

market for the shares is not mature and the ECN operator is not a member of the exchange in that market.¹³⁴

VI. CONCLUSION: POSSIBLE SOLUTIONS TO EFFICIENT INTEGRATION

The EU must approach integration with the protection of investors as the primary objective. A possible means of achieving efficient integration is adopting a comprehensive approach to transparency, whereby all trading systems should be subject to transparency requirements to a standard acceptable to all Member States of the EU. Implementing such a standard would require a comprehensive approach to trade reporting and surveillance whereby the regulatory system must have overall arrangements which fosters confidence that trading activities will be tracked and monitored in a way which will enable detection of market abuse and misconduct.¹³⁵ The regime for non-exchange trading systems must ensure similar standards of conduct for users of these systems as for users of exchanges. However, establishing similar standards could be the responsibility of self-regulatory organizations or an organization with power delegated by the EU, rather than the responsibility of the system operator. Finally, regulators will have to keep in mind the different driving forces among the markets, some are quote driven and others are order-driven.

Open competition will only get integration so far in the EU. Currently, ECNs only have a door open through the UK. By way of the Investment Services Directive, ECNs may operate as a Pan-European ECN as long as they become a registered exchange in a Member State (e.g., as Tradepoint has done in the UK). Thus, open competition in the EU markets is severely limited in contrast to the more efficient open competition system in the U.S. If the EU is to achieve true market integration, regulatory efforts will need to be implemented even if only temporary in nature.

¹³⁴ *Id.*

¹³⁵ *Id.*

TRADEMARK LAW & ENFORCEMENT IN CHINA: A TRANSNATIONAL PERSPECTIVE

JESSICA JIONG ZHOU*

I. INTRODUCTION

Deng Xiaoping's¹ effort to encourage the economic development of the People's Republic of China has made China, with a population of more than one billion consumers, a magnet for international companies as well as counterfeiters of their products. International companies have been eager to enter and service this vast market, but some have found much to their surprise, that their goods are already available in China – or at least counterfeits of their goods.²

Issues surrounding the transfer of intellectual property across national borders have provoked intense discussions during the last three decades.³ At the core is the desire to obtain protected intellectual property quickly and inexpensively irrespective of its current holders' proprietary rights and profit motives.⁴ Particularly with regard to developing countries, some commentators have pointed out that the necessity of intellectual property represents a fundamental paradox because those countries cannot afford it.⁵ However, a country hungry for technology learns quickly that the engine that drives technological advancement is the effective protection of intellectual property rights. The People's Republic of China is such a country.

China has reached a stage in its development where it increasingly recognizes the value of a strong intellectual property protection regime. The country aspires, as part of its drive for even faster economic development, to join the league of industrialized countries with such regimes. In recent years, China has made bold strides to reform its domestic intellectual property legislation, and thus making its shores safer for foreign trademarks, patents, and copyrights. The country has also, within a remarkably short

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¹ Deng Xiaoping, now deceased, was the former Secretary General of the Communist Party of the People's Republic of China.

² Stuart C. McCormack, *The Trademark Forum: Counterfeits in China*, 77 TRADEMARK REP. 133, 133 (1987).

³ RALPH H. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS 720 (3rd ed. 1995).

⁴ *Id.*

⁵ See, e.g., Scott A. McKenzie, *Global Protection of Trademark Intellectual Property Rights: A Comparison of Infringement and Remedies Available in China versus the European Union*, 34 GONZ. L. REV. 529, 552 (1998-1999).

period of time, strengthened the judicial and administrative mechanisms necessary to protect intellectual property.

However, critics often charge that the extensive promulgation of new intellectual property laws, especially those with respect to trademark protection, is nothing but a mere carbon copying of concepts and rules from other countries, given the lackluster enforcement of the laws. Intellectual property protected by trademarks is a vital asset for enterprises to distinguish products and services from one another in the marketplace, both nationally and globally. But in China, perhaps not too surprisingly, there news reports such as "Chinese villagers protest government investigation of counterfeit jeans manufacturers."⁶ Due to rampant trademark counterfeiting, U.S. trademark holders doing business in the largest developing market in the world used to claim billions of dollars of profit loss annually.⁷ Moreover, China's long-time inability to join the World Trade Organization (WTO) had been largely attributable to political oppositions from the U.S. and Europe claiming, among other things, that China could not provide adequate protection for intellectual property rights.⁸

Have the genuine legislative efforts of the Chinese government become futile? What are the underlying ambiguities and loopholes within such a legal regime? What are the cultural, economic, and social impediments to effective and adequate trademark protection? What are the public and private mechanisms that western, especially U.S. businesses selling on the Chinese market can use to safeguard their trademarks? Can China really achieve the international standard in trademark protection? This article attempts to answer these and many other questions and to explore the real landscape of trademark law and its enforcement in China, from both a national and a transnational perspective. Part II of this article provides a historical overview of the recognition and protection accorded to trademark rights in China. Part III outlines the current legislative framework. Part IV

⁶ *Chinese Villagers Protest Government Investigation of Counterfeit Jean Manufacturers*, West's Legal News, Nov. 29, 1996, available at 1996 WL 683119.

⁷ According to the U.S. International Trade Commission, the cost of piracy to the United States is generally an annual export loss of \$43 billion to \$61 billion. In 1991, U.S. industries' loss of sales due to piracy was an estimated \$16 billion in books, \$45 million in pharmaceuticals, \$18 billion in software, \$11 billion in movies, and \$7 million in sound recordings. In 1992, trade losses due to piracy were estimated to be \$45 million in the motion picture industry, \$45 million in the recording and music industry, \$225 million in the computer programming industry, and \$100 million in the book industry. In 1990, the U.S. lost an estimated \$418 million in trade due to piracy in China. In 1992, the price went down a little to \$415 million. See Hamideh Ramjerdi & Anthony D'Amato, *The Intellectual Property Rights Laws of The People's Republic of China*, 21 N.C. J. INT'L L. & COM. REG. 169, 181 (1995).

⁸ See, e.g., Kristie M. Kachuriak, *Chinese Copyright Piracy: Analysis of the Problem and Suggestions for Protection of U.S. Copyright*, 13 DICK. J. INT'L L. 599, 618-19 (1995).

discusses the current enforcement conditions and problems. Part V suggests some of the practical considerations for foreign trademark owners doing business in the Chinese market. Finally, Part VI attempts to shed some light on China's prospects to achieve the international standard in trademark protection.

II. LOOKING BACK IN THE MIDST OF MISCONCEPTIONS: THE GLORIOUS PAST YET ONLY PAST GLORY?

At the outset, is it fair to say that China has historically disregarded the importance of intellectual property rights? Many western commentators have generally assumed so. In fact, however, this is a misconception.

A. ANCIENT HISTORY

During its five thousand years of civilization, China has been one of the world's leaders in scientific discovery and technological inventions. For example, the Chinese were the first to invent papermaking, printing with movable types, gunpowder, and the compass. These and other famous ancient inventions and discoveries had at times "changed the whole face and state of things throughout the world."⁹ As a result, social awareness for the importance of scientific advancement has always been remarkable in China.

The first Chinese law on intellectual property is the copyright law in the Tang Dynasty (618-906 A.D.), a dynasty witnessing the widespread use of printing and an unprecedented boom in liberal arts. The first Chinese patent law, the "Provisional Rules on the Encouragement of Art and Crafts," was enacted in December 1911, and it granted five-year patents for innovations.¹⁰

The use of trademarks can be traced back as early as the Northern Zhou Dynasty (556-580 A.D.), when the Chinese used marks to identify the source of their products.¹¹ These marks were the embryonic form of trademarks in China. In the Tang Dynasty, when more merchants began to use different marks to distinguish their goods from others, the marks increasingly served a source-identifying function. Merchants who valued

⁹ FRANCIS BACON, *THE NEW ORGANON* 118 (F. Anderson ed., 1981) ("[N]o empire, no sect no star seems to have exerted greater power and influence in human affairs than these mechanical discoveries.").

¹⁰ Ramjerdi & D'Amato, *supra* note 7, at 174.

¹¹ Geoffrey T. Willard, *An Examination of China's Emerging Intellectual Property Regime: Historical Underpinnings, the Current System and Prospects for the Future*, 6 IND. INT'L & COMP. L. REV. 411, 413 (1996).

their business own reputation and craftsmen who took pride in their own craftsmanship carefully designed their own logos to protect and enhance their reputation. For example, fine china bearing the "Jingdezhen" mark, designating the geographic origin, still enjoys worldwide fame today.

In 1904, the Qing Dynasty government enacted the first formal trademark law, which was largely administered by foreigners who took substantial control of China's trade at that time. The development of trademark law continued during the reign of the warlords in the early 1900s, when the Northern Warlord government issued a trademark law which was administered by a newly created "trademark office" under the Ministry of Agriculture and Commerce. Later, the Nationalist government also promulgated its own trademark law in 1931.¹² Hence, China's trademark intellectual property law has evolved much earlier in history than its Anglo-American counterparts.¹³

B. MODERN HISTORY¹⁴

*The existence of a law on trademarks in a socialist country is bound to strike the reader as somewhat anomalous, if not as a downright abandonment of basic principles of the socialist system. After all, trademarks are used to identify and distinguish the products of individual manufacturers ... to the general public to foster fair and effective competition. In a socialist economy ... why should there be a need for trademarks?*¹⁵

1. Early Trademark Regulation

(A) The 1950 Regulations

As the history of China entered a new phase,¹⁶ the Provisional Regulations on Trademark Registration were enacted in 1950 (the "1950

¹² Tan Loke Khoon, *China Amends Trademark Law*, 15 E. ASIAN EXEC. REP. 9 (Mar. 15, 1993).

¹³ See WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* ch. 2 (1995).

¹⁴ For a more detailed and insightful discussion of the development of trademark law in Chinese modern history, see Mark Sidel, *Copyright, Trademark and Patent Law in the People's Republic of China*, 21 TEX. INT'L L. J. 259, 270-73 (1986).

¹⁵ Heinz Dawid, *Trademark Protection in the People's Republic of China*, 9 DEN. J. INT'L L. & POL'Y 217, 217 (1980).

¹⁶ The People's Republic of China was founded on October 1, 1949. See LASZLO LADANY, *LAW AND LEGALITY IN CHINA: THE TESTAMENT OF A CHINA-WATCHER* 58 (1992).

Regulations"),¹⁷ and provided for a centralized trademark registration system. The legislative intent was to "assure the right of [the] exclusive use" of trademarks in "industry and commerce."¹⁸ The Regulations required mandatory re-registration of old marks formerly registered with the Nationalist Government. However, registration of new marks was largely voluntary and few firms saw the reason to register. Those who did register, however, were able to see the advantage much later when in the 1980s trademark regulators relied upon such registration to resolve disputes among competing firms.¹⁹

(B) The 1963 Regulations

The 1950 Regulations were replaced in 1963 by the Regulations for Administration of Trademarks (the "1963 Regulations").²⁰ The principal underlying policy tilted from protecting the "exclusive right to use" to strengthening "trademark control" and improving product quality.²¹ Under the 1963 Regulations, regulatory agencies had the authority to supervise the quality of goods bearing trademarks and the Central Administration of Industry and Commerce could revoke the trademarks of poor quality goods.²² For goods that did not bear trademarks, the Regulations required that the name and address of the producer appear on the packages.²³ This reflected a stronger emphasis on economic centralization in the 1960s, a time of economic difficulties in China.

A major improvement in the 1963 Regulations and its Implementing Rules is that they established the reciprocity principle with respect to foreign trademarks.²⁴ Under this principle, a foreign entity that has already registered in its home country can seek trademark registration in China, as long as the home country has reciprocal trademark protection with China through the China Council for the

¹⁷ 1950 Trademark Regulations, 1 ZHONGYANG RENMIN ZHENGFU FALING HUIBIAN [LAWS AND DECREES OF THE CENTRAL PEOPLE'S GOVERNMENT] 528 (1952), translated in 58 PAT. & TRADEMARK REV. 358 (1960).

¹⁸ *Id.* at 359.

¹⁹ Sidel, *supra* note 14, at 270-71.

²⁰ 1963 Trademark Regulations, 13 ZHONGYANG RENMIN ZHENGFU FALING HUIBIAN [LAWS AND REGULATIONS OF THE CENTRAL PEOPLE'S GOVERNMENT] 164 (1964), translated in 62 PAT. & TRADEMARK REV. 249 (1964).

²¹ *Id.* art. 1.

²² *Id.* art. 11, at 165.

²³ *Id.* art. 2, at 164.

²⁴ Sidel, *supra* note 14, at 272.

Promotion of International Trade (the "CCPIT").²⁵ For example, in March 1978, the CCPIT approved the registration of several U.S. trademarks under the reciprocity principle after finding that the U.S. Lanham Act recognized the same principle.²⁶

However, the mere existence of law did not guarantee its enforcement. The Chinese legal system was still at an early development stage, and the concept of the Rule of Law remained vague in people's minds. Moreover, productivity was low and goods were in such limited supply that people did not have much latitude choosing among the products that were available. In fact, there was often only one brand-named product for certain goods. Therefore, for example, "LIGHTHOUSE" was almost synonymous for washing soap, "GOLDEN FISH" for powder detergent, and "PHOENIX" or "FOREVER" for bicycles. In addition, under the "iron rice bowl" distribution regime,²⁷ a manufacturer had little incentive to seek protection of its trademarks, since economic rewards were not linked with a product's success or failure in the market. Consequently, the government made little efforts to implement and enforce the trademark laws.

2. The Cultural Revolution

A "Cultural Revolution" swept China between 1966 and 1976.²⁸ During this "Revolution," the "Gang of Four"²⁹ and their followers controlled the central government and executed a policy of extreme economic equalitarianism.³⁰ They painted the illusion that pure Marxist ideological aspirations, not economic incentives, would promote social productivity. "Eating from the big rice pot" and "distribution according to one's need, not one's contribution" were popular propaganda at the time. Not surprisingly, individual ownership of intellectual property therefore did not fare well with these extremist ideals.

²⁵ Implementing Rules to the 1963 Trademark Regulations. *Supra* note 20, art. 15, at 166.

²⁶ Kaufman, *Trademark Practice: People's Republic of China*, in *LEGAL ASPECTS OF DOING BUSINESS WITH CHINA* 250-51 (1985).

²⁷ The notion of "iron rice bowl," also known as "no matter how much you worked or how well you did, you get the same reward," was a symbol of the extreme egalitarian distribution method at the time. See, e.g., Zhaocong Jiang, *China's Tax Preferences to Foreign Investment: Policy, Culture and Modern Concepts*, 18 J. INT'L L. BUS. 549, 617 (1998).

²⁸ The Cultural Revolution is also referred to as "the ten-year holocaust" in Chinese modern history. For a detailed discussion, see *LAW AND LEGALITY IN CHINA*, *supra* note 16, at 72-78.

²⁹ The "Gang of Four" refers to Jiang Qing, Zhang Chunqiao and three other people. Regarding the Cultural Revolution and the Gang of Four, see generally RALPH H. FOLSOM & JOHN H. MINAN, *LAW IN THE PEOPLE'S REPUBLIC OF CHINA* 10-13 (1989).

³⁰ L. Mark Wu-Ohlson, *A Commentary on China's New Patent and Trademark Laws*, 6 N.W. J. INT'L L. & BUS. 86, 87 (1984).

However, people were soon disillusioned as national production plummeted, natural disasters erupted, and political chaos ensued. Knowledge was looked down upon. Children were put out of school to "participate in the revolution." Sketches of scientific and technological advancements were thrown into trashcans. Young intellectuals were sent to the countryside to receive "re-education" by peasants who were having trouble feeding themselves, and old intellectuals were prosecuted because their thinking was considered "worthless and harmful to the people."

During this darkest period of modern Chinese history, the whole legal system came to a complete halt. Trademark registration nearly stopped, as did regulatory supervision of product quality. Trademarks such as "Red Flag," "East Wind" and "Worker-Peasant-Soldier," all highly symbolic of the "Revolution," became uniform for all kinds of goods.³¹

C. THE NEW ERA

With the downfall of the Gang of Four in 1975, Deng Xiaoping³² reappeared in public life and launched an ideological attack on the policy of excessive equalitarianism that completely ignored the importance of economic development. A landmark document entitled "*Some Problems in the Acceleration of Industrial Development*" for the first time pronounced that:

...[t]he restriction of bourgeois right can never be performed in isolation from the material conditions and spiritual conditions at the current stage ... [W]e cannot deny distribution according to one's work, reject necessary differences ... [A]bsolute equalitarianism is not only impossible at present but also impracticable in the future.³³

The new leadership saw the need to incorporate the concept of property rights into the socialist lexicon of "distribution according to work" rather than "according to need." The government established the Center for the Research of Economic Laws, which later became the aide of the State Council, to implement a new set of economic and commercial laws and

³¹ Sidel, *supra* note 14, at 272. See also TAN L. KHOON & CLIFFORD BORG-MARKS, *TRADEMARK LAW IN THE PEOPLE'S REPUBLIC OF CHINA* 19 (1998).

³² See FOLSOM & MINAN, *supra* note 29, at 13-14.

³³ *Some Problems in the Acceleration of Industrial Development*, 12 CHINESE L. & GOV'T 75, 95 (1979).

ensure that they keep pace with the operation of the new "socialist market economy." The 1983 trademark law was a product of this research center.

1. *Impetus For Implementing A New Intellectual Property Regime*

(A) *From Big Iron Rice Pot to Self-Sufficiency: Adjustment to Market Mechanisms and Enterprise Economy*

The "big iron rice pot" that everyone used to feed from soon became rusted when the government installed a new economic structure. Enterprises began to have more autonomy in their operations and retain a larger portion of their profits than before.³⁴ State-run enterprises that used to operate under "central plans"³⁵ and rely on state subsidies now have to account for their own livelihood. Economic decentralization has prompted price liberalization, as the government announced that virtually all price ceilings would soon disappear.³⁶ Market mechanisms, rather than government plans, began to play an increasingly important role in shaping the economy.

Since China's economy began to take great leaps,³⁷ its people have enjoyed a higher standard of living³⁸ and a greater supply of goods. Personal consumption in this fast developing economy soon began to outstrip brisk GDP growth rates.³⁹ As the market became more competitive, firms have

³⁴ The Corporate Law, which took effect in July 1994, states that enterprises are independent legal entities, enjoying corporate property rights and running their business independently. See *China: Reformed Enterprises Lead Way*, CHINA DAILY, Aug. 30, 1997, available at 1997 WL 13646410.

³⁵ For a period of time, central authorities, such as the State Planning Commission, administered the sales of most products under a quota system. See, e.g., Wu-Ohlson, *supra* note 30, at 95.

³⁶ Ford S. Worthy, *Why There's Still Promise in China*, FORTUNE, Feb. 27, 1989, available at 1989 WL 2414005.

³⁷ China's estimated Real GNP increased from ¥121 billion Yuan in 1975 to ¥427 billion Yuan in 1989. In 1992, the Real GNP was ¥2398.8 billion Yuan, and in 1993 it was targeted to be ¥2638.7 billion Yuan. Shwu-Eng H. Webb, U.S. Dep't of Agriculture, *China's Economy Continued to Expand*, INT'L AGRIC. & TRADE REP.: CHINA 3 (July, 1993).

³⁸ China is an agricultural nation. 75% of its population (about 800 million in 1992) live on the land. Approximately 200-270 million Chinese were thought to have been living in "absolute poverty" (not even having enough food) in 1978. During the three-year natural disaster, even urban people had to live on stringent monthly quotas of food supply. Later, the number of the absolutely poor shrunk to 100 million due to farming reforms. There has been a startling rise in living standards for both the rural and urban population. See *The Titan Stirs*, ECONOMIST, Nov. 28, 1992, available at 1992 WL 11282205.

³⁹ According to the WEFA Group, an economic consulting firm, the most dramatic economic changes between 1983 and 1993 took place in East Asia, where per capita incomes rose at an estimated annual rate of 6.5%. In China alone, incomes over that period grew 8.5% annually. The World Bank predicts that developing countries (excluding Eastern Europe and the former

increasingly realized the importance of their trademarks as the primary means of retaining consumer goodwill and promoting sales.

(B) *From Collective Ownership to Private Ownership: An Ideological Change*

Confucianism,⁴⁰ a philosophy that dominated ancient China for over two thousand years, promotes self-abstinence and forbearance. This coupled with the notion of the "big iron rice pot," which supports collective ownership and equal allocation of social resources, run afoul to the fundamentals of private ownership of property, including intellectual property.

Nevertheless, by the late 1970s, the idea of science and technology being the number one driving force for productivity had replaced the Cultural Revolution slogan of "knowledge is useless."⁴¹ Intellectual property quickly became the engine for China's modernization.

At the same time, China's state-owned enterprises experienced a major transition. These enterprises used to be monuments to bureaucratic ineptitude. While they accounted for half of the country's industrial output, 60 percent of its industrial employment⁴² and two-thirds of its GNP,⁴³ they absorbed almost three-quarters of domestic credit.⁴⁴ Even in a boom year, around two-thirds of the enterprises were losing money, and among the approximately 45 million urban industrial workers they employed, one-third was superfluous.⁴⁵ Believing that only privatization can bring salvation,⁴⁶ many of these enterprises have embarked on a journey of privatizing from government hands.

Soviet Union) could have an annual average GDP growth of 4.8% over the next ten years, against 3.5% in the 1980s. See Rahul Jacob, *The Big Rise: Middle Classes Explode Around the Globe, Bringing New Markets and New Prosperity*, FORTUNE, May 30, 1994, available at 1994 WL 2801603.

⁴⁰ See, e.g., FOLSOM & MINAN, *supra* note 29, at 1-2. Confucianism is the philosophy of the ancient Chinese philosopher and educator Confucius. The essence of Confucianism is the virtues of being modest, good-hearted, humble, spendthrift, and willing to forbear. In particular, it stresses the virtues of yielding and compromise so as to avoid friction and achieve societal harmony.

⁴¹ This is a popular saying among the Red Guards during the Cultural Revolution. See LADANY, *supra* note 16, at 74.

⁴² *Cleaning Up the Chinese State*, ECONOMIST, Nov. 14, 1992, available at 1992 WL 11282070.

⁴³ Worthy, *supra* note 36.

⁴⁴ Richard Tomlinson, *A Chinese Giant Forges A Capitalist Soul: Reviving State Enterprises is the Key Issue Confronting the World's Biggest Economy -- Here's An Inside Look At One Steelmaker's Struggle*, FORTUNE, Sept. 29, 1997, available at 1997 WL 3108785.

⁴⁵ *Id.*

⁴⁶ *Cleaning Up the Chinese State*, *supra* note 42.

The massive economic changes inevitably spilled into society. People began to embrace the idea of private property ownership, a right that they increasingly choose to defend rather than forbear like their ancient ancestors. Moreover, the public awareness of private ownership increasingly expanded to intangible properties, especially intellectual property.

(C) *From Closed Door to Open Door: Incentives for Foreign Investment*

*Like nervous hosts, countries in need of economic development sometimes promise party favors to the first guests who show up.*⁴⁷

Global economic integration has demonstrated the futility of isolation on the world stage. In 1978, China, a country that has historically played an important role in international politics, decided to also become an active participant in international economy. The Chinese government initiated an "open-door" policy, seeking to bring an end to its economic isolation since the birth of the country in 1949. In the next two decades, the country's economic performance brought about one of the "biggest improvements in human welfare anywhere at any time."⁴⁸ Real GNP grew at an average of nine percent annually, and by 1994, China's economy was already several times bigger than that in 1978.⁴⁹ Foreign trade and investment were so strongly encouraged that foreign investors swarmed in to "chase the dragon."⁵⁰ In 1995, China received more direct foreign investment than any other country except the United States.⁵¹

The Beijing government, like a generous hostess throwing her first party, issued both economic incentives⁵² and legal incentives to attract foreign investment. In the less than two decades following the adoption of the reform and open-door policy, the country's top-level legislature, the

⁴⁷ Ford S. Worthy, *Getting In On the Ground Floor*, FORTUNE, Fall 1990, at 61 (Special Issue).

⁴⁸ *The Titan Stirs*, supra note 38.

⁴⁹ *Id.*

⁵⁰ *Id.* The dragon is a traditional symbol of China.

⁵¹ In 1996, the inflow of capital reached \$42 billion. *Not Quite so Sparkling China: Foreign Investment - Has Foreign Investment Peaked in China? And Will It Ever Take off in Japan?* ECONOMIST, Mar. 1, 1997, available at 1997 WL 1836484.

⁵² Economic incentives include, for example, tax breaks, operational autonomy, liberalization of the domestic market, and the opening-up of domestic industries, such as transportation, retail and banking. For detailed discussions, see Pierre Mauge, *Tax Incentives in the People's Republic of China: who Benefits?*, 5 TUL. J. INT'L & COMP. L. 155 (1997); Henry J. Graham, *Foreign Investment Laws of China and the United States*, 5 J. TRANSNAT'L L. & POL'Y 253 (1996); Daniel J. Brink & Xiao Lin Li, *A Legal and Practical Overview of direct Investment and Joint Venture in the "New" China*, 28 J. MARSHALL L. REV. 567 (1995).

National People's Congress (the "NPC") and its Standing Committee have passed and amended over three hundred laws,⁵³ seeking to change the stagnant state of economic legislation and bring China's market economy within the rule of law.⁵⁴

As China accelerated its industrialization and hosted more foreign investment, new intellectual property issues emerged, creating the need to implement a complete legal regime for the protection of intellectual property rights ("IPR"). In addition, Western countries also began to lobby for more effective intellectual property protection in China.

Among these western countries, the U.S. is the most ardent advocate. The U.S. employs a powerful weapon, the "Special 301,"⁵⁵ for fast solution of international IPR problems. Under Special 301, the U.S. Trade Representative (the "USTR") can lodge a complaint against any country that it believes to be conducting unfair trade practices.⁵⁶ Special 301 views IPR violations as a market barrier to U.S. exports, and accordingly, the U.S. can deny the infringing country access to the U.S. market. China used to be a "priority country" on the U.S. Special 301 list. In order to avoid trade sanctions and to invite U.S. support in China's bid to accede to the World Trade Organization, Beijing signed a bilateral Memorandum of Understanding with Washington in January 1992.⁵⁷ In February 1995, when the final bell rang for the end of the second round of bilateral discussions over the issue of the piracy of U.S. IPR, China further agreed to draw out Action Plans to improve border enforcement, to share enforcement effort data with the U.S., and to establish a licensing-and-permitting system against piracy.⁵⁸

Therefore, China's decision to enter the world marketplace became the catalyst for its development of an IPR protection system. The country considered IPR protection as one of the legal cornerstones for its economic reform and integration into the global market,⁵⁹ and quickly strengthened

⁵³ Xu Yang, *Socialist Legal System Takes Shape with NPC's Help*, CHINA DAILY, Aug. 30, 1996, available at 1996 WL 8532014.

⁵⁴ Ma Chenguang, *More Finance Laws in Sight*, CHINA DAILY, Jan. 11, 1996, available at 1995 WL 11205063.

⁵⁵ See Omnibus Trade Act of 1974 § 182, Pub. L. No. 93-618, 182, 88 Stat. 1978, 2041 (1975) (codified as amended at 19 U.S.C. 2242 (1994)). For a detailed discussion of the Special 301, see Robert J. Pechman, *Seeking Multilateral Protection for Intellectual Property: The United States "TRIPS" Over Special 301*, 7 MINN. J. GLOBAL TRADE 179 (1998).

⁵⁶ Arthur Wineburg, *The Close of Round Two China and the United States Sign A Last-Time Agreement, but Adequate Protection of Intellectual Property Rights Will Depend on Further Cooperation*, CHINA BUS. REV. (July 1, 1995), available at 1995 WL 9770810.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Liu Gushu, *A Retrospect of the Chinese Intellectual Property Rights System and Some Thoughts Thereon*, CHINA L. 64, 64 (Issue 1, 1995).

that cornerstone by instituting domestic legislation as well as signing international agreements.⁶⁰

2. Legislation in the New Era

(A) The 1983 Laws

In 1982, the 24th Session of the Standing Committee of the 5th NPC adopted a new trademark law based on the revision of the 1963 trademark law.⁶¹ The new laws became effective in 1983 (the "1983 Law"), followed by the enactment of a set of implementing regulations, which served to fill in gaps and address specific application of the laws.⁶²

The 1983 Law made it possible for individuals and institutions, in addition to enterprises, to apply for trademark registration.⁶³ This reflected the change in the structure of ownership of production.⁶⁴ Moreover, as a major improvement upon prior trademark laws, the 1983 Law protected the exclusive right of a trademark owner to use a registered mark and authorized a private right of action against acts of infringement.⁶⁵ However, damages for infringement remained compensatory, and service marks remained unregistrable.

The subsequent surge in applications for registration manifested in a revived public awareness of trademark rights.⁶⁶ Nonetheless, the new laws did not require mandatory registration except for certain goods. Thus, some producers put on the market products with unregistered marks or no marks at all.⁶⁷ These products often had poor quality, leading to consumer

⁶⁰ Angela Mia Beam, *Piracy Of American Intellectual Property In China*, 4 J. INT'L L. & PRAC. 335, 341-42 (1995).

⁶¹ See 2 China Laws for Foreign Businesses: Business Regulation (CCH) ¶ 11-500, at 14,001.

⁶² See Michael N. Schlesinger, *A Sleeping Giant Awakens: the Development of Intellectual Property Law in China*, 100 J. CHINESE L. (Spring, 1995).

⁶³ Wu-Ohlson, *supra* note 30.

⁶⁴ The economic reform encouraged more diverse ownership of production, including the state ownership, the collective ownership, and also the previously much abhorred private ownership. For a detailed analysis of ownership transition in China, see, e.g., Lan Cao, *The Cat That Catches Mice: China's Challenge to the Dominant Privatization Model*, 21 BROOKLYN J. INT'L L. 97 (1995).

⁶⁵ Trademark Law of the People's Republic of China, art. 4, *supra* note 61.

⁶⁶ For example, from August 1982 to June 1985, the Trademark Office received 92,600 applications, out of which 23,700 were filed in the first half of 1985 alone. By mid-1985, the Office registered more than 116,000 trademarks, of which foreign applicants owned 17,900. *China Advances in Building Industrial Property System*, XINHUA [NEW CHINA] GENERAL OVERSEAS NEWS SERVICE, Item No. 092497, Sept. 24, 1985, available at LEXIS, News Library, Xinhua file.

⁶⁷ According to a survey at that time, only 29 percent of the products coming from the city of Harbin bore registered trademarks, and among those enterprises using trademarks, a large

complaints. In response, the State Administration of Industry and Commerce ("AIC") issued a decree requiring that producers state their name and address on the packaging of products with no registered trademarks.⁶⁸

(B) The 1993 Laws

The most recent amendments to China's trademark laws occurred in 1993, partly in response to the criticism that China was not providing adequate enforcement against trademark infringement.⁶⁹ The 30th Session of the Standing Committee of the 7th NPC revised the old laws to comply with the requirements of the Paris Convention of Industrial Property (the "Paris Convention") and the Madrid Union to which China was a signatory. In the same year, the Standing Committee promulgated the Supplementary Regulations Against Counterfeiting Registered Trademarks, intensifying the battle against counterfeiting.

The 1993 Law incorporated the legislative purpose of previous legislation. The law was designed to improve "the administration of trademarks" and encourage "producers to guarantee the quality of their goods and maintain the reputation of their trademarks, with a view to protecting consumer interests and to promoting the development of [the] socialist commodity economy."⁷⁰

Moreover, the 1993 Law for the first time made registration available for service marks.⁷¹ It defined "infringement" to include the sale of goods that one is "fully aware" are counterfeits of a registered mark, the forgery or unauthorized manufacturing of representations of another's registered trademark, and the sale of trademark representations that were forged or manufactured without authorization.⁷² In addition, it improved trademark registration procedures, increased administrative fines, and permitted administrative authorities to order payment of damages.⁷³

proportion failed to obtain registration. See Shen, *A Talk in the Formation and Development of China's Trademark Laws*, FAXUE YANJIU (LEGAL RESEARCH) 37, 40 (1980).

⁶⁸ Directive of the State Administration of Industry and Commerce that Goods Upon Which Unregistered Trademarks are Utilized Should Indicate the Name and Address of the Enterprise, 1985 ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN GONGBAO [STATE COUNCIL GAZETTE] 784 (1985).

⁶⁹ William P. Alford, *Don't Stop Thinking About ... Yesterday: Why There Was No Indigenous Counterpart to Intellectual Property Law In Imperial China*, 7 J. CHINESE L. 3, 5-6 (1993).

⁷⁰ Trademark Law of the People's Republic of China, art. 1, *supra* note 61.

⁷¹ Jianyang Yu, *Protection of Intellectual Property in the P.R.C.: Progress, Problems, and Proposals*, 3 UCLA PAC. BASIN L.J. 140, 143 (1994).

⁷² Remjerdi & D'Amato, *supra* note 7, at 178-79.

⁷³ *Id.*

III. CURRENT TRADEMARK LEGISLATION

A. CONSTITUTIONAL BASIS AND LEGISLATIVE OBJECTIVES

The Constitution of the People's Republic of China lays out the foundation for China's intellectual property laws. It provides that "[t]he state promote the development of the natural and social sciences, disseminate scientific and technical knowledge, and commend and reward achievements in scientific research as well as technological discoveries and inventions."⁷⁴ Therefore, the Constitution explicitly recognizes the importance of intellectual property in social development. However, the Constitution leaves open two questions: (1) whether such intellectual property should belong to the people at large or to the individual who generates it, and (2) how such individual will be "rewarded" and "commended."⁷⁵

Perhaps because of such constitutional ambiguity, China's intellectual property laws traditionally focused very heavily on encouraging the creation and dissemination of intellectual property, but not on protecting its private ownership. However, this ambiguity has gradually clarified itself as society began to embrace the idea of private ownership and recent laws have become increasingly cognizant of the rights and interests of intellectual property owners. For example, the General Principles of the Civil Law of 1986 provides:

*If a citizen's or legal person's right of authorship (copyright), patent right, right to the exclusive use of a trademark, right of discovery, right of invention or other right pertaining to scientific or technical achievements is infringed upon in the form of plagiarism, falsification or imitation, the citizen or legal person shall have the right to demand that the infringement be stopped, the effects of the infringements eliminated and damage compensated for.*⁷⁶

⁷⁴ Constitution of the People's Republic of China, art. 20, 1 China Laws for Foreign Business: Business Regulation (CCH) ¶ 4-500, at 5,317. In addition, the Constitution states that the people "have the freedom to engage in scientific research, literary and artistic creation and other cultural pursuits," and the state "encourages and assists creative endeavors conducive to the interests of the people made citizens engaged in education, science, technology, literature, art and other cultural work." *Id.*, art. 47, at 5,331-33.

⁷⁵ *Id.* at art. 20.

⁷⁶ General Principles of Civil Law of the People's Republic of China, art. 118, 4 China Laws for Foreign Business: Business Regulation (CCH) ¶ 19-150, at 23,861. Article 96 also specifically provides that "[t]he exclusive right to use a trademark obtained, according to [the] law, ... is protected by [the] law." *Id.* at 23,853.

Such explicit acknowledgement of the rights of intellectual property holders refutes the critique that China's intellectual property laws remain merely instrumental to the ideological agenda of a socialist society.

However, the trademark laws, like other intellectual property laws in China, do carry policy objectives that are different from those of their western counterparts. Specifically, they mandate the protection of the consuming public. For example, early legislation such as the Measures for the Control of Trademarks⁷⁷ provided that registration of a trademark could be cancelled if the quality of the products was not up to a prescribed level or where cancellation was demanded "by most of the people."⁷⁸ Similarly, the Trademark Law of 1993 aims not only to protect the "exclusive right to use a trademark," but more importantly, to guarantee product quality and protect "consumer interests."⁷⁹

Moreover, the Trademark Law's role in assuring consumers of good quality products is also supplemented by other laws regarding product quality and consumer protection. For example, the Product Quality Law,⁸⁰ Protection of the Rights and Interests of Consumers Law,⁸¹ and Unfair Competition Law⁸² all have relevant trademark provisions geared toward protecting consumers.

B. LEGISLATIVE FRAMEWORK

1. At the Domestic Level

Currently, major trademark legislation includes the Trademark Law⁸³ and its Implementing Rules,⁸⁴ the Well-known Trademark

⁷⁷ The Measures for the Control of Trademarks, art. 11, was adopted and became effective on Apr. 10, 1963.

⁷⁸ The Measures for the Control of Trademarks. 62 PAT. & TRADEMARK REV. 249, 249 (1964).

⁷⁹ The Trademark Law of 1993, art. 1, *supra* note 61. See also *id.* at art. 6, 31 and 34 (prohibiting the passing off of shoddy products of inferior quality to deceive consumers).

⁸⁰ Product Quality Law of the People's Republic of China, art. 4, *supra* note 76, ¶ 16-635, at 21,761. "The counterfeiting or passing off of ... famous brand marks and marks of excellence ... shall be prohibited." Business Regulation, CHINA LAWS FOR FOREIGN BUSINESS 21,717 (1997 CCH Asia Pacific).

⁸¹ Law of the People's Republic of China on the Protection of the Rights and Interests of Consumers, art. 50(4). *Id.* ¶ 16-480, at 20,101.

⁸² Law of the People's Republic of China Against Unfair Competition, art. 5 (1993) (prohibiting anyone "(1) to fake the registered trademarks of others; (2) to use, without prior permission, the same or similar names, packages, decorations of well known brand name products so as to mislead buyers; (3) to use, without prior permission, the names of other enterprises so as to mislead buyers; (4) to forge or counterfeit the identification marks, marks indicating good quality products and other quality marks on commodities or to falsify the place of origin or use other false indicators to mislead people with regard to quality."). *Id.* ¶ 16-640, at 21,853.

⁸³ Trademark Law of the People's Republic of China, *supra* note 61, ¶ 11-500.

Regulations,⁸⁵ and the Trademarks for Foreign Trade Regulations.⁸⁶ However, the bulk of China's trademark law is contained in the 1993 Trademark Law and its Implementing Rules.

2. *At the International Level*

In addition to legislative efforts at the domestic level, during the past two decades, China has attempted to keep in line with internationally recognized intellectual property protection standards by becoming signatory to international and multilateral trademark treaties.⁸⁷

The July 1979 U.S.-China Agreement on Trade Relations marked the first of China's IPR legislative steps at the international level. The agreement provided for reciprocal protection of patents and copyrights between the two countries.⁸⁸ In the same year, Beijing sent out its observer team to sit in on the International Trademark Registration Treaty Conference convened by the United Nations World Intellectual Property Organization ("WIPO").⁸⁹ A year later, China submitted a membership application to the Organization, and in June 1980, it became a member of the WIPO.⁹⁰ Three years after joining the Paris Convention, China adopted the International Classification of Goods and Services system for trademark registration in 1988.⁹¹ The following year, China acceded to the Madrid Agreement for the International Registration of Marks. By the 1990s, China has entered into most major international IPR treaties.

⁸⁴ Detailed Rules for the Implementation of the Trademark Law of the People's Republic of China. *Id.* ¶ 11-505.

⁸⁵ Provisional Regulations on the Recognition and Administration of Well-known Trademarks. *Id.* ¶ 11-523.

⁸⁶ Regulations of the Ministry of Foreign Trade and Economic Cooperation and the State Administration for Industry and Commerce Concerning the Administration of Trademarks for Foreign Trade. *Id.* ¶ 11-535.

⁸⁷ See China Business Law Guide (CCH) ¶ 60-110, at 62,202.

⁸⁸ Michael Hsu, *China's Intellectual Property Protection Regime at a Glance*, CHINA BUS. REV. Nov. 1, 1994, available at 1994 WL 11291288.

⁸⁹ The team was headed by Ren Jianxin, the director of the Law Department of the China Council for the Promotion of International Trade, later Justice of the Supreme People's Court. In 1979, the Chinese government also sent a delegation for an intellectual property protection observation tour to more than ten countries. The delegation was headed by Wu Heng, Vice Minister of the State Science Commission, who turned in a report to the State Council. See *id.*

⁹⁰ *Id.*

⁹¹ *Id.*

IV. ENFORCEMENT: TRADEMARK LAW IN ACTION

A. IMPROVEMENTS

Over the past ten years, China's courts strengthened judicial enforcement against IPR violation.⁹² Since 1992, China launched a national campaign against fake and shoddy goods. The country's prosecutors stepped up the battle against egregious counterfeiting with more criminal prosecutions, among which several death penalties have been imposed.⁹³ From 1991 to 1995, the people's courts adjudicated a total of 1,690 criminal cases for counterfeiting registered trademarks.⁹⁴ In 1993 alone, the state and local AICs handled a total of 13,042 trademark infringement cases, of which about 500 involved foreign trademarks.⁹⁵

Because the adjudication of intellectual property cases often requires special knowledge and technical expertise, the Supreme People's Court set up an Intellectual Property Rights Working Office to supervise lower judicial bodies on intellectual property cases.⁹⁶ In June 1993, the Beijing Intermediate People's Court established its own Intellectual Property Rights Tribunal, the first court whose jurisdiction is exclusively on intellectual property cases. Appeals from this tribunal go to a special court affiliated with the Beijing High People's Court. Subsequently, intellectual property courts were set up in Shanghai, Tianjin, Guangzhou, Fujian Province, Jiangsu Province, Hainan Province, and the Special Economic Zones.⁹⁷

However, these intellectual property courts are still in need of more qualified individuals to serve as judges. Because the Chinese legal system

⁹² Li Guoguang, *China's Courts Strengthened Power on Judicial Protection of IPR - Speech at the Press Conference on Judicial Protection of IPR*, CHINA L. 56, 56-58 (Issue 3, 1996).

⁹³ In October 1992, the Guizhou Higher People's Court sentenced one man to death where he counterfeited MAOTAI wine, resulting in illegal profit of approximately US\$260,000. The Kunming Intermediate People's Court issued the death penalty to one of the defendants and life imprisonment to six others in April 1993 where they sold counterfeit "RED PAGODA MOUNTAIN" cigarettes for an illicit profit of about US\$150,000. In August 1993, China prosecuted three men found guilty of producing fake medicine and poor quality fertilizer, false advertising, and trademark pirating; but this time, under the Criminal Law provision dealing with crimes against property, rather than the Criminal Law's trademark provision. By September 1993, the courts have handled 68,989 cases involving fake or shoddy goods, sentenced 500 people to prison, one additional person to death, and five additional to life imprisonment. See Paul B. Birden, Jr. *Trademark Protection in China: Trends and Directions*, 18 LOY. L.A. INT'L & COMP. L. REV. 431, 431 (1996).

⁹⁴ Among these cases, 1,676 were tried, and 1,375 people received imprisonment or other criminal penalty. Li, *supra* note 92, at 58.

⁹⁵ *Trademark Infringers Shut Down*, CHINA DAILY, June 3, 1994, at 3 (N. AM. Ed.).

⁹⁶ Li, *supra* note 92, at 57.

⁹⁷ *Id.* at 6.

is inquisitorial rather than adversarial, a judge's lack of competence can be particularly devastating.⁹⁸ Therefore, China is in the process of appointing more legal professionals with technical expertise, high ethical standards, and foreign language proficiency to be judges for the intellectual property courts. Courts at different levels have also organized training workshops and sent judicial personnel abroad for study and on-the-job-training.⁹⁹

Non-judicial efforts are also notable. Supporting organizations such as the Product Liability Department under the China Management Association and various consumer associations have been established.¹⁰⁰ Additionally, in an effort to train more intellectual property professionals, Beijing University set up the first graduate program in intellectual property law,¹⁰¹ soon followed by similar programs at other major universities.¹⁰²

C. PROBLEMS

Despite significant improvements over the past two decades, the trademark protection regime in China still has many problems.

1. Judicial Independence

China's Constitution provides that the people's courts exercise judicial power independent from any interference by political parties, administrative agencies, and individuals.¹⁰³ It also mandates that the people's courts execute their responsibilities on the basis of facts and in strict accordance with the substantive and procedural laws.¹⁰⁴ Nonetheless, the question remains whether every court in the country is truly independent of non-judicial interference. Due to the long absence of the

⁹⁸ For a detailed discussion, see Gregory S. Kolton, Comment, *Copyright Law and the People's Courts in the People's Republic of China: A Review and Critique of China's Intellectual Property Courts*, 17 U. PA. J. INT'L ECON. L. 415, 420 (1996).

⁹⁹ *Id.*

¹⁰⁰ *Law Group on Quality Is Formed*, CHINA DAILY, July 13, 1993, at 3 (N. Am. Ed.).

¹⁰¹ This program has been offered at Beijing University since December 1993. See, e.g., *China Sets up First Copyright School*, AGENCE FRANCE PRESSE, Dec. 16, 1993, available at LEXIS, News Library, News Group File.

¹⁰² Kolton, *supra* note 98, at 457.

¹⁰³ "All state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings must abide by the Constitution and the law. ... No organization or individual may enjoy the privilege of being above the Constitution and the law." Art. 5, Constitution of the People's Republic of China, *supra* note 74, at 5,309. "The people's courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations or individuals." *Id.* art. 126, at 5,377.

¹⁰⁴ *Id.*

Rule of Law, China's judiciary had for a long time remained inextricably linked with the Party.¹⁰⁵ Although the trademark laws seek to blend the best of foreign and Chinese expertise,¹⁰⁶ the establishment of true judicial independence necessary to breathe life into the laws will still take time.

2. Bureaucracy, Bureaucracy

Today, China has a complete set of sophisticated trademark laws. However, a successful trademark protection regime depends on how people work with these laws. Although China is quickly marching toward modernization, some of its governmental bodies still hold on to their old bureaucratic habits. Files are often passed around, lying beneath teacups on different desks without being read, and then joining previous backlogs and thrown into oblivion.

As the old organizational structure became increasingly burdensome and inefficient, the country's new generation of leadership initiated bold organizational restructuring to end bureaucracy. Even during the economic slow-down in the late 1990s,¹⁰⁷ the government reduced the number of State Council ministries from forty to twenty-nine, and downsized the number of civil servants from eight million to four million.¹⁰⁸ In light of such large-scale structural reform, legal professionals who should still be prepared to deal with bureaucracy can expect to see less and less of it in the future.

3. Inadequate Remedies

Critics have argued that the damage awards in most trademark infringement cases in China are not enough to curb current infringement and deter future ones. This is because courts and administrative authorities usually only grant injunctions against future infringement, but do not grant compensation for damages caused by past infringement. Absent more powerful remedies, free-riders of others' trademark rights are

¹⁰⁵ See generally Jerome Cohen, *The Chinese Communist Party and "Judicial Independence" 1949-1959*, 82 HARV. L. REV. 967 (1969).

¹⁰⁶ The trademark and patent laws were promulgated after an extensive study of the laws in many other countries, including the U.S., Germany, Japan, the former Soviet Union and others. Fang Yangchun, *Bocai ta guo zhi chang, zuo zhongguo zijide daolu* [Assimilate the Strong Points of Other Countries, Take the Road with Chinese Characteristics], 1 GONGYE CHANQUAN [INDUSTRIAL PROPERTY] 10 (1988).

¹⁰⁷ The economic slow-down was precipitated by massive lay-offs in state-run firms and the Asian financial crisis. See *Red Alert*, ECONOMIST, Oct. 24, 1998, available at 1998 WL 11700318.

¹⁰⁸ Nua Chen, *From 8 Million to 4 Million: the Government of China to Carry Out Staff Reductions*, CHINA L. 53, 53 (Issue 2, 1998).

likely to continue free riding. For example, they can circumvent court decrees by transferring the illegal activity from one factory to another, and by the time their illegal activities are exposed again, they would have already made another windfall. To these people, the business is enormously lucrative and the risk is minimal.

Even in cases where monetary damages are awarded, the amounts are often so nominal that they barely justify the litigation costs. Walt Disney Company, for example, incurred more than \$15,000 in legal costs battling for its Mickey Mouse in 1993, only to win a single fine of \$91 as compensation from one of the factories raided as compensation.¹⁰⁹ Failing in an effort to appeal, the frustrated company returned from the battlefield only to find its film, *The Lion King*, appearing in China before its own video release in the U.S.¹¹⁰

4. Regional Discrepancy

*Economic growth and accompanying disparities among China's regions – along with diversification of Chinese political, cultural, and social life – have driven the country's political decentralization, and will likely continue to do so. ... This model seeks to accommodate just enough regional power to maintain Party and national State hegemony at the apex of a widened political pyramid.*¹¹¹

Decades of economic decentralization has made China different from the highly unitary state fifty years ago.¹¹² At the national level, the power of law-making ultimately resides in the NPC and its standing committee. At the lower levels, the people's congresses of provinces, provincial capitals, autonomous regions, and directly-administered municipalities¹¹³ promulgate local laws and regulations to implement laws made by the national legislature.¹¹⁴ Additionally, the Special Economic

¹⁰⁹ Susan Orstein, *Disney Duels With Chinese "Pirates" Over Mickey: Case Goes to New Beijing Court*, LEGAL TIMES, July 25, 1994, at 2.

¹¹⁰ See, e.g., Maggie Farley, *Industries Applaud U.S.-China Trade Pact; Dispute: CA Software, Entertainment firms Expect Big Money in Resolution of Privacy Issue*, L.A. TIMES, Feb. 27, 1995, at D1.

¹¹¹ James V. Feinerman, *The Give and Take of Central-Local Relations*, CHINA BUS. REV. (Jan. 1, 1998), available at 1998 WL 10921709.

¹¹² The old Constitution of 1982 stated that China is a unitary state with a strong central government based in Beijing and a system of parliamentary supremacy. *Id.*

¹¹³ The directly-administered municipalities in China include Beijing, Chongqing, Shanghai and Tianjin.

¹¹⁴ Constitution of the People's Republic of China, arts. 99, 100, *supra* note 74, at 5,365.

Zones¹¹⁵ can also issue their own legislation subject to approval from provincial legislature.

However, because the legislative powers at the different levels are not very well defined, some local governments, with their own economic objectives in mind, often fail to observe the regulations of the central government. This has made it difficult for law enforcers to find the applicable law, and thus leading to confusion and lax enforcement at the local level.

Furthermore, the publication of new laws often lags behind their promulgation. Often times, a brief newspaper account is the only source for people to learn about important new laws. While the NPC and the Supreme People's Court publish laws and judicial opinions in official gazettes, their provincial counterparts usually do not.¹¹⁶ Therefore, legal guidelines at the local level are very vague.

In addition, because the ultimate authority to carry out anti-counterfeiting raids lies in local hands, protectionism, driven by local economic incentives, often tends to undo the central government's enforcement efforts. Especially after the 1994 implementation of a nationwide "tax assignment" system¹¹⁷ which permitted local governments to retain a portion of the tax money for local use, local governments had more incentives to enhance tax revenue by encouraging short-term projects with quick return. Ironically, the local-based trademark counterfeiters are often big contributors to local tax revenue, because they operate on low cost (they do not incur the cost of developing and protecting the trademarks) and sell for high profit. Thus, as long as these counterfeiters pay taxes, some local governments have been reluctant to put them out of business. As some local officials have put it, "just open one eye and close the other."

Finally, apart from policy discrepancies between the central and the local governments, the various local governments can also have very different administrative approaches. Decentralization and market reform have replaced the "cellular economy," an economic legacy reflecting Mao's idea of every city being self-efficient within a unified national market. However, regional economic gaps have expanded.¹¹⁸ As such,

¹¹⁵ The Special Economic Zones are Shantou, Shenzhen, Zhuhai, Xiamen, and Hainan. SEE CHINA BUSINESS LAW GUIDE, *supra* note 87, ¶ 1-420, at 3,003; 3,201.

¹¹⁶ Feinerman, *supra* note 111.

¹¹⁷ *Id.* The "tax assignment" system puts internal revenue in three groups: (1) "central taxes" for the central government to exercise macroeconomic control, (2) "sharing taxes" for both the central and local governments to boost economy, and (3) "local taxes" for purely local use.

¹¹⁸ In today's China, where 90 per cent of foreign investment has gone to the urbanized coast areas (particularly Shanghai and the southern province of Guangdong), the government is trying very hard

uneven application of laws among different localities can also add to the difficulty for trademark protection.

5. Criminal Enforcement: Some Real Color?

The criminal prosecution of trademark cases has always lacked real teeth. In the last few years, even where prosecutors have undertaken seizures at the behest of IPR owners or administrative authorities, they have usually been reluctant to ask the court for criminal sanctions.¹¹⁹ Behind such reluctance is a combination of factors: lack of clear local guidelines, limited financial and human resources, vested local interests, and in some cases, corruption.¹²⁰ Consequently, although criminal enforcement against trademark infringement in major cities has significantly increased over recent years, places with no criminal enforcement mechanisms have attracted manufacturers and wholesalers specializing in counterfeiting and trafficking counterfeits.

A bright sign may lie in the new Criminal Procedure Code which authorizes a private right of action in criminal prosecution of trademark infringement.¹²¹ The Supreme People's Court's interpretation of the Code further lifted barriers to private prosecution by allowing trademark owners to bring complaints directly to the court for criminal prosecution without prior approval from local prosecutors or other authorities.¹²² However, while this may alleviate the difficulty in criminal enforcement, whether the local judges are willing to convict the politically powerful can still pose a problem.

to lure investors into the interior of the country. *The Discreet Charm of Provincial Asia*, ECONOMIST, Apr. 27, 1996, at 65, available at 1996 WL 8671910.

¹¹⁹ Joseph T. Simone, Jr., *A Stronger Front Line New Customs Regulations May Help China Enforce Intellectual Property Rights*, CHINA BUS. REV. (Mar. 1, 1996), available at 1996 WL 8669476.

¹²⁰ Nevertheless, the Chinese government has demonstrated a true resolve in combating corruption of government officials in the past ten years: between April 1988 and March 1992, prosecutors handled over 40,000 bribery cases; between January and August 1992, governmental supervisory bodies disciplined approximately 22,900 corrupted officials. Major corruption cases doubled in the year of 1993 when China strengthened a national effort against economic crimes. See also Chang Hong, *Corruption Purge has Officials on the Rack*, CHINA DAILY, Nov. 7, 1992, at 11, available at 1992 WL 8729446; *Party Wages War on Corruption as Incidents Soar*, CHINA DAILY, Mar. 3, 1994, available at 1994 WL 11428358 (N. Am. Ed.).

¹²¹ See Catherine Gelb, *Foreign and Chinese Software Firms are Competing, and Cooperating, to Build A Dynamic Sector*, CHINA BUS. REV. (Sept. 1, 1997), available at 1997 WL 9618789.

¹²² See *id.*

6. Customs: Untested Water, Incentive and Deterrence

China's customs laws prohibit the import or export of illegal products. Accordingly, local customs offices have authority to seize infringing products. In order to get customs protection, a foreign trademark holder must have registered the trademark with the Chinese Trademark Bureau.

The majority of customs enforcement actions are based on information reported by trademark holders to the General Administration of Customs with respect to specific shipments that they have identified. After the trademark holder has identified a suspect shipment, however, he only has three working days to request formal enforcement measures and to prove that the detained goods are infringing. Otherwise, customs can release the suspected goods to the importer or exporter, and the trademark holder must pay a bond equal to the full value of the goods.¹²³ Many foreign companies fear that such a high burden of initial proof on the part of the trademark holder may potentially open up loopholes for cunning counterfeiters.

V. PRACTICAL CONSIDERATIONS FOR FOREIGN TRADEMARK OWNERS ON THE CHINESE MARKET

China has become one of world's ten biggest emerging markets.¹²⁴ As such, many foreign and multinational companies are positioned to take advantage of this booming market. Nonetheless, given the reality of trademark protection in the country, these companies should keep in mind some important considerations while they set foot on the Chinese market.

A. MAINTAIN VIGILANCE AND GET REGISTERED

The plight of the Walt Disney Company and its big-eared Mickey Mouse is a good showcase for the importance of always keeping a vigilant eye out on the market. When Mickey and his friends became popular with kids and adults alike in China, their popularity also increased among the racketeers who started to make all kinds of imitation goods, from candy-

¹²³ Simone, *supra* note 118.

¹²⁴ According to the U.S. Department of Commerce, the ten markets are China, Indonesia, India, South Korea, Turkey, South Africa, Poland, Argentina, Brazil, and Mexico. These countries are expected to double their share of global GDP to 20 per cent by 2010; by then, their percentage of world imports probably will exceed that of Japan and the European Union combined. See Rahul Jacob, *The Big Rise: Middle Classes Explode Around the Globe, Bringing New Markets and New Prosperity*, FORTUNE, May 30, 1994, at 74, available at 1994 WL 2801603.

wraps to coffee mugs and T-shirts. In September 1988, to the dismay of Chinese kids, new episodes of the cartoon program were suddenly discontinued because they were withdrawn by the enraged company, which then filed 350 trademark applications with the Chinese Trademark Bureau and brought its complaints to the attention of the Chinese government.¹²⁵

In the U.S., Disney, in its zeal to protect Mickey, has gone so far as to challenge paintings of the ubiquitous creature on the walls of a Florida day care center.¹²⁶ Likewise, in China, it now holds more registered trademarks than any other foreign company¹²⁷ and has sold numerous licenses to Chinese companies to make apparel, toys, and novelty items using the Disney name.¹²⁸ Having learned to protect itself by closely watching the market and actively seeking registration of its trademarks in China, the company now finds the Chinese market even more attractive than before.

Seeking registration is of vital importance because unlike the first-to-use doctrine provided in the U.S. Lanham Act, China's Trademark Law adheres to a strict first-to-file rule for trademark registration. Evidence of actual use only becomes relevant when two applicants seek to register same or similar trademarks for same or similar products on the same day. Therefore, a foreign trademark holder should apply for Chinese registration as early as possible in order to win the race to the register and therefore win the protection afforded to a registered trademark.

Unlike many other countries where a trademark holder can only protect itself by bringing a lawsuit in court, China's trademark laws, at least on a theoretical level, provide more proactive protection mechanisms. The law purports to involve many parties other than the trademark holder in protecting a trademark. Specifically, administrative agencies like the AICs monitor the market and respond to trademark infringement on their own initiative, and consumers also have a right to report poor quality goods.¹²⁹ However, a trademark holder should not rely solely on the administrative agencies because they do not have enough resources to look into every

¹²⁵ Tan Loke Khoo, *Counter Feats the Art of War against Chinese Counterfeiters*, CHINA BUS. REV., Nov. 1, 1994, available at 1994 WL 11291284.

¹²⁶ Jessica Litman, *Mickey Mouse Emeritus: Character Protection and the Public Domain*, 11 U. MIAMI ENT. & SPORTS L. REV. 429, 429 (1994).

¹²⁷ Gerald S. Jagard, *The Mouse That Roars: Character Protection Strategies of Disney and Others*, 21 T. JEFFERSON L. REV. 235, 256 (1999).

¹²⁸ Kolton, *supra* note 98, at 443. In 1999, on a daylong tour to Los Angeles, Chinese Prime Minister Zhu Rongji discussed with officials at the Walt Disney Company about marketing more of their products in China. V. Dion Haynes, *Chinese Premier Focuses on Trade Deficit, Import Issues on His Agenda*, CHI. TRIB., Apr. 7, 1999, at 3, available at 1999 WL 2861032.

¹²⁹ Li Bida, *How Foreign Enterprises May Obtain Trademark Protection in China*, CHINA L. 99, 100-01 (Issue 3, 1995).

factory, distributor and vendor. Self-help should not be the ultimate answer to trademark protection in China, because China's effective participation in the international commercial sphere will depend on official enforcement efforts.¹³⁰ However, given the current enforcement of the trademark laws, self-help will likely continue to play a very important role in the near future.

A. ENGAGE PROFESSIONALS

A trademark holder operating on the Chinese market needs to engage legal professionals in order to comply with the laws and protect his or her own trademark rights and economic interests. As discussed earlier, China's legal reform is under way. Desperately in need of highly qualified lawyers,¹³¹ the country is also reforming its administration of the legal profession.¹³² The reforms, combined with a more competitive legal market and improved legal education, will improve the general quality of existing lawyers and attract more talented young people into the legal profession.

Although some have said that maneuvering through the Chinese legal system can be an exercise in frustration,¹³³ it is worth the trouble in the long run. Foreign trademark owners should engage capable Chinese counsels at an early stage upon entering the Chinese market, in order to develop IPR protection strategies, monitor the market, and prepare for legal battles if needed.

B. MONITOR BUSINESS PARTNERS OR "GO IT ALONE"

The Unilever Company sued Shanghai No. 3 Department Store for infringement of its enormously popular trademark LUX ("Lishi," as registered by the plaintiff in China).¹³⁴ The Shanghai Yangpu District Court

¹³⁰ Stanton J. Lovenworth & Kurt P. Dittrich, *Protection of Well-Known Trademarks in China*, 78 J. PAT. & TRADEMARK OFF. SOC'Y 181, 187 (1996).

¹³¹ Due to political reasons, the legal profession was almost non-existent in China from the 1950s to the 1970s. After the Cultural Revolution, China reestablished its legal profession regime in 1979. Currently, according to the Chinese Ministry of Justice, China needs at least 300,000 to 500,000 lawyers, but only has 80,000. In the past fifteen years, China has trained over 70,000 lawyers, who handled more than 400,000 criminal and civil cases each year; however, the number of lawyers is far from enough to meet the demand. The government has introduced favorable measures in the hope to alleviate the shortage. Chen Bian, *Demand for Legal Eagles Soars*, CHINA DAILY, Nov. 1, 1995, available at 1995 WL 11204034.

¹³² The Provincial Judicial Department Chiefs Meeting held in June 1993 made it clear that a reform of the lawyers system was to start with the reform of the ownership of law offices. Existing law offices will develop into independent professional groups that are self-supporting and free from government financing. See Liu, *supra* note 59.

¹³³ Kolton, *supra* note 98, at 445.

¹³⁴ See Li, *supra* note 92.

carefully investigated the case and ascertained the respective liability of twelve of the defendant's branch stores in four provinces.¹³⁵ Now the company has several joint ventures with Chinese partners. Apart from making every effort to maintain good relationships with these partners, Unilever is also closely monitoring them to ensure that no local distributor is infringing on its trademark.

Like Unilever, many foreign firms have set up joint ventures with local partners in China. But the process of licensing and assignment of trademark rights can be very costly and time-consuming, and business relationship can turn sour if the local partners feel that they are constantly being watched. So more foreign firms now prefer to "go it alone."¹³⁶ By setting up their own enterprises or buying out their Chinese partners in joint ventures, they seek to gain full control of the marketing and distribution network. This eliminates the risk of potential misuse of their trademarks by local partners competing with similar products.¹³⁷

C. EDUCATE CONSUMERS

Every package of EAGLE brand ginseng tea bears a flying eagle logo on its laser-print label. Such labels are also called "anti-counterfeiting" labels because they are very difficult for infringers to imitate. Moreover, in the product's television commercials, a deep-sounding overvoice cautions consumers to look for the authentic label when "looking for the true eagle." This not only helps consumers distinguish "true eagles" from fake ones, but also enhances the product's good will by tapping on consumer psychology: because counterfeiters only counterfeit products that are very good, this product must be very good.

For durable goods such as home electronic appliances, good after-sales service is another way to educate consumers. For example, SHARP can help consumers tell the difference between an original set of SHARP air-conditioner and a counterfeit by offering product warranty and a complete package of installation, maintenance and repair services for a certain period of time.

Microsoft has developed a different strategy. Because it is impossible to offer hands-on training to every end-user directly, the company sets up numerous training centers for dealers and distributors of its software,

¹³⁵ *Id.*

¹³⁶ Gene Linn, *More Foreign Investors Go It Alone in China*, J. COM., available at 1998 WL 20940322.

¹³⁷ *Id.*

who in turn train the end-users. It also has big billboards bearing its "Windows" logo at almost every major intersection of the Beijing "Zhongguancun electronic zone."¹³⁸

D. OPT IN A TWO-TIERED PROTECTION REGIME

As discussed earlier, China's trademark protection regime has two tiers: the judicial tier and the administrative tier. Thus, when a trademark holder discovers infringement, he has the option to either first report it to the local AIC or go directly to the court. The AICs at different levels administer trademark registration and oversee market conditions. They have experienced professionals who can often handle trademark matters more quickly and effectively than the court. Furthermore, they have their own market information database, which makes them generally better equipped to investigate trademark infringement and regulate the market. Therefore, although China's courts have improved significantly in their capacity to handle trademark cases, a trademark holder will often benefit from first resorting to the local AIC to collect evidence of infringement.

E. ALTERNATIVE DISPUTE RESOLUTION – WHY WAR AND WHY NOT

Alternative dispute resolution ("ADR") procedures, whether used independently or in conjunction with litigation, can often substantially reduce the cost and other burdens of litigation and bring solutions unavailable at court. Many trademark disputes are especially suited for arbitration, not only because arbitration usually costs less, but more importantly, because it protects trade secrets and affords the procedural flexibility that helps the trademark holder save time.¹³⁹ By quickly resolving the problem and eliminating infringement, the trademark holder can significantly mitigate profit loss and, therefore, lessen the actual harm done to its business reputation, because the longer the infringement persists, the greater the profit loss and reputation harm to the trademark holder.

¹³⁸ The "Zhongguancun electronic zone" is a hi-technology zone for computer software and hardware in Beijing. It has gained the reputation of "China's Silicon Valley." See, e.g., *NASDAQ Considers Setting up Branch in China*, CHINAONLINE, Apr. 19, 2002, available at LEXIS, News Library, News Group File.

¹³⁹ David B. Dreyfus, *Confucianism and Compact Discs: Alternative Dispute Resolution and its Role in the Protection of United States Intellectual Property Rights in China*, 13 OHIO ST. J. DISP. RESOL. 947, 962 (1998).

However, litigation also has its inherent advantages in certain cases. The publicity generated by filing a formal lawsuit can help enhance consumer awareness of the particular trademark. Moreover, litigation can often result in much higher damage awards than arbitration. Additionally, the assurance of court enforcement gives the plaintiff more certainty about his ability to get the damage award. Therefore, some plaintiffs prefer litigation, especially high-profile litigation, to ADR approaches.

Nevertheless, when potential damage awards cannot justify the costs of retaining legal counsel and litigating the case, plaintiffs often attempt settlement by informal negotiations and cease-and-desist letters.¹⁴⁰ Alternatively, foreign trademark owners can consider a three-way mediation with the infringer and the regulator rather than commissioning elaborate expert studies, taking scores of depositions, and rushing to file a lawsuit.

VI. CONCLUSION: AN OUTLOOK FOR A NEW WTO MEMBER

On November 10, 2001, after 15 years of negotiation, the WTO trade ministers unanimously voted in favor of China's application to join the WTO, officially bringing a market of 1.3 billion people into the global trading system.¹⁴¹ As this new WTO member is shifting to a market economy and becoming increasingly involved in world trade, issues concerning its trademark protection have come to the front stage of world economics and politics. In addition, China's domestic companies and industrial associations, which have become more aware of the importance of protecting their trademarks against infringement, have begun to play a more active role in lobbying the government for a more effective trademark protection regime. Therefore, if the extensive legislative efforts in the past have been, as some critics stated, largely an attempt to avoid economic sanctions from other countries, then today China has every

incentive of its own to keep pace with the international standards of IPR protection.

The Chinese government has taken significant steps to reform the laws. On top of the elaborate legislative framework discussed earlier, in 1996, China announced plans to overhaul its main IPR legislation in the near future. A State Council working conference was set up to oversee IPR enforcement through the State Science and Technology Commission.¹⁴² Currently, the Trademark Bureau and the State Council are engaged in serious efforts to draft new legislation in full compliance with the Agreement on Trade-Related Aspects of Intellectual Property Rights (the "TRIPs Agreement").¹⁴³ One of these new laws will deal exclusively with counterfeit products and will provide greater penalties on the infringing manufacturer and vendor.¹⁴⁴

Although currently the enforcement of the trademark laws still has many problems, the trend toward more forceful and effective enforcement is irreversible. Even for the U.S. (at one time the biggest critic of China's IPR regime), where the Constitution explicitly provides for IPR protection¹⁴⁵ and related laws were enacted more than 100 years ago, the effective enforcement of those laws did not happen instantaneously. Similarly for China, there will be a learning process for trademark law enforcement professionals, and it will take time for them to develop new investigative techniques, to battle and eventually eliminate government red-tape, and to nurture public awareness of trademark rights. In fact, this is why the WTO, instead of demanding immediate results, allows developing countries up to five years to comply with the TRIPs Agreement.¹⁴⁶

¹⁴² In addition, provinces and municipalities are also establishing their own working conferences and "task forces." The task forces will be organized by representatives from the national Copyright Administration, Trademark Bureau, Patent Office, State AIC, Customs Administration, and local police units. They will have the power to collect evidence of infringement, seize suspected goods and materials, impose fines and enjoin production. See Wineburg, *supra* note 56.

¹⁴³ The TRIPs Agreement established an international standard of IPR protection for all members of the WTO. For a detailed discussion on compliance with the TRIPs Agreement, see Zheng Chengsi, *The TRIPs Agreement and Intellectual Property Protection in China*, 9 DUKE J. COMP. & INT'L L. 219, 222 (1998).

¹⁴⁴ See *id.*

¹⁴⁵ U.S. CONST. art. I, § 8, cl. 8 ("To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.").

¹⁴⁶ All members of the WTO must comply with the standard set forth in the TRIPs Agreement. The Agreement generally gives countries one year from the date they enter the WTO to comply. Developing countries are given an additional four years, and the least developed countries are entitled to a ten-year "phase-in period." See TRIPs, General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, April 15,

¹⁴⁰ *Id.* at 969.

¹⁴¹ China was a signatory to the GATT in 1948 under the Nationalist government and withdrew in 1949. It began its courtship of the GATT/WTO again in 1986. But the request was demurred, followed by a series of discussions about commitment, responsibility, and mutual obligation. During the Uruguay Round of the GATT negotiations, China held observer status. See *China and Trade: Declining Passion*, ECONOMIST, Oct. 17, 1998, available at 1998 WL 11700264. On November 10, 2001, WTO trade ministers unanimously approved China's reentry into the WTO. U.S. Trade Representative Robert Zoellick said of China before the votes: China is already a major influence in world trade, and its participation in the WTO will be a boost for both itself and the U.S. French Finance Minister Laurent Fabius also commented that the WTO could not genuinely be called a "world" organization without the world's most populous nation. *Taiwan Joins China in WTO*, available at www.cnn.com/2001/WORLD/asiapcf/central/11/11/taiwan.WTO/index.html (last visited Nov. 10, 2001).

As trademark legislation quickly evolves in China, an increasing number of successful precedential actions brought by Chinese and foreign trademark holders suggests that a commitment is finally becoming a reality. Given past progress and a true nationwide resolve, there is good reason to believe that trademark protection in China will soon achieve the international standard that it has vigorously aspired to over the past two decades.

GLOBAL ORGANIZED CRIME AND INTERNATIONAL SECURITY, Ashgate Publishing Company 1999

REVIEWED BY

THOMAS J. HOLTER

Professor Emilio Viano's book begins with the following premises: globalization has "increased the profitability and destructive impact of systematic illegal activity."¹ "Transnational crime is presently one of the most serious security threats to democratic institutions, the rule of law, community welfare, and basic values and norms."² "Along with military power, law and its enforcement are indispensable integers in a transnational equation of peace."³ Each of these assertions deserves careful scrutiny in its own book.⁴ They are not examined here; this book has other objectives.

First, it aims to share research and information concerning the globalization of organized crime. Second, it hopes to analyze the effects of this globalization and of the responses initiated by states. Third, it seeks to discuss contemporary approaches and strategies to fight organized crime. Finally, it promises to "[f]acilitate understanding the complexity, methodologies, and specificities of organized crime in the contemporary 'global village.'"⁵ Although the book does not accomplish these ambitious goals, it nevertheless contains a number of thought-provoking essays, and therefore merits a look by anyone curious about this fascinating and obscure topic.

The book consists of a series of essays by different authors loosely organized into three parts. The first part offers several essays that purport to show the outlines of the problem. The second part contains a series of "case studies," which are essentially descriptions of particular authors' research in organized crime, usually in specific geographic locales. The third part examines various public policy responses to global organized crime. This format imbues the book with a vaguely schizophrenic quality, and significantly frustrates the stated aims of the text.

"Organized crime" is difficult to define and rather difficult to research, arguably as obscure as the dark side of the moon. Perhaps even more obscure, because the moon's very existence is not contingent upon

1994, 33 I.L.M. 1125. See also *id.* at Annex 1C, 1197; Michael Yeh, *Up against A Great Wall: The Fight against Intellectual Property Piracy in China*, 5 MINN. J. GLOBAL TRADE 503, 514 (1996).

¹ GLOBAL ORGANIZED CRIME AND INTERNATIONAL SECURITY xi (Emilio C. Viano ed., 1999).

² *Id.*

³ *Id.*

⁴ Such careful scrutiny is not contained in this text. The first of these premises is unexceptional; globalization has increased the profitability and "impact" of many types of systematic economic activity. The second premise, which is ultimately the assumed conclusion of the book, is questionable. The third premise is merely an assertion of political ideology.

⁵ VIANO, *supra* note 1, at xii.