



8-21-2014

Trademark Counterfeiting in China: The Real Price of Knock-Offs

Joyce Chang

Follow this and additional works at: <http://digitalcommons.law.scu.edu/lawreview>

Recommended Citation

Joyce Chang, Comment, *Trademark Counterfeiting in China: The Real Price of Knock-Offs*, 54 SANTA CLARA L. REV. 765 (2014).
Available at: <http://digitalcommons.law.scu.edu/lawreview/vol54/iss3/6>

This Comment is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

TRADEMARK COUNTERFEITING IN CHINA: THE REAL PRICE OF KNOCK-OFFS

Joyce Chang*

TABLE OF CONTENTS

Introduction	765
I. Background	768
A. What is Counterfeiting?	768
B. Current Laws in Place	769
C. Resulting Problems from Counterfeiting.....	771
1. Trademark Owner’s Rights Infringed	771
2. Consumer Risks	772
3. Criminal Activity.....	775
i. Terrorist Groups	775
ii. Child Labor	776
II. Analysis.....	777
A. Why Does Counterfeiting Occur?.....	777
1. History	777
1. Local Protectionism and Governmental Corruption: “The Sky is High and the Emperor is Far Away”	780
i. Lack of (True) Enforcement: Counterfeiting is Fuel for the Chinese Economy	780
ii. Lack of Deterrence	782
III. How To End Counterfeiting	785
A. Education.....	785
B. Publicity	787
C. Long-Term Approach	789
Conclusion.....	790

INTRODUCTION

Wang Yajuan of Shijiazhuang City, China, awoke at 7:00

* J.D., Santa Clara University School of Law, 2014; B.S., University of California, Davis, 2009. I would like to thank Professor Anna M. Han for her invaluable feedback regarding this Note, the editors and staff of the Santa Clara Law Review for their work on this Note, and my family for their constant love and support.

a.m. every morning to begin her twelve-hour shift at a textile factory.¹ Along with other children, she toiled at least twelve hours a day, seven days a week, and slept in a dilapidated, poorly ventilated factory room with no heat in the frigid winters.² One night in December 2004, Yajuan and her roommates lit a small charcoal stove, only to be found dead the next morning from inhaling charcoal fumes.³ Yajuan's labor, alongside countless other young victims, fuel a multi-billion dollar counterfeit industry every year.⁴

Eduardo Arias of Panama City, Panama, was shopping the aisles of a discount store when he spotted a tube of toothpaste labeled with the word, "Colgate," being sold at a price so low that even street vendors purchased their supplies from the chain.⁵ But among the ingredients, where it should have listed "glycerin," Arias caught the chemical name for antifreeze,⁶ the same toxic substitute that had already caused innumerable deaths in the country earlier in the year.⁷ Within days, Mr. Arias lit the fuse that exposed a scandal of counterfeit products that would reverberate throughout the world.⁸ The fake Colgate toothpaste Mr. Arias found would eventually reach thirty-four countries, doled out to U.S. prisoners and wealthy patrons at high-end hotels alike.⁹

1. Jan Goodwin, *The Human Cost of Fakes*, HARPER'S BAZAAR, Jan. 1, 2006, at 54, available at <http://www.jangoodwin.com/articles/thehumancostoffakes.pdf>.

2. *Id.*

3. See e.g., *id.* (In the morning, the factory owner ordered the girls' bodies be quickly sealed in coffins and sent them off for cremation. Later, an investigation would reveal that at least two of the girls had still been alive when they were entombed).

4. Jamie Corsi, *For Companies, Counterfeit Battle is Never-Ending*, CNBC (Jul. 90, 2010), <http://www.cnbc.com/id/38125681> ("Watches, handbags, footwear and medicine made up more than \$260 million in counterfeit products seized at US ports in 2009.").

5. Walt Bogdanich, *The Everyman Who Exposed Tainted Toothpaste*, N.Y. TIMES (Oct. 1, 2007), <http://www.nytimes.com/2007/10/01/world/americas/01panama.html?pagewanted=all&r=0>.

6. David Von Drehle, *Eduardo Arias - Person of the Year 2007, People Who Mattered*, TIME (Dec. 19, 2007), http://www.time.com/time/specials/2007/personoftheyear/article/0,28804,1690753_1690758_1693575,00.html; see also Bogdanich, *supra* note 5.

7. Laura C. Nastase, *Made in China: How Chinese Counterfeits are Creating a National Security Nightmare for the United States*, 19 FORDHAM INT'L PROP. MEDIA & ENT. L.J. 143, 150 (2008) (citing Bogdanich, *supra* note 5).

8. Von Drehle, *supra* note 6; see also Bogdanich, *supra* note 5.

9. Bogdanich, *supra* note 5.

LeRoy Hubley of Toldeo, Ohio, watched his wife of forty-eight years pass away.¹⁰ Mrs. Hubley had a kidney disease that required dialysis, a disorder she also passed to her son.¹¹ For months, Mrs. Hubley used Heparin, a commonly prescribed blood-thinner, not knowing that the batch she was given was counterfeit—the active ingredient was switched with a far cheaper substitute¹² that would poison her to death. Within weeks, the Hubleys' son suffered the same fate.¹³

These three stories regarding trademark infringement, alongside countless others that have come out of the woodwork,¹⁴ all originate from a common source: China, the country that remains the single largest producer of counterfeit goods in the world.¹⁵ Just as China has become the world's leading exporter of manufactured goods, it is likewise dominating the underground market for knock-offs.¹⁶

The purpose of this Comment is to explore trademark counterfeiting. Part I will discuss what trademark counterfeiting comprises of, the current laws in place, and the impact the act leaves on companies in the United States.¹⁷ Part II will examine why trademark counterfeiting occurs and why, despite being the target of severe international scrutiny and criticism for over a decade, there still appears to be little evidence¹⁸ of marked improvement.¹⁹ Lastly, Part III will

10. Bill Powell, *Heparin's Deadly Side Effects*, TIME (Nov. 13, 2008), <http://www.time.com/time/magazine/article/0,9171,1858870-1,00.html>; see also Gardiner Harris, *F.D.A. Says Drug Contamination May Have Been Deliberate*, N.Y. TIMES, Apr. 30, 2008, at A11, available at <http://www.nytimes.com/2008/04/30/health/policy/30heparin.html>.

11. See Powell *supra* note 10; see also Harris *supra* note 10.

12. *Id.*

13. *Id.*

14. See, e.g., Goodwin, *supra* note 1.

15. Dalila Hoover, *Coercion Will Not Protect Trademark Owners in China, But an Understanding of China's Culture Will: A Lesson the United States Has to Learn*, 15 MARQ. INTELL. PROP. L. REV. 325, 326 (2011).

16. Andrew Yeh, *The Complex Trade in Luxurious Fakes*, FIN. TIMES OF ASIA (Apr. 19, 2006), available at <http://www.ft.com/intl/cms/s/1/05eb362c-cef7-11da-925d-0000779e2340.html#axzz2CXW0cpUI>.

17. See *infra* Part I.

18. See generally Daniel C.K. Chow, *Counterfeiting in the People's Republic of China*, 78 WASH. U. L.R. 1 (2000) [hereinafter Chow, *Counterfeiting in the PRC*]; Daniel C.K. Chow, *Why China Does Not Take Commercial Piracy Seriously*, 32 OHIO N.U. L. REV. 203, 204 (2006) [hereinafter Chow, *China Does Not Take Commercial Piracy Seriously*].

19. See *infra* Part II.

recommend strategies for ending China's counterfeit crisis.²⁰

I. BACKGROUND

A. *What is Counterfeiting?*

Trademark counterfeiting has become increasingly pervasive in international trade.²¹ From 2004 to 2009, China dominated in counterfeit production by a wide margin, accounting for 77% of the aggregate value of goods seized in the United States—with the next country in line accounting for merely 7%.²² China's extensive history of corruption and its ineffective enforcement of anti-counterfeiting in the field of intellectual property have certainly been heavily documented.²³ In particular, Chinese trademark counterfeiting has been the target of intense scrutiny, from U.S. Senators²⁴ to the chairman of Louis Vuitton,²⁵ who bemoaned China as being an especially big headache.²⁶ In August 2012, U.S. Customs and Border Protection reported that customs agents seized nearly 25,000 counterfeit goods during fiscal year 2011, amounting to an estimated \$1.1 billion in lost sales.²⁷ In reality, the number of counterfeit products

20. *See infra* Part III.

21. THE U.S. CONG. JOINT ECON. COMM. CHAIRMAN'S STAFF, SEN. BOB CASEY, CHAIRMAN, THE IMPACT OF INTELLECTUAL PROPERTY THEFT ON THE ECONOMY 1 (Aug. 2012), *available at* http://www.jec.senate.gov/public/index.cfm?a=Files.Serve&File_id=aa0183d4-8ad9-488f-9e38-7150a3bb62be [hereinafter *Congress Joint Economic Committee*].

22. U.S. GOV'T ACCOUNTABILITY OFFICE, INTELLECTUAL PROPERTY: OBSERVATIONS ON EFFORTS TO QUANTIFY THE ECONOMIC EFFECTS OF COUNTERFEIT AND PIRATED GOODS 8 (2010), *available at* <http://www.gao.gov/assets/310/303057.pdf>.

23. Nastase, *supra* note 7, at 145; *see also* Donald P. Harris, *The Honeymoon is Over: The U.S.-China WTO Intellectual Property Complaint*, 32 FORDHAM INT'L L.J. 96, 102 (2009).

24. *Counterfeit Goods: Easy Cash for Criminals and Terrorists: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 109th Cong. 1-3 (2005) (statement of Sen. Susan M. Collins, Chairman, S. Comm. on Homeland Sec. and Governmental Aff.), *available at* <https://bulk.resource.org/gpo.gov/hearings/109s/21823.pdf> [hereinafter *Hearing*].

25. *See e.g.*, Yeh, *supra* note 16 (Bernard Arnault is the LVMH chairman and also France's richest man. LVMH includes the Louis Vuitton, Fendi, Givenchy, Moët & Chandon, and Dom Perignon brands).

26. *Id.*

27. *Congress Joint Economic Committee*, *supra* note 21; *see also* CBP OFFICE OF INTERNATIONAL TRADE, U.S. DEP'T HOMELAND SECURITY, INTELLECTUAL PROPERTY RIGHTS FISCAL YEAR 2011 SEIZURE STATISTICS (2012), *available at* <http://www.ice.gov/doclib/iprcenter/pdf/ipr-fy-2011-seizure-report.pdf>; Sheryl

that pass undetected is immeasurably higher because of the impossibility to screen each imported shipment of goods. In the port of Los Angeles alone, 14 million containers arrive every year, but authorities are able to examine less than 1% of those containers.²⁸ Overall, counterfeiting cost American businesses \$250 billion in lost revenue in 2011,²⁹ and while trademark counterfeiting occurs worldwide, China accounts for the vast majority of fake goods detained at the U.S. border.³⁰

In this Comment, “counterfeiting” refers to the unlawful act of one party in producing exact copies of merchandise with trademarks owned by another party.³¹ Counterfeiting involves an effort to market fake merchandise as genuine by creating a replicated product that appears to be indistinguishable from the authentic product.³² To do so, counterfeiters use the same trade dress as the original product on the knock-off and often even include on the pirated goods the name and address of the manufacturer whose product and trademark has been infringed upon.³³ Counterfeit products also raise product quality concerns and pose consumer risks because the replicated goods are of lower quality, yet the counterfeiter attempts to pass off the product as genuine and originating from a well-known brand name.³⁴

B. Current Laws in Place

In 1982, China adopted the Trademark Law, which was devised to address many of the same concerns covered by

Harris, ‘Faux, Faux Faux.’ *Dodge Counterfeits As You Shop For the Holidays: Plain Dealing*, CLEVELAND SUN.COM (Nov. 17, 2012, 12:00 PM), http://www.cleveland.com/consumeraffairs/index.ssf/2012/11/dodging_counterfeits_as_you_sh.html.

28. Elizabeth Lee, *Counterfeit Industry Tied to Organized Crime, Terrorism*, VOICE OF AM. (July 4, 2012), <http://www.voanews.com/content/counterfeit-industry-tied-to-organized-crime-terrorism/1363590.html>.

29. Greg Hardesty, *Police Crack Down on Designer Deceit in O.C.*, ORANGE CNTY. REG. (Nov. 16, 2012), <http://www.oregister.com/news/counterfeit-377983-agents-merchandise.html> (citing the International Anti-Counterfeiting Coalition).

30. *Congress Joint Economic Committee*, *supra* note 21.

31. Chow, *Counterfeiting in the PRC*, *supra* note 18, at 449.

32. *Id.* at 450.

33. *Id.*

34. *Id.* at 450–51.

the trademark law in the United States.³⁵ Under the Trademark Law, a party may infringe by using a mark that is the same or similar to another's on the same or similar goods, selling goods that bear another's mark, or counterfeiting another's mark.³⁶ Similar to the American doctrine of contributory infringement, providing storage or shipping products for the purpose of infringement also incurs liability.³⁷ Then, when the amount of infringing sales involved is "relatively large" or "huge," infringers may face criminal charges.³⁸

It would be fair to say that China's existing framework for trademark protection is viable because the Chinese government has shown its commitment to trademark protection through adopting both domestic laws and all major international treaties.³⁹ In 1980, China became a contracting party of the World Intellectual Property Organization ("WIPO"), a United Nations agency comprised of over 185 member states dedicated to protecting intellectual property.⁴⁰ In 1985, China became a member of the Paris Convention for the Protection of Intellectual Property ("Paris Convention"), and in order to comply with the Convention's requirements, passed the 2001 Trademark Law and the 2003 Provisions on the Determination and Protection of Well-Known Marks.⁴¹ In 1995, China joined the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks ("Madrid Protocol"), an international system for registering marks.⁴² Lastly, in 2001, China became a member of the World Trade Organization, signing the Trade-Related Aspects of Intellectual Property Rights Agreement⁴³ and amending existing Chinese law to comply with Article 16 of the

35. Timothy Lau, Kyle Niemi & Lanna Wu, Note, *Protecting Trademark Rights in China Through Litigation*, 47 STAN. J. INT'L L. 441, 442 (2011).

36. *Id.* at 443.

37. *Id.*

38. *Id.*

39. Hoover, *supra* note 15, at 337.

40. See WORLD INTELLECTUAL PROP.ORG., <http://www.wipo.int/members/en/> (last visited Apr. 27, 2014).

41. Hoover, *supra* note 15, at 335–36.

42. *Id.* at 336.

43. Press Release, World Trade Org., *WTO Ministerial Conference Approves China's Accession* (Nov. 10, 2001), http://www.wto.org/english/news_e/pres01_e/pr252_e.htm.

agreement.⁴⁴ By continually committing themselves to conventions, treaties, and agreements, China demonstrates its commitment to meeting international standards for protecting intellectual property.⁴⁵ Moreover, China's participation in the international platform is particularly important because under Chinese law, when a conflict arises between Chinese domestic law and international standards, the international rules will apply.⁴⁶

It is important to note, however, that having laws that comply on paper with international standards means little when enforcement of the laws is weak.⁴⁷ In the United States, the incentive to copy is heavily offset by the criminal sanctions that result if caught.⁴⁸ On the contrary, China has a developing legal structure that is inadequate in enforcing intellectual property rights.⁴⁹

C. Resulting Problems from Counterfeiting

1. Trademark Owner's Rights Infringed

Innovation stimulates both economic growth and employment opportunities, and at the core of ensuring that individuals pursue such innovation is the assurance that their intellectual property rights will be protected.⁵⁰ By contrast, counterfeiting stunts economic growth and erodes the returns on innovation because the negative impacts of potential theft on businesses diminish the incentive to create.⁵¹ Businesses often experience lost revenue and eventually, lower profits when sales from authentic goods are diverted to counterfeits.⁵² Profits are also negatively impacted by the added costs required to defend the business from future incidences of intellectual property infringement.⁵³ Additionally, the availability of a replicated good can put

44. Hoover, *supra* note 15, at 337.

45. *Id.*

46. Administrative Procedure Law (adopted Apr. 4, 1989), art. 72 (China), available at <http://en.chinacourt.org/public/detail.php?id=2695>.

47. Chow, *China Does Not Take Commercial Piracy Seriously*, *supra* note 18, at 212.

48. *Id.* at 211–12.

49. *Id.* at 212.

50. *Congress Joint Economic Committee*, *supra* note 21.

51. *Id.*

52. *Id.*

53. *Id.*

downward pressure on the price of the authentic product, causing further decline in revenue.⁵⁴

The proliferation of the Internet has significantly enhanced the accessibility to counterfeit goods.⁵⁵ Furthermore, counterfeiting techniques have become so developed and advanced that many fakes cannot be distinguished from the real product by the naked eye.⁵⁶ Accessibility to counterfeits in conjunction with nearly perfect replication skyrockets the likelihood of purchase and consumer confusion. As a result, a company's brand may be damaged when consumers, unaware that they purchased a counterfeit good, instead blame the maker of the genuine product for the poor-quality counterfeit they have received.⁵⁷

2. Consumer Risks

Counterfeiting activity creates significant consumer safety risks, a concern that affects not only the well-being of individuals in the United States but the health and safety of individuals throughout the world. Consumers are harmed when they purchase counterfeit items of lower quality because some goods, such as illegitimate medicines, pose devastating health and safety risks.⁵⁸ For example, in 2007, consumers were unwittingly putting antifreeze in their mouths until Eduardo Arias, mentioned earlier, noticed a tube of counterfeit toothpaste marked with the words "diethylene glycol" ("DEG").⁵⁹ In the past, counterfeiters have substituted DEG as a cheap alternative for its more expensive chemical

54. *Id.*

55. John Schwartz, *Black Market for Software is Sidestepping Export Controls*, N.Y. TIMES (Dec. 2, 2002), <http://www.nytimes.com/2002/12/02/business/technology-black-market-for-software-is-sidestepping-export-controls.html?pagewanted=all&src=pm>.

56. See e.g., Goodwin, *supra* note 1, at 53 (Goodwin, recounting a situation with one of her fashionable colleagues who experienced a rude awakening at a cocktail party: "[My colleague] was nibbling on canapés, a designer bag in the crook of her arm, when a publicist for the brand came over to chat and asked her where she'd bought her handbag. My colleague had received it from her boyfriend—a much-loved first-anniversary gift—and he'd found it online at a great price. "That bag is a fake," the publicist informed her. My colleague asked her how she could tell and was shown the subtle difference in stitching—almost invisible to the naked eye—that separated her handbag from the genuine thing. She was mortified.").

57. *Congress Joint Economic Committee, supra* note 21.

58. *Id.*

59. Bogdanich, *supra* note 5.

counterpart, glycerin.⁶⁰ The tainted toothpaste was manufactured in China, falsely labeled under Colgate and Sensodyne brand names, and slipped into the international marketplace.⁶¹ Although the 2007 toothpaste scare in Panama did not result in any consumer deaths in the United States,⁶² another drug the following year did.

In 2008, eighty-one people died from ingesting a Chinese-made counterfeit version of the drug Heparin,⁶³ a blood thinner commonly used prior to surgery⁶⁴ and often prescribed to dialysis patients.⁶⁵ LeRoy Hubley, mentioned earlier, watched his wife and son pass away from severe allergic reactions brought on by a counterfeit version of the drug—both used the blood thinners to regimen their hereditary kidney disorder and were fatally poisoned by a replicated version.⁶⁶ The Food and Drug Administration identified Changzhou SPL, a Chinese subsidiary of Scientific Protein Laboratories,⁶⁷ as the source of the adulterated blood thinners, which substituted the use of genuine heparin with oversulfated chondroitin sulfate—a contaminant estimated to cost merely \$9 per pound, as opposed to \$900 per pound, the cost of authentic heparin.⁶⁸ In light of these stark price differences and the discovery that nearly one-third of the material in some batches of heparin comprised of the cheaper replacement led federal drug regulators to believe that the

60. *Id.*

61. *Id.*

62. *Id.*

63. Editorial, *The Frightening Heparin Case*, N.Y. TIMES, Apr. 28, 2008 at A22, available at http://www.nytimes.com/2008/04/28/opinion/28mon2.html?pagewanted=print&_r=0; see also Olga Khazan, *Here's Why 10 Percent of the Developing World's Drugs Are Fake*, WASH. POST (Nov. 14, 2012, 10:33 AM), <http://www.washingtonpost.com/blogs/worldviews/wp/2012/11/14/heres-why-10-percent-of-the-developing-worlds-drugs-are-fake/>.

64. News Release, U.S. Food & Drug Admin., Baxter's Multiple-Dose Vial Heparin Linked to Severe Allergic Reactions (Feb. 11, 2008), <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2008/ucm116858.htm>.

65. *Heparin Injections*, MEDLINE PLUS, <http://www.nlm.nih.gov/medlineplus/druginfo/meds/a682826.html> (last visited Apr. 16, 2014) (describing the composition of heparin).

66. Harris, *supra* note 10.

67. *Id.* (Scientific Protein Laboratories supplied the contaminated heparin material to Baxter International, which manufactured and delivered the finished drug.)

68. *Id.*

contamination was deliberate.⁶⁹ Though Chinese officials have disputed the contention that the replacement chemical caused death and injury, the circumstances were still enough for FDA Commissioner Andrew C. von Eschenbach to describe the contamination as a result of “economic fraud.”⁷⁰ Ultimately, the batches of blood-thinning drugs laced with counterfeit active ingredients were shipped to eleven countries and suspected in the deaths of eighty-one people.⁷¹

Dangerous imitation drugs are not a recent discovery⁷² and its development is far from elementary—to the contrary, it operates within complex international frameworks.⁷³ Accordingly, Andrew Jackson, head of corporate security at Novartis, describes the counterfeit drug trade as “not exactly a mom-and-pop operation,” but rather as “organized crime.”⁷⁴ For example, by the time the adulterated drugs arrive in the United States, the shipment has already traveled through multiple countries. In one investigation, counterfeit drugs produced in China were transported by road to Hong Kong, sent by air to Dubai, and passed through London Heathrow on the way to the counterfeit organization’s warehouse fulfillment center in the Bahamas.⁷⁵ From there, the drugs were shipped to another organization in the U.K., which then ultimately delivered the packages to the United States.⁷⁶ Since 2000, FDA inspections of counterfeit drugs have increased by over 20% and consumer danger does not end with purses, toiletries, and pharmaceuticals.⁷⁷ On many street corners in some American cities, buyers can find counterfeit golf clubs, eggs,⁷⁸ sneakers, auto parts, and infant formula.⁷⁹

69. *Id.*

70. *Id.*

71. See e.g., Harris, *supra* note 10 (Heparin is made from the mucous membranes of the intestines of slaughtered pigs that, in China, are often cooked in unregulated family workshops. The FDA has identified 12 Chinese companies that have supplied contaminated heparin to 11 countries—Australia, Canada, China, Denmark, France, Germany, Italy, Japan, the Netherlands, New Zealand and the United States).

72. Nastase, *supra* note 7.

73. Paul Toscano, *The Dangerous World of Counterfeit Prescription Drugs*, USA TODAY (Oct. 7, 2011, 5:50 PM), <http://usatoday30.usatoday.com/money/industries/health/drugs/story/2011-10-09/cnbc-drugs/50690880/1>.

74. *Id.*

75. *Id.*

76. *Id.*

77. Nastase, *supra* note 7.

78. Patrick Boehler, *Bad Eggs: Another Fake-Food Scandal Rocks China*,

2014] *TRADEMARK COUNTERFEITING* 775

3. *Criminal Activity*

i. *Terrorist Groups*

Counterfeiting activity is also correlated with supporting criminal activity both in China and the United States.⁸⁰ Spencer Burgess, director of Carratu International's Intellectual Property Investigations Division, warns against the common misconception that counterfeiting is run by small businesses attempting to make some extra income.⁸¹ Rather, counterfeiting is significantly more organized and malicious.⁸² Links have been found between counterfeiting and Al-Qaeda, Hezbollah, the Russian Mafia, and drug cartels.⁸³ Indeed, Al-Qaeda training materials exposed that part of their funding was acquired through counterfeit goods.⁸⁴

Though purchasing faux Gucci sunglasses⁸⁵ or a pair of fake Tory Burch shoes seems harmless enough, such small purchases can serve as funding sources for international terrorism because terrorist attacks do not require a significant amount of money.⁸⁶ For example, the devastating 9/11 attacks are estimated to have cost only \$500,000,⁸⁷ and the 1993 World Trade Center bombing only cost an estimated \$10,000.⁸⁸ In her statement to the U.S. Senate, Senator Susan Collins explained that such a sum is effortlessly generated

TIME (Nov. 6 2012), <http://newsfeed.time.com/2012/11/06/how-to-make-a-rotten-egg/>.

79. Nastase, *supra* note 7; *see also* *Hearing, supra* note 24, at 5–6 (statement of Sen. Daniel Akaka) (Senator Akaka stressed that counterfeit goods is not a victimless crime. Counterfeit baby formula sold in China resulted in the deaths of 13 infants and serious illness to another 171 infants).

80. *Hearing, supra* note 24.

81. *Rise in Counterfeit Market Linked To Terrorist Funding*, FRAUDAID, <http://www.fraudaid.com/scamspeak/conprods.htm> [hereinafter *Terrorist Funding*].

82. *Id.*

83. *Id.*; *see also* Lee, *supra* note 28; *see also* Kevin Lewis, *The Fake and the Fatal: The Consequences of Counterfeits*, 17 PARK PLACE ECONOMIST 48, 52 (2009), *available at* <http://www.iwu.edu/economics/PPE17/lewis.pdf>.

84. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., TERRORIST FINANCING STAFF MONOGRAPH 19, *available at* http://govinfo.library.unt.edu/911/staff_statements/911_TerrFin_Ch2.pdf; *see also* *Terrorist Funding, supra* note 81.

85. Hardesty, *supra* note 29.

86. Nastase, *supra* note 7.

87. *Id.*

88. *Id.*

from the sale of counterfeit goods.⁸⁹ Each day, investigators find evidence strongly suggesting that terrorist groups are raising funds through the sale of counterfeit goods.⁹⁰ As such, a critical aspect in counter-terrorism efforts is to stifle such funding sources that allow terror groups to operate.⁹¹

ii. Child Labor

On the other side of purchasing counterfeit goods are the hands, working for a pittance⁹², which created the products. Over the years, stories of the tragic lengths to which counterfeiting operators have gone leaked out of China.⁹³ Though Shanghai and Beijing have rapidly become the glittering cities of the future, where over 250,000 Chinese “dollar millionaires” now live a life of luxury, the rural economy has collapsed during China’s economic restructuring.⁹⁴ As a result, many families in need of supplemental income are forced to send their children to work in ramshackle factories,⁹⁵ the children’s labor fueling the \$600 billion per year counterfeiting industry.⁹⁶ Although children under sixteen years of age are not legally allowed to work in China, those laws are not always enforced.⁹⁷ Further shielding the public from labor circumstances in China are regulations mandated in 2000 by the Ministry of Labor classifying child-labor statistics as state secrets.⁹⁸ However, despite the local government’s effort to suppress what occurs behind the closed doors of counterfeiting warehouses, tales of child labor, often tantamount to slave labor, have nonetheless been exposed.⁹⁹

89. *Hearing, supra* note 24, at 1–3 (statement of Sen. Susan M. Collins, Chairman, S. Comm. on Homeland Sec. and Governmental Aff.).

90. *Hearing, supra* note 24, at 10–14 (testimony of Kris Buckner, President of Investigative Consultants) (Investigate Consultants is a licensed private investigative firm based in Southern California specializing in investigations involving the manufacture, distribution, and sale of counterfeit goods).

91. Nastase, *supra* note 7, at 153.

92. *Rising Slavery and Child Labor in China*, ASIA BURNING, <http://www.asiaburning.com/entry/rising-slavery-and-child-labor-in-china/>.

93. Corsi, *supra* note 4.

94. Goodwin, *supra* note 1, at 54.

95. Dana Thomas, *The Fight Against Fakes*, HARPER’S BAZAAR (Jan. 9, 2009), <http://www.harpersbazaar.com/magazine/feature-articles/the-fight-against-fakes-0109>.

96. *About Counterfeiting*, INT’L ANTI-COUNTERFEITING COAL., [available at http://www.iacc.org/counterfeiting-statistics.html](http://www.iacc.org/counterfeiting-statistics.html).

97. Goodwin, *supra* note 1, at 54.

98. *Id.*; *see also Rising Slavery and Child Labor in China*, ASIA BURNING, [available at http://www.asiaburning.com/entry/rising-slavery-and-child-labor-in-china/](http://www.asiaburning.com/entry/rising-slavery-and-child-labor-in-china/).

99. *See e.g.*, Goodwin, *supra* note 1, at 54 (“The people who run factories

II. ANALYSIS

A. *Why Does Counterfeiting Occur?*1. *History*

History shows that Chinese counterfeiting is virtually as old as America itself.¹⁰⁰ In 1784, the first American ship traveled from New York to modern-day Guangzhou, returning the following year with a cargo of tea, cotton fabric, and porcelain that earned investors a 25% return.¹⁰¹ American ships began voyaging to Guangzhou, and the Chinese craftsman they encountered were among the world's most talented and productive—and particularly skillful at duplicating images.¹⁰² In the early 1830s, the Carnes brothers of New York City began sending French imports to Guangzhou for Chinese craftsmen to replicate at a fraction of the cost of an original.¹⁰³ Remarkable imitations began flooding the French-crazed New York and were sold at authentic prices, generating for the Carnes brothers a spectacular return on their investment.¹⁰⁴ Today, Chinese counterfeiting operates at a magnitude far greater than it did centuries ago,¹⁰⁵ and an examination of China's history reveals the foundation of trademark counterfeiting. The ongoing issue of counterfeiting in China needs to be analyzed with an awareness of the country's cultural roots and heritage because a historical perspective of China will show how deeply embedded the issue of counterfeiting is and will proffer an explanation as to why enforcement has been ineffective.¹⁰⁶

Historically, China has been characterized as a collectivist society, where individualistic needs are suppressed to enhance the harmony of the greater society.¹⁰⁷

are scumbags, hiring children, locking employees in production areas where there have been fires and they can't escape.”).

100. Eric Jay Dolin, *Debate Jibes Ignore Chinese Counterfeiting's Long History*, REUTERS (Oct. 24, 2012), <http://blogs.reuters.com/great-debate/2012/10/24/debate-jibes-ignore-chinese-counterfeitings-long-history/>.

101. *Id.*

102. *Id.*

103. *Id.* at 2.

104. *Id.*

105. *Id.*

106. Hoover, *supra* note 15, at 343.

107. Edward Yui-tim Wong, *The Chinese At Work: Collectivism or*

As a result, the concept of intellectual property rights conflicts with long-established Chinese values. Deemed a moral code by many, Confucianism served as a guide for proper Chinese behavior from the sixth century B.C. to the middle of the twentieth century, and Chinese imperial rules followed Confucian beliefs to maintain their authority and governmental regime.¹⁰⁸ Confucianism focused on the fluidity and passing down of intellectual property for others to further build on, encouraged imitation of teachers as a method of learning, and emphasized subordination of individual interests to benefit the greater societal good.¹⁰⁹ For the good of society, work products were generated for and collectively owned by the State,¹¹⁰ not for the creator to individually gain from. Consequently, asserting intellectual property rights by excluding others is instinctively at odds with this communal social order: new products ought to be invented and branded not only for the individual creator's own benefit but shared with all members of the community as a whole.¹¹¹ In 1949, the Chinese Communist Party emerged and furthered the traditional collectivist mentality.¹¹² Therefore, historically, the Chinese simply did not view intellectual property rights as an individual right requiring protection—on the contrary, sharing with others and copying from others were not only perfectly acceptable ways of life, they were highly encouraged.¹¹³

Furthermore, traditional Chinese culture places a heavy emphasis on informal methods of social ordering such as hierarchy and morality before turning to state laws.¹¹⁴

Individualism? H.K. INST. OF BUS. STUDIES (Feb. 2001), http://www.library.ln.edu.hk/eresources/etext/hkibs/hkws_0040.pdf.

108. Hoover, *supra* note 15, at 343 (citing Shin-yi Peng, *The WTO Legalistic Approach and East-Asian: From the Legal Culture Perspective*, 1 ASIAN-PAC. L. & POL'Y J. 13, 87 (2000)).

109. Hoover, *supra* note 15, at 343–44.

110. *Id.* at 344.

111. *Id.*

112. Dexin Tian, *The Chinese Cultural Perceptions of Innovation, Fair Use, and the Public Domain: A Grass-Roots Approach to Studying the U.S.-China Copyright Disputes 50–51* (Dec. 2008) (unpublished dissertation, Bowling Green State University), available at https://etd.ohiolink.edu/rws_etd/document/get/bgsu1224963994/inline.

113. Hoover, *supra* note 15, at 344.

114. Aileen M. McGill, *How China Succeeded in Protecting Olympic Trademarks and Why This Success May Not Generate Immediate Improvements in Intellectual Property Protection in China*, 9 LOY. L. & TECH. ANN. 1, 6 (2009–2010).

Confucianism disapproved of litigation,¹¹⁵ considered harmony with others a virtue,¹¹⁶ and utilized external laws only when self-regulation failed to provide an adequate remedy.¹¹⁷ Believing in the rule of man rather than the rule of law, one of Confucianism's basic tenets states:

Lead the people with governmental measures and regulate them by law and punishments, and they will avoid wrongdoing, but will have no sense of honor or shame. Lead them by virtue and regulate them by the rules of propriety and they will have a sense of shame, and moreover, set themselves straight.¹¹⁸

Therefore, the driving force behind morality and proper behavior is the Chinese's fear of shame and dishonor to the country,¹¹⁹ not reverence for legal regulations. Indeed, in many trademark infringement cases, the penalty ordered by the court is through shaming,¹²⁰ not a financial penalty: the Chinese believe that such embarrassment should serve as an adequate deterrent for future misbehavior.¹²¹ Such penalties show that a primary reason for China's problems regarding trademark infringement and legal enforcement is the country's long-cherished and deep-rooted culture.¹²²

Although over the past century China has undergone a swift political and economic transformation, the cultural mores and the laws of the country have consistently preserved a Confucian and Marxist undertone of subjugating individual interest for the greater good of society.¹²³ Many people in China still believe that all creative works belong to the society as a whole¹²⁴ and with such rich, long-standing traditions, the high levels of counterfeiting occurring in China

115. Tian, *supra* note 112, at 52.

116. *Id.*

117. Hoover, *supra* note 15, at 344.

118. Hoover, *supra* note 15 at 344 *citing* William P. Alford, *To Steal A Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization* 20 (STANFORD UNIVERSITY PRESS, 1997).

119. Hoover, *supra* note 15, at 345.

120. *See e.g., id.* (Public apologies are often the penalty required of an infringer. If an infringer fails to apologize as ordered, the court may publish an apology on their behalf).

121. *Id.* at 345.

122. *Id.* at 347.

123. McGill, *supra* note 114, at 6 *citing* Tao-Tai Hsia & Kathryn A. Huan, *Laws of the People's Republic on Industrial and Intellectual Property*, 5 LAW & POL'Y INT'L BUS. 743, 750 (1973).

124. Tian, *supra* note 112, at 53.

today become unsurprising.

1. *Local Protectionism and Governmental Corruption:
“The Sky is High and the Emperor is Far Away”*¹²⁵

One reason why China participates so readily in counterfeiting is because of local protectionism: since the Chinese governmental structure is dominated by local—and often corrupt—power, international treaties and laws are difficult to enforce.¹²⁶ Despite acts of enforcement by the local government,¹²⁷ another reason why counterfeiting is so widespread is the lack of deterrence. China’s chronic underutilization of criminal punishment¹²⁸ is essentially the equivalent of having no deterrence at all because the infringers face very lenient penalties, particularly in comparison to the profit they stand to gain per replicated product.¹²⁹

i. *Lack of (True) Enforcement: Counterfeiting is Fuel
for the Chinese Economy*

Although the central government, People’s Republic of China (“PRC”), has made frequent declarations regarding the importance of protecting intellectual property rights in China,¹³⁰ actual enforcement occurs at the local level.¹³¹ At the ground level, pervasive issues of local protectionism and other types of government corruption plague the possibility of successful enforcement against counterfeiting¹³² because of

125. Walt Bogdanich & Jake Hooker, *From China to Panama, a Trail of Poisoned Medicine*, N.Y. TIMES (May 6, 2007), <http://www.nytimes.com/2007/05/06/world/americas/06poison.html?pagewanted=all>. “The sky is high and the emperor is far away” describes how the realities of provincial life are distant from activities in Beijing. *Id.*

126. Hoover, *supra* note 15, at 341.

127. Daniel C.K. Chow, *Anti-Counterfeiting Strategies of Multi-National Companies in China: How a Flawed Approach is Making Counterfeiting Worse*, 41 GEO. J. INT’L L. 749, 756 (2010) [hereinafter Chow, *Anti-Counterfeiting Strategies*]. “Law enforcement officials wish to appease multi-national companies [in combating counterfeiting], yet also do not wish to shut down the counterfeiting trade.” *Id.*

128. OFFICE OF THE U.S. TRADE REP., 2008 SPECIAL 301REPORT 21, available at http://www.ustr.gov/sites/default/files/asset_upload_file553_14869.pdf.

129. Chow, *Anti-Counterfeiting Strategies*, *supra* note 127.

130. See CTR. GOV’T OF CHINA, *Action Plan on IPR Protection for 2007* (Apr. 6, 2007), http://www.gov.cn/english/2007-04/06/content_574197.htm.

131. Chow, *Anti-Counterfeiting Strategies*, *supra* note 127, at 754.

132. *Id.*

the direct and indirect interests the local government has in letting the counterfeiting trade thrive. While U.S. companies protest that they are losing billions of dollars from their inventions being copied and sold in China, their losses sustain the Chinese local economy.¹³³ Local government officials are often unwilling to enforce trademark laws against businesses because the companies generate sizeable amounts of income for the government.¹³⁴ Some businesses are so successful that their revenues single-handedly fuel the entire local government¹³⁵ because clusters of legitimate businesses (i.e. hotels, restaurants, nightclubs, and warehouses) all depend on the counterfeit business.¹³⁶

Powerful local government officials are also infused into management positions in various counterfeiting companies because the presence of the government officials demonstrates that the companies will be strongly defended by local governments—and local governments in China control all levels of power in law enforcement.¹³⁷ For example, the local government elects the province's judges, police officers, and administrative enforcement officials.¹³⁸ If these individuals choose to act contrary to the objectives of the local government, they risk retaliatory action such as being discharged from their jobs, demoted, or reduced income.¹³⁹ The pressure of ceding to the wishes of local government leaders repeatedly overrides the enforcement officials' desire to enforce laws against counterfeiters,¹⁴⁰ making true enforcement practically impossible.

Further adding to the local government's unwillingness to counter the counterfeiting trade is the fact that counterfeiting provides much-needed jobs.¹⁴¹ In fact, putting an end to counterfeiting would mean loss of jobs, which augments a government official's inclination to turn a blind eye towards

133. Kristi Heim, *Inside China's Teeming World of Fake Goods*, SEATTLE TIMES (Feb. 13, 2006, 1:14 PM), http://seattletimes.com/html/businesstechnology/2002782434_chinapiracy12.html.

134. Hoover, *supra* note 15, at 341.

135. DANIEL C.K. CHOW & ANNA M. HAN, *DOING BUSINESS IN CHINA* 378 (2012). An example of such a city is Yiwu. *Id.*

136. Chow, *Anti-Counterfeiting Strategies*, *supra* note 127, at 756.

137. *Id.* at 755.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 755.

enforcing intellectual property laws¹⁴² because PRC officials fear unemployment the most—unemployment will cause social turmoil, chaos, and unrest.¹⁴³ As attorney Nelson Dong explains: “The government’s tacit winking of the eye is because they know they are getting something from non-enforcement.”¹⁴⁴ Not only does the counterfeiting industry help maintain social order, local governments receive a substantial amount of taxes from sellers and distributors of counterfeit goods.¹⁴⁵ The local government also receives significant rent payments from the shop owners because hundreds of tenants pay rent to a management company that leases the land from the city.¹⁴⁶ For some locations, rent reaches nearly \$5,000 a month,¹⁴⁷ accruing for the local government millions of dollars to use towards providing essential public services.¹⁴⁸ In addition, local governments are rewarded with subsidies if they meet economic targets set by the national authorities.¹⁴⁹ Therefore, even though China’s central government may be working towards reducing counterfeiting,¹⁵⁰ the many incentives for local authorities’ non-compliance seriously hinder any progress towards eradicating counterfeiting.

Ultimately, counterfeiting in China persists because counterfeiting is a lucrative business and enforcement authorities have no incentive to dismantle their local economies by shutting down the activities. The number of enforcement activities is in fact very high.¹⁵¹ However, while the enforcement *activity* is significant, nearly no punishment results.¹⁵² Therefore, the critical problem lies with deterrence. Without adequate deterrence, counterfeiting continues.

ii. Lack of Deterrence

In order to effectively combat counterfeiting, focus needs

142. Heim, *supra* note 133.

143. Chow, *Anti-Counterfeiting Strategies*, *supra* note 127, at 756.

144. Heim, *supra* note 133.

145. Chow, *Anti-Counterfeiting Strategies*, *supra* note 127, at 755.

146. Heim, *supra* note 133.

147. *Id.*

148. Chow, *Anti-Counterfeiting Strategies*, *supra* note 127, at 755.

149. *Id.* at 756.

150. Heim, *supra* note 133.

151. *Id.* at 212.

152. Chow, *China Does Not Take Commercial Piracy Seriously*, *supra* note 18, at 212.

to be placed on deterrence because without a severe penalty resulting from enforcement activities, any amount of raids is useless. There has been a marked increase in enforcement activities¹⁵³ but the raids and seizures do not penalize enough for an infringer to cease any wrongdoing because the fines imposed on trademark infringers are far too low.¹⁵⁴ Penalties for trademark infringement are calculated by the price of the replicated good on the counterfeit market rather than by the value of the original brand. Since the value of counterfeit products is lower than the value of the original, fines are often too small to outweigh the profits of engaging in the counterfeiting trade.¹⁵⁵ Furthermore, only 1 in 489 cases are criminally prosecuted,¹⁵⁶ and even then, infringers are generally only subjected to probation.¹⁵⁷ China's high threshold for criminal prosecution of trademark infringement fails to provide effective deterrence because infringers often see these minor penalties as simply part of the ordinary course of business.¹⁵⁸ Therefore, China must not only heighten enforcement, but also increase counterfeiting penalties as well in order to truly effectuate enforcement activities. The following example of the 2008 Olympic Games in Beijing provides a good model to pursue.

A central component as to why China was so successful in thwarting counterfeiting activity surrounding the Olympic Games was because of local government efforts: enforcement mechanisms were improved and penalties were increased.¹⁵⁹ When China was awarded the Olympics in 2001, the country responded by immediately passing legislation and enforcement procedures for the protection of Olympic trademarks.¹⁶⁰ The Beijing municipal government issued a decree on the Protection of Olympic Intellectual Property Provisions by the Beijing Municipality, the Beijing Organizing

153. *Id.*

154. Hoover, *supra* note 15, at 342. For example, the average penalty paid by a counterfeiter in 2000 was \$794. Chow, *China Does Not Take Commercial Piracy Seriously*, *supra* note 18, at 212.

155. Hoover, *supra* note 15, at 342.

156. Chow, *China Does Not Take Commercial Piracy Seriously*, *supra* note 18, at 212.

157. Nastase, *supra* note 7, at 154.

158. Chow, *China Does Not Take Commercial Piracy Seriously*, *supra* note 18, at 212.

159. McGill, *supra* note 114, at 21.

160. *Id.* at 23.

Committee for the Games of the XXIX Olympiad ("BOCOG"), which created a legal department assigned to protecting Olympic intellectual property rights, and the national government endorsed the Regulations on the Protection of Olympic Insignia.¹⁶¹ Interestingly enough, the text of the Olympic trademark legislation was practically identical to existing national trademark legislation.¹⁶² However, the differences between the two were the enforcement criteria and increased penalties.

First, enforcement against counterfeiting was heightened surrounding the Olympic Games by specifically delegating to the Administration of Industry and Commerce the duty of enforcing Olympic intellectual property violations.¹⁶³ Additionally, the BOCOG organized their own enforcement staff dedicated to monitoring the market for incidences of Olympic trademark infringement.¹⁶⁴ These actions by the Chinese government sent a clear message regarding their expectations of intellectual property rights and held local government officials accountable when they failed to report trademark infringement in favor of local interests.¹⁶⁵

Second, along with enhanced enforcement, penalties for Olympic trademarks were determined from the Olympic item's official licensing fee rather than the arbitrary (and lower) price of the infringing product.¹⁶⁶ Furthermore, fines could be imposed even when no illegal income was earned.¹⁶⁷ Such legislation offered a double layer of protection: by calculating damages off of the more-expensive, genuine product rather than the counterfeit price, penalties were higher and therefore served as a greater disincentive. Then, the threat of fines even when no illegal income was seized further deterred potential infringers because the counterfeit trade becomes fiscally undesirable; the infringer's purpose of counterfeiting essentially vanishes along with the disappearance of financial incentives. Likewise, today, China should revise the penalties for trademark infringement to align with those passed in the

161. *Id.*

162. *Id.*

163. *Id.* at 25.

164. *Id.*

165. *Id.* at 25–26.

166. *Id.* at 24.

167. *Id.*

Olympic regulations because counterfeiters are simply not troubled by the low fines imposed upon them.¹⁶⁸ Determining fines through the market price for the trademarked product more appropriately compensates the market for the damage done by infringement.¹⁶⁹ At the same time, the appeal of counterfeiting diminishes if the financial losses outweigh the gains. By heightening enforcement activities and increasing penalties, China succeeded in protecting Olympic trademarks and similarly, China ought to utilize the same mechanisms towards eradicating counterfeiting altogether.

III. HOW TO END COUNTERFEITING

A. Education

One step towards eradicating counterfeiting in China begins with a two-fold change in education: first, by instilling in children from a young age about the importance of protecting intellectual property rights in order to drive innovation, and second, by changing the tone through which such advice is administered.¹⁷⁰ Children must learn from an early age the harm counterfeiting causes¹⁷¹ because despite China's modern veneer, there still lays a deeply rooted cultural factor at work.¹⁷² From a young age, children in schools have been taught to emulate artistic and literary masters of the past, making the idea of intellectual property simply foreign.¹⁷³ As David Zhang, vice president at a Shanghai company, explains: "When [students] study, [they] learn to copy the masters . . . if you say you want to be innovative, people say you're crazy . . . that's a cultural process, and it will take time to change."¹⁷⁴ With such strong cultural values, it will take nothing less than essentially starting from scratch for China to eradicate counterfeiting. China must educate from the ground up: Chinese children's mindsets must be transformed so they grow to learn about the benefits of trademark protection rather than the negative,

168. *Id.* at 25.

169. *Id.*

170. Chow, *Anti-Counterfeiting Strategies*, *supra* note 127, at 776.

171. McGill, *supra* note 114, at 29.

172. Heim, *supra* note 133.

173. *Id.*

174. *Id.*

visceral reaction the average Chinese citizen today feels towards intellectual property.¹⁷⁵

In addition to educating children from a young age regarding the importance of trademark protection, the U.S. government must adopt a different approach in encouraging China to take action against counterfeiting. Currently, and in the past, most forms of “education” come in the form of the U.S. government berating PRC officials to increase their enforcement activities.¹⁷⁶ Officials from the United States Trade Representative Office, the United States Patent and Trademark Office, and the United States Custom Service all “educate” in the same manner: while a countless number of speakers lecture on the importance of more enforcement during training sessions, PRC officials sit back resentfully, “becoming totally disinterested, bored, sickened and hostile.”¹⁷⁷ As Professor Daniel K. Chow describes:

PRC officials have turned a deaf ear to the constant haranguing and castigation by U.S. government officials. This should not be surprising. No one likes to be constantly lectured and pummeled for an endless list of shortcomings If one mentions “intellectual property” to the average person in China, the image that comes immediately to mind is that of the U.S. government lecturing in a condescending and arrogant fashion on the need to protect U.S. intellectual property rights.¹⁷⁸

The mounting demands made by the U.S. result in making the Chinese government and its officials more defensive than receptive to strengthening its trademark protection system,¹⁷⁹ and therefore, the U.S. government’s method of education must change from a negative approach to a positive approach.¹⁸⁰ If the U.S. government adopted a less abrasive form of “education” towards the PRC officials in urging their government to enforce trademark rights, and Chinese children are taught from an early age the benefits and importance of trademark protection, China can take strides towards eliminating counterfeiting with time.

175. Chow, *Anti-Counterfeiting Strategies*, *supra* note 127, at 776.

176. *Id.* at 775.

177. *Id.*

178. *Id.* at 776.

179. Hoover, *supra* note 15, at 347.

180. Chow, *Anti-Counterfeiting Strategies*, *supra* note 127, at 776.

B. Publicity

Aside from education, another way towards ending counterfeiting is by exposing China's activities to the public because the consequential apprehension and sense of national pride simultaneously increases China's desire to abide by fair practices and decreases their willingness to accept misbehavior. Though government corruption is illegal in China, it is tolerated so long as it remains shielded from the public eye.¹⁸¹ Therefore, the key to curbing local protectionism—and ultimately, counterfeiting—is by raising these issues with the PRC government and bringing them to the public's attention.¹⁸² By exposing corruption, the Communist Party becomes embarrassed and feels obligated to act—and will generally do so promptly and mercilessly.¹⁸³

One example of such swift and effective action catalyzed by publicity was China's quick execution of Zheng Xiaoyu, a former top drug and food regulator, exposed by the media to have taken bribes to approve untested medicine.¹⁸⁴ Mr. Zheng's case served a political purpose because his immediate and drastic punishment was the result of China scrambling to prove that the PRC government was serious about combating the country's unimpressive product-safety history.¹⁸⁵ As a Chinese official explained about the uncommonly prompt execution: "Corruption in the food and drug authority has brought shame to the nation. What we will have to learn from the experience is to improve or work and emphasize public safety."¹⁸⁶ Since Mr. Zheng's actions embarrassed the country and threatened China's reputation abroad, government officials were compelled to—and did—act quickly and severely in hopes of minimizing the damage done.

Another example of quick government action prompted by publicity was China's response to the Falun Gong, a pervasive social movement that was perceived to threaten the

181. *Id.* at 778.

182. *Id.*

183. *Id.*

184. Joseph Kahn, *China Quick to Execute Drug Official*, N.Y. TIMES (July 11, 2007), http://www.nytimes.com/2007/07/11/business/worldbusiness/11execute.html?_r=0&adxnnl=1&pagewanted=all&adxnnlx=1355356922-SJdjAEwNS5qztp3yluXYMw.

185. *Id.*

186. *Id.*

Communist Party's power and authority.¹⁸⁷ Even though the movement involved millions of people throughout China, the government was able to completely eliminate the movement because they were under the pressure of severe international criticism.¹⁸⁸ Therefore, despite China's considerable geographical size and diversity,¹⁸⁹ the government *is* capable of controlling even such widespread behavior—when the world is watching. Accordingly, the same effect should be within the government's power to effectuate in the realm of counterfeiting.

In 2008, the Olympics in Beijing did just that: the Games put China in the spotlight, magnifying their achievements—and shortcomings—in the field of intellectual property enforcement.¹⁹⁰ Under such critical observation of the world, China underwent tremendous “packaging,”¹⁹¹ civility campaigns, and true enforcement activity in order to present China's best foot forward.¹⁹² Global public relations firms were hired, campaigns to improve manners and foster new attitudes were initiated, celebrities and the media's assistance were solicited, and perhaps most importantly, local efforts were significantly strengthened.¹⁹³ Counterfeiting did still occur,¹⁹⁴ but fake Olympic merchandise appeared less

187. Chow, *China Does Not Take Commercial Piracy Seriously*, *supra* note 18, at 222.

188. *Id.*

189. See Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131 (2000) (describing how China's size and diversity have impeded the enforcement of national laws).

190. McGill, *supra* note 114, at 28.

191. *IR2008: Packaging China for the Olympics*, CHINA RIGHTS FORUM, 2007, at 123, available at http://www.hrichina.org/sites/default/files/PDFs/CRF.1.2007/CRF-2007-1_complete.pdf. “Packaging” refers to the efforts expended towards improving China's image and preparing the country for international eyes. Major “packaging” participants include global public relations companies, legal services, advertising firms, and so on. *Id.*

192. Calum MacLeod, *China Wants Olympians to See Its Best Behavior*, USA TODAY (Feb. 8, 2006, 9:32 PM), http://usatoday30.usatoday.com/news/world/2006-02-08-china-manners_x.htm?POE=NEWISVA.

193. *Id.*

194. See e.g., Hamish McKenzie, *Faking It: Piracy Poses Headache for Olympics*, CNN, July 31, 2007, <http://www.cnn.com/2007/WORLD/asiapcf/07/24/olympics.piracy/index.html?iref=newssearch>. (Chinese authorities uncovered over 1,500 cases of violations involving Beijing Olympic slogans, logos, and other trademarks between 2004 and 2005, resulting in fake goods worth \$1.9 million. However, these cases resulted in fines of nearly \$1.1 million.)

frequently than one would imagine, even in markets normally filled with counterfeit designer goods.¹⁹⁵ With their national pride at stake and heightened deterrence mechanisms, the Chinese felt a greater unwillingness to profit from Olympic symbols because bringing pride and honor to China remained of utmost importance.¹⁹⁶

Therefore, using Mr. Zheng's execution, Falun Gong, and the Olympics as examples, one way China can end counterfeiting is through mobilizing its people and instilling a sense of national pride and responsibility towards achieving a common goal: when their "face" is on the line,¹⁹⁷ China is more apt to properly comply. As Zhang Huigang, director of Beijing's Capital Ethics Development Office explains: "We want foreign guests to see the good side of Beijing . . . we want to give foreign guests a good impression."¹⁹⁸ Such publicity and its corresponding national pride, coupled with the government participation in truly enforcing against counterfeiting activity through deterrence and fear,¹⁹⁹ can serve as a mighty force towards gradually eradicating the counterfeiting trade in China.

C. Long-Term Approach

Although revamping education and increasing publicity can contribute greatly towards ending the counterfeit trade, it must be acknowledged that any serious change in counterfeiting activity will be the result of long-term efforts rather than short-term.²⁰⁰ Local governmental authorities are unlikely to take significant action on their own initiative because of the financial support counterfeiting infuses to local economies.²⁰¹ Consequently, local governments must

195. McGill, *supra* note 114, at 21.

196. *Id.* at 20.

197. McKenzie, *supra* note 194 (James McGregor, CEO of China research and advisory firm JL McGregor and Company, explained about the Olympics: "It's international. It's China's coming-out party. It's China's face. Who wants to put on the Olympics and be looked at as the low-class pirate country that steals everyone else's trademarks?").

198. *Id.* (Zhang concedes that the goal is difficult.).

199. Chow, *China Does Not Take Commercial Piracy Seriously*, *supra* note 18, at 222 (explaining how China utilized draconian measures to eradicate the Falun Gong).

200. Chow, *Anti-Counterfeiting Strategies*, *supra* note 127, at 773.

201. Chow, *China Does Not Take Commercial Piracy Seriously*, *supra* note 18, at 222.

be pressured by Beijing to instigate a serious crackdown.²⁰² However, the government is in no hurry to undertake such a crackdown because of the disastrous domino effect that results: local economics will be crippled, tax revenues for cities will be diminished, and local business that support counterfeit goods will be disturbed.²⁰³ Therefore, in light of the significant costs, China's leaders have no compelling reason to take on the counterfeit crisis.²⁰⁴ China and its willingness to abide by guidelines is a matter of political will—and since the political will to change does not currently exist, any significant improvement will require perhaps even decades.²⁰⁵ As Zhang, mentioned earlier, explains: “Building stadiums is no problem . . . but raising people's quality and civilization is not something we can do in one or two months, or even one or two years.”²⁰⁶

CONCLUSION

Counterfeiting in China is particularly attractive because the penalties and risks of getting caught are very low while its money-generating potential is incredibly high.²⁰⁷ Effectively enforcing trademark law in a country whose deep cultural background is at odds with intellectual property rights will be a timely and ongoing challenge,²⁰⁸ especially with few incentives to counter the trade and a lack of political will. However, increasing penalties for trademark infringement will more successfully deter counterfeiting, as will education from an early age regarding the importance of protecting intellectual property rights and increased publicity to shed light upon the counterfeiting crisis in China. And in doing so, perhaps incidences of tragedies suffered by Wang Yajuan and the Hubleys will with time fade away.

202. *Id.*

203. *Id.* at 223.

204. *Id.*

205. *Id.* at 224–25.

206. MacLeod, *supra* note 192.

207. *Hearing, supra* note 24, at 3–4 (statement of Sen. Joe Lieberman).

208. McGill, *supra* note 114, at 29.