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# The Emperor Is Far Away: China's Enforcement of Intellectual Property Rights Protection, 1986–2006

Joseph A. Massey\*

“Déjà vu all over again.” Yogi Berra’s classic remark seems particularly apt when discussing the status of intellectual property rights (“IPR”) protection in China. It has been twenty years since, as newly appointed Assistant US Trade Representative (“USTR”) for Japan and China, I set out with colleagues from USTR and other US government agencies on a six-year marathon series of negotiations with China on IPR and market access. Yet in the surveys conducted over the past several years by the American Chambers of Commerce in Beijing and Shanghai and by the US–China Business Council, US firms say that the biggest problems they face in China today are much the same as the complaints they raised in 1986, namely inadequate protection or enforcement of IPR<sup>1</sup>—copyrights, patents, trademarks and trade secrets.

There is, however, an important difference between the situation in 1986 and that of today, which is neatly captured in a classic Chinese phrase, “The mountains are high and the emperor is far away.”

In 1986, China’s problems in IPR stemmed directly from the policies, laws, and conduct of the national government in Beijing. There was little legal protection for intellectual property. The existing trademark law was weak and routinely flouted. The patent law, enacted only the year before our talks began in 1985, provided no product patent protection for chemicals and

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<sup>1</sup> See, for example, American Chamber of Commerce in Shanghai, *2004 White Paper on American Business in China: Intellectual Property Rights*, available online at <<http://www.amcham-shanghai.org/AmChamPortal/MCMS/Presentation/Publication/WhitePaper/WhitePaperDetail.aspx?Guid={F18D0B0F-225C-4133-86E9-E34EDAFCD3A8}>> (visited Apr 22, 2006) (stating that widespread infringement of IPR continues across a variety of products and technologies primarily attributable to the lack of an effective Chinese enforcement system).

pharmaceuticals.<sup>2</sup> Most importantly, there was no copyright law at all, and the central government itself was the major pirate of US software. Government ministries, particularly the Ministry of Chemical Industries and the Ministry of Electronics and Machine Building, routinely—and legally, since there was no law to bar it—copied vast amounts of foreign software without compensation and distributed the copies widely to their client state-owned enterprises.<sup>3</sup>

Today, after four bilateral US–China agreements on IPR protection (1989,<sup>4</sup> 1992,<sup>5</sup> 1995,<sup>6</sup> and 1996<sup>7</sup>) and China’s accession to the World Trade Organization (“WTO”), piracy in China is no longer primarily the result of the Beijing government’s own actions. Rather, the major continuing issue has been Beijing’s failure to get its laws and international obligations adequately and effectively enforced. Chinese provincial authorities, “far away over the mountains,” benefit

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<sup>2</sup> For China’s current patent law provisions, see State Intellectual Property Office of the People’s Republic of China, *Patent Law of the People’s Republic of China*, available online at <[http://www.sipo.gov.cn/sipo\\_English/flfg/zlflfg/t20020327\\_33872.htm](http://www.sipo.gov.cn/sipo_English/flfg/zlflfg/t20020327_33872.htm)> (visited Apr 22, 2006).

<sup>3</sup> For China’s current copyright law provisions, see State Intellectual Property Office of the People’s Republic of China, *Copyright Law of the People’s Republic of China*, available online at <[http://www.sipo.gov.cn/sipo%5FEnglish/flfg/xgflfg/t20020416\\_34754.htm](http://www.sipo.gov.cn/sipo%5FEnglish/flfg/xgflfg/t20020416_34754.htm)> (visited Apr 22, 2006).

<sup>4</sup> The May 1989 US–China Memorandum of Understanding on Enactment and Scope of P.R.C. Copyright Law stipulates that Chinese copyright legislation will include computer programs as a specific category and expands patent protection without specifying industries or time limits. For a chronology of China’s intellectual property protection See Cheng-China Huang, *A Brief Chronology of China’s Intellectual Property Protection*, available online at <<http://www.american.edu/ted/hpages/ipr/cheng.htm>> (visited Apr 22, 2006).

<sup>5</sup> The January 1992 US–China Memorandum of Understanding on Intellectual Property Rights provides that China will extend copyright protection to foreign owners of software, books, films, sound recordings, and other media previously unprotected. Memorandum of Understanding between the United States of America and the People’s Republic of China (1992), TIAS No 12,036.

<sup>6</sup> In February 1995, the USTR executed an agreement stating that the US approved of China’s “Chinese Action Plan for Effective Protection and Enforcement of Intellectual Property Rights.” China–United States: Agreement Regarding Intellectual Property Rights (1995), 34 ILM 881. In this agreement, China promised to significantly reduce piracy; improve enforcement at its national borders; and open its markets for US computer software, sound recordings, and movies.

<sup>7</sup> In June 1996, the US and China reached an agreement on the protection of intellectual property. The US agreed not to impose sanctions on China for IPR violations and its failure to effectively enforce its February 1995 commitments. US consent to lift threatened sanctions resulted from China’s promise to: (1) close specific CD plants known to produce copies of CDs in violation of IPR; (2) take more high-level national action against pirates at all levels of the production-distribution chain; (3) forbid the importation of CD production equipment unless approved by three Chinese government agencies; and (4) continue to abide by the February 1995 agreement allowing US sound recording and movie companies to enter into joint ventures with Chinese companies. People’s Republic of China Implementation of the 1995 Intellectual Property Rights Agreement—1996, available online at <[http://tcc.export.gov/Trade\\_Agreements/All\\_Trade\\_Agreements/exp\\_005361.asp](http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005361.asp)> (visited Apr 22, 2006).

financially or politically from the proceeds of piracy or, instead, turn a blind eye to powerful local interests that do. At the same time, the judicial process often fails to impose deterrent penalties against piracy.

In 1986, the primary objective of US negotiators was to get Beijing to take the necessary first step: to establish the legal foundations for a Chinese IPR regime consistent with international norms. This included enacting or strengthening domestic laws (and their implementing regulations) and acceding to major international intellectual property agreements such as the Berne Copyright<sup>8</sup> and Geneva Phonograms Conventions.<sup>9</sup> To achieve this required strong and sustained pressure from the US government. Five issues in the negotiating environment in the late 1980's contributed to that pressure.

First was the escalating friction with Japan over competition in high technology industries. The US government was acutely concerned that China not be a repeat of the US experience with Japan. Parts of Japan's IPR regime played supporting roles in tilting the competitive playing field, inducing or in some cases compelling the transfer to Japanese rivals of key US technologies. These included the government's mandated cap on royalty payments, compulsory licensing policies, and patent procedures that enabled Japanese firms to surround foreign rivals' core patents with peripheral patents as a means to compel cross-licensing. The result was all too often to deny the US or other foreign firms the competitive advantage in the Japanese market that they would otherwise enjoy based on their technology.

Second, in the latter half of the 1980's the US began to run a rapidly increasing trade deficit with China, second only to that with Japan. At the same time, US industry losses from Chinese intellectual property piracy mounted ominously, and access to the Chinese market remained difficult, further reinforcing the concern that China might become a new threat to American business and technology.

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<sup>8</sup> The Berne Convention for the Protection of Literary and Artistic Works, 25 UST 1341 (1971), established the recognition of copyrights between sovereign nations. Each party to the Convention must recognize and protect the copyright on works of authors from other signatory countries in the same way it protects the copyright of its own nationals. *Id* at art 1. The Berne Convention entered into force for China on October 15, 1992. Robert Haibin Hu, *Guide to China Copyright Law Studies* 19 (Hein 2000).

<sup>9</sup> The Geneva Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of Their Phonograms obligates each contracting state to protect producers of phonograms who are nationals of other contracting states against the making of duplicates without the consent of the producer and to restrict the importation of such duplicates. 25 UST 309 (1971). "Phonogram" means any exclusively aural fixation of sounds of a performance or of other sounds. *Id* at art 1(a). China became party to the Convention in April 1993. Hu, *Guide to China Copyright Law Studies* at 20 (cited in note 8).

Congress wielded two big sticks that accounted for two other sources of pressure. The George H.W. Bush Administration (“Bush Administration”) needed to make progress in the IPR and market access negotiations with China if it was to convince Congress to give its annual renewal of China’s Most Favored Nation (“MFN”) status.<sup>10</sup> This, in turn, gave the US negotiators useful leverage at the negotiating table.

The second Congressional lever was the Omnibus Trade and Competitiveness Act of 1988<sup>11</sup> with its Super 301 and Special 301 provisions. These provisions were designed to compel the Bush Administration to threaten trade retaliation against designated “priority foreign countries,” whose protectionist trade policies or inadequate IPR protection were deemed most injurious to US commerce.<sup>12</sup> In 1989, China was among the first to be selected for Super 301 negotiations over market access and for Special 301 negotiations on IPR. Initially, the Bush Administration avoided designating China (or any other trading partner) a “priority foreign country” but did place China on the so-called “priority watch list” of countries deemed of highest concern.

China’s desire to avoid the “priority foreign country” designation and to have the “priority watch” designation removed induced Beijing to move faster and farther than before to meet US requests. On the IPR front, Beijing committed in a May 1989 Memorandum of Understanding with the United States<sup>13</sup> to submit a copyright bill to the National People’s Congress, which became law in 1990.

A fifth factor was the US response to Beijing’s June 4, 1989 bloody crackdown on the demonstrators in Tiananmen Square. Tiananmen stilled the voices within the interagency process in Washington who had been calling, on “geopolitical” or other grounds, for the negotiators to moderate trade and IPR demands on China and accept lesser Chinese concessions. At the same time, however, the US decided not to press for criminal penalties for IPR piracy, a decision that (although appropriate at a time of severe political repression in China) would lead to problems in IPR enforcement later on.

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<sup>10</sup> MFN status grants to the receiving nation the low tariff levels and other trade advantages that WTO members normally grant to other WTO members. In May 2000 the US House of Representatives voted to grant China permanent MFN or Normal Trade Relations (NTR) status. HR 4444, 106th Cong, 2d Sess (May 24, 2000). On China’s MFN status, see generally Kerry Dumbaugh, Congressional Research Service Report for Congress, *RS20691: Voting on NTR for China Again in 2001, and Past Congressional Decisions*, available online at <<http://cnie.org/NLE/CRSreports/Economics/econ-87.cfm>> (visited Apr 22, 2006).

<sup>11</sup> Pub L No 100-418, 102 Stat 1107 (1988), codified as amended at 19 USC §§ 2901 et seq.

<sup>12</sup> Id at § 1303.

<sup>13</sup> US–China Memorandum of Understanding on Enactment and Scope of P.R.C. Copyright Law (cited in note 4).

The talks, suspended for a time in 1989 and 1990 as part of the US sanctions, stalled thereafter, and on May 26, 1991, the Bush Administration for the first time designated China as a “priority foreign country.”

Six further rounds of intensive and at times contentious talks led to the first full bilateral IPR agreement in January 1992,<sup>14</sup> in which the US removed the “priority foreign country” designation<sup>15</sup> and American IPR organizations publicly supported renewal of MFN status for China. In return, China committed to provide improved protection for US IPR by amending the copyright law to provide strong protection for published works and, inter alia, extending coverage to software and sound recordings;<sup>16</sup> joining the Berne and Geneva Conventions;<sup>17</sup> providing patent protection for chemical and pharmaceutical products;<sup>18</sup> restricting the use of compulsory licensing;<sup>19</sup> and committing to adopt trade secrets legislation.<sup>20</sup>

In the January 1992 agreement, China made one further commitment that proved less substantial: to adopt effective measures to enforce intellectual property rights both in the domestic Chinese market and at China’s borders.<sup>21</sup> That China would fail to enforce its IPR laws and commitments was foreshadowed almost immediately after the agreement when a senior USTR official visiting Guangdong was told by a senior provincial government leader that “Beijing’s agreement” with the US was “mei you guanxi” (irrelevant) in that southern province. So far as Guangdong was concerned, the mountains were high and the emperor in Beijing was far away. It was not surprising, then, that despite the 1992 agreement, US firms’ losses to piracy continued to escalate alarmingly, particularly in the areas of software and recordings.

The US responded by threatening \$3 billion in punitive tariffs for China’s failure to honor its commitment to IPR enforcement. More contentious negotiations followed, leading to two further bilateral agreements in February 1995<sup>22</sup> and June 1996.<sup>23</sup> China committed to strengthen its enforcement

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<sup>14</sup> Memorandum of Understanding between the United States of America and the People’s Republic of China (cited in note 5).

<sup>15</sup> *Id.* at art 7.

<sup>16</sup> *Id.* at art 3 ¶¶ 4, 6.

<sup>17</sup> *Id.* at art 3 ¶¶ 1–2.

<sup>18</sup> *Id.* at art 1 ¶ 1.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at art 4.

<sup>21</sup> *Id.* at art 5.

<sup>22</sup> China–United States: Agreement Regarding Intellectual Property Rights (cited in note 6).

measures, including the establishment in each province of an IPR Conference Committee headed by a vice governor to coordinate all agencies involved in enforcement, and the creation of parallel local IPR committees including police and other agencies. In addition, IPR enforcement was made part of China's nationwide anti-crime campaign and criminal penalties were added to the civil penalties already on the books. Chinese lawyers and judges were provided with training in IPR, including programs in the US sponsored by the US government with the cooperation of American companies and IPR groups.

With its accession to the WTO in December 2001, China made further changes to its patent, trademark and copyright laws and regulations, and issued new implementing rules. The changes constituted significant progress toward bringing China's IPR regime into compliance with the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS").<sup>24</sup>

The problem of IPR protection in China today is thus in one crucial respect very different from that which we faced in 1986: central government leaders and their policies no longer ignore or promote the infringement of intellectual property. They appear to have come to recognize the necessity of enforcing the laws protecting those rights and have put in place a substantial administrative apparatus for that purpose.

For a time last year it appeared as if the central government was going to put its own policies back at the center of the IPR conflict with the US. This time it was not government piracy but government procurement that was at issue. Beijing had drafted proposed government procurement regulations for software that would define software suppliers to Chinese government agencies as domestic, non-domestic or preferred non-domestic. Special approval, involving difficult and onerous procedures, would be required for purchases of non-domestic products. To qualify as a preferred non-domestic supplier, foreign software firms would be required to meet stringent conditions including the transfer of core software technology to China. Fortunately, after strong objections from the US and on the eve of commencing talks related to China's accession to the government procurement code, Beijing shelved the proposed regulations, for the time being at least.

It is to be hoped that the regulations remain on the shelf permanently and that US firms are not compelled to sacrifice their IPR protection in order to gain

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<sup>23</sup> US-China agreement in which the US agreed not to impose sanctions on China for IPR violations and failure to effectively enforce its February 1995 commitments in exchange for renewed and specific Chinese commitments to protect IPR (cited in note 7).

<sup>24</sup> TRIPS is an international treaty which sets down minimum standards for most forms of intellectual property regulation that all member countries of the WTO must abide by. Marrakesh Agreement Establishing the World Trade Organization: Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights (1994), 33 ILM 1197.

access to the Chinese government software market—a major market that, as a result of long years of prior negotiations, is no longer a haven for pirates.

In a broader sense, we have come nearly full circle. Once, as Vice Minister of Foreign Economic Relations and Trade, Madame Wu Yi was the lead Chinese negotiator charged with fending off US pressures against the Chinese government's policies promoting widespread and wholesale infringements of IPR. Now, as Vice Premier and head of the State Council Leading Group on Intellectual Property, she still faces US pressures, including opposition to the proposed procurement regulations. At the same time, however, she is also charged with coordinating the enforcement of existing Chinese laws aimed at promoting and protecting IPR across all of China, "far away and over the mountains."

How well Vice Premier Wu succeeds in securing effective IPR enforcement in the provinces is likely to be determined by three things. The first is the degree to which central government policies themselves maintain the momentum for IPR protection and not, in an attempt to promote the domestic software industry, send an implicit message "across the mountains" that Beijing's own commitment to IPR has been a sham.

The second is the extent to which Beijing can compel Guangdong and the other provinces to accept that Beijing's laws are not "irrelevant" but are the law of the land that must be enforced. The provincial and local committees cannot become "Potemkin villages" mouthing lip service for IPR as piracy continues unabated.

Third, and in the long run perhaps most important, Chinese domestic companies must come to recognize that the enforcement of China's IPR laws serves their interests as well as those of their foreign rivals. That recognition seems to be gradually emerging, as an increasing number of Chinese firms develop their own technologies and, thus, seek protection against piracy under China's IPR laws or redress against infringers in Chinese courts. In an increasingly competitive and unified Chinese market, new interests are growing that look to the rules of the "Emperor" in Beijing for protection to keep the pirates, not the Emperor, far away. But, the pirates are still there and going strong.



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