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## 1995 Agreement regarding Intellectual Property Rights between China and the United States: Promises for International Law or Continuing Problems with Chinese Piracy, The

Frank V. Prohaska

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# **THE 1995 AGREEMENT REGARDING INTELLECTUAL PROPERTY RIGHTS BETWEEN CHINA AND THE UNITED STATES: PROMISES FOR INTERNATIONAL LAW OR CONTINUING PROBLEMS WITH CHINESE PIRACY?**

## **I. INTRODUCTION**

According to a Chinese folk tale, there was a man named Chiang Tai Gung who became the primary counselor of the founder of the Chou Dynasty. Chiang Tai Gung attained this position due to his renown as a wise man. His reputation had developed from his practice of fishing with a straight hook instead of a curved hook. He reasoned that only those fish willing to be caught would be taken by his hook. The moral to this tale is that those willing to join a venture or project should do so at their own risk.<sup>1</sup>

While probably known to the Chinese representative that signed the recent China-United States Agreement Regarding Intellectual Property Rights Memorandum of Understanding (1995 MOU)<sup>2</sup> with the United States Trade Representative (USTR), Michael Kantor, this folk tale may foreshadow the kind of result that can be expected from this latest U.S.-Sino collaboration on intellectual property rights. This note will focus on the recent 1995 MOU; its likely effects on international law and just how effective it will be on curtailing the infringement of intellectual property rights by the People's Republic of China (China). To begin

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1. This folk tale is taken from a Chinese language textbook compiled by the National Taiwan Normal University, Mandarin Training Center in Taipei, Taiwan. HSI-CHEN WU ET AL., *CHINESE FOLK TALES* (VOL I 1986).

2. Agreement Regarding Intellectual Property Rights, Feb. 26, 1995, U.S.-P.R.C., 34 I.L.M. 881 [hereinafter 1995 MOU].

this discussion, it is first necessary to examine two documents that preceded the 1995 MOU, namely the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention)<sup>3</sup> and the China-United States Memorandum of Understanding on the Protection of Intellectual Property of 1992 (1992 MOU)<sup>4</sup>.

## II. THE 1886 BERNE CONVENTION

The Berne Convention of 1886 was the earliest attempt to protect intellectual property on an international level. It outlines several provisions for protecting literary and artistic works that are to be applied by every country that joins the union created by the convention. China acceded to the Berne Convention in the 1992 and 1995 MOUs.<sup>5</sup> In order to understand the reasons and importance of this action it is necessary to briefly discuss the appropriate articles of the convention.

The Berne Convention was established in 1886 and is still applied to the protection of literary and artistic works at present as amended in Paris on October 2, 1979.<sup>6</sup> While a discussion of this convention and its impact could be a separate note in itself, this article will focus only on those provisions of the Berne Convention that have a bearing on the 1995 MOU.

The Berne Convention begins by creating a union of member nations for multilateral protection of each member state's literary and artistic works.<sup>7</sup> This protection is extended to authors who are nationals of a nation that is part of the union, authors who are not nationals of a union member but have had their works published in a member state, and authors who are not nationals of a member state but habitually reside within one of the countries of the union created by the convention. Protection further applies to authors of cinematographic works who have their headquarters or habitual residence within one of the countries of the union, and to authors of architectural works or artistic works incorporated within a building in one of the member states of the union. Additionally, the convention provides that protection in the country of origin should be applied by domestic law and implemented equally to authors who are not nationals of a member state but have published works within one of the countries of the union.<sup>8</sup>

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3. Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, amended October 2, 1979, 828 U.N.T.S. 221.

4. Memorandum of Understanding on the Protection of Intellectual Property, Jan. 17, 1992, U.S.-P.R.C., 34 I.L.M. 676.

5. 1995 MOU, *supra* note 2.

6. Berne Convention, *supra* note 3.

7. Berne Convention, *supra* note 3, art. 1.

8. *Id.*, arts. 3, 4 & 5(3).

The Berne Convention further authorizes the seizure of illegal copies of protected works. It provides for any country that is a member of the union to seize infringing copies of a protected work within that country or to seize illegal copies imported from a non-member nation. The seizure of copies is to be carried out according to the legislation of the country where the seizure takes place.<sup>9</sup>

Lastly, the Berne Convention allows for special agreements among union members and provides for accession by countries outside the union. This final point is most important because this is the mechanism that permitted China to join the Berne Convention. First, the convention stipulates that special agreements can be made among members of the union that grant more extensive rights or contain provisions that do not contradict the convention.<sup>10</sup> Second, countries outside the union are permitted to accede and become party to the Berne Convention and therefore become a member of the union. Countries may exclude provisions that may conflict with domestic principles or concerns with the possibility of including excluded provisions at a later date. Once a country accedes to the convention it shares the protection and responsibilities accorded other union members.<sup>11</sup>

### III. COMPARISON BETWEEN THE 1992 AND 1995 MEMORANDUMS OF UNDERSTANDING

In addition to the Berne Convention, the 1992 Memorandum of Understanding between China and the U.S. specifies the provisions that must be made to protect U.S. intellectual property within China.<sup>12</sup> This section will briefly discuss the appropriate articles of the 1992 MOU that address the curtailing of patent infringement of U.S. intellectual property in China. Also, this discussion of specific 1992 MOU articles will examine the addition of the 1995 MOU to this preexisting document. Both documents primarily focus on redefining and reinforcing Chinese patent laws and the enforcement of these laws within Chinese territory.<sup>13</sup>

#### A. *The 1992 MOU*

The 1992 MOU required two main actions by the Chinese government involving intellectual property. First, China was to expand protection for U.S. patents<sup>14</sup> by approving additions in their own legisla-

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9. *Id.* art. 16.

10. *Id.* art. 20.

11. *Id.* art. 28.

12. See generally Memorandum, *supra* note 4 at 676.

13. See generally, 1992 MOU, *supra* note 4 and 1995 MOU, *supra* note 2.

14. Article 1 of the 1992 MOU specifies:

tive body and then including those provisions in their patent law. Secondly, China was to accede to the Berne Convention, the Paris Convention for the Protection of Industrial Property (Paris Convention), and the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Geneva Convention).<sup>15</sup> The scope of the 1992 MOU is rather specific to these two points, but does not provide for extensive reforms to infractions of copyrights and patents on a wide variety of intellectual property.

Additionally, the 1992 MOU establishes that both China and the U.S. will provide effective remedies to prevent violations of intellectual property rights. Each governments agreed to create safeguards from abuses and to avoid obstructions to trade relations. Upon signature of the 1992 MOU on January 17, 1992, the U.S. further conceded to end "Special 301"<sup>16</sup> investigations of China.<sup>17</sup> However, China was designated a "priority foreign country" under "Special 301" by USTR Mickey Kantor on June 30, 1994.<sup>18</sup> According to USTR Kantor, while China's intellectual property laws have improved, enforcement is "spo-

1. The Chinese government will provide the following levels of protection under the Patent Law of the People's Republic of China:

(a) Patentable Subject Matter

Patents shall be available for all chemical inventions, including pharmaceuticals and agricultural chemicals, whether products or processes.

(b) Rights Conferred

A patent shall confer the right to prevent others not having the patent owner's consent from making, using, or selling the subject matter of the patent. In the case of a patented process, the patent shall confer the right to prevent others not having the patent owner's consent from using that process and from using, selling, or importing the product obtained directly by that process . . .

2. The Chinese government will submit a bill to provide the levels of protection specified in subparagraph 1 of this Article to its legislative body and will exert its best efforts to have enacted and to implement the amended patent law by January 1, 1993.

15. The accession to the Berne Convention was to be enacted by the Chinese government by June 30, 1992 with an instrument of accession submitted to the World Intellectual Property Organization to be effective by October 15, 1992. Accession to the Geneva Convention was to be effected in the Chinese legislature by June 30, 1992 with deposit of the Chinese instrument of ratification and the Convention coming into effect by June 1, 1993. Berne Convention, *supra* note 3, art. 3(1) & 3(2).

16. "Special 301" is a provision of the U.S. Omnibus Trade and Competitiveness Act that grants to the U.S. Trade Representative the authority to designate nations that are violating fair trade practices with the U.S. on the "priority watch list" for trade sanctions. Omnibus Trade and Competitiveness Act of 1988, § 301, 19 U.S.C. §§ 2242(a)(1), 2411 (1988).

17. See 1992 MOU, *supra* note 4, art. 7.

18. *China Designated a 'Priority Foreign Country'*, 6 J. PROPRIETARY RTS., Aug. 1994, at 36.

radic at best and virtually non-existent for copyright works.”<sup>19</sup> Placement of China as a “priority foreign country” under the Special 301 provision of the 1988 Omnibus Trade Act required the U.S. Trade Representative to begin the negotiation process with China regarding increased rights protections.<sup>20</sup>

### *B. The 1995 Agreement Regarding Intellectual Property Rights*

The 1995 MOU extends the 1992 MOU provisions and attempts to remedy Chinese infractions of intellectual property rights that were not ended by the previous agreement. The focus of the 1995 MOU is on reforming and reinforcing Chinese law prohibiting the illegal copying of intellectual property within China. Most of the burden of the agreement is centered on the Chinese government and its efforts to end infringements of its patent and copyright laws in respect to U.S. intellectual property rights.<sup>21</sup>

This agreement begins by authorizing China’s State Council Working Conference on Intellectual Property (Working Conference) to develop an Action Plan designed to crack down on Chinese violations of intellectual property rights. The Working Conference is responsible for centrally organizing and coordinating protection and enforcement of all intellectual property rights throughout China. Furthermore, the Working Conference is responsible for coordinating, studying and deciding policies for effective protection of intellectual property rights, monitoring the implementation of laws on these rights, instructing and organizing authorities to provide education on these laws, and instructing that administrative, civil and criminal processes are applied consistently and uniformly to any and all infringing parties.<sup>22</sup>

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19. *Id.* at 36.

20. See *USTR Cites China, India, and Argentina For Poor Protection*, 6 J. PROPRIETARY RTS., Sept. 1994, at 36. This action by USTR Kantor prompted the 1995 MOU.

21. American Society of International Law, *supra* note 2 at 887,888.

22. Article 1(A)(3) provides in full that:

3. The main duties that the State Council’s Working Conference on Intellectual Property Rights will carry out are:

—To coordinate, study, and decide on the major policies and measures for the effective protection and enforcement of intellectual property rights, and to coordinate and organize enforcement activities among provinces, directly administered municipalities, autonomous regions and cities, as well as government ministries and departments (hereinafter referred to as regions and departments) to achieve uniform and effective protection and enforcement of intellectual property rights;

—To monitor the implementation of the laws and regulations on intellectual property rights, to organize and instruct the relevant authorities within regions and departments to investigate and substantially reduce infringement of intellectual property rights;

Aside from the authorization for the Working Conference to take action, China has also made concessions that will substantively change existing Chinese regulations. A prime example is the provision allowing trademark agents in China to act not only on behalf of Chinese persons, but also for foreign individuals. This provision requires changes in Chinese law by adding foreign individuals with trademarks to be equally protected as Chinese individuals under Chinese law.<sup>23</sup>

In addition to this change in Chinese law, China has also agreed to make new customs regulations to be entered into force by October 1, 1995.<sup>24</sup> The new regulations will clarify the status of imported or exported goods that infringe on intellectual property rights. Furthermore, Chinese customs is empowered to enforce the necessary and applicable Chinese laws which prohibit infringing goods from entering or leaving China. Chinese customs will also enforce copyrights in cases where the applicant for enforcement presents legal proof of copyright, which for nationals of a member of the Berne Convention can be satisfied by a copyright registration certificate of that nation. Chinese customs will enforce trademarks if the AIC either issues an applicant "Trademark Registration Certificate" or confirms the well-known status of the unregistered marks.<sup>25</sup>

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—To instruct and organize the relevant authorities within regions and departments to provide education on and publicity for the laws regarding intellectual property rights, to foster the understanding of intellectual property rights protection among people throughout the country, and to improve intellectual property law enforcement skills of leading officials at various levels of government, as well as the skills of enforcement personnel;

—To instruct that administrative, civil and criminal processes and sanctions are applied consistently and uniformly to all Chinese and foreign persons and all public, private, and not-for-profit entities, that engage in infringing conduct.

*Id.* at 888.

23. Article 1(D)(4)(b) states in full that:

b. Any trademark agent permitted to act on behalf of Chinese individuals and entities will now also be permitted to act on behalf of foreign individuals and entities. For the purposes of obtaining enforcement actions by the AIC [State Administration for Industry and Commerce] and Customs, wholly-owned subsidiaries of foreign companies, joint ventures involving foreigners in China, and any licensee in China will be permitted to act on behalf of the foreign owner of the mark.

*Id.* at 896, 897.

24. *Id.* at 900.

25. For a complete discussion of the agreed upon customs enforcement to be enacted by China see the 1995 MOU Article 1 (G)(2). This section covers many different areas regarding customs enforcement in China that will take place upon ratification of the 1995 MOU. The above mentioned provisions state in full:

— Goods that infringe intellectual property rights under Chinese laws and regulations are prohibited from being imported into or exported from China.

The 1995 MOU creates administrative agencies and establishes authorization for these agencies under Chinese law. However, the primary effect of the agreement is to improve enforcement of intellectual property rights by making the necessary changes in Chinese law. To understand the impact on Chinese law, it is essential to briefly examine existing Chinese regulations on intellectual property law and the law's application to foreign individuals and entities.

### C. *Current Chinese Regulations*

Present Chinese law regarding intellectual property was established and became effective on January 1, 1987.<sup>26</sup> China's enactment of this law and subsequent regulations involving private property ownership rights was a clear step away from traditional Marxist-Leninist thinking and opened the door for such agreements as the 1992 and 1995 MOU's.<sup>27</sup>

The General Principles of the Civil Law of the People's Republic of China establishes that citizens and legal persons shall be entitled to authorship, issuance and publication of their works in accordance with the law. Patent rights were also extended to discoveries, inventions, and scientific or technological research. Furthermore, the applicable section grants protection by law to patent rights lawfully obtained by citizens and legal persons and to the exclusive use of trademarks obtained by these entities.<sup>28</sup>

However, these regulations are not particularly specific regarding intellectual property rights for foreign persons and entities.

According to the Civil Law, a legal person is an organization that has capacity for civil rights and assumes civil obligations. Legal per-

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— In the area of copyrights, Customs will enforce copyrights against infringing imports and exports in all cases in which the applicant for enforcement presents legal proof of copyright, which in the case of a national of a member of the Berne Convention For the Protection of Literary and Artistic Works, would be satisfied by a copyright registration certificate of that member country.

— In the area of trademarks, Customs enforces trademarks against infringing imports and exports in all cases in which the applicant for enforcement presents a "Trademark Registration Certificate" issued by the AIC or, in the case of unregistered marks, a claim of well-known status confirmed by the AIC.

*Id.*

26. China also enacted a copyright law in 1990. For a discussion of this law and its history see Yiping Yang, *The 1990 Copyright Law of the People's Republic of China*, 11 UCLA PAC. BASIN L.J. 260 (1993).

27. *Id.* at 266.

28. General Principles of the Civil Law of the People's Republic of China Chapter III. § III (1987), available in LEXIS-Nexis Library CHINALAW No. 346 (Civil Law).

sons must be established in accordance with the law, possess necessary property or finances, possess its own name and premises, and be able to independently bear civil liability.<sup>29</sup> The Civil Law applies these definitions to foreign legal persons as well.

The intellectual property protections are further implemented in relation to foreign individuals and legal persons in Chapter VIII of the Civil Law. This provision applies any international treaty concluded or acceded to by China to dealings with foreign entities within China. In absence of a treaty, the law may utilize international practice.<sup>30</sup> Now that there is some understanding of current Chinese regulations, it is necessary to briefly establish some of the principles of U.S. intellectual property protection in an international setting.

#### *D. Basic Principles of U.S. Intellectual Property Rights on an International Level*

A clear understanding of the necessity for international intellectual property rights protection for U.S. trade must be initiated before discussing the basic principles of intellectual property rights. Chinese piracy of U.S. goods have been reported to be a \$1 billion-plus loss to U.S. businesses.<sup>31</sup> U.S. computer corporation Microsoft has reportedly lost up to \$30 million due to rampant piracy in China.<sup>32</sup> Furthermore, approximately 25% of U.S. exports consist of intellectual property.<sup>33</sup>

The U.S. Constitution is the primary source for patent rights in the United States. Congress has the power to "promote the progress of science and useful arts" by granting the creator of a work exclusive rights to the work for a period of time.<sup>34</sup> The U.S. also relies on the principles contained in the Berne Convention as ratified by the Congress in 1988. However, the Berne Convention is not a self-executing treaty in the U.S.<sup>35</sup>

The U.S. has established basic principles of protection through the U.S. International Trade Commission and the Omnibus Trade and Competitiveness Act § 1342. This section eliminated the economic injury

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29. See *id.* § 1 (art. 37).

30. *Id.* Chapter VIII (art. 142).

31. See Tony Munroe, *Action Aside, Chinese Intellectual Property Hasn't Slowed*, WASH. TIMES, Aug. 31, 1995, at B7.

32. See *Chinese Composers Sue Matsushita on Copyright*, ASIAN-PACIFIC NEWS, Mar. 28, 1995, at 2.

33. John T. Masterson, *Protection of Intellectual Property Rights in International Transactions*, 863 PLI Corp. 333 (Oct. 1994).

34. "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." U.S. CONST. art. I, § 8, cl. 8.

35. Berne Convention Implementation Act of 1988, Pub.L.No. 100-568 § 2 (1988).

requirement when infringement of U.S. patents, trademarks and copyrights were involved. It also eliminated the Section 337 requirement that the domestic industry be "efficiently and economically operated."<sup>36</sup> Furthermore, the USTR is authorized under the "Special 301" provision to designate nations infringing on U.S. intellectual property rights as "priority foreign countries."<sup>37</sup> The USTR must identify, by April 30 of each year, countries that are not providing adequate protection of intellectual property rights and that are not providing fair access to markets under the Omnibus Trade Act § 1303.<sup>38</sup>

#### IV. IMPACT ON CHINESE-U.S. TRADE RELATIONS BY THE 1995 MOU

Now that the 1992 and 1995 MOU's have been discussed and some of the underlying Chinese laws and U.S. principles on the protection of intellectual property have been examined, this article turns to a discussion of the impact the 1995 MOU has, and will possibly continue to have, on the U.S.-Chinese trade relationship. This section will begin with an analysis of the Chinese reaction to the agreement and then address the U.S. reaction.

##### *A. Chinese reaction to the 1995 Agreement Regarding Intellectual Property Rights*

China was optimistic about the intellectual property talks that led to the agreement on February 26, 1995. Shen Guofang, China's Foreign Ministry spokesman, expressed China's desire to resolve the problems with piracy and infringements of intellectual property in China. However, this optimism could be due in part to threatened "Special 301" sanctions that were to be imposed if no agreement could be reached in February, 1995.<sup>39</sup>

China's Trade Minister Wu Yi halted the potential U.S. tariffs by agreeing to and signing the 1995 MOU with USTR Michael Kantor. The agreement signifies a chance for improved trade relations between China and the U.S. Furthermore, China expects that their compromise will bring them U.S. support for China's entry to the World Trade Organization (WTO), especially since USTR Kantor agreed to soften the U.S. opposition to China's entry as a member of the WTO.<sup>40</sup>

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36. See Masterson, *supra* note 33, at 342.

37. See generally 1992 MOU, *supra* note 13, at 676.

38. Masterson, *supra* note 33, at 342.

39. *China Optimistic on Intellectual Property Rights Talks*, JAPAN ECONOMIC NEWSWIRE, Jan. 12, 1995, at 1, available in LEXIS, Nexis Library, JAPANNEWS File.

40. Lincoln Kaye, *Dull But Sharp: Deputies Rattle Their Rubber Stamps*, FAR E. ECON. REV. 20, Mar. 23, 1995.

There is much for China to gain from the 1995 MOU. Chinese law will be strengthened in the hopes that it will be able to enforce intellectual property rights more efficiently and with greater effectiveness. Trading between China and the U.S. will most likely expand now that the U.S. has protective measures in China and has ended "Special 301" investigations of China.<sup>41</sup> In addition to these benefits, China will also receive greater protection for Chinese intellectual property.

One example of improved protection for Chinese intellectual property rights is a lawsuit filed in March of 1995 against the Japanese company Matsushita Electric Industrial Inc. by two Chinese composers. A composer, Zang Tianshuo, and a lyricist, Huang Xiaomao, are suing Matsushita for alleged violations of intellectual property rights. They contend that their song "Praying Heart" was illegally put onto a karaoke tape by Matsushita. The case has been brought before the Beijing Intellectual Property Rights Court.<sup>42</sup>

This is not the only recent case to be brought in a Chinese court regarding intellectual property rights. A Beijing court approved a 1 million renminbi (U.S. \$120,000) award in favor of a plaintiff who sued a Chinese company for patent infringement of a water-purifier.<sup>43</sup> In May of 1995, the Chinese court ordered repayment of U.S.\$27,360 to Walt Disney Corp. by three local publishers for the illegal use of Disney cartoon characters. Lastly, the court granted a copyright settlement in favor of publishers Prentice Hall and Harcourt Brace in their suit against Anhui Science and Technology Press.<sup>44</sup>

While China has apparently improved its protection of intellectual property rights as a result of the 1995 MOU, just how far have the improvements met with American approval? The U.S. has been experiencing many problems with piracy in China.<sup>45</sup> What has been the American reaction to the 1995 MOU?

### *B. U.S. Reaction to the 1995 Agreement Regarding Intellectual Property Rights*

According to President Clinton, U.S. policy in relation to China was clearly met by the 1995 MOU. It established provisions for enforcement of intellectual property rights within China and acquired Chinese guarantees that piracy would be cracked down on in order to allow more access of U.S. goods to the Chinese market. The agreement

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41. See generally 1992 MOU, *supra* note 13, at 676.

42. *Chinese Composers Sue Matsushita on Copyright*, ASIAN PACIFIC NEWS, Mar. 28, 1995, at 2.

43. Henny Sender, *See You In Court: In China, Some Newfound Respect For Copyrights*, FAR E. ECON. REV. 80, June 22, 1995, at 1.

44. *Id.*

45. See discussion *infra*, Part III.D.

could mean that more U.S. jobs will be created or saved as a result of destroying piracy and manufacturing of illegal copies of intellectual property.<sup>46</sup>

The U.S. was able to force China to accede to the 1995 MOU primarily due to an estimated \$1.1 billion of sanctions under the "Special 301" provisions.<sup>47</sup> USTR Michael Kantor has stated that the agreement would have an "enormous impact" on the \$30 billion trade deficit the U.S. has with China.<sup>48</sup> Furthermore, the U.S. lost an estimated \$1 billion in computer software due to pirating in 1994. The 1995 MOU will strengthen Chinese regulations that will protect U.S. imports and hopefully reduce the amount of pirating in China. However, there is no guarantee that the Chinese government will be able to efficiently reduce or deter the amount of pirating in China.<sup>49</sup>

There is some skepticism that the Chinese Working Conference<sup>50</sup> will be able to sufficiently crack down on Chinese piracy. A Senior U.S. Official involved in the discussions on the 1995 MOU commented, "it's great to have a good piece of paper; it's another thing to see it implemented."<sup>51</sup> Chinese piracy continues fairly unabated as is apparent from massive quantities of pirated goods showing up in U.S. ports. Furthermore, a reported 1.89 million CDs, 752,000 video and audio cassettes, 37,000 software programs and 450,000 published works have been seized by Chinese officials.<sup>52</sup> Additionally, Eric Smith, president of the International Intellectual Property Alliance, estimated that 28 to 35 Chinese plants continue to manufacture counterfeit CDs. U.S. officials also reported that counterfeit copies of Microsoft's Windows 95 were available in China before the program was even officially released.<sup>53</sup>

Although China has made some advances toward meeting the requirements of the 1995 MOU, it still seems the country has not progressed far enough. With some concern over whether China will fulfill its obligation, what implication does the 1995 MOU have on regional trade as a whole?

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46. See President Bill Clinton, Statement by the President on China Intellectual Property Accord, WHITE HOUSE PRESS RELEASE, Feb. 26, 1995.

47. See generally 1992 MOU, *supra* note 4, at 676.

48. Lincoln Kaye, *Trading Rights: Beijing Exacts a High Price For Copyright Accord*, FAR E. ECON. REV., Mar. 9, 1995, at 16.

49. See *id.*

50. See *supra* Part III.B.

51. See Munroe, *supra* note 31.

52. See *id.*

53. See *id.*

## V. IMPLICATIONS OF THE CHINA-U.S. 1995 MOU ON REGIONAL TRADE

Due to the increasing interest and international involvement in the growing Chinese market, regional trade will be affected by the 1995 MOU. European Union Vice President of the European Commission, Sir Leon Brittan, confirmed in the April 1995 talks with the Chinese government that China has formally stated that the February 26, 1995 agreement on intellectual property rights between China and the U.S. will also be applied to European Union citizens. By doing this, China can gain favors on an international scale which will be effective in improving China's trade worldwide.<sup>54</sup> Furthermore, Commissioner Brittan stated that "the European Commission is prepared to increase significantly the level of technical assistance . . . including assistance for personnel training and documentation in the intellectual property field."<sup>55</sup> In April, China reassured the EU that Europe would be afforded the same protection in the area of intellectual property rights as the U.S.<sup>56</sup> Commissioner Brittan issued a statement declaring that there were "clear assurances given to me that China will continue to grant equal treatment to its partners in the future, as in the past."<sup>57</sup>

China needs support for entry into the WTO due to Chinese withdrawal from the General Agreement on Tariffs and Trade (GATT) in 1949. The EU Commission wants China in the WTO, but still has concerns regarding China's internal barriers to trade and the Chinese unwillingness to adhere to minimum rules of trade etiquette.<sup>58</sup> The Commission spokesman questioned whether China would enforce the pact stating, "The problem with intellectual property in China is one of implementation, rather than what's on paper."<sup>59</sup>

The EU Commissioner further asserted that for China to improve its chances of joining the WTO and strengthening other economic agreements, such as the 1995 MOU, it needs to increase China's internal economic reforms, not grant concessions. The U.S. seems to agree on this point in light of the provisions in the 1995 MOU that establish more protection for intellectual property within China. The 1995 MOU will help China's attempts to gain access to the WTO by illustrating the

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54. See Robert Flint, *EU Commissioner Says China Wants European Involvement*, ASIAN WALL ST. J., Apr. 24, 1995, at 20.

55. *Id.*

56. *China to Treat E.U. Same as U.S. On Intellectual Property*, DOW JONES NEWS SERVICE, Apr. 19, 1995, at 1.

57. *Id.*

58. *Trade and Politics: EU Hails U.S.-China Pact On Intellectual Property*, THE WALL ST. J. EUR., Feb. 28, 1995, at 2.

59. *Id.*

Chinese government's willingness to make an effort at improving economic relations on an international level.<sup>60</sup>

Furthermore, China's Foreign Ministry spokesman Shen Guofang stated that the U.S.-China agreement will apply to all of China's economic ties. He further asserted that the principles of the agreement are beneficial to economic trade between China and other nations. China apparently wants to apply the 1995 MOU's principles on a wide scale in order to promote its entry to the WTO. Another interesting point to consider is that the talks held in February resulting in the U.S.-China accord were, to a large degree, due to threats by the U.S. that China would be placed on the priority list of "Special 301" trade sanctions. China is definitely trying to improve international economic relations by applying the recent agreement with the U.S. to all of their trading partners. This should result in favorable reactions from those nations who may also be experiencing problems with piracy and copyright infringements in China.<sup>61</sup>

China seems to be enforcing the 1995 MOU provisions against Japan. The Chinese courts, as of March 24, 1995, have become involved in hearing a suit against Matsushita Inc.<sup>62</sup> Whether China will continue to enforce its intellectual property laws and maintain the obligations set forth in the 1995 MOU is still a matter of conjecture. However, Deputy U.S. Trade Representative Charlene Barshefsky warned China that their willingness to respect the 1995 MOU would be used as a litmus test for future agreements.<sup>63</sup> She also expressed some concern that although China had made moderate progress in cracking down on pirated goods, there has still been no significant diminution of piracy in China.<sup>64</sup>

## VI. 1996 DEVELOPMENTS CONCERNING THE MOU

Within the last year many problems have developed with attempts to enforce the 1995 MOU. In February of 1996, Trade Representative Kantor had not yet made a decision on enforcement. Kantor reportedly was concerned that China was not living up to their part of the agreement and was considering the sanction targeting of certain Chinese products as a way to enforce the agreement.<sup>65</sup> National Economic

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60. See generally, David Armstrong, *The Promise and Peril of Trading With China Oakland Conference Draws a Big Turnout*, S.F. EXAM., June 25, 1996, at C1.

61. Chinese Composers, *supra* note 32, at 2.

62. *Id.*

63. Francis Curta, *US Issues New Warning to China On Respect For Intellectual Property*, AGENCE FR.-PRESSE, Nov. 29, 1995, available in 1995 WL 11477990.

64. *Id.*

65. Kantor: *Clinton Undecided On How to Enforce China Trade Pact*, DOW JONES NEWS SERVICE, Feb. 21, 1996.

Council Chairwoman Laura D'Andrea Tyson also reaffirmed that the U.S. is committed to enforcing the agreement with China and that U.S. officials would not "sit back idly if the agreement is not abided by."<sup>66</sup>

Enforcement has remained a vital issue to the MOU. While U.S. trade officials have asserted that the U.S. would enforce the pact, actually getting it enforced has been another issue entirely. In March of 1996, plans were made for Deputy U.S. Trade Rep. Charlene Barshefsky to visit China to discuss alleged continuation of Chinese intellectual property rights violations. While this latest round of talks may yield positive results, the question remains whether they will actually meet with success in bringing an end to Chinese piracy.<sup>67</sup>

## VII. CONCLUSION

Although China and the U.S. are hopeful that this agreement will curtail rampant piracy and improve their trading relationship, it seems that, at present, piracy persists at an alarming rate in China. China may not have the internal structure necessary to effectively curb production of counterfeit intellectual property and it appears unlikely that the provisions of the 1995 MOU on intellectual property rights enforcement in China will have an overwhelming effect. The provisions have been somewhat effective at improving Chinese crack down on pirated goods, but so far no substantial result has been noticed.

The U.S. is still burdened with trying to keep China accountable to the agreement. China has taken steps to implement U.S. demands on curbing piracy,<sup>68</sup> but has done so reluctantly and with much trepidation. It appears that the only real enforcement technique available to the U.S. is to threaten trade sanctions in order to force China's compliance with the 1995 MOU.<sup>69</sup> While this method has yielded some success, it is not terribly effective in solving the overall problem of piracy within China. Furthermore, this method has brought China and the U.S. close to a trade war which is one of the problems the 1995 MOU sought to eliminate.<sup>70</sup>

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66. Tyson: *U.S. to Enforce China Intellectual Property Pact*, CAP. MKT. REP., Mar. 6, 1996.

67. *U.S.'s Barshefsky to Visit China First Week In April*, AFX NEWS, Mar. 14, 1996.

68. See Munroe, *supra* note 31.

69. See generally, Joe McDonald, *U.S., China Close New Anti-Piracy Deal*, GREENSBORO NEWS & RECORD, June 18, 1996, available in WESTLAW, ALLNEWS database at 1996 WL 5774316. *U.S., China Optimistic As Talks Start*, WASH. POST, July 7, 1996., available in WESTLAW, ALLNEWS database at 1996 WL 10719856.

70. See generally, William P. Alford, *A Piracy Deal Doesn't Make a China Policy*, ASIAN WALL ST. J., July 24, 1996, available in WESTLAW, ALLNEWS database at 1996 WL-WSJA 10218785.

It seems unlikely that the U.S. will forego any involvement in the Chinese market. At present, China's market is too large and viable to ignore. U.S. interests will continue as long as there is a large trade deficit with China and the Chinese market steadily grows. The 1995 MOU will most likely have some effect on increasing U.S. trade by reducing piracy in China to some degree and by improving intellectual property rights for U.S. goods in China.<sup>71</sup> Although this agreement may not be as effectual as hoped, it appears to be a step in the right direction and can lead to an eventual resolution to U.S. trade problems with China.

On an international level, the 1995 MOU is a milestone document particularly because of China's intention to apply it to all of their trading partners.<sup>72</sup> Primarily due to EU interest, this agreement could result in a multilateral, or possibly a worldwide, treaty on intellectual property rights. It is very likely that the 1995 MOU will not remain a bilateral agreement. In addition to the possibility of a new multilateral agreement or formation of an intellectual property rights trading bloc, this agreement could become an internationally recognized custom. If enough trading partners to China become involved with China's enforcement of intellectual property rights, an international custom on the protection of intellectual property could be recognized.

The 1995 MOU holds many possibilities, but ultimately the burden for maintaining the agreement is on China since the agreement focuses on reinforcing and improving China's internal enforcement of intellectual property rights.<sup>73</sup> What needs to be examined is whether China is fishing with a straight or curved hook. As Chiang Tai Gung knew, only those fish willing to be caught are taken.

*Frank Prohaska V*

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71. See generally, Jeff Cole, Robert S. Greenberger & Joseph Kahn, *China Offers to Finalize \$4 Billion Order For Boeing, McDonnell Douglas Planes*, WALL ST.J., March 14, 1996, at A3, available in WESTLAW, ALLNEWS database at 1996 WL-WSJ 3094693; *China Insists It Didn't Give In To U.S. On Copyright Piracy*, DOW JONES ASIAN EQUITIES REP., June 18, 1996, available in WESTLAW, FARNEWS database; Simon Fluendy, *Officials Relieved At Striking of IPR Deal*, S. CHINA MORNING POST, June 18, 1996, at 1, available in WESTLAW, ALLNEWS database at 1996 WL 3760220.

72. Chinese Composers, *supra* note 32, at 2.

73. See generally 1995 MOU, *supra* note 2.

