

Intellectual Property Rights Protection in Post-WTO China: Still an Incurable Blight on Sino-U.S. Trade Relations?

QINGJIANG KONG

Inadequate protection of foreign intellectual property rights (IPR) in China has tainted Sino-U.S. trade relations over the past thirteen years. These disputes, which on numerous occasions almost resulted in trade war, have ironically also prompted a relatively sophisticated legal framework for IPR in China. China's accession to the World Trade Organization (WTO) has, moreover, given further momentum to the construction of a state-of-the-art IPR regime. However, according to the U.S. Special 301 Report 2002, China's WTO entry has so far not produced the expected results in terms of protection of foreign intellectual property in China. Note that while the effort for WTO compliance helps repair China's institutional deficiency to a larger degree, it can barely affect the economic rationale behind IPR infringement. Therefore, enforcement of IPR laws needs to be tightened; otherwise, the IPR protection issue could reappear to taint the Sino-U.S. trade relationship even in the WTO era.

KEYWORDS: intellectual property rights (IPR); Sino-U.S. relations; World Trade Organization (WTO); trade dispute.

[®]Institute of International Relations, National Chengchi University, Taipei, Taiwan (ROC).

Qingjiang Kong (孔慶江) received his doctoral degree in law from Wuhan University (武漢大學) in 1998 and is currently Professor of International Economic Law and Vice Dean of the Law Faculty, Hangzhou University of Commerce, PRC. Professor Kong can be reached at <qkong2000@yahoo.com>.

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In early 2002, the United States Trade Representative Office (USTR), in its annual National Trade Estimate Report on Foreign Trade Barriers (NTE),¹ accused China of lacking enforcement of intellectual property rights (IPR) on patented, copyrighted, and trademarked materials. On April 30, 2002, in its annual Special 301 Report,² the USTR, once more, designated China as a country requiring "Section 306 monitoring."³ This indicated that in the eyes of the United States, China had failed to accord protection to U.S. intellectual property in the previous year in accordance with bilateral IPR agreements. The United States would be monitoring closely China's implementation of its commitments relating to the IPR in the coming year. This was not the first time China had been identified among the "Special 301 list" of countries (see table 1). In fact, from 1989 to 2002, China was not on the Special 301 list for only the years 1992 and 1995. As a matter of fact, IPR infringement is rampant. Piracy and counterfeiting are sophisticated and widespread. Knock-off consumer products are readily available almost everywhere in China. The destructive effect of widespread IPR infringement has threatened the long-term viability of foreign business operations in China and poisoned the bilateral trade relations between China and the United States.

Nevertheless, annual Special 301 Reports of the USTR show that protection of U.S. intellectual property is improving in China, albeit sporadically.⁴ However, given that these developments occurred at the turn of

¹For the 2002 NTE Report, visit the website <<http://www.ustr.gov/reports/nte/2002/index.htm>> maintained by the USTR.

²For the 2002 Special 301 Report, visit the website <<http://www.ustr.gov/reports/2002/special301.htm>> maintained by the USTR.

³This was the seventh consecutive year that China was subjected to "Section 306 monitoring."

⁴Based on varying degrees of its trading partners' delinquencies or negligence in addressing IPR issues, the USTR may categorize them as "priority foreign countries" (for the most flagrant violators), assign them to either the "priority watch" or "watch" list (for those requiring particular and close attention), give them "special mention" or "priority practices" status, or select them for "Section 306 monitoring." Since 1997, annual Special 301 Reports have consistently designated China for "Section 306 monitoring," showing that inadequate protection of IPR in China has not been as severe as before.

Table 1
U.S. Special 301 Decisions on China (1989-2002)

Year	Special 301 Decisions
1989	Priority watch list
1990	Priority watch list
1991	Priority foreign country
1992	Not on the Special 301 list
November 1993*	Priority watch list
1994	Priority foreign country
1995	Not on the Special 301 list
1996	Priority foreign country
1997	Section 306 monitoring
1998	Section 306 monitoring
1999	Section 306 monitoring
2000	Section 306 monitoring
2001	Section 306 monitoring
2002	Section 306 monitoring

Source: USTR annual Special 301 Reports (1989-2002).

*The USTR may choose certain countries for "out-of-circle" reviews to assess developments occurring after the annual April decisions have been made, and may elect to change classifications at that time. This happened to the PRC during this year.

China's accession to the World Trade Organization (WTO), this development was an ominous sign for both the United States—who has sought improved protection of IPR from China for many years—and China—who has aspired to a smooth trade relationship with the United States. Will these events recur in the post-WTO era? Will this lead to disputes plaguing Sino-U.S. trade relations? This paper intends to answer these questions. It starts with a review of the IPR-related trade disputes between China and the United States in the past, and then explains why protection of IPR was inadequate in China. The paper then moves to review developments in the protection of IPR that China's accession to the WTO brought forth and the bilateral IPR cooperation in which China has engaged. The analysis ends with an extrapolation of the prospects for IPR protection in China and the ramifications for Sino-U.S. trade relations.

Review of U.S.-PRC IPR Disputes

For traders and countries, intellectual property sharpens the competitiveness of both the trader and the country. This explains why infringement of foreign IPR in China once constituted one of the biggest obstacles to China's accession to WTO and remains as a major source of contention between China and the international community, and the United States in particular. In fact, since the 1989 Tiananmen incident, protection of intellectual property in China has been a constant subject of debate in Sino-U.S. trade relations. China has often been criticized by the USTR for its inadequate protection of U.S. intellectual property.

There have been three high-profile rounds of disputes between China and the United States in this regard, occurring in 1991, 1994, and 1996, respectively. The 1991 round began when the USTR identified China as a "priority foreign country" under the Special 301 provision on April 26 of that year. The alleged reason—later seemingly standardized—was: "Piracy of all forms of intellectual property is widespread in China, accounting for significant losses to U.S. industries."⁵ After a difficult struggle with the U.S. government, the Chinese side signed a "Memorandum of Understanding on the Protection of Intellectual Property" on January 17, 1992, the night before the United States was to institute prohibitive import tariffs on Chinese products.⁶

The 1994 round of confrontation began on June 30, 1994, when the USTR initiated a Special 301 investigation against China. A six-month review led to the decision that the United States would impose prohibitive tariffs on US\$2.8 billion worth of Chinese imports into the United States unless China yielded to U.S. demands before February 4, 1995. Fortunately, the imminent trade war came to an end with the signing by the two

⁵USTR, Special 301 Report, 1991.

⁶See "Intellectual Property Rights Disputes Between China and the United States" (中美知識產權爭端) and "China-U.S. Intellectual Property Negotiations Recalled" (中美知識產權談判回顧), *Zhongguo zhishi chanquan bao* (中國知識產權報 China Intellectual Property News) (Beijing), November 14, 2001.

sides of a "Memorandum of Understanding on the Protection of Intellectual Property: Action Plan" on February 26, 1995.⁷

Note that the 1994 round of confrontation took place only two years after the conclusion of the agreement ending the 1991 dispute. After the conclusion of the 1995 "Action Plan" which, in turn, ended the 1994 dispute, serious concerns still remained on the U.S. side about China's likely implementation of the agreement.⁸ Despite frequent high-level discussions with Chinese officials, the United States on May 15, 1996 again announced its intention to impose sweeping sanctions (ultimately amounting to about US\$2 billion in import tariffs) on Chinese imports due to China's continuing failure to adequately enforce the 1995 bilateral IPR agreement. China retaliated by threatening its own sanctions against U.S. firms. The issue was resolved at the last hour before the June 17, 1996 deadline set forth by the United States, when the two parties signed an agreement on the implementation of the 1995 "Action Plan."⁹ As a result of Chinese actions, the USTR announced that the United States would not impose sanctions.¹⁰

The debate and disputes concerning protection of intellectual property not only cast a shadow on bilateral trade relations in general, but

⁷Ibid. Note that the Memorandum was signed after the deadline for imposition of sanctions had passed.

⁸U.S. concerns focused primarily on four key areas. First, effective action has not been taken against the at least thirty-four known factories producing CDs, CD-ROMs, and video-CDs. Second, border enforcement efforts by Chinese customs officers have been inadequate, as are China's customs regulations and rules for border enforcement of IPR. Third, expected improvements in market access for U.S. firms and products in the audio-visual (including motion pictures), sound recording, and computer software sectors have not been realized as of early 1996. Finally, the United States has requested that the special enforcement period be extended so as to achieve concrete and identifiable reductions in the production, distribution, and sale of pirated products with special emphasis on the provinces, cities, and localities where infringement is most prevalent, for example, in Guangdong Province (廣東省). See USTR, 1996 National Trade Estimate, in the part entitled: "China, People's Republic of."

⁹Actually, before signing the new agreement, China had acted in the final days to close a number of pirating factories. On June 17, 1996, acting U.S. Trade Representative Charlene Barshefsky announced in Beijing "that China has reached a critical mass of enforcement actions ... with the 1995 IPR Agreement." See USTR Press Release 96-53, June 17, 1996, available at <<http://www.tradelaw.com/Ann.htm>>.

¹⁰See note 6 above.

also even threatened to undermine the foundation of the trade relations between China and the United States, the most-favored-nation (MFN) treatment. While, technically, the granting of MFN and IPR protection were completely separate issues, during the process of the above-mentioned 1996 dispute, for example, some members of the U.S. Congress expressed reluctance to renew MFN treatment to China unless China reached agreement with the United States on the IPR dispute before the June 17, 1996 deadline.

Why Inadequate IPR Protection in China?

Of the varying factors in China that contribute to the inadequate protection of foreign intellectual property in China, the main ones include low IPR awareness, institutional deficiencies, and underdeveloped judicial practice.

1. *Low IPR awareness*: In China, IPR awareness is still low, as evidenced, *inter alia*, by fewer patent applications in comparison with those in the developed countries.¹¹ This lower IPR awareness not only dampens the public's awareness of IPR protection, but also weakens the authorities' political will and determination to protect foreign intellectual property.¹² In association with the low level of domestic intellectual property and a general unawareness of IPR issues is the domestic pressure to counteract "hegemony," which occurs in the form of the protection of infant national industry and consumers' rights. A typical example is the *Microsoft v. Yadu* case.¹³

¹¹Statistics show that the Japanese, Americans, and Germans respectively file more than 400,000, 200,000, and 150,000 patent applications a year both at home and abroad. In the year 2000, China received only 25,346 Chinese patent applications, compared to 30,343 foreign ones. See *China Daily*, December 28, 2001, 4.

¹²Empirical evidence shows that the protection of IPR is often a problem in those countries or regions where the domestic IPR rate is lower than that of foreign IPR in the domestic market. Taiwan used to be such an example.

¹³After an investigation (the result was notarized), more than fifty computers were found installed with pirated computer software MS-DOS, MS-Windows 95 (Chinese edition), and

2. *Institutional deficiencies*: At the institutional level, factors contributing to the inadequate protection of intellectual property in China include deficiencies in standards for IPR protection in IPR laws, operability of IPR laws, and the effectiveness of law enforcement bodies. To make matters worse, political concerns often exacerbate the problem. In the process of negotiation for WTO accession, China was reluctant to change its IPR regime unless progress was made on its application to become a member of the WTO.

A further examination of the institutional factors would find differences in the degree to which IPR protection is affected. The standards for intellectual property protection in the IPR laws may be raised and the operability of these laws may be enhanced through the enactment of IPR laws and the application of improved legislation techniques. The difficulty, however, lies more in the effectiveness of IPR enforcement.

Due to the dominance of the administrative authority, most IPR enforcement in China is done through administrative actions. However, administrative sanctions the authorities render to IPR infringements are often found to result in little more than "a slap on the wrist." As a result, administrative penalties do not play any real role in deterring such infringements.

At present, administrative protection of intellectual property rests on a diversified administrative structure. Government offices responsible for IPR protection include: the State Intellectual Property Office (SIPO 國家知識產權局), the Trademark Office under the State Administration of Industry and Commerce (SAIC 國家工商行政管理局商標局), the SAIC

MS-Windows 95 (English edition) at the Beijing Yadu Technology Corporation (北京亞都科技公司, Yadu). Microsoft sued Yadu for copyright infringement at the Beijing First Intermediate People's Court in April 1999. The case was seen as a landmark copyright suit in China and a test of Beijing's activism in pursuing IPR abuses following its bilateral agreement with the United States regarding accession to the WTO reached in November 1999. A Microsoft announcement that IPR protection is critical to the development of knowledge economy was, therefore, perceived as not only putting pressure on the court to protect the copyright, but also interpreted as hinting at its expectation of the outcome of the suit. However, many Chinese viewed the issue differently; some even cried to "strike Microsoft's intellectual hegemony." For a legal analysis of the case, see Qingjiang Kong, "Judicial Enforcement of Intellectual Property Rights in China: On the Eve of WTO Accession," *Journal of World Intellectual Property* 4, no. 6 (November 2001): 818-19.

Copyright Office (版權局), the State Drug Administration (SDA 國家藥品監督管理局), the General Administration of Customs (GAC 海關總署), the Ministry of Agriculture (MOA 農業部), the State Administration of Forestry (SAF 國家林業局), the Ministry of Information Industry (MII 信息產業部), the State Administration for Entry-Exit Inspection and Quarantine (SAEIIQ 國家出入境檢驗檢疫局), and other institutions such as the State Press and Publications Administration (國家新聞出版署) and the police. The SIPO is responsible for patent approval; the SAIC Trademark Office for trademarks registration; the SAIC Copyright Office for copyright policymaking; SAIC for anti-unfair competition, including the protection of trade secrets; SDA for administrative protection of pharmaceuticals; GAC for border measures; MOA and SAF for protection of plant varieties; MII for the protection of layout designs of integrated circuits; and SAEIIQ and SAIC for combating counterfeiting activities. Coordination difficulties resulting from this diversified structure, in combination with the often interest-driven administrative behavior, reduce the effectiveness of administrative enforcement of IPR.

This convoluted administrative structure will also have an impact on the protection of foreign intellectual property in China in the post-WTO era. For example, even in the event the IPR laws and the operability of these laws are improved as a result of the effort to align with the WTO agreement, the effectiveness of the law enforcement bodies will likely remain less than stellar, to say the least.

3. *Underdeveloped judicial practice:* Despite the increasing competence of the courts in dealing with IPR cases in recent years, judicial practices limit the courts' protection of IPR. Basing filing fees on the amount of damages requested makes large-scale infringement actions unnecessarily costly; basing calculation of damages on the infringer's profits—combined with China's rules on establishing the level of profits which require evidence of actual sale and which disregard inventory and past activity—often results in damage amounts inadequate to compensate for the injury that the right-holder has suffered. Moreover, many counterfeiting and copyright piracy cases, which the infringed parties think need to be referred to for criminal prosecution, are handled adminis-

tratively.¹⁴ All these practices certainly have a negative impact on the effectiveness of IPR protection in China.

IPR in China at the Turn of WTO Accession

China's drive for WTO membership has provided further impetus to the institution-building concerning IPR in China.¹⁵ China committed, in the historical agreement between China and the United States on China's accession to the WTO in 1999, to bring the IPR regime in full compliance with the "Agreement on Trade-Related Aspects of Intellectual Property Rights" (TRIPS Agreement), and reiterated this commitment later in the "Protocol on Accession of the People's Republic of China to the World Trade Organization." China also committed itself to implementing the TRIPS Agreement immediately upon accession—with no transition period.

In fact, even before accession to the WTO, China had conducted an intensive work program to examine and revise her IPR laws, administrative regulations, and ministerial rules relating to the implementation of the WTO Agreement and China's accession commitments. Among the new legislative moves directly in association with WTO compliance, the Patent Law, the Trademark Law, and the Copyright Law have all been amended. Moreover, these laws were entered into force before accession.¹⁶

¹⁴Statement by Joseph S. Papovich, U.S. Assistant Trade Representative for Services, Investment, and Intellectual Property, in Beijing on January 23, 2002, available at <<http://www.usembassy-china.org.cn/english/press/events/papovich0102.html>>.

¹⁵It should be pointed out that the effort to formulate an IPR regime in China did not begin with WTO accession. The formulation of laws and regulations in the IPR field can be traced back to the late 1970s. China has since gradually established a comprehensive IPR regime by adopting laws and regulations on trademarks, patents, and copyrights. Parallel with these domestic legislative efforts, China has joined relevant international conventions and actively participated in the activities sponsored by relevant international organizations. Foreign pressure has served as a useful tool to persuade China to upgrade its intellectual property laws.

¹⁶Similarly, "Regulations for the Implementation of the Patent Law" had also been amended and entered into effect before accession. "Regulations on the Protection of Computer Software" were promulgated on December 20, 2001 and took effect on January 1, 2002. "Provisions on the Implementation of the International Copyright Treaty," "Regulations on

The regime covers all the IPR areas that the TRIPS Agreement contains, i.e., copyrights, trademarks, geographical indications, industrial designs, patents, plant variety protection, layout designs of integrated circuits, and trade secrets. Arguably, as far as the range of IPR protection is concerned, China had already met the requirements of the TRIPS Agreement.

The IPR regime provides the substantive standards of protection and procedures for the acquisition and maintenance of IPR. For example, while in many countries the use of pirated software by end-users is still ignored, the newly amended "Regulations on the Protection of Computer Software" adopt a world-class standard concerning software infringements by end-users.¹⁷ Moreover, the new regime lends support to enforcement, including specifying detailed procedures for administrative and judicial protection,¹⁸ granting more power to local officials to investigate cases of infringement, and offering more compensation for infringement. In short, notwithstanding the initial stage of its development, China's IPR protection system is aimed at achieving international standards.

Despite the above accomplishments, enforcement of foreign IPR still remains a problem. Trademark infringement, retail piracy, counterfeit goods, and even end-user piracy of business software remain widespread in China. According to the USTR,

[IPR] violations are still rampant. Piracy and counterfeiting are sophisticated and widespread. Pirates find ways to get digital copies of blockbuster films and computer programs into the Chinese market almost immediately after they are released in the United States. Knock-off consumer products are readily avail-

Customs' Protection of Intellectual Property Rights," "Regulations on the Protection of New Varieties of Plants," and "Regulations on the Implementation of the Integrated Circuit Layout Design" are all to be revised to conform to the TRIPS Agreement. In addition, China abrogated, upon accession, the ministerial rules regarding IPR inconsistent with the TRIPS Agreement: "Interim Rules on the Administration of Patents in Agriculture, Animal Husbandry, and Fisheries," "Notice on the Interim Regulations on the Protection of Copyright of Books and Magazines," "Detailed Rules of the Interim Regulations on the Protection of Copyright of Books and Magazines," and "Regulations on the Administration of Audiovisual Products." See Qingjiang Kong, *China and the World Trade Organization: A Legal Perspective* (Singapore: World Scientific Publishing, forthcoming), chap. 3.

¹⁷ Art. 30 of the "Regulations on the Protection of Computer Software."

¹⁸ *Ibid.*, Art. 24.

Table 2
Estimated Trade Losses Due to Piracy (in US\$ Million) and Levels of Piracy

Industry	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion pictures	120.0	90%	120.0	90%	120.0	90%	120.0	75%	120.0	85%	124.0	100%
Sound recordings/ Music compositions	70.0	85%	70.0	90%	80.0	56%	150.0	56%	176.8	53%	300.0	54%
Business software applications	658.7	93%	437.2	91%	808.4	95%	987.9	96%	507.5	95%	488.0	96%
Entertainment software	N.A.	99%	1,382.5	95%	1,420.1	95%	1,409.4	96%	1,380.0	97%	1,286.0	99%
Books	130.0	N.A.	128.0	N.A.	125.0	N.A.	125.0	N.A.	125.0	N.A.	125.0	N.A.
Total	978.7		2,137.7		2,553.5		2,792.3		2,309.3		2,323.0	

Source: International Intellectual Property Alliance, "2001 Special 301 Report: People's Republic of China."

able almost everywhere in China, and consumers are often unaware that they are purchasing IPR-infringing goods.¹⁹

According to some estimates, U.S. companies lose an average of US\$2.2 billion each year due to copyright infringement alone (see table 2). U.S. consumer goods giant Procter & Gamble (P&G) itself recorded losses of some US\$150 million per year.²⁰

New Developments

A preliminary evaluation of the new developments in IPR protection brought about by China's WTO accession is encouraging. There have been positive changes in political will, public awareness, enforcement capacity building, and court competence.

Political will: In the effort to keep in line with its commitments which

¹⁹See note 1 above.

²⁰"IPR and the WTO: Can the WTO Solve China's IPR Problems?" *China Brief* (The American Chamber of Commerce in China), February 2002.

are freely chosen, China has shown sincere political will to combat IPR infringement. The Chinese government established a new "National Anticounterfeiting Coordination Committee" (全國打假聯合協調小組), chaired by Vice-Premier Wu Bangguo (吳邦國), and reorganized the "Office of Anti-Piracy and Pornography" (掃黃打黑工作小組辦公室), chaired by Vice-Premier Li Lanqing (李嵐清). In a concrete move, the government issued a decree to prohibit the use of unauthorized copies of software in government agencies and enterprises. Parallel with the national-level efforts, local governments also are undertaking serious measures to protect IPR. Shanghai, for example, set itself the target of becoming the "model city for copyright protection" (版權保護模範城市) which shows its determination to combat IPR infringement.²¹ In addition, enforcement of IPR is now characterized with a combination of the launches of enforcement campaigns and regular enforcement.

Public awareness: As part of the high-profile drive to prepare for WTO accession, a desirable development relating to the IPR protection is the enhancement of IPR awareness among the public. Competent administrative authorities and the judiciary have publicized the issues of IPR and IPR laws on an unprecedentedly large scale. The government even designated April 26 as "Intellectual Property Rights Day."²² Although no accurate data is available,²³ the wide and constant media coverage of IPR issues suggests more IPR awareness among the public. This is closely related to the political will to protect IPR among the leadership. The Chinese government has undertaken systematic measures to enhance the general public's IPR awareness through the legal publication and education of the

²¹In the document entitled "Certain Opinions on Strengthening the Protection of Intellectual Property in Our City" (關於加強本市知識產權保護的若干意見) of 2000, the Shanghai municipal government vowed to "build a modern cosmopolitan by utilizing the intellectual property system" (利用知識產權制度建設現代化國際大都市) and to become a "model city for copyright protection."

²²April 26 was the anniversary of the World Intellectual Property Organization and therefore was named the "Intellectual Property Rights Day." On April 26, 2002, China celebrated this day for the first time.

²³At the time this article was written, the first nationwide investigation on public awareness on IPR was being held under the auspices of the State Intellectual Property Office.

public. These public education efforts are often coupled with vigorous and sustained enforcement characterized by harsh penalties. For example, in a binding document entitled "Circular on Certain Matters Relating to Cracking Down on Intellectual Property Infringement" (關於開展知識產權打假行動若干事項的通知) of March 5, 2001, the State Intellectual Property Office required IPR administrations across the country to educate the public while cracking down on patent infringement.

Enforcement capacity building: In parallel with the above efforts, China has taken aggressive steps in the WTO preparation drive to improve IPR enforcement.²⁴ There are signs that the Chinese government has attached further importance to IPR enforcement capacity building. In April 1998, the Patent Administration Office (國家專利局) was transformed into the State Intellectual Property Office, a move some observers believe is the first step toward unifying the regulators in the field of IPR. In December 1999, the Administration of Industry and Commerce (AIC 工商行政管理局) was restructured to the effect that an AIC is now directly responsible to the AIC above, rather than to the local government. The reform strengthened the power of AICs at higher levels, thus making it easier for local AICs to carry out the orders of the higher AICs and to shut out local protection in regard to trademark infringement and unfair competitive acts. Several administrative enforcement authorities have joined forces to act against specific IPR infringements. In March 2000, for instance, the State Press and Publications Administration, the State Copyright Administration (國家版權局), the Ministry of Public Security (公安部), and the State Administration of Industry and Commerce (SAIC), as well as their provincial, regional, and municipal branches, launched a special campaign against DVD piracy in China.²⁵ In the same year, the

²⁴Of course, IPR enforcement did not begin only recently. Amid the cry for protection of IPR primarily from the U.S. side, the State Council promulgated the "Decision on Further Strengthening of Intellectual Property Rights Protection Work" on July 5, 1994, demonstrating resolve to strengthen its hand administratively in the field of law enforcement. The Decision dictated the establishment for the first time of the State Intellectual Property Office to coordinate the work of IPR protection among various central agencies. It also required governments at all levels to strengthen the enforcement of IPR laws.

²⁵On March 2, 2000, the four government agencies issued an urgent joint circular to urge

State Intellectual Property Office, the Ministry of Foreign Trade and Economic Cooperation (MOFTEC 對外貿易經濟合作部), the General Administration of Customs, the SAIC, and the State Administration Bureau of Entry-Exit 出入境管理局) jointly issued the "Notification of Carrying on the Actions of Attacking the Acts of Counterfeiting UL Mark."²⁶ In order to bring further coordination of efforts toward WTO compliance, China established the National Anticounterfeiting Coordination Committee.

The latest revisions of the IPR laws lend support to enforcement, including specifying detailed procedures for litigation, granting more power to local officials to investigate cases of infringement, and offering more compensation for infringement. These changes serve an encouraging example of China's determination to honor the commitment.²⁷

Court competence: As noted above, protection of IPR is generally shared by administrative organs and the judiciary. However, due to the dominance of the administrative authority in China, and the reluctance of the Chinese to resolve disputes through methods other than litigation, administrative organs have so far played a much more important role than the judiciary. It is a blessing that judicial enforcement by Chinese courts, which used to be useless particularly in infringement of trademark cases, has become increasingly competent since the mid-1990s. Judicial enforcement of IPR is realized through case handling by the courts. Chinese courts deal with civil cases where the IPR proprietors file suits with the court against infringers, criminal cases where prosecutors file criminal

every provincial, regional, and municipal government authority to launch a special campaign against DVD piracy across the country.

²⁶The UL marks are registered certification marks of Underwriters Laboratories, Inc. They may be only used on, or in connection with, products certified by UL and with the written agreement of UL. According to statistics, the State Administration for Entry-Exit Inspection and Quarantine supervised the destroying of counterfeit UL goods valued at RMB 2 million *yuan*, imposed fines of approximately RMB 800,000 *yuan*, and transferred about ten cases to the administrative authorities for industry and commerce and public security bureaus at various levels. Each port of the customs investigated about eighty lots of export goods bearing the UL mark. See the website maintained by the State Intellectual Property Office: <http://www.sipo.gov.cn/sipo_English/gftx_e/ndbg_e/2000nb_e/200202270007.htm>.

²⁷Even before becoming a WTO member, China had already put into effect the newly amended Patent Law, which was deemed consistent with the TRIPS Agreement.



charges against suspected infringers, and administrative litigation cases where the parties who are dissatisfied with administrative acts by authorities for IPR administration initiate administrative litigations. A statistical analysis of the cases handled by Chinese courts in recent years shows that the total number of cases that the judiciary has accepted is steadily going up, which reflects the fact that the judicial enforcement of IPR has gradually gained more weight.²⁸

Amid the effort to prepare for WTO accession, courts across the country, particularly the Supreme People's Court (SPC) and those in major cities, are becoming more and more competent. However, it should be pointed out that the efforts of China's judiciary to improve the enforcement of IPR did not begin with this WTO preparation drive. Early in 1994, the SPC promulgated the "Circular on Further Strengthening Judicial Protection of Intellectual Property," a milestone in the history of judicial enforcement of IPR in China.²⁹ The courts become increasingly comfortable in dealing with IPR cases. It is particularly worthwhile to mention the special role of the SPC, the highest judiciary body in China. By hearing a bunch of appeal IPR cases, the SPC sets the example of enforcing IPR, and the cases it adjudicates serve as references for all courts across the country. In addition, the SPC has made quite a few judicial interpretations on IPR that are binding on all the courts.³⁰ On another occasion, the SPC followed the generally recognized principle of judicial review, asserting its power to render judicial protection to the victim of a trademark infringement, despite

²⁸See, for instance, Luo Guoqiang, "Recent Developments in Judicial Protection for Intellectual Property in China," Oxford Intellectual Property Research Centre Working Paper Series No. 3 (November 2001), available at <<http://www.oiprc.ox.ac.uk/EJWP0301.html>>.

²⁹The Supreme People's Court, "Circular on Further Strengthening Judicial Protection of Intellectual Property" (Fa [1994] No. 111). In the Circular, the courts were urged, among other things, to establish tribunals specifically responsible for handling IPR cases and train judges with a good knowledge of IPR.

³⁰The SPC, for instance, promulgated the "Interpretation Regarding Certain Matters of Law Application to Cases of Computer Net Copyright Disputes" in December 2000. This judicial interpretation offers applicable rules for treatment of issues such as the jurisdiction of the cases concerning the network copyright disputes, the digitalization of works, the description of copyrights, the cognizance of violations, legal liability, as well as the application of the damage-compensating responsibilities, which neither of the General Principles of Civil Law, the Copyright Law, and the Civil Procedure Law have dealt with.

the existence of a contrary previous administrative decision.³¹ The Haidian (海淀) District People's Court in Beijing is also worth praising for taking initiative on on-line copyright infringement even when some leading scholars within China believed that the then Copyright Law was somehow unclear on copyright protection in the digital context.³²

U.S.-China Cooperation on Intellectual Property

Another development in IPR protection is the U.S.-China cooperation in this regard, which is closely, but not exclusively, related to China's WTO accession. For more than a decade, the United States and China have engaged in detailed discussions regarding the improvement of China's protection of IPR and market access for products needing IPR protection. The United States has also held training programs for Chinese IPR officials and judges at various levels and regions (see table 3). The dialogues and training programs are designed to help China both improve her legal framework for IPR protection based on the bilateral agreements, and enhance

³¹ See the *TMT* case (The Supreme People's Court, Civil Judgment Fa Gong Bu (2000) No. 25). Trademarks TMT, TMC, and SMT were designed and first used and registered abroad by TMT Company, a Hong Kong-based firm. In 1980, with the authorization from the TMT Company, Guangdong Light Industry registered the trademarks in China in its own name. In 1997, Guangdong Light Industry submitted an application to the customs office, in the name of the owner of the trademarks, for an injunction on the exports bearing said trademarks. Subsequently, the TMT Company brought a suit before the High People's Court of Guangdong Province in the name of the real trademark holder. The Guangdong High People's Court rendered a judgment in favor of the TMT Company. Guangdong Light Industry appealed to the SPC. Regardless of the statutory provisions asserting the decisions of the Trademark Bureau of China are final concerning the propriety of trademarks, the SPC seized the jurisdiction and pronounced a judgment.

³² See *Chen Weihua v. Chengdu Computer Business Information*. The case is the first Internet-related case of copyright infringement in China. The plaintiff maintained a personal home page under his pen name "Wu Fang." On May 10, 1998, an article entitled "Talking about MAYA Dramatically" was uploaded onto this home page. On October 16, 1998, the defendant published this article in its newspaper, *Computer Business Information*, with the author being named as "Wu Fang." The plaintiff sued the defendant for copyright infringement at the Haidian District People's Court of Beijing. The court held that the copyright infringement was established and the defendant was the infringer. For a legal analysis of the case, see Kong, "Judicial Enforcement of Intellectual Property Rights in China," 821-22.

Table 3
U.S.-Sponsored Intellectual Property Training Programs for China (October 1998-June 2000)

Time	Sponsoring Institution	Program
November 1998	Department of Justice	Guangdong Province People's Procuratorate, briefing on IPR for rule of law reforms
December 1998	Music Publishers' Association	Internal staff training for Shanghai officials—basic knowledge in optical product identification
December 1998	Music Publishers' Association	Internal staff training for Beijing officials—basic knowledge in optical product identification
December 1998	Music Publishers' Association	Internal staff training for Guangzhou officials—basic knowledge in optical product identification; fifty-six participants from various government authorities
February 1999	U.S. Information Agency	International Visitor Program brought an academic from the Harbin Institute of Technology to learn about intellectual property protection
April 1999	U.S. Information Agency	The director of the Lawyer Management Department of the Sichuan Judicial Bureau traveled to the United States for one month to study, among other things, legislation to protect intellectual property rights and the U.S. legal system
April 1999	Music Publishers' Association	Methods to examine VCD, DVD information introduction on title verification & legal issues were taught to sixty officials consisting of twenty-two enforcement agencies of the Sichuan Provincial Copyright Administration
May 1999	U.S. Information Agency	Official from the State Intellectual Property Office traveled to the United States to participate in a program on the "Protection of Intellectual Property Rights"
July 1999	U.S. Information Agency	Proposals have been made requesting that information be exchanged and training be given to assist Chinese officials' efforts to combat counterfeiting of all types of consumer and industrial goods
August 1999	U.S. Patent and Trademark Office	Consultations with Guangxi Patent Office

Table 3 (Continued)

Time	Sponsoring Institution	Program
August 1999	Music Publishers' Association	Training in combating optical disc piracy provided to officials from the ministries of Culture, Public Security, and Information in Shanghai
August 1999	Music Publishers' Association	Training in combating optical disc piracy provided to officials from the ministries of Culture, Public Security, and Information in Hangzhou
September 1999	U.S. Patent and Trademark Office	Consultations between SIPO and Commissioner of Patents and Trademarks in Washington, D.C.
November 1999	U.S. Customs	U.S. Customs, in coordination with Revenue Canada, conducted training for forty-five Chinese customs officers on the importance of TRIPS compliance, U.S. approach to IPR border enforcement, etc. Private industry was represented by Underwriters Laboratories, the Business Software Alliance, International Federation of the Phonographic Industry, the Interactive Digital Software Association, and the Motion Picture Association
November 1999	U.S. Patent and Trademark Office	Trademark Office of China visited USPTO to gain assistance in learning about TRIPS obligations and trademark application process
January 2000	U.S. Patent and Trademark Office	Bilateral consultations
April 2000	U.S. Patent and Trademark Office	U.S.-China International Exchange Advancement Association, Patent Administration officials, and USPTO provided briefings of the U.S. systems
May 2000	U.S. Patent and Trademark Office	Consultations with SIPO Commissioner
June 2000	U.S. Patent and Trademark Office	Visitors to USPTO from the Ministry of Science and Technology; visit to USPTO sponsored by Temple University Law Program

Source: The National Intellectual Property Law Enforcement Coordination Council, "Annual Report 2000."

enforcement of those IPR laws. The effect of such cooperation is evident in the establishment of an IPR legal framework with a high standard of IPR protection and the empowerment of Chinese officials with IPR knowledge. For example, the U.S.-China dialogue on title verification of audiovisual works resulted in a working program of the State Copyright Administration of China.³³ In addition, these dialogues and training programs help foster mutual understanding between Chinese and U.S. IPR enforcement officials as well as between U.S. industries and Chinese IPR enforcement officials, thus facilitating cooperation between the two sides in combating IPR infringements in China and reducing the likelihood of confrontation.

Prospects for IPR Protection in the Post-WTO Era and Ramifications for Sino-U.S. Trade Relations

Indeed, China believes she has, in association with the preparation for WTO accession, worked earnestly to protect foreign intellectual property in China. The PRC's achievements in IPR protection include significant revisions to the IPR laws and regulations, heightened standards for IPR protection, enhanced public awareness on IPR issues, and strengthened political will to combat IPR infringement. More importantly, China has agreed, in the context of the Protocol on Accession to the WTO, to implement the TRIPS Agreement without recourse to any transition period. Honoring the commitment means making available enforcement measures and sanctions. All these offer grounds for cautious optimism.

Nevertheless, WTO accession cannot tackle all the factors contributing to the inadequate protection of foreign intellectual property in China. This is not only because of the inadequacy of deterrent sanctions (including less harsh criminal penalties) and the opaque structure of IPR administration and enforcement in China,³⁴ but also due to the inability of the some-

³³See the letter dated February 26, 1996, by Wu Yi (吴仪), Minister of Foreign Trade and Economic Cooperation. It was addressed to USTR Michael Kantor.

³⁴This was argued by the USTR and the industrial organizations for IPR protection (e.g.,

what state-of-the-art IPR regime to deal with the sophisticated market. In other words, the overriding reason may be "market" forces. Indeed, the market for pirated products is extremely difficult to close down. The experience of other WTO members in the region such as South Korea and Japan has demonstrated this fact.³⁵

For these reasons, IPR infringement is not likely to be always reduced to a level found to be tolerated in such countries as the United States. Just as the U.S. side has discovered in the few months following China's accession to the WTO,³⁶ the issue of inadequate protection of U.S. intellectual property in China does not seem to be going away, at least from the U.S. perspective. U.S. companies in China and the U.S. government are likely to push for further protection of U.S. intellectual property. This will lead to an intensification of disputes, particularly if unilateral U.S. trade regulations (e.g., Special 301 of the Trade Act of 1974) are employed. Such scenarios will unavoidably damage Sino-U.S. trade relations.

As far as the United States is concerned, protection of U.S. intellectual property, as well as market access in China, is to remain a major concern in Sino-U.S. trade relations. With more progress in market access, protection of U.S. intellectual property in China will become an increasingly prominent issue. On the U.S. side, a large proportion of disputes that may arise from Sino-U.S. trade relations would be related to protection of U.S. intellectual property in China. While protection of U.S. intellectual property will continue to be a nuisance to Sino-U.S. trade relations, the

International Intellectual Property Alliance, or IIPA). See, for example, the 2001 Special 301 Report (USTR) and the 2001 Special 301 Report (IIPA).

³⁵A report by Velisarios Kattoulas entitled "Counterfeiting: Bags of Trouble" in the *Far Eastern Economic Review* (March 21, 2002, 52-55) illustrates how high-quality pirated products are welcome in the two countries.

³⁶During his WTO compliance-monitoring trip, on January 23, 2002, U.S. Assistant Trade Representative Joseph Papovich bluntly warned in Beijing that China was making little progress in ending piracy of music, movies, software, and consumer goods, had a rampant counterfeit industry, and had a long way to go to fill its promise as a new WTO member. See note 14 above. Also, during the first U.S. business development mission to China since its accession to the WTO, IPR protection was among the few issues that U.S. Commerce Secretary Donald Evans expressed his concerns about. See U.S. Department of Commerce, Press Release, April 23, 2002.

issue would be a tumor to the bilateral trade relations when inadequate protection of IPR has culminated in disputes. It may be a blessing that the closer cooperation between China and the United States on IPR protection helps foster mutual understanding, having the effect of mitigating the possibility of disputes. In addition, the WTO provides a channel for both parties to resolve the disputes.