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Argh, No More Pirating America’s Booty: Improving Copyright Protections for American Creators in China

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Cover Page Footnote
Associate Editor, Fordham Intellectual Property, Media & Entertainment Law Journal, Volume XXVIII; J.D., Fordham University School of Law, 2018; B.A. Economics, New York University, 2014. I would like to thank Professor Mark Cohen for his guidance and feedback, my Fordham Law Chinese IP Law Spring 2017 classmates, and the IPLJ Editorial Board and staff for their hard work. I also would like to thank my parents for their constant love and support.

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Argh, No More Pirating America’s Booty: Improving Copyright Protections for American Creators in China

Johnathan Ling*

The advent of the internet brought about revolutionary changes and challenges to the world. Internet piracy is one area which is presenting new challenges, particularly to copyright holders such as artists, filmmakers, and creators. China has been a hotbed of piracy and is home to the second highest number of file sharing infringers in the world. China has made strides to improve its copyright protection, such as implementing a copyright law in 1990, as well as joining the World Trade Organization and signing on to the Agreement on Trade-Related Aspects of Intellectual Property Rights, which specifies minimum levels of intellectual property protection each member nation must provide, the World Intellectual Property Organization Copyright Treaty, and the World Intellectual Property Organization Performances and Phonograms Treaty. However, China’s compliance with its obligations as a signatory to the Agreement is a continued point of contention between it and the United States.

This Note proposes ways for China to resolve the problems by increasing the statutory maximum damage award for copyright infringement in China, relaxing the foreign film quota, stronger enforcement of the copyright law to protect films that are not formally imported into China, and creating a special copyright

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division of the Specialized Intellectual Property Tribunals. Implementing these solutions will benefit not only American creators, but Chinese creators as well. With 21st Century problems, these solutions will help ensure that everyone has effective copyright protection in China in the 21st Century in light of the global marketplace that is the Internet.

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INTRODUCTION

“Just because something is traditional is no reason to do it. Piracy, for example, is a tradition that has been carried on for hundreds of years, but that doesn’t mean that we should all attack ships and steal their gold.”1

Traditions, regardless of their benevolent or malevolent nature, perpetuate themselves. Historically, China has felt that copyright protection was unnecessary because the Chinese believed that laws were meant to support, rather than supersede, more desirable governing methods, such as heavenly reason (天理) or morality (德).2 In addition, prior to the nineteenth century, foreign investors did not often invest in China, until they realized that China offered a market of four hundred million potential customers, which led to the rise of novel intellectual property issues.3 With their investors having a significant presence in China, western powers subsequently introduced China to the notion of copyright law “at gunpoint” in order to protect their citizens’ interests.4

After the British overwhelmingly defeated the Chinese forces in the Opium War (1842), the British obtained significant concessions from the Chinese, including extraterritoriality privileges and “most favored nation treatment.”5 Extraterritoriality grants foreigners in China immunity from Chinese law, while the most favored nation6 status ensures that the recipient country, in this case the British, receives the best trade terms that China agrees

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1 LEMONY SNICKET, HORSERADISH 50 (2007).
3 Id. at 34–35.
4 Id. at 30 (The Chinese were introduced to the notion of copyright law “at gunpoint” because of Western nations using the threat of their superior military force to obtain favorable trading terms with the Chinese. See id. at 32–34). See also DOUGLAS CLARK, GUNBOAT JUSTICE: BRITISH AND AMERICAN LAW COURTS IN CHINA AND JAPAN (2015).
6 It may seem contradictory, but most favored nation status means that a country treats its trading partners virtually equally. Trade Without Discrimination, Subsection of Principles of the Trading System, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/whatis_e/tif_e/fact2_e.htm#seebox [https://perma.cc/IA4Q-GVRA] (last visited Sept. 11, 2017). For example, if a country improves trading terms to one nation, it must improve its trading terms with all other WTO nations so that they all remain the “most favored nation.” Id.
to with any other country if the terms are better than the terms to which China and Great Britain had agreed to.7

Despite these concessions, trademark protection was still the primary intellectual property issue in China for Britain, the U.S., and Japan.8 For example, unscrupulous Chinese merchants, looking to capitalize on the popularity of foreign products in China, began producing products featuring unauthorized trademarks.9 In addition, China struggled with widespread copyright infringement during the twentieth century (e.g., unauthorized book reproductions, patent issues).10 However, China has made great strides in intellectual property protections since the nineteenth century.

In 1990, China adopted a copyright law (“1990 Copyright Law”) at the fifteenth meeting of the Standing Committee of the Seventh National People’s Congress.11 While the 1990 Copyright Law’s enactment was certainly a step forward, it left much to be desired. Currently, China has an amended Copyright Law that went into effect in 2010 (“2010 Copyright Law”), that, among other things, capped statutory damages at 500,000 RMB,12 or approximately $78,592.13 USD.13 However, since the 1990 Copyright Law went into effect, the internet has proliferated, effectively creating a borderless global marketplace, and online

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7 See id.; SUCHY, supra note 5.
8 See ALFORD, supra note 2, at 36.
9 See id. at 34–35. Cigarettes, wine, and medicine are some examples of products which were produced using unauthorized trademarks. See id.
10 Id. at 61.
piracy has continued to grow. In 2017, “China [was] home to 10.77% of the world’s file sharers—the second highest percent” globally. In response to China’s growing online piracy problem and the U.S. government’s dissatisfaction with China’s copyright protection, the U.S. Trade Representative (“USTR”) placed China on its priority watch list on its 2018 Special 301 Report and previous Special 301 Reports. The USTR was concerned with the widespread piracy and counterfeiting in China’s online markets. According to reports the USTR identified, China’s online and retail sales were nearly $752 billion in 2016, but China’s State Administration for Industry and Commerce (“SAIC”) estimated that 40% of goods purchased online were not genuine.


16 The watch list is a list of countries that the USTR compiles, identifying countries that the USTR believes provide inadequate and ineffective intellectual property protection for “U.S. inventors, creators, brands, manufacturers, and service providers.” OFF. OF THE U.S. TRADE REPRESENTATIVE, 2017 SPECIAL 301 REPORT 1 (2017).


18 See id. at 41–42. There are currently twelve countries on the priority watch list, and twenty-four countries on the watch list. See id. at 9. The placement of a country on the priority watch list or watch list indicates that there are problems with respect to intellectual property rights protection, enforcement, or market access. Id. at 8. The removal of a country from the watch list or the movement of a country from the priority watch list to the watch list is an indication that the country has made progress regarding the intellectual property issues that caused them to be placed on the watch list or priority watch list. See id.; see also Press Release, Off. of the U.S. Trade Representative, Israel Removed from Special 301 Report (Feb. 2014) (on file at the Office of the U.S. Trade Representative official government website). Israel is an example of a country removed from the watch list in 2014. See OFF. of the U.S. Trade Representative, supra.

As related to the media and entertainment industry, foreign countries are likely interested in the Chinese market because it presents an enormous opportunity for potential content distributors, with China’s media and entertainment industry forecasted to reach $242.2 billion by 2019.\(^{20}\) For example, China has 41,179 film screens and the Chinese box office’s revenue reached $6.58 billion USD in 2016, an almost 50% increase from 2014.\(^{21}\) China was the world’s second largest movie market back in 2013,\(^ {22}\) and data from Bloomberg correctly predicted that China would surpass the United States as the world’s largest movie market.\(^ {23}\) While China

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has greatly progressed in both intellectual property production and protection since enacting the 1990 Copyright Law, it must continue to evolve and adapt its copyright law to face new twenty-first century copyright challenges, namely online copyright challenges.24

This Note examines copyright infringement issues relating to Chinese motion pictures. Part I provides the history of Chinese copyright law and, specifically, China’s introduction of copyright law. Part II reviews the current state of copyright protection in China and explains the conflict between the U.S. and China regarding non-compliance with international copyright norms and protections. In Part III, this Note proposes four actions that would help relieve the tension between the U.S. and China: 1) increasing the statutory damages for copyright infringement; 2) further relaxing the foreign film import quota; 3) stronger enforcement of the copyright law to protect artists of prohibited works; and 4) creating a copyright division of the Chinese specialized intellectual property tribunals to exclusively cover copyright claims.

I. THE HISTORY OF COPYRIGHT IN CHINA

To understand the current controversy, it is necessary to understand the historical underpinnings that led to the development of the current Chinese copyright law. Section I.A provides background on the development of copyright in Imperial China.25 Section I.B describes how copyright further developed in the Republic of China following the takeover of the Nationalist government. Finally, Section I.C examines how copyright


25 Imperial China was the system of government that ran China from 221 B.C. until 1912 A.D. Imperial China, FACT MONSTER, https://www.factmonster.com/dk/encyclopedia/history/imperial-china [https://perma.cc/5MNX-M6VW] (last visited Oct. 20, 2017). The system was ruled by an emperor. Id.
developed in the current People’s Republic of China following the Chinese Civil War.

A. Copyright in Imperial China

Historically, Imperial China did not develop a notion of a copyright on its own. 26 Imperial China was mainly an agricultural society, and the traditional Chinese thought that society should be governed through a hierarchy of principles: heavenly reason (天理), the way (道), morality (德), ritual propriety (禮), custom (俗), community compacts (相約), family rules (家程), and the state’s formal written law (listed in order of decreasing desirability). 27 The state’s formal written law was supposed to support, rather than supersede, the other more desirable methods of guiding society. 28 The written law was a last resort and was implemented only when the more desirable methods failed to achieve the desired effect. 29

This is not to suggest that the Chinese were apathetic towards the illegal reproductions of texts. The Chinese were indeed concerned about intellectual property rights, but for different reasons. Prior to the twentieth century, the Chinese protected intellectual property rights to protect imperial power and maintain the stability and longevity of its dynastic regime, not to protect artists and writers from illicit copying. 30 For example, the Qin Dynasty (221–206 B.C.) was concerned with the distribution of written materials, and the Han Dynasty prohibited the unauthorized copying of the Classics. 31 However, the advent of printing during

26 See Alford, supra note 2, at 10. Copyright is intended to protect literary, artistic, and musical works, with a focus on protecting the expression of the idea instead of the idea itself. Id. at 2.
27 Id. at 10.
28 Id.
29 Id. Heavenly reason is similar to the concept of natural law, which holds there are rights endowed by God. See Chi Yun Chang, Confucianism: A Modern Interpretation 179 (2013). All Chinese institutions, according to Heavenly Reason, had their origin in the natural law. See id.
30 See Alford, supra note 2, at 17.
31 See id. at 12–13. Classics were books that had “paradigms for social order” and had claims regarding the “trans-historical truth.” See Jonathan Ocko, Copying, Culture, and Control: Chinese Intellectual Property Law in Historical Context, 8 Yale J.L. & Human.
the Tang Dynasty (A.D. 618–907) caused China’s first sustained effort to regulate the publication and reproduction of works.32 In 835 A.D., the Wengzong Emperor prohibited the unauthorized copying of calendars, almanacs, state legal pronouncements, official histories, devilish books and talks, and most works on Buddhism and Taoism because he wanted to maintain strict control over these items, lest they be used to challenge his assertion that he was the link between humanity and nature, and therefore challenge his dynastic control.33 Unfortunately, little evidence exists demonstrating the effectiveness of these measures.34 Later, when the Song Dynasty (A.D. 960–1279) noticed an increase in printed materials, it introduced a prepublication review and registration system.35 The prepublication review’s primary goal was to protect the state’s exclusive right to print certain materials.36 In contrast, England and other European countries developed approaches toward copyright protection during the seventeenth and eighteenth centuries that had no counterpart in imperial Chinese copyright law. The European approach gave artists, authors, and inventors a property interest in their works that was protectable even against the state.37 Unlike European copyright law, the primary objective of imperial China’s copyright regulation was to maintain state authority.38

559, 570 (2013) (quoting BENJAMIN ELMAN, FROM PHILOSOPHY TO PHILOLOGY: INTELL. AND SOCIAL ASPECTS OF CHANGE IN THE LATE IMPERIAL CHINA 28 (1984)).

32 ALFORD, supra note 2, at 13.
33 See Ocko, supra note 31, at 562; ALFORD, supra note 2, at 13.
34 See ALFORD, supra note 2, at 13.
35 Id.
36 Id. Some examples of materials the state was concerned about were authorized versions of the Classics, model answers to imperial civil service examinations, maps, and materials concerning the inner workings of government, politics, and military affairs. Id. at 14.
37 Id. at 18.
38 Id.
B. Copyright in the Republic of China

The turn of the twentieth century created more intellectual property problems in China, as entrepreneurs took advantage of foreign goods’ popularity and foreign-owned Chinese factories. China’s four-hundred-million potential customers attracted the entrepreneurs. In 1886, six countries adopted the International Union for the Protection of Literary and Artistic Property, also known as the Berne Convention, which China did not observe at its inception. However, China was not a party to the convention until July 10, 1992. As a result, foreigners in China often turned to their mother country’s representatives for assistance in enforcing their rights in China, as they believed that the Chinese government would be of little help to them.

Negotiations regarding ways to protect intellectual property and nurture a thriving international business market then ensued between China and the United Kingdom, then between China and the United States, and then between China and Japan. As a result of these negotiations, China granted the intellectual property protection sought by these nations. Later, China instituted a

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39 The Republic of China was the government that followed the fall of the last imperial dynasty, the Qing, in 1912. Sun Yat-Sen, of the Guomindang party, was the leader of this new government. See Ulrich Theobald, Republic of China 中華民國 (1912–1949), CHINAKNOWLEDGE.DE, http://www.chinaknowledge.de/History/Rep/rep.html [https://perma.cc/WC86-J37B] (last visited May 2, 2018).
40 See ALFORD, supra note 2, at 34.
41 Id. at 35.
43 See Berne Notification No. 140, WORLD INTELL. PROP. ORG. (July 15, 1992), http://www.wipo.int/treaties/en/notifications/berne/treaty_berne_140.html [https://perma.cc/C8GF-5VJT] (The United States also was not a party to the convention until November 16, 1988).
45 Id. at 36.
46 Id. at 37.
provisional copyright act in 1910 ("1910 Copyright Law"), as result of pressure from foreign governments, but the act provided limited protections for Chinese authors and provided no protection to foreigners.\(^{47}\) In effect, the passage of the 1910 Copyright Law was largely symbolic.\(^{48}\)

In the 1920s, the advent of the printing press, the increasing literacy rates across China, and the rise of urban elites who wanted to consume content further pressured China to institute meaningful copyright protection.\(^{49}\) Pirates, seeking to satisfy the demand from the urban elites, began copying works like textbooks.\(^{50}\) Without a uniform national system of protective copyright laws, foreigners in China resorted to alternative means to protect their copyrights.\(^{51}\) Some foreigners registered their copyrights with their consulates in China, while others persuaded local Chinese officials to use the officials’ discretionary power to enforce the copyright holder’s rights against infringers.\(^{52}\) Following the fall of dynastic rule and a period of political instability, Chiang Kai-Shek, the leader of the Guomindang party, established a new Nationalist government in 1928.\(^{53}\) The Republic of China spearheaded another effort to augment copyright protection in 1928 ("1928 Copyright Law").\(^{54}\) However, like the 1910 Copyright Law, the 1928 Copyright Law did not protect foreign rights holders, and because copyright

\(^{47}\) See ALFORD, supra note 2, at 42. The 1910 provisional copyright law protected only registered copyright works for the life of the author plus thirty years, or thirty years from the date of registration if the author was an organization. SOCHY, supra note 5, at 153. Moral rights of authorship and integrity were also recognized in perpetuity. See ALFORD, supra note 2, at 42; Mark Allen Cohen, An American Patent Dispute in the Qing Dynasty, WORDPRESS: CHINA IPR BLOG (July 2, 2012), https://chinaipr.com/2012/07/02/an-american-patent-dispute-in-the-qing-dynasty/ [https://perma.cc/H2LM-Y4XF].

\(^{48}\) See ALFORD, supra note 2, at 42.

\(^{49}\) See id. at 43.

\(^{50}\) Id.

\(^{51}\) Id.

\(^{52}\) See Ocko, supra note 31, at 563.


\(^{54}\) See ALFORD, supra note 2, at 52–53.
protection was not considered “deserving of attention in China,” very few infringement lawsuits were brought.\(^{55}\)

C. Copyright in the People’s Republic of China\(^{56}\)

Following the Chinese Civil War in 1949, the Communist Party took control of China and established the People’s Republic of China.\(^{57}\) The People’s Republic of China was more concerned with compensating authors for their work than previous Chinese governments, but still desired to maintain state control over the published content.\(^{58}\) At this time, revolution and war had ravaged China for decades, and the state believed that compensating authors for their work would incentivize intellectuals and therefore allow China to catch up on the decades of scientific and intellectual developments it had missed during the war.\(^{59}\) In the 1950s, China looked to the Soviet Union for an example of copyright law.\(^{60}\) The Soviet system compensated authors for their work based on the number of copies printed and allowed authors to prevent unauthorized alteration of their works.\(^{61}\) China implemented the Soviet system through resolutions in the early 1950s, which were not officially the law but society understood them to express the Chinese government’s official policy.\(^{62}\)

\(^{55}\) Id.

\(^{56}\) The People’s Republic of China is the government that emerged in 1949 following the Chinese Civil War, in which the Communists defeated the Nationalist Guomindang, who fled to Taiwan. See Ulrich Theobald, People’s Republic of China (since 1949), CHINAKNOWLEDGE.DE, http://www.chinaknowledge.de/History/PRC/prc.html [https://perma.cc/6KWN-5EEC] (last visited May 2, 2018).

\(^{57}\) China in the 20th Century, supra note 53; Theobald, supra note 56.

\(^{58}\) See ALFORD, supra note 2, at 59.

\(^{59}\) Id.

\(^{60}\) Id.

\(^{61}\) Id. The Soviet Union granted copyright protection, “[h]owever, the personal rights of the author were not the exclusive rights of the author.” Susan Tiefenbrun, Piracy of Intellectual Property in China and the Former Soviet Union and Its Effects Upon International Trade: A Comparison, 46 BUFF. L. REV. 1, 47–48 (1998). This is because the Soviets had a socialist government, and personal property rights “did not fit into a socialist system.” Id. Soviets also used copyright laws to promote the development of arts and literature that “promoted the socialist philosophy.” Id.

\(^{62}\) ALFORD, supra note 2, at 60. The resolutions were statements that did not have the force of law but were understood to reflect official government positions. See id. These resolutions stipulated that “publishing circles should respect the rights of both authors
Chinese government ministries, such as the Ministry of Culture, promulgated resolutions forbidding the unauthorized copying of texts, spelling out the relationship between authors and publishing houses, and specifying the method of compensating authors.\textsuperscript{63} However, the pronouncements did little to restrict the flow of infringement because even state-owned enterprises, such as Xinhua (新華社, the New China News Agency), disregarded the resolutions and continued to infringe without consequences.\textsuperscript{64}

While China made strides toward ensuring authors were compensated for their work, the Great Proletarian Cultural Revolution in 1966 (“Cultural Revolution”) halted that progress.\textsuperscript{65} In the Cultural Revolution, the Chinese government sought to fundamentally change Chinese society by instituting measures that dramatically curtailed the realm of acceptable discourse.\textsuperscript{66} For example, one measure banned all theater except for eight revolutionary “operas.”\textsuperscript{67} Furthermore, another measure curtailed intellectual work and, as a result, many intellectuals were imprisoned or subjected to torture in the countryside.\textsuperscript{68} The Chinese government also condemned the legal system for following a “black line” and being inherently reactionary rather than proactive.\textsuperscript{69} With free discourse significantly curtailed, authors found copyright protection inconsequential because the government barred publishing many of their works.\textsuperscript{70} In addition, even if the Chinese government deemed their works worthy of publication, copyrights were irrelevant because the state

\begin{thebibliography}{99}
\bibitem{63} Id.
\bibitem{66} Id.
\bibitem{67} Id.
\bibitem{68} Id. at 64. Intellectual work included any work of scientists and writers. \textit{See id.}
\bibitem{69} \textit{See id., supra} note 2, at 64. The black line was the line between Mao Zedong and the bourgeoisie. The black line is often defined as a combination of elements from the bourgeoisie, the revisionists, and arts and culture from the 1930s. \textit{See WEN-SHUN CHI, READINGS IN THE CHINESE COMMUNIST CULTURAL REVOLUTION: A MANUAL FOR STUDENTS OF THE CHINESE LANGUAGE} 151 (1971).
\bibitem{70} \textit{See ALFORD, supra} note 2, at 64.
\end{thebibliography}
reproduced, or tolerated reproduction of, the works without compensating the original author.71

China emerged from the Cultural Revolution in the autumn of 1976, and the lack of progress in China’s development disturbed the new leadership.72 The new regime soon called for a program of “Four Modernizations,” which would create world-class agriculture, science and technology, industry, and military capability in China before the twenty-first century.73 The Cultural Revolution had set the Chinese back a decade because of the time lost that could have been spent on development and training, so the Chinese government sought to promote and foster scientific and other intellectual work to make up for the lost time.74 In addition, Chinese leadership realized that it would have to open itself up to foreign investment because those investments were key to rebuilding the country.75 The path to gaining copyright protections in China was a “tortuous road,” but the Chinese government first publicly recognized functional copyrights when it promulgated the General Principles of the Civil Law (“GPCL”) of the People’s Republic of China76 in 1986.77 The GPCL only spoke of copyright protection generally, as Article [Ninety-Four] did not include the word “copyright,” and simply stated that “[c]itizens and legal persons shall enjoy rights of authorship (copyrights) and shall be entitled to sign their names as authors, issue and publish their works[,] and obtain remuneration in accordance with the law.”78 Moreover, Article [Ninety-Four]’s terms were unclear; as a result, the vague statute forced the authorities to rely on Communist party

71 Id.
72 Id. at 65.
73 See id.
74 Id.
75 Id.
77 See id.; ALFORD, supra note 2, at 77.
78 General Principles of the Civil Law of the People’s Republic of China, art. 94.
policies and their own sense of fairness to decide copyright infringement cases.\(^\text{79}\)

Following the GPCL’s enactment, three groups intensely debated creating a Chinese copyright law because it would establish private property interests in a socialist society.\(^\text{80}\) The first group, software producers and entrepreneurs, wanted to open China up to the world because they saw no alternative if China wanted to remain competitive.\(^\text{81}\) The second group, which consisted of central government officials and personnel in industries dependent on the unauthorized use of foreign copyrighted materials, were wary of creating new rights.\(^\text{82}\) Finally, the third group were people who thought that China should gradually adapt to the changing times and the inevitability of complying with international standards.\(^\text{83}\) The state’s attempt to create an official copyright law in 1990 illuminated the tension among the three groups.\(^\text{84}\) The government produced twenty drafts

\(^\text{79}\) See Alford, supra note 2, at 77. There were 500 court cases and 400 administrative actions regarding authorship in the four-and-a-half years between the promulgation of the GPCL and the 1990 Copyright Law. See id. The lack of clarity made it difficult for the courts to decide cases and some cases took years to close. See id. The GPCL considered fairness to mean “the equality of civil subjects’ opportunity to engage in civil activities, and reciprocity in the enjoyment of civil rights and the undertaking of civil duties.” See Tong Rou, The General Principles of Civil Law of the PRC: Its Birth, Characteristics, and Role, 52 LAW & CONTEMP. PROBS. 151, 161 (1989). In deciding what is fair or not, judges were to take into account “people’s general sense of social value, concept of morality, and concept of interests.” Id. This vague standard of fairness in the end left it up to judges to decide what was fair or not. See Alford, supra note 2, at 77.

\(^\text{80}\) See ALFORD, supra note 2, at 77.

\(^\text{81}\) Id. at 78.

\(^\text{82}\) Id.

\(^\text{83}\) Id.

\(^\text{84}\) See id. The National People’s Congress (“NPC”) and its Standing Committee have the power to enact legislation in China. See U.S.–CHINA BUS. COUNCIL, THE PRC LEGIS. PROCESS: RULE MAKING IN CHINA 2–3 (2009). The NPC gets suggestions from top leaders and advisors regarding areas of potential legislation. See id. Once the NPC gets a formal submission regarding an area of potential legislation, all submissions are compiled and compared with the government priorities. See id. Once the Standing Committee and the State Council approve the government priorities, the proposed legislation that compliments the government priorities are forwarded to drafting groups of the NPC. See id. At this time, the NPC notifies the various government agencies that will be affected by the proposed legislation. See id. Once a draft is complete, the NPC’s Law Committee reviews it and makes a report to the Standing Committee with suggested amendments.
of the copyright law, and the National People’s Congress Vice President labeled the drafting process “the most complicated” in China’s history.\(^{85}\) Despite the long and “tortuous road,” the Chinese government finally enacted the 1990 Copyright Law on September 7, 1990.\(^{86}\)

As a result, to file a copyright infringement lawsuit in China today, a party must first bring the lawsuit to a local tribunal.\(^{87}\) While the 1990 Copyright Law’s enactment was a significant development in Chinese copyright protection, the law only provided a limited grant of rights for Chinese and foreign authors.\(^{88}\)

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See id. at 3. Once the draft law is finalized, the NPC or its Standing Committee passes it and it becomes law. See id.

\(^{85}\) See Alford, supra note 2, at 77.

\(^{86}\) Id. at 77–78.


\(^{88}\) “Works the publication or distribution of which is prohibited by law shall not be protected by this law. Copyright owners, in exercising their copyright, shall not violate the [C]onstitution or laws or prejudice the public interests.” 1990 Copyright Law, supra note 11, art. 4. The Chinese Government maintained tight control over whether rights were granted or not, since works that were against the law would not be protected by copyright. See id.; see also Alford, supra note 2, at 78.
II. THE CURRENT CONFLICT REGARDING COPYRIGHT PROTECTION IN CHINA

Currently, the existing legal options available to foreign copyright holders in China are inadequate in providing effective copyright protection. China joined the World Trade Organization in 2001, which meant that China had to comply with international agreements specifying minimum standards of intellectual property protection.89 Section II.A describes the intellectual property implications of China joining the World Trade Organization. Section II.B addresses the conflict between the U.S. and China regarding China’s alleged non-compliance with its World Trade Organization Member obligations. Finally, Section II.C discusses the difficulties copyright holders face in enforcing their rights in China.

A. The Intellectual Property Implications of China’s Ascension to the World Trade Organization

China has progressed greatly in terms of copyright protection since the dynastic era, and the 1990 Copyright Law was certainly a step in the right direction. However, the Chinese government enacted the 1990 Copyright Law prior to the advent of the internet and, as a result, the 1990 Copyright Law protections lagged behind the pace of technological innovation and international developments.90 Despite the revolutionary innovation since its enactment, the Chinese government has only amended the 1990 Copyright law twice: the 2001 amendments and the 2010 amendments.91

On December 11, 2001, China joined the World Trade Organization ("WTO"), which signaled the United States’ and the global community’s recognition of the Chinese economy as an equal because, as a WTO member, China participates in

89 See discussion infra Section II.A.
developing international trade rules. Significantly, as WTO member, China must abide by the international Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”). The TRIPS agreement sets out minimum standards of protection of intellectual property rights that each member nation must provide. TRIPS specifically requires that member nations comply with the substantive obligations of the main conventions of the World Intellectual Property Organization (“WIPO”), the Paris Convention for the Protection of Industrial Property (“Paris Convention”), and the Berne Convention for the Protection of Intellectual Property.

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92 China and the WTO, Section of Member Information, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/countries_e/china_e.htm (last visited Apr. 17, 2017). The WTO is a global international organization that organizes the rules of trade between nations, whose mission is to ensure that “trade flows as smoothly, predictably[,] and freely as possible.” The WTO, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/thewto_e.htm (last visited Sept. 10, 2017). To become a WTO member nation, the country must ratify the TRIPS agreement. See Overview: The TRIPS Agreement, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Apr. 18, 2017). The WTO had 164 member nations as of July 29, 2016. Members and Observers, Section of Understanding the WTO: The Organization, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Sept. 10, 2017). If a member country believes that another member country is not meeting the minimum standards of protection outlined in the TRIPS agreement, the member country can raise a dispute at the WTO. See Briefing Note: Dispute Settlement, Section of Tenth WTO Ministerial Conference, Nairobi, 2015, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/minist_e/mc10_e/briefing_notes_e/brief_disputes_e.htm (last visited Sept. 20, 2017).

93 See generally Overview: The TRIPS Agreement, supra note 92 (outlining minimum obligations of WTO member nations under the TRIPS agreement).

94 See id.

95 “WIPO is the global forum for intellectual property services, policy, information[,] and cooperation.” Inside WIPO, WORLD INTELL. PROP. ORG., http://www.wipo.int/about-wipo/en/ (last visited Sept. 8, 2017). WIPO’s mission is to foster “the development of a balanced and effective international intellectual property (IP) system.” See id.

96 The Paris Convention protects a broad range of intellectual property, such as patents, trademarks, industrial designs, and service marks. Summary of the Paris Convention for the Protection of Industrial Property (1883), WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ip/paris/summary_paris.html (last visited Sept. 7, 2017). The main protections of the Paris Convention fall into three areas: (1) national treatment; (2) right of priority; and (3) common rules. Id. The national treatment provision of Paris provides that nations provide the same level of
B. The China-United States Dispute Regarding Copyright at the WTO

China’s compliance with its TRIPS Agreement obligations as a WTO member is a continued source of contention with the United States. In 2007, the United States raised a dispute at the WTO alleging that China was not complying with its TRIPS agreement obligations. The United States asserted, inter alia, that China’s denial of copyrights and other related rights to authors, as well as its lack of enforcement against the distribution and publication of unauthorized works, did not satisfy part of the Berne Convention. In particular, the United States alleged that China failed to satisfy the Berne Convention’s requirement that, at a minimum, foreign authors enjoy the same level of protection as foreign member nationals as it provides to its own nationals. Id. The right of priority protects patent applications, as the date of the first patent application in one state gives the applicant a certain period of time to file an application in another member state. Id. The Paris Convention also provides a set of “common rules that all [member nations] must follow.” Id.

97 The Berne Convention “deals with the protection of [artistic] works and the rights of their [creators].” Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886), WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ip/berne/summary_berne.html [https://perma.cc/29EQ-GYS9] (last visited Sept. 7, 2017). There are three main principles of the Berne Convention: (1) works originating in one nation must be given the same treatment that the receiving country gives to works created by their own nationals; (2) protection must be “automatic,” and cannot be tied to compliance with formalities; and (3) protection must be given regardless of whether the originating country offers protection. Id.

98 Overview: The TRIPS Agreement, supra note 92.

99 Id. “The TRIPS Agreement is [also] sometimes referred to as the Berne and Paris-Plus Agreement.” Id.


101 Id.

102 Id.
domestic authors\textsuperscript{103} because the 1990 Copyright Law did not protect works whose distribution or publication was prohibited by the government.\textsuperscript{104} Consequently, the United States believed that Chinese copyright law violated China’s obligations under Article 9 of the TRIPS Agreement.\textsuperscript{105} Ultimately, the United States won part of the WTO dispute against China, with the WTO panel\textsuperscript{106} finding, inter alia, that Article 4 of the 1990 Copyright Law denied protection to certain prohibited works, including WTO member nations’ works; the panel also found that United States did not substantiate its claim that China did not provide adequate criminal remedies to address commercial scale piracy by establishing high criminal thresholds for prosecution and conviction.\textsuperscript{107} However, the WTO panel emphasized that its ruling did not limit China’s right to review works and select what content to permit in China, and that it had no impact on the piracy of authorized works.\textsuperscript{108}


\textsuperscript{104} See DS362: China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights, supra note 100; see also 1990 Copyright Law, supra note 11, art. 4.


\textsuperscript{106} When WTO members have disputes with one another, there are various stages to the dispute resolution. See A Unique Contribution, Section of Understanding the WTO: Settling Disputes, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatw_e/tif_e/disp1_e.htm [https://perma.cc/V6C9-XS3C] (last visited Sept. 8, 2017). In the first stage of the dispute, a consultation is arranged between the countries in the hopes of settling the dispute without the need for formal proceedings. See id. If this fails, the complaining country can ask that a panel be formed to hear the dispute. \textit{Id.} A panel consists of three to five experts from different countries “chosen in consultation with the countries in dispute.” \textit{Id.} If the two sides cannot agree on panel members, “the WTO director general appoint[s] them.” \textit{Id.} Once both sides present their case, the panel makes a recommendation as to whether there the disputed measure violates a WTO agreement or obligation. See \textit{id}. However, the panel’s report can be rejected by a consensus of the Dispute Settlement Body. \textit{Id.}


\textsuperscript{108} \textit{Id.} para. 7.144.
As a result of the WTO panel’s ruling, China amended its 1990 Copyright Law in 2010, specifically amending, inter alia, Article 4 of the 1990 Copyright Law. Unlike the 1990 Copyright Law’s tumultuous implementation, the Chinese government passed the 2010 amendments to the 1990 Copyright Law relatively seamlessly, which highlights the WTO’s significant influence on China’s intellectual property laws and policy. However, while the 2010 amendments eliminated the provision explicitly denying protection to prohibited works, it did not affirmatively provide protection to those prohibited works, even though their economic value would be low since they would have no legitimate market in China. Thus, any work or portion of a work the Chinese government does not approve of, for example because it fails content review, is not fully protected under China’s copyright law.

In addition to the Article 4 complaint, the United States brought another case at the WTO in 2007 alleging that China unfairly restricted access to its market by implementing rules such as the “Film Regulation,” the “Film Distribution and Exhibition Regulation,” and other restrictions on the market. At the WTO, the United States alleged that China unfairly restricted access to its market by implementing rules such as the “Film Regulation,” the “Film Distribution and Exhibition Regulation,” and other restrictions on the market.

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109 Compare 1990 Copyright Law, supra note 11, art. 4 (“Works the publication or distribution of which is prohibited by law shall not be protected by this law. Copyright owners, in exercising their copyright, shall not violate the constitution or laws or prejudice the public interests.”), with 2010 Copyright Law, supra note 12, art. 4 (“Copyright owners, in exercising their copyright, shall not violate the Constitution or laws or infringe upon the public interests. The state shall supervise and administer the publication and circulation of works according to law.”). For a discussion of how a law is passed in China, see supra note 84 and accompanying text.


111 See 2010 Copyright Law, supra note 12, art. 4.


Rule,”114 and the “Film Enterprise Rule.”115 These rules limited foreign companies to importing up to twenty foreign films into Chinese cinemas per year.116 Ultimately, a WTO panel found that Article 30 of China’s Film Regulation was inconsistent with paragraphs 1.2, 5.1, 83(d), 84(a), and 84(b) of the Accession Protocol,117 but that Article 5 of the Film Regulation was not inconsistent with China’s trade requirements under the Ascension Protocol.118 Following this WTO panel decision, China agreed to comply with the WTO’s rulings by March 2011.119 Accordingly, China revised certain measures and repealed others concerning “books, newspapers, journals, DVDs[,] and music.”120 However, despite these steps, China is still not in “full compliance with the WTO’s rulings, particularly with regard to the online distribution of music.”121 Notably, China did not address motion pictures’ protection following the WTO ruling; instead, China proposed entering into bilateral talks with United States to resolve the motion pictures disagreement.122

114 Id. para. 7.603. The “Film Distribution and Exhibition Rule” grants the Chinese government a monopoly on importing foreign films by making the state-run China Film Import and Export Corporation the exclusive importer of foreign films into China. See id.

115 Id. para. 4.48. The “Film Enterprise Rule” only considers enterprises in China as importers of films. Id.


120 Id.

121 Id.

122 Id.
As a result of the United States’ concerns regarding the film market and the WTO ruling, the United States and China agreed to a Memorandum of Understanding (“MOU”) in 2012, subject to review after five years. The MOU raised the foreign film import quota from twenty films per year to thirty-four films per year by allowing at least an additional fourteen films in enhanced formats, such as IMAX and 3D format, and increased U.S. revenue producer’s share of a film’s revenue to 25% of the gross box office receipts. The MOU has been at least partially successful; it has increased the quantity of American films imported into China, and U.S. film producers have received larger revenue from the imported films. In addition, an alternative avenue for American film companies to gain entrance into the Chinese motion pictures market has emerged: co-producing a film

123 Memorandum of Understanding Between the People’s Republic China and the United States Regarding Films for Theatrical Release, China–U.S., Apr. 25, 2012, https://www.state.gov/documents/organization/202987.pdf [https://perma.cc/SGW2-6FEK] [hereinafter Memorandum of Understanding]. The Memorandum of Understanding is a document that allowed the United States and China to come to an agreement regarding the WTO dispute regarding films. See id. The Memorandum of Understanding was negotiated in part by both countries’ Vice Presidents. See OFF. OF THE U.S. TRADE REPRESENTATIVE, supra note 119, at 142–43. It provided that the United States would not raise a dispute at the WTO as long as the United States considered China in compliance with its obligations under the Memorandum of Understanding. See Memorandum of Understanding, supra, at 3.

124 OFF. OF THE U.S. TRADE REPRESENTATIVE, supra note 119, at 143.

125 Memorandum of Understanding, supra note 123, at 1.

126 See WT/DS363/19, supra note 116, ¶ 1 (“China confirmed that enhanced format films (such as 3D and IMAX films) are not subject to the [twenty]-film commitment.”).

127 Memorandum of Understanding, supra note 123, at 1.

128 Id. China’s box office has been increasing steadily while the United States’ box office has been stagnant, causing Hollywood to look to China to find profit. See Ainhoa Marzol Aranburu, The Film Industry in China: Past and Present, 2 J. EVOLUTIONARY STUD. BUS. 1, 20 (2017). In 2014, the six largest movie studios, Walt Disney, Fox, Universal, Warner Bros., Sony, and Paramount, see Natalie Robehmed, Hollywood’s Most Profitable Movie Studios, FORBES (May 15, 2015, 8:30 AM), https://www.forbes.com/sites/natalierobehmed/2015/05/15/disney-is-hollywoods-most-profitable-movie-studio/#71ee53e629b8 [https://perma.cc/99TV-J5L6] (listing top six movie studios based on 2014 profits), got 70% of their revenue outside of the United States. See Aranburu, supra, at 20–21. An example of how important the Chinese market is to producers is the 2014 release of Gravity, which grossed $71 million USD in China, 10% of its total box office gross. See id.
with a Chinese film company. The co-production route allows an American film company to circumvent the film quota system because the Chinese government treats the film as a domestic production with respect to the foreign film import quota. However, it is unclear what qualifies as a co-production, as recent films that have tried to qualify, for example Transformers 4 and Kung Fu Panda 2, were rejected as co-productions. One clear example of a U.S.-China co-production was the Matt Damon film The Great Wall, which was such a failure at both the U.S. and Chinese box offices that it threw into doubt whether there would be any future U.S.-China co-productions.

The MOU represents progress because, unlike the 2007 disputes, the United States and China resolved film trade issues without resorting to a WTO hearing. However, China has failed to fully implement the MOU’s commitments in regard to opening up film distribution opportunities for foreign films, even though the agreement’s five-year term before review expired in February of 2017.

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129 See Tiffany Kwong, China’s Film Censorship Program and How Hollywood Can Enter China’s Film Market, 5 ARIZ. ST. U. SPORTS & ENT. L.J. 164, 176–77 (2015). The co-financing route is more attractive to American studios because it allows American films to effectively bypass the Chinese film quota system. Id. at 177; Patrick Brzeski, Can Legendary Entertainment Bypass China’s Film Quota System?, HOLLYWOOD REP. (Apr. 8, 2016, 3:00 AM), http://www.hollywoodreporter.com/news/can-legendary-entertainment-bypass-chinas-881765 [https://perma.cc/KY6T-7NS7]. In addition, for Chinese co-production status, films must have substantial Chinese content and story elements, and 30% of the cast and crew must be Chinese. Id.

130 See Kwong, supra note 129, at 177.


133 See generally Memorandum of Understanding, supra note 123. However, the MOU does note in its introduction the DS363 WTO hearing of 2010’s impact on the decision to form the 2012 MOU. See id. at 1.

134 See OFF. OF THE U.S. TRADE REPRESENTATIVE, supra note 16, at 32 (describing China’s failure to abide by the 2012 MOU); see also OFF. OF THE U.S. TRADE REPRESENTATIVE, supra note 119, at 143 (noting the five-year term before review of the 2012 MOU).
Furthermore, the election of Donald J. Trump as President of the United States in 2016 complicated the MOU’s renewal and renegotiation. In April of 2017, President Donald Trump held meetings with the President Xi Jinping of China which were “very frank” and “very positive.” This meeting gave the American film industry hope that the two countries could avoid a trade war. Hollywood studios are probably particularly interested in the Chinese film market because China is the single largest export market for American films. However, the President reversed course in August when he directed the USTR to launch a probe to examine whether Chinese laws, policies, practices, or actions negatively affected American intellectual property rights. While President Trump called this a “very big move,” the state-run China Daily newspaper stated that “the investigation will ‘poison’ relations and warned the Trump administration not to make a rash decision it could regret.” With President Trump changing his tone regarding China from cooperative to confrontational, American film studios are concerned that the deteriorating relationship between the United States and China will negatively affect negotiations with the Chinese regarding motion pictures.


136 See id.

137 Id.

138 Id.


Subsequently, President Trump implemented $200 billion dollars worth of tariffs on Chinese imports into the United States because the Trump administration concluded that Chinese intellectual property practices “constitute a grave threat to the long term health and prosperity of the United States economy.” President Trump’s move has some in Hollywood nervous, since China has restricted outward investment in the entertainment sector in response to President Trump’s tariffs, more American producers are heading to China than Chinese producers heading to Hollywood.

C. The Hurdles Rights-Holders Face to Protect Themselves in China

Apart from opening the Chinese film market to foreign films, rampant online piracy and counterfeiting continue to cause rights holders large financial challenges in China. According to the USTR, online piracy and counterfeiting in China cause inordinate losses to U.S. rights holders producing and distributing legitimate film and television content. In a 2011 report, the U.S.

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145 Counterfeiting is the process whereby someone manufactures a good using someone else’s name or trademark. See What Is Counterfeiting, INT’L ANTI-COUNTERFEITING COAL., http://www.iacc.org/resources/about/what-is-counterfeiting [https://perma.cc/5BKS-PVFX] (last visited Sept. 17, 2017). Counterfeit goods are usually made from inferior quality materials and try to take advantage of the trust consumers place in a brand name. See id.


International Trade Commission estimated the losses due to copyright infringement in China ranged from $10.2 billion to $37.3 billion. Unauthorized camcording—where people bring camcorders into cinemas and illegally record films—was a serious problem in remained one of the top sources of online audiovisual infringements in 2016. Another problem is media box piracy, which is where a set-top box is preloaded with illegally downloaded content, or links to sources of illegally downloaded content. According to some estimates, many of the media box manufacturers, as well as the servers that connect the media box users to the infringing content, reside in China. In addition, the majority of websites and third-party apps that media box users connect to are reportedly owned or operated in China. Online piracy continues to get more sophisticated, with “illegal download[ing] sites, peer-to-peer (P2P) piracy sites . . . BitTorrent indexes,” and new derivative piracy sites emerging.

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151 See Off. of the U.S. Trade Representative, 2016 Special 301 Report at 32 (2016).


153 See Off. of the U.S. Trade Representative, supra note 151, at 32.

154 Int’l Intell. Prop. Alliance, 2016 Special 301 Report on Copyright Protection and Enforcement, China (PRC) 16 (2016). A derivative piracy site is when a user of an infringing website creates his own website that links back to the mother website that is hosting the infringing content. See id. These websites generate traffic and revenue for the secondary website as well as the mother website hosting the infringing content. See id. Peer-to-peer file sharing is when computer systems are connected directly to each other via the Internet without the need for a central server. P2P, Entry in Internet Terms, TechTerms, https://techterms.com/definition/p2p [https://perma.cc/GJB9-WFZ7]
derivative piracy sites are especially problematic because they incentivize multiple users to create their own websites, which in turn links back to the original website that hosts the infringing content, because each derivative website generates traffic revenue for itself as well as the linked original websites. This means that everyone in the derivative website chain profits at the rights holder’s expense. Other measures the Chinese have implemented that concern the USTR are those that discriminate against content, such as rules barring imported films from releasing in China on certain dates, and “require[ments that] state-owned entities hold an ownership stake in online platforms for film and television content.”

Chinese consumers’ attitudes toward piracy also contribute to the problem. According to a recent survey, 84% of Chinese consumers polled indicated they were aware that producing pirated content is illegal, however, only 54% of the consumers polled indicated that they were aware that consuming pirated content was also illegal. These results illustrate the lack of understanding among Chinese consumers that both producing and consuming

(last visited Sept. 7, 2017). This allows files to be shared between the computers via P2P software. See id. BitTorrent is a type of P2P file sharing that distributes file transfers across multiple computers, reducing the computing power that is used by a single computer. BitTorrent, Entry in Internet Terms, TECHTERMS, https://techterms.com/definition/bittorrent [https://perma.cc/5Q5K-QPYR] (last visited Sept. 7, 2017). This is because most internet providers offer faster download speed than upload speed and downloading a file from multiple computers can make the process faster than downloading from a single computer. Id.

155 INT’L INTELL. PROP. ALLIANCE, supra note 154, at 16.
156 See id.
159 See id. Irdeto, which is a digital security company, conducted the survey. See id. Irdeto’s products and solutions are designed protect revenue streams and fight cybercrime. See id. Irdeto’s products are used by leaders across multiple industries, including media and entertainment, payments, and automobiles. Id.
imposing content is illegal. In contrast, a similar survey conducted with American consumers found that 74% of American consumers were aware that producing pirated content is illegal, while 69% were aware that consuming pirated content was also illegal. Online piracy has only worsened in recent years because more advanced technology has made it easier for consumers to obtain infringing content. For example, China’s music sales revenue only reached $64.3 million USD in 2010, compared to “$4.2 billion [USD] in the [United States], $178.4 million [USD] in South Korea[,] and $68.9 million [USD] in Thailand—a country with less than [5%] of China’s population.” If Chinese music sales were equivalent to Thailand’s on a per capita basis, [China’s] music sales [in 2010] would [have been] almost $1.4 billion [USD],” which highlights the immense impact of online piracy. Fortunately, Chinese consumers that have recently been more willing to pay for their digital content, a trend that would have been unthinkable in the “wild west” days of China’s rampant online piracy.

In addition to the financial concerns regarding piracy in China, plaintiffs are also concerned with the quality of the enforcement of their rights, which goes back to the China enforcement case that

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160 Id.
163 Id.; See also Mark Cohen, Developments in Online Civil Copyright Enforcement in China: NCAC’s Analysis, CHINA IPR (Aug. 8, 2015), https://chinaipr.com/2015/08/08/developments-in-online-civil-copyright-enforcement-in-china-ncacs-analysis/ [https://perma.cc/4JH4-3CQU].
the US brought to the WTO, DS/362. A primary concern regarding enforcing copyrights in China is the lack of judicial consistency due to ambiguity in legal instruments, a lack of established case law, and the inconsistent quality of judges, which together result in an unpredictable interpretation and subsequent implementation of copyright laws. In addition, judges in geographic locations without a heavy intellectual property caseload often hear other types of cases, such as family law cases. Therefore, the judges have vastly differing levels of experience adjudicating intellectual property disputes. In an effort to create standardized rules of adjudication and reduce judicial inconsistency, the Standing Committee of the National People’s Congress issued a decision on August 31, 2014, creating specialized intellectual property courts in three cities: Beijing, Shanghai, and Guangzhou. These specialized intellectual property courts have jurisdiction in the first instance over cases involving complex technologies, such as patents and technological trade secrets, and appellate jurisdiction over copyright and trademark disputes. However, since the Chinese civil procedure law requires a plaintiff to bring any lawsuit against a Chinese

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165 See Off. of the U.S. Trade Representative, supra note 16, at 29.
167 See id. (manuscript at 7–8).
168 See id. (manuscript at 8).
169 LOVELLS, supra note 87, at 1.
170 Id. The most frequent case of first instance before the Beijing Intellectual Property Court are trademark infringement cases, which account for about 73% of first instance cases, while copyright infringement cases account for about 2.5% of first instance cases. See Judge Gang Feng, The Introduction to the Specific IP Adjudication of China: From the Perspective of Beijing IP Court, WENTING CHENG ON IP & INNOVATION (June 3, 2016, 3:17 AM), https://wenting.ch/2016/06/the-introduction-to-the-specific-ip-adjudication-of-china-from-the-perspective-of-beijing-ip-court/ [https://perma.cc/R9MP-9GQ6]. However, copyright infringement cases account for about 78% of second instance cases. See id.
citizen in the court where the defendant resides, unless the case has a major impact on the jurisdiction, the local courts continue to have jurisdiction in the first instance over trademark and copyright disputes despite their judicial inconsistency.¹⁷¹

Judicial inconsistency isn’t the only barrier to foreign plaintiffs; evidentiary barriers also contribute to the hurdles foreigners face in enforcing their copyrights in China.¹⁷² Unlike the United States, which has an extensive discovery mechanism in its civil lawsuits, China does not; China’s legal system does not allow for a party to request information from the opposing party.¹⁷³ Instead, a party must conduct research, hire private investigators, or purchase copies of the allegedly infringing work.¹⁷⁴ Furthermore, even if a foreign party obtains evidence to support their case, it faces yet another challenge because a Chinese notary public must notarize the evidence and documents presented.¹⁷⁵ This requirement is justified in part because it is difficult to translate another language into Chinese characters, which one of the authorized firms must perform.¹⁷⁶

¹⁷³ Compare, e.g., FED. R. CIV. P. 26 (providing general provisions governing discovery and requiring the production of evidence from other parties), with Civil Procedure Law of the People’s Republic of China, arts. 49, 61, 63–81 (allowing parties to collect evidence, and the court to collect and require its own evidence, but providing no mechanism to require evidence from another party); see also Brian J. Safran, A Critical Look at Western Perceptions of China’s Intellectual Property System, 3 U. P.R. BUS. L.J. 135, 155–56 (2012) (“Unlike in the United States, where most day-to-day legal work concentrates on discovery or the process by which opposing counsel share pertinent information with one another about the case, there is no procedure similar to discovery in China.”).
¹⁷⁴ Safran, supra note 173, at 156.
¹⁷⁵ CHINA IPR SME HELPDESK, supra note 172, at 3.
Aside from the documenting hurdles foreigners face in bringing copyright infringement lawsuits in China, foreigners also encounter financial barriers. The hefty requirements for evidence’s authenticity create additional, costly hurdles for plaintiffs to overcome.\(^1\) In addition, a plaintiff must bring a copyright infringement lawsuit in a local court in the first instance.\(^2\) Additionally, it is almost impossible for plaintiffs to prove actual damages, so they usually resort to statutory damages.\(^3\) Alternatively, even if the plaintiff can afford the litigation, the expected recovery is likely less than the predicted litigation costs because of judicial inconsistency and the aforementioned evidentiary burdens and expenses.\(^4\)

One study indicated that of the 2,235 cases brought in China for copyright infringement, courts found for plaintiffs in 1,868 cases—and of those 1,868, cases, awarded statutory damages in 99% of cases.\(^5\) Article 49 of China’s 2010 Copyright Law

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1. Cf. China IPR SME Helpdesk, supra note 172, at 3; Statistical Analysis Report on Intellectual Property Cases in the Film and Television Industry, IPHouse, http://en.iphouse.cn/static/pdfdata/Statistical2017.pdf [https://perma.cc/WJ8Y-TGRT] [hereinafter Analysing Copyright Infringement Cases] (showing how rights holders, even when victorious, often receive in way of compensation for all their trouble). An example of this is the Beijing Ciwen Digital Oriental Film & TV Production Co. v. Hainan Branch Co. of China Netcom Group Co. case, where Beijing Ciwen accused the Hainan Branch website of copyright infringement by providing an illegal link to the movie “Seven Swords.” See Xue Kun, Case [Ten] - Civil Decision of the Supreme People’s Court of the People’s Republic of China – Case No. [2009] Min Ti Zi No. 17, in IPR2, EU-CHINA PROJECT ON THE PROT. OF INTEL. PROP. RIGHTS, LEADING COURT CASES ON CHINESE INTELL. PROP. 50, 50–51 (2011). Beijing Ciwen was unable to get evidence indicating that Hainan setup the illegal website and, as a result, they lost in the first instance. See id.


4. See id. at 605 (discussing judicial inconsistency for awarding damages); Analysing Copyright Infringement Cases, supra note 177 (discussing poor returns on sought after damages awards); notes 177–178 and accompanying text (discussing other economic burdens and factors to consider).

5. See Analysing Copyright Infringement Cases, supra note 177.
provides for statutory damages up to 500,000 RMB\(^{182}\) when the actual damages cannot be ascertained.\(^{183}\) WIPO\(^{184}\) estimated that the cost of bringing an intellectual property lawsuit in the first instance in China is approximately $150,000 USD (based on patent litigation metrics).\(^{185}\) Currently, the 500,000 RMB statutory cap converts to approximately $78,592.13 USD,\(^{186}\) which is about half the cost to bring lawsuit according to WIPO.\(^{187}\) In copyright lawsuits, plaintiffs on average claim actual damages of 1,079,450 RMB ($169,660.34 USD),\(^{188}\) but even if they are successful, the court only awarded plaintiffs an average of 27,789 RMB ($4,367.82 USD).\(^{189}\) Accordingly, one can assume that some foreign plaintiffs do not bring lawsuits to enforce their copyrights in China because it does not make financial sense. For example, between July 2016 and June 2017, there were only three foreign cases relating to the film and television industry, with two copyright cases and one trademark case.\(^{190}\) Moreover, with the average statutory damage award at approximately $4,030 USD, and the cost of bringing a lawsuit around $150,000 USD, it would

\[\text{RMB is often used interchangeably CNY, which stands for the Chinese Yuan. Rebecca Campany, Here’s the Difference Between the Yuan and the Renminbi, BUS. INSIDER (Aug. 20, 2015, 11:27 AM), http://www.businessinsider.com/heres-the-difference-between-the-yuan-and-the-renminbi-2015-8 [https://perma.cc/CZL9-K4NB]. There is essentially no difference between RMB and CNY. Id. RMB translates to “people’s currency” while CNY is a denomination of RMB. Id. See 2010 Copyright Law, supra note 12, art. 49.}\]

\[\text{\(^{183}\) See supra note 95 and accompanying text.}\]

\[\text{\(^{184}\) See supra note 95 and accompanying text.}\]

\[\text{\(^{185}\) See supra note 13 and accompanying text.}\]

\[\text{\(^{186}\) See supra note 13 and accompanying text.}\]

\[\text{\(^{187}\) See supra note 13 and accompanying text.}\]


\[\text{\(^{189}\) See Analysing Copyright Infringement Cases, supra note 177; 27,789 RMB, Calculation of XE Currency Converter: CNY to USD, XE, http://www.xe.com/currencyconverter/convert/?Amount=27789&From=CNY&To=USD [https://perma.cc/376X-VMUZ] (last visited May 4, 2018).}\]

\[\text{\(^{190}\) See Analysing Copyright Infringement Cases, supra note 177.}\]
be imprudent for a profit-oriented rights holder to bring a lawsuit for copyright infringement that would result in statutory damages. Unfortunately, this lack of enforcement provides an environment where pirates operate with carte blanche because they face relatively inconsequential damages for infringing.

### III. THE PATH CHINA SHOULD TAKE GOING FORWARD

China has made progress towards addressing copyright infringement in China through adopting the 2010 amendments to the 1990 Copyright Law and creating specialized intellectual property courts. However, China should take several further steps to ensure that it remains a thriving market for filmmakers, both Chinese and foreign, to exhibit and sell their works. First, Section III.A outlines a proposed increase in the statutory maximum damage award that China should undertake, which would incentivize rights-holders to enforce their rights in China. Next, Section III.B explains how China should relax the foreign film quota. Then, Section III.C contends that China should further pursue stronger enforcement measures to protect films that are not formally imported under the Foreign Film Quota. Finally, Section III.D asserts that China should create a copyright division of the Specialized Intellectual Property Tribunals to exclusively cover copyright claims.

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191 See World Intell. Prop. Org., supra note 185, at 19; Analysing Copyright Infringement Case, supra note 177.
192 Carte blanche is a Latin phrase that means “[f]ull discretionary power; unlimited authority.” Carte Blanche, BLACK’S LAW DICTIONARY (10th ed. 2014).
194 See generally 2010 Copyright Law, supra note 12; Lovells, supra note 87.
A. Increasing the Statutory Maximum Damage Award for Copyright Infringement

One solution to the problem is for China to increase the statutory maximum damages award for copyright infringement from 500,000 RMB to 3,000,000 RMB, making it equivalent to the 3,000,000 RMB statutory maximum damages award for trademark infringement. The Chinese government increased the statutory maximum damages award for trademark infringement to 3,000,000 RMB in 2013 to further protect the legitimate rights of trademark holders and to ensure a fairer market for trademark holders. All of these concerns should be equally applicable to copyright holders. Currently, with the low statutory maximum damages of 500,000 RMB ($78,592.13 USD), a pirate can still profit even if the pirate pays the fine, which itself is contingent on a judicially inconsistent court finding the pirate liable for copyright infringement. In 2015, the top ten illegally downloaded movies accounted for over 360 million illegal downloads worldwide, demonstrating a huge appetite for infringing content. With so many illegal downloads just from the top ten most illegally downloaded movies, a $78,592.13 statutory damages award is not a deterrent to potential pirates, it is just a cost of doing business. The increased maximum fine would encourage motion picture

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195 In 2013, the Chinese government adopted changes to the Trademark Law for the first time in twelve years. See China: Trademark Law Revised, Highlight in Global Legal Monitor, LIBRARY OF CONG. (Sept. 13, 2013), http://www.loc.gov/law/foreign-news/article/china-trademark-law-revised/ [https://perma.cc/UB9R-SJGL]. Among other things, the 2013 amendments enhanced damages and introduced the requirement of good faith in certain areas. See id.


197 One example of such potential profit is the $8.767 billion USD value of unlicensed computer software in China, when there is almost no cost of producing illegal copies. See BSA, THE COMPLIANCE GAP: GLOBAL SOFTWARE SURVEY 4 (2014).

198 See Priest, supra note 24, at 826.

199 See supra discussion accompanying notes 165–171.


201 See Cox and Sepetys, supra note 193, at 11.407.
rights holders to bring actions against infringers because, with a possible maximum statutory damage award of $471,558.40 USD202 and the average cost of bringing a lawsuit in China around $150,000 USD,203 the potential recovery would now outweigh the cost of bringing a copyright lawsuit.

One example of a successful trademark lawsuit under the new trademark rules is the recent New Balance lawsuit, where New Balance won $500,000 USD in damages and legal costs against a company in Hangzhou that infringed New Balance’s trademark by manufacturing shoes containing New Balance’s trademark.204 Increasing the maximum statutory damages also has the added benefit of deterring copyright infringers without the state expending additional resources to crack down on infringement,205 as the government need only watch as the invisible hand of market force pushes copyright holders to bring lawsuits against pirates in order to enforce their rights.206

B. Relaxing the Foreign Film Import Quota

China should also further relax, or eliminate, the foreign film import quota from its current thirty-four films per year.207 China


203 See discussion supra Section II.C.


207 See supra note 125 and accompanying text.
uses the foreign film quota as a way to protect its growing domestic film industry from domination by Hollywood blockbusters. However, the SAIC reported that in 2015, domestic Chinese films accounted for “27.1 billion yuan, or 61.58[%]” of China’s total box office revenue. According to the SAIC, these statistics indicated that domestic films “maintain[ed] a clear dominance over the country’s cinema market,” in part because only thirty-four foreign films were permitted in China that year. While the quota was designed to protect the domestic film industry, isolation from the rest of the world’s film industry may in fact do more harm than good. Actor Jackie Chan recently stated that competition with Hollywood films could benefit the Chinese film market because foreign competitive pressure makes Chinese filmmakers exert more effort, which increases the quality of the films. Chan believes that if Chinese filmmakers did not have any competition, the Chinese box office would not be as successful as it is today. In addition, the Senior Vice-President of the Wanda


210 See China’s 2015 Box Office Soars to 6.8 [Billion] USD, supra note 209. The fact that only thirty-four films were allowed in the theaters greatly impacted the profitability of distributing films in China. See discussion supra Section II.B.


212 See id.
John Zeng, emphasized that “Chinese audiences favor Hollywood films with strong IP, visual effects[,] and creativity.”

While China may have intended the film quota to protect the domestic Chinese film industry, the enforcement of the film quota has been far from inflexible. In 2016, the foreign film quota was relaxed from the thirty-four foreign films to thirty-nine foreign films as a result of a box office slump in China. It doesn’t make sense to have a film quota, which purports to protect the domestic film industry, that is disregarded when box office revenues are sagging, especially when the quota may be harming the Chinese film industry instead of helping it in the long run. By increasing the amount of films imported, it would allow for more screens to be built, which in the end would lead to more Chinese films being produced.

216 See Brzeski, supra note 116.
217 Id. The government seems to have chosen thirty-nine films because of an unexpected slump in box office ticket sales. See id. With four weekends in December, the government “packed the December release schedule with additional Hollywood films” in a supposed last-ditch effort to improve the box office receipts for 2016. Id.
218 An example of the potential harm would be Legendary Entertainment’s films. See, e.g., Brzeski, supra note 129. Legendary is interested in co-producing with China because it allows their films to bypass the Chinese Foreign Film Import Quota. Kwong, supra note 129, at 177. However, the addition of too much Chinese content to a film, which does not cohere with the overall story, could hurt its global appeal. See Brzeski, supra note 129 (noting the requirements to include, inter alia, a certain number of Chinese roles by Chinese actors and incorporate Chinese themes, values, and story elements for coproduction status with China).
Chinese films have experienced tremendous growth at the domestic box office, but have struggled to attract audiences abroad.\textsuperscript{219} Feng Xiaogang, a Chinese actor and director, believes that Chinese films fail to attract foreign audiences because of their poor craftmanship and domestic censorship regulations.\textsuperscript{220} The foreign film quota certainly helps Chinese films maintain a dominance over the Chinese film market in terms of the number of films released compared to Western films,\textsuperscript{221} but the quota may have the unintended consequence of making Chinese film producers complacent.\textsuperscript{222} Chinese film producers’ complacency is exacerbated because producers make low quality movies and earn huge profits in China.\textsuperscript{223} Without any competition, poorly made films rise to the top of the Chinese box office, and producers are disincentivized to invest more resources to make a better product because the film quota provides them with a pseudo-monopoly over the Chinese film market.\textsuperscript{224} Therefore, further relaxing, or eliminating, the foreign film import quota would benefit both the United States and China. U.S. filmmakers would have greater access to the booming Chinese motion picture market, and Chinese filmmakers would have increased competition between Hollywood and the Chinese film industry. The competition would send a strong message to Chinese film producers that they need to catch up or the foreign films producers will pass them by, which in turn will raise the quality of Chinese films and allow Chinese films to


\textsuperscript{220} Id.

\textsuperscript{221} See Zhang, supra note 215.

\textsuperscript{222} See Liu, supra note 219; see also discussion supra notes 211–12.

\textsuperscript{223} See Liu, supra note 219.

\textsuperscript{224} See Charles Liu, Famous Chinese Director Blasts China’s Film Industry, \textit{NANFANG} (Feb. 8, 2015, 9:44 PM), https://thenanfang.com/feng-xiaogang-slams-chinese-blockbusters-bad-influence/ [https://perma.cc/V27Q-AM8Q]. A poorly made film, according to Xiaogang, would be considered one that is simply made for box office returns rather than artistic and aesthetic potential. See \textit{Audiences Not to Blame for Poor Films}, \textit{CHINA DAILY} (June 21, 2017, 7:40 AM), http://www.chinadaily.com.cn/opinion/2017-06/21/content_29824174.htm [https://perma.cc/YDZ5-X2MY]. For example, \textit{The Midnight Canteen}, a Chinese drama adapted from a Japanese comic, received terrible reviews from critics, yet was successful with Chinese viewers. \textit{Id}.
perform better in foreign markets. In addition, greater knowledge transfer between U.S. and Chinese filmmakers would follow. Chinese filmmakers would likely learn what makes Hollywood films popular to Chinese audience, such as CGI and visual effects. U.S. producers would also benefit by gaining an increased understanding about the Chinese market. Actor Donnie Yen recently stated that a lot of American films don’t work in China because western filmmakers have not “spent the time to really analyze the Asian market.” This is exemplified by the film Rogue One: A Star Wars Story, which did poorly in China despite being an established American film franchise. With an increased understanding of the Chinese market, American films can do better at the Chinese box office, which would then be reinvested into the Chinese film industry. In the end, both the Chinese and American film industries would be left in a better position.

C. Stronger Enforcement of the Copyright Law to Protect Films that Are Not Formally Imported

In addition, China should increase enforcement of the 2010 Copyright Law to protect films which are not one of the thirty-four permitted foreign motion pictures. China’s copyright law and the foreign film quota are inextricably intertwined. China and

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227 Id.

228 China’s film quota only allows thirty-four films because of the Memorandum of Understanding signed with the United States in 2012. See MEMORANDUM OF UNDERSTANDING, supra note 123.

229 There are two ways of importing a film into China; the import quota method and the flat-fee method. Jonathan Papish, Foreign Films in China: How Does It Work?, CHINA FILM INSIDER (Mar. 2, 2017), http://chinafilminsider.com/foreign-films-in-china-how-does-it-work/ [https://perma.cc/ZLE9-P34Q]. The import quota method is where a non-Chinese film producer shares revenue with a local Chinese film distributor. See id. The non-Chinese producer gets 25% of box office sales in China. Id. This method of importing would count as one of the thirty-four films that are allowed to be imported into China annually. See id. In contrast, the flat-fee method gives a flat price to non-Chinese producers in exchange for the Chinese distributor retaining 100% of the box office sales.
the United States have relied on the now-expired memoranda of understanding that they must negotiate every five years. According to the Motion Picture Association of America, 718 films were released in North America in 2016. Because of the foreign imported film quota, American film producers did not import over 95% of American films into China in 2016. Chinese consumers are then placed in a conundrum because when they want to view the newly released foreign films, very likely the only means available to them is to illegally source the films from pirates. Pirates, in this situation, would operate in a grey area because they would be pirating content which has no legitimate market in China.

Article 4 of China’s 1990 Copyright Law was amended in 2010 to provide copyright protection as long as copyright holders did not violate the Constitution or laws, or jeopardize the public interest. However, the Chinese government maintained the right to administer the publication and dissemination of works. Despite the 2010 amendments, the 2010 Copyright Law continues to prohibit copyright holders from violating the law, which includes the foreign film import quota. As a result, concerns regarding the conflict between the film quota and the copyright law remain, and studios are likely unsure whether foreign films that are not successfully imported are protected. For example, a foreign film,

230 See supra notes 123–24 and accompanying text.
231 See supra notes 123–24 and accompanying text.
232 See supra note 118.
233 Compare 1990 Copyright Law, supra note 11, art. 4 (“Works the publication or distribution of which is prohibited by law shall not be protected by this law. Copyright owners, in exercising their copyright, shall not violate the Constitution or laws or prejudice the public interests.”), with 2010 Copyright Law, supra note 12, art. 4 (“Copyright holders shall not violate the Constitution or laws or jeopardize public interests when exercising their copyright. The State shall supervise and administer the publication and dissemination of works according with the law.”).
234 See 2010 Copyright Law, supra note 12, art. 4; supra note 108 and accompanying text.
235 See 2010 Copyright Law, supra note 12, art. 4; Memorandum of Understanding, supra note 123, at 1.
such as Shrek 2, which was awaiting content review by the Chinese government, was automatically granted copyright protection because the content within the film was deemed lawful. However, an unanswered question remains because a disconnect exists between content which is lawful and the producers of that content being able to legally market that content in China. If it is never lawful for film producers to exhibit certain content in China due to the foreign film quota, then those films can never make money in China while they suffer losses in China and in overseas markets due to piracy. Content review in effect is a denial of copyright protection, since it delays entry into the marketplace. This plays into the hands of the pirates, since they are the only source of content for films that cannot access the Chinese marketplace, despite being an illegal source of the content. Increased enforcement and protection of copyrights for films that film producers cannot import, due to the foreign film quota, has benefits for both sides. It allows China the autonomy to continue to censor content while simultaneously protecting rights holders who do not have access to the Chinese market, which would go a long way towards improving relations between the U.S. and China.

D. Creating a Copyright Division of the Specialized Intellectual Property Tribunals

The final solution would be for China to expand the specialized intellectual property tribunal by creating a copyright division that will exclusively copyright infringement cases. Currently, the intellectual property courts only take copyright cases that deal with software. Judges on these specialized intellectual property courts have training and extensive experience in intellectual property


and consequently, the intellectual property courts judges are the most qualified Chinese judges to adjudicate copyright disputes. However, one problem with the current system is the sheer volume of cases, with nearly 87,000 copyright cases filed in 2016, which far outpaces all other types of intellectual property cases brought in China combined.

There are some welcome developments regarding the intellectual property courts, as the Supreme People’s Court authorized in January and February of 2017 the establishment of four additional specialized intellectual property tribunals in Wuhan, Nanjing, Suzhou, Chengdu. These specialized intellectual property tribunals are attached to the intermediate courts of the cities in which they sit. Furthermore, China established 15 Intellectual Property Tribunals nationwide, with these specialized tribunals having “cross-regional and exclusive jurisdiction over IP matters in significant first-instance cases,” in addition to creating a new chamber in the Supreme People’s Court.

While these are positive developments, the intellectual property tribunals are still limited in that they can generally only hear copyright cases involving software; the first instance copyright cases are still handled at the local level. One benefit from creating a copyright division of the intellectual property tribunal is the resulting reduction in judicial inconsistency across courts. Predictability and consistency could be hallmarks of an efficient Chinese intellectual property judicial system, and having consistent judgements could prevent intellectual property pirates from establishing a base of operations in an area where the court has given out small monetary damage awards to victims of copyright

239 See Wayne Ma, How a Plague on the Movie and Music Industries Became Their Chief Protector in China, WALL STREET JOURNAL, May 21, 2017.
240 See id.
241 Id.
242 See COVINGTON, supra note 237.
243 See id.
244 Id.; See also supra notes 165–71 and accompanying text.
infringement. The establishment of these intellectual property tribunals and courts may alleviate concerns about inconsistent results and regional protectionism, since many defendants will not be sued in their own cities. 245 Predictability is critical to attracting foreign investment, as foreigners are unlikely to invest in distributing content if it is difficult for them to protect their investment. With the advent of the Internet, commerce is no longer bound by national borders. With the click of a button, content can be sent around the globe in little more than a few seconds. Pirates may benefit from a geographically-constrained judicial system when they operate in a world without borders. Eliminating these forum selection issues in the judicial system, such as by granting the specialty intellectual property tribunals jurisdiction over traditional copyright claims, is one way to combat pirates from having carte blanche to infringe copyrights in China. Finally, the creation of a copyright division would help ease the backlog of cases, as the judges in this division would be dedicated solely to hearing copyright cases. Copyright cases are the most common type of intellectual property cases brought in China, and the copyright division would help to ensure the swift resolution of these cases.

CONCLUSION

China has come a long way in the past twenty-seven years since the Chinese government enacted the 1990 Copyright Law. China is no longer regarded as the “wild west” of intellectual property, where infringement is rampant and unchecked. 246 However, piracy has also evolved in that time period. 247 The Internet is now commonplace and has made pirating easier and more profitable than ever. 248 Pirates are no longer constrained by physical mediums such as VHS, DVD, or Blu-Ray; pirates instead can upload infringing content to websites and millions of people

245 See COVINGTON, supra note 237.
246 See CHATTERTON, supra note 164.
247 See supra notes 144–56 and accompanying text.
248 See supra notes 144–56 and accompanying text.
around the world can view this infringing content without paying for it.\textsuperscript{249}

The solutions proposed are in no way going to completely eliminate the piracy problem in China, but instead are steps forward in combating the piracy problem. Increasing the statutory maximum damages for copyright violations to 3,000,000 RMB creates incentives for rights holders to bring enforcement actions against pirates because it makes it financially worthwhile to do so.\textsuperscript{250} With low statutory maximum damages, rights holders are put in an impossible situation where their content is stolen before their eyes, but the cost of litigation far exceeds the possible recovery.\textsuperscript{251}

In addition, relaxing the foreign film import quota would steer potential customers away from illegitimate content sources to legitimate sources.\textsuperscript{252} Increasing the quota would also help the Chinese film industry by increasing competition and consequently improving the quality of Chinese films and their financial performances abroad.\textsuperscript{253} Also, stronger enforcement of Copyright Law to protect to films not imported under the film quota increases confidence that foreign film producers’ work is safe in China even if they cannot import it into China.\textsuperscript{254} Finally, creating a copyright division of the specialized intellectual property tribunal that exclusively handles copyright claims in the first instance creates a predictable, consistent, comprehensive, and efficient system of protecting foreign copyrights across China.\textsuperscript{255}

These solutions require a cooperative spirit between the United States and China to succeed, but both countries will benefit from this cooperation. While it may be necessary to take a tough stance on improper intellectual property theft, saber-rattling only serves to antagonize the other side and drive them away from mutually beneficial solutions. The solution to this complex intellectual property rights problem is to come together for both sides’ benefit.

\textsuperscript{249} See supra notes 144–56 and accompanying text.
\textsuperscript{250} See supra Section III.A.
\textsuperscript{251} See supra notes 177–93 and accompanying text.
\textsuperscript{252} See supra Section III.B.
\textsuperscript{253} See supra Section III.B.
\textsuperscript{254} See supra Section III.C.
\textsuperscript{255} See supra Section III.D.