The Not So Great Wall of China: Intellectual Property Enforcement Issues March On in the People’s Republic

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I. INTRODUCTION

My interest in the piracy of copyrighted goods was first piqued when a good friend of mine asked me to find him a legitimate music CD from a Chinese singer. I was living in Los Angeles at the time and I figured it would not be difficult, because Los Angeles had a good number of businesses that catered to its Chinese population. To my dismay, I learned that all the music CDs and DVDs that I had been purchasing up to that point were all pirated copies. The clerk at the store told me that there were no legitimate copies, but that I could pay extra for an “grade A” pirated copy. These pirated copies came in what appeared to be original packaging, which even included the holograms indicating the authenticity of the items. I asked the clerk if there were any stores in the area that carried legitimate copies. The clerk simply laughed at me and replied that she was not sure what a legitimate copy was or how to distinguish between a legitimate copy from a pirated copy.

I encountered a similar situation when I was travelling in China. I passed by countless numbers of retail stores that sold CDs and DVDs, except this time, the clerk lied to me and told me that the copy I was purchasing was legitimate. The amount I paid was substantially more for what I believed was my “legitimate copy” than the “grade A” pirated copy. I went home that day and played the movie, but halfway through, it paused, and I noticed that certain scenes from the movie were omitted.
With respect to movies and music from Chinese retailers, I have come to learn that it has become progressively difficult to distinguish between a legitimate copy and a pirated copy. Perhaps if I carried a portable DVD player to play the entire movie at the time of purchase, that would serve to quell some of my doubts. However, the quality of pirated goods has increased, making it even harder to distinguish legitimate and pirated goods. Now, I have given up on trying to find legitimate goods in China altogether. Such inquiries would only disclose my identity as a foreigner to the merchants. Native Chinese people usually would never ask for a legitimate copy at the retailers that I have visited.

China is often depicted as one of the main offenders of intellectual property rights, and it is not hard to see why when you consider the following statistic: China accounts for nearly two-thirds of counterfeit goods—goods including movies and music, prescription drugs, designer handbags and motorcycles—on the estimated $512 billion worldwide counterfeit market. Over ninety percent of all music CDs and movie DVDs sold in China are pirated. While it may be hard to calculate the precise value of losses resulting from piracy, it is estimated that Chinese piracy cost the U.S. music and movie industries $1.85 to $2.54 billion annually.

This essay attempts to trace the evolution of intellectual property rights (IPR) system, specifically piracy of DVDs and CDs in China. Despite the progress that China has made in its

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4 *Id.*

5 *Id.* (explaining the losses that U.S. industries incurred as a result of China’s piracy problems).
IPR laws, China has failed to appease its western counterparts.\(^6\) China continues to remain one of the world’s biggest culprits when it comes to pirating.\(^7\) In addition to traditional piracy, which involves physical copies of pirated goods, China is also engaged in online piracy, pirating of copyrighted goods via internet file-sharing.\(^8\) It is submitted that China can deal more effectively with its pirating problem if it shifts its focus to reducing the demand of pirated goods. Currently, China’s criminal and civil provisions only provide punishment against those who are involved in selling or copying pirated goods.\(^9\) China’s futile attempts at enforcing IPR laws and its punishment do not serve as an effective deterrent.\(^10\) China should also punish the consumers of pirated goods. If the consumers are deterred, the demand would go down thereby decreasing the supply of pirated goods. This alternative will not completely rid China’s piracy problems but the benefits of implementing such an approach will outweigh its drawbacks.

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\(^6\) Elizabeth Chien-Hale, *Doing Business in China: Resolving the Challenges in Today’s Environment*, 109 (Practicing Law Institute, 2007) (citing Peter K. Yu, *Intellectual Property Aspects of Doing Business in China*, 119, 125) (explaining that the U.S. has been unsatisfied with China’s pledges to crack down on piracy). See also Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. Rev. 131, 140–148 (2000) (stating that the U.S. threatened China numerous times with trade wars and backed down when both countries reached a temporary compromise. For example, the U.S. used section 301, which targets unfair trade practices concerning intellectual property rights to induce China to strengthen protection of intellectual property rights. Section 301 requires the United States Trade Representative (USTR) to identify foreign countries that provide inadequate intellectual property protection. The USTR must initiate an investigation into the act, policy or practice and request a consultation with the country regarding its offending practices. If the issues remain unresolved after six months, the USTR may suspend or withdraw trade benefits, and impose restrictions); Peter Morici, *Barring Entry? China and the WTO*, available at http://www.rhsmith.umd.edu/faculty/pmorici/Barring%20Entry%20China%20and%20the%20WTO.doc (last accessed April 1, 2010) (detailing how in February 1995, the U.S. threatened 100% tariffs on $1.1 billion of Chinese imports and in March 1995, the U.S. relented by signing another agreement with the Chinese).

\(^7\) Priest, supra n. 3, at 797.

\(^8\) Id. at 799–802 (discussing that the statistics of the cost of piracy do not include piracy over the internet. China currently has the world’s largest internet population and internet piracy will likely be a problem in China as it has been in countries like Australia, Canada and the U.S.).


II. IN THE BEGINNING, THERE WAS NO WALL

Historically, as far back as imperial China, only a fraction of its population was privileged enough to be educated. The bulk of the population in China was illiterate.\(^\text{11}\) There was little demand for creative works and piracy was not a problem. This changed as literacy rates increased and technology advanced.\(^\text{12}\)

In stark contrast to Western countries’ emphasis on individual and property rights, Chinese culture has always embraced collectivist notions.\(^\text{13}\) This is supported by Confucian principles which have been seen as a great influence on Chinese culture\(^\text{14}\) and China’s association with Communism.\(^\text{15}\)

1. Communism

In 1949, the People’s Republic of China was created by the Communist Party.\(^\text{16}\) At this time, some assurances were made to authors to encourage them to produce creative works.\(^\text{17}\) However, when pirating occurred, the authors were often left without a remedy.\(^\text{18}\) In 1966, Mao


\(^{14}\) Id.

\(^{15}\) Id.

\(^{16}\) Priest, *supra* n. 3, at 804.

\(^{17}\) Id. at 804–805 (describing that the Communist Party issued pronouncements which promoted respect for the author’s works and remuneration for it).

\(^{18}\) Id. Under Communism, individuals were not permitted to own property. Id. All property was owned by the government. Id. If an author wanted to seek a remedy based on infringement of his work, he would be seeking a remedy against the government. Id. Because the government owned everything, there was no infringement and the author was often left without a remedy. Id.
Zedong led the Cultural Revolution to “re-educate” the Chinese and incorporate communism into every aspect of life.\(^{19}\) As a result of the Cultural Revolution, the legal system was dismantled.\(^{20}\) Any pre-existing rules on compensation and remuneration for authors were gone and piracy was not only condoned, but became the official policy. Any rights that the author once held now belonged to the government.

2. **Confucianism**

Confucianism stresses that a person’s actions should be guided by his morals and not by coercive laws. \(Li\) is a concept that is associated with Confucianism.\(^{21}\) \(Li\) refers to personal relationships and etiquette.\(^{22}\) Accordingly, when there is a dispute, people should seek compromise to avoid confrontation.\(^{23}\) Individual rights should give way to further the interests of society.\(^{24}\)

In contrast, \(fa\) refers to the rule of law and is associated with punishment.\(^{25}\) Rule of law is used when authorities cannot rule with \(li\).\(^{26}\) According to Confucius Analects, “govern the people by regulations, keep order among them by chastisement, and they will flee from you, and lose all

\(^{19}\) Crane, *supra* n. 13, at 107.


\(^{21}\) \(Li\) translates to mean manners in Chinese.

\(^{22}\) Butterton, *supra* n. 20, at 1109.


\(^{24}\) Butterton, *supra* n. 20, at 1109.

\(^{25}\) \(Fa\) translates to mean law or authority in Chinese.

\(^{26}\) Butterton, *supra* n. 20, at 1109.
self-respect. Govern them by moral force, keep order among them by ritual and they will keep their self-respect and come to you of their own accord.”\textsuperscript{27}

If we apply principles from Communism and Confucianism to IPR, it would be easier to understand why China has lagged in creating an IPR system. Arguably, the IPR system primarily benefits the author of a creative work. The author is encouraged to create works because he would be granted property rights in his creation. This may not necessarily benefit society at large because included within the author’s bundle of rights, is the right to control dissemination of his work. If the author chooses to restrict access to his work, then society will not be able to reap the benefits of his creation.

Communism and Confucianism principles do not align with the idea of subordination of societal interests at the expense of an individual’s interests. Communism strongly supports the contention that the best way for society to benefit is when there are no property rights and everyone is entitled to usage of others’ creations. Article 51 of the Chinese Constitution states, “the exercise by citizens … of their freedoms and rights, may not infringe upon the interests of the state, of society and of the collective.”\textsuperscript{28}

\textbf{III. LAYING OF THE BRICKS}

After Mao Zedong’s death in 1976, China adopted the open door economic policy under Deng Xiaoping.\textsuperscript{29} The open door economic policy aimed to open China up to the world economically and culturally.\textsuperscript{30} Under Deng Xiaoping’s guidance, China’s relations with Western

\textsuperscript{27} Arthur Waley, \textit{The Analects of Confucius} 88 (1938).

\textsuperscript{28} The Constitution Of The People’s Republic Of China, Article 51 (1982) (P.R.C.).

\textsuperscript{29} Priest, \textit{supra} n. 3, at 805. The Open Door Policy opened China up to foreign countries and it refers to equal trading rights among countries. \textit{Id}.

\textsuperscript{30} \textit{Id}.
countries improved. In 1979, China signed the Agreement on Trade Relations between the U.S. and China. In signing this agreement, China promised to ensure U.S. citizens intellectual property protection. The following year, 1980, China gained admission into the World Intellectual Property Organization (WIPO).

Prior to China’s agreement with the U.S., there were no intellectual property laws in place. Piracy was rampant. Pirates had no fear of copying creative works, and authors had no property rights in their work. The creative works belonged to the government. This changed in the 1980s when China began to draft a series of legislation that aimed to provide some protection for copyrighted works.

1. Copyright Act of 1990

The first copyright law was implemented in 1990 (Copyright Act). The good news was that it recognized the author’s property rights in his work. The bad news was that the copyright

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32 Agreement on Trade Relations, U.S.-P.R.C., July 7, 1979, 31 U.S.T. 4651.

33 Sanqiang Qu, Copyright in China 4, 42–43 (2002).

34 Priest, supra n. 3, at 808.

35 Butterton, supra n. 20, at 1084. There were few laws left after the Cultural Revolution. Id. The few remaining laws were silent on copyright infringement. Id.

36 Id. at 1084–1085.

37 Priest, supra n. 3, at 807–808 (explaining that China was responding to pressure from foreign governments. No copyright law was implemented until 1990 due to the intense debate that authorities had. Drafting begun in the 1980s. Apparently the debate revolved around the appropriateness of copyright laws in a socialist system).

38 Copyright Law (promulgated by the Standing Committee National People’s Congress, September 7, 1990, effective June 1, 1991). [hereinafter Copyright Act]

39 Id. at Articles 10–11.
law provided broad exceptions to the government. This exception in effect took away some of the protection that the copyright law sought to grant. Another limitation of this Copyright Act was that China had discretion on who would receive protection. China could refuse protection to works that it considered “unclean”. Those who had a copyright would be able to seek protection from the government. At this time, the Copyright Act did not provide criminal penalties for copyright infringement. The author could only seek civil remedies. In spite of the Act’s limitations, it was perceived as an indication of China’s changing attitude towards IPR.

Unfortunately, this Act did little to deter piracy because China failed to enforce the Copyright Act. What good is a law if it will not be enforced? As a result of China’s lax enforcement, the U.S. and China began one of its many rounds of reciprocal threats of sanctions against one another.

Such sanctions were avoided when both parties agreed to sign a Memorandum of Understanding (MOU) in 1992. China complied with the MOU by signing the Berne

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40 See Id. at Article 22(7) which states, “a work may be used without permission from, and without payment of remuneration to, the copyright owner … in a published work by a state organ for the purpose of performing of its official duties.”; Id. at Article 43 which states, “a radio or television station may broadcast, for non-commercial purposes a published sound recording without seeking permission from, or paying remuneration to, the copyright owner, performer and producer of the sounding recording.”

41 Priest, supra n. 3. at 808. Chinese government continues to censor material in the country. Id.

42 Copyright Act at Article 4 (stating that “copyright owners in exercising their copyright shall not violate the constitution or law or prejudice the public interests.”).

43 Priest, supra n. 3, at 812–814. Criminal provisions were first introduced in 1997 and amended in 2004.

44 Id. at 809; See also supra n. 9.

45 Priest, supra n. 3, at 808.

46 Chien-Hale, supra n. 6, at 122–125 (explaining that threatening China has not been effective in getting China to enforce IPR laws. The U.S. would be in a better position if it worked together with China).

Convention, ratifying the Geneva Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms and amending the 1990 Copyright Act.\(^{48}\) However, China’s pledges on paper did not result in better enforcement. Piracy continued and another round of threats were traded between the U.S. and China.\(^ {49}\) Once again, sanctions were avoided. \(^ {50}\) This time, China promised to develop a plan to improve enforcement. \(^ {51}\) This too failed to appease the U.S. in the long run.\(^ {52}\) This cycle of threats and responses continued. \(^ {53}\)

2. Copyright Act of 2001

In the late 1990s, China sought to gain admission into the World Trade Organization (WTO).\(^ {54}\) Joining the WTO would provide China with several benefits.\(^ {55}\) First, it would give

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\(^ {48}\) Priest, supra n. 3, at 809.

\(^ {49}\) Id. at 810.

\(^ {50}\) Id.

\(^ {51}\) Id. China agreed to implement an “Action Plan” that would improve the enforcement infrastructure. Id.


\(^ {53}\) Daniel Pruzin & Adriane Grace, WTO Gives Mix Ruling in U.S. Complain Against Chinese IP Enforcement Measures, 77 Patent, Trademark & Copyright Journal 303, 307–308 (2009). Recently the World Trade Organization announced its ruling on a U.S. complaint against China’s enforcement of IPR. Id. The ruling was seen as a victory and a loss to the U.S as it won and lost some claims. Id. The WTO held that China violated TRIPS because “it denied copyright protection to works that have not been authorized for publication or distribution in China.” Id. Additionally, China also violated TRIPS to the extent that its measures permitted counterfeit trademark goods to be sold after the removal of the trademark. Id. However, the U.S. failed to prove that the “value and volume thresholds established by China for the prosecution of IP infringement cases violated TRIPS.” Id. But see, Connie Carnabuci & Victoria White, Reducing the Risk of IP Rights Leakage, http://www.internationallawoffice.com/Newsletters/detail.aspx?g=67724cfe-e526-48b5-b948-481e680b92e (last accessed December 25, 2009) (stating that China published its “IP Rights Protection Action Plan” in April 2009, which includes a commitment to carry out nine separate campaigns to boost IP rights enforcement). See also infra Section IV regarding Chinese’s response to U.S. criticism.

\(^ {54}\) Wayne M. Morrison, China and the World Trade Organization, available at
China access to the dispute resolution process in the WTO, and the U.S. would no longer be able to threaten China with sanctions as it had in the past.\footnote{Id. Article lists six benefits that China would enjoy if it were a member of the WTO. The other three benefits are: it would represent international recognition of China’s growing economic power; it would make it easier for reformers in China to push for liberalization policies if they could argue that such steps are necessary to fulfill China’s international obligations; China would be able to participate in the next round of multilateral trade negotiations in the WTO. \textit{Id.}} Second, membership in the WTO would permit China to obtain permanent trade relations or most favored nation status from the U.S.\footnote{Id. WTO specifies a process for members to abide by in the event of a dispute or complaint. \textit{See also} Chien-Hale, \textit{supra} n. 6, at 141–143 (explaining that the WTO process prohibits a member state from taking retaliatory measures before it has exhausted all of the actions permissible under the rules. China’s membership in the WTO changes the process the U.S. has to go through when it is unhappy with China. This new process includes consultations, negotiations, dispute settlement, and arbitration); Peter K. Yu, \textit{U.S.-China Trade: Opportunities and Challenges: Still Dissatisfied After All These Years: Intellectual Property, Post-WTO China and the Avoidable Cycle of Futility}, 34 Ga. J. Int’l & Comp. L. 143, 149 (2005) (implying that China’s admission into the WTO may not offset its obligations under the 1992 MOU, but it would provide China with protection against the U.S.’s threat of unilateral sanctions).} In addition, China would be able to participate in the development of new international rules on trade in the WTO.\footnote{Morrison, \textit{supra} n. 54 (explaining that at the time, this status was renewed annually).}

One of the obstacles that China faced when seeking admission was that WTO membership required compliance with the Agreement on Trade-Related Intellectual Property Rights (TRIPS).\footnote{Morrison, \textit{supra} n. 54. The Copyright Act was adopted on October 27, 2001. \textit{Id.}} TRIPS set a minimum level of protection that members had to provide for IPR.

To prepare for admission into the WTO, China passed the 2001 Copyright Law Act (Copyright Law).\footnote{Id.} The new Copyright Law brought most of China’s IPR laws in compliance http://fpc.state.gov/documents/organization/6560.pdf (last accessed November 19, 2001).
with TRIPS’ requirements.\textsuperscript{61} The change in China’s copyright law represents a shift in emphasis from communist philosophy to private rights.\textsuperscript{62} The new Copyright law created sixteen categories of rights.\textsuperscript{63} The new Copyright Act gave authors the right of “communication of information on networks, that is, the right to communicate to the public a work, by wire or wireless means….”\textsuperscript{64} The inclusion of this right may actually exceed the international standards that TRIPS requires because TRIPS does not speak explicitly to internet transmission of copyrighted works.\textsuperscript{65}

3. Criminal Liability for Copyright Infringement

Criminal sanctions were first enacted in 1997 and were amended in 2004.\textsuperscript{66} Criminal provisions applied to those involved in copying protected works and to those who sold pirated copies.\textsuperscript{67} The severity of punishment depended on whether one’s gains were “relatively large” or “huge”. Under the 1997 criminal provision, those involved in unauthorized copying that resulted in “relatively large” profits were subjected to a fine and/or a maximum of three years in prison. Those who made a “huge” profit were subjected to a fine and/or three to seven years in prison.

\textsuperscript{61} Weinstein & Fernandez, supra n. 10, at 232–233 (explaining that some of China’s IP laws were not in full compliance with TRIPS. However, China has until 2011 to bring its laws to full compliance with TRIPS).

\textsuperscript{62} Priest, supra n. 3, at 811.

\textsuperscript{63} See 2001 Copyright Law Article 10 (effective on October 27, 2001) (P.R.C.), translation available at http://en.wikisource.org/wiki/Copyright_Law_of_the_People's_Republic_of_China (last accessed November 6, 2009). The categories of right include: right of publication; right of authorship; right of alteration; right of integrity; right of reproduction; right of distribution; right of rental; right of exhibition; right of performance; right of showing; right of broadcast; right of communication of information on networks; right of making cinematographic work; right of adaptation; right of translation; right of compilation. \textit{Id.}

\textsuperscript{64} \textit{Id.}

\textsuperscript{65} Priest, supra n. 3, at 811–812.

\textsuperscript{66} \textit{Id.} at 813–814.

For those involved in selling pirated goods, they would have to make “huge” profits to be liable for fines and/or three years in prison.68

In 2004, China’s Supreme People’s Court lowered the criminal liability threshold. For “relatively large” the amount was lowered from 100,000 yuan to 30,000 yuan in profits. “Huge” is now defined at 150,000 yuan.69 In addition, the amendment provides criminal penalties for internet piracy.70 Those who reproduce and distribute more than one thousand copies of pirated goods are subject to fines and/or a maximum of three years in prison.71 According to the amendment, reproducing and distributing extends to works that are reproduced and distributed over internet file sharing.72 Those who reproduce and distribute more than 5,000 copies are subject to fines and/or a maximum of seven years in prison.73

68 Copyright Law of the People’s Republic of China, Article 48 available at http://www.chinaiprlaw.com/english/laws/laws10.htm (last accessed April 1, 2010). It states, “Where a copyright or a copyright-related [sic] right is infringed, the infringer shall compensate for the actually [sic] injury suffered by the right holder; where the actual injury is difficult to compute, the damages shall be paid on the basis of the unlawful income of the infringer. The amount of damages shall also include the appropriate fees paid by the right holder to stop the infringing act. Where the right holder's actual injury or infringer's Unlawful [sic] income cannot be determined, the People's Court shall Judge [sic] the damages not exceeding RMB 500,000 [sic] depending on the circumstances of the infringing act.” Id. RMB stands for Renminbi which literally translates to mean “the People’s currency,” this is synonymous with the yuan. But see Pirating and Counterfeiting in China, available at http://factsanddetails.com/china.php?itemid=356&catid=9&subcatid=61 (last accessed April 1, 2010) (quoting one owner of a stall that sold fake luxury goods told the International Herald Tribune, “If I get caught I’d lose my merchandise and I’d probably be fined, but when business is good, the profits are quite high, so it is absolutely worth the risk.”).


71 Id.

72 Priest, supra n. 3, at 814–815.

73 Supra n. 67.
4. The Structure of China’s IPR System

The Chinese IPR system is rather complex because it involves different government offices at different levels.\(^74\) To further complicate matters, sometimes there may be more than one agency that has power over a specific area.\(^75\) The National People’s Congress and its Standing Committee are responsible for passing all legislation, including IPR legislation.\(^76\) The Supreme People’s Court supervises the People’s court system to enforce the IPR law.\(^77\) The Supreme People’s Procuratorate supervises the prosecutorial system to enforce criminal aspect of the IPR laws.\(^78\) State Council supervises the state level IP agencies, which in turn supervise their local counterparts to grant/record/enforce IPR and initiate legislative changes.\(^79\)

\(^74\) Chien-Hale, supra n. 6 at 112.

\(^75\) Priest, supra n. 3, at 824.

\(^76\) Jianfu Chen, *Chinese Law: Context and Transformation* 179–180 Martinus Nijhoff Publishers (2008) (explaining that the National People’s Congress is responsible for basic laws governing criminal and civil matters, basic economic systems and state structures. The Standing Committee is responsible for other laws as well as partial supplementation and revision of basic laws when the National People’s Congress is not in session. The State Council is empowered to issue administrative regulations. Local legislatures at provincial level (including the authorities in Special Economic Zones and relatively large cities approved by the State Council) are in charge of making local regulations and autonomous regulations. Governments at provincial level and ministries and commissions under the State Council may issue local government rule and departmental rules).

\(^77\) Id. at 151. The People’s Court has a hierarchical order as defined by the Organic Law of the People’s Courts. Id. at 150. The Supreme People’s Court sits at the top, and is followed by the High People’s Courts (established at provincial levels), the Intermediate People’s Courts (established in cities and prefectures), and the Basic People’s Courts (established in counties, towns and villages). Id. The People’s Courts handles civil and minor criminal cases. Id. at 151.

\(^78\) Chien-Hale, supra n. 6, at 112. See also Chen, supra n. 76, at 158. (stating that the procuratorates also exercise the functions and powers of supervising the implementation of law as well as undertaking direct investigation of certain crimes). The People’s Procuratorate also has a hierarchical order. Id. The Supreme People’s Procuratorate sits at the top, and is followed by the High People’s Procuratorates (established at provincial levels), the Intermediate People’s Procuratorates (established in cities and prefectures), and the Basic People’s Procuratorates (established in counties). Id.

\(^79\) Chien-Hale, supra n. 6, at 112. See infra Section IV (1)(b) for an overview of Chinese government structure.
Copyrighted goods do not require registration for protection.\textsuperscript{80} In accordance with the WTO, a work is automatically protected upon creation.\textsuperscript{81} However, copyright owners should register their copyright with China’s National Copyright Administration (NCA) to establish evidence of ownership.\textsuperscript{82}

China’s IPR system has two enforcement channels: administrative and judicial.\textsuperscript{83} Each channel offers different remedies and parties seeking protection should consider what their priorities are before pursuing an enforcement channel.\textsuperscript{84} Parties may also seek protection from both channels.\textsuperscript{85}

The NCA is the primary administrative body with jurisdiction over copyright disputes.\textsuperscript{86} The NCA has power to investigate claims of alleged infringement at the request of copyright owners or on its own initiative.\textsuperscript{87} Copyright owners must submit a complaint and some evidence of the infringement to the NCA.\textsuperscript{88}

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\textsuperscript{82} Supra n. 80.

\textsuperscript{83} Chien-Hale, supra n. 6, at 113.

\textsuperscript{84} Id.

\textsuperscript{85} Priest, supra n. 3, at 815.

\textsuperscript{86} See Peter Feng, Intellectual Property in China at 16 (2003).

\textsuperscript{87} Id. at 19.

\textsuperscript{88} Id.
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The Public Security Bureau (PSB) is the principal police agency.\textsuperscript{89} It has authority to conduct raids if there is reason to suspect that infringement implicates the criminal provisions against copyright infringement.\textsuperscript{90} The PSB has power to force entry and to make arrests.\textsuperscript{91} Once this is completed, the agency issues a judgment regarding the alleged infringement. It can then forward the case to the People’s Prosecutorate for criminal prosecution.\textsuperscript{92}

There are several advantages of pursuing the administrative route. It is often less expensive, and administrative agencies can usually act quicker than courts.\textsuperscript{93} Additionally, enforcement action is likely to be reported in the media.\textsuperscript{94}

Copyright owners also have the option of proceeding through the judicial route. The judicial route will usually provide longer and broader terms of relief.\textsuperscript{95} It is also wise for copyright owners to file a case in a higher court like the Court of First Instance.\textsuperscript{96} Doing so can

\textsuperscript{89} Daniel C.K. Chow, *Counterfeiting in the People’s Republic of China*, 78 Wash.U. L.Q. 1, 23. Chow’s article focused on enforcement in relation to trademark counterfeiting, however, the same issues arise in relation to enforcement of copyright counterfeiting.

\textsuperscript{90} Id. *See also* Priest, *supra* n. 3, at 816.

\textsuperscript{91} Chow, *supra* n. 89, at 23.

\textsuperscript{92} Id. at 24.

\textsuperscript{93} Priest, *supra* n. 3, at 817. *See also* Chien-Hale, *supra* n. 6, at 113–114.

\textsuperscript{94} Chien-Hale, *supra* n. 6, at 113–114.

\textsuperscript{95} Id. at 113.

\textsuperscript{96} The Supreme People’s Court in Beijing is the highest court in China. It is an appellate level court. The Court of First Instance (national) is the next highest, followed by the High People’s Court (provinces, autonomous regions), Intermediate People’s Court (prefectures, autonomous prefectures, and Basic People’s Court (autonomous towns, counties and municipal districts).
reduce the influence of local protectionism. Copyright owners may also bring criminal cases to the court system.

One advantage this route provides is that courts have the power to grant preliminary injunctions against alleged infringing action. Such injunctions empower the judicial agency to conduct flash raids without warning to infringers. Prior to the new Copyright Act, pirates were allowed to continue with their pirating activities while lawsuits were still pending. Moreover, copyright owners can only obtain civil damages when they use the judicial route. Now infringers who are found guilty may be required to pay up to 500,000 yuan if damages cannot be calculated. Damages can be calculated in three ways: lost profits; infringers’ profits; reasonable royalties. However, punitive damages are not available.

There are also other ways for copyright owners to protect their rights in China. The Chinese government has established more than fifty service centers around China. These

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97 Chien-Hale, supra n. 6, at 113.
98 Id. at 114.
99 Priest, supra n. 3, at 816.
100 Id.
101 Id.
102 Id. at 817. However civil damages are usually very little and do not adequately compensate the copyright owner. Id. Owners are usually interested in stopping the infringement rather than recouping losses especially when they are not adequate. Id.
103 Weinstein & Fernandez, supra n. 10, at 230.
104 Id.
105 Crane, supra n. 13, at 111.
service centers help answer questions about IP violations. They also provide assistance to copyright owners in gathering proper paperwork for an enforcement agency.

Another way to protect IPR in China is through customs. Customs can inspect goods on its own initiative or according to copyright owners’ reports. Copyright owners can register their copyrights with the national customs system and apply for detention of suspected goods. One drawback of using this option is detention of goods requires a cash bond payment. This can be a problem especially if the goods in question are worth a substantial amount of money. The bond that a copyright owner has to post is equivalent to the value of the goods.

IV. IS THE WALL HIGH ENOUGH YET? PROBABLY NOT.

Despite China’s actions to combat piracy, China remains one of the biggest culprits when it comes to pirating. Several reasons explain why China has failed to appease Western countries with its newly enacted legislation and programs. Chief among them are, lax enforcement and insufficient deterrents.

107 Id.
108 Id.
109 Chien-Hale, supra n. 6, at 115.
110 Weinstein & Fernandez, supra n. 10, at 230.
111 Id.
112 Id.
113 Shi, supra n. 2, at 454.
114 Chien-Hale, supra n. 6, at 125.
While TRIPS require its members to provide effective enforcement of its IPR laws, TRIPS does not explain what effective enforcement means. Criticisms of China’s failure to enforce its IPR laws may not be warranted. Chinese officials have argued that “it is unrealistic to expect China to reach a level of copyright enforcement in less than two decades akin to that enjoyed by Western countries that have had centuries to develop intellectual property laws and norms.” China currently has a piracy rate of over ninety percent. However, developed countries like France and Spain currently have a piracy rate ranging from the mid-forties to the low fifties. Taken in context, China’s rate does not seem so outlandish. France and Spain are countries who have had an IPR system in place for more than two hundred years. It is hard to gauge exactly how much progress China has made in enforcement because other factors affect piracy rates.

Further, Article 41(5) of TRIPS state that, “a WTO member state is not required to devote more resources to intellectual property enforcement than other areas of law enforcement.” China currently has a problem with tax collection and it would be hard to

116 Chien-Hale, supra n. 6, at 145.
117 Priest, supra n. 3, at 836.
118 Id. at 797.
119 Chien-Hale, supra n. 6, at 145 (comparing the rates of piracy in different countries, the U.S. has a rate of twenty-one percent; France, Italy and Spain has rates of mid-forties to low-fifties; China has a rate of ninety percent. However, all these countries with the exception of China had a well established IPR system for over two centuries).
120 Compare Priest, supra n. 3, at 797 with Chien-Hale, supra n. 6, at 145. Gary Shapiro, president of the Consumer Electronics Association describes the figures as “absurd on its face” and “patently obscene.” Id.
121 Chien-Hale, supra n. 6, at 146 (stating that the amount of protection must be viewed in light of its domestic socio-economic conditions, technological needs, development goals, and public policy objectives).
imagine that China would put enforcement of IPR laws ahead of tax collection.\textsuperscript{123} This is understandable. It is unlikely that any country will put enforcement of IPR laws ahead of domestic problems like “murders, robberies, assaults, distribution of narcotics and child pornography.”\textsuperscript{124}

In large U.S. cities like New York and Los Angeles, it is not surprising to see retailers selling pirated goods. In Santee Alley in Los Angeles, these transactions are often made out in the open, within blocks of a police station. Combating piracy may have a serious financial impact on an agency’s budget.\textsuperscript{125} “In New York, for example, it is ‘simply impossible to raid all the warehouses all of the time without swallowing the entire NYPD anti-counterfeiting budget and taking officers off other duties.’”\textsuperscript{126} And even when these raids have been performed, there are some “district attorney’s offices which refused to prosecute those cases.”\textsuperscript{127}

1. Lax Enforcement

Regardless of how much or how little progress China has made in enforcement of its IPR system, enforcement could improve. The problems that plague China’s ability to enforce its IPR system are numerous and complex.\textsuperscript{128} These problems encompass cultural, economic and

\begin{flushleft}
\textsuperscript{123} Yu, supra n. 122, at 419. See also John L. Chan, China Streetsmart: What You Must Know To Be Effective And Profitable In China 103 (2003) (explaining that in China tax rules are constantly changing, enforcement and interpretation may vary. There are also people exploiting loopholes in the tax rules).

\textsuperscript{124} Yu, supra n. 122, at 416.

\textsuperscript{125} Id.

\textsuperscript{126} Id.


\textsuperscript{128} Priest, supra n. 3, at 821.
\end{flushleft}
political factors. Some of these problems include lack of political will, local protectionism, and overlapping jurisdiction.

A. Lack of Political Will

Many commentators have pointed to enforcement problems by emphasizing the lack of political will. While political will of Chinese authorities is important, the problem is larger than that. One analyst has stated “it is laughable to hear excuses from Beijing when they can not control fifty pirate CD factories. If they were turning out thousands of copies of the BBC documentary on the Tiananmen Square protest—rather than bootleg copies of The Lion King—the factory managers would be sharing a cell with other dissidents in a heartbeat”. There are several things wrong with this analyst’s statement.

First, China’s interest in controlling what it views as a national threat is justifiably different from China’s interest in enforcing IPR laws. China’s commitment to its IPR system will not override its commitment to some other issues.

Second, even where China has exercised its political will, there are instances where it has failed to combat piracy. When China won the bid to host the 2008 summer Olympics, it passed a series of laws to protect copyrights and trademarks of the images and slogans that were going to be used to promote the summer Olympics. In addition, China launched an education campaign encouraging citizens to turn in offenders. Despite China’s interest in keeping pirated Olympics

\[\text{\footnotesize 129} \text{Id.} \]
\[\text{\footnotesize 130} \text{See generally Andrew Mertha, The Politics of Piracy: Intellectual Property in Contemporary China (2005).} \]
\[\text{\footnotesize 131} \text{James Shinn, The China Crunch, Washington Post February 18, 1996, at C1.} \]
\[\text{\footnotesize 132} \text{Craig Simons, Faking It, South China Morning Post, January 10, 2005, at 18.} \]
\[\text{\footnotesize 133} \text{Yu, supra n. 122, at 420.} \]
items off the streets, these items appeared.\textsuperscript{134} The problem was more pronounced in areas further away from Beijing.\textsuperscript{135} The central government has little control over local authorities’ actions or inactions.

The Chinese government may remedy this problem. It may show more political will by exerting more control over the local government.\textsuperscript{136} It can also hire more people to help enforce the IPR rules. The section on local protectionism supports the contention that the political will of the central government alone is insufficient to curb piracy. However, increasing political will, especially that of the local government, will undoubtedly improve the enforcement problem.

\textbf{B. Local Protectionism}

Local protectionism is probably the biggest factor contributing to China’s enforcement problems.\textsuperscript{137} China is the world’s most populous country,\textsuperscript{138} accounting for about twenty percent of the world’s population.\textsuperscript{139} The country has twenty-two provinces and these provinces have further divisions of smaller, local governments. Central authorities promulgate laws and

\begin{footnotesize}
\begin{enumerate}
  \item[\textsuperscript{134}] \textit{Id.}
  
  \item[\textsuperscript{135}] Robert Watts, \textit{Fakes are a Real Headache}, Sunday Telegraph (London), July 16, 2006, at 8 (reporting that European customs officials seized fake Beijing Olympics merchandise as early as July 2006).
  
  \item[\textsuperscript{136}] See generally Charles Schulman, Student Author, \textit{The Grant of Asylum to Chinese Citizens Who Oppose China’s One-Child Policy: A Policy of Persecution or Population Control?}, 16 B.C. Third World L.J. 313, 317 (1996). In 1979, China implemented the One-Child Policy. \textit{Id.} Local authorities had quotas to meet and if a province exceed the quota, authorities may have their salary reduced, be demoted or even lose their job. \textit{Id.} at 318. Arguably, the central government can exert similar pressure with local authorities enforcing IPR rules as it does with local authorities enforcing the One-Child Policy.
  
  \item[\textsuperscript{137}] Priest, \textit{supra} n. 3, at 822.
  
  \item[\textsuperscript{138}] Crane, \textit{supra} n. 13, at 95. China’s population is approximately 1.3 billion and there are over 200 dialects are spoken.
  
  \item[\textsuperscript{139}] \textit{China Statistical Press}, China Statistical Yearbook 2000, at 96 (2000). China has the largest population of any country in the world. \textit{Id.} As reported in 2000, China has over 1.26 billion people. \textit{Id.} This represent one-fifth of the entire world population. \textit{Id.}
\end{enumerate}
\end{footnotesize}
regulations, but it is ultimately up to local authorities to enforce the laws and regulations.\textsuperscript{140} Unfortunately, local authorities do not always have the same interests as the central authorities.\textsuperscript{141}

In the past two decades, China has experienced rapid economic development.\textsuperscript{142} As a result of this growth, the income and wealth gap has become wider between the rich and the poor. There is a big difference in the living conditions of those in big cities like Shanghai and those in smaller rural communities.

In rural communities, piracy may contribute to the local economy by providing jobs and income to residents.\textsuperscript{143} In addition, local officials may also benefit from these illegal activities in the form of taxes and rent collected from these business ventures.\textsuperscript{144} According to Guangzhou resident, Wang Meiyu, commercial rental rates vary depending on the location.\textsuperscript{145} The bulk of DVD and CD retailers will usually rent property in popular locations because opportunity for profits would be maximized.\textsuperscript{146} The local government also collects taxes from businesses operating in its locale. These taxes are usually a fixed percentage of a business’ profit.\textsuperscript{147} This

\textsuperscript{140} Priest, supra n. 3, at 822.

\textsuperscript{141} Id. at 822–823. Local government can earn rental income if it rents out state-owned stalls to these businesses. Id.

\textsuperscript{142} Hu & Khan, supra n. 12.

\textsuperscript{143} Priest, supra n. 3, at 822–823.

\textsuperscript{144} Id. Local government can earn rental income if they rent out stalls to these business ventures that are state owned. Id.

\textsuperscript{145} Telephone Interview with Wang Meiyu, Guangzhou resident (December 5, 2008) (explaining rental rates: in “hot spots” are about 150 yuan per square meter; in a “decent” location, it ranges from sixty to eighty yuan per square meter; in least popular parts of the city it is about 50 yuan per square meter).

\textsuperscript{146} Id. (describing how it is in the retailers’ best interest to have its business in a popular location. Because prices between pirated goods are roughly the same from retailer to retailer, it would be profitable to have a business in a “hot spot”).

\textsuperscript{147} Telephone Interview with Liu Kin, business owner of a general supplies store (December 5, 2008) (noting that this tax is based on gross profits. For Example, the rate is Taishan is eight percent. If the cost of goods to a retailer is
percentage will vary from area to area. It is easier to understand why local officials would be reluctant to stop piracy after considering its potential impact on their local economy.

A Chinese proverb may help illustrate the problem of local protectionism, “the mountain is high and the king is far.” Because of China’s decentralized government structure, local authorities do not have to answer to central authorities. Officials who would like to enforce the IPR rules will likely face pressure to turn a blind eye. The local official in charge has the authority to terminate the employment of his subordinate, arrange an undesirable job transfer or a salary cut. The central authority is in no position to punish a local agency employee for refusing to enforce IPR laws. With this in mind, many local officials/employees choose to protect their local interests. Arguably, the main culprit behind China’s enforcement problem is lack of political will from the local authorities—not the central government.

C. Overlapping Jurisdictions

The IPR system in China is fairly new and the system itself can also be improved. The organization of the IPR system created problems of overlapping jurisdictions. Overlapping jurisdiction creates a different problem than local protectionism. In local protectionism,

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50 fifty yuan and the goods are sold for 100 yuan, the gross profits would be fifty yuan. The tax due to the local government would be four yuan).

148 Id. (explaining that in Taishan, where his business is located, the tax rate is about eight percent. However, in Guangzhou this rate is about ten percent).

149 Priest, supra n. 3, at 824 (explaining that central authority’s interest may not align with that of local authority. However, the central authority’s power over the local authority is limited. If, the local authority is not willing to enforce IPR laws, there is very little that the central government can do).

150 Chow, supra n. 89, at 29–30.

151 Priest, supra n. 3, at 824.

152 Chow, supra n. 89, at 29–30.

153 See generally Chow, supra n. 89.
jurisdiction in an area of substantive law (for example, copyright infringement) is given to one agency and that agency is not enforcing the law.\textsuperscript{154} In overlapping jurisdiction there is more than one agency with jurisdiction in an area.\textsuperscript{155} As a result, these agencies may compete over the rights to enforcement.\textsuperscript{156} For example, consider the pirating of a Disney movie. The agency policing copyright infringement has jurisdiction over this matter, but the agency policing trademark infringement also has jurisdiction. This problem is further complicated if the copyrighted goods involves “moral standards”. In that case, then the Culture Marketing Administration will also have jurisdiction in the matter.\textsuperscript{157} Competition between agencies exists because an agency can benefit from handling an infringement case.\textsuperscript{158}

Other factors may also help explain why piracy continues to persist in China in spite of its IPR system. These factors include state centralism, judicial incompetence and economic conditions.

**D. State Centralism**

Although China has taken steps in recent years to move towards a market economy, it has retained control over the media.\textsuperscript{159} Currently, China permits the export of a limited number of movies per year.\textsuperscript{160} In addition, China places strict limits on musicians who can perform in

\textsuperscript{154} Priest, \textit{supra} n. 3, at 824.

\textsuperscript{155} \textit{Id}.

\textsuperscript{156} Chow, \textit{supra} n. 89, at 31–32. Agencies compete because handling enforcement may result in benefits for the agency. \textit{Id}. The agency may receive more staff or budget increases. \textit{Id}.

\textsuperscript{157} Priest, \textit{supra} n. 3, at 824.

\textsuperscript{158} One may wonder why enforcement is still a problem if there is overlapping jurisdictions and agencies are competing to enforce IPR rules. Overlapping jurisdictions only exists in some places, usually, the larger cities.

\textsuperscript{159} Priest, \textit{supra} n. 3, at 808.

\textsuperscript{160} Yu, \textit{supra} n. 122, at 426–427.
China. If censorship intact, piracy thrives because it provides access to censored works. If China was successful in combating piracy, this would seriously restrict the type and amount of movies and music that its citizens currently have access to. In effect, people in China would be confined to entertainment that the state has approved of as being “clean”.

E. Judicial Incompetence

Judicial incompetence may also contribute to lax enforcement of infringement cases. During the Cultural Revolution in 1966–76, the Chinese legal system was destroyed. As a result, all the law schools were closed and lawyers were denounced. Under Deng’s rule, lawyers were allowed to practice again in 1978 and the legal system was slowly revived.

In larger Chinese cities, lawyers and judges have increased their understanding of the IPR system. However, judges in smaller cities and in rural communities generally have not comparably increased their understanding of the IPR system. Larger cities have specialized intellectual property courts. While evidence shows that rural judges’ qualifications and knowledge are improving, this does not necessarily mean that they have greater competence in

161 Id.
162 Priest, supra n. 3, at 828.
163 Supra n. 42.
164 Butterton, supra n. 20, at 1119.
165 Id. at 1119–1120.
166 Id.
167 Priest, supra n. 3, at 826.
168 Yu, supra n. 6, at 214 (explaining that most Chinese judges lack experience and expertise in intellectual property cases).
169 Priest, supra n. 3, at 826.
intellectual property matters. Judges in rural areas do not have the same access to specialized courts in larger cities like practitioners in larger cities may have. This can be especially problematic because many pirates base their operations in rural communities. Criminal cases often begin in local courts and if these judges are not competent in matters involving IPR then justice is compromised.

F. Economic Conditions

While Chinese culture may help explain why piracy continues to persist, a better explanation may be found in the economic conditions. Problems of piracy in China are much more prevalent in rural communities where the standard of living may be incredibly low. In certain rural communities, the average annual salary for a full time worker is about 1,800 yuan. Bear in mind that full time work in China is not synonymous with full time work in the U.S. Individuals often have to work six days a week and for long hours.

It is certainly true that individuals in rural communities may not have to pay mortgage/rent and some utilities. However, education at any stage is not free in China. Educating a child is still considered a luxury in some parts of China. After consideration of all

170 Id. at 827.
171 Id.
172 One way to increase the competence of these judges is by training and educating them about the IPR system.
173 Chien-Hale, supra n. 6 (explaining that as the Chinese economy grows, the Chinese will have more disposable income and purchasing power. When people are poor, they are more willing to settle for pirated items).
174 Zijun Li, China’s Income Gap Widening, http://www.worldwatch.org/node/4469 (last accessed April 6, 2009). The exchange rate as of April 6, 2009 was $1 U.S. for 6.83 Yuan. Rate obtained from http://finance.yahoo.com/currency-converter?amt=1&from=USD&to=CNY&submit=Convert#from=USD;to=CNY;amt=1 (last accessed April 6, 2009). 1,800 yuan is worth approximately $263.54.
175 Telephone Interview with Wang Meiyu, Guangzhou resident (December 5, 2008). One’s residence is usually inherited so rent and mortgage is usually not an issue. Id.
176 Id.
these facts, it is not hard to see why people buy pirated goods at a fraction of the price of legitimate goods. For example, a legitimate DVD movie can cost 150 yuan, but a pirated copy sells for as little as three yuan.\textsuperscript{177} It makes no economic sense for people to purchase legitimate goods.\textsuperscript{178}

Individuals in larger cities generally make and have more money. In larger cities the average annual salary for a full time worker is about 6,000 yuan.\textsuperscript{179} They are also more likely to buy legitimate goods.\textsuperscript{180} This is not to say that copyright infringement is not a problem in larger cities like Shanghai and Beijing, but proportionally, there are a larger percentage of people who own legitimate goods in larger cities than in rural communities.\textsuperscript{181}

However, improved economic conditions alone will not draw Chinese consumers to legitimate goods. This is supported by what Warner Brothers did two years ago with Paramount and Dreamworks Animation.\textsuperscript{182} Warner Brothers reduced the price of its DVDs to twenty-two

\textsuperscript{177} Id. Apparently there are different grades for pirated goods. Id. DVD-9 is probably closest in quality to a legitimate good and these costs nine to eighteen yuan depending on whether you are in a big city like Guangzhou or in smaller area like Taishan. Id. VCD is the lowest quality pirated goods, these go for about three yuan. Id.

\textsuperscript{178} Legitimate goods will always be overpriced in comparison pirated goods. There is little or no difference in the quality, but there is a notable difference, however little, in the price of the goods.

\textsuperscript{179} Li, supra n. 174. The exchange rate as of April 6, 2009 was $1 U.S. for 6.83 Yuan. Rate obtained from http://finance.yahoo.com/currency-converter?amt=1&from=USD&to=CNY&submit=Convert#from=USD;to=CNY;amt=1 (last accessed April 6, 2009). 6,000 yuan is worth approximately $878.48.

\textsuperscript{180} Chien-Hale, supra n. 6, at 199–200.

\textsuperscript{181} Telephone interview with one resident from each of the following places: a large city, Guangzhou; a mid-size city, Jiangmen; a small rural area, Taishan. In Guangzhou, legitimate DVDs sell in the range of 100-150 yuan whereas the pirated ones sell for eight to ten yuan. In Jiangmen, legitimate DVDs sell for about 180 yuan and pirated copies sell for eight to ten yuan. In Taishan, the resident could not locate a legitimate DVD and three to four pirated copies sell for ten yuan.

yuan in an effort to combat DVD piracy in China.\textsuperscript{183} Twenty-two yuan for a legitimate DVD is an affordable price but some consumers may still be reluctant to spend more money on a product. Affordability is important but consumers may feel that a legitimate copy simply is not worth the difference in price. Pirated goods will always be made and sold for less than legitimate goods.\textsuperscript{184} Furthermore, the quality of pirated goods have improved substantially making it hard to distinguish between a legitimate and pirated copy.

2. Insufficient Deterrents

According to Chinese reports, Chinese authorities have stepped up enforcement of copyright infringement. Between 2000–2004, enforcement officials made “2,462 arrests, and courts heard 1,710 criminal prosecutions.”\textsuperscript{185} Within the same period, 1,948 pirates were penalized.\textsuperscript{186} However, these figures pale in comparison to the gravity of the piracy problems in China.\textsuperscript{187} Problems with enforcement mean that few pirates face liability. For those who are caught and brought before a court, another problem arises. It is often difficult to obtain evidence to convict pirates of any wrongdoing.\textsuperscript{188}

With respect to criminal prosecutions, China’s evidentiary standards require proof that the defendant knowingly sold pirated goods.\textsuperscript{189} This can be shown with sales receipts or account

\begin{flushright}
\textsuperscript{183} Id.
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\textsuperscript{184} Priest, supra n. 3, at 829.
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\textsuperscript{185} Supra n. 70.
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\textsuperscript{186} Id.
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\textsuperscript{187} Priest, supra n. 3, at 826.
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\textsuperscript{188} Chow, supra n. 89, at 33–34.
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\textsuperscript{189} Priest, supra n. 3, at 825.
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books. Most retailers who sell DVDs and CDs in China do not provide receipts to its customers. There is usually no refund policy but most retailers will permit you to do an exchange if the pirated copy that you purchased does not work. Account books may be hard to locate. There is also a threshold that a defendant has to meet in order to be held criminally liable for copyright infringement. Most participants in pirating business (those who sell and those who copy) will not carry enough evidence to meet the threshold. Therefore, the goods that they possess will likely be confiscated and they may have to pay a monetary fine but, they do not have to worry about being criminally prosecuted.

With respect to civil sanctions, the monetary fines are often too little to deter pirates. In 1995, the Walt Disney Company won a lawsuit against several Chinese publishing houses. The defendants/pirates were publishing books for children that contained Disney characters. The lawsuit lasted for seventeen months. In the end, Walt Disney was awarded 227,094 yuan. In addition, the publishing houses were ordered to cease publication of books containing Walt Disney’s characters and were ordered to issue a public apology. This award was too light

190 Id.

191 Supra n. 70.

192 Priest, supra n. 3, at 825.

193 Id.


195 Id.

196 Id.

197 Id. This was a court-mediated settlement. The exchange rate as of April 6, 2009 was $1 U.S. for 6.83 Yuan. Rate obtained from http://finance.yahoo.com/currency-converter?amt=1&from=USD&to=CNY&submit=Convert#from=USD;to=CNY;amt=1 (last accessed Apr. 6, 2009). 227,094 yuan is worth approximately $33,249.50.

198 Id.
to deter pirates. There are still plenty of books containing Disney characters in China. The bulk of them are likely to be an infringement on Walt Disney’s copyright.

In applying a cost-benefit analysis, many pirates conclude that the benefit of economic gains involved in pirating copyrighted goods outweigh the potential costs of being caught. Because most pirates are not criminally prosecuted, they only stand to lose some money and that is, only if they are caught.

V. MAKE THE WALL LESS ATTRACTIVE TO CLIMB

Thus far, China’s IPR system has focused on eliminating the supply of pirated goods. As amended, the 2004 Criminal Provision only provides punishment for those involved in copying and/or selling of pirated goods. Copyright owners can only bring civil suits against alleged infringers or those involved in selling pirated goods. It is submitted that it would be more efficient for China to shift its focus to eliminating the demand for pirated goods. As explained above, there are many factors which contribute to the success of pirates in China. One of the most important factors is economic conditions.

In addressing its problems with piracy, China should look for ways to make buying and using pirated goods less appealing. Because there may be little difference in the quality of goods, China should focus on the price that consumers pay for using pirated goods. Of course, the Chinese government has little say in the going rates of pirated works, but the Chinese government has the power to indirectly inflate the costs of using pirated goods.

This approach is efficient for several reasons. If the costs of using pirated goods increase, then demand for these goods will decrease. If there is little demand for pirated goods, then

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199 Supra n. 70.
200 Id.
pirates have little incentive to continue with their business enterprise. It is not practical for China to target pirates. Pirates can be very mobile. The government can raid a warehouse where pirated goods are produced, but another warehouse can be erected just as easily.\textsuperscript{201} If the Chinese government is serious about cracking down on piracy, then it should try to reduce the demand for pirated goods.

With respect to traditional piracy, goods sold on a physical medium such as DVDs and CDs, the government should penalize consumers with a monetary fine. The monetary fine does not have to be astronomical to deter consumers; it just has to be at about the same price of a legitimate copy of the goods. There should also be a cap on how much a consumer can be fined. The goal here is to deter consumers who turn to pirated goods and it will not be necessary to give them a devastating fine that would severely threaten their livelihood. The fine should be within the range of the cost of a legitimate good.

If implemented, this can be particularly effective in rural communities in China. In rural communities, many people still live in villages. Villages in China are usually organized by a person’s surname\textsuperscript{202} and membership in a village is for a lifetime for most members.\textsuperscript{203} Women

\textsuperscript{201} Telephone Interview with Liu Kin, business owner of a general supplies store (December 5, 2008). There is little equipment involved in the production of pirated goods and they are also relatively inexpensive. \textit{Id.}

\textsuperscript{202} In person interview with Ms. Ma, resident of Xinhui (November 12, 2010). China uses a household registration system. \textit{Id.} In villages, this is largely based on a person’s surname. A person can register in a village as a resident if the individual is the biological or adopted child of a resident or by marriage. \textit{Id.}

\textsuperscript{203} Telephone interview with Mr. Siu, retired bank supervisor and current resident of Jiangmen (November 10, 2010). Residents in villages are allowed to move to the city. Each city has different requirements. \textit{Id.} For example, in the city of Jiangmen, an individual must meet three requirements in order to register as a resident of Jiangmen. \textit{Id.} First, the individual must own a home in excess of 100 square meters. \textit{Id.} Second, that home must have been purchased for more than 150,000 yuan. \textit{Id.} Finally, that individual must have resided in Jiangmen on or before September 26, 2009. \textit{Id.} The city has great discretion in approving resident registration. \textit{Id.} Even if an individual meets the requirement, the city may not approve resident registration. \textit{Id.} In that case, the individual will register in the city as a visitor. \textit{Id.}
are allowed to move to another village if they are married to a man of another village. But typically, a person with the surname of Wong is not allowed to move into a village where the surname is Liu. There may also be many villages where inhabitants’ surname is Wong, but that person is generally prohibited from moving from one Wong village to another Wong village.

Villages are close-knit communities. Therefore, it is very likely that when one person in a village has been fined for purchasing pirated goods, others in the village will know about it. Implementation of such a plan would further specific and general deterrence. Depending on the size of the fine, fining an individual in a rural community can be overwhelming. Even if the fine was “affordable” that person would likely be deterred because of the possibility of being fined again. General deterrence is served because villagers would likely become aware of the punishment that their fellow villager has endured. It would not be worth it for a person to buy pirated goods anymore if the fine brings the price difference between pirated and legitimate goods to a closer range.

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204 It is possible for a man to move to a village by marrying his wife. However, he will have to take up his wife’s surname. Additionally, their children will also take their mother’s surname. This scenario is extremely rare and is usually done when the man comes from a family that is extremely poor.

205 In person interview with Mr. Liu, officer of local level authorities in Taishan, China (November 12, 2010). One example where a person may move from one village to another is for the person to purchase property in the village that he wishes to move to. Id. This is virtually unheard of because homes in villages are passed down from generation to generation, and no one wants to sell his ancestor’s home. Id. Additionally, the residents belonging to the village that the individual wishes to move to must vote to allow him to move in. Id. This usually requires a vote from sixty-three to seventy percent. Id. Each resident that is registered to that village as a resident may vote. Id.

206 Id.

207 Supra n. 201. In recent years, local authorities in Taishan, China passed a new legislation requiring drivers and passengers of motorcycles to wear helmets. Id. In the beginning, only the driver was fined when his or her customers did not wear helmets. Id. Later on, the legislation was amended so that both the driver and the passenger would be fined. Id. As a result of several passengers’ fine, word spread and now, most passengers wear helmets. Id.
This approach would also be effective in larger cities. Individual residential homes with yards have little or no place in China. Most people live in apartments and people in China are less mobile than Americans. Most of the people in China do not have the luxury of switching homes that some Americans do. Most residential homes are not rented, they are owned. However, there are practically no financing options in China like there is in America. In China, most people have to pay a substantial amount (usually 100%) of the price of their home upfront. As a result, most people stay in their homes for very long periods of time. While inhabitants of apartment buildings may not be as close-knit as those in villages, there is usually plenty of socializing between inhabitants of the same building. Word of mouth of a neighbor’s monetary fine would likely spread around in the same apartment building. Specific and general deterrence would also be served in larger cities. The media could also help spread word by publicizing what authorities are doing to consumers of pirated goods.

This approach may potentially face the same problems with enforcement. Local authorities may be reluctant to enforce IPR laws because it may threaten the economic livelihood in the area. This problem could be curbed if the monetary fines that the authorities collect from consumers were invested in the area again. The local government who may collect rent and taxes from renting out stalls to pirating businesses may receive more money. This is true if the monetary fines exceed the amount of rent and taxes. Another problem with this approach is that it may be hard to monitor and detect such transactions. If consumers insist on purchasing pirated goods for whatever reason, they may choose to conduct these transactions at times and places where detection is impracticable. There may be potential problems with proof, however the

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208 Id.

209 Id. (describing the difficulty for an average household to save 150,000 yuan, which is the average price of a home in a decent location in Taishan).
government can overcome that by imposing a bright-lined rule. For example, possession of pirated goods alone would lead to a monetary fine and confiscation of the pirated good. The rule should have little or preferably no flexibility similar to the traffic safety rule implemented in some regions of China.\textsuperscript{210}

Possession of pirated goods should lead to a fine. This would rid potential proof problems with enforcing such a rule.

\textbf{VI. ANTICIPATING THE NEXT HOLE IN THE WALL AND HOW TO AVOID IT}

Soon China will not only have to weather criticism for its failure to police traditional piracy but also online piracy. Currently, China has the world’s largest internet population.\textsuperscript{211} China’s internet population will continue to grow.\textsuperscript{212} In 2004, “mp3” was the most popular search term on Baidu.com, China’s most popular internet search engine.\textsuperscript{213}

In anticipation of the problem that online piracy will cause, China can take a similar approach as the one outlined above to combat online piracy. China’s IPR system currently punishes those who “reproduce and distribute” pirated copies of copyrighted goods online.\textsuperscript{214} One way for China to combat online piracy is to permit/encourage copyright holders to upload

\begin{footnotesize}
\textsuperscript{210} Supra n. 201. With respect to the traffic safety rule, the registered owner of the vehicle has to pay a fine. The owner does not get to present any defense. The owner has to pay such a fine even if he or she claims that his or her vehicle was stolen.

\textsuperscript{211} China Web Users Outnumber U.S. Population, http://news.yahoo.com/s/afp/20090726/ts_afp/chinatechnologyinternet_20090726094158 (last accessed July 27, 2009). China’s internet population has reach 330 million by the end of June 2009. \textit{Id.} “Ninety-five percent of townships were connected by broadband and ninety-two percent of villages had telephone lines that could be used for internet access”. \textit{Id.}

\textsuperscript{212} \textit{Id.} Three of China’s telecom operators have invested 280 billion yuan (40 billion dollars) in a national 3G network. \textit{Id.}

\textsuperscript{213} \textit{Id.}

\textsuperscript{214} Supra n. 70.
\end{footnotesize}
copies of their work with viruses onto the internet. This is about deterring people that are turning to pirated goods. This virus should cause the computer to “crash” so that persons will have to re-format their computer. Re-formatting a computer would be time consuming and an inconvenience. That should be the “price” that people would be paying to download pirated goods.\textsuperscript{215}

There is little doubt that the above suggested solution will not completely rid online piracy. It is very likely that persons who want to continue downloading pirated goods will continue to do so. With technology advancing at a constant rate, it would not be surprising if internet users could create a loophole of some sort to avoid downloading the virus-filled goods. However, this approach would require no work on behalf of the Chinese government. Furthermore, not all internet users will be computer savvy enough to detect a virus-filled good from a “clean” pirated good.

\textbf{VII. CONCLUSION}

While China is still seen as one of the world’s main culprits of piracy,\textsuperscript{216} it is important to consider the progress that it has made since its accession to the WTO. China has made substantial changes in its legislation to protect copyright owners. China can continue to make progress by shifting its focus on reducing the \textit{demand} for pirated goods instead of reducing the \textit{supply} of pirated goods. If the demand goes down, supply will accordingly follow.

One way for China to decrease the demand of pirated goods is by indirectly increasing the costs of pirated goods. It can do so by penalizing consumers of traditional piracy with a

\textsuperscript{215} \textit{Supra} n. 181. The costs of repairing a virus-infected computer is as follows: fifty to one hundred yuan in Guangzhou; fifty yuan in Jiangmen; twenty yuan in Taishan. However, this price does not include the time that repairs take or the inconvenience of it. On average, computer repairs take about three days.

\textsuperscript{216} Shi, \textit{supra} n. 2, at 454.
monetary fine and penalizing consumers of online piracy with a virus-filled good. While solution comes with its drawbacks, it offers more bite than China’s current method of dealing with piracy.