COPYRIGHT LAW AND THE PEOPLE'S COURTS IN THE PEOPLE'S REPUBLIC OF CHINA: A REVIEW AND CRITIQUE OF CHINA'S INTELLECTUAL PROPERTY COURTS

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1. INTRODUCTION

The first conception of a legal right to own one's intellectual works stemmed from the invention of printing.¹ Several hundred years later, in 1708, Great Britain enacted the world's first formal copyright law.² Thus, copyright and, consequently, copyright laws are not novel concepts in modern society's endeavor to protect intellectual undertakings from unauthorized use.

Formal copyright law initially appeared in China during the early twentieth century. The Copyright Law of the Great Qing,
adopted by the Government of the Qing Dynasty in 1910 ("1910 Law"), was the first formal copyright law instituted in China. The 1910 Law, which protected "works of literature and art, pamphlets, calligraphy, photographs, sculptures[,] and models," did not last long. The Qing Government was overthrown just two years after the 1910 Law's inception.

The Northern Warlord implemented a second copyright law in China in 1915. Subsequently, in 1928, the Guomindang Government instituted a new copyright law, which remained in effect until China's Communist Revolution in 1949. These two copyright laws were only slight revisions of the original 1910 Law.

Beginning in the 1950s, the Communist government of the People's Republic of China ("PRC" or "China") established various laws and regulations that purported to protect copyright-like rights in certain instances, and remunerated writers and artists for their efforts. Still, after almost thirty years following the Communist Revolution, the PRC lacked a coherent and comprehensive legal system for intellectual property protection. Moreover, during the period between 1966 and 1976, commonly known as the Cultural Revolution, the PRC suspended the then-existing protective regulations and the concomitant compensation for innovators.

The late 1970s, coinciding with the end of Chairman Mao Zedong's regime, brought the advent of the PRC's "Four Modernizations" policy of economic and technological development. Copyright protection became an important mechanism for encouraging creativity and ingenuity in China's push toward

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4 Id.
5 See id. at 44.
6 See id.
7 See id.
8 See id.
9 See id.
10 See id. at 45.
11 See id. at 44.
12 See id. at 44-45. See generally CHINA'S FOUR MODERNIZATIONS: THE NEW TECHNOLOGICAL REVOLUTION (Richard Baum ed., 1980) (detailing the Four Modernizations program established by post-Maoist China in order to upgrade the PRC's economic and technological capabilities) [hereinafter FOUR MODERNIZATIONS].
modernization.\textsuperscript{13}

In 1979, in order to modernize Chinese society, the PRC began an official inquiry aimed at establishing a new, comprehensive system of copyright legislation and protection.\textsuperscript{14} After thorough discussion, intensive research, and over twenty drafts and revisions throughout the next decade,\textsuperscript{15} the Fifteenth Session of the Standing Committee of the Seventh National People's Congress ("NPC") of China approved the first official Communist-era Copyright Law of the PRC ("Copyright Law") on September 7, 1990.\textsuperscript{17} The Implementing Regulations for the Copyright Law of the PRC ("Implementing Regulations") and the Copyright Law itself became effective contemporaneously on June 1, 1991.\textsuperscript{19}

Nevertheless, recent events, such as the Tiananmen Square uprising, have raised concerns about the volatility of China's political apparatus and its relationship with the West.\textsuperscript{20} As recent trade disputes between the United States and China illustrate, this relationship has become very fragile.\textsuperscript{21} The

\textsuperscript{13} See Muwen, supra note 3, at 44-45.


\textsuperscript{15} See Durney, supra note 1, at xx.

\textsuperscript{16} Any references to Chinese legal documents in this Comment refer to English language translations of such documents, not their official Chinese versions.

\textsuperscript{17} See Copyright Law of the People's Republic of China, translated in 27 COPYRIGHT, Copyright and Neighboring Rights Laws and Treaties (insert) at 2-01 (1991) [hereinafter Copyright Law]. This Copyright Law was strongly influenced by the copyright legislation of other nations, such as the United States and Japan, yet Article 1 retains a slight socialist bent, mentioning, for example, the promotion of "socialist culture and sciences" and the "construction of socialist spiritual and material civilization." Id. art. 1; see Durney, supra note 1, at 1.


\textsuperscript{20} See Durney, supra note 1, at 2.

\textsuperscript{21} See discussion infra section 5.
maintenance of the U.S.-Sino connection has profound implications on the enforcement of China's nascent legal system for copyright protection.22

This Comment analyzes judicial enforcement of copyrights in post-Maoist China. Section 2 reviews the current state of Chinese copyright law, including the PRC's recent accession to various international copyright protection conventions. Section 3 outlines the existing judicial structures in China. Section 4 reviews several copyright cases adjudicated prior to the implementation of the 1991 Copyright Law, details the logistics of bringing copyright lawsuits in the People's Courts of the PRC, and discusses the newly formed Intellectual Property Courts that constitute a specialized section of, and gain their authority from, the People's Courts. This section also explores recent copyright cases, both

22 A short synopsis of current political developments is instructive, although this issue generally is beyond the scope of this Comment. With the impending death of longtime Chinese ruler Deng Xiaoping—who, at the time this Comment was written, was allegedly unable to stand on his own due to illness—the future political climate in the PRC is very uncertain. See Rone Tempest, Nightly News Has Clues to China's Likely Next Leader, L.A. TIMES, Jan. 21, 1995, at A1, A12 [hereinafter Tempest, Nightly News Has Clues]. Three high-level members of the PRC government, President Jiang Zemin, Premier Li Peng, and National People's Congress Chairman Qiao Shi, all appear to be possible successors to Deng. See id. at A12. Many political scientists observe that it appears likely, at least at the beginning of the "post-Deng era," that these three men may share power, with Jiang, Deng's chosen successor, at the core. See id.

Jiang's future succession is far from certain, however, and he faces strong challenges from other top government officials. See Taiwan's Ruling Party Sees Power Struggle in China, REUTERS WORLD SERV., Feb. 9, 1995, available in LEXIS, News Library, Curnws File. The favorite of Western governments is Vice Premier Zhu Rongji, who orchestrated many recent Chinese economic reforms. Zhu, however, apparently has fallen out of favor within the Communist Party as of late. See Tempest, Nightly News Has Clues, supra, at A12.

This scenario does not bode well for the improvement of intellectual property protection in China. Most of the recent gains in legislation and enforcement can be traced back to Western pressure on the Chinese government. Such pressure will probably carry less weight in a new, dispersed Chinese power structure. Cf. William Safire, Power to the People Doesn't Mean Anarchy, CHI. TRIB., Feb. 9, 1995, at 27 (arguing that political power in China after Deng's death "will probably devolve to centrifugalmen in a half-dozen regions, thereby reflecting economic reality"). But see William Flannery, Who Will Bend Most in China Talks?, ST. LOUIS POST-DISPATCH, Feb. 7, 1995, at 6C (quoting Remi L. Wrona, an international trade consultant, who feels that "[t]he shift of power has been basically settled; I don't think Deng's passing will have that great an impact") [hereinafter Flannery, Who Will Bend Most].
domestic and foreign, brought in the Intellectual Property Courts and critiques their efficacy in light of those cases. Section 5 explores extrajudicial factors which are necessary for a more effective copyright protection system in China.

2. THE CURRENT STATE OF COPYRIGHT LEGISLATION IN THE PRC

The foundations of the PRC’s domestic copyright protection are the Copyright Law and its Implementing Regulations, which protect a wide variety of copyrightable intellectual property.\(^{23}\) The Implementing Regulations clarify, and occasionally alter, integral concepts used in the Copyright Law, and buttress the Copyright Law’s administrative and penalty requirements.\(^{24}\) Computer software, while specifically enumerated and safeguarded by the Copyright Law,\(^{25}\) essentially is protected by a separate piece of legislation entitled the Regulations on Computer Software Protection of the People’s Republic of China (“Software Regulations”).\(^{26}\) Additional elements of protection for computer software in China are the Measures for the Registration of Copy-

\(^{23}\) The Copyright Law contains 56 articles divided into six chapters; the Implementing Regulations also contains 56 articles, but is split into seven chapters. Protected items include: “literary works, oral works, musical[,] dramatic[,] and choreographic [sic] works, works of fine art, photographic works, cinematographic[,] television[,] and video works, product and engineering designs and their explanations, maps and schematic drawings, computer programs, and other works as stipulated in laws and administrative regulations.” INTELLECTUAL PROPERTY PROTECTION IN ASIA § 3.25 (Arthur Wineburg ed., 1992) [hereinafter PROTECTION IN ASIA]; see Copyright Law, supra note 17, art. 3. “Adaptations, translations, annotations[,] and collations of such protected works also are protected.” PROTECTION IN ASIA § 3.25; see Copyright Law, supra note 17, art. 10.

There is no registration requirement for copyright protection of most of these works in the PRC. See Stephen Hayward, China: Practical Protection of IP Rights, IP ASIA, June 30, 1994, at 2, 6. Registration is mandated only for computer software, and then merely “to facilitate proof not subsistence of copyright.” Michael D. Pendleton, Chinese Intellectual Property — Some Global Implications for Legal Culture and National Sovereignty, 15 EUR. INTELL. PROP. REV. 119, 119 (1993).

\(^{24}\) See Zhao, supra note 19, at 9.

\(^{25}\) See Copyright Law, supra note 17, art. 3(8).

right in Computer Software, which were signed by the Chinese Minister of the Machine-Building and Electronics Industry on April 6, 1992.\(^\text{27}\)

Despite the thoroughness and sophistication of these recent copyright laws and regulations, they do not bring China's copyright protection in line with the standards of the international community, as represented by the Berne Convention\(^\text{28}\) and the Universal Copyright Convention ("UCC").\(^\text{29}\) The Berne Convention is a multinational accord designed both to create reciprocal copyright protections among its member nations and to secure minimum standards of copyright protection for nationals of all such countries.\(^\text{30}\) The UCC exists under the auspices of the United Nations and mandates a basic level of copyright

\(^{27}\) See Durney, supra note 1, at 4.

\(^{28}\) See Berne Convention for the Protection of Literary and Artistic Works (Paris Act, July 24, 1971) [hereinafter Berne Convention], reprinted in ZHENG CHENGSI & MICHAEL PENDLETON, COPYRIGHT LAW IN CHINA app. 4 [hereinafter COPYRIGHT LAW IN CHINA].


\(^{30}\) The Berne Convention is presided over by the World Intellectual Property Organization ("WIPO") and it provides copyright protection to works first published outside of the country where an author subsequently requests his or her work be protected. See Berne Convention, supra note 28, art. 5, para. 1. See generally Convention Establishing the World Intellectual Property Organization, July 14, 1967, 21 U.S.T. 1749, 828 U.N.T.S. 3 (containing the provisions establishing the WIPO). The Berne Convention is not intended to supersede a member state's copyright laws; rather it is intended to supplement these laws, thus ensuring relative consistency in protection among member states. See Berne Convention, supra note 28, art. 5, para. 1. Protection and the "means of redress" are governed "exclusively by the [copyright] laws of the country where protection is claimed." Id. art. 5, para. 2. Article 5 of the Berne Convention provides:

Protection in the country of origin [of a copyrighted work] is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under [the Berne] Convention, he shall enjoy in that country the same rights as national authors.

\(^{31}\) Id. art. 5, para. 3.

Additionally, the Berne Convention stipulates that "[t]he enjoyment and the exercise of [the above-mentioned] rights [are not] subject to any formality," imposing no strict formal requirements for protection. \(^{31}\) Id. art. 5, para. 2.

protection for citizens of countries who are parties to the agreement in any other state which is also a party to the UCC.\textsuperscript{31}

In 1991, the United States pressured the PRC to improve its intellectual property protections with threats of trade sanctions pursuant to the “Special 301” section of the Omnibus Trade and Competitiveness Act of 1988,\textsuperscript{32} and in the eleventh hour China capitulated.\textsuperscript{33} The resulting U.S.-Sino Memorandum of Understanding (“MOU”) on intellectual property issues was signed January 17, 1992, and became effective two months later.\textsuperscript{34} This bilateral MOU created reciprocal copyright protection between the United States and China and also stipulated that the PRC accede to prevailing international copyright standards.\textsuperscript{35} Pursuant to the MOU, China joined the Berne Convention on October 15, 1992, and the UCC on October 30, 1992.\textsuperscript{36} China effected its accession to the Berne Convention through the Implementing International Copyright Treaties Provisions (“Treaties Provisions”).\textsuperscript{37}

\begin{itemize}
\item \textsuperscript{31} See UCC, supra note 29, 25 U.S.T. at 1345, 943 U.N.T.S. at 195.
\item \textsuperscript{34} See Simone, Improving Protection, supra note 33, at 9.
\item \textsuperscript{35} See id.
\item \textsuperscript{37} See id. at 36-39. The Treaties Provisions, which became effective on September 30, 1992, increased the protection afforded to foreign works, thus meeting the minimum requirements for copyright protection under the Berne Convention; they do not, however, afford similar protection to domestic works, which are still solely covered by the Copyright Law and the Software Regulations. See id. at 38. The Treaties Provisions clarify that foreign works covered by the Berne Convention or a bilateral treaty are protected, whether the works are published or unpublished. See id. at 38-39. Also, this added protection applies to intellectual property created by Sino-foreign joint ventures and wholly foreign-owned ventures. See id. at 36.

China’s laws already met the basic requirements under the UCC and the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (“Geneva Convention”), so those Conventions are not included in these Treaties Provisions. See Convention for the Protection of Producers of Phonograms Against Unautho-
The PRC's Copyright Law gives protection only to domestic copyrights and foreign copyrightable works that are "first published" in China. The PRC's accession to the Berne Convention circumvents this limitation, however, by granting protection to all works attributed to nationals of any signatory of the Berne Convention, commonly referred to as a member state, as long as the works are in accordance with the appropriate sovereign's copyright law and the Berne Convention's minimum standards.

Copyright administration and enforcement in the PRC is the responsibility of the National Copyright Administration ("NCA") and various local Chinese administrative authorities. For
instance, Article 8 of the Copyright Law states that "[t]he copyright administration department under the State Council shall be responsible for the nationwide administration of copyright."\(^{41}\) Furthermore, Article 20 of the Treaties Provisions states that "[t]he State Copyright Administration shall be responsible for the implementation of international copyright treaties in China."\(^{42}\)

In addition to administrative action, the Copyright Law permits consensual arbitration or mediation for settling copyright infringement lawsuits.\(^{43}\) The People’s Courts are entitled to refuse enforcement of an arbitration award if it is deemed "unlawful."\(^{44}\) Article 34 of the Software Regulations provides that "[a]n infringement dispute over software copyright may be settled through mediation."\(^{45}\) Article 48 of the Copyright Law contains an analogous provision for copyright infringement.\(^{46}\) Furthermore, the Copyright Law permits a complaining party to institute a lawsuit directly in a People’s Court.\(^{47}\)

China’s strong copyright laws and traditionally available judicial avenues for enforcement, however, have not been enough
to thwart the growing copyright piracy problems in the PRC.\textsuperscript{48} This is due at least partially to a long-standing belief in China that copying another's creative works is not morally bankrupt, a view contrary to Western beliefs.\textsuperscript{49}

The Chinese traditionally have viewed the copying of another's intellectual work as a compliment to the creator.\textsuperscript{50} Also, "the Confucian disdain for profit motive prevailed over the capitalistic drive which propelled intellectual property reform in the West."\textsuperscript{51} This belief is directly contradictory to Western notions of intellectual property protection and is one of the primary obstacles toward establishing an effective Western-style copyright system in China. The PRC government has developed its Intellectual Property Courts with the hope that such courts may be able to break through these ingrained notions by both educating the Chinese public about intellectual property protection issues and punishing wrongdoers. Sanctions meted out to lawbreakers will emphasize the illegality of copying and could create a potent deterrent to piracy and other copyright violations.

3. A BRIEF OVERVIEW OF THE JUDICIAL SYSTEM IN THE PEOPLE'S REPUBLIC OF CHINA

The many permutations of the Chinese government throughout the twentieth century have resulted in dramatic shifts in the

\textsuperscript{48} See discussion supra sections 4 \& 5.

\textsuperscript{49} One Chinese newspaper noted that there is "weak legal awareness" regarding intellectual property rights and "[m]any people think that copyright piracy has nothing to do with them and they only wish for cheap goods." 'Renmin Ribao' on "Startling" Level of Copyright Infringement, BBC SUMMARY OF WORLD BROADCASTS, Oct. 7, 1994, available in LEXIS, News Library, Curnws File (excerpting from Yin Zhibo & Qiao Yang, Infringement of Copyrights is Startling, RENMIN RIBAO (Beijing, China), Sept. 27, 1994, at 5) [hereinafter "Startling" Level]; see also Brian Barron, Chinese Patent Legislation in Cultural and Historical Perspective, 6 INTELL. PROP. J. 313, 330 (1991) (noting that "[t]he concept of individuals holding exclusive rights in an article of intellectual property . . . [is] troublesome for a society with a traditionally low tolerance for rapacious profit-seeking and a long political tradition favouring state control over individual enterprise").

\textsuperscript{50} See William P. Alford, Don't Stop Thinking About . . . Yesterday: Why There Was No Indigenous Counterpart to Intellectual Property Law in Imperial China, 7 J. CHINESE L. 3, 18-34 (1993) (discussing the traditional Chinese veneration of the past and the need of leaders and authors alike to legitimate their authority by copying what has gone before them).

\textsuperscript{51} Yonay, supra note 1, at 538.
nation's legal system. During the period between 1957 and 1965, a budding, formalized, and independent judiciary was made subservient to the Communist Party and many Chinese lawyers and other members of the judiciary were purged.

As recently as the Cultural Revolution, the Communist Party regarded the PRC legal system with mistrust, apprehension, and outright violence, resulting in considerable atrophy of legal structures. From 1966 to 1976, the legal profession was "effectively decimated" and many of its members were executed or received long-term sentences in labor camps.

The death of Chairman Mao Zedong in 1976 halted this process of destruction. Since then, the adoption of a new Chinese constitution in 1977 has re-established and substantially overhauled the Chinese judicial system. Still, the PRC's present legal system has been described as "a complex mix of socialist ideology, ancient practices, traditional values, and modern

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52 Traditionally, there have been two divergent conceptions of Chinese adjudication: a view favoring a legalist position on Chinese legal structures and one which is influenced by the ever-present Confucianism within Chinese society. See THOMAS CHIU ET AL., LEGAL SYSTEMS OF THE PRC 1-2 (1991). The legalist position is aligned with Western notions of adjudication. See id. at 2. It fosters a general respect for laws and their equal applicability to all people. See id. at 2. To the present day, Confucian notions of social hierarchy, and the natural progression of human relationships, permeate the Chinese culture, and are at odds with a uniform legal system. See id. at 1. The Confucian concept of "li," which delineates the correct performance of religious and social rituals according to social prominence is difficult to reconcile with Western legal notions. See id. at 2. "[A]ge, patriarchy, and status" determine authority, respect, and order. Id. at 1. Legal formalism, or "fa," is regarded by the Chinese as at odds with such beliefs. See id. at 1-3.

The Chinese legal system was fashioned specifically to support the "natural" Confucian authoritative structure. See id. at 1. In contrast, within the past 200 years, whether due to social realities or an increasing exposure to the West, Chinese legal organs very slowly began taking on a more Western flavor. See id. at 3.

53 There were nearly 2,500 full-time lawyers during this period. See id. at 31.

54 See id. This newly formed judiciary was established by the First Constitution of the PRC and the Organic Laws of the People's Court and People's Procuratorate in 1954. See id. at 30-31.


56 CHIU ET AL., supra note 52, at 31.

57 See FOUR MODERNIZATIONS, supra note 12, at 1.

58 See id. at 3.
legal principles."  


An ideal behind the PRC Constitution was a return to the legal reform initially undertaken before 1957, whereby the PRC government would allow the Chinese judiciary to assume its place as the chief adjudicatory apparatus in the PRC. Today, this is more or less a reality.

Chinese judicial bodies now consist of Public Security Organs, People's Procuratorates, and People's Courts. Article 123 of the PRC Constitution declares that "the [P]eople's [C]ourts in the [PRC] are the judicial organs of the state," consequently, they exercise the bulk of the PRC's judicial powers. Article 124 of the PRC Constitution establishes "the Supreme People's Court and the local [P]eople's [C]ourts at different levels, military courts[,] and other special [P]eople's [C]ourts." The People's Courts have broad responsibility for adjudicating

59 Opportunities for Foreign Investors, supra note 44, at 42.
60 See ZHONGHUA RENMIN GONGHEGUO XIANFA art. 123-35 (P.R.C.) [hereinafter XIANFA], translated in ZHENG CHENGSI, CHINESE INTELLECTUAL PROPERTY AND TECHNOLOGY TRANSFER LAW app. 1 at 209, 235 (1987) [hereinafter TECHNOLOGY TRANSFER LAW].

61 See TECHNOLOGY TRANSFER LAW, supra note 60, at 2. The vast majority of criminal cases, those not handled by the People's Procuratorates, such as corruption cases or those infractions which are beyond the jurisdiction of the People's Courts, are the responsibility of the Public Security Bureau ("PSB"), which both investigates and determines initial criminal liability. See CHIU ET AL., supra note 52, at 93. These bodies exist at all levels of Chinese government. See id. Other PRC bodies that share policing functions with the PSB are the State Security Bureau, which handles all cases dealing with foreign espionage, and the People's Liberation Army. See id. at 97-99. The People's Procuratorates are responsible for pursuing all public criminal prosecutions. See id. at 78. The People's Procuratorates' power emanates from Article 129 of the PRC Constitution. See XIANFA, supra note 60, art. 129. They have similar independence and are subject to substantially equivalent restrictions as the People's Courts. See CHIU ET AL., supra note 52, at 78.
62 XIANFA, supra note 60, art. 123.

63 See CHIU ET AL., supra note 52, at 67. The People's Courts are nevertheless accountable to the NPC and its Standing Committee, the PRC's chief legislative body, and any other additional bodies of state power which may create any of the lower courts. See XIANFA, supra note 60, art. 128. Additionally, the NPC and its Standing Committee, and not the courts, decide the proper final interpretations of statutes and the PRC Constitution. See COPYRIGHT LAW IN CHINA, supra note 28, at 6.
64 XIANFA, supra note 60, art. 124.
four distinct types of issues: (1) criminal matters pursuant to the Criminal Law of the PRC, (2) civil matters pursuant to the Civil Law of the PRC, (3) economic matters, and (4) administrative matters. Additionally, the People's Courts are demarcated into four separate hierarchical levels. The first level is the Basic People's Courts, which operate at the county level in Chinese provinces, in Chinese autonomous regions, in Chinese cities without districts, and at the district level in Beijing, Tianjing, and Shanghai. The Basic People's Courts function as lower courts of original jurisdiction only. Second, there are Intermediate People's Courts that function at the level of prefectures and municipalities in Chinese provinces, the autonomous region level, the regional level, and at the district level in Beijing, Tianjing, and Shanghai. These Intermediate People's Courts operate as courts of both original and appellate jurisdiction.

65 See CHIU ET AL., supra note 52, at 68-70. All People's Courts also are required officially to set up judicial committees to "sum up the evidence at the trial, to discuss earlier cases which are of relevance or give rise to difficulty[,] and to make a decision in the dispute before it." TECHNOLOGY TRANSFER LAW, supra note 60, at 4.

66 See TECHNOLOGY TRANSFER LAW, supra note 60, at 2. As of 1991, there were over 2,700 of these Basic People's Courts throughout the PRC which have the jurisdiction over civil and criminal cases in the first instance, unless excluded by statute or preempted by one of the higher courts. See CHIU ET AL., supra note 52, at 71. The cases they hear are usually of minor significance, mainly due to higher courts' discretion to assert original jurisdiction over cases involving issues of a greater magnitude or covering a larger geographic scope (i.e. province-wide or national disputes). See id.

In addition, these Basic People's Courts may set up a limited number of "people's tribunals," which are collegiate panels not authoritatively distinct from the court that establishes them and whose decisions are reported as that of a Basic People's Court. See id. There are in excess of 10,000 of these adjudicatory bodies in existence, whose purpose is to hear especially minor civil, economic, or criminal matters. See id.

67 See CHIU ET AL., supra note 52, at 71.

68 See TECHNOLOGY TRANSFER LAW, supra note 60, at 2.

69 See CHIU ET AL., supra note 52, at 72. There are over 300 such Intermediate People's Courts in the PRC that also have original jurisdiction over criminal, civil, and economic matters, and unlike the Basic People's Courts, they may impose the maximum penalties of life imprisonment or death. See id. These Intermediate People's Courts also may hear appellate matters, but a party is allowed only one appeal, which becomes a final and binding decision. See Donald C. Clarke, Dispute Resolution in China, 5 J. CHINESE L. 245, 253 (1991). Also, People's Procuratorates that are not satisfied with the findings of Basic People's Courts may appeal the decisions of such courts. See CHIU ET AL., supra note 52, at 72.
twenty-nine Higher People’s Courts at the provincial level and in Beijing, Tianjing, and Shanghai. The Higher People’s Courts have original jurisdiction over the most pressing matters within a province, autonomous region, or municipality. They also may hear appeals taken from the Intermediate People’s Courts. Finally, the pinnacle of judicial authority in the PRC is the Supreme People’s Court, which sits in Beijing. The Supreme People’s Court may hear cases of first impression which are of national dimension, such as when criminal charges are instituted against very senior government officials. The court also has an appellate function whereby it reviews the decisions of both the Higher People’s Courts and the Special People’s Courts.

In addition to the four levels of regular People’s Courts, which customarily have general jurisdiction, there are Special People’s Courts which have authority over issues affecting the military, railway transportation, forestry, and maritime law. Since 1980, for example, the Chinese government has created over 2,000 Economic Courts in order to pursue economic reforms and attract foreign capital. They may hear both foreign and domestic civil

Unlike in the United States, however, judicial review is not limited to appeals. A legislative body may order a review of any decision and can require a retrial. See id. at 72. This procedure is used purportedly to “identify and correct mistakes of law as well as any fundamental injustices that may have transpired.” Id.

70 See TECHNOLOGY TRANSFER LAW, supra note 60, at 2.
71 See CHIU ET AL., supra note 52, at 72.
72 See id. at 72-73. As with the Intermediate People’s Courts, original jurisdiction resides with the discretion of the Higher People’s Courts. See Clarke, supra note 69, at 253. Additionally, these Higher People’s Courts may hear applications for review from the People’s Procuratorates. See CHIU ET AL., supra note 52, at 72-73. They are responsible for automatically reviewing death penalty cases, whereby a report is given to the Supreme People’s Court for a final ruling, unless authority to do so themselves has been delegated. See id. at 73.

73 See TECHNOLOGY TRANSFER LAW, supra note 60, at 2.
74 See CHIU ET AL., supra note 52, at 74.
75 See id. Other powers of the Supreme People’s Court include: (1) supervising and administrating justice within the PRC; (2) approving death penalty convictions; (3) interpreting of laws and statutes; (4) hearing protests from the Supreme People's Procuratorate; (5) re-trying, or ordering a lower court to re-try, a case in which it has found a legal mistake occurred, even if the holding has already gone into effect; and (6) submitting bills to the NPC or its Standing Committee. See id. at 73-74.

76 See TECHNOLOGY TRANSFER LAW, supra note 60, at 3.
77 See CHIU ET AL., supra note 52, at 73.
matters implicating economic disputes.\textsuperscript{78}

Parties with copyright infringement disputes increasingly are turning to litigation in the People’s Courts to settle their differences. As the next section demonstrates, this process began in April 1985, when the Higher People’s Court in Jiangsu Province ruled on the first “copyright infringement” case, more than six years prior to the implementation of the Copyright Law.\textsuperscript{79}

4. THE PAST, PRESENT, AND FUTURE OF COPYRIGHT LITIGATION IN THE PRC

4.1. Copyright Disputes Prior to the Implementation of the PRC’s Copyright Law

4.1.1. The Jiang v. Qiao and the Film Hospital Ward No. 16' Case

In 1985, even in the absence of a copyright statute, the Supreme People’s Court recognized that certain rights and duties of ownership inured to “creators” of literary or artistic works.\textsuperscript{80} In an incipient Chinese “copyright” case, Jiang v. Qiao and the Film Hospital Ward No. 16', the defendant, Qiao, an author employed by the Cultural Office of Nanjing City, Jiangsu Province, wrote a novel which she subsequently drafted into a screenplay under a contractual relationship with the Shanghai Film Studio.\textsuperscript{81} Qiao mailed all her background material for the novel, along with her first draft of the screenplay, to the plaintiff, Jiang, who was employed by the Shanghai Film Studio, and then

\textsuperscript{78} See id.

\textsuperscript{79} See COPYRIGHT LAW IN CHINA, supra note 28, at 35-40; Zheng Chengsi & Michael D. Pendleton, \textit{China’s First Court Decision on Copyright: Jiang v. Qiao and the Film ‘Hospital Ward No. 16’,} 12 EUR. INTELL. PROP. REV. 217, 217 (1990) [hereinafter \textit{First Court Decision}].

\textsuperscript{80} See First Court Decision, supra note 79, at 217 n.5. Such “creators” were employed as authors by local government departments in charge of cultural affairs. See id. They customarily had rights similar to copyright in the works they produced, excluding documents and the like produced for the government. See id. The rights of these “creators” are superseded by the PRC’s Copyright Law. See id. at 217.

\textsuperscript{81} See id. at 217.
had little contact with him for over one and one-half years.\textsuperscript{82} Desiring her screenplay to be filmed, Qiao then entered into another contractual relationship with the Changchun Film Studio to produce the film and thus gave the Changchun Studio a copy of her screenplay.\textsuperscript{83} A critically acclaimed and profitable film ensued.\textsuperscript{84} Jiang later heard of the agreement between Qiao and the Changchun Studio and instituted a suit in a Basic People’s Court claiming that he should be named as coauthor of the script.\textsuperscript{85} Jiang alleged that five minutes of the film was based on revisions he had made to Qiao’s screenplay.\textsuperscript{86}

The significance of this issue was deemed great enough for the case to be transferred from the Basic People’s Court to the Higher People’s Court of Jiangsu Province.\textsuperscript{87} In April 1985, the Higher People’s Court decided, after conducting a mediation, that the two parties were “joint adapters” and should share copyright jointly.\textsuperscript{88}

The Jiang decision is generally thought to have been a bad one and a clear indication that Chinese copyright protection was inadequate.\textsuperscript{89} The Jiang case made it evident that the drafters of the new Copyright Law needed to take a close look at the myriad of copyright protection problems, including, but not limited to, satisfactory legal definitions of “joint authorship” and “joint adaptation,” and the basic lack of legal guidance for PRC judg-

\textsuperscript{82} See id. Qiao and Jiang did engage in some preliminary editing to Qiao’s novel. See id.
\textsuperscript{83} See id. at 218.
\textsuperscript{84} See id.
\textsuperscript{85} See id. at 217-18.
\textsuperscript{86} See id. at 218.
\textsuperscript{87} See id. Article 34 of the Chinese Civil Litigation Code (“Civil Code”) provides that “[w]hen a lower People’s Court considers that the trial of a civil case at first instance under its jurisdiction should be tried by a higher People’s Court, it may transfer it to that higher [People’s] Court.” COPYRIGHT LAW IN CHINA, supra note 28, at 38. Additionally, Article 18 of the Civil Code provides that “[t]he higher People’s Court has jurisdiction over the trial of civil cases at first instance that have important influence in the region under their jurisdiction.” Id.
\textsuperscript{88} First Court Decision, supra note 79, at 218.
\textsuperscript{89} See id. at 218-19.
es. Additionally, the Jiang decision clearly went against the facts of the case and is not considered a successful mediation. The only parties bound by the court-sanctioned mediation order were Jiang and Qiao. The Changchun Film Studio, a semi-state run company, was free to continue its "infringement" and in fact ignored the outcome of the mediation. This quandry further underscored the need for coherent copyright laws and emphasized the limitations of copyright litigation without coherent copyright laws or implementing regulations.

After the problematic Jiang decision, an increasing number of copyright-like lawsuits were initiated after the enactment of the Chinese General Principles of Civil Law in 1986 ("Civil Law"). The Civil Law provides in Article 94 that "[c]itizens and legal entities enjoy authors' rights . . .; they have, in accordance with the law, the rights to claim authorship, to disclose or publish . . ., and to receive remuneration . . ." A substantial number of lawsuits were brought under this authority during the period between 1988 and 1989.98

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90 See id. Article 13 of the Copyright Law successfully addresses this issue by providing that "[w]here a work is created jointly by two or more coauthors, the copyright in the work shall be enjoyed jointly by those coauthors. Coauthorship may not be claimed by anyone who has not participated in the creation of the work." Copyright Law, supra note 17, art. 13 (emphasis added).
91 See First Court Decision, supra note 79, at 218. The defendant, Qiao, went on to write numerous screenplays which became successful films, while Jiang never published any literary work on his own. See id. at 218-19.
92 See id. at 219.
93 See id. at 218 n.6.
94 See id. at 219.
95 See id.
96 See COPYRIGHT LAW IN CHINA, supra note 28, at 40.
97 Id. at 40 n.58.
98 See id. at 40. An example of such a suit is the case of Xing v. Heh, concerning the drama "Restaurant No. 1," which was decided by the Copyright Office of the Beijing Cultural Bureau in 1989. See id. at 40-46. At that time, Article 39 of the PRC's Trademark Law and Article 60 of the PRC's Patent Law both allowed a complaining party to go either to an administrative authority or directly to a People's Court for a settlement. See id. at 42 n.60. Apparently, the same option existed by analogy for copyright-like infringements. See id.
4.1.2. The Gao Cheng De v. UBTV Case

Another early case, Gao Cheng De v. UBTV, which was decided by the Intermediate People’s Court of Zhejiang Province,99 further highlighted the ineffectiveness of pre-Copyright Law copyright protection.100 The plaintiff was a professor at Beijing University who gave lectures via radio to correspondence students of the State University of Broadcasting and Television.101 The defendant, the Provincial University of Broadcast and TV of Zhejian Province (“UBTV”), received copies of the plaintiff’s lectures and reproduced them for use by the defendant’s correspondence students without the plaintiff’s permission and without crediting him.102 The plaintiff, before the defendant copied the lectures, turned the substance of his lectures into a book, which was published and sold at approximately the same time the defendant began releasing the audio tapes.103

The plaintiff sued UBTV requesting a cease and desist order, a public apology, and damages.104 The Zhejiang Intermediate People’s Court held that the defendant’s actions constituted “fair dealing,” and thus no copyright infringement occurred.105 Furthermore, the court stated that even if it had found infringement, it could not be classified as copyright infringement because China had no law bestowing copyright protection on sound recordings, and thus the court could not grant relief.106 As a result, the Intermediate People’s Court rejected the plaintiff’s action, noting that the court considered adequate the defendant’s original compensatory offer to the plaintiff consisting of a private apology and substantially lower damages than initially requested by the plaintiff.107

99 See id. at 47.
100 See id. at 46-49. The case was couched in terms similar to those of a “fair use” question pursuant to the U.S. copyright law under 17 U.S.C. § 107 (West 1993). See, e.g., Campbell v. Acuff-Rose Music, Inc., 114 S.Ct. 1164 (1994) (detailing the current state of U.S. caselaw on the question of “fair use”).
101 See COPYRIGHT LAW IN CHINA, supra note 28, at 46-47.
102 See id.
103 See id. at 47.
104 See id.
105 See id.
106 See id.
107 See id. at 47-48.
This case further highlighted the problems surrounding the use of the Chinese judiciary to cure copyright infringements and further exemplified China’s need for a copyright law to deal with disputes over copyrightable intellectual property. The decision eventually spurred the Supreme People’s Court and the Chinese Copyright Office to start organizing intellectual property training courses for both the staff of the PRC copyright administration and People’s Court judges.¹⁰⁸

4.2. The Logistics of Bringing a Copyright Suit Pursuant to the 1991 Copyright Law

Article 46 of the Copyright Law states that

[a]nyone who commits any [number of specified] acts of infringement shall bear civil liability for such remedies as ceasing the infringing act, eliminating the effects of the act, making a public apology[,] or paying compensation for damages, . . . and may, in addition, be subjected by a copyright administration department to such administrative penalties as confiscation of unlawful income from the act or imposition of a fine.¹⁰⁹

¹⁰⁸ See id. at 48-49. Many copyright cases decided between the first People’s Court decision on copyright in Jiang and the passing of the Copyright Law in 1990 had a substantial effect on the drafting of the Law. See id. at 60-64 (listing and briefly discussing the relevance of numerous copyright decisions prior to 1990). The bulk of these cases do not depart from the problematic pre-Copyright Law court decisions as typified by the Jiang and Gao Cheng De cases. Thus, these older cases need not be analyzed within the context of this Comment.

¹⁰⁹ Copyright Law, supra note 17, art. 46. Article 46 imposes civil liability for the following acts:

(1) plagiarizing a work created by another; (2) reproducing and distributing a work for commercial purposes without the consent of the copyright owner; (3) publishing a book where the exclusive right of publication belongs to another; (4) reproducing and publishing a sound recording or video recording of a performance without the consent of the performer; (5) reproducing and distributing a sound recording or video recording produced by another, without the consent of the producer; (6) reproducing and distributing a radio or television program produced by a radio station or television station without . . . consent . . . ; [or] (7) producing or selling a work of fine art where the signature of an artist is counterfeited.

Id. Similar liability is imposed for various infractions under the Software
Moreover, the Second Session of the Standing Committee of the Eighth NPC enacted the "Decision of the NPC Standing Committee on Punishing Crimes of Producing and Selling Fake Commodities," which added measures to the PRC Criminal Law to punish pirates of protected intellectual property.\(^\text{110}\)

In order to determine liability, the Copyright Law allows any citizen, legal person, or organization to institute proceedings in a People's Court "if mediation is unsuccessful, . . . if one of the parties fails to carry out an agreement reached by mediation,"\(^\text{111}\) "if a people's court refuses to enforce an arbitration award,"\(^\text{112}\) if a party objects to an administrative penalty,\(^\text{113}\) or directly, if the party so chooses.\(^\text{114}\)

The People's Courts preside over public hearings in accordance with Chinese substantive and procedural law.\(^\text{115}\) In many ways,
Chinese trials are conducted in a style familiar to Western litigators. There is equality of all citizens before the law, a basic right to a defense, a requirement that the plaintiff file a bill of complaint detailing the claim (this may be done orally in simple cases), and a mechanism whereby the parties may argue their cases, but only after the court first has the opportunity to adequately question the parties and their witnesses.

There are, however, significant differences from Western-style trials. Trials are quick relative to Western standards because pretrial discovery is unavailable to the parties. In addition, PRC judicial decisions “do not enjoy stare decisis status.” Thus, at present, there are no clear judicial standards with respect to intellectual property issues.

A People’s Court is responsible for hearing and executing its own decisions. Accordingly, the increasing amount of intellectual property litigation strained the existing court system due to its unfamiliarity with the Copyright Law and its underlying purposes. To alleviate this problem, the PRC developed new Intellectual Property Courts in 1993.

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the PRC Civil Procedure Law and the PRC Criminal Procedure Law. See CHIU ET AL., supra note 52, at 87-89.

Each People’s Court is made up of a president, who is elected by the corresponding People’s Congress (which has authority over the People’s Courts within its power), and a vice-president and judicial officers, who are appointed by the standing committee of the People’s Congress. See CHIU ET AL., supra note 52, at 75. The electing bodies also have the power to dismiss the People’s Court members, and they hold office until they retire or are dismissed. See id.

Legal training is not a requirement for any court position, and a test required for promotion does not test only legal knowledge; rather, each officer is required to have a broad knowledge of Marxist ideology. See id.


See id. at 95.

CHIU ET AL., supra note 52, at 87-88.

See id.

See id.


See id.

See CHIU ET AL., supra note 52, at 88-89. A court decision may be appealed to a higher People’s Court if brought either 15 days from a judgment or 10 days from a ruling. See id.
4.3. The New Intellectual Property Courts

China's specialized Intellectual Property Courts were first established in Beijing at both the Intermediate and Higher People's Court levels on August 5, 1993. They are designed to handle a wide range of topics, such as patents, trademarks, copyright, inventions, and contracts related to intellectual property matters. In 1994, the Higher People's Courts in four other provinces and municipalities established Intellectual Property Courts as well. The Intermediate People's Courts in all of China's specialized economic zones and in Shanghai also have established these new Intellectual Property Courts. The Intermediate People's Courts in municipalities, in autonomous regions, and in the capital cities of other Chinese provinces, have set up collegial panels which are designated to hear intellectual property cases. The President of the Supreme People's Court,

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124 These courts are also referred to as Intellectual Property Tribunals or Divisions, as well as Intellectual Property Rights Courts. For consistency, the term Intellectual Property Courts will be employed throughout this Comment. Additionally, since all levels of Chinese People's Courts can hear cases in the first instance, see Zhurun & Jun, supra note 115, at 31, references to the different levels of People's Courts have been eliminated in some discussions.


126 See State Forms, supra note 125, at 30. Even before the establishment of the Intellectual Property Courts, various levels of courts in Beijing heard 727 intellectual property cases between 1985 and August 1993, of which 638 were settled. See id.

127 These other Intellectual Property Courts are located in Shanghai Municipality, Guangdong Province, Fujian Province and Hainan Province. See Bu Yuntong, Hainan Sets Up Intellectual Property Court, XINHUA, Jan. 19, 1994, microformed on FBIS-CHI-94-021, at 54 (Foreign Broadcast Info. Serv.); Guangdong Sets Up 'Intellectual Property Court', XINHUA, Jan. 20, 1994, microformed on FBIS-CHI-94-018, at 71 (Foreign Broadcast Info. Serv.) (noting that Guangdong was the first province opened to market forces and is the most commercially active province); Zhurun & Jun, supra note 115, at 31.

128 See White Paper, supra note 37.

129 See id. These collegial panels, which are designated to ease the burden of People's Courts, are closely tied to the People's Court which created them and their power is derived directly from such People's Court.
Ren Jianxin, recently announced that the Supreme People's Court will set up its own Intellectual Property Court.\textsuperscript{130}

Before the creation of Intellectual Property Courts, litigation of intellectual property disputes occurred in either the Civil Divisions or the Economic Divisions of the People's Courts.\textsuperscript{131} The new Intellectual Property Courts generally are conducted as tribunals and follow a similar procedure to their Civil Division and Economic Division counterparts.\textsuperscript{132} There are, however, some noteworthy differences. Claims do not have to be presented to an Intellectual Property Court in any special form for copyright cases,\textsuperscript{133} but a plaintiff must pay for court costs up front, usually between 0.5-3.0\% of the plaintiff's total claim.\textsuperscript{134} In addition, all plaintiffs filing lawsuits in the Intellectual Property Courts must file a "consularized Power of Attorney" upon commencement of the proceedings.\textsuperscript{135} This requirement is contrary to the general PRC procedure, which allows courts to

\textsuperscript{130} See Intellectual Property: China to Establish Court to Enforce IPR Protections, [July-Dec.] Daily Rep. for Executives (BNA), at A223 (Nov. 20, 1995) [hereinafter China to Establish Court].

\textsuperscript{131} See Zhurun & Jun, supra note 115, at 31. As mentioned earlier, many intellectual property disputes were heard before the new Intellectual Property Courts came into existence. See discussion supra section 4.1. From 1986 through the end of June 1994, various Chinese courts tried 4,120 intellectual property cases, including 1,329 copyright infringement cases. See China to Protect Market Economy by Law, XINHUA, Oct. 25, 1994, available in LEXIS, Asiapc Library, Allasi File.

\textsuperscript{132} See A Beijing Court Hears a Software Case: Testing Protection, BUS. CHINA, July 25, 1994, at 5 [hereinafter Software Case].

\textsuperscript{133} See id. at 6. In the Broad Mind Computer Co. case, discussed in section 4.4.2 of this Comment, the Chief Judge, Su Chi, briefed both parties and outlined the rights and rules of the court. See id. Each side read their statement of the claim or statement of defense, but the hearing had no formal debate or question and rebuttal procedure. See id. Queries were posed by the judges and the parties' representatives had an opportunity to answer. See id. Also, Su used an evidence exchange procedure that he learned while studying intellectual property law in Germany as there is no formal discovery in the PRC. See id. Su mandated that the defendant had 14 days to respond to the plaintiff's claim, then plaintiff had 14 days to reply, and so on until the court was satisfied. See id. This procedure was supposed to save time over formal discovery, but its efficiency is questionable.

\textsuperscript{134} See id.

begin proceedings while a request for a consularized Power of Attorney is pending. As a result of the PRC’s Copyright Law and China’s accession to various international conventions, both Chinese nationals and foreign enterprises have tested the waters of these tribunals to determine if the PRC’s enforcement of its laws is as zealous as the scope of Chinese copyright legislation.

4.4. Recent Disputes Adjudicated Before the Intellectual Property Courts

4.4.1. Domestic Copyright Infringement Case — The China Golden Dawn Dispute

The first computer software copyright infringement case heard by the Beijing Intellectual Property Court was China Golden Dawn Safety Technology Co. v. Beijing Shijingshan Dist. Zhiye Elec. Ltd., reported on January 4, 1994. In that case, the plaintiff developed, produced, and sold software for which it had a valid copyright. The plaintiff caught the defendant “red handed” when the plaintiff, accompanied by a PRC official, purchased software from one of defendant’s employees after the employee copied the software right in front of the plaintiff and the official.

In light of such strong evidence, the Beijing Intellectual Property Court, pursuant to Article 30 of the Software Regulations, immediately ordered the defendant and all involved third parties to cease pirating plaintiff’s software, awarded Rmb100,000 for economic loss, loss to reputation, court costs, and legal fees, and awarded an additional Rmb50,000 for any costs incurred in correcting the effects of defendant’s activities.

This case clearly demonstrates the court’s willingness to

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136 See id.
137 See Case Digest: Local Software Developer Wins Rmb150,000 Award for Infringement, CHINA L. & PRAC., Apr. 11, 1994, at 19 [hereinafter Case Digest].
138 See id.
139 Article 30 of the Software Regulations prohibits both “copy[ing], or copy[ing] in part, a piece of software without the consent of the copyright owner of the software” and “distribut[ing] . . . a copy of a piece of software without the consent of the copyright owner of the software.” Software Regulations, supra note 26, arts. 30(6) & (7).
uphold a domestic PRC copyright when the evidence is strongly against the defendant. On the other hand, recent disputes brought by foreign companies pursuant to the Berne Convention or a bilateral copyright treaty apparently have encountered more resistance.

4.4.2. The First Foreign Copyright Infringement Case — The Broad Mind Computer Co. Dispute

The first foreign case brought in Beijing's Intellectual Property Court after the PRC's accession to the Berne Convention was instituted by Hong Kong's Broad Mind Computer Co. ("BMC") against Beijing's Hai Wei Electronic Engineering Co. ("Hai Wei"). BMC suspected Hai Wei's infringement of BMC's copyright as early as 1989, but did not bring suit until 1993 because of the PRC's lack of software protection regulations.

BMC filed a claim equivalent to US$800,000 in September 1993, and the court began hearings on March 4, 1994. Initially, Hai Wei argued that the two-year statute of limitations on BMC's claim had run, rendering BMC's claim inval-

141 This does not mean that domestic PRC companies do not have difficulties. China's top software company, SunTendy, went to court to protect its software from piracy, but complained that "there [was] a long queue and the process [was] very slow, so we [tried] another channel by cooperating with the local commerce bureau." China Computer Firm Seeks Piracy Compensation, REUTER EUR. BUS. REP., Nov. 11, 1994, available in LEXIS, News Library, Curnws File. After filing suit in October 1993, SunTendy was forced to wait until June 1995 before the Beijing Intermediate People's Court ruled in its favor. See Jeffrey Parker, China Software Firm Eyes Precedent in Piracy Case, REUTER ASIA-PAC. BUS. REP., June 21, 1995, available in LEXIS, News Library, Curnws File. This lengthy court process, however, may indicate that factors other than guilt, such as political implications, affect copyright litigation in China.

142 These disputes must be brought under the Berne Convention or a bilateral agreement because, as noted earlier, the Chinese Copyright Law protects only foreign works first published in China and domestic copyrights; most foreign works do not fall under either category. See discussion supra section 2.

143 See Carol P. Lai, Hong Kong Firm Files Suit in Software Copyright Case, E. EXPRESS, Mar. 1, 1994, at 8, microformed on FBIS-CHI-94-042, at 69-70 (Foreign Broadcast Info. Serv.).

144 See id. at 70.

145 See Software Case, supra note 132, at 5. BMC was required to advance 1% of its claim, or approximately US$8,000, to cover court costs. See id. at 6.
BMC responded that the Copyright Law was not effective until October 1991, thus precluding any lawsuit until after the Copyright Law became effective. BMC alternatively argued that even if the limitations period began running in 1988, Hai Wei continued infringing on the copyright until well within the two-year limit. The Beijing court found for BMC on these claims and allowed the lawsuit to proceed.

Hai Wei further contended that BMC did not have sufficient evidence to prove ownership because BMC was required to show actual infringement. BMC attempted to do so by showing catalogs, invoices, and research and development notes from as far back as 1986. In addition, BMC demonstrated that Hai Wei's software had the same bugs and defects as its own, which they contended could not have happened unless Hai Wei copied exactly BMC's work.

The Beijing Intellectual Property Court was not convinced by BMC's argument and asked for Hai Wei's "source codes" within fourteen days, which Hai Wei supplied. Four months passed without a ruling before the Beijing court indicated that BMC would be required to supply even more information at a later date. During this period, however, Hai Wei was allowed to continue its pirating activities and reap its purportedly illegal profits.

Obviously, BMC had a myriad of complaints with the Chinese judicial system. First, BMC concluded that the judges had only a limited knowledge of general intellectual property matters.

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146 See id. at 5. 
147 See id. 
148 See id. 
149 See id. 
150 See id. 
151 See id. 
152 See id. 
153 See id. 
154 See id. It is uncertain whether there were any further developments in this case subsequent to July 25, 1994. 
155 See id. at 6. In order for BMC to get the Intellectual Property Court to freeze the defendant's activities, BMC would have been required to post a bond in an amount equivalent to its total claim. See id. This bond could have been very costly, especially if BMC lost. See id. 
156 See id. BMC felt that an inordinate amount of time was spent educating the judges on the issues. See id. The judges previously sat on a regular
Second, three officials from the Beijing Office of Computer Software Registration were present only in an “informal capacity.” These officials, who were apparently experts on the Chinese Copyright Law and were thus capable of providing the judges with valuable insights, were underutilized by the Intellectual Property Court. This occurred, in part, because there was no formal procedure by which to include them. Finally, BMC believed that the Beijing court was severely understaffed. BMC conceded, however, that “[t]he judges and court officials were earnest in their efforts to be objective and did not demonstrably [favor] the Chinese defendant.”

This case illustrates that some foreigners are uncomfortable and unimpressed with the current Intellectual Property Court system. BMC, although providing clear evidence of infringement, was unable to get any judicial relief. On the other hand, while the BMC lawsuit highlights some fundamental problems concerning the new Intellectual Property Courts, the copyright protection framework is still young. Furthermore, not everyone has...

Intermediate People’s Court and apparently were assigned randomly to the Intellectual Property Court. See id.

See id.
See id.
See id.

There were only three judges assigned to the Intellectual Property Court at that time. See id. There appears to have been a nationwide problem of understaffing in the Intellectual Property Courts. One newspaper article mentions that, as of February 1994, the Intellectual Property Courts only employed a total of 100 people. See Mark Evans, Copyright Violators at Odds with GATT, S. CHINA MORNING POST, Feb. 25, 1994, at 22, available in LEXIS, Asiapc Library, Allasi File. In contrast, a later PRC publication reported that the Beijing court had 16 full-time workers, as of June 1994, including a computer software expert. See Beijing Copyright Court Accepts 40 Overseas Cases, XINHUA, June 29, 1994, available in LEXIS, Asiapc Library, Allasi File. Additionally, according to Chief Judge Su Chi, all Intellectual Property Court judges in Beijing have at least five years of general judicial experience and speak English. See id.

Software Case, supra note 132, at 6. One commentator has corroborated this assessment by noting that the Intellectual Property Court appeared “energized” and that the judges are trying to prove that the Intellectual Property Court is “not just a showpiece.” Mike Laris, In China, Challenging the Pirates: Software Companies Test New Laws, Courts, WASH. POST, Jan. 3, 1994, at F13, F16. This same commentator opined that the judges on the Beijing Intellectual Property Court are “among Beijing’s top authorities on intellectual property law,” a view which differs completely from BMC’s impressions. Id.
experienced as difficult a time as BMC did in obtaining relief.

4.4.3. The First Copyright Infringement Case Involving a U.S. Party — The Walt Disney Co. Dispute

More than forty cases involving intellectual property matters were brought by overseas parties and handled by the Beijing Intellectual Property Court between January and November 1994. In January 1994, the first copyright infringement case brought by a U.S. enterprise pursuant to the 1992 U.S.-Sino MOU was instituted by the Walt Disney Co. ("Disney") against the Beijing Youngsters and Children Publishing House ("Children Publishing"), the Beijing Publishing House, and the Beijing circulation department of Xinhua Bookshop. The defendants were, respectively, a book publisher, a book distributor, and a book retailer. Another Chinese publisher, Great World Publishing Co. ("Great World"), was brought into the suit as a third party defendant. The case was brought as a civil suit because criminal sanctions were unavailable before July 5, 1994.

Pursuant to Article 46 of the Copyright Law, Disney asked for the following remedies: an injunction, an accounting of profits, a public apology, and the equivalent of US$77,000 in damages. Disney claimed that the defendants were all involved in the illegal production and distribution of children's books using well-known Disney characters like Mickey Mouse and Goofy without Disney's

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162 See Mickey Mouse Victory in Intellectual Property Rights Cases, BBC Summary of World Broadcasts, Nov. 21, 1994, available in LEXIS, News Library, Curnws File. The cases concerned companies from Hong Kong, Macao, Taiwan, Europe, and the United States, and mostly involved copyright issues, with over 30 suits filed by the United States alone. See id.


165 See Walt Disney Wins, supra note 163, at 17.

166 See Gelston, supra note 164, at 5.

Disney itself does not manufacture goods in China; rather, it sells licenses to parties in the PRC so that they may make and sell Disney books, apparel, toys, and novelty items using the Disney name. The defendants claimed that they purchased such a license to sell Disney products and thus they did not infringe Disney's copyrights.\(^{169}\)

The Beijing court found that the titles published and distributed by the defendant were identical to a series produced legally under a license Disney had granted to a Hong Kong company, but that the license had expired in September 1990.\(^{170}\) On August 4, 1994, the Intellectual Property Court held both the publisher and the distributor liable for copyright infringement under the Copyright Law for pirating children's books that British Maxwell Communications Company, the Hong Kong licensee, had been publishing and selling legally up until 1990.\(^{171}\)

In May 1995, the Beijing Intellectual Property Court also found the retailer liable.\(^{172}\) The Beijing court awarded Disney approximately Rmb227,000, the equivalent of US$27,360, in damages to be paid as a lump sum by Beijing Publishing House.\(^{173}\) The court also found Great World partially responsible and ordered Great World to remit to Beijing Publishing House approximately Rmb90,800.\(^{174}\) Both Beijing Publishing House and Great World were directed to pay close to Rmb6,000 in court expenses and Rmb40,000 in other legal expenses.\(^{175}\) Additionally, the court ordered a public apology from all three

\(^{168}\) Disney obtained "evidence" by having some its employees purchase the incriminating children's books on open display in one of the defendant's stores. See Orenstein, supra note 164, at 2.

\(^{169}\) See id.

\(^{170}\) See Benjamin K. Lim, China Court Favours Disney in Key Copyright Suit, REUTER ASIA-PAC. BUS. REP., Aug. 4, 1994, available in LEXIS, Asiapc Library, Allasi File. Disney estimated that as many as 300,000 of the illegally pirated books were produced between 1991 and 1993. See Gelston, supra note 164, at 5.

\(^{171}\) See Lim, supra note 170.

\(^{172}\) See Mickey Offered an Apology, FIN. TIMES, May 19, 1995, at 4.

\(^{173}\) See Walt Disney Wins, supra note 163, at 17.

\(^{174}\) See id.

\(^{175}\) See id. The court imposed a fine of Rmb50,000 on the Beijing Publishing House and seized nearly Rmb16,500 in combined illegal profits from Xinhua Bookshop and Great World. See id.
defendants176 and also ordered all three defendants to stop their illegal publishing activities.177

Disney, however, was apparently more concerned with testing China's resolve for enforcing its intellectual property laws, thus creating a deterrent to future piracy,178 than with monetary relief.179 Claire Robinson, Disney's vice-president for intellectual property, stated, in reference to the lawsuit, that "[w]e're doing this to set a precedent. . . . If we lose, it will be grounds for further complaining. If we win, it will be precedent for further success."180

This decision is more promising than Disney's other forays in the Chinese judiciary. In 1993, Disney brought evidence of

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176 See Mickey Offered an Apology, supra note 172, at 4.

177 See Chinese Court Grants Disney Copyright Damages, AGENCE FRANCE PRESSE, May 18, 1995, available in LEXIS, News Library, Curnws File. Furthermore, the court ordered the seizure of "33,341 sets of the Disney collections and colour films of such collections from Beijing Publishing House." Walt Disney Wins, supra note 163, at 17.

178 Disney has about 70 boutique stalls in China's department stores, but distribution has been impeded by the extent of piracy in the PRC. See Bronwen Maddox, Chinese Pirates Fail to take Mickey Out of Disney, FIN. TIMES, Aug. 5, 1994, at 14. For example, a recent police raid on a Chinese factory uncovered pirated videodiscs of Disney's film "The Lion King" before Disney itself even had released it on videotape. See Jeffrey Parker, New Ally in War on Copyright Theft: China Victims, REUTERS ASIA-PAC. BUS. REP., Nov. 4, 1994, available in LEXIS, Asiapc Library, Allasi File.

179 See Orenstein, supra note 164, at 14. Many U.S. companies, however, are still skeptical about the effectiveness of favorable court rulings because of the difficulty of enforcement. For instance, Art Barron, Chairman of Time-Warner International, stated that "[t]his ruling should be good for everyone in the entertainment industry. The problem is who enforces it, but it's a good start." Maddox, supra note 178, at 14.

In a similar case, Microsoft Corp. sued for trademark infringement against State-run South China University after it pirated 650,000 copies of Microsoft's MS-DOS version 5, which the company claims cost it at least US$30 million. See Pamela Burdman, Chinese Pirates Hurt U.S. Firms; Music, Software Sectors Hit Hard, S.F. CHRON., May 19, 1994, at D1, D4; French J/V Wins in China's First Foreign Trademark Case, EXTEL EXAMINER, Feb. 3, 1994, available in LEXIS, News Library, Curnws File [hereinafter French J/V Wins]. In contrast, the perpetrators were only fined the equivalent of US$260, which was later increased to approximately US$5,000. See Burdman, supra, at D4. Supposedly, the infringers also were allowed to keep their molds and later evidence showed the counterfeiting continued. See id. Microsoft claims that it spent over a US$1 million in filing fees, legal costs, and other investigative costs. See id. They have filed an appeal in the Beijing Intellectual Property Court and are now asking for US$20 million in damages. See French J/V Wins, supra.

180 Orenstein, supra note 164, at 2.
trademark infringement to the PRC’s trademark agency.\(^{181}\) The Chinese government raided the pirates’ factories and confiscated various pirated goods.\(^{182}\) Disney spent over US$15,000 in legal costs, but has so far only received a US$91 fine for their efforts.\(^{183}\) Chinese officials only assessed fines for the goods they found on-site, not for any prior or future economic damages. Also, Chinese officials dissuaded Disney from appealing.\(^{184}\) At the time, Disney’s assistant general counsel, Peter Nolan, remarked that “the remedies we’re getting from the judicial system [are] pitiful.”\(^{185}\)

Despite its recent success, Disney — like Broad Mind Computer Co.— found that maneuvering through the PRC’s legal system can be an exercise in frustration.\(^{186}\) Claire Robinson commented that Disney was “charting unknown territory. . . . There has been sort of confusion at every step.”\(^{187}\) At a preliminary hearing, Disney’s Chinese lawyers apparently completely misunderstood the substance of Disney’s argument.\(^{188}\) Also, Disney claims that

\(^{181}\) See id.

\(^{182}\) See id.

\(^{183}\) See id.

\(^{184}\) See id.

\(^{185}\) Id.

\(^{186}\) Disney’s Hong Kong counsel could not try the case because foreign attorneys are not allowed to practice in Chinese courts, so the Hong Kong firm’s affiliate in the PRC chose local counsel. See id. This rule is still in place despite a loosening of restrictions on foreign lawyers which should double the number of foreign law firms in China in the next few years. See Wendy I. Zeldin, More Foreign Law Firms To Be Allowed in China, E. ASIAN EXECUTIVE REP., June 15, 1994, at 13-14. This technical encumbrance compounds the problems faced by foreign enterprises trying to sue Chinese copyright infringers because local Chinese lawyers are often ineffective counsel. Billy Robbins, of the Los Angeles law firm Robbins, Berliner & Carson, an adviser to China on intellectual property issues, has stated that in the PRC “[t]here [are] a lot of lawyers who are sorely undertrained. . . . Some would never qualify to . . . practice law in the United States.” Orenstein, supra note 164, at 2. This does not mean that until foreign lawyers can directly represent their clients litigations will necessarily fail. One attorney from the United States whose firm has had extensive experience dealing with Chinese courts feels slightly more confident about the possibility of winning in the Chinese courts. He remarked that “[e]ighty percent of all litigations so far have been successful, although we should have won all of them, since nobody brings a lawsuit in China without ironclad evidence.” Uli Schmetzer, China Taking the Wind Out of Copyright Pirates’ Sales, CHI. TRIB., Aug. 10, 1994, at 1, 14.

\(^{187}\) Orenstein, supra note 164, at 2.

\(^{188}\) See id.
they had to point out some of the available remedies under the Copyright Law to their Chinese counsel, who should have known the law themselves. 189

On the other hand, Disney’s achievement of the US$27,360 award against Beijing Publishing House may be an indication that the Chinese legal system is now more capable of correctly adjudicating and remedying copyright infringements. In actuality, this latter view is not satisfying because of the continued disapproval of Chinese copyright protection voiced by many U.S. and other Western governments and corporations.

4.4.4. Caveats Regarding Use of the People’s Courts to Enforce Copyrights

Portions of the largest copyright suit brought by U.S. companies in the PRC to date are still pending in Beijing’s Intellectual Property Court. Software makers Microsoft Corporation, Autodesk, Inc., and Lotus Development Corporation, part of the Business Software Alliance (“BSA”), a U.S. software industry trade group, have filed lawsuits against five Beijing companies for ten separate counts of alleged copyright infringement. 190 Recently, there have been some notable successes for the BSA. On October 12, 1995, for example, the Beijing Intellectual Property Court found Beijing Juren Computer Co. guilty of infringing the copyrights of BSA members Autodesk, Novell, and Microsoft. 191

Microsoft alone estimates its losses from blatant copyright

189 See id.
violations in the PRC to be in the billions of U.S. dollars.\textsuperscript{192} For instance, Microsoft representatives state that it sold 4,000 copies of its Windows application in China between October and December 1993, but for each legal copy sold, they contend that there were ten illegal copies produced.\textsuperscript{193} To acquire a version of Windows in one Beijing shop, all it took was twelve floppy diskettes and an additional Rmb10 (totaling about Rmb200), as opposed to the original price of Rmb980 for a legal copy.\textsuperscript{194} Thus, much more needs to be done to curb the actions of these Chinese copyright pirates.

Nevertheless, many U.S. companies continue to expand their business operations in the PRC. For example, Microsoft wishes to enter into more joint ventures with Chinese-owned enterprises and also would like to set up a wholly owned subsidiary to search for such possibilities.\textsuperscript{195} These new operations may increase the likelihood of copyright violations. In order to combat this eventuality, foreign companies can institute lawsuits in the Intellectual Property Courts. Foreign enterprises should keep in mind many of the fundamental difficulties associated with suing for copyright infringement in such courts.\textsuperscript{196}

\textsuperscript{192} See U.S. Software Makers, supra note 190. The U.S. Trade Office estimates that 94\% of all software in use in the PRC is pirated. See Donna K.H. Walters, Chinese Court for First Time Upholds U.S. Firm's Copyright, L.A. TIMES, Aug. 5, 1994, at D1, D5. Foreign software companies' losses from infringement in China are thought to be approximately US$255 million for 1992, while losses to U.S. software makers alone were over US$320 million in 1993. See Evans, supra note 160, at 22. To put these figures in perspective, however, one newspaper article estimates that U.S. firms lost somewhere between US$8.1-17 billion worldwide from all forms of intellectual property piracy in 1993. William Flannery, Piracy Overseas Threatens U.S. Firms Patent; Patent Violations, Counterfeiting of Products Contribute to Billions Lost, ST. LOUIS POST-DISPATCH, Apr. 4, 1994, at 5D [hereinafter Flannery, Piracy Overseas].

\textsuperscript{193} See Laris, supra note 161, at F13.

\textsuperscript{194} See "Startling" Level, supra note 49. Yet, Microsoft is still planning to sell its new Windows '95 application in the PRC, with help from China's Great Wall Electronics group. See Microsoft, China Cooperate on Windows 95, CHI. TRIB., Nov. 13, 1994, at 8. Ideally, they want to increase annual revenue from China to US$200 million within the next 2-3 years, but they admit it will probably not be possible unless piracy is contained. See id.


There are significant flaws in the Chinese legal system which might deter the expansion of foreign enterprises into China. First, Chinese damage awards have characteristically been small by Western standards. Even when People's Courts have awarded damages, collecting judgments can be very difficult. This inadequacy may be attributed to the exceptionally weak enforcement power of the People's Courts, including the Intellectual Property Courts. Penalties for declining to heed a Chinese court order are virtually nonexistent. Additionally, People's Courts have little power to compel other Chinese governmental bodies to enforce their orders and any such power, if it exists at all, is derived from the governmental status of individual judges, not the People's Courts themselves. Finally, participation by local Chinese authorities generally is needed to enforce People's Court orders, which they might be unwilling to offer if doing so would be detrimental to their authority, especially if the judgment comes from a jurisdiction outside the scope of such officials’

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197 See, e.g., Paul Blustein, U.S. Warns China to Step Up Efforts Against Piracy, WASH. POST, Nov. 30, 1995, at B13. The awards, however, have been increasing. The Beijing Intellectual Property Court ordered a Beijing company to pay a Taiwanese publisher Rmb270,000, approximately US$31,800, for copyright infringement. China Court Makes Record Copyright Award, REUTERS WORLD SERVICE, Sept. 16, 1994, available in LEXIS, News Library, Curnws File. The largest award to date, Rmb13 million, was awarded recently to a Chinese company for infringement of its computer software copyrights by a domestic competitor. See $1.5m Bill for Beijing Pirate, FIN. TIMES, Jan. 11, 1996, at 5. The People's Court also required the infringer to immediately stop production of the illegal software and ordered a public apology. See id. In another recent case, a Shanghai Intermediate People's Court ordered a compact disc pirate to pay over Rmb7 million to the Chinese record industry, and ordered that the infringer stop illegal production and publicly apologize. See CD Pirate Gets Jail Term and $7m Fine Over Counterfeits, S. CHINA MORNING POST, Jan. 8, 1996, at 4, available in LEXIS, Asiapc Library, Allasi File. One report argues that awards in the Rmb100,000 to Rmb200,000 range are significant for small and medium-sized Chinese enterprises to pay. See China - Govt Emphasizes Foreign Copyright Protection, NEWSBYTES NEWS NETWORK, Aug. 10, 1995, available in LEXIS, News Library, Curnws File.

198 See Clarke, supra note 69, at 263; see also Seth Faison, Pirates Show Their Colors; Chinese Firms Start to Defy Courts, INT'L HERALD TRIB., May 18, 1995, available in LEXIS, News Library, Curnws File (noting that "rapid economic growth and receding regulation are making Chinese companies less accountable and more difficult to prosecute" and that "[Chinese companies are] more afraid of their shareholders than they are of the court").

199 See Clarke, supra note 69, at 264.

200 See id. at 265.
Second, corruption is a significant problem in the PRC. Many Chinese infringers are protected by Chinese officials and, consequently, are beyond the Intellectual Property Courts' ability to prosecute. For instance, there are twenty-six major compact disc manufacturers in the PRC and they are all semiofficial State-owned companies, which decreases the possibility that they will be prosecuted. In effect, one branch of the government would be prosecuting another. Moreover, many of the PRC’s compact disc factories are joint ventures with Hong Kong or Taiwan firms who sought partners among the relatives of officials in the Communist Party. The Chinese Trade Minister has confided that at least one such factory is “untouchable” because of its owner’s ties with the Chinese military (the Trade Ministry is weak, especially compared to the PRC military).

Furthermore, local and national Communist Party officials have been known to interfere with intellectual property infringement lawsuits. Traditionally, local Communist Party officials reviewed and approved judicial outcomes. While this is no longer a universal occurrence, it still most likely continues to a lesser degree today. This interference also may come in the form of meddling in a lawsuit by higher court officials. In addition to these external forms of corruption, the salaries of Chinese judges and court officials are relatively low, which makes them susceptible to corruption and bribery.

201 See id. at 266.
203 See Schmetzer, supra note 186, at 14.
204 See id.
205 See Borrus et al., supra note 202, at 40.
206 See id.
207 See Clarke, supra note 69, at 261.
208 See id. at 262. On February 28, 1995, however, a new Judges Law of the PRC became effective. See New Law Digest - National: Legal System, CHINA L. & PRAC., Mar. 31, 1995, at 9 [hereinafter New Law Digest]. It is still too early to gauge the new law’s effectiveness, but Article 43 holds administrative authorities, social organizations, or individuals liable if they “interfere with the lawful adjudication of cases by judges.” Id.
209 See Clarke, supra note 69, at 260.
210 See id. at 259-60; see also Schmetzer, supra note 186, at 14; Flannery, Piracy Overseas, supra note 192, at 5d (noting that China has weak court
Third, there appears to be a general lack of legal training among PRC judges, especially relating to intellectual property issues.\textsuperscript{211} There are only a limited number of “qualified” individuals in China who have the knowledge to become effective judges. Because the current legal system is so new, many of the Chinese who do have a legal education are too young to serve as judges.\textsuperscript{212} For instance, Professor William Alford, Director of East Asian Legal Studies at Harvard Law School, notes that because Chinese judges are politically appointed, and the Chinese court system and tolerance for lawyers are both relatively new, many Chinese judges, rather than being legal professionals, are retired army sergeants and have no formal legal training.\textsuperscript{213}

This lack of education may be particularly devastating because the Chinese judicial system, unlike the U.S. adversarial system, is inquisitional.\textsuperscript{214} Judges in many instances must find facts based on their own initiative.\textsuperscript{215} Moreover, determining which law is applicable can be similarly difficult. Chinese law is a confusing array of laws and regulations; there may be no law on point or the laws that do exist may contradict one another.\textsuperscript{216} Also, there is no case reporting system in the PRC comparable to those used in the West, making the research of caselaw precedent nearly

\textsuperscript{211} See id. This lack of experience, however, is not universal. Justice Zongyi Fei, a member of the Supreme People’s Court, is extremely well-versed in intellectual property law. In early 1994, for example, he traveled to Los Angeles for four days to meet with U.S. legal and business professionals to discuss intellectual property matters. See Iris Yokoi, \textit{Chinese Jurist in U.S. to Study Laws}, L.A. TIMES, Apr. 3, 1994, at 9.

\textsuperscript{212} See Clarke, \textit{supra} note 69, at 257. Judges have been known to use their law clerks as “substitute judges” to fill in when there are shortages of available judges. See \textit{id.} at 258.

\textsuperscript{213} See Flannery, \textit{Piracy Overseas}, \textit{supra} note 192, at 5d. There are no formal objective requirements for judges in the PRC. See Clarke, \textit{supra} note 69, at 258.

\textsuperscript{214} See Clarke, \textit{supra} note 69, at 258.


\textsuperscript{216} See Clarke \textit{supra} note 69, at 258-59.
impossible.\textsuperscript{217} Thus, even the basic tenets of the Chinese legal system can prove frustratingly difficult to identify for judges and parties alike.\textsuperscript{218}

Fourth, Intellectual Property Court fees, calculated by charging a percentage of damages claimed and payable by a plaintiff in advance, can deter suits because there is no guarantee that a claimant will win.\textsuperscript{219} Moreover, these fees may not be balanced by sufficient damage awards by the People's Court.\textsuperscript{220} Fifth, it may be difficult for foreign firms which plan to continue doing business in China to sue because doing so may wreck their “guanxi” — personal contacts or favors — that are integral for doing business in the PRC.\textsuperscript{221} Finally, the Intellectual Property Courts have long dockets with extended waiting periods; thus securing relief may be protracted.\textsuperscript{222} For example, one Hong Kong attorney reiterated some foreigners’ feelings that “[u]n实践, remedies are more likely to be forthcoming through the State Administration of Industry and Commerce in the form of raids and confiscation than through the courts.”\textsuperscript{223}

While these problems may be daunting, Western companies like Disney have achieved some modicum of success. Moreover, China’s Copyright Law and the Intellectual Property Courts are both in embryonic stages. Given time and an opportunity to correct some of their problems, they may yet provide formidable weapons for use by foreign entities to combat illegal piracy.

There are, however, factors other than the efficacy of the Intellectual Property Courts which must be considered, without which copyright protection will be extremely difficult. In all

\textsuperscript{217} See id.

\textsuperscript{218} The new PRC Judges Law was promulgated to help eradicate some of these problems by “detailing the duties, rights, obligations, qualifications, appointment, dismissal, ranking, examination, training, awards, penalties, employment treatment[,] and resignation of judges,” thus solidifying the responsibilities and duties of Chinese judges. See \textit{New Law Digest, supra} note 208, at 9. As mentioned, this new law is still untested; hence its efficacy is far from certain. See id.


\textsuperscript{220} See id.

\textsuperscript{221} See Laris, \textit{supra} note 161, at 16.

\textsuperscript{222} See \textit{China Politics, supra} note 195.

likelihood, the Intellectual Property Courts will not provide the sole solution to the pervasiveness of Chinese copyright piracy, even if the problems enumerated above were resolved. But in combination with improvements in other extrajudicial areas, the Intellectual Property Courts may provide a strong deterrent to Chinese copyright piracy.

5. **EXTRAJUDICIAL FACTORS NECESSARY TO EFFECTIVELY CURB COPYRIGHT PIRACY**

U.S. companies lost an estimated US$866 million in 1995 due to intellectual property piracy in the PRC.\(^{224}\) Because of the size of this problem, even a well functioning Chinese judiciary cannot solve it entirely on its own. Despite some acknowledged successes against Chinese copyright pirates in the Intellectual Property Courts,\(^{225}\) copyright piracy continues to be widespread. Thus, in early 1995, the United States increased its pressure on the PRC to help protect U.S. companies from Chinese copyright infringement.\(^{226}\)

In June 1994, a six month investigative period was initiated by United States Trade Representative ("USTR") Mickey Kantor under "Super 301" of the Omnibus Trade and Competitiveness Act of 1988\(^{227}\) in order to study China's abuses of intellectual property rights.\(^{228}\) The PRC government labeled this move "rude, unacceptable[,] and unreasonable."\(^ {229}\) When the investigative period closed, the USTR threatened to impose 100 percent duties on Chinese imports equivalent to the estimated losses to U.S. companies caused by China's failure to enforce intellectual property laws.\(^ {230}\) The PRC responded with equivalent threats of its own, setting the stage for a full-scale trade war.\(^ {231}\) Proposed U.S. sanctions included: US$465 million on plastic goods, US$294 million on shoes and apparel, US$108 million on cellular phones, US$78 million on sporting goods, US$70 million on

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\(^{224}\) See Blustein, *supra* note 197, at B13.

\(^{225}\) See *supra* note 191 and accompanying text.

\(^{226}\) See Blustein, *supra* note 197, at B13.


\(^{228}\) See Lim, *supra* note 170.

\(^{229}\) Id.


\(^{231}\) See *id.*
wood items, and US$65 million on bicycles.  

On February 26, 1995, the United States and China signed an unprecedented trade pact described as "the most comprehensive and detailed copyright enforcement agreement [U.S. officials] had ever negotiated with any country," which averted the threatened sanctions. Part of this Sino-U.S. Intellectual Property Rights Agreement ("Sino-U.S. Agreement") included an immediate six-month crackdown on copyright violators consisting of "a series of task forces to collect evidence, the expansion of search-and-destroy powers for Chinese customs officers[,] and the immediate removal of quotas on imports of [U.S.] films." The Sino-U.S. Agreement also was designed to produce long-term benefits, including: (1) increased access to the People's Courts for U.S. copyright infringement claimants and preservation of evidence while trials are pending; (2) a stricter customs system modeled after the U.S. Customs Service; and (3) title verification systems for copyrighted material.

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232 See Flannery, Who Will Bend Most, supra note 22, at 6C.


234 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. Despite this February 1995 Sino-U.S. Agreement, talks between the United States and China over the PRC's re-entry into GATT have stalled over various issues, including a major obstacle, enforcement of intellectual property rights. See id. China hoped that with the new trade pact in place, its entry into the World Trade Organization ("WTO") would receive further serious consideration. See id. China's entry into the WTO is unlikely, unless significant progress is made toward effectuating the goals of the Sino-U.S. Agreement.

235 Id.

In a letter to USTR Kantor dated February 26, 1995, Wu Yi, the head of China's Ministry of Foreign Trade and Economic Cooperation, asserted that China's courts would be effectual in decreasing copyright piracy. See Sino-U.S. Agreement, supra note 233, 34 I.L.M. at 882-83. Wu noted that China's Supreme People's Court would "address intellectual property cases expeditiously, including cases involving foreign right holders." Id. at 883. Additionally, she confirmed that the People's Procuratorates were "actively pursuing criminal infringement cases." Id.

237 See id. at 900. The goal of intensified customs procedures was to prevent the import or export of goods that infringe on China's intellectual property laws. See id.

Ultimately, the success of the Sino-U.S. Agreement depends on the resolve of Chinese authorities to enforce antipiracy laws. It is clear, however, that the Sino-U.S. Agreement generally has not lived up to expectations. While acknowledging some improvement since February 1995, many in the U.S. software industry believe that Chinese copyright protection needs to be significantly improved. Deputy USTR Charlene Barshefsky noted in November 1995 that China's enforcement of the Sino-U.S. Agreement has remained weak, and that the PRC must "honor fully its commitments" or face further pressure from the United States. Many of the problems existing before the Sino-U.S. Agreement continue to plague domestic and foreign copyright owners.

The most serious problem, acknowledged by both foreign enterprises and PRC officials, is the need for stronger enforcement of copyright legislation. China has a well-formulated system

Intellectual Property Alliance) [hereinafter Metalitz Statement], available in LEXIS, NEWS Library, Curnws File. It was hoped that such verification systems would be a "key tool for cracking down on unauthorized production of copyrighted material." Id.

See David C. Johnston, U.S. Business Favors Deal, with Caution, N.Y. TIMES, Feb. 27, 1995, at D6. Some U.S. technology firms are convinced that the piracy of copyrighted commodities will continue until the Chinese are prosperous enough to afford them legally, notwithstanding enforcement efforts. See, e.g., Laris, supra note 161, at F16.

See Metalitz Statement, supra note 238; Blustein, supra note 197, at B13.

See International Trade, Barshefsky Demands China Halt Pirated Compact Disks, CD-ROMs, [1995] Daily Rep. for Executives (BNA), at A219 (Nov. 14, 1995) available in LEXIS, News Library, Drexec File. USTR Kantor noted that as of November 1995, 29 Chinese factories were producing pirated compact discs, the same number that were doing so before the Sino-U.S. Agreement was signed. See id.

Chinese officials also recognize the post-Sino-U.S. Agreement shortcomings of Chinese copyright protection. Ren Jianxin, the Chief Judge of the Supreme People's Court, noted that "[w]e not only need to further perfect relevant laws and apply for participation in more international conventions, but [we need] also to reform the country's existing intellectual property rights management system and strengthen the attack on activities involving infringements on such rights." See China to Establish Court, supra note 130.

See, e.g., Laris, supra note 161, at F16; Talking in China, supra note 219.

See Talking in China, supra note 219. Professor William Alford, Director of East Asian Legal Studies at Harvard Law School, believes that "[t]he Chinese actually have some nice-looking laws . . . but the problem comes in enforcement. In my view, the [Chinese officials] lack a respect for the rule of law, lack a consciousness about the rights of people[,] and have a weak court system." Flannery, Piracy Overseas, supra note 192, at 5d.
of copyright laws and a complete judicial apparatus, but neither is entirely effective without government cooperation and enforcement, particularly due to the traditionally subordinated position of the judiciary within the PRC's political system.244

Currently, the Chinese government appears reluctant to enforce intellectual property rights, and in some cases it directly contravenes its own legal standards. Although the Chinese government has made minimal efforts to prosecute copyright infringers, piracy is still rampant.245 In fact, it is believed that Chinese pirates have been protected by Chinese government officials, undermining the effectiveness of enforcement efforts.246 Local copyright officials are underpaid and, consequently, easily corrupted.247 Accordingly, one specialist on U.S. trade with China stated that "piracy is not just a problem, it is a fundamentally ingrained part of China's economic plan."248

The Sino-U.S. Agreement has done little to alleviate this situation. For instance, the anticipated title verification systems have been established for audio-visual works only, ignoring significant piracy of sound recordings and software.249 In addition, it has been observed that directed enforcement activities


244 See supra notes 52-59 and accompanying text.

245 See, e.g., James Riley, China 'Flouts' Piracy Law, S. CHINA MORNING POST, Dec. 6, 1994, available in LEXIS, Asiapc Library, Allasi File (reporting that since crackdowns on music compact disc piracy in China, pirates have switched to aggressively producing software CD-ROMs, which have a lower profile in the international community); but see CD Factories, supra note 110 (reporting that a 1994 crackdown in China's Guangdong Province resulted in searches of more than 7,700 stores and uncovered over 1 million pirated compact discs).


247 See Talking in China, supra note 219.


249 See Metalitz Statement, supra note 238.
are the exception, not the rule.\footnote{See id.}

China must redouble its antipiracy efforts by hiring and effectively training more officials to enforce its intellectual property laws, by discouraging government protection of these illegal operations, and by vigorously enforcing all civil and criminal sanctions available.\footnote{BSA vice-president Stephanie Mitchell opined that "until someone goes to jail, no one pays attention" to the law. \textit{Intellectual Property, Chinese Legal Officials Outline Harsh Penalties for IP Violators}, [1994] Daily Rep. for Executives (BNA), at A98 (May 24, 1994).} Without the implementation of such strong enforcement measures the PRC's copyright legislation and the People's Courts essentially will be ineffective in curbing copyright violators.

A related problem is the lack of education regarding copyright issues. The vast majority of Chinese officials and the Chinese populace are not familiar with the general principles of intellectual property law, let alone its intricacies.\footnote{See Stephen Keating, \textit{China Gets Word on Software Piracy}, \textit{DENVER POST}, May 6, 1995, at 1D (quoting U.S. Representative Patricia Schroeder's statement that "[10] years ago, [the Chinese] didn't have a concept of private property. Now [the West has] to educate them about intellectual property").} As was noted above, it has been accepted historically in China that copying the work of another is considered complimentary.\footnote{See supra notes 50-51 and accompanying text.} Enforcement of intellectual property rights was traditionally motivated by a desire to maintain the state's power, not to promote original authorship.\footnote{See Alford, supra note 50, at 17.} The Chinese government exacerbates the situation by failing to disseminate publicly information on piracy and enforcement.\footnote{See \textit{China Politics}, supra note 195.}

In order to confront this lack of education and traditional disregard for intellectual property protection, the Chinese must employ several tactics. Judges and officials of the Intellectual Property Courts at all levels should study and research copyright related technology, laws, regulations, and international treaties. These court members should summarize their experiences and share them with peers, possibly by writing Western-style law journal articles. Also, the Intellectual Property Courts should select and publish some typical copyright cases to publicize and to
promote legal awareness about copyright issues.\footnote{See Laris, supra note 161, at F13 (describing typical cases before these courts.).}

Furthermore, the PRC should continue to establish and support intellectual property departments at its major universities to place such education within the grasp of more Chinese and foreigners. China already has established intellectual property departments at several of its top universities. On December 15, 1993, Beijing University became home to the first Chinese school to teach and research intellectual property.\footnote{See Xie Liangjun, School on Intellectual Property Rights Opens, CHINA DAILY, Dec. 16, 1993, at 3, microformed on FBIS-CHI-93-241, at 33 (Foreign Broadcast Info. Serv.).} The first class consisted of forty-five graduate and double-degree students, but no specific degree will be awarded when the students complete their two or three years of study in the program.\footnote{See id.} Shanghai University also has decided to open an intellectual property department.\footnote{See Shanghai Protects Intellectual Property, AGENCE FRANCE PRESSE, Oct. 31, 1994, available in LEXIS, News Library, Curnws File.} The Chinese government needs to pursue its educational propaganda campaign\footnote{See, e.g., Evans, supra note 160, at 22 (noting Beijing's use of media reports and propaganda to publicize its enforcement of intellectual property laws).} by sponsoring official seminars to provide the Chinese people with information on intellectual property matters.

To enhance copyright protection, in addition to enforcement and education, the Chinese government should continue to support nongovernmental intellectual property rights groups, such as the Zhongcheng Intellectual Property Rights Protection Service Company Limited ("Zhongcheng").\footnote{See Aipin, supra note 14, at 36. Zhongcheng is a joint venture between Chinese International Economic and Legal Counseling Company and Hong Kong Chung-shing International Company Limited. See id.} Chinese companies often neglect to protect their own copyrights, disregard others' infringements of their copyrights, or infringe themselves.\footnote{See id.} Companies such as Zhongcheng can help by providing their clients with technical and legal advice on copyright issues.\footnote{See id.}

In August 1995, China formed its first intellectual property
exchange in Xi'an.\textsuperscript{264} This exchange is designed to provide a place where copyrights and other intellectual property can be bought and sold legally.\textsuperscript{265} The exchange may assist China's burgeoning market structures in the legal transfer of intellectual property rights. Cai Cheng, vice chairman of the National People's Congress Standing Committee, acknowledged that “as far as the protection of intellectual property rights is concerned, it is inadequate to rely [completely] on the state to exercise legislative, judicial, and administrative protection . . . . [I]t is necessary to draw support from nongovernmental professional forces to provide enterprises or individuals with special technical and legal assistance.”\textsuperscript{266}

Finally, tighter border controls could significantly improve Chinese copyright protections.\textsuperscript{267} This is because a vast portion of infringing material is exported out of China for sale abroad, thereby exponentially increasing the potential market for these illegal goods. In 1994, in order to limit the export of pirated goods, the Chinese government released two notices allowing PRC customs officials to confiscate infringing goods and then to give them to local industry and commerce administrations.\textsuperscript{268}

These notices were not effective enough to satisfy U.S. officials and thus one of the main elements of the Sino-U.S. Agreement was improved customs enforcement.\textsuperscript{269} Pursuant to the Sino-U.S. Agreement, for the period between March 1 and October 1, 1995, Chinese customs officials were ordered to intensify the import/export border control for copyrighted material, including compact discs and CD-ROMs.\textsuperscript{270} Once infringing materials were

\begin{footnotesize}
\begin{enumerate}
\item See id. at S8.
\item Aiping, supra note 14, at 36. In the same interview, Cai encouraged the “all-round and three-dimensional protection of intellectual property rights.” Id.
\item See Talking in China, supra note 219.
\item See id. Typically, PRC customs officials did not have the authority to confiscate infringing goods but instead would customarily return them to the Chinese individual or company responsible. See Katherine C. Spelman, Combating Counterfeiting, in GLOBAL TRADEMARK AND COPYRIGHT 1995: MANAGEMENT AND PROTECTION, 309 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. 417, 1995).
\item See supra note 237 and accompanying text.
\item See Sino-U.S. Agreement, supra note 233, 34 I.L.M. at 900.
\end{enumerate}
\end{footnotesize}
stopped at the border, they were to be "seized, forfeited and destroyed[,] or excluded from the stream of commerce."\textsuperscript{271} The Sino-U.S. Agreement also called for the implementation of new customs regulations, modelled after U.S. laws, to be published by July 1, 1995, and made effective October 1, 1995.\textsuperscript{272}

Despite these promises, the Chinese have yet to significantly improve border control. Illegally pirated goods still easily flow out of Chinese ports.\textsuperscript{273} Chinese customs regulations do not yet meet the requirements of the Sino-U.S. Agreement, and contain substantial loopholes.\textsuperscript{274} A customs recordation system has not yet been established as required under the Sino-U.S. Agreement.\textsuperscript{275} One problem complicating enforcement is that several agencies are responsible for controlling pirated goods in China, unlike Hong Kong where one department does the job, thus making coordination more difficult.\textsuperscript{276} Problems in supervising provincial government authorities also have made border control difficult because they sometimes disregard orders from the national government.\textsuperscript{277} These issues must be addressed in order to successfully combat Chinese copyright pirates.

If all or even some of these extrajudicial factors are improved, the Intellectual Property Courts would be much more effective and might begin to have a real impact on the Chinese attitude towards copyright infringement. If not, the Intellectual Property Courts could be relegated to impotence and obscurity as intellectual property owners either seek redress from other, potentially more efficacious sources or settle for no relief at all.

\textsuperscript{271} Id.
\textsuperscript{272} See id.
\textsuperscript{273} See, e.g., Pirated PC Software Said Flooding Out of China, \textsc{Reuters Ltd.}, Nov. 9, 1995, available in LEXIS, News Library, Curnws File.
\textsuperscript{275} See id.
\textsuperscript{276} See Jonathan Hill, Mainland Told to Act on Piracy, \textsc{S. China Morning Post}, Nov. 17, 1995, at 3.
\textsuperscript{277} See id.
Currently, copyright infringement in the PRC remains a significant problem. As a result of Western pressure, however, China has agreed to substantially increase its proactive efforts to reduce piracy. Despite these efforts, Western firms must continually resort to the Chinese judicial system to protect their intellectual property rights. Foreign entities such as Disney and the BSA recently have experienced relative success navigating the Intellectual Property Courts in order to protect their copyrights. Damage awards are slowly increasing as more cases are adjudicated, which may provide the incentive for more Western companies to sue for copyright infringement.

More importantly, greater utilization of the Intellectual Property Courts is a crucial element in the fight against Chinese copyright pirates. These courts can help enforce copyrights and educate the Chinese public regarding intellectual property issues, thus providing a strong deterrent against future infringement. Cutting through deeply ingrained Chinese notions that copying is proper conduct and replacing such ideas with a more Western view of copyright is fundamental to copyright protection in the PRC. Without the stricter enforcement and increased awareness with respect to intellectual property issues that Intellectual Property Courts can help foster, Chinese and Western efforts to improve copyright protection in China may be doomed to failure.

Expanded employment of the Intellectual Property Courts, combined with stricter PRC government enforcement, more zealous education on intellectual property issues, use of nongovernmental professional groups, and escalated border control, most likely will produce some reduction of Chinese copyright piracy, although how much is still uncertain. As the PRC strives toward a market economy and makes a genuine attempt to take its desired place as an international trading power, significant progress in copyright protection may yet occur in China as improvements are made in judicial and extrajudicial copyright protection mechanisms.