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The Intellectual Property Rights Laws of The People's Republic of China

Hamideh Ramjerdi and Anthony D'Amato†

I. Introduction

As economic development and legal reform continue to explode in the People's Republic of China (China), issues surrounding international intellectual property rights protection in China have been propelled to the forefront of Chinese and world politics. The primary focus of this Article is to examine the legal reform that has occurred in China in the area of intellectual property rights and the effect that it has had on China and world trade. Thus, this Article will explore the development and enforcement of the intellectual property rights laws of China since 1978. During 1978, the third plenum, under the leadership of Deng Xiaoping and his “Practice Group,” reformed China's legal structure by establishing a democratic system of laws, within the framework of monolithic Communist control. The creation of these legal structures represents China's progress toward a market economy. This Article specifically examines the significance of the development of the intellectual property rights laws in the transformation of China's economy from a Soviet-style planned economy to a more productive market economy.

Section II of this Article will examine the growth of trademarks and patents in China and its economic impact on China's international trade and gross national product (GNP). Section III will examine the development of the current intellectual property rights laws and reveal how China modified its intellectual property rights laws from a Soviet-style model to a market-based model. Furthermore, Section III will describe the shortfalls of China's intellectual property rights laws and reveal how China's size and isolation, coupled with the newness of intellectual property rights, are major obstacles to the enforcement of these laws. Finally, Section IV concludes that if the intellectual property rights laws of China were adequately enforced, then

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2 Id.
China's economic growth would be accelerated by the influx of new foreign investment.

II. Patent and Trademark Registrations

The first patent law was adopted at the fourth session of the Standing Committee of the Sixth National People's Congress on March 12, 1984. Since then, China's patent law has played an important role in encouraging inventions, stimulating the commercialization of scientific research, assisting progress in science and technology, transferring technology, and accelerating modernization and economic growth. For example, the value of China's estimated Real GNP increased from $121 billion in 1975 to $427 billion in 1989. In 1992, the Real GNP was $493.4 billion ($428,8 billion Yuan), and in 1993 the value of the Real GNP was targeted to be 2638.7 billion Yuan.

One of the reasons for this accelerated growth in China is the opening of the economy to foreign trade and foreign investment. Exports increased and the foreign exchange bottleneck was removed. In 1992, China was the eleventh largest trading nation in the world, up from fifteenth in 1991. China's global exports (f.o.b.) in--

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5 The most important objectives of intellectual property rights laws are "to promote research and development and to encourage the disclosure of inventions so that others can use them and build upon research results." Nancy T. Gallini, Patent Policy and Costly Imitation, RAND J. OF ECON., Spring 1992, at 52. Another objective is to encourage private producers to invest in innovations. See Stanley M. Besen and Leo J. Raskind, An Introduction to the Law and Economics of Intellectual Property, J. OF ECON. PERSPECTIVES, Winter 1991, at 3, 5.

6 Technology transfer involves a number of commercial transactions, often conducted simultaneously, which include payments for licenses and patents and the exchange of sophisticated equipment in which the technology is embedded. The transfer of technology to China could result in appropriations without sufficient compensation to the originator. However, the patent law protects the originator of the technology from appropriation, thus encouraging trade and investment. See U.S. Congress, Office of Tech. Assessment, Energy Technology Transfer to China: A Technical Memorandum, OTA-TM-ISC-30 (Washington, D.C: U.S. Government Printing Office, Sept. 1985).


8 Unless otherwise indicated, all of the monetary values are in U.S. currency.


12 Id.

increased from $7.13 billion in 1975 to $59.435 billion in 1988,\textsuperscript{14} $71.90 billion in 1991,\textsuperscript{15} and $85.00 billion in 1992.\textsuperscript{16} Global imports (c.i.f.) increased from $5.58 billion in 1975 to $27.405 billion in 1988,\textsuperscript{17} to $63.80 billion in 1991,\textsuperscript{18} and to $80.60 billion in 1992.\textsuperscript{19} The trade share of the GNP increased from 9% in 1978 to 36% in 1991.\textsuperscript{20}

The increased trade between China and the United States has had a great impact on the Chinese economy. The value of exports to the United States was $5.1795 billion in 1990 and $6.1937 billion in 1991.\textsuperscript{21} Furthermore, China has been running a global trade surplus since 1990, especially with the United States.\textsuperscript{22} In 1992, China's trade surplus with the United States reached a record $18.2 billion.\textsuperscript{23}

China has established a patent administration, which deals with patent examination, adjudication, data service, and patent agents.\textsuperscript{24} Under the Central Government of China, patent administrative offices have been set up in provinces, autonomous regions, coastal sites, and the three cities of Beijing, Tianjin, and Shanghai to handle each area's development plans.\textsuperscript{25} In 1992, China had more than 400 patent offices and 4,800 patent agents.\textsuperscript{26} China has the second largest number of patent agents in the world, next to the United States.\textsuperscript{27}

According to the deputy director of the China Patent Bureau, the Bureau had received 96,579 patent applications from domestic and overseas applicants and approved 21,631 domestic patents and 1,459 overseas patents by March of 1989.\textsuperscript{28} The number of patent applications increased by 29% in 1985-86, 40% in 1986-87, and 30% in 1987-88.\textsuperscript{29} Domestic applicants accounted for 78.9% of the total number of applications, and overseas applicants accounted for 21.1% of the total number.\textsuperscript{30} Between 1986 and 1987, there was a 125% increase in the

\textsuperscript{14} Estimated Real GNP, supra note 9.
\textsuperscript{17} CIA, Imports Total (national Source), available in Nat'l Trade Data Bank-The Export Connection, U.S. Dep't of Commerce (Dec. 27, 1993) (total imports were calculated by adding EE and developed figures).
\textsuperscript{18} Vital Statistics, supra note 15.
\textsuperscript{19} Vital Statistics, supra note 15.
\textsuperscript{22} Id.
\textsuperscript{24} P.R.C. Year Book, supra note 7, at 217.
\textsuperscript{25} Id.
\textsuperscript{26} Id.
\textsuperscript{27} Id.
\textsuperscript{28} Id.
\textsuperscript{29} Id.
\textsuperscript{30} Id.
number of patent approvals. Similarly, there was a 75% increase between 1987 and 1988. There has also been an increase in the proportion of patent applications from business enterprises. For instance, in 1986, the number of business applications was less than one-third of that from institutions of higher learning, but in 1987, enterprises submitted more applications than colleges and universities did. In a sample survey, approximately 30% of the patents applied for and received are for production. Another survey of 146 patent projects concludes that the surveyed projects have added 1.69 billion Yuan to output value, 450 million Yuan to profits and taxes, and $17.63 million to export earnings. The number of trademark applications also increased from 20,000 in 1983 to 110,000 in 1991. In 1992, the number of registered trademarks was 360,000.

Also indicative of China's movement toward a market-based economy is the fact that the China Patent Bureau has established bilateral cooperative relations with its counterparts in the United States, Japan, Germany, and Austria, as well as the European Patent Bureau. It has also become an active member of the World Intellectual Property Organization.

III. The International Property Rights Laws

A. Background

Trademarks in China date back to the Tang Dynasty, when traders started using marks and logos to distinguish goods. In 1904, the
Qing government publicized the first formal trademark, which was administered by foreigners (who had assumed control of much of China's trade at that time). The first Chinese patent law, entitled "Provisional Rules on the Encouragement of Art and Crafts," was enacted in December 1911, and it granted five-year patents for innovations. The Kuomintang government revised the patent laws several times. For example, in February 1939, patent protection was extended to utility models and designs, in addition to inventions and new methods of production. From 1911 to 1944, 360 patents were granted by the Nationalistic Government of the Republic of China.

In 1949, when the Communists took over China, the Chinese Communist Party abolished all the laws and the judicial systems of the Nationalist Regime and the Kuomintang's Complete Book of Six Codes. The old system was replaced by Marxism and Leninism, Mao Tsetung's theory of State and Law, and the "New Democracy's" policy. As a result, China's Communist government was faced with the dilemma of dealing with inventions. According to Marxist ideology, an invention of an individual is considered to be social production; therefore, the idea of giving an exclusive right to an individual to profit from an invention would be inconsistent in a socialist society.

The earliest intellectual property legislation of the People's Republic of China after the Communist victory in 1949 dealt with the problem by replicating the Soviet models. The Provisional Regulations on the Protection of the Invention Right and the Patent Rights of August 11, 1950, and the Provisional Regulations on Awards for Inventions, and Technical Improvements and Rationalization Proposals...
Concerning Production of May 6, 1954,55 established a dual system to deal with patents and certificates of authorship. A certificate of authorship would be issued when an invention was developed. The reward to the patent holder was minimal and proportional to the amount of money saved by society because of the invention.56 If inventions involved such areas as national security, military technology, pharmaceuticals, or agricultural species, then the inventor would be issued a Certificate of Authorship only.57 Foreigners could apply for a patent or certificate only if they resided in China.58 Only six certificates of authorship and four patents were recognized before the political climate changed in 1963.59

On November 3, 1963, as the country pressed for self-reliance and industrialization, the patents were revoked as ideologically unacceptable, and inventions were considered to be the property of the State.60 The systems of checks and balances between courts were completely abolished, civil disputes were handled by informal or nonjudicial agencies, and the People's Daily openly praised lawlessness.61 Furthermore, the Gang of Four62 instructed the Red Guards to smash the police organs and courts.63 All of this, coupled with the restricted trade policy of the Western countries with the Communist bloc, pushed China close to autarky.64

After Mao's death on September 9, 1976, and the concurrent fall of the Gang of Four (which is considered the end of the Cultural

55 Blaustein, supra note 50, at 523-533.
56 Id. at 525-26.
57 Id.
58 Id. at 523.
60 Id.
61 Mao favored the rule of man over the rule of law and promoted the idea of continuous revolution, which does not easily lead to the building of firm legal structures. China's Developing Legal Structure for Trade and Commerce, supra note 3, at 8; see also China's New Patent Law and Other Recent Legal Developments, supra note 46, at 5 (citing In Praise of Lawlessness, RENMIN RIBAO [People's Daily], Jan. 31, 1967, at 6). Articles appearing in Chinese newspapers represent the views of the State and often urge particular types of conduct. See VICTOR H. LI, LAW WITHOUT LAWYERS: A COMPARATIVE VIEW OF LAW IN CHINA AND THE UNITED STATES 15 (1978) ("A Chinese newspaper, unlike an American newspaper is not a chronicle of daily events but rather a means by which messages are sent from the center to the intermediate levels and then to the bottommost levels.")
62 The Gang of Four, which influenced the Cultural Revolution, was made up of Jiang Zing (Mao's wife), Zhang Chunqiao, Yao Wenyuan, and Wang Hongwen. PETER M. LICHTENSTEIN, CHINA AT THE BRINK: THE POLITICAL ECONOMY OF REFORM AND RETRENCHMENT IN THE POST-MAO ERA 28 (1991). These leaders were all members of the Communist Party Central Committee "intent upon shaping China according to their own personal visions." Id.
64 The International Trade Administration, Foreign Companies Profile, available in Nat'l Trade Data Bank-The Export Connection, U.S. Dep't of Commerce (Dec 27, 1993).
Revolution and Mao's isolationist policy), the view toward a whole range of economic and legal issues began to shift away from the orthodox Marxist ideas that were popular between 1950 and 1978.

Since 1978, Deng Xiaoping has moved China's economy from a Soviet-style centralized and monolithic political-socioeconomic system, in which control over capital, human resources, information and economic decisions was in the hands of the political bureaucratic elite, toward a more productive market-oriented economy. Furthermore, he has begun the process of reforming the legal structure to promote democracy "in the form of a system of laws." Thus, the third plenum of 1978, under the leadership of Deng and his "Practice Group," set in motion a series of major reforms which are considered to be the turning point in the history of the People's Republic of China.

In 1980, Deng announced a reform plan for the "Economic Structure" which proposed that China should develop a commodity (market) economy which would be regulated by central "guidance." The plan included ownership reforms, a qualified decentralization, structural changes and openness to foreign countries, particularly the West. The dual strategy of economic reforms with cautious political changes caused the process of marketization to be gradual.

B. The 1985 Patent Law

To facilitate trade and establish a legal framework for foreign interchange, China enacted its first patent law in April 1985. The 1985 patent law consists of sixty-nine articles and covers eight areas. The

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65 The Great Proletarian Cultural Revolution was a violent movement lasting from 1966 to 1976 that "attempted to weed out all vestiges of capitalism and to revolutionize China's social relations." Lichtenstein, supra note 62.
66 Yahuda, supra note 63.
69 Deng and his associates were often known as the "practice group." Yahuda, supra note 63, at 189.
70 Id. at 188-89.
71 China's New Patent Law and Other Recent Legal Developments, supra note 46, at 7.
72 Robert Delfs, Little Dragon Model, FAR E. ECON. REV., Mar. 9, 1989, at 12, 12.
75 China's Developing Legal Structure for Trade and Commerce, supra note 5, at 31 (statement of John J. Byrne and Eugene Theroux).
law provides for the granting of patents in three areas: (1) inventions (a nonrenewable term of 15 years); (2) utility models; and (3) designs (a term of 5 years, renewable for an additional 3 years). The patent law allowed foreign individuals, foreign enterprises and other organizations in foreign countries to apply for patents in China in accordance with agreements which their countries had signed with China, in accordance with international conventions to which both China and the foreign country were parties, or in accordance with the principle of reciprocity. Thus, the 1985 Patent Law was intended to reassure foreigners involved in technology license agreements that industrial designs not yet publicly disclosed would have legal protection, as well as to encourage invention-creation and to promote the development of science and technology for the needs of modernization.

Article 25 of the Patent Law prohibits the granting of patents to scientific discoveries, rules and methods of intellectual activity, methods of diagnosis and treatment of diseases, food products, beverages, flavorings, animal and plant species, and substances obtained by means of nuclear fusion. However, production processes for food products, beverages, flavorings, pharmaceutical products, substances obtained by means of a chemical process, and animal and plant species are eligible for patents. Because food products and pharmaceuticals relate to human life and health and are important to the masses, granting patents would pave the road to capitalism. Thus, they were disallowed. Chemical patents would put the chemical industry under strong foreign influence, which was undesirable.

The major shortfalls of the 1985 Patent Law were that it provided little protection to pharmaceutical and chemical companies and it did not recognize services. Furthermore, the 1985 Law did not affect the current inventions and utility models and designs for which patent applications had been filed abroad before October 1, 1984. The law also did not provide for intellectual property rights in computer software.

C. Amendments to the Patent Law and the Trademark Law

In 1991, the 1985 Patent Law of China was revised. The new law

76 Id. at 92
77 Id. at 84.
79 Some Legal Aspects of Our Import of Technology and Foreign Investment, supra note 74, at 88-89.
81 China's Developing Legal Structure for Trade and Commerce, supra note 3, at 34 (statement of John J. Byrne and Eugene Therox).
82 Id. at 42.
83 Id.
84 Id.
85 Id. at 43.
took effect June 1, 1991. Although these amendments represented a step in the right direction, there still was not adequate protection for foreign works. On January 17, 1992, the United States and China signed a Memorandum of Understanding (MOU) to solve many problems with the Chinese law. In compliance with the MOU, China has amended its patent laws. The new patent laws increase both the scope and the term of patent protection. In addition, the Chinese have issued regulations to provide administrative protection for U.S. patent holders of agrichemicals and pharmaceuticals since January 1, 1986. After completing the U.S. and Chinese certification requirements, a U.S. patent holder will have market exclusivity for 7 years and 6 months. These agreements are exclusive to the United States; they do not include Japan and Europe.

China's Trademark Law was amended on February 22, 1993. Although the new patent law distinguishes between goods and services, the laws that apply to trademarked goods also apply to services. If an applicant uses the same trademark, it is possible for one application to cover more than one class of goods or services. The Revised Law now specifies that registrations obtained by deception or improper means may be canceled by the Trademark Office. Acts of infringement include the "sale of goods that one is fully aware" are counterfeits of goods protected by a registered trademark. Another new infringement provision provides that acts of infringement include forgery or unauthorized manufacture of representations of another's registered trademark, and the sale of trademark representations that were forged.

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86 Simpson, supra note 1, at 587.
88 Id.
90 The patent protection for pharmaceuticals, agricultural chemicals, and food products now extends beyond the manufacturing process to the products themselves. Lack of Intellectual Property Protection, supra note 87.
91 The duration of the patent right has been increased from 15 years to 20 years for innovations and from 5 years to 10 years for industrial designs. Id.
92 Id.
93 Id.
95 Khoon, supra note 38, at 9 (the amended Trademark Law is referred to as the Revised Law).
96 Id. In 1992, of the 296,000 new companies registered by Chinese authorities, nearly 75% were services or as the Chinese often refer to it, the "tertiary" sector operations. The service sector was neglected in China for many years due to the Marxist idea that services are "unproductive" or "capitalist." See Risks of Rapid Growth, supra note 13, at 8.
97 Khoon, supra note 38, at 9.
98 Id. at 14.
99 Id.
or manufactured without authorization.\footnote{\textit{Id.}}

The strict “first-to-file” rule still applies, which means that rights will be given to the first applicant/registrant rather than the first user of a service mark.\footnote{\textit{Id.}} The Revised Law makes no mention of associate collective marks, certification marks or defensive marks.\footnote{\textit{Patent Law of the People’s Republic of China, supra note 3, at 45 (Article 30); see Edward J. Radlo, Moving Toward International Patent Harmony, 31 CHI. DAILY L. BULL., Sept. 5, 1993, at 6. The United States retains “first-to-invent” priority rationale, and is one of only two countries in the world to award patents to the first to invent. \textit{Id.; see also R. Carl Moy, The History of the Patent Harmonization Treaty: Economic Self-Interest as an Influence, 26 J. MARSHALL L. REV. 457, 469 (1993) (discussing U.S.’s failure to change to a “first-to-file” system).}} The Revised Law also does not include protection of well-known marks, and does not explicitly designate any duties to the Customs Department in infringement matters.\footnote{\textit{Id.}} In contrast, the United States Customs Service protects trademarks, trade names, and copyrights that are recorded with it.\footnote{\textit{Id.}}

The Revised Law implementing rules impose a higher range of fines and criminal penalties.\footnote{\textit{Id.}} The supplementary provisions amending the criminal laws regarding the counterfeiting of trademarks also became effective January 1, 1993.\footnote{\textit{Id.}} In serious cases, counterfeiters are subject to prison terms of up to seven years, in addition to fines.\footnote{\textit{Id.}} Before the revisions, counterfeiters in serious cases were imprisoned for three years.\footnote{\textit{Id.}}

\section{D. Computer Software Protection Regulations}

On June 4, 1991, the new Computer Software Protection Regulations went into effect. With a protection term of 25 years and a renewal term of another 25 years (a total protection term may not exceed 50 years),\footnote{\textit{Office of the U.S. Trade Representative, Enforcing Intellectual Property Rights, available in Nat’l Trade Data Bank: The Export Connection, U.S. Dep’t of Commerce (Oct. 27, 1993).}} the term complies with the Berne Convention Standard.\footnote{\textit{Khoon, supra note 38, at 15.}} In addition, on January 17, 1992, the Memorandum Of Understanding (MOU) was signed between the United States and China to provide significantly improved protection for U.S. investments and copyrighted works, including software and sound recordings, and to adopt rules and regulations for the protection of trade


\footnote{\textit{Michael Freegard, The Berne Convention, Compulsory Licensing and Collecting Societies (Conference to Celebrate the Century of the Berne Convention, 1886-1986), COLUM.-VLA J. L. & ARTS 137 (1986).}}
These regulations are still inadequate. For instance, they fail to protect all computer software as "literary work" as required by the Berne Convention. Furthermore, Article 6 protects the published and unpublished works of "Chinese citizens and units," but it does not protect unpublished foreign software. This violates major multilateral copyright treaties such as the Berne Convention. The regulations do not allow retroactivity and they contain inadequate enforcement provisions. The regulations fail to protect works of foreign authorship including foreign computer programs that were first published outside China. There is no provision to punish or impose criminal penalties, which would impede infringement. The regulations do not address unauthorized importation of software to China (usually the copyright owner has control over importation). Also, Article 22 permits software users to make unauthorized copies for noncommercial use such as classroom education and scientific institutions, and Article 13 authorizes compulsory licensing of software possessing major significance for national security or public security for any organization designated by the national and the local government, without permission, for unspecified royalties to be set by relevant national regulation. Article 7 contains a blanket exclusion of algorithms, and according to Article 31, the Chinese government could declare the elements of a successful software package to be the "technical standard" — in effect, legalized plagiarism.

Furthermore, the dearth of unfair competition laws in China has resulted, in one instance, in a loss of $500 million worth of sales to U.S. exporters. In 1991, two Chinese entities transferred U.S. M-11 sur-

112 Id.; see also Implementing Rules for the Copyright Law of the People's Republic of China, supra note 109, at 261-65.
113 Many of the U.S. software packages remain unpublished for a significant period of time.
115 Id. The lack of retroactivity means that all software in existence prior to the enactment of the regulations will be in the public domain; thus piracy of such software packages will continue freely. This lack of retroactivity is a major issue in the Special 301 Investigation. Id.
116 Id.
117 Id.
118 Id. at 11.
119 Id.
120 Id.
121 China and America: Diplomacy Hit by Missile, ECONOMIST, Aug. 28, 1993, at 32-33.
face-to-surface missile technology to Pakistan, thus leading to the imposition of trade sanctions against China and Pakistan. As a result, during 1991 and 1992, U.S. export companies were banned from selling various parts and accessories for satellites and rockets to China and Pakistan. To prevent a similar occurrence, the 1993 Patent Laws of China protect trade secrets from unauthorized disclosure or use, including use by third parties.

E. Problems with Intellectual Property Right Laws in China

Intellectual property rights are unclear concepts in China. Because of Communism's rejection of individual property ownership and the newness of intellectual property rights in China's legal system, intellectual property has a precarious place in China's legal scheme. Also, because of China's size and isolation, many people do not understand intellectual property, much less the laws protecting it.

For example, counterfeiting and the piracy of trademarks in China continue to run rampant. According to the Lanham Act, counterfeiting is the use of a mark "identical with or substantially indistinguishable from, a registered mark." Counterfeiting destroys the information capital embodied in a mark, reduces the incentive to develop a viable mark, kills reward systems, undermines consumer confidence, threatens consumer health and safety, controverts the principles of free and fair competition, reduces investment in costly innovation, reduces the introductions of new products (thereby reducing long-run consumer welfare), reduces profit, increases trade restrictions, and injures the international reputation of the country in which counterfeiters operate.

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123 Id. China on May 26, 1991, was under the special 301 "priority (watch) list," and on January 17, 1992, after signing of the Memorandum Of Understanding (MOU) with the United States, the investigations were resolved. Special 301 Hearing, supra note 42, at 59 (statement of Ira Shapiro). The United States uses retaliatory remedies to deal with unfair trade through section 301 of the U.S. Trade Act of 1930. Section 337 protects U.S. firms from unfair competition from imports. Section 301 offers more leeway and allows the United States to act against inadequate protection of its intellectual property in other countries, even if the violations do not involve products imported to the United States. The 1984 Trade and Tariff Act explicitly designates weak intellectual property in a country as grounds for withdrawing trade concessions extended to that country under the Generalized System of Preference.
124 White House Fact Sheet, supra note 122, at 456.
125 Hansen, supra note 94.
126 Special 301 Hearing, supra note 42, at 68 (statement of Senator Orrin G. Hatch).
127 Id.
128 Id.
It has been estimated that the damage caused by counterfeiting\textsuperscript{132} is anywhere between $43 billion and $61 billion annually in the United States.\textsuperscript{133} The State of New York estimates that this type of trademark infringement reduces its tax revenues by nearly $2 million annually.\textsuperscript{134} According to International Trade Commission estimates, the cost of piracy to the United States each year is a global export loss between $43 billion and $61 billion.\textsuperscript{135} In 1992, trade losses due to piracy were estimated to be $45 million in the motion picture industry, $45 million in the recording and music industry, $225 million in the computer programming industry, and $100 million the book industry.\textsuperscript{136} In 1991, U.S. industries' loss of sales due to piracy was an estimated $16 billion in books, $45 million in pharmaceuticals, $18 billion in software, $11 billion in movies, and $7 billion in sound recordings.\textsuperscript{137} In 1990, the United States lost an estimated $418 million in trade due to piracy in China.\textsuperscript{138} In 1992, piracy in China cost the United States $415 million in trade.\textsuperscript{139}

China is a major center for piracy of trademarks. Cases involving violations in China of intellectual property rights are numerous.\textsuperscript{140} In one case, the People's Republic of China had illegally produced and exported 1.2 million pairs of imitation Levi Strauss jeans all over the world.\textsuperscript{141} Levi Strauss & Co. estimates that this constituted anywhere between 20% to 50% of its goods illegally produced and exported. In another case, two Chinese companies were making copies of the popular Parker Brothers game "Monopoly." They collected more than $200 million and stayed out of jail in spite of breaking a number of copyright and trademark laws.\textsuperscript{142} In another example, an American observer watched a Chinese woman pull small oranges from a garbage bag, stamp them with the "Sunkist" trademark and repack them in Sunkist boxes.\textsuperscript{143} When asked, the woman did not know what the

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\textsuperscript{132} Counterfeiting includes a broad range of practices such as illegal selling of video games, counterfeiting of designer jeans, making fake Apple and IBM computers, illegally copying software programs, reversing engineering chips, home taping of records and movies, photocopying, and taking satellite signals off the air. See Robert Arnold Russel, In Defence of Piracy, EXECUTIVE, 47-52 (Sept. 1983).
\textsuperscript{134} Id.
\textsuperscript{135} Id. at 85 (statement of Eric H. Smith).
\textsuperscript{137} Special 301 Hearing, supra note 42, at 85 (statement of Eric H. Smith).
\textsuperscript{138} Id.
\textsuperscript{139} Id. at 55-59 (testimony of Von Scilcher).
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} Id.

word "Sunkist" meant, but did know that the oranges marked with it sold better than those without it. In another illustration, in 1989, the China National Textiles Import-Export Corporation, a semi-governmental Chinese company, was falsely labeling 24,000 boys' acrylic jogging suits as girls' apparel in order to bypass the filled quotas for these items. Another Chinese company, China National, in 1990 was conspiring to mislabel Chinese-made jeans with "Made in Egypt" tags. Infringing copies of copyrighted decorative fabric designs are entering the U.S. markets, but the owners of the U.S. copyrights in the designs are without a remedy since the Chinese officials do not consider textile designs to be subject to protection under their copyright laws.

Only limited technology is needed to counterfeit certain kinds of products. This gives the counterfeiter a wide variety of localities from which to operate. Some of the problems of counterfeiting in China are created by middlemen from Hong Kong who subcontract with factories and businesses in China to produce a certain number of a product within a certain time period. This makes the timing of the investigation critical; often by the time the goods are traced to the origin, the factory is producing another product and the damage is done. More than 100,000 counterfeiting cases have reportedly been handled by the administrative authorities over the past ten years. The Chinese authorities, in their effort to clean up the counterfeit market, have conducted numerous nationwide campaigns against counterfeit products, false advertisements, and other such illegal activities. "Chinese enforcement officials are also conducting more extensive investigations and raids, and stiffer penalties are being imposed."

Because of the limited enforcement of intellectual property rights and serious trademark infringements, U.S. companies are facing the risks of investment and technology transfer. For instance, DuPont has agreed to a number of projects with China which require DuPont technology. DuPont's major concern is technology transfer. As the President of DuPont Asia/Pacific said, "We urge the Ministry of the Chemical Industry to be more proactive. The problem is that China

146 Id.
147 Special 301 Hearing, supra note 42, at 111, 114.
148 Hatch, supra note 144, at 67.
149 Id.
150 Id.
151 Id.
152 Id.
153 Id.
doesn't have the legal system."\textsuperscript{155}

The extent of piracy of software, video, sound recordings and printed materials has been immense, and the Chinese state agencies are the major suspects.\textsuperscript{156} Since very few individuals in China have personal computers (in 1992 there were an estimated 400,000 to 600,000 microcomputers in China),\textsuperscript{157} most of the copying is done in institutional settings such as ministries, local governments, universities, research institutions, and corporations.\textsuperscript{158} In 1993, U.S. companies' share of computer hardware sales to China was seventy percent.\textsuperscript{159} China has some of the world's best software engineers.\textsuperscript{160} However, the CC-Dos Chinese character input system developed by the Sixth Research Institute of the Ministry of Machinery and Electronic Industry was widely pirated.\textsuperscript{161} As a result, the developers did not realize any revenue for their efforts. Over two-thirds of the software in use in China are unauthorized copies of foreign software products such as Lotus 1-2-3, Database, Word Perfect, and computer languages which are modified for Chinese character input (hanzifield).\textsuperscript{162}

Despite the fact that China has joined numerous international organizations for the protection of international property rights such as the World Intellectual Property Organization, the Paris Union on Industrial Property,\textsuperscript{163} and the Madrid Union On Trademarks, and has joined the Berne Convention and the Universal Copyright Convention,\textsuperscript{164} the competing interests between different government ministries and agencies, the difficulties of coordinating China's enormous bureaucratic process, lassitude, and corruption have made progress on intellectual property rights concerns difficult.\textsuperscript{165}

The rules and regulations governing trade in China are not easily available and differ significantly by region.\textsuperscript{166} As a result, U.S. firms and even many Chinese officials themselves lack a solid understanding of Chinese trading works.\textsuperscript{167} For instance, in 1978 Coca-Cola obtained an exclusive right to sell its product with the Central Government

\begin{itemize}
  \item \textsuperscript{155} Id.
  \item \textsuperscript{156} Id. 
  \item \textsuperscript{157} China Economic Policy and Trade Practices, supra note 111.
  \item \textsuperscript{158} D. Barnes, International Trade Administration, China-PC Software Market, available in Nat’l Trade Data Bank-The Export Connection, U.S. Dep’t of Commerce (Dec. 27, 1994).
  \item \textsuperscript{159} Id. 
  \item \textsuperscript{159} Id.
  \item \textsuperscript{160} Barnes, supra note 157.
  \item \textsuperscript{161} Id.
  \item \textsuperscript{162} Id.
  \item \textsuperscript{163} The Paris Convention came into being in 1883. Prior to the Paris Convention, no international agreement addressed the obstacles to international patenting. See ARPAD BOGSCS, THE FIRST HUNDRED YEARS OF THE PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY 9 (1983).
  \item \textsuperscript{164} Special 301 Hearing, supra note 42, at 19 (statement of Ira Shapiro).
  \item \textsuperscript{165} See Lack of Intellectual Property Protection, supra note 87.
  \item \textsuperscript{166} See Joseph Eastlack and Susan Kramer Watkins, China, in INTERNATIONAL BUS. HANDBOOK 165, 187-89 (Haworth ed., 1990).
  \item \textsuperscript{167} Id. at 189.
\end{itemize}
Trading Company.\(^{168}\) In 1984 when Pepsi-Cola entered the market, Coca-Cola was informed that it (Coca-Cola) did not have exclusive rights for all of China, but rather a priority right to sell in the provinces in which it operated.\(^{169}\) China has begun the process of publishing formerly restricted trade regulations, but still maintains a set of internal rules governing foreign trade that are not available to foreigners and may take precedence over published regulations.\(^{170}\)

In China, regulations often have been interpreted inconsistently by different government ministries and government agencies.\(^{171}\) The laws themselves are extremely vague, often leaving important undefined terms up to government officials without giving any indication as to whom those responsible officials are.\(^{172}\) The investigations and dispute settlements are costly, time-consuming and complicated, and there is a shortage of Chinese lawyers trained in intellectual property law.\(^{173}\) There is no judicial or administrative body to handle the copyright disputes, and the Chinese court systems are not ready to handle the copyright infringement claims.\(^{174}\) As a result, the legal processes that look effective on paper do not work in reality, thus raising doubts about how effectively these new laws and regulations will protect foreign investors and the transfer of technology.

IV. Conclusion

In order to illuminate the nature and importance of intellectual property laws, this Article has examined the development and lack of enforcement of these laws and the effect on China’s foreign investment.

China has signed bilateral investment treaties with fifty-two countries, all with identical provisions in substance.\(^{175}\) This presents enormous opportunities for foreign investments. China’s economy, as its markets are extremely large, needs and demands foreign investment as well as an infinite array of goods and services.\(^{176}\) However, this critically needed foreign investment remains far below its potential level.\(^{177}\) The amount of foreign investment grew on average at an an-

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\(^{168}\) Id.

\(^{169}\) Id.


\(^{171}\) See Pam Baldinger, Ongoing Debate Over China’s MFN Status Clouds Future Trade Growth with U.S., Asian Wall St. J. WKLY., June 15, 1992, at 4B.

\(^{172}\) Allocation of Resources In The Soviet Union And China, supra note 11, at 319.

\(^{173}\) Hatch, supra note 144, at 68.

\(^{174}\) See id. at 67.

\(^{175}\) International Trade Administration, China-Investment Climate Statement, available in Nat’l Trade Data Bank-The Export Connection, U.S. Dep’t of Commerce (Mar. 1, 1994).


\(^{177}\) Direct investments are in the form of equity and contractual joint ventures, oil exploration by foreign companies and wholly foreign-owned business enterprises. Indirect invest-
nual rate of thirty percent since 1980,¹⁷⁸ and in 1991, the amount of foreign investment was over $11.9 billion.¹⁷⁹ Foreign investment, specifically in high-technology industries, is dependent upon intellectual property protection.¹⁸⁰ If intellectual property rights were adequately enforced in order to maintain the profitability and competitiveness of these industries in the global economy, then there would be a flood of new investments and products in China, which would alleviate domestic shortages, promote exports, and bring in foreign exchange and technologies which are vital for building infrastructure needed for modernization and long-term growth in China's economy.¹⁸¹