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THE NEW CHINESE DYNASTY: HOW THE UNITED STATES AND INTERNATIONAL INTELLECTUAL PROPERTY LAWS ARE FAILING TO PROTECT CONSUMERS AND INVENTORS FROM COUNTERFEITING

*Anna-Liisa Jacobson**

I. INTELLECTUAL PROPERTY: DEFINING THE TENANTS GUARDING INTELLIGENT WORKS

A discussion of the development of intellectual property law, both in the United States and internationally, is a challenging feat, yet it is a necessary step in understanding why China has been able to dominate the underworld of counterfeiting. A definition of what copyright is and its many tenants is a logical place to begin. Copyright is generally defined as a “form of limited monopoly granted by the government to authors of original intellectual works.”¹ Copyright law has been expanded to protect a plethora of works of authorship. However it is said that only an author’s original expression of an idea is protected; an idea itself may not be copyrighted.² In addition, copyright law does not protect “utilitarian” works, such as functional objects like desks whose only value lies in the object’s useful function.³ When looking for an authoritative stance on copyright law in the United States, one must simply turn to the written words of the United States Constitution, which spell out the fundamental protection of literary and artistic works on which so many intellectual property laws rely. The text of the Constitution grants Congress the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁴ The U.S. Code spells out the exclusive rights an individual gains through the copyright of his or her work. The exclusive rights of the owner of copyright include the rights to do and authorize the following:

To reproduce the copyrighted work in copies or phonorecords; to prepare derivative works based upon the

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¹ Irwin Gross, *Researching Software Copyrightability: A Practical Guide*, 10 SANTA CLARA COMPUTER & HIGH TECH. L.J. 69, 72 (1994).

² *Id.* at 73 (discussing *Baker v. Seldon*, 101 U.S. 99, 105 (1880)).

³ *See id.* at 73.

⁴ U.S. CONST. art. 1, § 8, cl. 8.

copyrighted work; to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.⁵

Although United States intellectual property law is comprehensive and provides a wide umbrella of protection, it took centuries to evolve into the valuable form in which it exists today.

A. *A Brief History of Intellectual Property Law in the United States*

Intellectual property law or, more specifically, copyright law, as it exists today in the United States is generally traced back to the eighteenth century.⁶ Congress first exercised its Constitutional authority by enacting the Copyright Act of 1790 and has since used this Constitutional power to protect certain forms of authorship listed under this act.⁷ The last major revision of the Copyright Act occurred in 1976 and it extended copyright protection to “original works of authorship fixed in any tangible medium of expression, now known or later developed.”⁸ However, not all reproduction and copying of published works is protected. The U.S. Code permits some copying and distribution without the permission of the copyright holder. Specifically, the statute states that “the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”⁹ The statute does not clearly define fair use, but instead gives four non-exclusive factors to consider in a fair use analysis: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the por-

⁵ 17 U.S.C. § 106 (2005).

⁶ See generally Gross *supra* note 1, at 72.

⁷ See *id.*

⁸ *Id.* at 72.

⁹ 17 U.S.C. § 107 (2005).

tion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.¹⁰

The length of the copyright term within the United States, for works in existence in their first term on January 1, 1978 is twenty-eight years from the date of incorporation¹¹ and an additional sixty-seven years at the expiration of the original copyright date.¹² An extension to this time frame was provided by the Sonny Bono Copyright Term Extension Act, which states that “[a]ny copyright still in its renewal term at the time that the Sonny Bono Copyright Term Extension Act becomes effective [October 27, 1998], shall have a copyright terms of 95 years from the date [the] copyright was originally secured.”¹³ Although this legislation was challenged, the Supreme Court affirmed it in *Eldred v. Ashcroft*, holding that the length of the copyright term could be extended by Congress after the original act of creation and beginning of the copyright term.¹⁴ Works published before 1923 are considered to be in the public domain.¹⁵

The Copyright Office and the Patent and Trademark Office establish the criteria a work must meet in order to be copyrightable or patentable.¹⁶ If a work achieves these standards it will be afforded protection for the applicable term of years determined by Congress, at the end of which it will fall into the public domain.¹⁷ If a work cannot achieve the requisite standards, it will fall into the public domain with no prior period of protection.¹⁸

In 1976, the National Commission on New Technological Uses of Copyrighted Works (“CONTU”) was created by Congress to establish guidelines for minimum standards of educational fair use.¹⁹ These guidelines were developed to enable librarians and copyright proprietors to gain a better understanding of the level of photocopying permitted under copyright law.²⁰ In 1992, the U. S. Code was further

¹⁰ *Id.*

¹¹ 17 U.S.C. § 304(a)(1)(A).

¹² 17 U.S.C. § 304(a)(2)(A).

¹³ 17 U.S.C. § 304(b).

¹⁴ See *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003).

¹⁵ Lynn McLain, *Thoughts on Dastar From a Copyright Perspective: A Welcome Step Toward Respite for the Public Domain*, 11 U. BALT. INTELL. PROP. L.J. 71, 74 (2003).

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ See *id.* at 75.

¹⁹ Copyright Timeline: A History of Copyright in the United States, <http://www.arl.org/pp/ppcopyright/copytimeline.shtml> (last visited Sept. 20, 2007).

²⁰ See *id.*

amended to make copyright renewal automatic.²¹ This amendment significantly reduced the number of works protected by copyright law before 1978 from being entered into the public domain.²² The Digital Millennium Copyright Act of 1998's five titles created the following: implemented the World Intellectual Property Organization ("WIPO") Internet Treaties, established "safe harbors" for online service providers, provided for temporary copies of programs to be used during computer maintenance, and also made various amendments to the Copyright Act.²³

Although most discussion on intellectual property law and its development tends to focus on copyright, trademarks are an integral entity as well and are generally included in the provisions of most intellectual property laws. A trademark is defined as "a word, name, symbol or device used in trade with goods to indicate the source of the goods and to distinguish them from the goods of others."²⁴ Prior to the 1946 enactment of the Lanham Act, trademark protection was governed by state common law.²⁵ The Lanham Act provides additional copyright protection by prohibiting the "use of a federally registered mark in such a way as to cause confusion in the sale, distribution or advertising of any goods or services."²⁶ State law, however, continues to add its own protections, which complement the federal system.

Although international intellectual property law and United States intellectual property law share a similar foundation, they are markedly different in several aspects. First, countries other than the United States recognize the protection of an author's moral rights to a work.²⁷ Moral rights "recognize the author's parental and dignitary rights, associated with the author's right to control what others do to their works or how their name is used."²⁸ The U.S. Code, in order to be in compliance with international treaties, added a section on moral rights. However, it is narrower than the protections available in other

²¹ See generally 17 U.S.C. § 101 (2005).

²² See Copyright Timeline: A History of Copyright in the United States, *supra* note 19.

²³ *Id.*

²⁴ What are Patents, Trademarks, Servicemarks, and Copyrights?, <http://www.uspto.gov/web/offices/pac/doc/general/whatis.htm> (last visited Nov. 4, 2007).

²⁵ See Patrick E. Boland, *Wrongful Assault on the Trademark System*, 1987 COLUM. BUS. L. REV. 153, 156 (1987).

²⁶ John R. Warner, *Trademark Infringement Online: Appropriate Federal Relief From the Illicit Use of Trademarked Material in Web Site Meta Tags*, 22 T. JEFFERSON L. REV. 133, 144 (2000) (citing 15 U.S.C. § 32(1) (2005)).

²⁷ See University of Washington Copyright Connection: International Copyright Law, http://depts.washington.edu/uwcopy/Copyright_Law/International_Copyright_Law/Differences.php (last visited Sept. 19, 2007).

²⁸ *Id.*

countries. This provision allows an author the right to: claim authorship for a work,²⁹ prevent the use of the author's name on any work not created by the author,³⁰ prevent intentional distortion or mutilation that prejudices the author's honor or reputation,³¹ and prevent the destruction of famous works.³² In the United States, unlike international intellectual property law, moral rights can be transferred in the same method as other forms of copyright.³³

B. *A Brief History of International Intellectual Property Law*

Although the eighteenth century is seen as the major period of expansion and true development of intellectual property law in the United States, the development of international intellectual property law began as early as the fourteenth century through Gutenberg's Bible.³⁴ Gutenberg's revolutionary development of movable type and the printing press encouraged the mass production of printed works, allowing large numbers of copies of a single work to be reproduced in a relatively short amount of time.³⁵ Gutenberg's contemporaries labeled this development as the "art of multiplying books."³⁶ This printing process quickly spread to other German cities in the 1450s, to Italy in the 1460s, and eventually to France and the rest of Europe.³⁷

In the seventeenth century, laws and often customs established monopolies over acts of invention or creation.³⁸ An example of this is Galileo Galilei's use of a customary Italian law to acquire the royalties for optical devices that he had invented and was allowing others to manufacture.³⁹ The first "true" piece of copyright legislation is generally considered to be the Statute of Anne of 1710, which gave publishers and authors a very limited monopoly on written or published books.⁴⁰ Older examples of similar laws were in place in Italy, where these rights took the form of privileges granted by a local govern-

²⁹ 17 U.S.C. § 106A(a)(1)(A) (2006).

³⁰ 17 U.S.C. § 106A(a)(1)(B).

³¹ 17 U.S.C. § 106A(a)(3)(A).

³² 17 U.S.C. § 106A(a)(3)(B).

³³ See University of Washington Copyright Connection, *supra* note 27.

³⁴ See The University of Texas at Austin Online Exhibition, <http://www.hrc.utexas.edu/exhibitions/permanent/gutenberg/html/5.html> (last visited May 2, 2006).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ See Daniel J. Gervais, *The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 929, 933 (2002).

³⁹ *Id.*

⁴⁰ *Id.*

ment.⁴¹ Similar privileges existed in England as early as the sixteenth century and in France as early as the thirteenth century.⁴² The French Revolution of 1789 led to the creation of the “author’s right” or “droit d’auteur” tradition, which was based on the belief that copyright was a human right.⁴³

The internationalization of intellectual property law has been divided into four comprehensive phases: the bilateral phase, the “BIRPI” phase, the “TRIPS” phase, and the paradigmatic phase.⁴⁴ In the eighteenth and nineteenth centuries, international trade was on the rise and nations began to realize that, if they only protected their own national works, foreign works might become available in “pirate form” at a significantly lower price.⁴⁵ This led to foreign works being treated as favorably as national works, placing them on an equal playing field from a market perspective.⁴⁶ Countries began entering into bilateral agreements with partner countries granting national treatment to the works of those from the partner nation. These bilateral agreements are generally considered to be the first phase in the development of international copyright law.⁴⁷

The BIRPI phase involved the creation of two major international treaties and takes its name from the negotiation and conclusion of these treaties: the Paris Convention in 1883 and the Berne Convention in 1886.⁴⁸ This phase is called the BIRPI phase because these treaties were administered by the predecessor to the WIPO, the Bureaux Internationaux Reunis pour la Protection de la Propriete Intellectuelle (“BIRPI”). These treaties provided little more than national treatment among signatory nations.⁴⁹ The Berne Convention’s goals were to provide the basis for mutual recognition of copyright between sovereign nations and promote the development of international norms of copyright protection.⁵⁰ The European nations that took part in the creation of this treaty established a mutually uniform copyright law to replace the need for separate registration in each country.⁵¹ This treaty has been revised five times since 1886, and the United

⁴¹ *Id.* at 934.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 943-48.

⁴⁵ *Id.* at 935.

⁴⁶ *See id.*

⁴⁷ *See id.*

⁴⁸ *Id.* at 936.

⁴⁹ *Id.*

⁵⁰ *See Copyright Timeline: A History of Copyright in the United States, supra* note 19.

⁵¹ *Id.*

States became a Berne signatory in 1988.⁵² The major changes to the United States intellectual property system as a result of Berne include: greater protection for proprietors, new copyright relationships with twenty-four countries, and elimination of the requirement of copyright notice for copyright protection.⁵³ The United States' delay in entering into the treaty more than one hundred years after its enactment is due to the Berne Convention's incompatibilities with U.S. intellectual property law.⁵⁴ Between the late nineteenth century and 1968, international intellectual property standards evolved slowly from the idea that national treatment for new subject matter would only be achievable when a sufficient number of like-minded countries were prepared to enter into an international agreement for that purpose, to a more flexible ideal.⁵⁵

The TRIPS phase began in 1971 after the signing of the Paris Act of the Berne Convention and the application of the standards negotiated at the Stockholm Conference, and ended with the signing of the TRIPS Agreement in 1994.⁵⁶ This phase was spawned by the increasing importance of intellectual property rights in economic development. For example, major copyright industries are accountable for almost five percent of the gross domestic product (GDP) of the United States and between four and five percent of the GDP of most industrialized nations.⁵⁷ Trademarks and other copyright laws concerning marketing became more prevalent as they were seen as being vital to national and international trade.⁵⁸ This third phase also involved the input of nations that were relatively excluded from the Paris and Berne Conventions. Several African, Asian, Latin American, and Middle Eastern countries began to actively participate, and gain a more dominant presence, in international intellectual property negotiations.⁵⁹ The increased participation of these varied nations was essential to ensure that the intellectual property standards reflected the diverse needs of all nations and were not limited exclusively to nations that fell within the European Union and the Americas. The beginning of this third phase, from 1971-1986, was quite similar to the bilateral phase, due in part to the fact that there was a tendency to use bilateral discussions and trade-based sanctions as a means of compelling other nations to change their intellectual property standards.⁶⁰ The inter-

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Gervais, *supra* note 38, at 937.

⁵⁵ *Id.* at 938-39.

⁵⁶ See *id.* at 939.

⁵⁷ *Id.* at 940.

⁵⁸ *Id.*

⁵⁹ *Id.* at 941.

⁶⁰ *Id.* at 942.

national intellectual property standards were upgraded as a result of these standards being added to the agenda of the Uruguay Round trade talks of 1986 and, more specifically, the inclusion of these standards into the General Agreement on Tariffs and Trade (GATT).⁶¹

The language of GATT reflects the international need to include intellectual property standards and rights into the realm of international trade. For instance, Article 15 defines a trademark as “any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings. . .”⁶² GATT further stipulates in Article 3 that “each Member shall accord to the nationals of other Members, treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property. . .”⁶³ GATT has been viewed as being a very useful forum for updating the international intellectual property system due to the strong link that binds trade and intellectual property together.⁶⁴ Although the initial agenda involved the inclusion of intellectual property rights, the actual negotiations produced fairly limited results.⁶⁵ The real multilateral negotiations involving substantive changes did not begin in earnest until the early 1990s when European communities created a draft legal text covering vast aspects of international intellectual property law.⁶⁶ For the first time in a multilateral document, the Uruguay Round produced detailed rules governing the application of intellectual property rules before national courts and custom authorities, as well as proposals that these rules be integrated into the dispute-settlement mechanism of the newly formed trade body, the World Trade Organization.⁶⁷ On April 15, 1994, the Uruguay Round package of agreements, including the TRIPS Agreement, was signed in Marrakech and the World Trade Organization came into being on January 1, 1995.⁶⁸ This new multilateral agreement covered all forms of intellectual property, including forms never previously covered by an international agreement and, for the first time, national courts and administrative authorities could apply an identical agreement.⁶⁹

⁶¹ *Id.* at 943.

⁶² Agreement on Trade Related Aspects of Intellectual Property Rights art 15, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments-Results of the Uruguay Round, 33 I.L.M. 81 (1994) [hereinafter Agreement].

⁶³ Agreement art. 3.

⁶⁴ Gervais, *supra* note 38, at 944.

⁶⁵ *See id.* at 944-45.

⁶⁶ *See id.* at 945.

⁶⁷ *Id.*

⁶⁸ *Id.* at 947.

⁶⁹ *Id.*

The paradigmatic phase technically covers the period from 1994 to the present. This period is characterized by the emergence of new, and often challenging, intellectual property concerns, ranging from biotechnological patents to the regulation of Internet sites to the counterfeiting of mass-market goods.⁷⁰ Within this period, in 1996, the World Intellectual Property Organization (WIPO) was created.⁷¹ WIPO is an international organization “dedicated to promoting the use and protection of works of the human spirit.”⁷² WIPO is headquartered in Geneva, Switzerland and is one of sixteen specialized agencies in the United Nations. It administers twenty-three international treaties dealing with different aspects of intellectual property protection. WIPO has one hundred eighty-three nations listed as member states.⁷³

Of the many challenges facing international intellectual property law today, perhaps the most daunting is how to deal with counterfeiting. More specifically, the question is how to deal with the maelstrom of Chinese counterfeiting on a national and international level.

II. COUNTERFEITING: A BRIEF OVERVIEW

The WIPO generally uses the term “counterfeiting” to refer to infringements on trademarks, while piracy is associated with infringement on copyright or related rights.⁷⁴ Both terms are often used in connection with cases of intentional infringements of intellectual property rights related to commercial purposes of the infringer or that cause significant economic harm to the right holder.⁷⁵ Note 14 of the TRIPS Agreement states the following:

Counterfeit trademark goods’ shall mean any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation.

⁷⁰ *Id.* at 948.

⁷¹ See Copyright Timeline: A History of Copyright in the United States, *supra* note 19.

⁷² World Intellectual Property Organization, <http://www.wipo.int/about-wipo/en/> (last visited Nov. 4, 2007).

⁷³ *Id.*

⁷⁴ World Intellectual Property Organization FAQ 1, <http://www.wipo.int/enforcement/en/faq/counterfeiting/faq01.html> (last visited May 2, 2006).

⁷⁵ *Id.*

Pirated copyright goods shall mean any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.⁷⁶

The quickest and most effective way to damage an industry is through the piracy of intellectual property.⁷⁷ Worldwide piracy and counterfeiting activities are estimated to represent between five and seven percent of world trade.⁷⁸ Experts forecast that the problems of piracy and counterfeiting will worsen as the pace of globalization quickens.⁷⁹ With advances in technology, nearly identical reproductions of original products can be created. This reproduction is further ignited by the internationalization of economies and fervent worldwide demands for certain products and brands. Counterfeit goods have evolved from cheap and easily discernible fakes to carefully crafted reproductions, which are often sold as originals for a high price to unsuspecting consumers.⁸⁰

In terms of piracy, the most commonly affected industry is that of computer software, closely followed by the music industry.⁸¹ The International Federation of Phonographic Industry (IFPI) estimates that one in three music discs sold worldwide is an illegal copy, creating a \$4.6 billion pirate market.⁸² A total of 1.2 billion pirated music discs were sold in 2004, equaling thirty-four percent of all discs sold worldwide.⁸³ Piracy is increasingly affecting the film industry as well.⁸⁴ Optical discs such as Digital Versatile Discs (DVDs) are inexpensive to manufacture and easy to distribute.⁸⁵ In addition, the growth of on-line piracy by means of downloadable or streaming media further ex-

⁷⁶ *Id.*

⁷⁷ See Philip H. Lam, *Copyright Protection of Foreign Computer Software in the People's Republic of China: Significant Progress in Two Years*, 17 LOY. L.A. INT'L & COMP. L. REV. 861, 861 (1995).

⁷⁸ World Intellectual Property Organization FAQ 2, <http://www.wipo.int/enforcement/en/faq/counterfeiting/faq02.html> (last visited May 2, 2006).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ World Intellectual Property Organization, FAQ 3, <http://www.wipo.int/enforcement/en/faq/counterfeiting/faq03.htm> (last visited May 2, 2006).

⁸² INT'L FED'N OF THE PHONOGRAPHIC INDUSTRY, THE RECORDING INDUSTRY 2005 COMMERCIAL PIRACY REPORT 4 (2005), <http://www.ifpi.org/content/library/piracy2005.pdf> (last visited Nov. 4, 2007).

⁸³ *Id.*

⁸⁴ World Intellectual Property Organization, FAQ 3, *supra* note 81.

⁸⁵ *Id.*

acerbates this issue.⁸⁶ The Motion Picture Association of America estimates that approximately 600,000 illegal copies of movies are downloaded daily.⁸⁷ Counterfeiting impacts an even wider spectrum of industry sectors than those affected by piracy.⁸⁸ The traditional victims of counterfeiting were luxury items such as watches, handbags, perfumes and toys. However, this has evolved into aircraft and automotive components and even into the perilous realm of pharmaceuticals.⁸⁹

A. *Buyer Beware: The Invasion of Pharmaceuticals by Counterfeiting*

The growing issue of counterfeit pharmaceuticals raises many issues within the international legal community. The first major issue is how to address counterfeit drugs when the definitions of what constitutes a counterfeit drug vary widely between nations.⁹⁰ In order to address this issue, the World Health Organization (WHO) developed a universal definition stating that, "a counterfeit medicine is one which is deliberately and fraudulently mislabeled with respect to identity and/or source."⁹¹ According to the WHO, "counterfeiting can apply to both branded and generic products and counterfeit products may include products with the correct ingredients or with the wrong ingredients, without active ingredients, with insufficient active ingredients or with fake packaging."⁹² The second major issue is the ease with which criminals can counterfeit pharmaceuticals and the remarkable profits yielded by pharmaceutical production.⁹³ The production of medicine involves a relatively low cost and the market and need for medicines is continual and growing.⁹⁴ Ingredient costs can also be very low when the counterfeiter either uses cheap substitutes or entirely omits active ingredients.⁹⁵ Manufacturing these drugs does not require a large facility; they can even be produced in a small cottage or backyard.⁹⁶ Overhead costs are virtually non-existent, which helps to keep costs

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ World Health Organization, General Information on Counterfeit Medicines, <http://www.who.int/medicines/services/counterfeit/overview/en/index.html> (last visited Sep. 22, 2007).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *See id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

low and profits high.⁹⁷ Counterfeit drugs are easy to pawn since they often look identical to the original product if packaged well and sold by a seemingly legitimate source.⁹⁸ Consumers are often less aware of what a drug is supposed to be like and how it is supposed to be utilized than they would be about other commercial products.⁹⁹

The dangers posed by using these counterfeit drugs are detrimental both to the user and to the health care industry. These counterfeit drugs are not equivalent in safety, efficacy, or quality to their authentic counterparts.¹⁰⁰ Even if the products are of the correct quality or contain the correct amount of active substances, their production and distribution are not within the control of the drug regulatory authority of the nation in which they are being produced.¹⁰¹ Any defects or reactions associated with the use of these drugs cannot be easily recognized or monitored and an effective recall might be impossible.¹⁰² As a result, counterfeit drugs might erode public confidence in the health care system, including those who supply and prescribe drugs.¹⁰³ Incorrect labeling may also damage the authentic manufacturer's reputation and financial standing.¹⁰⁴ The extremely hazardous activity of counterfeiting pharmaceuticals is a worldwide problem. However, China is the nation at the forefront of this new and ultimately life-threatening battle.

B. *The Late Development of Intellectual Property Law in China*

Before delving into the complex world of Chinese counterfeiting, it is essential to discuss how Chinese intellectual property law came into existence. China did not enact its first comprehensive intellectual property law until 1990.¹⁰⁵ Although this was the first so-called "comprehensive" copyright law, laws in other forms were in effect for centuries. The ancient Chinese, through their inventions of papermaking and printing, found the need to protect commercial authors.¹⁰⁶ As early as 1068 A.D., one can see the foundations of an developing intellectual property system. For example, during the Northern Song Dynasty, a court prohibited the unauthorized engraving and making of an edition of plates printed by the Imperial College

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Lam, *supra* note 77, at 863.

¹⁰⁶ *Id.* at 865.

of the Nine Classics.¹⁰⁷ Although court decisions on intellectual property were in existence during this early period, statutory prohibitions did not exist until the late Qing Dynasty.¹⁰⁸ In 1910, the Emperor enacted the *Da Qing* Copyright Law, which was the first written intellectual property statute.¹⁰⁹ This statute provided protection for “literature, art, pamphlets, calligraphy, photographs, sculptures, and models; it also dealt with ownership, inheritance, works of joint authorship, commissioned works, oral works, and translations.”¹¹⁰ With the founding of the Communist Chinese Government in 1949, all existing statutes, including the *Da Qing* Copyright Law were repudiated.¹¹¹ Beginning in 1957, copyright protection ground to a halt, primarily due to the fact that intellectuals had lost their political power under Mao Tze-Dong.¹¹²

In 1979, the United States and China officially established diplomatic relations, which led to the formation of bilateral agreements regarding copyright law.¹¹³ China did not formally recognize the concept of copyright until 1985,¹¹⁴ when the Inheritance Law, which was newly enacted, provided for the inheritance of copyright as a property and economic right.¹¹⁵ The enactment of the 1990 Chinese copyright law came equipped with three official objectives: to protect copyright and related interests of authors of literary, artistic, and scientific works; to encourage the creation and the dissemination of works beneficial to socialist material and spiritual culture; and to promote the development and prosperity of socialism’s cultural and scientific institutions.¹¹⁶ This law also provides the right of integrity to all authors and encompasses the right to be free from, “distortion, fragmentization, and unauthorized changes.”¹¹⁷ Other rights under the law fall into two categories: economic and personal. Economic rights include the right to publish, the right to identify oneself and affix one’s name, the right to amend, and the right of integrity; while personal rights include the right to use one’s own work and the right to remuneration.¹¹⁸ There are no criminal sanctions imposed by this law so that,

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 866.

¹¹² *Id.*

¹¹³ *Id.* at 867.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 871-72.

¹¹⁶ *Id.* at 871.

¹¹⁷ *Id.* at 872.

¹¹⁸ *Id.*

even when a weighty violation has taken place, the likelihood of being arrested, convicted and penalized is quite low.

C. The Next Generation: China's Invasion of the "Legal Drug" World

China is a nation that has been a relative pioneer in the field of intellectual property destruction. It has been wreaking havoc on multiple industries over the past several decades, taking aim at high fashion, jewelry, software, and now pharmaceuticals. As much as the abuse of intellectual property rights can be damaging to the correct copyright, trademark, or patent holder, when extended to pharmaceuticals, the abuse can actually be deadly. Counterfeiting is a \$16 billion industry in China, according to the Chinese Development Research Center.¹¹⁹ Procter & Gamble has stated that ten to fifteen percent of its Chinese revenues are lost each year to counterfeit products.¹²⁰ The growth of counterfeiting has been attributed to China's transition to a market economy, its large workforce, and the availability of newer technologies.¹²¹ While the majority of the products counterfeited in China remain inside the country, rising quantities are showing up in foreign markets. This international trade relies on sophisticated distribution networks, which are often run by organized crime syndicates along the same trade routes used for narcotics.¹²² One of the main reasons that counterfeiting has been able to take root and spread so quickly and fervently through China can be attributed to their delayed involvement in the vast realm of intellectual property law.

The current shift from counterfeiting commercial luxury items to pharmaceutical drugs appears to be best explained by the ease in which drugs can be duplicated and the high profits associated with drug sales. There is also relatively little enforcement of intellectual property law in China, often because counterfeiting supports local economies, which allows for the counterfeiting of pharmaceuticals with little threat of punishment.¹²³ Shutting down a counterfeiting operation often means closing down entire towns or municipalities, which

¹¹⁹ Timothy P. Trainer, *The Fight Against Trademark Counterfeiting*, 29 CHINA BUS. REV. 6 (2002), <http://www.chinabusinessreview.com/public/0211/trainer.html> (last visited Nov. 4, 2007).

¹²⁰ David M. Hopkins, Lewis T. Kontnik & Mark Turnage, *Counterfeiting Exposed: How to Protect Your Brand and Market Share*, THE ECONOMIST, May 15, 2003.

¹²¹ Trainer, *supra* note 119.

¹²² See Lam, *supra* note 77, at 865.

¹²³ Richard Finney, *China's Product Piracy Rate 'Highest in the World'*, RADIO FREE ASIA, May 19, 2005, available at http://www.rfa.org/english/news/business/2005/05/19/china_piracy/ (last visited Nov. 4, 2007).

can lead to unemployment, dislocation, or even social chaos.¹²⁴ Another problem for the citizens of China lies not in the fact that they could be harmed by counterfeit products being defective, but by the deeper issue of falling behind the rest of the world in terms of innovation. China is suffering a severe lack in growth in terms of entrepreneurship.¹²⁵ China is often described as the “world’s factory,” however the rampant copying of others’ ideas prevents the Chinese people from creating ideas, technologies, and products that are new and original. Some suggest that there is an overall reluctance to create original ideas in China when they could so easily be duplicated at a fraction of the cost.¹²⁶

According to global public health officials, the production and sale of counterfeit drugs has begun to spread across national borders and, in some cases, is contaminating authentic drug supplies.¹²⁷ The U.S. Food and Drug Administration estimates that counterfeits make up more than ten percent of the global medicines market and account for more than \$32 billion in annual sales. The FBI believes that over half of the pharmaceuticals sold in China, Nigeria, Thailand, Cambodia and Indonesia are counterfeit.¹²⁸ The worldwide spread of these drugs is staggering. Approximately one-third to one-half of packets of artesunate tablets, a life-saving anti-malarial drug, recently bought in Southeast Asia were fakes and did not contain a single active ingredient.¹²⁹ “A total of 192,000 Chinese patients are reported to have died in 2001 from fake drugs and, in the same year, Chinese authorities closed 1,300 factories while investigating 480,000 cases of counterfeit drugs worth \$57 million USD.”¹³⁰ In 2004, Chinese authorities arrested twenty-two manufacturers of grossly substandard infant milk

¹²⁴ *Id.*

¹²⁵ William Pesek Jr., *Chinese Counterfeiting Hurts China, too*, INT’L HERALD TRIB., May 17, 2005, available at <http://www.ihf.com/articles/2005/05/16/bloomberg/sxpesek.php> (last visited Nov. 4, 2007).

¹²⁶ *Id.*

¹²⁷ Peggy B. Hu & Berta Gomez, United States Department of State, *Public Safety Jeopardized by Chinese Counterfeiters, Experts Say: Fake pharmaceuticals contradict notion of “victimless” crime*, May 20, 2005, available at <http://usinfo.state.gov/eap/Archive/2005/May/20-45620.html> (last visited Nov. 4, 2007).

¹²⁸ *Id.*

¹²⁹ Robert Cockburn et al., *The Global Threat of Counterfeit Drugs: Why Industry and Governments Must Communicate the Dangers*, 2 PLoS MEDICINE 302, 303 (2005), available at http://medicine.plosjournals.org/archive/1549-1676/2/4/pdf/10.1371_journal.pmed.0020100-S.pdf (last visited Nov. 4, 2007).

¹³⁰ *Id.* (quoting Martin Fackler, *China’s Fake Drugs Kill Thousands*, SAN FRANCISCO EXAMINER, July 29, 2002).

powder and closed three factories after the deaths of over fifty infants.¹³¹

D. The Available Protections for Combating Counterfeiting in China

Although international protections are in existence, they are relatively useless against China. In China, as in most countries, trademark owners can pursue counterfeiters civilly (usually for compensation and an injunction against further violations) or criminally.¹³² Chinese courts, however, handle only a very small percentage of the counterfeiting cases that arise each year, with the vast majority addressed by a range of administrative enforcement bodies.¹³³ These enforcement bodies include local offices of the General Administration of Customs, the State Administration for Industry and Commerce (SAIC), and the Technical Supervision Bureau.¹³⁴ The enforcement powers of these bodies are generally limited to confiscating fakes and imposing monetary fines.¹³⁵ Most counterfeiters view the threat of economic penalties as a mere cost of doing business and brand owners with experience in the field regard these fines as having little or no deterrent impact.¹³⁶ Between January and May of 2002, the criminal tribunals of the People's Courts convicted only 187 trademark counterfeiters, which represents less than one percent of the tens of thousands of counterfeiting cases that administrative authorities dealt with during this period.¹³⁷

In response to the challenges raised by the inefficient civil remedies for dealing with counterfeiters, the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) explicitly requires that criminal enforcement be made available to address both counterfeiting and copyright piracy.¹³⁸ China lacks the resources and training needed for effective criminal enforcement of these intellectual property violations. In response to these concerns, the Quality Brands Protection Committee (QBPC), a Beijing-based industry group promoting anti-counterfeiting efforts, has begun providing more resources and training to Chinese police and prosecutors.¹³⁹ Although these ef-

¹³¹ *Id.* (citing Jim Yardley, *Infants in Chinese City Starve on Protein-Short Formula*, N.Y. TIMES, May 5, 2004, at A3).

¹³² Trainer, *supra* note 119.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

forts are a step in the right direction, the level of counterfeiting has not lessened.¹⁴⁰

In addition to updating China's criminal and civil enforcement methods, the Chinese Criminal Code allows a prison term for up to three years for counterfeiters if the circumstances are deemed "serious" or the sales "relatively large" and up to seven years if the circumstances are "especially serious" or the sales "huge."¹⁴¹ These penalties are consistent with international standards. Government enforcers and brand owners alike have long complained, however, that police and prosecutors have been reluctant to commence criminal investigations and prosecutions because of the lack of guidance from the central government over the meaning of the terms "relatively large" and "serious."¹⁴²

III. WHAT NOW?

Over the past few years, China's Government Agencies have amended a large number of intellectual property laws and regulations to meet WTO obligations, including laws on trademarks and copyrights.¹⁴³ China has also taken steps to address the world crisis of counterfeit pharmaceuticals, particularly since its accession to the World Trade Organization in 2001.¹⁴⁴ In 2003, for example, China's State Drug Administration closed 1,300 illegal factories and investigated cases of counterfeit drugs worth \$57 million.¹⁴⁵ Chinese officials have also begun to raid counterfeiters' facilities, seizing a variety of counterfeit products, ranging from alcoholic beverages and air conditioners to printer cartridges, mobile-phone products, and watches.¹⁴⁶ Although these raids are a step in the right direction, many trademark, patent, and copyright owners say that the prosecutions resulting from these raids only provide minimal penalties which lack a strong deterrent effect.¹⁴⁷ Moreover, the officials conducting the raids often fail to search for documents that might provide helpful information about counterfeiting operations and the specific people involved.¹⁴⁸ Successful counterfeiters with highly profitable operations are not easy to deter because they have sophisticated networks that

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ See Trainer, *supra* note 119.

¹⁴⁴ Hu & Gomez, *supra* note 127.

¹⁴⁵ *Id.*

¹⁴⁶ See Trainer, *supra* note 119.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

are difficult to fully uncover.¹⁴⁹ As time passes and counterfeiters operate without the threat of serious penalties, their networks grow and their ventures become more brazen as they become further entrenched in the economy. The Chinese enforcement system must utilize harsh penalties such as the destruction of goods, seizure of equipment, sufficiently high monetary fines to remove financial incentives, and imprisonment for individuals who refuse to pay fines or who engage in large manufacturing operations.¹⁵⁰

To incorporate some of these notions, the Chinese government needs to take valiant steps at the national, provincial, and local levels in order to be effective. It also must target the full scope of products being harmed and involve a full enforcement system on all levels, including administrative agencies, police, prosecutors, and judges.¹⁵¹ The current steps that China is taking to combat the problem of counterfeiting are a step in the right direction. As it is often said, change must come from within. The international and United States laws are not going to be as effective to deal with this issue. Although they are very sound in theory, such laws are impractical to actually implement. An outside nation cannot force a separate sovereign nation to do something against its will. It can be a very daunting task of trying to unify multiple nations, including those nations that are in violation of intellectual property law. Nations have varying needs and differing levels of technology, infrastructure, and government influence and a law that works well in one country might be utterly useless in another.

There is also the practical issue of manpower; some nations simply lack the resources necessary to power a team of investigators to track down and arrest perpetrators and seize stolen goods. China is a vast nation with a virtually unstoppable counterfeiting regime and it will take a very large taskforce to infiltrate and break up the system. Counterfeiting has become so rampant in China that it is almost beyond the point of being resolved by legal means. Law is always the idealistic solution and, in actuality, should be able to solve problems such as counterfeiting. The law, however, is failing to truly resolve the issues of counterfeiting in China.

The international intellectual property laws are too hard to implement, especially on a freestanding and independent nation. China's own laws also fail to solve the problem, due to the fact that the judicial system is ill-equipped to prosecute and sentence violators. China needs to implement harsher punishments on those who are in violation of copyright law, such as longer prison sentences. China must also implement a larger investigative force to continue seizing counter-

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

feit goods. China needs to control its borders and ports and conduct searches to determine whether products are counterfeit. Although it can be difficult to stop all counterfeited goods from being exported, it would provide slight relief.

Until China cracks down on counterfeiters more firmly and develops a more effective system to deal with them, there is not much that outside nations can do unless they use other mechanisms outside the realm of intellectual property law, such as trade sanctions. The true solution, however, needs to come from within China and, since they have progressed quite significantly over the past decade in terms of intellectual property development, there is hope that they can continue along this path and eventually fully combat this issue.

