Here There Be Pirates: How China is Meeting Its IP Enforcement Obligations under TRIPS

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I. INTRODUCTION

Comprising nearly 100 million workers and more than one billion consumers, China is a force to be reckoned with for many foreign businesses. China is undergoing expansive economic growth, more than doubling in the past decade to become the fourth largest economy in the world. This economic growth is expected to continue to an economic output of four trillion dollars by 2020. In addition, China shows particular strength in a number of key markets. It is now the third largest market in personal computers, the second largest market in telecommunications, and the seventh largest market in healthcare.

1. Sean Foote, Don't Invest in China, VENTURE CAPITAL J., Oct. 1, 2005, at 43 (arguing that investment in China is dangerous despite the temptations of its growing economy).

2. Juan Gonzalez, From Piracy to Profitability: Re-thinking IP Rights Protection in China, 45 NATIONAL CONTRACT MANAGEMENT 8, 8 (2005) (providing advice to businesses to help protect their intellectual property in China).

3. But see Peter K. Yu, Take a New Look at Chinese Market; Foreign Companies Need Diverse Strategies, DETROIT FREE PRESS, Nov. 18, 2005, at 17 (arguing that China's consumer market is small because many Chinese citizens have limited disposable income).


5. Keith Bradsher, China Reports Another Year of Strong (or Even Better) Growth, N.Y. TIMES, Jan. 25, 2006, at C5 (arguing that China's growth may be even greater than the reported nearly ten percent per year). China is the fourth-largest economy behind the United States, Japan, and Germany. It recently passed France, Britain, and Italy. Id. China's rate of expansion is three times that of the United States. Foote, supra note 1.


However, for many foreign businesses, along with such growth comes fear—fear that China will not protect intellectual property rights (IP). Businesses divide their concerns regarding IP infringement between piracy and counterfeiting. Pirated products infringe copyrights, while counterfeited products infringe patents, trademarks, and any additional intellectual property rights other than copyrights. The specific terminology is usually unimportant and often used interchangeably. In either situation an unauthorized user makes or sells products that violate the IP rights of another. The statistics are staggering. Ninety percent of the music and movies available in China are pirated copies, and in 2003 sixty-five percent of the counterfeit goods seized in the United States came from China. While IP theft brings China nearly $16 billion dollars annually, it costs U.S. companies $250 billion a year. Moreover, infringement prompts national security fears when unauthorized Chinese entrepreneurs copy and export powerful U.S. scientific and engineering software to nations such as Libya and North Korea in violation of U.S. government regulations.

(Harbhajan S. Kehal & Varinder P. Singh, eds., 2005) (discussing a research study focusing on the Chinese culture’s influence on e-commerce development).


10. Also abbreviated as IPR in other sources.


16. John Schwartz, Black Market for Software is Sidestepping Export Controls, N.Y. TIMES, Dec. 2, 2002, at C1 (describing the black market for scientific and
Despite these problems, foreign companies cannot afford to ignore China’s massive population and growing economy. China will certainly remain a major trading partner with the developed nations.\(^\text{17}\) This paper will examine whether China is meeting its obligations to protect IP rights under the TRIPS agreement, an international intellectual property trade agreement China acceded to upon joining the World Trade Organization (WTO).\(^\text{18}\) Moreover, it will address whether China’s increased IP protection in law equals increased protection in fact. Part II will describe China’s legal structure, its TRIPS obligations upon joining the WTO, and China’s IP laws. Part III will discuss China’s enforcement of these IP laws from the perspective of developed nations and from China’s own perspective. Part IV includes suggestions on how China can improve its enforcement of IP in order to fulfill its obligations, how foreign governments can encourage China to better protect IP, and how foreign businesses can protect their own IP within the current framework.

**II. CHINA SIGNIFICANTLY CHANGED ITS WRITTEN IP LAWS TO COMPLY WITH WTO OBLIGATIONS UNDER TRIPS**

All WTO members are required to alter their IP laws to meet specific obligations outlined in TRIPS. The following section discusses China’s transition to a WTO member country and its efforts to modify Chinese IP laws to comply with TRIPS. This modification has been a far greater challenge to developing China than it was to many other developed nations. To understand why, one must first examine China’s legal structure.

\[A. \text{China’s Multi-Tiered Legal Structure and Emphasis on the “Rule of Man” Create Challenges to Complying with Western-Inspired International Agreements}\]

Throughout its history, China has been an “autocratic, bureaucratic, centralized system which faced the same problems Chinese governments had always faced—those arising from attempting to govern a huge area engineering software so powerful that it is subject to export restrictions, such as those used to design nuclear reactors).


with an enormous population...19 Today China’s legislative system is divided into two tiers: (1) the National People’s Congress the central Chinese legislature;20 and (2) the local people’s congresses and committees in provincial, autonomous regional, and municipal city governments and the State Council governments.21

The court system is divided into four tiers. The Supreme People’s Court is the highest tier court in China. It is China’s central court and is overseen by the National People’s Congress.22 The Higher People’s Courts, which are provincial courts, make up the second tier.23 The third tier consists of Intermediate People’s Courts, representing courts in the provincially administered cities.24 These three tiers are jointly referred to as the Special People’s Courts.25 The fourth tier includes the Basic-Level People’s Courts at the town and county level.26 An individual bringing suit in any level People’s Court may appeal to a court in a higher tier, but the verdict from the second court is final.

In addition, China designated courts in the Special People’s Courts to deal specifically with IP matters. IP litigation should be initiated in the Intermediate People’s Courts in the city where the infringement took place or where the infringers reside.27 The Beijing Intermediate Courts have exclusive jurisdiction over cases granting or revoking IP rights.28 However, cases involving infringement alone do not fall within this

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20. The National People’s Congress enacts laws, supervises the enforcement of laws, amends the constitution, and nominates presidents of the Supreme People’s Court. DELI YANG, INTELLECTUAL PROPERTY AND DOING BUSINESS IN CHINA 86 (Pervez N. Ghauri ed., 2003).
21. Id. at 86–87.
22. Id. at 96–97. The National People’s Congress nominates and removes presidents of the Supreme People’s Court. Id. at 86.
23. There are 33 Higher People’s Courts. Id. at 97.
24. There are 381 Intermediate People’s Courts. Id.
25. Id. at 96.
26. There are nearly 3,000 Basic-Level People’s Courts. Id. at 97. Outside the four-tier court system, tribunals assist people in remote areas. There are more than 17,000 of these tribunals. Id.
27. Id.
category. Thus, many IP cases may still be brought in courts outside the Beijing Intermediate Courts.

Injured IP holders may also choose to bring IP infringement actions before an administrative agency rather than litigating in court. In fact, this process is more common than litigation.\(^29\) Three important Chinese administrative IP organizations are worth noting. First, the State Intellectual Property Office (SIPO) examines patent applications. A subdivision within SIPO, the Patent Re-examination Board, re-examines rejected applications. Both SIPO and the subdivision Patent Re-examination Board resolve disputes.\(^30\) Second, the Trademark Office under the State Administration for Industry and Commerce (SAIC) undertakes examination, registration, administration, and cancellation of trademarks. Only the Trademark Review and Adjudication Board, a subdivision within SAIC, resolves disputes.\(^31\) Third, the State Copyrights Administration (SCA) regulates copyrights and oversees infringement investigations.\(^32\) Provincial organizations assist SIPO, SAIC, and SCA.\(^33\) The People’s Courts may review these Administrative decisions.\(^34\)

The Chinese system provides a number of different dispute settlement options making litigation usually the last choice.\(^35\) Arbitration is generally preferred over litigation.\(^36\) Arbitration requires parties to submit their dispute to a non-governmental arbitration institution.\(^37\) Parties may also engage in consultation on their own or may attempt mediation with the assistance of a third party.\(^38\) The third party may be a private party or it may be one of the administrative IP organizations discussed above. Consultation and mediation are the most preferred methods due to their

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30. YANG, supra note 20, at 93. The separate State Drug Administration protects pharmaceuticals. Id. at 95.
31. Id. at 94. For more on initiating a complaint with the local AIC, see Alisa Cahan, Note, China’s Protection of Famous and Well-Known Marks: The Impact of China’s Latest Trademark Law Reform on Infringement and Remedies, 12 CARDOZO J. INT’L & COMP. L. 219, 233 (2004) (arguing that China’s IP laws inadequately protect well-known trademarks).
32. YANG, supra note 20, at 95. The China Copyright Protection Centre deals specifically with computer copyrights. Id.
33. Id. at 93-95.
34. Sun, supra note 28 at 285.
35. YANG, supra note 20, at 101.
36. Schiappacasse, supra note 29, at 178.
37. YANG, supra note 20, at 100.
38. Id. at 99.
relative simplicity of implementation and their emphasis on compromise and harmony.  

Cultural influences are an important consideration to understanding the state of IP law in China. One concept of central importance is that the Chinese people do not consider the “rule of law” as important as the “rule of man.” Academic experts rarely argue that the rule of law is superior to the rule of man. Instead, they note that this difference in perspective presents challenges for the Chinese to adapt to Western-inspired laws, such as those required by TRIPS. However, not all scholars agree. Some contend the Chinese do not necessarily hold the rule of man to be superior to the rule of law. Yet, the weight of authority supports the argument that Chinese citizens generally place stronger emphasis on the rule of man. As explained by an attorney of Chinese descent, “law is not enough to govern a society.”

Under the rule of law, law must be more important than the individuals in charge or the party in power. The rule of law requires a set of rules and punishments to induce people to behave, perhaps under the assumption that it is impossible to expect people to be good without guidance. Throughout history, the Chinese viewed the rule of law unfavorably because they felt that people who understood their normative roles in society had no need for litigation and punishment; people should behave properly without the threat of punishment. This distaste for the rule of law has survived throughout China’s history. It can be traced from the Western Zhou period thousands of years ago through the time

39. Id. at 100.
40. “For a Western-trained lawyer encountering Chinese law for the first time, a reaction other than perplexity is a bad sign—it means that one has not really grasped the depth of the problem of understanding.” Donald C. Clarke, Puzzling Observations in Chinese Law: When Is a Riddle Just a Mistake?, in UNDERSTANDING CHINA’S LEGAL SYSTEM: ESSAYS IN HONOR OF JEROME A. COHEN 93, 93 (C. Stephen Hsu ed., 2003).
42. See generally Pat K. Chew, The Rule of Law: China’s Skepticism and the Rule of People, 20 OHIO ST. J. ON DISP. RESOL. 43 (2005) (discussing that the rule of law is not necessarily better than the rule of man in China’s view, despite the West’s assumptions otherwise).
43. Jones, supra note 19, at 7 (quoting Professor Jerome A. Cohen, in turn quoting an unnamed Hong Kong barrister of Chinese descent).
of Confucian society and continuing through recent Communist China. Because the state made most of society’s decisions in China, law was less important. People did not need to sue each other to resolve disputes; the government would decide for them. However, the rule of law is integral to a market economy, which China appears to be entering at full throttle. As a member of the WTO, China will have to face this cultural and legal chasm.

China also faces numerous logistical problems relating to its legal system that it must overcome in order to meet its WTO obligations. Currently, China lacks qualified legal personnel. This is primarily due to the fact that China’s legal profession was eliminated during the start of the communist era and only resumed twenty-five years ago. China lacks qualified judges as well as attorneys. In fact, many judges do not have a full legal education and do not have time for the training required to allow them to fully grasp legal concepts.

Another logistical problem China must address is arbitrary enforcement of IP laws. There are three primary reasons for this. First, China’s government is too decentralized to adequately supervise enforcement. China has thirty regions throughout its “vast” landmass. China exhibits severe regional disparity compared to other countries, and it experiences considerable lack of coordination between the administrative agencies.

46. Lichtenstein, supra note 44, at 284.
47. Id. at 287.
48. The personnel problem varies by geographic area. For example, Beijing and Shanghai courts and attorneys are more experienced in IP issues. Dennis S. Fernandez, China’s IP Is Not Entirely Out of the Haze Yet, 10 INTELLECTUAL PROPERTY STRATEGIST No. 6, Mar. 18, 2004, at 1 (warning businesses of specific problems in China’s IP laws).
49. Schiappacasse, supra note 29, at 179.
50. YANG, supra note 20, at 159. A Chinese law professor explains that few judges have worked on IP cases for more than five or ten years. IPR Judicial System in Need of Review, BUS. DAILY UPDATE, Feb. 16, 2006, available on LexisNexis.
53. YANRUI WU, CHINA’S ECONOMIC GROWTH: A MIRACLE WITH CHINESE CHARACTERISTICS 49 (2004). Business should also be aware that Chinese patents, for example, are not protected in Hong Kong or Macao because they have their own systems. Fernandez, supra note 48.
55. Andrew Evans, Comment, Taming the Counterfeit Dragon: The WTO, TRIPS, and Chinese Amendments to Intellectual Property Laws, 31 GA. J. INT’L & COMP. L. 587,
Second, many of China’s local officials are biased. They have been known to resist enforcing IP laws if such enforcement could injure the local region’s important sources of income and employment. As one Chinese customs director said, “We have to strike the right balance between enforcing anti-piracy regulations and encouraging economic development.”

Further, local governments occasionally go so far as to tell local citizens how to beat claims of infringement. Not even the judiciary is independent; the local governments control their finances and personnel allocations.

The third problem leading to arbitrary enforcement is outright corruption. Even the Chinese government admits bribery is a problem. The cultural tradition of “favor for favor” is sometimes extended beyond its limits, transforming from gifts of gratuity to simple bribery. Further, the People’s Liberation Army and government officials own many of the factories guilty of infringement; local officials of lower rank are unlikely to punish them. All of these problems lead businesses to avoid litigation in China because they fear revenge from local officials.

Perhaps the most important issue China faces is that IP law is a still a relatively new concept to the Chinese culture. Although early China provided intellectual protections for such things as calendars, weaving, and winemaking, China generally survived without IP laws. In fact, Confucius encouraged people to learn by copying and imitation, which
is the antithesis of IP protection. The recent history of China’s IP laws is erratic at best. The first trademark law in 1904 was immediately invalidated. Later, in the period between 1911 and 1949 when the Nationalist Party controlled China, it re-introduced trademark law along with copyright and patent laws. However, when the Communist Party took over, they eliminated IP laws in exchange for a reward system for inventions. Because “owning property is tantamount to sin” in a socialist society, the Communists emphasized national control rather than private ownership. Then, during the Cultural Revolution, the Communist Party removed even this limited reward system, leaving China with no legal forum of encouragement to create IP. Over the years, the Communist system led to the perception that law was the responsibility of the government, not of the people. It is unlikely that a people with little concept of personal property and no stake in the law could expect their ideas and inventions to be protected during this period.

Yet, in 1979 China began to create IP laws as a part of its “Opening to the Outside” world. When Deng Xiaoping became leader, he decided economic strength could be the source of China’s power. In the past quarter century, China changed from a country with practically no IP protection to one with a “broad and systematic” IP structure. Before joining the WTO, China joined the World Intellectual Property Organization and acceded to a number of IP treaties, including the Paris Convention, the Madrid Agreement, the Integrated Circuits Treaty, and the Berne Convention. China established administrative agencies and enacted

67. YANG, supra note 20, at 18.
68. Id. at 20.
69. Id. at 20.
70. Id. at 20.
71. For a discussion on the socialist legal system, see generally Palmer, supra note 52.
72. YANG, supra note 20, at 21.
73. Yu, The Second Coming, supra note 45, at 18.
74. YANG, supra note 20, at 21-22. For example, the copyright regulations served to benefit publishing houses owned by the government rather than individual artists. Id. at 22.
75. Id. at 22-23.
76. Id. at 24.
77. Id. at 25.
78. Jones, supra note 19, at 39.
79. Yu, The Second Coming, supra note 45, at 22.
80. Id. at 26. A discussion of the scope of these treaties is beyond the scope of this comment.
81. Id. at 32. The United States felt China was not living up to its obligations under these agreements and threatened trade sanctions, which led to the Sino-U.S. Agreement on the Protection of Intellectual Property. See generally Peter K. Yu, From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century, 50 AM. U.L. REV. 131 (2000).
laws for patents, trademarks, and copyrights. Thus began the current system.

B. China’s Current IP Laws Enacted After Joining the WTO Comply with the Literal Requirements of TRIPS

“The [WTO] is the only global international organization dealing with the rules of trade between nations. . . . The goal is to help producers of goods and services, exporters, and importers conduct their business.”

The WTO serves as a forum to negotiate and settle trade disputes. Moreover, WTO membership carries significant clout; member countries make up more than 97% of world trade. China joined the WTO, on December 11, 2001 after fifteen years of negotiations, becoming the only communist nation among the “major” WTO members. China received numerous benefits upon joining the WTO, including increased foreign investment and increased cooperation among member nations based on their mutual promises to abide by international rules. In exchange, the WTO required China to fulfill certain obligations in order to join.

China fulfilled one important WTO obligation by accession to the TRIPS Agreement, covering intellectual property. TRIPS membership


83. JAN HOOGMARTENS, EC TRADE LAW FOLLOWING CHINA’S ACCESSION TO THE WTO 9 (Ross Buckley ed., 2004) (discussing trade issues from the perspective of the European Communities).

84. YANG, supra note 20, at 78.


86. Yu, The Second Coming, supra note 45, at 3.

87. Halverson, supra note 85, at 320.

88. YANG, supra note 20, at 35.

89. TRIPS, supra note 18.

90. YANG, supra note 20, at 35.
requires compliance with other international intellectual property agreements, such as the Paris Convention, dealing with trademarks and other rights, and the Berne Convention, dealing with copyrights. The objectives of TRIPS are to protect and enforce IP rights in order to promote technological innovation and dissemination of technology. With some minor exceptions, China must treat the nationals of member countries as favorably as it treats its own nationals ("national treatment"), and any advantages China gives to the nationals of one member country must also be given to nationals of all other member countries ("most-favored nation treatment").

TRIPS spells out narrower obligations for each of the major IP categories. Patents are protected under articles 27-34. Patent law protects inventions. Inventions are described as novel ideas to solve specific problems in the field of technology. The government grants the patent holder an exclusive right to prevent others from using the invention without the inventor's authorization for a given period of time, usually twenty years. Two common examples of patents are machines and manufactured drugs. Patents allow inventors to exclude others from making, using, or selling the same invention even if a third party later made that invention independently without copying the patented invention.

TRIPS requires certain minimum standards for IP protections. However, members implementing TRIPS generally may choose to exceed these standards. For example, under TRIPS, a patent lasts for twenty years from the filing date, but a member nation may choose to provide a longer term of protection. Under TRIPS, an invention must be new, non-obvious ("involve an inventive step"), and useful ("capable of industrial application") in order to receive a patent. Members may exclude inventions from patentability in order to protect the public order or morality, to protect life, and to avoid prejudice to the environment. TRIPS allows limited

91. Members must comply with the Paris Convention. TRIPS art. 2. Members' copyright laws must also comply with art. 1-21 of the Berne Convention. TRIPS art. 9.
92. TRIPS art. 7.
93. TRIPS art. 3.
94. TRIPS art. 4.
95. TRIPS arts. 9-40.
96. TRIPS arts. 27-34. TRIPS protects other categories of IP, which are beyond the scope of this comment. See TRIPS art. 25-26 (industrial designs); TRIPS arts. 35-38 (layout-designs of integrated circuits); TRIPS art. 39 (protection of undisclosed information); and TRIPS art. 40 (control of anti-competitive practices in contractual licenses).
97. YANG, supra note 20, at 42.
98. Id.
99. TRIPS art. 1(1).
100. TRIPS art. 33.
101. TRIPS art. 27(1).
102. TRIPS art. 27(2). TRIPS art. 27(3) describes specific categories of inventions that may be excluded from patentability, at the discretion of the member nation.
exceptions for third parties to use the patent if such use does not unreasonably conflict with normal use of the patent and does not unreasonably prejudice the patent holder’s interests.\textsuperscript{103}

Today, China’s Patent Law\textsuperscript{104} follows many of the TRIPS requirements. It allows patents for inventions, utility models, and designs.\textsuperscript{105} The current law provides for injunctions when the patentee has evidence that another party is infringing or will soon do so.\textsuperscript{106} It also has a stricter standard for allowing compulsory licenses than in previous versions of the Patent Law.\textsuperscript{107}

However, the current law contains some problematic aspects. For example, without defining “social morality,” article five states, “[n]o patent right shall be granted for any invention-creation that is contrary to the laws of the State or social morality or that is detrimental to the public interest.”\textsuperscript{108} This is both broader and vaguer than TRIPS,\textsuperscript{109} which allows the exclusion of patents when necessary to protect the (undefined) public order or morality as long as the exclusion is not made merely because the exploitation is prohibited by the member’s law.\textsuperscript{110} The “contrary to the laws of the State” language in the Chinese law seems to directly contradict this TRIPS limitation.

Further, despite language requiring novelty and inventiveness as compelled by TRIPS,\textsuperscript{111} many patents are granted without examination of originality.\textsuperscript{112} Moreover, the Patent Law allows compensation to patentees based on either the losses suffered by the patentee or the profits the infringer has earned.\textsuperscript{113} If the latter calculation is used, damages based on the cheaper

\textsuperscript{103} TRIPS art. 30.
\textsuperscript{106} Patent Law of China art. 61. Accord TRIPS art. 44 (Injunctions).
\textsuperscript{107} Yu, The Second Coming, supra note 45, at 28. See also Patent Law of China art. 48-55.
\textsuperscript{108} Patent Law of China art. 5.
\textsuperscript{109} Fernandez, supra note 48. However, TRIPS itself is fairly vague. See TRIPS art. 27.
\textsuperscript{110} TRIPS art. 27(2).
\textsuperscript{111} Patent Law of China art. 22; TRIPS art. 27(1).
\textsuperscript{112} French, supra note 58. Other problems of enforcement will be addressed below.
\textsuperscript{113} Patent Law of China art. 60.
copy's sales could be much lower than actual damages suffered by the patentee. The language does not indicate when one method of calculation must be used as opposed to the other. Although these provisions and China's Patent Law on the whole generally correspond to the TRIPS requirements,\textsuperscript{114} other WTO member nations expect China to enact rules beyond the mere minimum standards of TRIPS and to fully enforce the laws for all IP subjects.

TRIPS articles 15-21 cover trademarks.\textsuperscript{115} Trademarks are names, words, or symbols capable of identifying and distinguishing between goods or services from one source and goods or services of another source.\textsuperscript{116} Common examples are names or logos representing certain brands, such as the name Coca Cola or Nike's "Swoosh" symbol. TRIPS requires a trademark to be indefinitely renewable\textsuperscript{117} but allows limited exceptions for others to use the mark, such as fair use of descriptive terms.\textsuperscript{118} TRIPS does not list further specific examples of fair use or other limitations, but it states that in allowing such exceptions a member should consider the legitimate interests of the trademark holder and third parties.\textsuperscript{119} The holder of a registered mark can exclude third parties from using identical or similar marks for products or services that are similar to the registered product or service if the use would lead to a likelihood of confusion.\textsuperscript{120} TRIPS also protects trademark holders from a third party's use of the mark on dissimilar goods or services, provided that: (1) the use of the mark indicates a connection between the owner of the registered mark and the third party's goods; and (2) the registered mark owner's interests will likely be harmed by such use.\textsuperscript{121} Further, TRIPS protects marks that are well known to the relevant sector of the public even when the mark is not registered in that nation.\textsuperscript{122}

Much of China's Trademark Law\textsuperscript{123} complies with TRIPS. China is a

\begin{itemize}
  \item [114.] Compare TRIPS art. 45 with Patent Law of China art. 57. (Damages) merely requires judges to have the authority to order adequate compensation and expenses.
  \item [115.] TRIPS arts. 15-21. TRIPS arts. 22-24 cover the related subject of geographical indications, which is beyond the scope of this comment.
  \item [116.] YANG, supra note 20, at 43.
  \item [117.] TRIPS art. 18.
  \item [118.] TRIPS art. 17. An example of the fair use of a descriptive term might be "spicy." If one company trademarked a food product with the word "spicy" in its name, another company might still be allowed to use the same word to describe its food product.
  \item [119.] TRIPS art. 17.
  \item [120.] TRIPS art. 16(1).
  \item [121.] TRIPS art. 16(3). An example of protection for dissimilar goods would be "Nike" toothpaste, if such use indicates a connection between the athletic footwear company and this toothpaste, and if the athletic company would likely be damaged by this connection.
  \item [122.] TRIPS art. 16(2), referring to the Paris Convention (1967) art. 6bis.
  \item [123.] Trademark Law of China, supra note 81.
\end{itemize}
first to file trademark system, meaning the first person to register the mark receives trademark protection, rather than the first person to use it in commerce. The Trademark Law provides exceptions giving priority to the first user, regardless of registration, when the mark was used in an international exhibition or where the mark is well-known, likely to mislead the public, and likely to prejudice the interests of the well-known mark holder. A foreign mark need not be famous in China to be well known. The law also provides for courts to issue preliminary injunctions to halt unauthorized use of the mark and allows the administrative authority handling the matter to confiscate and destroy infringing products. Further, the law provides criminal penalties for trademark infringement.

However, China’s Trademark Law retains certain problems even when it complies with TRIPS. China has no unified standard, which means the provinces regulate trademarks differently from one another. Further, China has no “dilution” rule preventing a mark holder from being harmed by a third party’s use of the mark in dissimilar goods or services even though consumers are unlikely to be confused. Although dilution is not addressed in TRIPS, it is an important issue among many WTO member nations. Further, China calculates the amount of damages based on either the profit earned by the infringer or the injury suffered

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124. Yang, supra note 20, at 90.
125. Trademark Law of China art. 25.
129. Trademark Law of China art. 53. Accord TRIPS art. 46 (Other Remedies) (judicial authorities may order goods to be disposed).
131. Yang, supra note 20, at 151. However, the law does specify factors needed to determine well-known status. Trademark Law of China art. 14. But see Cahan, supra note 31, at 232-33 (arguing that the factors are too subjective).
132. Michelle Lee, Note and Comment, Franchising in China: Legal Challenges When First Entering the Chinese Market, 19 AM. U. INT’L L. REV. 949, 992 (2004) (addressing problems for a foreign business opening a franchise in China). An example of using a mark for dissimilar goods would be Nike toothpaste. Note that dilution differs from the situation covered by TRIPS art. 16(3) in which consumers are confused into assuming a connection between the mark holder and the third party’s goods. Rather, dilution refers to the mark being no longer unique or special.
by the trademark holder. The law does not state which to use, but it allows courts to grant up to 500,000 Yuan in cases where neither can be calculated.\textsuperscript{133} As described in the discussion on patent law, damages based on profits could be considerably lower than those based on injury to the trademark holder.

In addition, anyone who can prove he legitimately obtained and sold infringing goods without knowledge of their infringing status is not liable for damages.\textsuperscript{134} Depending on the level of proof required, this might allow infringers to avoid punishment. Although such language is not specifically barred by TRIPS, TRIPS states that members may authorize the recovery of profits or damages even when the infringer did not knowingly infringe.\textsuperscript{135} WTO member nations expect greater protections than TRIPS minimally requires and see this as a loophole for infringers.

Moreover, China will not grant a trademark for marks “detrimental to socialist morals or customs, or having other unhealthy influences”\textsuperscript{136}—a vague limitation that could allow infringers to legally copy marks the government doesn’t approve of. The “unhealthy influences” language appears to go beyond the TRIPS exceptions to protect public order or morality\textsuperscript{137} and may well prevent marks with anti-communist sentiment from appearing in China at all. IP laws are enacted to protect right-holders and promote technological innovation,\textsuperscript{138} not to provide the government with a system to limit the public discourse. Such goals, if ever appropriate, should be accomplished by other means.

TRIPS articles 9-13 cover copyrights.\textsuperscript{139} Copyright protects what some commentators consider artistic rights, including literary works, music, and visual arts, among others.\textsuperscript{140} Copyright is an automatic right; no formal registration is required for the original author to prevent the sale or public use of copies of his work. However, copyright is not a full monopoly right like patents and trademarks; it does not protect against similar works created independently without copying.\textsuperscript{141} For example, if two authors independently write similar stories, the first author’s copyright does not prevent the second author’s work. Under TRIPS, a copyright

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133. Trademark Law of China art. 56. Compare with TRIPS art. 45 (Damages) (allowing judges to order adequate compensation and expenses).
134. \textit{Id.}
135. TRIPS art. 45(2).
137. TRIPS art. 27(2).
138. TRIPS art. 7.
139. TRIPS arts. 9-13. TRIPS art. 14 covers the related subject of protection of performers, producers of phonograms, and broadcasting organizations, which are beyond the scope of this comment.
140. \textsc{Yang, supra} note 20, at 92.
141. \textit{Id.} at 46.
\end{flushright}
lasts no less than 50 years from publication or from creation of unpublished works. Member countries may also calculate the term of protection based on the end of a natural person’s life. Limitations or exceptions should be confined to “special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”

China’s Copyright Law meets many of the TRIPS obligations. It protects literary, artistic and scientific works. Except as otherwise provided, the copyright belongs to the author. This law protects works created by Chinese citizens, while international treaties or bilateral agreements protect works created by foreign citizens. The law includes remedies such as injunctions, confiscation of the infringing goods and materials used to create them, and criminal liabilities, as required by TRIPS. The Copyright Law includes a compensation calculation based on the actual injury of the right-holder. The law specifically states that compensation will only be calculated based on the earnings of the infringer when the actual injury is difficult to calculate. When neither can be calculated, the court may grant damages up to 500,000 Yuan. This is less ambiguous than compensation under the Patent Law and Trademark Law, discussed above and goes beyond the TRIPS minimum requirements.

\[142. \text{TRIPS art. 12.}\]
\[143. \text{Id.}\]
\[144. \text{TRIPS art. 13.}\]
\[145. \text{Copyright Law of China, supra note 81.}\]
\[146. \text{Copyright Law of China art. 1. China has a separate law covering copyrights for computer software, Regulations for the Protection of Computer Software, which is beyond the scope of this comment.}\]
\[147. \text{Copyright Law of China art. 11.}\]
\[148. \text{Copyright Law of China art. 2. The foreign citizen’s home country and China must have an agreement or both be parties to an international treaty. The Copyright Law of China does not state which treaties may be included. Id.}\]
\[149. \text{Copyright Law of China art. 49.}\]
\[150. \text{Copyright Law of China art. 47.}\]
\[151. \text{TRIPS art. 44 (Injunctions); art. 45 (Damages); art. 46 (Other Remedies); art. 61 (Criminal Procedures).}\]
\[152. \text{Copyright Law of China art. 48.}\]
\[153. \text{It is unclear why this difference exists. Perhaps the Copyright Law of China was written after the Trademark Law of China, despite their identical dates of enactment, or perhaps the Chinese government believes copyright holders are due different protections than trademark and patent holders.}\]
\[154. \text{See TRIPS art. 45 (Damages).}\]
However, the Copyright Law still suffers from many problems. The Copyright Law includes a broad “fair use” provision containing twelve exceptions, which allow copying of copyrighted materials for such purposes as private study or commentary, among others. Although fair use exceptions are not unusual among WTO members, the Chinese fair use exception extends beyond the norm in allowing use by a state organ fulfilling its official duties. Such an exception is not introduced by TRIPS, and because all Chinese state owned enterprises are state organs, this leads to a far-reaching exception.

Further, the Copyright Law does not protect works that violate Chinese law and are therefore banned from publication or distribution. It is quite possible that the restrictive Chinese government will ban creative works that would be protectable elsewhere. This could allow the government to further discourage the existence of any works it disapproves of, such as those with anti-communist bases. The original works would be banned in China, but anyone who discovered them elsewhere could copy and alter the works in China, presenting a viewpoint contrary to that of the original author while using the products of his labor.

Overall, China’s amended Patent, Trademark, and Copyright Laws show vast improvement over prior versions and align fairly closely with TRIPS. However, these improvements in written law do not, by themselves, complete the story. Written law means nothing without adequate enforcement.

155. Copyright Law of China art. 21. TRIPS art. 13 (Limitations and Exceptions) and the entire Copyright section do not include a broad fair use exception. Instead, TRIPS art. 9 incorporates the Berne Convention (describing narrow categories of fair use under the Certain Free Uses of Works in articles 10 and 10bis for purposes of teaching and news reporting, provided that the source is indicated).

156. Copyright Law of China art. 21.

157. Brent T. Yonehara, Enter the Dragon: China’s WTO Accession, Film Piracy and Prospects for Enforcement of Copyright Laws, 12 DEPAUL-LCA J. ART & ENT. L. & POL’Y 63, 98 (2002) (arguing that significant copyright problems facing China after its WTO accession can only be solved by adherence to the rule of law). In other words, all state-run businesses can claim an exemption from Copyright Law of China to copy any copyrighted materials.

158. Copyright Law of China art. 4.

159. This analysis assumes the works could be altered to meet the Chinese government’s approval. Imagine a Taiwanese documentary censored and edited to portray a positive view of Chinese domination. Such alterations would disappoint the author and could possibly confuse Chinese citizens about the Taiwanese perspective on independence.

160. Yu, The Second Coming, supra note 45, at 26. Trade secret issues are beyond the scope of this comment. For more on China’s trade secret laws see generally Nathan Greene, Article, Enforceability of the People’s Republic of China’s Trade Secret Law: Impact on Technology Transfer in the PRC and Preparing for Successful Licensing, 44 IDEA 437 (2004).
III. CHINA’S SUBSTANTIAL IP ENFORCEMENT IMPROVEMENTS APPEAR INADEQUATE TO MANY DEVELOPED NATIONS

Adequacy of China’s IP enforcement may be a matter of perspective. China and the developed nations do not always see eye to eye when assessing China’s role in enforcing IP rights within its borders.

A. IP Enforcement Obligations Under TRIPS

TRIPS includes many provisions covering the enforcement of IP rights.161 Member nations’ IP enforcement must be effective, fair, and equitable.162 Members’ case decisions should be in writing and made available to the parties involved, and the parties should be given opportunity for review.163 Judges must have authority to order the infringer to pay damages that adequately compensate the right holder.164 Judges must also have the authority to order the destruction of infringing goods and the materials used to create them, without compensation to the infringer.165 And authorities, such as customs officials, shall not allow exportation of the infringing goods in their infringing state.166 Member nations must enact criminal procedures and penalties, such as imprisonment, fines, and destruction of goods, to be applied in cases of willful trademark counterfeiting and copyright piracy on a commercial scale. Members may provide for criminal penalties to apply in other cases of IP infringement.167

Perhaps most importantly, TRIPS requires transparency among its members. Members must publish or otherwise make available in the national language any laws, regulations, and final judicial decisions regarding the TRIPS subject matter. Members must supply information about these laws, regulations, and final judicial decisions in response to a written request from another member who reasonably believes these laws or decisions affect its IP rights.168 Transparency remains key to TRIPS enforcement obligations. Without sufficient information about what enforcement mechanisms are provided for or undertaken, WTO nations

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161. TRIPS art. 41-61.
162. TRIPS art. 41(2).
163. TRIPS arts. 41(3)-(4).
164. TRIPS art. 45(1).
165. TRIPS art. 46.
166. TRIPS art. 59.
167. TRIPS art. 61.
168. TRIPS art. 63.
may reasonably suspect that a given member nation is inadequately protecting foreign IP within its borders.

B. The Developed Nations Argue China’s IP Enforcement Remains Inadequate

Developed nations, including the United States, Japan, and the European Union, generally agree that although China has made improvements enforcing IP, much remains to be done. Improvements in enforcement seem to have stagnated between 2004 and 2005. However, the United States remains hopeful that enforcement will improve.

The developed nations point to a number of problems with Chinese IP enforcement. As discussed above, China lacks qualified attorneys and judges to promote IP enforcement because China’s legal profession was eliminated during the communist era and only resumed less than three decades ago. China’s enforcement mechanism suffers from long delays due in part to this lack of personnel. Further, China’s IP enforcement is often arbitrary due to simple bias or outright corruption. Moreover, China’s large, decentralized system impacts the sufficiency of its enforcement. Therefore, enforcement at the local level frequently does not live up to the central government’s promises.

The developed nations argue that although Chinese authorities conduct raids to seize fake products, China is only “scratching the surface” in undertaking enforcement actions. For example, in 2004, although...
Chinese authorities increased the number of raids on infringers, this had no effect on the black market because Chinese authorities only imposed small fines and did not apply any criminal penalties. In fact, fines are regularly so small that they merely "amount to a cost of doing business for those who infringe." This may be due to the fact that both China's Patent Law and its Trademark Law allow damages to be calculated based on either the losses suffered by the right holder or the profits earned by the infringer. Damages based on the infringing copy's sales could be much lower than actual damages suffered by the patentee because copies are generally less expensive. The Copyright Law, however, only allows calculations based on the infringer's earnings when the actual injury is difficult to calculate. The clarity of this law is an improvement over the others, but it still depends on how loosely the authorities interpret the "difficult to calculate" language.

The developed nations further complain that too many IP cases are administrative rather than criminal. Administrative cases resulting in small fines are not as strong a deterrent as criminal sanctions. Although both the Trademark Law and Copyright Law include criminal penalties, this does not lead to the conclusion that such penalties are being enforced. In fact, during 2004 only two out of two thousand administrative cases were transferred to criminal cases. This administrative track seems inadequate to deter serious IP infringement.

Recently, the United States has focused on China's lack of transparency as its primary complaint. The United States requested specific information: (1) China's courts need to state the precise legal basis for finding IP infringement in recorded cases; (2) the Chinese government must enumerate remedies for IP infringement; (3) China should provide a complete record on IP enforcement actions containing location and date

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180. Lawrance, supra note 57.
181. Trademark Law of China art. 59; Copyright Law of China art. 47.
183. In compliance with TRIPS art. 63(3).
184. It is difficult to find written case law for Chinese courts. Much of the information available to outsiders comes from news articles rather than case reporters.
statistics and including which cases are sent to criminal authorities; and (4) China must provide the home countries and additional information regarding foreigners involved in IP cases.\textsuperscript{185} Without such transparency, WTO member nations cannot know whether China is adequately enforcing IP laws, whether it is exhibiting bias or corruption, or whether it is exercising any of its criminal remedies. Because TRIPS specifically requires transparency,\textsuperscript{186} this is an issue China must address.

**C. China Emphasizes Dramatic Improvements in IP Protection in Recent Years**

Despite complaints from outside its borders, China argues that it not only complies with its WTO promises but also goes further than the WTO requires.\textsuperscript{187} China has made great improvements. Commentators note that many Chinese know the meaning of *zhishi chanquan* (the Chinese term for IP).\textsuperscript{188} Further, China has expanded efforts to educate judges in IP laws generally and on specific WTO rules.\textsuperscript{189} China has also made efforts to prevent corruption by improving judges' salaries and preparing clear disciplinary rules regarding gifts to judges.\textsuperscript{190}

China occasionally focuses its enforcement in sudden "crackdowns." In 2000, one such crackdown spotlighted products presenting health risks to consumers, including food, drugs, and medical supplies.\textsuperscript{191} Later, in

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\textsuperscript{185} Agencies*, 6 *WASHINGTON INTERNET DAILY* 208, Oct. 27, 2005 (the U.S. government seeks information about Chinese IP enforcement via WTO rules).
\textsuperscript{186} TRIPS art. 63.
\textsuperscript{189} Hung, *supra* note 51, at 109-12 (discussing the efforts towards judicial improvements and major criticisms).
\textsuperscript{190} Id. at 120-22 (discussing a Court Reform Plan).
\textsuperscript{191} Yu, *The Second Coming, supra* note 45, at 28.
\end{footnotesize}
2005, nine criminal and administrative enforcement departments worked together to seize a wider range of infringing products.192

Between these large crackdowns, in 2004, China introduced a tougher criminal law for IP violations.193 This new law lowered the economic value required for criminal sentencing and expanded the definition of an IP infringement accomplice under criminal law.194 Further, the new law included criminal sentencing of three to seven years for persons copying more than 5,000 CDs or VCDs without permission from the right holders.195 China points out that this seven-year imprisonment term is the toughest IP punishment in the world.196 China states that even before the introduction of this new law, from 2000 to 2004 China solved 5,305 cases of criminal IP infringement and arrested 7,100 suspects.197 Specifically, IP violation arrests rose by 36% and prosecutions rose by 75% in the three-year period ending in 2004.198

Although China’s enforcement of IP is imperfect, China argues it is undertaking a substantial task. Chinese authorities note that the nation is “trying to achieve in a dozen years what it had taken the Western world a century to do.”199 In only a quarter century, China has evolved from a


195. Video compact discs.

196. See Violation of IPR Now a Major Crime, supra note 194.


199. China Tightens Counterfeit Penalties, FIN. TIMES (London), Dec. 22, 2004 at Asia-Pacific 5. Some commentators note that China’s national government launches these crackdowns because it does not want to lose foreign investment. The problems result not from the national government but from local officials who are more likely to ignore pirating by local businesses. Akiko Kashiwagi and Dennis Normile, Bridging the Chinese Supply Chain Gap: Chinese Component Suppliers Are Getting Stronger, But How Far Can They Go?, ELECTRONIC BUSINESS, Feb. 1, 2006, at 36.

200. Landler, supra note 6.
country with no IP protection to one with a broad system of IP laws and state IP agencies.\textsuperscript{201} As the largest developing nation in the world with more than twenty-six million people living in poverty,\textsuperscript{202} enforcement of IP law is unlikely to be China’s top priority. However, China has made significant progress with its much-criticized IP enforcement. China’s IP enforcement mechanism, as a new system, will likely undergo significant change in the near future.

IV. SUGGESTIONS FOR ENCOURAGING CHANGE AND FOR FUNCTIONING IN CHINA’S CURRENT IP ENFORCEMENT SYSTEM

Three major groups have a significant stake in the progression of China’s IP enforcement. The Chinese government must undertake efforts to fulfill its WTO obligations under TRIPS. Foreign governments can also encourage change through support in the international trade system rather than retaliatory actions. Finally, businesses operating within China will need to prepare for the current, imperfect system, while simultaneously helping to drive change through guidance and economic support. This comment offers suggestions for each.

A. China Can Improve Efforts to Fulfill its WTO Obligations by Focusing on Central Control and Education and Continuing to Update its IP Laws

One major change China can make to improve consistency and transparency is to enact greater central control of IP. Although centralized control of such a large landmass is a challenge, control can be concentrated to a manageable level. For example, instead of allowing the four tiers of the court system to have independent judgment appealed only once, the tiers should all answer to a single higher authority, such as the Supreme People’s Court or even a new National IP Appellate Court.\textsuperscript{203}

China can also improve its IP enforcement by continuing efforts to educate lawyers and judges in IP matters.\textsuperscript{204} Increasing the number of educated personnel will help prevent delays. Further, China should set

\begin{itemize}
\item \textsuperscript{201} See YANG, supra note 20, at 26.
\item \textsuperscript{202} See generally White Paper on China’s “Peaceful Development Road,” BBC WORLDWIDE MONITORING, Dec. 23, 2005, at BBC Monitoring Asia Pacific-Political (discussing a white paper released by the Chinese government outlining its policy of peaceful development).
\item \textsuperscript{203} Cf. YANG, supra note 20 at 219 (suggesting there should be a separate agency to supervise policy and regulations to censure organizations that make rules inconsistent with central government policy). A similar problem exists in the U.S. state courts in situations where there is no question of federal law. \textit{Id.} at 219 n.6.
\item \textsuperscript{204} The China Intellectual Property Training Center and many Chinese universities provide IP training. Yu, \textit{The Second Coming}, supra note 45, at 27.
\end{itemize}
time limits for IP cases so they will not linger.\textsuperscript{205} In both cases, foreign businesses will be more likely to rely on Chinese courts if they know decisions will be based on sound understanding of the law and will not be intentionally postponed or unintentionally delayed. China should undertake further anticorruption efforts including clear regulations and internal supervision with whistleblower protection. Although some such efforts have already begun, they should be continued and expanded.\textsuperscript{206}

Finally, China should make small but significant changes to the current IP laws. It should require that patent and trademark infringement damages be calculated based on the loss suffered by the right holder rather than profits earned by the infringer, unless such loss cannot be calculated. Currently, both laws allow damages based on either,\textsuperscript{207} unlike the Copyright Law, which only allows damages based on profits when actual loss cannot be calculated.\textsuperscript{208} Further, the law should clarify when actual loss cannot be calculated so judges will not use this as an excuse whenever they want to award lower damages.

Although change may be difficult, each of these suggestions, on its own, need not be a major burden to China. They are small modifications, which can have a significant impact. Perhaps the smallest change with the greatest impact will be for China to continue to educate its citizens that buying copied goods is illegal and wrong in the new Chinese system.\textsuperscript{209} This new perspective will count for far more than any new law in a nation governed by the rule of man.

\begin{thebibliography}{9}
\bibitem{206} Hung, \textit{supra} note 51, at 108, 120-22.
\bibitem{207} Patent Law of China art. 60; Trademark Law of China art. 56.
\bibitem{208} Copyright Law of China art. 48.
\bibitem{209} Hong Kong has already begun similar efforts through publicity and advertising, \textit{HK Works to Enhance Awareness In Intellectual Property Rights}, \textit{People's Daily} (Beijing), Sept. 19, 2000, \textit{available at} http://english.people.com.cn/english/200009/19/eng20000919_50868.html.
\end{thebibliography}
Foreign governments can offer assistance to China or use retaliatory measures to pressure China to make changes. Whether to use the “carrot” or the “stick” is a current topic of debate. Foreign governments can provide assistance through monetary loans to aid the Chinese in personnel training and citizen education of IP law, expert advice for training legal personnel and customs officials, and manpower to assist IP agencies or law enforcement authorities. The United States has already begun assisting China in joint investigations. However, the U.S. government has publicly considered certain retaliatory measures. Thus, this section will focus on the propriety of methods to pressure the Chinese government.

The WTO Dispute Settlement Understanding is the WTO’s preferred method for settling disputes. If a dispute arises between two or more member nations relating to the violation of TRIPS, members must agree to consultations and attempt settlement of disputes under the Dispute Settlement Understanding. WTO members agree to use the Dispute Settlement Understanding (DSU) system rather than taking unilateral action against a WTO member that adopts a policy in violation of TRIPS or fails to live up to its obligations. The Dispute Settlement Body (DSB), a quasi-judicial panel acting under the DSU, encourages settlement whenever possible.

When settlement fails, the entire DSB process lasts about one year if neither party appeals and an additional three months if a party appeals. Once the DSB finds that a party is in violation of an agreement, the party in violation must quickly comply with the agreement or offer compensation. If it does not, the DSB may grant the winning party’s request to impose

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211. Id.
212. TRIPS art. 64.
sanctions, such as trade embargoes or tariffs. Through the DSU, the drafters of TRIPS attempted to prevent unilateral action among WTO members in reprisal for IP violations.

The benefits of this system include stability in the international trading system and a focus on rules rather than coercion. However, the DSU system can result in retaliation. If the losing nation refuses to compensate the winner, the only other option is to suspend the winner’s treaty obligations to the loser.

The United States has recently begun the DSU process by requesting clarification of specific cases of IP enforcement by China. Japan and Switzerland followed with similar requests to China. These requests could lead to further action under the DSU. As of this writing, no further DSU actions have commenced, but they have not been ruled out.

Some commentators specifically argue against the current progression towards the DSU. The DSU system is slow and convoluted.

214. Id. Sanctions should preferably be imposed in the same trade sector as the subject of the dispute. If this is not feasible, sanctions in another sector may be acceptable in serious circumstances. Id.


216. Letter from Peter F. Allgeier, U.S. Ambassador and U.S. Trade Representative, to Sun Zhenyu, Chinese Ambassador to the WTO (Oct. 25, 2005), http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/asset_upload_file115_8232.pdf. TRIPS art. 63 (Transparency), section 3 states that a member nation shall supply information in response to a request by another member regarding judicial decisions and administrative rulings affecting that member’s rights. TRIPS art. 63 (3). TRIPS art. 64 covers dispute settlement. See supra section III(B), for a discussion of the specific request for transparency.


219. However, the United States announced a plan to encourage Chinese accountability for IP enforcement. The United States will establish a task force to monitor Beijing’s progress and will introduce a trade negotiator at the U.S. embassy in Beijing. The United States will also strengthen the U.S.-China Joint Commission on Commerce and Trade by adding mid-year review of progress. The U.S. Trade Representative also promised to aggressively pursue IP cases, without announcing any specific cases. Heather Scott, USTR Portman Plans to Add Teeth to China Trade Policy, MAIN WIRE, Feb. 15, 2006, available on LexisNexis.

220. Yu, Opportunities and Challenges, supra note 188, at 144.
Further, although China is concerned with showing its economic strength, it might be unable to comply with DSB decisions. Therefore, commentators suggest that the United States and other nations should avoid bringing such disputes.

Professor Peter K. Yu, an expert on China's IP law, provides four main reasons why the United States should not utilize the DSU at this time. First, TRIPS does not define "effective" enforcement. Because some commentators challenge the accuracy of infringement statistics presented by U.S. businesses, it is difficult to know whether the enforcement is "effective." Certain statistics are based on the assumption that every copy is a lost sale. Critics complain that such statistics are "over inflated" because many who copy would not buy the original work, especially if they could not afford it. Therefore, each copy does not necessarily reflect a lost sale. Second, most WTO cases focus on specific provisions, rather than lack of enforcement overall, as in the current complaint. For example, a typical case might focus on the method of calculating criminal fines or the "state actor" fair use exception, rather than arguing "lack of enforcement" in general. Succeeding on such a general case will be difficult for the United States and may be unfair considering that the United States has its own difficulties enforcing IP, especially in digital file-sharing copyright cases. Third, the DSU does not guarantee success for the United States. Even a partial win for the United States might be seen as a failure and could set an important symbolic precedent as a loss in the first WTO case against China. Finally, this could significantly damage the U.S.'s interests in promoting international trade because the United States
should save its reliance on the DSU for "the right complaint" that in the future could help spur specific changes in China's IP enforcement.\footnote{Id. at 148.}

Although WTO member nations are discouraged from acting unilaterally against other members, these nations have some options at their disposal. In the past, the United States has used its own national law under a method called "Special 301" to threaten unilateral action against China and other nations.\footnote{Jacob, supra note 221 (describing that the United States has threatened unilateral actions to speed the trade dispute system).} Special 301 is an addition to an act called Section 301 in U.S. trade law, allowing U.S. trade representatives to retaliate against nations with discriminatory trade practices.\footnote{Trade Act of 1974, 19 U.S.C. § 2411 (2006).} Under Special 301, U.S. trade representatives will investigate a given law or practice identified as a potential problem. If the problem remains unresolved after consultation over six to nine months, the United States may withdraw trade benefits or impose sanctions. Special 301 is used primarily as a threat and is rarely completed.\footnote{YANG, supra note 20, at 30.}

Some commentators suggest that Special 301 is ineffective and may lead to trade wars.\footnote{Yu, Toward a Nonzero-sum Approach, supra note 215, at 584-85 (comparing dispute resolution systems and recommending a nonzero-sum approach).} Repeatedly, when the United States proposed sanctions, China responded by proposing its own sanctions in return.\footnote{Id. at 579 (arguing this coercive approach threatens the integrity of the global trading system).} The build-up to sanctions eventually ended with last-minute compromises. Unfortunately, infringement worsened soon after attention was diverted from this "cycle of futility."\footnote{Yu, The Second Coming, supra note 45, at 32.} Despite the fact that IP protection in China seemed to improve when the United States was not acting in a retaliatory manner,\footnote{Gonzalez, supra note 2.} the United States once again considered sanctions under Special 301 in 2005 and 2006.\footnote{Baucus Seeks Bill to Boost Trade Enforcement, UNITED PRESS INT'L (Washington, D.C.), Nov. 1, 2005. Senator Lindsey Graham has also proposed legislation to repeal} In the near future, much international attention will be focused on these exchanges between the United States and China.
If the commentators are correct that the DSU and external retaliatory measures such as Special 301 are inappropriate at this time, a business owner with IP in China might wonder what options remain. Perhaps the most appropriate actions are those taken by businesses themselves.

C. Foreign Businesses Can Protect Their IP Within the Current Framework By Fulfilling the Chinese Consumers’ Needs and Forming Relationships

Despite the difficulties based on a lack of enforcement and non-transparent enforcement, foreign businesses should still register and market IP in China because the Chinese markets are growing so rapidly. First, foreign business owners and managers should try to understand the Chinese culture and the perspectives from which Chinese citizens view IP. Because forced conversion is usually ineffective, firms should try to work within the ideological constructs of the current system.

Foreign businesses have a number of options within the Chinese commerce system. Companies should attempt to clearly differentiate their original products from copies. Such differentiation can be physical, such as special labels or markings, or intangible, such as warranties, upgrades, and replacements. In some cases it is impossible to distinguish copies because their physical appearance so closely resembles the original. However, in other cases, the physical quality is so poor that it is apparent at first sight. In addition to predictable circumstances of photocopied books and camcorder copies of movies, consumers might recognize other clues that a product is counterfeit or pirated. For example, a copy of Bill Clinton’s autobiography describing how Chinese technology “left us in the dust” and that his hometown had “very good feng shui” might indicate to an

permanent normal trade relations with China, despite the U.S. Trade Representative’s argument that such legislation would be detrimental to both nations. Portman Vows Aggressive Push On Gamut Of Trade Issues, NAT. JOURNAL’S CONGRESS DAILY, Feb. 9, 2006, available on LexisNexis.


244. Long, supra note 41.

245. Lawrance, supra note 57 (describing holograms on copies of Microsoft software).
astute observer that something was amiss. Businesses should consider offering rewards for customers who recognize and turn in these copies. Businesses can also decrease the likelihood of copying by focusing on price of goods. High prices encourage more piracy. Therefore, foreign companies should keep prices low whenever possible. For example, if movie companies keep the price of DVDs low and dub them in Chinese, Chinese citizens will be more likely to buy originals, and English speakers will be less likely to purchase such copies exported to the United States. Film companies’ revenues might rise from the increased volume of sales resulting from lower prices. Another option is to make the purchase difficult to avoid. Microsoft recently made a deal with Chinese computer maker Lenovo, in which all Lenovo machines would be sold with Windows software pre-installed.

Businesses might also decide to reorganize their units operating in China. For example, they could choose to focus only on making products for high-level customers who will pay for IT assistance or a guaranty of quality or give away software for free while charging for accessories or “playing time” on the Internet. Further, a business could split information and manufacturing in various locations so no single office has access to all of the company’s IP. This can help alleviate the


247. Long, supra note 41. Such rewards can significantly encourage consumers to unmask frauds and discourage businesses from selling fakes. James Harding, Odd Jobs Fakebusters: In China Counterfeiting Has Extended Beyond Manufactured Goods to Spawn a Network of Bogus Copyright Investigators and Enforcers, FIN. TIMES (London), Dec. 30, 1998, at Comment & Analysis 12 (describing a Chinese man who made “a small fortune” by claiming double compensation, as permitted by law, when he proved goods purchased at Chinese department stores were copies).

248. Yu, Opportunities and Challenges, supra note 188, at 153.


250. Heim, supra note 246 (describing how most Chinese consumers prefer to buy computers without software because they can purchase pirated software for less than one dollar).


252. Heim, supra note 246. Microsoft is also focusing on selling software to Chinese companies rather than individual customers because these companies cannot successfully argue the price of software is prohibitive. Id.

problem with insiders who steal company information.\textsuperscript{254} Perhaps a firm will choose to use older technology for products manufactured in China\textsuperscript{255} or will keep manufacturing out of China altogether while still selling in the nation.\textsuperscript{256} Or a business might choose to forego direct investment in China in favor of funding a Chinese company through venture capital, assuming that the Chinese company will receive greater IP protection through its local ties and understanding of Chinese customs.\textsuperscript{257} Further, a company could set up in Hong Kong, where IP enforcement is stronger, and use the Closer Economic Partnership Arrangement between Hong Kong and China, a WTO act allowing free trade with China.\textsuperscript{258}

Foreign businesses should also consider investing in the local economy. This will both increase goodwill and create a personal benefit for Chinese citizens. Businesses can invest in local companies they might one day sell products to. For example, the U.S. entertainment industry could help develop local movie theatres. If they are able to make the movie-going experience something better than watching a film at home, audiences might view films in the theatres rather than buying infringing copies.\textsuperscript{259} Further, businesses could establish local partners or distributors so Chinese citizens will see a benefit for their own companies rather than just for foreign firms.\textsuperscript{260}

\textsuperscript{254} Lawrance, supra note 57. Businesses engaged in outsourcing with exportation or importation of technology should consider registering their outsourcing contracts with the Ministry of Commerce, which will help the foreign firm enforce the contract. Kevin E. Colangelo, China Comes to Nixon (Texas): Contract Issues in Outsourcing’s Next Wave, METROPOLITAN CORP. COUNS., Dec. 2005, at 48.

\textsuperscript{255} Patricia Vowinkel, Plaintiff: Start Your Engines! U.S. Automakers Believe it is Better To Do Battle with the Pirates of Intellectual Property and Cope With All the Other Risks Involved in an Emerging Market Like China to Win a Share of an Important New Market, 16 RISK & INSURANCE No. 6, May 1, 2005, at 46.


\textsuperscript{257} Foote, supra note 1.

\textsuperscript{258} Flahardy, supra note 4.


\textsuperscript{260} See Fernandez, supra note 48. But see French, supra note 58 (describing how Chinese companies frequently steal information even from the foreign companies who they engage with in joint ventures); Florian Gimbel, Dogged By the Grey Market: Piracy is Hard to Tackle When It Involves a Supplier or Business Partner, FIN. TIMES (London), Mar. 23, 2005, at Investing in China 9.

However, some commentators argue that the cost of production in China is too high despite these cultural benefits. Mariko Sanchanta, Japanese Companies Warned of China Risks, FIN. TIMES (London), July 2, 2005, at Asia-Pacific 3 (arguing that due to China’s poor IP enforcement and difficulty in finding trained middle management, companies
Foreign companies might be more successful by working to become a part of the local community. By investing directly in the local community to support cultural activities or education, Chinese citizens would have a stake in the success of the foreign company’s IP. Chinese culture instills the belief that there is a moral obligation to return a favor. Because China is not a single market but many smaller ones, this type of direct local investment would be more likely to sway Chinese citizens than investment in the nation as a whole. In addition, foreign businesses should build relationships with local government authorities and remind them of lost tax revenues from nontaxable illegal operations. Further, businesses should help educate consumers about IP and its benefits. Specifically, they should point out dangers resulting from poorly made copies of patented machines and drugs, such as vehicles prone to explosions or counterfeit drugs contaminated with bacteria. In fact, some businesses have already begun doing so, with successful results.

Businesses also have options for enforcing IP rights within the legal system even if they fear the courts will not help them with IP law suits. They can consider legal arbitration and mediation. Companies should

should move production to other South Asian nations with comparable costs); Joe Zhang, China’s Corporate Cost Advantage is a Myth, FIN. TIMES (London), Apr. 29, 2005, at Comment 19 (explaining there is a high cost for doing business in China).

For additional recommendations on how Chinese and foreign companies can work together, see generally Yu, Toward a Nonzero-sum Approach, supra note 215. See also Liu Baocheng, Discovering Chinese Cultural Roots, in DOING BUSINESS WITH CHINA 175 (Jonathan Reuvid & Li Yong, eds., 4th ed., 2003) (providing advice on business dealings with an emphasis on Chinese culture).

For advice on licensing and negotiating in China, see generally Larry W. Evans, Challenges of Licensing to and from China and Hong Kong, in LICENSING BEST PRACTICES 359 (Robert Goldscheider, ed., 2002).

261. Yu, Toward a Nonzero-sum Approach, supra note 215, at 648. See also Long, supra note 41.

262. Efendioglu & Yip, supra note 7, at 284.


264. Fernandez, supra note 48. Cf. YANG, supra note 20, at 213-14 (explaining that most foreign companies in China use consultation with Chinese businesses and government as the primary way to resolve problems).

265. Long, supra note 41.

266. Id.


also adequately inform the government when they observe infringement, to ensure that lack of enforcement is not due to lack of awareness. Further, businesses should make sure to register IP with Chinese Customs officials who can prevent importation and exportation of illegal products.269

Another option in certain industries is to attack infringers through consumer protection laws rather than IP laws. The Communist system historically placed great emphasis on the people’s health. China’s strong consumer protection laws can aid foreign businesses with IP in drugs, food, or medical products, as well as with the Chinese citizens those laws are intended to protect.270

However, perhaps the best option for businesses is also the most frustrating one: the waiting game. Historically, nations infamous for IP piracy became IP proponents as their economies grew and their citizens created more IP.271 In fact, the United States, now a strong supporter of IP protection, was well known for foreign copyright piracy during the eighteenth and nineteenth centuries.272 Japan, another strong critic of China’s problematic IP enforcement, also underwent a similar transformation.273 Currently, only 0.03% of Chinese companies own IP for “key technologies,” but commentators expect improvement in China’s IP enforcement as Chinese businesses increasingly file their own IP.274 Chinese businesses are already beginning to complain about the lack of enforcement. These companies arguably have the most to lose from inadequate IP enforcement because China is often their biggest or sole market.275 Therefore, they will be a strong voice for change.

269. Gonzalez, supra note 2.


271. Yu, The Copyright Divide, supra note 249, at 333-34. For more on the history of piracy in the United States and China, see generally id.

272. Id.


274. Only 0.03% of Chinese Firms Own Key Technologies: SIPO, ASIA PULSE (New South Wales, Australia), Jan. 3, 2006, at Nationwide International News.


276. Kashiwagi and Normile, supra note 199 (quoting Dolphina Gao, a sales manager for a Chinese manufacturer of components for electrical devices).
Changes, though slow, are occurring. In 2002, China began allowing research firms to own state-funded patents. This move away from state ownership towards individual ownership should increase Chinese citizens’ interests in IP protection. In 2003, for the first time in eight years, domestic patent applications exceeded foreign applications. And in 2005, Chinese computer company Lenovo bought IBM’s personal computer unit in large part to obtain IBM’s patents. This is strong evidence of China’s transformation into a nation with a strong interest in IP. From computer patents to trademarks for the 2008 Olympics, China is evolving into a nation with important IP worth protecting. However, business leaders must remember that evolution takes time.

V. CONCLUSION

While this paper addresses many aspects of the current state of IP protection in China and offers suggestions for improvement, there are a few issues that deserve special attention. First, we need thorough research and statistics from unbiased sources to determine the number and significance of IP violations, IP law enforcement actions, and judicial determinations. China’s IP enforcement is undergoing significant change. IP protection in China is probably neither as well developed as Chinese leaders suggest nor as deficient as many foreign businesses and lawmakers contend. It is somewhere in between and in a constant state of flux. Without understanding the true nature of the problem, Chinese and foreign interests cannot properly resolve this problem. The Chinese government needs to provide open access to information, and foreign businesses and governments need to provide the economic and technical

279. Clark, supra note 273.
assistance to adequately analyze the nature of IP infringement in China today.

After determining the extent of IP infringement in China, foreign governments should limit use of DSU and retaliatory methods. These governments should preserve the DSU for specific grievances rather than complaints about a general lack of enforcement. Regarding specific laws, foreign interests should encourage China to make minor changes to its Patent Law and Trademark Law to require damages based on the right holder’s actual loss rather than the infringer’s gain and to more clearly define when damages to the right-holders cannot be calculated. They should encourage changes in the IP laws regarding “state actor” fair use and “contrary to the laws of the State” exclusion language. However, foreign governments should be careful to positively encourage such change rather than using threats and force. Foreign leaders should remember the ineffective results of such coercion against China in the past and should focus on helping China become a nation whose own self-interest leads to IP protection.

To help spur change, foreign businesses and governments should help focus Chinese citizens’ attention on IP issues that are important to them as individuals. Through advertising and education, they can remind the Chinese citizens of the health dangers of infringing pharmaceuticals and the economic gains for Chinese patents, copyrights, and trademarks. Businesses should focus on partnership in China and encouraging Chinese firms to invest in their own IP. Just as the United States and Japan did in the past, as China perceives a benefit in IP, it will evolve from pirate to protector.