

# The World's Trademark Powerhouse: A Critique of China's New Trademark Law

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## ABSTRACT

China has become the world's trademark powerhouse with the largest number of trademark registrations for goods and services. Parallel to the new rise is the explosion of scandals concerning trademarked goods, causing numerous deaths, massive hospitalizations, and consumer defection from domestic brands. Instead of having a trademark law with consumer protection as the cornerstone, China's new Trademark Law will cement China as the world's manufacturer of trademarks. This Article is the first to critically examine China's new Trademark Law. The new law mainly centers on creating procedural measures for more trademark registrations, maintaining China's trademark registration powerhouse status, and perpetuating China's obsession with metrics-based reform. Metrics obsession will neither instill public trust in Chinese brands nor encourage public consumption to meet China's national economic goal of stimulating moderately high growth. This Article suggests a return to trademark fundamentals for the safety of the public in China and the world. Only quality and safe trademarked products from China will truly cement its status as the world's trademark powerhouse.

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#### INTRODUCTION

China's Communist Party released its thirteenth Five-Year Plan for 2016–2020, dictating a national economic and social policy with a new strategic vision to accelerate urbanization, encourage consumption, and stimulate moderately high growth.<sup>1</sup> The “encourage consumption” goal intimates the role of trademarks in facilitating purchase transactions between producers and the consuming public.<sup>2</sup> The public generally relies on trademarks as shortcuts to conducting research of goods or services in purchase decisions.<sup>3</sup> The producers rely on trademarks to communicate information to the public about the quality of the goods and services

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1. See Mark Magnier, *China's Communist Party Approves Five-Year Plan*, WALL ST. J. (Oct. 29, 2015, 9:16 AM), <http://www.wsj.com/articles/chinas-communist-party-approves-five-year-plan-1446124597> [<https://perma.cc/G2NC-CF44>]; David Floyd, *China's 13th Five Year Plan: Three Key Questions*, NASDAQ (Nov. 2, 2015, 11:32 AM), <http://www.nasdaq.com/article/chinas-13th-five-year-plan-three-key-questions-cm537626> [<https://perma.cc/B85L-ZFR9>].

2. See *Qualitex Co. v. Jacobson Prods. Co., Inc.*, 514 U.S. 159, 163–64 (1995) (observing that a trademark “‘reduce[s] the customer’s costs of shopping and making purchasing decisions,’ for it quickly and easily assures a potential customer that *this* item—the item with this mark—is made by the same producer as other similarly marked items that he or she liked (or disliked) in the past” (internal citation omitted) (alteration in original)).

3. Brian A. Jacobs, *Trademark Dilution on the Constitutional Edge*, 104 COLUM. L. REV. 161, 164 (2004) (noting how trademarks “lower the cost of searching for a good or service” by consumers); Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1690–94 (1999) (explaining economic justifications for trademarks and search cost reduction); *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 205 (1942) (“A trade-mark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants.”); *Brookfield Commc’ns, Inc. v. W. Coast Entm’t Corp.*, 174 F.3d 1036, 1048 (9th Cir. 1999) (asserting that trademarks reduce “the costs that customers incur in shopping and making purchasing decisions”). The “search cost” theory of trademark owes its origin to the seminal economic work by Landes and Posner. See William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 268–69 (1987) (providing the classic search cost theory of trademarks). In addition, unfair competition is often invoked as the predominant theory for trademarks. See generally Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839 (2007).

offered by the business.<sup>4</sup> The communicative, informational power of trademarks,<sup>5</sup> however, will deteriorate if the public cannot trust trademarks due to misleading information, false advertisements, and unsafe products.<sup>6</sup> Consequently, the “encourage consumption” goal may be difficult to fully achieve in a short time frame of five years.

China, preempting potential difficulty of trademark-related concerns to its “encourage consumption” goal, recently amended its trademark law for the third time, after almost fifteen years of legislative absence.<sup>7</sup> The revised Trademark Law of 2014 was promoted with much fanfare as a major milestone of intellectual property legal development for China because the new law was created with only China in mind, not some foreign power or external pressure.<sup>8</sup> In contrast, China's old trademark law, the original version in 1982<sup>9</sup> and the subsequent first and second

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4. *Anti-Monopoly, Inc. v. Gen. Mills Fun Grp.*, 611 F.2d 296, 301 (9th Cir. 1979) (“[T]rademark can be a potent weapon in the competitive contest, for it guarantees, identifies, and sells the article to which it refers.”); *Id.* (stating that “[u]sed as a means of identifying the trademark owner's products, a trademark ‘makes effective competition possible in a complex, impersonal marketplace by providing a means through which the consumer can identify products which please him and reward the producer with continued patronage’” (quoting *Smith v. Chanel, Inc.*, 402 F.2d 562, 566 (9th Cir. 1968))). In addition to trademarks as information signifiers, some trademarks like Microsoft, Apple, and Coca-Cola have become powerful brands in the global marketplace.

5. Various branding techniques are used to build and enhance the communicative informational power of trademarks. Over time some trademarks have become global and cultural symbols. *See, e.g.*, Doris Estelle Long, *Is Fame All There Is?: Beating Global Monopolists at Their Own Marketing Game*, 40 GEO. WASH. INT'L L. REV. 123, 130–35 (2008); Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 397 (1990) (discussing how trademarks' role has expanded from being a marketing tool in the Middle Ages to today's symbols of popular culture).

6. *U.S. Jaycees v. Commodities Magazine, Inc.*, 661 F. Supp. 1360, 1367 (N.D. Iowa 1987) (noting that in order for trademarks to “enable the public to buy with confidence,” trademark law was enacted to prevent “misrepresentation” and protect “the public against deception,” “false trade descriptions,” and counterfeit). *See also Anti-Monopoly, Inc.*, 611 F.2d at 301 (stating that purchasers “especially trust the constancy of quality emanating from a particular producer”).

7. *See Xuan-Thao Nguyen, Trademark Apologetic Justice: China's Trademark Jurisprudence on Reputational Harm*, 15 U. PA. J. BUS. L. 131, 139–41 (2012) (tracing China's trademark law development from 1982 to 2001).

8. *See, e.g., New China Trademark Law*, ROUSE THE MAG. (July 16, 2014) <http://www.rouse.com/magazine/articles/alerts/new-china-trade-mark-law?tag=manufacturing%20&%20industrials> [<https://perma.cc/SC4C-ZBT2>] (noting that “[a]fter several drafts and more than a decade of waiting, the revisions to the China Trade Mark Law took effect on 1 May 2014”); Gang Hu et al., *A Welcome Change for Trademark Owners in China*, MANAGING INTELL. PROP. (Mar. 1, 2014), <http://www.managingip.com/Article/3322844/A-welcome-change-for-trade-mark-owners-in-China.html> (stating that Gang Hu, Fang Wang, and Jing Qui of CCPIT Patent and Trademark Office explained the changes in “the transformative Trademark Law, which aims to modernize China's IP landscape”). The Chinese authority touted that the newly revised Trademark Law is truly “the first IP protection law after the opening policy.” *Id.*

9. L. Mark Wu-Ohlson, *A Commentary on China's New Patent and Trademark Laws*, 6 NW. J. INT'L L. & BUS. 86, 113 (1984) (providing historical context for the 1982 Trademark Law and analyzing the then new law).

amendments in 1993<sup>10</sup> and 2001,<sup>11</sup> respectively, were crafted with much external pressure.<sup>12</sup> China today has the second largest global economy<sup>13</sup> and has shifted fundamentally from collaboration with—to direct competition against—the United States.<sup>14</sup>

China has already become the world's powerhouse of receiving the most trademark applications for registration.<sup>15</sup> In 2014, China had a staggeringly large number of 2,146,557 trademark applications for registration.<sup>16</sup> By contrast, the United States only had 879,075 trademark applications or 41% of China's applications.<sup>17</sup> China has been very proud

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10. See *Trademark Law of the People's Republic of China*, WIPO, [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=181327](http://www.wipo.int/wipolex/en/text.jsp?file_id=181327) (last visited Feb. 20, 2016) (stating the law was “[a]dopted at the 24th Session of the Standing Committee of the Fifth National People's Congress on August 23, 1982, and amended according to the ‘Decision on the Revision of the Trademark Law of the People's Republic of China’ adopted at the 30th Session of the Standing Committee of the Seventh National People's Congress, on February 22, 1993”).

11. See *Trademark Law of the People's Republic of China*, WIPO, [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=131395](http://www.wipo.int/wipolex/en/text.jsp?file_id=131395) (last visited Feb. 20, 2016) (stating the law was “[a]dopted at the 24th Meeting of the Standing Committee of the Fifth National People's Congress on August 23, 1982 and promulgated by Order No.10 of the Standing Committee of the National People's Congress on August 23, 1982; amended for the first time in accordance with the Decision on Revising the Trademark Law of the People's Republic of China adopted at the 30th Meeting of the Standing Committee of the Seventh National People's Congress on February 22, 1993; and amended for the second time in accordance with the Decision on Revising the Trademark Law of the People's Republic of China adopted at the 24th Meeting of the Standing Committee of the Ninth National People's Congress on October 27, 2001”).

12. See Mary K. Alexander, Note, *The Starbucks Decision of the Shanghai No. 2 Intermediate People's Court: A Victory Limited to Lattès?*, 58 CASE W. RES. L. REV. 881, 891–92 (2008) (observing that the 2001 China Trademark Law “reflects a desire to quell concern among foreign investors over China's first-to-file system” and to move China “closer in line with its obligations under the Paris Convention and TRIPS”); Scott J. Palmer, *An Identity Crisis: Regime Legitimacy and the Politics of Intellectual Property Rights in China*, 8 IND. J. GLOBAL LEGAL STUD. 449, 458 (2001) (noting that due to U.S. pressure under the 1979 Agreement on Trade between China and the United States, China enacted intellectual property laws in the early 1980s); see, e.g., Peter K. Yu, *The Sweet and Sour Story of Chinese Intellectual Property Rights*, 1, 2–3 (Oct. 1, 2004), <http://www.peteryu.com/sweetsour.pdf>; Robert H. Hu, *International Legal Protection of Trademarks in China*, 13 MARQ. INTELL. PROP. L. REV. 69, 83–84 (2009) (providing a history of China's intellectual property development).

13. For a graphic demonstrating change in the world's largest economies, see Charles Riley & Ivory Sherman, *World's Largest Economies*, CNN MONEY (Jan. 18, 2017), [http://money.cnn.com/news/economy/world\\_economies\\_gdp/](http://money.cnn.com/news/economy/world_economies_gdp/).

14. David Shambaugh, *In a Fundamental Shift, China and the US Are Now Engaged in an All-Out Competition*, S. CHINA MORNING POST (June 12, 2015), <http://www.scmp.com/comment/insight-opinion/article/1819980/fundamental-shift-china-and-us-are-now-engaged-all-out?page=all> [<https://perma.cc/69LS-GF37>].

15. The phrase “trademark powerhouse” was used by Minister Zhang Mao, State Administration for Industry and Commerce of the People's Republic of China on September 2014. See Zhang Mao, *China's New Trademark Law*, WIPO MAG. (Sept. 2014), [http://www.wipo.int/wipo\\_magazine/en/2014/05/article\\_0009.html](http://www.wipo.int/wipo_magazine/en/2014/05/article_0009.html) [<https://perma.cc/8LVF-BVWC>].

16. *Statistical Country Profiles: China*, WIPO, [http://www.wipo.int/ipstats/en/statistics/country\\_profile/profile.jsp?code=CN](http://www.wipo.int/ipstats/en/statistics/country_profile/profile.jsp?code=CN) [<https://perma.cc/AHW6-AL9W>].

17. *Statistical Country Profiles: United States of America*, WIPO, [http://www.wipo.int/ipstats/en/statistics/country\\_profile/profile.jsp?code=US](http://www.wipo.int/ipstats/en/statistics/country_profile/profile.jsp?code=US) [<https://perma.cc/FH6G-3XUQ>].

of its global trademark registration powerhouse status for the last fourteen years.<sup>18</sup>

While China is enjoying the world's trademark powerhouse status, the consuming public has witnessed a collision of trademarks and trust. With the rise of trademark registrations, there are plenty of trademarked products and services made by domestic businesses available in China.<sup>19</sup> However, Chinese consumers are weary of Chinese-branded products. The erosion of trust stems from national scandals from Sanlu milk, Dalian Hanwei eggs, and Diaojiangba snacks to Nongfu Spring bottled water. Chinese consumers, avoiding trademarked products in China, become "bakugai" (or "explosive buyers") in frequent trips to their neighboring country, Japan, to purchase Japanese trademarked products for common consumption items at home in China.<sup>20</sup> The Chinese shopping escalation in Japan for Japanese trademarked products, especially for children's products, is a "sensibility [that] has been growing since 2008" when the Sanlu baby formula scandal caused both deaths and massive hospitalizations.<sup>21</sup>

Unfortunately, China's new Trademark Law for China—the world's powerhouse of trademark registrations—ignores the trademark fundamental of protecting the consuming public. The new law mainly centers on procedural measures for *more* trademark registrations, maintaining China's trademark registration powerhouse status, and perpetuating China's obsession with metrics-based reform.

This Article proceeds as follows. Part I provides statistical information on China's trademark applications for registrations and traces the rise of China as the world's new trademark powerhouse. The

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18. See STATE INTELL. PROP. OFF. OF CHINA, 2014 INTELLECTUAL PROPERTY RIGHTS PROTECTION IN CHINA 6, <http://english.sipo.gov.cn/laws/whitepapers/201507/P020150722307566924877.pdf> ("Trademark applications continued to grow significantly. A total of 2,285,400 applications for trademark registration were accepted in 2014, a year-on-year increase of 21.47%, exceeding the threshold of 2 million for the first time and ranking 1st in the world for 13 consecutive years.").

19. By the end of 2014, China had accumulated more than ten million registered trademarks and more than eight million valid registered trademarks. *Id.* at 7. The valid registered trademarks mean these registered marks are used with the associated products and services in China's marketplace. Again, the valid registered trademarks ranked China "first in the world." *Id.*

20. Julian Ryall, *Bakugai! Japan's New Term for "Explosive" Chinese Shoppers*, S. CHINA MORNING POST (Dec. 3, 2015), <http://www.scmp.com/news/asia/east-asia/article/1886280/bakugai-japans-new-term-explosive-chinese-shoppers> [<https://perma.cc/X48Z-RSZ3>] (reporting that Chinese tourists, 2.75 million in the six-month period from January to July 2015, are the "explosive shoppers" Bakugai, purchasing food, cosmetics, perfume, spirits, cigarettes, medicine, toiletries, disposable nappies, and other products in Japan).

21. Philip Brator & Masako Tsubuku, *Chinese Shoppers Keep Japan's Tills Ringing*, JAPAN TIMES (Aug. 23, 2015), <http://www.japantimes.co.jp/news/2015/08/23/business/economy-business/chinese-shoppers-keep-japans-tills-ringing/#.VruMZvkrJhE> [<https://perma.cc/NQ5U-USM6>].

trademark rise coincides with China's rise in global ranking of its economic powers.

Part II observes an incongruent development that while China enjoys its prominence as the world's trademark powerhouse, the consuming public in China faces many product safety scandals that undermine its trust in Chinese trademarks. Part II first explains the role of trademarks in the marketplace and how the consuming public establishes its trust in trademarks. Next, Part II explores how public trust in trademarked products severely deteriorated after numerous scandals in products across China, altering consumer purchasing behaviors towards Chinese brands.

China, ignoring the fundamental goal of trademarks, to protect consumers, aimed to enhance and improve trademark application and registration procedures in the newly revised 2014 Trademark Law. Part III explains how China's National Intellectual Property Strategy (the Strategy) served as the foundation for its ambition to be the world's powerhouse in trademarks. The action plan for the Strategy was the new trademark law. With specificities, Part III details the major revisions in the 2014 Trademark Law.

There are several shortcomings in the 2014 Trademark Law. Part IV identifies three areas: (1) the missing consuming public; (2) the missing trademark right as property right; and (3) the ineffective "good faith" principle that serves as a glaring example of how China tightly controls trademarks at the expense of consumer protection and public trust in trademarks. A return to trademark fundamentals is necessary. The new law must reflect trademarks in the marketplace of competition. China must recognize and incorporate consumer confusion principles stemming from misleading information, false advertisement, and inconsistent quality of goods into its trademark law. The law must allow the marketplace, with public-centered interests, to dictate whether the producer has right in a trademark.

This Article concludes that China, as the world's trademark powerhouse, must embrace the status with responsibility. Metrics obsession with a high volume of trademark applications and registrations alone will neither instill the consuming public's trust in domestic brands nor encourage consumption. Quality and safe trademarked products from China will cement its status as the world's trademark powerhouse.

#### I. CHINA AS THE WORLD'S NEW TRADEMARK POWERHOUSE

In September 2014, Minister Zhang Mao of China's State Administration for Industry and Commerce (SAIC) declared that China

has reached a major milestone.<sup>22</sup> China is now the world's new trademark powerhouse.<sup>23</sup> The number of trademark applications filed in China has surpassed all nations.<sup>24</sup> For example, in 2013, China witnessed 1,881,546 newly filed trademark applications, representing a 14.5% increase from the prior year.<sup>25</sup> In 2014, China experienced a momentous jump in trademark applications as the number reached almost 2.3 million.

In fact, China became the world's trademark powerhouse in 2010.<sup>26</sup> Specifically, China saw more than one million trademark applications filed in 2010.<sup>27</sup> The increase continued: 1.4 million trademark applications in 2011 and 1.6 million in 2012.<sup>28</sup> In comparison, the United States is second after China in trademark application filing, with 723,129 applications filed in 2010; 797,152 in 2011; 825,117 in 2012; and 872,519 in 2013.<sup>29</sup> In 2014, the United States' trademark applications constituted a little more than one-third of China's more than two million trademark applications.

The tremendous increase in China's trademark filings is not a surprise, as it reflects the transformation of China's economy.<sup>30</sup> China's market has expanded, and its economy has overtaken the United States' market to become the largest economy in the world.<sup>31</sup> Internally, Chinese entities increase their trademark filings to match the demands for goods

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22. See Mao, *supra* note 15.

23. *Id.* (stating "in recent years, China has emerged as a true trademark power").

24. *Id.* (remarking that "by the end of 2013, China had recorded a cumulative total of 13.24 million trademark applications and 8.65 million registrations, of which 7.24 million remain in force"). These numbers are perhaps inflated due to China's old trademark law, which only permitted one class per trademark application, rather than multiple classes per trademark application. *Id.*

25. *Trade News*, PANAWELL & PARTNERS, <http://www.panawell.com/?newsxqen/id/158.html> [<https://perma.cc/G25U-G5P9>].

26. See *Statistical Country Profiles: China*, WIPO, [http://www.wipo.int/ipstats/en/statistics/country\\_profile/profile.jsp?code=CN](http://www.wipo.int/ipstats/en/statistics/country_profile/profile.jsp?code=CN) [<https://perma.cc/D74Y-S8QR>].

27. *Id.*

28. *Id.*

29. See *Statistical Country Profiles: United States of America*, *supra* note 17.

30. *Overview: China*, WORLD BANK (Sept. 18, 2015) <http://www.worldbank.org/en/country/china/overview> [<https://perma.cc/8P4N-77XH>] (stating that China's "GDP growth . . . average[s] nearly 10 percent a year . . . and has lifted more than 800 million people out of poverty").

31. Brett Arends, *It's Official: America Is Now No. 2*, MARKET WATCH (Dec. 4, 2014, 11:18 AM), <http://www.marketwatch.com/story/its-official-america-is-now-no-2-2014-12-04> [<https://perma.cc/T2N5-2VW8>]; Mike Bird, *China Just Overtook the US as the World's Largest Economy*, BUS. INSIDER (Oct. 8, 2014, 5:08 AM), <http://www.businessinsider.com/china-overtakes-us-as-worlds-largest-economy-2014-10> [<https://perma.cc/K8DY-L2BB>]. Three years earlier, China overtook Japan as the world's second-largest economy. See Justin McCurry & Julia Kollewe, *China Overtakes Japan as World's Second Largest Economy*, GUARDIAN (Feb. 14, 2011, 1:38 PM), <http://www.theguardian.com/business/2011/feb/14/china-second-largest-economy> [<http://perma.cc/B7SD-2XLW>] (reporting that after forty years of being the world's second-largest economy, Japan lost its prominence to China).

and services across all sectors.<sup>32</sup> Indeed, Chinese resident businesses filed 1,733,364 trademark applications, or 93% of all trademark applications filed in 2013.<sup>33</sup> Foreign applications constituted only 7%.<sup>34</sup>

These numbers demonstrate that China is no longer the labor market for the world. China has evolved from providing cheap labor, to making goods for the world,<sup>35</sup> to building a nation of innovation for domestic and global consumption.<sup>36</sup> China's market has matured to where Chinese companies, not foreign companies, are the driving force of building the market.<sup>37</sup> Chinese companies register trademarks in large numbers to capture the huge appetite of the Chinese consuming public, as demonstrated by the vast number of trademark applications filed by Chinese companies.<sup>38</sup> In addition, China's market has attracted some foreign companies hungry for new opportunities to expand growth.<sup>39</sup>

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32. Under China's old trademark law, each trademark application was for a class of goods or services. The increase in trademark applications represents the increase in the new goods and services offered in association with the applications. See Mao, *supra* note 15.

33. See *Statistical Country Profiles: China*, *supra* note 26.

34. Compared to the United States, foreign applications constitute 222%, or more than double that of U.S. applications; there were 270,761 applications filed by U.S. entities and 601,758 applications filed by foreign applicants. See *Statistical Country Profiles: United States of America*, *supra* note 17.

35. In fact, Chinese manufacturers have been moving their plants to neighboring countries for cheaper wages and lower production cost. See Kathy Chu, *China Manufacturers Survive by Moving to Asian Neighbors*, WALL ST. J. (May 1, 2013), <http://www.wsj.com/articles/SB10001424127887323798104578453073103566416> [<http://perma.cc/64TK-JCBT>]. Since the introduction of the economic reforms in 1978, China has become the world's manufacturing hub, where the secondary sector (comprising industry and construction) represented the largest share of GDP. *China Economic Outlook*, FOCUS ECON. (Jan. 27, 2015), <http://www.focus-economics.com/countries/china> [<https://perma.cc/74FF-WD33>]. However, in recent years, China's modernization propelled the tertiary sector, and, in 2013, it became the largest category of GDP with a share of 46.1%, while the secondary sector still accounted for a sizeable 45% of the country's total output. *Id.* Meanwhile, the primary sector's weight in GDP has shrunk dramatically since the country opened to the world. *Id.*

36. See George S. Yip & Bruce McKern, *China's Many Types of Innovation*, FORBES (Sept. 9, 2014), <http://www.forbes.com/sites/ceibs/2014/09/19/chinas-many-types-of-innovation/> (identifying eight different types of innovation in which Chinese companies have shown success: cost innovation, process innovation, application innovation, supply chain innovation, product innovation, technological innovation, business model innovation, and non-customer innovation).

37. *Domestic Innovation and Procurement*, CHINA BUS. REV. (May 1, 2010), <http://www.chinabusinessreview.com/domestic-innovation-and-procurement/> [<https://perma.cc/7WQV-YM8Q>] (reporting China's indigenous innovation plan and policy for Chinese companies across sectors). Foreign companies face many difficulties to survive in China. See Paul Carsten, *In China, US Tech Firms Turn to Domestic Rivals for Survival*, REUTERS (Jan. 29, 2015), <http://www.reuters.com/article/2015/01/29/china-tech-usa-idUSL4N0V75IM20150129> [<https://perma.cc/X7QB-TDV8>].

38. WIPO collects and publishes statistics of trademark activities for China. The statistics provide the number of foreign applications and registrations filed each year. See *Statistical Country Profiles: China*, *supra* note 26.

39. Anthony Goh & Matthew Sullivan, *The 5 Biggest Challenges Businesses Face When They Expand To China*, BUS. INSIDER (Dec. 13, 2010), <http://www.businessinsider.com/the-five-biggest->

These foreign companies, though significantly smaller in number compared to the total number of Chinese companies,<sup>40</sup> add modestly to China's skyrocketing increase in trademark applications.<sup>41</sup> Significantly, as the world's powerhouse in trademarks, China has indeed embarked into a new area of *manufacturing* trademarks in recent years.

## II. TRADEMARKS AND CONSUMER TRUST COLLISION IN CHINA

While China enjoys its rise as the world's trademark powerhouse, a startling problem arises in parallel. The consuming public in China faces many scandals that challenge its trust in Chinese trademarks.

### *A. Trademark Role and Public Trust*

A trademark can be a name, sign, symbol, logo, color, or phrase<sup>42</sup> with the power to communicate to the consuming public.<sup>43</sup> Through marketing, distribution, and sale of a trademarked product or service, the trademark owner imparts in the public mind what the name, sign, logo, or phrase represents.<sup>44</sup> When consumers select a product or service to purchase based on the trademark, they have confidence in the purchase

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practical-challenges-for-foreign-smes-in-the-chinese-market-2010-12#ixzz3RsICJcPk [https://perma.cc/S7R6-Y2UE] (noting foreign companies' desire to expand into the Chinese market and obstacles faced by these companies).

40. See *Statistical Country Profiles: China*, *supra* note 26.

41. *Id.* (stating there were 126,766 foreign trademark applications in China for 2013, representing an increase of 22% from the prior year); see also Goh, *supra* note 39.

42. See, e.g., 15 U.S.C. § 1127 (2006) (defining a trademark as "any word, name, symbol, or device, or any combination thereof" that is used or intended to be used in commerce "to identify and distinguish . . . goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown"); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 173 (1995) (holding that trademarks include color, in addition to word, name, symbol, and device); see also Xuan-Thao Nguyen, *Shifting the Paradigm in E-commerce: Move Over Inherently Distinctive Trademarks—The e-Brand, i-Brand and Generic Domain Names Ascending to Power?* 50 AM. U. L. REV. 937, 943 (2001) (stating that trademarks include any "word, phrase, name, symbol, logo, device, or image that is used or intended to be used by a person in commerce").

43. Margreth Barrett, *Finding Trademark Use: The Historical Foundation for Limiting Infringement Liability to Uses "In the Manner of a Mark"*, 43 WAKE FOREST L. REV. 893, 894 (2008) (stating that trademark use "can be generally understood as use of a word or symbol in close association with goods or services being offered for sale, in a manner that is likely to communicate the source of those goods or services to consumers"); see also Timothy Denny Greene & Jeff Wilkerson, *Understanding Trademark Strength*, 16 STAN. TECH. L. REV. 535, 568 (2013) (noting that when a mark "is likely to be viewed as a trademark by consumers—because, for example, it is stylized in a way that quickly communicates its function as a brand name").

44. See, e.g., *YKK Corp. v. Jungwoo Zipper Co., Ltd.*, 213 F. Supp. 2d 1195, 1200 (C.D. Cal. 2002) (finding that the trademark owner YKK "has achieved worldwide brand name recognition as a result of its manufacturing, distribution, marketing, advertising and sales efforts"); *Scarves by Vera, Inc. v. Todo Imps. Ltd.*, 544 F.2d 1167, 1170 (2d Cir. 1976) (observing that the trademark owner had introduced extensive evidence of advertisements and sales to demonstrate that its trademark has achieved "wide recognition in the fashion-conscious consumer market").

and believe that it will meet their expectations.<sup>45</sup> Public trust in the trademark is paramount for the trademark owner to cultivate customer loyalty and building a long-lasting goodwill.<sup>46</sup>

By trusting the trademarks, the consuming public engages in daily purchases without conducting extensive research prior to making purchase decisions.<sup>47</sup> Essentially, the prominent role of trademarks is to inform the consumer and to reduce search cost.<sup>48</sup> Therefore, trademark law must protect the consumer, as consumers have trusted trademarks as shortcuts in purchasing decisions and have relied on them to distinguish different sources of competing products.<sup>49</sup> The reduction in search costs helps

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45. See *Vittoria N. Am., L.L.C. v. Euro-Asia Imps. Inc.*, 278 F.3d 1076, 1082 (10th Cir. 2001) (“A trademark symbolizes the public’s confidence or ‘goodwill’ in a particular product.” (quoting *Premier Dental Prods. Co. v. Darby Dental Supply Co. Inc.*, 794 F.2d 850, 853 (3rd Cir. 1986))); see also *CAE, Inc. v. Clean Air Eng’g, Inc.*, 267 F.3d 660, 672 (7th Cir. 2001) (stating that trademark law protects “both consumer confidence in the quality and source of goods and businesses’ goodwill in their products”); *Cumberland Packing Corp. v. Monsanto Co.*, 32 F. Supp. 2d 561, 567 (E.D.N.Y. 1999) (“The Lanham Act, enacted to protect both consumers and trademark owners, is designed to ensure that consumers purchasing a product may be confident of getting the brand they think they are getting, and that when trademark owners expend resources promoting their products to consumers their reputation and goodwill will not be misappropriated by pirates.”). Capitalizing on the public confidence in the trademark, the trademark owner typically includes a provision in its distribution or licensing agreements wherein the licensees acknowledges the goodwill of the trademark built by the trademark owner and the public confidence fostered by the trademark owner. See, e.g., *Getty Petroleum Mktg., Inc. v. Shipley Fuels Mktg., LLC*, No. 07-CV-340, 2007 WL 2844872, at \*28 (E.D. Pa. Sept. 27, 2007) (“1.3 Acknowledgments Distributor hereby acknowledges that (a) Mobil has made a substantial investment in developing its own numerous marketing premises as retail service stations, (b) Mobil has developed retail service stations throughout the country which are distinguished by design, trademark, decor, promotions and graphics, (c) Mobil has built valuable goodwill throughout the country and has fostered confidence in the motoring public in retail service stations and products bearing Mobil’s trademarks; (d) Mobil has advertised its Mobil products extensively throughout the country, (e) the continued success of Mobil, of Mobil dealers, and of Distributor as a Mobil distributor, as well as all other Mobil distributors, is dependent upon each Mobil distributor and Mobil dealer maintaining the highest standards of service station and/or facility operation, product quality, personal commitment to high performance and customer service, and (f) Distributor’s conduct and the conduct and personal performance of Distributor’s Mobil dealers will impact on Mobil’s efforts to achieve high standards so long as Distributor and Distributor’s Mobil dealers represent the Mobil trademarks and products to the public.”).

46. For example, in the over-the-counter drug industry, the owner of the Tylenol brand name spent \$40 million in an effort to regain its customers’ loyalty to the Tylenol brand, which was lost when “its capsules were tampered with,” and the brand Tylenol in association with “[t]he red and yellow capsule-shaped gelcap thereafter became [a] top selling Tylenol product.” *McNeil-PPC, Inc. v. Granutec, Inc.*, 919 F. Supp. 198, 203–04 (E.D.N.C. 1995).

47. *Ty Inc. v. Perryman*, 306 F.3d 509, 510 (7th Cir. 2002) (“The fundamental purpose of a trademark is to reduce consumer search costs by providing a concise and unequivocal identifier of the particular source of particular goods.”).

48. Margreth Barrett, *Internet Trademark Suits and the Demise of “Trademark Use”*, 39 U.C. DAVIS L. REV. 371, 392 (2006) (“We protect trademarks to ensure that they will effectively communicate the source of goods or services to consumers, thus lowering consumer search costs and promoting a more efficient marketplace.”).

49. *Mattel, Inc. v. Walking Mountain Prod.*, 353 F.3d 792, 806 (9th Cir. 2003) (“The . . . purpose of trademark protections . . . is to ‘avoid confusion in the marketplace’ by allowing a trademark owner

consumers select products or services that fit their desires or circumstances.<sup>50</sup>

In daily commerce, consumers have a right to not be misled or deceived when they rely on trademarks to make purchases.<sup>51</sup> They have the right to be able to “accurately assess the quality of a product and choose a product that is in accordance with their preferences.”<sup>52</sup> In other words, consumers want truthful information when they make purchases.<sup>53</sup> As conveyors of accurate information, trademarks foster open and fair competition among producers.<sup>54</sup> The public has a strong interest in such competition.<sup>55</sup>

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to prevent ‘others from duping consumers into buying a product they mistakenly believe is sponsored by the trademark owner.’” (quoting *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 900 (9th Cir. 2002))). In addition, to protect the consumer, trademark law also protects the trademark owner’s investment. See *Boston Duck Tours, LP v. Super Duck Tours, LLC*, 531 F.3d 1, 11–12 (1st Cir. 2008) (stating that trademark law extends “protection for entities that adopt and use trademarks to advertise and market their goods and services. This protection is justified by the substantial benefits that trademarks offer for both consumers and businesses. Serving to distinguish and identify goods, as well as their sources, trademarks concisely impart information to consumers”).

50. *Boston Duck Tours*, 531 F.3d at 11–12 (stating trademarks reduce the consumer’s search costs, “allowing them to make decisions that more closely coincide with their preferences”).

51. The considerable consumer reliance on trademarks also creates an incentive for other competing, and typically less successful businesses “to pass off their inferior brand as the successful brand by adopting a confusingly similar trademark, in effect appropriating the goodwill created by the producer of the successful brand.” *Perryman*, 306 F.3d at 510 (stating that trademark law is designed, in part, to prevent these “passing-off” practices and the consumer confusion that results from it); see also *Union Nat’l Bank of Tex., Laredo, Tex. v. Union Nat’l Bank of Tex., Austin, Tex.*, 909 F.2d 839, 844 (5th Cir. 1990) (“The idea is that trademarks are ‘distinguishing’ features which lower consumer search costs and encourage higher quality production by discouraging free-riders.”).

52. See, e.g., *Alt. Pioneering Sys., Inc. v. Direct Innovative Prod., Inc.*, 822 F. Supp. 1437, 1444–45 (D. Minn. 1993); *W.L. Gore & Assoc. v. Totes, Inc.*, 788 F. Supp. 800, 813 (D. Del. 1992) (“The public has a right to information that will allow them to assess the quality of a product and to accurately price the product in accordance with their priorities and desires.”).

53. *Alt. Pioneering Sys.*, 822 F. Supp. at 1444–45 (discussing public interest in trademarks); *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 730 (3d Cir. 2004) (The public interest concern in trademark infringement cases is “the interest in the prevention of confusion, particularly as it affects the public interest in truth and accuracy.”).

54. *KJ Korea, Inc. v. Health Korea, Inc.*, 66 F. Supp. 3d 1005, 1018 (N.D. Ill. 2014) (“Trademark law aims to avoid confusion regarding source because it would increase consumers’ search costs, reducing market demand, and disincentivize suppliers from investing in quality, creating a less competitive market.”); *Truck Equip. Serv. Co. v. Fruehauf Corp.*, 536 F.2d 1210, 1215 (8th Cir. 1976) (“Trade-marks . . . are the essence of competition, because they make possible a choice between competing articles by enabling the buyer to distinguish one from the other. Trade-marks encourage the maintenance of quality by securing to the producer the benefit of the good reputation which excellence creates. To protect trade-marks, therefore, is to protect the public from deceit, to foster fair competition, and to secure to the business community the advantages of reputation and good will by preventing their diversion from those who have created them to those who have not.”).

55. See, e.g., *Davidoff & CIE, S.A. v. PLD Int’l Corp.*, 263 F.3d 1297, 1304 (11th Cir. 2001) (“[T]he public interest is served by preventing consumer confusion in the marketplace.”); *Coach House Rest., Inc. v. Coach & Six Rests., Inc.*, 934 F.2d 1551, 1564 (11th Cir. 1991) (“[I]f there is an inevitability of confusion, [a] petitioner’s law suit may be revived from estoppel.”).

*B. Scandals Shaking Public Trust*

The Chinese public's trust in trademarked products severely deteriorated after numerous scandals. In early September 2008, fourteen babies in Gansu province became ill after drinking Sanlu milk.<sup>56</sup> The Sanlu milk powder was contaminated with the toxic chemical melamine. The tainted Sanlu milk ultimately caused there to be 296,000 ill babies and several deaths.<sup>57</sup> About 6,000 infants suffered from kidney diseases,<sup>58</sup> and their heads became swollen.<sup>59</sup> As reported by scholars, prior to the scandal eruption, the branded Sanlu milk was heavily advertised in Chinese television media and celebrated as the milk provider for Chinese astronauts in the China Space Program.<sup>60</sup>

In addition to the Sanlu milk scandal, there have been many other food scandals.<sup>61</sup> The Dalian Hanwei eggs contained the toxin melamine<sup>62</sup> at 4.7 parts per million of melamine compared to the legal limit of 2.5 parts

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56. *Timeline: China Milk Scandal*, BBC (Jan. 25, 2010, 9:47 AM), <http://news.bbc.co.uk/2/hi/7720404.stm> [<https://perma.cc/B7ML-EAEG>]; see also Chenglin Liu, *Profits Above the Law: China's Melamine Tainted Milk Incident*, 79 MISS. L.J. 371, 376–78 (2009) (tracing the Sanlu milk crisis to the demand for domestic milk products in China as part of China's strategy to stimulate domestic consumption and vitalize domestic markets to achieve national, sustainable economic growth).

57. See *Timeline: China Milk Scandal*, *supra* note 56; Kaz Ross, *Faking It: Food Quality in China*, 8 INT'L J. ASIA PAC. STUD., no. 2, 2012, at 33, 33–54 (stating that food, medicine, and water products in China are often of poor quality and that in the dairy industry alone, twenty-two branded products contained dangerous level of melamine).

58. See Peng Hu et al., *Clinical Observation of Childhood Urinary Stones Induced by Melamine-tainted Infant Formula in Anhui Province, China*, 9 ARCHIVES MED. SCI. 98, 98–104, (2013) (noting that the Chinese Ministry of Health had reported that 294,000 infants had been affected by melamine-contaminated infant formula, more than 5,000 infants hospitalized, and six deaths confirmed).

59. See David Barboza, *Former Executive Pleads Guilty in China Milk Scandal*, N.Y. TIMES (Jan. 1, 2009), <http://www.nytimes.com/2009/01/01/world/asia/01iht-milk.1.19025735.html> (explaining that the tainted milk in China was “watered-down milk being doctored with a chemical used in plastics and fertilizer to falsely raise its protein count” that “sickened nearly 300,000 children and killed six”).

60. Liu, *supra* note 56, at 377–78 (noting reports from various sources that heavy TV and billboard dairy ads, which enlisted athletes, pop stars, scholars, physicians, and government officials to be spokespeople for branding campaigns, were effective propaganda, “especially among young generations”).

61. See Jim Yardley, *Infants in Chinese City Starve on Protein-Short Formula*, N.Y. TIMES (May 5, 2004), <http://www.nytimes.com/2004/05/05/world/infants-in-chinese-city-starve-on-protein-short-formula.html> (reporting “big head disease” milk scandals erupted before the Sanlu milk scandal and that food safety is “a recurring problem, with regular reports of poisonings at school cafeterias and restaurants”); see also Liu, *supra* note 56, at 377–78.

62. See David Bandurski, *China Quiet on Bad Eggs as the Premier Talks Tough on Safety*, CHINA MEDIA PROJECT (Oct. 27, 2008, 2:53 PM), <http://cmp.hku.hk/2008/10/27/1303/> [<https://perma.cc/38JC-LGK5>] (reporting on the chicken eggs and related products scandals); *Wal-Mart Removes Brand of Eggs from China Stores*, ABC NEWS (Oct. 28, 2008, 6:36 AM), <http://abc7chicago.com/archive/6474164/> [<https://perma.cc/RK6E-3ZBF>].

per million.<sup>63</sup> Other eggs from different brands processed by Jingshang Pengchang Agricultural Product Company, Hubei province, and by Green Living Beings Development Center based in Shanxi province were removed from the market for safety concerns.<sup>64</sup> When the “gutter oil” scandal broke nationwide, Wuhan Polytechnic University’s researcher released an estimate that about 10% of the meals prepared by restaurants in China were cooked in the contaminated oil.<sup>65</sup> In 2014, at least five people died and seventeen others were poisoned in Yunnan province after they consumed fermented corn flour snacks from Diaojiangba.<sup>66</sup> Recently, the meat scandal sent another shock wave across China, as meat frozen in the 1970s was available for sale and marked with Chinese labels.<sup>67</sup>

The scandals are not just in food; they are also in bottled water. Chinese consumers heavily rely on bottled water because 70% of China’s fresh water sources are polluted.<sup>68</sup> China’s \$21.4 billion<sup>69</sup> bottled water industry is shrouded in secrecy, raising questions on the quality and safety of the bottled water consumed by millions.<sup>70</sup> Experts predict water scandals will become more widespread given that the majority of the bottled water brands in China are domestic<sup>71</sup> and the industry lacks consistent quality control standards.<sup>72</sup> Indeed, there have been several bottled water brands that have failed to pass meager inspections.<sup>73</sup> For

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63. *Chinese Eggs Tainted with Excessive Melamine*, NBC NEWS (Oct. 26, 2008, 3:38 PM), [http://www.nbcnews.com/id/27389907/ns/health-food\\_safety/t/chinese-eggs-tainted-excessive-melamine/#.VqkqBPkrKUK](http://www.nbcnews.com/id/27389907/ns/health-food_safety/t/chinese-eggs-tainted-excessive-melamine/#.VqkqBPkrKUK) [<https://perma.cc/4RAX-XRB7>].

64. *Chinese Delayed Disclosure of Tainted Eggs*, USA TODAY (Oct. 29, 2008, 11:09 AM), [http://usatoday30.usatoday.com/news/health/2008-10-29-china-eggs\\_N.htm](http://usatoday30.usatoday.com/news/health/2008-10-29-china-eggs_N.htm) [<https://perma.cc/TQU2-ZU86>].

65. See Austin Ramzy, *Reports on “Gutter Oil” Series, Assaulted, People’s Daily Says*, N.Y. TIMES: SINOSPHERE (May 19, 2014), <http://sinosphere.blogs.nytimes.com/2014/05/19/reporters-on-gutter-oil-series-assaulted-peoples-daily-says/>.

66. See Austin Ramzy, *5 Die from Food Poisoning from Southern Chinese Snack*, N.Y. TIMES: SINOSPHERE (Jul. 4, 2014), <http://sinosphere.blogs.nytimes.com/2014/07/04/5-die-in-food-poisoning-from-southern-chinese-snack/>.

67. See Dan Levin & Crystal Tse, *In China, Stomachs Turn at News of Traders Peddling 40-Year-Old Meat*, N.Y. TIMES, June 24, 2015, at A4 (reporting half a billion dollars’ worth of frozen meat with some dating to the 1970s was seized by government).

68. See Abigail Barnes & Wei Cao, *Muddy Waters: The Public Health Risks and Sustainability of Bottled Water in China*, 38 VT. L. REV. 971, 971 (2014) (“Approximately 70% of China’s fresh water supplies are polluted to some degree, and the water pipes in many urban areas are outdated, often leeching impurities into the public drinking water.”); see also Levin & Tse, *supra* note 67.

69. Barnes & Cao, *supra* note 68 at 982 (observing the rise in sales of bottled water in China; analysts valued the industry at \$21.4 billion).

70. *Id.* at 974–75 (noting the Orwellian censorship policies perpetuate the lack of information and media scrutiny of the bottled water industry in China).

71. *Id.* at 981 (stating that major bottlers for water are Hangzhou Wahaha Group, Ting Hsin International Group, Nongfu Springs, and foreign brands constitute a “smaller sliver” of the China market).

72. *Id.* at 995–97.

73. *Id.* at 996–97 (tracing the deficiencies in quality control in bottled water in China).

example, in July 2011, the Beijing Administration for Industry and Commerce conducted random market inspections to determine the number of brands that were non-compliant with water safety standards; the report concluded that more than thirty brands of bottled water were in violation.<sup>74</sup> One brand, according to the report, contained “bacteria 9,000 times the permissible safety levels” while other brands contained bromate levels “eight times the permissible level.”<sup>75</sup> Notable brands among those implicated included Harbin Pharmaceutical Group’s “Pure in the Pure,” Inner Mongolia’s “King Friends Desert Water,” and Nongfu Spring.<sup>76</sup> Nongfu Spring was accused of bottling water containing “excessive levels of arsenic,” despite claiming its bottled water was sourced from “four of the best water sources in China.”<sup>77</sup>

In summary, as products are sold in association with trademarks or brands, the public trust erodes when the public cannot rely on the trademarks in their daily purchasing decisions.<sup>78</sup> The product scandals have caused much fear in Chinese brands and altered consumer behaviors.<sup>79</sup> Some Chinese consumers, facing numerous product safety scandals, have gravitated to shopping overseas,<sup>80</sup> using shopping agents for foreign products,<sup>81</sup> and “overseas online shopping.”<sup>82</sup> Chinese

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74. *Id.* at 996.

75. *Id.*

76. *Id.* at 997.

77. *Id.*

78. Vaughn M. Watson, *Food Safety and China: Scandal and Consequence*, WORLD POL’Y J. (Aug. 7, 2013), <http://www.worldpolicy.org/blog/2013/08/07/food-safety-and-china-scandal-and-consequence> [<https://perma.cc/L33Q-FBG4>] (identifying numerous consequences stemming from the food safety problems and how there has been a widespread distrust of domestic products, especially among middle-class Chinese, in the five years after the Sanlu scandal in 2008).

79. See Yujun Qiu, *Understanding Chinese Consumers*, CHINA BUS. REV. (July 1, 2001), <http://www.chinabusinessreview.com/understanding-chinese-consumers/> (observing that the “product safety incidents and lax government supervision have scared Chinese consumers away from certain domestic products. Consumers will often pay a premium for foreign brands to ensure quality”).

80. See Adam Minter, *Why Chinese Tourists Love Japan*, BLOOMBERG VIEW (Mar. 25, 2015), <http://www.bloombergview.com/articles/2015-03-25/why-chinese-tourists-love-japan> [<https://perma.cc/82QE-P2FR>] (“Given China’s frequent product safety scandals . . . Chinese often schedule shopping sprees when they’re outside the country. In 2014 alone, Chinese consumers spent \$164 billion abroad, making them the world’s biggest vacation spenders . . . During this past February’s Chinese New Year, Chinese tourists spent around \$1 billion in Japan.”).

81. Chinese living in mainland China use shopping agents residing in the United States to purchase healthcare products. The shopping agents then ship the goods to Chinese buyers. See Alice Yan, *China’s Shopping Agents, Online Firms Flourish as Locals Look Abroad for Quality Health-Care Goods*, S. CHINA MORNING POST (Nov. 15, 2015), <http://www.scmp.com/news/china/money-wealth/article/1878930/chinas-shopping-agents-online-firms-flourish-locals-look> [<https://perma.cc/DJT2-7ATM>].

82. See Zhou Wenting & Palden Nyima, *Shoppers Shift Gaze Overseas for Goods Online*, CHINA DAILY (Dec. 3, 2015), [http://www.chinadaily.com.cn/china/2015-12/03/content\\_22620694.htm](http://www.chinadaily.com.cn/china/2015-12/03/content_22620694.htm) (stating that nationwide spending on “overseas online shopping” on a single day, Black Friday 2015,

consumers have greater trust in foreign trademarked products than in their domestic brands.<sup>83</sup> Unfortunately for Chinese consumers, many Chinese companies have registered “an office in the United States or Europe” to brand their products as “foreign,” causing difficulty for consumers trying to “discern domestic from foreign brands.”<sup>84</sup>

### III. CHINA'S NEW TRADEMARK LAW IN CONTEXT

China crafted the 2014 Trademark Law as part of its ambitious national strategy for intellectual property. The new trademark law meets China's goal of being as an intellectual property creator, as the law indeed will increase the production of trademark applications and registrations.

#### *A. China's National Intellectual Property Strategy*

On June 5, 2008, China's State Council released the National Intellectual Property Strategy (the Strategy).<sup>85</sup> The ambitious Strategy sets forth several important goals in positioning China to become the new leader in intellectual property (IP) creation and generation.<sup>86</sup> Gone is the

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was “15 times that of last year” and popular items included maternity commodities, children's products, and healthcare products).

83. Tadanori Yoshida, *Counterfeit Products Driving Chinese Shoppers Overseas*, NIKKEI ASIAN REV. (Jan. 26, 2016), <http://asia.nikkei.com/Business/Consumers/Counterfeit-products-driving-Chinese-shoppers-overseas> [https://perma.cc/27TB-8KQR].

84. See Qiu, *supra* note 79.

85. See Guo Fa, *State Council Issued a Notice of National Intellectual Property Strategy*, no. 18 (2008), [http://www.gov.cn/zwqk/2008-06/10/content\\_1012269.htm](http://www.gov.cn/zwqk/2008-06/10/content_1012269.htm); *Compendium of China National Intellectual Property Strategy Issued*, SIPO (June 12, 2008), [http://english.sipo.gov.cn/news/ipspecial/200904/t20090417\\_453098.html](http://english.sipo.gov.cn/news/ipspecial/200904/t20090417_453098.html); *Outline of the National Intellectual Property Strategy*, WIPO, <http://www.wipo.int/edocs/lexdocs/laws/en/cn/cn021en.pdf> [https://perma.cc/CBH5-HT4W] [hereinafter *The Strategy*]. In the past, China was concerned with intellectual property enforcement and passed law and established policy to enforce intellectual property rights. See generally Haiyan Liu, *The Policy and Targets of Criminal Enforcement of Intellectual Property Rights in China and the United States*, 24 WASH. INT'L L.J. 137, 172 (2015) (explaining that intellectual property criminal offenses are crimes undermining the order of China's socialist market economy). China has turned a new page in its embrace of intellectual property rights. See generally Peter K. Yu, *The Second Coming of Intellectual Property Rights*, in 11 OCCASIONAL PAPERS IN INTELLECTUAL PROPERTY 16–26 (2006); Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle*, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS PLUS ERA 1, 173 (Daniel J. Gervais ed., 2007).

86. Paragraph 7 of the Strategy focuses on China's ambition for independent intellectual property. See *The Strategy*, *supra* note 85, at 3 (“The level of the self-relied intellectual property will be higher by a large margin and the quantity of intellectual property will be greater. China will rank among the advanced countries of the world in terms of the annual number of patents for inventions granted to the domestic applicants, while the number of overseas patent applications filed by Chinese applicants should greatly increase. A number of world-famous brands will emerge. The proportion of the GDP accounted for by the value of core copyright industries will greatly increase. China should own the rights to a number of high-quality new varieties of plants and high-level layout-designs of integrated circuits. Trade secrets, geographical indications, genetic resources, traditional knowledge as well as folklores will be effectively protected and reasonably utilized.”).

China as imitator and infringer. No longer is China the follower and user of IP created by the West. The Strategy calls to significantly increase China's capability to create IP, enhance the effects of IP employment, and fully capitalize on the market value of IP assets.<sup>87</sup> The Strategy desires to improve IP protection by expanding IP administration capabilities and elevating intellectual property rights (IPR) capabilities through the establishment of a national IPR information public service platform.<sup>88</sup> The Strategy adopts several measures to meet the ambitious goals.<sup>89</sup> The Strategy includes, among other measures, the promotion of competitiveness in the international market.<sup>90</sup>

To be more specific with regard to trademarks, the Strategy insists that China will have globally recognized, famous brands within the next five years.<sup>91</sup> Chinese enterprises "should be encouraged" to register their trademarks overseas and to participate in international competition.<sup>92</sup> The Strategy implores Chinese enterprises to have trademark strategies and

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87. *See id.* ("The benefits of utilizing . . . IPRs . . . will be increased significantly and the proportion of products rich in IPRs should grow significantly. Enterprises should make progress in improving their system for managing intellectual property, invest more in the area of intellectual property and significantly improve their capacity to utilize intellectual property in market competition. A number of preponderant enterprises with famous brands, core intellectual property and rich experience in utilizing the intellectual property system will emerge.").

88. Paragraph 7 of the Strategy sets forth: "The protection of IPRs will be significantly improved. Infringement of IPRs, such as piracy and counterfeiting, should be significantly reduced, the expense of protecting intellectual property right will decrease a great deal and abuse of intellectual property should be effectively curbed." *Id.*

89. *See* Section V of the Strategy for a list of specific strategies relating to various intellectual property. *Id.* at 8.

90. *Id.*

91. Paragraph 7 of the "Goals for the next five years" of the Strategy ("A number of world famous brands will emerge" and a "number of preponderant enterprises with famous brands . . . will emerge."). *Id.* at 3.

92. Section IV, subsection 2 "Trademark" of the Strategy sets forth an action plan for trademarks. *Id.* at 6 ("(21) Protect the lawful rights and interests of trademark holders and consumers effectively. Strengthen our capacity to enforce the law and take strict measures for curbing counterfeiting and other infringements to maintain fair competition and good order in the market. (22) Support enterprises in carrying out their trademark strategies and encourage them to utilize their own trademarks in business activities. Enterprises should be encouraged to enrich the meaning of their trademarks, increase the added value and improve the reputation of their trademarks, and establish their well-known trademarks. Enterprises should also be encouraged to register their trademarks overseas, to protect rights and interests in their trademarks, and to participate in international competition. (23) Make full use of trademarks in the industrialization of agriculture. Market entities need to be helped to register and use their trademarks to improve the quality of their farm products, ensure food safety and raise the added value of their farm products and their competitiveness on the market. (24) Enhance the administration of trademarks. Efficiency of trademark examination needs to be improved, the time for examination needs to be shortened, and the quality of examination needs to be improved. Market rules need to be respected, and issues related to the determination of well-known trademarks, famous trademarks, well-known commodities, famous-brand products and high quality brands need to be truly solved.").

implement the strategies in their businesses.<sup>93</sup> The Strategy dictates that China will “make full use of trademarks in the industrialization of agriculture.”<sup>94</sup> That means trademarks will be used “to improve the quality of their farm products, ensure food safety and raise the added value of their farm products and their competitiveness on the market.”<sup>95</sup>

To implement the Strategy,<sup>96</sup> China formulated a new national action plan for intellectual property by releasing the “Action Plan for Deep Implementation of National Intellectual Property Rights Strategy” (2014–2020) (the “Action Plan”) on January 4, 2014.<sup>97</sup> Consistent with the Strategy and the Action Plan, China comprehensively revised its trademark law in 2013, the third amendment of the Trademark Law.<sup>98</sup>

### *B. New Trademark Law for New Powerhouse Status*

The newly revised Trademark Law became effective on May 1, 2014.<sup>99</sup> China enacted its first Trademark Law in 1982 after Deng Xiaoping modernized the Chinese society and economy by opening China to foreign investment in 1979.<sup>100</sup> Subsequently, with the desire to join the World Trade Organization (WTO), China substantially revised its Trademark Law in 1993 and 2001 to be in compliance with the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).<sup>101</sup> From 2001 to 2014, between the second and third major revisions of China's

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93. *Id.*

94. *Id.*

95. *Id.*

96. For a critique of the Strategy, see for example, Peter K. Yu, *Five Oft-Repeated Questions About China's Recent Rise as a Patent Power*, 2013 CARDOZO L. REV. DE NOVO 78, 88–96 (2013) (providing an analysis of the Strategy and asserting that China's development of its independent innovation policies will have significant impact on the international intellectual property development system).

97. *China Issues the Further Implementation of the National IP Strategy Action Plan (2014–2020)*, SIPO, [http://english.sipo.gov.cn/news/official/201501/t20150114\\_1061802.html](http://english.sipo.gov.cn/news/official/201501/t20150114_1061802.html) [<https://perma.cc/CK6W-QQTZ>] (A copy of the Action Plan is on file with the author).

98. *Trademark Law of the People's Republic of China*, WIPO (Aug. 30, 2013), [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=341321](http://www.wipo.int/wipolex/en/text.jsp?file_id=341321).

99. See Zhang Mao, *supra* note 15; Joseph S. Yang, *China: The New Trademark Law in Detail*, INT'L TRADEMARK ASS'N (Oct. 15, 2013), <http://www.inta.org/INTABulletin/Pages/CHINATheNewTrademarkLawinDetail.aspx> [<https://perma.cc/KNU8-VVQQ>].

100. See Xuan-Thao Nguyen, *Trademark Apologetic Justice: China's Trademark Jurisprudence on Reputational Harm*, 15 U. PA. J. BUS. L. 131, 140 (2012); IMMANUEL, C.Y. HSU, *THE RISE OF MODERN CHINA* 858 (6th ed. 1999) (tracing the rise of foreign investment in China after the historic visit by President Richard Nixon).

101. See generally Joseph A. Massey, *The Emperor is Far Away: China's Enforcement of Intellectual Property Rights Protection, 1986–2000*, 7 CHI. J. INT'L L. 231, 236 (2006) (noting that with accession to the WTO in 2001, China made revisions to its trademark laws and regulations); Ruixue Ran, *Well-Known Trademark Protection in China: Before and After the TRIPS Amendments to China's Trademark Law*, 19 UCLA PAC. BASIN L.J. 231, 231 (2002) (analyzing the 2001 China Trademark Law).

Trademark Law, China rapidly transformed itself economically and currently reigns as the world's second largest economy.<sup>102</sup>

With the status as the world's second largest economy, China's newly revised Trademark Law reflects its ambition to "generate significant economic . . . benefits for" not only China but to also "support the growth of the global economy."<sup>103</sup> To meet China's ambition, the new Trademark Law streamlines and optimizes the registration procedures for trademarks.<sup>104</sup> For example, the new Trademark Law expands the scope of protection to cover sound marks<sup>105</sup> and permits applicants to apply for registration of the same trademark in multiple classes of goods or services.<sup>106</sup> The multi-class application is a major departure from the old trademark law of single-class trademark application<sup>107</sup> and brings China in line with the Madrid Agreement for International Registration of Marks and its Protocols.<sup>108</sup> The Trademark Law modernized the process by allowing for the electronic filing of trademark applications.<sup>109</sup> The new Trademark Law enhances the efficiency of the trademark registration

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102. Peter K. Yu, *Sinic Trade Agreements*, 44 U.C. DAVIS L. REV. 953, 989 (2011) ("China is the world's second largest economy, exporter, and trading nation, up from the thirty-second largest trading nation when the country was first reopened to Western trade.").

103. Minister Zhang Mao's Statement, *supra* note 15.

104. *Id.* ("The newly amended Trademark Law of the People's Republic of China, which took effect on May 1, 2014, is the latest major step in enhancing the country's IP system. The new trademark law streamlines trademark registration procedures and strengthens the legal protection of trademarks in China in line with international standards.").

105. Sound is now included in Article 8 of the new Trademark Law: "An application for trademark registration may be filed for any mark including word, design, letter, number, 3-D mark, or color combination, or sound, or the combination of the elements above, that can distinguish the commodities of the natural person, legal person or other organization from those of others." 中华人民共和国商标法 (根据2013年8月30日全国人民代表大会常务委员会《关于修改〈中华人民共和国商标法〉的决定》修正) [Law of the People's Republic of China on Trademark Law (Amendment of the Decision of the Standing Committee of the National People's Congress on August 30, 2013, on the Revision of the Trademark Law of the People's Republic of China)] 2014 Trademark Law, art. 8 (2014) [hereinafter 2014 Trademark Law] *translated in* BRIDGE IP LAW COMMENTARY (2014), <http://www.chinaiplawyer.com/full-text-2013-china-trademark-law/> [<https://perma.cc/ZPQ6-G666>].

106. *See* 2014 Trademark Law, art. 22 ("The applicant can apply the same trademark for goods in different classes with an application.").

107. *See* 2001 Trademark Law, art. 20 ("If an applicant intends to use the same trademark on goods in different classes, he shall submit an application for each class on the basis of the specified form of classification of goods.").

108. *See* Madrid Agreement Concerning the International Registration of Marks art. 3(2), April 14, 1891, 828 U.N.T.S. 389 (as amended Sept. 28, 1979) (providing that "the applicant must indicate the goods or services in respect of which protection of the mark is claimed and also, if possible, the corresponding class or classes"). *Madrid Agreement Concerning the International Registration of Marks*, WIPO (Sept. 28, 1979), [http://www.wipo.int/wipolex/en/wipo\\_treaties/text.jsp?file\\_id=283530](http://www.wipo.int/wipolex/en/wipo_treaties/text.jsp?file_id=283530).

109. *See* 2014 Trademark Law, art. 22 ("The trademark registration applications and other relevant documents can be filed in writing or by other electronic means of data transmission.").

system and allows the applicant an opportunity to make corrections or clarifications instead of immediately dismissing the application.<sup>110</sup> Likewise, the new Trademark Law improves trademark opposition and sets time limits for the review and adjudication of trademark opposition.<sup>111</sup>

China's trademark right is based on registration.<sup>112</sup> The new Trademark Law continues to emphasize the "right to exclusive use" of a trademark that can only be bestowed on the "trademark registrants."<sup>113</sup> Certain conduct deemed to be an infringement of the exclusive right to use a registered trademark is listed in Article 57 of the new Trademark Law.<sup>114</sup> Owners of registered trademarks can seek higher damages, punitive damages, and statutory damages in infringement cases.<sup>115</sup> Balancing the

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110. See 2014 Trademark Law, art. 29 ("Where the content of trademark registration application is deemed to require further explanation or revision in the course of examination, the Trademark Office may require the applicant to submit further explanation or revision. Where no explanation or revision is given by the applicant, a lack of said revision or explanation will not affect the Trademark Office's examination decision.").

111. See 2014 Trademark Law, art. 35 ("Where an opposition is filed against a trademark application published after a preliminary examination, the Trademark Office shall hear the facts and grounds submitted by the opposing party as well as the opposed, shall make a decision on whether or not to approve the application for registration within the twelve months from the date of publication after investigation and verification, and shall notify the opposing party and the opposed of its decision, in writing. If an extension is needed, upon the approval of the department of industry and commerce administration under the State Council, the time limit can be extended a further three months.").

112. See generally An Qinghu, *Well-Known Marks & China's System of Well-Known Mark Protection*, 95 TRADEMARK REP. 705, 713–14 (2005) (stating that "the protection of trademarks in China is based on registration, which means that marks not registered will not be protected"); 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 (2014) (mapping the evolution of trademark law in the last 30 years).

113. See 2014 Trademark Law, art. 3 ("Trademark registrants shall be entitled to the right to exclusive use of their trademarks and shall be protected by law.").

114. Article 57 of the 2014 Trademark Law sets forth that the following constitutes an infringement of the exclusive right to use a registered trademark. See 2014 Trademark Law, art. 57 ("(1) Using a trademark that is identical with a registered trademark in connection with the same goods without the authorization of the owner of the registered trademark; 2) Using a trademark that is similar to a registered trademark in connection with the same goods, or that is identical with or similar to a registered trademark in connection with the same or similar goods, without the authorization of the owner of the registered trademark, which may cause public confusion; 3) Selling goods that violate the exclusive right to use a registered trademark; 4) Counterfeiting, or making, without authorization, representations of another party's registered trademark, or selling such representations; 5) Altering another party's registered trademark without authorization and selling goods bearing such an altered trademark; 6) Help any others to infringe the exclusive right to use its registered trademark with intention to provide convenience for infringing the exclusive right to use its registered trademark; 7) Otherwise causing prejudice to another party's exclusive right to use its registered trademark.").

115. 2014 Trademark Law, art. 63 ("The amount of damages for infringing the exclusive right to use a trademark shall be actual losses that the right owner has suffered as a result of the infringement during the period of the infringement; where the losses suffered by the right owner cannot be determined, the amount of damages for trademark infringement shall be the profits that the infringer has earned as a result of the infringement during the period of the infringement; where the losses suffered by the right owner, or the profits earned by the infringer, cannot be determined, the amount

rights of others, there are some restrictions of trademark rights based on registration.<sup>116</sup> These restrictions include a good faith use of a registered trademark by others in a generic or descriptive manner,<sup>117</sup> while a trademark owner's nonuse of a registered trademark for more than three years may result in failure to obtain damages with respect to trademark infringement.<sup>118</sup>

Overall, the new Trademark Law emphatically modifies and improves the trademark application and registration system. The improvements will increase the number of trademark applications being registered, streamline the application process, and propel China's status firmly forward as the world's new trademark powerhouse with the most registered trademarks.<sup>119</sup> The State Intellectual Property Office (SIPO) of the People's Republic of China has proudly reported, in its white paper, *2014 Intellectual Property Rights Protection in China*, that trademark applications for registration reached 2,285,400 in 2014, reflecting an

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of damages shall be determined based on a reasonable amount that would be paid for a licensing royalty for the trademark right. If there is malicious infringement and an existence of serious circumstances, the amount may be more than one up to three times the aforesaid determined amount. The amount of damages will also include reasonable expenses the right owner has suffered to prevent the infringement. For the purpose of determining the amount of damages, where the account books and information related to the infringement are held by the infringer, and where the rights owner has presented as much proof of its claims as is practically possible, a People's Court may order the infringer to submit such account books and information. If the infringer refuses to submit such account books and information, or submit a false version thereof, a People's Court may determine the amount of damages with reference to the right owner's claims and proof. Where the actual losses suffered by the right owner, the profits earned by the infringer, or the licensing royalties of trademark infringement cannot be determined, a People's Court shall award damages up to RMB 3,000,000, depending on the facts of the case.").

116. 2014 Trademark Law, art. 59 ("The holder of the exclusive right to use a registered trademark shall have no right to prohibit others from properly using the generic name, graphics or models of a commodity, or information directly indicating the quality, main raw materials, functions, purposes, weight, quantity or other features of the commodity, or the names of geographical locations as contained in the registered trademark. The holder of the exclusive right to use a registered trademark that is a three-dimensional symbol shall have no right to prohibit others from properly using the forms shaped by the inherent nature of a commodity, commodity forms necessary for achieving technological effects or forms that bring substantive value to the commodity as contained in the registered trademark.").

117. *Id.*

118. Article 64 of 2014 Trademark Law limits the exclusive right in trademark. *See* 2014 Trademark Law, art 64 ("Where the holder of the exclusive right to use a registered trademark claims for compensation, and the alleged infringer counterclaims that the said holder has not used the registered trademark, the relevant People's Court may require the holder to furnish evidence of its actual use of the registered trademark during the three years prior to the lawsuit. The alleged infringer shall not be liable for compensation if the said holder is neither able to prove its actual use of the registered trademark during the three years prior to the lawsuit, nor able to prove other losses suffered as a result of the infringement.").

119. Mao, *supra* note 15.

increase of 21.4% from previous years.<sup>120</sup> For the first time, China broke through the two million threshold.<sup>121</sup> SIPO touted that for the last “13 consecutive years,” China ranked “1<sup>st</sup> in the world” in trademark applications.<sup>122</sup> With the new Trademark Law, China has positioned itself to maintain its status as the global trademark producer.

#### IV. A CRITIQUE OF THE NEW TRADEMARK LAW

Building public trust in trademarked goods requires that consumer protection is the cornerstone of trademark rights. China's new Trademark Law ignores consumers, refutes how rights in trademark intertwine consumer protection with trademark investment, and erects an ineffectual “good faith” principle without meaningful remedies for the consuming public and competitors in the marketplace.

##### *A. The Missing Consuming Public*

How does a person or entity acquire rights in a trademark and what is the value in a trademark? This question requires an understanding of the purpose of trademarks. A trademark is a shorthand communication between the producer and the consuming public about the goods or services being offered.<sup>123</sup> This means the producer must present the trademark in association with the goods or services in the channel of communication, i.e., in the channel of trade.<sup>124</sup> The producer must advertise the trademark in connection with the products or services.<sup>125</sup> The producer must sell the products or services in association with the trademark.<sup>126</sup> In order for the consuming public to engage in

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120. ST. INTELL. PROP. OFF. OF THE PEOPLE'S REPUBLIC OF CHINA, 2014 INTELLECTUAL PROPERTY RIGHTS PROTECTION IN CHINA, <http://english.sipo.gov.cn/laws/whitepapers/201507/P020150722307566924877.pdf>.

121. *Id.*

122. *Id.*

123. *New Kids on the Block v. News Am. Pub., Inc.*, 971 F.2d 302, 305 n.2 (9th Cir. 1992) (“In economic terms, trademarks reduce consumer search costs by informing people that trademarked products come from the same source.”).

124. In order to obtain priority in a trademark, the producer must engage in lawful use of the trademark in commerce. *CreAgri, Inc. v. USANA Health Scis., Inc.*, 474 F.3d 626, 630 (9th Cir. 2007) (agreeing with the Patent and Trademark Office's policy that “only lawful use in commerce can give rise to trademark priority”); *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219, 1225 (10th Cir. 2000) (adopting similar requirement of trademark priority begins with lawful use of the trademark in commerce).

125. *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holdings, Inc.*, 696 F.3d 206, 226–27 (2d Cir. 2012) (noting that a trademark owner invests substantial amount in building a reputation and good will in a trademark in order to create a brand with wide recognition).

126. The producer of goods or services must keep in mind the significance of use in order to acquire trademark right. *Lloyd's Food Prods., Inc. v. Eli's, Inc.*, 987 F.2d 766, 768 (Fed. Cir. 1993) (“A service mark is different from a mark for goods, especially in the manner it is used in commerce. The legally significant use giving rise to rights in a mark for goods is derived from the placing of the

communication with the producer, the trademark must be in use with the product and provide the consuming public an opportunity to know the producer's goods or services.<sup>127</sup> By seeing, touching, and hearing about the trademark in association with the goods or services being offered, the consuming public may decide to either embrace or reject what the producer has offered.<sup>128</sup> Ultimately, the value of a trademark is "the saving in search costs made possible by the information that the trademark conveys about the quality of the trademark owner's brand."<sup>129</sup> Through public recognition, the producer will reap "the financial, reputation-related rewards associated with a desirable product" and the trademark law thereby "encourages the production of quality products."<sup>130</sup>

Consequently, the consuming public is the ultimate decider whether the producer has a right in the trademark.<sup>131</sup> Moreover, the consuming public structures the producer's scope of trademark rights.<sup>132</sup> No matter the amount the producer is trying to manufacture or advertise, the consuming public may reject the products or services due to quality, price,

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mark in some manner on the goods either directly or on their containers or packaging. A service mark, on the other hand, entails use in conjunction with the offering and providing of a service. This makes all the more important the use of the mark in "sales" or "advertising" materials of different descriptions.").

127. *Cullman Ventures, Inc. v. Columbian Art Works, Inc.*, 717 F. Supp. 96, 113 (S.D.N.Y. 1989) ("Trademark rights develop when goods bearing the mark are placed in the market and followed by continuous commercial utilization."); *Uitgeverij Crux v. W. Frederic Isler*, WIPO Case No. D2000-0575 ("A fundamental principle of trademark law is that rights in a trademark can be acquired through use, and such rights exist even though the trademark may not be registered.").

128. *Kraft Foods Grp. Brands v. Cracker Barrel Old Country Store, Inc.*, 735 F.3d 735, 739 (7th Cir. 2013) ("A trademark's value is the saving in search costs made possible by the information that the trademark conveys about the quality of the trademark owner's brand. The brand's reputation for quality depends on the owner's expenditures on product quality and quality control, service, advertising, and so on. Once the reputation is created, the firm will obtain greater profits because repeat purchases and word-of-mouth endorsements will add to sales and because consumers will be willing to pay a higher price in exchange for a savings in search costs and an assurance of consistent quality. These benefits depend on the firm's ability to maintain that consistent quality.").

129. *Id.* at 739–40.

130. *Qualitex Co., v. Jacobson Prods.*, 514 U.S. 159, 163–64 (1995).

131. *Kenner Parker Toys Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 353 (Fed. Cir. 1992) (noting that "a mark with extensive public recognition and renown deserves and receives more legal protection than an obscure or weak mark").

132. For example, the producer cannot prevent the third party from using a mark identical or similar to the producer's mark, unless the consuming public is likely to be confused. *Paletteria La Michoacana, Inc. v. Productos Lacteos Tocuambo S.A. De C.V.*, 69 F. Supp. 3d 175, 195 (D.C. 2014) ("Consumer opinion is dispositive because a fundamental purpose of trademark law is to create a marketplace in which consumers are not deceived or confused by competing merchants using similar marks."); *see also* *E.I. DuPont de Nemours v. Yoshida Int'l, Inc.*, 393 F. Supp. 502, 513 (E.D.N.Y. 1975) ("[The] purchasing public must be credited with at least a modicum of intelligence, or with a minimum capacity for discrimination. The controlling objective standard of consumer prudence is the ordinary purchaser's general impression when buying under the normally prevalent conditions of the market and giving the attention such purchasers usually give in buying that class of goods.").

demand, fads, and availability of alternatives.<sup>133</sup> If the consuming public's appetite decreases, the producer faces the possibility of losing the trademark because the producer cannot sustain its business with the decimating level of sales corresponding with the declining use of the trademark. In other words, trademarks are dynamic in the marketplace.<sup>134</sup> In the life of a trademark, the trademark can be strong or weak depending on the market demand for the products or services associated with the trademark.<sup>135</sup> The fluctuation of a trademark's strength in the marketplace reflects the level of rights the producer has in the trademark.<sup>136</sup> Accordingly, the government cannot be the sole arbiter of trademark rights. As such, the government cannot be the sole decider that a person or entity has rights in a trademark while the consuming public does not recognize the trademark in the marketplace<sup>137</sup> or finds the trademark is too weak for protection against others for likelihood of confusion.<sup>138</sup>

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133. Deborah R. Gerhardt, *Consumer Investment in Trademark*, 88 N.C. L. REV. 427, 450 (2010) (“A brand can fail because consumers decline to invest in it from the beginning or because consumers withdraw an investment made previously. If a brand succeeds, its meaning will not remain constant. Consumer perceptions about trademarks are dynamic and can change over time and in response to experience and other stimuli.”).

134. *Eniva Corp. v. Global Water Solutions, Inc.*, 440 F. Supp. 2d 1042, 1049 (D. Minn. 2006) (observing “trademarks are dynamic in that they can gain or lose strength over time. As such, arguments made with respect to a certain trademark also may change over time”).

135. A mark can begin conceptually weak but becomes strong later in the marketplace or a mark may begin conceptually strong but becomes weak due to lack of consumer awareness in the marketplace. *Water Pik, Inc. v. Med-Systems, Inc. Eyeglasses*, 726 F.3d 1136, 1153–54 (10th Cir. 2013) (noting that commercial strength is “the marketplace recognition value of the mark” and that “[e]vidence of a mark’s commercial strength can make up for conceptual weakness because a conceptually weak mark may become strong by virtue of acquired consumer awareness.” A “mark may enjoy anything from a high degree of commercial strength to a low degree”).

136. *Petro Stopping Ctrs., L.P. v. James River Petroleum, Inc.*, 130 F.3d 88, 93 (4th Cir. 1997) (ruling that the “strength of a mark ultimately depends on the degree to which the designation is associated by prospective purchasers with a particular source”); *George & Co. LLC v. Imagination Entm’t Ltd.*, 575 F.3d 383, 395–96 (4th Cir. 2009) (ruling that the LCR trademark was weak because inadequate evidence to support that consumers associated it with plaintiff). A conceptually weak mark, if it does not become a strong mark in the marketplace, may not receive consumer recognition and therefore no trademark right and protection will be accorded to the mark. *Herman Miller, Inc. v. Palazzetti Imports & Exports, Inc.*, 270 F.3d 298, 316 n.8 (6th Cir. 2001) (“When determining the commercial or marketplace strength of a mark, the courts look to the same kind of evidence of real world recognition of the mark as is used to decide the presence or absence of secondary meaning to determine whether a non-inherently distinctive designation is or is not a valid mark.”).

137. If the consuming public does not recognize a descriptive trademark, the trademark has no protection under the law due to lack of secondary meaning. Evidence of secondary meaning includes “direct consumer testimony; survey evidence; exclusivity, manner, and length of use of a mark; amount and manner of advertising; amount of sales and number of customers; established place in the market; and proof of intentional copying by the defendant.” *Filipino Yellow Pages v. Asian J. Publ’n*, 198 F.3d 1143, 1151 (9th Cir. 1999).

138. See *Water Pik, Inc.*, 726 F.3d at 1154–55 (ruling that the trademark SinuCleanse is weak in the marketplace and such finding weighs in against the trademark holder in the likelihood of confusion analysis because the trademark owner’s consultant had conceded that “the average person on the

Recognizing the role of the consuming public in trademark right requires the trademark law to fashion a system of priority based on use,<sup>139</sup> or constructive use, of the trademark.<sup>140</sup> The rights in a trademark stems from the use of the trademark in commerce where the consuming public comes to associate the trademark with the product and distinguishes the trademarked product from those offered by others.<sup>141</sup> In other words, trademark rights exist only “as a right *appurtenant to an established business or trade* in connection with which the mark is employed.”<sup>142</sup>

The trademark law must also protect the consuming public by considering unfair competition in assessing whether a proposed trademark should be registered or not with regard to prior registrants and users of a similar or identical trademark.<sup>143</sup> If the public is likely to be confused by the proposed trademark registration, the public’s interest must be protected and the proposed trademark registration must be rejected.<sup>144</sup> Anti-unfair

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street” would not “know what SinuCleanse is” and the consultant “had no data on whether the average consumer was aware of the brand”).

139. “[O]wnership of a mark requires both appropriation and use in trade; and that ownership of a mark and the exclusive right to a mark belongs to the one who first uses the mark on goods placed on the market.” *Signature Guardian Sys., Inc. v. Lee*, 209 U.S.P.Q. 81, 87 (T.T.A.B. 1980) (citing *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90 (1918)); *New West Corp. v. NYM Co. of Calif., Inc.*, 595 F.2d 1194, 1200 (9th Cir. 1979) (“A party may acquire rights in a designation which may be superior to any rights that a subsequent user may acquire in a confusingly similar term through use thereof in advertising or promotional material connected with the publicizing and/or offering for sale of goods or services, providing that this use has been of such nature and extent as to create an association of the goods or services and the mark with the user thereof.”).

140. *Allard Enter., Inc. v. Advanced Programming Res., Inc.*, 249 F.3d 564, 572 (6th Cir. 2001) (“Ownership rights flow only from prior use—either actual or constructive. Federal registration of a trademark or service mark cannot create rights and priority over others who have previously used the mark in commerce, but federal registration is prima facie evidence of the registrant’s ownership and exclusive right to use the mark, and constitutes constructive use of the mark.”).

141. *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 97 (1918) (recognizing that the right to a particular mark grows out of its use, not its mere adoption; its function is simply to designate the goods as the product of a particular trader and to protect his good will against the sale of another’s product as his; and it is not the subject of property except in connection with an existing business).

142. *Id.*

143. *See In re Espinosa Cigars, LLC*, 2014 WL 5282252 (T.T.A.B. Oct. 3, 2014) (affirming the registration refusal of the applicant’s trademark La Bomba for cigars on the ground of likelihood of confusion with the registered La Bomba for cigars upon an analysis of factors such as similarity of the goods, trade channels, purchaser’s degree of care in purchasing decision, classes of consumers for the goods, similarity of the marks).

144. In the United States, the factors to analyze for likelihood of confusion were established by *Application of E.I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1361 (C.C.P.A. 1973) (“(1) The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression[;] (2) The similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use[;] (3) The similarity or dissimilarity of established, likely-to-continue trade channels[;] (4) The conditions under which and buyers to whom sales are made, i. e. “impulse” vs. careful, sophisticated purchasing[;] (5) The fame of the prior mark (sales, advertising, length of use)[;] (6) The number and nature of similar marks in use on similar goods[;] (7) The nature and extent of any actual confusion[;] (8) The length

competition must be at the heart of trademark law in according trademark rights to a person or entity.<sup>145</sup>

Unfortunately, China's new Trademark Law ignores the consuming public's role in trademark rights. For example, with respect to trademark registration, Article 30 states that registration will be refused by the Trademark Office if the trademark application is "identical with or similar to a registered trademark used in connection with the same or similar goods."<sup>146</sup> The law does not consider whether the proposed trademark is likely to cause consumer confusion or mistake or to deceive the consumer.<sup>147</sup>

Article 58 of the new Trademark Law also declines to protect the consuming public against unfair competition by sending the concern to a separate body of law, the Anti-Unfair Competition Law of the People's Republic of China. The Trademark Law deliberately avoids protecting the

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of time during and conditions under which there has been concurrent use without evidence of actual confusion[;] (9) The variety of goods on which a mark is or is not used (house mark, "family" mark, product mark)[;] (10) The market interface between applicant and the owner of a prior mark: (a) a mere "consent" to register or use[;] (b) agreement provisions designed to preclude confusion, i.e. limitations on continued use of the marks by each party[;] (c) assignment of mark, application, registration and good will of the related business[;] (d) laches and estoppel attributable to owner of prior mark and indicative of lack of confusion[;] (11) The extent to which applicant has a right to exclude others from use of its mark on its goods[;] (12) The extent of potential confusion, i.e., whether de minimis or substantial[;] (13) Any other established fact probative of the effect of use." See also *In re Dixie Restaurants Inc.*, 105 F.3d 1405 (Fed. Cir. 1997) (applying the DuPont factors and affirming the registration refusal).

145. Protecting the consuming public from unfair competition is seen in concurrent registrations of two identical marks. See 15 U.S.C. § 1052(d) ("If the Director determines that confusion, mistake, or deception is not likely to result from the continued use by more than one person of the same or similar marks under conditions and limitations as to the mode or place of use of the marks or the goods on or in connection with which such marks are used, concurrent registrations may be issued to such persons when they have become entitled to use such marks as a result of their concurrent lawful use in commerce prior to (1) the earliest of the filing dates of the applications pending or of any registration issued.").

146. See 2014 Trademark Law, art. 30 ("Where a trademark application does not comply with the relevant provisions in this Law or is identical with or similar to a registered trademark used in connection with the same or similar goods, its registration shall be refused by the Trademark Office after examination and the mark shall not be published.").

147. Compare 2014 Trademark Law, art. 30, with 15 U.S.C. § 1052(d) ("No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it consists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive."), and *In re Electro-Vox, Inc.*, 134 U.S.P.Q. (BNA) 463 (T.T.A.B. 1962) (overturning the registration rejection upon an analysis of likelihood of confusion and noting that registration for "ELECTRO VOX" for "intercommunications systems comprising a plurality of stations and switching mechanisms, paging and program distribution systems for use in connection therewith, and telephone systems" was rejected on the ground that the applicant's mark was so resembles the registered "ELECTRO-VOICE" for similar goods, as to be likely, to cause confusion or mistake or to deceive purchasers).

consuming public: “Where a party uses a famous trademark as registered, or unregistered, as an enterprise name and confuses the public, if it constitutes unfair competition, the infringer shall be handled in accordance with the Anti Unfair Competition Law of the People’s Republic of China.”<sup>148</sup>

Accordingly, Article 58 of the Trademark Law recognizes only registered and famous trademarks, ignoring nonregistered trademarks and non-famous registered trademarks, as worthy to be sent off to the agency administering the Anti-Unfair Competition Law.<sup>149</sup> That means only registered *and* well-known trademarks can rely on the Anti-Unfair Competition Law to fend off use of such trademarks by others that misleads the public.<sup>150</sup> The nonregistered trademarks and not-so-famous registered trademarks are disregarded, having no Anti-Unfair Competition Law protection, even though the public is being misled.<sup>151</sup> A mark is only “famous” as defined in Article 14 of the Trademark Law<sup>152</sup> and is protected against unauthorized registration under Article 13 of the Trademark Law.<sup>153</sup>

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148. 2014 Trademark Law, art. 58.

149. *Id.*

150. *Id.*

151. *Id.*

152. *See* 2014 Trademark Law, art. 14. A famous trademark, based on the parties’ request, can be defined when the facts in each case dealing with the relevant trademark support such a conclusion. *See id.* (“The following factors shall be considered in making such a determination: 1) The degree of public recognition of the mark in its trading areas; 2) How long the mark has been in use; 3) The duration and extent of advertising and publicity of the mark, and the geographical extent of the trading areas in which the mark is used; 4) The protection of the mark as a famous trademark; 5) Other reasons for the fame of the trademark. In examining a trademark registration and in the course of investigating cases involving illegal use of trademarks handled down by the authorities for industry and commerce may, upon a claim filed by the parties involved in accordance with Article 13 of this law, the Trademark Office may make a determination as to whether a trademark is a famous trademark. In the process of handling a trademark dispute, the parties may, in accordance with Article 13 of this law, make such claims in regard to whether a trademark is famous; the trademark review and adjudication board may, in accordance with the needs of a specific case, make a determination as to whether a trademark is famous. In the course of hearing civil and administrative trademark cases, the parties involved may claim rights according to the provisions of Article 13 of this Law, and according to the specific circumstances and needs of each case, the Supreme Court-appointed People’s Courts may make a determination, based on the specific circumstances and needs of each case, as to whether a mark is famous. A producer or operator shall not use the words “Famous Trademark” on its goods, packaging, or container, or in its advertising, exhibitions or other commercial activities.”)

153. 2014 Trademark Law, art. 13 (“Should any rights of a trademark well known to the relevant public be infringed, the trademark holder can follow the relevant provisions in this law to request the protection of the said famous trademark. Where a mark is a reproduction, imitation, or translation of a third-party’s famous trademark which has not been registered in China and where the goods are identical or similar, which may cause public confusion and damage the interests of the registrant of the famous mark, no registration shall be granted and the use of the mark shall be prohibited. Where a mark is a reproduction, imitation, or translation of a third-party’s famous trademark which has been registered in China and where the goods are not identical or dissimilar, which may mislead the public

The only time the new Trademark Law touches on the consuming public is in Article 57, which mentions conduct that constitutes infringement.<sup>154</sup> Specifically, paragraph 2 of Article 57 provides that using a trademark that is “similar to a registered trademark in connection with the same goods, or that is identical with or similar to a registered trademark in connection with the same or similar goods, without the authorization of the owner of the registered trademark, which may cause public confusion” constitutes infringement.<sup>155</sup> This means the new law extends protection only to registered trademarks.<sup>156</sup> If the consumers are confused in the marketplace between a junior user of a mark that is identical or similar to a senior’s mark, the consumers are not protected if the senior’s mark is unregistered.<sup>157</sup> The confused public, who deserves protection against unfair competition, receives it only when the senior’s unregistered mark is deemed famous under Article 58 and the protection comes from the Anti-Unfair Competition Law, not Trademark Law.<sup>158</sup>

Moreover, the remaining paragraphs 1, 3, 4, 5, 6, and 7 of Article 57 do not include the likelihood of public confusion as a requirement for finding trademark infringement.<sup>159</sup> Perhaps the government, in drafting the new law, assumes that public confusion is universally understood and there is no need to include it in the remaining six paragraphs describing infringement. However, protecting the consuming public is the cornerstone of trademark law.<sup>160</sup> It is difficult to imagine the reasons for drafting trademark infringement law without incorporating the

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and cause injury to the interests of the registrant of the famous trademark, no registration shall be granted and the use of the mark shall be prohibited.”)

154. 2014 Trademark Law, art. 57 (“Any of the following constitutes an infringement of the exclusive right to use a registered trademark: 1) Using a trademark that is identical with a registered trademark in connection with the same goods without the authorization of the owner of the registered trademark; 2) Using a trademark that is similar to a registered trademark in connection with the same goods, or that is identical with or similar to a registered trademark in connection with the same or similar goods, without the authorization of the owner of the registered trademark, which may cause public confusion; 3) Selling goods that violate the exclusive right to use a registered trademark; 4) Counterfeiting, or making, without authorization, representations of another party’s registered trademark, or selling such representations; 5) Altering another party’s registered trademark without authorization and selling goods bearing such an altered trademark; 6) Help any others to infringe the exclusive right to use its registered trademark with intention to provide convenience for infringing the exclusive right to use its registered trademark; 7) Otherwise causing prejudice to another party’s exclusive right to use its registered trademark.”).

155. *Id.*

156. *Id.*

157. *Id.*

158. *See* 2014 Trademark Law, art. 58.

159. *See* 2014 Trademark Law, art. 57.

160. *Vaad L’Hafotzas Sichos, Inc. v. Kehot Publ’n Soc.*, 935 F. Supp. 2d 595, 603 (E.D.N.Y. 2013) (“Consumer confusion is the cornerstone of trademark infringement.”); *Electro Source v. Brandess-Kalt-Aetna Grp., Inc.*, 458 F.3d 931, 941 (9th Cir. 2006) (protecting the public from confusion is one of the two cornerstone interests in trademark law).

requirement of likelihood of public confusion.<sup>161</sup> Yet, the missing public confusion requirement in the new law is, unfortunately, consistent with what other scholars have observed in the old law.<sup>162</sup>

### *B. The Missing Trademark Right as Property Right*

A trademark holder incurs costs in selecting a trademark for a product or service, testing the trademark in focus groups, advertising the goods by using the trademark, and selling the goods affixed with the trademark.<sup>163</sup> The trademark holder may incur additional costs associated with special marketing campaigns and expanding use of the trademark in new fields and territories.<sup>164</sup> These costs will increase if the trademark holder must police, defend, and enforce the trademark against unauthorized use.<sup>165</sup> The investment the trademark holder devotes to a trademark is beneficial to the holder, as the trademark holder receives in return the repeated purchase of its goods or services and the reputation and

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161. Typically, in a trademark case, “the cornerstone issue of likelihood of confusion is a legal question.” *Brown v. Quiniou*, 744 F. Supp. 463, 467 (S.D.N.Y. 1990); *Gruner & Jahr USA v. Meredith Corp.*, 991 F.2d 1072, 1077 (2d Cir. 1993) (stating “in order to succeed in a trademark infringement suit, that is, that there is a likelihood of confusion or, in other words, that numerous ordinary prudent purchasers are likely to be misled or confused as to the source of the product in question because of the entrance in the marketplace of defendant’s mark”).

162. See Yan Xu, *The Cultural and Psychological Characteristics of Chinese Consumers and Their Influence on the Trademark Law in China*, 15 HOUSTON BUS. & TAX L.J. 100, 116 (2015) (noting what others have commented on China’s trademark law and stated that “[w]hile the Chinese government previously considered the likelihood of confusion informally, it was not required by the 2001 Trademark law”).

163. See David J. Goldstone & Peter J. Toren, *The Criminalization of Trademark Counterfeiting*, 31 CONN. L. REV. 1, 4 (1998) (stating that companies spend significant sums in investment of their trademarks because “trademarks continue to serve their important traditional functions for both consumers and manufacturers). For consumers who cannot investigate the merits of every product they buy or service they use, trademarks can provide a uniquely reliable source of information about potential purchases. For manufacturers, trademarks crystallize the good will sometimes called “brand equity,” they have built up over time and ensure that customers will continue to purchase their products. A trademark serves many of the same functions for commercial entities that a signature does for individuals.” *Id.*

164. Xuan-Thao Nguyen & Jeffrey A. Maine, *Branding Taxation*, 50 GA. L. REV. 399 (2016) (focusing on the role of advertising campaign expenditures in building trademark reputation).

165. Depending on the amount in controversy, trademark infringement litigation costs range from \$375,000 to \$2 million. See INTEL. PROP. INS. SERVS. CORP., AIPLA 2013 REPORT OF ECONOMIC SURVEY (2013). Corporations often take “considerable action to cultivate, maintain and strengthen” their trademarks. *Lorillard Tobacco Co. v. S & M Cent. Serv. Corp.*, 2004 WL 2534378 \*5 (N.D. Ill. Nov. 8, 2004) (finding that the plaintiff took many steps to build its valuable trademarks including “(1) registering the trademarks with the United States Patent and Trademark Office); (2) manufacturing the Newport product through strict quality control standards; (3) investing substantial time, energy and money in advertising and promoting the Newport product; (4) training its sales personnel to be aware of counterfeit products so, like in this case, they can identify and report suspicious items; and (5) protecting the value of its trademarks by litigating against trademark infringers”).

goodwill accumulated in the trademark.<sup>166</sup> The trademark holder's right in the trademark is a private property right.<sup>167</sup> It belongs to the trademark holder.<sup>168</sup> It is exclusive, as others cannot have the same.<sup>169</sup> Business and government, respecting the private property right in trademarks, are cautioned against seeking divestiture of property rights in a trademark.<sup>170</sup>

The property right in the trademark, however, has boundaries, as the holder can only exclude others from using a mark that may cause the consuming public confusion.<sup>171</sup> The property right is intertwined with the

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166. *Union Nat'l Bank of Tex., Laredo, Tex. v. Union Nat'l Bank of Tex., Austin, Tex.* 909 F.2d 839, 843 n.11 (5th Cir. 1990) ("The financial investment in trademarks is often substantial. Millions of dollars are routinely spent by the corporate giants on the search for and promotion of that magic word or words that will move a product off the shelf, or bring in customers in droves. And the more indistinguishable competing products are, the fiercer the competition over, and protection of, the name. No doubt, for some corporations in this status-conscious era, their names are their most precious asset as long as the mere affixing of the name on a label guarantees millions in profits.")

167. *See generally Nat'l Geographic Soc. v. Classified Geographic*, 27 F. Supp. 655, 661 (D. Mass. 1939) (stating that it is "well settled that the right in the trademark with the goodwill symbolized by it are property rights which the court will protect against invasion"). *See also Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 413, 418 (1916) ("Common-law trademarks, and the right to their exclusive use, are, of course, to be classed among property rights; but only in the sense that a man's right to the continued enjoyment of his trade reputation and the good will that flows from it, free from unwarranted interference by others, is a property right, for the protection of which a trademark is an instrumentality."). The Court also observed that a trademark right is "not limited in its enjoyment by territorial bounds, but, subject only to such statutory regulations as may be properly made concerning the use and enjoyment of other property, or the evidences of title to the same, the proprietor may assert and maintain his property right wherever the common law affords remedies for wrong." *Id.*

168. *Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*, 299 U.S. 183, 194-95 (1936) (The good will that the mark symbolizes "is property in a very real sense, injury to which, like injury to any other species of property, is a proper subject for legislation. Good will is a valuable contributing aid to business-sometimes the most valuable contributing asset of the producer or distributor of commodities. And distinctive trade-marks, labels and brands, are legitimate aids to the creation or enlargement of such good will. It is well settled that the proprietor of the good will 'is entitled to protection as against one who attempts to deprive him of the benefits resulting from the same, by using his labels and trade-mark without his consent and authority.'" (quoting *McLean v. Fleming*, 96 U.S. 245, 252 (1877)).

169. *Hall v. Holstrom*, 289 P. 668, 671 (Cal. App. Ct. 1930) ("A trade-mark or design used as a sign is property, and is therefore susceptible of private ownership. The possession of a trade-mark, design, or sign entitles the owner thereof to its use to the exclusion of others.")

170. *Switzer Bros., Inc. v. Locklin*, 297 F.2d 39, 49 (7th Cir. 1961) ("It seems to us that divestiture of property rights in a trademark, by injunction against the mark's continued use, is a remedy which would seldom commend itself to equity in a private suit under the antitrust laws for injunctive relief and treble damages. Even in the context of suits by the United States to restrain conspiratorial monopolies, divestiture as a remedy is not without proscription.")

171. *New Kids on the Block v. News Am. Pub., Inc.*, 971 F.2d 302, 305 n.2 (9th Cir. 1992) ("A trademark is a limited property right in a particular word, phrase or symbol . . . Indeed, the primary cost of recognizing property rights in trademarks is the removal of words from (or perhaps non-entrance into) our language. Thus, the holder of a trademark will be denied protection if it is (or becomes) generic, i.e., if it does not relate exclusively to the trademark owner's product."). *Nu-Enamel Corp. of Ill. v. Armstrong Paint & Varnish Works*, 95 F.2d 448, 450 (7th Cir. 1938) ("Courts will not unduly extend monopolies under trademarks, but where a clear property right is shown and it is apparent that that right is being invaded and trespassed upon as in the present case, we

consuming public's right.<sup>172</sup> Protecting the consuming public from likelihood of confusion is the other side of the coin of recognizing the property right in the trademark.<sup>173</sup> If the trademark right is not protected, the trademark holder will cease to care about the trademark, and the "public trust" in the trademark will deteriorate.<sup>174</sup>

The property right in the trademark must be recognized by law so that the trademark holder owns the property right.<sup>175</sup> With the property right, the trademark holder can assign the ownership of the trademark along with the goodwill to an assignee.<sup>176</sup> The assignee will then step into

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shall not hesitate to grant relief. He who establishes a favorable reputation of merchandise under a known mark, brought about by extensive advertising and backed up by continuous manufacture of reputable products branded with a definite mark, which indicates not their character or purpose but their origin, shall be protected; and he who attempts to acquire the business which 'another has developed through many years of fair dealing and through the expenditures of vast sums in advertising and in establishing a good will,' must face the fact that his actions will meet with disapproval and condemnation.").

172. *G. Heileman Brewing Co., Inc. v. Anheuser-Busch, Inc.*, 873 F.2d 985, 997 (7th Cir. 1989) (stating that trademark law has two objectives: "(1) to prevent confusion among consumers as to the source of goods or services; and (2) to indicate ownership and permit the trademark owner to control the product's reputation"); *Magic Foam Sales Corp. v. Mystic Foam Corp.*, 98 N.E.2d 439, 441 (Ohio Ct. C.P. 1950) ("It decries the public being deceived by representations which give the goods a character and reputation which they do not possess or deserve so that the remedy granted is not based alone upon the property acquired by one owning symbols and names as trade marks but also on the broad principle that it will not permit fraud to be practiced upon the public nor upon private individuals."); see also *Hanover Star Billing*, 240 U.S. at 413-14 (observing that "[h]e cannot therefore be allowed to use names, marks, letters, or other indicia, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person"; it is plain that in denying the right of property in a trademark it was intended only to deny such property right except as appurtenant to an established business or trade in connection with which the mark is used"). If the trademark has never been in use in commerce and is a subject to an "intent to use" application, there is no vested property right in the trademark. See *U.S. Olympic Comm. v. Toy Truck Lines, Inc.*, 237 F.3d 1331, 1334 (Fed. Cir. 2001) (ruling that since the application at issue was "based solely on 'intent to use,' with no representation of actual use, there is no suggestion of the existence of any vested property right or investment in trademark use").

173. *Sands, Taylor & Wood Co. v. Quaker Oats Co.*, 978 F.2d 947, 958 (7th Cir. 1992) (stating that trademark law "protect[s] an owner's interest in its trademark by keeping the public free from confusion as to the source of goods and ensuring fair competition"); *Minn. Min. & Mfg. Co. v. Johnson & Johnson*, 454 F.2d 1179, 1180 (C.C.P.A. 1972) (stating that "where the issue is likelihood of confusion caused by conflicting trademark usage, there are real and logical reasons for protecting the private property in a trademark with a wider moat or a higher fence").

174. *Panavision Int'l, L.P. v. Toepfen*, 945 F. Supp. 1296, 1301 (C.D. Cal. 1996) (stating that "if trademarks are valuable to consumers, then protecting businesses' investments in trademarks will benefit consumers by increasing the willingness of businesses to invest in the creation of recognized marks").

175. See *Nu-Enamel Corp. of Ill.*, 95 F.2d at 450 (announcing that "a manufacturer of goods is entitled to the reputation he has established and the public has the right to rely upon his distinctive means of distinguishing between his and other goods").

176. Whether there is a trademark assignment between the assignor and assignee is carefully scrutinized by the court. "Requiring strong evidence to establish an assignment is appropriate both to prevent parties from using self-serving testimony to gain ownership of trademarks and to give parties incentives to identify expressly the ownership of the marks they employ." *TMT N. Am., Inc. v. Magic*

the prior holder's place to enjoy the property right in the assigned trademark.<sup>177</sup> Whatever the prior holder once owned is now acquired by the assignee.<sup>178</sup>

The property right in the trademark affords the trademark holder the right to license the trademark to others to use the mark in different fields of use and geographical territories.<sup>179</sup> The licensor can decide whether to grant exclusive or nonexclusive license to use the trademark.<sup>180</sup> The licensor can expand the market of the trademark use through licensing.<sup>181</sup> The goodwill generated through the expansion of a licensed trademark will inure in the licensor.<sup>182</sup> In other words, using licensing as a business model,

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Touch, 124 F.3d 876, 876 (7th Cir. 1997). An owner or administrator of trademark can assign trademarks. *See Park & Tilford Import Corp. v. Nash*, 171 A. 339, 344 (Md. App. Ct. 1934) (“In the sale of the trade-mark and good will, it was the duty of the administrator to exercise the same degree of judgment and prudence as an owner would have done in the sale of his own property. If the administrator was without knowledge of the value of the trade-mark and good will, it should have made proper effort to have learned its value, and the greater the difficulty of learning its value, the greater was the effort required of the administrator. There can be no assurance of a sale being fair and just to the owners, unless the seller has some adequate knowledge of the value of the property which he is to sell.”). A trademark can also be assigned from the original owner to two different assignees for concurrent use of the trademark in different geographical areas, as long as there is no likelihood of confusion. *See Houlihan v. Parliament Import Co.*, 921 F.2d 1258, 1262 (Fed. Cir. 1990) (holding that the Trademark Trial and Appeal Board “justifiably concluded that there was no likelihood of confusion, the Board’s alleged “expansion” of prior precedent to permit assignment of a mark to two different domestic contiguous users was proper”).

177. *Beauty Time, Inc. v. Beauty Makers, Inc.*, 118 F.3d 140, 150 (3d Cir. 1997) (explaining valid assignment of trademark right is a prerequisite to ownership in the trademark). The new assignee, in a valid assignment of ownership in a trademark, will become the party with standing to bring anti-dilution law suit under trademark law. *See generally Prince of Peace Enter., Inc. v. Top Quality Food Market, LLC*, 760 F. Supp. 2d 384, 393–94 (S.D.N.Y. 2011).

178. *Ludden v. Metro Weekly*, 8 F. Supp. 2d 7, 15 (D.C. 1998) (ruling that [l]ike other property, trademarks are assignable and “after a valid assignment the assignee (Ludden) inherits the assignor’s (Bladecomp’s) date of first use”).

179. *See generally* ROBERT GOMULKIEWICZ, ET AL., *INTELLECTUAL PROPERTY LICENSING* (2d ed. Aspen 2015) (summarizing trademark licensing law and practice); Irene Calboli, *The Sunset of “Quality Control” in Modern Trademark Licensing*, 57 AM. U. L. REV. 341, 348 (2007) (defining trademark licensing).

180. Xuan-Thao Nguyen, *Bankrupting Trademarks*, 37 U.C. DAVIS L. REV. 1267, 1275–81 (2004) (explaining different types of trademark licenses and tracing how trademark licensing becomes common in today’s business).

181. *Id.*

182. Ryan Gabay, *Sunbeam: A Ray of Hope for Trademark Licensees*, 82 FORDHAM L. REV. 245, 253 (2013) (noting that a trademark “licensor who grants a license to a licensee retains an interest in the mark and does not transfer all of its rights in the mark through the licensing agreement. For instance, if a licensee acquires any goodwill through the use of a license, all of these benefits will be passed along to the licensor”); Irene Calboli, *Quality Control and the Antitrust Laws In Trademark Licensing*, YALE L.J. 1173 (1963) (noting “widespread use of trademark licensing as a flexible business device designed to maximize the value of the licensor’s good will or notoriety”).

the trademark owner cultivates and increases the owner's property right in the trademark.<sup>183</sup>

With the property right in the trademark, the owner can leverage the trademark as a collateral asset in obtaining financing or capital for the business.<sup>184</sup> The royalty stream stemming from the licensing of the trademark, the trademark license right, and the exclusive ownership in the trademark are the potential collateral assets relating to the trademark that the owner can leverage for financing purposes.<sup>185</sup>

Fundamentally, China's new Trademark Law falls short in fully embracing the property right in trademarks.<sup>186</sup> The new Trademark Law is concerned mainly with procedures and administration of trademark registration.<sup>187</sup> It addresses only the "exclusive right to use a registered trademark"; it ignores the trademark property right.<sup>188</sup> The new Trademark Law does not include provisions dealing with trademark property rights.<sup>189</sup> Moreover, the new Trademark Law seems to lack the fundamental understanding that the property right in trademark is rooted in consumer recognition of the trademark. This consumer recognition is based on use of the trademark—either use by the trademark owner or use by the owner's licensing network.<sup>190</sup> The value of a trademark is based on use. With that value, the trademark, together with associated goodwill, will be (or will not be) attractive in the marketplace for licensing, financing, and acquisition of the trademark by others. In other words, the property right in the trademark fluctuates with the market and cannot be dictated, controlled, or manipulated by law.

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183. Neil Wilkof, *Trademark Licensing: The Once and Future Narrative*, 104 TRADEMARK REP. 895 (2014) (providing a narrative of trademark licensing and how the practice and the law evolved over time).

184. Stuart M. Riback, *The Interface of Trademarks and Bankruptcy*, J. PROPRIETARY RTS. 1, 2, 9 (June 1994) (noting how trademarks are used as collateral in secured credit transactions). See generally Allison Sell McDade, *Trading in Trademarks – Why the Anti-Assignment in Gross Doctrine Should be Abolished When Trademarks Are Used as Collateral*, 77 TEX. L. REV. 465 (1998) (noting potential problems with trademarks as collateral if anti-assignment in gross doctrine continues to exist).

185. Xuan-Thao Nguyen, *Collateralizing Intellectual Property*, 42 GA. L. REV. 1, 17–18 (2007) (exploring the current state of collateralization of patents, copyrights, and trademarks in secured transactions).

186. 2014 Trademark Law, art. 1 (providing that "[t]his Law is enacted for the purposes of improving the administration of trademarks, protecting the exclusive right to use a trademark, and encouraging producers to guarantee the quality of their goods and maintain the reputation of their trademarks, with a view towards protecting consumers' interests and promoting the development of a socialist market economy").

187. See Part III, *infra*.

188. *Id.*

189. *Id.*

190. *Id.*

*C. The Problem with the “Good Faith” Principle*

The new Trademark Law exhibits the characteristics of paternalistic government in regulating trademarks. The new law, in Article 7, includes a “good faith” principle on “any application or usage of a trademark.”<sup>191</sup> Many praises have been lavished on the inclusion of the “good faith” principle in trademark law.<sup>192</sup> A Chinese scholar explains that the principle of “good faith” in trademark law is consistent with China’s General Civil Principles of the Civil Law for “voluntariness, fairness, making compensation for equal value, honesty[,] and credibility.”<sup>193</sup> The “good faith” principle in trademark law will “prevent and eliminate counterfeiting, prevent trademark squatting, and maintain the solemnity” of the new Trademark Law.<sup>194</sup> Nonetheless, how “good faith” would actually prevent such conduct is yet to be seen. Certainly, without a strong enforcement mechanism and meaningful private action available to both the consuming public and competitors, counterfeiting, trademark squatting, and other trademark abuses would be difficult to eliminate.

Article 7’s “good faith” principle seems to incorporate the leftovers from the old version of the trademark law, as it states any “user of a trademark shall be responsible for the quality of the goods on which the trademark is used.”<sup>195</sup> The incorporation of the “good faith” principle is both redundant and ineffectual.

It is redundant because in a marketplace when a producer offers goods or services to the consuming public, the producer is always responsible for the trademarked products.<sup>196</sup> The consuming public “rely on trademarks ... as indicia of those responsible for their contents.”<sup>197</sup> The

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191. 2014 Trademark Law, art. 7.

192. See generally Yang, *supra* note 98; Wang Zhengzhi, *China: Bad Faith Registration: What China’s New Trademark Law Will Protect IPR Owners*, MONDAQ (May 31, 2014), <http://www.mondaq.com/x/310464/Trademark/Bad+Faith+Registration+What+Chinas+New+Trade+mark+Law+Will>; *China’s New Trademark Law*, JONES DAY PUBLICATIONS (Oct. 2013), <http://www.jonesday.com/chinas-new-trademark-law-10-10-2013/>.

193. Xiaoqing Feng, *Internationalization and Local Elements: Research on Recent Amendments to the Trademark Law of China*, 7 AKRON INTELL. PROP. J. 101, 148 (2015).

194. *Id.*

195. 2001 China Trademark Law, art. 7, [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=131395](http://www.wipo.int/wipolex/en/text.jsp?file_id=131395).

196. *Ty Inc. v. Perryman*, 306 F.3d 509, 510 (7th Cir. 2002) (“The consumer who knows at a glance whose brand he is being asked to buy knows whom to hold responsible if the brand disappoints and whose product to buy in the future if the brand pleases. This in turn gives producers an incentive to maintain high and uniform quality, since otherwise the investment in their trademark may be lost as customers turn away in disappointment from the brand.”).

197. *Little Tor Auto Ctr. v. Exxon Co. USA*, 830 F. Supp. 792, 794 (S.D.N.Y. 1993).

producer is in the best position to prevent inferior quality to flood the market.<sup>198</sup> The producer is the entity with knowledge regarding quality.<sup>199</sup>

Also, if the quality of the trademarked goods or service is not consistent, the consuming public will soon discover and reject what the producer offers.<sup>200</sup> The producer will soon lose the share in the market to competitors.<sup>201</sup> If the quality is inferior or presents any danger, the producer is strictly liable.<sup>202</sup> The consuming public should have the right to bring individual or class action against the producer under strict product liability for defective products.<sup>203</sup>

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198. Producers are strictly liable for their products under enterprise liability theory. *See generally* David J. Franklyn, *Toward a Coherent Theory of Strict Tort Liability for Trademark Licensors*, 72 S. CAL. L. REV. 1, 20 (1998) (discussing the enterprise liability and questioning courts' extension of the enterprise liability to trademark licensors who do not produce the trademarked products).

199. Michelle Fowler, Note, *To Protect and . . . To Profit: The Trademarking of the LAPD as an Example of Expanding Intellectual Property Rights*, 74 S. CAL. L. REV. 1623, 1636–37 (2001) (“[S]ellers have superior information regarding the unobservable features of an item as compared to buyers, but the unobservable features of a product are often the crucial determinants of the good’s total value.”); Nicholas S. Economides, *The Economics of Trademarks*, 78 TRADEMARK REP. 523, 526 (1988) (identifying trademark functions in the marketplace and how the producer’s prosperity benefits from “its adherence to a high quality level for goods bearing its trademark or trade name” in a stable market).

200. *See* Todd Kantorczyk, *How to Stop the Fast Break: An Evaluation of the “Three-Peat” Trademark and the FTC’s Role in Trademark Law Enforcement*, 2 UCLA ENTMT L. REV. 195, 197–98 (1995) (summarizing that trademarks “reduce consumer search costs by using a word or symbol as a shortcut for product research. For a consumer, a specific trademark signifies a certain expectation of quality, which in turn substitutes for the information a consumer would normally need to make a purchase decision. Second, a trademark enhances product quality. A trademark is worthless to a producer if a consumer associates inferior or inconsistent quality with the mark. These two beneficial properties do not flow from the trademark itself, but rather from the ability of the product to be associated with that strong trademark.”).

201. *Kraft Foods Grp. Brands v. Cracker Barrel Old Country Store, Inc.*, 735 F.3d 735, 739 (7th Cir. 2013) (“When a brand’s quality is inconsistent, consumers learn that the trademark does not enable them to predict their future consumption experiences from their past ones. The trademark does not then reduce their search costs. They become unwilling to pay more for the branded than for the unbranded good, and so the firm no longer earns a sufficient return on its expenditures on promoting the trademark to justify them.”)

202. Arthur Schwartz, *The Foreign Trademark Owner Living with American Products Liability Law*, 12 N.C. J. INT’L L. & COM. REG. 375, 376–77 (1987) (reviewing strict liability law and discussing Section 402(A) of the Restatement of Torts on strict liability definition); *Greenman v. Yuba Power Prods., Inc.* 377 P.2d 897, 900–01 (Cal. 1962) (“A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. . . . The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than the injured persons who are powerless to protect themselves and since the manufacturers have the most knowledge of the product, they can most effectively reduce the hazards.”).

203. Chinese consuming public generally does not rely on litigation to enforce their rights in defective products cases. Technical hurdles prevent private litigation. *See* Liu, *supra* note 55, at 410–14 (describing the technical hurdles Chinese victims face in defective products litigation). Moreover, the government only prefers administrative fines against the wrongdoers. *Id.* at 414. “Realistically, given the close ties between the local milk companies and local governments,

Imposing the “good faith” principle is hollow if there is an absence of a meaningful legal mechanism to protect the consuming public. For example, if the quality of the product is inferior, failing to meet the advertisement or information provided by the producer, there must be a government trade or commerce commission with enforcement authority to initiate action against the false advertisement. The consuming public should be able to immediately notify the commission for swift action. The consuming public should have access to court for remedies in private action. In addition, a competitor can also initiate private action against the producer if the producer engages in false advertisement, misleading the consuming public.

Article 7, in keeping with the old trademark law, addresses the ineffectual concern of the “good faith” principle by providing that the “administrative authorities” for industry and commerce “shall exercise supervision over the quality of the goods” through the administration of trademark to “prohibit any practice that defrauds the consumer.”<sup>204</sup> These phrases are both devoid of any specificity and ring hollow. In addition, they raise questions as to how “administrative authorities” will “supervise” the “quality of the goods” in the entirety of China. What is the scope of the supervision? Judging from inadequate responses to the food, medicine, and water scandals, the ineffectiveness of administrative authority experienced by the consuming public does not instill a high level of confidence to trust trademarked goods in heeding the goal of national increase in domestic consumption as a sustainable engine for national economic growth.

In summary, imposing the “good faith” principle in trademark law fails to grasp both an understanding of the complexity of trademarks in the marketplace and the complex layers of protection for the consuming public.

## CONCLUSION

In order for the consuming public to trust trademarked products and increase consumption, China's Trademark Law must center on protection of the consuming public, not a metrics obsession with a high volume of trademark applications and registrations. The world's trademark powerhouse status demands China to truly embrace this status with responsibility.

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administrative fines might not be imposed for fear of damaging the reputation of local industry, regardless of whether the law was violated.” *Id.*

204. 2014 Trademark Law, art. 7. In comparison, Article 7 of China's 2001 trademark law calls for “stop[ping] any practice that deceives consumers.” 2001 Trademark Law, art. 7.