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Volume 18 | Number 3

Article 6

6-1-1996

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Jill Chiang Fung, *Can Mickey Mouse Prevail in the Court of the Monkey King? Enforcing Foreign Intellectual Property Rights in the People's Republic of China*, 18 Loy. L.A. Int'l & Comp. L. Rev. 613 (1996). Available at: <https://digitalcommons.lmu.edu/ilr/vol18/iss3/6>

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NOTES AND COMMENTS

CAN MICKEY MOUSE PREVAIL IN THE COURT OF THE MONKEY KING? ENFORCING FOREIGN INTELLECTUAL PROPERTY RIGHTS IN THE PEOPLE'S REPUBLIC OF CHINA

I. INTRODUCTION

In the August 1994 case, *Walt Disney Co. v. Grand World Publishing*, a Chinese court for the first time recognized a U.S. company's copyrights and trademarks, taking a crucial step towards affording general protection for foreign intellectual property rights in the People's Republic of China (China).¹ The Intellectual Property division of the Beijing People's Intermediate Court agreed with the California-based Walt Disney Company (Disney) that a Chinese publisher and its distributor had pirated children's books bearing a Mickey Mouse logo, and various Disney animated films,² including *Cinderella*,³ *Snow White*,⁴ and *Peter Pan*.⁵ The court fined the violators \$77,000. In an earlier case,⁶ involving infringement of a Disney trademark, a Chinese court merely fined a Chinese publisher ninety-one dollars and the case never went to trial.⁷

In *Walt Disney Co.*, Disney sued the Chinese publishing company alleging copyright violation in nine picture-story books featuring four Disney characters.⁸ The publishing company "reportedly produced and marketed 300,000 copies of the books in 1991, 1993, and 1994."⁹ *Walt Disney Co.* was the first decision handed down by the Beijing Intellectual Property Court. The Court, however, did not publish an opinion. This indicates that

1. Donna K.H. Walters, *Chinese Court for First Time Upholds U.S. Firm's Copyright*, L.A. TIMES, Aug. 5, 1994, at D1. The People's Republic of China is distinct from the Republic of China, Taiwan.

2. *Id.*

3. CINDERELLA (Walt Disney Productions 1950).

4. SNOW WHITE (Walt Disney Productions 1953).

5. PETER PAN (Walt Disney Productions 1953).

6. Walters, *supra* note 1, at D1.

7. *Id.*

8. *Disney Files Suit in China*, N.Y. TIMES, Aug. 8, 1994, at C2.

9. *Id.*

Chinese courts still need time to develop an organized and efficient system in order to adequately exercise their power.

Does the decision in *Walt Disney Co.* signal a new Chinese commitment to tackling infringement of foreign intellectual property rights? If so, can China realistically adopt a workable set of intellectual property laws for the protection of foreign products in China?

This Comment explores the historical concept of individual rights in the Chinese legal system to explain the differences that exist between U.S. and Chinese ideology towards intellectual property rights. Concepts of Chinese intellectual property rights are foreign to the United States and most other Western legal systems. Thus, legal professionals from the United States and other Western legal systems find enforcing intellectual property rights in China difficult.

Part II of this Comment explains China's social philosophy that gave rise to its legal philosophy, and explores the concept of individual rights under the Chinese Constitution. Part III focuses on changes that China has adopted in its intellectual property laws. Part IV discusses the international community's concerns regarding protection of foreign intellectual property rights in China. Part IV also examines recent U.S. pressures and policy decisions influencing protection of U.S. intellectual property rights.

Part V analyzes the implications of the landmark decision in *Walt Disney Co.*¹⁰ and argues that the decision marks China's commitment to ending piracy of intellectual property and preventing violation of foreign property rights in China. In the past, U.S. firms were reluctant to launch litigation in China's notorious legal vacuum.¹¹ Today, China is using the *Walt Disney Co.* decision to give U.S. companies increased influence in their enforcement of intellectual property rights. *Walt Disney Co.* also should provide the United States and other countries with greater incentives to invest in future business dealings in China.

Finally, Part VI concludes that the Beijing court decided in

10. Roberto Coloma, *U.S. Says Patent Ripoffs Endanger China's GATT Chances*, Agence France Presse, Dec. 16, 1994, available in LEXIS, Intlaw Library, China File. Intellectual property piracy annually costs U.S. companies hundreds of millions of dollars. Maggie Farley, *U.S.-China Trade Talks Stall Over Copyrights*, L.A. TIMES, Dec. 17, 1994, at D1.

11. Uli Schmetzer, *China Taking the Wind Out of Copyright Pirates' Sales*, CHI. TRIB., Aug. 10, 1994, at 1.

favor of Disney to show China's commitment to end piracy, avoid increased international pressures, and ensure that Disney continues to do business in China.

II. THE TRADITIONAL CHINESE LEGAL SYSTEM

Western legal scholars have always believed that traditional Chinese justice is "paternal" justice rather than "adjudicative" justice.¹² Chinese justice is geared toward specific situations rather than individual rights. Also, Chinese justice favors the settlement of disputes rather than defining the claims.¹³ In essence, Imperial China bases its law on traditional social relationships and not on the individual who claims personal rights and bears a fixed level of responsibility.¹⁴ The relational aspect of ancient Chinese law is undoubtedly a product of the influence of Confucian legal theory.¹⁵ At the same time, however, the "Legalists"¹⁶ had an equally profound, if not greater, impact on the development of Chinese law than Confucianists, rendering the legal system of Imperial China at once highly hierarchical and contextual.¹⁷

Confucianism did not take on its characteristic emphasis on hierarchy and civil obedience until it was reinterpreted in the orthodox school around the time that the Ming Dynasty ruled China.¹⁸ In its pure form, Confucian perspectives on law contrast sharply with Western "positive" legal theories.¹⁹ The modern Chinese laws have incorporated the pure Confucian ideas inherent in traditional Chinese legal thinking. This traditional thinking has

12. Alice Erh-Soon Tay, *Law in Communist China—Part 1*, 6 SYDNEY L. REV. 153, 156 (1969).

13. *Id.* at 153, 156.

14. *Id.*

15. *Id.* at 160-61. Confucius wrote "If the people be led by laws, and uniformity is sought to be given them by punishments, they will try to avoid punishments but have no sense of shame. If they be led by virtue and uniformity sought to be given them by *li*, they will have a sense of shame and, moreover, will become good." *Id.*

16. ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE REPUBLIC OF CHINA 8 (1992). The Legalists advocated heavy reliance on law—meaning a set of rules that state-imposed sanctions supported in case of non-imposed—as an instrument of government. *Id.* Clear legal rules, equally applicable to all people irrespective of social ranks, should exist and persons in breach of the law should be given strict punishment. *Id.*

17. *Id.*

18. *Id.* at 6-18.

19. *Id.*

especially influenced the development of China's intellectual property laws.

A. *Legal Philosophy in Ancient China: Confucian Social Philosophy and Legal Philosophy*

The Chinese Constitution²⁰ is remarkably similar to the U.S. Constitution in certain aspects, despite enormous differences between the two cultures. Both pledge immutable commitment to civil and political rights including the freedoms of speech, press, assembly, and freedoms of personal and religious belief, as well as the right to vote.²¹

No one would deny, however, that Chinese and Western views of rights are inherently irreconcilable. The West holds sacred the individual's civil and political rights, emphasizing their abstract and universal nature.²² In contrast, the Chinese place greater importance on social and economic rights, viewing them as collectively based, non-universal, and inferior to state interests.²³ Consider, for example, the Chinese Communists' concept of human rights:

Human rights are not "heaven-given," they are given and regulated by the state and by law; they are not universal, but have a clear class nature; they are not abstract but concrete; they are not absolute but limited by law and morality; they are not eternally fixed and unchanging but change their nature and proper scope in accordance with changes in the functions and position of people in the midst of shifting conditions of material production.²⁴

This concept of human rights reflects a collective view of rights at large, which is attributable to the traditional concepts of society, the state, and the law.²⁵ These concepts, in turn, are deeply rooted in Confucian philosophy and ideology.²⁶

As early as 50 B.C., Chinese scholars and philosophers espousing the "purist" Confucian views on society and politics

20. XIANFA [Constitution] (P.R.C.). The Chinese Constitution has been amended four times since 1949. CHEN, *supra* note 16, at 51.

21. For an analysis of China's four constitutions, see Ann Kent, *Waiting for Rights: China's Constitutions, 1949-1989*, 13 HUM. RTS. Q. 170 (1991).

22. DERK BODDE & CLARENCE MORRIS, *LAW IN IMPERIAL CHINA* 18-21 (1967).

23. Kent, *supra* note 21, at 174.

24. CHEN, *supra* note 16, at 15.

25. Kent, *supra* note 21, at 174.

26. *Id.*

accepted law only as a necessary evil.²⁷ They believed that public enactment of the law is not necessary in the ideal state and that, even in times of inferior administrations, government by law should always remain secondary to government by moral precept and example.²⁸

In contrast, groups opposed to the Confucianists, known as Legalists or the School of Law, ardently advocated applying law to maintain social order.²⁹ Legalists were men of affairs, administrators and diplomats rather than political philosophers who sought employment in whichever state could use their services.³⁰ Their goal was to create a political and military apparatus powerful enough to suppress feudal privileges at home, to expand the state's territories abroad, and to unite all rival kingdoms into a single empire.³¹ Their insistence on ruling by law was motivated not by concern for human rights, but simply by the realization that law was crucial for effectively controlling the growing populations under their jurisdictions.³² In comparison to the Legalists' view of people in society as indistinguishable entities combined to form a mass, Confucianists placed paramount importance on the well-being of the individual, family, and local community.³³

At the heart of Confucian thought is the term *li*, meaning moral or social rules of conduct, as opposed to the Legalists' *fa*, meaning law.³⁴ The difference between the two is analogous to the distinction between Western concepts of natural and positive law. *Fa* symbolizes a model, pattern, or procedure to be followed.³⁵ The superior authority essentially imposes an absolute standard to which people must conform, allowing for no differentiation on the basis of personal differences.³⁶ The strict meaning of *li*, on the other hand, denotes the performance of all kinds of religious rituals.³⁷ In a broader and more popular sense, *li*

27. *Id.*

28. BODDE & MORRIS, *supra* note 22, at 18.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. CHEN, *supra* note 16, at 8-9.

35. *Id.*

36. PHILLIP M. CHEN, LAW AND JUSTICE: THE LEGAL SYSTEM IN CHINA, 2400 B.C. TO 1960 A.D., at 30 (1973).

37. *Id.*

includes the entire gamut of ceremonial or polite behavior, secular as well as religious.³⁸ Furthermore, according to its broadest meaning, *li* is a designation for all the institutions and relationships, both political and social, which foster harmonious living in a Confucian society.³⁹ It constitutes both the concrete institutions and the accepted modes of behavior in a civilized state.

The orthodox Confucian interpretation of *li* is manifested in the Chinese legal system as emphasizing hierarchical differences.⁴⁰ Consequently, *li* is understood to prescribe sharply differing patterns of behavior according to a person's age and rank, both within the family and in society at large.⁴¹ From the standpoint of the "purist" Confucianists, however, *li* is an embodiment of broad moral principles rooted in innate human feelings, representing what men instinctively feel is right.⁴² To illustrate Confucian virtue working in its purest form, a professor of Chinese history at the University of Hong Kong noted the familiar event depicting a Chinese student standing in front of a row of tanks in Tiananmen Square in June 1989.⁴³ The most commendable person in the picture is not the student, but the soldier in the first tank.⁴⁴ The student was acting only in the heat of passion, but the soldier

38. *Id.*

39. BODDE & MORRIS, *supra* note 22, at 19-20.

40. *Id.* at 20.

41. *Id.*

42. *Id.* Accordingly, the concept of *li* makes several assertions, including:

1. Man is by nature good, and the inculcation of *li* shapes the individual into a socially acceptable human being. Thus, *li* turns the individual away from evil before he considers committing it, whereas *fa* acts only to punish the individual for evil already committed.
2. The five major relationships of Confucianism - those of father and son, ruler and subject, husband and wife, elder and younger brother, friend and friend - are instinctive to man and necessary for a stable social order. *Li* reinforces these relationships by prescribing modes of behavior differing according to status, whereas law obliterates the relationships by imposing a forced uniformity.
3. A government based on *li* functions harmoniously, because the unwritten *li* can be flexibly interpreted to meet the exigencies of any particular situation. A government based on law will tend to over-generalize conflicts and claims, and its people will seek to circumvent the words of the law rather than abide by its spirit.
4. The Legalists make no distinction between relatives and strangers, nor do they differentiate the noble from the humble. All are judged by them as one before the law, thereby quashing all kindness expressed in affection toward relatives and respect toward the honorable.

Id.

43. Interview with Professor K.S. Lee, Professor of Chinese History at the University of Hong Kong, Hong Kong, August, 1991).

44. *Id.*

risked his job as well as his life by refusing to run over the "rebel."⁴⁵ The soldier did not see the person blocking the convoy as either a rebel of the government or a target of his mission, but as a brother, or a son, or a husband, or a father, just like himself.⁴⁶ His decision reflected the highest level of moral ethics, absent any concept of hierarchy or obedience.⁴⁷ This virtue is known as *ren* or *jen*—the very mode of thought which Confucius himself attempted to instill in his followers.⁴⁸

In their struggle to create the legal system, the Legalists overpowered the "purist" Confucians.⁴⁹ In the words of one commentator:

[o]f all the difference between Legalist *fa* and Confucian *li*, none is more basic than the universalism of the former (its refusal to make exceptions for particular individuals or groups) as against the particularism of the latter (its insistence upon differing treatment according to individual rank, relationship, and specific circumstances).⁵⁰

Confucianism is inextricably ingrained in Chinese culture. Thus Confucian ideology cannot be divorced from the development of constitutionalism in China, regardless of the political agenda of the governing regime. Although China is a communist state, its people remain true to their culture. Consequently, efforts to implement a constitutional system based primarily on individual-civil and political rights of the contemporary West should be done with utmost care and scrutiny because such rights are foreign to the Chinese culture. One commentator notes that:

[a]ttempts by some Chinese scholars to link the humanist ethics, *ren* and *yi*, of traditional China with the notion of 'human rights as founded in the wellbeing [sic] of the people as individual moral beings' involve a qualitative logical leap from the collective notion of 'wellbeing [sic] of the people,' which it represents, to the notion of the quintessential value of the individual, which it does not.⁵¹

The best approach may be to discard the rights-based approach

45. *Id.*

46. *Id.*

47. *Id.*

48. CHEN, *supra* note 16, at 9.

49. *Id.*

50. BODDE & MORRIS, *supra* note 22, at 29.

51. KENT, *supra* note 21, at 174.

altogether, and utilize the relationship-based method as the foundation for understanding the current structure of China's constitutional system.

Arguably, the U.S. Constitution has worked effectively in guarding the personal liberties of those who live under its protection. It offers the same safeguards to all its citizens because universal, abstract principles like justice, equality, and fairness have always been the norm in U.S. society. On the other hand, for the past twenty-five hundred years, Confucianism has dominated Chinese philosophy, controlling the functions of family, community, government, and all else.⁵²

China's Constitution is one of Communist or "authoritarian" state, unlike the U.S. Constitution in formal authority and substantive content.⁵³ Law does not command as great a respect in China as it does in Western countries. For example, the Communist Party need not conform to the guidelines of China's Constitution, and Constitutional regulations do not include the Party as one of the entities that fall under the authority of the Constitution. Communist Chinese regard the Communist Party as supreme to the Constitution.⁵⁴ The Constitution in China merely provides directives or guidelines for the legislature, and its provisions are not enforceable in the absence of implementing legislation.⁵⁵

B. Effects of the Traditional Chinese Concept of Individual Rights on Enforcement of Intellectual Property Rights

China's concept of rights and liabilities differs radically from the West's. Chinese jurists criticize the capitalist legal system for trivializing and commercializing matters such as human dignity, conscience, reputations, pain, and morality into items of merchandise that have a price and can be exchanged.⁵⁶ To the Chinese, personal gains are secondary to national pride and community gains.⁵⁷

China's Constitution does not incorporate Western notions of human rights or civil liberties without qualification. The Com-

52. CHEN, *supra* note 16, at 39-50.

53. *Id.*

54. *Id.* at 40.

55. *Id.* at 79.

56. BODDE & MORRIS, *supra* note 22, at 3-11.

57. *Id.*

munist Chinese argue that constitutional guarantees of human rights and freedom in capitalist countries benefit only the capitalist elite. Protection given to the masses of working people, they assert, is illusory⁵⁸ because political power and the means of production are in the hands of the capitalists, and the system exploits the masses.⁵⁹

In the Chinese Constitution, individual rights are not divine and are revokable.⁶⁰ For example, because counter-revolutionaries have failed to perform their prescribed "duties,"⁶¹ they are not included among the "people" protected under the constitution. Instead, the constitution considers them the enemies of the "people." Article 33 of the revised Constitution states that:

All persons holding the nationality of the People's Republic of China are citizens of the People's Republic of China. All citizens of the People's Republic of China are equal before the law. Every citizen enjoys the rights and at the same time must perform the duties prescribed by the Constitution and by the law.⁶²

Chinese citizens must perform their "duties" as the law and the constitution prescribe in exchange for enjoyment of their rights.⁶³ This linkage of individual rights to the performance of social duties is consistent with the Communist tradition.⁶⁴ The Constitution lays out the fundamental duties of citizens, including: safeguarding the country's unity; observing the law, labor discipline and social ethics; safeguarding the security, honor and interests of the motherland; performing military service; and paying taxes as the law requires.⁶⁵ The Dengist regime⁶⁶ repeatedly stressed that any purported exercise of constitutional rights and freedoms is "unconstitutional" and "unlawful" if it violates any of the "Four Basic Principles" enshrined in the preamble of the Constitution itself: (1) keeping to the socialist road; (2) upholding the people's democratic dictatorship; (3) insisting on the leadership of the

58. CHEN, *supra* note 16, at 51.

59. *Id.*

60. XIANFA [Constitution] art. 2.

61. *Id.*

62. *Id.* art. 33.

63. *Id.* art. 42.

64. CHEN, *supra* note 16, at 53.

65. XIANFA [Constitution] art. 37-47.

66. CHEN, *supra* note 16, at 53.

Communist Party; and (4) adhering to Marxism-Leninism and Mao Zedong thought.⁶⁷

More specifically, China's Constitution states that the rights of the people may not interfere with the state's interests and the interests of other citizens.⁶⁸ An individual's interests are not of utmost importance in China.⁶⁹ The state's interests are the top priority. As a result, individual ownership and compensation are of secondary importance in China.

III. CHINESE INTELLECTUAL PROPERTY LAWS

Systems of intellectual property protection, such as patent and trademark laws, evolved as a complement to commercial growth.⁷⁰ Ideas, inventions, and symbolic representations, such as logos indicating the source or quality of goods, are valuable to buyers and sellers alike.⁷¹ These items, however, are inherently intangible and endlessly divisible.⁷² Anyone can "take" an idea without causing a physical diminution in the inventor's property.⁷³

Prior to the establishment of intellectual property laws, inventors could not exclude others from appropriating their ideas.⁷⁴ Because ideas and inventions have little value in commerce if the public can replicate them freely, intellectual property laws play a critical role in providing economic incentives for the development and disclosure of novel creations.⁷⁵

Modern patent systems in developed countries, such as the United States and the European states, encounter relatively little opposition on either theoretical or practical grounds. On the other hand, the concept of an individual holding exclusive rights in an

67. XIANFA [Constitution]. Mao invented the phrase the "Four Basic Principles" in response to the Democracy Movement of 1978-1979. CHEN, *supra* note 16, at 46.

68. XIANFA [Constitution] art. 1.

69. Understanding this concept of "selflessness" that the Chinese law promotes is essential in order to understand the difficulty of enforcing laws that protect individual profits in China.

70. See generally PAUL GOLDSTEIN, COPYRIGHT, PATENT AND RELATED STATE DOCTRINES, 1-2 (3d ed. 1990). As one commentator of China's Patent Law noted, "mental labor, like manual labor, can create value. Inventions and creations, as products of mental labor, are commodities." Liwei Wang, *Political and Cultural Aspects of the PRC Patent Law: The Role of Article 14*, 6 WIS. INT'L L.J. 193, 206 (1988).

71. GOLDSTEIN, *supra* note 70, at 1-2.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

article of intellectual property or a trademark, as well as the money-seeking tendencies and excessive individualism such rights might foster, are troublesome for a society such as China.⁷⁶ China traditionally has had little tolerance for rapacious profit-seeking and has favored state control over individual enterprise.⁷⁷

A. *Historical and Cultural Factors Influencing China's Intellectual Property Laws*

Chinese civilization extends back as far as ten thousand years, during which China was often far ahead of other cultures in scientific and technological advances. The Chinese are credited with notable innovations such as gunpowder, paper, and the compass, but cultural tendencies led the Chinese to forego commercialization of such inventions.⁷⁸ Those tendencies include the prevalence of Confucian thinking, which stresses personal development rather than personal reward, and a society with a system of incentives that does not include legal protection for invention and ingenuity.⁷⁹ Unlike the capitalist cultures that established the legal doctrine of property rights in ideas, and granted a monopoly to the inventor as an economic incentive for others to innovate,⁸⁰ the Chinese adopted a monetary and public recognition approach.⁸¹

By providing a cultural basis for the preeminence of state interests over individual autonomy,⁸² Confucian ideology and China's traditional aversion to individual profiteering fit neatly with the precepts of the Marxist economic system that took hold in 1949. Thus, China enacted its first Patent Law in 1950, and subsequent enabling rules such as the Regulations on Inventions in 1963, rewarding inventors with minor prizes but mandating

76. *Id.*

77. See Regulations of the People's Republic of China on Awards for Invention, promulgated by the State Council on Dec. 18, 1978, and amended on Apr. 25, 1984, art. 9 [hereinafter P.R.C. Invention].

78. In the Middle Ages, from 1000-1500 A.D. for example, China was well ahead of Europe in technology and industrial applications. Yet a feudal, rice-based economy, and the natural north-south geographical and climatic division, contributed to the lack of commercialization of such technology. *Id.*

79. P.R.C. Invention, *supra* note 77, art. 9.

80. See GOLDSTEIN, *supra* note 70, at 358.

81. See P.R.C. Invention, *supra* note 77, art. 6.

82. CHEN, *supra* note 16, at 53.

ownership of novel inventions in the state.⁸³ To emphasize the subordination of the individual to the State during the Cultural Revolution extending from 1966 to 1975, Mao's imposition of strict Marxist principles eliminated even those small rewards and recognitions.⁸⁴

B. China's First Intellectual Property Laws

Incorporating laws that grant exclusive intellectual property ownership rights to individuals into a socialist legal system is paradoxical. Thus, applying these laws proves to be difficult, as the following discussion of China's new intellectual property laws and their effectiveness demonstrates.

1. China's Trademark Law of 1982

The first law protecting intellectual property after the Four Modernization⁸⁵ was the Trademark Law, which China adopted in 1982.⁸⁶ It was China's first modern experiment in intellectual property protection. The legislature intended the Trademark Law to protect "the right to exclusive use of trademark."⁸⁷ Under Article 3 of the Trademark Law, a trademark registrant enjoys "the right to exclusive use of a trademark and receives legal protection."⁸⁸

The present regime clearly encourages brand competition and wants to put an end to the indiscriminate use of marks, a practice that marred the old system. Clauses 1 and 2 of Article 38 of the new Trademark Law specify that unauthorized use of a trademark on the "same type of commodity (as the trademark is registered for

83. See P.R.C. Invention, *supra* note 77.

84. CHEN, *supra* note 16, at 28-38.

85. *Id.* at 33-38. The "Gang of Four," as they were colloquially known, assumed power after Mao's death. *Id.* The group included Mao's widow and three of her cohorts in the Central Cultural Revolution Group. *Id.* Under the Four Modernization, China's leadership changed its focus to encourage economic and industrial development and began a period of reform. *Id.* One element of the overall economic reform drive was an "Open Door" policy, which led to the passage of many new laws, including measures to protect intellectual property consistent with laws of other nations. *Id.* These reforms were intended to provide international investors with a level of confidence that their industrial products and processes would not be misappropriated by unscrupulous locals. *Id.*

86. Trademark Law of the People's Republic of China of August 23, 1982, translated in 2 China Laws for Foreign Business — Business Regulation (CCH) ¶ 11-500, at 2 (1993) [hereinafter P.R.C. Trademark Law].

87. Trademark Law of the People's Republic of China, RENMIN RIBOA, Aug. 27, 1982.

88. P.R.C. Trademark Law, *supra* note 86, art. 3.

use on) or a similar commodity" as well as "unauthorized manufacture or sale of another's registered trademark sign" constitutes infringement.⁸⁹

The Trademark Law includes the following seven features:

(1) Applicants receive protection on a "first-to-file" basis.⁹⁰

(2) Trademark registration is voluntary.⁹¹ Entities may use an unregistered mark as long as it does not infringe on a registered mark and the entity clearly identifies its name.⁹² A 1985 amendment imposes compulsory registration of marks on certain goods, such as tobacco.⁹³

(3) A valid trademark is usable within three years of issuance; keeping a trademark for any extended period during its operation without usage may result in revocation.⁹⁴

(4) A trademark is valid for a period of ten years, is renewable, and is assignable through license.⁹⁵

(5) No protection exists for service marks.⁹⁶

(6) Nationals of the members of countries of the Paris Convention have priority registration for trademarks.⁹⁷

(7) An owner may enforce a trademark through administrative and legal proceedings.⁹⁸

2. China's Patent Law of 1984

In a socialist society like China, no one forbids others to study and use the experience of advanced workers. The Chinese government encourages their advanced workers to "play their role," and urges the working masses to study and use the advanced workers' experience, because the interests of socialist society conform to those of the advanced workers. Therefore, regarding

89. *Id.* art. 38, cls. 1, 2.

90. *Id.*

91. *Id.* art. 4-5; see also *Circular Governing Suggestions on the Adoption of the Non-Registered Trademarks*, Apr. 29, 1985, available in LEXIS, INTLAW Library, CHINA File, CHINALAW No. 279.

92. P.R.C. Trademark Law, *supra* note 86, art. 38.

93. *Id.* art. 1.

94. *Id.* art. 30(4).

95. *Id.* art. 23.

96. *Id.* Introduction.

97. *Provisional Regulations Governing Applications For Priority Registrations of Trademarks in China*, Introduction, Mar. 15, 1985, available in LEXIS, INTLAW Library, CHINA File, CHINALAW No. 259.

98. P.R.C. Trademark Law, *supra* note 86, art. 39.

the inventions and technical improvements of a certain individual or a certain unit as personal property is not necessary because no "protection" is necessary to the Chinese socialists.

The Chinese realized, however, that, in order to nurture and continue absorption of advanced technology from abroad and develop a technological infrastructure in China, implementing more intellectual property protection was necessary. Hence, beginning in 1980, the Chinese began formulating new laws to encourage technological innovations. The writers were unanimous in their verdict that China needed a patent law extending a proprietary interest in an invention or technological innovation to the party responsible for its creation.⁹⁹ The Chinese perceived that simply by granting proprietary rights in inventions under a patent law and committing to penalties for patent infringement would provide foreigners with sufficient assurances that their rights in technology, patentable in their own countries, will be safe within China's borders.¹⁰⁰

As Article 1 of China's Patent Law indicates,¹⁰¹ the Chinese leaders of the late 1970s and early 1980s who supported the goals of the Four Modernization¹⁰² recognized the utility of intellectual property protection as an incentive for economic development. Between 1980 and 1983, China sent dozens of envoys with legal, scientific, and political backgrounds to extensively study the patent laws and practices of various developed countries.¹⁰³ As a result, the Patent Law China eventually enacted contained many features common to established patent laws in developed countries.¹⁰⁴

99. Zheng, *Preliminary Comment on the Necessity of Promulgating the Patent Law*, 6 FAXUE YANJIU 27 (1980).

100. *Id.*

101. STANDING COMM. OF SIXTH NAT'L PEOPLE'S CONG., 4th SESS., Patent Law of the People's Republic of China, art. 1 (Mar. 12, 1984), translated in 2 China Laws for Foreign Business, China Trade Docs. (CCH) ¶ 11-600, at 2 (1993) [hereinafter P.R.C. Patent Law]. China enacted Article 1 "to protect patent rights for inventions-creations, to encourage invention creation, to foster the spreading and application of inventions-creations, and to promote the development of science and technology, for meeting the needs of the construction of socialist modernization." *Id.*

102. CHEN, *supra* note 16, at 36.

103. Lionel S. Sobel, *Technology Transfer and Protection of Intellectual Property in China*, 12 LOY. L.A. INT'L & COMP. L.J. 61, 63 (1989). Developed countries include Canada, the United States, and European Community members states. See also Mark Sidel, *Copyright, Trademark and Patent Law in the People's Republic of China*, 21 TEX. INT'L L.J. 279, 280-82 (1986).

104. Sobel, *supra* note 103, at 63.

In 1984, China passed a patent law that facially extended to foreign patent holders a level of protection similar to that of other internationally-accepted models.¹⁰⁵ Complaints of piracy and infringement by the Chinese, however, continued throughout the 1980s and Chinese courts could not effectively handle the complaints through its existing legal system.¹⁰⁶ In December 1991, the United States Trade Representative (U.S.T.R.) responded to these complaints by instituting a Section 301 investigation of China's trade practices pursuant to the 1974 Trade Act.¹⁰⁷ After the U.S.T.R. threatened sanctions, China agreed to tighten its intellectual property protection, and in January 1992 China and the United States signed a Memorandum of Understanding (MOU).¹⁰⁸ In September 1992, the Chinese State Council approved an amendment to the Patent Law to address the complaints of foreign businesses and to implement its pledge as outlined in the MOU¹⁰⁹

Under Article 2 of the newly amended Patent Law, the unauthorized manufacture or sale of a patent or patented product constitutes patent infringement.¹¹⁰ Article 62 exempts certain actions from this proscription, including the unknowing use or resale of a patented product.¹¹¹ A two-year statute of limitations applies to the institution of "legal proceedings concerning the

105. P.R.C. Patent Law, *supra* note 101; *see also* Ross J. Oehler, Comment, *Patent Law in the People's Republic of China: A Primer*, 8 N.Y.L. SCH. J. INT'L & COMP. L. 456 (1987). The Chinese borrowed primarily from the patent laws of the United States, Germany and Canada. The "[Chinese] Patent Law . . . does not differ drastically from United States Patent Law or that of the Paris Convention members." Convention on the Grant of European Patents, Oct. 5, 1973, *reprinted in* 12 I.L.M. 271 (1974).

106. P.R.C. Patent Law, *supra* note 101.

107. 19 U.S.C. § 2411(c) (1988); The Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (codified in various sections of 19 U.S.C.), made significant amendments to the Trade Act of 1974. "Section 301" refers to sections 301 to 309 as amended in 1988. Section 301 actions allow the U.S.T.R. to impose severe sanctions in the form of greatly increased tariffs on countries found to violate trade practices. The Trade Act of 1974 *amended by* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 93-618, 88 Stat. 2066 (codified as amended at 19 U.S.C. §§ 2411-2487 (1988 & Supp. 1990)).

108. Memorandum of Understanding Between the Government of the P.R.C. and the Government of the USA on the Protection of Intellectual Property, Jan. 17, 1992, U.S.-China (Dept. St. Document on file with the B.C. INT'L & COMP. L. REV.) [hereinafter MOU].

109. *See id.*

110. *See generally* P.R.C. Patent Law, *supra* note 101, art. 2.

111. *Id.*

infringement of patent right" beginning on the date a patentee or interested party "obtains or should have obtained knowledge of the infringing act."¹¹²

Furthermore, under the new Patent Law, the complainant in an infringement action may sue for both an injunction of the infringing act and compensatory damages.¹¹³ In addition, Article 63 provides that an infringer may be subject to criminal prosecution under Article 127¹¹⁴ "[w]here any person passes off the patent of another person."¹¹⁵ The Chinese term *jia mao*, translated in the new patent law as "passes off," implies knowledge or intent.¹¹⁶ Alleging intentional infringement therefore appears to be an essential element of complainant's case for criminal patent infringement.

3. China's Copyright Law Today

Since 1992, China has passed and amended a number of intellectual property laws, including its Copyright Law.¹¹⁷ China's Copyright Law protects an author in fields such as literature, art, natural science, social science, and engineering technology.¹¹⁸ The copyright protection period generally covers the author's lifetime plus fifty years.¹¹⁹ Additionally, copyrights are inheritable.¹²⁰ A copyright awarded for a work that two or more persons have created is a common right of the joint authors.¹²¹ Works that individuals have created in performing employment duties are deemed professional works for which the authors receive

112. *Id.* art. 61. Under Article 60 of the P.R.C. Patent Law, a party seeking remedy for infringement may either "institute legal proceedings in the People's Court" or "request the administrative authority for patent affairs" to handle the matter. *Id.* art. 60. Article 61 apparently does not apply to actions for infringement brought before administrative authorities. *Id.* art. 61.

113. *Id.* art. 60.

114. STANDING COMM. OF FIFTH NAT'L PEOPLE'S CONG., 2D SESS., Criminal Law of the People's Republic of China, art. 127, (adopted on July 1, 1979 and took effect on January 1, 1980) [hereinafter P.R.C. Criminal Law].

115. P.R.C. Patent Law, *supra* note 101, art. 63.

116. *Id.*

117. Lulin Gao, *Taking a Stand*, CHIN. BUS. REV. Nov. 1994, at 9.

118. *Id.*

119. STANDING COMM. OF THE 7TH NAT'L PEOPLE'S CONG., 15th SESS., Copyright Law of the People's Republic of China, art. 2, (Sept. 7, 1990) *reprinted in* 11 EUR. INTELL. PROP. REV. 1 (Zhenlun Zhao trans. 1990) [hereinafter P.R.C. Copyright Law].

120. *Id.* art. 19.

121. *Id.* art. 13.

copyrights; however, their work units have a priority right of use.¹²² For a period of two years after the completion of such work, the author may not allow a third party to use the work without the approval of the work unit.¹²³ Copyrights are awarded to the relevant work unit, however, for professional works in the form of engineering and product design blueprints, software, maps, and so forth, that an individual produced primarily with the use of a work unit's material and technical resources, and for which the work unit bears responsibility. The author may receive a reward from the work unit for the achievement.¹²⁴

China's Copyright Law provides exceptions allowing for reasonable use of a published work without permission from and remuneration to the copyright holder.¹²⁵ Examples include: use for personal study, translation, and reproduction for educational purposes.¹²⁶ A copyright holder may require a user to obtain permission before using his copyrighted material. In the absence of such a requirement, newspapers or magazines may reprint the material, or a professional performance may use such material so long as the copyright holder receives payment.¹²⁷

The Patent Law protects works of foreigners if first published within Chinese territory. This protection also extends to works published in China within thirty days after their first publication in another country.¹²⁸ Copyright protection extends to performances by foreign performers in China and to audio-video recordings that foreigners produce and issue in China.¹²⁹ Works of foreigners published outside of China receive protection in accordance with any applicable international agreement to which both China and the foreigner's country are parties.¹³⁰

122. *Id.* art. 16.

123. *Id.*

124. *Id.*

125. *Id.* art. 22.

126. *Id.*

127. *Id.*

128. *Id.* art. 2. Article 2 of the P.R.C. Copyright Law protects works of foreigners that are first published in China. *Id.* Article 25 of the Implementing Rules for the P.R.C. Copyright Law clarifies this to include a foreigner's work published in China within thirty days of its first publication outside China. *Id.* art. 25. This conforms with Article 3(4) of the Berne Convention. MOU *supra* note 108, at 4.

129. P.R.C. Copyright Law, *supra* note 119, art. 3.

130. *Id.*

C. *The Climate for Intellectual Property Protection Improves in China, But Pitfalls Remain*

Many state-run foreign language bookstores in China restrict foreigners access to at least one section of the store. This restriction protects only one state secret: widespread copyright violations. Behind these closed doors are unauthorized reprints and photocopies of Western novels, textbooks, and reference materials.¹³¹

This lack of concern for intellectual property rights does not surprise those who conduct business in China. Many computer and software firms have avoided the Chinese market because of piracy concerns. Until their recent victory, even Disney had canceled a highly popular cartoon show when Chinese authorities proved unwilling to fight against copycat programs and products.¹³²

The *Walt Disney Co.* case serves as a turning point in the Chinese conception of intellectual property rights. This decision indicates that China may finally be willing to adopt and enforce a more globally acceptable set of intellectual property laws, which will promote greater foreign investment in China. The new intellectual property laws are, however, not consistent with the Chinese legal system, which is based on a set of assumptions different from those of Western legal systems.

Disney is now back in China, and computer firms are jumping in with both feet.¹³³ One reason for the renewed interest is the sense that those who do not get in soon will miss out on what may become the largest economy of the twenty-first century. Another reason comes from changes in Chinese law, which on paper—and sometimes even in practice, as the recent Disney decision has proven¹³⁴—provides as much security for intellectual property rights as any industrialized society. Pressure from the United States, together with a thirst for Western innovation and technology, has created a new climate of protection for inventions, ideas, and other intellectual property in China.

Intellectual property rights long have been a subject of

131. Walters, *supra* note 1, at D5.

132. Michael Duckworth, *Laws Inspire Disney's Return to China*, ASIAN WALL ST. J., Mar. 23, 1992, at 3.

133. *Id.*

134. *Disney Sues to Halt Sales Of Knock-Offs*, WALL ST. J., Oct. 7, 1988 at A2.

negotiation between the United States and China. The MOU of January 1992 between these two governments committed the Chinese to significantly expand the scope of protection for U.S. intellectual property.¹³⁵ As a result of the MOU, China joined the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention)¹³⁶ and the Geneva Phonograms Convention.¹³⁷ China also amended its own laws to provide additional protection for both domestic and foreign intellectual property.¹³⁸

One of the more significant changes to domestic law is in the area of unfair competition. Until the end of 1993, China had no laws against improper use or disclosure of business secrets.¹³⁹ A foreign company seeking to protect proprietary information had to rely solely on the contract rights negotiated with its Chinese partners. Because many, if not most, trade secret infringers have no contractual relationship with the owner of the secret, relying on contract rights did not prove to be an effective weapon against piracy.¹⁴⁰

China's new Law for Countering Unfair Competition¹⁴¹ solves the problem. As of December 1, 1993, a party may obtain, use, or disclose economically valuable "technical information and operational information that is not known to the public" only if he is the owner of the information. Criminal, as well as civil penalties are available under this act.¹⁴² This act also prohibits practices such as false advertising, price fixing, bid rigging, and commercial bribery.¹⁴³

1. Significant Changes in Patent Law

Treaties and expansion in domestic law also have significantly

135. MOU, *supra* note 108, at 3-4.

136. *Id.*

137. Harvey J. Winter, *The Role of The United States Government in Improving International Intellectual Property Protection*, 2 J. L. & TECH. 325, 328 (1987); also see MOU, *supra* note 108, art. 3.

138. MOU, *supra* note 108, art. 5-6.

139. Xiao-Lin Zhou, *U.S.-China Trade Dispute and China's Intellectual Property Rights Protection*, 24 N.Y.U. INT'L L. & POL. 1115 (1992).

140. *Id.*

141. Agreement Regarding Intellectual Property Rights, Feb. 26, 1995, China-U.S., art. I. (I)(2), *reprinted in* 34 I.L.M. 881.

142. *Id.*

143. *Id.*

altered China's Patent Law. On January 1, 1994, China acceded to the Patent Cooperation Treaty.¹⁴⁴ This treaty establishes standardized procedures for patent filing and examination, and therefore should simplify the process of obtaining patent rights in China.

Inventors of pharmaceutical and chemical inventions like fertilizers and pesticides may now apply for patents under domestic law.¹⁴⁵ China also extended the duration of most patents from fifteen to twenty years,¹⁴⁶ and now offers greater protection for process patents.¹⁴⁷ In the past, infringement of a process patent occurred only in the manufacturing area; now unauthorized sale or importation of a product manufactured with a patented process is also infringement.¹⁴⁸

2. China's Copyright Law Proves to Be Vague

The status of the expected changes in China's Copyright Law is less clear than those in its trademark and patent laws. In theory, China's accession to the Berne Convention provides a basis of protection for the owners of computer programs, literary works and other creative property.¹⁴⁹ China's domestic law, however, remains less protective than the Berne Convention in some areas.¹⁵⁰ For example, China's Copyright Law offers no protection for unpublished works and does not provide exclusive rights for public performances of films or recordings.¹⁵¹ Whether Chinese officials are willing to enforce Berne Convention provisions that exceed or conflict with China's domestic law remains to be seen.

IV. PROBLEMS IN ENFORCEMENT OF INTELLECTUAL PROPERTY LAWS

China has been fairly successful in passing laws to protect intellectual property. The more important, and more difficult, step is enforcing the rights that the laws create. China's performance in enforcement is a "mixed bag." Recent high profile raids and

144. MOU, *supra* note 108, at 3-4.

145. *Id.* at 1.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 5.

150. *Id.*

151. *Id.*

prosecutions have given the appearance that some segments of Chinese authority are serious about stopping piracy.¹⁵² In its anti-piracy campaign, China has even executed at least one counterfeiter.¹⁵³

Nevertheless, piracy remains rampant. In its 1993 submission to the United States, the International Intellectual Property Alliance (I.I.P.A.)¹⁵⁴ estimated piracy losses of \$827 million to U.S. software, motion picture, recording, and book publishing industries.¹⁵⁵ Howard Lincoln, chairman of Nintendo of America, Inc. (Nintendo), complained in a recent *Wall Street Journal* editorial that even entities of the Chinese government continue to engage in massive counterfeiting of video games and hardware.¹⁵⁶ Both the I.I.P.A. and Nintendo have requested that the U.S.T.R. name China a priority foreign country, subjecting it to trade sanctions unless it makes further progress in intellectual property protection.¹⁵⁷

Problems in intellectual property protection are attributable to principal differences between Chinese and U.S. intellectual property laws. For example, Chinese law does not explicitly protect against unauthorized third party acquisition of trade secrets.¹⁵⁸ In China, the grant of a trade secret, unlike that of a patent, does not confer exclusive rights for a specific number of years.¹⁵⁹ Rather, protection of trade secrets depends upon the possessor's ability to preserve confidentiality. Consequently, protection of trade secrets requires different legal mechanisms.¹⁶⁰ In contrast, in the United States, the laws of each state generally protect trade secrets,¹⁶¹ and some states have also adopted the Uniform Trade Secret Act.¹⁶²

152. Coloma, *supra* note 10, at 15.

153. *Id.*

154. Gao, *supra* note 117, at 37.

155. *Id.*

156. *Id.*

157. *Id.*

158. See STANDING COMM. OF SIXTH NAT'L PEOPLE'S CONG., 21st SESS., Detailed Rules for Implementation of the Administrative Regulations of the P.R.C. on Technology Import Contract, art. 41, (June 23, 1987), reprinted in LAW OF THE PRC ON TECHNOLOGY CONTRACT (1987).

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

Another difference between the two countries is that China adheres to a "first-to-file" principle in both patent and trademark applications. China grants a patent or trademark to the first registrant to file the appropriate application,¹⁶³ and does not require a showing of prior use to obtain the initial registration of a trademark.¹⁶⁴ In fact, mere use will not result in exclusive rights to a trademark, with the exception of well-known marks under the Paris Convention.¹⁶⁵ In contrast to China's use of a "first-to-file" principle, the United States employs a "first-to-invent" standard, under which the first party to file a patent or trademark may not necessarily be the party that ultimately receives the patent.¹⁶⁶

Intellectual property laws in the United States and China also differ markedly in terms of implementation and enforcement. In China, although judicial remedies exist for patent, trademark, and copyright infringements and violations, the government clearly places an emphasis on administrative and other non-judicial resolutions such as mediation and arbitration.¹⁶⁷ The Chinese system generally disfavors litigation, although this does not necessarily result in a diminution of protection for U.S. intellectual property rights in China. China now is making efforts to raise the level of intellectual property protection to internationally acceptable standards. Once China succeeds, the non-judicial procedures may result in speedier and less costly resolution of infringement claims.

Problems still exist, however, in accessing the Chinese market. In the past decade, China has made various gestures indicating its desire to open its doors to foreign business.¹⁶⁸ Yet China continues to enforce various protectionist oriented policies, believing it fosters the growth of Chinese industries.¹⁶⁹

163. P.R.C. Trademark Law, *supra* note 86, art. 18.

164. *Id.*

165. Convention on the Grant of European Patents, *supra* note 105.

166. *Harmonization, USPTO Proposes First-To-Invent Option in Harmonization Treaty*, PAT. TRADEMARK & COPYRIGHT L. DAILY (BNA), Apr. 24, 1991, at 70.

167. Chen, *supra* note 16, at 175-76.

168. China has enacted and amended its Copyright, Trademark, and other Intellectual Property Laws to attract foreign investors who desire more protection from the Chinese government.

169. Nicholas D. Kristof, *China's Congress Likely to Pick Young Rulers*, N.Y. TIMES, Mar. 15, 1993, at A2 (discussing China's effort to further advance a market economy).

V. U.S. POLICIES ON PIRACY AND PRESSURE FOR REFORM

During 1992, the Bush administration won a last-minute commitment from Beijing to improve protection of U.S. patents, copyrights, and trade secrets.¹⁷⁰ On January 17, 1993, China and the United States signed a bilateral agreement committing China's adherence to accede to two international copyright conventions, to take other steps to curb piracy in computer software and sound recordings, and to extend stronger protection to U.S. producers of pharmaceutical and agricultural chemicals.¹⁷¹ This agreement not only ensured intellectual property protection for U.S. investors in China, but also ended the U.S. threat of punitive tariffs on hundreds of millions of dollars in Chinese imports. The United States would have imposed those sanctions had the agreement negotiation failed with China.¹⁷² Under the bilateral agreement, the IIPA has agreed to endorse the renewal of China's most-favored-nation trade benefits.¹⁷³

Recently, the U.S. Government broke off key trade talks with Beijing officials, warning that trade sanctions are inevitable if China does not make "serious offers" to improve intellectual property rights enforcement soon.¹⁷⁴ At issue is China's treatment of international copyrights, patents, and trademarks. A senior U.S. trade official indicated that China has not only failed to live up to the promises it made in the bilateral agreement, but has also permitted the number of factories making pirate compact discs to jump from fifteen to twenty-nine in the eighteen months since the United States and China began negotiations on the issue.¹⁷⁵

China claims that U.S. accusations are indicative of the failure of the United States to recognize the improvements China has already made in the past twelve years.¹⁷⁶ In merely twelve years China has introduced a series of intellectual property laws

170. Eduardo Lachica, *China Settles Dispute Over U.S. Patents, Copyrights, Heading Off Tariff Threat*, WALL ST. J., Jan. 17, 1992, at A2.

171. *China Settles Dispute Over U.S. Patents, Copyrights, Heading Off Tariff Threat*, WALL ST. J., Jan. 17, 1992, at A1.

172. *Id.*

173. *Id.*

174. Farley, *supra* note 10, at D1.

175. *Id.*

176. *Intellectual Property in China: Copy to Come*, ECONOMIST, Jan. 7, 1995, at 51.

resembling those in many Western countries. According to the head of Beijing's intellectual property protection center, Li Changxu, China's legislation of legal measures outpaced the ability of the authorities to enforce them.¹⁷⁷

On February 27, 1995, China and the United States entered into a trade accord giving new assurances of access to the Chinese market, including intellectual property protection for U.S. companies.¹⁷⁸ Under the new agreement, China will take new steps to enforce existing laws, and monitor its borders with the technical assistance of the U.S. Customs Service.¹⁷⁹ China will allow U.S. companies to open entertainment production facilities in the cities of Shanghai, Guangzhou, and elsewhere.¹⁸⁰ China will also pursue trademark protection and stop government ministries from using pirated computer software.¹⁸¹ Finally, and most importantly, China will provide holders of U.S. copyrights with enhanced access to the Chinese market.¹⁸² For its part, rather than slapping \$1 billion in trade sanctions on Chinese products sold in the United States, the United States will now try to make billions of dollars by turning the 1.2 billion Chinese citizens into customers for properly licensed compact discs, videos, computer software, and pharmaceuticals.¹⁸³

Although this new pact should lead to better enforcement of Chinese intellectual property laws, it presently leaves many questions unanswered. Whether China will continue the course it began is unclear. Such a course involves closing down plants in southern cities where pirates produced illegal compact discs without paying royalties. Also unknown is whether Chinese courts will continue to punish pirates of U.S. products as in the Disney case.

VI. CONCLUSION

A revolutionary expansion of the property rights conferred on individuals and enterprises is the foundation for the new regime of

177. *Id.*

178. James Gerstenzang, *China Pact Leaves Many Questions*, L.A. TIMES, Feb. 27, 1995, at A1.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

Chinese intellectual property law. Enforcement of these new laws, however, will take time. The traditional Chinese concepts of rights and ownership are very different from that of capitalist societies. Consequently, as China attempts to conform and to implement laws so foreign to its history and culture, Western countries must be patient and allow China adequate time to adapt.

In the past decade, China has made rapid advances in the promulgation and enforcement of laws to protect intellectual property rights. In this short period, the Chinese government has established a modern intellectual property legal system, trained a contingent of patent personnel, and formed a complete organization for the administration, justice, research, and education on intellectual property rights issues. Since 1992, China has passed or amended a number of intellectual property laws, including the Patent Law, Trademark Law, Copyright Law, and respective implementing regulations. China's intellectual property protection regime provides protection to creative achievements in the fields of science, technology, culture, and art. While many still complain of China's slow progress, China's establishment of a legal framework to protect industrial property and copyrights in so short a period of time is actually a significant accomplishment.

As its trade with the outside world expands, China will strengthen its protection of intellectual property especially with regard to imported products. For western countries to expect immediate results is neither realistic nor fair. According to the draft agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) signed during the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), different timetables for implementing TRIPS provisions apply to different types of countries.¹⁸⁴ The general time-frame calls for countries to implement the agreement within one year after the agreement enters into force.¹⁸⁵ TRIPS entitles any developing country transforming a centrally planned economy to a market-driven economy, however, to an additional four years to comply with the TRIPS terms.¹⁸⁶ If a developing country has difficulty providing patent protection to every technical field, that country has another five

184. Coloma, *supra* note 10.

185. *Id.*

186. *Id.*

year extension for specific areas.¹⁸⁷ The least-developed countries are given up to ten years to implement the TRIPS agreement. Under these guidelines, China should be eligible to claim a transition period of up to nine years to phase in TRIPS requirements. At present, however, China has already reached world intellectual property rights protection standards.¹⁸⁸ In this respect, China is ahead of schedule rather than behind.

Aside from improvements to its legislative framework, China also stepped up the judicial and administrative enforcement of copyright, trademark, and patent protection. Any individual or entity in China found to have committed infringing acts will be legally obligated to stop the infringement, to take any necessary measures to remove the influence of infringement, and, in some cases, to pay a fine or face criminal charges.¹⁸⁹

Although China will continue to settle some of these cases through administrative means, China's courts will play a more important role in handling intellectual property-related disputes as China's judicial system evolves. Foreigners, therefore, should not depend solely on government or administrative departments to handle infringement complaints, but should also institute legal proceedings in the courts when infringers violate their intellectual property rights.

There is still concern with China's actual ability to pursue violations and enforce the laws. The concern stems from the inherent dysfunction of the newly created intellectual property laws and China's cultural and political environment. China's rapid economic growth left it with little sense of direction in how to control, sustain, and most importantly, manage this growth in accordance with changes in the rest of the world. To have an effective and smooth transition, China must tailor its intellectual property laws carefully to reflect the basic values of Chinese legal beliefs. The world must be patient with China while assisting its attempt to improve its legal system.

China is making an effort to better protect intellectual property rights. Western countries should afford China the time and respect. As one Chinese trade negotiator said, "we're

187. *Id.*

188. *Id.*

189. *Id.*

revolutionizing a system, and you can't do that in 90 days."¹⁹⁰

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190. Gerstenzang, *supra* note 178 (quoting Greg Mastel, a trade expert at the Economic Strategy Institute in Washington).

* J.D. candidate, Loyola Law School, 1996; B.A., Smith College, 1993. I dedicate this Comment to my husband, Richard, for being my best friend and for giving me constant support and love in everything I try to do in life. I love you, Rich! I also thank my grandparents for everything they have given me, and Mom, for being such a strong role model to me. *You are a constant inspiration to me.* I thank Tom, for being there for me every step of the way, and Tutu, for being the best brother in the world.

