

THE MOVIE PIRACY INDUSTRY IN CHINA AND ITS RELATIONSHIP WITH
INTELLECTUAL PROPERTY RIGHTS

BY

Lori-Lin Shipman

Submitted to the graduate degree program in International Studies
and the Faculty of the Graduate School of the University of Kansas
In partial fulfillment of the requirements for the degree of
Master's of Arts

Tailan Chi, Ph. D., Business Administration

Committee Members

John Kennedy, Ph. D., Political Science

Hal Wert, Ph. D., History

Date Defended: _____

The Thesis Committee for Lori-Lin Shipman certifies
That this is the approved Version of the following thesis:

The Movie Piracy Industry in China and Its Relationship
with Intellectual Property Rights

Committee:

Tailan Chi, Ph. D., Business Administration

John Kennedy, Ph. D., Political Science

Hal Wert, Ph. D., History

Date Approved: _____

Table of Contents

Abstract.....	5
List of Tables.....	6
1. Introduction.....	7
2. Literature Review.....	9
3. Historical Background of Movie Industry and Piracy	
3.1 The Film Industry in China.....	13
3.2 Development of Movie Piracy in China.....	15
3.3 Optical disc technology: VCD and DVD.....	17
4. China and Intellectual Property	
4.1 Early development of China’s IPR Regime.....	20
4.2 Modern IPR Regime.....	23
4.2A Provisional Regulations on the Protection.....	24
of the Invention Right and Patent Right	
4.2B 1984 Patent Law and the China Patent Bureau or SIPO.....	24
4.2C The Trademark and Copyright Laws.....	26
5. Intellectual Property Rights Law	
5.1 Building a New IPR Regime	29
5.1A Sino-U.S. IPR Negotiations.....	29
5.1B Special 301.....	31
5.1C The IIPA.....	32
5.1D TRIPS.....	35
4.1E WTO.....	37
5.2 IPR at the Local Levels.....	39
5.2A The Cost of IPR Enforcement to Local Governments.....	39

5.2B The Local Court System and IP.....	41
5.3 Enforcement of IP Laws.....	43
5.3A Challenges of enforcement.....	43
5.3B Corruption.....	48
5.3C The Legal system.....	48
4.3D Difficulties with Copyright Enforcement and Yiwu.....	53
6. Conclusion.....	56
7. Bibliography.....	58

Abstract

The goal of this thesis is to determine the reasons for the continued existence of movie piracy in optical disc form in China. This paper will take into account the history of the movie industry and other cultural factors that may have influenced China's intellectual property regime, and how these elements have allowed movie piracy to develop into a rampant problem. Trade and other international agreements are considered and offer insight to the recent domestic laws pertaining to intellectual property. In addition, the practices of the local levels of government and courts provide a direct connection to law promulgation and enforcement. The complexities of these topics reveal the intricacies and relationships behind the continued existence of movie piracy in China. This paper supports the view that the Chinese government has the ability and capacity to enforce the laws, however, there are many complications associated with costs, political relationships and cultural factors that prevent effective enforcement.

List of Tables

Table 1	China's VCD Player Production.....	18
Table 2	PRC-Estimated Losses due to Copyright Piracy.....	33
Table 3	Legal vs. Administration Cases of Anti-Counterfeiting.....	49
	and Enforcement	
Table 4	AIC Trademark Enforcement Activity 1997-2000.....	55

Introduction

At the Shanghai International Film Festival in June 2007, the Motion Picture Association (MPA), the China Film Copyright Protection Association (CFCPA) and the organizers of the festival launched a nation-wide anti-piracy campaign. Distributing over 40,000 posters with a message from movie star Jackie Chang that read “Save the movies, say no to piracy,” the members of the movie industry aimed to reach the consumer in order to help stop this illegal activity (MPA 2007). According to the most recent calculations by the MPA, \$1.4 billion US in potential revenue was lost in 2005 to illegal copying in the Asia-Pacific region, primarily China. This calculation is done by estimating the potential revenue of a movie as it is released in a sequential order: U.S. release of movie, international release of movie, domestic home video market, pay television or cable, network television and then syndication (MPA 2007).

The problem of movie piracy in China emerged with the advancement of technology and the opening of the Chinese economy. Optical discs, in the forms of video compact disc (VCD) or digital videodisc (DVD), are produced in mass with ease and low production costs. Due to this, counterfeit movies offer a cheap form of entertainment to a large population. These factors alone have contributed to one of the most visible forms of piracy in China today. Nonetheless, movie piracy would not be as rampant as it is today if it were not for an environment that tolerates or even fosters its existence.

This paper looks into the reasons behind this illegal activity in China by examining the history of intellectual property rights (IPR) and the current legal applications of IPR by the Chinese Communist Party (CCP). It is also necessary to consider the relationship between the central and local governments and how this affects law enforcement. Moreover, the costs of enforcement could be a possible factor as to why the local governments have not fully honored the IPR laws. This paper supports the view that the CCP has the ability and

capacity to enforce the laws, however, there are many complexities associated with costs, political relationships and cultural factors that prevent effective enforcement.

To address these issues, it is necessary to examine the possible causes or independent variables such as the governmental relationships, cultural factors behind the acceptance of IPR and the costs of enforcing the laws that lead to the effect or dependent variable which is the existing piracy problem in the movie industry.

As China has risen to become one of the world's largest trading partners, there have been many efforts to address the problem of product piracy and the protection of IP. Legislation has been drafted to protect IPR of China's trading partners and domestic IP owners by way of the accession to the WTO and the TRIPS Agreement. While much of the IP legislation is economically driven, the MPA has been vigilant in its effort to stop piracy by working with the International Intellectual Property Alliance (IIPA). Still, the outcome shows that optical disc piracy is rampant.

Supporting the argument that movie piracy in China is due to a lack of political will, the Chinese authorities have at times resorted to corruption in order to preserve personal economic interests. The town of Yiwu is one such case where piracy serves as its main source of revenue and government officials foster the illegal industry. Additionally, movie piracy employs the majority of the Yiwu residents and without the piracy industry, the town would be faced with a huge unemployment problem. Moreover, when it comes to enforcing the law, penalties are inconsequential and the industry goes unaffected.

As piracy is driven largely by economic motives, the lack of IPR protection in China is made possible by the country's weak legal infrastructure, the complex relationship between the central and local governments as well as ineffective law enforcement and cultural perception of IPR. This paper intends to demonstrate that the culmination of these elements lead to the lack of enforcement of IPR laws that allows movie piracy to endure.

Literature Review

From weak governmental relationships to lack of IPR enforcement and tolerance, movie piracy in China persists with determination. A continuing problem throughout China, movie piracy subsists as a result of complex issues that have allowed this illegal industry to endure. While there have been many attempts to curtail this activity through the TRIPS Agreement and Special 301, there have also been many factors that have allowed it to continue be it cultural, governmental or economic. The literature used in this paper demonstrates the gradual development of piracy from a historical and cultural background through the creation of intellectual property legislation and enforcement. Furthermore, the connection between the central and local governments is taken into account, as this is an area of weakness that has an adverse affect on IPR enforcement. The scope of material used includes academic journal articles, government reports and findings, books that specialize in intellectual property and conference papers.

Building a historical perspective on the movie industry and how piracy evolved in China, the sources show a close connection to the Confucian ideals, the authoritarian regime and how the movie industry is perceived. A journal article by Wang and Zhu (2003) examines the outcomes of optical disc and film piracy in China as they pertain to media policy, history, technology and the market. This article makes the point of disregarding globalization as an independent variable as it solely focuses on the events in China related to the movie industry. It considers the Confucian ideals and how these have influenced the government policy on intellectual property at present and the growth of the movie piracy industry. Moreover, an important question from this work is whether or not Western ideals are being imposed on culture for pure economic motives.

Additional research on the movie industry in China consists of articles by Montgomery (2004) and Li (2004). Both authors describe the Chinese movie industry as one

that developed as a means to spread propaganda by the government and then transformed into a form of popular entertainment for the Chinese people.

As a major focus of this thesis, intellectual property is examined from varying viewpoints. Culturally, legally and historically, intellectual property is a concept that some believe to be fairly new to China and is at the crux of the economic and trade negotiations of this century. Presented in books by Alford (1995), Kong (2005) and Mertha (2007), intellectual property in China is thoroughly assessed and discussed in a manner that question whether or not China can fully embrace this concept as part of its culture.

Focusing on the stages of economic development and how IP evolves in this process, Kong (2005) emphasizes that IP standards are based on international ideals and that it is value of the costs and benefits that determine the level of IP protection. This is evident in the manner of which IPR matters are handled and enforced by the central and local governments. This is a very significant point as it exposes a weakness in the government's operations and gives insight to the breakdown of IP enforcement. Further, Mertha (2007) closely looks at the bureaucratic relationships and finds that it is the structure of the Chinese political system that has prevented consistent IP enforcement. Moreover, there is a common hypothesis found within these works that a divide between China and the industrialized world on intellectual property is largely cultural in nature that has influenced the lack of enforcement of IPR laws.

Laikwan Pang (2004) analyzes the participation of the Chinese State and similarly looks at the history behind the perception that the Chinese have uncivilized respect for IP laws, which results in the high rate of counterfeiting. Additionally, he poses a counter argument that piracy is a matter of individual rights and it is the nature of capitalism that aims to suppress this. Pang also discusses the problems of globalization in contemporary Chinese culture and the impact of movie piracy on China's collective identity.

An analysis by Barden N. Gale looks at intellectual property in China through the government's encouragement to become more innovative. It is difficult to think of IPR in China without considering the government's belief that intellectual property belongs to the state (Gale 1978). Gale's paper coordinates the drive for invention with IPR as he looks into the early formation of an IPR regime shaped by China's traditional values.

Supporting the endemic nature of the piracy problem, reports from the United States Trade Representative (2007) and the International Intellectual Property Alliance (2007) offer quantitative research that adequately maintains the argument that improper enforcement by the Chinese government is to fault for the high rate of piracy. The 2007 Special 301 report states that piracy of "hard goods", or obtaining movies by purchasing or acquiring an illegally produced VHS, DVD, or VCD through a commercial source or making illegal copies for oneself or receiving from a personal source an illegal copy of a legitimate VHS, DVD or VCD, is around 85 – 95%. This percentage reflects the estimated amount of pirated "hard goods" compared to the total number of all goods, VHS, DVD, VCD, on the market. Financial losses also contribute to the reports. The report contains recommendations by both organizations that advocate for an increase in the penalties for offenders is a necessary mean to reducing the illegal activity. However, it is uncertain as to whether or not the Chinese legal system has the resources to effectively implement the recommendations. Additionally, while these sources offer specific recommendations, they were lacking in that there was little attention paid to the cultural aspect of IPR in China. While there were recommendations on how to disseminate information and educate the Chinese authorities, there were not recommendations about educating the general population. It is clear that the main concern of these particular reports is economically based.

As China moved from a centrally planned economy to a market oriented one, it did not expect the rapid expansion of its trade and foreign investment. The effect of this

transition led to China's accession to the World Trade Organization and other international agreements. When China's economy began to open to the international community, it did not expect to face intense external pressure to abide by standards of other nations. Piracy surfaced as an urgent matter to be addressed as it has detrimental economic effects on many of China's trading partners as well as its own economic development. The argument of this paper relies on the research that supports that China's IPR reform, a result of external impetus, is insufficient to control the production of pirated goods by means of its legal and government institutions.

Furthermore, the established legal and judicial systems in China have taken on reform and the question is whether or not these forms of institutional infrastructure can successfully process intellectual property disputes. There are agreeing arguments by Yu (2002) and Chow (2003) that the current institutions do not have the experience, resources or will to uphold intellectual property rights and the outcome of this is the persistent manufacturing of pirated goods.

One of the most significant elements behind the continued piracy problem

The research for this paper consists of a range of literature, articles and reports that examine the movie industry and how illegal copying and distribution of movies became a major problem for China and its IP regime. Although China has existing IPR laws and international agreements, there is a disconnection between the implementation of such laws and enforcement. Looking at the poor enforcement of IP laws, the research supports the view that the problem not only lies within a cultural understanding of IP, but it also lies within the government institutions to adhere to the laws.

Historical Background of Movie Industry and Piracy

The Film Industry in China

To understand how movie piracy evolved in China, it is helpful to be familiar with the history of the film industry in China. It is this insight that will offer cultural significance as to how the Chinese audience viewed domestic films versus the appreciation of films that came from abroad. The early perception of film was seen as a ‘political, economic, military and cultural invasions of the West’ and carried with it a ‘deep colonial branding’ (Wang and Zhu 2003). Moreover, there is a considerable and historical difference between the domestic and international film appreciation, which in time played a part in the development of movie piracy.

As a means to reach the audience with political and social messages, the film industry served as a communication tool for the Chinese government. While the film industry didn’t truly begin until 1913 in Shanghai, the early films were not known for being creative works (Li 2004). Typically, the topics covered in film reflected the existing political campaigns by the government as it decided to use this media form to gain popularity in the 1930s and 1940s, (Pang 2004). Japanese aggression and the civil war were among topics in later films.

After the liberation of the Party in 1949, the government centralized everything from production to distribution and relocated the center of the industry from Shanghai to Beijing. In order to exert complete control over distribution, the China Film Corporation was created under the Ministry of Culture. The CFC managed the purchase of films and distributed them to the provinces. At this level, the provincial agencies would then distribute the authorized films to the smaller cities and towns. Ideally, this system aimed to supervise the type of movies that were shown to the viewers. On the other hand, this hierarchical practice only grew into an inefficient, bureaucratic system, which was removed from the audience (Pang 2004). Not only did the CFC work with any and all film divisions in China, it also managed

any of the few foreign distributors. After the Communist Revolution in 1949, American films were banned entirely in 1950 (Wang and Zhu 2003). With this tight regulation, the China Film Corporation enabled cinema to become the most influential vehicle for propaganda (Pang 2004).

Between the years of 1966 and 1972 during the Cultural Revolution, no films were produced. After 1972, movies consisted of pro-socialist messages from the state. Subsequent to this time period, movie making surfaced as a major entertainment form. Although under the censorship of the CCP, new styles emerged that reflected Chinese folk art such as shadow plays, puppetry and paper cuts in films (Australia-China Free Trade Agreement Feasibility Study 2004).

Film production during the 1980s, “the fifth generation of filmmakers”, and 1990s, “the sixth generation of filmmakers”, earned much international attention. While Chinese films earned worldwide acclaim, the film industry moved from the Ministry of Culture to the newly created State Administration of Radio, Film and Television, SARFT, in order to bolster government supervision and continue the message of the principles of the state as well as the importance of China over commercial and artistic element (Australia-China Free Trade Agreement Feasibility Study 2004). However, it allowed the co-production of films with other countries such as Hong Kong, Japan, France, Italy and the U.S.

Montgomery lays out a categorical division of how film production is currently divided. There are two types of filmmaking: legal or legitimate, and illegal or underground. Within the legal framework, state owned studios, foreign co-productions, quota imports and independent productions are all legitimate. Found within the underground division, films are distributed without government approval and those that are distributed through pirate DVD outlets.

Suffering from small budgets and control over the creative process, the industry began to weaken. Filmmakers sought new sources of finances from abroad that would not only furnish larger budgets, but the constraints on film content would not be in place. Furthermore, the low quality of government approved films and problems with distribution along with new social outlets such as bars and discos posed competition for the movie industry. Additionally, due to limited access to quality films, the Chinese audience welcomed movies from the international market (Australia-China Free Trade Agreement Feasibility Study 2004).

Development of Movie Piracy in China

The lack of entertaining, non-political, creative movies in China can be seen as a primary and logical explanation to the emergency of movie piracy and its success. Since the beginning of the film industry in China, funding and distribution are managed by the government for both domestic and international films. As a result of these factors, the variety of films presented to the Chinese was and still is restricted. It is logical to arrive at the conclusion that tight control not only contributed to the formation of the underground film sector, but it also reduced cultural diversity because the freedom to select such goods from an open market has been denied (Pang 2004). Consequently, films made outside of China are highly desired.

In *Piracy/Privacy: The Despair of Cinema and Collectivity in China*, Laikwan Pang puts forth an argument that piracy has largely emerged because of capitalism and the political culture has allowed it to flourish. He writes “Most frighteningly, piracy demonstrates the potent penetrating power of capital, which is now gained by the pirates instead of the Hollywood studios, to break down boundaries blocking capital’s expansion.” He continues with his point that movie piracy or “the force opposing despotism is now gaining an upper hand and overwhelming the State’s control.” In other words, movie piracy is driven by

economic motives and a government that used to have tight control over affairs of the state does not have control over this matter that Pang indicates is a lack of political will.

Pang views the cultural significance of movie piracy to be dissemination and disorder. He claims that movie piracy is the largest crime collectively committed by the Chinese people against the authority of both the State and the international culture (movie) industry. Making the State responsible for the existence of this crime, Pang stresses that the political culture of the State or any commercial party has no authority, rules and discipline regarding this matter and permits movie piracy to thrive.

Besides cultural factors, government policies and economic issues also play into the maintenance of the piracy industry. Economically, pirated goods have offered many people both a source of income and affordable entertainment. In addition, Mertha (2005) offers two very critical points in *The Politics of Piracy* that also help illustrate economic motives for piracy in a developing country such as China. He first states that the widespread diffusion of intellectual property, in this case movies and film, is often regarded as the most effective means to distribute material that will eventually lead to economic development and power. Secondly, he writes that many developing countries argue that they are too poor to pay for IPR royalties and should not be forced to pay if they cannot afford this. So, “if such technology is available and can be harnessed without royalty payments, the tendency to violate intellectual property becomes irresistible,” (Mertha 2007). This differs in Pang’s argument that piracy is the result of a lack of control of the State.

More importantly, it’s the state’s inefficient and ineffective policy on intellectual property protection that has allowed movie piracy to flourish. This ineffectiveness can be due to what Mertha (2007) identifies as two types of bureaucratic fragmentation. One form exists where there are jurisdictional cleavages that separate discrete bureaucracies, and the

other governmental fragmentation is based on geography where the national and local governments undermine each other and policy sees little success.

Aside from the above-mentioned causes, a major factor behind the rampant growth of movie piracy is technology. In the 1970s, piracy in the film industry appeared to be a problem when Sony introduced its consumer grade VCR. During the 1980s, video piracy became a more serious concern when Hollywood realized that a market existed wherever there was hardware capacity according to Wang (2003). In addition, Wang states that the VCR technology gave the consumer the tools to enjoy content sharing and allowed pirates to easily duplicate and distribute copies to the masses.

With better access to the commercial market, China's film industry evolved from being a media form that disseminated government propaganda to a major source of entertainment. Although the shift in movie content offered a new means of cultural expression, it also experienced censorship. The Chinese government put strict guidelines on the types of films that were shown in movie houses that not only limited domestic films, but also those from the international market in an attempt to control Western ideals.

Optical disc technology: VCD and DVD

Following the VCR, the VCD or video compact disc not only became the preferred technology for piracy, but it was also an unexpected challenge on the production and manufacturing end. The major movie studios and manufacturers of electronic hardware that hold, determine, and monopolize video and audio entertainment formats and standards were faced with a considerable obstacle (Wang and Zhu 2003). Designed both by Sony, Phillips and later Matsushita and JVC (Pang 2004), the VCD was seen in the West as a low technology and unsophisticated form that did not completely capture the essence of a movie's special effects. Rejecting this technology, the media conglomerates also believed that the

VCD was not to the level of the marketing packages typically found with the promotion of a studio film.

On the other hand, the VCD entered the Asian market with much success. According to Wang and Zhu (2003), *The Economist* cites that China had over 500 VCD manufacturers alone by 1998, and the VCD player sold for less than \$40 USD. Also key to its popularity was the weight and size of the VCD player. Not only was it affordable, it was easy to transport, carry and then, copy.

In the West, home audio-visual equipment has taken a progressive path from VHS to LD (laser disc) to DVD in the last two decades, each step representing an advance and a breakthrough in technology. In Asia, however, VCD took an alternative route: its use overlaps with the mentioned products, and it does not follow what we assume to be the normal technological path. With respect to visual and audio quality, VCD constitutes a technological regression when compared to VHS and LD, which were invented much earlier... The advantage of VCD is its low cost about \$0.3 per disc, allowing its retail price to go down to as low as \$1 (Pang 2004).

The VCD's content can be viewed from any VCD player or read from a CD-ROM drive on a PC. Furthermore, movie viewing was now both more convenient and affordable for the Asian consumer.

Table 1

	China's VCD Player Production				
	1997	1998	1999	2000	2001
Units	15.7 million	18.5 m	17.2 m	14.5 m	11.2 m
Revenue	\$1.97 billion	\$1.70 b	1.69 b	1.23 b	874 m

(Wang and Zhu 2003)

Pang (2004) writes that the technology of the VCD was well matched for the Asian household since many did not have a VCR. Due to its digital feature that allowed the VCD

to be played on the personal computer, the consumer did not have to purchase additional equipment to watch a movie. As a result, the price and accessibility took precedence over quality.

The characteristics of the VCD technology that made it popular in Asian markets facilitated a new branch of movie piracy. Using a CD-ROM burner, one can copy a movie at home with a minimal investment. In mass production, a two disc film only costs about \$ 0.35 USD and a single disc reproduction line can manufacture 20,000 copies a day. Once the copies are made, the entry barriers to the industry are low and profits are high (Wang 2003). With low production costs and a small amount of time needed to copy a movie, it is easy to understand how movie piracy has spread throughout China.

In the article “Mapping Film Piracy in China”, Wang and Zhu maintain that part of the VCD piracy phenomenon lies within the demand that far surpassed the supply. In a personal interview conducted by Wang and Zhu with Zhang Hui Guang, vice-director of the National Anti-Piracy and Pornography Working Committee and Jiang Ning Yuan, managing director of United East Audio & Video, Zhang and Jiang put forward a formula that illustrated the supply and demand of the VCD. According to the interview, there were approximately 40 million VCD players in China in the year 2000.

If each comes with a demand of 20 VCD per year, there would be in total 800 million discs a year of demand. In 2000, the legal supply of VCDs was 200 million discs, which leaves 600 million in unmet demands... Herein lies the crisis of content supply shortage. Pirated goods thus provide an easy solution for the shortage of content sources. (Wang and Zhu 2003)

With the high consumer demand and the simple technology, China became the largest producer and market for VCDs (Pang 2004).

While the VCD's basic format and versatility made it a popular entertainment system, the DVD technology shares similar qualities that have made it easy and inexpensive to copy

while it ironically improved the quality of the VCD as well. Superior in quality to the VCD, the DVD standard replaced the VCD. It not only had better capabilities, but it also had a better picture (Wang 2003). The counterfeit movie on DVD is sold for about \$1 USD in China (Guilford 2007). Interestingly, the American film companies believed that the new technology would curtail piracy. Nevertheless, bootleggers in China and elsewhere figured out the new technology and the spread of this information seemed to make unauthorized copying easier than ever (Buckley 2003).

Using either the VCD or DVD form to copy a film, the process in which movies are pirated is rather unsophisticated. During production, a film copy can come from the disc version or the theater version. The disc version is usually made from a legitimately produced form of the movie. Once it has been made, this is to be considered the master copy that can be reproduced in a home or sent off to a factory for mass production. For the latter, a pirate will go to a theater to record the movie by taking in a concealed camcorder. Although the quality may not be great as the recording will pick up background noise in the theater, subtitles or dubbing will be added before it is packaged and sold. The theater copy has an advantage as the pirate has copied a movie that has currently been released and will benefit from the marketing and promotion (Pang 2004).

According to the Motion Picture Association of America, 93% of DVDs sold in China are unlicensed copies (McDonald 2007).

China and Intellectual Property

Early development of China's IPR Regime

With technological advancement and openness to foreign direct investment, China has become a leading power in the global economy. Its pursuit of economic modernization began in the 1970s and a goal of this process was to formulate its own intellectual property rights (IPR) regime (Kong 2005). With much external pressure from the international

community, specifically the United States, China has taken major steps to improve its copyright and other intellectual property laws (Alford 1995). What's more, past threats to impose trade sanctions and accession to the World Trade Organization (WTO) have prompted China to take a more aggressive approach to its IPR regime in contrast to its earlier gradual efforts such as the enactment of the Copyright Law in 1990 (Kong 2005).

While IPR issues are at the core of China's trade policies today, an understanding of how the concept of intellectual property progressed may offer insight as to how product piracy and other IP violations achieved such magnitude. In Yu's article *The Second Coming of Intellectual Property Rights in China*, he argues that there are two distinct periods to China's IPR regime. He proposes that the first period or coming of IPR in China was shaped by many factors including Confucian beliefs, the socialist economic system and censorship. These distinct elements contribute to what he considers the framework of IPR in China and the foundation of the legal culture and judicial system.

Marked by the reopening of China in the late 1970s, Yu maintains that the second coming of IPR is characterized by its relationship over IP disputes with the United States. Underscoring the cultural differences, Yu claims that the piracy problem is due to significant institutional barriers that impair the protection and enforcement of intellectual property rights in China. These barriers are heavily rooted in Chinese culture and philosophy and explain the difference between the intellectual property ideals of the west and China.

Chinese law can be traced back to the first imperial dynasty, the Qin (221-206 b.c.) with an emphasis on penal code (Alford 1995). Criminal law, *fa*, served to maintain public order through the threat of force and *li*, ritual propriety, focused on maintaining a harmonious society and preventing conflict (Yu 2002). Traditional Chinese law is organized in a hierarchical structure in which there is not a clear delineation between criminal and civil law. The preservation of harmony is the main objective where the community and family come

before the individual. As this describes the traditional order, it also offers a rationalization to why individual rights and litigation became unnecessary in a Confucian society.

Both Alford (1995) and Yu (2002) make clear that there were early efforts in China to regulate publication and reproduction of printed materials. The Tang code was an edict that was issued in A.D. 835 by the Wenzong Emperor that prohibited the unauthorized reproduction by persons of calendars, almanacs and related items.

“Since the Chinese considered the emperor to be the link between human and natural events, this was meant to protect the emperor against findings that would have undermined the dynasty or predicted its downfall,” (Yu 2002). The Song dynasty continued with this decree by adding that other materials that were prohibited from reproduction included materials of the government, politics, pornography and using the names of the imperial family that were not beneficial to scholars. Yu points out that this was an attempt to control the dissemination of ideas.

In addition to the order on reproduction of written material, there was also a dynastic code in which certain characters or symbols tied to the imperial family were restricted. Also, those who made goods for the imperial family were also protected by local laws since they registered their brand names and symbols (Yu 2002).

Alford also raises the question of how China, known for its innovation and early science and technology, did not provide more comprehensive protection. Reiterating Yu’s point, it seems that the early trademark law was issued more or less to maintain the state’s authority through controlling the spreading of ideas. Regardless of these provisional endeavors, the creation of any formal intellectual property laws and enforcement were not attempted until the early twentieth century (Yu 2002).

When China opened up its coastal ports to Western trade in the 1840s, there was little foreign investment and trade was limited to tea, opium and silk. Items

were sold in bulk and were not sold with any specific brand name. Although objections arose due to poor grades of tea that were passed off as their more costly counterparts, substantial problems with intellectual property did not arise until decades later (Alford 1995).

After foreign trade began to grow during the late 19th and the early 20th centuries, intellectual property problems evolved as imports were becoming popular. Foreign merchants from the West assumed that the integrity of their trademarks would be honored in China as they were at home (Alford 1995), however, this was not the case. Although foreign trademarks were being copied, there was not much effort put forth to file a complaint with the Chinese government. Rather than undertake the Chinese legal system, foreign merchants brought their grievances to their local representatives of their home governments. In turn, their foreign consulates began to register marks with the Imperial Maritime Customs Service, however, these efforts turned out to be unsuccessful due to lack of enforcement.

After it acceded to the Paris Convention for the Protection of Industrial Property, the United States made its first move to protect intellectual property in China by enacting the Chase Act in 1903 (Yu 2002). This was designed to provide intellectual property rights in China for foreigners as well as offer copyright, patent and trademark protection in exchange for equal protection to the Chinese. With additional laws such as a patent law in 1912 and a trademark law in 1923, these laws formed the foundation of the laws that were later enacted by the government (Yu 2002). Although it seemed as if China was taking measures to prevent intellectual property violations, in reality, piracy worsened due to industrialization, the spread of literacy and the growth of the urban elite.

Modern IPR Regime

Mertha (2007) contends that the attitudes and events during the Mao Era (1949-1976) helped to influence the promulgation and progression of China's IP laws such as the 1984 Patent Law and the Copyright Law. Hoping to encourage innovation, China looked to the

Soviet Union's model to guide them. It was believed by both governments that invention is a public good and the dissemination of ideas was to be controlled. Further, innovation solely depended on the government, and IPR was not part of the economic makeup.

The whole process of knowledge creations was under the direct guidance of the government, which played the role of organizer and had no commercial dealing therein. That is to say, on the side of the consumption of knowledge, state-owned entities-whether government agencies or state enterprises-were in the position to have access, direct or indirect, to any intellectual property in the name of the state, (Kong 2005).

Gradually, the exogenous pressure, primarily from the United States, to build up IPR led to regulations that were borrowed from Western models rather than the former Soviet Union.

Provisional Regulations on the Protection of the Invention Right and Patent Right.

The Government Administration Council (GAC) approved the Provisional Regulations on the Protection of the Invention Right and Patent Right in 1950. Encouraging innovation, the GAC hoped that inventors would donate their ideas in exchange for an award (Mertha 2007). The regulations stated that new inventions pertaining to military technology, national defense or military manufacturing and inventions affecting the welfare of the great majority such as pharmaceuticals and agriculture qualified for the award (Hsia and Haun 1973). Clearly, the state would have full control, and if the GAC learned of an invention that was created in a state office or factory, the inventor would not be eligible for the award. At this point in time, the government was more concerned with the facilitation of the invention process rather than impose consequences for piracy or copyright violations.

1984 Patent Law and the China Patent Bureau or SIPO. In the 1980s, China began to work on establishing a patent law. With several meetings and revisions, the official Patent Bureau faced major counterarguments. Mertha cites in *The Politics of Piracy* the first being that the rights of a patent holder were in opposition to traditional socialist norms. Second,

China is a developing country with low-level technology, so a foreign company would have a hold on the market as their invention would hinder China's economic development. Third, foreign technology contributed to the development of China through copying. Lastly, there was concern that any patents pertaining to chemical or pharmaceutical manufacturing might have a detrimental effect on China's national interest.

On March 12, 1984, the Patent Law of the people's Republic of China was adopted and enacted in April of 1985 despite the resistance (Mertha 2007). Since then, there have been two amendments in 1992 and 2000. Currently, patents are filed in Beijing and the State Intellectual Property Office are responsible for administrative enforcement (U.S. Department of Commerce International Trade Administration 2005). One noticeable difference between filing a patent in China versus the United States is that China issues patents to those individuals who are first to file the invention rather than to the inventor. In the United States, patents are issued to the inventors, not to the first person to file.

The enforcement of the 1984 Patent Law was placed under the China Patent Bureau. Established before the finalization of the Patent Law, the Patent Bureau was to oversee the approval of applications for patents from abroad. Additionally, the Patent Bureau was under the State Science and Technology Committee, SSTC, and later moved to the State Economics Commission, SEC. This move reflected a shift in goals from a scientific focus to an economic one (Mertha 2007). Another change took place after the Seventh National People's Congress in which the State Council was now supervising the Bureau. It wasn't until March 1993, that the Bureau became an independent branch of the State Council and then renamed the State Intellectual Property Office (*Intellectual Property Protection in China* 2007). In 1998, SIPO became the office that would coordinate China's IP enforcement efforts by merging the patent, trademark and copyright offices under one authority (U.S. Department of Commerce International Trade Administration 2005). Mertha writes that the Patent

Bureau/SIPO became proficient in its technical functions such as the day-to-day matters and managing applications. However, it was institutionally powerless and politically weak. For the obvious reasons that the SIPO experienced many bureaucratic changes, it did not have the opportunity to develop into a mature, effective agency.

One of the most notable yet inadequate features of the SIPO can be found at the provincial level. After the promulgation of the Patent Law, provincial-level officers were created. Disseminating information about the patent process, serving as clearinghouses for local inventors and providing mediation for disputes, the local offices had many responsibilities and the specific details about the patent regime were unclear and ambiguous at times (Mertha 2007). Moreover, inconsistencies existed between the different offices and the manner of which patents were protected and enforced varied where some offices were weak and some strong. Although there are more sub-levels to the SIPO, the provincial offices provide an example of how the national government cannot be totally duplicated at the local levels.

Moving SIPO from one state office to another coupled with the unreliable and inconsistent operations of the provincial level offices illustrates how the intricacies of a large bureaucratic system can undermine the effectiveness and purpose of an agency.

The Trademark and Copyright Laws. The Trademark Law and the Copyright Law were the start of the systematic establishment of China's modern legal framework for IPR protection (Kong 2005). These laws, in addition to others, revealed that China recognized that an IPR regime could benefit the campaign to advance technology, which was at the root of its economic progress.

The General Principles of the Civil Law in 1986 states that the laws of China apply to foreigners. In Article 142, international agreements to which China has acceded contain

provisions that differ from those under China's laws; the provisions of international agreements shall apply (Kong 2005).

“A trademark in China is defined as anything composed of most words, designs, or other combinations. A registered trademark in China is protected as long as it is renewed periodically and its use continues,” (Kong 2005). The 1982 Trademark Law specifically states in section (i) of Article 38 that an infringement of a trademark can be “Unauthorized use of a trademark that is identical or similar to the registered trademark of another party in respect of the same or similar good,” (Kong 2005). The conventions of the Trademark Law look after the holder of a registered trademark in China, yet there is question as to whether or not foreign trademarks are equally entitled as evident by the many pirated goods that continue to exist.

Again, the Paris Convention of which China acceded makes clear that the member countries are bound to the agreements under the trademark provisions. In 1993, legislators added a new condition that corrected the error in the previous law. Still, it is noteworthy that the updated law reads “the holder of a well-known trademark, be it registered in China or not, enjoys special protection if the holder can prove that others have registered an identical or a similar trademark by copying, imitating, or translating the well-known mark in question...”(Kong 2005). The term “well-known mark” is not defined and consequently, this is a part of the law that makes trademarks vulnerable to copying and challenging to dispute.

The PRC did not have a comprehensive statute on copyright until the 1980s. A series of regulations were created between 1980 and 1986 that addressed written and audiovisual materials. Yet, the promulgation of the General Principles of the Civil Law, specifically Article 94, recognized copyright but did not possess detailed information or guidelines. Furthermore, the authorities did not have anything to refer and the resolution of court cases and actions on authorship took a lengthy amount of time (Alford 1995).

A feature of copyright law is that there are royalties and in a socialist society, the notion of such opposes the socialist ideology. With economic restriction, the National People's Congress, NPC, designed a system that allowed the state to set compensation amounts for authors although the amount was very modest. Besides controlling the amount of royalties an author can learn, the Copyright Law also made certain that any work that was not considered to be conventional would not receive the benefits of a copyright. "Works prohibited by law to be published and disseminated are not entitled to copyright protection, while also specifying that copyright holders shall not violate the Constitution and the law, or infringe upon the public interest, while exercising their copyrights," (Alford 1995).

With external pressure on China, the Copyright Law was intended to offer foreigners security while it limited the earnings for a domestic author, it did not limit earnings for a foreigner. Like the Patent Law, the Copyright Law encouraged administrative solutions to disputes rather than filing a complaint or lawsuit directly to the people's courts. With much debate and many revisions, the Copyright Law posed many problems because of its vague beginning. In the wake of the Special 301, the Copyright Law evolved to being more complex, however, the law has not prevented the uncontrolled rate of piracy as of today.

The Copyright and Trademark Laws show that there is legislation in place to regulate and protect the intellectual property of an individual or corporation, either domestic or international. In addition, government offices have been set up just to administer IP issues. These laws also demonstrate China's acknowledgment that intellectual property does exist and protection of IP is necessary for the continued its economic development. Yet, infringements can be seen in the number of pirated goods that are available. With these laws, the pirated goods can only exist due to a lack of will and the means to enforce them.

For example, Crutsinger's article *U.S. Blasts China Over Copyright Piracy*, U.S. Trade Representative Susan Schwab recently declared that the United States was losing

billions of dollars annually from piracy levels in China that were still unacceptably high. The article states that Schwab was to file two cases with the World Trade Organization that contends that Beijing's lax enforcement of copyright and trademark protections violates WTO rules, and the other will argue that Beijing has created WTO-illegal barriers to the sale of U.S.-produced movies, music and books in China.

Intellectual Property Rights Law

Building a New IPR Regime

China's economic growth and technological advancement have not only improved its standard of living, but they have also pushed China to the forefront of international trade. As the country now provides manufacturing, production and distribution for many multinational corporations, it also needs to reassure that intellectual property belonging to these MNCs is protected. That said, China had to rebuild and update its previous laws on IPR as well as create new ones and new agencies to oversee this. Much of this new legal work and policymaking is due to the international agreements China has consented and obligated to accede.

The Agreement on Trade-Related Aspects of Intellectual Property Rights, TRIPS, the accession to the WTO and the Special 301, have many legal and political implications that lead to the effectiveness and stability of China's legal system. China committed to being in compliance with these agreements by raising standards and making certain that these laws are enforced. Nonetheless, the reality is that one can still buy a counterfeit movie from a street dealer and neither the buyer nor seller faces any legal consequences.

Sino-U.S. IPR Negotiations. Sino-U.S. IPR negotiations began in 1979 when China agreed to protect foreign patents, copyright and trademarks in the U.S.-China Bilateral Trade Agreement of 1979 (Mertha 2007). As addressed earlier, China enacted its Patent Law in

1984, reworked the Trademark Law in 1982 and joined the Paris Convention on International Trade in 1985.

In 1989, bilateral Sino-U.S. working groups were established to examine issues on trade, investment and most important, intellectual property rights. One goal was to design an IPR regime that was more in line with the west. Copyright law was at the front of the agenda as these negotiations were taking place after the events of Tiananmen Square. As a result, the government was looking to impede freedom of expression and conservative members of the CCP viewed copyright infringement as a criminal offense.

In 1991, China was listed under Special 301 (see below) as a priority foreign country that was failing to protect the intellectual property of the United States (Mertha 2007). Among this grievance, human rights abuses and trade imbalance were also identified which led to the removal of the Most Favored Nation status. Later this year, the U.S. backed its move by arguing that the weak IPR protection in China caused substantial financial losses to American businesses. A deadline for China's compliance with the 1974 Trade Act was set for November 26, 1991; otherwise, the United States was going to place a 100% tariff increase on exports to the U.S.

The United States Trade Representative or USTR, the agency overseeing trade, led a delegation to China to discuss intellectual property, transparency and enforcement. At the center of these discussions were copyright for computer software and patents on pharmaceutical and chemical products. A ninety-day extension was granted to meet these demands before sanctions were introduced.

After talks resumed in Washington D.C. in January 1992, the United States and China finally reached an agreement. The Sino-U.S. Memorandum of Understanding (MOU) on the Protection of Intellectual Property was created with a strong focus on patents (Kong

2005). This agreement, although bilateral, contributed to the shaping of China's IPR regime as it committed to strengthening IP protection.

Special 301. Originally an amendment to Section 252 of the 1962 Trade Expansion Act, Section 301 gave the president more discretion in limiting imports, imposing tariffs and decision making on other trade issues without having to observe international obligations before taking unilateral action.

Future changes to this, which is Section 301 of the 1974 U.S. Trade Act, gives the responsibility to the USTR, the government agency charged with overseeing trade, to identify and investigate the countries that it deems to be engaging in unfair trade practices. The 1984 Trade and Tariff Act focused on inadequate IPR protection and it also extended Section 301 to include IPR.

Prior to this, Section 301 allowed measures on IP violations to be taken only if international law was violated. At this time, the IP standards of international treaties were not very high. Section 301 stated that "action was not required if a panel under the General Agreement on Tariffs and Trade determined that no unfair practices had taken place; since all GATT members had veto power, it was relatively easy to block decisions made by the panel," (Mertha 2007).

Not until the 1988 Omnibus Trade and Competitiveness Act, or 1988 Trade Act, were mandates for investigations and trade sanctions included for those countries that appeared to be violating U.S. IP. The 1988 Trade Act also stated that the final decision-making authority in Section 301 disputes was transferred from the president to the USTR (Mertha 2007). To add, the 1988 Trade Act requires that USTR provide Congress with an annual report on unfair trade practices abroad and it also contained the "priority foreign country" rubric (Mertha 2007). A country that turned up on the list was then targeted to suffer U.S. trade sanctions in consequence for its IP violations. Initially, this designated list seemed harsh and

excessive although it sent a clear and definite message to the international community that the U.S. was not going to tolerate any intellectual property infringements whatsoever. Since the original “priority foreign country” list received criticism not only by its trading partners but also by Washington, D.C., U.S. Trade Representative Carla Hills created two additional categories or rubrics that still conveyed the same message:

Countries which have the most onerous or egregious acts, policies, or practices and which have the greatest adverse impact on relevant U.S. products are designated “Priority Foreign Countries,” and at the end of an ensuing investigation, risk having trade sanctions levied against them. Countries can also be placed on other lists which do not result in immediate trade sanctions, such as “Priority Watch List” and “Watch List,” (IIPA 2007).

The IIPA. A few years before the 1988 Trade Act, a private coalition was formed to represent the U.S. copyright-based industries in both bilateral and multilateral endeavors that aimed to build up IP protection. The International Intellectual Property Alliance (IIPA) represents seven trade associations and since the 1988 Trade Act, the IIPA works very closely with the USTR on the Special 301 report. Those belonging to IIPA include the Motion Picture Association of America (MPAA), National Music Publishers’ Association (NMPA), Recording Industry Association of America (RIAA), Association of American Publishers (AAP), Business Software Alliance (BSA), Entertainment Software Association (ESA) and the Independent Film & Television Alliance (IFTA) (IIPA 2006). These organizations represent 1,900 companies that produce and distribute materials around the world such as computer software, movies, CDs and the like. Today’s technology is accessible and inexpensive and unfortunately, these qualities have led to approximately \$30-35 billion in losses annually according to the IIPA.

Table 2

INDUSTRY	2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	244.0	93%	280.0	95%	178.0	95%
Records & Music	204.0	85%	202.9	85%	286.0	90%
Business Software	1554.0	86%	1488.0	90%	1787.0	92%
Entertainment Software	589.9	92%	510.0	90%	568.2	96%
Books	52.0		50.0		40.0	
TOTALS	2643.9		2530.9		1893.3	

(IIPA 2007)

In a written statement presented to the Congressional Subcommittee on Courts, the Internet and Intellectual Property, Eric H. Smith, the president of the IIPA, shares the concerns, problems and recommendations of China's record on enforcement of copyright law. In this report, Smith reiterates the conclusion of the 2005 Special 301 that

China has failed to comply with its commitment made over one year ago in the Joint Commission on Commerce and Trade (JCCT) to significantly reduce piracy rates. While some modest reductions have occurred in some sectors, by no measure have piracy rates been significantly reduced... In my testimony today, I would like, for the record, to update that report and in the process to summarize it where appropriate. Our report tells the sad, frustrating story of the failure of an enforcement system to deter rampant piracy in the potentially largest market in the world (Smith 2005).

He continues by bringing to attention that China was recently placed on the Priority Watch List by the USTR because of its enforcement practices.

Also in this testimony, Smith elaborates on the piracy of the motion picture industry. Primarily in the forms of DVD or VCD, counterfeit movies have contributed to a 95% piracy rate in China. The legitimate home video market in China represents 5% of the estimated total market of \$1.3 billion. At that time, there were 83 licensed optical disc factories along

with an unknown number of “underground” unlicensed plants. Both of these manufactured pirated DVDs. Further, optical discs with pirated movies made in China have been confiscated in over 25 countries.

The point that Smith seems to emphasize throughout this report, not just pertaining to the movie industry, is that enforcement has not been severe enough nor are violators being prosecuted. Additionally, he says that the administrative fines remain far too low to deter piracy.

A recent anecdotal study, conducted by an IIPA member, the Motion Picture Association revealed that the average fine imposed per pirate home video product (DVD, VCD) seized in raids resulting from MPA complaints is only slightly higher than the cost of purchasing a blank disk – clearly of no deterrent value. The lack of deterrent administrative penalties is key reason, in addition to the almost complete lack of criminal enforcement that piracy rates persist at 90% of the market and above (Smith 2005).

Two years later the *International Intellectual Property Alliance 2007 Special 301 Report, People’s Republic of China (PRC)* advises that “the USTR maintain China on the Priority Watch List,” and “China must bring a significant number of criminal prosecutions for copyright piracy of U.S. works,” (IIPA 2007). In accordance with the testimony of Smith in 2005, China’s efforts in prosecuting criminal cases for copyright violations along with the non-deterrent enforcement system have allowed piracy to persist.

One of the enforcement recommendations that the report makes is that China must do something to stop the optical disc plants from manufacturing pirated goods. “We believe there are approximately 92 optical disc plants in China, with 1,482 total lines bringing total disc capacity based on IIPA’s conservative methodology to a staggering 5.187 billion discs per year,” (IIPA 2007). The technology is such that the productions lines are very versatile and are able to produce DVDs, VCDs and CDs. The IIPA wants China to take criminal

action against such plants. For the most part, the Chinese government still sees piracy as a matter to be handled administratively, not criminally. According to this Special 301 report, pirated discs made in China have been found in Europe, the United States and other countries around the world in 2006. Without a doubt, enforcement of IP laws is a priority for the IIPA and is among its several recommendations in the 2007 Special 301 Report.

TRIPS. The Trade-Related Aspects of Intellectual Property Rights is a multi-lateral World Trade Organization agreement that was negotiated in the years 1986 – 1994 of the Uruguay Round. Put into effect in 1996, the provisions applied to all signatories and are binding with each WTO member as this was considered to be the intellectual property regime of the WTO. TRIPS requires the adherence to a minimum set of copyright standards and expands the capacity of protected subjects. Protection includes “trademarks, geographical indications, industrial designs, patents, integrated-circuit layout designs and undisclosed information,” (2006 Report to Congress of China's WTO Compliance 2006). Under the TRIPS Agreement, WTO members must provide national and most-favored nation treatment to the nationals of other WTO members with regard to the protection and enforcement of intellectual property rights.

Those nations with a developing country or in transition status receive a four- year transition period except for obligations pertaining to national and most-favored nation treatment. There is also an additional five-year transitional period for product patents in areas that were not protected at the date of application of the Agreement.

The revision of domestic laws to include new ones that were compliant with the WTO agreements, including the TRIPS Agreement, was a promise that China made upon accession to the WTO. In regards to the TRIPS Agreement, China was to examine and review the existing laws and was to amend those laws that were not consistent with TRIPS (2006 Report to Congress of China's WTO Compliance 2006). Three IPR laws were revised:

the Patent Law, the Trademark Law and the Copyright Law. These three were found to be inconsistent with the TRIPS Agreement and the revisions became effective before the accession (Kong 2005).

China committed to being in full compliance with the TRIPS agreement immediately upon accession to the WTO. It had already built an IPR regime that was in line with the international standard of IP protection per the TRIPS agreement. Yet, the continuance of infringements and violations is evident that real enforcement of the TRIPS Agreement has not been put into effect.

While evidence of counterfeiting and unauthorized use of patents and trademarks remained prevalent, the U.S. continued to pressure on China to increase its enforcement. In response, the government created the IPR Leading Group in the fall of 2003 (Bergsten 2006). China also committed to prosecuting serious IPR violations as criminal rather than as civil in April 2004 and July 2005. Nonetheless, in December of 2004, the Supreme People's Court and the Supreme People's Procuratorate reduced the monetary limit for criminal prosecutions of trademark and patent counterfeiting as well as copyright piracy (Bergsten 2006). Following this change, the U.S. along with Japan and Switzerland asked for detailed information on China's enforcement of IPR for the last few years under a transparency provision of the TRIPS Agreement. The Chinese government would not provide such information and questioned the right of the U.S. to make such an inquiry.

According to Bergsten (Bergsten 2006), the U.S. should continue to press China to fulfill its WTO IPR commitments even if it means that a complaint is filed before the WTO Dispute Settlement Body. As it is made clear in this book, the TRIPS agreement does lay down certain general principles on enforcement, but it does not describe or define what constitutes effective enforcement nor does it necessitate that a state dedicate more resources

than other areas of law enforcement. Therefore, filing a formal complaint would not be successful and the economic burden of China's violations falls heavily on the U.S. firms.

WTO. After 15 years of difficult negotiations, China became the 143rd member of the WTO on December 11, 2001. The Chinese economy began to open up in the late 1970s and in the early 1980s. China took gradual steps to end its isolation from the world. Resuming its membership in the General Agreement on Tariffs and Trade from which it withdrew in 1950 signaled the desire to become more integrated into the global economy (Adhikar 2002).

Besides GATT, the CCP made several trade related changes as its economy was changing from a centrally planned one to a more market-oriented one, and its accession to the WTO was a foremost event to its growth. China took steps to reform its economy by lowering trade barriers and improving market access to goods and services imported from the United States and other countries. Furthermore, abolishing trade plans, decentralizing trade, improving transparency, slashing tariffs and unifying the dual exchange rates in 1994 resulted in increased foreign trade and investment.

Its exports grew from \$10 billion in 1978 to \$278 billion in 2000, making it the sixth largest trading nation in the world (from about the thirteenth in the late 1970s). The trade-to-GDP ration increased from 10% at the beginning of reforms to about 40% in the late 1990s, (Adhikar 2002).

When it came to negotiations of China's accession, The Working Party was to handle China's application and negotiate the terms for its accession. This organization consisted of all interested GATT contracting parties and worked under the name GATT Working Party. After the formation of the WTO in 1995, the organization became the WTO Working Party and all interested WTO members took over the negotiations. There were three basic aspects to the accession negotiations.

“First, China must provide information to the Working Party regarding its trade regime...Second, each interested WTO member negotiated bilaterally with China

regarding market access concessions and commitments in the goods and services areas, including for example, the tariffs that would apply on industrial and agricultural goods and the commitments that China would make to open up its market to foreign services suppliers. Third, China engaged in multilateral negotiations with Working Party members on the rules that would govern trade with China. Throughout these multilateral negotiations, U.S. leadership in working with China was critical to removing obstacles to China's WTO accession and achieving a consensus on appropriate rules commitments," (2004 Report to Congress on China's WTO Compliance 2004).

Aside from the trade reform and terms, an essential component to China's accession was its commitment to protect intellectual property rights since this was one of the biggest obstacles to China's accession to the WTO. Taking on IPR reform to bring itself into alignment with the TRIPS Agreement, the CCP restated its pledge to reform in the Accession Protocol. Knowing that IPR protection was a most important concern in the international community, China amended the enforcement aspects to its existing IPR laws.

Even more recently, the latest revisions emphasize enforcement by including specifying detailed procedures for litigation, granting more power to local officials to investigate cases of infringement, and offering more compensation for infringement. With this TRIPS-compatible IPR regime, the infringing activities could in theory be curbed in a timely and effective manner and the legitimate rights of the right-holders could be protected (Kong 2005).

With the new IPR responsibilities, the CCP needed to strengthen its enforcement capacity and train judicial officials and other agencies in IPR enforcement. While this is a multifaceted and painstaking process, there are problems that have prevented comprehensive enforcement of the new laws prior to and since China's WTO accession.

China's entrance to the WTO initiated a reform to its IPR regime that was necessary in order to uphold China's economic growth and development. The events leading up to the WTO accession pressed China to creating a more rigorous IPR regime as China needed to

prove it is a prominent nation within the international community. Before its accession, China met the requirements of the TRIPS Agreement including a rewrite of the Patent Law and the Trademark Law. Furthermore, the IPR regime has a comprehensive framework from which to function. However, it is the judicial system's bureaucratic processes and the proper enforcement of these laws by officials and manufacturers that have not improved the situation. Now, it seems that the agreements of the WTO were only a diplomatic strategy rather than a serious commitment to IPR protection. Of course, the lack of fulfillment of these agreements will have both negative economic and political repercussions if China does not more aggressively pursue and take legal action against IPR violators.

IPR at the Local Levels.

While some argue that China has a history of intellectual property rights and others argue that it has not had IP protection until the recent decades, currently, China has made a commitment to protect intellectual property, both domestic and foreign, through various trade and international agreements as well as its own legislation. The government has taken substantial measures to build an IP framework both nationally and locally, but full enforcement has not been achieved. Yet, for some local communities, the costs of enforcement prove to be a deterrent to the enforcement of IP laws. On the other hand, when IP violations do make it to the courts, there are still weaknesses within the judicial system at the local levels that prevent effective enforcement of the law. Moreover, the governmental structure at the local levels has the ability to actively enforce IP laws, but costs of enforcement and effectiveness of the court system continue to pose obstacles to consistent IP protection.

The Cost of IPR Enforcement to Local Governments. While the Chinese government has taken gradual steps to curtail corruption and promote economic development, the Party has made an effort to improve its efficiency by letting go of some of

its authority to the local governments, courts and other institutions although it still maintains final control. The local government levels consist of the province, county, city or municipality and town or village. Roughly defined, a main purpose of all levels of local government is to sustain economic development in addition to ensuring rule of law and the maintenance of the local infrastructure.

Within each level, the economic objectives are handed down by the level above them that is originally issued from the Standing Committee. This committee is comprised of members of the Local People's Congress at the county level or above and is to obey the State Council (Swift 2004). The methods as to how each level is to achieve these economic objectives is unique as each level is an independent entity and is not constrained by the laws or priorities of the upper levels. Additionally, local revenue is generated from local taxes (collective enterprise income, agriculture, real estate), shared taxes (individual income, product and business, joint venture) and other sources (monopolies, set quotas, bonds, credits) (Swift 2004). Moreover, the reform efforts include the delegation of more power to the local levels, which has allowed them to create their own ways to the fulfillment of economic goals even if it includes illegal activity such as piracy.

In regards to the local levels and piracy, the illegal trade has become deep-rooted into many towns and cities as a major source of revenue. It provides employment for those who lack education and personal connections as well as offers an alternative industry. Overlooking the illegal aspect of piracy, many local officials depend on the counterfeit business and cracking down on this would create problems for the areas that largely subsist on this industry. The cost of enforcement of IP laws could mean a greater one when it comes to the economic stability of the local community. The pressure on the local governments to maintain employment outweighs IP law enforcement.

In the article *Inside China's Teeming World of Fake Goods* (Heim 2006), an attorney, Nelson Dong, who works with multinational technology companies that do business in China states that "piracy provides a safety valve of trickle-down gain to the main on the street, presenting jobs and economic freedom for people who have no other options," (Heim 2006). When authorities arrive at a scene where pirated DVDs are sold, the sellers just pack up and move to another part of town. There is no formal arrest and the vendor just relocates without consequence.

Local officials have little incentive to enforce intellectual property laws if that could put many people out of work. The government's tacit winking of the eye is because they know they are gaining something from nonenforcement (Heim 2006).

Also mentioned in this article is the Xiangyang market in Shanghai. Tenants of this market paid monthly rent to a management company that leases the land from the city. For some, shops paid a rent as high as \$5,000.00 a month, so the annual total reaches millions of dollars (Heim 2006). Obviously, this provided a significant amount of revenue although now, the market closed the summer of 2006. Ironically prior to its closing, Shanghai officials said that they intended to close the market, but "may allow it to reopen elsewhere if sellers respect intellectual-property rights," (Heim 2006).

Furthermore, it is clear that the counterfeit business can have a huge impact on local economies and it is left up to the discretion of the local officials on whether or not enforcement of IP laws is worth the costs.

The Local Court System and IP. When IP matters eventually make it to the courts, it is not uncommon that the Chinese judiciary may not be fully capable of enforcing the law and therefore, the courts are not a dependable source of IP regulation support. Although there are judicial and court systems in place, they are not equipped to effectively enforce IP laws. In addition, a lack of confidence in the court system is based on inconsistent and

arbitrary rulings that are due to judges who are inexperienced and uneducated in IP matters. Unfortunately, these judges interpret the IP laws with this limited background. Further contributing to the weak judicial system, the country's court systems are notoriously prone to corruption, so when it comes to IP violators, many are well connected and protected from enforcement (Fernandez 2006). Problems with competence relating to IP and corruption have created a lack of confidence in the judicial system and for many business managers, going to the courts is a last resort when it comes to IP infringements (Fernandez 2006). Nonetheless, China is taking steps towards improving its courts so that IP laws are enforced.

Changes influencing competence of the judges are most important as these are the officials who interpret and enforce the laws. In the past, judges only had a limited military background (Fernandez 2006). Today, judges are required to hold university degrees and pass a national unified law exam (Bergsten 2006). Even so, only 40% of all judges hold a degree and the quality and experience of judicial personnel outside of the major cities is uneven (Bergsten 2006). Though there are new professional requirements to become a judge, the salaries are still low and this contributes to widespread corruption.

Corruption seems to be a major cause to weakening the court system. The judicial system is problematic in that it is definitely not independent of local interests or political pressures (Fernandez 2006).

For one thing, central government decisions don't fully "carry downward" to provincial and municipal levels. Then, too, local officials and local law enforcers are geographically, as well as socially and culturally, "close" to the infringers and may sympathize with them over a foreign and distant legal IP holder. "If you look at local governments...the authorities have every vested interest in squelching intellectual property rights." (Fernandez 2006).

Keeping corruption and lack of experience in mind, the court system continues to improve and to focus on IP matters although it will take time to mature. There are still many

things that the government is learning when it comes to IP laws and the court system is getting better. According to *China CEO*, “There is no doubt that they are improving every day....The Chinese government has a truly honest, positive attitude in honoring business laws, but sometimes the laws aren’t complete enough and things fall through the cracks. In other words, the “will” exists, but the “way” is not yet complete,” (Fernandez 2006).

Enforcement of IP Laws

Joining the WTO, China made an international commitment to overhaul its protection of IPR. The WTO agreements require that China honor the IP treaties and organizations of which it is bound. Although China has taken extensive actions to adopt more stringent IP laws, so far, it has been less successful in enforcement. The laws are there and need to be followed by all; nevertheless, inconsistencies have shown that the laws are not being enforced. In regards to enforcement, there are two broad categories: administrative and judicial.

There are many obstacles to ensuring the proper enforcement of the IP laws. From the legitimate manufacturer that produces and sells pirated movies to the inconsequential penalties for an IP violator, piracy will continue to exist until there is progress with the legal system and the general will of the CCP.

Challenges of enforcement. Several factors add to China’s poor IPR enforcement history. Historically, IP has not been a familiar concept in China and educating the public and the government has posed a challenge when it comes to enforcing IP laws. It can also be argued that the institutional infrastructure is in place to support this legislation, but China’s authorities have not successfully applied the laws in order to deter piracy. While there are many challenges to enforcing the IP laws, these challenges are feasible and it is up to the will of the people to uphold and respect IP laws.

The argument that the concept of intellectual property is not a traditional aspect of Chinese culture and therefore, it is difficult to enforce IP laws comes up consistently. “The attitude in China is that the average citizen does not consider it (copying) a crime,” (Low 2002). Enforcement on the streets is minimal and buyers and sellers can carry on business with little fear of getting caught.

In *To Counterfeit in China is Divine: Or is it?*, Low writes “Street hawkers see it as a way to make a living, the buyers see it as only natural to purchase DVDs that are substantially less expensive. For example, a copy of *Titanic* costs RMB 5, while the retail price of the imported version is around RMB 200. The cost differential is highly compelling in favor of the counterfeit DVD.” Additionally, there is a perception that the Chinese cannot afford the more expensive, legitimate copies of entertainment, but once China is considered an industrialized country, the people will be able to afford legal versions of entertainment and software. Unfortunately, this argument does not seem very realistic as there is a deep-rooted history of piracy in China and it is doubtful that a consumer will spend more money on a legitimate copy of a movie just because he has the means to afford to do so.

To support this notion that it is the will of the Chinese people to refuse to pay for the legitimate copies and are aware that they are committing an illegal act by purchasing pirated material, Wang and Zhu give profiles of both the consumer and the seller in their paper *Mapping Film Piracy in China*. After reading these accounts, it is clear that it is the lack of will of the people to uphold the law. Here are three telling anecdotes from this paper.

A college professor in Beijing. Professor S is in his late 30s, teaching statistics. For his personal viewing, he prefers American action films. He often bases his decisions of which pirated VCDs to buy on what he reads in the newspaper or on the Internet regarding the latest and hottest Hollywood releases. When one of the authors interviewed him in June and July of 2000, he was searching for *MI2* and *U571*, both new U.S. releases. He found copies for RMB 10 each for

both films...in November 2001, he had already purchased the pirated version of the new Windows XP. He felt that he had no choice but to resort to the pirated copies... To him, pirated software is indispensable for the development of national higher education.

A Sojourner Taiwanese Businessman in Shanghai. Mr. K is in his late 30s and is a well-to-do Taiwanese businessman in Shanghai. He owns a real estate marketing company and employees, both local and those he brought over from Taiwan...He married a Beijing woman and has a son. Together they live in one of the most expensive and trendy neighborhoods in Shanghai where many expatriate business people live... 'Look at me,' he said, 'I am best example.' In his spare time, he watches and collects pirated VCDs. When he was interviewed in summer 2000, he owned the pirated *Crouching Tiger, Hidden Dragon* VCD, as the film was first premiered in Asia, months ahead of its U.S. release...To him, the price of pirated VCDs vis-à-vis a cinema ticket is not an issue. It is rather a matter of choice and availability of non-mainstream films. In his neighborhood, pirated VCDs are selling for RMB 15.

A Street Vendor Pirate in Beijing. Mr. Z is in his 30s and is part of the 'floating population in Beijing. A former peasant from Anhui province in eastern China, Mr. Z and his wife and their toddler son share a tiny room in northern Beijing. He makes slightly above RMB 1,000 a month selling pirated VCDs...His major complaint about selling pirated VCDs is the lack of quality contents, especially those of major Hollywood films. Because most of his customers are repeat customers, he has to accommodate their tastes and demands... When asked about the piracy networks and how they operate, he says he only knows the person who delivers the goods to him. According to Mr. Z, the police care more about cracking down on pornography than on pirated movies. In case of an arrest, he would be sent home without further punishment. And he would always return to Beijing where his son would have a better opportunity for good education.

In *WTO, Internationalization and The Intellectual Property Rights Regime in China*, Kong argues that it is a lack of will among the consumer, government and manufacturer to enforce IP laws. This can be seen in the functioning of the legal system as well as in the piracy business. For example, if there were tougher enforcement of the IP laws and if IP

infringements were considered to be a criminal offense, then piracy could be better controlled and those offenders could be properly prosecuted. In order to put an end to piracy, the central government needs the support of the local governments to carry out and enforce the laws. Kong's argument is that the weakness of the government institutions, low standard of IPR laws and inefficiency of the law enforcement bodies remain inadequate.

With the help of foreign knowledge and experience, China worked with the U.S. Congress on the U.S.-China Legal Cooperation Fund and the European Union on the EU-China Intellectual Property Rights Cooperation Program. These efforts revealed the CCP's desire to continue to build its IPR regime and since receiving this assistance, there has been noticeable improvement while there is still a great amount to be done.

The first problem that Kong identifies is that there is immature industrial self-policing. There are many legitimate firms that not only produce legal products such as software and movies, but they also make pirated products as well. Because of its simple technology, these types of firms are able to make counterfeit goods with minimal consequences and make a high profit. By doing this, economic justification overrides IPR protection. Besides the lack of will by the manufacturers, Kong reiterates that piracy has become very easy and lucrative. DVDs can be produced in mass quantity at a high quality and therefore, piracy is actually promoted.

Low IPR awareness is another issue that Kong sees as a major hindrance to protection. "While low IPR-awareness may cause the public to disregard other's IP rights, it has at the same time subtly weakened the authorities' political will and determination to protect foreign IPR," (Kong 2005).

Also citing IP awareness, Katherine Wang argues that it is a question of cultural adaptability and understanding of IP in China that may thwart effective enforcement. She maintains that historically, the Chinese are not familiar with the Western concept of

intellectual property and that the lasting Confucian ideals are the foundation to the legal system. Wang also points out that “it was always the emperor, not the people or the courts that decided what was acceptable to be published and how it should be used,” (Wang 2006).

Making IPR information available to the Chinese public is a challenge within itself as the size of the country and its population is massive. On the other hand, this is unexpected as a characteristic of the PRC as it is known for its ability to effectively spread propaganda. If the public were made aware that pirating copyrighted material is breaking the law and that there are clear consequences, it would seem as though there would be a decrease in the production of the counterfeit products.

Kong’s assessment of the IPR problems in China emphasizes the ineffectiveness of administrative sanctions and the competence of the judicial system. IP protection and enforcement is dependent on the work of a large group of administrative offices. Because there is such a range of offices involved with different types of IPR, it is difficult to coordinate and maintain consistent policies. With such a big bureaucracy, it is obvious that problems will arise and enforcement is often unreliable and unsuccessful.

Once an IPR infringement makes it to court, the required procedures and fees play a part in the ineptness of the legal process. Basing filing fees on the amount of damages requested, basing calculation of damages on the violator’s profits and unwillingness to file criminal cases in regards to counterfeiting and piracy illustrate that the legal system still has many changes that need to be made if it intends on using law enforcement as a means of curbing piracy.

Kong’s overall point is that the legal framework for IPR enforcement is there, however, there is a fervent need for additional enforcement efforts by the Chinese authorities. “China’s authorities must apply the enforcement legislation rigorously in order to make any

headway in reducing the existing high levels of copyright piracy and trademark counterfeiting.” (Kong 2005).

Corruption. Another challenge of enforcing the law is corruption. While the central government needs the help of the local governments, the local officials actually contribute to the problem. While piracy is driven by economic motives, some local governments seek additional funds through piracy or help in the production of pirated materials. In some small cities, local authorities might seize counterfeit goods from a manufacturer and then fine the offender that in turn, brings in revenue. Then, the authorities will resell the counterfeit items to the original owners, which also brings in more revenue (Low 2002). An obvious disconnection exists between the central government and the local governments. If both the national and local authorities worked more closely together, there would be more accountability and ideally, less corruption.

In this case, putting in place tougher laws is not sufficient. In many circumstances, the Chinese laws are vulnerable to corruption. The fine for the pirated materials is about five times the price of the goods. Nonetheless, the fines are apt to be arbitrary as many officials are willing to reduce the fine in return for a favor.

Low recommends that the problem with this should be dealt with at the retail level, not just the manufacturing. The retailers have the demand for the counterfeit goods since their profit margins are high, and there are manufacturers that supply them with inventory. Though, when it comes to questioning the retailer, the retailer does not admit that he purchased illegal movies or software. As mentioned earlier in Kong’s points, it can be difficult to prosecute an IP offender and thus, proving the crime is difficult.

The Legal system. Since the economic reform that began in 1978, the CCP has enacted many new intellectual property laws and regulations in a short period of time as a result of external pressure exerted by foreign investors and governments. With the creation

of the CCP's modern IPR regime, it is inevitable that changes be made to the legal system. The enactment of the Trademark Law, the Copyright Law and the TRIPS Agreement are examples of laws and policies that are fairly new to very old legal and judicial systems. The question is whether or not China has the legal capacity to support these new laws effectively in an infrastructure that is new to the protection of IP and enforcement of those who violate it.

As stated previously, there are two enforcement areas when it comes to IPR law: judicial and administrative. The administrative level is comparable to the U.S. system of arbitration where the findings are legal and binding, but handed down by local authorities. IPR violations are usually addressed in the administrative division and it is infrequent that an IPR offense is considered a criminal offense and makes it to the judicial branch. One criticism, particularly by the United States, of this separation between judicial and administrative is that there would be a decrease in pirated goods if more cases were categorized as criminal rather than administrative. The Chinese have traditionally viewed piracy as a civil matter.

Table 3

Legal vs. administrative cases of anti-counterfeiting and enforcement China Administration of Industry and Commerce Yearbook 1997-2001 China Intellectual Property Yearbook 2000				
<u>Year</u>	<u>Cases of adjudication</u>		<u>Cases of administrative enforcement</u>	
	Copyright	Trademark	Copyright	Trademark
1996	436	42	673	14,000
1997	411	45	1,361	32,027
1998	571	92	1,208	28,952
1999	750	65	1,586	32,298
2000	963	49	2,457	38,240

(Mertha 2007)

Under the administrative division, there are four distinct areas that handle intellectual property. The China Patent Office is the national administrative authority over the patent area. There are over 50 local patent offices that have the authority to settle patent right disputes and issue orders prohibiting patent infringement, if the plaintiff does not file a lawsuit in court (Zhang 1997).

An infringement of a patent can be considered as any act of exploiting the patent, including manufacture, sale, or use of the patent without the authorization of the patent owner according to Article 57 of the Patent Law. When there is an infringement of a patent, there is a mediation process that takes place. If mediation does not work, the owner can file a suit directly in a people's court or request the local patent administrative authority to handle the matter. Article 58 of the Patent Law provides for both civil and criminal liability for the counterfeiting of patents. The Patent authorities need to then transfer the case to the police before a criminal prosecution can begin (Chow 2003).

Previously mentioned, the first intellectual property legislation enacted by China after the reforms was the Trademark Law. The Trademark Office, under the China State Administration of Industry and Commerce or SAIC is responsible for the nationwide registration and administrative control of trademarks (Zhang 1997). Trademarks in China are categorized at different levels and the Trademark office has the authority to handle infringement cases and to impose fines when the violation is not a criminal offense.

In the case of trademark infringement, both the SAIC and the people's courts have jurisdiction to hear the cases. Most trademark owners chose the administrative division because of its efficiency and simple procedure (Chow 2003). Lastly, trademark owners believe that the penalties and sanctions for a trademark violation are not adequate enough to deter violators.

In regards to copyright, the latest revisions to the Copyright Law are a result of the TRIPS Agreement. The Copyright Law provides full protection for literature, art, natural sciences and many other disciplines and intellectual resources. The term of the protection is the life of the author plus fifty years for a natural person and fifty years for a legal person, or a foreigner or stateless person.

The China National Copyright administration or NCA shall be the state's copyright administrative department. The NCA has the power to investigate copyright infringement cases that have a major effect on the whole country (Zhang 1997). There are also provincial copyright offices and municipalities that are responsible for local copyright issues.

Article 46 of the Copyright Law gives administrative departments the authority to investigate infringement cases and are allowed to confiscate material, equipment and any object used in the infringing activity (Chow 2003). Administrative authorities may also order the offender to stop the activity, make an apology, pay compensation, and pay fines according to Article 47. Like with the other agencies, the authorities can also transfer cases to the judicial authorities for criminal prosecution.

While it seems that piracy is driven by economic motivation, the government is concerned with how to control the publication and press. It has been challenging for China to enforce copyright laws partly due to its ideological policy. "China wants to open the door for foreign technology while preventing the penetration of Western ideology. Enforcement measures against piracy, however, should be easier to implement," (Zhang 1997).

The fourth area of the administrative division deals with trade secrets. The protection of trade secrets falls under the PRC Anti-Unfair Competition Law. Article 10 of this Law defines business secrets as undisclosed technical or business information that may be used for economic gain (Chow 2003). This law also imposes liability on any third party that might profit from business secrets with the actual knowledge that the secrets were procured

illegally. The enforcement of this law is difficult since China does not currently have the necessary private resources to investigate a crime such as security firms and law firms.

Judicial enforcement is the other path to settling intellectual property disputes. It is considered to be the slowest and more costly than the administrative division. There may also be geographical limits to what an agency can or cannot do to pursue an IP infringement case and this creates controversy and confusion when seeking action against a copyright offender who may have a factory in one province and sell the product in another. This makes it difficult for a foreigner to effectively protect IPR through the Chinese legal system (Kumar 2007).

The Chinese People's Courts have four divisions: civil trial division, economic trial division, criminal trial division and an trial division (Zhang 1997). The civil trial division handles civil cases, which include copyright disputes. The economic trial division deals with economic contract laws and industrial property laws (Patent Law, Trademark Law and Unfair Competition Law) and the criminal trial division has jurisdiction over all criminal cases and may hold defendants liable under criminal law for intellectual property violations (Zhang 1997). Under the administrative trial division, all intellectual property cases under administrative law are found. An intellectual property rights trial division has been established that has exclusive jurisdiction over all IP cases not involving criminal or administrative law.

To help address copyright and industrial property cases, tribunals have been set up in the civil and economic trial divisions. These are located in both the high and intermediate people's courts in the cities where the high people's courts sit. Additionally, the People's Supreme Court of China set up an IPR office.

While there is a clear framework to the IPR judicial system, this does not necessarily mean that the system is effective or efficient. While China has done a lot of work to enforce

intellectual property laws, there are still many unresolved problems in the enforcement mechanism.

Difficulties with Copyright Enforcement and Yiwu. In *The Legal System of the People's Republic of China*, Chow looks at general problems that arise from enforcement efforts against copyright piracy. Focusing on Beijing to make legislative changes and commitments to fight piracy, the U.S. government and other industry lobbying groups expect that the central government understands the importance of protecting IP for China's economic development. While the CCP can create the legislation, it is up to the local governments to implement and enforce the law. It is here where the level of enforcement is questionable.

When it comes to the evaluation of local level leaders, the economic performance of the local township is a standard by which the leader is measured. So, pirated goods certainly help the local economy by way of employment, revenue, tax revenue and other local industries such as hotels and restaurants. (Chow 2003). According to Chow, the town of Yiwu in Zhejiang Province is known as the center of commercial piracy. There are over 33,000 wholesale outlets and the industry experts guess over 90% of the daily use and consumer products sold in Yiwu are counterfeit. The city also distributes its counterfeit product throughout the country as well as exporting its goods to Asia, Africa and South America.

These wholesale (counterfeit) business also account for a substantial portion of the taxes paid to the local government supporting a host of public services. Most of the businesses that sell counterfeit and infringing goods in Yiwu negotiate a fixed amount of taxes to be paid to the local government in lieu of payment based upon graduated tax rates linked to revenue...The trade in counterfeit and pirated goods has transformed Yiwu from a poor farming town into an economic model that other towns are seeking to emulate (Chow 2003).

Unfortunately, the local leaders are reluctant to shut down productive economic activity while they may have a direct financial interest themselves. In Yiwu, the local administration of industry and commerce has invested millions of dollars in the infrastructure. Businesses are charged monthly fees to sell the illegal goods. The governing body that is in charge of local enforcement, the Administration of Industry and Commerce (AIC), may also have financial interest in the illegal activity that they are supposed to control. In fact, all of the local officials may have a financial interest in piracy. Judges, prosecutors and enforcement officials may be beholden to the local governments that appointed them and therefore, they may face pressure to protect the local trade of pirated goods.

Cracking down on counterfeiting could create problems that would directly affect the local community like the unemployment and the closing of legitimate businesses. The cost of any serious campaign against piracy has been avoided by China's central government. "To date, it appears that China's central authorities lack the political resolve or commitment to launch a serious nationwide crackdown on counterfeiting," (Chow 2003).

Aside from local protectionism, criminal sanctions have also contributed to the lack of enforcement and low deterrence of counterfeiting. Many brand owners who suspect counterfeiting of their goods have called authorities. Even if there have been successful raids, many of the owners say that the counterfeiters and pirates are back in business in a short period of time. According to Chow, the average fine on a counterfeiter in 2000 was \$794 USD which is very low considering the earnings.

Table 4

AIC Trademark Enforcement Activity, 1997-2000 SAIC Annual Statistics				
<u>Year</u>	<u>Cases</u>	<u>Avg. Fine</u>	<u>Avg. Damages</u>	<u>Criminal Prosecutions</u>
1997	15,321	\$679 USD	\$40 USD	57 total or 1/268 cases
1998	14, 216	\$699	\$41	35 total or 1/406 cases
1999	16, 938	\$754	\$40	21 total or 1/806 cases
2000	22,001	\$794	\$19	45 total or 1/489 cases

(Chow 2003)

When it comes to criminal prosecutions, administrative authorities transfer cases that have criminal liability to judicial authorities for criminal prosecution. To be considered a criminal case, the counterfeiter with sales above RMB 50,000 but below RMB 200,000 must be sentenced to a term of imprisonment of up to two years and must also pay fines (Chow 2003). As the amount of sales increase, so does the severity of the punishment. On the other hand, the severity hasn't been harsh enough to deter the offenders.

Chow states that the reason for a low criminal prosecution rate is due to the lack of effort by the administrative authorities. When a case is referred to the judicial division, the fines that an administrative authority would have collected, after spending time on raids and seizures, is now transferred as the case is transferred. The AIC must transfer all evidence to the judicial authorities and this is an additional loss of income as some of the confiscated materials could have been sold at a public auction.

With economic interests, insignificant penalties and an inefficient bureaucracy, continued existence of piracy is understandable. The circumstances of Yiwu illustrate how an illegal activity can provide revenue while local officials assist. Most importantly, the lack of copyright enforcement is due to a lack of will by the people, local officials and national government.

Conclusion

This paper sought to show that the continued existence of movie piracy is due to complexities associated with China's IPR regime, culture, governmental structure and legal system. A wide range of factors has contributed to the inadequate protection of IP in China that has allowed this illegal business to persist. Focusing on the movie industry in the forms of counterfeit optical discs, it is clear that observance of IPR laws is low and enforcement has been somewhat ineffective as pirated movies continue to be widespread today.

Historically, intellectual property had a different internal definition than it does today where it was based on Confucian ideals, a socialist economic system and censorship. With this early perception, the modern IPR poses an imposition of such a concept that created many challenges both for China and its international trading partners. The Sino-US Negotiations, the accession to the WTO and the TRIPS Agreement were attempts to align China with the other members' commitments and standards on intellectual property rights. Furthermore, legislation has been implemented to protect the rights of China's trading partners and to establish a workable framework from which China can continue to improve its IPR regime.

Although there has been improvement in China's IPR, optical disc piracy is still at the forefront of the MPA's and IIPA's agenda while the rate of pirated movies in China is around an alarming 90%. Reasons for this can be found within deficiencies in the legal system and the officials who run it. Failing to categorize IP violations as criminal offenses along with the corruption of authorities exemplify the major downfalls of strict IP observation. When it comes to enforcing the laws and settling disputes, the system as such does not facilitate proper enforcement and is inefficient in its methods. The lack of experience of the court system and its officials when it comes to IP laws has also contributed to the poor enforcement.

From the TRIPS Agreement to the restructuring of China's judicial and administrative systems, many efforts have been made to improve the IPR regime and stop movie piracy. Yet, the piracy rate remains to be high and the enforcement has not been severe enough to deter the illegal copying of movies. Lastly, economic motives that have cultivated a thriving illegal industry continue to exist and these motives along with other factors have added to the ongoing piracy problem in China. This paper hopes that it successfully presented and supported the view that the Chinese government has the ability and capacity to enforce the laws, however, the complex nature of the costs, political relationships and cultural factors prevent effective enforcement of IP laws.

Bibliography

- 2004 Report to Congress on China's WTO Compliance. 2004. The Office of the United States Trade Representative.
- 2006 Report to Congress of China's WTO Compliance. 2006. Office of the U.S. Trade Representative.
- Adhikar, Ramesh and Yongzheng Yang. 2002. What Will WTO Membership Mean for China and Its Trading Partners? *Finance and Development*, September 2002, 22-25.
- Alford, William P. 1995. *To Steal a Book is an Elegant Offense, Intellectual Property Law in Chinese Civilization*. Stanford, CA: Stanford University Press. Original edition, 1995.
- Australia-China Free Trade Agreement Feasibility Study. 2004. Department for Foreign Affairs and Trade.
- Bergsten, Fred C., Bates Gill, Nicholas R. Lardy and Derek Mitchell. 2006. *China: The Balance Sheet What the World Needs to Know Now about the Emergine Superpower*. New York: Public Affairs.
- Buckley, Chris. 2003. Helped by Technology, Piracy of DVD's Runs Rampant in China. *The New York Times*, August 18, 2003.
- Chow, Daniel C.K. 2003. *The Legal System of the People's Republic of China*. St. Paul, MN: Thomson West.
- Fernandez, Juan Antonio and Laurie Underwood. 2006. *China CEO Voices of Experience from 20 International Business Leaders*. Edited by J. W. S. A. P. LTD. Singapore: Saik Wah Press Pte Ltd.
- Gale, Barden N. 1978. The Concept of Intellectual Property in the People's Republic of China: Inventors and Inventions. *The China Quarterly* (74):334-355.
- Guilford, Gwynn. 2007. U.S. Movie Giants Swim with China's Sharks. *Asia Times Online*, http://www.atimes.com/atimes/China_Business/IA04Cb01.html.

- Heim, Kristi. 2006. Inside China's Teeming World of Fake Goods. *The Seattle Times*, February 12, 2006.
- Hsia, Tao-tai, and Kathryn A. Haun. 1973. Laws of the People's Republic of China on Industrial and Intellectual Property. *Law and Contemporary Problems* 38 (2):274-291.
- IIPA, International Intellectual Property Alliance. 2006. Description of the IIPA. ———. *Copyright and Trade Issues* 2007 [cited. Available from http://www.iipa.com/copyrighttrade_issues.html].
- . 2007. IIPA 2007 Special 301 Report People's Republic of China (PRC): International Intellectual Property Alliance.
- IIPA, International Intellectual Property Alliance and Estimated Levels of Copyright Piracy. 2007. USTR 2007 Special 301 Decisions, Estimated Trade Losses due to Copyright Piracy.
- Intellectual Property Protection in China* 2007. 2007 [cited January 9, 2007 2007]. Available from http://www.ipr.gov.cn/ipr/en/info/Article.jsp?a_no=45249&col_no=925&dir=200701.
- Kong, QingJiang. 2005. *WTO, Internationalization and the Intellectual Property Rights Regime in China*: Marshall Cavendish Academic.
- Kumar, Sameer and Jorgen Ellingson. 2007. Adaptive IP Strategies in China: A Tactical Analysis. *Journal of Intellectual Capital* 8 (1):139-158.
- Li, Xiao. *Film Industry in China*, June 10, 2007 2004 [cited. Available from <http://china.org.cn/english/features/film/84966.htm>].
- Low, Alex. 2002. To Counterfeit in China is Divine: Or is it? In *Deakin Law Review*, edited by D. S. o. Law.

- McDonald, Joe. 2007. 6 Film Studios Win China DVD Piracy Case. *International Business Times*, <http://www.ibtimes.com/articles/20070425/china-dvd-piracy.htm>.
- Mertha, Andrew C. 2007. *The Politics of Piracy, Intellectual Property in Contemporary China*. Ithaca, New York: Cornell University Press. Original edition, 2005.
- MPA, Motion Picture Association. 2007. MPA and Local Bodies Launch Chin-Wide Anti-Piracy Campaign at Shanghai Film Festival. http://www.mpa.org/press_releases/china-posterreljun07.pdf.
- Pang, Laikwan. 2004. Mediating the Ethics of Technology: Hollywood and Movie Piracy. *Culture, Theory & Critique* 45 (1):19-32.
- . 2004. Piracy/Privacy: The Despair of Cinema and Collectivity in China. *boundary 2* 31 (3):101-124.
2005. Subcommittee on Courts, the Internet, and Intellectual Property United States House of Representatives. *Intellectual Property Theft in China*. May 17, 2005.
- Swift, Nick. 2004. *Local Government Reforms in China are Led by Big Cities* 2004 [cited October 23, 2004 2004]. Available from http://www.citymayors.com/government/china_locgov.html.
- U.S. Department of Commerce International Trade Administration, United States Embassy in Beijing. 2005. *IPR Toolkit, Protecting Your Intellectual Property Rights (IPR) in China* 2005 [cited Decembefr 2005 2005]. Available from http://beijing.usembassy-china.org.cn/protecting_ipr.html.
- Wang, Katherine Er-yu. 2006. Intellectual Property Courts in China: Effects on Judicial Competency in the PRC and International Corporate Strategies, Public Policy Program, Stanford University, Stanford, CA.
- Wang, Shujen. 2003. Film (Optical Disc) Piracy in China. In *SSRC Intellectual Property, Markets & Cultural Flows Workshop*. New York, New York.

Wang, Shujen , and Jonathan Zhu. 2003. Mapping Film Piracy in China. *Theory Culture and Society* 20 (4):97-126.

Yu, Peter K. 2002. The Second Coming of Intellectual Property Rights in China. *Occasional Papers in Intellectual Property from Benjamin N. Cardozo School of Law Yeshiva University*, www.peteryu.com/2dcoming.pdf.

Zhang, Naigen 1997. Intellectual Property Law Enforcement in China: Trade Issues, Policies and Practices. In *Fifth Annual Conference on International Intellectual Property Law and Policy at Fordham University School of Law*. New York, New York.