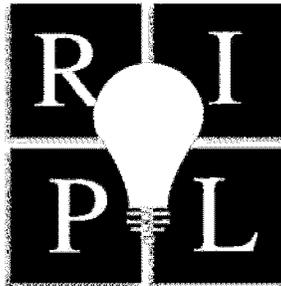


# THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



## CHINA'S STRUGGLE TO MAINTAIN ECONOMIC VIABILITY WHILE ENFORCING INTERNATIONAL AND DOMESTIC INTELLECTUAL PROPERTY RIGHTS

RANDAL S. ALEXANDER

### ABSTRACT

The development of global intellectual property rights (“IPRs”) can lead to complex issues regarding conformity with international standards of IP protection and enforcement. Although each country willing to become a WTO signatory is tasked with the development of such a regime, each country’s domestic affairs and economic survival competes with the burden of adhering to those international standards. This struggle provides the potential for many countries to confuse the boundaries of protection and create a fog of marginal infringement. In China, this fog is heavier because of local protectionism and judicial disincentives to enforce IPRs.

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# CHINA'S STRUGGLE TO MAINTAIN ECONOMIC VIABILITY WHILE ENFORCING INTERNATIONAL AND DOMESTIC INTELLECTUAL PROPERTY RIGHTS

RANDAL S. ALEXANDER\*

“America has a profound stake in what happens in China and how China relates to the rest of the world. That's why, for 30 years, every President, without regard to party, has worked for a China that contributes to the stability of Asia, that is open to the world, that upholds the rule of law at home and abroad.”

—Former President Clinton, on U.S.-China trade relations<sup>1</sup>

## INTRODUCTION

One of the most contentious issues before the World Trade Organization (“WTO”) is the enforcement of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the “TRIPs Agreement”) upon WTO members that are developing countries. Developing countries, such as China struggle with the implementation of the TRIPs Agreement standards while maintaining their domestic agendas. This struggle leads many developing countries to blur the lines of protection and therefore create a fog that obscures effective enforcement of intellectual property rights (“IPRs”) allowing the countries to reap the rewards of both membership in the WTO and non-compliance with TRIPs. The United States, along with other developed countries, argues that although developing countries are eager to profit from new technology, they are slow to implement measures to prevent infringement and uphold enforcement of foreign IPRs.

China, a rapidly growing developing country, invites much of the IP realm's attention because of China's deficient enforcement of WTO standards regarding IPRs.<sup>2</sup> In response to China's increased importance in the global economy, this comment provides a case study of China as a developing country seeking to develop and bolster its IP regime.

As a backdrop for the discussion, Part I outlines the chronological development of global IPRs through the establishment of the WTO and the codification of TRIPs. Part I also delineates the policies and standards set forth in the TRIPs agreement. Part II discusses the economics of creating an IP regime. Next, Part III and Part IV

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<sup>1</sup> Bill Clinton, Former U.S. President, Remarks of the President on China at the Paul H. Nitze School of Advanced International Studies, (Mar, 08, 2000), [http://www.usembassy.it/file2000\\_03/alia/a0030819.htm](http://www.usembassy.it/file2000_03/alia/a0030819.htm) (last visited Aug. 1, 2005).

<sup>2</sup> See, e.g., Scott J. Palmer, *An Identity Crisis: Regime Legitimacy and the Politics of Intellectual Property Rights in China*, 8 IND. J. GLOBAL LEG. STUD. 449, 465–66 (2001).

discuss China's creation of an IP regime along with its entrance into the international IP arena and the United States's involvement in influencing China's IP laws. Lastly, Part V analyzes and proposes legal reforms to enable China to solve the judicial and administrative problems that inhibit China's enforcement of IPRs.

## I. THE DEVELOPMENT OF INTELLECTUAL PROPERTY RIGHTS IN THE INTERNATIONAL ARENA

The foundation of IP rights in the international arena dates back over a century to the Paris<sup>3</sup> and Berne<sup>4</sup> Conventions, which established minimum standards of protection for IP among the member countries. Subsequently, the global marketplace experienced rapid industrialization and vast technological advancements that negatively affected the supervision of those IPRs in the developing global economy.<sup>5</sup> In the mid-twentieth century, the United Nations established the World Intellectual Property Organization ("WIPO") to supervise the standards of the Paris and Berne Conventions.<sup>6</sup> WIPO's fundamental focus was sustaining the viability of international IPRs by providing its member states with both a forum for the negotiation of international agreements and guidance within the parameters of existing treaties.<sup>7</sup>

However, the protection of IPRs under WIPO remained fragmented and unenforceable.<sup>8</sup> As a result, member states exploited various means of circumventing WIPO's enforcement measures.<sup>9</sup> The lack of effective protection eventually compelled the WIPO member states to seek additional avenues of enforcement to strengthen measures protecting IPRs, such as the General Agreement on Trade and Tariffs

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<sup>3</sup> See Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as last revised at Stockholm, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention].

<sup>4</sup> See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised at Paris, July 24, 1971, 828 U.N.T.S. 221 (as amended) [hereinafter Berne Convention].

<sup>5</sup> See Jose Felgueroso, *Trips and the Dispute Settlement Understanding: The First Six Years*, 30 AIPLA Q.J. 165, 169 (2002). The deficiencies caused by such advancement manifested as a lack of international harmonization, disparate national treatment and an inadequate system of IPR enforcement. *Id.*

<sup>6</sup> World Intellectual Property Organization, General Information, <http://www.wipo.int/about-wipo/en/gib.htm> (last visited July 26, 2005).

<sup>7</sup> *Id.* Through its 180 member states, WIPO seeks to:

harmonize national intellectual property legislation and procedures, provide services for international applications for industrial property rights, exchange intellectual property information, provide legal and technical assistance to developing and other countries, facilitate the resolution of private intellectual property disputes, and marshal information technology as a tool for storing, accessing, and using valuable intellectual property information.

*Id.*

<sup>8</sup> See Felgueroso, *supra* note 5, at 171. Although WIPO is highly regarded for its expertise in the field of intellectual property, its enforcement mechanisms lack strength because the enforcement of international agreements is left up to the International Court of Justice ("ICJ"). *Id.* at 170. Offending countries were able to circumvent ICJ enforcement with little consequence by declining the ICJ's jurisdiction and blocking or ignoring the ICJ's rulings. Matthew V. Pietsch, *International Copyright Infringement and the Internet: An Analysis of the Existing Means of Enforcement*, 24 HASTINGS COMM. & ENT. L.J. 273, 304 (2002).

<sup>9</sup> See Felgueroso, *supra* note 5, at 171.

(“GATT”).<sup>10</sup> GATT became a focal point for developed countries to introduce IPR protection into the realm of international trade.<sup>11</sup> During the 1994 Uruguay Round of negotiations for GATT, the establishment of the WTO<sup>12</sup> and the TRIPs Agreement combined IPRs with international trade.<sup>13</sup> The general responsibility assigned to the WTO was to provide a forum for further negotiations that would enhance the applicability of the newly created TRIPs Agreement to the evolving area of IP protection within the international arena.<sup>14</sup>

The TRIPs Agreement—as expressed in Article 7—is premised upon the idea that promoting innovation and the transfer and dissemination of technology will further global economic development.<sup>15</sup> In order to safeguard the welfare of the member countries, the rights and obligations of the TRIPs Agreement take into consideration the necessity to balance the protection of individual members’ IPRs with the realities of socioeconomic and technological development faced by each.<sup>16</sup>

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<sup>10</sup> *Id.* See generally General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

<sup>11</sup> Michael P. Ryan et al., *From International Trade to International Economic Law: International Governmental Organization Knowledge Management for Multilateral Trade Lawmaking*, 15 AM. U. INT’L L. REV. 1347, 1370–73 (2000) (discussing the development of GATT’s purposes from facilitating multilateral trade cooperation through tariff-reduction negotiations to reduction of non-tariff barriers to trade, and ultimately including trade-related economic policy issues of IP). The rationale of linking IPRs and free trade under GATT would ultimately require signatories to uphold a minimum standard of intellectual property protection. Keith Ferguson, *PPJC: Economic Justice/Globalization-The World Trade Organization (WTO) and its Multilateral Trade Agreements (GATT, GATS, TRIPS, TRIMS, etc.)*, [http://www.peaceandjustice.org/issues/econjustice/gl\\_wto.html](http://www.peaceandjustice.org/issues/econjustice/gl_wto.html) (last visited Oct. 1, 2004).

<sup>12</sup> See Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 155, 33 I.L.M. [hereinafter WTO]. The purpose of the WTO is to implement and enforce global rules of trade (including the oversight of IPR protection) between the member countries in an effort reduce trade friction. World Trade Organization, *The WTO in Brief*, [http://www.wto.org/english/thewto\\_e/whatis\\_e/inbrief\\_e/inbr00\\_e.htm#content](http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr00_e.htm#content) (last visited Oct 4, 2004). The WTO also provides a dispute settlement process aimed towards enforcing conformity of the member countries. *Id.*

The disputes that arise are resolved within a dispute-settlement system set forth in the Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”). See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1226 (1994) [hereinafter DSU]; see also Felgueroso, *supra* note 5, at 178.

Under the DSU, member countries who receive decisions against an offending fellow member may impose trade sanctions if the offending member does not comply with the DSU decision. Felgueroso, *supra* note 5, at 170–80 (discussing the actions available to parties involved in the DSU hearing).

<sup>13</sup> See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994) [hereinafter TRIPs], [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](http://www.wto.org/english/docs_e/legal_e/27-trips.pdf) (providing for the common protection and enforcement of intellectual property rights, such as copyrights, trademarks and patents, and making rules intended to limit the international trade in counterfeit goods).

<sup>14</sup> Adrian Otten & Hannu Wager, *Compliance with TRIPS: The Emerging World View*, 29 VAND. J. TRANSNAT’L L. 391, 413 (1996).

<sup>15</sup> TRIPs, *supra* note 13, art. 7.

<sup>16</sup> *Id.* arts. 7, 8.

However, for purposes of this article, the TRIPs Agreement most notably established that each member of the WTO is required to adapt its domestic IP laws in accordance with a minimal standard of protection,<sup>17</sup> which includes providing domestic rules of enforcement and remedial measures to protect the rights of those who hold IPRs.<sup>18</sup>

## II. THE ECONOMICS OF CONFORMING TO INTERNATIONAL STANDARDS OF INTELLECTUAL PROPERTY PROTECTION

The requirements of the TRIPs Agreement create a point of contention when viewed in terms of a country's economic development. The level of a country's industrial development often determines its economic power within the global economy.<sup>19</sup> The levels of industrialization are developed, newly developed, and developing.<sup>20</sup> Throughout this spectrum of industrialization, different rationales have been presented regarding whether IPRs should be given more or less strength.<sup>21</sup>

### *A. Developed Countries*

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<sup>17</sup> See *id.* arts. 2(1), 9(1) (reflecting the substantive obligations of the main WIPO Conventions: the Paris and Berne Conventions). Member countries may adjust their domestic IPRs and regulatory regimes "to accommodate local constraints as long as the general provisions of TRIPs are adhered to." Sahar Aziz, *Linking Intellectual Property Rights in Developing Countries with Research and Development, Technology Transfer, and Foreign Direct Investment Policy: A Case Study of Egypt's Pharmaceutical Industry*, 10 ILSA J. INT'L & COMP. L. 1, 12 (2003) (noting a divergence from complete harmonization of IPRs on an international level).

<sup>18</sup> TRIPs, *supra* note 13, arts. 41–61 (requiring members to provide administrative, civil and criminal procedures, and remedies for the enforcement of intellectual property rights).

<sup>19</sup> See Jean R. Homere, *Intellectual Property Rights Can Help Stimulate the Economic Development of Least Developed Countries*, 27 COLUM. J. L. & ARTS 277, 277 n.2 (2004).

According to Hugh Hansen's categorizations, countries of the world may be divided into three groups in relation to their "production and consumption of intellectual property products." First, there are the developed countries, which are net sellers and exporters of intellectual property. They want to obtain increased value for their exported technology, while seeking to secure worldwide protection. Second, there are the newly developed countries with the resources and industries to become net sellers and exporters. They seek broad worldwide protection in addition to increased domestic protection as an incentive for local industry to develop intellectual property and to compete better at home and abroad. Finally, there are the developing countries and the least developed countries, which are the net users and importers of intellectual property.

*Id.* It could be argued that such economic growth is chiefly a result of technology transfer and development generated by IPR protection. Tara K. Giunta & Lily H. Shang, *Ownership of Information in a Global Economy*, 27 GEO. WASH. J. INT'L L. & ECON. 327, 332 (1993–1994).

<sup>20</sup> Homere, *supra* note 19, at 277 n.2. The WTO allows countries to determine their own level of industrialization relevant to their designation as a "developing" or "developed" country. World Trade Organization, Who are the developing countries in the WTO?, [http://www.wto.org/english/tratop\\_e/devel\\_e/d1who\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm) (last visited July 26, 2005).

<sup>21</sup> Giunta & Shang, *supra* note 19, at 330.

Industrialized countries, in general, rely upon the development and transfer of technology as a source of income.<sup>22</sup> Naturally, it is understandable that these countries would have a greater interest in the protection of their IPRs.<sup>23</sup> The rationale for such protection stems from the economic loss that flows from the piracy of such technology and the resulting absence of incentive to develop new technologies.<sup>24</sup> Moreover, the absence of such an incentive could directly affect these countries' competition in the global market and ultimately result in a plethora of idle domestic economies.<sup>25</sup> One could conceive that such events would create a ripple effect that would not only affect industrialized countries, but also those countries whose development depends upon the advancement of the industrialized countries.<sup>26</sup>

The TRIPs Agreement created of a minimum standard of IP protection may seem politically self-serving to the developed countries that encouraged its ratification; however, with stronger IP protection, developed countries will be less reluctant to commit resources to foreign direct investment in undeveloped countries.<sup>27</sup> Consequently, in order to ensure a continued flow of foreign investment, it is beneficial for developing countries to support a "business environment friendly to the needs of wealthy, western multinationals."<sup>28</sup>

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<sup>22</sup> *Id.* at 332.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *See Aziz, supra* note 17, at 5.

<sup>27</sup> *Id.* at 7. Foreign direct investment ("FDI") refers to:

the purchase of a controlling interest in existing operations and businesses (known as mergers and acquisitions). Multinational firms seeking to tap natural resources, access lucrative or emerging markets, and keep production costs down by accessing low-wage labour pools in developing countries are FDI investors. Classic examples of FDI include American banks taking over Korean ones or Canadian mining companies building mines in Brazil.

Currency Transaction Tax, Glossary of Financial Terms, <http://www.currencytax.org/glossary.php> (last visited July 26, 2005). The free flow of capital across a country's borders has several advantages to the investing country:

First, international flows of capital reduce the risk faced by owners of capital by allowing them to diversify their lending and investment. Second, the global integration of capital markets can contribute to the spread of best practices in corporate governance, accounting rules, and legal traditions. Third, the global mobility of capital limits the ability of governments to pursue bad policies.

Prakash Loungani and Assaf Razin, How Beneficial is Foreign Direct Investment for Developing Countries?, <http://www.imf.org/external/pubs/ft/fandd/2001/06/loungani.htm> (last visited July 26, 2005). FDI also provides the host country with benefits:

(1) FDI allows the transfer of technology—particularly in the form of new varieties of capital inputs—that cannot be achieved through financial investments or trade in goods and services. FDI can also promote competition in the domestic input market.

(2) Recipients of FDI often gain employee training in the course of operating the new businesses, which contributes to human capital development in the host country.

(3) Profits generated by FDI contribute to corporate tax revenues in the host country.

*Id.*

<sup>28</sup> *Aziz, supra* note 17, at 7.

### *B. Developing Countries*

Developing countries, aspiring to become signatories to the WTO and conform to the TRIPs agreement, face the difficult obstacle of establishing a sufficient domestic IP regime.<sup>29</sup> These countries, in furtherance of their economic advancement in the global economy, rely upon the more developed countries for technology imports.<sup>30</sup> This creates a concern that developed countries will utilize their advantage in the marketplace and increase the prices of their goods.<sup>31</sup> As a result, this could lead to a trade deficit for developing countries and cause an overall decrease in a developing country's ability to negotiate favorable terms of trade.<sup>32</sup> Wealthier countries might abuse their competitive edge by fixing prices through cooperation with their horizontal competitors.<sup>33</sup> Thus, a dilemma emerges: newly developing countries are reluctant to freely accept the industrialized world's assurances that it will act in an appropriate manner to help sustain the development of those countries when it is reasonably foreseeable that the industrialized countries can increase their economic power by simply manipulating the flow of technology transfer to best benefit themselves.

## III. FOUNDATION OF IPRS IN CHINA

Paradoxically, China has recognized the concept of one's legal right to buy, sell or trade personal property as a commodity,<sup>34</sup> yet has had "no ideological reason to enforce IPRs."<sup>35</sup> Throughout much of the twentieth century, no rights were accorded to intellectual endeavors because of Imperial China's opposition to private appropriation of ideas.<sup>36</sup> The government believed that any such private

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<sup>29</sup> Marney L. Cheek, *The Limits of Informal Regulatory Cooperation in International Affairs: A Review of the Global Intellectual Property Regime*, 33 GEO. WASH. INT'L L. REV. 277, 294–95 (2001). The fact that many countries either were not signatories to the Paris or Berne Conventions, or were signatories to one convention but not the other, left these countries lacking in IP protective measures. *Id.*

<sup>30</sup> See Aziz, *supra* note 17, at 9.

<sup>31</sup> See *id.*

<sup>32</sup> See *id.*

<sup>33</sup> See *id.*

<sup>34</sup> Andrew Evans, *Taming the Counterfeit Dragon: The WTO, TRIPS and Chinese Amendments to Intellectual Property Laws*, 31 GA. J. INT'L & COMP. L. 587, 588 (2003).

<sup>35</sup> Robert B. Frost, Jr., *Intellectual Property Rights Disputes in the 1990s Between the People's Republic of China and the United States*, 4 TUL. J. INT'L & COMP. L. 119, 122 (1995) (noting the paradox of granting an individual exclusive rights under China's socialist regime).

<sup>36</sup> Evans, *supra* note 34, at 588–89. This belief that the good of the whole outweighs individual reward stems from Confucian principles that dominated Chinese culture from about 100 B.C. until 1911 A.D. *Id.* at 589. After the Maoists came into power in China, they reiterated the need for focus on the good of the society over the development of an individual, thus allowing the traditional practice of copying so that all could have access to creative works. *Id.*; see also Lewei Wang, *The Current Economic and Legal Problems Behind China's Patent Law*, 12 TEMP. INT'L & COMP. L.J. 1, 4 (1998). Article 23 of the Regulation on Awards for inventions states: "all inventions are the property of the state, and no one or unit may claim monopoly over them. All units throughout the country . . . may make use of the inventions essential to them." Evans, *supra* note 34, at 589. Because of China's principle of socialist economic development, the concept of protecting IPRs did not reach fruition until China realized the importance of attracting foreign investors. *Id.* at 590.

appropriation restricted the government's control of access to that idea.<sup>37</sup> However, by the mid-1970s, Chinese leaders attributed the slow development of the economy to the suppression of IPRs and soon turned towards a policy of IPR modernization.<sup>38</sup>

These changes towards IPR protection reflected China's move from a centralized isolationist economy toward a more market-based "open-door" economy.<sup>39</sup> For example, in 1979, the United States and China entered into the Agreement of Trade Relations (the "1979 Trade Agreement"),<sup>40</sup> which indicated China's eagerness to open its borders to international trade, recognize IPRs and undertake the effort to make its markets more appealing to Western countries by explicitly mentioning the importance of IPRs.<sup>41</sup>

Since the signing of the 1979 Trade Agreement, China has been committed to further developing its IP laws in order to improve its protection of IPRs.<sup>42</sup> In the international realm, China acceded into most of the agreements for the protection of IP: in 1980, China joined WIPO;<sup>43</sup> in 1985, China joined the Paris Convention;<sup>44</sup> seven years later, China joined the Berne Convention; and in 1993, China joined the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms.<sup>45</sup> Most significantly, in 2001, China became a member of the WTO and a signatory to the TRIPs Agreement.<sup>46</sup> On the domestic front, China promulgated several IP laws to solidify their IP regime: the Trademark Law in 1982, the Patent Law in 1984, the Copyright Law in 1990, the Software Protection Act in 1991 and the Unfair Competition Law in 1993.<sup>47</sup>

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<sup>37</sup> *Id.*

<sup>38</sup> Susan Tiefenbrun, *Piracy of Intellectual Property in China and the Former Soviet Union and its Effects Upon International Trade: A Comparison*, 46 BUFFALO L. REV. 1, 12–13 (1998). This modernization came at the end of a series of movements bent on restricting IPRs. *Id.* at 12. The Anti-Rightist Movement of 1957 and the Great Leap Forward of 1958–60 repressed the existing intellectual property laws that created material incentives for invention, creation and commercial activity. *Id.* Then, in 1966, the Great Proletariat Cultural Revolution placed further restrictions upon the intellectual property laws. *Id.* Such restrictions ultimately caused inventors to withhold the acknowledgement of their participation in such activities. *Id.*

<sup>39</sup> Evans, *supra* note 34, at 590.

<sup>40</sup> See Agreement on Trade Relations Between the United States of America and the People's Republic of China, Jul. 7, 1979, 31 U.S.T. 4651 [hereinafter 1979 Trade Agreement].

<sup>41</sup> See *id.* art. 6(1). "Contracting parties in their trade relations recognize the importance of effective protection of patents, trademarks and copyrights." *Id.*; see also Evans, *supra* note 34, at 590 (noting China's willingness to adopt Western provisions containing concepts for the protection of IPRs).

<sup>42</sup> Chengfei Ding, *The Protection from New Plant Varieties of American Businesses in China after China Enters the WTO*, 6 DRAKE J. AGRIC. L. 333, 338 (2001) (noting that China "actively participa[tes] in international cooperation programs in order to meet the international standards of intellectual property protection").

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Assafa Endeshaw, *A Critical Assessment of the U.S.-China Conflict on Intellectual Property*, 6 ALB. L.J. SCI. & TECH. 295, 312–13 (1996).

<sup>46</sup> Wang Jun, *Patent Law in China: Two Decades Later*, [http://www.bjreview.com.cn/200410/Business-200410\(B\).htm](http://www.bjreview.com.cn/200410/Business-200410(B).htm) (last visited July 26, 2005) (underscoring the accession to the agreements as a considerable feat towards China's efforts to bring confidence in their patent system).

<sup>47</sup> Graham J. Chynoweth, *Reality Bites: How the Biting Reality of Piracy in China is Working to Strengthen Its Copyright Laws*, 2003 DUKE L. AND TECH. REV. 3, 5–6 (2003), <http://www.law.duke.edu/journals/dltr/articles/PDF/2003DLTR0003.pdf>.

## IV. U.S. "INVOLVEMENT" IN STRENGTHENING CHINESE IPR ENFORCEMENT

Despite the legislative actions of China to improve their IPR regime, the opportunity for rampant infringement, both domestically and abroad, remains. As of 2003, eighty percent of counterfeit goods in China were imitations of Chinese brands.<sup>48</sup> As a result, the retailers of these products have no choice but to increase prices to make a profit, depriving ordinary citizens of the ability to purchase quality products at affordable prices.<sup>49</sup>

Since accession to the WTO, China has been under strict scrutiny from domestic and international law enforcement agencies, as well as private entities that attempt to mirror law enforcement agencies' efforts to police counterfeiting.<sup>50</sup> Upon China's bolstering of its IPRs protection in the 1990s, China "experienced a ten-fold increase in foreign direct investments from 1990–95, receiving nearly \$36 billion in 1995."<sup>51</sup> However rather than greater scrutiny, simple global economics fueled this increase because, on the international scale, China is a giant in the consumer market, having a population of approximately 1.3 billion people.<sup>52</sup> Access to an economy of this size provides an invaluable opportunity for foreign companies to acquire more resources as well influence, through distribution, the surrounding economies of other Asian countries. However, as the epidemic of IPR infringement in China continues, one could conceive why global industries are hesitant to invest more in China.<sup>53</sup> This infringement threatens China's technological advancement, and potentially impedes China's ability to "assum[e] a more influential role in world trade and manufacturing."<sup>54</sup>

In response to China's inability to curb the excessive amount of counterfeiting and piracy occurring within its borders, the U.S. has taken actions to protect its own IPRs.<sup>55</sup> In the past, the United States threatened China with sanctions through the USTR Special 301 Action.<sup>56</sup> For example, on three separate occasions between 1992

<sup>48</sup> Evans, *supra* note 34, at 596.

<sup>49</sup> *Id.*

<sup>50</sup> Yahong Li, *The Wolf Has Come: Are China's Intellectual Property Industries Prepared for the WTO?*, 20 UCLA PAC. BASIN L.J. 77, 81 (2002) (noting that U.S. film companies established offices in China to monitor the pirating of U.S. films, as well as other infringing activities).

<sup>51</sup> Homere, *supra* note 19, at 286–87 (explaining how the adoption of the TRIPs agreement has benefited lesser developed countries through foreign direct investment and technology transfer where those countries have taken a progressive role in strengthening IPRs); *see also* Endeshaw, *supra* note 45, at 318 (stating that although the United States protests the IP piracy in China, the United States values the potential of the Chinese market too much to not to deal with China).

<sup>52</sup> Chynoweth, *supra* note 47, at 2 (noting that access to such a large market has led the international corporations to assist eagerly in bringing China up to speed).

<sup>53</sup> Li, *supra* note 50, at 81 (2002). "China has been named the worst country in the world for copyright infringement and trademark violations, costing . . . [—]just about anyone with a product for sale—billions of dollars a year." *Id.* at 91.

<sup>54</sup> Evans, *supra* note 34, at 596.

<sup>55</sup> *Id.*

<sup>56</sup> *See* 19 U.S.C. §§ 2901–06 (1988). In the Omnibus Trade and Competitiveness Act of 1988, the United States introduced a mechanism of identifying and dealing with countries that lacked adequate and effective protection of IP rights and unfairly denied market access to United States products: Special 301. *Id.* This Act listed the United States's principal negotiating objectives regarding IP: to seek the enactment and

and 1996, the United States threatened economic sanctions against China.<sup>57</sup> In efforts to persuade the United States not enforce those sanctions, China signed agreements promising to enact further measures to ensure the enforcement of its existing IP laws.<sup>58</sup>

Although these efforts show China's willingness to adapt its IP laws, the sentiment of the United States is that such adaptations fall short of effective enforcement.<sup>59</sup> Many in China, however, believe that the United State's demands for eradicating piracy are irrational.<sup>60</sup> One objection stated that the "United States demands encroached on [China's] sovereignty and that, as a developing country, [China] could not handle large-scale stamping out of piracy."<sup>61</sup> Regardless of China's deficient enforcement, the U.S. should remain involved to help China remedy some of the problems related to their inadequate IP enforcement.

## V. PROBLEMS WITHIN THE CHINESE LEGAL INFRASTRUCTURE

A country's development of domestic IPRs can lead to complex issues when it conforms with the international standards of IP protection and enforcement. Although each country willing to become a WTO signatory is tasked with the development of such a regime, each country's domestic affairs and economic survival

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enforcement, by foreign countries, of law which would recognize and adequately protect IP and provide protection against unfair competition. *See id.* at § 2411; *see also* Evans, *supra* note 34, at 597–98 (noting "the USTR's allowance of unilateral action against any trading partner not meeting its obligations under the agreement").

<sup>57</sup> Evans, *supra* note 34, at 597. In 1992, the U.S. accused China of inadequately protecting IPRs and the U.S. threatened sanctions. *Id.* In 1995, sanctions were almost enforced for China's lack of enforcement of copyright protection. *Id.* Lastly, in 1996, the U.S. threatened, once again, a multi-billion dollar penalty unless the Chinese government took action to quash the production of American goods within its borders. *Id.*

<sup>58</sup> *Id.* In 1992 China signed the Memorandum of Understanding ("MOU") which required China to adopt the terms of the Berne Convention and the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms. *Id.* The so-called 1995 Accord consisted of an Agreement Letter from the Chinese Minister of Foreign Trade and Economic Cooperation and an Action Plan that consisted of four new mechanisms for combating piracy. *Id.* at 598. The new mechanisms consisted of:

- (1) [An] intra-agency Intellectual Working Conferences and task forces to investigate and handle copyright infringement cases;
- (2) Identifying infringing regions and implementing six-month special enforcement periods that would intensify efforts to apprehend infringers;
- (3) Implementing Source Identification Codes, a new licensing and ownership verification system designed to help identify pirated goods, namely domestically produced software; and
- (4) Implementing new customs procedures to prevent the influx of counterfeit goods into the stream of commerce.

*Id.* at 598.

<sup>59</sup> Office of the United States Trade Representative, 2004 Report to Congress on China's WTO Compliance Special 301 Report § 306, [http://www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2004/asset\\_upload\\_file281\\_6986.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2004/asset_upload_file281_6986.pdf) (last visited Aug. 1, 2005).

<sup>60</sup> Endeshaw, *supra* note 45, at 320.

<sup>61</sup> *Id.*

competes with the burden of adhering to those international standards. This struggle provides the potential for many countries to confuse the boundaries of protection and accidentally create a fog of marginal infringement.

As China became more involved in creating an IPR regime, conforming with the TRIPs Agreement presented several challenges.<sup>62</sup> These challenges included upholding the minimum requirements, overcoming its weak bargaining position in the creation of IP policies within the WTO, and dealing with competition from foreign counterparts.<sup>63</sup>

During the tumultuous development of China's IP regime, China seemingly has faced many difficulties in offering IPR owners a broad protection and enforcement of their rights. Once China opened the proverbial door, its cheap labor market and fledgling IP system caused counterfeiters to flock to China in an attempt to take advantage of the system's many vulnerabilities.<sup>64</sup> As such, the implementation of an IP system in China progressed sluggishly, primarily due to various administrative difficulties<sup>65</sup> and impediments to judicial enforcement.<sup>66</sup>

#### A. Local Protectionism

The decentralization process of the Chinese political system shifted power from the central government to the local governments.<sup>67</sup> Powerful local governments created a problem of local protectionism.<sup>68</sup> Local protectionism is the result of a local government creating a self-reliant economic "kingdom"<sup>69</sup> that tends to seek the protection of traditional technology while limiting competition.<sup>70</sup>

These local governments have proven uncooperative in China's overall effort to protect and enforce IPRs because local governments often are not interested in technology innovation. The enforcement of foreign IPRs without an immediate

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<sup>62</sup> Li, *supra* note 50, at 81.

<sup>63</sup> *Id.*

<sup>64</sup> Evans, *supra* note 34, at 590.

<sup>65</sup> *Id.* at 590–91. Administrative problems arose from decentralization—the creation of regional governments—within China. *Id.* The money to be made from counterfeiting spawned corruption that penetrated to the upper echelon of the regional governments. *Id.* The same regional governments were in control of funding the enforcement of IP law. It was more lucrative for officials to turn a blind eye to the rampant piracy. *Id.* Even when proceedings were commenced against an infringer, the multiple localities created a hardship for the IPR owner to receive uniform protection because of the differences in the local procedures. *Id.*

<sup>66</sup> *Id.* at 592. Adjudication of an IPR in China under the decentralized system was ineffective mainly due to a pseudo-sense of partiality and the lack of enforcement. *Id.* Judges in each region were faced with the convictions of the corrupt administrators (or were at least subject to their influence if they wanted to stay politically viable). *Id.* In addition, the Chinese legal system suffered from a lack of attorneys who were qualified to litigate national and international IP laws. *Id.* Even if an IPR owner was able to get a friendly verdict without complication, the courts had limited ability to enforce the court decrees. *Id.*

<sup>67</sup> Ding, *supra* note 42, at 347.

<sup>68</sup> See Wang, *supra* note 46, at 35–36.

<sup>69</sup> *Id.* at 35. Conflicts of interest may arise between the local and central governments and thus cause discord among the policies each may advocate. Ding, *supra* note 42, at 347.

<sup>70</sup> Wang, *supra* note 46, at 35.

benefit to the region provides little incentive to the local economy.<sup>71</sup> These local governments primarily fund their economies by heavily taxing the goods of other regions, thus forcing local consumers to buy locally made products.<sup>72</sup> “Local governments acquiesce in, or support, the manufacture and sale of fake goods by local enterprises.”<sup>73</sup> Therefore, many local governments within China believe that enforcing foreign IPRs would lead to local unemployment and instability.<sup>74</sup>

Furthermore, the local enforcement officials report to the local politicians who themselves are ultimately controlled by the will of the national government.<sup>75</sup> However, the national government does not possess the ability to sanction or dismiss these local officials.<sup>76</sup> Therefore, faced with implementing a directive from a higher authority versus implementing a directive from the local politician, such as a mayor, the officials are more likely to follow the interests of the local politicians. Such local protectionism effectively undermines enforcement and creates widespread antipathy for the central government’s duty to enlarge the national economy.

### *B. Courts’ Lack of Authority*

As a subset of China’s efforts to establish a basic legal system to protect IPRs, China has also provided for the adjudication of issues related to the enforcement of IPRs.<sup>77</sup> Notwithstanding its existing courts, China established a specific trial division in its industrialized regions to preside exclusively over IP issues.<sup>78</sup>

However, there are several factors existing within the Chinese judiciary system that permit continued infringement. China’s courts are not entirely independent from governmental administration.<sup>79</sup> They serve, in part, to implement governmental policy and still rely upon the national government for basic resources.<sup>80</sup> Therefore, one way for an infringer to escape judicial enforcement is to hide behind the guise of local protectionism discussed in the previous section.

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<sup>71</sup> Ding, *supra* note 42, at 348.

<sup>72</sup> Wang, *supra* note 46, at 35.

<sup>73</sup> *Id.*

<sup>74</sup> Ding, *supra* note 42, at 348.

<sup>75</sup> Daniel C. K. Chow, *Counterfeiting in the People’s Republic of China*, 78 WASH. U.L.Q. 1, 29 (2000).

<sup>76</sup> *Id.* at 29.

<sup>77</sup> Naigen Zhang, *Intellectual Property Law in China: Basic Policy and New Developments*, 4 ANN. SURV. INT’L & COMP. L. 1, 14 (1997). The basic judicial setup of the Chinese People’s Court has 4 tiers: District People’s court, Intermediate People’s Court, High People’s Court, and Supreme People’s Court. *Id.*

<sup>78</sup> *Id.* at 15. Specifically, in 1993, China created intellectual property law divisions in the High People’s Court and the Intermediate People’s Court in the cities of Beijing, Shanghai, and Tianjin, and in the Guangdong, Fujian, Jiangsu and Hainan Provinces, with the rationale that the prevalence of IP lawsuits in these regions would benefit from a specialized court that could adjudicate IP issues in a timely manner. *Id.*

<sup>79</sup> David L. Weller, *The Bureaucratic Heavy Hand in China: Legal Means for Foreign Investors to Challenge Agency Action*, 98 COLUM. L. REV. 1238, 1278 (1998). China’s post-reform Constitution does not embody the principle of separation of powers. *Id.* Chinese courts do have independence but still serve a policy implementation function. *Id.*

<sup>80</sup> *Id.*

In addition, because each local government is allowed to retain a portion of revenue from local businesses, local governments have an incentive to intervene in judicial matters.<sup>81</sup> For example, local enterprises being sued for infringement could fall into financial trouble or possibly go bankrupt, causing a decrease in revenue for the local government. Thus, an incentive exists for local governments to interfere in the judicial proceeding or with a court's judgment.<sup>82</sup> Additionally, the low salaries of judges increase the possibility for bribery and corruption.<sup>83</sup>

Additional factors add to the disparity of China's IP regime: (1) a lack of knowledge regarding IPRs due to traditional thought within Chinese culture;<sup>84</sup> (2) a lack of legal training of judges in IP issues<sup>85</sup> (however, recent efforts have been made to improve judges' knowledge in the area of IP<sup>86</sup>); and (3) a reluctance by the courts to issue damages that would deter infringement.<sup>87</sup>

## VI. CHINESE LEGAL REFORM WILL CREATE EFFECTIVE ENFORCEMENT

Upon noting the significant levels of infringement, one may suggest that China lacks sufficient IP laws and mechanisms to provide for the protection of IPRs. This speculation, however, is untrue. The Office of the U.S. Trade Representative ("USTR") has recognized that China has taken significant steps towards enacting legislation and enforcement mechanisms.<sup>88</sup> James Lilley, former U.S. ambassador to China, stated that "the problem [is] not in the Chinese laws, since [China has] very tough IPR rules."<sup>89</sup> Thus, the United States remains fixated on better enforcement of China's existing laws.

Even though China continues its efforts to enforce its IP laws, the problems of local protectionism and judicial shortcomings have not allowed those efforts to reach fruition. In 2003, China was experiencing its highest rate of piracy since 1995.<sup>90</sup> Because of such ongoing infringement, in May 2004, the USTR once again placed

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<sup>81</sup> Ding, *supra* note 42, at 348.

<sup>82</sup> *See id.*

<sup>83</sup> Eric M. Griffin, *Stop Relying on Uncle Sam! – A Proactive Approach to Copyright Protection in the People's Republic of China*, 6 TEX. INTELL. PROP. L.J. 169, 184 (1998).

<sup>84</sup> *Id.* at 186. Moreover, disseminating information as to the protection of intellectual property rights throughout the country would be an enormous task. *Id.* Therefore, individuals are likely unaware that certain actions may constitute a violation of the IP laws. *Id.* Speculation from this hypothetical could lead to the inference that a majority of infringers are "innocent." *See id.*

<sup>85</sup> *Id.* at 185. IP is remains a relatively novel issue in Chinese courts and therefore, the lack of experienced judges in this area makes it difficult to enforce IP laws effectively. *Id.*

<sup>86</sup> Wang, *supra* note 46, at 26. Judges' qualifications do not rise to that of the lawyers'. *Id.* In 1995, China enacted the Law of Judge to help improve the quality of the judges' knowledge. *Id.*

<sup>87</sup> Griffen, *supra* note 83, at 184. The methods Chinese courts use for calculating such damages are based on the value of the infringing products in the pirated market, and not the legitimate market. *Id.*

<sup>88</sup> Endeshaw, *supra* note 45, at 321. The series of China-U.S. agreements in 1979, 1992, 1995, is proof that China has undertaken significant efforts to bring their IPR regime to comparative international standards. *Id.* at 323.

<sup>89</sup> *Id.* at 321.

<sup>90</sup> Phuong Yokitis, *MPAA Commends USTR 'Special 301' Report: China Under 'Section 306 Monitoring,' Taiwan, Russia and Brazil on 'Priority Watch List,'* at 2, [http://www.mpaa.org/MPAAPress/2004/2004\\_05\\_03.pdf](http://www.mpaa.org/MPAAPress/2004/2004_05_03.pdf) (last visited Aug. 1, 2005).

China on the USTR Special 306 Priority Monitoring List (“Special 306”), which allows for the strategical protection of U.S. IPRs.<sup>91</sup> Special 306 imposes the threat of sanctions if there is a decrease in China’s enforcement of its bilateral agreement regarding IP.<sup>92</sup> To reassure the United States that China would significantly reduce IPR infringement, Chinese Vice Premier Wu delineated six objectives in the pursuit of enforcement.<sup>93</sup> These objectives seek to strengthen IPR protection through (1) judicial interpretation, (2) concentrated efforts to prevent piracy, (3) implementing new customs regulations, (4) ratifying WIPO treaties protecting against Internet piracy, (5) conducting audits to ensure the use of legitimate software and (6) public education campaigns designed to convey the importance of IPRs.<sup>94</sup>

Other measures U.S. companies are taking to protect their IPRs are through cooperation with international organizations.<sup>95</sup> By using multinational industry-based organizations within China, these companies, in participation with such organizations, could effectively lobby towards the protection of their industry specific IPRs.<sup>96</sup> International organizations would also prove useful in other ways: (1) educating consumers, retailers and governments; (2) monitoring the activities of possible infringers; (3) providing a forum for negotiation; (4) pressuring local governments; and (5) possibly initiating legislation.<sup>97</sup>

These measures, along with the USTR objectives, are realistic goals that should provide for more effective enforcement of IPRs. Such goals, however, are only the minimal steps that should be taken. The fundamental problem of local protectionism remains a significant underlying cause of IPR infringement.

The Chinese government must push further in the area of legal reform.<sup>98</sup> Eliminating local protectionism in China will not be simple because the foundation of traditional Chinese economy stands as an impediment to emancipating the courts from governmental interference.<sup>99</sup> A solution to the problems of local protectionism and judicial dependency on local practices requires that the barriers of regionalism

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<sup>91</sup> Office of the United States Trade Representative, Special 301 Report § 306, [http://www.ustr.gov/Document\\_Library/Reports/Publications/2004/2004\\_Special\\_301/2004\\_Special\\_301\\_Report\\_Section\\_306.html](http://www.ustr.gov/Document_Library/Reports/Publications/2004/2004_Special_301/2004_Special_301_Report_Section_306.html) (last visited Aug. 1, 2005) [hereinafter Special 306].

<sup>92</sup> Yokitis, *supra* note 90, at 1.

<sup>93</sup> Office of the United States Trade Representative, 2004 Special 301 Report, Executive Summary, [http://www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2004/2004\\_Special\\_301/asset\\_upload\\_file16\\_5995.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2004/2004_Special_301/asset_upload_file16_5995.pdf) (last visited Aug. 1, 2005).

<sup>94</sup> *Id.*

<sup>95</sup> Griffen, *supra* note 83, at 190.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Inventors’ Rights Protected*, CHINA DAILY, Oct. 24, 2003, available at LEXIS, News & Business, Major World Publications, Journal Code FCHD. Within the past two years, attempts have been made to circumvent the problems of local protectionism. *Id.* Regional IPR administrations set up several cross-province IPR enforcement agencies. *Id.* Although this may appear to solve the problem of disproportionate enforcement of IPRs, it is analogous to using a band-aid for a broken bone. The problem of local protectionism will persist and the regional officials will retain the power to influence the local judges.

<sup>99</sup> See Wang, *supra* note 46, at 39. Political reform is the only way that China will be able to create an independent legal authority. *Id.*

be removed through legislation to create a national market and an independent judicial system.

Local judges must be allowed to control their judicial power and abandon their subordination to superior officials' directives.<sup>100</sup> This could be achieved through legislation mandating that local judges be elected. If elected, local judges will be less likely to feel obligated to implement the will of local politicians. Moreover, it is also likely that judicial elections would provide for increased impartiality in court proceedings. In addition, elections will provide the opportunity for individuals who were not conditioned to the extreme loyalty of the "unified leadership of the Party" to become judges.<sup>101</sup> Furthermore, judicial elections will create a divergence from a merit-based system that promotes the judges' interest in advancing their superiors' directives which are contrary to IPR enforcement.<sup>102</sup>

Ideally, China needs to reallocate powers within its government in order to break down local protectionism and create a unified national market.<sup>103</sup> In March of 2005, the Chinese legislature was scheduled to discuss a draft of an antitrust law aimed at breaking down the barriers that lead to local protectionism.<sup>104</sup> This would cause the local governments to comply completely with the national government's directives relating to IP laws.

The national government should then take away the regional governments' powers to influence decisions the courts make (i.e., local politicians' abilities to remove judges). Judges would then be free to enforce the IP laws as they exist and hand down fair judgments against infringers, rather than enforcing the politicians' favoritism toward local protectionist policies that burden IPRs.

Local governments, however, might resist any such deprivation of power. The localities would be directed to implement and enforce the IP laws at a cost to their local economies, leading the local governments to retaliate by total refusal. Indeed, this problem could be solved through government funding. The Chinese national government should use financial incentives to back the implementation and enforcement of IPRs in individual regions. As a result, local governments would no longer have to rely upon anti-competitive practices to sustain their local economies. Such reallocation of powers within China's governmental system, combined with

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<sup>100</sup> See *id.* Presently, judges are elected by the Local People's Congress or appointed by Committee of the People's Congress and have no tenure or are subject to removal. *Id.*

<sup>101</sup> *Id.* Presently, one requisite for an individual to be eligible to become a judge is that he must demonstrate a loyalty to "the Adherence of the Four Basic Principles [adherence to Marxism-Leninism-Mao Zedong Thought, to the dictatorship of the proletariat, to the socialist road, and to the leadership of the Party]." *Id.* Such a requirement generates government and political officials who will continue to support the proliferation of local protectionism. *Id.*

<sup>102</sup> *Id.* Judges have the incentive to follow their superiors' directives in order to gain merit from their superiors. *Id.* This also allows judges to be lenient with a judgment because the blame will shift upon their superiors. *Id.* at 39.

<sup>103</sup> See Shi Ting, *Breaking Down the Barriers to Progress*, S. CHINA MORNING POST, Nov. 10, 2004, at 7, available at LEXIS, News & Business, Major World Publications. One attempt of such progression was the submission of a draft law that prohibited local governments "from creating regional trade blockades by restricting the flow of commodities and labor." *Id.* In the fall of 2004, Beijing "sent a joint taskforce to 28 provinces and regions to inspect local government progress on eliminating market protectionism." *Id.* The taskforce included "top-level officials from seven ministerial departments" including: the Ministry of Commerce, the State Council's Legal Affairs Office and the Ministry of Finance. *Id.*

<sup>104</sup> *Id.*

government subsidies, would establish an independent judicial authority and abolish the need for local protectionism.

An even more ground-breaking change would be the implementation of a federalist-like allocation of power within China. However, China's progression toward a market-based economy foreshadows this event.<sup>105</sup> The ever-growing population in China is becoming more receptive to private—rather than public—ownership. It follows that as these Chinese push toward economic development, Chinese officials will be presented with a widespread sentiment to further reform Chinese policy and politics,<sup>106</sup> allowing for better enforcement of China's IP laws.

## VII. CONCLUSION

The infringement of IPRs in China is the most contentious issue involving China's trade relations in the global economy. The infringement epidemic that China is experiencing is a result of implementing the gambit of international IPR treaties into their domestic agenda. Most notably, the historical repression of protecting one's creative works under China's communist economy created the influx of infringement once China began to shift towards a market economy in 1979.

China's endeavors to create an environment that is friendly to foreign investment, along with the United States's efforts to protect its IPR within China through bilateral trade agreements, resulted in China's promulgation of a comprehensive system of IP laws. However, rampant infringement continues in China due to judicial inconsistencies caused mainly by local protectionism. This has created a severe lack of IPR enforcement within China. However, if China would reallocate the balance of power within its government to create an independent legal authority and provide incentives for local enforcement of IPRs, China could make huge advancements in preventing the problem of excessive piracy.

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<sup>105</sup> See Wang, *supra* note 46, at 39.

<sup>106</sup> South Korea and Taiwan experienced similar political reforms. *Id.* These governments had policies similar to that of China (influenced by Confucianism). *Id.* Over the span of about thirty years their governments sustained increased economic development in commerce and industry, and ultimately experienced a political and economic change. *Id.*; see also Yokitis, *supra* note 90, at 2.