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# American Films in China: An Analysis of China's Intellectual Property Record and Reconsideration of Cultural Trade Exceptions Amidst Rampant Piracy

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## INTRODUCTION

New technology has created new problems for the Motion Picture Industry Association of America (MPAA)<sup>1</sup> as it attempts to protect against the illegal reproduction and distribution of American movies.<sup>2</sup> The MPAA faces particular problems in China, a country widely criticized for its poor record of intellectual property (IP) rights protection.<sup>3</sup> China's IP legislation and enforcement efforts were major issues in its trade negotiations with the United States and in its accession to the World Trade Organization (WTO).<sup>4</sup> While China's IP regime has seen

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\* J.D. Candidate, 2006, University of Minnesota Law School; B.A., Swarthmore College, 1996. This Note is dedicated to my mother, Carol, for all of the love, encouragement, and joy she has given me throughout my life. I would also like to thank my father, Glenn, and my wife, Julia, for all of their love and support, as well as Jingjie Lu for her suggestions on my article.

1. Originally formed as a trade association for American films, today the MPAA represents seven major film studios and functions as the "voice and advocate of the American motion picture, home video and television industries." About MPA, MPAA, <http://www.mpa.org/> (last visited Nov. 24, 2004). The Motion Picture Association (MPA) is the international arm of the MPAA. *Id.*

2. See Alan Butterworth, *Illegal Downloading: Group Sues Movie Pirates*, MINN. DAILY, Nov. 19, 2004, at 1; Tom Zeller, Jr., *As Piracy Battle Nears Supreme Court, the Messages Grow Manic*, N.Y. TIMES, Feb. 7, 2005, at C1. See generally Jeanmarie LoVoi, *Competing Interests: Anti-piracy Efforts Triumph Under TRIPS but New Copying Technology Undermines the Success*, 25 BROOK. J. INT'L. L. 445 (1999); John Tehranian, *All Rights Reserved? Reassessing Copyright and Patent Enforcement in the Digital Age*, 72 U. CIN. L. REV. 45 (2003).

3. Joseph Kahn & Helene Cooper, *China Plans to Cut Tariffs, End Quotas in Bid to Join Trade Group*, WALL ST. J., Nov. 20, 1995, at A10.

4. See Andrew Evans, *Taming the Counterfeit Dragon: The WTO, TRIPS and Chinese Amendments to Intellectual Property Laws*, 31 GA. J. INT'L & COMP. L. 587, 587 (2003); Kahn & Cooper, *supra* note 3. The WTO was established in April 1994 to

great improvements over the last few years, major problems continue to exist across all IP sectors.<sup>5</sup>

Compounding China's inadequate IP enforcement efforts is a supply problem created by quotas the country imposes on imports of foreign films.<sup>6</sup> Despite quotas and other import restrictions, many Chinese citizens watch the latest American theatrical releases in the privacy of their homes while the restricted movies are still in U.S. theaters and not even legally showing in China.<sup>7</sup> Such restrictions are permitted despite China's WTO membership because, due to a cultural exception, movies are not subject to the same trade liberalization requirements that prevent China from protecting other industries.<sup>8</sup>

Part I of this Note examines the existing copyright protection and other IP rights in China. Part I.A provides a short history of copyright law in China. Part I.B describes China's recent international IP commitments. Part I.C analyzes China's actual enforcement of such commitments. Part II discusses the

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administer multilateral trading rules originally established under the General Agreement on Tariffs and Trade (GATT). See generally *The Agreement Establishing the World Trade Organization, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, Apr. 15, 1994, 33 I.L.M. 1125 (1994) [hereinafter WTO Agreement] (formalizing the GATT's coverage of the international trade of goods and providing rules for other areas such as services, intellectual property, and agriculture). From January 1, 1948, until the entrance into force of the WTO on January 1, 1995, the GATT provided the basic rules of multilateral trading. See generally WTO, <http://www.wto.org> (last visited Sept. 21, 2005). The original GATT is now often referred to as GATT 1947 to distinguish it from GATT 1994, which sets out the main WTO rules that relate specifically to trade in goods. See *id.*

5. See OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2004 NAT'L TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 57 (2004), available at [http://ustr.gov/Document\\_Library/Reports\\_Publications/2004/2004\\_National\\_Trade\\_Estimate/2004\\_NTE\\_Report/Section\\_Index.html](http://ustr.gov/Document_Library/Reports_Publications/2004/2004_National_Trade_Estimate/2004_NTE_Report/Section_Index.html) [hereinafter USTR 2004 Report]; U.S. EMBASSY IN BEIJING, CHINA COUNTRY COMMERCIAL GUIDE FY 2004, at 17 (2004) [hereinafter China 2004 Commercial Guide].

6. See *U.S.-China Trade: Preparations for the J. Commission on Commerce and Trade: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection, of the H. Comm. on Energy and Commerce*, 108th Cong. 45-55 (2004) (testimony of Fritz E. Attaway, Executive Vice President and Wash. General Counsel, MPAA) [hereinafter Attaway Testimony].

7. See generally SHUJEN WANG, GLOBALIZATION AND FILM DISTRIBUTION IN GREATER CHINA (2003) (tracing the legal and illegal distribution of American films in Mainland China, Hong Kong and Taiwan).

8. See Alan Riding, *A Global Culture War Pits Protectionists Against Free Traders*, N.Y. TIMES, Feb. 5, 2005, at B9; Gen. Conference of the U.N. Educ., Scientific and Cultural Org. [UNESCO], *25 Questions on Culture, Trade and Globalisation: What Do We Generally Understand by "Cultural Exception"?*, <http://portal.unesco.org> (follow "Culture" hyperlink, then follow "Cultural Industries" hyperlink, then follow "FAQs" hyperlink) (last visited Oct. 10, 2005) [hereinafter UNESCO Cultural Exception Definition].

various methods China uses to restrict market access for foreign films. Part III presents a short discussion of the history of cultural exemptions to free trade. Part IV analyzes China's enforcement efforts and asks whether cultural exemptions should exist at all in light of China's rampant IP enforcement problems. Although all problems would not completely disappear, China should provide greater access to foreign films in order to meet its international IP obligations. This Note concludes that the United States should negotiate a formal instrument to govern international trade in cultural products and take a hard line in order to ensure that such an agreement addresses the IP problems created by restricting access to foreign films and other media.

## I. PROTECTION OF COPYRIGHT AND OTHER INTELLECTUAL PROPERTY RIGHTS IN CHINA

### A. A SHORT HISTORY OF COPYRIGHT LAW IN CHINA

Despite being one of the earliest countries to develop printing,<sup>9</sup> China's promulgation of a copyright law that met international standards came near the end of the twentieth century.<sup>10</sup> The concept of a property right attaching to one's own creative work that developed in seventeenth and eighteenth century Europe simply had no equivalent in China.<sup>11</sup> Many

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9. Included in the many inventions to which China is credited with bringing to the world are paper, ink and movable type. *See generally* WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* (1995) (providing an in-depth study of the historical attitudes toward copyright in China); HONG XUE & CHENGSI ZHENG, *CHINESE INTELLECTUAL PROPERTY LAW IN THE 21ST CENTURY* (2002) (detailing the development of China's copyright laws).

10. *See* CHENGSI ZHENG & MICHAEL PENDLETON, *COPYRIGHT LAW IN CHINA* 17 (1991) (discussing China's first official copyright law in 1910 and the enactment of a law meeting international standards in 1990); Connie Neigel, *Piracy in Russia and China: A Different U.S. Reaction*, 63 *LAW & CONTEMP. PROBS.* 179, 189-93 (2000) (tracing the development of China's copyright laws). Prior to the promulgation of official laws, and even prior to the invention of the printing press, China's rulers did seek to prevent the unauthorized reproduction of written materials, but such efforts were designed to maintain the authority of those in power rather than protect the ownership rights of authors to their works. *See id.* at 189-91 & nn.68, 73-74.

11. *See* Neigel, *supra* note 10, at 190. Conversely, England enacted the Statute of Queen Anne in 1709, widely considered to be the first law on author's rights. *Id.* at 180 n.1 (citing EDWARD W. PLOWMAN & L. CLARK HAMILTON, *COPYRIGHT: INTELLECTUAL PROPERTY IN THE INFORMATION AGE* 12 (1980)); *see also* Evans, *supra*

commentators cite the dominance of Confucianism on Chinese culture as a major reason for the lack of development of IP rights in China.<sup>12</sup>

The Confucian vision of nature and civilization mandated that all individuals have access to a shared intellectual past.<sup>13</sup> In Confucian tradition, individuals predominately learned by copying the past, and as a result “the copying of works of almost any kind has for centuries been regarded as honorable and necessary.”<sup>14</sup> Indeed, according to Confucianism, copying or imitation was not a “moral offense, but rather ‘a noble art’—a ‘time-honored learning process’ through which people manifested respect for their ancestors.”<sup>15</sup> Confucian philosophy undoubtedly looked down upon individual ownership of ideas, but copyright development was also hampered both by the lack of a means to mass produce literary works and by a limited demand due to China’s low literacy rate.<sup>16</sup>

As China began to have greater interaction with Western nations in the late nineteenth century, it was introduced to the legal concepts of patents, trademarks, and copyrights.<sup>17</sup> And in 1910, China’s Qing Dynasty enacted the country’s first formal copyright law.<sup>18</sup> The law offered extensive copyright protection, but was never fully implemented as the Qing government was overthrown a year later in the Nationalist Revolution.<sup>19</sup> China’s Nationalist government revised the copyright statute, but when Mao Zedong’s Communist Party assumed control of China in 1949, all existing copyright laws were retracted as part of the national expulsion of foreign nationals and Western concepts.<sup>20</sup>

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note 4, at 589–90 (noting copying was widely encouraged by imperial rulers and did not have a negative connotation as in the West).

12. See Ling Li, *The Sky Is High and the Emperor Is Far Way: The Enforcement of Intellectual Property Law in China*, 108 BOLETÍN MEXICANO DE DERECHO COMPARADO 951, 954 (2003).

13. See *id.*

14. See *id.* (quoting N. Wingrove, *China Traditions Oppose War on IP Piracy*, 38 RES. TECH. MGMT. 3 (1995)).

15. Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 361 (2003).

16. See ALFORD, *supra* note 9, at 19. China’s literacy rate remained below twenty percent into the early twentieth century. *Id.*; see also Yu, *supra* note 15, at 360–64 (commenting that while the cultural explanations, Confucian tradition, and pro-copying culture provide insight into an important barrier to IP law reform in China, other factors including socialism and xenophobia were no less important).

17. See PETER FENG, *INTELLECTUAL PROPERTY IN CHINA* 3 (1997).

18. ZHENG & PENDELTON, *supra* note 10, at 17.

19. Neigel, *supra* note 10, at 190–91.

20. See *id.* When the Communists first came to power, the government did initiate a system of publishing contracts that provided for remuneration between

In addition, despite the fact that Mao's government sought to replace Confucian values with Communist ones, the infusion of Communist ideas did not change the country's view with respect to intellectual property rights—"owning property [in a Socialist system] is tantamount to sin."<sup>21</sup> Furthermore, during various class struggles and China's Cultural Revolution, many intellectuals were tortured, killed, imprisoned, or sent to communes; as a result, "most creative intellectual work was stopped and copyright infringement was rampant" during much of this period.<sup>22</sup>

After Mao's death and the end of the Cultural Revolution in 1976, Deng Xiaoping and other leaders sought to renew China's commercial ties with the United States, Japan, and other Western developed countries.<sup>23</sup> China's lack of IP legislation and the historical treatment of IP under both Confucianism and socialism understandably made foreign nationals apprehensive about investing their technology and other IP into China.<sup>24</sup> As China began entering into trade agreements with Western nations, foreign countries began pressuring China to enact more protective IP laws.<sup>25</sup>

## B. CHINA'S RECENT INTERNATIONAL IP COMMITMENTS

### 1. *Bilateral Trade Agreements With and IP Pressures From the United States*

The 1979 Agreement on Trade Relations Between the United States of America and the People's Republic of China (1979 Trade Agreement)<sup>26</sup> was one of modern China's first im-

authors and publishers. *Id.* These contracts, however, did not prevent unauthorized reproduction by third parties and in the following decades the remuneration system was eliminated and unauthorized reproduction increased. *See id.*

21. Yu, *supra* note 15, at 361 (quoting Susan Tiefenbrun, *Piracy of Intellectual Property in China and the Former Soviet Union and Its Effects upon International Trade: A Comparison*, 46 BUFF. L. REV. 1 (1998)); *see also* Li, *supra* note 12, at 955. "Under the socialist economic system, property belongs to the State and the people, rather than private owners. Authors thus create literary and artistic works for the welfare of the State, rather than for the purpose of generating economic benefits for themselves." Yu, *supra* note 15, at 362.

22. Neigel, *supra* note 10, at 191 & n.91; *see also* Yu, *supra* note 15, at 361-62.

23. *See* FENG, *supra* note 17, at 4950; Yu, *supra* note 15, at 354.

24. *See* Li, *supra* note 12, at 954; Neigel, *supra* note 10, at 191; Peggy Yeh, *Yo, Ho, Ho and a CD-Rom: The Current State of Software Piracy in the PRC*, 31 LAW & POL'Y INT'L BUS. 173, 175-76 (1999); Yu, *supra* note 15, at 361.

25. *See* Neigel, *supra* note 10, at 192.

26. Agreement on Trade Relations Between the United States of America and

portant trade agreements with a foreign country. In terms of copyright protection, the 1979 Trade Agreement provided that China and the United States would each take measures to ensure copyright protection for the legal or natural persons of the other party.<sup>27</sup> Although China had not yet enacted modern IP laws, when it signed the 1979 Trade Agreement China took on obligations to provide international IP protection.<sup>28</sup> China followed the 1979 Trade Agreement by joining international IP organizations and enacting its first IP laws.<sup>29</sup> In response to pressure from the United States, China finally enacted a modern copyright law that met international standards in 1990.<sup>30</sup> However, despite the enactment of the 1990 Copyright Law, rampant piracy of both domestic and foreign films, as well as other artistic works, continued.<sup>31</sup>

As U.S. businesses became increasingly concerned about extensive piracy of their audiovisual products and computer software, they lobbied the U.S. government to apply economic

the People's Republic of China, U.S.-P.R.C., July 7, 1979, 31 U.S.T. 4652.

27. *Id.* at 4657-58. The 1979 Trade Agreement contained similar provisions with respect to trademarks and patents. *See id.*

28. *See* HONG XUE & CHENGSI ZHENG, SOFTWARE PROTECTION IN CHINA: A COMPLETE GUIDE 5 (1999).

29. China became a member of the World Intellectual Property Organization (WIPO) in 1980 and shortly thereafter joined the Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1538, 828 U.N.T.S. 305 (last revised at the Stockholm Conference, July 14, 1967). China's first IP legislation included a new trademark statute—Zhonghua Renmin Gongheguo shang biao fa 中华人民共和国商标法 [Trademark Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 23, 1982, effective Mar. 1, 1993) (P.R.C.), available at [http://www.sipo.gov.cn/sipo/flfg/ygzscqgflfg/t20011030\\_2149.htm](http://www.sipo.gov.cn/sipo/flfg/ygzscqgflfg/t20011030_2149.htm) [hereinafter PRC Trademark Law]—and a new patent statute—Zhonghua Renmin Gongheguo zhuan li fa 中华人民共和国专利法 [Patent Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 12, 1984, effective Apr. 1, 1985) (P.R.C.), available at [http://www.sipo.gov.cn/sipo/flfg/fljxzfg/t20011029\\_1919.htm](http://www.sipo.gov.cn/sipo/flfg/fljxzfg/t20011029_1919.htm) [hereinafter PRC Patent Law]. The PRC Trademark was subsequently amended in 1993 and 2001; the PRC Patent Law was subsequently amended in 1992 and 2001. As China drafted its initial IP legislation, its government remained leery of introducing any concept of private property into the socialist economic system. *See* Yu, *supra* note 15, at 356-57. As such, the laws were drafted to give individuals rights over their inventions, while at the same time promoting socialist ideals—much in line with Deng Xiaoping's concept of "socialism with Chinese characteristics." *See* ALFORD, *supra* note 9, at 70.

30. Zhonghua Renmin Gongheguo zhu zuo quan fa 中华人民共和国著作权法 [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, effective June 1, 1991) (P.R.C.), available at <http://www.ncac.gov.cn/servlet/servlet.info.NatLawServlet?action=list&id=367> [hereinafter 1990 Copyright Law].

31. *See* Yu, *supra* note 15, at 357-58.

pressure on China.<sup>32</sup> The U.S. power to threaten economic sanctions is primarily grounded in the Omnibus Trade Competitiveness Act (1988 U.S. Trade Act).<sup>33</sup> The 1988 U.S. Trade Act contains a provision known as Special 301<sup>34</sup> which authorizes the U.S. Trade Representative (USTR)<sup>35</sup> to use trade sanctions and other restrictions on market access to retaliate for a trading partner's inadequate protection of U.S. IP rights.<sup>36</sup> Throughout the late 1980s and early 1990s the U.S. government responded to the requests of U.S. businesses by threatening China multiple times with trade wars, economic sanctions, non-renewal of most-favored-nation status, and opposition to China's entry into the

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32. See *id.*; Neigel, *supra* note 10, at 192–93.

33. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988) (codified as amended in scattered sections of 19 U.S.C.).

34. *Id.* §§ 1301, 1303, 102 Stat. at 1164–76, 1179–81 [hereinafter Special 301] (amending the Trade Act of 1974, Pub. L. No. 93-316, §§ 302(b), 182). For a detailed discussion of the Omnibus Trade and Competitiveness Act of 1988 and Special 301, see Julia Cheng, *China's Copyright System: Rising to the Spirit of TRIPS Requires an Internal Focus and TWO Membership*, 21 *FORDHAM INT'L L.J.* 1941, 1965–67 (1998).

35. The USTR is a cabinet-level official who serves as an advisor to the President on trade policy, coordinates the development of U.S. trade policy initiatives, leads U.S. international trade negotiations, and seeks to expand U.S. exports by promoting the removals of or reductions in foreign trade barriers. *DICTIONARY OF INTERNATIONAL TRADE TERMS* 172–73 (1996).

36. Special 301, *supra* note 34. When taking an action against a country through Special 301, the United States first places a country on one of three lists: the priority foreign country list, the priority watch list, or the watch list. Cheng, *supra* note 34, at 1965–67. The priority foreign country category is reserved for countries that have committed more onerous or egregious acts, policies, or practices in the area of intellectual property, have the greatest adverse economic impact on the United States, and have failed to enter into good faith negotiations or to make significant progress in bilateral or multilateral negotiations. 19 U.S.C. § 2242(b)(1). Countries on the priority watch list differ from priority foreign countries in that these countries have negotiated in good faith or are making significant progress in their negotiations. USTR Fact Sheets on Super 301 Trade Liberalization Priorities and Special 301 on Intellectual Property, released May 15, 1989, 6 *Int'l Trade Rep.* (BNA) 715, 719 (May 31, 1989). Countries on the watch list, the least serious of the three categories, are identified by the United States due to their questionable intellectual property systems. USTR, 1995 Trade Policy Agenda and 1994 Annual Report 58, 98 (1994). In addition to these three lists, China and Paraguay are subject to another part of the statute, Section 306 monitoring, because of previous agreements reached with the United States to address specific problems raised in earlier USTR reports. USTR, *Special 301 Full Report*, May 1, 2003, available at [http://ustr.gov/assets/Document\\_Library/Reports\\_Publications/2003/2003\\_Special\\_301\\_Report/asset\\_upload\\_file665\\_6124.pdf](http://ustr.gov/assets/Document_Library/Reports_Publications/2003/2003_Special_301_Report/asset_upload_file665_6124.pdf). After placing a country on one of these lists, the USTR initiates an investigation and consults with the country in question; if no resolution has been reached after six months, the USTR is authorized to take various unilateral actions, including initiating trade sanctions against the foreign nation. See 19 U.S.C. §§ 2411–2414 (1988); Cheng, *supra* note 34, at 1966.



WTO.<sup>37</sup> These threats eventually led to the signing of a Memorandum of Understanding in 1992 (1992 MOU),<sup>38</sup> an IP agreement in 1995 (1995 Agreement),<sup>39</sup> and an accord that reiterated China's commitment to IP protection in 1996 (1996 Accord).<sup>40</sup>

By signing the 1992 MOU, China agreed to join two international copyright conventions—the Berne Convention<sup>41</sup> and the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms.<sup>42</sup> China also amended its 1990 Copyright Law and issued implementing regulations in accordance with the provisions of the 1992 MOU.<sup>43</sup> Despite the regulatory improvements resulting from the 1992 MOU, the United States became increasingly frustrated with China's lack of enforcement of its IP laws. In an attempt to curb China's woeful enforcement record, the United States placed China on the Priority Foreign Country List in 1994 and also threatened Special 301 trade sanctions on Chinese products.<sup>44</sup>

Averting a trade war,<sup>45</sup> the two countries signed the 1995

37. See Neigel, *supra* note 10, at 192–93; Yu, *supra* note 15, at 357–58.

38. Memorandum of Understanding Between China (PRC) and the United States on the Protection of Intellectual Property, P.R.C.-US. Jan. 17, 1992, T.I.A.S. No. 12036, 34 I.L.M. 677 (1995) [hereinafter 1992 MOU]. See also Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-first Century*, 50 AM. U. L. REV. 131, 142–43 (2000) (discussing the 1992 MOU).

39. Agreement Regarding Intellectual Property Rights, P.R.C.-U.S., Feb. 26, 1995, 34 I.L.M. 881 (1995) [hereinafter 1995 Agreement]. See also Yu, *supra* note 38, at 145–48 (discussing the 1995 Agreement).

40. Chinese Implementation of the 1995 Intellectual Property Rights Agreement, June 17, 1996, P.R.C.-U.S., available at <http://www.export.gov/tcc> (click on “View Trade Agreements”; then click on “List All Agreements”; then click on “People's Republic Of China Implementation Of The 1995 Intellectual Property Rights Agreement—1996”) [hereinafter the 1996 Accord]. See also Yu, *supra* note 38, at 150–51 (discussing the 1996 Accord).

41. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221 (last revised in Paris, July 24, 1971). The Berne Convention is widely seen as the birth of international copyright protection, as it created a union of member states committed to multilateral protection of each other's literary and artistic works. See Cheng, *supra* note 34, at 1945; see also 1992 MOU, *supra* note 38, at 680–81 (stipulating that China would adhere to the Berne Convention and would submit legislation authorizing such accession).

42. Oct. 29, 1971, 25 U.S.T. 309. See also 1992 MOU, *supra* note 38, at 681 (stipulating that China would accede to and ratify the Geneva Convention).

43. Zhu zuo quan fa shi shi tiao li 著作权法实施条例 [Copyright Law Implementing Regulations] (promulgated by the Nat'l Copyright Admin., May 30, 1991, effective June 1, 1991) (P.R.C.), available at <http://www.ncac.gov.cn/servlet/servlet.info.NatLawServlet?action=list&id=369>; Yu, *supra* note 15, at 358.

44. Neigel, *supra* note 10, at 194.

45. China responded to threatened U.S. sanctions with threats of its own. *Id.*

Agreement,<sup>46</sup> which was designed to further strengthen China's developing domestic IP rights protection regime.<sup>47</sup> In order to increase enforcement of existing IP laws, the 1995 Agreement created enforcement Task Forces, which serve various police functions in pursuing IP violations.<sup>48</sup> The agreement further called for greater market access for U.S. IP, the registration of foreign audiovisual products and computer software with China's National Copyright Administration, the training of officials on IP rights, and the intensification of Customs inspections on imports and exports of digital media.<sup>49</sup>

Despite China's promises in the 1995 Agreement to crack down on music, film, and software piracy, U.S. investigators found that China had taken no action against some of the worst offenders of compact disc piracy.<sup>50</sup> Acting USTR Charlene Barshefsky announced that China would again be placed on the Foreign Country List. Within thirty minutes of the announcement, China retaliated by announcing it would place 100% tariffs on a list of U.S. products.<sup>51</sup> A multibillion dollar trade war was again averted, however, when the two countries signed the 1996 Accord<sup>52</sup> on the June 17, 1996 deadline, the date at which such tariffs were set to go into effect.<sup>53</sup> The 1996 Accord reflected many of the same terms of the 1995 Agreement, but

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In essence, the United States was dissatisfied with China's efforts to enforce the laws while China was upset that it had taken such diligent measures to revamp its intellectual property rights regime and the United States was not patient enough to wait for the system to achieve its desired results. *See id.*

46. *See supra* note 39.

47. *Id.* The 1995 Agreement called for the creation of China's State Council Working Conference on Intellectual Property Rights and a "unique copyright verification system, proposing to punish by administrative and judicial means any manufacturer of audiovisual products who failed to comply" with the verification system. Yu, *supra* note 15, at 359.

48. The Task Forces are comprised of administrative and other authorities that are responsible for intellectual property protection. *See* 1995 Agreement, *supra* note 39. Such authorities include China's National Copyright Administration, State Administration for Industry and Commerce, Patent Office, police at various levels, and customs officials. Yu, *supra* note 15, at 359 n.224. Task Forces are authorized to enter and search the premises of those allegedly infringing on intellectual property rights, review books and records, seal suspected goods, and confiscate materials and implements used to make infringing goods. *Id.*

49. *Id.* at 359-60; Neigel, *supra* note 10, at 194.

50. *See* Neigel, *supra* note 10, at 195; *see also* Evans, *supra* note 4, at 599-600 (noting that "crackdowns proved ephemeral, as domestic counterfeiters found new and more effective ways to circumvent the laws").

51. *See* Neigel, *supra* note 10, at 195.

52. *See supra* note 40.

53. *Id.*

China's efforts to combat piracy that year convinced U.S. officials that this time China meant to carry out its obligations.<sup>54</sup>

Piracy of U.S. films, music, and software remained rampant despite such efforts, but the United States moved away from coercive efforts and threats of trade sanctions after the 1996 Accord.<sup>55</sup> As China made preparations to enter the WTO, however, it made significant institutional reforms to improve IP protection.<sup>56</sup>

## 2. *The Effect of China's WTO Entrance on Its Copyright Laws*

On November 8, 2001, WTO member states approved China's accession to the body, and China officially became a member on December 11, 2001.<sup>57</sup> In preparation for WTO entry, China amended its 1990 Copyright Law.<sup>58</sup> China's amended Copyright Law, which became effective as of late 2001, strengthened protection of copyrights by broadening protection and increasing penalties for violations.<sup>59</sup> The amendments also

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54. *Id.* at 196 & n.125. Such steps to combat piracy included "the closure of fifteen pirate CD factories and the enlistment of China's powerful national police, the Ministry of Public Security to help combat piracy." *Id.* at 195-96.

55. 1996 Accord, *supra* note 40 at 196; Yu, *supra* note 15, at 365.

56. Yu, *supra* note 15, at 365.

57. See Press Release 252, WTO, WTO Ministerial Conference Approves China's Accession (Nov. 10, 2001), available at [http://www.wto.org/english/news\\_e/pres01\\_e/pr252\\_e.htm](http://www.wto.org/english/news_e/pres01_e/pr252_e.htm). For details on the terms of China's accession, see Press Release 243, WTO, WTO Successfully Concludes Negotiations on China's Entry (Sept. 17, 2001), available at [http://www.wto.org/english/news\\_e/pres01\\_e/pr243\\_e.htm](http://www.wto.org/english/news_e/pres01_e/pr243_e.htm).

58. See generally Xiaoqing Feng & Frank Xianfeng Huang, *International Standards and Local Elements: New Developments of Copyright Law in China*, 49 J. COPYRIGHT SOC'Y U.S.A. 917 (2002).

59. Zhonghua Renmin Gongheguo zhu zuo quan fa 中华人民共和国著作权法 [Copyright Law of the People's Republic of China] (amended by the Standing Comm. Nat'l People's Cong., Oct. 27, 2001), available at <http://www.ncac.gov.cn/servlet/servlet.info.NatLawServlet?action=list&id=372> [hereinafter Amended Copyright Law]. Specifically, China's amended Copyright Law now authorizes administrative agencies and courts to confiscate illegal profits and pirated copies, as well as the materials and equipment used for infringing activities. *Id.* art. 47. Statutory damages of up to RMB 500,000 can be assessed when the plaintiff's damage or the infringer's profits cannot be determined. *Id.* art. 48. In addition, the amended Copyright Law provides access to preliminary injunctions and addresses internet copyright issues. *Id.* arts. 10, 37, 47, 49, 58. China enacted implementing regulations for the amended Copyright Law in the following year. Zhonghua Renmin Gongheguo zhu zuo quan fa shi shi tiao li 中华人民共和国著作权法实施条例 [Copyright Law of the People's Republic of China Implementing Regulations] (promulgated by the Nat'l Copyright Admin., effective Sept. 15, 2002) (P.R.C.), available at <http://www.ncac.gov.cn/servlet/servlet.info.NatLawServlet?action=list&id=373>.

improved China's compliance with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).<sup>60</sup>

China's poor intellectual property rights record had been a major obstacle to China's accession to the WTO and, prior to its creation, to the GATT.<sup>61</sup> Not coincidentally, many commentators consider WTO membership to have been a major impetus for improvements in China's IP legislation.<sup>62</sup> However, while WTO membership may have brought about improvements in legislation to reflect international standards, actual enforcement of those standards has remained inadequate.<sup>63</sup>

### C. CHINA'S ENFORCEMENT OF OBLIGATIONS

#### 1. Task Force Results

China claims to have made great strides in its enforcement efforts. For example, in an anti-piracy campaign in March 2000, Task Forces<sup>64</sup> in Shanghai and Guangdong seized more than 200,000 pirated DVDs of U.S. films and arrested twenty-four people.<sup>65</sup> The Shanghai Customs Bureau claims to have cracked 210 IP cases in 2003, up 50% from its results in 2002.<sup>66</sup> During a September 2004 news conference in Beijing, Zhang

60. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement]. The TRIPS Agreement came as a result of the dissatisfaction of the United States and other Western countries with existing intellectual property conventions during the 1970s. Cheng, *supra* note 34, at 1948. The TRIPS Agreement focuses on domestic legislation and enforcement of intellectual property rights in member countries. *Id.* It incorporates the minimum standards of the Berne Convention, but extends protection to newer forms of intellectual property, such as computer programs. *Id.* at 1949.

61. See Kahn & Cooper, *supra* note 3, at A10 (describing how China's poor record of IP enforcement posed an obstacle to WTO entry).

62. See Cheng, *supra* note 34, at 1942-43; Yu, *supra* note 15, at 372.

63. See *infra* Part I.C.

64. See *supra* note 48 and accompanying text.

65. *How Does the United States Benefit from a "No" Vote for Permanent Normal Trade Relations with China? Hearing on Permanent Normalized Trade Relations with the People's Republic of China Before the Senate Commerce Comm.*, 106th Cong. (2000) [hereinafter Valenti testimony] (testimony of Jack Valenti, President and Chief Executive Officer, MPAA) (discussing the benefits of extending normal trade relations with China).

66. Doug Nairne, *Beijing's Phoney War on Fakes*, SOUTH CHINA MORNING POST, July 23, 2004, at 15.

Zhigang, one of China's vice ministers of commerce, announced that China had seized "2 million compact discs during the first half of the year in raids on 8,000 CD and software dealers around the country, fining violators about \$3.6 million."<sup>67</sup> One particularly high profile case in Shanghai—the first joint investigation by Chinese and U.S. authorities of DVD piracy—resulted in the seizure of over 210,000 pirated DVDs and \$100,000 in cash, as well as the arrest of six people, including two Americans.<sup>68</sup> Although these examples are quite impressive, piracy in China remains a significant problem, and the United States has continued to criticize China's efforts to combat it.<sup>69</sup>

## 2. Enforcement in Chinese courts

Copyright violation disputes may be tried in three of the four Chinese judicial divisions authorized to handle IP related claims: civil, criminal, or administrative courts.<sup>70</sup> Litigation in these courts has steadily increased.<sup>71</sup> In 2003, three MPAA

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67. Peter S. Goodman, *Pirated Goods Swamp China: Official Crackdown has Little Effect*, WASH. POST, September 7, 2004, at E1.

68. Michael Janofsky, *2 Americans Held in China on Charges of Film Piracy*, N.Y. TIMES, July 31, 2004, at B4. The arrests led to convictions. The Associated Press, *2 Americans Sentenced in DVD Piracy in China*, N.Y. TIMES, Apr. 20, 2005, <http://www.nytimes.com/2005/04/20/business/media/20piracy.html>. One American was fined \$60,500 and sentenced to two and half years in prison; the other was fined \$1200 and sentenced to one year in prison. *Id.* They will be deported after serving their sentences. *Id.* The court also convicted two Chinese accomplices involved in the operation. Press Release, Motion Picture Association of America, *Americans Accused of Stealing and Selling Movies Sentenced Today in China* (Apr. 19, 2005), available at [http://www.mpaap.org/MPAAPress/2005/2005\\_04\\_19a.doc](http://www.mpaap.org/MPAAPress/2005/2005_04_19a.doc).

69. See *infra* Part I.C.3.

70. See Brent T. Yonehara, *Enter The Dragon: China's WTO Accession, Film Piracy and Prospects for the Enforcement of Copyright Laws*, 9 UCLA ENT. L. REV. 389, 396–97 (2002). In terms of IP violations, the fourth division of China's People's Courts—economic courts—handles only economic contract cases resulting from patent and trademark disputes. *Id.* IP trial courts at both the intermediate and high court level exist in the major trade cities/provinces of Beijing, Shanghai, Hainan, Jiangsu, Guangdong and Fujian. See generally Susan Finder, *The Protection of Intellectual Property Rights Through the Courts*, in CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE 255, 225, 260 (Mark A. Cohen et al. eds., 1999). Additionally, as the highest court in China, the Supreme People's Court is further authorized to hear appeals. Yonehara, *supra* note 70, at 396–97.

71. Between 1992 and 1997, China's IP courts adjudicated a total of 16,894 IP cases. Finder, *supra* note 70, at 257–58. And, between 1997 and 2000, the number of copyright suits accepted by courts jumped by 175% from 350 to 963. Graham J. Chynoweth, *Reality Bites: How the Biting Reality of Piracy in China is Working to Strengthen its Copyright Laws*, 2003 DUKE L. & TECH. REV. 3, ¶ 15 (2003).

companies won a major lawsuit in Shanghai against two local DVD companies that sold pirated versions of MPAA films.<sup>72</sup> Noting that the litigation marked the first time a foreign film company sued local DVD sellers,<sup>73</sup> the Shanghai intermediate court based its ruling on the fact that U.S. companies enjoy copyright protection of their films in China due to China's signature to the Berne Convention.<sup>74</sup>

### 3. U.S. Assessment of China's Enforcement Efforts

Over the last few years, the U.S. Congress has recognized China's regulatory improvements and enforcement efforts.<sup>75</sup> In 1996 the United States took China off the Special 301 list, but has continued to monitor the country due to the serious intellectual piracy problems that continue to plague U.S. companies doing business in China.<sup>76</sup> With regard to copyrights, Congress noted crackdown efforts by relevant Chinese authorities, but indicated that significant problems continued to exist.<sup>77</sup> The USTR reported that in 2003 at least 90% of virtually every type of copyrighted work sold in China was counterfeit, causing annual losses of over \$1.8 billion to U.S. companies due to piracy of copyrighted materials.<sup>78</sup>

The U.S. Commercial Service echoed these comments in their evaluation of China's efforts in 2004.<sup>79</sup> The agency noted China's enactment of several new IP laws, but remarked that

72. Da Yong, *US Film Giants Win Lawsuit*, CHINA DAILY (North America), Aug. 8, 2003, at 3.

73. *But see* WANG, *supra* note 7, at 87 (citing cases the MPA brought in Chinese courts against home video pirates as early as 1994).

74. Yong, *supra* note 72, at 3. In addition to awarding the U.S. film giants more than \$80,000 in damages, the court ordered the two Chinese DVD distributors to issue a public apology and confession via the local Chinese language news media. *Id.*

75. Country Reports on Economic Policy and Trade Practices, S. REP. NO. 107-53, at 28-29 (2002) (prepared by the U.S. Dept. of State).

76. *Id.*

77. *Id.* at 29. Congress noted that "retail software revenue lost to piracy was estimated to total \$1.1 billion at the end of 2000." *Id.* As for the motion picture industry, even as Vice Minister Zhang Zhigang delivered his announcement on China's success in cracking down on infringing goods, pirated copies of new and old DVDs and CDs were being sold in shops and on sidewalks on the most prominent intersections of China's cities. Goodman, *supra* note 67, at E1.

78. *China and the WTO: Compliance and Monitoring Hearing Before the U.S.-China Economic and Security Review Commission*, 108th Cong. 136 (2004) [hereinafter Smith Testimony] (testimony of Eric H. Smith, president, International Intellectual Property Alliance); USTR 2004 Report, *supra* note 5, at 73.

79. China 2004 Commercial Guide, *supra* note 5, at 17-18.

“the Chinese Government has yet to enact effective enforcement measures to address willful trademark counterfeiting or copyright piracy, as required by TRIPS.”<sup>80</sup> Further, while China had some success in closing down factories that produced DVDs and other optical disks, “large markets continue[d] to openly sell pirated and counterfeit products despite repeated U.S. government requests to shut down and prosecute vendors selling infringing goods.”<sup>81</sup>

The MPAA estimates that in 2003 it lost \$175 million in trade losses to China due to a combination of Chinese trade barriers and piracy.<sup>82</sup> The MPAA lists China’s piracy rate—95%—as among the highest in the world and the highest in the Asian region.<sup>83</sup> Between 1995 and 2000, MPAA’s estimated losses due to piracy in China averaged around \$120 million per year and increased dramatically to \$160 million in 2001 with the increased market for DVDs.<sup>84</sup> MPAA Executive Vice President and Washington General Counsel Fritz Attaway stated that “[t]otal box office from all films in China declined 40% since the advent of VCD and DVDs, as customers substituted buying pirated copies of home entertainment for viewing at home instead of going to the movies.”<sup>85</sup> Film piracy is clearly a great problem, but it is one of many the MPAA has encountered as it has entered the Chinese market.<sup>86</sup>

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80. *Id.* at 18.

81. *Id.* at 18–19. In addition, there is evidence that pirates exported pirated CDs, VCDs and DVDs out of the country. Smith Testimony, *supra* note 78, at 137. With more than \$87 million dollars in counterfeit goods coming from China seized by U.S. Customs authorities during 2004, “China has no equal either as a source of counterfeit and pirated goods to the world or as a market in which fakes are produced and sold locally.” Submission of the International AntiCounterfeiting Coalition, Inc. to the USTR: Special 301 Recommendations 11 (Feb. 11 2005), <http://www.iacc.org/2005-301.pdf> [hereinafter IACC 2005 Special 301 Recommendations]. UK Customs reported that “China’s share of optical products seizures catapulted from an almost insignificant half of one percent of all seizures in 2002 to the third largest source of pirated optical discs in 2003”—and this was only a small fraction of the pirated goods produced in China targeted at world markets. Attaway Testimony, *supra* note 6, at 50.

82. Attaway Testimony, *supra* note 6, at 47.

83. Attaway Testimony, *supra* note 6, at 46, 47, 49, 50, 51; MPAA, Anti-piracy statement, <http://www.mpa.org/anti-piracy/content.htm> (last visited Sept. 25, 2005).

84. WANG, *supra* note 7, at 78.

85. Attaway Testimony, *supra* note 6, at 51.

86. *See infra* Part II. *But see* WANG, *supra* note 7, at 87 (noting that video piracy has developed a market for some American films, including ROBOCOP 3 (Orion Pictures 1993), which when released legitimately in China was extremely successful due in part to the market created by counterfeit copies of ROBOCOP 1 (Orion Pictures

## II. CHINA'S MARKET ACCESS FOR FOREIGN FILMS

### A. GOVERNMENT FRAMEWORK ON FOREIGN FILM DISTRIBUTION

Commentators have noted that “[t]he operation of the film business in China is unlike that of any other country in the world.”<sup>87</sup> Two major government bodies govern the media industry: the State Administration of Radio, Film and Television (SARFT), which regulates the film (theatrical releasing and distribution), radio, and television sector, and the Ministry of Culture, which monitors the home video import and distribution business.<sup>88</sup>

#### 1. *Film (Theatrical) Distribution*

Promulgated in 1981, the Film Import Measures<sup>89</sup> gave the state-run China Film Corporation exclusive rights to select, import, and distribute foreign films in China.<sup>90</sup> Beginning with the import of *The Fugitive*<sup>91</sup> in 1994, a proposal adopted by SARFT authorized the China Film Corporation to import and distribute foreign films on a revenue-sharing basis.<sup>92</sup> However, prior to China's WTO accession, SARFT imposed a de facto quota limiting the number of foreign films that could be distri-

1987) and *ROBOCOP 2* (Orion Pictures 1990) that had been previously distributed by pirates).

87. CHINESE FILM: THE STATE OF THE ART IN THE PEOPLE'S REPUBLIC 3 (George Stephen Semsel ed., 1987)

88. Shujen Wang, *Film (Optical Disk) Piracy in China*, 3 (2003) Issue Paper Prepared for SSRC Intellectual Property, Markets & Cultural Flows Workshop, Oct. 24–25, 2003, New York, <http://www.ssrc.org/programs/ccit/publications/shujen.wang.rtf>

89. *Jin kou ying pian guan li ban fa* 进口影片管理办法 [Imported Films Administrative Measures] (promulgated by the Ministry of Culture and the General Administration of Customs, approved by the State Council, Oct. 13, 1981) (P.R.C.) [hereinafter *Imported Films Administrative Measures*] (detailing the provisions for China's import of films and placing the same restrictions on films imported from Hong Kong and Macau as those placed on films imported from foreign countries).

90. *Imported Films Administrative Measures*, *supra* note 89, art. 2; see Xiaowei (Sherry) Yin, *China Opening Up on Foreign Film Imports*, CHINA DAILY (Hong Kong), July 16, 2003, at 7.

91. *THE FUGITIVE* (Warner Bros. 1993).

92. Wang, *supra* note 88, at 3. Although MPAA members have generally enjoyed a 50-50 box office receipts split with local distributors under the revenue-sharing basis concept, in China they generally only receive 15% of the box office receipts, with approximately 30% going to the China Film Corporation and the remainder to the local film companies that handle distribution in their localities. See Valenti Testimony, *supra* note 65, at 59.



buted on a revenue-sharing basis to ten per year.<sup>93</sup>

As part of the U.S.-China Bilateral WTO Agreement, China agreed to double the revenue-sharing quota; it currently allows for a maximum of twenty films to be imported annually.<sup>94</sup> In addition to raising the revenue-sharing quota, China's WTO commitments also reduced the film import duty from nine to five percent, and changed the method used to calculate the duty, resulting in a substantially lower tariff rate.<sup>95</sup> Before any of these twenty films can be distributed in China, however, first they must undergo a lengthy review and censorship process, which results in a lengthy delayed release of the film in China—often several months after the film has been released in the United States and other countries.<sup>96</sup>

In December 2001, to address concerns over the lack of competition in film distribution and to break up the China Film Group's monopoly, the Ministry of Culture and SARFT issued amendments to the Film Import Measures calling for "the establishment of another Chinese film distribution giant."<sup>97</sup> Less than two years after the amendments, Chinese officials formally announced the formation of another film distribution giant—Huaxia Film Distribution Company (Huaxia)—to begin distributing approximately half of the twenty revenue-sharing films China imports annually.<sup>98</sup>

## 2. Home Video<sup>99</sup> Distribution

China began officially importing American home videos in 1997.<sup>100</sup> Between 1997 and 2000, China's Ministry of Culture approved the import of over 800 home video titles (averaging

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93. See Yin, *supra* note 90; OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2001 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 46 (2001), [http://www.ustr.gov/assets/Document\\_Library/Reports\\_Publications/2001/2001\\_NTE\\_Report/asset\\_upload\\_file535\\_6560.pdf](http://www.ustr.gov/assets/Document_Library/Reports_Publications/2001/2001_NTE_Report/asset_upload_file535_6560.pdf).

94. See Summary of U.S.-China Bilateral WTO Agreement, Motion Pictures, Videos, Sound Recordings (Feb. 2, 2000), <http://www.uschina.org/public/wto/ustr/generalfacts.html> [hereinafter U.S.-China Bilateral WTO Agreement].

95. Attaway Testimony, *supra* note 6, at 53.

96. Wang, *supra* note 88, at 4.

97. Yin, *supra* note 90.

98. See *id.* Huaxia's shareholders include the China Radio & Film Group (its largest shareholder with a 20% stake), China Film Group, Shanghai Film Group, Changchun Film Group, and a total of fifteen Chinese film producers and theater circuits. *Id.*

99. As used in this Note, home video refers to video tapes, VCDs, and DVDs released for home entertainment.

100. Wang, *supra* note 88, at 4.

200 per year).<sup>101</sup> Like films imported for theatrical release, home videos also undergo a review and censorship process that, while significantly faster than the process which reviews the twenty annual theatrical releases, is still lengthy.<sup>102</sup> As part of its WTO commitments, China lowered its tariffs on home videos from 15% to 10%, and agreed to change the calculation method as it had done for theatrical releases.<sup>103</sup>

### 3. Other Venues of Market Access

In addition to increasing the annual number of foreign films available in Chinese theaters, China's WTO commitments also called for foreign participation in joint ventures to distribute video and sound recordings as well as cinema ownership and operation.<sup>104</sup> Effective January 1, 2004, the Provisional Rules on Foreign Invested Cinemas<sup>105</sup> permitted foreign investors to hold stakes of up to 49% in joint ventures for the renovation, construction and operation of cinemas.<sup>106</sup> SARFT has also issued a regulation that permits majority foreign ownership of film technology joint ventures in specified provinces and cities, and minority stakes of up to 49% in film production companies.<sup>107</sup>

101. *Id.*

102. *Id.*

103. Valenti Testimony, *supra* note 65.

104. U.S.-China Bilateral WTO Agreement, *supra* note 94.

105. Wai shang tou zi dian ying yuan zhan xing gui ding 外商投资电影院暂行规定 [Provisional Rules on Foreign Invested Cinemas] (promulgated by the State Administration of Radio, Film & Television, Nov. 11, 2003, approved by the Ministry of Commerce and Ministry of Culture, Jan. 1, 2004) (P.R.C.).

106. See Yin, *supra* note 90. Although China only committed to allowing foreign minority ownership in theater management, in October 2003, China approved Warner Brothers International Theaters, Inc. to take a 51% controlling interest in its joint venture with the Shanghai Cinema Group to build and operate ten cinemas. Julie Walton, *WTO: China Enters Year Three*, CHINA BUS. REV., Jan.-Feb. 2004, at 10, 14.

107. Dian ying zhi pian, fa xing, fang ying jing ying zi ge jin ru zhan xing gui ding 电影制片、发行、放映经营资格准入暂行规定 [Provisional Regulations on Qualifications for Engaging in Film Production, Distribution, and Presentation] (promulgated by the State Administration of Radio, Film & Television, Sept. 9, 2003, effective Dec. 1, 2003) (P.R.C.) available at <http://www.sarft.gov.cn/manage/publishfile/35/1252.htm>. In accordance with this regulation, Warner Bros. Pictures, China Film Group, and Chinese privately-owned Hengdian Group have recently been approved to form Warner China Film HG Corp.—China's first Sino-foreign film production joint venture—which is authorized to develop, invest in, produce, market, and distribute Chinese-language feature films, TV films, and animation. US-China Business Council, CHINA MARKET INTELLIGENCE, Oct. 27, 2004,

## B. HOLLYWOOD'S COMPLAINTS ABOUT CHINA'S DISTRIBUTION SYSTEM

Although China has increased the number of revenue-sharing films to twenty per annum, the MPAA has complained that this quota is still far too low.<sup>108</sup> According to the MPAA, normal WTO interpretation is that the twenty film commitment marks the "minimum" number of permissible film imports rather than a "maximum" film quota, as it is interpreted by Chinese authorities.<sup>109</sup> The twenty imported foreign films fall far short of Chinese demand for foreign, primarily American, films.<sup>110</sup> Also frustrating for the MPAA is the fact that the mandatory censorship process is two to three times longer than the process in other Asian markets with similar censorship requirements.<sup>111</sup> In terms of distribution rights, while Huaxia may provide some competition to the China Film Corporation, both entities are fundamentally owned by the same State organs.<sup>112</sup> This highly controlled government import and distribution structure provides few opportunities for true competition and "pays little attention to the commercial needs of a large and hungry market."<sup>113</sup>

In addition, China has periodically announced "blackout periods," during which no foreign films may be screened.<sup>114</sup> For

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<http://www.uschina.org>.

108. Attaway Testimony, *supra* note 6, at 52.

109. *Id.*

110. Attaway Testimony, *supra* note 6; Mary L. Riley, *The Regulation of the Media in China*, in CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE 355, 364–65 (Mark A. Cohen et al. eds., 1999) (finding that China maintains an artificially small market for foreign films to support its domestic film industry); Wang, *supra* note 88, at 3–4; cf. Gerardo Lara, *The Piracy of American Films in China: Why the U.S. Art Form Is Not Protected by Copyright Laws in the People's Republic of China*, 2 UCLA J. INT'L L. & FOR. AFF. 343, 357 (1998) (concluding that China deliberately limits market access to American films in order to reap the benefits of piracy).

111. Attaway Testimony, *supra* note 6; cf. Naigen Zhang, *Intellectual Property Law Enforcement In China: Trade Issues, Policies and Practices*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 63, 78 (1997) (commenting that China's censorship process is based on a concern about cultural influences from Western countries). By way of comparison, China typically takes fifteen to thirty days and sometimes longer to finish its censorship process of films, while Korea takes on average seven to ten days, Singapore generally takes about seven days, Taiwan takes five to seven days, and Japan needs about seven days for a film to clear customs (i.e., Japan does not impose the same kind of censorship review). Attaway Testimony, *supra* note 6, at 52.

112. Attaway Testimony, *supra* note 6, at 52.

113. *Id.*

114. *Id.* at 53.

example, as summer blockbusters such as *Spider-Man 2*,<sup>115</sup> *Harry Potter and the Prisoner of Azkaban*,<sup>116</sup> and *Shrek 2*<sup>117</sup> were set to be released worldwide in July 2004, in May 2004 China announced a “crackdown on bad influences” designed to lower rising violent crime rates in its nation’s youth and protect them from China’s embrace of commercialism.<sup>118</sup> As a result of the blackout period, no foreign films were released in China during July 2004 in an effort to “encourage more upright pursuits.”<sup>119</sup> Some speculate that the Chinese blackout periods are more an effort to protect China’s domestic releases than a policy choice to “purify the screen.”<sup>120</sup>

The MPAA argues that the combination of the twenty film quota, the slow censorship process, the film distribution monopoly, the blackout periods, and the tariffs—which are not paid by DVD pirates—has created a piracy market to satisfy Chinese demand for U.S. films with which legitimate U.S. film companies cannot legally or monetarily compete.<sup>121</sup> Similarly, due to the slow home-video censorship process and the small number of retail outlets, legitimate copies of video tapes, VCDs, and DVDs are typically sold several months after consumers have already bought pirated versions sold upon original release.<sup>122</sup> When given a choice, most Chinese choose the cheaper, newer title.<sup>123</sup> Despite China’s WTO membership, these trade barriers are permitted due to a “cultural exception” in international trade.<sup>124</sup>

### III. THE CULTURAL EXCEPTION TO MULTILATERAL TRADE AGREEMENTS

The concept of a cultural exception to multilateral trade agreements rests on the notion that there are certain products which are “cultural” and because of their “cultural specificity” and “unique status,” and indeed their very existence, they

115. SPIDER-MAN 2 (Columbia Pictures 2004).

116. HARRY POTTER AND THE PRISONER OF AZKABAN (Columbia Pictures 2004).

117. SHREK 2 (DreamWorks Pictures 2004).

118. Shashank Bengali, *China Cracking Down on ‘Bad Influences’ in Entertainment*, KNIGHT RIDDER WASH. BUREAU, Aug. 4, 2004.

119. *Id.* To the Chinese government’s credit, official instructions also led to the free opening of museums during that time. *Id.*

120. *See id.*

121. Attaway Testimony, *supra* note 6.

122. Wang, *supra* note 88, at 4–5; Attaway Testimony, *supra* note 6.

123. *See* Wang, *supra* note 88, at 4.

124. *See infra* Part III.

should not be regulated according to the same trade liberalization rules applied to other goods.<sup>125</sup> However, the cultural exception does not currently have any formal legal status; that is, the exception does not exist as such in any agreement or treaty of the WTO.<sup>126</sup> However, during the final negotiations for the establishment of the WTO, France and other countries expressed concern that some GATT rules—in particular most-favored-nation and national treatment status—would destroy cultural industries if applied to them.<sup>127</sup> Heated discussions provided no resolution, but there is now a tacit understanding that WTO trade liberalization rules do not apply to films and audio-visual goods and services.<sup>128</sup>

As has been noted by many, “Hollywood started to dominate

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125. See UNESCO Cultural Exception Definition, *supra* note 8.

126. See *id.*; John H. Barton, *The International Video Industry: Principles for Vertical Agreements and Integration*, 22 CARDOZO ARTS & ENTN'T. L.J. 67, 93 (2004) (discussing that while Article IV of the GATT 1947 “included a provision on cinematograph films . . . [and expressly permitted] screen quotas reserving time for national films,” WTO discussions failed to reach an agreement with respect to audiovisual services); Sandrine Cahn & Daniel Schimmel, *The Cultural Exception: Does It Exist in GATT and GATS Frameworks? How Does It Affect Or Is It Affected by the Agreement on TRIPS?*, 15 CARDOZO ARTS & ENTN'T. L.J. 281, 286–305 (1997) (discussing the GATT exception to motion pictures, the North American Free Trade Agreement (NAFTA) general exclusion to cultural works “to protect Canada from losing its cultural identity from a massive influx of U.S. works, which the Canadian public eagerly consumes” and the WTO Uruguay Round discussions and standstill for cultural exceptions). See generally Chi Carmody, *When “Cultural Identity Was Not At Issue”: Thinking About Canada—Certain Measures Considering Periodicals*, 30 LAW & POL'Y INT'L BUS. 231, 261–77 (1999) (discussing treatment of culture in GATT and WTO decisions).

127. See Cahn & Schimmel, *supra* note 126, at 297–304; Alan Riding, *Filmmakers Seek Protection From U.S. Dominance*, N.Y. TIMES, Feb. 5, 2003, at E3 (discussing France’s “impressive victory” over Hollywood in the WTO negotiations); UNESCO Cultural Exception Definition, *supra* note 8. Generally, the most-favored-nation principle requires WTO members to treat all members equally, and with some exceptions, a nation cannot grant a tariff or other trading preference to one nation without giving it to all other countries. See Understanding the WTO, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact2\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm) (last visited Feb. 16, 2005). The principal of national treatment requires nations to provide the same treatment to foreign products, services, or IP items once they have entered the domestic market. See *id.* Proponents of a cultural exception argue that cultural industries, and in particular film and audiovisual ones, survive due to import restrictions and other support mechanisms that would be destroyed should the industries be subject to most-favored-nation and national treatment requirements. See UNESCO Cultural Exception Definition, *supra* note 8.

128. See Cahn & Schimmel, *supra* note 126, at 301–04 (discussing the scope of the United States and the European Union’s “agreement to disagree” over GATT rules being limited only to audiovisual services, and that while audiovisual works are fully covered by the free trade provisions, the audiovisual sector is temporarily excluded from WTO trade liberalization).

the world cinema market in the 1920s."<sup>129</sup> Since then, France and other foreign countries have supported measures to guard against what they deem "American cultural invasion."<sup>130</sup> The United States has consistently viewed such restrictions purely on economic terms—essentially as barriers to free trade.<sup>131</sup>

Advocates for the existence of a cultural exception in international trade agreements argue that normal trade liberalization rules should not apply to cultural products, as they are not "merely manufactured product[s], but rather an expression of what is most profound in a people, in a nation—it is its history, its language, its very identity."<sup>132</sup> Proponents further argue that "film and television are crucial conveyors of cultural express[ion]—in fact the most widely applied means of transporting a nation's culture at the end of the twentieth century"—and therefore protection, otherwise inapplicable, should be given to a country's film industry.<sup>133</sup> Cultural exception supporters do not call for complete bans of the importation of foreign cultural goods, but instead argue that trade rules should favor domestic movie, television, and radio industries by subsidizing those industries and by minimizing foreign competition through the imposition of import quotas.<sup>134</sup>

Critics of the cultural exception do not dismiss the importance of culture, nor do they argue that a nation should not take any steps to promote its own domestic film industry.<sup>135</sup> However, critics do argue that cultural exemptions are based on the

129. *See id.* at 287.

130. Thomas Bishop, *France and the Need for Cultural Exception*, 29 N.Y.U. J. INT'L L. & POL. 187, 187–88 (1997).

131. *See id.* at 187–88.

132. *Id.* at 187 ("Each country, although it needs to be open to the cultures of other lands, has a right—even a duty—to protect and develop its own culture. The disappearance of one country's culture cannot be made up by another's gain; the result would be an irretrievable loss for all humanity."); Joseph Devlin, Note, *Canada and International Trade in Culture: Beyond National Interests*, 14 MINN. J. GLOBAL TRADE 177, 190 (2004) (stating that "cultural productions are rooted in the culture that produces them").

133. Bishop, *supra* note 130, at 187.

134. Riding, *supra* note 127, at E3 (discussing the French and Canadian views on cultural exceptions).

135. *See id.* (quoting MPAA President Jack Valenti's partial support for France's subsidies as a method to protect French film and comparing France's success with the failing industries in other countries); cf. Carolyn Hyun-Kyung Kim, *Building the Korean Film Industry's Competitiveness: Abolish the Screen Quota and Subsidize the Film Industry*, 9 PAC. RIM L. & POL'Y J. 353 (2000) (discussing the failed application of a quota system in Korea and other countries and promoting the use of subsidies to increase the competitiveness of the domestic Korean film industry).

false presumption that “cultural transmission is a one-way street,” and argue further that although American films have benefited from globalization of the audiovisual sector, it is unclear that this success has translated into “substantive homogenization and a respective diminution of cultural identity.”<sup>136</sup> Hence, opponents argue that normal trade rules adequately protect cultural interests, and that if all other industries are negotiated through the WTO, a special exception should not be made for films.<sup>137</sup>

Because the TRIPS Agreement focuses on the “acquisition, maintenance, and transfer of intellectual property rights, [and] not on an author’s right to exploit his work,” it is unlikely that the TRIPS Agreement will, by itself, defeat the cultural exception concept.<sup>138</sup> Cultural trade exceptions remain a point of contention, but steps have been taken to formalize an agreement on the issue and a Draft Cultural Convention<sup>139</sup> is currently being organized by UNESCO. Although the focus of the Draft Cultural Convention is the protection of culture and not IP rights, the United States should stress China’s rampant film piracy and failure to enforce its TRIPS obligations in the treaty’s negotiations.

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136. Frederick Scott Galt, *The Life, Death, and Rebirth of the “Cultural Exception” in the Multilateral Trading System: An Evolutionary Analysis of Cultural Protection and Intervention in the Face of American Pop Culture’s Hegemony*, 3 WASH. U. GLOBAL STUDIES L. REV. 909, 918–22 (2004).

137. See *id.* See generally Riding, *supra* note 127.

138. See Cahn & Schimmel, *supra* note 126, at 305–06.

139. UNESCO, *Preliminary Draft of a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions*, U.N. Doc. CLT/CPD/2004/CONF-201/2 (July 2004) [hereinafter Draft Cultural Convention]; see Riding, *supra* note 8 (discussing the 2004–2005 negotiations regarding the Draft Cultural Convention); UNESCO, *Towards a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions*, [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=11281&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=11281&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last visited Sept. 21, 2005) (discussing the development of the Draft Cultural Convention).

#### IV. DISCUSSION OF THE COMPATIBILITY OF CHINA'S IP ENFORCEMENT AND TRADE RESTRICTIONS ON U.S. FILMS

##### A. CHINA'S FAILURE TO ENFORCE IP RIGHTS CANNOT BE CURED SOLELY THROUGH FUTURE TRADE NEGOTIATIONS

###### 1. *China's Current Enforcement is Insufficient*

China has taken major steps to increase IP protection, but these efforts are still not producing real results. China is now a member to all important international IP treaties and has both enacted and amended related domestic legislation to conform its own laws to international IP treaties and standards.<sup>140</sup> As such, the text of China's copyright laws and its WTO membership would appear to provide adequate protection to the MPAA and give the organization confidence as it markets films in China.<sup>141</sup>

Enforcement, in contrast to China's formal legislative and international obligations, is clearly another matter.<sup>142</sup> Pirated DVDs are still readily available for sale throughout the country in spite of China's copyright laws.<sup>143</sup>

[T]he bottom line is that with piracy rates over 90 percent, China is not in compliance with its TRIPS obligations under Articles 41 and 61 of the WTO agreement, TRIPS agreement. Put simply, the Chinese enforcement system has failed to significantly lower piracy levels in any significant way over the last few years.<sup>144</sup>

Although litigation in Chinese IP courts and some notable prosecutions of illicit DVD producers have increased, China's current enforcement system fails to sufficiently deter pirates wishing to profit from counterfeited DVDs and other optical discs.<sup>145</sup>

Simply copying one computer program, CD, VCD, or DVD

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140. See *supra* notes 29, 30, 41, 42, 43, 57 and accompanying text.

141. See *supra* note 57 and accompanying text.

142. See *supra* notes 77-83 and accompanying text.

143. See *supra* note 77 and accompanying text.

144. Smith Testimony, *supra* note 78, at 134. Article 41 provides, *inter alia*, that member states are to ensure enforcement procedures that prevent infringement and provide deterrents. TRIPS Agreement, *supra* note 60, art. 41. Article 61 provides that member states shall enact criminal procedures and penalties for willful copyright piracy on a commercial scale which shall act as an effective deterrent. *Id.* art. 61.

145. See *supra* notes 65-71 and accompanying text.



may lead to a profit of up to several hundred percent in China.<sup>146</sup> Unlike huge printing presses required to reproduce books, the internet and DVD burners allow pirates to reproduce films quickly and cheaply. This ease in copying allows pirates to set up new factories almost overnight, immediately after one is shut down. Moreover, the light weight and small size of DVDs allow the media to be transported easily and undetected throughout the country. Accordingly, when news of a major DVD confiscation is announced, the confiscation is a “mere drop in the bucket compared to what really passes through the market place in China.”<sup>147</sup>

One sign that China is treating piracy more seriously was a “nationwide campaign to stamp out illegal CD and DVD production lines” announced by the Chinese government in the summer of 2005.<sup>148</sup> The National Office for Cracking Down on Pornography and Piracy (one of the eight government agencies responsible for the campaign) opened a hotline for informants to report pirate factories and offered rewards of up to \$36,232 for each illegal production line reported.<sup>149</sup> China previously conducted similar campaigns, but the reward amount was increased for the 2005 campaign.<sup>150</sup>

Although the summer 2005 campaign was a positive step forward, China still needs to increase measures to deter the sale of pirated films. Increased deterrence could come from larger fines for counterfeiting and China treating piracy as a true criminal offense.<sup>151</sup> Although IP cases may be heard in criminal courts,<sup>152</sup> in practice administrative enforcement offers a less cumbersome enforcement option for China to deal with counterfeiting and piracy.<sup>153</sup> The International Intellectual Property Alliance (IIPA),<sup>154</sup> has stated that “[n]o country in the world has been able to deal significantly with high levels of piracy without

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146. Cf. Smith Testimony, *supra* note 78, at 135.

147. *Id.*

148. U.S.-China Business Council, China Launches Campaign Against Illegal CD/DVD Production Lines, Raises Tip Reward (June 29, 2005), <http://www.uschina.org> (follow “China Market Intelligence” hyperlink).

149. *Id.*

150. *Id.* From 1994 to 2004, \$4.82 million was paid out in rewards to informers of pirated audio and video products. *Id.*

151. Smith Testimony, *supra* note 78, at 135.

152. See *supra* notes 67–68 and accompanying text.

153. Smith Testimony, *supra* note 78, at 135.

154. *Id.* (“The IIPA is a coalition of six trade associations representing the copyright industries which has worked to strengthen copyright laws and enforcement regimes in over 100 countries worldwide.”).

using its criminal law . . . [and until China does so, there will not] be any significant change.”<sup>155</sup>

China does need to increase penalties for copyright violations and make piracy more than a mere administrative offense in order to bring its enforcement into conformity with its international commitments. But as will be discussed below, U.S. opportunities to bring about direct change in China’s IP enforcement practices are quite limited.

## 2. Negotiations Cannot Increase Enforcement Directly

A major force encouraging China to improve its IP legislation and creating Chinese obligations to improve its IP enforcement was the bilateral trade negotiations with, and threats of trade wars from, the United States.<sup>156</sup> Other than some high profile cases, however, these U.S.-Chinese promises have had little practical significance.<sup>157</sup> The passing of new legislation will naturally take place more quickly than its actual enforcement, but the multiple failed negotiations and weak agreements demonstrate their ineffectiveness in achieving any real change in the enforcement area.

In an attempt to protect the IP interests of the U.S. business community, the USTR has carefully scrutinized China for its IP violations and has stated that it intends “to continue to use . . . all available mechanisms to press for further improvement in China’s IPR regime.”<sup>158</sup> Additionally, the International AntiCounterfeiting Coalition, Inc. (IACC)<sup>159</sup> states that “current trends suggest China will remain the world’s worst violator of intellectual property rights unless decisive action is taken to fix

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155. *Id.*

156. See *supra* notes 26–32, 37–51, 55–58 and accompanying text.

157. See *supra* notes 63–83 and accompanying text; see also IACC 2005 Special 301 Recommendations, *supra* note 81, at 12–13.

158. See USTR, 2004 Special 301 Report Section 306 (May 3, 2004), [http://www.ustr.gov/Document\\_Library/Reports\\_Publications/Section\\_Index.html](http://www.ustr.gov/Document_Library/Reports_Publications/Section_Index.html) (click on “2004 USTR Reports and Publications” hyperlink; click on “2004 Special 301 Report” hyperlink; click on “2004 Special 301 Report Section 306” hyperlink); USTR, Special 301 Q & A - 2003, [http://www.ustr.gov/Document\\_Library/Reports\\_Publications/Section\\_Index.html](http://www.ustr.gov/Document_Library/Reports_Publications/Section_Index.html) (click on “2003 USTR Reports and Publications” hyperlink; click on “2003 Special 301 Report” hyperlink; click on “Special 301 Q & A” hyperlink) [hereinafter USTR 301 Q&A]; see also *supra* note 76 and accompanying text.

159. The IACC is a multinational organization which represents the interest of companies concerned with IP enforcement. IACC 2005 Special 301 Recommendations, *supra* note 81, at 2.

the problem."<sup>160</sup> But while the IACC urges the Chinese government to impose more severe penalties and clarify judicial interpretations of its laws, and the USTR meets with China to discuss violations of international obligations, effective change will only come from a change in Chinese political will.

Even if previous negotiations with U.S. officials were conducive to reforming China's IP regime when the United States signed bilateral agreements with China from 1979 through the mid-1990s,<sup>161</sup> the threat of trade sanctions today no longer carries the same weight. With each of those agreements, China had something to gain from international trade cooperation—first renewed trade relations with the United States and other Western countries, and then ultimately entry into the WTO.<sup>162</sup> However, China's WTO entrance removed a huge bargaining chip that the United States was able to use as leverage in its negotiations with China to insist on significant legal reform. In short, threatened trade sanctions are likely to have little effect in the actual disappearance of counterfeit DVDs from China's streets.

China's membership in the WTO now permits the United States and other member states to use the WTO dispute settlement system to resolve IP disputes between the two countries.<sup>163</sup> Settling disputes through the WTO must be handled through the Dispute Settlement Body (DSB).<sup>164</sup> While the DSB is an attractive venue for settling some international trade disputes, the potential time and burden of proof required to settle disputes through the DSB makes it an uninviting arena in

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160. *Id.* at 11.

161. *See supra* notes 26–52 and accompanying text.

162. *See supra* notes 26, 37–40 and accompanying text.

163. The TRIPS Agreement is part of the undertaking WTO member states take when they accede to the international trading body, meaning that that the TRIPS Agreement applies to all WTO members and that the WTO's dispute resolution system can be applied to TRIPS Agreement related disputes between member states. *See* WTO, Frequently Asked Questions About TRIPS (Trade-Related Aspects of Intellectual Property Rights) in the WTO, [http://www.wto.org/english/ratop\\_e/trips\\_e/tripfq\\_e.htm](http://www.wto.org/english/ratop_e/trips_e/tripfq_e.htm) (last visited Feb. 17, 2005).

164. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU]. The DSB is made up of all member governments, usually represented by ambassadors or equivalent officials. *Id.* art. 2. If two WTO member states cannot mutually resolve a dispute, they may request that the DSB appoint a Panel, which will make a recommendation on the dispute after hearing arguments from both sides. *Id.* art. 11. The panel's recommendation will become the DSB's ruling on the dispute if it is not rejected by consensus. *Id.*

which to solve U.S.-Chinese IP disputes.<sup>165</sup> The DSB exists more to resolve disputes than to make rulings, and therefore many cases are negotiated between countries for several years without resolution.<sup>166</sup> In addition, the remedies available through a DSB resolution are not very appealing. For example, the DSB might issue a ruling requiring China to improve enforcement of its IP legislation and particularly to adequately protect the IP rights of American films. However, if China refused or was unable to comply with the decision, the conventional penalty—imposing trade sanctions—has proven ineffective in forcing China to improve enforcement.<sup>167</sup> Moreover, the USTR has stated that it prefers to settle matters “out of court” and views settling disputes through the WTO DSB “as a tool of ‘last resort.’”<sup>168</sup>

China’s WTO membership itself will arguably have a positive effect on the continued development of China’s IP climate. Increased trade with other nations will result in better economic conditions for Chinese citizens and foster a desire for higher quality products.<sup>169</sup> On the other hand, WTO membership will also improve access to Chinese markets, a condition which may enhance the economic conditions that give rise to piracy and counterfeiting.<sup>170</sup> Chinese pirates might also gain increased access to international markets for counterfeit goods.<sup>171</sup>

Assuming that WTO membership does increase IP law enforcement, the change will not take place overnight. As such, it is likely that the U.S. government, IP watchdogs, and the MPAA will need to continue monitoring China’s violations and make recommendations to China on how to reform its IP regime for some time.

### *3. Chinese Requests for Patience Are Not Completely Ungrounded*

Although China’s IP legislation is still not as strong as it should be, it is impressive how quickly China has joined international copyright conventions and enacted copyright legislation

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165. Cf. Peter K. Yu, *The Second Coming of Intellectual Property Rights in China*, 11 OCCASIONAL PAPERS IN INTELL. PROP. 1, 31 (2002) (implying that it may be difficult to prove aspects of China’s piracy problem before the DSB).

166. See DSU, *supra* note 164, art. 3.

167. See *id.* art. 22; *supra* note 44 and accompanying text.

168. See USTR 301 Q&A, *supra* note 158.

169. See Yu, *supra* note 165, at 30–31.

170. See *id.*

171. See *id.*

to conform, albeit generally, to its international commitments.<sup>172</sup> The changes within the last thirty years are even more impressive when viewed against a historical and cultural background that is best described as antithetical to the concept of copyright law.<sup>173</sup> Further, since enforcement involves educating judges, law enforcement officers, and the public generally, it is natural that strong enforcement of the new legislation will require some additional time. Therefore, China's argument that time is required to develop adequate copyright enforcement is not completely unfounded.<sup>174</sup>

It is worth noting that while the United States has the benefit of a longer history of copyright laws and a greater appreciation of their importance, movie piracy exists on the internet and streets of the United States as well, and is also a great concern to the film industry.<sup>175</sup> Theft is universally frowned upon, but technological advances have created a "perception that freely downloading copyrighted works is something other than theft" by consumers in the United States.<sup>176</sup> MPAA President and Chief Executive Dan Glickman stated that "[p]eople knew they couldn't steal a video tape out of Blockbuster . . . but the principles [when downloading a pirated version of a film] are still the same."<sup>177</sup> As big a concern as this is in the United States, it will be a growing concern in coming years in China as well. In addition to the open sale of pirated DVDs, internet piracy of films is already becoming a larger problem in China, which is reported to have the second largest number of internet users in the world.<sup>178</sup>

Realistically identifying the difficulty of affecting positive enforcement change in China is not to suggest that the MPAA or U.S. authorities should sit idly by while pirated DVD copies of American films are sold openly on Chinese streets. The resistance to increased IP enforcement in China does, however, suggest that the problems of counterfeit DVDs and internet piracy are likely to exist in China for some time, even if China does increase fines for IP violations and treat piracy more seriously.

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172. See *supra* notes 30, 41, 42, 58, 144 and accompanying text.

173. See *supra* notes 9–25 and accompanying text.

174. See *supra* note 45 and accompanying text.

175. See generally *supra* note 2 and accompanying text.

176. Zeller, *supra* note 2.

177. *Id.*

178. See Smith Testimony, *supra* note 78, at 137.

4. *Although Results Will be Limited, Self-Help and Direct Action by MPAA Companies in China Will Continue to be Effective Under China's Current Enforcement Regime*

While the U.S. government should continue to pressure China to improve its IP enforcement, American film companies and U.S. authorities must also continue to file lawsuits in Chinese courts and work together directly with Chinese authorities to prosecute copyright violations.<sup>179</sup> Although full-scale piracy investigations are costly and may not always result in huge victories, the investigations serve two purposes: (1) they punish the actual violator and may even result in the recovery of some of the ill-gained profits acquired through illegal sales of the copyrighted works, and (2) they make the Chinese (and non-Chinese) public more aware of the importance of copyrights.

The 2004 international counterfeit DVD ring bust in Shanghai, conducted jointly by U.S. Customs and Chinese authorities, highlights the success that can be achieved when U.S. authorities work directly with the Chinese government in China.<sup>180</sup> The MPAA viewed the bust as a major step toward China fulfilling its IP commitments.<sup>181</sup> However, U.S. authorities only discovered the piracy operation due to statements posted on a foreign website by an American participating in the ring.<sup>182</sup> Had the counterfeit DVD ring not been exporting DVDs out of China, and had the individual not boasted of his income over the internet, it is unlikely he would have attracted the attention of U.S. authorities. The blatancy of the participants' actions was not only instrumental in their arrest, but is indicative of Chinese pirates' perception of the law. Due to China's low level of enforcement, many pirates believe they can violate Chinese copyright law with impunity. Given the clandestine nature of most DVD piracy operations, and their ability to move their production lines quickly, the vast majority

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179. See *supra* notes 66–71 and accompanying text.

180. See *supra* note 68 and accompanying text.

181. See Janofsky, *supra* note 68 (quoting then President and Chief Executive of MPAA Jack Valenti that the raid was “unprecedented” and “a very crucial step in redeeming” the promise of China Vice Premier Wu Yi to significantly reduce piracy by the end of the year).

182. *Id.* One of the two Americans seized in the case had “described himself in great length in a profile on a website for men seeking brides from Russia.” *Id.* He stated that he had “moved to China in 1995” because he “thought it would be an interesting place to live with many business opportunities.” *Id.* He further described his gross sales of pirated DVDs from his website in Shanghai as “about \$25,000 per month” and that he had “10 full-time employees.” *Id.*

of counterfeiters readily evade the radar of most U.S. investigations.<sup>183</sup>

It is also doubtful whether Chinese authorities would have welcomed such intricate U.S. involvement in the case had American citizens not been actively participating in the counterfeit ring. Nonetheless, the summer 2004 bust does provide a good model for partnership in combating piracy of U.S. films. It also suggests that when DVD rings do involve a foreign element, Chinese authorities may be more open to cooperation with U.S. authorities.

### *5. Partnership With Domestic Film Industries May be a Partial Solution*

As China's domestic music and movie industries develop and begin to lose greater profits on account of copyright violations, China will likely do more to enforce its IP commitments. One indication that the Chinese government is taking the issue of piracy against domestic audiovisual industries more seriously is China's invitation to more than one hundred entertainers, including twenty from Hong Kong, Macao, and Taiwan, to take part in a concert on February 26, 2005 to promote an anti-piracy campaign.<sup>184</sup> "The concert [was] designed to raise anti-piracy awareness among the general public," and it was the "first time [China's] central government held such an event to protect intellectual property rights."<sup>185</sup> Proceeds from the concert benefited a national anti-piracy fund set aside by the China Audio-Video Association for its efforts to combat counterfeiting.<sup>186</sup>

China's laws currently limit foreign ownership in film production companies to minority interests.<sup>187</sup> As American film companies partner with their Chinese counterparts, however, the copyright interests the MPAA seeks to protect will be those

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183. See *supra* note 147 and accompanying text.

184. See Cui Ning, *Pop Stars to Sing Out Against Pirate Music*, CHINA DAILY (North America), Feb. 15, 2005, at 1.

185. *Id.* (quoting Liu Jie, Deputy Director of the copyright department of the National Copyright Administration).

186. *Id.*

187. See *supra* notes 104–107 and accompanying text. Despite being restricted to minority ownership, a clear advantage of establishing a joint venture to produce films in China is that its films would not be restricted by the country's annual quota of twenty foreign films. David Barboza, *Hollywood Movie Studios See the Chinese Film Market as Their Next Rising Star*, N.Y. TIMES, July 4, 2005, at C3.

of a Chinese company. As such, the Chinese government will have an increased interest in their protection. As shown by the February 2005 concert, the cooperation will allow for greater opportunities to educate the public about copyrights and provide greater funds to fuel anti-piracy efforts.

### *6. Piracy Cannot be Eliminated Without Improved Market Access*

Increased penalties and raids will only have a limited effect as long as market access restrictions remain high on American films in China.<sup>188</sup> The ease with which DVDs can be reproduced, coupled with the time required for copyright law to gain legitimacy, creates an atmosphere highly conducive for those wishing to make a profit by meeting the demand created by the limited availability of high-quality American films. Therefore, if the MPAA seeks to make serious inroads in combating piracy in China, it must find a way to have more films distributed legally.<sup>189</sup>

## B. REEVALUATION OF THE CULTURAL EXCEPTION AND RELATED MARKET ACCESS ISSUES IN LIGHT OF CHINA'S PIRACY PROBLEM

### *1. The Cultural Exception, Generally*

It is a reasonable proposition that cultural products should

188. See *supra* notes 87–122 and accompanying text.

189. Some companies have begun to experiment with alternative strategies to combat piracy of their films in China. In summer 2005, Warner Bros. released *THE SISTERHOOD OF THE TRAVELING PANTS* (Warner Bros. 2005) on DVD in China on the same day it debuted in U.S. theaters. Jon Healey, *Warner Gets a Jump on Film Pirates in China*, L.A. TIMES, June 9, 2005, at A1. In order to make unauthorized copies of the legitimately released DVD less appealing to counterfeiters located both in and outside China, the DVD was released in China without any special features and with “Mandarin subtitles that cannot be hidden.” *Id.* Given that *THE SISTERHOOD OF THE TRAVELING PANTS* was “a relatively low-budget film that the studio had not planned on releasing in Chinese theaters,” the move was mainly intended to “provide some insights into the market,” and Warner Bros. has no immediate plans “to apply the same strategy to combat bootlegging in the U.S. or other countries,” or “with more high-profile titles.” *Id.* Sony Pictures previously tried a similar strategy by releasing “deeply discounted” DVDs of the Chinese-made film *KUNG FU HUSTLE* (Sony Pictures 2004) in China just forty-five days after it was released in Chinese theaters. *Id.* Sony did not release the film in U.S. theaters until two months later. *Id.*



be treated differently in international trade from other goods.<sup>190</sup> Assuming that cultural products truly contain that which is "most profound in a people," then a cultural product simply cannot be treated the same as a "manufactured product."<sup>191</sup> Trade liberalization is based on a theory of comparative advantage, which provides that a nation should manufacture the goods that it is most efficient in producing compared to other goods, and then trade with other nations to obtain the goods that it produces less efficiently.<sup>192</sup> If this theory were to be applied to cultural products, the cultural industries and traditions of many nations might disappear, which would be a loss for all nations.<sup>193</sup>

Therefore, in order to protect a nation's cultural industries from disappearing, it logically follows that the WTO trading rules of most-favored-nation and national treatment should be relaxed with respect to cultural products.<sup>194</sup> Accordingly, a nation should be able to provide some special treatment to its own domestic film industry or to that of another country if it wishes to ensure its continued existence.<sup>195</sup> While the preservation of cultural products is good in theory, if no limits are placed on how a nation is allowed to benefit from the exception, it also follows that the nation could prohibit the free and open exchange of ideas, knowledge, and culture, which would be no less of a loss for all nations.<sup>196</sup>

The issue of pirated DVDs in China highlights the problems created by a nation that is too restrictive in protecting the existence of its own film industry. When a nation restricts legal importation of foreign films, the restriction must be balanced against the ability of the nation's citizens to obtain the film

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190. See *supra* notes 129–34 and accompanying text.

191. See *supra* note 132 and accompanying text; cf. Devlin, *supra* note 132, at 189–90 (noting that "interchangeability is noticeably absent in cultural production").

192. JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 7–14 (4th ed. 2002).

193. See *supra* note 132 and accompanying text.

194. See *supra* note 127 and accompanying text.

195. *But cf.* Devlin, *supra* note 132, at 197 ("Although the nation-state is not an entirely trustworthy advocate for the preservation of commercially vulnerable culture in world trade, it is the only stakeholder that has standing in relation to the WTO.").

196. Riding, *supra* note 8 (quoting the American response to the Draft Cultural Convention: "Mounting trade barriers, including efforts to prevent the free flow of investment and knowledge, is not a valid way to promote cultural liberty or diversity since such measures reduce choices."); see *supra* notes 136–137 and accompanying text.

through unlicensed channels, including pirate DVD networks and the internet. China's current ability to set extremely low quotas on the number of foreign films that can be legally imported annually has created and strengthened its market for pirated DVDs.<sup>197</sup> As access to digital technologies and the internet grows, border inspections may become "increasingly difficult and even futile" in preventing the free flow of cultural products and a cultural exception may seem less meaningful.<sup>198</sup> Given the importance France, Canada, China, and other countries place on the protection of cultural industries, however, the existence of cultural exceptions will be a long-term issue.<sup>199</sup>

The current United States-European Union "agreement to disagree" on cultural exemptions in the WTO has created a de facto cultural exception that is more problematic than a formal exception. The unstated agreement does not provide any guidelines on the limits to measures which a nation can take in seeking to protect "cultural products."<sup>200</sup> The conclusion of a formal treaty governing trade in cultural products could provide formal guidelines to address the problems created by China's highly protective environment. The lack of set guidelines provides too little transparency and predictability for movie producers and allows countries to discriminate against foreign films simply because they are cultural products. A formal agreement could address these issues and at the same time ensure that cultural products are adequately protected.

The Draft Cultural Convention is a proposed instrument that would formally establish a cultural exception.<sup>201</sup> The draft was presented by fifteen culture experts in the summer of 2004 and attempted to address concerns of both the United States and cultural exception supporters "by endorsing 'the free flow of ideas by word and image' and by noting that cultural goods and services 'must not be treated as ordinary merchandise or consumer goods.'"<sup>202</sup> The United States has objected to "anything that prevents the free and open exchange of" cultural products in the Draft Cultural Convention, while supporters of the Convention have argued that the instrument would promote the

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197. See *supra* notes 85, 93, 94, 105–07 and accompanying text.

198. See Devlin, *supra* note 132, at 188.

199. See Riding, *supra* note 8; *supra* notes 126, 128, 139 and accompanying text.

200. See *supra* notes 126–28 and accompanying text.

201. See *supra* note 139.

202. Riding, *supra* note 8.

availability and choice of different cultural products.<sup>203</sup>

Debate on amendments to the Draft Cultural Convention is likely to exist for the near future.<sup>204</sup> Various countries and international organizations, including WIPO, have commented on the Draft Cultural Convention, but as of the date of this Note many commentators' concerns have not yet been incorporated into the text of the Convention.<sup>205</sup> Given that the Convention's goal is to protect "the diversity of cultural contents and artistic expressions"<sup>206</sup> and that it was drafted by culture experts, its treatment of the IP issues involved is minimal.<sup>207</sup> The original July 2004 text of the Draft Cultural Convention did provide:

Article 7 – Obligation to promote diversity of cultural expression

2. States Parties shall also ensure:

(a) that the legal and social status of artists and creators is fully recognized, in conformity with international existing instruments, so that their central role in nurturing the diversity of cultural expressions is enhanced;

(b) *that intellectual property rights are fully respected and enforced according to existing international instruments, particularly through the development or strengthening of measures against piracy.*<sup>208</sup>

The authors of the July 2004 text of the Draft Cultural Convention also provided two options describing how the Convention might function with existing IP laws and treaties to which member states are parties:

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203. See *id.*

204. See *id.*

205. Office of the Spokeswoman of UNESCO, Second Session of the Intergovernmental Meeting of Experts on the Preliminary Draft on the Protection of the Diversity of Cultural Contents and Artistic Expressions (Jan. 31–Feb. 12, 2005), [http://portal.unesco.org/en/ev.php-URL\\_ID=13486&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13486&URL_DO=DO_TOPIC&URL_SECTION=201.html). UNESCO has begun to incorporate some government suggestions into the Draft Cultural Convention. See generally UNESCO, *Preliminary Report by the Director-General Setting Out the Situation to be Regulated and the Possible Scope of the Regulating Action Proposed, Accompanied by the Preliminary Draft of a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions*, U.N. Doc. 33 C/23 (Aug. 4, 2005) (hereinafter Cultural Committee Second Session). The analysis in this Note refers solely to the original July 2004 text of the Draft Cultural Convention.

206. Cultural Convention Second Session, *supra* note 205.

207. The so-called "cultural experts" who drafted the text of the Draft Cultural Convention are government representatives nominated by UNESCO member states. See *id.*

208. Draft Cultural Convention, *supra* note 139, art. 7 (emphasis added).

## Article 19 – Relationship to other instruments

## Option A

1. Nothing in this Convention may be interpreted as affecting the rights and obligations of the States Parties under any existing international instrument relating to intellectual property rights to which they are parties.
2. The provisions of this Convention shall not affect the rights and obligations of any State Party deriving from any existing international instrument, except where the exercise of those rights and obligations would cause serious damage or threat to the diversity of cultural expressions.

## Option B

Nothing in this Convention shall affect the rights and obligations of the States <sup>209</sup>Parties under any other existing international instruments.

While proposed articles 7 and 19 require that member states uphold their external IP commitments, the broad language of proposed article 6 of the original July 2004 draft called into question whether a country could adequately fulfill those commitments:

## Article 6 – Rights of States Parties at the national level

1. Within the framework of its cultural policies as defined in Article 4.7, and taking into account *its own particular circumstances and needs, each State Party may adopt measures, especially regulatory and financial measures, aimed at protecting and promoting the diversity of cultural expressions within its territory*, particularly in cases where such expressions are threatened or in a situation of vulnerability.
2. Such measures may include the following:
  - (a) measures which in an appropriate manner *reserve a certain space for domestic cultural goods and services among all those available within the national territory, in order to ensure opportunities for their production, distribution, dissemination and consumption*, and include, where appropriate, provisions relating to the language used for the above-mentioned goods and services;
  - (b) measures which *guarantee independent cultural industries effective access to the means of producing, disseminating and distributing cultural goods and services*;

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209. *Id.* art. 19.

(c) measures which grant public financial aid; in granting such aid, States Parties may determine the nature, amount and beneficiaries thereof;

(d) measures which promote the free exchange and circulation of ideas, cultural expressions, and cultural goods and services, encourage non-profit organizations, and stimulate the entrepreneurial spirit;

(e) measures<sup>210</sup> which encourage and support public service institutions.

As with the current *de facto* cultural exception, these provisions are troubling as they do not provide any guidelines on the limits to measures which a country could take in seeking to protect its own cultural products. That is, this provision would continue to allow China to set unreasonably restrictive quotas on the import of foreign films, which has been a major factor in the development of China's pirated DVD market. The remainder of this note will highlight the inadequacy of the status quo in terms of allowing a country such as China to continue to have no restrictions in limiting legal access to foreign audiovisual works. The remainder will also describe how the Draft Cultural Convention could be amended to better protect the IP rights of producers of American films in China.

## 2. *The Cultural Exception's Problems as Applied to China*

### a. China's Quotas Need to be Reduced

In response to its commitments in the U.S.-China Bilateral WTO Agreement, China doubled the number of foreign films it allows to be shown in Chinese theaters.<sup>211</sup> Yet the current foreign film quota is still extremely limited given the great demand for foreign films in the Chinese market.<sup>212</sup> Whether the quota is considered in purely economic terms or as a good faith effort to protect against American homogenization of the international film industry, as with screen quotas imposed by other nations, the Chinese authorities state that the quotas are necessary to protect the vitality of Chinese film makers and Chinese culture.<sup>213</sup>

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210. *Id.* art. 6 (emphasis added).

211. *See supra* note 94 and accompanying text.

212. *See supra* note 110 and accompanying text.

213. *See supra* notes 110, 120, 129-31 and accompanying text.

The number of Chinese multiplex theaters with state-of-the-art equipment will increase as new laws permitting increased foreign ownership in theaters take hold, but currently many theaters can show only a limited number of films at once.<sup>214</sup> Chinese supporters of the quota argue that without imposing quotas on foreign films, the demand for American films would require that Chinese theater owners show fewer Chinese films, and as a result the Chinese film industry would be severely damaged.<sup>215</sup> China is not the only nation that claims quotas are required to protect the livelihood of its domestic film industry.<sup>216</sup> Nevertheless, the widespread existence of pirated DVDs ultimately undermines at least some of the goals cultural protection is designed to achieve through the use of quotas.

Unlike the Chinese authorities who prohibited foreign films to be shown in order to purify the screen during the summer of 2004, most advocates of a cultural exception do not fear the negative moral and cultural influences contained in imported films.<sup>217</sup> Proponents instead view the quotas as a measure designed to ensure the economic viability of the domestic film makers and indirectly preserve the domestic culture of the people.<sup>218</sup>

The extensive proliferation of pirated DVDs arguably defeats this goal. While quotas do make fewer foreign films available to consumers and allow more ticket money to be directed toward domestic film companies, even quotas offer no assurance that domestic film makers will continue to produce truly domestic cultural products. Domestic film makers may be influenced directly by any Western films they view, pirated or otherwise. Chinese movie producers may also sense a domestic demand for Hollywood-style movies and seek to emulate Hollywood films in order to make a profit rather than make "Chinese" films. Therefore, although Western cultural influence may be tempered by the direct restriction on American films, it may be the inevitable result of cultural producers attempting to profit off of what they know is in demand. In other words, it is not at all obvious that market access restrictions protect the existence of "true" Chinese films.

Additionally, it is questionable how successful quotas are as

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214. See *supra* notes 105–106 and accompanying text.

215. See *supra* note 110 and accompanying text.

216. See *supra* notes 129–31 and accompanying text.

217. See *supra* notes 118–20, 129–31 and accompanying text.

218. See *supra* note 132 and accompanying text.

a direct means to protect the general populace from being dominated by American culture. Rather than paying an exorbitant amount of money to buy one ticket to have one's culture poisoned by foreign influences in a theater, instead the cheap prices of pirated DVDs allow Chinese citizens to buy, own, watch, and be poisoned by even more foreign movies. As such, quotas do not prohibit Chinese citizens from watching foreign films, but only from watching them legally. Ironically, the low price of DVDs combined with the inability to see the films in domestic theaters increases the Chinese citizenry's knowledge of American life (as viewed through Hollywood blockbusters), and at the same time tacitly encourages continued delay in the appreciation for copyright law.

Therefore, whether quotas are designed to protect Chinese citizens directly from the adverse effects of exposure to foreign films or protect the livelihood of the domestic film industry, the rampant spread of extremely cheap DVDs inhibits the achievement of both goals. The Draft Cultural Convention should therefore be amended to prohibit the use of such restrictive quotas. If quotas are to be permitted at all, they must factor into account the effects of digital and other technologies that facilitate widespread viewing of films despite official import restrictions. Under China's current system, its highly restrictive movie quotas create incentives for Chinese consumers to watch pirated DVDs and help the counterfeit industry to flourish. Accordingly, the quotas should be set high enough that consumers are encouraged to watch foreign films legally rather than purchase pirated copies of DVDs. If the Draft Cultural Convention endorsed a higher quota system, China would benefit by being able to reserve room for domestically produced films in its theaters, not having to renegotiate the issue individually with foreign countries, and potentially having its IP enforcement increased.

Alternatively, rather than permit strict quotas on the number of foreign film imports as China currently does, the Draft Cultural Convention could establish that only screen time quotas are permissible.<sup>219</sup> Under a screen time quota system, a country could be permitted to reserve a minimum amount of

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219. See *supra* notes 129–31 and accompanying text. See generally Ivan Bernier, Local Content Requirements for Film, Radio, and Television as a Means of Protecting Cultural Diversity: Theory and Reality, <http://www.mcc.gouv.qc.ca/international/diversite-culturelle/eng/update.html> (last visited Sept. 21, 2005) (discussing the screen time allocation quotas of various countries).

time during which theaters are required to show domestic films. As screen time quotas do not limit the number of foreign films that are actually imported and shown, they ensure that domestic works receive a minimum amount of screen time and simultaneously allow for increased cultural exchange. Ultimately, however, the best solution would be for the Draft Cultural Convention to only permit the use of subsidies to benefit domestic film producers, even if those subsidies were based on duties charged on the import of foreign films.<sup>220</sup> Such a system would allow countries like China to ensure that domestic films are being produced even in the face of competition from Hollywood films. The use of subsidies would also allow more foreign films to be shown legally in China and may indirectly increase respect for copyright law in China.

b. China's Blackout Periods Need to be Eliminated, or at Least Reduced

China's periodic blackout periods completely restricting the import of foreign films fail, like quotas, to protect the cultural heritage of China's film industry. In order to combat piracy in both the United States and abroad, American film makers now release films in theaters worldwide at approximately the same time.<sup>221</sup> The concept is simple. If a consumer can see the newest Hollywood blockbuster in a theater with a huge screen, stadium seating and great sound, without having to wait several months, the consumer is less likely to download a pirated, poor quality version of the film from the internet. Given the wide availability of pirated DVDs of American films in China, as well as Chinese citizens' access to the internet, American film producers have an extra incentive to ensure that their films are shown in Chinese theaters in a timely fashion.<sup>222</sup>

Not surprisingly, China's occasional blackout periods are extremely troublesome to American film makers.<sup>223</sup> During the busy 2004 summer season, as schools let out for vacation and MPAA film companies released new movies worldwide, the Chinese government banned all foreign movies in its theaters claiming the Chinese government needed to protect its youth.<sup>224</sup>

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220. See *supra* notes 132, 135 and accompanying text.

221. See *supra* note 118 and accompanying text.

222. See *supra* notes 85, 178 and accompanying text.

223. See *supra* notes 114–20 and accompanying text.

224. See *supra* notes 115–20 and accompanying text.



If the ban truly denied Chinese youth all access to the harmful American cultural missiles, then one could take the measure more seriously.<sup>225</sup> But while the ban undoubtedly prevented some Chinese youth from being corrupted, many young consumers watched the long-awaited American blockbusters on pirated DVDs.<sup>226</sup> After the blackout period ended and the films were allowed in theaters, those who had watched the films illegally had little incentive to pay higher prices to watch them again. Because of the widespread availability of pirated movies in China, the blackouts ultimately fail to prevent an influx of American culture.

The Draft Cultural Convention should be amended to prohibit blackout periods altogether. A USTR argument to this effect would be helpful, but would not have the same strength as a blackout prohibition included in a binding international agreement. While screen time quotas may be a tolerable compromise permitting a minimum screening percentage of domestic films, complete bans on all foreign films over extended periods of time—especially during well known busy periods—are plainly protectionist.

### c. China's Censorship Delays Must be Improved

Although pre-release censorship is not directly covered by cultural exception discussions, censorship raises many of the same concerns as blackout periods and quotas. The concept of censorship has an ugly connotation to those who hold the freedoms of speech and expression as essential in a free democracy. At the same time, however, Americans understand that these freedoms are not absolute. There are certain subjects, such as child pornography, which should be censored in order to protect what we consider to be higher values. Because not all countries share the same cultural values, it is natural that different governments and populations will have different ideas about

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225. See *supra* notes 119, 120 and accompanying text.

226. To the Chinese government's credit, shortly before SHREK 2 was to be legally released on DVD and VCD in China on November 5, 2005, the National Copyright Administration called for a crackdown on pirated copies of SHREK 2 DVDs in response to a complaint from Dreamworks SKG that pirated copies were being sold in some Chinese shops and by street peddlers. See Cui Ning, *Cracking Down Pirated Shrek 2 DVD*, CHINA DAILY, Oct. 21, 2004. The crackdown called for the confiscation of any SHREK 2 DVDs sold prior to November 5 and threatened penalties for any companies that attempted to "sell or produce illegal copies." *Id.* Given that the majority of the damage was done over the summer, however, this crackdown likely brought limited relief.

which subjects should censored. Although American directors and actors are undoubtedly unhappy when their cultural products are edited to meet foreign moral standards, the MPAA has generally accepted this censorship as an unavoidable transaction cost of doing global business.<sup>227</sup>

Even while censorship itself may be an acceptable cost of doing business in a foreign market, the MPAA is correct to insist on a quick and efficient censorship process. Most other Asian countries accomplish the process in a fraction of the thirty-day time period Chinese censorship typically requires.<sup>228</sup> As with China's quotas on foreign films and blackout periods, the continued proliferation of pirated DVDs creates urgency on the part of American film makers to have their films clear China's censorship process as quickly as possible. China's censorship process for both home videos and theatrical release of films is extremely slow, often leading to significant delays in the release of films and videos.<sup>229</sup> While a film or home video is waiting to clear China's censors, pirated DVDs of the uncensored version of the film are easily purchased.<sup>230</sup>

Speeding up the censorship process would not alleviate all of the concerns created by the availability of pirated versions of the films. Consumers may still purchase the pirated version simply because it is not censored and they want to enjoy the entire uncensored work. But the censored legitimate copy also comes with quality assurances and other perks, including the advantage of being able to view the film in a theater, an advantage not available with the pirated copy. Therefore, China should speed up the censorship process both in order to protect American film makers from losses related to IP rights violations and in order to protect Chinese citizens from viewing the uncensored, "harmful" portions of the films. While this internal reason to expedite the censorship process does exist, an external pressure could come from provisions in an international treaty. The Draft Cultural Convention could specify maximum time periods in which censorship is required to take place following the importation of an audiovisual work.

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227. See *supra* notes 96, 111 and accompanying text.

228. See *supra* note 111 and accompanying text.

229. See *supra* notes 96, 102, 111 and accompanying text.

230. See *supra* notes 122–123 and accompanying text.

d. Tariffs Should be Lowered and Phased Out, But are Likely to Remain for the Near Future

In addition to dealing with the quota system, blackout periods and censorship process, American film makers are also forced to pay tariffs for the films they import into China legally.<sup>231</sup> China did lower these tariffs as part of its WTO accession commitments,<sup>232</sup> but it goes without saying that the cost of these tariffs is borne entirely by foreign film companies. Counterfeiters pay no duties when they import and sell films that are either legitimately or illegitimately available in the country. Chinese IP laws do impose fines on offenders, but the low risk of getting caught and low cost required for large profits continue to make the sale of pirated DVDs an attractive option for many in China.<sup>233</sup>

While tariffs on foreign films clearly impose an unfair burden on those seeking to legitimately import films to China, the continued existence of a cultural exception is likely to allow for the continued existence of high tariffs. Still, the extraordinarily high level of piracy in China should be an effective bargaining chip with which to call for a reduction in film tariffs, either in bilateral negotiations or if the United States decides to address the issue through the WTO's DSB or a dispute settlement body created by a cultural convention.<sup>234</sup> If the Draft Cultural Convention is enacted, it should deal specifically with tariffs on film imports and describe how a dispute settlement body would effectively balance TRIPS violations against the tariffs.

e. Liberalization of China's Film Importation and Distribution Monopoly is Required

China's creation of Huaxia, a second film distribution giant to compete with the China Film Corporation, marginally added competition to China's foreign film distribution industry.<sup>235</sup> However, because both Huaxia and the China Film Corporation

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231. See *supra* note 121 and accompanying text.

232. See Attaway Testimony, *supra* note 6, at 53; *supra* note 121 and accompanying text.

233. See *supra* notes 146–147 and accompanying text.

234. See *supra* notes 164–68 and accompanying text. If enacted, the Draft Cultural Convention would exist separately from the WTO agreements and would require its own dispute settlement body, as currently proposed in the text of the Convention. See Draft Cultural Convention, *supra* note 139, art. 24.

235. See *supra* notes 97–98, 112–13 and accompanying text.

are essentially owned by the same Chinese government bodies, it is unlikely this competition serves the needs of the market sufficiently.<sup>236</sup> China has enacted legislation and approved Sino-foreign joint ventures in the areas of theater building, film technology and film production.<sup>237</sup> Foreign ownership is currently limited to a minority interest in film product joint ventures, but the foreign ownership group is authorized to handle the distribution and marketing of its own films.<sup>238</sup>

China will likely maintain strict control of the importation of foreign films in the near future. But if import quotas are lifted, the China Film Corporation and Huaxia may not be able to handle the volume of films imported, and China would likely liberalize this sector out of necessity. If laws are enacted allowing for foreign ownership of distribution companies, MPAA companies may wish to consider working together with pirates. After all, the counterfeiters know the market well and have already established their own distribution networks. Any move to do so, however, should be approached with due diligence and continued self-policing so as to ensure the American film company would not be simply supplying the counterfeiter with better quality merchandise which he could then continue to pirate on the side.

## CONCLUSION

China has come a long way in developing its IP legislation and enforcement. Nonetheless, rampant DVD piracy throughout the country indicates there is much to be done and that combating the counterfeiting problem will likely be a huge cost of doing business for the American film industry in the future. Compounding the piracy problem are China's huge market access restrictions for American films that are permitted to protect against cultural homogeneity. The widespread availability of foreign films through counterfeit networks, however, prevents the cultural exception from truly protecting Chinese culture from outside influence.

The annual losses suffered by the American motion picture industry due to piracy and trade restrictions in China must take into consideration that one reason pirated DVDs sell so well is

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236. See *supra* notes 98, 112–13 and accompanying text.

237. See *supra* notes 105–07 and accompanying text.

238. See *supra* note 107 and accompanying text.

simply because they are so much less expensive than going to the theater or buying legitimate copies of the DVDs. Basic economics teaches us that given two equal products, people will pick the cheaper one. And China's piracy problem is not limited to counterfeit DVDs. Counterfeit handbags, watches, shirts, and many other goods that are not subject to such strict import quotas are still produced and sold throughout China.<sup>239</sup> Therefore, even if quotas, blackout periods, tariffs, and censorship were all removed and the distribution monopoly was liberalized, DVD piracy would likely continue to exist for the immediate future.

Still, China's market access restrictions prevent MPAA companies and other foreign film producers from having any meaningful competition with the pirates. Therefore, the cultural exception to free trade must be reconsidered in light of new technologies and rampant piracy. Conditions must be placed on the use of the doctrine to balance the competing interests of blindly protecting culture and protecting IP rights. The current tacit understanding that cultural goods are simply not covered by other WTO agreements is simply an insufficient method to protect both the cultural integrity of China's domestic film industry and the IP rights of American films entering China.

The creation of a formal agreement specifically covering trade in cultural goods may be an effective method to address both of these issues. Cultural goods would be seen as distinct goods that need to be considered separately from other goods when engaging in foreign trade. The agreement could also allow for clearer rules to protect against both protectionism and cultural imperialism. The formal rules would need to stipulate how quotas, subsidies, and other measures would be applied in order to protect against excessively restrictive policies that foster counterfeit networks. The rules could also make allowances for a balance of culturally protective measures against those guaranteed in TRIPS. Should these issues not be addressed, piracy of U.S. films in China is likely to continue to have a detrimental effect for both Hollywood and Chinese consumers alike.

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239. See generally IACC 2005 Special 301 Recommendations, *supra* note 81, at 11-32.