

# THE FUTURE OF MUSIC AND FILM PIRACY IN CHINA

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## I. INTRODUCTION

Piracy, whether physical or in cyberspace, is the single greatest threat to the world's entertainment industries. And no country contributes more to the piracy problem, or will play a more critical role in shaping the future of international piracy, for better or worse, than China. Any realistic

solution to the international piracy problem must include a solution to the problem in China.

Anyone who doubts the importance of intellectual property protection in China to U.S. industries need look no further than a February 2005 issue of *Business Week*, where China was mentioned twice on the cover alone in connection with a feature on the growing international piracy and counterfeiting epidemic.<sup>1</sup> That article identifies China as the world's major intellectual property infringement culprit, stating that "China accounts for nearly two-thirds of counterfeit goods"—goods including movie DVDs and music CDs, prescription drugs, Budweiser beer, designer handbags, motorcycles, and elevators—on the estimated \$512 billion worldwide counterfeit market.<sup>2</sup> Exasperated over what it perceives as the Chinese government's lack of adequate intellectual property enforcement, the International Intellectual Property Alliance ("IIPA"), which represents the interests of U.S. copyright owners, wrote to the U.S. Trade Representative in October 2004, complaining that "China can no longer excuse its failure to lower piracy rates to below 90%, among the highest rates in the world."<sup>3</sup>

The reported copyright piracy levels in China are alarming. According to copyright industry estimates, more than 90% of all music CDs, movie DVDs, and software sold in China are pirated.<sup>4</sup> Recent estimates of U.S. losses due to piracy in China range from about \$1.85 to \$2.54 billion annually in displaced sales of CDs, DVDs, VCDs (video compact discs), and software.<sup>5</sup> Many pirated and counterfeit products make their way back into

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1. Frederik Balfour, *Counterfeiting's Rise*, BUS. WK., Feb. 7, 2005, at 54. The cover of the issue reads: "Fakes! The global counterfeit business is out of control, targeting everything from computer chips to life-saving medicines. It's so bad that even China may need to crack down." Beneath a pair of nearly identical motorcycles pictured on the cover are the words: "One of these Honda CG125 motorcycles is a Chinese knockoff."

2. *Id.* at 56.

3. INT'L INTELLECTUAL PROP. ALLIANCE, 2004 SPECIAL 301 REPORT: PEOPLE'S REPUBLIC OF CHINA 31-32 (2004) [hereinafter IIPA, 2004 REPORT].

4. Letter from Thomas M.T. Niles, President, U.S. Council for Int'l Bus., and Clarence T. Kwan, Chairman, China Subcomm., U.S. Council for Int'l Bus., to Gloria Blue, Executive Sec'y, Trade Policy Staff Comm., Office of the U.S. Trade Representative (Sept. 10, 2003) ("Pirated optical media products, CD, VCD and DVD, and counterfeit goods continue to be a major problem [in China], and the piracy rate for optical media products and business software is well in excess of 90%."); see also IIPA, 2004 REPORT, *supra* note 3, at 33.

5. See *A Growing Problem with Links to Organized Crime and Terrorism: Hearing on Int'l Copyright Piracy Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 108th Cong. 12 (2003) (statement of Rep. Howard L. Berman, member, Subcomm. on Courts, the Internet, and Intellectual Prop.) (plac-

Western markets. About 75% of counterfeit goods seized at U.S. borders originate in China<sup>6</sup>—a significant number considering the U.S. counterfeit market in 2003 was estimated at \$286.8 billion.<sup>7</sup>

Although the loudest complaints about the state of copyright enforcement in China historically come from foreign copyright owners, China's own entertainment industries have arguably suffered the most from rampant piracy. For example, the IIPA reports that in 2003, domestic Chinese music companies lost \$286 million due to piracy.<sup>8</sup> Since 1998, total estimated losses to copyright piracy in China (including software and books) have generally hovered around \$2 billion or higher annually.<sup>9</sup> Piracy is certainly a factor in the Chinese music and film industries' comparatively low sales revenue. Although China's population is the world's largest, China only accounted for 0.6% of the world market for music sold on a physical format (CDs, cassettes, etc.) in 2003, while the United States and England combined accounted for nearly 50% of the world's sales.<sup>10</sup> By Chinese movie industry standards, 2005 was a strong year with total box office revenue of \$248 million, but that total equaled less than 3% of total U.S. box office receipts in 2005.<sup>11</sup> Many factors other than piracy contribute to the Chinese movie and music industries' low revenue figures,<sup>12</sup> and

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ing the "aggregate hard-good piracy losses suffered by U.S. copyright industries" in China at \$1.85 billion); *see also* IIPA, 2004 REPORT, *supra* note 3, at 33 (placing the "trade losses due to piracy" of motion pictures, records and music, and business and entertainment software applications at approximately \$2.54 billion).

6. Jonathan Ansfield, *Lessons of Pirate Row: Beijing's Aggressive Defense of Its Cherished Olympic Logo Shows It Can Stop Counterfeiters, if It Wants to*, NEWSWEEK INT'L, Jan. 10, 2005, at 45.

7. CITY OF NEW YORK OFFICE OF THE COMPTROLLER, *BOOTLEG BILLIONS: THE IMPACT OF THE COUNTERFEIT GOODS TRADE ON NEW YORK CITY* 4 (2004).

8. IIPA, 2004 REPORT, *supra* note 3, at 35.

9. *See id.* at 33 (finding that estimated losses dipped to slightly over \$1 billion in 2000, but jumped to slightly under \$2 billion in 2001, and have remained in that range or higher since).

10. Press Release, IFPI, *Global Music Sales Fall by 7.6% in 2003—Some Positive Signs in 2004* (Apr. 7, 2004), <http://www.ifpi.org/site-content/statistics/worldsales.html> (placing 2003 world retail music sales total at \$32 billion and stating that the U.S. and U.K. music markets combined represented 47% of the total world market); *see also* IFPI, *THE RECORDING INDUSTRY COMMERCIAL PIRACY REPORT 2004*, at 8 (2005) [hereinafter IFPI, *COMMERCIAL PIRACY REPORT 2004*] (reporting that, in 2003, China's legitimate music market was valued at \$198 million—0.6% of the total world sales value).

11. Box Office Mojo, *Yearly Box Office*, <http://www.boxofficemojo.com/yearly/> (last visited Apr. 12, 2006) (listing total U.S. box office revenue for 2005 at nearly \$9 billion).

12. *See* Jeroen De Kloet, *Rock in a Hard Place, in MEDIA IN CHINA: CONSUMPTION, CONTENT AND CRISIS* 96-97 (Stephanie Hemelryk Donald et al. eds., 2002) (discussing

losses to piracy reported by both U.S. and Chinese copyright industries are probably, if not certainly, exaggerated.<sup>13</sup> Nevertheless, Chinese piracy is a serious problem for copyright owners in China and throughout the world.<sup>14</sup>

As disheartening as the numbers are for the Chinese music and motion picture industries, the situation is about to become even worse. The estimated losses above contemplate only piracy of physical copies; they do not include losses from the thousands of websites and numerous peer-to-peer file-sharing networks that make copyrighted works available for free to internet users in China.<sup>15</sup> With the Chinese economy thriving and a national emphasis on technological development,<sup>16</sup> China now boasts the second-highest number of internet users in the world.<sup>17</sup> This number is increasing by 27% annually, and by January 2006 had reached approxi-

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how the overall low rate of music consumption in China and the structure of the music industry, which is still largely controlled by the state, contribute to the music industry's problems); *see also* Yingchi Chu, *The Consumption of Cinema in Contemporary China*, in *MEDIA IN CHINA: CONSUMPTION, CONTENT AND CRISIS* 48-50 (Stephanie Hemelryk Donald et al. eds., 2002) (arguing that the structure of the film industry in China has contributed significantly to its problems).

13. IIPA member associations base estimates of losses to piracy on a "displaced sales methodology." IIPA, 2004 REPORT, *supra* note 3, at 33 n.2. For pirated music and movie CDs and DVDs in China, IIPA member organizations essentially consider all pirated copies sold as "displaced sales," that is, each copy sold by pirates would have been a legitimate copy sold but for the availability of pirated copies. *See id.* app. B (discussing methodology of IIPA estimates). The IIPA claims that because it is "impossible to gauge losses for every form of piracy, we believe that our reported estimates for 2003 actually underestimate the losses due to piracy . . ." *Id.* app. B, at 1. It is, of course, doubtful that every CD, cassette, DVD, or VCD sold by pirates in China would have been a legitimate sale at list price—typically several times higher than the price of the pirated product. Thus, actual displaced sales probably are far lower than industry estimates. In any event, as Lawrence Lessig points out, even if there is little or no actual economic harm to these industries at all, that is nevertheless a poor justification for piracy. LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 64 (2004).

14. *See generally* Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131 (2000) (describing long-standing tensions between the U.S. and China over intellectual property protection).

15. *See* IIPA, 2004 REPORT, *supra* note 3, app. B, at 1 (describing the methodology used for estimating losses due to piracy, with no indication that internet downloading or file sharing figures factor into the methodology).

16. *See infra* note 246.

17. *Netizens Number over 90 million in China*, PEOPLE'S DAILY ONLINE, Dec. 23, 2004, [http://english.people.com.cn/200502/27/eng20050227\\_174879.html](http://english.people.com.cn/200502/27/eng20050227_174879.html) (last visited Apr. 12, 2006).

mately 110 million users.<sup>18</sup> In 2004, “MP3” and “BT” (short for “BitTorrent”) were the first and fifth most popular search terms, respectively, on Baidu.com, China’s largest internet search engine,<sup>19</sup> with searches for downloadable music accounting for 20% of Baidu’s total traffic.<sup>20</sup> The IIPA believes that millions of Chinese users already trade copyrighted material online, either through peer-to-peer networks or FTP servers.<sup>21</sup> This behavior appears particularly concentrated on college campuses, with a potent combination of poor students and readily accessible high-speed internet access. Anecdotally, according to one recent graduate of a Beijing law school, students at her school use university-hosted servers to store and share their music and movie collections with classmates. During her senior year, she claimed, it seemed as if no one was studying because they spent so much time watching movies they downloaded from the server to their PCs.<sup>22</sup>

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18. See Jiang Yaping, *Investing in China’s Internet Industry: Opportunities and Competition*, PEOPLE’S DAILY ONLINE, Feb. 27, 2005, [http://english.people.com.cn/200502/27/eng20050227\\_174879.html](http://english.people.com.cn/200502/27/eng20050227_174879.html) (last visited Apr. 12, 2006) (noting an annual 27% internet-user growth rate); see also CHINA INTERNET NETWORK INFORMATION CTR. (CNNIC), 17TH STATISTICAL SURVEY REPORT ON THE INTERNET DEVELOPMENT IN CHINA 4 (Jan. 2006).

19. *2004 Top Chinese Search Results*, SINOSPLICE, Jan. 5, 2005, <http://www.sinosplice.com/weblog/archives/2005/01/05/2004s-top-chinese-search-results> (last visited Apr. 12, 2006) (original results published in Chinese at <http://www.baidu.com/2004/index.html#is>). BitTorrent is a peer-to-peer and file distribution tool. BitTorrent technology, which is available for free under an open-source software license, allows for easier and more efficient downloading of large files on the internet, thus it has become the method of choice for sharing movies and television shows online. See BitTorrent, WIKIPEDIA: THE FREE ENCYCLOPEDIA, <http://en.wikipedia.org/w/index.php?title=BitTorrent&oldid=44973529> (last visited Mar. 22, 2006).

20. Sherman So, *More IP Suits Await Baidu after NASDAQ*, THE STANDARD, Aug. 3, 2005, <http://www.thestandard.com.hk/stdn/std/Business/GH03Ae08.html> (last visited Apr. 14, 2006).

21. See IIPA, 2004 REPORT, *supra* note 3, at 37.

22. Some of the information used in this Article was obtained from numerous interviews I conducted in Shanghai and Beijing between December 2004 and January 2005. All of those interviewed are connected with the entertainment industry or copyright protection in China. Interviewees included government officials, intellectual property lawyers, an appellate court judge specializing in intellectual property cases, law professors, music producers, a television producer, a publicist, an agent, professional songwriters, and music industry executives. Because of the political sensitivity of some information discussed, some interviewees asked that their names not be used. To ensure anonymity of all the interviewees, therefore, I have decided not to include any names when quoting or paraphrasing the interviewees’ responses. All of these interviews are on file with the author, although the names of the participants have been redacted.

China is caught between two eras in the development of copyright protection: while it struggles to defeat what one might call “twentieth-century piracy” (that is, the unauthorized copying and selling of DVDs, VCDs, and CDs, also referred to herein as “traditional piracy”), it finds itself careening toward the growing threat of “twenty-first century piracy,”<sup>23</sup> (that is, internet file-sharing, or “internet piracy,” which threatens to overtake physical piracy in value of goods “stolen”). The Chinese government has myriad social and economic worries with which to contend<sup>24</sup> and therefore—much to the chagrin and sometimes denial of Western intellectual property owners—has limited resources with which to fight piracy. The Chinese government faces critical questions at this crossroads: Should it allocate the bulk of its enforcement resources to traditional piracy, where the problem is currently at its worst, and address internet piracy enforcement as that problem increases in the future? Or should Chinese authorities attempt to pursue internet piracy now, recognizing that in the future it is sure to become the bigger problem? To what extent should China fear the internet as a new medium for the distribution of pirated works and to what extent does the internet present new opportunities for combating piracy? Is China obliged to strive for levels of copyright protection found in developed Western nations or is China in fact already at the cutting edge of the twenty-first century entertainment business model?<sup>25</sup>

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23. The term “piracy” is used here merely as shorthand for unauthorized copying, recognizing that the term has negative implications that may not be applicable in all cases. See, e.g., LESSIG, *supra* note 13, at 62-79. Lessig, for example, observes that only some of the massive quantity of internet file sharing involves infringement and that “even among the part that is technically copyright infringement, calculating the actual harm to copyright owners is more complicated than one might think.” *Id.* at 67. He cautions: “So consider—a bit more carefully than the polarized voices around this debate usually do—the kinds of sharing that file sharing enables, and the kinds of harm that it entails.” *Id.*

24. As important an issue as intellectual property protection has become, it pales in comparison to other grave challenges facing the Chinese government. These include a potentially devastating AIDS epidemic, an unemployment rate that some experts estimate is as high as 23%, a rapidly widening rural-urban income and education gulf, and excessive pollution resulting in serious environmental damage and public health problems. See, e.g., MINISTRY OF HEALTH, PEOPLE’S REPUBLIC OF CHINA, JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS, AND WORLD HEALTH ORGANIZATION, 2005 UPDATE ON THE HIV/AIDS EPIDEMIC AND RESPONSE IN CHINA (2005); Joseph Kahn, *China’s Elite Learn to Flaunt It While the New Landless Weep*, N.Y. TIMES, Dec. 25, 2004, at A1; Charles Wolf, Jr., *China’s Rising Unemployment Challenge*, ASIAN WALL ST. J., July 7, 2004, available at <http://www.rand.org/commentary/070704AWSJ.html>; Jim Yardley, *Rivers Run Black, and Chinese Die of Cancer*, N.Y. TIMES, Sept. 12, 2004, at 1.

25. A USA Today technology columnist argues that circumstances in China have begun to light the path for the future of the music industry worldwide. Kevin Maney, *If Pirating Grows, It May Not Be the End of Music World*, USA TODAY, May 3, 2005, at

This Article contemplates what the future holds for the protection of audiovisual works in China. It is meant to provide cultural and historical context to the copyright piracy problem in China and, with that context in mind, realistically assess three policy options the Chinese government might employ to defeat piracy in the internet age while promoting vibrant domestic music and film industries. To that end, Part II gives a brief historical and cultural account of the rise of piracy in China, then reviews early developments in Chinese copyright law from the beginning of the twentieth century through the late 1970s. Part III discusses the present legal framework in China for protecting copyright and considers the goals of Chinese copyright law. Part IV considers the road ahead for China in its fight against piracy, examining three major legal and policy directions for addressing the piracy problem in the future: (1) cracking down hard on piracy; (2) staying the present course; and (3) adopting a tax-funded, internet-based alternative compensation system for sharing music and movies online as an innovative solution to China's piracy problem in the internet age. This third option could provide the optimal balance between the objectives of Chinese consumers (more entertainment at a lower price), copyright owners (fair compensation), and the Chinese government (cultural enrichment and reduction of internet and physical piracy).

## II. CHINESE PIRACY IN HISTORICAL PERSPECTIVE

No notion of intellectual property, or the corollary notion of copyright piracy, ever developed indigenously in China. These concepts were not introduced until the late nineteenth century, when, in the words of William Alford, Western powers did so "at gunpoint."<sup>26</sup> China's historical lack of an intellectual property culture can be attributed in part to an economic system that stressed agriculture and deemphasized commerce. Imperial China was a mostly illiterate, rural agrarian society<sup>27</sup> in which the "de-

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B3, available at [http://www.usatoday.com/tech/columnist/kevinmaney/2005-05-03-music-piracy-china\\_x.htm](http://www.usatoday.com/tech/columnist/kevinmaney/2005-05-03-music-piracy-china_x.htm). Chinese artists "have to regard CDs as essentially promotional tools, not as end products." *Id.* He cites an example of a popular rock band that relies primarily on concert revenue, endorsement deals, and appearances in television commercials for income. *Id.* Their theory is, "if people hear and like [the band's] songs on pirated CDs, at least they'll be more likely to come to the concerts and buy what the duo endorses. It's possible that this is the future of the global music industry." *Id.* The author concludes: "And even though that sounds dire for music and musicians, surprisingly it might not be." *Id.*

26. WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION 12-13, 30 (1995).

27. SANQIANG QU, COPYRIGHT IN CHINA 4, 9 (2002) (arguing that since approximately 500 B.C., nearly every dynasty espoused the policy of stressing agriculture and



mand . . . for cultural consumption and intellectual creation was relatively low.”<sup>28</sup> That is not to say China lacked a rich literary and technologically advanced culture. On the contrary, historically, China was among the world’s most culturally and technologically advanced civilizations, at least through the twelfth century.<sup>29</sup> But the creation and consumption of literary works was limited to a relatively small class of educated elites,<sup>30</sup> so there was little need to develop inexpensive mass production technologies and distribution systems for creative works.<sup>31</sup> Accordingly, unauthorized copying did not occur on the kind of broad scale one would expect to precipitate the development of a home-grown intellectual property regime. Perhaps more importantly, Confucianism, the elaborate moral code that permeated social and political life in imperial China for two millennia, was in many ways antithetical to the values of economic and moral rights that underlie copyright.<sup>32</sup>

As there was no indigenous Chinese notion of copyright, unauthorized copying was not recognized as a legal wrong in China until Western pow-

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deemphasizing commerce); *see also* SUSAN NAQUIN & EVELYN S. RAWSKI, CHINESE SOCIETY IN THE EIGHTEENTH CENTURY 97-98 (1987).

28. QU, *supra* note 27, at 5.

29. *See* ALFORD, *supra* note 26, at 19.

30. QU, *supra* note 27, at 9.

31. *See* ALFORD, *supra* note 26, at 19.

32. In the Confucian conception, law was an instrument for maintaining social order and protecting state interests, and did not involve Western-style individual rights that one could enforce against others or the state. *See* DANIEL C.K. CHOW, THE LEGAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA 46-47 (2003). The notion of a right in intellectual property would have been all the more inconceivable since artistic works were considered a part of the common heritage of all Chinese. *See id.* at 46, 411. Confucianism placed tremendous emphasis on looking to the past for moral guidance and cultural constancy; thus art in imperial China stressed allusion and continuity over inventiveness. *See* ALFORD, *supra* note 26, at 25-26. A Western notion of copyright would have seemed utterly unnecessary and obtrusive in a society that prized mastery of the past over novelty. Indeed, as several scholars wrote, the “notion that creative and inventive accomplishments could be the subject of individual property rights was not simply foreign to their mode of thinking, but was essentially beyond the scope of their mental picture of the world.” John R. Allison & Lianlian Lin, *The Evolution of Chinese Attitudes toward Property Rights in Invention and Discovery*, 20 U. PA. J. INT’L ECON. L. 735, 744 (1999). Further, employing financial incentives to stimulate creative expression—a central tenet in most Western conceptions of intellectual property—would have met with disdain in imperial China. There was reason to downplay economic interests in creative works: engaging in creative expression was to be an exercise in moral refinement and edification, and was ideally not to be sullied by commerce, which Confucianism disparaged for causing people to eschew their moral development in favor of immediate financial gain. *See* ALFORD, *supra* note 26, at 27-29.

ers introduced the concept in the late nineteenth century.<sup>33</sup> Before the Opium War (1839-1842), foreign powers in China were not concerned with the lack of intellectual property protection because there was little foreign investment there and the chief early Western exports to China were unbranded, bulk commodities, not technological innovations or creative works.<sup>34</sup> In the late nineteenth century, however, some Chinese producers began to imitate foreign brands, largely to avoid paying a tax levied only on domestic goods and to capitalize on the increasing popularity of foreign imports as well as the more lenient treatment local officials often gave to foreign merchants.<sup>35</sup> By the first quarter of the twentieth century, piracy of written works became a serious problem for foreign and Chinese authors as printing technologies improved and literacy rates increased.<sup>36</sup> Thus began a century of endeavoring to curb widespread piracy in China by establishing copyright through formal laws or state policies, despite the absence of historical, cultural, and legal conditions conducive to effective copyright enforcement.<sup>37</sup>

When the People's Republic of China (PRC) was established by the Communist Party in 1949, it inherited a war-ravaged nation desperately in need of technology and intellectual output and, therefore, rapidly issued a series of pronouncements concerning publication and author remuneration policies intended to stimulate creation and reassure intellectuals that their rights would be safeguarded.<sup>38</sup> The pronouncements articulated general

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33. ALFORD, *supra* note 26, at 34.

34. *Id.* at 33-34.

35. *Id.* at 33.

36. *Id.* at 42-43.

37. *Id.* at 30-55. The first official documents in China concerning intellectual property protection appeared in the early twentieth century, when the Qing government concluded a series of bilateral agreements on the subject with Japan, England, and the United States. *See id.* at 36-38; QU, *supra* note 27, at 21. In 1910, two centuries after copyright began developing in the West, China promulgated its first copyright law. Bryan Bachner, *Intellectual Property Law*, in INTRODUCTION TO CHINESE LAW 439, 440 (Chenguang Wang & Xianchu Zhang eds., 1997). The nearly four decades between the fall of the Qing dynasty in 1911 and the founding of the People's Republic of China (PRC) in 1949 saw the rapid growth of piracy and, consequently, further efforts to stem the tide through the establishment of modern copyright laws. Most notably, in 1928 the Nationalist Guomindang government of Dr. Sun Yatsen promulgated its "Authors' Rights" law, which drew heavily from German and Japanese law. The 1910 and 1928 laws ultimately proved ineffective because China was continually fraught with political and social upheaval, and because "these laws . . . presumed a legal structure, and indeed, a legal consciousness, that did not then exist in China and, most likely, could not have flourished there at that time." ALFORD, *supra* note 26, at 53.

38. *See* ALFORD, *supra* note 26, at 59-60; *see also* Bachner, *supra* note 37, at 441-42.

principles concerning the need to respect the rights of authors and publishers, and focused on safeguarding the author's right to remuneration.<sup>39</sup> Nevertheless, book piracy remained commonplace, even perpetrated by official state-owned publishers or bookstores.<sup>40</sup> Authors typically had few options for redress when others copied their works without permission. Then, during the political and social upheaval of the Cultural Revolution (1966-1976), the intellectual environment and production of creative works severely atrophied as a result of oppressive policies that fostered anti-intellectualism and all but decimated the entire legal system, including all previous policies and regulations concerning authors' rights.<sup>41</sup> Piracy effectively became the official state policy. New and existing works deemed appropriate for publication were published freely and without restriction as all copyrighted works were considered property of the state; authors lost all economic and moral rights in their works, save the right to earn a base salary.<sup>42</sup> The total disregard for intellectual property rights during that period is apparent in an oft-cited popular maxim of the day: "Is it necessary for a steel worker to put his name on a steel ingot that he produces in the course of his duty? If not, why should a member of the intelligentsia enjoy the privileges of putting his name on his intellectual product?"<sup>43</sup>

When China emerged from the Cultural Revolution, the new President Deng Xiaoping and a new generation of leaders realized that it needed to modernize and open itself both economically and culturally to the world.<sup>44</sup> They realized that intellectual property law would be essential to attract foreign investment and rebuild a technological and cultural base that had lost ten crucial years.<sup>45</sup> However, the nation lacked any semblance of a functioning legal system, not to mention an intellectual property regime.<sup>46</sup> Thus, faced with rampant piracy, no intellectual property laws, and a cultural history that was at best inhospitable to the development of intellectual property norms, the Chinese leadership set about the colossal undertaking of attempting to reshape China once again. These attempts are still very much a work in progress. China has enjoyed unprecedented economic growth, yet it still struggles with massive social, institutional, and

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39. See QU, *supra* note 27, at 64.

40. See Bachner, *supra* note 37, at 442; see also ALFORD, *supra* note 26, at 61.

41. See Bachner, *supra* note 37, at 443.

42. See *id.*

43. *Id.* (quoting a popular saying from the Cultural Revolution).

44. ALFORD, *supra* note 26, at 65-66.

45. *Id.*

46. *Id.*

economic challenges.<sup>47</sup> On the intellectual property front, as discussed in Part III, China has made significant strides in developing its laws, but most of the progress has been formal rather than substantive and is often instigated by pressure from the international community rather than from within. Indeed, with improved economic and technological conditions, the Chinese appetite for pirated products has never been stronger. Consequently, nearly thirty years after its initial steps to modernize its intellectual property laws, China is now home to the largest piracy problem in human history<sup>48</sup> while teetering on the precipice of an internet piracy epidemic.

### III. CONFRONTING PIRACY THROUGH LAW

Before examining why these difficulties in establishing an effective anti-piracy regime persist and analyzing China's options for addressing music and film piracy in the internet age, it is useful to understand China's modern anti-piracy legal framework, including recent efforts to regulate internet file sharing. This Part, therefore, introduces the major elements of copyright and criminal laws at the heart of China's efforts to confront piracy. First, I discuss the development and major provisions of the copyright law since 1978. Second, I explain the criminal law provisions and penalties related to copyright infringement. Third, I introduce the bifurcated enforcement system of pursuing copyright claims through administrative proceedings and/or the courts. And lastly, in order to provide some criteria for evaluating the normative desirability of the policy directions explored in Part IV, I briefly consider the policies that Chinese copyright law seeks to advance.

#### A. The Development of Copyright Law in China after 1978

In the late 1970s, China began formulating an intellectual property strategy to help facilitate its newly adopted open-door economic policy. Hoping to stimulate imports of foreign technology and international investment in the wake of the legal and cultural abyss of the Cultural Revolution, China in 1979 signed the Agreement on Trade Relations Between the United States of America and the PRC.<sup>49</sup> China agreed to "seek to en-

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47. See *supra* note 24.

48. See *60 Minutes II: The World's Greatest Fakes* (CBS television broadcast Jan. 28, 2004) (transcript available at <http://www.cbsnews.com/stories/2004/01/26/60II/main595875.shtml>) (quoting Professor Daniel C.K. Chow, "We have never seen a problem of this size and magnitude in world history. There's more counterfeiting going on in China now than we've ever seen anywhere.").

49. Agreement on Trade Relations, U.S.- P.R.C., Jul. 7, 1979, 31 U.S.T. 4651.

sure” the protection of U.S. citizens’ intellectual property, including copyrights.<sup>50</sup> China joined the World Intellectual Property Organization (WIPO) the following year.<sup>51</sup> The PRC’s Constitution, first promulgated in 1982 and most recently amended in 2004, does not expressly mention intellectual property rights. It does, however, recognize citizens’ “inviolable” right to own private property<sup>52</sup> and their “freedom to engage in scientific research, literary and artistic creation and other cultural pursuits.” Further, it provides that the state “encourages and assists creative endeavors conducive to the interests of the people that are made by citizens engaged in education, science, technology, literature, art, and other cultural work.”<sup>53</sup>

When China signed the 1979 trade agreement with the U.S., copyright piracy in China was commonplace.<sup>54</sup> In the absence of copyright laws, publishers openly sold duplicates of original works without fear of repercussion.<sup>55</sup> Aware that there was no legal recourse against copyists, some authors simply chose not to publish their works at all.<sup>56</sup> Driven by concern for the development of Chinese industry as well as by pressure from foreign governments to protect their nationals’ works, the Chinese govern-

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50. See QU, *supra* note 27, at 42-43.

51. WIPO, Treaties Database Contracting Parties, [http://www.wipo.int/treaties/en/ShowResults.jsp?search\\_what=C&country\\_id=38C](http://www.wipo.int/treaties/en/ShowResults.jsp?search_what=C&country_id=38C) (last visited Mar. 10, 2006) (showing that China joined WIPO convention on June 3, 1980).

52. XIAN FA art.13 (1982) (P.R.C.), *translated at* [http://www.oefre.unibe.ch/law/icl/ch00000\\_.html](http://www.oefre.unibe.ch/law/icl/ch00000_.html) (last visited Apr. 13, 2006).

53. *Id.* art. 47. I mention these Constitutional “rights” to point out that, although intellectual property rights are not expressly recognized as fundamental rights under the PRC Constitution, there has been an apparent intellectual property rights consciousness reflected in the Constitution’s provisions since its inception. Nevertheless, it is doubtful these Constitutional “rights” could be vindicated in a court of law, at least for the time being, as the PRC Constitution is generally viewed as aspirational and not a source of rules of decision that courts can apply. See Chenguang Wang, *Introduction: An Emerging Legal System*, in INTRODUCTION TO CHINESE LAW 1, 18 (Chenguang Wang & Xianchu Zhang eds., 1997); see also ALBERT CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA 40-41 (1998). That said, there are indications that a more proactive view of Constitutional rights is developing in China. See, e.g., *First Case Involving Right to Equality*, BEIJING REV., Feb. 28, 2002, at 21-22.

54. Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 357-58 (2003) (describing widespread unauthorized copying of computer software in the late 1970s in China). Although Professor Yu’s article primarily describes the effect a lack of copyright law had on software developers, the complete absence of a copyright regime at the time would have affected producers of all kinds of creative works in the same ways.

55. See *id.* at 357 (noting that during this period in China, software programmers often feared instant piracy).

56. See *id.* (observing that some software developers opted to keep their works unpublished rather than subject them to certain piracy in the marketplace).

ment drafted a series of regulations in the mid-1980s that laid the groundwork for copyright protection.<sup>57</sup> These included interim regulations related to copyright, which marked the PRC's first attempt at formulating its new rights-based approach to copyright law<sup>58</sup> and the General Principles of the Civil Law,<sup>59</sup> in which the mention of copyright as a new form of property placed it squarely within the bounds of civil law.<sup>60</sup> Then, in 1990, after a decade of intense internal debate over the appropriateness of intellectual property in a socialist system, the National People's Congress (NPC) promulgated the PRC's first copyright law.<sup>61</sup>

### 1. *The 1990 Copyright Law*

The text of the 1990 Copyright Law reflected the irreconcilable tensions that shaped the drafting process, which one high ranking official called the "most complicated" in the PRC's history.<sup>62</sup> While it recognized the economic and moral rights of the individual,<sup>63</sup> it also undeniably reaffirmed the central role of the state in a socialist copyright scheme.<sup>64</sup> The 1990 Copyright Law lagged notably behind international standards, particularly in its broad exceptions for use by government actors, including radio and television stations.<sup>65</sup> In addition, it refused protection to works that the state considers heterodox.<sup>66</sup> Nonetheless, the 1990 Copyright Law

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57. See ALFORD, *supra* note 26, at 76-79.

58. Bachner, *supra* note 37, at 444.

59. Min fa tong ze [General Principles of the Civil Law] (promulgated by the Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987) (P.R.C.).

60. The General Principles of Civil Law provide that citizens should enjoy the right of authorship and that such authors should have the right to sign, publish, and receive remuneration for their works. They also stipulate that injunctions and damages may be sought where plagiarism, passing off, or distortion of one's work occurs. See Bachner, *supra* note 37, at 444 (referring to Articles 94 and 118 of the General Principles of Civil Law).

61. Zhu zuo quan fa [Copyright Law] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, effective Jun. 1, 1991) (P.R.C.) [hereinafter 1990 Copyright Law]; see also ALFORD, *supra* note 26, at 77-78.

62. See ALFORD, *supra* note 26, at 77.

63. See, e.g., 1990 Copyright Law arts. 10-11 (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, effective Jun. 1, 1991) (P.R.C.).

64. See, e.g., *id.* art. 22(7) ("A work may be used without permission from, and without payment of remuneration to, the copyright owner . . . in a published work by a state organ for the purpose of performing its official duties."); *id.* art. 43 ("A radio station or television station may broadcast, for non-commercial purposes, a published sound recording without seeking permission from, or paying remuneration to, the copyright owner, performer and producer of the sound recording.").

65. See *id.* art. 43.

66. *Id.* art. 4 ("Copyright owners in exercising their copyright shall not violate the constitution or laws or prejudice the public interests.").

laid the formal groundwork for legal recognition of authors' rights in their creations and made copyright infringement an actionable offense for which civil remedies were available. The law also signaled China's desire to show the international community that it took copyright protection seriously.

Despite these improvements to the formal law, the ability and perhaps willingness of Chinese authorities to enforce the law was sorely lacking, and fierce piracy persisted. The United States, whose creative industries were already claiming substantial losses at the hands of Chinese pirates, continued to pressure the Chinese government to improve copyright protection.<sup>67</sup> U.S. threats to initiate a trade war and economic sanctions, followed by Chinese threats of retaliation, ultimately led the two nations in 1992 to sign a Memorandum of Understanding ("MOU") regarding the protection of intellectual property in China.<sup>68</sup> In accordance with the MOU, China signed the Berne Convention,<sup>69</sup> ratified the Geneva Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms,<sup>70</sup> and amended the 1990 Copyright Law.<sup>71</sup>

Despite these steps, U.S. businesses continued to complain about losses due to Chinese pirates. Again the United States and China traded threats until 1995, when the issue was resolved by another agreement on intellectual property protection, in which China established a detailed "Ac-

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67. See Yu, *supra* note 14, at 132-34.

68. See *id.* at 142.

69. Memorandum of Understanding on the Protection of Intellectual Property, U.S.-P.R.C., Jan. 17, 1992, 34 I.L.M. 676, art. 3(1) [hereinafter MOU]. Article 3 of the MOU states, "The Chinese Government will accede to the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) (Paris 1971)." *Id.* The Berne Convention, which came into force in 1886, requires that member states recognize the copyrights of works created by authors of or first published in other member states. Berne Convention for the Protection of Literary and Artistic Works, art. 3, Sept. 6, 1886, S. Treaty Doc. No. 99-27, 1161 U.N.T.S. 3 [hereinafter Berne Convention].

70. MOU, *supra* note 69, art. 3(4). The convention requires member states to protect:

producers of phonograms who are nationals of other Contracting States against the making of duplicates without the consent of the producer and against the importation of such duplicates, provided that any such making or importation is for the purpose of distribution to the public, and against the distribution of such duplicates to the public.

Geneva Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, art. 2, Oct. 29, 1971, 25 U.S.T. 309 [hereinafter Geneva Phonograms Convention].

71. See MOU, *supra* note 69, art. 3(4); see also Yu, *supra* note 14, at 142-43.

tion Plan” focused on improving the enforcement infrastructure.<sup>72</sup> Just a year later, though, the same cycle played itself out yet again when American frustration over inadequate enforcement neared the boiling point, and threats and counter-threats of trade sanctions were cooled only by another eleventh-hour agreement in which China reaffirmed its obligations and commitment to intellectual property protection.<sup>73</sup> All the posturing and promises on both sides failed to dent the piracy problem. In 1997, estimates of losses due to copyright piracy in China reached record levels, and though the loss estimates have tapered somewhat, copyright owners consistently claim that pirated products vastly outsell legitimate copyrighted goods.<sup>74</sup>

## 2. *The 2001 Copyright Law Amendment*

By the late 1990s, given China’s rapid economic development, the 1990 Copyright Law’s high level of generality rendered it increasingly incapable of providing guidance on issues arising from new technologies.<sup>75</sup> In addition, in the late 1990s China sought to join the World Trade Organization (WTO). Because WTO membership would require China to sign the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS),<sup>76</sup> which sets minimum standards for member nations’ intellectual property laws,<sup>77</sup> considerable amendments to the 1990 Copyright Law were necessary to conform to international standards. Thus, in 2001, the NPC passed the most significant amendments ever to the Copyright Law.<sup>78</sup>

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72. See Yu, *supra* note 14, at 144-46.

73. *Id.* at 148-50.

74. See IIPA, 2000 SPECIAL 301 REPORT: PEOPLE’S REPUBLIC OF CHINA 27 (2000) [hereinafter IIPA, 2000 REPORT]; IIPA, 2004 REPORT, *supra* note 3, at 33.

75. See Xiaoqing Feng & Frank Xianfeng Huang, *International Standards and Local Elements: New Developments of Copyright Law in China*, 49 J. COPYRIGHT SOC’Y U.S. 917, 920 (2002).

76. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments, Results of the Uruguay Round, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS], available at <http://www.uspto.gov/web/offices/com/doc/uruguay/finalact.html>.

77. See World Trade Organization, Overview: the TRIPS Agreement, [http://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm) (last visited Mar. 2, 2006).

78. Zhu zuo quan fa [Copyright Law] (amended by the Standing Comm. Nat’l People’s Cong., Oct. 27, 2001, effective Oct. 27, 2001) (P.R.C.) [hereinafter 2001 Copyright Law].



The 2001 Copyright Law aimed to bring China into compliance with TRIPS and account for challenges posed by new technologies.<sup>79</sup> Commentators generally believe the law succeeded in meeting international standards in most of its provisions.<sup>80</sup> Many of the primary changes and enhancements signaled a shift away from the socialist, state-centered philosophy of the 1990 Copyright Law and toward privatization of rights.<sup>81</sup> Thus, the 2001 Copyright Law considerably expanded the enumerated economic rights vested in the author. While the 1990 version only granted the generic economic rights of exploitation and remuneration,<sup>82</sup> the new law created thirteen categories of economic rights, including the rights of reproduction, distribution, rental, exhibition, performance, screening, broadcasting, making cinematographic works, and communication through an information network.<sup>83</sup> Further, the new law cut back on the controversially broad fair use privileges afforded state organs and broadcasters under the 1990 law.<sup>84</sup>

Inclusion of the right of “communication through an information network, that is, the right to make a work available to the public by wire or by wireless means,” was among the most important changes to the 2001 law.<sup>85</sup> By specifically creating this right, the law arguably exceeded inter-

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79. See Feng & Huang, *supra* note 75, at 920.

80. See, e.g., *id.* at 946 (“[T]he revision of the Copyright Law brought the Chinese copyright regime in substantial compliance with WTO/TRIPs Agreement . . . .”); CHOW, *supra* note 32, at 417-18 (“[China’s] current intellectual legal regime . . . complies in all substantial respects with the requirements of TRIPS and other major international agreements.”).

81. See QU, *supra* note 27, at 359.

82. See 2001 Copyright Law art. 10 cl. 5 (amended by the Standing Comm. Nat’l People’s Cong., Oct. 27, 2001, effective Oct. 27, 2001) (P.R.C.).

83. See *id.* art. 10. In total, the law enumerates sixteen categories of rights.

84. *Id.* art. 22(3) (providing that the media may now make free use of copyrighted materials only in the case of “unavoidable reappearance or use of a published work in newspapers, periodicals, radio programs, television programs, and other media for the purpose of reporting current events”); see also *id.* art. 22(7) (providing that governmental actors may only use published works without having to seek permission or pay remuneration “to a justifiable extent for the purpose of fulfilling [the state organ’s] official duties”). Yet another important example of the law’s shift toward favoring authors’ economic rights over state and collective interests is the new requirement that radio and television stations (most if not all of which are state-owned) pay copyright owners statutory compulsory license fees to use their works, replacing the “statutory free use” of copyrighted works allowed under the 1990 law. *Cf.* 1990 Copyright Law art. 43 (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, effective Jun. 1, 1991) (P.R.C.).

85. See 2001 Copyright Law art. 10 cl. 12 (amended by the Standing Comm. Nat’l People’s Cong., Oct. 27, 2001, effective Oct. 27, 2001) (P.R.C.).

national standards, as the TRIPS Agreement does not expressly cover internet transmission of copyrighted works.<sup>86</sup> The provision in the 2001 Copyright Law does mirror the language of the WIPO Copyright Treaty (WCT),<sup>87</sup> designed to enhance copyright protection in the era of digital technologies.<sup>88</sup> Although at the time of this writing China has not signed the WCT, the WCT greatly influenced this provision and other internet-related copyright legislation.<sup>89</sup> Prior to promulgation of the 2001 Copyright Law, some argued that the law should encourage development of new information technologies and uphold the “public interest” policies underlying Chinese copyright law by allowing free dissemination of information over the internet.<sup>90</sup> However, the mounting number of internet-related copyright cases demonstrated a need for clarity in the law. Further, a general desire to harmonize domestic copyright law with the WCT convinced the legislature that the new copyright law should expressly identify a right in the transmission of creative works over an information network.<sup>91</sup>

## B. Criminal Sanctions

Criminal sanctions for copyright infringement are a critical aspect of the copyright enforcement regime in China even though they are generally viewed as woefully insufficient to deter piracy in a meaningful way.<sup>92</sup> The lack of criminal sanctions contributed to the impotence of China’s copyright law during the early 1990s.<sup>93</sup> China’s assurances to the international

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86. See Feng & Huang, *supra* note 75, at 936.

87. WIPO Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65, available at <http://www.wipo.int/documents/en/diplconf/distrib/94dc.htm> (last visited Mar. 24, 2006).

88. The WCT provides that “authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means . . . .” WIPO Copyright Treaty, *supra* note 87, art. 8.

89. XUE HONG & ZHENG CHENGSI, CHINESE INTELLECTUAL PROPERTY LAW IN THE TWENTY-FIRST CENTURY 15 (2002) (discussing the strong influence the WCT had on provisions of the 2001 Copyright Law).

90. See PETER FENG, INTELLECTUAL PROPERTY IN CHINA 157 (2003).

91. See XUE & ZHENG, *supra* note 89, at 14-15. In May 2005, the NCA and Ministry of Information Industry took further steps to protect copyright online by promulgating the Measures on Administrative Protection of Internet Copyright, which subjects ISPs to administrative fines for failing to remove infringing content once notified of the infringement by the copyright owner. Hu lian wang zhu zuo quan xing zheng bao hu ban fa [Measures on Administrative Protection of Internet Copyright] (promulgated by National Copyright Administration & Ministry of Information Industry, Apr. 29, 2005, effective May 29, 2005) (P.R.C.), translation available at <http://www.chinaitlaw.org/?p1=print&p2=051006180113>.

92. See *infra* Section IV.A.

93. QU, *supra* note 27, at 305-06.

community that it would make criminal sanctions genuine deterrents to intellectual property infringement led to the inclusion of a section on intellectual property crimes in the 1997 general amendment of the Criminal Code.<sup>94</sup> The criminal provisions distinguish between the acts of *copying* protected works and *selling* the illegal copies, with the punitive emphasis on copying. Those who commit for-profit, unauthorized copying that results in a “relatively large” amount of “illegal gains” are subject to a fine and a maximum of three years in prison, while those who copy and earn a “huge” amount of illegal gains are subject to a fine and/or three to seven years in prison.<sup>95</sup> On the other hand, those who knowingly sell unauthorized copies of works must obtain a huge amount of illegal gains to be subject to criminal penalties, which include fines and a maximum of three years in prison.<sup>96</sup> Definitions for the vague terms “relatively large” and “huge” are to be supplied periodically through Supreme Court–issued “interpretations” of the law.<sup>97</sup>

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94. See FENG, *supra* note 90, at 55.

95. Xing fa [Criminal Code] art. 217 (promulgated by the Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997) (P.R.C.), translation available at [http://www.chinalaw.gov.cn/jsp/jalor\\_en/disptext.jsp?recno=2&&ttlrec=2](http://www.chinalaw.gov.cn/jsp/jalor_en/disptext.jsp?recno=2&&ttlrec=2).

Any of the following categories of persons who infringes upon copyright for the purpose of reaping profits shall, if the amount of illegal gains is relatively large or other serious circumstances exist, be sentenced to fixed-term imprisonment of not more than three years or criminal detention, and concurrently or independently be sentenced to a fine. If the amount of illegal gains is huge or other especially serious circumstances exist, the offender shall be sentenced to fixed-term imprisonment of not less than three years and not more than seven years, and concurrently be sentenced to a fine: (1) reproducing and distributing, without the permission of the copyright owner, his written works, musical works, cinematic works, television works, video works, computer software and other works; (2) publishing a book of which another person has the exclusive publishing right; (3) reproducing and distributing, without the permission of the phonogram or videogram producer, the phonogram or videogram produced by him; or (4) producing and selling a work of art bearing the forged signature of another person.

*Id.*

96. *Id.* art. 218 (“Whoever sells, for the purpose of reaping profits, those which he well knows are infringing reproductions specified in Article 217 of this Law shall, if the amount of his illegal gains is large, be sentenced to fixed-term imprisonment of not more than three years or criminal detention, and concurrently or independently be sentenced to a fine.”).

97. The Supreme People's Court and Supreme People's Procuratorate have the power to issue official “interpretations” of laws, which can have the force of sub-statutes or supplemental legislation. Guan yu jia qiang fa lü jie shi gong zuo jue yi [Resolution on Strengthening the Work of Interpretation of Laws] (promulgated by the Standing Comm.

In December 2004, China's Supreme People's Court issued a judicial interpretation of the Criminal Law lowering the criminal liability threshold for copyright infringement (hereinafter "2004 Judicial Interpretation").<sup>98</sup> The previous criminality threshold was 100,000 yuan (\$12,000) in profits or doing 200,000 yuan (about \$24,000) in gross sales.<sup>99</sup> Under the 2004 Interpretation, earning illegal profits of 30,000 yuan (about \$3,600) or more, or doing 50,000 yuan (\$6,000) in gross illegal sales, constitutes a "relatively large" amount of illicit gains, punishable by a fine and/or a maximum of three years in prison.<sup>100</sup> Earning 150,000 yuan (about \$18,000) in illegal profits, or doing 250,000 yuan (about \$30,000) in total illegal sales, constitutes a "huge" amount of illegal gains, punishable by a fine and/or three to seven years in prison.<sup>101</sup>

Perhaps the most significant change, however, was the introduction of strict penalties that clearly target internet piracy. Under the 2004 Judicial Interpretation, individuals are subject to fines and/or a maximum of three years in prison for "reproducing and distributing more than one thousand illegal copies of a written work, musical work, motion picture, television program or other visual works, computer software or other works without permission of the copyright owner."<sup>102</sup> "Reproducing and distributing" a copyrighted work also includes reproduction and distribution via an "information network,"<sup>103</sup> and the government has stated explicitly that the

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Nat'l People's Cong., June 10, 1981, effective June 10, 1981) (P.R.C.) (vesting the Supreme People's Court and the Supreme People's Procuratorate with the general power to interpret specific questions of law that arise out of adjudicative practice); *see also* CHOW, *supra* note 32, at 174-77 (discussing the de facto legislative character of many Supreme People's Court-issued interpretations).

98. *See* Guan yu ban li qin yue zhi shi chan quan xing shi an jian ju ti ying yong fa lü ruo gan wen ti de jie shi [Interpretation on Several Issues of Concrete Application of Laws in Handling Criminal Cases of Infringing Intellectual Property] (promulgated by the by the Supreme People's Court & Supreme People's Procuratorate, Dec. 8, 2004, effective Dec. 22, 2004) (P.R.C.), *translation available at* <http://www.chinaiprlaw.com/english/laws/laws20.htm> [hereinafter 2004 Judicial Interpretation].

99. *See* *China Lowers Conviction Criteria of IPR Violations*, PEOPLE'S DAILY ONLINE, Dec. 22, 2004, [http://english.people.com.cn/200412/22/eng20041222\\_168201.html](http://english.people.com.cn/200412/22/eng20041222_168201.html).

100. 2004 Judicial Interpretation (promulgated by the by the Supreme People's Court & Supreme People's Procuratorate, Dec. 8, 2004, effective Dec. 22, 2004) (P.R.C.), art. 5, *translation available at* <http://www.chinaiprlaw.com/english/laws/laws20.htm>.

101. *Id.*

102. *Id.*

103. *Id.* art. 11.

2004 Judicial Interpretation covers internet file sharing.<sup>104</sup> The level of punishment jumps to three to seven years' imprisonment and/or fines for reproducing and distributing more than 5,000 copies.<sup>105</sup> While the language of the 1997 Criminal Law stresses that criminal liability only applies where the copying and distribution is for profit, it appears open to interpretation whether the 2004 Judicial Interpretation requires a profit motive in the case of internet file sharing.<sup>106</sup>

### C. Enforcement Options: Administrative Actions versus Judicial Proceedings

Aggrieved copyright owners in China may initiate administrative enforcement actions, judicial proceedings, or both. This bifurcated enforcement system developed in the 1980s when a heavy caseload overwhelmed Chinese courts as the legal system underwent massive reforms and entirely new categories of legal rights came into existence.<sup>107</sup> It is also a remnant of the pre-reform socialist governmental organization, which was structured to protect public interests through state agencies rather than protect individual rights through courts.<sup>108</sup> The bifurcated approach has been criticized for confusing administrative and judicial functions, undermining judicial independence, and causing overlap and conflict among administrative authorities.<sup>109</sup> Regardless, the system appears well entrenched, and administrative powers are even expanding.<sup>110</sup>

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104. *See IPR Violators Now Major Criminals*, CHINA DAILY, Dec. 22, 2004, <http://www.china.org.cn/english/2004/Dec/115570.htm> (“[T]he interpretation will also apply to online piracy”).

105. 2004 Judicial Interpretation art. 5 (promulgated by the by the Supreme People's Court & Supreme People's Procuratorate, Dec. 8, 2004, effective Dec. 22, 2004) (P.R.C.), *translation available at* <http://www.chinaiprlaw.com/english/laws/laws20.htm>.

106. *See id.* It is plausible to interpret Article 5 of the 2004 Interpretation as requiring a profit motive for committing any of the enumerated offenses under Article 217 of the Criminal Code but not for causing “other serious circumstances” or “other particularly serious consequences,” which respectively include “distributing” at least one thousand or five thousand unauthorized copies.

107. *See* FENG, *supra* note 90, at 17.

108. *See* Daniel C.K. Chow, *Counterfeiting in the People's Republic of China*, 78 WASH. U. L.Q. 1, 25 (2000).

109. FENG, *supra* note 90, at 16; *see also* QU, *supra* note 27, at 400-02 (describing the historical background for this bifurcation of administrative and judicial functions, at least in part because of undue emphasis on criminal liability rather than tortious liability for copyright infringement, and noting that administrative liability falls somewhere in between criminal and tortious liability).

110. *See* FENG, *supra* note 90, at 16.

The National Copyright Administration (“NCA”) is the primary (but not sole) administrative body with jurisdiction over copyright disputes.<sup>111</sup> Thus, copyright owners seeking to enforce their rights through administrative action typically submit a complaint and evidence of infringement to the NCA, which has the power to investigate copyright claims either at the request of copyright owners or on its own initiative.<sup>112</sup> Complainants may take their case instead to other agencies with jurisdiction over the matter, such as the Public Security Bureau (“PSB”), the principal police agency, which has authority to conduct raids if criminal levels of infringement are suspected.<sup>113</sup> The PSB possesses powers that the other enforcement agencies do not, including the power to force entry and to detain and arrest suspects.<sup>114</sup> Typically, the agency involved will raid the infringer’s premises and confiscate infringing items and other evidence.<sup>115</sup> Once the enforcement action is complete, the agency involved will issue a judgment concerning the infringement of the substantive law at issue.<sup>116</sup>

Complainants can appeal a dissatisfactory administrative decision in court or can skip the administrative action altogether and file a civil action directly. If during the course of an administrative action the agency obtains evidence that the infringing activity has exceeded the criminality threshold, the agency can refer the case to the PSB, which can, if criminal liability is established, forward the case to the People’s Procuratorate for criminal prosecution.<sup>117</sup> Because litigation proceeds slowly, thus allowing defendants time to continue infringing activities or, more likely, disappear altogether, the 2001 Copyright Law added a provision specifically authorizing courts to grant preliminary injunctions.<sup>118</sup> This provision helped alleviate one of the major past disadvantages of the civil route, because previously only administrative agencies possessed the ability to strike immediately with flash raids before infringers had time to react.

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111. *Id.* at 18.

112. *Id.* at 19.

113. *See* Chow, *supra* note 108, at 23. While Chow’s article focuses on the enforcement mechanisms for trademark counterfeiting, the same issues arise in relation to copyright enforcement.

114. *Id.* at 23 n.80.

115. *Id.* at 23.

116. *See id.* at 24.

117. *Id.* The People’s Procuratorate is “modeled on the institution of the procuracy in the former Soviet Union” and “performs the task of approving arrests by the public security organs and prosecuting criminals.” CHOW, *supra* note 32, at 215.

118. *See* 2001 Copyright Law art. 49 (amended by the Standing Comm. Nat’l People’s Cong., Oct. 27, 2001, effective Oct. 27, 2001) (P.R.C.). This provision satisfies the requirement under TRIPS that member countries’ domestic law provide for preliminary injunctions under certain circumstances. *See* TRIPS Agreement, *supra* note 76, art. 50(6).

Whether a copyright owner chooses to pursue an administrative action or a civil lawsuit very much depends on the copyright owner's goals at that stage of the procedure. For example, a company that simply seeks to stop the infringement may choose the administrative route because agencies can act with speed and efficiency unattainable in court, and it is often the less expensive alternative.<sup>119</sup> However, administrative agencies generally will not order civil damages, so companies seeking that remedy must take their cases to court.<sup>120</sup> Nevertheless, when first entering the Chinese market, some international companies are not especially concerned with extracting monetary damages and prefer to work through administrative agencies because the enforcement action is likely to be reported in the newspaper, providing the company with free promotion.<sup>121</sup>

#### D. A Working Theory of Chinese Copyright

Before considering various policy directions Chinese authorities might take to enforce copyright in the internet age, it is worth briefly inquiring into the goals of Chinese copyright law. Enunciating a core theory of Chinese copyright<sup>122</sup> is challenging because modern Chinese copyright law simultaneously combines at least four very different influences: (1) Western copyright laws that emphasize private economic rights; (2) Western copyright laws that emphasize natural "moral" rights;

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119. Interview on Jan. 14, 2005 (on file with author).

120. FENG, *supra* note 90, at 23.

121. Interview on Jan. 14, 2005 (on file with author).

122. Admittedly, identifying a core theory of intellectual property is impossible even in the West, as several justifications for intellectual property rights have emerged in judicial opinions and scholarly literature. William Fisher has identified four major theories: (1) Utilitarianism, the proponents of which argue that intellectual property should "strike an optimal balance between, on one hand, the power of exclusive rights to stimulate the creation of inventions and works of art and, on the other, the partially offsetting tendency of such rights to curtail widespread public enjoyment of those creations"; (2) Labor Theory, derived from the Lockean notion that natural property rights accrue from mixing labor with raw materials "held in common"; (3) Personality Theory, which holds that creations are inexorably linked to their creators and law should shield creative works from policies or actions that threaten that link (this concept informs moral rights theory, prominent in the copyright codes of many civil law countries); and (4) Social Planning Theory, which maintains that "property rights in general—and intellectual-property rights in particular—can and should be shaped so as to help foster the achievement of a just and attractive culture." William Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 36, 36-75 (Stephen Munzer ed., 2001). While none of these theories are universally accepted, an ongoing debate about the source of intellectual property rights helps lead to a working consensus in different circumstances that can be used to shape and guide policy and further debates about the purposes and functions of an intellectual property system.

(3) socialist copyright law, which holds that copyright is not a natural right but one created and granted by the state, thus deemphasizing private rights and stressing innovation for the betterment of society;<sup>123</sup> and (4) the historical tendency in China to consider state censorship power a central feature of publishing regulations. Echoes of these diverse influences are found in Article 1 of the 2001 Copyright Law, which states the law was enacted

for the purpose of protecting the copyright of authors in their literary, artistic and scientific works and the rights and interests related to copyright, of encouraging the creation and dissemination of works conducive to the building of a socialist society that is advanced ethically and materially, and of promoting the progress and flourishing of socialist culture and sciences.<sup>124</sup>

While more practical, instrumentalist concerns often form the true motivations behind Chinese copyright law developments,<sup>125</sup> Article 1 of the 2001 Copyright Law and the historical context outlined in this study can help us enunciate a Chinese theory of copyright for present purposes. Due in part to socialist influences, Chinese copyright theory strongly echoes

123. See QU, *supra* note 27, at 53-54.

124. 2001 Copyright Law art. 1 (amended by the Standing Comm. Nat'l People's Cong., Oct. 27, 2001, effective Oct. 27, 2001) (P.R.C.).

125. For example, a strong motivation for establishing copyright law in China has been to attract investments from, or to appease, copyright-rich foreigners. See FENG, *supra* note 90, at 4-5. China's desire to join the WTO spurred sweeping revisions of Chinese copyright law, expanding private rights well beyond what the government was willing to grant in the previous iteration of the law in order to comply with the international standards embodied in TRIPS. See QU, *supra* note 27, at 343. Chinese officials frequently cite international opinion and attracting foreign investment, in addition to the encouragement of domestic economic growth, as primary justifications for improving intellectual property protection. See, e.g., *IPR Infringers Face Lengthy Jail Terms and Hefty Fines*, CHINA DAILY, Jan. 14, 2005, <http://www.china.org.cn/english/international/117896.htm> ("From China's perspective, protecting IPR effectively is not only part of its obligation as a World Trade Organization member or to court more foreign capital, but also a prerequisite to the country's pursuit of constant technological progress and long-term economic prosperity."); *Nation Enhancing IPR Protection: FM*, Jan. 12, 2005, <http://www.china.org.cn/english/2005/Jan/117541.htm> ("China is increasing intellectual property right protection to meet international demands and benefit China's economic development, said Foreign Ministry spokesman Kong Quan . . ."); *2,505 Suspects Arrested for Producing, Selling Fake Products*, XINHUA NEWS AGENCY, Mar. 9, 2005, [http://service.china.org.cn/link/wcm/Show\\_Text?info\\_id=122245](http://service.china.org.cn/link/wcm/Show_Text?info_id=122245) ("Turning a blind eye to IPR infringement is a short-sighted act," [Vice Premier Wu Yi] said at a meeting last year. "Such acts will not only seriously undermine market economic order and hamper China's economic growth, but also ruin the prestige and image of the country and influence China's future opening-up.").



the utilitarian theory of copyright,<sup>126</sup> which seems to be the predominant theory in the United States, and holds that authors' rights should be protected enough to provide an economic incentive to create, but that the law should limit those rights to enhance access to the creations for the benefit of society. Thus, the public's right to access creative works plays an important role in Chinese copyright theory and limits creators' property rights in their works. With the general utilitarian goals of Chinese copyright in mind, the next Part evaluates three possible policy directions for China going forward as it attempts to confront the piracy problem while moving full-bore into the internet age.

#### **IV. THE ROAD AHEAD**

Although the past three decades have seen steady development in China's copyright laws and enforcement infrastructure, China's piracy problem remains among the world's most severe. With the formal legal structure for copyright largely in place, how can China proceed toward an acceptable policy for meeting and balancing the needs of creators, content industries, and society in the age of internet file sharing? The remainder of this Article first examines the two most obvious paths Chinese authorities might take: (1) committing to a long-term strategy of cracking down hard on copyright infringement in real space and cyberspace; and (2) staying the present course, that is, developing an intellectual property enforcement regime gradually and organically while a marked disparity continues to exist between the formal legal standards and reality. Finally, Section IV.C proposes an alternative compensation system for works of music and film shared on the internet in China. I conclude that this solution is the best of the three policy directions.

##### **A. Cracking Down Hard on Piracy**

Many believe that widespread piracy in China is the result of a lack of will on the central government's part to confront and eliminate the problem. As one commentator put it,

It is laughable to hear excuses from Beijing that they can't control the 50 pirate CD factories. If they were turning out thousands of copies of the BBC documentary on the Tiananmen Square protest—rather than bootleg copies of "The Lion

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126. See Fisher, *supra* note 122, at 169.

King”—the factory managers would be sharing a cell with other dissidents in a heartbeat.<sup>127</sup>

In the same vein, another commentator more recently wrote,

[T]here is, however, one knockoff that shoppers [in Beijing] can no longer find: T shirts, caps and bags bearing the insignia of Beijing's 2008 Summer Olympic Games. One 25-year old vendor says she used to sell boxloads of Beijing Olympic shirts. But early last year city officials raided her stand, seized the merchandise and fined her several hundred dollars. If they caught her selling Olympic counterfeits again, they warned, they would shut her down for good. . . . The pressure for China to get serious [about protecting intellectual property rights] is rising. . . . the question remains however: will Beijing choose to enforce the new rules?<sup>128</sup>

Such views abound in the West: if the Chinese government would only start taking its role as enforcer of intellectual property rights seriously—if it would just *choose* to enforce the rules—it could effectively knock out the piracy problem.

The authors of the above quotes take the naive position that the Chinese government is obligated or inclined to protect the interests of private parties (many of whom, in the case of copyright owners, are foreigners) with the same urgency with which it protects its own interests. Thus, the Chinese government should, for example, be as apt to shut down CD factories copying “The Lion King” as it is to shut down those manufacturing highly politically sensitive censored products. This view also understates the vastness of the piracy problem by positing one example in isolation and suggesting that if the government could crack down on that, it should be able to crack down on everything else. Views such as these fail to consider the size of the problem, the fact that piracy networks operate internationally and many pirated goods are imported into China, and other complexities that present obstacles to enforcement.<sup>129</sup> Hard-liners in the West call these excuses, and in many cases they probably are correct, as the Chinese government can benefit from inaction and use explanations about the problem's size and complexity to excuse poor copyright enforcement unjustifiably. But oversimplifications and caricatures of the problem, such as the views expressed in the above quotes, deny the existence of very real

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127. James Shinn, *The China Crunch; Three Crises Loom in the Next 30 Days*, WASH. POST, Feb. 18, 1996, at C1.

128. Ansfield, *supra* note 6, at 45.

129. *See infra* Section IV.A.1.

barriers to enforcement and overlook many Chinese officials' sincere desire to combat piracy. Such views also create unrealistic expectations about what the Chinese government should be expected to do or is capable of doing.

Nevertheless, Beijing receives tremendous pressure internationally (much but certainly not all from the United States) and domestically to enforce more seriously the comprehensive laws that it has now adopted and to crack down on piracy. Publicly, Chinese officials embrace the notion that a reliable intellectual property regime is required to attract foreign investment and develop a sound economy.<sup>130</sup> Given that China has verbalized aspirations to move in this direction,<sup>131</sup> how realistic is an effective crackdown on piracy in the foreseeable future? The following Sections consider the numerous formidable barriers to a successful crackdown strategy for both physical and internet piracy in China and how these challenges make the pursuit of such a strategy extremely unlikely in the near future.

### 1. *Cracking Down on Physical Piracy*

A successful long-term crackdown on physical piracy in China requires that various government institutions and private actors coordinate effective and efficient enforcement of the copyright law and related criminal laws. Several major barriers to effective copyright enforcement must be overcome, however, before a meaningful, long-term crackdown on physical piracy can be realized. The barriers are varied and complex, and include cultural, economic, and political factors. The following discussion highlights seven areas in which reform is needed before consistent and effective copyright enforcement can be realized in China: (1) local protectionism, economic conflicts of interest, and official corruption; (2) bureaucratic rivalries and overlapping jurisdiction; (3) the insufficient deterrent effect of criminal penalties and prosecutions; (4) lack of judicial compe-

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130. See, e.g., *2,505 Suspects Arrested for Producing, Selling Fake Products*, *supra* note 125.

131. See, e.g., *Chinese Courts Concludes 8,832 IPR Violation Cases in 2004*, XINHUA NEWS AGENCY, Feb. 4, 2005, [http://english.people.com.cn/200502/04/eng20050204\\_172916.html](http://english.people.com.cn/200502/04/eng20050204_172916.html) ("In December 2004, the Supreme People's Court and the Supreme People's Procuratorate jointly promulgated a judicial interpretation of the Criminal Law application on IPR violations, aiming to intensify efforts to crack down on IPR violations."); Mathew Forney, *Faking It; Beijing's Inability to Curb Rampant Intellectual-Property Theft Is Infuriating Its Trading Partners*, TIME ASIA, June 6, 2005, <http://www.time.com/time/asia/magazine/printout/0,13675,501050613-1069142,00.html> (discussing Chinese Vice Premier Wu Yi's 2004 promise to crack down on intellectual property abuse, and subsequent governmental crackdown efforts).

tence in intellectual property matters; (5) state centralism; (6) underdeveloped economic conditions; and (7) the absence of a culture of respect for intellectual property rights. This Section only briefly outlines the kinds of institutional and legal obstacles that exist, several of which have been discussed more thoroughly elsewhere.<sup>132</sup>

a) Local Protectionism, Conflicts of Interest, and Official Corruption

Local protectionism probably constitutes the largest obstacle to cracking down on piracy in China. Rural communities, towns, and cities of all sizes across China play an enormous role in the piracy trade in China as manufacturers, distributors, and consumers of illegitimate products.<sup>133</sup> Central authorities promulgate laws and regulations, but local authorities implement those laws and regulations. To date, serious questions about many local officials' commitment to stopping piracy exist.<sup>134</sup> The interests of local officials do not always align with those of central authorities; local leaders often loathe dismantling trade—even illegal trade—that significantly boosts their respective regions' economic activities, and in some cases local leaders have a direct interest in the illegal trade.<sup>135</sup> In a number of areas, piracy accounts for a substantial portion of local commerce, providing jobs and income to local residents, and taxes and other forms of revenue to local officials. Indeed, in a few areas piracy drives the entire local economy.<sup>136</sup> China's socialist tradition exacerbates the problem be-

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132. See generally ANDREW MERTHA, *THE POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA* (2005); Chow, *supra* note 108. Professor Chow discusses the effect of local protectionism, bureaucratic rivalries, and insufficient criminal sanctions and prosecutions in his article on counterfeiting in China. Much of the information in the article derives from his personal experience in China during the late 1990s as in-house counsel for a multinational company looking to expand its business in China. His responsibilities included protecting the company's intellectual property, which "led [him] on investigations and raids of underground factories, markets, and warehouses dealing in pirated, counterfeit and smuggled products" giving him "a sense of the many enforcement challenges that lie ahead for China's earnest law reformers who seek to enact effective laws protecting the interests of legitimate business and property owners." See CHOW, *supra* note 32, at v-vi. While the article primarily deals with the problem of trademark infringement, in general, the obstacles impeding effective enforcement of trademark laws are the same as those blocking enforcement of copyright. See *id.* at 439.

133. See CHOW, *supra* note 32, at 441.

134. *Id.* at 439.

135. *Id.* at 439-40.

136. See Balfour, *supra* note 1, at 62; see also CHOW, *supra* note 32, at 440 (describing a town called Yiwu in Zhejiang province on China's east coast, where "it is no exaggeration to say that the entire local economy . . . is built on the trade in counterfeit and

cause of the government's dual roles as entrepreneur—in the form of state-owned enterprise—and regulator.<sup>137</sup> For example, local governments earn significant rental income from stalls and booths at state-owned markets and wholesale distribution centers, where large quantities of pirated and counterfeit products typically are sold.<sup>138</sup>

Although U.S. officials generally direct their intellectual property complaints to Beijing, central Chinese authorities' influence over local officials is limited.<sup>139</sup> Local officials report to higher-level units within the same administration regarding their professional duties, but local politicians control the officials' appointments, dismissals, salaries, housing, and other benefits.<sup>140</sup> "Faced with the choice of disobeying a directive from a higher level unit that is powerless to sanction disobedience and a directive from the local mayor who can terminate employment or arrange an undesirable job transfer or salary cut, many local enforcement officials opt to protect local interests."<sup>141</sup>

Local enforcement officials sometimes seek bribes in order to perform their duties. Such requests might be for "fees" or items, such as mobile phones or money, ranging in value from one hundred dollars to tens of thousands of dollars. In addition to increasing enforcement costs for copyright owners, such requests pose an obstacle to enforcement where companies have internal policies against paying such fees or fear violating laws in their home countries prohibiting bribery of government officials.<sup>142</sup>

Many Chinese central authorities understand the long-term benefits of strong copyright enforcement for China's economic development,<sup>143</sup> but their political will alone cannot erase the systemic problems and impedi-

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pirated goods and that shutting down this illegal trade would be tantamount to shutting down the local economy").

137. See Chow, *supra* note 108, at 27.

138. *Id.* at 27-28 (estimating that some local agencies could earn as much as \$1.5 million annually from such enterprises).

139. See CHOW, *supra* note 32, at 439.

140. Chow, *supra* note 108, at 29.

141. *Id.* at 29-30.

142. *Id.* at 30-31.

143. CHOW, *supra* note 32, at 439; see also Bruce Odessey, *Swiftly Expanding U.S.-China Economic Relations Stir Debate*, WASH. FILE, Mar. 2, 2005, <http://usinfo.state.gov/eap/Archive/2005/Mar/03-588739.html>. Odessey reports an anonymous U.S. trade official's statement that China's central government leadership appreciates and understands the importance of protecting intellectual property rights, "Not because they're trying to protect the U.S. film industry or U.S. companies . . . . They realize that for China to become a modern, mature economy they have to have robust protection of intellectual property rights. So they get it—for purely selfish Chinese reasons." *Id.*

ments to effective enforcement outlined here. Political relationships between central and local authorities can be sensitive and complex. If Beijing wishes to make unequivocal demands of local governments in a matter of local economic importance, Beijing must spend significant political capital to do so. "Any decision by central authorities to suppress local protectionism will involve significant political and social costs at a time when the PRC faces many difficult problems competing for the resources of the central government."<sup>144</sup> A significant reduction in piracy is not possible until central authorities are willing and able to spend the political capital needed to ensure that local officials are similarly committed to defeating piracy.

b) Bureaucratic Rivalries and Overlapping Jurisdiction

The complex and often conflicting web of laws, regulations, and rules relating to intellectual property enforcement can result in overlapping jurisdiction among agencies in a given case.<sup>145</sup> Sometimes, therefore, one runs into a problem quite the opposite of local protectionism: two or more bureaucracies, each of which has a claim to jurisdiction over a case, compete over the rights to enforcement. For example, the NCA has authority to handle and investigate all copyright infringement cases "having a national impact."<sup>146</sup> However, the Culture Marketing Administration, under the Ministry of Culture, also claims jurisdiction over products of popular culture, such as magazines, CDs, and DVDs, on the grounds that such items must conform to moral standards.<sup>147</sup> Compounding this problem, illicit items may infringe more than one intellectual property right. Thus, a pirated DVD bearing a film studio's logo would infringe both copyright and trademark laws, potentially multiplying the number of interested agencies.

Rivalries exist because bureaucratic agencies can reap significant benefits from handling an intellectual property infringement case in the form of increased staffing and budgets and income generated through fines and confiscations.<sup>148</sup> The primary difficulty resulting from bureaucratic rivalries is a lack of cooperation among agencies.<sup>149</sup>

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144. CHOW, *supra* note 32, at 442.

145. See MERTHA, *supra* note 132, at 145-52; see also Mark A. Groombridge, *The Political Economy of Intellectual Property Rights in the People's Republic of China*, in INTELLECTUAL PROPERTY RIGHTS IN EMERGING MARKETS 27 (Clarissa Long, ed. 2000).

146. FENG, *supra* note 90, at 18.

147. Chow, *supra* note 108, at 32.

148. *Id.* at 31.

149. See Groombridge, *supra* note 145, at 27.

c) Criminal Prosecutions and Civil Damages Provide Minimal Deterrence

In practice, criminal penalties are often too small to deter pirates,<sup>150</sup> and it is difficult to collect sufficient evidence to prosecute them in the first place.<sup>151</sup> The insufficiency of the penalties notwithstanding, without an adequate enforcement structure, criminal sanctions have not altered pirates' behavior significantly. In 1998, the year after the Criminal Code was updated to include penalties for copyright infringement, estimated losses to copyright piracy decreased slightly, from \$2.8 billion to \$2.6 billion.<sup>152</sup> The decrease might be attributable in part to the new criminal law, but without consistent enforcement a lasting downward trend has never materialized.

In addition to insufficient criminal penalties, copyright owners blame China's high piracy levels on the low number of criminal prosecutions for copyright violations. Bureaucratic agencies' reluctance to transfer cases for criminal investigation has contributed to the lack of criminal prosecutions. Furthermore, the difficulty of collecting satisfactory evidence of infringement from defendants' premises makes it hard to satisfy criminal evidentiary standards requiring direct physical evidence of past sales—for example, account books or sales receipts—proving that the defendant knowingly sold enough infringing product to meet the criminality threshold.<sup>153</sup> Anecdotally, distributors and sellers of pirated goods typically carry on their person less than enough evidence to meet the threshold. Therefore, when investigated or arrested, although they might be subject to administrative fines and confiscation of their goods, they will never be criminally prosecuted.

Lately, central authorities claim China has increased the number of criminal prosecutions for intellectual property rights violations.<sup>154</sup> The government reports that between 2000 and 2004, enforcement officials made 2,462 arrests and courts heard 1,710 criminal prosecutions for intellectual property infringement, meting out penalties to 1,948 offenders.<sup>155</sup>

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150. See, e.g., QU, *supra* note 27, at 308 (arguing that the changes made in the 1997 Criminal Code are actually a step backward from the 1994 Decisions on Penalties for Infringement of Copyright).

151. See FENG, *supra* note 90, at 55; see also Chow, *supra* note 108, at 33-34.

152. See IIPA, 2000 REPORT, *supra* note 74, at 27.

153. Chow, *supra* note 108, at 33-35.

154. See, e.g., Alexa Olesen, *419 Held in New Fakes Crackdown*, THE STANDARD, Apr. 8, 2005, <http://www.thestandard.com.hk/stdn/std/China/GD08Ad02.html>.

155. See *IPR Violators Now Major Criminals*, *supra* note 104. These numbers include infringers of all forms of intellectual property in addition to copyright, including

These numbers seem anemic when compared with the magnitude of the piracy problem. It is too soon to determine whether the latest lowered criminality threshold established by the 2004 Judicial Interpretation will significantly reduce copyright infringement.<sup>156</sup>

U.S. copyright owners remain skeptical, complaining that they have “consistently had difficulty in gathering information on the use of the criminal law against acts of piracy,” and that they often discover convictions attributed to piracy are in fact “usually under other laws, like pornography or ‘illegal business,’ not piracy.”<sup>157</sup> When it was able to “unearth” statistics regarding prosecutions under the piracy provisions of the criminal law, the IIPA claimed that in 2002 “19 criminal cases were brought and concluded (with reported sentences of six months to 6 years)” in Beijing, and that in 2003, “30 cases were filed in Beijing and Shanghai,” of which “[o]nly 3 . . . were brought under the criminal ‘piracy’ provisions . . . .”<sup>158</sup>

The threat of litigation in Chinese courts fails to effectively deter pirates. Damages awarded in successful copyright infringement lawsuits often range from 80,000 to 200,000 yuan (about \$10,000 to \$24,000) and are too light to intimidate many commercial pirates.<sup>159</sup> Says one Chinese attorney, “The cost of violating copyright laws in China is small in comparison with the business opportunities it brings.”<sup>160</sup>

#### d) Lack of Judicial Competence in Intellectual Property Matters

One commentator notes that what looks like local protectionism in some cases might in fact be nothing more than poorly trained judges.<sup>161</sup> In larger Chinese cities, where specialized intellectual property courts exist, lawyers, prosecutors, and judges have significantly increased their understanding of intellectual property matters.<sup>162</sup> However, poor legal training

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patent, trademark, and trade secrets. Among those prosecuted and convicted for copyright infringement, many are likely to have been small-time street vendors or to have received minimal penalties.

156. See *supra* text accompanying notes 100-101.

157. IIPA, 2004 REPORT, *supra* note 3, at 41-42.

158. *Id.*

159. See So, *supra* note 20.

160. *Id.* (quoting Hangzhou-based attorney Ye Zhijian who represents a film studio suing Baidu.com for allegedly infringing the copyright of the film *House of Flying Daggers* by making the film available for viewing through Baidu.com’s movie download service).

161. Groombridge, *supra* note 145, at 26.

162. See Allison & Lin, *supra* note 32, at 788; see also Peter Yu, *From Pirates to Partners (Episode Two): Protecting Intellectual Property in Post-WTO China*, 55 AM. U. L. REV. (forthcoming 2006).



has traditionally plagued the Chinese judiciary, particularly in the countryside.<sup>163</sup> While evidence suggests that even rural judges' qualifications and training are improving generally,<sup>164</sup> improved competency in more common forms of adjudication, such as family or contract law, does not necessarily translate into competency in more complex intellectual property jurisprudence. This problem particularly matters in criminal piracy cases, where the court of first instance is the local county-level court of the infringer's domicile. Since many pirates base their operations in rural locales, criminal copyright cases often begin in front of local judges lacking experience in or understanding of intellectual property law. Efforts to train Chinese judges in intellectual property matters will take time given the size of the country, the large number of judges requiring comprehensive training in this area, and the fact that intellectual property training is competing with other pressing judicial reform needs.

Judicial reform in the intellectual property context represents only a small subset of the broader judicial reforms needed and underway. Indeed, since the mid-1970s, when China emerged from the Cultural Revolution that "totally shattered" its court system, its judiciary has been in a perpetual state of reform.<sup>165</sup> The broader reforms focus on increasing judicial independence, modernizing and improving the efficiency of the court system,<sup>166</sup> reducing corruption,<sup>167</sup> and improving the overall quality and training of judges. The current judicial reforms also have far-reaching implications for the development of the rule of law in China, which many believe is a prerequisite to the culture of individual rights and respect for law necessary for a successful intellectual property regime.<sup>168</sup>

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163. See generally Stanley B. Lubman, *Dispute Resolution in China after Deng Xiaoping: "Mao and Mediation" Revisited*, 11 COLUM. J. ASIAN L. 229, 311-12 (1997); Yu, *supra* note 14, at 214 ("[M]ost Chinese judges lack experience and expertise in intellectual property cases."); QU, *supra* note 27, at 390-91.

164. See Randall Peerenboom, *The X-Files: Past and Present Portrayals of China's Alien "Legal System"*, 2 WASH. U. GLOBAL STUD. L. REV. 37, 78 (2003) (arguing that critiques of the Chinese judiciary, which often focus on the fact that many judges are former military officers with little formal legal training, typically fail to consider recent improvements in judicial training and standards).

165. See Keyuan Zou, *Judicial Reform in China: Recent Developments and Future Prospects*, 36 INT'L LAW. 1039, 1045 (2002); see also Chunying Xin, *What Kind of Judicial Power Does China Need?*, 1 INT'L J. CONST. L. 58, 59 (2003) ("Judicial reforms in China are of a depth and breadth that cannot be compared to any other country.").

166. See Zou, *supra* note 165, at 1045-46.

167. *Id.* at 1042.

168. See, e.g., Yahong Li, *The Wolf Has Come: Are China's Intellectual Property Industries Prepared for the WTO?*, 20 UCLA PAC. BASIN L.J. 77, 111 (2002) ("[T]he overall condition of the rule of law will affect the development of the IPRs system. For

## e) State Centralism

Censorship and continued stringent state control over film production provide a boon to movie pirates in particular. By limiting the number of foreign films that can be legitimately imported each year, and ensuring that only approved “clean” films are available for viewing in official film outlets, the state has driven demand skyward for unapproved and uncensored—but more entertaining—pirated films.<sup>169</sup> “It seems like a more vigorous and healthy [legitimate] market will not be developed unless censorship is extensively relaxed.”<sup>170</sup>

## f) Economic Conditions

Copyright enforcement in China cannot improve until overall economic conditions improve. As one young intellectual property attorney in Beijing put it, “Most foreigners think copyright infringement has to do with Chinese culture or philosophy, but it’s really an economic problem. People want to buy the *daoban* [pirated] VCDs or DVDs because they are cheap. But now that I am making more money, I like to buy *zhenban* [legitimate copies].”<sup>171</sup> While it is an oversimplification to say the piracy problem only comes down to price, the high cost of legitimate product is undoubtedly an important factor. An average worker earning \$100 per month<sup>172</sup> will choose to pay one dollar for a pirated DVD rather than the ten to fifteen dollars a legitimate DVD has typically cost. Likewise, legitimate music CDs usually cost about 20 yuan (about \$2.40), four to five times more than their pirated counterparts.

As reflected in the young lawyer’s comment, the growing middle and upper class in China can afford legitimate products and might be willing to buy them if they represent a significant upgrade in features and quality and if producers continue to reduce the price gap between legitimate and pirated product. Nevertheless, even though the market for legitimate music CDs increased by 40% in 2004—an increase probably due in large part to the demographic trend just discussed—the piracy rate still has failed to

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example, poor enforcement of IPRs is often associated with the ineffective judicial system and local protectionism which are deeply rooted in the problem of the lack of judicial independence in China.”).

169. Laikwan Pang, *The Global-National Position of Hong Kong Cinema in China*, in *MEDIA IN CHINA: CONSUMPTION, CONTENT AND CRISIS* 55, 59 (Stephanie Hemelryk Donald et al. eds., 2002).

170. *Id.* at 59.

171. Interview on Jan. 24, 2005 (on file with author).

172. See WORLD BANK, *CHINA AT A GLANCE* (2005), available at [http://www.worldbank.org.cn/English/Content/chn\\_aag02.pdf](http://www.worldbank.org.cn/English/Content/chn_aag02.pdf) (estimating China’s 2004 annual gross national income per capita at \$1,290).

drop appreciably.<sup>173</sup> Until the economy reaches a point where the prices of legitimate product fit well within the average budget, the piracy rate is unlikely to change.

Unfortunately for the entertainment industry, improved economic conditions alone will not suffice to wean even well-to-do Chinese consumers off cheap pirated goods. Film studios and record companies have begun to drop prices dramatically in an effort to compete with pirates, as evidenced by Warner Brothers' decision in March 2005 to reduce the price of legitimate DVDs in China to between 22 and 28 yuan (about \$2.70–\$3.40).<sup>174</sup> Because legitimate music and film companies must recoup the costs of product development, however, pirated products will always be manufactured and sold more cheaply than their legitimate counterparts. In recent years, music and film companies have lost more competitive ground as the quality of pirated goods has improved considerably, often making them indistinguishable from the real thing.<sup>175</sup> Thus, "Chinese queried by the [Agence France Presse] threw doubt on the likelihood that [Warner Brother's price-dropping] initiative would be successful. 'The quality of pirated DVDs is already good enough,' said Wu Hao, a Beijing resident. 'How many people will pay twice the money for negligible improvement?'"<sup>176</sup>

g) Creating a Culture of Respect for Intellectual Property Rights

China must find ways to educate officials, judges, lawyers, businesses, and average citizens about the meaning and importance of intellectual property rights to culture, society, and the economy. Doing so will help foster a culture of intellectual property in China, in which businesses understand the value of innovating and protecting their innovations while respecting others' rights in innovations, and judges and officials will become more familiar with intellectual property issues and the value of intel-

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173. See IFPI, COMMERCIAL PIRACY REPORT 2004, *supra* note 10, at 8; IIPA, 2004 REPORT, *supra* note 3, at 33.

174. See *Warner Bros. to Sell Bargain DVDs in China*, AGENCE FRANCE PRESSE, Mar. 11, 2005, [http://www.channelnewsasia.com/stories/afp\\_asiapacific\\_business/view/136851/1/.html](http://www.channelnewsasia.com/stories/afp_asiapacific_business/view/136851/1/.html).

175. See Maney, *supra* note 25. Maney writes:

I bought [a] CD in a legitimate music store on one of the busiest corners in Beijing, a few blocks from Tiananmen Square. The CD came shrink-wrapped, complete with a slick insert of photos and lyrics, and cost the equivalent of \$4. Yet despite the retail setting and packaging, the CD is most likely a pirated copy. The pirates are so good, hardly anyone can tell the difference.

*Id.*

176. See *Warner Bros. to Sell Bargain DVDs in China*, *supra* note 174.

lectual property to society. Within the general population, the goal is to inculcate an innate sense of ownership regarding one's own creations, and to teach people that there is value in purchasing legitimate rather than pirated goods.

China has already made great strides in intellectual property education. News items stressing the importance of intellectual property to society and the economy are ubiquitous in the Chinese media. Many judges and officials attend intellectual property training programs,<sup>177</sup> and many domestic corporations now make such training available to employees.<sup>178</sup> The question is not whether the Chinese government is willing to educate the public on copyright, nor is it whether Chinese businesses will come to appreciate the value of intellectual property. It is instead how much real-world effect these educational efforts will have, and it remains to be seen whether the general population will come to appreciate the value of intellectual property rights.

## 2. *Cracking Down on Internet Piracy*

Even if Chinese authorities accomplish the myriad reforms discussed above, they are still essentially at square one regarding internet file sharing. Indeed, it might not be an exaggeration to speculate that, by the time China implements the breadth and depth of reforms needed to effectively prevent physical piracy, internet downloading and associated technologies will render physical piracy largely obsolete. The internet threatens to turn anyone with a broadband connection and file sharing software into a pirate. These potential pirates include the sixty-five million (and growing) broadband subscribers in China.<sup>179</sup> In the words of one Chinese copyright law expert, "If [internet copyright] violations are not curbed in a timely way, our efforts in the past few years to fight against piracy in the market will be in vain."<sup>180</sup>

As with physical piracy, a crackdown on internet file sharing must come on two fronts: administrative and civil actions and criminal prosecutions.<sup>181</sup> Civil actions against file sharers have enjoyed little success in other countries. Despite several years of legal threats and lawsuits against

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177. See, e.g., *Beijing's IPR Workload Soars*, CHINA DAILY, Apr. 18, 2003, <http://www.china.org.cn/english/government/62632.htm>.

178. See, e.g., *IPR Strategy to Define Government's Role*, CHINA DAILY, June 14, 2004, <http://www.china.org.cn/english/government/98148.htm>.

179. CNNIC, *supra* note 18, at 4.

180. *Halting Online Copyright Violations*, CHINA DAILY, Apr. 4, 2005, [http://www.chinadaily.com.cn/english/doc/2005-04/04/content\\_430627.htm](http://www.chinadaily.com.cn/english/doc/2005-04/04/content_430627.htm) (quoting Zheng Chengsi).

181. See *supra* Section III.C.

file sharing services and individual file swappers,<sup>182</sup> file sharing has remained robust around the world.<sup>183</sup> Copyright owners' legal efforts received an unprecedented boost in June 2005, when the U.S. Supreme Court held in *MGM Studios, Inc. v. Grokster, Ltd.* that those who distribute technologies "with the object of promoting [their] use to infringe copyright" are themselves liable for the infringing acts of third parties.<sup>184</sup> However, the international character of peer-to-peer networks will likely mute any chilling effect the *Grokster* decision has in the United States. Legal efforts in the West to combat file sharing are unlikely to impact the rapid growth of online piracy in China significantly. Millions of Chinese already share digital media over the internet, with huge catalogs of unauthorized movie and song files from China, Hong Kong, and Taiwan available online and often easily located via major search engines.<sup>185</sup> The Chinese online piracy community is likely to adapt and persist even if major global peer-to-peer networks such as KaZaa or Grokster are shut down.

Copyright owners are not waiting idly for the effects of the *Grokster* decision to trickle down to China; instead, they have gone on the offensive there as well. For example, Universal Music recently announced a partnership with Chinese internet startup R2G that portends a new generation of anti-piracy strategies in the internet age.<sup>186</sup> R2G will monitor thousands of Chinese websites for unauthorized copies of songs in Universal's catalog

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182. See Yu, *supra* note 54, at 374-402 (chronicling efforts by the U.S. music and movie industries to halt music and movie file sharing on peer-to-peer networks by suing the peer-to-peer service providers and individual file swappers).

183. During the first half of 2004, about eight million people were online worldwide at any given time sharing files on major peer-to-peer services such as BitTorrent, Kazaa, and eDonkey. John Borland, *Survey: Movie-Swapping Up; Kazaa Usage Down*, CNET ASIA NEWS, July 14, 2004, <http://www.zdnetasia.com/news/internet/0,39044246,39186711,00.htm>.

184. 125 S. Ct. 2764, 2780 (2005).

185. See IIPA, 2004 REPORT, *supra* note 3, at 37 ("Not counting music files . . . being exchanged through FTP servers set up by university students, and other peer-to-peer servers [such as the Taiwan-based Kuro], RIAA/IFPI estimates that there millions [sic] of music files being offered for download and listening [through audio streaming] from over a thousand active pirate music websites in China."); Allen T. Cheng, *China NetEase Suspends Music Search to Fight Pirates*, BLOOMBERG.COM, Aug. 17, 2005, <http://www.bloomberg.com/apps/news?pid=10000080&sid=am30KlpeHZp4&refer=asia> ("There are more than 7,000 music sites in China, and almost all of them offer free music down loads without having obtained legal rights from music publishers . . ."); see also *infra* text accompanying note 19.

186. See *Interview: R2G*, PACIFIC EPOCH, May 19, 2005, [http://www.pacificepoch.com/pecontent/29438\\_0\\_3\\_0\\_M/](http://www.pacificepoch.com/pecontent/29438_0_3_0_M/) (interview with Scarlett Li, Chief Operating Officer, R2G).

and has the authority to sue infringers on Universal's behalf.<sup>187</sup> Ultimately, however, R2G aspires to encourage a legitimate online music marketplace by compelling providers of illegitimate content to "turn legit" and offer content licensed through R2G.<sup>188</sup>

Displaying increasing sophistication in their private efforts to crack down on internet piracy, Chinese copyright owners have begun targeting internet search engines—the easily identified, cash-rich backbones of the Chinese online piracy culture—as contributory infringers.<sup>189</sup> While internet search giants might find the threat of being hauled into a Chinese court less than intimidating, such companies are increasingly responsible to foreign investors and have international reputations to maintain.<sup>190</sup> The liability associated with infringement lawsuits can affect the value of such companies in the eyes of foreign investors.<sup>191</sup> Thus, shortly after announcing in July 2005 that it would seek an initial public offering in the U.S., Chinese internet search giant Baidu.com bowed to music industry pressure and agreed to remove links to more than 3,000 unauthorized, infringing files, and claimed to be investigating 50,000 other links to allegedly infringing content.<sup>192</sup> Public listing in the U.S. also creates the potential for jurisdiction in U.S. courts and application of U.S. law, even when the plaintiff and locus of infringement are in China, supplying further impetus for companies like Baidu to police their sites and purge any suspect links.<sup>193</sup>

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187. *Id.*

188. *Id.*

189. *See Sony, Warner, EMI Sue Baidu Over Free Music Downloads*, BLOOMBERG.COM, Sept. 16, 2005, [http://www.bloomberg.com/apps/news?pid=10000080&refer=asia&sid=a2DlpMuvP\\_6M](http://www.bloomberg.com/apps/news?pid=10000080&refer=asia&sid=a2DlpMuvP_6M) (noting that Baidu and other top Chinese search engines are publicly listed in the United States and discussing the deleterious effect allegations of contributory copyright infringement had on Baidu's U.S. stock price).

190. *See id.*

191. *See So, supra* note 20.

192. Mure Dickie, *Baidu Deletes Links to Pirated Music*, FT.COM, July 18, 2005, available at 2005 WLNR 11244409. As of this writing, however, Baidu still provides links to infringing content and is loathe to remove them altogether since searches for music files account for 22% of Baidu's traffic. *See also* Faye Wong & Rachael Chen, *Top Five Winners in China's IT Industry This Year*, INTERFAX CHINA, Dec. 23, 2005, <http://www.interfax.cn/showfeature.asp?aid=8658&slug=RANK>. Shortly after the Baidu suit was filed, popular Chinese search engine NetEase—also publicly traded in the U.S.—announced the discontinuation of its dedicated music search service “out of concern and respect for copyrights.” Cheng, *supra* note 185 (quoting NetEase co-founder William Ding).

193. *See So, supra* note 20; *see also* Graeme B. Dinwoodie, *Conflicts and International Copyright Litigation: The Role of International Legal Norms*, in *INTELLECTUAL PROPERTY IN THE CONFLICT OF LAWS* 195 (Jurgen Basedow et al. eds., 2005) (canvassing

Although these developments evidence incremental progress for copyright owners, such private enforcement efforts will be insufficient to stem the tide of internet piracy in China.<sup>194</sup> In the West, file-sharing networks and technologies have adapted to thwart legal and technological hurdles with relative ease.<sup>195</sup> Furthermore, solutions such as R2G do not address major contributors to the digital piracy problem, such as “sneakernets” (i.e., networks in which files are transported and shared among acquaintances by way of a physical medium such as a CD-R or MP3 player) and FTP file sharing on closed-access university servers.<sup>196</sup> It also remains to be seen whether R2G can provide an effective answer to peer-to-peer networks.<sup>197</sup>

R2G and similar companies and technologies represent private approaches to reducing piracy. It seems impossible, however, for private actors to significantly dent online piracy alone without more proactive and effectual government involvement. Ultimately, if Chinese authorities are to decisively crack down on internet piracy, they must find a way to do what no other government has been able or willing to do: crack down authoritatively and effectively on a large number of average citizens trading movies, music, and other files online. The success of such an approach in China is even more in doubt because resources spent on attempts to control physical piracy dilute efforts to quash internet piracy.

In addition to the unauthorized dissemination of copyrighted works through file sharing, the internet can be used to promote and sell pirated physical goods. In a high-profile example, a Shanghai court sentenced American citizen Randolph Guthrie III in April 2005 to two-and-a-half years in prison for selling illegal DVDs to American consumers through

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the devices increasingly used by U.S. courts in intellectual property cases to extrude U.S. law globally and stating: “If I may paraphrase Paul Torremans, the U.S. courts have moved not so much from dodging the bullets to biting them, but onward still to actively seeking them.”).

194. See *China Attempts to Sink MP3 Pirates*, NEWSFACTOR.NET, July 20, 2005, [http://www.newsfactor.com/story.xhtml?story\\_id=11000002G5J8](http://www.newsfactor.com/story.xhtml?story_id=11000002G5J8) (“[M]ost analysts have suggested that [Baidu’s decision to delete links to Internet sites offering pirated music] is a sticking plaster treatment for a growing problem rather than a cure.”).

195. See *supra* notes 182-183.

196. See Xiao Wei Chen, *Exclusive Interview with Jun Wu, R2G’s President and CEO*, DIGITAL MEDIA IN ASIA BLOG, Dec. 19, 2005, <http://blogs.law.harvard.edu/dmablog/2005/12/19#a31> (“[College students are] not on the top of our to-do list. Once the overall piracy rate in the public network is reduced to a certain level we will start addressing these niche market too.”).

197. R2G plans to introduce a peer-to-peer filtering technology in early 2006, though at the time of this writing details are scant. See *id.*

his personal website.<sup>198</sup> Nine months earlier, during a televised raid, Chinese officials arrested Guthrie for selling nearly 200,000 pirated DVDs over a two-year period from his Shanghai apartment-turned-warehouse.<sup>199</sup> Using the internet to sell pirated physical goods does not present new legal issues, as the internet simply provides an alternative medium through which to engage in the classically infringing act of selling an unauthorized copy. However, it amplifies China's enforcement problem, particularly with regard to the exporting of pirated goods, as the Guthrie case illustrates. The internet increases pirates' ability to reach customers overseas, creating further opportunities and incentives for pirates and even more complex enforcement challenges for authorities.

### 3. *Chinese Copyright Theory and Cracking Down on Piracy*

For instrumentalist reasons, a policy of cracking down effectively on film and music piracy is attractive to China. It could strengthen China's international credibility as a major economic player and help domestic cultural and entertainment industries flourish to a degree never before seen in modern China. In addition, it would dispose of a wealth of illegal activities that involve and encourage organized crime and official corruption and potentially improve the overall respect for the rule of law.

Cracking down effectively on film and music piracy would also be attractive from the standpoint of the Chinese theory of copyright suggested above.<sup>200</sup> Rampant commercial physical piracy clearly harms the Chinese music and movie industries. Not only have the industries themselves suffered, but the quality and variety of domestic music and movies suffer.<sup>201</sup> The relative lack of quality cultural products harms society and undermines the goal of promoting a "materially advanced society." International copyright owners crave an effective crackdown as well. It would lead to increased revenues from sales in China, even though the increases from China sales would for years likely be far lower than the loss estimates

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198. See David Litterick, *U.S. Internet Pirates are Jailed in China*, TELEGRAPH, Apr. 21, 2005, <http://www.telegraph.co.uk/money/main.jhtml?xml=/money/2005/04/21/cnchina21.xml&menuId=242&sSheet=/money/2005/04/21/ixcity.html>; *American Nationals Given Jail Terms for Selling Pirated DVDs*, PEOPLE'S DAILY ONLINE, Apr. 20, 2005, [http://english.people.com.cn/200504/20/eng20050420\\_181820.html](http://english.people.com.cn/200504/20/eng20050420_181820.html); see also Peter Wonacott & Sarah McBride, *To Catch Film Pirate, U.S., China Follow Spy Flick to Shanghai*, WALL ST. J., Mar. 7, 2005, at A1.

199. Wonacott & McBride, *supra* note 198.

200. See *supra* Section III.D.

201. As mentioned above, piracy is not the sole cause of China's music and film industry woes, but the enormous amounts of piracy cannot but greatly reduce the ability of the Chinese music and film industries to invest in and cultivate talent. See *supra* note 12.



proffered by the IIPA, since many Chinese consumers will continue to balk at paying the higher price of legitimate product.

An effective crackdown on piracy also carries risks, however. Chinese copyright law incorporates a utilitarian theory of copyright, which presumes striking a healthy balance between the need to provide incentives for creators and the public's interest in widespread enjoyment of those creations.<sup>202</sup> A policy of cracking down hard on physical piracy, internet piracy, or both is not an optimal solution if it ends up putting greater power in the hands of copyright owners than is required to stimulate new creations.

It is also unclear whether cracking down on internet piracy would produce net benefits for Chinese society and the entertainment industries. Lawrence Lessig has posited that much file sharing does not involve a violation of copyright, and much file sharing that does violate copyright is not economically harmful.<sup>203</sup> In fact, there is some evidence to suggest that file sharing actually helps, rather than hurts, music sales, at least in the West.<sup>204</sup> File sharing and the internet undoubtedly offer unprecedented promise for promotion and enabling widespread access to creative content. The Chinese record industry, which because of piracy has developed more flexible business models and is less reliant on retail sales revenues, is naturally positioned at the cutting edge of an internet-driven shift from the old, product-oriented music business model to a service-oriented business model.<sup>205</sup> It is worth simply noting that China might maximize its position as a leader in developing next-generation, internet-centered entertainment business models if new companies such as R2G<sup>206</sup> and online/mobile content retailers focus on business model innovations that take advantage of,

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202. See *supra* Section III.D.

203. See LESSIG, *supra* note 13, at 66-79; see also FELIX OBERHOLZER & KOLEMAN STRUMPF, THE EFFECT OF FILE SHARING ON RECORD SALES: AN EMPIRICAL ANALYSIS 3-4 (2004) ("While downloads occur on a vast scale, most users are likely individuals who would not have bought the album even in the absence of file sharing.").

204. See OBERHOLZER & STRUMPF, *supra* note 203, at 3 (2004) (finding that "file sharing has only had a limited effect on record sales. . ."). But see STAN J. LIEBOWITZ, FILE-SHARING: CREATIVE DESTRUCTION OR JUST PLAIN DESTRUCTION? 3 (2004) ("[This study] concludes that the industry is not crying wolf. The evidence seems compelling that the recent decline in sales can be properly attributed to file-sharing.").

205. See DAVID KUSEK & GERD LEONHARD, THE FUTURE OF MUSIC: MANIFESTO FOR THE DIGITAL MUSIC REVOLUTION 13 (2005) ("The digital distribution of music will gradually minimize the pay-for-product mentality that has dominated the music business for over a century, and technology may finally create some deeper empowerment for more of the involved parties.").

206. See *supra* text accompanying notes 186-193.

rather than combat, present circumstances in China.<sup>207</sup> Unfortunately, much energy seems to be spent reinforcing the twentieth-century entertainment industry business model by transporting it to the internet context.

#### 4. *Prospects for Cracking Down on Music and Film Piracy*

Prospects for a sustained, effective nationwide crackdown on music and movie piracy in the foreseeable future are slim. In the best-case scenario, the prerequisite changes to fundamental attitudes and institutions discussed in Section IV.A.1 will take years, if not decades. For example, since the enactment of the 1990 Copyright Law, only incremental increases in the market share for legitimate works have been achieved. Likewise, an effective, widespread crackdown on internet file sharing does not appear to be on the horizon. Such a crackdown would be a massive and technologically challenging undertaking, and it does not appear to be a government priority now. Even if attempted, significant doubts about its effectiveness exist. For example, the government's concerted efforts to block internet pornography sites have met with only partial success,<sup>208</sup> and effectively blocking file sharing on peer-to-peer and other distribution networks is arguably more demanding and technologically complex than blocking access to pornographic websites.

Chinese officials and lawyers argue, reasonably enough, that it is unrealistic to expect China to reach a level of copyright enforcement in less than two decades akin to that enjoyed by Western countries that have had centuries to develop intellectual property laws and norms.<sup>209</sup> Although the

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207. In Section IV.C, *infra*, I will outline a solution that I believe comports with and complements China's present legal, social, and entertainment market realities.

208. See generally OPENNET INITIATIVE, INTERNET FILTERING IN CHINA IN 2004-2005: A COUNTRY STUDY (2005), available at [http://www.opennetinitiative.net/studies/china/ONI\\_China\\_Country\\_Study.pdf](http://www.opennetinitiative.net/studies/china/ONI_China_Country_Study.pdf).

209. See, e.g., *IPR Infringers Face Lengthy Jail Terms and Hefty Fines*, *supra* note 125 ("Law enforcement officers in China's government and judicial departments have not done a bad job, considering it is only two decades or so since the country introduced legislation on trademark, patent and copyright."); *Nation Places IPR as Key Priority*, CHINA DAILY, Mar. 21, 2005, <http://www.china.org.cn/english/BAT/123345.htm> ("IPR violations exist in many countries, including developed nations with hundreds of years of IPR history. China still needs a long period to improve its IPR system, since it only has 20 years of history working with IPR."); see also INFORMATION OFFICE OF THE STATE COUNCIL (P.R.C.), NEW PROGRESS IN CHINA'S PROTECTION OF INTELLECTUAL PROPERTY RIGHTS (2005) [hereinafter STATE COUNCIL REPORT], available at [http://english.gov.cn/official/2005-07/28/content\\_18131.htm](http://english.gov.cn/official/2005-07/28/content_18131.htm) ("[I]n a large developing country with a population of 1.3 billion, relatively backward economy and low level of science and technology, a complete IPR protection system cannot be established overnight. China has a long way to go in this regard, and faces a tough task when it comes to IPR protection.").

issue of copyright protection has become important to the Chinese government, its importance pales in comparison to myriad other issues more directly related to social stability, including unemployed workers potentially numbering in the hundreds of millions, an alarming wealth disparity between classes, and a growing AIDS crisis.<sup>210</sup> Recently, Yan Xiaohong, vice director of the NCA, admitted publicly that effectively preventing piracy through government crackdowns is not realistic: “China cannot win the anti-piracy battle if it relies only on government crackdowns and judicial punishment. . . . Despite the government’s pledge and enhanced efforts to stamp out piracy, intellectual property infringement is rampant.”<sup>211</sup>

As more time passes without significant progress in copyright enforcement, it is conceivable that the Chinese government will actually receive increasingly *less* pressure from domestic and foreign industry groups to crack down on piracy. As we will see in Section IV.B.2, some content producers who believe that investments in copyright enforcement are not yielding results already seek alternative business models that reflect the reality of the Chinese market and are not reliant on legal enforcement of copyright. Others have built the “cost” of piracy into their current business model in China<sup>212</sup> or are simply doing enough private enforcement to keep the problem from worsening.<sup>213</sup> Still others are withdrawing from the Chinese market altogether.

### 5. *Seeking a Middle Ground*

Effective nationwide copyright enforcement is not in China’s foreseeable future. But if copyright owners and the Chinese government believe that a sustained crackdown on piracy is the best course of action, it makes sense to pursue a geographically targeted enforcement strategy rather than a nationwide strategy. It is easy for foreigners to view China as a social, economic, and political monolith. But there is a significant (and growing) economic, cultural, and educational divide between China’s metropolises and its smaller cities and villages and between China’s richer eastern re-

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210. *See supra* note 24.

211. *China Expresses Doubts about Ability to Curb IPR Violations*, AGENCE FRANCE PRESSE, Feb. 24, 2005, [http://www.channelnewsasia.com/stories/afp\\_asiapacific/view/134156/1/.html](http://www.channelnewsasia.com/stories/afp_asiapacific/view/134156/1/.html).

212. In the late 1990s, the president of a U.S.-based independent record label, whose primary markets are in Asia, indicated to me that in markets such as Hong Kong it has built losses to piracy into its normal cost of doing business.

213. *See Balfour, supra* note 1, at 60 (“[Some] companies simply try to make life as difficult as possible for [pirates and counterfeiters] by raiding factories and warehouses or by slightly altering the look of products, making it tough for counterfeiters to keep up with changes.”).

gion and its underdeveloped western region. These differences impact piracy. Anecdotal evidence from a number of copyright industry professionals in Beijing and Shanghai suggests that the piracy problem is improving in some large eastern cities—not vastly, but tangibly. When asked what “improving” means, one entertainment industry veteran said five years ago there were *no* legitimate music CDs in stores, while today one can find *some* legitimate CDs. This, according to these copyright industry professionals, contrasts the near 100% piracy rate present in many smaller cities and rural areas.<sup>214</sup> International music industry figures support this anecdotal evidence: the market for legitimate music in China rose sharply in 2003 and 2004, although, because of vast problem regions, overall piracy rates still remained at 90% or higher.<sup>215</sup>

Foreign and Chinese copyright owners would likely see tangible gains if they were to surrender, for the time being, the goal of nationwide enforcement, and instead persuade the central government to concentrate on creating “piracy-free zones” around some of the largest, most developed cities. One Western media professional close to the Chinese copyright industries privately opined, “If Hollywood would just concentrate on Shanghai and Beijing, they would recover their money.”<sup>216</sup> While it is difficult to know whether this is true, such a strategy makes sense. First, central authorities could focus their limited resources intensely and relentlessly in smaller, well-defined areas. Second, the preponderance of enforcement efforts would be located closer to central authorities, giving them more direct control and reducing the influence of local protectionism and corruption. Third, the demand for legitimate products would flourish in the biggest potential markets. While such a plan would take some of the pressure off pirates outside the designated enforcement zones, the average income level is lower in more rural areas, thus sales that actually displace legitimate products would be correspondingly fewer since the potential market for legitimate products is smaller. Fourth, such a plan would increase the number of infringement cases, particularly criminal cases, heard by experienced intellectual property judges in major cities.

The major drawback to such a plan would be that, given somewhat freer reign to operate in rural areas, pirates might have more opportunity to concentrate on exporting their wares, ultimately moving the problem overseas. Although a concern, this drawback should not cause this idea to be discounted. First, while reliable piracy sales figures are impossible to

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214. Interview on Jan. 20, 2005 (on file with author).

215. See IFPI, COMMERCIAL PIRACY REPORT 2004, *supra* note 10, at 9.

216. Interview on Jan. 4, 2005 (on file with author).

ascertain, decreasing the supply and demand for pirated goods in the markets of Shanghai and Beijing would undoubtedly constitute a significant blow to the pirates' business, helping to keep their numbers in check. Second, some of the resources saved by deemphasizing nationwide enforcement could be refocused on import and export channels for pirated goods. Third, in many parts of China the enforcement is currently so weak that it is not clear such a program would leave those areas significantly worse-off than they are presently.

The point here is not to elucidate the details of such a program or even strongly advocate it. Rather, it is to highlight that the goal of effectively cracking down on piracy nationwide is impractical under the present circumstances. Any attempt to strictly enforce copyright laws should be measured and strategic, and should keep in mind China's reality as a large and extremely diverse nation both economically and demographically. As the Chinese saying goes, it is best not to try to get fat all in one bite.

## **B. Staying the Present Course**

Given that an effective crackdown on piracy is unlikely in the near future, what prospects for the movie and music industries in China exist should China simply stay on its present course? In other words, what can we expect if China continues to pursue a course of measured, long-term legal and institutional reforms relating to intellectual property protection, while increasingly encouraging copyright owners to take private action against infringers and while a significant chasm persists for years or decades between the formal law and reality? This Section explores China's present trajectory in its development of an effective copyright enforcement regime, and the impact that the present slow-paced reform is likely to have on copyright owners and entertainment business models. I then consider whether China's present strategy comports with the policies underlying Chinese copyright and consider the prospects for China staying on its present course.

### *1. The Long March to Reduced Piracy Levels*

Many in China and throughout the world hoped that China's accession to the WTO, and its agreement to amend its intellectual property laws as required by TRIPS, would immediately help to lower piracy levels. However, the effects on piracy have been mixed. On one hand, China's entrance into the WTO led to significant changes in the copyright law that most international observers laud.<sup>217</sup> As economic conditions improve, the number of buyers willing and able to purchase legitimate products in-

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217. See *supra* text accompanying note 80.

creases. In 2004, the market for legitimate music CDs grew considerably faster than the market for pirated CDs.<sup>218</sup> During that time, the estimated piracy rate for music CDs dropped slightly.<sup>219</sup> The number of copyright-related arrests by Chinese authorities has increased steadily, as have criminal prosecutions of pirates.<sup>220</sup> Furthermore, the Supreme People's Court has substantially lowered the thresholds for criminal liability in copyright infringement cases.<sup>221</sup>

On the other hand, some experts predicted that China's entry into the WTO could worsen piracy, at least in the short term, and some indicators support those predictions.<sup>222</sup> Improvements in economic conditions increase the demand not only for legitimate goods but also pirated audiovisual products.<sup>223</sup> Experts also predict a sharp rise in exported pirated goods as China gradually relaxes its export restrictions in compliance with the WTO agreement.<sup>224</sup> In the motion picture industry, the rate of piracy and the estimated losses due to piracy have both increased since 2001.<sup>225</sup>

Nevertheless, it appears the overall trend is one of very gradual improvement as government officials begin taking to heart the importance of intellectual property to the nation's development, and, most importantly, as domestic enterprises begin to appreciate the value of their own intellectual property. Traditional media companies with the deepest pockets, both foreign and domestic, are likely to continue to wage war against piracy as long as legal and technological strategies for defeating piracy hold promise.<sup>226</sup> Nevertheless, despite ongoing advances in copyright protection, de-

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218. IFPI, COMMERCIAL PIRACY REPORT 2004, *supra* note 10, at 8 (reporting that legitimate sales increased by 40% while pirated sales increased by 20%).

219. IFPI estimates indicate the overall piracy rate in China dropped by 1% in China in 2004. *See id.* (listing the 2004 piracy rate for music sales in China at 90%); IFPI, COMMERCIAL PIRACY REPORT 2003, *available at* <http://www.ifpi.org/site-content/antipiracy/piracy2003-priority-territories.html> (listing the 2003 piracy rate for music sales in China at 91%).

220. *See, e.g., Beijing's IPR Workload Soars, supra* note 177 ("Courts in Beijing at various levels dealt with 978 IPR cases last year, a rise of 28 per cent over 2001 and 2.5 times the number in 1998.").

221. *See supra* Section III.B.

222. *See* CHOW, *supra* note 32, at 450.

223. *See* IFPI, COMMERCIAL PIRACY REPORT 2004, *supra* note 10, at 8 (estimating 20% growth in 2004 for the Chinese pirated-music market).

224. *See* CHOW, *supra* note 32, at 450.

225. *See* IIPA, 2004 REPORT, *supra* note 3, at 33.

226. A prime example of this is the advent of solutions such as R2G, which essentially attempts to combat online piracy by grafting the "old media" business model onto the internet. *See infra* text accompanying notes 186-193.

veloping an effective and reliable copyright regime in China will take many years, if not decades, for the reasons outlined above in Section IV.A.

2. *The Trend toward Decreased Reliance on Copyright Protection*

In the meantime, many foreign and domestic entertainment companies doing business in China will see little return on their investment in combating piracy and their business strategies will continually outpace the law as they adjust to the realities on the ground. For example, after diligently pursuing myriad deterrents—legal and otherwise—to the heavy piracy of their popular retail video games in China, game developer Electronic Arts, Inc. has publicly all but conceded the Chinese retail market to pirates and is instead concentrating its efforts on developing subscription-based online gaming, which is less susceptible to piracy.<sup>227</sup> Warner Bros.'s aggressive DVD pricing and value-added features indicate a business strategy designed to help the company compete directly with pirates.<sup>228</sup> In addition, Warner Bros. is exploring other avenues to generate revenue, including partnering with Chinese movie theaters to improve the theater-going experience to attract more Chinese to spend their money in theaters rather than on pirated DVDs.<sup>229</sup> Likewise, some Chinese entertainment companies now view piracy as inevitable and anticipate losses to it in their business plans. Rather than attempt to control piracy, they harness its potential as free promotion and generate revenue through other means such as licensing songs or characters for use in advertising or on product packaging.<sup>230</sup> Some argue that, in China, and perhaps in the future everywhere, artists will leverage the exposure piracy (or legitimately distributed free music) provides and will exploit their fame gained through such exposure

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227. Comments by Lars U. Buttler, Vice President Global Online, Electronic Arts, Inc., at the Asia Business Conference, Panel on New Opportunities and Challenges for Interactive Media Businesses in Asia, Harvard Business School, Feb. 19, 2005.

228. *See supra* text accompanying note 174.

229. Comments by Darcy Antonellis, Senior Vice President Worldwide Anti-piracy Operations, EVP, Technical Operations, Warner Bros. Entm't, Inc., at the Asia Business Conference, Panel on New Opportunities and Challenges for Interactive Media Businesses in Asia, Harvard Business School, Feb. 19, 2005.

230. *See* Maney, *supra* note 25. I am told the Taiwanese animation company behind a popular cartoon character in China named "Bluecat" does not actively prevent pirated compilations of its cartoons from flooding the market. Instead, it considers piracy to be free promotion and seeks revenue through licensing deals and broadcast royalties. Of course, this approach to revenue generation still might rely on trademark law some other manner of enforcing intellectual property rights. Licensing deals by their nature presume the intellectual property owner's ability to prevent unauthorized uses of a song, character, or persona by others.

to earn revenue from alternative sources such as commercial sponsorships, live performances, and licensing.<sup>231</sup>

Similarly, copyright owners will likely approach internet file sharing as they have approached physical piracy. If copyright owners in China become convinced that fighting internet piracy is hopeless, they are likely to develop internet business models that are less vulnerable to piracy or to harness file sharing for its promotional potential.

### 3. *The Present Course and Chinese Copyright Theory*

The difficulty surrounding the enforcement of Chinese copyright law undermines incentives to create, vitiating a central principle of the copyright law.<sup>232</sup> Most notably, unreliable copyright protection contributes, at least in part, to the relatively small number of albums and films released in China each year.<sup>233</sup> This undercuts opportunities for new artists and films to emerge, and diminishes the quantity and variety of domestically produced works available to Chinese consumers.

Nevertheless, private-sector solutions to the piracy problem, developing to fill the vacuum left by lax copyright protection, possess the potential to undermine the goals underlying copyright and harm consumer interests. Emerging Chinese entertainment business strategies—online music and video stores selling or renting encrypted internet or mobile phone downloads,<sup>234</sup> corporate sponsorships/endorsements for artists and filmmakers,<sup>235</sup> and private policing of internet file sharing<sup>236</sup>—threaten to enable a new generation of gatekeepers with significant control over how, when, and by whom entertainment can be enjoyed. Many of these solutions rely on technological restrictions that empower copyright owners to create barriers to public access in ways that can far exceed what copyright law provides. Likewise, business models that rely on corporate endorsements to compensate for losses to piracy can stifle diversity and expression by favoring highly commercial, uncontroversial artists and films.

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231. *Id.* (“Eventually, recorded music will no longer make money. . . . Chinese pop artists . . . find ways to make money other than through selling CDs. A lot of it comes from sponsorship.”).

232. *See* 2001 Copyright Law art. 1 (amended by the Standing Comm. Nat’l People’s Cong., Oct. 27, 2001, effective Oct. 27, 2001) (P.R.C.).

233. While the dearth of new music and film releases in China each year is also due to other factors, including government overregulation and structural inefficiencies in the music and film industries, there is little doubt that piracy plays a significant role. *See generally* De Kloet, *supra* note 12; Chu, *supra* note 12.

234. *See, e.g.*, Aigo Music, <http://www.aigomusic.com/> (last visited Feb. 28, 2006).

235. *See supra* text accompanying note 231.

236. *See supra* text accompanying notes 186-193.



However, the current environment in China also increases public access to creative works, helping to realize an important goal underlying copyright law despite lax enforcement of the law. For example, the great variety of works available through piracy is a fortunate byproduct of the present situation in China. Because pirated goods are priced within the average consumer's budget and are beyond the reach of government censors, more Chinese are exposed to more music and movies than would likely ever be possible with an effective copyright regime. Tight government quotas on foreign films would greatly limit Chinese consumers' ability to view Hollywood movies but for the cornucopia of foreign films available through piracy.

The environment in China drives innovative music and film business models and methods.<sup>237</sup> As technology blogger Joi Ito wrote, "[I]n [the Chinese] market where the record industry basically doesn't function, artists and agents are going to be pushing the cutting edge of music business models and might in fact discover the post DRM/RIAA [Digital Rights Management / Recording Industry Association of America] business model before Hollywood does."<sup>238</sup> The lax copyright environment in China no doubt shifts the balance of power to pirates and consumers. But efforts by copyright owners to advance new technologies and business models that swing the pendulum to the opposite extreme, strongly favoring owners' rights, should be resisted. The next-generation entertainment business model should ideally keep copyright law's underlying principles in mind and strike a fair balance between consumer and copyright owner interests.

#### 4. *Prospects for Staying the Present Course*

Despite occasional pledges to crack down on piracy of audiovisual products,<sup>239</sup> the strongest indications from the Chinese government suggest it will stay the present course with regard to policies for combating music and film piracy.<sup>240</sup> That is, China will likely proceed with gradual

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237. See, e.g., *supra* text accompanying note 231.

238. Michael Song on Chinese Music Industry, Joi Ito's Web (Sept. 10, 2004, 13:43 JST), [http://joi.ito.com/archives/2004/09/10/michael\\_song\\_on\\_chinese\\_music\\_industry.html](http://joi.ito.com/archives/2004/09/10/michael_song_on_chinese_music_industry.html).

239. See Forney, *supra* note 131.

240. See, e.g., Craig Simons, *Faking It: The World's Number One Producer of Counterfeit Goods Shows Little Sign of Change—Except When it Comes to Protecting Olympic Symbols*, S. CHINA MORNING POST, Jan. 10, 2005, FF Features, available at 2005 WL 55978653 ("Some low-level officials enforce the law when necessary, but do not treat it as a high priority' . . . . And after occasional crackdowns, to show commitment to protocol, 'they loosen up again.'") (quoting Douglas Clark, partner at Lovells' law firm in

and measured institutional reforms, while performing occasional strike-hard campaigns against infringers in response to pressure from foreign and, increasingly, domestic copyright owners. In practice, copyright enforcement will continue for some time to fall far short of the standards formalized in the law.<sup>241</sup>

Assuming China stays on its present course, how long will it take to reach an acceptable level of copyright enforcement? Taiwan's experience can provide some insight. High piracy levels existed for decades in Taiwan, which has extremely close cultural and historical ties to China. Like China today, Taiwan of the late 1950s through the early 1990s was rife with piracy, prompting complaints and lobbying efforts from Western copyright owners that resulted in diplomatic threats against the Taiwanese.<sup>242</sup> The 1990s saw a significant reduction in piracy as Taiwan's rapid economic growth, legal reforms, and increasingly sophisticated electronics industry led to increased domestic support for effective copyright laws and norms.<sup>243</sup> A decade later, Taiwan's piracy rate for music is still slightly above 40%.<sup>244</sup> This level is markedly better than the piracy rate in China, to be sure. But if it took Taiwan, which has had closer political and economic ties to the West for much longer than China, decades to reduce the piracy rate, it is difficult to imagine that China could do the same in less time. Although during the last decade China has made gains of its own regarding intellectual property protection, it has a far greater territory to control and nearly sixty times Taiwan's population, with all the attendant difficulties of reforming the political, economic, and social institutions of a country so large.

Many observers are convinced that intellectual property protection in China will begin to develop in earnest when Chinese companies them-

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Shanghai); STATE COUNCIL REPORT, *supra* note 209 (“[A] complete IPR protection system cannot be established overnight. China has a long way to go in this regard, and is faced with heavy tasks in IPR protection.”); *IPR Infringers Face Lengthy Jail Terms and Hefty Fines*, *supra* note 125 (expressing “little hope” for a short-term solution to widespread intellectual property infringement but cautious optimism that gradual improvement in the legal system and enforcement efforts will result in long-term reductions in infringement).

241. See STATE COUNCIL REPORT, *supra* note 209 (concluding that “the Chinese government is clearly aware that, in a large developing country with a population of 1.3 billion, relatively backward economy and low level of science and technology, a complete IPR protection system cannot be established overnight”).

242. See ALFORD, *supra* note 26, at 96-104.

243. See *id.* at 108.

244. IFPI, THE RECORDING INDUSTRY COMMERCIAL PIRACY REPORT 2004, *supra* note 10, at 11.

selves increasingly fall victim to infringement. That is, once Chinese companies' interests are at stake, those companies and the Chinese government will be compelled to improve the overall level of intellectual property protection.<sup>245</sup> There can be little doubt that domestic interest in intellectual property protection is central to the maturation of the Chinese intellectual property system as a whole. Still, it is unclear how much this wisdom applies to the Chinese music and film industries, which have long been victims of piracy and sought improved protection, but have had little success reducing piracy levels. Moreover, going forward, there is no guarantee that Chinese authorities will work to enforce all intellectual property laws with equal intensity, nor is it likely that enforcement resources will be allocated equally for protection of patent, trademark, and copyright.<sup>246</sup>

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245. See, e.g., Odessey, *supra* note 143 (noting that while central government authorities see the danger piracy poses to domestic industries, local governments are not yet convinced of the interests at stake).

246. The government apparently considers patents to be more essential to China's overall economic growth and stability than copyright. The emphasis on patent and trademark is apparent in the 2005 Draft Plan for National Economic and Social Development. REPORT ON THE IMPLEMENTATION OF THE 2004 PLAN FOR NATIONAL ECONOMIC AND SOCIAL DEVELOPMENT AND ON THE 2005 DRAFT PLAN FOR NATIONAL ECONOMIC AND SOCIAL DEVELOPMENT, 10th Nat'l People's Cong., 3rd sess., Mar. 5, 2005 [hereinafter 2005 Draft Economic Plan]. The Plan expressly identifies the need to develop intellectual property to protect "key technologies" and to continue to develop "[h]i-tech industries that can greatly stimulate economic development," including biology, integrated circuits, and software, to be owned by state and private companies, as well as the need to develop proprietary high-tech equipment under Chinese brands. *Id.* Regarding cultural works, the plan indicates an aspiration to "continue to develop . . . social undertakings to satisfy the spiritual and cultural needs of the people" and "energetically develop culture, radio and TV, film, the press, publishing and sports." *Id.* The cultural industries, however, are not identified in the plan as key economic contributors. See *id.* Likewise, news reports on national and regional intellectual property strategies indicate a strong emphasis on developing intellectual property rights to spur high-tech innovation, and typically make little or no mention of copyright. See, e.g., *Nation Plans IPR Protection Strategy*, CHINA DAILY, June 3, 2004, <http://www.china.org.cn/english/BAT/971173.htm> (mentioning "patent," "research," or "technological innovation" numerous times in relation to the forthcoming national strategy on intellectual property rights, but failing to mention copyright protection or the music or movie industries); *Jiangsu Works Out IPR Scheme*, CHINA DAILY, Aug. 6, 2004, <http://www.china.cn/english/BAT/103159.htm> (reporting an intellectual property strategy developed for Jiangsu, a wealthy industrial province on China's east coast; the report suggests Jiangsu's strategy focuses on developing intellectual property rights in enterprise and industry, mentioning patent and "brands protection," but not copyright). There is historical precedent in China for the strategy of favoring patent over copyright in order to spur technological development, as the Communist party in the early years of the PRC, sorely in need of new technologies and attempting to rebuild a nation ravaged by decades of war, made patent law the "cornerstone of [its] early efforts at regulating intellectual property." ALFORD, *supra* note 26, at 57.

Despite the prognosis that piracy will remain a fact of life in China for many years to come, the present copyright law provides tangible effects. With pirates in larger cities having increasingly less freedom to operate in the open, there is some reason to believe that certain larger cities will eventually resemble the “piracy-free zones” envisioned above in Section IV.A.4, as the laws and regulations improve and general reforms gradually alter the Chinese political, administrative, judicial, and economic landscape. Furthermore, copyright owners have more effective options than ever before for legal recourse.

### C. An Alternative Compensation System for Sharing Music and Movies Online

As we examined the first two options for solving China’s piracy problem, we have generally considered the internet as a threat to the development of an effective copyright/anti-piracy regime in China. A third option takes the view that the internet presents an opportunity to combat piracy and advance the goals of Chinese copyright law more effectively than could be achieved through either strict enforcement of copyright law alone or alternative private business models that do not rely on copyright.<sup>247</sup> This option is an alternative compensation system (“ACS”) akin to those proposed by Professors William Fisher and Neil Netanel,<sup>248</sup> in which a governmentally sponsored award system encourages efficient, legal distribution of creative works over the internet and ensures that copyright owners are fairly compensated for the distributed works.<sup>249</sup> Most importantly, as a governmentally sponsored system, the ACS provides for the needs of consumers and creators alike, thus realizing copyright law’s underlying

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In the realm of copyright, software will likely receive priority from the Chinese government with regard to enforcement resources, having been identified as among the industries that “can greatly stimulate economic development.” 2005 Draft Economic Plan, *supra*. An emphasis on using copyright to stimulate the development of useful and scientific works also has some historical precedent, as the first pronouncements the PRC passed in 1950 concerning author remuneration stipulated that writings related to science were to be more highly valued than those in the humanities. ALFORD, *supra* note 26, at 60. The movie and music industries in China are too small, and are too irrelevant to China’s overall economic prosperity, for one to imagine the government expending significant resources stamping out piracy of music and films.

247. See, e.g., Maney, *supra* note 25; see also *supra* text accompanying notes 227-231.

248. WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 199-258 (2004); Neil W. Netanel, *Impose a Non-commercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1 (2003).

249. See FISHER, *supra* note 248, at 202; Netanel, *supra* note 248, at 4.

goals by ensuring both fair compensation for creators and liberal access to creative content for consumers.<sup>250</sup>

This Section begins with an overview of the ACS concept, followed by a discussion of how an ACS could be developed specifically for the Chinese market. I explore the merits and drawbacks of a Chinese ACS and discuss how an ACS would advance the goals of Chinese copyright law. Lastly, I consider the prospects for a Chinese ACS as a solution to the piracy problem in China.

1. *An Overview of the Alternative Compensation System (ACS) Concept*

In an ACS, copyright owners would register digital copies of their works with a government agency, such as the NCA in China, which would maintain the system and track usage of the registered works.<sup>251</sup> Those copies would be fingerprinted or watermarked with a digital code containing information about the work and the author, which would enable the system to track the work for accounting purposes.<sup>252</sup> End users could engage in non-commercial downloading and copying of those works from the internet, free of cost, copyright restrictions, advertisements, and encryption.<sup>253</sup> Files could be distributed via a peer-to-peer network or could be made available for downloading and streaming from a centralized location on the Web. The system could also be structured to streamline the licensing of creative works within the system for use in new derivative works.<sup>254</sup>

In return for this legal access to registered works, users would pay a sales tax on products and services that enable file sharing, such as computer equipment with multimedia functions, internet access fees, MP3 players, CD and DVD writable media, and CD and DVD burners.<sup>255</sup> The agency would track, or estimate based on sampling data, how many times a given work is downloaded or “enjoyed” in a given period, and distribute a proportionate amount of the tax receipts to the copyright owner of that work.<sup>256</sup> The ACS would only apply to works copied from the internet; it would not affect works sold on physical media such as DVDs, VCDs, or CDs.<sup>257</sup>

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250. See generally FISHER, *supra* note 248; Netanel, *supra* note 248.

251. See *id.* at 203-04.

252. See *id.* at 223-34.

253. *Id.* at 202-03, 236-37, 247; Netanel, *supra* note 248, at 37.

254. See FISHER, *supra* note 248, at 234; Netanel, *supra* note 248, at 38-40.

255. See FISHER, *supra* note 248, at 216-23; Netanel, *supra* note 248, at 43-44.

256. FISHER, *supra* note 248, at 224; see also Netanel, *supra* note 248, at 53-54.

257. See FISHER, *supra* note 248; Netanel, *supra* note 248.

An ACS would offer several advantages over other alternatives discussed above.<sup>258</sup> An ACS would provide consumers with the most variety in entertainment at the lowest cost. It would save society and copyright owners the costs of policing the internet and litigating file sharing cases and would allow authorities and copyright owners to devote more resources to reducing physical piracy. It would provide much-needed, guaranteed revenue to copyright owners in place of what is now entirely lost revenue through file sharing. It would give musicians and filmmakers more direct control over the distribution of their works and would offer them at least the same level of exposure as they currently receive through the mass distribution of pirated works, with the added advantage that they would be compensated for the consumption of their works. It would avoid technological restrictions to access (and the potential for overreaching with these) typical in DRM encryption schemes. And it almost certainly would spur the further development of domestic computer and home electronics industries, which China considers key to national economic growth.

## 2. *Developing an ACS with Chinese Characteristics*

Providing a detailed blueprint of a Chinese ACS is beyond the scope of this Article and unnecessary, as variations of the ACS model have received thorough treatment elsewhere and should be adaptable to circumstances in China.<sup>259</sup> Following, however, are a few considerations regarding the development of an ACS for the Chinese market. These include deciding whether works by artists from other countries would be included in the Chinese ACS repertoire, revenue generation and taxation issues, and possible conflicts with China's copyright treaty obligations.

### a) *Repertoire*

What kinds of works are likely to constitute the system's repertoire? Assuming the system would only be accessible in China, at least to begin with, would the ACS offer songs and movies by Chinese artists only? Considering that a large percentage of popular music and movies in China comes from Hong Kong and Taiwan, would they be included as well? What about popular Western movies and artists, like Hollywood movies or American hip-hop artists?

Since the state is deeply involved in music and film distribution in China,<sup>260</sup> amassing a large catalog of Mainland recordings and movies

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258. See *supra* Sections IV.A. & IV.B.

259. See FISHER, *supra* note 248; Netanel, *supra* note 248.

260. See MERTHA, *supra* note 132, at 145-52.

should not be difficult. Many Chinese entertainment companies maintain close relationships with companies in Taiwan and Hong Kong. Since piracy also affects those companies, they likely would be willing to participate in the ACS. Chinese authorities would likely welcome their participation, since their works comprise a substantial portion of music and movies consumed in China. It probably would not be advisable for Chinese authorities to make participation mandatory, however, due to China's international treaty obligations, as discussed below.<sup>261</sup>

Whether China would welcome or even permit other foreign works in the ACS presents a more complicated issue. If an ACS aims to prop up the Chinese music and film industries, Chinese authorities might be reluctant to permit a flood of Hollywood movies and Western music that would send a substantial percentage of the system's revenues to overseas copyright owners. Further, the Chinese government currently maintains a strict quota over the number of foreign films admitted for theatrical release in China each year.<sup>262</sup> While the quota may exist partly for economic protectionist reasons, it also functions for ideological and cultural reasons, and the government might be reluctant to allow the ACS to become a vehicle for even wider exposure to Western values through movies and music.<sup>263</sup>

Whether major Western film and music companies would want to participate in the ACS is unclear. Should China not permit them to participate, Western copyright owners might complain about a perceived barrier to free trade. They might be reluctant to complain publicly, however. Major movie studios and record companies are notoriously protective of their control over content distribution and disfavor any system, such as an ACS, which threatens that control.<sup>264</sup> As one major Hollywood studio executive admitted privately, should China ever implement an ACS, his company would refuse any official involvement for fear of the precedent it might set for development of an ACS in the United States and elsewhere. The company would carefully evaluate the Chinese system, however, and might reconsider its position should the ACS prove after some time to be the best way to make money in China.

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261. See *infra* text accompanying notes 278-284.

262. IIPA, 2004 REPORT, *supra* note 3, at 47 (observing that China currently has a policy of permitting the importation of only twenty revenue-sharing films for theatrical release each year).

263. See MERTHA, *supra* note 132, at 151 (discussing Chinese culture officials' efforts to ensure that foreign content (motion pictures, music, and television) accounts for only a small percentage of content distributed to Chinese consumers).

264. See KUSEK & GERD, *supra* note 205, at 36-41, 107-37.

b) Revenue & Taxation

The thorniest problem facing a Chinese ACS concerns the generation of revenue. The tax system in China is complex, inefficient, and seemingly perpetually in need of reform.<sup>265</sup> It suffers from problems similar to those plaguing copyright enforcement, including official corruption, underfunding of and inefficiencies in the tax administration system, and diverging goals and practices among local and central government officials.<sup>266</sup> Furthermore, the tax system is overly complex and lags behind the country's economic development.<sup>267</sup> Individuals and enterprises evade taxes; this problem is exacerbated by the fact that a large percentage of transactions are cash-based and, therefore, difficult to trace.<sup>268</sup>

A technical discussion of the tax law and policy invoked by the institution of an ACS is beyond the scope of this Article. Nevertheless, I will note that, although in China no sales tax is levied directly on consumers, businesses selling goods or providing services are required to pay a value-added tax (VAT) that functions like a sales tax, as businesses ultimately pass it along to consumers.<sup>269</sup> However, the VAT is currently only levied at one of four fixed rates.<sup>270</sup> What rate a taxpayer owes is determined by the category of goods or services sold, and whether the seller is considered a "small-scale" taxpayer (in which case a lower rate applies regardless of the goods or services sold).<sup>271</sup> The current fixed-rate VAT tax scheme does not appear conducive to the addition of an ACS tax, particularly given the legal and administrative changes that would have to be introduced to effect such a tax. Additionally, it is also probably politically unfeasible simply to divert a portion of the current VAT revenue to fund an ACS. Therefore, it seems likely that any tax-funded ACS will have to await fresh tax reforms. Perhaps proponents of tax reform in China might point to the ACS as an example of the potential benefits of a more efficient and flexible tax regime.

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265. See generally Trish Fulton et al., *Tax System and Policy Options, in CHINA'S TAX REFORM OPTIONS* (Trish Fulton et al. eds., 1998).

266. *Id.* at 25-26.

267. *Id.* at 14.

268. See generally Ping Chen, *Chinese Tax Reform: Unsolved Problems, in CHINA'S TAX REFORM OPTIONS* 57, 57 (Trish Fulton et al. eds., 1998).

269. Peter Kung & Koohn-Ming Ho, *The New Turnover Taxes in Practice, in CHINA'S NEW TAX REGIME* 12, 12-15 (Chris Hunter ed., 1994).

270. See Zeng zhi shui zan xing tiao li [Provisional Regulations on Value-Added Tax] art. 2 (promulgated by the State Council, Dec. 13, 1993, effective Jan. 1, 1994) (P.R.C.), available at [http://www.law-lib.com/law/law\\_view.asp?id=10027](http://www.law-lib.com/law/law_view.asp?id=10027).

271. See *id.* arts. 11-13.



Assuming the central government could now or in the future levy a sales tax on goods and services, what goods or services should be taxed? An ACS tax is most sensibly levied on products and services likely to enable use and enjoyment of the ACS. Such a tax would of course be both over- and under-inclusive, but this problem is not unique to an ACS. The kinds of goods on which the tax might be levied, then, are broadband internet access services (perhaps dial-up services as well, at a lower tax rate), computers with multimedia functions, MP3 players, portable MPEG video players, stereos, and other portable or home consumer electronics that play digitized movies or music, and blank CD-R and DVD-ROM media. Given the burgeoning popularity of directly downloading music, ring tones, and other content to mobile phones, enabling mobile phone access to the ACS seems an inevitable feature, thus making mobile phone service fees—and even the purchase of the phones themselves—legitimate targets of the ACS tax.

In reality, present economic conditions in China might make tax collection for many of these goods difficult. Many consumers buy their computers and electronic goods at kiosks in massive electronics marketplaces. Tax evasion by such small entrepreneurs is probably rampant, and many such retailers would surely bridle at the added burden of collecting and accounting for a minute tax on high-volume commodities such as blank CD-ROMs. It seems the most reliable source of revenue would come from a tax on internet services or mobile phone services, which employ transparent, reliable, and automated billing procedures.

How much should the ACS tax be? In other words, what is the value to Chinese society of the abundant supply of music and movies available through the ACS? Fisher notes this is a complicated theoretical question, but ultimately, both Fisher and Netanel suggest that for a U.S.-based ACS, the most appropriate formula for determining the value of the system is to ascertain what amount would make copyright owners “whole” for their losses suffered through their inability to enforce their copyrights on the internet in the peer-to-peer context.<sup>272</sup> In China, for practical reasons, such a formula is probably neither necessary nor desirable. The perceived value of the system will be low at the outset, given the low average income in China, the high availability of inexpensive pirated goods, the historical lack of a significant legitimate market on which to base valuations, and the fact that Chinese consumers have grown accustomed to paying extremely low prices for movies and music. Moreover, beleaguered Chinese copyright owners will not expect the system to make them whole for all their

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272. See FISHER, *supra* note 248, at 208-10; Netanel, *supra* note 248, at 47.

losses to piracy and thus will not have the same concerns about losing revenue streams through the ACS that their U.S. counterparts would have.<sup>273</sup> In reality, the present piracy problem already endangers all revenue streams. Many Chinese copyright owners are likely to embrace whatever income the ACS can generate as a veritable windfall and will prefer the ACS to the status quo so long as ACS revenues are substantial.

Therefore, the question for China is not how it should make copyright owners whole; the question, at least initially, seems to be what amount of tax would seem fair to most broadband subscribers while still providing substantial compensation to the movie and music industries after paying the costs of administering the system. This is an arbitrary formula for determining aggregate compensation levels, to be sure, and after some years it should be replaced by criteria more directly related to a determination of the value of the works in the system.

Of course, only the Chinese government, people, and music and film industries can determine an initial figure that is both fair to taxpayers and reasonably compensates copyright owners, but the following are some figures that hint at the possibilities. According to Chinese telecom industry figures, there are more than sixty-four million broadband lines in China at the time of this writing.<sup>274</sup> Most likely, not all of these are taxable individual accounts; some are likely government or similarly non-taxable accounts. The following calculation, however, assumes very conservatively that by the time China is ready to adopt an ACS, sixty-five million discrete taxable broadband accounts will exist. If the government was to levy on each of those accounts a small tax of, say, 6 yuan (72¢) per month, or 72 yuan per year, that would generate 4.6 billion yuan per year (\$564 million). Considering the value an ACS provides, an increase of 6 yuan should not be unpalatable to most broadband subscribers, as it amounts to about a 5% to 7% tax on typical monthly broadband fees in China of \$10 to \$13. Adopting Professor Fisher's conservative estimate of a 20% fee deducted for administrative costs, that still leaves nearly 3.75 billion yuan (\$451 million) to distribute among music and film companies. Putting that number in perspective, it is more than the total 2004 combined value of the legitimate Chinese music market (\$212 million) and movie market (\$180 million).<sup>275</sup> Most importantly, these potential revenue figures only

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273. See FISHER, *supra* note 248, at 209-14 (explaining how the potential loss of certain revenue streams in the United States through an ACS would concern U.S. copyright owners).

274. See *supra* note 179.

275. IFPI, THE RECORDING INDUSTRY 2005 COMMERCIAL PIRACY REPORT 10 (2005); *China Becomes World's Third Largest Film Maker*, PEOPLE'S DAILY ONLINE, Apr. 24,

account for one revenue source—broadband internet access. Revenue derived from multiple sources could push the number significantly higher. The government could also bring universities—undoubtedly among the biggest online piracy offenders—into the fold by charging a bulk rate for campus-wide access to the ACS, which universities might pass on to students as slight increases in their term fees.<sup>276</sup>

Cybercafes could also be an important source of revenue. Millions of computers connected to the internet through cybercafes provide the primary internet access points for nearly 30% of China's internet users.<sup>277</sup> A very small ACS tax could be levied on all cybercafe computers, which could be distributed among patrons as a slight increase in the hourly usage fee. The fee could be divided among so many patrons that it would be almost negligible to the individual user. In return, they would be free to use all that the ACS has to offer from any cybercafe computer. Cybercafes might instead consider providing ACS access to its patrons at no additional charge in order to gain an advantage over competing establishments. Alternatively, cybercafes might offer ACS subscriptions and software only on select computers, and charge slightly higher rates for the value-added service on those computers.

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2005, [http://english.people.com.cn/200504/24/eng20050424\\_182511.html](http://english.people.com.cn/200504/24/eng20050424_182511.html) (reporting 2004 total box office revenue in China was \$180 million).

276. Increasing university student term fees is a controversial proposal since millions of Chinese students come from poor families who cannot afford even a slight fee increase. This problem might be addressed in a few ways. First, on-campus pilot ACS programs might be offered in larger cities with wealthier student populations, then offered in other areas as economic development in those areas increases. This solution, of course, would only exacerbate the rich/poor divide problem discussed later in Section IV.C.4. Alternatively, universities might pick up the costs of the ACS themselves. Universities would have numerous reasons for doing so, not the least of which is the potential threat of liability for students' illegal file sharing. *See, e.g.,* Zhipei Jiang, *Legal Liability of Internet Service Providers for Copyright Infringement*, <http://www.chinaiprlaw.com/english/forum/forum7.htm> (last visited Apr. 14, 2006) (discussing secondary liability of internet service providers under Chinese copyright law); *see also* Hu lian wang zhu zuo quan xing zheng bao hu ban fa [Measures on Administrative Protection of Internet Copyright] (promulgated by National Copyright Administration & Ministry of Information Industry, Apr. 29, 2005, effective May 29, 2005) (P.R.C.), *translation available at* <http://www.chinaitlaw.org/?p1=print&p2=051006180113>. Regardless of whether such a claim would succeed, it is no doubt a fight copyright owners will contemplate, and one that universities would rather avoid. Lastly, China could adopt a combination of these approaches.

277. CNNIC, *supra* note 18, at 15.

c) International Obligations

China has acceded to three international intellectual property treaties that a Chinese government-sponsored ACS might implicate, including the Berne Convention (acceded in 1992), the Geneva Phonograms Convention (acceded in 1993), and TRIPS (acceded in 2001).<sup>278</sup> Reports indicate that China also intends to accede to the WCT and the WIPO Performance and Phonograms Treaty.<sup>279</sup> Article 2 of the Berne Convention requires copyright protection for “literary and artistic works,” expressly including musical compositions and cinematographic works, and subsequent articles grant authors the exclusive right to control the reproduction, public performance, and alteration of their works.<sup>280</sup> TRIPS incorporates these Berne Convention provisions by reference.<sup>281</sup> Furthermore, the Geneva Phonograms Convention only permits compulsory licensing of audio recordings “for the purpose of teaching or scientific research.”<sup>282</sup> An ACS, however, is a compulsory licensing scheme that contemplates a much broader scope of uses than those allowed under the Geneva Phonograms Convention.

Could China implement an ACS and not run afoul of these provisions? Professor Fisher believes that an ACS likely violates TRIPS and the Berne Convention and recommends modifying the Berne Convention to permit such a system.<sup>283</sup> His book, however, contemplates implementing an ACS in the United States, which few would disagree holds more sway in international intellectual property matters than China. Modifying the Berne Convention to enable adoption of such a controversial system is not likely an option for China. However, China probably could avoid breaching its obligations under the Berne Convention, the Geneva Phonograms Convention, and any other intellectual property treaties by making ACS registration optional for copyright owners. Those copyright owners who wish to receive a proportion of the distributed revenue must register their work with the ACS-administering agency and agree to license the works for distribution and copying according to the rules of the system. Those owners unwilling to grant such a license could choose not to include their works in the ACS. Certainly, no treaty prohibits voluntary licensing of copy-

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278. Berne Convention, *supra* note 69; Geneva Phonograms Convention, *supra* note 70; TRIPS, *supra* note 76.

279. See *Halting Online Copyright Violations*, *supra* note 180; WIPO Copyright Treaty, *supra* note 87; WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76, available at <http://www.wipo.int/documents/en/diplconf/distrib/95dc.htm>.

280. See Berne Convention, *supra* note 69.

281. See TRIPS, *supra* note 76, art. 9.

282. Geneva Phonograms Convention, *supra* note 70, art. 6.

283. FISHER, *supra* note 248, at 248-49.

righted works. In practice, however, it stands to reason that few Chinese copyright owners would not opt to include their works in the ACS, as inclusion in the ACS would promise potentially significant income.<sup>284</sup>

d) Technology

An ACS could be centralized, like Apple's iTunes<sup>285</sup> music store. In that case, all authorized users would access a central website to download files stored on servers maintained and controlled by the ACS-administering agency. Alternatively, the ACS could employ a decentralized, peer-to-peer system. Would a Chinese ACS be "open," that is, accessible by anyone from any computer anywhere, or "closed," that is, accessible only by authorized users? A closed system seems the best choice in China for at least the following three reasons. First, the global character and open architecture of the internet makes international leakage one of the great challenges facing any ACS.<sup>286</sup> Chinese taxpayers would be funding the ACS; in return, only Chinese taxpayers should enjoy the benefits of the system. People in other countries, including millions of overseas Chinese living around the globe, should not be able to access the system and enjoy unlimited music and movies at the expense of Chinese taxpayers.<sup>287</sup> Making the system closed would help stem the leakage, and, perhaps more importantly, help defeat any popular perception by taxpayers that they fund the world's entertainment portal.

Second, world tastes in movies and music are not going to precisely track Chinese tastes. For example, Jackie Chan movies might only account for a relatively small percentage of all downloads by taxpayers in China, but because he is an international star, downloads of his films will be disproportionately higher in the rest of the world than downloads of most other Chinese films. While one could argue that he deserves a higher percentage of the distributed revenue because his works were enjoyed more frequently than those of others, it seems substantively unfair to skew distribution proportions based on the preferences of people who are not contributing funds.

Third, an internationally accessible Chinese ACS, which would give users in other countries unlimited access to free content, would threaten to

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284. As noted above, even if foreign copyright owners are permitted to include their works in the ACS, there is reason to believe many would refrain from doing so, at least for a time, despite the potential income. *See supra* Section IV.C.2.

285. *See* iTunes, <http://www.itunes.com> (last visited Feb. 28, 2006).

286. *See* FISHER, *supra* note 248, at 245.

287. To supplement revenue and make Chinese media available globally, the government could offer paid memberships to customers in other countries.

usurp any legitimate overseas markets for Chinese movies and music. This problem would not only undermine one of the goals of establishing the ACS in the first place, that is, to help fund the struggling Chinese music and movie industries, but it would also be a tremendous disincentive for entertainment companies with films and artists popular outside of China to include their works in the ACS.

There are a number of ways to make the ACS a closed system. It could be designed to permit access only to users connecting from IP addresses verifiably located within China. Alternatively, the government could require that users apply for a user name and password that would be automatically requested for verification upon connection. The application process would be designed to ensure that the user is a resident of China. A combination of these techniques might also be used. There are sure to be other ways to design the system to keep leakage to a minimum. Naturally, there also would be ways to fool the system. Sophisticated users in foreign countries might trick the system into thinking they are signing on from a Chinese IP address. Or valid user names and passwords might be shared privately or posted online. But the apparent ability of for-pay services like iTunes and Napster 2.0 to avoid violating their licensing agreements by limiting transactions to specific territories suggests that even existing technology could reasonably ensure the system's integrity.

### 3. *Merits of an ACS in China*

The following subsections detail reasons why an ACS might be an attractive option for Chinese consumers, the Chinese recording and film industries, and the Chinese government. Regarding most or all of the following benefits, an ACS is likely to provide more significant and immediate gains than the other policy alternatives discussed in this Article, namely, cracking down hard on piracy and staying the present course.

- a) An ACS would help China make significant strides toward solving the problem of internet piracy by legalizing file sharing, and could help reduce physical piracy.

As dire as the current piracy problem is, the internet threatens to make it much worse. In a single stroke, an ACS would legalize a high volume of activity that is currently illegal. Authorities could avoid diverting attention and resources to a huge number of transactions on the internet, and could instead devote those resources to the fight against physical piracy.

Certainly, an ACS would not end all copyright infringement online, as some kinds of file sharing would continue to be illegal. For example, an ACS is not very appropriate for software, because software pricing varies

significantly.<sup>288</sup> As cultural works with subjective value, most songs are valued equally on the market, as are most films.<sup>289</sup> As tools with practical application and, therefore, more objectively discernable value, software varies dramatically in price from a few dollars to thousands of dollars depending on numerous factors including research and development costs and the software's level of technological sophistication. An ACS that apportions royalties based on download popularity would not adequately reflect the value of most software. Thus, unauthorized sharing of software would continue to be illegal, as would unauthorized sharing of songs and movies outside of the ACS, posting of copyrighted text online without the author's permission, or any other form of copyright violation online. Nevertheless, an ACS would enormously reduce the amount of copyright policing on the internet.

One of the most important advantages of an ACS is the effect it would have on physical piracy. As broadband internet penetration increases and the ACS begins to overtake prerecorded media as the primary source of music and movies for personal use, the ACS promises to "shrink out" the pirates who rule the market for physical media. It would be impossible for pirates to provide consumers with anything close to the value available through the ACS, and the pirates' market would diminish. Slowly choking off the pirates' market in this way would be superior to other strategies for defeating piracy. Unlike strategies that call for increased copyright enforcement efforts, shrinking the market for pirated goods would reduce rather than increase the burden on the state's administrative and judicial organs. It would allow copyright owners to reinvest or pocket profits that would otherwise have to be spent tracking down and suing pirates. It would circumvent present barriers to enforcement, such as local protectionism, official and judicial corruption, and administrative inefficiency. And it would avoid the social and economic disruption that would result if copyright laws were suddenly strictly enforced and thousands who earn their living through manufacturing, distributing, and selling pirated goods were abruptly jailed or left unemployed.

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288. See Netanel, *supra* note 248, at 41-42 (observing that software, as distinguished from works of artistic expression, has an objective, instrumental, and hence measurable, value).

289. For example, a Britney Spears song and a nineteen-minute Beethoven symphony are both 99¢ on iTunes, and most films on DVD are in roughly the same price range as other films on DVD regardless of genre or film production costs.

- b) An ACS would help the domestic Chinese music and movie industries thrive.

With an ACS in place, Chinese artists, filmmakers, record companies, and movie studios would be guaranteed fair compensation for their works through a system relatively free from the threat of piracy. Competition with other music and movies for a share of the distributed proceeds would create incentives for individual artists, record companies, and film companies to continually create new content of increasingly superior quality. The government should enact regular tax increases to reflect the growing value of the ACS. These increases, in turn, would encourage new independent artists and allow record companies and film studios to invest in new projects and diversify their stable of artists or films, enabling them to take more creative risks. The cycle would continue as the ever-increasing richness of works available draws still more consumers and contributors into the flourishing online marketplace of creative expression.

Moreover, the ACS might be structured to encourage the development of even more new content by enabling streamlined creation of derivative works. Professors Fisher and Netanel envision an ACS that recognizes a reality of creative expression in the twenty-first century: the use of preexisting works as building blocks in new works is central to the creative process.<sup>290</sup> Digital sampling and mash-ups are but a few examples. The ACS could be structured to permit easy, automated licensing of existing works for use in new derivative works.<sup>291</sup> This would enhance the overall cultural wealth of society, as well as provide a further boost to the ACS in terms of the volume of works available and provide even more incentive for people to use the system. It might be at odds, however, with some of the moral rights provisions in Chinese copyright law, such as the rights of revision, integrity, and attribution of authorship, which empower authors to control how their published works may be altered.<sup>292</sup> Assuming the development of adequate digital watermarking technology, the system could preserve attribution of authorship by ensuring that the digital information encoded in the stamp or watermark for each work contains proper attribution to any authors of the original work (and intervening derivative works). Whether permitting such derivative uses would contravene the rights of revision or integrity is a more complicated question about

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290. See FISHER, *supra* note 248, at 234-36. Cf. Netanel, *supra* note 248, at 38.

291. See FISHER, *supra* note 248, at 205, 236.

292. See 2001 Copyright Law art. 10 (amended by the Standing Comm. Nat'l People's Cong., Oct. 27, 2001, effective Oct. 27, 2001) (P.R.C.).



whether those rights should be waivable or modifiable to some degree under Chinese copyright theory.<sup>293</sup>

Adopting an ACS would also help content producers by reducing overhead costs. Companies and individual artists could decrease or eliminate their expenditures for pressing, packaging, and distributing their content on optical media.

- c) An ACS could provide Chinese consumers with access to an unprecedented wealth of music and film entertainment for considerably less than what most consumers of music and movies currently pay, even for pirated products.

For the cost of a few pirated music CDs per consumer each month, an ACS could provide unlimited, DRM- and advertisement-free music and movies.

- d) An ACS could spur growth in the Chinese computer, home electronics, and internet industries.

The tremendous increase in music and film entertainment that the ACS would make available through the internet should help drive consumers to purchase the high-tech products needed to enjoy the content. This drive would spur demand for numerous primary electronic products and services, such as broadband internet access, computers, MP3 players, and home theater equipment, and help grow the domestic Chinese consumer electronic industries. It would also boost sales of ancillary products in seemingly countless diverse categories from wiring cables to Wi-Fi transmitters and receivers, as well as home video and audio recording equipment and software as more people feel an incentive to create at home and publish their works on the ACS. The system also likely would drive the development of entirely new products and service industries revolving around making the ACS experience more useful, enjoyable, and convenient.

- e) An ACS could help increase respect in China for intellectual property laws.

A likely reason intellectual property norms have a difficult time gaining traction in Chinese society is that the economy has grown at a dizzying pace since the 1980s, with no signs of slowing despite China's poor intel-

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293. Chinese copyright law and theory are unclear on this point. It seems clear, however, that book publishers may revise and alter an author's work so long as the author has given permission. See FENG, *supra* note 90, at 118 (suggesting that authors of audiovisual works may also grant permission to alter such works).

lectual property protection record. While some in China might be aware in the abstract of the benefits of effective intellectual property protection, Chinese society simply has not experienced the tangible benefits of a system where creators receive fair compensation for their work. Thus, the individual's perceived benefit of buying or downloading pirated works (low cost) outweighs the perceived harm to society (low quality products and lack of indigenously produced works).

With an ACS in place, more Chinese citizens than ever before would pay for legitimate music and movies. Those paying the tax would have a strong incentive to use the ACS as their primary source for personal and home entertainment. ACS users would experience first-hand the increased quality and variety of indigenously produced audiovisual works and correlate the blossoming cultural industries with compensation for legitimate use. The experience could prove a valuable springboard to greater social and political enthusiasm for protection of intellectual property rights.

#### 4. *Potential Problems*

This Article has discussed some potential drawbacks of a Chinese ACS, namely, difficulties surrounding the raising of revenue through taxation,<sup>294</sup> international leakage,<sup>295</sup> and possible conflicts with China's treaty obligations.<sup>296</sup> Other potential problems include increased government intervention in the dissemination and consumption of art, stifling the innovation of private business models, bureaucratic rent-seeking, and exacerbating the growing divide between China's rich and poor.

##### a) *Governmental Intervention*

Government involvement in the funding and dissemination of art poses a significant problem for an ACS funded through taxation. This problem exists with any such system and is hardly unique to China. Indeed, Professor Fisher counts the opportunity "for government officials to indulge their biases" about art as "one of the primary hazards of an alternative compensation system."<sup>297</sup> There is reason for particular concern in China, however, given the country's long history of state censorship and present policies for censoring or banning heterodox works.

In one sense, governmental involvement in an ACS probably raises fewer red flags in China than it would in the United States, where the government historically has had less direct involvement in the creative indus-

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294. See *supra* text accompanying note 269.

295. See *supra* text accompanying note 286.

296. See *supra* text accompanying notes 278-284.

297. See FISHER, *supra* note 248, at 234.

tries. In this sense, an ACS would not leave Chinese consumers any worse off than they are now in terms of government control. Presently, state culture and propaganda agencies are deeply involved in publishing and disseminating art, including legitimate music and motion pictures in China.<sup>298</sup> Implementing a system of government-controlled dissemination of movies and music online would do little more than move the present real-world entertainment industry model into cyberspace. This is in contrast to Western democratic countries, where such works are produced and distributed through private commerce. In these countries, an ACS would introduce more governmental involvement in the dissemination of music and films than currently exists.

One could argue, however, that Chinese consumers would be considerably worse off if an ACS were to successfully expand the market for legitimate works (all of which, in theory, are state-approved) and concomitantly decrease the market for and availability of pirated works. In Section IV.B, I noted that, from the consumer perspective, the current state of poor copyright enforcement has the fortunate byproduct of flooding the black market with a tremendous variety of audiovisual works beyond the reach of government censors. The ACS would be administered by a government agency—probably the NCA—that is closely tied to the system of state propaganda and censorship.<sup>299</sup> A successful ACS would arguably further tighten propaganda officials' grip over the dissemination of art and information while invigorating them with a sharp increase in funding through ACS administrative fees. So, the ACS would not only decrease the market for uncensored, illegitimate works; it would also fund copyright and propaganda officials' efforts to further quash consumers' ability to access such works.

The increase in propaganda and censorship bureaucrats' power and funding is a serious concern, but it might be mitigated by two factors. First, most domestic Chinese works do not raise red flags for censors. The vast majority of pirated works are neutral in the eyes of government censors; that is, they are neither politically sensitive nor pornographic,<sup>300</sup> and thus most works would easily be included in the ACS system. Content considered politically sensitive surely would be barred from the ACS. But such content, when available at all, is available through underground channels, which would still exist even if an ACS were adopted. Similarly, to the extent that foreign works are barred from the ACS there would un-

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298. See MERTHA, *supra* note 132, at 145-52.

299. See, e.g., MERTHA, *supra* note 132, at 151 (describing the close relationship between the "culture bureaucracies" and copyright protection in China).

300. *Id.* at 144.

doubtedly be, due to their popularity, a thriving piracy trade in foreign music and films that would ensure public access to them until they are eventually permitted to register with the ACS system.<sup>301</sup> It seems censorship, whether in real- or cyberspace, never fails to create a thriving black market for desirable content made scarce through official action.

Second, as Andrew Mertha has pointed out, the same officials concerned with censorship are typically sensitive to market considerations and are more open-minded than many in the West realize.<sup>302</sup> It would be in the self-interest of officials administering the ACS to ensure that it is as successful as possible, as a thriving ACS would bring income and prestige to their organization. An ACS that is too restrictive with regard to permitting content would strangle itself, and it is a good bet that the officials involved would be fairly deferential to public tastes and demands and, therefore, try to be as inclusive as possible.

Of somewhat lesser concern are privacy and surveillance issues implicated by government involvement in distributing creative works over the internet. Professor Fisher writes that, for an ACS to work in the United States, the system's administrators must ensure the privacy of information gathered concerning individual usage patterns.<sup>303</sup> Assurances that usage data would not be made public would be important to the success of an ACS in China, as well, but the potential for the government to use such data for ideological purposes is perhaps of greater concern. Theoretically, the ACS technology could allow the government to trace individual preferences in films and music, using it as a method of surveillance. While this thought is certainly unsettling from a human rights standpoint, what are the practical implications? Most consumers' usage probably would never raise any red flags. In most cases, if the government deems a given film or song heterodox, the government's response would most likely be to remove it from the system rather than take action against end users who happened to download it. Nevertheless, the possibility of end-user scrutiny always exists in such a system.

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301. One might suggest this undercuts the argument for adopting an ACS in China in the first place because until state censorship policies are greatly relaxed, some level of piracy is always desirable. I am not arguing, however, that an ACS will eradicate all forms of audiovisual piracy. Rather, as a route to realizing the goals of the copyright law, an ACS is superior to the other alternatives discussed in this Article. Moreover, the implementation of the system can develop and improve over time: foreign works might be excluded from the system at first, but could be worked in over several years.

302. MERTHA, *supra* note 132, at 151-52.

303. *See* FISHER, *supra* note 248, at 228.

Therefore, the focus should be on whether an ACS would threaten end users' privacy to the point that it outweighs the benefits of the system. It probably would not. While the ACS's tracking ability theoretically makes end users more vulnerable than they currently are when purchasing physical media, it would not necessarily increase their vulnerability compared to their present risk when downloading illegal content from the internet. Indeed, downloading copyrighted works to one's hard drive without permission currently exposes one to civil liability under the copyright statute,<sup>304</sup> and distributing more than one thousand unauthorized copies of a work on the internet exposes one to criminal liability,<sup>305</sup> not to mention possible ideological red flags that might be raised by downloading or disseminating heterodox content. The technology and legal justifications already exist for governmental entities to track online activity and even make seizures and arrests. Any privacy violations to which users might be vulnerable using an ACS would not leave them worse off than they are now. In fact, an ACS probably would leave users better off than they are now in this regard because it would legalize an entire range of traceable internet activity for which users are currently civilly or criminally liable.

b) Stifling Innovation of Private Business Models

Section IV.B.2 discussed the likelihood that many copyright owners will shift to new business models in China that would provide them with fair compensation for their works and be less vulnerable to piracy. Adopting an ACS would likely defeat any need for private-sector development in China of movie and film content delivery systems on the internet. This development, in turn, could stifle the innovation of alternative private business models which, driven by market competition, might lead to a system superior in any number of ways to the ACS. An ACS, by contrast, is unlikely to develop as quickly as privately developed content distribution technologies forged in a competitive marketplace, thus undermining the ACS should its technology and user interface become outdated and lag behind contemporary technologies.

Despite the absence of market competition, the administrators of the ACS would have to continually develop or encourage development of content delivery technology that would be convenient, highly functional, attractive, and fun for Chinese consumers to use. To truly achieve its goals and provide the most accurate reflection of society's collective tastes, the ACS would have to be convenient and user-friendly enough that all users with a modicum of computer skills could take advantage of at least its ba-

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304. See XUE & ZHENG, *supra* note 89, at 64.

305. See *supra* text accompanying note 102.

sic features. If a single demographic—say, younger users with advanced computing skills—becomes the system’s predominant user group because the system proves too unfriendly for other users, the monetary distribution will be drastically distorted compared to the tastes of society or even the tastes of eligible users. To avoid this issue, the government might contract a private developer to design, update, and operate the system, paying close attention to user-friendliness, convenience, and powerful features. The government might even inject competition into the process by requesting proposals from several vendors and awarding the contract to the company with the most intuitive, attractive, and powerful system. Or, if peer-to-peer technologies are employed, the government could encourage the organic development of several competing technologies. It would also be crucial that the government involve Chinese music and movie industry groups in the development process, and maintain a constant dialog with them thereafter. It might make sense to have a panel of entertainment industry experts review the system periodically and make specific recommendations based on user satisfaction data. The more users join the ACS, the more money the entertainment industries stand to make. The entertainment industries’ incentive to ensure the system is user-friendly, reliable, cutting edge, and enjoyable should go a long way toward compensating for the lack of market forces.

It is worth reiterating that solutions developed in the private sector, which typically use technological restrictions to compensate for insufficient copyright protection, will not necessarily strike a healthy balance between the interests of copyright owners and society. Private-sector solutions often seem to shift the balance substantially in favor of owners’ rights.<sup>306</sup> Moreover, some observers believe legitimate for-pay internet music and film distribution services will never find success in China.<sup>307</sup> Instead, they believe music and film distribution will always remain largely in the hands of pirates and file sharers and outside the legitimate entertainment industry’s control. In such a business model, artists use their notoriety to seek revenue from other sources such as corporate sponsorships. If the sponsorship model is indeed the future of the Chinese entertainment industry, then an ACS would not be stifling the development of a superior business model since it would be a substantial improvement over the sponsorship model. An ACS would guarantee income to artists for the consumption of their works and would not preclude artists from also earning income from sponsorships, licensing, or other such sources if they

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306. *See supra* text accompanying notes 234-236.

307. *See, e.g.,* Maney, *supra* note 25.

choose to do so. It would, however, ensure that artists are not beholden to corporate sponsors, which are not easily found and can effectively limit artists' creative freedoms as much as government censors.

c) Bureaucratic Rent-Seeking and Infighting

The sample calculations for an ACS given previously envision apportioning 20% of the ACS's annual intake to a government agency, amounting to an administrative budget of nearly 346 million yuan (almost \$42 million). While the costs of setting up and operating an ACS are certain to be high, an ACS still puts a single government agency in a position to receive a large influx of money, opening the door for efficiency and rent-seeking concerns. It would be imperative that the ACS be structured to include a series of governmental checks and perhaps the opportunity for external review and recommendations by a board of music and film industry professionals.

A related problem is infighting among interested agencies. The same overlapping bureaucratic jurisdictions that create impediments to copyright enforcement in China<sup>308</sup> could work against the effective implementation of an ACS. China sports an exceedingly complex latticework of culture bureaucracies,<sup>309</sup> many of which could seek to stake a claim to or exert jurisdiction over some aspect of the ACS, potentially dooming it to stall in a quagmire of bureaucratic inertia and inefficiency. For this reason, it would be critical at the outset for the State Council, China's supreme administrative body, to designate one agency, presumably the NCA, with sole authority over all aspects of ACS administration—even powers and duties that other agencies hold in the non-ACS context. This issue is also critical with regard to tax collection. While an in-depth discussion of the conflicts and inefficiencies of the Chinese tax collection system is beyond the scope of this Article, ensuring the absolute minimum number bureaucratic units on all levels of government is involved in collecting taxes for an ACS is critical. At a minimum, establishing high-level working groups, with input from leaders of the creative industries as well as officials, appears mandatory to oversee the efficient administration of these systems.

d) Exacerbating the Divide between Rich and Poor

While it is true that most of China's hundreds of millions of rural poor have more pressing needs than a digital entertainment service, it is also true that the ACS, intended to enrich society with unprecedented access to creative works, would for many years remain a luxury of the urban elite.

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308. See *supra* Section IV.A.1.

309. See MERTHA, *supra* note 132, at 145-49.

The basic price of admission—a personal computer and an internet access account—is beyond the financial reach (and often, in the case of internet access, geographical reach) of a majority of Chinese. The ACS would be yet another in a long list of lifestyle improvements dividing the Chinese upper and lower economic classes. On the positive side, as China's economy develops, internet access will penetrate deeper into Chinese territory and society. An ACS would provide yet another incentive for people of all backgrounds to join the internet community as it becomes feasible for them to do so.

e) Remaining Issues

The ACS faces other challenges, perhaps the most threatening being the possibility of “gaming” the system, for example, downloading one's own song endlessly in order to “ballot stuff” the results and obtain an undue share of the distribution. This problem, and others, are not specific to China, and have already been treated at length by Fisher and Netanel.<sup>310</sup> Suffice it to say that although this issue and others pose problems for the system, there is good reason to believe that such problems can be reduced to an acceptable level, if not solved altogether.

5. *The ACS and Chinese Copyright Theory*

Although an ACS would be in some ways an alternative to current copyright laws, how do the principles underlying the system stack up against the goals of copyright law in China?<sup>311</sup> Indeed, an ACS as envisioned here would further many of the goals of Chinese copyright law better than a crackdown on piracy. True, an effective crackdown on piracy should help restore incentives to create, as an expansion of the legitimate market would allow the music and movie industries to invest in the creation of new works. However, Chinese copyright theory incorporates a strong, socialist-influenced public goods connotation.<sup>312</sup> While this fact is often ignored in the West, socialism is still, at least in theory, an important feature of Chinese copyright as it fits into China's “socialist market economy.” Even if an effective widespread crackdown on piracy were possible, it would not provide a strategy for advancing this element of Chinese copyright law and theory, nor is it likely to provide the rich diversity of creative works an ACS promises.

The ACS would produce a nearly optimal balance between providing economic incentives to create and providing an acceptable, even essential,

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310. See FISHER, *supra* note 248, at 226-34; Netanel, *supra* note 248, at 55-57.

311. See *supra* Section III.D.

312. See *supra* Section III.D.



role for the state in the development of the creative industries. While many in the West are wary of any system that relies on government involvement more than on market forces, throughout Chinese history, market forces did not drive creativity. China's incredibly rich artistic tradition was based on access, which allowed people to keep old works fresh by enjoying them repeatedly and using them as building blocks to develop new works. It was not based on copyright, which creates legal barriers to access, and which has, consequently, created a market for piracy. The state's role in an ACS need not, and should not, be overly intrusive. The state can, however, assume the admirable role of ensuring that a rich body of creative works is available to as many citizens as possible while simultaneously ensuring that those creating these works are duly rewarded for their important contributions. Such a system resonates with Chinese values and practices of the past and present.

#### 6. *Prospects for an ACS in China*

Would China ever consider adopting an ACS? China probably is not prepared to take such a radical step in the near future. The internet is young and the Chinese music and movie industries are still facing their heaviest losses to physical, rather than internet, piracy. Moreover, many observers still have hope that copyright enforcement in China eventually will improve dramatically and the market will begin to function as it does in the most developed countries. However, if copyright enforcement fails to improve significantly during the next several years and if rapid broadband adoption leads to levels of file sharing that undermine any gains made against physical pirates, industry groups might begin calling for a solution at least as radical as an ACS. If another country adopts an ACS first and China is able to assess the success of that system, China may resort to adopting an ACS, given that its internet policies are strongly influenced by the policies of other countries.<sup>313</sup>

There is reason to believe the idea of an ACS would be well received in China. In private interviews, a high-ranking official in Shanghai's General Legal Affairs Office praised the concept as "a truly proactive way of dealing with the piracy problem,"<sup>314</sup> while a music publishing executive

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313. See, e.g., *EU to Help China Build Modern Copyright System*, XINHUA NEWS AGENCY, July 7, 2004, <http://www.china.org.cn/english/international/100511.htm> ("China is of particular interest on how Europe is adapting to the challenges of the Internet society, which has provided major challenges against illegal piracy," said Liu Jie, the acting director general of copyright department of [the NCA]. "China needs to adopt such systems," he said.").

314. Interview on Jan. 7, 2005 (on file with author).

believed the system could prove to be a viable solution to his industry's woes. An influential Chinese copyright scholar privately called it a highly effective solution<sup>315</sup> to the piracy problem. Another noted intellectual property scholar, Xue Hong, recently proposed a similar system as a solution to internet piracy, describing it as a "win-win" proposition for Chinese copyright owners and end users:

If copyright owners and end users consider the problem from one another's perspective, we can fashion a win-win solution. For example, we could set up a compulsory licensing system through a collective administrative organization that would allow users to exchange legal copies of copyrighted works. Every user that exchanges works using peer-to-peer technology would be required to pay a small copyright tax (if the number of users is in the multimillions, the copyright tax per individual could be very low). The administrative organization can develop a software program that will work with peer-to-peer systems, requiring users to register automatically with the administrative organization when they log in, and pay a certain amount of copyright tax based on the quantity of the works they upload or download (those works authorized by the original authors or in the public domain would be exempted). With this system, users can exchange works at a low price, peer-to-peer providers are free of liability, and owners' compensation is guaranteed. Why not kill three birds with one stone!<sup>316</sup>

If more academics, officials, and entertainment executives become convinced an ACS is viable and would improve the fortunes of the Chinese music and film industries, if copyright enforcement conditions remain the same or worsen, and if privately held online content distribution systems have underwhelming success in China in the interim, an ACS could eventually receive serious consideration in China.

## V. CONCLUSION

In the Introduction, I suggested that China is poised at a crossroads, where the physical piracy of the twentieth century intersects with the specter of widespread internet piracy in the twenty-first century. This intersection of the "old" and "new" presents immense challenges as well as oppor-

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315. Interview on Jan. 12, 2005 (on file with author).

316. XUE HONG, ZHI SHI CHAN QUAN YU DIAN ZI SHANG WU [INTELLECTUAL PROPERTY IN ELECTRONIC COMMERCE] 367-68 (2002) (excerpt translated by Eric Priest and Wei Chen).

tunities and could be seen as symbolic of many aspects of China's reform, including the development of intellectual property norms. Piracy in China has been and will continue to be shaped by the tensions between myriad "new" and "old" cultural, economic, social, technological, and political forces. The piracy story in China is about the clash of socialism and free-market economics, which coexist simultaneously in this transitional period of a "socialist market economy." It is about the traditional political and cultural values of collectivism, state centralism, and emphasis of duties over rights intersecting with an ever-increasing awareness in China of individual rights, property rights, and intellectual property rights. It is, to some extent, about a generations-old Chinese association of intellectual property rights with colonialism and extraterritoriality and a renewed reluctance to allow foreigners to use intellectual property rights to leverage their way into an advantageous position in the Chinese market. It is about a society propelled by unprecedented economic development, with every manner of entertainment and innovative technology available to entice consumers, while the average worker subsists on one hundred dollars per month.

The government's present trajectory in the war on piracy—pursuing a long-term plan for improved intellectual property protection through measured reforms, education, and reliance on private parties to enforce their own copyright portfolios—will not solve the piracy problem or bring about significant relief to copyright owners for many years, if ever. In fact, the Chinese entertainment industry will likely turn to alternative business models that do not rely on copyright law to generate revenue before reliable copyright enforcement becomes a reality in China. The Chinese government's other major policy option for copyright enforcement—a truly effective crackdown on piracy in China—appears impossible in the foreseeable future. Too many political, institutional, economic, and cultural barriers to successful copyright enforcement exist, and Chinese consumers' have too strong an appetite for cheap music and movies. Indeed, the incentives for Chinese consumers to support the piracy trade have never been stronger. Piracy offers Chinese consumers a tremendous variety of works from all over the world at a fraction of the legitimate price. They accumulate huge libraries of music and movies, many of which would have been banned less than a generation ago. In a sense, pirated products represent a kind of consumer freedom—pirated goods are entirely free from government and corporate interference. In this way, attraction to pirated products in China is similar to the attraction many in the rest of the world have to the freedom from interference inherent in peer-to-peer content sharing.

The cultural factors contributing to piracy run deep. Even among academics, including legal academics, plagiarism in China is widespread.<sup>317</sup> Such examples seem to reveal a disconnect between what many in China “know” intellectually about the benefits of copyright protection for authors and society, on one hand, and their culturally informed behavior on the other. Copyright owners, especially foreign copyright owners, must be realistic about the prospects for reducing piracy in China. Those copyright owners who count all losses to piracy in China as displaced sales and hope for dramatic short-term improvement must lower their expectations. Reaching a law-based solution to the dearth of copyright norms in China will ultimately prove as nuanced and complex as the factors that accumulated to cause the situation. And that will take time—perhaps a very long time.

Meanwhile, the United States, while pressuring China to improve copyright enforcement, has experienced a growing chorus of voices from within seriously questioning the extent to which copyright is relevant and appropriate in the internet age.<sup>318</sup> They maintain that the internet poses the best opportunity in history to fulfill the promise of the original copyright bargain enshrined in the U.S. Constitution, that authors shall enjoy limited rights in their works in order to promote creation for the betterment of society.<sup>319</sup> Ironically, the seemingly endless expansion of copyright impedes, rather than facilitates, this promise by extending barriers to public access at a time when the internet could provide greater access than ever before.

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317. See Tim Johnson, *In China, Faculty Plagiarism a “National Scandal”*, MERCURYNEWS.COM, Mar. 22, 2006, <http://www.mercurynews.com/mld/mercurynews/news/world/14161154.htm>.

318. See, e.g., FISHER, *supra* note 248 (proposing an ACS for sharing digital works on the internet); LAWRENCE LESSIG, *THE FUTURE OF IDEAS* (2001) (arguing that the digital era gives new life to the public domain, therefore necessitating sweeping changes to the term of copyright); JESSICA LITMAN, *DIGITAL COPYRIGHT* (2001) (proposing that copyright law in the digital age be altered to better align the law with what Litman believes is the public’s view of the copyright bargain, thus copying a protected work for pecuniary gain would be infringement, while copying for private use would not); Andrew Kantor, *CyberSpeak—There’s Little Right with Today’s Copyright Laws*, USATODAY.COM, Nov. 19, 2004, [http://www.usatoday.com/tech/columnist/andrewkantor/2004-11-19-kantor\\_x.htm](http://www.usatoday.com/tech/columnist/andrewkantor/2004-11-19-kantor_x.htm). Kantor writes:

The copyright system can’t be repaired. It needs to be rebuilt from scratch with 21<sup>st</sup> century ideas, and in a world where it’s acknowledged that people can copy and distribute content quickly and easily. Rather than fight that idea with lawyers, guns, and money (© Warren Zevon), the law needs to embrace it and give users the kind of rights that it’s willing to lavish on producers.

*Id.*

319. U.S. CONST. art. I, § 8, cl. 8.

Ultimately, both overly expansive copyright protections and piracy threaten creativity.

It might be, then, that copyright law as we know it does not strike the best balance between society's interest in accessing a rich variety of reasonably priced works and compensating copyright owners' for their creative efforts. While the United States struggles to define the role of copyright on the internet, China, relatively unsaddled with the pressure of domestic old-media lobbying, can explore the internet's potential for defeating physical piracy and developing its domestic music and film industries. Driven to tap the internet's promise as a means of bringing the creator and consumer closer together while keeping pirates out of the loop, the private and/or public sectors in China might greatly contribute to the next-generation distribution-compensation model that provides both extensive access to, and fair compensation for, creative works without relying on copyright. Social benefit is a core principle of Chinese copyright, and Chinese society would benefit mightily from a system that could harness internet technology to energize its music and film industries, spur development of a rich corpus of creative works, and increase public appreciation for the rights of all copyright owners, domestic and foreign. The Chinese music and film industries, despite their relatively small size and impact on the Chinese economy, have an important role to play in China's development. As the spokesman for the NCA has observed, "Rampant piracy harms people's creativity, and a nation without creativity is a nation without hope."<sup>320</sup>

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320. *Officials, Entertainers Stage Events to Fight Piracy*, XINHUA NEWS AGENCY, Feb. 25, 2005, [http://english.people.com.cn/200502/27/eng20050227\\_174806.html](http://english.people.com.cn/200502/27/eng20050227_174806.html) (quoting Wang Ziqiang).