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Trademark Protection in China: Trends and Directions

PAUL B. BIRDEN, JR.*

I. INTRODUCTION

A country hungry for technology learns quickly that the engine that drives technological advance is protection of intellectual property rights. Recognizing this, China has in recent years made bold strides to make its shores safe for foreign copyrights, patents and trademarks.  

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1. This Article contains cites to Chinese sources that were not available in English. For these sources, the Journal relied on Mr. Birden's expertise in translating and interpreting the Chinese-language sources. Copies of these sources are on file with the Journal and the author.

2. With a view toward reaching technical equality with the West by the year 2000, China initiated the “863 Program,” a national high-technology acquisition program, in 1987. The next year China initiated the “Torch Plan,” which encourages the transformation of research results to enterprise. For an overview of these and other programs, see Richard Suttmeier, China’s High Technology: Programs, Problems, and Prospects, in JOINT
Although Western countries complain that China's intellectual property controls offer fewer safeguards than those of more developed countries, China has worked hard to replace its old laws that were more suited to the era of Confucius with an infrastructure that will support modern products and modern marketing methods. China has passed new laws and amended old ones to give them new force. It has signed on to several international conventions that aim to provide and protect rights of owners of trademarks and other intellectual property.  

Perhaps most telling, in 1992, China also launched its own internal crackdown on fake and shoddy goods. 

Chinese consumers are "brand-name" conscious and view trademarks as emblems of a firm's prestige and management standard. Trademark recognition, just as in the United States, often motivates a consumer's decision to buy a product. Thus, trademarks impact products marketed in China more directly and immediately than patents and copyrights. Through the manipulative and deceptive use of trademarks, however, fake goods can pass as genuine goods, and thus negatively impact trademark holders. Chinese officials, therefore, justifiably regard its trademark laws as playing a key role in promoting China's commodity economy, ensuring product quality, and protecting consumer interests.


6. For a description of the lure of name-brands in Shanghai, see Pan Qing, Name Brand Shops Mushroom in Shanghai, ECON. REP. (China), 1993, at 23; see also Gene Linn, High Returns for Image Building, ASIAN Bus., Mar. 1994, at 9 (finding that there is a "huge potential in China for a good corporate image and highly-regarded brand name" and that "well-packaged products sell well").


12. Waigouren Huo Waiguo Qiye Shenqing Shangbiaofa Zhuce Daili Banfa [ Procedures for Agents of Foreigners and Foreign Entities Applying for Trademark Registration], in CHINA'S ECONOMIC LEGISLATION, supra note 11, at 1162.


15. See e.g. Trademark Law, supra note 10, arts. 31-34.
other intellectual property protection regimes and to enhance its stature worldwide, China acceded to two important international treaties governing use of intellectual property: in 1985, to the International Convention for the Protection of Industrial Property (Paris Convention);\textsuperscript{16} and in 1989, to the Madrid Agreement Concerning the International Registration of Marks (Madrid Agreement).\textsuperscript{17} By the end of 1993, foreign companies had registered about 60,000 trademarks in China; of these, U.S. companies had registered 16,221.\textsuperscript{18} Yet, despite China's continued promulgation of intellectual property laws and accession to the Paris Convention and Madrid Agreement, protection continued to be insufficient. The evidence suggested that foreigners received little benefit from China's membership in those conventions.\textsuperscript{19}

In the face of rising foreign discontent, China released a "White Paper" in June 1994 proclaiming its commitment to intellectual property protection.\textsuperscript{20} The United States, however, remained skeptical. It once again designated China a "Priority Foreign Country" under the "Special 301" provisions of the Trade Act of 1974\textsuperscript{21} for its poor record of intellectual property protec-


\textsuperscript{18} White Paper Hails Property Protection, supra note 7, at 4.


\textsuperscript{21} 19 U.S.C.A. §§ 2411-2420. This statute requires the U.S. Trade Representative to identify and prioritize countries that deny adequate protection to U.S. intellectual property. For a discussion of Special 301 activity, see Lucille A. Barale, Section 301
In February 1995, President Clinton announced the imposition of trade sanctions against China. China reciprocated in kind. These dueling actions portended a trade war; yet, at the eleventh hour, China agreed to strengthen its intellectual property protection.

This Article examines the trends and direction of trademark protection in China, the Trademark Law itself and its Implementing Rules. Part II reflects upon the background to the 1993 Amendments to the Trademark Law and its Implementing Rules. Part III is a general survey of China's intellectual property laws and its membership in international organizations. Part IV closely examines China's Trademark Law and related legislation. Part V discusses problems of official corruption and bribery. Part VI takes a close look at the non-legislative efforts China has made to bolster protection of trademarks and other intellectual property. Finally, Part VII considers both recent trends in intellectual property activities and steps U.S. businesses may take to protect their own intellectual property.
II. BACKGROUND TO THE 1993 TRADEMARK LAW AMENDMENTS

The International Intellectual Property Alliance, a U.S. trade organization, calculated that U.S. industries lost some $415 million in China in 1988 from sales of pirated goods, as a result of China’s failure to protect U.S. intellectual property adequately. In 1991, the U.S. government determined that China warranted a Special 301 investigation under Title III of the Trade Act of 1974 for its poor record of intellectual property protection.27

To prevent U.S. trade retaliation by businesses, China and the United States signed a Memorandum of Understanding (MOU) in January 1992 whereby both countries agreed to stem further infringement of intellectual property rights.28 The United States also agreed to terminate its Special 301 investigations and remove China from its list of priority countries.29

The following month, a crackdown on fake and poor quality goods began in Anhui Province.30 As a result, China eliminated approximately 204 centers engaged in producing fake goods, arrested nearly fifty people, and confiscated numerous fake items valued at 24.74 million Yuan ($4.58 million U.S.).31

In July 1992, China began a nationwide crackdown on fake and poorly made goods. By October 1992, the government found and seized 12,944 types of fake or poor quality goods, 75 illegal operators engaged in making or selling fake products, and 3899 underground plants that such business groups used.32 During the confiscation of fake Pierre Cardin products in Shanghai, where only one store had a license to sell that brand of goods, the government inventoried more than fifty individually owned fashion shops, and

31. *Id.*
found fake Pierre Cardin shirts, leather belts and suits. The last half of 1992 saw a flood of illegally recorded materials in the Chinese market, including foreign records, tapes and cassettes that were smuggled into and recorded in China.

In 1992, more than 90,000 applicants, including 8300 from foreign countries, made submissions for trademark registration, compared with a total of 18,500 applicants, including 1565 foreign applicants, in 1982. By 1992, the number of valid trademark registrations in China had risen to 366,000.

Chinese legislators met in December 1992 to consider amending the Trademark Law to address service mark protection, registration of trademarks by deceptive means, and the prohibition of using administrative regions as trademark names. The legislators also looked at simplifying registration procedures and extending the time period for raising trademark disputes. As a result, on February 22, 1993, China amended and repromulgated its Trademark Law, which became effective on July 1, 1993. The legislature amended the Implementing Rules on July 9, 1993, and the rules took effect on July 28, 1993.

To further strengthen trademark protection, Chinese legislators also amended the Criminal Law. On February 22, 1993, they passed Supplementary Provisions Concerning the Punishment of Crimes of Counterfeiting Registered Trademarks Made by the Standing Committee of the National People’s Congress (Counterfeiting Regulations), which became effective on July 1, 1993.
III. OTHER INTELLECTUAL PROPERTY LAWS

A. Copyright and Related Laws

1. General Overview

China adopted its Copyright Law and its Implementing Rules in September 1990. Both took effect on June 1, 1991.42 The Copyright Law suffered from several deficiencies. The law failed to protect foreign unpublished works.43 Although the United States acceded to the 1971 Paris Revision of the International Convention for the Protection of Literary and Artistic Works (Berne Convention)44 in 1989, China had not yet acceded to the Berne Convention when the Copyright Law was enacted. Thus, Chinese law still provided no protection for U.S. works.

The MOU that China and the United States signed in 1992 marked China's agreement to amend the Copyright Law and its Implementing Regulations. Further, China would thereafter seek accession to the Berne Convention.45 Pursuant to that MOU, China enacted the Provisions Implementing International Copyright Treaties (Treaty Implementing Regulations), which it formulated specifically to protect the legitimate rights and interests of foreign copyright owners.46 Through this regulation, China made several key amendments to its Copyright Law and Computer Congress, translated in INDUS. PROP. (WIPO, Geneva, Switz.), Sept. 1993, at Text 3-003 [hereinafter Counterfeiting Regulations]. For additional commentary, see Standing Committee of the National People's Congress, Punishment of the Crime of Passing Off Registered Trademarks Supplementary Provisions, CHINA L. & PRAC., Apr. 29, 1993, at 4.


43. Copyright Law, supra note 42, art. 2; China, Thailand, Indonesia Among Countries Criticized for Inadequate Protection of Intellectual Property, supra note 26, at 8.

44. MPEAA Seeks Copyright and Court Reforms, IP ASIA, June 18, 1992, at 17.


46. Shishi Guoji Zhezuoquchan Tiaoyue de Guiding [Regulations on the Implementation of International of Copyright Treaties Provisions], art. 1, translated in CHINA L. FOREIGN BUS. (CCH) ¶ 11-703 (Sept. 25, 1992) [hereinafter Copyright Treaty Implementing Regulations].
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Software Protection Regulations,\textsuperscript{47} which paved the way for its accession to the Berne Convention.\textsuperscript{48} The Treaty Implementing Regulations specifically state that China's Copyright Law, Implementing Rules, and the Treaty Implementing Regulations themselves apply to foreign works.\textsuperscript{49}

China's Copyright Law protects "works," including, inter alia, engineering and product design blueprints and related explanations, maps, schematic diagrams, other graphic works, and computer software.\textsuperscript{50} "Works" does not, however, include digital and general tables and formulae.\textsuperscript{51}

Among the rights China's Copyright Law confers are the right of publication, the right of usage, and the right to receive remuneration.\textsuperscript{52} Copyright protection for the rights of publication, usage, and remuneration receipt, in the case of an individual, exists for the author's lifetime plus fifty years after the author's death.\textsuperscript{53} In the case of joint works, the period of protection ends on December 31 of the fiftieth year after the death of the last surviving joint contributor.\textsuperscript{54} For corporate or non-corporate units and professional works whose copyrights belong to those units, the duration of the copyright is fifty years.\textsuperscript{55} Pursuant to the Treaty Implementing Regulations, unpublished foreign works receive the same protection.\textsuperscript{56} Owners may assign copyright usage rights pursuant to a written contract.\textsuperscript{57}

The State Copyright Bureau is the State Council's copyright administrative control department.\textsuperscript{58} It controls copyrights throughout China by, inter alia, investigating cases of copyright infringement that have a nationally detrimental effect,\textsuperscript{59} dealing with foreign trademark concerns,\textsuperscript{60} guiding the work of local

\textsuperscript{47} Id. For additional commentary, see also New Regulations on Berne Accession, ASIA L. PRAC., Oct. 22, 1992, at 23.
\textsuperscript{48} See New Regulations on Berne Accession, supra note 47, at 46.
\textsuperscript{49} Copyright Treaty Implementing Regulations, supra note 46, art. 2.
\textsuperscript{50} Copyright Law, supra note 42, art. 3.
\textsuperscript{51} Id. art. 5(3).
\textsuperscript{52} Id. art. 10.
\textsuperscript{53} Id. art. 21.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Copyright Treaty Implementing Regulations, supra note 46, art. 5.
\textsuperscript{57} Copyright Law, supra note 42, art. 23.
\textsuperscript{58} Copyright Law Implementing Rules, supra note 42, art. 7(2).
\textsuperscript{59} Id. art. 7(2).
\textsuperscript{60} Id. art. 7(4).
copyright administrative control departments,\textsuperscript{61} and implementing and interpreting the Treaty Implementing Regulations.\textsuperscript{62} Following complaints by groups such as the Business Software Alliance\textsuperscript{63} about the failure of the Copyright Law and Software Protection Rules to provide for criminal penalties,\textsuperscript{64} China made copyright infringement a criminal offense punishable for up to seven years.\textsuperscript{65}

2. Computer Software Protection Rules.

The Copyright Law specifically listed computer software as a protectable work,\textsuperscript{66} but made no further mention of computer software, except to say that separate regulations would apply.\textsuperscript{67} In 1991, China enacted Computer Software Protection Rules (Software Protection Rules), effective October 1991,\textsuperscript{68} and Measures for Computer Software Copyright Registration (Software Registration Measures).\textsuperscript{69} Upon proper registration in China, these laws protect foreign computer programs,\textsuperscript{70} which include source code and target programs, and related files.\textsuperscript{71} The Treaty Implementing Regulations made the Software Protection Rules applicable to foreign works.\textsuperscript{72}

Under the law, "computer software" refers to computer programs and related files.\textsuperscript{73} "Computer program" refers to

\begin{footnotes}
\textsuperscript{61} Id. art. 7(6).
\textsuperscript{62} Id. arts. 20-21.
\textsuperscript{65} \textit{Copyright Violators Face Imprisonment}, \textit{CHINA DAILY} (N. Am. Ed.), July 6, 1994, at 1.
\textsuperscript{66} Copyright Law, \textit{supra} note 42, art. 3.
\textsuperscript{67} Id. art. 53.
\textsuperscript{68} Jisuanji Ruanjian Baohu Tiaoli [Computer Software Protection Rules], art. 40, \textit{CHINA L. FOREIGN BUS.} (CCH) ¶ 11-704 (May 24,1991) [hereinafter Software Protection Rules].
\textsuperscript{69} Zhonghua Renmin Gonghegua Jixié Dianzi Gongyebu Jisuanji Ruan jian Zhezuquan Dengji Banfa [Measures for Computer Software Copyright Registration], \textit{CHINA L. FOREIGN BUS.} (CCH) ¶ 11-706 (Apr. 6, 1992) [hereinafter Software Registration Measures].
\textsuperscript{71} Software Protection Rules, \textit{supra} note 68, art. 3.
\textsuperscript{72} Copyright Treaty Implementing Regulations, \textit{supra} note 46, art. 2.
\textsuperscript{73} Software Protection Rules, \textit{supra} note 68, art. 2.
\end{footnotes}
either the coded command sequences, symbolic command sequences, or symbolic statement sequences, which may be automatically transferred into coded command sequences.74 "File" refers to written data and diagrams compiled in a natural language or semiotic language used to describe the program's content, structure, design, functional specifications, developmental state, test results and usage methods, such as a program design manual, flow sheet or user's manual.75

To be eligible for protection, a developer must have developed the software independently and the software already must exist in some tangible medium.76 Software protection does not extend to the protection of thoughts, concepts, discoveries, principles, algorithms, processing procedures and operational methods employed in the development of the software.77 Only the software copyright holder, inheritor or assignee may apply to register software.78

The protection period for software copyright is twenty-five years after the software's first release.79 Software copyright holders may apply to the software registration control organ for an extension of another twenty-five years.80 The maximum protection period, however, may not exceed fifty years.81 Where foreign computer programs are regarded as literary works under relevant Copyright Laws,82 the term of protection is fifty years, and owners need not register under the Software Protection Rules.83

Pursuant to the Software Protection Rules, the Ministry of Engineering and Electronics Industries (MEEI) promulgated the Software Registration Measures.84 The State Council is the software registration and control organ generally responsible for software registration nationwide85 and interpretation of the

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74. Id. art. 3(1).
75. Id. art. 3(2).
76. Id. art 5.
77. Id. art 7.
78. Software Registration Measures, supra note 69, art. 4.
79. Software Protection Rules, supra note 68, art. 15.
80. Id.
81. Id.
82. Copyright Treaty Implementing Regulations, supra note 46, art. 7.
83. Id.
84. Software Registration Measures, supra note 69, art. 1.
85. Software Protection Rules, supra note 68, art. 8.
Software Protection Rules. After State Council authorization, however, the MEEI is responsible for overseeing national software copyright registration. The China Software Registration Center, which the MEEI commissions, is responsible for the actual implementation of computer software copyright registration. The MEEI is also responsible for interpreting the Software Registration Measures.

The Software Registration Measures allow an applicant to register a software-copyright to only one released item of software that is independently useable and that has accompanying software authentication material. Authentication material includes material showing independent development of the software, which humans are capable of reading, and also includes the distinguishing features of the software, its program, and file authentication material. Such authentication material must contain twenty consecutive pages from each of the beginning, middle, and end of the source program. If the complete program, however, is fewer than sixty pages, an applicant must submit a detailed account of the complete source program. A possible exception to these requirements is when the materials contain an applicant's business secrets or confidential matters that the applicant is unwilling to disclose.

Software copyright infringement is now a criminal offense in China. Chinese law prefers mediation for disputes in this area, allowing and parties to file applications for mediation with the software copyright administration. Parties who do not agree with the administration's decision may appeal the matter to a People's court.

86. Id. art. 39.
87. Software Registration Measures, supra note 69, art. 6.
88. Id.
89. Id. art. 49.
90. Id. art. 7.
91. Id. art. 9.
92. Id. art. 11.
93. Id. art. 12.
94. Id.
95. Software Protection Rules, supra note 68, arts. 29, 37.
96. Id. arts. 34-35.
97. Id. arts. 35-36.
B. Patent and Related Laws

1. General Overview

China first adopted its Patent Law in March 1984 and enacted implementing rules in January 1985. Both the Patent Law and the Patent Law Implementing Regulations became effective April 1, 1985. Pursuant to these laws, China extended patent protection to inventions, utility models and designs, but did not include pharmaceuticals or chemicals. In addition, the Patent Law required patent owners to manufacture their product in China, and to allow others to use the product in China, or face compulsory licensing.

In the January 1992 MOU, China promised to amend its Copyright Law and its Patent Law. Thus, in September 1992, the Standing Committee of the National People’s Congress (NPC) revised the Patent Law, effective January 1, 1993, and later revised the Patent Law Implementing Regulations, also effective January 1, 1993. The new amendments mainly benefited pharmaceutical and chemical companies because the amendments extended protection to chemicals, pharmaceuticals, foods, beverages and flavorings, as well as relaxed the compulsory licensing provisions.

100. Id. at 14, 263; Patent Law, supra note 98, at 14, 201.
102. Id. art. 51.
103. See Simone, supra note 45, at 30-31.
China's Patent Law extended protection to inventions, utility models, and designs (invention-creations). Inventions and utility models must be novel, inventive, and have practical application before a party may patent them. A party may patent designs if they are not identical with, or similar to, any design that another party has publicly disclosed in a domestic or foreign publication, or has used publicly in China. Patents for inventions are valid for twenty years after the date of filing, while those for utility models and designs are valid for ten years after the date of filing. The Patent Law uses a "first to file" standard for prospective patentees who file patent applications for an identical invention-creation.

Under pre-amendment law, patent owners had to manufacture their products in China or face compulsory licensing, but that requirement no longer exists. Under the amended Patent Law, manufacturing of a product in China is mandatory only if the patent office imposes compulsory licensing. Now, upon request and assuming reasonable terms, a patentee of an invention or utility model must allow a qualified person or entity to exploit the patent, or face possible compulsory licensing by the Patent Office. Persons or entities granted compulsory exploitation licenses must pay the patentee a reasonable exploitation fee.

Relevant departments of the State Council, as well as various regional and local governments, establish the administrative authorities that govern patent affairs. After receiving patent rights for an invention-creation, patentees may complain of infringement to the administrative authority for patent affairs. If a patentee is dissatisfied with the authority's decision in the matter, the patentee may institute suit in a People's court. A party

109. Id. art. 2.
110. Id. art. 22.
111. Id. art. 23.
112. Id. art. 45.
113. Id. art. 9.
114. See Simone, supra note 107, at 30.
115. Patent Law, supra note 98, art. 53 (a person or entity that has developed a product that is technologically superior to a party holding the patent on a similar product).
116. Patent Law, supra note 98, art. 51; see Khoon & Yin, supra note 105, at 16.
117. Patent Law, supra note 98, art. 57.
118. Patent Law Implementing Regulations, supra note 99, art. 76.
119. Patent Law, supra note 98, art. 60; Patent Law Implementing Regulations, supra note 99, art. 77.
must bring a patent infringement suit, however, within two years from the date on which the patentee knew or should have known of the infringing activity.120

2. Protection of Pharmaceuticals

As added protection for pharmaceuticals, the State Pharmaceutical Administration promulgated Administrative Protection of Pharmaceuticals Regulations (Pharmaceutical Protection Regulations)121 on December 19, 1992, and rules to implement these regulations (Pharmaceutical Protection Implementing Rules) on December 30, 1992. Both measures became effective on January 1, 1993.122

The Pharmaceutical Protection Regulations protect pharmaceuticals used to prevent, treat, or diagnose human diseases.123 Only owners of exclusive rights, who enjoy the complete right to manufacture, use and market the relevant pharmaceutical, may apply through an agent for administrative protection.124

Under the Pharmaceutical Protection Regulations, foreigners may apply for administrative protection of certain types of pharmaceuticals, provided their country has signed a treaty or bilateral agreement with China on the administrative protection of pharmaceuticals.125 For a pharmaceutical to receive protection, China’s Patent Law must not have protected it.126 Before January 1, 1993, a foreign applicant’s exclusive rights must have been obtained abroad between January 1, 1986 and January 1, 1993, and the pharmaceutical must not have been offered for sale127 or otherwise gone through legitimate business channels in the

120. Patent Law, supra note 98, art. 61.
123. Pharmaceutical Protection Implementing Rules, supra note 122, art. 3.
124. Pharmaceutical Protection Regulations, supra note 121, art. 6; Pharmaceutical Protection Implementing Rules, supra note 122, art. 4.
125. Pharmaceutical Protection Regulations, supra note 121, art. 3.
126. Id. art. 5.
127. Id. art. 5.
pharmaceutical markets within China. Before or after applying for administrative protection, an applicant must obtain permission to manufacture or sell the subject pharmaceutical in China.

If China grants administrative protection for the pharmaceutical, the protection lasts for seven and one-half years from the date of issuance. If a party makes or sells a protected pharmaceutical without a license, the Regulations allow the aggrieved party to ask the state Pharmaceutical Administration, which is the State Council administrative department charged with production and distribution of pharmaceuticals, to halt the infringing activity, or to institute suit in a People’s court if the aggrieved party is seeking monetary compensation.

3. Protection of Agrochemicals

In legislation complementary to both the Patent Law amendments and the Pharmaceutical Protection Regulations, Chinese legislators passed Regulations for the Administrative Protection of Agrochemical Products (Agrochemical Products Protection Regulations) and rules to implement these regulations (Agrochemical Products Protection Implementing Rules), both effective January 1, 1993. While the Agrochemical Products Protection Regulations closely trace the Pharmaceutical Protection Regulations, the former apply to chemically synthesized pesticides used in farm production, to chemically synthesized weed-killers, insecticides, disinfectants, and rodenticides, and to preparations used to regulate vegetation growth.

For an agrochemical product to receive protection, China’s Patent Law must not have protected it prior to January 1, 1993; a

128. Pharmaceutical Protection Implementing Rules, supra note 122, art. 5.
129. Pharmaceutical Protection Regulations, supra note 121, art. 9.
130. Id. art. 13.
131. Pharmaceutical Protection Implementing Rules, supra note 122, art. 2.
132. Pharmaceutical Protection Regulations, supra note 121, art. 19.
135. Agrochemical Products Protection Regulations, supra note 133, art. 2.
foreign applicant must have obtained exclusive rights abroad between January 1, 1986, and January 1, 1993; and the agrochemical product must not have been offered for sale or otherwise gone through legitimate business channels in Chinese markets for agrochemical products. Both before and after applying for administrative protection, the foreign applicant must comply with relevant Chinese laws and follow procedures that the State Council's administrative department of agriculture has established. If China gives protection to the agrochemical product, such protection also will last for seven years and six months from the date of issuance of the certificate of administrative protection.

The Ministry of Chemical Industry oversees the Agrochemical Products Protection Regulations and its corresponding Implementing Rules. Parties may make complaints to rescind administrative protection with the Ministry of Chemical Industry; parties dissatisfied with the Ministry's decision may file suit in a people's court. If an unauthorized party manufactures or sells a protected agrochemical product, the rightful owner may entreat the Ministry of Chemical Industry to halt the infringing activity; if the rightful owner seeks monetary compensation, the party may institute suit in a people's court. Under these broad general proscriptions, unregistered trademarks come indirectly under the new law's protection.

C. Anti-Unfair Competition Law and Trade Secret Protection

Unfair Competition Law, China lacked protection for trade and corporate secrets and trade dress. The new law addressed that area, while also regulating market activities, maintaining impartial competition, and proscribing official profiteering, power-money trade, and local protectionism.

In the first half of 1993, national courts handled 150% more cases involving corporate-secrets theft than over the same period in 1992. Some scientists and technicians also left their respective employers to start their own businesses or change jobs, many taking with them the results of their research. Consequently, difficult disputes arose involving unpatented research results.

Under the new Anti-Unfair Competition Law, protectable "business secrets" include technical and business information unknown or not readily available to the public but potentially profitable to their owners. This category presumably would include protected but unpatented research results, marketing strategies, and client lists.

Proscribed activities include, inter alia, passing off as one's own a trademark registered to another party; unauthorized use of packaging or trade dress similar to that of well-known products so as to mislead buyers into believing that they are actually buying the well-known product; bribery, false or misleading advertising;

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at 1; see also Anti-unfair Competition Law to Take Effect, IP ASIA, Nov. 25, 1993, at 21.


145. In the United States, "trade dress" may include "words, names, symbols, and devices, alone or in association with other matter, including but not limited to graphic and pictorial indicia, style, and placement of script, color and the totality of individual components of a label, point-of-sale display...[capable] of conveying, a unitary, source-generated, commercial impression." CHARLES E. MCKENNY & GEORGE F. LONG, III, FEDERAL UNFAIR COMPETITION: LANHAM ACT § 43(a), at 4-4 to 4-5 (1995); see also Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763 (1992). Trade dress, however, under the Anti-Unfair Competition Law is less extensive and refers to distinctive packaging designs and product labels. Joseph T. Simone, Damming the Counterfeit Tide, CHINA BUS. REV., Nov.-Dec. 1993, at 53.

146. Hong, supra note 142, at 1. Actually, China had long been obligated under art. 10 of the Paris Convention to protect nationals of signatories thereto from unfair competition. See Stanton J. Lovenworth, Protection of Well Known Trademarks in China, N.Y. L.J., Aug. 21, 1995, at 1.


149. Safeguarding Corporate Secrets, supra note 147, at 4.
disclosing business or trade secrets; and breaching confidentiality agreements. Thus, unregistered trademarks indirectly come under the new law’s protection.

Under this new law, the administrative authorities for industry and commerce (AIC) above the county level supervise and examine acts of unfair competition, which are defined generally as businesspersons’ acts that injure the lawful rights and interests of other businesspersons and disrupt social order. The Anti-Unfair Competition Law, however, has been ineffective in suppressing monopolistic practices. In response, China is considering drafting new legislation aimed at trade monopolies.

D. Product Quality Law

On February 22, 1993, the NPC passed the Product Quality Law (Quality Law), in order to strengthen supervision and control of product quality and to safeguard the rights of users and consumers. The Quality Law prohibits, inter alia, the counterfeiting and passing off of certification marks, marks of fame and marks of excellence, and the passing off of fake products as genuine products. The Quality Law makes both producers and sellers liable for the quality of their products. Products bearing marks also must display, in Chinese, the producing factory’s name and address.

The Quality Law obligates producers and sellers to compensate users for both damages and losses. Where a producer or seller produces or markets a product that offends state or industry standards for protection of health, personal safety or personal

150. Anti-Unfair Competition Law to Take Effect, supra note 144, at 21-22. For further remarks, see Safeguarding Corporate Secrets, supra note 147, at 4; Simone, supra note 145, at 53.
151. Anti-Unfair Competition Law, supra note 144, art. 16; see also, Anti-unfair Competition Law to Take Effect, supra note 144, at 21.
152. Anti-Unfair Competition Law, supra note 144, art. 2; Anti-unfair Competition Law to Take Effect, supra note 144, at 21.
155. Id. art. 1.
156. Id. arts. 4, 19-20, 26, 27.
157. Id. arts. 3, 14.
158. Id. art. 15.
159. Id. arts. 28-32.
property, the Quality Law allows confiscation of the illegally produced products and illegal income obtained therefrom, and the imposition of fines and criminal sanctions.\textsuperscript{160} Departments of supervision and control, AICs, and relevant departments handle consumer complaints.\textsuperscript{161} A people’s court hears appeals from those agencies.\textsuperscript{162}

Although the Quality Law did not explicitly mandate implementing rules, on October 31, 1993, Chinese legislators enacted the Protection of the Rights and Interests of Consumer Law (Consumer Protection Law), effective January 1, 1994.\textsuperscript{163} Focusing on consumer’s rights instead of on manufacturers’ and traders’ rights, the fifty-five-article statute calls on manufacturers and market managers to take full responsibility for warranties, replacements and refunds on goods they sell, thus bearing the costs of repair or exchange.\textsuperscript{164} The law also covers consumer protection organizations and dispute settlement, permitting disgruntled consumers to file suit directly in a people’s court.\textsuperscript{165}

E. Foreign Trademark Provisions

On May 12, 1994, the National People’s Congress adopted China’s Foreign Trade Law,\textsuperscript{166} effective on July 1, 1994. The law maintains order in the foreign trade activities of foreign trade operators.\textsuperscript{167} It defines foreign trade operators as those legal persons or other organizations engaged in the import and export of goods and technology and trade in international services.\textsuperscript{168}

\textsuperscript{160. Id. arts. 37-38.}
\textsuperscript{161. Id. arts. 12, 45. See Ma Zhiping, Consumers Use Law to Fight For Their Rights, CHINA DAILY, May 5, 1994, at 3 (reporting consumer groups handled 73,570 complaints from disgruntled shoppers in 28 provinces during the first quarter of 1994).}
\textsuperscript{162. Quality Law, supra note 154, art. 46.}
\textsuperscript{163. See Protection of the Rights and Interests of Consumers Law, CHINA L. & PRAC., Dec. 28, 1993, at 8 (providing an overview of that new law). In the first half of 1993, 27 provincial and regional consumer associations received more than 135,000 complaints, most of which concerned the quality of goods. Ma Zhiping, Consumer Complaints Set New Record, CHINA DAILY (N. Am. Ed.), Aug. 2, 1993, at 3.}
\textsuperscript{164. Consumer Law To Be a Huge Help, CHINA DAILY (N. Am. Ed.), Dec. 24, 1993, at 1.}
\textsuperscript{165. For commentary on Article 34, see Protection of the Rights and Interests of Consumers Law, supra note 163, at 8.}
\textsuperscript{167. Id. art. 1}
\textsuperscript{168. Id. art. 2}
The Foreign Trade Law requires foreign trade operators to maintain the quality of their commodities and to compete fairly, and prohibits them from infringing upon intellectual property rights protected in China.

In furtherance of both the Foreign Trade Law and the Trademark Law, the Ministry of Foreign Trade & Economic Cooperation (MOFTEC) and the State Administration for Industry and Commerce (SAIC) jointly promulgated the Administration of Trademarks in Foreign Trade Provisions (Foreign Trade Trademark Provisions). The Foreign Trade Trademark Provisions extended the provisions of the Foreign Trade Law to foreign trade operators. Under the Foreign Trade Trademark Provisions, both MOFTEC and SAIC and their subsidiaries, are responsible for the administration, supervision and directing of trademarks in foreign trade nationally. Thus, the new law allows yet another agency, MOFTEC, to accept complaints of trademark infringement.

Augmenting the Trademark Law, the Foreign Trade Trademark Provisions generally seek to promote foreign trade operator compliance with the Trademark Law, and obliges operators to ensure that trademarks used on their commodities do not violate the Trademark Law. It also obliges foreign trade operators to enter into and adhere to the provisions of a trademark licensing agreement if it uses a trademark registered to another party, and to document its own right to use a trademark to parties wishing to license its use. Foreign trade operators who violate the Foreign Trade Trademark Provisions are subject to sanctions by MOFTEC and its local counterparts, and corresponding sanctions by import and export chambers of commerce.

169. Id. art. 8.
170. Id. art. 12.
171. Id. art. 27.
172. Id. art. 15.
174. Id. art. 6.
175. Id. arts. 6, 12, 13. For commentary on the new law, see Mary-Louise Donnan, Administration of Trademarks in Foreign Trade Provisions, CHINA L. & PRAC., Feb. 1966.
177. Id. art. 9.
178. Id. art. 10.
179. Id. arts. 14, 15.
180. Id. art. 15.
MOFTEC can prohibit foreign trade operators who violate the Foreign Trade Trademark Provisions from participating in foreign trade work.\footnote{Id. art. 14.}

\section*{F. Membership in International Conventions}

China became a member of the WIPO on June 3, 1980.\footnote{See WIPO, supra note 9.} China next acceded to the Paris Convention in 1985. As a member of the Paris Convention,\footnote{See Paris Convention, supra note 16.} China is obligated to deny or cancel registration, and otherwise prohibit use of international marks that are "well-known" in China.\footnote{Id. art. 6\superscript{b}.} Although the Paris Convention does not define "well-known" marks, Chinese authorities regard them as those which enjoy: (1) a leading market position in the country of original manufacture; (2) high name-recognition in the international market; and (3) a certain level of fame in China.\footnote{Tan Loke Khoon, Regional Focus: PRC, IP ASIA, Nov. 18, 1992, at 13.} A specific officer under SAIC handles trademark applications, as the Paris Convention requires, thus giving special protection to well-known trademarks.\footnote{Ma Zhiping, State Clears Up Confusion in Foreign Trademarks, CHINA DAILY, Apr. 13, 1994, at 1.}

With China's accession to the Madrid Agreement, nationals of any other signatory country may protect their marks in China by registering them at the International Bureau of Intellectual Property (International Bureau), through the Bureau's intermediary in their country of origin.\footnote{Madrid Agreement, supra note 17, art. 1(2). Art. 1(2) offers similar protection, upon certain conditions, to nationals of countries that are not signatories to the Agreement. Id.} To bring its trademark registration practices more in line with international practice, China signed the Agreement Concerning the International Classification of Goods and Services to Which Trademarks Apply.\footnote{See China Joins Nice Trademark Pact, CHINA DAILY (N. Am. Ed.), Aug. 10, 1994, at 1 (noting that China signed this Agreement on Aug. 9, 1994).} The agreement requires China and other signatory countries to use a single system for classifying goods and services for the purposes of classification.

\begin{thebibliography}{99}
\footnotesize
\item 181. Id. art. 14.
\item 182. See WIPO, supra note 9.
\item 183. See Paris Convention, supra note 16.
\item 184. Id. art. 6\superscript{b}. For other commentary on protecting well-known trademarks, see Lovenworth, supra note 146.
\item 186. Ma Zhiping, State Clears Up Confusion in Foreign Trademarks, CHINA DAILY, Apr. 13, 1994, at 1.
\item 187. Madrid Agreement, supra note 17, art. 1(2). Art. 1(2) offers similar protection, upon certain conditions, to nationals of countries that are not signatories to the Agreement. Id.
\end{thebibliography}
Trademark Protection in China


Although each of these Conventions, except for the ICSID Convention, New York Convention, and the ICC, addresses different types of intellectual property, the Paris Convention and the Madrid Agreement have the most direct impact on the unauthorized use of trademarks in China. When it becomes

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189. 1957 Nice Agreement, supra note 188, art. 1(2).
197. See Trademark Law Treaty, supra note 22.
effective the new Trademark Law Treaty will also impact the procedural aspects of trademark protection. 199

IV. CHINA'S TRADEMARK LAW

The Trademark Law itself consists of but forty-three articles, of which the 1993 Amendments replaced or amended nine. Pursuant to those amendments, the Trademark Law now protects service marks as well as trademarks, and imposes heavier sanctions upon those who "pass off" registered trademarks. 200

China first adopted the Trademark Law on August 23, 1982; the law took effect on March 1, 1983. The Trademark Law abrogated earlier regulations governing trademarks and any other provisions that conflicted with the provisions of the new Trademark Law, but trademarks registered before March 1, 1983, remained valid. 201 Article 42 of the Trademark Law provided that the SAIC would draft implementing regulations. 202 After a five-year delay, the SAIC promulgated Implementing Regulations on January 13, 1988, thereby abrogating the earlier Detailed Rules for the Implementation of the Trademark Law of March 10, 1983. 203 The Trademark Law specified fees for filing trademark applications and other matters. 204

A. Administrative Control of Trademarks

Under the Trademark Law, the SAIC is responsible for registration and administrative control of trademarks nationwide. 205 The SAIC Trademark Office establishes a Register of Trademarks for recordation and other trademark matters. This office also designs and arranges the printing and issuing of trademark notices giving information on registered trademarks. 206

199. The Trademark Law Treaty deals almost exclusively with procedural aspects of trademark protection and will apply primarily to visible trademarks and service marks, but not to collective, certification, guarantee, sound, or olfactory marks, when it becomes effective. See Trademark Law Treaty, supra note 22.

200. Trademark Law, supra note 10, art. 34.
201. Id. art. 43.
202. Id. art. 42.
203. Trademark Law Implementing Rules, supra note 13, art. 49.
204. Trademark Law, supra note 10, art. 41; Trademark Law Implementing Rules, supra note 13, art. 4.
205. Trademark Law, supra note 10, art. 2.
206. Trademark Law Implementing Rules, supra note 13, art. 5; see also Ma Zhiping, Services Fall Under Trademark Protection, CHINA DAILY, June 30, 1993, at 3, (directing
The Trademark Law also requires the SAIC to establish a Trademark Review and Adjudication Board (Board) to evaluate and examine certain trademark matters. Thus, the Trademark Office oversees the Register of Trademarks and is responsible for establishing the Board, which is independent, but still under the aegis of the SAIC.

Not everyone can apply to register a trademark. An applicant wishing to register a trademark must constitute a legally registered enterprise, institution, individual, industrial or commercial household operation, social group, individual partnership, or a foreigner or foreign enterprise complying with Article 9 of the Trademark Law. Article 9 requires foreigners or foreign enterprises to apply for trademark registration in accordance with any agreement concluded between China and the applicant's country. Unless the applicant is a foreigner, applicants may entrust matters such as applications for trademark registration, assignment, renewal, registration certificate reissuance, or modification of a registrant's name or address to an SAIC-approved agent, or applicants may handle such matters directly.

B. Applications by Foreigners

Foreigners or foreign enterprises applying for trademark registration or submitting other trademark matters must do so through a SAIC-approved agent. By mid-1994, six agencies were authorized to handle trademark matters that foreigners submitted: (1) CCPIT Patent and Trademark Agency; (2) China Trademark Agency; (3) Shanghai Patent Agency; (4) China Patent Agent (H.K., Ltd.); (5) NOD Patent and Trademark Agent, Ltd.;

that both Chinese and foreign enterprises apply for service mark protection through the SAIC's Trademark Bureau).

207. Trademark Law Implementing Rules, supra note 13, art. 8.
208. Id. art. 2.
209. Trademark Law, supra note 10, art. 9.
210. Trademark Law Implementing Rules, supra note 13, art. 3.
211. Trademark Law, supra note 10, art. 10; Trademark Law Implementing Rules, supra note 13, art. 3. On June 29, 1994, the SAIC promulgated Provisional Measures of the PRC for the Administration of Trademark Agency Organizations, which took effect July 1, 1994. The measures describe qualification requirements and establishment procedures for persons and organizations engaged in trademark agency. CHINA LEGAL DEV. BULL., supra note 20, at 8.
and (6) China Sinda Property Agent Corporation.212 Liu, Shen & Associates was the first foreign-related agency that the SAIC authorized to handle patent, trademark, copyright, and other intellectual property matters submitted by foreigners and foreign enterprises.213 All trademark activity by foreigners or foreign enterprises, from the initial application and registration to infringement complaints, must be entrusted to one of these agents.

Foreigners or foreign enterprises intending to register trademarks in China must file an application in accordance with any agreement concluded between China and the applicant’s country, or in accordance with any international treaty to which both countries are signatories, or on a basis of the principle of reciprocity.214 Applications and other documentation that foreigners and foreign entities submit must be completed in or translated into Chinese. In addition, the agents must be given power of attorney, with the scope of their power and their nationality described therein.215

Under the Madrid Convention, however, foreigners and foreign entities having trademarks registered in their country of origin may register them at the branch of the International Bureau in their country of origin,216 which the Madrid Convention defined as that country where the registrant has a real and effective

212. Bian Hongwei, State Clamps Down on Fake Products, CHINA DAILY, May 19, 1994, at 4; see also Wells, supra note 19 (observing that by mid-1993, the agencies authorized to handle trademark applications submitted by foreigners were: (1) the China Trademark Agency (formerly the Trademark Agent Office of the CCPIT) in Beijing; (2) the China Trademark Service in Beijing; (3) the Shanghai Patent Agency in Shanghai; (4) the China Patent Agent (H.K.), Ltd., in Hong Kong; and (5) the NTD Patent Agency, Ltd., in Hong Kong).


216. Madrid Agreement, supra note 17, art. 1(2).
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industrial or commercial establishment. Once registered at the International Bureau, the registrant's mark secures protection in other signatory countries as if the registrant had filed in that signatory country, and the registrant enjoys the right of priority that Article 4 of the Paris Convention provides. The Trademark Implementing Rules require pursuing international trademark registration through the Madrid Agreement. The Trademark Law Treaty, which took effect in late 1995, lists the application elements that member countries may require in applications for registering a mark.

The date the Trademark Office receives the application is considered its application date. If the applicant has properly completed the application, the Trademark Office will give the application a number; otherwise, the office will return the application without one. If, however, the application is in substantial procedural compliance but only needs supplementary amendments, the Trademark Office will give the applicant fifteen days to make the amendments. If the applicant completes the amendments within those fifteen days, the application retains the original application date; if not, the application is returned and the application date expires.

Once a trademark application passes preliminary examination and receives approval, the Trademark Office notifies the applicant through a public announcement. The Trademark Office also notifies rejected applicants. If a trademark application falls short, but the Trademark Office believes it to be amendable, the office issues a View of Examination. The applicant then has fifteen days to make amendments. An applicant must submit a request to review a rejected application to the Board in an Application for Review of a Refused Trademark, along with

217. Id. art. 1(3).
218. Id. art. 4(1).
219. Id. art. 4(2).
220. Trademark Law Implementing Rules, supra note 13, art. 3.
221. See Trademark Law Treaty, supra note 22, art 3.
222. Trademark Law Implementing Rules, supra note 13, art. 12.
223. Id.
224. Id.
225. Id.
226. Trademark Law, supra note 10, art. 16.
227. Trademark Law Implementing Rules, supra note 13, art. 16.
228. Id.
supporting documents, within fifteen days of receipt of the rejection notice.  

**C. What Constitutes a Trademark**

As initially enacted in 1983, the Trademark Law provided that persons or enterprises seeking the exclusive right to use a trademark must apply to register the trademark. The law, however, gave no definition of what constitutes a trademark, and made no mention of service marks, or of "collective marks," those used by groups or associations. When the legislature first enacted the Trademark Law, most Chinese enterprises were state-owned, with little competition or infringement of services between them. With the introduction of a market economy in China, and the gradual increase of competition between goods and services, some enterprises copied and imitated reputable service marks. This then led to unfair competition and confusion, damaging the reputations of the owners of such marks.

The Trademark Law describes a "registered trademark" as one the Trademark Office has approved and registered. Once a trademark is registered, its registrant has the exclusive, legally protected, right to use it. The law does not prohibit the use of unregistered marks; unless a trademark is registered, the law does not protect it. The common law concept of "use" is inapplicable, and no amount of use in China will give a party an exclusive right to use a trademark.

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229. Id. art. 17. If the Board approves the request, the matter is sent to the Trademark Office for further handling.

230. Trademark Law, supra note 10, art. 4.


232. Xu Lugang, supra note 39.

233. Trademark Law, supra note 10, art. 3.

234. Winston K. Zee, Trademark Administration in the PRC—A Key-Point Outline, IP ASIA, Jan. 4, 1990, at 9. The only exception to this rule occurred with respect to service mark registration between July 1 and September 30, 1993. See Joseph T. Simone, New Practice Guidelines for Service Marks Issued in IP ASIA, June 25, 1993, at 25. Simone discusses the guidelines governing service mark registration as set forth in Necessary Information Concerning Applications for the Registration of Service Marks, an informational booklet issued by China's Trademark Office. Id.; see also On Your Marks, Get Registered, BUS. ASIA, Sept. 13, 1993, at 4, (describing the three main types of intellectual property systems used throughout the world, and noting that under one of the three main systems, the "Chinese" system, most rights are acquired by registration).
While the Trademark Law does not specifically define “trademark,” it provides that words, designs, or their combinations used as trademarks must be distinctive so as to be distinguishable.\textsuperscript{235} Thus, as is the general practice, the gravamen of a mark used as a trademark is that it be sufficiently different as to be distinguishable from others.

Where registered trademarks are used, either the Chinese characters for “Registered Trademark” or an encircled letter “R” indicating that it is a registered trademark, should accompany it.\textsuperscript{236} Registered trademarks are valid for a term of ten years after approval.\textsuperscript{237} Trademarks registered at the International Bureau pursuant to the Madrid Agreement, however, remain valid for twenty years.\textsuperscript{238}

The first of the 1993 Trademark Law amendments expanded protection to include service marks, making all provisions of the law that are applicable to trademarks equally applicable to service marks.\textsuperscript{239} Despite this expansion, neither the Trademark Law nor the 1993 Amendments defined trademarks or service marks. This omission distinguishes the Trademark Law from other Chinese intellectual property laws,\textsuperscript{240} and regional intellectual property laws.\textsuperscript{241} The Implementing Rules extended protection to collec-

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235. Trademark Law, supra note 10, art. 7. The phrase “words, designs or their combinations” constitutes the nearest language that may be regarded as a definition of “trademark.” The peculiarities of the Chinese language and its many dialects make selecting a trademark a formidable task. The Trademark Treaty likewise does not define trademark. Article 8 only refers to the prohibited registration of generic and descriptive marks. See Trademark Law Treaty, supra note 22. \\
236. Trademark Law, supra note 10, art. 7; Trademark Law Implementing Rules, supra note 13, art. 26. \\
237. Trademark Law, supra note 10, art. 23. \\
238. Madrid Agreement, supra note 17, art. 6(1). \\
239. Trademark Law, supra note 10, art. 4; Trademark Law Implementing Rules, supra note 13, art. 2; see also Simone, supra note 234. \\
240. China’s Patent Law, for example, protects “inventions- creations,” defined in Article 2 thereof as “inventions, utility models and designs” and further defined in Article 2 of the Patent Law’s Implementing Rules. See Patent Law, supra note 98, art. 2; Patent Law Implementing Regulations, supra note 99, art. 2. China’s Copyright Law protects “works,” defined in Article 3 thereof, and “creative work,” which is defined in Article 3 of the Copyright Law’s Implementing Rules. More extensive definitions are given in articles 4 and 5 of the Implementing Rules. See Copyright Law, supra note 42, art. 3; Copyright Law Implementing Rules, supra note 42, arts. 3-5. \\
241. See, for example, Article 1 of Indonesia’s new Trademark Law, defining such terms as “mark,” “trademark,” “service mark,” “collective mark,” and “license,” or Section 4 of Thailand’s Trademarks Act, defining such terms as “mark,” “trademark,” “service mark,” “certification mark,” and “collective mark.”
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tive marks and certification marks, registration procedures of which are the subject of separate SAIC measures. Collective marks and certification marks are registered with examination and approval of the Trademark Office.

The purpose of the 1993 Amendments is to formalize service mark registration. In a departure from procedure, the Implementing Rules instituted the "first to use" principle between July 1 and September 30, 1993, and allowed use of evidence that proves the valid use of the service mark both in China and abroad. The Regulations provided for evaluation of service mark registration applications submitted after October 1, 1993, under the "first to file" principle normally used for trademark registration.

While China's accession to the Paris Convention already obligated it to protect service marks, no method to register service marks existed until the 1993 amendments. Many companies offset this omission in the Trademark Law by registering their company names under the 1991 Regulations on the Administration of the Registration of Enterprise Names, which gives foreign enterprises the exclusive right to use their company names and provides means of redress against others who use them without authorization. Thus, the import of the 1993 Amendment was to allow foreign service companies to formally register their service marks directly under the Trademark Law.

242. Trademark Law Implementing Rules, supra note 13, art. 6. On December 30, 1994, the SAIC enacted the Measures for Registration and Administration of Collective Marks and Certification Marks, in which both marks were clearly defined. Beginning March 1, 1995, China began accepting applications for the registration of both collective and certification marks. Xu Lugang, Protection for Collective Marks and Certification Marks, IP ASIA, Apr. 1995, at 38; see also Strengthening of Intellectual Property Protection, supra note 20, at 6.

243. Id.

244. Xu Lugang, supra note 39, at 2.

245. Id.

246. Articles 1(2) and 6 of the Paris Convention state that protection of service marks is one of the Convention's objectives. Paris Convention, supra note 16, arts. 1(2), 6.

247. The 1991 Regulations on the Administration of the Registration of Enterprise Names (Enterprise Name Registration Regulations) require that all enterprises established in China, including foreign investment enterprises, register with the SAIC, and allow registration of company names consisting of at least two characters on a "first-to-file" basis. Protecting Your Company's Name, CHINA BUS. REV., July-Aug. 1992, at 10-12.

248. Id.

249. The amendments allowed service mark registration in eight areas: advertising, insurance, building construction, telecommunications, transportation, materials processing,
D. Quality Control of Goods Under a Trademark

The Trademark Law has broad, general purposes, including improvement of trademark administration, protection of exclusive rights to use trademarks, and encouragement of producers to warrant the quality of their goods and maintain the reputation of their trademarks. Trademark users are responsible for the quality of goods upon which they affix their trademark. Administrative authorities must supervise quality control over goods and terminate any practices that might deceive the public.

The law obligates certain goods, such as pharmaceuticals intended for human consumption, tobacco products, or other items, to bear specific kinds of trademarks. In order to sell such goods, a party must apply for and register the required trademark. The party must attach to the application a proper license for producing or dealing in that item. If such goods bear an unregistered trademark, the administrative authorities must bar

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education and food supply. Also, an interim period from July 1 through September 30, 1993 was established for applying for initial service mark registration, for affirming the right to service marks that have already been in use, and for voiding unfair applications. See Ma Zhiping, supra note 206. Still, however, it is thought that where a company name also constitutes its service mark, the Enterprise Name Registration Regulations remain viable, and companies should still register their name thereunder. See Protecting Your Company's Name, supra note 247; see also Tan Loke Khoon, PRC: Revised Trademark More in Line with International Practice, IP ASIA, Apr. 22, 1993, at 2.

250. Trademark Law, supra note 10, art. 1. Article 122 of the General Principles of the Civil Law of the PRC makes manufacturers liable for damages caused by their substandard products, while Article 106 of the Civil Law obviates the need to show the manufacturer's "fault." Chinese enterprises have long viewed trademarks as competitive weapons. As the symbols of an enterprise's prestige and the standard of its management, trademarks distinguish one product from another on the market. See Trademarks Essence of Enterprises, supra note 5.

251. Trademark Law, supra note 10, art. 6. Under the Product Quality Law, which applies to entities engaging in production and sales activity outside China, producers and sellers are likewise responsible for the quality of the goods they produce. See Quality Law, supra note 154, arts. 2, 3, 14.

252. Trademark Law, supra note 10, art. 6. Under Article 6 of the Quality Law, however, the State Council's department of supervision and control of product quality is made responsible for overall supervision and control of product quality. Quality Law, supra note 154, art. 6.

253. Trademark Law Implementing Rules, supra note 13, art. 7. Article 11 of the Implementing Rules describes prerequisites to obtaining registration for pharmaceuticals for human use, tobacco products, and other such items. Id. art. 11.

254. Trademark Law, supra note 10, art. 5.
sale of the goods, and seize or seal for safekeeping their trademark symbol. The administrative authorities also may impose a fine.\textsuperscript{255}

\textbf{E. Proscribed Trademarks}

Article 8 of the Trademark Law bars use of certain words, designs, or combinations thereof.\textsuperscript{256} The prohibitions include symbols that: (1) are similar or identical to state names, national flags or emblems, or military flags or decorations of the People's Republic of China or foreign countries; (2) are similar or identical to the flags, names or emblems of international intergovernmental organizations, the Red Cross, or the Red Crescent; (3) relate to generic names or designs of the goods for which they are used; (4) directly refer to the quality, main raw materials, function, use, weight, quantity or other features of the goods under the trademark; (5) discriminate against any nationality; (6) exaggerate or suggest deceit in advertising goods; and (7) are detrimental to socialist morals or customs, or have other unhealthy influences.\textsuperscript{257}

The second of the 1993 Amendments added to the list of proscribed trademarks the names of administrative divisions at the county level or above, and well-known names of foreign places, except where such names have other meanings.\textsuperscript{258} Previously registered trademarks that used such place names, however, were valid.\textsuperscript{259} This addition merely restated, with a slight variation, what had already been the law. In other words, it codified into the Trademark Law that part of the Implementing Rules that proscribed use of names of administrative areas at the county level and above and well-known foreign place names, unless they were verified, approved and registered before the enactment of the Trademark Law, it which case they would continue to be valid.\textsuperscript{260}

\textsuperscript{255} Trademark Law Implementing Rules, supra note 13, art. 33. Article 34 of the Implementing Rules proscribes the illegal printing, making, purchase or sale of trademark symbols. Id. art. 34. Administrative authorities are directed to halt such activity when discovered. Id.

\textsuperscript{256} Trademark Law, supra note 10, art. 8.

\textsuperscript{257} Id.

\textsuperscript{258} 1993 Trademark Law Amendments, supra note 39.

\textsuperscript{259} Id.

\textsuperscript{260} Trademark Law Implementing Rules, supra note 13, art. 6. Thus, already incorporated into the 1993 Trademark Law Amendments, this article was deleted in the 1993 Amendments to the Implementing Rules.
F. Applications for Trademark Registration

Applications for trademark registration must indicate, according to the good's designation in the commodity classification table, the class and designation of the goods submitted for trademark. An application for trademark registration must comply with the item category in the commodity classification table, include ten copies of the proposed trademark design, and meet certain other physical requirements. Pre-amendment law provided that, where marketers intended to use one trademark in different classes of goods, parties must submit separate applications for each good. The third of the 1993 Amendments now provide that, where parties intend to use the same trademark on goods of different classes, the applicant must apply for registration according to the classification of goods. Although this standard seems to imply that parties may use the same trademark on goods in several classes, some authorities suggest it actually creates more uncertainty than clarification. The language of the amendment seems merely to juggle the language of the original article: the amendment still seems to require registration based upon classification of goods, as it did under the pre-amendment article.

Where parties intend to use a trademark with different goods of the same class, or seek to change any registered word and/or design, they must file a new registration application. Even

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261. Trademark Law, supra note 10, art. 11; Trademark Law Implementing Rules, supra note 13, art. 9. These classifications had been found in the Notice of SAIC on Implementing an International Classification of Commodities with Registered Trademarks, promulgated by the SAIC on Sept. 15, 1988. Since China's accession to the 1957 Nice Trademark Agreement, however, classification of goods and services must comport with the single system used by other signatories to that Agreement. See 1957 Nice Agreement, supra note 188.

262. Trademark Law Implementing Rules, supra note 13, art. 9, 10. The Trademark Law Treaty states that "where good and/or services belonging to several classes of the Nice Convention have been included in one and the same application, such an application shall result in one and the same registration." Trademark Law Treaty, supra note 22, art. 6.

263. Trademark Law, supra note 10, art. 12.


265. Tan Loke Khoon and Lim Mei Yin, of the Baker & McKenzie law firm, Hong Kong, view this amendment as implying that a single application may cover multiple classes. See 1993 Trademark Law Amendments, supra note 39; see also, 3 INTELLECTUAL PROPERTY IN ASIA 3 (Arthur Wineburg ed., 1994) (maintaining that for each class of goods, a separate trademark application must be filed).

266. Trademark Law, supra note 10, art. 13.

267. Id. art. 14.
if the change is something as immaterial to the trademark as the registrant’s name or address, after trademark registration, the party must file any changes.  

G. Priority Registration

The Trademark Office must accept and hear cases requesting priority registration. The SAIC outlines procedures for this process in Provisional Regulations Governing Applications for Priority Registration of Trademarks (Priority Registration Regulations). Under the Priority Registration Regulations, and in accordance with the provisions of the Paris Convention, nationals of Paris Convention member countries may file an application for trademark registration in China within six months of having first filed an application for trademark registration in another country, even though they may have first filed a similar application for the same trademark covering the same goods in another member country. If an applicant files a properly certified duplicate of the first application and authenticated supporting documents along with the application filed in China, the application date in the first country serves as the application date in China.

H. Examination and Approval of Trademarks

After examination, the Trademark Office must approve and publish any trademarks whose application registration meets Trademark Law requirements. If a registration application

268. Id. arts. 13, 14.
269. Id. art. 15. Trademark Law Implementing Rules, outline the procedures for such a modification. Trademark Law Implementing Rules, supra note 13, art. 20. Article 20 was amended effective May 15, 1995, pursuant to Order 31 of the Director of the SAIC of the PRC. See Xu Lugang, Revision of Implementing Regulations under the Trademark Law, IP ASIA, July/Aug. 1995, at 39.
270. Trademark Law Implementing Rules, supra note 13, art. 15.
271. Provisional Regulations Governing Applications for Priority Registration of Trademarks in China (Guanyu Shenqing Shangbiao Yaoqiu Youxianquan de Zhexing Guiding), CHINA L. FOREIGN BUS. (CCH) (Sept. 1, 1990) [hereinafter Priority Registration Rules].
272. Id. at pmbl.
273. Id. art. 2.
274. Id. arts. 3, 4.
275. Trademark Law, supra note 10, art. 16. For additional commentary on protecting trademarks and other intellectual property in China and Asia, see generally Stephan Hayward, China: Practical Protection of IP Rights, IP ASIA, June 30, 1994, at 2; Asia:
does not meet Trademark Law requirements, or if the desired trademark is identical or similar to another registered or preliminarily approved trademark of similar goods, the Trademark Office must refuse the application and not publish the trademark.276

China's Trademark Law contains a "race-statute" providing that, where two or more applicants apply for registration of identical or similar goods, the application filed first takes priority.277 For applications for the same or similar items filed on the same day, the trademark that was used first prevails.278 In such a situation, each applicant must submit, as directed by the Trademark Office, proof of the date of first use.279 If usage began the same day or if use is still pending, the parties must meet to discuss the matter.280 When those meetings exceed thirty days, the parties may resort to "drawing straws," or letting the Trademark Office decide.281

I. Trademark Disputes

Trademark disputes come under the Board’s jurisdiction.282 A person may contest a preliminarily approved and published trademark within three months of approval283 by filing with the Trademark Office two copies of an opposition letter.284 If no party files an opposition, or if the Trademark Office deems the opposition meritless or unjustifiable, the office formally approves the trademark’s registration and issues a trademark registration certificate. If the opposition is considered meritorious, the

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276. Trademark Law, supra note 10, art. 17.
277. Id. art. 18.
278. Id.
279. Trademark Law Implementing Rules, supra note 13, art. 13.
280. Id.
281. Id.
282. Trademark Law, supra note 10, art. 20.
283. Id. art. 19; Trademark Law Implementing Rules, supra note 13, art. 18.
284. Trademark Law Implementing Rules, supra note 13, art. 18. Contents of the Letter of Opposition are described in Article 18 of the Implementing Rules. See Hayward, supra note 275, at 4 (noting that once the three-month period has elapsed, and an earlier registrant has obtained registration of a disputed trademark, one must then file a cancellation action).
Trademark Office will not approve registration. The Trademark Office must notify the applicant in writing when it refuses an application and does not publish the trademark. Aggrieved parties may apply for review of the matter within fifteen days of their receipt of notification; the Board must then make a final determination and notify the applicant in writing.

A formal opposition filed against a trademark with preliminary approval requires the Trademark Office to hear both the opponent and applicant and, after investigation and verification, render a decision in the matter. Aggrieved parties may appeal for further review by the Board within fifteen days of receipt of the notification; the Board must then make a final decision and notify both parties in writing.

**J. Trademark Renewal**

Registrants wishing to continue using a registered trademark beyond its expiration date must file a renewal application within six months of the expiration date. If a registrant does not file an application in a timely manner, the trademark lapses. Renewal periods are ten years; after approval, the Trademark Office publishes. Because a product or service may sell indefinitely,
a registrant may renew a trademark an unlimited number of times. The renewal period for trademarks filed with the International Bureau is twenty years.\footnote{Madrid Agreement, supra note 17, art. 7. Article 12 of the Trademark Law Treaty describes the elements of a renewal request. Both the duration of registration and the renewal period are ten years. \textit{Trademark Law Treaty}, supra note 21, art. 12.}

\textbf{K. Assignment and Licensing of Trademarks}

When a registrant seeks to assign a registered trademark, both the assignor and the assignee must jointly file an application for assignment with the Trademark Office.\footnote{\textit{Id.}} The assignee guarantees the quality of goods marketed under the trademark.\footnote{\textit{Id.}} The registrant must assign all identical or similar trademarks for the same or similar goods at the same time.\footnote{\textit{Id.}} The Trademark Office must publish the assignment of the registered trademark.\footnote{\textit{Id.}}

Although the Trademark Law does not define the term "trademark license contract," it provides that a trademark registrant may license others to use its trademark by signing a trademark license contract.\footnote{\textit{Id.}} The licensor still must supervise the quality of goods the licensee vends under the trademark, and the licensee also must guarantee the quality of goods.\footnote{\textit{Id.}} The licensor and licensee files the trademark licensing contract with the local administrator for industry and commerce.\footnote{\textit{Id.}}

The fourth 1993 Amendment directs that licensees using trademarks registered to others must indicate this on the goods.\footnote{\textit{Id.}} This amendment appears to strengthen quality control over goods and provides a mechanism to facilitate later investigation.

describes the procedures to be followed in modifying the name of a trademark registration. \textit{Id.} art. 20.

293. Madrid Agreement, supra note 17, art. 7. Article 12 of the Trademark Law Treaty describes the elements of a renewal request. Both the duration of registration and the renewal period are ten years. \textit{Trademark Law Treaty}, supra note 21, art. 12.

294. Trademark Law, supra note 10, art. 25.

295. \textit{Id.}

296. Trademark Law Implementing Rules, supra note 13, art. 21.

297. Trademark Law, supra note 10, art. 25.


299. \textit{Id.}

300. \textit{Id.} This requirement can be problematic for parties who do not know exactly what will be viewed as a trademark licensing agreement. Suppose, for example, a trademark registrant includes provisions in a joint-venture or other agreement allowing the joint-venture to use the trademark. The question would arise whether the agreement would have to be filed.

Whenever a trademark registrant allows someone else to use the trademark, the registrant must sign a trademark usage license agreement and he must send a copy of the agreement to the county-level administrative authority. Licensees must indicate their names and the origin of the goods they market under the licensor's trademark; those who fail to do so risk seizure of the trademark. Alternatively, noncompliance with these requirements may result in a fine or trademark cancellation. There is no limit to the number of times a trademark registrant may permit others to use the trademark.

To dispute a Trademark Office's rejection of an application for assignment or renewal, an applicant has fifteen days to file with the Board an Application for a Review of an Assignment (or Renewal) Rejection.

L. Cancellation of Trademarks

If a party believes the Trademark Office has registered an improper mark, he may file an Application for the Cancellation of the Registration of an Improper Trademark. To cancel one's own trademark, a registrant must submit an Application for Cancellation and return its Trademark Registration Certificate to the Trademark Office.

Before the 1993 Amendments, the Trademark Law provided that any person who contests a registered trademark could apply to the Board within one year of the date of trademark registration approval for adjudication. Upon receiving the application, the Board had to notify the interested parties and direct them to respond within a specified period.

The fifth of the 1993 Amendments now requires the Board to
cancel trademarks registered in violation of the provisions of Article 8,\textsuperscript{310} or registered through deceptive or other improper means, and permits other units or individuals to request the Board to cancel such marks.\textsuperscript{311} When a party seeks cancellation on other grounds, the party must file a cancellation application within one year of the date of trademark approval.\textsuperscript{312} Trademark registrants who contest a Trademark Office decision to cancel a mark, may petition the Board within fifteen days of receipt of the Trademark Office's cancellation notification.\textsuperscript{313}

Parties may not seek adjudication regarding trademarks while approval is pending.\textsuperscript{314} After the Board renders a final decision either maintaining or cancelling a disputed registered trademark, the Board notifies the interested parties.\textsuperscript{315} The sixth 1993 Amendment merely deletes the word "disputed."\textsuperscript{316}

If a registrant unilaterally alters its trademark, changes its name, address or other registered information without application, assigns its trademark without proper approval, or fails to use the trademark for three consecutive years, the Trademark Office will direct the registrant to remedy the situation or suffer cancellation of the trademark.\textsuperscript{317} Thus, while usage will not grant exclusive rights to a trademark, owners of registered trademarks may lose those rights through non-usage.

As evidence of the importance attached to quality control of goods, if a registrant uses a registered trademark with substandard goods, or switches inferior goods for superior goods, resulting in consumer deception, the Trademark Law requires the administrative authorities to set a deadline by which the marketer must fix the problem.\textsuperscript{318} Administrative authorities also may circulate a

\textsuperscript{310} 1993 Trademark Law Amendments, supra note 39, ¶ 5 (amending article 27). Article 8 proscribes the use of certain names and symbols in trademarks. \textit{Id.} art. 8.

\textsuperscript{311} \textit{Id.}

\textsuperscript{312} 1993 Trademark Law Amendments, supra note 39, ¶ 5 (amending art. 27) Article 25 of the Trademark Law Implementing Rules, supra note 13, describes the acts considered deceptive and improper means for obtaining trademark registration and outlines other cancellation action procedures.

\textsuperscript{313} Trademark Law Implementing Rules, supra note 13, art. 25.

\textsuperscript{314} Trademark Law, supra, note 9, art. 27.

\textsuperscript{315} \textit{Id.}

\textsuperscript{316} 1993 Trademark Law Amendments, supra note 39, ¶ 6.

\textsuperscript{317} Trademark Law, supra note 10, art. 30; Trademark Law Implementing Rules, supra note 13, arts. 28, 29.

\textsuperscript{318} Trademark Law, supra note 10, art. 27.
notice of criticism or impose a fine. Furthermore, the Trademark Office may cancel registration. Once a registered trademark is cancelled or lapses without renewal, the Trademark Office may not approve applications for similar or identical trademarks for one year. This restriction, however, does not apply to an application to register an identical or similar trademark for an identical or similar commodity cancelled under Article 29 of the Implementing Rules. Trademark registrants disagreeing with a Trademark Office decision to revoke their registered trademark must file an Application for Review with the Board within fifteen days of receiving the notice.

If a person sells goods before the approval and registration of a trademark in violation of Article 5 (requiring certain kinds of goods to bear trademarks), the administrative authority must order the person to apply for registration within a specified time and may also impose a fine.

If an applicant falsely represents a trademark as registered, the trademark violates the provisions of Article 8, or the manufactured goods are either substandard or have been replaced by inferior goods to the deception of consumers, the local AIC must stop users of unregistered trademarks from continuing use and order them to remedy the problems. The AIC also may circulate a notice of criticism or impose a fine. The AIC must bar advertisement of the violating goods and may seize the trademark symbol. The Trademark Law limits the exclusive right to use a registered trademark to the approved and registered trademark and to the goods for which its use has been approved.

Parties aggrieved by a Trademark Office decision to cancel a

319. Id.
320. Id. art. 31; Trademark Law Implementing Rules, supra note 13, art. 31.
321. Trademark Law, supra note 10, art. 32.
322. Trademark Law Implementing Rules, supra note 13, arts. 29, 30. Article 29 provides for cancellation of a trademark if a licensee fails to prove use within the past three years. Id. at art. 29.
323. Id. art. 40.
324. Trademark Law, supra note 10, arts. 5, 33; Trademark Law Implementing Rules, supra note 13, art. 33. Article 5 provides for requiring certain kinds of goods to bear trademarks. Trademark Law, supra note 10, art. 5.
325. Article 8 proscribes the use of certain words or emblems in trademarks. Trademark Law, supra note 10, art. 8.
326. Id. art. 34.
327. Trademark Law Implementing Rules, supra note 13, art. 32.
328. Trademark Law, supra note 10, art. 37.
registered trademark may apply for review within fifteen days of receipt of the notice. The Board must make a final decision and notify the applicant in writing.\textsuperscript{329} Parties aggrieved by a decision of an administrative AIC imposing a fine under Articles 31, 33 or 34 may commence proceedings in the People's court within fifteen days of receipt of the notice.\textsuperscript{330} If proceedings do not begin promptly, or if a party does not pay a fine in a timely manner, the administrative official may seek enforcement of the order by the People's court.\textsuperscript{331} In some cases, a party seeking review of trademark matters may request an extension.\textsuperscript{332}

\textit{M. Proscribed Activities}

The Trademark Law forbids the sale of trademark symbols, and requires destruction of abandoned or defective marks.\textsuperscript{333} Only certain approved entities may make or reproduce trademarks, and contracting for the reproduction of trademarks requires authorization.\textsuperscript{334} Entities requiring reproduction of their registered or unregistered trademark must apply to the local county level administrative official.\textsuperscript{335} Foreigners seeking reproduction of their trademarks must submit a request, along with proper documentation, to the provincial administrative official where the unit undertaking the reproduction is located.\textsuperscript{336} Other examination and approval procedures also apply to the reproduction of trademarks.\textsuperscript{337} Units authorized to reproduce trademarks may not do so without proper documentation authorizing the reproduction.\textsuperscript{338}

Parallel importation of goods occurs when parties use unauthorized means to import genuine products into a country.

\textsuperscript{329} Id. art. 35.
\textsuperscript{330} Id. art. 36; Trademark Law Implementing Rules, supra note 13, art. 40.
\textsuperscript{331} Trademark Law, supra note 10, art. 36.
\textsuperscript{332} Trademark Law Implementing Rules, supra note 13, art. 46.
\textsuperscript{333} Shangbiao Yinzi Guanli Zhexiong Banta [Provisional Measures for the Administration of the Reproduction of Trademarks], art. 7 translated in CHINA L. FOREIGN BUS. (CCH) § 11-526 (Dec. 21, 1985) [hereinafter Reproduction Measures]; Trademark Law Implementing Rules, supra note 13, art. 34.
\textsuperscript{335} Reproduction Measures, supra note 333, art. 3.
\textsuperscript{336} Id. arts. 9, 10.
\textsuperscript{337} Id. arts. 4, 5.
\textsuperscript{338} Id. art. 6.
without the trademark owner's permission, thus circumventing officially sanctioned importers and distributors. Marketers sell these unauthorized but genuine imports, called "gray goods," at prices competitive to the products that officially sanctioned importers and distributors, creating what is called a "gray market." China's Trademark Law does not proscribe parallel importation of trademarked "gray goods."

N. Trademark Infringement

China's General Principles of the Civil Law provide that, where a citizen's or legal entity's trademark rights are infringed, that party has the right to demand that the infringement cease, its effects be eliminated, and losses be compensated. Infringement of the exclusive right to use includes unauthorized use of a trademark that is identical or similar to a trademark registered for use with the same or similar goods, unauthorized manufacture or sale of representations of someone else's registered trademark, and any other act prejudicial to another's exclusive use rights. What is unclear is whether the prohibition against "any other act prejudicial to another's sole use rights" applies to "dilution" via use of similar or identical trademarks of totally unrelated goods, or against "reverse passing."

341. General Principles of the Civil Law, art. 118. For a discussion on precautions to take before exposing one's intellectual property in China, and the steps to take when an infringement is discovered, see Purging the Pirates, BUS. CHINA, May 17, 1993, at 1.
342. Trademark Law, supra note 10, art. 38; Trademark Law Implementing Rules, supra note 13, art. 41.
343. A trademark becomes "diluted" when, after developing a value and reputation of its own, it or marks similar to it are used by others on wholly unrelated types of goods. For example, if the first trademark is used on a popular brand of soap, someone else might use the same or a similar mark on radios. No direct infringement occurs. Because the trademark is so well recognized, however, consumers think the unrelated good, the radio, was manufactured by the soap maker. The use of the mark on the radio is then said to dilute the strength of the soap's mark. See Simone, supra note 145, at 53 (noting that the Anti-Unfair Competition Law also fails to address the dilution problem).
344. "Reverse passing off" is similar to "bait and switch," where a manufacturer advertises as its own goods pictures of a second manufacturer's goods. When customers order from that first manufacturer, pursuant to the "bait" of pictures of the second
The seventh 1993 Amendment expanded the acts that constitute trademark infringement to include the knowing sale of goods bearing counterfeit trademarks, the forgery or unauthorized manufacture of another’s registered trademark, or the sale of copies of trademarks that were forged or manufactured without authorization.\textsuperscript{345} This “knowledge” requirement creates a burden of proving that the person who sold goods bearing counterfeit trademarks “knew” that the trademarks were counterfeit. Establishing such knowledge, however, is considerably easier under provisions in the Quality Law obligating sellers to implement an examination and acceptance system for stock they purchase.\textsuperscript{346}

\section*{O. Sanctions for Trademark Infringement}

In the event of trademark infringement under Article 38, an injured party has two avenues of recourse: (1) ask the administrative official at or above the county level situated where the infringing party either lives or is established, to handle the matter; or (2) institute proceedings directly in a People’s court.\textsuperscript{347} The administrative official can order an immediate halt to the infringing act, and order the infringing party to compensate the injured party in an amount ranging from one-half to five times the profit made during the period of infringement, or for any damages the injured party suffered during that period.\textsuperscript{348} Pre-amendment law provided that the administrative official also could impose fines in serious cases.\textsuperscript{349}

The eighth 1993 Amendment clarifies the imposition of fines by providing that the administrative official may impose them where the infringing activity does not constitute a criminal offense.\textsuperscript{350} The import of this amendment seems mainly to be its recognition of criminal sanctions for certain offenses, and prevention of a person being tried criminally and fined at the same time.

\begin{footnotesize}
\begin{enumerate}
\item manufacturer’s goods, which they think they are buying, they are then sold another good. See Sublime Products v. Gerber Products, 579 F. Supp. 248 (S.D.N.Y. 1984).
\item 1993 Trademark Law Amendments, supra note 39, ¶ 7 (amending art. 38).
\item Quality Law, supra note 154, art. 21.
\item Trademark Law, supra note 10, art. 39; Trademark Law Implementing Rules, supra note 13, art. 42.
\item Trademark Law Implementing Rules, supra note 13, art. 43.
\item Id.
\item 1993 Trademark Law Amendments, supra note 39, ¶ 8 (amending art. 39); Trademark Law Implementing Rules, supra note 13, art. 43.
\end{enumerate}
\end{footnotesize}
This provision is clarified and bolstered in the Counterfeiting Regulations, which provide for jail sentences of up to three years and fines for unauthorized use of a registered trademark on similar goods, or sale of goods bearing counterfeit trademarks.\textsuperscript{351} The level of profit heightens the punishment—if the income derived is enormous, the party may receive a three-to-seven year term of imprisonment and/or incur a fine.\textsuperscript{352} Parties who profit from counterfeiting or selling registered trademarks are likewise subject to similar sentences.\textsuperscript{353} Enterprises or institutions engaging in proscribed activities are not immune from punishment. Not only may the enterprise be fined, but the employees held responsible may receive sentences similar to those using registered trademarks without authorization.\textsuperscript{354} Also augmenting the eighth of the 1993 Trademark Law amendments are the Foreign Trade Trademark Provisions, which allow MOFTEC, its local subordinates, and import and export chambers of commerce to sanction the trademark infringer if it is engaged in foreign trade.\textsuperscript{355}

Dissatisfied parties may commence proceedings in the People’s court within fifteen days of receiving notice.\textsuperscript{356} If proceedings do not begin in a timely manner, or if a party fails to comply with the order directing payment of a fine within the specific period, the administrative AIC may seek enforcement in the People’s court.\textsuperscript{357}

If an act infringes on a registrant’s exclusive use rights, the AIC has authority to stop the infringing activity, seize and seal the trademark symbols used, mandate their removal from existing goods, and order compensation.\textsuperscript{358} A party may appeal the

\textsuperscript{351} Counterfeiting Regulations, \textit{supra} note 41, art. 1
\textsuperscript{352} \textit{id.}
\textsuperscript{353} \textit{id.} art. 2.
\textsuperscript{354} \textit{id.} art. 3.
\textsuperscript{355} Foreign Trade Trademark Provisions, \textit{supra} note 173, arts. 14, 15.
\textsuperscript{356} Trademark Law, \textit{supra} note 10, art. 40.
\textsuperscript{357} \textit{id.} art. 39.
matter within fifteen days of receiving notice of the AIC's decision. A party injured by infringement of an exclusive right to use a trademark may begin proceedings directly in the People's court.

P. "Passing Off" Registered Trademarks

Under pre-amendment law, when one party passed off another's registered trademark, including a party who made or sold representations of another's registered trademark without authorization, the infringing party must compensate the injured party and pay a fine. Persons directly responsible for passing off the registered trademark are subject to criminal prosecution as well.

The 1993 Amendments expanded the passing off provision, partly to reflect concurrent changes in the Criminal Law, which China enacted in response to a 1992 Supreme People's court decision verdict in a criminal case against a distiller of fake liquor counterfeiter. Ruling that the distillery manager had severely disrupted the socialist economic order with his counterfeit version of Maotai spirits, the court sentenced him to death.

Pursuant to the ninth 1993 Amendment, under which passing off, forgery, unauthorized copying, or sale of forged or unauthorized copies constitutes a criminal offense, or where a party knowingly sells goods bearing counterfeit trademarks, the party is subject to criminal prosecution in addition to liability for any

359. Trademark Law Implementing Rules, supra note 13, art. 44.
360. Trademark Law, supra note 10, art. 39; Trademark Law Implementing Rules, supra note 13, art. 42.
361. Trademark Law, supra note 10, art. 40.
362. Under Article 127 of the Criminal Law, where an industrial or commercial enterprise passes off a registered trademark in violation of the law, the persons directly responsible face not more than three years imprisonment, criminal detention, or a fine. Under the provisions enacted to supplement Article 127, effective July 1, 1993, the permissible prison terms were extended, in some cases, to seven years. For commentary, see Standing Committee of the National People's Congress, Punishment of the Crime of Passing Off Registered Trademarks Supplementing Provisions, CHINA L. & PRA C., Apr. 29, 1993, at 4.
364. Id. Although such harsh justice for product counterfeiting may seem unfathomable to Western sensibilities, the offense was indeed a grave one under Chinese law. There, stealing or swindling large amounts of public or private property warrants severe punishment. Id.
damages the owner suffers. As under pre-amendment law, infringement of a party's exclusive right to use a registered trademark allows the party to begin proceedings directly in the People's court.

Q. Enforcement of Trademark Rights

Anyone may complain about infringement of trademark rights or passing off of fake trademarks. To bring such a complaint, a party may file either with the local AIC or with the court. The former course is favored for several reasons. First, the AIC's resources are more extensive and it has the power to effectively enforce trademarks. Second, the AIC performs both administrative and judicial functions. It has the power to conduct raids without the need to show cause, to order unlawful activities to cease, to impound and destroy infringing materials, and to order an infringer to pay compensation. In comparison, the courts may take longer to act because civil procedure as a body of law still is developing in China and slowly evolving. Third, the AIC staff generally is more knowledgeable about trademarks and their infringement than the court. Finally, the Chinese authorities prefer solutions via the AIC rather than the courts.

The China International Economic and Trade Arbitration

366. Trademark Law, supra note 10, art. 39.
367. Trademark Law Implementing Rules, supra note 13, arts. 42, 45; see also Mitchell A. Silk, The Watchdogs, CHINA BUS. REV., May-June, 1994, at 23 (describing various agencies currently involved in combating economic crimes, including the fraudulent production of trademarks and fake goods).
368. 1993 Trademark Law Amendments, supra note 39, ¶ 8 (amending art. 39); see also Wells, supra note 19, at 36. For an excellent discussion on AIC versus court action, see Tan Loke Khoon, Counter Feats, CHINA BUS. REV., Nov.-Dec. 1994, at 15. Recall, however, that if the complained-of activity falls under the purview of another item of legislation, complaints may also be lodged with the agency in charge of administering that legislation. MOFTEC, for example, would take charge if the alleged violator is a foreign trade operator. See Foreign Trade Trademark Provisions, supra note 173, arts. 2, 3.
371. Id. This should remain true until such time as China's new intellectual property courts gain momentum.
372. Id.; see also China's Arbitration System: Mutual Dissatisfaction, BUS. CHINA, Aug. 23, 1993, at 2 (noting that China's foreign economic laws offer several alternative dispute resolution methods to discourage litigation in court).
Commission (CIETAC) oversees arbitration in China. A new set of rules governing business disputes that CIETAC handles took effect in June 1994, under which streamlined arbitrations before multilingual arbitrators may be conducted in any official language upon which the parties agree.

China enacted a new Arbitration Law, effective as of September 1995.

V. EFFORTS TO COMBAT OFFICIAL CORRUPTION

The problematic rise in official bribery and corruption following China's shift from a centrally-planned to a market economy has contributed to the rise in trademark infringement. In some instances, government officials hamper efforts to eliminate fake and shoddy goods by obstructing the investigation and confiscation of such goods, or by asking law enforcement officials to treat offenders leniently once they are caught. China's current problem of official bribery and corruption is so pervasive that some have compared it to the level of corruption that led to the fall of the Qing Dynasty and the Nationalist Chinese

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374. PRC—Developments in Dispute Settlement, supra note 373, at 6; CIETAC Provisions, supra note 373, art. 39; see also New Trade Arbitration Rules Issued, CHINA DAILY (N. Am. Ed.), May 7, 1994, at 1. The new rules impose a nine-month limit for arbitration cases and streamline procedures for cases involving less that 500,000 RMB ($57,000 U.S.).

375. See Lewis, supra note 196, for a discussion of arbitration in China. The new law also creates the China Arbitration Association to supervise PRC arbitration commissions.

376. State Set to Combat Bribery, Corruption, CHINA DAILY, June 11, 1993, at 1; Boom in High-Level Graft, CHINA MORNING POST, Feb. 27, 1994, at 6. Under previous central planning, central authorities allotted for local governments' expenses, relieving local government dependence on local economic circumstances. With administrative and economic decentralization after 1978, local governments' power to manage and develop their local economies has expanded, as has their stake in the development and economic return of local enterprises.

377. For additional comments on the possible causes for the rise in corruption, see also Combat Against 'Payola' Is Not an Easy Job, ECON. REP. (China), No. 4, 1993, at 17; Anti-corruption: Not Only Aim at Symptoms But More At Permanent Cure, ECON. REP. (China), Nov. 10, 1993, at 4.

Between April 1988 and March 1992, China's prosecutors handled more than 40,000 graft cases. From 1992 to 1993, the various People's courts heard 743 criminal cases for counterfeiting trademarks. Nationally, between January and August 1992, supervisory departments disciplined approximately 22,900 unsatisfactory and crooked government officials, 719 of which were high-ranking cadres, including a vice-governor, 32 subministerial-level officials, and 686 county-level officials. Between January and April 1993, China's prosecutors handled 13,729 corruption and bribery cases. Major corruption cases doubled in 1993, while between September and December 1993, 42,195 party members were disciplined and regulatory bodies handled 6790 major graft and bribery cases.

In 1993, cases involving economic crimes among high ranking officials at or above the county level was 6.8 times the number of similar cases in 1992. China's prosecutors hear an average of 80,000 bribery and graft cases each year, and the number is rising. China has approximately 37,000 anti-graft experts, but some commentators believe China needs more than twice that number to combat the problem because most corrupt officials are people holding positions of authority, and combatting graft in their ranks requires special knowledge and training.

In 1992, China convened a national anti-corruption conference in Beijing after the exposure of serious corruption and bribery in some law enforcement agencies and state monopolies. At the
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At the conference, participants announced they would give special attention to government officials who took advantage of their power and authority to obtain benefits for themselves or for small groups.\(^{389}\) As a result, the Counterfeiting Regulations now allow criminal prosecution of any state functionary. This includes any state prosecutorial functionary who exploits his office to harbor an enterprise or individual he knows used a trademark without authorization, or who makes it possible for that person or enterprise to avoid prosecution.\(^{390}\)

Serious economic crime rose ninety-three percent between 1992 and 1993, and this trend continued into 1994.\(^{391}\) In response, Chinese President Jiang Zemin and Premier Li Peng vowed to severely discipline corrupt officials and to increase efforts to fight corruption in general.\(^{392}\)

In April 1994, China executed the Director-General of the China Great Wall Electronics Company for corruption and soliciting bribes.\(^{393}\) At the same time, the party stripped the Vice Chairman of the National Science Committee of his party membership, sentenced him to twenty years in prison, and deprived him of political rights for four years for his corrupt activities.\(^{394}\) The following month, after exhausting appeals to China’s Supreme Court, China executed the Vice-Chairman of the Student Recruitment Commission in Sichuan’s Luzhou City for his corrupt activities,\(^{395}\) and four other officials for smuggling and accepting bribes.\(^{396}\) These five executions within two months are particu-

\(^{389}\) Id.

\(^{390}\) Counterfeiting Regulations, supra note 41, art. 4.

\(^{391}\) Silk, supra note 379.


\(^{393}\) Shen Tai Fu Bei Yi Fa Chu Tsz (Shen Tai Fu Executed in Accordance with Law), JINGJI RIH BAO, Apr. 12, 1994. Shen Tai Fu's wife was sentenced to a 15-year term of imprisonment. Id.

\(^{394}\) Id. Vice-Chairman Li Syau Shi was sentenced for corruption and accepting bribes. Id.

\(^{395}\) Chuan Guo Zui Da de Zhao Sheng Shou Hui An Shen Jie (Nation's Highest Ranking Student Recruiter's Trial Concluded), JEN MIN JIH BAO, May 10, 1994, at 3. Shi Ren Fu, Vice-Chairman of the Luzhou Student Recruitment Commission, was condemned to death for taking bribes and other corrupt activity. Id.

\(^{396}\) Gao Fa Gongbu Liang Chi Zousi An Shenpan Jieguo (High Court Announces Results in Two Big Smuggling Cases), JEN MIN JIH BAO, May 30, 1994, at 1. Three officials in the Kong Shan City Commerce Bureau in Shandong Province were executed for smuggling and accepting bribes, and a Deputy Battalion Leader of Zhuhai City, Guangdong Province's Public Security Bureau was executed for smuggling cigarettes. Id.
larly noteworthy because the crimes were strictly economic crimes involving bribery, corruption or smuggling, and involved no loss of human life.

The punishment of these entrepreneurs and both local and national officials demonstrates that the Chinese government is waging a serious war on corrupt activities. The question remains whether such highly-publicized prosecutions and pledges indicate authorities' genuine interest to deal with China's corruption problem. To answer this question, one commentator suggests keeping an eye on China's treatment of three groups of people: provincial and local authorities, influential party members, and members of the new entrepreneurial class. Although the reported prosecutions targeted cadre and government officials from all levels, apparently most came from the lower and mid-level cadres.

VI. NON-LEGAL EFFORTS TO STRENGTHEN INTELLECTUAL PROPERTY PROTECTION

Perhaps the most consequential changes arising from the 1993 Amendments are the recognition of service marks, the expansion of the acts that will constitute trademark infringement, and the strengthening of the "passing off" provisions to include criminal liability. At long last, the legislature protected service marks as extensively as goods, and persons who sell goods bearing counterfeit marks are liable for criminal sanctions as well as monetary damages.

Still, this mechanical strengthening of the Trademark Law will not, in and of itself, solve China's intellectual property dilemma. In addition to continued problems of corruption, other problems contribute greatly to the rampant increase of trademark infringement in China, including: backwards trademark technology, unsound and inadequate trademark administration, a lack of qualified trademark professionals, and a general lack of understanding as to what, exactly, constitutes intellectual property

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397. Silk, supra note 379, at 22.
398. See High Court Announces Results in Two Big Smuggling Cases, supra note 396.
399. Khoon, supra note 249, at 1.
Faced with such difficulties, China had to do more than simply amend old laws and enact new ones to buttress trademark protection. It attacked the problem of trademark infringement from several angles.

An early sign of China's commitment to punish persons found guilty of manufacturing fake goods came well before China launched its anti-corruption campaign of July 1993. Toward the end of 1992, the Guizhou Higher People's court sentenced to death a man found guilty of manufacturing and selling fake Maotai spirits under fake trademarks, even though the illegal activities did not cause death or injury to any third party. Several months later, the Kunming Intermediate People's court sentenced one man to death and jailed six others for manufacturing and selling fake cigarettes under an infringed trademark. Again, no deaths or injuries resulted from these illegal sales. At the same time, in an effort to lessen the temptation for government officials to seek funds illegally, China announced it would raise civil servants' salaries.

A. Establishment of Courts and Other Support Groups

In June 1993, China founded the Beijing Intermediate People's court Intellectual Property Rights Tribunal under the Beijing Intermediate People's court. The Tribunal was the first court devoted entirely to hearing and resolving intellectual property

401. Khoon, supra note 249.
402. Since 1988, China has enacted several anti-corruption and bribery laws. Included among these are the Interim Provisions on Administrative Sanctions for Corruption and Bribery by State Administrative Personnel, the Implementing Regulations for the Interim Provisions on Administrative Sanctions for Corruption and Bribery, and the Provisions Prohibiting State Administrative Offices and Personnel from Giving and Accepting Gifts. The Criminal Law was augmented with Supplementary Provisions Relating to the Punishment of Corruption and Bribery. For remarks on China's corruption and bribery problems, the laws enacted to counter them, and the probable effect of those laws, see Allison W. Conner, Anti Corruption Legislation: Will More and Better Rules Curb Widespread Corruption?, E. ASIAN EXECUTIVE REP., Jan. 15, 1989, at 8.
cases.\footnote{408} Appeals from this court go to a special tribunal attached to the Beijing High People's court.\footnote{409} Later, the Guangdong Higher People's court set up an intellectual property court in Guangzhou, and announced plans to set up more of such courts in the three SEZs of Shenzhen, Zhuhai, and Shantou.\footnote{410} By focusing on trademark, patent and copyright protection, these Courts promote China's development and investment climate.\footnote{411}

China's first company specializing in intellectual property rights is the Zhongcheng Intellectual Property Rights Protection Service. This company, a joint-venture between mainland and Hong Kong lawyers, is situated in Beijing to monitor infringement of intellectual property rights.\footnote{412}

A special force of anti-fraud lawyers, attached to the Quality Responsibility Legal Department under the China Management Association, was formed in Beijing to handle problems relating to product quality.\footnote{413} The group handles cases of fraudulent products and arbitrates disputes on product and project quality, while protecting famous brand products and trademarks by handling cases concerning fake goods.\footnote{414} Presently, some 2550 county-level consumer associations and another 18,000 grassroots committees exist, and more than 1.5 million complaints have been registered with these various organizations since 1985.\footnote{415}

As a further effort to improve the country's protection of


\footnote{409}{ Copyright Boost for Writers and Composers, supra note 408; see also New Court Hears First Patent Case, CHINA DAILY (N. Am. Ed.), Aug. 28, 1993, at 3 (describing the new court's debate of a dispute over a well-known patented computer technology). A panel of technical experts advised the judges on technical aspects of the case. See Ma Chenguang, More Courts to Protect Trademarks and Patents, CHINA DAILY, Mar. 29, 1994, at 1 (noting that, as of the end of March 1994, the two Beijing Courts had heard 125 cases and ruled on 87 of them).}

\footnote{410}{ Special Courts, CHINA DAILY (N. Am. Ed.) Jan. 21, 1994, at 3; see also Wang Yong, Patent Courts to Guard Rights, CHINA DAILY (N. Am. Ed.), Jan. 31, 1994, at 2 (reporting that a patent court system is planned for major cities to protect domestic and foreign intellectual property rights).}

\footnote{411}{ Ma Chenguang, supra note 409.}

\footnote{412}{ Copyright Boost for Writers and Composers, supra note 408.}

\footnote{413}{ Law Group on Quality Is Formed, CHINA DAILY (N. Am. Ed.), July 13, 1993, at 3.}

\footnote{414}{ Id.}

\footnote{415}{ Xiao Fei, Consumers Armed with Rights, CHINA DAILY (N. Am. Ed.), Mar. 9, 1994, at 6; see also Ma Zhiping, supra note 206.}
intellectual property rights, China opened its first school to teach and research intellectual property rights, and to train China's senior intellectual property professionals at Beijing University in December 1993. Students learn laws on science and technology, trademarks, copyrights, and the protection of computer technology, as well as technical, contract, international, economic, and criminal law. China also disclosed a planned nationwide education campaign to promote public awareness of intellectual property rights.

B. Continued National Crackdown on Fake Goods

Since 1992, when China launched a national campaign against the production of fake and inferior goods, China has clarified its willingness to do more than simply pay lip-service to its pledge to combat corruption.

In August 1993, China executed three men found guilty of producing fake medicine and poor-quality fertilizer, false advertising, and trademark pirating. By September 1993, the courts handled 68,989 cases involving fake or shoddy goods, sentenced 500 people to prison, sentenced one additional person to death, and sentenced five people to life imprisonment. In October 1993, following a lengthy investigation, a Chinese court gave a factory manager a life sentence and an assistant manager a seventeen-year sentence for manufacturing fake medicines, even though no deaths resulted from their use; six officials who accepted bribes for

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417. S-llions of Fake Goods Uncovered, Destroyed, supra note 3; see also Deeper Crackdo, ged on Fake Goods, supra note 403.
418. See, supra note 379, at 23. Silk notes that Chinese authorities are aggressively handing down swift and stiff sentences to economic criminals, and have begun using unpaid informants to investigate criminal wrongdoing. Id.
419. Counterfeit Spirit Manufacturer Receives Death Penalty, supra note 362. Here, the manufacturer was prosecuted under provisions of the Criminal Law dealing with crimes against property, although he could just have easily been prosecuted under the Criminal Law's trademark provisions.
covering up the illegal activity were also jailed. In 1993, various AICs handled a total of 13,042 trademark infringement and counterfeiting cases, of which approximately 500 involved foreign trademarks.

In the first four months of 1994, China's procuratorial organs scheduled more than 1900 cases for investigation and prosecution, 1200 of which involved bribery and corruption. In the first quarter of 1994, courts nationwide heard 9836 cases involving economic crimes. Of that number, 102 people were sentenced to either death or life imprisonment. While an increase in the number of reported bribery and corruption cases is clear, so too is China's willingness to deal severely with convicted offenders.

C. Mixed Signals by Chinese Authorities

Because the export of fake and shoddy goods from China into neighboring countries damages China's trading reputation, China also has waged a strenuous border war on fake goods. Vowing to crush the export of fake and inferior goods that harm its trading image in neighboring countries, officials disclosed that China would impose severe punishment, even death in some cases, institute stricter commodity inspection and border checks, and investigate companies involved in border trade.

By mid-1994, however, one glaring inconsistency continued to

422. *Fake Cure Men Jailed,* supra note 421, at 8; *see also (Micro)soft on Offenders,* BUS. CHINA, Feb. 21, 1994, at 12 (describing a Taiwanese raid that netted some 650,000 copies of Microsoft's hologram that was copied in mainland China).


424. Jia Da Da Ji Jing Ji Fan Zui Li Du [Increase Strikes at Dynamics of Economic Crimes], JINGJI JIH BAO, June 7, 1994, at 1.

425. Id.

426. Id.


428. *China Vows to Crush Fake Trade,* CHINA DAILY (N. Am. Ed.), July 16, 1993, at 2 (also noting that China's self-employed businesses and a few township enterprises are mainly to blame for the rise in fake and inferior goods in border trade); *see also Companies Protest Piracy in China,* S. CHINA MORNING POST, Feb. 20, 1994, at 2 (noting that fake goods produced in China are also exported to such countries as Mexico, Panama, Brazil, Spain, and Portugal). The General Administration of Customs issued a communique, effective September 15, 1994, establishing procedures pursuant to which parties could apply to local customs authorities to prevent the import or export of infringing goods. *Strengthening of Intellectual Property Protection,* supra note 20, at 6.
exist in light of China’s avowal to stiffen its border trade restrictions and shut down factories that made counterfeit goods. Although China had seldom failed to publicly laud its prosecution of government officials, the existence of so many illicit compact disc (CD) and laser disc manufacturing enterprises within the purview of government officials, and the export of the illegally manufactured goods to worldwide destinations, evidenced that China’s effort to stem production of counterfeit goods and fight corruption was inconsistent. At least twenty-six factories capable of producing between seventy and seventy-five million counterfeit CDs annually existed. The bulk of these CDs were exported to foreign markets. U.S. officials demanded the factories be closed, yet authorities in China did not raid or close them. China failed to take action despite having promulgated notices on this issue. These included an April 1994 Urgent Notice on Strengthening the Control over the Reproduction of Compact Discs requiring relevant departments to approve all units producing CDs and laser discs, and an October 1993 Notice on Conscientiously Examining Merchandise Trademarks when Submitting Applications of Export Enterprises.

With the enactment of the Regulations for Customs Protection of Intellectual Property (Customs Regulations), China launched a new salvo in the border war against fake goods, strengthening the system for handling imports and exports, and forbidding the import or export of goods that violate Chinese intellectual property laws. The Customs Regulations require consignees, consignors, or their agents to record with China’s Customs General Administration (CGA) the intellectual property status of imported or

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430. Intellectual Rights Measures—Do They Go Far Enough?, supra note 429; Companies Protest Piracy in China, supra note 429.
431. US Demands, supra note 429.
433. Khoon, supra note 22, at 8.
435. Shaojie Chi, supra note 434, at 51; Khoon, supra note 434, at 40.
exported goods.\textsuperscript{436} The Customs Regulations allow the CGA to seize goods suspected of infringement and to impose fines equivalent to an imported good’s CIF value or an exported good’s FOB value.\textsuperscript{437}

\section*{VII. TRENDS IN INTELLECTUAL PROPERTY PROTECTION AND REMEDIES FOR U.S. BUSINESSES}

Fifteen years ago, China’s intellectual property protection regime stood on shaky ground. China had no patent law, and it abandoned efforts to enact a copyright law in 1957. Its Trademark Law was twenty-six years old. Then, accelerating technological growth worldwide generated conditions that swept a flood of Western products into previously isolated China.

Since 1979, China has made strenuous efforts to update a virtually nonexistent intellectual-property protection infrastructure to cope with the new-product tide flowing into its borders. It enacted and amended Patent,\textsuperscript{438} Copyright\textsuperscript{439} and Trademark Laws,\textsuperscript{440} and joined the World Intellectual Property Organization.\textsuperscript{441} It has sought to protect computer and chemical products,\textsuperscript{442} and has attempted to encourage fair competition among products by enacting an Unfair Competition Law.\textsuperscript{443} Yet from a Western perspective, those efforts continue to fall short.

Despite China’s efforts to strengthen its intellectual property protection regime, intellectual property infringement has risen to an all-time high, evidenced in fivefold growth of CDs made in China between 1992 and 1993.\textsuperscript{444} After piracy losses in China soared to $827 million in 1993, the United States again added

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{436} Shaojie Chi, \textit{supra} note 434, at 58; Khoon, \textit{supra} note 434, at 40.
\item \textsuperscript{437} Shaojie Chi, \textit{supra} note 434, at 59; Khoon, \textit{supra} note 434, at 41.
\item \textsuperscript{438} \textit{See supra} part III.B.1.
\item \textsuperscript{439} \textit{See Copyright Law, supra} note 42.
\item \textsuperscript{440} \textit{See supra} part IV.
\item \textsuperscript{441} \textit{See supra} part III.F.
\item \textsuperscript{442} \textit{See supra} parts III.A.2, III.B.2, and III.B.3.
\item \textsuperscript{443} \textit{See supra} part III.C.
\item \textsuperscript{444} \textit{See One Third of World Piracy Sales Are Compact Discs, IP ASIA, June 1994, at} 34 (noting that counterfeit CD’s of Chinese origin are exported worldwide). One reason for the CD piracy growth in China is that pirates’ production skills have kept pace with CD production technology to the point where sound quality and packaging of pirated copies are indistinguishable from those of originals. For other commentary on the problem of high-tech counterfeiting, see also Peter Lowe, \textit{Asia: Counterfeiting Techniques Keeping Pace with Technology, IP ASIA, Aug. 16, 1993, at} 7; M. Margaret McKeown & Heng-Pin Kiang, \textit{China Begins Revolution in Intellectual Property, NAT’L L.J., Oct. 31, 1994, at} C41.
\end{enumerate}
\end{footnotesize}
China to its list of Priority Countries. After China's repeated failure to close twenty-nine counterfeit CD manufacturing facilities, President Clinton announced that the United States would impose a 100% punitive tariff on some $1 billion worth of Chinese goods exported to the United States beginning February 26, 1995, a move some viewed as inconsistent with other U.S. trade dealings with China. China immediately responded by announcing that, also beginning February 26, 1995, and pursuant to its new Foreign Trade Law, it would place a 100% tariff on U.S. goods exported to China.

China and the United States, however, agreed to implement a detailed enforcement plan, and averted the impending trade war that the two countries' antagonistic positions mandated. Pursuant to this agreement, China agreed, inter alia, to take immediate steps to stem intellectual property rights, improve enforcement methods, establish intellectual property task forces, launch raids against retail outlets, and crack down intensively on copyright and trademark violators for six months following the implementation of the agreement.

While U.S. trade groups praised the February 1995 agreement, the question remains as to whether China will rigorously enforce the agreement or whether China simply did what was necessary to stave off a trade war. This lingering doubt existed because China abated a similar trade war threat in 1992 by signing a Memorandum of Understanding intended to prevent the very

446. Sanger, supra note 23. According to Sanger, over the first 11 months of 1994, the United States imported $36 billion worth of goods from China, while exporting to it only $8.5 billion worth of goods. Id.
447. Around the same time the trade sanctions were announced, the United States approved a rocket deal with China. See Kantor Defends U.S.'s Mix of Sanctions and Deals in Trade Policy With China, WALL ST. J., Feb. 9, 1995, at A2.
448. Zhongguo Renmin Gongheguo Duiwai Maoyi Fa [Foreign Trade Law -of the People's Republic of China] (1994), translated in CHINA L & PRAC., July 25, 1994, at 20. Under Article 7, the law provides that if any country imposes sanctions, restrictions, or other similar discriminatory measures on China, China may take corresponding measures against that country. Id. art. 7.
449. See Counter-retaliation List, supra note 24.
450. Faison, supra note 25, at D6; China Averts Trade War With the U.S., Promising a Campaign Against Piracy, WALL ST. J., Feb. 27, 1995, at A3 [hereinafter China Averts]; see also Hope, supra note 25, at 12.
type of intellectual property infringement that led to the 1994 complaints.  

Regarded as the most comprehensive and detailed intellectual property rights enforcement agreement ever concluded by the United States, the primary benefit of the agreement appears to lie with China's formal and public promise to implement a detailed enforcement plan and to regularly consult with U.S. officials. Intellectual property protection is a two-way street requiring the cooperation of all parties, not just one. While China's new laws have made combating intellectual property infringement easier, other countries should not expect China to bear alone the entire weight of the intellectual property infringement problems that exist within its borders. As some commentators note, intellectual property owners should not wait for the Chinese government to do the entire job for them, but should take the baton offered them, and begin cooperating more closely with the Chinese authorities to stem the tide of infringement.

Although Chinese authorities agreed to crack down intensively on copyright and trademark infringers for six months following the agreement, infringement problems will not be eradicated within that period and will continue long after it ends in August 1995. Just as the fight against drug trafficking might appear hopeless, so too might the fight against trademark counterfeiters and other intellectual property infringers seem hopeless. China, however, can make trademark counterfeiting and intellectual property infringement more costly and riskier ventures for those who would engage in them.

Despite whatever promises China made in the February 1995 agreement, now is not the time for U.S. businesses to relax or to sit back in a "wait and see" posture. The February 1995 agreement is, after all, only an agreement, and whether China will live up to it remains to be seen. U.S. businesses have important roles to play

452. See Khoon, supra note 28.
453. Faison, supra note 25; China Averts, supra note 450.
454. China Averts, supra note 450.
456. See Arthur Wineburg, The Close of Round Two, CHINA BUS. REV., July-August 1995, at 23 (noting that until several obstacles to full intellectual property rights protection are overcome, intellectual property rights will continue to be a source of friction between the US and China).
as well.

A. Maintain Trademark Vigilance

After a company has gone through the effort and expense of selecting, pre-screening, clearing, registering and advertising a trademark, policing its use and protecting it is crucial. Publicity can be a potent weapon in policing efforts. Publicizing the actions a company takes and will take against counterfeitters, while offering appropriate rewards for information leading to the discovery of counterfeiting operations, may have powerful effects. This is particularly true with respect to "stealth" companies, whose piracy operations move from place to place to avoid enforcement actions.

Companies must promptly and assertively enforce trademark rights against infringers, because infringing marks weaken a trademark's legal and marketing strength and delay in bringing suit against infringers may further weaken a trademark's prestige. As two eminent trademark practitioners observed, "[t]rademark [v]igilance is not just a some time job. It's an every day job."

B. Pursue Court Action Against Infringers

Seven major items of national legislation and two international treaties protect trademarks: (1) Trademark Law and the Implementing Regulations; (2) Anti-Unfair Competition Law; (3)

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458. For an excellent treatise on trademark practice generally, see ROBERT C. DORR & CHRISTOPHER H. MUNCH, PROTECTING TRADE SECRETS, PATENTS, COPYRIGHTS, AND TRADEMARKS (2d ed. 1995).

459. See Wheare, supra note 16, for commentary on the benefits of publicizing intellectual property rights. Ancillary to deterring infringers, advertising a trademark may ensure that a foreign mark does not become generic in the local market. Regarding the deterrent effect of advertising, see Khoon, supra note 22 (observing that placing warning notices and the like in newspapers are generally less effective than court actions or direct warning letters).


461. J. Thomas McCarthy & Christopher M. Pickett, High-Tech Trademarks: Selection and Use, 21 AIPLA Q. J. 265, 303 (1993). See also commentary by Charlene Barshesky, Deputy U.S. Trade Representative, who successfully concluded the February 1995 Agreement staving off the Feb. 26, 1995, trade to the effect that the vigilance of U.S. companies is equally as important as Chinese political will.

462. McCarthy & Pickett, supra note 461, at 303. For an excellent overview of the counterfeit goods suppression process, see KENNETH W. LUCK & PETER LOWE, PRODUCT FRAUD: COUNTERFEIT GOODS SUPPRESSION, THE INVESTIGATION OF COUNTERFEIT PRODUCTS (1993); see also Khoon, supra note 434, at 40.
Product Quality Law; (4) Provisional Measures for the Administration of the Reproduction of Trademarks; (5) Criminal Law and its Supplementary Provisions on the Punishment of the Crime of Passing Off Registered Trademarks; (6) Regulations for Customs Protection of Intellectual Property; (7) the Foreign Trade Trademark Provisions; (8) the Paris Convention; and (9) the Madrid Agreement. Under these laws, trademark owners can make legal attacks against anyone involved in trademark or other intellectual property infringement, from manufacturers to merchants, and courts can impose criminal sanctions. Although China disdains litigation, China indicated that its courts are open to complaints of intellectual property infringement.

The type of intellectual property infringement complaint brought to court is contingent upon action on the information collected, which in turn depends upon a combination of several factors: (1) the infringer's volume of business and assets; (2) the availability and cooperation of local law enforcement officials; (3) the legislation pursuant to which the contemplated action is taken; and (4) the availability of competent investigators. Different actions require different burdens of proof, and all the components of a successful action must fall in place.

C. Train More Trademark Professionals

Just as China has shown a willingness to train more intellectual property professionals, so too should U.S. businesses train and/or hire their own U.S. legal and intellectual property professionals. They should become versed in both Chinese law and culture, and able to identify, investigate, and evaluate evidence of...
infringement, identify responsible individuals, interview witnesses, liaise with the foreign lawyers who must represent them in the courts or before the SAIC, arbitrate with Chinese entrepreneurs, liaise more effectively with licensees, distributors, local AICs, the SAIC and other Chinese intellectual property professionals to prepare and file effective complaints, and monitor infringement activity. The United States should encourage and train lawyers to perform investigative and legal functions to assure continuity in enforcement matters. As some commentators note, the key to effective enforcement is persistence. Thus, the larger the businesses, and the more intellectual property they own, the larger, more active and more competent their own contingent of legal specialists should be.

D. Monitor Business Partners

One observer asserts that U.S. businesses should encourage their licensees to report to the licensor any infringement of the licensee’s rights. Perhaps, U.S. businesses might take this matter a step further and, where possible, require their licensees, distributors, agents, and joint-venture partners to maintain investigatory staff who would be responsible for policing the counties or larger geographical areas in which their factories, offices, or outlets are situated. In this fashion, these business partners can use their own staff, who have better access to local Chinese communities, to investigate and report infringement activities in their area. The licensor then can use its own or hired investigators to examine those same areas independently and hold licensees accountable for any infringement activities that may be uncovered. Where Chinese business partners are not part of the state distribution system, they might not strenuously object to this arrangement if they can be shown convincingly how intellectual property pirates erode their own profits. In any event, business partners should be pressed to take a more active role in protecting the proprietary rights of their licensors. Properly prepared agreements spelling out the parties’ rights and obligations will help

468. Persistence the Key to Controlling Piracy, IP ASIA, Apr. 27, 1994, at 39; see also Purging the Pirates, supra note 341, at 2 (observing that constant pressure on Chinese authorities to enforce their laws is needed to combat infringement).
469. Hayward, supra note 275, at 8 (noting measures that might be taken to protect intellectual property and observing that license contracts normally contain standard clauses requiring licensees to notify licensors when infringement is discovered).
prevent business partners from engaging in unauthorized overproduction, parallel trade and sub-contracting.  

E. Monitor Government Officials

Whatever problems China has with its trademark and other intellectual property practices appear to lie more with the people entrusted to enforce them than with the laws themselves. Factories and other manufacturing entities occupy space, hire workers, and utilize fuel, electricity and water resources. In a socialist country like China, where citizens' activities are closely monitored and resources are often at a premium, a factory can not spring up unnoticed, particularly in less-populated areas. The mere fact that factories and other establishments for the manufacture of unlicensed, unauthorized goods exist suggests government acquiescence in the illegal activities on one level or another. Arguably, the widespread graft and corruption in so many areas and on so many levels constitutes the real intellectual property piracy problem in China. Immediately prior to the signing of the February 1995 agreement, Chinese authorities raided and shut down a well-known counterfeit CD factory. Yet, the government requested closure of twenty-six counterfeit CD manufacturing facilities in mid-1994. If the existence of such factories was known to U.S. businesses, they were also known to the government officials in whose jurisdictions the factories were permitted to thrive.

After having already bolstered its administrative and judicial organizations tasked with accepting and investigating complaints involving intellectual property, China has further agreed to regularly consult with the United States on its enforcement

470. See Wheare, supra note 16, (observing that considering intellectual property matters at the negotiation state may obviate future misunderstandings). Where foreign trade operators are involved, Article 8 of the Foreign Trade Trademark Provisions obliges them to establish trademark administration systems, while Article 9 obliges them to adhere strictly to the terms of licensing contracts. See Foreign Trade Trademark Provisions, supra note 173, arts. 8, 9.


473. See Wineburg, supra note 456 (noting that a major obstacle to effective intellectual property rights protection is that some local officials stand to gain economically from piracy).
thereby providing an opportunity to monitor government activity and government officials. Given the level of official corruption, government officials should not be permitted to ignore or treat lightly complaints presented to them, and those who do should be monitored and reported to higher governmental authorities immediately. Legal professionals who speak Chinese and who are versed in intellectual property law might assist by tracking government officials' activities and decisions, monitoring the number and kinds of illegal activities uncovered in the areas they oversee, and tracking judicial decisions. In this manner, their performance can be evaluated, and complaints can be lodged against those inadequately perform their duties, those who solicit monetary incentives, and those who handle complaints leniently.

F. Do Not Submit to Counterfeiters

Commentators suggest that, in certain circumstances, U.S. businesses might consider the unorthodox tactic of partnering with suspected or would-be counterfeiters, but such a tactic might prove more harmful than beneficial. Performing four protectable functions, trademarks: (1) serve as a symbol identifying one seller's goods and services and distinguishing them from goods and services sold by others; (2) attest that goods and services bearing the trademark come from or are controlled by a single source; (3) signify that the quality level of goods and services bearing the trademark is uniform and equal; and (4) function as a prime instrument in advertising and selling.

Often, purchasers buy goods bearing well-known trademarks precisely because the goods are foreign-made, and therefore of better quality, and image is extremely important in China. The first line of defense against trademark infringement and counterfeiting is quality control of the trademarked goods. Partnering with suspected or would-be counterfeiters is tantamount to partnering with suspected or would-be criminals. Casting one's lot with such elements easily could result in a weakening or reduction of an otherwise strong trademark's ability to clearly and unmistak-
ably identify the source and quality of the goods, a labefaction of its advertising strength and prestige, and a general loss of public confidence. This is especially true where the suspected or would-be counterfeiter is local, and the goods are to be sold locally. Although such dilution might be less pronounced where the potential partner works in a distant foreign country, it might be disastrous where the potential partner is local.

Given the pressure exerted on China to change its laws, make its courts accessible to foreigners, and crack down on counterfeiters, and its recent agreement to work with U.S. officials, capitulating to suspected or would-be counterfeiters by legitimizing their activities would operate as a slap in the face to the Chinese government, signifying a lack of faith in its judicial and administrative enforcement organs. Additionally, it might encourage others to engage in illegal activities. If U.S. businesses engage more professionals to participate in enforcement activities, such unorthodox partnering would be unnecessary.

VIII. CONCLUSION

Counterfeiting in the United States has reached an all-time high, with marketing of everything from embroidering machines and sneakers to liquor and software. United States authorities are hard pressed to combat the problem within their own country. Thus, it is extremely hypocritical for the United States and other western countries in similar situations to condemn China for failing to cure within its borders a problem western countries cannot cure within their own.

China is a large country whose history and traditions are deeply embedded in the beliefs of its various peoples. While concepts of intellectual property law might be fully understandable to westerners, many Chinese people view and understand them differently. Educating people takes time and patience, especially a people as diverse and well-entrenched in their beliefs as the Chinese. Their efforts to bolster their intellectual property protection regimes, while trying simultaneously to stem trademark infringement and other counterfeiting activities, must be given credit.

Adequate legislation to protect trademarks and other forms of

intellectual property is now in place, and appears to warrant few additional legislative changes. The real benefit of the legislation lies in China's clear willingness and promise to enforce it: China has established new courts, trained more intellectual property professionals, sought to educate its citizenry, streamlined its arbitration mechanisms, and meted out stiff penalties to violators. Most importantly, however, China has made its courts more accessible to foreigners and promised to work closely with the United States. Such achievements and concessions have not come easily in a country the size of China.

Given China's desire to attract foreign business, it is highly likely that China will live up to the terms of its February 1995 agreement and continue to enforce its existing intellectual property laws. Instead of waiting to see whether China continues in the enforcement direction it has apparently chosen or whether the trend of enforcement will slacken off, U.S. businesses should strike while the iron is hot, increase their roles in protecting their own property, and assist China in its enforcement efforts by themselves hiring more investigatory and enforcement professionals.480
