

## Counterfeiting in China

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Nothing in this paper shall be considered legal advice to any reader, nor shall it be deemed to create an attorney-client relationship between the author and the reader. You should undertake your own due diligence when determining intellectual property laws in general and any investment you may choose to make in China. You should also independently seek the services of legal counsel

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## I. INTRODUCTION TO THE PROBLEM: THE CITY OF YIWU AND COUNTERFEITING

Yiwu is the counterfeit capital of China. Every day, approximately 200,000 distributors buy up to 2,000 tons of goods from the city’s wholesale black market. In Beijing, China’s official capital, which is a five-hour train ride from Yiwu, you can find a makeshift outdoor market dubbed “Treasure Street,” where buyers can purchase counterfeit products wholesale. Yabaolu is a modern building housing 300 private showrooms, each representing a Chinese factory where the fake goods are produced.

On average, 20 percent of all consumer products in the Chinese market are counterfeit. If the product sells, it is counterfeited. Rolex watches, Gucci handbags, Duracell batteries, Gillette razor blades, Safeguard soap, Head & Shoulders shampoo, Viagra, and luxury automobiles are just a few of the many fake goods available for purchase. The Chinese often joke that in China, “everything is fake but your mother” and “we can copy everything except your mother.” With places like Yiwu and Treasure Street providing counterfeit items ranging from car-inspection stickers and college diplomas to designer clothing and computer software, you cannot help but agree.

The United Nations Office on Drugs and Crimes estimates that two billion counterfeit products worth \$8.2 billion are produced annually in China.<sup>2</sup> The World Customs Organization has calculated that 65 percent of all counterfeit shipments globally

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<sup>2</sup> UNOff. on Drugs and Crime, *The Globalization of Crime: A Transnational Organized Crime Threat Assessment* 175, 181 (2010), available at [http://www.unodc.org/documents/data-and-analysis/tocta/TOCTA\\_Report\\_2010\\_low\\_res.pdf](http://www.unodc.org/documents/data-and-analysis/tocta/TOCTA_Report_2010_low_res.pdf) ( hereinafter “UNODC Report”).

originate in mainland China.<sup>3</sup> When shipments from Hong Kong, a special administrative region of China, are included, the proportion of shipments worldwide rises above two-thirds.<sup>4</sup>

In 2009, \$230 million of counterfeit goods from China and Hong Kong were seized in the United States, which represents almost 90% of the value of all counterfeits intercepted that year.<sup>5</sup> The problem is even worse in Europe, where customs officials reported nearly 50,000 seizures in 2008, a tenfold increase over the previous ten-year period.<sup>6</sup> European customs official estimate two-thirds of all counterfeit articles seized originated in China or Hong Kong. 57% of the seized counterfeits were clothing or related accessories, while jewelry and watches accounted for 10%, and electrical devices constituted 7%.<sup>7</sup> Counterfeit goods are spread unevenly across the continent with Germany, Spain, and particularly, the Netherlands, reporting large numbers of seizures.<sup>8</sup> While the European Union does not attach a monetary value to the counterfeit articles it seizes, if one assumes the average value of an item intercepted in the United States is about the same as in Europe, the total value of all counterfeit products seized in Europe would exceed \$850 million in 2008.<sup>9</sup>

Not all counterfeit articles are harmless imitations. Many are deadly, including: antibiotics made of talcum powder and birth control pills filled with rice flour. The World Health Organization estimates that 10% of the world's medicine supply, and, more alarmingly, 30% of the developing world's supply is counterfeit, i.e. drugs "deliberately and fraudulently mislabeled with respect to identity and/or source."<sup>10</sup> In 2008 alone, European customs officials reported more than 3,000 attempts to import fake drugs, the vast majority of which originated in India and China.<sup>11</sup> One estimate suggests that more than half of all anti-infective drugs in

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<sup>3</sup> *Id.* at 177.

<sup>4</sup> *Id.*

<sup>5</sup> *Id. d.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 181.

<sup>10</sup> *Id.* at 175, 181

<sup>11</sup> *Id.* at 184.

regions of Africa and Asia are likely to be counterfeit.<sup>12</sup> The former Director-General of Nigeria's National Agency for Food and Drug Administration and Control has even publicly stated that "[m]ost of the fake drugs in Nigeria come from India and China."<sup>13</sup>

A 2003 research study revealed that 22 of 25 places where artesunate, an anti-malarial drug, was sold were actually selling a counterfeit version of the drug.<sup>14</sup> Another study conducted across Southeast Asia in 2008 found that half of the 391 artesunate samples they collected were fake.<sup>15</sup> The researchers analyzed the counterfeit artesunate and traced it to southern China.<sup>16</sup>

To help combat the spread of counterfeit medicines, the International Criminal Police Organization, commonly known as INTERPOL, has coordinated numerous multi-country operations. In 2008, "Operation Storm" helped national law enforcement officials raid sites in China and several other Southeast Asian countries, resulting in the arrests of 27 people and the seizure of 16 million fake pills.<sup>17</sup> The following year, "Operation Storm II" confiscated 20 million doses of counterfeit medicines and shut down 100 outlets for these illicit products across the region.<sup>18</sup>

The counterfeit medicines also have deadly consequences within China itself. In 2006, at least 18 people died after being given counterfeit Amillarisin A, a drug designed to treat gallbladder problems, while hospitalized in Guangdong province. The problem is not limited to the streets alone but reaches into the highest echelons of power. In 2007, China executed the former director of the State Food and Drug Administration for approving numerous fake drugs, some of which caused fatalities, in exchange for bribes. In the face of this worldwide problem originating on its shores, China has taken some action to combat counterfeiting. In 2008, the State Administration for Industry and Commerce seized more than \$220 million worth of counterfeit products.<sup>19</sup> The following year,

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 186.

<sup>14</sup> *Id.* at 185.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 186.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 176.

the General Administration of Quality, Supervision, Inspection and Quarantine seized nearly \$500 million in counterfeit goods and dispatched nearly two million inspectors across the country.<sup>20</sup> Although the Chinese government's efforts have intercepted significant quantities of counterfeit articles, these seizures represent only a drop in the bucket and counterfeiting remains widespread.

In December 2001, China joined the World Trade Organization and many in the global community hoped that this would relegate Yiwu's outrageous counterfeit business practices to a thing of the past. However, despite China's continuing efforts to align its standards of intellectual property protection with WTO standards, such as through the TRIPS Agreement, the country is still faced with the daunting task of embracing (and enforcing) western notions of property rights. For most Chinese, trademark piracy is too tempting to turn down. No one really knows why the Chinese are the best and the most prolific in violating every notion of western intellectual property rights. It could be a matter of economics, or it could be cultural.

## II. THE WESTERN CONCEPTION OF INTELLECTUAL PROPERTY

Think of intellectual property as the protection of ideas. It is any original creative work that can be protected by law. As the term itself refers to a group of intangible property rights, it is no wonder that the scope of what is considered intellectual property is immense. From television shows to fashion designer logos, computer software to plant varieties, industrial processes to genetic engineering, these are all works that are considered to be intellectual property. However abstract these artistic, commercial and scientific works may be, they enjoy similar private property rights awarded to tangible assets. Intellectual property rights are designed with the creator in mind by protecting their ingenuity and consequently ensuring some sort of economic reward for the fruit of their labor. From the corporate perspective, intellectual property operates as an important commercial asset. As companies establish themselves and their products within an industry, its sales and competitive edge depend on the goodwill transmitted through its name, brand names and logos. Failure to properly manage their intellectual property

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<sup>20</sup> *Id.*

can be financially damaging to the company and can smear the company's reputation as a producer of quality products. There are four major pillars of intellectual property: copyrights, trademarks, patents, and trade secrets. Each will be discussed below.

#### ***A. Copyrights***

Copyrights protect creative works from being reproduced, performed, displayed, or disseminated by unauthorized users by bestowing on the owner the exclusive rights to such works. Almost all copyrights are identified by the symbol "©", the abbreviation "Copr." or the word Copyright, the year the copyright was first established and in some cases, the name of the owner of the copyright. Typically, the owner of a copyright is usually the author of the work. In cases where an employee of a firm is the creator of the copyrighted work, the first owner is actually the employer. Original written and non-written works, including books, computer software, plays, television shows, songs, advertisements, paintings, sculptures, and movies, can be protected by a copyright. Once copyrighted, these works cannot be copied or published without permission from the creator. The copyright does not keep the works from being available to the general public, rather like any other tangible property, the copyright can be sold or licensed to others, but not without providing the owner with appropriate royalties.

Copyright laws in the United States date as far back as 1790 when Congress passed the first copyright law. In fact, Article I, Section 8 of the U.S. Constitution states that Congress is given the power, "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." While this certainly laid the groundwork for intellectual property rights in the U.S., current copyright protection is based on more recent legislation, namely the Copyright Act of 1976. This act outlines the time span of patents as being the author's life span plus seventy years.

#### ***B. Patents***

Letters patent, more commonly known as patents, are another example of an intellectual property right. Generally speaking, the patent is a document issued by a government, hence

‘letters patent’, granting a special right or privilege. This special right or privilege is the protection of a technical innovation. In the United States, patents can be granted for improvements, discovery, or innovations relating to art, manufacturing, and even genetic engineering. In order to qualify an innovation as a patent, the invention must be new, it must involve an inventive step and it must be capable of being applied across an entire industry. The invention can be some sort of novel equipment, industrial process or even a method of operation never before seen or made public. Like copyrights, ownership of patents can be transferred as easily as any good that can be bought or sold.

### ***C. Trademarks***

The trademark is what makes us associate golden arches with McDonalds or a swoosh with Nike. Trademarks are why we can readily distinguish similar goods from one another. A trademark can be a word, sign, slogan, or just about anything that a consumer can use to identify the source of the goods and distinguish it from a competitor. Trademarks identify the quality of the product and the goodwill of the owner by a mere symbol. The trademark protects this symbol by preventing others from using it by providing exclusive use to the owner of the trademark thus making it available to others only through licensing or by sale of the trademark. The franchising of fast food restaurants is just one example of the licensing of trademarks. One thing to note is that while companies certainly enjoy this sort of product identification, they do run the risk of losing their status as trademarks. Several common terms, such as aspirin, cellophane, and escalator, are “lost trademarks.” They were initially intended by their manufacturers to be used as trademarks but instead have been relegated to more common product identification.

### ***D. Trade Secrets***

The final form of intellectual property is trade secrets. A trade secret is a secret kept by commercial entities in order to be successful or maintain success. There are as many forms of trade secrets as there are patents, copyrights and trademarks, including: formulas, computer programs, processes, methods, devices, techniques, pricing information, customer lists, and other non-public

information. Probably the most widely understood trade secret is the formula for Coca Cola. Trade secrets are very different from patents, copyrights, and trademarks. While patents and copyrights require you to disclose your information in the application process (information that eventually becomes public), trade secrets require you to actively keep the information secret. Trade-secret protection can potentially last longer than that of patents (20 years) and copyrights (100 years). A trade secret remains one as long as it remains a secret. In other words, if someone else discovers the same information using independent means, it is no longer a trade secret.

### III. CHINA'S CONCEPTION OF INTELLECTUAL PROPERTY

Intellectual property rights have not been the focus of much attention throughout China's history. One does not have to delve deep into China's history to uncover its intellectual property laws. Little attempt was made to protect patents and trademarks before the 1990s. Perhaps one of the earliest indications of China's attempt to adopt Western concepts in intellectual property protection was with the Agreement on Trade Relations between the United States of America and the People's Republic of China of 1979 ("Agreement"). According to the Agreement,

Each Party shall seek, under its laws and with due regard to international practice, to ensure to legal or natural persons of the other Party protection of patents and trademarks equivalent to the patent and trademark protection correspondingly accorded by the other Party . . . each Party shall take appropriate measures, under its laws and regulations and with due regard to international practice, to ensure to legal or natural persons of the other Party protection of copyrights equivalent to the copyright protection correspondingly accorded by the other Party."

By entering into this agreement, China was made a member of the World Intellectual Property Organization in 1980 and the Paris Convention for the Protection of Intellectual Property in 1984. These events subsequently led to the establishment of new trademark and patent laws within China.

Many of China's current intellectual property laws were developed within the past 30 years. The Trademark Law of 1982 serves as the oldest of the major laws. Based on first-to-file system, registration for trademarks under this law is valid for 10 years after approval, with a 10-year renewal option. In the United States, the law protects the inventor's creation as long as he or she can prove that they were the first to complete an invention, regardless of when they filed their patent. By contrast, in China, the law protects the first to file, not the first to invent. With respect to trademarks, Chinese legislation gives scant protection to the owner; their laws only provide protection for marks that are already "famous," thus making it difficult, if not impossible, to protect new or relatively unknown trademarks.

The United States soon realized after entering the 1979 Trade Relations Agreement with China that protection of intellectual property rights in China was verging on hopeless. China certainly passed laws on the recognition of intellectual property rights, but tailored them so that they would only "promote socialist legality with Chinese characteristics."<sup>21</sup> As a result, the United States attempted to solve China's intellectual property rights problems by invoking Section 301 of the Trade Act of 1974, which permitted the President to investigate and impose sanctions on countries engaging in unfair trade practices that threaten the United States' economic interests.<sup>22</sup> A 1988 amendment to Section 301 required the United States Trade Representative (USTR) to identify foreign countries that provided inadequate intellectual property protection or that denied American intellectual property goods fair or equitable market access.<sup>23</sup> Should a country, say China, be identified as such, an investigation into the act, policy, or practice of the identified country would be conducted in addition to consultation with the country regarding its offense. Furthermore, trade activity with the offending country could be suspended or withdrawn unless an agreement or some other accommodation between the U.S. and the offending country was made.

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<sup>21</sup> Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-first Century*, 50 Am. U. L. Rev. 131, 134 (2000).

<sup>22</sup> *Id.* at 138.

<sup>23</sup> *Id.* at 140.

At the request of American business executives, China was placed on the “Priority Watch List” (maintained by the USTR of countries whose intellectual property practices or market access barriers warrant special attention) by the USTR in 1989. As a consequence of this international pressure, China passed a copyright law in 1990, but it was more symbolic than substantive. For example, foreign works copyrighted in other countries would be given no protection unless they first registered for copyright protection in China.

The Chinese also wreaked havoc with traditional notions of trademark and patent protection. These laws carried a distinctly socialist flavor. The government placed limits on the rights granted by the patent and trademark laws. The Patent Law of 1984 granted patent protection to “job-related invention-creation” but it limited ownership to the work unit, the enterprise, or the joint venture.<sup>24</sup> Like the Trademark Law, the Patent Law operates on a first to file basis. According to Article 9 of the Patent Law, “where two or more applicants file applications for patent for the identical invention-creation, the patent right shall be granted to the applicant whose application was filed first.” China’s “first-to-register” system requires no evidence of prior use or ownership, leaving registration of popular foreign marks open to third parties. Not surprisingly, these modest and superficial attempts at dealing with intellectual property rights violations did nothing to stem the tide of massive counterfeiting. Threats of U.S. sanctions likewise went nowhere, and were in fact met by incredible Chinese threats of counter-sanctions. Today, everyone’s hope is that China cherishes its continued membership in the WTO so much that it will take greater steps to protect intellectual property rights.

Some sources blame the Chinese culture for the lack of acceptance and perhaps in many cases the resistance to the concept of intellectual property. In his work titled, “A Study into the Problem of Software Piracy in Hong Kong and China,” Kenneth Ho relates the influences of Confucianism and its emphasis on learning through copying to the Chinese current attitude towards intellectual

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<sup>24</sup> *Id.* at 136.

property.<sup>25</sup> While Western sensibility would lead us to perceive copying as an inferior imitation of an original, and in fact cheating, “in many Asian nations the highest compliment one can be paid is to be copied.”<sup>26</sup>

#### IV. THE WORLD TRADE ORGANIZATION

With its headquarters in Geneva, Switzerland, the World Trade Organization, WTO, currently operates as the only global international organization that deals with the rules of trade between nations. The WTO was formed in 1995 following the Uruguay Round of Negotiations on the General Agreement on Tariffs and Trade, also known as GATT. Founded in 1947 with membership of 123 governments, GATT operated as a provisional international organization focusing on international trade with the primary goal to preserve stability among nations following World War II by facilitating economic recovery through the reduction of tariffs and other barriers to trade. GATT tried to arrange mutually advantageous relationships between nations by eliminating discriminatory treatment in international trade agreements. Although it inherited many of the same basic principles as GATT, the WTO now operates as a global commerce agency with its own secretariat and the same legal status as the United Nations. Virtually every country in the world is now a member of the WTO.

The basic organization of the decision-making bodies of the WTO is three tiered, governed by the Ministerial Conference. Meeting at least every two years, this body is comprised of all members and operates as the main governing body of the WTO. Below the Ministerial Conference is the General Council, also comprised of all members. The Council oversees operation of the WTO between meetings of the Ministerial Conference. It is this body that operates one of the most primary functions of the organization, the dispute resolution process. Finally, within this structure are the specialized standing committees which include the Council for Trade in Goods, the Council for Trade in Services, and

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<sup>25</sup> Swinyard, W.R., quoted in Kenneth Ho, *A Study into the Problem of Software Piracy in Hong Kong and China*, available at [http://www.ipd.gov.hk/eng/intellectual\\_property/study\\_aids/piracy\\_hk\\_china\\_cop\\_yrt/piracy\\_hk\\_china\\_c.htm](http://www.ipd.gov.hk/eng/intellectual_property/study_aids/piracy_hk_china_cop_yrt/piracy_hk_china_c.htm)

<sup>26</sup> *Id.*

the entity of most interest to the subject of this paper, the Council for Trade-Related Aspects of Intellectual Property Rights, aka TRIPS. These committees meet more regularly than the other bodies to discuss issues regarding international trade policies.

While world economic recovery is no longer its primary focus, the WTO's main objectives now are to administer WTO trade agreements, provide a forum for trade negotiations, handle trade disputes, monitor national trade policies, provide technical assistance and training for developing countries, and cooperate with other international organizations such as the World Bank and the United Nations.<sup>27</sup> Any state or separate customs territory possessing full autonomy in the conduct of external trade may apply for membership. Other requirements include the acceptance of the results of the Uruguay Round of Multilateral Trade Negotiations. Perhaps the most important criteria for those nations wishing to become member nations is compliance with international trade rules as set forth by the WTO legislation such as the Trade Related Aspects of Intellectual Property Rights commonly known as the TRIPS Agreement. For China, acceding to the WTO required the reworking of many of its laws to bring them into conformity with international trade rules, particularly those laws that dealt with intellectual property rights.

## V. THE TRADE RELATED ASPECTS OF INTERNATIONAL PROPERTY RIGHTS AGREEMENT

The TRIPS Agreement is the benchmark for intellectual property rights. Effective January 1, 1995, the Agreement covers areas of intellectual property such as copyright, trademarks, patents, industrial designs, varieties of plants, layout-designs of integrated circuits, and undisclosed information including trade secrets and test data.<sup>28</sup> Member states must adopt or conform their laws within their respective legal systems to comply with the TRIPS Agreement. The Agreement is like an instruction manual for member nations of the WTO as it provides direction as to how they are to manage intellectual property rights by providing minimum standards for

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<sup>27</sup> World Trade Organization, *What is the WTO?*, [http://www.wto.org/english/thewto\\_e/whatis\\_e/whatis\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm).

<sup>28</sup> Overview: the TRIPS Agreement, WTO, *available at* [www.wto.org](http://www.wto.org)

intellectual property protection, procedures for enforcement of these rules, and subjects disputes between Members to the WTO's dispute settlement procedures.

The TRIPS Agreement is not solely responsible for setting the standards for intellectual property protection. In fact, the Agreement embodies the terms of earlier agreements dealing with this matter, namely the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works. The TRIPS Agreement extracts many provisions from each of these conventions and appends additional requirements where the previous documents were considered deficient. As for enforcement of intellectual property rights, the Agreement provides procedures and remedies for intellectual property protection in the domestic capacity. It also outlines civil and administrative procedures and remedies, provisional measures and special requirements related to border measures and criminal procedures.

As with all other WTO agreements, the obligations outlined by the TRIPS Agreement are to be fulfilled by every member of the WTO. Developing countries are provided with a longer time frame to integrate and conform to the Agreement's standards, as is the case with China.

It is important to remember that the TRIPS Agreement only provides the minimum standard by which intellectual property is to be protected. Different member countries may have varying levels of intellectual property protection but all must meet the TRIPS Agreement's requirements. These varying levels of protection can prove to be a problem between countries as demonstrated by American businesses' reluctance to enter into trade with China.

The WTO is invested with the power to enforce global commerce rules through the imposition of economic sanctions. With 160 member nations as of June 26, 2014 (Yemen was the most recent country to join), members are expected to raise standards of living, expand the production of trade in goods and services, and ensure that developing countries participate and consequently

benefit from expanding international trade.<sup>29</sup> In order to maintain its objective to liberalize restrictive and biased home country trade policies, members of the WTO have the right to challenge other countries' local, state or provincial, and even federal or national laws if they feel that they impede international trade. Since the organization of the WTO comes complete with a judicial authority, once this body issues a ruling, the non-complying country is faced with only three options: it must either pay permanent compensation to the challenging country, be subjected to trade sanctions, or change its laws to conform to WTO requirements, as seen in China in regards to intellectual property rights. By conducting its affairs in such a manner, the WTO believes that it is providing developing countries the opportunity to take advantage of freer trade through expanded access to industrialized country markets.

For China, entrance into the WTO became a priority for their nation for many reasons, one being image. Membership has signified that China is a growing economic power in the international community. As a member of the WTO, China also had the opportunity to take part in the development of new international rules on trade. Given its immense size and growing economy, the country will certainly play a major role in trade talks for many years to come.

From the perspective of U.S. firms, China's entrance into the WTO has been a double-edged sword. Since China's accession, its economy has grown anywhere between 6-13% annually, as measured by percent change in gross domestic product, thereby making it very attractive for foreign firms to conduct their business there. However, China is also home to a thriving black market. A significant portion of its economy is based on counterfeiting and the violation of most intellectual property laws found in the western hemisphere.

It will not be easy to eradicate counterfeiting in China without hurting the domestic economy. Piracy employs both directly and indirectly 3 to 5 million people in China. Recent

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<sup>29</sup> Secretary-General's Report To Ministers 2014, OECD, *available at* <http://www.oecd.org/about/secretary-general/SG-Annual-Report-to-Ministers-2014.pdf>

estimates place the market value of counterfeit goods upwards of \$25 billion annually. It is so pervasive that companies established by local governments operate as some of the 40,000 outlets nationwide for these fake goods. Many of the most flagrant brand violators are state enterprises and run by the same governments that should be policing them.

The legal system in China is ill-prepared to handle the numerous intellectual property right violations. China's laws are fairly new and they are a mixed bag of unfairness and arbitrariness. China does not protect creators; it protects the person who reaches the registration office first, even if he or she stole the idea from someone else. China draws a distinction between "famous" trademarks and those that are not so famous. The legal profession in China is sub-standard by western standards, and the judiciary is equally inept and inexperienced.

While the government's enforcement arm, the State Intellectual Property Office (SIPO), has resolved the backlog of intellectual property applications, other problems remain. Local police, when asked to assist in an enforcement raid, will sometimes ask for a hefty "fee" for their assistance. Sometimes, the local police will simply warn the counterfeiter of an impending raid. Other times, local residents will even resort to violence to thwart an enforcement raid, in order to protect their economic livelihood. The younger Chinese generation's penchant for things Western fuels the demand for famous western brands. This, coupled with the lack of strong legal protection for brands, makes counterfeiting a safe and profitable enterprise. Foreign firms find themselves competing with cheap, low quality imitations of their goods thereby hurting their market share and destroying the goodwill for those products that depend on reputations for good quality. Counterfeits of name brand consumer products are in some instances placing the health of consumers at risk.

China's mishandling of intellectual property rights is not only detrimental to foreign firms, but domestic ones as well. Many Chinese companies are not properly prepared to protect those works that may be considered intellectual property.

## VI. CHINESE EFFORTS TO PROTECT INTELLECTUAL PROPERTY AFTER JOINING THE WTO

Just prior to entry into the WTO, China passed a batch of new copyright, trademark, and patent laws. These laws generally imposed statutory damages for intellectual property right violations, created a preliminary injunction cause of action for victims, provided for greater judicial review, and widened the scope of forms of intellectual property that would be recognized and protected in China. However, these reforms were only the first step in a long journey, which is ongoing to this day.

The protection of intellectual property continues to be a work in progress for China as it makes efforts to fulfill its WTO commitments and protect its own domestic markets. China is reworking its legal system to provide an improved environment for the good of economic and social development. The Supreme People's Court of China, the country's highest court, has been subjected to lectures and training courses on WTO rules and senior judges have even been sent to study laws in developed countries. Laws and regulations that do not conform to the WTO are being either reworked, eliminated, or replaced by new legislation. Intellectual property rights have come to be the focus of much attention as the battle against infringement continues to wage on. In 2001, the Beijing High People's Court released a set of patent regulations titled "Opinions Concerning the Determination of Patent Infringement." Wang Zhenqing, then the vice-president of the court, said the new rules, which add up to 129 entries, would extend patent protection to almost all fields. In late 2013, the Beijing High People's Court issued a revised set of guidelines that integrate the court's experience resolving intellectual property matters over the past decade.

New courts are also being established. On August 31, 2014, the Standing Committee of the National People's Congress approved the creation of specialized courts for intellectual property rights in Beijing, Shanghai, and Guangzhou. According to Wang Chuang, the deputy presiding judge of the IP division of the Supreme People's Court, the new courts are "an important

revolution of the country's judicial system" and will "promote the development of China's emerging industries."<sup>30</sup>

The first of these specialized courts opened its doors in Beijing on November 6, 2014 and already has more than twenty-five judges and 200 cases. The Guangzhou Intellectual Property Court began hearing cases on December 21, 2014 and currently has ten judges. The most recently established of the three specialized courts, the Shanghai Intellectual Property Court, started hearing cases on January 4, 2015 with fourteen judges.

The Supreme People's Court has stated that the new courts will adjudicate "civil and administrative cases related to patents, computer software, technology secrets, trademarks, and copyrights[.]"<sup>31</sup> To avoid conflicting rulings and encourage specialization in this important field, the trial and intermediate courts in Beijing, Shanghai, and Guangzhou will gradually relinquish jurisdiction of intellectual property rights cases to the new courts.

Other post-WTO developments in the protection of intellectual property rights in China have been made in the area of trademark infringement. On January 22, 2002, the second and latest round of amendments to China's Trademark Law went into effect. These amendments gave holders of registered trademarks and interested parties the right to seek preliminary injunctions to stop infringement and preserve evidence. Known as "The Interpretation on the Issue of the Law Applicable to Stopping the Infringement of Exclusive Rights in Registered Trademarks and Preservation of Evidence Prior to Litigation," it addresses matters such as the court with relevant jurisdiction, the matters that must be included in petitions for preliminary injunctions, the evidence that must be presented, the provision of security by petitioners, time limits for granting injunctions that courts must comply with, time

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<sup>30</sup> *China Opens Intellectual Property Courts to Improve Image*, BLOOMBERG.COM, (Nov. 3, 2014, 2:54 EST), available at <http://www.bloomberg.com/news/articles/2014-11-03/china-opens-intellectual-property-courts-to-improve-image>.

<sup>31</sup> Hu Qingyun, *China Preps IP Court Launch*, GLOBAL TIMES (Nov. 4, 2014), available at <http://www.globaltimes.cn/content/889863.shtml>.

limits for instituting an action after an injunction has been granted and non-preliminary interlocutory rulings.

The Copyright Law of 1990 was amended for the first time in October 2001. Known as the “Decision of the Standing Committee of the National People’s Congress on Amendment of the ‘Copyright Law of the People’s Republic of China,’” these amendments govern assignments of copyright, expand the list of works that are protected, introduce collective organizations that can assert rights on behalf of their members, expand the list of rights copyright holders possess (adding, among others, the right of transmission by computer information network) and change the rules on permitted use without authorization.

On April 1, 2010, a second batch of amendments to the Copyright Law went into effect to comply with WTO rulings. The first major change was the deletion of a provision that barred copyright protection to prohibited works. In its place, Article 4 of the Copyright Law now states: “Copyright owners should not exercise their copyrights in a manner that violates the Constitution or relevant laws, or harms the public interests. The country will supervise publication and distribution of the works in accordance with law.” The 2010 amendments also clarified when copyright owners could use their copyright as security for a debt and required them to register that pledge with the State Council.

Since 2010, the National Copyright Administration has been publishing additional draft changes to the Copyright Law for public comment and has made numerous revisions based on the feedback received.

One suggestion to improve current enforcement mechanisms of intellectual property rights is to increase the presence and effectiveness of private (i.e., court and contractual) means of resolving intellectual property disputes.<sup>32</sup> This idea, which is endorsed by Donald C. Clarke of the University of the Washington School of Law, premises that the current system of enforcement in China, which is dominated by government agencies at the local

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<sup>32</sup> Donald Clarke, “Private Enforcement of Intellectual Property Rights in China,” Nat’l Bureau of Asian Research Analysis, vol. 10, no. 2, at 29 (April 1999).

level, is ineffective and too localized in nature to be a true watchdog of intellectual property rights.

Clarke argues that while China does have courts, currently these courts suffer from problems such as difficulty in issuing injunctions, difficulty in enforcing any rulings it makes, and relatively small damage awards so as to fail to truly deter intellectual property right infractions. Should China be willing to change these problems in its courts, so that these courts may more effectively enforce private measures of recourse for intellectual property infringements, then more foreign investors would be willing to work directly in China. However, there appears to be little indication that China would be willing to make any sweeping changes in the near future. Therefore, Clarke argues, the best mode of recourse at this point is to use the TRIPS Agreement and the WTO to pressure China to reform its courts with respect to intellectual property issues in accordance with China's commitments to these organizations and agreements.

Another change would be to reform the Chinese law that links the severity of the penalty for trafficking counterfeit goods to the value of the material seized.<sup>33</sup> Because of the law, traffickers routinely split massive shipments into several smaller packages, which lessens the risk that the entire shipment will be seized and reduces the penalty assessed for any seized goods. The United Nations Office on Drugs and Crime notes that the law has effectively permitted repeat and habitual traffickers to operate profitably over the long-term with little or no fear of imprisonment<sup>34</sup>

## VII. CHINA'S PROSPECTS BEYOND THE WTO

There is no question that China's economic prospects have dramatically improved following entry into the WTO. In 2013, China eclipsed the United States and became the world's largest trading entity with exports and imports totaling \$3.87 trillion. While China's growing economic clout will give it a greater role,

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<sup>33</sup> UNODC Report, *supra* note 2, at 178.

<sup>34</sup> *Id.*

and presumably stake, in maintaining regional and global stability, it may cause some problems on the domestic front. The new markets in China, which the country has had access to by virtue of its WTO membership, have proven detrimental to many undercapitalized private and state-owned businesses. Now and in the future, Chinese goods will face strong competition from its WTO colleagues.

Unemployment in China may rise as the country continues its long journey towards effectively enforcing its WTO obligations. Although the current official unemployment rate is at 4.1%, this figure is misleading because in urban areas, unemployment is significantly higher. Furthermore, tens of millions of rural workers make up a so-called “floating population” that migrate from farming to construction. These migrant workers are often unemployed and do not show up in official unemployment rates. Notwithstanding the great economic progress made in lifting hundreds of millions of its citizens out of the poverty, the World Bank estimates, as of 2014, that 128 million Chinese live below the poverty line (approximately \$1.80 per day) and the average annual household income per household is \$2,100 but varying significantly between urban and rural areas. Despite these statistics, China became the largest economy in the world based on purchasing power parity in early October 2014 according to the International Monetary Fund. While the United States still leads based on nominal GDP, the gap is expected to shrink in the coming years.

China has good reason to strengthen its intellectual property protection. By doing so, China can more effectively capitalize on its inherent strengths in a new multinational industrial system.<sup>35</sup> This new multinational industrial system is known as the “value chain”, and within the value chain, nations tend not to focus on entire industries from beginning to end but rather focus on certain steps in the manufacturing process where they have (or can attain) a competitive advantage.

Through this system, developing nations such as China will not be served by trying to copy and usurp entire industries or

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<sup>35</sup>Barry Naughton,, *The Global Electronics Revolution and China's Technology Policy*, Nat'l Bureau of Asian Research Analysis, vol. 10, 2, at 5 (April 1999).

processes, but can become more valuable in the international manufacturing community by making themselves indispensable in certain processes in manufacturing and/or research and design scheme. However, due to China's lack of intellectual property protection, foreign investors are less willing to use Chinese companies as a cog in their manufacturing wheel, and thus, Chinese companies are given fewer opportunities to take advantage of their strengths. Such strengths include its cheap labor, its natural resources, and its growing consumer base, which can serve as a springboard for creating new ideas for consumer wants.

If China wants to become a key player in this new multinational economic system, it must take it upon itself to create effective intellectual property protections for all holders of intellectual property rights, both foreign and domestic. If not, then China will only be harming its own economic success in the decades to come.

#### VIII. HOW TO AVOID PIRACY IN CHINA

Because of rampant piracy in China, and China's "first to register" law on patents, Western companies should do everything possible to minimize their IPR losses. Some suggestions are:

1. Find a partner who is unlikely to pirate or who has the power to halt those who will pirate.
2. Bring mid-level technology, not the highest-level technology, to China.
3. In your Joint Venture Agreement, specify that technology transferred to the joint venture is not being transferred to the local partner.
4. Do not transfer your technology into a joint venture or other form of foreign-funded enterprise in China. Instead, grant a license for the Chinese company to use your technology.
5. To the extent possible, set forth in your agreement that everything produced by the Chinese company belongs to you and only you.
6. Never agree to arbitration before a Chinese arbitration body.
7. Have everyone involved, from managers to local workers,

- sign a non-disclosure agreement.
8. Centralize your crucial knowledge and processes.
  9. To the extent you cannot centralize information, camouflage it and spread it out among different people in different areas.
  10. Give remuneration in the form of confiscatable assets like housing for the workers and managers (hopefully, this will give employees a long term vested interest in the company and its success and reduce turnover, a major source of technology leakage).
  11. Train locals about intellectual property rights and how the protection of such rights can benefit China in the long run.