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TWO STEPS FORWARD, ONE STEP BACK: A NEED FOR CHINA TO FURTHER AMEND ITS 2013 TRADEMARK LAW IN ORDER TO PREVENT TRADEMARK SQUATTING

INTRODUCTION

The People's Republic of China ("China") has quickly emerged as a leading force in the global economy.¹ In 2010, China surpassed Japan to have the world's second-largest economy behind only the United States.² By 2031, economists predict that China will surpass the United States to become the world's largest economy.³ With the financial dominance of China's upper class, the continuing development of its middle class,⁴ and a 2016 population of approximately 1.3 billion people,⁵ it is no surprise that "[s]ixty-seven percent of the U.S. companies surveyed by the American Chamber of Commerce in Shanghai said they intend to increase the level of investment in China. . . ."⁶ In order to fully capitalize on China's marketplace, many corporations and individuals have realized the importance of filing for trademark registration in China, which identifies a product's source and establishes recognition between a product and a particular

1. See Paul Kossof, *The New Chinese Trademark Law*, 104 TRADEMARK REP. 867, 867 (2014).

2. See Andrew Monahan, *China Overtakes Japan as World's No. 2 Economy*, WALL ST. J. (Feb. 14, 2011, 6:21 PM), <http://www.wsj.com/articles/SB10001424052748703361904576142832741439402>.

3. See Andrew Soergel, *America's Days Are Numbered as the World's Top Economy*, U.S. NEWS (Dec. 28, 2015, 2:16 PM), <http://www.usnews.com/news/articles/2015-12-28/americas-days-are-numbered-as-the-worlds-top-economy>. In 2031, China is projected to have a gross domestic product (GDP) of \$35.26 trillion USD, while the United States is expected to have a GDP of \$33.66 trillion USD. *Id.*

4. See Kossof, *supra* note 1.

5. *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <http://www.census.gov/popclock/> (last visited May 25, 2017).

6. Alexandra Ho, *Record Number of U.S. Companies Call China Top Bet, Survey Shows*, BLOOMBERG NEWS (Mar. 4, 2015), <http://www.bloomberg.com/news/articles/2015-03-04/record-number-of-u-s-companies-call-china-top-bet-survey-shows>. The survey, which included responses from 377 companies, shows a slight increase from the 2014 survey, where 65 percent of U.S. companies indicated a strong desire to increase investment efforts in China. *See id.*

corporation or individual.⁷ Trademarks play a vital role for foreign corporations and individuals trying to establish themselves in today's global economy,⁸ as trademarks allow a company or individual to distinguish their product and reputation from others in a crowded marketplace.⁹ The importance of trademarks has especially increased due to the prominence of advertising to consumers.¹⁰ For eleven straight years, China has received the most trademark applications in the world.¹¹ In 2013 alone, China had 13.24 million trademark applications.¹² Given these statistics, it is apparent that China has become a "trademark powerhouse."¹³

Many corporations and individuals, however, have been precluded from receiving sufficient trademark protection in the Chinese marketplace by notorious trademark squatters.¹⁴ A trademark squatter is "a person or company that acquires trademarks, not in the hopes of actually using them to help market a product or service, but rather, in the hopes of making trademark infringement claims against other persons or companies that do

7. See Kossof, *supra* note 1.

8. See Paolo Beconcini, *China: The Role of Trademark Opposition in the Protection of Brands in China in Light of the New Trademark Law*, MONDAQ (Oct. 30, 2014), <http://www.mondaq.com/china/x/350820/Trademark/The+Role+Of+Trademark+Opposition+In+The+Protection+Of+Brands+In>.

9. See Abigail Rubinstein, *7 Reasons Why Trademarks Are Important to Your Business*, ENTREPRENEUR (July 24, 2014), <https://www.entrepreneur.com/article/235887>.

10. See Timothy W. Blakely, *Beyond the International Harmonization of Trademark Law: The Community Trade Mark as a Model of Unitary Transnational Trademark Protection*, 149 U. PA. L. REV. 309, 309 (2000).

11. See Hank Leung & Ai-Leen Lim, *'Professional' TM Squatters in China*, LEXOLOGY (May 5, 2014), <http://www.lexology.com/library/detail.aspx?g=b89acc4f-b101-4cec-898b-adbf5fdcc017>.

12. See Zhang Mao, *China's New Trademark Law*, WORLD INTELL. PROP. ORG. MAG., no. 5, Oct. 2014, at 34. The number of applications received in 2013 is a dramatic increase from 2005 and 2006, when the Chinese Trademark Office received 664,017 and 766,000 trademark applications respectively. Robert H. Hu, *International Legal Protection of Trademarks in China*, 13 MARQ. INTELL. PROP. L. REV. 69, 71 (2009).

13. See Mao, *supra* note 12.

14. See Sophie Brown, *Brand Wars: Battling China's Trademark 'Squatters'*, CNN (July 17, 2014, 10:30 PM), <http://www.cnn.com/2014/07/17/world/asia/china-trademark-squatters-pen-folds/>.

use them to market their products or services.”¹⁵ Trademark squatting is a global issue that has become an increasing concern over the years.¹⁶ Since 2007, the Office of the U.S. Trade Representative¹⁷ has expressed concern over the insufficient impact that China’s Trademark Law has on deterring trademark squatters.¹⁸ As a result of trademark squatters, foreign corporations and individuals have lost billions of dollars in both sales and jobs,¹⁹ including in 2009 alone, when U.S. corporations lost an estimated \$48 billion USD.²⁰ These lost sales demonstrate how trademark squatters interrupt the flow of global commerce as a whole, as they prevent individuals and corporations from capitalizing in foreign marketplaces.²¹

Examples of trademark squatting victims include Hermès, who filed a trademark in China without registering its Chinese translation, Ai Ma Shi.²² Hermès, however, continuously used Ai Ma Shi as its Chinese name with the characters “爱马” in

15. Donald J. Smythe, *Clearing the Clouds on the CISG’S Warranty of Title*, 36 NW. J. INT’L L. & BUS. 509, 515 (2016).

16. *See id.*

17. The Office of the U.S. Trade Representative (USTR) advises the president of the United States on matters pertaining to U.S. international relations and trade. *See Mission of the USTR*, OFF. U.S. TRADE REPRESENTATIVE, <https://ustr.gov/about-us/about-ustr> (last visited Dec. 8, 2016).

18. *See* William M. Leahy & Stephen Kho, *Is China’s Amended Trademark Law a Law with Teeth, or a Paper Tiger?*, BOAO REV., Apr. 2015, at 106, <https://www.akingump.com/images/content/3/5/v2/35819/Is-China-s-Amended-Trademark-Law-a-Law-with-Teeth-or-a-Paper.pdf>.

19. *See* Kitsuron Sangsuvan, *Trademark Squatting*, 31 WIS. INT’L L.J. 252, 257–58 (2013). As stated by the U.S. Secretary of State, Carlos Gutierrez, “the theft of IP in China was costing U.S. businesses an estimated \$ 2.3 billion a year. . . .” 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, 327 n.8 (2011).

20. Of the \$48 billion USD lost by U.S. corporations, \$36.6 billion USD comes from lost potential sales, while \$11.6 billion USD comes from lost royalty and license payments. *See* David Butcher, *What Chinese IP Violations Cost the U.S.*, INDUSTRY NEWS (Aug. 2, 2011), <http://news.thomsonnet.com/imt/2011/08/02/what-chinese-intellectual-property-violations-cost-american-businesses-economy>.

21. *See* Smythe, *supra* note 15.

22. *See* Ann Yan, *China: Hermes and Chivas—The Disadvantages of Not Being the First to File Applications for Trade Marks in China*, MONDAQ (Apr. 2, 2012), <http://www.mondaq.com/x/170806/Trademark/Hermes+and+Chivas+The+Disadvantages+of+Not+Being>.

China.²³ Thereafter, in 1995, a menswear company registered the Chinese translation of Hermès using the almost identical characters “爱玛仕,” which also means Ai Ma Shi in Chinese.²⁴ After battling for years to regain rights in its name, the Chinese courts ultimately ruled against Hermès, finding that Hermès failed to prove that it was a well-known brand in China prior to the registration of its Chinese translation.²⁵ Another victim of trademark squatting includes pharmaceutical corporation, Pfizer, who was prevented from receiving adequate protection for the name of its popular drug, Viagra, when Guangzhou Viamen Pharmaceutical Company (“Viamen”) registered the Chinese translation for Viagra, Weige (伟哥).²⁶ The Supreme People’s Court in China ultimately denied Pfizer’s final appeal to invalidate the registration, agreeing with previous rulings that Pfizer was not a well-known brand in China prior to Viamen’s registration.²⁷ Hermès and Pfizer are not alone in their battles against Chinese trademark squatters, as corporations like Nike,²⁸ Apple,²⁹ and Ferrari,³⁰ and individuals like Justin

23. *Id.*

24. *Id.*

25. *See id.*

26. *See* Daniel Chow, *Lessons from Pfizer’s Disputes Over its Viagra Trademark in China*, 27 MD. J. INT’L L. 82, 82–83, 95–96 (2012).

27. *See id.* at 91.

28. In 2005, Nike attempted to register “LeBron James” in Chinese characters, only to find that a trademark squatter had already registered the name. Laura Wen-yu Young, *Understanding Michael Jordan v. Qiaodan: Historical Anomaly or Systemic Failure to Protect Chinese Consumers?*, 106 TRADEMARK REP. 883, 894 (2016). After a ten-year battle, China’s Supreme People’s Court ruled in favor of Nike and invalidated the squatter’s mark. *Id.*

29. Apple registered the mark “iPhone” in China in 2002. *See* Lydia Belanger, *Apple Loses Trademark Battle, Allowing Chinese Company to Use the ‘IPHONE’ Name*, ENTREPRENEUR (May 3, 2016), <https://www.entrepreneur.com/article/275080>. In 2007, however, Xintong Tiandi began using the mark on various products and registered for a trademark. *See id.* Subsequently, Apple unsuccessfully pursued legal action against Xintong in 2012. *See id.*

30. A Chinese court granted a Chinese department store the right to register Ferrari’s prancing horse design because Ferrari failed to establish that its mark was well-known in China prior to the department store’s registration. *See* Jing Luo & Shubha Ghosh, *Protection and Enforcement of Well-Known Mark Rights in China: History, Theory and Future*, 7 NW. J. TECH. & INTELL. PROP. 119, 141–50 (2009).

Bieber³¹ and the Kardashians³² have all experienced this issue in China.

After dramatic increases in China's trademark applications,³³ years of criticism and calls for reform from the United States and other countries,³⁴ and a meeting of the U.S.-China Joint Commission on Commerce and Trade,³⁵ where both countries agreed to implement measures against bad-faith trademark registrations,³⁶ China made amendments to its Trademark Law, which took effect on May 1, 2014.³⁷ First, Article 7 of China's 2013 Trademark Law directly aims to restrict bad-faith trademark applications by stating that "[t]he principle of good faith shall be upheld in the application for trademark registration and in the use of trademarks."³⁸ The meaning of good faith and how it is to be determined, however, remains unclear.³⁹ Article 7 has already shown signs of hindering trademark squatting, as seen

31. See Brown, *supra* note 14.

32. The Kardashians are precluded from selling their fashion and beauty products in China due to trademark squatters registering their last name in the country. See David Pierson, *Trademark Squatting in China Doesn't Sit Well with U.S. Retailers*, L.A. TIMES (Mar. 28, 2012), <http://articles.latimes.com/2012/mar/28/business/la-fi-china-trademark-squatting-20120328>.

33. See Celia Y. Li & Tai Guo, *Policies, Changes and Responses—Discussion on the Third Amendment of China's Trademark Law*, CHINA IP, http://ipr.chinadaily.com.cn/2013-11/15/content_17108832.htm (last visited May 25, 2017).

34. See David Hoffman, *China's Trademark Law May Not Go Far Enough*, L.A. DAILY J. (Dec. 11, 2013), <http://dlhpatent.com/articles/chinas-trademark-law-may-not-go-far-enough.pdf>.

35. The U.S.—China Joint Commission on Commerce and Trade “is an annual dialogue that addresses commercial and trade issues between the US and China.” *U.S.—China Joint Commission on Commerce and Trade (JCCT)*, U.S. DEP'T COM., <https://www.commerce.gov/tags/us-china-joint-commission-commerce-and-trade-jcct> (last visited Apr. 4, 2017).

36. See Leahy & Kho, *supra* note 18.

37. See Mao, *supra* note 12. See generally Kossof, *supra* note 1, at 868 (discussing the process leading up to the enactment of China's 2013 trademark amendments).

38. Trademark Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 23, 1982, rev'd Aug. 30, 2013, effective May 1, 2014), art. 7, http://www.wipo.int/wipolex/en/text.jsp?file_id=341321 (last visited Oct. 1, 2016) [hereinafter PRC Trademark Law of 2013].

39. See Matthew D. Asbell & Dongfang Maggie Wang, *Ten Key Considerations on Chinese New Trademark Law*, LADAS & PARRY (Oct. 8, 2014), <http://ladas.com/education-center/ten-key-considerations-chinese-new-trademark-law/>; Kossof, *supra* note 1, at 885.

through the cases of U.S. menswear designer Michael Bastian, which precluded a trademark squatter with 120 unrelated trademarks from registering Bastian's name,⁴⁰ and former NBA player Michael Jordan, which similarly prevented a trademark squatter from using Michael Jordan's last name in Chinese on sports equipment.⁴¹ Article 35 of China's 2013 Trademark Law, unlike Article 7, has an indirect and negative impact on curtailing trademark squatting by granting trademark squatting victims an initial appeal of a trademark application to China's Trademark Office (CTMO),⁴² while allowing further appeals to China's Trademark Review and Adjudication Board (TRAB)⁴³ only after the trademark has been registered.⁴⁴ This creates an entirely new invalidation process where an alleged trademark squatter is granted legal rights in the trademark before completion of the appeals process.⁴⁵

Despite the positive rulings against trademark squatters in the Michael Bastian and Michael Jordan cases, the Chinese amendments have not gone far enough to fully protect trademark rights of foreign corporations and individuals.⁴⁶ China's

40. See Matthew Dresden, *Not so Fast, Fashionistas: China Trademark Registration is Still Required*, CHINA L. BLOG (July 17, 2015), <http://www.chinalawblog.com/2015/07/not-so-fast-fashionistas-china-trademark-registration-is-still-required.html>.

41. See Sui-Lee Wee, *Chinese Court Likes Mike in Mandarin Characters*, N.Y. TIMES, Dec. 8, 2016, at B7.

42. See *Key Issues Regarding the Third Amendment to PRC Trademark Law*, UBILLA & CIA (Sept. 30, 2013), <http://www.ub-co.com/country/china/key-issues-regarding-the-third-amendment-to-prc-trademark-law/>.

43. The TRAB is responsible for resolving litigation that arises involving trademark applications in accordance with China's Trademark Law. See *Rules for Trademark Review and Adjudication*, ST. ADMIN. INDUSTRY & COM. CHINA (Sept. 17, 2002), http://www.saic.gov.cn/sbjenglish/flfg1_1/flfg/201012/t20101227_103089.html.

44. See PRC Trademark Law of 2013, *supra* note 38, art. 35. While a trademark may also be opposed based on nonuse, this option is only available if a trademark squatter cannot prove use of the mark within the past three years. See Xiang Gao, *An In-Depth Look at the New China Trademark Law*, MONDAQ (June 20, 2014), <http://www.mondaq.com/china/x/322032/Trademark/An+In-Depth+Look+At+The+New+China+Trademark+Law>).

45. See Sunny Chang, *Combating Trademark Squatting in China: New Developments in Chinese Trademark Law and Suggestions for the Future*, 34 NW. J. INT'L L. & BUS. 337, 353 (2014).

46. See Yue Fei, *Trademark Piracy—A Problem that Persists in China*, SMITHS IP (June 14, 2016), <http://www.smithsip.com/trademark-piracy-a-problem-that-persists-in-china/>.

failure to provide any definition or guidance for what constitutes good faith registration of a trademark not only leaves foreign corporations and individuals vulnerable to unclear, inconsistent, and bias decision-making from Chinese officials who may favor Chinese nationals⁴⁷ but may also cause them to think twice before investing time or capital into filing for a trademark in China. This makes Article 35 especially troublesome, given that trademark squatters are free to assert legal rights in the trademark or hold it as ransom before foreign corporations and individuals are able to fully utilize the appeals process.⁴⁸ These issues cannot be adequately resolved by simply implementing the commonly suggested “file-first” solution, which calls for foreign corporations and individuals to file for registration at an earlier point, even if business is not being conducted in China,⁴⁹ as it assumes that all foreign corporations and individuals have the economic ability to engage in such a practice.⁵⁰ Instead, to adequately protect foreign corporations and individuals in Chinese courts, Article 7 should be clarified to eliminate some of the discretionary power afforded to Chinese officials⁵¹ by adopting the definition and examples of bad faith from Australia’s Trade Mark Amendment Act (TMMA). Moreover, Article 35 should be repealed and replaced by Article 33 of China’s 2001 Trademark

47. See Asbell & Wang, *supra* note 39.

48. See Ashley Benjamin, *Will New Chinese Law Help in Battle Against Trade Mark Squatters?*, DEHNS, http://www.dehns.com/site/information/industry_news_and_articles/chinese_law_battle_against_trademark_squatters.html (last visited Nov. 2, 2016).

49. See Patrick Soon, *Trademark Squatting in China: What Every American Business Should Know*, INSIDE COUNS. (Sept. 4, 2014), <http://www.insidecounsel.com/2014/09/04/trademark-squatting-in-china-what-every-american-b>; Phillips Ormonde Fitzpatrick, *Trade Mark Squatters in China*, LEXOLOGY (Aug. 12, 2014), <http://www.lexology.com/library/detail.aspx?g=0621eb51-9e53-46ab-b3f5-8897c6dee719>; Scott Baldwin, *Don't Sit and Wait: Stopping Trademark Squatters*, 4 INVENTORS EYE, no. 1, 2013, <https://www.uspto.gov/custom-page/inventors-eye-don-t-sit-and-wait-stopping-trademark-squatters>; *Trademark Hijacking in China: The Importance of Trademark Registration*, REVOMARK (July 3, 2013), <http://www.revomark.co.uk/trademark-hijacking-in-china-the-importance-of-trademark-registration/>.

50. See Brown, *supra* note 14.

51. See INT’L TRADEMARK ASS’N, PEOPLE’S REPUBLIC OF CHINA TRADEMARK LAW REVISION COMMENTS (Jan. 25, 2013), <http://www.inta.org/Advocacy/Documents/January252013.pdf> [hereinafter INTA COMMENTS].

Law, which suspended the grant of trademarks until the conclusion of the appeals process.⁵² China should also increase rights for foreign corporations and individuals during the appeals process by not only granting them the right to review trademark squatters' arguments and responses to the opposition⁵³ but also by granting automatic dismissal of the trademark if the trademark squatter fails to respond to a claim of bad faith.⁵⁴

This Note will explore the progress made in China's enforcement of trademark rights against trademark squatters, while calling for further reform to provide clarity, consistency, and equal protection for foreign corporations and individuals trying to assert trademark rights in China. Part I of this Note will define and describe the trademark squatter problem and provide possible explanations for its persistence today, including the high value placed on Chinese trademarks due to its large consumer base,⁵⁵ the lack of international trademark knowledge by foreign corporations and individuals,⁵⁶ and China's first-to-file system, which grants a trademark to whoever files the application first, without needing proof of the trademark's use in commerce.⁵⁷ This Part will also provide suggestions from scholars and lawyers to avoid falling victim to trademark squatting, including filing for trademark registration at the earliest point possible,⁵⁸ utilizing China's multiclass registration system, which enables foreign corporations and individuals to protect

52. Trademark Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 23, 1982, rev'd Oct. 27, 2001), art. 33, http://www.saic.gov.cn/sbjenglish/flfg1_1/flfg/201012/t20101227_103092.html [hereinafter PRC Trademark Law of 2001]; see also INTA COMMENTS, *supra* note 51.

53. See INT'L TRADEMARK ASS'N, PRC TRADEMARK LAW REVISION IMPLEMENTING REGULATIONS COMMENTS (Nov. 22, 2013), <http://www.inta.org/PDF%20Library/INTA%20Comments%20on%202013%20China%20Implementing%20Regulations.pdf> [hereinafter PRC IMPLEMENTING REGULATIONS COMMENTS].

54. See *id.*

55. See *Foreign Fashion Designer Prevails Against Trademark Squatter Despite Failing to Prove Prior Use*, WORLD TRADEMARK REV. (July 20, 2015), <http://www.worldtrademarkreview.com/Daily/detail.aspx?g=3cdbaceb-62f9-4bd9-8b01-11592c3932b3>.

56. See Soon, *supra* note 49.

57. See Chow, *supra* note 26, at 93.

58. See Soon, *supra* note 49; Fitzpatrick, *supra* note 49; Baldwin, *supra* note 49; *Trademark Hijacking in China: The Importance of Trademark Registration*, *supra* note 49.

various goods under the same mark with one trademark application,⁵⁹ pursuing litigation,⁶⁰ and entering the Chinese marketplace with an entirely new mark.⁶¹ Part II will discuss the history and development of China's Trademark Law by detailing when it initially took effect, what rights it offered for trademark registrations, and the scope of its protections. This Part will continue by demonstrating China's commitment to protecting intellectual property (IP) rights through its adoption of international trademark agreements and amendments to its own Trademark Law. Part III will then discuss the amendments to China's 2013 Trademark Law that have had a positive and negative impact on trademark squatting by imposing a good faith principle, rather than a rule, against trademark applicants and agencies,⁶² enforcing monetary penalties for violating this principle,⁶³ and restructuring the application and appeals process itself to not only protect various goods with one trademark application⁶⁴ but also grant legal rights in the trademark to a squatter before the appeals process concludes.⁶⁵ While this Part will highlight the positive impact of these amendments through the Michael Bastian and Michael Jordan cases, it will also describe why further amendments are needed to clarify the good faith principle's ambiguity and the appeal process' favoritism toward trademark squatters over foreign corporations and individuals. In calling for these amendments, this Part will conclude by dispelling the commonly suggested, yet oversimplified "file-first" solution. Finally, Part IV will outline recommendations for future changes to China's Trademark Law by describing Australia's definition and examples for bad-faith registration of a trademark, while detailing how China can grant more rights to foreign corporations and individuals during the appeals process to even the playing field when challenging trademark squatters in Chinese courts.

59. See Chang, *supra* note 45, at 352.

60. See Yan, *supra* note 22.

61. See Maria Dam Jensen, *New Hope for Trademark Owners in China*, AWAPATENT IP BLOG (Sept. 3, 2015), <http://www.awaipblog.com/tag/trademark-squatters/>; see also Brown, *supra* note 14.

62. See PRC Trademark Law of 2013, *supra* note 38, arts. 7, 19.

63. See *id.* arts. 63, 68.

64. See *id.* art. 22.

65. See *id.* art. 35.

I. CHINA'S TRADEMARK SQUATTER PROBLEM

This Part will describe how and why a trademark squatter rushes to file Chinese translations of trademark registrations by detailing the economic benefits produced by holding the power to sell rights in the mark back to foreign companies and individuals, without ever needing to exert time or effort into establishing reputation in the mark. It will also articulate the negative consequences for trademark squatting victims that leave them vulnerable to trademark infringement liability and losing products associated with the trademark. Finally, knowing that trademark squatters exist, reasons are provided for their persistence, including the high economic value of a Chinese trademark, a lack of international trademark registration knowledge by corporations and individuals, a lack of enforcement of trademark rights by Chinese officials, and China's own first-to-file system.

A. Trademark Squatting Defined

A trademark squatter is an individual who "steals another's mark and registers it as a trademark in his countr[y] knowing that it belongs to someone else."⁶⁶ Trademark squatters are often connected to the trademark field itself, as they work as trademark agents and utilize their business and legal knowledge to gain an advantage against foreign corporations and individuals.⁶⁷ Trademark squatters not only target large corporations but also small- and medium-sized corporations as well.⁶⁸ Beyond corporations, individuals are also susceptible to trademark squatters.⁶⁹ The types of trademarks that squatters attack also varies. For example, some trademark squatters seek to register trademarks once a brand owner has already established notoriety in the mark, as they can economically benefit without need-

66. Sangsuvan, *supra* note 19, at 259.

67. See Leung & Lim, *supra* note 11.

68. See Helika Jurgenson, *Bad Faith Trade Registrations in China*, YOURIP INSIDER (June 27, 2016), <http://www.youripinsider.eu/bad-faith-trade-mark-registrations-china/>.

69. See AJ Park, *Trade Mark Squatter Dealt to in China Under New Trade-mark Laws*, LEXOLOGY (July 16, 2015), <http://www.lexology.com/library/detail.aspx?g=51f85d88-c543-4a42-9454-ab1032b31d9c>; Wee, *supra* note 41.

ing to exert time into establishing a reputation in the trademark.⁷⁰ Others register trademarks that have not yet entered the Chinese marketplace, but may successfully do so in the foreseeable future, as they can capitalize early on the potential future success that a trademark may have.⁷¹

The main reasons for trademark squatting are the legal entitlements and bargaining power that it creates over foreign corporations and individuals. First, trademark squatters have the legal power to assert claims of trademark infringement against foreign corporations and individuals who try to use their mark.⁷² Moreover, trademark squatters may cause foreign corporations and individuals to have their goods associated with the trademark seized.⁷³ Trademark squatters are also afforded significant bargaining power over foreign corporations and individuals because they are able to use the trademark as a bargaining chip in exchange for money to sell the trademark back to its rightful owner.⁷⁴

B. Why Trademark Squatting Persists

Given these legal entitlements and bargaining power, it is no surprise that trademark squatters continue to plague foreign corporations and individuals today. One explanation for the prevalence of trademark squatting in China is that Chinese trademarks are uniquely valuable to squatters,⁷⁵ given that China's marketplace grants access to a large consumer population consisting of roughly 1.3 billion people.⁷⁶ Moreover, many foreign corporations and individuals have a lack of international trademark knowledge,⁷⁷ making them unaware that they need to file for trademark registration outside of their own country under the principle of territoriality, which states that "a trademark has a separate existence in each sovereign territory where

70. See Bradley Sova, *Double-Double Trademark Trouble: In-N-Out and Caliburger's International Burger Brawl*, 14 ASIAN-PAC. L. & POL'Y J. 53, 75 (2012).

71. See *id.*

72. See Sangsuvan, *supra* note 19, at 259.

73. See Breann M. Hill, *Achieving Protection of the Well-Known Mark in China: Is There a Lasting Solution?*, 34 DAYTON L. REV. 281, 288 (2009).

74. See Sangsuvan, *supra* note 19, at 259.

75. See *Foreign Fashion Designer Prevails Against Trademark Squatter Despite Failing to Prove Prior Use*, *supra* note 55.

76. See *U.S. and World Population Clock*, *supra* note 5.

77. See *Soon*, *supra* note 49.

it is registered (or otherwise legally recognized)."⁷⁸ This was evident through a United States Patent and Trademark Office⁷⁹ study, which found that "only 15% of American small business with a presence overseas were aware that a U.S. trademark only receives protection within the United States."⁸⁰

Beyond these external factors, Chinese officials and its trademark system itself can explain why the trademark squatter problem persists.⁸¹ First, Chinese officials fail to consistently enforce its trademark law against squatters.⁸² Factors including "localism, a lack of financial resources . . . [and] local officials, [who] . . . often profit from counterfeit goods through kickbacks and bribes,"⁸³ all help to explain the law's lack of enforcement. Even when Chinese officials actually enforce the trademark law, however, it is based upon a first-to-file system that further perpetuates trademark squatting by granting trademark rights to the first party who files the trademark application,⁸⁴ without requiring evidence of its use in commerce.⁸⁵ This system enables trademark squatters, who have no true interest in the mark itself, to steal a mark from a foreign corporation or individual in

78. James E. Darnton, *The Coming of Age of the Global Trademark: The Effect of TRIPS on the Well-Known Marks Exception to the Principle of Territoriality*, 20 MICH. ST. J. INT'L L. 11, 12 (2011).

79. The United States Patent and Trademark Office (USPTO), which was established in 1952, aims "to promote the progress of science and the useful arts by securing for limited times to inventors the exclusive right to their respective discoveries for a certain period of time." *Patent and Trademark Office*, FED. REG., <https://www.federalregister.gov/agencies/patent-and-trademark-office> (last visited Oct. 12, 2016). Through its function of registering trademarks, the USPTO helps companies protect their brand and assists consumers in identifying the source of the products in which they are investing. *See id.*

80. Soon, *supra* note 49.

81. *See* Sova, *supra* note 70.

82. *See* Chang, *supra* note 45, at 354.

83. *Id.*

84. *See* Chow, *supra* note 26, at 93.

85. *Id.* Canada, through Bill C-31, Economic Action Plan 2014 Act, No. 1 ("Bill C-31"), also follows China's first-to-file system. Bill C-31 eliminates the use requirement for trademark registration, despite similar concerns that the bill will allow trademark squatters to prevail. *See* Robert D. McDonald, *Major Changes to Canada's Trademark Laws—What Every Business Needs to Know*, LEXOLOGY (Aug. 1, 2014), <http://www.lexology.com/library/detail.aspx?g=c27e3759-b28d-4564-ae2e-1f0e60fb08c4>.

order to benefit economically from the reputation already established in the mark.⁸⁶ Trademark squatters are able to flourish under this system because the squatters are not required to invest time or money in the mark prior to filing for registration.⁸⁷ This leaves foreign corporations and individuals who have established popular and successful marks outside of China vulnerable to interference inside China.⁸⁸ This differs from the approach adopted in countries such as the United States, which follow the first-to-use system.⁸⁹ Rather than focusing on the individual who files for registration first, a first-to-use system requires the mark owner to use the trademark in commerce before an application is accepted for registration.⁹⁰

C. Can Trademark Squatters Be Defeated?

Since trademark squatting continues to persist in China, lawyers and academics have recommended two proactive steps that foreign corporations and individuals can take to prevent trademark squatters from obtaining registration of their trademarks in China.⁹¹ The most common recommendation for foreign corporations and individuals is to follow the “file-first” solution by filing for registration before the trademark squatter, even if they are not yet conducting business in China.⁹² In conjunction with filing trademark registrations early, foreign corporations and individuals can prevent trademark squatters from registering their marks for different products by utilizing Article 22 of China’s 2013 Trademark Law, which creates a multiclass application system.⁹³ A multiclass application system enables foreign corporations and individuals to indicate the various products and services that they wish to associate with their trademark in

86. See Melanie Lee & Lee Chyen Yee, *China’s Trademark System Baffles Foreign Firms*, REUTERS (Feb. 17, 2012, 8:59 AM), <http://www.reuters.com/article/uk-china-trademark-idUSLNE81G02520120217>.

87. See Smythe, *supra* note 15, at 516.

88. See Chang, *supra* note 45, at 346.

89. See *id.* at 345.

90. See Scott A. McKenzie, *Global Protection of Trademark Intellectual Property Rights: A Comparison of Infringement and Remedies Available in China Versus the European Union*, 34 GONZ. L. REV. 529, 560 (1998).

91. See Yan, *supra* note 22.

92. See Chow, *supra* note 26, at 94–95; Soon, *supra* note 49; Fitzpatrick, *supra* note 49; Baldwin, *supra* note 49; *Trademark Hijacking in China: The Importance of Trademark Registration*, *supra* note 49.

93. PRC Trademark Law of 2013, *supra* note 38, art. 22.

a single trademark registration application.⁹⁴ This recommendation, however, is oversimplified, as it requires foreign corporations and individuals to predict what types of products or services the trademark squatter will try to register the trademark under.⁹⁵

If these two preventive measures are not taken, foreign corporations and individuals may try to defeat trademark squatters by engaging in litigation.⁹⁶ This course of action, however, often leads to high litigation costs, lengthy delays in reaching a decision, and missed economic opportunities to benefit from the mark.⁹⁷ Pursuing lengthy litigation is especially risky in China, as victory in a Chinese court can be difficult for foreign challengers because Chinese officials may be biased in favor of their own nationals.⁹⁸ This causes many foreign corporations and individuals, such as Apple, to pay the squatters' monetary demands.⁹⁹ Alternatively, foreign corporations and individual may choose to rebrand and enter the Chinese marketplace with an entirely new mark to avoid the issue altogether.¹⁰⁰

94. See Chang, *supra* note 45, at 352. When filing for a trademark registration application, the trademark applicant must specify the good or service that they wish to associate the trademark with. See *id.* at 346–47. Services and goods are divided into classes, where services are classified based on the “nature of the services performed,” and goods are classified according to function or material composition. *Id.*

95. See Yan, *supra* note 22; see also Chow, *supra* note 26, at 96.

96. See Yan, *supra* note 22.

97. See Soon, *supra* note 49.

98. See *id.* Pfizer's unsuccessful battle to protect the Chinese name for Viagra lasted eleven years. See Pierson, *supra* note 32.

99. Apple paid \$60 million USD to the China unit of Proview International Holdings Ltd. for the right to the iPad trademark. Loretta Chao, Jessica E. Vascellaro, & Paul Sonne, *Apple Pays Small Price in China Case*, WALL ST. J. (July 2, 2012, 2:58 PM), <http://www.wsj.com/articles/SB10001424052702304211804577501681233676036>.

100. See Jensen, *supra* note 61; see also Brown, *supra* note 14. Li Daozhi filed a trademark in China for Castel, a French wine, prior to Castel entering the Chinese marketplace. See Jeffrey C. P. Wang & Trevor Roberts, *Trademark Squatting 101*, 57 ORANGE CTY. LAW. 30, 32 (2015). Daozhi offered to sell the mark to Castel for one million euros. *Id.* Castel refused to comply with the demand and was sued by Daozhi, who won 33.73 million yuan (roughly \$5.5 million USD). *Id.* While Castel appealed the decision, it nonetheless rebranded with a new Chinese name in case it receives an unfavorable outcome. *Id.* 3.1 Phillip Lim also chose to alter its logo in order to not be precluded from entering the Chinese marketplace by a trademark squatter. See *China's Trademark Turnaround Offers Hope for Brands Fighting 'Squatters'*, JING DAILY (July 12,

II. HISTORICAL TREATMENT OF TRADEMARK LAW IN CHINA

To fully understand the trademark squatter problem in China, a brief examination of China's historical treatment of trademarks and involvement in international trademark agreements is necessary. This Part will begin by discussing China's early trademark history, describing when trademark rights were first acknowledged and what they protected, when these protections ceased, and when China formally introduced its own Trademark Law. It will also discuss the international trademark agreements to which China is a signatory, including the Paris Convention for the Protection of Industrial Property ("Paris Convention"), the Madrid Agreement Concerning the International Registration of Marks ("Madrid Agreement"), and the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement"), and describe how these agreements have not only shaped China's Trademark Law but also demonstrated its commitment to protect and enforce IP rights.

China's first known attempt to recognize IP rights occurred in 35 CE, when Emperor Wenzong of the Tang dynasty issued an edict that "prohibited the unauthorized reproduction by persons of calendars, almanacs, and related items that might be used for prognostication."¹⁰¹ China's focus on trademarks specifically began during the Northern Zhou Dynasty in 556–580 CE, when the Chinese began attributing words to specific products.¹⁰² Legally, China began recognizing trademarks during the Qing Dynasty in 1904, when its first Trademark Law was passed—the Interim Trademark Registration Regulation.¹⁰³ At this early stage, the trademark law had no impact on protecting trademark rights, as officials did not punish violators of the law.¹⁰⁴

2015), <https://jingdaily.com/chinas-trademark-turnaround-offers-hope-for-brands-fighting-squatters/>.

101. WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 13 (1995).

102. Chinese merchants initially began trademarking their products to protect the craftsmanship behind their work. See Jessica Jong Zhou, *Trademark Law & Enforcement in China: A Transnational Perspective*, 20 WIS. INT'L L.J. 415, 417 (2002). An early example of this is fine china, which was branded using the mark "Jingdezhen." *Id.*

103. See *id.* at 418; see also JIANQIANG NIE & KEISUKE IIDA, *THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN CHINA* 179 (2006).

104. See Chang, *supra* note 45, at 341. The promulgation of China's Interim Trademark Registration Regulation came as the Qing Dynasty was perishing, creating an inability for leaders during that time to effectively implement the

Any efforts made toward protecting IP rights, however, came to an official and sudden standstill during the rise of the People's Republic of China.¹⁰⁵ From 1966 to 1976, any laws geared toward protecting IP rights were repealed due to the Cultural Revolution,¹⁰⁶ causing fear and uncertainty amongst trademark owners with respect to their ability to assert and defend their trademarks.¹⁰⁷

In the 1980s, China began to desire more foreign investors, as they were seen as vital to the country's economic development.¹⁰⁸ This led to reformulating China's legal system to emphasize protections for trademarks.¹⁰⁹ On August 23, 1982, the foundation for China's present trademark law was established in the Trademark Law of China,¹¹⁰ when China started protecting trademark rights for corporations and individuals by allowing for trademark registrations.¹¹¹ Allowing for trademark registrations was significant because it "protected the exclusive right of a trademark owner to use a registered mark and authorized a private right of action against acts of infringement."¹¹² While this law went a long way toward modernizing China's protection of trademark rights, it still had deficiencies, including the failure to provide punishment beyond compensatory damages as a deterrent.¹¹³

Simultaneous to acknowledging the deficiencies in its Trademark Law, China conformed to the viewpoint of the international community, which recognized the integral role that IP plays in facilitating trade amongst nations and in boosting the global economy.¹¹⁴ Due to the increased demand for trade, the

regulations against violators. See DEMING CHEN, *ECONOMIC CRISIS AND RULE RECONSTRUCTION* 355 (2014).

105. See Jessica C. Wong, *The Challenges Multinational Corporations Face in Protecting Their Well-Known Trademarks in China*, 31 *BROOK. J. INT'L L.* 937, 940–41 (2006).

106. See NIE & IIDA, *supra* note 103, at 180.

107. See Wong, *supra* note 105, at 941.

108. See Chang, *supra* note 45, at 342.

109. See *id.*

110. See *Trademark Law of the People's Republic of China*, http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384018.htm (last visited Oct. 1, 2016).

111. See Zhou, *supra* note 102, at 426.

112. *Id.*

113. See *id.*

114. See Li & Guo, *supra* note 33.

need for a system of universalized trademark laws became necessary to allow trademarks to properly function in the global economy.¹¹⁵ International treaties adequately accomplish this necessary harmonization by reducing the differences in the trademark standards amongst signatory countries,¹¹⁶ while also providing “efficiency, clarity, [and] predictability”¹¹⁷ in their enforcement. This caused China to join the World Intellectual Property Organization (WIPO)¹¹⁸ and become a signatory to the following international agreements: the Paris Convention,¹¹⁹ the Madrid Agreement,¹²⁰ and the TRIPS Agreement.¹²¹ The Paris Convention seeks to protect trademarks and other intellectual property rights by promoting the enforcement of individual rights in various countries.¹²² Similarly, the Madrid Agreement enables a trademark applicant to protect a single mark within multiple countries, so long as those countries are also signatories to the agreement.¹²³ Finally, the TRIPS Agreement creates minimum standards that each Member State must uphold, provides

115. See Blakely, *supra* note 10, at 310.

116. See Li & Guo, *supra* note 33.

117. Blakely, *supra* note 10, at 312.

118. The WIPO is an agency consisting of over 180 member countries dedicated to spreading global awareness and protecting intellectual property rights. See *World Intellectual Property Organization (WIPO)*, ENCYCLOPEDIA BRITANNICA (June 24, 2008), <https://www.britannica.com/topic/World-Intellectual-Property-Organization>. The WIPO promotes IP rights through IP treaties and monitoring compliance with any intellectual property agreements. See *id.*

119. See Paul B. Birden, Jr., *Trademark Protection in China: Trends and Directions*, 18 LOY. L.A. INT'L & COMP. L.J. 431, 434 (1996).

120. China became a signatory to the Madrid Agreement on July 4, 1989. See *Madrid (Marks) Notification No. 41 Madrid Agreement Concerning the International Registration of Marks*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/notifications/madrid-gp/treaty_madrid_gp_41.html (last visited Oct. 1, 2016).

121. See *Other IP Treaties*, WORLD INTELL. PROP. ORG., http://www.wipo.int/wipolex/en/other_treaties/parties.jsp?treaty_id=231&group_id=22 (last visited Oct. 1, 2016).

122. See *Paris Convention for the Protection of Industrial Property*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/treaties/en/ip/paris/> (last visited Oct. 1, 2016).

123. See *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks*, WORLD INTELL. PROP. ORG. INTELLECTUAL PROP. ORG., http://www.wipo.int/treaties/en/registration/madrid_protocol/ (last visited Oct. 1, 2016).

enforcement of IP rights through the creation of domestic procedures and remedies, and subjects disagreements between Member States to dispute-settlement procedures.¹²⁴

With China's adoption of these international agreements, it needed to assure that its Trademark Law complied with the obligations under each agreement, specifically the requirement to adopt measures enforcing IP rights.¹²⁵ Accordingly, China first amended its trademark law on February 22, 1993.¹²⁶ These amendments aimed to "improve 'the administration of trademarks' and encourage 'producers to guarantee the quality of their goods and maintain the reputation of their trademarks, with a view to protecting consumer interests and to promoting the development of [the] socialist commodity economy.'"¹²⁷ First, the amendments outlined what constitutes "infringement," which includes "the sale of goods that one is 'fully aware' are counterfeits of a registered mark, the forgery or unauthorized manufacturing of representations of another's registered trademark, and the sale of trademark representations that were forged or manufactured without authorization."¹²⁸ It also increased the amount of administrative fines that could be levied against infringers.¹²⁹

Despite these positive changes, China needed additional amendments to further comply with its TRIPS Agreement and Paris Convention obligations.¹³⁰ This led to a second series of amendments to its Trademark Law on October 27, 2001.¹³¹ Among other changes, these amendments included expanding the protectable subject matter for trademarks, protecting well-known marks, creating judicial review for trademark disputes,

124. See *Overview: The TRIPS Agreement*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Oct. 15, 2016).

125. See Jayanth S. Swamidass & Paul M. Swamidass, *The Trajectory of China's Trademark Systems Leading Up to the New Trademark Law Taking Effect in May 2014*, 96 J. PAT. & TRADEMARK OFF. SOC'Y 56, 62 (2014).

126. *Trademark Law of the People's Republic of China*, *supra* note 110.

127. Zhou, *supra* note 102, at 427.

128. *Id.*

129. See *id.*; see also Swamidass & Swamidass, *supra* note 125, at 62.

130. See Swamidass & Swamidass, *supra* note 125, at 63.

131. See *id.*; see also *Trademark Law of the People's Republic of China*, *supra* note 110.

extending the timeframe for filing a trademark dispute against an alleged infringer, and allowing for statutory damages.¹³²

III. CHINA'S 2013 AMENDMENTS AND THE NEED FOR FURTHER IMPROVEMENTS

Despite the amendments to China's Trademark Law and its adoption of international trademark agreements, IP-infringing activities continue to plague China.¹³³ Following a dramatic increase in Chinese trademark applicants¹³⁴ and years of criticism and calls for change from the United States and other countries, China further amended its Trademark Law in 2013.¹³⁵ This Part will describe the amendments that have positively impacted trademark squatting, including Article 7 and 19's good faith principle for trademark applicants and agencies, Article 22's multiclass application system, and Article 63 and 68's allowances for damages against trademark squatters. This Part will also discuss the negative impact of Article 35, which creates an invalidation procedure when appealing trademark applications by trademark squatters.¹³⁶ This Part will continue by specifying the positive impact that Article 7's good faith principle has already had on defeating trademark squatters, as seen in Michael Bastian and Michael Jordan's cases. Moreover, this Part will acknowledge that the meaning of good faith under Article 7 needs to be further clarified, while Article 35 needs to be amended to create a fair appeals process for foreign corporations and individuals. Finally, this Part will explain why these changes are necessary, even though many scholars and lawyers argue that the "file-first" solution is sufficient.

A. How China's 2013 Amendments Impact Trademark Squatters

China's 2013 Trademark Law took effect on May 1, 2014.¹³⁷ These amendments are considered to be the most monumental and impactful changes to China's trademark law since 1982.¹³⁸

132. See Swamidass & Swamidass, *supra* note 125, at 63.

133. See *id.*

134. See Li & Guo, *supra* note 33.

135. See Hoffman, *supra* note 34.

136. See Chang, *supra* note 45, at 352–54.

137. See Mao, *supra* note 12.

138. See *The New Trademark Law Showcases China's Determination to Fight Against the Increasing Bad-Faith Filings*, GEVERS (Jan. 9, 2014),

While the trademark squatter problem continues to exist in China today, the 2013 amendments show China's dedication toward creating a trademark system that targets bad faith trademark squatters.¹³⁹

The most critical amendment aimed at curtailing the trademark squatter problem is Article 7, which states that "the principle of good faith shall be upheld in the application for trademark registration and in the use of trademarks."¹⁴⁰ This amendment can be used by foreign corporations and individuals to protect an unregistered trademark by contesting a trademark squatter's application to register the mark.¹⁴¹ It may also be used to prevent the CTMO from considering future trademark applications made by the squatter.¹⁴² Through Article 19, this good faith principle is extended beyond the trademark squatters themselves and may also apply to trademark agencies.¹⁴³ This expands the scope of protection afforded to foreign corporations and individuals by targeting both trademark squatters and the agencies that assist them in filing for registration of the mark.¹⁴⁴ This ultimately decreases the legal resources available to trademark squatters to carry out their illegal schemes.

Moreover, Articles 7 and 19 are reinforced by Articles 63 and 68 respectively, which serve as economic deterrents against trademark squatters and trademark agencies who act in bad faith.¹⁴⁵ Article 63 affords Chinese courts discretion to award punitive damages ranging from 500,000 to 3 million RMB, (roughly \$80,000 to \$500,000 USD) based on a finding of bad faith.¹⁴⁶ Chinese courts can also multiply the damages by up to three times

<http://www.gevers.eu/en/news/2014-01-09/new-trademark-law-showcases-china-s-determination-fight-against-increasing-bad-faith>.

139. See Chang, *supra* note 45, at 350–51.

140. PRC Trademark Law of 2013, *supra* note 38, art. 7.

141. See Cynthia S. Wang, *China: Unregistered Rights in a First to File Environment*, WORLD TRADEMARK REV., <http://www.worldtrademarkreview.com/Magazine/Issue/54/Country-correspondents/Unregistered-rights-in-a-first-to-file-environment> (last visited Oct. 14, 2016); see also Chang, *supra* note 45, at 353.

142. See 8 *Key Revisions to Chinese Trademark Law: Promising Steps Toward IP Protection*, LATHAM & WATKINS (Oct. 16, 2013), <https://www.lw.com/thoughtLeadership/lw-chinese-trademark-law-revisions>.

143. PRC Trademark Law of 2013, *supra* note 38, art. 19.

144. *Id.*

145. *Id.* arts. 63, 68.

146. 8 *Key Revisions to Chinese Trademark Law: Promising Steps Toward IP Protection*, *supra* note 142.

the allowed amount where bad faith is proven.¹⁴⁷ Corporations and individuals who successfully defend their trademarks in China are also entitled to repayment of all expenses related to defending their mark.¹⁴⁸ When determining the amount of damages that a trademark squatter must pay, the burden of proof shifts to the trademark squatter, who must produce requested documentation and accounting books for the Chinese judge to assess damages.¹⁴⁹ With respect to trademark agencies, however, Article 68, limits the potential liability to civil damages with no possibility for punitive damages.¹⁵⁰

Furthermore, the amendments not only create a good faith principle under which trademark applications must be filed but also alter the application process itself to deter trademark squatting.¹⁵¹ Under Article 22, foreign corporations and individuals can designate one trademark application to protect the mark for multiple types of goods.¹⁵² This not only broadens the protection that one trademark application has for foreign corporations and individuals but also makes trademark squatting more difficult, as foreign corporations and individuals do not have to pay multiple application fees in order to prevent trademark squatters from simply finding a popular trademark and registering it on an unrelated product.¹⁵³

Article 35 also alters the application process, however, its effects ultimately perpetuate trademark squatting.¹⁵⁴ For example, Article 35 grants foreign corporations and individuals the ability to appeal a trademark application after an initial loss before the CTMO.¹⁵⁵ While an appeal is still possible through the TRAB, a certificate of trademark registration will be granted to the trademark squatter, giving the squatter legal entitlement over the mark before the conclusion of the appeals process.¹⁵⁶ This empowers and emboldens trademark squatters to hold trademarks for expensive ransoms from foreign corporations

147. *See id.*

148. *See id.*

149. *See Chang, supra note 45, at 353.*

150. PRC Trademark Law of 2013, *supra note 38, art. 68.*

151. *See Chang, supra note 45, at 352.*

152. PRC Trademark Law of 2013, *supra note 38, art. 22; see also Chang, supra note 45, at 352.*

153. *See Chang, supra note 45, at 352.*

154. *See id.* at 353.

155. PRC Trademark Law of 2013, *supra note 38, art. 35.*

156. *See id.*

and individuals to regain legal rights in their marks.¹⁵⁷ One possible justification offered for the enactment of Article 35 is that it reduces the backlog of pending trademark applications before the TRAB by registering the trademark at an earlier point.¹⁵⁸ Proponents also allege that Article 35 decreases the number of allegedly frivolous trademark application challenges by foreign corporations and individuals.¹⁵⁹ Theoretically, these frivolous lawsuits create a heavy workload that cannot be successfully maintained by trademark examiners.¹⁶⁰ Article 35 is thus intended to deter foreign corporations and individuals from making frivolous challenges because it forces these parties to assess the financial risk of opposing a trademark registration.¹⁶¹

B. Positive Aspects of the 2013 Amendments

China's 2013 amendments were widely anticipated and celebrated by those in the trademark community for their potential to influence the trademark squatter issue.¹⁶² For example, in its Special 301 Report,¹⁶³ the WIPO identified China's amendments as positive steps toward the promotion of intellectual property rights internationally.¹⁶⁴ Various aspects of China's amendments have lived up to these expectations. One positive feature of the 2013 amendments are that they establish the good faith requirement as a principle, not a rule.¹⁶⁵ A rule establishes a

157. See Chiang Ling Li & Haifeng Huang, *China's New Trademark Law*, JONES DAY (Oct. 2013), <http://www.jonesday.com/files/Publication/7f2e3b1a-5cce-40bd-b8a2-e0b37e686c2d/Presentation/PublicationAttachment/8bfa47aa-c24b-45c7-ad16-e0d2d4ec31f5/China%20New%20Trademark%20Law.pdf>.

158. See Chang, *supra* note 45, at 353.

159. See Beconcini, *supra* note 8.

160. See *id.*

161. See *id.*

162. See Kossof, *supra* note 1, at 867–68.

163. The Special 301 Report is required according to section 182 of the Trade Act of 1974. See generally OFFICE OF THE U.S. TRADE REP., 2016 SPECIAL 301 REPORT (2016), <https://ustr.gov/sites/default/files/USTR-2016-Special-301-Report.pdf>. It is produced by the USTR, who thoroughly examines how each U.S. trading partner implements policies to enforce IP rights. See *id.* A country will be given priority status if its IP policies fail to adequately protect U.S. products. See *id.*

164. See *id.* at 7.

165. See *New China Trade Mark Law*, ROUSE (July 16, 2014), <http://www.rouse.com/magazine/articles/alerts/new-china-trade-mark-law/>.

All other countries that recognize good faith in their trademark laws have aligned with these benefits and concerns by utilizing principles instead of rules

clear boundary for what will constitute permissible conduct.¹⁶⁶ While a rule would provide trademark squatters, companies, and individuals with a clear understanding of how to behave, a rule would also encourage trademark squatters to push the boundaries and come as close to violating the rule as possible without any punishment.¹⁶⁷ A standard, however, allows for greater flexibility by describing permissible and forbidden conduct in broader terms, allowing judges to carefully analyze each case on an individualized basis.¹⁶⁸ This may cause trademark squatters to be more cautious, as the line between good and bad faith registrations is less clear.¹⁶⁹

Moreover, in the year since the amendments took effect in China, there is evidence that trademark squatting is on the decline.¹⁷⁰ The positive progress achieved through the good faith principle can be seen most notably in Michael Bastian's case.¹⁷¹ Michael Bastian, a U.S. menswear designer, was precluded from entering the Chinese marketplace by a Chinese company that registered his English name and its equivalent Chinese translation.¹⁷² In 2015, the designer appealed the trademark decision and brought a lawsuit before the Chinese TRAB, defeating the trademark squatter based on the principle of good faith.¹⁷³ The TRAB found that Bastian established bad faith of the Chinese trademark squatter, who previously attempted to register 120 marks (unrelated to Bastian's) without any known connection to those marks.¹⁷⁴ In reaching its decision, the TRAB held that Bastian sufficiently established bad faith and did not require proof that the mark was well-known in China prior to the Chinese

to guide its enforcement. *See generally* ELIZABETH HOULIHAN, INTELLECTUAL PROP. OWNERS ASS'N, BAD FAITH TRADE MARK FILINGS—AN INTERNATIONAL PERSPECTIVE (2013), <http://www.ipo.org/wp-content/uploads/2013/11/badfaith-filings.pdf>.

166. *See* Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 384 (1985).

167. *See id.* at 384–85.

168. *See id.* at 385.

169. *See id.*

170. *See* Wang Yadong & Lu Lei, *China Supreme People's Court Gives Clear Legal Prescription for Trademark Squatting*, NIUYIE, <http://www.niuyie.com/china-supreme-peoples-court-gives-clear-legal-prescription-for-trademark-squatting/> (last visited Nov. 1, 2016).

171. *See* Park, *supra* note 69.

172. *See* Jensen, *supra* note 61.

173. *See* Park, *supra* note 69.

174. *See* Dresden, *supra* note 40.

company filing for registration of the mark.¹⁷⁵ While the good faith principle has previously been applied to Chinese nationals,¹⁷⁶ the Michael Bastian case is significant because it marked the first instance where the principle was successfully applied in favor of a foreign company's opposition for registration.¹⁷⁷

Another example of China's progress toward curtailing trademark squatting can be seen through Michael Jordan's case.¹⁷⁸ Jordan's legal battle began in 2012, when Qiaodan Sports, a Chinese sports company, registered the trademark "Qiaodan," which is the Chinese translation of Jordan.¹⁷⁹ With the inclusion of Jordan's name on its products, Qiaodan Sports thrived, as the business sold around \$500 million USD in goods in 2015 alone.¹⁸⁰ Jordan challenged Qiaodan's registration numerous times but failed to overturn the lower court rulings in favor of Qiaodan, which found insufficient evidence definitively linking Jordan to the mark, reasoning that "Jordan" is a common name that can refer to anyone.¹⁸¹ Qiaodan's mark, however, was ultimately invalidated by the Supreme People's Court in 2016, which granted

175. See *Michael Bastian Wins Landmark Trademark Decision in China*, CHINA IP (July 10, 2015), <http://www.chinaipmagazine.com/en/news-show.asp?id=7907>.

176. The good faith principle was successfully argued by former national basketball association (NBA) player and Chinese national, Yao Ming, who blocked a trademark squatter from using his name on feminine sanitary products. See *The NBA and Its Continuing Trademark Battles*, CHINA IPR (July 10, 2012), <https://chinaipr.com/2012/07/10/the-nba-and-its-continuing-trademark-battles/>; see also Mark Allen Cohen, *Trademark Squatting in China Doesn't Sit Well with U.S. Retailers*, L.A. TIMES (Mar. 28, 2012), <http://articles.latimes.com/2012/mar/28/business/la-fi-china-trademark-squatting-20120328>.

177. See Dresden, *supra* note 40.

178. See Wee, *supra* note 41.

179. Qiaodan Sports also registered Jordan's NBA jersey number 23 and the image of Jordan jumping with a basketball in his hand. See Eben Blake, *Michael Jordan Loses China Trademark Lawsuit to Chinese Knockoff Brand Qiaodan Sports*, INT'L BUS. TIMES (July 30, 2015, 1:09 PM), <http://www.ibtimes.com/michael-jordan-loses-china-trademark-lawsuit-chinese-knockoff-brand-qiaodan-sports-2032080>.

180. Amy Hsiao & Christopher Shen, *How Michael Jordan Won TM Case in China Without TM Rights*, LAW360 (Jan. 24, 2017), <https://www.law360.com/articles/876507/how-michael-jordan-won-tm-case-in-china-without-tm-rights>.

181. Qiaodan successfully defended its use of the Jordan trademark in two court rulings as well as in the Supreme People's Court in Beijing, where the

Jordan the rights to the Chinese translation of his name.¹⁸² Jordan was able to establish bad faith against Qiaodan Sports by showing recognition of his name in China dating back to 1984, well before Qiaodan's 2012 registration.¹⁸³ Jordan further established Qiaodan's bad faith through its unexplainable registration of other marks associated with his name, including his jumpman silhouette, jersey number, and sons' names.¹⁸⁴ Based on this evidence, the court ultimately reasoned that "Qiaodan Sports . . . 'maliciously' registered trademarks for the use of Jordan's name under different classes and built its entire business on that goodwill."¹⁸⁵ While these two cases demonstrate the positive impact of Article 7's good faith principle, more work is still needed to assure that the cases on the fringes in China are decided in ways that protect the rights of rightful trademark owners.

C. *The Need for Continued Improvement*

Despite the positive progress that China's 2013 trademark amendments have made toward hindering the trademark squatter problem and showing dedication to the improvement of IP rights, the law does not fully protect foreign corporations and individuals.¹⁸⁶ Article 7 vaguely articulates a good faith principle, without establishing any predetermined factors to be analyzed on a case-by-case basis for what constitutes bad faith registration of a mark.¹⁸⁷ While this may be enough to safeguard against notorious trademark squatters, as seen in the Michael Bastian and Michael Jordan cases,¹⁸⁸ this broad leniency afforded to Chinese courts may result in inconsistent and unpre-

Chinese courts found that Jordan failed to prove that Qiaodan unequivocally refers to him specifically. *See id.*

182. *See Wee, supra* note 41.

183. *See Hsiao & Shen, supra* note 180.

184. *See id.*

185. *Michael Jordan's Trademark Victory in China: A Lesson Learned For International Companies*, ARMSTRONG TEASDALE (Dec. 9, 2016), <http://www.armstrongteasdale.com/michael-jordans-trademark-victory-in-china-a-lesson-learned-for-international-companies-12-09-2016/>.

186. *See Zhou, supra* note 102; *see also Chang, supra* note 45, at 355.

187. *See Asbell & Wang, supra* note 39; *see also Kossof, supra* note 1, at 885.

188. *See Dresden, supra* note 40.

dictable decisions for less obvious cases of trademark squatting.¹⁸⁹ This leniency is especially troublesome, given that disputes against Chinese trademark squatters occur in Chinese courts,¹⁹⁰ giving the trademark squatter a potential advantage with judges who, for political or governmental reasons, may favor protection of local trademark rights over foreign challengers.¹⁹¹ This is evident by the fact that most Chinese courts continue to favor trademark squatters,¹⁹² especially when the foreign company or individual is not recognized in China prior to registration by the trademark squatter.¹⁹³

Furthermore, even if China provides an adequate definition detailing what constitutes good faith registration of a trademark, because Article 35's appeal process can only occur after an applicant's mark has been registered,¹⁹⁴ a barrier is created for opposing and defeating trademark squatters, as rights are granted in the mark before a foreign corporation or individual completes the appeals process.¹⁹⁵ This not only weakens the impact and strength of Article 7 for foreign corporations and individuals¹⁹⁶ but also enhances the leverage that a trademark squatter has over the trademark as ransom until a Chinese judge makes a final decision regarding the mark.¹⁹⁷ This inadequate appeals process discourages foreign corporations and individuals from investing in the application and legal fees associated with trademarks and creates skepticism in China's ability to safeguard trademark rights once a trademark squatter has begun using the mark.¹⁹⁸ This concern is validated by the fact that China has a notoriously low success rate for returning

189. See Asbell & Wang, *supra* note 39.

190. See generally Sangsuvan, *supra* note 19, at 291 (explaining that trademark squatting disputes are resolved in Chinese courts because "the foreign country is responsible for the enforcement of trademark law within its own border and will apply its own trademark law to a trademark squatting dispute").

191. See *id.* at 292.

192. See Dresden, *supra* note 40.

193. See Beconcini, *supra* note 8.

194. PRC Trademark Law of 2013, *supra* note 38, art. 35.

195. See Chang, *supra* note 45, at 353.

196. See *New China Trade Mark Law*, *supra* note 165.

197. See Benjamin, *supra* note 48.

198. See Beconcini, *supra* note 8.

trademark rights to legitimate owners once they have been infringed by a squatter.¹⁹⁹ Even if foreign corporations and individuals choose to invest in a Chinese trademark application, under the current Trademark Law, once Article 35's appeal process is triggered, many foreign corporations and individuals may lack the resources to challenge trademark squatters, given that invalidation proceedings may be too expensive and are unlikely to succeed.²⁰⁰

D. Dispelling the "File-First" Solution

Despite these legitimate concerns, it has been argued by lawyers and academics that, rather than amending or repealing China's current Trademark Law, foreign corporations and individuals can simply defeat trademark squatters by filing for registration at an earlier point, even if they have not actually started conducting business in the registering country.²⁰¹ While this is understandably a quick and easy solution, it oversimplifies the magnitude of the problem and is not a viable option for everyone seeking to register a trademark, as it does not take into account the varying economic situations amongst individuals and corporations.²⁰² For example, while the cost of registering a trademark in China may be insignificant to large corporations, start-up companies and individuals do not necessarily have the same financial resources to file a trademark application before they even decide to enter the Chinese marketplace.²⁰³ This leaves these companies and individuals with the option of receiving only limited trademark protection, which in turn leaves them susceptible to trademark squatters.²⁰⁴ Moreover, the first-to-file solution highlights anticipatory issues in defeating trademark squatters, wherein trademark squatters predict the success that a person will have in the future, as seen in Jeremy Lin's

199. *See id.*

200. *See Fei, supra* note 46. Pfizer's legal battle against Viamen cost millions of dollars in legal fees. *See Wang & Roberts, supra* note 100.

201. *See Soon, supra* note 49; Fitzpatrick, *supra* note 49; Baldwin, *supra* note 49; *Trademark Hijacking in China: The Importance of Trademark Registration, supra* note 49.

202. *See Brown, supra* note 14.

203. *See id.*

204. *See id.*

case.²⁰⁵ Prior to Jeremy Lin gaining notoriety with the New York Knicks,²⁰⁶ Wuxi Risheng Utility Co., which manufactures sports equipment, successfully applied for a trademark bearing his name in China.²⁰⁷ The Jeremy Lin case shows that a trademark squatter who accurately predicts early success or potential in a company or individual cannot be stopped by merely implementing the file-first approach,²⁰⁸ as it is not always practical for an individual to predict that they even have a product or identity to protect at this early stage.

IV. RECOMMENDATIONS

Despite the advancements in China's Trademark Law that address the trademark squatter problem, further reform is needed to adequately protect the trademark rights of foreign corporations and individuals. First, this Part will argue that Article 7's good faith principle needs to be clarified.²⁰⁹ As a guide, China should look to Australia's TMAA because it not only defines bad faith but also provides examples of what constitutes bad faith, eliminating excess discretionary power of Chinese officials. Second, Article 35's invalidation process should be replaced with China's 2001 appeals process for trademark disputes, which required completion of the appeals process before the mark could become legally registered to either party²¹⁰ and granted more rights to foreign corporations and individuals during the appeals process.

A. Step One: Clarifying the Good Faith Principle

In finding solutions to China's vague definition for good faith trademark registrations, it is beneficial to consider how other countries have provided a definition for bad faith in their trademark laws.²¹¹ While no country has provided a concrete rule for

205. See Benjamin Kang Lim, *Trademark Dispute Looming over Who Discovered Jeremy Lin*, REUTERS (Feb. 27, 2012, 3:35 AM), <http://www.reuters.com/article/us-nba-china-trademark-idUSTRE81Q0QC20120227>.

206. See *New York Knicks*, BRITANNICA, <https://www.britannica.com/topic/New-York-Knicks> (last visited May 26, 2017).

207. Wuxi Risheng Utility Co. only spent 4,460 yuan (\$710 USD) to capitalize on Lin's estimated net worth of \$15 million USD. See Lim, *supra* note 205.

208. See Cohen, *supra* note 176.

209. See INTA COMMENTS, *supra* note 51.

210. See PRC Trademark Law of 2001, *supra* note 52, art. 33.

211. See Chang, *supra* note 45, at 355.

bad faith, countries have nonetheless been able to provide broad, generalized guidance for what constitutes a bad faith trademark application.²¹²

While other countries have provided a definition and guidance for bad faith registration of trademarks, Australia's approach seems most promising and applicable to the situation in China.²¹³ The TMAA provides a definition for bad faith applications that balances the need for flexibility and clarity to protect foreign corporations and individuals against trademark squatters.²¹⁴ According to the TMAA, bad faith is broadly defined as "instances in which a person has deliberately set out to gain registration of a trade mark, or adopted a trade mark in bad faith."²¹⁵ Australia then provides specific examples of bad faith registration of a trademark, including monitoring property developments and registering a mark associated with it while simultaneously threatening the legitimate trademark owner with trademark infringement lawsuits, registering a mark with no intent to sell goods associated with the mark in the Australian marketplace, and engaging in a pattern of slightly altering trademark names to benefit from the notoriety of the established mark.²¹⁶

The positive impact that Australia's bad faith definition could have on China's trademark squatter problem can be seen through *Hard Candy Fitness, LLC v. Hardy Candy (Australia)*.²¹⁷ In this case, an Australian fitness company sought to register the name of pop singer Madonna's gym, Hard Candy, in

212. See HOULIHAN, *supra* note 165. Brazil, for example, defines bad faith as attempting to register a trademark that is so similar to an existing trademark that it is highly unlikely that copying did not occur. See *id.*

213. See *id.* See generally *Trade Mark Opposition Procedures—Australia*, WORLD INTELL. PROP. ORG., http://www.wipo.int/export/sites/www/sct/en/comments/pdf/sct17/au_4.pdf (last visited Dec. 12, 2016) (discussing the presence of the good faith principle in Australia's TMAA and its amended presence in Australia's 2006 Trade Mark Act, which allows a third-party to challenge a trademark registration based on bad faith).

214. See *id.*

215. *Trade Marks Amendment Act 2006* (Cth) s 62A (Austl.); see also HOULIHAN, *supra* note 165.

216. See *Trade Marks Amendment Act 2006*; see also HOULIHAN, *supra* note 165.

217. *Hard Candy Fitness, LLC v. Hard Candy (Australia) Pty Ltd* [2015] ATMO 61 (30 June 2015). See generally Chris Round, *Bad-Faith Trademark Applications*, IP L. WATCH, <https://www.iplawwatch.com/2016/01/bad-faith-trademark-applications/> (last visited Dec. 4, 2016).

Australia.²¹⁸ Using the examples of bad faith set forth in the TMAA, the Australian Trademark Office denied the trademark application, reasoning that the Australian company previously filed various applications connected to famous foreign companies, which specifically violated the examples set forth in Australia's trademark law by identifying a trademark that had yet to come to Australia and using it to gain money from the trademark owner.²¹⁹ This case demonstrates how specific factors can be used to provide clarity behind the meaning of the good faith principle in determining whether a trademark squatter is infringing on the rights of others.²²⁰ By adopting Australia's definition of bad faith to create more predictability and certainty, Chinese courts will be guided by examples that are written into the law when adjudicating trademark disputes.²²¹

B. Step Two: Increase Rights for Challengers

While China can adopt the Australian approach in defining the bad faith principle, it must also address the issues arising from Article 35 in order to fully protect foreign corporations and individuals throughout the entire appeals process.²²² China's most optimal solution would be to return to Article 33 of the 2001 amendments, which suspends the grant of a trademark until the conclusion of opposition proceedings.²²³ This solution is the quickest and easiest way to restore an equal appeals process, as it saves time and resources that would be dedicated to creating an entirely new appeals process. This may not be a practical or realistic solution, however, because the adoption of Article 35 was seen as necessary to prevent the backlog of bad faith oppositions.²²⁴ More realistically, rather than replace Article 35 entirely, China could take steps toward correcting the appeals process in a way that limits the effect of Article 35 and grants more rights than are currently afforded to foreign corporations and

218. See Round, *supra* note 217.

219. The Australian gym previously sought to register trademarks for G-Star and Isotta Fraschini. See *id.*

220. See *id.*

221. See Dresden, *supra* note 40.

222. See Chang, *supra* note 45, at 353.

223. See INTA COMMENTS, *supra* note 51; see also PRC Trademark Law of 2001, *supra* note 52, art. 33.

224. See Beconcini, *supra* note 8.

individuals during the initial opposition process.²²⁵ First, in order to limit the effect and need for foreign corporations and individuals to rely on Article 35, China can place more weight on a trademark squatter's response to an alleged violation of Article 7's good faith requirement.²²⁶ Instead of needing to go through the invalidation process, which can be time consuming and expensive, a foreign corporation or individual would be entitled under Article 44 to argue that a failure to respond to an Article 7 violation should be automatic grounds for dismissal of the mark.²²⁷ This solution would align with the purpose of Article 44, which already describes numerous instances where a registered mark will receive such treatment.²²⁸ This solution would prevent many foreign corporations and individuals who challenge trademark squatters from needing to rely on Article 35's appeals process altogether, as many notorious trademark squatters may fail to reply to the challenges and will forego asserting any possible rights in the mark for fear that costly litigation will reveal other illegal squatting schemes.

Moreover, China can both ease the impact of Article 35 and the bias of Chinese officials against foreign corporations and individuals that results from trademarking squatting disputes taking place in China by granting a challenger the right to review the trademark applicant's arguments and responses to the opposition, while also allowing the challenger an adequate amount of time to respond to these documents and the assertions made in them.²²⁹ This will provide more transparency during the initial opposition proceeding, which may produce more favorable outcomes for foreign corporations and individuals, thus decreasing the need for challengers to rely on the invalidation process outlined in Article 35.²³⁰

CONCLUSION

China's 2013 amendments to its trademark law show an effort and willingness to provide more protection than ever previously afforded to foreign corporations and individuals trying to protect their trademarks in China. Given China's powerful position in

225. See PRC IMPLEMENTING REGULATIONS COMMENTS, *supra* note 53.

226. See *id.*

227. See *id.*

228. See PRC Trademark Law of 2013, *supra* note 38, art. 44.

229. See PRC IMPLEMENTING REGULATIONS COMMENTS, *supra* note 53.

230. See *id.*

the global economy and its continued escalation to being the world's largest economy with each passing year,²³¹ it is critical that China amend its trademark law further to consistently deter trademark squatting. After investing time, money, and energy into making a mark valuable, foreign corporations and individuals should have adequate legal protections when trying to reach Chinese consumers in China. While Article 7's good faith principle might at first glance appear to combat trademark squatting, its vagueness empowers Chinese judges to engage in domestic favoritism and ignore its application to protect trademark squatters. Article 35 is equally troublesome, as after Article 7 is ignored, foreign corporations and individuals must resort to an unequal and ineffective appeals process as a remedy. The solutions for amending Article 7, which calls for implementing Australia's factors for evaluating claims of bad faith registration, and Article 35, which calls for limiting its impact by automatically invalidating registrations where the applicant has failed to respond to an Article 7 violation, and allowing for review of certain documents during the opposition period, will provide foreign corporations and individuals with clarity, consistency, and increased individual protections when trying to assert trademark rights in China. It is critical that these amendments occur immediately. Until these further amendments are implemented, potential foreign corporations and individuals will continue to feel uneasy investing in China's marketplace, given the uncertainty regarding whether they will receive outcomes similar to Michael Jordan²³² and Michael Bastian,²³³ rather than those received by Hermès²³⁴ and Pfizer.²³⁵

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231. See Soergel, *supra* note 3.

232. See Wee, *supra* note 41.

233. See Park, *supra* note 69.

234. See Yan, *supra* note 22.

235. See Chow, *supra* note 26.

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