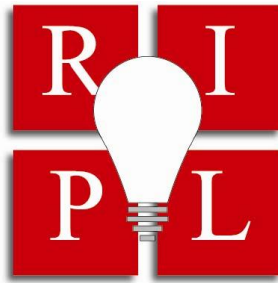


# THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



LET IT GO? A COMPARATIVE ANALYSIS OF COPYRIGHT LAW AND  
ENFORCEMENT IN THE UNITED STATES OF AMERICA AND CHINA

KEVIN FLEMING

## ABSTRACT

Cheap, knockoff designer items have flooded the streets of China for years. These products infringe on the copyrights of the manufacturers but are rarely enforced. China has attempted to revise their copyright laws to offer more protection to copyright owners, but this has not yet occurred. This comment examines two recent occurrences of copyrighted works in the United States of America being infringed upon in China. This comment examines the how a court or tribunal would rule applying American copyright law and Chinese Copyright law, while also examining the possible remedies that could result. This comment also proposes possible solutions to increase copyright protection for American works overseas.

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*Cite as Kevin Fleming, Let It Go? A Comparative Analysis of Copyright Law and  
Enforcement in the United States of America and China, 15 J. MARSHALL REV.*

INTELL. PROP. L. 584 (2016).

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LET IT GO? A COMPARATIVE ANALYSIS OF COPYRIGHT LAW AND  
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I. INTRODUCTION

“Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”<sup>1</sup> If everyone has the right to the protection of their interests that are the result of something they produce, what is the proper legal recourse when this protection is infringed upon? Two situations have occurred recently that ask this question, with the additional element that the alleged thieves in question live in China.

The most recent case concerns Anish Kapoor’s first public outdoor work installed in the United States and located in Chicago, Illinois.<sup>2</sup> Cloud Gate, also known as “The Bean,” is a 110-ton elliptical sculpture that is forged of a seamless series of highly polished stainless steel plates, which reflect Chicago’s famous skyline and the clouds above.<sup>3</sup> At the revealing of the statue, Kapoor stated “the [welding] technology to create this piece did not exist, it had to be created, it was beyond what NASA could do.”<sup>4</sup> This piece of art has become a Chicago icon and has been ranked as the city’s best attraction, beating out Wrigley Field and Lake Michigan.<sup>5</sup> At The Bean’s dedication ceremony in Millennium Park, its popularity deeply touched Kapoor and he admitted to being proud of the way in which it had entered the public consciousness.<sup>6</sup>

It seems however, that The Bean is not only popular with Chicago natives and tourists. In China’s far west Xinjiang region there is the oil-producing city of Karamay.<sup>7</sup> In this city, an artist, who city officials refuse to name, is putting on the

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\* © Kevin Fleming 2016. Juris Doctor Candidate, The John Marshall Law School, 2017; Bachelor of Arts in Criminology and Law Studies, Marquette University, 2010. I would like to thank all of the staff members of the John Marshall Review of Intellectual Property Law for assisting me throughout the process of writing this comment.

<sup>1</sup> The Universal Declaration of Human Rights, art. 27. As a result of World War II, the United Nations General Assembly made this declaration in order to express the rights that all human beings are inherently entitled to.

<sup>2</sup> *Millennium Park—Arts & Architecture*, CITY OF CHICAGO, [http://www.cityofchicago.org/city/en/depts/dca/supp\\_info/millennium\\_park\\_artarchitecture.html](http://www.cityofchicago.org/city/en/depts/dca/supp_info/millennium_park_artarchitecture.html) (last visited Oct. 5, 2015).

<sup>3</sup> *Id.*

<sup>4</sup> Noreen S. Ahmed-Ullah, *Bean’s Gleam has Creator Beaming*, CHICAGO TRIBUNE, (May 16, 2006), [http://articles.chicagotribune.com/2006-05-16/news/0605160259\\_1\\_bean-cloud-gate-millennium-park](http://articles.chicagotribune.com/2006-05-16/news/0605160259_1_bean-cloud-gate-millennium-park).

<sup>5</sup> Jacob Mikanowski, *Cloud Gate, Tilted Arc*, THE POINT, (Spring 2012) Issue 5, <http://thepointmag.com/2012/criticism/cloud-gate-tilted-arc> (Last Accessed Oct. 17, 2015).

<sup>6</sup> See Ahmed-Ullah, *supra* note 4.

<sup>7</sup> Karamay, China, WORLD ENERGY CITIES PARTNERSHIP, <http://www.energycities.org/Karamay-China> (last accessed Oct. 5, 2015).

finishing touches of an arching, reflective, stainless steel blob<sup>8</sup> that reflects the granite ground underneath it, which is meant to bring to mind an oil field.<sup>9</sup> Understandably, Mr. Kapoor is furious and stated, “in China today it is permissible to steal the creativity of others.”<sup>10</sup> Additionally, he has vowed to take his grievance to the highest level and pursue those responsible in court, while even trying to enlist the help of Chicago’s Mayor Rahm Emanuel.<sup>11</sup> Unfortunately, this is not the only current copyright issue that spans across the Pacific Ocean.

The second case involves the highly popular and award winning animated Disney film, FROZEN.<sup>12</sup> This film featured an award-winning song titled “Let It Go” that was performed by Idina Menzel and written by Kristen Anderson-Lopez and

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<sup>8</sup> Alex Nitkin, *China Totally Ripped Off Chicago’s Bean Sculpture*, DNAINFO, (Aug. 12, 2015, 9:18 am) <http://www.dnainfo.com/chicago/20150812/downtown/china-totally-ripped-off-chicagos-bean-sculpture-photo> (Last accessed Dec. 21, 2015). Pictured: The top photo is of the Bean in Chicago, while the bottom picture is the Oil Bubble Statue of Karamay.



<sup>9</sup> Editorial: *Cloudgate! Chicago’s Beloved Sculpture is Victim of a Scandal*, CHICAGO TRIBUNE, (Aug. 13, 2015), <http://www.chicagotribune.com/news/opinion/editorials/ct-bean-cloud-gate-china-kapoor-edit-0814-jm-20150813-story.html> (Last accessed Oct. 29, 2015). Ma Jun, the chief of planning and construction told the Wall Street Journal, “While we use similar materials, the shapes and meanings are different. ‘Cloud Gate’ intends to reflect the sky, but ours reflects the ground; that’s why we used granite to imitate oil waves.” *Id.*

<sup>10</sup> *The Bean and the Bubble: when is imitation in art flattery, when is it theft?*, THE ECONOMIST, (Aug. 29, 2015), <http://www.economist.com/news/united-states/21662539-when-imitation-art-flattery-and-when-it-theft-bean-and-bubble> (Last accessed Oct. 12, 2015).

<sup>11</sup> *Id.*

<sup>12</sup> FROZEN, Awards, IMDB, <http://www.imdb.com/title/tt2294629/awards> (last accessed May 20, 2016).

Robert Lopez.<sup>13</sup> The popularity of this song led to people from all over the world using the copyrighted content to create parodies, mashups, and covers that could be considered copyright infringement, yet Disney chose not to pursue any claims.<sup>14</sup>

On July 31, 2015, Beijing was awarded the opportunity to host the 2022 Winter Olympics.<sup>15</sup> An element of its bid included ten official songs that were written in an effort to bring the Olympics back to Beijing.<sup>16</sup> Caijing Online, the website of a prominent Chinese business magazine immediately criticized one of the songs, “The Song of Ice and Dance” as a rip-off of “Let It Go.”<sup>17</sup> Caijing quoted one critic as saying “some notes are almost the same as the opening line of Let It Go, and the only difference is the tempo of each song.”<sup>18</sup> The questions now become, what protection, if any, are these artists entitled to in each country?

The goal of this comment is to compare the copyright protections that are afforded to copyright owners in both China and The United States. To do this, I will examine past copyright cases and use these to analyze what might happen if Mr. Kapoor or Disney chose to take action and bring a copyright infringement claim in either country. I will then examine possible solutions to offer equal copyright protection in both countries.

## II. BACKGROUND

The United States Congress is authorized to enact copyright legislation through the Copyright Clause of the United States Constitution, “To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”<sup>19</sup> Congress first began protecting copyrights federally in 1790 and has continued to do so through the

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<sup>13</sup> See Jason Newman, *Oscars 2014: ‘Frozen’ Track ‘Let It Go’ Wins Best Song*, ROLLING STONE, (Mar. 2, 2014), <http://www.rollingstone.com/movies/news/oscars-2014-frozens-let-it-go-wins-best-song-20140302> (last accessed Oct. 15, 2015) (discussing how “Let It Go” won the award for Best Original Song at the 86<sup>th</sup> Academy Awards, was nominated for a Golden Globe for Best Original Song, and reached the top five on the Billboard Hot 100 music chart).

<sup>14</sup> Rich Steeves, *Disney Decides to ‘Let it Go’ When it Comes to Copyright Infringement*, INSIDE COUNSEL, (May 23, 2014), <http://www.insidecounsel.com/2014/05/23/disney-decides-to-let-it-go-when-it-comes-to-copyr> (last accessed Oct. 19, 2015).

<sup>15</sup> Julian Linden, *Beijing Awarded 2022 Winter Olympics*, REUTERS, (July 31, 2015, 7:08 PM), <http://www.reuters.com/article/2015/07/31/us-olympics-2022-winner-idUSKCN0Q513P20150731> (last accessed Oct. 15, 2015).

<sup>16</sup> Wayne Beynon, *China Out in the Cold Over Alleged ‘Frozen’ Theft*, HUFFINGTON POST, (Sep. 15, 2015, 10:59 PM), [http://www.huffingtonpost.co.uk/wayne-beynon/china-frozen-let-it-go\\_b\\_8134466.html](http://www.huffingtonpost.co.uk/wayne-beynon/china-frozen-let-it-go_b_8134466.html) (last accessed Oct. 20, 2015).

<sup>17</sup> Steven Jiang, *Is China’s 2022 Winter Olympics Song too Much Like ‘Frozen’s’ ‘Let It Go?’*, CNN, (Aug. 4, 2015 3:08 AM), <http://www.cnn.com/2015/08/04/china/china-winter-olympics-song-frozen/>. “Caijing Online . . . offered a technical analysis that went beyond the melodic parallels. Among the main points: both songs employ a piano as the major instrument, have similar prelude chords and an eight-beat introduction, and they run at almost exactly the same tempo.” *Id.*

<sup>18</sup> Tom Phillips, *Chinese Winter Olympics Anthem is Rip-Off of Frozen Song, Say Online Critics*, THE GUARDIAN, (Aug. 4, 2015 8:24 AM), <http://www.theguardian.com/world/2015/aug/04/chinese-winter-olympics-anthem-rip-off-frozen-song-say-critics> (last accessed Oct. 23, 2015).

<sup>19</sup> 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.02 (2015).

centuries.<sup>20</sup> The statute that governs current copyright disputes is The Copyright Act of 1976, which is codified in Title 17 of the United States Code.<sup>21</sup>

“Under Title 17 protected sculptural works include two-dimensional and three-dimensional works of fine, graphic and applied art, photographs . . . models and technical drawings.”<sup>22</sup> “A ‘work of visual art’ is a painting, drawing, print, or sculpture, existing in a single copy, . . . in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author.”<sup>23</sup> “Copyright protection subsists . . . in original works of authorship such as pictorial, graphic, and sculptural works; and musical works, including any accompanying words.”<sup>24</sup>

Title 17 gives the owner of a copyright “the exclusive rights to reproduce the copyrighted work, to distribute copies of the copyrighted work, to perform the copyrighted work publicly and by means of digital audio transmission.”<sup>25</sup> While the owner is given exclusive rights to his or her copyright, there are limitations. “The fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright.”<sup>26</sup>

“Copyright in a work protected under Title 17 vests initially in the author or authors of the work.<sup>27</sup> Generally, copyright in a work created on or after January 1, 1978 subsists from its creation and . . . endures for a term consisting of the life of the author and seventy years after the author’s death.”<sup>28</sup>

“Anyone who violates any of the exclusive rights of a copyright owner . . . is an infringer of the copyright or right of the author.”<sup>29</sup> “The owner of that exclusive right is entitled . . . to institute an action for any infringement of that right.”<sup>30</sup> There are four remedies for infringement: injunctions, impounding and disposition of infringing

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<sup>20</sup> *Id.* Congress has continually updated copyright laws through the 20<sup>th</sup> Century. Some of the laws Congress has passed include: The Copyright Act of 1909, which governs causes of actions prior to 1978, The Sound Recording Amendment, the Copyright Act of 1976 that went into effect in 1978, The Berne Convention Implementation Act of 1988, The Computer Software Copyright Act of 1980, the Record Rental Amendment of 1984, the Satellite Home Viewer Act of 1988, the Computer Software Rental Amendments Act of 1990, the Audio Home Recording Act of 1992, and the Digital Performance Right in Sound recordings Act of 1995.

<sup>21</sup> 17 U.S.C. § 100, *et seq.* (2012).

<sup>22</sup> 17 U.S.C. § 101 (2012).

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

<sup>24</sup> 17 U.S.C. § 102(a)(2),(a)(5)(2012).

<sup>25</sup> 17 U.S.C. § 106(1)-(6) (2012).

<sup>26</sup> 17 U.S.C. § 107 (2012). The factors to be considered whether the use of copyrighted material is deemed to be fair use include: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

<sup>27</sup> 17 U.S.C. § 201(a). “If there are multiple authors of a joint work, they are co-owners of the copyright in the work.” *Id.*

<sup>28</sup> 17 U.S.C. § 302(a). *See also*, 17 U.S.C. § 304 (“Any copyright subsisting on January 1, 1978 shall endure for twenty-eight years from the date it was originally secured. At the expiration of the original term, the copyright shall endure for a renewed and extended further term of sixty-seven years.”).

<sup>29</sup> 17 U.S.C. § 501(a)(2012).

<sup>30</sup> 17 U.S.C. § 501(b)(2012). “The court may require such owner to serve written notice of the action with a copy of the complaint upon any person shown, by the records the Copyright Office, to have or claim an interest in the copyright.” *Id.*

articles, damages and profits, and costs and attorney's fees.<sup>31</sup> Additionally, if someone criminally infringes<sup>32</sup> a copyright under 17 U.S.C. § 506(a)(1)(A) he can face imprisonment and fines.<sup>33</sup>

In 1989, Luther R. Campbell wrote a song entitled "Pretty Woman" as a satire of Roy Orbison and William Dees' rock ballad "Oh, Pretty Woman," to be performed by his rap music group, 2 Live Crew.<sup>34</sup> The rap group sought permission from Acuff-Rose<sup>35</sup> and offered to pay a fee for the use, and when Acuff-Rose rejected this offer, 2 Live Crew released the song anyway.<sup>36</sup> A year later, after nearly a quarter of a million copies of the recording had been sold, Acuff-Rose brought suit for copyright infringement, and the case was eventually granted certiorari by the United States Supreme Court.<sup>37</sup> The Court used several factors to analyze the fair use inquiry.<sup>38</sup> The central purpose of this inquiry was to see whether the new work merely "supersede[s] the objects" of the original creation, or if it instead adds something new; in other words, it asks whether and to what extent the new work is transformative.<sup>39</sup> The court determined "there were no bright line rules and that

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<sup>31</sup> 17 U.S.C. § 502-505 (2012). Any court having jurisdiction may grant temporary and final injunctions that can be served anywhere in the United States. *Id.* A court may order the impounding of any and all copies of infringing material. *Id.* The copyright owner is entitled to recover actual damages suffered by him or her and any profits of the infringer that are attributable to the infringement that are not taken into account in computing actual damages. *Id.* The copyright owner may also elect at any time prior to final judgment being rendered, to recover an award of statutory damages rather than actual damages. *Id.* The court may also award reasonable attorney's fees and court costs to the prevailing party. *Id.*

<sup>32</sup> 17 U.S.C. § 506(a) (2012). Criminal infringement is, in general,

any person who willfully infringes a copyright . . . if the infringement was committed for purposes of commercial advantage or private financial gain; by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1,000; or by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible by members of the public, if such person knew or should have known that the work was intended for commercial distribution.

*Id.*

<sup>33</sup> 18 U.S.C. § 2319(a)-(d) (2012). Maximum imprisonment for copyright infringement is ten years.

<sup>34</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569,572 (1994).

<sup>35</sup> Acuff-Rose was an American music publishing firm that represented Luther Campbell's musical interests and could have given 2 Live Crew a license to use Orbison's song. *Id.*

<sup>36</sup> *Id.* at 573.

<sup>37</sup> *Id.* The district court granted summary judgment for 2 Live Crew, reasoning the commercial purpose of the song was no bar to fair use. *Id.* The Court of Appeals for the Sixth Circuit reversed and remanded, concluding that the blatantly commercial purpose prevented the parody from being fair use. *Id.*

<sup>38</sup> *See id.* at 578 ("discussing the factors of fair use, where the first factor is "the purpose and character of the use, including whether such use is of a commercial nature is if for nonprofit educational purposes. The second is the nature of the copyrighted work. The third is whether the amount and substantiality of the portion used in relation to the copyrighted work as a whole are reasonable in relation to the purpose of copying. And the fourth is the effect of the use upon the potential market for or value of the copyrighted work.").

<sup>39</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. at 579. "The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." *Id.*

parody, has to . . . be judged case by case, in light of the ends of the copyright law, and ultimately ruled in favor of 2 Live Crew.”<sup>40</sup>

The Copyright Law of the People’s Republic of China was enacted on September 7, 1990 and amended most recently on February 26, 2010.<sup>41</sup> “The law was enacted . . . for the purpose of protecting the copyright of authors in their literary, artistic, and scientific works and to encourage the creating and dissemination of works conducive to the building of a socialist society that is advanced ethically and materially, and promoting the progress and flourishing of socialist culture and society.”<sup>42</sup> It was designed specifically for Chinese citizens, but includes a clause that states “The copyright enjoyed by foreigners or stateless persons in any of their works under an agreement concluded between China and the country to which they belong . . . shall be protected by this Law.”<sup>43</sup>

Under Chinese law, copyright owners include the authors of the works and other citizens, legal entities, or other organizations that are enjoying the copyright.<sup>44</sup> These owners have the rights of publication, authorship, reproduction, distribution, exhibition, performance, presentation and the right of adaptation.<sup>45</sup> An author’s right to authorship and revision and his right to protect the integrity of his work has no time limit.<sup>46</sup> However, the rights of publication last the lifetime of the author and fifty years after his death on December 31.<sup>47</sup>

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<sup>40</sup> *Id.* at 581. The Court determined that 2 Live Crew’s song could reasonably be perceived as commenting or criticizing the original song, which would constitute a fair use, and the parody style of the song did not offend the inquiry factors enough for the copyright to have been infringed upon. *See also* Cariou v. Prince, 714 F.3d 694 (2d Cir. N.Y. 2013) (holding that Prince’s twenty-five artworks made fair use of the copyrighted photographs of Cariou because the artworks presented a new expression, meaning, or message. The artworks were transformative because they manifested an entirely different aesthetic from the photographs since the artist’s composition, presentation, scale, color palette, and media were fundamentally different and new. The court also found the audiences for the works were different and that Prince’s work never touched any of Cariou’s target market.).

<sup>41</sup> *Copyright Law of the People’s Republic of China of February 26, 2010 (amended up to the Decision of February 26, 2010, by the Standing Committee of the National People’s Congress on Amending the Copyright Law of the People’s Republic of China*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, available at <http://www.wipo.int/wipolex/en/details.jsp?id=6062>. The amending of the Chinese Copyright Law went into effect on April 1, 2010.

<sup>42</sup> Copyright Law of the People’s Republic of China. (中华人民共和国著作权法) (promulgated by the Standing Comm. Nat’l People’s Cong., (Feb. 26, 2010), effective Apr. 1, 2010) Chapter 1. art. 1.

<sup>43</sup> *Id.* at page 4 Article 2. The United States and China are parties to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which provides protections for copyright owners in foreign countries.

<sup>44</sup> *See* Copyright Law of the People’s Republic of China(中华人民共和国著作权法) (promulgated by the Standing Comm. Nat’l People’s Cong., Feb. 26, 2010, effective April 1, 2010) art. 3. “Works include, among other things, works of literature, art, natural sciences, social sciences, engineering and technology in the following forms: written works, oral works, musical and dramatic works, photographic works . . . and other works provided for in laws and administrative regulations.” Additionally, “the author of a work is the citizen who creates the work, if it is created under the auspices and accords of a legal entity or organization, that entity or organization is the author.” *See also id.* art. 11.

<sup>45</sup> *See Id.* art. 10. This is not an exhaustive list.

<sup>46</sup> *See Id.* art. 20.

<sup>47</sup> *See Id.* art. 21.



In China, there are certain circumstances in which a work may be used without permission from, and without payment to, the copyright owner.<sup>48</sup> “A producer of sound recordings who exploits, for making a sound recording, a musical work of which a lawful sound recording has been made, may do so without permission from the copyright owner, but shall, . . . pay remuneration to the copyright owner. When both the actual losses and the unlawful gains cannot be determined, the People’s Court shall decide compensation.”<sup>49</sup>

Anyone that infringes upon a copyright in China bears civil liabilities that range from ceasing infringement, eliminating the bad effects of the act, and making an apology or paying compensation for damages.<sup>50</sup> Compensation is determined by a calculation of actual losses suffered by the copyright owner; if these are difficult to calculate, the infringer must pay compensation in the amount of the unlawful gains of the infringer.<sup>51</sup>

In 1994, Walt Disney Co. brought suit against a Chinese publisher and its distributor for pirating children’s books bearing a Mickey Mouse Logo and based on Disney’s animated films.<sup>52</sup> The case was brought in front of the intellectual property trial division of Beijing People’s Intermediate Court, with Disney seeking multiple remedies.<sup>53</sup> Ultimately, the court ruled in favor of Walt Disney Co.<sup>54</sup> This was

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<sup>48</sup> See *Id.* art. 22. Copyright protection is unavailable when the material is used for the purposes of one’s own personal study; it is a translation or reproduction of a public work by teachers or scientific researchers for classroom use; it is the reproduction of a work in its collections by a library or other institutes for the purpose of display; or is a gratuitous live performance of a published work.

<sup>49</sup> See Copyright Law of the People’s Republic of China (中华人民共和国著作权法) (promulgated by the Standing Comm. Nat’l People’s Cong., (Feb. 26, 2010), effective Apr. 1, 2010) art. 40. If the copyright owner declares that exploitation is not permitted, then his work may not be exploited.

<sup>50</sup> See *Id.* art. 47. Infringements that can be punished include: publishing a work without permission of the copyright owner; plagiarizing a work created by another; exploiting a work for exhibition without permission of the copyright owner; exploiting a work without paying remuneration; and other acts that infringe upon the rights related to the copyright.

<sup>51</sup> See *Id.* art. 49. When both the actual losses and the unlawful gains cannot be determined, the People’s Court shall decide compensation amounting to no more than 500,00 RMB.

<sup>52</sup> Donna K.H. Walters *Chinese Court Upholds Walt Disney Co. Copyright: Ruling: Size of penalty is seen as a test of commitment to crack down on intellectual property piracy*, LOS ANGELES TIMES, (Aug. 5, 1994).

<sup>53</sup> Naigen Zhang, *Intellectual Property Law Enforcement in China: Trade Issues, Policies and Practices*. 8 FORDHAM INTELL. PROP. MEDIA, & ENT. L.J. 63 (Autumn 1997). Disney sought an injunction, an accounting of profits, a public apology, and the equivalent of \$77,000 in damages in accordance with article 46 of the Chinese Copyright Law. *Id.* See also Case of Copyright Dispute—The Walt Disney Company, U.S. v. Beijing Publishing Press, etc., Shanghai Nui Di Law Firm (June 6, 2015), available at [http://www.shnuodi.com/\\_case.asp?iid=2994](http://www.shnuodi.com/_case.asp?iid=2994). Beijing Publishing companies argued that they had secured the rights to the cartoon images used in the stories through their Agreement on Transferring the Simplified Chinese Version of Disney’s Children’s Books with Maxwell Communication Corporation. *Id.* Each Publisher placed blame on one another. *Id.*

<sup>54</sup> See Zhang at 80. See also Walters *Chinese Court Upholds Walt Disney Co. Copyright: Ruling: Size of penalty is seen as a test of commitment to crack down on intellectual property piracy*, LOS ANGELES TIMES, (Aug. 5, 1994). The Beijing court found that the books published and distributed were identical to a series produced earlier by another Chinese company under a Disney license that had expired in 1990. See also *Walt Disney, U.S.*, accessed at [http://www.shnuodi.com/\\_case.asp?iid=2994](http://www.shnuodi.com/_case.asp?iid=2994). The court found that the publishing companies had no right to infringe upon Walt Disney Co.’s copyright and declared that the defendants must

significant because it was the first copyright case brought by a U.S. company that went to trial in a Chinese Court, and it was seen as a sign that China was serious about cracking down on intellectual property piracy.<sup>55</sup>

One of the most recent cases of international copyright law dispute is that of *CYBERSitter, LLC v. People's Republic of China*.<sup>56</sup> In 2010, CYBERSitter<sup>57</sup> filed suit against the People's Republic of China (PRC) and numerous other tech companies for misappropriation of trade secrets and copyright infringement.<sup>58</sup> No Chinese representative appeared in court nor ever made a public statement of any value.<sup>59</sup> Ultimately, the tech companies settled but the PRC did not,<sup>60</sup> arguing immunity to the suit through the Foreign Sovereign Immunities Act.<sup>61</sup> The presiding Judge in the U.S. District Court in California declared China in default for failing to respond.<sup>62</sup>

While China seems to have all the proper statutes and regulations in place, there still seems to be a lack of enforcement.<sup>63</sup> This lack of enforcement has resulted in China being placed on a Priority Watch List by the United States.<sup>64</sup>

immediately halt distribution, apologize publicly in one of the nation-wide newspapers, and pay a lump sum of 227,094.14 RMB (\$27,000 roughly).

<sup>55</sup> Walters *Chinese Court Upholds Walt Disney Co. Copyright: Ruling: Size of penalty is seen as a test of commitment to crack down on intellectual property piracy*, LOS ANGELES TIMES, (Aug. 5, 1994), [http://articles.latimes.com/1994-08-05/business/fi-23940\\_1\\_intellectual-property](http://articles.latimes.com/1994-08-05/business/fi-23940_1_intellectual-property) (Last accessed Oct. 28, 2015).

<sup>56</sup> Michael Riley, *China Mafia-Style Hack Attack Drives California Firm to the Brink*, BLOOMBERG BUSINESS, (Nov. 27, 2012 5:01 PM), <http://www.bloomberg.com/news/articles/2012-11-27/china-mafia-style-hack-attack-drives-california-firm-to-brink>. Brian Milburne was in a three-year long battle of cyber harassment with a group of Chinese hackers that begun after he had publicly accused China of appropriating his company's parental filtering software, CYBERSitter, for a national internet censoring project. *Id.*

<sup>57</sup> *Id.* CYBERSITTER is the parental filtering software created by Solid Oak Software, Inc. Solid Oak accused the PRC of appropriating their software as a part of China's national internet censoring project. *Id.*

<sup>58</sup> *CYBERSitter, LLC v. People's Republic of China*, 2010 U.S. Dist. LEXIS 128345 ¶ 1. The PRC allegedly copied nearly 3,000 lines of code from Solid Oak and disseminating it to the Chinese Public. *See also* Riley, *supra* note 56. An independent analysis later found that four of the five active filters were copied almost verbatim from CYBERSitter. *Id.*

<sup>59</sup> *See* Riley, *supra* note 56. The only contact any Chinese representative made with the District Court was an urging that the suit be dismissed. After the court denied defendant's motions to dismiss it was allowed to proceed to trial. *Id.* Upon this decision, settlement talks increased and ultimately ended in a \$2.2 billion settlement for Mr. Milburn and his company. *Id.*

<sup>60</sup> *Id.*  
<sup>61</sup> Lana Birbrair, *Cybersitter Ends \$2b Code Theft Case Against Lenovo, Others*, LAW360, <http://www.law360.com/articles/307944/cybersitter-ends-2b-code-theft-case-against-lenovo-others> (last accessed Oct. 30, 2015).

<sup>62</sup> Riley, *supra* note 56. Because of the settlement, China faced no disciplinary action.

<sup>63</sup> Reuters, *WTO Finds China Copyright Laws Lacking*, (Jan 27, 2009), THE NEW YORK TIMES, [http://www.nytimes.com/2009/01/27/business/27trade.html?\\_r=0](http://www.nytimes.com/2009/01/27/business/27trade.html?_r=0).

<sup>64</sup> U.S. TRADE REPRESENTATIVE, 2014 Report to Congress on China's WTO Compliance, (Dec. 2014). p. 117, available at <https://ustr.gov/sites/default/files/2014-Report-to-Congress-Final.pdf>. China has been on the Special 301 "Priority Watch List" since April 2005. *Id.* Although its intellectual property laws are in accordance with its WTO commitments, effective enforcement has not been achieved as infringement remains a serious problem throughout China. *Id.* Intellectual property rights enforcement is hampered by a lack of coordination among Chinese government ministries and agencies, lack of training, resource constraints, lack of transparency in the enforcement process and its outcomes, procedural obstacles to civil enforcement, and local protectionism and corruption. *Id.* There have been positive developments as of 2014, but ongoing

### III. ANALYSIS

In this section we will analyze these two case illustrations under the U.S. and Chinese Copyright laws to compare and contrast the relative outcomes.

#### *A. The Bean v. The Oil Bubble Statue (U.S. Law)*

In order for Anish Kapoor to be successful in a claim for copyright infringement, if he were to bring one, his sculpture must be afforded copyright protection.<sup>65</sup> His sculpture is a piece of work that receives copyright protection.<sup>66</sup> Kapoor was the designer and sculptor of The Bean<sup>67</sup> and is therefore the author of the sculpture, so he receives copyright protection.<sup>68</sup> Because Mr. Kapoor is the sole owner of the copyright and creator of the work, he has the exclusive right to display his work publicly.<sup>69</sup>

A fair use defense would most likely be the defendant's best option. The wrinkle in a possible fair use argument is that the Chinese officials refuse to admit The Bean had any influence on the Chinese sculpture.<sup>70</sup> However, if the defendant admitted that The Bean influenced the Oil Bubble Statue, they might have a fair use argument. Chinese officials could argue that the nature of the copyrighted work is a tribute to the town's oil wells and that the effect of the fair use does not devalue the potential market of The Bean.<sup>71</sup> However, their argument will most likely fall short regarding the purpose of the use of The Bean's likeness and the amount of the portion of the copyright work used as a whole.<sup>72</sup> The only differences between the two pieces are the uneven surface on the Chinese statue and the presence of LED lights underneath it.<sup>73</sup> These differences are not likely to influence a court to find there was no infringement.

If Mr. Kapoor were successful in a claim of copyright infringement, he might be disappointed with the remedies available to him under U.S. law. An injunction

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challenges still exist in a complex and uncertain environment for intellectual property right holders. *Id.* See BSA & IDC, third Annual BSA & IDC Global Software Piracy Study 4, (May 2006), available at [http://globalstudy.bsa.org/2011/downloads/study\\_pdf/2011\\_BSA\\_Piracy\\_Study-Standard.pdf](http://globalstudy.bsa.org/2011/downloads/study_pdf/2011_BSA_Piracy_Study-Standard.pdf). In 2011, China had a piracy rate of 77%, which is among the top three countries of the top twenty economies in the world. *Id.* However, this rate has dropped every year since 2005. *Id.*

<sup>65</sup> 17 U.S.C. § 501(b) (2012). "The legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right." *Id.*

<sup>66</sup> 17 U.S.C. § 101 (2012). "Sculptural works include two-dimensional and three-dimensional works . . . of art." *Id.*

<sup>67</sup> Blair Kamin, *Chinese Sculpture Bears Striking Resemblance to The Bean*, CHICAGO TRIBUNE, (Aug. 12, 2015, 6:32 PM), <http://www.chicagotribune.com/news/columnists/ct-bean-china-cloudgate-met-0813-20150812-column.html> (Last visited Oct. 18, 2015).

<sup>68</sup> 17 U.S.C. § 102(a)(5) (2012).

<sup>69</sup> 17 U.S.C. § 106(5) (2012).

<sup>70</sup> *The Bean and the Bubble, When is imitation in art flattery, and when is it theft?*, THE ECONOMIST, (Aug 29, 2015), <http://www.economist.com/news/united-states/21662539-when-imitation-art-flattery-and-when-it-theft-bean-and-bubble>. This article discusses the Chinese sculpture's inspiration as the natural oil well located in Karamay. *Id.*

<sup>71</sup> 17 U.S.C. § 107(2)(4)(2012).

<sup>72</sup> 17 U.S.C. § 107(1)(3)(2012).

<sup>73</sup> Kapoor, *supra* note 70.

would prove futile as the statue has already been completed and is on display in Karamay.<sup>74</sup> A court would most likely find it unreasonable to impound or destroy an overseas statue that violates the exclusive rights of Mr. Kapoor.<sup>75</sup> The Chinese artist would be liable for either Mr. Kapoor's actual damages and any additional profits of the infringer, or statutory damages if Mr. Kapoor elects.<sup>76</sup> Mr. Kapoor will most likely have difficulty in claiming any actual damages because he was already paid his commission for *The Bean*, and the value of the statue would not likely be lowered due to the presence of a similar statue in a small Chinese village. His best plan of attack would be to elect statutory damages to be awarded to ensure some sort of reward.<sup>77</sup> Finally, Mr. Kapoor would also be awarded recovery of costs and attorney's fees if he were to prevail.<sup>78</sup>

Mr. Kapoor would most likely prevail in his claim of copyright infringement. However, if the court were to determine that the works were fundamentally different, they could rule against Mr. Kapoor because his target audience of Chicago tourists would not be affected by a similar sculpture in China that targets an audience of Chinese citizens.<sup>79</sup>

### *B. The Bean v. The Oil Bubble Statue (Chinese Law)*

Although he is not a citizen, Mr. Kapoor is afforded the rights of the Copyright Laws of China because his country of residence, The United Kingdom,<sup>80</sup> and China are both parties<sup>81</sup> to numerous international copyright agreements.<sup>82</sup> Under Chinese law, *The Bean* would have to be categorized as a work of the fine arts in order to receive protection.<sup>83</sup>

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<sup>74</sup> 17 U.S.C. § 502 (2012).

<sup>75</sup> 17 U.S.C. § 503(a)(b)(2012).

<sup>76</sup> 17 U.S.C. § 504(a)(b)(c)(2012).

<sup>77</sup> 17 U.S.C. § 504(c)(2012). The court could award anywhere from \$750 to \$30,000. If Mr. Kapoor sustains the burden of proving the infringement was committed willfully, the award can be increased to \$150,000.

<sup>78</sup> 17 U.S.C. § 505 (2012).

<sup>79</sup> See *Cariou v. Prince*, 714 F.3d 694 (2d Cir. N.Y. 2013) (holding that twenty-five of the artworks were fair use of the copyright because they presented a new expression, meaning, or message and they were transformative by being different in aesthetics, of additional importance was the fact that the copyright owner's target audience was not usurped or poached by this fair use).

<sup>80</sup> *Anish Kapoor*, LISSON GALLERY, <http://www.lissongallery.com/artists/anish-kapoor> (last visited Oct. 24, 2012).

<sup>81</sup> *Other IP Treaties*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, [http://www.wipo.int/wipolex/en/other\\_treaties/parties.jsp?treaty\\_id=231&group\\_id=22](http://www.wipo.int/wipolex/en/other_treaties/parties.jsp?treaty_id=231&group_id=22). See also, Berne Convention, Berne (1886), PRIMARY SOURCES OF COPYRIGHT, (1450-1900) (L. Bently & M. Kretschmer Eds.) and Agreement on Trade-Related Aspects of Intellectual Property Rights, (Apr. 15, 1994); Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, The Results Of The Uruguay Round Of Multilateral Trade Negotiations 320 (1999); 18869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

<sup>82</sup> Copyright Law of the People's Republic of China (中华人民共和国著作权法) (promulgated by the Standing Comm. Nat'l People's Cong., (Feb. 26, 2010), effective Apr. 1, 2010) art. 2, 2010, [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=186569](http://www.wipo.int/wipolex/en/text.jsp?file_id=186569) (WIPO).

<sup>83</sup> *Id.* art. 3(4).

As the author of the sculpture, Mr. Kapoor is the copyright owner and has multiple rights that can be enforced, including the right of reproduction, right of revision and the right of exhibition.<sup>84</sup> There is no time limit set on the term of protection for the rights of his authorship, so Mr. Kapoor has his entire life to bring this claim.<sup>85</sup>

Similar to the defenses available to an infringer in America, the artist might have an easier defense if he were to admit to a Chinese tribunal that The Bean was an influence of his work. If the defendant could prove that it was reproduced to display or preserve a copy of the work, and they had been commissioned by a library or museum, they can use the work without Mr. Kapoor's permission and without payment of remuneration. They would only have to mention the name and title of his original work.<sup>86</sup> However, if they refuse to acknowledge the influence, they most likely would be punished under Chinese law for plagiarizing a work created by another person and exploiting that work without paying remuneration.<sup>87</sup>

Mr. Kapoor might not be satisfied with the damages award of a successful claim. The infringer would have to pay compensation for any actual losses Mr. Kapoor suffered, which would be nominal at best.<sup>88</sup> If the court finds these losses difficult to calculate, the infringer would pay Mr. Kapoor compensation in the amount he gained, which would be his commission from the Oil Bubble Statue, including his expenses in putting an end to the infringement.<sup>89</sup> The main difference between each country's damage awards is that if neither the loss of Kapoor, nor the gain of the infringer can be determined, The People's Court would then decide on compensation amounting to no more than 500,000 RMB (approximately \$78,765.60) rather than giving Mr. Kapoor the choice of statutory damages.<sup>90</sup>

Regrettably, this result seems far-fetched. "Private party enforcement of copyright protections in China have not been effective either because of a lack of favorable judgments, or infringers' abilities to elude punishment."<sup>91</sup> This is the most difficult intellectual property right to enforce in China and has been the cause of a World Trade Organization dispute before.

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<sup>84</sup> *Id.* art. 10.

<sup>85</sup> *Id.* art. 20.

<sup>86</sup> *Id.* art. 22.

<sup>87</sup> *Id.* art. 47(5)(7).

<sup>88</sup> Copyright Law of the People's Republic of China (中华人民共和国著作权法) (promulgated by the Standing Comm. Nat'l People's Cong., (Feb. 26, 2010), effective Apr. 1, 2010) art. 49, 2010, [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=186569](http://www.wipo.int/wipolex/en/text.jsp?file_id=186569) (WIPO).

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

<sup>90</sup> *Id.*

<sup>91</sup> Thomas Ross, *Enforcing Intellectual Property Rights in China*, CHINA BUSINESS REVIEW, (Oct. 1, 2012) <http://www.chinabusinessreview.com/enforcing-intellectual-property-rights-in-china/> (last visited Oct. 24, 2015) (stating that copyright infringement is the most notorious of China's intellectual property issues and has even caused the United States to bring WTO disputes in the past).

### C. “Let It Go” (U.S. Law)

The hit song “Let It Go” is afforded copyright protection because it is a musical work.<sup>92</sup> Deciding who is the owner of this copyright is more complex. The song was written by Kristen Anderson-Lopez and Robert Lopez for the movie “Frozen.”<sup>93</sup> Because they wrote this song for Disney and were paid, Disney is considered the author.<sup>94</sup> Because Disney is considered the author, it is the owner of the copyright and are the party that can decide whether or not to bring suit over infringement.

There has been no response by the composer of “The Snow and Ice Dance” in regards to the possible plagiarism that has been committed.<sup>95</sup> The strongest fair use argument in regards to musical works is often parody as seen in *Campbell v. Acuff-Rose Music, Inc.*<sup>96</sup> However, a fair use argument will not suffice in this case. The purpose and character of the use of the song is of commercial nature because it was created as a part of a bid to bring the 2022 Winter Olympics to China.<sup>97</sup> When there is a blatantly commercial purpose for the infringement, the work cannot be considered fair use unless the new work is transformative like a parody.<sup>98</sup>

If Disney were to bring a claim of copyright infringement it would most likely prevail. Disney would have to prove that the presence of “The Snow and Ice Dance” has decreased the value of “Let It Go” in any possible way. If this proves too difficult, it could request statutory damages in addition to attorney’s fees and court costs. This case could also result in criminal punishment for infringement. Because the song was created for the commercial purpose of securing the Winter Olympics, it can be considered criminal infringement.<sup>99</sup>

While the case seems to be a strong case for Disney, do not expect it to file suit anytime soon. Disney has become relatively more relaxed in its pursuit of copyright infringement claims in the digital era.<sup>100</sup> Although it has softened its stance and

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<sup>92</sup> 17 U.S.C. § 102(a)(2)(2012).

<sup>93</sup> Jason Newman, *Oscars 2014: ‘Frozen’ Track ‘Let It Go’ Wins Best Song*, ROLLING STONE, (March 2, 2014), <http://www.rollingstone.com/movies/news/oscars-2014-frozens-let-it-go-wins-best-song-20140302> (last visited Oct. 20, 2015).

<sup>94</sup> 17 U.S.C. § 201(b)(2012).

<sup>95</sup> Tom Phillips, *Chinese Winter Olympics Anthem is Rip-Off of Frozen Song, Say Online Critics*, THE GUARDIAN, (Aug. 4, 2015 8:24 AM), <http://www.theguardian.com/world/2015/aug/04/chinese-winter-olympics-anthem-rip-off-frozen-song-say-critics> (last visited Oct. 21, 2015).

<sup>96</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569,572 (1994) (holding that the district court gave insufficient consideration to the nature of parody in weighing the degree of copying, and accordingly reversing their decision).

<sup>97</sup> Wayne Beynon, *China Out in the Cold Over Alleged ‘Frozen’ Theft*, HUFFINGTON POST, (Sep. 15, 2015, 10:59 PM) [http://www.huffingtonpost.co.uk/wayne-beynon/china-frozen-let-it-go\\_b\\_8134466.html](http://www.huffingtonpost.co.uk/wayne-beynon/china-frozen-let-it-go_b_8134466.html) (last visited Oct. 24 2015).

<sup>98</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569,579 (1994) (finding that commercial character is not the only element to be used when determining fair use, and that in the case of parody, a substantial portion of the parody song can not be taken verbatim from the original).

<sup>99</sup> 17 U.S.C. § 506(a)(1)(A)-(C) (2012). This could result in imprisonment pursuant to U.S.C. 17 § 2319 Criminal Infringement of a Copyright. *Id.*

<sup>100</sup> Andrew Leonard, *How Disney Learned to Stop Worrying and Love Copyright Infringement*, SALON, (May 23, 2014, 11:43 AM), [http://www.salon.com/2014/05/23/how\\_disney\\_learned\\_to\\_stop\\_worrying\\_and\\_love\\_copyright\\_infringement/](http://www.salon.com/2014/05/23/how_disney_learned_to_stop_worrying_and_love_copyright_infringement/), (Last visited Oct. 24, 2015).

remained silent amongst the criticism of China's blatant plagiarism, Disney could always change its tune and bring suit.<sup>101</sup>

#### D. "Let It Go" (Chinese Law)

Because "Let It Go" is a musical work, it is afforded copyright protection in China.<sup>102</sup> Both Disney and the Lopezes would be considered the copyright owners because the Lopezes are the authors of the song, and Disney is a legal entity or organization enjoying the copyright.<sup>103</sup> Both owners of the copyright could bring a claim that their right of performance, right of broadcasting, right of authorship or right of adaptation had been violated.<sup>104</sup> Because this song was created in the scope of employment the copyright is afforded protection of its rights for fifty years.<sup>105</sup>

The "The Snow and Ice Dance" does not credit Disney or the Lopezes for the creation of this song, nor was remuneration paid to either party, so the work may not be used without the permission of the copyright owner.<sup>106</sup> Additionally, because this song is considered a sound recording, it was necessary for the producer of the song to receive permission from the copyright owner prior to exploiting their work.<sup>107</sup>

"The Snow and Ice Dance" is infringing on the rights of Disney and the Lopezes in multiple fashions, but the strongest case would be one for plagiarism.<sup>108</sup> The authors could face civil liabilities and be forced to cease the infringement and make a public apology to the copyright owners.<sup>109</sup> Additionally, for reproducing a sound recording, they could face criminal sanctions.<sup>110</sup> Finally, Disney and the Lopezes could seek compensation in the amount of the unlawful gains of the infringer or most likely the award of 500,000 RMB because of the difficulty in calculating these damages.<sup>111</sup> Based on the laws of China and past cases,<sup>112</sup> it would seem that the copyright owners would prevail in a claim.

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<sup>101</sup> *Id.*

<sup>102</sup> Copyright Law of the People's Republic of China (中华人民共和国著作权法) (promulgated by the Standing Comm. Nat'l People's Cong., (Feb. 26, 2010), effective Apr. 1, 2010) art. 2,3 2010, [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=186569](http://www.wipo.int/wipolex/en/text.jsp?file_id=186569) (WIPO). Because both countries are parties to numerous international agreements, copyrights created and possessed in the United States receive protection in the PRC. *Id.*

<sup>103</sup> *Id.* art. 9. *See also, id.* art. 13. Where a work is created jointly by two or more authors, the work shall be enjoyed jointly by the co-authors.

<sup>104</sup> *Id.* art. 10(2)(3)(9)(11)(14). This is not an exhaustive list of all rights that are potentially being violated.

<sup>105</sup> *Id.* art. 21.

<sup>106</sup> Copyright Law of the People's Republic of China (中华人民共和国著作权法) (promulgated by the Standing Comm. Nat'l People's Cong., (Feb. 26, 2010), effective Apr. 1, 2010) art. 22, 2010, [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=186569](http://www.wipo.int/wipolex/en/text.jsp?file_id=186569) (WIPO).

<sup>107</sup> *Id.* art. 40. A producer of sound recordings who exploits . . . a musical work . . . may do so without permission of the copyright owner, but shall, . . . pay remunerations to the copyright owners. *Id.*

<sup>108</sup> *Id.* art. 47(5). Defendant would also be liable for exploiting a work created by another person.

<sup>109</sup> *Id.* art. 48.

<sup>110</sup> *Id.* art. 48(3).

<sup>111</sup> Copyright Law of the People's Republic of China (中华人民共和国著作权法) (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 26, 2010, effective Apr. 1, 2010) art. 49, 2010.

It would seem that if the copyright owners were to bring their claims in either country they would most likely be successful. Both countries are parties to the same international agreements and their copyright laws practically mirror one another.<sup>113</sup> Where these two countries differ are in the enforcement of their copyright laws.

In China, all intellectual property rights are enforced by its judicial and administrative branches.<sup>114</sup> China has two agencies that can impose penalties for copyright infringement.<sup>115</sup> While this is seen as a valiant effort on its face, it is speculated that these agencies are used to enforce copyrights that appeal to the objectives of China's media control bureaucracy.<sup>116</sup>

Although there have been complaints from American copyright owners for the lack of protection, statistics would have you believe these complaints are unfounded.<sup>117</sup> However, due to a lack of transparency, there are many that doubt these numbers.<sup>118</sup> The number one concern foreign copyright owners face in China is whether their copyright will be enforced.

#### IV. PROPOSAL

In order to allow international copyright holders to feel comfortable with the rights afforded to them in copyright protection, there needs to be stricter enforcement in the copyright laws of China. China needs to use these laws for copyright protection, as they were meant to be used. One way this could be done is to have copyrights enforced strictly through their specially designed Intellectual Property courts<sup>119</sup> rather than Chinese administrative agencies.<sup>120</sup> A last-ditch effort could be

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<sup>112</sup> *The Walt Disney Company, U.S. v. Beijing Publishing Press, etc.*, Shanghai Nui Di Law Firm (June 6, 2015), (Holding that United States citizens are protected by Chinese laws.

<sup>113</sup> See 17 U.S.C. §101, *et seq*; see also, Copyright Law of the People's Republic of China (中华人民共和国著作权法) (promulgated by the Standing Comm. Nat'l People's Cong., (Feb. 26, 2010), effective Apr. 1, 2010) 2010.

<sup>114</sup> Heidi Hansen Kalscheur, "About Face": *Using Moral Rights to Increase Copyright Enforcement*, 39 HASTINGS CONST. L.Q. 513, 519 (2012) (citing YU ZINGZHONG, *Western Constitutional Ideas and Constitutional Discourse in 2005*, in BUILDING CONSTITUTIONALISM IN CHINA 66 (Palgrave Macmillan, 2009)).

<sup>115</sup> Amy Rosen, *China vs. United States: A Cosmopolitan Copyright Comparison*, 15 PGH. J. TECH L. & POL'Y 1, 10 (listing the two enforcement agencies as the National Copyright Administration, which handles nationwide cases, and the State Administration for Industry and Commerce, which handles localized cases).

<sup>116</sup> Stephen McIntyre, *The Yang Obeys, But The Yin Ignores: Copyright Law Suppression In The People's Republic of China*, 29 UCLA PAC. BASIN L.J. 75, 124 (stating that the agencies overlap with government units charged with regulating media content, and thus, take a backseat to censorship efforts).

<sup>117</sup> Rosen, *supra* note 115 at 12, (stating Chinese intellectual property cases have increased from 2,491 cases in 2003, to 87,419 in 2012, however the number of foreigners bringing these cases only consisted of 2.5% of the total cases in 2006 to 3.28% in 2011).

<sup>118</sup> See *id.* (stating that it has been speculated the Chinese government may be intentionally boosting the statistical data when it comes to domestic intellectual property filings in order to show the world that Chinese companies are becoming increasingly innovative).

<sup>119</sup> *Id.* at 19 (citing *IPR Toolkit: Protecting your Intellectual Property Rights (IPR) in China*, EMBASSY OF THE UNITED STATES, BEIJING, CHINA, [http://beijing.usembassychina.org.cn/protecting\\_ipr.html](http://beijing.usembassychina.org.cn/protecting_ipr.html)).

<sup>120</sup> McIntyre, *supra* note 116 at 124.



to seek out trade sanctions against the Chinese. Another, less harsh solution is to convince the Chinese people and government that enforcement of copyright protection is in their best interest.<sup>121</sup>

Empowering Chinese administrative agencies to enforce copyrights results in an abuse of power and discretion. There are agencies that interpret the Copyright law, investigate copyright disputes, and hand out punishments on both a national, and a statewide level.<sup>122</sup> These administrative agencies are “embedded within a [system] that concerns itself with the cultural, ideological, and value-laden media.”<sup>123</sup> This results in copyright enforcement being used as a weapon that the government can use to censor what it wants.

Chinese tribunals should have sole power in enforcing copyright laws, however, there is still work that needs to be done to make this more efficient. Chinese courts use an inquisitorial judicial system where the judges determine the facts themselves, rather than overseeing two opposing lawyers.<sup>124</sup> This can be problematic when determining complex intellectual property matters such as copyright laws, even if they are being heard in specialized tribunals. A major problem with this route is the fact that the Chinese court system is not a common law system like the United States.<sup>125</sup> This means that it does not take into account past cases and precedents that have been set before them: each case is a new issue separate from the last.

The Chinese government should consider keeping the powers of the administrative agencies and the courts separate. They can utilize the agencies to investigate copyright disputes, but when it comes to interpreting the laws and administering remedies, it should rest solely in the hands of the specialized tribunals. These tribunals were created to work specifically on intellectual property cases, and with formal training in each issue they should be prepared to handle any case that comes in front of them.

If there is no reform in the handling of copyright cases by the Chinese government, the United States’ last-ditch effort would be attempting to raise sanctions through the World Trade Organization or another international agency.<sup>126</sup> While sanctions can be seen as extreme,<sup>127</sup> they have been proven beneficial in

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<sup>121</sup> Rosen, *supra* note 115. “A second solution is to use elements of Chinese culture to “re-educate” its population about the importance of intellectual property and why it should be protected.” *Id.*

<sup>122</sup> McIntyre, *supra* note 116 at 125.

<sup>123</sup> *Id.*

<sup>124</sup> Rosen, *supra* note 115 (citing Gregory S. Kolton, Comment, *Copyright Law and the People's Courts in the People's Republic of China: A Review and Critique of China's Intellectual Property Courts*, 17 U. PA. J. INT'L ECON. L. 415, 450 (1996)).

<sup>125</sup> Ross, *Enforcing Intellectual Property Rights in China*, CHINA BUSINESS REVIEW, (Oct. 1, 2012), <http://www.chinabusinessreview.com/enforcing-intellectual-property-rights-in-china/> (last visited Nov. 13, 2015).

<sup>126</sup> Charles Baum, *Trade Sanctions and the Rule of Law: Lessons From China*, 1 STANFORD J. OF E. ASIAN AFFAIRS 57, Spring 2001. This would not be the first time the U.S. has imposed or threatened to impose sanctions on China. *Id.* In 1996 acting United States Trade Representative Barshevsky released a list containing \$3 billion worth of Chinese goods, which would be sanctioned if China did not take steps to improve implementation of a 1995 agreement. *Id.* Chinese officials threatened retaliatory sanctions on a similar scale. *Id.* As before, The U.S. and China reached a last-minute deal in June 1996. *Id.*

<sup>127</sup> Donald Harris, *The Honeymoon is Over: Evaluating the U.S.-China WTO Intellectual Property Complaint*, FORDHAM INT'L. L.J. 32, 98, available at

furthering agreement talks when it comes to creating stronger intellectual property right enforcement policies in China.<sup>128</sup> However, further examination has shown that while these sanctions can sway the policies of Chinese officials and affect legislative policies, they still do not fix the problems that exist in the Chinese infrastructure to be seen as a long-term solution.<sup>129</sup>

What could be seen as the true culprit behind the lack of enforcement in intellectual property rights in China is that piracy has become a part of Chinese culture and a large part of local towns' economies.<sup>130</sup> Chinese culture has been largely influenced by Confucianism, which emphasizes that writers should replicate rather than compose as a way to respect one's ancestors.<sup>131</sup> These Confucian ideals almost expressly approve of violating intellectual property rights of others, and condone the acts.<sup>132</sup>

This would seem to suggest that the best way to increase intellectual property rights would be to educate the Chinese citizens, but this has already been attempted.<sup>133</sup> Considering that we are facing the same problems now that we faced in 1995, this is not an easily obtainable solution.<sup>134</sup>

The most realistic and convincing solution is to convince Chinese officials that they can become an even stronger economic power across the globe if they were to increase intellectual property rights enforcement. So far all outside pressure to reform Chinese intellectual property laws and enforcement strategies have come from the United States and other countries that are seeking economic protection for their own citizens.<sup>135</sup> "The United States needs to convince Chinese leaders why economic integration will benefit China and improve its standing in the international

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<http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2190&context=ilj>. Beyond the legal merits of the dispute, the complaint may threaten already fragile U.S relations with China as evidenced by mounting domestic dissatisfaction with China's role in the global trading system and China's staunch resistance to U.S. Pressure to reform its legal regime. *Id.*

<sup>128</sup> Baum, *supra* note 126 at 57-58. After the 1996 agreement China was also moved from the "Priority Foreign Watch" list to the less extreme "Watch List." *Id.*

<sup>129</sup> *Id.* at 58

<sup>130</sup> *Id.* The trade in counterfeit goods has become "a vital portion of some local economies, providing employment of otherwise unemployable workers and generating significant revenue for the local economy." *Id.*

<sup>131</sup> Rosen, *supra* note 115 at 22. "Replicating is not considered 'plagiarism,' but rather a way to properly preserve the record and respect one's ancestors." *Id.* Moreover, replication is viewed as an important means of learning, allowing one to master a subject." *Id.*

<sup>132</sup> *Id.* "The anti-litigation nature of Confucianism demonstrates that it implicitly approves of copying works of art, while concurrently discourages people from using a legal system for enforcement . . . In Confucianism, honoring one's parents and elders is much more important than any legal system." *Id.*

<sup>133</sup> *Id.* at 26. "In 1995, there was an Action Plan, which called for education, followed by the signing of a seven-year agreement between the Shanghai Municipal People's Government, Shanghai Intellectual Property Administration, and the American International Education foundation in an effort to strengthen intellectual property rights." *Id.*

<sup>134</sup> *Id.* at 27. "Changing social norms is . . . a very complex challenge. People generally comply with laws when the majority feel that the rest of society is also cooperating and that the results . . . are equitable." *Id.*

<sup>135</sup> Rosen, *supra* note 115 at 28. "China is hesitant to have a strict intellectual property right regime because it was mainly benefit foreigners, not Chinese citizens." *Id.*

community.”<sup>136</sup> If copyright and other intellectual property rights allowed Chinese citizens and the government to profit, then there is a chance that we might see an increase in enforcement. China needs to look towards Japan and other countries<sup>137</sup> to see how this could be accomplished.<sup>138</sup>

Copyright and other intellectual property enforcements needs to be incentivized in some way.<sup>139</sup> “If the Chinese government could find a profitable niche industry that necessitates the development of intellectual property, then China would have more incentive to protect IPR.”<sup>140</sup> Besides an industry and monetary surge, China could create millions of jobs if it were to enforce intellectual property rights.<sup>141</sup>

Another way to convince Chinese officials to enforce intellectual property rights is to point out the harm it does to Chinese citizens that have their own works infringed upon. Chinese authors are just as vulnerable as foreign authors to piracy.<sup>142</sup> Additionally, it is not only Chinese authors that are harmed; entrepreneurs, businessmen, and investors fear bringing their business into the country due to piracy concerns.<sup>143</sup> We must be able to communicate to the Chinese

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<sup>136</sup> *Id.* at 29. “Doing so could help China increase international business transactions and become more legitimate as a world player.” *Id.*

<sup>137</sup> *Id.* at 30. “There are other economies in regions such as Hong Kong, Singapore, South Korea, and Taiwan that show how other Asian countries have benefited and profited from having greater IPR protections.” *Id.*

<sup>138</sup> *Id.* at 29.

Japan has improved [IP protection] considerably in the last two decades. The original Copyright Act in Japan did not protect programming language, rules or algorithms for computer and software programs. In the 1970s and 1980s Japan became a major player in the consumer electronics and computer industries. Because of this, the Copyright Act was amended in 1986 to include protection for circuit layouts of semiconductor integrated circuits. Such protections allowed Japan to focus on the success of these growing industries, which led to increases in foreign investment and an average of four percent real economic growth in the 1980s.

*Id.*

<sup>139</sup> Kenneth Rapoza, *In China, Why Piracy Is Here To Stay*, FORBES, (Jul. 22, 2012, 9:47 p.m.), <http://www.forbes.com/sites/kenrapoza/2012/07/22/in-china-why-piracy-is-here-to-stay/> (last accessed Nov. 20, 2014).

Until IP infringement is seen as an immediate threat to economic success, or advanced as a vital state interest, few will really care whether Windows 8 is a knock off, or if the X Box 360 sold in Shanghai is being hacked to allow for a pirated version of 2K Sports NBA Basketball.

*Id.*

<sup>140</sup> Rosen, *supra* note 115 at 30.

<sup>141</sup> *Id.* “For example, one study from 2006 by the Business Software Alliance suggests that ‘China could create 2.6 million new jobs in information technology if piracy was sharply reduced.’” *Id.*

<sup>142</sup> *Id.* “Chinese authors have to battle both piracy within China and the competition between their products and pirated works from abroad.” *Id.*

<sup>143</sup> Rosen, *supra* note 115 at 30-31. “As China’s free market continues to grow, piracy hurts the entire Chinese population, and not just wealthy businessmen or foreigners. Counterfeiting goods results in billions of dollars’ worth of losses, as foreign investors are deterred from entering the Chinese markets.” *Id.*

officials that it is in the best interest of their government, and of their people to protect copyright and other intellectual property rights.<sup>144</sup>

## V. CONCLUSION

Chinese and American copyright laws are substantially similar.<sup>145</sup> When China amended its Copyright Laws in 2010, it updated its statutes to offer more protection to copyright owners in its country and abroad.<sup>146</sup> These amendments were completed in order to elevate China's laws to the level of protection required by its membership in the Berne Convention and Trips Agreement.<sup>147</sup>

The largest problem facing copyright owners is the lack of enforcement of the Copyright Law in China.<sup>148</sup> In order to fix this problem China needs to either reform its enforcement program and allow the judiciary to handle all cases,<sup>149</sup> ensure that the judges are specifically trained in these complex issues or stress that they emphasize past precedent, and finally educate the Chinese people<sup>150</sup> on the importance of copyright law enforcements, which is the strongest option.<sup>151</sup> If these remedies are not sufficient, the United States could turn to sanctions, which it has not been shy to do in the past.<sup>152</sup>

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<sup>144</sup> *Id.* at 31. "By communicating to the Chinese that piracy is not just a question of robbing a distant foreign company, but a pervasive problem with real consequences at home, the incentive to combat piracy will increase dramatically." *Id.*

<sup>145</sup> Christopher Beam, *Bootleg Nation: How Strict are Chinese Copyright Laws?*, SLATE, (Oct. 22, 2009, 6:16 PM), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2009/10/bootleg\\_nation.html](http://www.slate.com/articles/news_and_politics/explainer/2009/10/bootleg_nation.html) (Last accessed Nov. 19 2015). "For the most part, China's statutes resemble those in the United States. You can't steal or profit from someone else's work. If you do, the injured party can either alert the agency in charge . . . or sue you in court." *Id.*

<sup>146</sup> Rose Liu, *Amendments to China's Copyright Law Strengthen Author and Owner Protections*, MWE CHINA LAW OFFICES, <http://www.mwechinalaw.com/news/2010/chinalawalert0610c.htm> (Last accessed Nov. 19, 2015). "PRC's Amended Copyright Law increases protections for copyrighted works in China, including works that may not have been or cannot be officially published in the country." *Id.*

<sup>147</sup> *Id.* "Such amendments . . . have been made to improve the law and increase its alignment with provisions of the Berne Convention and the TRIPS Agreement of the World Trade Organization." *Id.*

<sup>148</sup> Daniel Dimov, *Differences in Copyright Enforcement between the U.S. and China*, INFOSEC INSTITUTE. "China enforces its copyright laws less strictly than the U.S. A clear indicator of the weak enforcement of copyright laws in China is a report published by the International Intellectual Property Alliance . . . which found ninety percent of DVDs distributed in China are unauthorized copies." *Id.*

<sup>149</sup> Rosen, *supra* note 115 at 18. "The first [possible] solution is to encourage an independent judiciary to properly conduct copyright lawsuits, focusing on some of the procedural issues that make Chinese legal proceedings problematic." *Id.*

<sup>150</sup> *Id.* "Local protectionism poses a major obstacle in combating . . . piracy since provincial governments have the task of enforcing the copyright laws at the local level." *Id.*

<sup>151</sup> Rosen, *supra* note 115 at 28. "Doing so could help China increase international business transactions and become more legitimate as a world player . . . If protecting IPR would allow Chinese citizens and the PRC to make money, then IPR might be better enforced." *Id.*

<sup>152</sup> Harris, *supra* note 127, at 95. "China's failure to protect intellectual property rights has prompted the United States, after many failed negotiations to file a WTO complaint against China." *Id.*

Short of issuing sanctions, there is not much more that America can do. China will not be quick to embrace western ideals influencing its court system, nor is it likely to reduce the duties of China's administrative agencies. We need to convince Chinese officials that it is in their best interest, as well as ours, to enforce copyright laws and have similar enforcement modes. Copyright enforcement is not an issue that we can shrug our shoulders and say "let it go."