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# MOTION PICTURE PIRACY IN CHINA: RATED AARRGH!

## I. INTRODUCTION

Once viewed by many cultures as the sincerest form of flattery, copying is now universally considered an unforgivable crime.<sup>1</sup> In fact, copyright theft has become “the largest irritant in the [multi-billion dollar] annual commercial relationship between the United States and China,”<sup>2</sup> accounting for a loss of nearly \$250 million in revenue in the United States each year. Blame it on Confucius.<sup>3</sup> Blame it on poverty.<sup>4</sup> Blame it on ignorance.<sup>5</sup> Blame it on a weak police force.<sup>6</sup> No matter how you spin it, the excuses boil down to the same basic tenet: copyright infringement is a serious problem in China and it is having an even more

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1. See K.C. Swanson, *The China Challenge*, DAILY DEAL, Sept. 12, 2005.

2. US Disputes China’s Anti-Piracy Success, TAIPEI TIMES, May 1, 2005, at 11.

3. Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U.L. REV. 131, 165 (2000); K.C. Swanson, *supra* note 1 (explaining that in Chinese history, copying had a positive connotation, especially in the arts, and under Communism people were taught to share their resources). See also WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 29 (1995) (explaining that in ancient Chinese civilization, copying was indicative of one’s appreciation for the work of a particular author; copying “bore witness to the quality of the work copied and to its creator’s degree of understanding and civility.”).

4. Eunice Yoon, *U.S. Shoemaker Faces Chinese ‘Gall Factor,’* CNN.COM, May 19, 2005, <http://www.cnn.com/2005/WORLD/asiapcf/05/19/eyeonchina.fakes/index.html> (“The [Chinese] government is hamstrung by its desire to keep its 1.3 billion people employed to maintain social order,” explained Harley Lewin, a New York intellectual property lawyer representing New Balance in a lawsuit.).

5. See Seth Faison, *China Turns Blind Eye to Pirated Disks*, N.Y. TIMES, Mar. 28, 1998, at D1 (discussing that Chinese storeowners and consumers often do not realize the implication that piracy is criminal. One storeowner defended herself saying, “There’s nothing wrong with selling pirated VCD’s. My son loves watching them.”).

6. William Pesek, Jr., *Chinese Counterfeiting Hurts China, Too*, INT’L HERALD TRIB., May 17, 2005 (explaining that local authorities often protect counterfeiters because they provide local jobs and that police are neither effective nor do they have budgets to enforce the law). See also *Piracy of Intellectual Property: Hearing Before the Subcommittee on Intell. Prop. Sen. Judiciary Comm.*, (2005) (statement of Eric H. Smith, President, Int’l Intell. Prop. Alliance (IIPA)) (explaining that “unlike in the 1980s and 1990s, the problem [of piracy] has less to do with inadequate laws and more with the ineffective and non-deterrent enforcement systems”); Kathleen E. McLaughlin & Christopher S. Rugaber, *U.S., Chinese Trade Officials Make Progress on IPR, Market Access, but Stall on Textiles*, Int’l Trade Rep., July 14, 2005, at 1162; Neil Graham, *Senate Panel Highlights Scourge of IP Piracy in Russia and China*, Int’l Trade Rep., June 9, 2005, at 936; IIPA, 2005 Special 301 Report: People’s Republic of China (PRC) (2005), available at <http://www.iipa.com/rbc/2005/SPEC301PRCrev.pdf> [hereinafter Special 301 Report].

serious impact on American industries, particularly the motion picture industry. In fact, the motion picture industry faces a 95 percent piracy rate in China each year, which means that 95 percent of all American home videos and films<sup>7</sup> sold in China are illegal copies.<sup>8</sup>

The Chinese economy, in turn, has become dependent upon revenues from piracy, thus fueling its popularity.<sup>9</sup> Some estimates attribute about one-third of China's GDP to piracy and counterfeiting.<sup>10</sup> The profits are so great that many pirates, akin to drug dealers,<sup>11</sup> will take huge risks to attain them and do not see anything wrong with their acts.<sup>12</sup> And while

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7. See, e.g., *PIRATES OF THE CARIBBEAN: THE CURSE OF THE BLACK PEARL* (Walt Disney Productions 2003); *PETER PAN* (Walt Disney Productions 1953); *HOOK* (Columbia Pictures 1991); *TREASURE ISLAND* (Walt Disney Productions 1950); *THE GOONIES* (Warner Brothers 1985).

8. See *Piracy of Intellectual Property: Hearing Before the Subcommittee on Intell. Prop. Sen. Judiciary Comm.*, (2005) (statement of Eric H. Smith, President, IIPA) (explaining that between 1998 and 2004 the legitimate home video market in China represented about 5 percent of the estimated total \$1.3 billion market); *Economic Worth of the Copyright Industries: Hearing Before the Committee on Foreign Relations*, 108th Cong. 4 (2004) (statement of Jack Valenti, President and CEO, Motion Pictures Association of America (MPAA)), available at <http://foreign.senate.gov/testimony/2004/ValentiTestimony040609.pdf>.

9. Henry Blodget, *How to Solve China's Piracy Problem: A Dozen Ideas, Maybe One Will Work*, SLATE, Apr. 12, 2005, <http://slate.msn.com/id/2116629/index.html>.

10. *Id.* Not only do DVDs fall victim to counterfeiting in China, but products from virtually every other sector are also counterfeited, from Ralph Lauren shirts to Callaway golf clubs to Gucci handbags to Chevy cars. Malini Bawa, *Pirating of Intellectual Property by Chinese Businesses is Huge Problem*, VOANEWS.COM, Nov. 22, 2005, <http://www.voanews.com/english/2005-11-22-voa61.cfm>; *China Pirates Conjure Fake Potter*, CNN.COM, Jul. 31, 2005, <http://www.cnn.com/2005/BUSINESS/07/31/china.potter/ap/index.html>.

11. Seth Faison, *supra* note 5, at D1. In his article, Faison compares pirates to drug dealers and explains that:

[P]rofits are so great, [pirates] will take any risk . . . they're like drug dealers. It is very difficult to arrange a crackdown. You have to coordinate all these different departments, the copyright publication department, the Industrial and Commercial Administration . . . . When it comes to copying a disk, most Chinese people don't see what's wrong.

*Id.* See also Greg Hernandez, *China Piracy Costs High; Movies: Counterfeit DVD Sales Stealing Millions from Studios*, LONG BEACH PRESS-TELEGRAM, Nov. 22, 2005, at A21 (citing an MPAA study claiming that revenue from piracy reached \$512 billion in 2004, compared with \$322 billion from the sale of illegal drugs); Greg Hernandez, *It's Even Bigger than Drugs: CD, DVD Piracy Makes Billions in China*, DAILY NEWS OF LOS ANGELES, Nov. 22, 2005, at B1 (charging the profit margin for DVD piracy is "exponentially higher" than for drugs).

12. Simon Teng, *China's IP Law Report Card: A Troubled Student?*, IPFRONTLINE, Feb. 15, 2005, <http://ipfrontline.com/printtemplate.asp?id=2131> (explaining that the

the Chinese government does not encourage piracy, current policy—such as the over-restrictive censure of releases<sup>13</sup>—and weak law enforcement do nothing to discourage it.<sup>14</sup>

But piracy's boon to the Chinese economy is a threat to the United States' economy—or at least to certain sectors of the economy. Notwithstanding the extraordinary rate of piracy in China, Jack Valenti, president of the Motion Picture Association of America (MPAA), boasts the United States copyright industries as “America's greatest trade prize”—they represent the only sectors to maintain a surplus balance of trade with every other country in the world.<sup>15</sup> The copyright industries—which include motion pictures, music, and books—are intertwined with other aspects of the economy, so their losses<sup>16</sup> trickle down into the entirety of

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choice to become a pirate is often a “survival decision” due to rampant unemployment and the scarce number of jobs with livable wages available in China).

13. Official Chinese movie theaters are only permitted to show “clean” movies—meaning those that have been screened by and approved by the Chinese government. Further, the government imposes strict limits on the number of foreign films that can be exhibited in China's theaters and requires that it be on a revenue-sharing basis. The resulting discrepancy between what the people want to see and what the government allows them to see has created a highly-trafficked black market for pirated goods. Yingchi Chu, *The Consumption of Cinema in Contemporary China*, in *MEDIA IN CHINA: CONSUMPTION, CONTENT, AND CRISIS* 43, 53 (Stephanie Hemelryk Donald, Michael Keane, & Yin Hong eds., 2002); Laikwan Pang, *The global-national position of Hong Kong Cinema in China*, in *MEDIA IN CHINA: CONSUMPTION, CONTENT AND CRISIS*, *supra*, at 59; Greg Hernandez, *U.S. Studios Urge Crackdown on China's CD, DVD Pirates*, ALBANY TIMES UNION, Nov. 24, 2005, at 23.

14. See Kathleen E. McLaughlin & Christopher S. Rugaber, *U.S., Chinese Trade Officials Make Progress on IPR, Market Access, but Stall on Textiles*, Int'l Trade Rep., July 14, 2005, at 1162; Greg Hernandez, *supra* note 13, at 23. Piracy has become such a competitive market that it has been reported that “Chinese storekeepers who sell fake DVDs for ten yuan gripe about street vendors selling them for seven. And the street vendors complain about competitors offering two-for-one specials.” Blodget, *supra* note 9.

15. Alan Story, *Don't Ignore Copyright, the 'Sleeping Giant' on the TRIPS and International Educational Agenda*, in *GLOBAL INTELLECTUAL PROPERTY RIGHTS: KNOWLEDGE, ACCESS AND DEVELOPMENT* 125, 129 (Peter Drahos & Ruth Mayne eds., 2002).

16. “Losses” per se are very hard to calculate. The people who buy pirated DVDs in China often do so because they cannot afford to buy genuine products at full price. While the industry cites that it has lost roughly \$280 million per year (compared to the estimated \$60 billion losses estimated to all other industries) the industry is not necessarily losing out on sales to the pirates. See Special 301 Report, *supra* note 6; James M. Sellers, *The Black Market and Intellectual Property: A Potential Sherman Act Section Two Antitrust Defense?*, 14 ALB. L.J. SCI. & TECH. 583, 605 (2004); Jon Healey & Chuck Phillips, *Piracy Spins a Global Web*, L. A. TIMES, Oct. 11, 2005. Andrew Mertha explains in his book, that the real uneasiness in Hollywood in relation to piracy, is a result of the unsettling notion of “free riding,” whereby “pirates reap profits from manufacturing—and

the United States' economy, affecting job availability,<sup>17</sup> tax flow, quality of life for various other businesses, and cash flow for investments.<sup>18</sup> These annual revenue losses have the copyright industries so riled up that they are lobbying for the World Trade Organization (WTO) to take action against China.<sup>19</sup>

In reality the WTO, by way of its Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement is the kindling fueling many of the movie industry's problems. The Agreement suffers from a lack of effective enforcement mechanisms and is thereby incapable of providing efficient criminal remedies for the acts of movie pirates. Parts II and III of this Note examine the flaws inherent in the TRIPS Agreement, focusing on China's criminal code and motion picture piracy as illustrations of where the Agreement went wrong. Part IV suggests that the WTO reinstate negotiations to amend TRIPS in order to better protect intellectual property rights; and Part V concludes that the piracy problem is not likely to be resolved without any WTO intervention, as illustrated by the drastic measures being taken in self-defense by Hollywood and the United States' government.

## II. THE TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS AGREEMENT

The Agreement on Trade-Related Aspects of Intellectual Property Rights<sup>20</sup> requires member nations<sup>21</sup> to uphold Intellectual Property Rights

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consumers enjoy the savings from purchasing—pirated goods that deny the rightholders their share of remuneration.” ANDREW C. MERTHA, *THE POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA* 19 (Cornell Univ. Press 2005).

17. James M. Sellers, *supra* note 16, at 605–06 (discussing that the Business Software Alliance estimated a loss of 44,000 jobs lost directly, and 74,000 jobs through a trickle-down effect in 2001, plus a loss of \$22 billion in 2001). *See also* John Malcolm & Lauren Nguyen, *Criminal Prosecution Needed in Movie Piracy Cases*, PROSECUTOR, July/Aug. 2005, at 37 (explaining that copyright theft is not a victimless crime because it affects not only producers but also carpenters, seamstresses, electricians, and other personnel).

18. Malcolm & Nguyen, *supra* note 17, at 37.

19. Swanson, *supra* note 1. *See infra* Part IV (discussing the counter-arguments that WTO action may not be the right technique to solve the piracy problem).

20. 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]. TRIPS was the result of the Uruguay Round of Multilateral Trade Negotiations, which took place at Punta del Este, Uruguay in September 1986 to negotiate fourteen different trade-related topics including intellectual property. DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* 10–12 (Sweet & Maxwell Ltd. 2003) (1998).

21. TRIPS Agreement, *supra* note 20, at Annex 12 (listing the WTO Members as of January 1, 2002), *reprinted in* GERVAIS, *supra* note 20.

(IPR) and enforce their nation's civil and criminal laws governing IPR.<sup>22</sup> In general, the TRIPS Agreement sets out minimum standards for IPR protection,<sup>23</sup> basic principles of enforcement,<sup>24</sup> and means for dispute settlement through the WTO that each member country must abide.<sup>25</sup> Initially entered into force in January 1996 as a compilation of and addition to the Berne and Paris Conventions,<sup>26</sup> the TRIPS Agreement was referred to as an intellectual property milestone because it was the first agreement to create detailed rules, in the form of universal minimum standards, in the area of IPR enforcement.<sup>27</sup> Idealists who look to the

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22. Abdulqawi A. Yusuf, *TRIPs: Background, Principles and General Provisions*, in *INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: THE TRIPS AGREEMENT* 3, 11 (Carlos M. Correa & Abdulqawi A. Yusuf eds., 1998).

23. The importance of the agreement is that it:

[S]ets these standards by requiring, first, that the substantive obligations of the main conventions of the WIPO, the Paris Convention for the Protection of Industrial Property (Paris Convention) and the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) in their most recent versions, must be complied with . . . . Secondly, the TRIPS Agreement adds a substantial number of additional obligations on matters where the pre-existing conventions are silent or were seen as being inadequate. The TRIPS Agreement is thus sometimes referred to as a Berne and Paris-plus Agreement.

WTO Intellectual Property—Overview of TRIPS Agreement, [http://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm) (last visited Dec. 21, 2005) [hereinafter Overview of TRIPS].

24. *Id.* (“[E]nforcement contains provisions on civil and administrative procedures and remedies, provisional measures, special requirements related to border measures and criminal procedures which specify, in a certain amount of detail, the procedures and remedies that must be available so that right holders can effectively enforce their rights.”).

25. *Id.*

26. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986). Paris Convention for the Protection of Industrial Property, as last revised at the Stockholm Revision Conference, July 14, 1967, 21 U.S.T. 1583; 828 U.N.T.S. 303.

27. GERVAIS, *supra* note 20, at 3. In his book, Gervais writes:

[The scope of TRIPS] is in fact much broader than that of any previous international agreement, covering not only all areas already (sometimes only partly) protected under extant agreements, but also giving new life to treaties that failed and protecting for the first time rights that did not benefit from any multi-lateral protection. In addition, and some would say perhaps more importantly than its broad coverage, the TRIPS Agreement enshrined detailed rules on one of the most difficult and, for rights holders, painful aspects of intellectual property rights: enforcement.

See also Maria Strong, *Copyright Enforcement: Basic Considerations and Strategies to Protect Copyrights Abroad*, in *INTERNATIONAL TRADEMARKS AND COPYRIGHTS*:

WTO to solve the global problem of IPR violations view TRIPS as “not only a trade agreement, [but] also a multifaceted project to export to all corners of the globe a particular set of values and presumptions about the need to protect both ideas and the expression of those ideas . . . .”<sup>28</sup> It follows that the TRIPS Agreement was drafted to effectively protect IPR while encouraging international trade, not burdening it.<sup>29</sup>

TRIPS endeavors to achieve these results through two basic principles: national treatment and most favored nation status. National treatment requires that members treat their own citizens the same as citizens of other Member States with respect to IPR enforcement, while most favored nation status provides equal treatment under domestic laws, preventing one member country from getting a ‘better deal’ on IPR than another or one Member State from receiving unfair advantages over another.<sup>30</sup>

Members to the TRIPS Agreement are required to implement criminal sanctions for “willful trademark counterfeiting or copyright piracy<sup>31</sup> carried out on a commercial scale.”<sup>32</sup> In other words, TRIPS seeks to punish

ENFORCEMENT AND MANAGEMENT 61, 64 (John T. Masterson ed., 2004) (explaining that the Agreement is often referred to as “Berne-plus” which indicates that TRIPS raised the minimum standards set in the Berne Agreement).

28. Story, *supra* note 15, at 129. *See also* Understanding the WTO—Intellectual Property: Protection and Enforcement, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm7\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm) (explaining that TRIPS is an attempt to unify IPR protection while simultaneously striking a balance between the long-term benefits of creation and invention with the short-term costs of protection mechanisms to society).

29. Overview of TRIPS, *supra* note 23.

30. *See* John T. Masterson, Jr., *Enforcement of Trademarks and Copyrights under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights*, in INTERNATIONAL TRADEMARKS AND COPYRIGHTS: ENFORCEMENT AND MANAGEMENT, *supra* note 27, at 2–3; J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection under the TRIPS Component of the WTO Agreement*, in INTELLECTUAL PROPERTY AND INTERNATIONAL TRADE: THE TRIPS AGREEMENT 21, 25 (Carlos M. Correa & Abdulqawi A. Yusuf eds., 1998).

31. International Chamber of Commerce Counterfeiting Intelligence Bureau, *Enforcement Measures Against Counterfeiting and Piracy: An International Survey*, at x n.21 [hereinafter Survey]. This survey indicates that the TRIPS Agreement defines pirated copyright goods as:

[A]ny goods which are copies made without the consent of the right holder or person duly authorized by him in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.

32. *Id.* at xv. The TRIPS Agreement also creates civil and administrative policies and laws relating to IPR; the focus of this Note is the criminal aspect of TRIPS.

and deter people profiting from the business of piracy.<sup>33</sup> Under Article 61(1) of TRIPS, the punishments imposed by a Member State against a copyright violator<sup>34</sup> must be comparable to the penalties for similar crimes under the national law of the WTO member concerned and must respect Article 41(1) of TRIPS,<sup>35</sup> which obliges Member States to put forth their best efforts to prevent infringement and to provide expeditious remedies to prevent and deter future infringements.<sup>36</sup>

Actual enforcement of IPR in Member States in order to inflict these penalties upon pirates, however, is difficult to achieve. Although WTO members are required to enact statutes that conform to TRIPS, the Agreement does not include specific mechanisms or detailed rules governing the application of such provisions. Further, TRIPS requires sanctions relative to those for other similar crimes—a rather undefined standard—which yields inconsistent results among the member nations. Article 41(5) plainly states that “nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of [IPR] and the enforcement of law in general.”<sup>37</sup> The Article elaborates that members need not implement a separate judicial system to enforce IPR.<sup>38</sup> As a result, a member nation can easily skimp out on providing maximum enforcement of their IPR laws by claiming it does not have enough resources to do the job.<sup>39</sup> As a WTO Agreement, disputes arising under TRIPS may be resolved through WTO procedures<sup>40</sup> such as a dispute settlement panel, review by the Appellate Body, or cross-retaliation

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33. TRIPS Agreement, *supra* note 20.

34. *Id.* art. 61 (explaining that the TRIPS Agreement not only covers issues relating to copyright rights. The TRIPS Agreement covers the areas of intellectual property including copyright and related rights, trademarks including service marks, geographical indications including applications of origin; industrial designs; patents, including the protection of new varieties of plants; the layout-designs of integrated circuits; and undisclosed information including trade secrets and test data).

35. GERVAIS, *supra* note 20, at 327. *See also* Overview of TRIPS Agreement, *supra* note 23 (noting that enforcement must be in accordance with particular rules. Governments must ensure that IPR can be enforced under their laws and that the penalties for infringement are tough enough to deter further violations. The procedures must be fair and equitable, but at the same time they may not be unnecessarily complicated or costly. For example, they must not include unreasonable time limits or unwarranted delays.).

36. Masterson, *supra* note 30, at 8–9.

37. TRIPS Agreement, *supra* note 20, art. 41(5).

38. *Id.* art. 41(5).

39. *See infra* Part III (explaining the impact this has on China and, analogously, other developing countries).

40. *See* Masterson, *supra* note 30, at 3 (explaining that this is governed by Article 22 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes).



by Member States,<sup>41</sup> these procedures are rarely—if ever—used. As of 2004, such WTO mechanisms had never been used to combat the inadequate enforcement of IPR.<sup>42</sup>

Further complicating the implementation process is the caveat that the private parties, such as individual authors, artists, producers, or interest groups (e.g., the MPAA), who are most likely to see their rights directly violated and to feel the effects of an IPR violation, cannot enforce the TRIPS Agreement.<sup>43</sup> Instead they must make complaints through government channels with access to settlement procedures.<sup>44</sup> The United States, for example, provides such an option through section 301 of the 1988 Omnibus Trade and Competitiveness Act. This Act allows any interested person to “file a petition with the United States Trade Representative (USTR) requesting it take action to enforce the United States’ rights under a trade agreement or to prevent unreasonable foreign trade practices.”<sup>45</sup> Upon such a request, the USTR will investigate the allegations made in the individual’s petition or explain the decision not to investigate.<sup>46</sup> Then, the USTR may initiate WTO dispute settlement proceedings against a foreign country it has identified as having serious IPR deficiencies that warrant increased attention to particular problem areas or practices under the auspices of Special 301.<sup>47</sup> Because such efforts are time consuming and onerous, they do not provide an effective tool for deterring piracy or punishing it. The United States has been particularly wary about pursuing WTO procedures against China for fear of straining the relationship between the two countries.<sup>48</sup> Specifically, China and the United States have an interdependent trading partnership whereby the

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41. *Id.* at 4 (explaining that Article 6 of TRIPS limits dispute settlement to concerning the “exhaustion of intellectual property rights” to violations of the national agreement and most favored nation obligations).

42. Masterson, *supra* note 30, at 6–7.

43. Only members to an agreement may enforce its provisions unless expressly provided for otherwise. In the case of the WTO, the only members are States, not individuals. *See generally* TRIPS Agreement, *supra* note 20, *passim*.

44. Survey, *supra* note 31, at xvi.

45. *Id.* at xvii.

46. *Id.*

47. Masterson, *supra* note 30, at 18–20 (referencing section 182 of the Trade Act of 1974, under which the USTR may identify countries that deny adequate protection of IPR or deny fair and equitable market access to U.S. persons that rely upon IP protection. It is under Special 301, however, that the USTR has power to designate countries to the Priority Watch List.); Yu, *supra* note 3, at 128–29 (referring to the Special 301 as the “H-bomb of trade policy” because it is a dramatic measure aiming to completely eliminate unfair trade practices, while allowing the United States to impose sanctions upon countries it finds threatening to its economic progress).

48. *See* Yu, *supra* note 3.

United States absorbs nearly a third of China's exports and China is the fifth largest market for U.S. exports.<sup>49</sup> Similarly, the United States depends upon Chinese cooperation to peacefully resolve potential tensions involving Taiwan, Hong Kong, and North Korea.<sup>50</sup>

Ultimately, as evidenced by the sky-high rate of copyright infringement around the world, sufficient enforcement of the TRIPS Agreement is sorely lacking.<sup>51</sup> No matter how closely a country aligns its own laws with the standards of the TRIPS Agreement, the rate of piracy and respect for IPR will be difficult to improve without significant changes to the Agreement itself.<sup>52</sup>

### III. CASE STUDY: CHINA

Russia and China are the biggest thieving countries. If they wanted to take care of their IP problems, they could. They don't belong in the WTO unless they do. Hopefully, they're watching, because we mean business.

Sen. Orrin Hatch, R-Utah, Chairman of the Subcommittee on Intellectual Property of the Senate Judiciary Committee<sup>53</sup>

There is a tendency to build unrealistic expectations regarding China's ability to enforce policy. In particular, there is a propensity to oversimplify the issue and place the blame for failure squarely at the feet of China's national leadership.

Andrew Mertha, author of *The Politics of Piracy*<sup>54</sup>

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49. *See Id.*

50. *Id.* at 17; Swanson, *supra* note 1.

51. Masterson, *supra* note 30, at 6. Motion picture piracy rates are high in countries around the globe, not just in China. *See, e.g.*, Myron Brilliant, Vice President, East Asia, U.S. Chamber of Commerce, Views on China's Intellectual Property Record, Testimony Before the House Judicial Subcommittee on the Internet and Intellectual Property (May 17, 2005), available at <http://www.uschamber.com/NR/rdonlyres/ehmj5rnmn43vyr73fe5rdh6xpyowlsuk6ochwrqheq65rtctlsxeovg4rdxytjcgjzbxv23df2uo44tcwhl7jhxhrd/HouseJudiciaryChinatestimonyMay172005revised.doc> (the rate in Russia is 80 percent); Carolyn Boyle, *View From Here: Copyright Clampdown*, LEGAL WEEK GLOBAL, Nov. 24, 2005 (the rate in Malaysia is over 90 percent).

52. Although TRIPS was drafted to reflect the United States' laws regarding IPR, piracy is still rampant in this country. For example, on Manhattan's Canal Street, police frequently overlook the sale of imitation goods which abundantly impale the market. MERTHA, *supra* note 16, at 37-52; Barnett, *Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis*, 91 VA. L. REV. 1381, 1381 (2005).

53. Graham, *supra* note 6, at 936.

54. Mertha, *supra* note 16, at 225.

*A. China's Piracy Problem*

Consider a country where Spader-Man (not Spider Man)<sup>55</sup> protects the streets from danger, workout enthusiasts don New Barlun sneakers (as opposed to New Balance),<sup>56</sup> and movie buffs see films months before their scheduled release,<sup>57</sup> and one would not be surprised to learn that China, one of the largest infringers of copyright rights in the world,<sup>58</sup> has long been the target of pressure from both the United States and the World Trade Organization to tighten its protection of intellectual property rights.<sup>59</sup>

However, China is also a country where criminal laws penalizing copyright infringement have been on the books since the early 1990s, a specialized court to prosecute IPR infringement was set up in 1996,<sup>60</sup> and a number of bureaucratic agencies were established to implement the country's copyright laws.<sup>61</sup> The disparity between the expected result of China's bold efforts to protect IPR and the reality of rampant piracy evokes many questions concerning the effectiveness of Chinese policy, the seriousness of enforcers, and the root of the problem with Chinese regulations.

*B. China's Criminal Law Pertaining to Copyright Infringement*

For the first time in its millennia-long history, China amended its criminal law in 1990 to include a provision subjecting serious offenders of copyright to criminal sanctions such as fines and product confisca-

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55. Andrew Frew McMillan, 'Spader-man' Prowls Hong Kong's Streets, CNN.COM, May 16, 2002, <http://archives.cnn.com/2002/BUSINESS/asia/05/15/hk.spaderman/index.html>.

56. Yoon, *supra* note 4.

57. Swanson, *supra* note 1.

58. *Id.*

59. *Id.* See also ANDREW C. MERTHA, *supra* note 16, at 37–52 (explaining the long-term negotiations between the United States and China regarding IPR).

60. Jiang Zhipei, Member, Judicial Comm. of the Sup. People's Ct., Address at the Int'l Intell. Prop. Inst. Seminar: Recent Developments in China's Judicial Protection of Intellectual Property Rights (Sept. 17, 2002), available at <http://www.chinaiprlaw.com/English/forum/forum33.htm> [hereinafter Jiang Zhipei Address].

61. MERTHA, *supra* note 16, at 133–35 (citing examples of bureaucratic agencies created to fight piracy, including: the Ministry of Culture Publications Bureau—originally the Central People's Government Publishing General Administration—the National Copyright Administration of the Ministry of Culture, National Publications Enterprises Management Bureau, National Press and Publications General Administration, and local Copyright Divisions).

tion.<sup>62</sup> Although China was not yet a member of the WTO, it drafted these criminal laws to conform to the TRIPS requirements.<sup>63</sup> While it is debatable whether this change was made to placate foreign powers fixated on reforming China's disposition as a threat to copyright holders or because it hoped to eventually enter into the WTO is debatable, the gesture nevertheless signaled China's willingness to take IPR seriously and to change policies that impliedly condoned piracy as a means of economic advancement.<sup>64</sup>

In its simplest terms, China's criminal law punishes copyright infringement, for example the reproduction or distribution of a motion picture without the permission of the copyright owner, for the purpose of making a profit. Where the amount of illegal gains from such infringement is "huge" or there are "situations of serious circumstances," the individual infringer is subject to a fixed term of imprisonment of up to three years and a potential fine.<sup>65</sup> However, if the amount of illegal gains from such infringement is "relatively large" or there are "especially serious circumstances," the individual infringer is subject to a fixed term of

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62. PETER FENG, *INTELLECTUAL PROPERTY IN CHINA* 140 (Sweet & Maxwell Asia 2003) (explaining that it took until 1990 for China to amend its criminal law because of the traditional view in China that intangible property—like a copyright—was not as valuable as tangible property. The author further describes the process by which major laws are issued by the National People's Congress (NPC), the supreme legislative body in China. The NPC is made up of three administrative organs: the State Council, the Supreme People's Procuratorate, and the Supreme People's Court, and each of these administrative organs may issue binding administrative orders, such as a judicial interpretation of a law).

63. See Embassy of the United States, <http://beijing.usembassy-china.org.cn/copyright.html> (last visited Nov. 27, 2005). China first began its "negotiations" over IPR with the United States in 1979. The new criminal provisions were most likely added in response to mounting pressure by the USTR, as well as China's co-signatories of the Paris Convention on International Trade, who had already become infuriated by China's utter disregard for IPR. Andrew Mertha explains further that the United States used the draft TRIPS Agreement:

[A]s a "carrot" . . . to get China to agree to better protection of U.S. copyright in China: if China made sufficient progress, according to one US negotiator, the United States would support China's bid to be a founding member of the [WTO]. Thus TRIPS provided a convenient substantive and symbolic link between U.S. IPR concerns and China's desire to join the WTO.

MERTHA, *supra* note 16, at 127.

64. *Id.* at 37–52. See also RONALD C. BROWN, *UNDERSTANDING CHINESE COURTS AND LEGAL PROCESS: LAW WITH CHINESE CHARACTERISTICS* 6–7 (Kluwer Law Int'l 1997).

65. *Zhonghua Renmin Gongheguo Xingfa* [Criminal Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 1, 1979, amended Mar. 14, 1997, effective Oct. 1, 1997) (P.R.C.).

imprisonment ranging from three to seven years and/or a potential fine.<sup>66</sup> Further, a penalty of up to four years of imprisonment can be mandated for a person who, for the purpose of making a profit, knowingly sells motion pictures or video recordings reproduced by infringing upon the owner's copyright.<sup>67</sup> When one of the above referenced crimes is committed by a unit—rather than an individual—the Code provides that the unit be punished “in accordance with the provisions of the appropriate article.”<sup>68</sup>

Drafted in a somewhat ambiguous and illogical fashion, the provisions' key terms—for example, “huge” and “relatively large” illegal gains, the corresponding fines for such gains, and the term “knowingly”—are not defined. Explanations of these terms were later specified by the Supreme People's Court (SPC)<sup>69</sup> in the form of judicial interpretations<sup>70</sup> of the

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66. *Id.* art 217. Article 217 of the Criminal Law states, in part:

Whoever, for the purpose of making profits, commits any of the following acts of infringement on copyright shall, if the amount of illegal gains is relatively large, or if there are other serious circumstances, be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined; if the amount of illegal gains is huge or if there are other especially serious circumstances, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and shall also be fined: (1) reproducing and distributing a . . . motion picture . . . without permission of the copyright owner; . . . (3) reproducing and distributing an audio or video recording produced by another person without permission of the producer.

*Id.* Although these are not the only actions that are criminalized, motion pictures are the relevant medium that will be described for the purpose of this Note.

67. *Id.* art. 218. Article 218 of the Criminal Law states, in its entirety:

Whoever, for the purpose of making profits, knowingly sells works reproduced by infringing on the copyright of the owners as mentioned in Article 217 of this Law shall, if the amount of illegal gains is huge, be sentenced to a fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined.

*Id.*

68. *Id.* art. 220. Article 220 of the Criminal Law states, in its entirety:

Where a unit commits any of the crimes mentioned in the Articles from 213 through 219 of this Section, it shall be fined, and the persons who are directly in charge and the other persons who are directly responsible for the crime shall be punished in accordance with the provisions of the Articles respectively.

*Id.*

69. BROWN, *supra* note 64, at 35–37 (discussing that the SPC is an independent judicial authority that does not receive any interference from administrative institutions, indi-

law, issued first in April 2001 and most recently in December 2004.<sup>71</sup> SPC-issued interpretive administrative orders function in Chinese law like legislation.<sup>72</sup>

The SPC's 2001 judicial interpretation of the criminal law defined the thresholds for a punishable copyright crime at a virtually unattainable level and penalized infringers with minimal fines.<sup>73</sup> That infringers were undeterred from their acts is an understatement—enforcement remained severely deficient. Days after an infringing factory was fined and shut down it would reopen.<sup>74</sup> Weeks after a raid confiscating hundreds of DVDs, perpetrators would pop-up at a different store in Beijing.<sup>75</sup> And in 2003 only three cases were filed under criminal provisions (as compared to a mere nineteen criminal cases in 2002, which resulted in sentences ranging from six months to six years imprisonment).<sup>76</sup> Not surprisingly, China is routinely cited on the USTR Priority Watch List<sup>77</sup> and on the radar of other concerned countries that anticipated sustained detriments to their own copyright industries.

China's attempt to better protect copyright—and thwart retaliation by its trading partners—culminated in its enactment in December 2004 of a new judicial interpretation (JI) of the criminal law pertaining to IPR in-

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viduals, or public organizations; it is responsible for administrating courts, interpreting the laws, adjudicating cases, and participating in lawmaking).

70. A judicial interpretation is an interpretation of the law issued by a judicial organ and viewed by government and Party officials to have the same bearing as a traditional administrative order. *Id.* at 37 n.167.

71. Criminal codes are enforced in dual part by the Supreme People's Procuratorate (SPP), which heads the prosecution system and has the ability to initiate criminal cases under the Law of Criminal Procedure, and the Supreme People's Court (SPC), an independent judicial authority that issues judicial interpretations of the law. *Id.* at 8–10, 25–27.

72. *Id.* at 67–68 (explaining that SPC orders are the function of a judicial organ of the NPC. The NPC is made up of three bodies including the SPP and the SPC.).

73. Special 301 Report, *supra* note 6.

74. *Id.*

75. *Id.*

76. *Id.*; [Interpretations of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues of Application of Laws When Hearing the Criminal Cases of Infringing on the Intellectual Property Rights] (promulgated by the Sup. People's Ct. and the Sup. People's Proc., Dec. 21, 2004, effective Dec. 22, 2004), arts. 5–6, 14, *translated in* ISINOLAW (last visited Aug. 29, 2005) (P.R.C.) [hereinafter Judicial Interpretation].

77. Yu, *supra* note 3, at 131–39 (explaining the cycle where the United States would put China on its “watch-list,” make threats of sanctions to bully it into making laws that would change its IPR, ultimately do nothing, and then put China on the priority list again).

fringement.<sup>78</sup> The new JI redefines its key terms to more adequately meet the demands both of the WTO—particularly Articles 41 and 61 of TRIPS—and of “offended” countries.<sup>79</sup>

Ostensibly, the 2004 JI would make it easier for China to prosecute copyright infringers by lowering monetary thresholds and recalculating the value of illegal gains necessary to trigger pirate prosecution.<sup>80</sup> Specifically, the JI redefines “relatively large illegal gains” as a profit greater than RMB 30,000 (US\$3,710) and “huge illegal gains” as a profit more than RMB 150,000 (US\$18,552).<sup>81</sup> The value gained is calculated based upon the selling price, not on the price of real goods for the products.<sup>82</sup> Similarly, the JI lowers the volume of infringing products that a pirate may sell before he is subject to prosecution.<sup>83</sup> It is considered a “serious circumstance” when an individual reproduces and distributes at least 1,000 illegal copies of a motion picture without the permission of the copyright owner and an “especially serious circumstance” where an individual reproduces and distributes at least 5,000 copies of the motion picture.<sup>84</sup> Other “serious circumstances” include instances where the illegal business volume exceeds RMB 50,000 (US\$6,326) and other “especially serious circumstances” include where the illegal business volume exceeds RMB 250,000 (US\$31,632).<sup>85</sup> Perhaps one of the most significant changes in the JI is the alteration of the rules pertaining to “units” committing a crime. The JI elevates the punishment level for units to a rate of three times that prescribed for an individual pirate, compared to the previous JI which assigned trivial punishments for group actions.<sup>86</sup>

### C. China's Compliance with TRIPS

The USTR and IIPA are famous for issuing reports that insist that if only China would change its laws or if only China would follow the TRIPS agreement, piracy would be eradicated—or at least greatly dimin-

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78. Judicial Interpretation, *supra* note 76.

79. *Id.*

80. *Id.*

81. Currency conversion computations made using The Universal Currency Converter, <http://www.xe.com/ucc/convert.cgi> (last visited Oct. 23, 2006). For the text of the Judicial Interpretation, see Judicial Interpretation, *supra* note 76, arts. 5–6, 14.

82. Wu Jing, *China Lowers the Conviction Criteria of IPR Violation*, People's Daily Online (P.R.C.), Dec. 23, 2004, available at [http://english.people.com.cn/200412/23/eng20041223\\_168430.html](http://english.people.com.cn/200412/23/eng20041223_168430.html).

83. Judicial Interpretation, *supra* note 76.

84. *Id.*

85. *Id.* arts. 5–6.

86. *Id.* art. 15. See *China Pirates Conjure Fake Potter*, *supra* note 10.

ished—in that country.<sup>87</sup> This section will demonstrate that the new JI is even more closely aligned with the major standards regarding copyright infringement set out in Articles 41 and 61 of TRIPS than its predecessors. Yet, since the adoption of the JI, the rate of copyright infringement in China has neither seen the radical decrease once predicted,<sup>88</sup> nor is one anticipated.<sup>89</sup> This section will then demonstrate why apparent ambiguities and weaknesses inherent throughout the TRIPS Agreement are to blame for this failure.

Under Article 41(1) of TRIPS, Member States are required to incorporate enforcement procedures that “permit effective action against any act of infringement of intellectual property right covered by [the TRIPS] agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements”<sup>90</sup> into their laws. In other words, each Member must allow its courts to “issue injunctions, award compensatory damages, costs, and attorney’s fees, allow the recovery of profits; and order the uncompensated seizure and disposition of infringing goods.”<sup>91</sup>

An examination of China’s current policies shows that the country has implemented measures to comply with these requirements. In 1996 a new court was established expressly to hear IP cases.<sup>92</sup> In 2004, as a result of 573 raids, 145 shops selling pirated DVDs were closed and 510 were fined.<sup>93</sup> Also in 2004, over 22 million DVDs were seized, 34 cases were commenced, 30 indictments were made, and 21 cases resulted in

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87. Special 301 Report, *supra* note 6. See also *Piracy of Intellectual Property: Hearing Before the Subcommittee on Intell. Prop. Sen. Judiciary Comm.* (2005) (statement of Eric H. Smith, President, IIPA) (explaining that the IIPA submits annual reports to the USTR on the piracy of sixty-seven countries, including China, and detailing some of the reasons for piracy’s breadth); International Intellectual Property Alliance: About IIPA, <http://www.iipa.com/aboutiipa.html> (last visited Nov. 5, 2006).

88. Various IIPA and USTR documents and reviews of China audaciously proclaim that if China would accede to the TRIPS agreement and follow it more closely all would be solved with the problem of piracy, but this Note’s analysis indicates that may not be so. International Intellectual Property Alliance: About IIPA, *supra* note 87; OFFICE OF THE U.S. TRADE REP., OUT-OF-CYCLE REVIEW ON CHINA, (2005), available at [http://www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2005/2005\\_Special\\_301/asset\\_upload\\_file835\\_7647.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_Special_301/asset_upload_file835_7647.pdf) [hereinafter USTR Out-of-Cycle Review].

89. See Chris Buckley, *On Piracy, An Advocate for China’s Progress*, INT’L HERALD TRIB., Oct. 4, 2005.

90. TRIPS Agreement, *supra* note 20, art. 41(1).

91. Neil W. Netanel, *The Next Round: The Impact of the WIPO Copyright Treaty on TRIPS Dispute Settlement*, 37 VA. J. INT’L L. 441, 461 (1997) (citations omitted).

92. Jiang Zhipei Address, *supra* note 60.

93. Special 301 Report, *supra* note 6, at 196.



jail time.<sup>94</sup> Despite these successes, the IIPA placed China on its Priority Watch List and charged that China has not met its TRIPS commitment to provide effective criminal enforcement against piracy and is at fault for not exhibiting the “political will” needed to bring about such changes.<sup>95</sup>

It is true that China has not yet efficiently and effectively refined its mechanisms for preventing and punishing piracy. However, this is not inconceivable considering that the ambiguities and loopholes encompassed by Article 41(5) suggest that the objectives set out in Article 41(1) need not be enforced in their entirety.<sup>96</sup> The effect, in whole, is that the potential benefits of “international IPR enforcement cannot be realized on a global scale.”<sup>97</sup> Article 41(5) enunciates that it does not create any obligations on Member States to implement a new judicial system for the enforcement of IPR nor does it oblige Members to expend extra resources on IPR enforcement.<sup>98</sup> Thus, developing countries whose legal systems are not adapted to such regulations are weak protectors of IPR. For example, the judicial system China implemented for IP cases is not yet very effective.<sup>99</sup> Because Article 41(5) does not create any obligations with respect to the distribution of resources, China is not required to put forth more resources toward IPR than it does to the enforcement of law in general.<sup>100</sup> As a result, China may uphold its existing law enforcement mechanisms, no matter how inadequate they are. Thus, the

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94. *Id.* at 200. This data was estimated by the IIPA; China has not officially released its own data in this matter. The Bush administration, along with Japan and Switzerland, has demanded that China share information regarding the enforcement of IPR by January 23, 2006. Edward Alden, *U.S. to Press China on Moves Against Piracy*, FINANCIAL TIMES, Oct. 27, 2005, at 11.

95. Special 301 Report, *supra* note 6; USTR Out-of-Cycle Review, *supra* note 88.

96. GERVAIS, *supra* note 20, at 327; Jishnu Guha, *Time for India's Intellectual Property Regime to Grow Up*, 13 CARDOZO J. INT'L. & COMP. L. 225, 237 (2005).

97. Jishnu Guha, *supra* note 96, at 253.

98. TRIPS Agreement, *supra* note 20, art. 41(5).

99. See Jiang Zhipai Address, *supra* note 60.

100. Christian L. Broadbent & Amanda M. McMillian, *Russia and the World Trade Organization: Will TRIPS be a Stumbling Block to Accession?*, 8 DUKE J. COMP. & INT'L. L. 519, 546 (1998). This article narrowly interprets TRIPS Article 41(5) to mean that:

Members are not required to put in place a system of judicial enforcement entirely distinct from that State's already existing court system. However, the language that emphasizes a Member State's autonomy in distributing resources between intellectual property enforcement and general enforcement may have a

significant impact in countries like Russia where the government has limited resources to dedicate to enforcement of intellectual property laws.

*Id.*

police force, stymied by bribery and inadequate training, is incapable of curbing piracy and would be even if China had the most sophisticated system of laws.<sup>101</sup>

The USTR and IIPA fault China as having weak law enforcement mechanisms.<sup>102</sup> They call on China to increase fines for IPR infringement. They promote the idea of transparency by requesting that China make public IPR-related case rulings and statistics.<sup>103</sup> And they demand that China “[m]ake administrative IPR enforcement actions deterrent.”<sup>104</sup> However, these demands reach beyond the scope of the TRIPS Agreement, no matter how helpful they would be to foreign nations. TRIPS does not require a country to make fundamental changes to its national legal system<sup>105</sup>—yet insisting that China make its case decisions public and change its enforcement actions would be such a fundamental change.

Ironically, the drafters envisioned the ambiguous language in Article 41 as a safety valve to ensure TRIPS was unanimously accepted by the Member States.<sup>106</sup> The provisions allowed for broader interpretations, accounted for limited resources in developing countries, and avoided the requirement that each country develop a new judicial system.<sup>107</sup> Instead, the ability to broadly interpret the agreement is easily exploited by member nations eager to find any excuse not to fully enforce TRIPS. The effect is that in Member States, measures are implemented “only as far as normally available judicial or administrative resources are available.”<sup>108</sup>

#### *D. The Impact of TRIPS’ Inadequacies on China’s IPR Law and Enforcement*

Admittedly, the II is not perfect. Current provisions that require a profit motive before criminalizing behavior and that provide weak punishments for accomplices must be amended in order for China to vigor-

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101. See e.g., Pesek, *supra* note 6.

102. USTR Out-of-Cycle Review, *supra* note 88; *Piracy of Intellectual Property: Hearing Before the Subcommittee on Intell. Prop. Sen. Judiciary Comm.* (2005) (statement of Eric H. Smith, President, IIPA).

103. *Id.* The USTR report explains that China refuses to give information to foreign governments about the severity of punishments given to pirates or what happens to goods confiscated during raids.

104. *Id.*

105. Survey, *supra* note 31, at x–xi.

106. GERVAIS, *supra* note 20, at 287 (explaining that Article 41(5) addresses the “stumbling blocks” of negotiation dealing with conflicting legal systems and differing levels of available resources among the countries).

107. *Id.* at 287–89.

108. *Id.* at 289.

ously target pirates.<sup>109</sup> But analyzed objectively as a country whose legal system is still developing, Chinese laws reflect the requirements set out in TRIPS to a remarkable degree.<sup>110</sup> Even the United States, in the 2005 USTR Out-of-Cycle Review, acknowledged that, under the leadership of Vice Premier Wu Yi, China has made significant strides in the arena of protecting IPR.<sup>111</sup> So, instead of faulting China's legal system, international focus should turn to the real reason China's laws are not having the immediate impacts desired by the United States and other foreign countries: the inadequacies of the TRIPS Agreement.

Despite China making changes to and enacting its own laws to meet the standards enunciated in TRIPS standards,<sup>112</sup> the USTR has determined several years in a row that China has failed to adequately protect IPR. And in early 2005, China was officially placed on the USTR Priority Watch List because of universal concern that China is not in compliance with its WTO/TRIPS obligations and is not actually on the road to adequately protect IPR.<sup>113</sup> China's failure to significantly reduce the incidence of IPR violations is largely a consequence of the TRIPS Agreement's failure to address issues such as the provision of resources for enforcement and fundamental changes to national legal systems.<sup>114</sup> And as a result, China's Judicial Interpretation of its criminal laws regarding IPR, although created to comply with TRIPS, cannot adequately succeed in producing significant decreases in copyright infringement.<sup>115</sup>

From the perspective of Chinese lawmakers, the enactment of a new JI regarding the criminalization of IPR infringement was a bold step in the

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109. *See id.*

110. *See infra* note 61; MERTHA, *supra* note 16, *passim*.

111. USTR Out-of-Cycle Review, *supra* note 88, at 1.

112. *See infra* Part III.C.

113. USTR Out-of-Cycle Review, *supra* note 88 (explaining that once a country is placed on the Priority Watch List it is subject to a special yearly review. The 2005 review concluded that China has not done enough to curb piracy and must continue to change its practices of implementing its IPR laws.).

114. *See* Survey, *supra* note 31, at xi.

115. Teng, *supra* note 12 (reporting that the Special 301 Report Card found that, in 2003, 85 percent of DVDs manufactured in China were pirated, as were 69 percent of VCDs. Further, it was reported that the Special 301 report estimated that in 2004 U.S. industries lost \$2.5 billion to piracy in China. Overall piracy rates hover around 90 percent in China.); FENG, *supra* note 62, at 140 (explaining that in the January 1995 Judicial Interpretation, criminal sanctions would be imposed for "illegal sales exceeding RMB 100,000 for individuals and RMB 500,000 for units." Additionally, the 1995 interpretation considered factors such as a previous record of criminal copyright infringement or political and social consequences. The current interpretation does not take these factors into consideration.).

pursuit of judicial reform.<sup>116</sup> In fact, in the self-proclaimed era of “Justice and Efficiency,”<sup>117</sup> which seeks to provide “effective protection for the legal interests of IP rights holders, promot[e] the prosperity and development of science, technology and culture, [help] to regulate the economic order of the market and [improve] the investment environment,”<sup>118</sup> the JI would be the effort’s pinnacle.

In theory, it *is* a bold step forward. For decades, outsiders perceived China as having a moral void in the realm of IPR.<sup>119</sup> The JI, in contrast, serves as a guide to judges, a tool to educate the public, and a promise to the international community to provide more effective protection.<sup>120</sup> But in practice, the mechanisms to enforce such a bold plan are limited. The country faces challenges more serious than IP and therefore cannot focus its monetary resources on the problem.<sup>121</sup> Further, customs agents are easily bribed to allow pirates to import and export pirated goods.<sup>122</sup> The police force, relied upon to implement and enforce the law, does not have enough money in its budget to enforce the law or to properly train its officers in regard to IPR.<sup>123</sup> And combined with the drafters’ failure to maintain TRIPS as an agreement capable of placing adequate pressure on a country to strengthen its IPR enforcement—or their failure to foresee the necessity of doing this—the ultimate result is that China will continue to move at a slow, but steady pace toward its goal of curbing piracy.<sup>124</sup>

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116. See Jiang Zhipei Address, *supra* note 60.

117. *Id.* In his speech regarding recent developments in China’s judicial protection of IPR, Zhipei stated:

Since China’s entry into WTO, reform in China has reached a new stage and the judicial reform of the Courts has been carried out even further. “Justice and Efficiency” has been declared the theme of the judicial system in the 21<sup>st</sup> century and a well-focused movement to make Chinese judges more professional has been put on the schedule. All of these measures have created a sound situation at home and abroad for the Court to carry out the difficult mission of IP law enforcement in China. I am confident that IP law enforcement will become ever more just and efficient.

*Id.*

118. Jiang Zhipei is a Member of the Judicial Committee of the Supreme People’s Court and has been involved in the formulation of legislation of intellectual property law in China. *Id.*

119. See generally ALFORD, *supra* note 3.

120. Buckley, *supra* note 89.

121. *Id.*

122. Faison, *supra* note 5.

123. Pesek, *supra* note 6; Special 301 Report, *supra* note 6.

124. Buckley, *supra* note 89.

## IV. SOLUTION: PUTTING THE WTO BACK ON TRACK

And so, more than a decade after joining the WTO, piracy in China has not been significantly reduced. But the onus for change cannot be placed upon China—or comparable countries—alone. First, TRIPS does not provide mechanisms for harmonization,<sup>125</sup> which means that every country can choose its own method to cope with piracy and its WTO responsibilities. The result if every developing country did this, however, would be a jumble of rules and regulations. Second, China is doing all that it can—at this moment—to enforce IPR. As discussed in Part III, China has already developed a new court system and changed its laws to comply with TRIPS.<sup>126</sup> Further, China is working hard to educate government officials, as well as lawyers, businessmen, and trademark agents, about IP protection and laws at the Intellectual Property Training Center in Beijing which opened in January 1997.<sup>127</sup> The onus, instead, must be placed on the WTO itself to stimulate change.<sup>128</sup>

But the ideas of imposing sanctions or filing an official complaint at the WTO, which have been advocated—or at least threatened—by the MPAA, IIPA, and USTR, are not certain to be viable options either.<sup>129</sup> This form of WTO action would likely embarrass China, rather than acknowledging and applauding the great strides it has already made.<sup>130</sup> Such action would set China up for more criticism from other countries and possibly alienate it.<sup>131</sup> Consequently, other developing countries would be deterred from changing their own laws to conform to IPR norms. As any grade school teacher knows, ambiguously defined rules lead to disorder in the classroom. Students who fully understood the reasons behind the rules their teachers impose and who have a say in the

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125. A harmonization mechanism would provide a basic structure to which each member state must conform its rules. GEORGE A. BERMAN & ROGER J. GOEBEL ET AL., CASES AND MATERIALS ON EUROPEAN UNION LAW 536–39 (West Group 2002) (1993).

126. See *infra* Part III.

127. Yu, *supra* note 3, at 151–52.

128. Because the WTO is a neutral body with a peaceful mission to promote fair trade, it is capable of promoting resolutions to these problems. *Id.* The United States needs to find a peaceful solution to the IPR problems, rather than imposing sanctions or a WTO hearing because it relies upon China to keep peace in North Korea and Russia, to fight terrorism in the Middle East and around the world, and for trade; the United States cannot afford to alienate China over the issue of piracy. See *id.*; Wang Jsi, *China's Search for Stability with America*, FOREIGN AFFAIRS, Sept./Oct. 2005, available at <http://www.foreignaffairs.org>; Swanson, *supra* note 1.

129. Yu, *supra* note 3, at 166–70.

130. *Id.*

131. *Id.*

rulemaking, however, are more apt to abide by them.<sup>132</sup> Analogously, China and other similarly situated countries must be held to clear standards. Like students in a classroom, each would benefit from a clear enunciation of these expectations in the TRIPS Agreement itself, rather than in subsequent documents produced by the IIPA and USTR to criticize China. Although China has worked to implement criminal laws to protect IPR, it cannot be expected to meet the stringent expectations of the United States and organizations like the IIPA when those expectations are expressed ambiguously in TRIPS, the defining document.

Although they did not foresee the specific problems affecting China today, the drafters of TRIPS did anticipate that with continued growth in technology, globalization, and potentially unanswered questions in the agreement itself, there would be an eventual need to amend the Agreement.<sup>133</sup> As a result, Article 71 was adopted to provide a mechanism to review and amend TRIPS. Specifically, it calls for TRIPS to be reviewed at least every other year or at any time therein that the Council decides “in the light of any relevant new developments which might warrant modification or amendment of [the TRIPS] Agreement.”<sup>134</sup> It is pivotal that Article 71 powers be used to tweak the provisions of the TRIPS Agreement to ensure the high quality of Member States’ legal systems and to adequately stop IPR infringement and punish pirates while maintaining due process.<sup>135</sup> Through this process, member nations must—at a minimum—amend provisions to make the agreement self-executing, revise Article 41’s ambiguities, and ensure that adequate resources are available to enforce TRIPS.

Member States must assess, via the mechanisms available in Article 71,<sup>136</sup> how the provisions of Article 41 can be fine-tuned to ensure every member’s concerns are met. The current ambiguities, as explained in Parts II and III, render it nearly impossible for Member States to implement measures to successfully protect IPR. Likewise, it is pertinent that China and other countries, in the process of changing their own systems, are key players in this negotiation process. By taking ownership and responsibility, China’s government and citizens will gain a greater understanding of the rules by which they will abide and negotiators can be certain that the measures agreed upon are both practicable and just.

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132. FREDRIC H. JONES, PH.D., TOOLS FOR TEACHING *passim* (Fredric H. Jones & Associates, Inc. 2000).

133. GERVAIS, *supra* note 20, at 370 (explaining that the review mechanism was included to circumvent the need for another formal discussion forum).

134. TRIPS Agreement, *supra* note 20, art. 71.

135. *Id.*

136. *Id.*

Further, the TRIPS Agreement must be re-evaluated and amended to be a self-executing agreement. This would mean that a Member State could rely on the Agreement alone to set national standards and laws in order to ensure IPR are protected, rather than requiring Member States or non-government organizations to make their own pacts with infringing states. For example, instead of relying upon independent agreements such as the one made in July 2005 between the Motion Picture Association (MPA), an international organization designed to protect American films,<sup>137</sup> and China, TRIPS itself should provide similarly specific mechanisms to curb piracy. The MPA-China agreement, for example, stipulated that the MPA will regularly submit a list of films which will be screened there in exchange for an agreement that Chinese officials would seize all illegal copies of the listed movies found on the streets.<sup>138</sup> Although this agreement has resulted in a dramatic decrease in the availability of pirated DVDs in China—for example, none of the films listed on the first submission list were available in Shanghai<sup>139</sup>—it would be more efficient if specific legal language was included in TRIPS which could be applied to all Member States, rather than forcing the motion picture industry to create separate agreements with infringing nations.

Finally, using its Article 71 power of review, the Council must initiate the negotiation of a mechanism to provide supplemental resources to states for the enforcement of TRIPS.<sup>140</sup> For example, Member States could require that parties wishing to pursue an action in court pay a fee to access the court. This court fee would prevent Member States from using their lack of resources as an excuse for failing to prosecute IPR infringements.<sup>141</sup> A second option would be to require Member States to pay dues to the WTO. Like the United Nations, the WTO is a treaty-based organization and does not have its own revenue sources to keep it afloat.<sup>142</sup> Membership dues—paid on a sliding scale—allow the U.N. to pursue its mission.<sup>143</sup> Similarly, membership dues could enable the WTO

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137. Jonathan Landreth, *China to Help MPA's Battle Against Piracy*, HOLLYWOOD REPORTER, July 17, 2005, available at <http://www.hollywoodreporter.com>. See Motion Picture Association, [http://www.mpa.org/piracy\\_IntLaw.asp](http://www.mpa.org/piracy_IntLaw.asp) (last visited Nov. 6, 2006).

138. William Triplett, *China Results Mixed in Antipiracy Efforts*, DAILY VARIETY, Oct. 26, 2005, at 5.

139. *Id.* (citing that, as a result of the agreement, the availability of pirated titles fell 50 percent in Beijing during September and fell “sharply” in Guangzhou).

140. TRIPS Agreement, *supra* note 20, art. 71.

141. Jiang Zhipei Address, *supra* note 60.

142. Image and Reality: Questions and Answers about the U.N., <http://www.un.org/geninfo/ir> (follow “5. Is the United Nations Good Value for the Money” hyperlink) (last visited Nov. 6, 2006).

143. *Id.*

to distribute resources on an as-needed basis to countries without ample resources to implement IPR protection mechanisms.<sup>144</sup> By amending TRIPS to include a provision that would provide developing countries with the extra resources they need to protect IPR, the loopholes invited by Article 41 and which allow Member States to only enforce IPR to the extent they have the resources to do so, would be narrowed.<sup>145</sup>

## V. CONCLUSION: 'HOLLYWOOD' STRIKES BACK

### A. Introduction

Although the MPAA and Hollywood executives are encouraged by the idea that China has conducted a few investigations into and raids of fraudulent businesses, the rest of the world nevertheless looks on confused and disgruntled at the slow pace with which change is occurring in China.<sup>146</sup> But perhaps "Hollywood" has the right view—that China is forging new paths and is coming around to protect IPR, albeit slowly. As China has begun to recognize the influence of piracy on its *own* movie industry, its government has been more apt to acknowledge the idea that IPR protections are important. As a result, China has become more willing to work with the United States and the WTO to enforce IPR to the extent it can. But Hollywood—and now the U.S. government—have recognized that complacency is not an option; they must still take the initiative to protect themselves because TRIPS is not currently strong enough to do it.<sup>147</sup>

### B. Current Efforts to Protect U.S. Business Interests

Although some Hollywood experts might be optimistic about China's progress, none can be accused of naiveté. Hollywood executives, the MPAA, and other organizations have taken their own initiatives to curb the impact of copyright piracy in China. For example, the MPAA recently filed lawsuits against six hubs for TV show trading because international markets are hurt by reduced demand for syndication and interna-

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144. *Id.* (explaining that the purpose of collecting membership dues is to enable the United Nations to follow its mission of providing resources to promote world peace, humanitarian issues, etc.). In the context of the WTO, membership dues would allow nations to pool their resources to then distribute to nations incapable of financing their own IPR protection mechanisms. Helping poorer nations up-front would ultimately diminish the amount that nations often pay later to establish other mechanisms to protect IPR when a country cannot meet the demands of TRIPS because it lacks the resources to do so.

145. TRIPS Agreement, *supra* note 20, art. 41.

146. Special 301 Report, *supra* note 6.

147. *See supra* Part II.



tional sales when content is stolen.<sup>148</sup> In addition, some movie production companies have asked that movie theater representatives wear night vision goggles during the first weeks of a movie's release in order to effectively patrol for pirates.<sup>149</sup> And at the Spiderman premiere, security was tighter than the named superhero's own webs around arch-enemy the Green Goblin. The studio sent the footage to the theater locked in vaults and armed with digital tracking codes, and guests were sent through metal detectors and subject to identification checks in order to prevent illegal recordings of the movie from being made.<sup>150</sup>

On an international front, movie production companies, such as Warner Brothers, have experimented with the simultaneous release of movies in theaters in the United States and on video in China. For example, the movie *Sisterhood of the Traveling Pants*, produced by Warner Brothers, was released in 1,500 stores in China on the same day it was released in American theaters.<sup>151</sup> A Warner Brothers executive described this as "a way to offer movie buffs legal alternatives to stolen copies."<sup>152</sup> However, the studio in this case never planned to release this movie in Chinese theaters, so it is unclear what impact such a strategy would have on box office sales for movies that are planned for future release in China.<sup>153</sup> Another creative approach was taken by the MPA, which sponsored a merit badge for Boy Scouts in Hong Kong who took a course on international property rights and piracy.<sup>154</sup> Even actor Jackie Chan and California Governor Arnold Schwarzenegger, a former actor himself, irate at lost revenues after their movies' DVD release, have teamed up to fight piracy as real-life action heroes in a new public service announcement aimed at educating China's citizens about the criminality of piracy.<sup>155</sup>

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148. *MPAA Targets TV Download Sites*, THE INTERNET NEWSLETTER, June 2005, at 7.

149. *High-tech Hunt for Potter Pirates*, CNN.com, May 31, 2004, <http://www.cnn.com/2004/SHOWBIZ/Movies/05/31/britain.potter/index.html> (explaining that such practices have been in effect for at least two years in areas of the United States where movie piracy is considered a major threat).

150. Healey & Philips, *supra* note 16.

151. Jonathan Landreth, *U.S. Companies Confident Patience Will Pay Off*, HOLLYWOOD REPORTER, July 28, 2005.

152. *Warner opens new front in piracy war?*, CNN.COM, June 9, 2005, available at [http://money.cnn.com/2005/06/09/technology/personaltech/piracy\\_china](http://money.cnn.com/2005/06/09/technology/personaltech/piracy_china).

153. Landreth, *supra* note 151. Taking this idea one step further, the creators of the most recent Harry Potter movie opted to release it on the "big screen" in China before its U.S. release with the hope that "Chinese fans [would] pay for tickets before pirated DVDs show[ed] up in markets." Bawa, *supra* note 10.

154. Pesek, *supra* note 6. See also *Piracy of Intellectual Property: Hearing Before the Subcommittee on Intell. Prop. Sen. Judiciary Comm.* (2005) (statement of Eric H. Smith, President, IIPA).

155. Ben Sisario, *Fighting Piracy in China*, N.Y. TIMES, Nov. 19, 2005, at B8.

These creative attempts by the U.S. government and businesses at protecting IPR serve to compliment the efforts by the Chinese government and other international governments to educate people in China about the importance of protecting IPR and even about the existence of IPR. However, that these actions are even necessary is a clear signal to the international community that the current standards in TRIPS are not working and must be changed if they are to work independently from outside agreements and intervention to protect intellectual property rights.

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