ARTICLES

INTELLECTUAL PROPERTY RIGHTS IN THE P.R.C.: IMPEDIMENTS TO PROTECTION AND THE NEED FOR THE RULE OF LAW

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INTRODUCTION

As the one year anniversary of the historic February 26, 1995 intellectual property agreement between the People's Republic of China (P.R.C. or China) and the United States approached,[1] the Associated Press carried a prophetic, if not amusing, story touching upon the success of the Agreement. The story, which was widely publicized in the Chinese state press, concerned a retailer of condoms and sex aids that was going out of business because of its inability to compete with counterfeiters.[2] While to some the tale of the Chinese condom store may be of interest in light of China's one-child policy or the government's desire to crackdown on pornography, the story's real import is that it is a barometer of the status of intellectual property rights in the P.R.C. In the classic half full, half empty debate, the story presages both negative and positive developments. On the one hand, the plight of Chinese business is the type of anecdotal evidence supporting the argument that infringement of intellectual property rights in China remains unchecked, which suggests that the 1995 MOU has failed to provide greater protection for

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1. *See* China-United States: Agreement Regarding Intellectual Property Rights, Feb. 26, 1995, 34 I.L.M. 881 (1995) [hereinafter 1995 MOU or the Agreement] (containing both the Letter and the Action Plan).

2. *See* Elaine Kurtenbach, *Condoms Among Latest Targets of Chinese Crackdown on Counterfeits*, A.P., Feb. 2, 1996, *available in* 1996 WL 4409759.

right holders. On the other hand, the problem underscores several encouraging developments: first, the increase in domestic enterprises relying on protection of intellectual property rights, second, a growing awareness of intellectual property rights among the Chinese masses, and finally, the central government's desire to improve protection of intellectual property as indicated by the widespread attention given to the story in the state-controlled press.

Prior to the 1995 MOU, American business complained that efforts by the Chinese to curb piracy had failed.[3] Piracy neared the one billion mark annually.[4] The Agreement was concluded just hours after a U.S. imposed deadline had expired, with the Chinese avoiding punitive trade sanctions amounting to 1.8 billion dollars.[5] When the 1995 MOU was executed, it was hailed as "the single most comprehensive and detailed [intellectual property rights] enforcement agreement the U.S. ha[d] ever concluded."[6] Although characterized as a great achievement, American business viewed the Agreement with cautious optimism.[7] In the period since the execution of the 1995 MOU, the United States has complained that there has been little progress in eradicating approximately one billion dollars a year in losses, while nongovernmental organizations have asserted that the problem is in fact worse.[8] Indeed, a trade war was again narrowly averted in June 1996 when China agreed to take further measures designed to promote the enforcement of intellectual property rights, which the U.S. claims China has failed to effec-

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3. *See U.S., China Announce Broad Agreement on Intellectual Property Protection*, 49 PAT. TRADEMARK & COPYRIGHT J. 514, 516 BNA No. 1218 (Mar. 2, 1995) [hereinafter *U.S., China Announce*].

4. *See* M. Margaret McKeown & H. Ping Kiang, *IP Protection In China: Real or Virtual Reality*, LEGAL TIMES, May 15, 1995, at 24.

5. *See U.S., China Announce*, *supra* note 3, at 515.

6. Helen Cooper & Kathy Chen, *China Averts Trade War with the U.S., Promising a Campaign Against Piracy*, WALL ST. J., Feb. 27, 1995, at A3; *see also* Seth Faison, *U.S. China Sign Accord to End Piracy of Software, Music Recordings and Film*, N.Y. TIMES, Feb. 27, 1995, at A1.

7. *See* Cooper & Chen, *supra* note 6.

8. On the eve of the anniversary of the Agreement, U.S. Trade Representative Mickey Kantor remarked that China had taken measures to improve the situation, but piracy remained a significant problem and that the U.S. would "not wait forever." Fed. News Serv. Wash. Package, Jan. 31, 1996, *Remarks By Mickey Kantor United States Trade Representative to the U.S.-China Business Council*, *available in* 1996 WL 5793315. Official estimates are one billion in losses per year as a result of piracy, but one company estimates that its losses alone reach that level. *See* McKeown & Kiang, *supra* note 4, at 24. Nongovernment organizations, such as the International Intellectual Property Alliance (IIPA), an industry watch dog, asserts that piracy is worse than prior to the 1995 MOU. *See* Geoffrey Crothall, *Beijing Promises to Clamp Down on CD Pirates*, S. CHINA MORNING POST, Nov. 8, 1995, *available in* 1995 WL 7539598; *see also infra* notes 61-62.

tively protect.[9] China's perceived inability to tackle infringement imposes a troublesome strain on U.S.-Sino relations not only because of the loud protests heard from American industry, but also as a result of the mounting trade deficit with China.[10] Eye catching stories concerning the reopening of compact disc (CD) factories closed as a condition of the 1995 MOU make it difficult for China to cast a positive light on its efforts.[11] While China does not deny that protection of intellectual property rights remains a problem, it maintains that considerable progress has been achieved.[12]

Regardless of the public debate, it is clear that the 1995 MOU has not achieved — and cannot alone achieve — the protection anticipated by both the parties and industry. The question, then, is why? Myriad arguments can be proffered to explain the rampant piracy in China, including that China's intellectual property laws are inadequate, permissible sanctions are insufficient to deter violations, and the central government and, more importantly, the Chinese Communist Party (CCP) are not committed to ending piracy. While these answers should not be discounted, this Article argues that even if China's laws met "international standards" and the government was unequivocally dedicated to eradicating piracy, protection of intellectual property rights would continue to elude China.

The 1995 MOU was a response to the complaints of right holders who found the Chinese judicial system to be a paper tiger in the face of clever and well protected infringers. The mandate

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9. *See* Seth Faison, *U.S. and China Agree on Pact to Fight Piracy*, N.Y. TIMES, June 18, 1996, at A6; Matt Forney & Nigel Holloway, *Play It Again, (Uncle) Sam: U.S. Wrings Concessions from China*, FAR E. ECON. REV., June 27, 1996, at 65, *available in* 1996 WL-FEER 10569236; Kathy Chen, *China and U.S. Avert Trade War Over Copyrights*, ASIAN WALL ST. J., June 18, 1996, at 1, *available in* 1996 WL-WSJA 10216135. For a discussion of the June 1996 Agreement, *see infra* notes 64-65.

10. There is no shortage of news stories addressing the deleterious effect of piracy on U.S. business. *See, e.g.*, Gene Marlow, *Kentucky Magnet Maker Trying to Fend Off Pirates*, RICHMOND TIMES-DISPATCH, Dec. 16, 1995, *available in* 1995 WL 2536440 (discussing the threat to the survival of a once thriving company). The trade deficit was approximately $34 billion in 1995, up 11.6% from 1994. *See Credit Freeze "Will Backfire"*, S. CHINA MORNING POST, Mar. 1, 1996, available in 1996 WL 3753589.

11. *See* Dusty Clayton, *US to Demand Fresh Copyright Crackdown*, S. CHINA MORNING POST, Nov. 7, 1995, *available in* 1995 WL 7539332; Wanda Szeto, *Undercover Bid to Find China's Disc Pirates*, S. CHINA MORNING POST, Aug. 14, 1995, *available in* 1995 WL 7533672. In fact, complaints that many illegal factories remained a year after the 1995 MOU almost led to a trade war, which was narrowly averted by the June 1996 agreement. *See also* Faison, *supra* note 9; Forney & Holloway, *supra* note 9; Chen, *supra* note 9.

12. *See* ZHONGGUO TONGXUN SHE, July 19, 1995 (P.R.C.), *translated in Copyright Official: "Piracy Remains a Problem,"* F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. CHI-95-140, July 21, 1995, at 15 (statement of deputy director of the State Copyright Administration); *infra notes* 63-64.

of the Agreement was the establishment of a dual system providing both judicial and administrative avenues for protection of rights. Right holders were freed from reliance on a weak court system, which was hampered by inexperienced and usually poorly trained court personnel, and they were given the right to petition administrative institutions dedicated to the protection, the enforcement, and the investigation of infringement. The purpose of the 1995 MOU was to address four major obstacles to the protection of intellectual property rights: (1) local protectionism, (2) weak enforcement institutions, (3) incompetency of court and administrative personnel and lawyers, and (4) a general lack of legal knowledge among the masses. The 1995 MOU is an important backdrop for understanding China's inability to eliminate piracy; thus, the events leading to its enactment and the provisions of the Agreement are the subjects of section I of the Article.

The Article then turns to an explanation of the impediments to protection and enforcement of intellectual property rights in China. The devolution of authority from the central government in Beijing to the localities as part of the economic reforms produced an unwelcome rise in the influence of local officials, cadres, and profitable, illegal enterprises. These powerful elite, with their interest in protecting illegal businesses, have interfered with the protection of intellectual property rights. This problem still remains, notwithstanding the fact that the 1995 MOU intended to take aim at localism. Sections II and III address how localism plagues the administrative and judicial systems, respectively, by interfering with the independence of these institutions and their enforcement capabilities. Localism is a debilitating force; defeating it requires stronger judicial and administrative bodies, an increase in resources to ensure that these institutions are no longer beholden to local governments, and the elimination of support for illegal businesses by offering legitimate enterprises as an attractive, alternative source of revenue.

Section IV focuses on the notion that the lack of training and expertise of judges, administrative officials, and lawyers undermines the ability of both legal and administrative institutions to protect intellectual property rights. It then asks whether the provisions of the 1995 MOU calling for improved training of officials have been successfully implemented and concludes that while progress has been made, serious problems remain. On a related front, the Article examines how Beijing's efforts to promote legal awareness among the masses reflect an encouraging step toward placing responsibility for understanding and protecting legal rights, including intellectual property rights, on Chinese society as a whole.

The final section of the Article shifts gears to explore fledgling rule of law concepts in China. Section V argues that the key to protection of rights in China is the development of rule of law principles. At this point, an important caveat must be mentioned. It is not my purpose to champion a theory of liberalism requiring separation of powers, a republican form of government, increased protection of human rights, or democracy. Instead, I am using rule of law in the sense that the laws of a nation should be enforced according to the spirit of the law, that is even-handedly and uniformly so as to ensure a reasonable expectation of predictability. While many argue that piracy could be eliminated if such was the true desire of the central government and the CCP, this is a suggestion that neither seems correct nor, more importantly, desirable. While the CCP controls the economic and social agenda through its influence on the enactment of laws, the legal system must be able to protect any rights and enforce any obligations, including intellectual property rights, granted by those laws. A system governed by rule of law, rather than the rule of men, will provide predictability and uniformity and will instill in the masses a respect for law, thereby deterring illegal activity and encouraging use of legal institutions to protect rights. In the final analysis, regardless of the adequacy of China's intellectual property laws, infringement will continue in the absence of legal and administrative institutions that can — and will — enforce rights according to the law and free from external pressures.

I. THE 1995 MEMORANDUM OF UNDERSTANDING

Pursuant to its obligations under a January 1992 memorandum of understanding with the United States,[13] the P.R.C. had by 1994 enacted or amended a substantial body of law concerning the creation, protection, and enforcement of intellectual property rights.[14] Yet, given the seemingly unstoppable infringe-

13. Memorandum of Understanding Between the Government of the People's Republic of China and the Government of the United States of America on the Protection of Intellectual Property, Jan. 17, 1992, 34 I.L.M. 676 [hereinafter 1992 MOU]. For a brief discussion of the 1992 MOU, *see infra* text accompanying notes 18-20.

14. This Article does not attempt to assess the adequacy of China's intellectual property laws, assuming instead that even if these laws satisfy "international standards," other institutional weaknesses would continue to impede protection of intellectual property rights in China. However, for a thorough discussion of China's intellectual property laws and regulations, see WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE (1995); Jianyang Yu, *Protection of Intellectual Property in the P.R.C.: Progress, Problems and Proposals*, 13 UCLA PAC. BASIN L.J. 140 (1994); Michael N. Schlesinger, Comment, *A Sleeping Giant Awakens: The Development of Intellectual Property Law in China*, 9 J. CHINESE L. 93 (1995); Derek

ment of these rights, it became apparent that the two countries would again knock heads over the issue and, indeed, that confrontation occurred in 1995. When the smoke cleared, the United States and China had penned the 1995 MOU, thereby preventing the imposition by the United States of one billion dollars in punitive trade sanctions and a certain trade war.

A. EVENTS LEADING UP TO THE 1995 MOU

The history of the 1995 MOU stretches much farther back than the fiery threats, intense negotiations, and diplomatic bravado that culminated in the eleventh-hour accord between the U.S. and China on February 26, 1995. The seeds of the 1995 MOU were already sown by the mid-1980s when a chorus of complaints from American businesses began to reach the ears of the U.S. government. Proponents of improving foreign protection of intellectual property rights forcefully argued that America's mounting trade deficit was in no small part related to rampant foreign infringement.[15] Eventually, in response to the hue and cry raised by interested parties, the United States passed the Omnibus Trade and Competitiveness Act of 1988, an amendment to the Trade Act of 1974.[16] For the intellectual property right holders the key to the 1988 Act is the "Special 301" watchlist, which authorizes the United States Trade Representative (USTR) to identify countries that are especially lax in protecting free trade and to take coercive action absent curative steps by the offending state.[17]

What did the passage of the 1988 Act mean to China? In fact, it meant a great deal. Between the passage of the 1988 Act and 1995, China was placed on the "Special 301" watchlist twice, and, as a result, China, on both occasions, entered into bilateral agreements intended to remedy the pervasive infringement within its borders.[18] After the first time it was placed on the list, China executed the 1992 MOU promising, *inter alia*, to enact a comprehensive legislative scheme protecting intellectual property rights and to join the Berne and Geneva Phonograms Con-

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Dessler, Note, *China's Intellectual Property Protection: Prospects for Achieving International Standards*, 19 FORDHAM INT'L L.J. 181 (1995); Laura W. Young, *China, Taiwan IP Laws Approach World Standards*, NAT'L LAW J., July 8, 1996, at C8.

15. *See* William P. Alford, *How Theory Does-and Does Not-Matter: American Approaches to Intellectual Property Law in East Asia*, 13 UCLA PAC. BASIN L.J. 8, 12-14 (1994); Judith H. Bello & Alan F. Holmer, *"Special 301": Its Requirements, Implementation, and Significance*, 13 FORDHAM INT'L L.J. 259, 260-65 (1989-90).

16. *See* Alford, *supra* note 15, at 13.

17. *See* Bello & Holmer, *supra* note 15, at 261-63.

18. *See* Angela Mia Beam, *Piracy of American Intellectual Property in China*, 4 J. INT'L L. & PRAC. 335, 350-51 (1995).

ventions.[19] In one respect, China satisfied a significant part of its promise by enacting or amending copyright, trademark, patent, and unfair competition legislation. On the other hand, these efforts did little to end infringement. The ultimate ineffectiveness of the 1992 MOU was a result of its failure to establish a regime for enforcing China's newly amended or enacted intellectual property laws.[20]

After the failure of the 1992 MOU to achieve any demonstrable progress in eliminating piracy, China was placed on the 301 watchlist a second time in June 1994.[21] This action eventually led to a second agreement, the 1995 MOU, but not before dramatic, diplomatic saber rattling. Feeling no progress had been achieved in curtailing infringement and buoyed by pressure from American business, the U.S. set a February 26, 1995 deadline for the imposition of 100% tariffs on $1.8 billion worth of Chinese goods.[22] This unprecedented threat led to the equally unprecedented, eleventh hour 1995 MOU.[23] The 1995 MOU was hailed as the most comprehensive copyright enforcement agreement ever negotiated by the U.S. and was praised by the Clinton Administration and American business alike.[24] The lack of an enforcement regime in the 1992 MOU was not overlooked by USTR Mickey Kantor in negotiating the 1995 Agreement. Indeed, the heart of the 1995 MOU was the creation of a dual administrative and judicial enforcement regime accessible to right holders. However, while the provisions of the 1995 MOU held out great promise, they are now viewed as providing little comfort to right holders. Why the 1995 MOU did not live up to its promise is the central focus of this Article. But before addressing this issue, a review of the 1995 MOU is necessary.

B. THE LETTER AND ACTION PLAN

1. The Letter

The 1995 MOU consists of two documents: (1) a letter from Wu Yi, China's Minister of the Ministry of Foreign Trade and Economic Cooperation, to then USTR Mickey Kantor (the Letter), and (2) an annex to the Letter, entitled Action Plan for Effective Protection and Enforcement of Intellectual Property

19. *See* 1992 MOU, *supra* note 13.

20. *See* Arthur Wineburg, *The Close of Round Two*, CHINA BUS. REV., July-Aug. 1995, at 20.

21. *See* Beam, *supra* note 18, at 351; U.S. TRADE REPRESENTATIVE, 1995 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS, 47, 48 [hereinafter 1995 USTR REPORT].

22. *See* Beam, *supra* note 18, at 352.

23. *See Id.* at 352-53.

24. *See* Cooper & Chen, *supra* note 6; Faison, *supra* note 6.

Rights (the Action Plan).[25] The Letter is significant because it not only summarizes the Action Plan but also includes several additional assurances. For instance, touting intellectual property protection as "[a]nother aspect of China's decision to develop its economy and open markets further,"[26] the letter agreed to increase "cooperation and trade in products protected by intellectual property rights,"[27] to not "impose quotas, import license requirements or other restrictions on the importation of audio-visual and published products," to allow U.S. entities to establish joint ventures concerning the production, reproduction, and sale of audio-visual products and computer software,[28] and to permit U.S. entities to execute revenue sharing agreements relating to film products.[29]

In a significant development, the P.R.C. agreed to publish all the laws and regulations relating to intellectual property by October 1, 1995.[30] While to some this may appear to be an empty gesture, in fact it is a significant departure from earlier practice which proscribed the publication of law.[31] There are also mutual obligations; the U.S. agreed to provide assistance and training to Chinese personnel, and both parties agreed to periodically exchange information and statistics relating to enforcement.[32] These mutual obligations have provided some ammunition for China when responding to complaints concerning its implementation of the 1995 MOU.[33]

2. *The Action Plan*

The provisions of the Action Plan are rooted in four principles: (1) U.S. right holders secured national treatment in China, (2) uniform protection of intellectual property rights was promised, (3) local protectionism was identified as a major obstacle to enforcement, and (4) education and increased public awareness concerning intellectual property rights, and more generally law,

25. *See* 1995 MOU, *supra* note 1.

26. *Id.* at 883.

27. *Id.*

28. *See Id.* at 884. These joint ventures are permitted "to enter into contracts with Chinese publishing enterprises to, on a nationwide basis, distribute, sell, display and perform in China." *Id.* Joint Ventures in audio-visual products are immediately allowed in Shanghai, Guangzhou and "other major cities," with joint ventures permitted in thirteen cities by the year 2000. *Id.*

29. *See Id.* In the Letter, China also approved the establishment of a representative office of the International Federation of Phonogram Industries (IFPI) and agreed to approve other copyright verification groups. *See Id.* at 884.

30. *See Id.*

31. For a discussion of the prohibition against publication of law, see *infra* text accompanying notes 143-46.

32. *See Id.* at 885-86.

33. *See infra* text accompany note 84.

were necessary. On the one hand, the Action Plan is worthy of praise because of its attempt to identify the fundamental obstacles to intellectual property protection in China. On the other hand, the Plan's inherent weakness is its inability to address these impediments.

The Action Plan is divided into two main parts. The first part creates an Intellectual Property Enforcement Structure. The focal point is the enforcement scheme empowering administrative bodies as well as foreign and domestic right holders to pursue enforcement of rights. The second part of the Action Plan concerns assurances relating to information dissemination, training of personnel, and improvements in the environment for intellectual property rights. The Plan obligates all levels of government to participate in its implementation and, as shall be seen, much to the detriment of the Plan's efficacy, places considerable authority in local governments.[34]

a. Enforcement Structure

The Enforcement Structure of the Action Plan comprises nine sections. The Action Plan, however, does not alter existing judicial institutions but rather establishes additional administrative agencies empowered to conduct investigatory and enforcement activities separate from, and as a compliment to, judicial institutions.

Section A requires China's State Council to establish a ministerial-level State Council Working Conference on Intellectual Property Rights and Sub-Central Working Conferences.[35] The Working Conference is responsible for coordinating the protection and enforcement of intellectual property rights among geographic areas and various departments.[36] It is also responsible

34. As discussed below, *infra* text accompanying notes 69-73, devolution of authority from the central government in Beijing to the localities is unquestionably a necessity given the size and bureaucracy of China. However, it is Beijing's inability to ensure implementation by the localities of both the Action Plan and more generally China's intellectual property laws that is the major obstacle to successful protection of intellectual property in China.

35. *See* 1995 MOU, *supra* note 1, art. I(A)(4). The task force is comprised of the major enforcement arms of the Chinese government, including the police and key ministries. *See* 1995 USTR REPORT *supra* note 21, at 55. By sub-central working conferences, the Action Plan means provincial, directly administered municipalities and autonomous regions and major cities. *See* 1995 MOU *supra* note 1, art. I(A)(4).

36. *See* 1995 MOU, *supra* note 1, art. I (A)(1). The Working Conference is required "to coordinate, study and decide the major policies and measures for the effective protection and enforcement of intellectual property rights" and coordinate activities among localities and government ministries and departments "to achieve uniform and effective protection and enforcement of intellectual property rights." *Id.* I(A)(3). It is also responsible for organizing and instructing authorities within regions and departments to investigate and "substantially reduce infringement," es-

for monitoring the implementation of the laws and regulations.[37] The most significant pledges are interrelated: the Working Conference is obligated (1) to ensure uniformity in the application and implementation of administrative, civil, and criminal processes and sanctions[38] with respect to all Chinese and foreigners, and (2) to coordinate the work of the sub-central working conferences in order to achieve the effective implementation and enforcement of laws and the "elimination of interference by local protectionism."[39]

The goals of the Working Conference are to be achieved through the creation of Enforcement Task Forces, as described in Section B of the Enforcement Structure. The administrative agencies responsible for protection of intellectual property rights — the National Copyright Administration (NCA), the State Administration for Industry and Commerce (AIC), the Patent Office, and the police and customs officials — are required to coordinate their activities under the working conference system and participate in enforcement task forces.[40] The task forces, which are the investigatory and adjudicatory bodies within the administrative system,[41] must act aggressively and on their own initiative[42] and consider petitions of foreign and domestic right holders without prejudice to any judicial action they may be able

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tablish education and publicity of intellectual property laws to foster understanding of those laws among the masses, and improve the enforcement skills of the responsible authorities. *See Id.*

37. *See Id.*

38. *See Id.*

39. *See Id.* art. I(A)(5)(a). Coordination of sub-central working conferences includes issuing directions to formulate action plans and work programs in their localities and review of such plans and programs by the State Council's Working Conference. *See Id.* The obligations of the Working Conference and the sub-central working conferences concerning the formulation and implementation of action plans and work programs and handling day-to-day functions are set forth in article I(A)(5) & (6).

40. *See Id.* art. I(B)(1). Local task forces must publish their action plans to ensure compliance with government policy. *See* 1995 USTR REPORT, *supra* note 21, at 56. The task forces are to remain in effect for three to five years.

41. *See* 1995 MOU, *supra* note 1, art. I(B)(1)-(3). The task forces have the authority to initiate and conduct investigations, including search premises, review records, and seal goods; and to impose fines, order the infringing conduct to cease, revoke permits, seize and destroy infringing goods and to enjoin suspected infringing conduct pending the processing of the particular case. Suspected cases of criminal infringement must be passed over to the state prosecutor and remain subject to administrative action. *See Id.*

The task forces are also authorized to coordinate investigations involving more than one jurisdiction. *See Id.* art. I(B)(1)(a). While in theory coordination within and between localities should be a significant part of the implementation of the intellectual property laws, in reality local protectionism has all but made such coordination impossible. *See infra* text accompanying notes 85-90.

42. *See* 1995 MOU, *supra* note 1, art. I(B)(4).

to seek.[43] Each participating agency *must* provide assistance to ensure effective enforcement of the intellectual property laws.[44] Significantly, the relevant people's governments must guarantee the necessary personnel and the financial support and conditions for implementation of the Action Plan.[45] The need to rely on local governments for resources has crippled implementation of the Plan.[46]

Section E[47] of the Enforcement Structure addresses "Enforcement Directly Through Administrative Agencies and Departments."[48] If there is reason to believe infringement has occurred, the responsible administrative agency[49] must order that the infringement cease; if a violation is found, an agency must impose "serious fines," must order compensation upon request of the right holder, and, in egregious cases, may revoke for three years a repeat offender's license in the field.[50] Here, the Action Plan again states that agencies at national and local levels must review and determine whether to act upon petitions directly submitted by a right holder.[51] In an important departure from previ-

43. *See Id.* art. I(B)(4), (6).

44. *See Id.* art. I(B)(1).

45. *See Id.*

46. *See infra* text accompanying notes 81-84.

47. The next section of the Plan actually provides a "special enforcement period" lasting six months from March 1, 1995, requiring intensive enforcement efforts by China during the period. *See Id.* art. I(C). Because the period has already expired, it is unnecessary to address it further here.

Section D of the Enforcement Structure is entitled Enforcement Efforts in Specific Fields. *See id.* art. I(D). The Plan requires special investigatory efforts with respect to audio-visual products and motion pictures. *See Id.* art. I(D)(2). Specialized efforts were to include the completion of investigations by July 1, 1995 of factories suspected of producing infringing products. *See Id.* art. I(D)(1)(a). In addition, a "comprehensive investigation of all CD, LD and CD-ROM production lines" was required. *See Id.* art. I(D)(2). Similarly, special efforts are mandated with respect to computer software, books, periodicals, and other printed works and trademarks. *See Id.* art. I(D)(2)(b) (computer software); *id.* art. I(D) (3) (books, periodicals and other printed works); *id.* art. I(D) (4) (trademarks). Section I(D) of the Plan also sets forth requirements with respect to licensing. The Plan provides for investigation and inspection of businesses involving intellectual property; requires procurement of proper licenses and registrations; permits administrative and judicial actions; provides for seizure and forfeiture of infringing products; damages; fines and, in cases of repeat offenders, revocation of either product permits or, in some cases, business licenses may be revoked for three years. *See id.* art. I(D), 34 I.L.M. at 893-97.

48. *See generally id.* art. I(E).

49. The section details the enforcement authority of the administrative agencies, including the NCA and local copyright agencies, the Trademark Office of the SAIC or AIC, and the Chinese Patent Office. *See Id.* art. I(E)(3).

50. *See Id.* Cases also may be referred to the prosecutor for criminal investigation. *See Id.*

51. *See Id.* art. I(E) (5). Again, submitting a petition to the relevant administrative agency does not preclude an action seeking judicial remedies. *See Id.* Right holders no longer need to rely on designated agents to enforce their rights. *See* 1995 USTR REPORT, *supra* note 21, at 57.

ous practice, administrative and judicial bodies must not only accept information proffered by the right holder but, significantly, foreign holders or their representatives can collect information which must be accepted as evidence equivalent to that collected by nationals.[52]

Section F of the Plan, entitled "Additional Administrative Actions," details additional duties of administrative agencies. To determine if infringement has occurred, all central level administrative departments must institute an intellectual property protection and enforcement system with individuals or enterprises that manufacture or sell books or computer software, or engage in trademark printing or publishing.[53] These departments "must combine stringent enforcement with information and education," conduct training classes, and require manufactures and sellers to study the intellectual property laws and pass an examination as a condition to the issuance of permits or business licenses.[54] Subcentral administrative departments are also required to monitor serious infringement cases and coordinate cross-regional investigation and enforcement efforts.[55]

b. Information Dissemination, Training, and Improvement of the Environment for Intellectual Property Laws

The second part of the Action Plan focuses on education and heightening public awareness concerning the protection and enforcement of intellectual property rights. What at first blush may

52. *See Id.* art. I(E)(4) & (6). The importance of this provision will be revisited later. *See infra* text accompanying notes 134-35.

53. *See Id.* art. I(F)(1). The Plan also restates here that permits and business licenses are conditioned on compliance with the law and repeat offenders will have their permits or, in serious cases, licenses revoked. *Id.*

54. *See Id.* art. I(F)(2). This notion of requiring education and training is an important feature. *See infra* text accompanying notes 148-53.

55. *Id.* art. I(F)(4). The lack of coordination among administrative as well as judicial institutions is a significant obstacle. *See infra* text accompanying notes 85-89, 111-12.

The remaining three sections of the Enforcement Structure can be briefly summarized. The "Customs Enforcement" section provides regulations concerning the prevention of the import and export of infringing goods. *See* 1995 MOU, *supra* note 1, art. I(G). The next section provides for the "Establishment of Copyright Verification Systems." The system consists of an identification verification system whereby manufactures of CDs, CD-ROMS and LDs are issued unique identifiers which must be imprinted on goods, and failure to comply can result in administrative or judicial punishment. *See Id.* art. I(H)(1). The Plan also requires title verification system under which all entities engaged in the production of foreign products in CD-ROM format must register their contracts with the NCA or local copyright authorities and receive title registration and operating permits. *See Id.* art. I(H)(2). The final section of the Enforcement Structure includes guidelines concerning verification, determination and protection of well known trademarks and lists acts constituting unfair competition. *See Id.* art. I(I).

seem to be superficial promises by the Chinese to educate the masses, improve training of authorities, and promote public awareness are in fact worthy goals necessary for the improvement of the intellectual property system in the P.R.C. The importance of these promises will be addressed in greater detail later.[56] At this juncture, however, it is important to recognize that major obstacles to effective protection of intellectual property rights in China include (1) insufficient training of enforcement personnel, and (2) a lack of understanding among the people of the importance of protecting such rights.

First, China promised to initiate education and training concerning intellectual property rights. Consistent with the general desire to promote education among officials and responsible authorities, the Chinese agreed to incorporate intellectual property laws into the country's current law popularization plan; they also agreed to improve the training of officials responsible for the protection of intellectual property rights, including administrative, judicial, prosecutorial, and customs personnel.[57] Along with the education of officials, China also promised to launch a program of national training and education with respect to intellectual property rights.[58] Second, China stated that the media would play a role in heightening awareness of intellectual property rights, in publicizing positive efforts in the protection of these rights, and in exposing infringement and local protectionism.[59] Finally, in a key departure from prior practice, China stated that it would make public all laws, regulations, and interpretations regarding intellectual property rights.[60]

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56. *See infra* text accompanying notes 113-53.

57. *See* 1995 MOU, *supra* note 1, art. II(A)(1) & (2). China is currently in the midst of its third Five Year Plan aimed at raising the knowledge of law among officials and the masses. For a discussion of the importance of this law popularization plan, see *infra* text accompanying notes 148-53.

58. The MOU requires publicity campaigns through the news media, establishment or expansion of institutions of higher learning, and training of management personnel at entities that produce or sell protected products. *See Id.* art. II(A)(3).

59. *See Id.* art. II(B)(1).

60. *See Id.* art. II(C). In a similar vein, and in an equally promising departure from past practice, the relevant agencies are directed to compile and then publish guidelines clarifying the "standards and procedures for intellectual property rights protection, so that Chinese and foreign holders of intellectual property rights can have a better understanding of the legal provisions and methods for protecting intellectual property rights in [China]." *Id.* art. II(D).

China previously had a long tradition against publication of laws, limiting their accessibility to judges and other officials. For a discussion of the reason for this policy and the recent departure from it, see *infra* text accompanying notes 143-47.

C. STATUS OF INTELLECTUAL PROPERTY SINCE THE AGREEMENT

The execution of the 1995 MOU has generated a great deal of discussion concerning the status of intellectual property rights in the P.R.C. Both the signatory states and American business have been quite vocal with their analyses. The U.S. vociferously asserts that China has made little progress,[61] while many American businesses maintain that the infringement has in fact worsened.[62] China, vehemently rejecting these complaints, avers that it has made "tremendous efforts."[63] Moreover, there is no shortage of "evidence" published in the Chinese press to support the stories of the P.R.C.'s alleged success in combating infringement.[64] Regardless of these stories, by early 1996 U.S. dissatis-

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61. *See China Taps Inspectors to Sniff Out Piracy of Audio, Videotapes*, Asian Wall St. J., Jan. 2, 1996, at 3, *available in* 1996 WL-WSJA 3323613 (United States complains P.R.C. not implementing Agreement); Chen Jian, EASTERN EXPRESS, Jan. 5, 1995 (H.K.), *transcribed in 'Trademark Piracy' Rampant in Guangdong*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-96-004, Jan. 5, 1996, at 37; Simon Beck, *Pirate Trade in U.S. Goods Lead Talks to Flashpoint*, S. CHINA MORNING POST, Nov. 6, 1995, at 10 (Kantor asserts piracy still "rampant"); Charles S. Smith, *Microsoft's Royalty Losses Mount Despite China Pact*, ASIAN WALL ST. J., Oct. 26, 1995, at 3 *available in* 1995 WL-WSJA 8778746 (Microsoft notes still losing tens of millions of dollars a year despite Agreement).

62. *See e.g.*, Sheel Kohl, *Copyright Deal Fails to Control CD Piracy*, S. CHINA MORNING POST, Nov. 27, 1995, at 4, *available in* 1996 WL 7540429; Geoffrey Crothall, *Piracy Booms Despite Pact*, S. CHINA MORNING POST, Oct. 13, 1995, at 1 (Eric Smith of the International Intellectual Property Alliance (IIPA) described piracy in China as even worse than before the 1995 MOU); Sally D. Goll, *'Lion King' Roars in China Ready to Take on Pirates*, ASIAN WALL ST. J., July 21, 1995, at 8, *available in* 1995 WL-WSJA 8778746 (pirated version of Lion King released in China before real version, prompting latter to be called "the sequel to the pirated version").

63. *See* Sun Hong, *Nation Active in Protecting IPR*, CHINA DAILY, Feb. 13, 1996 at 1 (P.R.C.), *transcribed in MOFTEC Official Claims 'Great Strides' in IPR Protection*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-96-030, Feb. 13, 1996, at 35; *China Says U.S. Copyright Concerns Unjustified*, AFX NEWS, Feb. 1, 1996, *available in* Westlaw, AllNewsPlus (foreign ministry spokesman Chen Jian stated that China has made "'tremendous efforts' to boost intellectual property rights (IPR) protection by strengthening legislation and 'seriously punishing' violators"); DOW JONES INT'L NEWS SERV., Feb. 8, 1996, *available in* Westlaw, AllNewsPlus (director of the State Council's working committee on intellectual property described "law enforcement concerning intellectual property rights [as] 'markedly improved'").

64. The published stories of the efforts to combat piracy are daily grist for the mill in the P.R.C. With that in mind, a few examples give the flavor of these stories. *See, e.g.*, XINHUA, Feb. 8, 1996 (P.R.C.), *transcribed in P.R.C.: Official on 'Important Progress' in IPR Protection*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-96-027, Feb. 8, 1996, at 42 (estimating officials seized 800,000 pirated records and video-tapes, destroyed over 20 million pirated LDs, over 40,000 sets of software and 480,000 copies of pirated publication since the 1995 MOU was implemented); *China Continues Crackdown of Trademark Infringements*, XINHUA NEWS AGENCY, Feb. 1, 1996, *available in* 1996 WL 3774995 (official stated that China's administrative offices "handled" 14,776 cases of trademark infringement between September and December 1995); *Oil Fakes Put Out of Business*, S. CHINA MORNING POST, Jan. 21,

faction with China's progress led to a threat of two billion dollars in trade sanctions and a series of negotiations that bore an uncanny resemblance to the events of a year earlier. As in 1995, a trade war was narrowly averted by an eleventh-hour agreement on June 17, 1996, which the Clinton Administration again hailed as a significant victory for right holders and the Chinese claimed was evidence of their commitment to protection of intellectual property rights.[65]

The obvious question then is whether the 1995 MOU deserves the praise it initially received. Unfortunately, a definitive answer would be much too simplistic a response. Of all the pronouncements concerning the 1995 MOU, the one most worth exploring is an argument implicit in all of China's characterizations of its progress: namely that although protection has in fact improved, it is unrealistic to ask the P.R.C., as a developing country, to eradicate infringement overnight. Although this view is certain to provoke rebuke from right holders, the Article suggests that this is an accurate assessment of events in China. Defining China's success with respect to the protection of

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1996, at 5, *available in* 1996 WL 3751202 (producers of counterfeit oil products shut down in Zhengcheng, Guangdong amidst accusations that companies supported by local officials); *Overseas Trademark Registration are Increasing in China, Stimulated by the Heated Market Competition and Improved Intellectual Property Rights Protection*, XINHUA ENGLISH NEWSWIRE, Jan. 21, 1996, *available in* 1996 WL 5569911 (noting that in 1995 SAIC investigated and dealt with 16,857 trademark infringement cases, of which 1,362 involved foreign marks); *Officials Tout Case*, DOW JONES INT'L NEWS. SERV., Feb. 1, 1996 (noting four hundred piracy cases handled by Chinese courts in 1995, up 35% from 1994), *available in* Westlaw, AllNewsPlus; Wang Zhanguo, ZHONGGUO XINWEN SHE (P.R.C.), *translated in Progress in Trademark Management Reviewed*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-96-004, Jan. 5, 1996, at 36 (noting accomplishments of last five years); Mao Jing, BEIJING RIBAO (P.R.C.), Sept. 4, 1995, at 6 (P.R.C.) *translated in Beijing Government Enforces IPR Regulations*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-95-188, Sept. 26, 1995, at 53; XINHUA (P.R.C.), Sept. 26, 1995 (P.R.C.), *translated in Copyright Administration To Punish Disk Pirates*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-95-191, Oct. 3, 1995, at 46; (noting "disciplinary" actions against twelve entities for piracy).

65. Pursuant to the June 17, 1996 Agreement, the P.R.C. averted $2 billion in trade sanctions by demonstrating that it had closed 15 factories producing counterfeit CDs, LDs and CD-ROMs and it (1) established a 24-hour monitoring system with on-site inspectors, (2) promised to allow U.S. officials to participate in monitoring enforcement through periodic inspections, (3) agreed to require CD factories to obtain approval from the National Copyright Administration and to require that all CDs carry an identification code, (4) extended a special crackdown period for Guangdong province, (5) promised to step up enforcement by involving China's powerful Ministry of Public Security, which controls the nationwide police force and (6) reaffirmed earlier promises to improve market access by allowing U.S. recording companies to sell directly to Chinese publishing houses and U.S. film companies to co-produce movies with Chinese companies and sell films to China on a revenue-sharing basis. *See* Chen, *supra* note 9, at 1; Faison, *supra* note 9, at A6; Forney & Holloway, *supra* note 9, at 65.

intellectual property is, without question, a matter of great controversy. In any event, assessing the sincerity of China's professed "progress" requires an understanding of both the systemic changes that have occurred in the last several years and the obstacles China must address to provide a legitimate system of intellectual property protection.

II. IMPEDIMENTS TO ADMINISTRATIVE ENFORCEMENT

Reiterating an earlier caveat seems especially necessary at this juncture. While arguments focusing on the inadequacy of China's intellectual property laws may be well-grounded,[66] those complaints are only of tangential interest here since in reality China's ineffective legal system[67] remains the major impediment to protection of intellectual property rights. This section argues that the fundamental obstacle to implementation of the 1995 MOU is local protectionism — that is, Beijing's failure to manage the decentralization of its power has given rise to the unchecked authority of local elites who wield their power for personal gain.

A. THE RISE OF LOCALISM

The central government has recognized the vital link between the protection of intellectual property and economic reform.[68] Some may argue, however, that if the central government and the CCP genuinely identified protection of intel-

66. Of course, the laws should be amended to address any shortcomings, but the fact remains that amendment of the laws without the systemic changes discussed in this Article would be fruitless.

67. The phrase "legal system" is defined broadly here to encompass not only judicial and administrative mechanisms for protection and enforcement of rights but also public awareness of rights, training of relevant authorities concerning proper application of law and education both of professionals and the general population.

68. *See* LIAOWANG, July 17, 1995 (P.R.C.), *translated in Supreme Court President on Law Enforcement*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-95-164, Aug. 24, 1995, at 25 [hereinafter *Supreme Court President*]; *Report on the Work of the Supreme People's Court delivered by Ren Jianxin, President of the Supreme People's Court, at the Third Session of the Eighth National People's Congress on 13 March 1995*, XINHUA, Mar. 22, 1995 (P.R.C.), *translated in Ren Jianxin on Court Work*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-95-058, Mar. 27, 1995, at 40-41, 47 [hereinafter *Court Work*]; Chen Zujia, *Enhancing the Awareness of Protecting Intellectual Property Rights*, RENMIN RIBAO, Apr. 17, 1995, at 5 (P.R.C.), *translated in Renmin Ribao on 'Enhancing' IPR Awareness*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-95-109, June 7, 1995, at 60; ZHONGGUO XINWEN SHE, Apr. 13, 1995, (P.R.C.), *transcribed in Li Tieying Says Copyright Protection Long-Time Task*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-95-072, Apr. 14, 1995, at 35 (statement of State Councillor Li Tieying); XINHUA, Apr. 10, 1995 (P.R.C.), *transcribed in Leaders Call for Stricter Copyright Law Enforcement*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-95-069, Apr. 11, 1995, at 62 (statement of Song Jian,

lectual property rights as a priority issue, piracy would be easily eradicated. While Beijing's directives generally are implemented without question, protection of intellectual property rights may be one area where Beijing's support is not alone sufficient. Indeed, China's inability to tackle piracy in large part arises from Beijing's monumental 1979 decision to enhance local autonomy in order to promote the transformation from a planned to a market economy.

Since 1979, the P.R.C. has viewed the devolution of central government authority to local regions as a necessary method of fostering economic growth. While no one can dispute that the legislative output of the National People's Congress (NPC) since 1979 has been anything less than astounding, even more dramatic has been the frenetic pace of legislation by local governments.[69] Beijing has vested great authority in the localities to attract direct foreign investment — the creation of the Special Economic Zones is just one example. Local governments have been empowered to establish the institutions necessary to implement, guide, and regulate investment. The unexpected consequence of decentralization, however, has been the unsettling growth of local protectionism.

Imperial China was infamous for its hydra-headed bureaucracy and the inability of the Imperial Court to control the authority of local elites.[70] The P.R.C. now finds itself confronted with the same problem because decentralization has led to the erosion of Beijing's control, the rise of regionalism and corruption, and the enormous growth in power of local officials and cadres.[71] The problem has not gone unnoticed in Beijing, where

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a State Councillor in charge of the Intellectual Property Rights Working Conference under the State Council).

China's desire to protect intellectual property rights stems from more than a desire to appease the United States; the P.R.C. understands that the capital and technology necessary for economic reform must come from foreign trade and investment and that foreign right holders will not be willing to invest, establish joint ventures and agree to technology transfers in China if their rights cannot be protected. *See* Jeffrey W. Berkman, Protection of Intellectual Property Rights in the P.R.C.: A Quasi-Liberal Theory for an Illiberal State (1996) (unpublished manuscript available from author).

69. Between 1979 and 1994, the NPC and its Standing Committees adopted 175 laws and 77 legislative decisions related to legal issues. In the same period, provincial level people's congresses and their standing committees enacted over 3000 laws and regulations. *See* Zhao Wei, *Forging Ahead Along the Path of Democracy and the Legal System*, XINHUA, Mar. 18, 1995 (P.R.C.), *translated in Commentary Views Legal Systems*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-95-058, Mar. 27, 1995, at 48, 49.

70. The sheer size of China has required a massive bureaucracy ever since the country was first unified by the Qin Dynasty in 221 B.C.

71. Stanley B. Lubman, *Does Beijing Signify Anything, With Power Flowing to Provinces, Cities?* L.A. TIMES, Dec. 3, 1995, at 2.

localism has been identified as a major obstacle to economic and legal reform.[72] Again, while some may argue that the government's public support for eliminating localism and promoting uniform enforcement of economic rights is simply government propaganda, it is propaganda that is understood as a directive by officials charged with law enforcement.[73]

B. LOCALISM AND ADMINISTRATIVE ENFORCEMENT

Although Beijing has identified localism as a priority concern, it remains a major obstacle to the enforcement of laws in China — and obviously to protection of intellectual property rights. The drafters of the 1995 MOU were clearly aware that local protectionism was among the fundamental obstacles to enforcement of intellectual property rights and, indeed, targeted its elimination as a major goal.[74] In drafting the 1995 MOU, it appears that China and the U.S. understood that the weakness of China's judicial system made it especially susceptible to local-

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72. *See Speech by Qiao Shi to Forum on Legislative Work*, XINHUA DOMESTIC SERVICE, Dec. 19, 1995 (P.R.C.), *translated in Qiao Shi Speaks on Legislative Work*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-96-008, Jan. 11, 1996, at 17, 19 [hereinafter *Legislative Work*] (urging need to keep an eye on relationship between central and local governments and departments and warning localities to "conscientiously serve the interests of the overall situation" and to exercise administrative powers "according to law"); Zhang Shutang and Liu Siyang, *Law-Enforcement Inspection Teams of the Standing Committee of the National People's Congress Inspect Implementation of the Decision on Popularizing Law Education*, XINHUA, Dec. 26, 1995 (P.R.C.), *translated in Li Ximing Views Legal Education*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-96-003, Jan. 4, 1996, at 14, 15 (Vice-chairman of the NPC Standing Committee noted that local cadres ignore the law and local protectionism, corruption and abuse of power must be eliminated); Cai Qingze, Deputy Secretary of Central Commission for Discipline Inspection and Minister of the Ministry of Supervision, *Further Strengthen Supervision Over Law Enforcement in General Interest of Reform, Development, and Stability*, BEIJING ZHONGGUO JIJIAN JIANCHA BAO, June 24, 1995, at 1 (P.R.C.), *translated in Cao Qingze Urges Strengthening of Law Enforcement*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-95-169, Aug. 31, 1995, at 18 (noting problem of localism); *Supreme Court President*, *supra* note 68, at 27 (localism described as "extremely harmful to the establishment of a unified and open socialist market and economic order"); XINHUA, June 22, 1995 (P.R.C.) *transcribed in Top Prosecutor Says New Law to Unify Legal System*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-95-120, June 22, 1995, at 17 (Zhang Siging, Procurator General, expressed need to "oppose local department protectionism"); *Court Work*, *supra* note 68, at 46-47 (eradicating localism cited as a major task).

73. In an interview with a Judge of the Higher Level People's Court (the second highest court in China) localism was identified as the most pressing issue facing law enforcement officials in China. Interview with Judge X, Judge of the Higher Level People's Court of the People's Republic of China, in New York, N.Y. (Feb. 7, 1996) [hereinafter Interview].

74. *See* 1995 MOU, *supra* note 1, art. I(A)(5)(a); *id.* art. II(B)(1).

ism.[75] Thus, the Action Plan vested responsibility for protection of intellectual property rights in a dual administrative/judicial system. The apparent hope was that the burden of protecting intellectual property would be borne primarily by administrative officials. These officials would investigate violations and initiate administrative adjudications *ex officio* or upon petition of foreign and domestic right holders.[76] The roots of localism, however, are deeper than the experts have seemingly anticipated.

First, administrative agencies must confront powerful local officials who profit from piracy or, in many instances, military officials who actually run illegal factories; therefore, the agencies often are intentionally lax in their enforcement efforts.[77] A more subtle, but equally obstructive, problem stems from the fact that officials are unwilling to enforce laws against local business pillars, who serve as important sources of local revenue.[78] Even outside the field of intellectual property, administrative agencies are described as "weak" and their enforcement efforts characterized as "arbitrary."[79] Protection of rights therefore more often depends on the interests of the particular enforcement authorities, or local cadres who influence them, rather than on legal imperatives.

Second, the local agencies and departments responsible for enforcement of the intellectual property laws are, by the reality of China's bureaucracy, beholden to many of the same local officials or cadres who wish to impede enforcement. For example, the orders of the intellectual property working conferences require enforcement by the local task forces, which must be willing to implement such orders. Thus, while the Action Plan gives the enforcement task forces broad authority both to conduct investi-

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75. The various institutional weaknesses of the P.R.C.'s judicial system are discussed in Sections III and IV of this Article.

76. Thus, the Action Plan creates administrative bodies with the authority to initiate investigations *ex officio* or at the request of a right holder, impose administrative penalties, seize violating goods, and suspend or revoke licenses of offending enterprises. *See supra* text accompanying notes 35-54.

77. *See* U.S. TRADE REPRESENTATIVE, 1994 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 51, 51-52 (1994) [hereinafter 1994 USTR REPORT]; *see also* Wineburg, *supra* note 20, at 21. Perhaps even more disturbing is that at one point it was estimated that ninety percent of government agencies used pirated software. *See* Wineburg *supra* note 20, at 21.

78. *See* 1994 USTR REPORT, *supra* note 77, at 51-52.

79. Administrative authorities are described as "weak" in that violations of the law go unpunished and those fines imposed have no deterrent or punitive effect. Enforcement is characterized as "arbitrary" because procedural and substantive rights are often ignored or punishment is meted out without regard for the law. FAZHI RIBAO, Sept. 28, 1995, at 7 (P.R.C.), *translated in Administrative Punishment System Ineffectual*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-95-237, Dec. 11, 1995, at 16.

gations and impose administrative punishments in the event of infringement, having such power and exercising it are two entirely separate matters.[80]

Third, the pernicious effect of the localism is exacerbated by the lack of financial and technological resources available to local enforcement bodies.[81] An unwelcome result of the 1995 MOU is that local governments now control the all important power of the purse because they are required to provide enforcement resources, including expenses and personnel.[82] An obvious conflict of interest therefore arises when the local government is more interested in protecting profitable, although illegitimate, local businesses than expending resources to shut them down. Even the best intentions of local departments may not be sufficient if they lack the financial resources and personnel to initiate enforcement efforts.[83] Responding to complaints from the U.S. about unimpressive enforcement efforts, the P.R.C. attempts to blame the victim by reminding the U.S. of its obligation to provide technical assistance under the Agreement.[84] The U.S. should comply with the Agreement; however, it is unlikely to eradicate the ultimate problem of insufficient resources. To counter obstinate localism, Beijing must, at least for the short run, provide the local enforcement agencies greater resources so they no longer are dependent on local governments and powerful cadres for support.

Fourth, the lack of coordination among responsible institutions hampers enforcement. If the offending activities of a business or individual implicate more than one intellectual property claim, different administrative bodies, such as the NCA, Patent Office, Trademark Offices, and the local agencies of each body, may become involved, and claims will be split according to the expertise of each agency. The lack of coordination among these departments undermines unified enforcement efforts.[85] The Action Plan does not appear to address this concern; in fact, argua-

80. *See* Lubman, *supra* note 71, at 2 (noting how in "China's councils of state, the ministry does not have the muscle to compel other ministries and organizations, such as the Chinese army, to close down profitable illegal enterprises").

81. *See* Interview, *supra* note 73.

82. *See* 1995 MOU, *supra* note 1, art. I(B)(1).

83. *See Snags Hit IPR Fight*, S. CHINA MORNING POST, Apr. 13, 1995, at 10, *available in* 1995 WL 7524734.

84. *See, e.g.*, Agnes Cheung, *U.S. 'Failed' on Copyright Help*, S. CHINA MORNING POST, Feb. 5, 1996, at 9, *available in* 1996 WL 3752290. Pursuant to the Letter of the 1995 MOU, the United States agreed to provide assistance and training to enforcement personnel.

85. *See generally* Cheung, *supra* note 84, at 9 (comment of the general manager of the China Patent Agent, one of the largest agencies dealing with overseas right holders); *see* Yu, *supra* note 14, at 155.

bly it maintains a division of responsibility according to the "intellectual property at issue."[86] At the same time, Beijing is simply unable to ensure adherence to the Action Plan by the multi-layered bureaucracy responsible for various functions under it.[87] The lack of cooperation is especially troublesome when an infringer acts in several localities since officials and Party cadres in a particular locality are often reluctant to allow "foreign" departments to act against local illegal enterprises. Indeed, local governments and officials continue to oppose cross-locality enforcement on the theory that "fertile water should not be allowed to flow into the fields of others."[88] This opposition occurs, despite the fact that the Action Plan expressly requires administrative departments to "coordinate cross-region and cross-province investigations and enforcement efforts."[89] Thus, localism remains a fundamental obstacle to the protection of intellectual property despite the administrative enforcement bodies established pursuant to the 1995 MOU.

The inability, or reluctance, of local administrative officials to crackdown on piracy has raised loud criticism from the U.S. Right holders, however, may have a basis to hope for improved protection of their property rights. In a substantial concession, the P.R.C. for the first time pledged in the June 1996 Agreement to employ the powerful Ministry of Public Security, the nation-wide police force, to investigate piracy.[90] The participation of the Ministry of Public Security in enforcement efforts could provide the muscle that the administrative officers lacked in confronting well-connected pirate operations. An increased role for the police, if in fact more than an empty promise, should dramatically

86. *See* 1995 MOU, *supra* note 1, art. I(B)(6) (stating that petitions from right holders will be "forwarded to the administrative authority within the task force in charge of the intellectual property at issue"); *See id.* art. I(E)(5).

87. *See* Lubman, *supra* note 71.

88. Lin Zhongliang, *Resolutely Eradicate Local Protectionism in Law Enforcement*, FAZHI RIBAO, Apr. 25 1995, at 1-2 (P.R.C.), *translated in Local Protectionism in Law Enforcement*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-95-110, June 8, 1995, at 23-24. The quote aptly describes the notion of local protectionism in China. Local enforcement personnel are criticized for (1) their reluctance to accept economic cases from entities or individuals outside their locality, (2) wrongly treating serious cases, including criminal intellectual property infringement, as mere economic disputes, (3) partiality in court or administrative decisions, (4) obstructing enforcement of court orders from other jurisdictions and (5) abuse of power by officials and Party members in order to protect illegitimate local interests. *See Id.* 23-25; Marcus W. Brauchli, *Beijing Eases Up: China's Economic Changes Spur Legal-System Reform*, ASIAN WALL ST. J., June, 21, 1995, at 1, *available in* 1995 WL-WSJA 8776228.

The ability to enforce court orders in other jurisdictions is impeded by localism. *See* Interview, *supra* note 73.

89. 1995 MOU, *supra* note 1, art. I(F)(4).

90. *See supra* note 65.

improve enforcement, but the P.R.C. must still address impediments resulting from weak judicial institutions and a failure to adhere to the rule of law.

III. IMPEDIMENTS TO JUDICIAL ENFORCEMENT

A. INSTITUTIONAL ASPECTS OF THE JUDICIAL SYSTEM

1. Court Structure

Before addressing the impediments to judicial enforcement, a brief overview of the P.R.C.'s judicial system is necessary. The judicial system has four levels of courts. The Supreme People's Court (SPC) (zuigao renmin fayuan) is the highest court of China. Next there are thirty Higher Level People's Courts (gaoji renmin fayuan), one for each province, autonomous region (i.e., Tibet), and centrally-administered city (i.e., Shanghai). Below that are 389 Intermediate Level People's Courts (zhongji renmin fayuan), which sit below the provincial level in prefectures, provincially-administered cities, and within centrally-administered cities. At the lowest level are some three thousand Basic Level People's Courts (jiceng renmin fayuan), which sit at the county level.[91] Most Basic Level and Intermediate Level courts have execution chambers (zhixing ting), which are responsible for enforcement of court orders.[92] Judges, of which there are approximately 106,000 in China, are chosen by the people's congress or the appropriate level standing committee.[93] Significantly, judges do not have tenure and thus are not immune from external pressures and localism.[94]

2. Adjudication Committees

An institutional aspect clearly foreign to students of American constitutional law are China's Adjudication Committees. Minor, non-politically sensitive cases can be handled by individual judges, or a collegiate bench of judges and lay persons, gener-

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91. *See* Donald C. Clarke, *Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments*, 10 COL. J. ASIAN L. 1, 7 (1996). Some of the courts have special divisions, such as the intellectual property division of the Beijing Municipal Intermediate People's Court. For discussion of these intellectual property divisions, see *infra* text accompanying notes 124-27.

92. *See id.* at 12. While the officers of the execution chambers are at a level equal to adjudicatory officers, most lack any formal legal training, and the "young and capable cadres go to the adjudicatory chambers." *Id.* Higher Level People's Courts also have execution chambers. *See* Interview, *supra* note 73.

93. *See* Clarke, *supra* note 91, at 6. There are also approximately 52,000 assistant judges appointed by the courts themselves. *See id.* at 6 n.14. There are approximately 3,500 courts. *See id.* at 6.

94. *See id.* at 8.

ally free from interference by other court officials.[95] However, cases deemed to be of importance, perhaps those involving difficult legal issues, significant economic disputes, sensitive political matters, or highly charged public issues, are handled by individual judges on advice of the particular court's Adjudication Committee.[96] While the individual judge will hear the case, following consultation the Committee may direct the judge to enter a particular verdict, invite the judge to seek more information from the parties, or report the case to a higher level court for guidance.[97] The Committee consists of the president of the court, the vice-president, the head and deputy head of the various specialized chambers, and some ordinary judges.[98] Members of the Committee are also likely to be Party members, and thus the influence of the CCP should be assumed in all decisions.[99]

When Chinese officials speak of judicial independence they may be using a lexicon familiar to westerners, but they certainly do not intend to connote the separation of powers usually equated with the democratic definition. Judicial independence in the P.R.C. refers to the independence of the court as an institution rather than the independence of an individual judge.[100] Yet, despite this departure from the liberal notion of "judicial independence," the official Chinese ideal still requires the court as an institution to decide cases free from external pressures. The reality, however, is that localism, pressure from Party cadres, and corruption undermine not only judicial independence but ultimately the rule of law.

B. Impediments to Judicial Enforcement

In a classic chicken or egg problem, it is difficult to determine whether localism is responsible for a judiciary unable to enforce the law or the systemic weakness of the judiciary is responsible for allowing localism to flourish. The weakness of China's judiciary is, in any event, a formidable obstacle to the protection of intellectual property rights since the courts are unable (1) to render impartial judgments, and (2) to enforce their orders.

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95. *See* Interview, *supra* note 73; *see also* Clarke, *supra* note 91, at 10-11.

96. *See* Interview, *supra* note 73; Clarke, *supra* note 91, at 11.

97. *See* Interview, *supra* note 73.

98. *See* Clarke, *supra* note 91, at 11.

99. *See* Brauchli, *supra* note 88, at 1. A judgment may be appealed, in which case there will be a trial *de novo*, and the judgment of the second trial is final and cannot be appealed. *See* Clarke, *supra* note 91, at 38.

100. *See* Interview, *supra* note 73. The difference between the western notion of judicial independence and the Chinese concept of judicial independence was stressed during the interview.

1. *The Lack of Impartial Judgments*

Localism, Party pressures, and corruption undermine the court's ability to render impartial judgments. First, the judicial institutions face much of the same pressure from local cadres, powerful government officials, and influential local businesses as administrative agencies.[101] Courts depend on local governments for resources, and all personnel, even judges, are beholden to local politicos for their jobs.[102] In the context of intellectual property actions, judges may be reluctant to accept cases or to issue unfavorable orders against "connected" enterprises. Second, cadre influence can be directly applied through the Adjudication Committee — often composed of Party officials or court personnel with strong ties to the local people's congress — which is empowered to direct the "proper" verdict in a case.[103] The Party may also exert its influence through an informal review prior to the disposition of particular cases. Finally, rampant corruption results in favoritism for illegal enterprises.[104] Although in 1995 the P.R.C. Law on Judges was adopted in an effort to, *inter alia*, combat corruption by providing for punishment of judges who abuse their authority and protect judges who defy unlawful interference,[105] corruption remains a significant problem.[106]

2. *The Inability to Enforce Judgments*

American federal and state judges generally give little thought to whether their orders will be followed and their judgments will be enforced. Chinese judges, on the other hand, cannot be so confident. The court system as an institution generally lacks the political muscle to stare down powerful, local officials

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101. For a discussion of the problem of localism in the context of administrative enforcement, see *supra* text accompanying notes 74-90.

102. *See* Clarke, *supra* note 91, at 42.

103. *See supra* text accompanying notes 95-100.

104. The news articles and public pronouncements against influence peddling and corruption are far too numerous to include here. Suffice it to say, eliminating corruption is a priority issue for Beijing. *See, e.g.*, XINHUA, Mar. 22, 1995 (P.R.C.), *translated in Further Reportage on Developments During NPC: Supreme Procuratorate Work Report*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-95-064, Apr. 4, 1995, at 41, 49 [hereinafter *Supreme Procuratorate Report*] ("Attention should be paid to uncover and investigate cases involving judicial, administrative, and law enforcement personnel practicing favoritism amid lax and unjust law enforcement."). Also, courts are reluctant to issue unfavorable verdicts or orders when the alleged illegal activity is conducted by a state-owned enterprise or an enterprise in which the state or military is involved. *See* Wineburg, *supra* note 20, at 21.

105. For a discussion of the P.R.C. Law on Judges, see *infra* text accompanying notes 121-23.

106. *See supra* note 104.

who may wish to impede law enforcement.[107] In a country where *guanxi* (relationship) is as old as the Chinese bureaucracy, court personnel must often seek assistance from the local powers to enforce court orders.[108] Even *guanxi*, however, may not be sufficient where an unfavorable verdict is rendered against a powerful cadre or a well-connected enterprise.

There is a widespread belief that court orders can be ignored with impunity since the authority of judges to impose penalties on recalcitrant parties is questionable. Judges do not have the authority to issue criminal contempt orders nor is it clear that the refusal to obey a court order is a crime.[109] While under Article 102 of the Code of Civil Procedure fines or administrative detention may be ordered where a party refuses to obey a court order, it remains to be seen whether judges will actually rely on this provision and whether local elites will interfere with the application of Article 102.[110] At a minimum, the law should be amended to bolster the enforcement authority of the courts by granting them contempt powers that can be exercised without the need to rely on extrajudicial local support.

Courts and successful litigants also face significant resistance when seeking to enforce a judgment outside the jurisdiction in which it was rendered. These impediments do not stem from a lack of legal authority but rather from the lack of bureaucratic muscle. Court orders are technically binding on the losing party in any jurisdiction within China.[111] Getting a court or enforcement authority in another jurisdiction to honor a judgment from another locality, however, is an entirely different matter. Thus, the local protectionism that generally acts as a significant obsta-

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107. *See* Clarke, *supra* note 91, at 42-43.

108. *See* Interview, *supra* note 73.

109. *See* Clarke, *supra* note 91, at 71. Pursuant to Article 157 of the Criminal Law, a court may impose punishment upon anyone who "by means of threats or violence obstructs state personnel from carrying out their functions according to law or refuses to carry out judgments or orders of people's courts that already have been legally effective." *Id.* (quoting the Criminal Law of the People's Republic of China, art. 157). It is unclear whether the second clause of Article 157 covers the mere refusal to obey a court order. *See id.* at 71-72.

110. Code of Civil Procedure of the People's Republic of China, art. 102, *translated in* CHINA L. FOREIGN BUS. ¶ 19-201 (1993) [hereinafter Code of Civil Procedure]; *see* Clarke, *supra* note 91, at 69-71.

The Code of Civil Procedure provides methods for enforcement of judgments, including garnishment, confiscation and freeze orders, *see* Code of Civil Procedure, *supra*, arts. 216-33, but these measures provide little comfort when a party simply refuses to cease certain illegal activity, such as counterfeiting, or local powers interfere with the enforcement of a particular court order.

111. *See* Donald C. Clarke, *Execution of Local Judgments In China*, 141 CHINA Q. 65, 66-67 (Mar. 1995).

cle to enforcement of judgments can be even more problematic where a "foreign" judgment is the subject of enforcement.[112]

IV. COMPETENCE AND ENFORCEMENT

As the bodies responsible for enforcement of the intellectual property laws, China's judicial and administrative institutions also face a substantial challenge in their lack of competence within the system. Administrative officials, court personnel, lawyers, and right holders often lack the legal training, the expertise, or, especially in the case of many Chinese right holders, a basic understanding of the laws and enforcement institutions. The systemic incompetence is not a problem that can be shelved while modernization of the legal system runs its course; it is an impediment to continued legal modernization. The P.R.C. has emphasized the critical need to improve the legal training of judges and lawyers, to ensure the expertise of agencies involved in overseeing the application of particular laws, and to promote legal education among the masses.[113]

A. JUDICIAL PERSONNEL

China lacks a sufficient pool of professionally trained and qualified judicial personnel. The legal nihilism of the Cultural Revolution (*wenhua da geming*), culminating in the destruction of China's legal system, resonates twenty years later.[114] Court personnel generally are poorly educated and lack a formal legal education or experience. As of 1993, one-third of all judges lacked post-secondary training in any subject.[115] Expansion of the legal system to handle the recent reforms has resulted in the appointment of many young judges, who lack the qualifications and experience necessary to tackle China's rapidly evolving legal issues.[116] Moreover, judges of the adjudicatory chambers may find their orders thwarted when relying on the generally less competent officials of the execution chambers.[117]

Even experienced and highly trained judges may have difficulty keeping tabs on new laws and emerging legal concepts. Often the judges are not to blame since even the simple task of finding the applicable law can be arduous. Laws and regulations are adopted by myriad governmental and administrative bodies,

112. *See* Interview, *supra* note 73; *see also* Clarke, *supra* note 111, at 66-67.

113. *See, e.g.*, *Court Work*, *supra* note 68, at 48.

114. For a brief discussion of the Cultural Revolution, see *infra* text accompanying notes 156-61.

115. *See* Donald C. Clarke, *"Even Judges Sometimes Progress,"* 22 CHINA EXCHANGE NEWS 12 (Winter 1994).

116. *See id.*

117. *See supra* text accompanying note 92.

and no comprehensive, current indices are available.[118] Judges looking for guidance from court decisions are restricted to a select group of cases published by the Supreme People's Court or transmitted internally to the lower courts.[119] A hallmark principle of the American common law system, *stare decisis*, does not apply in Chinese courts. Thus, inexperienced judges have neither standards to follow nor legal sources to provide guidance and ensure uniformity in the interpretation and application of the law.[120]

The P.R.C. adopted an important measure towards improving judicial competency when it enacted the Law on Judges in February 1995 (the Law).[121] The Law is aimed at (1) codifying judicial duties, responsibilities, obligations, rights, qualification standards, grounds for removal, and guidelines for evaluation and training, (2) ensuring the quality of judges according to stringent requirements, including satisfactory performances on examinations, and (3) improving impartial enforcement of the law free from external pressures and in conformity with ethical obligations.[122] Local governments are implicitly admonished against appointment of unqualified judges, while incumbent judges are advised to complete the training necessary to meet the qualification standards, or risk dismissal.[123] Although the Law should im-

118. *See* Clarke, *supra* note 115, at 13. Access to law, however, is increasing for judges, the masses, and foreigners. A loose leaf service entitled Laws and Regulations of the People's Republic of China will now be published internationally and will contain some 1,435 laws and regulations of the P.R.C. *See* XINHUA, Feb. 13, 1996 (P.R.C.), *translated in PRC: Book on Laws, Regulations Published Overseas*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-96-031, Feb. 13, 1996, at 18.

119. *See* Nanping Liu, *"Legal Precedents" with Chinese Characteristics: Published Cases in the Gazette of the Supreme People's Court*, 5 J. CHINESE L. 107, 116 (1991). Select cases of China's supreme court have been published since 1985 in the Gazette of the Supreme People's Court. *See id.* at 107. It is important to recognize, however, that under the P.R.C. Constitution, the National People's Congress is empowered to interpret the law while the courts apply it. Thus, the "precedential value" of even those cases published in the Gazette may be suspect. *See id.*

120. *See* Clarke, *supra* note 115, at 13.

121. *See* XINHUA, Mar. 1, 1995 (P.R.C.), *translated in NPC Committee Adopts Law on Judges*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-95-054, Mar. 21, 1995, at 32.

122. *See id.*; *see also* XINHUA, Mar. 1, 1995 (P.R.C.), *translated in Ren Jianxin Discusses Law on Judges*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-95-054, Mar. 21, 1995, at 24, 24-25 [hereinafter *Ren Jianxin Discusses Law*].

123. *See Ren Jianxin Discusses Law*, *supra* note 122, at 25. Further commenting on implementation of the Law on Judges, Ren Jianxin stated, "It is necessary to strengthen the education and training of judicial staff, earnestly train those incumbent judges who are unqualified or not totally qualified . . . and remove from office or transfer to other posts those who still cannot meet the requirements after having undergone training." *Supreme Court President*, *supra* note 68, at 28. The Law on Judges is part of the campaign "to enforce judicial discipline and improve judicial style, run the courts strictly, punish lawless behavior sternly, and eliminate corrupt elements promptly." *Id.*

prove judicial competence, as with any law in China, whether it will be followed by local cadres in the recruitment of judges and enforced with respect to the training of court personnel is uncertain.

An equally promising development is the establishment of special courts dedicated solely to intellectual property matters. The first intellectual property chambers were established in July 1993 as divisions of the Beijing Municipal Higher People's Court and the Beijing Municipal Intermediate People's Court, and several have been added in other areas of the country.[124] The P.R.C. has credited these courts with successfully aiding law enforcement.[125] In conjunction with the establishment of the intellectual property divisions, training of judicial personnel on intellectual property issues has improved the ability of the courts to handle such cases.[126] These special courts are important not only because they establish institutions dedicated to enforcement of intellectual property laws, but for the more subtle reason that these chambers are staffed with trained judges who concentrate solely on intellectual property cases and therefore will develop the expertise to handle difficult issues.[127]

B. ADMINISTRATIVE PERSONNEL

Concerns about the competence of judicial personnel also apply to administrative officials. In shifting responsibility, or at

124. *See* Chen Yanni, *Judges Champion Copyright, Patent*, CHINA DAILY, Jan. 25, 1996, at 31, *available in* 1996 WL 8530506 (noting that as of January 1996 there were some twenty chambers); ZHONGGUO XINWEN SHE, June 13, 1995 (P.R.C.), *transcribed in Tianjin Courts Prepare To Hear IPR Cases*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-95-114, June 14, 1995, at 54 (reporting establishment of special courts in Tianjin); XINHUA, Oct. 12, 1995 (P.R.C.), *translated in Hunan Forms Intellectual Property Rights Court*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-95-198, Oct. 13, 1995, at 55 (reporting creation of special court in Changsha, Hunan province); Nanjing Jiangsu People's Radio Network, Aug. 29, 1995 (P.R.C.), *translated in Jiangsu Officially Establishes IPR Division*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-95-172, Sept. 6, 1995, at 49.

125. *See* Peng Weixing & Li Muping, ZHONGGUO XINWEN SHE, Dec. 25, 1995 (P.R.C.), *translated in Court Official Notes Increase in IPR Cases*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-95-247, Dec. 26, 1995, at 27; Dong Qingjie & Feng Xiaojia, *China Improves Intellectual Property Rights Legal System*, RENMIN RIBAO, Nov. 8, 1995 at 5 (P.R.C.), *translated in State Council IPR Office Reports Progress*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-96-001, Jan. 2, 1996, at 76; XINHUA, Sept. 15, 1995 (P.R.C.), *translated in Trademark Enforcement Statistics Detailed*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-95-180, Sept. 18, 1995, at 13; Chen Yanni, *supra* note 124, at 31.

126. *See Court Work*, *supra* note 68, at 45. The Supreme People's Court has also issued a series of explanatory reports addressing the implementation of the intellectual property laws. *See id.*

127. One judge believes that the judges of the special intellectual property chambers are among the best educated and most well-trained judges in the country. *See* Interview, *supra* note 73.

least in making administrative agencies equal partners in the protection of intellectual property rights, China and the U.S. envisioned that the 1995 MOU would create administrative institutions with the expertise to handle enforcement. The Action Plan gives administrative officials the authority to commence investigations *ex officio*, as well as at the request of right holders. The intent was to free the courts from sole responsibility over intellectual property matters and to provide right holders institutions dedicated to enforcement. It is important then that administrative personnel possess the expertise to apply the relevant laws and regulations. The P.R.C. therefore must initiate a program of supervision, perhaps similar to the Law on Judges, to ensure proper training of the administrative officials.

C. LAWYERS

China also suffers from a scarcity of lawyers and, more significantly, well trained, experienced lawyers. Lawyers were among the main victims of the Cultural Revolution.[128] With the drive for economic modernization and the need for a modern legal system, however, lawyers have reassumed an important role in China. Yet, the P.R.C. still lacks a sufficient pool of professionally trained lawyers with legal experience. Officials estimate that only 2.2% of university students are specializing in law, and the education system produces only about seven hundred law graduates a year.[129] At the infancy of the economic reforms in 1980, there were only three thousand lawyers, with that number rising to ninety thousand by the mid-1990s.[130] Meanwhile, the government has stressed a need for 600,000 legal professionals — 150,000 attorneys — by the next millennium.[131] Obviously, the lack of trained legal professionals undermines law enforcement. The problem is especially acute given that the population generally has little understanding of law and thus must rely on professionals to protect their rights.[132]

The lack of trained and experienced lawyers has a deleterious effect on court proceedings. China follows the inquisitorial system, and thus inexperienced judges seeking guidance in com-

128. For a brief discussion of the Cultural Revolution, see *infra* text accompanying notes 156-61.

129. *See* ZHONGGUO XINWEN SHE, Jan. 8, 1996 (P.R.C.), *transcribed in Law Leaders Urge Expanded Legal Education*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-96-008, Jan. 11, 1996, at 22, 22-23 [hereinafter *Law Leaders*].

130. *See* William P. Alford, *Tasselled Loafers for Barefoot Lawyers: Transformation and Tension in the World of Chinese Legal Workers*, 141 CHINA Q. 22, 30 (Mar. 1995); Ma Chenguang, *Role of Lawyers to be Expanded*, CHINA DAILY, June 24, 1996, at 13, *available in* 1996 WL 8531404.

131. *See Law Leaders*, *supra* note 129, at 23; Alford, *supra* note 130, at 23.

132. *See infra* text accompanying notes 143-53.

plex cases, such as intellectual property matters, can expect to learn little from unqualified lawyers. Moreover, pursuant to China's Code of Civil Procedure, the court is charged with responsibility for collecting evidence, arguably a difficult task for inexperienced judges to adminster.[133] In a significant improvement from prior procedural rules, the 1995 MOU permits foreign right holders to collect evidence for use in administrative proceedings.[134] Thus, if right holders or their counsel are well-trained in intellectual property matters, their assistance in collecting evidence and their general expertise will promote improved prosecution of administrative cases. But the language of the 1995 MOU is unclear as to whether the evidence can be used in judicial actions.[135] Prohibiting its use, however, would make little sense as this would eliminate its potential for improving court proceedings and ultimately enforcement of the intellectual property laws.

Beijing has identified the training of legal professionals as a priority.[136] Since 1980, approximately 160 higher learning institutions or departments of legal education have been established or restored.[137] In calling for approximately 150,000 lawyers by the year 2000,[138] China has recognized the need for qualified lawyers capable of providing legal and consulting services to the approximately 6.5 million businesses and some 110,000 foreign-funded enterprises.[139] This marks a significant departure from the previous, limited role of lawyers as employees of state run firms who acted primarily as counsel in criminal cases.[140] The emphasis on legal education now includes training legal experts capable of handling complex business issues involving domestic and foreign-invested enterprises — these matters including intel-

133. Code of Civil Procedure, *supra* note 110, art. 64.

134. 1995 MOU, *supra* note 1, art. I(E)(6).

135. Evidence collected by foreign entities "will be admissible as evidence when administrative agencies initiate investigations and handle cases and this evidence will be treated as equal to evidence collected and provided by Chinese nationals." *Id.*

136. *See* XINHUA, Jan. 8, 1996 (P.R.C.), *transcribed in Ren Jianxin Urges Development of Law Education*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-96-008, Jan. 11, 1996, at 22 [hereinafter *Ren Jianxin Urges Development*].

137. *See id.* Some twenty-nine correspondence centers and two hundred subcenters for providing legal education have also been established. *See id.*

138. *See* Alford, *supra* note 130, at 30.

139. *See Law Leaders*, *supra* note 129, at 23. With an eye toward further improvement of the legal profession, China has adopted the Lawyers Law, which is intended to promote management of lawyers and to codify ethical standards. *See* Ma Chenguang, *supra* note 130, at 13.

140. *See* Timothy A. Gelatt, *Lawyers in China: The Past Decade and Beyond*, 23 N.Y.U. J. INT'L. L & POL. 751 (1991).

lectual property issues.[141] In addition, judges and lawyers are encouraged to study foreign legal systems, while an increasing number of legal professionals bolster their education by attending foreign law schools.[142] In any event, the growing complexity of the issues confronting China's legal system requires trained legal professionals capable of handling such issues. And, the protection of intellectual property rights is among the burgeoning issues requiring knowledgeable legal professionals capable of advocating often complex legal positions.

D. Mass Appeal

Although there has been a great deal of discussion about the need to improve legal institutions and the training of legal personnel, it is obvious that law cannot enforce itself. Both sophisticated business persons and the general population must recognize that a legal system creates rights and imposes obligations beyond those arising from normative expectations of social interaction. Put simply, even unsophisticated Chinese peasants understand that theft of another's television is unlawful, but they may not recognize that manufacturing goods resembling another's product, selling unauthorized copies of books, movies, or CDs, or using another's invention without permission also constitute theft. Domestic right holders may not even understand their legal options when their rights are violated. And, those who understand their rights may have little faith that the legal system can protect them. Legal awareness not only means understanding that people should observe the rights, but also that in the event their rights are violated, they can and should seek redress.

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141. Universities have begun to offer courses relating to intellectual property. *See* Jianyang Yu, *supra* note 14, at 149 (reporting that forty-eight of seventy-one universities surveyed in 1994 had courses relating to intellectual property). A special copyright school was established in Tianjin in 1995 to train judges, government officials and lawyers. *See* XINHUA, June 12, 1995 (P.R.C.), *translated in Tianjin Opens Copyright School for Officials*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-95-112, June 12, 1995, at 57. Notably, graduates of the IPR College of Beijing University, established in 1993 to train professionals specializing in intellectual property rights, are in great demand in both the private and public sectors. *See IPR Graduates from Beijing University Badly Demanded*, XINHUA ENG. NEWSWIRE, June 26, 1996, *available in* 1996 WL 10822964.

142. For example, in 1995-1996, as part of its Global Law Program, New York University School of Law had in residence judges, lawyers, officials from administrative agencies such as the National Copyright Agency and the Chinese Securities Regulatory Commission, professors and other visiting legal scholars from the P.R.C.

Daniel Feng, Solicitor General for Hong Kong, has suggested that the study of foreign legal systems, including common law systems such as Hong Kong's, will have a significant effect on the modernization of China's legal system. Daniel Feng, Remarks at New York University School of Law, Asia Hour, Feb. 2, 1996 (unpublished remarks).

For the Chinese, ignorance of the law is, at some level, one reason for the widespread violation of the intellectual property laws.

Some historical background may shed light on the problem of widespread ignorance of the law. Chinese legal history stretches back several thousand years.[143] Thus, a discourse on Chinese legal history is certainly beyond the scope of this Article, but one point may help explain the Chinese masses' historical disinterest in law. Regardless of the governing ideology at any point in Chinese history, law was considered an internal (*neibu*) matter of the ruler. Confucians believed that respecting normative patterns of social relationships would lead to correct behavior and that law should not be accessible to the general population because it could only lead them astray.[144] Even when laws were codified — as the Ming, Tang and Qing Codes — they were for the eyes of the Imperial Court and magistrates only. Under Mao Zedong, law consisted mainly of internal policy directives which were kept from the masses, and thus law could be manipulated to fit political interests.[145] Codified laws and regulations are now accessible to the public; however, finding the law remains difficult for judges and exceedingly difficult for the masses. The 1995 MOU seeks to address the lack of transparency by requiring publication of the laws and issuance of guidelines relating to intellectual property.[146] Yet for the masses, whether living in booming Shanghai or the far reaches of Xincheng, law is still often viewed as within the province of the government and as too difficult to grasp. Arguably, such legal phobia inhibits the masses' understanding of how the myriad

143. *See generally* DEREKE BODDE & CLARENCE MORRIS, LAW IN IMPERIAL CHINA (1973); Hugh T. Scogin, Jr., *Between Heaven and Man: Contract and the State in Han Dynasty China*, 63 S. CAL. L. REV. 1325 (1990); Walter Gellhorn, *China's Quest for Legal Modernity*, 1 J. CHINESE L. 1 (1987).

144. For example, the *Analects* of Confucius state, "Lead the people with governmental measures and regulate them by law and punishment, and they will avoid wrongdoing but will have no sense of honor and shame. Lead them with virtue and regulate them by the rules of propriety (*li*), and they will have a sense of shame and, moreover, set themselves right." *Analects*, 2:3 *translated in* WING-TSIT CHAN, A SOURCE BOOK IN CHINESE PHILOSOPHY 22 (Princeton Univ. Press 1963). Suffice it to say, during Imperial China (pre-1911), law could be described as an outgrowth of deep-rooted philosophical and social norms and was applied in this context. The Confucian ideology — by no means the only view of law — saw law as an instrument of last resort necessary to punish those who could not follow the normative ideal of social harmony arising from the many social relationships within society.

The traditional aversion to the publication of laws is evidenced by a memorial of the Qing Dynasty (1644-1911) warning that the availability of law codes will only make people litigious and contentious. *See* JAMES LEGGE, THE CHINESE CLASSICS 609 (Southern Materials Center 1985).

145. *See* Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMP. L. 711, 713 (1994).

146. 1995 MOU, *supra* note 1, art. II(C), (D).

laws and regulations, most of which only have been enacted since 1979,[147] apply to them.

In 1985 China embarked on a campaign for "popularization of law education."[148] The campaign is intended to raise the masses' awareness of the legal system.[149] China has thus emphasized the need for universal education concerning law.[150] The P.R.C. has involved the media in the campaign, and there are daily statements in the press from important officials about the need for the masses to learn the law.[151] Beijing has also stressed the importance of increasing access to the law.[152] Therefore, in light of the traditional view that law should be for governmental use only, the decision to publish laws is a significant development likely to advance the legal education of the people.

The popularization of law campaign is in fact consistent with the P.R.C.'s obligations under the Action Plan to (1) initiate education and training concerning intellectual property protection, (2) heighten awareness of intellectual property rights through the media, (3) publicize efforts concerning the protection of these rights while exposing infringement and local protectionism, and (4) publicize laws and regulations.[153] Before expecting the masses to understand the importance of respecting intellectual property of others or protecting one's own rights, they must first

147. *See supra* note 69.

148. *See* Zhang Shutang & Liu Siyang, *supra* note 72, at 14. A five-year plan began in 1985, a second five-year plan began in 1991, *see id.*, and a third five-year plan began in 1996.

149. *See id.* at 14. Li Ximing, vice-chairman of the NPC Standing Committee, stated that, as a result of the campaign, "[t]he masses' awareness on [sic] the legal system and the law has been enhanced remarkably; the ability of governments at all levels to make policy decisions and manage economic and social affairs according to law has been improved considerably; the law-enforcement level of administrative law-enforcement personnel and judicial personnel have been raised considerably and law enforcement has been gradually improved [and] enterprises have had a greater sense of legal matters in operation and management . . . ." *Id.*

150. *See Legislative Work*, *supra* note 72, at 18; Liu Zhenying, Chen Weiwei, Zhang Sutang, XINHUA, Dec. 20, 1995 (P.R.C.), *translated in Jiang, Li Address Law Enforcement Forum*, F.B.I.S. DAILY REPORT -CHINA, F.B.I.S. No. CHI-95-245, Dec. 21, 1995, at 15, 15-16 (statement of Jiang Zemin); XINHUA, Mar. 22, 1995 (P.R.C.), *translated in Further Reportage on Developments During NPC: Standing Committee Work Report*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-95-058, Mar. 27, 1995, at 34, 36 [hereinafter *Standing Committee Report*]; Interview, *supra* note 73.

151. *See Standing Committee Report*, *supra* note 150, at 36. "News media were also organized to publish special reports on education in the legal system in a market economy and on the enforcement of relevant laws. The reports pointedly answered questions of concern to the masses and contributed to law enforcement." *Id.* at 36.

152. *See Legislative Work*, *supra* note 72, at 19; Liu Zhenying, Chen Weiwei, Zhang Sutang, *supra* note 150, at 16 (statement of Jiang Zemin).

153. *See* 1995 MOU, *supra* note 1, arts. II(A), (B), (C), and (D). For a further discussion of China's obligations with respect to dissemination of information and legal education and training under the Action Plan, see *supra* text accompanying notes 56-60.

understand the nature of such rights and the means to protect them. While public education will not eliminate the economic interests driving the wide-spread piracy in China, it certainly will increase awareness of intellectual property rights among a population that previously had little exposure to notions of private property. The media blitz may deter infringement by those who perceive a likelihood of severe punishment and encourage right holders to protect their property rights. On a more cynical level, the U.S. should be encouraged by the legal education campaign because it undermines a defense premised on the alien nature of intellectual property rights; indeed, ignorance of the law will not be an excuse. An emphasis on widespread legal education should foster the mass appeal necessary to promote the protection of intellectual property rights.

V. Rule of Law

The impediments to protection of intellectual property rights have thus far been identified as (1) localism, (2) weak judicial and administrative enforcement mechanisms, and (3) the incompetency of the players within the legal system. A fourth systemic problem, which seemingly has been ignored by many scholars in addressing intellectual property issues in China, is the struggle for the rule of law. Recognizing the potential for criticism based on the definition of "rule of law" offered here, I have chosen to define it simply as: the supremacy of law as opposed to the arbitrary power of government. Rule of law is distinguished here from "rule of men," where the former provides clear prospective rules enabling people to guide their lives, judge disputes, experience stability, and exercise the rights the system grants.[154] This Article does not tackle the issue of defining the components of a rule of law system, but focuses on the notion of the rule of law as a source of stability, predictability, and limitation on the exercise of arbitrary power.[155] The struggle for the rule of law is a systemic weakness fundamental to the institutional problems identified thus far and, at the same time, it is the most likely source for improving enforcement of all legal rights.

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154. *See* Francis J. Mootz III, *Is the Rule of Law Possible in a Post-Modern World?*, 68 WASH. L. REV. 249, 259-60 (1993). Rule of men, on the other hand, rests on the whims of those in power. *See id.* at 258.

155. Thus, there is no need to confront the question of whether rule of law presupposes separation of power. Indeed, some argue that separation of powers is not possible or necessary in China. *See* Li Long, *Fazhi Moshi Lun*, 6 ZHONGGUO FAXUE 29, 31 (1991). Nor is it necessary to address whether protection of human rights is part and parcel of rule of law or whether rule of law means rule of "good law." *See* Mootz, *supra* note 154, at 258-60.

A. Rule of Law in China

The starting point for understanding China's current legal reforms is the 1957 Anti-Rightist Movement.[156] By the time Mao had consolidated his power in 1949, he had repealed the civil law system previously established by the Nationalists after the fall of the Qing Dynasty in 1911. Although Mao initially flirted with the notion of enacting legal codes and establishing a Soviet-style legal system, by the end of the Anti-Rightist Movement and the beginning of the Cultural Revolution in 1966, the legal system was destroyed.[157] Mao justified this legal nihilism, i.e., the "re-education" of legal scholars and lawyers and the closure of law schools, as necessary to "return law to the hands of the people."[158]

Throughout the Cultural Revolution and until Mao's death in 1976, law was simply a mechanism for implementing Party policy, interpreted and reinterpreted to reflect the direction of the prevailing political winds.[159] Law became an instrument of Mao and the CCP and was used to suppress "counterrevolutionaries" and protect Mao's power.[160] The seemingly daily fluctuations in Mao's political, economic, and social policies destroyed any sense of predictability in law. On the eve of Deng Xiaoping's reform movement, China was a nation of rule by men — or more specifically by one man, Mao — rather than of law.[161] Equally important, the Cultural Revolution had instilled in the masses the cynical view that law was a concern of the government, not the people, and a tool to create social stability and advance political agendas rather than a mechanism to protect rights.

Current legal reform began in December 1978 when the CCP linked economic modernization to the development of the legal system.[162] Following this watershed policy pronouncement,

156. Choosing the post-revolutionary period as the starting point for understanding the place of, and attitudes toward, law in China today is obviously quite artificial. On the other hand, defining law in the period prior to Communist rule in 1949 is beyond the scope of this Article — and arguably unnecessary.

157. For a general discussion of the P.R.C.'s legal system between 1911 and 1966, see Keller, *supra* note 145, at 719-24; Gellhorn, *supra* note 143, at 4-7; Stanley Lubman, *Introduction: The Future of Chinese Law*, 141 China Q. 1, 3 (Mar. 1995).

158. Gellhorn, *supra* note 143, at 7.

159. *See* Keller, *supra* note 145, at 721; Ronald C. Keith, China's Struggle for the Rule of Law 92 (1994).

160. *See* Keller, *supra* note 145, at 721.

161. *See* Keith, *supra* note 159, at 1; Jerome Alan Cohen, *The Criminal Process in the People's Republic of China: An Introduction*, 79 Harv. L. Rev. 469, 470-71 (1966); Shao-Chuan Leng, *The Role of Law in the People's Republic of China as Reflecting Mao-Tse Tung's Influence*, 68 J. Crim. L. & Criminology 356 (1977).

162. *See Communique of the Third Plenary Session of the 11th Central Committee of the Communist Party of China*, Dec. 23, 1978 (P.R.C.), *transcribed in CCP Central Committee Communique*, F.B.I.S. Daily Report - China, F.B.I.S. No. CHI-78-248,

development of the legal system became a priority.[163] And, while the shock waves emanating from the events of Tiananmen in 1989 may continue to provoke concern about China's commitment to the promotion of democracy and human rights, it has not shaken Beijing's professed commitment to developing rule of law concepts.[164] Beijing now places great stock in building a strong judiciary as a necessary to link economic, political, and social stability.[165] It has recognized that enacting law is of no value in the absence of strong judicial and administrative institutions to enforce it.[166] The concern for law enforcement is at the

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Dec. 26, 1978, at E4, E10; *see also Communique of the Third Plenary Session of the 11th Central Committee of the Communist Party of China*, PEKING REV., Dec. 29, 1978, at 7, 14.

163. *See, e.g.*, KEITH, *supra* note 159, at 1; Eileen Donahoe, Note, *The Promise of Law for the Post-Mao Leadership in China*, 41 STAN. L. REV. 171, 172 (1988). In the early reform period, there were numerous statements or reports expressing the need to link economic and legal reform. *See, e.g.*, Zhao Ziyang, *Advance Along the Road of Socialism With Chinese Characteristics*, Beijing Domestic Service, Oct. 25, 1987 (P.R.C.), *translated in Zhao Ziyang Work Report to CPC Congress*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-87-206s, Oct. 26, 1987, at 10 (report delivered at the 13th National Congress of the CCP, Oct. 25, 1987); Zhang Qiong, *A Brief Talk on Reform of the Political Structure*, ZHONGGUO FAZHI RIBAO, Aug. 11, 1986, at 2 (P.R.C.), *translated in Political Structure Reform, Legal Systems Linked*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-86-165, Aug. 26, 1986, at K27; CHINA DAILY, July 17, 1986, (P.R.C.), *transcribed in China Daily Commentator on Need for Rule of Law*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-86-138, July 18, 1986, at K18.

164. Four months after Tiananmen, the President of the Supreme People's Court, Ren Jianxin, stated that "our country is turning from one which is ruled mainly by government and Party policies to one chiefly administered by laws." CHINA DAILY, Oct. 3, 1989, at 4. It is not possible to cite here the multitude of statements echoing support for the rule of law. For some examples, however, see *Ren Jianxin Urges Development*, *supra* note 136, at 22; XINHUA, Oct. 25, 1994 (P.R.C.), *translated in Judge Says China to Protect Market Economy by Law*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-94-207, Oct. 26, 1994, at 45 (Teng Dehua stated that healthy development is not possible without legal protection); *Provincial News Hookup*, Zhejiang People's Radio Network, Dec. 3, 1992 (P.R.C.), *translated in Zhejiang Secretary on Democracy, Rule of Law*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-92-240, Dec. 14, 1992, at 54; RENMIN RIBAO, Nov. 10, 1991, at 3 (P.R.C.), *translated in Justice Minister on Promoting Rule by Law*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-91-230, Nov. 29, 1991, at 28.

165. *See, e.g.*, *Legislative Work*, *supra* note 72, at 18; Liu Zhenying, Chen Weiwei, Zhang Sutang, *supra* note 150, at 15; XINHUA, Dec. 18, 1995 (P.R.C.), *transcribed in Ren Jianxin on Strengthening Law Enforcement*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-95-243, Dec. 19, 1995, at 26; *Court Work*, *supra* note 68, at 41.

166. *See* Speech by Comrade Qiao Shi at the 13th Meeting of the National People's Congress Standing Committee on 10 May 1995, XINHUA, May 10, 1995 (P.R.C.), *translated in Qiao Shi Addresses Meeting*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-95-091, May 11, 1995, at 21, 21-22 [hereinafter *Qiao Shi Addresses Meeting*]. Addressing the issue of law enforcement, Qiao Shi, Chairman of the NPC, stated, "[w]e have enacted many laws. How to ensure the effective implementation of these laws is an important task facing the legal system of our country. Enacting a law is not the ultimate objective, and the objective of enacting a law is to enforce it. Only by effectively enforcing the law in actual life will it be able to standardize the

forefront of the reforms,[167] and improving enforcement of intellectual property laws clearly is included in the current drive to strengthen the legal system.[168]

B. PROMOTING A FORM OF RULE OF LAW FOR CHINA

As already discussed, the devolution of authority to local governments is a result of Beijing's desire to promote reform by retaining authority over macroeconomic issues while allowing the localities to handle the vagaries of microeconomic management.[169] However one characterizes the success of the economic reforms and the decentralization that began in earnest in 1978, the policy has resulted in a degree of localism that poses a serious threat to modernization, or at least erects serious impediments to further economic and social reform — and, along with these, protection of intellectual property.[170] The establishment of a strong legal system free from external interference is among the most important institutional developments that must occur in China. This is not to suggest that Beijing cannot continue to implement State policy through national legislation. Modernization requires instead a legal system that can enforce such policies without interference from government officials and Party cadres. Adher-

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conduct of members of the society, prevent functionaries of state organs from abusing their powers, maintain political, economic, and social order, and protect citizens' legitimate rights and interests." *Id.* at 22.

An article in *China Daily* from 1994 provides a good example of China's frustration concerning enforcement of the law. The article discusses the case of a state owned coal mine surrounded by a dozen small mines operating in violation of State law. The particular local governments asserted that the number of illegal mines stymied their ability to close them down. The article complains that therefore "the law remains useless" and that "[t]his happens all too frequently." Hao, *TO THE POINT Rule of Law Must be Observed Equally*, CHINA DAILY, June 25, 1994, *available in* 1994 WL 10760312.

167. *See, e.g.*, Liu Zhenying, Chen Weiwei, Zhang Sutang, *supra* note 150, at 15-17 (Jiang Zemin stressed efforts to ensure that "laws will be enforced, the execution of laws will be strict, and lawless conduct will be punished; and so that the law's dignity and authority will be safeguarded;" Li Peng noted that "Law enforcement departments must fully understand the significance of improving the economic order through tightening the enforcement of economic laws"); Zhang Shutang & Liu Siyang, *supra* note 72, at 14; *Standing Committee Report*, *supra* note 150, at 38; *Supreme Procuratorate Report*, *supra* note 104, at 45; *Court Work*, *supra* note 68, at 46.

Premier Li Peng stated that, "In law enforcement, the central requirement is to provide a good social environment and a legal system which facilitate reform, opening up, and economic construction." Liu Zhenying, Chen Weiwei, Zhang Sutang, *supra* note 150, at 16.

168. *See, e.g.*, *Standing Committee Report*, *supra* note 150, at 35; *Court Work*, *supra* note 68, at 47; *Supreme Procuratorate Report*, *supra* note 104, at 48-49; *Supreme Court President*, *supra* note 68, at 27.

169. *See supra* text accompanying notes 68-69.

170. For a discussion of local protectionism in China, see *supra* text accompanying notes 68-90.

ence to the law can promote controlled decentralization, prevent localism, and ensure the predictability and uniformity in law enforcement necessary for an attractive investment environment. If one can transcend a myopic conceptualization that defines rule of law by reference to liberal democracies, the corrected vision may reveal that China's commitment to legal reform portends emerging rule of law concepts. Whether expressly stated, or disguised by less obvious Beijing speak,[171] the campaign to improve law enforcement and build a strong legal system represents a step toward rule of law rather than rule by men.

First, law must be applied equally to all, regardless of status, position, or power. In this regard, China is taking direct aim at localism, corruption, and influence peddling by emphasizing the need for enforcement "according to law."[172] Obviously, a fundamental premise of the rule of law is the application of legal obligations and the enforcement of legal rights according to the spirit of the written law rather than a person's political and/or social status.

Second, there is a clear effort to foster greater respect for the law among both officials and the masses. It would be a significant oversight to allow the subtle nature of such a change to become a reason for missing its importance to the promotion of legal rights, and specifically intellectual property. Regardless of disputes such as whether adherence to law is best accomplished under Austinian sanctions or through the promise of rewards, there can be no doubt that the ultimate concern is the willingness of the populace to abide by the law. Twentieth century China

171. Officials generally refer to enforcement or handling affairs "according to law." *See, e.g.*, *Legislative Work*, *supra* note 72, at 18; Liu Zhenying, Chen Weiwei, Zhang Sutang, *supra* note 150, at 16; *Qiao Shi Addresses Meeting*, *supra* note 166, at 23; Ruan Chongwu, *It Is Necessary To Administer Socialist Market Economy Under the Law*, RENMIN RIBAO, Apr. 4, 1995 (P.R.C.), *translated in Ruan Chongwu Stresses Rule of Law*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-95-089, May 9, 1995, at 19; *Supreme Procuratorate Report*, *supra* note 104, at 48-49; *Standing Committee Report*, *supra* note 150, at 39; *Court Work*, *supra* note 68, at 47.

172. *See, e.g.*, Zhang Shutang & Liu Siyang, *supra* note 72, at 14 (criticizing those local leaders who "put the stress of propaganda and education in the legal system one-sidedly on making the masses become obedient and heed what the superior says to the neglect of protecting according to law the masses' participation in the management of state affairs and the safeguarding of their own legitimate rights and interests"); *Qiao Shi Addresses Meeting*, *supra* note 166, at 22 (noting the need to enforce the laws to rectify "[d]isgusting conduct, such as arbitrary intervention by persons in authority and bending the law to suit personal interests"); *Supreme Court President*, *supra* note 68, at 27 (stressing need to follow law "strictly" to eliminate localism); Zhang Yan & Liu Siyang, XINHUA, June 14, 1995 (P.R.C.), *translated in Minister Addresses Meeting on Law Enforcement*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-95-117, June 19, 1995, at 38, 39 (statement of Cao Qingze, Central Discipline Inspection Commission deputy secretary and supervision minister); *Standing Committee Report*, *supra* note 150, at 34; *Court Work*, *supra* note 68, at 46.

has spent most of its years, especially under Mao, following Beijing's "laws" as orders to be followed rather than understood. Of course, the masses have little trouble understanding the need for laws proscribing murder or robbery. However, as China decentralizes, creates a freer economic and social intercourse, and promotes innovation, there is a greater need for law to address concepts which previously were of little concern to most Chinese. Among the new legal concepts are intellectual property rights.[173] In this light, the law popularization campaign as well as the Action Plan's provisions mandating popular education on intellectual property make great sense.[174] Fostering popular understanding of intellectual property rights, and legal institutions in general, should promote greater adherence to the laws protecting such rights.[175]

Third, Beijing is hopeful that instilling in the masses a greater respect for legal institutions will foster a reliance on legal institutions to protect rights. While China has a rich history of both formal and informal dispute resolution,[176] there is the countervailing tradition against litigation as a means of protecting rights.[177] In modern China, the normative tradition against litigation has been referred to as the "preference for death rather than bringing a lawsuit."[178] Now, however, protecting one's

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173. Some argue that there is no indigenous counterpart to Western notions of intellectual property in China. *See* ALFORD, *supra* note 14.

174. For a discussion of the popularization of law campaign, see *supra* text accompanying notes 148-53.

175. Indeed, Professor Alford argues that adopting laws is not enough to ensure protection of intellectual property in China; there also must be an acceptance by the society of the need to protect such rights. *See* Alford, *supra* note 15, at 21. This point seems consistent with an earlier observation that only when a legal concept is understood and accepted by individual groups within a society will compliance with the concept generally exist. *See* HSIEN CHIN HU, THE COMMON DESCENT GROUP IN CHINA AND ITS FUNCTIONS 63 (Viking Fund Publications in Anthropology No. 10, 1948).

176. There is a great deal of scholarship discussing dispute resolution methods in China. *See, e.g.*, Philip C. C. Huang, *Between Informal Mediation and Formal Adjudication: The Third Realm of Qing Civil Justice*, 19 MOD. CHINA 251 (1993); Stanley Lubman, *Mao and Mediation: Politics and Dispute Resolution in Communist China*, 55 CAL. L. REV. 1284 (1967).

177. The normative aversion to litigation stretches back to pre-unified China, as indicated in the *Book of Changes*, dated approximately 1000 B.C. *See* I CHING, OR BOOK OF CHANGES 28-30 (Richard Wilhelm, trans., Princeton Univ. Press 3d ed. 1967) (expressing the notion that song, translated to mean conflict, is to be avoided).

178. Wang Chenghua & Liu Kaiguo, *Universal Legal Education: Status Quo and Countermeasures*, FAZHI RIBAO, June 6, 1995, at 7 (P.R.C.), *translated in Status of Universal Legal Education Viewed*, F.B.I.S. DAILY REPORT - CHINA, F.B.I.S. No. CHI-95-133, July 12, 1995, at 26.

There is still some concern that the masses view the evolving laws and regulations negatively because they appear to impose many new obligations. *See* Interview, *supra* note 73.

rights through litigation is becoming a practice encouraged by the government.[179] On the intellectual property front, for example, the government has passed a law enabling consumers to demand a double refund for counterfeit goods in an effort to invoke grass roots change.[180] Domestic right holders should be encouraged to enforce their rights by relying on law instead of by either ignoring the problem or looking outside the legal system to influential cadres or officials. This brings us full circle to the plight of the condom maker introduced at the beginning of the Article. As the masses discover the economic benefits associated with owning, or more likely, licensing intellectual property rights, the more they will support its protection.[181] By the same token, foreigners can benefit from alliances with local enterprises since the more Chinese who have a stake in protection of intellectual property rights the more the masses will support a strong intellectual property regime.[182] Yet, until the impediments to judicial and administrative enforcement are addressed, a lack of faith in the system will continue to plague the protection of rights.[183]

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179. The enactment of the Administrative Litigation Law in 1989, which allows citizens to sue officials, has prompted a feeling of legal empowerment among the masses. The movie *Story of Qiu Ju*, by Zhang Yimou, received critical acclaim and an Oscar nomination for its depiction of the unfailing efforts of a woman from a small village to seek legal redress on behalf of her husband, whom she felt was wronged by a local cadre.

180. The retailer, in turn, can seek repayment from the supplier and the manufacturer. One entrepreneur has used the law to make money by purposefully seeking out counterfeit goods and then demanding the double refund from the retailer. Referring to the activities of this Mr. Wang, one paper coined the slogan: "May 10,000 Wang Hais emerge in every city." Joseph Kahn, *Finding Fakes: Wang Hai Reaps Profits Outwitting China's Pirates*, WALL ST. J. ASIA, Dec. 28, 1995, at 1, *available in* 1995 WL 10232091.

181. *See* Shada Islam, *China Cos Now Seek Better Copyright Protection*, DOW JONES INT'L NEWS SERVICE, Feb. 7, 1996, *available in* Westlaw, AllNewsPlus (noting the growing clamor for stricter copyright controls from the emerging group of domestic music producers). Developing domestic industries that rely on intellectual property rights may also give rise to the type of industry watch dog organizations, such as the International Intellectual Property Association (IIPA) and the Business Software Alliance (BSA), that exist elsewhere in the world. At the same time, local industry will be more willing to support the current efforts in China by the IIPA, BSA and others, which have faced strong local resistance. *See infra* note 183.

182. The 1995 MOU recognizes the need to promote respect for intellectual property by requiring training and education among the masses, manufacturers, and retailers. *See* 1995 MOU, *supra* note 1, art. II(A)(3). The letter introducing the MOU permits the establishment of joint ventures and exclusive licensing agreements in intellectual property-related businesses. *See* Letter Introducing the 1995 MOU, 34 I.L.M. 882, 884.

183. As discussed throughout this article, these impediments include localism, corruption, lack of judicial independence, weak enforcement mechanisms and incompetence. In some cases, localism is so severe that intellectual property right holders are reluctant to assert their rights for fear of retaliation, *see* Chen Jian, *supra* note 61, at 37, and industry watchdog agencies, such as the IIPA, have closed resident operations, fearing harm to their personnel, *see Fatalities Threatened in China*

Fourth, foreign right holders should seek to protect their rights by both utilizing Chinese enforcement institutions as well as by creating local allies. There continues to be a forensic xenophobia which undermines the willingness of many foreigners to use the Chinese legal system. While the reluctance is understandable, ultimately it may be more self-defeating. Foreign right holders cannot simply hope that diplomatic pressure will eliminate piracy. By seeking redress through the domestic institutions, foreigners put potential violators on notice of their intention to protect their rights. Local cadres are less likely to interfere in actions involving foreigners because of the notoriety of those cases. Moreover, utilization of the legal system by experienced foreigners should help uncover procedural obstacles to the adjudication of rights as well as the substantive weaknesses in legal codes. Chinese right holders may also be exposed to western strategies and techniques for applying law to protect intellectual property rights.

Fifth, enforcement of rights in China is undermined by a lack of coordination and uniformity in the application of laws. Predictability and uniformity are hallmarks of rule of law systems. However, whether as a result of localism, corruption, or incompetence, enforcement of law is undermined by inconsistency within and between judicial and administrative bodies.[184] The system is also undermined by China's failure to enact an administrative procedure law delineating the hierarchy and scope of authority of the various administrative bodies. As a result of the 1995 MOU, right holders are permitted to seek redress through both judicial and administrative enforcement mecha-

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Piracy War, CONSUMER MULTIMEDIA REP., Jan. 1, 1996, *available in* 1996 WL 6714485.

Added to these concerns are obstacles to speedy justice, such as problems relating to acquisition of evidence. *See* Chen Jian, *supra* note 61, at 37. For a further discussion of issues relating to the collection of evidence in light of the 1995 MOU, see *supra* text accompanying notes 134-35.

184. *See* Liu Zhiyang, Chen Weiwei, Zhang Sutang, *supra* note 150, at 15-17; *Legislative Work*, *supra* note 72, at 17; *Supreme Court President*, *supra* note 68, at 25; *Standing Committee Report*, *supra* note 150, at 34; *Court Work*, *supra* note 68, at 41.

The weakness of the legislative process raises an additional problem. The central government has great difficulty coordinating legislation among the national and local people's congresses, as well as at the administrative levels. Major issues of constitutional development have arisen concerning uniformity in legislation and the validity of laws and regulations enacted at the local level. Concerns include defining the responsibility for law making, ensuring consistency in the legislative process, determining the hierarchy of laws and regulations and improving legal and administrative drafting. *See* Keller, *supra* note 145, at 739-40. These issues of constitutional development and reform are beyond the scope of this article, but certainly deserve mention. However, even addressing problems relating to law making in China will not resolve the other impediments to enforcement of rights — in particular, intellectual property rights — discussed in this article.

nisms — a system intended to ensure protection of rights that the court system alone seemed unable to provide. The purpose of this Article is not to criticize the approach adopted in the Action Plan or to suggest the need for a vertical enforcement structure. In fact, right holders should welcome the additional administrative options for protecting rights and the fact that administrative bodies are now empowered to investigate infringement and impose sanctions without court involvement. For those who find the court system slow, unresponsive, or difficult to navigate, the administrative enforcement institutions are an important addition. The criticism instead is leveled at the lack of coordination and the absence of uniform application of the laws by both the courts and administrative agencies.[185] Until the system can ensure the uniformity and predictability expected from a rule of law system, enforcement of intellectual property rights will remain a problem in the P.R.C.

It seems appropriate here to return to a subject briefly addressed earlier in the Article concerning the role of the Communist Party. Some commentators maintain that if the CCP really was interested in eliminating infringement, it could eradicate it with relative ease. Hopefully, this argument no longer carries sway since the CCP cannot by mere policy directive eliminate localism, incompetence, corruption, and the lack of coordination and uniformity in the application of the law. Even if it could, from a rule of law standpoint, reliance on the Party to implement law is not desirable. Once the law — which represents the embodiment of Party policy — is enacted, the legal system should be able to ensure implementation of the law without the need of government, Party, or military involvement. If the system requires action by the powerful elite within the government, the Party, or both to ensure enforcement, rule of law is replaced by rule of men. Therefore, while Party support is a prerequisite to the protection of intellectual property, that support need only be implemented through the enactment of law creating and protecting intellectual property rights. In the end, protection of intellectual property rights requires legal institutions responsible for, and more importantly able to, ensure the protection of the rights granted by the enacted laws.

CONCLUSION

Two years after the execution of the 1995 MOU in February 1995, the U.S. and China continue to proffer divergent views concerning the success of the Agreement. Meanwhile, U.S. industry

185. The Action Plan was intended to address the problem of lack of administrative coordination. *See* 1995 MOU, *supra* note 1, arts. I(B), (E)(2), (F)(4).

remains dissatisfied with China's efforts as piracy, in some estimates, still exceeds the one billion mark annually. China's inability to address piracy within its borders strains U.S.-Sino relations not only because of the loud protests heard from U.S. businesses, but also as a result of the mounting trade deficit with China. The ever looming possibility of a trade war poses a serious challenge to relations already tested by issues such as China's human rights record, its sale of arms to outlaw nations, and its challenges to Taiwan's independence.

Regardless of how China characterizes its success in combating piracy, it is clear that the 1995 MOU has not achieved its principal goal of eliminating piracy. The need for a further agreement in June 1996, which again narrowly averted a trade war, clearly demonstrates this point. However, the 1995 MOU, which intended to address the obstacles created by localism, weak enforcement institutions, incompetency among personnel, and the lack of legal knowledge among the masses, still represents a substantial step toward the protection of intellectual property rights. Responding to the complaints of right holders who found the Chinese judicial system incapable of enforcing their rights, the Agreement created a dual system of judicial and administrative enforcement institutions.

The Article identifies localism as the major impediment to protection of intellectual property rights in China. Powerful elites or military officials interested in protecting illegal enterprises have interfered with the enforcement measures. Localism undermines enforcement by interfering with the independence of administrative and judicial institutions as well as legal enforcement. Stronger judicial and administrative institutions are required to counter localism; more resources are needed to ensure that enforcement institutions are not at the mercy of local governments; and legitimate enterprises must be encouraged in order to undermine the reliance on illegal enterprises.

Competency is also a serious obstacle to enforcement. The poor training of judges, administrative officials, and lawyers plagues the legal system. On the other hand, several steps have been taken to improve education and training of enforcement personnel, including the enactment of the Law on Judges, which mandates that judges possess certain qualifications. China is also promoting legal awareness among the masses, reflecting an important policy change from historic practice. The popularization of the law campaign is a significant development likely to create a new breed of Chinese who respect intellectual property rights.

The Article ends as it began, with the story of the Chinese condom store. On the one hand, the story exemplifies the unchecked piracy in China, suggesting that the 1995 MOU has

failed to achieve its intended purpose. On the other hand, it may presage an improved environment for intellectual property right holders. First, an increase in domestic enterprises relying on protection of intellectual property rights portends greater support for enforcement institutions and adherence to laws by a growing and potentially influential domestic constituency. Second, there is a growing awareness of intellectual property rights among the masses, which will promote an improved respect for legal rights. Finally, the attention given the story by the State press indicates Beijing's support for reform of the legal system and protection of intellectual property rights.

Both the reforms and Beijing's apparent support for improved protection of intellectual property are encouraging. But they are not enough. Bilateral agreements aimed at improving China's intellectual property institutions should be encouraged. But these agreements also are not enough. Improved enforcement of all rights in China requires greater adherence to the rule of law — namely, uniform enforcement according to the spirit of the law rather than the will of the enforcer. Many argue that eradication of piracy merely requires genuine CCP support. This argument is challenged here primarily because of its short-sightedness. A modern legal system requires institutions capable of enforcing laws and protecting the rights granted by those laws. Relying on Beijing and the CCP to enforce the laws rather than the sanctity of the laws themselves is a reversion to rule of men. In the final analysis, protection of intellectual property requires a respect for and an adherence to rule of law principles.