Intellectual Property Protection in China: Enforcing Trademark Rights

Anne M. Wall

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INTELLECTUAL PROPERTY PROTECTION IN CHINA: ENFORCING TRADEMARK RIGHTS

ANNE M. WALL

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APPENDIX

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** The author, Anne Wall, is an expert in brand protection. Wall was responsible for brand protection at the 2002 Olympic and Paralympic Winter Games in Salt Lake City.

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I. INTRODUCTION

Protecting valuable intellectual property rights, in particular, sports properties such as sporting events and, sports-related products and services, is difficult in the People's Republic of China. China is possibly the fastest-growing market for sports properties in the world and sports marketers cannot afford to ignore it. This article will help sports properties, their legal counsel and business advisors navigate through the complex Chinese intellectual property rights (IPR) bureaucracy, understand the changes that led to China’s recent overhauling of IPR law and identify brand protection measures designed to increase protection of sports-related trademarks and other types of intellectual property.

An overview of Chinese history and culture are offered in Parts II and III to establish the foundation upon which the present IPR system was built and to explain how the People’s Republic of China evolved into both a global trading partner and a leading supplier of counterfeit and pirated goods. Parts IV, V and VI provide an overview of the Chinese legal system since its reform gave rise to the current intellectual property laws, registration system and enforcement mechanisms. Part VII discusses the challenges associated with criminal counterfeiting and piracy. Part VIII offers intellectual property rights owners suggestions for internally generated brand protection methods. Part IX summarizes the protection of intellectual property rights in China. Part X concludes with information from Deputy Director of Marketing for the Beijing Organizing Committee on the brand protection plan for the 2008 Olympic and Paralympic Games.

China is considered by many to be the single largest producer of pirated and counterfeit goods in the world.1 An estimated ten to thirty percent of China’s gross domestic product (GDP) comes from piracy and counterfeiting,2 but this estimate may be low. Nearly ten percent of the workforce in China derives a portion of their income from unauthorized and illegal use of

1. Conversations with U.S. law enforcement and other government officials.
2. "In a speech to the National Association of Manufacturers, Thomas Boam, the minister counselor, estimated that between 10 and 30 percent of China’s GDP comes from piracy and counterfeiting." ODED SHENKAR, THE CHINESE CENTURY – THE RISING CHINESE ECONOMY AND ITS IMPACT ON THE GLOBAL ECONOMY, THE BALANCE OF POWER AND YOUR JOB 86 (2006).
trademarks and copyrights.\(^3\) Andrew Mertha, author of *The Politics of Piracy*, states that, "China has acquired an international reputation as a global manufacturing base and clearinghouse for counterfeit products."\(^4\) In certain retail markets, nearly ninety percent of standard household products are counterfeit, while the Chinese government has gone on record admitting that an aggregate ratio of counterfeit goods to legitimate products is two to one.\(^5\)

Yet as quickly as the production of pirated and counterfeit goods grows in China, so does the popularity of sports. Spectator sports in China are gaining in popularity.\(^6\) So too are participant sports. China's official government website reports that as Chinese society progresses and the economy develops, recreational sports are permeating all levels of society. Today, about 300 million Chinese take part in sports activities regularly.\(^7\) While this percentage is small compared with participation in the United States,\(^8\) it is growing.

As sporting events gain popularity in eastern cultures, sports are increasingly viewed as cross-cultural marketing tools. While in the United States it is established business practice for professional sports leagues to license the manufacture and sale of athletic merchandise and apparel, there is a new and inevitable market for such products opening in China. It is not surprising that Chinese companies such as Lenovo, Haier, and Li-Ning recognize the opportunities existing in the sports arena; but, increasingly, companies such as Panasonic, UPS, Kodak and Coca-Cola are identifying their products and services with athletes and events in China.

Lenovo is China's largest and best known computer equipment

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5. Id.

6. When asked about the importance of sports properties in China, NBA Entertainment provided the following information from NBA China: Participation: 300 million people in China play basketball, an increase of 60% since 1980; Popularity: Ranks as the number one sport in Beijing, Shanghai and Guangzhou; Programming: Reaches over 500 million viewers via 24 television networks; Online: NBA.com/China averages more than 110 million page-views per month; Wireless: Content available via interactive partners to over 320 million mobile phone users. Interview with Michael Proman, Coordinator New Bus. Dev. & Mktg. P'ships, NBA Entertainment (July 24, 2006).


manufacturer (considered number one in the Chinese market and across the Asia-Pacific region) and is known for its recent purchase of IBM’s personal computer division and ThinkPad brand. Lenovo has agreed to provide approximately 70 million dollars (U.S.) in equipment and cash over a four-year period to become a “Worldwide Partner” of the 2008 Olympic Games.9 Haier, a leading Chinese manufacture of home appliances and one of the largest appliance makers in the world10 (ranked in 2005 by the Financial Times as number one in the list of China’s Top Global Brands11) has become a Beijing 2008 national level sponsor.12

Sporting goods manufacturers such as Li-Ning, China’s leading athletic shoemaker, and American/European rivals Nike and Adidas, also heavily invest in the sports world. Li-Ning’s brand image is associated not only with events but also with the high profile of its founder, a six-time Olympic medalist in gymnastics.13

Reebok has had the good fortune to be associated with Chinese basketball superstar, Yao Ming. This brand association might change now that Adidas has acquired Reebok.14 Yao Ming is well known in China, although he currently plays for the National Basketball Association’s (NBA) Houston Rockets in the United States where his endorsement deals are estimated in the tens of millions of dollars. No doubt, the NBA will leverage its investment in Yao Ming to reach out to the Chinese people and tap the enormous potential of China’s emerging commercial sports market.

The real test for the successful marketing of sports brands in the Chinese marketplace will be at the 2008 Summer Olympic and Paralympic Games. For more than two decades, global brands like the Olympic Rings and those of the Olympic partners have been targeted by ambush marketers. The International Olympic Committee (IOC) became aware of the need to protect sponsors after the Olympic Games began accepting corporate sponsorship support in

connection with the 1984 Los Angeles Games. Although the practice of ambush marketing\textsuperscript{15} may extend further back, it was not until the 1996 Atlanta Olympic Games that the IOC put together its first brand protection program to combat ambush marketing. How the Chinese government deals with ambush marketing and brand protection as it hosts the Olympic Games will likely have a substantial impact upon what companies are willing to do and their level of investment in China in the future.

To date, China’s underdeveloped judicial system and lackluster IPR enforcement system have made it difficult, but not impossible, for sports properties and corporate partners to protect their brands. The protection of the exclusive right to use a registered trademark in China is enforceable under the Chinese legal code through three different channels: (1) administrative enforcement, (2) civil enforcement and (3) criminal enforcement. There are also diplomatic, non-litigious enforcement measures and alternatives that can be useful.

Regardless of the action or inaction of the Chinese government, the best form of IPR protection in China is internally-generated proactive prevention. Proactive prevention funded and implemented by rights holders may be the best avenue for protection of intellectual property assets in China. Prevention measures are applicable not only to multinational companies with global brands but to smaller organizations such as those involved in sports marketing—provided such companies are willing to allocate the necessary resources to protect their own interests. We discuss six types of proactive brand protection measures: (1) registration, (2) education, (3) communication, (4) strategic planning, (5) operational initiatives, and (6) sports-specific measures, each of which is designed to discourage ambush marketing and eliminate or reduce trademark infringement. These preventive measures are based primarily on established business principles and brand protection practices with a proven track record. We have included methods for monitoring the marketplace for unauthorized and illegal use of registered trademarks, and we offer ideas on how to respond quickly to stop ambush marketing and infringement activities.

Will the threat of trademark infringement and counterfeiting deter sports marketers from expanding their foray into the Chinese marketplace? If these practices are allowed to continue, how will this impact national and international sports organizations that rely on financial support from corporate

\textsuperscript{15} Ambush Marketing is defined as "any attempt to create a false commercial association with the sports property or brand, thereby interfering with the legitimate marketing rights of official sponsors [licensees and broadcast rights holders]." Anne Wall, Marketing Navigators Inc., \textit{BRAND PROTECTION Educational Seminar} (Mar. 2004).
sponsors and broadcast rights holders? What about royalties from the sale of licensed merchandise? How can legitimate rights holders protect their intellectual property rights in China? These are a few of the questions we will explore.

II. POLITICAL & ECONOMIC FORCES LEAD TO CHINESE REFORM

In order to better understand the evolution behind modern Chinese economic reforms, which gave rise to the current intellectual property rights legal and enforcement structure, one must learn about China's history. We offer the following summary of the major economic and political periods in the country's history. Additional information concerning China's Imperial past is covered in the next section in our discussion about Chinese education and culture.

Imperial Past (Pre-1911) Chinese emperors ruled for two millennia. The Imperial period was marked by scholarly thought, innovation, Confucianism and a feudal economy. The last dynasty (Qing) ended in 1911.

Republican period (1911-1949)
- 1911-25 Volatile period of competing military warlords.
- 1911 Sun Yat-sen was named provisional President of Republic of China.
- 1912 The Nationalist (Guomindang) Party was founded.
- 1913 Sun fled to safety in Japan.
- 1913 Yuan Shikai (warlord) forced his election as President of Republic of China and dissolved Kuomintang.
- 1916 Yuan Shikai died. Regional warlords started fighting.
- 1919 May Fourth Movement (student protests exploded into national republican movement, during which Mao Zedong became a Marxist).
- 1919 Sun re-established the Guomindang.
- 1921 Chinese Communist Party was founded.
- 1925 Sun Yat-sen death.

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Nationalist Party Rule (1925-1949)\textsuperscript{17}  
- 1925 Chiang Kai-shek took command of the Nationalist Army and was appointed to national-revolutionary supreme commander.
- 1926 Chiang Kai-shek married Soong Mayling from the prominent Soong family.
- 1927 Chinese Communist Party split from the Guomindang.
- 1928-37 China was consolidated under Chiang's and Guomindang control.
- 1931 Japan seized Manchuria.
- 1934-35 Long march, during which Mao Zedong may have assumed control of Chinese Communist Party (CCP) at Zunyi meeting.
- 1937 Deng Xiaoping directed the Communist inner-party "recertification" campaign.
- 1938 Japan declared war on China.
- 1945-49 Chinese Communist Party forces fight Nationalist forces for control in a civil war.
- 1948 Nationalist China joined General Agreement on Tariffs and Trade (GATT).
- 1949 Mao's People's Liberation Army conquered the Nationalists. The Nationalist Government fled to Taiwan (where the Chiang established the Republic of China Government).

Communist Rule (1949-1978)\textsuperscript{18} – A period of central planning and one-party rule fueled by Marxism-Leninism-Maoism philosophy and political thought.
- 1949 The People's Republic of China was founded.
- 1949 to 1955-56 Reconstruction and Transition (a time in which foreign firms were allowed to operate, but their operations were disrupted and curbed).
- 1958 to 1960 The Great Leap Forward (industrial production was pushed to the countryside with ruinous consequences, including starvation). The period of famine lasted from 1959-1962.

\textsuperscript{17} Id.  
\textsuperscript{18} Id.; SHENKAR, supra note 2, at 33.
• 1966 to 1976 The Cultural Revolution (the "lost decade") It was a period when Communist Party Chairman and chief theorist of the Chinese revolution, Mao Zedong (Tse-tung), unleashed the Red Guard Army on political rivals, scientists and intellectuals; thus dissolving the state educational system and closing the universities for 10 years.

• 1973 Deng Xiaoping was reinstated as Deputy Premier by Premier Zhou Enlai.

• 1975 Deng's reform goals, the Four Modernizations were adopted by the Fourth National People's Congress as official party policy.

• 1976 Mao Zedong death (born 1893).

Economic Reform (1978-Present) – The Economic Revolution (this ushered in a period of reform inspired by the speeches of Deng Xiaoping on his southern tour) is also remembered for the disaster at Tiananmen Square and human rights concerns. Noteworthy during this time period were China's accession into the WTO, the overhauling IPR laws, the restructuring of the educational system and reopening of the universities, the infusion of foreign capital and intellectual property, the privatization of the state sector, the rapid sustained growth in industrial manufacturing and the continuation of an undeveloped service sector.

• 1980 Deng's protégé, Zhao Ziyang, became Premier.

• 1981 Hu Yaobang became Communist Party Secretary.

• 1987 After this time, Deng's only official posts were as Chairman of the State and Communist Party Central Military Commissions.

• 1989 Tiananmen Square (triggered by the death of liberal-minded Hu Yaobang).

• 1992 Deng toured the southern provinces and urging economic reform.

• 1993 National People’s Congress amended the constitution to incorporate the notion of a Socialist Market Economy as a State practice.19

• 1997 Hong Kong was transferred to the PRC.

2001 WTO Accession & Beijing awarded the Host City Contract for the Olympic Games.

Following the establishment of the People’s Republic of China in 1949, “China embarked on a massive program of technology transfer from the Soviet Union.” The technology transfer program ended in a disagreement between Mao and his former Soviet allies, at which point Mao embarked on the disastrous “Great Leap Forward.”

The Great Leap Forward (1958) was Chairman Mao’s plan for rapid economic growth in China. It emphasized the collectivization of agriculture, national self-sufficiency and labor-intensive methods. He also advocated a resource deployment plan called the “Third Ring of Defense.” The Third Ring was the movement of military personnel and some manufacturing operations inland (away from the major cities) and into more rural communities. These relocations were made in the event that the Soviet Union might someday invade China.

Although excluded from central power for several years, by 1965 Mao had recovered control of the party. By 1966, Chairman Mao was encouraging people “to break all forms of social convention by attacking ‘bad elements’ in society and waging ‘perpetual revolution’” as part of his grand plan for the Great Proletarian Cultural Revolution. Ridding society of political dissidents, intellectuals and scientists, the Cultural Revolution left China void of institutes of higher learning and of science and research centers. An entire generation lost the opportunity to benefit from higher education. The Cultural Revolution created chaos throughout the country. It caused wide-spread waste of resources. These factors generated unrest. The situation became so bad Mao feared he might lose control.

Before Chairman Mao’s death in 1976, there was a power struggle between Mao and Deng Xiaoping. Deng realized that in order for the Chinese Communist Party to survive, it had to bring about economic change to improve the lives of the Chinese people.

20. Shenkar, supra note 2, at 63.
21. Id.
24. Id. at 23.
25. Great Leap Forward, supra note 22.
It took until 1992 (around the time of Deng Xiaoping’s Southern Tour) before modern day China began its Economic Revolution. The revolution was sparked by Deng’s writings and the speeches he delivered that year along the coastal regions. The plan became known as the “Four Modernizations” because it focused on agriculture, industry, science and technology, and the military. Although Deng is credited with the Four Modernizations, the concept was officially launched in 1975 at the Fourth National People’s Congress, and adopted as official party line in December 1978.

Deng believed that controlled economic development could pull China out of the economic depression arising from Mao’s Cultural Revolution philosophy. He carried his message directly to the people, reaching out to local authorities and bypassing the senior and central party bureaucrats.

By creating a more open economy, Deng believed China could attract much needed foreign investment and capitalize on outsiders’ knowledge, technology and manufacturing expertise. This campaign began along the coastal regions where the major population centers were located. Deng foresaw a “trickle down” effect with money coming initially into the major markets and eventually finding its way to the smaller towns in the rural farming and manufacturing areas. According to one early foreign investor, Deng’s speeches “galvanized” the entire country to set up investment zones and hold trade fairs to attract foreign investors.

Deng’s Economic Revolution was also a period of intense reform, leading to the development of a centrally planned socialistic market economy and the overhauling of intellectual property laws. These changes were needed in order to attract foreign capital. In an effort to develop a more market-oriented economy, China has attempted to develop its capital markets in order to finance much needed corporate restructuring.

27. Id. at 25-26.
31. Id.
In order to stabilize its economy, improve its infrastructure, update its manufacturing facilities and improve the quality of its goods, China has opened its market to foreign investment. It now attracts more international investment funds than any other market.33

As a condition of joint venture arrangements with China’s state-owned enterprises, the Chinese frequently require knowledge and technology transfer agreements from their foreign partners. They have been learning from global technology leaders by importing their knowledge and technology, and then sharing this intellectual property internally. Unfortunately, the practice of copying available technology has compromised the intellectual property protection of others.34

In the early years of reform, many foreign investors found it difficult to work with their Chinese counterparts and, therefore, failed to achieve their business objectives. Rather than learn the ways of the East, they became impatient when the Chinese did not respond according to the norms of western philosophy and classic Western business school training.

As a result, many pioneering foreign investors retreated from the Chinese marketplace, leaving behind millions of dollars in assets. Some domestic companies left behind benefited from their retreat. The brightest and most ambitious managers used the new factories, modern equipment and innovative designs to produce low cost products and penetrate the huge Chinese domestic market. In less than a decade, the most successful majority-owned Chinese businesses began leveraging their domestic manufacturing base to buy up their domestic competitors and expand overseas. Once established abroad, buying well-known brands enabled these young companies to compete in the global marketplace.35

China may be the world’s oldest civilization. The party and the people are very aware of their historic roots.36 Extending as far back as Imperial times, China has been characterized by a system of bureaucratic control with no separation of powers,37 a practice which continues today even after the

33. SHENKAR, supra note 2, at 43.
34. Id. at 60.
36. SHENKAR, supra note 2, at 30.
37. Id.

Indeed, the concept of separation of [central governmental] powers was— and to a large extent remains— alien to China, which partially explains why the country still does not have an independent judiciary.
reforms. Moreover, the Chinese judicial system remains under the control of Party politics. Administrative authorities today continue to protect their own interests and vie for power within, competing among themselves.

Although during the Imperial Period there was invention and the first merit-based examination system appeared, China never foresaw a need to emphasize science in its education system. The country apparently was unaware of the detrimental impact this would later have on its ability to advance technologically.

For many years, state-run enterprises virtually guaranteed lifetime employment. In addition to jobs, the State also built factory compounds with employee housing and cafeterias. The level of wages, terms of employment and other compensation (i.e., iron rice bowl benefits) were not related to job performance. This may be the cause for many Chinese businesses to become overpopulated, underproductive, and unable to compete for the work needed to sustain their workers. Despite subsequent economic growth and the rise in salaries, the average annual wage earned by Chinese workers, falls well

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Id. at 30.

38. "Imperial past is the tradition of bureaucratically controlled economic activity... the tradition of bureaucratic rule implies no separation of powers, with the judicial and the legislative being in essence instruments of the executive branch. (In modern China all three branches are under the rule of the party.)"

39. Id. at 28.

40. "A third imprint of China's Imperial past is the persistence of local interests that compete with each other and especially with the center. This implies the continuation of local fiefdoms that make their own rules and defend their own interests even when in conflict with Beijing." Id. at 30.

41. Id. at 28.

42. Id. at 61-62.


per capita income of a senior executive in a foreign enterprise in China is 645,000 RMB (approx.
below that of more developed western nations. And although foreign brands are enjoying increased popularity in China, the vast majority of Chinese can only afford to purchase the knock-off version of many reputable brands.

Nowhere is the gap between rich and poor more prevalent in China than in the northeast provinces, heartland of Mao’s communist industrial revolution. Today, there are distinct differences between the economies of the modern industrial coastal areas and the more rural communities and cities inland. It is these rural areas of high unemployment and poverty where much of the production of counterfeit goods occurs. Much of it is labor intensive piece work that does not require a high degree of skill or education.

These economically depressed inland communities of the northeastern provinces were once revered as the Chinese “cradle of industrialization” and now are considered the “rust belt.” Hoping to reverse that situation, the central government (Beijing) has spent 7.5 billion dollars (U.S. equivalent) so far on the rehabilitation of this area, closing or privatizing old state-owned factories and retraining workers for industries more suited to the 21st century. An estimated 31 million Chinese workers lost their jobs between 1998 and 2003, one-quarter of those lived in the northeast. Most of these people lost the housing, education and medical support that had previously been provided by the state-run factories. Many of them, between ages forty and fifty, became a “lost” generation. Their reality was the “world of the xiagang—the laid off state workers.”

As a nation, China is in the process of overcoming its economic developmental limitations. In the interim, the Chinese continue to assimilate intellectual property developed overseas through knowledge and technology transfer programs. Through joint ventures with western universities, China’s education system has reawakened. Foreign partners have been encouraged to build and fund new research and technology centers in keeping with the knowledge transfer requirements imposed by the government and as a...

US$77,000). A middle level executive make by comparison 297,000 RMB (approx. US$35,780) . . . a Chinese professional employee could earn an annual salary of approximately 100,000 RMB (approx. US$12,000) while a factory worker or an ordinary employee could expect about 36,000 RMB (approx. US$4,340).

Salary Rises in for Foreign Firms Continued in Asia, supra note 45. Wal-Mart paid its U.S. employees a starting wage of $9.68/hour as compared with the average hourly wage of its subcontractors at $0.17/hour. Anderson, supra note 45.

46. Brook Larmer, Manchurian Mandate, NAT'l GEOGRAPHIC, Sept. 2006, at 50.
47. Id. at 60.
49. Id.
50. Id.
condition of foreign investment. During the Economic Revolution, other aspects of modern Chinese society also underwent change.

Westerners often criticize the Chinese for the lack of protection of intellectual property rights, failing to recognize the rapid pace of change in China, and the nation’s many advancements in this area. Critics may be unaware of China’s commitment to elevate its international standing through the modernization of industry, business and legal reforms. China is determined to become a competitive, innovation-oriented country that commands international respect. How China addresses the world’s concerns about IP protection and enforcement will have a significant impact on its ability to achieve such a positive international reputation.

China intends to become an innovative leader and a world class economic and industrial superpower without compromising cultural values and political views. With a relatively short history of technological innovation, modern Chinese advances are being accomplished by studying available technology and expanding that knowledge to improve the lives of Chinese citizens.

In addition to knowledge and technology transfer, China has encouraged companies to establish research centers to rejuvenate a lost generation of scientific innovation. Chinese companies are now becoming product innovators instead of simple imitators. They are using their low-cost


On March 28, State Council Premier Wen Jiabao issued in the State Science and Technology Awarding Congress, "Only by owning strong scientific and technological innovation capabilities and independent IPRs, could we elevate our country's international competitiveness and obtain respectful international status and dignity from others. Increasing independent innovation capability shall be the national strategy that is integrated into every aspect of modernization, every industry, business and region, trying to enable the country to be an innovation-oriented country with an international impact." On October 8, Premier Wen Jiabao pointed out in the Explanation about the Proposal on the Eleventh Five-year Program on National Economy and Social Development, "It is of particular importance to underline IP protection. IP protection has significant impact on encouraging independent innovation, optimizing environment for innovation and reducing IP disputes with foreign countries. We should improve IP protection system and strengthen IP enforcement protection."

Id.

52. SHENKAR, supra note 2, at 66.

Since foreigners had been shown to have the superior knowledge and hence the military and economic upper hand, it was necessary to learn from them, but it was vital that learning did not "contaminate" China’s culture and society in the process. China continued to look for ways to adopt "foreign technology without foreign values."

Id.

manufacturing operations to springboard themselves into the global market. Building a huge marketing base at home, Chinese companies like Haier can achieve the economy of scale and market where they can test products and perfect manufacturing operations.\textsuperscript{54}

Rather than settle for being the low-cost manufacturers of goods developed elsewhere, Chinese companies are applying for more patents than ever before.\textsuperscript{55} The rise in the number of patent applications is a good sign that Chinese business leaders of the future will become more aggressive and knowledgeable about intellectual property protection. How this will impact the intellectual property protection available to foreigners is unknown.

As a result of economic reform, the Chinese are better off today financially; and as a result of increased personal income, a middle class has emerged. Within certain sectors of the population, the Chinese people have begun to enjoy more purchasing power than ever before. Deng’s reforms and economic plan are working, despite the fact that the per capita purchasing power\textsuperscript{56} does not equal Western European and American standards. In today’s China, the more “well-to-do” Chinese, a small but growing percentage of the population, are shopping for brand name merchandise at high-end shops in Shanghai and other modern Chinese cities.

It is clear, however, that economic reform has a long way to go before China can take its place in the world as a modern industrial powerhouse respected in the international marketplace. Although sheer size and volume make China a force to be reckoned with, additional legal reform was needed to bring it into step with the industrialized world. The Chinese government recognized this fact, and beginning in the 1990s, it promoted legal reforms that overhauled China’s intellectual property rights laws.

External events have brought other economic changes as well. The capital

\textsuperscript{54} Engardio, \textit{supra} note 35.

\textsuperscript{55} “In 2005, 214,003 patents were granted by the SIPO, an increase of 12.5% over 190,238 of the previous year. Among the total granted patents, 171,619 were from domestic applicants, an increase of 13.4% over 151,328 of the previous year, and 42,384 were from overseas applicants, an increase of 8.9% over 38,910 of the previous year.” \textit{China’s Intellectual Property Protection in 2005, supra} note 51.


According to the Office of the United States Trade Representative (USTR), which is responsible for developing and coordinating U.S. international trade policy, China is the world’s second-largest economy in purchasing power parity terms. In terms of nominal gross domestic product (GDP), China is the world’s sixth-largest economy, with annual per capita GDP close to $1,200. The rising incomes of China’s nearly 1.3 billion consumers are fueling strong demand for U.S. farm products, manufactured goods and technical services, USTR says.

\textit{Id.}
city of Beijing offered a bid for the summer Olympic Games. The city was awarded a Host City Contract for the 2008 summer games in July of 2001. This decision by the International Olympic Committee (IOC) sparked unique opportunities for economic development to support the Games. Construction of new buildings and roadways began in Beijing. In addition to the Olympic Games, the city will also host the 2008 Paralympic Games\(^5\) which are organized to promote the competition of elite athletes with disabilities.

The Beijing Organizing Committee for the Games of the XXIX Olympiad was formed on December 13, 2001.\(^5\) This was around the same time China was offered membership in the World Trade Organization (WTO). In its negotiations with the WTO, China managed to avoid making an explicit commitment to end its conditional requirement on foreign investors that they transfer technology, although the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIP) with WTO would make it more difficult.\(^5\)

As host of the Beijing 2008 Olympic and Paralympic Games, China will be obligated to protect the Olympic and Paralympic brands. As a member of the WTO, China is also subject to international standards for intellectual property rights protection and fair trade practices set forth in the TRIP Agreement. These two milestone events coupled with China’s goal to become an economic powerhouse should inspire future reforms.

Sustaining double-digit growth rates and planning for the future after the Olympic and Paralympic Games conclude will necessitate a change of brand strategy. China is aware of the need to evolve beyond its manufacturing base into a more marketing- and technology-driven economy. The Ministry of Foreign Trade & Economic Cooperation (MOFCOM) is espousing brand building as one way to increase profit from export trade. MOFCOM is beginning to encourage Chinese companies to build global brands. As Chinese multinational corporations develop brand equity, the concern for brand protection and mounting pressure for further IP reforms will likely increase.

Bo Xilai, Minister of Commerce, points out “lacking strong brands, the huge exports have resulted in only a small profit, as the lion’s share of the profit has gone to importers and retailers. Huge exports [have] also led to

\(^{57}\) The Beijing Paralympic Games will be held from September 6 through 17, 2008 and will open twelve days after the 29th Summer Olympic Games end on August 24. Beijing Organizing Committee for the Games at the XXIX Olympiad Official Website Beijing Paralympic Marketing Program Officially Launched, available at http://en.beijing2008.com/63/95/article212029563.shtml (last visited Aug. 26, 2006).


\(^{59}\) SHENKAR, supra note 2, at 67.
numerous trade disputes.” The Ministry of Commerce and the Ministry of Finance pledged 700 million yuan (US$86 million) in 2006 in support of brand building of Chinese companies to facilitate the corporate transition from global producers to global brand builders.60 There are long-term benefits associated with brand development.61

Modern Chinese companies, intent upon international growth, have recently focused on growth through acquisition. To survive long term, the Chinese must develop reputable brands of their own as well as sustain and protect those acquired through others. The low-price strategy, upon which Chinese domestic businesses have built their base and penetrated the international market, likely cannot be maintained in the competitive world of global branding.

III. EDUCATION & CULTURE INFLUENCE CHINESE IPR SYSTEM

It may be a long while before the treatment of privately-held and legally-owned intellectual property in China catches up with other nations. Even with the most recent legal reforms, the current IPR protection and enforcement system has been unable to change Chinese behavior patterns that have evolved over centuries.

Chinese civilization dates back thousands of years. The Imperial Period was a formative phase in Chinese culture, which marked the abolition of feudalism and the end of the Warring States (475-221 BC). China was then unified in 221 BC under its first Emperor. The Chinese Imperial Empire period lasted more than 2000 years during which time China was the most affluent and influential community in East Asia.” 62 During this Imperial

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The long-term benefits and strengths generated from the branding strategies of many international companies are now more visible to local enterprises. While many Chinese companies have been competing on price and the struggle for immediate benefits, international players have been increasing the presence and reputation of their products and companies on the China market. Branding, which has yet to be mastered by the majority of local companies, has been a major contributor to their success, just as it has been on international market. . . . In the past few years, acquisition of part or whole of a local company with well-known brands has become a trend. Yet a more challenging issue is how to manage and take care of the local brands after the takeover.

Id.

Period, there was no establishment of "rule by law" recognized to settle disputes.

The Chinese of the Imperial Period considered themselves to be cultural and "civilized." "They never compared themselves with the Europeans whom they classified as "barbarians." Europeans coveted military superiority and a culture based on rational, scientific thinking, which had nothing in common with the "Chinese monistic ideals of a harmonious world."\(^\text{63}\)

Also during the Imperial Period, the Chinese made an educational system available to all classes in society based upon a rigorous examination process. There were three levels of examination. They covered literature, philosophy and history. The test results were used for appointing people to civil service positions. These positions, therefore, were filled on the basis of merit and not on inherited privilege. During the Ming Dynasty in (1368-1644 AD) approximately forty-seven percent of those who passed the highest level job examinations were from families with no official connections.\(^\text{64}\) It was not until later years that family connections influenced the civil service selection process in China.

In addition, the "Civil Service Imperial Exams" tested for proficiency in "Six Arts" (music, archery, horsemanship, arithmetic, writing, and the knowledge of rituals and ceremonies). In time Confucian teachings were added and the curriculum was expanded to include "Five Studies," with additional training and examinations in military strategy, civil law, agriculture, and geography. The actual "learning" process at the time consisted primarily of rote memorization.\(^\text{65}\)

The Imperial Period which lasted for over two millennia was characterized as a period of scholarly thought and innovation without the underlying disciplines of research and science. China’s Republican Period marked the end of Imperial rule. From 1925-1949, China was ruled by the Nationalist Party. This lasted until the Nationalist Party leader, Chiang Kai-shek, was driven out of China. During the year 1949, Chinese Communist Party came into power. Their leaders were obsessed with stability and order at the expense of scholarly thought and scientific innovation.\(^\text{66}\)

As Communist rule continued into the 1960s, Chairman Mao’s military Red Guard was recruited to eliminate what the Chairman perceived as a danger to his influence. In an effort to expand his control during this period of

\(^{63}\) Id.


\(^{65}\) Id.

\(^{66}\) SHENKAR, supra note 2, at 60.
economic downturn and social unrest, Mao sent his Red Guards to squash scholarly thought by eliminating political challengers, eradicating intellectuals, closing Chinese technical schools, and essentially devastating the entire educational system. Mao ordered that books be burned, and he reassigned teachers to the countryside.

China's legal system also experienced the adverse affects of Mao's Cultural Revolution. Without justification, government authorities cracked down on law professors and practitioners whom they feared. This discouragement in the development of Chinese legal talent spanned two decades. It ended when the Chinese legal system began modern day reform in 1979, triggered by the Sino-Foreign Equity Joint Venture Law. This law later created an opportunity for foreign law firms to establish themselves in China.

Ironically, Chairman Mao was intimidated by an educated citizenry. In contrast, his predecessor Confucius held that scholarship pursuits were among the most important of human activities. As a result, most Chinese children raised during the Cultural Revolution (1966-76) did not receive State-funded higher education. This period was referred to as the "lost decade" and under the Chinese Communist system that was in place only the most talented were formally educated enough to become eligible for bureaucratic appointment.

After the death of Mao in 1976, Deng Xiaoping returned to power and social order was reestablished. Even then, because of China's lack of an efficient taxation system, the central government had only limited resources for educational pursuits. Funding for education was not a priority.

The ascension of Deng allowed for additional reforms in China. Deng was considered to be the father of Chinese economic reforms. He focused China's economic recovery on agriculture, military, industry and natural sciences. It was after Deng's death in 1997 that an emphasis on the educational system was fostered in conjunction with the economic system.

It is important to also note that prior to Deng's death, the National People's Congress amended the constitution in 1992 to incorporate the notion of a Socialist Market Economy as a State practice. The amendment forbids citizens from interfering with Modern China's new social economic order.

67. The Legal System in China, supra note 32.
68. "The Imperial examination system screened a relatively small number of candidates, and few of those passed and became eligible for bureaucratic appointment. The Communist system, while professing to equalize education, permitted only a small fraction of the brightest and well connected to attend institutions of higher education." SHENKAR, supra note 2, at 73.
With this 1992 amendment, the fundamental economic structure of the country transformed from a "command economy" into a "socialist market economy." This was in contrast to the Mao Chinese economic system that was centrally planned, whereas Deng’s new system was more open to outside influence.

At the same time that Deng served as Chairman, his protégé, Zhao Ziyang, was appointed Premier. Like Deng, Ziyang was a reformer. The Premier believed China was the "essence" and the West was the "instrument" of reform. During his period of reform, the goals of maintaining the essence of Chinese culture and political thought, while at the same time rebuilding the nation’s economy were both very important. It was Ziyang who said, “We will get technical know-how from the West and learn how to use it. But our culture cannot be copied.”

There are many aspects of China’s “high culture” (pre-1911) that have survived to the present day. The two main philosophical constructs of Chinese culture from the Imperial Period are the teachings of Laozi (Lao Tzu) and Confucius (K’ung Fu Tzu). Confucius was a philosopher and one of China’s greatest teachers. Confucianism is a set of social ethics telling people how to behave. It is a blend of Taoism and Buddhist concepts. Among other values, Confucian ethical teachings preach loyalty to the state.

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70. Grosse-Ruyken, supra note 62.
71. Id.
72. Taoism and Daoism, http://www.yakrider.com/Tao/Taoism_Daoism.htm (last visited Aug. 26, 2006). "The Tao Te Ching (or Dao De Jing) is a collection of writings or thoughts said to be written by Lao Tzu around 600 B.C. The Tao Te Ching is the second most translated publication in the world next to the Bible." Id.

Taoism really has to do with flowing with the Tao... Water is used as a representation of Tao because water always seeks the path of least resistance... So what is this Tao? Historically there have been three uses of the word in Taoism... The Taoist’s desire to live life by the power (te) of the Tao... A second current of Taoism might be called "vitalizing Taoism" because it seeks to increase or augment the supply of the Tao's power which it finds in the life-force, or ch'i, through three means: movement, matter, and mind. In this stream you will find ch'i increasing training programs based on movement (Tai Chi Chuan, Kung-Fu exercises, etc.) which also worked as ch'i unblocking practices... This brings us near the third stream of Taoism and its approach to the power of the Tao. It can be called "religious Taoism" because it is more organized than the other two and its approach to te is as vicarious power through a Taoist priesthood.

Id.


Much of Chinese culture was derived from the teachings of Confucius. Since the Han Dynasty (206 BC–220 AD), four life passages have been recognized and regulated by Confucian tradition: birth, maturity, marriage and death. In addition, the Chinese adopted an education system centered on Confucian teaching, including the practice of copying as part of the learning process. This application of their virtue has impeded the development of intellectual property rights. The Socialistic acceptance of copying has led to an ingrained system of piracy.

Chinese educational history has had a substantial impact on why eastern and western schools of thought are considered to be very different. Historically, China's school systems have taught people how to learn through replication rather than through analysis. Memorization of rules and customs are prized in the east, whereas western culture values critical thinking skills and encourage new ideas and inventions. As western nations have emphasized math, science and technological innovation, the Chinese have placed great emphasis on art and culture.

Ironically, during the ancient period of Imperial rule, the Chinese were considered great innovators. But the cultural and environmental conditions that led to such innovation were lost during the Cultural Revolution (1966-1976), Chinese Communists found themselves preoccupied with a need to establish Socialistic order and a desire for people to conform to the rules of law. There was little emphasis on individual performance as the Communists valued the performance of the group as a whole. This attention to a prescribed set of rules, behavior patterns and customs created social order but forced the practice of conformity and discouraged free thinking and innovation.

In terms of Chinese business culture at the time, human relations and personal connections were valued over individual achievement for the good of
society. Human relations were considered much more important than legal reforms. Contracts had little meaning unless they were backed by committed relationships and a sense of obligation between the parties.

The practice of “guanxi” is deeply imbedded in the Chinese culture then and also in today’s business environment. Guanxi represents a relationship that binds a contract through personal connections and social capital. It is considered more important than the legal tools used to solidify the contract itself. In China, human relationships, by nature, form a sense of obligation. The Chinese view the “legal language” of a contract as a western notion that focuses on a transaction and not on the relationship between the parties. In China, contracts are useful in developing relationships, but the contract is always subject to change and renegotiation. This notion can be very frustrating to many westerners believing a fully executed contract to be binding and enforceable.

Whenever possible, Chinese prefer to work out conflicting issues in private, almost always out of the public eye of the courtroom and government officials. They believe that public disputes lead to loss of “mianzi” (loss of social face). In the Chinese culture, loss of face brings shame to oneself and one’s family through embarrassment. Chinese believe it is better to resolve differences through discussion and negotiation than to risk losing face.

Within modern Chinese copyright law is a specific remedy for apology. A public apology is an acknowledgement of wrongdoing. It brings with it the significant social stigma of shaming. The Chinese believe that the embarrassment caused by a public apology will create a significant future deterrent. Consequently, courts have been ordering a public apology in an increasing number of infringement cases.

Chinese copyright law now protects literary, artistic and scientific works whether published or not (including written works, oral works, musical,

78. Grosse-Ruyken, supra note 62.

Chinese thought has never centered around ideas, Gods, abstract principles, but always focused on how to accomplish perfect order: pragmatism and syncretism. World is constant flux, ever changing content, only the patterns of change stays the same. The Chinese philosophy aims at the destruction of the subject / the individual: no individualism, human rights, western law, citizenship, etc. You become human only by complying with the rules of human behavior. Self only in relation to society, network. Human relations are more important than legal contracts.

Id.

79. Yu, supra note 19, at 952.

80. See Copyright Law of the People’s Republic of China, art. 46, available at http://www.sipo.gov.cn/sipo_English/lflg/xglflg/t20020416_34754.htm (last visited Nov. 13, 2006). "Anyone who commits any of the following acts of infringement shall bear civil liability for such remedies as ceasing the infringing act, eliminating the effects of the act, making an apology or paying compensation for damages, depending on the circumstances . . . ." Id.
acrobatic, fine art, architecture engineering designs, computer software, etc.). Yet despite these advances, the law is not rigorously enforced. To this day, the Chinese have continued copying as a way of learning and as a way of generating income. In fact, there is an entire village that is famous for copying en masse famous works of art.  

Before modern Chinese copyright law came into effect, individual creations were not the exclusive domain of the creator. Under the Communist ideology, work products were owned collectively by the State for the good of society. The State therefore served the common good by providing jobs, housing, food and other benefits for its people. With so many Chinese employed by state enterprises, it is not surprising that the concept of private ownership of work products was not recognized as an individual right.

As market conditions changed and modern economic reform took hold, the notion of private property and individual shareholder rights emerged. It became necessary to recognize private rights in order to attract foreign investment. In August 1982, China enacted its first trademark law. The first patent law was enacted by State Council in March 1984. The copyright law did not come into effect until September of 1990. To the average Chinese citizen, having ownership rights in intellectual property may still be an abstract concept. Additional reform laws known as the "Millennium Amendments," passed only a few years ago, refined and expanded upon the concept of private intellectual property rights that were brought about by changing economic conditions amid a push for further reforms by World Trade Organization member nations.

Improved economic strength and strict population controls have afforded more Chinese families the opportunity to educate their children abroad. The most wealthy of Chinese families have been sending their "little emperors and


Confucian ideology continued to influence the Chinese view of intellectual works. In China, economic gain from creative or scholarly work was looked on with disdain. Chinese artisans tolerated the forging or copying of their works since Chinese cultural traditions did not regard individual creativity as the sole right of the creator. Additionally, copying or imitation used to be considered a time-honored learning process in China. Not surprisingly, "China's laws concerning intellectual property developed far differently from those of the Western states, appearing not to resemble Western laws again until centuries later in the early 1980s." As a result, China has historically offered little in the way of protecting the intellectual property rights of its own citizens, or citizens of any other country.

*Id.*


84. *Id.* at 906-08.
empresses” to western nations for schooling. The Chinese are “the largest contingent of foreign students in the United States.”

The foreign educated Chinese are beginning to return home, bringing with them western business knowledge, technical know-how, cultural experience and personal contacts. The Chinese government has made a concerted effort to attract Chinese nationals back to the mainland from schools and businesses abroad by making fundamental changes to its education and business infrastructure. The government has been upgrading schools, paying higher salaries to attract better teachers, developing technology zones to entice businesses, and with help from joint-venture partners, setting up research centers.

Chinese institutions of higher learning are once again encouraging research and scholarly thought. Since reopening its universities, China has raised academic standards and is churning out academic papers and PhDs in an effort to catch up with its western neighbors.

The Chinese legal system has also been changing to match the economic and cultural improvements. It was not until 1992 that the Chinese government permitted foreign law firms to establish offices in mainland China. It took a constitutional change for China to begin attracting foreign investment, which in turn allowed state-owned law firms to provide legal advice to domestic and foreign companies operating in China. A decade earlier, in the mid-1980s, private Chinese-owned law firms had emerged. Encouraged by the Ministry of Justice, these domestic firms followed the western model of expansion.

After China developed a more market-oriented economy and joined the WTO, local Chinese law firms and foreign law firms worked together on mergers, acquisitions, and other foreign investment deals that became popular. Today, there are over 100 foreign law firms licensed to practice in China. These firms are working with many of the top global investors. Even Hong-Kong lawyers, with knowledge of the Chinese language, culture and laws, can now sit for the Bar exam in the People’s Republic of China, so they too are

85. "[L]ittle emperors (the term used in China to denote the pampered children born under the one-child policy). This explains why despite a relatively modest national expenditures on education (less than 3 percent of GDP), there has been an impressive expansion of educational activities, many of which are paid in part or in full by the parents." SHENKAR, supra note 2, at 74.

86. Id. at 5.

87. An estimated 160,000 Chinese students went abroad in 2002. Almost 65,000 were enrolled in American schools 2002-03 academic year. “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. . . .” Id. at 75.

88. SHENKAR, supra note 2, at 60.

89. The Legal System in China, supra note 32.
making inroads.  

Since the dissolution of state-owned law firms in 2002, there have been a growing number of capable Chinese law firms available to advise foreign and domestic clients. Typically, domestic firms ensure compliance with Chinese laws while the foreign firms make sure their clients' deals are structured in accordance with international standards. There can be advantages to working with local Chinese lawyers. Many of the Chinese attorneys speak English, and can respond quickly (often overnight) with sound legal advice that takes into account the Chinese culture. They know the procedures and have valuable local contacts. Selecting the right legal counsel is one of the most crucial steps in navigating the enforcement apparatus in China.

IV. APPLICABLE DOMESTIC LAWS & INTERNATIONAL ACCORDS

An awareness of domestic and international laws is essential for protection of intellectual property rights. The following is a summary listing of the current laws within the People's Republic of China promulgated for the protection of intellectual property rights. For an English translation and the full text of these and other Chinese intellectual property related laws, please check the official government website for the State Intellectual Property Office: http://www.sipo.gov.cn/sipo_English. For more information pertaining international accords, refer to the World Intellectual Property Organization website: http://www.wipo.int.

In addition to the three basic IP laws relating to trademark, copyright and patents, there are also bilateral treaties and trade agreements that afford IPR protection. Collectively these internal laws and these treaties and agreements form the legal foundation upon which intellectual property assets may be protected in China.

90. Id.

91. "Domestic firms charge US$100 to US$350 per hour, while foreign firms apply Hong Kong hourly rates, between US$450 and US$600 for partners and between $100 and $400 for associates." Id.

92 Id.

Email from Mark Petri, President/Chief of Staff of Rite-Hite Holding Corporation, to author (Aug. 26, 2006) (on file with author).
The National People’s Congress (NPC) of the State Council is the highest legislative governing body in China. Under the Chinese constitution, the NPC and its Standing Committees are authorized to enact laws. The State Council of the NPC formulates administrative regulations under the constitution and laws.  

Upon the issuance of a Certificate of Registration, intellectual property is afforded protection under the following legislation:

(1) Trademark Law of the People’s Republic of China

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 on 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.

(2) Copyright Law of the People’s Republic of China

Adopted at the Fifteenth Session of the Standing Committee of the Seventh National People’s Congress on 7 September 1990, and revised in accordance with the Decision on the Amendment of the Copyright 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.

(3) Patent Law of the People’s Republic of China

Adopted at the 4th Meeting of the Standing Committee of the Sixth National People’s Congress on March 12, 1984.

(4) Regulations of the People’s Republic of China on Customs


95. Copyright Law of the People’s Republic of China, supra note 80.

Protection of Intellectual Property Rights


Rights holders, including some who have not registered their intellectual property, may seek protection under certain provisions of the following laws:

(1) Law Against Unfair Competition of the People’s Republic of China


(2) Contract Law of the People’s Republic of China

Adopted at the Second Session of the Ninth National People’s Congress on March 15, 1999.


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 14, 1997.

There are two laws specifically devoted to the protection of Olympic symbols, known as the Regulations on the Protection of Olympic Symbols.

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and the Regulations of Beijing Municipality on the Protection of Olympic-Related Intellectual Property. Additional information about the protection of Olympic intellectual property rights is available in the final section of this article.

China was not the first nation to enact special legislation to protect the Olympic Games. Similar laws designed to protect Olympic words, symbols and phrases were passed in the United States and Australia. Statutory protection will likely continue in the years ahead as organizing committees for future Games encourage their governments to pass legislation related to the protection of Olympic and Paralympic related intellectual property.

This type of legislation protects trademark owners and rights holders, and it benefits the host city and host nation. Economic development derived from Olympic and Paralympic related events, products, services and tourism is a substantial benefit to the cities and nations that host the Games as well as to the sponsors, licensees and broadcaster rights holders that support these events. Safeguarding Olympic and Paralympic marks against ambush marketing activities and intellectual property theft preserves the image, reputation, goodwill and revenue opportunities associated with the Games. When unlawful activities occur, these laws make it easier for law enforcement officials to take appropriate and immediate action.

In addition to domestic laws and special Olympic statutes, there are international accords that protect intellectual property. Among the most noteworthy international treaties to which China is a party are the following:

(1) Convention Establishing the World Intellectual Property Organization (WIPO)\textsuperscript{103}

(2) Paris Convention for the Protection of Intellectual Property\textsuperscript{104}

(3) Berne Convention for the Protection of Literary and Artistic Works\textsuperscript{105}


(3) Madrid Agreement Concerning the International Registration of Marks\textsuperscript{106}

(4) Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement of the World Trade Organization (WTO)\textsuperscript{107}

Where Chinese domestic law and international agreements conflict, the provisions of international treaties supersede in accordance with Article 142 of the General Principles of Civil Law.\textsuperscript{108}

V. REGISTRATION & RECORDATION PROCESS\textsuperscript{109}

This section explains the Chinese domestic trademark registration system, international trademark registration under the Madrid System, and the General Administration of Customs (GAC) recordation procedure in the People's Republic of China.

Trademarks and patents must be registered to enforce intellectual property rights in China. Although copyright registration is not a requirement for enforceability, it is a formality that may help with enforcement actions. Registration is the first step in the prevention of intellectual property rights violations.

Copyrights can be registered with the National Copyright Administration of China (NCAC).\textsuperscript{110} China’s State Intellectual Property Office (SIPO)\textsuperscript{111} registers patent applications.

Applications for registration of trademarks, service marks and trade dress are handled through the Trademark Office under the State Administration of


\textsuperscript{108} Yu, supra note 19, at 907.

\textsuperscript{109} For further information about the registration and recordation process, refer to the "Trademark Registration & Recordation" flowchart in Appendix A created by Judith Massuda, July 2006. The Chinese registration process has been flowcharted in greater detail at http://www.ipr.gov.cn/ipr/en/info/Article.jsp?a_no=4787&col_no=203&dir=200605 (last visited July 30, 2006).

\textsuperscript{110} For information about copyright registration contact the NCAC at http://www.ncac.gov.cn (last visited Nov. 29, 2006).

After the trademark registration process has been completed and a Certificate of Registration issues, the registration should be recorded with the GAC. Recordation is a requirement in order for the GAC to ban counterfeit goods at the border.

**Domestic Registrations—Trademarks**

The Chinese define a trademark as "any visual sign capable of distinguishing the goods or service 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 colors, and their combinations." The following types of marks are recognized under Chinese law: (1) trademarks, (2) service marks, (3) collective marks, and (4) certification marks. Also protected by law are geographic indications, three-dimensional marks and color trademarks, and well-known trademarks.

Under the State Council, the Trademark Office of the SAIC oversees registration and administration of trademarks throughout the country. The SAIC has three responsibilities: (1) processing trademark registration applications and deciding on approvals in accordance with the law; (2) supervising the use of the trademark and deciding on the revocation of registered trademark, and; (3) recording licensing contracts for the use of registered trademarks.

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113. For more information about Customs recordation and enforcement procedures, contact GAC at http://www.customs.gov.cn home page and click on "English" or go directly to the English version located at http://wwwenglish.customs.gov.cn/default.aspx (last visited Aug. 29, 2006).


115. "Trademark" and "mark" are used throughout this article to describe all forms e.g., trademark, service mark, collective mark and certification marks.


117. Id.


Among those eligible to apply for registration are natural persons, legal entities or other organizations that intend "to acquire the exclusive right to use a trademark for the goods produced, manufactured, processed, selected or marketed by it" or him/her or to use a service mark for the services rendered by one in his/her business. Registrants enjoy the exclusive right to use the trademarks, and are protected by law.

The Trademark Office accepts applications directly from individuals and entities through state-designated agents and also through procedures defined by international agreements to which China is a party. The Madrid Agreement and Madrid Protocol are two such accords. 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 registration.

Upon receipt of an application and payment of fees, the application goes through a formality check and substantive examination. It may be preliminarily approved and published for opposition, and if there is no opposition, the mark will proceed to registration. Alternatively, the mark may be refused registration on various grounds. Such grounds include a mark considered (1) generic, (2) descriptive, (3) geographically descriptive, (4) in conflict with an existing registration in China, (5) confusingly similar to the flags, emblems or name of China, foreign countries, or international governmental organizations, (6) harmful to socialist morals or customs, or (7) otherwise considered obnoxious. If rejected, the registrant may appeal within fifteen days of receipt of notice to the Trademark Review and Adjudication Board (TRAB).

Applications that pass examination are published for opposition. The


122. See id. art. 3.
123. The U.S. Embassy in Beijing offers the following advice to foreign trademark applicants: Foreign companies seeking to distribute their products in China are advised to register their marks and/or logos with the China Trademark Office. Further, foreign companies should register appropriate Internet domain names and Chinese language versions of their trademarks. As with patent registration, foreign parties must use the services of approved Chinese agents when submitting the trademark application. However, foreign attorneys or the Chinese agents may prepare the application. Recent amendments to the Implementing Regulations of the Trademark Law allow local branches or subsidiaries of foreign companies to register trademarks directly without use of a Chinese agent.

opposition period is three months from the date of the publication. During this time period, any person may file in opposition to the published trademark despite such mark’s preliminary approval. Within fifteen days of receipt of the Trademark Office’s issuance of a decision in an opposition, a request can be made to the TRAB for review of the opposition. If no opposition is filed or a claim of opposition has been rejected, a certificate of trademark registration should issue.

Once granted, the registration remains valid for a period of ten years. Thereafter, the registration is renewable for subsequent ten-year periods. A renewal application must be filed within six months of expiration of the existing registration term.

If the owner of record grants the use of a registered trademark to another party, he or she must establish a trademark licensing contract and register it in order for the licensee to remit royalty payments overseas in foreign exchange. Trademark owners should execute and thereafter register appropriate trademark licensing agreements with the Trademark Office of SAIC. According to the information provided on the US Embassy Beijing website, “the recorded licensing agreement may take legal precedence over a non-recorded agreement in the event of a dispute between the licensor and licensee.”

Current Chinese law follows the first-to-file principle as opposed to a first-to-use principle for registration of a mark. The exclusive right to use a registered trademark in commerce extends to the owner of record according to the earliest date of filing in China or other recognized filing priority elsewhere. In the U.S., trademark rights extend back to the date of first use or to the date of filing for registration subject to later use of the mark. In the U.S., an unregistered user of a trademark may establish protected trademark ownership rights under common law if it can prove prior use relative to a junior user. The fundamental difference between the first-to-file and first-to-use principle has caught many foreign trademark owners by surprise. Unaware of China’s trademark registration system, they enter Chinese commerce without prior registration of IP rights. This common mistake is not easily rectified if a third party files and obtains its own registration for the mark covering relevant goods.

125. See id. art. 33.
International Registrations—Trademarks

The Trademark Law allows for trademark registration in accordance with bilateral agreements. China signed the Madrid Agreement on October 4, 1989, and the Madrid Protocol on December 1, 1995. The Madrid System for the international registration of marks allows a pending or registered trademark to be protected in member nations by filing one application through a member state's own national or regional industrial property office and designating the nations in which registration is being applied for. The Madrid System was established in 1891.

The Madrid System is administered by the World Intellectual Property Organization (WIPO), located in Geneva, Switzerland. The Madrid System simplifies the international registration process and the management of subsequent ownership changes and renewals of registrations. The registrant must be a national of a member state of the Madrid Union or have a real and effective industrial or commercial establishment or a domicile in that country. After a trademark office in the designated country (e.g., China) receives an application from WIPO, an extension of protection for the international registration is granted if the trademark office does not refuse protection within a specified period of time. Each country in which the registrant is seeking protection has eighteen months to review and issue a rejection of the application.

Trademark rights extend back to the date of filing an application for international registration in the member state or earlier, based on a filing priority for pending applications. For marks pending or registered in America, applications for international registration are presented through the United States Patent and Trademark Office (USPTO) to the International Bureau of the WIPO. The International Bureau does not accept applications directly from trademark owners. International registration, using the Madrid System, is only available through member states of the Madrid Agreement or Madrid Protocol. The U.S. became a party to the Madrid Protocol on December 2, 2003, and is not a member of the Madrid Agreement.

130. WORLD INTELLECTUAL PROPERTY ORG., supra note 128.
Registration under the Madrid Protocol is dependent upon the underlying national registration. If the national registration is rejected or successfully opposed within the first five years of issuance of the international registration, the international registration and all of the rights obtained in the member countries will be canceled. However, under provisions of the Madrid Protocol, the owner of the cancelled international registration may convert its filings with designated countries into national filings. Most member states do not require actual use in order to proceed with registration. In contrast, the owner of a U.S. national application based on intent to use the mark in the U.S. cannot obtain registration until the owner submits to the USPTO acceptable evidence of use of the mark. Any decision by the USPTO to refuse, delay, limit or invalidate a national application or registration may also result in delay, limitation or invalidation of the related international registration.131

When applying for a registration, registrants of foreign trademarks should investigate the Chinese transliterations as well as translations of the mark. If not previously registered by a third party, it is advisable to consider registering the mark in the language of the registrant’s domicile using the Madrid System, and also use the Chinese national registration system to register appropriate Chinese transliterations and translations in Chinese characters, letters or numerals. It is advisable to register the direct translation from Chinese characters to Latin alphabet and every conceivable transliteration within each class of trade in which the marks will be used. Failure to commit the necessary funds to file separate registrations in all available transliterations for a brand is a mistake foreign companies frequently make. The registrant should also apply for corresponding domain name registrations around the same time.

Prior to China’s accession into the WTO, internationally well-known marks not registered in China were not accorded protection by China on the basis of being well-known. Owners of famous marks applying for registration in China often encountered conflicts upon discovering that a third party had previously registered the marks. Sometimes the third party was a licensee acting in good faith; but in other cases the registrant was a supplier seeking an unfair advantage, an outright competitor, or a trademark pirate. If the third party does not voluntarily forfeit or transfer the registration to the rightful owner, then the owner has the right to challenge the existing registration.

Before China joined the WTO and agreed to adhere to international treaties, there were problems when marks registered in China conflicted with marks considered ‘famous’ or ‘well-known’ in the international marketplace. This was because Article 6bis of the Paris

Convention required member states to give recognition to "famous" mark owners from other member states and cancel conflicting marks. For some time, China’s SAIC attempted to interpret Article 6bis to avoid its application to China’s domestic marks. One such attempt required a mark to be well-known in China before it is considered a "famous mark." Obviously, this lackadaisical approach to international trademark protection did not pacify the United States and various European nations, and China received further pressure to amend its practice.132

A trademark may be cancelled in accordance with Article 13 of Trademark Law of the PRC, which provides for cancellation under the following conditions:

Where a trademark in respect of which the application for registration is filed for use for identical or similar goods is a reproduction, imitation or translation of another person’s trademark not registered in China and likely to cause confusion, it shall be rejected for registration and prohibited from use.

Where a trademark in respect of which the application for registration is filed for use for non-identical or dissimilar goods is a reproduction, imitation or translation of the well-known mark of another person that has been registered in China, misleads the public and is likely to create prejudice to the interests of the well-known mark registrant, it shall be rejected for registration and prohibited from use.133

In the event of a dispute challenging the validity of an existing trademark, the Trademark Office may cancel a registration.134

**Customs Recordation**

After a Certificate of Registration has been issued, it should be recorded with the GAC by filing an application with all of the necessary particulars. Without recordation, the GAC does not have the authority to stop infringing goods at the Chinese boarder. The following information is required on the application:135

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134. Id.
135. See Regulations of the People’s Republic of China on Customs Protection of Intellectual Property Rights, supra note 97, art. 7.
(1) the business name or name, place of registration or nationality, etc. of the holder of the intellectual property right;

(2) the description, contents and any other relevant information relating to the intellectual property right;

(3) the status quo relating to licensing of the intellectual property right;

(4) the description, origin, Customs at the port of entry or exit, importer or exporter, main features and prices, etc. of the goods on which the holder of the intellectual property right lawfully exercises his right;

(5) the manufacturers, importers or exporters, Customs at the port of entry or exit, main features and prices, etc. of the goods that infringe the intellectual property right, as far as it is known.

Upon review of an application for recordation, the GAC has 30 working days to review the application and respond to the applicant. Customs may accept or reject the application in accordance with the Regulations of the People's Republic of China on Customs Protection of Intellectual Property Rights. Once granted, the recordation is valid for a term of ten years and renewable thereafter. Upon review of an application for recordation, the GAC has 30 working days to review the application and respond to the applicant. Customs may accept or reject the application in accordance with the Regulations of the People's Republic of China on Customs Protection of Intellectual Property Rights. Once granted, the recordation is valid for a term of ten years and renewable thereafter.136 Recordation can be rejected where the application documents are incomplete or invalid, where the applicant is not the holder of the intellectual property right, where the intellectual property right is no longer protected under laws or administrative regulations.137

The GAC is the highest supervisory unit of Customs in China. It is a full ministerial level government agency affiliated directly with the State Council. Unlike the US Customs Service, Chinese Customs agents cannot seize shipments of counterfeit goods unless they are suspected of bearing trademarks identical to or confusingly similar to marks duly recorded with the GAC. Once a suspect shipment has been spotted through the inspection process, before a seizure can be made the rights holder of record is required to post a bond. The value of the bond was recently standardized.138

A Trademark Registration Flowchart is provided in the Appendix.139

136. Id. art. 10.
137. Id. art. 8.
138. Prior to 2005, the amount of the bond was based on the value of each shipment, a procedural requirement that was more complex and more costly than the current regulation.
139. See infra Appendix B, Trademark Registration, created by Judith Massuda, July 28, 2006.
VI. LEGALISTIC & ALTERNATIVE TRADEMARK ENFORCEMENT MEASURES

The protection of intellectual property “is as much a business strategy as it is a legal issue.”\textsuperscript{140} Burdened by bureaucracy and often stymied by local political concerns, the Chinese IPR enforcement apparatus can, at times, appear ineffectual to those unfamiliar with the system. The enforcement apparatus is extremely difficult to navigate particularly for people that do not know how to work within the system. Because of the complexity and fluidity of this system coupled with the pace of change in China, early in the process it is advisable to engage the professional assistance of qualified brand protection specialist and trademark counsel with local and international IPR knowledge and expertise. Navigating the system often requires guanxi—the use of personal connections and social capital, as mentioned earlier. Establishing a relationship with Chinese locals is very important, preferably well-connected, influential individuals whose network of personal contacts may be called upon when needed.

There are multiple enforcement routes available and within each route, there are many different avenues that can be pursued depending on the circumstances. These include administrative and judicial enforcement and diplomatic channels. The least discussed and possibly most useful route is often the non-litigious route, which provides rights holders with alternative measures for gaining compliance.

While smaller businesses may prefer the administrative enforcement route, multinational companies including many Chinese and Japanese businesses are taking their complaints directly to court with increased frequency since the Chinese judicial system underwent reform, although the total volume of IP-related civil and criminal cases is still considerably less than those handled through administrative enforcement.\textsuperscript{141}

It should also be noted that many cases of infringement are never reported

\begin{footnotesize}
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\item \textsuperscript{140} Yu, \textit{supra} note 19, at 947.
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to authorities for a variety of reasons. Some companies prefer to resolve disputes in private and thereby preserve relationships and save face in accordance with past custom. In other situations, rights holders may fear reprisal; concerned that formal complaints will cause unnecessary delays when pursuing permits and other government approvals. They may also fear potential loss of market share in retaliation for filing a complaint against a state-owned business. According to a 2006 report from McKinsey & Company, “state-owned enterprises still control the most important resources—especially capital.”

Other reasons given for not using remedial procedures include insufficient evidence or information to support a complaint under Chinese law; no expectation of advantage or profit, and the prohibitive cost of pursuing legal remedies. Rather than file a formal complaint, some businesses consider infringement to be “acceptable losses.” A foreign corporation may be able to absorb a certain amount of loss from trademark infringement when such loss is offset by profits gained from expansion into the Chinese marketplace. When IP problems become insurmountable, some businesses set up anti-counterfeiting fraud departments to protect brand equity and other intellectual assets.

In China, responsibility for IPR protection is diffused across many different administrative enforcement authorities. With the institution of recent reforms, it is relatively easy to research the applicable laws and regulations; however, finding an administrative agency willing to take on a particular concern may be more difficult, though not insurmountable. Accordingly, the range of enforcement options can be daunting at times. On the occasion that a claim is inadvertently misplaced or evidence gets lost, a case can be perpetually under investigation or move from one agency to the next with overlapping jurisdiction. These or similar experiences may cause rights holders to become disillusioned and deter them from filing infringement claims in China.

Because of its complexity, the Chinese IPR enforcement system requires patience, knowledge, good relationships and local cooperation.

With regard to judicial claims, the regulations are clear. A registered

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144. "With new regulations coming out all the time, it's usually possible to find a regulation or an agency to fit the concern. There is lots of bouncing back and fourth. This creates lots of difficulties. Finding the right branch and the right authority can be difficult." Interview with Min (Amy) Xu, Esq., Dorsey & Whitney, LLP (Aug. 10, 2006).
A trademark owner may file a civil lawsuit in the place where: (1) the trademark infringement occurred; (2) where the infringed products were stored, sealed or detained; or (3) where the infringer is domiciled. Foreign rights holders are allowed to file complaints with the Economic or Intellectual Property Division of the People's Intermediate Courts nearest to one of these three locations.145

Summary of Trademark Enforcement Routes

The protection of the exclusive right to use registered trademarks, copyrights and patents in China is enforceable under legal codes through three different means: (1) administrative enforcement, (2) civil enforcement and (3) criminal enforcement. Within this enforcement system are a number of administrative authorities (government agencies and offices within) and there are different levels within the People's Courts authorized by the State Council of the People's National Congress to enforce Chinese IP laws and regulations. Special IP tribunals have been set up within the People's Court to hear IP cases. There are also diplomatic channels and alternative enforcement measures.

The following is an outline of key trademark enforcement routes followed by a brief summary of each one. For a graphic overview of the primary Chinese trademark enforcement structure (excluding alternative measures), please refer to the flowchart in the appendix along with the list of acronyms.

**Administrative Routes (under local control)**

(1) State Administration for Industry & Commerce (SAIC)

(2) General Administration of Quality Supervision, Inspection and Quarantine (GAQSIQ)

(3) General Administration of Customs (GAC)

(4) Other agencies may have jurisdiction in matters involving certain types of IP violations (i.e., copyright infringement, patent infringement, unfair trade practice, etc.)

*The office with jurisdiction is authorized to handle the case. All of these agencies have the authority to transfer criminal cases over to the Public Security Bureau (PSB) for further investigation. If there is sufficient evidence, the PSB may turn the case over to Supreme People's Protectorate (SPP) for prosecution.*
Civil Route (under central control)

(1) Civil Cases – Intellectual Property Tribunals in the Intermediate People’s Courts and the High People’s Courts

Criminal Route (under state control)

(1) Criminal Cases – Public Security Bureau (PSB) for investigations
Supreme People’s Protectorate (SPP) for prosecution in the People’s Courts

Diplomatic Routes (international channels)

(1) China Association of Enterprises & Foreign Investment (CAEFI)
(2) Quality Brands Protection Committee (QBPC)
(3) International Anti-Counterfeit Coalition (IACC)
(4) World Trade Organization (WTO)**
(5) World Intellectual Property Organization (WIPO)**

** Work through national trade representative and ministry of commerce

Non-Litigious Routes (alternative measures)

(1) Educational Letters and other forms of communications used to gain voluntary compliance
(2) Cease & Desist Notices***
(3) Contractual Leverage (e.g., financial penalties, sanctions, revoke privileges and/or cancel the licensed trademark)
(4) Negotiated Settlements

*** It is customary for Chinese administrative authorities to issue cease and desist letters in situations where there is sufficient evidence to merit this action. It is less common for rights holders to issue cease and desist letters directly.

Legal Measures: Overview of Enforcement System

China has a complicated administrative structure for IP protection. At the
top, the State Council of the People’s Republic of China governs all IP matters. Beneath the State Council there is both an ‘internal’ and an ‘external’ administrative process. External coordination is handled by the State Intellectual Property Office (SIPO). SIPO communicates with the World Intellectual Property Office (WIPO), the World Trade Organization (WTO) and other international IPR regulatory bodies. In addition, SIPO has responsibility for the dissemination of information to the public about trademark, copyright and patent laws, regulations and enforcement procedures.

Internally, there are many agencies involved with IP protection. While SIPO communicates on all IP matters, internally it is responsible only for patent registration and enforcement actions. The State Administration for Industry and Commerce (SAIC) handles trademark registration and enforcement. The General Administration of Quality Supervision, Inspection and Quarantine (GAQSIQ) is also involved in infringement matters, but to a lesser degree. Its primary responsibility is ensuring product quality and standards. GAQSIQ handles trademark infringement when the infringed products are of substandard or inferior quality. National Copyright Administration (NCA) handles copyright registration and may impose administrative penalties to enforce the copyright law; although due to a shortage of personnel, the NCA generally may prefer that infringement matters be taken up with the People’s Court.

Administrative authorities can mediate disputes and impose administrative penalties to enforce the law. For example, under the trademark law, administrative authorities have the power to issue cease and desist orders to stop infringing acts, and to confiscate and destroy infringing goods. They neither have the authority to issue preliminary injunctions nor to award damages. These remedies are reserved for civil and criminal cases handled through the People’s Courts.

In addition, the General Administration of Customs in China (GAC), the Public Security Bureau (PSB) and Supreme People’s Protectorate (SPP) are all involved with IP protection at some level. These authorities handle enforcement of more serious infringements such as commercial scale piracy and counterfeiting. The PSB and SPP deal with criminal cases primarily on a referral basis.

The SAIC, SIPO, GAQSIQ, NCA, GAC, PSB and SPP are totally separate enforcement agencies that operate under the State Council, each with its own local and regional offices. Information about individual cases does not readily flow between them. Cross-jurisdictional enforcement will likely remain a challenge until formal procedures have been developed to manage the process.

It is not unusual for a brand protection incident to include multiple violations of law. For example, a trademark infringement could include a
copyright or patent infringement, unfair trade practice and a breach of contract. In such a case, many different agencies have partial jurisdiction. Without cooperation between such agencies, a case may be bounced among various agencies without resolution for long periods of time.

Choosing the right authority to initiate an investigation into a particular case can be a challenge. The appropriate choice of administrative authorities can depend on a number of variables including geographic jurisdiction, specific aspects of laws or regulations, the severity of the violation and quality of supporting evidence, the level of authority, the availability of resources within the authorized agency, the willingness to undertake an investigation into the matter, who does the asking, conflicts of interest, and other priorities and political concerns at the time. Naturally, the experience and sensitivity of the complainant in regard to Chinese business culture and methods can aid in the enforcement process.

**Administrative Enforcement - SAIC**

The Trademark Office of the State Administration for Industry and Commerce (SAIC) is the lead agency responsible for enforcing the Chinese Trademark Law. Within the Trademark Office is the Trademark Review and Adjudication Board (TRAB), which has the authority to review trademark registration decisions.

Within Administration for Industry and Commerce’s municipal offices, the Trademark Division also has the authority to investigate infringement cases that occur within its jurisdiction.\(^{146}\) There are Administration for Industry and Commerce (AIC) offices located within the following geographic jurisdictions: state, provincial, prefecture, county, and town or village. Pursuing infringement cases through local offices of the SAIC is generally the preferred route, although this could change. It is considerably faster and less expensive than litigation. Administrative enforcement teams have the right to

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\(^{146}\) *Authority of the Administration Departments for Industry and Commerce in Investigating Trademark Infringement Cases,* INTELLECTUAL PROPERTY PROTECTION IN CHINA, May 30, 2006, available at [http://www.ipr.gov.cn/ipt/en/info/Article.jsp?a_no=5204&col_no=243&dir=200605](http://www.ipr.gov.cn/ipt/en/info/Article.jsp?a_no=5204&col_no=243&dir=200605). When investigating and handling an act suspected of infringement of a registered trademark, the administrative authority for industry and commerce may exercise the following functions and authorities: to inquire of the interested parties, and to investigate the relevant events of the infringement of the exclusive right to use the trademark; to read and make copy of the contracts, receipts, account books and other relevant materials of the interested parties relating to the infringement; to inspect the site where the interested party committed the alleged infringement of the exclusive right to use the trademark; and to inspect any articles relevant to the infringement; any articles that prove to have been used for the infringement of another person’s exclusive right to use the trademark may be sealed up or seized.

*Id.*
enter facilities suspected of harboring counterfeit goods. They may confiscate the infringing merchandise and levy fines.

Traditionally, local and regional offices have had the authority to mediate trademark disputes. This may be changing as the State Council chips away at the agency’s traditional responsibilities. These days, decisions on matters of interpretation of law are being made more often within the People’s Courts. In addition, administrative decisions may be appealed in the People’s Court.147

In situations where a rights holder has encountered a blatant IPR infringement that may cause serious harm, the rights holder may undertake a “preliminary” investigation before turning the case over to the authorities. To ensure compliance with Chinese law, which places restrictions on private investigations, such investigation should be limited to certain forms of “market research.”148 Rights holders may contract with one or more private investigation firms or a consulting firm, preferably one with local knowledge and good contacts. Multinational organizations with famous brands may also consider maintaining an internal staff to assess the validity of the claims, gather the facts and evidence, identify the relevant parties, prepare reports so complaints may be filed with the proper authorities, monitor the progress of each case, maintain a database on infringement activity, and watch for infringement trends that could adversely affect the brand.

Administrative Enforcement – GAQSIQ

When an infringement involves substandard quality, as is often the case with counterfeit goods, then the General Administration of Quality Supervision, Inspection and Quarantine has the authority to investigate the matter. AQSIQ offices are responsible for ensuring product quality and standards in China. The AQSIQ is a lower level office of the GAQSIQ, which falls under the authority of the State Council. In 2001, the State Quality Technical Supervision Bureau (SQTSB) was folded into GAQSIQ. The AQSIQ operates offices at the provincial, prefecture, and county levels. Unlike the AIC, the AQSIQ does not operate at the township or village level. AQSIQ handles certain types of counterfeit cases under its State mandate to protect genuine origin products.

Internal competition between the offices of the AIC and the SQTSB has

147. "Where any interested party is dissatisfied with an administrative decision by the SAIC, the party may, within fifteen days from the date of receipt of the notice, institute legal proceedings in the People's Court, according to the Administrative Procedure Law of the People's Republic of China." Trademark Law of the People's Republic of China, supra note 94, art. 53.

led to an increase in the number of enforcement actions in recent years.\textsuperscript{149} An estimated ten to fifteen percent of the infringement cases are being handled by AQSIQ. Although this enforcement route is being used more often for infringement cases, it is still not used as frequently as the local offices of the SAIC.

\textit{Administrative Enforcement - GAC}

The General Administration of Customs in China (GAC) has limited jurisdiction over IP protection. In accordance with the Regulations of the People’s Republic of China on Customs Protection of Intellectual Property Rights (March 2004), the GAC has the authority to ban infringing goods from importation and exportation. China Customs has 48,000 staff maintaining 347 ports of entry.\textsuperscript{150} Customs officials have the authority to hold suspect shipments for inspection. If inspection by Customs reveals an infringement, officials have the legal authority to confiscate the infringing goods and impose a fine.

In addition, if a rights holder suspects a shipment of infringing goods, then the rights holder may present an Application for Detention along with evidentiary documents to Customs, requesting that the suspected shipment be detained for inspection\textsuperscript{151} Recordation for Customs protection is necessary before a rights holder can request detention of a suspected shipment. When requesting that Customs detain a shipment, the rights holder must provide security in the amount not exceeding the value of the goods.\textsuperscript{152}

If Customs discovers a shipment of infringing goods, it will notify the rights holder of record and the holder will have three days to respond in conformity with provision in Articles 13 and 14.\textsuperscript{153} The rights holder may apply to the People’s Court for an order to cease the infringing act or for preservation of property.\textsuperscript{154}

The IP rights holder is obligated under Article 2, to pay all relevant expenses for warehousing, maintenance and disposal of the goods incurred by Customs. If the rights holder fails to pay, Customs may deduct these expenses from the rights holder’s security payment or bond. By bringing an action

\textsuperscript{149} \textsc{Mertha, supra} note 6, at 192.
\textsuperscript{150} \textsc{Gen. Admin. of Customs of the People’s Republic of China, Brief Introduction to China Customs, available at http://english.customs.gov.cn/default.aspx (last visited Oct. 28, 2006)}.
\textsuperscript{151} \textit{See} Regulations of the People’s Republic of China on Customs Protection of Intellectual Property Rights, \textsc{supra} note 135, arts. 12-13.
\textsuperscript{152} \textit{See id.} art. 16.
\textsuperscript{153} \textit{See id.}
\textsuperscript{154} \textit{See id.} art. 23.
against the infringer in civil court, the rights holder may reclaim such paid expenses as reasonable expenses incurred in halting the infringement.

Infringing goods may be confiscated, auctioned after removing the infringing features, used for public works or destroyed by Customs if the rights holder does not buy the infringing goods.\textsuperscript{155} If Customs does not determine that the detained goods have infringed intellectual property rights or, alternatively, if the People’s Court holds that there is no infringement after the rights holder has requested that Customs detain a suspected shipment, the rights holder is apparently liable for damages, according to the law.

Customs agents around the world play an important role in the protection of intellectual property. China Customs is coming under increased pressure from the world trade community to step up its enforcement efforts to prevent the exportation of pirated and counterfeit goods. China’s law enforcement authorities have stepped up the number of raids resulting in the seizure of pirated and counterfeit goods (although still only a small percentage of the total).\textsuperscript{156} There are more criminals being investigated and prosecuted for IPR violations in China. In addition, but perhaps to a lesser degree, efforts are being made to crack down on corrupt officials within the system. Despite some recent successes, however, the GAC has been unable to completely stem the flow of counterfeit goods across the Chinese border. Progress is slow, but nonetheless moving in the right direction.\textsuperscript{157}

\textsuperscript{155} See id. art. 27.

\textsuperscript{156} As an example of a successful seizure, the GAC announced on May 17, 2006, that ten containers containing over 55,000 articles of fake shoes, headgear, shirts and suits were seized by Tianjin, Customs. Among the brands seized were Adidas, Puma, Reebok and Lacoste. Gen. Admin. of Customs of the People’s Republic of China, http://english.customs.gov.cn/ Default.aspx?TabID=4712&InfoID=24899&ctl=InfoDetail&mid=12909&ContainerType=G&ContainerName=_default&C ontainerSrc=notitle.ascx (last visited Aug. 29, 2006).

Statistics for China Customs IPR Seizures (in 2005)

Customs Cases for IPR Category (Year of 2005)

<table>
<thead>
<tr>
<th>IPR Category</th>
<th>Case</th>
<th>%</th>
<th>Value</th>
<th>%</th>
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<td>1106</td>
<td>91</td>
<td>87,750,000</td>
<td>88</td>
</tr>
<tr>
<td>Copyright</td>
<td>67</td>
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<td>999,000</td>
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<tr>
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<td>3</td>
<td>11,040,000</td>
<td>11</td>
</tr>
</tbody>
</table>


In order to exercise the right to enforce the General Administration of Customs Law within the People’s Republic of China, rights holders must have all the necessary paperwork completed and be prepared to post bond and cover the relevant expenses. Paper shuffling can delay enforcement measures and may preclude GAC from taking action against an infringement. For rights holders in high risk industries, it may expedite matters to assign company brand protection and anti-counterfeit teams responsibility for preparing Customs’ recordation forms, Applications for Detention and evidentiary documents along with gathering information, evidence and writing reports. They can work in concert with corporate and outside legal counsel.

Judicial Enforcement – Civil Complaints

The judicial system in the People’s Republic of China consists of the Supreme People’s Court (SPC) and local People’s Courts at different levels. There are High People’s Courts, Intermediate People’s Courts and Primary People’s Courts. There are also Special Courts dedicated to military, maritime and railway transportation. The structure of the People’s Court is composed of the civil, criminal and administrative divisions and the enforcement, research and general offices.

The present legal system dates back to the 1970s. It is a system based on the rule of law and is not a civil code system. For this reason, China’s legal system has more in common with Japan and Germany than the United States and the United Kingdom. Laws are subject to interpretation of statutes not on

case law and precedent.

The courts are authorized to hear administrative, civil and criminal cases and to accept appeals and petitions for retrial against judgments rendered in the lower courts. SPC has the authority to give judicial interpretations and solve “knotty” legal issues. Since 1993, the SPC has maintained a tribunal for intellectual property rights protection.

Civil complaints regarding infringements may be filed with the AIC or directly with the People’s Court. Cases of appeal and trademark infringement cases of a serious nature can be filed with the Intellectual Property Tribunals of the Supreme People’s Court.

When filing an application, the complainant is required to state the reason for the application, show that the alleged infringer is currently or is about to carry out an infringement and include the alleged products as supporting evidence. Applicants may file for evidence preservation when it can be adequately proven that evidence may disappear or will be difficult or impossible to obtain later on.

An application for a pre-trial preliminary injunction can also be submitted when there is sufficient evidence to merit the issuance of a temporary cease and desist order by the courts. Under Article 58, the rights holder applying for preliminary injunction may be required to provide security or a bond prior to the issuance of an injunction. As with all preliminary injunctions, irreparable harm must be shown. The court has forty-eight hours to respond.

In the complaint, the rights holder must demonstrate that the alleged infringement involves: (1) a mark identical or similar to the rights holder’s registered trademark; (2) an infringement connected with or affixed to similar goods or services; (3) unlawful activity interfering with the registered right holder’s exclusive rights; or; (4) causing the registered trademark holder economic loss. The statute of limitations for trademark infringement is two years.

In China, the cost of enforcement after an infringement has occurred can exceed the value of the financial remedy. And, as in the United States, collection of judgments may be a costly and unproductive exercise.


162. U.S. EMBASSY, BEIJING, CHINA, supra note 126.

163. Id.
Nonetheless, suits involving intellectual property have risen substantially over the past two years.\textsuperscript{164}

There are strategic advantages for filing civil complaints over the use of administrative procedures in certain situations. A preliminary injunction, once issued, could seriously affect the business and the livelihood of the defendant. A judgment in favor of the infringed rights holder may send a message to other potential infringers that they, too, could be tied up in court. Making these judgments public could serve as a deterrent to infringers who might not be able to afford the time and expense of mounting a defense. Upon filing, a civil complaint becomes a public dispute; this action alone can bring shame to defendants. The loss of face may be incentive enough to force a settlement. These are all viable reason for pursuing civil actions.

In China, the judicial route is a strategy that is being used by more Japanese invested in Chinese businesses than Americans. Japanese-funded enterprises in China are collecting evidence of infringements and using this evidence to encourage Chinese law enforcement officials to enforce existing intellectual property laws. Contrary to the traditional behavior of the Japanese which avoids confrontation and litigation, these experts will use the evidence to bring Chinese businesses to court.\textsuperscript{165}

\textit{Judicial Enforcement – Criminal Complaints}

In accordance with the Trade-Related Aspects of Intellectual Property Rights Agreement of the World Trade Organization (TRIP Agreement), China is obligated to provide remedies for criminal enforcement of commercial scale piracy and counterfeiting.\textsuperscript{166} Under Chinese law, egregious IP infringement cases are the jurisdiction of the Public Security Bureau (PSB). The PSB may undertake a criminal police investigation. If the infringement is “serious” enough, the PSB may recommend prosecution by the Supreme People’s Protectorate (SPP).\textsuperscript{167}

If a civil case escalates to a criminal enforcement matter, it must be

\textsuperscript{164} "The number of suits involving intellectual property—trademarks, patents and copyrights—soared 32 percent in 2004 and another 20.6 percent in 2006, reaching 16,583 cases last year.” Tim Johnson, \textit{Putting Pirates on the Plank}, STAR TRIB. (Minneapolis, Minn.), Aug. 23, 2006, at 1D.


\textsuperscript{167} Factors to consider when determining if a case merits criminal prosecution are: (1) the quantity of infringing products produced; (2) amount of illegal gain; and (3) potential to harm public health and safety. U.S. EMBASSY, BEIJING, CHINA, \textit{supra} note 126.
transferred to the PSB, although some administrative agencies have been reluctant to transfer cases because it adversely affects their case count and the revenue generated from fines collected.\textsuperscript{168} Although rarely done, owners of registered trademarks also have the right to initiate the prosecution of criminals under the Criminal Law.\textsuperscript{169}

Registered trademark owners and registered licensees are entitled to file complaints with the public prosecutors' office or with the police if their rights have been infringed by a criminal act such as counterfeiting or piracy. For those who cannot afford the time and expense associated with civil lawsuits, and who have enough information and evidence to support a criminal complaint, the criminal enforcement route offers another option. This route can be used to pursue individuals and companies that habitually counterfeit others' goods, whereas the civil and administrative routes may be less effective in these situations (i.e., when one business is shut down, another one may pop up).

As the law is currently interpreted, criminal counterfeiting and piracy are based upon actual transactions—the unlawful sale of infringing goods. Unlike France, for example, China and the United States do not have laws that make purchasing or using infringing goods illegal. It is important to note, however, that the U.S. Immigration & Customs Enforcement Service (ICE) has the authority to confiscate and fine people for transporting infringing goods into the United States from China and other locations outside the country. Obtaining evidence to support a claim of an unlawful sale in China is not an easy task. Preserving the chain of custody and, when necessary, applying to the courts for evidence preservation is a job best left to professionals.

Article 140 of the Criminal Law sets forth sentencing guidelines based upon the earnings from the sale of infringed goods.\textsuperscript{170} Notably, warehousing,

\textsuperscript{168} \textit{Id.}

Some foreign trademark holders have complained that local AICs rarely turn cases over for criminal prosecution due to inter-agency conflicts with local government. Administrative agencies may have the financial incentive to adjudicate cases that are more appropriate for criminal prosecution because the administrative fines paid by the respondent go to the coffers of the administrative agency.

\textit{Id.}

\textsuperscript{169} The SPP and Ministry of Public Safety established standards for prosecution of economic crimes on April 18, 2001. As explained by the U.S. Embassy in Beijing in the \textit{IPR Report}, these standards may be applied to counterfeiters under Articles 61, 62 and 63 of the \textit{Provisions on Standards for Prosecution of Economic Crimes}. \textit{Id.}

\textsuperscript{170} If the earnings from sales are more than RMB50,000 and less than RMB200,000: (1) a fixed term of imprisonment not to exceed two years and; (2) shall also, or only, be fined not less than half nor more than twice the amount of profit from illegal sales. If the earnings from sales are more than RMB200,000 and less than RMB500,000: (1) a fixed term of imprisonment between two to seven years and; (2) shall also be fined not less than half nor more than twice the amount of profit
distribution and transport are not factored into the sentencing guidelines. The lower the earnings, the lower the jail time and fines. Sentences can range from less than two years to no more than fifteen years. Fines can range from one-half to double the value of earnings from the infringed goods.

*Diplomatic Enforcement Channels*

When rights holders become victims to serious violations of intellectual property laws in China, from a practical standpoint there may be a limit to what any one individual or company can do on its own. This is particularly true if the violation escalates to a criminal matter or a violation of international law. Government assistance may be needed to resolve the matter. The U.S. facilitates the submission of IPR cases through China’s Ministry of Commerce to relevant Chinese agencies. There is an inter-agency team that reviews cases where the Chinese government fails to provide adequate protection of IPR to U.S. businesses. After vetting the cases, those that merit attention are sent to the Chinese government to facilitate their resolution. Through the new Case Referral Mechanism, the U.S. has submitted five cases to the Chinese to date.171

In April 2006, the Bush Administration announced its “Strategy for Targeting Organized Piracy.”172 Within the plan was an announcement to expand the United States’ IP attaché program in China and add new attaché positions in other locations around the world. The U.S. now provides training for embassy personnel to be effective first responders to IPR issues. Their role in the fight against piracy and counterfeiting is to “identify problems abroad and assist rights holders before fakes enter the market and the supply chain.”173 Of the top five trading partners from IP-related seizures to date, sixty-eight percent of the value of IPR seizures entering the United States originated in China. One of the duties of the National IPR Center, jointly run by Homeland Security’s Immigration and Customs Enforcement (ICE)174 and

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172. Id.

173. Id.

the Department of Justice's Federal Bureau for Investigation (FBI),\textsuperscript{175} is outreach and training with foreign governments. Since 2001, the U.S. government has conducted more than fifty training programs with Chinese government officials.\textsuperscript{176}

Since becoming a member of the World Trade Organization,\textsuperscript{177} the Chinese have come under increased pressure to play by the rules of international trade. If the Chinese administrative enforcement and judicial enforcement routes fail to bring about a satisfactory result, then international rights holders may have other alternatives. For example, the matter may be taken up with the rights holder's foreign trade representative. This avenue should be reserved for incidents involving an alleged violation of a bilateral trade agreement such as the Trade-Related Aspects of Intellectual Property Rights of the World Trade Organization.

The Department of Commerce and Office of the U.S. Trade Representative are more inclined to become involved in a case where evidence indicates that China is failing to comply with its enforcement obligations under the TRIPS Agreement.\textsuperscript{178} Although foreign governments are obligated to respect China's right to govern itself as a sovereign nation, where governmental practices conflict with an international trade agreement, member states may initiate an objection. It is up to national trade representatives to determine if a case merits pursuing under the terms of a bilateral agreement. The WTO and WIPO have provisions outlining the proper procedures for challenging a member nation accused of violating their international agreements.\textsuperscript{179}

The Department of Commerce may inquire about the status of an IPR case brought before the People's Court and contact Chinese government officials about concerns related to effective administration of legal remedies. However, while the Department of Commerce can monitor the case, it cannot directly

\textsuperscript{175} For more information about the Federal Bureau of Investigation see http://www.fbi.gov (last visited Nov. 14, 2006).

\textsuperscript{176} OFFICE OF THE IP COORDINATOR, supra note 171.

\textsuperscript{177} For more information contact the World Trade Organization at http://www.wto.org (last visited Aug. 29, 2006).


intervene in the case.\textsuperscript{180}

The diplomatic route can be a viable option. However, involving people at the highest levels of government may bring about other problems. For example, going over the heads of local officials can ruffle feathers. The loss of face, may hamper other enforcement efforts over the long run.

Another route to consider is that of teaming up with like-minded businesses who share an interest in stopping large-scale criminal counterfeiting and piracy. There are anti-counterfeit coalitions and industry trade associations that rights holders can join to advocate collectively for stronger legal reforms, equitable enforcement, training programs and greater anti-counterfeit measures.

One way members of these groups can help each other is through sharing information about criminal counterfeit and piracy activity as long as such information sharing does not violate antitrust laws. One effective method of sharing information about criminal activity is the reporting of such activities to Interpol, an intergovernmental agency that maintains a criminal database.

Another approach is to file joint action suits against infringers. Coalition members can also file applications with administrative authorities in China, requesting raids in cases where the evidence of infringement merits such action such as when pirated brands infringing the rights of multiple owners are manufactured in one facility. By working collectively on a case, member organizations are more apt to reach the minimum thresholds for trademark enforcement at any given location. Authorities are empowered to investigate and seize all the brands named in the complaint at one time. Another benefit is that participating organizations can spread the cost of IPR enforcement over a number of companies and a number of brands. This makes it more economically conducive to protect intellectual property assets.

The Quality Brands Protection Committee\textsuperscript{181} (QBPC) was renamed in 2000 from the China Anti-Counterfeit Coalition (CACC). QBPC was folded into the China Association of Enterprises & Foreign Investment. This makes the QBPC a quasi-government agency that advocates for the protection of well-known brands. It has fourteen industry working groups including one for sporting goods. They work cooperatively with Chinese central and local

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\textsuperscript{181} "The QBPC mission is to work cooperatively with the Chinese Central and local governments, local industry, and other organizations to make positive contributions to intellectual property protection in the People’s Republic of China." \textit{Fact Sheet, QBPC}, http://www.qbpc.org.cn/en/about/about/factsheet (last visited Aug. 19, 2006).
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governments in an effort to protect intellectual property.\textsuperscript{182} QBPC has been very active in IPR legal reform within China.

Similarly, the International Intellectual Property Alliance\textsuperscript{183} (IIPA) originated in 1984. It is headquartered in Washington D.C. This organization is dedicated to protecting products against counterfeiting and piracy. It achieves its mission by conducting training for domestic and foreign law enforcement officials and participants in programs aimed at improving intellectual property enforcement standards.

Finally, the third group is the International Anti-Counterfeit Coalition\textsuperscript{184} (IACC), formed in 2001. This is an international non-profit foundation headquartered in the United States. Its members are U.S. based multinational

\textsuperscript{182} According to its website, QBPC's goals for 2006 are as follows:

1. Strengthen the QBPC's role as a bridge between China and the international community, as well as facilitating international cooperation in IP enforcement;

2. Work collaboratively with the Chinese central government on building regional IP strategy into the regional economic/social development plans, supporting China's 11th Five-Year Plan, and fighting local protection continuously and effectively;

3. Strengthen criminal and administrative enforcement;

4. Strengthen coordination with both domestic and overseas enforcement departments at all levels, and effectively crack down on cross-border trade concerning IPR infringement;

5. Build the QBPC into a comprehensive IP professional organization and work more closely with Chinese domestic brands;

6. Increase public awareness of IPR protection and advocate the concept of prevention by continuing public education; and

7. Encourage greater presence of existing member companies in QBPC activities, and realize membership retention, further recruitment and improved communication.


The IIPA is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. IIPA is comprised of seven trade associations, each representing a significant segment of the U.S. copyright community. These member associations represent 1,900 U.S. companies producing and distributing materials protected by copyright laws throughout the world.


The IACC Foundation is a non-profit 501 (c)(3) organization which sponsors and conducts educational seminars, conferences and workshops to promote international public awareness of the problems associated with the commercial counterfeiting and piracy of trademarks, copyrights, industrial and intellectual property. The Foundation also supports and conducts research relating to the protection of intellectual property rights and disseminates such information.
corporations, trade associations and U.S. government agencies. IACC advocates for counterfeit enforcement through education. Its educational training programs and seminars are aimed at improving intellectual property enforcement standards domestically and abroad.

Alternative Measures

Not all infringements are serious enough to warrant the involvement of government authorities. A surprisingly large volume of ambush marketing incidents arise from a lack of awareness and understanding on the part of the infringer.\(^\text{185}\) This can happen, for example, when enthusiastic supporters or fans use a registered trademark for commercial purposes without requesting permission from the rights holder. The infringer may be an individual, small business or municipal agency. The infringer may have acted in good faith, unaware that authorization was required. For unwitting individuals and businesses, education and communication are very effective tools to combat trademark infringement. Simply by communicating with constituents, potential infringers and actual infringers whose violations are less severe, rights holders can curtail many infringing activities.

Throughout China, there are still many people unaware of the intellectual property rights granted under the law to registered trademark owners. It is understandable in a nation where intellectual property was traditionally considered socialistic public property and not privately-owned lawful property until the 1980s. Through education and communication, the IPR owner can often obtain voluntary compliance.

There are other measures that can be used to obtain voluntary compliance. Where contractual leverage is available, it may be useful in forcing compliance. A well-written contract may provide leverage through sanctions, fines and loss of a trademark license in the event of non-compliance.

For violations that pose only a moderate threat, it is often possible to negotiate a settlement in private. Negotiated settlements are not advised when the infringement is of a criminal nature involving trademark counterfeiting and

\(^{185}\) Facsimile from BOCOG Marketing Dep't (July 31, 2006) (on file with author).

Statistically, the Marketing Department, reported through the Legal Department to the government law enforcement authority more than 30 cases, which include 12 cases of counterfeit merchandise, 15 cases of unauthorized use of Olympic marks in advertising and 5 cases of other unauthorized commercial uses of Olympic marks. Some of the ambush activities do not directly or seriously violate the law. In these cases, BOCOG will directly contact those ambushers and ask them to stop any further actions. According to our statistics over 30 such activities, among which 4 cases involve press release and 27 cases are unauthorized commercial uses of Olympic marks.

\(^{*}\) Id.
copyright pirating rings. Rather than placing the brand protection team in harms way, these professional syndicates should be dealt with by law enforcement officials.

For those who knowingly and willfully infringe upon registered trademarks and do so for commercial gain, stringent measures are called for. Typically, legal sanctions in addition to proactive prevention measures work best.

**Threat Assessment & Enforcement Modeling**

To determine the best route of enforcement, one must first assess harm; i.e., what “harm” has been caused by a particular infringement and what is the appropriate level of response? Was the alleged violation a conscious, malicious attempt to commercially profit and will it result in substantial harm to rights holders or the public?

Another question to consider is at what point does it move from a private matter to one that involves government authorities? Recourse through governmental options may not be warranted until the violation has caused, or evidence indicates it may cause, substantial harm. This would be a threat worth taking very seriously.

A damage assessment report may be needed to make a realistic determination of the severity of an incident. The appropriate course of enforcement action will depend on the preliminary investigation. At this point a determination can be made as to which enforcement route is most appropriate.

It is possible to assess potential harm from future threats by simply analyzing historic data compiled from actual infringement cases. An analysis of the threat level can then be used to develop an Enforcement Model for the brand protection plan. Brand protection specialists can help you develop an effective action plan, whereby each threat level is matched with a corresponding enforcement action. By conducting a threat analysis and preparing an enforcement plan for management review and approval in advance, the brand protection team is empowered to respond quickly, in accordance with management directives, advice of counsel, and in compliance with local and state laws and regulations.

An enforcement plan follows an outline based upon perceived level of threat. Voluntary compliance is the lowest enforcement action. From this point forward, enforcement actions escalate in intensity to the corresponding threat level. Criminal enforcement is the highest and most serious measure. As a

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general rule, it is advisable to resolve disputes with the lowest enforcement measure, except when an infringement is severe.

Low Threat Assessment & Potential Enforcement Action – A “low” threat level usually warrants an equally low level of response. These are unwitting infringers unaware of the law, or, a particular trademark was registered to another party. Or, they may be within the distribution channel, under the impression that their purchase or participation was legitimate. Educational seminars, workshops and informational letters may be enough to ward off this level of threat.

In the case of a low level infringement, an educational letter, phone call or meeting with the infringer may be warranted to inform him or her about the trademark owner’s legally protected rights and the company’s trademark use policy. After educating, a request for voluntary compliance can be made to stop the offensive activity. This should often be enough to obtain voluntary compliance. Monitor the case. If voluntary compliance is not forthcoming, then escalate the case to a higher threat level.

Moderate Threat Assessment & Potential Enforcement Action – A “moderate” threat is one that has the potential to harm brand image and reputation. It may cause confusion as to the source of ownership or sponsorship. If left unchecked, the infringing activity could erode market share or result in bad publicity. But if generally not large in scale, it may not likely cause substantial loss of profit or cause any physical harm.

A violation perceived as a moderate threat can be handled several different ways. The choice of action depends upon whether the infringer has an existing relationship or potential future relationship with the rights holder. These relationships often give the rights holder better leverage. If there is an existing contractual relationship with the infringer, the course of action becomes clearer.

Possible enforcement actions might entail sending a warning notice or engaging in negotiated settlement without formal mediation or court intervention. Both options could bring about voluntary compliance. Depending on the circumstances of the case, it may be necessary to request voluntary surrender of infringing goods, voluntary disclosure of other parties involved in the infringement, and to negotiate remedies for compensation of any losses or other damages. If these enforcement measures do not resolve the matter, it may escalate to a higher threat level.

High Threat Assessment & Potential Enforcement Action – A “high” threat level is one that has the potential to cause serious harm.

High threat levels often warrant administrative, civil or criminal proceedings depending upon the evidence uncovered during the preliminary
investigation. It may be advisable to involve local authorities at this time so they can undertake a more comprehensive investigation. Which authorities to involve will depend on the circumstances of a given case and a number of other factors previously outlined. For trademark infringement cases, it could be the jurisdiction of SAIC, GAQSIQ, GAC or another administrative bureau such as the SIPO.\textsuperscript{187} For cases that are criminal in nature, the PSB has the authority.

The judicial route may be needed to obtain a preliminary injunction to force cessation, to instigate a court ordered seizure, or to seek remedies for damages. In a civil action, it may be desirable to obtain a court ordered public apology from the infringer as part of the remedy and to make public the judgment including any fines or jail sentences. These public remedies can bring shame and hopefully deter other infringers. Criminal proceedings are the highest and most aggressive enforcement actions.

Finally, depending on the nature and severity of the violation, a high threat level might warrant the involvement of diplomatic channels.

\section*{VII. CONFRONTING THE CRIMINAL ELEMENT}

In this section, we will discuss two widely publicized concerns confronting foreign IP rights holders in China: (1) combating criminal infringement activities, and; (2) dealing with bureaucratic and sometimes corrupt officials. Criminal trademark counterfeiting\textsuperscript{188} and copyright piracy\textsuperscript{189} pose a serious threat to foreign brands.\textsuperscript{190} These illegal practices run rampant in China,\textsuperscript{191} to the point where some criminals have enjoyed the local

\textsuperscript{187}. The results compiled from 134 respondents out of 178 companies surveyed revealed the following breakdown of administrative measures used by the respondents: 53% SAIC, 39% GAQSIQ, 9% GAC, 1% SIPO and 1/2% other. MINISTRY OF ECONOMY, TRADE AND INDUSTRY, \textit{supra} note 143.

\textsuperscript{188}. "Counterfeiting, or the selling of fake or bogus merchandise, goes a step further by trying to pass the product for an original, as in the sale of an imitation Gucci bag." SHENKAR, \textit{supra} note 2, at 83.

\textsuperscript{189}. "Piracy or bootlegging, refers to the unauthorized production, distribution or use of a good, design, or technology via unauthorized means, such as copying software, imitating a patented industrial process, or selling a motorcycle based upon somebody else's design without permission and compensation." SHENKAR, \textit{supra} note 2, at 83.

\textsuperscript{190}. In February 2005, the cover story in \textit{BusinessWeek} revealed that "[t]he World Customs Organization estimates that counterfeiting accounts for 5% to 7% of global merchandise trade, equivalent to lost sales of as much as $512 billion [in 2004]. Experts believe China accounts for nearly two-thirds of all the fake and pirated goods worldwide." Frederik Balfour, \textit{Fakes}, \textit{B\textsc{usiness}W\textsc{eek}}, Feb. 7, 2005, at 56-57.

protectionism provided by a few corrupt officials.

"For years, Chinese authorities [have] turned a blind eye to the problem" because commercial counterfeiting and pirating activities helped fuel the Chinese economy, provide jobs and make products more affordable for consumers. Counterfeiters, pirates and even some officials generated a profit off the infringement of intellectual property. Cases of corruption have been reported over the years.

White collar crimes like trademark infringement are generally not considered serious offenses in China until they undermine the economic order, infringe upon personal and democratic rights and the property rights of citizens, disrupt the social order or pose a public health and safety concern.

Under the People's democratic dictatorship, a socialistic system ruled by the Chinese Communist Party, employment and most basic commodities were provided to Chinese citizens. During an economic downturn, Chinese businesses took on any work they could find that would enable them to keep factories operating. Because these factories provided employment and income for people in the community, local officials often looked the other way when they learned about IP infringements. It was not unusual for some factory managers to take advantage of workers by offering them opportunities (and sometimes requiring them) to make money at home on piecemeal work, thus giving rise to a cottage industry comprised of smaller, often unwitting counterfeiters.

Today, China has a worldwide reputation for counterfeiting and pirating. There is a huge market for "fakes" as domestic and foreign consumers flock to China's flea markets to buy fake purses (e.g., Gucci), watches (e.g., Rolex), shoes (e.g., Nike, Adidas and New Balance), clothing (e.g., North Face and Lacoste) and more. The demand for counterfeit goods will likely continue until the Chinese clamp down more aggressively on counterfeiters and their protectors. At the present pace, it may be a long time before Chinese authorities curtail the pervasive problems associated with criminal IPR infringement.

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2005_Special_301/asset_upload_file835_7647.pdf. Value of Chinese counterfeits seized before entering U.S. markets rose from $94 million to $134 million, and products originating from China accounted for 67% of all IPR-related seizures by U.S. Customs agents. Id.

192. Balfour, supra note 190, at 60.


194. "In a speech to the National Association of Manufacturers, Thomas Boam, the minister counselor, estimated that between 10 to 30 percent of China's GDP comes from piracy and
The international organized criminal element in China apparently has the assets required to operate global counterfeiting networks. These crime syndicates make use of digital technology, diversified sourcing, and multinational distribution to successfully counterfeit. Modern manufacturing makes it more difficult to distinguish the “fakes” from authentic goods. To make matters worse, China’s unsecured boarders, low infringement penalties, loose IPR laws and relaxed enforcement system have not sufficiently discouraged counterfeiters.\textsuperscript{195}

By maintaining low inventory levels at any one location, savvy counterfeiters can often avoid the high profile that attracts law enforcement—staying well below the minimum illegal product thresholds for prosecution.\textsuperscript{196} With relatively small fines and jail sentences, penalties available under the present laws are not strong deterrents. Relative to other countries, violation thresholds for criminal prosecution are high and the penalties are low in China.\textsuperscript{197}

The potential profit motive often outweighs the threat of jail sentences or fines that may be levied in a criminal judgment. Counterfeiters simply factor these penalties into their business plan along with a reasonable amount for the payment of bribes. In addition, counterfeiters purchase local “protection” to reduce the prospect of being prosecuted. Through the theft of intellectual property, they avoid the high cost of research, development, marketing and advertising. With this unfair advantage, it is little wonder counterfeiters and IP pirates can afford to finance their criminal activity and still generate a profit. In a story in \textit{BusinessWeek}, it was reported that “[c]ounterfeiting has become as profitable as trading illegal narcotics, and is a lot less risky.”\textsuperscript{198}

In addition to relaxed IPR enforcement, another challenge confronting foreign rights holders in China is inequitable enforcement of IPR laws. As

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\textsuperscript{195} The [Chinese] porous boarders also encourage the outflow bogus goods into neighboring countries and from there to other overseas markets. . . . The export of counterfeit and pirated goods does not constitute an actual sale according to Chinese law and hence is not considered a criminal offense. As confirmed by the WTO report to Congress, the Chinese Customs Service refuses to block exports of counterfeit goods even when presented with evidence.” SHENKAR, \textit{supra} note 2, at 94.
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\textsuperscript{196} “Beijing lowered the threshold for criminal prosecution of counterfeiters. Prior to the changes, an individual needed to have $12,000 worth of goods on hand before police could prosecute. It was easy to skirt that rule by spreading the wares around. Today, that threshold stands at $6,000 for counterfeiters caught with one brand and $3,600 for those with two or more . . . One big problem: too many scammers have ties to local officials, who see counterfeiting as a major source of employment and pillars of the local economy.” Balfour, \textit{supra} note 190, at 62.
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\textsuperscript{197} “The criminal process has a threshold level of 200,000 yuan (about $24,000) for firms and 50,000 yuan (about 6,000) for individuals. Not only are these thresholds high to begin with, but they also are counted per seizure . . . .” SHENKAR, \textit{supra} note 2, at 94.
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\textsuperscript{198} Balfour, \textit{supra} note 190, at 60.
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often the case, enforcement of IPR laws is affected by the strength of the relationships. When conflicts occur, those with the strongest relationships will most likely prevail. It is not surprising that local relationships typically prevail.199

Rights holders seeking IPR enforcement in China would do well to maintain a local presence through partnerships with Chinese companies200 and to develop strong working relationships with local authorities—those who can be trusted to do their jobs and enforce the law. It is also beneficial to develop relationships with local investigative agencies and consultants, particularly those that employ former investigators from the Public Security Bureau. They are in a position to help navigate the system. The locals know who can be trusted and who may be corrupt.

Chinese provincial authorities and party officials have great influence. They can also help mediate disputes.201 The Administration of Industry and Commerce has traditionally mediated infringement cases.202 If the parties are unsatisfied, they have the right to appeal the decision through Intellectual Property Tribunals in the Intermediate and High People’s Court. Officials have the ability to fast track civil and criminal cases. At the administrative level, it is not uncommon to discover laws and regulations frequently interpreted in favor of local complainants.203 For this reason, multinational companies are taking more cases directly to court where there is less likelihood of judgments being unduly influenced.

Mediation of trademark infringement disputes through the Administration for Industry and Commerce and adjudication through the People’s Courts are both viable enforcement options to those who know how to work the system and in whom they can place their trust.

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199. Government and party officials are more receptive to supporting the local concerns of domestic businesses over those of foreign rivals. In recent telephone interview a Worldwide Olympic Partner said, "When it’s in the [Chinese] government’s best interest, they’ll protect it. They’ll support it." Telephone Interview with Anonymous Worldwide Olympic Sponsor (Aug. 3, 2006).

200. "Partnering with local companies is key. It’s got to be the right ones." Interview with Michael Proman, Coordinator New Business Development and Marketing Partnerships, NBA Entertainment (Aug. 3, 2006.)

201. "The [Chinese] government can help broker a truce behind the scenes, if you want to settle as quietly as possible and not make it public. Develop relationships as high up as possible. Reach to the top decision-makers locally, like the mayor and the provincial party leader." Proman, supra note 200.


203. "If there is a right that is being infringed and it implicates both our company and your Chinese partner, it may get the attention of the government better if it involves a Chinese company." Interview with Ayala Deutsch, SVP & Chief Intellectual Property Counsel, NBA Properties, Inc. (July 27, 2006).
To the government's credit, there has been an increase in the number of cases handled through both the administrative and the judicial enforcement routes, although more cases continue to be handled by the SAIC.\textsuperscript{204} Current statistics would seem to indicate that the Chinese government is making an outward show of stepping up its enforcement efforts in the area of intellectual property rights protection.\textsuperscript{205} This increase in litigation is a sign that China is taking IPR more seriously.

The National IPR Protection Working Group Office of the Chinese government published "China's Action Plan on IPR Protection 2006,"\textsuperscript{206} a comprehensive plan affecting eleven governmental departments. The proposed plan was designed to "better protect the IPR, resolutely punish and combat various infringement and other illegal activities."\textsuperscript{207} If this plan is adopted and put into action, it will demonstrate China's commitment to address the IPR problems. However, it remains to be seen whether the measures outlined in the 2006 action plan are strong enough.

\section*{VIII. Proactive Prevention through Internally Generated Brand Protection Measures}

An often heard saying is that "if it sells well, China will most likely copy it." Any business can become a victim without strong prevention measures in place. Fortunately, prevention is the best and least expensive form of protection for intellectual property and branded products.

Evidence of trademark infringement often signals that a brand is in demand. While strong demand is good, the adverse effects associated with trademark infringement can be devastating to a brand. Trademark infringement may dilute brand value and erode market share. Trademark infringement also harms consumers by confusing the true identity of the owner, the origin of the goods, and the source of sponsorship. Substandard quality is common in counterfeit goods.

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\item \textsuperscript{204} "According to the statistics 49,412 trademark violation related cases covering different categories were investigated and dealt with by various levels of administrations for industry \& commerce across the country. Of these cases, 6,770 were foreigner-related, an increase of 23.2\% over 5,494 of 2004." \textit{China's Intellectual Property Protection in 2005}, supra note 51.
\item \textsuperscript{205} "In 2005, people's courts at all levels across the country accepted total 16,583 IP civil cases" (including unfair competition cases), up 20\% over the prior year. \textit{Id.} Of these, trademark cases accounted for 1782. In 2005, there were a total of 3567 IP criminal cases, an increase of 28\% over 2004. \textit{Id.}
\item \textsuperscript{207} \textit{Id.}
\end{itemize}
Making brand protection part of a company’s overall business plan preserves brand equity and goodwill and protects the company’s image, reputation and profit opportunities. It is important to engage every aspect of the business in the brand protection process both inside and outside the organization. Entities outside the organization to be involved include event organizers, sport facilities managers, producers, broadcast rights holders, sponsors, athletes, service providers, community partners, merchandise licensees and their suppliers, assemblers, distributors and retailers. Each one of them has a vested interest in the brand and should be made aware of their own interest in participating in the brand protection program. After all, the most important intangible asset is reputation. Protecting the brand helps protect the reputation of the business, its coworkers and its partners.

Additionally, a company must educate the public about intellectual property rights. Public consumers of a brand may be encouraged to report brand protection violations such as trademark infringements. Business partners may provide assistance and support, and be enlisted as allies in the fight against ambush marketing. Their cooperation in the protection of valued brands cannot be undervalued.

Internally, cross-functional integration of brand protection is necessary; therefore, all departments throughout the organization should participate. Because it permeates the entire organization, support from the chief executive officer (CEO) and chief operating officer (COO) is needed for a brand protection program to succeed. By making brand protection the responsibility of every person within the organization, the business can better protect its intellectual property assets from misuse and infringement.

Assemble a team of brand protection experts. Grant the brand protection team oversight responsibility for development and implementation of an anti-ambush marketing campaign. Much of the funding can come from departments responsible for executing the program and indirect expenses can be absorbed within the departments where expenses are incurred. Direct expenses should be allocated to the brand protection function. Using this financial strategy, the incremental cost to the business will appear less expensive and in actuality, may save the business money because prevention is considered to be the least costly form of protection.

Brand protection responsibilities traditionally reside within the Marketing and Legal Affairs Departments. This is appropriate as brand protection requires product knowledge, an awareness of the brand strategy and its target market, familiarity with the value chain (all activities through which the firm
creates value and competitive advantage\textsuperscript{208}), and experience with manufacturing or event operations and knowledge of trademark and contract laws.

Developing a brand protection program starts with trademark registration. Intellectual property assets should be registered in every country where products and services will be made or marketed. To ensure enforceability under Chinese trademark law, registration is a requirement. Unlike the United States, trademark registration in China dates back to the date of filing and not the date the product or service was first used in commerce. Therefore, the registration process in China should begin prior to manufacture, distribution or marketing in the Pacific Rim.

Additionally, a brand protection program should establish guidelines and standards for the use of the registered trademarks. Requirement that such guidelines be followed must be a condition of trademark use. Businesses should set up a "marks" approval process for the review and approval of each and every application in which the marks are used. Licensees should be monitored closely. While voluntary compliance is the goal, in the event of noncompliance, the licensed right to use the trademarks can be revoked. (The same holds true for copyrights and patents.) This is a strong deterrent, providing tremendous leverage. Another strategy used to ensure voluntary compliance is a "holdback" provision that establishes a financial penalty for noncompliance.

In order to facilitate an amicable resolution when a brand protection incident occurs, one must know what kind of trade-offs can be made without undermining brand value. This can be useful in negotiating resolutions.

Many brand protection violations occur without malicious intent and, for the most part, people who infringe are acting in good faith and may be unaware that they have violated the law. The following example from Beijing Organizing Committee for the Games of the XXIX Olympiad (BOCOG) is fairly typical.

There have been quite a number of ambush marketing incidents in China, but none have gone to court. Most infringements are done in good faith. They do not intentionally infringe... We send them a letter and educate them as to why they cannot do it like this.

I think the most effective way to fight ambush marketing is to educate the public. Many often infringe unintentionally. [For example], many TV stations like to make programs about the Olympics. Many of them

\textsuperscript{208} A term popularized by Michael Porter is "value chain model." \textit{See generally} MICHAEL PORTER, COMPETITIVE ADVANTAGES (1985).
seek sponsorship for Olympic television programs from non-Olympic sponsors. BOCOG has had to educate them many times. [Now] they know they cannot use the marks.

The public takes what BOCOG says very seriously. The public is in favor of the Games.209

Much of the work of the brand protection function is behind the scenes. The role of a Brand Protection Specialist is more than being that of "brand police." In addition to policing the brand, they are trademark administrators and skilled negotiators and arbiters of disputes. Brand Protection Specialists are constantly balancing the competing interests of opposing parties engaged in disputes over the brand. Trademark attorneys are usually brought in after a serious violation has occurred. When it becomes apparent that an amicable solution cannot be reached, legal counsel takes a more active and aggressive role. The challenge for Brand Protection is to minimize the types of infringement cases that escalate to the point where litigation becomes necessary.

In brand protection, it can be more important to win cases in the "court of public opinion" than to win in a "court of law." Brand protection is the art of balancing competing interests to preserve brand equity and goodwill. Litigating a case in public can be disastrous for the brand image. On the other hand, it can also discourage others from making the same mistake. When a company's case is strong, it is often possible to force a settlement. By being proactive, brand protection specialists can minimize the number and severity of offenses that require litigation.

Anti-ambush measures (including anti-counterfeit measures) are extremely effective forms of prevention. The six primary measures are (1) registration, (2) education, (3) communication, (4) strategic, (5) operational initiatives, and (6) sports-specific brand protection measures. Within each category is a wide range of techniques. When used in combination, these tools are very powerful deterrents.

The best offensive strategy lies in choosing the right combination of plays. The right game plan can reduce all but the most egregious infringements. Allocating resources to prevention saves time and money in the long run.

Why allow brands to be co-opted by ambush marketers, when it is better to be prepared in advance than to be taken by surprise in an ambush? Rather than wait until after a problem occurs, rights holders should become proactive. Instead of leaving the brand to the mercy of trademark infringers, counterfeiters and copyright pirates, take positive steps to prevent these

209. Interview with Chen Feng, Deputy Dir. of BOCOG Marketing Dep't (Aug. 1, 2006).
problems. By reducing the number and severity of offenses, there should be less need for government intervention to enforce laws governing intellectual property rights.

The potential for becoming a victim of trademark infringement in China is dramatically reduced when a plan for protecting intellectual property assets is implemented.

Brand Protection Registration Initiatives

- Register trademarks early before products and service enter the stream of commerce in the People’s Republic of China.
- Apply for separate registrations on translations and transliterations of brand names and other important trademarks.
- Obtain trademark and copyright registrations for logos for added protection. Although not a requirement, copyright registration can be beneficial in the defense of a brand.
- Once a certificate of registration has issued, record the registration with the General Administration of Customs in China.
- Use a notice of trademark registration on the logo, ®, to alert the public that the brand has been registered.
- Subscribe to a worldwide trademark watch service monitoring published marks that may be confusingly similar to those owned or controlled by the rights holder.
- Challenge registrations conflicting with existing marks. Conflicting registered marks can be challenged and revoked.
- Keep in mind that agreements containing licensing provisions for registered trademarks must be registered with the SAIC.

Brand Protection Education Initiatives

- Before allowing trademarks to be used, seek agreement on the terms and conditions of use. Educate constituents and the public about the company’s trademark use policies and approval procedures.
- Produce and disseminate a graphic standard and style guide to help ensure proper use and depiction of protected marks such as the distinctive symbols, words and phrases that comprise logos and slogans associated with branded products and services.
- Meet with every department and function within the organization.
Involve them in the planning and brand protection processes.

- Conduct workshops with rights holders, community partners and retailers of licensed merchandise to educate them about brand protection and enlist their support in reporting violations.

- Do not wait until after a violation has occurred to begin working with local authorities on intellectual property protection initiatives. Establish a relationship and educate them in advance about the company’s concerns. Forge amicable relationships with senior government officials where the business operates.

- Hold joint training sessions, forums and conferences with law enforcement officials charged with the responsibility of enforcing intellectual property rights. Reach out to the police, prosecutors and administrative authorities.

- Within corporate training programs, colleges and universities, sponsor classes on Chinese corporate, sports and intellectual property law and on Chinese cultural awareness to educate current and perspective employees about the Chinese culture and legal systems so they learn how to function within these systems.

- Further prepare corporate executives and MBA students by educating them about brand protection. Host brand protection seminars and sponsor continuing education courses.

- Before entering the market, learn how to do business in China by taking advantage of executive training programs and community education workshops that may be available locally.

- Additionally, study the ways of the Japanese. Learn how this non-litigious society is dealing with infringement issues in China. Japanese companies operating in China are filing lawsuits against their infringers. Find out why.

Communication

- Disseminate marks approval policies and procedures. Retain the right to review and approve every application in which the marks are used. Do not rely on verbal agreements alone. Confirm all commitments in writing and maintain a database to monitor the status of each request, and respond accordingly. Along with each application require camera-ready art or a prototype. Retain production samples and digital images of the finished products. These may be needed later
to distinguish “originals” from “fakes.”

- Invest in an anti-ambush marketing campaign. Use an integrated communications approach to educate the public about the company’s intellectual property rights and the laws designed to protect them. Ignorance of the law can contribute greatly to intellectual property rights violations, particularly where the right to own intangible property is not well-known.

- As part of an anti-ambush marketing campaign, release information about the most egregious offenses. For example, after obtaining a favorable ruling, which may include a public apology as part of the remedy, make public the judgment. In China, public shaming can be a very effective deterrent because it has the ability to cause loss of face.

- Communicate directly with those who are most likely to infringe upon the company’s intellectual property rights. Alert them of IPR concerns and obtain their voluntary cooperation to stop infringing activities before they cause further problems.

- Minimize dependency on translation services provided by bilingual employees. When translation services are needed, hire a competent translator. Do not rely solely on employees as they may have their own agenda. Find a loyal interpreter and use that person repeatedly, someone that understands the Chinese way and can give advice by interpreting verbal and non-verbal cues.

- Forge strong relationships with Chinese colleagues. Show respect for the Chinese culture and the people. Offer opportunities to learn by working together, but resist the temptation to impose western values. Show interest, not impatience. Do small favors early in the relationship to build trust. For example, provide minor concessions when negotiating an agreement. In China, friends generally feel obligated to reciprocate.

*Brand Protection Strategic Initiatives*

- Before setting up business in China, find out which jurisdictions do the best job protecting intellectual property rights.

- Incorporate into marketing strategies and legally enforceable contracts provisions for IP protection. Cultivate an understanding of these provisions with the parties and form close, cooperative working relationships to further the likelihood of compliance.
• Retain a brand protection specialist with experience protecting global brands. In addition, involve legal counsel with local and international expertise. Hire a team of Chinese private investigators with an intimate knowledge of the local market and exceptionally good contacts. Develop a comprehensive brand protection strategy.

• Network with people of equal standing in China. Create informal relationships, give face and gain respect to build trust and a sense of obligation. Giving face can help build social credits and maintain balance and harmony in relationships with Chinese partners. Pay respect, observe, show self-control and do not show arrogance. Be attentive, patient and understanding of the Chinese way. Learn to interpreter subtle as well as hidden meanings and indirect responses. Build strong relationships that can be useful in business dealings, negotiating contracts and resolving brand protection issues.

• It is not uncommon for Chinese to mix business and private affairs. It is customary to build informal relationships over banquets. Much business is dealt with over meals, but do not make the mistake of starting a meal with business talk. It is more appropriate to keep the discussion informal by making small talk initially. Pay close attention to the seating arrangement. Traditionally, the most important person faces the door with the guest of honor to the left and people of lower rank further away in descending order of importance.210

• When negotiating contracts ask not why or how something is done, but for what reason. Save important points until the end of the negotiation and give concessions early. Be aware that it is not unusual for many Chinese to be involved in the negotiation process. They may come and go. Whenever possible, negotiate with those that have the most power within the network.

• When working with new business partners, establish friendly relationships and begin building alliances by working together on non-sensitive matters to generate trust before embarking on more sensitive projects involving proprietary intellectual property. It is customary for business executives to make their position in the organizational hierarchy clear and pay respect to seniors and those in a position of greater power in China.

• When structuring a business deal in China, transfer only as much knowledge and technology as absolutely necessary. If this is not

possible, be prepared to walk away from the deal. Take care to maintain exclusive control over the most critical and sensitive aspects of the core business, and do not disclose anything in violation of U.S. national security concerns. Maintain control over any and all use of proprietary trade secrets, trademarks, design patents and copyrighted works.

- Carefully select products and technology for the Chinese marketplace. Rather than export recent innovations, penetrate the market with tried and proven products first. Select products for which the company has already recovered its research and development investment. Older products can usually be positioned at a lower, more affordable, price point. These "classics" are likely to be popular among Chinese low and middle income consumers. Save the newest innovations and high-end brands for upscale markets outside of China, where IPR enforcement measures are more advanced.

- Innovate frequently to make it more difficult and costly for unscrupulous competitors, counterfeitors and pirates to keep up with design changes.

- Reduce the available data accessible on the internet. There are security measures and tracking devices that can be helpful.

- Screen job candidates for high ethical standards and cultivate an understanding about private ownership of intellectual property rights. Include non-compete covenants in contracts with senior managers and key employees. This may prevent trade secrets, proprietary business methods and intellectual property from being co-opted and replicated without permission.

- Require copyright assignments from freelance designers, creative agencies and other service providers that develop logos, slogans, advertisements, promotional literature, videotapes, hang-tags and other proprietary works.

- Use a volunteer services agreement to establish ownership interest in what is created by volunteers providing services to the organization. As a condition of volunteer service and corresponding benefits, request that volunteers transfer IP rights in original works of authorship developed for the business.

- In franchise and joint venture agreements, negotiate buyout

[211] Jinglian, supra note 142.
provisions allowing for one business partner to buy out another in the event that a party is implicated for participation in unethical or illegal business practices. This will serve as a deterrent to local partners to produce and sell unauthorized overruns.

- Form strong alliances with other companies in parallel situations, taking care not to violate any antitrust laws. Join industry trade groups and anti-counterfeit coalitions. By joining forces, rights holders can present a strong and unified case for the search and seizure of counterfeit goods as long as they do not violate antitrust laws. Authorized raids involving multiple brands can make it easier for law enforcement officials to reach the minimum threshold for criminal enforcement for infringements. Joint actions can lower costs by spreading enforcement-related expenses across multiple companies.

- When a serious infringement matter does occur, work through the United States' IP attaché in the US Embassy in Beijing. The IP attaché program is relatively new and it has the potential of being very helpful.

**Brand Protection Operational Initiatives**

- Build anti-counterfeit devices into products before marketing them. For example, include a hangtag, sewn label or adhesive sticker on merchandise. Use it to identify the source of goods and rightful trademark owner. Use special light sensitive invisible inks, holograms, DNA embedded codes, small traces of metallic isotopes, serial numbers, watermarks or other anti-counterfeit measures. It is advisable to add these security devices after products (e.g., licensed merchandise) leave the factory. Choose a secure location. Track each shipment. Maintain unused inventory of the security devices under lock and key. Monitor inventory levels very closely to prevent overruns and thefts.

- Use preloaded software algorithms and smart chip technology to make imitations more difficult to reproduce.

- Disperse the production and assembly of products across a number of geographic locations rather than allow a single source to gain access to important intellectual property. Produce sophisticated technologically separately, preferably at a location outside the People’s Republic of China where more stringent enforcement measures are already in place. Keep technology details secret.
• Assign a trustworthy person from headquarters to remain on-site at the manufacturing plant when products bearing the brand (or sensitive technology) are being produced.

• Make product packaging more costly and difficult for counterfeiters to reproduce. For this, plastic and foil wrapping and holograms can be useful.

• Use radio frequency tracking devices to monitor shipments and to make it more difficult for goods to be stolen in transit.

• Install electronic surveillance to monitor workers where potential problems could occur.

• Maintain transparency in reporting between the rights holder, licensees, sub-licensees and suppliers. Do not rely on self-reporting by Chinese partners and suppliers.

_Additional Brand Protection Measures Specific to Sports Marketing_

• When entering into an agreement with rights holders (i.e., sponsors, licensees and broadcast partners), the sports organization should clarify all marketing and trademark rights. Negotiate restrictions on sublicensing and cross-licensing. Detail each party’s rights and obligations. Specify the terms and conditions under which the licensed trademarks may be used and the scope of rights. For example, negotiate uniform guidelines, rights and limitations to advertising, brand presence, product placement, and corporate hospitality within the sports venues. Agree upon all advertising and promotion opportunities inside and outside the venue. Discuss every form of media so as not to leave open the possibility that a competitor can ambush a sponsor by using a medium that was not expressly covered by the agreement. Seek agreement on all aspects of marketing and trademark rights in advance. Specify exclusivity arrangements within the agreement (i.e., brands, product/service category, geographic scope, etc.). Squeeze as much value as possible out of the bundle of rights. The language must be very specific. Rights holders’ expectations should be expressly covered so these rights are not open to question or misinterpretation. It is even important to specify the designation that rights holders may use in their marketing communications campaigns and on packaging (i.e., “Worldwide Partner,” “National Sponsor,” “Proud Sponsor of XYZ Team,” “Supporter of XYZ Team or Athlete,” “Licensed Provider of ABC
Products for XYZ Team”).

- When negotiating a grant of exclusive marketing and trademark rights, stipulate the applicable category of products or services, and the specified geographic locations and channels of distribution in which these marks may be used. If the arrangement is non-exclusive, specifically state this fact. Either way, place restrictions on the right to sublicense the trademarks. Always maintain the right to approve sublicensing agreements and make sure they are properly registered.

- As part of the agreement, stipulate each party’s obligations with respect to the protection of licensed intellectual property and prompt reporting and provide evidence of IPR violations to the trademark owner. Determine in advance whether the trademark owner or the licensee of the marks will be obligated to enforce intellectual property rights and who will bear the expense of such enforcement actions.

- In China, sponsorships of sports teams and acquiring commercial rights to Chinese athletes almost always require government approval. Expect to involve the athlete, sports organization and state government in these negotiations. In China, the State has control over athletes’ commercial rights in all State-run sports organizations and those supported by the State. Confirm with the relevant national and local authorities the sponsorship arrangement and the athlete’s and team’s approval.\footnote{212}

- When negotiating athlete commercial rights, find out who controls the rights before executing any kind of agreement with the athlete, athlete’s agent or sports team. In addition to the State and the athlete’s sports organization, there may be limitations placed on athlete commercial rights or the rights may have been acquired previously by an undisclosed third-party.\footnote{213} China allows athletes’ names to be

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In 2003, NBA star, Yao Ming, filed a suit against Coca-Cola alleging unauthorized use of his image. *Id.* Ming had signed a personal sponsorship deal with Coke’s competitor PepsiCo. *Id.* This case was settled. *Id.* The Coke subsidiary announced it had halted the production and marketing of its commemorative bottles bearing the image. *Id.* Yao in return agreed to withdraw the suit, in which he had accused Coke of image rights infringement and sought a public apology from the beverage giant
However, the Trademark Office of SAIC may consider certain uses of an athlete’s name and image to be in the public domain. When a famous athlete is “held in high moral, historic or cultural esteem, that person’s name is owned by society and should be available for public use.”

- Secure the right of first negotiation for advertising buys with official broadcast partners in order to preempt competitors’ ad buys. By granting sponsors the first right to negotiate ad buys with media partners, official sponsors can block competitive advertising by purchasing available ad space first. Chinese media rights may involve negotiating with the government.

- Wherever possible, under a facilities lease or management agreement try to assume management of sports venues to control in-venue advertising and product placements during the term of the lease and duration of the event. Venues that are government-owned and operated will require state or local government approval. Contractual control over the venue will enable the sports organization to prevent competitors and vendors from ambushing official sponsors by giving them the right to block unauthorized advertising and product placements provided such rights were negotiated in advance.

- Negotiate for prominent signage and billboard rights to control advertising before and during events. This can be tricky because it may require negotiating with many different parties—those who own or control adjacent buildings and signage boards where commercial signs are displayed. Local ordinances may also come into play. If possible, make the ad space available for rent to official sponsors only. Pre-empt competitive advertising activity by buying signage rights in advance.

- If the sports event is a major international event with television coverage, it is a good idea to harmonize the look of the city with the look of the event. Coordinate with local authorities to ensure that the brand image is properly maintained and ambush activities are

plus a symbolic compensation of one yuan, or about US$0.12. *Id.* The settlement came four days ahead of October 20, when the suit's court trial was scheduled to take place, as the twenty-three-year-old Yao prepared for his second NBA season with the Houston Rockets. *Id.*

214. “For example, the underwear company Beijing Dani’aier Clothing Co. Ltd., registered the competitor number of a famous Chinese hurdler, Liu Xiang, ‘1363’ for the Athens 2004 Olympics... China allows registration of athletes’ names as trademarks, which is impossible in many countries.” Ordish, *supra* note 212.

215. *Id.*
restricted by contract during the time of the event.

- When negotiating contracts with ticket sellers and travel agents, stipulate the terms and conditions of use for tickets and hospitality programs. Include limitations on branding and advertising. Stipulate the distribution and advertising channels.

- Enclose a ticketing agreement with the sale of each ticket, alerting ticket holders about rules of entry. Place restrictions on items that may be carried into the venue and unpermitted activities. Post notices about spectator rules at each entry gate.

- Include security devices on tickets and enclose spectator rules of entry with each ticket.

- Be aware of and monitor vendors outside and around the sport venue for sales of infringing goods. Enlist the support of local authorities for enforcement well in advance of the event.

- Place restrictions on branding of athletes’ and officials’ uniforms to protect the interests of rights holders. Limit by contract (athlete entry form) the number, size, placement location and types of commercial messages allowed on uniforms. Similar restrictions may apply to sponsors, suppliers, service providers, entertainers, and all who enter the venue during an event.

- As part of the entry agreement for athletes, place restrictions on athlete appearances in advertising during the competition. This may help prevent conflicts between athletes’ personal sponsors, the team’s sponsors and those of the event organizers.

- Communicate brand protection rules to all those participating in the event, including managers, performers and other non-athletes.

- Send out warning letters to competitors of official sponsors alerting them to restrictions on the use of protected trademarks and any restrictions placed on athletes competing in the event.

- Stop unauthorized use and outright theft of protected marks prior to widespread misuse or infringement. The following are a few surveillance techniques for monitoring compliance:

**Monitor for Unauthorized Use of Registered Trademarks & Other Ambush Marketing Activity**

- Channel all brand protection complaints (IPR Incident Reports) through one area in the company. This is generally the job of the
brand protection function.

- Train employees to identify and report cases of suspected misuse or infringement. Sales and marketing personnel are usually best suited to handle this responsibility, because they are more familiar with the company's products and services and more aware of sponsors' concerns.

- Educate sponsors and licensees on how and to whom to report alleged brand protection violations.

- Encourage the public to report alleged incidents of misuse. Most often these reports come from suppliers, licensees, sponsors and loyal customers familiar with the brand.

- Monitor for compliance throughout the marketplace.

- Retain the services of an international trademark search firm to monitor the publication of conflicting registrations.

- Work with competent undercover agents in cooperation with law enforcement authorities.

- Establish a "mystery shopper" program. Shop online, at retail stores and at flea markets. Develop procedures for gathering and safeguarding evidence, observing all legal requirements.

- Conduct internet searches using random queries and special web data mining software tools with search algorithms programmed to detect infringements.

- Browse online auction sites and notify them of proprietary brands and intellectual property rights. Make auction site owner/operators aware of IPR concerns. Establish a relationship so they react quickly to shut down sellers offering infringing products, upon notification and assertion of proprietary intellectual property rights.

- Monitor the media for misuse of protected trademarks in advertising and promotion, and for unauthorized programming and broadcast sponsorships. Seek cooperation from official broadcast rights holders and retain the services of a media monitoring research firm.

- Coordinate investigations with law enforcement officials. Take care to choose trustworthy individuals. Work with those without obvious conflicts of interest. Take advantage of local supporters' knowledge and contacts.

- Build a database to record incidents of alleged misuse and
infringement and track the status of each case. Watch for emerging trends and patterns that may help identify the sources of these activities.

While it may not be possible to completely stop the theft of intellectual property in the People’s Republic of China, or elsewhere for that matter, it is entirely possible to reduce the magnitude and severity of intellectual property rights violations. A reduction in the quantity, frequency and severity of incidents can significantly improve long-term sustainability of brands produced, marketed or sold in China.

Consumer brand loyalty is vital to the long-term survival of multinational brands in the People’s Republic of China. Regardless of whether a rights holder is a not-for-profit entity like BOCOG or a for-profit entity like the NBA, sports organizations rely on their image and reputation to attract and retain sponsors, licensees and broadcast rights holders. In order to honor commitments of exclusivity, trademark owners are obligated to protect their brands against unauthorized use and infringement. Trademark owners and their rights holders also have an obligation to their customers. They should endeavor to protect them from unscrupulous and unlawful practices employed by counterfeitters and pirates that mislead consumers and undermine the confidence and thus the integrity of the brand.

IX. CONCLUSION

The protection of intellectual property rights in China depends not only on the study of existing laws but on an understanding of China’s history, culture, business environment, economic conditions and fluctuating political climate. Understanding the country’s complex bureaucracy is essential. With this knowledge comes the ability to navigate the Chinese legal and business system, making it easier to chart a course for intellectual property rights protection.

Our review of current IP laws, related literature, IP registration and enforcement statistics and assessment of current administrative and judicial enforcement practices indicates that China is taking IP concerns more seriously. Although pleasantly surprised by the recent advances made in Chinese intellectual property rights reform, it was evident from our research that further advances are necessary. Fortunately, rights holders need not depend solely on a legalistic approach to intellectual property protection.

Rights holders can develop an effective brand protection program in the Chinese marketplace. There are “proactive” prevention measures available, seldom publicized. Proactive prevention can be used in combination with non-litigious enforcement methods such as voluntary compliance and negotiated
settlements, in addition to administrative and judicial enforcement remedies and diplomacy. Enforcement measures should be appropriate relative to the perceived threat. Used in combination, rights holders will have at their disposal the necessary tools to implement a comprehensive brand protection plan.

A combination of brand protection methods, both offensive and defensive, is needed to combat ambush marketing in China. A comprehensive plan should include:

1. registration and recordation
2. education and communication programs
3. strategic and operational initiatives
4. administrative compliance
5. adjudication
6. diplomacy
7. cross-functional integration of brand protection within a company.

Many infringements can and should be prevented. Less severe cases can often be resolved amicably.

Retain professional assistance. Brand protection specialists and trademark counsel with international experience and expertise in China can help organizations develop and implement a brand protection plan. When necessary, hire private investigators to monitor for infringements and undertake preliminary investigations. Every party engaged in the business should become an ally in the fight against trademark infringement. Do not overlook opportunities to reach out to those around the organization. Educate them about the company's intellectual property rights and its brand protection program. Encourage them to report brand protection violations through the proper channels. Be prepared to respond promptly and appropriately. Have the necessary tools in place before violations are reported. Use every available opportunity to prevent trademark infringement.

Disclaimer: The information provided in this article by no means constitutes legal advice and should not be a substitute for advice from legal counsel. We recommend that companies doing business in China seeking intellectual property protection retain qualified legal counsel and brand protection expertise to pursue their rights and proactively protect their IP assets in accordance with the laws and regulations in the People's Republic of China.
X. COMMENTARY FROM BOCOG'S DEPUTY DIRECTOR OF MARKETING

Being asked by Madam Anne M. Wall, I feel honored to write some words, as part of her wonderful article, on the brand protection plan of the Beijing Organizing Committee for the XXIX Olympiad (BOCOG) and the administrative rules specifically designed to protect Olympic Intellectual Property Rights in China. To achieve a success in the marketing program, it is very important to protect the Olympic and Paralympic intellectual property rights.

First of all, emphasis is placed on education and communication. We communicate internally in BOCOG to prevent ambush occurrence in the work of each function. Coordination is frequently made with [the] Chinese Olympic Committee, Chinese Paralympic Committee and government entities in respect to a combined effort against ambush activities. The public is also educated to be made aware of the harms inflicted upon the Games by ambush marketing activities.

Secondly, we have a number of measures in place to fight against ambush marketing. For instance, registration is filed for BOCOG’s emblem and mascots in China and some other countries. Infringement cases can be reported on [BOCOG's official] website, by telephone and through other means. Acknowledgement is made by BOCOG for the sponsors’ contribution[s] to the Games to build up public awareness of their sponsorship. During the Games time, the athlete apparel rules will be strictly followed. The spectators will be warned against ambush activities in the venue. The airspace and outdoor advertising will be controlled in the main areas.

Thirdly, from [a] legislative perspective, special administrative rules are enacted to protect Olympic IPRs apart from [and in addition to] laws designed for the protection of regular IPRs such as copyright, trademark, patent, know-how, commercial secrets and anti-unfair-competition. These rules play a more effective role. For instance, terminology, such as Olympiad, Olympic Games, BOCOG, Beijing 2008 and other Olympic-related terms are being protected. These terms, as a very important part of Olympic properties, might have fallen short of protection as de minimis in the copyright law, due to being unregistered in the trademark law and owing to the lack of evidence of loss caused by the infringement in the anti-unfair-competition law. Additionally, since protection of Olympic intellectual properties, according to the rules, are responsibilities taken [on] by administrative entities, such as the Administration for Industry and Commerce and the General Administration of
Customs, we do not have to go through as many legal procedures as required by the court.

Chen Feng
Deputy Director of BOCOG Marketing Department
APPENDIX A - TIMELINE

• 1980
  ○ China acceded to the WIPO

• 1982
  ○ Trademark Law of the People’s Republic of China
  ○ State Administration for Industry and Commerce (SAIC) current incarnation established

• 1984
  ○ Patent Law of the People’s Republic of China

• 1985
  ○ China signed onto the Paris Convention

• 1989
  ○ China signed onto the Madrid Agreement

• 1990
  ○ Copyright Law of the People’s Republic of China

• 1991
  ○ US identified China as a “priority foreign country” for not protecting US Intellectual Property

• 1992
  ○ Sino-U.S. Memorandum of Understanding Between China (PRC) and the United States on the Protection of Intellectual Property
  ○ Patent law first revision
  ○ China signed onto the Berne Convention

• 1993
  ○ Trademark law first revision
  ○ Law Against Unfair Competition of the People’s Republic of China

• 1995
  ○ “Agreement Regarding Intellectual Property Rights” (between the US and China)
  ○ Rules for Trademark Review and Adjudication
  ○ China signed onto Madrid Protocol

• 1996
 Provisional Regulations on Identification and Administration of Well-Known Trademarks

• 1997
  o Criminal Law of the People’s Republic of China revised to include crimes against intellectual property

• 1998
  o State Intellectual Property Organization
  o China Copyright Protection Center

• 1999
  o Contract Law of the People’s Republic of China
  o U.S. – China Bilateral WTO Agreement

• 2000
  o Patent law second revision

• 2001
  o Press and Publications Administration and thereby National Copyright Administration achieved ministry-level
  o Olympic Games Host City Contract signed
  o Trademark law second revision
  o Copyright Law revised
  o Regulations of Beijing Municipality on the Protection of Olympic-related Intellectual Property (Decree No. 65)
  o Regulation of Protection of Olympic Symbol of Beijing
  o BOCOG created
  o China joins WTO

• 2002
  o Regulation on the Protection of Olympic Symbols
  o Regulations for the Implementation of Trademark Law
  o Rules for Trademark Review and Adjudication revised

• 2003
  o Measures for the Registration and Administration of Collective Marks and Certification Marks (SAIC)
  o Provisions on the Determination and Protection of Well-known Marks (SAIC)
  o “Chinese Emblem-Beijing in Dancing”

• 2005
  o The Official Mascots of the Beijing 2008 Olympic Games; Proclamation of the Beijing Organizing Committee for the Games
of the XXIX Olympiad
• 2006
  ◦ China’s Action Plan on IPR Protection 2006

Created by Judith Massuda
July 26, 2006
APPENDIX B – TRADEMARK REGISTRATION

Trademark Registration and Recordation in the People's Republic of China

International

USPTO (International Registration for US Marks according to the Madrid Protocol)

State

SAIC

GAC record, references registered marks so that Customs could protect the marks correctly

State Trademark Bureau (Department of SAIC that registers marks)

Created by Judith Massuda

July 28, 2006
APPENDIX C – TRADEMARK ENFORCEMENT

Created by Judith Massuda
July 28, 2006
APPENDIX D - PERTINENT ACRONYMS

WIPO – World Intellectual Property Organization

WTO – World Trade Organization

INTA – International Trademark Association (Not-for-profit, “dedicated to the support and advancement of trademarks and related intellectual property as elements of fair and effective national and international commerce”)


USTR – United States Trade Representative

CAEFI – China Association of Enterprises & Foreign Investment

QBPC – Quality Brands Protection Committee (renamed from CACC in 2000 and folded into CAEFI making QBPC a quasi-government agency; lobbying group for the protection of well-known brands)

CACC – China Anti-Counterfeit Coalition (formed from IIPA in 1988, later renamed QBPC)

IIPA - International Intellectual Property Alliance (founded 1984, later renamed CACC)

IACC – International Anti-Counterfeit Coalition (An international organization with a US headquarters)

SIPO – State Intellectual Property Office (examination of foreign and domestic patents)

NAC - National Copyright Administration of China (handles copyright registrations)

MOFTEC – Ministry of Foreign Trade & Economic Cooperation (Renamed
MOFCOM, Ministry of Commerce in 2003)


SAIC – State Administration for Industry & Commerce (Responsible for enforcing Trademark Law, Directly under the State Council)

AIC – Administration for Industry & Commerce (Under SAIC, registration only under the provincial level, lower levels handle infringement, not registration)

TRAB – Trademark Review & Adjudication Board of the State Administration for Industry & Commerce

SQTSB – State Quality Technical Supervision Bureau (formerly known as STSB and SEC; responsible for ensuring product quality and consumer safety; also handled counterfeit enforcement) (Folded in 2001 into GAQSIQ, General Administration of Quality Supervision, Inspection and Quarantine, Enforces Product Quality Law, handles counterfeit enforcement as it relates to product quality which is approximately ten to twenty percent of counterfeit enforcement)

AQSIQ – Administration of Quality Supervision, Inspection and Quarantine, (lower level offices of GAQSIQ)

GAC – General Administration of Customs in China (Responsible for imports and seizure of counterfeit imports. Directly under the State Council, Enforces Customs Regulations)

PSB – Public Security Bureau (Under the Ministry of Public Security, responsible for enforcing Criminal Law, Section 7 of which is “CRIMES OF INFRINGING ON INTELLECTUAL PROPERTY RIGHTS”)

SPC – Supreme People’s Court (Highest Court in China, handles trademark case appeals)

SPP – Supreme People’s Protectorate (state prosecutor’s office)