

# NOTES

ASHLEY L. DAVISON\*

## Through the Grapevine: New Developments in the Protection of Geographical Indications in China

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\* Juris Doctor, University of Oregon School of Law; The author would like to thank Professor Chris Hermann for inspiring the idea for this paper as well as Professor Eric Priest for his guidance and critiques. The author would also like to thank her future husband for his years of support and her parents for always encouraging her to pursue her dreams.

## INTRODUCTION

The world is thirsty for wine, and the United States and China are driving the increase in global wine consumption.<sup>1</sup> China, in particular, is on the radar for many countries as the most lucrative opportunity in the global wine market.<sup>2</sup> In 2010, China consumed about 1.4 billion liters of wine, amounting to a value of about 36 billion RMB.<sup>3</sup> About 20% of that consumption was from imported wines.<sup>4</sup>

China is one of the fastest growing markets for wine consumption, on track to move from the fifth to the second largest consumer of wine in the world in the next five years.<sup>5</sup> While the per capita consumption in China pales in comparison to countries like France and the United States,<sup>6</sup> the massive population of over 1.3 billion people<sup>7</sup> means that

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<sup>1</sup> AFP News, *Sip Sparingly, Researchers Say Global Wine Shortage Looms*, N.Y. DAILY NEWS (Oct. 31, 2013, 12:45 PM), <http://www.nydailynews.com/life-style/eats/global-wine-shortage-looms-study-article-1.1502727>.

<sup>2</sup> See Chris Mercer, *China Wine Potential Beats US, Says NZ Estate Owner*, DECANTER (Oct. 8, 2013), <http://www.decanter.com/news/wine-news/584438/china-wine-potential-beats-us-says-nz-estate-owner>; Richard Woodard, *New Zealand Launches Sales Offensive in China*, DECANTER (Jan. 30, 2013), <http://www.decanter.com/news/wine-news/530807/new-zealand-launches-sales-offensive-in-china>; Sophie Kevany, *Asian Wine Market Worth €1bn by 2017*, DECANTER (Aug. 19, 2008), <http://www.decanter.com/news/wine-news/485601/asian-wine-market-worth-1bn-by-2017>; Livia Xin, *California Wineries Eyeing China's Wine Market*, THE DRINKS BUS. (Nov 18, 2013), <http://www.thedrinksbusiness.com/2013/11/california-wineries-eyeing-chinas-wine-market/>; Claire Wilson, *Spanish Wine Makers Target Lucrative Chinese Market with New Offerings*, THE OLIVE PRESS (Nov. 20, 2013, 6:30 PM), <http://www.theolivepress.es/spain-news/2013/11/20/spanish-wine-makers-target-lucrative-chinese-market-with-new-offerings/>.

<sup>3</sup> This is equivalent to over US \$5.5 billion. RMB is the abbreviation for Renminbi, the name given to Chinese currency. It translates to the "people's currency," CHINA TODAY, July 12, 2008, <http://www.chinatoday.com/fin/mon/>; FOREIGN AGRIC. SERV., U.S. DEP'T OF AGRIC., GLOBAL AGRICULTURAL (ABV.) INFORMATION (ABV.) NETWORK REPORT(ABV): MARKETING U.S. WINE IN CHINA, 1, 3 (2012), [http://gain.fas.usda.gov/Recent%20GAIN%20Publications/Marketing%20U.S.%20Wine%20in%20China\\_Shanghai%20ATO\\_China%20-%20Peoples%20Republic%20of\\_4-19-2012.pdf](http://gain.fas.usda.gov/Recent%20GAIN%20Publications/Marketing%20U.S.%20Wine%20in%20China_Shanghai%20ATO_China%20-%20Peoples%20Republic%20of_4-19-2012.pdf).

<sup>4</sup> *Id.*

<sup>5</sup> Richard Siddle, *China Could Be World's Second Largest Wine Consuming Country Within Five Years*, HARPERS (Nov. 4, 2013), <http://www.harpers.co.uk/news/china-could-be-worlds-second-largest-wine-consuming-country-within-five-years/351248.article>.

<sup>6</sup> Georgina Hindle, *China Overtakes U.K. to Become Fifth Largest Wine-Consuming Nation: Vinexpo*, DECANTER (Jan. 11, 2012), <http://www.decanter.com/news/wine-news/529653/china-overtakes-uk-to-become-fifth-largest-wine-consuming-nation-vinexpo>.

<sup>7</sup> Cent. Intelligence Agency, *Population: Country Comparison to the World*, THE WORLD FACTBOOK (July 2013), <https://www.cia.gov/library/publications/the-world-factbook/fields/2119.html>.

even slight growth in per capita consumption translates to tremendous growth in overall consumption.<sup>8</sup>

Many countries that are looking to capitalize on this growth have their eyes set on the lucrative China wine market.<sup>9</sup> This phenomenon made its way into popular culture with a recent documentary which detailed the success of international wine producers in China's high-end market<sup>10</sup> and revealed the great extent to which people have gone to counterfeit expensive bottles.<sup>11</sup> The resulting reputational and financial risk involved with counterfeited wines is prohibitive for many international wine sellers looking to get into the China market.<sup>12</sup> Thus far, only one foreign region has managed to gain protection against counterfeiting for its products that are sold in China.<sup>13</sup>

As the global wine market becomes ever more interconnected, cohesive systems of protection for intellectual property rights (IPRs) become ever more important. "Intellectual property refers to creations of the mind . . . [including] symbols, names and images used in commerce."<sup>14</sup> Trademarks are one form of intellectual property; a trademark is "any word, name, symbol, device, or any combination, used or intended to be used to identify and distinguish the goods/services of one seller or provider from those of others, and to indicate the source of the goods/services."<sup>15</sup> Brand owners protect their brands and reap the benefits of their creations by exercising their IPRs.<sup>16</sup>

One form of protection for IPRs in the wine industry is known as Geographical Indications (GIs).<sup>17</sup> GIs "identify a good as originating in

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<sup>8</sup> Christopher W. Runckel, *Wine Industry in China*, BUSINESS IN ASIA (2012), [http://www.business-in-asia.com/china/china\\_wine.html](http://www.business-in-asia.com/china/china_wine.html).

<sup>9</sup> See Mercer, *supra* note 2.

<sup>10</sup> RED OBSESSION (Lion Rock Films 2012).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Press Release, NEWS RELEASE: Napa Valley First International Wine Region to Receive Landmark Protection in China, NAPA VALLEY VINTNERS (Oct. 11, 2012), [http://napavintners.com/press/press\\_release\\_detail.asp?ID\\_News=3421228](http://napavintners.com/press/press_release_detail.asp?ID_News=3421228).

<sup>14</sup> WORLD INTELLECTUAL PROP. ORG., WHAT IS INTELLECTUAL PROPERTY?, at 2, [http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo\\_pub\\_450.pdf](http://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf).

<sup>15</sup> U.S. PATENT AND TRADEMARK OFFICE, TRADEMARK BASICS, <http://www.uspto.gov/trademarks/basics/index.jsp>.

<sup>16</sup> WORLD INTELLECTUAL PROP. ORG., *supra* note 14, at 3.

<sup>17</sup> WORLD INTELLECTUAL PROP. ORG., *Frequently Asked Questions: Geographical Indications*, [http://www.wipo.int/geo\\_indications/en/about.html](http://www.wipo.int/geo_indications/en/about.html).

the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.”<sup>18</sup> GIs are essentially a subset of trademark law, though there are at least three crucial differences between a GI and a typical trademark.<sup>19</sup> GIs differ from regular trademarks in that (1) they protect regions, rather than a particular mark or symbol; (2) they belong to all members of that region, rather than to an individual or entity; and (3) they indicate certain reputational characteristics of that region, rather than indicating only the source of a good or service.<sup>20</sup>

The Napa Valley is an example of a well known GI in the wine industry. The region is known for its “dry Mediterranean Climate [which] provides vintage-to-vintage consistency” as well as its “diversity of microclimates, weather, and geography.”<sup>21</sup> The Napa Valley Vintners (NVV) is a nonprofit trade association that represents 430 wineries in the Napa Valley.<sup>22</sup> NVV has worked diligently to protect the region’s name and reputation all over the world, and has secured GI status in the EU, India, and Thailand.<sup>23</sup> Securing GI status in China, however, proved challenging for the NVV. A common anecdote, and a singular success story, is that of the Napa Valley’s fourteen year legal battle in China after a Chinese domestic wine producer attempted to register as Napa Valley, despite the fact that its grapes were grown entirely in China.<sup>24</sup> The Napa Valley, as a registered GI in China, is now protected as a region, and the right to use the region’s name on products and in advertisements in China belongs exclusively to the wineries that are members of that region.

While the Napa Valley has successfully registered as a GI in many countries, including China, the United States does not have a formal GI

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<sup>18</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights art. 3.1, Apr. 15, 1994 [hereinafter TRIPS].

<sup>19</sup> WORLD INTELLECTUAL PROP. ORG., *supra* note 17.

<sup>20</sup> *Id.*

<sup>21</sup> Napa Valley Vintners, *About the Napa Valley Appellation* (2014), [http://napavintners.com/napa\\_valley/](http://napavintners.com/napa_valley/).

<sup>22</sup> *Napa Valley Vintners Joins Prominent International Network of Geographic Indications*, REUTERS (May 1, 2012), <http://www.reuters.com/article/2012/05/02/idUS28885+02-May-2012+BW20120502>.

<sup>23</sup> *Id.*

<sup>24</sup> Laura Zanzig, *The Perfect Pairing: Protecting U.S. Geographical Indication with a Sino-American Wine Registry*, 88 WASH. L. REV. 723, 724 (June 12, 2013).

register.<sup>25</sup> Rather, the United States protects GIs under its Trademark Law as collective and certification marks.<sup>26</sup> Because of the vastly different legal structures between the United States and China, it can be exceptionally difficult for American wine producers to navigate the confusing system by which China protects GIs. However, given China's growing interest in imported wines, and the increasing foreign interest in China's rapidly growing market, it is imperative that wine producing regions be protected in China.

China recognizes that its wine market is problematic. In its 2008 National Intellectual Property Strategy, China listed the protection of IPRs and, more specifically, GIs, as a top priority, noting that "the international community attaches greater importance to intellectual property as well as innovation."<sup>27</sup> Additionally, the TRIPS Agreement, a multilateral agreement governing the protection of intellectual property rights, carves out a requisite level of protection for all GIs,<sup>28</sup> and a higher level of protection for geographical indications of wines and spirits.<sup>29</sup> If China is to comply with these provisions of the TRIPS Agreement, it will need to both create legislation (only a small part of the battle) and enforce that legislation.<sup>30</sup> Finally, with the ever-increasing production of Chinese domestic wines,<sup>31</sup> Chinese wine producers also stand to benefit from the protection of GIs for wines and spirits.

Part I of this paper will outline the major problems of counterfeiting and infringement that plague China's wine market, and the tension these frauds have created between China and the United States in relation to TRIPS compliance. Part II will explain the complex system that wine producers must navigate in order to gain protection, and the systematic and administrative difficulties that allow counterfeit

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<sup>25</sup> U.S. PATENT AND TRADEMARK OFFICE, GEOGRAPHICAL INDICATION PROTECTION IN THE UNITED STATES, at 1, [http://www.uspto.gov/web/offices/dcom/olia/globalip/pdf/gi\\_system.pdf](http://www.uspto.gov/web/offices/dcom/olia/globalip/pdf/gi_system.pdf).

<sup>26</sup> *Id.*

<sup>27</sup> WORLD INTELLECTUAL PROP. ORG (WIPO), *China: Outline of the National Intellectual Property Strategy* (2008) 1, 7, <http://www.wipo.int/wipolex/en/text.jsp?fileid=125982>.

<sup>28</sup> TRIPS, *supra* note 18, at art. 22.

<sup>29</sup> TRIPS, *supra* note 18, at art. 23.

<sup>30</sup> PAUL TORREMANS, HAILING SHAN & JOHAN ERAUW, INTELLECTUAL PROPERTY AND TRIPS COMPLIANCE IN CHINA 1 (2007).

<sup>31</sup> Jessica Beaton, *China Headed for Wine Greatness*, CNN TRAVEL (Jan. 27, 2011), <http://travel.cnn.com/shanghai/drink/next-major-new-world-wine-could-be-chinese-758>

operations to flourish. Part III will outline the newest revisions to China's Trademark Law. Part IV will argue that in order to increase protection of GIs, China needs to balance its levels of administrative and criminal enforcement, and provide incentives for the greater protection of wines and spirits. Finally, Part V will discuss what still needs to be done to ensure China's compliance with the TRIPS Agreement. Ultimately, in order to reach a greater level of enforcement, China needs to balance its levels of upper-level and ground-level enforcement, which would require it to untangle the overlapping administrative agencies and make centralization and coordination more effective.

## I

### THE PROBLEM—VIOLATIONS OF IPRS IN CHINA AND TRIPS

China is a notorious hotbed for counterfeit goods. According to U.S. Customs, in 2012, about 72% of all counterfeit goods seized in the United States. came from China.<sup>32</sup> The international wine industry is no exception; it, too, has been plagued with Chinese counterfeits.<sup>33</sup> China has rapidly ascended to major-player status in the international wine industry. As a consequence of that success, China's wine counterfeit market has exploded.<sup>34</sup> While counterfeits of U.S. wines may not yet be as prevalent as counterfeits of French wines,<sup>35</sup> the U.S. Trade Representative noted concern about the impact that counterfeiting is having on U.S. agricultural industries, including the wine industry.<sup>36</sup>

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<sup>32</sup> U.S. CUSTOMS AND BORDER PROTECTION, U.S. DEP'T OF HOMELAND SEC., INTELLECTUAL PROPERTY RIGHTS: FISCAL YEAR 2012 SEIZURE STATISTICS, 1, 10 (2012), [http://www.cbp.gov/sites/default/files/documents/FY2012%20IPR%20Seizure%20Statistics\\_0.pdf](http://www.cbp.gov/sites/default/files/documents/FY2012%20IPR%20Seizure%20Statistics_0.pdf).

<sup>33</sup> Terril Yue Jones, *Amid China's Boom, Fake Wine Proliferates*, N.Y. TIMES (June 9, 2013), [http://www.nytimes.com/2013/06/10/business/global/amid-chinas-boom-fake-wines-proliferate.html?\\_r=2&](http://www.nytimes.com/2013/06/10/business/global/amid-chinas-boom-fake-wines-proliferate.html?_r=2&).

<sup>34</sup> RED OBSESSION, *supra* note 10.

<sup>35</sup> Jim Boyce, *Brand at Risk: How Wineries Exporting to China Protect Their Intellectual Property*, WINES & VINES (Aug. 2013), <http://www.winesandvines.com/template.cfm?section=features&content=119743>.

<sup>36</sup> RONALD KIRK, 2012 SPECIAL 301 REPORT, OFFICE OF THE U.S. TRADE REP. 29 (Apr. 2012), [http://www.ustr.gov/sites/default/files/2012%20Special%20301%20Report\\_0.pdf](http://www.ustr.gov/sites/default/files/2012%20Special%20301%20Report_0.pdf).

### A. Counterfeits, Infringement, and Trademark Squatting

Trademark violations in China primarily take two forms: counterfeiting and infringement.<sup>37</sup> The difference between these two offenses are subtle. Counterfeiting occurs when the outside packaging of the violating product is virtually identical to its legitimate counterpart.<sup>38</sup> In the wine industry, clever counterfeiters have established the practice of purchasing and refilling legitimate empty wine bottles,<sup>39</sup> which has led to the creation of a black market for the bottles.<sup>40</sup> French wine producer Chateau Lafite, for example, has become the paradigmatic victim of counterfeiting in the wine industry.<sup>41</sup> One of its most coveted bottles, the 1982 Chateau Lafite Rothschild, can be worth up to US \$10,000;<sup>42</sup> an empty bottle is believed to sell on the black market for US \$1,500.<sup>43</sup> Cautious wine connoisseurs and restaurant owners smash the empty bottles to ensure they will not end up on the black market.<sup>44</sup>

A similar and equally harmful offense, infringement, occurs when the violating product is similar looking, but not identical to, the legitimate product.<sup>45</sup> The classic example of infringement is found in the Australian brand, Penfolds, one of the most well known brands in China.<sup>46</sup> In 2010, infringers started selling “Benfolds” wine in packaging that looked strikingly similar to its legitimate Australian counterpart.<sup>47</sup>

Both counterfeit and infringing products can be very difficult to spot, and can do serious harm to legitimate IPR holders, as well as

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<sup>37</sup> ANDREW MERTHA, *THE POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA* 167 (2005).

<sup>38</sup> *Id.* at 168.

<sup>39</sup> Emily Kehoe, *Combating the Counterfeiting Woes of Wine Sellers in China*, 53 *IDEA* 257, 259 (2013).

<sup>40</sup> See Peter Shadbolt, *Counterfeits in the Grape Wall of China*, CNN (Mar. 10, 2011, 11:54 PM), <http://www.cnn.com/2011/WORLD/asiapcf/03/10/china.wines/index.html>.

<sup>41</sup> Jones, *supra* note 33.

<sup>42</sup> *Id.*

<sup>43</sup> Shadbolt, *supra* note 40.

<sup>44</sup> *Id.*

<sup>45</sup> MERTHA, *supra* note 37, at 168.

<sup>46</sup> *Id.*

<sup>47</sup> Zanzig, *supra* note 24, at 724; Rachel Donkin, *Wine Makers Suffer from Rip-Offs in China*, *THE WEST AUSTRALIAN* (July 25, 2011), <http://au.news.yahoo.com/a/9905642/wine-makers-suffer-from-rip-offs-in-china/>.

consumers.<sup>48</sup> Damages for fraudulent wines include lost sales and market share, damage or dilution to the IPR holder's reputation, and in the worst case scenario, danger to consumers.<sup>49</sup>

There is one slightly more nebulous offense that needs to be addressed: Trademark Squatting. This occurs when "trademark squatters" preemptively register a foreign IPR holder's trademark in bad faith.<sup>50</sup> When a squatter foresees a foreign IPR holder moving into the China market, he or she will register the same or a similar mark with the intent to either (1) sell it back to the holder at an inflated price,<sup>51</sup> or (2) use the mark on their own product to gain sales by way of the good will that is associated with the legitimate mark.<sup>52</sup> Trademark squatting can be very detrimental to the IPR holder and can make it very difficult, or even impossible, for foreign wine sellers to enter the China market.<sup>53</sup> In order to adequately protect IPRs, China needs to curb violations of counterfeiting, infringement, and trademark squatting.

### ***B. The TRIPS Agreement and Foreign Pressure***

Enforcement of IPRs generally happens through either administrative or criminal enforcement.<sup>54</sup> Administrative enforcement is provided by the many agencies with jurisdiction over the protection of IPRs in China.<sup>55</sup> Administrative enforcement can be thought of as "ground level" enforcement because it is "on the ground" work that consists of raiding and seizing counterfeit goods.<sup>56</sup> Criminal enforcement, on the other hand, is supplied by the police and the court

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<sup>48</sup> Kehoe, *supra* note 39, at 258–59.

<sup>49</sup> *Id.* at 259.

<sup>50</sup> Bradley Sova, *Double-Double Trademark Trouble: In-N-Out and CaliBurger's International Burger Brawl*, 14 ASIAN-PACIFIC L. & POL'Y J. 53, 75 (2012).

<sup>51</sup> *Id.*; Jane Anson, *Bordeaux Chateau Changes Name to Bypass Chinese Trademark 'Squatters'*, DECANTER (Sept. 26, 2013), <http://www.decanter.com/news/wine-news/584396/bordeaux-chateau-changes-name-to-bypass-chinese-trademark-squatters>.

<sup>52</sup> Sova, *supra* note 50, at 75.

<sup>53</sup> *Id.* at 43; Anson, *supra* note 51.

<sup>54</sup> MARTIN K. DIMITROV, *PIRACY AND THE STATE: THE POLITICS OF INTELLECTUAL PROPERTY RIGHTS IN CHINA* 115, 146 (2009).

<sup>55</sup> *Id.* Dimitrov refers to these different types of enforcement as "administrative" and "non-administrative." This paper refers to them as "ground-level" and "upper-level" enforcement because these terms are illustrative of *how* and *where* the enforcement is carried out.

<sup>56</sup> *See id.* at 120.



system.<sup>57</sup> Criminal enforcement is “upper level” enforcement that is characterized by judicial application of legislation; cases usually reach the criminal enforcement level after being “passed up” from administrative agencies.<sup>58</sup>

China’s current system protects IPRs primarily through administrative enforcement, as opposed to criminal enforcement.<sup>59</sup> The problem in China is not the amount of IPR enforcement.<sup>60</sup> In fact, “[c]ontrolling for population, China already has the highest volume of IPR enforcement in the world.”<sup>61</sup> The problem is that this enforcement is ineffective, primarily because of the confusion caused by jurisdictional overlap and administrative redundancy.<sup>62</sup> These dynamics are incredibly complex, but one method of combating IPR violations is through foreign pressure.<sup>63</sup>

There are several international agreements that require minimum levels of protection for IPRs and, more specifically, Geographical Indications (GIs). The most broad sweeping of these is the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).<sup>64</sup> The TRIPS Agreement, to which both the United States and China are signatories, is an international agreement intended to protect and prevent GI dilution.<sup>65</sup> The TRIPS Agreement sets minimum standards for the protection of GIs in member countries.<sup>66</sup> Pursuant to Article 22, members must put in place legal avenues to prevent (a) the use of GIs in a manner which would mislead the public as to the true origin of a good and (b) the use of GIs which would constitute unfair competition.<sup>67</sup> The TRIPS Agreement does not mandate how these provisions must be put in place, and instead gives each Member the freedom “to determine the appropriate method of implementing the

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<sup>57</sup> *Id.* at 115.

<sup>58</sup> *Id.* at 146–48.

<sup>59</sup> *Id.* at 146.

<sup>60</sup> *Id.* at 33.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 34.

<sup>63</sup> *Id.* at 53.

<sup>64</sup> Mark J. Calaguas, *A Rosé by Any Other Name: Protecting Geographical Indications for Wines and Spirits in China*, 3 *LOY. U. CHI. INT’L L. REV.* 257, 261 (Spring/Summer 2006).

<sup>65</sup> Zanzig, *supra* note 24, at 726.

<sup>66</sup> TRIPS, *supra* note 18, at art. 1.1.

<sup>67</sup> *Id.* at art. 22.2.

provisions . . . within their own legal system and practice.”<sup>68</sup> Over the years, China has reformed its intellectual property laws to bring them into compliance with its obligations under TRIPS.<sup>69</sup> These changes include the 2001 amendments to its trademark, patent, and copyright laws.<sup>70</sup> Despite these changes, it is still difficult for IPR holders to obtain effective enforcement in China.<sup>71</sup> This is in part because of China’s confusing legal system that protects GIs through multiple avenues, including Trademark Law, Appellations of Origin, and Unfair Competition Law.<sup>72</sup>

The United States plays a very active role in international IPR enforcement and has put pressure on China in regard to its IPR enforcement.<sup>73</sup> This pressure has led to higher enforcement volumes but, ultimately, has not effectively produced higher quality enforcement.<sup>74</sup> Trade between Chinese and U.S. officials has been tense for quite some time,<sup>75</sup> and this tension manifests itself in the United States Trade Representative’s (USTR) “Special 301” Reports.<sup>76</sup> Each year, pursuant to Section 301 of the 1988 Trade Act, the USTR must complete an annual report, the “Special 301 Report.”<sup>77</sup> The primary function of this report is to reflect the state of IPR protection in various countries.<sup>78</sup> The USTR is to “identify and analyze . . . practices of each foreign country which constitute significant barriers to . . . United States exports of goods or services (including agricultural commodities; and property protected by trademarks . . .).”<sup>79</sup> The USTR must release this report on or before March 31 of each year.<sup>80</sup> Within thirty days of submitting this Report, the USTR must identify those

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<sup>68</sup> *Id.* at art. 11.

<sup>69</sup> Calaguas, *supra* note 64, at 269.

<sup>70</sup> *Id.*

<sup>71</sup> DEMETRIOS MARANTIS, 2013 SPECIAL 301 REPORT, OFFICE OF THE U.S. TRADE REPRESENTATIVE (May 2013), <http://www.ustr.gov/sites/default/files/05012013%202013%20Special%20301%20Report.pdf>.

<sup>72</sup> Bradley M. Bashaw, *Geographical Indications in China: Why Protect GIs with Both Trademark Law and AOC-Type Legislation?*, 17 PAC. RIM. L. & POL’Y J. 73, 78 (Jan. 2008).

<sup>73</sup> DIMITROV, *supra* note 54, at 53.

<sup>74</sup> *Id.*

<sup>75</sup> See MERTHA, *supra* note 37, at 35.

<sup>76</sup> See, e.g., MARANTIS, *supra* note 71, at 31.

<sup>77</sup> MERTHA, *supra* note 37, at 40 (for a more detailed history on the development of Special 301, see Mertha pp. 39-66).

<sup>78</sup> MARANTIS, *supra* note 71, at 4.

<sup>79</sup> 19 U.S.C. § 2241(a)(1)(A) (2012).

<sup>80</sup> 19 U.S.C. § 2241(b).

countries that “deny adequate and effective protection of intellectual property rights, or deny fair and equitable market access to United States persons that rely upon intellectual property protection.”<sup>81</sup> The USTR then categorizes countries in order of concern, as either (1) Watch List, (2) Priority Watch List, or (3) Priority Foreign Country.<sup>82</sup>

“Priority Foreign Countries” are those countries “that have the most onerous or egregious acts, policies, or practices.”<sup>83</sup> When a country is identified as a “Priority Foreign Country,” the USTR is required to conduct an investigation of its IPR practices to determine whether trade sanctions would be appropriate,<sup>84</sup> though sanctions are rarely imposed.<sup>85</sup> Because of the harshness of this designation, any country that is “entering into good faith negotiations, or making significant progress in bilateral or multilateral negotiations” is unlikely to receive it.<sup>86</sup> Those countries may instead be designated as either “Priority Watch Countries” or “Watch Countries.”<sup>87</sup> A “Priority Watch Country” is a “foreign country that lacks sufficient IPR protection, but is not targeted for negotiations and retaliation under a specific deadline.”<sup>88</sup> A “Watch Country” is a country that is “making ‘sufficient progress’ in ongoing talks with the USTR.”<sup>89</sup> In addition, the USTR may subject a country to “Section 306 Monitoring,” which allows the USTR to apply sanctions on a country if it fails to implement measures that are the basis for initiating a Section 301 investigation.<sup>90</sup>

Some scholars are skeptical about the effectiveness of threatening trade sanctions since actual sanctions are imposed so infrequently.<sup>91</sup> For example, China’s failure to meet USTR standards for U.S. IPRs has resulted in its placement on the Priority Watch list every year since 2005.<sup>92</sup> China has also been subject to Section 306 Monitoring since 2005.<sup>93</sup> Yet, the United States has never imposed sanctions on the

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81 19 U.S.C. § 2242(a)(1)(A)–(B) (2012).

82 MERTHA, *supra* note 37, at 40.

83 19 U.S.C. § 2242(b)(1)(A).

84 MERTHA, *supra* note 37, at 40.

85 DIMITROV, *supra* note 54, at 54.

86 19 USC § 2242(b)(1)(C).

87 MERTHA, *supra* note 37, at 40.

88 *Id.* at 41.

89 *Id.*

90 MARANTIS, *supra* note 71, at 57 (codified in 19 U.S.C. § 2416(a) (2012)).

91 DIMITROV, *supra* note 54, at 54.

92 *See, e.g.*, MARANTIS, *supra* note 71, at 31; Special 301 Reports 2005-2013.

93 *Id.*

nation.<sup>94</sup> The USTR noted in the 2013 Special 301 Report that enforcement has been a central challenge in China for many years, but it also expressed a level of optimism on China's attempts at legal reform as it relates to improving IPR protection.<sup>95</sup> This optimism is bolstered by the fact that rights holders reported to the USTR a doubling in the number of administrative enforcement actions and criminal convictions in 2012.<sup>96</sup> However, counterfeiting is still a pervasive problem for foreign IPR holders in China.<sup>97</sup> Despite improvement, the International Intellectual Property Alliance (IIPA) submitted its recommendations to the USTR in February, recommending that the USTR maintain China on the Priority Watch List and continue to monitor China under Section 306.<sup>98</sup> The fact that the USTR continues to subject China to Section 306 monitoring and has listed China under the Priority Watch List for nine years in a row, suggests that something needs to change in China's system of IPR protection.

## II

### CHINA'S ADMINISTRATIVE AND REGULATORY SYSTEMS

China protects GIs through several different laws, regulations, and administrative measures. In order to understand the major problems that foreign IPR holders face in entering the China market, it is important to also understand the complex dynamics of the administrative and regulatory systems that are charged with enforcement of IPRs.

#### A. "Ground-level" Enforcement

Understanding the structure and dynamics of China's IPR protection system is a complex task because China protects IPRs primarily through administrative, or "ground level," enforcement, and because it allocates jurisdiction among dozens of agencies.<sup>99</sup> Of those many agencies, five are relevant to the discussion of GIs. These five agencies

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<sup>94</sup> Special 301 Reports, 2005-2013.

<sup>95</sup> MARANTIS, *supra* note 71, at 32.

<sup>96</sup> *Id.* at 32-33.

<sup>97</sup> *Id.* at 33.

<sup>98</sup> International Intellectual Property Alliance, *2014 Special 301 Report on Copyright Protection and Enforcement*, at 22 (Feb. 7, 2014), <http://www.iipa.com/rbc/2014/2014SPEC301CHINA.PDF>.

<sup>99</sup> DIMITROV, *supra* note 54, at 115.

are factions of the State Council, the chief administrative agency of China,<sup>100</sup> and include: (1) the State Administration for Industry and Commerce (SAIC); (2) the General Administration of Quality Supervision, Inspection, and Quarantine (AQSIQ); (3) the Ministry of Health (MOH); (4) the China Food and Drug Administration (SFDA); (5) and the Ministry of Agriculture (MOA).<sup>101</sup> In terms of “ground level” enforcement, the SAIC and AQSIQ are the relevant authorities for protection of IPRs because they have a general mandate to handle trademark counterfeiting cases.<sup>102</sup> The Ministry of Health,<sup>103</sup> the China Food and Drug Administration,<sup>104</sup> and the Ministry of Agriculture are less involved in the administration of GIs. These agencies are responsible for supervising public health,<sup>105</sup> food safety,<sup>106</sup> and agricultural industries.<sup>107</sup>

With a wide regulatory mandate, the SAIC has four different departments with overlapping directives in anti-counterfeiting.<sup>108</sup> Among other things, it is responsible for protecting legitimate enterprises and clamping down on illegal enterprises.<sup>109</sup> More specifically, its mandates include “supervising the growing local market economies and ensuring that pricing and other related behaviors

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<sup>100</sup> *The State Council*, PEOPLE, <http://en.people.cn/data/organs/statecouncil.shtml> (last visited Nov. 14, 2015).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> THE NAT'L HEALTH AND FAMILY PLANNING COMM'N OF THE PEOPLE'S REPUBLIC OF CHINA (Jan. 23, 2015), <http://en.nhfpc.gov.cn/departments.html>. The Ministry of Health is now called the National Health and Family Planning Commission of the People's Republic of China. It was merged in 2013 with the National Population and Family Planning Commission to create the new agency. See China.org, *China to Merge Health Ministry, Family Planning Commission*, (Mar. 10, 2013), [http://www.china.org.cn/china/NPC\\_CPPCC\\_2013/2013-03/10/content\\_28191095.htm](http://www.china.org.cn/china/NPC_CPPCC_2013/2013-03/10/content_28191095.htm).

<sup>104</sup> The CFDA used to be called the State Food and Drug Administration, until it was elevated to a ministerial-level agency in March 2013. See Mary Lou Valdez, *FDA's Collaboration with Chinese Partners gets Stronger Each Year*, U.S. FOOD AND DRUG ADMINISTRATION (May 3, 2013), <http://blogs.fda.gov/fdavoices/index.php/tag/china-food-and-drug-administration/>.

<sup>105</sup> THE NAT'L HEALTH AND FAMILY PLANNING COMM'N OF THE PEOPLE'S REPUBLIC OF CHINA, *What We Do*, <http://en.nhfpc.gov.cn/about.html> (last visited Nov. 14, 2015).

<sup>106</sup> *Main Responsibilities*, CHINA FOOD AND DRUG ADMIN., <http://eng.sfda.gov.cn/WS03/CL0756/> (last visited Nov. 14, 2015).

<sup>107</sup> *Main Functions of the Ministry of Agriculture*, MINISTRY OF AGRIC. OF THE PEOPLE'S REPUBLIC OF CHINA, <http://english.agri.gov.cn/aboutmoa/mandates/> (last visited Nov. 14, 2015).

<sup>108</sup> DIMITROV, *supra* note 54, at 119.

<sup>109</sup> MERTHA, *supra* note 37, at 175.

remain legal and above board; . . . registering and protecting trademarks; managing advertising; . . . and inspecting groups, units, enterprises, undertaking units to . . . ensure production by legitimate means.”<sup>110</sup>

A big piece of understanding the counterfeit puzzle lies in understanding the structure of these agencies. The SAIC reaches all the way down to the township level.<sup>111</sup> At the more local level, the trademark offices are involved in investigation and enforcement of trademarks, but these offices have little incentive to carry out these responsibilities because they do not derive any income from doing so.<sup>112</sup> Instead, that income is passed up to the national level SAIC.<sup>113</sup> Another department of the SAIC, the Fair Trade Department, has authority to investigate factories and retail outlets, as well as to confiscate illegal merchandise and impose fines on people and businesses for violating commercial laws and regulations.<sup>114</sup> However, due to a long, confusing history of restructuring and renaming, there is often confusion regarding the distinction between the names and roles of the different departments within the SAIC.<sup>115</sup> In some cases, the different departments exist independently of each other, but with unclear roles; in others, these offices are one and the same.<sup>116</sup> For example, in some provinces, the “fair trade department” is distinct from the “economic enforcement team,” while, in others, the departments are one and the same.<sup>117</sup> Further, some areas in China have offices that function as fair trade departments, but which have not gotten around to changing their names, believing it is an unnecessary narrowing of the scope of responsibilities.<sup>118</sup> This is just one example of the confusion that arises within the administrative agencies in China.

A separate administrative agency, AQSIQ has three departments with jurisdiction over counterfeiting cases.<sup>119</sup> AQSIQ’s primary mandate is to “maintain[ ] product quality and overall standardization

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<sup>110</sup> *Id.*

<sup>111</sup> DIMITROV, *supra* note 54, at 119.

<sup>112</sup> MERTHA, *supra* note 37, at 178.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> DIMITROV, *supra* note 54, at 120.

in China.”<sup>120</sup> Like the SAIC, AQSIQ has local-level investigation and enforcement teams.<sup>121</sup> Unlike the SAIC, AQSIQ’s enforcement teams have a more narrow mandate, and thus are more manageable than their SAIC counterparts.<sup>122</sup> While the SAIC was originally charged with being the chief enforcer for counterfeit cases, AQSIQ’s enforcement rates are actually much higher.<sup>123</sup> In the most recent Special 301 Report, the USTR recognized a “significant increase in administrative and criminal enforcement against trademark counterfeiting in China.”<sup>124</sup> The Report stated that the number of administrative and criminal enforcement actions both doubled in 2012.<sup>125</sup> This increase in enforcement is likely due to a combination of domestic and foreign external pressures,<sup>126</sup> as well as an organizational competition between AQSIQ and the SAIC.<sup>127</sup>

### ***B. “Upper-level” Enforcement***

In addition to “ground-level” enforcement, IPR holders also have the option of seeking criminal enforcement through the police or civil enforcement through the courts.<sup>128</sup> However, because there are many obstacles preventing cases from reaching upper-level enforcement, China relies much more heavily on ground-level enforcement.<sup>129</sup> To reach the upper-level enforcement, cases are primarily brought to the police by transfer from an administrative agency.<sup>130</sup> This is already an obstacle to criminal enforcement because the administrative agencies are reluctant to transfer cases.<sup>131</sup> If a case is transferred, a complex, multistep process determines whether the case will make it up to the

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<sup>120</sup> MERTHA, *supra* note 37, at 180.

<sup>121</sup> *Id.* at 183.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 120.

<sup>124</sup> MARANTIS, *supra* note 71, at 32.

<sup>125</sup> *Id.* at 32–33.

<sup>126</sup> DIMITROV, *supra* note 103, at 144.

<sup>127</sup> MERTHA, *supra* note 37, at 184, 188–90, 192. Mertha refers to AQSIQ as the Quality Technical Supervision Bureau (QTSB). The QTSB was merged with the Administration for Entry-Exit Inspection and Quarantine in 2001, and at that time acquired its new name (AQSIQ); DIMITROV, *supra* note 54, at 119–20.

<sup>128</sup> MERTHA, *supra* note 37, at 185.

<sup>129</sup> DIMITROV, *supra* note 54, at 146.

<sup>130</sup> *Id.* at 146–48; *see* MERTHA, *supra* note 37, at 206–07.

<sup>131</sup> DIMITROV, *supra* note 54, at 146; MERTHA, *supra* note 37, at 207.

courts for prosecution.<sup>132</sup> Ultimately, the number of cases that make it through that process is very small.<sup>133</sup> However, “once a criminal matter reaches the docket in China, there is a 99 percent chance of conviction.”<sup>134</sup>

Most countries protect GIs through either the American Trademark Law model or through the French appellation of origin model.<sup>135</sup> Legal protection of GIs in China is unique in that China uses both of these schemes.<sup>136</sup>

Among the ministerial rules governing GIs are the 2008 Measures for the Administration of Geographical Indications of Agricultural Products, put in place and governed by the Ministry of Agriculture.<sup>137</sup> Prior to these measures taking effect, the USDA published a GAIN Report that reflected the general confusion that surrounds China’s system of protection for GIs. Upon taking effect, these measures became the third mechanism for protecting GIs,<sup>138</sup> with little clarity as to how (or if) the systems overlapped, whether IPR holders needed to register under all systems, or to whom IPR holders should complain in the case of a breach.<sup>139</sup>

### 1. Trademark Law

China’s Trademark Law is accompanied by several implementing rules and regulations, including the Implementing Regulations of the Trademark Law<sup>140</sup> and the Measures for the Registration and

<sup>132</sup> DIMITROV, *supra* note 54, at 146.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 159. Note, however, that this high number is likely due to selective enforcement; “the system is working to generate convictions, not volume.”

<sup>135</sup> Bashaw, *supra* note 72, at 77.

<sup>136</sup> *Id.*

<sup>137</sup> See generally Nong Chan Pin Dili Biao Zhi Guan Li Ban Fa (农产品地理标志管理办法) [Measure for the Administration of Geographical Indications of Agricultural Products] (effective Feb. 1, 2008), <http://www.wipo.int/edocs/lexdocs/laws/en/cn/cn121en.pdf>.

<sup>138</sup> The other two systems were China’s Trademark Law, see *infra* note 145, protecting GIs through certification or collective marks, and the Rules of Protection of Products of Geographical Indication, administered by AQSIQ, see *infra*, note 155.

<sup>139</sup> MARK PETRY & LIANG YUANCHUAN, CHINA, PEOPLES REPUBLIC OF FAIRS SUBJECT REPORT NEW MOA GI LAW (2008), <http://apps.fas.usda.gov/gainfiles/200801/146293583.pdf>.

<sup>140</sup> Zhong Hua Ren Min Gong He Guo Shang Biao Fa Shi Shi Tiao Li (中华人民共和国商标法实施条例) [Implementing Regulations of the Trademark Law of the People’s Republic of China] (promulgated by Order No. 358 of the State Council of the People’s



Administration of Collective Marks and Certification Marks.<sup>141</sup> China's GI-specific law defines GIs as "products that originate from a particular geographical region with the quality, reputation, or other characteristics substantially attributable to the natural and human factors of the region."<sup>142</sup> GIs are incorporated in the Trademark Law under Article 16 as "signs that signify the place of origin of the goods in respect of which the signs are used, their specific quality, reputation or other features as mainly decided by the natural or cultural factors of the regions,"<sup>143</sup> and can be protected as either Certification Marks or Collective Marks.<sup>144</sup> The Trademark Law defines "certification marks"

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Republic of China, Aug. 3, 2002, effective Sept. 15, 2002), <http://www.wipo.int/wipolex/en/details.jsp?id=15011>.

<sup>141</sup> Zheng Ming Shang Biao Zhuce He Hu Guan Li Ban Fa (证明商标注册和管理办法) [Measures for the Registration and Administration of Collective Marks and Certification Marks] (effective, June 1, 2003), <http://www.wipo.int/wipolex/en/details.jsp?id=6373>. Other implementing regulations include the Measures for Administration of Trademark Agency, see *Shang Biao Dai Li Guan Li Ban Fa* (商标代理管理办法) (promulgated by The State Administration for Industry and Commerce of the People's Republic of China Order No. 50, effective July 12, 2010), <http://www.wipo.int/wipolex/en/details.jsp?id=14285>, the Regulations on Issues of Trademark Transfer Application Guan Yu Shen Qing Zhuan Rang Shang Biao You Guan Wen Ti De Gui Ding (关于申请转让商标有关问题的规定) [the Regulations on Issues of Trademark Transfer Application] (promulgated by The State Administration for Industry and Commerce of the People's Republic of China Order No. 50, effective, June 12, 2010), <http://www.wipo.int/wipolex/en/details.jsp?id=14904>, Trademark Review and Adjudication Rules Shang Biao Ping Shen Gui Ze (商标评审规则) [Trademark Review and Adjudication Rules] (revised by the Order No. 65 of the State Administration for Industry and Commerce of the People's Republic of China, May 28, 2014, Nov. 2, 1995, <http://www.wipo.int/wipolex/en/details.jsp?id=15032>), the Provisions on the Recognition and Protection of Well-known Trademarks Chi Ming Shang Biao Rending Hu Bao Hu Gui Ding (驰名商标认定和保护规定) [Provisions on the Recognition and Protection of Well-known Trademarks] (promulgated by The State Administration for Industry and Commerce of the People's Republic of China Order No. 66, July 3, 2014, effective June 1, 2003), <http://www.wipo.int/wipolex/en/details.jsp?id=15030>, and the Interim Regulations on Online Applications for Trademark Registration Shang Biao Zhu Ce Wang Shang Shen Qing Zan Xing Gui Ding (商标注册网上申请暂行规定) [Interim Regulations on Online Applications for Trademark Registration] (effective May 1, 2014), <http://www.wipo.int/wipolex/en/details.jsp?id=15107>.

<sup>142</sup> Li Biao Zhi Chan Pin Bao Hu Gui Ding (地理标志产品保护规定) [Provisions for Protection of Products of Geographical Indication art. 2], (promulgated by the Gen. Admin. of Quality Supervision, Inspection and Quarantine of the People's Republic of China, May 16, 2005, effective June 15, 2005), <http://www.wipo.int/wipolex/en/details.jsp?id=6348> [hereinafter GI Provisions].

<sup>143</sup> This provision remained the same in the 2013 version of the Trademark Law.

<sup>144</sup> Bashaw, *supra* note 72, at 78–79; Zhong Hua Ren Min Gong He Guo Shang Biao Fa Shi Shi Tiao Li (中华人民共和国商标法实施条例) [Regulations for Implementation of TM Law art. 6], (Promulgated by Decree No.358 of the State Council of the People's Republic of

as “signs which are controlled by organizations capable of supervising some goods . . . and used by entities . . . outside the organization for their goods . . . to certify the origin, material, mode of manufacture, quality, or other characteristics of the goods . . .”<sup>145</sup> “Collective marks” are “signs which are registered in the names of . . . organizations to be used by the members thereof in their commercial activities to indicate their membership of the organizations.”<sup>146</sup> A trademark that contains a GI is invalid if the goods are not from the indicated region and misleads the public.<sup>147</sup> Trademarks registered in good faith remain valid.<sup>148</sup>

The registration of these marks is governed by the Trademark Office.<sup>149</sup> When a GI is registered as a certification or collective mark, anyone whose goods satisfy the conditions of that mark are permitted to use it.<sup>150</sup> These conditions include supplying (1) documents certifying the qualification of the subject, (2) detailed information regarding the party’s ability to supervise the particular quality of the goods to which the GI applies, and (3) approval documents from the governmental entity that has jurisdiction over the origin and industry.<sup>151</sup> An applicant must also indicate the boundaries of the region and make clear the correlation between the region, in its natural and human factors, and the particular quality or reputation that the GI is intended to indicate.<sup>152</sup> This law has recently undergone many changes. The changes have brought some potential administrative benefits, but have also brought some negative consequences.

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China, Aug. 3, 2002, effective Sept. 15, 2002), <http://www.wipo.int/wipolex/en/details.jsp?id=856> [hereinafter Implementing Regulations].

<sup>145</sup> Zhong Hua Ren Min Gong He Guo Shang Biao Fa (中华人民共和国商标法) [Trademark Law of the People’s Republic of China art. 3], (as amended up to decision of Aug. 30, 2013, of the Standing Committee of National People’s Congress on Amendments to the Trademark Law of the People’s Republic of China, effective May 1, 2014) (WIPO has not yet released an English translation; the only English translation available is available at <http://www.chinaiplawyer.com/full-text-2013-china-trademark-law/>) [hereinafter Trademark Law].

<sup>146</sup> *Id.* at art. 3.

<sup>147</sup> *Id.* at art. 16. This regulation was not changed.

<sup>148</sup> *Id.*

<sup>149</sup> Implementing Regulations, art. 13, 21.

<sup>150</sup> *Id.* at art. 6.

<sup>151</sup> Nong Chan Pin Di Li Biao Zhi Guan Li Ban Fa (农产品地理标志管理办法) [Measures for the Administration of Geographical Indications of Agricultural Products art. 4-6] (effective Feb. 1, 2008), <http://www.wipo.int/wipolex/en/details.jsp?id=6578> [hereinafter Administrative Measures].

<sup>152</sup> *Id.* at art. 7. See Bashaw, *supra* note 72, at 916.

## 2. AOC Legislation

China also protects GIs through the French AOC model, more specifically referred to as China's GI-specific SAQSIQ System, under the Provisions for the Protection of Products of Geographical Indications.<sup>153</sup> Registering a GI under this system is much more intensive in terms of government involvement.<sup>154</sup> This system is governed by AQSIQ, which exercises the "nationwide, uniform administration of the work relating to the protection" of GIs.<sup>155</sup> The applicant must submit (1) a proposal from the county-level local government entity regarding the boundaries of the region for the GI; (2) a document establishing the association or enterprise as an applicant; and (3) a series of materials proving the GI, including a description of the name, class, boundary, and characteristics of the GI.<sup>156</sup> The applicant must also submit a description of the physical, chemical, or sensory characteristics of the product and a description of the sales and history of the product.<sup>157</sup> The review process is extensive; after a two month opposition period,<sup>158</sup> an expert examination panel technically examines the application for approval.<sup>159</sup> The local quality and technical supervision departments are in charge of investigating misappropriation and use of names or indications that are likely to cause confusion for consumers.<sup>160</sup>

## 3. Other Types of Legislation

Finally, GIs are also protected through China's Unfair Competition, Product Quality, and Consumer Rights Laws, though these laws were not enacted for the specific purpose of protecting GIs.<sup>161</sup> Each of these laws prohibit misappropriation, "passing off," and falsely representing that a product is of a particular origin.<sup>162</sup>

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<sup>153</sup> Bashaw, *supra* note 72, at 82. *See generally* GI Provisions.

<sup>154</sup> Bashaw, *supra* note 72, at 82.

<sup>155</sup> GI Provisions, at art. 4.

<sup>156</sup> *Id.* at art. 10.

<sup>157</sup> *Id.* at art. 10(3)(c), (e).

<sup>158</sup> *Id.* at art. 14.

<sup>159</sup> *Id.* at art. 15–16.

<sup>160</sup> *Id.* at art. 21.

<sup>161</sup> Bashaw, *supra* note 72, at 85–86. These laws are outside the scope of this paper.

<sup>162</sup> Zhong Hua Ren Min Gong He Guo Fan Bu Zheng Dang Jing Feng Fa (中华人民共和国反不正当竞争法) [Law of the People's Republic of China Against Unfair Competition, art. 5, 9] (promulgated by People's Republic of China Presidential Order No. 10, effective Dec. 1, 1993), <http://www.wipo.int/wipolex/en/details.jsp?id=849>; Zhong Hua

### III CHINA'S NEW TRADEMARK LAW

The newest revision of China's new Trademark Law has been relatively well received.<sup>163</sup> While it certainly won't fix all of the problems IPR holders face overnight, it is "another step in the journey."<sup>164</sup> The 2013 Trademark Law constitutes fifty-three changes, covering three major areas that pertain to the protection of GIs: (1) good faith, (2) time limitations, and (3) damages. The most important of these changes are those that promise to have a greater effect on ground-level enforcement, including increased damages, which work to deter those infringers and counterfeiters who are looking to make a quick payout.

First, the new Trademark Law imposes a catchall good faith principle. As Part 1 of Article 7 explains, "The application for registration and use of the mark shall comply with the principle of good faith."<sup>165</sup> This concept of good faith is incorporated into other areas of the law as well. Part 2 of Article 15 prohibits the registration of a mark where the applicant misappropriated the mark through contractual, business, or other relationships with the legitimate IPR holder.<sup>166</sup> Article 19 similarly imposes good faith principles on trademark agencies.<sup>167</sup> The principle of good faith is significant because it demonstrates the Chinese government's awareness of the problems of trademark squatting and infringement.<sup>168</sup> Where trademark squatters successfully register a mark in the hopes of selling it to a legitimate IPR

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Ren Min Gong He Guo Chan Pin Zhi Liang Fa (中华人民共和国产品质量法) [Law of the People's Republic of China on Product Quality art. 5, 30–32, 37–39 (effective Sept. 1, 2000), <http://www.wipo.int/wipolex/en/details.jsp?id=6547>; Zhong Hua Renmin Gong He Guo Xiao Fei Zhe Quan Yi Bao Hu Fa (中华人民共和国消费者权益保护法) [Law of the People's Republic of China on Consumer Rights and Interests art. 50(2), (4)] (effective Jan. 1, 1994), <http://www.wipo.int/wipolex/en/details.jsp?id=8745>.

<sup>163</sup> Joseph S. Yang, *CHINA: The New Trademark Law in Detail*, INTA BULLETIN vol. 68, no. 19 (Oct. 15, 2013), <http://www.inta.org/INTABulletin/Pages/CHINATheNewTrademarkLawinDetail.aspx>; Loke-Khoon Tan & David Wu, *China's New Trademark Law—Another Step in the Journey*, MANAGING INTELLECTUAL PROPERTY (Nov. 18, 2013), <http://www.managingip.com/Article/3279947/Managing-Trade-Marks-Archive/Chinas-new-Trademark-Lawanother-step-in-the-journey.html>.

<sup>164</sup> Tan & Wu, *supra* note 163.

<sup>165</sup> Trademark Law, at art. 7.

<sup>166</sup> *Id.* at art. 15.

<sup>167</sup> *Id.* art. 19.

<sup>168</sup> Yang, *supra* note 163.

holder, that IPR holder may have the option now to raise the issue of bad faith in the hopes of invalidation.<sup>169</sup>

Second, the Trademark Law, for the first time, sets statutory time frames for authorities.<sup>170</sup> Under Article 28, the Trademark Office (CTMO) must complete examinations of applications within nine months of application.<sup>171</sup> If an application is rejected, the applicant may file for review to the Trademark Review and Adjudication Board (TRAB).<sup>172</sup> The TRAB must render a decision within nine months.<sup>173</sup> A three month extension may be granted under special circumstances.<sup>174</sup> Oppositions must be decided within twelve months after expiration of the publication for opposition, with provision for a six-month extension under special circumstances.<sup>175</sup> Similarly, where opposition fails, the opponent may file for review, and the TRAB must render a decision within twelve months.<sup>176</sup> Again, a six-month extension is permitted under special circumstances.<sup>177</sup> These time limitations, if abided by, go a long way to ensure greater speed and certainty for both foreign and domestic entities.<sup>178</sup> The limitations also work in favor of upper-level enforcement as a whole, and make ground-level enforcement more manageable. If victims of counterfeiting can see a light at the end of the reasonably-long tunnel, they might be more willing to push forward with claims.

In addition to increasing the efficiency of the trademark registration system, this nine-month time limitation, if adhered to, will also bring China into greater compliance with its international obligations. China is a signatory to the Madrid Agreement, the international trademark system, which is administered by the International Bureau of World Intellectual Property Organization (WIPO).<sup>179</sup> Since Madrid applications have always been reviewed within nine months, this new

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> Trademark Law, art. 28.

<sup>172</sup> *Id.* at art. 34.

<sup>173</sup> *Id.* at art. 34.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at art. 35.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> Tan & Wu, *supra* note 163.

<sup>179</sup> WIPO, Objectives, Main Features, Advantages of the Madrid System, at <http://www.wipo.int/madrid/en/general/>.

time limitation brings China in line with international expectations.<sup>180</sup> This could be helpful for U.S. IPR holders because it will make China's registration process more competitive with the currently more popular Madrid registration process, which may seem easier to those who are more familiar with it, but in fact results in unnecessary rejections.<sup>181</sup> However, at the outset, the CTMO hired hundreds of new examiners, who some have described as untrained and as rendering unfounded rejections.<sup>182</sup> Only time will tell if the CTMO will gain consistency and maintain efficiency as it grows into these new deadlines.

Significantly, the new law also includes a three year non-use provision: "Where a registered trademark . . . is not in use for three consecutive years without justifiable reasons, any organization or individual may request the Trademark Office to adjudicate to cancel the registered mark."<sup>183</sup> This is significant in the case of trademark squatters and upper-level enforcement because it gives IPR holders the option to petition for invalidation of the mark for non-use, rather than simply paying the squatter's inflated price to obtain the mark. In the scenario where the trademark squatter attempts to sue for damages against a legitimate IPR holder, no damages will be awarded if the squatter has not used the mark in the last three years.<sup>184</sup>

Some are skeptical that these time limitations will have lasting effect on the TMO's actual efficiency rates.<sup>185</sup> While it may be a struggle to keep up with the new time limitations, the new law also implements E-filing<sup>186</sup> and multi-class registration.<sup>187</sup> These measures should greatly improve the efficiency that the TMO is able to achieve.

Finally, and perhaps most significantly, the new law contains dramatic changes in relation to damages, which might have the biggest impact on ground-level enforcement. Where bribery and profit drive the counterfeit industry in China, a significant increase in damages means an increased risk for counterfeiters and their administrative

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<sup>180</sup> Matthew Dresden, *China's New Trademark law and the Law of Unintended Consequences*, CHINA LAW BLOG (June 2, 2014), <http://www.chinalawblog.com/2014/06/chinas-new-trademark-law-and-the-law-of-unintended-consequences.html>.

<sup>181</sup> Matthew Dresden, *China Trademarks. Register Them in China Not Madrid*, CHINA LAW BLOG (Apr. 14, 2014), <http://www.chinalawblog.com/2014/04/the-trouble-with-madrid-system-trademarks.html>.

<sup>182</sup> Dresden, *supra* note 182.

<sup>183</sup> Trademark Law, at art. 49.

<sup>184</sup> *Id.* at art. 64.

<sup>185</sup> Tan & Wu, *supra* note 163.

<sup>186</sup> Trademark Law, at art. 22.

<sup>187</sup> *Id.*

enablers. Article 63 increases the maximum statutory damages allowed from 500,000 RMB (about US \$81,000) to three million RMB (about US \$490,000).<sup>188</sup> This is significantly higher than statutory damages under both the Chinese Copyright and Patent Laws.<sup>189</sup> The law also allows for punitive damages of at least double, but no more than triple, the amount of statutory damages in cases “where serious circumstances of infringement of exclusive trademark rights in bad faith arise.”<sup>190</sup>

Article 60 goes even further to punish serious IPR violators and repeat infringers. In cases where the IPR violator’s profit amounts to more than 50,000 RMB, the violator can be fined up to five times the amount of that unjustified profit.<sup>191</sup> Where the profit is less than 50,000 RMB, a fine of up to 250,000 RMB can be imposed.<sup>192</sup> Repeat offenders will be loath to discover that those with two or more infringements within five years, will be “heavily punished.” While the phrase “heavily punished” leaves something to be desired in terms of specificity, that the law targets those major and repeat offenders is indicative of China’s intent to curb trademark infringement and meet the international standards to which it is obligated.

#### IV PROPOSAL

The thrust of China’s failure to adequately protect IPRs and, thereby, GIs lies in two truths: (1) There is a severe imbalance between ground-level and upper-level enforcement; and (2) Decentralization hinders the effective handling of cases among administrative agencies and law enforcement, both separately and together.<sup>193</sup> The combination of these two problems makes China an anomaly. China relies more heavily on its extraordinary number of administrative agencies than any other country, and as a result, enforcement is capricious and ineffective.<sup>194</sup> In order to successfully overcome these two widespread and endemic problems, China is going to have to tip the scales in favor of IPRs.

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<sup>188</sup> *Id.* at art. 63.

<sup>189</sup> Jason Wang & Yan Zhang, *Key Amendments of New Chinese Trademark Law 2013*, IP CHINA (Oct. 1, 2013), <http://ip4all.com/key-amendments-of-new-chinese-trademark-law-2013/>.

<sup>190</sup> Trademark Law, at art. 63.

<sup>191</sup> *Id.* at art. 60.

<sup>192</sup> *Id.* art. 60.

<sup>193</sup> DIMITROV, *supra* note 54, at 53.

<sup>194</sup> *Id.* at 144.

First, in order to combat counterfeiting and infringement of GIs in the wine industry, China needs to use its upper-level enforcement and its new legislation to impose higher penalties on violators of these IPRs. Given the inefficiency and confusion that surrounds China's many administrative agencies, extraordinary reliance on ground-level enforcement is unfounded. A look at other countries that have struggled with and tamed extensive counterfeiting reveals the "importance of well-coordinated enforcement for the institutionalization of high-quality IPR protection."<sup>195</sup> For example, where U.S. pressure in Taiwan resulted in higher levels of criminal enforcement, Taiwan became a model enforcer of IPR laws.<sup>196</sup> Of course, there are some fundamental differences between Taiwan and China that make coordination more challenging and less predictable,<sup>197</sup> but better coordination among the criminal divisions of the courts and the administrative agencies might provide support so that China's response to foreign pressure translates to higher quality enforcement, rather than just higher quantity.<sup>198</sup>

Second, while balancing the levels of ground-level and upper-level enforcement is important, China ultimately needs to address the inefficiencies of its administrative agencies that allow counterfeiting and infringement to occur in the first place. "When enforcement is delivered by agencies with poorly defined portfolios that are operating under conditions of decentralization, enforcement is likely to be inconsistent, nontransparent, and unfair."<sup>199</sup> By more clearly defining the jurisdictional roles of the various agencies and providing incentives for those agencies to coordinate with the upper-level enforcement, more cases can result in prosecution and penalties for violators of IPRs.<sup>200</sup>

## V

### WHAT STILL NEEDS TO BE DONE?

The two issues explored above only discuss the protection of IPRs generally. However, in order to reflect the higher level of protection for wines and spirits provided for in Article 23 of TRIPS,<sup>201</sup> China should

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<sup>195</sup> *Id.* at 147.

<sup>196</sup> *Id.* at 173.

<sup>197</sup> *Id.* at 173.

<sup>198</sup> *Id.* at 146, 180–81.

<sup>199</sup> *Id.* at 144.

<sup>200</sup> *Id.* at 180.

<sup>201</sup> TRIPS, *supra* note 18, at art. 23.



provide incentives to the ground-level enforcers and the upper-level enforcers to coordinate in the protection of IPRs related to wines and spirits. Currently, criminal enforcement of IPRs, which may be an effective tool for deterring counterfeiting and infringement of GIs in the wine industry, is impeded by the unwillingness of the ground-level enforcers to transfer cases to the upper-level enforcers, such as the police and court system.<sup>202</sup> If the two levels of enforcement were incentivized to work together to streamline the process of enforcement, more penalties could be imposed on violators of IPRs, thus increasing the risk for counterfeiters and infringers.

Taking measures to increase the quality of IPR protection for GIs is easier said than done in a country with an enforcement landscape as unique as China's. Several factors make the success of enforcement measures and changes difficult to predict. The sheer size of the country sets it apart from countries like Taiwan that have seen success in IPR enforcement.<sup>203</sup> Furthermore, most of the administrative agencies currently vested with authority to enforce IPRs and GIs have been in place for decades and have undergone structural changes such that they are now entrenched and reluctant to change.<sup>204</sup> For these reasons, any change towards higher quality enforcement needs to be gradual and methodical. Beginning at the national level and working all the way down to the local offices, China needs to clarify the structures, jurisdictions, and directives of the administrative agencies.<sup>205</sup>

### CONCLUSION

China's new Trademark Law goes a long way to raise its IPR protection standards in accordance with the international community. Due to the widespread nature of counterfeiting and infringement in China, the problem needs to be addressed from both the "ground-level" and from the "upper-level." In order to reach a greater level of enforcement, China's ground-level enforcement needs to coordinate with the upper-level enforcement, which would require it to untangle the overlapping administrative agencies in order to make centralization and coordination more effective. Rather than merely increasing the amount of enforcement, China needs to focus its energy on increasing

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<sup>202</sup> See DIMITROV, *supra* note 54, at 146. See also MERTHA, *supra* note 37, at 207.

<sup>203</sup> DIMITROV, *supra* note 54, at 173.

<sup>204</sup> DIMITROV, *supra* note 54, at 274–75.

<sup>205</sup> *Id.*

the quality of enforcement through administrative clarification and judicial enforcement. The changes in the new Trademark Law, if implemented properly, could make a big difference in the IPR climate in China. At the very least, it should be much easier and more efficient for foreign applicants to navigate the system, thus allowing more of the small wineries to do so in a faster time frame.