Note

A Sleeping Giant Awakens: the Development of Intellectual Property Law in China

I. INTRODUCTION

In the wave of recent scholarship on intellectual property law in mainland China ("China"), several scholars have argued that there was no indigenous counterpart to Western notions of intellectual property in China.[1] These arguments call into question the efficacy of intellectual property laws enacted by the People's Republic of China during the 1980s and early 1990s. Many commentators on China have viewed the passage of intellectual property laws in China as a mere reaction to external pressures, particularly from the United States, demanding that China strengthen its intellectual property regime to conform more closely to international practice as a pre-condition to full participation in international trade regimes.[2] Very few commentators have argued that intellectual property laws in China indicate a heretofore unchartered interest in promoting scientific invention and artistic creation within Chinese society,[3] and even fewer have asserted that the enactment of intellectual property laws in China is an indication of an emerging legal culture, characterized by a strengthening judiciary and greater compliance with the written laws, although there is increasing empirical evidence that just such a change is underway.[4]

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1. William Alford, Don't Stop Thinking About...Yesterday: Why There was No Indigenous Counterpart to Intellectual Property Law in Imperial China, 7 J. Chinese Law 1, 3-34 (1993); see also Liwei Wang, The Chinese Traditions Inimical to the Patent Law, 14 Nw. J. Int'l. L. & Bus. 15 (1993) [hereinafter Wang].

2. See, e.g., Alford, supra note 1, at 5-6 (claiming that China agreed in 1992 to revise its intellectual property laws "to meet American concerns"); Yiping Yang, The 1990 Copyright Law of the People's Republic of China, 11 UCLA Pac. Bas. L.J. 260, 260 (1993) ("Since the 1970's, China has felt strong pressure from Western nations, the United States in particular, to enact more protective intellectual property laws."); Mark E. Wojick & Michael J. Osty, Promises to Keep: American Views of Developments in Chinese Copyright Law, 6 Software L.J. 273, 285 (1993) ("China's history of weak protection of intellectual property and reluctance to strengthen the protection led the United States [in 1991] into threatening massive retaliatory trade sanctions blocking China's exports to America.").

3. But see William E. Beaumont, The New Patent Law of the People's Republic of China (PRC): Evidence of a Second Chinese "Renaissance"?, 27 Idea 39, 39-40 (1986).

4. See infra Section III.

In recent years, one of the main goals of Chinese foreign policy has been the attainment of contracting party status in the General Agreement on Tariffs and Trade ("GATT")[5] and the World Trade Organization ("WTO"),[6] which replaced the GATT on January 1, 1995 Those countries that wield power in the accession process, particularly the United States, have consistently demanded that China adequately enforce intellectual property rights as one of the pre-conditions to accession to the GATT/WTO.[7] However, throughout the negotiation process with China over intellectual property protection, the United States has, in large part, limited its attention to shortcomings in China's prosecution of copyright piracy and the inadequate damage awards available to plaintiffs in intellectual property cases.[8] In doing so, the United States has minimized the significance of China's substantive compliance with the requirements of the GATT Uruguay Round Agreement on Trade Related Intellectual Property Rights ("TRIPs"), which went into effect with the establishment of the WTO on January 1, 1995 [9] Further, the United States has overlooked clear trends of strengthening judicial enforcement of intellectual property rights in China.

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5. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT].

6. Final Act Embodying the Results of the Uruguay Round of Multilateral Negotiations, Agreement Establishing the World Trade Organization, art. 1, available in Uruguay Round of Multilateral Trade Negotiations General Agreement on Tariffs and Trade, GATT Doc. MTN/FA II (1993).

7. The following barriers to China's accession to the GATT have been enumerated: (1) absence of transparency in China's laws; (2) import licensing requirements; (3) import prohibitions and quantitative restrictions; (4) technical and certification requirements. Patrick H. Hu, The China 301 on Market Access: A Prelude to GATT Membership, 3 Minn. J. Global Trade 131, 144-151 (1994).

8. Office of the U.S. Trade Rep., United States and China Reach Accord on Protection of Intellectual Property Rights, Market Access 3 (1995). According to the Office of the U.S. Trade Representative, twenty-nine factories in southern China had a production capacity of 75 million CDs per year in 1994, although domestic demand stood at only 5 million CDs per year, and piracy of computer software in China has run as high as 94 percent. Id.

9. Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, GATT Doc. MTN/FA II-A1C (1993) [hereinafter TRIPs]. Under the WTO, TRIPs norms will be the standard by which the adequacy of WTO members' intellectual property laws will be judged. See infra Section IV This note will primarily discuss the trademark, patent and copyright provisions of TRIPs. TRIPs also covers protection of trade secrets, data bases and integrated circuits. Regarding trade secrets, China has, for the most part, come into compliance with TRIPs provisions through passage of the Anti-Unfair Competition Law in 1993. See Law Against Unfair Competition of the People's Republic of China, arts. 5(2), 10 (adopted Sept. 2, 1993, effective Dec. 1, 1993), translated in Law Against Unfair Competition of the People's Republic of China, Indus. Prop., Oct. 1994, Text 5-001, at 001 [Anti-Unfair Competition Law].

This note focuses on these largely minimized, but highly significant, aspects of China's intellectual property regime. Specifically, this note concludes that China is in substantial compliance with TRIPs, while pointing out areas in China's intellectual property laws that still fall short of full compliance. Further, it argues that recent judicial decisions in Chinese courts indicate a trend toward stronger judicial enforcement of China's intellectual property laws and that permitting China to join the WTO would provide the international community with another means of persuading China to bring its intellectual property laws into full compliance with international norms.

Section II will describe the sweeping changes that have occurred in intellectual property law in China since 1979 and, while pointing out deficiencies remaining in the laws, will conclude that the most recent changes have brought China into compliance with the major norms set out in TRIPs. Section III will address the Chinese legal system's handling of intellectual property disputes through a discussion of several recent cases and will discuss recent developments, including the establishment of intellectual property divisions in the Chinese courts. Section IV will explain China's posture in relation to the GATT/WTO and will argue that enforcement of intellectual property rights in China will improve if China is made subject to the jurisdiction of the WTO dispute resolution mechanism. Finally, Section V will conclude with the following suggestions: (1) that China's sincere efforts at compliance with TRIPs requirements should be encouraged rather than trivialized by those outside of China, (2) that judicial enforcement of intellectual property rights should be pursued more frequently in order to contribute to the formation of indigenous norms of intellectual property law in China and (3) that China should be admitted to the WTO and made subject to the WTO dispute resolution mechanism in order to encourage China's compliance with international norms of intellectual property protection.

II. INTELLECTUAL PROPERTY IN CHINA

Since 1979, sweeping changes have occurred in intellectual property law in China. The most recent changes largely bring China into compliance with the norms provided in the TRIPs agreement on trademarks, patents and copyrights.

A. Developments Since 1975

As early as 1975, more than one year before the death of Mao Zedong, a shift occurred within the inner ranks of the Communist Party, which came to fruition with the re-emergence of Deng Xiaoping in 1978 as a driving force behind Chinese government policy [10] One immediate result of this shift was the de facto discrediting of policies established during the Cultural Revolution and the announcement of the Four Modernizations in 1978.[11] The Four Modernizations ushered in an era in which the ultimate policy goal was building China "into a powerful Socialist State before the end of the century "[12]

The announcement of the Four Modernizations was a turning point in the history of Chinese intellectual property law as it marked the first time in the history of the People's Republic of China that Chinese government policy and the Chinese constitution clearly stood in congruence with the purposes of intellectual property [13] Further, with the open-door policy of the 1980s came the eventual recognition of private economic rights, including intellectual property rights, as fundamental to the achievement of desired economic improvements and socialist modernization.[14]

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10. For a discussion of the political struggle in China from 1975-1978, see generally Liang Hsüeh-ch'u, China's Economic Plan For A New Era of Development, 11 Chinese L. & Gov't 98 (1978).

11. The term "Four Modernizations" was coined during the Third Plenary Session of the 11th Chinese Communist Party Central Committee where it was stated that China's goal was "to realize the all round modernization of agriculture, industry, national defense and science and technology." Id. at 104.

12. Id. at 99, 104.

13. Constitution of the People's Republic of China, art. 47 (adopted Dec. 4, 1982) ("Citizens of the People's Republic of China have the freedom to engage in scientific research, literary and artistic creation and other cultural pursuits. The state encourages and assists creative endeavors conducive to the interests of the people that are made by citizens engaged in education, science, technology, literature, art and other cultural work."), translated in Constitution of the People's Republic of China and Amendments to the Constitution of the People's Republic of China 11 (Legislative Affairs Commission of the Standing Committee of the National People's Congress ed., 2d ed. 1990) [hereinafter Constitution]; id. art. 20 ("The state promotes the development of the natural and social sciences, disseminates knowledge of science and technology, and commends and rewards achievements in scientific research as well as technological innovations and inventions."); id. art. 19, para. 1 ("The state undertakes the development of socialist education and works to raise the scientific and cultural level of the whole nation.").

14. Id. amend. 1 ("The state permits the private sector of the economy to exist and develop within the limits prescribed by law. The private sector of the economy is a complement to the socialist public economy. The state protects the lawful rights and interests of the private sector of the economy, and exercises guidance, supervision, and control over the private sector of the economy.").

Since the announcement of the Four Modernizations, China has actively studied the intellectual property laws of other nations and has legislated a corpus of intellectual property laws in a remarkably short period of time, including the Trademark Law in 1982,[15] the Patent Law in 1984[16] and the Copyright Law in 1990.[17] In addition, the General Principles of the Civil Law — one of the cornerstones of China's version of the civil law system[18] — gave explicit recognition for the first time in a basic law[19] of the rights of individuals and legal persons to hold copyrights, patents and trademarks.[20] The General Principles of the Civil Law also established private causes of action in cases of infringement of intellectual property rights.[21]

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15. Trademark Law (adopted Aug. 23, 1982, effective Mar. 1, 1983, amended Feb. 22, 1993), translated in Trademark Law, Indus. Prop., Dec. 1982, Text 3-001, at 001 (1982) [hereinafter 1982 Trademark Law].

16. Patent Law (adopted Mar. 12, 1984, effective Apr. 1, 1985, amended Sept. 4, 1992), translated in Patent Law, Indus. Prop., Apr. 1984, Text 2-001, at 001 [hereinafter 1984 Patent Law].

17. Copyright Law of the People's Republic of China (adopted Sept. 7, 1990, effective June 1, 1991), translated in Zheng Chengsi & Michael Pendleton, *Copyright Law in China* 215 (1991) [hereinafter Copyright Law].

18. General Principles of the Civil Law of the People's Republic of China (adopted April 12, 1986, effective Jan. 1, 1987), translated in The Laws of the People's Republic of China, 1983-1986, at 225 (Legislative Affairs Commission of the Standing Committee of the National People's Congress, ed., 1987) [hereinafter General Principles of the Civil Law].

19. The National People's Congress and its Standing Committee, the supreme legislative authorities in China, have the power under articles 62 and 69 of the Chinese Constitution to revise the Chinese Constitution and to make "basic laws" ("*jiben falu*"). Constitution, supra note 13, arts. 62(1), (3), 69. While the term *jiben falu* has never been defined, it is understood by Chinese jurists that *jiben falu* are the supreme law of the land and that they generally trump all other laws ("*falu*"), regulations ("*tiaoli*") or provisions ("*guiding*"). For a discussion of the relative weights of legislative enactments in China, see Tao-tai Hsia and Constance A. Johnson, Lawmaking in China (pt. 1), E. Asian Exec. Rep., Jan. 1987, at 6.

20. See General Principles of the Civil Law, supra note 18, art. 94 (dealing with copyrights, or rights of authorship and entitling citizens and legal persons to sign their names as authors, issue their works and receive remuneration); id. art. 95 (protecting patent rights); id. art. 96 (granting a right of exclusive use for trademarks); id. art. 97 (granting a right to apply for certificates of discovery or a right to receive certificates of honor, bonuses or other awards for inventions or achievements in scientific and technological research).

21. Id. art. 118 (providing that citizens and legal persons shall "have the right to demand that infringement be stopped, its ill effects be eliminated and the damages be compensated for."). Article 118 applies "to foreigners and stateless persons within the People's Republic of China, except as otherwise provided by law." Id. art. 8. In addition, the Civil Procedure Law of the People's Republic of China has expanded the range of possible claimants to include "other organizations" and "foreign enterprises and organizations that institute or respond to proceedings in a People's Court." Civil Procedure Law of the People's Republic of China, arts. 3, 4 (effective April 9, 1991), translated in PRC, Civil Procedure Law, China L. & Prac., June 17, 1991, at 15.

The promulgation of laws to protect intellectual property in China must be understood in its larger context as one part of an explosion of new laws in post-Maoist China, dubbed by one writer as the "[r]e-establishment of [l]aw "[22] This re-establishment of law, referred to by another writer as the "fifth modernization,"[23] has witnessed the enactment of thousands of new laws, regulations and rules since 1979.[24] Concurrent with these sweeping changes, the central government in Beijing has frequently called upon administrative organs across the country to strengthen the rule of law and has encouraged citizens to bring their legal disputes to courts.

China has also recognized and committed itself to international standards in intellectual property protection. Shortly after the announcement of the Four Modernizations, China entered into a series of agreements with the United States normalizing their political relations, including one agreement in which China formally recognized the importance of effective protection of intellectual property.[25] In 1980, China was accepted as a member of the World Intellectual Property Organization ("WIPO").[26] Thereafter, during the 1980s and early 1990s, China joined most of the other major international treaties involving intellectual property, including the Paris Convention for the Protection of Industrial Property (the "Paris Convention") in 1985[27] and the Berne Convention for the Protection of Literary and Artistic

22. Ralph H. Folsom & John H. Minan, Law in the People's Republic of China 13 (1989).

23. Tek L. Chwang & Richard L. Thurston, Technology Takes Command: The Policy of the People's Republic of China with Respect to Technology Transfer and Protection of Intellectual Property, 21 Int'l Law. 129, 130 (1987) (describing "the strengthening of the socialist legal system" and the building of legal institutions as the "fifth modernization").

24. Id.

25. Agreement on Trade Relations, July 7, 1979, U.S.-P.R.C., art. VI, 31 U.S.T. 4651 (agreeing to abide by the principles of reciprocity and national treatment in the protection of patents, trademarks and copyrights).

26. WIPO Convention Accession: China, Indus. Prop. Apr. 4, 1980, at 123, 123 (stating that China deposited its accession document on March 3, 1980 and that the WIPO Convention entered into force with respect to China on June 3, 1980).

27. Convention for the Protection of Industrial Property, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention]. The Chinese government submitted its instrument of accession to the Paris Convention on December 19, 1984 and became a member of the Paris Convention on March 19, 1985. Information Office of the State Council, Intellectual Property Protection in China (1994), available in WESTLAW, Int-News Database [hereinafter White Paper].

Works (the "Berne Convention") in 1992.[28] Further, China held observer status during the Uruguay Round of the GATT negotiations.[29]

However, despite China's commitment to international standards, allegations of rampant piracy have led to investigations of China's regime for enforcing intellectual property rights by the United States. In both 1992 and 1995, the imposition of punitive trade sanctions on China by the United States was only narrowly averted by last-minute agreements on intellectual property [30]

B. Trademark Law in China and TRIPs

1. Background

While to many Chinese the Trademark Law of 1982 marked "the beginning of the systematic establishment of China's modern legal system for the protection of intellectual property rights,"[31] in 1904 the leaders of the late Qing Dynasty promulgated what could be considered

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28. Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, S. Treaty Doc. No. 99-27, 99th Cong., 2d Sess. (1990), 1 L.N.T.S. 217 [hereinafter Berne Convention]. China acceded to the Berne Convention on October 15, 1992 as one of the commitments under a memorandum of understanding on intellectual property entered into between China and the United States in January 1992. See Memorandum of Understanding on the Protection of Intellectual Property, Jan. 17, 1992, U.S.-P.R.C., art. 3(1), Hein's No. KAV 3136, Temp. State Dep't No. 92-29, at 1 [hereinafter MOU on Intellectual Property] ("The Chinese government will accede to the Berne Convention for the Protection of Literary and Artistic Works [and] will use its best efforts to have the bill [authorizing accession to the Berne Convention] enacted by June 30, 1992.").

29. In China's written request to accede to the GATT in 1986, China notified the GATT Secretariat of its wish to participate in the Uruguay Round negotiations. See Harold K. Jacobson & Michel Oksenberg, China's Participation in the IMF, the World Bank, and GATT 94 (1990). The contracting parties decided to allow countries who were negotiating the terms of their membership to participate as observers. Id. In 1990, during China's participation as an observer in the GATT Uruguay Round negotiations, an early draft of the TRIPs agreement was circulated. White Paper, supra note 27. See generally infra Section IV for a discussion of China's posture with regards to the Uruguay Round.

30. See MOU on Intellectual Property, supra note 28; Memorandum of Understanding Concerning Market Access, Oct. 10, 1992, U.S.-P.R.C., 31 I.L.M. 1274 [hereinafter MOU on Market Access]. In February 1995, the United States and China averted the imposition of sanctions with a letter of agreement containing an action plan by the Chinese regarding enforcement of intellectual property rights (the "IPR Agreement"). Letter from Michael Kantor, United States Trade Rep., to Wu Yi, Minister of Foreign Trade and Economic Cooperation, People's Republic of China (Feb. 26, 1995) [hereinafter IPR Agreement]. For a discussion of the 1994 negotiations leading to the IPR Agreement, see Seth Faison, U.S. and China Sign Accord to End Piracy of Software, Music Recordings and Film, N.Y. Times, Feb. 27, 1995, at A1.

31. White Paper, supra note 27.

China's first modern trademark law, protecting the economic goodwill built up in a company's marks.[32] Upon the establishment of the People's Republic of China in 1950, the trademark laws in existence at the time were repealed and replaced with rules designed to protect consumers by making the right of trademark contingent upon the trademark owner maintaining strict control of product quality [33] It was only after the announcement of economic reforms in the late 1970s that the government of the People's Republic of China recognized the importance of modernizing its trademark administration system in line with international standards, both to attract foreign investment and to create a fertile environment for economic development.[34]

Accordingly, the first Trademark Law of the People's Republic of China was enacted in 1982.[35] The Trademark Law was followed in 1983 by the enactment of a set of implementing regulations, which served to fill in gaps and address specifics of the trademark application, examination and registration process not provided for in the Trademark Law [36] In 1988, the 1983 implementing regulations were replaced by the enactment of a new set of implementing regulations (the "Trademark Implementing Regulations").[37] Subsequently, in an effort to bring the

32. Mark Sidel, Copyright, Trademark and Patent Law in the PRC, 21 Texas Int'l L.J. 259, 269 (1986) (explaining that Western officials assisted in the drafting of China's first modern trademark law in 1904).

33. See, e.g., Measures for the Control of Trade Marks, art. 11 (adopted Apr. 10, 1963, effective Apr. 10, 1963) (providing that registrations could be canceled if the quality of goods was not maintained at a prescribed level or when cancellation of the trademark was demanded "by masses of people"), translated in Measures for the Control of Trade Marks, 62 Pat. & Trademark Rev. 249 (1964).

34. White Paper, supra note 27. The White Paper states, in relevant part, "intellectual property protection plays a significant role in promoting progress in science and technology, enriching culture and developing the economy. It functions as one of the basic environments and conditions for conducting international exchange and cooperation in science, technology, economy and culture. Beginning in the late 1970s, China has been formulating laws and regulations for intellectual property rights protection; and has been participating in activities organized by the relevant international organizations aimed at strengthening international exchange and cooperation in the field of intellectual property rights." Id.

35. 1982 Trademark Law, supra note 15.

36. Implementing Regulations Under the Trademark Law of the People's Republic of China (effective Mar. 10, 1983, amended Jan. 13, 1988 and July 28, 1993), translated in Implementing Regulations Under the Trademark Law of the People's Republic of China, Indus. Prop., Sept. 1983, Text 3-002, at 001.

37. Implementing Regulations Under the Trademark Law (adopted July 15, 1993, effective July 28, 1993, amended July 28, 1993), translated in Implementing Regulations Under the Trademark Law, Indus. Prop., Mar. 1990, Text 3-002, at 001 [hereinafter 1988 Trademark Implementing Regulations].

intellectual property laws up to international standards, both the Trademark Law and the Trademark Implementing Regulations were amended in 1993.[38]

Recognizing the need to open the economy, but reflecting a continued mistrust of unbridled capitalism, the Trademark Law was clearly a legislative compromise, protecting "the exclusive right to use a trademark" but at the same time "protecting consumers' interests" and promoting the "development of socialist commodity economy."[39] According to the Trademark Law, a trademark is defined as a word or device that is "so distinctive as to be distinguishable."[40] Further, a trademark right gives its owner a legal claim for damages in cases of infringement.[41] However, the exclusivity of the right to use and assign the trademark is diminished by the responsibility to maintain "the quality of the commodities labeled with the trademark."[42]

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38. Trademark Law of the People's Republic of China, art. 1 (adopted Feb. 22, 1993, effective July 1, 1993), translated in Trademark Law of the People's Republic of China, Indus. Prop., Sept. 1993, Text 3-001, at 001 [hereinafter Trademark Law]; Implementing Regulations Under the Trademark Law of the People's Republic of China (adopted July 15, 1993, effective July 28, 1993), translated in Implementing Regulations Under the Trademark Law of the People's Republic of China, Indus. Prop., Sept. 1993, Text 3-002, at 001 [hereinafter Trademark Implementing Regulations].

39. Trademark Law, supra note 38, art. 1.

40. Id. art. 7 ("Any word, device or their combination that is used as a trademark shall be so distinctive as to be distinguishable."); see also id. art. 17 ("Where a trademark, the registration of which has been applied for, . is identical with or similar to the trademark of another person that has, in respect of the same or similar goods, been registered or, after examination, preliminarily approved, the Trademark Office shall refuse the application "); Trademark Implementing Regulations, supra note 38, art. 16 ("Where a trademark is distinctive and in conformity with the relevant provisions of the Trademark Law, the Trademark Office shall, after examination, preliminarily approve the trademark ").

41. Trademark Law, supra note 38, art. 39 ("The amount of compensation shall be the profit that the infringer has earned through the infringement during the period of the infringement or the damages that the infringee has suffered through the infringement during the period of the infringement.").

42. See id. art. 6. The requirement that the quality of goods bearing the trademark remain at a certain specified level holds whether such commodities are manufactured by the right holder or by an assignee. Id. art. 26, para. 1. However, it could be argued that the role of the Trademark Law in assuring consumers good quality products has been supplanted by recently enacted statutes relating to product quality and the protection of consumers. See, e.g., Product Quality Law of the People's Republic of China, translated in PRC, Product Quality Law, China L. & Prac., June 3, 1993, at 21 [hereinafter Product Quality Law]; PRC, Protection of the Rights and Interests of Consumers Law, China L. & Prac., Dec. 28, 1993, at 8 [hereinafter Consumer Protection Law] (summarizing the Protection of the Rights and Interests Consumers Law of the People's Republic of China).

2. Compliance with TRIPs

Under the TRIPs provisions on trademarks, countries party to the agreement must comply with articles 1-12 and 19 of the Paris Convention.[43] In addition to these Paris Convention provisions incorporated by reference into TRIPs, TRIPs requires that member countries provide trademark owners with the right to prevent others from unauthorized use of a registered trademark,[44] extend trademark protection to service marks,[45] expand the protection afforded to well-known marks under article 6bis of the Paris Convention,[46] establish an official trademark publication to give notice of pending trademark applications[47] and provide that trademark registration and renewal shall last for at least seven years.[48] Further, TRIPs prohibits the compulsory licensing of trademarks[49] and the cancellation of a trademark for non-use unless such non-use has been continuous for a period of at least three years.[50]

Largely due to the 1993 amendments to China's trademark regime, China can claim substantial compliance with the TRIPs requirements for trademarks.[51] However, certain inconsistencies remain. First, as a

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43. TRIPs, supra note 9, art. 2(1).
44. Id. art. 16(1).
45. Id. arts. 15(1), 16(2).
46. Id. art. 16(2), (3).
47. Id. art. 15(5).
48. Id. art. 18.
49. Id. art. 21.
50. Id. art. 19(1).
51. Regarding compliance of the Chinese trademark regime with the requirements of TRIPs, compare TRIPs, supra note 9, art. 15(2) (a member of the WTO may deny registration of a trademark "provided that they do not derogate from the provisions of the Paris Convention.") and Paris Convention, supra note 27, arts. 6^{quinquies}(B), 6ter (stating conditions under which a trademark may be denied registration) with Trademark Law, supra note 38, art. 8 (listing situations where a trademark will be denied registration parallel to those articulated in the Paris Convention).

Compare TRIPs, supra note 9, art. 15(5) (requiring the publication of a trademark to afford reasonable opportunity for opposition to the trademark) and Paris Convention, supra note 27, art. 12 (requiring the establishment of a service to communicate with the public about trademarks) with Trademark Implementing Regulations, supra note 38, art. 5 (providing for the establishment of a "Trademark Register" and a "Trademark Gazette").

Compare TRIPs, supra note 9, art. 16(1) (stating that the "owner of a registered trademark shall have the exclusive right to prevent all third parties not having his consent from using identical or similar signs . ") with Trademark Law, supra note 38, arts. 3, 38 (providing owners of registered trademarks with the exclusive right to prevent others from using identical or similar signs without the trademark owners's consent).

precondition for registering trademarks for products such as tobacco or pharmaceuticals, Chinese law requires that applicants obtain a license or

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Compare TRIPs, supra note 9, art. 16(2)-(3) (expanding the scope of protection given to well-known unregistered marks under article 6bis of the Paris Convention) with IPR Agreement, supra note 30, art. I(I)(1)(c)-(d) (stating China's intent to implement specific legal reforms which would bring it in line with subsections 16(2) and (3) of TRIPs).

Compare TRIPs, supra note 9, art. 18 (requiring that registration and renewal of a trademark shall be effective for a term of "no less than seven years") with Trademark Law, supra note 38, art. 23 (providing that the "period of validity of a registered trademark shall be ten years") and Trademark Law, supra note 38, art. 24 (providing that the "period of validity of each renewal of registration shall be ten years").

Compare TRIPs, supra note 9, art. 19(1) ("[i]f use is required to maintain a registration, the registration may be cancelled only after an uninterrupted period of at least three years of non-use," unless valid reasons for non-use exist) with Trademark Law, supra note 38, art. 30 (providing that a trademark is subject to cancellation "where the trademark has ceased to be used for three consecutive years"). Article 19(1) of TRIPs also provides in part that "import restrictions [and] other government requirements for goods and services protected by the trademark" shall be considered valid reasons for non-use. TRIPs, supra note 9, art. 19(1). In the February 1995 IPR Agreement, China confirmed that it would "not impose quotas, import license requirements, or other restrictions on the importation of audio-visual and published products." IPR Agreement, supra note 30, at 3.

Regarding the Trademark Law's compliance with relevant provisions of the Paris Convention, compare Paris Convention, supra note 27, art. 2 (requiring countries party to the Paris Convention to provide national treatment) with Trademark Law, supra note 38, art. 9 (providing that foreign trademark applications are to be dealt with in accordance with "international treaty to which both countries are parties").

Compare Paris Convention, supra note 27, art. 4(C)(1) (requiring that members of the Paris Convention recognize the priority of trademark applications for trademarks that have been registered in another member country within the preceding six months) with Trademark Implementing Regulations, supra note 38, art. 15 (requiring the Trademark Bureau to accept applications for which a priority date is claimed) and Provisional Regulations on Claims of the Right of Priority with Respect to Applications for the Registration of Trademarks, art. 2 (approved Mar. 15, 1985, effective Mar. 19, 1985) (recognizing a six month right of priority), translated in Provisional Regulations on Claims of the Right of Priority with Respect to Applications for the Registration of Trademarks, Indus. Prop., Oct. 1993, Text 3-003, at 001.

Compare Paris Convention, supra note 27, art. 6bis(1) (requiring members to refuse registration and prohibit the use of trademarks which may be confused with marks "considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person" entitled to protection under the Paris Convention) with Trademark Implementing Regulations, supra note 38, art. 25 (stating that "to violate the principles of honesty and credit and plagiarize, counterfeit or translate any well-known trademark of another party" in the registration for a trademark shall be treated as acquisition of the trademark by "fraud" or "unfair means" for purposes of article 27 of the Trademark Law) and Trademark Law, supra note 38, art. 27 (making trademarks obtained by fraudulent means subject to cancellation). See also Anti-Unfair Competition Law, supra note 9, art. 5(2) (providing that unauthorized use of "the name, packaging or decoration similar to that of well-known goods" is an act of unfair competition).

Compare Paris Convention, supra note 27, art. 7bis (providing for the protection of marks belonging to non-commercial or commercial associations) with Trademark Law, supra note 38, art.

production approval certificate from the government.[52] This requirement violates article 15(4) of TRIPs, which provides that "the nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark."[53] Although it is understandable that China would have a state interest in controlling the production of pharmaceuticals or tobacco products, in order to strengthen its compliance with TRIPs, China should remove any certification requirement from the trademark registration process and deal with the regulation of controlled substances through other legislation.[54]

Second, it may be argued that the Trademark Law violates several provisions of the Paris Convention that are incorporated into TRIPs. Specifically, article 5(C)(2) of the Paris Convention provides that a trademark owner may change a trademark in any way that does not alter its distinctive character.[55] The Trademark Law, by comparison, provides that the Trademark Office may cancel a registered trademark "where any word, device or their combination of a registered trademark is altered unilaterally "[56] Despite this provision's apparent inconsistency with the Paris Convention requirement, there is some indication that the Chinese authorities interpret this provision in a way that is consistent with the Paris Convention. In at least one recent ruling, Chinese authorities declined from cancelling a trademark even though the typeface of the

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4 (providing that "institutions" may apply for trademark registration).

Compare Paris Convention, supra note 27, arts. 9 (providing for the seizure of all goods unlawfully bearing a trademark or trade name) and id. art. 10 (extending the provisions of article 9 of the Paris Convention to false indications) with Trademark Implementing Regulations, supra note 38, art. 43 (authorizing the administrative authorities to order the seizure and destruction of representations of a trademark which infringe on the exclusive right of the owner of a registered trademark).

52. Trademark Law, supra note 38, art. 5; Trademark Implementing Regulations, supra note 38, art. 7 ("[P]harmaceutical products for human use and tobacco products shall use a registered trademark.").

53. Compare TRIPs, supra note 9, art. 15(4) with Paris Convention, supra note 27, art. 7 (article 15(4) of TRIPs almost exactly mirrors article 7 of the Paris Convention).

54. For a discussion of recent legislation dealing with controlled substances, see Mitchell A. Silk, Recent Efforts in China's Drive to Promote Investment through the Protection of Intellectual Property Rights: The 1988 Trademark Rules and the 1988 Technology Import Contract Rules, 15 Syr. J. Int'l Law & Comm. 215, 220 (1989).

55. Paris Convention, supra note 27, art. 5(C)(2) ("Use of a trademark by the proprietor in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered in one of the countries of the Union shall not entail invalidation of the registration and shall not diminish the protection granted to the mark.").

56. Trademark Law, supra note 38, art. 30.

mark as used on the product differed from that appearing in the registration for the trademark.[57]

Article 5(D) of the Paris Convention provides that, in using a registered trademark, there need be no indication accompanying the trademark to show that it has been registered.[58] The Trademark Law, on the other hand, requires all trademarks to be accompanied by notice of registration.[59] It could be argued that this notice requirement under the Trademark Law serves the purpose of better protecting trademarks in China as it sends a warning to potential infringers that a particular trademark is protected and further promotes an understanding of trademarks among the general populace. However, it is worrisome that the Trademark Law is silent as to the consequences for failing to provide a notice of registration. Further, as the Trademark Law clearly violates TRIPs on this point, the international community should encourage China to remove the requirement.

Articles 6^{sexies} and 8 of the Paris Convention provide that no registration requirement may be raised as an obstacle to the enforcement of "service marks" or "trade names."[60] The Trademark Law, on the other hand, imposes a registration requirement for service marks and is silent with regards to trade names.[61] International pressure should be brought on China to resolve this inconsistency.[62]

Finally, there are certain provisions of the Paris Convention which the Trademark Law does not address. Article 3 of the Paris Convention provides that nationals of non-member countries of the Paris Convention

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57. See M & M's v. W & W's, China L. & Prac., June 11, 1990, at 24. In that case, the Ningbo Administration for Industry and Commerce ("AIC") found that Mars, Inc.'s use of its "M & M's" trademark in a typestyle different from that appearing in the registration for the trademark amounted to an alteration of the registered trademark. The Ningbo AIC ruled that the alteration justified cancellation of the registration under article 30 of the Trademark Law. See Trademark Law, supra note 38, art. 30. Mars appealed the Ningbo AIC's decision to the State AIC, arguing that such a ruling would make the Chinese trademark registration system impractical and would work as a non-tariff trade barrier. The State AIC overturned the Ningbo AIC's ruling. See also discussion infra Section III.B.1.c.

58. Paris Convention, supra note 27, art. 5(D).

59. Trademark Implementing Regulations, supra note 38, art. 26.

60. Paris Convention, supra note 27, arts. 6^{sexies}, 8.

61. Trademark Law, supra note 38, art. 4, para 2.

62. In at least one recent case, a Shanghai court entered judgment in favor of claimant Nengshi Industries of Hong Kong where defendant had infringed on the Nengshi trade name, even though such trade name was not registered in China. Andrew Browne, Shanghai Cracks Down on Fake and Shoddy Goods, Reuters, Feb. 14, 1995, available in INTERNET, Clari.World.Asia.China. This case potentially indicates that China may not require registration of trade names in order for such marks to be afforded protection.

"who are domiciled or who have real and effective industrial or commercial establishments" in a Paris Convention country are to be treated as nationals of such country [63] Further, article 11 of the Paris Convention provides temporary protection to trademarks in respect of goods exhibited at certain official functions.[64] The Trademark Law is silent on both of these points.

3. Conclusions with Regards to China's Trademark Law

While it may be argued in all of the areas enumerated above that China is in non-conformity with TRIPs, it should also be recognized that these areas reflect legitimate Chinese policy concerns. Provisions such as those requiring production approval certificates, for example, are clearly remnants of a trademark system which once also acted to guarantee product quality and consumer safety Provisions such as those requiring that trademarks be accompanied by notice of registration may reflect efforts on the part of the Chinese government to educate the Chinese populace about a still nascent intellectual property regime. In addition, the requirement that trade names and service marks be registered may indicate an attempt to more efficiently administer and monitor the trademark system in China. In recent years, however, the importance of addressing many of these policies through the Trademark Law has faded as China's legal system has evolved and as new laws better suited to dealing with these issues, such as new consumer safety laws, have been enacted.[65] The international community should speed the process of legal reform by pressing China to continue to reform its intellectual property laws and to pursue its legitimate policies through other legislative means. At the same time, it should be recognized that China has made enormous progress in recent years in bringing its trademark regime into conformity with international intellectual property norms. Further, it should be recognized that China is in compliance with the major provisions of TRIPs on trademarks.

63. Paris Convention, supra note 27, art. 3.
64. Id. art. 11.
65. See Product Quality Law, supra note 42; Consumer Protection Law, supra note 42.

B. *Patent Law in China and TRIPs*

1. Background

Upon the establishment of the People's Republic of China, the new government enacted patent regulations that replaced the patent law of the exiled Nationalist government.[66] While the government of the People's Republic of China under Mao Zedong was committed to scientific and technological development in the 1950s, exploding atom bombs and launching a man-made satellite, and while China's leaders viewed science and technology as a means to achieve wealth, power and global status, there was little indication that they had any intention of enacting a comprehensive, modern patent law.[67] In line with the Chinese Communist Party's desire to control the intelligentsia, science and technology were allowed to flourish, but individual innovation and reward were largely looked down upon and scientists readily persecuted.[68]

In order to promote innovation in science and technology, but in keeping with communist ideology, a dual system of regulations emerged in the 1950s for awarding "Patents of Invention" and "Certificates of Invention," giving individual inventors the opportunity to receive monetary or honorary awards for their services.[69] Eventually, however, even such token gestures were attacked on ideological grounds, and in the 1960s, new regulations were passed which offered inventors only a nominal monetary award or honorary distinctions for their creations.[70] With the announcement of the Four Modernizations, and in the belief that improvements in "science and technology" were the keys to improvements in the other three targeted areas for modernization, these regulations were revised in the late 1970s, largely turning the Chinese patent system back to standards enjoyed in the 1950s.[71]

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66. After the fall of the Qing dynasty, the newly established Republic of China promulgated Provisional Rules on the Encouragement of Arts and Crafts in 1911, Beaumont, *supra* note 3, at 45, and enacted the Patent Law of the Republic of China in 1944. Henry R. Zheng, The Patent System of the People's Republic of China, 21 U.S.F L. Rev. 345, 347 (1987).

67. Wang, supra note 1, at 57.

68. See id. at 58.

69. Zheng, supra note 66, at 345, 347-348.

70. Id. at 348.

71. Id. at 348-349; cf. Wang, supra note 1, at 16.

Thereafter, the first Patent Law of the People's Republic of China was enacted in 1984.[72] As with the Trademark Law, the Patent Law was soon followed by the enactment of implementing regulations.[73] In 1992, in order to conform with the requirements set out in a memorandum of understanding between the United States and China on intellectual property (the "MOU on Intellectual Property")[74] and in order to bring China into compliance with TRIPs, China amended the Patent Law and enacted a new set of implementing regulations for the Patent Law (the "Patent Implementing Regulations").[75]

2. Compliance with TRIPs

Under the TRIPs provisions on patents, countries party to the agreement must comply with articles 1-5, 11-12 and 19 of the Paris Convention.[76] In addition to the Paris Convention provisions incorporated by reference into TRIPs, TRIPs requires that member countries provide patent owners with the right to prevent others from unauthorized use of a patent as well as the power to assign, transfer by succession or conclude licensing agreements with respect to their patents.[77] Further, member countries must protect invention patents for

72. 1984 Patent Law, supra note 16.

73. Implementing Regulations of the Patent Law of the People's Republic of China (adopted Jan. 19, 1985, effective April 1, 1985, superseded Dec. 1992), translated in Implementing Regulations of the Patent Law of the People's Republic of China, Indus. Prop., Mar. 1985, Text 2-002, at 001 [hereinafter 1985 Patent Implementing Regulations].

74. MOU on Intellectual Property, supra note 28. The main concessions made by the Chinese in the MOU on Intellectual Property were extending the term of patent protection to 20 years, id. art. 1(c), and extending patent protection to chemicals and pharmaceuticals, id. art. 1(a). Some commentators view China's agreement to protect chemical and pharmaceutical inventions as a major concession on the part of Chinese business interests. David Hill & Judith Evans, Chinese Patent law: Recent Changes Align China More Closely with Modern International Practice, 27 Geo. Wash. J. Int'l L. & Econ. 359, 364 (1993-94). As a result of these concessions, non-licensed and free use of technology will no longer be possible, driving production costs up and fueling an already spiralling inflation.

75. Patent Law of the People's Republic of China (adopted Mar. 12, 1984, effective Jan. 1, 1993, amended Sept. 4, 1992), translated in Patent Law of the People's Republic of China, Indus. Prop., June 1993, Text 2-001, at 001 [hereinafter Patent Law]; Implementing Regulations of the Patent Law of the People's Republic of China (approved Dec. 1992, effective Jan. 1, 1993), translated in Implementing Regulations of the Patent Law of the People's Republic of China, Indus. Prop., June 1993, Text 2-002, at 001 [hereinafter Patent Implementing Regulations].

76. TRIPs, supra note 9, art. 2(1).

77 Id. art. 28(1)-(2).

a minimum of twenty years;[78] allow an opportunity for judicial review of any decision to cancel a patent;[79] protect "any inventions, whether products or processes, in all fields of technology,"[80] which would include patents for pharmaceuticals, chemicals and agricultural products; provide protection for plant varieties;[81] limit compulsory licensing;[82] and require applicants to disclose their inventions in a manner sufficiently clear that someone skilled in the art could carry them out.[83]

Of China's intellectual property laws, the Patent Law is the most congruent with TRIPs requirements.[84] Any deviations in the Patent Law

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78. Id. art. 33.

79. Id. art. 32.

80. Id. art. 27(1). Article 27(1) provides that "patents shall be available for any inventions, whether products or processes, in all fields of technology " Id.

81. Id. art. 27(3)(b).

82. Id. art. 31.

83. Id. art. 29(1).

84. Regarding compliance of the Chinese patent regime with the requirements of TRIPs, compare Trips, supra note 9, art. 25(1) (requiring that members of the WTO protect industrial designs, provided that they are sufficiently "new or original" such that they "significantly differ from known designs or combinations of known design features") with Patent Law, supra note 75, art. 2 (including "designs" as one of the "inventions-creations" protected under the Patent Law).

Compare TRIPs, supra note 9, art. 26(1) (providing that the owner of an industrial design right has the right to prevent third parties not having the owner's consent from making, selling or importing articles bearing a design copying the protected design) with Patent Law, supra note 75, art. 11 (providing that "[a]fter the grant of the patent right for a design, no entity or individual may, without the authorization of the patentee, make or sell" a product incorporating the design for production or business purposes).

Compare TRIPs, supra note 9, art. 26(3) (requiring that industrial designs be protected for at least ten years) with Patent Law, supra note 75, art. 45 (providing that "patent right[s] for designs shall be 10 years, counted from the date of filing").

Compare TRIPs, supra note 9, art. 27(1) (providing, with certain exceptions, that "patents shall be available for any inventions, whether products or processes provided that they are new, involve an inventive step and are capable of industrial application") with Patent Law, supra note 75, art. 22 (providing that to be patentable an invention "must possess novelty, inventiveness and practical applicability") and Patent Implementing Regulations, supra note 75, art. 2 (defining an invention as "any technical solution relating to a product, a process or improvement thereof").

Compare TRIPs, supra note 9, art. 28(1) (providing that a patent owner has the exclusive right to prevent others from "making, using, offering for sale, selling, or importing" a patented product or a product produced by means of a patented process without the consent of the patent owner) with Patent Law, supra note 75, art. 11 (providing that for a patented product, no party may, without authorization, make, use, sell or import the patented product and that for a patented process no party may, without authorization, use the patented process or use, sell or import products "directly obtained by the patented process").

Compare TRIPs, supra note 9, art. 28(2) (providing that patent owners have the right to assign, transfer by succession or license such patent) with Patent Law, supra note 75, art. 10 (providing patent owners have "[t]he right to apply for a patent" and that such patent right "may be assigned") and Law of Succession of the People's Republic of China, art. 3(6) (adopted Apr.

10, 1985, effective Oct. 1, 1985) ("[P]roperty rights pertaining to copyright and patent rights" are part of the estate of a citizen for the purposes of succession), translated in LEXIS, Chinalaw Library. But see Patent Law, supra note 75, art. 12 (requiring that the patentee conclude a written license contract in order for a third party to be allowed to exploit the patent).

Compare TRIPs, supra note 9, art. 29(1) (requiring that applicants for a patent "disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art) with Patent law, supra note 75, art. 26 (providing that the description portion of the patent application "set forth the invention or utility model in a manner sufficiently clear and complete so as to enable a person skilled in the relevant field of technology to carry it out").

Compare TRIPs, supra note 9, art. 30 (allowing limited exceptions to the exclusive rights conferred by a patent) and id. art. 31 (allowing limited compulsory licensing) with Patent Law, supra note 75, arts. 51-58 (allowing compulsory licensing) and Patent Implementing Regulations, supra note 75, arts. 68-69 (limiting the cases in which compulsory licensing will be allowed). See also Paris Convention, supra note 27, art. 5(2), 5(3), 5(4) (providing in part for compulsory licenses).

Compare TRIPs, supra note 9, art. 32 (providing that an opportunity for judicial review of any decision to "revoke or forfeit" a patent shall be available) with Patent Law, supra note 75, art. 49 (allowing any party to institute legal proceedings in the people's courts where dissatisfied with the invalidation of a patent by administrative authorities).

Compare TRIPs, supra note 9, art. 33 (providing for a twenty year period of protection for an invention patent, tolling from the filing date) with Patent Law, supra note 75, art. 45 (providing that "[t]he duration of patent right for inventions shall be 20 years," tolling from the date of filing).

Regarding China's compliance with relevant portions of the Paris Convention for patents, compare Paris Convention, supra note 27, art. 2 (requiring that countries party to the Paris Convention provide national treatment to other members) with Patent Law, supra note 75, art. 18 (providing that foreign patent applications in China are to be dealt with in accordance with "any international treaty to which both countries are party").

Compare Paris Convention, supra note 27, art. 4(A)(1) (requiring that members of the Paris Convention recognize the priority of a patent application where the applicant has previously filed an application for the patent in another member country) and id. art. 4(C)(1) (stating that the priority of a patent application previously filed in another member country shall be recognized for twelve months where such patent application is for a patent or utility model or for six months where such applications is for an industrial design) with Patent Law, supra note 75, art. 29 (establishing a right of priority of twelve months for patents and utility models and six months for industrial designs).

Compare Paris Convention, supra note 27, art. 4ter (requiring that members of the Paris Convention grant an inventor the right of recognition as the inventor in the patent) with Patent Law, supra note 75, art. 17 (providing that "[t]he inventor or creator has the right to be named as such in the patent document").

Compare Paris Convention, supra note 27, art. 11 (providing temporary protection to patents in respect of goods exhibited at certain official functions) with Patent Law, supra note 75, art. 24(1) (providing that an invention-creation will not lose the necessary novelty to be patented if it is "first exhibited at an international exhibition sponsored or recognized by the Chinese Government").

Compare Paris Convention, supra note 27, art. 12 (requiring the establishment of a service to communicate with the public about patents) with Patent Implementing Regulations, supra note 75, arts. 80-81 (providing for the establishment of a "Patent Register" and a "Patent Gazette").

from TRIPs are relatively minor. Specifically, article 27(2) of TRIPs allows a member country to deny a patent which would harm "*order public* or morality"[85] However, member countries cannot deny the grant of an invention patent "merely because the exploitation is prohibited by domestic law"[86] Article 5 of the Patent Law, like article 27(2) of TRIPs, provides that any invention that is "contrary to social morality or that is detrimental to public interest" is not patentable.[87] Unlike article 27(2) of TRIPs, article 5 of the Patent Law also gives the government the right to deny a patent merely because it is "contrary to the laws of the state."[88]

Article 27(3) of TRIPs provides, in part, that "plant varieties" shall be protected "either by patents or by an effective sui generis system or by any combination thereof."[89] China has yet to extend patent protection to "plant varieties" as required by TRIPs.[90] However, as of late 1994, the Standing Committee of the National People's Congress was reportedly working on amendments to the 1992 Patent Law to extend patent protection to new plant varieties.[91] It is unclear when these amendments will come into effect.

Further, China's law is silent on certain provisions of TRIPs and the Paris Convention. Article 34(1) of TRIPs provides that when a product is identical to a product obtained by a patented process, there shall be a presumption that the manufacturer of the identical product used the patented process if (1) the product produced by the patented process is novel or (2) "there is a substantial likelihood that the identical product was made by the [patented] process and the owner of the patent has been unable through reasonable efforts to determine the process actually used."[92] Article 3 of the Paris Convention provides that nationals of non-member countries of the Paris Convention "who are domiciled or who have real and effective industrial or commercial establishments" in

85. TRIPs, supra note 9, art. 27(2).

86. Id.

87. Patent Law, supra note 75, art. 5.

88. See also article 4^{quater} of the Paris Convention, which provides that "[t]he grant of a patent shall not be refused and a patent shall not be invalidated on the ground that the sale of the patented product or of a product obtained by means of a patented process is subject to restrictions or limitations resulting from the domestic law." Paris Convention, supra note 27, art. 4^{quater}

89. TRIPs, supra note 9, art. 27(3)(b).

90. See Patent Law, supra note 75, art. 25(4) ("[N]o patent right shall be granted [for] animal and plant varieties.").

91. Wang Xiaozhong, Stronger Patent Law On The Way, China Daily, Oct. 11, 1994, at 9.

92. TRIPs, supra note 9, art. 34(1).

a Paris Convention country are to be treated as nationals of such country.[93] Finally, article 4[bis] of the Paris Convention provides that patent rights obtained for the same invention in different countries shall be independent of one another. The Patent Law does not address any of these provisions.

3. Conclusions with Regards to China's Patent Law

The only major requirements of TRIPs on patents which China has not satisfied involve the protection of plant varieties and the prohibition against denying a patent merely because a patented invention would be illegal under domestic law On the other hand, China's Patent Law, in conformance with TRIPs, limits compulsory licensing, protects chemicals, pharmaceuticals and agricultural products, and protects all invention patents for a term of twenty years. Compliance in these areas places China's patent regime far beyond those of other countries, such as Brazil and India. Further, TRIPs states that the requirement that members protect plant varieties is to be reviewed in four years, making it unclear whether this requirement will continue. Thus, while the international community should continue to monitor changes in China's patent law, it must be recognized that China has made great progress in recent years in creating a modern patent regime, one that both conforms with international intellectual property norms and complies with the major provisions of TRIPs on patents.

C. Copyright Law in China and TRIPs

1 Background

Upon the establishment of the People's Republic of China, the copyright law enacted by the Nationalist government in 1928 was repealed.[94] From 1950 until 1980, the protection of literary works was

93. Paris Convention, supra note 27, art. 3.

94. Copyright laws were published in 1910 by the Qing Dynasty government, during the reign of the last feudal emperor, Xuantong (1909-1912), in 1915 by the Republican government and in 1928 by the Nationalist government. The 1928 law was amended in 1944 and 1949, before the Nationalist government was forced to retreat to Taiwan. See Joseph T. Simone, Copyright in the People's Republic of China: A Foreigner's Guide, 7 Cardozo Arts & Ent. L.J. 1, 6 n.16 (1988).

governed by rules concerned with the protection of publication rights.[95] From 1980 until the enactment of the Copyright Law in 1990, additional regulations were published concerning the rights of authors, performers and the creators of audio-visual works.[96]

Despite strong external pressures, most notably from the United States, the enactment of a formal copyright law was delayed until 1990 because of political infighting as well as ideological differences among the drafters of the law concerning the meaning and purpose of copyright in China.[97] During the 1980s, new digital technologies emerged and the Chinese economy continued its process of reform and opening, providing fertile ground for copyright piracy With increasing evidence of rampant piracy in computer software, external pressures on China to enact a copyright law intensified.

The promulgation of the Copyright Law of the People's Republic of China in 1990 was accompanied by much fanfare. However, it did not quiet international pressure as many of the concerns of foreign copyright claimants went unanswered in the law[98] Many of these concerns were addressed, however, in later regulations promulgated by the Chinese government. Specifically, China enacted implementing regulations for the Copyright Law (the "Copyright Implementing Regulations") in 1991,[99] regulations to protect computer software (the "Computer Software

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95. See Zheng Chengsi & Michael Pendleton, Copyright Law in China 18-19, 26-27 (1991); K.H. Pun, A Critique of Copyright Protection for Computer Software in the People's Republic of China, 6 Eur. Intell. Prop. Rev. 227, 227 (1994).

96. Zheng & Pendleton, supra note 95, at 20-35.

97. See The Politics Behind the Law, China Bus. Rev., Sept.-Oct. 1990, at 26, 27. According to one account, delay tactics were employed by hard-liners at the June 1990 session of the National People's Congress Standing Committee to thwart passage of the Copyright Law. The question was posed by these hard-liners "whether works that advocate the overthrow of the government, encourage the 'six evils,' or are pornographic, superstitious, or contrary to the four cardinal principles should be eligible for copyright protection." Id at 27. In the end, a balance was struck. The Copyright Law, like the Trademark Law and the Patent Law before it, carries an explicit ideological agenda, specifically of "encouraging the creation and dissemination of works which would contribute to the construction of socialist culture and ethics and material civilisation, and of promoting the development and flourishing of the socialist culture and sciences." Copyright Law, supra note 17, art. 1. In addition, the Copyright Law is intended to serve the more traditional end of "protecting the copyright of authors in their literary, artistic and scientific works and rights and interests related to copyright " Id.

98. Foreigners did not enjoy equal treatment to Chinese persons under the Copyright Law. E.g., id. art. 2 (unpublished works of foreigners not protected).

99. Implementing Regulations of the Copyright Law of the People's Republic of China (promulgated June 1, 1991, effective June 1, 1991), translated in Zheng & Pendleton, supra note 95, at 303 [hereinafter Copyright Implementing Regulations].

Regulations") in 1991[100] and rules for the registration of computer software in 1992.[101] In September 1992, China enacted a set of provisions designed to implement the Berne Convention and to bring China's law into compliance with the MOU on Intellectual Property (the "Copyright Treaties Provisions").[102] These Copyright Treaties Provisions significantly strengthened the rights of foreign copyright owners in China.

2. Compliance with TRIPs

Under the TRIPs provisions on copyrights, countries party to the agreement must comply with articles 1-21 (not including article 6^{bis}) and the appendix of the Berne Convention.[103] In addition to the Berne Convention provisions incorporated by reference into TRIPs, TRIPs requires that member countries protect computer programs as literary works;[104] protect compilations of data;[105] provide authors with certain rights in the commercial rental of computer programs and movies;[106] and protect copyrights for works whose term of protection is not measured by the life of a natural person for at least fifty years,[107] except where such works are works of applied art or photography, in which case protection only extends over twenty-five years.[108] With regard to recordings and broadcasts, TRIPs requires member countries to provide performers with a fifty year right to authorize the recording of a performance or the broadcast of a live performance,[109] to provide producers of recordings with a fifty year right to authorize the reproduction of their recordings,[110] and to provide broadcasting

100. Regulations for the Protection of Computer Software (promulgated June 4, 1991, effective Oct. 10, 1991), translated in Zheng & Pendleton, supra note 95, at 313 [hereinafter Computer Software Regulations].

101. For a synopsis of these rules see Computer Software Copyright Registration Procedures, China L. & Prac., July 19, 1992, at 6.

102. Implementing International Copyright Treaties Provisions (promulgated Sept. 25, 1992, effective Sept. 30, 1992), translated in Implementing International Copyright Treaties Provisions, China L. & Prac., Jan. 14, 1993, at 36 [hereinafter Copyright Treaties Provisions].

103. TRIPs, supra note 9, art. 9(1).

104. Id. art. 10(1).

105. Id. art. 10(2).

106. Id. art. 11.

107. Id. art. 12.

108. Berne Convention, supra note 28, art. 7(4).

109. TRIPs, supra note 9, art. 14(1), (5).

110. Id. art. 14(2), (5).

organizations or owners of copyrights in broadcasts with at least a twenty year right to prevent unauthorized recording or rebroadcast.[111]

Largely due to the passage of the Copyright Treaties Provisions in 1991, China can claim substantial compliance with TRIPs provisions on copyrights.[112] However, several inconsistencies remain.

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111. Id. art. 14(3), (5).

112. Regarding China's compliance with the requirements of TRIPs on copyright, compare TRIPs, supra note 9, art. 10(1) (requiring that computer programs be protected as "literary works" under the Berne Convention) with Copyright Treaties Provisions, supra note 102, art. 7 (providing that "[f]oreign computer programs shall be protected as literary works").

Compare TRIPs, supra note 9, art. 10(2) (requiring the protection of "[c]ompilations of data," including computer databases) with Copyright Law, supra note 17, art. 14 (granting copyright to the compilers of compilations) and Copyright Treaties Provisions, supra note 102, art. 8 (providing for protection under the Copyright Law for "[f]oreign works that are a compilation of unprotected material but that are original in terms of selection and arrangement").

Compare TRIPs, supra note 9, art. 11 (requiring that members of the WTO provide authors with the right to authorize or prohibit the commercial rental of computer programs and cinematographic works, with certain exceptions) with Copyright Treaties Provisions, supra note 102, art. 14 (allowing owners of copyrights in foreign works to authorize or prohibit the rental of copies of their works once they have authorized other persons to distribute copies of their works).

Compare TRIPs, supra note 9, art. 12 (providing, in cases where not measured by the life of a natural person, works shall be covered by a fifty year term of protection, except for works of applied art or photography) and Berne Convention, supra note 28, art. 7(4) (providing that works of applied art or photography shall be protected for a term of at least twenty-five years) with Copyright Law, supra note 17, art. 20 (providing unlimited protection for the right of authorship, alteration and integrity) and id. art. 21 (providing life plus fifty years of protection for the right of divulgation, exploitation and remuneration "in respect of a work of a citizen" and fifty years "in respect of a work of a legal person or entity without legal personality, or in respect of a work created in the course of employment") and Copyright Treaties Provisions, supra note 102, art. 6 (limiting protection for foreign works of applied art to twenty-five years).

Regarding China's compliance with relevant provisions of the Berne Convention, compare Berne Convention, supra note 28, art. 2 (articulating an inexhaustive list of what works are subject to protection as "literary and artistic works") with Copyright Law, supra note 17, art. 3 (stating an exhaustive list of the works to be protected, including "literary, artistic, natural science, social science and engineering technical works").

Compare Berne Convention, supra note 28, art. 3 (providing that published and unpublished works of authors from Berne Union countries and authors from non-Berne Union countries whose works are first published in a Berne Union country shall be protected) with Copyright Law, supra note 17, art. 2 (providing that foreign works first published in China shall be protected) and Copyright Treaties Provisions, supra note 102, art. 5 (providing that unpublished foreign works are protected under the Copyright Law).

Compare Berne Convention, supra note 28, art. 5 (providing that authors shall enjoy national treatment) with Copyright Law, supra note 17, art. 2 (providing that works published outside of China are protected "in accordance with international treaties acceded to by both [the author's] country and China") and Copyright Treaties Provisions, supra note 102, art. 5.

Compare Berne Convention, supra note 28, art. 7 (providing that the term of protection for copyright "shall be the life of the author and fifty years after his death" or fifty years in the case of cinematographic works, anonymous or pseudonymous works and at least twenty-five years for

First, article 13 of TRIPs provides for "fair use" — use of a copyrighted work without consent from or payment to the copyright owner — so long as any such use "[does] not conflict with a normal exploitation of the work and [does] not unreasonably prejudice the legitimate interests of the right holder."[113] Similarly, article 22 of the Copyright Law also carves out an exception for fair use, setting forth twelve instances in which "a work may be used without permission from, and without payment to, the copyright owner"[114] as long as the moral rights of the copyright owner are not prejudiced.[115] However, some of the conditions of fair use set forth in the Copyright Law are potentially quite broad, including the "use of a published work by a state organ for the purpose of performing its official duties"[116] and the "free of charge performance of a published work."[117]

However, the Copyright Implementing Regulations bring China into compliance with article 13 of TRIPs regarding uses by state organs and into near compliance regarding free of charge performances. Article 29 of the Copyright Implementing Regulations mirrors article 13 of TRIPs, providing that in the case of use of a published work by state organs, such use must "not harm the normal exploitation of the works concerned and not unreasonably prejudice the legitimate interests of the copyright owners."[118]

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photographic works and works of applied art) with Copyright Law, supra note 17, art. 20 (providing unlimited protection for the right of authorship, alteration and integrity) and id. art. 21 (providing life plus fifty years of protection for the right of divulgation, exploitation and remuneration "in respect of a work of a citizen") and Copyright Treaties Provisions, supra note 102, art. 6 (limiting protection for foreign works of applied art to twenty-five years).

113. TRIPs, supra note 9, art. 13.

114. Copyright Law, supra note 17, art. 22. Under the Copyright Law, these instances are personal enjoyment and education, commentary, news reporting, classroom teaching, official duties of state organs, reproduction by libraries and archives, non-profit performances, copying and photographing of outdoor public exhibits, translation of Chinese works into ethnic minority languages, and translation into braille. Id. By contrast, the United States copyright law identifies only six instances of fair use: criticism, commentary, news reporting, teaching, scholarship and research. See Yang, supra note 2, at 268.

115. Copyright Law, supra note 17, arts. 22, 10. The four moral rights protected under the Copyright Law are the right to decide whether to publish, the right of attribution, the right to alter one's own work and the right to protect ones work from distortion. See id. art. 10(1)-(4); see also Yang, supra note 2, at 268 (noting the "high level of protection for an author's moral rights" under the Copyright Law).

116. Copyright Law, supra note 17, art. 22(7).

117. Id. art. 22(9).

118. Copyright Implementing Regulations, supra note 99, art. 29.

Regarding free of charge performances, under article 30 of the Copyright Implementing Regulations, in a performance of a published work, no fees may be collected from an audience and no remuneration paid to performers.[119] Given this provision, the conditions under which a free of charge performance would interfere with the normal exploitation of a work or unreasonably prejudice the legitimate interests of the copyright owner are extremely limited.

Second, article 18(1) of the Berne Convention provides that all works that have not fallen into the public domain as of the date a country joins the Berne Convention shall be protected by that country.[120] Therefore, under the Berne Convention, China must protect all copyrightable works, regardless of whether these works were previously afforded protection. In contrast to this principle of retroactivity under the Berne Convention, article 17 of the Copyright Treaties Provisions, promulgated pursuant to the MOU on Intellectual Property with the United States,[121] permits Chinese citizens and legal persons to continue using any foreign work owned or used prior to China's entrance to the Berne Convention in 1992, provided that such reproductions are not "used in any way that would unreasonably prejudice the legitimate rights and interests of the owners of copyright in the works."[122] Article 17 of the Copyright Treaties Provisions may violate article 18(1) of the Berne Convention.

Although the retroactivity principle of article 18(1) is ostensibly modified by article 18(3) of the Berne Convention, which provides that each member of the Berne Convention may determine the conditions for application of the principle of retroactivity with respect to other members, article 17 of the Copyright Treaties Provisions is so broad as to arguably go beyond any condition that would be acceptable under article 18(3). At the same time, however, insofar as application of article 17 of the Copyright Treaties Provisions is also limited to those cases

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119. Id. art. 30.

120. Berne Convention, supra note 28, art. 18(1). But see id. 18(3) (allowing countries, by mutual agreement, to derogate from the protection of article 18(1) of the Berne Convention).

121. MOU on Intellectual Property, supra note 28, art. 4. The MOU on Intellectual Property permitted the continuation of reasonable uses for works owned and used prior to March 17, 1992, the date bilateral copyright relations were established between the United States and China. Id. art. 3(7)(ii).

122. Copyright Treaties Provisions, supra note 102, art. 17, para. 2; see also Copyright Law, supra 17, art. 55, para. 2 ("Any act of infringement or breach of contract committed prior to the entry into force of this Law shall be dealt with in accordance with the relevant regulations or policies in force at the time when such act was committed.").

where the legitimate rights of a copyright owner are not prejudiced, it conforms to the requirements of article 13 of TRIPs, which states that members of TRIPs "shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interest of the right holder."[123] Further, it is also worth noting, with regards to concerns of the United States, that this article is in compliance with the MOU on Intellectual Property [124]

Third, article 14 of TRIPs provides various modes of protection for performers, record producers and broadcasting organizations.[125] Specifically, article 14(1) provides that performers on records shall be able to prevent others from re-recording or reproducing their fixed performances and that performers shall also be able to prevent others from broadcasting their live performances;[126] article 14(2) provides that record producers have the right to authorize or prohibit reproductions of their records;[127] and article 14(3) provides that broadcasting organizations have the right to prohibit recording and rebroadcasts of their broadcasts.[128] By contrast, articles 35, 37 and 40 of the Copyright Law provide that performers, record producers and broadcasters may use a published work created by others without the permission from the copyright owner so long as adequate remuneration is paid and so long as the copyright owner has not declared "that such exploitation is not permitted."[129]

While articles 35, 37 and 40 of the Copyright Law are not in complete conformance with article 14 of TRIPs, the broad recognition of an author's right to reserve all rights in a copyrighted work largely mitigates any such non-conformance.

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123. TRIPs, supra note 9, art. 13. However, note that article 17 of the Copyright Treaties Provisions does not replicate the requirement of article 13 of TRIPs that any exception to exclusive rights must not conflict with the "normal exploitation of works." Compare TRIPs, supra note 9, art. 13 with Copyright Treaties Provisions, supra note 102, art. 17.

124. MOU on Intellectual Property, supra note 28, art. 3(7)(ii).

125. TRIPs, supra note 9, art. 14.

126. Id. art. 14(1).

127 Id. art. 14(2).

128. Id. art. 14(3).

129. Copyright Law, supra note 17, arts. 35, 37, 40.

3. Conclusions with Regards to China's Copyright Law

It is indisputable that the one area the international community would most like to see improve in terms of China's intellectual property regime is the area of copyright. The international community has become particularly sensitive over the last several years to what is perceived as the lack of enforcement of China's Copyright Laws, particularly in cases of copyright infringement involving the piracy of compact discs and computer software.[130] However, despite the fact that there is considerable contention over China's enforcement of its copyright laws, this cannot detract from the fact that China's recently enacted and bitterly fought over copyright laws are in substantial compliance with TRIPs. Where several years ago protection for copyrightable works, such as computer software, was completely non-existent in China, laws now exist which have allowed slow, but consistent, progress in the treatment of China's piracy problem under the law Moreover, with regards to any areas where China is still arguably non-compliant with TRIPs, such as its fair use provisions, these areas of non-compliance are relatively minor when compared to the overall congruence between China's copyright laws and TRIPs.

III. THE EMERGING LEGAL CULTURE IN CHINA. THE INTELLECTUAL PROPERTY CASES

This section will address the evolving legal culture in China, will assess the efficacy of judicial and quasi-judicial enforcement of intellectual property rights in China through a discussion of recent cases, and will evaluate the significance of the establishment of intellectual property divisions in the Chinese courts. While many of China's critics claim that China has failed to properly enforce intellectual property rights, allowing piracy and other forms of intellectual property infringement to go unchecked, there is anecdotal evidence that China's courts are enforcing the laws. Further, while remedies for cases of

130. Even as Mickey Kantor of the United States Trade Representative and Wu Yi, the Chinese Minister of Trade, were in the process of completing the IPR Agreement in February 1995, reports emerged of a new Chinese CD-ROM called Subsidy CD selling for slightly more than US $100. This CD-ROM reportedly included seventy of the best-selling computer software programs in the world, by companies such as Microsoft, Aldus, Borland, Lotus and AutoCAD. The software on each CD-ROM was valued at US $6,000-12,000. Les Blumenthal, Northwest Stakes are Enormous in China's Computer Piracy, News Trib., Feb. 19, 1995, at F5.

intellectual property infringement may still be inadequate to effectively deter future infringement, China's legal system has evolved to a point where intellectual property cases can increasingly be handled by the courts.

A. Development of Judicial Institutions

As demonstrated by the negotiations in 1994-95 between the United States and China leading to the signing of a letter of agreement between the USTR and the Chinese Ministry of Trade (the "IPR Agreement"), the threat of trade sanctions is one means of inducing China to enforce its intellectual property laws. However, while police raids and factory closures resulting from such threat of sanctions may be welcome steps against piracy,[131] these gains are ephemeral. In fact, such short-sighted measures may ultimately be detrimental to the promotion and development of more stable legal institutions capable of fostering consistent decision-making regarding the protection of intellectual property rights and guided not so much by government pragmatism as by the rule of law

In July 1993, the Chinese government took steps to promote the institutionalization of intellectual property enforcement, commissioning the establishment of intellectual property divisions in the people's courts of China, beginning with the Beijing Intermediate People's Court.[132] As of early 1995, sixteen intellectual property divisions had been established, including three in Beijing, three in Shanghai, five in Guangdong, two in Hainan, and one each in Fujian, Xiamen and

131. Between the announcement by the United States Trade Representative on February 4, 1995 that US $1.08 billion in sanctions would be imposed on China and the announcement on February 26, 1995 of the IPR Agreement, Chinese authorities closed down seven of the twenty-nine factories cited by the United States Trade Representative as the greatest pirates of CDs and videodiscs. See Donna Smith, China, U.S. Pact Positive Step for Both Countries, Reuters, Feb. 27, 1995, available in INTERNET, Clari.World.Asia.China. Among the factories closed were the Shenfei Laser and Optical System Co. and the Zhuhai Special Economic Zone Audio-video Publishing House for severe infringement upon copyright. Benjamin K. Lim, China Closes Two of Most Notorious Pirate Plants, Reuters, Feb. 25, 1995, available in INTERNET, Clari.World.Asia.China. On February 26, 1995, "Protect CD Copyrights Promotion Day" was declared in Guangdong Province. China Targets Hi-Tech Pirates, Associated Press, Feb. 27, 1995, available in INTERNET, Clari.World.Asia.China. It was reported that tens of thousands of CDs were destroyed by a steamroller with a banner on the front reading "protect intellectual property - punish piracy." Id.

132. Chen Chunmei, Crackdown Unrelenting, China Daily, Jan. 17, 1995, at 1, 1.

Dalian.[133] Each of these intellectual property divisions are permanently staffed by a set of judges and their law clerks; their docket is entirely devoted to intellectual property cases.[134]

Since the mid-1980s, the number of intellectual property cases heard annually in China's courts has steadily risen.[135] However, the total number of intellectual property cases brought annually is still small compared to the total number of cases heard, for example, in the economic divisions of the people's courts.[136] Further, the activities of the intellectual property divisions are still dwarfed by those of administrative bodies in attempting to enforce intellectual property rights in China.[137]

Even so, the establishment of intellectual property divisions in the people's courts in China marks an unprecedented development in the history of Chinese intellectual property law as it indicates the resolve of

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133. Of the sixteen intellectual property divisions in China, five are in higher people's courts (Beijing, Shanghai, Guangdong, Fujian and Hainan), nine are in intermediate people's courts (Xiamen, Shenzhen, Guangzhou, Shanghai, Beijing, Haidian and Haikou, Shantou and Zhuhai) and two are in district people's courts (Huangpu and Dalian). Interview with Wang Yun, Judge with the Economic Division, Supreme People's Court, in New York, N.Y. (Feb. 24, 1995).

134. Id.

135. There were 266 intellectual property cases filed in the Intellectual Property Divisions of the Beijing Higher and Intermediate People's Courts in 1994, an increase over the previous year of 17.7 percent. Sun Chunying, Da Bu Kuaru Falu Guidao: Faguan Tan Jiaqiang Dui Zhishichanquan de Sifa Baohu (Big Step to the Rule of Law: Judge Speaks on Strengthening Judicial Protection of Intellectual Property Rights), Fazhi Ribao, Jan. 12, 1995, at 2. Of those cases, 98 involved copyright, an increase over the previous year of 55.5 percent. Id. In Shanghai, 225 intellectual property cases were filed in the Intellectual Property Division of the Shanghai Higher and Intermediate People's Courts in 1994, an increase over the previous year of 5.63 percent. Li Guoguang Fuyuanzhang Zai Shanghai Shigao, Zhongji Fayuan Zhishichanquan Shenpanting Chengli Yi Zhounian Xinwen Fabu Hui Shang de Jianghua (Li Guoguang, Vice President of the Shanghai Higher People's Court, Lecture on Intellectual Property Cases to Mark the One Year Anniversary of the Founding of the Intellectual Property Division), Feb. 11, 1995, at 1 (on file with the author); see also Yu Jianyang, Review of Patent Infringement Litigation in the People's Republic of China, 5 J. Chinese L. 297, 298 (1991).

136. According to official statistics, the number of cases heard in the economic divisions of the people's courts in China from 1989-93 was 3,016,608. Qiang Zhou, Judicial Independence and Legal Reform in China, at 26 (unpublished manuscript, original on file with author).

137. Administrative authorities have often ordered raids to put an end to intellectual property rights infringement. See, e.g., Piracy Crackdown, China Daily, Jan. 18, 1995, at 2 (stating that during the period from January 10-12, 1995, police in Guangdong Province seized more than 54,000 pirated compact discs, 1,500 laser discs and large numbers of printed video and cassette tapes); Fresh Call For Piracy Crackdown, China Daily, Sept. 5, 1994, at 3 (First National Working Conference on Intellectual Property Rights, convened by the State Council on September 2, 1994, called on 17 ministries to launch inspections to curb plagiarism and piracy and ordered local governments to wage crack-downs on CD piracy).

the Chinese government to promote a shift from non-judicial to judicial enforcement of intellectual property rights. Further, departmentalization of the courts into areas of legal expertise will likely result in a judiciary better equipped to make well-informed judgments in specialized areas such as intellectual property Specifically, the intellectual property divisions will be able to solidify Chinese legal norms, making legal outcomes more predictable for potential claimants. Along with certain signs that Chinese courts in general are gaining independence from manipulation by the Chinese Communist Party[138] and with the greater publicity surrounding intellectual property cases, it should become increasingly possible to monitor developing norms in intellectual property law in China.[139]

B. *Developing Trends in the Judicial Treatment of Intellectual Property Cases*

This section will briefly introduce the remedies available under China's intellectual property laws and point out trends in judicial enforcement of intellectual property rights as suggested by recent intellectual property cases decided in Chinese courts and administrative agencies. While Chinese judges do not always cite to specific articles in the law when announcing their decisions, the cases treated below indicate that such decisions are being made in accordance with relevant provisions of the intellectual property laws and that judicial and administrative authorities are engaging in good faith efforts to achieve effective enforcement and deterrence of future infringement of intellectual property rights.

1 Trademark Cases

a. Remedies

Under article 39 of the Trademark Law, Chinese administrative authorities have the power to administer the following remedies in cases

138. Donald C. Clarke, What's Law Got To Do With It? Legal Institutions and Economic Reform in China, 10 U.C.L.A. Pac. Bas. L.J. 1, 57-58, 62-63 (1991).

139. On Feb. 11, 1995, Li Guoguang, Vice President of the Shanghai Higher People's Courts, released a report on intellectual property cases in 1994 to mark the one year anniversary of the founding of the intellectual property divisions of the Shanghai courts. See Li Gouguang, supra note 135.

of trademark infringement: to enjoin a culpable party from further infringement, to impose fines on infringers and to award damages to victims of infringement.[140] Alternatively, a party whose trademark has been infringed may "institute legal proceedings directly with the people's court."[141] Administrative authorities, under the Trademark Implementing Regulations, also have the power to seize infringing trademark representations and to seize the means of production employed in trademark infringement.[142] Where infringement is particularly egregious, criminal prosecution for trademark infringement can be brought under article 127 of the Criminal Law.[143] Due to the amendment of the Trademark Law in 1993, when trademark infringement takes the form of a party passing off the trademark of another as his own or where a party knowingly sells a product bearing a counterfeit trademark, the infringing party may be criminally prosecuted under article 40 of the Trademark Law and subjected to punitive fines or imprisonment.[144]

Regarding the calculation of damages in non-criminal cases, article 39 of the Trademark Law provides that in cases in which infringement has been found, the relevant Administration for Industry and Commerce ("AIC")[145] can order that compensation be paid — such compensation to comprise the "profit that the infringer has earned through the infringement or the damages that the infringee has suffered through

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140. Trademark Law, supra note 38, art. 39.

141. Id.

142. Trademark Implementing Regulations, supra note 38, art. 43.

143. Criminal Law of the People's Republic of China (adopted July 1, 1979, effective Jan. 1, 1980), art. 127, translated in The Laws of the People's Republic of China, 1979-1982, at 89 (Legislative Affairs Commission of the Standing Committee of the National People's Congress, ed., 1987) [hereinafter Criminal Law].

144. Trademark Law, supra note 38, art. 40; see also Supplementary Provisions Concerning the Punishment of Crimes of Counterfeiting Registered Trademarks Made by the Standing Committee of the National People's Congress (adopted Feb. 22, 1993, effective July 1, 1993) (supplementing the Criminal Law to provide for criminal sanctions for the crime of passing off a registered trademark), translated in Supplementary Provisions Concerning the Punishment of Crimes of Counterfeiting Registered Trademarks Made by the Standing Committee of the National People's Congress, Indus. Prop., Sept. 1993, Text 3-003, at 001.

145. The role of AICs is set forth in the Trademark Implementing Regulations. The responsibilities of the AICs include, among other things, responsibility for registration of a trademark, assignment of a trademark registration and renewal of registration. Trademark Implementing Regulations, supra note 38, art. 3. The AICs have also been given enforcement powers for trademarks, including the power to impose fines and to seize infringing trademark representations, id. art. 43.

the infringement "[146] In addition, article 39 provides for the imposition of fines.[147] The amount of any fine under article 43 of the Trademark Implementing Rules may not exceed 50% of any illegally derived revenue or five times any profits made from the infringement.[148]

Many critics have argued that the damage awards allowable in trademark infringement cases in China are inadequate to curb future trademark infringement. The Chinese reaction to such calls for stricter enforcement has been to revise article 40 of the Trademark Law to make greater numbers of cases subject to criminal prosecution.[149]

b. Counterfeiting

Recent counterfeiting cases in China have involved small Chinese companies wishing to cash in on the value built up in popular and profitable products bearing a particular trademark. The counterfeiter recreates the product as completely as possible to fool consumers into believing that they are actually buying the trademarked product. The resulting product directly injures the trademark owner by decreasing the sales of the authentic product and injures the reputation of the proprietor of the trademark as the quality of the counterfeit good is usually inferior to that of the trademark owner's.

In the case of *IBM v 6 Shenzhen Companies*, IBM China/Hong Kong obtained a favorable judgment against five companies located in Shenzhen which in 1988 distributed and sold personal computers bearing counterfeit IBM labels.[150] The Shenzhen AIC found that the five companies had infringed the IBM trademark, which IBM had registered in 1980. The AIC ordered the infringing companies to pay a fine totalling RMB 662,696.50, remove the counterfeit IBM trademark representations from the computers and destroy all packaging materials bearing the counterfeit IBM mark. The fine was roughly 20% of the

146. Trademark Law, supra note 38, art. 39.

147. Id. art. 39.

148. Trademark Implementing Regulations, supra note 38, art. 43.

149. Article 40 was amended in 1993 to allow criminal prosecution in cases of forging a trademark or knowingly selling counterfeit goods. Trademark Law, supra note 38, art. 40. Previously, article 40 had only allowed criminal prosecution in cases where a person, other than the trademark holder, passed off a trademark as his own. 1982 Trademark Law, supra note 15, art. 40.

150. IBM v. 6 Shenzhen Companies, China L. & Prac., June 5, 1989, at 32.

RMB 3.23 million reported revenue from the illegal sales of imitation IBM computers, the amount specified under article 43 of the Trademark Implementing Rules.[151]

A more recent example, *3M v. Shenzhen G. Yuan Industrial Company*, was the first trademark case reported in the People's Republic of China in which compensation was awarded to a foreign trademark owner.[152] The case involved the well known Minnesota Mining and Manufacturing Company ("3M"), proprietor of the "3M" trademark, registered in China in 1987. 3M brought an administrative action before the Shenzhen AIC under article 39 of the Trademark Law[153] claiming that Shenzhen G. Yuan Industrial Company ("G. Yuan Industrial") had infringed the 3M trademark. The court found that in 1989 G. Yuan Industrial had purchased 200,000 counterfeit 3M diskettes, reselling most of them for a total of RMB 796,299.80 in illegal revenues. The Shenzhen AIC held that, based on article 38(1) of the Trademark Law,[154] G. Yuan Industrial had infringed the 3M trademark. The AIC ordered G. Yuan Industrial to pay RMB 53,717.43 in damages to 3M and RMB 79,629.98 as a fine to the state. As this case preceded the enactment of the present Trademark Implementing Rules and as the case report was silent on how damages or fines were calculated, it is unclear how the AIC arrived at these figures. At least with respect to damages, under article 39 of the Trademark Law, the proper measure should have been the profits of the infringer or the losses suffered by the trademark owner.[155]

Hong Kong Sendon International v. Shenzhen Huada Electronics[156] is the most striking example of a Chinese court awarding damages in line with international standards and with Chinese law. In this case, Hong Kong Sendon International ("Sendon") appealed from a decision by the Shenzhen AIC. Sendon had brought its action before the Shenzhen AIC because it alleged that Shenzhen Huada Electronics

151. 1988 Trademark Implementing Regulations, supra note 37, art. 43.

152. 3M v. Shenzhen G. Yuan Indus. Co. Ltd., China L. & Prac., Feb. 25, 1991, at 23.

153. See Trademark Law, supra note 38, art. 39.

154. Id. art. 38(1) (stating that "use a trademark that is identical with or similar to a registered trademark in respect of the same or similar goods without the authorization of the proprietor of the registered trademark" shall constitute "an infringement of the exclusive right to use a registered trademark").

155. Id. art. 39.

156. Hong Kong Sendon Int'l v. Shenzhen Huada Elec., China L.Q., Dec. 1994, at 51 (Shenzhen Mun. Intermediate People's Ct. Aug. 14, 1991).

("Shenzhen Huada") had used the "Sendon" trademark without Sendon's permission. Although the Shenzhen AIC held in favor of Sendon, issuing an injunction against Shenzhen Huada and imposing a fine equivalent to eighteen percent of Shenzhen Huada's revenues from the infringement, it refused to award damages to Sendon.

The Shenzhen Intermediate People's Court, also finding trademark infringement, held contrary to the Shenzhen AIC on the issue of damages. The court based its finding of trademark infringement on article 38(1) of the Trademark Law, which treats use of a "trademark that is identical with or similar to a registered trademark in respect of the same or similar goods without the authorization of the proprietor of the registered trademark"[157] as infringement. Citing article 39 of the Trademark Law,[158] the court ordered Shenzhen Huada to pay Sendon RMB 468,314.40 in damages. According to the court, this award constituted the profits obtained by Shenzhen Huada. The court also awarded interest on the damage award as well as court costs of HK $19,275.

Procurators have recently stepped up the battle against egregious cases of counterfeiting by bringing criminal actions against counterfeiters, charging such counterfeiters with having committed "crimes of property violation."[159] Such prosecution of counterfeiting cases has led to several occasions in which the death penalty has been imposed.

On October 18, 1992, the Guizhou Higher People's Court sentenced Luo Deming to death where he had produced and sold 40,000 bottles of counterfeit Maotai wine at a profit of approximately US $260,000.[160] In another death penalty case, on April 29, 1993, the Kunming Intermediate People's Court sentenced one defendant to death and six others to life imprisonment where they sold counterfeit "Red Pagoda Mountain" cigarettes for an illegal profit of approximately US $150,000.[161] These death penalty cases, while possibly raising

157 Trademark Law, supra note 38, art. 38(1).

158. Id. art. 39.

159. "Crimes of property violation" include such crimes as taking property by force, Criminal Law, supra note 143, art. 150, stealing, id. art. 151, swindling, id. art. 152, theft, id. art. 153, fraud, id., forcible seizure, id., extortion, id. art. 154, blackmail, id., embezzlement of state funds, id. art. 155, and destruction of property, id. art. 156.

160. Counterfeit Spirit Manufacturer Receives Death Penalty, China L. & Prac., Jan. 14, 1993, at 20.

161. Counterfeit Cigarette Seller Receives Death Penalty, China L. & Prac., Oct. 14, 1993, at 24.

questions as to the proportionality of punishment and crime, certainly indicate the resolve of the Chinese courts to deter serious trademark infringement.

c. *Unfair Competition*

Cases of unfair competition involve a lower quality product trying to gain a competitive advantage in the market by associating itself with a higher quality product while avoiding outright copying of the higher quality product or of its registered trademark. Specifically, the seller of the lower quality product tries either to create confusion in the mind of the consumer as to the identity of the maker of the product or to sell "copycat" products, bearing a trade name similar to that of the higher quality product. Other instances of unfair competition include attempts to obtain registration for trademarks similar to previously registered well-known marks. Recent cases demonstrate the resolve of authorities to strike out at infringers engaged in acts of unfair competition.[162]

In *M & M's v. W & W's* in 1990, the Trademark Bureau ruled in favor of Mars, Inc. ("Mars") in its opposition to an application for registration of the mark "W & W's" by the Sanlian Food Co. ("Sanlian").[163] Mars brought its action under article 19 of the Trademark Law, which provides that any party may raise an objection to a trademark during the application process.[164] Mars had previously registered the "M & M's" trademark in China in 1983 but learned in 1989 that Sanlian had begun to manufacture and sell "W & W's" milk and peanut chocolate candies in China. Further, Sanlian had applied for and received preliminary approval for the trademark "W & W's" from the Trademark Bureau.[165] Mars filed a formal complaint with the Shanghai and other regional AICs opposing the Sanlian application. After an initial ruling unfavorable to Mars from the Ningbo AIC in 1988, the State AIC ruled in favor of Mars in January 1990 and ordered the

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162. See, e.g., Dragon Spring Ten Thousand Double-edged Sword Factory v. Dragon Spring County Double-edged Sword Factory, China L. & Prac., Dec. 5, 1988, at 35-36; Weisan-U Case, China L. & Prac., Feb. 20, 1989, at 44-45.

163. M & M's, supra note 57, at 24.

164. Trademark Law, supra note 38, art. 19 ("Any person may, within three months from the date of the publication, file an opposition against the trademark that has, after examination, been preliminarily approved.").

165. Mars also learned that W & W's was engaged in advertising practices which it felt clearly constituted acts of unfair competition. For example, the M & M's slogan is the well-known "milk chocolate melts in your mouth, not in your hands" while the slogan adopted by W & W's was "only dissolves in your mouth, not in your hand." M & M's, supra note 57, at 24.

Beijing, Shanghai and Ningbo AICs to enjoin sales of the infringing W & W's products. In addition, the State AIC, in accordance with article 43 of the Trademark Implementing Regulations, seized products with the "W & W's" mark.[166]

Remarkable in that it demonstrates the willingness of the administrative authorities to look to international norms in making legal decisions is *Santak v Hong Kong Sendon International Scientific Instrument and Equipment Co.*,[167] decided in 1990. In this case, the Trademark Review and Adjudication Board (the "Trademark Review Board") of the State AIC cancelled an improperly registered trademark, citing in its opinion article $10^{bis}(2)$ of the Paris Convention, which prohibits registering a trademark when such registration would constitute an act of unfair competition.[168]

Both Santak and the Hong Kong Sendon International Scientific Instrument and Equipment Company ("Sendon Scientific") were established in the mid-1980s by He Shaowen and were engaged in the manufacture of electronic power supply units called uninterrupted power suppliers ("UPS"). In 1986, He Shaowen withdrew from Sendon Scientific but continued using the Santak mark in the production of UPS. Sendon Scientific, in competition with Santak from 1986 onward, registered both the "Sendon" and "Santak" trademarks in China in 1989 Santak applied to the Trademark Review Board pursuant to article 25 of the Trademark Implementing Rules[169] to have Sendon Scientific's registration of the "Santak" trademark cancelled. On May 28, 1990, the Trademark Review Board held that the "Santak" trademark should be cancelled, reasoning that as Santak had built up a reputation for excellence in products bearing the "Santak" trademark, the registration of this trademark by Sendon Scientific constituted an act of unfair competition in violation of the Paris Convention and the Trademark Implementing Rules.

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166. 1988 Trademark Implementing Regulations, supra note 37, art. 43.

167. Santak v. Hong Kong Sendon Int'l Scientific Instrument and Equip. Co., translated in Santak v. Sendon, China L. & Prac., Dec. 10, 1990, at 25.

168. Article $10^{bis}(2)$ of the Paris Convention provides, "[a]ny act of competition contrary to honest practices in industrial or commercial matters constitutes and act of unfair competition." Paris Convention, supra note 27, art. $10^{bis}(2)$.

169. 1988 Trademark Implementing Regulations, supra note 37, art. 25 ("Wherever any organization or individual considers that a trademark has been improperly registered, it or he may apply for adjudication by sending [an] 'Application for the Cancellation of Improperly Registered Trademark' to the Trademark Review and Adjudication Board.").

2. Patent Cases

a. Remedies

Under article 60 of the Patent Law, parties who infringe the patent rights of others may be ordered by the administrative authorities to cease the infringing action and pay damages.[170] Article 60 of the Patent Law provides for administrative authorities to provide compensatory damages but is silent as to the measure for such damages.[171] Article 78 of the Patent Implementing Regulations provides, in cases of passing off the patented product of another, for administrative authorities to impose fines ranging from RMB 1,000-50,000 or, alternatively, between 100-300% of any income derived by the patent infringement.[172] The regulations are silent as to which schedule of fines is to be applied in any particular case.

Alternatively, a party whose patent has been infringed may directly institute proceedings in the people's courts.[173] Further, under article 63 of the Patent Law, parties who pass off the patented product of another as their own can be prosecuted criminally under the Criminal Law, potentially leading to imprisonment, criminal detention or criminal fines.[174]

b. Infringement of Patent Rights

In *Shenyang No. 9 Leather Shoe Factory v. Shenyang No. 1 Leather Shoe Factory*, the Shenyang Intermediate People's Court ruled in 1987 that Shenyang No. 1 Leather Shoe Factory ("Shenyang No. 1") infringed Shenyang No. 9 Leather Shoe Factory's ("Shenyang No. 9") utility

170. Patent Law, supra note 75, art. 60.

171. Id. art. 60.

172. Patent Implementing Regulations, supra note 75, art. 78.

173. Patent Law, supra note 75, art. 60.

174. Id. art. 63 (applies article 127 of the Criminal Law, which imposes criminal penalties for trademark infringement, mutatis mutandis, to the crime of passing off a patent (the act of selling a product which the seller claims is patented but which is not patented) under article 63 of the Patent Law); Criminal Law, supra note 143, art. 127.

model for a new shoe made of artificial leather, real leather and chemical fibroid net.[175]

Shenyang No. 9 filed an application for the utility model in late 1985, whereafter it began closed-door production of the shoes in December of that year. Shenyang No. 1, after an inspection tour of the Shenyang No. 9 plant, began producing shoes in March 1986, while Shenyang No. 9's patent was still pending, using the same technology Shenyang No. 9's patent application was subsequently announced in April 1986 and the utility model patent was granted in July 1986. By that time, Shenyang No. 1 had already produced 18,100 pairs of shoes using Shenyang No. 9's utility model, 5,000 of which had already been sold.

The court, pursuant to article 11 of the Patent Law, held Shenyang No. 1 liable for infringement of Shenyang No. 9's patent. Article 11 of the Patent Law provides that a patent right owner has the exclusive right to exploit its patented invention.[176] Relying on article 60 of the Patent Law and article 77 of the Patent Implementing Regulations,[177] the court ordered Shenyang No. 1 to cease producing shoes employing the Shenyang No. 9 design. In addition, the court ordered Shenyang No. 1 to pay RMB 0.50 for each pair of shoes produced between April 30 and July 31, 1986, the period during which Shenyang No. 9's patent application was pending, and to pay RMB 3.26 for each pair of shoes produced subsequent to the grant of the patent. Despite the Court's ruling, the two sides reached a court mediated settlement to enter into a voluntary license agreement, with Shenyang No. 1 agreeing to pay Shenyang No. 9 RMB 18,000 plus court costs.[178]

In *Lu Zhengming v Shanghai Engineering General Company and Wuxi City Environmental Sanitation Engineering Research Factory*, the

175. Shenyang No. 9 Leather Shoe Factory v. Shenyang No. 1 Leather Shoe Factory, China L. & Prac., July 18, 1988, at 34. Decided on November 30, 1987 by the Shenyang Intermediate People's Court, this was reportedly the first case of patent infringement to be decided by a court in China. Id. at 35.

176. 1984 Patent Law, supra note 16, art. 11.

177 Id. art. 60 (providing that in the case of unauthorized exploitation of a patent, "the patentee or any interested party may directly institute proceedings in the people's court," and the relevant administrative authority "shall have the power to order the infringer to stop the infringing act and to compensate for the damage"); 1985 Patent Implementing Regulations, supra note 73, art. 77 (providing that the relevant administrative authority shall have the power to decide that the infringer "shall pay appropriate fees" for the time period "after the publication of an application for a patent and before the grant of the patent right ").

178. See Yu, supra note 135, at 308-09.

Shanghai Higher People's Court held, on appeal, that Shanghai Engineering General Company ("Shanghai Engineering") and Wuxi City Environmental Sanitation Engineering Laboratories ("Wuxi Environmental") infringed the patent right of Lu Zhengming in a utility model for a compactor to be used for recycling garbage.[179] In April 1989, Wuxi Environmental had contracted for Shanghai Engineering to research and produce a garbage compactor. Lu alleged that Shanghai Engineering had used his published patent in producing the contracted for compactor.

Although the lower court found that Shanghai Engineering had used Lu's patent, the court dismissed the complaint, holding that under article 62(5) of the Patent Law Shanghai Engineering's reliance on the patent did not constitute infringement of Lu's patent right. Article 62(5) provides that it shall not be deemed infringement of a patent right "where any person uses the patent concerned solely for the purposes of scientific research."[180]

The Shanghai Higher People's Court reversed the lower court decision, reasoning that article 62(5) of the Patent Law is restricted to laboratory use. The purpose of article 62(5), the court ruled, is to further develop technology, to demonstrate the technology, or to determine the technology's economic value. Because in this case Shanghai Engineering had used the patented technology to manufacture a machine to be sold for profit, the court held that its use of the patented invention violated article 11 of the Patent Law Article 11 provides that "[a]fter the grant of the patent right for an invention no entity or individual may, without the authorization of the patentee, make, use or sell the patented product "[181] The court ordered Shanghai Engineering to pay Lu RMB 20,000 and ordered Wuxi Environmental to pay RMB 1,000 for the cost of evaluating the technology by experts during the proceedings.

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179. Lu Zhengming Su Shanghai Gongcheng Chengtao Zong Gongsi, Wuxi Shi Huanjing Weisheng Gongcheng Shiyanchang Zhuanli Qinquan Shangsu An (Lu Zhengming v. Shanghai Engineering General Company and Wuxi City Environmental Sanitation Engineering Laboratories, on Appeal from a Suit for Violation of Patent), 1994 Zhongguo Falu Nianjian (Law Yearbook of China) 901 (1994).

180. 1984 Patent Law, supra note 16, art. 62(5).

181. 1984 Patent Law, supra note 16, art. 11.

3. Copyright Cases

In many of the copyright cases decided prior to the enactment of the Copyright Law in 1990, courts and administrative authorities awarded inadequate damage awards to copyright owners and failed to enjoin infringers from continued infringement of such owners' copyright. Although damage awards are still low in comparison to international standards, the trend in recent cases has been for courts to enjoin infringers from further exploitation of a copyrighted work.

a. Remedies

Article 45 of the Copyright Law provides that parties who infringe another's copyright shall cease such infringement, eliminate the effects of the infringement, apologize publicly and pay damages to the copyright owner.[182] In addition, administrative authorities may impose fines or confiscate any illegal revenue for more serious cases of infringement.[183] Furthermore, criminal sanctions for copyright infringement have recently been introduced.[184]

b. Copyright Infringement

In *Dalian Audio-Visual Publishing Co. v. Haidian District Audio-Visual Arts Services Agency of Beijing*, Dalian Audio-Visual Publishing Co. ("Dalian AV") sued Haidian District Audio-Visual Arts Services Agency of Beijing ("Haidian AV") in the Beijing Haidian District People's Court for infringing Dalian AV's exclusive right under contract to publish and distribute audio cassettes of songs from a television series.[185] Although this case came to the court before the Copyright

182. Copyright Law, supra note 17, art. 45.

183. Id. art. 46.

184. See National People's Congress, Penalties for Infringement Upon Copyrights Decision, China L. & Prac., Aug. 29, 1994, at 6; see also Ma Chenguang, Copyright Violators Face Imprisonment, China Daily, July 6, 1994, at 1 (computer software copyright infringement punishable through criminal sanctions).

185. Exclusive Publication and Distribution Rights Upheld, China L. & Prac., Apr. 9, 1992, at 23 (reporting *Dalian Audio-Visual Publishing Co.*). In October 1990, Dalian AV obtained exclusive publication and distribution rights for audio cassettes of songs from a television series under a contract with Dalian Television Station. The two parties issued a joint declaration in the journal *Press and Publishing News* forbidding unauthorized copying, publication and distribution by any third party during the term of the agreement. Id. at 23.

Law went into effect, the court relied on article 118 of the General Principles of the Civil Law to hold in favor of Dalian AV. Article 118 of the General Principles of the Civil Law gives a party whose rights in a copyright have been infringed the right to demand the cessation of infringement of the copyright and compensation for losses.[186] The Court ruled that although Dalian AV did not own the copyrights to the songs, Dalian AV's exclusive distribution and publishing rights were infringed upon as a result of Haidian AV reproducing 600 copies of the tape.[187] Pursuant to court initiated mediation, the parties agreed that Haidian AV would immediately cease all infringement, publish an apology in a newspaper within 10 days of the settlement, and pay compensation of RMB 22,070 for economic losses and court costs of RMB 930.

Beijing Wei Hong Computer Software Research Institute v. Beijing Zhong Ke Yun Wang Technology Co., decided in 1993, was reportedly the first case resolved by a Chinese court since the implementation of the Computer Software Regulations.[188] Beijing Wei Hong Computer Software Research Institute ("Wei Hong") owned the copyright for a piece of computer software called "unfox [sic] 2.1 Fan Bian Yi Bo Shi v 2.1" ("Unfox"). Wei Hong brought suit against Beijing Zhong Ke Yun Wang Technology Co. ("Zhong Ke") after it discovered Zhong Ke advertising the sale of Unfox at a computer software exhibition, although Zhong Ke had not previously obtained a license to market the product from Wei Hong. The Beijing Haidian People's Court, pursuant to article 94 of the General Principles of the Civil Law and article 9 of the Computer Software Regulations, held that Zhong Ke had infringed on Wei Hong's copyright. Article 94 of the General Principles of the Civil Law provides that "Citizens and legal persons shall enjoy rights of authorship (copyrights) and shall be entitled to publish their works and obtain remuneration in accordance with the law."[189] Under article

186. General Principles of the Civil Law, supra note 18, art. 118.

187. This issue of standing would likely be decided similarly under China's present copyright laws. Under article 35 of the Copyright Implementing Regulations, "[t]he person who has obtained exclusive right [sic] in relation to the use in a certain way of a work shall have the right to prevent any other person including the copyright owner as licensor from using the work in the same way." Copyright Implementing Regulations, supra note 99, art. 35. This means that a person who obtains a right under contract to use a copyrighted work has a right of action against unauthorized parties using the work in a similar manner.

188. Landmark Computer Software Dispute: Court Penalises Infringement, China L. & Prac., June 3, 1993, at 19 (reporting *Beijing Wei Hong Computer Software Research Institute*).

189. General Principles of the Civil Law, supra note 18, art. 94.

9 of the Computer Software Regulations, owners of copyright in software have the right of publication, attribution and exploitation of such software.[190] In addition, article 9 reserves to the copyright holder the right to license or assign the copyrighted software.[191] The court ordered Zhong Ke to cease infringement, to pay Wei Hong RMB 46,000 in compensation and to pay Wei Hong RMB 7,000 in auditing expenses. Further, the court imposed a fine of RMB 10,000 on Zhong Ke and ordered Zhong Ke to publish a written apology

In *China Golden Dawn Safety Technology Co. v Beijing Shijingshan District Zhiye Electronics Limited*, a case decided in early 1994, the Intellectual Property Division of the Beijing Intermediate People's Court rendered its first decision concerning computer software infringement.[192] China Golden Dawn Safety Technology Co. ("Golden Dawn") owned the copyright for a piece of computer software called "KILL." In July 1993, Golden Dawn discovered a brochure advertising a program called "KILL 66" being sold by an employee of Beijing Shijingshan District Zhiye Electronics Limited ("Zhiye"). A sample of "KILL 66" revealed that it was an exact copy of Golden Dawn's program, "KILL." The court ruled in favor of Golden Dawn based on article 9 of the Computer Software Regulations. Article 9 provides in part that copyright owners have the right to exploit and receive remuneration for their software, including the right to copy and distribute such software.[193] The court held that Zhiye and its employee had infringed the copyright of Golden Dawn by copying the software "KILL" and by distributing the brochure for "KILL 66" without the permission of Golden Dawn. The Court ordered Zhiye and its employee to pay damages of RMB 100,000 to Golden Dawn for economic damages and loss of reputation plus RMB 50,000 for costs incurred by Golden Dawn in enforcing its claim. The measure of damages and the amount awarded to Golden Dawn are particularly noteworthy While the Computer Software Regulations do not specify the measure of damages for acts of computer software copyright infringement, nonetheless, the court's award of economic losses and loss of reputation is in greater harmony with

190. Computer Software Regulations, supra note 100, art. 9(1)-(4).

191. Id. art. 9(5).

192. Local Software Developer Wins RMB 150,000 Award For Infringement, China L. & Prac., Apr. 11, 1994, at 19 (digesting *China Golden Dawn Safety Technology Co.*).

193. Computer Software Regulations, supra note 100, art. 9(3)-(4).

international norms than previous copyright cases decided by Chinese courts.

4. Conclusion

While anecdotal evidence indicates that the courts and administrative authorities are upholding the laws against intellectual property infringement, the problem of inadequate damage awards and fines continues to prevent judicial and administrative decisions from effectively deterring future infringement of intellectual property rights in China. Specifically, cases such as *IBM v. 6 Shenzhen Companies*[194] cannot be heartening to companies seeking to protect their interests in China. However, as inadequate damage awards do not significantly detract from China's overall compliance with TRIPs and as the general trend in trademark, patent and copyright cases seems to be towards greater damage awards and less reluctance to issue injunctive relief, any continued inadequacy in damage awards should not pose a significant barrier to China's accession to the WTO. Indeed, the international community may be in a better position to press China to award higher damages to injured parties and to impose more significant fines on infringers if China is made subject to the WTO dispute resolution process.

IV THE WTO AND THE PEOPLE'S REPUBLIC OF CHINA

A. Historical Posture

China was a founding member of the General Agreement on Tariffs and Trade in 1947,[195] but in the aftermath of the retreat of Chiang Kaishek's Nationalist forces to the island of Taiwan in October 1949 and the rise to power of the Communists on the mainland, the Nationalist government gave notification to the GATT Secretariat in March 1950 that China was withdrawing from the GATT.[196] On July 14, 1986, the government of the People's Republic of China formally notified the

194. See discussion supra note 150 and accompanying text.

195. GATT went into effect on January 1, 1948, with "the Republic of China" identified as one of the original Contracting Parties in the Preamble. GATT, supra note 5, pmbl.

196. Lori F. Damrosch, GATT Membership in a Changing World Order: Taiwan, China, and the Former Soviet Republics, 1 Col. Bus. L. Rev. 19, 21 (1992).

GATT Secretariat of its intention to seek "resumption" of its status as a contracting party [197] From late 1986 until the founding of the WTO on January 1, 1995, China has been permitted to participate in the GATT Uruguay Round of negotiations as an observer. However, China ultimately failed in its primary objective: persuading the GATT contracting parties to allow it into the GATT before the founding of the WTO [198]

China's inability to join the GATT in time to become a founding member of the WTO was largely due to political opposition, particularly from the United States and Europe.[199] One of the key hurdles to

197. An enormous amount of discussion in academic circles has been devoted to the question of whether China could be readmitted to the GATT or whether its request in 1986 should be understood as a de novo application for contracting party status. It has been persuasively argued that as the government of the People's Republic of China neither contested the legality of the Republic of China's withdrawal nor attempted to assume the responsibilities of membership in the GATT shortly after the withdrawal of the Republic of China, the People's Republic of China waived their right to claim readmission. Id. at 22-23. Thus, it might be argued that China's posture before January 1, 1995, at which time the WTO replaced the GATT, should be understood as that of applying anew for accession to the GATT.

198. One of the stumbling blocks for China's accession to the GATT in time to become a founding member of the WTO has been the question of whether China would participate in the WTO as a "developing country" or as a "developed country." See, e.g., Osman Tseng, Delaying the Mainland's Entry into GATT, Bus. Taiwan, Dec. 26, 1994, available in LEXIS, World Library, Txtline File. As a "developing country," China would qualify not only for the one-year transition period, which applies to all member countries under article 65(1) of TRIPs, TRIPs, supra note 9, art. 65(1), but would also qualify for an additional delay of up to four years, id. art. 65(3). See also id. art. 65(4) (allowing an additional delay of five years on patent protection for products in certain areas of technology). The United States and Europe consider China too large to be allowed to join the WTO under the favorable conditions reserved for developing countries, and instead, the United States Trade Representative, Mickey Kantor, has stated that the United States would like to negotiate China's entry to the WTO on a "commercially reasonable" basis. China Links U.S. Trade to Political Improvement, Reuters N. Am. Wire, Mar. 24, 1995, available in LEXIS, News Library, Reuna File. But see US Flexible on China Joining WTO, Kantor Says, Reuters, Mar. 9, 1995 ("I believe it would be not appropriate and certainly not realistic to assume that China can take on every obligation that the most developed nations have taken on immediately. However, there is no excuse for China not to take on the basic obligations of the Uruguay round and the WTO to become a member in order to gain that accession on a commercially reasonable basis."), available in LEXIS, News Library, Curnws File.

199. During China's fierce negotiations to join the GATT in late 1994, the European Union Commissioner, Sir Leon Brittan, was firm in his opposition to China's bid to join the GATT without improvements in market access, economic reforms, free trade for all products and currency convertability. Brittan: China Must Do More to Earn GATT Membership, Deutsche Presse-Agentur, Nov. 7, 1994, available in LEXIS, News Library.

China's entry, from the point of view of the United States, was China's lack of adequate intellectual property enforcement.[200]

In a visible manifestation of the tension underlying intellectual property issues, the United States Trade Representative, in June 1994, mounted its second investigation in three years of China's enforcement record in the field of intellectual property.[201] On February 4, 1995, pursuant to the results of this investigation, the United States announced US $1.08 billion in sanctions against China, to take effect on February 26, 1995, unless an accord was reached between the two countries.[202]

The effect of this investigation was to make China's accession to the GATT in late 1994 highly improbable, barring some extraordinary move on the part of the Chinese to improve the intellectual property situation before December 1994. Prior to the IPR Agreement reached in February 1995 between the United States and China as a result of fierce negotiations, the United States clearly demonstrated, both in its rhetoric and its political actions, that it was no longer committed to China's "rapid attainment" of membership to the GATT/WTO, contrary to its promise in a 1992 agreement on market access,[203] so long as enforcement of intellectual property rights remained a problem.

B. *Enforcement of Intellectual Property Rights through the WTO Dispute Resolution Process*

The GATT dispute settlement procedures were largely overhauled in the Uruguay Round of negotiations.[204] Under the old GATT rules, a panel of experts (a "Trade Dispute Panel") could be convened on an

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200. See Lindsay Griffiths, U.S., China Trade Words Over GATT, Reuters Euro. Bus. Rep., Nov. 3, 1994 ("The chief stumbling block [to China's gaining entry into GATT] is the U.S. insistence that China first reform its economic system," including "cracking down on trade piracy."), available in LEXIS, News Library, Curnws File; China's Piracy Woes Tarnish Image, UPI, July 30, 1994 (reporting that the United States demanded stringent action against violators of copyright as "one of the conditions for China's re-entry into the General Agreement on Tariffs and Trade"), available in LEXIS, News Library, Curnws File.

201. See Release by the Office of the United States Trade Representative Regarding Special 301 Investigation, Fed. News Service, Dec. 31, 1994 (announcing the commencement of an investigation into China's enforcement of intellectual property rights).

202. U.S., China Announce Trade Sanctions in Dispute Over Copyright Protection, 12 Int'l Trade Rep. 250, 250 (1995).

203. MOU on Market Access, supra note 30, art. VIII(2).

204. See Understanding on Rules and Procedures Governing the Settlement of Disputes, GATT Doc. MTN/FA II-A2 (1993) [hereinafter DS Understanding].

ad hoc basis to rule on alleged violations of GATT trade practices.[205] A report issued by a Trade Dispute Panel, recommending remedial action to be taken in a trade dispute, could be vetoed by any contracting party, including the losing party in a dispute.[206] However, no mechanism existed for appeal or for monitoring the implementation of a Trade Dispute Panel report.[207]

Under the new WTO rules, a permanent body called the Dispute Settlement Body (the "DSB") was established to administer the settlement of trade disputes among WTO members.[208] Under the new rules, the DSB can convene a Trade Dispute Panel upon the request of any party to a dispute.[209] Unlike the old GATT rules, a report issued by a Trade Dispute Panel must automatically be adopted unless appealed by a party to a dispute or rejected by consensus of the DSB.[210] Further, in cases in which a party refuses to implement a Trade Dispute Panel report within a reasonable period of time, the DSB may order compensation from the non-compliant party or may order a suspension of GATT concessions.[211] Panel reports can also be appealed by either party[212] and a mechanism has been established for monitoring the enforcement of panel reports.[213]

The United States has long advocated less "political" and more "legalistic" dispute resolution mechanisms under the GATT It was the absence of such a dispute resolution mechanism which ostensibly led to legislation in the United States in 1988 expanding the scope of the United States' trade laws and allowing for the imposition of trade sanctions on countries flaunting GATT norms.[214] Ironically, it was this legislation which also led other countries to demand that the WTO incorporate more legalistic dispute resolution mechanisms.[215] It was believed that by giving the WTO more power to decide international trade disputes, this would undermine unilateral enforcement actions by

205. Judith H. Bello & Alan F Holmer, Dispute Resolution in the New World Trade Organization: Concerns and Net Benefits, 28 Int'l Law. 1095, 1096 (1994).
206. Id. at 1097
207. Id.
208. DS Understanding, supra note 204, § 2.1.
209. Id. § 6.1.
210. Id. § 16.4.
211. Id. § 22.1-.2.
212. Id. § 16.4.
213. Id. § 21.
214. Bello & Holmer, supra note 205, at 1097.
215. Id. at 1101-1102.

the United States, such as those brought against China in both 1991 and 1994.[216]

V CONCLUSION

In order to maximize the avenues for seeking improvement in China's enforcement of intellectual property rights, China should be admitted to the WTO, thereby making it subject to the jurisdiction of the DSB. In those areas in which China is not in compliance with TRIPs, the DSB would act as an additional form of leverage in pushing China towards greater adherence with international norms. As opposed to the recent unilateral measures taken by the United States, the DSB establishes a clear legal process whereby the weight of international pressure can be marshalled against countries like China should they fail to comply with international intellectual property norms. Given the amount of international tension created in recent years over closely averted trade wars, it is to be hoped that the WTO dispute resolution process would render unilateral actions largely unnecessary in the future. This is not to say that the recent measures taken by the United States were not effective but that, by delaying China's accession to the WTO, WTO members are wasting another opportunity to seek greater enforcement of intellectual property rights protection.

Further, while it is both realistic and reasonable of the international community to expect China to take continued steps to improve its enforcement of intellectual property rights as a condition for enjoying the benefits of the WTO, the international community need not sit by idly observing legal developments in China but can, and should, take an active role in bringing their legal claims to Chinese courts. In particular, international claimants should take advantage of the important opportunities presented by the establishment of intellectual property divisions in the people's courts. In short, the good advocate should explore all avenues towards resolution, including domestic litigation and international dispute resolution.

The outcomes of legal conflict in China and the reasoning behind those outcomes will depend on who is making the decision, Chinese political leaders or Chinese judges. Threatened sanctions may produce one result, companies bringing their claims in Chinese courts may produce another and adjudication of trade disputes within the WTO yet

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216. Id. at 1099.

another. China has shown a real effort within a remarkably short period of time to establish substantive legal norms as well as judicial and administrative organs designed to protect intellectual property rights. The emerging legal culture in China has created a climate in which indigenous Chinese attitudes toward intellectual property can continue to be challenged if the legal culture is challenged, and the legal culture cannot be fully challenged if the courts are bypassed.

*Michael N. Schlesinger**

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* A.B., 1989, Oberlin College, J.D. expected Feb. 1997, Columbia University.

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