

## AN ACTION PLAN TO REINVENT U.S.-CHINA INTELLECTUAL PROPERTY POLICY

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Since the Second World War, information and high-technology goods have become a very important sector of the American economy.<sup>1</sup> These goods have become even more important with the emergence of the Internet and the transformation of the global economy.<sup>2</sup> To protect its economic interests, the United States has been very aggressive in pushing for a universal intellectual property regime that offers information and high-technology goods uniform protection throughout the world.<sup>3</sup> Intellectual property therefore has moved from a meager bilateral trade issue to the forefront of the international economic debate.<sup>4</sup>

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<sup>1</sup> See INTELLECTUAL PROPERTY LAWS OF EAST ASIA 9 (Alan S. Gutterman & Robert Brown eds., 1997) (noting that the share of intellectual property-based exports in the United States has doubled since the Second World War); R. Michael Gadbow & Rosemary E. Gwynn, *Intellectual Property Rights in the New GATT Round*, in INTELLECTUAL PROPERTY RIGHTS: GLOBAL CONSENSUS, GLOBAL CONFLICT? 38, 45 (R. Michael Gadbow & Timothy J. Richards eds., 1988) [hereinafter GLOBAL CONSENSUS, GLOBAL CONFLICT?]; (“The new reality is that the U.S. economy is increasingly dependent for its competitiveness on its ability to protect the value inherent in intellectual property. United States exports are increasingly weighted toward goods with a high intellectual property content.”); Bruce A. Lehman, *Speech Given at the Inaugural Engelberg Conference on Culture and Economics of Participation in an International Intellectual Property Regime*, 29 N.Y.U. J. INT’L L. & POL. 211, 211 (1997) (“Many Americans have begun to derive their livelihoods from products of their minds, as opposed to products of manual labor, and much of [its] gross domestic product is attributable to new information and entertainment-based industries which have an interest in protecting their valuable products through intellectual property rights.”).

<sup>2</sup> See, e.g., ECON. & STATISTICS ADMIN., U.S. DEP’T OF COMMERCE, DIGITAL ECONOMY 2000 (2000), available at <http://www.esa.doc.gov/De2000rev.pdf>.

<sup>3</sup> See Donald E. deKieffer, *U.S. Trade Policy Regarding Intellectual Property Matters*, in INTERNATIONAL TRADE AND INTELLECTUAL PROPERTY: THE SEARCH FOR A BALANCED SYSTEM 97 (George R. Stewart et al. eds., 1994) [hereinafter INTERNATIONAL TRADE AND INTELLECTUAL PROPERTY].

<sup>4</sup> See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1197 (1994) [hereinafter TRIPs Agreement]; JAMES BOYLE, SHAMANS, SOFTWARE & SPLEENS: LAW AND THE CONSTRUCTION OF INFORMATION SOCIETY 2 (1996) (“[T]he protection of information ‘value-added’ in products is one of the key elements in the foreign policy of the developed world. Intellectual property—which stretches beyond ‘information’ conventionally defined—has become a major area of international concern.”); Theodore H. Davis, Jr., *Combating Piracy of Intellectual Property in International Markets: A Proposed Modification of the Special 301 Action*, 24 VAND. J. TRANSNAT’L L. 505, 506 (1991) (“The increasing importance of intellectual property rights in world markets has pushed the issue of their proper legal treatment to the forefront of domestic and international

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To increase its leverage, the U.S. government has threatened to impose trade sanctions on countries that fail to provide adequate intellectual property protection to American products. During the last decade, the United States repeatedly threatened China with a series of economic sanctions, trade wars, non-renewal of Most Favored Nation (“MFN”) status, and opposition to entry into the World Trade Organization (“WTO”).<sup>5</sup> Such threats eventually led to compromises by the Chinese government and the signing of intellectual property agreements in 1992,<sup>6</sup> 1995,<sup>7</sup> and 1996.<sup>8</sup> Despite these agreements, intellectual property piracy remains rampant in China. Every year, the United States loses over \$2 billion of revenues due to intellectual property piracy in China alone.<sup>9</sup>

Although China initially had serious concerns about the United States’s threats of trade sanctions, the constant use of such threats by the U.S. government has led China to change its reaction and approach. By 1996, it had become obvious that the existing American foreign intellectual property policy was ineffective, misguided, and self-deluding.<sup>10</sup> The United States

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debate.”); R. Michael Gadbaw, *Intellectual Property and International Trade: Merger or Marriage of Convenience*, 22 VAND. J. TRANSNAT’L L. 223 (1989) (examining the interaction between trade and intellectual property rights policies through key developments in United States law, General Agreement on Tariffs and Trade, and the World Intellectual Property Organization); Congressman Robert W. Kastenmeier & David Beier, *International Trade and Intellectual Property: Promise, Risks, and Reality*, 22 VAND. J. TRANSNAT’L L. 285 (1989) (recounting how the issue of intellectual property came to be included in the Uruguay Round).

<sup>5</sup> See Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-first Century*, 50 AM. U. L. REV. 131, 142-43 (2000) [hereinafter Yu, *From Pirates to Partners*] (tracing the development of the American intellectual property policy toward China in the late 1980s and 1990s); see also Peter K. Yu, *Piracy, Prejudice, and Perspectives: An Attempt to Use Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate*, 19 BOSTON INT’L L.J. 1, 3-16 (2001) [hereinafter Yu, *Piracy, Prejudice, and Perspectives*] (discussing the United States’s repeated attempts to convert China’s intellectual property regime in the twentieth century).

<sup>6</sup> Memorandum of Understanding Between China (PRC) and the United States on the Protection of Intellectual Property, Jan. 17, 1992, P.R.C.-U.S., 34 I.L.M. 677 (1995); see also Yu, *From Pirates to Partners*, *supra* note 5, at 142-43 (discussing the 1992 Memorandum of Understanding). Pursuant to the 1992 Memorandum of Understanding, China amended the 1984 Patent Law, Patent Law of the People’s Republic of China, translated in INTELLECTUAL PROPERTY PROTECTION IN CHINA: THE LAW 66-79 (1996), promulgated new patent regulations, Implementing Regulations of the Patent Law of the People’s Republic of China, translated in INTELLECTUAL PROPERTY PROTECTION IN CHINA: THE LAW, *supra*, at 83-116, and acceded to the Patent Cooperation Treaty, June 19, 1970, 28 U.S.T. 7645, 1160 U.N.T.S. 231. China also acceded to the Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised in Paris, July 24, 1971, 828 U.N.T.S. 221, and ratified the Geneva Convention for Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Oct. 28, 1971, 25 U.S.T. 309. In addition, China amended the Copyright Law, Copyright Law of the People’s Republic of China, translated in INTELLECTUAL PROPERTY PROTECTION IN CHINA: THE LAW, *supra*, at 128-42, updated its trademark law, adopted a new unfair competition law, and afforded protection to trade secrets.

<sup>7</sup> Agreement Regarding Intellectual Property Rights, Feb. 26, 1995, P.R.C.-U.S., 34 I.L.M. 881 (1995) [hereinafter 1995 Agreement]; see also Yu, *From Pirates to Partners*, *supra* note 5, at 145-48 (discussing the 1995 Agreement). The 1995 Agreement summarized the enforcement measures China had undertaken in the past and those it would undertake in the near future. It included a pledge to improve market access for American products and to promote transparency by publishing all laws, rules, and regulations concerning limitation on imports, joint ventures, and other economic activities. The Agreement also delineated the mutual responsibilities that would be undertaken by both countries, such as training customs officers and bureaucrats, exchanging information and statistics, and undertaking future consultations. In addition, the 1995 Agreement provided a series of short-term and long-term remedial measures, including the establishment of the State Council Working Conference on Intellectual Property Rights; the creation of Enforcement Task Forces; the adoption of a copyright verification system that protects compact discs, laser discs, and CD-ROMs; the requirement for title registration of foreign audiovisual products and computer software in CD-ROM format; and the intensification of border control by customs officers. Finally, the Agreement provided for a six-month “special enforcement period,” during which intensive efforts would be undertaken to crack down on the major infringers of intellectual property rights and to target regions in which infringing activity was particularly rampant at the time of the Agreement.

<sup>8</sup> China Implementation of the 1995 Intellectual Property Rights Agreement, June 17, 1996, P.R.C.-U.S., available at <http://www.mac.doc.gov/TCC/DATA/index.html> (last visited Mar. 6, 2001); see also Yu, *From Pirates to Partners*, *supra* note 5, at 150-51 (discussing the 1996 Accord). The terms of the 1996 Accord include the closing of pirate plants, criminal prosecution for those who violate intellectual property regulations, a special enforcement period where police assume responsibility for the investigation of piracy, improved border surveillance by customs officers, and a registration system for compact disc manufacturers.

<sup>9</sup> Seth Faison, *China Turns Blind Eye to Pirated Disks*, N.Y. TIMES, Mar. 28, 1998, at D1.

<sup>10</sup> As commentators, including myself, have pointed out, the culprit behind the Chinese piracy problem is the Confucian beliefs ingrained in the Chinese culture, the country’s socialist economic system, the leaders’ skepticism toward Western institutions, the xenophobic and nationalist sentiments of the populace, the government’s censorship and information control policy, and the significantly

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not only lost its credibility,<sup>11</sup> but its constant use of trade threats had helped China improve its ability to resist American demands.<sup>12</sup> Such threats and bullying also created hostility among the Chinese people, making the government more reluctant to adopt Western intellectual property law reforms.<sup>13</sup>

Even worse, the ill-advised bilateral policy had created a futile cycle of events, based on which an observer can forecast the outcome of future intellectual property negotiations between China and the United States.<sup>14</sup> This cycle of futility begins when the United States threatens China with trade sanctions. China then retaliates with countersanctions of a similar amount. After several months of bickering and posturing, both countries come to an eleventh-hour compromise by signing a new intellectual property agreement. Although intellectual property protection improves during the first few months immediately after the signing of the agreement, the piracy problem revives once international attention is diverted and the foreign push dissipates. Within a short period of time, American businesses again complain to the U.S. government, and the cycle repeats itself.

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different Chinese legal culture and judicial system. See, e.g., WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* (1995); Glenn R. Butterson, *Pirates, Dragons and U.S. Intellectual Property Rights in China: Problems and Prospects of Chinese Enforcement*, 38 ARIZ. L. REV. 1081 (1996); Susan Tiefenbrun, *Piracy of Intellectual Property in China and the Former Soviet Union and Its Effects upon International Trade: A Comparison*, 46 BUFF. L. REV. 1 (1998); Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 5, at 16-37. Unfortunately, the existing American intellectual property policy toward China does not target any of these problems. Rather, it masks the ideological differences between the two countries and conceals the limited understanding American scholars, policymakers, the mass media, and the general public have about China. Yu, *From Pirates to Partners*, *supra* note 5, at 165; see also Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 5, at 67-77 (discussing the wrong-headed debate on U.S.-China intellectual property conflict).

<sup>11</sup> As Greg Mastel explained:

The stakes in this dispute, however, go far beyond just the dollar value of Chinese piracy. American credibility is on the line. Less than one year ago, U.S. and Chinese negotiators reached the second agreement in three years to end piracy of intellectual property, but that agreement appears to have had little, if any, effect. China also appears to have failed to comply with every major trade agreement it has struck with the United States in recent years. The United States has threatened China with trade sanctions for its many trade sins a half-dozen times in recent years without making good on its threats. In the eyes of the Chinese, continued empty U.S. threats have little credibility.

Greg Mastel, *Piracy in China: No Mickey Mouse Issue*, WASH. POST, Feb. 15, 1996, at A27; see also JAMES MANN, *ABOUT FACE: A HISTORY OF AMERICA'S CURIOUS RELATIONSHIP WITH CHINA, FROM NIXON TO CLINTON* 311 (2000) ("Clinton's retreat on human rights made matters worse than if he had never imposed his MFN conditions. . . . [I]t had shown that American would back down from the threats it made about human rights and democracy in cases where its commercial and strategic interests were jeopardized."); James Lilley, *Trade and the Waking Giant—China, Asia, and American Engagement*, in *BEYOND MFN: TRADE WITH CHINA AND AMERICAN INTERESTS* 36, 53 (James R. Lilley & Wendell L. Willkie II eds., 1994) [hereinafter *BEYOND MFN*] ("President Clinton does not seem entirely credible to foreign leaders because he has made threats without following up on them."); James D. Morrow, *The Strategic Setting of Choices: Signaling, Commitment, and Negotiation in International Politics*, in *STRATEGIC CHOICE AND INTERNATIONAL RELATIONS* 77 (David A. Lake & Robert Powell eds., 1999) (emphasizing the importance of credibility in international relations).

<sup>12</sup> See RICHARD BERNSTEIN & ROSS H. MUNRO, *THE COMING CONFLICT WITH CHINA* 82-129 (Vintage Books 1998). As Richard Bernstein and Ross Munro pointed out, China successfully inverted the American coercive approach:

The method used in the past by the United States was to threaten Beijing with high import duties on its products sold in America—resulting from a withdrawal of China's most-favored-nation status—unless the regime stopped jailing its political dissenters. That initiative, little more than a clumsy and ultimately transparent bluff, failed abysmally. China in its way inverted the American approach. Beijing threatened to impose the equivalent of economic sanctions against the United States—an effective boycott on the purchase of high-technology products and curbs on American investments in China—unless it dropped its policy of pressure and threats. The difference is that China's bluff was taken seriously, and its strategy has been remarkably successful.

*Id.* at 83.

<sup>13</sup> See Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 5, at 24-28 (discussing the prevailing skepticism and xenophobic and nationalist sentiments among the Chinese people and how the United States's coercive attempts have created resentment among these people).

<sup>14</sup> See Yu, *From Pirates to Partners*, *supra* note 5, at 140-51, 153-54 (discussing the cycle of futility); see also Gregory S. Feder, Note, *Enforcement of Intellectual Property Rights in China: You Can Lead a Horse to Water, But You Can't Make It Drink*, 37 VA. J. INT'L L. 223, 250-51 (1996) (noting the emergence of a cycle); Editorial, *Surprise! A Deal with China*, WALL ST. J., June 18, 1996, at A22 ("One of the Clinton Administration's specialties is threatening a trade war and then striking a deal at the 11th hour.").

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In light of this frustrating cycle of events and China's recent accession to the WTO,<sup>15</sup> scholars, policymakers, and commentators have called for a critical assessment and reformulation of the existing U.S.-China intellectual property policy. To reformulate this policy, this Article designs a twelve-step action plan based on the "constructive strategic partnership" model outlined in the United States-China Joint Statement<sup>16</sup> issued after the U.S.-China Summit in October 1997.<sup>17</sup> As I argued elsewhere, this partnership model not only presents a new model upon which the two countries can build their diplomatic relations, but also provides a conceptual framework under which policymakers can develop a new bilateral intellectual property policy.<sup>18</sup>

Targeting the shortcomings of the existing ineffective American foreign intellectual property policy, this action plan strives to cultivate a more stable and harmonious relationship between the two countries, to foster better mutual understanding between each other, and to promote a self-sustainable intellectual property regime in China. The first three steps of the action plan cover actions that are needed to cultivate a stable and harmonious relationship between China and the United States and to foster a better understanding of China by American scholars, policymakers, the mass media, and the general public. If a constructive strategic partnership is to be developed, a stable and harmonious relationship and a better understanding of each other will be needed. The next three steps outline the actions that must be taken to change the mindsets of the Chinese leaders, to relieve their skepticism toward Western intellectual property rights, and to overcome their paranoia about foreign aggression. Under the existing political apparatus in China, nothing matters more than the wholehearted support of the Chinese leaders. The final six steps focus on the long-term efforts that are needed to promote a self-sustainable intellectual property regime. So far, the intellectual property regime in China is fairly weak and has to be constantly rejuvenated by external "pushes," such as the threat of trade sanctions and section 301 investigations. The efforts outlined in these final steps aspire to replace these intrusive pushes with internal development that will promote and sustain the regime. Although these steps are presented in numerical order, they are equally important and should be carried out simultaneously.

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<sup>15</sup> On November 10, 2001, the WTO member states approved the proposal to admit China to the international trading body in the Ministerial Conference in Doha, Qatar. See Paul Blustein & Clay Chandler, *WTO Approves China's Entry*, WASH. POST, Nov. 11, 2001, at A47; Joseph Kahn, *World Trade Organization Admits China, Amid Doubts*, N.Y. TIMES, Nov. 11, 2001, at 1A. After 15 years of exhaustive negotiations, China formally became the 143rd member of the WTO on December 11, 2001. For discussions of the ramifications of China's entry into the WTO, see generally SUPACHAI PANITCHPAKDI & MARK CLIFFORD, *CHINA AND THE WTO: CHANGING CHINA, CHANGING WORLD TRADE* (2002); Peter K. Yu, *The Ramifications of China's Entry into the WTO: Will the Global Community Benefit?*, FINDLAW'S WRIT: LEGAL COMMENTARY, Dec. 4, 2001, at [http://writ.news.findlaw.com/commentary/20011204\\_yu.html](http://writ.news.findlaw.com/commentary/20011204_yu.html).

<sup>16</sup> Joint United States-China Statement, 33 WEEKLY COMP. PRES. DOC. 1680, 1683 (Oct. 29, 1997) [hereinafter Joint Statement].

<sup>17</sup> See John M. Broder, *Summit in Washington*, N.Y. TIMES, Oct. 30, 1997, at A1 (reporting on the 1997 U.S.-China Summit).

<sup>18</sup> See Yu, *From Pirates to Partners*, *supra* note 5, at 154-65 (examining the constructive strategic partnership model and explaining how this model paves the way for a new U.S.-China intellectual property policy).

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### *Step One: Abandon the Coercive Policy*

*The case in which it may sometimes be a matter of deliberation how far it is proper to continue the free importation of certain foreign goods is, when some foreign nation restrains by high duties or prohibitions the importation of some of our manufactures into their country. Revenge in this case naturally dictates retaliation, and that we should impose the like duties and prohibitions upon the importation of some or all of their manufactures into ours. Nations, accordingly, seldom fail to retaliate in this manner.*

— Adam Smith, *The Wealth of Nations* (1776)<sup>19</sup>

Coercion invites retaliation.<sup>20</sup> The first thing the United States needs to do is to abandon its coercive foreign intellectual property policy. Unlike a decade ago, when the United States could use section 301 sanctions on China at will, China's recent accession to the WTO has greatly limited the United States's options of coercive tactics.<sup>21</sup> Nonetheless, China's WTO membership does not necessarily spell an end to the United States's coercive bilateral policy. The United States can always undertake coercive actions in areas that are not, or arguably not, covered by the WTO Agreements. It also can use its economic leverage to universalize its intellectual property regime and to coerce other countries to reform their intellectual property laws in the image of U.S. intellectual property laws.<sup>22</sup>

Commentators have noted *ad nauseum* the ineffectiveness of coercion, in particular unilateral sanctions, in the trade arena. As pointed out by the U.S.-China Business Council, the umbrella group for American firms doing business in China, "there is little evidence that unilateral U.S. sanctions can effectuate policy changes in other nations."<sup>23</sup> In fact, unilateral

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<sup>19</sup> ADAM SMITH, *THE WEALTH OF NATIONS* bk. IV, ch. 2, at 434 (Edwin Cannan ed., 1937) (1776).

<sup>20</sup> See Robert O. Keohane, *The Demand for International Regimes*, in *INTERNATIONAL REGIMES* 141, 180, 182-83 (Stephen D. Krasner ed., 1983); see also Scott Fairley, *Extraterritorial Assertions of Intellectual Property Rights in International Trade*, in *INTERNATIONAL TRADE AND INTELLECTUAL PROPERTY*, *supra* note 3, at 141, 144 ("Unilateralism begets unilateralism."). Professor Sykes disagreed:

[The retaliation argument] relies on the assumption that a considerable danger of counter-retaliation arises when the United States sanctions cheating. In cases of blatant cheating, counter-retaliation amounts roughly to a strategy whereby a foreign government announces that it intends to cheat periodically in a manner that everyone can recognize as cheating, and if caught and sanctioned it will respond by cheating to an even greater extent. Such countries will obviously enjoy poor reputations in the trading community, and discourage other nations from entering trade agreements with them. For this reason, it is questionable whether any nation sanctioned for a blatant act of cheating would find counter-retaliations to be an optimal strategy.

Alan O. Sykes, "Mandatory" Retaliation for Breach of Trade Agreements: Some Thoughts on the Strategic Design of Section 301, 8 *B.U. INT'L L.J.* 301, 313 (1990).

<sup>21</sup> Article 64 of the TRIPs Agreement requires that all intellectual property disputes arising under the Agreement be settled by the dispute settlement procedure provided in the General Agreement of Trade and Tariffs. See TRIPs Agreement, *supra* note 4, art. 64, 33 I.L.M. at 1221. Under this mandatory procedure, a WTO member state must present and win its case before the Dispute Settlement Body and follow procedures for suspensions of concessions before taking any unilateral actions. Nonetheless, as a recent WTO panel decision has found, section 301 per se does not violate the United States's WTO obligations. See United States—Section 301-310 of the Trade Act of 1974, WT/DS152/R (Dec. 22, 1999) (holding that section 301 does not violate the United States's WTO obligations because the system allows the United States Trade Representative to comply with the WTO rules before taking any unilateral actions), available at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/152R.DOC>; see also Raj Bhala, *The Bananas War*, 31 *MCGEORGE L. REV.* 839 (2000) (discussing the WTO panel decision); Seung Wha Chang, *Taming Unilateralism Under the Multilateral Trading System: Unfinished Job in the WTO Panel Ruling on U.S. Sections 301-310 of the Trade Act of 1974*, 31 *LAW & POL'Y INT'L BUS* 1151 (2000) (same). Thus, one commentator proposed to use section 301 as a mechanism to review China's compliance with its WTO obligations. See Charles Tiefer, *Sino 301: How Congress Can Effectively Review Relations with China After WTO Accession*, 34 *CORNELL INT'L L.J.* 55 (2001).

<sup>22</sup> See *infra* text accompanying notes 44-48 for a discussion of the coercive nature of the TRIPs Agreement.

<sup>23</sup> Julia Chang Bloch, *Commercial Diplomacy*, in *LIVING WITH CHINA: U.S.-CHINA RELATIONS IN THE TWENTIETH-FIRST CENTURY* 185, 205 (Ezra F. Vogel ed., 1997) [hereinafter *LIVING WITH CHINA*].

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sanctions tend to hurt American businesses without any guarantee of change.<sup>24</sup> Today, goods produced in the United States are also produced in Europe and Japan. Because Europe and Japan do not impose similar demands on China,<sup>25</sup> “the Chinese government will react to sanctions by becoming even more hostile to the United States and by switching from U.S. products to European and Japanese ones.”<sup>26</sup> For example, when the United States threatened to sanction China over its lack of intellectual property protection, Chinese Premier Li Peng went to France to sign a \$1.5-billion order for thirty short-haul Airbus planes, instead of Boeing planes.<sup>27</sup> China also gave a European consortium the rights to develop a new hundred-seat airliner.<sup>28</sup>

As “the growth prospects for the U.S. economy . . . have become increasingly dependent on exports,”<sup>29</sup> a confrontational policy will hurt American businesses even more. Due to the

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<sup>24</sup> See *id.* at 206; see also ABRAM CHAYES & ANOTNIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 22 (1995) (“If we are correct that the principal source of noncompliance is not wilful disobedience but the lack of capability or clarity or priority, then coercive enforcement is as misguided as it is costly.”); Mark A. Groombridge, *China’s Accession to the World Trade Organization: Costs and Benefits*, in *CHINA’S FUTURE: CONSTRUCTIVE PARTNER OR EMERGING THREAT* 165, 178 (Ted Galen Carpenter & James A. Dorn eds., 2000) (“If one looks at the history of using economic sanctions as a weapon . . . , there is a clear and consistent trend: multilateral sanctions sometimes work; unilateral sanctions almost never do.”). As some commentators noted:

During the last several years, America has imposed some form of unilateral economic sanctions against 26 countries, accounting for half the world’s population. These sanctions have not achieved their goals; indeed, sanctions often harm exactly those they seek to help. And sanctions have cost the United States about \$20 billion in lost exports, 200,000 jobs, and the goodwill and trust of its allies abroad.

W. Bowman Cutter et al., *New World, New Deal; A Democratic Approach to Globalization*, FOREIGN AFF., Mar./Apr. 2000, at 80, 92. But see Richard W. Parker, *The Problem with Scorecards: How (and How Not) to Measure the Cost-effectiveness of Economic Sanctions*, 21 MICH. J. INT’L L. 235 (2000) (pointing out the difficulty in measuring the effectiveness of economic sanctions and the methodological challenges confronting empirical studies regarding economic sanctions); see also Jagdish Bhagwati, *Trade Linkage and Human Rights*, in *THE URUGUAY ROUND AND BEYOND: ESSAYS IN HONOR OF ARTHUR DUNKEL* 241, 243 (Jagdish Bhagwati & Marhias Hirsch eds., 1998) [hereinafter URUGUAY ROUND AND BEYOND] (arguing that moral absolutists are willing to suffer economic harm even though the sanctions may not result in any policy changes).

<sup>25</sup> See Bloch, *supra* note 23, at 207 (arguing that the United States is increasingly alone in imposing unilateral sanctions); Robert P. O’Quinn, *Integrating China into the World Economy*, in *BETWEEN DIPLOMACY AND DETERRENCE: STRATEGIES FOR U.S. RELATIONS WITH CHINA* 45, 80 (Kim R. Holmes & James J. Przystup eds., 1997) (asserting that imposing unilateral sanctions without cooperation from the international community tends to isolate the country imposing the sanctions more than the target country); William J. Dobson, *China’s Europe Card*, N.Y. TIMES, Apr. 13, 1996, at A21 (“To be effective, America’s China policy cannot simply be manufactured in Washington and delivered in Beijing; to some degree, it must be sold in London, Paris and Bonn.”). As Greg Mastel explained:

Historically, . . . the United States, as the Cold War leader of the free world, played a role in defining the direction of China’s relationship with the West.

. . . With the collapse of the Soviet Union, U.S. allies feel more free than ever to set their own foreign policy independent of U.S. positions. Given its geographic proximity and the long history involved, Japan in particular looks at China independently of the United States. Attracted to the potential of China’s market, many countries seem even less likely to look to the United States for leadership on China policy in the future.

GREG MASTEL, *THE MIDDLE KINGDOM EMERGES: THE RISE OF THE CHINESE ECONOMY* 187 (1997).

<sup>26</sup> Bloch, *supra* note 23, at 206; Tony Walker et al., *Li Peng Backs Trade with “More Lenient” Europeans*, FIN. TIMES, June 11, 1996, at 1 (“If the Europeans adopt more co-operation with China in all areas, not just in economic areas but also in political and other areas, then I believe the Europeans can get more orders from China.” (quoting Chinese Premier Li Peng)); see also Haiying Zhao, *Sino-U.S. Economic Relations Across Time and Space*, in *THE OUTLOOK FOR U.S.-CHINA RELATIONS FOLLOWING THE 1997-1998 SUMMITS: CHINESE AND AMERICAN PERSPECTIVES ON SECURITY, TRADE AND CULTURAL EXCHANGE* 207, 216 (Peter Koehn & Joseph Y.S. Cheng eds., 1999) [hereinafter OUTLOOK FOR U.S.-CHINA RELATIONS] (“Given the current world economic landscape, the United States has to compete with Europe and Japan in the emerging Chinese market, and China has to compete with other developing countries in the U.S. market.”).

<sup>27</sup> See Craig R. Whitney, *China Awards Huge Jet Order to Europeans*, N.Y. TIMES, Apr. 11, 1996, at A1. “[M]ost observers believe the Airbus decision was made for business reasons, with the human rights linkage tacked on later.” ANDREW J. NATHAN, *CHINA’S TRANSITION* 254 (1997). As Professor Nathan pointed out, there is no other case in which the Chinese government discriminated against an American company because of United States human rights activism. Nevertheless, “[c]ontinued U.S. division over human rights . . . may encourage the Chinese to start enforcing such linkages.” *Id.*

<sup>28</sup> See *China and France Will Study Developing a 100-Seat Jet*, N.Y. TIMES, Apr. 12, 1996, at D2.

<sup>29</sup> Bloch, *supra* note 23, at 205. As Dean Garten explained:

To begin with, the health of the American economy is more closely linked to foreign markets than ever before. The country can no longer generate enough growth, jobs, profits, and savings from domestic sources. More than one-third of American’s economic growth now derives from exports. By the turn of the century, more than 16 million jobs will be

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constant use of trade threats by the American government and the uncertain trade relations between the two countries, many risk-averse American businesses have limited their business in China to avoid risks. Unreliable as long-term suppliers, some of the American businesses have also been replaced by their foreign competitors.<sup>30</sup> Even worse, the trade threats and constant bullying have sparked a new resurgence of nationalism and xenophobia in China.<sup>31</sup> Evidence of this resurgence includes two recent bestsellers,<sup>32</sup> the Chinese reaction to the United States's bombing of their embassy in Belgrade,<sup>33</sup> and China's recent standoff with the United States over the collision between its jet fighter and a U.S. reconnaissance plane.<sup>34</sup> If these sentiments continue to grow, they may even lead to boycotts of U.S. products or harassment of American businesses.<sup>35</sup>

At the global level, a coercive policy will threaten the integrity of the international trading system and may even lead to its collapse.<sup>36</sup> China's responses to the United States's

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supported by overseas sales. From Coca-Cola to Caterpillar, many U.S. companies are taking in more than 50 percent of their revenues abroad. From a foreign policy standpoint, moreover, America's links to most countries, and its potential influence on them, depend increasingly on commercial relationships. Trade finance, and business investment have become the sine qua non of links with Russia, China, Japan, Southeast Asia, the European Union, and the nations of the western hemisphere.

Jeffrey E. Garten, *Business and Foreign Policy*, FOREIGN AFF., May/June 1997, at 67, 69-70.

<sup>30</sup> See WILLIAM H. OVERHOLT, THE RISE OF CHINA: HOW ECONOMIC REFORM IS CREATING A NEW SUPER POWER 381 (1993).

<sup>31</sup> Commentators have argued that there might be a resurgence of national sentiment in China "because a new ideology is necessary as faith in Marxism or Maoism declines and nationalism, if handled properly, can justify the political legitimacy of leadership." YONGNIAN ZHENG, DISCOVERING CHINESE NATIONALISM IN CHINA: MODERNIZATION, IDENTITY AND INTERNATIONAL RELATIONS 2 (1999) [hereinafter ZHENG, DISCOVERING CHINESE NATIONALISM]; see also *id.* at 17 (arguing that the rise of nationalism in post-Mao China is "a response to the 'Chinese problems' that post-Mao China has encountered"); see also Yue Ren, *China's Perceived Image of the United States: Its Sources and Impact*, in OUTLOOK FOR U.S.-CHINA RELATIONS, *supra* note 26, at 247, 251 (showing a poll that indicates anti-American sentiment). See generally CHINESE NATIONALISM (Jonathan Unger ed., 1996) for a collection of essays examining Chinese nationalism.

<sup>32</sup> These two bestsellers include *China Can Say No*, QIANG SONG ET AL., ZHONGGUO KEYI SHUO BU [CHINA CAN SAY NO] (1996), and *Behind a Demonized China*, XIGUANG LI ET AL., YAOMOHUA ZHONGGUO DE BEIHOU [BEHIND A DEMONIZED CHINA] (1997).

<sup>33</sup> Although the United States insisted that the bombing was an accident and apologized for the incident, many Chinese considered the bombing a deliberate attack to slow down China's rise in world affairs and to warn China against challenging American hegemony. STEVEN M. MOSHER, HEGEMON: CHINA'S PLAN TO DOMINATE ASIA AND THE WORLD 81 (2000); see also John Pomfret & Michael Lavis, *China Suspends Some U.S. Ties; Protesters Trap Ambassador in Embassy*, WASH. POST, May 10, 1999, at A1 (reporting on the anti-American protests outside the U.S. embassy after the bombing of China's embassy in Belgrade).

<sup>34</sup> See John Pomfret, *New Nationalism Drives Beijing; Hard Line Reflects Public Mood*, WASH. POST, Apr. 4, 2001, at A1 (attributing the recent standoff with Washington to the growing nationalist sentiments among the Chinese people); Elisabeth Rosenthal, *Many Voices for Beijing*, N.Y. TIMES, Apr. 10, 2001, at A1 (noting that anti-American feelings are running high in China).

<sup>35</sup> To highlight these possibilities, one commentator entitled a chapter of his book "To Screw Foreigners Is Patriotic." GEREMIE R. BARMÉ, IN THE RED: ON CONTEMPORARY CHINESE CULTURE 255-80 (1999); see also James Cox, *U.S. Firms: Piracy Thrives in China*, USA TODAY, Aug. 23, 1995, at 2B ("A pirate program in China is often referred to as 'patriotic software,' out of a belief that it speeds the nation's modernization at little or no cost.").

<sup>36</sup> As one commentator cautioned:

What if the EC was to assert that the U.S. patent system is discriminatory and should be repealed since it takes "first applying, first served" as its basis for dealing with foreigners? What if Central and South American countries were to insist that U.S. restrictions on sugar imports are clear impediments to trade and demand their removal? What if Japan and Taiwan were to claim that the U.S. requirement for voluntary restraints on machine tool exports are harmful to domestic industry and demand compensation? Would the United States enter into negotiation with these trading partners? If the United States decided not to make the required concessions and these countries responded with countermeasures or sanctions against U.S. imports without recourse to GATT procedures, what would become of the world free-trading system?

Makoto Kuroda, *Super 301 and Japan*, in AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM 219, 220-21 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990) [hereinafter AGGRESSIVE UNILATERALISM].

Professor Milner pointed out the two central problems of unilateral sanctions as follows:

First, . . . unilateralism will cause problems. Countries simply will not let another nation cast judgement on, and try to force change in, their laws, policies, and practices. It is an infringement on their sovereignty and will provoke resistance. Moreover, the United States will be judging its own case; it is an interested, not a neutral judge. No fair way exists for one country to evaluate its own case in a dispute with another. Judgement by the United States, then, is likely to be seen as unfair and hence to provoke retaliation. Unilateralism will bring destructive spirals of mutual retaliation with each country viewing the other as acting unfairly. . . .

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threats of trade sanctions have demonstrated that a coercive policy always leads to retaliation and may even result in a global trade war. In such a war, resources tend to be allocated inefficiently, and the whole world will become worse off. A coercive policy also would lead to criticism from other countries, thus alienating the United States from its trading partners.<sup>37</sup> Even worse, in their transition from a command economy to a market economy, the emerging democracies are constantly looking to the policies of Western democracies, in particular the United States, for guidance. A coercive policy therefore would lead to unrevised adoption by these emerging democracies.<sup>38</sup> The United States has taken a tremendous effort to create the TRIPs Agreement and to build an international intellectual property system. Ironically, its foreign intellectual property policy is attempting to destroy what it has worked so hard to achieve.<sup>39</sup>

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This unilateralism leads to a second problem. Aggressive, bilateral reciprocity violates central tenets of the postwar international trading system. GATT upholds the principles of multilateralism, nondiscrimination, and neutral dispute settlement. Super 301 may encroach upon all of these. It implies bilateralism, may lead to discriminatory trade agreements that favor American commerce, and constitutes unilateral dispute settlement. Super 301 will bypass GATT, and it will violate its central principles. Its legality under international trade law is debatable. The United States thus may be violating international law as well as undermining GATT. Both actions will be costly. Violations of international law by leading powers will induce other states to violate those laws as respect for them declines. Disregarding GATT norms will bring the entire system into question and may lead to its breakdown, as U.S. actions did to the Bretton Woods monetary regime in the early 1970s. Since GATT has helped provide a stable, prosperous trading environment for forty years, ending it should not be done lightly. Moving from a system of multilateral negotiation and dispute settlement to a bilateral one will increase the costs of negotiating trade liberalization and will greatly politicize the process. Undermining the GATT system in exchange for marginal improvements in the U.S. trade balance does not seem to be a rational strategy.

Helen Milner, *The Political Economy of U.S. Trade Policy: A Study of the Super 301 Provision*, in *AGGRESSIVE UNILATERALISM*, *supra*, at 163, 176-77; *see also* CHAYES & CHAYES, *supra* note 24, at 100 (“The central lessons the drafters [of GATT] took from interwar history was that unilateral action on trade questions and disputes led ultimately to the collapse of the international trading system.”); Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 *IOWA L. REV.* 273, 297 (1991) (arguing that the bilateral trade-based approach “run[s] counter to U.S. long-term interests for a healthy, stable trade environment” and “tend[s] to fragment the world trading system . . . [by creating] resentment, particularly among Third World countries who view imposed bilateral agreements as a species of colonialism”). *But see* William Safire, *Smoot-Hawley Lives*, *N.Y. TIMES*, Mar. 17, 1983, at A23 (arguing that protectionism may be the only solution to unfair competition from foreign countries).

<sup>37</sup> *See* Julia Cheng, Note, *China’s Copyright System: Rising to the Spirit of TRIPS Requires an Internal Focus and WTO Membership*, 21 *FORDHAM INT’L L.J.* 1941, 1979; *see also* *GATT Bill Brings Major Reforms to Domestic Intellectual Property Law*, 11 *Int’l Trade Rep. (BNA)* 1966, 1966-67 (Dec. 21, 1994) (noting the dissatisfaction of the less developed countries over the United States’s ability to impose Special 301 sanctions despite their compliance with the TRIPs Agreement); David Hartridge & Arvind Subramanian, *Intellectual Property Rights: The Issues in GATT*, 22 *VAND. J. TRANSNAT’L L.* 893, 909 (1989) (suggesting that states may not accept new multilateral commitments in the intellectual property area if they are going to be vulnerable to unilateral actions).

<sup>38</sup> Professor McGee pointed out the tendency of emerging democracies to look to the United States for guidance in making its transition from a command economy to market economy:

One major implication of U.S. protectionism that could have an effect on trade in Europe is the possibility that our trading partners, especially those in emerging democracies, could decide to adopt U.S. trade policies as their own, not in order to retaliate, but because they think that U.S. policies are somehow better than those of other countries. Nothing could be farther from the truth.

There is a tendency in emerging democracies, especially those that are attempting to convert from a centrally planned system to a market system, to look to the policies of Western democracies for guidance. For example, the government of Poland invited representatives of the U.S. Internal Revenue Service to Poland to teach Polish tax collectors how to collect taxes. Many Americans who learned of this invitation were horrified at such a prospect. The Internal Revenue Service is one of the least freedom loving of all government bureaucracies. It has been known to confiscate and destroy or sell assets with little or no due process. Yet Poland and other countries want to copy U.S. policies and methods.

ROBERT W. MCGEE, *A TRADE POLICY FOR FREE SOCIETIES: THE CASE AGAINST PROTECTIONISM* 160 (1994) (footnotes omitted); *see also* Whitmore Gray, *The Challenge of Asian Law*, 19 *FORDHAM INT’L L.J.* 1, 5-6 (1995) (“After the Second World War, however, a new era of global interaction of legal systems developed. U.S. economic dominance reinforced the idea that U.S. legal institutions and, particularly, recent U.S. substantive law, should be considered as normal models for modernization.”).

<sup>39</sup> As one commentator explained:

[The] United States approach will work towards overthrowing any measure of success that the United States has achieved in placing intellectual property on an arguably “international” pedestal (the TRIPs) after passing through long periods of bilateral arrangements. Consequently, the quiet overhaul that the international IP system has been subjected to through the TRIPs may now be in danger of collapse by the American insistence that it will interpret IP treaties and take any measures it deems appropriate, unilaterally and from its own national perspective. Each move of the United States to take IP matters throughout the world in its own hands will increasingly reduce the global significance of the TRIPs formula to a national system that has been outdated for quite some time.



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Moreover, a coercive policy is self-deluding in nature, and it rarely succeeds in the long run. Even though a coercive policy may be effective in facilitating immediate compliance and inducing short-term concessions,<sup>40</sup> such as those improvements made during the first few months immediately after the signing of a new intellectual property agreement, such a policy “fail[s] to generate[] the type of domestic rationale and conditions needed to produce enduring change.”<sup>41</sup> Apart from the lukewarm responses it was able to elicit, the coercive American foreign intellectual property policy failed to create any sustainable and continuous protection for American products. Intellectual property piracy still remains rampant in China. As the Chinese economy grows, the problem will exacerbate. In 1995, the United States lost about \$1 billion of revenues due to intellectual property piracy in China.<sup>42</sup> By 1998, this figure had doubled to \$2 billion,<sup>43</sup> despite the government’s increased efforts to combat piracy and the public’s heightened awareness of intellectual property rights.

To illustrate the self-delusive nature of a coercive policy, there is no better example than the TRIPs Agreement, which many regard as coercive<sup>44</sup> and “imperialistic.”<sup>45</sup> Although the Agreement gives less developed countries reductions in tariffs on apparel and agriculture, it provides developed countries universal minimum standards of intellectual property protection and relaxation of restrictions in foreign direct investment.<sup>46</sup> Undeniably, bringing less developed

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Assafa Endeshaw, *Commentary: A Critical Assessment of the U.S.-China Conflict on Intellectual Property*, 6 ALB. L.J. SCI. & TECH. 295, 337-38 (1996); see also A. Samuel Oddi, *The International Patent System and Third World Development: Reality or Myth?*, 1987 DUKE L.J. 831, 874 [hereinafter Oddi, *International Patent System*] (arguing that the United States’s unilateral actions and its approach toward protection of patents and mask works “ha[ve] raised a significant question of its continued commitment to the principle of national treatment”).

<sup>40</sup> See ALFORD, *supra* note 10, at 118; see also CHAYES & CHAYES, *supra* note 24, at 89 (arguing that U.S. unilateral economic sanctions have been effective at times in inducing countries to fulfill treaty obligations); Alan O. Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301*, 23 LAW & POL’Y INT’L BUS. 263, 313 (1992) (“Section 301 is fairly successful in inducing foreign governments to modify their practices when they are accused of violating U.S. legal rights; . . . success is more likely with a GSP beneficiary.”).

<sup>41</sup> ALFORD, *supra* note 10, at 118; see also CHAYES & CHAYES, *supra* note 24, at 32 (“[T]he experience in the international arena is that unilateral sanctions in the more coercive form of military or economic penalties are but infrequently and sporadically deployed to redress violations of treaty obligations, and are not very effective when they are.”); Leaffer, *supra* note 36, at 278 (“A durable agreement must be based on mutual gain and cannot be imposed by the information-producing countries on the developing world.”).

<sup>42</sup> See Tony Munroe, *Action Aside, Chinese Intellectual Property Hasn’t Slowed*, WASH. TIMES, Aug. 31, 1995, at B7.

<sup>43</sup> See Faison, *supra* note 9.

<sup>44</sup> See, e.g., Marci A. Hamilton, *The TRIPs Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT’L L. 613, 614 (1996) [hereinafter Hamilton, *TRIPs Agreement*] (“Far from being limited to trade relations, correcting the international balance of trade, or lowering customs trade barriers, TRIPs attempts to remake international copyright law in the image of Western copyright law.”); Surendra J. Patel, *Can the Intellectual Property Rights System Serve the Interests of Indigenous Knowledge?*, in VALUING LOCAL KNOWLEDGE: INDIGENOUS PEOPLE AND INTELLECTUAL PROPERTY RIGHTS 305, 316 (Stephen B. Brush & Doreen Stabinsky eds., 1996) [hereinafter VALUING LOCAL KNOWLEDGE] (arguing that TRIPs “universalize[s] the U.S. system of intellectual property rights”).

<sup>45</sup> See Robert Burrell, *A Case Study in Cultural Imperialism: The Imposition of Copyright on China by the West*, in INTELLECTUAL PROPERTY AND ETHICS 195 (Lionel Bently & Spyros M. Maniatis eds., 1998); Hamilton, *TRIPs Agreement*, *supra* note 44, at 614 (contending that TRIPs could become “one of the most effective vehicles of Western imperialism in history”); *id.* at 617 (equating the TRIPs Agreement with “freedom imperialism”); A. Samuel Oddi, *TRIPs—Natural Rights and a “Polite Form of Economic Imperialism,”* 29 VAND. J. TRANSNAT’L L. 415 (1996); J.H. Reichman, *Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection*, 22 VAND. J. TRANSNAT’L L. 747, 813 (1989) (“Imposition of foreign legal standards on unwilling states in the name of ‘harmonization’ remains today what Ladas deemed it in 1975, namely, a polite form of economic imperialism.” (citing 1 STEVEN P. LADAS, PATENTS, TRADEMARKS, AND RELATED RIGHTS: NATIONAL AND INTERNATIONAL PROTECTION 14-15 (1975))); see also SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER 184 (1996) [hereinafter HUNTINGTON, CLASH OF CIVILIZATIONS] (“What is universalism to the West is imperialism to the rest.”); Susan Strange, *Cave! hic dragones: A Critique of Regime Analysis*, in INTERNATIONAL REGIMES, *supra* note 20, at 337, 340 (arguing that the American policy is a form of “nonterritorial imperialism”). Interestingly, as Professor Strange pointed out, one French author titled his book on American foreign policy *The Imperial Republic*. *Id.* (referencing RAYMOND ARON, THE IMPERIAL REPUBLIC: THE U.S. AND THE WORLD, 1945-1973 (1974)).

<sup>46</sup> See MICHAEL P. RYAN, KNOWLEDGE DIPLOMACY: GLOBAL COMPETITION AND THE POLITICS OF INTELLECTUAL PROPERTY 12-13 (1998).

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countries into the TRIPs Agreement allows developed countries to impose economic sanctions on infringing countries and to “achieve treaties in diplomatically and politically difficult areas in which agreement would otherwise be elusive.”<sup>47</sup> However, by trying to circumvent these difficult areas so that countries can reach a compromise, the TRIPs Agreement fails to attack the crux of the intellectual property piracy problem. In fact, the Agreement masks the significant cultural and ideological differences between the developed and less developed countries and has created an illusion that these differences can be easily resolved.<sup>48</sup>

Finally, the repercussions of the existing coercive policy are not only limited to the trade arena. By demonstrating that a country should rely heavily on pressure and ultimata to protect its economic interests, the existing foreign intellectual property policy backfires and jeopardizes the United States’s longstanding interests in promoting human rights and civil liberties in China. It also discredits the very important message that one should respect rights and the legal process.<sup>49</sup> Even worse, the coercive policy provides China with “a convenient legitimization for repressive measures [the Chinese authorities] intended to take in any event while simultaneously constraining America’s capacity to complain about such actions.”<sup>50</sup> For example, to comply with the Western demands to crack down on piracy, the Chinese authorities have enlisted the help of some of their toughest law enforcers, including those who are notorious for gross human rights violations, to clean up the pirate factories.<sup>51</sup> To create a deterrent effect and to demonstrate to the West their eagerness in eradicating the piracy problem, the authorities also have enforced the death penalty on infringers in severe cases.<sup>52</sup> Even though the incidence of piracy may have reduced, human rights violations may have actually increased as a result.

### *Step Two: Recast the Debate on U.S.-China Intellectual Property Conflict*

Intellectual property rights are very important to the economic development and the progress of modern society. There is no question that China’s intellectual property protection is inadequate according to international standards, not to mention the American standards. There is also no question that the rampant piracy problem has a substantial adverse impact on the American economic interests. The current debate on the U.S.-China intellectual property conflict, however, is far from presenting the true picture. As Professor Boyle has pointed out vividly and insightfully, the current debate is presented like a morality play:

For a long time, the evil pirates of the East and South have been freeloading on the original genius of Western inventors and authors. Finally, tired of seeing pirated copies of *Presumed*

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<sup>47</sup> *Id.* at 12.

<sup>48</sup> *See id.*

<sup>49</sup> *See* William P. Alford, *Making the World Safe for What? Intellectual Property Rights, Human Rights and Foreign Economic Policy in the Post-European Cold War World*, 29 N.Y.U. J. INT’L L. & POL. 135, 143 (1997) [hereinafter Alford, *Making the World Safe for What?*]; Jeffrey W. Berkman, *Intellectual Property Rights in the P.R.C.: Impediments to Protection and the Need for the Rule of Law*, 15 UCLA PAC. BASIN L.J. 1, 42 (1996) (“If the system requires action by the powerful elite within the government, the Party, or both to ensure enforcement, rule of law is replaced by rule of men.”); Burrell, *supra* note 45, at 198 (“[The Western approach toward China] suggests that the western governments are more concerned with property rights than with the more fundamental rights of China’s population.”); *see also* J.H. Reichman & David Lange, *Bargaining Around the TRIPS Agreement: The Case for Ongoing Public-Private Initiatives to Facilitate Worldwide Intellectual Property Transactions*, 9 DUKE J. COMP. & INT’L L. 11, 48 (1998) (“Coercion is . . . a delicate, risky, and possibly counterproductive strategy, one that could easily backfire on those governments that succumb to this temptation.”).

<sup>50</sup> Reichman & Lange, *supra* note 49, at 144-45.

<sup>51</sup> *See id.* at 143.

<sup>52</sup> *See* ALFORD, *supra* note 10, at 91 (stating that China has imposed death penalty on at least four individuals, life sentences on no fewer than five others, and imprisonment on some 500 people for trademark violations); Tom Korski, *China Sentences Three to Life in Prison for CD Piracy in Harshes Sanction So Far*, Pat. Trademark & Copyright L. Daily (BNA), at D2 (Dec. 11, 1997).

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*Innocent* or Lotus 1-2-3, and infuriated by the appropriation of Mickey Mouse to sell shoddy Chinese toys, the Western countries—led by the United States—have decided to take a stand. What’s more, the stand they take is popularly conceded to have more moral force than that of United Fruit protecting its investments in Central America or Anaconda Copper complaining about nationalization in Salvador Allende’s Chile. In this case, the United States is standing up for more than just filthy lucre. It is standing up for the rights of creators, a cause that has attracted passionate advocates as diverse as Charles Dickens and Steven Spielberg, Edison and Jefferson, Balzac and Victor Hugo.<sup>53</sup>

Significantly, this morality play omits the main reasons behind the inadequate intellectual property protection in China, such as the Confucian beliefs ingrained in the Chinese culture, the country’s socialist economic system, the leader’s skepticism toward Western institutions, xenophobic and nationalist sentiments of the populace, the government’s censorship and information control policy, and the significantly different Chinese legal culture and judicial system.<sup>54</sup> Thus, the current debate “obscure[s] far more than . . . illuminate[s].”<sup>55</sup> It baffles American scholars, policymakers, the mass media, and the general public and prevents them from understanding the roots of the Chinese piracy problem.

To avoid this illusion, the United States must recast its public debate concerning intellectual property protection in China. To capture attention, the current debate tends to overstate the extent of the Chinese piracy problem. Most of the reported losses in intellectual property in China are estimated under the assumption that the Chinese would be able to afford and would be willing to purchase the pirated goods at the retail price set by Western manufacturers.<sup>56</sup> These assumptions, however, are largely unfounded. One can hardly imagine how a Chinese, or even an American, who earns fifty dollars a month would spend half of his or her monthly salary to buy a single book.<sup>57</sup> Even if that person could afford such a product, he or she might not be interested in purchasing it. The fact that pirated products are very cheap or are virtually free induces people to make irrational choices. For example, it is common to find teenagers in China owning a large collection of sophisticated computer software that they are incapable of using. Indeed, as one commentator has controversially suggested, some software manufacturers “deliberately allow [software piracy] to take place, in the hope that their software may become widely used and establishes [sic] as industry standard, preferably becoming a necessity in many organizations.”<sup>58</sup> Thus, one may wonder whether some of these losses due to

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<sup>53</sup> BOYLE, *supra* note 4, at 123.

<sup>54</sup> See Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 5, at 16-37.

<sup>55</sup> Alford, *Making the World Safe for What?*, *supra* note 49, at 135.

<sup>56</sup> Professor Alford cautioned us not to take these reported losses at face value:

These figures should not be taken at face value, as they are based on data supplied by domestic industries seeking government assistance against infringers and typically calculate losses by multiplying estimated instances of infringement by full list prices. Even assuming the accuracy of estimates of the numbers of infringers, there is no reason to presume that each infringer would prefer to pay a list price rather than cease using the item in question, were these the only two alternatives.

ALFORD, *supra* note 10, at 129 n.13.

<sup>57</sup> See William P. Alford, *How Theory Does—and Does Not—Matter: American Approaches to Intellectual Property Law in East Asia*, 13 UCLA PAC. BASIN L.J. 8, 13 (1994) [hereinafter Alford, *How Theory Does—and Does Not—Matter*] (emphasizing how unlikely a Chinese person “earning fifty dollars a month would be to fork out more than a month’s salary to buy even such an outstanding work as Melville Nimmer and Paul Geller’s treatise on worldwide copyright”); see also RYAN, *supra* note 46, at 80 (“Chinese officials defended the book piracy by claiming that people are too poor to pay for Western books, ‘yet we must obtain this knowledge that we can develop our economy.’”).

<sup>58</sup> Kenneth Ho, *A Study in the Problem of Software Piracy in Hong Kong and China* ¶ 2.6 (1995), available at [http://info.gov.hk/ipd/eng/information/studyaid/piracy\\_hk\\_china.htm](http://info.gov.hk/ipd/eng/information/studyaid/piracy_hk_china.htm) (last visited Feb. 7, 2000); see also Mark A. Groombridge, *The Political Economy of Intellectual Property Rights Protection in the People’s Republic of China* [hereinafter Groombridge, *Political Economy*], in INTELLECTUAL PROPERTY RIGHTS IN EMERGING MARKETS 11, 38 (Clarissa Long ed., 2000) (“As long as they are going to steal software, we want them to steal ours.” (quoting William Gates, CEO of Microsoft Corp.)).

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software piracy should be considered the promotional expense needed to capture the Chinese market.

In addition, the current debate tends to exaggerate the impact of the piracy problem on the existing U.S.-China trade deficit.<sup>59</sup> Although a portion of the trade deficit may be attributable to the piracy problem and the limited access to the Chinese market for American products, there are other equally important factors. For example, economists attributed the trade deficit to the American macroeconomic policy in the early 1980s, which raised the value of the American dollar, thus pricing American exports out of foreign markets.<sup>60</sup> Commentators also attributed the enormous trade deficit to the policy constraints the United States placed on its exports<sup>61</sup> and the constant threats of trade sanctions by the American government.<sup>62</sup> While the United States's unfavorable export credits have cost American companies some large

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<sup>59</sup> As Professor Hsü pointed out:

China did not always enjoy trade surplus with the United States. From 1972 to 1982, it had a trade deficit almost annually with the United States and accumulated a total loss of U.S. \$8,196 billion. The trade was more or less balanced between 1983 and 1985, but then it turned rapidly in China's favor.

IMMANUEL C.Y. HSÜ, *THE RISE OF MODERN CHINA* 961 (6th ed. 2000).

In fact, some commentators argued that the trade deficit is irrelevant to the United States-China bilateral trade relationship: On the broader level, the vast literature of economic theory suggests that trade deficits matter very little to the economic health of a country. The trade deficit (or surplus) is a reflection of the *current account*, which records all trade in merchandise goods and services. Conversely, the *capital account* records all trade in assets, including portfolio or direct investments. As economists routinely note, "The magnitude of the account deficit or surplus is determined by a country's savings-investment ratio. By definition, a country's current account balance equals its excess of saving over investment: when saving exceeds investment, the current account is positive, and domestic residents are acquiring foreign assets." It ill behoves us to blame the lender who tides U.S. citizens over in this situation. For this reason, Douglas Irwin, speaking for most international trade economists, notes that a "country's trade balance is related to international capital flows—not to open or closed markets, unfair trade practices, or national competitiveness." Unfortunately, though, "this lesson is still apparently lost on many policy officials today."

MARK A. GROOMBRIDGE & CLAUDE E. BARFIELD, *TIGER BY THE TAIL: CHINA AND THE WORLD TRADE ORGANIZATION* 11 (1999) (footnotes omitted); see MCGEE, *supra* note 38, at 32-44 (arguing that the balance of trade figure is an "irrelevant statistic" that should not influence a country's economic policy); *id.* at 43 ("Whether or not a country's exports exceed its imports is completely irrelevant as far as determining whether the economy benefits by trading with foreigners."); MASTEL, *supra* note 25, at 33-34 ("Trade deficits are not the best indicator of protectionism and mercantilism. Under the correct economic conditions protectionist countries, such as South Korea, can run a trade deficit. Under other conditions, a completely open market can run a trade surplus."). Likewise, one commentator criticized the trade deficit argument for ignoring the difference between the size of the two trading partners:

Another problem with the trade deficit mentality is that it totally ignores the effect of measuring bilateral trade between countries of different sizes. For example, Japan has about half the population of the United States. Even if the Japanese buy the same amount of products from the United States per capita as the United States buys from Japan, there will be a trade deficit because the United States has twice the population of Japan. In order to have a zero trade deficit with Japan, Japan would have to buy twice as much from the United States per capita as the United States buys from Japan. Yet, both sides benefit by voluntary trade, so, even though there is a trade "deficit," there is no cause for concern.

*Id.* at 43. Indeed, as Adam Smith emphasized more than two centuries ago, voluntary trade is always advantageous:

Nothing . . . can be more absurd than this whole doctrine of the balance of trade. . . . When two places trade with one another, this doctrine supposes that, if the balance be even, neither of them either loses or gains; but if it leans in any degree to one side, that one of them loses, and the other gains in proportion to its declension from the exact equilibrium. Both suppositions are false . . . that trade which, without force or constraint, is naturally carried on between any two places, is always advantageous . . . to both.

SMITH, *supra* note 19, bk. IV, ch. 3; see also MCGEE, *supra* note 38, at 43 ("Trade is not a zero-sum game where one party benefits and the other loses. Both parties benefit by trade. Otherwise, no trades would be made, because individuals do not enter into trade with the idea of making themselves worse off.")

<sup>60</sup> See Warren H. Maruyama, *U.S.-China IPR Negotiations: Trade, Intellectual Property, and the Rule of Law in a Global Economy*, in *CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE* 165, 175 (Mark A. Cohen et al. eds., 1999).

<sup>61</sup> See Bloch, *supra* note 23, at 202; see also GROOMBRIDGE & BARFIELD, *supra* note 59, at 84 (arguing that the Chinese market is more open than experts suggested because Europe's and Japan's exports to China have been increasing); Greg Mastel, *How to Deal with China*, *J. COM.*, July 16, 1998, at A9 (noting that U.S. exports to China have fallen behind those from Japan and Asia).

<sup>62</sup> See OVERHOLT, *supra* note 30, at 381-82; Bloch, *supra* note 23, at 202; see also Jerome A. Cohen & Matthew D. Bersani, *Leveling the Playing Field for U.S. Firms in China*, in *BEYOND MFN*, *supra* note 11, at 107, 108 ("The current U.S. policy is partly responsible for the underachievement of American business in the China market.")

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procurement deals,<sup>63</sup> its increasing use of trade sanctions has made American companies less reliable, or even unreliable, as long-term suppliers.<sup>64</sup> Given the lack of transparency in the Chinese authorities, it would not be surprising to see “day-to-day bureaucratic actions that hold back, divert, or delay action on U.S. companies’ permits, applications, and bids whenever U.S.-China relations sour.”<sup>65</sup>

In fact, the current debate becomes even more distorted when the trade deficit figure does not reflect the Hong Kong variable. The figure does not “fully take into account that half of what U.S. companies sell to Hong Kong is subsequently reexported to China, while two-thirds of what the United States buys from China also passes through Hong Kong entrepreneurs.”<sup>66</sup> It ignores “a large portion of China’s export earnings [that] goes to foreign firms who process about half of all Chinese exports.”<sup>67</sup> It also ignores the fact that factories in Hong Kong and Taiwan relocated to China in the late 1980s and early 1990s. Between 1987 and 1992, “[t]he U.S. deficit with Hong Kong and Taiwan decreased by about 13 billion . . . ; for the same period, the U.S. deficit with China rose by 15.5 billion. In effect Hong Kong and Taiwan shifted their surpluses to China.”<sup>68</sup>

Furthermore, the current debate tends to overstate the extent of protection the relevant American laws provide within the United States.<sup>69</sup> Even though American intellectual property laws afford authors and inventors rights in their own creations, these rights are always qualified with exceptions and limitations. In fact, these exceptions and limitations are “just as important as the grant of the right itself.”<sup>70</sup> Consider for example the 1976 Copyright Act. The statute grants to the copyright holder the exclusive rights to reproduce, distribute, perform, and display the copyrighted work and to prepare derivative works based upon that work.<sup>71</sup> Despite its breadth, this bundle of rights is granted with significant limitations. To protect the public domain against ill-advised impoverishment by copyright holders, the statute includes safeguards such as the originality requirement,<sup>72</sup> the fair use privilege,<sup>73</sup> durational limits of copyright protection,<sup>74</sup> and the idea-expression dichotomy.<sup>75</sup>

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<sup>63</sup> See Bloch, *supra* note 23, at 202.

<sup>64</sup> See OVERHOLT, *supra* note 30, at 381.

<sup>65</sup> *Id.* at 209.

<sup>66</sup> *Id.* at 201; see BERNSTEIN & MUNRO, *supra* note 12, at 133.

<sup>67</sup> Bloch, *supra* note 23, at 201.

<sup>68</sup> *Id.* at 202; see BERNSTEIN & MUNRO, *supra* note 12, at 133; MASTEL, *supra* note 25, at 33.

<sup>69</sup> Cf. ALFORD, *supra* note 10, at 5.

<sup>70</sup> BOYLE, *supra* note 4, at 138.

<sup>71</sup> See 17 U.S.C. § 106 (1994).

<sup>72</sup> See *id.* § 102 (requiring originality for copyright protection); *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991) (“Originality is a constitutional requirement.”).

<sup>73</sup> See 17 U.S.C. § 107 (1994) (codifying the fair use privilege); see also *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901) (articulating for the first time the concepts that evolved into the fair use doctrine). For comprehensive discussions of fair use, see generally MARSHALL A. LEAFFER, *UNDERSTANDING COPYRIGHT LAW* § 10.1-6 (2d ed. 1995); WILLIAM PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* (2d ed. 1995); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661 (1988); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990); William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667 (1993).

<sup>74</sup> See U.S. CONST. art. I, § 8, cl. 8 (granting authors the exclusive right to their writings “for limited Times”); 17 U.S.C. §§ 302-304 (1994) (specifying copyright duration in various situations). For discussions of durational limits of copyright, see generally LEAFFER, *supra* note 73, § 6.1-4; 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 1.05[A][1] (1998); Marci A. Hamilton, *Copyright Duration Extension and the Dark Heart of Copyright*, 14 CARDOZO ARTS & ENT. L.J. 655 (1996); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 361-63 (1989) (discussing the economic rationale for durational limits of copyright); William F. Patry, *The Copyright Term Extension Act of 1995: Or How Publishers Managed to Steal the Bread from Authors*, 14 CARDOZO ARTS & ENT. L.J. 661 (1996).

<sup>75</sup> The *idea-expression dichotomy* “is the term of art used in copyright law to indicate the elements in a copyrighted work which the grant of the copyright monopoly does not take from the public.” Howard B. Abrams, *Copyright, Misappropriation, and Preemption*:

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Finally, in assessing the current debate, one must not assume that copyright piracy is only a problem in the East or in the less developed countries.<sup>76</sup> “[A]s Charles Dickens, Anthony Trollope, and many others learned the hard way, the United States did not grant even formal protection for foreign copyrighted materials until 1891—by which time [the United States] had passed through what arguably might be termed [its] period as a developing country.”<sup>77</sup> Even today, the problems of software piracy, home taping, and mp3 piracy constantly appear on newspaper headlines.<sup>78</sup> In fact, as a Hong Kong government official pointed out, “it is not uncommon for Westerners from places such as America and Canada to come to Hong Kong [or China] specifically for the purchase of cheap counterfeit computer software which are actually pirated copies of mostly American products.”<sup>79</sup> Thus, cynical observers may wonder whether

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*Constitutional and Statutory Limits of State Law Protection*, 1983 SUP. CT. REV. 509, 563. This dichotomy “‘strike[s] a definitional balance . . . by permitting free communication of facts while still protecting an author’s expression.’” Harper & Row, Publishers, Inc. v. Nation Enters., 723 F.2d 195, 203 (2d Cir. 1983), *rev’d*, 471 U.S. 539 (1985). For excellent discussions of the idea-expression dichotomy, see generally Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 IND. L.J. 175 (1990); Robert A. Gorman, *Fact or Fancy? The Implications for Copyright*, 29 J. COPYRIGHT SOC’Y 560 (1982); Leslie A. Kurtz, *Speaking to the Ghost: Idea and Expression in Copyright*, 47 U. MIAMI L. REV. 1221 (1993); Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L. REV. 321 (1989). See also Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936) (“[I]t is convenient to define such a use by saying that others may ‘copy’ the ‘theme,’ or ‘ideas,’ or the like, of a work, though not its ‘expression.’”); Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (“[T]here is a point in this series of abstractions where [creative works] are no longer protected, since otherwise the playwright could prevent the use of his ‘ideas,’ to which, apart from their expression, his property is never extended.”); Landes & Posner, *supra* note 74, at 347-49 (discussing the economic rationale for the idea-expression dichotomy).

<sup>76</sup> See ALFORD, *supra* note 10, at 5. A recent study by the software industry indicated that the industry lost about \$3.2 billion of revenues in 1999 due to software piracy within the United States. See INTERNATIONAL PLANNING & RESEARCH CORPORATION, 1999 GLOBAL SOFTWARE PIRACY REPORT 5 (2000), available at [http://www.bsa.org/usa/globallib/piracy/1999\\_Piracy\\_Stats.pdf](http://www.bsa.org/usa/globallib/piracy/1999_Piracy_Stats.pdf); see also *id.* (estimating the piracy rate in the United States at 25 percent); \$22 Million of Alleged Counterfeit Microsoft Software Seized in Pennsylvania; State Troopers, Following Leads About Stolen Laptops, Uncover Huge Worldwide Counterfeiting Operation, PR NEWSWIRE, June 12, 2000, available at Lexis, News Library, Curnws File (reporting on the investigation and discovery of a significant counterfeit distribution operation in Harrisburg, Pennsylvania).

<sup>77</sup> ALFORD, *supra* note 10, at 5; see Alford, *Making the World Safe for What?*, *supra* note 49, at 147 (arguing that the United States did not always provide robust copyright protection and that if policymakers in the United States recognized this fact, much of the U.S. “moralism” which “inflames passions” in both the United States and China could be eliminated); see Thomas Bender & David Sampliner, *Poets, Pirates, and the Creation of American Literature*, 29 N.Y.U. J. INT’L L. & POL. 255, 255 (1997) (arguing that the United States did not afford intellectual property protection for non-U.S. citizens until it became a major industrial power); Gerhard Joseph, *Charles Dickens, International Copyright, and the Discretionary Silence of Martin Chuzzlewit*, 10 CARDOZO ARTS & ENT. L.J. 523 (1992) (demonstrating how Dickens’s novel reflects his distress over the United States’s lack of copyright protection to British authors); see also ASSAFA ENDESHAW, INTELLECTUAL PROPERTY POLICY FOR NON-INDUSTRIAL COUNTRIES 120 (1996) (“Historically, each of the advanced countries today was determined to industrialize first before either ‘opening up’ to forces and interests that they might previously have dreaded and before calling for a stronger international IP system.”). Even though the United States’s historical indifference to foreign intellectual property rights does not necessarily justify China’s abuse of intellectual property rights, “an appreciation of [the] nation’s own ‘sins’ would temper the moralism that infuses governmental and industry rhetoric about Chinese infringement and inflames passions in both nations about the other’s intentions and integrity.” Alford, *Making the World Safe for What?*, *supra* note 49, at 147.

<sup>78</sup> See, e.g., Jason Chervokas, *New CD-Copying Trend Threatens Record Industry*, CHI. TRIB., Apr. 17, 1998, at 70 (explaining that college students copying music files has become a threat to the music industry); Neil Strauss, *Free Web Music Spreads from Campus to Office*, N.Y. TIMES, Apr. 5, 1999, at A1 (reporting on the growing popularity of downloading music from the Internet). See also A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (affirming the district court’s grant of preliminary injunction enjoining Napster from engaging in, or facilitating others, in copying, downloading, transmitting, or distributing copyrighted musical compositions or sound recordings without express permission of the copyright holders); RIAA v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1081 (9th Cir. 1999) (denying an injunction against the manufacturers of the Rio, a portable digital audio device); UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 352-53 (S.D.N.Y. 2000) (holding that mp3.com violated copyright law by creating a database in which users could store music and access it via any access point connected to the Internet).

<sup>79</sup> Ho, *supra* note 58, ¶ 2.5 (citing Peter Cheung, Assistant Director of Intellectual Property, Government of the Hong Kong Special Administrative Region). As Peter Cheung noted:

Any trip to one of the more prominent shopping arcades where pirated software are on sale, and it would not be an unusual sight to see Americans with a huge catalogue of software to be purchased, and this is not surprising considering that the difference in the total price of counterfeit software and the price of legitimate software would probably be sufficient to cover the cost of the trip.

*Id.*

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the United States uses China as a convenient scapegoat for its largest trade deficit in years<sup>80</sup> and a rallying cry for its disagreement over domestic intellectual property issues.<sup>81</sup> This observation is particularly justified when the United States singled out China even though many other countries infringed upon American intellectual property rights.<sup>82</sup> To these observers, the “Americans are disguising a political dispute as a trade dispute and are bringing unfair trade pressure to bear in order to undermine China’s political system.”<sup>83</sup> Such use of trade pressure not only interferes with China’s sovereignty, but also violates the principles of customary international law.<sup>84</sup>

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<sup>80</sup> See Alford, *How Theory Does—and Does Not—Matter*, *supra* note 57, at 13.

<sup>81</sup> See Harry Harding, *The Clinton-Jiang Summits: An American Perspective*, in *OUTLOOK FOR U.S.-CHINA RELATIONS*, *supra* note 26, at 29, 42 (“A variety of interest groups—concerned with issues such as religion, national security, labor, human-rights, nonproliferation, and the environment—regularly attack Chinese behavior, often because doing so helps them mobilize public support for their broader political agenda.”). For example, American software manufacturers have used competition against foreign software developers to justify the need for software patents. See Claire Whitmer, *Industry Divided over Software Patents; Patent and Trademark Office Weighs Protecting vs. Stifling Innovation*, INFOWORLD, Feb. 28, 1994, at 20 (reporting on the arguments made for and against software patents during hearings held by the United States Patent and Trademark office).

<sup>82</sup> See OVERHOLT, *supra* note 30, at 383 (“[T]he United States is pushing China harder and faster than it pushed Taiwan, South Korea, and the ASEAN countries. It is insisting that China solve intellectual property issues in a single year that Thailand, Indonesia, Singapore, and Malaysia—proportionately much worse offenders—refused to resolve for decades.”); Cheng, *supra* note 37, at 1975 (“China considered it unfair for the United States to single out China when statistics from the Business Software Alliance showed that China was only sixth among major nations responsible for the United States’ losses due to copyright infringement.”); Thomas L. Friedman, *Deal with China Urged by Bentsen*, N.Y. TIMES, Mar. 20, 1994, at A20 (“The United States maintains a triple standard. For their own human rights problems they shut their eyes. . . . For some other countries’ human rights questions they open one eye and shut the other. And for China, they open both eyes and stare.” (quoting Chinese Finance Minister Liu Zhongli)).

Professor Huntington explained this varying standard:

Hypocrisy, double standards, and “but nots” are the price of universalist pretensions. Democracy is promoted but not if it brings Islamic fundamentalists to power; nonproliferation is preached for Iran and Iraq but not for Israel; free trade is the elixir of economic growth but not for agriculture; human rights are an issue with China but not with Saudi Arabia; aggression against oil-owning Kuwaitis is massively repulsed but not against non-oil-owning Bosnians. Double standards in practice are the unavoidable price of universal standards of principle.

HUNTINGTON, *CLASH OF CIVILIZATIONS*, *supra* note 45, at 184. One commentator explained the double standard under a conspiracy theory:

When the Soviet Union collapsed the U.S. government was eager to identify potential rivals. China became the target. The Chinese leaders tend to think the “china-threat” conspiracy is organized by Washington politicians and widely supported by the latter’s allies. Any conflicts between the two countries with regard to issues such as trade, human rights, Taiwan and Tibet, arms sales, etc., are perceived by Beijing as reinforcing evidence that U.S. decision makers would like to keep China weak and divided.

Ren, *supra* note 31, at 262.

<sup>83</sup> OVERHOLT, *supra* note 30, at 384.

<sup>84</sup> To China, state sovereignty is the most fundamental principle of international law and society. Peter K. Yu, *Succession by Estoppel: Hong Kong’s Succession to the ICCPR*, 27 PEPP. L. REV. 53, 88 & n.207 (2000) [hereinafter Yu, *Succession by Estoppel*]; see also CHINA RISING: NATIONALISM AND INTERDEPENDENCE 181 (David S.G. Goodman & Gerald Segal eds., 1997) (“China is the rearguard great power when it comes to the erosion of state sovereignty.”). As Professor Zhao explained:

Beijing has been able to set clear principles in advance to establish a negotiating position aimed at self-preservation and achieving the maximum advantage. Once principles are set, some conditions are negotiable and some are not. The non-negotiable principles (*yuanzhexing*) are those that involve vital national interests such as regime legitimacy and the internal power politics. The negotiable principles are those regarded as low priorities or technical issues. Beijing’s is a deductive approach to international behaviour: it insists on the clarification and codification of basic principles that allow a flexible application to reach a desired agreement.

QUANSHENG ZHAO, *INTERPRETING CHINESE FOREIGN POLICY* 143-44 (1996); see also U.N. CHARTER art. 2, ¶ 7 (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . .”). But see Universal Declaration of Human Rights, G.A. Res. 217 III(A), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810, art. 27(2) (1948) (“[E]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”); Meinhard Hilf & Thomas Oppermann, *International Protection of Intellectual Property: A German Proposal*, in *THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW* 287, 291 (Subrata Roy Chowdhury et al. eds., 1992) (“[I]t should be considered inconsistent with general public international law to deny an adequate protection of intellectual property only on the basis of the exercise of sovereignty.”).

Indeed, some commentators argued that “the trend toward international agreements and the formation of international institutions are consistent with the basic desire of government to maintain their sovereignty.” Enrico Colombatto & Jonathan R. Macey, *A Public*

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### *Step Three: Foster a Better Understanding of China by the American People*

*Henry Kissinger: Many visitors have come to this beautiful, and to us, mysterious land. . . .*

*Zhou Enlai (interrupting): You will not find it mysterious. When you have become familiar with it, it will not be as mysterious as before.*<sup>85</sup>

If the United States and China are to build a constructive strategic partnership, they must understand each other better<sup>86</sup> and “deal with [the other] as it exists and is becoming, not as some imagine it or hope it to be.”<sup>87</sup> To promote this understanding, the two countries have to foster more exchanges (in particular educational and cultural ones) between academics, professionals, and government officials.<sup>88</sup> They also have to organize joint conferences, seminars, and research projects that help identify the common interests of and differences between the two countries.<sup>89</sup> Given the significant differences between the two countries, these exchanges and joint projects will help the other understand their respective positions, intentions, and national objectives.

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*Choice Model of International Economic Cooperation and the Decline of the Nation State*, 18 CARDOZO L. REV. 925, 926 (1996). As Professors Colombatto and Macey explained:

All else equal, regulators would prefer not to cede or to share authority with their counterparts from other countries. Thus, regulators in a particular country generally will not sacrifice autonomy by coordinating their activities with regulators from other countries. . . . [H]owever, . . . technological change, market processes, and other exogenous variables may deprive the regulators in a particular country of the power to act unilaterally. Such change can cause regulators acting alone to become irrelevant. When this happens, the regulators in a particular country will have strong incentives to engage in activities such as international coordination in order to survive.

*Id.*

<sup>85</sup> RICHARD H. SOLOMON, CHINESE NEGOTIATING BEHAVIOR: PURSUING INTERESTS THROUGH ‘OLD FRIENDS’ 15 (1999).

<sup>86</sup> See Xinghao Ding, *Basis for a Constructive Strategic Partnership Between China and the United States*, in OUTLOOK FOR U.S.-CHINA RELATIONS, *supra* note 26, at 157, 161; see also HELEN V. MILNER, INTERESTS, INSTITUTIONS AND INFORMATION: DOMESTIC POLITICS AND INTERNATIONAL RELATIONS 20 (1997) (“[T]he uncertainty created by incomplete or asymmetric information leads to outcomes that prevent optimal levels of exchange or that foster conflict. In other words, incomplete information leads to inefficient outcomes.”); *id.* at 259 (“[W]hen assessing other countries’ behavior, policy makers should make sure they understand the domestic situation their foreign counterparts face.”); ARTHUR STEIN, WHY NATIONS COOPERATE: CIRCUMSTANCE AND CHOICE IN INTERNATIONAL RELATIONS 58 (1990) (“It is universally suggested that the result of misconception is conflict that would have been otherwise avoidable. Although international conflicts are often attributed to misperception, international cooperation never is.”).

<sup>87</sup> Lee H. Hamilton, *Introduction to BEYOND MFN*, *supra* note 11, at 1, 4. As Professor Ren explained:

An image is a perception of a reality. In this sense, there is no “real image.” Under normal conditions, how an individual acts toward an object is determined by his or her image, or perception, of that object. Such images are rooted in personal beliefs and attitudes and shaped by experience. This property of image makes it difficult for changes to take place. Furthermore, an image “may cause people to make self-serving attributions and permit them to believe what they want to believe because they want to believe it.”

Ren, *supra* note 31, at 247, 248 (quoting Ziva Kunda, *The Case for Motivational Reasoning*, 108 PSYCHOL. BULL. 487 (1990)).

<sup>88</sup> See Ding, *supra* note 86, at 167; Gregory P. Fairbrother & Gerard A. Postiglione, *Teaching About China in America: Shaping the Perspectives of a Generation*, in OUTLOOK FOR U.S.-CHINA RELATIONS, *supra* note 26, at 267 (arguing for the incorporation of China-related content in the U.S. social-studies curriculum); see also *id.* at 283 (“Schools have the potential to influence the formation of public opinion about China and improve relations at the citizens’ level by teaching specific information about issues important in present-day China and U.S.-China relations and by enhancing students’ abilities to assess reports in the popular media objectively.”); *China: Sino-US Seminar on Intellectual Property Rights Closes*, CHINA BUS. INFO. NETWORK, Sept. 21, 1998, available at 1998 WL 13494566 (reporting the joint seminar between Chinese and U.S. experts in Chongqing, which explored the relations between the protection of intellectual property rights and economic development).

<sup>89</sup> See Ding, *supra* note 86, at 167; YVES L. DOZ & GARY HAMEL, ALLIANCE ADVANTAGE: THE ART OF CREATING VALUE THROUGH PARTNERING 80 (1998) (emphasizing the importance of creating an interface so that partners can learn from each other); *China Fair of Inventions, New Technologies Opens in US*, CHINA BUS. INFO. NETWORK, Sept. 2, 1999, available at 1999 WL 17730900 (reporting on the China Fair of Inventions and New Technologies, an event co-sponsored by the State Intellectual Property Office of China and the U.S.-China Council for International Exchange, Inc. to promote better understanding and cooperation between China and the United States in the intellectual property area).



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They also will help reduce the mutual suspicion between the two countries and be conducive to maintaining a stable, healthy, and harmonious bilateral relationship.<sup>90</sup>

A good example of a joint project in the intellectual property field will be a joint conference examining the common traits between Western intellectual property notions and Chinese philosophy, in particular Confucianism.<sup>91</sup> Professor William Alford's seminal work, *To Steal a Book Is an Elegant Offense*,<sup>92</sup> laid down the groundwork for understanding the cultural differences between China and the West in the intellectual property area. So far, there is very little research regarding the common traits between Western intellectual property notions and Chinese philosophy.<sup>93</sup> Such an exploration will be constructive and beneficial to the success of the constructive strategic partnership.

Indeed, because "Chinese leaders . . . are not ready to accept Western concepts in their rhetoric and ideology,"<sup>94</sup> such an exploration becomes even more important. From time to time, the Chinese leaders "have created various 'new' terms to characterize the country's development such as 'socialist market economy,' 'socialism with Chinese characteristics,' and 'democracy with Chinese characteristics.'"<sup>95</sup> Research that will lead to the development of "intellectual property rights with Chinese characteristics" therefore will be very important.

In addition to joint projects, the U.S. government needs to sponsor research that enhances understanding of China. So far, the American scholars, policymakers, and the general public have very limited understanding of China, in particular its political institutions and decisionmaking processes<sup>96</sup> and how it conducts its foreign affairs.<sup>97</sup> Increased funding for

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<sup>90</sup> DOZ & HAMEL, *supra* note 89, at 36 (stating that trust is established between parties to a joint effort as they work together); JORDAN D. LEWIS, *TRUSTED PARTNERS: HOW COMPANIES BUILD MUTUAL TRUST AND WIN TOGETHER* (2000) (emphasizing the importance of mutual trust to the success of a partnership).

<sup>91</sup> See Paul Edward Geller, *Legal Transplants in International Copyright: Some Problems of Method*, 13 UCLA PAC. BASIN L.J. 199, 205 (1994) (suggesting that Western copyright principles would be best introduced to the Chinese by drawing from traditional concepts of Chinese law).

<sup>92</sup> ALFORD, *supra* note 10.

<sup>93</sup> One example is provided by Professor Ocko, who discusses the following common traits between Western and Chinese intellectual property notions and Chinese philosophy:

[T]he Romantic notion of the author . . . had its counterpart in Chinese literati writing about painting. To the Romantics, a "work is an extension of the artist's personality." For the Chinese, "to know [a painter's] art was to know the man himself," for "the character of the artist is seen as the core of painting." Each Chinese painting, and each poem for that matter, was unique, a singular creation of the moral character of the artist.

Jonathan Ocko, *Copying, Culture, and Control: Chinese Intellectual Property Law in Historical Context*, 8 YALE J.L. & HUMAN. 559, 569 (1996) (book review) (footnotes omitted).

Most recently, substantial research has been devoted to explore the common grounds between human rights and the Chinese culture, in particular Confucianism. See, e.g., DANIEL A. BELL, *EAST MEETS WEST: HUMAN RIGHTS AND DEMOCRACY IN EAST ASIA* (2000); *CONFUCIANISM AND HUMAN RIGHTS* (Wm. Theodore de Bary & Tu Weiming eds., 1998); *CONFUCIANISM AND HUMAN RIGHTS* (Wm. Theodore de Bary & Tu Weiming eds., 1998); *WM. THEODORE DE BARY, ASIAN VALUES AND HUMAN RIGHTS: A CONFUCIAN COMMUNITARIAN PERSPECTIVE* (1998); *THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS* (Joanne R. Bauer & Daniel A. Bell eds., 1999); *HUMAN RIGHTS AND CHINESE VALUES: LEGAL, PHILOSOPHICAL, AND POLITICAL PERSPECTIVES* (Michael C. Davis ed., 1995).

<sup>94</sup> ZHENG, *DISCOVERING CHINESE NATIONALISM*, *supra* note 31, at 90; *id.* (attributing the Chinese leaders' reluctance to "their concerns with the Chinese way to power and wealth, and their nationalistic or patriotic feelings"). See also ANN KENT, *BETWEEN FREEDOM AND SUBSISTENCE: CHINA AND HUMAN RIGHTS* (1993) (discussing the difficulties in establishing human rights protection in China); ANN KENT, *CHINA, THE UNITED NATIONS, AND HUMAN RIGHTS: THE LIMITS OF COMPLIANCE* (1999) [hereinafter KENT, *THE LIMITS OF COMPLIANCE*] (discussing China's evolving human rights policies).

<sup>95</sup> ZHENG, *DISCOVERING CHINESE NATIONALISM*, *supra* note 31, at 90.

<sup>96</sup> See David Bachman, *Domestic Sources of Chinese Foreign Policy*, in *CHINA AND THE WORLD: NEW DIRECTIONS IN CHINESE FOREIGN RELATIONS* 31 (Samuel Kim ed., 3d ed. 1989) [hereinafter *CHINA AND THE WORLD*] ("[Domestic factors] have had a greater impact than international factors in shaping Chinese foreign policy."); Kenneth Lieberthal, *Domestic Forces and Sino-U.S. Relations*, in *LIVING WITH CHINA*, *supra* note 23, at 254, 274-75 ("[T]he inability of each nation's leaders . . . to understand and empathize with the domestic political constraints confronting the other side . . . limited both the ability and the desire of each leadership to accommodate the other."); Kenneth Lieberthal, *Domestic Politics and Foreign Policy*, in *CHINA'S FOREIGN RELATIONS IN THE 1980S* 43, 43 (Harry Harding ed., 1984) ("[Each of China's domestic political campaigns] has had clear and direct implications for its posture toward the rest

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research in this area would provide the United States with the information needed to overcome the obstacles of negotiating with and transacting business in China. It also would provide the American government with the capacity to make a more accurate assessment of the conditions in China. To help create incentives for research in these areas, the American government can “cultivate and reward its foreign service officers, commercial counselors, military officers, and intelligence analysts who have expertise on China.”<sup>98</sup>

To help corporate officers anticipate problems that might occur during business transactions in China, the U.S. government can provide awareness programs that help American businesses understand the status of the piracy problem in China and the pitfalls in transacting business there. These programs can alert business officers about the possible preventive measures<sup>99</sup> and protective techniques.<sup>100</sup> They also can highlight the strengths and weaknesses

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of the world.”); see also BERNSTEIN & MUNRO, *supra* note 12, at 105-29 (describing China’s progress in mastering American domestic politics).

Greg Mastel explained the difficulties of understanding the Chinese political system:

Even a cursory discussion of [Chinese politics and China’s government] is difficult because the Chinese political system is not transparent; much occurs behind closed doors, out of the public eye, and certainly away from western eyes. It is usually possible to obtain formal organizational charts of the Chinese government, but these tell, at most, only part of the story. Observers of the Chinese political system often emphasize the importance of shifting alliances between senior officials and family ties over positions on organizational charts. The Chinese system is particularly difficult for westerners to understand because what appear to be promotions can often, in fact, be demotions. There is a long tradition in China of leaders promoting rivals to “brightly lit shelves,” highly visible positions with no real power.

MASTEL, *supra* note 25, at 43.

<sup>97</sup> See ZHAO, *supra* note 84, at 9 (“[T]he study of Chinese diplomatic history has become fairly well developed, the study of Chinese foreign policy decisionmaking remains very underdeveloped, and the study of China’s foreign relations is barely on the radar scope.” (quoting Kenneth Lieberthal)); Michel Oksenberg & Elizabeth Economy, *Introduction to CHINA JOINS THE WORLD: PROGRESS AND PROSPECTS* 1, 39 (Elizabeth Economy & Michel Oksenberg eds., 1999) [hereinafter CHINA JOINS THE WORLD]; see also SOLOMON, *supra* note 85 (noting the peculiarities of Chinese negotiating behavior); Lucian W. Pye, *Understanding Chinese Negotiating Behavior: The Roles of Nationalism and Pragmatism*, in BETWEEN DIPLOMACY AND DETERRENCE, *supra* note 25, at 211 (noting the difference between American and Chinese negotiating behavior).

In his *Ten Commandments*, Lazlo Ladany, a Jesuit priest and China watcher, summed up his lifetime’s experience of analyzing and observing China, thus providing a model guide for all those who work on China:

1. Remember that no one living in a free society ever has a full understanding of life in a regimented society.
2. Look at China through Chinese spectacles; if one looks at it through foreign glasses, one is thereby trying to make sense of Chinese events in terms of our own problems.
3. Learn something about other Communist countries.
4. Study the basic tenets of Marxism.
5. Keep in mind that words and terms do not have the same meaning in a Marxist society as they do elsewhere.
6. Keep your common sense: the Chinese may have the particular characteristics [sic] of Chinese, but they are human beings and therefore have the normal reactions of human beings.
7. People are not less important than issues; they are probably more so. A group may adopt the programme of those who oppose it in order to retain power.
8. Do not believe that you know all the answers. China poses more questions than it provides answers.
9. Do not lose your sense of humour. A regimented press is too serious to be taken very seriously.
10. Above all, read the small print.

Jurgen Domes, *Preface* to LASZLO LADANY, *LAW AND LEGALITY IN CHINA: THE TESTAMENT OF A CHINA-WATCHER* vii, ix (Marie-Luise Näth ed., 1992) (quoting Laszlo Ladany, *Ten Commandments*, CHINESE NEWS ANALYSIS, No. 1248, Dec. 1982).

<sup>98</sup> Oksenberg & Economy, *supra* note 97, at 39.

<sup>99</sup> One commentator explained the importance of preventive measures:

As in fighting a disease, prevention is always better than trying to cure the disease and is vital for realizing a return on an investment in intellectual property rights. Given the costs of bringing a product or brand to the market place, such as research and development, tooling, raw materials, manufacturing, distribution, marketing and sales and the cost of registering intellectual property rights, it makes commercial sense to invest in the time and resources to prevent counterfeiting.

Simon P. Cheetham, *Protection of Intellectual Property Rights in Luxury Goods*, in CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE, *supra* note 60, at 385, 387.

<sup>100</sup> See Thomas Lagerqvist & Mary L. Riley, *How to Protect Intellectual Property Rights in China*, in PROTECTING INTELLECTUAL PROPERTY RIGHTS IN CHINA 7, 15 (Mary L. Riley ed., 1997). As Thomas Lagerqvist and Mary Riley explained:

By introducing technological measures to protect legitimate rights, the costs of counterfeiting will increase as counterfeiters will also have to replicate as accurately as possible the technological measures that have become part of the rights owner’s protection. Otherwise it would be too easy to identify the fake from the original. Sometimes technical identifiers of genuine

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of the available remedies and suggest alternative solutions, including those that are unconventional to the American public.<sup>101</sup> In addition to awareness programs, the American government can promote research that helps find innovative solutions to protect intellectual property in China. Examples of these solutions include joint ventures,<sup>102</sup> forum shopping,<sup>103</sup> persuading the authorities to take criminal actions,<sup>104</sup> preference of judicial action to administrative enforcement,<sup>105</sup> and indirect approaches.<sup>106</sup>

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products, for example, holograms on CDs, make it easier to prove the difference between a genuine article and a fake, simplifying the burden of proof that lies with the rights owner in connection with legal action taken with or without the assistance of administrative authorities.

*Id.*

<sup>101</sup> An example of an unconventional remedy is public shaming. This approach “can be extremely effective even without strong government support when the pirate product poses a significant health risk for Chinese people.” John Donaldson & Rebecca Weiner, *Swashbuckling the Pirates: A Communications-Based Approach to IPR Protection in China*, in CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE, *supra* note 60, at 409, 426. For example, to deal with local pirates of their infant formula, Heinz Baby Food brought reporters to raids that exposed not only the pirates, but also the shoddy quality and unsanitary facilities at the pirate factories. After a series of well-publicized raids, the company has not experienced other serious piracy problems. *See id.*

<sup>102</sup> *See infra* text accompanying notes 172-179 for a discussion of the benefits of establishing joint ventures in China.

<sup>103</sup> *See* Yiqiang Li, *Evaluation of the Sino-American Intellectual Property Agreements: A Judicial Approach to Solving the Local Protectionism Problem*, 10 COLUM. J. ASIAN L. 391, 414 (1996) (“Forum shopping can overcome an infringer’s strong influence in the local law enforcement apparatus.”); *see also id.* at 414-17 (describing how to use forum shopping to help protect intellectual property in China).

<sup>104</sup> *See id.* at 418-22.

<sup>105</sup> *See* Lagerqvist & Riley, *supra* note 100, at 32 (asserting that Chinese judges are less likely than administrative agencies to bend to local pressure); *see also* Susan Finder, *The Protection of Intellectual Property Rights Through the Courts*, in CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE, *supra* note 60, at 255 (discussing issues potential litigants in the Chinese courts must be aware of when considering whether to seek enforcement of their intellectual property rights through the Chinese courts). As one commentator explained:

The courts are . . . more powerful than administrative agencies. While an administrative agency may only take action against infringers located in the same area, a court, under proper procedure, may institute preliminary measures against the infringer no matter where it is located. In the past, a court could only detain a suspect with the consent of the suspect’s local court. The Supreme People’s Court has recently waived this requirement, apparently out of a concern for the undue influence of local protectionism. In a breach of contract case, *Yanbian Leather Factory vs. Mishan City Shoe Factory*, the defendant’s place of business was in Mishan City, Heilongjiang Province whereas the breach took place in Longjing City, Jilin Province. The City Court of Longjing City rendered a default judgment against the defendant and ordered bailiffs to seize the defendant’s properties in Mishan City. With the support of the local enforcement authority, the defendant regained the confiscated properties. The City Court of Longjing held that the defendant had seriously obstructed justice and, citing Articles 102(1)(2) and 105 of the Civil Procedure Law, detained the manager and assistant manager of the defendant’s company, who were in Mishan City at the time. The defendant ultimately complied with the court’s order and surrendered the confiscated properties. Here, the City Court of Longjing had not sought the approval of the City Court of Mishan and the decision was upheld by the Supreme People’s Court.

Li, *supra* note 242, at 414-15. *But see* Berkman, *supra* note 49, at 24 (“The court system as an institution generally lacks the political muscle to stare down powerful, local officials who may wish to impeded law enforcement.”); Lagerqvist & Riley, *supra* note 100, at 28 (“In China, administrative enforcement is occasionally seen as more cost effective than either civil or criminal proceedings against counterfeiters.”); Gregory S. Kolton, Comment, *Copyright Law and the People’s Courts in the People’s Republic of China: A Review and Critique of China’s Intellectual Property Courts*, 17 U. PA. J. INT’L ECON. L. 415, 451 (1996) (“[I]t may be difficult for foreign firms which plan to continue doing business in China to sue because doing so may wreck their “guanxi”—personal contacts or favors—that are integral for doing business in the PRC.”).

<sup>106</sup> As one commentator explained:

Another way may be available if the infringing party has conducted advertising or trade mark sales or any sales (directly or indirectly) to consumers. China has especially several laws and regulations containing statutory warranties of the quality of goods manufactured or sold in such cases. If the product copy is of inferior quality, selling it under a trade mark is an offense, as is advertising it or selling it directly to a consumer.

Mary L. Riley, *Strategies for Enforcing Intellectual Property Rights in China*, in PROTECTING INTELLECTUAL PROPERTY RIGHTS IN CHINA, *supra* note 100, at 65, 70; *see also id.* at 70-72 (discussing various indirect approaches).

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### *Step Four: Convince the Chinese Leaders Why Intellectual Property Protection Will Benefit China*

Since China's defeat in the Opium War in the mid-nineteenth century, the Chinese officials have viewed the West with a paradox of admiration and skepticism.<sup>107</sup> On the one hand, the Chinese admire the military prowess and technological advancement of the Western powers and believe modernization is the solution to China's backwardness and socio-economic problems. On the other hand, the Chinese people entertain skepticism toward Western institutions and sometimes wonder whether these institutions are trojan horses that help the West contain, or even control, China.<sup>108</sup> While the colonial past of the Western powers has demonstrated that these concerns are justified, China's growing world power status will lead to even more skepticism and less admiration.

Even today, many Chinese leaders do not regard intellectual property rights as institutions that are important to the country's strategy of economic development, foreign investment, and interstate relations.<sup>109</sup> Rather, these Chinese leaders consider intellectual property rights as weapons that were designed specifically to protect the West's dominant position and the United States's hegemony,<sup>110</sup> to drain the Chinese purse,<sup>111</sup> and to slow down China's economic progress and its rise in world affairs.<sup>112</sup> Paranoid about Western aggression,

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<sup>107</sup> See Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 5, at 22-28.

<sup>108</sup> See *id.* at 24-28 (discussing the prevailing skepticism and xenophobic and nationalist sentiments among the Chinese people).

<sup>109</sup> See Robert Sherwood, *Why a Uniform Intellectual Property System Makes Sense for the World* [hereinafter Sherwood, *Why a Uniform Intellectual Property System Makes Sense*], in GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS IN SCIENCE AND TECHNOLOGY 68, 83 (Michael B. Wallerstein et al. eds., 1993) [hereinafter GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS] ("Strong intellectual property safeguards seem likely to speed rather than retard progress toward world-class achievement."); Yu, *Succession by Estoppel*, *supra* note 84, at 100 (arguing that abiding by international norms is important to China's strategy of economic development, foreign investment, and interstate relations); see also PETER HOWARD CORNE, FOREIGN INVESTMENT IN CHINA: THE ADMINISTRATIVE LEGAL SYSTEM 1 (1997) ("[F]or continued economic development, [China] needs to further amplify economic linkages with West and Japan."); *id.* at 284 ("Law's overt purpose is to assist China's modernization by replacing policy decree and customary practices with a stable universal framework of normative behaviour.").

<sup>110</sup> See David M. Lampton, *A Growing China in a Shrinking World: Beijing and the Global Order*, in LIVING WITH CHINA, *supra* note 23, at 120, 121; Ren, *supra* note 31, at 262 ("From the Chinese point of view, Washington is sensitive to any power that might pose a challenge to its hegemonic position.").

<sup>111</sup> As commentators explained:

[D]eveloping countries tend to have scarce government resources. As a result, they resist spending on the enforcement of foreign intellectual property rights. As with the importation of capital, developing countries often view the importation of intellectual property as a means of dominating and exploiting the economic potential of the importing country. Paying for imports or royalties is thus seen as an economic burden fostering a negative balance of trade.

Tara Kalagher Giunta & Lily H. Shang, *Ownership of Information in a Global Economy*, 27 GEO. WASH. J. INT'L L. & ECON. 327, 331 (1993) (footnotes omitted); Edgardo Buscaglia, *Can Intellectual Property in Latin America Be Protected*, in INTELLECTUAL PROPERTY RIGHTS IN EMERGING MARKETS, *supra* note 58, at 96, 111 (noting that Latin American countries "have traditionally used intellectual property rights as an instrument for regulating technology transfer and avoiding royalty payments on innovations from the developed world").

<sup>112</sup> See Elizabeth C. Economy, *China's Environmental Diplomacy*, in CHINA AND THE WORLD, *supra* note 96, at 264, 281 ("[T]here was increasing discussion in the Chinese media suggesting that sustainable development was part of a master plan by the advanced industrialized countries (and especially the United States) to contain China by forcing it to slow the pace of economic growth in order to protect the environment."); Paul H.B. Godwin, *Force and Diplomacy: China Prepares for the Twenty-first Century*, in CHINA AND THE WORLD, *supra* note 96, at 171, 178 ("Beijing is convinced that at the heart of U.S. strategy is the intent to delay, if not prevent, China's emergence as great power in the twenty-first century; that the United States views China as the principal contender for the predominant position of the United States in Asia."); Michel Oksenberg, *Taiwan, Tibet and Hong Kong in Sino-American Relations*, in LIVING WITH CHINA, *supra* note 23, at 53, 56 ("[The Chinese leaders] believe that foreign leaders tend to be reluctant to welcome China's rise in world affairs and would prefer to delay or obstruct its progress."). *But see* BERNSTEIN & MUNRO, *supra* note 12, at 204 ("The goal of the United States is not a weak and poor China; it is a China that is stable and democratic, that does not upset the balance of power in Asia, and that plays within the rules on such matters as trade and arms proliferation."); Hamilton, *Introduction*, *supra* note 87, at 5 ("The U.S. interest is served by China's continuing economic development, for the sake of both improving the material welfare of the Chinese people and fostering political liberalization.").

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the leaders consider these rights as a tool to divide China, to erode its cultural identity,<sup>113</sup> and to ensure that the nation “follow the path of the former Soviet Union and Eastern Europe—toward economic decay, social unrest, and political instability.”<sup>114</sup> Unless the United States can convince the Chinese leaders, both national and local, that intellectual property rights will benefit China and that their fears and concerns are unjustified, their skepticism and paranoia will persist and militate against further intellectual property law reforms.

Undeniably, Western technology is far more advanced than what is currently produced in China. Different countries, however, have different technological needs.<sup>115</sup> A product or technology that is suitable to a Western developed country may not be suitable to China. Thus, China still has to provide adequate intellectual property protection in order to create incentives for domestic authors and inventors to invent, commercialize, and market their products. In fact, such protection will allow consumers to identify their favorite local products and may even help China “open up market opportunities in export markets.”<sup>116</sup> For example, Beijing Quanjude

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<sup>113</sup> See HUNTINGTON, *CLASH OF CIVILIZATIONS*, *supra* note 45, at 223 (“By 1995, a broad consensus reportedly existed among the Chinese leaders and scholars that the United States was trying to divide China territorially, subvert it politically, contain it strategically and frustrate it economically.” (internal quotations omitted)); Hamilton, *Introduction*, *supra* note 87, at 7 (“[T]he United States must avoid creating the impression within China’s elite that it intends to bring down the current system or divide the country. That, of course, is not the U.S. objective.”).

<sup>114</sup> Harry Harding, *Breaking the Impasse over Human Rights*, in *LIVING WITH CHINA*, *supra* note 23, at 165, 172 [Harding, *Breaking the Impasse*]. *But see* BERNSTEIN & MUNRO, *supra* note 12, at 204 (“The goal of the United States is not a weak and poor China; it is a China that is stable and democratic, that does not upset the balance of power in Asia, and that plays within the rules on such matters as trade and arms proliferation.”); Hamilton, *Introduction*, *supra* note 87, at 4 (“China’s stability is in the U.S. interest.”).

<sup>115</sup> See Edmund W. Kitch, *The Patent Policy of Developing Countries*, 13 *UCLA PAC. BASIN L.J.* 166, 172 (1994) (arguing that “the developing countries have their own, unique needs”). As Professor Kitch explained:

The technological needs of a developing country are not the same as the technological needs of a developed country. A technology does not exist apart from the needs, conditions, and resources of its users. A technology must be sensitive to the educational background of the users, and the related available technologies. For instance, it will often be critical what type of repair and maintenance services are available. A certain type of machinery may be highly effective and productive when used in a mass production system with an ample supply of electric power, skilled electronic engineers, and easy access to spare parts, but utterly useless at a more remote location. Thus, technological improvements which can make a substantial contribution to the lives of people in a developing country may be irrelevant in a different setting. A private firm has an incentive to make such an improvement only if it will be protected against immediate copying in those markets where the product has value. Thus, a no patent strategy may enable a country, to some extent, to appropriate the technology of others, but that technology will often not be the technology that the country needs.

*Id.* at 176-77.

<sup>116</sup> Janet H. MacLaughlin et al., *The Economic Significance of Piracy*, in *GLOBAL CONSENSUS, GLOBAL CONFLICT?*, *supra* note 1, at 89, 104. As commentators explained:

Establishing national trademarks in developing countries can also open up market opportunities in export markets. Consumers in developed countries then can more easily identify products imported from developing countries. This promotes economic growth in the developing country and also provides new sources of foreign exchange. A good example of this phenomenon is Mexican beer. On the strength of beer several well recognized brand names, Mexico exported over \$65 million of beer to the United States during 1985. By 1986, a single Mexican beer, Corona, has become the second largest selling imported beer, with total sales in the United States of 13.5 million cases. As more countries implement intellectual property rights protection that requires reciprocal treatment, the provision of full trademark protection will be especially important for export markets.

*Id.* (footnotes omitted). By contrast, inadequate trademark protection encourages competition policies that reduce the competitiveness of local products in export markets:

Firms in a less developed country could be interested in having the right to infringe trademarks for either of two reasons. Either they desire to produce goods bearing infringing marks in order to export them into other countries where they will be sold in violation of the trademark rights of that country. Or they desire to infringe the mark in their own country because the mark has established a reputation with consumers in the less developed country.

The first motive is a case of simple piracy, in which the home industries wish to use their home country as a “pirate base” to infringe in other countries. Such a competitive strategy will result in a parasitical business that will always be dependent on the willingness of the targeted countries to tolerate the infringing imports. Because the status of the business in its target markets will always be illicit and hence uncertain, it will never have an established market position that can lay a foundation for the development of an internationally competitive business. The second motive means that the mark the firms desire to copy will inevitably lose its reputation in the less developed country as multiple sources produce goods infringing it while none of them has an incentive to protect its value as a signal of quality desired by consumers.

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Roast Duck Restaurant is world renowned for its roast ducks. A successful trademark application can allow the owner to prohibit other restaurants, including those abroad, from exploiting the name of this 135-year-old restaurant.<sup>117</sup>

In addition, a well-functioning intellectual property regime will increase foreign investment,<sup>118</sup> thus creating new jobs<sup>119</sup> and facilitating technology transfer.<sup>120</sup> It also will promote indigenous industries and technologies<sup>121</sup> and will generate considerable tax revenues for the country.<sup>122</sup> As the economy grows, the Chinese government is beginning to understand the benefits of intellectual property rights. In April 1997, the Chinese government provided

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Kitch, *supra* note 115, at 168.

<sup>117</sup> *China: Famous Beijing Roast Duck Restaurant Secures Trademark*, CHINA BUS. INFO. NETWORK, Jan. 20, 1999, available at 1999 WL 5617961.

<sup>118</sup> A survey of major U.S. companies conducted by a World Bank affiliate demonstrated the correlation between intellectual property rights and foreign investment:

48 percent said [the strength or weakness of intellectual property protection] has a “strong effect” on whether to set up facilities to manufacture components, 59 percent said it was a determining factor in building overseas facilities to manufacture complete products, and 80 percent of them said the presence of such laws was a key factor in whether they would establish research and development facilities in a given country.

Josh Martin, *Copyright Law Reforms Mean Better Business Climate*, J. COM., Mar. 7, 1996, at 2C; see EDWIN MANSFIELD, INTELLECTUAL PROPERTY PROTECTION, FOREIGN DIRECT INVESTMENT AND TECHNOLOGY TRANSFER (1994) (discussing the correlation between intellectual property and foreign investment); Lagerqvist & Riley, *supra* note 100, at 8 (listing the loss of foreign investment and know-how as a cost of counterfeiting); Antonio Medina Mora Icaza, *The Mexican Software Industry*, in GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS, *supra* note 109, at 232, 236 (“Intellectual property rights protection in a country is a way to seek the trust of foreign investors in the country that will allow its economy to grow.”); A.R.C. Westwood, *Preface* to GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS, *supra* note 109, at v, vi (discussing how corporations will be hesitant to do business in countries that do not provide intellectual property); see also Robert M. Sherwood, *Intellectual Property Systems and Investment Stimulation: The Rating of Systems in Eighteen Developing Countries*, 37 IDEA 261, 265 (1997) (using foreign investment as one of the variables in measuring intellectual property protection in a less developed country); *Mickey Mouse in China*, N.Y. TIMES, June 3, 1993, at D4 (reporting that Disney bought Mickey Mouse back to China after a self-imposed four-year absence due to copyright infringements). *But see* Oddi, *International Patent System*, *supra* note 39, at 849 (noting that patent protection seems an unlikely determinative factor for deciding whether or not to invest in a foreign country).

<sup>119</sup> See Lagerqvist & Riley, *supra* note 100, at 9; PRICEWATERHOUSECOOPERS, CONTRIBUTION OF THE SOFTWARE INDUSTRY TO THE CHINESE ECONOMY 4 (1998) (estimating that a 60% decrease in piracy would translate into more than 79,000 jobs).

<sup>120</sup> See MANSFIELD, *supra* note 118, at 20 (“[T]he strength or weakness of a country’s system of intellectual property protection seems to have a substantial effect, particularly in high-technology industries, on the kinds of technology transferred by many U.S. firms to that country.”); SUSAN K. SELL, POWER AND IDEAS: NORTH-SOUTH POLITICS OF INTELLECTUAL PROPERTY AND ANTITRUST 214 (1998) (arguing that an operational intellectual property regime will promote foreign investment); Kitch, *supra* note 115, at 175-76 (same). Technology transfer is very important to a less developed country:

[Without technology transfer], the country will have to try to develop its own technological capability without sharing in the common pool of existing technology developed by others. This in turn will mean that its nationals and firms will develop technological solutions, methods, and products which are different from prevailing international standards. This will isolate the domestic economy from the international economy, and deny the country the advantages of international exchange of both goods and services. Such economic isolation in turn increases the difficulty of enhancing the national technological base.

*Id.* at 176. However, Professor Oddi suggested that the granting of intellectual property protection such as patents may actually retard technology transfer. As he explained:

The foreign owner may have little incentive to transfer technical information related to that patent invention if the owner is deriving significant profits from having an import monopoly on that invention. Moreover, even though sources other than the patent owner may be willing to transfer adequate technical information into the country, domestic enterprises would be foolish to pay for such technology because the patent owner could bar domestic production on the basis of the patent. The existence of the patent therefore precludes competition in technology available from third-party sources.

See Oddi, *International Patent System*, *supra* note 39, at 852.

<sup>121</sup> See Robert Merges, *Battle of the Lateralisms: Intellectual Property and Trade*, 8 B.U. INT’L L.J. 239, 246 (1990) (“A recording industry flourished in Hong Kong for the first time after the passage of a copyright act protecting sound recordings; the Indian software industry saw a growth surge after a copyright was extended to software . . .”); Sherwood, *Why a Uniform Intellectual Property System Makes Sense*, *supra* note 109, at 72 (noting that “immediately after Mexico reformed its patent law in June 1991, large numbers of patent applications were filed by Mexican nationals.”); *id.* (“A small but striking before-and-after shift comes from Columbia when copyright protection for software took effect in 1989. More than 100 Columbian nationals have since produced application software packages that have been registered with the copyright office, with hundreds more written but not registered.”).

<sup>122</sup> See Lagerqvist & Riley, *supra* note 100, at 9; PRICEWATERHOUSECOOPERS, *supra* note 119 (estimating that a 60% decrease in piracy would translate into more than \$466 million in tax receipts).

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assistance to set up special intellectual property affairs departments, create intellectual property protection networks, and build a self-protection system in forty-seven enterprises and institutes to which intellectual property rights are particularly important. These enterprises and institutes included major oil and chemical corporations, computer companies, and prestigious universities and scientific research institutes.<sup>123</sup>

Finally, an operational intellectual property regime will help prevent domestic problems that will arise due to inadequate intellectual property protection. For example, adulterated drugs and counterfeit products will lead to illness, extended injuries, and unnecessary deaths.<sup>124</sup> Emerging entrepreneurs, authors, and creative artists will be unable to capture the benefits of their inventions, innovations, and creative endeavors.<sup>125</sup> To make up for the potential infringement of their fellow citizens and organizations, businesses and educational centers will have to pay more for the needed foreign technologies and materials.<sup>126</sup> Consumers who receive worse products despite paying the same price<sup>127</sup> will be reluctant to consume in the open market.<sup>128</sup> Foreign entities will be wary of investing in China because of widespread intellectual property piracy.<sup>129</sup> And worst of all, “[t]he best and brightest from [China will] feel compelled to leave their home countr[y] for the more remunerative systems in developed nations.”<sup>130</sup>

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<sup>123</sup> See *China: New Measure Will Be Taken to Protect IPR*, CHINA BUS. INFO. NETWORK, Apr. 4, 1997, available at 1997 WL 9842657; see also *China Introduces Anti-Piracy Technology*, CHINA BUS. INFO. NETWORK, Mar. 15, 1999, available at 1999 WL 5618404 (reporting the efforts of the China Software Association to introduce new anti-piracy technology to local software producers).

<sup>124</sup> See Alford, *Making the World Safe for What?*, *supra* note 49, at 136.

<sup>125</sup> See *id.* at 136-37.

<sup>126</sup> See *id.* at 137; see also Ho, *supra* note 58, ¶ 2.6 (noting that legitimate copies of software are 20% more expensive in Hong Kong than they are in the United States).

<sup>127</sup> See Giunta & Shang, *supra* note 111, at 341 (“Many of [the less developed] countries fail to realize that prices in countries that respect intellectual property are not necessarily higher than prices in those countries where piracy abounds.”); Sherwood, *Why a Uniform Intellectual Property System Makes Sense*, *supra* note 109, at 82 (“In [some cases], notably pharmaceuticals, the price at which the imitation is sold is often nearly as high as the original.”); James W. Peters, Comment, *Toward Negotiating a Remedy to Copyright Piracy in Singapore*, 7 NW. J. INT’L L. & BUS. 561, 589 (1986) (“Pirated works are not necessarily cheaper than the originals.”).

<sup>128</sup> As commentators explained:

Trademark protection provides various types of benefits to consumers which are important for a consumer-based economy that offers a wide range of goods. One such benefit is quality control, which can actually promote economic activity in a market. Trademarks tie responsibility for the content and quality of products to the specific producers of those products, and in this way can assure the consumer of a certain level of quality associated with a product.

If the consumer cannot distinguish between high and low quality products in the market, then the low quality merchandise may chase the high quality merchandise out of the market altogether as consumers become discouraged and buy less. The market then shrinks and may even disappear.

This informational asymmetry results in an externality to the market that can reduce economic activity. Lacking full information, potential buyers cannot discern the actual quality of individual products in the market but can discern the average quality in the market, and, therefore, are only willing to pay a price that reflects this average. Potential producers know the actual quality of their products, and at the price reflecting the average quality, potential producers of more costly, higher quality goods stay out of the market.

MacLaughlin et al., *supra* note 116, at 103 (footnotes omitted), see also George Akerloff, *The Market for Lemons: Qualitative Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970) (analyzing market dynamics when the supply of goods was subject to varying degrees of quality known only by the individual producers and not the consumers); Alford, *Making the World Safe for What?*, *supra* note 49, at 137 (stating that fake products were so prominent in Shanghai that government officials had to inform citizens over the airwaves where they could purchase legitimate products).

<sup>129</sup> See Gordon C.K. Cheung, *Social Cost Analysis in Sino-American Disputes over Intellectual Property Rights*, in OUTLOOK FOR U.S.-CHINA RELATIONS, *supra* note 26, at 229, 231 (“[I]nfringement discourages U.S. industries from product investment, distribution, and marketization.”).

<sup>130</sup> Richard E. Vaughan, *Defining Terms in the Intellectual Property Protection Debate: Are the North and South Arguing Past Each Other When We Say “Property”?* A Lockean, Confucian, and Islamic Comparison, 2 ILSA J. INT’L & COMP. L. 307, 345 (1996); see also ROBERT SHERWOOD, INTELLECTUAL PROPERTY AND ECONOMIC DEVELOPMENT 156 (1990) (describing a reverse “brain drain” in South Korea after its implementation of intellectual property laws in 1987). Robert Sherwood explained the impact of inadequate intellectual property protection on human resources as follows:

Students who have gone abroad, prefer to stay abroad. Researchers on the verge of innovation, leave for a protected environment to complete their work. Technically skilled people are not much stimulated to do creative work when assigned

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These problems not only will induce significant costs to the economic system and generate social discontent, but also will incur significant political costs to the existing reformist leaders. Although the post-Mao reforms have turned China into the fastest growing economy in the world, those reforms have significantly reduced the power of the central government.<sup>131</sup> Dissatisfied with this decline of state power, the conservative leaders are constantly looking for an opportunity to regain their lost power and discredit their reformist counterparts.<sup>132</sup> The above domestic problems would undoubtedly provide this valuable opportunity.<sup>133</sup> They also would help bolster the conservatives' nationalist argument that "the Americans [are] us[ing] the economic opening to attempt to destroy China's progress rather than to welcome it into the world community."<sup>134</sup> Eventually, the problems would slow down China's modernization efforts and economic growth. They also would alienate the various diasporic Chinese communities around the world. Disappointed by the economic retrogression, these communities might decide to readjust their ties with the motherland.<sup>135</sup> Under this scenario, China would "retreat into a new kind of isolationism" and would have to continue to struggle under an international order dominated by the West.<sup>136</sup>

### *Step Five: Assist China to Integrate into the International Community and the Global Economy*

As intellectual property has become an integral part of the international economy,<sup>137</sup> a country that integrates well into the global economy will likely provide stronger intellectual property protection. To accelerate China's integration into the global economy, the United

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the task of copying and imitation. The research establishment does not flourish and patterns for financing new technology are not developed . . . .

*Id.* at 174; *see also* Kitch, *supra* note 115, at 174 (arguing that technologically sophisticated students who obtain employment outside the country may, "over time, become comfortable in their place of employment and will resist ever returning to their country of origin"). This loss of talents is particularly devastating in light of the blossoming software industry and the country's eagerness to develop science and technology parks. *See China: Guangzhou to Establish "Silicon Valley,"* CHINA BUS. INFO. NETWORK, Dec. 4, 1998, *available at* 1998 WL 22707603 (reporting the municipal government's intention to develop an international science and technology park); *China: Sales of Software Stay Strong Despite Fakes,* ASIAINFO DAILY CHINA NEWS, June 20, 2000, *available at* Lexis, News Library, ASINFO File ("Despite the damage done by piracy, China's software industry is still moving ahead with sales in 1999 hitting 17.6 billion RMB yuan (US\$ 2.13 billion), an increase of 27.5 percent over 1998."); *China: Software Industry Booms in China,* CHINA BUS. INFO. NETWORK, Oct. 30, 1997, *available at* 1997 WL 12878806 (reporting a 50% annual growth rate in the software industry over the past several years).

<sup>131</sup> *See* ZHENG, *DISCOVERING CHINESE NATIONALISM,* *supra* note 31, at 16; *see also* MARGARET M. PEARSON, *CHINA'S NEW BUSINESS ELITE: THE POLITICAL CONSEQUENCES OF ECONOMIC REFORM* 21 (1997) (noting that the intentional decentralization of economic authority by the state has been the "hallmark of the post-Mao reform strategy").

<sup>132</sup> *See* BERNSTEIN & MUNRO, *supra* note 12, at 63 ("[I]f there is a collapse, or even just a slowdown, the consequence could be political turmoil or even chaos."); Margaret M. Pearson, *China's Integration into the International Trade and Investment Regime, in CHINA JOINS THE WORLD,* *supra* note 97, at 161, 186-87 (arguing that China's integration into the world trade and investment regimes has been the subject of some domestic political wrangling between reformers and conservatives).

<sup>133</sup> "Foreign policy is not usually the central issue in Chinese factional conflicts. It is a realm unfamiliar to most of the senior Communist leaders, and one that affects their power interests less than domestic issues." ANDREW J. NATHAN & ROBERT S. ROSS, *THE GREAT WALL AND THE EMPTY FORTRESS: CHINA'S SEARCH FOR SECURITY* 128 (1997); *see also* David de Pury, *Drawing National Democracies Towards Global Governance, in URUGUAY ROUND AND BEYOND,* *supra* note 24, at 171, 177 (arguing that politicians have a clear preference for working on a national level, even if international matters are involved).

<sup>134</sup> OVERHOLT, *supra* note 30, at 393.

<sup>135</sup> The following statistics demonstrate the importance of diasporic Chinese communities:

In 1992, 80 percent of the foreign direct investment in China (\$11.3 billion) came from overseas Chinese, primarily in Hong Kong (68.3 percent), but also in Taiwan (9.3 percent), Singapore, Macao, and elsewhere. In contrast, Japan provided 6.6 percent and the United States 4.6 percent of the total. Of total accumulated foreign investment of \$50 billion, 67 percent was from Chinese sources.

HUNTINGTON, *CLASH OF CIVILIZATIONS,* *supra* note 45, at 170-71.

<sup>136</sup> MICHAEL YAHUDA, *HONG KONG: CHINA'S CHALLENGE* 4 (1996).

<sup>137</sup> *See* BOYLE, *supra* note 4, at 2-3.



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States needs to convince the Chinese leaders why economic integration will benefit China and improve its standing in the international community. Since adopting an open door policy in 1978, China has broadly accepted traditional sources of international law<sup>138</sup> and “has played an active role in conferences formulating new rules of international law in areas such as the law of the sea and the protection of the environment.”<sup>139</sup> Reformulating its intellectual property laws along international norms not only would be consistent with China’s current approach toward international law,<sup>140</sup> but also would foster China’s role as a team player within the international community.<sup>141</sup> This team player identity may even change the perception of the Western countries on China’s human rights protection, alleviate the concerns of its neighboring countries regarding its territorial ambitions, and consolidate its relations with the United States, Japan, and other major European powers.<sup>142</sup>

Indeed, China’s recent history has twice demonstrated that it is dangerous to isolate the country from the international community. Before the Opium War, China regarded foreigners as “outer barbarians” and believed the country had no need for foreign objects, manufactures, and ideas.<sup>143</sup> Ignorant and complacent, Emperor Qianlong of the Qing dynasty told King George III of England: “We possess all things. I set no value on objects strange or ingenious, and have no use for your country’s manufactures.”<sup>144</sup> A couple of centuries later, the scientific progress and military prowess of the Western powers proved Qianlong wrong. In fact, they brought China two centuries of tremendous pain and humiliation. It was not until the resumption of sovereignty in Hong Kong in 1997 that China was able to recover from all the unequal treaties signed in the nineteenth and early twentieth centuries.

During the Mao era, China made a similar mistake by withdrawing completely from the global economy. Practicing self-reliance and import substitution, China sought to produce domestically those products it traditionally imported. By the late 1970s, China had concluded that this self-reliant policy was ineffective.<sup>145</sup> It had led to high-cost, ineffective domestic

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<sup>138</sup> See YASH GHAI, HONG KONG’S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW 431 (1997); Yu, *Succession by Estoppel*, *supra* note 84, at 100. In 1981, China published its first textbook on international law, and universities have since promoted studies of international law. Instead of being skeptical of the economic ties to international law, Chinese scholars try to “divorce the analysis of international law from remnants of Marxian ideology.” GHAI, *supra*, at 431 (1997). See generally HUNGDAH CHIU, THE PEOPLE’S REPUBLIC OF CHINA AND THE LAW OF TREATIES (1972), for an excellent survey of China’s attitudes toward international law in the Mao era.

<sup>139</sup> GHAI, *supra* note 138, at 431.

<sup>140</sup> See Roda Mushkat, *The Future of Hong Kong’s International Legal Personality: Does International Law Matter? A Post-Handover Snapshot*, 22 S. ILL. U. L.J. 275, 285 (1998) (“[China] prides itself on abiding by all its international agreements and commitments, and that it enjoys a reasonably good record of compliance with treaties.”); *Parliament Leader Li Peng Urges Study, Use of International Law*, BBC SUMMARY OF WORLD BROADCASTS, May 4, 2000, available at LEXIS, News Library, BBCSWB File (reporting that Chinese Premier Li Peng advocated the use of international laws to handle state-to-state relations and international affairs and to conduct foreign exchanges and cooperation).

<sup>141</sup> For a discussion of China’s participation in the international legal order, see generally CHINA JOINS THE WORLD, *supra* note 97; KENT, THE LIMITS OF COMPLIANCE, *supra* note 94; James V. Feinerman, *Chinese Participation in International Legal Order: Rogue Elephant or Team Player*, in CHINA’S LEGAL REFORMS 201 (Stanley Lubman ed., 1996).

<sup>142</sup> See Yu, *Succession by Estoppel*, *supra* note 84, at 100-02.

<sup>143</sup> See ALFORD, *supra* note 10, at 30-31; see also HSÜ, *supra* note 59, at 142 (“The Chinese attitude toward foreign trade was an outgrowth of their tributary mentality. It postulated that the bountiful Middle Kingdom had no need for things foreign, but that the benevolent emperor allowed trade as a mark of favor to foreigners and as a means of restraining their gratitude.”).

<sup>144</sup> Letter from the Qianlong Emperor to King George III of England (Oct. 3, 1793), quoted in HSÜ, *supra* note 59, at 161.

<sup>145</sup> Some commentators criticized the self-reliance policy as follows:

According to ancient Greek philosophy, the world is composed of four elements: earth, water, air, and fire. Ancient Chinese philosophy maintains that the world consists of five elements: metal, wood, water, fire (energy) and earth. Among these five elements, three are in short supply in China (metal, wood, and energy), and the other two require future development. The status of resource availability and development in China suggests that China must participate actively in international economic cooperation of the exploitation of its own natural resources and draw upon needed resources from other countries.

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production, and China remained a backward country with limited foreign technology and capital.<sup>146</sup>

When Deng Xiaoping returned to power in the late 1970s, he was determined to “internationalize” China by renewing its diplomatic ties with other countries, including the United States.<sup>147</sup> As information and trade become increasingly globalized in this information age,<sup>148</sup> seclusion is no longer a viable foreign policy. Today, one can easily find a product grown in Malaysia, processed in Singapore, sold in China, and bought by an American. A seclusion policy will prevent China from taking advantage of the specialization capability within the global trading system.

Even though China has repeatedly emphasized the importance of national sovereignty, the need for global cooperation has drastically weakened the foundation of this principle.<sup>149</sup> To resolve domestic problems that have ramifications beyond national frontiers, states often have to cooperate with each other.<sup>150</sup> Even the United States, which has been known to favor unilateral

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Such cooperative ventures must be wide-ranging and extensive. The former policy that merely stressed “self-sufficiency” and “self-reliance” was harmful to China’s economic development and punctuated by political turmoil.

SHZHONG DONG ET AL., *TRADE AND INVESTMENT OPPORTUNITIES IN CHINA: THE CURRENT COMMERCIAL AND LEGAL FRAMEWORK* 3 (1992).

<sup>146</sup> Professor Pendley explained why China needs to integrate into the global economy:

Despite its large relatively cheap labor supply, China will need continuing transfers of technology to remain competitive in international trade. It will need open markets for its exports to provide hard currency exchange and reserves for its debt servicing, even as it attempts to maintain international protections for some of the domestic sectors of its economy. The necessary improvements in both economic and physical infrastructure will require financial assistance from foreign public and private sources as well as international organizations. Finally, China must find a way to reduce the heavy drain on its economy caused by inefficient state industries without also creating social instability.

William T. Pendley, *China as International Actor*, in *BETWEEN DIPLOMACY AND DETERRENCE*, *supra* note 25, at 19, 27.

<sup>147</sup> See Agreement on Trade Relations Between the United States of America and the People’s Republic of China, July 7, 1979, U.S.-P.R.C., 31 U.S.T. 4652.

<sup>148</sup> See BOYLE, *supra* note 4, at 2 (“Information . . . is a central feature of the international economy.”); *INTELLECTUAL PROPERTY LAWS OF EAST ASIA*, *supra* note 1, at 9 (examining the shift in capital from tangible assets and labor to knowledge and innovation resulting from the globalization of business activity in the past twenty-five years); see also LESTER C. THURLOW, *BUILDING WEALTH: THE NEW RULES FOR THE INDIVIDUALS, COMPANIES, AND NATIONS IN A KNOWLEDGE-BASED ECONOMY* xiii (1999) (“Knowledge is the new basis for wealth. . . . In the past, when capitalists talked about their wealth, they were talking about their ownership of plant and equipment or natural resources. In the future when capitalists talk about their wealth, they will be talking about their control of knowledge.”); WIPO, *FINAL REPORT OF THE WIPO INTERNET DOMAIN NAME PROCESS* ¶ 12 (1999) (“[T]he source of wealth is increasingly intellectual, as opposed to physical, capital and . . . markets are distributed across the globe.”); see also THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* (2000) (examining the impact of globalization).

<sup>149</sup> See de Pury, *supra* note 133, at 171 (“Global governance is what is needed to make an increasingly global world economy function better and ensure sustainable world-wide growth and development.”); Harding, *Breaking the Impasse*, *supra* note 114, at 177 (stating that the need for global cooperation has weakened the principle of national sovereignty); John O. McGinnis, *The Decline of the Western Nation State and the Rise of the Regime of International Federalism*, 18 *CARDOZO L. REV.* 903 (1996) (arguing that a new regime of “international federalism” has replaced the regime of nation states); see also CHAYES & CHAYES, *supra* note 24, at 27 (“[F]or all but a few self-isolated nations, sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in reasonably good standing in the regimes that make up the substance of international life.”); *id.* (“Sovereignty, in the end, is status—the vindication of the state’s existence as a member of the international system. In today’s setting, the only way most states can realize and express their sovereignty is through participation in the various regimes that regulate and order the international system.”); STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999) (contending that states have never been as sovereign as scholars argued); DENNIS ROY, *CHINA’S FOREIGN RELATIONS* (1998) (“[S]tates are not the only important actors in international relations, but must share the stage with non-government organizations, international institutions, and multinational corporations.”); ARNOLD WOLFERS, *DISCORD AND COLLABORATION* 27 (1962) (“Co-operation means sacrificing some degree of national independence with a view to co-ordinating, synchronizing, and rendering mutually profitable some of the political, military, or economic policies the co-operating nations intend to pursue.”); John H. Jackson, *The Uruguay Round Results and National Sovereignty*, in *URUGUAY ROUND AND BEYOND*, *supra* note 24, at 293, 294 (suggesting that there is no longer absolute sovereignty for nations). For a collection of essays discussing the decline of the nation state and the implications of such a decline, see generally Symposium, *The Decline of the Nation State and Its Effects on Constitutional and International Economic Law*, 18 *CARDOZO L. REV.* 903 (1996).

<sup>150</sup> These problems include, to name a few, illicit drug trafficking, refugees, illegal immigration, environmental degradation, illegal arms sales, nuclear proliferation, terrorism, and bribery and corruption. See Judith H. Bello, *National Sovereignty and Transnational Problem Solving*, 18 *CARDOZO L. REV.* 1027, 1027 (1996) (“Many of the most difficult problems that challenge nation states in the

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actions, has had to go through, and indeed is still going through, “difficult adaptations to the demands of global institutions, international law, multinational companies, and transnational financial networks and the loss of exclusive national decision-making power associated with them.”<sup>151</sup>

As China makes its transition to a world power, it can no longer focus *solely* on its own internal development. World power status is glamorous, but it does come with a price. This price may entail sacrifice of a country’s own internal development, its sovereignty, and its decisionmaking power. As the Joint Statement indicated, both China and the United States have a “common responsibility to work for peace and prosperity in the 21st century.”<sup>152</sup> Given this significant responsibility, China, like the United States, has to assume the role to maintain international peace and order and has to set examples for other countries.<sup>153</sup>

To help China integrate into the international community, the United States can treat China and its leaders with the status appropriate to a major power. It also can support China’s participation at the G-7 and G-8 meetings and encourage Chinese membership and active participation in international organizations.<sup>154</sup> Now that China has joined the WTO, the United States can assist China in making transition into this new trading arrangement.<sup>155</sup> Despite

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increasingly interdependent world do not respect borders. . . . Nation states acting alone are helpless to resolve or most effectively alleviate these problems.”).

<sup>151</sup> Lampton, *supra* note 110, at 123. The United States’s performance in the international human rights arena clearly demonstrates its uncomfortable position:

The United States has been particularly reluctant in ratifying international human rights instruments. Its representatives often took an active part in the drafting of human rights treaties, mostly taking a particularly conservative stand, with internal political interests as a primary guide. Proponents of international human rights standards almost invariably pursue compromises that would satisfy American demands, if for no other reason than simply because the United States happens to carry the purse for implementation expenditures. The result is quite often a mediocre convention with lukewarm enforcement procedures, and subsequently, when ratification is called for, Washington simply won’t play ball!

Johan D. van der Vyver, *Universality and Relativity of Human Rights: American Relativism*, 4 BUFF. HUM. RTS. L. REV. 43, 66 (1998).

<sup>152</sup> Joint Statement, *supra* note 16.

<sup>153</sup> Even though China seeks to attain superpower status, the Chinese leaders are particularly sensitive to the hegemony issue. As Richard Bernstein and Ross Munro explained:

A slogan that has been a constant since the heyday of Chairman Mao is “We will never seek hegemony.” Indeed, that slogan, a statement of China’s peaceable intent in its foreign relations, is one of the few that has remained in use in China as the country has passed through its various political stages, from radical Maoism to the era of Deng Xiaoping. All along, China’s official position has been that it seeks to develop a world-class economy, to maintain military force only for defense, and to refrain from interfering in the internal affairs of other countries. For three decades, China has promised never to attack another country first—only to counterattack if another country attacks it. It has vowed never to be the first to use nuclear weapons. It proclaims itself to be a struggling Third World country with no superpower capabilities and ambitions.

BERNSTEIN & MUNRO, *supra* note 12, at 51. *But see* ALASTAIR IAIN JOHNSTON, *CULTURAL REALISM: STRATEGIC CULTURE AND GRAND STRATEGY IN CHINESE HISTORY* (1995) (arguing that China has a realist strategic culture); MOSHER, *supra* note 33 (arguing that hegemonistic tendencies are rooted in the Chinese culture and such tendencies have resurged in the post-Mao era).

<sup>154</sup> *See Final Report of the Eighty-ninth American Assembly, in LIVING WITH CHINA, supra* note 23, at 295, 301. The G-7 is an informal forum of seven major industrialized countries—Canada, France, Germany, Italy, Japan, the United States, and the United Kingdom. Since 1998, the G-7 and the Russian Federation have met as the G-8 to discuss global economic issues.

<sup>155</sup> Although China has joined the WTO, discussions about why the United States should, and should not, accelerate China’s entry into the WTO are still informative and insightful. *See, e.g.,* Cohen & Bersani, *supra* note 62, at 110; Lampton, *supra* note 110, at 137; *see also* Joint Statement, *supra* note 16, at 1682 (“The United States and China agree that China’s full participation in the multilateral trading system is in their mutual interest.”); *id.* (agreeing “to intensify negotiations on market access, including tariffs, non-tariff measures, services, standards and agriculture and on implementation of WTO principles so that China can accede to the WTO on a commercially meaningful basis at the earliest possible date”); China’s WTO Accession: American Interests, Values and Strategies: Hearings Before the House Comm. on Ways and Means, 106th Cong. 1 (2000), *available at* [http://www.ustr.gov/speech-test/barshefsky\\_t34.pdf](http://www.ustr.gov/speech-test/barshefsky_t34.pdf) (statement of USTR Charlene Barshefsky) (“China’s WTO accession is a clear economic win for the United States.”); Laura D’Andrea Tyson, *China Policy: Means and Ends*, N.Y. TIMES, Mar. 9, 1997, at A15 (“China’s admission to the World Trade Organization—on commercially acceptable conditions—is probably our single most effective means of shaping a more open, market-oriented China.”); *cf.* MASTEL, *supra* note 25, at 176 (cautioning that China’s accession to the WTO is “a double-edged sword”). *But see* BERNSTEIN & MUNRO, *supra* note 12, at 211 (arguing against WTO membership for China); James V. Feinerman, *Free Trade, Up to a Point*, N.Y. TIMES, Nov. 27, 1999, at A15 (discarding myths concerning China’s accession to the WTO); James Mann, *Our*

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comments about negative implications of China's entry into the WTO, having China in the WTO is more preferable than having it outside the WTO.<sup>156</sup> After all, China "will more likely to adhere to international norms that it has helped to shape."<sup>157</sup> Today, "[g]lobal commerce can ill afford to have a major player like China not playing by market rules and conventions. If China is allowed to pirate whatever products and technology it chooses, the international system could well break down."<sup>158</sup>

To help accelerate the economic development in China, the United States can "fully support [the World Bank]'s efforts to assist in the reform of unproductive state enterprises in [China] and the promotion of stable economic development."<sup>159</sup> "Although providing more open markets will not necessarily directly produce a rapid growth of intellectual property [protection] in [China], constricting access to the markets of major industrialized countries almost certainly will retard it."<sup>160</sup> Liberalizing the American market also would provide the non-state capital needed to develop a local intellectual property industry.<sup>161</sup>

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*China Illusions*, AM. PROSPECT, June 5, 2000, at 22 (arguing that China's entry into the WTO would likely disappoint the American business community). As Richard Bernstein and Ross Munro explained:

[S]uch a deal would give away the store to China without gaining any compensating advantages for the United States. It would give Third World privileges to a Chinese economy that, as we have shown, has developed large, First World enclaves ready to compete head-on, but unfairly, with the United States.

In addition, WTO membership for China would virtually prohibit the United States from taking meaningful action in its trade disputes with China, since China would have the right to insist that any dispute be resolved via the WTO's system of binding arbitration. Like its predecessor, the GATT, the WTO moves cautiously and slowly, rarely assertively or bravely. Disputes will take years to resolve. And even if the United States wins every time, it will be back to the issue-by-issue approach that China can always win by following its People's War strategy.

BERNSTEIN & MUNRO, *supra* note 12, at 211; *see also* Giunta & Shang, *supra* note 111, at 329 ("Bilateral agreements are most effective because they address the individual concerns and circumstances facing each signatory. Importantly, such agreements can take into consideration the particular phases of development confronting each country, and provide for the gradual inclusion of a developing country into the global economy."); *id.* at 340 (stating that the bilateral agreements initiated after the United States threat of trade sanctions "have generally encouraged speedier and more substantial changes in suspect nations, as failure to comply might result in immediate trade sanctions"); Ashoka Mody, *New International Environment for Intellectual Property Rights*, in *INTELLECTUAL PROPERTY RIGHTS IN SCIENCE, TECHNOLOGY, AND ECONOMIC PERFORMANCE: INTERNATIONAL COMPARISONS* 203, 255 (Francis W. Rushing & Carole Ganz Brown eds., 1990) [hereinafter *INTERNATIONAL COMPARISONS*] ("In the short-run, bilateralism is proving more effective than multilateral efforts in furthering U.S. interests. Bilateralism is quicker and allows more focused and tailored responses."). Likewise, Tara Giunta and Lily Shang argued that "[b]ilateral agreements provide the most workable vehicle for addressing the contentious issues surrounding intellectual property protection." Giunta & Shang, *supra* note 111, at 339. As they explained: "Unlike multilateral agreements, bilateral agreements are country specific and thus may provide more protection for owners of foreign patent rights. In addition to bilateral treaties specifically addressing intellectual property protection are the 'Treaties of Friendship, Commerce and Navigation' and the various income tax treaties." *Id.* at 339-40 (footnote omitted); *see also id.* at 329 (stating that bilateral agreements allow less developed country to assume greater responsibility in safeguarding intellectual property rights as it becomes a stronger player). *See generally* CHINA IN THE WORLD TRADING SYSTEM: DEFINING THE PRINCIPLES OF ENGAGEMENT (Frederick M. Abbott ed., 1998) for a collection of essays discussing China's accession to the WTO.

<sup>156</sup> *See* Lampton, *supra* note 110, at 137 (noting that "[i]nvolving China in the WTO and obtaining deadlines for compliance (even if allowing for longer transition times than one would wish) is preferable to having China outside the WTO, with no deadlines for compliance whatsoever"); *see* GROOMBRIDGE & BARFIELD, *supra* note 59, at 41 ("WTO is by no means a panacea to China's economic problems, but both China and the world trading community will be better served if China is a member."); Pearson, *supra* note 132, at 195 ("[W]ithout China in the WTO the United States loses a key forum for seeing that China adheres to the rules of the regime.").

<sup>157</sup> Sam Nunn, *Address to the American Assembly*, in *LIVING WITH CHINA*, *supra* note 23, at 277, 285.

<sup>158</sup> Bloch, *supra* note 23, at 200; *see also* Cheng, *supra* note 37, at 2005 ("Admitting China into the WTO will encourage China to enforce its [intellectual property] protection and enhance the international community's position to contain China's piracy problem.").

<sup>159</sup> Cohen & Bersani, *supra* note 62, at 111.

<sup>160</sup> ALFORD, *supra* note 10, at 122-23. *But see* BERNSTEIN & MUNRO, *supra* note 12, at 101 ("Trade with the West . . . has a double edge. It brings in practices and ideas that ought to lead to political reform. But it also enhances the power of the regime to resist and suppress political reform and to force other countries to drop their demands for it.").

<sup>161</sup> *See* ALFORD, *supra* note 10, at 123; Neil Weinstock Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217, 278 (1998) [hereinafter Netanel, *Asserting Copyright's Democratic Principles*] ("If tailored to provide for licenses for the printing and production of foreign works, rather than merely the importation of foreign-produced copies, it could also help to provide a measure of income for local media, thus contributing to their fiscal independence."). *But see* PEARSON, *supra* note 131, at 164 ("[T]here is reason to be skeptical that the business elite in the PRC will either emerge as a strong independent force or that it will be at the center of a more progressive form of state-society relations.").

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Moreover, economic integration would “help the reformers tilt the internal Chinese debate in directions that would minimize, if not avoid, future economic conflicts. It [also] would encourage and perhaps accelerate the inevitable transformation of China’s political regime.”<sup>162</sup> In fact, if China were excluded from active participation in the international community, despite its joining the WTO, “leaders might emerge in China who would attempt to devise an alternative regime, rejecting the WTO-based system as unnecessarily invasive.”<sup>163</sup> Given the growing importance of Asia,<sup>164</sup> this alternative regime may take the form of the Asia Pacific Economic Cooperation Forum, commonly known as APEC.<sup>165</sup> Although the financial crisis in Asia made the possibility of such an Asia-based regime slim,<sup>166</sup> there may be renewed interest in creating such a regime once the region’s economy recovers.

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<sup>162</sup> Michael E. DeGolyer, *Western Exposure, China Orientation: The Effects of Foreign Ties and Experience on Hong Kong*, in OUTLOOK FOR U.S.-CHINA RELATIONS, *supra* note 26, at 299, 300 (internal quotations omitted) (quoting C. Fred Bergsten, *The New Agenda with China*, INT’L ECON. POL’Y BRIEFS, May 1998, at 2); see David E. Sanger, *Playing the Trade Card: U.S. Is Exporting Its Free Market Values Through Global Commercial Contracts*, N.Y. TIMES, Feb. 17, 1997, at 1 (reporting that the Clinton administration considers the WTO as a tool to foster political change in China); see also GROOMBRIDGE & BARFIELD, *supra* note 59, at 41 (“[A]n international institution such as the WTO can help bolster China’s reform leadership against powerful hard-liners. International institutions can tie the hands of leaders in ways that the ineffectual bilateral relationship is not able to do so.”). *But see* Mann, *supra* note 155, at 22 (“[H]elping the reformers’ is a poor basis for American policy. It is too risky. It plays into (and, indeed, accentuates) China’s internal political tensions.”).

<sup>163</sup> Pearson, *supra* note 132, at 185.

<sup>164</sup> Commentators explained the importance of East Asia:

East Asia is generally considered the new frontier for economic development. According to some accounts, East Asia is generating wealth at an unprecedented rate. As a result, experts predict a massive shift of global economic power in the near future. Years of export surpluses, combined with high savings rates and prudent fiscal policies, have left East Asian governments with foreign reserves topping \$250 billion. It has been estimated that by the year 2000, East Asia will account for half of all growth in world trade. Asia’s economic growth has such momentum that, according to the International Monetary Fund, half of the estimated \$7.5 trillion surplus in gross world product over the next ten years will be contributed by this region.

Moreover, East Asians are expected to account for 3.5 billion of the world’s 6.2 billion people by the end of the century. According to conservative estimates, one billion of these Asians will be living in households with some consumer-spending power. Furthermore, roughly 400 million of these consumers will have attained disposable incomes at least equal to the average consumer in a developed country today. Such phenomenal growth presents both opportunities and challenges to the West.

As an investment opportunity, East Asia’s future capital needs will be enormous. Over the next ten years, the region must mobilize more than \$1 trillion to build basic infrastructure such as high ways, communications systems and power plants. Billions more are needed to establish capital-intensive industries such as microelectronics, steel and petrochemicals. These opportunities, however, will be accompanied by their share of problems.

Giunta & Shang, *supra* note 111, at 346-47 (footnotes omitted).

<sup>165</sup> Professor Pearson described this new possible alternative regime:

The core [of the alternative regime] would likely be a revised and strongly Asia-oriented APEC that adheres to many norms of free trade (such as low tariffs), and yet—like Japan, South Korea, and Taiwan—is more tolerant of industrial policy, and that is not dominated by the United States (which could continue to leverage trade policies to insert itself into areas many Asian governments feel are their sovereign rights, such as treatment of political dissidents.) An Asia-oriented APEC might be even more sympathetic to a relationship-based norm of interactions that avoids binding agreements of the sort that tend to make the PRC leadership uncomfortable than to a rule of law-based norm. As it stands already, Chinese leaders appear to feel APEC is an easy forum to operate in, saying it works in the “Asian way”—not requiring signed agreements, but working according to gradual negotiations to reach a consensus. It is already true that many investments from overseas Chinese investors (who have contributed as much as 70 percent of China’s FDI in the 1990s) are back-of-the-envelope deals based on personal connections rather than the rule of law. Overseas Chinese often are given preferential treatment (such as lower export requirements), sometimes a result of relationships they may have cultivated with PRC officials. A new APEC also could provide a buffer against Western criticisms over lack of protection of intellectual property or Western attempts to link trade policy to human rights. It also conceivably could be a forum in which China could resist increased attempts by organizations such as the WTO and the World Bank to use “good governance” and anticorruption as criteria for membership or lending. Support from an Asia-exclusive trade organization would be forthcoming from some other members, notably Malaysia.

Pearson, *supra* note 132, at 185 (footnotes omitted).

<sup>166</sup> *See id.*

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### Step Six: Promote a Local Intellectual Property Industry

So far, the Chinese leaders are reluctant to promote intellectual property rights because these rights benefit mainly foreigners. For example, in 1992, foreigners obtained two-thirds of all invention patents granted even though the Chinese people filed eleven times more applications.<sup>167</sup> The Chinese leaders, however, may change their minds if intellectual property protection benefits the domestic population and contributes to the economic growth of the country. Thus, the American government and business community need to encourage and assist the Chinese, in particular its independent sector, to develop a local intellectual property industry.<sup>168</sup> The American government and U.S. businesses also can help facilitate legitimate intellectual property exchange.<sup>169</sup>

As the American foreign antitrust policy demonstrated, the sustainability of a new policy in a less developed country depends on the emergence of politically powerful domestic constituencies committed to the new policy and the ability of interested private parties to mobilize these constituencies to uphold and enforce such a policy.<sup>170</sup> A prosperous local

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<sup>167</sup> See ALFORD, *supra* note 10, at 84. As one commentator explained:

Because developed countries create a majority of the patentable inventions and technology, most of the patents granted in developing countries are issued to foreigners. The largest proportion of inventions covered by patents are thus induced, not by the availability of patent protection in the developing countries, but rather by the domestic patent system of the holder or in conjunction with patent systems in other developed countries. As a result, a developing country cannot expect that implementation of a patent regime will induce foreign innovators to focus their development efforts on new products and technologies that meet the special needs of the developing nations.

INTELLECTUAL PROPERTY LAWS OF EAST ASIA, *supra* note 1, at 20-21 (footnotes omitted).

<sup>168</sup> One commentator explained the need to develop a local intellectual property industry:

Remember, even India—a country that had a flourishing black market in pirated media—has seen a decline in counterfeiting as its own film and software industries have developed. Japan rose to become an economic superpower through strategic copying of others' innovations, but Japanese industry has grown to appreciate the importance of patents and copyrights. Just ask Sony and Matsushita, which also own movie studios, and Hitachi and Toshiba, which are among the leading filers for U.S. patents.

Today, all the economic incentives in China dictate that piracy is a business model that makes sense. The best way to change that is to help China and its entrepreneurs develop their own intellectual property industries, protected by intellectual property laws that make sense.

Michael Schrage, *In China, Start with Human Rights to Stop the Software Pirates*, WASH. POST, Feb. 10, 1995, at D3; see also Maruyama, *supra* note 60, at 167 (“China’s IPR regime will become self-sustaining only when it sees that protecting technology, films, music, and software advances its own core economic interests.”); *id.* at 208 (arguing that intellectual property agreements became self-sustaining in Korea and Taiwan “when both countries began developing indigenous innovative technologies, and thus a stake in effectively wielding IP laws to protect domestic economic interests”).

Glenn Butterson explained the economics behind the need to develop a local intellectual property industry:

Before IPRs (or the broader institutions of private property) were theoretically made available to the general population under Deng’s reforms, most Chinese actors may well have been allied as infringing pirates or as unwitting consumers of pirated materials. They might, therefore, have stood in an adverse relation only with a rights holder. In such a situation, the enforcer’s decision to refrain from an enforcement action would have benefited all local parties concerned, and the near-term costs of refraining from enforcement would have been shifted to the non-local, typically foreign actor, *viz.*, the owner of the property being infringed; the long-term costs would theoretically have been partly borne locally if declines in revenue due to piracy ultimately extinguished investment activity in, or distribution in China of, the product in question. But once Chinese parties obtain significant IPR stakes, the cost and benefit calculations of consuming and pirating Chinese parties, as well as those of government enforcers, will begin to shift with some of the significant costs of non-enforcement being borne locally by Chinese stakeholders. In this way, when Chinese actors are put in a position, relative to other available investments, to increase significantly their net potential gains through either IPR ownership, licensing or litigation, the economic explanation predicts that they will, in fact, tend to choose to increase and protect those gains.

Butterson, *supra* note 10, at 1118 (footnote omitted).

<sup>169</sup> See Kolton, *supra* note 105, at 458-59 (describing the intellectual property exchange in Xian in August 1995).

<sup>170</sup> SELL, *supra* note 120, at 216; see also Gary M. Hoffman & George T. Marcou, *Combating the Pirates of America’s Ideas*, COMPUTER LAW., July 1990, at 8, 12 (1990) (“The local recording industry in Indonesia, for example, helped significantly in convincing the Indonesian government to pass an effective copyright law.”).

The difference between the American foreign intellectual property and antitrust policies clearly demonstrates the sharp distinction between overt coercion and persuasion. See SELL, *supra* note 120, at 13. “The adoption of antitrust policies in developing countries has

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industry and a well-organized intellectual property lobby are therefore essential to create the domestic constituencies that are needed to push for and sustain continuous intellectual property law reforms and enforcement efforts. To this end, American businesses should rally the support of local intellectual property holders and help them develop a lobby that aims to protect their own interests.<sup>171</sup>

Apart from setting up branches in China, American businesses can establish joint ventures with local companies.<sup>172</sup> These joint ventures not only will help create immediate economic incentives for the Chinese to enforce intellectual property rights, but also will facilitate market access for international trade partners.<sup>173</sup> In addition, the joint ventures would protect American enterprises against losses due to intellectual property piracy and counterfeiting<sup>174</sup> and would assist them in overcoming local protectionism.<sup>175</sup> These joint ventures also would allow American investors to bridge their cultural differences, to obtain access to the distribution network of their local partners,<sup>176</sup> and to take advantage of the personal connections, or *guanxi*, that are essential to commercial success in China.<sup>177</sup> Moreover, the joint ventures would alleviate the unemployment problem that may result from the closure of pirated factories, a problem that is of major concern to the local officials in light of the Asian financial crisis and

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been based on choice within constraints rather than coercion.” *Id.* at 198. In response to the economic crisis in the early 1980s, the developing countries changed both their policies and their mindsets with respect to antitrust policies. *See id.* at 177. Politically powerful domestic constituencies favoring the new policies had emerged, and the governments in those countries actively and voluntarily sought information and assistance in drafting laws and training officials to administer these new policies. *See id.* at 177-78.

<sup>171</sup> As commentators explained:

[U]ltimately, the strongest voices in China are always Chinese, and the most convincing arguments for development and enforcement of strict IPR protocols in China have come from those Chinese organizations which are starting to discover that they have intellectual property worth protecting. More and more MNCs are finding that one of the best ways to fight Chinese pirates is to seek out or help create Chinese organizations which share the same interest.

Donaldson & Weiner, *supra* note 101, at 417; *see* MILNER, *supra* note 86, at 239 (arguing that the legislature would likely to adopt a proposal that it does not fully understand when it can depend on one or more informed domestic groups to signal it about the proposal); *see also* Giunta & Shang, *supra* note 111, at 331 (“[U]nlike Western countries, developing countries have few strong lobbies of inventors, authors or companies that would benefit from strict intellectual property laws or the enforcement thereof.”); Eric M. Griffin, Note, *Stop Relying on Uncle Sam!—A Proactive Approach to Copyright Protection in the People’s Republic of China*, 6 TEX. INTELL. PROP. L.J. 169, 191 (1998) (“Intellectual property is simply too new a concept within China to have any strong lobbies of inventors, authors, or companies.”).

<sup>172</sup> For discussions of joint ventures in China, *see generally* Walter Sterling Surrey et al., *Joint Ventures in China: The First Water Stop*, 21 TEX. INT’L L.J. 221 (1986), for a discussion of joint ventures in China. *See also* Pitman B. Potter, *Foreign Investment Law in the People’s Republic of China: Dilemmas of State Control*, in CHINA’S LEGAL REFORMS, *supra* note 141, at 155 (reviewing the structure and performance of foreign investment law and policy in China).

<sup>173</sup> Cheng, *supra* note 37, at 2010; *see also id.* (“The business structure of joint ventures may even move potential Chinese pirates to the opposite side of the infringement equation.”).

<sup>174</sup> *See* Keshia B. Haskins, *Special 301 in China and Mexico: A Policy Which Fails to Consider How Politics, Economics and Culture Affect Legal Change Under Civil Law Systems of Developing Countries*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1125, 1169 (1999) (“In joint ventures, United States investors work with local partners in foreign countries who gain economic interests in keeping the intellectual property safe from loss.” (quoting Frank Long, *Joint Ventures: Different Kind of Union Protection*, ARIZ. BUS. GAZETTE, Mar. 27, 1997, at 11 [hereinafter Long, *Joint Ventures*])); Long, *Joint Ventures*, *supra* (explaining how American exporters use joint ventures to protect their intellectual property). *But see* Groombridge, *Political Economy*, *supra* note 58, at 12 (“All too often it is the authorized manufacturer who is invited in the infringing activities.”).

<sup>175</sup> As one commentator explained:

Foreign enterprises can reduce local protectionism by forming joint ventures with their Chinese opponents. The Chinese partner is more likely to have a better understanding of the nuances of political life in China, be more aware of impending upheavals, and maintain the proper government contacts to safeguard joint venture’s investments. Also, a local government is more willing to take action when a foreign investor has a government-linked partner and the government’s own interest is at stake.

Cheng, *supra* note 37, at 2010; *see also* Haskins, *supra* note 174, at 1169 (“[Joint ventures] can protect foreign investors against loss ‘in countries where political risks are high.’” (quoting Long, *Joint Ventures*, *supra* note 174, at 11)).

<sup>176</sup> *See* Cheng, *supra* note 37, at 2010.

<sup>177</sup> *See* Haskins, *supra* note 174, at 1169; *see also* Kolton, *supra* note 105, at 451 (noting that *guanxi* are an integral aspect of doing business in the United States).

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increased unemployment resulting from the downsizing of state-operated enterprises.<sup>178</sup> Because of this unemployment problem, some commentators even suggested co-optation of piracy factories as a solution to the piracy problem.<sup>179</sup>

Finally, to help win the acceptance and goodwill of the local leaders and the Chinese people, American businesses can invest some of their profits back into the local community in the form of cultural or educational benefits.<sup>180</sup> These projects not only would demonstrate to the local officials the benefits of adequate intellectual property protection, but also would allow local officials to benefit from the success of foreign intellectual property businesses.<sup>181</sup> In addition, these projects would help alleviate the xenophobic sentiments among the Chinese people and their widespread skepticism toward Western institutions.

### *Step Seven: Promote Individual Rights and the Rule of Law in China*

Societies that have no respect for individual rights are unlikely to tolerate private expressions or expressive activities.<sup>182</sup> Without such toleration, people will have very limited incentives to create expressions. Indeed, there is “an intimate link” between respecting individual rights and respecting a copyright system that values and promotes an individual’s creative achievement.<sup>183</sup> To believe in intellectual property rights, one must accept, at least, some version of individualism, reward, and commodification.<sup>184</sup> Thus, the United States needs to continue its hard work in promoting individual rights and civil liberties in China.<sup>185</sup>

In fact, a well-functioning intellectual property regime will help advance the United States’s longstanding interests in promoting human rights and civil liberties in China.<sup>186</sup>

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<sup>178</sup> See Long, *Joint Ventures*, *supra* note 174; see also Cheetham, *supra* note 99, at 385 (stating that the local economies are concerned about “the employment, foreign exchange, and increased industrial development provided by counterfeiting factories”).

<sup>179</sup> See, e.g., Clifford J. Shultz II & William Saporito, *Protecting Intellectual Property: Strategies and Recommendations to Deter Counterfeiting and Brand Piracy in Global Markets*, 31 COLUM. J. WORLD BUS. 18, 23 (1996); Griffin, *supra* note 171, at 188 (stating that co-optation through buy-outs or joint ventures may help alleviate the piracy problem). Cooption serves two purposes:

First, it effectively “shuts down” the bogus operation while keeping manufacturing capacity “employed.” The production of legitimate, quality goods is achieved and a counterfeit operation has been eliminated with little incentive to start others.

Second, a strategy that employs the local work force is good public relations, politically expedient and well received by local governments and can be leveraged for future interests.

Shultz & Saporito, *supra*, at 23.

<sup>180</sup> See Doris Estelle Long, *China’s IP Reforms Show Little Success*, IP WORLDWIDE, Nov.-Dec. 1998, at 6 [hereinafter Long, *China’s IP Reforms*]; see also R. Michael Gadbaw & Timothy J. Richards, *Introduction to GLOBAL CONSENSUS, GLOBAL CONFLICT?*, *supra* note 1, at 1, 27 (arguing for the investment of a portion of the benefits the United States would gain from the elimination of piracy). “For example, under the auspices of Project Hope, Motorola has contributed funds to assist in the construction of local primary schools throughout China.” Long, *China’s IP Reforms*, *supra*, at 6.

<sup>181</sup> Long, *China’s IP Reforms*, *supra* note 180, at 6.

<sup>182</sup> See Alford, *How Theory Does—and Does Not—Matter*, *supra* note 57, at 17-18; see also Naigen Zhang, *Intellectual Property Law in China: Basic Policy and New Developments*, 4 ANN. SURV. INT’L & COMP. L. 1, 7 (1997) [hereinafter Zhang, *Intellectual Property Law in China*] (attributing the delay of implementing copyright law to “China’s concern about the control of publications”). As Dean Garten explained:

If foreign governments do not seek to protect basic human rights, they are more likely to ignore or circumvent other basic laws of great commercial relevance, such as those that protect intellectual property rights, combat corruption, and mandate the disclosure of critical financial information. If the arrogance of governments that oppress their people transfers easily to other areas.

Garten, *supra* note 29, at 75.

<sup>183</sup> Hamilton, *TRIPS Agreement*, *supra* note 44, at 618; see also Barbara Ringer, *Two Hundred Years of American Copyright Law*, in ABA, 200 YEARS OF ENGLISH AND AMERICAN PATENT, TRADEMARK & COPYRIGHT LAW 117, 118 (1977) (“[W]e know, empirically, that strong copyright systems are characteristic of relatively free societies.”).

<sup>184</sup> See Hamilton, *TRIPS Agreement*, *supra* note 44, at 617.

<sup>185</sup> *Cf. id.* (“Individualism, as captured in the Western intellectual property system, is the *sine qua non* for a society to recognize and honor personal liberty.”).

<sup>186</sup> Mark Groombridge expressed his skepticism:



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Consider copyright for example. Being the “engine of free expression,”<sup>187</sup> copyright “provides an incentive for creative expression on a wide array of political, social, and aesthetic issues, thus bolstering the discursive foundations for democratic culture and civic association.”<sup>188</sup> It also “supports a sector of creative and communicative activity that is relatively free from reliance on state subsidy, elite patronage, and cultural hierarchy.”<sup>189</sup> Because of the intertwined relationship between intellectual property and individual rights, one can hardly promote intellectual property law reforms without strengthening individual rights in the country.<sup>190</sup>

Nevertheless, it is ill-advised to mix up the two issues on the trade negotiation table. During his 1992 Presidential election campaign, then-Governor Bill Clinton accused President George Bush of “coddling dictators.”<sup>191</sup> He vowed to condition the MFN benefits upon improvement in human rights conditions in China.<sup>192</sup> By 1994, he had accepted defeat and

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In light of th[e] pervasive statism, one should not interpret efforts by the PRC leadership to protect IPR as evidence of a new-found elevation of the individual or of individuals’ rights. Rather, just as the entire economic reform effort is for the leadership a means to increase its power, recent developments in IPR protection reflect an effort in nation-building. Public statements about building a “knowledgeable economy” almost always reflect those statist goals. In the words of a recent joint statement by the governor of Guangdong Province and the mayors of Beijing and Shanghai, “Only when it values and promotes a knowledge economy can China put itself in an invincible position in the next century.”

Groombridge, *supra* note 58, at 12.

<sup>187</sup> Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

<sup>188</sup> Neil Weinstock Netanel, *Copyright and a Democratic Society*, 106 YALE L.J. 283, 288 (1996) [hereinafter Netanel, *Copyright and a Democratic Society*]; see also ROBERT BURNETT, THE GLOBAL JUKEBOX: THE INTERNATIONAL MUSIC INDUSTRY 115-16 (1996) (noting that large cultural industries using an open system of production and development may show significant expressive diversity despite ownership concentration); PAUL GOLDSTEIN, COPYRIGHT’S HIGHWAY: THE LAW AND LORE OF COPYRIGHT FROM GUTENBERG TO THE CELESTIAL JUKEBOX 236 (1994) (arguing that copyright would promote “political as well as cultural diversity”); LYMAN RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS’ RIGHTS 133 (1991) (explaining how copyright encourages the flow of ideas in a democratic society); Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L.J. 215 (1996) (arguing for a democratic approach to copyright law in Cyberspace); Leval, *supra* note 73, at 1135 (“Although copyright often results in suppression of speech, its underlying objectives parallel those of the first amendment.”); Netanel, *Asserting Copyright’s Democratic Principles*, *supra* note 161, at 271 (“[C]opyright law may make possible a relatively ‘open’ system of cultural production, characterized by a significant level of innovation and diversity even under oligopolistic conditions.”); *id.* at 277 (“[R]equiring authoritarian and developing countries to implement proprietary copyright regimes modeled on those of the West will, as a matter of course, engender global democracy.”). But see BEN H. BAGDIKIAN, THE MEDIA MONOPOLY (6th ed. 2000) (examining the chilling effects of corporate media ownership); RONALD V. BETTIG, COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY (1996) (examining the power of the wealthy few to expand their fortunes through the ownership and manipulation of intellectual property).

<sup>189</sup> Netanel, *Copyright and a Democratic Society*, *supra* note 188, at 288; see Hamilton, *TRIPS Agreement*, *supra* note 44, at 617-18 (arguing that the TRIPS Agreement has the potential to forge greater democratization in transitional societies); Netanel, *Asserting Copyright’s Democratic Principles*, *supra* note 161, at 267-72 (discussing the importance of an independent sector of authors and publishers to democratic development); *id.* at 273 (“[Copyright] may undermine notions of uncritical obedience to political and cultural authority. In so doing, it may help to spark democratic transition.”). As Professor Netanel explained:

Such a sector may be vital to democratic development in four interrelated ways. First, the sector’s financial independence from state patronage enhances its ability to act as a watchdog of the state, to expose corruption and authoritarian retrenchment and to level criticism of government officials and their policies. Second, financial independence enables authors and publishers to produce a greater variety of expression, free from official notions of proper literature and art. Third, the presence of an indigenous sector of political and cultural expression creates greater possibilities for addressing local issues and developing a local democratic culture. As we have seen, expression that is imported from abroad may help to undermine authoritarian control. Yet, a sphere of public discourse consisting entirely of imported expression would be unlikely to support local political and civic organization and, particularly in more advanced stages of democratic development, would only intermittently and haphazardly confront local officials and state policy. Fourth, and partly overlapping with the third factor, relatively autonomous, indigenous authors and publishers contribute to, and make up a significant part of, an independent civil society, a realm of discourse and association that is widely seen as a vital component of democratic culture and development.

*Id.* at 268 (footnote omitted).

<sup>190</sup> See Hamilton, *TRIPS Agreement*, *supra* note 44, at 614 (“To understand TRIPS, it is important to embrace an interdisciplinary approach, to widen the copyright lens to include culture, politics, and human rights.”).

<sup>191</sup> MANN, *supra* note 11, at 274.

<sup>192</sup> See *id.* at 274-91.

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completely reversed his trade policy by delinking human rights from such a policy.<sup>193</sup> The whole incident not only demonstrates China's reluctance to accept human rights, or its internal affairs, as a bargaining chip on the trade negotiation table, but also shows the lack of long-term support from the American business community over abstract issues like human rights.<sup>194</sup>

### *Step Eight: Educate the Chinese Officials About Intellectual Property Rights*

“For a national intellectual property system to work, there must first be a judicial system that works, a precondition that is often missing.”<sup>195</sup> Thus, an intellectual property regime would not be fully operational until the government officials understand what to enforce, when to enforce, and why they need to enforce. At present, many Chinese officials, especially those at the local level, do not understand the necessity and urgency of protecting individual intellectual property interests.<sup>196</sup> To many of them, intellectual property laws were, more or less, unjustly forced upon China by the United States, rather than legitimately introduced by their leaders. Once international attention is diverted and the pressure from their leaders dissipates, these officers will likely loosen their enforcement of these “unjust” laws.

In addition, most Chinese judges lack experience and expertise in intellectual property cases. The Great Proletariat Cultural Revolution took away some of the most qualified members of the legal profession,<sup>197</sup> resulting in a majority of lawyers who are too young to serve as judges.<sup>198</sup> Furthermore, many Chinese judges are retired military officials who have no formal legal education.<sup>199</sup> In light of China's inquisitorial judicial system, this lack of experience and expertise threatens the effectiveness of the judicial process. Under the inquisitorial system, judges must often gather facts on their own.<sup>200</sup> Judges must also search confusing laws and regulations to determine which law to apply.<sup>201</sup> Thus, a judge who has inadequate training or experience will likely be incompetent to perform these tasks.

Apart from judges, China also suffers from a shortage of lawyers, in particular intellectual property lawyers.<sup>202</sup> Because of this shortage, businesses and individuals cannot

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<sup>193</sup> See *id.* at 292-314.

<sup>194</sup> See *id.* at 282, 302-03 (noting that the Clinton Administration failed to enlist long-term support from the American business community for the Administration's human rights policy toward China).

<sup>195</sup> Sherwood, *Why a Uniform Intellectual Property Makes Sense*, *supra* note 109, at 85.

<sup>196</sup> Patrick H. Hu, “Mickey Mouse” in *China: Legal and Cultural Implications in Protecting U.S. Copyrights*, 14 B.U. INT'L L.J. 81, 105 (1996); see also Tiefenbrun, *supra* note 10, at 37 (“The failure to reduce or eradicate piracy of intellectual property in China is also due to the serious misconceptions of the very notion of ownership by the Chinese people and by their government leaders.”).

<sup>197</sup> See William P. Alford, *Tasselled Loafers for Barefoot Lawyers: Transformation and Tension in the World of Chinese Legal Workers* [hereinafter Alford, *Tasselled Loafers for Barefoot Lawyers*], in CHINA'S LEGAL REFORMS, *supra* note 141, at 22, 27-28; Kolton, *supra* note 105, at 425 (emphasizing the devastating effect of the Cultural Revolution on the legal profession); see also ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 30-33 (1998) (discussing the impact of the Cultural Revolution on the Chinese legal system). See generally JUNG CHANG, WILD SWANS: THREE DAUGHTERS OF CHINA 273-443 (1991) for an insightful personal account of the Great Proletariat Cultural Revolution.

<sup>198</sup> Kolton, *supra* note 105, at 450.

<sup>199</sup> *Id.*; see CHEN, *supra* note 197, at 37 n.84 (“Since 1957, judges were usually recruited from demobilised military personnel and the public security organs, and not from law schools.”).

<sup>200</sup> Kolton, *supra* note 105, at 450 (footnote omitted).

<sup>201</sup> See *id.* (“Chinese law is a confusing array of laws and regulations; there may be no law on point or the laws that do exist may contradict one another.”).

<sup>202</sup> See Jianyang Yu, *Protection of Intellectual Property in the P.R.C.: Progress, Problems, and Proposals*, 13 UCLA PAC. BASIN L.J. 140, 161 (1994) [hereinafter Yu, *Progress, Problems, and Proposals*] (“The P.R.C. has a shortage of lawyers, and intellectual property lawyers are considered to be one of the specialty lawyers in great demand.”); see also CHEN, *supra* note 197, at 37; Alford, *Tasselled Loafers for Barefoot Lawyers*, *supra* note 197, at 30; Berkman, *supra* note 49, at 29. This shortage may be alleviated once China lifts the geographic ban on overseas lawyers and opens up the legal profession to foreign law firms. “So far, branches of overseas law firms have been set up in only eight cities including Beijing and Shanghai among all the 15 Chinese cities which have government

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obtain advice and services from competent lawyers to protect and enforce their intellectual property rights in lawsuits and administrative proceedings.<sup>203</sup> Thus, the shortage of lawyers poses a significant barrier to a well-enforced intellectual property regime. This lack of enforcement greatly reduces the deterrent effect and economic incentives generated by the intellectual property regime.

In the early 1990s, the Chinese government began to enact new laws to promote professionalism in judges,<sup>204</sup> lawyers,<sup>205</sup> procurators,<sup>206</sup> and law enforcement officers.<sup>207</sup> The Chinese government also sought to promote the rule of law by ensuring judicial independence “in accordance with the law.”<sup>208</sup> Even though developments were impressive and encouraging,

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permission to hold overseas law firms.” *China: Geographic Restrictions on Lawyers to Be Lifted After WTO*, CHINA BUS. INFO. NETWORK, May 4, 1999, available at 1999 WL 17728683.

<sup>203</sup> See Yu, *Progress, Problems, and Proposals*, *supra* note 202, at 161.

<sup>204</sup> See RONALD C. BROWN, UNDERSTANDING CHINESE COURT AND LEGAL PROCESS: LAW WITH CHINESE CHARACTERISTICS 101-07 (1997) (discussing the attempt to professionalize judges through the Judges Law). The Judges Law aims “to ensure that the People’s Courts independently exercise judicial authority according to law and that judges perform their functions and duties according to law, to enhance the quality of judges, and to realize the scientific administration of judges.” JUDGES LAW OF THE PEOPLE’S REPUBLIC OF CHINA art. 1 (1995) [hereinafter JUDGES LAW], translated in BROWN, *supra*, at 292, 294.

<sup>205</sup> Professor Brown explained how the Law on Lawyers help professionalize lawyers:

The Lawyer’s Law . . . seeks to further professionalize the lawyers in China by recognizing their increased autonomy by refining their role from “state worker” to that of a certified provider of legal services, and, also by establishing qualifications and standards of conduct, and creating a disciplinary commission within the All-China Lawyers’ Association (ACLA) acting to enforce those standards. A lawyer’s professional is supervised by the . . . ACLA . . . and lawyers can be sanctioned by the ACLA or can have their licenses suspended or revoked by the Ministry of Justice’s Judicial Administration Department; lawyers are further regulated by permitting compensation for malpractice where a lawyer’s error causes loss to clients; and the law from being used or slandering of competitors. The law also sets forth regulations on the operation of law firms, the management of attorneys by their own association, and provisions for state-assisted legal services for qualifying individuals.

BROWN, *supra* note 204, at 116 (footnotes omitted); see also *id.* at 115-17 (discussing the attempt to professionalize lawyers through the Law on Lawyers and through licensing). Article 1 of the Law on Lawyers states the law’s objectives:

This Law is enacted in order to improve the system governing lawyers, to ensure that lawyers practise according to law, to standardize acts of lawyers, to safeguard the lawful rights and interests of parties, to ensure the correct implementation of law, and to enable lawyers to play a positive role in the development of the socialist legal system.

LAW OF THE PEOPLE’S REPUBLIC OF CHINA ON LAWYERS art. 1 (1996), translated in BROWN, *supra* note 204, at 335, 335.

Professor Brown described the development of lawyers since the reopening of China:

There were very few lawyers in China until the 1979 modernization. In 1980 provisional regulations were issued and in 1986, national exams were introduced. The number of Chinese lawyers has now grown to about 89,000, with a goal of having 150,000 lawyers by the year 2000. Presently there are about 7,000 law firms, with non-government firms numbering about 1,611; however, this number is expected to expand rapidly under this new law and the country’s economic reforms.

BROWN, *supra* note 204, at 115-16 (footnote omitted); see Alford, *Tasselled Loafers for Barefoot Lawyers*, *supra* note 197 (examining the transformation of Chinese lawyers and the implications of such transformation for further development of the Chinese legal profession and the larger academic debate on law reform and legal profession); *China: Law Profession Attracts More Chinese Applicants*, CHINA BUS. INFO. NETWORK, Mar. 11, 1998, available at 1998 WL 22707411 (estimating that there will be 250,000 to 300,000 lawyers by 2010).

<sup>206</sup> See BROWN, *supra* note 204, at 107-10 (discussing the attempt to professionalize procurators through the Public Procurators Law).

The Public Procurators Law aims “to ensure that the People’s Procuratorates exercise legal supervision and independently exercise procuratorial authority according to law and that public procurators perform their functions and duties according to law, to enhance the quality of public procurators, and to realize the scientific administration of public procurators.” PUBLIC PROCURATORS LAW OF THE PEOPLE’S REPUBLIC OF CHINA art. 1 (1995), translated in BROWN, *supra* note 204, at 313, 315.

<sup>207</sup> See BROWN, *supra* note 204, at 110-15 (discussing the attempt to professionalize law enforcement officers through the People’s Police Law). Article 1 of the People’s Police Law provides:

The present Law is enacted in accordance with the Constitution for the purpose of safeguarding State security, maintaining public order, protecting the lawful rights and interests of citizens, strengthening the building of the contingent of the people’s police, strictly administering the police, enhancing the quality of the people’s police, ensuring the people’s police’s exercise of their functions and power according to law, and ensuring the smooth progress of reform, opening up and the socialist modernization drive.

PEOPLE’S POLICE LAW OF THE PEOPLE’S REPUBLIC OF CHINA art. 1 (1995), translated in BROWN, *supra* note 204, at 303, 305.

<sup>208</sup> See XIANFA art. 126 (1982) (“The People’s courts exercise judicial power independently, in accordance with the provisions of the law, and are not subject to interference by any administrative organ, public organization or individual.”); CIVIL PROCEDURE LAW OF THE PEOPLE’S REPUBLIC OF CHINA art. 6 (1991) (“The people’s courts shall try civil cases independently in accordance with the law, and shall be subject to no interference by any administrative organ, public organization, or individual.”), translated in BROWN, *supra* note

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courts are still marred by the limited independence of the judicial branch,<sup>209</sup> the intertwining relationship between the court and the Chinese Communist Party,<sup>210</sup> the court's vulnerability to outside influence,<sup>211</sup> the judges' susceptibility to bribery and corruption,<sup>212</sup> underfunding,<sup>213</sup>

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204, at 174, 177; JUDGES LAW, *supra* note 204, art. 1 (ensuring the People's courts independently exercise their judicial authority in accordance with the law), *translated in* BROWN, *supra* note 204, at 294; JUDGES LAW, *supra* note 204, art. 43 (providing that judges can file charges against those who interfere and stipulating that those who interfere will be investigated), *translated in* BROWN, *supra* note 204, at 301; ORGANIC LAW OF PEOPLE'S COURTS art. 4 (1983) ("The People's courts shall exercise judicial power independently, in accordance with the provisions of the law, and shall not be subject to interference by any administrative organ, public organization or individual."), *translated in* BROWN, *supra* note 204, at 150, 151.

Professor Brown explained the meaning of "in accordance with the law" and the differences between unfettered judicial independence and judicial independence "in accordance with the law":

The meaning of the term "in accordance with the law" must be understood in historical and political context. Since "Liberation," there had been a practice of courts operating as an arm of the state and under the "guidance of the Party (and the military at various times) to control the illegal activities of citizens. In 1957, at the time of the Anti-Rightist Movement, advocates of judicial independence were purged as persons who were undermining party control. Over the next decade, Party control over adjudication of cases was institutionalized and in some cases the three judicial institutions (courts, procuracy, and public security) were integrated or at least their activities were coordinated under the Political-Legal Committee of the party. During most of the years of the Cultural Revolution (1966-1976), law and the courts were not present in any recognizably "legitimate" form. That period was brought to an end by the arrest of the "Gang of Four" in 1976 and the installation of new leadership under Deng Xiaoping in 1978 and the Gang of Four's trial in 1980-1981. Thus, in the period of 1949-1979 it was clear that the court system had a large political element and, was under "close guidance" and direction of the Party.

In 1979, the Central Committee of the Party issued a directive that hereinafter the Party would not directly intervene in day-to-day operations of the court or in individual cases, but rather would monitor judicial work and exercise leadership only under general policy guidance. This indirect influence would come through policy directives, nomination (and in effect, selection) of appropriate persons for judicial positions, and general supervision through political-legal committees. Additionally, in practice, during that period the Party may still have provided some guidance on some "important or difficult" cases, either through its own initiative, upon request, or through documents.

In sum, recent history shows the role of law and the courts in Chinese society (and the role of government and Party in that process) has varied, as would the meaning also of "in accordance with the law." However, since 1979, there has been a generally consistent pattern, in the vast majority of cases, of moving the law and the courts from being an instrument of government control to that of also being an arbiter of civil, economic, and administrative disputes.

In addition to the above political facets defining and influencing "judicial independence," it must be remembered . . . that in China's legislative system of government, the NPC (and through it, the Standing Committee) is the highest government organ, and the Supreme People's Court is subordinate to it on matters of "judicial interpretation." That is the law; and, therefore, "in accordance with the law" incorporates that reality.

BROWN, *supra* note 204, at 127-29 (footnotes omitted). For discussions of the development of the rule of law in China, see, for example, BROWN, *supra* note 204; CHINA'S LEGAL REFORMS, *supra* note 141; DOMESTIC LAW REFORMS IN POST-MAO CHINA (Pitman B. Potter ed., 1994); RONALD C. KEITH, CHINA'S STRUGGLE FOR THE RULE OF LAW (1994); THE LIMITS OF THE RULE OF LAW IN CHINA (Karen G. Turner et al. eds., 2000); MURRAY SCOTT TANNER, THE POLITICS OF LAWMAKING IN POST-MAO CHINA: INSTITUTIONS, PROCESSES AND DEMOCRATIC PROSPECTS (1999); STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO (1999); Stanley B. Lubman, *Studying Contemporary Chinese Law: Limits, Possibilities, and Strategy*, 39 AM. J. COMP. L. 293 (1991).

<sup>209</sup> See XIANFA art. 128 (1982) ("The Supreme People's Court is responsible to the National People's Congress and its Standing Committee. Local People's courts at various levels are responsible to the organs of state power which created them."); BROWN, *supra* note 204, at 35 (arguing that the constitutional basis of the judicial system in China is not separation of powers, but a "division of functions and responsibilities" under the guidance of state power organs and the Chinese Communist Party); *see also id.* at 125 ("Because of the dual obligations to state and client, concerns were noted regarding loyalty, confidentiality, and legal constraints on professional ethics and conduct."); CORNE, *supra* note 109, at 141 ("Administrative interpretation is not only the most important mode of legal interpretation in the PRC, it is in effect an authoritative supplement and accretion to legislation.").

<sup>210</sup> Professor Brown explained this intertwined relationship:

[T]he governmental congresses and standing committees are comprised of members primarily selected by Party members through a separate Party congress mechanism. Party committees, such as the Political-Legal Committee, "supervise" the public security (police), procuratorates, and the courts. Sometimes, the heads of these organs are appointed to the Political-Legal Committee. Thus, the supervisory responsibility can become complex with, for example, the head of the police sitting on the Political-Legal Committee supervising the procuratorate which is responsible to supervise the police. Though this general enigma may be made more transparent, how it actually plays out in practice will vary by locale, depending on "who is wearing what official hat or hats."

BROWN, *supra* note 204, at 8; *see also* JUDGES LAW, *supra* note 204, art. 9(4) (stating that a judge must have fine political quality), *translated in* BROWN, *supra* note 204, at 295.

<sup>211</sup> See BROWN, *supra* note 204, at 129-30 ("In a country that appreciates loyalty and *guanxi* (connections), pressure on judges to be responsive to political influences is inherent in the process."); CORNE, *supra* note 109, at 253 (indicating that the trial judge is susceptible to outside pressure and that the judge's decisions can be overridden by an adjudication committee with the local people's court); Berkman, *supra* note 49, at 24 ("Courts depend on local governments for resources, and all personnel, even judges, are beholden to local politicians for their jobs."). As one commentator explained:

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abuse of government officials, and local protectionism.<sup>214</sup> In addition, these legal developments failed to keep up with China's current economical explosion.<sup>215</sup> Due to the need for specialized knowledge, the increasing importance of information products, the globalization trend, and the proliferation of the Internet and new communications technologies, the supply of intellectual property lawyers is significantly below the demand for legal services.

To help China cope with this shortage, the United States needs to provide assistance programs that help China train its legal workers.<sup>216</sup> Examples of these programs include regular training programs that provide the basic understanding of intellectual property rights and general expertise in the drafting, implementation, and enforcement of intellectual property laws; advanced seminars that help people keep pace with the new legal and technological developments in the country and abroad; and regional, national, and international conferences where policymakers, the mass media, government officials, judges, and lawyers share information regarding their experiences and difficulties in enforcing intellectual property rights in their region. To minimize logistical difficulties, these events can be organized with distance learning and new media technologies. For example, a bilingual technical assistance website that targets local judges and officials would provide the needed basic understanding of intellectual property rights. Likewise, digital videoconferencing equipment would allow leading intellectual property scholars in the United States to simultaneously educate people in Beijing, Shanghai, Tianjin, and Guangzhou. Nevertheless, due to the limited Internet access enjoyed by the Chinese people, in particular those in suburban and rural areas, and the very stringent information control

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Chinese judges and court officers do not always enjoy sufficient independence to avoid the intervention of such interested parties as do local officials, senior government officials, and influential local businesses. Local officials derive their power to shape the outcome of a case from the fact that those officials control the expenditures of the courts as well as the housing and employment opportunities of the judges' children. Succumbing to local pressures, judges may unreasonably deny motions for transfer of forum, render judgments highly favorable to local parties and refuse to respect former judgments by other courts.

Cheng, *supra* note 37, at 1992-93. *But see* JUDGES LAW, *supra* note 204, art. 8(3) (stating that judges shall not be removed, demoted, dismissed, or sanctioned "without statutory basis and without going through statutory procedures"), *translated in* BROWN, *supra* note 204, at 295.

<sup>212</sup> See BROWN, *supra* note 204, at 130 (stating that Chinese judges do not receive high compensation and are therefore susceptible to bribery and corruption); Daniel C.K. Chow, *Counterfeiting in the People's Republic of China*, 78 WASH. U. L.Q. 1, 30-31 (2000) ("Some local enforcement officials ask for payments, case fees, or gifts such as mobile phones from trademark owners in exchange for conducting enforcement actions."). In the last few years, China has made a significant effort to combat corruption. See, e.g., *China Issues New Codes on Prosecution of Corruption*, CHINA BUS. INFO. NETWORK, Sept. 17, 1999, available at 1999 WL 17731146; Tom Korski, *China Premier Pledges Drive Against Corruption, Economic and Copyright Crimes*, Pat. Trademark & Copyright L. Daily (BNA), at D2 (Mar. 5, 1997) ("More than 400 senior Communist officials have been imprisoned or executed for corruption in the past six months, by official estimate, while 2,522 state employees have been fired for 'disciplinary reasons.' . . . Chinese prosecutors initiated probes into more than 78,000 corruption cases last year, according to state agencies."); Anthony Kuhn, *China Executes Ex-Official for Corruption*, L.A. TIMES, Sept. 15, 2000, at A1 (reporting on the execution of a former vice chairman of the National People's Congress who was convicted of taking five million dollars in bribes). Unfortunately, like the problem with intellectual property rights, the Chinese government has yet to succeed in this area.

<sup>213</sup> See BROWN, *supra* note 204, at 130; *id.* at 37 (explaining that judicial administration may be hampered by inadequate funding of Chinese courts and that court officials may succumb to political pressure in exchange for funding from outside sources).

<sup>214</sup> See *id.* at 130 (describing the problem of local protectionism); Chow, *supra* note 212, at 26-30 (same); see also CHEN, *supra* note 197, at 217 ("Judges who without fear or favour apply the law to the detriment of local interests may . . . suffer in terms of their career prospects or their employment benefits. Reduction of funding for the local court is also a threat that its members have to live with.").

<sup>215</sup> See Alford, *Tasselled Loafers for Barefoot Lawyers*, *supra* note 197, at 30 (arguing that the number of licensed legal workers "would be inadequate for an economy that was not only one of the largest but also growing by the order of 10 per cent a year and determined to take part in the international marketplace").

<sup>216</sup> WIPO has been particularly active in providing technical assistance and in training government officials, judges, and the general populace in less developed countries. Since its formation, WIPO has "expand[ed] greatly the scope of its teaching regarding the purpose, implementation, and enforcement of intellectual property policy in order to help developing countries meet their TRIPS agreement obligations." RYAN, *supra* note 46, at 125. By 1992, 23,000 people had participated in its training seminars. See *id.* at 130. To promote the use of new communications technologies, WIPO has been very active in applying these new technologies to their programs. The website of the WIPO Worldwide Academy is available at <http://www.wipo.int/academy/en.htm>.

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policy of the Chinese government,<sup>217</sup> these distance learning programs would not be successful unless the Chinese authorities are willing to cooperate with the foreign organizers.

The United States also can improve the professionalism of legal workers in China by encouraging them to create professional associations and to become members of national and transnational epistemic communities.<sup>218</sup> In addition, the United States can encourage and assist the Chinese courts, in particular those in small towns and rural areas, to set up specialized branches to address intellectual property rights<sup>219</sup> and to publish their decisions (in both English and Chinese) to guide the general public and foreign businesses.<sup>220</sup> Since 1993, intellectual property trial divisions have been set up in the High People's Courts of the cities of Beijing, Shanghai, and Tianjin, and of the Guangdong, Fujian, Jiangsu, and Hainan Provinces.<sup>221</sup> China also confers the exclusive appellate jurisdiction for the entire country upon the intellectual property appellate division in the Beijing Municipal Higher People's Court.<sup>222</sup> Reminiscent of the United States Court of Appeals for the Federal Circuit, this centralizing arrangement not only provides greater judicial expertise in determining intellectual property rights, but also more uniform decisions regarding infringement and remedies.<sup>223</sup> In light of the Chinese civil law tradition, in which prior cases do not have the force of precedent,<sup>224</sup> uniform decisions are particularly important.

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<sup>217</sup> See Peter K. Yu, *Barriers to Foreign Investment in the Chinese Internet Industry*, GIGALAW.COM, Mar. 2001, at <http://www.gigalaw.com/articles/2001/2001-03.html> (discussing content regulations in the Chinese Internet industry); Sheila Tefft, *China Attempts to Have Its Net and Censor It Too*, CHRIST. SCI. MONITOR, Aug. 5, 1996, at 1 (stating that China seeks to enjoy the benefits of the Internet without surrendering its fiercely held control of information).

<sup>218</sup> See RYAN, *supra* note 46, at 15.

<sup>219</sup> See Yu, *Progress, Problems, and Proposals*, *supra* note 202, at 161; see also Lagerqvist & Riley, *supra* note 100, at 32 (stating that judges in the intellectual property courts are specially trained to hear intellectual property cases, are of particularly high standard, and have scientific qualifications and foreign language skills).

<sup>220</sup> See CHENGSI ZHENG, *INTELLECTUAL PROPERTY ENFORCEMENT IN CHINA: LEADING CASES AND COMMENTARY* xxvi (1997), for a collection of and commentary on important early intellectual property cases in China.

<sup>221</sup> Zhang, *Intellectual Property Law in China*, *supra* note 182, at 15.

<sup>222</sup> See Butterson, *supra* note 10, at 1101.

<sup>223</sup> Commentators argued that the centralizing arrangement made the law less arbitrary by limiting the discretion of judges:

[M]any laws and regulations are broadly drafted to encompass general principles and often do not include mechanisms necessary for consistent interpretation of such principles. Therefore, courts in China often find themselves armed with some discretion in applying broad principles to individual cases. The adjudication of such cases in turn may influence other court decisions, but Chinese legal decisions are not usually reported publicly and are therefore unavailable for guidance.

DONG ET AL., *supra* note 145, at 5.

<sup>224</sup> Professor Brown disagreed:

The fact seems to be that Chinese court decisions have elements of both common-law and civil law. When the author raised that point with President Ren Jianxin and asked which he thought dominated, President Ren's answer in reflection was—"Neither, it is Chinese law with Chinese characteristics." And so it is; but nevertheless those "Chinese characteristics" seem to carry with them decisions which have *de facto* binding and precedential effect.

Lower court judges are keen to follow what the Supreme People's Court has indicated is the "absolutely correct" way to interpret the law. Higher courts have the obvious avenue of enforcing that result through the systems of appeal and adjudication supervision. Also, in cases using the adjudication committee, the collegial panel must implement the decision of the committee. Whether "administrative in nature" and/or "precedential-in-function," the evidence supports the court "decisions" are used as authority and as "precedent." "Precedent is defined as a "rule of law established for the first time by a court for a particular type of case and thereafter referred to in deciding similar cases." Interestingly, the Supreme People's Court has provided: "[A]ll opinions and instructions given by the Supreme People's Court on the application of laws shall be followed, but it is not appropriate, however, to cite them directly.

BROWN, *supra* note 204, at 82 (footnotes omitted); see also NANPING LIU, *OPINIONS OF THE SUPREME PEOPLE'S COURT: JUDICIAL INTERPRETATION IN CHINA* (1997) (examining the opinions of the Supreme People's Court and the role they played within the Chinese legal system); Nanping Liu, "Legal Precedents" with Chinese Characteristics: *Published Cases in the Gazette of the Supreme People's Court*, 5 J. CHINESE L. 107 (1991) (arguing that the decisions reported in the Gazette of the Supreme People's Court may carry force as precedents).

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### *Step Nine: Educate the Chinese Populace About Intellectual Property Rights*

Laws alone are insufficient, no matter how well they are enforced. These laws must be accompanied by a legal culture that fosters voluntary compliance. Instead of constantly coercing China to redraft its laws and introduce new legal institutions, the United States should promote underlying values that support voluntary compliance.<sup>225</sup> These values include legitimacy and morality.<sup>226</sup> To provide legitimacy, the United States must abandon its coercive policy, which drastically undercuts the legitimacy of intellectual property rights.<sup>227</sup> Such a policy makes the Chinese people suspicious of the willingness of their government to adhere to and enforce the new legal regime forced upon their country.<sup>228</sup> To provide morality, the United States can educate the Chinese populace about the rationales behind intellectual property protection and the wrongful nature of appropriating other's intellectual property.<sup>229</sup> As Professor Litman pointed out insightfully:

People do seem to buy into copyright norms, but they don't translate those norms into the rules that the copyright statute does; they find it very hard to believe that there's really a law out there that says the stuff the copyright law says. . . . People don't obey laws that they don't believe in. It isn't necessarily that they behave lawlessly, or that they'll steal whatever they can if they think they can get away with it. Most people try to comply, at least substantially, with what they believe the law to say. If they don't believe the law says what it in fact says, though, they won't obey it—not because they are protesting its provisions, but because it doesn't stick in their heads.<sup>230</sup>

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<sup>225</sup> Tom R. Tyler, *Compliance with Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT'L L. & POL. 219, 234 (1997); see CORNE, *supra* note 109, at 8 (“Law’s effectiveness depends on shared social values. Law is apparently an autonomous agency which depends on and mirrors particular social and cultural conditions.”); see also SELL, *supra* note 120, at 177 (“If targeted countries do not accept the value orientation preferred by the powerful state, and no politically influential domestic constituency favors the new policies, one can expect nonimplementation and robust domestic resistance.”); *id.* at 212 (“The fact that developing countries have not vigorously enforced these new policies suggests that domestic opposition is still robust.”); Geller, *supra* note 91, at 203 (arguing that a full-scale copyright law that is bolstered by widespread supporting values might be more effective than police measures).

<sup>226</sup> See Tyler, *supra* note 225, at 224 (“Morality is concerned with an individual’s personal feelings about what is right or wrong. Legitimacy involves one’s feelings that one ought to obey the law.”).

<sup>227</sup> Cf. CHAYES & CHAYES, *supra* note 24, at 127 (“Legitimacy . . . depends on the extent to which the [policy] (1) emanates from a fair and accepted procedure, (2) is applied equally and without invidious discrimination, and (3) does not offend minimum substantive standards of fairness and equity.”); *id.* (arguing that the conception of legitimacy “carries more than faint echoes of the core U.S. constitutional principles of due process and equal protection of the laws”).

<sup>228</sup> See Tyler, *supra* note 225, at 224.

<sup>229</sup> See *id.* at 226 (“[One crucial problem regarding the piracy problem] is the lack of a public feeling that breaking intellectual property laws is wrong. In the absence of such a conception, there is little reason for people to follow intellectual property laws.”); Introduction to PROTECTING INTELLECTUAL PROPERTY RIGHTS IN CHINA, *supra* note 100, at 1, 4-5 (“The Chinese obey laws and observe rights if they are persuaded that it will be in their best interest to do so, just as people everywhere do.”); Steven Mufson, *In Fight for Intellectual Rights in China, Pirates Still Winning*, WASH. POST, Feb. 18, 1996, at A29 (“China has a good structure as far as legislation goes . . . . The main problem is education. People don’t think of intellectual property as property like other property.” (quoting Bian Zizhen, a patent consultant with New China Consultants)). For efforts to educate the Chinese populace, see, for example, China: Sino-US Cooperation to Promote Use of Original Software, CHINA BUS. INFO. NETWORK, July 10, 1998, available at 1998 WL 13493308 (reporting on the joint effort by the Chinese Software Alliance and the Business Software Alliance to promote the use of original software in China); China: Hong Kong Strengthen IPR Protection Through Education China: Sino-US Cooperation to Promote Use of Original Software, CHINA BUS. INFO. NETWORK, May 5, 1998, available at 1998 WL 7561690 (reporting on efforts by the Intellectual Property Department of the Hong Kong Special Administrative Region to educate school children on intellectual property rights). See also Mark Evans, *Copyright Violators at Odds with GATT*, S. CHINA MORNING POST, Feb. 25, 1994, at 22, available at LEXIS, News Library, ALLNWS File (“Beijing has tried to promote its efforts through an aggressive propaganda campaign and media reports.”).

<sup>230</sup> Jessica Litman, *Copyright Noncompliance (Or Why We Can’t “Just Say Yes” to Licensing)*, 29 N.Y.U. J. INT’L L. & POL. 237, 238-39 (1997); see Hamilton, *TRIPS Agreement*, *supra* note 44, at 616 (“Intellectual property is nothing more than a socially-recognized, but imaginary, set of fences and gates. People must believe in it for it to be effective.”); see also Jessica Litman, *Copyright as Myth*, 53 U. PITT. L. REV. 235 (1991) (examining the difference between the prevailing public myth of copyright and existing copyright statute and case law); see also Faison, *supra* note 9, at D1 (“We take copyright violations very seriously, but when it comes to copying a disk,

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To help promote a sustainable intellectual property regime, the United States needs to make the Chinese aware of the benefits of intellectual property rights and the damages inadequate intellectual property protection can inflict upon the growing Chinese economy.<sup>231</sup> The United States also needs to alert the Chinese to the harmful effects of using counterfeit products and make them aware that any long-term costs of copyright piracy would ultimately outweigh the short-term benefits.<sup>232</sup>

Interestingly, “[f]or all its much ballyhooed expressions of concern, neither the U.S. government nor many of the companies driving [the American foreign intellectual property] policy . . . have made any substantial attempt . . . to communicate to the Chinese why better intellectual property protection would be in their interest.”<sup>233</sup> This lack of efforts may be attributable to two reasons. First, the American political system tends to reward short-term results, rather than long-term results. Thus, policymakers are reluctant to focus on long-term policies such as providing education at the grassroots level.<sup>234</sup> Second, education is a public good. Most companies tend to free ride on each other’s efforts without incurring any substantial investment. Indeed, this market failure provides one of the major economic justifications for intellectual property.<sup>235</sup>

Finally, to reduce the skepticism of the Chinese people toward Western intellectual property rights, the United States can point out the compatibility between the Chinese culture and Western intellectual property notions.<sup>236</sup> Consider, for example, the Confucian tradition of

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most Chinese people don’t see what’s wrong.” (quoting Xu Guoji, senior official in Shanghai’s Industrial and Commercial Administration)).

<sup>231</sup> See Hu, *supra* note 196, at 106 (“[E]ffective enforcement of copyrights in China requires not only enhanced efforts to combat illegal piracy but also increase public awareness of the damage that inadequate copyright protection does to the Chinese economy.”).

<sup>232</sup> See Long, *China’s IP Reforms*, *supra* note 180.

<sup>233</sup> Alford, *Making the World Safe for What?*, *supra* note 49, at 142; Chow, *supra* note 212, at 46 (noting that “brand owners are reluctant to commit the amount of resources necessary to achieve these goals or to risk seriously offending the Chinese government”); see also Hu, *supra* note 196, at 111 (“Active involvement by U.S. companies and lawyers, for example through special seminars, exchange programs, mock proceedings, and other assistance to the Chinese media, will expedite the training process.”). One commentator argued that “U.S. Companies must take a proactive stance and not be content to rely on government for help.” Griffin, *supra* note 171, at 190. As he explained:

Bilateral agreements can create resentment between Chinese citizens and policy makers. However, U.S. companies can promote their interests within China without the appearance of imperialism by joining together with international organizations. The Chinese government may be pressured more effectively by multinational, industry-based organizations than by individual companies. Currently the Motion Picture Association of America (MPAA) and the Recording Industry Association of America have successfully joined with foreign counterparts to lobby for anti-piracy programs in individual countries. Other members of the intellectual property community should follow their lead. International organizations should act as a unified group in China to educate consumers, retailers, and governments; monitor perpetrators; provide arbitration centers; initiate legislation; and pressure local governments. Unified activism can be effective where governmental pressure is not.

*Id.* (footnotes omitted).

<sup>234</sup> See also JOHN M. KEYNES, *MONETARY REFORM* 88 (1924) (“In the long run, we are all dead.”).

<sup>235</sup> Professor Sterk illustrated the public goods problem and the danger of free riding:

If the author of a creative work cannot prevent copying, any potential copyist has an incentive to reproduce the creative work so long as the market price for the work is greater than the marginal cost of reproduction. As a result, the market price for copies of the work would approach the marginal cost of reproduction. If copies were indistinguishable in quality from the original, the market price for the original, too, would approach the marginal cost of reproduction. At that price, however, the author would realize no financial return on his investment in creating the work. In this world, only authors unconcerned with financial return would produce creative works.

Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1204 (1996) (footnotes omitted); see also Landes & Posner, *supra* note 74, at 326 (discussing the economic rationale justifying copyright protection). See generally Earl R. Brubaker, *Free Ride, Free Revelation, or Golden Rule?*, 18 J.L. & ECON. 147 (1975), for an excellent discussion of the free riding problem.

<sup>236</sup> Compare XIANFA art. 20 (1982) (amended Mar. 29, 1993) (“The state promotes the development of natural and social sciences, disseminates knowledge of science and technology, and commends and rewards achievements in scientific research as well as technological innovations and inventions.”), and *id.* art. 47 (“The state encourages and assists creative endeavors conducive to the interests of the people that are made by citizens engaged in education, science, technology, literature, art and other cultural work.”), with



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interaction with the past. Under this tradition, copying is an important living process through which people acquire understanding to guide their behavior, to improve themselves through self-cultivation, and to transmit such knowledge to the posterity.<sup>237</sup> Even though the Chinese civilization emphasizes this tradition, Chinese poets and literary theorists have disagreed as to the extent of the reproduction.<sup>238</sup> Indeed, “as Confucius demonstrated in undertaking to edit the Classics and to comment on them in the *Analects*, transmission . . . entailed selection and adaptation if it was to be meaningful to oneself, one’s contemporaries, and one’s successors.”<sup>239</sup> Thus, traditional Chinese culture does not call for *verbatim* reproduction. Rather, it calls for transformative use of preexisting works that is tailored to the user’s needs and conditions. Such use, and the ability to do so, will demonstrate the user’s comprehension of and devotion to the core of the Chinese civilization and his or her ability to distinguish the present from the past through original thoughts.<sup>240</sup>

This emphasis of transformative use is similar to what the United States Supreme Court pronounced in *Campbell v. Acuff-Rose Music, Inc.*<sup>241</sup> In *Campbell*, a music publisher brought a copyright infringement action against the rap band, 2 Live Crew, for its salacious rap parody of the song “Oh, Pretty Woman.” Emphasizing that transformative works are important to promote the constitutional goal of copyright, the Court held that the rap band’s rendition of the song constituted fair use and did not infringe upon the publisher’s copyright.<sup>242</sup>

### *Step Ten: Be Patient with China During the Transitional Period*

The effort to foster serious, widespread, and long-term adherence to a new regime “entails significant transformations in a people’s attitudes toward intellectual creation, toward property, toward rights, toward the vindication of such rights through formal legal action, toward government and so forth.”<sup>243</sup> The new intellectual property laws were not enacted in China until the mid-1980s. Even if one ignores the inertia of the longstanding copying culture, the public’s general understanding of intellectual property is still vague and weak.<sup>244</sup> It took the United States more than two centuries, five copyright acts,<sup>245</sup> five patent statutes,<sup>246</sup> and numerous trademark and unfair competition laws to get to where it is, not to mention the English and

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U.S. CONST. art. I, § 8, cl. 8 (“The Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

<sup>237</sup> See ALFORD, *supra* note 10, at 28 (“[I]nteraction with the past is one of the distinctive modes of intellectual and imaginative endeavor in traditional Chinese culture.” (internal quotations omitted) (quoting ARTISTS AND TRADITIONS: USES OF THE PAST IN CHINESE CULTURE xi (Christian Murck ed., 1976))). The Chinese believe that “[t]he essence of human understanding had long since been discerned by those who had gone before and, in particular, by the sage rulers collectively referred to as the Ancients who lived in a distant, idealized ‘golden age.’” ALFORD, *supra* note 10, at 25. Subsequent generations thus have to interact thoroughly with the past in order to acquire this understanding to guide their behavior and to transmit such knowledge to the posterity.

<sup>238</sup> See ALFORD, *supra* note 10, at 26-29 (“[O]ver time, Chinese poets and literary theorists have expressed a myriad of views as to the very question of what constituted appropriate interaction with the past.” *Id.* at 26).

<sup>239</sup> *Id.* at 25.

<sup>240</sup> *Cf. id.* at 29.

<sup>241</sup> 510 U.S. 569 (1994).

<sup>242</sup> See *id.* at 579 (“[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright . . . .” (citation and footnote omitted)).

<sup>243</sup> Alford, *How Theory Does—and Does Not—Matter*, *supra* note 57, at 21; see also SHERWOOD, *supra* note 130, at 193-96 (discussing the difficulty of shifting the mindset of the people in less developed countries with respect to intellectual property rights).

<sup>244</sup> Hu, *supra* note 196, at 110.

<sup>245</sup> Since its adoption in 1790, the Copyright Act has undergone major revisions in 1831, 1870, 1909, and 1976.

<sup>246</sup> In 1790, Congress enacted the first patent statute. Subsequently, the statute has undergone major revisions in 1793, 1836, 1870, and 1952.

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French works American authors had “borrowed” when the United States was still a less developed country.<sup>247</sup> Even in this information age, where changes occur at an astonishing pace, it is unreasonable for the United States to expect drastic and immediate changes in Chinese attitudes toward intellectual property rights or the sudden emergence of those institutions needed to support and nurture those attitudes.<sup>248</sup> Thus, the United States needs to be patient with China’s development efforts while China is undergoing transition to a new intellectual property regime.

During this critical transitional period, the United States can help China make its transition by sacrificing some of its short-term profits and economic advantage. For example, American manufacturers and publishers can price their products lower in Chinese markets than other Western developed countries.<sup>249</sup> Such bargain pricing is particularly important for educational products, where access to these products is crucial to the country’s development and for raising the living standards of its people. Considering that the Chinese can afford lower-priced products, bargain pricing also would be economically sound as long as these bargain products do not enter the United States as gray market goods. In fact, American businesses can lower their business costs by manufacturing their products in China, thus taking advantage of the lower labor, production, and distribution costs.<sup>250</sup>

Moreover, counterfeiters are business people who are motivated by profits and who monitor the market for business opportunities.<sup>251</sup> In mathematical terms, “the total cost of the crime includes the cost of producing and distributing the fakes and the cost of paying penalties, weighed against the embarrassment of being caught, the probability of being convicted, and the severity or inconvenience of any non-monetary penalties that are likely to be imposed.”<sup>252</sup> A lower price and thus a lower profit margin would eventually take away the counterfeiters’ incentives to make pirate goods.<sup>253</sup> The smaller price difference between legitimate and illicit

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<sup>247</sup> See BOYLE, *supra* note 4, at 3 (noting that the United States used to be the biggest pirate in the late eighteenth and early nineteenth centuries); Alford, *Making the World Safe for What?*, *supra* note 49, at 146 (stating that the United States has been “notorious for its singular” and “cavalier attitude toward the intellectual property of foreigners” during the time when it was a less developed country); Bender & Sampliner, *supra* note 77, at 255 (stating that the United States failed to observe foreign intellectual property rights during its formative period and did not sign any international intellectual property agreements until the end of the nineteenth century).

<sup>248</sup> Alford, *How Theory Does—and Does Not—Matter*, *supra* note 57, at 21; see Carole Ganz Brown & Francis W. Rushing, *Intellectual Property Rights in 1990s*, in INTERNATIONAL COMPARISONS, *supra* note 155, at 1, 14 (“[I]ncreased protection is not to be expected tomorrow, and the movement will be evolutionary rather than revolutionary. Strategies to advance protection should take long-range approaches, say, a five to ten year time frame.”); Marcus W. Brauchli & Joseph Kahn, *China Moves Against Piracy as U.S. Trade Battle Looms*, ASIAN WALL ST. J., Jan. 6, 1995, at 1 (“[Building a functional intellectual property regime is] like building a house. . . . You can have the house structure all set up, very beautiful. But then, you need electricity and water pipes. That takes more time.” (quoting Li Cahngxu, head of China United Intellectual Property Investigation Center)); see also TRIPS Agreement, *supra* note 4, arts. 65-66, 33 I.L.M. at 1222 (providing a five-year transitional period for developing countries and an 11-year transitional period for the least developed countries).

Interestingly, the colonial British government was more patient than the contemporary American government. In a letter to his minister in Beijing, Lord Stanley, the British Foreign Minister, cautioned:

We must not expect the Chinese, either the Government or the people, at once to see things in the same light as we see them; we must bear in mind that we have obtained our knowledge by experience extending over many years, and we must lead and not force the Chinese to the adoption of a better system. We must reconcile ourselves to waiting for the gradual development of that system, and content ourselves with reserving for revision at a future period. . . .

Letter from Lord Stanley to Rutherford Alcock (Aug. 17, 1867), *quoted in* HSÜ, *supra* note 59, at 297.

<sup>249</sup> See RYAN, *supra* note 46, at 81; see also Donaldson & Weiner, *supra* note 101, at 433 (asserting that one approach to stop piracy is to offer the affected people a legitimate way to earn a living); Don Goves, *Warner Bros., MGM Dips into China Vid Market*, DAILY VARIETY, Feb. 21, 1997, at 1 (stating that Warner Bros. and MGM have entered a licensing deal with a Chinese government-owned conglomerate to release low-priced video products dubbed in Mandarin).

<sup>250</sup> See RYAN, *supra* note 46, at 81.

<sup>251</sup> Lagerqvist & Riley, *supra* note 100, at 17.

<sup>252</sup> *Id.*

<sup>253</sup> Nevertheless, “pricing can be an enemy and an ally.” Cheetham, *supra* note 99, at 395. As one commentator explained:

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products also would discourage the local people from buying counterfeit products, provided the consumers can distinguish between the two.<sup>254</sup> American manufacturers and publishers also can attract consumers by providing them with better products or post-sale benefits that are not available to purchasers of counterfeit goods, such as warranty service, replacement part guarantees, free upgrades, and contests or giveaways.<sup>255</sup> Like people anywhere, the Chinese want to receive value in exchange for their money.<sup>256</sup> Providing these post-sale benefits therefore would help convince the Chinese that legally-manufactured goods are worth the higher price.<sup>257</sup>

### *Step Eleven: Assist China to Reform Its Intellectual Property Laws*

Given the very specialized nature of intellectual property laws, the legal and technical assistance by the United States in drafting, implementing, and enforcing laws will be very helpful. Indeed, both the TRIPs Agreement<sup>258</sup> and the Joint Statement<sup>259</sup> have emphasized the importance of such assistance. In providing legal assistance, the United States needs to be careful about the laws and ideas they will bring into China, because laws and legal ideas usually “bring their specific motivating values with them.”<sup>260</sup> For example, the United States copyright

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[I]n the absence of very good control over the distribution of products, a low price strategy for a select market will simply fuel counterfeiting’s close cousin, diversion. In some cases, the effects can be so extreme that not only will the low-priced products be diverted from their intended market but at the same time, imitations and fakes will rapidly fill the void in the original market.

*Id.*

<sup>254</sup> A case in point is the reduction of pirated Taiwanese software in Hong Kong after the Taiwanese computer software manufacturers lowered the prices of their software. This example is drawn from the Author’s own experience in Hong Kong.

<sup>255</sup> As one commentator recounted:

One joint venture publishing company which publishes popular comics chose to compete directly against their pirates. Beyond wrapping the magazine in hard-to-reproduce plastic, the company has continuously upgraded the quality of the comic’s graphics and paper relative to pirate editions, and included inexpensive, educational prizes with each issue. These gambits have worked. Despite being significantly more expensive than the pirated version, this popular comic book has seen increasing subscriptions and readership, and the company is planning to expand its operations.

Donaldson & Weiner, *supra* note 101, at 432; *see also* Long, *China’s IP Reforms*, *supra* note 180 (arguing that post-sale benefits would create incentives for the Chinese to buy legitimate products).

<sup>256</sup> Long, *China’s IP Reforms*, *supra* note 180.

<sup>257</sup> *Id.*

<sup>258</sup> The TRIPs Agreement requires developed countries to provide “assistance in preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and . . . support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel.” TRIPs Agreement, *supra* note 4, art. 67, 33 I.L.M. at 1222-23.

<sup>259</sup> *See* Joint Statement, *supra* note 16, at 1683 (“The United States and China agree that promoting cooperation in the field of law serves the interests and needs of both countries.”).

<sup>260</sup> Geller, *supra* note 91, at 205; *see* ROBERT B. SEIDMAN, *THE STATE, LAW AND DEVELOPMENT* 34 (1978) (“Legal transplants practically never work.”); Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 27 (1974) (“[A]ny attempt to use a pattern of law outside the environment of its origin . . . requires a knowledge not only of the foreign law, but also of its social, and above all its political, context.”); Herbert H.P. Ma, *The Chinese Concept of the Individual and the Reception of Foreign Law*, 9 J. CHINESE L. 207 (1995) (discussing the cultural barrier to the reception of Western laws in China); Julie Mertus, *Mapping Civil Society Transplants: A Preliminary Comparison of Eastern Europe and Latin America*, 53 U. MIAMI L. REV. 921 (1999) (arguing that foreign legal experts bring with them their own cultural, social, and political misconceptions); Netanel, *Asserting Copyright’s Democratic Principles*, *supra* note 161, at 274 (“[A] legal rule or doctrine often operates quite differently, or carries very different symbolic content, when transplanted from the source to the host jurisdiction. Even if a rule is transplanted word-for-word, it may effectively be modified in substance or simply rendered irrelevant in the host country.”); *see also* JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS & FOREIGN AID IN LATIN AMERICA* 280 (1980) (arguing that the law and development movement is “an energetic but flawed attempt to provide American legal assistance and to transfer American legal models, which were themselves flawed”); ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 21-30 (2d ed. 1993) (arguing that the laws of one society are borrowed from another society); Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT’L ECON. L. 179 (1999) (discussing American legal assistance to the post-Communist societies); John V. Orth, *Exporting the Rule of Law*, 24 N.C. J. INT’L L. & COM. REG. 71, 82 (1998) (“Legal culture is not so readily exportable as scientific culture, in which the medium is the universal language of mathematics and experiments are reproducible

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law, in particular the 1976 Copyright Act, is filled with compromises struck among American interest groups that participated in the drafting process.<sup>261</sup> A verbatim transplant of this statute into China not only would be inefficient, but could be indeed harmful, if China were not facing similar interest group pressure or did not have similar needs or concerns.

The United States also needs to pay special attention to how it structures its assistance efforts. The United States's assistance efforts to the former Soviet Union and Eastern and Central Europe have demonstrated that assistance may either "bridge the gap or serve to widen it," depending on how the aid is structured and transferred and on the relationship between the donor and donee countries.<sup>262</sup> Indeed, assistance can be competitive and may dominate power relations.<sup>263</sup> An assistance effort that humiliates the receiver clearly contravenes the goal and spirit behind the constructive strategic partnership model.<sup>264</sup>

When assisting China in revising its intellectual property laws, the United States should focus on those problems that continue to hamper the existing intellectual property regime in China. These problems include the difficulties in monitoring a large territory,<sup>265</sup> in collecting

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abroad. Law is inevitably more local."); Ann Seidman & Robert B. Seidman, *Drafting Legislation for Development: Lessons from a Chinese Project*, 44 AM. J. COMP. L. 1 (1996) (discussing the difficulties encountered while assisting China in drafting legislation). As Professor Huntington cautioned us in his seminal work, *Political Order in Changing Societies*:

In confronting the modernizing countries the United States was handicapped by its happy history. In its development the United States was blessed with more than its fair share of economic plenty, social well-being, and political stability. This pleasant conjuncture of blessings led Americans to believe in the unity of goodness: to assume that all good things go together and that the achievement of one desirable social goal aids in the achievement of others. In American policy toward modernizing countries the experience was reflected in the belief that political stability would be the natural and inevitable result of the achievement of first, economic development and then of social reform. . . .

. . . In some instances programs of economic development may promote political stability; in other instances they may seriously undermine such stability . . . the relationship between social reform and political stability resembled that between economic development and political stability. In some circumstances reforms may reduce tensions and encourage peaceful rather than violent change. In other circumstances, however, reform may well exacerbate tensions, precipitate violence, and be a catalyst of rather than a substitute for revolution.

SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* 5-7 (1968).

<sup>261</sup> See Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 859 (1987); see also Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 53 (1994) ("The only way that copyright laws get passed in this country is for all the lawyers who represent the current stakeholders to get together. . . . This process has produced laws that are unworkable from the vantage point of people who were not among the negotiating parties." (footnote omitted)); Sterk, *supra* note 235 (arguing that American copyright protection expands due to interest group politics and efforts by the nation's elite to protect the status quo). As Professor Netanel explained:

Like any complex body of law, copyright represents an uneasy accommodation of competing interests and theoretical premises. However, copyright is particularly unstable, largely because of rapid advances in the technology for creating, reproducing, and communicating authors' works, which have in turn dramatically reconfigured, and portend further upheaval in, the markets for those works. Battles have erupted over issues such as whether copyright's duration should be further extended, the extent to which copyright holders should have exclusive control over creative reformulations of their works (now including digital manipulation and sampling), the extent to which traditional limitations and exceptions to copyright holder rights should carry over into the digital environment, and whether copyright holders should be able, through shrink wrap licenses and web site access agreements, to contract out of such limitations and exceptions. These and other deepening fault lines have in turn engendered widespread debate over what are and should be copyright's primary objectives.

Netanel, *Asserting Copyright's Democratic Principles*, *supra* note 161, at 225-26.

<sup>262</sup> JAINE R. WEDEL, *COLLISION AND COLLUSION: THE STRANGE CASE OF WESTERN AID TO EASTERN EUROPE 1989-1998*, at 6 (1998); *id.* at 7 ("In some instances, unwitting donors sustained and even reinforced those legacies through their sheer misunderstanding of them.").

<sup>263</sup> See Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 5, at 60-61; see also Nicholas D. Kristof, *Asians Worry That U.S. Aid Is a New Colonialism*, N.Y. TIMES, Feb. 17, 1998, at A4 (reporting on the concerns of the Asian countries that the American assistance efforts may create a new form of colonialism).

<sup>264</sup> See DE BARY, *supra* note 93, at 9 ("[D]iplomacy . . . requires tact; it cannot succeed if the other party is discountenanced and left humiliated.").

<sup>265</sup> See Lagerqvist & Riley, *supra* note 100, at 16 ("The [piracy] problem is partly logistical, as it is difficult to monitor a territory as large as China effectively enough to keep on top of the counterfeiters and to act swiftly against every act or potential act of infringement or counterfeiting.").

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evidence of infringement,<sup>266</sup> and in collecting judgments;<sup>267</sup> widespread corruption;<sup>268</sup> abuse by government officials;<sup>269</sup> different values placed on intellectual property infringement;<sup>270</sup> the indistinguishability between public and private entities;<sup>271</sup> local protectionism;<sup>272</sup> and the decentralization of government.<sup>273</sup>

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<sup>266</sup> See *id.* at 28 (“Because injunction orders for the preservation of evidence are generally unavailable in China except in the form of ‘sealing up’ company assets—which amounts to shutting down the company—there is little to stop infringers from simply taking away the evidence of infringement.”); see also Cheng, *supra* note 37, at 1969 (“Continued widespread piracy resulted largely from the fact that pirates were able to destroy crucial evidence because Chinese authorities delayed in responding to allegations of piracy by infringing stores, factories, and distribution centers.”). But see *Trademark Protection in China: Procedure and Strategy*, Pat. Trademark & Copyright L. Daily (BNA), at D2 (Feb. 18, 1998) (arguing that a conservation measure proceeding, which is similar to a preliminary injunction, is available to seize the allegedly infringing goods after the plaintiff lodges the complaint).

<sup>267</sup> See Mary L. Riley, *Enforcement in a Nutshell*, in PROTECTING INTELLECTUAL PROPERTY RIGHTS IN CHINA, *supra* note 100, at 73, 73; Berkman, *supra* note 49, at 25 (“There is a widespread belief that court orders can be ignored with impunity since the authority of judges to impose penalties on recalcitrant parties is questionable. . . . Courts and successful litigants also face significant resistance when seeking to enforce a judgment outside the jurisdiction in which it was rendered.”); Kolton, *supra* note 105, at 448 (explaining the difficulty of collecting judgements in China even after damages have been awarded by the People’s Courts).

<sup>268</sup> See CORNE, *supra* note 109, at 285 (“Enforcement patterns reflect whether or not one can attract the patronage of the ‘right official’ for the personalized ‘quick fix’ rather than codified substantive or procedure norms.”); Tiefenbrun, *supra* note 10, at 68 (“People in [China] are accustomed to function according to a corrupt system of favors which may still be prevalent in the court system.”); Kolton, *supra* note 105, at 449 (“Many Chinese infringers are protected by Chinese officials and, consequently, are beyond the Intellectual Property Courts’ ability to prosecute. . . . The Chinese Trade Minister has confided that at least one [compact disc] factory is ‘untouchable’ because of its owner’s ties with the Chinese military. . . .”).

<sup>269</sup> See Tiefenbrun, *supra* note 10, at 9 (“[In China,] the government, government institutions, and many individuals allegedly engage in pirating. Government violations of domestic and international intellectual property law make it all the more difficult to discourage this illegal practice by corporations and individuals.”).

<sup>270</sup> See Linus Chua, *China Steps up Enforcement Piracy Laws*, L.A. TIMES, Apr. 4, 1994, at D3 (reporting on a fine of \$ 91 levied against a Chinese company counterfeiting Disney’s Mickey Mouse trademark); Matt Forney, *Microsoft Furious over China’s Trademark Ruling*, UNITED PRESS INT’L, Feb. 4, 1994 (reporting on a fine of \$ 260 imposed on a Shenzhen University research institute for counterfeiting more than 650,000 Microsoft trademark holograms); see also OFFICE OF USTR, 2000 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 50 (2000) (indicating concerns over the “reluctance or inability on the part of enforcement officials to impose deterrent level penalties”); Butterton, *supra* note 10, at 1104 (stating that fines were not broadly applied or sufficiently substantial to serve as deterrents); Lagerqvist & Riley, *supra* note 100, at 16 (stating that damages awards are so low that there is no deterrent effect). Nevertheless, the awards have been increasing. See, e.g., *\$ 1.5m Bill for Beijing Pirate*, FIN. TIMES, Jan. 11, 1996, at 4 (reporting on an award of 13 million yuan to a local software manufacturer); *CD Pirate Gets Jail Term and \$ 7m Fine Over Counterfeits*, S. CHINA MORNING POST, Jan. 8, 1996, at 4 (reporting on an award of 6.67 million yuan to the record industry).

<sup>271</sup> See PEARSON, *supra* note 131, at 40 (noting the difficulty in distinguishing in post-Mao China between what is within the Party-state and what falls outside of it); William Alford, *Underestimating a Complex China*, CHI. TRIB., May 24, 1994, at 23 (stating that many of the businesses that the American media describe as independent from state control are actually owned in large part by the Chinese government or the Communist Party).

<sup>272</sup> See CORNE, *supra* note 109, at 240 (“Government bureaux are still linked to production facilities and foreign trading corporations. When licenses or permits are needed, . . . the administrative organ with jurisdiction to handle the matter will only grant the license or permit to the extent that it does not threaten a domestic interest . . . .”); Berkman, *supra* note 49, at 17 (“While Beijing’s directives generally are implemented without question, protection of intellectual property rights may be one area where Beijing’s support is not alone sufficient.”); Li, *supra* note 103, at 401 (commenting that the consent and cooperation of local governments are often needed to implement a national plan); Lucian Pye, *China: Erratic State, Frustrated Society*, FOREIGN AFF., Fall 1990, at 58, 58 (“[China] is a civilization pretending to be a state.”); Gerald Segal, *The Muddle Kingdom? China’s Changing Shape*, FOREIGN AFF., May/June 1994, at 43, 58 (“Foreigners who want to trade with China are best advised to think in terms of provinces or localities. It is [the local authorities] who can guarantee the transparency of global trading regulations or resolve disputes over intellectual property.”); Kolton, *supra* note 105, at 448 (“[Piracy p]roblems arise from flaws in the Chinese legal system, which allows for local protectionism both in the adjudication process and the enforcement process.”); *id.* at 448-49 (“Participation by local Chinese authorities generally is needed to enforce People’s Court orders, which they might be unwilling to offer if doing so would be detrimental to their authority, especially if the judgment comes from a jurisdiction outside the scope of such officers’ authority.”); see also CHINA DECONSTRUCTS: POLITICS, TRADE, AND REGIONALISM (David S.G. Goodman & Gerald Segal eds., 1994) [hereinafter CHINA DECONSTRUCTS] (examining the regional political and economic disparities in China); DONG ET AL., *supra* note 145, at 196 (“In China, local governments are highly protective of their own interests. A well-known expression in China sums up the protectionist attitudes of local governments: ‘The central government has policies but the local governments have policy-proof devices.’”); EDWARD FRIEDMAN, NATIONAL IDENTITY AND DEMOCRATIC PROSPECTS IN SOCIALIST CHINA (1995) (arguing that two distinct regional identities exist in China).

By contrast, one commentator argued that China always used local protectionism as an excuse not to comply with its intellectual property agreements:

It is laughable to hear excuses from Beijing that they can’t control the 50 pirate CD factories. If they were turning out thousands of copies of the BBC documentary on the Tiananmen Square protest—rather than bootleg copies of “The Lion King”—the factory managers would be sharing a cell with other dissidents in a heartbeat.

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Local protectionism has been a long-standing problem, whose origin can be traced back to the Qing dynasty<sup>274</sup> or even further to the previous dynasties.<sup>275</sup> Even though there have been substantial efforts to centralize power in the Chinese Communist Party in the 1950s and 1960s,<sup>276</sup> recent economic reforms have led to greater autonomy of regional and local governments.<sup>277</sup> Even worse, many of these governments are “owners of the vast bulk of enterprises in China which are likely to be violators of [intellectual property] regulations, and thus have a direct economic interest in the income accruing from such violations.”<sup>278</sup> Thus, the continuing economic modernization process and the decentralization movement will further exacerbate the existing law enforcement problem. Indeed, the decentralization movement may even make bilateral intellectual property negotiation more difficult, because what was agreed in Beijing may not necessarily be enforceable in Guangzhou.

### *Step Twelve: Develop a New and Harmonized International Intellectual Property Regime*

In light of the need for global cooperation, the significant differences between China and the West, and China’s leadership in Asia and growing world power status, a new intellectual property regime that takes their political, social, economic, cultural, and ideological differences into consideration is greatly needed.<sup>279</sup> One should, however, not confuse this regime with a

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James Shinn, *The China Crunch; Three Crises Loom in the Next 30 Days*, WASH. POST, Feb. 18, 1996, at C1. *But see* Chow, *supra* note 212, at 4-5 (“[T]here are real political and social costs associated with any serious crackdown on a problem as massive as counterfeiting. Overcoming local protectionism will require the expenditure of considerable political capital and divert limited resources from China’s myriad other pressing problems.”).

<sup>273</sup> See Hu, *supra* note 196, at 106 (“[E]conomic decentralization originally intended as an incentive for local development has caused the central government to lose control over local administrators; many of them strive for economic growth at the price of leaving legitimate copyright interests unprotected.”); *see also* XIANFA art. 101 (1982) (amended Mar. 29, 1993) (granting local people’s congresses the power to elect and dismiss officials); Stanley B. Lubman, *Does Beijing Signify Anything, with Power Flowing to Provinces, Cities?*, L.A. TIMES, Dec. 3, 1995, at 2 (discussing the problem of a decentralized Chinese government).

One commentator explained the lack of centralized leadership:

Ideally, authorities are supposed to share power according to a system of dual rule (*shuangchang lingdao*). Problems that arise are supposed to be resolved by the unifying authority of the CCP at the same level, which normally has an office and a deputy secretary in charge of the area in question, and which has jurisdiction over it. In reality, however, there is no dual rule. There is rule by either *tiao tiao* or *kuai kuai* authorities depending on their relative power and the issue at hand.

CORNE, *supra* note 109, at 87 (footnote omitted).

<sup>274</sup> For example, regionalism was one of the main causes for the failure of the Self-Strengthening Movement conducted by the Qing government in the latter half of the nineteenth century:

The provincial promoters of Self-strengthening rivaled rather than cooperated with each other and regarded their achievements as the foundation of personal power. Their sense of regionalism and their eagerness for self-preservation persisted so strongly that during the French war of 1884 the Peiyang and Nanyang fleets refused to go to the rescue of the Fukien fleet under enemy attack, and during the Japanese war of 1894-95 the Nanyang fleet maintained “neutrality” while the Peiyang fleet alone fought the Japanese navy. The results of both wars were, of course, disastrous.

HSÜ, *supra* note 59, at 288.

<sup>275</sup> See CORNE, *supra* note 109, at 124 (“China is a country which encompasses regions at vastly different stages of economic development, every province, city and county having its own peculiar features and problems.”); MILTON MUELLER & ZIXIANG TAN, *CHINA IN THE INFORMATION AGE: TELECOMMUNICATIONS AND THE DILEMMAS OF REFORM* 10 (1997) (noting the historical instability among central and regional governments in China); Berkman, *supra* note 49, at 17 (“Imperial China was infamous for its hydra-headed bureaucracy and the inability of the Imperial Court to control the authority of local elites.”).

<sup>276</sup> See Dali L. Yang, *Reform and the Restructuring of Central-Local Relations*, in *CHINA DECONSTRUCTS*, *supra* note 272, at 62-74.

<sup>277</sup> See PEARSON, *supra* note 131, at 21; ZHENG, *DISCOVERING CHINESE NATIONALISM*, *supra* note 31, at 16.

<sup>278</sup> Andrew G. Walder, *Harmonization: Myth and Ceremony? A Comment*, 13 UCLA PAC. BASIN L.J. 163, 165 (1994); *see* Hu, *supra* note 196, at 106 (“[M]any local government entities either use pirated materials or have financial interests in the illegal production of copyrighted products. Such entanglement of financial interest by local officials make copyright enforcement even more difficult and intriguing.” (footnote omitted)).

<sup>279</sup> See ENDESHAW, *supra* note 77, at 47 (arguing that less developed countries may be able to modernize if “they manage to grasp the internal dynamic that operates in each of them and devise appropriate economic and technological policies, without neglecting social and political aspects”); *id.* at 98-142 (outlining a proposal for an intellectual property system in non-industrial countries); Vincent Chiappetta,

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universalized Western intellectual property regime. In fact, the American government “sometimes confuses its natural policy preferences with ‘international norms’”<sup>280</sup> and ignores the interests of other countries, in particular the less developed countries.<sup>281</sup> Although the U.S. government “claims that stronger intellectual property protection will benefit developing countries, this relationship has yet to be demonstrated in either economic theory or empirical proof.”<sup>282</sup> Likewise, the presumption that a universalized regime would maximize global welfare is equally questionable.<sup>283</sup> Also doubtful is the “assum[ption] that the current level of intellectual property strikes the right balance between incentives to future production, the free flow of information and the preservation of the public domain in the interest of potential future creators.”<sup>284</sup> Indeed, many Americans disagree on the proper balance between intellectual

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*The Desirability of Agreeing to Disagree: The WTO, TRIPs, International IPR Exhaustion and a Few Other Things*, 21 MICH. J. INT’L L. 333 (2000) (arguing that countries must “agree to disagree” during their negotiation of a multilateral intellectual property regime); Carlos M. Correa, *Harmonization of Intellectual Property Rights in Latin America: Is There Still Room for Differentiation?*, 29 N.Y.U. J. INT’L L. & POL. 109, 129 (1997) (“Differentiation . . . looks desirable in that it permits countries in the Latin tradition to retain a system that responds to their own cultural perceptions of creation and protects the moral and economic rights of all interested parties.”); Claudio R. Frischtak, *Harmonization Versus Differentiation in Intellectual Property Rights Regime*, in GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS, *supra* note 109, at 89 (arguing that countries should tailor their intellectual property system by taking into account their economic needs, productive and research capabilities, and institutional and budgetary constraints); Oddi, *International Patent System*, *supra* note 39, at 866-74 (outlining a proposal for a patent system in less developed countries); Robert M. Sherwood et al., *Promotion of Inventiveness in Developing Countries Through a More Advanced Patent Administration*, 39 IDEA 473 (1999) (explaining how to restructure the patent administration in ways that can maximize the contribution of inventors to economic growth and sustained development); Sherwood, *Why a Uniform Intellectual Property System Makes Sense*, *supra* note 109, at 68 (“The first characteristic of the uniform system being proposed is that the specific intellectual property systems being proposed is that the specific intellectual property systems of individual countries need not be identical.”); David Silverstein, *Intellectual Property Rights, Trading Patterns and Practices, Wealth Distribution, Development and Standards of Living: A North-South Perspective on Patent Law Harmonization*, in INTERNATIONAL TRADE AND INTELLECTUAL PROPERTY, *supra* note 3, at 156 (“[A] truly successful IP system must be culturally-specific and responsive to the different economic and social realities of each country.”); *id.* at 171 (“[I]t cannot be taken for granted that a Western IP system will be either beneficial to or successful in other countries with different cultures.”); see also PHILIP LEITH, *HARMONISATION OF INTELLECTUAL PROPERTY IN EUROPE: A CASE STUDY OF PATENT PROCEDURE* (1998) (discussing efforts to harmonize patent protection throughout the European Union).

Professor Huntington cautioned that full harmonization may threaten the United States, the West and the rest of the world:

Some Americans have promoted multiculturalism at home; some have promoted universalism abroad; and some have done both. Multiculturalism at home threatens the United States and the West; universalism abroad threatens the West and the world. Both deny the uniqueness of Western culture. The global monoculturalists want to take the world like America. The domestic multiculturalists want to make America like the world. A multicultural American is impossible because a non-Western America is not American. A multicultural world is unavoidable because global empire is impossible. The preservation of the United States and the West requires the renewal of Western identity. The security of the world requires acceptance of global multiculturality.

HUNTINGTON, *CLASH OF CIVILIZATIONS*, *supra* note 45, at 318; see also Keohane, *supra* note 20 (exploring why self-interested actors in world politics should seek to establish international regimes through mutual agreement). See generally INTERNATIONAL REGIMES, *supra* note 20, for an excellent collection of essays discussing international regimes.

<sup>280</sup> Lampton, *supra* note 110, at 133; see also ENDESHAW, *supra* note 77, at 80 (“[T]he US drive for stronger protection of IP is more in the direction of devising a new legal regime that answers to its needs than to accommodate within the present conventions upcoming global trends in technology creation and use.”).

<sup>281</sup> See Burrell, *supra* note 45, at 198 (arguing that the Western approach toward China “fails to respect other voices and other traditions and instead posits the moral superiority of a value system which is far more recent than the tradition it seeks to condemn”).

<sup>282</sup> SELL, *supra* note 120, at 221; see also Frischtak, *supra* note 279, at 90 (“There is little in economic theory to support convergence of IPR systems on a cross-country basis, particularly if convergence means an increase in the level of protection in developing and industrializing countries.”). *But see* Richard T. Rapp & Richard P. Rozek, *Benefits and Costs of Intellectual Property Protection in Developing Countries*, 24 J. WORLD TRADE 75 (1990) (asserting that the level of economic development is closely correlated to the existing level of intellectual property protection).

<sup>283</sup> See Correa, *supra* note 279, at 126; see Frischtak, *supra* note 279, at 103-05 (urging countries to develop their intellectual property rights regime according to their own needs); see also Keohane, *supra* note 20, at 152 (arguing that an international regime may not yield overall welfare benefits and that actors outside the regime may suffer).

<sup>284</sup> BOYLE, *supra* note 4, at 124; see J.H. Reichman, *From Free Riders to Fair Followers: Global Competition Under the TRIPS Agreement*, 29 N.Y.U. J. INT’L L. & POL. 11, 24 (1997) [hereinafter Reichman, *From Free Riders to Fair Followers*] (arguing that policymakers in many developed countries take the existing levels of innovative strength for granted and mistakenly promote protectionism); see also F.A. HAYEK, *THE FATAL CONCEIT: THE ERRORS OF SOCIALISM* (W.W. Bartley III ed., 1988) (“While property is initially a product of custom, and jurisdiction and legislation have merely developed it in the course of millennia, there is then no reason to suppose that the particular forms it has assumed in the contemporary world are final.”).

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property protection and the access to information “needed to spur further innovation and ensure the citizenry’s full participation in our democratic polity.”<sup>285</sup> The Americans also disagree on the expediency and constitutionality of American database protection legislation.<sup>286</sup>

Adherents of the realist theory of international relations will find even more unconvincing the argument that the Western intellectual property regime represents universal values. As many scholars pointed out, the Western intellectual property regime becomes universal because it is backed by great economic and military might, rather than because of its “appeal to common sense or . . . innate conceptual force.”<sup>287</sup> Indeed, it was not until the eighteenth century that the contemporary notion of authorship was developed.<sup>288</sup> Unlike contemporary writers, “[m]edieval church writers actively disapproved of the elements of originality and creativeness which we think of as essential component of authorship. ‘They valued extant old books more highly than any recent elucubrations and *they put the work of the scribe and the copyist above that of the authors.*’”<sup>289</sup> Even though writers in later periods changed their attitudes toward originality and creativeness, they did not espouse modern attitudes toward plagiarism. Rather, like the Chinese people, they regarded imitation as the sincerest form of flattery and a necessary component of the creative process.<sup>290</sup> For example, in *The Defence of Poesy*, Sir Philip Sidney maintained that poetry “is an art of imitation . . . [and] counterfeiting.”<sup>291</sup> Likewise, “Shakespeare engaged regularly in activity that we would call

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<sup>285</sup> Alford, *How Theory Does—and Does Not—Matter*, *supra* note 57, at 22; see also Dennis S. Karjala, *Copyright, Computer Software and the New Protectionism*, 28 JURIMETRICS J. 33 (1987) (arguing that policymakers and the judiciary should not automatically apply the existing copyright paradigm to computer software); John Perry Barlow, *The Economy of Ideas: A Framework for Rethinking Patents & Copyrights in the Digital Age (Everything You Know About Intellectual Property Is Wrong)*, WIRED, Mar. 1994, at 84 (arguing against the need for copyright in digital media).

<sup>286</sup> For discussions of the expediency and constitutionality of American database protection legislation, see generally Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 BERKELEY TECH. L.J. 535 (2000); Marci A. Hamilton, *A Response to Professor Benkler*, 15 BERKELEY TECH. L.J. 629 (2000); Malla Pollack, *The Right to Know?: Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause, and the First Amendment*, 17 CARDOZO ARTS & ENT. L.J. 47 (1999); J.H. Reichman & Paul F. Uhlir, *Database Protection at the Crossroads: Recent Developments and Their Impact on Science and Technology*, 14 BERKELEY TECH. L.J. 793 (1999); J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 51 (1997); Peter K. Yu, *Evolving Legal Protection for Databases*, GIGALAW.COM, Dec. 2000, at <http://www.gigalaw.com/articles/2000/yu-2000-12.html>.

<sup>287</sup> Alford, *How Theory Does—and Does Not—Matter*, *supra* note 57, at 17; see ENDESHAW, *supra* note 77, at 93 (“[W]hether or not [intellectual property] was consciously designed to serve economic policies in any of the [industrialized countries], it has always evolved in response to economic and political necessity.”); see also ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* 247 (1998) (“The range of Western beliefs that define intellectual and cultural property laws . . . are not universal values that express the full range of human possibility, but particular, interested fictions emergent from a history of colonialism that has disempowered many of the world’s peoples.”).

Indeed, Western culture and ideology are sometimes attractive because they are backed by hard economic and military power. As Professor Huntington explained:

[Culture and ideology] becomes attractive when they are seen as rooted in material success and influence. . . . Increases in hard economic and military power produce enhanced self-confidence, arrogance, and belief in the superiority of one’s own culture or soft power compared to those of other peoples and greatly increase its attractiveness to other peoples. Decreases in economic and military power lead to self-doubt, crises of identity, and efforts to find in other cultures the keys to economic, military, and political success.

HUNTINGTON, *CLASH OF CIVILIZATIONS*, *supra* note 45, at 92.

<sup>288</sup> See MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (1993); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the ‘Author,’* 17 EIGHTEENTH-CENTURY STUDS. 425 (1984).

<sup>289</sup> BOYLE, *supra* note 4, at 53 (quoting ERNST P. GOLDSCHMIDT, *MEDIEVAL TEXTS AND THEIR FIRST APPEARANCE IN PRINT* 112 (1943)).

<sup>290</sup> See *id.* at 54; see also Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 5, at 16-20 (noting that the Chinese considered copying as a form of respect related to ancestor worship).

<sup>291</sup> SIR PHILIP SIDNEY, *THE DEFENSE OF POESY* (1595), *reprinted in* THE NORTON ANTHOLOGY OF ENGLISH LITERATURE 479, 483 (M.H. Abrams ed., 6th ed. 1993) (footnote omitted); see also ROSE, *supra* note 288, at 13 (discussing Sir Philip Sidney’s *The Defense of Poesy*).



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plagiarism but that Elizabethan playwrights saw as perfectly harmless, perhaps even complimentary.”<sup>292</sup>

Furthermore, a Western intellectual property regime may contradict the economic policies of the less developed countries. Consider copyright for example. Copyright is an economic incentive regime that grants authors the exclusive rights to control and profit from the use of their intellectual creations while permitting uses that foster the creation and dissemination of intellectual works for the public welfare.<sup>293</sup> Due to different social, political, and economic needs, different countries have to make different value judgments as to what would best promote the creation and dissemination of intellectual works in their own countries. Some governments have not developed to an economic level that makes Western intellectual property protection a cost-effective and sound government policy.<sup>294</sup>

Similarly, by promoting a uniform incentive scheme, a universalized regime ignores the fact that different countries need different incentive schemes. Consider for example the duration of a patent. Economists have shown that the “length of protection for a given product should be inversely related to the length of elasticity of demand and the social rate of discount, and positively related to R&D returns.”<sup>295</sup> Because markets in different countries differ in their levels of income and preferences, it is likely that different countries would have different elasticities, discount rates, and research and development productivities. Thus, strict equality in the duration of patents would not be justified.<sup>296</sup>

Finally, intellectual property protection involves a fundamental debate about economic development strategy.<sup>297</sup> Such protection therefore may threaten the established relationships of

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<sup>292</sup> BOYLE, *supra* note 4, at 230 n.12; RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 382 & n.3 (1988) (“Shakespeare was by modern standards a plagiarist, but by the standards of his time not. . . . A competing playwright, Robert Greene, called Shakespeare ‘an upstart Crow, beautified with our feathers.’”); *see also* ALEXANDER LINDEY, *PLAGIARISM AND ORIGINALITY* 72 (1952) (“Borrowing flourished in sixteenth-century England. It was often flagrant enough to constitute plagiarism. The Elizabethans did not bother to devise plots, incidents and characters; they lifted them from their predecessors and from each other.”). As Professor Boyle pointed out, Shakespeare’s “plagiarism” is the main reason why critics doubted the authorship of what we generally attribute to Shakespeare. *See* BOYLE, *supra* note 4, at 230 n.12; *see also* JOHN MICELL, *WHO WROTE SHAKESPEARE?* (1999) (examining questions concerning the authorship of Shakespeare’s plays and sonnets); James Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 *AM. U. L. REV.* 625 (1988) (examining the similarities between textual indeterminacy and the notion of romantic authorship).

<sup>293</sup> *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 432 (1984) (“The immediate effect of [United States] copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.” (quoting *Twentieth Century Music Corp.*, 422 U.S. 151, 156)); Peter K. Yu, Note, *Fictional Persona Test: Copyright Preemption in Human Audiovisual Characters*, 20 *CARDOZO L. REV.* 355, 382-85, 398-400 (1998) (discussing the economic incentives created by U.S. copyright law). For excellent economic analyses of copyright law, *see generally* Richard P. Adelstein & Steven I. Peretz, *The Competition of Technologies in Markets for Ideas: Copyright and Fair Use in Evolutionary Perspective*, 5 *INT’L REV. L. & ECON.* 209 (1985); Landes & Posner, *supra* note 74.

<sup>294</sup> *See* RYAN, *supra* note 46, at 75; *see also* *Conferences: Intellectual Property Lawyers Lament Supreme Court Federalism*, Pat. Trademark & Copyright L. Daily (BNA), at D3 (Nov. 22, 1999) (reporting that a Ukrainian government minister told Judge Randall Rader that honoring U.S. intellectual property rights on products used in Ukraine would cost half of the country’s gross national product).

<sup>295</sup> As Claudio Frischtak explained:

Nordhaus assumes a competitive world, with inventors producing small process innovations; the objective is to maximize the net welfare to society, provided the innovator’s returns are sufficient to ensure that the innovation becomes available to society. The intuition behind Nordhaus’s results is that the length of protection should be longer, the more insensitive demand is to price changes or the harder it is to innovate, so that it would take longer for the innovator to reap the necessary returns; similarly the longer terms of protection are optimal if society can “wait” to appropriate the gains from the invention (the social rate of discount is low).

Frischtak, *supra* note 279, at 97 (citing WILLIAM NORDHAUS, *INVENTION, GROWTH AND WELFARE* (1969)).

<sup>296</sup> *Id.*

<sup>297</sup> *See* THUROW, *supra* note 148, at 128 (arguing that countries with different levels of economic development desire, need, and should have different intellectual property systems); Reichman, *From Free Riders to Fair Followers*, *supra* note 284, at 25

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businesses and the government.<sup>298</sup> It also may put the ruling elites in the less developed countries in a very difficult, if not precarious, position.<sup>299</sup> For example, in 1987, Thai Prime Minister Prem Tinsulanond's administration was ousted in a no-confidence vote after it attempted to strengthen the country's copyright laws.<sup>300</sup> Fearing similar repercussions, the South Korean government was very sensitive to the political threat posed by college students who were seriously concerned about increased textbook prices resulting from efforts to curtail piracy.<sup>301</sup>

In sum, due to the variations in the level of wealth, economic structure, technological capability, political system, and cultural tradition,<sup>302</sup> different states have different goals, interests, and political pressures.<sup>303</sup> China and the United States therefore should join together to develop a new international intellectual property regime, rather than to universalize the existing Western regime.<sup>304</sup> In particular, this new regime must recognize the difficulties in "reconciling legal values, institutions, and forms generated in the West with the legacy of China's past and the constraints imposed by its present circumstances."<sup>305</sup>

Harmonization is not an easy process. It is even more difficult, considering the significant political, economic, social, and cultural differences between China and the West.<sup>306</sup>

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("[A]dherence to the TRIPS Agreement requires [the less developed] countries to reconcile their own economic development goals with its international intellectual property norms."); see also MacLaughlin et al., *supra* note 116 (examining whether intellectual property protection is of net benefit to the less developed countries); Oddi, *International Patent System*, *supra* note 39 (arguing that the Paris Convention incurs significant costs to the less developed countries); J.H. Reichman, *Beyond the Historical Lines of Demarcation: Competition Law, Intellectual Property Rights, and International Trade After the GATT's Uruguay Round*, 20 BROOK. J. INT'L L. 75, 81 (1993) ("[P]olicymakers concerned to promote investment in important new technologies often overstate the supposed benefits of specific intellectual property regimes while ignoring the negative economic functions of these regimes in relation to the complementary operations of competition law generally.").

<sup>298</sup> See RYAN, *supra* note 46, at 144.

<sup>299</sup> See SELL, *supra* note 120, at 215; *id.* ("If they succumb to U.S. pressure, they are subject to criticisms of selling out sovereignty to foreign interests."); Burrell, *supra* note 45, at 207 ("Clearly no Chinese leader could be seen bowing to pressure from the United States without being in danger of undermining his own position, a difficult which goes some way towards explaining much of the brinkmanship which has characterised the negotiations between China and the United States on the issue."); see also MILNER, *supra* note 86, at 33 ("The structure of domestic preferences holds a key to understanding international cooperation."); *id.* at 246-47 (arguing that international cooperation is the continuation of domestic politics by other means); Ronald Rogowski, *Institutions as Constraints on Strategic Choice*, in STRATEGIC CHOICE AND INTERNATIONAL RELATIONS, *supra* note 11, at 115 (arguing that domestic political institutions affect the formation of foreign policy and the strategies actors choose); Renato Ruggiero, *Whither the Trade System Next?*, in URUGUAY ROUND AND BEYOND, *supra* note 24, at 123, 139 (arguing that the post-Cold War international system "is blurring the distinction between foreign and domestic policies").

<sup>300</sup> SELL, *supra* note 120, at 192.

<sup>301</sup> RYAN, *supra* note 46, at 75.

<sup>302</sup> SELL, *supra* note 120, at 191.

<sup>303</sup> *Id.* at 201; see also Giunta & Shang, *supra* note 111, at 333 ("Fundamental differences in concepts of ownership and legal regimes provide at least some explanation as to why it has been so difficult to draft a multilateral intellectual property agreement. A favorable agreement for one country could be unfavorable for another country.").

<sup>304</sup> See THURLOW, *supra* note 148, at 256 ("[An international intellectual property system] is not something that can be built by any one country and then imposed on the rest of the world. It will have to be built by the world for the world.").

<sup>305</sup> ALFORD, *supra* note 10, at 2.

<sup>306</sup> To understand the difficulty of the harmonization process, it is illustrative to look at the difficulty the European Community faced in its attempt to harmonize the trademark laws of its members:

Although trademarks are an important form of intellectual property, they do not have the same bearing on science and technology as patents and copyright, but two aspects of the European Community's experience in this field are relevant and worth a brief mention. The first is that although the economic pressure to "globalize" the use of trademarks is strong and has benefited some firms trading in Europe, such as the Mars Corporation, there is still a cultural and linguistic resistance to the process. Thus, there is not quite the degree of support for a pan-European trademark system that the community authorities had expected. The second is that while the EC is nevertheless going ahead with its proposals for a community trademark, it is hamstrung by a purely political dispute over where the trademark office should be located. This is a salutary reminder that the concerns of intellectual property experts are in the last event always subordinate to the political process and that legislation on intellectual property is ultimately determined by political considerations.

Bryan Harris, *The European Community*, in GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS, *supra* note 109, at 158, 160. At an international intellectual property conference organized by the National Research Council, an observer from the Arab Society for

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Nevertheless, a harmonized regime would be in the interest of both countries. Given the fact that a majority of the American economy is knowledge-based and technology-driven, the importance of a harmonized regime to the United States is apparent. Although the Chinese economy has not reached the stage where information will become a major sector, a harmonized regime is also crucial to China. Such a regime will allow China to trade effectively with other Western countries. It also will generate the substantial capital needed for the modernization process and will allow China to take advantage of the new globalization trends and e-commerce opportunities.

In fact, while China is undergoing modernization,<sup>307</sup> the harmonization process will provide China with a full grasp of the Western intellectual property regime. This grasp will help Chinese leaders understand the principles behind Western economic systems and anticipate the problems that may occur during this critical transitional period. It also will allow the leaders to assess the strengths and weaknesses of a market economy and to design an economic development strategy that matches China's present conditions. As Chairman Mao once wrote, "If you want to know the taste of a pear, you must change the pear by eating it yourself."<sup>308</sup>

In constructing the new regime, the legal specialists of the two countries need to pay special attention to the weakness of the existing Western intellectual property regime. The Western intellectual property regime tends to "value the raw materials for the production of intellectual property at zero."<sup>309</sup> It "disproportionately . . . favor[s] the developed countries' contributions to world science and culture"<sup>310</sup> while ignoring the interests of the less developed countries that supply the raw materials. Even worse, these raw materials may include cultural heritage, which is rare, unique, irreplaceable, and invaluable.<sup>311</sup> The Chinese civilization has over 4000 years of history and is made up of the majority Han Chinese and a great variety of minority cultures,<sup>312</sup> bringing with them rich tradition, indigenous art, and native medical knowledge.<sup>313</sup> The loss of these cultures and cultural knowledge is not only a loss to the Chinese civilization, but to all humanity.<sup>314</sup>

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the Protection of Industrial Property noted great difficulty in harmonizing intellectual property laws of a less developed country with those of the United States:

[H]armonization among the United States, Japan, and the EC seemed the most feasible, not because there are fewer disagreements or differences in their IPR systems, but because they collectively possess nearly all of the technological capacity in the world and have a natural, common interest in establishing strong protection for their assets. By the same logic, . . . it should not be surprising that there is little incentive for the rest of the world to embrace this level of protection, since the majority of the world operates under completely different circumstances.

*Discussion, in GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS, supra note 109, at 183, 185.*

<sup>307</sup> See generally OVERHOLT, *supra* note 30, for an overview of China's modernization efforts in the post-Mao era.

<sup>308</sup> TSE-TUNG MAO, *On Practice, in 1 SELECTED WORKS OF MAO TSE-TUNG* 300 (1965), *quoted in* NATHAN, *supra* note 27, at 1.

<sup>309</sup> BOYLE, *supra* note 4, at 126 (emphasis omitted).

<sup>310</sup> Bellagio Declaration, *in* BOYLE, *supra* note 4, at 195.

<sup>311</sup> See Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954, 249 U.N.T.S. 240 [hereinafter Convention for the Protection of Cultural Property] (declaring that each cultural group contributes invaluable cultural heritage to the world).

<sup>312</sup> "The largest of the fifty-six minority groups are the Zhuangs (15.4 million), Hui or Chinese Muslims (8.6 million), Uygur (7.2 million), Yi (6.5 million), Tibetans (4.5 million), Miao (7.3 million), Manchus (9.8 million), Mongols (4.8 million), Bouyei (2.1 million), and Koreans (1.9 million)." JAMES C.F. WANG, *CONTEMPORARY CHINESE POLITICS: AN INTRODUCTION* 176 (6th ed. 1999).

<sup>313</sup> See generally VALUING LOCAL KNOWLEDGE, *supra* note 44, for a collection of essays examining the protection of indigenous knowledge.

<sup>314</sup> See, e.g., Convention for the Protection of Cultural Property, *supra* note 311 (stating that cultural artifacts are the "cultural heritage of all mankind"); Thomas Bishop, *France and the Need for Cultural Exception*, 29 N.Y.U. J. INT'L L. & POL. 187, 187 (1997) ("Each country, although it needs to be open to the cultures of other lands, has a right—even a duty—to protect and develop its own culture. This disappearance of one country's culture cannot be made up by another's gain; the result would be an irretrievable loss for all humanity."); Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 73 IND. L.J. 723, 769 (1997) (arguing that

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To protect against this bias against indigenous cultural materials, the Bellagio Declaration<sup>315</sup> called our attention to the scientific and artistic contributions of minority cultures and the lack of representation from these cultures.<sup>316</sup> As the Declaration stated:

Contemporary intellectual property law is constructed around the notion of the author, the individual, solitary and original creator . . . . Those who do not fit this model—custodians of tribal culture and medical knowledge, collectives practicing traditional artistic and music forms, or peasant cultivators of valuable seed varieties, for example—are denied intellectual property protection.<sup>317</sup>

The Western intellectual property regime has resulted in a massive outflow of traditional knowledge, folklore, genetic material, and native medical knowledge<sup>318</sup> and has threatened the very existence of indigenous cultures.<sup>319</sup> By scrutinizing the structural and ideological assumptions built within the Western intellectual property regime, the policymakers in the two countries would be able to pay special attention to the interests of *nonauthorial* producers.<sup>320</sup> By doing so, the policymakers also would be able to acknowledge the importance of protecting folkloric works, works of cultural heritage, and biological and ecological know-how of traditional peoples.<sup>321</sup>

### Conclusion

After a decade of heightened tension between China and the United States, the two countries have finally decided to build a more stable and healthy relationship with each other. The Joint Statement issued after the 1997 U.S.-China Summit not only presents a new model upon which the two countries can build their diplomatic relations, but also provides a conceptual framework under which policymakers can develop a new bilateral intellectual property policy.

This Article argues that the constructive strategic partnership model pronounced in the Joint Statement issued after the 1997 U.S.-China Summit may spell an end to the decade-long coercive American intellectual property policy toward China. Based on this model, this Article develops a twelve-step action plan to help policymakers formulate a new bilateral intellectual property policy. Targeting the shortcomings of the existing ineffective American foreign

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cultural property connects different cultures and promotes a common heritage); J.H. Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339, 349 (1989) (arguing that cultural property promotes “participation in a common human enterprise”).

<sup>315</sup> Bellagio Declaration, reprinted in BOYLE, *supra* note 4, at 195.

<sup>316</sup> See *id.* at 193.

<sup>317</sup> *Id.*

<sup>318</sup> See *id.*

<sup>319</sup> See *id.* at 196. One commentator described this threat as follows:

The very cultural heritage that gives indigenous peoples their identity, now far more than in the past, is under real or potential assault from those who would gather it up, strip away its honored meanings, convert it to a product, and sell it. Each time that happens the cultural heritage itself dies a little, and with it its people.

Thomas Greaves, *Tribal Rights*, in VALUING LOCAL KNOWLEDGE, *supra* note 44, at 25, 25.

<sup>320</sup> See Bellagio Declaration, *supra* note 315, at 194 (advocating the protection of the interests of the nonauthorial producers); see also Burrell, *supra* note 45, at 224 (“It is only when the principle of equitable treatment has been accepted that other cultures and other voices will be treated with the respect and concern to which they are entitled.”); Greaves, *supra* note 319, at 26 (“Western Intellectual property protections not only fail to protect indigenous knowledge; they protect its appropriation by others.”).

<sup>321</sup> See Bellagio Declaration, *supra* note 315, at 194. Most recently, some countries and policymakers have emphasized the need for a “cultural exception” in international agreements. See, e.g., Council Directive 89/552 on Television Without Frontiers, art. 4, 1989 O.J. (L 298) 26 (requiring that 50% of audiovisual products broadcast over European television to be of European origin); North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, Annex 2106, 32 I.L.M. 289, 702 (providing the cultural industries exemption); William Drozdiak, *With Deadline Looming Before Trade Talks, U.S., France Trade Blame*, WASH. POST, Oct. 16, 1993, at A14 (reporting that the French Cultural Minister argued that culture could not be included in any global trade deal lest it leads to “the mental colonization of Europe and the progressive destruction of its imagination”).

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intellectual property policy, this action plan strives to cultivate a more stable and harmonious relationship between the two countries, to foster better mutual understanding of each other, and to promote a self-sustainable intellectual property regime in China.

The action plan does not intend to offer an exhaustive list of actions that are available to the United States in reconciling its foreign intellectual property policy. Apparently, with the continuous growth and modernization of the Chinese economy and the increasing globalization of information technologies and products, creating such a list would be impossible. Thus, the action plan merely aspires to present a conceptual framework under which American policymakers can reformulate its current wrongheaded policy. The test of the plan is not whether it can eradicate completely the piracy problem in the near future, but whether it offers a meaningful direction in which such a problem can be eradicated.

Within the last two decades, China has become one of the fastest growing economies in the world. Although there are still differences between China and the United States, cooperation with China has apparently become more beneficial to U.S. interests than confronting China. The 1997 U.S.-China Summit has provided a great opportunity for both countries to mend their bilateral relationship. Whether the constructive strategic partnership will become a success or just another empty label will depend on the will and the vision of the leaders of both countries and the support of their constituents, including the very powerful American business sector.