

NOTE

USING THE CARROT, NOT THE STICK: STREAMING MEDIA AND CURBING DIGITAL PIRACY IN CHINA

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INTRODUCTION

Increased global access to high speed Internet has led to many benefits, such as increased economic activity and greater spread of information.¹ However, it has also proved very effective for spreading unauthorized copies of copyrighted material.² Digital piracy, especially of music, has been a persistent global problem for many years.³ Piracy is especially egregious in China, which reports piracy rates of nearly one hundred percent.⁴ Despite warnings from the US government and concerns among foreign investors, China has not done enough to combat and decrease these piracy levels.⁵ In the past decade, China began to adopt world intellectual property treaties and refine their copyright laws.⁶ And while recent developments are encouraging,⁷ there is much left to do to decrease piracy.

China's development of copyright law differs significantly from how Western cultures approach ownership rights in creative property.⁸ China's culture, stemming from Confucianism and later Communism, does not place the same emphasis on individual property and ownership rights as the United States and similar nations.⁹ As such, it has been difficult to introduce and

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¹ RONALD KIRK, U.S. TRADE REPRESENTATIVE, 2011 SPECIAL 301 REPORT 11 (2011) [hereinafter SPECIAL 301], *available at* <http://www.ustr.gov/about-us/press-office/reports-and-publications/2011/2011-special-301-report>.

² *Id.*

³ IFPI, DIGITAL MUSIC REPORT 2011 14 (2011) [hereinafter IFPI], *available at* www.ifpi.org/content/library/DMR2011.pdf.

⁴ *Id.* at 19. Piracy Rates are the percentage of goods pirated.

⁵ See SPECIAL 301, *supra* note 1, at 20; see also Brad Williams & Danielle Mihalkanin, *China's Special Campaign to Combat IPR Infringement*, CHINA BUS. REV., Oct.–Nov. 2011, at 43.

⁶ Jesse London, *China's Approaches to Intellectual Property Infringement on the Internet*, 38 RUTGERS L. REC. 1, 6 (2011).

⁷ *Id.* at 7, 11 (discussing two major cases against infringement); see *infra* Part IV.

⁸ See *infra* Parts I and II.

⁹ Charles W. L. Hill, *Digital piracy: Causes, consequences, and strategic responses*, ASIA PAC. J. MANAGE. 9, 12 (2007).

instill a Western notion of intellectual property rights (“IP rights”).¹⁰ China still views creative works as the State’s property and its people have difficulty respecting the rights of foreign works.¹¹ Because of this, the Chinese populous has a decreased moral barrier to piracy, and piracy is a cultural norm.¹²

Two foreign laws passed in 2009 may provide guidance as to China’s options for lowering its levels of infringing activities. Both the Intellectual Property Rights Enforcement Directive (“IPRED”) law passed in Sweden and the French *Haute Autorité Pour la Diffusion Des Œuvres et la Protection Des Droits Sur Internet*¹³ (“HADOPI”) law have succeeded in curbing piracy in their respective countries.¹⁴ Both laws deter piracy by increasing the likelihood of detecting an infringing user’s activity.¹⁵ China is under pressure to adopt more stringent laws against copyright enforcement, so implementing something similar to IPRED and HADOPI may be a good starting point, but it may not be enough. This Note argues that in addition to adopting more stringent laws, streaming media services like Hulu, Netflix, and Spotify should expand into the Chinese market, as historical Chinese views on IP rights will make users especially receptive to such services.

Parts I and II examine the origins of China’s current intellectual property system. Part III discusses China’s current laws covering copyright over the Internet. Parts IV, V, VI, and VII examine the methods used in China to enforce copyright violations and the problems and limitations such enforcement faces. Part VIII discusses the IPRED and HADOPI laws, their effectiveness, and the general motivations behind copyright infringement. This note concludes by addressing whether China should adopt laws similar to IPRED and HADOPI, and why greater penetration of streaming media services into the Chinese market is the best way to curb piracy.

I. HISTORY OF CHINESE COPYRIGHT LAW

Copyright started with the advent of the printing press.¹⁶ While this occurred most notably in Germany with the Guttenberg printing press in the fifteenth century, a similar method of type printing originated in China in the eleventh century.¹⁷ Around this time, China adopted a loose form of copyright

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*; See also LAIKWAN PANG, CREATIVITY AND ITS DISCONTENTS 100 (2012).

¹³ French for “law promoting the distribution and protection of creative works on the Internet.”

¹⁴ IFPI *supra* note 3, at 11, 18.

¹⁵ *Id.*

¹⁶ ZHENG CHENGSU, CHINESE INTELLECTUAL PROPERTY AND TECHNOLOGY TRANSFER LAW 86 (1987).

¹⁷ *Id.*

similar to what the Universal Copyright Convention uses.¹⁸ Local Chinese authorities would issue orders forbidding printing books except by the printing house that initially registered the right and would destroy copies of unauthorized printings.¹⁹ This form of copyright protection lasted until the early twentieth century.²⁰

In 1910, the Qing Dynasty's central government published the "first true Chinese copyright law."²¹ Though similar to most copyright laws in other countries, the *Author's Rights in the Great Qing Empire* included a registration requirement.²² This law did not last long because the Qing Dynasty was overthrown a year later.²³ China modified the 1910 law in 1915 and again in 1928, which lasted until the Communist Revolution in 1949.²⁴ Though China refused invitations to adopt the Berne Convention in 1913 and 1920, the 1928 law did provide copyright protection for foreign works, as long as they were registered in China and their countries protected Chinese authors.²⁵ Shortly after the People's Republic of China ("PRC") was established in 1949, the first National Publications Conference adopted, among other things, a short list of copyright rules.²⁶ In 1952, the General Office of Publication published a collection of rules governing editors and publishing houses.²⁷ During the 1950s and early 1960s, many publishing houses drafted their standard contracts based on these rules and their specificity prevented many disputes.²⁸

In the late 1970s, toward the end of Mao Zedong's regime, China became more concerned with Copyright protection in light of the new push toward

¹⁸ *Id.* (requiring the "copyright" to display the name of the printers, a notice of registration, and a restriction on reprinting without authorization).

¹⁹ *Id.*

²⁰ *Id.* at 87.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Gregory S. Kolton, *Copyright Law and the People's Courts in the People's Republic of China: A Review and Critique of China's Intellectual Property Courts*, 17 U. PA. J. INT'L ECON. L. 415, 416 (1996).

²⁵ CHENGSI, *supra* note 16, at 87. The Berne Convention, enacted in 1886, requires members to respect the copyrights created by authors of or first published in other member states. Berne Convention for the Protection of Literary and Artistic Works, Sept. 6, 1886, 1161 U.N.T.S. 3 [hereinafter Berne Convention]. It is "a multinational accord designed both to create reciprocal copyright protections among its member nations and to secure minimum standards of copyright protection for nationals of all such countries." Kolton, *supra* note 24, at 420.

²⁶ CHENGSI, *supra* note 16, at 88 (noting that the four rules were essentially: respect for copyright and publication; a record in the work of time, edition, author, and copies; interests to take account of in remuneration; and illegality of selling all rights of authorship).

²⁷ *Id.*

²⁸ *Id.*

modernization.²⁹ In 1979, China signed the Agreement on Trade Relations Between the United States of America and the PRC, seeking to protect United States Intellectual Property Rights, and the following year China joined the World Intellectual Property Organization (“WIPO”), the United Nations agency dedicated to promoting and protecting intellectual property.³⁰ The National People’s Congress (“NPC”) promulgated the first official copyright law in 1990.³¹ The law itself and the implementing regulations went into effect on June 1, 1991.³²

Despite having a formal copyright law then in place, China’s enforcement was sub-par and piracy remained rampant.³³ Under pressure from the United States to increase its copyright protection, China signed a Memorandum of Understanding (“MOU”) in 1992 regarding IP rights, and in accordance “signed the Berne Convention, ratified the *Geneva Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms* (which obligates contracting parties to protect producers of phonograms from unauthorized duplication and distribution of their works)³⁴ and amended the 1990 Copyright Law.”³⁵ Even after the MOU, United States copyright owners complained about losses from piracy.³⁶ In 1995 China created an “Action Plan” detailing enforcement improvements.³⁷ When complaints did not stop, China attempted to reaffirm its commitment to IP rights in 1996 by closing down multiple cinemas showing pirated films, along with factories and distribution centers that produced infringing compact disks.³⁸

In the late 1990s, China wanted to join the World Trade Organization, which would require it to sign the Trade Related Aspects of Intellectual Property Rights (“TRIPS”) treaty.³⁹ The TRIPS agreement requires all

²⁹ Kolton, *supra* note 24, at 416–17.

³⁰ Eric Priest, *The Future of Music and Film Piracy in China*, 21 BERKELEY TECH. L.J. 795, 806–07 (2006); *see also* *What is WIPO?*, WIPO, <http://www.wipo.int/about-wipo/en/> (last visited Apr. 9, 2012).

³¹ Priest, *supra* note 30, at 808.

³² Kolton, *supra* note 24, at 417.

³³ Priest, *supra* note 30, at 808.

³⁴ *Summary of the Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms (1971)*, WIPO, http://www.wipo.int/treaties/en/ip/phonograms/summary_phonograms.html (last visited Apr. 9, 2012).

³⁵ Priest, *supra* note 30, at 809.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*; *see also* Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131, 145, 148–49 (2001).

³⁹ Priest, *supra* note 30, at 810.

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signatories to adhere to a basic minimum standard of protection for IP rights.⁴⁰ In addition to requiring member states to comply with the Berne convention, TRIPS provides some guidelines for domestic enforcement and transnational dispute resolution.⁴¹ In order to become a signatory, China had to make major amendments to the 1990 Copyright Law, which it added in 2001.⁴² This new law created sixteen categories of enumerated rights, including distribution, reproduction, performance, and communication through information networks.⁴³ By adding the right to communicate through information networks (essentially, through the Internet), China arguably exceeded the TRIPS minimum requirements.⁴⁴ Additionally, weak criminal sanctions in the early 1990s did little to deter piracy, leading to a 1997 amendment designed to clarify and separate punishments for distribution and copying in an effort to increase the deterrent effects of the law.⁴⁵ In 2004, the Supreme People's Court issued a new interpretation of the Criminal Code, lowering the threshold for liability for infringement and introducing new penalties targeted at Internet piracy.⁴⁶ Most recently, in 2007, China entered the WIPO Copyright Treaty ("WCT") and the WIPO Performances and Phonograms Treaty ("WPPT"),⁴⁷ collectively known as the "Internet Treaties."⁴⁸ Under Chinese law, any treaty provisions that conflict with domestic law overrides the domestic law, meaning that these treaties are the supreme law of the land when it comes to intellectual property.⁴⁹

II. EARLY CHINESE ATTITUDES TOWARD IP RIGHTS.

Early Chinese law governing what we might now call intellectual property was more focused on sustaining imperial power than on protecting individuals' property interests.⁵⁰ For example, one of the earliest edicts regulating

⁴⁰ See *World Trade Organization, Overview: the TRIPS Agreement*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Feb. 18, 2013).

⁴¹ *Id.*

⁴² Priest, *supra* note 30, at 810.

⁴³ Zhonghua Renmin Gongheguo Zhu Zuo Quan Fa (中华人民共和国著作·法) [Copyright Law of the People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., Sep. 7, 1990, effective Oct. 27, 2001) (China) [hereinafter 2001 Copyright Law], available at http://www.wipo.int/wipolex/en/text.jsp?file_id=125980.

⁴⁴ Priest, *supra* note 30, at 811–12.

⁴⁵ *Id.* at 813.

⁴⁶ *Id.* at 814. China's general criminal law codification did not include punishment for copyright violations until 1997. *Id.*

⁴⁷ London, *supra* note 6, at 6.

⁴⁸ *WIPO Internet Treaties*, WIPO, http://www.wipo.int/copyright/en/activities/wct_wppt/wct_wppt.html (last visited Feb. 18, 2013).

⁴⁹ London, *supra* note 6, at 6.

⁵⁰ WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE* 16–17 (1995).

publication banned unauthorized reproduction of calendars and almanacs because limiting access to such materials maintained the emperor's claim that he was the link between human and natural events.⁵¹ Parts of the dynastic code prohibited copying symbols associated with the throne, and restricted reproducing government materials.⁵² Thus, these early laws attempted to control dissemination of ideas rather than create IP rights.⁵³ Efforts by printers, publishers, and other merchants to control their monopolies were to some extent rudimentary beginnings of China's IP rights, although the State only tolerated such efforts because they advanced its own objectives.⁵⁴ While state interest in early intellectual property was not unique to China, by around the seventeenth and eighteenth centuries, Europe began to believe that authors and inventors had rights in their works that were separate from any state interest.⁵⁵ China, however, continued to view intellectual property in terms of how controlling it could benefit the State's interest.⁵⁶

Although the State maintained strict control over materials deemed harmful or necessary only for official use, materials deemed helpful, such as classical works, or materials in which the state had no particular interest, were less regulated.⁵⁷ China did grant some protection to publishers, though such protection stemmed out of a sense of fairness and custom, not out of any rights creators had in their works.⁵⁸ The lack of explicit protection was a result of the Confucian concept of a "shared past." Because the Chinese emphasized interacting with the past (embodied by cultural works), it was improper for anyone other than the State to restrict access to its expression.⁵⁹ When it came to poetry and other literary works, China did not carry the same negative attitudes as the West toward replicating original works without assigning the credit due to the original author.⁶⁰ Instead, China regarded copying as a form of flattery, or proof of the work's importance.⁶¹

Economic and technological factors, such as late adoption of mass production, likely contributed to China's failure to develop IP rights along with

⁵¹ *Id.* at 13.

⁵² *Id.* at 17.

⁵³ *Id.*

⁵⁴ ALFORD, *supra* note 50, at 17. Early concern about copying focused mainly on preventing inaccuracies in orthodox works. See GUAN H. TANG, COPYRIGHT AND THE PUBLIC INTEREST IN CHINA 48 (2011) ("[P]rivate interest and rights in China were safeguarded only under the condition of satisfying the state's concern first . . .").

⁵⁵ ALFORD, *supra* note 50, at 18.

⁵⁶ *Id.*

⁵⁷ *Id.* at 24.

⁵⁸ *Id.* at 25.

⁵⁹ *Id.*

⁶⁰ *Id.* at 28.

⁶¹ *Id.* at 29.

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the rest of the world.⁶² However, China's Confucian beliefs are key to understanding China's treatment of intellectual property.⁶³ Although Confucianism is no longer widely practiced, its effects on Chinese culture are still apparent in the lax attitudes on piracy.⁶⁴ Confucian ideals held that everyone was bound by a set of relationships with reciprocal, though not necessarily equal, responsibilities.⁶⁵ Historically, a ruler was responsible for ensuring the spiritual and physical wellbeing of the people, who were expected to be loyal and productive in return.⁶⁶ The ruler played a paternalistic role and decided how best to nurture the populace, a position that required the ruler to determine what information to disseminate and what information to withhold in the interests of the people.⁶⁷

When the PRC was formed in October 1949, the Chinese began to look to the more accessible Soviet Union model of IP rights for guidance in their own laws.⁶⁸ The view that inventors and creators were engaged in a social activity drawing on collective knowledge, and thus belonging to society at large, resonated particularly well with the early-held Confucian ideals.⁶⁹ Both the Soviet Marxist ideals and the Confucian ideals saw creativity as a product of society at large, and thus did not feel a strong need for establishing private rights in the creator.⁷⁰ Both systems of thought also felt that controlling access to information was acceptable and necessary.⁷¹ These similarities between Marxism and Confucianism made an intellectual property system akin to the Soviet Union's much easier for the PRC to understand than a system embodying Western ideals.⁷²

This history helps explain why China's intellectual property laws remained stagnant for most of the twentieth century. Given that Confucianism and socialism deemphasized individual rights to property, there was initially no

⁶² Mass production, often seen as key in developing IP rights, did not occur as early in China as it did in the West, and even by the beginning of the nineteenth century only twenty percent of Chinese were literate, potentially decreasing interest in IP rights. *Id.* at 19.

⁶³ TANG, *supra* note 54, at 253; *see also* GORDON C. K. CHEUNG, *INTELLECTUAL PROPERTY RIGHTS IN CHINA* 20 (2009).

⁶⁴ *See* TANG *supra* note 54, at 47 (“[T]he sharing and copying of intellectual works have been regarded as necessary and honourable . . .”).

⁶⁵ ALFORD, *supra* note 50, at 19. The most important relationships were those between ruler and subject, father and son, and husband and wife. *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 23.

⁶⁸ *Id.* at 56.

⁶⁹ *Id.*

⁷⁰ *Id.* at 57.

⁷¹ *Id.*

⁷² *Id.* at 56.

strong need or desire to implement protection for creative works.⁷³ As these ideals were a large part of Chinese culture and society, they did not develop the same moral attitude toward creator's rights that the West did.⁷⁴ Lack of emphasis on, and belief in, creator's rights coupled with Confucian teachings that copying and imitation are desirable acts help explain the rampant piracy we see today.⁷⁵

III. CHINA, THE INTERNET, AND COPYRIGHT

Despite China's relatively recent access to the global Internet,⁷⁶ online piracy has quickly become a serious problem.⁷⁷ Many of China's recent changes and additions to its copyright laws have specifically targeted Internet piracy, largely in response to growing concerns over piracy rates.

Passed in 2006, "*Ordinance on the Protection of the Right to Network Dissemination of Information*" ("Information Regulation") attempts to explain the application of copyright law to Internet cases.⁷⁸ Article 2 explicitly states the requirement that anyone attempting to disseminate through information networks the "works, performances, or audio-visual recordings" of others, must first gain permission and pay remuneration to the original owners.⁷⁹ Article 4 permits copyright owners to apply "technical measures," commonly known as digital rights management ("DRM"), to protect copyrighted works, and prohibits unauthorized circumvention of such measures.⁸⁰ Article 6 lists eight circumstances in which dissemination without permission is acceptable,

⁷³ See *supra* Part II.

⁷⁴ Hill, *supra* note 9, at 12.

⁷⁵ See TANG, *supra* note 54, at 47, 48.

⁷⁶ The first Chinese global connection was established in 1994. IDG News Serv., *China celebrates 10 years of being connected to the Internet*, PCWORLD, http://www.pcworld.idg.com.au/article/128099/china_celebrates_10_years_being_connected_internet?pp=2&fp=2&fpid=1 (May 17, 2004).

⁷⁷ *Halting Online Copyright Violations*, CHINADAILY.COM, http://www.chinadaily.com.cn/english/doc/2005-04/04/content_430627.htm (last updated Apr. 4, 2004) ("Online copyright violations have been running rampant in the country in the recent years."); see also *Recording Industry Steps Up Campaign Against Internet Piracy In China*, IFPI.ORG, http://www.ifpi.org/content/section_news/20080204.html (Feb. 4, 2008) ("[M]ore than 99 per cent [sic] of all music files distributed in the country are pirate[d].").

⁷⁸ London, *supra* note 6, at 6.

⁷⁹ Xinxī Wǎngluò Chuánbō Quán Bǎohù Tiáolì (信息网络传播权保护条例) [Ordinance on the Protection of the Right to Network Dissemination of Information] (promulgated by St. Council, May 10, 2006, effective July 1, 2006) (China), *available at* <http://tradeinservices.mofcom.gov.cn/en/b/2006-05-18/7880.shtml>. Of course, this protection holds, "except where otherwise provided." *Id.*

⁸⁰ *Id.* Article 12 allows for circumvention of DRM in specific circumstances, but prohibits providing such methods to others. *Id.*

including when quotation is necessary to comment on a work; when only a small portion of a work is used for teaching or scientific research; when the State uses material within the reasonable scope of its duties; and when a published written work is provided to the blind without profit.⁸¹ Articles 13 through 17 deal specifically with the rights and duties of internet service providers (“ISP”), requiring in particular that an ISP provide contact information connected to suspected infringing “service objects,” and providing guidelines for requesting that infringing material be removed.⁸² Article 18 imposes civil liabilities, including possible fines of up to 100,000 RMB (approximately \$16,000 USD).⁸³ Articles 20 through 22 define when an ISP is not liable for compensation for infringement.⁸⁴ Article 23 imposes a requirement of at least recklessness on an ISP to find liability in hosting infringing material.⁸⁵ Despite the Information Regulation’s robust nature, these rulings are not the official law of the land and are only instructive in nature for lower courts.⁸⁶

In 1996, China also adopted the two World Intellectual Property Organization (“WIPO”) treaties commonly known as the “Internet Treaties,”⁸⁷ and formally entered into these treaties in 2007.⁸⁸ The WCT, a derivative of the Berne Convention,⁸⁹ contains three articles that have a particularly strong bearing on copyright protection over the Internet.⁹⁰ Article 8 grants creators the exclusive right to authorize communication of their works by “wired or wireless means,” including allowing the public to access these works in the time and place of their choosing.⁹¹ Articles 11 and 12 address DRM, requiring

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* Generally, the ISP’s services are automatic and do not alter any works stored or distributed on it.

⁸⁵ *Id.*

⁸⁶ London, *supra* note 6, at 6. In a civil law tradition such as China, the supreme law of the land is codified, and court interpretations and rulings are not seen as binding on other courts. When deciding a case, judges examine the facts and apply the relevant provisions of the applicable code. As such, rulings made outside of official legislation are not binding on the courts. See UNIV. OF CAL. AT BERKELEY, BOALT HALL, THE ROBBINS COLLECTION, THE COMMON LAW AND CIVIL LAW TRADITION (2010), available at <http://www.law.berkeley.edu/library/robbins/pdf/CommonLawCivilLawTraditions.pdf>.

⁸⁷ See *supra* note 48 and accompanying text.

⁸⁸ London, *supra* note 6, at 6.

⁸⁹ WIPO Copyright Treaty art. 1, Dec. 20, 1996, S. TREATY DOC. No. 105-17 (1997), available at http://www.wipo.int/export/sites/www/treaties/en/ip/wct/pdf/trtdocs_wo033.pdf.

⁹⁰ *Id.* arts. 8, 11, 12.

⁹¹ *Id.* art. 8.

signatories to provide legal protection for, and remedies against, removal of technological measures and rights management information designed to identify and protect copyrighted works.⁹²

The WPPT contains two articles that echo the rights granted in Article 8 of the WCT.⁹³ Articles 10 and 14 grant performers and producers of phonograms the exclusive right to distribute to the public, by wired or wireless means, access to the work at the time and place of their choosing.⁹⁴ As a means of enacting these treaties, the PRC's General Principles of Civil Law state that if international treaties differ from the civil law, the international treaties' provisions apply, effectively making treaties the supreme law of the land.⁹⁵ Assent to the WCT in particular is vital for the enforcement of copyright over the Internet.⁹⁶ It does not seem that the adoption of these treaties has had any significant affect on piracy as enforcement remains lax and rates have remained high.⁹⁷

IV. STANDARDS OF ENFORCEMENT

The 2001 Copyright Law enumerates a list of penalties for anyone who commits infringement.⁹⁸ When the "public interest" is damaged, infringers may face penalties such as mandated cessation of infringing acts, confiscation of unlawful income derived from the act, confiscation and destruction of infringing materials, and fines.⁹⁹ The State may confiscate the equipment used to make the infringing copies if the acts of infringement are particularly serious.¹⁰⁰

The 2002 Regulations on the Implementation of the Copyright Law further clarify what acts the State may take in response to copyright infringement.¹⁰¹ Administrative departments of copyright investigate any acts of copyright violation that prejudice social or public interests or any act of infringement that

⁹² *Id.* arts. 11, 12.

⁹³ WIPO Performances and Phonograms Treaty, art. 10, 14, Dec. 20, 1996, S. TREATY DOC. No. 105-17 (1997), available at http://www.wipo.int/export/sites/www/treaties/en/ip/wppt/pdf/trtdocs_wo034.pdf.

⁹⁴ *Id.* art. 10 (relating to performers); *id.* art. 14 (relating to producers).

⁹⁵ See London, *supra* note 6, at 6.

⁹⁶ TANG, *supra* note 54, at 48.

⁹⁷ See e.g., Hill *supra* note 9, at 10; see also SPECIAL 301, *supra* note 1, at 19–20 (China is still on the priority watch list and "99% of all music downloads in China are illegal . . .").

⁹⁸ JIANQIANG NIE, THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN CHINA 206 (2006).

⁹⁹ *Id.*

¹⁰⁰ *Id.* It is unclear what exactly constitutes a "serious" infringement. See 2001 Copyright Law, *supra* note 43, art 47.

¹⁰¹ NIE, *supra* note 98, at 207.

has a nationwide effect.¹⁰² Any fines levied in relation to these investigations are not to exceed three times the profit from the illegal business, or 100,000 yuan (approximately \$16,000 USD) if such a calculation is difficult to ascertain.¹⁰³ The 2001 Copyright Law gives the appropriate authorities (the State Copyright Agency (“SCA”)) the power to carry out enforcement through ordering cessation of infringement and confiscating copies and the materials used to make them.¹⁰⁴ Just one year after the 2001 Copyright Law came in to effect, 5250 cases were concluded with administrative penalties.¹⁰⁵

Protection of copyright over the Internet has similarly evolved surrounding the 2001 Copyright Law.¹⁰⁶ In 2000, the Supreme People’s Court of China promulgated its version of the United States’ Digital Millennium Copyright Act,¹⁰⁷ the “Interpretation of the Supreme People’s Court on Several Issues Concerning the Application of Law in the Trial of Cases in Relation to Copyright Disputes over Computer Network” (“the Interpretation”).¹⁰⁸ The Interpretation makes it clear that a digital work’s copyright remains with the proprietor, and unauthorized uploading, distributing, copying, etc. without remuneration is infringement.¹⁰⁹

The Interpretation also addresses the liability of Internet service providers.¹¹⁰ The Interpretation splits ISPs into two categories and assigns different liability to each: those that provide link services to networks and other such infrastructure, and those that actually provide content.¹¹¹ ISPs that only provide connection services are not liable for the infringement of their users, but those that participate, abet, or assist are liable for contributory infringement.¹¹² ISPs that provide content may be found liable for

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 220.

¹⁰⁵ *Id.*

¹⁰⁶ Hon. Jian Zhipei, *Legal protection of copyright and trademarks in cyberspace in China*, in INTELLECTUAL PROPERTY AND TRIPS COMPLIANCE IN CHINA 126 (Paul Torremans ed., 2007).

¹⁰⁷ Enacted in 1998, the DMCA is a United States copyright law that implements the two WIPO Internet Treaties. H.R. REP. NO. 105-796, at 1 (1998).

¹⁰⁸ Zhipei, *supra* note 106, at 126. The Interpretation was meant to guide courts in implementing the 2006 Information Regulation. TANG, *supra* note 54, at 34.

¹⁰⁹ Zhipei, *supra* note 106, at 127.

¹¹⁰ *Id.* at 129.

¹¹¹ *Id.*

¹¹² *Id.* at 129–30. See also *Interpretations of the Supreme People’s Court on Some Matters Concerning the Application of Law in the Trial of Cases Related to Copyright Disputes over Computer Network*, INVEST IN CHINA (Nov. 22, 2006), http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/JudicialInterpretation/t20071108_86925.jsp.

contributory infringement if they do not remove infringing content in a timely manner upon request; they must also provide the network registration information of infringing users when so requested by copyright holders.¹¹³ However, if an ISP complies with a request to take down allegedly infringing material that is ultimately not infringing and causes the alleged infringer to suffer damages, it is the rights owner who requested the takedown who pays compensation, not the ISP.¹¹⁴

Under the Interpretation, it is up to the rights holder to ascertain the amount of damages suffered from infringement over the Internet, usually in one of three ways: actual loss, both direct and expected; gains made by the infringer; or statutory compensation of up to 500,000 Yuan (approximately \$80,000 USD).¹¹⁵ There are no clear guidelines for calculating such damages, complicating court decisions on Internet works and copyright holders.¹¹⁶

V. PROBLEMS WITH ENFORCEMENT

Despite making great strides in implementing legislation to comply with WTO and TRIPS commitments, China still faces some issues with actual enforcement.¹¹⁷ While Chinese intellectual property laws are sufficient to protect IP rights, piracy remains rampant, indicating that enforcement has been ineffective.¹¹⁸ Part of the problem stems from the Communist system and its ideals, introduced to China in 1949.¹¹⁹ Under the collectivist ideology, the State saw IP rights as a means to state ends as opposed to specific individual rights,¹²⁰ and while China has recently made significant reforms to that ideology, it still regards individual IP rights as a barrier to economic development.¹²¹ As the individualistic principles of intellectual property are contrary to a collectivist society's beliefs, and protecting foreign works evokes nationalistic sentiments, China has been reluctant to fully implement IP rights.¹²²

Notwithstanding a coherent legal framework for protecting IP rights, gains from others' intellectual property and piracy are more attractive to local

¹¹³ Zhipei, *supra* note 106, at 130.

¹¹⁴ *Id.* at 131.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See generally WEI SHI, INTELLECTUAL PROPERTY IN THE GLOBAL TRADING SYSTEM 87 (2008).

¹¹⁸ *Id.* at 88; see also Hill, *supra* note 9, at 10 (noting that penalties for infringement are seen as a "cost of doing business.").

¹¹⁹ SHI, *supra* note 117, at 89.

¹²⁰ *Id.*; see also ALFORD, *supra* note 50, at 56–57.

¹²¹ SHI, *supra* note 117, at 89.

¹²² *Id.* at 90.

governments than respecting IP rights and enforcing the legal framework.¹²³ This mindset has been around for generations, and China is having difficulty abandoning it.¹²⁴ Although China's laws now more clearly define criminal liabilities for violations of IP rights, and have lower thresholds for violation, many citizens have yet to embrace the relevant legal standards.¹²⁵ IP rights are largely based upon Western notions of private property rights, a belief not traditionally shared by Chinese society, which historically views such rights negatively.¹²⁶ In contrast to the constitutions of many Western countries, the Chinese constitution does not explicitly refer to the importance of IP rights and private rights, instead focusing on the public interest.¹²⁷ Although there was a 2004 amendment to the Chinese constitution addressing private rights, actual integration into the legal system is still underway.¹²⁸

In order for enforcement to be effective, there must be well-allocated responsibilities and resources along with transparency between different authorities.¹²⁹ However, China's system of administration often leads to overlap between enforcement agencies.¹³⁰ One problem is determining who actually has jurisdiction over enforcement, an issue that often leads to "bureaucratic turf battles."¹³¹ For example, the National Copyright Administration ("NCA"), responsible for implementing copyright law and international copyright treaties and the investigation of infringement, shares an administrative system with the General Administration of News and Publication, leading to insufficient resources and expertise for both.¹³² In 2004, the State Council created the National Working Group for Intellectual Property Rights Protection ("NWGIPR"), comprised of various authorities, including the Supreme People's Court, Ministry of Commerce, National Copyright Office, and State Intellectual Property Office, with the intention of centralizing cooperation and coordination of IP rights enforcement.¹³³ Spurred by the NWGIPR, the State Council launched an anti-infringement campaign running from September 2004 to August 2005 in which over one thousand infringement cases were investigated.¹³⁴ However, such campaigns generally have only temporary effects, as they are carried out under diplomatic pressure

¹²³ *Id.* at 91.

¹²⁴ *Id.*; *see also* CHEUNG, *supra* note 63, at 97–98.

¹²⁵ SHI, *supra* note 117, at 91; *see also*, CHEUNG, *supra* note 63, at 63.

¹²⁶ SHI, *supra* note 117, at 92.

¹²⁷ *Id.*

¹²⁸ *Id.* at 93.

¹²⁹ *Id.* at 95.

¹³⁰ SHI, *supra* note 117, at 95; *see also*, CHEUNG, *supra* note 63, at 39–40.

¹³¹ Shi, *supra* note 117, at 95.

¹³² *Id.* at 97.

¹³³ *Id.* at 97–98.

¹³⁴ *Id.* at 98.

and are generally only policy-oriented.¹³⁵

Transparency in IP rights enforcement is a key WTO principle, as without it there is a danger of abuse and inefficiency.¹³⁶ Unfortunately, Chinese administration still resists transparency, due to its preference to reach political consensus and compromise behind closed doors.¹³⁷ Although overall China wants to eliminate infringement, it has encountered significant resistance in its attempts to convince local authorities, who have significant decision-making power, to take the necessary steps.¹³⁸ Additionally, China's central government frequently finds itself at odds with China's decentralized local governments (created to facilitate economic growth) when it comes to IP rights protection.¹³⁹ While the central government may enthusiastically pursue IP rights protection, local authorities remain skeptical.¹⁴⁰

The problems with IP rights enforcement in China can be illustrated by the seemingly futile efforts to curb counterfeit cigarettes in the Da'ao village.¹⁴¹ The entrenchment of IP Rights violating practices is so severe, that, even though the authorities raided the village a hundred times in a single year, there is no clear indication that these practices have changed.¹⁴² Authorities have been conducting these small raids since the 1990s.¹⁴³ This ineffective enforcement leads smaller towns and even counties to depend, economically, on counterfeiting.¹⁴⁴ In 2004, the central government sent three thousand enforcement personnel to Da'ao in an attempt to curb the rampant counterfeiting, where they confiscated fifty-six million yuan (\$7 million USD) worth of counterfeit goods.¹⁴⁵ Such large-scale action is typical of campaign-style enforcement, which usually involves multiple enforcement agencies attempting to quickly counter major problems.¹⁴⁶ These large scale raids frequently fail to produce results, however, as seized goods are sold back to the counterfeiters,¹⁴⁷ or operations simply moved to a different town.¹⁴⁸ These campaigns help illustrate the ineffective enforcement that plagues China and

¹³⁵ SHI, *supra* note 117, at 99.

¹³⁶ *Id.* at 99.

¹³⁷ *Id.*

¹³⁸ *Id.* at 100–01.

¹³⁹ *Id.* at 101.

¹⁴⁰ *Id.*

¹⁴¹ MARTIN DIMITROV, *PIRACY AND THE STATE* 3 (2009).

¹⁴² *Id.*

¹⁴³ *Id.* at 4.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 3.

¹⁴⁸ *Id.* at 4–5.

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allows piracy to continue.¹⁴⁹

VI. 2011 SPECIAL CAMPAIGN

Launched in October 2010 and continuing until June 2011,¹⁵⁰ China's nationwide "Program for Special Campaign on Combating IPR Infringement and Manufacture and Sales of Counterfeiting and Shoddy Commodities" ("Special Campaign") aimed to crack down on IP infringement and counterfeiting, raise awareness of IP rights and create a positive environment for intellectual property protection, and urge businesses to increase awareness of infringement and avoid infringing practices.¹⁵¹ The government carried out the campaign in three steps.¹⁵² The "mobilization period" lasted from October 2010 to November 2010, with regional departments creating detailed plans on how to implement the campaign's goals.¹⁵³ The "implementation period" was carried out between November 2010 and February 2011 and was the core crackdown period of the campaign, with the Leading Group of the National Campaign overseeing all activities.¹⁵⁴ The last stage, the "acceptance inspection period" took place from March 2011 to June 2011, during which the government examined the Special Campaign's results.¹⁵⁵

In addition to simply curbing IP rights violations, the Special Campaign undertook to improve law enforcement effectiveness, efficiency, and collaboration.¹⁵⁶ The campaign aimed to improve the market environments, target places where goods were collectively manufactured, crack down on repeat offenders, all with a specific focus on the publishing, recreation, and high-tech industries.¹⁵⁷ The campaign called for such industries to increase supervision of their manufacturing to prevent infringement, and threatened to revoke printing licenses in cases of severe infringement.¹⁵⁸ One of the main focuses of the Special Campaign was to target IP rights violations occurring over the Internet, which called for inter-departmental cooperation.¹⁵⁹ The

¹⁴⁹ See CHEUNG, *supra* note 63, at 63, 77.

¹⁵⁰ Williams & Mihalkanin, *supra* note 5, at 43. The campaign was initially planned to last until March 2011.

¹⁵¹ *Program for Special Campaign on Combating IPR Infringement and Manufacture and Sales of Counterfeiting and Shoddy Commodities*, INTELL. PROP. PROTECTION IN CHINA (Nov. 11, 2010, 10:52 AM), http://www.chinaipr.gov.cn/newsarticle/news/headlines/201011/976853_1.html.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

Special Campaign also called for news coverage of relevant IP rights related issues, and government sponsored programs to educate the public on IP rights.¹⁶⁰ This massive campaign was to be carried out by national intellectual property agencies, along with local authorities.¹⁶¹

Although ambitious in scope, the campaign's goals faced criticism from major Chinese news outlets as being vague about its intended methods of enforcement.¹⁶² But despite early misgivings, the campaign was a success. The campaign resolved 708 cases involving IP rights violations by the end of 2010 alone.¹⁶³ By the end of the campaign in June 2011, the campaign solved 15,868 cases, bringing in 13.12 billion yuan (\$2.08 billion USD).¹⁶⁴ The press hailed these achievements as a success.¹⁶⁵

However, many remain unconvinced that the Special Campaign was a victory for IP rights.¹⁶⁶ While one goal of the campaign was to boost foreign investors' confidence, many companies are unsure whether the campaign ultimately instated a long-term solution to IP rights violations.¹⁶⁷ The Special Campaign is only part of larger IP rights initiatives, coinciding with China's long-term plans to become a leading economic and technological powerhouse by 2050.¹⁶⁸ Some worry that the Special Campaign's efforts to protect foreign IP rights may be undermined by these long-term goals, which may seek to limit foreign companies' ability to incorporate and sell intellectual property developed abroad.¹⁶⁹ These worries stem from China's protectionist innovation policies that seek to promote domestic innovation, with twenty-nine percent of United States IP-intensive businesses in China citing such concerns

¹⁶⁰ *Id.*, art. 2 § 6.

¹⁶¹ *Id.*

¹⁶² See, e.g., *China's 'Special Campaign' On IP Piracy Missing Specifics, New Approaches*, WTO CHINA NEWS (Nov. 30, 2010), http://www.sccwto.net/webpages/WebMessageAction_viewIndex1.action?menuid=e36db09f-3dbc-4f2d-b815-46aa90d25174&id=1d5a0623-43e4-4905-9d22-a2545e9d96d2.

¹⁶³ *708 Cases Concerning IPR Infringement And Manufacture And Distribution Of Fake And Shoddy Commodities Have Been Cracked In China*, INTELL. PROP. PROTECTION IN CHINA (Dec. 31, 2010), http://www.chinaipr.gov.cn/newsarticle/news/government/201012/1184509_1.html.

¹⁶⁴ *National IPR Protection Campaign Delivers*, CHINA INTELL. PROP. (July 25, 2011), <http://www.chinaipmagazine.com/en/news-show.asp?id=3347>.

¹⁶⁵ *Special Campaign Delivers Throughout the Nation*, INTELL. PROP. PROTECTION IN CHINA (Aug. 15, 2011, 12:25 PM), http://www.chinaipr.gov.cn/newsarticle/news/government/201108/1245816_1.html.

¹⁶⁶ See Williams & Mihalkanin, *supra* note 5.

¹⁶⁷ *Id.* at 43.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

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in 2009.¹⁷⁰ Despite the misgivings, however, businesses are encouraged by the progress China has made in combating IP rights violations.¹⁷¹

China made great strides with respect to its online piracy enforcement during the Special Campaign.¹⁷² 1,148 cases dealing with online infringement were reported closed, and over 200 websites were shut down.¹⁷³ In particular, music piracy was reduced.¹⁷⁴ Two popular sites for obtaining infringing music downloads, Quishi.com and 5474.com, were shut down in November 2010.¹⁷⁵ In January 2011, one of the largest piracy sites voluntarily removed all links to infringing content, perhaps as a preemptive response to the PRC Ministry of Culture's statement that illegal sites would be shut down if not properly registered.¹⁷⁶ Such actions are a boon to the music industry, which claim severe losses in revenue due to online piracy from Chinese websites, estimating losses upwards of US \$581 million to China's popular Baidu.com alone from 2006–2007.¹⁷⁷ The Special Campaign represents a major step forward in China's efforts to curb piracy, but the long-term effects remain to be seen. While the Special Campaign is an example of general enforcement, two recent cases illustrate more specific enforcement of Chinese copyright laws.

VII. INTERNET COPYRIGHT PROTECTION IN ACTION

In the last few years, two major cases dealing with copyright infringement over the Internet came before Chinese courts.¹⁷⁸ The International Federation of the Phonographic Industry ("IFPI") brought two suits, one in 2006 and one in 2007, against two major Chinese companies, alleging infringement of the exclusive right to communicate musical works over public information networks ("Internet Rights").¹⁷⁹ The first suit was against Baidu, a highly popular Chinese search engine.¹⁸⁰ The IFPI alleged that, by providing links to streams and downloads of mp3 music files, Baidu infringed the copyright of

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 44.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 45.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ See generally London, *supra* note 6 (discussing *IFPI v. Baidu* and *IFPI v. Yahoo China*). Due to the publishing practices of Chinese courts, very few Chinese court cases are available for English translation.

¹⁷⁹ See *id.* at 7, 11.

¹⁸⁰ *Id.* at 7. Baidu, available at <http://www.baidu.com>, is currently a more popular search engine in China than Google.

Universal Music, Inc.¹⁸¹ The Beijing No. 1 Intermediate People's Court found no infringement, in part because there was no subjective fault on Baidu's part in providing the links and it complied fully with requests to remove infringing material.¹⁸² Further, the court implied that the real culprits were the owners of the websites hosting the infringing files, that Baidu could not and had no responsibility to discover infringing files on its own, and that requiring such liability could ruin the way search engines operate.¹⁸³

In reaching this conclusion, the court looked at four factors: "(1) the defendant's subjective fault; (2) whether 'streaming' or 'downloading' is infringing; (3) the availability and sufficiency of Baidu's infringement prevention methods; and (4) [the] availability and sufficiency of plaintiff's technological prevention methods."¹⁸⁴ The court found no subjective fault because, as a search engine, Baidu had no control over what other website owners host on their sites.¹⁸⁵ Baidu was also not an intermediary for infringement, as the files were downloaded elsewhere, and Baidu's general procedures for taking down infringing material when notified were sufficient.¹⁸⁶ Finally, the court reasoned that the copyright holders could use technological measures to protect their works, as anyone caught tampering with such measures would be subject to civil penalties under the law.¹⁸⁷ In 2007, the IFPI appealed to the Beijing Higher People's Court ("HPC"), and although the HPC stated that Baidu could be found liable for contributory infringement, it was not liable for direct infringement.¹⁸⁸ The court found that Baidu facilitated infringement by making it easier for users to find infringing files.¹⁸⁹ However, because Baidu did not actually provide infringing files to users from its site, did not know of the infringement, and removed offending files when notified, it could not ultimately be found liable for facilitation of copyright infringement.¹⁹⁰

In April of 2007, the IFPI once again sued a search engine for infringement of "Internet Rights," this time successfully.¹⁹¹ The IFPI brought suit against Yahoo China ("YC") for both direct and contributory infringement of the copyrights in several songs owned by GO East, pointing to YC's "TryListen"

¹⁸¹ London, *supra* note 6, at 7, 8.

¹⁸² *Id.* at 8, 9.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 9.

¹⁸⁶ *Id.* at 8. The court actually held IFPI responsible for this failure, as IFPI did not adequately notify Baidu of the addresses of the infringing sites. *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 10.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 11.

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service (allowing users to search for and stream music) and its “Music Box” service (allowing users to share links to music with other members).¹⁹² YC defended itself on primarily the same grounds as Baidu did: that it was only a search engine and not responsible for the content of third party hosts.¹⁹³ Although YC actively collected information on and categorized music tracks, the court did not find this to be detrimental as it agreed with YC that the information was only gleaned from user input and any information displayed was to make it easier for holders to claim their rights.¹⁹⁴ The court thus found YC was not liable for direct infringement.¹⁹⁵ However, the Court did find YC liable for its failure to adequately remove links to infringing content at the request of IFPI, as under the new Internet Regulations, providers are jointly liable if they were aware of a link to infringing content.¹⁹⁶ On appeal, the HPC upheld all of the lower court’s findings, but elaborated on the requirements for providers to be found liable for inducing infringement, finding that if a provider should have foreseen infringement, it can be liable.¹⁹⁷ Because Yahoo China operated a popular and profitable music search engine, it ought to have knowledge of the legal status of the music files, thus liability for inducing infringement was appropriate.¹⁹⁸

Despite being decided on the same day by the HPC and on arguably the same general facts, the outcomes of the Baidu and the Yahoo China cases were polar opposites.¹⁹⁹ Although there were some key differences (YC’s indexing of music and its less than cooperative handling of takedown requests), both cases were about search engines providing a service to users allowing them to search and listen to potentially infringing music files.²⁰⁰ One explanation for the differing outcomes is that the Yahoo China case was brought after the 2006 Internet Regulation.²⁰¹

These two cases succinctly illustrate China’s approaches to Internet piracy and its current efforts in attempting to reduce infringement. However, it is important to note that as China is a Civil Law state, *stare decisis* does not exist and Chinese courts are not required to follow the rulings of previous courts.²⁰² While court rulings are useful for bringing infringers to justice, China must do more to curb piracy.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 13.

¹⁹⁸ *Id.* at 13–14.

¹⁹⁹ *Id.* at 14.

²⁰⁰ *Id.* at 15.

²⁰¹ *Id.* at 14.

²⁰² *Id.*

Baidu came under attack again in March of 2011, when a large group of Chinese authors and publishers alleged that Baidu Wenku, a free online library operated by Baidu, had infringed their works.²⁰³ The 50 authors claimed that Baidu had distributed most of their works for free and without authorization.²⁰⁴ Baidu argued that the search engine service simply provided a way for people to share documents and thus it had no knowledge of any infringement.²⁰⁵ The back and forth between the authors and Baidu drew the attention of China's National Copyright Administration, which conducted a study revealing that Baidu Wenku was one of ten Chinese information sharing services and that it received a substantial amount of uploads each day, many of which violated copyrights.²⁰⁶

Due to the rising controversy over Baidu Wenku, Baidu CEO Li Yanhong decided to shut down the service if Baidu, its users, and the rights holders could not resolve the copyright issues.²⁰⁷ Although the 2006 regulations protect such search engines from liability if they quickly remove infringing works, Baidu would be liable if it knew an item violated a copyright.²⁰⁸ Baidu could also run afoul of the law by publishing on the Internet without an Internet publishing permit.²⁰⁹ By late March 2011, Baidu promised to clean up the service and shortly thereafter removed close to 2.8 million files and launched a new service, Baidu Wenku Copyright Collaboration Platform.²¹⁰ This new service aims to collaborate with copyright holders of literary works and offers "sales commissions, advertising commissions, promotion and marketing, and copyright protection [to those] who work with Baidu."²¹¹ Baidu will also implement a system to check for copyright violations when any work over 1,000 words is uploaded to its platform.²¹² Baidu also plans to create commission models for copyright owners, where their works can be downloaded for free, and the owners would receive a share of advertising revenue in exchange.²¹³ Baidu's turnaround on this copyright issue has encouraged other companies to look for ways to cooperate and collaborate with

²⁰³ Zhang Xusheng, *Baidu Caught in Copyright Clash with Writers*, CAIXINONLINE (Mar. 25, 2011, 1:06 PM), <http://english.caixin.cn/2011-03-25/100241170.html>.

²⁰⁴ *Id.*

²⁰⁵ Wang Jing, *Reluctantly, Baidu Refreshes Copyright Stance*, CAIXINONLINE (Apr. 11, 2011, 6:54 PM), <http://english.caixin.cn/2011-04-11/100246782.html>.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

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copyright holders.²¹⁴

In light of the Chinese government's struggle with enforcement of infringing activity, self-regulation by content providers like Baidu may be more effective at curbing piracy. If content providers can stop piracy at its source by removing access to infringing materials, it would be logical to expect a decrease in piracy. Such self-regulation is also in accord with lingering Confucian principles that prefer mediation between interested parties before getting authorities involved.²¹⁵ However, while self-regulation by content providers might eventually have some impact, other methods for reducing piracy in China need to be considered.

VIII. INTERNATIONAL RESPONSES TO DIGITAL PIRACY: IPRED AND HADOPI

Digital piracy, especially in regard to music, continues to be a growing concern for rights holders, publishers and record labels, ISPs, and governments.²¹⁶ Although the digital music market between 2004 and 2010 increased by more than 1,000 percent, global music revenues decreased by thirty-one percent over the same period.²¹⁷ This overall loss in revenue is attributed to digital music piracy.²¹⁸ The IFPI estimates that in 2004, thirty-four percent of recorded music sales worldwide were pirated, costing the industry \$4.6 billion a year.²¹⁹ Another study claims that 2.6 billion songs are downloaded illegally each month.²²⁰ China is by far the most egregious violator, with piracy levels reaching nearly 100% of domestically consumed media.²²¹

The future of digital music is not completely bleak, as three major sources of infringing material were recently shut down.²²² For example, Limewire was "the biggest source of illegal music downloads in the United States,"²²³ and in May of 2011, the District Court for the Southern District of New York granted summary judgment against the popular file sharing service Limewire for inducement of copyright infringement, common law infringement, and unfair competition.²²⁴ A Dutch court ordered the disabling of MiniNova, a popular BitTorrent site, in November 2009, and in November 2010, the Swedish Court

²¹⁴ *Id.*

²¹⁵ TANG, *supra* note 54, at 121.

²¹⁶ IFPI, *supra* note 3, at 10, 18, 21, 23.

²¹⁷ *Id.* at 14.

²¹⁸ *Id.*

²¹⁹ Hill, *supra* note 9, at 9.

²²⁰ *Id.*

²²¹ IFPI, *supra* note 3, at 19.

²²² *Id.* at 21.

²²³ *Id.*

²²⁴ *Arista Records LLC v. Lime Group LLC*, 784 F. Supp. 2d 398, 440 (S.D.N.Y. 2011).

of Appeals upheld the conviction of the three men who ran the most popular BitTorrent site, The Pirate Bay.²²⁵ These sites quickly became among the most visited websites on the Internet after they were launched, and contributed heavily to file sharing by facilitating users' attempts to find infringing content.²²⁶ However, while steps are being taken to shut down BitTorrent sites, the popularity of cyberlockers as a way of obtaining infringing material is on the rise.²²⁷

BitTorrent and cyberlockers are the two primary ways people share copyright infringing files over the Internet.²²⁸ Websites such as The Pirate Bay or MiniNova do not host infringing material on their servers; rather, they allow users to download "torrent" files that, through the use of a BitTorrent client, connect them to other peers who have the desired content.²²⁹ The content is then downloaded to the user's computer in bits and pieces from multiple users connected to the same client.²³⁰ By contrast, cyberlockers actually host content on their servers, and users can download directly from them.²³¹

Combating piracy is a serious issue for world governments, and innovative solutions are being proposed to decrease illegal downloads.²³² France adopted one of the more popular methods, the "Graduated Response," in 2007.²³³ The Creation and Internet Law, referred to as "HADOPI" after the organization tasked with enforcing it, works by issuing warnings to offenders, and after the second warning, referring them to court where they may face penalties such as fines or temporary suspension of Internet access.²³⁴ Preliminary studies revealed that fifty-three percent of those who had illegally downloaded protected works stopped or reduced their infringing activities after the law was

²²⁵ IFPI, *supra* note 3, at 21.

²²⁶ Flora Graham, *How The Pirate Bay sailed into infamy*, BBC NEWS (Feb. 16, 2009), <http://news.bbc.co.uk/2/hi/7893223.stm>.

²²⁷ IFPI, *supra* note 3, at 14; *see also* Ernesto, *Cyberlockers Take Over File-Sharing Lead From BitTorrent Sites*, TORRENTFREAK (Jan. 11, 2011), <http://torrentfreak.com/cyberlockers-take-over-file-sharing-lead-from-bittorrent-sites-110111/>.

²²⁸ IFPI, *supra* note 3, at 14.

²²⁹ *See* Adam Pash, *A Beginner's Guide To BitTorrent*, LIFEHACKER (Aug. 3, 2007, 12:00 PM), <http://lifehacker.com/285489/a-beginners-guide-to-bittorrent>.

²³⁰ *Id.*

²³¹ Bill Wyman, *So Long, and Thanks for All the Pirated Movies*, SLATE (JAN. 20, 2012, 6:08 PM), http://www.slate.com/articles/business/technology/2012/01/megaupload_shutdown_what_the_site_s_departure_means_for_other_traffic_hogging_cyberlockers.html.

²³² IFPI, *supra* note 3, at 18.

²³³ *Id.*

²³⁴ *Id.*; *see also* HADOPI Bill Adopted Tuesday By French Deputies, INTELL. PROP. WATCH (May 12, 2009, 6:44 PM), <http://www.ip-watch.org/weblog/2009/05/12/hadopi-bill-adopted-tuesday-by-french-deputies/>.

passed.²³⁵ The United Kingdom, South Korea, Ireland, Taiwan, and Chile have also adopted a graduated response plan, and other countries are considering it as well.²³⁶

Sweden's adoption of the Intellectual Property Rights Enforcement Directive 2004/48/EC ("IPRED") in 2009 has also seen recent success in curbing infringing activities.²³⁷ IPRED is a European Union directive, passed in April of 2004, which regulates the enforcement of IP rights.²³⁸ IPRED allows a rights holder to demand that an ISP release user information when there is reasonable belief the user infringed the rights holder's copyright.²³⁹ In order to prosecute a user, the rights holder must first present evidence to a court that a specific Internet Protocol address²⁴⁰ was engaged in infringing activity, at which point the court may order the ISP to turn over the user's identity.²⁴¹ The court will only order the release of a user's information if the user has uploaded copyrighted works or downloaded large volumes of infringing material.²⁴² Swedish Internet traffic experienced a forty percent drop on the day the law went into effect, a drop largely attributed to a decrease in illegal downloading.²⁴³

In a 2010 article researching the effects of the new IPRED law, researchers found statistically significant increases in both physical and digital sales of music.²⁴⁴ While physical sales increased sharply with the introduction of the law but gradually tapered off, sales of digital music increased gradually over the time of the study.²⁴⁵ Physical sales saw a 26.5 percent increase, and digital sales grew by 48.2 percent.²⁴⁶ Although Internet traffic returned to pre-IPRED levels nine months later, the researchers believe that the increased traffic and the sharp increase in digital music sales may be attributable to users switching

²³⁵ IFPI, *supra* note 3, at 18.

²³⁶ *Id.* at 18–19.

²³⁷ Adrian Adermon & Che-Yuan Liang, *Piracy, Music, And Movies: A Natural Experiment 1*, 5 (Uppsala Univ. Dep't of Econ., Working Paper No. 2010:18, 2010), available at <http://www.nek.uu.se/Pdf/wp201018.pdf>.

²³⁸ *Id.* at 5.

²³⁹ *Id.* at 6.

²⁴⁰ Internet Protocol addresses are unique identifiers for each computer connected to the Internet. Stephanie Crawford, *What Is An IP Address?*, HOWSTUFFWORKS, <http://computer.howstuffworks.com/internet/basics/question549.htm> (last visited Oct. 8, 2012).

²⁴¹ Adermon & Liang, *supra* note 237, at 6.

²⁴² *Id.*

²⁴³ *Id.* at 8.

²⁴⁴ *Id.* at 1.

²⁴⁵ *Id.* at 15.

²⁴⁶ *Id.*

to streaming music programs such as Spotify.²⁴⁷ The research indicated that absent piracy, sales of physical music would have been seventy-two percent higher, and sales of digital music 131% higher than current sales.²⁴⁸ This finding would account for the forty-three percent drop in physical sales in Sweden between 2000 and 2008 and strongly supports the music industry's claim that piracy was the cause of the decline.²⁴⁹

The study found a direct causal link between the increased risk of liability for piracy after the passage of IPRED and the subsequent decrease in piracy.²⁵⁰ This increased risk of liability led to higher sales of both physical and digital music.²⁵¹ Possibly because of limitations on the digital music market,²⁵² physical sales were strongest at first and tapered off as they were replaced by digital sales.²⁵³ Although piracy levels appeared to return to normal six months after the law was enacted, sales of digital music remained high.²⁵⁴ It is possible that with convictions, the initial deterrent effect will reoccur, but at the very least the law was effective in boosting sales of digital music.²⁵⁵

Like IPRED, the French HADOPI law led to a similar initial decrease in piracy followed by a gradual return to normalcy.²⁵⁶ A 2011 survey conducted by the Hadopi department reported that of 1500 users surveyed, seven percent claimed that they or someone they knew had received a warning, and that half of that number had subsequently stopped infringing activities.²⁵⁷ This means that only 3.5 percent of those surveyed who had been infringing ceased infringing activities.²⁵⁸ In fact, it seems that piracy might be on the rise.²⁵⁹ A 2011 survey by the University of Rennes in France found that although fifteen

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 16.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 18.

²⁵¹ *Id.*

²⁵² At the time IPRED was passed, Internet users could only gain access to streaming services such as Spotify by receiving an invitation. *Id.* at 15.

²⁵³ *Id.* at 18.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ Compare IFPI, *supra* note 3, at 18, with Electron Libre, *French Law Against Online Piracy: Six Months On*, FRANCE 24 (Feb. 27, 2011), <http://www.france24.com/en/20110226-french-law-against-piracy> (stating French users continue to download illegally).

²⁵⁷ Jared Moya, *French "Three-Strikes" Survey: Less Than 3.5% Have Quit P2P?*, ZEROPAID (May 12, 2011), <http://www.zeropaid.com/news/93430/french-three-strikes-survey-less-than-3-5-have-quit-p2p/>.

²⁵⁸ *Id.*

²⁵⁹ Nate Anderson, *Piracy Up in France After Tough Three-Strikes Law Passed*, ARS TECHNICA (Mar. 26, 2010, 6:37 PM), <http://arstechnica.com/tech-policy/news/2010/03/piracy-up-in-france-after-tough-three-strikes-law-passed.ars>.

percent of those surveyed had ceased using Peer-to-Peer (“P2P”)²⁶⁰ networks to pirate music, two-thirds of those users simply moved to alternative methods of pirating, such as illegal streaming services and cyberlockers, which led to a three percent overall increase in piracy.²⁶¹ Hadopi also struggles to keep up with the volume of complaints it has received.²⁶² As of July 2011, Hadopi had received eighteen million complaints, but only sent out 470,000 initial warnings, 20,000 second warnings, and only ten French users had received final warnings and faced possible prosecution.²⁶³ Hadopi is even holding back on sending second or third warnings in the hopes that users’ activity will change.²⁶⁴

A study published by GfK National Opinion Polls in August 2011 may help explain why IPRED and HADOPI were not as successful as hoped, and may provide some insight into what can be done to combat digital piracy in China. The British study surveyed forty-seven participants, ranging from ages twelve to fifty-two.²⁶⁵ Participants were selected based on a screening questionnaire that determined the amount and frequency of their use and familiarity with file sharing services.²⁶⁶ Participants were categorized into four groups by age, technical expertise,²⁶⁷ and passion for content.²⁶⁸ “Generation File-share” consisted of younger participants (under eighteen) with low expertise, and who grew up around digital media and file sharing services.²⁶⁹ “Self-serving Consumers” were older adults with low to moderate expertise who used file-sharing as one way to quickly access content, alongside other legitimate services.²⁷⁰ “Collectors” were adults with high expertise who became interested in file sharing as a way to explore niche genres (e.g. 1970’s horror

²⁶⁰ P2P is “[a]ny system that allows users to share and download files directly from other users and not via a central server.” GfK, QUALITATIVE RESEARCH INTO ONLINE DIGITAL PIRACY 40 (2011).

²⁶¹ Anderson, *supra* note 259.

²⁶² Timothy B. Lee, *French Copyright Cops: We’re Swamped With “Three Strikes” Complaints*, ARS TECHNICA (July 14, 2011, 11:15 PM), <http://arstechnica.com/tech-policy/news/2011/07/french-agency-were-swamped-with-three-strikes-complaints.ars>.

²⁶³ As multiple notices in one week from the same Internet Protocol are counted as a single strike, it is unlikely that those eighteen million complaints stem from eighteen million different users. *Id.*

²⁶⁴ *Id.*

²⁶⁵ GfK, *supra* note 260, at 4.

²⁶⁶ All participants had at least some familiarity with file sharing. *Id.*

²⁶⁷ Technical expertise was determined by familiarity with services and aptitude in uploading and downloading content. *Id.*

²⁶⁸ *Id.* at 10.

²⁶⁹ *Id.* at 10–11.

²⁷⁰ *Id.* at 11–12.

films).²⁷¹ “Cybertechnies” were unique in that they were motivated by the technical aspects of file sharing as opposed to desire for content, and tended to be more interested in sharing content with friends and family than the other groups.²⁷²

Across all four groups, the main motivation for engaging in file sharing services was because the content was free.²⁷³ However, each group did have more specific reasons for their involvement.²⁷⁴ The younger members of Generation File-share were driven by their desire to stay abreast of the latest music and their peers, and as the cost of services such as iTunes were prohibitively high,²⁷⁵ they turned to illegal downloads.²⁷⁶ Self-serving Consumers were also interested in accessing US films and television shows before they aired in the UK.²⁷⁷ Collectors were interested in sampling a wide array of content that would be difficult to access elsewhere, or wanted to try out new content before making a decision about buying it.²⁷⁸ Lastly, Cybertechnies were motivated by the ability to share large volumes of content with friends and family.²⁷⁹

Of the four groups, Generation File-share and the Self-serving Consumers were the least knowledgeable about the file-sharing process.²⁸⁰ P2P file sharing sites encourage users to upload as well as download content, and often require users to upload as a condition of their use.²⁸¹ When a user visits a file sharing site, they download a “torrent” that when run, allows them to download bits of the file they seek from other users, while simultaneously uploading that same content to other users.²⁸² The less tech-savvy groups are often unaware of their participation in uploading, although the more savvy Collectors and Cybertechnies will actively seek to disperse content.²⁸³

Overall, the groups did not seem worried about potential risks associated with file sharing.²⁸⁴ The most common concern centered on getting viruses

²⁷¹ *Id.* at 12–13.

²⁷² *Id.* at 13.

²⁷³ *Id.* at 21.

²⁷⁴ *Id.* at 20–22.

²⁷⁵ The participants estimated costs of around £40 a month if they were to buy singles from legitimate sources. *Id.* at 21.

²⁷⁶ *Id.* at 20–21.

²⁷⁷ *Id.* at 21.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.* at 11.

²⁸² *Id.* at 14. The process of disseminating content as it’s downloaded is commonly called “sharing.”

²⁸³ *Id.* at 22–23. None of the groups reported uploading original content. *Id.* at 23.

²⁸⁴ *Id.* at 28.

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from the downloaded files, although considering the availability of anti-virus software and technical knowledge, viruses were more of a hassle than a deterrent.²⁸⁵ Participants were also concerned about downloading “junk files,” or files that were different from what the download indicated.²⁸⁶ No group perceived getting caught as a significant risk.²⁸⁷ Some users were unclear as to the legality of their activities, while others believed only those who engaged in heavy downloading or uploading were at risk, and their own activity was not enough to cause concern.²⁸⁸ Participants often distanced themselves from their activity, claiming that their own habits are “normal” or inconsequential in their effects on the industry’s revenue.²⁸⁹

Participants had difficulty coming up with answers when asked what would deter them from file sharing, as they saw file sharing as such a “low risk, high reward” activity.²⁹⁰ Potential deterrents did, however, vary depending on the participant’s level of experience with file sharing.²⁹¹ For those with the lowest experience and commitment, raising awareness of the unlawful nature of file sharing and warning letters or media campaigns would likely be effective deterrents.²⁹² Those somewhat more invested in file sharing would need greater awareness of the consequences of being caught, and would be deterred if consequences and legal alternatives were better publicized.²⁹³ For those who were most committed to file sharing, actual evidence of effective detection and prosecution would be necessary for deterrence, as would penalties affecting access to the Internet.²⁹⁴

Although the sample size in this GfK study was small, and thus may not be indicative of the larger population, it may still be helpful in finding potential solutions to piracy, and may be applicable in China. From what the GfK study participants voiced, a widespread media campaign explaining the legal consequences of file sharing, alongside publicized and successful prosecutions, could be effective in curbing piracy.²⁹⁵ To some degree, IPRED achieved this result.²⁹⁶ The increased risk of detection, coupled with the highly publicized Pirate Bay trial, led to a significant decrease in piracy shortly after the law’s

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 29.

²⁸⁷ *Id.* at 30.

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 34.

²⁹⁰ *Id.* at 36.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.* at 37.

²⁹⁵ *Id.* at 36–37.

²⁹⁶ Adermon & Liang, *supra* note 237, at 2–3.

introduction.²⁹⁷ In June of 2009, and one year later, GfK surveyed Swedish users about their music consumption habits after the enactment of IPRED.²⁹⁸ Sixty percent of those who admitted to file sharing in 2009 reported that they had either stopped or decreased their file sharing activities, and listed Spotify and IPRED as the main reasons for curbing their activity.²⁹⁹

China's recent developments are encouraging. The two Baidu cases show that China is serious about curbing piracy, and the fact that Baidu Wenku voluntarily put measures in place to stop piracy on its service shows that businesses are serious as well.³⁰⁰ But shutting down one source of pirated material is not enough, as others will simply appear in its place.³⁰¹ Yet going after the creators of file sharing services has proved ineffective, as even after the imprisonment of the originators of The Pirate Bay and the seizure of their servers, the site still continues to operate.³⁰² Instead, the wisest course of action may be to deter the users themselves or provide users with more attractive alternatives.³⁰³

Recently, such an alternative has come out. Launched in Europe in 2008, and in the United States in the summer of 2011, Spotify is a free, ad-supported music streaming service that also offers paid subscriptions for unlimited listening without advertisements.³⁰⁴ In 2008, five major record labels agreed to license their music catalogues to the Swedish startup, founded by Daniel Ek.³⁰⁵ BMI, a music licensing fee collection company,³⁰⁶ similarly granted Spotify licenses to use its works in 2011.³⁰⁷ Spotify pays the labels a percentage of

²⁹⁷ *Id.* at 2–3, 6.

²⁹⁸ *Id.* at 20.

²⁹⁹ *Id.* at 20–21.

³⁰⁰ *See supra* Part VII.

³⁰¹ For example, after the infamous Napster was shut down in 2001, similar services such as Gnutella, Kazaa, and Grokster were quick to replace it. Adermon & Liang, *supra* note 237, at 5.

³⁰² *See id.*

³⁰³ *See supra* Part VIII; *see also* John Timmer, *Ending Music Piracy: The Best Plan Hasn't Even Been Tried*, ARS TECHNICA (Aug. 11, 2009, 8:00 PM), <http://arstechnica.com/media/news/2009/08/uks-youth-would-pay-for-all-you-can-eat-music-downloads.ars>.

³⁰⁴ Don Reisinger, *Spotify (Finally) Launches In The U.S.*, CNET (July 14, 2011, 5:10 AM), http://news.cnet.com/8301-13506_3-20079400-17/spotify-finally-launches-in-the-u.s/.

³⁰⁵ Brendan Greeley, *Spotify's Ek Wins Over Music Pirates With Labels' Approval*, BLOOMBERG (July 14, 2011, 10:46 AM), <http://www.bloomberg.com/news/2011-07-14/spotify-wins-over-music-pirates-with-labels-approval-correct.html>. The labels signed on at the time of the article were Universal Music, EMI Group Ltd., Sony Music Entertainment, Warner Music Group and Merlin. *Id.*

³⁰⁶ *About BMI*, BMI, <http://www.bmi.com/about/> (last visited Feb. 18, 2013)

³⁰⁷ *BMI Licenses Spotify & Turntable.fm*, BMI (July 21, 2011), <http://www.bmi.com/news/entry/552172>.

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revenue gained from ads and subscriptions, and four of the labels own a small percentage of the company.³⁰⁸ Currently, Spotify generates more revenue in Sweden for Universal than the ever-popular iTunes platform, proving that it can be a commercially viable option.³⁰⁹ If China passed a law with the same framework as IPRED, and increased access to legitimate content through streaming media services, China could see decreased levels of piracy.

CONCLUSION

China's cultural heritage toward IP rights differs markedly from that of the West.³¹⁰ Confucianism, followed by Communism, never instilled the same attitude toward individual ownership of creative works that we see in the West.³¹¹ Although the Chinese government is trying to align its copyright and trademark laws with the standards set by the Berne Convention and TRIPS, enforcement has been lax and the Chinese people are slow to adopt Western attitudes toward IP rights.³¹² These factors, specifically, lax enforcement and different views on IP rights, coupled with China's desire for Western media³¹³ are a leading cause of rampant piracy.³¹⁴

Attempts to curb piracy through legal action against individuals has seen mixed results.³¹⁵ Suits by the RIAA against individuals for file sharing have garnered mass criticism, and there is skepticism about the effectiveness of suing your consumers.³¹⁶ While reports show that the French HADOPI penalties (cutting off internet for repeated violations) have succeeded in deterring some users,³¹⁷ the administrative burden of tracking and dealing with each offender is too large a hurdle for enforcement.³¹⁸ The Swedish IPRED law has had the most notable effect with a significant decrease in piracy as soon as the law was enacted.³¹⁹ However, piracy levels began to return to normal in the following months, though they did not quite reach pre-IPRED

³⁰⁸ Greeley, *supra* note 305.

³⁰⁹ *Id.*

³¹⁰ *See supra* Part I.

³¹¹ *See supra* Part I.

³¹² *See supra* Parts III, V.

³¹³ *See* CHEUNG, *supra* note 63, at 58–59.

³¹⁴ *Id.* at 97.

³¹⁵ *See generally*, Part VIII *supra* (discussing IPRED and HADOPI).

³¹⁶ *See, e.g.*, David Kravets, *File Sharing Lawsuits at a Crossroads, After 5 Years of RIAA Litigation*, WIRED (Sept. 4, 2008, 2:55 PM) <http://www.wired.com/threatlevel/2008/09/proving-file-sh/>.

³¹⁷ *See* GfK, *supra* note 260.

³¹⁸ *See* Lee, *supra* note 262.

³¹⁹ *See* Adermon & Liang, *supra* note 237.

levels,³²⁰ which was partially attributed to the launch of Spotify around the time of IPRED's enactment.³²¹ Surveys showed that many people credited Spotify's streaming music service with their decreased music piracy.³²²

This insight may be the key to curbing China's piracy problem. While it seems unrealistic to enact a law like HADOPI (if France with fifty million internet users³²³ has a difficult time tracking and responding to all infringers,³²⁴ it seems unlikely that China with over 500 million users³²⁵ will be more successful), a law like IPRED to use as a "scare-tactic" coupled with the release of legal streaming content services such as Netflix, Spotify, and Hulu could jolt the populous away from piracy and toward legitimate practices.³²⁶ There is also good reason to believe that streaming services would go over well in China, in light of their cultural heritage and general reasons for piracy.

Two major reasons why people pirate digital content is ease of access to available content, and perceived unfairness in equity.³²⁷ China is a major consumer of foreign culture.³²⁸ However, this content is not always available, and when it is, access is sometimes limited.³²⁹ Hence, people will turn to piracy to get what they want, especially when it is so easy.³³⁰ Digital piracy is also very easy for the average user to rationalize.³³¹ Each individual action doesn't seem like it would have a major impact on the industry, the Internet works as an effective barrier to any perceived wrongdoing, and it's easy to think that any harm being done is to an amorphous corporate entity rather than to an individual artist.³³² Such rationalizations become easier to maintain if a user views the price of legitimate content to be disproportional to its subjective value.³³³ This perceived imbalance in price versus content can be seen as inequitable, leading users to pirate digital media.³³⁴ Chinese culture already does not share the same views on IP rights as the Western world, so restricting

³²⁰ *Id.*

³²¹ *Id.*

³²² *See id.* at 20–21.

³²³ *Internet Users in Europe*, INTERNET WORLD STATS, <http://www.internetworldstats.com/stats4.htm> (last updated Jan. 14, 2013).

³²⁴ *See Lee, supra* note 262.

³²⁵ *Internet Users in Asia*, INTERNET WORLD STATS, <http://www.internetworldstats.com/stats3.htm> (last updated Jan. 17, 2013).

³²⁶ *See supra* Part VIII for discussion on positive effects of IPRED.

³²⁷ Hill, *supra* note 9, at 10, 12.

³²⁸ CHEUNG, *supra* note 63, at 58–59; PANG, *supra* note 12, at 175.

³²⁹ PANG, *supra* note 12, at 170.

³³⁰ Hill, *supra* note 9, at 11.

³³¹ *Id.*

³³² *Id.* at 13.

³³³ *Id.* at 12.

³³⁴ Hill, *supra* note 9.

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access to desired content and inequitable prices creates an atmosphere rich for piracy. However, it also could be perfect for streaming content services.

Streaming content services could deliver exactly what Chinese consumers want: quick and easy access to media, especially that of Western culture. Introducing a broader array of content also solves the problem of having to override the cultural heritage inherited from Confucian and socialist ideals. Rather than engage in a complete overhaul of Chinese culture in the hopes that it will drastically decrease piracy, a mutually beneficial result can be reached by the introduction of streaming media. Streaming media services have proven to be profitable,³³⁵ and while it is undoubtedly expensive to expand, the benefits could easily outweigh the costs. This solution even caters to the Confucian ideals of harmony.³³⁶ China's growing consumer culture demands access to more and more content, and without legitimate means, it turns to piracy.³³⁷ The stick has been ineffective; it is time to try the carrot.

³³⁵ Peter Brody, *Competing With Free*, PUBLIC KNOWLEDGE (Nov. 28, 2011), <http://www.publicknowledge.org/blog/competing-free>.

³³⁶ TANG, *supra* note 54, at 121.

³³⁷ CHEUNG, *supra* note 63, at 97.