accompanying text (discussing China's accession to Berne Convention).

491. Berne Convention, *supra* note 5, 102 Stat. 2853, 828 U.N.T.S. 221.

492. TRIPS Agreement, *supra* note 20, art. 35, 33 I.L.M. at 1211; see *supra* note 46 and accompanying text (providing TRIPS protection of layout-designs of integrated circuits).

493. See *supra* notes 61-241 and accompanying text (presenting China's intellectual property protection laws).

494. Correa, *supra* note 47, at 8.

495. See Patent Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 2, at 14,201 (defining "inventions-creations" as inventions, utility models, and designs).

496. See Software Regulations, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), ¶ 11-704, at 14,681 (providing computer software protection supplementary to China's Copyright Law).

497. TRIPS Agreement, *supra* note 20, art. 39, 33 I.L.M. at 1212; see *supra* note 47 and accompanying text (providing TRIPS protection for trade secrets).

trade secrets.<sup>498</sup> The seriousness of this omission is underscored by the fact that a majority of working technologies are based on trade secrets,<sup>499</sup> and that it has been reported that trade secrets were of great importance for nearly seventy percent of the affected sales, second in importance only to trademarks.<sup>500</sup>

#### 4. Judicial and Administrative Provisions

China's intellectual property laws do not fulfill all of the enforcement measures required by TRIPs.<sup>501</sup> China's laws are deficient with respect to procedures for remedying acts of infringement,<sup>502</sup> written decisions and evidence,<sup>503</sup> injunctive relief,<sup>504</sup> and damages.<sup>505</sup> Although China's laws are less deficient with respect to damages, they still are not fully consistent with TRIPs.<sup>506</sup>

##### a. Procedures to Remedy Acts of Infringement

TRIPs requires that remedies for acts of infringement be decided on the merits of the case, preferably in writing, and based

498. See *supra* notes 61-241 and accompanying text (providing China's protection of intellectual property).

499. Correa, *supra* note 47, at 32.

500. *Id.*

501. See *supra* notes 61-241 and accompanying text (presenting China's intellectual property protection laws); see also *supra* notes 38-60 and accompanying text (discussing TRIPs requirements).

502. See *supra* note 57 and accompanying text (providing TRIPs civil and administrative procedures and remedies); see also *supra* notes 423-31 and accompanying text (criticizing China's litigation proceedings).

503. See *supra* note 57 and accompanying text (providing TRIPs requirements concerning timely, detailed, written notice); see also *supra* notes 423-31 and accompanying text (criticizing China's litigation proceedings).

504. See *supra* note 58 and accompanying text (presenting TRIPs injunctive relief); see also *supra* notes 61-241 and accompanying text (providing China's protection of intellectual property).

505. See *supra* note 59 and accompanying text (discussing TRIPs damages provisions); see also Trademark Implementing Rules, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 43, at 14,105 (providing trademark damage provisions); Copyright Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), arts. 45-46, at 14,587-91 (presenting Copyright Law's provisions for legal liabilities and damages).

506. See *supra* note 59 and accompanying text (discussing TRIPs damages provisions); see also Trademark Implementing Rules, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 43, at 14,105 (providing trademark damages provisions); Copyright Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), arts. 45-46, at 14,587-91 (presenting Copyright Law's provisions for legal liabilities and damages).

only on evidence that the parties had the opportunity to present.<sup>507</sup> TRIPs also requires that defendants be given timely, detailed, written notice of enforcement proceedings, with all parties allowed to present all relevant evidence.<sup>508</sup> China's intellectual property protection laws do not provide detailed procedures, and it is unclear whether such procedures are provided by China's Civil Procedure or Administrative Litigation Laws.<sup>509</sup> For example, both the Civil Procedure and Administrative Litigation Laws include provisions for serving notice of claims, but such notice is only minimal, and it is unclear whether it would satisfy the TRIPs mandate. The Civil Procedure Law requires only that a procedural document be served directly on the person to be served,<sup>510</sup> and the Administrative Law similarly states that the People's Court shall send a copy of the complaint to the defendant within five days of the date on which the case is accepted.<sup>511</sup> It is not clear whether these procedures fulfill the TRIPs requirements of timely and detailed written notice.<sup>512</sup>

#### b. Written Decisions and Evidence

TRIPs prefers written decisions and the opportunity to offer evidence.<sup>513</sup> Again, China's intellectual property protection laws make no reference to these procedural matters, so one must turn to the Civil Procedure and Administrative Litigation laws.<sup>514</sup> With regards to provisions requiring written decisions, the Ad-

507. TRIPs Agreement, *supra* note 20, art. 41, 33 I.L.M. at 1213-14; *see supra* note 56 and accompanying text (providing TRIPs obligations for enforcing intellectual property rights).

508. TRIPs Agreement, *supra* note 20, art. 42, 33 I.L.M. at 1214; *see supra* note 57 and accompanying text (providing TRIPs civil and administrative procedures and remedies).

509. *See supra* notes 423-31 and accompanying text (discussing criticism of China's litigation proceedings).

510. Civil Procedure Law, CHINA LAWS FOR FOREIGN BUSINESS, 3 Business Regulation (CCH), art. 78, at 23,923.

511. Administrative Litigation Law, CHINA LAWS FOR FOREIGN BUSINESS, 3 Business Regulation (CCH), art. 43, at 24,573.

512. *See supra* note 57 and accompanying text (providing TRIPs requirements concerning timely, detailed, written notice).

513. TRIPs Agreement, *supra* note 20, art. 41(3), 33 I.L.M. at 1214; *see supra* note 56 and accompanying text (presenting TRIPs obligations for enforcing intellectual property rights).

514. *See supra* notes 61-241 and accompanying text (providing China's intellectual property protection laws); *see also supra* notes 423-31 and accompanying text (discussing criticism of China's litigation proceedings).

ministrative Law makes no mention of how decisions are to be made; the Civil Procedure Law states only that judgements and rulings made in writing should contain the cause of the action, the facts and reasons ascertained in the judgement, including the applicable law, and the result of the judgement.<sup>515</sup> The Civil Procedure Law, however, does not require written decisions; in fact, it provides for nonwritten decisions by allowing verbal rulings to be entered in the written record.<sup>516</sup>

With respect to the opportunity to present all relevant evidence in a dispute, China's laws are inconsistent with the TRIPs standards.<sup>517</sup> As discussed above, the power to collect evidence in Chinese cases resides with the court.<sup>518</sup> While the Civil Procedure Law provides that a party is responsible for providing evidence in support of its allegations, the means of obtaining this evidence is greatly limited, if not nonexistent.<sup>519</sup> Usually, only the court has the right to investigate and collect evidence.<sup>520</sup> The Administrative Litigation Law contains similar provisions, plus one that bars the defendant from collecting evidence from the plaintiff or witness on its own during the proceedings.<sup>521</sup>

### c. Injunctive Relief

TRIPs requires that courts be authorized to order preliminary injunctive relief.<sup>522</sup> Such relief would require an infringer to cease all infringing activities during the course of the proceedings.<sup>523</sup> China's intellectual property laws do not provide

515. Civil Procedure Law, CHINA LAWS FOR FOREIGN BUSINESS, 3 Business Regulation (CCH), art. 138, at 23,951.

516. *Id.* art. 140, at 23,951-53.

517. See *supra* notes 38-60 and accompanying text (providing TRIPs requirements); see also *supra* notes 61-241 and accompanying text (presenting China's protection of intellectual property); *supra* notes 423-31 and accompanying text (criticizing China's litigation proceedings).

518. See *supra* notes 423-31 and accompanying text (presenting criticism of China's litigation proceedings).

519. Civil Procedure Law, CHINA LAWS FOR FOREIGN BUSINESS, 3 Business Regulation (CCH), art. 64, at 23,919; see *supra* notes 423-431 and accompanying text (criticizing China's litigation proceedings).

520. Civil Procedure Law, CHINA LAWS FOR FOREIGN BUSINESS, 3 Business Regulation (CCH) arts. 64-65, at 23,919.

521. Administrative Litigation Law, CHINA LAWS FOR FOREIGN BUSINESS, 3 Business Regulation (CCH), art. 33, at 24,561.

522. TRIPs Agreement, *supra* note 20, art. 44, 33 I.L.M. at 1215; see *supra* note 58 and accompanying text (providing TRIPs injunctive relief).

523. TRIPs Agreement, *supra* note 20, art. 44, 33 I.L.M. at 1215.

for injunctive relief.<sup>524</sup> Instead, Chinese courts may only order an infringer to cease the infringing activity after a judgement of infringement is entered.<sup>525</sup> Additionally, neither the Civil Procedure nor the Administrative Litigation Laws expressly authorize preliminary injunctions.<sup>526</sup> It has been suggested that injunctive relief could be made available pursuant to Articles 92 and 94 of the Civil Procedure Law, which provide that courts may grant provisional property remedies using other forms permitted by law for reasons other than ensuring the execution of a court judgement.<sup>527</sup> The fact, however, is that clear and unambiguous provisions for injunctive relief are not provided by China's laws.<sup>528</sup>

#### d. Damages

TRIPs provides that authorities should have the right to order infringers to pay the right-holder damages to adequately compensate for injuries suffered, including attorneys fees, as well as the right to recover the profits from the infringing act and the right to dispose of the infringing goods.<sup>529</sup> TRIPs also provides that these remedies should be severe, to deter further infringements.<sup>530</sup> TRIPs further requires criminal penalties in cases of trademark counterfeiting or copyright piracy on a commercial scale.<sup>531</sup>

China's intellectual property laws do provide for remedies as prescribed by TRIPs such as, destroying the infringing goods

524. *See supra* notes 61-241 and accompanying text (providing China's intellectual property protection laws).

525. Trademark Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 39, at 14,063; Patent Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 60, at 14,227; Copyright Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 45, at 14,587.

526. *See supra* notes 423-31 and accompanying text (presenting criticism of China's litigation proceedings).

527. Civil Procedure Law, CHINA LAWS FOR FOREIGN BUSINESS, 3 Business Regulation (CCH), arts. 92, 94, at 23,929.

528. *See supra* notes 61-241 and accompanying text (providing China's intellectual property protection).

529. TRIPs Agreement, *supra* note 20, arts. 45-46, 33 I.L.M. at 1215; *see supra* note 59 and accompanying text (discussing TRIPs damages provisions).

530. TRIPs Agreement, *supra* note 20, art. 41, 33 I.L.M. at 1213-14; *see supra* note 56 and accompanying text (providing TRIPs requirements regarding enforcement procedures and remedies).

531. TRIPs Agreement, *supra* note 20, art. 61, 33 I.L.M. at 1220.

and ordering the infringer to compensate the right-holder.<sup>532</sup> While criminal penalties exist for commercial copyright piracy and trademark counterfeiting,<sup>533</sup> there is reason to doubt that the remedies proposed by Chinese officials are actually meant to serve as deterrents.<sup>534</sup> In one recent case involving Microsoft, an infringer illegally copied and exported over 220,000 copies of a computer operating system, resulting in US\$22 million in lost revenues for the right-holder.<sup>535</sup> The Chinese court, however, fined the infringer US\$260.<sup>536</sup> Such penalties are unlikely to deter further infringements.<sup>537</sup>

### B. *Impediments Remain Unaddressed by the 1995 Accord*

The 1995 Accord does not address all of the impediments to effectively implementing China's intellectual property laws.<sup>538</sup> Unfortunately, the Accord is silent with respect to the many ambiguities and loopholes in China's intellectual property laws,<sup>539</sup> as well as the problem of China's market barriers.<sup>540</sup> The Accord, however, does provide for procedural reforms<sup>541</sup> and sig-

532. See *supra* notes 61-241 and accompanying text (providing China's intellectual property protection laws).

533. Trademark Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), art. 40, at 14,065; Supplementary Trademark Provisions, *supra* note 73, art. 96; Decision of the Standing Committee of the National People's Congress Concerning Punishment of the Crime of Copyright Infringement, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), ¶ 11-701, at 14,597.

534. See *Microsoft Seeks \$22 Million In Chinese Pirating Case*, Newsbytes News Network, April 14, 1994, available in WESTLAW, MAGSPLUS Database (reporting that infringer responsible for counterfeiting 220,000 units of computer software, costing U.S. manufacturer US\$22 million in lost revenues, was fined just US\$260 by Chinese court).

535. *Id.*

536. *Microsoft "Disappointed" Over Chinese Software Ruling*, Newsbytes News Network, Feb. 4, 1994, available in WESTLAW, MAGSPLUS Database; *Microsoft Seeks \$22 Million In Chinese Pirating Case*, *supra* note 534.

537. See TRIPs Agreement, *supra* note 20, art. 41, 33 I.L.M. at 1213. "Members shall ensure that enforcement procedures . . . [include] remedies to prevent further infringements and remedies which constitute a deterrent to further infringements." *Id.*

538. See *supra* notes 242-374 and accompanying text (discussing 1995 Accord's provisions); see also *supra* notes 375-471 and accompanying text (presenting impediments to implementing China's intellectual property protection laws).

539. See *supra* notes 242-374 and accompanying text (discussing provisions of 1995 Accord); see also *supra* notes 381-412 and accompanying text (presenting ambiguities and loopholes in China's intellectual property protection laws).

540. See *supra* notes 460-71 and accompanying text (discussing China's market barrier problems).

541. See Action Plan, *supra* note 269, art. I(E), (F), 34 I.L.M. at 897-900 (presenting 1995 Accord's procedural reforms).

nificantly expands enforcement measures.<sup>542</sup>

### 1. Ambiguities in the Laws and Market Barriers Persist

The Accord is silent with respect to the ambiguities, lack of definition, loopholes, fair use exceptions, and related weaknesses inherent in China's current intellectual property laws.<sup>543</sup> For example, patent infringement remains undefined,<sup>544</sup> "lack of knowledge" may still be used as a defense to an infringement charge,<sup>545</sup> and the Accord does not clarify whether a non-Chinese person includes a non-Chinese corporation.<sup>546</sup> Terms such as "create" and "plagiarize" remain undefined,<sup>547</sup> and the status of Hong Kong and Taiwanese nationals remains in doubt.<sup>548</sup> Furthermore, it is still not clear whether the Copyright Law applies to software,<sup>549</sup> and, if it does, the terms "small number of copies" and "non-commercial purposes" remain undefined and/or ambiguous.<sup>550</sup> Additionally, the Software Regulations still do not cover items published prior to the laws' enactment.<sup>551</sup> Similarly, market barriers to intellectual property rights protection, such as the "shadowy" quotas for films, or prohibitive tariffs that impede the import of legitimate merchandise and thus indi-

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542. See *id.* art. I(B), 34 I.L.M. at 890 (providing for enforcement task forces); see also *id.* art. I(C), 34 I.L.M. at 892 (outlining six month special enforcement period); *id.* art. I(D), 34 I.L.M. at 893 (presenting enforcement efforts in specific fields); *id.* art. I(E), 34 I.L.M. at 897 (providing for enforcement directly through administrative agencies); *id.* art. I(G), 34 I.L.M. at 900 (outlining intensified customs enforcement); *id.* art. I(H), 34 I.L.M. at 903 (establishing copyright verification system).

543. See *supra* notes 242-374 and accompanying text (discussing 1995 Accord's provisions); see also *supra* notes 381-412 (presenting ambiguities and loopholes in China's intellectual property protection laws).

544. See *supra* note 385 and accompanying text (stating that Patent Law does not define infringement).

545. See *supra* notes 387-89 and accompanying text (criticizing Patent Law's "knowingly" requirement for infringement).

546. See *supra* note 395 and accompanying text (discussing uncertainty regarding whether Copyright Law's definition of non-Chinese person includes non-Chinese corporations).

547. See *supra* note 396 and accompanying text (presenting terms undefined in China's Copyright Law).

548. See *supra* note 397 and accompanying text (stating that China's Copyright Law is silent regarding status of citizens in Taiwan, Hong Kong, and Macao).

549. See *supra* note 403 and accompanying text (discussing uncertainty whether specific provisions of China's Copyright Law apply to software).

550. See *supra* note 404 and accompanying text (criticizing China's Software Regulations' ambiguous language).

551. See *supra* note 410 and accompanying text (criticizing China's Software Regulations' lack of retroactivity).

rectly encourage the growth of pirated products,<sup>552</sup> are only touched on in the Agreement Letter itself.<sup>553</sup>

## 2. Procedural Reforms and the Enhancement of Enforcement Provisions

The Accord should materially reduce several major procedural impediments to intellectual property rights protection in China.<sup>554</sup> The most significant procedural change is found in the subsection expanding the administrative agencies' enforcement powers.<sup>555</sup> Specifically, prior to the Accord, administrative agencies, like the AAPA, often had the dual role of administrator and adjudicator in intellectual property matters without any enforcement powers.<sup>556</sup> The question of whether the Civil Procedure or Administrative Litigation Laws apply when an agency decision is appealed is not answered directly by the Accord,<sup>557</sup> but non-Chinese right-holders are now permitted to legally collect information, thereby removing a glaring procedural impediment.<sup>558</sup>

If the 1995 Accord is faithfully implemented by China's authorities, it should have its greatest impact in the area of enforcement.<sup>559</sup> The Accord's requirement of manufacturing licens-

552. See *supra* notes 460-71 and accompanying text (discussing China's market barrier problems).

553. Agreement Letter, *supra* note 268, 34 I.L.M. at 884. The Agreement Letter states that China will not impose quotas, import license requirements, or other restrictions on the importation of audio-visual and published products. *Id.*

554. See *supra* notes 242-374 (discussing 1995 Accord's provisions); see also *supra* notes 375-471 (presenting impediments to implementing China's intellectual property protection laws).

555. See Action Plan, *supra* note 269, art. I(E), 34 I.L.M. at 897 (outlining enforcement directly through administrative agencies); see also *id.*, art. I(F), 34 I.L.M. at 899 (providing additional administrative actions).

556. See *supra* notes 415-17 and accompanying text (presenting conflict of interest existing in AAPA's role as both administrator and adjudicator).

557. See *supra* notes 429-31 and accompanying text (discussing procedural problem of whether China's Civil Procedure Law or Administrative Litigation Law applies when an AAPA decision is appealed to court).

558. Action Plan, *supra* note 269, art. I(E)(6), 34 I.L.M. at 898-99; see *supra* notes 425-28 and accompanying text (criticizing China's system for collecting evidence).

559. See Action Plan, *supra* note 269, art. I(B), 34 I.L.M. at 890 (providing for enforcement task forces); see also *id.* art. I(C), 34 I.L.M. at 892 (outlining six month special enforcement period); *id.* art. I(D), 34 I.L.M. at 893 (presenting enforcement efforts in specific fields); *id.* art. I(E), 34 I.L.M. at 897 (providing for enforcement directly through administrative agencies); *id.* art. I(G), 34 I.L.M. at 900 (outlining intensified

ing<sup>560</sup> and provision for title verification systems,<sup>561</sup> may well reduce the activities of even state-related pirate CD and other factories.<sup>562</sup> This is particularly likely in light of the Accord's broader mandates that the administrative agencies, task forces, and government levels work closely together to end piracy.<sup>563</sup> The fact that agencies like the National Copyright Agency were previously "impotent"<sup>564</sup> and required local ministers to enforce their decisions should no longer be an impediment.<sup>565</sup> This is due to the Accord's organizing of multi-agency task forces,<sup>566</sup> its requirement that governments "at each level" aid in the enforcement process,<sup>567</sup> its empowerment of the task forces to impose fines and end production of violators,<sup>568</sup> and its empowerment of the agencies themselves.<sup>569</sup> Similarly, customs officers are now authorized to detain and destroy infringing products.<sup>570</sup> Enforcement, historically, suffered due to the lack of criminal sanctions; the 1995 Accord improves this situation but only indirectly: it empowers the task forces and customs agents to impose fines and hold and detain infringing products.<sup>571</sup> Since the Accord mandates various copyright and verification systems,<sup>572</sup> it should become easier to prove that infringers had "knowledge" of the infringement.<sup>573</sup> Furthermore, this should facilitate the enforcement of both civil and criminal sanctions for the commercial sale of pirated products.<sup>574</sup> The Accord also, in a nota-

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customs enforcement); *id.* art. I(H), 34 I.L.M. at 903 (establishing copyright verification system).

560. *Id.* art. I(D)(2)(a)(i), 34 I.L.M. at 894.

561. *Id.* art. I(H), 34 I.L.M. at 903.

562. *See supra* notes 435-39 and accompanying text (discussing pirating activities of China's CD and LD factories).

563. Action Plan, *supra* note 269, art. I(A), (B), (E), 34 I.L.M. at 887, 890, 897.

564. *See supra* notes 449-50 and accompanying text (criticizing weakness of China's National Copyright Agency).

565. *See supra* notes 451-53 and accompanying text (criticizing China's enforcement structure's reliance on local ministries for enforcing intellectual property protection laws and regulations).

566. Action Plan, *supra* note 269, art. I(B), 34 I.L.M. at 890.

567. *Id.* art. I(B)(1), 34 I.L.M. at 890.

568. *Id.* art. I(B)(1)(c), 34 I.L.M. at 890.

569. *Id.* art. I(E)(3), 34 I.L.M. at 897.

570. *Id.* art. I(G)(1), 34 I.L.M. at 900.

571. *Id.* art. I(B)(1)(c), 34 I.L.M. at 890.

572. *Id.* art. I(H), 34 I.L.M. at 903.

573. *See supra* notes 387-89 and accompanying text (criticizing Patent Law's "knowingly" requirement for infringement).

574. *See* Trademark Law, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation

ble improvement for non-Chinese firms, for the first time gives non-Chinese firms direct access to administrative remedies that were formerly denied to them.<sup>575</sup>

Beyond these specific and immediate changes, the Accord may improve the long term status of intellectual property rights protection in China.<sup>576</sup> For example, the State Council Working Conference may have a broad, long-term impact by coordinating policies<sup>577</sup> and monitoring the implementation of the existing laws.<sup>578</sup> Similarly, the Accord's educational programs<sup>579</sup> may create improved awareness of the need for intellectual property rights protection and enhanced customs enforcement<sup>580</sup> may eliminate a major incentive for intellectual property pirates.

Yet, three issues remain: first, in the past China has entered into intellectual property protection agreements, only to fail to enforce them;<sup>581</sup> second, the 1995 Accord is basically silent regarding the ambiguities, lack of definition, fair use exceptions, loopholes, and similar inadequacies in the laws themselves, so that enforcement, even if pursued, might well prove slow or futile;<sup>582</sup> third, even six months after the Accord was signed, and therefore well into its special enforcement period, serious concerns were being raised by U.S. officials about China's commitment to implementing the Accord.<sup>583</sup>

(CCH), art. 40, at 14,065 (providing criminal liabilities for trademark counterfeiting); *see also* Supplementary Trademark Provisions, CHINA PAT. & TRADEMARKS, Apr. 1993, at 91 (outlining criminal penalties for counterfeiting trademarks on a commercial scale); Decision of the Standing Committee of the National People's Congress Concerning Punishment of the Crime of Copyright Infringement, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), ¶ 11-701, at 14,597 (presenting criminal liabilities for copyright pirating).

575. Action Plan, *supra* note 269, art. I(B)(6), 34 I.L.M. at 891. It is not clear, however, if the new agreement will necessarily remedy the current unauthorized televised broadcasts of motion pictures. *See supra* notes 446-47 and accompanying text (discussing unauthorized televised broadcasts of motion pictures in China).

576. *See* Action Plan, *supra* note 269, 34 I.L.M. at 887 (stating that Action Plan sets forth long-term projects for enforcing intellectual property rights).

577. *Id.* art. I(A)(3), 34 I.L.M. at 888.

578. Action Plan, *supra* note 269, art. I(A)(3), 34 I.L.M. at 888.

579. *Id.* art. II, 34 I.L.M. at 905-07.

580. *Id.* art. I(G), 34 I.L.M. at 900-03.

581. Cooper & Chen, *supra* note 6, at A3.

582. *See supra* notes 543-53 and accompanying text (discussing the 1995 Accord's silence regarding various impediments found in China's intellectual property protection laws).

583. *See supra* notes 16-18 and accompanying text (discussing U.S. concerns regarding China's implementation of 1995 Accord).

C. *A Number of Modifications to the 1995 Accord Are Required*

The 1995 Accord will have to be modified if it is to address the remaining impediments to effective intellectual property protection in China.<sup>584</sup> Since many of these impediments are rooted in China's laws, the Accord should be modified to require amending a number of these laws in such a way as to bolster intellectual property rights protection in China. China's Software Regulations must be amended to provide Berne Convention protection to computer software.<sup>585</sup> Topographies and trade secrets must receive protection.<sup>586</sup> China's laws must be amended to provide detailed provisions for serving notice of claims<sup>587</sup> and for opportunities to review and present all relevant evidence in a dispute.<sup>588</sup> Ambiguities, loopholes, and inadequate definitions in the laws must be addressed.<sup>589</sup> Specifically, terms such as "patent infringement," "number of copies," and "non-commercial purposes," must be clarified. The ability of the courts and agencies to assign criminal sanctions must be strengthened. Sanctions should be added to the 1995 Accord to ensure that the Accord's enforcement provisions,<sup>590</sup> particularly as they apply to the manufacturers' level, will be applied more aggressively, as well as the Agreement Letter's pledge to improve market access.<sup>591</sup> Without such modifications, the 1995 Accord will remain, if not toothless, surely incapable of eliminating

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584. See *supra* notes 476-537 and 543-53 and accompanying text (presenting impediments remaining after 1995 Accord).

585. Software Regulations, CHINA LAWS FOR FOREIGN BUSINESS, 2 Business Regulation (CCH), ¶ 11-704, 14,681; see also *supra* notes 484-91 and accompanying text (comparing TRIPs requirement of Berne Convention protection for computer software with China's computer software protection).

586. See *supra* notes 492-500 and accompanying text (noting that China does not provide protection for topographies and trade secrets).

587. See *supra* notes 507-12 and accompanying text (comparing China's provisions for serving notice of claims with TRIPs requirements).

588. See *supra* notes 517-21 and accompanying text (noting inconsistencies between China's provisions for reviewing and presenting relevant evidence and TRIPs requirements).

589. See *supra* notes 381-412 and accompanying text (presenting ambiguities and loopholes in China's intellectual property protection laws).

590. See Action Plan, *supra* note 269, art. I(E), 34 I.L.M. at 897 (outlining enforcement directly through administrative agencies); see also *id.* art. I(F), 34 I.L.M. at 899 (providing additional administrative actions).

591. See Agreement Letter, *supra* note 268, 34 I.L.M. at 884 (stating that China will not impose quotas, import license requirements, or other restrictions on importation of audio-visual and published products).

some of the most pernicious impediments to intellectual property protection in China.

#### *CONCLUSION*

The 1995 Accord fails to address many of the impediments that continue to hamper intellectual property protection in China. Consequently, while the Accord is a significant step forward for intellectual property protection in China, it will not, in its current form, move China into compliance with the international standards embodied in TRIPs. The Accord, therefore, should be revisited and modified to address the impediments to China's effective intellectual property protection. Without such modifications, and without China's faithful implementation of its agreements, China will not be able to bring its intellectual property protection up to international standards.