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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.

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

* 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.

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

¹ LEMONY SNICKET, *HORSERADISH* 50 (2007).

² See WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELL. PROP. LAW IN CHINESE CIVILIZATION* 9–29 (1995).

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).

⁵ See DONNA SUCHY, *IP PROTECTION IN CHINA* 152–53 (2015). A

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/thewto_e/whatis_e/tif_e/fact2_e.htm#seebox [https://perma.cc/HA4Q-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

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.

¹¹ Copyright Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, effective June 1, 1991; amended Oct. 27, 2001; amended Feb. 26, 2010), CLI.1.4812 (EN) (Lawinfochina) [hereinafter 1990 Copyright Law].

¹² Copyright Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Feb. 26, 2010, effective Apr. 1, 2010), art. 49, CLI.1.127326 (EN) (Lawinfochina) [hereinafter 2010 Copyright Law].

¹³ 500,000 RMB, Calculation of *XE Currency Converter: CNY to USD*, XE, <http://www.xe.com/currencyconverter/convert/?Amount=500000&From=CNY&To=USD> [<https://perma.cc/SE77-MQ7V>] (last visited May 4, 2018). This conversion is as of May 4, 2018.

piracy has continued to grow.¹⁴ In 2017, “China [was] home to 10.77% of the world’s file sharers – the second highest percent” globally.¹⁵ 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 list¹⁶ on its 2018 Special 301 Report and previous Special 301 Reports.¹⁷ The USTR was concerned with the widespread piracy and counterfeiting in China’s online markets.¹⁸ 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.¹⁹

¹⁴ See Alexander J. Martin, *Police Cracking Down on Illegal Streaming as Game of Thrones Piracy Grows*, SKY NEWS (Aug. 14, 2017, 6:55 PM), <http://news.sky.com/story/police-cracking-down-on-illegal-streaming-as-game-of-thrones-piracy-grows-10988497> [<https://perma.cc/RU98-ZWNH>].

¹⁵ *P2P File Sharing Networks: [Ten] File Sharing Trends in China*, TECXIPIO MAG. (Sept. 19, 2017), <https://www.tecxipio.com/single-post/trends-in-p2p-file-sharing-networks-in-china> [<https://perma.cc/3GET-YGJW>]. File sharing is where digital information, such as multimedia, books, images, and computer programs, are shared among users. See *File Sharing*, TECHOPEDIA, <https://www.techopedia.com/definition/16256/file-sharing> [<https://perma.cc/3AS3-LHZA>] (last visited Sept. 17, 2017). A file sharing internet protocol (“IP”) address is a specific internet address where users can access the digital information. *Cf. id.*

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).

¹⁷ See OFF. OF THE U.S. TRADE REPRESENTATIVE, 2018 SPECIAL 301 REPORT 9 (2018).

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*.

¹⁹ See OFF. OF THE U.S. TRADE REPRESENTATIVE, *supra* note 16, at 31. The state definition of genuine seems to be authentic or of good quality. See *Shoddy, Counterfeit Goods in [Forty] Pct China Online Deals: Report*, XINHUA NEWS (Nov. 3, 2015, 01:04 AM), http://news.xinhuanet.com/english/2015-11/03/c_134776510.htm [<https://perma.cc>

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

/6GX4-Z5MX]. The SAIC has a Consumer Protection Bureau that investigates and punishes conduct that does not adhere to the genuine or good quality principles, such as counterfeit, fake, and inferior quality goods. *See Our Organizational Set-Up*, STATE ADMIN. FOR INDUS. & COM. OF CHINA, <http://home.saic.gov.cn/english/aboutus/Departments/> [<https://perma.cc/6EPL-JCZA>] (last visited Sept. 19, 2017).

²⁰ INT'L TRADE ADMIN., U.S. DEP'T OF COMMERCE, *Country Case Study: China, in 2016 TOP MARKETS REP. FOR MEDIA AND ENT.: A MARKET ASSESSMENT TOOL FOR U.S. EXPORTERS* 29, 29 (2016).

²¹ *Compare China's 2015 Box Office Soars to 6.8 [Billion] USD*, XINHUA NEWS (Dec. 31, 2015, 8:08 PM), http://news.xinhuanet.com/english/2015-12/31/c_134968462.htm [<https://perma.cc/87MQ-QZL3>], with Patrick Brzeski, *China Box-Office Growth Slowed to 3.7 Percent in 2016, Official Data Shows*, HOLLYWOOD REP. (Jan. 1, 2017, 7:11 PM), <http://www.hollywoodreporter.com/news/china-box-office-growth-slows-37-percent-2016-official-data-shows-960217> [<https://perma.cc/YB2N-UCZH>] ("China built 1,612 new cinemas this year, bringing its total to 41,179 screens."). "Film screen" means a screen that shows a motion picture. *See Atanu Dhar, Multi Screen vs Single Screen—Which Kind of Theatre Makes More Economic Sense?*, LINKEDIN (Mar. 25, 2015), <https://www.linkedin.com/pulse/multi-screen-vs-single-screen-which-kind-theatre-makes-atanu-dhar/> [<https://perma.cc/49YH-KXGS>]. A movie theater can have multiple film screens. *See id.* For example, the AMC Empire [Twenty-Five] movie theater in New York City has twenty-five film screens. *See AMC Empire [Twenty-Five]*, CINEMA TREASURES, <http://cinematreasures.org/theaters/255> [<https://perma.cc/AG3A-2EDP>] (last visited Sept. 20, 2017).

²² *China Becomes World's Second-Biggest Movie Market*, BBC NEWS (Mar. 22, 2013), <http://www.bbc.com/news/business-21891631> [<https://perma.cc/XT7G-4QZ4>].

²³ *See* Patrick Frater, *China Box Office Overtakes North America in First Quarter of 2018*, VARIETY (Apr. 2, 2018, 10:46 PM), <http://variety.com/2018/film/asia/china-box-office-global-biggest-first-quarter-2018-1202742159/> [<https://perma.cc/6TDE-893U>] (noting China's box office revenues were higher than the aggregate of the U.S.'s and Canada's in the first quarter of 2018); Nancy Tartaglione, *China Box Office Still on Track to Overtake U.S. in 2017 Despite Recent Slump: Report*, DEADLINE (Aug. 18, 2016, 9:45 AM), <http://deadline.com/2016/08/china-box-office-overtake-us-2017-1201805401/> [<https://perma.cc/7PM6-6P3T>] (predicting China's rise to the number one spot in movie box office sales).

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

²⁴ See Natalie Riso, *Q&A with Eric Priest on Chinese Music Industry Investment*, USC ANNENBERG (July 25, 2017), <https://china.usc.edu/QA-ERIC-PRIEST-CHINESE-MUSIC-INDUSTRY-INVESTMENT> [<https://perma.cc/R554-GSU6>]. See also Eric Priest, *The Future of Music and Film Piracy in China*, 21 BERKELEY TECH. L.J. 795 (2006); Eric Priest, *Copyright and Free Expression in China's Film Industry*, 26 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1 (2015).

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 Wenzong 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*³⁹

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.⁴⁰ China's four-hundred-million potential customers attracted the entrepreneurs.⁴¹ 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.⁴² However, China was not a party to the convention until July 10, 1992.⁴³ 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.⁴⁴

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.⁴⁵ As a result of these negotiations, China granted the intellectual property protection sought by these nations.⁴⁶ Later, China instituted a

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)*, CHINA KNOWLEDGE.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.

⁴² *Id.* at 34; see also *Berne Convention (Total Contracting Parties: 176)*, Subsection of *Contracting Parties*, Section of *WIPO-Administered Treaties*, WORLD INTELL. PROP. ORG. http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15 [https://perma.cc/F4UH-TR9W] (last visited Oct. 11, 2017).

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).

⁴⁴ See ALFORD, *supra* note 2, at 35. For an example of this, see Mark Cohen, *A New Winner: China's First Patentee in the US and One of China's First Patentees in China*, WORDPRESS: CHINA IPR BLOG (Sept. 11, 2015), <https://chinaipr.com/2015/09/11/a-new-winner-chinas-first-patentee-in-the-us-and-one-of-chinas-first-patentees-in-china/> [https://perma.cc/7AQK-GR6T].

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. SUCHY, *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.

⁵³ See *Chiang Kai-Shek*, HISTORY (2009), <https://www.history.com/topics/chiang-kai-shek> [<https://perma.cc/J645-SGJ7>]; *China in the 20th Century*, KING’S COLL. HISTORY DEP’T, <http://departments.kings.edu/history/20c/china.html> [<https://perma.cc/6QM4-TTYV>] (last visited Oct. 11, 2017).

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 中华人民共和国 (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.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.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.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.⁶⁶ For example, one measure banned all theater except for eight revolutionary “operas.”⁶⁷ Furthermore, another measure curtailed intellectual work and, as a result, many intellectuals were imprisoned or subjected to torture in the countryside.⁶⁸ The Chinese government also condemned the legal system for following a “black line” and being inherently reactionary rather than proactive.⁶⁹ With free discourse significantly curtailed, authors found copyright protection inconsequential because the government barred publishing many of their works.⁷⁰ In addition, even if the Chinese government deemed their works worthy of publication, copyrights were irrelevant because the state

and of [other] publishers: acts such as the unauthorized reproduction, plagiarism, and distortion [of texts] are prohibited.” *Id.*

⁶³ *Id.*

⁶⁴ *See id.* at 61.

⁶⁵ *See id.* at 63.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 64. Intellectual work included any work of scientists and writers. *See id.*

⁶⁹ *See id.*, *supra* note 2, at 64. The black line was the line between Mao Zedong and the bourgeois. The black line is often defined as a combination of elements from the bourgeoisie, the revisionists, and arts and culture from the 1930s. *See* WEN-SHUN CHI, READINGS IN THE CHINESE COMMUNIST CULTURAL REVOLUTION: A MANUAL FOR STUDENTS OF THE CHINESE LANGUAGE 151 (1971).

⁷⁰ *See* ALFORD, *supra* note 2, at 64.

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.*

⁷⁶ General Principles of the Civil Law of the People's Republic of China (promulgated by the Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987; amended Mar. 15, 2017, effective Oct. 1, 2017), CLI.1.2780 (EN) (Lawinfochina). The GPCL was intended to create a predictable and consistent framework of civil rights in a market economy. *See* SUCHY, *supra* note 5, at 155. China modeled the GPCL after the German Civil Code. *See 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.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.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.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.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.⁸³ The state's attempt to create an official copyright law in 1990 illuminated the tension among the three groups.⁸⁴ The government produced twenty drafts

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.

⁸⁰ *See* ALFORD, *supra* note 2, at 77.

⁸¹ *Id.* at 78.

⁸² *Id.*

⁸³ *Id.*

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, in order to file a copyright infringement lawsuit in China today, a party must bring the lawsuit in the first instance to a local specialized IP tribunal in China.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

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.

⁸⁷ Hogan Lovells, Specialized IP Courts in Beijing, Shanghai, and Guangzhou: Paving the Way to More Efficient IP Litigation? 1 (2014), https://www.hoganlovells.com/~/MEDIA/HOGAN-LOVELLS/PDF/PUBLICATION/10222014SPECIALISED-IP-COURTS-IN-BEIJING-SHANGHAI-GUANGZHOSHIPS49649V3_PDF.PDF [<https://perma.cc/2CK2-SENG>]; *Legal Research Guide: China*, Library of Congress, <https://www.loc.gov/law/help/legal-research-guide/china.php> [<https://perma.cc/AF76-VUSL>] (last visited Jan. 17, 2018). The court system in China is currently a four-tier system. *Introduction to China's Legal System*, Library of Cong. (Dec. 7, 2016), <https://www.loc.gov/law/help/legal-research-guide/china.php> [<https://perma.cc/G346-PCLD>]. The Grass-roots People's courts are at the lowest level of the judicial system. *See id.* The Intermediate People's Courts are at the second level of the judicial system. *See id.* The Higher People's Courts are at the third level of the judicial system. *See id.* The Supreme People's Court is the highest court in China. *See id.* There are also several specialty courts that operate at these different levels apart from the main judicial structure. *See id.* *See also* Mark Cohen, *A Deeper Dive Into the Jurisdiction and Role of Specialized IP Courts*, China IPR (Nov. 15, 2014), <https://chinaipr.com/2014/11/15/a-deeper-dive-into-the-jurisdiction-and-role-of-specialized-ip-courts/> [<https://perma.cc/D4SG-AKWY>].

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.

⁹⁰ See Eric Priest, *Making Amends: China Music Copyright Law Primer*, OUTDUSTRY (May 6, 2014), <https://blog.outdustry.com/making-amends-china-music-copyright-law-primer-b047886882ae> [<https://perma.cc/56EK-YUMB>].

⁹¹ See 2010 Copyright Law, *supra* note 12; Copyright Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 2001), CLI.1.37087 (EN) (Lawinfochina) [hereinafter 2001 Copyright Law].

developing international trade rules.⁹² Significantly, as WTO member, China must abide by the international Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”).⁹³ The TRIPS agreement sets out minimum standards of protection of intellectual property rights that each member nation must provide.⁹⁴ TRIPS specifically requires that member nations comply with the substantive obligations of the main conventions of the World Intellectual Property Organization (“WIPO”),⁹⁵ the Paris Convention for the Protection of Industrial Property (“Paris Convention”),⁹⁶ and the Berne Convention for the Protection of

⁹² *China and the WTO*, Section of *Member Information*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/countries_e/china_e.htm [<https://perma.cc/9CU2-6X4E>] (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 [<https://perma.cc/9A3R-CR3Q>] (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 [<https://perma.cc/3GN2-BNKB>] (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 [<https://perma.cc/WUW4-MTT7>] (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 [<https://perma.cc/3XBM-U7B7>] (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/> [<https://perma.cc/8V5Q-K4CX>] (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 [<https://perma.cc/GQZ6-7Z3B>] (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

Literary and Artistic Works (“Berne Convention”)⁹⁷ in their most recent form.⁹⁸ In other words, the TRIPS Agreement incorporates the requirements that the previous conventions imposed, except for the Berne Convention’s moral rights, and adds new obligations where the previous conventions were silent or inadequate.⁹⁹

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.¹⁰⁰ In 2007, the United States raised a dispute at the WTO alleging that China was not complying with its TRIPS agreement obligations.¹⁰¹ 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.¹⁰² 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

protection to 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 INTEL. 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.*

¹⁰⁰ See *DS362: China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm [<https://perma.cc/WP2E-L7GN>] (last visited Apr. 20, 2017).

¹⁰¹ *Id.*

¹⁰² *Id.*

domestic authors¹⁰³ because the 1990 Copyright Law did not protect works whose distribution or publication was prohibited by the government.¹⁰⁴ Consequently, the United States believed that Chinese copyright law violated China's obligations under Article 9 of the TRIPS Agreement.¹⁰⁵ Ultimately, the United States won part of the WTO dispute against China, with the WTO panel¹⁰⁶ 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.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.¹⁰⁸

¹⁰³ Berne Convention for the Protection of Literary and Artistic Works art. 5, Sept. 9, 1886, 102 Stat. 2853, 828 U.N.T.S. 221.

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.

¹⁰⁵ See *DS362: China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, *supra* note 100; see also Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

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/whatis_e/tif_e/displ_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. *Id.* A panel consists of three to five experts from different countries "chosen in consultation with the countries in dispute." *Id.* If the two sides cannot agree on panel members, "the WTO director general appoint[s] them." *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 *id.* However, the panel's report can be rejected by a consensus of the Dispute Settlement Body. *Id.*

¹⁰⁷ Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, paras. 7.16, 7.139, 7.143, 7.669, 8.1, WTO Doc. WT/DS362/R (adopted Jan. 26, 2009).

¹⁰⁸ *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.¹⁰⁹ 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.¹¹⁰ 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.¹¹¹ 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.¹¹²

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,"¹¹³ the "Film Distribution and Exhibition

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.

¹¹⁰ See Natalie P. Stoianoff, *The Influence of the WTO over China's Intellectual Property Regime*, 34 SYDNEY L. REV. 65, 81–82 (2012) (noting additionally how the amendment improved copyright protections in China).

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

¹¹² See *id.* Content review is the "relatively strict process" that the Chinese government uses to ensure that the "publication and dissemination of literary and artistic works . . . compl[ies] with [its] Constitution." Weijun Zhang & Yanbing Li, *Content Review and Copyright Protection in China After the 2009 U.S. v. China WTO Panel Ruling*, 62 J. COPYRIGHT SOC'Y U.S.A. 437, 439 (2015).

¹¹³ See Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, para. 7.488, WTO Doc. WT/DS363/R (adopted Aug. 12, 2009) [hereinafter Panel Report on China]. The "Film Regulation" states that only organizations approved by the Chinese Government are allowed to import foreign films. *Id.*

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.*

¹¹⁶ Joint Communication from China and the United States, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc. WT/DS363/19 (May 11, 2012), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=37113,100415,98787,52698,98943,54354,94560,98815,85644,47998&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [<https://perma.cc/35YV-AHHZ>]; Patrick Brzeski, *China’s Quota on Hollywood Film Imports Set to Expand, State Media Says*, HOLLYWOOD REP. (Feb. 9, 2017, 11:30 PM), <http://www.hollywoodreporter.com/news/chinas-state-media-says-quota-hollywood-film-imports-will-expand-974224> [<https://perma.cc/754K-ZCE8>].

¹¹⁷ Panel Report on China, *supra* note 113, para. 7.706. An Accession Protocol is the procedure by which a country joins the WTO. *See, e.g.*, Decision of [Ten] November 2001, *Accession of the People’s Republic of China*, WTO Doc. WT/L/432 (Nov. 23, 2001).

¹¹⁸ Panel Report on China, *supra* note 113, para. 7.706.

¹¹⁹ OFF. OF THE U.S. TRADE REPRESENTATIVE, 2016 REP. TO CONGRESS ON CHINA’S WTO COMPLIANCE, at 142 (2017).

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 2012,¹²³ subject to review after five years.¹²⁴ 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,¹²⁵ such as IMAX and 3D format,¹²⁶ and increased U.S. revenue producer's share of a film's revenue to 25% of the gross box office receipts.¹²⁷ 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.¹²⁸ 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.¹²⁹ 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.¹³⁰ 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.¹³¹ 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.¹³²

The MOU represents progress because, unlike the 2007 disputes, the United States and China resolved film trade issues without resorting to a WTO hearing.¹³³ 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 2017.¹³⁴

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.

¹³¹ Seagull Haiyan Song, *Chinese Entertainment Law Year in Review, 2015: Is It Converging with the U.S. Practice?*, 49 *GEO. WASH. INT'L L. REV.* 259, 294 (2016).

¹³² See Pamela McClintock & Stephen Galloway, *Matt Damon's 'The Great Wall' to Lose \$75 Million; Future U.S.-China Productions in Doubt*, *HOLLYWOOD REP.* (Mar. 2, 2017, 6:00 AM), <https://www.hollywoodreporter.com/news/what-great-walls-box-office-flop-will-cost-studios-981602> [<https://perma.cc/H4WL-5ZLT>].

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.¹³⁵ In April of 2017, President Donald Trump held meetings with the President Xi Jinping of China which were "very frank" and "very positive."¹³⁶ This meeting gave the American film industry hope that the two countries could avoid a trade war.¹³⁷ Hollywood studios are probably particularly interested in the Chinese film market because China is the single largest export market for American films.¹³⁸ 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.¹³⁹ 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."¹⁴⁰ 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.¹⁴¹

¹³⁵ Gwilym Mumford, *China's Hollywood Film Quota to Expand After Trump Trade Deal*, GUARDIAN (Apr. 12, 2017, 6:50 EDT), <https://www.theguardian.com/film/2017/apr/12/trump-xi-trade-talks-china-hollywood-film-quota> [<https://perma.cc/2R7D-4ADT>].

¹³⁶ *See id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *See* Memorandum on Addressing China's Laws, Policies, Practices, and Actions Related to Intellectual Property, Innovation, and Technology, 82 Fed. Reg. 39,007, 39,007 (Aug. 17, 2017).

¹⁴⁰ *See* Leslie Wroughton & Jeff Mason, *Trump Orders Probe into China's Intellectual Property Practices*, REUTERS (Aug. 14, 2017, 2:26 PM), <https://www.reuters.com/article/us-usa-trump-trade-china/trump-orders-probe-of-chinas-intellectual-property-practices-idUSKCN1AU23N> [<https://perma.cc/3W2Z-CKMG>] (quoting *Trump Asking Too Much from Beijing on Peninsula Issue*, CHINA DAILY (Aug. 14, 2017, 7:30 AM), http://www.chinadaily.com.cn/opinion/2017-08/14/content_30572626.htm [<https://perma.cc/5QNP-T2YW>]).

¹⁴¹ *See* Nancy Tartaglione, *Hollywood & China: Does Donald Trump's Trade Probe Impact the Film Industry?*, DEADLINE (Aug. 15, 2017, 1:24 PM), <http://deadline.com/2017/08/donald-trump-trade-investigation-hollywood-impact-1202149101/> [<https://perma.cc/GGZ3-VT2S>].

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.”¹⁴² 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.¹⁴³

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

Apart from opening the Chinese film market to foreign films, rampant online piracy¹⁴⁴ and counterfeiting¹⁴⁵ continue to cause rights holders large financial challenges in China.¹⁴⁶ 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.¹⁴⁷ In a 2011 report, the U.S.

¹⁴² See Charles Wallace, *Trump Unleashes Full-Scale Trade War with China*, FORBES (Sept. 17, 2018, 8:45 PM), <https://www.forbes.com/sites/charleswallace1/2018/09/17/trump-unleashes-full-scale-trade-war-with-china/#32180b5196d2> [https://perma.cc/X9XT-CVAB].

¹⁴³ See Patrick Brzeski, *Hollywood-China Dealmakers Lament Trump Trade War, Beijing Regulatory Crackdown*, HOLLYWOOD REP (Sept. 30, 2018, 11:58 PM), <https://www.hollywoodreporter.com/news/trumps-trade-war-china-a-crackdown-investment-cause-worry-hollywood-1147932> [https://perma.cc/SCA8-DN83].

¹⁴⁴ Online piracy is the illegal copying of copyrighted materials via the Internet. See *What It Is*, Section of *Online Piracy*, UNIV. OF N.C., <http://piracy.web.unc.edu/test/> [https://perma.cc/TP3V-QGPK] (last visited Sept. 19, 2017).

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.*

¹⁴⁶ See OFF. OF THE U.S. TRADE REPRESENTATIVE, *supra* note 16, at 31. “China is home to 10.77% of the world’s file sharers – the second highest percent” in the world. See *P2P File Sharing Networks: [Ten] File Sharing Trends in China*, *supra* note 15.

¹⁴⁷ See OFF. OF THE U.S. TRADE REPRESENTATIVE, *supra* note 16, at 31. One study conducted by L.E.K. Consulting found that piracy cost movie studios \$6.1 billion dollars per year. See Carl Bialik, *Putting a Price Tag on Film Piracy*, WALL ST. J.: THE

International Trade Commission estimated the losses due to copyright infringement in China ranged from \$10.2 billion to \$37.3 billion.¹⁴⁸ 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 2016.¹⁴⁹ Another problem is media box piracy, which is where a set-top box¹⁵⁰ is preloaded with illegally downloaded content, or links to sources of illegally downloaded content.¹⁵¹ 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.¹⁵² In addition, the majority of websites and third-party apps that media box users connect to are reportedly owned or operated in China.¹⁵³ 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.¹⁵⁴ The

NUMBERS (Apr. 5, 2013, 11:42 PM), <https://blogs.wsj.com/numbers/putting-a-price-tag-on-film-piracy-1228/> [<https://perma.cc/2UHM-Q5UF>].

¹⁴⁸ See U.S. INT’L TRADE COMM’N, INVESTIGATION NO. 332-519, USITC PUB. 4226, CHINA: EFFECTS OF INTELL. PROP. INFRINGEMENT AND INDIGENOUS INNOVATION POLICIES ON THE U.S. ECONOMY, at xv (2011).

¹⁴⁹ OFF. OF THE U.S. TRADE REPRESENTATIVE, *supra* note 16, at 14–15, 31.

¹⁵⁰ A set-top box is similar to a cable box in that it “converts video content to analog or digital TV signals.” *Definition of: Set-Top Box*, Entry in *PC Magazine Encyclopedia*, PC MAG., <https://www.pcmag.com/encyclopedia/term/51203/set-top-box> [<https://perma.cc/J7S8-QXWU>] (last visited Oct. 12, 2017).

¹⁵¹ See OFF. OF THE U.S. TRADE REPRESENTATIVE, 2016 SPECIAL 301 REPORT at 32 (2016).

¹⁵² See *id.* A media box is a device that is preloaded with software that allows users to illegally access copyrighted material such as films and TV shows. See Aatif Sulleyman, ‘Kodi Boxes’ that Let Users Illegally Stream Films and Sport Create Piracy Headache for Government, INDEPENDENT (July 7, 2017, 5:07 PM), <http://www.independent.co.uk/life-style/gadgets-and-tech/news/kodi-boxes-films-stream-legal-illegal-piracy-issues-police-a7829836.html> [<https://perma.cc/EUA7-SL55>].

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.¹⁵⁵ This means that everyone in the derivative website chain profits at the rights holder's expense.¹⁵⁶ 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."¹⁵⁷

Chinese consumers' attitudes toward piracy also contribute to the problem.¹⁵⁸ 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.¹⁵⁹ 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.*

¹⁵⁷ OFF. OF THE U.S. TRADE REPRESENTATIVE, *supra* note 16, at 32.

¹⁵⁸ *See generally* Press Release, Irdeto, Irdeto Research: Chinese Consumers Aged [Thirty-Five] to [Forty-Four] Watch Pirated Content the Most, but also Most Willing to Watch Less or Stop Watching Pirated Content (Mar. 23, 2017), <https://irdeto.com/news/irdeto-research-chinese-consumers-aged-35-to-44-watch-pirated-content-the-most-but-also-most-willing-to-watch-less-or-stop-watching-pirated-content.html> [<https://perma.cc/D2VL-TRWP>].

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.*

infringing content is illegal.¹⁶⁰ 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.¹⁶¹ 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."¹⁶² "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.¹⁶³ 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.¹⁶⁴

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

¹⁶⁰ *Id.*

¹⁶¹ See Todd Spangler, *Piracy Survey: 39% of U.S. Consumers Don't Care that Studios Lose Money From Illegal Sharing*, VARIETY: NEWS (Jan. 18, 2017, 6:00 AM), <http://variety.com/2017/digital/news/piracy-survey-consumers-studios-lose-money-1201961634/> [<https://perma.cc/P4HP-4PW8>].

¹⁶² Steven Millward, *US Report: 99% of Music Downloads in China Are Pirated, Video Sites a Concern Too*, TECH IN ASIA (May 2, 2012), <https://www.techinasia.com/ustr-music-movie-tv-show-piracy-china-2012> [<https://perma.cc/W3SJ-Y4TX>].

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>].

¹⁶⁴ Eric Priest, *Featuring Articles and Essays from the Center for the Protection of Intellectual Property's Conference: The IP Platform: Supporting Invention & Inspiration: Meet the New Media, Same as the Old Media: Real Lessons from China's Digital Copyright Industries*, 23 GEO. MASON L. REV. 1079, 1089–90 (2016); Edward Chatterton, *China No Longer the 'Wild West' of Intellectual Property*, NIKKEI ASIAN REVIEW (June 1, 2015, 7:00 AM), <http://asia.nikkei.com/Viewpoints-archive/Perspectives/China-no-longer-the-Wild-West-of-intellectual-property> [<https://perma.cc/6SNC-ZNMY>].

the US brought to the WTO, DS/362.¹⁶⁵ 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.¹⁶⁶ In addition, judges in geographic locations without a heavy intellectual property caseload often hear other types of cases, such as family law cases.¹⁶⁷ Therefore, the judges have vastly differing levels of experience adjudicating intellectual property disputes.¹⁶⁸ 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.¹⁶⁹ 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.¹⁷⁰ However, since the Chinese civil procedure law requires a plaintiff to bring any lawsuit against a Chinese

¹⁶⁵ See OFF. OF THE U.S. TRADE REPRESENTATIVE, *supra* note 16, at 29.

¹⁶⁶ Duncan Matthews, *Intellectual Property Courts in China* (Queen Mary Univ. of London, Sch. of Law, Legal Studies Research Paper No. 254/2017, Forthcoming in Oxford Univ. Press 2017) (manuscript at 7), <https://ssrn.com/abstract=2917154> [<https://perma.cc/A56J-X8J5>]. See also Max Goldberg, *Enclave of Ingenuity: The Plan and Promise of the Beijing Intellectual Property Court*, (2017) student work; Mark Cohen, *The Widening Impact of China's Publication of IP Cases*, CHINA IPR (Apr. 10, 2018), <https://chinaipr.com/2018/04/10/the-widening-impact-of-chinas-publication-of-ip-cases/> [<https://perma.cc/5RZZ-VMPS>].

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

¹⁷¹ See Civil Procedure Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991; amended Aug. 31, 2012, effective Jan. 1, 2013), art. 22, CLI.1.183386 (EN) (Lawinfochina); LOVELLS, *supra* note 87, at 1–2.

¹⁷² See CHINA IPR SME HELPDESK, ENFORCEMENT OF INTELL. PROP. RIGHTS IN CHINA (2016), http://www.china-iprhelpdesk.eu/sites/all/docs/publications/EN_Enforcement_Mar-2016.pdf [<https://perma.cc/T24H-KJ3H>].

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.

¹⁷⁶ Cf. Xiaoming Liu, *Chofn Intell. Prop., Beijing IP Court's Stricter Formalities for Trademark Administrative Lawsuits*, LEXOLOGY (Dec. 1, 2016), <https://www.lexology.com/library/detail.aspx?g=ce905266-9080-453e-b817-6ccdf5ee8c56> [<https://perma.cc/PTF8-HWCZ>].

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.¹⁷⁷ In addition, a plaintiff must bring a copyright infringement lawsuit in a local court in the first instance.¹⁷⁸ Additionally, it is almost impossible for plaintiffs to prove actual damages, so they usually resort to statutory damages.¹⁷⁹ 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.¹⁸⁰

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.¹⁸¹ Article 49 of China's 2010 Copyright Law

¹⁷⁷ 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 INTELL. 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.*

¹⁷⁸ See LOVELLS, *supra* note 87, at 1–2. See generally *China's Judicial System*, UNIV. OF MISS., <http://www.olemiss.edu/courses/pol324/chnjudic.htm> [https://perma.cc/B4HH-XZD8] (last visited Sept. 6, 2017) (providing more information pertaining to China's court system).

¹⁷⁹ Guangliang Zhang, *Statutory Damages for Copyright Infringement in China: “Alienation” and “Redemption,”* 63 J. COPYRIGHT SOC'Y 597, 608 (2016).

¹⁸⁰ 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).

¹⁸¹ See *Analysing Copyright Infringement Cases*, *supra* note 177.

provides for statutory damages up to 500,000 RMB¹⁸² when the actual damages cannot be ascertained.¹⁸³ WIPO¹⁸⁴ 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

¹⁸² 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.*

¹⁸³ See 2010 Copyright Law, *supra* note 12, art. 49.

¹⁸⁴ See *supra* note 95 and accompanying text.

¹⁸⁵ See WORLD INTELL. PROP. ORG., *IP Litigation Costs: Special Edition*, WIPO MAG., Feb. 2010, at 1, 19.

¹⁸⁶ See *supra* note 13 and accompanying text.

¹⁸⁷ See WORLD INTELL. PROP. ORG., *supra* note 185, at 19. WIPO estimated the cost of bringing an intellectual property lawsuit at approximately \$150,000 USD, based on patent litigation figures. See *id.* This cost includes, but is not limited to, research, the hiring of private investigators, and documentation notarization. See Safran, *supra* note 173, at 156–57.

¹⁸⁸ 1,079,450 RMB, Calculation of XE Currency Converter: CNY to USD, XE, <http://www.xe.com/currencyconverter/convert/?Amount=1079450&From=CNY&To=USD> [https://perma.cc/Y5CY-EHXX] (last visited May 4, 2018).

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).

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.¹⁹¹ Unfortunately, this lack of enforcement provides an environment where pirates operate with *carte blanche*¹⁹² because they face relatively inconsequential damages for infringing.¹⁹³

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.¹⁹⁴ 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.

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).

¹⁹³ See Alan Cox & Kristina Sepetys, *Intellectual Property Rights Protection in China: Litigation, Economic Damages, and Case Strategies*, in CORPORATE COUNSEL’S GUIDE TO DOING BUS. IN CHINA 11.401, 11.407 (3d ed. 2006). See also Jeffrey Langer, *Rapid Changes in the Chinese Legal System, an Increasingly Attractive Venue for IP Litigation*, IP WATCHDOG (May 7, 2018), <https://www.ipwatchdog.com/2018/05/07/rapid-changes-chinese-legal-system-attractive-venue-ip-litigation/id=96099/> [<https://perma.cc/4HAZ-M64Q>] (showing data that in 2014, the average damage award for an IP case was \$12,368.47 USD).

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.¹⁹⁵ 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.¹⁹⁶ 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 profit¹⁹⁷ even if the pirate pays the fine,¹⁹⁸ which itself is contingent on a judicially inconsistent court finding the pirate liable for copyright infringement.¹⁹⁹ In 2015, the top ten illegally downloaded movies accounted for over 360 million illegal downloads worldwide, demonstrating a huge appetite for infringing content.²⁰⁰ 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.²⁰¹ The increased maximum fine would encourage motion picture

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.*

¹⁹⁶ *See* Zhang Mao, *China's New Trademark Law*, WIPO MAG. Sept. 2014, http://www.wipo.int/wipo_magazine/en/2014/05/article_0009.html [<https://perma.cc/CN5S-AVM3>].

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.

²⁰⁰ *See* Andrew Wallenstein, *Top [Ten] Pirated Movies of 2015 See Alarming Increase in Downloads*, VARIETY (Dec. 27, 2015, 1:26 PM), <http://variety.com/2015/digital/news/top-10-pirated-movies-of-2015-see-alarming-increase-in-downloads-1201667982/> [<https://perma.cc/BJZ4-GU7V>] (last visited Apr. 22, 2017)

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

²⁰² 3,000,000 RMB, Calculation of XE Currency Converter: CNY to USD, XE, [HTTP://WWW.XE.COM/CURRENCYCONVERTER/CONVERT/?AMOUNT=3000000&FROM=CNY&TO=USD](http://www.xe.com/currencyconverter/convert/?Amount=3000000&From=CNY&To=USD) [https://perma.cc/WEU9-XZFL] (last visited May 4, 2018).

²⁰³ See discussion *supra* Section II.C.

²⁰⁴ See Sui-Lee Wee, *New Balance Wins \$1.5 Million in Landmark China Trademark Case*, N.Y. TIMES (Aug. 22, 2017), <https://www.nytimes.com/2017/08/22/business/china-new-balance-trademark.html> [https://perma.cc/TBE7-C7QE].

²⁰⁵ Cf. Christopher Beam, *How Strict Are Chinese Copyright Laws?*, SLATE: BOOTLEG NATION (Oct. 22, 2009, 6:16 PM), http://www.slate.com/articles/news_and_politics/explainer/2009/10/bootleg_nation.html [https://perma.cc/S58C-JNTK]. China also has a draft revision to the patent law pending, which increases statutory damages for patent infringement. See *Draft Revision of China Patent Law Boosts Fines for IP Violations*, THE STRAITS TIMES (Dec. 24, 2018), <https://www.straitstimes.com/asia/east-asia/draft-revision-of-china-patent-law-boosts-fines-for-ip-violations> [https://perma.cc/6X7R-PVVE].

²⁰⁶ See Matthew Dresden, *Copyright Protection in China – It's Real, and It's Spectacular*, HARRIS BRICKEN: CHINA L. BLOG (May 22, 2017), <https://www.chinalawblog.com/2017/05/copyright-protection-in-china-its-real-and-its-spectacular.html> [https://perma.cc/VQ34-6UTP] (noting an increase in copyright lawsuits correlating with an increase in copyright protection).

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.²⁰⁸ 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.²⁰⁹ 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.²¹⁰ 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.²¹¹ Chan believes that if Chinese filmmakers did not have any competition, the Chinese box office would not be as successful as it is today.²¹² In addition, the Senior Vice-President of the Wanda

²⁰⁸ *China’s Media: Quota on Hollywood Film Imports to Expand*, CHINA DAILY (Feb. 10, 2017, 11:28 PM), http://usa.chinadaily.com.cn/china/2017-02/10/content_28166746.htm [<https://perma.cc/A6ZQ-SQCS>].

²⁰⁹ *See China’s 2015 Box Office Soars to 6.8 [Billion] USD*, XINHUA NEWS (Dec. 31, 2015, 8:08 PM), http://news.xinhuanet.com/english/2015-12/31/c_134968462.htm [<https://perma.cc/YU7F-ST89>]. Most of the rest of the revenue came from American films. *Cf.* Julie Makinen, *Movie Ticket Sales Jump 48% in China, but Hollywood Has Reason to Worry*, L.A. TIMES (Dec. 29, 2015, 8:26 PM), <http://www.latimes.com/entertainment/envelope/cotown/la-et-1230-ct-china-box-office-20151230-story.html> [<https://perma.cc/PQD8-9FHA>].

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.

²¹¹ *See* Associated Press, *Jackie Chan: Hollywood Competition Means Better Chinese Films*, VOA NEWS: ARTS & ENT. (Mar. 7, 2017, 9:06 PM), <http://www.voanews.com/a/jackie-chan-hollywood-comeptition-means-better-chinese-films/3754820.html> [<https://perma.cc/98A4-WMBX>].

²¹² *See id.*

Group,²¹³ John Zeng, emphasized that “Chinese audiences favor Hollywood films with strong IP, visual effects[,] and creativity.”²¹⁴

While China may have intended the film quota to protect the domestic Chinese film industry,²¹⁵ the enforcement of the film quota has been far from inflexible.²¹⁶ 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.²¹⁷ 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.²¹⁸ 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.

²¹³ The Wanda Group is a Chinese multinational corporation. *See Corporate Profile*, Section of *About Us*, WANDA GROUP, <https://www.wanda-group.com/corporate/> [<https://perma.cc/2LKY-ELD2>] (last visited Oct. 9, 2017). It is also China’s largest private property developer. *See id.*

²¹⁴ Jeremy Kay, *CinemaCon: Wanda Executive Outlines Route to Success for Imported Films in China*, SCREEN DAILY (Mar. 27, 2017), <http://www.screendaily.com/news/cinemacon-wanda-exec-on-how-hollywood-can-succeed-in-china/5116285.article> [<https://perma.cc/R67H-BDH5>].

²¹⁵ *See* Gaochao Zhang, *During Hollywood Blackout, Domestic Films Dominate China’s Box Office*, L.A. TIMES (July 25, 2017, 2:20 PM), <http://www.latimes.com/business/hollywood/la-fi-ct-china-box-office-20170725-story.html> [<https://perma.cc/V442-FNDR>]. The James Cameron film *Avatar* is an example of this. *See* Gabrielle Jaffe, *Will the Great Film Quota Wall of China Come Down?*, THE GUARDIAN (Mar. 24, 2011, 7:08 PM), <https://www.theguardian.com/business/2011/mar/24/china-film-quota> [<https://perma.cc/U7N3-N3S8>].

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.²¹⁹ Feng Xiaogang, a Chinese actor and director, believes that Chinese films fail to attract foreign audiences because of their poor craftsmanship and domestic censorship regulations.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,²²¹ but the quota may have the unintended consequence of making Chinese film producers complacent.²²² Chinese film producers' complacency is exacerbated because producers make low quality movies and earn huge profits in China.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 quote provides them with a pseudo-monopoly over the Chinese film market.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

²¹⁹ Charles Liu, *Chinese Films Struggling to Find an Audience Abroad*, NANFANG (Mar. 31, 2016, 12:34 PM), <https://thenanfang.com/chinese-films-not-finding-audience-abroad-no-one-likes-understands/> [<https://perma.cc/YEY4-V9RU>].

²²⁰ *Id.*

²²¹ See Zhang, *supra* note 215.

²²² See Liu, *supra* note 219; see also discussion *supra* notes 211–212.

²²³ See Liu, *supra* note 219.

²²⁴ See Charles Liu, *Famous Chinese Director Blasts China's Film Industry*, 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 *Audiences Not to Blame for Poor Films*, 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, *The Midnight Canteen*, a Chinese drama adapted from a Japanese comic, received terrible reviews from critics, yet was successful with Chinese viewers. *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.²²⁵ 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."²²⁶ This is exemplified by the film *Rogue One: A Star Wars Story*, which did poorly in China despite being an established American film franchise.²²⁷ 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.²²⁸ China's copyright law and the foreign film quota are inextricably intertwined.²²⁹ China and

²²⁵ CGI stands for computer-generated imagery. See *CGI (Computer-Generated Imagery)*, WHATIS.COM, <http://whatis.techtarget.com/definition/CGI-computer-generated-imagery> [<https://perma.cc/6N9U-LLYC>] (last visited Oct. 12, 2017).

CGI is the creation of still or moving images using computer imaging software. *Id.*

²²⁶ Chris Bumbray, *Ex. Donnie Yen Talks His New Film, Why Star Wars Didn't Work in China & More*, *JOBLO* (Aug. 2, 2018).

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://chinafilm insider.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.²³⁰ According to the Motion Picture Association of America, 718 films were released in North America in 2016.²³¹ Because of the foreign imported film quota, American film producers did not import over 95% of American films into China in 2016.²³² 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.²³³ However, the Chinese government maintained the right to administer the publication and dissemination of works.²³⁴ Despite the 2010 amendments, the 2010 Copyright Law continues to prohibit copyright holders from violating the law, which includes the foreign film import quota.²³⁵ 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,

in China. *See id.* This method of importing would not count against the same annual thirty-four film quota as import quota films, but it is probably rarely profitable for foreign producers to utilize this method of importation. *Cf. id.*

²³⁰ *See supra* notes 123–124 and accompanying text.

²³¹ *See* MOTION PICTURE ASS'N OF AM., THEATRICAL MARKET STATISTICS 2016, at 21 (2016).

²³² *See id.* at 7.

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.²³⁶ 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.²³⁷ Judges on these specialized intellectual property courts have training and extensive experience in intellectual property

²³⁶ Wang Qian, Professor, IPR School, E. China Univ. of Political Sci. & Law (Shanghai), Part D Discussion at the Fordham University School of Law Seventeenth Annual Conference International Intellectual Property Law & Policy: United States v. China in the WTO (Apr. 15–16, 2009).

²³⁷ *Establishing 15 IP Tribunals Nationwide, Chinese Courts Further Concentrate Jurisdiction Over IP Matters*, COVINGTON INSIGHTS (Mar. 15, 2018), https://www.cov.com/-/media/files/corporate/publications/2018/03/establishing_15_ip_tribunals_nationwide_chinese_courts_further_concentrate_jurisdiction_over_ip_matters.pdf [<https://perma.cc/E3K6-NNKB>].

matters²³⁸ 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.²³⁹

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.²⁴⁰ These specialized intellectual property tribunals are attached to the intermediate courts of the cities in which they sit.²⁴¹ 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.²⁴²

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.²⁴³ One benefit from creating a copyright division of the intellectual property tribunal is the resulting reduction in judicial inconsistency across courts.²⁴⁴ 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

²³⁸ See Xiang Li et al., *China's Specialized IP Courts*, KLUWER PATENT BLOG (Apr. 10, 2017), <http://kluwerpatentblog.com/2017/04/10/chinas-specialized-ip-courts/> [https://perma.cc/U868-ACX6].

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 165–171 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 144–156 and accompanying text.

²⁴⁸ See *supra* notes 144–156 and accompanying text.

around the world can view this infringing content without paying for it.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.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.²⁵¹ In addition, relaxing the foreign film import quota would steer potential customers away from illegitimate content sources to legitimate sources.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.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.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.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.

²⁴⁹ See *supra* notes 144–156 and accompanying text.

²⁵⁰ See *supra* Section III.A.

²⁵¹ See *supra* notes 177–193 and accompanying text.

²⁵² See *supra* Section III.B.

²⁵³ See *supra* Section III.B.

²⁵⁴ See *supra* Section III.C.

²⁵⁵ See *supra* Section III.D.

