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Note

**STOP RELYING ON UNCLE SAM!—A PROACTIVE APPROACH TO COPYRIGHT PROTECTION IN THE
PEOPLE'S REPUBLIC OF CHINA**

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As the United States shifts to an information-based economy, American copyrighted works are increasingly vulnerable to piracy and counterfeiting in foreign countries.¹ According to the International Intellectual Property Alliance (IIPA),² “[i]n 1993, the core copyright industries³ contributed \$238.6 billion in value added to the U.S. economy, or approximately 3.74% of the Gross Domestic Product (GDP), and the total copyright industries accounted for \$362.5 billion in value added, or approximately 5.69% of GDP (in real 1993 dollars).”⁴ Total foreign sales in the core copyright industries were an estimated \$45.8 billion annually.⁵ In the last few years the core copyright industries have grown at more than double the rate of the U.S. economy as a whole, and have employed new workers at more than four times the overall U.S. rate.⁶

These industries are threatened as never before. In 1995, the estimated total U.S. trade losses from copyright piracy were \$14.6 billion.⁷ The Motion Picture *171 Association (MPA) alone reported seizure worldwide of more than five million pirated videocassettes in 1996.⁸ A thriving parallel market of counterfeit and pirated goods erodes the incentives to creation provided by intellectual property law⁹ and contemplated in the U.S. Constitution.¹⁰ Domestic intellectual property laws provide the creator or author with a limited monopoly, which spurs the development and dissemination of new information,¹¹ but the creator or author cannot compete with an illegitimate producer, who does not bear the investment, creation, or development costs of the protected property.¹² Worldwide protection will require a combination of indigenous law, international treaties, enforcement, and proactive endeavors by the members of the core copyright industries and the U.S. government.

Although even the United States is a source of pirated goods,¹³ most piracy takes place in Third World countries where intellectual property protection is inadequate either in form or enforcement.¹⁴ In 1995, the People’s Republic of China¹⁵ was the most disastrous country for U.S. copyright owners, with more than \$2.3 billion in U.S. trade losses caused by inadequate copyright laws or enforcement.¹⁶ Piracy levels in China for 1995 were 100% for motion pictures, 99% for entertainment computer software, 96% for business computer software, and 54% for recordings and music.¹⁷ Imagine—an estimated 750,000 personal computers were sold in China in 1993 and 1994, but less than one U.S. dollar per machine was spent on business-applications software in the first three quarters of 1994.¹⁸ Because Chinese factories produce seventy-five million CDs per year for a local market that can only absorb five million,¹⁹ the additional copies are exported to Latin America, Europe, and Hong Kong for consumption or further export.²⁰

Inadequate protection of intellectual property is usually caused by one of two situations: (1) a deficiency in or lack of intellectual property law, or (2) unsatisfactory enforcement of existing law.²¹ China is the foremost example of the latter situation. While intellectual property is protected by Chinese laws and international treaties, China is widely deemed a “one-copy” country.²² A single legitimate copy of CD, CD-ROM, VCD,²³ or other media is used to produce thousands of copies that result in devastating piracy levels.²⁴ While huge financial losses face corporations, the consumers may welcome counterfeit goods when, as with recorded music, clothing, or name-brand items, a product of similar appearance may be purchased for less.²⁵ The perceived value, and hence, the market value, of a T-shirt, handbag, or cap may be greatly increased by simply adding the logo of a fashionable brand.²⁶

I. Chinese Copyright Law

Protection of intellectual property rights under current thinking began in present-day China with the Trademarks Law in 1983, followed by the Patents Law in 1984, the Copyright Law in 1990,²⁷ and unfair competition law in 1993.²⁸ This Note *173 will focus on copyright protection, but theories discussed may apply to other forms of intellectual property protection as well.

Chinese copyright law protects literary and artistic works created by nationals of most countries.²⁹ It operates on a two-tier system: foreign works receive protection under international treaties while Chinese works are protected under the revised 1992 Chinese law.³⁰ The revised law includes most of the international norms, such as protection arising automatically upon creation of the work and the level of originality required for protection.³¹

Copyright holders may seek relief from infringement from either administrative or judicial bodies.³² The only administrative body where a foreign copyright holder may seek relief is the National Copyright Association (NCA).³³ The NCA may impose fines and confiscate goods, means of production, and unlawfully obtained assets.³⁴ However, use of judicial authority is more common in copyright cases because the NCA lacks experience in handling infringement matters.³⁵

A significant development for judicial proceedings has been the establishment of special Intellectual Property Tribunals.³⁶ These courts originated in Beijing in 1993 and consist of specially trained judges.³⁷ Through judicial proceedings, copyright infringers may face civil or criminal penalties of ten years to life imprisonment, or even execution.³⁸ While these stiff penalties are available, only recently have reasonably tough fines been imposed upon convicted infringers.³⁹ *174 This may be an indication of a new willingness of the Chinese courts to enforce copyright protection.

II. International Agreements

In the face of insufficient Chinese enforcement efforts, U.S. intellectual property owners have joined in numerous international agreements covering all types of intellectual property rights in China. In January 1992, China and the United States entered into a Memorandum of Understanding (MOU) which committed China to adopt internationally compatible renovations of its copyright law.⁴⁰ China became a signatory to the Berne Convention⁴¹ on Oct. 15, 1992; the Universal Copyright Convention⁴² on October 30, 1992; and the Geneva Phonograms Convention⁴³ on June 1, 1993.⁴⁴ The Berne Convention bases copyright protection on national treatment, requiring that foreign works receive in each member country the same protection given works of its nationals, thereby setting minimum levels of protection.⁴⁵ These major treaties are administered by the United Nations through the World Intellectual Property Organization (WIPO).⁴⁶ Unfortunately, these multilateral arrangements do little to create transnational rights for intellectual property and do not include any system for enforcement.⁴⁷ “The Conventions have proven to be ineffective (as in the case of China) when countries simply do not enforce their laws.”⁴⁸ To remedy the weakness of the multilateral agreements, the United States has engaged in a series of bilateral agreements with China.

*175 III. U.S.-China Intellectual Property Rights Agreements

A. Special 301

Through direct negotiations, facilitated by economic sanctions, the United States has been able to achieve some amount of intellectual property protection that the international conventions alone could not provide.⁴⁹ One important weapon is Special 301 of the 1988 Trade Act, which requires the United States Trade Representative (USTR) to formulate and present for review an annual list of those countries which allow the most egregious piracy of U.S. intellectual property.⁵⁰ A Special 301 review determines “whether acts, policies or practices of any foreign country deny adequate and effective protection of intellectual property rights or fair and equitable market access for U.S. persons relying on intellectual property protection.”⁵¹ After review, the USTR places the suspect countries on either the “Watch List,” “Priority Watch List,” or identifies the worst offenders as a “Priority Foreign Country.”⁵² If identified as a Priority Foreign Country, “Special 301 directs the USTR to negotiate agreements to end piracy within [six] to [nine] months.”⁵³ Those countries that refuse to reform are subject to economic retaliation against exports under other U.S. trade laws,⁵⁴ such as the Generalized System of Preferences (GSP).⁵⁵ This bilateral approach using Special 301 has been successful for the United States in Taiwan, which amended its copyright law to allow stronger penalties, and in Singapore, which passed an improved copyright law.⁵⁶ Emphasizing the power of

Special 301, Jay Berman, Chairman and Chief Executive Officer of the Recording Industry Association of America (RIAA) claims, “the most important trade weapon for United States copyright has been, and remains, Special 301.”⁵⁷

*176 China has been subject to Special 301 scrutiny numerous times since the law was implemented.⁵⁸ In 1993, the IIPA and USTR attempted to persuade China to pass legislation making copyright piracy a criminal offense.⁵⁹ Because of the absence of such penalties, China was named a Priority Foreign Country in June 1994.⁶⁰ China bowed to U.S. pressure and adopted a criminal provision for copyright piracy in July 1994.⁶¹ U.S. trade losses continued to grow, however, and “[o]n February 4, 1995[,] the U.S. government announced \$1.08 billion in retaliatory tariffs to compensate for trade losses due to piracy in China.”⁶² The imposition of these tariffs was avoided by the eleventh hour U.S.-China Intellectual Property Rights Agreement (IPR) of February 26, 1995.⁶³

B. February 26, 1995 IPR Agreement

In the February 26, 1995 U.S.-China IPR Agreement, China pledged “to undertake aggressive and continuing enforcement actions[;] … to impose deterrent sanctions[;] … to restructure its prosecutorial, administrative [[,] and border control systems[; and] … to begin to open its market to … [[[U.S.] music, … recording, motion picture[,] and publishing industries.”⁶⁴ The agreement was heralded as “the most extensive intellectual property pact the United States has negotiated with any country.”⁶⁵ This was a supposed triumph of U.S. trade policy and seemed to promise that the U.S. intellectual property industries would soon have not only access to the Chinese market, but also protection from piracy.⁶⁶

Nonetheless, according to the IIPA, China’s principal commitments largely remained unfulfilled one year later.⁶⁷ In a 1996 raid on an illegally operating plant, nearly 7,000 CD-ROMs were seized as production lines continued to stamp *177 thousands of VCDs, with “the authorities refusing to seize this product, close down the line or the plant.”⁶⁸ No CD molds in the plant were found with SID⁶⁹ coding and no government monitors were in place in these plants; these absences are violations of promises in the 1995 agreement.⁷⁰ In another event, on May 13, 1996, sixty thousand CDs were seized from a truck entering Hong Kong from China, casting serious doubts on Chinese credibility.⁷¹ Apparently many CD plants remained in operation while those said to be closed could not be confirmed as such, and several were even reopened shortly after execution of the agreement.⁷² According to the IIPA, the Chinese government had not demonstrated that it was fulfilling the February 1995 Agreement to impose deterrent penalties on violators.⁷³ The IIPA could find only one successful prosecution for piracy of U.S. copyrighted works in the year following the agreement.⁷⁴ Border control improvements did not look promising as the number of seizures was far too low to act as a deterrent to the massive export of pirated goods leaving for sale elsewhere.⁷⁵ Quotas on importation of intellectual property goods, which China promised to remove under the agreement, may not have existed formally, but persisted informally in most areas.⁷⁶ In fact, new barriers had been established.⁷⁷ At more than \$1.8 billion, the violations remained so excessive and egregious⁷⁸ that the IIPA recommended and the USTR agreed to designate China as a Priority Foreign Country for Special 301 in 1996.⁷⁹

***178 C. June 17, 1996 IPR Agreement**

With the USTR listing China as a Special 301 Priority Foreign Country in 1996, U.S. Trade Representative Charlene Barshefsky warned Chinese leaders that failure to observe the agreed-upon terms could affect Congress’s approval of most-favored-nation (MFN) status for China and could result in the imposition of punitive tariffs on up to \$2 billion worth of Chinese goods.⁸⁰ The U.S. warning and retaliation list spelled out four actions which needed to be taken to avoid commencement of sanctions:

(1) taking action to halt pirate production at the CD factories; (2) cracking down on piracy in [the] Guangdong Province through the reestablishment of last year’s [1995] “Special Enforcement Period”; [sic] (3) taking aggressive action at the border against cargo exports of pirate product; and (4) publishing the promised joint venture regulations, expanding revenue sharing agreements with U.S. motion picture companies and permitting the licensing by recording companies of their entire catalogue and the signing of local artists.⁸¹

Imposition of sanctions appeared imminent until June 17, 1996, when the United States and China reached an accord in last-minute talks.⁸² Ms. Barshefsky stated that the USTR was satisfied China had taken “serious and important” steps to bring themselves into compliance with the February 1995 agreement and to meet the four established requirements.⁸³ Citing

numerous measures⁸⁴ China claims to have taken since the April warning, Barshefsky maintained that while China was on its way to compliance with the agreement, it was not yet at full conformity.⁸⁵ The Chinese Foreign Ministry confirmed that the United States agreed to drop China *179 from its Special 301 list and halt plans for sanctions.⁸⁶ In return, China agreed to call off countermeasures aimed at the United States and expressed hope that following this accord, “the United States can honor its commitment made in the [February 1995] agreement to support China’s entry into the World Trade Organization....”⁸⁷ U.S. National Economic Advisor Laura Tyson confirmed that the copyright protection was part of the “blueprint” for winning WTO membership for China as presented by the United States, but declined to comment on whether it would lead to full U.S. support of China’s membership bid.⁸⁸ The Chinese Foreign Ministry went on to claim, “[t]he Chinese government will always strictly enforce the law and continue to crack down on IPR violations, regardless of whether or not there is an IPR agreement between China and the United States.”⁸⁹ Considering the Chinese record of failure to live up to bilateral agreements with the United States, the most recent accord may not have any noticeable effect on intellectual property protection in China.⁹⁰ The new agreement did not get off to a good start, according to U.S. Congressional testimony, as “at the time the June 17, 1996 understanding was reached, the People’s Liberation Army-run South Electronics Audio and Video factory in Foshan, Guangdong province, was reopened for production of pirated material.”⁹¹ As one journalist put it, “[t]he question now, as it was 16 months ago ..., is: Does Beijing have the political will or even the enforcement capacity to implement [the new accord]? ”⁹²

D. June 17, 1996 Aftermath

As a whole, copyright laws in China are adequate and, as written, they conform to international standards.⁹³ As then-USTR Mickey Kantor commented, “on *180 intellectual property rights[—]the laws have been passed, but they are just not being enforced.”⁹⁴ Kantor’s opinion is seconded by the president of the Business Software Alliance (BSA):⁹⁵ “[BSA’s] major difficulty in China has been the lack of commitment on the part of the Chinese government to enforce its intellectual property laws.”⁹⁶ The United States has relied on bilateral agreements to protect intellectual property in China.⁹⁷ However, these agreements have not been based upon mutual desire but upon threats of U.S. retaliation and penalties to achieve desired levels of protection.⁹⁸ The adequate protection of intellectual properties has not been accomplished.

A look at the proliferation of pirated goods in and around China demonstrates why the current system of protection for U.S. intellectual property in China is widely regarded as inadequate.⁹⁹ Vendors of pirated goods in China make no effort to hide their locations, and even a first-time tourist can find thousands of illegitimate goods for sale in the streets and shopping arcades.¹⁰⁰ Westerners frequently visit Hong Kong specifically to purchase pirated computer software produced in China.¹⁰¹ The latest versions of Autodesk’s AutoCAD, which retails in the United States for \$4,250, Novell’s NetWare 4.1, which retails for \$2,845, and Lotus’ SmartSuite were all packaged together with more than a hundred other programs and sold in Hong Kong in October 1995 for HK\$50 or US\$6.50.¹⁰² Pirated versions of Microsoft Windows 95 were found in a Hong Kong shopping center within a week of going on sale to the public.¹⁰³ This ready availability and low price corresponds with an *181 oversupply of goods and casts great doubt on Chinese enforcement efforts. James Shinn, U.S. Council on Foreign Relations says:

Credibility works both ways; what sense does it make to negotiate trade agreements with China if they won’t be enforced? It is laughable to hear excuses from Beijing that they can’t control the [fifty] pirate CD factories. If they were turning out thousands of copies of the BBC documentary on the Tiananmen Square protest—rather than bootleg copies of “The Lion King”—the factory managers would be sharing a cell with other dissidents in a heartbeat.¹⁰⁴

IV. Factors Affecting Piracy

It has been suggested that bilateral agreements are not the only and complete answer to U.S. trade woes in China and may run counter to U.S. long-term interests.¹⁰⁵ By examining the factors which allow piracy to flourish in the face of Chinese law and international agreement, it may be possible to find alternative remedies. Development of intellectual property protection in China goes beyond written law. Many forces joined together to create the climate in which Chinese piracy thrives. Historical, political, social, cultural, and other factors have added to the burden which already faces U.S. industries seeking to exploit intellectual properties in China. U.S. industry and government would be wise to examine these factors, either in search of solutions or merely for an understanding of the Chinese environment.

A. Historical Influences

Understanding the development of intellectual property in imperial China requires looking all the way back to the Tang dynasty (618-906 A.D.) and the appearance of printing.¹⁰⁶ While Western governments believed that the furthering of inexpensive propagation of texts required formal legal protections under copyright, Chinese legal history shows neither a formal nor informal counterpart to copyright or other intellectual property protection as a means to promote authorship.¹⁰⁷ Instead, the Chinese government, concerned about the proliferation of “undesirable printed materials,” used copyright law to ensure prepublication review of works for the purposes of entrenchment of the monarchy and the “protection” of the people.¹⁰⁸ The state interest in control of publication did not extend in any way *182 to the unauthorized reproduction of works which we would now protect by trademark and patent, and such protections never developed from within the state.¹⁰⁹

Perhaps even more important than the lack of protective influence by the state is the influence of Confucianism, which goes back 2500 years and emphasizes learning by copying.¹¹⁰ For centuries, the copying of all kinds of works has been regarded as honorable and necessary.¹¹¹ While Western cultures perceive copies as inferior works, in China, “such copying in effect bore witness to the quality of the work copied and to its creator’s degree of understanding and civility.”¹¹² When asked why China has such a piracy problem, Los Angeles attorney and leader of Baker & Hostetler’s intellectual property team, Anthony M. Keats, stated, “[o]ne reason is cultural. Copying isn’t seen as harmful, but is instead viewed as a form of flattery.”¹¹³

In addition to this Confucian underpinning, communist doctrine mandates sharing.¹¹⁴ “[I]mplementation of copyright and other intellectual property rights would contravene one of the most fundamental beliefs in a Communist state.”¹¹⁵ Fifty years ago the People’s Republic of China repealed the protectionist 1928 copyright law and no copyright law existed in China until 1990.¹¹⁶ Intellectual property protection was born of a predominantly Western concept of individual freedom and benefits.¹¹⁷ This individualistic belief is not found in Asia and has no natural place in Asian society, particularly in a communist regime such as China, where property is under the dominion of the state in trust for all people.¹¹⁸

B. Lack of “Rights Consciousness”

For the Chinese, placing monetary value on intangible items and requiring payment for expression is a new idea.¹¹⁹ There is a lack of “rights consciousness,” or “a belief that individuals are endowed with rights that they are entitled to assert *183 even with respect to those in positions of authority.”¹²⁰ The Asian approach is demonstrated in similarly-situated Indonesia, where scientists and inventors rarely register their creations, let alone request patent rights.¹²¹ “Scientists … never apply for protection of their intellectual rights, because the practice is regarded as part of western culture.”¹²²

C. Chinese Educational System

Another contributing factor to the prevalence of piracy in China is the traditional education system of China. Historically, the educational system in China was based on faultless and exacting reproduction of classical works.¹²³ The Chinese are still encouraged to copy; those who can recite the classical works without error are assured academic and societal success.¹²⁴ Additionally, Chinese students are taught through a system which concentrates on right and wrong answers with no kudos for creativity.¹²⁵ This arguably leads to low levels of originality, resulting in widespread copying as Chinese entrepreneurs “attempt to extrapolate ideas from their Western counterparts to be used in their own products, rather than developing their own ideas and creative thoughts.”¹²⁶

D. Governmental Involvement

Many of the CD factories that produce pirated goods are state-owned, which places much of the blame for piracy squarely on the shoulders of the Chinese and local governments.¹²⁷ Notably, the Chinese Trade Minister has asserted that one such factory is “untouchable” because of the owners’ ties to the Chinese military.¹²⁸ This situation is like that of the fox guarding the chickens; the violations are by the very people and agencies responsible for policing piracy activities.¹²⁹ Furthermore, *184 the BSA claims that “all indications are that Chinese government ministries regularly use illegal software.”¹³⁰ Even following the June 17, 1996 Intellectual Property Agreement between China and the United States, analysts believe that the illegal production of CDs takes place in factories with powerful connections to provincial governments and the military.¹³¹ Local governments asserting a measure of independence from Beijing continue to invest in and protect these plants.¹³²

E. Ineffective Judicial System

Perhaps the key element contributing to ineffective intellectual property protection is the ineffective nature of the Chinese judiciary. The various structures of the Chinese government in the twentieth century have resulted in extraordinary shifts in the nation's legal system.¹³³ Between 1957 and 1965, the formerly independent judiciary was made servile to the Communist Party.¹³⁴ Consequently, an independent judiciary has been slow to develop. There are numerous flaws in the Chinese court system despite efforts to provide for special intellectual property protection through exclusive jurisdiction courts.¹³⁵

First, courts have been reluctant to issue significant damage awards.¹³⁶ The methods used by Chinese courts for calculating economic harm inflicted by piracy have been based on the value of the infringing products in the pirate market, and not on their value in the legitimate market.¹³⁷ Because of this, fines and damage awards remain far below adequate levels.¹³⁸ Even when fines and damages are awarded, they are often difficult to collect.¹³⁹

Second, the influence of corruption has put many Chinese infringers under the protection of Chinese officials, sheltering them from prosecution. Many of the CD factories are partly state-owned or joint ventures between Hong Kong and Taiwanese *185 firms and relatives of Communist party officials.¹⁴⁰ According to Microsoft's lead intellectual property lawyer in the Far East, "[i]t's quite normal for the enforcement agencies in China to go shake down the target and warn them, '[w]e'll raid you tomorrow night,' " giving them time to pack up all evidence of illegal activity.¹⁴¹ Furthermore, Communist Party officials have been known to interfere with lawsuits and may even modify the judgments upon review.¹⁴² While no longer a prevalent occurrence, this practice most likely continues to some degree.¹⁴³ Finally, the salaries of Chinese judges are relatively low, which makes them receptive to bribery and corruption.¹⁴⁴

Third, there is a generalized lack of adequate legal training among judges, especially concerning intellectual property issues.¹⁴⁵ Because the laws are relatively new, the courts have almost no experience in deciding intellectual property cases.¹⁴⁶ Many qualified individuals with adequate legal training are too young to serve as judges.¹⁴⁷ From 1966 to 1976, many members of the legal profession were executed or sentenced to labor camps, ravaging the Chinese legal system.¹⁴⁸ This lack of education and experience among the judiciary is especially damaging because the Chinese legal system requires the judges to determine significant facts.¹⁴⁹ The lack of any adequate case reporting system makes research on precedent nearly impossible, adding to the judicial burden.¹⁵⁰

Not only does a foreign plaintiff face all these obstacles in the Chinese court system, but all parties must hire Chinese attorneys.¹⁵¹ This creates at least an appearance of conflict of interest as all Chinese attorneys are state officers paid by the state.¹⁵² Additional inadequacies of the Chinese judiciary specific to the *186 Intellectual Property Courts include high plaintiffs' fees and long waiting periods due to the proliferation of cases.¹⁵³

F. Other Factors

Several additional factors which add to the difficulty of protecting intellectual property rights in China should be noted.

William P. Alford, Director of East Asian Studies at Harvard Law School, believes that [t]he lack of respect for American intellectual property in China is deeply interwoven with, and ultimately inseparable from, the lack of respect found throughout China these days for law and legal institutions, which are widely viewed all too often as corrupt and subservient to the Communist Party and the personal pecuniary interests of the individual leaders.¹⁵⁴ This lack of respect may be a product of the corruption and failings within the legal system.

Another factor is the availability of knowledge and information regarding intellectual property law to the Chinese people.¹⁵⁵ The large size of China prohibits spreading information regarding intellectual property legislation and rights to more than 1.2 billion people.¹⁵⁶ Much of the population is unaware of which actions do and do not violate the law, and the truly innocent infringer may be among the majority.

China's status as a developing country adds another factor. In such countries, "[r]eady access to intellectual property is viewed as important to development, whereas the enforcement of intellectual property law is considered a burden on development."¹⁵⁷ Consequently, there is a resistance to allocating already scarce resources for a use which many view as

suspect, such as enforcing intellectual property rights.¹⁵⁸ Americans should not forget that when the United States was a *187 developing nation, domestic entrepreneurs were notorious pirates of British works of intellectual property.¹⁵⁹

V. Proactive Remedies/Courses of Action

Even as they shriek of astounding losses to piracy, American copyright industries have done little to devise intermediate solutions to the problem, but rather, they appear convinced that Washington's support and trade agreements will solve the piracy problem single-handedly.¹⁶⁰ Furthermore, the U.S. administration cannot perceive the intellectual property problems with China as separate "either from China's larger problems of legal and political development or from the plight of Chinese (and other foreigners) also experiencing infringement."¹⁶¹ American companies and the government should not assume that policies which pressure a few select Chinese businessmen and government officials will transform the attitudes and understanding of over 1.2 billion Chinese.¹⁶² "Our government should be directing the limited leverage we do have to help develop the type of legal institutions and legal consciousness that might in time generate a serious respect for the law" as it stands both nationally and internationally.¹⁶³ The typical sequence of actions followed when a corporation or government encounters piracy includes "registration, investigation, warning letters, newspaper notices, administrative action, and legal or diplomatic action."¹⁶⁴ The U.S. intellectual property industries should be careful not to skip to the last step in the sequence. There are numerous actions which industry leaders would be wise to pursue before litigation, either with or without government support.

A. Do Nothing or Co-Opt Offenders

Strangely enough, in some cases the best results may be achieved by simply doing nothing at all. Sometimes the brand awareness and affinity for the product that is created in the Chinese market can be converted and directed to authentic products in the long run.¹⁶⁵ As the Chinese economy becomes more developed, consumers should move from the purchase of "knock-offs" to buying the legitimate *188 product.¹⁶⁶ In the case of some products, such as software, the short life cycle soon makes pirated products obsolete.¹⁶⁷ The market will have been made aware of the product and will be receptive to the next generation of products.¹⁶⁸

In other situations, considering the prevalence of pirates within the legitimate production structure in China, it may be best to co-opt them through buy-outs or joint ventures.¹⁶⁹ In Thailand, for example, pirates were so adept at making counterfeit goods that rather than shut down the offending factories, the victims of the piracy bought some of the factories.¹⁷⁰ This method may only be appropriate for lower-technology, labor-intensive products.¹⁷¹ However, when it works, the benefits are exceptional.¹⁷² The pirated operation is eliminated, but the production of legitimate goods and employment of the local people continue.¹⁷³ This strategy is "good public relations, politically expedient and well received by local governments and can be leveraged for future interests."¹⁷⁴ In addition, the creation of localized intellectual property industries would be a significant step toward fighting piracy in China.¹⁷⁵ Development could come from joint ventures with U.S. firms, outside investment, and through direct assistance in research and development from the Chinese government.¹⁷⁶

B. Stress Enforcement of Existing Laws

The increased enforcement of already existing laws will produce some decrease of piracy in China. Yet, as a foreign nation, the U.S. government must rely on diplomatic measures such as Special 301 to persuade the Chinese to engage in more rigorous enforcement.¹⁷⁷ Xinhua News Agency¹⁷⁸ claims that officials shut *189 down twenty illegal CD production lines in December 1996.¹⁷⁹ The success is credited to a newly implemented reward system which awards informants in Guangdong province 300,000 yuan for turning in the pirates.¹⁸⁰ While such successes are compelling, the Chinese government's failed enforcement efforts suggest that additional or alternative methods are required.

C. Lobby for Increased Fines

In addition to lobbying for increased enforcement, the United States must persuade Chinese courts to discontinue their practice of calculating economic harm inflicted by piracy based on the value of the infringing products in the pirate market and not their value in the legitimate market.¹⁸¹ This mistake should be remedied and fines should be raised in order to deter and punish infringers.¹⁸² One possible way to encourage adequate punishments is to continue to test the Chinese court system

until sufficient fines and damages are awarded.¹⁸³

D. Attempt to Strengthen the Chinese Judicial System

Judges, lawyers, and the Chinese court system are often deficient when it comes to intellectual property cases.¹⁸⁴ One suggestion for improving the judiciary proposes that the judges and officials of Intellectual Property Courts study and research copyright related cases, articles, laws, and international treaties for summarization and distribution.¹⁸⁵ This self-improvement model also suggests that the Intellectual Property Courts select and publicize throughout the legal channels some typical and noteworthy copyright cases.¹⁸⁶ Another suggestion is to support intellectual property departments at major Chinese universities.¹⁸⁷ The departments should educate new lawyers and judges about intellectual property issues, and also serve as a resource for existing members of the legal community.¹⁸⁸

***190 E. Lobbying of the Chinese Government by Special Interests**

U.S. companies must take a proactive stance and not be content to rely on government for help. Bilateral agreements can create resentment between Chinese citizens and policy makers. However, U.S. companies can promote their interests within China without the appearance of imperialism by joining together with international organizations. The Chinese government may be pressured more effectively by multinational, industry-based organizations than by individual companies. Currently the Motion Picture Association of America (MPAA) and the Recording Industry Association of America have successfully joined with foreign counterparts to lobby for anti-piracy programs in individual countries.¹⁸⁹ Other members of the intellectual property community should follow their lead.¹⁹⁰ International organizations should act as a unified group in China to educate consumers, retailers, and governments; monitor perpetrators; provide arbitration centers; initiate legislation; and pressure local governments.¹⁹¹ Unified activism can be effective where governmental pressure is not.

F. Educate the Chinese Government as to Benefits for China

There is much to be gained by demonstrating to the Chinese the benefits of strong intellectual property protection. Historically, in the negotiation of treaties with China, neither the British, Japanese, nor Americans made “substantial efforts to show the Chinese government why intellectual property law might be of benefit to China, to assist in the training of Chinese officials with responsibility in this field, or to educate the Chinese populace as to its rationale.”¹⁹² U.S. industry and government should attempt a strategy to convince developing countries that “vigorous intellectual property enforcement is in their own best interest: that it should be regarded as an investment in ‘knowledge capital’—the information-producing and sharing activities that pay off with indigenous economic and cultural development.”¹⁹³ Chinese officials must be informed that without “knowledge capital” they will become more dependent upon those who possess intellectual property knowledge.¹⁹⁴ The Chinese must learn that if they do not protect intellectual property, they will not prosper beyond a “second-class” economy and culture.¹⁹⁵ They must be warned that China will continue to be dependent upon the *191 intellectual wealth of the countries which produce the intellectual property that China is now pirating.¹⁹⁶

Although governments must take, and have taken, the lead in attempting to convey this message to the Chinese leaders, U.S. firms must use their resources to lobby not only their own representatives but to influence Chinese officials as well.¹⁹⁷ California’s Unify Corporation was successful in late 1996 negotiations with Chinese agencies that had been using pirated versions of Unify’s software.¹⁹⁸ Through negotiations these agencies were persuaded to pay for their uses.¹⁹⁹ In this landmark agreement, the state-run Xinhua News Agency agreed to pay US\$1 million for licenses, while the Shanghai Architectural Association agreed to pay US\$3 million and the Ministry of Light Industry offered to pay US\$500,000.²⁰⁰ Such developments are far too rare. Through U.S. efforts the Chinese government can be made aware of the internal benefits of strong intellectual property protection.

G. Educate Chinese Industry as to Benefits for Industry

It is important to convince Chinese industries that they have an interest in intellectual property protection.²⁰¹ Chinese authors, artists, and companies may be unaware how much they have at stake and usually possess fewer resources to withstand the revenue drain of piracy.²⁰² International organizations should work with Chinese national lobbies who can help to persuade the government and the citizens that effective intellectual property laws would curry favor in the international

community, encourage investment, and benefit the nation's economy.²⁰³ In such a move, the local recording industry in Indonesia helped significantly in convincing the Indonesian government to pass an effective copyright law.²⁰⁴

Intellectual property is simply too new a concept within China to have any strong lobbies of inventors, authors, or companies. U.S. firms should aid those lobbies which do exist and help to organize lobbies in those areas not already *192 established. Chinese firms must be made aware that they will suffer when U.S. firms are less likely to transfer technologies to local companies without adequate reassurances against piracy.²⁰⁵ Foreign investment of technology is surely vital to the development of many local companies.²⁰⁶

A recent example of a joint government and industry movement to increase intellectual property protections can be found in Taiwan.²⁰⁷ Realizing that reliance on foreign-based technologies was a dead end for the Taiwanese economy, Taiwanese government and industry have begun a significant investment in scientific and technological research, creating in its wake a "rapidly expanding constituency that has its own rationale for protecting intellectual property."²⁰⁸ With worldwide recognized names such as Kenex, Acer, and Tatung, Taiwanese companies have a homegrown interest in protecting the intellectual property associated with those names.²⁰⁹ Once Chinese inventors and entrepreneurs have the assets and knowledge to protect their own interests, they can help to strengthen intellectual property protections for all who enter the Chinese market.²¹⁰ Legal and cultural changes in Taiwan are not superficial mostly because these changes came from domestic political and industrial forces.²¹¹

Speaking before the U.S. Congress and referring to the piracy of Chinese-created software as well as U.S. programs, the president of the BSA made it clear, "[t]he scourge of piracy affects all software developers, regardless of origin, and in fact may have an even greater negative impact on indigenous software developers who are trying to start operations in countries like China."²¹² The Chinese must be supported in their efforts to lobby their own government for protections and to develop their own industries.

H. National Consumer Awareness Campaigns

In addition to reaching out to the government and industries, educating the Chinese public about intellectual property rights is equally important for effective and successful intellectual property enforcement.²¹³ Government policy alone *193 cannot control piracy.²¹⁴ Through advertising, the market demand for pirated goods can be reduced or eliminated.²¹⁵ According to a patent specialist with New China Consultants, "China has a good structure as far as legislation goes. The main problem is education. People don't think of intellectual property as property like other property."²¹⁶ Advertising can allow consumers to differentiate between products and educate consumers about the superior quality and value of genuine goods.²¹⁷

The Hong Kong Intellectual Property Society (Society) has attempted to reduce piracy through education.²¹⁸ The Society has identified various messages which could be used to inform the public, and has given the advantages and disadvantages of each.²¹⁹ For instance, the Society suggests preaching that, "[u]sing pirated software in the home is an offence and can get you arrested."²²⁰ This would provide a strong deterrent, but is factually incorrect and would probably be denounced.²²¹ Most people know the chance of getting caught is slim. An alternative message is informing the public that "[c]opyright software piracy is theft."²²² This message also provides a strong deterrent, and the concept of theft is easily understood, but the phrase is also open to legal dispute which could diminish the effectiveness of the message.²²³ Finally, the Society has considered having a well-known artist make a public emotional plea against piracy.²²⁴ This would give a strong emotional pull, especially with young people, but there is also a strong public perception in Hong Kong that artists already receive more than adequate compensation.²²⁵

Whichever method intellectual property advocates choose, the importance of informing the public about intellectual property rights cannot be understated. Perhaps the most effective message would include a media blitz which includes *194 concepts from all three aforementioned messages. In that way, the benefits of all three messages could be achieved.

In just such an action, Italian authorities have begun a campaign aimed at reducing music piracy in a way that parallels a program which succeeded in Spain.²²⁶ The two-step plan follows a carrot-and-stick approach.²²⁷ First, they plan to improve the legal deterrents against piracy in Italy.²²⁸ Second, they will attempt to persuade the Italian public not to encourage piracy by purchasing pirated recordings.²²⁹ They plan to appeal to Italian desire to support local talent by using an awareness campaign featuring Italian musicians on signs and brochures.²³⁰ By eradicating piracy, the industry hopes to keep price levels down as the volume of legitimate sales increases.²³¹

An effective publicity program such as those suggested can be extremely effective, as the government of Japan found.²³² Government officials widely denounced piracy as theft to the previously uninformed Japanese public.²³³ Subsequently, many video pirates "actually submitted to voluntary searches by industry investigators and purged their inventories of pirated products."²³⁴

Such success is not limited to Japan.²³⁵ MPAA investigators report that many U.S. retailers have dumped illegally produced video cassettes upon reading of news reports of raids on pirates.²³⁶ In its own move, Vietnam has published a list of items covered by the country's copyright law.²³⁷ Officials hope to increase the implementation and public understanding of copyright protection under the 1994 Vietnam copyright law.²³⁸

***195 I. Competitive Pricing and Marketing**

If U.S. industry leaders hope to replace the pirates as suppliers in the Chinese market, U.S. companies must set prices at a level that Chinese consumers can afford.²³⁹ Pirates are often the only source of a needed product at a price affordable to Chinese consumers.²⁴⁰ "Piracy arises naturally where legally marketed products or information are available only at prices far beyond the economic reach of consumers."²⁴¹ A company simply cannot break into the Chinese market without offering the product at an affordable price locally.²⁴²

A Korean video store owner complains about paying US\$27 for a videotape when he can purchase a pirated one for half the cost.²⁴³ He insists, "[t]he high price the Americans charge is the main cause of piracy.... That forces the Korean people to copy. Otherwise we can't make a profit."²⁴⁴ Even more damaging to the cause of the U.S. companies, legitimate U.S. software retails for approximately 20% less in the United States than it does in Hong Kong, forcing inflated prices upon people who have weaker buying power.²⁴⁵ Companies can better help themselves by adapting to local needs and by adopting a pricing strategy that persuades consumers to buy legitimate goods priced affordably.²⁴⁶ The U.S. industries must realize that the Chinese student whose monthly salary is US\$50 is not likely to pay US\$35 for an American law book; unless U.S. suppliers provide a cheaper alternative (perhaps a paperback edition), the student will be forced to turn to the pirates for the product.²⁴⁷

A recent exceptionally insightful effort to adapt to the Chinese market came from Warner Bros. and MGM when they announced a home video licensing deal in the Chinese market.²⁴⁸ To enter a market where the piracy level is at over 98%, the companies have considered the limited purchasing power of the average citizen.²⁴⁹ *196 The Mandarin-dubbed products, which include *Outbreak*, *Rain Man*, *The Fugitive*, and *JFK*, will be available on VCD and laserdisks, and VCDs will be priced at as little as US\$5-US\$6 wholesale, US\$7-US\$8 retail.²⁵⁰ Pirated copies sell for approximately US\$4.²⁵¹ To avoid direct competition with pirated goods, the videos will be sold exclusively through the country's 60,000 post offices.²⁵²

In a similarly bold move, Microsoft has launched an anti-piracy campaign in Singapore, opening what it calls "concept stores" in the core of Singapore's pirate software markets.²⁵³ Suggesting a "Daniel-in-the-lion's-den" analogy of subdue and prosper, company leaders expect the stores to flourish while fighting piracy.²⁵⁴ Microsoft hopes that an emphasis on value, discount pricing, and service will convince consumers of the superiority of and the need for legitimately licensed products.²⁵⁵ Creative and proactive ideas such as these are the future of intellectual property protection.

VI. Conclusion

China has adopted all intellectual property laws in accordance with international treaties. Unfortunately, the Chinese government has been reluctant to expend the resources to enforce them properly. It has been suggested that bilateral agreements may not be the only and complete answers to U.S. trade woes in China and may run counter to U.S. long-term interests. These agreements can create resentment when viewed by the Chinese as a form of imperialism, and produce counterproductive results. Any durable agreement between China and the United States must be founded upon mutual gain, keeping in mind that Chinese interests, history, and culture differ from those of the United States. The impetus for change cannot result from imposition by U.S. forces alone.

China is a developing country and it is unlikely that there is a strong demand from within to increase protection of intellectual property. The government and people must decide for themselves that commitment of scarce resources is warranted before changes other than formalistic ones will occur. Through alternative means, the U.S. core copyright industries may be

successful in combating the factors which create such a fertile climate for piracy in China. U.S. industries can take a proactive stance and co-opt offenders; stress enforcement of existing law; lobby the Chinese *197 government for enforcement, increased fines, and a stronger judicial system; promote the virtues of intellectual property protection to the Chinese government, industries, and the Chinese public; and finally make efforts to provide competitively priced products. The U.S. core copyright industries can and must do more than just ask Uncle Sam for help with intellectual property protection in China.

Footnotes

¹ a1 J.D. December 1997, Pepperdine University School of Law. Elements of this Note are supported by personal experience the author gained: (1) as a summer law clerk in the Intellectual Properties Department with the Hong Kong firm of Wilkinson & Grist during the summer of 1996; (2) through study of Hong Kong and Chinese law at Hong Kong University during the summer of 1996; and (3) by extensive travel and personal interaction in Southeast Asia. I would like to thank my family, my close friends, and all my teachers. You have all given selflessly so that I may grow and learn. I can never repay you except with gratitude.

² 1 Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L.REV. 273, 274 (1991).

³ 2 IIPA was founded in 1984 to represent U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted works. *IIPA What We Do* (visited Feb. 2, 1997) <<http://www.iipa.com/html/what—we—do.html>> [hereinafter *IIPA Website*]. The IIPA coalition includes the Motion Picture Association of America (MPAA), the American Film Marketing Association (AFMA), and the Recording Industry Association of America, Inc. (RIAA). *Id.*

⁴ 3 The core copyright industries are comprised of all types of computer software, motion pictures, television pictures, video cassettes, music, records, compact discs (CDs), audio cassettes, textbooks, trade books, journals, reference and professional publications, and electronic and print media. Press Release from Eric Smith, President, International Intellectual Property Association, *The Copyright Industries Applaud the Administration for Enforcing the 1995 U.S.-China IPR Agreement* (May 15, 1996) (on file with the AFMA) [hereinafter May 1996 Press Release], available in International Intellectual Property Association, *The Copyright Industries Applaud the Administration for Enforcing the 1995 U.S.-China IPR Agreement* (visited Jan. 23, 1998) <<http://www.iipa.com/html/pn—china—051596—press—release.html>>.

⁵ 4 *Id.*

⁶ 5 *Id.*

⁷ 6 *Id.*

⁸ 7 *Price Tag for Overseas Copyright Piracy Top \$14 Billion, Industry Study Shows*, Feb. 6, 1997 (visited Jan. 23, 1998) <<http://www.iipa.com/html/pn—020697—press—release.html>> [hereinafter Feb. 6, 1997 Release]. Losses within the United States are not included. *Id.* Estimates include losses caused by inadequate laws and enforcement. *Id.* The estimates were calculated by member associations of IIPA by using data such as: legitimate sales of copyrighted products, sales of hardware, and estimated sales of unauthorized products. *International Intellectual Property Alliance, Estimates of 1995 U.S. Trade Losses Due to Foreign Piracy and Levels of Piracy*, at 4 (on file with the AFMA) [hereinafter 1995 Estimates]. These loss figures severely underestimate the overall impact of piracy because they only quantify losses suffered by U.S.-based copyright industries. *See id.*

⁹ 8 Dan Margolis, *Seized Pirate Booty Doubles*, DAILY VARIETY, Mar. 13, 1997, available in LEXIS, News Library, Curnws File.

¹⁰ 9 Leaffer, *supra* note 1, at 275.

¹⁰ U.S. CONST. art. I, § 8, d. 8.

¹¹ WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION 18 (1995).

¹² Leaffer, *supra* note 1, at 280.

¹³ Jim Erickson, *Software Piracy Goes from Bad to Ugly in China: Truckloads of Illegal CDs Seized at Hong Kong Border*, SEATTLE POST-INTELLIGENCER, Apr. 29, 1996, at B4, available in 1996 WL 6442293 (noting that Asia is not the only source of pirated goods). The software piracy rate in the United States is about 35%. *Id.*

¹⁴ Leaffer, *supra* note 1, at 274.

¹⁵ Hereinafter “China.” However, the Republic of China will be referred to as “Taiwan.”

¹⁶ Feb. 6, 1997 Release, *supra* note 7.

¹⁷ 1995 Estimates, *supra* note 7. Piracy levels represent the share of a country’s market that is served by pirated materials. *Id.*

¹⁸ Kenneth Ho, *A Study into the Problem of Software Piracy in Hong Kong and China* (visited Feb. 7, 1997) <<http://pluto.houston.com.hk/hkgipd/piracy.html>>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Leaffer, *supra* note 1, at 281.

²² Ho, *supra* note 18.

²³ The acronyms respectively refer to Compact Disc, Compact Disc-Read Only Memory, and Video Compact Disc.

²⁴ Ho, *supra* note 18.

²⁵ Clifford J. Shultz II & Bill Saporito, *Protecting Intellectual Property: Strategies and Recommendations to Deter Counterfeiting and Brand Piracy in Global Markets*, COLUM.J. WORLD BUS., Spring 1996, at 18, 19, available in 1996 WL 12710867.

²⁶ *Id.*

²⁷ Copyright Law of the People’s Republic of China, *translated in CHINA LAWS FOREIGN BUSINESS ¶ 11-700(3)* (1991). This law was adopted on September 7, 1990 at the 15th Session of the Standing Committee of the National People’s Congress. *Id.*

²⁸ Yvonne Chua, *Global Trademark and Copyright 1996: Management and Protection; Global Developments in Protecting Against*

Counterfeiting and Infringement of Trademarks and Copyrights, 455 PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES (PLI) 195, 202, Oct. 1996. These laws have since been supplemented through subsequent implementing regulations. *Id.*

29 *Id.*

30 International Intellectual Property Alliance, *1996 Special 301 Submission to USTR 1996*, at 12 (submitted to the United States Trade Representative Feb. 20, 1996) (on file with the AFMA) [hereinafter *1996 Special 301 Submission*].

31 Edward G. Durney, *Global Intellectual Property Series 1993: Protecting Trademarks and Copyrights; Successful Strategies; Copyright Law in China and Taiwan*, 367 PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES (PLI) 311, 319, Sept.-Oct. 1993. There is a work-for-hire doctrine; there are moral rights; and there are some provisions for fair use. *Id.*

32 Chua, *supra* note 28, at 203.

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.*

39 Microsoft v. Juren Computer Co. (decided Apr. 16, 1996), *cited in* Chua, *supra* note 28, at 206. Microsoft, WordPerfect, and Autodesk first instituted raids which resulted in the seizure of computers, software, ledgers, and records of the defendant. Chua, *supra* note 28, at 206. Juren was found guilty of giving their customers a choice of the plaintiffs' software with every personal computer purchased. *Chinese Firm Found Guilty in Copyright Case; Asia: Microsoft is Hoping for Punitive Damages and More Action to End Software Piracy*, L.A. TIMES, Oct. 31, 1995, at 2, *available in* 1995 WL 9840917 [[[hereinafter *Chinese Firm*]]. The court ordered the defendant to cease and desist and awarded damages and fines of RMB1,080,000. Chua, *supra* note 28, at 206; *see also* *Chinese Firm*, *supra* (reporting finding of guilt but not the award amount).

40 *1996 Special 301 Submission*, *supra* note 30, at 4.

41 Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 168 Consol.T.S. 185, *revised* Nov. 13, 1908, 1 L.N.T.S. 217, *revised* June 2, 1928, 123 L.N.T.S. 233, *revised* June 26, 1948, 331 U.N.T.S. 217, *revised* July 14, 1967, 828 U.N.T.S. 221, *revised* July 24, 1971, S. TREATY DOC. NO. 99-27 (1986) [hereinafter Berne Convention]. The Berne Convention became effective in the United States on Mar. 1, 1989.

42 Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2731, 216 U.N.T.S. 132, *revised* July 24, 1971, 25 U.S.T. 1341, 943 U.N.T.S. 194.

⁴³ Multilateral Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Oct. 29, 1971, 25 U.S.T. 309, 888 U.N.T.S. 67 (entered into force in the United States Mar. 10, 1974).

⁴⁴ 1996 *Special 301 Submission*, *supra* note 30, at 4.

⁴⁵ Berne Convention, *supra* note 41, 45 art. 4(1).

⁴⁶ Leaffer, *supra* note 1, at 292. WIPO is a specialized agency of the United Nations which promotes the protection of intellectual property rights by collaboration with numerous international and intergovernmental organizations. *Id.* WIPO is headquartered in Geneva, Switzerland and was established in 1967. *Id.*

⁴⁷ *Id.* at 294.

⁴⁸ *Id.*

⁴⁹ *Id.* at 295.

⁵⁰ 138 CONG.REC. S467 (daily ed. Jan. 28, 1992) (statement of Sen. Baucus), *available in* 1992 WL 12354 [hereinafter *Congressional Record*]. Special 301 is a section of the 1988 Omnibus Trade and Competitiveness Act, 19 U.S.C.A. §§ 2411-2420 (West 1993 & Supp.1997).

⁵¹ May 1996 Press Release, *supra* note 3.

⁵² *Congressional Record*, *supra* note 50, at S467.

⁵³ *Id.*

⁵⁴ See 19 U.S.C.A. § 2511; *see also* *Congressional Record*, *supra* note 50, at S469. The GSP allows denial of duty-free benefits to countries that condone piracy or other market-access barriers to copyrighted products.

⁵⁵ 19 U.S.C.A. §§ 2461-2467 (West 1993 & Supp.1997). The GSP allows denial of duty-free benefits to countries that condone piracy or other market-access barriers to copyrighted products. See 19 U.S.C.A. § 2462(b). Section 2411(c) permits the USTR to withdraw, suspend, or limit such duty-free treatment should the act, practice, or policy of a foreign country fail to meet GSP eligibility criteria. 19 U.S.C.A. § 2411(c) (referring to 19 U.S.C.A. § 2462(b), (c)).

⁵⁶ Leaffer, *supra* note 1, at 297 (citing Office of the United States Representative, Special 301 on Intellectual Property (May 25, 1989)).

⁵⁷ Feb. 6, 1997 Release, *supra* note 7.

⁵⁸ China's status according to the IIPA included: 1996 (recommended), 1994, 1991—Priority Foreign Country (subject to Section 306 monitoring); 1995, 1993, 1992—Watch List; 1990, 1989—Priority Watch List. *Special 301 Submission*, *supra* note 30. Other Priority Foreign Countries include the Russian Federation and Turkey in 1996, and Hungary and Brazil in 1993. *Id.*

⁵⁹ *See id.* at 4.

60 *Id.*

61 *Id.* The provision became effective in 1995 following interpretive ruling by the Chinese Supreme Court. *Id.*

62 *Id.*

63 *Id.* Under the agreement China was relieved of its status as a Priority Foreign Country and moved to the Section 301 Watch List. *Id.*

64 *Id.* at 1.

65 *Cracking Down on Pirates, Strategies for Fighting Sale of Illicit Goods*, 11 No. 2 ENT.LAW. & FIN. 3, May 1995 [hereinafter *Cracking Down on Pirates*] (interview between Stan Soocher, Editor-in-Chief of the periodical, and Anthony M. Keats, attorney and leader of the intellectual property team of Baker & Hostetler, Los Angeles).

66 See 1996 Special 301 Submission, *supra* note 30, at 1.

67 *Id.*

68 May 1996 Press Release, *supra* note 3.

69 “The source identification (SID) code allows reliable tracing of compact disk products to the factories in which they were produced.” 1996 Special 301 Submission, *supra* note 30, at 5 n. 2. Pirated discs without SID may be indistinguishable from legitimate copies. Linda W. Tai, Comment, *Music Piracy in the Pacific Rim: Applying a Regional Approach Towards the Enforcement Problem of International Conventions*, 16 LOY.L.A.ENT.L.J. 159, 190 (1995). The SID alerts consumers and allows customs officials to confiscate pirated discs. *Id.*

70 See May 1996 Press Release, *supra* note 3.

71 *Id.*

72 1996 Special 301 Submission, *supra* note 30, at 2.

73 *Id.*

74 *Id.*

75 *Id.*

76 *Id.*

77 *Id.* at 3. The number of imported films allowed was still limited by the ability of ChinaFilm Export and Import, the exclusive distribution agency in China, to distribute them, while the government warned it would bar films that clashed with Chinese “situation and laws.” *Cracking Down on Pirates*, *supra* note 65, at 3. The limitation of distribution to ChinaFilm was as effective an import restriction on theatrical release as any quota because ChinaFilm could only handle approximately fifteen U.S. films per year. *Id.*

78 In December 1995, the International Federation of the Phonographic Industry was forced to close its Guangdong office following death threats from thugs hired by one of the more powerful CD plants. *1996 Special 301 Submission*, *supra* note 30, at 5.

79 *Id.* at 3.

80 *Clinton Administration Warns China On IP Pact*, West’s Legal News, Apr. 17, 1996, available in 1996 WL 259943.

81 May 1996 Press Release, *supra* note 3.

82 Kathy Chen, *China-U.S. Accord Avoids Trade Battle Over Piracy*, WALL ST.J.EUR., June 18, 1996, at 2, available in 1996 WL-WSJE 10745741; *The War Is Off, for Now: U.S.-China Copyright Accord Averts Major Trade Conflict*, L.A. TIMES, June 18, 1996, at B6, available in WL 10651497.

83 *Id.* at 2.

84 Measures include: (1) closure of fifteen CD factories which were responsible for producing 30-50 million pirated units per year; (2) seizure or destruction of molds in these factories; (3) closure of six major distribution markets in Guangdong; (4) closure of over 5000 illegal “laser disc showing rooms”; (5) inclusion of intellectual property rights crimes in the “Severe Campaign Against Crime” by the Ministry of Public Safety; (6) institution of a nationwide Concentrated Enforcement Period focusing on wholesale and retail markets; (7) increase in border enforcement that led to seizure of over 80,000 pirated units; (8) increase in monitoring of factories, including implementation of SID codes and title verification; (9) opening of the market to U.S. intellectual property industries, such as motion pictures and music publishing; and (10) instruction of Chinese public and non-public entities to use legitimate software. Intellectual Property Department Hong Kong Government, *A Report on Chinese Enforcement Actions Under the 1995 IPR Agreement*: June 17, 1995 (visited Feb. 2, 1997) <<http://pluto.houston.com.hk/hkgipd/chincust.html>>.

85 Chen, *supra* note 82, at 2.

86 *China: News Briefing by the Chinese Foreign Ministry*, BEIJING REV., July 8, 1996, available in 1996 WL 11664357.

87 *Id.* The World Trade Organization (WTO) is a global trade monitoring body which came into existence on Jan. 1, 1995. Amy E. Simpson, *Copyright Law and Software Regulations in the People’s Republic of China: Have the Chinese Pirates Affected World Trade?*, 20 N.C.J. INT’L. L. & COM.REG. 575, 623 (1995).

88 *Clinton Hails Copyright Accord with China*, ASIAN ECON. NEWS, June 24, 1996, available in 1996 WL 7590316; Tom Korski & Amy Chew, *Bell Sounds for New Round of Disputes Hours After Striking IPR Deal*, S. CHINA MORNING POST, June 19, 1996, at 14, available in 1996 WL 3760275 (highlighting Chinese claims of U.S. support for Chinese admittance to WTO and U.S. failure to confirm such claims).

89 *China: News Briefing by the Chinese Foreign Ministry*, *supra* note 86.

90 See Rajiv Chandra, *Deal Again Sealed and Signed, but Can Beijing Deliver?*, INTER PRESS SERVICE, June 18, 1996, available in 1996 WL 10243472.

⁹¹ *Testimony of Christopher Cox on the Accession to the World Trade Organization by Taiwan and the People's Republic of China, 1996: Testimony Before the Subcomm. on Trade of the Comm. on Ways and Means*, 104th Cong. (1996), available in 1996 WL 10831306 (statement of Christopher Cox) (recommending Taiwan for accession to the WTO and recommending denial of membership to China based on (1) the absence of a rule of law to accord intellectual property protection and (2) the maintenance of foreign trade barriers and tariffs).

⁹² Chandra, *supra* note 90.

⁹³ Ho, *supra* note 18.

⁹⁴ *Id.*

⁹⁵ The BSA is a nonprofit body which promotes the growth of the U.S. software industry. *Microsoft Upset over RI's High Piracy Rate*, JAKARTA POST, Apr. 1, 1997, available in 1997 WL 100 16651.

⁹⁶ *Intellectual Property Rights and China: Testimony on the Intellectual Property Agreement Between the People's Republic of China and the United States on Intellectual Property Before the Senate Subcomm. on East Asian and Pacific Affairs*, 104th Cong. (1995), available in 1995 WL 96060 [[[hereinafter Holleyman Testimony] (Mar. 8, 1995 statement of Robert W. Holleyman II, President, Business Software Alliance)].

⁹⁷ Kim Newby, *The Effectiveness of Special 301 in Creating Long Term Copyright Protection for U.S. Companies Overseas*, 21 SYRACUSE J. INT'L. L. & COM. 29, 31-32 (1995).

⁹⁸ *Id.*

⁹⁹ Gary M. Hoffman & George T. Marcou, *Combating the Pirates of America's Ideas*, 7 COMPUTER LAW. 8, 9, July 1990, available in Westlaw, JLR database.

¹⁰⁰ Ho, *supra* note 18.

¹⁰¹ *Id.*

¹⁰² 1996 Special 301 Submission, *supra* note 30, at 166.

¹⁰³ *Id.* at 167. The latest version of Microsoft Windows 95 was available in 1995 at Golden Arcade Computer Center for HK\$300, or around US\$40. Edward A. Gargan, *Chinese "Pirates" Have All the Latest; No Royalties Mean Cheap Newest CDs, Computer Software*, PITTSBURGH POST-GAZETTE, Feb. 27, 1995, at A2, available in 1995 WL 3363101. A single CD ROM with 75 programs has a total value of thousands of U.S. dollars if purchased legally, but is priced at US \$33.00 in Hong Kong. *Id.* CD copies of Microsoft Office can be bought at the Golden Shopping Arcade in Hong Kong for as little as HK\$50, or approximately US \$6.50. Ho, *supra* note 18.

¹⁰⁴ James Shinn, *The China Crunch; Three Crises Loom in Next 30 Days*, WASH. POST, Feb. 18, 1996, at C1, available in 1996 WL 3064680, quoted in 1996 Special 301 Submission, *supra* note 30, at 12.

¹⁰⁵ Leaffer, *supra* note 1, at 297.

¹⁰⁶ ALFORD, *supra* note 11, at 9.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 13.

¹⁰⁹ *Id.* at 15.

¹¹⁰ See Ho, *supra* note 18.

¹¹¹ *Id.*

¹¹² ALFORD, *supra* note 11, at 29.

¹¹³ *Cracking Down on Pirates*, *supra* note 65, at 3.

¹¹⁴ Ho, *supra* note 18.

¹¹⁵ *Id.*

¹¹⁶ Durney, *supra* note 31, at 315.

¹¹⁷ Ho, *supra* note 18.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* (quoting ALFORD, *supra* note 11, at 117).

¹²¹ *Ignorance Blamed for Piracy of Intellectual Property*, JAKARTA POST, Mar. 22, 1997, available in 1997 WL 10016324.

¹²² *Id.* (quoting Eko Budihardjo, Dean of the School of Engineering at the University of Diponegoro in Semarang, Central Java).

¹²³ Ho, *supra* note 18.

¹²⁴ *Id.*

125 *Id.*

126 *Id.*

127 Amy Borrus et al., *Will China Scuttle Its Pirates? The U.S. is Pushing for a Crackdown and Threatening Sanctions*, BUS.WK., Aug. 15, 1994, at 40. Chinese provincial governments often own partial interests in the factories where CD piracy takes place. *See Tai, supra* note 69, at 164.

128 *Borrus, supra* note 127, at 40. The Trade Ministry is politically weak when compared to the Chinese military. *Id.*

129 *See Ho, supra* note 18.

130 Holleyman Testimony, *supra* note 96.

131 Chandra, *supra* note 90.

132 *Id.*

133 Gregory S. Kolton, *Copyright Law and the People's Courts in the People's Republic of China: A Review and Critique of China's Intellectual Property Courts*, 17 U.PA.J. INT'L. ECON.L. 415, 424 (1996) (citing THOMAS CHIU ET AL., *LEGAL SYSTEMS OF THE PRC* 1-2 (1991)).

134 *Id.* at 425 (citing CHIU, *supra* note 133, at 31).

135 *Id.* at 448. Due in part to the increased amount of intellectual property litigation in the People's Courts, China developed special Intellectual Property Courts in 1993. *Id.* at 435.

136 *See Erickson, supra* note 13, at B4. Those convicted of piracy can get up to seven years in jail, but in reality, penalties have been light or not imposed at all. *Id.*

137 *See 1996 Special 301 Submission, supra* note 30, at 12.

138 *Id.*

139 Kolton, *supra* note 133, at 448.

140 *Id.* at 449; *see also Erickson, supra* note 13, at B4.

141 Erickson, *supra* note 13, at B4.

142 Kolton, *supra* note 133, at 449 (citing Donald C. Clarke, *Dispute Resolution in China*, 5 J. CHINESE L. 245, 262 (1991)).

¹⁴³ Clarke, *supra* note 142, at 262.

¹⁴⁴ Kolton, *supra* note 133, at 449 (citing Clarke, *supra* note 142, at 259-60).

¹⁴⁵ *Id.* at 450 (citing Clarke, *supra* note 142, at 259-60).

¹⁴⁶ Durney, *supra* note 31, at 325.

¹⁴⁷ Kolton, *supra* note 133, at 450 (citing Clarke, *supra* note 142, at 257). Former military and government officials are often given judgeships before younger lawyers. *Id.*

¹⁴⁸ *Id.* at 425 (citing CHIU, *supra* note 133, at 31).

¹⁴⁹ *Id.* at 450 (citing Clarke, *supra* note 142, at 258-59).

¹⁵⁰ *Id.*

¹⁵¹ Durney, *supra* note 31, at 324.

¹⁵² *Id.*

¹⁵³ Kolton, *supra* note 133, at 451.

¹⁵⁴ William P. Alford, *In China, Respect for the Law Must Come First: U.S. Threats Won't Work; Helping the Chinese Develop a Legal Consciousness that Values Rights Might*, L.A. TIMES, Feb. 2, 1995, at 7, available in 1995 WL 2011036.

¹⁵⁵ See Ho, *supra* note 18.

¹⁵⁶ *Id.*

¹⁵⁷ Leaffer, *supra* note 1, at 282.

¹⁵⁸ *Id.*

¹⁵⁹ William P. Alford, *Intellectual Property, Trade and Taiwan: A GATT-Fly's View*, 1992 COLUM.BUS.L.REV. 97, 107 (citing generally AUBERT J. CLARK, THE MOVEMENT FOR INTERNATIONAL COPYRIGHT IN NINETEENTH CENTURY AMERICA (1960)).

¹⁶⁰ *Id.* at 100.

¹⁶¹ Alford, *supra* note 159, at 7.

162 *Id.*

163 *Id.*

164 Shultz & Saporito, *supra* note 25, at 22.

165 *Id.*

166 *Id.* This would be a difficult argument to make in the case of most copyrighted products and is better applied in a trademark violation situation. *Id.*

167 *Id.*

168 *Id.*

169 *Id.* at 23.

170 *Id.*

171 *Id.*

172 *Id.*

173 *Id.*

174 *Id.*

175 Ho, *supra* note 18.

176 *Id.*

177 See *supra* Part III.A.

178 Xinhua is China's official news service and is subject to government control.

179 Mary Kwang, *Beijing Shuts Down 20 More Illegal CD Plants*, SING. STRAITS TIMES, Jan. 9, 1997, available in 1997 WL 7202906.

180 *Id.* (about US\$40,000).

181 See 1996 Special 301 Submission, *supra* note 30, at 12.

182 *Id.*

183 *See supra* note 39. Microsoft v. Juren Computer Co. was such a “trial” case. Chua, *supra* note 28, at 206. Microsoft had attempted to receive sufficient remuneration in other litigation before this success. *Id.*

184 *See supra* Part IV.E.

185 Kolton, *supra* note 133, at 456-57.

186 *Id.*

187 *Id.* at 457.

188 *Id.*

189 Hoffman & Marcou, *supra* note 99, at 12.

190 *Id.*

191 Shultz & Saporito, *supra* note 25, at 22-26.

192 ALFORD, *supra* note 11, at 18.

193 Hoffman and Marcou, *supra* note 99, at 10.

194 *Id.*

195 *Id.*

196 *Id.*

197 Shultz & Saporito, *supra* note 25, at 21.

198 Keith Hammonds, *Chinese Pirates Pay the Price*, BUS.WK., Oct. 7, 1996, at 46, available in 1996 WL 10770890.

199 *Id.*

200 *Id.*

201 Hoffman & Marcou, *supra* note 99, at 12.

202 Steven Mufson, *In Fight for Intellectual Rights in China, Pirates Still Winning*, WASH. POST, Feb. 18, 1996, at A29, available in 1996 WL 3064647.

203 Hoffman & Marcou, *supra* note 99, at 12.

204 *Id.*

205 Leaffer, *supra* note 1, at 283.

206 *Id.*

207 Alford, *supra* note 159, at 104-05.

208 *Id.*

209 *Id.* at 105 (citing Maria Shao, *Stan Shih Wants “Made in Taiwan” to Mean First-Rate; The Entrepreneur’s Crusade Starts With His Own Products*, BUS. WK, June 8, 1987, at 109, available in 1987 WL 2004376).

210 *Id.* at 104; *see also* Durney, *supra* note 31, at 335.

211 Alford, *supra* note 159, at 104-05.

212 Holleyman Testimony, *supra* note 96.

213 Chua, *supra* note 28, at 206.

214 Shultz & Saporito, *supra* note 25, at 21.

215 *Id.* at 23.

216 Mufson, *supra* note 202, at A29.

217 Shultz & Saporito, *supra* note 25, at 23.

218 Hong Kong Intellectual Property Society, *Viable Strategies for Public Education on Intellectual Property Protection*, Jan. 27 1997 (visited Feb. 7, 1997) <<http://pluto.houston.com.hk/hkgipd/workshop.html>> [hereinafter *Strategies*].

219 *Id.*

220 *Id.*

221 *Id.*

222 *Id.*

223 *Id.*

224 *Id.*

225 *Id.*

226 Andrew Hill, *Piracy on the High C's is Taking Toll in Italy: Music Industry Plans to Fight Back with Milan-Based Anti-Piracy Unit and Consumer Campaign*, THE FIN. POST, Mar. 21, 1996, at 53, available in 1996 WL 5726686. In Spain, the program reduced recording piracy levels from up to 35% to less than 5%. *Id.*

227 *Id.*

228 *Id.*

229 *Id.*

230 *Id.*

231 *Id.*

232 Hoffman & Marcou, *supra* note 99, at 12.

233 *Id.*

234 *Id.*

235 *Id.*

236 *Id.*

237 *Vietnam Takes Step to Guard Copyrights with Published List*, ASIAN WALL ST. J., Mar. 6, 1997, at 8, available in 1997 WL-WSJA 3798677. Vietnam is currently one of the world's worst piracy offenders, as over 95% of all computer software in use in Vietnam has been pirated. *Id.*

238 *Id.*

239 Hoffman & Marcou, *supra* note 99, at 12.

240 *Id.*

241 *Id.*

242 *Id.* Some firms present a legitimate argument that affordable local pricing will result in their low-priced products being exported to the “gray market” in richer countries. *Id.* Unfortunately, U.S. courts have tended to allow imports of products if legitimately produced, even when these goods were bought abroad at deflated prices. *Id.* Congress should act to limit imports of such gray market goods. *Id.*

243 CONGRESSIONAL RECORD, *supra* note 50, at S468 (statement of Sen. Baucus) (quoting an article from the Wall Street Journal).

244 *Id.*

245 Ho, *supra* note 18.

246 *Id.*

247 Alford, *supra* note 159, at 99-100.

248 Don Groves, *Warner Bros., MGM Dips into China Vid Market*, DAILY VARIETY, Feb. 21, 1997, at 1, available in LEXIS, News Library, Curnws File.

249 *Id.*

250 *Id.*

251 *Id.*

252 *Id.*

253 Joslin Vethakumar, *New Microsoft Drive Against Piracy In Singapore*, NEWSBYTES, Dec. 5, 1996, available in WL 12027970.

254 *Id.*

255 Raju Chellam, *Microsoft to Extend its Singapore Anti-Piracy Scheme to Region*, BUS. TIMES, Jan. 6, 1997, available in 1997 WL 7763157.