

## Coercion Will Not Protect Trademark Owners in China, but an Understanding of China's Culture Will: A Lesson the United States Has to Learn

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## ARTICLES

# COERCION WILL NOT PROTECT TRADEMARK OWNERS IN CHINA,<sup>1</sup> BUT AN UNDERSTANDING OF CHINA’S CULTURE WILL: A LESSON THE UNITED STATES HAS TO LEARN

DALILA HOOVER\*

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1. For the purpose of this Article, the term “China” refers to mainland China as the People’s Republic of China [hereinafter “P.R.C.”].

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## ABSTRACT

China remains the single largest producer of pirated and counterfeit goods in the world. The purpose of this article is to explore the different factors that have impeded effective trademark protection in China. In particular, this article analyzes the cultural barriers between the United States and China, and in doing so, helps one understand the climate of hostility between the two nations when it comes to trademark enforcement. This article further analyzes the constant pressure exercised by the United States against China, which has led to the adoption of trademark laws by the Chinese government at the national and international level but has proven to be ineffective in the short-run. This article also provides an overview of Chinese history and culture to establish the foundation upon which the present trademark legal system was built, and to explain how these cultural mores are inconsistent with intellectual property rights as perceived under Western culture. Finally, this article explores an alternative to the coercive approach adopted by the United States to protect trademark owners in China. It is based upon the EU-China model which promotes leniency, understanding, and cooperation in the long-run.

## INTRODUCTION

Business entities and individuals have a legitimate interest in protecting their trademarks abroad.<sup>2</sup> However, when it comes to protecting their trademark(s) in China, the international community has voiced some deep concern about China's dedication and ability to provide protection.<sup>3</sup> Indeed, China is viewed as the single largest producer of pirated and counterfeit goods in the world.<sup>4</sup> This harsh critique of China's inability to protect trademark and intellectual property rights ("IPR") in general is widely spread in the West.<sup>5</sup> While China is undertaking a historic and unprecedented advancement in the

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2. See Scott A. McKenzie, Comment, *Global Protection of Trademark Intellectual Property Rights: A Comparison of Infringement and Remedies Available in China versus the European Union*, 34 GONZ. L. REV. 529, 531 (1998-1999).

3. Wei Shi & Robert Weatherley, *Harmony or Coercion? China-EU Trade Dispute Involving Intellectual Property Enforcement*, 25 WIS. INT' L. L.J. 439, 442 (2007).

4. Anne M. Wall, *Symposium: National Sports Law Institute of Advisors: Intellectual Property Protection in China: Enforcing Trademark Rights*, 17 MARQ. SPORTS L. REV. 341, 342 (2006); see Office of the United States Trade Representative, 2008 Special 301 at p. 19, available at [http://www.ustr.gov/sites/default/files/asset\\_upload\\_file553\\_14869.pdf](http://www.ustr.gov/sites/default/files/asset_upload_file553_14869.pdf) (last visited March 5, 2011) [hereinafter "USTR"].

5. Robert H. Hu, *International Legal Protection of Trademarks in China*, 13 MARQ. INTELL. PROP. L. REV. 69, 76 (2009).

legal protection of trademarks, ongoing debates have raged on between the West and China.<sup>6</sup> The West, led by the United States, continues to assert that China has done poorly in protecting foreign trademarks.<sup>7</sup> Trademark piracy in China is still rampant and continues to cost foreign trademark owners billions of dollars in lost sales and jobs.<sup>8</sup> Consequently, the United States' constant frustration with China's failure to protect and enforce trademark and IPR in general in China has led the U.S. Trade Representative ("USTR") to place China on the Priority Foreign Country Watch List for epidemic infringements of IPR more than once.<sup>9</sup> Each year on the last day of April, the USTR's Office issues the Special 301 Report that places countries on a priority foreign country list.<sup>10</sup> Many American businesses that recommended that China be put on the priority watch list in the next Special 301 Report on April, 30 2010,<sup>11</sup> have been heard as China remains on the priority watch list in 2010.<sup>12</sup> As of today, China continues to be the most notorious and singled-out country for piracy and counterfeiting practices.<sup>13</sup>

Conversely, China justifiably claims that it has made substantial strides in establishing a modern trademark system within a short period of time. Such action demonstrates China's commitment to fight intellectual property piracy and counterfeiting within its borders. To further demonstrate its commitment, China actively engaged on the international platform, signed several international treaties and conventions, and acceded to the World Trade Organization ("WTO") in 2001.<sup>14</sup> Following its accession to the WTO, China has complied with

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6. *Id.* at 74.

7. *Id.*

8. The U.S. Secretary of State, Carlos Gutierrez stated that the theft of IP in China was costing U.S. businesses an estimated \$2.3 billion a year and called on China to strengthen its fight against "rampant counterfeiting."

9. USTR, *supra* note 4, at 19.

10. *Id.*

11. Amy Tsui, *China Remains Top IPR Priority for Many Business Group Say at Special 301 Hearing*, Mar. 12, 2010, available at [http://news.bna.com/ptln/PTLNWB/split\\_display.adp?fedfid=16408158&vname=ptcjinotallissues&fn=16408158&jd=a0c2g1x5r1&split=0](http://news.bna.com/ptln/PTLNWB/split_display.adp?fedfid=16408158&vname=ptcjinotallissues&fn=16408158&jd=a0c2g1x5r1&split=0).

12. 2010 Special Report, 19 (April 30, 2010), available at [http://www.ustr.gov/webfm\\_send/1906](http://www.ustr.gov/webfm_send/1906) (holding that despite the positive steps China took in 2009 with respect to IPR enforcement, the overall IPR theft in China remains "unacceptable").

13. Donald P. Harris, *Nineteenth Annual Philip D. Reed Memorial Issue: Article: The Honeymoon is Over: The U.S.-China WTO Intellectual Property Complaint*, 32 FORDHAM INT'L L.J. 96, 102 (2009).

14. See Info, Office of the State Council, *New Progress in China's Protection of Intellectual Property Rights*, Part. III (1994), available at <http://china.org.cn/e->

the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).<sup>15</sup> Thus, China leaves no doubt as to its commitment to becoming a competitive, “innovation-oriented” country that should command international respect regarding IPR protection.<sup>16</sup>

Yet, China’s efforts in adhering to its domestic and international duties have not substantially reduced the problem of IPR piracy and trademark infringement in China.<sup>17</sup> At the national level, despite adequately implemented resources, including anti-piracy campaigns and an increasing number of IPR cases brought before Chinese courts, overall levels of piracy, counterfeiting, and trademark infringement remained unacceptably high in 2007.<sup>18</sup> Similarly, at the international level, although China’s legislation has been in accordance with international standards, enforcement under the TRIPs Agreement remains mediocre.<sup>19</sup> TRIPS is viewed as the “benchmark” for gauging the adequacy of China’s trademark laws because it sets the standard for international IPR protection.<sup>20</sup> According to the 2008 USTR Report, inadequate IPR enforcement is a key factor contributing to these shortcomings.<sup>21</sup> Thus, the West, especially the United States, continues to claim that legislation without enforcement in China is “elusive and deceptive, as are rights without remedy.”<sup>22</sup>

Trademark enforcement in China remains poor. However, critics of the Chinese trademark regime and its enforcement seem to disregard the influence of culture on China’s current efforts to enforce trademark infringement within its borders.<sup>23</sup> Indeed, Confucianism, and later on Communism, did not ratify the idea of providing property-like protection to products of the individual intellect.<sup>24</sup> This explains why

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white/intellectual/index.htm [hereinafter “Office of the State Council”].

15. Shi & Weatherley, *supra* note 3, at 440.

16. Wall, *supra* note 4, at 354.

17. Hu, *supra* note 5, at 82.

18. USTR, *supra* note 4, 20.

19. Shi & Weatherley, *supra* note 3, at 443.

20. See TERENCE P. STEWART, THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY 2249 (1986-1994) (introducing TRIPs as the cornerstone of the global IPR regime).

21. USTR, *supra* note 4, at 2.

22. Shi & Weatherley, *supra* note 3, at 443.

23. Dexin Tian, *The Chinese Cultural Perceptions of Innovation, Fair Use, and the Public Domain: A Grass-Roots Approach to Studying the U.S.-China Copyright Disputes* (2008), available at <http://etd.ohiolink.edu/send-pdf.cgi/Tian%20Dexin.pdf?bgsu1224963994>.

24. John R. Allison & Lianlian Lin, *The Evolution of Chinese Attitudes Towards Property Rights in Invention and Discovery*, 20 U. PA. J. INT’L ECON. L. 735, 786-87 (1999).

protection of trademarks in China depends not only on the study of existing laws but on an understanding of China's history and culture. As China is gradually changing its economic system into a market-based model,<sup>25</sup> new concepts of private property and individual rights have emerged. China has realized that the recognition of private rights has become a requisite to attract and protect foreign investments.

However, China's problems in enforcing the rights of trademark owners will not be remedied by the recourse to coercion that the United States exercises against it. Instead, coercion will merely exacerbate China's reluctance to respond to the United States' pressure. Thus, it is imperative for the United States to understand China's cultural and socio-economic powers. Such understanding will help the United States comprehend the problems China faces in enforcing trademarks within its borders. Well aware that it was in its best interest to pursue the "understanding" approach rather than the "coercive" approach, the European Union ("EU") has managed to establish a relationship with China that is mainly based on trust and harmony. Thus, while the United States has yet to learn the lesson that coercion will not resolve issues of trademark enforcement in China, it should exercise the "understanding" approach by adopting the EU-China model, which rests upon harmony, understanding, and cooperation.

The purpose of this article is to explore the different factors that have impeded effective trademark protection throughout Chinese history. In particular, this article analyzes the cultural barriers between the United States and China, and in doing so, helps one understand the climate of hostility between the two nations when it comes to trademark enforcement. This article further analyzes the constant pressure exercised by the United States against China that has led to the adoption of trademark laws by the Chinese government but has proven to be ineffective on the short-run.

Part I of this article addresses the development of intellectual property in China and the implementation of trademark laws, as well as China's accession to various international treaties and convention in response to the overwhelming pressure from the United States.

Part II of this article provides an overview of Chinese history and culture to establish the foundation upon which the present trademark legal system was built, and to explain how these cultural mores are inconsistent with intellectual property rights as perceived by Western

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25. Naigen Zhang, *Intellectual Property Law in China: Basic Policy and New Developments*, 4 ANN. SURV. INT'L & COMP. L. 1, 5-6 (1997).

culture.

Finally, Part III of this article explores an alternative to the coercive approach adopted by the United States to protect trademark owners in China. It is based upon the EU-China model that promotes leniency, understanding, and cooperation in the long-run.

#### I. CHINA RESPONDS TO FOREIGN PRESSURE AND OVERHAULS ITS NATIONAL LEGAL SYSTEM TO PROTECT TRADEMARK RIGHTS

Despite its worldwide reputation for trademark infringement, China has made considerable strides in entering and gaining acceptance from the international intellectual property community.<sup>26</sup> Now that China is gradually changing its economic system into a competitive market-based model, it has come to realize that it is crucial to protect the exclusive rights of domestic and foreign trademark owners.<sup>27</sup>

The 1982 Constitution of the People's Republic of China<sup>28</sup> does not specifically provide protection for trademarks.<sup>29</sup> The Chinese government implemented the Trademark Law in 1982.<sup>30</sup> Current laws within the People's Republic of China have been promulgated to protect intellectual property rights.<sup>31</sup> In addition, bilateral treaties and international trade agreements currently afford trademark protection.<sup>32</sup> Together, they form the legal foundation upon which trademark owners may be protected in China.<sup>33</sup>

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26. McKenzie, *supra* note 2, at 552.

27. Zhang, *supra* note 25, at 5-6.

28. Chinese Constitution, adopted on December 4, 1982, available at [http://english.gov.cn/2005-08/05/content\\_20813.htm](http://english.gov.cn/2005-08/05/content_20813.htm). The 1983 Constitution is currently valid even though it was amended in 1988 and 1993.

29. *See id.*

30. Trademark Law of the People's Republic of China, State Intellectual Property Office of P.R.C. Oct. 27, 2001, available at <http://www.chinaiprlaw.com/english/laws/laws11.htm> [hereinafter "Trademark Law"]. The 1982 Trademark Law was adopted before the 1982 Constitution was ratified by the National People's Congress. Adopted at the 24th Session of the Standing Committee of the Fifth National People's Congress on 23 August 1982, revised for the first time according to the Decision of the Amendment of the Trademark Law of the People's Republic of China adopted at the 30th Session of the Standing Committee of the Seventh National People's Congress on 22 February 1993, and revised for the second time according to the Decision on the Amendment of the Trademark Law of the People's Republic of China adopted at the 24th Session of the Standing Committee of the Ninth National People's Congress on 27 October 2001.

31. *Id.*

32. *Id.*

33. *Id.*

*A. Trademark Rights Protection in China: Awareness of the Risk*

Several attempts to promulgate regulations governing trademark rights were made in the 1950s and 1960s.<sup>34</sup> However, the old trademark system played a very limited role in the protection of trademark holders' rights.<sup>35</sup> Indeed, there was virtually no incentive to infringe trademarks in the centralized planning economy because Chinese producers were not concerned as to whether their products could be sold; their only concern was to follow government planning.<sup>36</sup>

China has been experiencing an unprecedented transformation of its trademark and legal systems to protect trademarks.<sup>37</sup> To respond to a rapid economic development that started to attract foreign businesses, and partly because of pressure exercised by the U.S., China has taken major steps to provide trademark protection. First, China realized that its economy had to modernize by embracing market-based principles already in place in the West.<sup>38</sup> Otherwise, China knew it would face the risk of an economic "dysfunction" of disastrous magnitude.<sup>39</sup> Second, the Chinese government implemented a body of law for the creation of a market economy, both as an end in itself and as an attraction for additional foreign investments.<sup>40</sup> Third and lastly, China began major initiatives to improve its overall system of higher education, with greater emphasis on education in science, technology, and law.<sup>41</sup> As a result, in 1977 China launched an economic reform that mainly overhauled its national legal system, including intellectual property law.<sup>42</sup> This marked the point at which China openly acknowledged the need to protect the rights of trademark owners as a means to attract foreign investments.<sup>43</sup>

Trademark protection in China is currently afforded, under the Trademark Law of the People's Republic of China,<sup>44</sup> upon issuance of a Certificate of Registration.<sup>45</sup> It is worth noting that trademark owners who have not registered their trademark may still seek protection under certain provisions of the Contract Law of the People's Republic of

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34. Hu, *supra* note 5, at 73.

35. Zhang, *supra* note 25, at 5.

36. *Id.*

37. Hu, *supra* note 5, at 71.

38. Allison & Lin, *supra* note 24, at 786-87.

39. *Id.*

40. *Id.*

41. *Id.* at 787.

42. McKenzie, *supra* note 2, at 553.

43. *Id.* at 552.

44. See Trademark Law, *supra* note 30.

45. See *id.*

China<sup>46</sup> or the Criminal Law of the People's Republic of China (Provision of Intellectual Property Crime).<sup>47</sup> Another type of trademark protection that is afforded under Chinese law is the Law Against Unfair Competition of the People's Republic of China.<sup>48</sup> Unfair competition is defined as activities that might damage the legal rights and interests of others and "disturb the order of [the] social economy."<sup>49</sup> The Law Against Unfair Competition prohibits the misappropriation of trade secrets and provides holders of well-known marks anti-dilution protection—like protection for loss of good will.<sup>50</sup>

However, trademark owners should not underestimate the benefits of the registration process in China. Indeed, as opposed to the *first-to-use* principle that is applied in the United States for registration of a mark, Chinese trademark law follows the *first-to-file* principle. This fundamental difference has caught many foreign trademark owners by surprise.<sup>51</sup> U.S. trademark owners are familiar with the U.S. principle where trademark rights extend back to the date of first *use*, or to the date of filing the registration subject to later use of the mark. Thus, in the U.S., an unregistered trademark user may still establish protected trademark ownership rights under common law if it can prove prior use relative to a junior user. Conversely, in China, the exclusive right to use a registered trademark in commerce extends to the owner of record according to the earliest date of filing, or other priority filing recognized

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46. Contract Law of the People's Republic of China, State Intellectual Property Office of P.R.C., *available at* <http://www.chinaiprlaw.com/english/laws/laws10.htm> (last visited March 5, 2011). Adopted at the Second Session of the Ninth National People's Congress on March 15, 1999.

47. Criminal Law of the People's Republic of China (Provisions of Intellectual Property Crime), *available at* <http://english.customs.gov.cn/Default.aspx?TabID=4712&InfoID=7897&ctl=InfoDetail&mid=12908&ContainerType=G&default&ContainerSrc=notitle.ascx> (last visited March 5, 2011) [hereinafter "Criminal Law"]. Adopted by the Second Session of the Fifth National People's Congress on July 1, 1979, and amended by the Fifth Session of the Eighth National People's Congress on March 4, 1997.

48. Law Against Unfair Competition of the People's Republic of China, State Intellectual Property Office of P.R.C., *available at* [http://www.sipo.gov.cn/sipo\\_English/laws/](http://www.sipo.gov.cn/sipo_English/laws/) (last visited February 23, 2010). Adopted at the Third Session of the Standing Committee of the Eighth National People's Congress on September 2, 1993. Promulgated by Order No. 10 of the President of the People's Republic of China on September 2, 1993 and Effective of December 1, 1993.

49. Jeffrey F. Levine, *Meeting the Challenges of International Brand Expansion in Professional Sports: Intellectual Property Right Enforcement in China through Treaties, Chinese Law and Cultural Mechanisms*, 9 TEX. REV. ENT. & SPORTS L. 203, 222 (2007).

50. *Id.*

51. Wall, *supra* note 4, at 372.

elsewhere.<sup>52</sup> Thus, unlike in the U.S., trademark owners need not submit evidence of use of the mark at either the application or registration stage.<sup>53</sup> To their own detriment, many U.S. trademark owners have already entered Chinese commerce without prior registration of their trademarks with the Trademark Office when they soon discovered that their trademark has been infringed.

Authors have disagreed as to the benefits and burdens of the *first-to-file* principle currently in place in China. Because U.S. trademark owners can register their marks in China before actually using them, they can benefit from the protection of their marks before they incur substantial capital expenses of actually selling and distributing trademarked goods, or providing services associated with those marks, in China.<sup>54</sup> However, it is not unlikely that the U.S. trademark is already registered in China by a third party, possibly a competitor.<sup>55</sup> Thus, trademark owners should be cautioned to register their trademark in China before considering doing business there.

Moving on to the registration process, as previously stated, the first step to the protection and enforcement of trademarks in China requires that trademarks be registered in China. In China, the term “trademark” is defined as “any visual sign capable of distinguishing the goods or services of one natural person, legal entity or any other organization from that of others, including any word, design, letters of an alphabet, numerals, three-dimensional symbol, combinations of colours, and their combination[s].”<sup>56</sup> Moreover, trademarks, service marks, collective marks, and certification marks are recognized under Chinese law.<sup>57</sup>

Application for registration of trademarks, service marks, and trade dress are handled through the Trademark Office under the State Administration of Industry and Commerce (“SAIC”).<sup>58</sup> Under the State Council, the Trademark Office of the SAIC oversees registration and

52. *Id.*

53. Frank X. Curci, *Symposium: Transnational Business in the Twenty-First Century: Protecting Your Intellectual Property Rights Overseas*, 15 TRANSNAT'L LAW 15, 16 (2002).

54. *Id.* at 17.

55. *Id.*

56. See Trademark Law, *supra* note 30, at art. 8; see Protect Your Intellectual Property Rights in China, Ministry of Commerce of the P.R.C., May 23, 2006, available at <http://www.mac.doc.gov/china/docs/businessguides/intellectualpropertyrights.htm>.

57. Trademark Law, *supra* note 30, at art. 3.

58. See U.S. Dept. of Commerce, International Trade, *Protecting Your Intellectual Property Rights (IPR) in China: A Practical Guide for U.S. Companies*, available at <http://www.mac.doc.gov/china/IPRNEW.htm> (last visited March 1, 2010) [hereinafter “IPR Toolkit”].

administration of trademarks throughout the country.<sup>59</sup> The SAIC has three responsibilities: (1) processing trademark registration applications and deciding on approvals in accordance with the law; (2) supervising the use of trademark and deciding on the revocation of registered trademarks; and (3) recording licensing contracts for the use of registered trademarks.<sup>60</sup>

The Trademark Office accepts applications directly from individuals and legal entities through state-designated agents and also through procedures established under international treaties or agreements such as the Madrid Protocol.<sup>61</sup> If the applicant is a foreign entity without a direct presence in China, the applicant must use a certified state-designated agent to apply for the registration.<sup>62</sup> Once the application is received with payment of the fees, it must pass the preliminary approval examination. Once it passes such examination, the application is published for opposition. The time allocated to oppose the application is three months from the day of publication. The applicant may apply before the Trademark Review and Adjudication Board (TRAB) for review of the opposition.<sup>63</sup> If there is no opposition, the mark will proceed to registration and a certificate of trademark registration will be issued. A mark may be refused for registration on several grounds, including whether the mark is (1) generic, (2) descriptive, (3) geographically descriptive, (4) in conflict with an existing registration, (5) confusedly similar to the flags, emblems or name of China, foreign countries, or international governmental organizations, (6) harmful to socialist morals and customs, or (7) otherwise considered obnoxious. In the case of a rejection, the applicant has fifteen days to appeal to the Trademark Review and Adjudication Board.<sup>64</sup>

Once the trademark registration process has been completed and a Certificate of Registration issued, the registration must be recorded with the General Administration of Customs (“GAC”).<sup>65</sup> Recordation enables the GAC to ban counterfeit goods at the border.<sup>66</sup> Thus, without it, the GAC has no authority to stop infringing goods at the

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59. Trademark Law, *supra* note 30, at art. 2.

60. See IPR Toolkit, *supra* note 58.

61. See *infra* note 77.

62. See IPR Toolkit, *supra* note 58.

63. See Trademark Law, *supra* note 30, at art. 33.

64. *Id.* at art. 32.

65. General Administration of Customs, Customs Recordation and Enforcement procedures, available at <http://english.customs.gov.cn/publish/portal191/> (last visited March 1, 2010).

66. See IPR Toolkit, *supra* note 58.

Chinese border.<sup>67</sup> Once the recordation is granted, it is valid for a term of ten years and renewable thereafter.<sup>68</sup> The registrant can enjoy the exclusive right to use its trademarks, which are now protected under China's laws.<sup>69</sup>

Finally, foreign trademark owners should consider filing separate registrations in all available transliterations and translations of the mark in Chinese characters, letters, and numerals within each class of trade in which the trademark will be used to secure the highest level of protection for their trademarks.<sup>70</sup> Thus, foreign trademark owners should register their trademark in China before doing business there to avoid any undesired and harmful results that can directly affect their entire business.

China's commitment to protect trademarks in China has not been limited to the adoption of domestic laws under domestic registration. Indeed, China has joined in or signed six multilateral conventions, treaties, and agreements.<sup>71</sup> Consequently, trademark owners may obtain an international registration in addition to the Chinese registration. Chinese legal scholars generally concede that treaties and agreements once adopted or acceded by China become sources of China's domestic law and achieve the full force and effect of binding legal rules.<sup>72</sup> This is supported by the General Principles of the Civil Law, which provides that international treaties and agreements supersede domestic law.<sup>73</sup>

In 1985, China became a member of the Paris Convention for the Protection of Intellectual Property ("Paris Convention"),<sup>74</sup> which protects industrial property in the widest sense, including inventions, marks, industrial designs, utility models, trade names, geographical indications, and the repression of unfair completion.<sup>75</sup> To comply with

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67. *Id.*

68. Trademark Law, *supra* note 30, at art. 30.

69. *Id.* at art. 3.

70. Wall, *supra* note 4, at 374.

71. See Office of the State Council, *supra* note 14.

72. See ALBERT HY CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 103 (1992).

73. See General Principles of the Civil Law of the People's Rep. of China, art. 142, available at <http://en.chinacourt.org/public/detail.php?id=2696> (last visited March 1, 2010) [hereinafter "General Principles of Civil Law"].

74. China became a member of the Paris Convention in March 19, 1985. Contracting Parties to the Paris Convention, World Intellectual Property Organization, available at [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=2](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=2) (last visited February 28, 2010).

75. Convention of Paris, signed in Paris on March 20, 1883, 828 U.N.T.S. 305, available at <http://wipo.int/treaties/en/ip/paris/summary-paris.html>.

the Paris Convention's requirements for the registration of "service marks" and the recognition of "well-known marks" in foreign countries,<sup>76</sup> China adopted the 2001 Trademark Law and later passed the Provisions on the Determination and Protection of Well-Known Marks in 2003.<sup>77</sup> Moreover, China became a member of the Convention Establishing the World Intellectual Property Organization ("WIPO")<sup>78</sup> and entered into the Madrid Agreement Concerning the International Registration of Marks.<sup>79</sup> The purpose of the Madrid Agreement is to facilitate the acquisition of protection for marks among member states. Thus, the owner of a trademark that is registered in its country of origin may file for an international registration through the WIPO.<sup>80</sup> Once approved, the mark will be deemed registered and protected in all of the member states' territories. To comply with the Agreement, the State Administration for Industry & Commerce of China issued the Policy for Implementation of International Registration of Marks in June 2003.<sup>81</sup>

On December 1, 1995, China became a state party to the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks ("Madrid Protocol").<sup>82</sup> The Madrid Protocol is an international system for the registration of marks that addresses shortcomings identified within the registration system established under the Madrid Agreement.<sup>83</sup> For instance, an eighteen-month period

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76. Hu, *supra* note 5, at 85.

77. Provisions on the Determination and Protection of Well-Known Marks (issued by the State Admin. for Industry & Commerce on April 17, 2003), *available at* <http://sbj.saic.gov.cn/english/show.asp?id=57&bm=flfg>.

78. China became a contracting party of the WIPO Convention on June 3, 1980. Contracting parties to WIPO Convention, World Intellectual Property Organization, *available at* <http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treatyid=1> (last visited February 28, 2010).

79. China became a contracting party on October 4, 1989. Contracting parties to the Madrid Agreement, World Intellectual Property Organization, *available at* [http://www.wipo.int/treaties/en/showresults.jsp?lang=en&treaty\\_id=21](http://www.wipo.int/treaties/en/showresults.jsp?lang=en&treaty_id=21) (last visited February 28, 2010).

80. Madrid Agreement, arts. 3, 7, 8; *see* World Intellectual Property Org., Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, June 27, 1989, S. Treaty Doc. No. 106-41, *available at* [http://www.wipo.int/treaties/en/ip/madrid/trtdocs\\_wo032.html](http://www.wipo.int/treaties/en/ip/madrid/trtdocs_wo032.html) [hereinafter "Madrid Protocol"].

81. State Admin. for Indus. & Commerce, Policy for the Implementation of International Registration of Marks under Madrid Agreement (Apr. 17, 2003), *available at* <http://www.mlipa.com/2/fl/14.doc>.

82. Contracting Parties to the Madrid Protocol, *available at* [http://www.wipo.int/treaties/en/showresults.jsp?lang=en&treaty\\_id=8](http://www.wipo.int/treaties/en/showresults.jsp?lang=en&treaty_id=8) (last visited February 28, 2010); *see* Madrid Protocol, *supra* note 80.

83. Edwin E. Wallis III, *The Madrid Protocol: Will This International System Succeed*

instead of twelve months is allowed for state refusal to registration and a longer period for opposition by a third party.<sup>84</sup> Also, a failed international registration can be transformed into a national application in each designated country, with the filing date and priority date of the respective international registration.<sup>85</sup>

Finally, China acceded to the World Trade Organization in December 2001 and signed the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement.<sup>86</sup> Once again, China amended its then-existing trademark law and regulations under Article 13 of the 2001 Trademark Law concerning recognition and protection of well-known marks to comply with Article 16 of the TRIPS Agreement.

By making consistent efforts to follow through on its bilateral treaty obligations and domestic laws, the Chinese government has undoubtedly shown that it is committed to protecting foreign trademarks and IPR in general. China has shown that, within a short period of time, it has established an impressive system to address trademark protection. “As [many] Chinese legal scholars have correctly observed, ‘In the process of implementing international treaties, China has demonstrated the credibility of a responsible super nation.’”<sup>87</sup> First, China replaced its laws to respond to its rapid economic growth while addressing the major concerns expressed by the West, especially the United States.<sup>88</sup> Indeed, China has passed new laws, re-promulgated Trademark Law to now include trademark service protection, and kept amending them to provide a new force.<sup>89</sup> Second, China has adopted all major international treaties and agreements concerning trademarks that are in existence today. China’s involvement in the international platform is important because under Chinese legal principles, international rules will prevail over domestic laws when there is a conflict between Chinese domestic law and the international norms.<sup>90</sup>

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*in the United States?*, 2004 UCLA J.L. & TECH. 1 (2004).

84. Madrid Protocol, *supra* note 80, at art. 5.

85. *Id.* at art. 9 *quinquies*.

86. World Trade Organization, *available at* [http://www.wto.org/english/thewto\\_e/countries\\_e/china\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/china_e.htm) (last visited March 1, 2010).

87. Hu, *supra* note 5, at 118.

88. Paul B. Birden Jr., *Trademark Protection in China: Trends and Directions*, 18 LOY. L.A. INT’ L & COMP. L. REV. 431, 432 (1996).

89. *Id.*

90. See General Principles of Civil Law, *supra* note 73, at art. 142; Civil Procedure Law, art. 238, *available at* <http://lehmanlaw.com/resource-centre/laws-and-regulations/civil-proceedings/law-of-civil-procedure-of-the-peoples-republic-of-china-1991.htm>; Administrative Procedure Law, art. 72, *available at* <http://en.chinacourt.org/public/detail.php?id=2695> (last visited March 5, 2011).

Third, under the action of the Trademark Office, the Chinese government has set up detailed rules and procedures for handling international trademark applications for registration submitted under the Madrid Union.<sup>91</sup> Fourth, China created the China Intellectual Property Training Center in 1997 to train professionals on intellectual property matters.<sup>92</sup> Even more telling, in 1992, China launched its own internal crackdown on counterfeit goods.<sup>93</sup> Thus, overall, it may be fair to say that China's new trademark laws provide a viable framework for the protection of most trademarks within the PRC.<sup>94</sup>

*B. Trademark Law Enforcement in China: Myth or Reality?*

China's unprecedented transformation of its trademark regime and legal system to protect trademark owners did not stop there. Indeed, China has also changed its judicial system to provide a means of enforcement<sup>95</sup> by engaging its courts actively in enforcing trademark laws and adjudicating trademark and other IPR disputes and infringement cases.<sup>96</sup> Special intellectual property tribunals have been set up within the People's Court to hear intellectual property cases. For instance, in June 1993, China founded the Beijing Intermediate People's Court Intellectual Property Rights Tribunal under the Beijing Intermediate People's Court.<sup>97</sup> Since the creation of these specialized courts, there has been a high increase in the number of intellectual property cases.<sup>98</sup> For instance, from 1998 to 2004, courts throughout the country concluded 38,228 IPR-related civil cases of first instance and 2,057 criminal cases of first instance involving IPR infringement in accordance with Section Seven, Chapter III of the "Specific Provisions" of the "Criminal Law," handing down sentences to 2,375 criminals.<sup>99</sup> In

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91. See Measures for the Implementation of Madrid International Registration of Trademarks (issued by the State Admin. for Indus. & Commerce, Apr. 17, 2003, effective June 1, 2003), available at <http://en.nci.gov.cn/Law/LawDetails.aspx?ID=6759> (last visited March 5, 2011).

92. China Intellectual Property Training Center is the first national training center dedicated to providing education on intellectual property issues and practice. SIPO, Annual Report, Ch. IX, section 2, Training, available at [http://www.sipo.gov.cn/sipo\\_English/laws/annualreports/ndbg2003/200804/t20080416\\_380253.html](http://www.sipo.gov.cn/sipo_English/laws/annualreports/ndbg2003/200804/t20080416_380253.html) (last visited March 5, 2011).

93. Birden, *supra* note 88, at 432; see Millions of Fake Goods Uncovered, Destroyed, China Daily (N. Am. Ed.), Nov. 17, 1992, art. 1.

94. McKenzie, *supra* note 2, at 553.

95. *Id.* at 554.

96. Hu, *supra* note 5, at 72.

97. Birden, *supra* note 88, at 481.

98. McKenzie, *supra* note 2, at 554.

99. See IPR Toolkit, *supra* note 58.

2004 alone, 8,332 civil IPR-related cases of first instance and 385 criminal cases of first instance involving IPR infringement were concluded, and 528 criminals were punished.<sup>100</sup> As more and more Chinese companies and individuals are becoming aware of their trademark rights, they are more willing to go to court to protect them.<sup>101</sup>

To enforce the protection of their exclusive right to use a registered mark in China, foreign and domestic trademark owners have three different channels under the Chinese legal code: (1) administrative enforcement, (2) civil enforcement, and (3) criminal enforcement. Trademark owners generally prefer to opt for a civil proceeding over an administrative action because they can obtain a preliminary injunction from the People's Court before or at the time a suit is filed.<sup>102</sup> Furthermore, civil cases are generally handled within six months from the filing date, with an additional three months for an appeal.<sup>103</sup>

Finally, trademark infringement can also be criminally prosecuted under China's Criminal Code. Because criminal prosecution is viewed as a greater deterrent, many trademark owners have elected it over the administrative and civil actions.<sup>104</sup> Indeed, it is a crime to use another party's registered trademark intentionally, sell merchandise under a fake trademark, and manufacture any representation of a registered mark without authorization from the registered owner.<sup>105</sup> To respond against regionalism and corruption, China has stiffened the penalties for counterfeiting trademarks. For instance, criminal penalties for trademark infringement may result in imprisonment for up to three years, and in cases where the violation was intentional, up to seven years.<sup>106</sup> However, despite the threat of incarceration for trademark infringement, fines cannot exceed twenty-percent of the "illegal business or twice the profit earned by the infringement."<sup>107</sup>

To further demonstrate China's commitment to fight trademark infringement and bring support to trademark owners, the Chinese

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100. *Id.*

101. See Office of the State Council, *supra* note 14.

102. See Trademark Law, *supra* note 30, at art. 57.

103. He Zhonglin, *Enforcement of Intellectual Property Law in Post-WTO China*, BCLA Seminar, July 25, 2002, available at <http://chinaiprlaw.com/english/forum/forum40.htm>.

104. Jessica C. Wong, *The Challenges Multinational Corporations Face in Protecting Their Well-Known Trademarks in China*, 31 BROOK. J. INT' L L. 937, 968 (2006).

105. Criminal Law, *supra* note 47, at arts. 213-15.

106. *Id.*

107. Angela Mia Beam, *Piracy of American Intellectual Property in China*, 4 J. INT' L. L. & PRAC. 335, 347 (1995)(quoting Liwei Wang, *The Chinese Traditions Inimical to the Patent Law*, 14 J. INT' L. L. & BUS. 15, 15 (1993)).

government, through its Supreme People's Court, released the "Interpretation by the [Supreme People's Court] in Handling Criminal Cases of Infringing Intellectual Property" in 2004.<sup>108</sup> Chinese legislators also amended the Criminal Law with Supplementary Provisions Concerning the Punishment of Crimes of Counterfeiting Registered Trademarks, which became effective in 1993. Thus, China has once again proved its willingness and determination to protect trademarks within its borders.

Yet, China remains under scrutiny and criticism for its poor enforcement of trademark laws. Today, the greatest area of concern for the international community is not so much the adoption of new laws and the change of a judicial system for the protection of foreign and domestic trademark owners;<sup>109</sup> instead, it is the actual enforcement of these new laws that raise concern.<sup>110</sup> China continues to face epidemic trademark infringement despite constant international threats.<sup>111</sup> The question remains as to what extent China's trademark laws and IP system in general is effective in protecting foreign trademarks.

Various factors may explain why a high number of trademark infringement cases are never reported to authorities.<sup>112</sup> More often than not, Chinese companies elect to resolve the dispute in a private setting to preserve relationships and save face, following past custom.<sup>113</sup> Furthermore, decentralization has contributed to the erosion of Beijing's control, the growth of regionalism and corruption, and the remarkable rise in power of local officials.<sup>114</sup> "Although Beijing has identified localism as a priority concern, it remains a major obstacle to the enforcement of [trademark] laws in China."<sup>115</sup> Indeed, "the legal fragmentation between the central government and administrative

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108. Interpretation by the Supreme People's Court and the Supreme People's Procuratorate on Several Issues of Concrete Application of Laws in Handling Criminal Cases of Infringing Intellectual Property (Adopted at the 1331st Session of the Judicial Comm. of the Supreme People's Ct., Nov. 2, 2004, and the 28th Session of the Tenth Procuratorial Comm. of the Sup. People's Procuratorate, Nov. 11, 2004, effective Dec. 22, 2004), available at <http://www.colaw.cn/findlaw/ip/infringing.htm> (last visited March 5, 2011).

109. Doris Estelle Long, *Article: The Protection of Information Technology in a Culturally Diverse Marketplace*, 15 J. MARSHALL J. COMPUTER & INFO. L. 129, 158 (1996).

110. *Id.*

111. Shi & Weatherley, *supra* note 3, at 445.

112. Wall, *supra* note 4, at 377-78.

113. *Id.* at 362.

114. See McKenzie, *supra* note 2, at 561.

115. Jeffrey W. Berkman, *Intellectual Property Rights in the P.R.C.: Impediments to Protection and the Need for the Rule of Law*, 15 UCLA PAC. BASIN L.J. 1, 18 (1996).

agencies makes it difficult to discern which authority will handle a particular issue, or how one would have the authority to impose the rule of law at all.”<sup>116</sup> Moreover, as the Chinese governmental structure is dominated by local power, the application of international treaties remains difficult to enforce.<sup>117</sup> “Beijing’s ability to enforce its intellectual property regulations is seriously hampered by local resistance to change, particularly when local authorities sense that such change will take power out of their hands.”<sup>118</sup> Not surprisingly, administrative agencies face powerful local officials, including military officials, who benefit directly from piracy. Despite China’s pressure on local governments to implement and enforce trademark laws, the level of trademark infringement remains high, particularly in smaller towns where factories generate the mass production of counterfeit goods.<sup>119</sup> Thus, because local businesses generate substantial sources of local revenue, officials are unwilling to enforce trademark laws against them. Some scholars have denounced the voluntary “resistance” of local governments in enforcing the laws<sup>120</sup> because they often seek to protect factories engaged in piracy that are beneficial to the area’s economy.<sup>121</sup> Many trademark owners may fear retaliation in the form of potential loss of market share if they file a complaint against a state-owned business as “state-owned enterprises still control the most important resources—especially capital.”<sup>122</sup>

According to the 2008 USTR Special Report (“Special Report”),

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116. Ryan P. Johnson, *Steal this Note: Proactive Intellectual Property Protection in the People’s Republic of China*, 38 CONN. L. REV. 1005, 1025 (2006).

117. PETER K. YU, *Intellectual Property, Economic Development and the China Puzzle* in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS PLUS ERA 153, 174.

118. Aileen M. McGill, “How China Succeeded in Protecting Olympic Trademark and Why This Success May not Generate Immediate Improvements in Intellectual Property Protection in China” LOY. LAW & TECH. ANN. (2010), available at [http://works.bepress.com/aileen\\_mcgill/2/](http://works.bepress.com/aileen_mcgill/2/) (quoting Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in Post-WTO China* in Practising Law Institute, *Intellectual Property Aspects of Doing Business in China: Corporate Law and Practice Course Handbook Series* 111, 118 (Oct. 2007)).

119. *Id.* at 14.

120. See ROBERT KLITGAARD et al., CORRUPTED CITIES: A PRACTICAL GUIDE TO CURE AND PREVENTION, 17-22.

121. Amanda S. Reid, *Case Notes and Comments: Enforcement of Intellectual Property Rights in Developing Countries: China as a Case Study*, 13 DEPAUL-LCA J. ART & ENT. L. & POL’Y 63, 92-93 (2003).

122. Wu Jinglian, *The road ahead for Capitalism in China*, THE MCKINSEY Q. 2006 SPECIAL EDITION: SERVING THE NEW CHINESE CONSUMER (June 2006), at 118, available at [http://www.mckinseyquarterly.com/The\\_road\\_ahead\\_for\\_capitalism\\_in\\_China\\_1782](http://www.mckinseyquarterly.com/The_road_ahead_for_capitalism_in_China_1782).

another major factor that has contributed to China's poor IPR enforcement is China's persistent "underutilization" of criminal deterrents. The Special Report stated that China continues to direct most of its trademark enforcement to administrative authorities.<sup>123</sup> The Report concludes that the "[r]ules designed to promote transfer of cases to criminal authorities . . . have not solved the problem."<sup>124</sup> Moreover, when trademark disputes reach the judicial system, the system fails to provide adequate deterrence because the fines imposed on trademark infringers are too low.<sup>125</sup> Indeed, the amount of the fine for trademark infringement is valued by the price of the infringing products on the counterfeit market instead of the value of the original mark being copied.<sup>126</sup> Consequently, it is not surprising that many infringers perceive administrative seizures and fines as a cost of doing business, making infringement an acceptable loss.<sup>127</sup> Finally, many authors have argued that the Chinese criminal code is considered rather vague because it fails to define what constitutes a counterfeiting crime of a "serious nature."<sup>128</sup> Thus, even if the local authorities apply the laws, they may simply apply more lenient standards because of their statutory ambiguity.

The current trademark protection and enforcement system in place in China has failed to change Chinese behavior patterns that have evolved over centuries. However, it should not be ignored that use of China's judicial system to enforce the protection of trademarks and IPR in general is still evolving and cannot be solved overnight. Regardless of criticism and despite serious flaws that continue to exist concerning trademark enforcement, China's trademark system is reasonably effective. Because China is committed to protecting domestic and foreign trademark owners, enforcement will be further strengthened.

## II. WHEN CHINESE CULTURE IS AN IMPEDIMENT TO TRADEMARK ENFORCEMENT

The ongoing issue of trademark law enforcement in China ought not to be analyzed without addressing China's cultural roots and heritage as

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123. USTR, *supra* note 4 at 21.

124. *Id.*

125. See Jennifer L. Donatuti, *Can China Protect the Olympics or Should the Olympics be Protected from China?*, 15 J. INTELL. PROP. L. 203, 217-18 (2007).

126. *Id.* at 218.

127. USTR, *supra* note 4.

128. Stephanie M. Greene, *Protecting Well-Known Marks in China: Challenges for Foreign Mark Holders*, 45 AM. BUS. L.J. 371, 392 (2008).

the primary ground for China's lack of enforcement.<sup>129</sup> Indeed, cultural factors may explain the poor progress of trademark protection in China despite the implementation of new trademark and intellectual property laws.<sup>130</sup>

The notion of trademark rights, as well as the concept of IPR, is relatively new in China.<sup>131</sup> For thousands of years, IPR have been absent in China's history even though the Chinese have been creative and innovative in many fields.<sup>132</sup> Until recently, the protection of trademarks and intellectual property in China was not a primary concern to the Chinese government.<sup>133</sup> Indeed, the adoption of trademark laws to protect owners did not come in response to the need of the Chinese people to protect their rights.<sup>134</sup> Instead, it was triggered by the constant pressure and frustration from the U.S. on the Chinese government to protect the intellectual property interests of U.S. nationals eager to do business in China. Thus, such concepts remain, to some extent, foreign to the Chinese community in which individual rights and private property have been overpowered by the interests of society.<sup>135</sup>

Chinese imperial rulers used Confucian values to legitimize their governmental regime and their own authority.<sup>136</sup> Regarded by many as an ethical code, Confucianism served as a guide to Chinese peoples' behavior from the sixth century B.C. to the middle of the 20th century.<sup>137</sup> The Confucian ideology, which essentially focused on the transmission or passing down of intellectual property works for others to build on,<sup>138</sup>

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129. See Long, *supra* note 109, at 159.

130. See Thomas Tze-Hun Chou, *Private Copyright Investment in China*, 1 J. SMALL & EMERGING BUS. L. 375, 393 (1997).

131. Hu, *supra* note 5, at 72-73.

132. Tian, *supra* note 23, at 17.

133. Donald P. Harris, *Nineteenth Annual Philip D. Reed Memorial Issue: Article: The Honeymoon is Over: The U.S.-China WTO Intellectual Property Complaint*, 32 FORDHAM INT'L L.J. 96, 103 (2009).

134. See Jennifer A. Crane, *Riding the Tiger: A Comparison of Intellectual Property Rights in the United States and the People's Republic of China*, 7 CHI.-KENT J. INTELL. PROP. 95 (2008).

135. See *id.*

136. Shin-yi Peng, *The WTO Legalistic Approach and East-Asia: From the Legal Culture Perspective*, 1 APLPJ 13, 87 (2000).

137. Deli Yang, *The development of intellectual property in China*, WORLD PATENT INFORMATION VOL. 25: 131, at 134, available at <http://www.sciencedirect.com/science/article/B6V5D-48761R7-1/2/c2ba4aff7e08722ab0ce75499ad69efb> 2003.

138. L. Montgomery & B. Fitzgerald, *Copyright and the creative industries in China* (2006), INT'L J OF CULTURAL STUD. 2006, 9: 407, at 408.

strongly encouraged imitation of teachers as a way of learning, loyalty to masters, and subordination of individual interests to the social good.<sup>139</sup> The state and its people believed in “ren min de li yi gao yu yi qie,” that is, the peoples’ interest is first. The family, not the individual, constituted the unit of the social and political community.<sup>140</sup> Legal obligations were attached to the family relationship.<sup>141</sup> Conversely, Western law regulated private and economic rights and duties of the individual.<sup>142</sup> Not surprisingly, the notion of private ownership was regarded as contrary to socialist community life.<sup>143</sup>

Thus, until recently, the Chinese never viewed IPR violations as the “taking away” of one’s individual rights. Instead, sharing, copying, and infringing were highly valued within China’s tradition and thus, perfectly acceptable. The emergence of the Chinese Communist Party in 1949 furthered such tradition.<sup>144</sup> For instance, work products were collectively owned by the State for the good of society. Thus, the State served the common good for its people.

Moreover, although morality and propriety were important in Confucianism, they were not regulated by external laws.<sup>145</sup> Instead, the use of external laws was a strongly disapproved means of governance.<sup>146</sup> Notwithstanding Confucian ideals, external laws were mostly used where self-regulation failed to provide an adequate remedy. For centuries, Chinese people who respected the rule of man (*ren-zhi*), rather than the rule of law (*fa zhi*), viewed lawsuits as bad luck, even evil. Accordingly Confucius’ Analects:

Lead the people with governmental measures and regulate them by law and punishments, and they will avoid wrong-doing, but will have no sense of honor or shame. Lead them by virtue and regulate them by the rules of propriety and they will have a sense of shame, and moreover, set themselves right.<sup>147</sup>

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139. Tian, *supra* note 23, at 50.

140. Shin-yi Peng, *supra* note 136, at 134.

141. *Id.*

142. *Id.*

143. See, generally, A. M. Bean, *Piracy of American Intellectual Property in China*, J. INT’L L. & PRAC. 339 (1995).

144. Tian, *supra* note 23, at 50-51.

145. Ann Kent, *Waiting for Rights: China’s Human Rights and China’s Constitution, 1949-1989*, HUMAN RIGHTS Q., VOL. 13, NO. 2, May 1991, 170, 174.

146. Tze-Hun Chou, *supra* note 130, at 394.

147. WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE:

Thus, wrongdoing, such as trademark infringement, has not been deterred by the risk of facing prison time or paying fines. Instead, wrongdoing has been deterred by the Chinese's fear of shame and dishonor among society.<sup>148</sup> Even today, it is not uncommon practice to make a public apology as the acceptance of wrongdoing. Indeed, apologies are often ordered by the court in its judgments.<sup>149</sup> They are generally published in newspapers and other media to eliminate the "adverse effect" of the infringement.<sup>150</sup> If an infringer fails to apologize as ordered, the court may draft and publish an apology instead and charge the expense to the wrongdoer.<sup>151</sup> The Chinese believe that such acknowledgment will create such an embarrassment that it will serve as a future deterrent. In other words, an apology is more like a shaming penalty, or the alternative remedy of "eliminating the effects of the [infringing] act," or both.<sup>152</sup> Not surprisingly, courts have been ordering a public apology in many trademark infringement cases.

Despite China's rapid political and economic growth in the recent years, the "cultural mores and the laws that reflect them have consistently retained a Confucian and Marxist basis of subjugation of individual interest to the greater good of society."<sup>153</sup> Consequently, many Chinese people consider state laws as the last recourse.<sup>154</sup> Thus, even today, the Chinese still prefer settling a dispute through an informal process.

### III. ANALYSIS

The United States has constantly put pressure on China to

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INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION 20 (Stanford University Press 1997).

148. Tze-Hun Chou, *supra* note 130, at 394.

149. Peter K. Yu, *A Review of Recent Decisions of the United States Court of Appeals for the Federal Circuit: Article: From Pirates to Partners (Episode II): Protecting Intellectual Property in Post-WTO-China*, 55 AM. U. L. REV. 901, 953 (2006).

150. *Id.*

151. *Id.*

152. *Id.*

153. Aileen M. McGill, "How China Succeeded in Protecting Olympic Trademark and Why This Success May not Generate Immediate Improvements in Intellectual Property Protection in China" LOY. LAW & TECH. ANN. (2010), available at [http://works.bepress.com/aileen\\_mcgill/2/](http://works.bepress.com/aileen_mcgill/2/); see also Tao-Tai Hsia & Kathryn A. Huan, *Laws of the People's Republic of China on Industrial and Intellectual Property*, 5 LAW & POL'Y INT'L BUS. 743, 750 (1973).

154. McGill, *supra* note 116, at 15 (citing TAN LOKE KHOON, *PIRATES IN THE MIDDLE KINGDOM: THE ART OF TRADEMARK WAR* (2004) at 4-5).

implement and enforce new laws to protect trademarks and other type of IPRs. For instance, the United States has been pushing for more criminal enforcement to fight against the proliferation of “safe harbors,” which have spared Chinese trademark infringers from criminal liability.<sup>155</sup> Each time, China has responded favorably by adopting and amending its existing laws to satisfy the U.S.’s expectations to provide tougher protection. Even more telling, China did so in a very short period of time. Yet, China’s efforts have remained unsatisfactory.

*A. From Coercion to Understanding: The United States Should Adopt the China-E.U. Model*

It has become obvious that the United States’ coercive policy towards trademark and IPR protection in general has been miscalculated in obtaining the expected results.<sup>156</sup> Since the late 1980s, the United States pursued a very aggressive foreign intellectual property policy towards China.<sup>157</sup> Indeed, it repeatedly threatened China with economic sanctions, trade wars, non-renewal of most-favored nation status, and opposition to China’s entry into the WTO.<sup>158</sup> A prime example is the frequent use of Section 301 of the Trade Act of 1974 by the United States against China.<sup>159</sup> In another instance, negotiations seeking active intellectual property enforcement and improved market access between the United States and China ended in 1995 when the USTR threatened to impose 100 percent tax on 1.08 billion of Chinese imports into the United States if enforcement issues were not resolved.<sup>160</sup> Finally, the United States filed two trade complaints against China at the WTO for the deficiency in China’s IPR laws and market access barriers to copyright-based industries.<sup>161</sup> As a result, the gap

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155. USTR, *supra* note 4, at 21; *see generally* Matthew W. Cheney, *Trading With the Dragon: A Critique of the Use of Sanctions by the United States Against China*, 6 JOURNAL OF INT’L LAW & PRACTICE 1, 25-26 (1997) (arguing that U.S.’s threats of trade sanctions in some way placed the U.S. in a worse position than before sanctions were taken).

156. *See* Shi & Weatherley, *supra* note 3, at 446.

157. Yu, *supra* note 149, at 934.

158. *Id.* at 999; *see* Wayne M. Morrison, *CRS Issue for Congress, China-U.S. Trade Issues*, available at <http://fpc.state.gov/documents/organization/41125.pdf> (last updated Nov. 3, 2004).

159. USTR, *supra* note 4.

160. *Id.*

161. *See* Press Release, Office of the U.S. Trade Representative, *United States Files WTO Cases Against China Over Deficiencies in China’s Intellectual Property Rights Laws and Market Access Barriers to Copyright-Based Industries* (Apr. 9, 2007), available at <http://www.ustr.gov/about-us/press-office/press-releases/archives/2007/april/united-states-files-wto-cases-against-china>.

between the United States and China has deepened.

At no time has the United States considered China's culture as one of the major impediments to enforcement of trademark laws in China. Thus, despite what the United States may claim, Chinese legislation is not necessarily "the root cause"<sup>162</sup> of all China's problems regarding legal enforcement. Instead, the root cause is China's long-cherished and deep-rooted culture.<sup>163</sup> Failure to understand Chinese culture will inevitably lead to the failure of foreign government attempts, like the U.S. government, to enforce trademark laws in China.<sup>164</sup> As Jeffrey Levine correctly stated:

[E]ffective IPR enforcement lies not exclusively through the use of courts, laws, treaties and international organizations, but also through the development of stakeholders relationships and the incentives they engender, the foundation of most mutually beneficial business ventures. Using an approach that accounts for Chinese cultural norms seems like a more promising approach to IPR enforcement as compared to forcing adoption of Western legal concepts which lack congruency with the Chinese approach to law and culture.<sup>165</sup>

In response to the U.S.'s coercive approach, the Chinese government has become more and more reluctant to take the necessary measures to meet the trademark protection standards. This may be explained by the lack of mutual trust and understanding between the two nations, and the ongoing use of trade threats made by the U.S.. Thus, the increasing demand made by the U.S. resulted in making the Chinese government and its officials more defensive than receptive to strengthening its trademark protection regime.<sup>166</sup>

While the U.S.'s coercive approach may be arguably effective in triggering immediate compliance by the Chinese government, such gains have been temporary as they have not been followed by effective enforcement. Indeed, this coercive approach tends to invite

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162. See Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMP. L. 711, 712 (1994).

163. Allison & Lin, *supra* note 24, at 786.

164. *Id.*

165. Levine, *supra* note 49, at 229.

166. Shi & Weatherley, *supra* note 3, at 447.

retaliation.<sup>167</sup> Specifically, in one instance, in response to Washington's refusal to delay its consideration of sanctions against China regarding the production of pirated video cassettes and compact disks, China sent a deliberate message to Washington, that it had the ability to turn to European partners, when it placed an order with France for an estimated 1.5 billion dollars worth of Airbus planes, instead of Boeing planes as it initially planned.<sup>168</sup> Arguably, this shows a preference in China towards the EU's flexible and cooperative approach. Thus, the use of coercion against China as the U.S. dominant tactics has proven to be unsuccessful in reducing piracy and trademark infringement.<sup>169</sup>

Furthermore, many scholars have denounced the failure of the United States' tactics because of its indifference, whether voluntary or not, to the cultural differences it has with China,<sup>170</sup> where "notions of [IPR] have reflected cultural values, which are inseparable from cultural and traditional values."<sup>171</sup> While Americans today treat trademark infringement as illegal and punishable as a crime, the Chinese tend to treat intellectual sharing as a virtue and normal learning process. This certainly demonstrates that the significance of historical events, social norms, and cultural differences can be the major reason for the widespread resistance among the Chinese against trademark enforcement. As Scholar J. A. Lehman stated, the heart of the U.S.-China IPR dispute "is a basic incompatibility between modern western views of intellectual property and traditional Chinese ethical and social thought."<sup>172</sup>

Thus, by disregarding China's historical and cultural attributes, U.S. policymakers have fundamentally misunderstood the capabilities of the current power structure and enforcement mechanisms. "While concepts

167. See SCOTT FAIRLEY, EXTRATERRITORIAL ASSERTIONS OF INTELLECTUAL PROPERTY RIGHTS IN INTERNATIONAL TRADE, INTERNATIONAL TRADE AND INTELLECTUAL PROPERTY: THE SEARCH FOR A BALANCED SYSTEM 141, 144 (George R. Stewart et al. eds. 1994) ("unilateralism begets unilateralism").

168. See Craig R. Whitney, *China Awards Huge Jet Order to Europeans*, N.Y. TIMES, Apr. 11, 1996, at A1, available at <http://www.nytimes.com/1996/04/11/world/china-awards-huge-jet-order-to-europeans.html?pagewanted=1>.

169. See Robert C. Bird, *Defending Intellectual Property Rights in the BRIC Economies*, 43 AM. BUS. L.J. 317, 334-35 (2006).

170. Alford, *supra* note 147, at 19-22.

171. Seung-Hwan Mun, *A New Approach to U.S. Copyright Policy against Piracy in China*, at 3, available at [http://www.allacademic.com/meta/p\\_mla\\_apa\\_research\\_citation/1/1/1/8/5/pages111851/p111851-2.php](http://www.allacademic.com/meta/p_mla_apa_research_citation/1/1/1/8/5/pages111851/p111851-2.php) (last visited March 5, 2011).

172. John Allen Lehman, *Intellectual Property Rights and Chinese Tradition Section: Philosophical Foundation*, J. BUS. ETHICS 1 (2006).

of intellectual property law might be fully understandable to westerners, many Chinese people view and understand them differently.”<sup>173</sup> Meanwhile, China’s efforts to improve and enforce its intellectual property regime, while trying simultaneously to stem trademark infringement and other counterfeiting activities, must not be overlooked.<sup>174</sup> Thus, U.S. businesses that have the desire to expand their operations in China, while in need to protect their trademarks, will first be required to appreciate the Chinese culture.

Furthermore, the United States, which has valued the rights of intellectual property owners and their individual freedom for more than two-hundred years, should acknowledge two things: first, China only recognized IPR during the last twenty-years; second, China passed its intellectual property laws before it developed a sense of intellectual property rights among its nationals.

Finally, because U.S. policymakers have incorrectly assumed that Western concepts of property rights have been universally accepted,<sup>175</sup> they wrongly believed that the mere exercise of external pressure would improve trademark protection in China. Not surprisingly, the Chinese government proved them wrong. The United States’ tactics did not yield substantial improvement in trademark protection and enforcement in China.<sup>176</sup> Instead, it yielded hostility and discontentment.

The United States should recognize that the Chinese government has made a concerted effort to raise public awareness among its nationals of the importance of protecting both domestic and foreign trademark by addressing China’s cultural perceptions.<sup>177</sup> A prime example of Chinese national achievement is the 2008 Olympics Games, which have strengthened the Chinese’s public awareness for the societal benefits of stronger trademark protection. Indeed, China used the Olympics to educate the public about trademark rights. Through the 2008 Olympics Games, China has proven that it can bridge the cultural disconnect and demonstrated to its domestic business community that global economic success is tied to effective trademark enforcement.<sup>178</sup> With the opening of the 2010 World Exposition in Shanghai on April 30,

173. Birden, *supra* note 88, at 494.

174. *Id.*

175. William P. Alford, *How Theory Does—And Does Not—Matter: American Approaches to Intellectual Property Law in East Asia*, 13 UCLA PAC. BASIN. L.J. 8, 17 (1994).

176. *Id.*

177. Tian, *supra* note 23.

178. See Levine, *supra* note 49.

2010, China will continue to educate its nationals with respect to trademarks and prove to the outside world that it has the ability to protect trademarks within its borders. In addition, China has started to construct better infra-structures, institutions, and capacities.<sup>179</sup> Foreign educated Chinese are returning home, bringing with them western business knowledge, technical know-how, cultural experience, and personal contacts.<sup>180</sup> Furthermore, educating the public about intellectual property and providing adequate training to lawyers and judges on the principles of law governing the protection of trademarks will take some time. China is gradually making changes to shift the Party's ideology to value trademark and IPR in general while responding to international pressure from the United States. China can certainly implement harsher penalties and establish effective relations between the administrative and judicial bodies that are currently in place to apply and enforce trademark laws on both the national and local levels. Again, China's current progress should not be overlooked. China's achievements over two decades in protecting trademark and IPR in general have taken hundreds of years in some other nations.<sup>181</sup> "Educating people takes time and patience, especially a people as diverse and well-entrenched in their beliefs as the Chinese."<sup>182</sup>

Thus, in order to protect a trademark owner's trademark rights in China, U.S. officials should remember these cultural differences<sup>183</sup> and account for Confucian ideology and Chinese societal norms when negotiating with Chinese officials with respect to trademark enforcement. To promote "real" progress in trademark protection, the U.S. will have to change an entire nation's societal and cultural behaviors towards intellectual property. Thus, instead of exercising further pressure on China, U.S. officials should engage in a "deeper dialogue" with China and try understanding China's traditional culture and history.

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179. Hu, *supra* note 5, at 119-20.

180. See ODED SHENKAR, *THE CHINESE CENTURY- THE RISING CHINESE ECONOMY AND ITS IMPACT ON THE GLOBAL ECONOMY, THE BALANCE OF POWER AND YOUR JOB* 575 (Wharton School Publishing 2005). An estimated 160,000 Chinese students went abroad in 2002. The "turtles as they are called in China to denote the tendency of the species to return to its birthplace could play a key role in China's technological transformation.

181. Kristie M. Kachuriak, *Chinese Copyright Piracy: Analysis of the Problems and Suggestions for Protection of U.S. Copyrights*, 13 DICK. J. INT'L. L. 599, 605 (1995).

182. Birden, *supra* note 88, at 494.

183. Richard J. Ansson Jr., *International Intellectual Property Rights, the United States, and the People's Republic of China*, 13 TEMP. INT'L & COMP. L. J. 1, 24 (1999).

*B. China- EU Relationship: A Model Approach*

The United States' tactics to provide trademark protection to its nationals in China provides a good illustration of "what has been tried and failed."<sup>184</sup>

Conversely, China and the European Union have maintained a harmonious relationship and thus should serve as a model in strengthening the relationship between China and the U.S. European companies have not been immune from infringement due to the lack of proper trademark protection in China. As a fact, many of these companies lobbied European institutions to initiate trade sanctions against China.<sup>185</sup> However, unlike the China-U.S. relationship, China and the European Union have maintained a more friendly relationship on both political and economic levels.<sup>186</sup> The dominant trend has been to favor and strengthen bilateral cooperation with respect to IPR protection.<sup>187</sup>

Over the past years, the EU and China have built a remarkable collaboration to protect IPR in China<sup>188</sup> by engaging in a series of negotiations to promote the development and enforcement of trademark laws in China and intellectual property in general. For instance, both nations held their first EU-China Annual Summit ("Annual Summit") in London in 1998.<sup>189</sup> The purpose of the Annual Summit has been to maintain current progress made by both nations regarding IPR protection.<sup>190</sup> Specifically, in the course of the Eighth Annual Summit in Beijing, in September 2005,<sup>191</sup> Chinese and European leaders emphasized the need to implement and enforce intellectual

184. Shi & Weatherley, *supra* note 3, at 447.

185. *Id.* at 448.

186. *Id.* at 452.

187. The EU Ambassador to China, Mr. Serge Abou, commented on March 7, 2007 in a press conference held in Shanghai, "the trade conflict between the EU and China is inappreciable, as a small tree in a dense forest, and a strengthened cooperation is the mainstream."

188. WEI SHI, INTELLECTUAL PROPERTY IN THE GLOBAL TRADING SYSTEM: EU-CHINA PERSPECTIVE 235 (2008).

189. *Id.*

190. *Id.* at 235-36.

191. Joint Statement of the 8th EU-China Summit, at art 4 (Sept. 5, 2005), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/1091&format=HTML&aged=0&language=EN&guiLanguage=en>; see The Commission of the European Communities, *Communication from the Commission to the Council and the European Parliament of 24 October 2006, EU-China: closer partners, growing responsibilities*, available at [http://europa.eu/legislation\\_summaries/external\\_relations/relations\\_with\\_third\\_countries/asia/r14208\\_en.htm](http://europa.eu/legislation_summaries/external_relations/relations_with_third_countries/asia/r14208_en.htm).

property laws while protecting the interests of consumers and creating a positive business environment for continued growth and protection. Most recently, at the Twelfth Annual Summit in Nanjing, in November 2009, leaders of both sides applauded the achievements in the development of bilateral relations and agreed that a political mutual trust is enhancing their continued support for each other's peaceful and sustainable development.<sup>192</sup> Both sides further agreed to stay committed to the strategic nature of the EU-China relationship and pledged to seek greater development based on mutual respect, equality, mutual benefit, openness, and win-win cooperation.<sup>193</sup> Additionally, the EU and China launched the EU-China Intellectual Property Rights Cooperation Programme ("the EU-China Programme") in 1998.<sup>194</sup> The main goal of the EU-China Programme was to promote bilateral trade by fostering China's commitment to develop an effective system for the protection of trademarks and intellectual property in general.<sup>195</sup> The EU-China Programme, which was managed by the European Patent Office, included the training judges and attorneys of administrative enforcement, public awareness, border enforcement, as well as conducting seminars and workshops in Beijing and in the provinces.<sup>196</sup> Another mechanism in place to ensure IPR protection and enforcement in China is the EU-China Intellectual Property Dialogue ("IDP"). The IDP, launched in 2003, provides a structured annual dialogue between the European Commission and China. During the 2007 IDP, the EU and China discussed the issue of "cleaning out retail and wholesale markets" that sell counterfeits and pirated goods, and China expressed "satisfaction."<sup>197</sup>

One of the factors that helps understand the relationship between the European Union and China is the ongoing support, rather than constant criticism, that the EU has expressed toward the Chinese government. For instance, Chinese cultural features have been accepted and understood by the EU for more than two thousand

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192. Joint Statement of the 12th EU-China Summit (Nov. 30, 2009), *available at* [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/en/er/111567.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/er/111567.pdf)

193. *Id.*

194. Shi, *supra* note 189, at 237.

195. See EU-China Project on the Protection of Intellectual Property Rights in China (IPR2), <http://www.epo.org/about-us/office/international-relations/project/eu-china.html> (last visited March 24, 2011).

196. *Id.*

197. See Outcome of the Third Meeting of the EU-China IP Dialogue, Brussels 15-16 March 2007, *available at* [http://trade.ec.europa.eu/doclib/docs/2007/may/tradoc\\_134658.pdf](http://trade.ec.europa.eu/doclib/docs/2007/may/tradoc_134658.pdf) p 2 (2007).

years.<sup>198</sup> Thus, China and Europe have been able to develop and maintain a close rapport despite their different values. Both nations have strived to understand each other by privileging communication and collaboration. Even more telling, the EU has been willing to adopt a long-term tactical approach regarding trademark protection in China because it has accepted that counterfeiting and piracy are common problems in developing countries such as China. By doing so, the EU has acknowledged China's culture, which in turn has resulted in a better understanding between China and Europe. According to Peter Mandelson, the EU Trade Commissioner, the EU "has accepted that IPR is a complex issue and that China's commercial culture and legal system need time to absorb change."<sup>199</sup> Moreover, although substantial work is still required, the EU and China have made several encouraging institutional arrangements, including the establishment of the EU-Intellectual Property Dialogue. In contrast, the United States has been using Section 301 constantly in fighting counterfeiting and piracy, without giving much credit to China's economic adaptation and cultural tradition. Furthermore, many of the U.S.-China bilateral agreements pertaining to trademark and IPR protections in general were the result of a coercive U.S. policy that aimed at imposing trade sanctions upon China.

Moreover, while the United States overtly expressed its opposition to China's fast entry into the WTO, the EU has been most supportive of China's WTO membership. Indeed, despite the so-called "China threat," the EU has viewed China's rapid economic growth as a unique opportunity.<sup>200</sup> Some authors argue that the EU's position may be partly understood because the absence of China's growth would be considered a greater threat to global affairs.<sup>201</sup> While this may be true, the EU's relationship with China is based on greater tolerance, which has proven to be a better approach to address trademark enforcement in China than the U.S.-China model.

The U.S.'s external pressure upon China definitely led to the implementation of new trademark laws; however, it is the understanding of China's culture that will help influence Chinese attitudes towards IPR in general. Thus, the U.S. should learn from the EU and adopt a more

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198. Shi & Weatherley, *supra* note 3, at 448.

199. Peter Mandelson, Protecting IPR in China, *Speech at Trade Fairs Seminar-Beijing* (Nov. 26, 2007), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/751&type=HTML>.

200. Shi & Weatherley, *supra* note 3, at 450.

201. *See id.*

lenient approach so that it can cultivate and maintain a long-term relationship based on the understanding of China's unique culture.

With regard to international IPR, the U.S. policy seems to have somewhat influenced political considerations. For instance, the recent WTO complaints against China under the Bush administration may be a response to reduce the trade deficit with China, which amounts to 268 billion dollars.<sup>202</sup> Because of such deficit, the White House appealed vigorously to intensifying anti-China "sentiments" in Congress<sup>203</sup> with respect to bilateral trade deficits with China by lobbying several economic sanctions. In comparison, although the EU suffered a trade deficit with China, the Europeans, unlike the Americans, blamed the deficit to the obstacle in market access in China and believe that such deficit would be reduced if China were to further open its markets.<sup>204</sup>

The cultivation of valuable business relationships with the Chinese is often a long-term process that requires a great deal of patience.<sup>205</sup> Despite the current threat of trademark infringement in China, this is the approach that the European Union has decided to adopt. This is also the approach the United States should adopt to promote trademark protection in China. The EU has correctly acknowledged that an understanding of Chinese culture facilitates relationship-building and can help trademark protection in China. Thus, the United States should adopt the China-EU model in its fight against trademark violations in China.

#### CONCLUSION

This article offers no easy answer to trademark enforcement in China. However, it points out the need to address trademark protection in China within the Chinese cultural and socio-economic setting. In the past several years, China's ability to protect trademark and IPR in general has dramatically risen under the pressure of the United States. China is taking intellectual property concerns very seriously and is aware that more needs to be achieved. As the United States has learned, attempts to make rapid and fundamental changes, such as those aimed at enforcing trademark laws in China, are destined to fail. Thus,

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202. See US-China Business Council, *US-China Trade Facts*, available at <http://www.ustr.gov/countries-regions/china> (last visited March 10, 2010).

203. Jonathan Weisman, *China's Demands Anger Congress, May Hurt Bid*, WASH. POST, July 6, 2005, at D01, available at <http://www.highbeam.com/doc/1P2-58566.html> (last visited April 19, 2010).

204. Shi & Weatherley, *supra* note 3, at 452.

205. See Tze-Hun Chou, *supra* note 130, at 396.

emphasis should be made on long-term goals.

To solve the trademark and IPR enforcement issues in the long run, China will continue to educate its people and help them adjust views and attitudes towards IPR. As of today, the change in Chinese culture is at a slow pace.<sup>206</sup> It is only when Chinese people understand the impact and need of IPR protection and become stakeholders of IPR that they will be willing to change their attitudes and support IPR protection. Meanwhile, the United States should be more sensitive to Chinese cultural and social conventions and seek creative solutions to enforce trademark in China, rather than forcing solutions on the Chinese that do not fit China's cultural context.<sup>207</sup> While China will undoubtedly encounter problems along the way, as it already has, its efforts to combat trademark violations should be credited. Because China will continue to attract foreign business, it can be expected that China will live up to the terms of its commitment and will do whatever it can to enforce its existing trademark laws.

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206. Allison & Lin, *supra* note 24, at 790.

207. *Id.*