

THE CAT AND MOUSE GAME IN CHINA

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In the late 1980s and early 1990s, the United States lost about \$2 billion of revenues annually due to rampant piracy in China.¹ To protect its businesses, the U.S. government adopted a coercive policy, threatening China repeatedly with economic sanctions, trade wars, non-renewal of most-favored-nation status, and opposition to China's entry into the World Trade Organization (WTO).² As a result of these "external pushes," the Chinese government established a new intellectual property regime and enforcement infrastructure,³ and intellectual property soon appeared at the forefront of the U.S.-China bilateral trade agenda. As the Chinese acquired a better understanding of intellectual property rights, Chinese leaders became more interested in implementing legislative reforms in the area.

Most recently, China completely revamped its intellectual property system in anticipation of accession to the WTO. Since 2000, China has amended its copyright,⁴ patent,⁵ and trademark laws.⁶ It also adopted a new regulation on the protection of layout designs of integrated circuits.⁷

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¹ See Seth Faison, *China Turns Blind Eye to Pirated Disks*, N.Y. TIMES, Mar. 28, 1998, at D1.

² See Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-first Century*, 50 AM. U. L. REV. 131, 140-51 (2000) [hereinafter Yu, *From Pirates to Partners*] (describing the United States' use of section 301 sanctions and various trade threats to induce China to protect intellectual property rights).

³ See, e.g., 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); Agreement Regarding Intellectual Property Rights, Feb. 26, 1995, P.R.C.-U.S., 34 I.L.M. 881 (1995).

⁴ Copyright Law of the People's Republic of China, translated in State Intellectual Property Office of the People's Republic of China, Laws and Regulations, available at http://www.sipo.gov.cn/sipo_English/flfg_e/xgfg_e/t20020416_5077.htm [hereinafter Revised Copyright Law]. For an excellent discussion of the amendments, see generally Xiaoqing Feng & Frank Xianfeng Huang, *International Standards and Local Elements: New Developments of Copyright Law in China*, 49 J. COPYRIGHT SOC'Y U.S.A. 917 (2002).

⁵ Patent Law of the People's Republic of China, translated in State Intellectual Property Office of the People's Republic of China, Laws and Regulations, available at http://www.sipo.gov.cn/sipo_English/flfg_e/zlflfg_e/t20020327_4704.htm [hereinafter Revised Patent Law].

⁶ Trademark Law of the People's Republic of China, translated in State Intellectual Property Office of the People's Republic of China, Laws and Regulations, available at http://www.sipo.gov.cn/sipo_English/flfg_e/xgfg_e/t20020416_5078.htm [hereinafter Revised Trademark Law].

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Taken as a whole, these new laws aligned the existing intellectual property regime with the changing socialist market economy. The amendments also strengthened protection, simplified procedures, and harmonized the regime with the TRIPs Agreements and other international treaties.⁸

Under the revised patent statute, enforcement authorities may now confiscate income from infringing products and impose fine on violators.⁹ Unless a contrary agreement exists, employers will have the right to apply for a patent in an employment invention.¹⁰ Where damages cannot be determined in a proceeding, the revised law allows for the calculation of damages based on appropriate royalties.¹¹ The law also prohibits “offers for sale” of infringing products¹² while enabling patent holders to request immediate suspension of potentially infringing acts before they request a formal legal determination.¹³ Moreover, the new law simplified the patent application procedures,¹⁴ enabled judicial review of patent revocations,¹⁵ ratcheted up the compulsory licensing standard,¹⁶ and required innocent infringers to prove that the patented product comes from a legitimate source.¹⁷

Amendments to the copyright law were equally extensive. Under the revised copyright law, administrative agencies and courts can now confiscation of illegal gains, pirated copies, and materials, tools, and equipment used to conduct infringement activities.¹⁸ Where the plaintiff’s damage or the infringer’s profits cannot be determined, the revised law allows for statutory damages of up to RMB 500,000.¹⁹ In addition, the law provides access to preliminary injunctions²⁰ and places the burden on the accused infringer to prove the existence of a legitimate license.²¹ The law also addresses, for the first time, copyright issues on the Internet²² while including China’s contract law as a basis for reference to determine whether parties fulfill their contractual obligations.²³

Finally, the amendments to the trademark law entered into effect in December 2001. As amended, the trademark law delineates factors used to determine the “well-known” status of a trademark,²⁴ provides access to preliminary injunctions,²⁵ and allows for statutory damages of up

⁷ Regulations on the Protection of Layout-Designs of Integrated Circuits of the People’s Republic of China, *translated in* State Intellectual Property Office of the People’s Republic of China, *Laws and Regulations*, available at http://www.sipo.gov.cn/sipo_English/flfg_e/zlflfg_e/200204020002.htm.

⁸ See Louis S. Sorell, *A Comparative Analysis of Selected Aspects of Patent Law in China and the United States*, 11 PAC. RIM L. & POL’Y 319, 323 (2002) (quoting Ma Lianyuan, Deputy Commissioner of State Intellectual Property Office of the People’s Republic of China). For discussions of recent amendments to the Chinese patent law, see generally *id.*; Jiwen Chen, *Better Patent Law for International Commitment—The Amendment of Chinese Patent Law*, 2 RICH. J. GLOBAL L. & BUS. 61 (2001).

⁹ Revised Patent Law, *supra* note 5, art. 58.

¹⁰ *Id.* art. 6.

¹¹ *Id.* art. 60.

¹² *Id.* art. 11.

¹³ *Id.* art. 61.

¹⁴ See Chen, *supra* note 8, at 67-70 (discussing the improved application procedure).

¹⁵ Revised Patent Law, *supra* note 5, art. 46.

¹⁶ *Id.* arts. 48-55.

¹⁷ *Id.* art. 63.

¹⁸ Revised Copyright Law, *supra* note 4, arts. 47, 51.

¹⁹ *Id.* art. 48.

²⁰ *Id.* art. 49.

²¹ *Id.* art. 52.

²² *Id.* arts. 10(12), 37(6), 41, 47.

²³ *Id.* art. 53.

²⁴ In determining the “well-known” status of a trademark, one must take into consideration the following factors:

(1) reputation of the mark to the relevant public;

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to RMB 500,000 in cases where the plaintiff's damage or the infringer's profits cannot be determined.²⁶ In addition, the statute authorizes administrative agencies and courts to confiscate and destroy counterfeit products and materials, tools, and equipment used to manufacture these products.²⁷ The amended law also requires enforcement authorities to transfer cases to judicial authority for criminal investigation.²⁸

In November 2001, member states of the WTO finally approved China's accession to the international trading body, after more than fifteen years of exhaustive negotiations.²⁹ Following its accession, China issued regulations for copyright and trademark laws, as well as implementing rules concerning integrated circuits, computer software, and pharmaceuticals.³⁰ In addition, various agencies issued measures to improve China's intellectual property regime:

[For example], the State Council issued the Amendments to the Patent Law Implementing Measures. . . . [T]he State Administration of Industry and Commerce issued the Rules on the Determination and Protection of Well-Known Trademarks, the Measures on the Implementation of the Madrid Agreement on Trademark International Registration and the Measures on the Registration and Administration of Collective Trademarks and Certification Marks. . . . [And] the National Copyright Administration of China issued the Measures on the Implementation of Administrative Penalties in Copyright Cases.³¹

On the enforcement front, the Chinese authorities, from time to time, have launched large-scale crackdowns on pirated and counterfeit products. For example, they launched an anti-counterfeiting campaign in November 2000 and followed it up a few months later with a major crackdown on counterfeit products that posed health and safety risks, such as food, drugs, medical supplies, and agricultural products.³² In 2002, the Chinese government initiated a new anti-counterfeiting and anti-piracy campaign, which in turn resulted in high numbers of seizures of infringing products.

In addition, the Chinese leaders, through speeches and position papers, have emphasized the importance of intellectual property as an economic strategy.³³ Taking the lead from their leaders, authors of books, television talk shows, media articles, and government and academic reports also highlighted the importance of intellectual property protection to China's economic development. Most recently, the Chinese government appointed Vice Premier Wu Yi to head a

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- (2) time for continued use of the mark;
 - (3) consecutive time, extent and geographical area of advertisement of the mark;
 - (4) records of protection of the mark as a well-known mark; and
 - (5) any other factors relevant to the reputation of the mark.

Revised Trademark Law, *supra* note 6, art. 14.

²⁵ *Id.* art. 57.

²⁶ *Id.* art. 56.

²⁷ *Id.* art. 53.

²⁸ *Id.* art. 54.

²⁹ Paul Blustein & Clay Chandler, *WTO Approves China's Entry*, WASH. POST, Nov. 11, 2001, at A47. For discussions of China's entry into the WTO, see generally GORDON G. CHANG, *THE COMING COLLAPSE OF CHINA* (2001); NICHOLAS R. LARDY, *INTEGRATING CHINA INTO THE GLOBAL ECONOMY* (2002); SUPACHAI PANITCHPAKDI & MARK CLIFFORD, *CHINA AND THE WTO: CHANGING CHINA, CHANGING WORLD TRADE* (2002); Symposium, *China and the WTO: Progress, Perils, and Prospects*, 17 COLUM. J. ASIAN L. 1 (2003).

³⁰ OFFICE OF USTR, 2004 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 72-73 (2004) [hereinafter 2004 NTE REPORT].

³¹ *Id.* at 73.

³² OFFICE OF USTR, 2002 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 58-59 (2002).

³³ *Id.* at 57.

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new leading group on intellectual property issues.³⁴ This key appointment strongly signaled the Chinese leaders' recognition of the need for more focused and sustained efforts to tackle enforcement problems and their concern that inadequate intellectual property protection ultimately would impede international trade, foreign investment, and the development of a knowledge-based economy.

Overall, U.S. policymakers and rights holders seem to be satisfied with the recent amendments and regulations. A growing number of domestic and foreign rightsholders also have brought civil actions in Chinese intellectual property courts, which have become increasingly sophisticated. Notwithstanding these improvements, the U.S. government remains concerned about China's failure to accede to the 1996 WIPO Internet Treaties, the rights holders' lack of access to, and application, of criminal enforcement measures, and the light penalties Chinese courts imposed on infringers.

Moreover, significant problems still exist with enforcement of intellectual property laws, especially at the grassroots level and in rural areas. These enforcement problems were further exacerbated by the "lack of coordination among Chinese government ministries and agencies, local protectionism and corruption, high thresholds for initiating investigations and prosecuting cases, lack of training and inadequate administrative penalties."³⁵ As the *2004 National Trade Estimate Report* stated:

In 2003, IPR infringement in China continued to affect products, brands and technologies from a wide range of industries, including films, music, publishing, software, pharmaceuticals, chemicals, information technology, consumer goods, electrical equipment, automotive parts and industrial products, among many others. According to a July 2003 report by the State Council's Development Research Center, the market value of counterfeit goods in China is between \$19 billion and \$24 billion, which translates into enormous losses for IPR rights holders. Various U.S. copyright holders report that inadequate enforcement has resulted in piracy levels in China that have remained at 90 percent or above in 2003 for all copyright sectors, and that estimated U.S. losses due to the piracy of copyrighted materials continues to exceed \$1.8 billion annually.³⁶

Since the mid-1990s, the Chinese authorities have been playing a cat and mouse game with pirates and counterfeiters. Even worse, the emergence of the Internet and the proliferation of new peer-to-peer technologies have made the cat and mouse game even more difficult to play. Traditionally, piracy and counterfeiting were committed by those who were motivated by commercial profits and who monitored the market for business opportunities. Very often, these offenders were linked to organized crimes. These days, however, a new brand of pirates has emerged. This group does not have affiliation with organized crimes. Nor do they work in manufacturing factories. Rather, they sit leisurely at home or cyber cafés swapping music and movies via peer-to-peer networks.³⁷

³⁴ Vice Premier Wu was heavily involved in negotiation of China's intellectual property agreements with the United States in the early 1990s.

³⁵ 2004 NTE REPORT, *supra* note 30, at 73.

³⁶ *Id.*

³⁷ See, e.g., Brian Buchanan, *Move with the TV Times*, GUARDIAN (London), May 1, 2003, at 19; Laura M. Holson, *Studios Moving to Block Piracy of Films Online*, N.Y. TIMES, Sept. 25, 2003, at A1; Mark Landler, *For Music Industry, U.S. Is Only the Tip of a Piracy Iceberg*, N.Y. TIMES, Sept. 26, 2003, at A1.

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When commentators analyzed China's piracy and counterfeiting problems, they always attributed these problems to the Confucian underpinnings of the Chinese culture.³⁸ According to these commentators, cultural difference is the *primary* cause of extensive piracy and counterfeiting in China, and intellectual property problems can be seen largely as a cultural phenomenon. Such characterization, however, is misleading and dangerous.³⁹ It not only confuses the public as to the cause and extent of the problems, but also misleads policymakers into finding solutions that fail to attack the crux of the piracy and counterfeiting problems. Communitarian philosophy is not unique to the Chinese; it is found in civilizations around the world. Indeed, it would be just as misleading to argue that extensive copyright piracy occurs in China by virtue of its cultural roots as to argue that extensive mp3 piracy occurs in Western societies because of communitarian underpinnings in Judeo-Christian teachings.

Undeniably, cultural barriers might make it difficult for intellectual property laws to emerge or to develop. A culture-based analysis also might provide insight into a community of which the public has limited understanding. However, a different, or even pro-copying, culture does not necessarily result in extensive intellectual property piracy and counterfeiting. As Professor William Alford pointed out in his seminal work, *To Steal a Book Is an Elegant Offense*, the Confucian culture militated against copyright protection in so far as it did not allow intellectual property protection to take root by itself.⁴⁰ This non-Western culture, however, had not prevented intellectual property protection from functioning in Chinese society once it was introduced—in this case by the United States.⁴¹ Indeed, there is strong compatibility between intellectual property rights and Confucianism,⁴² just as there is between Western human rights and Confucianism.⁴³

³⁸ See, e.g., WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 25-29 (1995) [hereinafter ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE*] (discussing the tension between Confucianism and intellectual property protection); Patrick H. Hu, "Mickey Mouse" in China: Legal and Cultural Implications in Protecting U.S. Copyrights, 14 B.U. INT'L L.J. 81, 99 (1996) (stating that "many [Chinese] consider copying or imitation 'acceptable' and a 'time-honored learning process'"); Peter K. Yu, *Piracy, Prejudice, and Perspectives: An Attempt to Use Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate*, 19 B.U. INT'L L.J. 1, 16-21 (2001) [hereinafter Yu, *Piracy, Prejudice, and Perspectives*] (discussing Confucianism and cultural practices).

³⁹ See Peter K. Yu, *Four Common Misconceptions About Copyright Piracy*, 26 LOY. L.A. INT'L & COMP. L. REV. pt. II.A (forthcoming 2003) (discussing the misconception that copyright piracy is merely a cultural problem).

⁴⁰ See generally ALFORD, *supra* note 38.

⁴¹ See PETER K. YU, *THE SECOND COMING OF INTELLECTUAL PROPERTY RIGHTS IN CHINA* 4-7 (Benjamin N. Cardozo School of Law Occasional Papers in Intellectual Property No. 11, 2002) (discussing the importation of intellectual property rights into China by Western countries); Edmund W. Kitch, *The Patent Policy of Developing Countries*, 13 UCLA PAC. BASIN L.J. 166, 178 (1994) (noting that "[o]utsiders can play a constructive role by insisting that the [intellectual property] issues be addressed within a larger and principled framework.").

⁴² See Yu, *From Pirates to Partners*, *supra* note 2, at 224-25 (discussing the compatibility between the Chinese culture and Western intellectual property notions); Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 38, at 76-77 (same). 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 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.").

⁴³ In the past decade, 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); 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).

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Piracy and counterfeiting are not unique to the Chinese. Many less developed countries, including those newly emerged industrialized countries (such as Singapore and South Korea), have experienced extensive piracy and counterfeiting before they implemented intellectual property law reforms. Nevertheless, some countries were more successful than others in transforming themselves into intellectual property stakeholders.

Consider, for example, Singapore, which introduced a modern copyright law in the late 1980s.⁴⁴ As a result of this new law, local recording artists and studios discovered opportunities that were not available before, and foreign copyright holders became more willing to license products to Singaporean video dealers. In the first year of protection, sales of records and cassettes in the country almost doubled, and local infringers quickly switched to profitable production of blank cassettes and cassette parts. Music companies noticed the enormous business potential and were willing to spend more on promoting singers. They entered into long-term arrangements with local artists and invested in training local studio engineers (as compared to importing them from abroad).

South Korea had a similar experience.⁴⁵ In 1987, the country adopted modern copyright and patent laws. As a result of the new patent law, there was a sharp increase in the number of patent applications filed by domestic inventors. Many Korean scientists who worked abroad also returned home, as they found more remunerative research careers and a more satisfying research environment in their home country.

Today, most less developed countries understand the benefits of intellectual property protection. Unlike what they did in the past, they no longer see intellectual property rights as “Trojan horses” that the West and the North designed to protect their dominant position or exploitative devices that drain their resources and slow down their economies and catch-up processes.⁴⁶ Rather, many less developed countries consider intellectual property rights as tools to promote modernization and economic development, attract foreign investment, and create new jobs.⁴⁷ They also understand how a strong, robust, and dynamic intellectual property system would facilitate transfer of knowledge and technology, promote indigenous authorship and creation, and generate considerable tax revenues for the country.

To understand why some countries made the transition more quickly than the others, one must notice and recognize the enormous “divide” between stakeholders and nonstakeholders in an intellectual property regime.⁴⁸ Obviously, the stakeholders are eager to protect what they have, while the nonstakeholders are eager to enlarge their share and become stakeholders. However, not everybody steals or uses other illegal means to enlarge his or her share. Most people do so only when they do not understand the law or when they do not believe in the system—for example, when they perceive the system as grossly unfair.

⁴⁴ See ROBERT SHERWOOD, *INTELLECTUAL PROPERTY AND ECONOMIC DEVELOPMENT* ch. 6 (1990).

⁴⁵ See *id.*

⁴⁶ See Yu, *From Pirates to Partners*, *supra* note 2, at 189-90; Yu, *Piracy, Prejudice, and Perspectives*, *supra* note 38, at 61-62.

⁴⁷ See Yu, *From Pirates to Partners*, *supra* note 2, at 192-93; Peter K. Yu, *The Harmonization Game: What Basketball Can Teach About Intellectual Property and International Trade*, 26 *FORDHAM INT'L L.J.* 218, 246-47 (2003).

⁴⁸ See generally Peter K. Yu, *The Copyright Divide*, 25 *CARDOZO L. REV.* 331 (2003).

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To help bridge the “intellectual property divide,” this Essay proposes four areas on which policymakers—be they government leaders, intergovernmental agencies, or industry executives—can focus their remedial efforts:

1. *Educate the Local People.*⁴⁹ Policymakers must educate the nonstakeholders about the intellectual property system. They need to make the nonstakeholders understand what intellectual property is, how it is protected, and why they need to protect such property. Policymakers also need to show the nonstakeholders the benefits of intellectual property protection—how such protection can help them and how the lack thereof can hurt them.

2. *Create Local Stakeholders.*⁵⁰ Policymakers need to help local people develop a stake in the system and understand how they can protect their products and receive royalties. For example, they need to help the nonstakeholders develop their own industry, such as a pharmaceutical industry or a recording industry. By doing so, they will be able to transform the nonstakeholders into stakeholders or potential stakeholders.

3. *Strengthen Laws and Enforcement Mechanisms.*⁵¹ Policymakers must help develop intellectual property laws and strengthen enforcement mechanisms. Today, most countries have intellectual property laws that comply with international standards. However, very few of these countries provide strong enforcement of intellectual property laws. Thus, policymakers need to work with their counterparts in these countries to strengthen intellectual property laws and develop effective enforcement mechanisms.

4. *Develop Legitimate Alternatives.*⁵² Policymakers, in particular those in the intellectual property industries, must help develop legitimate alternatives if products are needed, yet unaffordable, by the local people. For example, many movie studios have released low-priced audiovisual products dubbed in the local language or with added foreign-language subtitles. On the one hand, these bargain products provide an affordable alternative that accommodates local needs. On the other hand, by dubbing the original products in the local language or including subtitles, the studios successfully make the discounted products unappealing to consumers in the English-speaking world. This strategy therefore successfully prevents the bargain products from entering the country as parallel imports.⁵³

Intellectual property piracy and counterfeiting are major transnational problems today. With the advent of the Internet and the development of new communications technologies, the problems can only get worse. In fact, because of these new technologies, countries that traditionally have strong intellectual property protection are now experiencing serious piracy and counterfeiting problems. A case in point is the substantial mp3 piracy activities conducted

⁴⁹ See *id.* at 428-31 for more in-depth discussion.

⁵⁰ See *id.* at 431-33 for more in-depth discussion.

⁵¹ See *id.* at 433-35 for more in-depth discussion.

⁵² See *id.* at 435-37 for more in-depth discussion.

⁵³ For discussion of gray-market goods, see generally Margreth Barrett, *The United States' Doctrine of Exhaustion: Parallel Imports of Patented Goods*, 27 N. KY. L. REV. 911 (2000); Carl Baudenbacher, *Trademark Law and Parallel Imports in a Globalized World—Recent Developments in Europe with Special Regard to the Legal Situation in the United States*, 22 FORDHAM INT'L L.J. 645 (1999); Shubha Ghosh, *An Economic Analysis of the Common Control Exception to Gray Market Exclusion*, 15 U. PA. J. INT'L BUS. L. 373 (1994); Seth Lipner, *Trademarked Goods and Their Gray Market Equivalents: Should Product Differences Result in the Barring of Unauthorized Goods from the U.S. Markets?*, 18 HOFSTRA L. REV. 1029 (1990).

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within the United States in recent years.⁵⁴ Such piracy not only forced U.S. copyright holders to play a cat and mouse game similar to the one the Chinese authorities have been playing in the past decade, but also demonstrates the futility of the cat and mouse game in China.

In April 2003, the recording industry filed high-profile lawsuits against students at Princeton University, Michigan Technological University, and Rensselaer Polytechnic Institute, seeking hundreds of millions of dollars in damages.⁵⁵ A few months later, the Recording Industry Association of America followed up with 261 lawsuits against individuals who downloaded and distributed music illegally via peer-to-peer networks, such as KaZaA, Grokster, and iMesh.⁵⁶ Since then, the trade association has filed more than 1,000 lawsuits.⁵⁷

The recording industry's action was understandable. After all, global CD sales have dropped dramatically in the past three years.⁵⁸ As the International Federation of the Phonographic Industry (IFPI) pointed out recently, music piracy had threatened 600,000 jobs in the European music industry.⁵⁹ If piracy continued at the current level, it would not be surprising to find a similar number of—or even more—American jobs jeopardized.

Unfortunately, the strategies used by the Recording Industry Association of America (RIAA) are ill-advised, hurried, disorganized, costly, and ultimately ineffective. These strategies also have raised major concerns among legal commentators, consumer advocates, and civil libertarians while threatening to backfire on the constituents the trade group was charged to protect—record companies, musicians, artists, songwriters, engineers, producers, retailers, and truck drivers.

Instead of coercing pirates into submission, the industry's lawsuits are likely to drive pirates underground, forcing file-sharers to turn to proxy servers, offshore and mirror Web sites, and encrypted peer-to-peer systems.⁶⁰ Indeed, a large variety of anonymizing technologies already exist. For instance, Freenet software allows file-swappers to encrypt download requests by passing such requests from one computer to another without disclosing how and where the

⁵⁴ See Yu, *The Copyright Divide*, *supra* note 48, at 374-401.

⁵⁵ Frank Ahrens, *4 Students Sued over Music Sites*, WASH. POST, Apr. 4, 2003, at E1; Jon Healey, *Students Hit with Song Piracy Lawsuits*, L.A. TIMES, Apr. 4, 2003, at 1.

⁵⁶ Amy Harmon, *The Price of Music: The Overview*, N.Y. TIMES, Sept. 9, 2003, at A1.

⁵⁷ See John Schwartz, *More Lawsuits Filed in Effort to Thwart File Sharing*, N.Y. TIMES, Mar. 24, 2004, at C4; John Schwartz, *Music Industry Returns to Court*, N.Y. TIMES, Jan. 22, 2004, at C1; *Music Industry Files More Suits*, N.Y. TIMES, Dec. 4, 2003, at C9; *Record Industry Files 80 More Lawsuits*, N.Y. TIMES, Oct. 31, 2003, at C6. See generally Peter K. Yu, *The Escalating Copyright Wars*, 32 HOFSTRA L. REV. (forthcoming 2003).

⁵⁸ See Jefferson Graham et al., *Hammering Away at Piracy*, USA TODAY, Sept. 11, 2003, at 1D; Greg Kot, *Music Industry Chooses to Bite Hand That Feeds It*, CHI. TRIB., June 29, 2003, at C10. But see FELIX OBERHOLZER & KOLEMAN STRUMPF, *THE EFFECT OF FILE SHARING ON RECORD SALES: AN EMPIRICAL ANALYSIS* (2004) (showing that file sharing has only had a limited effect on record sales), available at http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf.

⁵⁹ Simon Beavis, *Record Firms Threaten Big Employers with Action to Combat Piracy*, INDEPENDENT (London), Jan. 21, 2003, at 19.

⁶⁰ See Saul Hansell, *Crackdown on Copyright Abuse May Send Music Traders into Software Underground*, N.Y. TIMES, Sept. 15, 2003, at C1.

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user obtains the files.⁶¹ Programs like Red Rover, Publius, and Free Haven provide attractive alternatives for file-sharers to remain anonymous, thus avoiding censorship and recrimination.⁶²

To some extent, the RIAA's recent efforts resemble the ineffective tactics used by the Chinese government to control the dissemination of unwanted information over the Internet. There is no doubt that the Chinese authorities have created a significant deterrent by cracking down repeatedly on cyber cafés, handing out heavy jail sentences to online dissidents, and implementing new and restrictive laws and regulations.⁶³ However, the heavy-handed tactics used by the Chinese authorities also have heightened the cautiousness and sophistication of Chinese netizens. As a result of the ill-advised tactics, anti-monitoring technologies proliferated, and Chinese users increasingly rely on proxy servers, offshore Web sites, and encrypted peer-to-peer systems to avoid detection.

If piracy were to be eradicated—in China or elsewhere—the cat must be smarter than the mouse. Chasing alone might not be the best and most efficient strategy. After all, the mouse always plays when the cat goes away.

⁶¹ See generally Adam Langley, *Freenet*, in PEER-TO-PEER: HARNESSING THE POWER OF DISRUPTIVE TECHNOLOGIES 123 (Andy Oram ed., 2001) [hereinafter PEER-TO-PEER], for a discussion of Freenet software.

⁶² See generally Alan Brown, *Red Rover*, in PEER-TO-PEER, *supra* note 61, at 133 (describing Red Rover); Marc Waldman et al., *Publius*, in PEER-TO-PEER, *supra* note 61, at 145 (describing Publius); Roger Dingledine, *Free Haven*, in PEER-TO-PEER, *supra* note 61, at 159 (describing Red Haven).

⁶³ For discussion of efforts by Chinese authorities to regulate the Internet, see generally SHANTHI KALATHIL & TAYLOR C. BOAS, THE INTERNET AND STATE CONTROL IN AUTHORITARIAN REGIMES: CHINA, CUBA, AND THE COUNTERREVOLUTION (Carnegie Endowment for International Peace Information Revolution and World Politics Project Working Papers 2001), available at <http://www.ceip.org/files/pdf/21KalathilBoas.pdf>; Nina Hachigian, *China's Cyber-Strategy*, FOREIGN AFF., Mar./Apr. 2001, at 118; Jack Linchuan Qiu, *Virtual Censorship in China: Keeping the Gate Between the Cyberspaces*, 4 INT'L J. COMM. L. & POL'Y 1 (1999); Jiang-yu Wang, *The Internet and E-Commerce in China: Regulations, Judicial Views, and Government Policies*, COMPUTER & INTERNET LAW., Jan. 2001, at 12; Peter K. Yu, *Barriers to Foreign Investment in the Chinese Internet Industry*, GIGALAW.COM, at <http://www.gigalaw.com/articles/2001/yu-2001-03.html> (Mar. 2001). See generally THE NETWORKS OF CONTRADICTIONS: UNDERSTANDING THE INFORMATION SOCIETY IN CHINA (Peter K. Yu & Jack Linchuan Qiu, forthcoming 2004).