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Copyright and Trademark Enforcement in China

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I. INTRODUCTION

China's failure to enforce intellectual property rights has hindered its efforts to increase its international trade.¹ Despite the fact that China's intellectual property laws appear to be adequate in theory, piracy of copyrighted works and

1. See Joseph Kahn & Helene Cooper, *China Plans to Cut Tariffs, End Quotas in Bid to Join Trade Group*, WALL ST. J., Nov. 20, 1995, at A10 (reporting that China's increased efforts at enforcing intellectual property rights are a big step toward gaining entry to the World Trade Organization); Amy E. Simpson, *Copyright Law and Software Regulations in the People's Republic of China: Have the Chinese Pirates Affected World Trade?*, 20 N.C. J. INT'L L. & COM. REG. 575, 579 n.20 (1995).

trademarks has been rampant in China, and the Chinese government has failed to live up to its obligations to enforce its own regulations under the 1992 U.S./China Memorandum of Understanding on Intellectual Property Protection.² Thus, there is skepticism regarding China's recent promises to curtail infringements.³ However, China is motivated to intensify its intellectual property enforcement to avoid a trade war with the United States.⁴

The United States maintains its own reasons to encourage China's enforcement of intellectual property rights.⁵ First, the U.S. government seeks to reduce the losses U.S. companies suffer at the hands of Chinese pirates. Second, it hopes to ensure that U.S. companies' significant efforts to develop the emerging Chinese markets are properly rewarded, thereby expanding the markets for U.S. goods.⁶

In an effort to increase Chinese protection of intellectual property rights and preclude an impending trade war, U.S. Trade Representative Mickey Kantor and People's Republic of China Minister of Foreign Trade Wu Yi announced on February 26, 1995 the signing of the Accord on Protection of Intellectual Property Rights ("Accord").⁷ The Accord purported to correct the enforcement problems which plagued the 1992 agreement.⁸ However, serious enforcement problems remained as piracy in China continued to increase despite the Accord.⁹

Again, on June 17, 1996, Acting U.S. Trade Representative Charlene Barshefsky and People's Republic of China President Jiang Zemin negotiated The Agreement on Protection of Intellectual Property Rights ("1996 Agreement"),¹⁰

2. Memorandum of Understanding Between the Government of the United States of America and the Government of the People's Republic of China on the Protection of Intellectual Property, Jan. 17, 1992 [hereinafter Memorandum of Understanding]; OFFICE OF THE U.S. TRADE REP., UNITED STATES AND CHINA REACH ACCORD ON PROTECTION OF INTELLECTUAL PROPERTY RIGHTS, MARKET ACCESS 4 (Feb. 26, 1995) (USTR Fax Retrieval System); see *infra* notes 57-77 and accompanying text.

3. OFFICE OF THE U.S. TRADE REP., *supra* note 2, at 4.

4. Kahn & Cooper, *supra* note 1. To some commentators, gaining U.S. support for entrance into the World Trade Organization ("WTO") is a significant factor in China's decisions to comply with U.S. demands for increased intellectual property enforcement. Simpson, *supra* note 1, at 579 n.20. But WTO considerations are beyond the scope of this article.

5. See OFFICE OF THE U.S. TRADE REP., *supra* note 2, at 1 (announcing that China's enforcement of intellectual property rights is necessary to protect U.S. companies and to provide market access for U.S. products).

6. See Edward J. Fitzpatrick et al., *Licensing in Asia*, in PLI INTELLECTUAL PROPERTY LAW INSTITUTE 1027, 1028 (1995) (stating that U.S. investment in China in 1994 was estimated at \$34 billion); OFFICE OF THE U.S. TRADE REP., *supra* note 2, at 1 (proclaiming that China's intellectual property enforcement is necessary to provide market access for intellectual property-based products).

7. OFFICE OF THE U.S. TRADE REP., *supra* note 2, at 1.

8. *Id.*; see *infra* notes 83-165 and accompanying text.

9. See *infra* notes 166-97 and accompanying text.

10. Charlene Barshefsky, *Statement by Acting USTR Charlene Barshefsky on Trade Talks with China on Intellectual Property Rights*, INT'L TRADE REP. 1036, 1036 (June 19, 1996).

narrowly averting trade sanctions which were threatened by both countries.¹¹ The terms of the 1996 Agreement continued the terms of the 1995 Accord¹² by merely augmenting some of the enforcement provisions of the Accord.¹³

This comment provides a historic overview of intellectual property rights in China, summarizes both the Accord and the 1996 Agreement, describes the effects of the measures implemented as a result of the Accord, and discusses the impact of the Accord on intellectual property rights protection in developing Chinese markets. Part II reviews the philosophical basis of China's approach to intellectual property protection and why it fosters piracy.¹⁴ Part III explores previous efforts to solve the problem of Chinese piracy.¹⁵ Part IV discusses the Accord, including immediate steps to address piracy, long-term changes to ensure effective enforcement, and enhanced access to the Chinese market for U.S. right holders.¹⁶ Part V examines the efforts of the Chinese government to implement the Accord.¹⁷ Part VI analyzes the 1996 Agreement.¹⁸ Part VII concludes with a critical examination of the intellectual property right enforcement situation in China since the Accord.¹⁹

II. THE PHILOSOPHICAL BASIS OF CHINA'S APPROACH TO INTELLECTUAL PROPERTY PROTECTION: WHY IT FOSTERS PIRACY

The source of friction between the United States and China on protection of intellectual property stems from the different histories of the two countries in recognizing those rights²⁰ and from the different perspectives the countries have based on their respective levels of economic development.²¹ The United States has placed a premium on protecting intellectual property rights for over two hundred years, as evidenced by the framers' inclusion of those rights in the Con-

11. Kathy Chen & Helene Cooper, *U.S. and China Reach an Agreement, Averting Trade Sanctions by Both Sides*, WALL ST. J., June 18, 1996, at A2.

12. *Id.*; see William P. Alford, *A Piracy Deal Doesn't Make a China Policy*, WALL ST. J., July 17, 1996, at A14 (stating the 1996 Agreement's "measures echo last year's U.S.-China intellectual property agreement").

13. See *infra* notes 202-23 and accompanying text.

14. See *infra* notes 21-61 and accompanying text.

15. See *infra* notes 62-82 and accompanying text.

16. See *infra* notes 83-165 and accompanying text.

17. See *infra* notes 166-201 and accompanying text.

18. See *infra* notes 202-25 and accompanying text.

19. See *infra* notes 226-35 and accompanying text.

20. Kristie M. Kachuriak, *Chinese Copyright Piracy: Analysis of the Problem and Suggestions for Protection of U.S. Copyrights*, 13 DICK. J. INT'L L. 599, 601 (1995).

21. See Tara Kalagher Giunta & Lily H. Shang, *Ownership of Information in a Global Economy*, 27 GEO. WASH. J. INT'L L. & ECON. 327, 330 (1993) (explaining and contrasting the perspectives of intellectual property held by the developed and developing worlds); Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273, 373 (1991) (describing the schism between the West and the developing world in their respective attitudes toward the protection of intellectual property).

stitution.²² China, on the other hand, has consistently recognized intellectual property rights only in the last twenty years.²³

Modern Chinese intellectual property protection only dates back to the late 1970s.²⁴ The Qing Dynasty enacted copyright protection beginning in 1910,²⁵ but those laws were destroyed by the Chinese Communist Party in 1949.²⁶ When the People's Republic of China was established in 1949, all property, including intellectual property, became collectively owned by the state in accordance with communist doctrine, thus rendering copyright protection irrelevant.²⁷

Following communist leader Mao Zedong's death in 1976, China's new leaders decided once again to recognize limited private property rights as a means to accelerate economic growth.²⁸ The new leaders, headed by Chairman Deng Xiaoping, believed increased application of modern technology to all sectors of the economy was needed for China to reach economic equality with the West.²⁹ During the 1980s, China modified its Marxist economy³⁰ in favor of a dual system consisting of a one-party autocratic political system and a government-assisted free market economy.³¹ This shift in economics reflects not an adoption of capitalism, but rather a return to Confucianism; the traditional philosophy of China.³² Where capitalism supports self-gain independent of societal gain, Confucianism allows the opportunity for self-gain only if it primarily helps society as a whole.³³ China began to enact intellectual property laws consistent with its efforts to restructure its economic system by recognizing private property

22. U.S. CONST. art. I, § 8, cl. 8 (empowering Congress "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").

23. Kachuriak, *supra* note 21, at 602.

24. *Id.*

25. Simpson, *supra* note 1, at 582.

26. *Id.*

27. See Kachuriak, *supra* note 21, at 603-04 (explaining that communists believe property should be collectively owned by the state to eliminate class inequities).

28. *Id.* at 604; see Laurence P. Harrington, *Recent Amendments to China's Patent Law: The Emperor's New Clothes*, 17 B.C. INT'L & COMP. L. REV. 337, 345 (1994) (stating that Chinese leaders of the late 1970s and early 1980s, "clearly recognized the utility of intellectual property protection as an incentive for economic development"); see also Guo Shoukang, *China*, in 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, §1[2][b] (Paul E. Geller ed., 1993) (stating that in the late 1970s, China adopted a new policy of reform including opening to the outside world).

29. Simpson, *supra* note 1, at 585. "West," as used in this comment, refers to developed, industrialized countries.

30. See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 730 (1991) (defining "Marxism" as the political, economic, and social principles advocated by Marx, especially the practice of communism and the dictatorship of the proletariat until the establishment of a classless society).

31. Simpson, *supra* note 1, at 585.

32. See J.P. ERRICO, LICENSING LAW HANDBOOK 59-65 (1995) (contrasting Marxism, Capitalism, and Confucianism and how these philosophies relate to Chinese patent law).

33. *Id.*

rights.³⁴ The People's Republic of China enacted its trademark law in 1983,³⁵ its patent law in 1985,³⁶ and its copyright law in 1990.³⁷

The development of Chinese intellectual property law is recent, thus the concept that copying is improper has yet to fully develop as a part of the Chinese culture.³⁸ For example, in China, the greatest compliment that authors can receive is having someone copy their works.³⁹ This unique aspect of Chinese culture makes enforcing intellectual property rights more difficult.⁴⁰

In addition, China shares with other developing countries certain disincentives to vigorous enforcement of intellectual property rights.⁴¹ Developing nations typically view intellectual property rights as a restriction on their ability to obtain and use technological information necessary for their economic development.⁴² Many developing nations argue that technological information should be easily accessible and provided at a minimal cost because knowledge is the common heritage of mankind and because Third World development is in the interest of all nations.⁴³ They view the importation of intellectual property as the Developed World's means of dominating and exploiting developing countries and the payment of royalties as fostering a negative balance of trade.⁴⁴

Developing countries see piracy as the natural marketplace response to high prices, as well as a practical means of obtaining necessary technology.⁴⁵ In the

34. Simpson, *supra* note 1, at 585.

35. TRADEMARK LAW OF THE PEOPLE'S REPUBLIC OF CHINA (adopted by the 5th Nat'l People's Cong., 24th Sess. of the Standing Comm., Aug. 23, 1982), translated in 2 CHINA LAWS FOR FOREIGN BUSINESS, *China Trade Documents* 11-500 (CCH Australia 1989); see Harrington, *supra* note 29, at 346 (stating that the 1982 Trademark Law, adopted in 1983, was the first law protecting intellectual property after 1976).

36. PATENT LAW OF THE PEOPLE'S REPUBLIC OF CHINA (adopted by the 6th Nat'l People's Cong., 4th Sess. of the Standing Comm., March 12, 1984), translated by *Chinalaw Computer-Assisted Legal Research Center, Peking University* (LEXIS, Chinalaw, No. 190).

37. Kachuriak, *supra* note 21, at 604; see WORLD INTELLECTUAL PROPERTY ORGANIZATION, WIPO PUBLICATION NO. 616 (E), COPYRIGHT AND NEIGHBORING RIGHTS LAWS AND TREATIES, *China: Text 2-201*, at 1 (1993) (translating China's copyright law of September 7, 1990); Shoukang, *supra* note 29, §1 (stating that the People's Republic of China's first copyright statute was the Copyright Act of September 7, 1990, which went into effect on June 1, 1991).

38. Kachuriak, *supra* note 21, at 605.

39. *Id.*

40. See *id.* (explaining that due to the incomplete understanding of intellectual property by the Chinese population, the concept that copying is "wrong" is not a part of Chinese culture).

41. Leaffer, *supra* note 22, at 275; see Giunta & Shang, *supra* note 22, at 330-31 (describing the perspective of the developing world on intellectual property).

42. Leaffer, *supra* note 22, at 282; see Giunta & Shang, *supra* note 22, at 330-31 (describing the major benefits developing nations gain from allowing piracy); ROBERT P. BENKO, PROTECTING INTELLECTUAL PROPERTY RIGHTS: ISSUES AND CONTROVERSIES 28, 28 (1987) (labeling problems related to enforcement of traditional intellectual property rights or existing intellectual property laws and institutions as "Old Issues," and describing the philosophical and practical differences between industrialized nations and the developing world).

43. Benko, *supra* note 43, at 28.

44. *Id.*

45. Leaffer, *supra* note 22, at 282; Giunta & Shang, *supra* note 22, at 331, 341.

short run, pirates enrich themselves and the country in which they operate.⁴⁶ For example, pirates incur minimal production costs by not having to fund research and development for the products they copy.⁴⁷ Furthermore, they make no royalty payments and avoid marketing failures by copying only successful products.⁴⁸ Therefore, pirates are in a better position than legitimate producers to satisfy demands in developing countries.⁴⁹

Developing countries tend to have limited financial and law enforcement resources which are largely consumed by other, higher-priority problems such as poverty and violent crime.⁵⁰ Consequently, few if any resources are allocated to enforcement of intellectual property rights.⁵¹ Developing countries seldom have lobbies of inventors, authors, or companies who would benefit from stricter intellectual property right enforcement, therefore, governments in these countries feel little internal pressure to enforce intellectual property rights.⁵²

In contrast, developed countries, such as the United States, have a much different perspective on intellectual property right enforcement, and they typically have greater financial and law enforcement resources relative to their problems.⁵³ Information is a valuable commodity and a major component of national income.⁵⁴ Inadequate protection undermines the goal of free trade and prevents creators from recovering their research and development costs, thereby diminishing the economic incentives necessary for future technological innovation.⁵⁵

In theory, China's laws protecting intellectual property rights provide adequate copyright and trademark protection.⁵⁶ The problem has been the inconsistent and seemingly reluctant enforcement of those laws by the Chinese government.⁵⁷ The reluctance is a result of China's cultural and economic disincentives

46. Leaffer, *supra* note 22, at 282; see Giunta & Shang, *supra* note 22, at 331 (listing reasons for developing countries' nonrecognition of intellectual property rights).

47. Leaffer, *supra* note 22, at 282; Giunta & Shang, *supra* note 22, at 331.

48. Leaffer, *supra* note 22, at 282; Giunta & Shang, *supra* note 22, at 331.

49. Leaffer, *supra* note 22, at 282; Giunta & Shang, *supra* note 22, at 331.

50. Leaffer, *supra* note 22, at 282.

51. *Id.*

52. *Id.*; Giunta & Shang, *supra* note 22, at 331.

53. Benko, *supra* note 43, at 28; see Giunta & Shang, *supra* note 22, at 330-32 (noting factors motivating developed countries to demand intellectual property protection); Leaffer, *supra* note 22 (discussing the different perspectives of developed and developing countries regarding intellectual property).

54. Benko, *supra* note 43, at 28; Leaffer, *supra* note 22, at 275; Giunta & Shang, *supra* note 22, at 332; see J. Thomas McCarthy, *Intellectual Property: America's Overlooked Export*, 20 U. DAYTON L. REV. 809, ____ (1995) (stating that if foreign nations do not recognize or enforce intellectual property laws, then America has nothing to sell).

55. Benko, *supra* note 43, at 28; Leaffer, *supra* note 22, at 277; Giunta & Shang, *supra* note 22, at 332.

56. See John Gero & Kathleen Lannan, *Trade and Innovation: Unilateralism v. Multilateralism*, 21 CAN.-U.S. L.J. 81, 88 (1995) (declaring that even U.S. officials admit China's intellectual property laws are adequate).

57. *Id.*

to intellectual property right enforcement.⁵⁸ In the past, when the United States threatened trade sanctions in retaliation for Chinese piracy, China made several well-publicized raids, pledged to protect intellectual property rights and proclaimed the problem solved.⁵⁹ However, after the United States dropped its threats, Chinese piracy continued at its previous pace.⁶⁰

III. EFFORTS TO SOLVE THE PROBLEM OF PIRACY IN CHINA

In 1991, the United States named China a Priority Foreign Country pursuant to Special 301⁶¹ due to China's failure to provide adequate patent and copyright protection, especially in the area of computer software.⁶² Lengthy negotiations resulted in the signing of an agreement ("Memorandum of Understanding") just hours before U.S. retaliatory measures were to be implemented.⁶³ The Memorandum of Understanding, entered into on January 17, 1992, was the first milestone in U.S. efforts to encourage China to enforce intellectual property rights.⁶⁴

Pursuant to the Memorandum of Understanding, China changed its legal system by adopting many of the intellectual property laws and regulations of western countries and by establishing special tribunals, such as the Intellectual Property Court, to handle cases under the new legislation.⁶⁵ Later that same year,

58. See *supra* notes 25-53 and accompanying text.

59. *Id.*

60. *Id.*

61. See Jeffrey E. Garten, *American Trade Law in a Changing World Economy*, 29 INT'L LAW. 15, 23-25 (1995) (explaining that Special 301 is a provision Congress added to Section 301 of the 1974 Trade Act). Section 301 is the principal statutory authority under which the President, through the USTR, may impose retaliatory trade sanctions against countries whose unfair trade policies or practices adversely affect U.S. trade interests. *Id.* Special 301 is targeted specifically at protecting U.S. intellectual property rights, requiring the USTR annually to identify countries failing to provide adequate and effective protection to U.S. intellectual property rights and to investigate that country under Section 301 with shorter deadlines for investigation and any subsequent determination to retaliate. *Id.*; see Newby, *supra* note 6, at 41 (noting that China was one of the first three countries to be named a Priority Foreign Country, the highest level of priority named by the USTR).

62. Newby, *supra* note 6, at 31.

63. *Id.*

64. Memorandum of Understanding, *supra* note 2.

65. Simpson, *supra* note 1, at 577. Specific changes China made pursuant to the Memorandum of Understanding included: extending patent protection to include all chemical inventions, setting the term of patent protection to twenty years from the date of filing the patent application, acceding to the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention"), acceding to the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms ("Geneva Convention"), issuing new regulations to comply with the Berne Convention and Geneva Convention, agreeing to recognize and protect computer programs as literary works under the Berne Convention and providing protection for a term of fifty years, protecting all works originating in a member of the Berne Union that are not in the public domain in their country of origin, and protecting trade secrets for as long as the conditions for protection are met. Memorandum of Understanding, *supra* note 2.

the United States rewarded China for its progress by moving it to the Watch List, the lowest level of priority named by the U.S. Trade Representative ("USTR").⁶⁶

Despite the progress in legislation, widespread piracy of U.S. products continued due to lackluster enforcement by the Chinese government.⁶⁷ Only a fraction of the intellectual property violations within China were tried in Chinese courts.⁶⁸ Furthermore, the claims that were tried had low success rates, and plaintiffs that were successful did not receive adequate or just awards.⁶⁹ In large part, this was due to the fact that pirates had a chance to destroy crucial evidence because Chinese authorities delayed in responding to allegations of piracy with sweeps of infringing stores, factories, and distribution centers.⁷⁰ Because of the continued lack of enforcement, the USTR once again upgraded China from the Watch List to the Priority Watch List on November 30, 1993.⁷¹

Realizing that greater enforcement was needed to appease the USTR, Chinese officials increased their efforts to enforce intellectual property laws. In 1994, they confiscated over 2.2 million pirated laser discs and uncovered about 140,000 cases of trademark violations.⁷² However, this success only affected a small portion of the Chinese pirating industry.⁷³

Estimated losses for U.S. industries in China due to copyright infringements for 1993 were \$415 million, with software companies alone losing \$225 million.⁷⁴ In 1994, the total estimated losses due to Chinese copyright infringement were over \$800 million.⁷⁵ In 1995, estimated losses due to Chinese piracy climbed to

66. See Newby, *supra* note 6, at 43 (noting that China was one of eighteen Watch List countries in 1992).

67. Simpson, *supra* note 1, at 577; see Newby, *supra* note 6, at 31 (estimating U.S. losses in China due to copyright infringement for 1993 at \$415 million); John M. Vassiliades, *Protection of Copyright and Trademark Rights in China*, in GLOBAL TRADEMARK AND COPYRIGHT 1995 MANAGEMENT AND PROTECTION 313, 317 (Siegrun D. Kane & Mark A. Steiner eds., 1995) (reporting that the Chinese government admitted that 95% of the CDs manufacture in China in 1994 were illegally copied and distributed). According to the Software Publishing Association, China's piracy rate of computer software was 98% in 1994, and "only one dollar [is] spent on software for every computer system purchased. *Id.* at 316-17.

68. See Simpson, *supra* note 1, at 604 (stating that the August 3, 1994, Beijing Intermediate Court ruling in favor of Walt Disney Co. against a prominent Beijing children's book publisher was one of only twenty civil cases filed in two years to receive a judgment).

69. See Vassiliades, *supra* note 68, at 329 (stating that damage awards against Chinese defendants have been extremely low). Recent judgments include a Chinese electronics company found liable for pirating Sega Enterprises' video games fined only \$3000, a \$22 million copyright suit brought by Microsoft resulted in only \$2500 in damages, and successful trademark infringement actions filed by Disney and Microsoft resulted in damage awards of \$91 and \$2600, respectively. *Id.*

70. Simpson, *supra* note 1, at 610 n.273.

71. Newby, *supra* note 6, at 41-42.

72. *United States and China Sign Accord to End Piracy*, 7 NO. 2 J. PROPRIETARY RTS. 35 (1995) [hereinafter *Sign Accord*].

73. *Id.* 2.2 million disks valued at \$10 each is \$22 million, which is less than 3% of the total estimated losses in 1994 of \$800 million. See *infra* note 76 and accompanying text.

74. Newby, *supra* note 6, at 30.

75. *Id.* at 31.

\$1.84 billion, with business software losses accounting for \$250 million of that total.⁷⁶

On June 30, 1994, due to the continued lack of satisfactory progress in enforcement measures, the USTR initiated a Special 301 investigation against China after placing China back on the list of Priority Foreign Countries.⁷⁷ The United States threatened trade sanctions on more than \$1 billion worth of Chinese products pursuant to Special 301.⁷⁸ China threatened similar trade sanctions of its own in retaliation.⁷⁹

On February 26, 1995, as the deadline approached for Special 301 trade sanctions against China to go into effect, the United States and China signed the Accord ending the impending threat of a trade war.⁸⁰ The Accord outlined the steps that the Chinese government was to take immediately to curb the widespread piracy of U.S. products and eventually to ensure continued effective enforcement of intellectual property rights.⁸¹

IV. THE 1995 U.S./CHINA ACCORD ON PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

The Accord represents the Chinese government's promise to begin enforcing its intellectual property laws.⁸² China already had adequate intellectual property laws, but the enforcement of those laws was woefully inadequate.⁸³ The Accord outlined specific enforcement procedures which would ensure effective intellectual property right enforcement in China.⁸⁴ In general terms, the Accord contained the following commitments: First, China was to take immediate anti-piracy steps, including creating task forces for an immediate crackdown to collect evidence and conduct expansive search-and-destroy raids on pirating factories;⁸⁵ Second, China was to implement long-term changes to ensure continued effective enforcement of intellectual property rights including: establishing a customs service modeled after the U.S. Customs Service to stop the exportation of pirated goods,⁸⁶ training Chinese business and legal professionals regarding intellectual

76. See Marcus W. Brauchli, *China Could Face U.S. Trade Sanctions Of Over \$2 Billion Due to Piracy Loses*, WALL ST. J., Feb. 26, 1996, at A9 (using estimates from the International Intellectual Property Alliance on total losses and from the Software Publishers' Association for estimated software losses).

77. Simpson, *supra* note 1, at 31; Newby, *supra* note 6, at 43.

78. Newby, *supra* note 6, at 43; *Sign Accord*, *supra* note 73. See *supra* note 62 and accompanying text (explaining Special 301).

79. Newby, *supra* note 6, at 43.

80. OFFICE OF THE U.S. TRADE REP., *supra* note 2, at 1; *Sign Accord*, *supra* note 73, at 31.

81. OFFICE OF THE U.S. TRADE REP., *supra* note 2, at 5-6; *Sign Accord*, *supra* note 73, at 31.

82. OFFICE OF THE U.S. TRADE REP., *supra* note 2, at 3.

83. Gero & Lannan, *supra* note 57, at 88.

84. OFFICE OF THE U.S. TRADE REP., *supra* note 2, at 2; *Sign Accord*, *supra* note 73, at 35.

85. OFFICE OF THE U.S. TRADE REP., *supra* note 2, at 2; *Sign Accord*, *supra* note 73, at 35.

86. OFFICE OF THE U.S. TRADE REP., *supra* note 2, at 2; *Sign Accord*, *supra* note 73, at 35.

property rights,⁸⁷ affording U.S. citizens and companies easier access to Chinese courts for intellectual property claims,⁸⁸ and establishing a new system for exchanging intellectual property enforcement statistics with the United States;⁸⁹ Lastly, China was to provide U.S. right holders with enhanced access to the Chinese markets by lifting all quotas on U.S. audio-visual goods and allowing joint ventures for audio and audio-visual productions.⁹⁰ These measures are reviewed in turn.⁹¹

A. Immediate Steps to Address Rampant Piracy Throughout China

The Accord promised a special enforcement period during which enhanced resources were to be allocated to investigating and prosecuting large-scale producers and distributors of infringing products.⁹² The special enforcement period was to begin on March 1, 1995, and run for six months.⁹³ The State Council's Working Conference on Intellectual Property Rights ("Council") was to be created to direct and coordinate the increased enforcement efforts during this period to ensure the elimination of piracy and to launch a nation-wide information and education campaign on intellectual property rights.⁹⁴ Particular emphasis was to be placed on regions with high levels of infringement activity with a focus on prosecuting some significant cases, imposing severe penalties and publicizing the penalties to deter further infringements.⁹⁵ Investigation was to focus on areas where pirated products were produced, distributed, and sold,⁹⁶ with efforts primarily to be directed at audio-visual products, computer software, books, sound recordings, and infringement of well-known trademarks.⁹⁷ China promised to allocate adequate resources to effectively take action against factories producing pirated products and to prohibit the exportation of pirated products.⁹⁸

The Accord placed special emphasis on enforcement against Chinese factories producing pirated compact disks (CDs), laser disks (LDs), or compact disks with read-only memory (CD-ROMs).⁹⁹ Each such factory was to be

87. OFFICE OF THE U.S. TRADE REP., *supra* note 2, at 3; *Sign Accord*, *supra* note 73, at 35.

88. OFFICE OF THE U.S. TRADE REP., *supra* note 2, at 3; *Sign Accord*, *supra* note 73, at 35.

89. OFFICE OF THE U.S. TRADE REP., *supra* note 2, at 3; *Sign Accord*, *supra* note 73, at 35.

90. OFFICE OF THE U.S. TRADE REP., *supra* note 2, at 3; *Sign Accord*, *supra* note 73, at 35.

91. *See infra* notes 93-165 and accompanying text.

92. CHINA'S SUPREME PEOPLE'S COURT, ACTION PLAN FOR EFFECTIVE PROTECTION AND ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS, Feb. 26, 1995, § I, C [hereinafter ACTION PLAN]; OFFICE OF THE U.S. TRADE REP., *supra* note 2, at 2.

93. Accord, *supra* note 93, § I, C, 1.

94. *Id.* § I, C, 1-2.

95. *Id.* § I, C, 3-4.

96. *Id.* § I, C, 4.

97. *Id.*

98. Office of the U.S. Trade Rep., *supra* note 2, at 2.

99. Accord, *supra* note 93, § I, D, 1.

investigated, without prior notice, by July 1, 1995, to determine whether they were, or had been, producing unauthorized disks.¹⁰⁰ Factories found to have engaged in infringement were to be punished through seizure, forfeiture, and destruction of the pirated products and the materials and implements directly and predominantly used to make them.¹⁰¹

B. Long-term Changes to Ensure Effective Enforcement of Intellectual Property Rights

In addition to the immediate protection provided in the 1995 Accord, and China's promise to enforce its intellectual property laws "strictly,"¹⁰² China promised to take the following steps to ensure that intellectual property rights would be respected and enforced in the future as well.¹⁰³

1. State Council's Working Conference on Intellectual Property Rights

The Accord charged the Council with overseeing long-term (three to five years) sustained enforcement.¹⁰⁴ China promised to establish a strong intellectual property enforcement scheme comprised of Intellectual Property Rights Working Conferences ("Working Conferences") to coordinate enforcement efforts and the drafting and implementation of legislation and regulation.¹⁰⁵ The Accord provided that each Working Conference would have an enforcement task force, empowered and directed to carry out enforcement efforts with respect to all types of intellectual property.¹⁰⁶

The Accord described the Council's role as ensuring that cross-jurisdictional enforcement efforts are carried out cooperatively and effectively between and among all Working Conferences.¹⁰⁷ In fulfilling its role, the Council must coordinate, study, and decide major policies and enforcement measures for intellectual property protection, and organize, instruct, and monitor all departments of the relevant authorities in each region that are charged with implementation.¹⁰⁸

100. *Id.* § I, C, 4 & D, 1, a.

101. *Id.* § I, D, 1, b.

102. Office of the U.S. Trade Rep., *supra* note 2, at 3.

103. *Id.* at 2.

104. Accord, *supra* note 93, annex I. The State Council's Working Conference on Intellectual Property Rights is comprised of the State Council's departments in charge of science, technology, foreign trade and economic cooperation, foreign affairs, press and publication, culture, broadcast, film, television, justice, public security, patent, copyright, industrial and commercial administration, and customs, and the departments in charge of the relevant industries. *Id.* § I, A, 2.

105. Office of the U.S. Trade Rep., *supra* note 2, at 2; see Accord, *supra* note 93, § I, A, 1-3 (stating that China was to create Working Conferences at the central, provincial, and local levels).

106. Office of the U.S. Trade Rep., *supra* note 2, at 2.

107. Accord, *supra* note 93, § I, A, 3; Office of the U.S. Trade Rep., *supra* note 2, at 2.

108. Accord, *supra* note 93, § I, A, 3.

Additionally, the Council must instruct and organize the relevant authorities to provide education and publicity for the laws regarding intellectual property rights.¹⁰⁹ All Working Conferences are required to issue follow-up reports each quarter for the first year, and semi-annually thereafter, beginning June 1, 1995.¹¹⁰

The authorities responsible for intellectual property protection were to coordinate their activities under the Working Conferences and to participate in enforcement task forces.¹¹¹ The task forces were to have all the personnel, financial resources, and legal authority necessary to effectively enforce intellectual property rights.¹¹² The Accord provided that when there is reason to believe or suspect that a company is engaging in copyright or trademark infringement, a task force may enter and search any premises, review books and records for evidence of infringement and damages, and seize suspected goods and the materials and implements directly and predominantly used to make them.¹¹³ When an intellectual property violation is found, the task force is authorized to impose fines, order an end to production and sale, revoke business permits, and cause the forfeiture and destruction of the pirated goods and the implements and materials predominantly used to make them.¹¹⁴ Working Conferences and enforcement task forces were to investigate and punish trademark infringement "promptly and strictly" and then turn cases over to prosecutors who were to "seek severe penalties."¹¹⁵

2. Customs Enforcement

In addition to the creation of task forces and Working Conferences discussed above, China was to create an effective customs enforcement system modeled after the U.S. Customs Service by October 1, 1995.¹¹⁶ The Chinese Customs Service ("Customs") was to publish regulations clarifying to the public that the import or export of pirated goods is illegal.¹¹⁷ Customs was to exercise all of the authority conferred by China's customs law including the authority to examine all types of imports and exports based on suspicion of infringement, based on the

109. *Id.* § I, A, 3.

110. *Id.* § I, A, 5, c.

111. *Id.* § I, B, 1.

112. *Id.* § I, B, 1, a.

113. *Id.* § I, B, 1, b.

114. *Id.* § I, B, 1, c.

115. *Id.* § I, D, 4, a. In addition to the punishment the task forces may inflict, judicial penalties for copyright or trademark violation may include, compensating right holders for losses suffered, eliminating the effects of infringement including making a public apology, punitive damages of two to five times the value of the infringing copies or goods, and criminal charges as may be appropriate under the Criminal Code of the People's Republic of China. Shoukang, *supra* note 29, §8[5]; TRADEMARK LAW OF THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 36, art. 40.

116. Office of the U.S. Trade Rep., *supra* note 2, at 2; Accord, *supra* note 93, § I, G, 2.

117. Accord, *supra* note 93, § I, G, 2.

petition of the right holder or his or her representative, or at random.¹¹⁸ Customs also was to enforce copyrights¹¹⁹ and trademarks¹²⁰ against infringing imports and exports.¹²¹ When Customs detained goods thought to be pirated, the right holder was to post a bond in an amount equal to the value of the goods, and if the final determination as to infringement was negative, the importer or exporter could request relief for losses incurred.¹²² Within ten days of goods being detained, Customs was to begin an investigation as to the legitimacy of the goods.¹²³ Within twenty days, Customs was to notify prosecutors, police, and other relevant authorities in cases involving suspected criminal activity.¹²⁴ Customs officials were to seize and destroy infringing articles, except in cases of trademark violation where the mark can be removed or obliterated; such goods will be kept out of the stream of commerce and can be used only for charity, government agencies, or auctioned to someone other than the infringer.¹²⁵ Parties dissatisfied with decisions made by Customs could seek administrative reconsideration or judicial proceedings.¹²⁶

3. Central Recordation

The Accord provided for Chinese customs to establish a central recordation system to aid in protecting copyright and trademark rights.¹²⁷ The system was to contain information on suspected or known infringers including the means of identifying specific infringing merchandise, the location and time of anticipated importation or exportation, and the suspected destinations of exported goods.¹²⁸ Customs was to continuously update the information and disseminate it to all customs offices.¹²⁹

China was to establish a copyright verification system to help prevent the production, distribution, exportation, and retail sale of audio-visual works, CDs,

118. *Id.*

119. Customs will enforce copyrights against infringing goods in all cases in which the applicant for enforcement presents legal proof of copyright, which in the case of a national of a member of the Berne Convention would be satisfied by a copyright registration certificate of that member country. *Id.*

120. Customs enforces trademarks in all cases in which the applicant for enforcement presents a "Trademark Registration Certificate" issued by the AIC (China's primary administrative law enforcement department for trademark infringement - *id.* § I, E, 1, b) or a claim of well-known status confirmed by the AIC. *Id.* § I, G, 2.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

LDs, and CD-ROMs without the verified consent of the right holder.¹³⁰ To help implement this system, all manufacturers of CDs, LDs, and CD-ROMs were to be issued a unique identifier that must be imprinted on manufactured copies in an obvious place.¹³¹ Disk manufacturers were to maintain a copy of the license contract and certificate of registration, together with an example of the copies produced, during production and for three years thereafter.¹³²

The Accord required registration of contracts with, and title registration from, China's National Copyright Administration ("NCA")¹³³ for all producers, reproducers, and publishers of foreign audio-visual products and CD-ROMs.¹³⁴ The NCA was to forward documents purporting to authorize production to the relevant associations of right owners, and issue a certificate of title registration only upon verification from the association.¹³⁵ Associations of U.S. right holders were to be allowed to establish offices in China to participate in this system.¹³⁶

The Accord provided that all software retailers were to be required to maintain an accurate inventory, including type, origin, quantity, and location, of any software it commercially reproduces, distributes, or rents, and to update and verify the accuracy of the inventory regularly.¹³⁷ Software retailers were to possess licenses to operate; all software distributed by entities lacking a license were to be treated as illegal, forfeited, and destroyed.¹³⁸ Repeat offenders were to lose their licenses for a minimum of three years.¹³⁹

The Accord was to protect copyrights on books, periodicals, and other printed works by stating that supervision and monitoring of distribution were to be improved, and that business licenses of those entities printing pirated material were to be revoked without mercy.¹⁴⁰ Publishers must check with the license issuing agency to verify the printing license before printing books or periodicals.¹⁴¹ Publishing licenses were to be granted based on whether the applicant has obtained

130. Office of the U.S. Trade Rep., *supra* note 2, at 2; *see* Accord, *supra* note 93, § I, H.

131. Accord, *supra* note 93, § I, H, 1, a.

132. *Id.* § I, H, 3.

133. The State Council approved the establishment of the National Copyright Administration of China in 1985. Shoukang, *supra* note 29, §1[2][b]. The NCA's main responsibilities are drafting copyright legislation, overall administration of copyright, collection and dissemination of copyright knowledge, and handling external copyright relations on behalf of the government. *Id.* Also, where a legal provision allows a use without the consent of the copyright owner, but requires that remuneration be paid, the NCA establishes the rates of remuneration for the exploitation. *Id.* §5[2][a].

134. Accord, *supra* note 93, § I, H, 2.

135. *Id.* § I, H, 2, b. The issuance of a registration certificate will in no way preclude a later action for infringement. *Id.*

136. Office of the U.S. Trade Rep., *supra* note 2, at 2.

137. Accord, *supra* note 93, § I, D, 2, b, ii.

138. *Id.*

139. *Id.*

140. *Id.* § I, D, 3, a.

141. *Id.* § I, D, 3, b.

authorization from the right holder to publish the material, and printing houses operating without a license will be shut down.¹⁴²

4. *Effective Judicial Relief*

Under the Accord, China was to ensure that U.S. right holders have access to effective judicial relief.¹⁴³ This includes giving “national treatment”¹⁴⁴ for civil filing fees, expeditious handling of intellectual property cases involving foreigners, and providing protection against destruction of evidence of infringement while a case is pending.¹⁴⁵ Also, China was to ensure the availability, or “transparency,”¹⁴⁶ of its laws, regulations, and rules related to the grant, maintenance, and enforcement of intellectual property rights.¹⁴⁷

5. *Information Dissemination and Training*

To facilitate enforcement, China was to enhance the training offered judges, lawyers, students, government officials, and business persons on the nature of intellectual property and the importance of its protection.¹⁴⁸ Within one to two years, fifty percent of the officials at or above the county and departmental ranks, and over eighty percent of persons in charge of research institutions, large and medium-sized enterprises, and institutions of higher learning, as well as officials in economics, science and technology, and culture management were to be trained on intellectual property rights.¹⁴⁹ Institutes of higher learning were to open or expand special studies of intellectual property and to provide basic intellectual property education for undergraduates.¹⁵⁰ The Chinese media, including radio, television, newspapers, and periodicals, was to systematically heighten the awareness of intellectual property rights and laws in society as a whole by

142. *Id.*

143. Office of the U.S. Trade Rep., *supra* note 2, at 3.

144. National treatment means that the Chinese government may not discriminate against right holders who are foreigners. *See* Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, art. 5(1) (making national treatment a part of the Berne Convention). National treatment “means that the authors of Union works, i.e. works protected by the [Berne] Convention, enjoy in all Union countries, other than in the country of origin of the work, the same protection as nationals of that country in addition to the rights they enjoy *jure conventionis*.” STEPHEN M. STEWART, *INTERNATIONAL COPYRIGHTS AND NEIGHBORING RIGHTS* 118 (1989).

145. Office of the U.S. Trade Rep., *supra* note 2, at 3.

146. Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, art. 63 [hereinafter TRIPS] (elaborating on transparency as “laws and regulations, and final judicial decisions and administrative rulings of general application . . . shall be published or . . . made publicly available . . . as to enable governments and right holders to become acquainted with them”).

147. Office of the U.S. Trade Rep., *supra* note 2, at 3.

148. *Id.*

149. Accord, *supra* note 93, § II, A, 1.

150. *Id.* § II, A, 3.

publicizing the consequences of infringements and giving wide coverage to prosecutions of serious infringements.¹⁵¹

The Accord provided that China was to protect against unauthorized use of intellectual property products in China's government ministries, and that those ministries were to be given adequate resources for the procurement of only authorized, legitimate computer software.¹⁵² Infringement of copyrighted software was strictly banned, and each individual and entity, public or private, was to be treated equally under the law; for example, China was to prosecute infringers whether they had political influence or not.¹⁵³

6. Exchange of Enforcement Statistics

The Accord established a system whereby the Chinese and the U.S. governments have begun to exchange statistics concerning enforcement efforts.¹⁵⁴ Information exchange began on a quarterly basis June 1, 1995, then semi-annually for two years beginning January 1, 1996, and is to be on a schedule to be agreed upon thereafter.¹⁵⁵ China is to provide information and statistics on the enforcement of intellectual property rights of U.S. nationals and joint ventures involving U.S. nationals.¹⁵⁶ Likewise, the United States is to provide information on federal intellectual property enforcement and statistics on Chinese products that are infringed in the United States.¹⁵⁷

C. Providing U.S. Right Holders with Enhanced Access to the Chinese Market

The 1995 Accord includes a commitment from China to abolish all quotas on the importation of U.S. audio-visual products.¹⁵⁸ This includes allowing U.S. record companies to market their entire catalog of works, subject to censorship concerns.¹⁵⁹ China promised to allow U.S. intellectual property related companies to enter into joint ventures with Chinese companies for the production, repro-

151. *Id.* § II, B.

152. *Id.* § I, D, 2, b, iii; Office of the U.S. Trade Rep., *supra* note 2, at 2.

153. Accord, *supra* note 93, § I, D, 2, b.

154. *Id.*

155. U.S. Trade Rep. Michael Kantor letter to Chinese Minister of Foreign Trade and Econ. Cooperation Wu Yi, 4 (Feb. 26, 1995) (USTR Fax Retrieval System) [hereinafter USTR Letter].

156. *Id.* at 4-5. The information is to be provided by type of intellectual property, establishments raided, value and disposition of infringing products, machinery, and implements, and on prosecutions and administrative and court decisions. *Id.*

157. *Id.* at 5. The United States is to report the customs seizure value of infringing goods by commodity and by type of intellectual property right, as well as seizure quantities by commodity, and information on prosecutions and court decisions in intellectual property cases. *Id.*

158. Office of the U.S. Trade Rep., *supra* note 2, at 3; USTR Letter, *supra* note 156, at 3.

159. Office of the U.S. Trade Rep., *supra* note 2, at 3; USTR Letter, *supra* note 156, at 3.

duction, distribution, and sale of U.S. audio-visual products in China.¹⁶⁰ Joint ventures initially may establish operations in Shanghai and Guangzhou, and China promised to allow expansion to eleven other as yet undetermined cities by the year 2000.¹⁶¹

Trademark agents permitted to represent Chinese individuals and entities were to be permitted to represent foreigners.¹⁶² Foreign subsidiaries, joint ventures, and licensees in China were to be permitted to act on behalf of the foreign owners of their marks.¹⁶³ These measures were to simplify access to China's trademark enforcement process for U.S. and other foreign trademark holders.¹⁶⁴

V. EFFECTS OF THE 1995 ACCORD

Some experts were quick to conclude that the initial results of the Accord were promising,¹⁶⁵ but others were not so optimistic.¹⁶⁶ In July 1995, the Chinese government announced that its fight against intellectual property rights violations had been a success and cited some impressive statistics to support its claim.¹⁶⁷ During the first four months of 1995, only two intellectual property rights violations cases were reported to the Beijing Public Notary Office, compared with two hundred cases reported in the same period in 1994.¹⁶⁸ Intellectual property rights violation suits in the Intellectual Property Court of the Beijing First Intermediate People's Court decreased by thirty percent for the first three months of 1995 as compared to the same period in 1994.¹⁶⁹ Of the suits filed in the Intellectual Property Court in 1995, approximately twenty percent involve litigation by foreign firms, including Microsoft and Walt Disney.¹⁷⁰ China claims that these changes are due to its successful fight against intellectual property rights violations.¹⁷¹

The task forces created as result of the 1995 agreement claimed to have closed seven of the twenty-nine Chinese factories that produce pirated CDs and

160. Office of the U.S. Trade Rep., *supra* note 2, at 3; USTR Letter, *supra* note 156, at 3.

161. Office of the U.S. Trade Rep., *supra* note 2, at 3; USTR Letter, *supra* note 156, at 3.

162. Accord, *supra* note 93, § I, D, 4, b.

163. *Id.*

164. *See id.* (stating that these provisions were designed for the purposes of obtaining enforcement actions).

165. Dominic Bencivenga, *Trade Pact with China: Enforcement Seen Key to Stamping Out Piracy*, 213 N.Y.L.J. 5 (Mar. 2, 1995) (stating that the initial results of the 1995 agreement are encouraging, but time will tell whether China is prepared to follow up words with action and enforce what they have agreed to do).

166. Kachuriak, *supra* note 21, at 600 (declaring that "the problem [of inadequate intellectual property protection] has persisted and in all likelihood will not immediately disappear even with the new agreement").

167. *China Claims Success in Enforcing IP Rights*, 7 NO. 7 J. PROPRIETARY RTS. 24 (1995) [hereinafter *China Claims Success*].

168. *Id.*

169. *Id.*

170. *Id.*

171. *See Id.*

movie laser disks.¹⁷² However, sales of pirated computer software continued,¹⁷³ and U.S. software companies claimed that twenty-eight of the twenty-nine Chinese pirate CD factories were still operating.¹⁷⁴

Microsoft Corporation, a large U.S. software manufacturer, complained in October of 1995 that China's enforcement of intellectual property rights remained erratic.¹⁷⁵ China's software market was about equal to that of France, but Microsoft's revenues for China were only about three percent of the total for French sales.¹⁷⁶ United States Customs agents seized a Chinese shipment of pirated Microsoft software bound for U.S. stores valued at tens of millions of U.S. dollars.¹⁷⁷ Despite the continued problems, Microsoft was optimistic, predicting its China revenues would rise to half the level of its France revenues within three years and asserted it was not about to give up on the Chinese software market.¹⁷⁸

Some Chinese CD pirates have turned to violence to protect their industry.¹⁷⁹ In December 1995, after numerous threats, an employee of the anti-piracy unit of the International Federation of the Phonographic Industry¹⁸⁰ was kidnaped by thugs who announced that hit men had been contracted to halt the staff's operations.¹⁸¹ The victim was returned unharmed, but the organization closed its Guangzhou, China, office and sent its employees into hiding.¹⁸² The threats had increased after the group identified several CD factories as makers of pornographic CD-ROMs.¹⁸³ The penalty for pirating CDs in China is two to seven years in prison, but the penalty for pornography can be execution.¹⁸⁴ Optimists see the violence as a positive sign that the pirates, knowing the days are over when intellectual property rights were not enforced, are desperate, since violence in other countries signaled the last gasp of local mafia control.¹⁸⁵

172. Kachuriak, *supra* note 21, at 617.

173. *Id.* at 618.

174. Kahn & Cooper, *supra* note 1, at A10.

175. Craig S. Smith, *Microsoft Says Pirate Copies Sap China Profits*, WALL ST. J., Oct. 27, 1995, available in WL [hereinafter Smith, *Microsoft Says*].

176. *Id.*

177. *Id.*

178. *Id.*

179. Maggie Farley, *Peril Escalates for Team Fighting Piracy of CDs; China: an Office is Closed and Staff Sent into Hiding after Colleague's Abduction, Death Threats*, L.A. TIMES, Dec. 25, 1995, at D4.

180. The industry group represents 1,100 record producers in 70 countries and opened three offices in China to monitor music bootlegging earlier this year. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* (quoting J.C. Giouw, Asian Regional Director of the International Federation of the Phonographic Industry).

185. *Id.*

U.S. officials charged that China had not made serious efforts to comply with the Accord, while China maintained it had made great progress.¹⁸⁶ While acknowledging that China had launched sporadic raids against offenders, U.S. officials claimed the raids were directed at retailers and not at the plants producing the goods.¹⁸⁷ U.S. newspapers claimed that many managers of infringing factories had strong local ties that protected them from closure and warned them of impending raids, so factory raids were ineffective.¹⁸⁸

Addressing the specific provisions of the Accord, the USTR stated that China did establish the State Council's Working Conference on Intellectual Property Rights, China failed to create an effective customs enforcement system modeled after the U.S. Customs Service by October 1, 1995, China did establish a central recordation system for title verification, China failed to provide effective judicial relief to foreign intellectual property right holders, China did make significant efforts in information dissemination and training, China did exchange enforcement statistics with the United States, and China failed to provide U.S. right holders with enhanced access to the Chinese market by abolishing all quotas on the importation of U.S. audio-visual products.¹⁸⁹

A year after the 1995 Accord, U.S. officials said that China had done very little to perform its side of the bargain in shutting down pirate operations.¹⁹⁰ These U.S. officials asserted: twenty-eight of the twenty-nine Chinese CD factories were still producing infringing products at top speed,¹⁹¹ nine out of ten U.S.-origin music recordings, computer software, videos, and books in Chinese markets were pirated products,¹⁹² and production of pirated CDs in China had increased since the Accord took effect.¹⁹³ The USTR maintained that China failed to attack production and distribution of pirated products with any of the vigor to which it

186. Charles Abbott, *U.S. Puts China Goods on Tentative Retaliation List*, REUTERS WORLD SERVICE, Dec. 31, 1995.

187. *Id.* (citing the USTR).

188. *E.g.* Farley, *supra* note 180, at D4.

189. Barshefsky, *supra* note 11, at 1036.

190. David E. Sanger, *U.S. to Apply New Vigor in Policing Trade*, N.Y. TIMES, Jan. 5, 1996, at D1; *Deadline Looms for China to Curb Copyright Piracy*, WALL ST. J., Mar. 8, 1996, at A6 [hereinafter *Deadline Looms*] (quoting USTR Mickey Kantor saying China has not enforced the 1995 Accord); Barshefsky, *supra* note 11, at 1036 (declaring that as of November, 1995, it was clear that China was not enforcing crucial portions of the Accord).

191. *See* Sanger, *supra* note 191, at D1 (stating that all twenty-nine factories are still operating at full capacity); Farley, *supra* note 180, at D4 (stating that one of the twenty-nine CD factories remains closed); U.S. 'Very concerned' about China's progress in intellectual property rights, AFX NEWS, Dec. 18, 1995 [hereinafter *Very Concerned*] (quoting Deputy USTR Charlene Barshefsky that twenty-nine factories are still producing large amounts of pirated material).

192. Abbott, *supra* note 187 (citing Eric Smith, president of the International Intellectual Property Alliance).

193. *See* Farley, *supra* note 180, at D4; Craig S. Smith, *U.S. Trade Officials Plan to Fault China On Its Lax Antipiracy Steps*, New Curbs, WALL ST. J., Feb. 7, 1996, at A10 [hereinafter *Officials Plan*].

committed in the Accord.¹⁹⁴ China's customs enforcement remained inadequate, and a series of customs regulations remained which did not conform with the Accord, according to the USTR.¹⁹⁵ From the U.S. perspective, the point of the Accord was for China to enforce its intellectual property laws, but the Accord's practical effect on Chinese piracy and on the enforcement actions of the Chinese government was negligible.¹⁹⁶

The USTR set a deadline of February 4, 1996, for China to increase enforcement or face trade sanction of up to a one hundred percent punitive tariff on \$2.8 billion worth of Chinese exports to the United States.¹⁹⁷ China immediately threatened counter-retaliation including suspending talks on joint ventures with major U.S. automobile manufacturers.¹⁹⁸ The sanctions were in effect for only a few hours before China once again promised greater enforcement of intellectual property rights.¹⁹⁹ Thereafter, the USTR decided not to impose trade sanctions for a few months.²⁰⁰

VI. THE 1996 U.S./CHINA AGREEMENT ON PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

In its 1996 report on the protection of U.S. intellectual property, the USTR listed China alone in its "Priority Foreign Country" category for egregiously inadequate protection of intellectual property, meaning China would be subject to Special 301 sanctions once again.²⁰¹ Acting USTR Charlene Barshefsky threatened Chinese officials with \$2 billion in trade sanctions if China failed to make progress by June 17, 1996, in shutting down pirate CD factories, increasing market access for U.S. entertainment and publishing firms, and strengthening customs controls.²⁰²

194. *Very Concerned*, *supra* note 192 (quoting Deputy USTR Barshefsky).

195. *Id.* (quoting Deputy USTR Barshefsky).

196. *See supra* notes 166-96 and accompanying text.

197. Abbott, *supra* note 187 (specifying that the preliminary list covers 23 tariff categories, including \$986 million in electronics, \$600 million in wood and furniture, and \$176 million in ceramics); Sanger, *supra* note 191, at D1.

198. Abbott, *supra* note 187.

199. Brauchli, *supra* note 77, at A9.

200. *Officials Plan*, *supra* note 194, at A10; *see Deadline Looms*, *supra* note 191, at A6 (stating that USTR officials will delay trade sanctions against China at least until the Taiwan elections March 23).

201. *See* Robert S. Greenberger, *U.S. Sharply Attacks China Over Intellectual Property*, WALL ST. J., May 1, 1996, at A3 (stating that the USTR report said China has "failed to stop illegal CD, video and CD-ROM production, to prevent the export of infringing goods, or to honor its promise to grant market access for legitimate audiovisual products").

202. *Id.*

To avoid the sanctions, China called upon its national police, the powerful Ministry of Public Security, to help fight piracy.²⁰³ Fifteen pirate CD factories were closed, and Chinese officials seized 80,000 pirated CDs.²⁰⁴ Barshefsky found these enforcement efforts, combined with the Chinese government's promise to continue strictly enforcing its intellectual property laws, sufficient to warrant dropping the threat of trade sanctions.²⁰⁵ The Chinese government's promise to continue its strict enforcement is embodied in the 1996 U.S./China Agreement on Protection of Intellectual Property Rights ("1996 Agreement").²⁰⁶

The 1996 Agreement provides that China will begin a special enforcement period, improve border enforcement, increase market access for U.S. companies, and establish monitoring and verification systems.²⁰⁷ The special enforcement period is a focused enforcement effort on regions of rampant piracy.²⁰⁸ Essentially, it is a reinstatement of the special enforcement period provided for in the Accord,²⁰⁹ with the additional involvement of China's Ministry of Public Security and Ministry of Culture.²¹⁰ The Ministry of Public Security is to make piracy a centerpiece of its sweeping nationwide anti-crime campaign, thereby adding tens of thousands of enforcement officials to the anti-piracy effort.²¹¹

China is to improve its border enforcement to comply with the provisions of the Accord.²¹² In particular, Chinese customs is to focus on exports of major cargo shipments and the import of presses used to manufacture CDs.²¹³ The Chinese customs service is to cooperate with its regional and international counterparts, including U.S. Customs.²¹⁴

Increased market access for U.S. companies is especially focused on Chinese market access for legitimate U.S. audio-visual and computer software products.²¹⁵ The 1996 Agreement reiterates the provisions of the Accord in China's commitments to allow U.S. record companies to enter into cooperative relationships with Chinese publishing houses for signing artists and producing and distributing the artists' works, to allow U.S. film companies the right to unlimited import of films, and to allow U.S. film companies to enter into projects with Chinese

203. Chen & Cooper, *supra* note 12, at A2; see Barshefsky, *supra* note 11 (stating that China's Ministry of Public Security announced it will make intellectual property crimes a part of its newly announced "Campaign Against Crime").

204. Chen & Cooper, *supra* note 12, at A2; Barshefsky, *supra* note 11, at 1036.

205. Barshefsky, *supra* note 11, at 1036.

206. *Id.*

207. *Id.*

208. *Id.*

209. See *supra* notes 93-102 and accompanying text.

210. Barshefsky, *supra* note 11, at 1036.

211. *Id.*

212. *Id.*; see *supra* notes 117-27 and accompanying text.

213. Barshefsky, *supra* note 11, at 1036.

214. *Id.*

215. *Id.*

companies to co-produce motion pictures.²¹⁶ Also echoing the Accord is the 1996 Agreement's provision reaffirming that Chinese public and private sector entities will use only legitimate software.²¹⁷

The 1996 Agreement provides for monitoring and verification systems designed to make China's intellectual property right protection system effective over time.²¹⁸ In order to ensure that the titles which Chinese CD factories and publishing houses wish to produce are properly licensed, the validity of the license must be checked with the appropriate U.S. trade association prior to production.²¹⁹ Any CD sold on the Chinese market without a SID code, the "signature" that identifies which CD press produced a particular CD, will be deemed per se illegal and subject to immediate seizure.²²⁰ China will station inspectors in all CD factories twenty-four hours per day to check title verification and the presence of SID codes on all molds and to audit CD press runs.²²¹ To limit the production capacity of potential pirates, China has prohibited the establishment of any new CD plants and has prohibited the importation of CD presses and equipment used in CD production lines unless expressly approved by the Chinese government.²²²

Most of these measures echo the Accord, and in the near future, they are likely to be just as ineffective as the Accord.²²³ Long-term effectiveness of Chinese intellectual property enforcement will not be realized until there is a strong domestic Chinese constituency for intellectual property. Increasing criminalization is no substitute for regularity and predictability in the application of a citizen-driven system of civil justice.²²⁴

VII. CONCLUSION

China may soon reach a stage in its development where it recognizes the value of stronger intellectual property protection.²²⁵ If this change in perspective

216. *Id.*; see *supra* notes 159-62 and accompanying text.

217. Barshefsky, *supra* note 11, at 1036; see *supra* notes 153-54 and accompanying text.

218. Barshefsky, *supra* note 11, at 1036.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. Alford, *supra* note 13, at A14.

224. *Id.* (opining that the way Washington has chosen to advance its intellectual property agenda may well end up impairing that very objective since history shows that serious copyright protection requires political and economic pluralism, and independent legal institutions capable of vigorously enforcing citizens' rights). "Only if citizens have the autonomy to develop and pursue their own ideas, apart from the state, ... will there be a strong domestic Chinese constituency for intellectual property." *Id.* The enforcement provisions of the 1996 Agreement centralize intellectual property right protection in the Chinese government which is contrary to political and economic pluralism. *Id.*

225. See Giunta & Shang, *supra* note 22, at 354 (asserting that a future of strong intellectual property protection in China looks promising because the Chinese government now recognizes its value).

occurs, it will be the product of two Chinese concerns.²²⁶ First, foreign firms will be reluctant to transfer technology to local companies, a necessary ingredient of sustained growth, if enforcement remains inadequate.²²⁷ Second, as China's economy grows, more local firms become piracy victims themselves, depressing sales and employment and discouraging local research and development.²²⁸ China's realization of the importance of intellectual property right enforcement to its long term economic development bodes well for more effective enforcement in the future.²²⁹

On the other hand, China is still a developing nation, so it has the disincentives to vigorous intellectual property enforcement common among developing countries.²³⁰ Promising strict enforcement keeps the flow of western technology pouring into China, while continued piracy allows Chinese industry to appropriate the technology it lacks without the associated research and development costs, thereby enabling China to compete in modern technological industries and avoid being dominated or exploited by developed countries.²³¹

For now, the pattern remains that the United States calls on China to remedy its inadequate enforcement, China agrees to do so, then China breaks its promise.²³² Such blatant disregard may undermine U.S. trade policy credibility around the world if it goes unanswered.²³³ However, history shows that China is seldom swayed by outside pressures.²³⁴

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226. *Id.*

227. *Id.*

228. *Id.* at 355.

229. See Giunta & Shang, *supra* note 22, at 354-55 (asserting that a future of strong intellectual property protection in China looks promising because the Chinese government now recognizes its value); Carlos A.P. Braga, *The Economics of Intellectual Property Right and the GATT: A View From the South*, 22 VAND. J. TRANSNAT'L L. 243 (1989) (noting that the ability to create new knowledge and to use it efficiently in the productive process is a fundamental requirement for economic development); Alford, *supra* note 13, at A14 (stating, "Only with strong domestic constituencies will there be sustained support for [intellectual property right] protection").

230. See *supra* notes 42-53 and accompanying text.

231. See *id.*

232. Sanger, *supra* note 191, at D1 (quoting Greg Mastel, a China expert at the Economic Strategy Institute).

233. *Id.*; cf. Alford, *supra* note 13, at A14 (suggesting the 1996 Agreement reflects the profound difficulty the United States has had in dealing with China).

234. See 16 THE NEW ENCYCLOPEDIA BRITANNICA *Macropaedia* 36 (15th ed. 1991) (stating that most of China's cultural development has been relatively unaffected by outside influence, the introduction of Buddhism from India being the major exception); Alford, *supra* note 13, at A14 (stating, "Rarely, if ever, has foreign pressure had its desired effect in this giant land that holds a quarter of humanity and is still largely impenetrable to outsiders").

