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Protecting the Mickey Mouse Ears: Moving Beyond Traditional Campaign-Style Enforcement of Intellectual Property Rights in China

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Cover Page Footnote

J.D., Fordham University School of Law, 2017; B.A., Politics & East Asian Studies, New York University, 2014; photographer, filmmaker, and writer. I would like to thank my family and friends for their enduring support throughout the writing process. I would also like to thank my professor Mark Cohen, along with Professor Eric Priest, Attorney-Advisor at the U.S. Patent and Trademark Office, Conrad Wong, National Program Manager at the National Intellectual Property Rights Center, Man Fung Tse, the 20th U.S.-China IP Cooperation Dialogue participants, and my Fordham Law China IP Law Spring 2017 classmates for their feedback and enthusiasm for this Note. In addition, I am grateful for the experts who frequently assisted me with understanding Chinese enforcement mechanisms. Finally, I would like to thank the editors of the Fordham Intellectual Property, Media & Entertainment Law Journal, and Senior Writing & Research Editor Jillian Roffer, for their help in publishing this Note.

Protecting the Mickey Mouse Ears: Moving Beyond Traditional Campaign- Style Enforcement of Intellectual Property Rights in China

Adela Hurtado*

Multinational corporations often struggle to protect their intellectual property rights in China. The Walt Disney Company, which has a long relationship with China, knows this all too well. In fact, counterfeit Mickey Mouse ears—along with numerous other Disney character goods—are now sold in plain sight at the new Shanghai Disneyland Resort. In an attempt to combat counterfeiting, companies such as Disney rely on a traditional method of enforcement of intellectual property rights: government campaigns. Campaigns are short periods of time during which multiple raids and government enforcement actions occur to crack down on counterfeiting. The irony of Disney's situation is that less than a year before the Shanghai Disneyland Resort opened Disney was part of a high-profile campaign to protect its trademarks and prevent counterfeiting at the new park. However, the results of the Disney campaign are not surprising. Campaigns as practiced are generally ineffective, with counterfeit goods manufacturers and

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sellers returning to their businesses within days. Herein lies the issue: While campaigns are marked with a high volume of enforcement, in the long-term they are ineffective for combating intellectual property rights infringement. This Note uses Disney as a case study to illustrate the present usage of campaigns as an attempt to alleviate the infringement, despite their long-term ineffectiveness. Though rarely used, there are new opportunities for multinational corporations to incorporate civil litigation into their anti-counterfeiting strategy as a means to move away from depending heavily on campaigns and provide long-term change. Additionally, a comparison to the United States version of a campaign provides a new model for multinational corporations which can be used to push for more effective practices that not only benefit them, but also China. It is time for a new strategy to combat infringement. By changing course, multinational corporations and the government can strengthen intellectual property rights in China.

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INTRODUCTION

Waiting on line for a Shanghai Disneyland ride can entail some on-the-go shopping.¹ A salesman will sneak through the lines and approach those innocently waiting to offer a pair of Mickey Mouse ears.² The seller will have them stashed in a black bag, with headgear ranging from plain Mickey Mouse ears to his counterpart's Minnie Mouse ears that come with bows in a variety of colors.³ The ears will fetch a bargain price of 20 Renminbi ("RMB"), equivalent to 3.11 USD, compared to the officially licensed ears sold throughout the park ranging from 75 RMB (roughly 12 USD) to 180 RMB (roughly 28 USD).⁴

The blatant disregard for intellectual property rights at the heart of the park is a symptom of a larger problem plaguing The Walt Disney Company ("Disney") and other multinational companies when conducting business in China. Globally, levels of intellectual property infringement have significantly risen.⁵ Most infringing goods seized by U.S., European Union, and Japanese customs authorities originate from East Asia, with China as the top producer—accounting for over seventy percent of counterfeit goods production and eighty-six percent when combined with Hong Kong.⁶ Companies from each market segment and industry

¹ Based on author's observations and personal experiences during three trips to the park in October, November, and December 2016. Specific instances are described in Section II.B.1 [hereinafter Author's Experiences].

² The term "salesman" is used loosely here as this person is not an actual salesman, but rather someone in plainclothes attempting to sell the Mickey ears.

³ Author's Experiences, *supra* note 1.

⁴ The RMB is the Chinese national currency. See Matt Phillips, *Yuan or Renminbi: What's the Right Word for China's Currency?*, WALL STREET J. (June 21, 2010), <https://blogs.wsj.com/marketbeat/2010/06/21/yuan-or-renminbi-whats-the-right-word-for-chinas-currency/> [https://perma.cc/2YZ7-NNN2]. For examples of headbands currently on sale see, Search Results for "Headband", on *Disney Search*, DISNEY, <https://search.disney.com/search?o=store&q=headband> [https://perma.cc/9J9L-4Z7X] (last visited Nov. 24, 2017) (search in search bar for "Headband;" then select the "Store" hyperlink to limit the search results). There are no websites with prices of headbands sold in the parks.

⁵ See GLOB. INTELLECTUAL PROP. CTR., U.S. CHAMBER OF COMMERCE, MEASURING THE MAGNITUDE OF GLOBAL COUNTERFEITING 5, 7 (2016), http://www.theglobalipcenter.com/wp-content/themes/gipc/map-index/assets/pdf/2016/GlobalCounterfeiting_Report.pdf [https://perma.cc/CP3X-ZS89].

⁶ See *id.* at 16, 19.

experience billions of dollars in losses along with damage to their brands' reputation as a result of counterfeit production.⁷ The total global *economic* value of counterfeit and pirated goods is as much as 1.13 trillion dollars.⁸ The already billions of dollars in losses are anticipated to multiply significantly in the years to come.⁹ However, companies that do business with and within China need a way to cope with this reality. To cope, these companies primarily rely on government agency campaigns, especially the raids they include.¹⁰

Part I of this Note highlights the heavy reliance on campaigns in China to enforce intellectual property rights, and uses Disney's recent campaign in China as an example of a company with a long history in China that depends on the campaign approach. Part II details the short-term advantages and long-term ineffectiveness of the campaign approach, foreign companies' rare use of civil litigation to enforce their rights, and obstacles to effectively using criminal prosecution. Part III argues that foreign companies should stop relying on campaigns to enforce their rights and take advantage of ample new opportunities in civil litigation. Part III additionally proposes a model, using examples from campaigns and corporate alliances in the United States, for a new type of Chinese campaign approach. In sum, this Note aims to provide alternative strategies for multinational corporations to move away from solely using a traditional method of enforcement that will never fully accomplish their goals to eradicate—or at least reduce—infringement of their intellectual property rights in China.

⁷ *Id.* at 10; *see also* NATHAN WAJSMAN ET AL., OFFICE FOR HARMONIZATION IN THE INTERNAL MKT., THE ECONOMIC COST OF IPR INFRINGEMENT IN THE CLOTHING, FOOTWEAR AND ACCESSORIES SECTOR 14 (2015), https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/resources/research-and-studies/ip_infringement/study2/the_economic_cost_of_IPR_infringement_in_the_clothing_footwear_and_accessories_sector_en.pdf [<https://perma.cc/T5FG-CC2U>]. For example, the clothing, footwear, and accessories sector loses 26.3 billion euros of revenue annually. *See* WAJSMAN ET AL., *supra*.

⁸ Andrew Baker, *Toll of Counterfeiting and Piracy Predicted to Top \$2.3 Trillion as Call Made for Governments to Do More*, DATADOT TECH. LTD. (Feb. 22, 2017), <http://www.ddotdna.eu/toll-of-counterfeiting-and-piracy-predicted-to-top-2-3-trillion-as-call-made-for-governments-to-do-more/> [<https://perma.cc/Y9X4-NGBT>]. Millions of jobs are lost due to counterfeiting as well. *See id.*

⁹ *See id.*

¹⁰ *See generally* Part II.

I. THE CHINESE CAMPAIGN AND DISNEY'S LONG STRUGGLE TO COPE WITH INFRINGEMENT IN CHINA

Knowing who is charged with enforcing intellectual property rights and where they stand in the context of the Chinese government is important when exploring how multinational corporations enforce their rights in China. First, Section I.A provides an overview of and defines the powers of the Chinese government and its intellectual property agencies. Section I.B explains the campaign approach the government uses to combat infringement in China. Section I.C then details the history of Disney in China. Finally, Section I.D discusses the special government campaign executed to protect Disney's intellectual property rights.

A. *The Chinese Government Structure and Its Agencies*

The Chinese government structure has several government bodies that generally operate under the Chinese Communist Party.¹¹ According to China's Constitution, the National People's Congress ("NPC") is China's legislative body.¹² Among its roles, the NPC elects the President and Vice President of the People's Republic of China.¹³ The NPC also introduces and drafts legislation.¹⁴ The judicial system's highest bodies are The Supreme People's Court and The Supreme People's Procuratorate.¹⁵ The Supreme People's Court supervises lower courts.¹⁶ The Supreme People's Procuratorate is charged with supervising regional and special procuratorates, and investigating and prosecuting cases.¹⁷

The most relevant governing body for this Note is the State Council, which carries out the Chinese government's laws and administrative functions.¹⁸ It is composed of ministries and

¹¹ See XIANFA pmbl. (2004) (China).

¹² See *id.* art. 2.

¹³ See *id.* art. 62, § 4.

¹⁴ See *id.* art. 62, §§ 1–3.

¹⁵ See *id.* arts. 127, 132; see also *People's Procuratorates*, CHINA.ORG.CN, <http://www.china.org.cn/english/features/Brief/192298.htm> [https://perma.cc/FS2H-4C3N] (last visited Dec. 17, 2017) (detailing a procuratorate's judicial functions).

¹⁶ See XIANFA art. 127.

¹⁷ See *id.* art. 133; *People's Procuratorates*, *supra* note 15.

¹⁸ See XIANFA arts. 85, 91.

commissions and is led by the Premier, Vice Premiers, State Councilors, Ministers, Auditor-General, and the Secretary General,¹⁹ who are decided by the National People's Congress.²⁰ The State Council can adopt administrative measures, enact administrative regulations, formulate tasks and responsibilities for lower bodies, create national economic plans, and exercise other powers.²¹ Its lower bodies include key intellectual property enforcement agencies—such as the State Administration for Industry and Commerce (“SAIC”); General Administration of Customs; National Copyright Administration; and the State Intellectual Property Office (“SIPO”), China's patent office.²²

The SAIC is in charge of market supervision and regulation in China.²³ As part of its mission, the SAIC strives to protect the “legitimate rights and interests of businesses and consumers by carrying out regulations in the fields of enterprise registration, competition, consumer protection, trademark protection and combating economic illegalities.”²⁴ To carry out this mission, the SAIC consists of over ten departments and bureaus that focus on specific issues.²⁵ For example, the overwhelming majority—over seventy-eight percent—of the SAIC's cases involve products sold that infringe on registered trademarks.²⁶ One bureau, the

¹⁹ See *id.* arts. 85–86. Ministries and commissions include the Ministry of Commerce and the National Development and Reform Commission. See *China's State Organizational Structure*, CONG.-EXEC. COMM'N ON CHINA, <https://www.cecc.gov/chinas-state-organizational-structure> [https://perma.cc/5CKD-SKPE] (last visited Nov. 24, 2017).

²⁰ See XIANFA art. 62, § 5.

²¹ See *id.* art. 89 (defining these and other powers such as directing urban and rural development, education, family planning, public security, foreign affairs, etc.).

²² See *China's State Organizational Structure*, *supra* note 19.

²³ See *Mission*, ST. ADMIN. FOR INDUS. & COMMERCE OF CHINA, <http://www.saic.gov.cn/english/aboutus/Mission/> [https://perma.cc/6PXY-323D] (last visited Nov. 25, 2017).

²⁴ *Id.*

²⁵ See *Departments*, ST. ADMIN. FOR INDUS. & COM. OF CHINA, <http://www.saic.gov.cn/english/aboutus/Departments/> [https://perma.cc/ZLS4-4BP2] (last visited Nov. 24, 2017).

²⁶ TRADEMARK OFFICE/TRADEMARK REVIEW & ADJUDICATION BD. OF STATE ADMIN. FOR INDUS. & COMMERCE, CHINA, ANNUAL DEVELOPMENT REPORT ON CHINA'S TRADEMARK STRATEGY 2014, at 15 (2015), <http://sbj.saic.gov.cn/sbtj/201505/P020161012051169314721.pdf> [https://perma.cc/VEW2-CGVX].

Trademark Office, is in charge of these cases, along with trademark registrations, and trademark disputes.²⁷

B. Campaign-Style Enforcement in China

It is impossible to discuss intellectual property rights enforcement in China without focusing on campaigns, or *zhuanxiang xingdong*, which roughly translates to “special campaigns.”²⁸ Campaigns, primarily used against copyright and trademark infringement, are short periods of time during which an agency or several agencies perform a series of quick raids and enforcement actions against infringers.²⁹ The campaign lasts between one and two weeks, with a decision issued within a couple of months.³⁰ Campaigns are the most common type of intellectual property rights enforcement action in China and usually the first response to counterfeiting issues.³¹ The SAIC and its local counterparts have the administrative power to conduct campaigns on behalf of trademark holders.³² This agency, or another such as

²⁷ See *Departments*, *supra* note 25.

²⁸ The Chinese characters for “special campaign” are “专项行动.” As an example, this term is used in the State Council’s 2013 regulatory document, *Notice of the General Office of the State Council on Issuing the 2013 Major Tasks for the Nationwide Crackdown on IPR Infringements and on the Production and Sale of Counterfeit and Shoddy Commodities*, (Gen. Office of the State Council effective May 7, 2013), CLI.2.201618 (EN) (PKULAW.CN), <http://en.pkulaw.cn/display.aspx?cgid=201618&lib=law> [https://perma.cc/F2HS-79M8] (last visited Nov. 25, 2017).

²⁹ MARTIN K. DIMITROV, *PIRACY AND THE STATE: THE POLITICS OF INTELLECTUAL PROPERTY RIGHTS IN CHINA* 14–15 (2009); see also Xuefang Huang & Michael Lin, *Anti-Counterfeiting Options in China*, MARKS & CLERK (Aug. 13, 2014), <https://www.marks-clerk.com/Home/Knowledge-News/Articles/Anti-counterfeiting-options-in-China.aspx#.WeJMKmW5659> [https://perma.cc/T525-ZJKK].

³⁰ Huang & Lin, *supra* note 29.

³¹ See BOB YUILL, FTI CONSULTING & PRACTICAL LAW CHINA, *EFFECTIVE ANTI-COUNTERFEITING ENFORCEMENT IN CHINA: STAGE BY STAGE* 7 (2014), <http://www.fticonsulting-asia.com/~media/Files/us-files/insights/reports/effective-anti-counterfeiting-enforcement-china.pdf> [https://perma.cc/Y26Q-UYJE]; see also DIMITROV, *supra* note 29, at 187 (discussing campaigns).

³² See Huang & Lin, *supra* note 29. Other agencies can also join the SAIC in a campaign so responsibilities can be shared among them. See DIMITROV, *supra* note 29, at 187. The SAIC’s local counterparts are local bodies that carry out the SAIC’s operations on the provincial, county, and municipal levels. See *Trademark Registration in China*, PATH TO CHINA (last updated Jan. 3, 2018), http://www.pathtochina.com/reg_tm.htm [https://perma.cc/R8CJ-HK25].

SIPO, creates an “Action Plan” or “Implementation Plan” which authorizes and coordinates intellectual property campaigns.³³

Raids, a key component of campaigns, involve the SAIC and law enforcement authorities sweeping through a market that sells counterfeit goods or a factory that produces them.³⁴ During the raid, the authorities confiscate the counterfeit goods and arrest workers and sellers.³⁵ Once rights holders are notified about the counterfeit goods, they begin a raid by petitioning the SAIC with documentation on the trademark and on the infringer.³⁶ After the SAIC processes the documentation, it will conduct the raid with the help of law enforcement within one to two weeks of the petition if it decides to do so.³⁷ Once the raid is completed, if the SAIC finds that infringement did in fact occur, it can “order[] the infringer to cease the infringing conduct, confiscat[e] or destr[oy the] counterfeit goods, [or] impos[e] fines” on the infringers.³⁸ The SAIC does not have the power to give monetary compensation to the rights holders, as that is in the courts’ jurisdiction.³⁹

The Disney campaign this Note focuses on in Section I.D embodies much of the typical Chinese campaign.⁴⁰ The Disney

³³ JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION: REVISED AND EXPANDED EDITION 803–04 (3d ed. 2015).

³⁴ See Section II.B; see also, e.g., Shen Lu & Charles Riley, *Police Raid Chinese Factory that Was Churning Out Fake iPhones*, CNNTECH (July 28, 2015, 6:23 AM), <http://money.cnn.com/2015/07/28/technology/china-fake-iphone-factory/index.html> [<https://perma.cc/9GWK-E55B>].

³⁵ See, e.g., Lu & Riley, *supra* note 34.

³⁶ See Huang & Lin, *supra* note 29. The owner of the intellectual property needs to show proof of ownership of their rights and any materials they have on the infringement, which can include trademark registration certificates and samples of infringing products. See *id.*

³⁷ See *id.*

³⁸ See IPKEY, ROADMAP FOR INTELLECTUAL PROPERTY PROTECTION IN CHINA 15 (2015), www.ipkey.org/en/ip-law-document/download/3356/3805/23 [<https://perma.cc/2YS4-MW7G>]. Fines imposed can be up to five hundred percent of the profits gained from the counterfeit goods or up to the limit of 250,000 RMB (38,000 USD). CHEN, *supra* note 33, at 806 (alterations in original).

³⁹ IPKEY, *supra* note 38, at 13.

⁴⁰ Affirming the similarities between campaigns, Simone Intellectual Property Services firm (“SIPS”), a leading Hong Kong law firm serving multinational corporations in China, stated that the Disney campaign was similar to initiatives of other short-term campaigns occurring from time to time, such as the 2008 Olympic Games anti-counterfeiting campaign. See *Special Campaign on Protection of Disney Trademarks*,

campaign consisted of the SAIC announcing the campaign's start and subsequent enforcement efforts.⁴¹ The campaign was also relatively long, lasting nearly a year.⁴²

C. *Disney's Life in China*

The Walt Disney Company was founded in 1923 and is based in the United States.⁴³ It is primarily in the filmmaking and television businesses, but also builds its own theme parks around the world and licenses its logos, films, and characters.⁴⁴ Disney's repertoire includes its large intellectual property portfolio of over five thousand trademarks and over one thousand patents—one of their trademarks being Mickey Mouse and his ears, registered in a variety of forms to ensure the character's protection.⁴⁵ Disney generates billions of dollars in revenue annually through merchandising, licensing, and selling consumer products of its intellectual property.⁴⁶ As of 2016, its numerous ventures created a

SIPS, <http://sips.asia/knowledge/legislation-and-policy/special-campaign-on-protection-of-disney-trademarks/> [<https://perma.cc/P8ZV-QNF4>] (last visited Nov. 25, 2017).

⁴¹ See *id.*

⁴² Compare *id.* (calling the Disney campaign an “unusual year-long campaign”), with Huang & Lin, *supra* note 29 (stating that the average raid occurs within one to two weeks, with decisions issued within a couple of months).

⁴³ See *About the Walt Disney Company*, WALT DISNEY COMPANY, <https://thewaltdisneycompany.com/about/> [<https://perma.cc/KHC6-AYHS>] (last visited Dec. 22, 2017); *Profile: Walt Disney Co (DIS.N)*, REUTERS, <https://www.reuters.com/finance/stocks/company-profile/DIS.N> [<https://perma.cc/89M4-VQKL>] (last visited Dec. 21, 2017) (showing company is based in Burbank, California).

⁴⁴ See Tom Delaney & Tami Stawicki, UNIV. CONN., THE WALT DISNEY COMPANY (NYSE:DIS) (2016), <http://smf.business.uconn.edu/wp-content/uploads/sites/818/2016/12/DIS-Report.pdf> [<https://perma.cc/R3N4-P3QP>].

⁴⁵ See *Disney Profile*, JUSTIA, <http://companyprofiles.justia.com/company/disney> [<https://perma.cc/N7A4-V2Q3>] (last visited Nov. 24, 2017); see also Jackson Gerber, Note, *Mickey Mouse in the Year 2023: What Happens Now?*, TOURO L. REV. ONLINE EDITION (Apr. 15, 2013), <http://www.tourolawreview.com/2013/04/mickey-mouse-in-the-year-2023-what-happens-now/> [<https://perma.cc/6NWC-RTBE>]. Examples of its trademarks and uses associated with the Mickey Mouse ears are found in the Notice of Opposition filed at the U.S. Patent and Trademark Office against Deadmau5 in 2014. See generally *Notice of Opposition*, Disney Enterprises, Inc., No. 6182.6914 (T.T.A.B. Sept. 2, 2014) (notice of opposition) <http://www.trademarkologist.com/files/2014/09/Disney-Notice-of-Opposition.pdf> [<https://perma.cc/AJ69-B5PJ>].

⁴⁶ Walt Disney Co., Annual Report Pursuant to Section 13 or 15(d) of the Securities Act of 1934 (Form 10-K) (Oct. 3, 2015), at 24, 65, https://www.sec.gov/Archives/edgar/data/1001039/000100103915000255/fy2015_q4x10k.htm [<https://perma.cc/8ABC->

top brand valued at 39.5 billion USD.⁴⁷ Therefore, the issue of counterfeiting in China is particularly important to the company, as it has invested an enormous amount of time, resources, and capital into expanding its business in the country.⁴⁸

Disney's relationship with China began on unfriendly terms when the Mickey Mouse character and all Disney films were banned in 1949 as part of a larger ban on foreign films when the Communist Party rose to power.⁴⁹ In 1986, Disney was "rehabilitated," and the company in that year signed a licensing agreement to supply cartoons for China's national network.⁵⁰ Disney then resumed its operations in China, only to have its films banned again in the 1996 when the company released Martin Scorsese's "Kundun," a film on the Dalai Lama's life, through its subsidiary Touchstone Pictures.⁵¹ The ban continued until 1999, when the government allowed the release of Disney's "Mulan" in exchange for agreements to hire Jackie Chan as a voice actor for

HTHX]; Marc Graser, *Disney Brands Generate Record \$40.9 Billion from Licensed Merchandise in 2013*, VARIETY (June 17, 2014), <http://variety.com/2014/biz/news/disney-brands-generate-record-40-9-billion-from-licensed-merchandise-in-2013-1201221813/> [https://perma.cc/JW8D-D5YS]; Natalie Robehmed, *The 'Frozen' Effect: When Disney's Movie Merchandising Is Too Much*, FORBES (July 28, 2015), <https://www.forbes.com/sites/natalierobehmed/2015/07/28/the-frozen-effect-when-disneys-movie-merchandising-is-too-much/#22ca8ce22ca8> [https://perma.cc/R8KR-5HDS].

⁴⁷ See *The World's Most Valuable Brands*, FORBES (2016), <https://www.forbes.com/pictures/mli45fflem/8-disney/#98c794050643>.

⁴⁸ See *China Has Become Important Market for Walt Disney International*, XINHUANET (July 13, 2017, 7:41 PM), http://news.xinhuanet.com/english/2017-07/13/c_136441501.htm [https://perma.cc/6HEQ-G7U4].

⁴⁹ See ASIAN POPULAR CULTURE: THE GLOBAL (DIS)CONTINUITY 59 (Anthony Y.H. Fung ed., 1st ed. 2013); TAN YE & YUN ZHU, HISTORICAL DICTIONARY OF CHINESE CINEMA 1 (1st ed. 2012); Clay Chandler, *Mickey Mao*, FORTUNE (Apr. 18, 2005), http://archive.fortune.com/magazines/fortune/fortune_archive/2005/04/18/8257022/index.htm [https://perma.cc/PYX7-UPVA].

⁵⁰ Chandler, *supra* note 49.

⁵¹ Daniel Frankel, *'Mulan' Freed for Release in China*, E! NEWS (Feb. 8, 1999), <http://www.eonline.com/news/37704/mulan-freed-for-release-in-china> [https://perma.cc/V94G-HSRG]; Bernard Weinraub, *Disney Will Defy China on Its Dalai Lama Film*, N.Y. TIMES (Nov. 27, 1996), <http://www.nytimes.com/1996/11/27/movies/disney-will-defy-china-on-its-dalai-lama-film.html> [https://perma.cc/JKM8-BVR4].

the Mandarin version of the film and to distribute two Chinese films in the United States.⁵²

Despite its precarious status in the country, Disney persisted with its relationship with China.⁵³ Disney first broke ground with the opening of Hong Kong Disneyland in 2005.⁵⁴ While not on the mainland, the Hong Kong theme park marked what Bob Iger, President of The Walt Disney Company, stated was the “first big step” to expand the company’s reach into China.⁵⁵ Disney then increased its efforts. Most notably, after ten years of planning and five years of construction, Disney opened Shanghai Disneyland Resort in June 2016 in partnership with state-owned Shanghai Shendi Group.⁵⁶ The park cost five-and-a-half billion dollars and covers 963 acres, making the park three times larger than its Hong Kong counterpart.⁵⁷ The Shanghai Disneyland Resort also has the tallest Disney castle ever built in all its parks.⁵⁸ The park soon became a hit with over eleven million visitors in its first year.⁵⁹ However, regardless of its status in the People’s Republic of China, Disney continues to suffer from widespread intellectual

⁵² See Erik Eckholm, *Easing Tensions, Disney Gains O.K. to Show ‘Mulan’ in China*, N.Y. TIMES (Feb. 8, 1999), <http://www.nytimes.com/1999/02/08/world/easing-tensions-disney-gains-ok-to-show-mulan-in-china.html> [https://perma.cc/C9NR-V753]; Frankel, *supra* note 51.

⁵³ For more examples of Disney bans see, Alyssa Abkowitz & Eva Dou, *Alibaba-Disney Partnership Is Frozen in China*, WALL STREET J. (Apr. 26, 2016), <https://www.wsj.com/articles/alibaba-disney-partnership-frozen-in-china-1461645337>; Joe McDonald, *China Bans ‘Simpsons’ from Prime-Time TV*, WASH. POST (Aug. 13, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/13/AR2006081300242.html> [https://perma.cc/SW6W-2P38].

⁵⁴ See Associated Press, *Disney Opens Theme Park in Hong Kong*, NBC NEWS (Sept. 12, 2005), http://www.nbcnews.com/id/9311663/ns/business-world_business/t/disney-opens-theme-park-hong-kong/#.WcgdHmVd-58 [https://perma.cc/GWV5-23RJ].

⁵⁵ *Id.*

⁵⁶ See John Gaudiosi, *Why Disney’s New Shanghai Park Is Its Most Ambitious Yet*, TIME (June 16, 2016), <http://time.com/4371493/shanghai-disneyland-park/> [https://perma.cc/2GFF-W6RV]; Julie Makinen, *Shanghai Disney Officially Opens: A Peek Inside*, L.A. TIMES (June 17, 2016), <http://www.latimes.com/la-fi-shanghai-disney-opening-htlstory.html> [https://perma.cc/LRN8-W5PA].

⁵⁷ Gaudiosi, *supra* note 56.

⁵⁸ *Id.*

⁵⁹ See Eunice Yoon, *Shanghai Disneyland Visitors Top [Eleven] Million in Its First Year, Blowing Past Expectations, CEO Iger Says*, CNBC (June 16, 2017), <https://www.cnbc.com/2017/06/16/shanghai-disneyland-visitors-top-11-million-in-its-first-year-blowing-past-expectations-ceo-iger-says.html> [https://perma.cc/VA66-XQRR].

property infringement through online and physical markets, as counterfeiters flood China with pirated Disney products.⁶⁰

D. Disney Turns to the Campaign Approach

The irony of recent infringement under Disney's "nose" is highlighted by Disney's path to eliminate this infringement. While the current infringement situation in China is challenging, Disney continued to cultivate its relationship with China and developed a coping strategy.⁶¹ So far, the company's primary strategy appears to be to "keep a close relationship with local government officials and to cry out loudly and often to get their ear."⁶² Disney's strategy led to the SAIC launching a year-long campaign (the "Disney Campaign") to "crack down" specifically on Disney trademarks.⁶³ The SAIC called this campaign a "special action" to protect Disney in anticipation of Shanghai Disneyland Resort's grand opening in June 2016, perhaps due to Disney's joint venture with the Shanghai government firm.⁶⁴ In addition to protecting the Disney brand, the SAIC declared that this campaign also sought to protect

⁶⁰ See, e.g., Angela Doland, *In China, There's Not Just Disney, There's 'Disnay' and 'Disnesy' Too*, AD AGE (June 2, 2016), <http://adage.com/article/cmo-strategy/china-disney-disnesy/304220/> [<https://perma.cc/U3RT-ND3B>]; Alice Hines, *Fake Apple, Disney and Ikea Stores: The Ultimate Knockoffs?*, AOL FIN. (Aug. 10, 2011, 11:00 AM), <https://www.aol.com/article/2011/08/10/apple-and-ikea-stores-the-ultimate-knockoffs-the-u-s-obsessio/20013610/> [<https://perma.cc/2HPM-8V6J>]; *Special Campaign on Protection of Disney Trademarks*, *supra* note 40. Section II.B.1 also has examples of Disney counterfeit goods in China.

⁶¹ See Adam Jourdan, *China Says Disney to Get Special Trademark Protection*, REUTERS (Nov. 5, 2015), <http://uk.reuters.com/article/us-walt-disney-china-idUKKCN0SU1ED20151105> [<https://perma.cc/7994-MKP9>].

⁶² Yang Jie, *China Rolls Out 'Emergency Teams' to Knock Out Disney Knockoffs*, WALL STREET J. (Nov. 5, 2015), <http://blogs.wsj.com/chinarealtime/2015/11/05/china-rolls-out-emergency-teams-to-knock-out-disney-knockoffs/> [<https://perma.cc/5VYZ-JFJ3>].

⁶³ For the original notice by the SAIC in Mandarin see, Gongshang Zongju Guanyu Kaizhan Baohu "Dishini" Zhuce Shangbiao Zhuanyongquan Zhuanyong Xingdong de Tongzhi (工商总局关于开展保护 "迪士尼" 注册商标专用权专项行动的通知), *Notice of the State Administration for Industry and Commerce on the Special Action to Protect the Exclusive Right of the Registered Trademark of Disney*, SAIC (Nov. 5, 2015), http://www.saic.gov.cn/zw/zcfg/gzjwj/201511/t20151105_216928.html [<https://perma.cc/V8NV-NR2X>]; see also Neil Gough, *China Moves to Crack Down on Counterfeit Disney Products*, N.Y. TIMES (Nov. 5, 2015), <https://www.nytimes.com/2015/11/06/business/media/disney-china-trademark.html> [<https://perma.cc/K6HF-J3JW>].

⁶⁴ See Gough, *supra* note 63.

the future development of the Shanghai Disneyland Resort and to “uphold China’s international image for safeguarding intellectual property rights.”⁶⁵

The Disney Campaign entailed numerous actions to crack down on Disney counterfeits. The SAIC declared it would establish a “key protected area” around the Shanghai Disneyland Resort and strengthen patrols in this area.⁶⁶ The enforcement efforts in this protected area were to be significantly increased to “comprehensively eliminate” infringement.⁶⁷ The SAIC then created “emergency teams” (similar to teams that carry out raids) to watch for counterfeits, whether on sale online or elsewhere, and to coordinate efforts among national and local officials.⁶⁸ The SAIC charged local SAIC divisions and authorities with inspecting wholesale distributions, production factories, and where trademarks are printed.⁶⁹ The SAIC also called for local agencies to carry out “collective rectification” against local infringers.⁷⁰ Additionally, the SAIC encouraged authorities nationwide to strengthen enforcement and narrow opportunities for people to infringe Disney’s trademarks.⁷¹ Edward Chatterton, a Hong Kong intellectual property lawyer, commented at the time, “I don’t think I’ve seen a specific brand being protected in this sort of comprehensive way before.”⁷² These moves, focusing solely on Disney products and its trademarks, were unprecedented.⁷³

Results soon came in. Within two months, officials seized a large batch of counterfeit Disney children’s clothing in

⁶⁵ *Special Campaign on Protection of Disney Trademarks*, *supra* note 40.

⁶⁶ Yuen Yeuk-laam, *Counterfeiters ‘Feel No Pressure’ Despite China’s Crackdown on Disney Copyright Infringement*, *GLOBAL TIMES* (Nov. 12, 2015), <http://www.globaltimes.cn/content/952354.shtml> [<https://perma.cc/MV36-ZRBD>].

⁶⁷ *Special Campaign on Protection of Disney Trademarks*, *supra* note 40.

⁶⁸ *See* Jie, *supra* note 62; *Special Campaign on Protection of Disney Trademarks*, *supra* note 40.

⁶⁹ *See* Jie, *supra* note 62; *Special Campaign on Protection of Disney Trademarks*, *supra* note 40.

⁷⁰ *Special Campaign on Protection of Disney Trademarks*, *supra* note 40.

⁷¹ *See id.*

⁷² Gough, *supra* note 63.

⁷³ *See* Rhonda Tin, *Trademark Protection in China – If Everyone Could Be Disney*, *AWAPOINT* (Feb. 29, 2016), <http://awaipblog.com/trademark-protection-in-china-if-everyone-could-be-disney/> [<https://perma.cc/S9DP-7QRZ>].

Hangzhou,⁷⁴ a city about one hundred miles from Shanghai.⁷⁵ In addition, officials fined five fake Disney hotels built near where the Shanghai Disneyland Resort was to be built.⁷⁶ The SAIC reported that during the campaign period it handled a total of one hundred and twelve Disney trademark infringement cases.⁷⁷ The Disney seizures and raids that were featured in various news outlets were subsequently seen by the media as promising signs that Disney will be successful in enforcing its rights.⁷⁸ The rapid results may seem impressive at first glance. However, by using the ineffective campaign approach, Disney would not achieve its goal of combating infringement against its trademarks, or even reducing it.

II. THE CAMPAIGN TRAP: IT IS INEFFECTIVE, BUT IS THERE A WAY OUT?

Despite its repeated use, the campaign approach has not worked. Part II focuses on how the campaign strategy has rarely worked to successfully combat infringement in its current form for multinational companies or for intellectual property rights in general. Section II.A discusses incentives to using the campaign approach while Section II.B examines its overall ineffectiveness, details the problems with multinational corporations' present use

⁷⁴ See *id.*; see also Wang Hongyi, *Counterfeit Disney Products Target of Trademark Campaign*, CHINA DAILY (Jan. 13, 2016), http://www.chinadaily.com.cn/kindle/2016-01/13/content_23071315.htm [<https://perma.cc/F3GT-P4Y2>].

⁷⁵ *Distance from Shanghai to Hangzhou*, DISTANCEFROMTO, <https://www.distancefromto.net/distance-from-shanghai-cn-to-hangzhou-cn> [<https://perma.cc/VAH4-XAFA>] (last visited Dec. 21, 2017).

⁷⁶ John Ruwitch, *China Fines Five Phony Disney Hotels - Xinhua*, REUTERS (Nov. 25, 2015), <http://www.reuters.com/article/disney-china-idUSL3N13K20K20151125> [<https://perma.cc/JQ5A-QG8Z>].

⁷⁷ There are no details as to the outcome of these cases. See TRADEMARK OFFICE/TRADEMARK REVIEW & ADJUDICATION BD. OF STATE ADMIN. FOR INDUS. & COMMERCE, CHINA, ANNUAL DEVELOPMENT REPORT ON CHINA'S TRADEMARK STRATEGY 2016, at 15 (2017), <http://sbj.saic.gov.cn/sbtj/201709/W020170901344688293241.pdf> [<https://perma.cc/4WP3-VAXN>].

⁷⁸ See David Barboza & Brooks Barnes, *How China Won the Keys to Disney's Magic Kingdom*, N.Y. TIMES (June 14, 2016), <https://www.nytimes.com/2016/06/15/business/international/china-disney.html> [<https://perma.cc/262W-WTS5>].

of civil litigation, and explores the obstacles to using criminal prosecution.

A. *The Short-Term Advantages of Campaigns*

Campaigns are used because multinational corporations and other rights holders prefer the cheapest and fastest method to solve their counterfeiting issues.⁷⁹ Campaigns have some short-term tangible effects. During the campaign period, factories and stores are closed down, large amounts of counterfeit goods are confiscated, and counterfeiters are arrested.⁸⁰ People selling counterfeits on the streets are removed quickly.⁸¹ The volume of enforcement is also high during campaign periods.⁸² Agency officials and law enforcement officers work overtime investigating rights holders' claims.⁸³ Raids performed during the campaign period are also inexpensive and fast, and the rights holder receives results quickly.⁸⁴ The temptation to obtain this type of enforcement is understandable for these reasons, and may explain why it is often used.

Results from campaign-related raids make headlines in national and international papers. For example, in February 2017, a raid resulted in seized counterfeit Chanel, Christian Dior, and other brand-name cosmetics worth 120 million USD.⁸⁵ In May 2017, the

⁷⁹ DIMITROV, *supra* note 29, at 189.

⁸⁰ See *supra* Section I.B; *infra* Section II.B.

⁸¹ See *supra* Section I.B; *infra* Section II.B.

⁸² See *supra* Section I.B.

⁸³ PETER K. YU, *The Curious Case of Fake Beijing Olympics Merchandise*, in TRADEMARK PROTECTION AND TERRITORIALITY CHALLENGES IN A GLOBAL ECONOMY 263 (Irene Calboli et al. eds., 2014).

⁸⁴ See U.S. INT'L TRADE COMM'N, CHINA: INTELLECTUAL PROPERTY INFRINGEMENT, INDIGENOUS INNOVATION POLICIES, AND FRAMEWORKS FOR MEASURING THE EFFECTS ON THE U.S. ECONOMY 1–8 (2010), <https://www.usitc.gov/publications/332/pub4199.pdf> [<https://perma.cc/6GXZ-HS49>]; Harley I. Lewin, *Understanding the Challenges and Nuances of Defending Intellectual Property Rights in China*, in INSIDE THE MINDS: DEFENDING INTELLECTUAL PROPERTY RIGHTS CASES IN CHINA (Astapore 2013); see also *supra* Section I.D.

⁸⁵ This raid occurred in Taizhou, an eastern city in China, and was initiated in response to reports of related counterfeit goods sold online. See Adam Jourdan, *Chinese Police Seize \$120 Million of Fake Cosmetics*, REUTERS (Feb. 15, 2017), <http://www.reuters.com/article/us-china-cosmetics-fakes-idUSKBN15V02Y> [<https://perma.cc/2DD7-6K52>].

media reported the largest raid seizure of brand-name counterfeit sports shoes, with around five hundred thousand pairs taken.⁸⁶ The Disney Campaign in China, especially the raids and seizures resulting from it, similarly achieved headlines in multiple news outlets.⁸⁷ The Chinese government also publicizes its campaigns through their websites and often point out items seized from raids.⁸⁸ The China Chamber of International Commerce recently mentioned the Disney Campaign in a comment to the Office of the U.S. Trade Representative as an example of China substantially improving its intellectual rights protection.⁸⁹ Campaign results generate publicity and may create a sense that serious, effective action is being taken against counterfeiting, making campaigns attractive to multinational corporations.

B. The Long-Term Ineffectiveness of Campaigns

1. The Transient Effects of Campaigns

Experts often criticize campaigns as “incur[ring] high administrative cost[s] with transient effects.”⁹⁰ Multinational corporations criticize the SAIC’s actions because shortly after a raid, even as soon as the next day, infringers return to selling counterfeit goods.⁹¹ After numerous raids, counterfeiting

⁸⁶ The raid occurred at a factory in Anhui province, and eleven people were arrested. See Catherine Lai, *Chinese Police Bust Factory Making Fake Nike, Vans, Converse Shoes*, H.K. FREE PRESS (May 26, 2017), <https://www.hongkongfp.com/2017/05/26/chinese-police-bust-factory-making-fake-nike-vans-converse-shoes/> [<https://perma.cc/KPT4-2QVV>].

⁸⁷ See Gough, *supra* note 63; Jie, *supra* note 62; Jourdan, *supra* note 61; Ruwitch, *supra* note 76.

⁸⁸ See, e.g., *Measures Taken*, CHINA CUSTOMS ENF’T OF INTELLECTUAL PROP. RIGHTS, <http://english.customs.gov.cn/topic/customs12/Measures%20Taken.htm> [<https://perma.cc/M5LM-353D>] (last visited Nov. 25, 2017).

⁸⁹ See China Chamber of Int’l Commerce, Summary of Testimony in Comment Letter on Section 301 Investigation: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation 1 (Sept. 26, 2017) (on file with Fordham Intellectual Property, Media & Entertainment Law Journal).

⁹⁰ See, e.g., Yana Jin et al., *Air Pollution Control Policies in China: A Retrospective and Prospects*, INT’L J. ENVTL. RES. & PUB. HEALTH, Dec. 2016, at 10. Dimitrov’s book is dedicated to criticizing campaign enforcement. See generally DIMITROV, *supra* note 29.

⁹¹ See FN Staff, *[Three] Big Issues that China Faces in Counterfeiting Battle*, FOOTWEAR NEWS (Sept. 20, 2016), <http://footwearnews.com/2016/business/retail/3-big-obstacles-counterfeiting-shoes-china-259833/> [<https://perma.cc/7LF8-Y5B9>].

operations move on to another town or factory, and continue to operate until they are subject to yet another campaign once companies request enforcement measures again.⁹² One notable example of the transient effects of campaigns is the 2008 Olympic campaign. Leading up to the 2008 Beijing Olympics, the Chinese government made several decrees establishing a campaign to protect the Olympic symbols and other trademarks related to the games.⁹³ Tens of thousands of government personnel across China worked overtime to crack down on counterfeits.⁹⁴ However, counterfeit 2008 Olympics goods were still easy to find, during the campaign and afterwards.⁹⁵ Vendors selling counterfeit Olympics goods continued to plague tourists.⁹⁶ Pirated versions of the opening ceremony popped up frequently in markets, even as close as two weeks after the ceremony itself.⁹⁷ Despite the campaign and the high volume of enforcement actions, the sale of counterfeit merchandise was still widespread across China.⁹⁸

Another high-profile example of an ineffective campaign was the 2011 month-long campaign to eradicate imitation Apple Inc. (“Apple”) stores and unauthorized sellers of Apple products.⁹⁹ The campaign began when an imitation Apple store found in Kunming, China made headlines around the world.¹⁰⁰ Upon further search of the city, over twenty other imitation Apple stores were found.¹⁰¹

⁹² DIMITROV, *supra* note 29, at 14–15.

⁹³ YU, *supra* note 83, at 262–63.

⁹⁴ *Id.* at 263.

⁹⁵ *Id.* at 264.

⁹⁶ *Id.* at 264–65.

⁹⁷ *Id.* at 265.

⁹⁸ *Id.* at 264.

⁹⁹ These are physical retail stores imitating Apple Inc. stores. This campaign differs from the Disney Campaign as it did not focus on the Apple trademark, but rather physical stores and counterfeits generally, because of the international attention the Kunming imitation Apple stores received. The campaign was also not as comprehensive or as long as the Disney campaign. See Xu Wei, *Unauthorized Apple Retailers Face Logo Ban*, CHINA DAILY (Aug. 8, 2011), http://www.chinadaily.com.cn/bizchina/2011-08/08/content_13071315.htm [https://perma.cc/9W7V-JD8M].

¹⁰⁰ See *id.*; see also *Chinese Authorities Find [Twenty-Two] Fake Apple Stores*, BBC (Aug. 12, 2011), <http://www.bbc.com/news/technology-14503724> [https://perma.cc/3NVQ-7PC9] (last visited Nov. 24, 2017).

¹⁰¹ See *Chinese Authorities Find [Twenty-Two] Fake Apple Stores*, *supra* note 100.

Several of these stores were shut down in Kunming.¹⁰² Imitation stores in Beijing's technology district Zhongguancun were ordered to stop using the Apple logo, but many stores remained open after the campaign.¹⁰³ Beijing store managers were slow to respond, with one stating: "If you come back a few days later, everything will be back as it was."¹⁰⁴ Imitation Apple stores even thrived in anticipation of a new phone's launch.¹⁰⁵ The number of imitation Apple stores has decreased over the years, but its decline could be credited to factors such as Apple's increased physical presence in China, and a growing preference for locally-made technology, instead of the anti-counterfeiting campaign.¹⁰⁶

As a final example, Disney counterfeit goods are also alive and well, even inside the Shanghai Disneyland Resort itself.¹⁰⁷ During 2016 and 2017, visitors reported seeing counterfeit Minnie Mouse ears and Mickey Mouse hats sold in plain sight.¹⁰⁸ One visitor

¹⁰² See *China Officials Close Fake Apple Stores in Kunming City*, BBC (July 25, 2011), <http://www.bbc.com/news/technology-14273444> [https://perma.cc/PN9T-LPSC]; *Chinese Authorities Find [Twenty-Two] Fake Apple Stores*, *supra* note 100.

¹⁰³ See Wei, *supra* note 99.

¹⁰⁴ *Id.*

¹⁰⁵ See Yimou Lee, *China's 'Fake' Apple Stores Thrive Ahead of New iPhone Launch*, REUTERS (Sept. 23, 2015), <http://www.reuters.com/article/us-apple-china-idUSKCN0RN2EF20150924> [https://perma.cc/QYS2-ADEP].

¹⁰⁶ See Yimou Lee, *China's Fickle Fake Stores Cool on Apple: For Now*, REUTERS (Jan. 26, 2016), <http://www.reuters.com/article/us-apple-china-idUSKCN0V4200> [https://perma.cc/5Q9C-V6AW].

¹⁰⁷ See Author's Experiences, *supra* note 1; see also Cathy Wu, *Fake Disney Hotel Website Scrapped After Exposé*, THAT'S MAGS (June 7, 2016), <https://www.thatsmags.com/shanghai/post/13980/fake-disney-hotel-website-scrapped-after-exposure> [https://perma.cc/4BUN-MADQ] (exposing a related incident where a fake Shanghai Disney Resort website was created to swindle unsuspecting customers).

¹⁰⁸ See, e.g., Review by diablodancer, *Falling Far Short of Disney's Usual Standards*, TRIPADVISOR (June 14, 2017), https://www.tripadvisor.com/ShowUserReviews-g308272-d10383031-r492990183-Shanghai_Disneyland-Shanghai.html#REVIEWS [https://perma.cc/6L33-AJ4G]; Review by Donald K, *Not Quite 'Disney'*, TRIPADVISOR (Mar. 18, 2017), https://www.tripadvisor.com/ShowUserReviews-g308272-d10383031-r468220239-Shanghai_Disneyland-Shanghai.html#REVIEWS [https://perma.cc/Z7X8-NYAC]; Review by KellyLoChu, *Most Beautiful Disneyland So Far! Absolutely Worth Visiting!*, TRIPADVISOR (Apr. 19, 2017), https://www.tripadvisor.com/ShowUserReviews-g308272-d10383031-r477016475-Shanghai_Disneyland-Shanghai.html#REVIEWS [https://perma.cc/TV9C-RAW5]; Review by TCspeech, *Spectacular Light Show in a Clean Theme Park*, TRIPADVISOR (Dec. 3, 2016), https://www.tripadvisor.com/ShowUserReviews-g308272-d10383031-r441819069-Shanghai_Disneyland-Shanghai.html#REVIEWS [https://perma.cc/5TMA-HLQL]; Review by TRVLtruth, *The Good*,

stated: “People are selling counterfeit merchandise from back packs all over the park.”¹⁰⁹ Another described numerous people “selling fake [D]isney items, raincoat[s,] and even cigarettes.”¹¹⁰ On July 15, 2017, one traveler wrote there were people “walking up and down INSIDE the queues selling fake Disney merchandise (e.g., light-up toys, keychains, etc.).”¹¹¹ The traveler went on to state that “[t]he first time it happened to us, I stared at the person in shock and she interpreted it as my interest to purchase something from her.”¹¹² On September 1, 2017, another traveler similarly wrote: “[T]here [is] a black market, people [are] selling the same as the shops in the [D]isney street cheaper.”¹¹³ Six days later a visitor stated there were “[h]awkers selling (counterfeit?) swag all over the place, especially in the lines.”¹¹⁴ A disappointed visitor singled out Shanghai Disneyland Resort: “[O]nly here we can find people selling unauthorized merchandise [at] a lower price than [in the] official store.”¹¹⁵ More examples of Disney counterfeits are abundant.¹¹⁶

Bad and Ugly of Shanghai Disneyland, TRIPADVISOR (Feb. 22, 2017), https://www.tripadvisor.com/ShowUserReviews-g308272-d10383031-r462113262-Shanghai_Disneyland-Shanghai.html#REVIEWS [https://perma.cc/T7XP-PV26]; Review by 136antoineb, *Way Too Overcrowded*, TRIPADVISOR (June 13, 2017), https://www.tripadvisor.com/ShowUserReviews-g308272-d10383031-r492726825-Shanghai_Disneyland-Shanghai.html#REVIEWS [https://perma.cc/VR84-AA3M].

¹⁰⁹ Review by txinky005, *Shanghai Disney – Crowds and Counterfeit Merchandise*, TRIPADVISOR (June 29, 2017), https://www.tripadvisor.com/ShowUserReviews-g308272-d10383031-r497289719-Shanghai_Disneyland-Shanghai.html#REVIEWS [https://perma.cc/YF2W-KFHT].

¹¹⁰ Member Review, ‘*Amazed Us!!! Extremely Unbearable Crowd.*’ TRIPADVISOR (July 4, 2017), https://www.tripadvisor.com/ShowUserReviews-g308272-d10383031-r498550819-Shanghai_Disneyland-Shanghai.html [https://perma.cc/WYV9-H2ZP].

¹¹¹ Review by Morgan P, *Didn’t Feel Like Disney*, TRIPADVISOR (July 15, 2017), https://www.tripadvisor.com/ShowUserReviews-g308272-d10383031-r502148284-Shanghai_Disneyland-Shanghai.html [https://perma.cc/XB4R-PGXQ].

¹¹² *Id.*

¹¹³ Review by dolorspenalba, *Could Be Better*, TRIPADVISOR (Sept. 1, 2017), https://www.tripadvisor.com/ShowUserReviews-g308272-d10383031-r520203862-Shanghai_Disneyland-Shanghai.html#REVIEWS [https://perma.cc/VYD6-RN82].

¹¹⁴ Review by BITAZUM, *Immensely Disappointing*, TRIPADVISOR (Sept. 7, 2017), https://www.tripadvisor.com/ShowUserReviews-g308272-d10383031-r522423923-Shanghai_Disneyland-Shanghai.html#REVIEWS [https://perma.cc/E2LV-UWFZ].

¹¹⁵ Review by dolin wj, *Very Crowded During Local Holiday. Maximize Fast Pass*, TRIPADVISOR (July 4, 2017), <https://www.tripadvisor.com/ShowUserReviews-g308272->

For a campaign that specifically set out to eliminate Disney counterfeits, these results are dismal. Despite the campaign's promises to protect the Shanghai Disneyland Resort area with emergency teams and strengthened patrols, counterfeits remain prevalent in the park.¹¹⁷ Just as in other campaigns, there were short term improvements, but no lasting change.¹¹⁸

2. The Overuse of Campaign-Style Enforcement

Despite its transient effects, the campaign approach is the tool of choice for solving infringement problems in China. At first, campaigns against infringement generally coincided with visiting foreign intellectual property or trade delegations, but since then campaigns have become a common government action.¹¹⁹ For the past several years, the annual agency "Action Plan" or "Implementation Plan" specifically coordinated the use of intellectual property-related campaigns.¹²⁰ For example, one of these intellectual property campaigns, "Special Campaign to Combat IPR Infringement and the Manufacture and Sales of Counterfeit and Shoddy Commodities," lasted nine months.¹²¹ The Chinese government declared it a "huge success," drawing attention to the high number of cases handled during campaign, even though counterfeit goods production is rising with China as the top culprit.¹²² In 2013, the government announced a six-month

d10383031-r498461153-Shanghai_Disneyland-Shanghai.html#REVIEWS

[<https://perma.cc/Q8J5-5G6S>].

¹¹⁶ See, e.g., Review by chinalad, *Shanghai Disneyland . . . The Most Unhappy Place on Earth . . . Stay Away*, TRIPADVISOR (June 30, 2017), https://www.tripadvisor.com/ShowUserReviews-g308272-d10383031-r497429562-Shanghai_Disneyland-Shanghai.html [<https://perma.cc/U5ML-RUP5>]; Review by 561louisl, *Not Suitable for Foreign Visitors*, TRIPADVISOR (June 20, 2017), https://www.tripadvisor.com/ShowUserReviews-g308272-d10383031-r494709754-Shanghai_Disneyland-Shanghai.html-REVIEWS [<https://perma.cc/Z4TV-SBWK>].

¹¹⁷ See Jie, *supra* note 62; *Special Campaign on Protection of Disney Trademarks*, *supra* note 40.

¹¹⁸ See discussion *supra* Section II.B.1.

¹¹⁹ CHEN, *supra* note 33, at 803; see also Danielle Mihalkanin & Brad Williams, *China's Special Campaign to Combat IPR Infringement*, CHINA BUS. REV. (Oct. 1, 2011), <https://www.chinabusinessreview.com/chinas-special-campaign-to-combat-ipr-infringement/> [<https://perma.cc/BF6Z-3LBC>].

¹²⁰ CHEN, *supra* note 33, at 803–04.

¹²¹ See Mihalkanin & Williams, *supra* note 119.

¹²² *Id.*; see also *supra* notes 6–9 and accompanying text.

campaign to combat counterfeit pharmaceutical products.¹²³ In 2014, the government created another campaign promising to fight intellectual property infringement online and elsewhere, such as websites advertising counterfeit products.¹²⁴ Another 2015 government campaign, “Red Shield Net Sword,” similarly focused on purging counterfeits in online sales and lasted five months.¹²⁵ Every year the government carries out campaigns, yet counterfeit production is still rising in China.¹²⁶

Multinational corporations reinforce the use of government campaigns (especially the raids that come with them) by relying on them to enforce their rights.¹²⁷ For example, similarly to Disney, other multinational corporations will establish close relationships

¹²³ See Michael Martina & Megha Rajagopalan, *China Launches Crackdown on Pharmaceutical Sector*, REUTERS (July 17, 2013), <http://www.reuters.com/article/us-china-multinationals-crackdown/china-launches-crackdown-on-pharmaceutical-sector-idUSBRE96G06C20130717> [<https://perma.cc/6TE6-6SNJ>].

¹²⁴ See *China to Crack Down on Online Piracy, Counterfeit Goods*, CHINA DAILY (Apr. 14, 2014), http://www.chinadaily.com.cn/china/2014-04/14/content_17432977.htm [<https://perma.cc/U6DV-E8EU>].

¹²⁵ For the original notice in Mandarin see Gongshang Zongju Guanyu Kaizhan 2015 Hongdun Wangjian Zhuanxiang Xingdong de Tongzhi (工商总局关于开展 2015 红盾网剑专项行动的通知), Notice of the State Administration for Industry and Commerce on Carrying out the Special Campaign of the 2015 Red Shield Network Sword (promulgated by the St. Admin. for Industry & Com., June 3, 2015) ST. ADMIN. FOR INDUSTRY & COM. CHINA, June 1, 2015, http://www.saic.gov.cn/zw/zcfg/gzjwj/201506/t20150603_216912.html [<https://perma.cc/79KG-DGNC>]; see also Deanna Wong, *China's SAIC Sharpens Its Blades for Its 2015 'Red Shield Net Sword' Enforcement Campaign*, LIMEGREEN IP NEWS (Sept. 9, 2015), <http://www.limegreenipnews.com/2015/09/chinas-saic-sharpens-its-blades-for-its-2015-red-shield-net-sword-enforcement-campaign/> [<https://perma.cc/5WFM-3VLW>]; Gillian Wong, *Chinese Regulator Announces New Crackdown on Online Sales of Fakes*, WALL STREET J. (June 4, 2015), <https://www.wsj.com/articles/chinese-regulator-announces-new-crackdown-on-online-sales-of-fakes-1433414502>.

¹²⁶ For example, the State Council in 2017 announced it would create new intellectual property campaigns, along with several campaigns for other issues such as product quality. See Guowuyuan Bangongting Guanyu Yinfa 2017 Nian Quanguo Daji Qinfan Zhishi Chanquan he Zhishou Jiamao Weilie Shangpin Gongzuo Yaodian de Tongzhi (国务院办公厅关于印发 2017 年全国打击 侵犯知识产权和制售假冒伪劣商品工作要点的通知), Notice of the General Office of the State Council on Issuing the Key Points in the Work of 2017 National Crackdown on IPR Infringement and the Manufacturing and Sale of Fake and Shoddy Goods, ST. COUNCIL (May 16, 2017), http://www.gov.cn/zhengce/content/2017-05/31/content_5198504.htm [<https://perma.cc/W6B6-M6ER>].

¹²⁷ See FN Staff, *supra* note 91.

with enforcement agencies, such as the SAIC, to induce enforcement measures.¹²⁸ After the SAIC conducts a raid, the foreign company may treat the SAIC officials and investigators to dinner and karaoke, and give them public recognition for their role.¹²⁹ If corporations cannot obtain SAIC's help, they can hire independent local "providers," or private investigators, to conduct raids as a quick way to get goods off the market.¹³⁰ Providers can be one-man operations or large companies that cater to multinational corporations in need of enforcement.¹³¹ Multinational corporations fall into the temptation of using the campaign approach to solve their intellectual property problems, which feeds into the government's continued use of campaigns.¹³²

Companies occasionally initiate their own anti-counterfeiting actions, but these ultimately resemble the Chinese campaign, as they are short term attempts to combat infringement. For example, in 2006, Disney gave customers the opportunity to enter contests for free Disney prizes if they mailed in the hologram stickers on official Disney merchandise.¹³³ Microsoft initiated its own anti-counterfeiting actions as well.¹³⁴ One action in 2008 consisted of causing a black screen to display every hour for users of pirated versions of Windows XP.¹³⁵ Microsoft then began a "Keep it Real" anti-counterfeiting effort in 2012 after purchasing 169 computers

¹²⁸ PEGGY E. CHAUDHRY & ALAN ZIMMERMAN, PROTECTING YOUR INTELLECTUAL PROPERTY RIGHTS: UNDERSTANDING THE ROLE OF MANAGEMENT, GOVERNMENTS, CONSUMERS AND PIRATES 154 (1st ed. 2013).

¹²⁹ *Id.*

¹³⁰ See YOUILL, *supra* note 31. An example of the inability obtain the SAIC's assistance is the lack of sufficient evidence that infringement took place. See CHINA IPR SME HELPDASK, ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN CHINA 2 (2013), http://www.china-iprhelpdesk.eu/sites/all/docs/publications/EN_Enforcement_Aug-2013.pdf [<https://perma.cc/Z6NV-WSJH>].

¹³¹ See YOUILL, *supra* note 31.

¹³² See FN Staff, *supra* note 91.

¹³³ See Geoffrey A. Fowler, *Disney Marketing Plan Fights Piracy in China Consumers to Collect Stickers for Contest*, WASH. POST (May 31, 2006), <https://www.washingtonpost.com/archive/business/2006/05/31/disney-marketing-plan-fights-piracy-in-china-span-classbankheadconsumers-to-collect-stickers-for-contestspan/8a5181bc-7142-494a-8578-8c95ace58f75/> [<https://perma.cc/72HE-EH4A>].

¹³⁴ See Reuters, *Software Pirates in China Beat Microsoft to the Punch*, N.Y. TIMES (Oct. 18, 2009), <http://www.nytimes.com/2009/10/19/business/global/19iht-windows.html> [<https://perma.cc/XA4U-HJSF>].

¹³⁵ See *id.*

from shops in China, and finding that all were installed with pirated versions of Windows.¹³⁶ As part of this effort, it notified sixteen Beijing sellers, who repeatedly sold these computers with pirated software, to stop.¹³⁷ In 2015, still facing massive pirating, Microsoft took a different course by simply offering free upgrades to Windows 10 to all Windows users, whether or not they were running genuine copies of the software.¹³⁸ Just as with government campaigns, these efforts by multinational corporations are short-term and bring little long-term effects. Both the government and foreign companies have become heavily reliant on short-term actions, whether in the form of campaigns or general anti-counterfeiting efforts.

3. Conflicts of Interest and Corruption Within Campaigns

Campaigns are also rendered ineffective due to conflicts of interest and corruption. A major conflict of interest is the local government's incentive to keep the local economy thriving, as local government authorities from different districts compete with each other for investment and growth, versus true enforcement of rights.¹³⁹ Although top government authorities, such as the SAIC and the State Council, may coordinate campaigns, local government officials may not always carry them out correctly.¹⁴⁰ Incentivized to protect local economic activity, local officials impose light fines and lax enforcement on local counterfeiters, even in the face of orders from high officials.¹⁴¹ For example, a factory producing counterfeits at times can be the "largest single employer in the province," so a government official will call the

¹³⁶ See Michael Kan, *Microsoft Launches Anti-Piracy Campaign in China*, COMPUTERWORLD H.K. (Dec. 16, 2012, 6:48 AM), <http://cw.com.hk/news/microsoft-launches-anti-piracy-campaign-china> [<https://perma.cc/QGZ6-5J97>].

¹³⁷ See *id.*

¹³⁸ See Paul Carsten & Bill Rigby, *Microsoft Tackles China Piracy with Free Upgrade to Windows [Ten]*, REUTERS (Mar. 17, 2015), <http://www.reuters.com/article/us-microsoft-china-idUSKBN0ME06A20150318> [<https://perma.cc/8MBK-8VH7>].

¹³⁹ YI-CHIEH JESSICA LIN, *FAKE STUFF: CHINA AND THE RISE OF COUNTERFEIT GOODS* 48 (1st ed. 2011).

¹⁴⁰ *Id.* at 48–51.

¹⁴¹ *Id.* at 48.

police and stop the ordered agency raid from occurring.¹⁴² A local agency may also accept bribes from both rights holders and counterfeiters, and will conduct—or fail to conduct—enforcement actions depending on which bribe is higher or depending on whether the counterfeiters contribute significantly to the local economy.¹⁴³ Enforcement becomes selective, with agencies focusing on “easy” cases, such as counterfeits being sold in a store, rather than finding and closing down whole enterprises that produce the counterfeits.¹⁴⁴ Raids, although the traditional method used by foreign companies as part of campaigns, merely become “propaganda show[s],” or illusions that action is being taken, instead of genuine enforcement.¹⁴⁵ Despite numerous raids, counterfeit items are still common in China partly due to conflicting interests within the Chinese government itself.¹⁴⁶

Independent local providers hired by corporations to conduct enforcement actions can also be corrupt, even working with counterfeiters to manufacture counterfeit goods and then “seize” them, and also create other obstacles to enforcing rights.¹⁴⁷ As these providers are paid on commission, counterfeit seizures mean higher fees, creating an incentive to work with counterfeiters or manufacture their own counterfeit goods.¹⁴⁸ For example, in 2015, the Associated Press released an investigative report that found

¹⁴² TIM PHILLIPS, *KNOCKOFF: THE DEADLY TRADE IN COUNTERFEIT GOODS* 64 (1st ed. 2005).

¹⁴³ See DIMITROV, *supra* note 29, at 186.

¹⁴⁴ *Id.* at 187.

¹⁴⁵ LIN, *supra* note 139, at 48; see also Kathy Chu, *In the Fight Against Counterfeits, Even the Raids Can Be Fake*, WALL STREET J. (Dec. 3, 2015), <https://www.wsj.com/articles/in-the-fight-against-counterfeits-even-the-raids-can-be-fake-1449171005>. For example, along with the corruption noted earlier, counterfeiters have found ways to evade consequences, such as hiding evidence before authorities arrive based on tip-offs, so when a raid does occur it is ineffective. See *id.*

¹⁴⁶ Kevin Lewis, *The Fake and the Fatal: The Consequences of Counterfeits*, 17 PARK PLACE ECONOMIST 47, 51 (2009).

¹⁴⁷ See Erika Kinetz, *Who's Investigating Fake Chinese Goods? Fake Investigators*, SAN DIEGO UNION TRIB. (Dec. 9, 2015), <http://www.sandiegouniontribune.com/sdut-whos-investigating-fake-chinese-goods-fake-2015dec09-story.html> [<https://perma.cc/4KGF-82DW>].

¹⁴⁸ See *China Anti-Counterfeiting Agents Make Many of the Fakes Themselves – Report*, GUARDIAN (Dec. 10, 2015), <https://www.theguardian.com/world/2015/dec/11/china-anti-counterfeiting-agents-make-many-of-the-fakes-themselves-report> [<https://perma.cc/NX6T-MYF9>].

“anti-counterfeiting investigators were widely involved in copying products of their own western customers.”¹⁴⁹ In another example, a company hired an investigator to track down counterfeit anti-dandruff shampoo in China.¹⁵⁰ Instead of conducting the investigation, he instead set up a factory to produce the shampoo himself which he then seized, calling it a successful raid.¹⁵¹ As a final example, Gucci brought an intellectual property case to court against a Chinese infringer relying on its investigator’s documents stating that two thousand counterfeit Gucci eyeglasses were found during a raid.¹⁵² The court dismissed Gucci’s case, finding that the documents may have been forged.¹⁵³ Alexander Theil, an investigator who supervised thousands of raids for counterfeit goods mostly in China, stated that in many raids, “numbers are faked, documents are faked or there is something fishy.”¹⁵⁴ Conflicts of interests and corruption are rampant in raids, but the government and multinational corporations continue to rely heavily on them, whether as part of campaigns or as part of general anti-counterfeiting measures.

4. The Responsive Nature of Campaigns

As campaigns in China are responsive by nature, they are not dedicated to solving the root cause of intellectual property infringement. They are measures designed as a “rapid resolution of a major problem,” done in response to pressure by a company or government authority as well as in crisis situations.¹⁵⁵ Pressure from government authorities to look good in the face of massive infringement, or a company’s board of directors looking for a fast solution to the situation in China, can also drive these short-term solutions.¹⁵⁶ For example, when China began its quest to join the World Trade Organization, it turned to campaigns to crack down on counterfeits, leading to these campaigns’ characterization as

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² See Chu, *supra* note 145.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ DIMITROV, *supra* note 29, at 4.

¹⁵⁶ See FN Staff, *supra* note 91.

“political and diplomatic” measures to respond to foreign pressure rather than true enforcement of intellectual property rights.¹⁵⁷ Customs enforcement of intellectual property rights also fluctuated depending on the level of U.S. government pressure.¹⁵⁸ Provinces that are more dependent on foreign investment have significant amounts of enforcement actions against counterfeiters, while provinces that do not have foreign investment have little to none.¹⁵⁹ Overall, campaigns come about if there is pressure or financial incentive, whether it is to combat criticism or drive investment, and not out of the true need for intellectual property enforcement itself.¹⁶⁰

5. Foreign Companies’ Rare Use of Civil Litigation

Campaigns are used very often, which creates the impression that there must be no other possible method of effective intellectual property rights enforcement.¹⁶¹ This is not the case, but corporations are neglecting alternative avenues. Disney has brought few intellectual property infringement cases in China since 1994—only three—when compared to its vast number of cases handled in the United States.¹⁶² Disney’s over 3,500 intellectual

¹⁵⁷ Max Goldberg, *Enclave of Ingenuity: The Plan and Promise of the Beijing Intellectual Property Court* 16 (May 19, 2017) (unpublished B.A. thesis, Yale University), http://elischolar.library.yale.edu/cgi/viewcontent.cgi?article=1005&context=ceas_student_work [<https://perma.cc/5R9V-GKRU>]; see also DIMITROV, *supra* note 29, at 24–36.

¹⁵⁸ See DIMITROV, *supra* note 29, at 79.

¹⁵⁹ See *id.* at 57.

¹⁶⁰ DEZAN SHIRA & ASSOCS., *INTELLECTUAL PROPERTY RIGHTS IN CHINA* 29 (Chris Devonshire-Ellis et al. eds., 2d ed. 2011).

¹⁶¹ See *supra* Section II.B.2.

¹⁶² This data is based on the Chinese version of IPHouse, a database of over 200,000 criminal, administrative, and civil cases filed in China. IPHOUSE, <http://en.iphouse.cn/> [<https://perma.cc/TJ7C-2F66>]. To reach this number, the author searched IPHouse to find the total number of IP civil litigation cases brought by Disney since 1980, and confirmed that no other cases were brought prior to 1994. To conduct this search query: (1) Select “Roles” on the IPHouse homepage; (2) then select “Litigant” under the “Roles” section; and (3) enter the Mandarin character name for Disney (“迪士尼”) into the search bar. Three names—two versions of “The Walt Disney Company” (“迪士尼企业公司” and “迪士尼公司”) and the third, Disney China (“华特迪士尼(中国)有限公司”)—appear with results under each name. For each of the three names: (1) Select the respective named hyperlink; (2) scroll down to the bottom of the page and follow the “See more” hyperlink; and finally, (3) filter the results by limiting the query to cases after 1980. This

property matters in the United States alone consist of more than 1,457 copyright, 1,760 patent, and 362 trademark cases, motions and filings.¹⁶³ The lack of Chinese civil litigation cases, although having a high win rate, mirrors the trend for multinational corporations in general in China.¹⁶⁴

Even more troubling, the number of foreign intellectual property cases is actually shrinking. In 2013, foreign cases comprised 1.9% of all intellectual property cases in China.¹⁶⁵ In 2014, the number of foreign intellectual property cases dropped to 1.8%.¹⁶⁶ This number shrank further in 2015 to a mere 1.2%.¹⁶⁷ In contrast, the number of total intellectual property cases in China is generally rising. Chinese courts received 133,863 cases in 2014, 130,200 cases in 2015, and a record number of 152,072 in 2016.¹⁶⁸

Mandarin name search revealed two civil suits where Disney was the plaintiff: One of the suits is the 2016 case discussed *infra* Section III.A.2, and the other is a suit from 2003. Additionally, the author returned to the “Litigant” page and entered the English version of the name “Disney” into the search bar. This revealed one litigant name, “Disney Enterprises, Inc.” Similar to the Mandarin search: (1) Follow the named hyperlink; and (2) scroll down to select “See more.” This search query yielded only one result, a 2005 civil suit brought by Disney, where it again was awarded damages. In total, three cases have been brought by Disney since 1994. Disney is also known as a strong trademark enforcer in the United States. For an overview of a of few of its latest trademark cases see, Chelsea Wold, *Big Mouse in the House: Disney Trademark Oppositions*, LAW-INSPIRING.COM (Jan. 19, 2017), <http://lawinspiring.com/2017/01/19/disney-trademark-oppositions/> [https://perma.cc/A236-ST6P].

¹⁶³ Case Activity for *The Walt Disney Company*, LAW360, <https://www.law360.com/companies/the-walt-disney-company/dockets> [https://perma.cc/2AP6-HVZ5] (last visited Nov. 25, 2017). Disney’s case activity (as of February 2, 2017) also includes suits related to labor law, contracts, personal injury, and civil rights. *See id.*

¹⁶⁴ *See* Mark Cohen, *Patent Litigation, Local Protectionism and Empiricism: Data Sources and Data Critiques*, CHINA IPR (Mar. 10, 2016), <https://chinaipr.com/2016/03/10/patent-litigation-local-protectionism-and-empiricism-data-sources-and-data-critiques/> [https://perma.cc/82M6-R2XE] [hereinafter *Patent Litigation, Local Protectionism and Empiricism*]; Mark Cohen, *Summarizing the SPC’s 2015 White Paper*, CHINA IPR (Apr. 22, 2016), <https://chinaipr.com/2016/04/22/summarizing-the-spcs-2015-white-paper/> [https://perma.cc/H9LD-7TBV] [hereinafter *Summarizing the SPC’s 2015 White Paper*]; Section III.A (discussing, in part, examples of Disney’s civil litigation success in China).

¹⁶⁵ *Summarizing the SPC’s 2015 White Paper*, *supra* note 164.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *See* Mark Cohen, *2014 Judicial IPR White Paper Shows Huge Growth in Trademark Appeals*, CHINA IPR (Apr. 21, 2015), <https://chinaipr.com/2015/04/21/2014-judicial-ipr-white-paper-shows-huge-growth-in-trademark-appeals/> [https://perma.cc/9Z29-ZVUV]; *Summarizing the SPC’s 2015 White Paper*, *supra* note 164; Cao Yin, *China’s Courts Saw*

Based on the data, it seems local Chinese companies have much less hesitancy to use the civil litigation system than their foreign counterparts.

Foreign companies make up a miniscule percentage of the civil litigation docket, but it is unclear why, as there are no explanations from the companies themselves. Instead of using the courts, Disney chose the campaign approach.¹⁶⁹ Companies may see civil litigation, despite its advantages and improvements discussed in Part III, as costly and time-consuming to bring for intellectual property infringement when counterfeits are abundant. However, civil trademark and copyright cases generally take an average of four months to complete and have enduring consequences, unlike the campaign approach.¹⁷⁰ The hesitancy could also be a matter of unfamiliarity with the Chinese court system. Whatever the reason, the civil litigation system is severely neglected by foreign companies.

6. Obstacles to Using Criminal Prosecution Effectively

Criminal prosecution is another way to enforce intellectual property rights in China, but one fraught with difficulties. Intellectual property infringement is expressly prohibited under the Criminal Law of the People's Republic of China ("Chinese Criminal Law").¹⁷¹ Companies can bring cases directly to the Public Security Bureau ("PSB") or administrative bodies such as

Record Number of IP Cases in 2016, CHINA DAILY (Apr. 24, 2016), http://www.chinadaily.com.cn/china/2017-04/24/content_29059335.htm [<https://perma.cc/7TSS-YVW6>]. The 2015 number includes 101,324 civil litigation cases, but breakdowns for each year are not available. See *Summarizing the SPC's 2015 White Paper*, *supra* note 164.

¹⁶⁹ See *supra* Section I.D; see also *supra* note 164 and accompanying text.

¹⁷⁰ To see this data, one needs to register for free at CIELA, a database of Chinese intellectual property cases. See CIELA, ANALYSING COPYRIGHT CIVIL INFRINGEMENT CASES: ALL COURTS (2015) (on file with Fordham Intellectual Property, Media & Entertainment Law Journal) [hereinafter CIELA COPYRIGHT: ALL COURTS]; CIELA, ANALYSING TRADE MARK CIVIL INFRINGEMENT CASES: ALL COURTS (2015) (on file with Fordham Intellectual Property, Media & Entertainment Law Journal) [hereinafter CIELA TRADEMARK: ALL COURTS].

¹⁷¹ See Criminal Law of the People's Republic of China (promulgated by Standing Comm. Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997) (EN), http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384075.htm [<https://perma.cc/ZNN3-E5JL>].

the SAIC will transfer the cases to the PSB.¹⁷² In either option, if there is sufficient evidence, the PSB will then hand the case over to a people's prosecutor for criminal prosecution.¹⁷³ However, several challenges make criminal prosecution difficult.

Criminal prosecution for these cases comes with high thresholds. A trademark infringer is punished if the case is of a "serious" nature, and in the case of an "especially serious" nature, the time of imprisonment lengthens.¹⁷⁴ Knowingly selling trademark-infringing merchandise with a "relatively large" sales volume can be punished with imprisonment, criminal detention, and fines.¹⁷⁵ Forging or manufacturing of a "serious" nature is punished the same way.¹⁷⁶ If the amount of the illicit income for forging or manufacturing is "especially serious," then the time for imprisonment is extended.¹⁷⁷ The Supreme People's Court interpreted the above trademark thresholds to mean that trademark infringement is punishable if the illegal business volume is 50,000 RMB (7,496 USD) or above, or if the amount of illegal profits is at least 30,000 RMB (4,552 USD).¹⁷⁸ Thresholds are applied to other types of intellectual property infringement; copyright infringers are punished if "the amount of illegal gains is relatively large" or if there are "other serious circumstances," and patent infringers are similarly punished when the "circumstances are serious."¹⁷⁹

Each type of illegal activity is only illegal if the circumstances are "serious," which may overlook one-man infringers and infringers with small to medium scale operations, entirely in favor of only catching the big fish. The thresholds focus on the volume of the enforcement instead of the intellectual property right itself, implying the notion that people can infringe intellectual property

¹⁷² See Ryan Ong, *Tackling Intellectual Property Infringement in China*, CHINA BUS. REV. (Mar. 1, 2009), <https://www.chinabusinessreview.com/tackling-intellectual-property-infringement-in-china/> [<https://perma.cc/CDU6-T5GN>].

¹⁷³ See *id.*

¹⁷⁴ Criminal Law of the People's Republic of China, art. 213 (EN).

¹⁷⁵ *Id.* art. 214.

¹⁷⁶ *Id.* art. 215.

¹⁷⁷ *Id.*

¹⁷⁸ MICHAEL BLAKENEY, *INTELLECTUAL PROPERTY ENFORCEMENT: A COMMENTARY ON THE ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA) 202* (1st ed. 2012).

¹⁷⁹ Criminal Law of the People's Republic of China, arts. 216–17 (EN).

rights in certain cases.¹⁸⁰ The United States brought these thresholds under scrutiny when it made a request for consultations to the World Trade Organization, claiming that the thresholds do not follow article 61 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, which the two countries promised to follow.¹⁸¹ Article 61 states: “Members shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale.”¹⁸² Member countries found that China’s “quantitative thresholds would not capture counterfeiting activities of limited value or smaller quantities,” and that these small scale illegal activities are “clearly meaningful,” as they contribute to the chain of infringement.¹⁸³ The panel formed to investigate the claim further noted the lack of criminal procedures and penalties for crimes falling below the thresholds.¹⁸⁴ Eventually, the panel found that China’s criminal measures do exclude some copyright and trademark infringement because of the thresholds, but also found that article 61 does not require member states to criminalize *all* copyright and trademark infringement.¹⁸⁵

As a result, Chinese criminal law remains unchanged to the detriment of rights holders. Only a select group of rights holders are protected. Evidencing this selectivity, a 2015 study of 376 Chinese intellectual property criminal cases, the United States’ official statistics on about half of these cases, official U.S. and Chinese statistics on IP criminal and administrative enforcement in

¹⁸⁰ See BLAKENEY, *supra* note 178.

¹⁸¹ See DS362: *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WORLD TRADE ORG. [WTO], https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm [<https://perma.cc/HR6Z-6P29>] (last visited Nov. 24, 2017). A request for consultations “formally initiates a dispute in the WTO.” *The Process — Stages in a Typical WTO Dispute Settlement Case*, Part of *Dispute Settlement System Training Module: Chapter [Six]*, WTO, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s2p1_e.htm [<https://perma.cc/KBN7-H2K5>] (last visited Nov. 25, 2017).

¹⁸² Panel Report, *China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, ¶ 7.502, WTO Doc. WT/DS362/R (adopted Jan. 26, 2009).

¹⁸³ *Id.* ¶ 7.438.

¹⁸⁴ See *id.* ¶¶ 7.444–46.

¹⁸⁵ WTO, CHINA — INTELLECTUAL PROPERTY RIGHTS SUMMARY (2017 ed., 2010), https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds362sum_e.pdf [<https://perma.cc/SV9R-FKJB>].

both countries, and in-depth interviews with intellectual property law practitioners in China, revealed that those who successfully brought criminal infringement cases were in a “handful of economically or politically powerful companies in a few particular industries.”¹⁸⁶ The study found that state-owned enterprises comprised 49% of these companies and 44% were companies with controlling foreign shareholders or foreign intellectual property rights, such as multinational corporations or corporations that hold foreign brands.¹⁸⁷ A mere 6.7% of Chinese criminal infringement cases involved domestic private and collective companies.¹⁸⁸ The majority of criminal infringement cases are also concentrated in a few companies with well-known brands, with at least 89.7% of all criminal infringement cases, whether foreign or domestic, falling into this category.¹⁸⁹

As it stands, only cases involving the biggest brands, or that seriously undermine the socialist market economy, are prosecuted, whether foreign or domestic.¹⁹⁰ The opposite is the case for administrative petitions, such as those to the SAIC requesting raids, whose petitioners belong to a variety of industries and brands.¹⁹¹ Overall, the Chinese criminal system handles a very small amount of infringement cases, with the vast majority of them being handled by administrative agencies.¹⁹² The deficiencies in the current Chinese criminal law lead to less cases prosecuted, less companies protected, and less opportunities for intellectual property holders to enforce their rights.¹⁹³ They also lead to companies turning to campaigns, as the thresholds limit criminal

¹⁸⁶ 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, 151–52, 154 (2015).

¹⁸⁷ *See id.* at 154.

¹⁸⁸ *See id.* at 155.

¹⁸⁹ *See id.* at 156–57.

¹⁹⁰ *See id.* at 156–57, 172.

¹⁹¹ *See id.* at 167.

¹⁹² *See id.* at 168.

¹⁹³ *See id.* at 165, 186. Enforcement against online counterfeiting operations also suffers from the high thresholds; police only begin investigations into operations if there is a strong possibility the thresholds can be met. *See* INTA ANTICOUNTERFEITING COMM. CHINA SUBCOMM., *ONLINE COUNTERFEITING ISSUES AND ENFORCEMENT IN CHINA* 7 (2015), <https://www.inta.org/Advocacy/Documents/2015/Online%20Counterfeiting%20Issues%20and%20Enforcement%20in%20China.pdf> [<https://perma.cc/7CTL-CWP2>].

prosecution.¹⁹⁴ This is worrisome as campaigns generally have only temporary effects.

However, when it comes to engaging the criminal justice system, these companies fall into a trap just as they do when it comes to campaigns. Their routine strategy is to build rapport with officials and pay fees for officials to investigate their claims, thereby securing the prioritization of their cases from local criminal law enforcement.¹⁹⁵ This strategy is noted, just as for campaigns in general, as leading to piecemeal and ineffective enforcement.¹⁹⁶ The current pattern leads to criminal prosecution only when the biggest foreign companies plead enough to instigate action from officials.¹⁹⁷ This creates yet another unnecessary responsive enforcement regime.¹⁹⁸

In conclusion, the campaign approach as currently practiced is inherently weak and ineffective, and multinational corporations are reinforcing its use by nearly exclusively using campaigns. Upon announcement of the Disney Campaign, Jack Clode, the co-founder of BlackSpeak Group, a firm working on trademark enforcement issues in China, correctly asked: “Authorities will keep Disney happy and will get a few wins against counterfeiters—but the question is, [w]hat sort of long-term effect will this have?”¹⁹⁹ This question conveys the crux of the problem with the current campaign approach: A campaign is a short-term solution for a long-term problem. As the results of campaigns have shown, the answer to his question is very little.

¹⁹⁴ See Liu, *supra* note 186, at 163 (noting how companies “seek criminal . . . processing when cases reach prosecution thresholds”).

¹⁹⁵ See *id.* at 163–64.

¹⁹⁶ See *id.* at 164.

¹⁹⁷ See *id.* at 165.

¹⁹⁸ See *id.*

¹⁹⁹ Gough, *supra* note 63.

III. MOVING BEYOND: INVESTING IN CIVIL LITIGATION, MODIFYING THE CAMPAIGN APPROACH, AND CREATING PRODUCTIVE ALLIANCES

In September 2017, the State Council's Ministry of Commerce, the ministry in charge of domestic and foreign trade,²⁰⁰ announced yet another campaign to attack intellectual property rights infringement.²⁰¹ The campaign has the hallmarks of the classic Chinese campaign: it is responsive to external pressure, as it was created to increase foreign investment, and will last for a short period of time, from September to December 2017.²⁰² With these hallmarks, it is highly likely this will be another campaign with transient effects. Lance Noble, Policy Director for the European Union Chamber of Commerce in China, seemed to recognize this and commented: "As welcome as further public commitments to protecting [intellectual property rights] are, this cannot be achieved through a campaign-style approach."²⁰³ He stated that instead, there needs to be "sustained commitment" to enforcement.²⁰⁴

This campaign was also critiqued at the section 301 Investigation and Hearing that the U.S. Trade Representative conducted on October 10, 2017.²⁰⁵ This investigation examined

²⁰⁰ See *Mission*, MINISTRY OF COMMERCE CHINA (Dec. 7, 2010) <http://english.mofcom.gov.cn/column/mission2010.shtml> [<https://perma.cc/8MBN-JYGP>].

²⁰¹ See *China Launches Campaign to Protect IPRs of Foreign Companies*, CHINA'S WEBSITE FOR CAMPAIGN AGAINST IPR INFRINGEMENTS & COUNTERFEITS (Sept. 19, 2017), <http://english.ipraction.gov.cn/article/TopNews/201709/20170900155494.shtml> [<https://perma.cc/4R33-CYRY>].

²⁰² See *id.* But see *China's Crackdown on Intellectual Property Theft Wasn't Driven by Outside Pressure: Official*, CNBC (Sept. 28, 2017), <https://www.cnbc.com/2017/09/28/china-crackdown-on-intellectual-property-theft-wasnt-driven-by-outside-pressure-official.html> [<https://perma.cc/4UXS-NPTD>] (noting the Chinese Ministry of Commerce's denial that the campaign was a result of foreign probes).

²⁰³ Joe McDonald, *China Announces Trade Secrets Crackdown to Assure Investors*, AP NEWS (Sept. 20, 2017), <http://www.businessinsider.com/ap-china-announces-trade-secrets-crackdown-to-assure-investors-2017-9> [<https://perma.cc/K9BG-WRXK>]. The European Union Chamber of Commerce in China is an organization consisting of 1,600 member European companies and is recognized as the "official voice of European business in China." *About the Chamber*, EUR. UNION CHAMBER OF COMMERCE IN CHINA, <http://www.europeanchamber.com.cn/en/european-chamber-background> [<https://perma.cc/44XS-ZEAP>] (last visited Nov. 24, 2017).

²⁰⁴ McDonald, *supra* note 203.

²⁰⁵ See *Initiation of Section 301 Investigation; Hearing; and Request for Public Comments: China's Acts, Policies, and Practices Related to Technology Transfer*,

China's actions and policies regarding technology transfer, intellectual property, and innovation.²⁰⁶ Mark Cohen, a Senior Counsel at the U.S. Patent and Trademark Office who has over thirty years of experience handling intellectual property issues in China, served as a panel member at the hearing.²⁰⁷ He noted the campaign's time period of only three months and asked: "Many scholars think that these short campaigns have limited duration and effect So I'd like to know why is this particular program any different from other ones before it? Why not extend it or make it permanent? Or perhaps should the focus be on judicial reform or other areas?"²⁰⁸

This Part will provide some answers to Cohen's questions on how to improve enforcement and how multinational corporations can participate. Multinational corporations need to do their part in changing the enforcement paradigm, and work towards a long-term solution instead of falling into the campaign trap.²⁰⁹ This can occur in several ways. Section III.A examines recently-created tools and developments in the civil litigation system, such as the new intellectual property courts, the long-term effects of recent rulings on Chinese intellectual property law, and recent successes with preliminary injunctions. Section III.A also urges companies to take advantage of these opportunities through new and increased use. Section III.B then proposes modifications to the existing Chinese campaign approach using examples from campaigns in the United States and multinational brand alliances. Instead of relying heavily on campaigns and their raids, multinational corporations should

Intellectual Property, and Innovation, FED. REG. (Aug. 24, 2017), <https://www.federalregister.gov/documents/2017/08/24/2017-17931/initiation-of-section-301-investigation-hearing-and-request-for-public-comments-chinas-acts-policies> [<https://perma.cc/DR3U-WLW3>].

²⁰⁶ See *id.*

²⁰⁷ See Section 301 Investigation and Hearing: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, Office of the U.S. Trade Representative 162, No. USTR-2017-0016-0063 (Oct. 10, 2017), <https://www.regulations.gov/document?D=USTR-2017-0016-0063> [<https://perma.cc/2GD6-9AP9>]. The transcript is available for download at the above link. See also Biography of Mark Cohen, Senior Counsel, U.S. Patent and Trademark Office, U.S.-CHINA ECON. & SEC. REV. COMM'N (2016), https://www.uscc.gov/sites/default/files/Admin%20Panel_Cohen_Bio.pdf [<https://perma.cc/7UN5-BX55>].

²⁰⁸ Section 301 Investigation and Hearing, *supra* note 207, at 164–65.

²⁰⁹ *Id.* at 164–66.

incorporate elements of the mechanisms above into a comprehensive, long-term strategy.

A. Opportunities in Civil Litigation

1. Establishment of the New Intellectual Property Courts

The Chinese government looks to the civil litigation system as a place to combat infringement. To develop more protection for intellectual property rights, in 2014 the government developed several intellectual property courts (“IP Courts”) in Beijing, Shanghai, and Guangzhou.²¹⁰ These courts handle intellectual property cases and over time they have become more specialized in the subject matter.²¹¹ Other characteristics of the intellectual property courts are important to note. Although China is a civil law country and its courts are not required to follow precedent, the highest IP Courts have issued “guiding” cases and model rulings to inform lower courts on key issues.²¹² For example, they have issued guiding cases on evidence preservation and preliminary injunctions, allowing these methods to become possible options for intellectual property owners.²¹³ The Beijing IP Court has cited prior cases in its rulings, making for a more uniform rule of law

²¹⁰ For the original decision see, *Decision of the Standing Committee of the National People’s Congress on Establishing Intellectual Property Right Courts in Beijing, Shanghai and Guangzhou*, (Standing Comm. Nat’l People’s Cong., effective Aug. 31, 2014), CLI.I.232867 (EN) (PKULAW.CN), <http://en.pkulaw.cn/display.aspx?cgid=232867&lib=law> (last visited Nov. 25, 2017).

²¹¹ See Mark Cohen, *A Deeper Dive into the Jurisdiction and Role of Specialized IP Courts*, CHINA IPR (Nov. 15, 2014), <https://chinaipr.com/2014/11/15/a-deeper-dive-into-the-jurisdiction-and-role-of-specialized-ip-courts/> [<https://perma.cc/ZW79-R486>].

²¹² See Mark Cohen, *Spring Time for IPR Case Law in China?*, CHINA IPR (Mar. 12, 2017), <https://chinaipr.com/2017/03/12/spring-time-for-ipr-case-law-in-china/> [<https://perma.cc/2L3N-SWLR>]; see also ROBBINS COLLECTION, UNIV. CAL. BERKELEY SCH. OF LAW, THE COMMON LAW AND CIVIL LAW TRADITIONS 1 (2010), <https://www.law.berkeley.edu/library/robbins/pdf/CommonLawCivilLawTraditions.pdf> [<https://perma.cc/4K4H-JKCY>] (describing the civil law system). For an example of the issuance of guiding cases see, Xiaohan Lou et al., Translation, *Supreme People’s Court Annual Report on Intellectual Property Cases (2015) (China)*, 26 WASH. INT’L. L.J. 147, 149–69 (2016).

²¹³ See Xiang Li et al., *China’s Specialized IP Courts*, WOLTERS KLUWER: KLUWER PATENT BLOG (Apr. 10, 2017), <http://kluwerpatentblog.com/2017/04/10/chinas-specialized-ip-courts/?print=pdf> [<https://perma.cc/Q87R-4NJX>].

regarding intellectual property rights.²¹⁴ The IP Courts are also now publishing their decisions on a database for the public, creating more consistency and transparency as older cases are easier to find for judges deciding new ones.²¹⁵

In 2017, the government established new specialized circuit intellectual property tribunals (“IP Tribunals”) in Nanjing, Suzhou, Chengdu, and Wuhan, which will spread opportunities for intellectual property rights enforcement to other areas of China for national and foreign companies.²¹⁶ IP tribunals are “attached” to the existing people’s courts in those cities.²¹⁷ These tribunals resemble the IP Courts in the sense that they exercise jurisdiction over intellectual property cases, and have judges with extensive experience with intellectual property litigation.²¹⁸ Unlike the IP Courts, they have cross-regional jurisdiction, meaning they can handle cases from a variety of cities in a region.²¹⁹ Overall, the civil litigation system for intellectual property rights is greatly improving, and foreign companies should not hesitate to use them.

2. High Win Rates for Foreign Companies

Civil litigation is the key way companies can combat infringement for long-term change. Chinese law, such as the Chinese Trademark Law (“Trademark Law”), gives companies the right to sue infringers.²²⁰ Disney was one of the first foreign companies to see the advantages of civil litigation when it brought

²¹⁴ See Cohen, *supra* note 212.

²¹⁵ Zhongguo Zhishi Chanquan Caipan Wenshu Wang (中国知识产权裁判文书网), [China IPR Judgments and Decisions], SUP. PEOPLE’S CT. CHINA (China), <http://ipr.court.gov.cn/> [https://perma.cc/K7QU-FY8J] (last visited Jan. 27, 2018).

²¹⁶ See Li et al., *supra* note 213.

²¹⁷ *Id.*

²¹⁸ See *id.*

²¹⁹ See *id.*

²²⁰ See Zhonghua Renmin Gongheguo Shangbiao Fa (Genju 2013 Nian 8 Yue 30 Ri Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui 《Guanyu Xiugai (Zhonghua Renmin Gongheguo Shangbiao Fa) de Jueding》 Xiuzheng (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)) [Trademark Law of the People’s Republic of China] (promulgated by Standing Comm. Nat’l People’s Cong., Aug. 23, 1982; amended Aug. 30, 2013, effective May 1, 2014), art. 60, *translated in* World Intell. Prop. Org. [WIPO], at 19–20, Lex. No. CN195 (2014) (EN), <http://www.wipo.int/wipolex/en/details.jsp?id=13198> [https://perma.cc/D9MQ-Z6H7].

an intellectual property infringement case in 1994 in Beijing.²²¹ The Beijing court in *Walt Disney Co. v. Beijing Press and Xinhua Bookstores* ruled against three Chinese publishing and distribution companies for their production of children's books based on Disney's animated films and characters without the company's approval.²²² Disney received a 227,000 yuan judgment against the Chinese companies.²²³ Disney's latest intellectual property infringement civil case in 2016 was another win for the company.²²⁴ The Shanghai IP Tribunal levied a 194,440 USD judgment against two infringing companies who created characters, titles, and posters substantially similar to those from Disney and Pixar's "Cars" and "Cars 2" films.²²⁵

Foreign companies in general have a high win rate for intellectual property-related civil litigation and even "had a 100% win rate" against counterfeiters in the Beijing IP Court in 2015.²²⁶ For all copyright infringement cases, whether foreign or domestic, across China there is still a high 85% win rate in court.²²⁷ The win rates for copyright cases in the Beijing and Shanghai courts are 82% and 92%, respectively.²²⁸ Trademark cases across China boast

²²¹ See CHAUDHRY & ZIMMERMAN, *supra* note 128, at 20–21; Mo Zhang, *International Civil Litigation in China: A Practical Analysis of the Chinese Judicial System*, 25 B.C. INT'L & COMP. L. REV. 59, 76 (2002).

²²² Zhang, *supra* note 221, at 76–77; see also *Analysis of Walt Disney of the United States v. Beijing Publishing Press, etc. for Infringement of Copy Rights*, PKULAW.CN, [http://pkulaw.cn/\(S\(21ctss45i13hxxjvmt44tijw\)\)/fulltext_form.aspx?Db=qikan&Gid=1510087600](http://pkulaw.cn/(S(21ctss45i13hxxjvmt44tijw))/fulltext_form.aspx?Db=qikan&Gid=1510087600) [<https://perma.cc/HM6Z-M9S3>] (last visited Nov. 22, 2017).

²²³ See *Analysis of Walt Disney of the United States v. Beijing Publishing Press*, *supra* note 222.

²²⁴ See *Disney Wins Copyright Infringement Case Against Chinese Companies*, CHINA DAILY (Jan. 3, 2017), http://usa.chinadaily.com.cn/business/2017-01/03/content_27844721.htm [<https://perma.cc/PJ23-XQVP>].

²²⁵ See *id.* The Shanghai IP Tribunal is administered by the Shanghai Pudong New Area People's Court and was established specifically for the Shanghai Pudong area. See *Dispute Settlement System*, SHANGHAI MUN. PEOPLE'S GOV'T (Sept. 13, 2017), <http://www.shanghai.gov.cn/shanghai/node27118/node27818/u22ai87437.html> [<https://perma.cc/7RYK-ZPVX>].

²²⁶ *Patent Litigation, Local Protectionism and Empiricism*, *supra* note 164.

²²⁷ CIELA COPYRIGHT: ALL COURTS, *supra* note 170. These figures are as of 2015.

²²⁸ CIELA, ANALYSING COPYRIGHT CIVIL INFRINGEMENT CASES: BEIJING (2015) (on file with Fordham Intellectual Property, Media & Entertainment Law Journal) [hereinafter CIELA COPYRIGHT: BEIJING]; CIELA, ANALYSING COPYRIGHT CIVIL INFRINGEMENT

a 91% win rate.²²⁹ The Beijing and Shanghai courts have win rates of 88% and 87%, respectively, for trademark cases.²³⁰ The consistently high win rate, as well as their successes over the years in Chinese courts, should show foreign companies that the Chinese civil litigation system is more reliable to stop infringers in the country than the campaign approach.

3. Civil Litigation's Long-term Effects on Chinese Law

Civil litigation also has long-term effects on Chinese law. For example, as a result of several cases, the Trademark Law was revised with tougher restrictions on infringement.²³¹ In 2011, Danjaq LLC, the U.S. company that produces the James Bond films, brought one such case that changed this law.²³² Danjaq LLC brought a civil case against a Chinese condom maker who used the Chinese characters for "James Bond, 007" and the name in English as the trademark logos for its products.²³³ The condom producer argued that its trademark was valid and its products were in an unrelated business.²³⁴ However, the Beijing High People's Court ruled that the condom producer "violated the 'principle of good faith' required under China's trademark law when a trademark is registered."²³⁵ It also ruled that trademarks cannot infringe on

CASES: SHANGHAI (2015) (on file with Fordham Intellectual Property, Media & Entertainment Law Journal) [hereinafter CIELA COPYRIGHT: SHANGHAI].

²²⁹ CIELA TRADEMARK: ALL COURTS, *supra* note 170.

²³⁰ CIELA, ANALYSING TRADE MARK CIVIL INFRINGEMENT CASES: BEIJING (2015) (on file with Fordham Intellectual Property, Media & Entertainment Law Journal) [hereinafter CIELA TRADEMARK: BEIJING]; CIELA, ANALYSING TRADE MARK CIVIL INFRINGEMENT CASES: SHANGHAI (2015) (on file with Fordham Intellectual Property, Media & Entertainment Law Journal) [hereinafter CIELA TRADEMARK: SHANGHAI].

²³¹ See *Trademark Law Set for Major Shakeup*, CHINA'S WEBSITE FOR CAMPAIGN AGAINST IPR INFRINGEMENTS & COUNTERFEITS (Feb. 17, 2017), <http://english.ipraction.gov.cn/article/Policies/201702/20170200125065.shtml> [<https://perma.cc/76PR-KB6C>].

²³² See *id.*; see also *Company Profile of Danjaq LLC*, BLOOMBERG, <https://www.bloomberg.com/profiles/companies/0731761D:US-danjaq-llc> [<https://perma.cc/7ZVC-BBYK>] (last visited Nov. 24, 2017).

²³³ *Trademark Law Set for Major Shakeup*, *supra* note 231.

²³⁴ See *id.*

²³⁵ *Id.* (quoting the Beijing High People's Court). The principle of good faith is violated when a trademark applicant knows of the existence of a person's prior use of an unregistered trademark, and proceeds to apply to register that same trademark. See Li Yunquan, *China's New Trademark Law Strengthening Good Faith Requirement in Trademark Registration and Use*, WANHUIDA PEKSUNG, <http://www.wanhuida.com/en/>

existing rights.²³⁶ Consequently, the government created a new regulation as part of the Trademark Law taking effect in 2017 to protect well-known characters, including those in books and movies.²³⁷ The regulation stated that those characters and titles of works protected by copyright law cannot be used as trademarks by any entity that does not hold the copyright, unless the copyright holder grants permission.²³⁸

This new regulation, created from a civil intellectual property case and not from a campaign,²³⁹ is useful for companies such as Disney who rely largely on its characters for business. Setting precedent through civil litigation makes it easier for companies to protect their trademarks, and to prove infringement in future civil cases. If a foreign company uses the civil litigation system, not only will they likely have a successful result, but also will likely permanently change laws in favor of intellectual property rights holders.

4. Higher Damages Awarded for Intellectual Property Civil Cases

The amount of damages won against infringers has risen, with the Beijing IP Court in a case between plaintiff Beijing Watchdata Data Systems Co. Ltd. and defendant Hengbao Co. Ltd. issuing its highest award for its jurisdiction to date, approximately 7.5 million USD, in December 2016.²⁴⁰ This civil case is also notable because it was the first time an award included an order for compensation

tabid/259/ArticleID/3361/default.aspx [https://perma.cc/C2MX-WTJN] (last visited Nov. 25, 2017).

²³⁶ See *Trademark Law Set for Major Shakeup*, *supra* note 231.

²³⁷ See Zuigao Renmin Fayuan Guanyu Shenli Shangbiao Shouquan Quequan Xingzheng Anjian Ruogan Wenti de Guiding (最高人民法院关于审理商标授权确权行政案件若干问题的规定), [Provisions of the Supreme People's Court on Several Issues Concerning the Hearing of Administrative Cases Involving the Granting and Affirmation of Trademark Right] (promulgated by Sup. People's Ct., Dec. 12, 2016, effective Mar. 1, 2017), art. 22, SUP. PEOPLE'S CT. CHINA, <http://www.court.gov.cn/zixun-xiangqing-34732.html> [https://perma.cc/C6FS-Y6JJ].

²³⁸ See *id.*

²³⁹ See *id.* at pmb1.

²⁴⁰ See Pauline Booth & Yi Zhang, *Chinese IP Courts Are Increasing Damages Awards*, LAW360 (Feb. 2, 2017), <https://www.law360.com/articles/885074/chinese-ip-courts-are-increasing-damages-awards>.

for litigation expenses, including attorney fees.²⁴¹ Foreign companies are slowly but surely winning higher damages in court as well. In November 2015, the Beijing IP Court awarded 470,000 USD to the Italian company Moncler for trademark infringement it suffered from a Chinese company.²⁴² In August 2017, New Balance won 1.5 million USD in damages in the Suzhou IP Tribunal against the Chinese company New Boom, which produced and sold shoes with New Balance's trademarked logo.²⁴³ This landmark decision has the highest damages award for a foreign company in a trademark infringement case in China to date.²⁴⁴ It was also noted as a victory for foreign companies attempting to enforce their rights in the Chinese civil courts.²⁴⁵ Intellectual property experts viewed New Balance's pursuit of enforcement in civil courts as a proactive, successful strategy, one that other foreign companies should implement in China.²⁴⁶ These recent results for both domestic and foreign companies should encourage foreign companies to see civil litigation as a worthwhile investment to combat infringement.

5. The Rise of Preliminary Injunctions

Preliminary injunctions are an additional useful tool for foreign companies.²⁴⁷ Preliminary injunctions are court rulings ordering a

²⁴¹ See *id.*

²⁴² See Jacob Schindler, *Beijing IP Court Grants Maximum Statutory Damages in a Trademark Case for the First Time*, WORLD TRADEMARK REV. (Nov. 19, 2015), <http://www.worldtrademarkreview.com/Blog/detail.aspx?g=700bf3b8-a30a-41e3-ada9-6890010bd0dd>.

²⁴³ See Tom Hancock, *New Balance Wins \$1.5[M] Damages for China Logo Infringement*, FIN. TIMES (Aug. 23, 2017), <https://www.ft.com/content/f696e7ec-87f0-11e7-bf50-e1c239b45787>. This case was handled by the Suzhou IP Tribunal, which is attached to the Suzhou Intermediate People's Court. See Li et al., *supra* note 213.

²⁴⁴ See Sui-lee Wee, *New Balance Wins \$1.5 Million in Landmark China Trademark Case*, N.Y. TIMES (Aug. 22, 2017), <https://www.nytimes.com/2017/08/22/business/china-new-balance-trademark.html> [<https://perma.cc/569V-9Y92>].

²⁴⁵ See *id.*

²⁴⁶ See Yiling Pan, *New Balance's Trademark Win Sets Right Example for Foreign Brands in China*, JING DAILY (Aug. 23, 2017), <https://jingdaily.com/new-balance-trademark-win/> [<https://perma.cc/DW3J-VMAU>]; *New Balance Wins US \$1.5 Million in Damages for Trademark Infringement*, ASIA IP (Oct. 12, 2017), <http://asiaiplaw.com/article/35/2917/> [<https://perma.cc/VV9D-344F>].

²⁴⁷ They are also known as "Conduct Preservation" or "Interim Injunctions" in China. See Zhen Feng & Suyu Yuan, *How to Obtain Interim Injunctions in China*, INT'L

party to perform or not perform an act.²⁴⁸ They were formally introduced to the civil litigation system in amendments to the Chinese Civil Procedure Law of 2012.²⁴⁹ China's preliminary injunction requirements closely resemble those of the United States. The court considers: whether the applicant has the likelihood of winning the case on the merits; whether the applicant's rights are valid; whether there may be irreparable harm to the applicant; whether the harm caused by the injunction to the respondent is greater than harm caused to the applicant if no action is taken; and whether the injunction would harm the public interest.²⁵⁰ Additionally, the applicant must post a sufficient bond, or a specified amount of money, to be paid if the applicant fully or substantially loses the case or if the issuance of the injunction is a mistake.²⁵¹ The bond is then used to offset the defendant's losses in these situations.²⁵²

Their formal introduction was seen as a positive step for intellectual property rights holders, as they now had a new opportunity for enforcement.²⁵³ Companies in general are requesting preliminary injunctions for intellectual property

TRADEMARK ASS'N (Feb. 15, 2017), https://www.inta.org/INTABulletin/Pages/Interim_Injunctions_in_China_7203.aspx [<https://perma.cc/3UA8-QGAX>].

²⁴⁸ See, e.g., Civil Procedure Law of the People's Republic of China (promulgated by Standing Comm. Nat'l People's Cong., Apr. 9, 1991; amended Aug. 31, 2012, effective Jan. 1, 2013), arts. 100–05, CLI.1.183386 (EN) (Lawinfochina).

²⁴⁹ See *id.*

²⁵⁰ For the original notice in Mandarin see, Zuigao Renmin Fayuan Guanyu Shencha Zhishi Chanquan yu Jingzheng Jiufen Xingwei Baoquan Anjian Shiyong Falu Ruogan Wenti de Jieshi (Zhengqiu Yijian Gao) ((最高人民法院关于审查知识产权与竞争纠纷行为保全案件 适用法律若干问题的解释 (征求意见稿)), Zuigao Renmin Fayuan (最高人民法院) (Feb. 26, 2015), <http://www.court.gov.cn/hudong-xiangqing-13517.html> [<https://perma.cc/B77U-UTEN>]. For the English translation, see, INTERPRETATION OF THE SUPREME PEOPLE'S COURT ON SEVERAL ISSUES CONCERNING LAWS APPLICABLE TO REVIEW OF THE CONDUCT PRESERVATION FOR INTELLECTUAL PROPERTY AND COMPETITION DISPUTE CASES (DRAFT FOR COMMENT) art. 7 (2015), IPKEY (Feb. 26, 2015), www.ipkey.org/en/ip-law-document/download/2519/3310/23 [<https://perma.cc/7WC9-JFGU>]; Feng & Yuan, *supra* note 247.

²⁵¹ See SUP. PEOPLE'S CT., *supra* note 250, arts. 9, 17–18.

²⁵² See *id.* art. 18.

²⁵³ KRISTIE THOMAS, ASSESSING INTELLECTUAL PROPERTY COMPLIANCE IN CONTEMPORARY CHINA: THE WORLD TRADE ORGANISATION TRIPS AGREEMENT 91 (1st ed. 2017).

infringement purposes more often in the last few years.²⁵⁴ For example, in 2015, the Guangzhou IP Court granted a preliminary injunction for copyright infringement in favor of Blizzard Entertainment, a California video game company, against Chengdu Seven Games Limited (“Seven Games”).²⁵⁵ Seven Games created “Everyone WarCraft,” which infringed Blizzard’s World of Warcraft game.²⁵⁶ The Guangzhou IP Court ordered Seven Games and the website used to host the games to cease reproduction, distribution, and online dissemination.²⁵⁷ In August 2016, the Beijing IP Court granted an injunction for trademark infringement in favor of Dutch company Talpa, the owner of the intellectual property rights in “The Voice” singing competition franchise, against a Chinese company that began producing a series named “The Voice of China.”²⁵⁸ A few months later, the Fujian IP Tribunal granted an injunction for U.S. clothing company Under Armour against Chinese company Uncle Martian, with the underlying trademark infringement case resulting in 300,000 USD in damages awarded to Under Armour.²⁵⁹ In 2017, the Beijing IP Court granted a permanent injunction for Iwncomm, a Chinese internet technology company, *against* a foreign company, Sony

²⁵⁴ See Jiang Liwei, *Preliminary Injunction: The New Favorable of IP Litigation*, CHINA IP MAG. (Aug. 2014), <http://www.chinaipmagazine.com/en/journal-show.asp?id=1121> [https://perma.cc/536T-SW48].

²⁵⁵ See Mark Cohen, *The World of Injunctions: Guangzhou Makes Its Mark*, CHINA IPR (Mar. 16, 2015), <https://chinaipr.com/2015/03/16/the-world-of-injunctions-guangzhou-makes-its-mark/> [https://perma.cc/QYY3-CKQG]. For the original article see, Weichu Jieguo Xianchu Jinling Guangzhou Fayuan Yaoqiu Quanmin Moshou Liji Tingyun (未出结果先出禁令广州法院要求全民魔兽立即停运) [*Guangzhou IP Court Grants an Interim Injunction Halting the Distribution and Operation of Everyone WarCraft: War of Draenor Immediately*], SINA (Mar. 12, 2015, 10:43 AM) (China), <http://games.sina.com.cn/o/z/wow/2015-03-12/1043607766.shtml> [https://perma.cc/G9BU-BDYS].

²⁵⁶ SINA, *supra* note 255.

²⁵⁷ *Id.*

²⁵⁸ See Eugene Low & Deanna Wong, *China: Whose Voice Is It?*, LIMEGREEN IP NEWS (Aug. 30, 2016), <http://www.limegreenipnews.com/2016/08/china-whose-voice-is-it/> [https://perma.cc/5Q2S-C959]. The Chinese company, Canxing, previously held the rights to use the franchise name, but after it lost those rights it began producing “The Voice of China.” See *id.*

²⁵⁹ See Bill Donahue, *Under Armour Wins TM Ruling in China Over ‘Uncle Martian,’* LAW360 (Aug. 3, 2017), <https://www.law360.com/articles/950991>. The Fujian division of the IP Tribunal was established in the 1990s. Robert Slate, *Judicial Copyright Enforcement in China: Shaping World Opinion on TRIPS Compliance*, 31 N.C.J. INT’L L. & COM. REG. 665, 680 (2006).

Corporation (“Sony”), for standard essential patent infringement when Sony used Iwncomm’s patent without authorization.²⁶⁰ The court also ordered Sony to pay 8.62 million RMB (1.25 million USD) in damages to Iwncomm.²⁶¹ Expanding the use of preliminary injunctions to patents, the Guangzhou IP Court granted the first preliminary injunction for patent infringement on June 22, 2016 for Christian Louboutin Ltd. against Guangzhou Benefit Cosmetics Co., which had manufactured and sold infringing lipsticks.²⁶²

The cases above are the few examples of foreign companies using preliminary injunctions, demonstrating they are certainly not the go-to response for combating infringement. This is the case despite high grant rates. In Beijing and Shanghai, courts granted injunctions against trademark infringement 97% of the time.²⁶³ Across China, injunctions were granted in 96% of cases where there was a finding of trademark infringement.²⁶⁴ The injunction rate for copyright infringement is similar, with 90% and 88% granted in Beijing and Shanghai courts, respectively, and 89% granted across China.²⁶⁵ The minimal use of injunctions must change. Preliminary injunctions are a powerful tool for multinational companies if these companies invest their time in securing them rather than pursuing ineffective campaigns.

²⁶⁰ See *An Injunction Based on a Standard Essential Patent Is Happening in China*, BEIJING E. IP LTD. (Apr. 1, 2017), <http://www.beijingeastip.com/type-news/injunction-sep-china/> [https://perma.cc/2X8L-FCD9]; *Iwncomm v. Sony: First SEP-Based Injunction Granted in China*, ALLEN & OVERY (Apr. 10, 2017), <http://www.allenoverly.com/publications/en-gb/Pages/Iwncomm-v-Sony-first-SEP-based-injunction-granted-in-China.aspx> [https://perma.cc/4M73-3C9B].

²⁶¹ *An Injunction Based on a Standard Essential Patent Is Happening in China*, *supra* note 260.

²⁶² See Weili Ma, *First Preliminary Injunction on Patent Granted by China IP Court to Christian Louboutin*, LINKEDIN (Oct. 24, 2016), <https://www.linkedin.com/pulse/first-preliminary-injunction-patent-granted-china-ip-court-ma-1>; see also *Guangzhou IP Court Issued Its First Preliminary Injunction on Patent Case*, JIAQUAN IP LAW, <http://www.jiaquanip.com/news.asp?ArticleID=77&ClassID=40> [https://perma.cc/6JLU-BMB9] (last visited Jan. 10, 2018).

²⁶³ See CIELA TRADEMARK: BEIJING, *supra*, note 230; CIELA TRADEMARK: SHANGHAI, *supra*, note 230.

²⁶⁴ CIELA TRADEMARK: ALL COURTS, *supra* note 170. These figures are as of 2015.

²⁶⁵ CIELA COPYRIGHT: BEIJING, *supra* note 228; CIELA COPYRIGHT: SHANGHAI, *supra* note 228; CIELA COPYRIGHT: ALL COURTS, *supra* note 170. These figures are as of 2015.

6. China's Commitment to Improving Its Civil Litigation System and What This Means for Foreign Companies

Multinational companies need to change their strategies on civil litigation. Companies should pressure the government to focus not on quick enforcement, but on long-lasting deterrence that comes with civil litigation.²⁶⁶ The government itself has recently intensified its focus on the civil litigation system. On November 27, 2016, the State Council released a statement entitled: "Opinion of the Central Committee of the Communist Party of China (C[PC]) and the State Council on improving the property rights protection (PRP) system and lawfully protecting property rights."²⁶⁷ It was the first time the government set out guidelines regarding intellectual property rights for lower government bodies across China, such as the IP Courts.²⁶⁸ The Chinese government statement openly admitted that intellectual property protection in China is "weak."²⁶⁹

Among other improvements, section 9 of the guideline calls for raising damages and for the implementation of a new punitive damages system for serious violations.²⁷⁰ Along with the recent decisions in the Beijing Watchdata and New Balance cases, these moves counter prior criticisms that damages awarded were too low to make civil litigation worth the effort.²⁷¹ In addition to these

²⁶⁶ See DIMITROV, *supra* note 29, at 28.

²⁶⁷ See Lisa L. Mueller, *Property Rights Protection Guideline Released in China*, BRIC WALL (Dec. 27, 2016), <https://bricwallblog.com/2016/12/27/property-rights-protection-guideline-released-in-china/> [<https://perma.cc/RDK6-2H9U>]; see also *State Council Organization Chart*, ST. COUNCIL CHINA (Aug. 28, 2014), http://english.gov.cn/state_council/2014/09/03/content_281474985533579.htm [<https://perma.cc/32GC-S3H6>]. For the original guideline in Mandarin see, Zhonggong Zhongyang Guowuyuan Guanyu Wanshan Chanquan Baohu Zhidu Yifa Baohu Chanquan de Yijian (中共中央 国务院 关于完善产权保护制度依法保护产权的意见), Zhongguo Zhengfu Wang Zhongyang Renmin Zhengfu Menhu Wangzhan (中国政府网_中央人民政府门户网站), (Nov. 27, 2016) (China), http://www.gov.cn/xinwen/2016-11/27/content_5138533.htm [<https://perma.cc/7D7H-DHAQ>].

²⁶⁸ See Mueller, *supra* note 267.

²⁶⁹ Zhongguo Zhengfu Wang, *supra* note 267.

²⁷⁰ *Id.*

²⁷¹ Compare, e.g., Eric Priest, *Copyright Extremophiles: Do Creative Industries Thrive or Just Survive in China's High-Piracy Environment?*, 27 HARV. J. L. & TECH. 467, 477 (2014) ("Damages awarded in civil infringement cases are often far too low to deter lucrative infringing activities."), with Booth & Zhang, *supra* note 240 (noting increasing

changes, in 2017 the State Intellectual Property Office announced a two-year arbitration mediation pilot program for intellectual property disputes in key areas such as Beijing and the Shanghai municipality.²⁷² As shown above, China has made great strides with its civil litigation system. As civil litigation—and alternative dispute resolution mechanisms—improve over time, these will most likely become the frontline in combating intellectual property infringement.

However, with the multinational companies' low use of civil litigation, there is wasted potential. It is clear that campaigns are not working.²⁷³ To improve intellectual property enforcement in China, companies should take the opportunity to enforce their rights more often in this channel. This does not mean that companies should bring any case to make a point, only that they ought to bring winning cases and bring them more often. Companies should also substantially increase requests for preliminary injunctions, as it is a new and effective avenue for remedying infringement.²⁷⁴ Disney led the way with its first civil judgment in 1994 and—along with other multinational corporations—should substantially increase its use of civil litigation and preliminary injunctions as part of its China strategy to bring more attention to its rights, shape the law, and shut down counterfeiting operations.²⁷⁵

damages awards in Chinese intellectual property cases); Hancock, *supra* note 243 (noting same). The case concerning Beijing Watchdata was discussed in Section III.A.4.

²⁷² See Notice of the General Office of the State Intellectual Property Office on Conducting Acceptance Check of the Pilot Program of Mediation of Intellectual Property Disputes, (State Intellectual Prop. Office, Apr. 14, 2017) CLI.4.293549 (EN) (Lawinfochina), <http://www.lawinfochina.com/display.aspx?id=23410&lib=law> [https://perma.cc/4Z2T-6GG5]; Notice of the General Office of the State Intellectual Property Office on Determining the Fourth Group of Regions Covered by the Pilot Program of Arbitration Mediation of Intellectual Property Disputes, (State Intellectual Prop. Office, June 21, 2017) CLI.4.296862 (EN) (Lawinfochina), <http://www.lawinfochina.com/display.aspx?id=23697&lib=law> [https://perma.cc/YQ3B-7TSM].

²⁷³ See DIMITROV, *supra* note 29, at 15.

²⁷⁴ See *supra* Section III.A.5.

²⁷⁵ See *supra* note 221 and accompanying text.

B. Changing the Chinese Campaign Approach Itself

Despite the problems with the campaigns described in this Note, campaigns need not be eradicated altogether. It would be more cost-efficient to modify campaigns, as China develops intellectual property campaigns every year. Fortunately, there are examples of more effective campaigns. The examples come from the United States, where campaigns are also carried out to combat counterfeit goods, but are implemented differently than Chinese campaigns. These examples will illustrate how campaigns can run more effectively. This Section features examples of multinational corporate alliances that combat counterfeiting, and recommends corporate alliances for those doing business in China.

If done in an effective way, campaigns can have long-term results. They could also then be a more fruitful part of a multinational corporation's strategy. Perhaps one day a multinational corporation may be able to balance both effective campaigns and civil litigation, obtaining the benefits of both systems, as part of a comprehensive scheme to battle infringement.

1. A New Model for Campaigns: The U.S. "Operation"

Counterfeit automotive parts have become a growing problem in the United States.²⁷⁶ The vast majority—between eighty-five and ninety-five percent—of these counterfeit parts are imported from mainland China or transferred to Hong Kong and then shipped abroad.²⁷⁷ Counterfeit parts range from brakes to airbags.²⁷⁸ The parts are untested and sub-quality, leading potentially to consumer deaths.²⁷⁹ For example, some counterfeit airbags were found to contain explosive elements that explode in

²⁷⁶ See *Intellectual Property Rights Center Warns of Counterfeit Auto Parts*, U.S. IMMIGRATION & CUSTOMS ENF'T (Oct. 2, 2014), <https://www.ice.gov/news/releases/intellectual-property-rights-center-warns-counterfeit-auto-parts#> [<https://perma.cc/9S4W-X468>].

²⁷⁷ *Homeland Security Warns Body Shops to Look Out for Counterfeit Parts*, AUTOBODY NEWS (May 17, 2016, 8:24 AM), <http://www.autobodynews.com/index.php/industry-news/item/11704-homeland-security-s-bruce-foucort-counterfeit-oem-parts.html> [<https://perma.cc/7WBB-8ERK>].

²⁷⁸ See *id.*

²⁷⁹ See *id.*

the victim's face during an accident.²⁸⁰ Online sales have spurred the counterfeit operations, making it easier for counterfeiters to reach consumers abroad with their cheaper products.²⁸¹

Automotive-manufacturing companies reported these counterfeit airbags to the National Intellectual Property Rights Coordination Center ("IPRC").²⁸² The IPRC is the administrative body created to focus solely on intellectual property theft and enforcement.²⁸³ Led by a director from the Department of Homeland Security, and deputy directors from the same, the Federal Bureau of Investigations, and U.S. Customs and Border Protection, the IPRC also works with enforcement groups including Interpol, the World Customs Organization, and representatives from foreign countries.²⁸⁴ The IPRC is further divided into three units: the Intellectual Property Unit, Outreach and Training Unit, and the HSI Commercial Fraud Unit.²⁸⁵ Of the three, the Intellectual Property Unit starts and maintains operations such as Operation Team Player, which targets the sale and trafficking of counterfeits sports merchandise and apparel in the United States.²⁸⁶ The Intellectual Property Unit also collaborates with industry partners, such as companies and partner agencies.²⁸⁷ For example, in addition to the IPRC receiving reports from car companies, the U.S. Customs and Border Protection ("CBP") discovered a counterfeit airbag shipment from China at a DHL facility en route to Tennessee.²⁸⁸ As counterfeit automotive parts are a health and safety concern, along with a growing intellectual

²⁸⁰ See NAT'L INTELLECTUAL PROP. RIGHTS COORDINATION CTR., PUBLIC SERVICE ANNOUNCEMENT: COUNTERFEIT AUTOMOTIVE PARTS (2014), <https://www.iprcenter.gov/reports/public-service-announcements/counterfeit-auto-parts/view>.

²⁸¹ See Christina Vazquez, *Feds Warn of Counterfeit Auto Parts*, ABC: LOCAL 10 NEWS (May 2, 2016, 6:00 AM), <http://www.local10.com/consumer/call-christina/feds-warn-of-counterfeit-auto-parts> [<https://perma.cc/57TV-ZXER>].

²⁸² See AUTOBODY NEWS, *supra* note 277.

²⁸³ See *Intellectual Property Rights*, U.S. IMMIGRATION & CUSTOMS ENF'T (Oct. 6, 2017), <https://www.ice.gov/iprcenter> [<https://perma.cc/6A8X-URPY>].

²⁸⁴ See *id.*

²⁸⁵ See *id.*

²⁸⁶ See *id.*

²⁸⁷ See *id.*

²⁸⁸ See *Case Studies*, NAT'L INTELLECTUAL PROP. RIGHTS COORDINATION CTR., <https://www.iprcenter.gov/ip-theft/case-studies> [<https://perma.cc/QR9L-7EH2>] (last visited Nov. 24, 2017).

property issue, spin-off investigations were initiated to take action against this new problem.²⁸⁹

In particular, the IPRC launched Operation Engine Newity (“Operation”)—a campaign with American characteristics—focusing on countering “the threat of counterfeit automotive, aerospace, rail, and heavy industry related components that are illegally imported and distributed throughout the United States.”²⁹⁰ Some of its strategies include: educating industry stakeholders and the public, investigating and prosecuting counterfeiters and traffickers, and barring and confiscating counterfeit goods at places such as ports of entry.²⁹¹ As the IPRC works with members of different federal agencies, the Operation also relies on members of different agencies, and coordinates efforts with these agencies.²⁹² For example, it shares information with the U.S. Customs and Border Protection to discover and halt any incoming counterfeit goods.²⁹³ Through its efforts, the Operation successfully stops counterfeits at the border, uncovers counterfeit goods, and criminally prosecutes both small and large operations.²⁹⁴

One of the Operation’s features is its collaboration with the industry.²⁹⁵ With the assistance of the IPRC, multinational corporations created the Automobile Anti-Counterfeiting Coalition, which meets four times per year, and exchanges information on its members’ counterfeiting experiences with federal agencies, such as the IPRC.²⁹⁶ This is similar to other corporate alliances, such as the U.S. Golf Manufacturers Anti-Counterfeiting Working Group, which is a collaboration of U.S.

²⁸⁹ See *id.*

²⁹⁰ U.S. IMMIGRATION & CUSTOMS ENF’T, TRANSPORTATION AND HEAVY INDUSTRY: OPERATION ENGINE NEWITY (2016), <https://www.iprcenter.gov/reports/fact-sheets/operation-engine-newity/view> [<https://perma.cc/7KVV-5J3Z>].

²⁹¹ See *id.*

²⁹² See *id.*

²⁹³ See *id.*

²⁹⁴ For some of its latest seizures and successes see, *News*, NAT’L INTELLECTUAL PROP. RIGHTS COORDINATION CTR., <https://www.iprcenter.gov/news-releases> [<https://perma.cc/564G-9LU8>] (last visited Jan. 8, 2017).

²⁹⁵ See *Intellectual Property Theft/Piracy*, FED. BUREAU OF INVESTIGATIONS, <https://www.fbi.gov/investigate/white-collar-crime/piracy-ip-theft> [<https://perma.cc/M4XF-56NV>] (last visited Nov. 24, 2017).

²⁹⁶ See AUTOBODY NEWS, *supra* note 277.

golf manufacturing companies working against the counterfeiting of golf products in China.²⁹⁷ As part of the Operation, corporations coordinate with law enforcement and other agencies—they exchange information with the IPRC and other federal agencies involved through regularly scheduled conference calls and other types of frequent communication.²⁹⁸ Companies have also created their own anti-counterfeiting operations through commercials and by notifying their consumers. For example, Hyundai and Honda created advertising campaigns through websites and commercials depicting the differences between counterfeit and authentic car parts, and illustrating the dramatic disparities between the two products should the consumer ever experience a car accident.²⁹⁹

2. Key Differences Between U.S. Operations and Chinese Campaigns

There are key differences between Chinese and U.S. campaigns. The first is the presence of a dedicated team focusing on counterfeits. The IPRC has both the Intellectual Property Unit, which is dedicated to its continuing IP operations,³⁰⁰ and members from different federal agencies and governments coordinating these efforts.³⁰¹ In China, different agencies join a campaign, but they are not coordinated.³⁰² This leads to a lack of information sharing, commitment only when a campaign is launched, and a

²⁹⁷ See *FAQ's*, U.S. GOLF MFRS. ANTI-COUNTERFEITING WORKING GRP., <http://www.keepgolffreal.com/#faqs> [<https://perma.cc/VX6E-VTZ3>] (last visited Nov. 24, 2017).

²⁹⁸ See U.S. CUSTOMS & BORDER PROT., CBP TRADE ENFORCEMENT BULLETIN 1 (2016), https://www.cbp.gov/sites/default/files/assets/documents/2016-Nov/Quarterly%20CBP%20Trade%20Enforcement%20Bulletin_Q4_External_FINAL.pdf [<https://perma.cc/AM6W-9V3J>].

²⁹⁹ See Scott Burgess, *Hyundai: Counterfeit Car Parts Could Kill You*, YAHOO! (Feb. 12, 2016), <https://www.yahoo.com/news/hyundai-counterfeit-car-parts-could-kill-you-161024390.html> [<https://perma.cc/3L23-2Y3B>]; *Airbag Aware*, HONDA, <http://collision.honda.com/airbagaware?from=http://airbagaware.honda.com/#.WOrX82UgRIg> [<https://perma.cc/PVL9-B2K2>] (last visited Nov. 22, 2017).

³⁰⁰ See *About the IPR Center*, NAT'L INTELLECTUAL PROP. RIGHTS COORDINATION CTR., <https://www.iprcenter.gov/about-us> [<https://perma.cc/X5FR-TPFF>] (last visited Nov. 22, 2017). This was also stated to the author during a visit to the IPRC in Washington D.C. on April 7, 2017.

³⁰¹ See *id.*

³⁰² See DIMITROV, *supra* note 29, at 15.

waste of resources when some infringers are raided repeatedly or a single case is reported multiple times.³⁰³ The lack of coordinated effort additionally leads to shirking of duties.³⁰⁴ Agencies have different priorities, complicated by their local branches who might take into account the economic well-being of their locality, and will let a counterfeiting operation continue for the revenue—especially when the campaign is left uncoordinated.³⁰⁵

The second difference is that the IPRC's efforts do not stop until the problem is solved. Unlike the majority of Chinese campaigns, operations do not end after a few weeks or months.³⁰⁶ Investigations, seizures, and raids continue for years, and the protection of intellectual property rights is an ongoing effort.³⁰⁷ Also, its operations are not responsive in nature. While reports from automotive companies were coming in, the IPRC was already conducting an investigation into counterfeit goods when the counterfeit airbags were discovered by the CBP on their way to Tennessee.³⁰⁸ In contrast, Chinese campaigns only start after mounting government or company pressure, or if a crisis occurs, giving rise to inconsistent and temporary enforcement to appease groups.³⁰⁹ If China wants to improve its enforcement against infringement, it will need to modify its campaigns to bring lasting change.

3. Multinational Corporation Alliance Opportunities

Where does this leave multinational corporations? So far, multinational corporations in China seem to be working mostly on their own. Occasionally, there are corporate alliances and information sharing. For example, Disney is a member of the Quality Brands Protection Committee ("QBPC") with other

³⁰³ See *id.*

³⁰⁴ See *id.* at 186.

³⁰⁵ See *id.*

³⁰⁶ For a list of ongoing anti-counterfeit operations that have been in effect for years see, *Ongoing Operations*, NAT'L INTELLECTUAL PROP. RIGHTS COORDINATION CTR., <https://www.iprcenter.gov/ip-theft/ongoing-operations> [https://perma.cc/AD8Q-ZH7F] (last visited Nov. 25, 2017).

³⁰⁷ See *id.*

³⁰⁸ See *id.*; see also NAT'L INTELLECTUAL PROP. RIGHTS COORDINATION CTR., *supra* note 288.

³⁰⁹ See *supra* Section II.B.4.

multinational corporations.³¹⁰ The QBPC organizes meetings and seminars with corporations.³¹¹ The QBPC's mission is "[t]o strengthen cooperation with China's central and local government agencies, institutions, enterprises," and other organizations to promote "the improvement of China's IP legal system, the IP administrative [and] judicial enforcement, the guiding role of judicial protection, the construction of a fair and orderly legal environment for economic growth and scientific [and] technological innovation for global interconnection and intercommunication."³¹² Yet this broad statement does not focus on a particular mission or issue—such as a type of counterfeit good or intellectual property—and instead groups multiple issues together.

Additionally, the QBPC's membership spans across different industries, from clothing stores, food, electronic goods, toys, cosmetics, films, to car manufacturers.³¹³ Its Industry Working Groups, which bring similar companies together, also make it difficult for a company that may not fit into only one group to work into this framework.³¹⁴ For example, Disney could easily fit into the Creative, Diversified, Sports, Fashion and Life Style, and Toys and Licensed Goods working groups, but it would be difficult to invest time into every group to work with members who may not share or understand Disney's priorities.³¹⁵ The QBPC's mission and groups are so broad that the alliance may not focus on the individual needs of companies, the intellectual property laws that apply to different industries, or different priorities. While the QBPC alliance membership is a positive step for a corporation to take, it may not ultimately be the most efficient or effective.

³¹⁰ See *QBPC Membership List 2017*, QBPC, <http://www.qbpc.org.cn/view.php?id=2856&cid=46> [https://perma.cc/QNR4-XC3W] (last visited Nov. 25, 2017).

³¹¹ See *Activities*, QBPC, <http://www.qbpc.org.cn/article.php?pid=24> [https://perma.cc/VC8S-6S3J] (last visited Nov. 25, 2017).

³¹² *QBPC Mission*, QBPC, <http://www.qbpc.org.cn/view.php?id=2716&cid=43> [https://perma.cc/XX68-WPV8] (last visited Nov. 25, 2017).

³¹³ See *QBPC Membership List 2017*, *supra* note 310.

³¹⁴ See *Introduction of IWGs*, QBPC (May 21, 2013), <http://www.qbpc.org.cn/view.php?id=1775&cid=87> [https://perma.cc/MZ2J-UQYY].

³¹⁵ See *id.*

Multinational corporations such as Disney should not only take advantage of the civil litigation system more often, but also form smaller and more specific alliances related to intellectual property infringement in China, similar to the one Operation Engine Newity created.³¹⁶ Disney and other foreign animation or film studios—such as DreamWorks Animation SKG, Inc. (“Dreamworks”) and Warner Bros. Entertainment Inc. (“Warner Bros.”)—should come together and share information instead of working alone. These companies have similar goals and issues in China. All want to conduct business in China, with Warner Bros. signing a new deal this year to license hundreds of its films with the popular Chinese streaming company iQiyi, and DreamWorks creating a joint venture with a Chinese animation studio to develop more films.³¹⁷ All only take a twenty-five percent share of box office revenue due to China’s revenue cap and are subject to Beijing’s quota system, which allows thirty-four foreign films to be imported annually.³¹⁸ Any foreign films released in China are assigned limited theatrical release dates, limiting any profits in China further.³¹⁹ All experience infringement of their trademarked and copyrighted characters, logos, names, and films.³²⁰

These companies have also successfully brought cases in China. For example, DreamWorks brought a civil case to oppose a person attempting to trademark “KUNG FU PANDA,” and this

³¹⁶ See *supra* notes 290–99 and accompanying text.

³¹⁷ See Tom Huddleston Jr., *Warner Bros. Films Like ‘Harry Potter’ Are Coming to China’s Netflix*, FORTUNE (Mar. 21, 2017), <http://fortune.com/2017/03/21/warner-bros-streaming-deal-iqiyi/> [<https://perma.cc/3EQ5-PHRT>]; *About Us*, ORIENTAL DREAMWORKS, <http://www.oriental-dreamworks.com/odw-about-our-film-studio> [<https://perma.cc/7KLC-EAQK>] (last visited Nov. 22, 2017).

³¹⁸ See Reuters, *China to Review Film Limits as Box Office Growth Slows*, FORTUNE (Dec. 17, 2016), <http://fortune.com/2016/12/16/china-to-review-film-limits-as-box-office-growth-slows/> [<https://perma.cc/CR4C-B9TS>].

³¹⁹ See Seagull Haiyan Song, *Chinese Entertainment Law Year in Review, 2015: Is It Converging with the U.S. Practice?*, 49 GEO. WASH. INT’L L. REV. 259, 293 (2016).

³²⁰ See Meg James & Anthony Kuhn, *‘Potter’ Plundered in Asia*, L.A. TIMES (Dec. 3, 2001), <http://articles.latimes.com/2001/dec/03/business/fi-10955> [<https://perma.cc/R7BT-DABK>]; *Snow White Spotted at Wanda City Triggers Backlash from Disney*, NEWSMAX (May 30, 2016), <https://www.newsmax.com/newsfront/disney-wanda-city-china/2016/05/30/id/731406/> [<https://perma.cc/DJ6V-D7CD>]; *Warner Opens New Front in Piracy War?*, CNN MONEY (June 9, 2005, 10:52 AM), http://money.cnn.com/2005/06/09/technology/personaltech/piracy_china/ [<https://perma.cc/TP77-7FBR>].

case led to the creation of prior merchandising rights, a new tool that companies can use to protect their trademark rights.³²¹ These companies can share information on infringement, lobby governments for better laws (such as lowering the threshold for criminal prosecution), and create a strategy with effective enforcement actions. They can also create their own long-running non-government campaigns, taking cues from the IPRC's "operations," that not only have dedicated staff, but also engage their audiences and encourage them to participate in the anti-counterfeiting effort. Disney did this once before with the 2006 hologram sticker campaign, which actually caused Chinese consumers to report counterfeit goods to Disney.³²² Perhaps new, united, long-term efforts can spark even more of these results. If similarly-situated companies can come together and coordinate their actions, then there can be positive, enduring change in China.

CONCLUSION

It is difficult for a multinational corporation to protect its intellectual property rights in China. Often under pressure to bring immediate results to a dire situation, the corporation will fall into the campaign trap. Disney knows this all too well as it attempts to protect its rights in China. After experiencing counterfeiting, the company turned to the campaign approach for help. However, the government campaign intended to protect Disney's rights, just as campaigns in the past, had only transient effects. This is because campaigns are short-term solutions for a long-term problem. Instead of focusing its efforts on bringing short-term campaigns, multinational corporations such as Disney should focus on long-term solutions that will deter infringers and bring transformative effects. Companies should continue taking action, but outside of the context of a traditional Chinese campaign. A comprehensive strategy of civil litigation, criminal prosecution, and productive industry-specific alliances will help bring positive change. The

³²¹ See Mark Cohen, *Beijing Higher People's Court Recognizes "Merchandising Rights" as Tool to Fight Bad-Faith Applications*, CHINA IPR (Dec. 23, 2015), <https://chinaipr.com/2015/12/23/beijing-higher-peoples-court-recognises-merchandising-rights-as-tool-to-fight-bad-faith-applications/> [<https://perma.cc/T8CS-DAJ4>].

³²² See Fowler, *supra* note 133.

Chinese government should also continue to improve its civil litigation and criminal prosecution systems, and create coordinated campaigns with dedicated teams that are ongoing for long periods of time. With the efforts of both multinational corporations and the government, lasting protection of intellectual property rights can continue to grow in China.