

2019

Makeup or Fakeup?: The Need to Regulate Counterfeit Cosmetics Through Improved Chinese Intellectual Property Enforcement

Jennifer Lei

Fordham University School of Law

Recommended Citation

Jennifer Lei, *Makeup or Fakeup?: The Need to Regulate Counterfeit Cosmetics Through Improved Chinese Intellectual Property Enforcement*, 88 Fordham L. Rev. 309 (2019).

Available at: <https://ir.lawnet.fordham.edu/flr/vol88/iss1/8>

This Note is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

MAKEUP OR FAKEUP?: THE NEED TO REGULATE COUNTERFEIT COSMETICS THROUGH IMPROVED CHINESE INTELLECTUAL PROPERTY ENFORCEMENT

*Jennifer Lei**

This Note examines whether new developments in intellectual property enforcement are able to fix the notorious counterfeiting issue in China, particularly with counterfeit cosmetics. Counterfeit cosmetics are a threat to public safety in the United States and globally, especially as the cosmetics industry continues to expand. There are two opposing views on whether China's intellectual property regime—in light of the 2017 to 2019 developments—is able to address the issue. This Note proposes that even with recent developments, current laws and enforcement methods do not reduce counterfeit production. Instead, this Note argues that the Chinese government should use educational campaigns to improve citizens' opinions of intellectual property rights, using the practice of the 2008 Olympics as a guide. Stronger support leads to more effective enforcement methods.

INTRODUCTION.....	310
I. THE DEVELOPMENT AND LASTING EFFECTS OF CHINA'S WEAK IP REGIME	312
A. <i>The History of Chinese IP Law Through Decades of Change</i>	313
B. <i>Current IP Enforcement Methods and Their Criticisms</i> ...	317
1. Raids by Administrative Agencies.....	317
2. Civil Litigation Against Counterfeiters.....	320
3. Criminal Prosecution	321
C. <i>China Implements New Policies with the Hope of Improving IP Enforcement</i>	322
1. IP Tribunal Courts in Smaller Cities.....	322

* J.D. Candidate, 2020, Fordham University School of Law; B.A., 2017, Fordham University. Thank you to Professor Janet Freilich for her guidance and the *Fordham Law Review* editors for their feedback throughout this process. I would also like to thank my dearest friends and family, especially Juan Soto and Alexandra Wong, for their constant love and support through all of my endeavors.

2. Restructuring the IP Office to Consolidate Authority	323
3. E-Commerce Platforms Must Prevent Counterfeits in Marketplaces	324
II. COSMETICS AND COUNTERFEITS	325
A. <i>The Success of the Cosmetics Industry</i>	325
B. <i>With a Successful Industry Come the Counterfeits</i>	326
C. <i>Consumers and Companies Bear the Burden of Preventing Counterfeits</i>	329
III. THE CURRENT IP REGIME IS ON THE CUSP OF A MAJOR CHANGE	331
A. <i>Recent IP Developments Can Stop Counterfeit Cosmetics Production</i>	331
B. <i>Recent IP Developments Do Not Address the Underlying Issues of Counterfeit Cosmetics Prevention</i>	334
IV. CHINA MUST ADDRESS THE UNDERLYING ISSUES WITH ENFORCEMENT	338
A. <i>Cultural Values Prevent Effective Enforcement</i>	338
B. <i>The Government Must Change Perceptions of IP Rights, Particularly Among Rural Citizens</i>	339
C. <i>Changing Perceptions Will Improve Penalties and Fines</i>	342
CONCLUSION	343

INTRODUCTION

One morning, Rachael McLaughlin rushed to the hospital with a swollen face, barely able to breathe.¹ After the teenager received emergency treatment, her face remained swollen for days.² Her lips were “completely gooey and blistering” after suffering from a life-threatening allergic reaction.³ The cause? Counterfeit Kylie Cosmetics liquid lipstick.⁴

Similarly, after Rosy Ferry used a limited-edition Dior eyeshadow palette purchased from eBay, she woke up the next morning with her eyes glued

1. Marci Robin, *Woman Says a Counterfeit Kylie Cosmetics Lip Kit Caused This Horrifying Allergic Reaction*, ALLURE (Feb. 14, 2018), <https://www.allure.com/story/counterfeit-kylie-cosmetics-lip-kit-allergic-reaction> [<https://perma.cc/9FML-CAYP>].

2. *Id.*

3. *Id.*

4. *Id.*

together.⁵ Only then did she realize it was counterfeit.⁶ Even after using antibacterial eye drops, Ferry continued to feel burning around her tear ducts for weeks, and the skin around her eyes remained red and flaky.⁷

Unfortunately, these are not one-off occurrences. Many consumers are deceived into purchasing seemingly authentic products that turn out to be counterfeit. According to one survey, over a third of respondents realized their recently purchased cosmetics product was a counterfeit after experiencing an allergic reaction.⁸ Counterfeit cosmetics have become a popular alternative to their real, luxury counterparts.⁹ However, saving money can come at the cost of the consumer's health.¹⁰ Counterfeit cosmetics commonly contain toxic components like mercury, lead, arsenic, cyanide, and even urine.¹¹

Public health scares like these highlight the need for strong intellectual property (IP) rights protection. This protection is important for two reasons. First, protection and enforcement of IP rights¹² fosters innovation; allowing individuals to hold sole ownership over a product or design incentivizes them to create a product or design for recognition and compensation.¹³ Second, proper protection and enforcement ensures that consumers are not deceived by IP infringers.¹⁴ People rely on a government's ability to properly enforce these rights, and when the government is unable to do so, both companies and consumers are harmed.¹⁵

5. Claire Coleman, 'Using Fake Make-Up Glued My Eyes Together': *The Women Who Discovered the Dangers of Buying Counterfeit Beauty Products Online After Terrifying Scare with Knock-Off Designer Eye Shadows*, DAILY MAIL (May 27, 2015, 8:11 PM), <https://www.dailymail.co.uk/femail/article-3099936/Using-fake-make-glued-eyes-women-discovered-dangers-buying-counterfeit-beauty-products-online-terrifying-scare-knock-designer-eye-shadows.html> [https://perma.cc/8VR7-QM8Q].

6. *Id.*

7. *Id.*

8. Macaela Mackenzie, *Makeup Dupes Are Unknowingly Being Bought by Customers*, ALLURE (July 24, 2017), <https://www.allure.com/story/how-to-avoid-buying-counterfeit-beauty-products> [https://perma.cc/Z6Q2-MXHM].

9. *See infra* Part II.A (explaining consumer trends in authentic and counterfeit cosmetics).

10. *See* Bridget March, *Fake Cosmetics Found to Contain Arsenic, Urine and Rat Poison*, COSMOPOLITAN (May 18, 2015), <https://www.cosmopolitan.com/uk/beauty-hair/news/a35780/fake-cosmetics-arsenic-urine-rat-poison/> [https://perma.cc/GKU3-6CGK].

11. *Id.*

12. In this Note, "protection" refers to the rights that are provided by statutes and "enforcement" refers to the tools and methods that governments use to uphold the rights provided by statutes. *See Intellectual Property: Protection and Enforcement*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm [https://perma.cc/NF32-XBNS] (last visited Aug. 22, 2019).

13. *Why Is Intellectual Property Important?*, STOPFAKES.GOV, <https://www.stopfakes.gov/article?id=Why-is-Intellectual-Property-Important> [https://perma.cc/HT9C-U7SL] (last visited Aug. 22, 2019).

14. *See supra* notes 1–8 and accompanying text.

15. *See infra* Part II.B (explaining the health, social, and economic harms of counterfeits for companies and consumers).

China is infamous for its inability to protect and enforce IP rights.¹⁶ China has long been known as the “world’s factory” for creating counterfeit goods.¹⁷ But in recent years, as the country has seen tremendous economic growth, it has sought to improve protection and enforcement.¹⁸

This Note argues that despite such efforts, China still falls short, which causes harm to many, including those in the cosmetics industry. Because consumers continue to purchase counterfeit goods and China’s current efforts to curtail counterfeits cannot correct the issue,¹⁹ this Note proposes that the Chinese government work on changing the public’s perception of IP rights. Only then can new laws and increased penalties effectively address counterfeiting.

Part I provides an overview of China’s modern IP law development. First, it provides a background of the cultural influences on the nation’s perception of IP laws and the external pressures that influenced statutory revisions. Then, it describes IP enforcement methods and the most recent legal developments to address counterfeiting. Part II examines current trends in the cosmetics industry, including the factors that led to its monumental success, and also discusses difficulties that the industry is facing, particularly with counterfeits.

Part III outlines the two opposing standpoints on whether recent developments in China are enough to address counterfeiting. Some claim that China is already strengthening its IP rights regime and that the developments will fix counterfeiting. Others claim that the developments are merely punitive and deter neither infringers from producing nor consumers from purchasing counterfeits. Part IV suggests that current enforcement methods are insufficient and proposes that the Chinese government focus on improving public support for IP rights to promote more efficient enforcement.

I. THE DEVELOPMENT AND LASTING EFFECTS OF CHINA’S WEAK IP REGIME

When China rapidly industrialized, its innovative success required new IP laws. However, despite its attempts to create strong IP protection and enforcement, China has struggled to curtail counterfeiting, which was fostered by industrialization. The origins of Chinese IP law and its modern developments help explain why its current IP laws are weak.²⁰ Part I.A

16. Wendy Wu et al., *China Puts IP Rights in Sight as World’s Factory Evolves from Bootleg Hub to Top Patent Owner*, S. CHINA MORNING POST (Apr. 10, 2018, 10:33 PM), <https://www.scmp.com/business/global-economy/article/2141143/china-puts-ip-rights-sight-worlds-factory-evolves-bootleg> [https://perma.cc/A4QG-7ZS2].

17. *Id.*

18. Peter K. Yu, *The Rise and Decline of the Intellectual Property Powers*, 34 CAMPBELL L. REV. 525, 528 (2012) (noting that China has had “many impressive economic and technological developments” and is “at the cusp of crossing over from a pirating nation to a country respectful of intellectual property rights”).

19. *See infra* Parts I.B, II.C (explaining the inefficiency of current enforcement methods).

20. *See infra* Part I.A.

explains the effects of Chinese culture and history on IP development in recent decades. Part I.B explains current IP enforcement methods and notes methods commonly used by rights holders. Part I.C describes the 2017 and 2018 developments in China's efforts to improve enforcement.

A. The History of Chinese IP Law Through Decades of Change

Traditional Chinese culture cultivated anti-IP rights sentiments. The modern definition of the Chinese term *shan zhai* refers to “counterfeiting that you should take pride in,”²¹ a phenomenon that benefits Chinese society by offering access to products at low prices.²² Traditional Chinese culture emphasizes informal social order and hierarchy and places societal interests over individual interests.²³ This phenomenon, coupled with the Confucian principle that people cannot privately own spiritual property,²⁴ created a nation with historically weak IP rights and enforcement.²⁵ Weak IP protection and enforcement are engrained within Chinese culture itself.

Beyond traditional Chinese culture, competing domestic and international interests changed IP laws in the last few decades. China first recognized IP rights in the early twentieth century during a time when piracy became a serious concern.²⁶ The nation adopted IP laws during the 1910s and 1920s, but these laws did not offer much protection and did not remain in effect for long.²⁷ Following the 1949 creation of the communist People's Republic of China, IP became a shared community right.²⁸ During this first half of the twentieth century, China evidently had oscillating views of IP law.

Following his rise in 1978, Deng Xiaoping reinforced IP rights as an individual right.²⁹ This famous Chinese politician's policies started the development of modern Chinese IP law. He implemented the “Four Modernizations,” a series of policies that reopened China to international trade and diplomatic relations with the West after a period of isolationism.³⁰

21. Patricia E. Campbell & Michael Pecht, *The Emperor's New Clothes: Intellectual Property Protections in China*, 7 J. BUS. & TECH. L. 69, 71 n.14 (2012) (quoting Nicholas Schmidle, *Inside the Knock-Off Tennis-Shoe Factory*, N.Y. TIMES (Aug. 19, 2010), <https://www.nytimes.com/2010/08/22/magazine/22fake-t.html> [<https://perma.cc/2FBN-67VZ>]).

22. Edward Tse et al., *Shan Zhai: A Chinese Phenomenon*, BOOZ & Co. 3 (2009), https://www.strategyand.pwc.com/media/file/Shan_Zhai_AChinese_Phenomenon.pdf [<https://perma.cc/77JV-Y63R>].

23. Aileen M. McGill, Student Article, *How China Succeeded in Protecting Olympic Trademarks and Why This Success May Not Generate Immediate Improvements in Intellectual Property Protection in China*, 9 LOY. L. & TECH. ANN. 1, 7 (2010).

24. The Confucian concept of spiritual property is what the United States would call intellectual property. Edward J. Walneck, Note, *The Patent Troll or Dragon?: How Quantity Issues and Chinese Nationalism Explain Recent Trends in Chinese Patent Law*, 31 ARIZ. J. INT'L & COMP. L. 435, 450 (2014).

25. *Id.*

26. Campbell & Pecht, *supra* note 21, at 71–72.

27. *Id.* at 72.

28. Justin McCabe, *Enforcing Intellectual Property Rights: A Methodology for Understanding the Enforcement Problem in China*, 8 PIERCE L. REV. 1, 15 (2009).

29. See Campbell & Pecht, *supra* note 21, at 72.

30. McGill, *supra* note 23, at 18 n.89.

The nation subsequently entered into a trade agreement with the United States, which required both countries to provide IP protections to citizens of the other country.³¹ Since the announcement of the Four Modernizations, China has actively amended its laws to meet the standards of international IP agreements.³²

In the 1980s and 1990s, China adopted its first modern IP laws in response to joining the World Intellectual Property Organization (WIPO) and ratifying the Paris Convention.³³ These first laws offered very little protection³⁴ but were adopted to solidify the nation's position in the global market.³⁵ During this period, many foreign companies shifted their production to China because of the country's tax incentives, government subsidies, and low cost of labor.³⁶

During the 1990s, China prepared for accession to the World Trade Organization (WTO) by enacting stricter IP regulations.³⁷ Western nations repeatedly threatened China with economic sanctions and trade wars because of its weak IP regime.³⁸ To address these concerns, China revised its IP laws and adopted various international treaties.³⁹

Scholars regard the 1980s and 1990s IP law revisions as ones motivated by external pressures.⁴⁰ However, since joining the WTO in 2001, China has revised its laws in response to growing domestic needs.⁴¹ In joining the WTO, the nation became subject to the requirements laid out in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which requires that the legal consequences of IP infringement "constitute a deterrent to further infringements."⁴² TRIPS, however, does not outline the standard of legal consequences required to constitute a deterrent.⁴³ Given the ambiguity in legal standards, China has ignored international pressure to strengthen enforcement.⁴⁴

31. Campbell & Pecht, *supra* note 21, at 72.

32. See Kevin Eugene Thomas Cunningham Jr., Note, *Fine China?: A Look into Chinese Intellectual Property Infringement, Treaty Obligations, and International Responses*, 99 J. PAT. & TRADEMARK OFF. SOC'Y 279, 289 (2017).

33. Brian J. Safran, *A Critical Look at Western Perceptions of China's Intellectual Property System*, 3 U. P.R. BUS. L.J. 135, 139–40 (2012).

34. See Peter K. Yu, *A Half-Century of Scholarship on the Chinese Intellectual Property System*, 67 AM. U. L. REV. 1045, 1046 (2018).

35. Dina M. Bronshtein, Comment, *Counterfeit Pharmaceuticals in China: Could Changes Bring Stronger Protection for Intellectual Property Rights and Human Health?*, 17 PAC. RIM L. & POL'Y J. 439, 446 (2008).

36. Campbell & Pecht, *supra* note 21, at 72.

37. Yu, *supra* note 34, at 1064.

38. Yu, *supra* note 18, at 529.

39. *Id.*; see also Bronshtein, *supra* note 35, at 446 ("China agreed to register all trademarks with the International Bureau of WIPO through its accession to the Madrid Trademark Agreement.").

40. See McGill, *supra* note 23, at 9.

41. Yu, *supra* note 34, at 1082.

42. Bronshtein, *supra* note 35, at 446–47.

43. See *id.*

44. See Jane Cai, *Trade War: Why US and China Remain so Far Apart on Intellectual Property Rights*, S. CHINA MORNING POST (Sept. 30, 2018, 1:00 AM), <https://www.scmp.com/>

Instead, China is now responding to internal factors, like its growing economy.⁴⁵ The nation intends to shift from a low-productivity manufacturing economy to one that is balanced with a “stronger service sector and a focus on scientific innovation”.⁴⁶ To achieve this shift, it aims to improve its IP system to protect new innovations and businesses. However, the current laws and enforcement methods hinder this aim.⁴⁷ The government continues to offer more rights protection and implement policies to achieve their aim.⁴⁸

The Chinese government gradually granted more protection to rights holders by enacting several amendments to the laws of trademarks, copyrights, and patents. For example, these new laws established offices to separately oversee enforcement: China National Intellectual Property Administration (CNIPA), formerly the State Intellectual Property Office (SIPO), oversees patent applications and enforcement;⁴⁹ the National Copyright Administration, along with the administrative departments of local governments, oversees the protection of copyright;⁵⁰ and the State Administration for Market Regulation (SAMR), formerly the State Administration for Industry and Commerce (SAIC), handles trademark registrations and enforcement.⁵¹ The establishment of the three major IP offices marked a dramatic change in Chinese IP laws compared to past decades.

Trademark laws typically protect against counterfeits by protecting a brand’s image and help consumers distinguish between logos.⁵² Trademark

news/china/diplomacy/article/2166315/trade-war-why-us-and-china-remain-so-far-apart-intellectual [https://perma.cc/ZH6P-GHZM] (“China will continue to improve [IP rights] protection . . . to serve its own interests rather than bowing to US pressure.”).

45. Gillian Kassner, *China’s IP Reform: State Interests Align with Intellectual Property Protection (Again)*, JOLT DIG. (Apr. 24, 2012), <https://jolt.law.harvard.edu/digest/chinas-ip-reform-state-interests-align-with-intellectual-property-protection-again> [https://perma.cc/MSW4-5CDR].

46. *Id.*

47. *Id.*; see also McCabe, *supra* note 28, at 6 (“[A]s a country becomes more powerful economically, thus becoming an exporter of intellectual property, the country has greater reason to empower its intellectual property system to protect these rights.”).

48. See *infra* Part I.C.

49. See Mark Liang, *Chinese Patent Quality: Running the Numbers and Possible Remedies*, 11 J. MARSHALL REV. INTELL. PROP. L. 477, 487 (2012). This Note refers to the office as “SIPO” to discuss actions and regulations prior to the restructuring and refers to the office as “CNIPA” to discuss post-restructuring actions and regulations.

50. Campbell & Pecht, *supra* note 21, at 106.

51. Katherine Wang et al., *China’s New State Administration for Market Regulation: What to Know and What to Expect*, ROPES & GRAY (Apr. 3 2018), <https://www.ropesgray.com/en/newsroom/alerts/2018/04/Chinas-New-State-Market-Regulatory-Administration-What-to-Know-and-What-to-Expect> [https://perma.cc/9DPE-QSUT] (“SAMR . . . will merge and undertake the responsibilities previously held by the State Administration for Industry and Commerce (SAIC).”). For an explanation of SAIC’s former responsibilities, see Campbell & Pecht, *supra* note 21, at 82.

52. This Note will focus mostly on trademark law because it is the main law that protects against counterfeits. However, counterfeits can also infringe on copyright and patent laws. For example, a cosmetic company’s concealer can have a patented formula and use several photographs for advertising. A counterfeit of this concealer could infringe on patent rights for

law prevents brands from using similar branding and enables consumers to identify a product's source.⁵³ The first modern Chinese trademark law was adopted in 1982 and has been amended several times—with the most recent amendment in 2019.⁵⁴ Despite the three amendments, Chinese trademark law creates challenges like “trademark squatting” and abuse of “well-known trademark” status.

The trademark law uses a first-to-file system,⁵⁵ which creates the issue of rights-squatting. The first-to-file system grants a trademark to whomever files their application first, even if the applicant is not using the trademark for commercial purposes.⁵⁶ Trademark squatting occurs when an applicant obtains a trademark to a brand they do not own.⁵⁷ These squatters can use this right to obtain money from the actual brand owner or use the right to produce counterfeits.⁵⁸

Another notable feature of the law is the “well-known trademarks” status, which prevents an applicant from registering a trademark that is a reproduction, imitation, or translation of another person or company's trademark.⁵⁹ The well-known trademark does not have to be registered in China so long as the office deems that an applicant's similar trademark may cause public confusion.⁶⁰

The Trademark Office and Trademark Review and Adjudication Board consider how familiar the public is with the trademark in question to determine whether a brand qualifies for well-known status.⁶¹ Other

the use of this formula. If the counterfeiter uses the company's photographs for advertising, she will be infringing on copyrights. See Weiqiu Long, *Intellectual Property in China*, 31 ST. MARY'S L.J. 63, 75 (1999) (discussing Chinese copyright and patent laws); Christopher P. Foley, *Protecting Chinese Company Trademark Rights in the U.S.*, FINNEGAN (May 2010), <https://www.finnegan.com/en/insights/protecting-chinese-company-trademark-rights-in-the-u-s.html> [<https://perma.cc/587V-RGXM>].

53. See Foley, *supra* note 52.

54. See Campbell & Pecht, *supra* note 21, at 75.

55. Shangbiao Fa (商标法) [2019 Trademark Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 23, 2019, effective Nov. 1, 2019), art. 31 (Westlaw China); see also Sunny Chang, Note, *Combating Trademark Squatting in China: New Developments in Chinese Trademark Law and Suggestions for the Future*, 34 NW. J. INT'L L. & BUS. 337, 345 (2014). The United States does not have a first-to-file system and instead requires proof of commercial use, among other criteria, before someone can obtain a trademark. Chang, *supra*, at 345.

56. See Jessica Martin, Note, *Two Steps Forward, One Step Back: A Need for China to Further Amend Its 2013 Trademark Law in Order to Prevent Trademark Squatting*, 42 BROOK. J. INT'L L. 993, 1000 (2017).

57. See Chang, *supra* note 55, at 345–46.

58. Martin, *supra* note 56, at 1003. But see Scott J. Palmer, *China's National Legislature Advances Changes to Trademark Law*, PERKINS COIE (Apr. 30, 2019), <https://www.perkinscoie.com/en/news-insights/chinas-national-legislature-advances-changes-to-trademark-law.html> [<https://perma.cc/CNP5-F96V>] (explaining that the most recent amendments to Articles 4, 33, and 44 of the Trademark Law may address the trademark-squatting issue by providing “a solid legal basis for rejecting trademarks filed in bad faith and challenging them in the opposition and invalidation contexts as well”).

59. 2019 Trademark Law, arts. 9, 13.

60. *Id.* art. 13.

61. See *id.* art. 14.

considerations include how long the trademark has been in continuous use, the duration and extent of advertising, and the history of protection as a famous mark.⁶² Given the subjective nature of these factors, trademarks that may be popular in other countries may still fail to obtain well-known status in China.⁶³

Thus, even though the modern trademark law offers more protection than previous versions, there are still areas that leave rights holders or companies vulnerable. The modern IP laws were developed through several decades of immense change but contain areas that can be strengthened.

B. Current IP Enforcement Methods and Their Criticisms

As China continues to expand its IP regime, it must concurrently strengthen its enforcement methods.⁶⁴ China's IP system has increased in activity over the past few decades. In 2016, China received over 1.3 million patent applications and saw a 21.5 percent growth in applications from the previous year;⁶⁵ in 2017, about 43 percent of the world's patent applications were filed in China.⁶⁶ Today, the biggest challenge that the country faces is not in protecting rights but rather in enforcing them.⁶⁷

China is criticized for its failure to enforce IP rights because its current enforcement methods are considered flawed. The national government seeks to improve these methods to keep up with the nation's growing economy. Part I.B.1 discusses administrative raids, a popular method among foreign companies. Part I.B.2 examines companies' options for pursuing civil litigation against infringers. Part I.B.3 explores criminal prosecution of infringers.

1. Raids by Administrative Agencies

Administrative agency raids of warehouses are the most frequently used enforcement method in China.⁶⁸ SAMR (formerly SAIC) is in charge of market supervision and regulation—a mission fulfilled in part by combatting

62. *Id.*

63. Campbell & Pecht, *supra* note 21, at 81 (using Bloomberg and Ferrari as examples of companies that failed to obtain “well-known” status for their trademarks). Only a handful of foreign companies have obtained this status, including Disney, Walmart, Pioneer, and Barbie. Breann M. Hill, Comment, *Achieving Protection of the Well-Known Mark in China: Is There a Lasting Solution?*, 34 U. DAYTON L. REV. 281, 291 (2009).

64. Yu, *supra* note 18, at 544.

65. Press Release, World Intellectual Prop. Org., China Tops Patent, Trademark, Design Filings in 2016 (Dec. 6, 2017), http://www.wipo.int/pressroom/en/articles/2017/article_0013.html [<https://perma.cc/7FVD-UWWC>].

66. *Facts and Figures 2017*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/edocs/infogdocs/en/ipfactsandfigures2017/> [<https://perma.cc/Q2DM-NPA2>] (last visited Aug. 22, 2019).

67. Yu, *supra* note 18, at 529–30.

68. Bob Youill, *Effective Anti-Counterfeiting Enforcement in China: Stage by Stage*, FTI CONSULTING 7 (May 2014), [https://www.fticonsulting-asia.com/~media/Files/us-files/insights/reports/effective-anti-counterfeiting-enforcement-china.pdf](https://www.fticonsulting-asia.com/~/media/Files/us-files/insights/reports/effective-anti-counterfeiting-enforcement-china.pdf) [<https://perma.cc/59Y7-ZS35>].

counterfeits.⁶⁹ One way agencies carry out this function is to work with local law enforcement to raid stores, factories, and warehouses containing counterfeit products.⁷⁰ Prior to its merger with SAMR, SAIC acted on behalf of trademark rights holders to perform raids when the rights holder submitted a petition.⁷¹ Upon conducting the raid, SAIC had the authority to decide whether rights were infringed and, if so, could choose to destroy the goods, confiscate the goods, or impose fines on the infringers.⁷²

Raids are conducted by all three of the IP agencies. While SAMR oversees trademark raids, CNIPA (formerly called SIPO)⁷³ oversees raids for patents and can order infringers to stop production.⁷⁴ The National Copyright Administration oversees copyright infringement and can order infringers to stop production.⁷⁵ It can also confiscate or destroy the infringing products.⁷⁶ Because these agencies have the discretion to decide whether to act on a petition, it is possible that, upon investigation, they may determine that there is no infringement or that they do not need to take further action.⁷⁷

Foreign companies prefer to enforce their rights through raids because of the publicity and the quick and inexpensive results.⁷⁸ The outcomes from these raids often make headlines because of the sheer number and value of products seized each time.⁷⁹ For example, in February 2017, SAIC seized about \$120 million worth of counterfeit cosmetics that infringed the rights of Chanel, Christian Dior, L'Oréal, and Estée Lauder.⁸⁰ Not only is each raid abundant in the quantity and value of products seized but the government also publishes raid statistics.⁸¹ The headlines lead the public (and

69. See *Highlights: Press Conference on Market Regulation*, CHINA DAILY (Mar. 11, 2019), <http://www.chinadaily.com.cn/a/201903/11/WS5c85ec67a3106c65c34edecd.html> [<https://perma.cc/YX68-8EZU>]; see also *Mission*, ST. ADMIN. FOR INDUS. & COM. CHINA, <http://home.saic.gov.cn/english/aboutus/Mission/> [<https://perma.cc/FM5B-65JB>] (last visited Aug. 22, 2019) (describing SAIC's mission to "maintain[] market order and protect[] the legitimate rights and interests of businesses and consumers by carrying out regulations in . . . trademark protection and combating economic illegalities").

70. Adela Hurtado, Note, *Protecting the Mickey Mouse Ears: Moving Beyond the Traditional Campaign-Style Enforcement of Intellectual Property Rights in China*, 28 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 421, 428 (2018).

71. *Id.* at 429.

72. *Id.*

73. See *infra* Part I.C.2.

74. Ling Zhu & Aaron Winger, *China Announces Plan to Restructure the State Intellectual Property Office ("SIPO")*, CHINA IP LEGAL REP. (June 9, 2018), <https://www.chinaiplegalreport.com/2018/06/china-announces-plan-restructure-state-intellectual-property-office-sipo/> [<https://perma.cc/W3CK-75KY>].

75. Campbell & Pecht, *supra* note 21, at 107.

76. *Id.*

77. See Hurtado, *supra* note 70, at 443.

78. *Id.* at 437.

79. *Id.*

80. Adam Jourdan, *Chinese Police Seize \$120 Million of Fake Cosmetics*, REUTERS (Feb. 15, 2017, 7:52 PM), <https://www.reuters.com/article/us-china-cosmetics-fakes/chinese-police-seize-120-million-of-fake-cosmetics-idUSKBN15V02Y> [<https://perma.cc/V47X-CRSS>].

81. Hurtado, *supra* note 70, at 437. In 2016, there were 170,000 counterfeit products cases and 20,000 arrests of suspected infringers in China. Jourdan, *supra* note 80.

companies) to believe that raids are effective.⁸² Raids provide a quick solution: they recover large amounts of counterfeit products each time, making them an appealing option for companies.⁸³

Further, raids are inexpensive and fast compared to litigation.⁸⁴ Yet, they are only a short-term solution.⁸⁵ Despite their popularity, raids have barely impacted the counterfeits market.⁸⁶ After a raid, infringers return to counterfeiting as soon as the next day.⁸⁷ Counterfeiting has not decreased⁸⁸ because infringers actively produce more than what is being seized.⁸⁹

Raids also place local governments in a difficult position. Counterfeiting activity stimulates small, local economies, which provides a major reason for local protectionism. Local government officials choose to prioritize local interests over the interests of outside parties,⁹⁰ which affects the efficiency of both raids and litigation⁹¹—the two direct enforcement methods that companies can pursue. Counterfeits are often produced or stored outside of big cities or coastal areas where the national government’s ability to oversee IP rights is relatively weak.⁹² The practice makes up a large, if not a majority, of the local economy in rural areas.⁹³ The activity provides work to locals and revenue for legitimate businesses, such as restaurants, hotels, nightclubs, transportation companies, and storage facilities.⁹⁴ Further, those involved in the counterfeiting business pay substantial local taxes, which are used to provide essential public services.⁹⁵

Local officials, who are incentivized to strengthen their local economies, face a conflict of interest when they are instructed by national agencies to raid these production sites.⁹⁶ Some local government officials even accept bribes, lie about conducting the raids, or invest money into the counterfeiting

82. Hurtado, *supra* note 70, at 437 (“Campaign results generate publicity and may create a sense that serious, effective action is being taken against counterfeiting.”).

83. See Youill, *supra* note 68, at 7; see also Minning Yu, Note, *Benefit of the Doubt: Obstacles to Discovery in Claims Against Chinese Counterfeiters*, 81 FORDHAM L. REV. 2987, 3005 (2013).

84. Jeffrey M. Duncan et al., *A Comparison Between the Judicial and Administrative Routes to Enforce Intellectual Property Rights in China*, 7 J. MARSHALL REV. INTELL. PROP. L. 529, 543 (2008).

85. *Id.*; see also Daniel Chow, *Anti-Counterfeiting Strategies of Multi-National Companies in China: How a Flawed Approach Is Making Counterfeiting Worse*, 41 GEO. J. INT’L L. 749, 763 (2010).

86. Hurtado, *supra* note 70, at 437.

87. *Id.* at 438.

88. See *infra* Part II.B.

89. Chow, *supra* note 85, at 765.

90. See Daniel C. K. Chow, *Counterfeiting in the People’s Republic of China*, 78 WASH. U. L.Q. 1, 26–30 (2000).

91. See *infra* Part I.B.2.

92. See Peter K. Yu, *Three Questions That Will Make You Rethink the U.S.-China Intellectual Property Debate*, 7 J. MARSHALL REV. INTELL. PROP. L. 412, 422–23 (2008).

93. Hurtado, *supra* note 70, at 444.

94. Chow, *supra* note 85, at 755.

95. *Id.* at 755–56.

96. Hurtado, *supra* note 70, at 444.

activities themselves.⁹⁷ Thus, raids are often merely an illusion that the government is eliminating counterfeits.⁹⁸

2. Civil Litigation Against Counterfeiters

Litigation is the other direct enforcement method that companies can pursue.⁹⁹ IP litigation in China has increased drastically.¹⁰⁰ In 2015, courts accepted approximately 109,000 IP rights civil cases of first instance,¹⁰¹ whereas in 2004, the courts accepted approximately 9000 cases of first instance.¹⁰² Strong IP enforcement is developing in Beijing, Shanghai, Guangzhou, and other major cities and coastal regions,¹⁰³ which benefit rights holders who pursue litigation. On the other hand, counterfeiting and piracy are moving to the less developed parts of China, where judicial authority is weaker.¹⁰⁴

Local protectionism also affects litigation outcomes. Local tribunals or local courts typically try IP litigation matters and, like the local administrators who underreport raids, local judges are incentivized to protect counterfeiting defendants.¹⁰⁵ Local protectionism creates a bias against foreign rights holders in favor of domestic companies; in one analysis, the litigation “win rate” for domestic companies against foreign companies is about 60 percent.¹⁰⁶

Further, foreign companies generally do not rely on litigation to enforce their rights due to its lengthy process.¹⁰⁷ In 2013, cases brought by foreign companies made up 1.9 percent of all IP litigation cases in China and in 2015, these cases accounted for 1.2 percent.¹⁰⁸ The hesitation exists for several reasons: (1) rights holders often find it difficult to obtain immediate relief

97. Chow, *supra* note 85, at 754; Kathy Chu, *In the Fight Against Counterfeits, Even the Raids Can Be Fake*, WALL ST. J. (Dec. 3, 2015), <https://www.wsj.com/articles/in-the-fight-against-counterfeits-even-the-raids-can-be-fake-1449171005> [<https://perma.cc/LH89-63FK>].

98. See Chu, *supra* note 97.

99. Hurtado, *supra* note 70, at 447.

100. Between 2004 and 2015, China saw an increase in about 100,000 IP litigation cases. Compare STATE INTELLECTUAL PROP. OFFICE OF CHINA, WHITE PAPER ON THE INTELLECTUAL PROPERTY RIGHTS PROTECTION IN CHINA IN 2004 (2005), http://english.sipo.gov.cn/laws/whitepapers/200804/t20080416_380355.html [<https://perma.cc/8MNE-5EKZ>] [hereinafter 2004 SIPO REPORT], with STATE INTELLECTUAL PROP. OFFICE OF CHINA, 2015 INTELLECTUAL PROPERTY RIGHTS PROTECTION IN CHINA 9 (2016), <http://english.sipo.gov.cn/laws/whitepapers/201607/P020160721403876149335.pdf> [<https://perma.cc/8MNE-5EKZ>] [hereinafter 2015 SIPO REPORT]. For comparison with the United States, see Owen Byrd, *Lex Machina 2015 End-of-Year Trends*, LEX MACHINA (Jan. 7, 2016), <https://lexmachina.com/lex-machina-2015-end-of-year-trends/> [<https://perma.cc/HMR8-CWER>] (showing that there were approximately 14,000 IP cases in the United States in 2015 by adding the number of patent, copyright, and trademark litigation cases together).

101. 2015 SIPO REPORT, *supra* note 100, at 9.

102. 2004 SIPO REPORT, *supra* note 100.

103. Yu, *supra* note 92, at 423.

104. *Id.*

105. Bronshtein, *supra* note 35, at 461.

106. Walneck, *supra* note 24, at 463.

107. Hurtado, *supra* note 70, at 447.

108. *Id.* at 448.

from civil courts;¹⁰⁹ (2) courts rarely issue preliminary injunctions;¹¹⁰ and (3) some courts will not try the case while it is still being investigated by an agency.¹¹¹ Rights holders must wait until the agency concludes the investigation, which typically takes a few months.¹¹² The delayed litigation hurts plaintiffs because the longer the courts take, the easier it is for counterfeiters to move and take any evidence with them.¹¹³

The final criticism of litigation is that damages are generally low. Litigation is more expensive than raids.¹¹⁴ Yet, despite the costs, the difficult process can yield minimal results. Chinese IP laws award damages below the real economic harm done by the counterfeiters and these awards do not include punitive damages that can deter future counterfeiting.¹¹⁵ For example, prior to the 2019 amendment, the court could only award damages up to 3 million yuan renminbi (RMB)¹¹⁶ (or about \$435,000) when the court had trouble determining actual loss suffered by the rights holder or the profit gained by the infringer.¹¹⁷ This damage cap may be common considering that evidence of infringement is hard to obtain.¹¹⁸ Courts have the discretion to award up to this cap, and a court that protects local interests may consistently award low damages.¹¹⁹ Thus, local protectionism and statutory limitations make litigation an unattractive option for companies.

3. Criminal Prosecution

The final enforcement method is criminal prosecution. IP infringement is prohibited under Chinese criminal law,¹²⁰ but a convoluted adjudication process hinders proper prosecution.¹²¹ To go after infringers, companies must first either directly bring their case to the Public Security Bureau or report to an IP agency like SAMR, which will then transfer the case to the Public Security Bureau.¹²² If there is sufficient evidence and the infringement is serious enough, the bureau will then transfer the case to a prosecutor.¹²³

109. Chow, *supra* note 90, at 24–25.

110. *Id.* at 25.

111. *Id.*

112. *Id.*

113. *Id.*

114. Duncan et al., *supra* note 84, at 540.

115. Kassner, *supra* note 45.

116. The renminbi is the official currency of China. See Stephen Mulvey, *Why China's Currency Has Two Names*, BBC NEWS (June 26, 2010), <https://www.bbc.com/news/10413076> [<https://perma.cc/N4UU-WERZ>].

117. See *infra* Part I.C.1.

118. See *supra* note 113 and accompanying text.

119. See Bronshtein, *supra* note 35, at 461.

120. Hurtado, *supra* note 70, at 449.

121. See *id.* at 452.

122. *Id.* at 449–50.

123. *Id.* at 450.

Like civil litigation, criminal prosecution in China is also rare.¹²⁴ The government will often overlook small- and medium-scale operations, as these infringers are not considered “serious.”¹²⁵ Instead, criminal prosecution is reserved for large-scale operations that infringe on the rights of the biggest brands.¹²⁶ Raids tripled between 1999 to 2008 and the average fine increased from about \$750 to about \$1200.¹²⁷ Similarly, the number of cases transferred to the judiciary for criminal prosecutions have also increased during this time period,¹²⁸ though only from 0.12 percent of all cases to about 0.24 percent.¹²⁹ Additionally, not all of these cases result in a verdict favoring the rights holders.¹³⁰ Thus, although there are three methods of enforcing IP rights, these methods all have faults that impede effective enforcement.

C. China Implements New Policies with the Hope of Improving IP Enforcement

China is increasing its enforcement efficiency in response to international criticism. Between 2017 and 2019, China enacted three major changes affecting IP rights to address the current issues surrounding enforcement.¹³¹ This section will discuss the three major changes and the improvements the government is seeking. Part I.C.1 covers new tribunals that specialize in IP cases and are aimed at expanding enforcement outside of big cities and coastal areas. Part I.C.2 describes the reorganization of SIPO, which gives this previously patent-exclusive office more authority to centralize enforcement methods. Part I.C.3 discusses a new law that will hold e-commerce platforms liable for allowing third-party sellers to sell counterfeits.

1. IP Tribunal Courts in Smaller Cities

In 2017, the central government established IP tribunals in Suzhou, Chengdu, Nanjing, and Wuhan and allowed them to take on IP cases.¹³² This system takes authority away from local courts that previously heard IP cases and were prone to protecting local interests.¹³³

124. See 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, 166 tbl.5 (2015).

125. Hurtado, *supra* note 70, at 450.

126. *Id.* at 452.

127. Chow, *supra* note 85, at 757.

128. *Id.*

129. See *id.* (showing that there were 21 criminal prosecutions out of about 16,000 cases in 1999 and 137 prosecutions in about 56,000 cases in 2008).

130. See *id.*

131. See William Weightman, *China's Progress on Intellectual Property Rights (Yes, Really)*, DIPLOMAT (Jan. 20, 2018), <https://thediplomat.com/2018/01/chinas-progress-on-intellectual-property-rights-yes-really/> [https://perma.cc/T74Z-AWMS].

132. *Id.*

133. See *supra* Part I.B.2.

With new courts in place, China also added new policies that enable these courts to award higher damages. In 2015, the Supreme People's Court promulgated an interpretation of Chinese civil procedure law that established a more formal discovery process aimed at increasing the requests for the production of evidence.¹³⁴ The discovery process could produce accounts, records, and books that detail counterfeit production and profits, which helps judges determine more accurate damage amounts.¹³⁵ The discovery process helps companies obtain evidence against counterfeiters who could previously take advantage of the long litigation process by erasing evidence.¹³⁶ Judges can award higher damages given the accessible evidence and formal discovery process.

The 2019 amendment to the Trademark Law further bolsters the strength of these courts by increasing statutory and punitive damages. The 2019 amendment increased statutory damages from 3 million RMB¹³⁷ in 2013 to 5 million RMB (approximately \$743,000).¹³⁸ Punitive damages were increased from three times¹³⁹ to five times of either the profits of the infringer, losses suffered by the rights owner, or a reasonable licensing royalty.¹⁴⁰

2. Restructuring the IP Office to Consolidate Authority

In 2018, China's national government announced a restructuring of its patent office, the State Intellectual Property Office (SIPO). Previously, the Trademark Office, a branch of the now-dismantled SAIC (which conducted raids), oversaw trademarks, while SIPO exclusively oversaw patents.¹⁴¹ In March 2018, the government granted SIPO the responsibility of overseeing trademarks and patents,¹⁴² while also renaming the office to China National Intellectual Property Administration (CNIPA).¹⁴³ CNIPA has the power to manage and grant patent and trademark applications and adjudicate

134. Paul Keller et al., *New Options for Getting Evidence into Chinese Courts*, NORTON ROSE FULBRIGHT (Feb. 23, 2016), <http://www.nortonrosefulbright.com/knowledge/publications/137423/new-options-for-getting-evidence-into-chinese-courts> [<https://perma.cc/PDJ9-5JDS>].

135. *Id.*

136. *See infra* notes 216–25 and accompanying text (discussing how the new discovery process helps companies obtain evidence and receive higher damage awards).

137. Shangbiao Fa (商标法) [2013 Trademark Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 20, 2013, effective May 1, 2014), art. 63 (Westlaw China).

138. *See* 2019 Trademark Law, art. 63; Palmer, *supra* note 58.

139. 2013 Trademark Law, art. 63.

140. 2019 Trademark Law, art. 63.

141. Steve Brachmann, *China Reorganizes SIPO, Gives It Authority over Trademark and Geographical Indications*, IP WATCHDOG (Mar. 22, 2018), <http://www.ipwatchdog.com/2018/03/22/china-reorganizes-sipo-trademark-geographical-indications/id=95144/> [<https://perma.cc/LYN9-MMSQ>].

142. *Id.*

143. *China: SIPO Has Been Renamed to CNIPA*, EUR. PAT. OFF. (Sept. 5, 2018), <https://www.epo.org/searching-for-patents/helpful-resources/asian/asiaupdates/2018/20180905.html> [<https://perma.cc/8ZJX-S53S>].

disputes.¹⁴⁴ The government also created SAMR to oversee CNIPA and help enforce patents and trademarks.¹⁴⁵ Copyright remains under the authority of a separate administration, the National Copyright Administration.¹⁴⁶

The Chinese government centralized CNIPA's authority to overcome jurisdictional conflicts between the previous trademark and patent agencies, as both administrations could previously investigate infringement actions and command their own enforcement teams (for raids).¹⁴⁷ However, these separate teams worked under different laws and regulations, which led to inconsistent results, especially when the product infringed on both patents and trademarks.¹⁴⁸ The two administrations had different remedies as well; SAIC could confiscate and destroy counterfeit goods, while SIPO could only order the counterfeiter to stop production.¹⁴⁹ The national government restructured the IP offices to streamline enforcement methods, particularly raids.

3. E-Commerce Platforms Must Prevent Counterfeits in Marketplaces

The Chinese government passed a law in August 2018—enacted in January 2019—that held e-commerce platforms responsible for the sale of counterfeit goods on their sites.¹⁵⁰ Per the law, major Chinese e-commerce platforms like Taobao and Pinduoduo have to audit sellers' business qualifications and establish a channel for consumers to report counterfeit products.¹⁵¹ When these e-commerce platforms receive a report, they must handle the matter in a timely manner.¹⁵² With e-commerce on the rise,¹⁵³ this new law aims to make it more difficult for counterfeiters to avoid detection and punishment by using internet anonymity.¹⁵⁴

Thus, in the past few decades, China has undergone major changes to its IP regime, but it is still criticized for its ineffective enforcement methods. China seeks to rectify this ineffectiveness through the recent IP developments, but the efficacy of these developments is yet to be determined.

144. Brachmann, *supra* note 141.

145. Zhu & Wininger, *supra* note 74.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. Lauren E. Fujino, *China's New E-Commerce Law: Businesses Should Ready for Stronger Compliance Norms*, CHINA BRIEFING (Sept. 25, 2018), <http://www.china-briefing.com/news/china-new-e-commerce-law-businesses-ready-new-compliance-norms-2019/> [<https://perma.cc/UC3P-ZDDA>].

151. *China's New E-Commerce Law Shifts Responsibility to Websites*, GLOBAL TIMES (Sept. 2, 2018, 8:48 PM), <http://www.globaltimes.cn/content/1117986.shtml> [<https://perma.cc/HDJ6-CTPC>].

152. Fujino, *supra* note 150.

153. *See infra* Part II.A.

154. Fujino, *supra* note 150.

II. COSMETICS AND COUNTERFEITS

As long as enforcement methods are inefficient, counterfeiters will infringe on the products of prominent industries. As an industry experiencing huge growth, the cosmetics industry is a prime target for counterfeiters.¹⁵⁵ A major source of the industry's success stems from online sales and heavy internet advertising.¹⁵⁶ Part II.A explains that while the internet is the source of industry success, it is also a source of revenue loss due to the accessibility of counterfeits. Part II.B highlights the harm of counterfeits to consumers and companies. Part II.C discusses how consumers, companies, and e-commerce platforms are protecting themselves against counterfeits.

A. *The Success of the Cosmetics Industry*

The global cosmetics¹⁵⁷ industry is a billion-dollar industry that continues to grow immensely. In 2017, the global cosmetics products market was valued at approximately \$532 billion—and it is expected to be valued at approximately \$805 billion within the next five years.¹⁵⁸ A major source of the industry's success is the internet, but the platform does not come without its drawbacks.

Online marketing and e-commerce are major sources of revenue for cosmetics companies. Between 2011 and 2016, e-commerce cosmetics sales increased at a quicker rate than sales through drugstores, department stores, and mass merchandisers.¹⁵⁹ Last year, cosmetics e-commerce increased by \$1.6 billion while brick-and-mortar sales decreased by \$168 million.¹⁶⁰ Amazon became the largest online beauty retailer in the United States, accounting for 36 percent of online cosmetic sales.¹⁶¹ Social media sites like Instagram, Facebook, and Snapchat help companies advertise directly to consumers.¹⁶² Although these social media outlets are a great medium for advertising, one of the most important outlets is YouTube. In June 2016,

155. See *infra* Part II.A.

156. See *supra* notes 157–63 and accompanying text.

157. This Note uses the U.S. Food and Drug Administration's definition of "cosmetic": "articles intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body . . . for cleansing, beautifying, promoting attractiveness, or altering the appearance." Food, Drug, and Cosmetic Act, 21 U.S.C. § 321(i) (2012).

158. *Global Cosmetics Products Market Expected to Reach USD 805.61 Billion by 2023—Industry Size & Share Analysis*, REUTERS (Mar. 13, 2018, 9:45 AM), <https://www.reuters.com/brandfeatures/venture-capital/article?id=30351> [<https://perma.cc/FED6-RXFM>].

159. Stephanie Wong, *Will Cosmetics Get an Amazon Makeover?*, BLOOMBERG BUSINESSWEEK (Jan. 9, 2018, 6:00 AM), <https://www.bloomberg.com/news/articles/2018-01-09/will-cosmetics-get-an-amazon-makeover> [<https://perma.cc/LZD9-5NY5>].

160. *Growth of Beauty E-Commerce and Brick-and-Mortar Sales in the United States in 2017 (in Million U.S. Dollars)*, STATISTA, <https://www.statista.com/statistics/764390/beauty-sales-growth-ecommerce-brick-and-mortar-us/> [<https://perma.cc/MWM9-7FHT>] (last visited Aug. 22, 2019).

161. Wong, *supra* note 159.

162. J. Clement, *Beauty Content on Social Media—Statistics & Facts*, STATISTA (June 9, 2017), <https://www.statista.com/topics/2381/beauty-brands-on-social-media/> [<https://perma.cc/LLH2-QLJS>].

beauty-related content, mostly created by influencers,¹⁶³ generated more than 5 billion views per month on YouTube.¹⁶⁴ These beauty influencers were also responsible for about 97 percent of cosmetics-related conversations on social media.¹⁶⁵

Major cosmetics companies use technology and social media for their benefit, yet technology has also become a double-edged sword. The counterfeiting issue is perpetuated by the rise of technology.¹⁶⁶ The same company-sponsored influencers also promote counterfeit cosmetics to their millions of followers.¹⁶⁷ While the internet provides a bigger platform for cosmetics companies to sell their products, it also provides customers the opportunity to purchase counterfeits, whether knowingly or unknowingly.¹⁶⁸ Despite the strong industry growth, cosmetic companies are dealing with a rise in counterfeit products.¹⁶⁹

B. *With a Successful Industry Come the Counterfeits*

Counterfeits¹⁷⁰ look like exact copies of brand-name items and are intended to fool consumers into believing that the product was made by the brand itself.¹⁷¹ By marketing fake products as genuine ones, counterfeits

163. Beauty influencers are independent content creators who have a significant and engaged following and endorse specific makeup and beauty brands. *What Is Beauty Influencer Marketing?*, IZEA (June 1, 2017), <https://izea.com/2017/06/01/beauty-influencer-marketing/> [<https://perma.cc/L5NJ-QSH9>].

164. Clement, *supra* note 162.

165. *Id.*

166. Ying Wang & Yiping Song, *Counterfeiting: Friend or Foe of Luxury Brands?: An Examination of Chinese Consumers' Attitudes Toward Counterfeit Luxury Brands*, 26 J. GLOBAL MARKETING 173, 183–84 (2013).

167. Nicola Dall'Asen, *Beauty YouTubers Are Doing Full Faces with Counterfeit Makeup, and It Needs to Stop*, REVELIST (Dec. 4, 2017, 2:29 PM), <https://www.revelist.com/bloggers/full-face-counterfeit-makeup/10713> [<https://perma.cc/QX2-ZRC4>]. While social media platforms like YouTube, Facebook, Snapchat, and Instagram are banned in China, they still market Chinese-made counterfeit goods abroad. *See, e.g.*, Laura Lee, *Full Face of Fake Ripoff Makeup!: Hit or Miss??*, YOUTUBE (Dec. 3, 2017), https://www.youtube.com/watch?v=9H3G6FfA9_c [<https://perma.cc/4JXZ-3PDF>] (showing an influencer sharing her experience of purchasing counterfeits from AliExpress, a Chinese online retail platform, with her followers).

168. Liz Ritter, *Government Report Finds Amazon and Walmart Are Selling Counterfeit Products—Including Cosmetics Containing Toxins*, NEWBEAUTY (Mar. 1, 2018), <https://www.newbeauty.com/blog/dailybeauty/11999-counterfeit-beauty-products-amazon-walmart/> [<https://perma.cc/P9KH-PWTJ>]. *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-216, *INTELLECTUAL PROPERTY: AGENCIES CAN IMPROVE EFFORTS TO ADDRESS RISKS POSED BY CHANGING COUNTERFEITS MARKET* (2018).

169. Macaela Mackenzie, *Fake Makeup Is Becoming as Big of a Problem as Fake News*, ALLURE (Feb. 28, 2017), <https://www.allure.com/story/counterfeit-beauty-products-all-time-high> [<https://perma.cc/W5KE-CY89>].

170. In the cosmetic industry, there is a difference in the terms “counterfeit” (or “fake” or “replica”) and “dupe.” *See* Mackenzie, *supra* note 8. Unlike counterfeits, dupes usually do not infringe on intellectual property rights because they are not marketed to deceive consumers. *See* Samantha Primeaux, Comment, *Makeup Dupes and Fair Use*, 67 AM. U. L. REV. 891, 893 n.3 (2018).

171. Joyce Chang, Note, *Trademark Counterfeiting in China: The Real Price of Knock-Offs*, 54 SANTA CLARA L. REV. 765, 769 (2014).

infringe on trademarks—but they may also infringe on patents and copyrights.¹⁷² While some market research suggests that counterfeits can increase brand awareness,¹⁷³ generally, counterfeits are harmful to both the companies and consumers.

Counterfeits cause economic and reputational harm. Counterfeits hurt a company's reputation, the very thing that a trademark seeks to protect.¹⁷⁴ Because counterfeits are meant to deceive consumers, those who try these knockoffs thinking they are the authentic product may form a poor opinion of the authentic product.¹⁷⁵ These fake products are associated with economic loss, loss of public funding, health risks, and criminal activity.¹⁷⁶ According to the International Chamber of Commerce, companies lose approximately \$12 billion in revenue every year as a result of counterfeits despite increased efforts to combat the issue.¹⁷⁷ Counterfeits are mostly produced in China, yet they cause economic harm to other nations. In 2013, 63 percent of seized counterfeit items originated in China and 21 percent originated in Hong Kong.¹⁷⁸ This same report lists countries that are “hit hardest”¹⁷⁹ by trade in fake goods—and the United States makes the top of the list.¹⁸⁰ U.S. Customs and Border Protection seized nearly \$1.4 billion worth of counterfeit goods in 2016.¹⁸¹

To keep the cost of production low, counterfeiters will replace high-quality ingredients found in authentic products with dangerous filler chemicals, which creates health risks for consumers.¹⁸² Common dangerous “filler” components include mercury, lead, arsenic, cyanide, and feces.¹⁸³ Exposure to these materials can have long-term toxic effects on bodily systems—

172. See Primeaux, *supra* note 170, at 893.

173. Wang & Song, *supra* note 166, at 174.

174. Esther A. Zuccaro, Recent Development, *Gucci v. Alibaba: A Balanced Approach to Secondary Liability for E-Commerce Platforms*, 17 N.C. J.L. & TECH. ONLINE 144, 145 (2016).

175. *Id.*

176. *5 Ways Counterfeiting Hurts Society—and What We Can Do About It*, INT’L CHAMBER COM. (July 6, 2017), <https://iccwbo.org/media-wall/news-speeches/5-ways-counterfeiting-hurts-society-and-what-we-can-do-about-it/> [<https://perma.cc/RD6W-S5WP>].

177. Wang & Song, *supra* note 166, at 174.

178. *Global Trade in Fake Goods Worth Nearly Half a Trillion Dollars a Year—OECD & EUIPO*, OECD (Apr. 18, 2016), www.oecd.org/industry/global-trade-in-fake-goods-worth-nearly-half-a-trillion-dollars-a-year.htm [<https://perma.cc/4U55-PQ2M>].

179. Countries “hit hardest” are described as the “top countries whose companies had their intellectual property rights infringed in the 2011–2013 seizures . . . whose brands or patents were affected by 20% of the knock-offs.” *See id.*

180. *Id.*

181. *Fake Makeup Can Be an Easy Buy—and a Health Hazard*, CBS NEWS (Dec. 29, 2017, 7:31 AM), <https://www.cbsnews.com/news/fake-makeup-health-hazard-us-customs-and-border-protection/> [<https://perma.cc/XMM2-RMMU>].

182. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 168, at 18.

183. Joanna Chiu, *The Very Real Danger of Fake Cosmetics from China*, MASHABLE (Nov. 10, 2015), <https://mashable.com/2015/11/10/fake-makeup-china/> [<https://perma.cc/LH7A-FK94>]; see also Amanda Jackson, *Police Find Animal Waste in Counterfeit Makeup—so It’s Not Such a Bargain After All*, CNN (Apr. 15, 2018, 4:31 PM), <https://www.cnn.com/2018/04/15/health/counterfeit-makeup-seizure-lapd-trnd/index.html> [<https://perma.cc/89RG-U5GD>].

including the nervous, digestive, and immune systems—and can also damage lungs, kidneys, skin, and eyes.¹⁸⁴

These health concerns are further exacerbated by the amount of counterfeit cosmetics in the market. As of 2015, 20 percent of the Chinese cosmetics market was counterfeit.¹⁸⁵ Even though a majority of the counterfeits are made in China, they still make their way to other countries. E-commerce sites like Amazon, eBay, Newegg, and Walmart promote the proliferation of counterfeits online and make it difficult to enforce anticounterfeiting measures.¹⁸⁶ With Amazon accounting for over a third of online cosmetics sales in the United States,¹⁸⁷ counterfeits on that platform pose a high risk to consumer health. Customs agents reported that fake personal care items are now even more common than knockoff handbags.¹⁸⁸

Global seizures exemplify the gravity of the counterfeit cosmetics issue. The Organisation for Economic Co-operation and Development reported that the value of counterfeit perfumes and cosmetics in 2013 was estimated at \$3.8 billion¹⁸⁹ and that global seizures increased by 25 percent from 2011 to 2013.¹⁹⁰ After confiscating a shipment of 90,000 counterfeit cosmetic products, a Chinese customs official stated, “[i]f such a large number of counterfeit cosmetics—possibly containing toxic chemicals—were to leave [China], it could have negatively affected the health of tens of thousands of people.”¹⁹¹ Estée Lauder reported that it “conducted over 1350 seizures and confiscated over 2.6 million pieces of counterfeit products” in 2016.¹⁹² Stronger regulations are necessary given the dangers of counterfeit cosmetics and the vast quantity of counterfeits available today.

184. *Fake Cosmetics Found to Contain ‘Toxic’ Chemicals*, BBC NEWS (Aug. 27, 2018), <https://www.bbc.com/news/uk-45313747> [<https://perma.cc/2KBD-PC6Q>].

185. Scott Cendrowski, *How Sephora Fights Fakes in China*, FORTUNE (May 13, 2015), <http://fortune.com/2015/05/13/how-sephora-fights-fakes-in-china/> [<https://perma.cc/T7NX-PK4D>].

186. Alana Semuels, *Amazon May Have a Counterfeit Problem*, ATLANTIC (Apr. 20, 2018), <https://www.theatlantic.com/technology/archive/2018/04/amazon-may-have-a-counterfeit-problem/558482/> [<https://perma.cc/WG6B-WB4C>].

187. *See supra* note 161 and accompanying text.

188. *Fake Makeup Can Be an Easy Buy—and a Health Hazard*, *supra* note 181.

189. David Woode, *Your Cheap Kylie Lip Kit Is Probably Fake and Might Be Toxic*, VICE: BROADLY (Aug. 2, 2017, 11:14 AM), https://broadly.vice.com/en_us/article/padj3b/cheap-kylie-lip-kit-fake-toxic-counterfeit-makeup [<https://perma.cc/D4V4-V3UK>].

190. David G. Herbert, *Code Rouge: Cracking the Case of the Counterfeit Makeup*, BLOOMBERG BUSINESSWEEK (Feb. 22, 2017), <https://www.bloomberg.com/features/2017-counterfeit-makeup/> [<https://perma.cc/ED3M-W7RX>]. Within the United States, customs agents seized more than 2000 shipments of counterfeit cosmetics in 2015, worth an estimated \$1.4 billion. Aliza Karetnick & Kelly Bonner, *Counterfeit Cosmetics: Fake Beauty, Real Danger*, DUANE MORRIS (Apr. 25, 2018), https://www.duanemorris.com/articles/counterfeit_cosmetics_fake_beauty_real_danger_0418.html [<https://perma.cc/37ZM-E3LH>].

191. Laurie Chen, *More Than 90,000 Fake Cosmetic Products Seized at Chinese Port*, S. CHINA MORNING POST (Aug. 29, 2017, 4:19 PM), <https://www.scmp.com/news/china/society/article/2108787/more-90000-fake-cosmetic-products-seized-chinese-port> [<https://perma.cc/APN3-5UAA>].

192. Kimberly Suiters, *WJLA Investigates the Counterfeit Makeup Market*, WJLA (Oct. 30, 2017), <https://wjla.com/features/7-on-your-side/7-on-your-side-investigates-the-counterfeit-makeup-market> [<https://perma.cc/9DDF-8YJ5>].

C. *Consumers and Companies Bear the Burden of Preventing Counterfeits*

Consumers and companies have taken on the responsibility of protecting themselves against counterfeits due to China's ineffective enforcement methods. Consumers must learn to spot counterfeits when they purchase products online, or they must learn to buy from reliable sources.¹⁹³ Consumers also blame companies for counterfeits and they believe that companies have a responsibility to keep these products off the market.¹⁹⁴ They pressure cosmetics companies and e-commerce platforms¹⁹⁵ to implement their own policies to tackle counterfeit products.

Major cosmetics companies like Estée Lauder and L'Oréal are taking steps to prevent the counterfeiting of their brand-name products. Estée Lauder has an investigative team of about twenty-four people all around the world, including in China and Hong Kong.¹⁹⁶ This team works closely with government agencies in conducting raids and seizures, monitoring social media, and educating customs officials.¹⁹⁷ Similarly, L'Oréal works with government authorities to conduct investigations and often reports the counterfeiters to law enforcement agencies or pursues civil action.¹⁹⁸ L'Oréal also uses "a proprietary coding system" that gives a "license plate" to a portion of its products to help it determine which products are stolen, diverted, or counterfeited.¹⁹⁹

The actions of these two companies are common for major luxury brands. Like Estée Lauder and L'Oréal, many multinational companies have established their own brand-protection units that work with government officials, in this case SAIC, to conduct raids and seize counterfeits.²⁰⁰ Sometimes, the units also work with private investigation companies to locate counterfeiters.²⁰¹ The brand-protection units in China are assigned to manage the advertising, marketing, and sales of their company's products and they evaluate products based on total sales revenue and market penetration.²⁰²

In China, e-commerce platforms struggle to regulate counterfeits in their marketplaces, which host third-party sellers on their platforms. JD.com, a

193. See, e.g., Katy Young, *Counterfeit Beauty Products: How to Spot a Fake*, TELEGRAPH (May 18, 2015, 12:07 PM), <https://www.telegraph.co.uk/beauty/make-up/how-to-spot-fake-beauty-products/> [<https://perma.cc/ZYA5-ES8E>].

194. See Mackenzie, *supra* note 8.

195. This Note uses the term "e-commerce platform" to refer to websites that sell products that their companies do not produce. Amazon is an example of an e-commerce platform because it hosts third-party sellers on Amazon Marketplace. See Pamela N. Danziger, *Thinking of Selling on Amazon Marketplace?: Here Are the Pros and Cons*, FORBES (Apr. 27, 2018, 1:55 PM), <https://www.forbes.com/sites/pamdanziger/2018/04/27/pros-and-cons-of-amazon-marketplace-for-small-and-mid-sized-businesses/> [<https://perma.cc/GE35-FDK9>] (describing Amazon Marketplace).

196. Suiters, *supra* note 192.

197. *Id.*

198. *Id.*

199. *Id.*

200. See Chow, *supra* note 85, at 760–61.

201. *Id.* at 761.

202. *Id.* at 760.

Chinese e-commerce platform, generates half of its revenue from its own warehouse and has about 60,000 merchants in its separate market platform.²⁰³ The company claims that limiting the number of third-party sellers and maintaining merchandise in its own warehouse help it regulate counterfeits.²⁰⁴ In contrast, its e-commerce competitor Taobao, owned by the Chinese company Alibaba, has over 8 million third-party sellers and spends over \$16 million a year to combat counterfeits.²⁰⁵ Despite these different business models, approximately 90 percent of the products on both of these platforms' marketplaces were fake, according to SAIC.²⁰⁶ One Beijing-based online cosmetics store, Jumei International, abandoned its independent marketplace feature altogether because it could not properly combat counterfeits.²⁰⁷

E-commerce companies like Alibaba and JD.com are taking steps to combat counterfeits. The high amount of counterfeits found on Taobao raised concerns about Alibaba's e-commerce legitimacy.²⁰⁸ The Office of the U.S. Trade Representative, a U.S. trade watchdog, placed Alibaba on its "notorious markets" list due to these concerns.²⁰⁹ To improve its reputation, Alibaba implemented a program that allows brands and retailers to report counterfeits and demand takedowns.²¹⁰ Since this implementation, Alibaba has responded to takedown demands within twenty-four hours,²¹¹ which has led to a 42 percent decrease in the number of takedown requests and a 17 percent increase in enrollment for this protection program.²¹² Alibaba reports that this program has been largely successful, given these promising statistics.²¹³

In sum, the cosmetics industry has recently grown at a tremendous rate and this success can be attributed to the industry's strong use of the internet for e-commerce and advertising. However, the internet also promotes counterfeit cosmetics, which raises health risks. As a result of China's

203. See Cendrowski, *supra* note 185.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. See Yue Wang & Carla Thomas, *Alibaba's Struggle for E-Commerce Legitimacy Is Undermined by Fake Gucci and Refugee Boats*, FORBES (Aug. 14, 2017, 11:48 PM), <https://www.forbes.com/sites/ywang/2017/08/14/alibabas-struggle-for-e-commerce-legitimacy-is-undermined-by-fake-gucci-and-refugee-boats/> [<https://perma.cc/UTW7-9P64>].

209. Michael Zakkour, *U.S. Agency Puts Alibaba's Taobao Back on 'Notorious Markets' List—Here's Why They're Wrong*, FORBES (Dec. 22, 2016, 2:22 PM), <https://www.forbes.com/sites/michaelzakkour/2016/12/22/u-s-agency-puts-alibaba-back-on-notorious-markets-list-heres-why-theyre-wrong/> [<https://perma.cc/CLR3-7283>].

210. Yiling Pan, *Alibaba's Anti-Counterfeiting Efforts Appear to Pay Off*, JING DAILY (May 21, 2018), <https://jingdaily.com/alibaba-anti-counterfeiting/> [<https://perma.cc/38BK-YZT3>].

211. Lucy T. Copp, *Alibaba Now Flushes Out Fake Products in Under 24 Hours*, COSMETICS BUS. (Aug. 14, 2017), https://www.cosmeticsbusiness.com/news/article_page/Alibaba_now_flushes_out_fake_products_in_under_24_hours/132659 [<https://perma.cc/V86E-RJ5G>].

212. Pan, *supra* note 210.

213. See Copp, *supra* note 211.

ineffective enforcement methods, consumers, companies, and e-commerce platforms are responsible for preventing the proliferation of counterfeits.

III. THE CURRENT IP REGIME IS ON THE CUSP OF A MAJOR CHANGE

The major changes in the Chinese IP regime have sparked two distinct views about the regime's future. This Part discusses the two views regarding IP enforcement in light of counterfeit cosmetics trends. In Part III.A, proponents already see signs of increasingly strong IP protection and enforcement, and the 2017–2018 developments may further bolster the regime. In Part III.B, opponents argue that the national government is not developing policies that properly address the counterfeiting issue, which leaves international consumers largely still at risk.

A. Recent IP Developments Can Stop Counterfeit Cosmetics Production

With China rapidly changing its IP laws and enforcement methods, proponents have expressed that these new implementations will be enough to correct the counterfeiting problem. Chinese government officials, including President Xi Jinping, have expressed their desire to strengthen IP enforcement.²¹⁴ This leaves some hopeful that China may soon become a leader in IP.²¹⁵ Current trends among Chinese citizens, its courts, and foreign luxury companies indicate the development of a strong IP regime.

China has already started responding to major criticisms, including challenges in obtaining evidence, awarding inadequate damages, and countering local protectionism.²¹⁶ Inadequate damages were a major hindrance to litigation as a viable enforcement method,²¹⁷ but the courts are moving towards steeper penalties. For example, in 2017, New Balance received the largest damages thus far awarded, RMB 10 million (or about \$1.5 million) for a trademark infringement.²¹⁸ New Balance's award reflects the general trend of increased damages awards in IP litigation.²¹⁹ This general trend is supported by the 2019 Trademark Law amendment that increased statutory and punitive damages.²²⁰

214. See, e.g., *Transcript: President Xi Addresses the 2018 BOAO Forum for Asia in Hainan*, US-CHINA PERCEPTION MONITOR (Apr. 11, 2018), <https://www.uscnpm.org/blog/2018/04/11/transcript-president-xi-addresses-2018-boao-forum-asia-hainan/> [<https://perma.cc/GAB8-YNLB>].

215. Alice de Jonge, *Why China Is a Leader in Intellectual Property (and What the US Has to Do With It)*, CONVERSATION (Mar. 26, 2018, 1:29 AM), <http://theconversation.com/why-china-is-a-leader-in-intellectual-property-and-what-the-us-has-to-do-with-it-93950> [<https://perma.cc/AM22-KE8E>].

216. Weightman, *supra* note 131.

217. See *supra* notes 114–19 and accompanying text.

218. Eva Fu, *Chinese Court Awards New Balance 1.5 Million for Logo Infringement*, EPOCH TIMES (Aug. 25, 2017), https://www.theepochtimes.com/chinese-court-awards-new-balance-1-5-million-for-logo-infringement_2286503.html [<https://perma.cc/YVM5-63SX>].

219. See Weightman, *supra* note 131 (explaining the increase in average damage awards and providing examples of other companies receiving damages in the millions).

220. See *supra* notes 137–40 and accompanying text.

Additionally, the new tribunals and discovery process prevent local judges from protecting local interests.²²¹ The discovery process produces stronger evidence against counterfeiters, and the new tribunals are less inclined to show bias against foreign companies.²²² Along with these improvements, some scholars interpret a rise in litigation²²³ to signify that IP rights will soon be strongly enforced.²²⁴ The rise in litigation shows a change in the attitudes of both the courts and rights holders.²²⁵

The growing anticounterfeiting sentiment²²⁶ among Chinese individuals also indicates that the nation's IP regime is improving. Individuals, particularly the growing middle class who reside in smaller cities, prefer authentic luxury products over counterfeits.²²⁷ These individuals believe that counterfeits devalue the authentic brands.²²⁸ More Chinese citizens are valuing authentic brands and therefore valuing IP rights. Historically, Chinese citizens did not bother to enforce their IP rights because they did not expect the government to facilitate the enforcement.²²⁹ Therefore, citizens' acknowledgement of rights shows an improvement in enforcement efficiency.

Further, foreign luxury companies are focusing their marketing campaigns on the growing middle class,²³⁰ which indicates that foreign companies trust Chinese citizens to respect IP laws and trust China to enforce IP rights against those who do not respect the laws. A former SIPO commissioner, Tian Lipu, expressed that foreign companies' involvement in China is a sign of their trust in the nation's IP system²³¹ and its citizens. Major foreign companies like Apple would not choose China as a manufacturing site if they were afraid of infringement.²³² Historically, foreign companies like Gucci avoided Chinese e-commerce platforms because of the counterfeiting issue.²³³ Instead, companies would sell products in China through their own websites,²³⁴ which they would not do if they were afraid of counterfeiting, as

221. *See supra* note 105 and accompanying text.

222. Weightman, *supra* note 131.

223. *See supra* notes 100–02 and accompanying text.

224. *See* Matthew A. Marcucci, Note, *Navigating Unfamiliar Terrain: Reconciling Conflicting Impressions of China's Intellectual Property Regime in an Effort to Aid Foreign Right Holders*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1395, 1424–26 (2013).

225. Xuan-Thao Nguyen, *The China We Hardly Know: Revealing the New China's Intellectual Property Regime*, 55 ST. LOUIS L.J. 773, 774–75 (2011).

226. *Id.* at 797–98.

227. *See* Farah Master & Donny Kwok, *Global Luxury Brands Again Chase China's Young, Rich and Spendthrift*, REUTERS (Aug. 19, 2018, 7:05 PM), <https://www.reuters.com/article/us-china-luxury-focus/global-luxury-brands-again-chase-chinas-young-rich-and-spendthrift-idUSKCN1L40Q6> [<https://perma.cc/B5ZF-LN4W>].

228. Wang & Song, *supra* note 166, at 178.

229. *See supra* Part I.A.

230. Master & Kwok, *supra* note 227.

231. Marcucci, *supra* note 224, at 1427.

232. *Id.*

233. Tom Hancock, *Gucci Wary of Chinese Ecommerce Tie-Up Because of Fakes*, FIN. TIMES (Oct. 15, 2018), <https://www.ft.com/content/5d75fe48-d05d-11e8-a9f2-7574db66bcd5> [<https://perma.cc/S7FE-AE5N>].

234. *See id.*

Tian noted. Moreover, the new e-commerce law aimed at decreasing counterfeits on sites like Taobao and JD.com may quell lingering fears of foreign companies.

The implemented policies are already improving China's IP system. The U.S. Chamber of Commerce's 2018 International IP Index shows China's promise.²³⁵ This index uses forty indicators to analyze the IP regimes of fifty global economies.²³⁶ In the patents category, China's score increased from 4.35 (out of eight) in 2017 to a score of 5.50 in 2018.²³⁷ In comparison, the United States scored a 7.25 (behind eleven other countries).²³⁸ China's increased score highlights the nation's commitment to improving its IP regime by fostering innovation and building stronger enforcement methods.²³⁹ Given that the index did not account for the new e-commerce law and CNIPA, China's index score may increase again in the next few years.

Recent developments will continue to improve existing policies. Critics of China's IP regime often cite its fragmented agencies as a reason for inefficient enforcement.²⁴⁰ But CNIPA can correct IP fragmentation in the nation.²⁴¹ Previously, SAIC conducted raids for trademark and copyright infringements, while SIPO conducted raids for patent infringements.²⁴² Under the old regime, rights holders had to choose a specific agency to enforce their IP rights. Because CNIPA now oversees patents and trademarks, the pursuit of IP infringers will be much easier. Previously, each agency had the authority to pursue only certain enforcement methods.²⁴³ There would be inconsistent rulings if the products infringed on multiple rights.²⁴⁴ Under CNIPA, rights holders can request help through just one administration and this avoids the previous clash of authorities.²⁴⁵

China's new e-commerce law will decrease the number of counterfeits on the market. For instance, Alibaba's independently implemented takedown program drastically reduced counterfeits.²⁴⁶ The platform claimed that 97 percent of reported counterfeits were removed before a single sale

235. See Gene Quinn, *U.S. Patent System Falls to 12th Place in Chamber Global IP Index for 2018*, IP WATCHDOG (Feb. 8, 2018), <https://www.ipwatchdog.com/2018/02/08/u-s-patent-system-falls-12th-place-chamber-global-ip-index-2018/id=93494/> [https://perma.cc/6AK7-4FVT].

236. Press Release, U.S. Chamber of Commerce, U.S. Chamber Releases Sixth Annual International IP Index (Feb. 8, 2018, 10:15 AM), <https://www.uschamber.com/press-release/us-chamber-releases-sixth-annual-international-ip-index> [https://perma.cc/SJP7-T992].

237. Quinn, *supra* note 235.

238. See *id.*

239. *Id.*

240. Marcucci, *supra* note 224, at 1432–33.

241. See *supra* notes 103–04 (describing the centralized IP enforcement in coastal cities and counterfeiting in rural areas of China).

242. See *supra* notes 147–49 and accompanying text.

243. See *supra* notes 147–49 and accompanying text.

244. See *supra* notes 147–49 and accompanying text.

245. Zhu & Wininger, *supra* note 74.

246. See *supra* notes 208–12 and accompanying text.

occurred.²⁴⁷ As the e-commerce law has just become effective in 2019, other e-commerce platforms may also see drastic improvements in combating counterfeits.

Proponents are hopeful that the government's priority of improving its IP protection regime, along with the current IP landscape in China, will significantly decrease counterfeit sale and production.

B. Recent IP Developments Do Not Address the Underlying Issues of Counterfeit Cosmetics Prevention

Opponents, however, argue that the new policies implemented in the past few years are not enough to limit counterfeiting,²⁴⁸ particularly in the cosmetics industry. Chinese IP enforcement methods are insufficient to solve the counterfeiting problem because these efforts are mainly focused on catching counterfeits as they are about to enter or have already entered the market.²⁴⁹ Enforcing IP rights on the tail end of the process does not deter counterfeiters,²⁵⁰ and the new CNIPA structure still allows local officials to protect them.

Despite recent developments, the demand for counterfeit cosmetics has risen.²⁵¹ As a result, counterfeit cosmetics are reaching international markets through e-commerce.²⁵² One report by a leading copyright protection company indicated that about 20 percent of online shoppers are unknowingly buying counterfeit cosmetics.²⁵³ Online brand infringement affects the cosmetics industry more than other industries.²⁵⁴ China's counterfeiting continues to affect global e-commerce. For example, in the United States, twenty-two Chinese defendants were charged with smuggling millions of dollars in counterfeit luxury goods, including cosmetics, from China.²⁵⁵

247. Pan, *supra* note 210.

248. See Yiling Pan, *Trump's New Tariffs May Benefit China's Luxury Counterfeits*, JING DAILY (Sept. 20, 2018), <https://jingdaily.com/trump-tariffs-china-counterfeiters/> [https://perma.cc/K35N-PXB4] (“Even though the Chinese government has stepped up efforts to clamp down on the counterfeiting businesses in recent years, the country has a long way to go to establish an effective legal system to protect the foreign intellectual property and innovation.”).

249. See Wang & Song, *supra* note 166, at 184 (“Anticounterfeiting measures designed primarily focusing on the supply side have been proved to be not very successful largely because of the high demand for counterfeit products from consumers.”).

250. See *infra* notes 276–79 and accompanying text.

251. Jenny Berich, *Cosmetic Counterfeiting on the Rise—Thanks to Social Media*, PROF. BEAUTY (June 18, 2018, 12:51 AM), <https://www.professionalbeauty.com.au/beauty/makeup/cosmetic-counterfeiting-on-the-rise-thanks-to-social-media/> [https://perma.cc/R83E-L5XR].

252. See *supra* Part II.B.

253. Berich, *supra* note 251.

254. Laetitia Woue, *Social Media Infringements Among Top Threats to Cosmetics Industry IP*, *Finds New Red Points Report*, RED POINTS (June 1, 2018), <https://www.redpoints.com/news-events/social-media-infringements-in-the-cosmetics-industry/> [https://perma.cc/PTU8-YMKB].

255. See, e.g., Press Release, U.S. Dep't of Justice, 22 Charged with Smuggling Millions of Dollars of Counterfeit Luxury Goods from China into the United States (Aug. 16, 2018), <https://www.justice.gov/opa/pr/22-charged-smuggling-millions-dollars-counterfeit-luxury-goods-china-united-states> [https://perma.cc/J9X8-HW96].

Evidently, counterfeiting in China is still prevalent²⁵⁶ despite China's efforts to strengthen its IP enforcement.

Further, despite the rising support for luxury products, consumers still support counterfeits. The same middle-class citizens who value luxury products still purchase high-end counterfeits.²⁵⁷ Demand for high-end counterfeits has also rapidly increased alongside the demand for authentic luxury goods in China.²⁵⁸ The Chinese citizens who claim that counterfeits devalue brands still purchase these high-end counterfeits and have positive attitudes about their purchases.²⁵⁹ Further, these middle-class citizens are not the ones producing the counterfeit products.²⁶⁰ Middle-class Chinese citizens do not understand the full extent of the harm that counterfeits cause and they are not deterred from purchasing counterfeit goods. Thus, even if there is an improving attitude about luxury brands, Chinese citizens do not fully believe the harm caused by counterfeits and will continue to support their production.

Counterfeiters are also shifting to social media platforms to avoid China's new e-commerce law. Popular social media platforms like WeChat are considered nontraditional e-commerce platforms under the new law.²⁶¹ Yet, a new trend among Chinese vloggers on social media is their ability to create counterfeit cosmetics that viewers are subsequently able to purchase.²⁶² The new law may initially prevent vloggers from contributing to the counterfeit market;²⁶³ there is no guarantee that the law can shut down the market altogether. Even though the law targets social media platforms, it only affects Chinese platforms, like WeChat.²⁶⁴ So, to avoid liability under this new law, counterfeit manufacturers and distributors may switch their focus to other e-commerce and social media platforms. When counterfeiters realize that one market has been closed off to them, they may simply seek out a different market. In other words, counterfeiters focus their marketing on platforms that do not conduct background checks on vendors and

256. *Id.*

257. Prices and quality vary within the counterfeit market. Wang & Song, *supra* note 166, at 184.

258. *Id.*

259. *Id.*

260. *See supra* note 227 and accompanying text.

261. William Potter, *China Raises Anti-Counterfeiting Pressure on E-Commerce Platforms*, TRADEMARKS & BRANDS ONLINE (Mar. 9, 2018), <https://www.trademarksandbrandsonline.com/news/china-raises-anti-counterfeiting-pressure-on-e-commerce-platforms-5309> [<https://perma.cc/2Z8H-ZUKY>].

262. Ruonan Zheng, *Counterfeiting Makeup Is a New Trend in Chinese How-To Videos*, JING DAILY (Apr. 2, 2018), <https://jingdaily.com/video-counterfeit-china/> [<https://perma.cc/TVB2-629G>].

263. *See supra* Part I.C.3.

264. *See* Trevor Little, *A Detailed Look at the Positives and Negatives of China's New E-Commerce Law*, WORLD TRADEMARK REV. (Sept. 13, 2018), <https://www.worldtrademarkreview.com/anti-counterfeiting/detailed-look-positives-and-negatives-chinas-new-e-commerce-law> [<https://perma.cc/Y46P-SY89>].

merchandise²⁶⁵ and even use bots to drastically improve exposure and sales.²⁶⁶

In fact, counterfeiters are already using markets where liability is minimal. Facebook and eBay account for more than 40 percent and 30 percent of online counterfeit cosmetics sales, respectively.²⁶⁷ Chinese e-commerce platforms collectively account for less than 15 percent of sales.²⁶⁸ Alternatively, if counterfeiters realize that one company heavily pursues infringers, they can produce counterfeits of another company's products. Given these strategies, simply passing an e-commerce law to hold some platforms, but not all, responsible will not impact the counterfeit market on a global scale.

The discrepancy between the e-commerce laws of China and other nations leaves global trade vulnerable to counterfeits. Although the new law holds Chinese e-commerce platforms liable for counterfeits, that liability does not extend to the United States.²⁶⁹ In the United States, e-commerce platforms like eBay are only liable if they know or have reason to know that the products on their platform are counterfeit and fail to take steps to remove them.²⁷⁰ These platforms do not have to prevent counterfeits from being posted on their sites.²⁷¹

This discrepancy, combined with counterfeiters' shift towards using eBay, Amazon, and international social media platforms, allows counterfeiters to bypass the measures that China has put in place.²⁷² Even if China is able to minimize counterfeiting within its nation, its laws are not able to prevent the products from reaching international markets.

265. See Lujie Chen et al., *8 Ways Brands Can Fight Counterfeits in China*, HARV. BUS. REV. (May 10, 2018), <https://hbr.org/2018/05/8-ways-brands-can-fight-counterfeits-in-china> [<https://perma.cc/8ZXS-7MWD>].

266. Daisy Lin, *Fighting Back Against Online Counterfeiters*, E.W. BANK (Mar. 26, 2018), <https://www.eastwestbank.com/ReachFurther/News/Article/Fighting-Back-Against-Counterfeiters-Online> [<https://perma.cc/23QV-UBCC>].

267. Berich, *supra* note 251. For an explanation of how counterfeits are sold online to non-Chinese consumers, see *supra* note 167 and accompanying text.

268. See Berich, *supra* note 251.

269. Béatrice Martinet & Reinhard J. Oertli, *Liability of E-Commerce Platforms for Copyright and Trademark Infringement: A World Tour*, A.B.A. (June 11, 2015), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2014-15/may-june/liability-e-commerce-platforms-copyright-trademark-infringement-world-tour/ [<https://perma.cc/K3BB-CVEC>].

270. *Tiffany (NJ) Inc. v. eBay, Inc.*, 576 F. Supp. 2d 463, 469 (S.D.N.Y. 2008), *aff'd*, 600 F.3d 93 (2d Cir. 2010). See generally Fara S. Sunderji, Note, *Protecting Online Auction Sites from the Contributory Trademark Liability Storm: A Legislative Solution to the Tiffany v. eBay, Inc. Problem*, 74 FORDHAM L. REV. 909 (2005).

271. Martinet & Oertli, *supra* note 269.

272. See Alana Semuels, *The Problem with Buying Cheap Stuff Online*, ATLANTIC (May 22, 2018), <https://www.theatlantic.com/technology/archive/2018/05/wish-china-cheap-stuff/560861/> [<https://perma.cc/BE2E-DV7W>] (explaining that consumers are increasingly buying directly from China and citing to a drastic increase in direct international mailing). *But see* Jonathan Walfisz & Trevor Little, *Amazon Expands Transparency Scheme as Spotlight Falls on Anti-Counterfeiting Efforts*, WORLD TRADEMARK REV. (July 10, 2019), <https://www.worldtrademarkreview.com/anti-counterfeiting/amazon-expands-transparency-scheme-spotlight-falls-anti-counterfeiting> [<https://perma.cc/QK6P-RXC6>].

Moreover, a centralized office overseeing patent and trademark infringements does not address the issue of local protectionism. Even though CNIPA streamlines the process of enforcement, the Beijing-based agency may still need local affiliates to conduct its raids. China's size and diversity make it difficult for the agency to single-handedly enforce IP rights.²⁷³ A stronger centralized office does not combat local protectionism because local powers continue to determine the outcomes of raids.²⁷⁴ So long as these local officials choose to protect local interests over the interests of rights holders, there cannot be effective raids. If local officials choose not to report IP infringement, that may hinder enforcement efforts altogether because enforcement raids are often the first step in civil litigation and criminal prosecution.²⁷⁵

Further, the penalties handed down by CNIPA and the tribunal courts will not deter counterfeiters. The increased damages awarded by tribunals and fines from raids are punishments rather than preventative measures against counterfeiters. At best, these punishments may prevent the counterfeiters from recommitting the offense.²⁷⁶ But severe punishments alone are ineffective at maintaining low counterfeiting rates.²⁷⁷ China's sole focus on strong punishments, while neglecting preventative methods, will not properly correct the counterfeiting issue.²⁷⁸ Instead, preventative measures like civic education may be more effective in lowering counterfeiting rates.²⁷⁹

Because these counterfeits do not originate from within their nation, foreign governments cannot do much more beyond raids, confiscations, and litigation. These are merely remedial—not preventative—measures. Other nations continue to express concern about China's counterfeiting issues.²⁸⁰ Opponents of the counterfeiting industry recognize that the problems will not be resolved easily and believe that attempts to pass laws that convict consumers who purchase counterfeit goods “have fallen by the wayside.”²⁸¹

In brief, current methods place the responsibility to combat counterfeiting on companies, rights holders, e-commerce platforms, and local

273. See McGill, *supra* note 23, at 26 (“China is too massive and diverse to rely on enforcement from Beijing.”).

274. See Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131, 232 (2000) (explaining that even with efforts to create a stronger centralized government, modern economic reforms lead to greater autonomy of regional and local governments).

275. See McGill, *supra* note 23, at 26.

276. See Matthew Murchie & Ronald Ling, *Is Severe Punishment the Best Way to Prevent Crimes?*, S. CHINA MORNING POST (Feb. 3, 2010, 12:00 AM), <https://www.scmp.com/article/705254/severe-punishment-best-way-prevent-crimes> [<https://perma.cc/D9CC-ZJEG>].

277. See *id.*

278. See *id.*

279. See *id.*

280. *China Remains Chief Concern in Latest EU Report on the Protection and Enforcement of Intellectual Property Rights*, EUR. COMMISSION (Mar. 12, 2018), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1813> [<https://perma.cc/DU8U-84TP>].

281. Chavie Lieber, *Why the \$600 Billion Counterfeit Industry Is Still Horrible for Fashion*, RACKED (Dec. 1, 2014, 11:45 AM), <https://www.racked.com/2014/12/1/7566859/counterfeit-fashion-goods-products-museum-exhibit> [<https://perma.cc/9ZKJ-58N3>].

governments.²⁸² But the Chinese national government must be the one to fix the issue.

IV. CHINA MUST ADDRESS THE UNDERLYING ISSUES WITH ENFORCEMENT

Some are hopeful that China's increased efforts to enforce IP rights will fix the problem of counterfeiting,²⁸³ but companies and other nations remain skeptical.²⁸⁴ Opponents even predict an increase in the production of counterfeit products in China.²⁸⁵ This Note argues that the current enforcement methods are not enough to stop counterfeiting. The new developments do not address the root of the problem, which is that the production of counterfeits is focused in rural areas where there is strong support for the practice.²⁸⁶

This Note suggests that the government should focus on improving perceptions of IP law amongst Chinese citizens, particularly the local officials and citizens in rural areas where counterfeit production occurs. In a nation where societal values take priority over individual rights, counterfeits are viewed as a benefit to China, especially to local economies.²⁸⁷ So long as citizens and local officials hold onto this perception, current enforcement methods are not enough to deter counterfeit production. Companies and foreign governments have taken measures to prevent counterfeits from reaching their own markets, but they have no incentive to prevent counterfeits on a large scale.²⁸⁸ For these reasons, the Chinese national government is the only entity that can holistically address counterfeiting.

Part IV.A argues that China's history and culture has led to the common belief that IP laws are not important. Part IV.B suggests that the national government can change this perception through education campaigns and make enforcement of IP rights more effective. The 2008 Olympics, hosted in Beijing, is one instance where the government's efforts to change perceptions about IP rights was successful. This Part suggests using the methods used by the Chinese government during the 2008 Olympics to correct issues with counterfeit cosmetics, while also noting how the differences between the two scenarios will cause challenges. Part IV.C recommends further enforcement methods to supplement education campaigns.

A. Cultural Values Prevent Effective Enforcement

The Chinese government needs to focus on preventing the production of counterfeits by positively improving perceptions of IP rights. Positive

282. *See supra* Parts I.B., II.B.2, II.B.3.

283. *See supra* Part III.A.

284. *See supra* Part III.B.

285. *See supra* notes 251–55 and accompanying text.

286. *See supra* Parts I.B.1–2.

287. *See supra* notes 92–98 and accompanying text.

288. *See supra* Part II.B; *see also supra* notes 265–68 and accompanying text.

reinforcement will supplement enforcement like fines and criminal punishments.

China's culture of *shan zhai*, Confucian principles, and history of appeasing Western nations²⁸⁹ have led citizens to believe that IP laws do not matter. Chinese culture stresses societal over individual interests and oscillating government stances regarding IP have reinforced the idea that IP is a community right.²⁹⁰ Historically, China adopted modern IP laws that aligned with Western philosophy.²⁹¹ For decades, China enacted policies that focused on bringing its IP regime in line with international standards to open itself to trade with Western nations.²⁹²

Counterfeiting persists because China's cultural and social norms clash with these Western-based laws.²⁹³ As a result, IP laws are largely ignored by counterfeiters and consumers of counterfeits.²⁹⁴ To reconcile the clashing philosophies, the government must positively improve Chinese perceptions about IP protections by changing the current notions that such laws only protect foreign brands and that counterfeits help China.

B. The Government Must Change Perceptions of IP Rights, Particularly Among Rural Citizens

Improving attitudes about IP rights, particularly in rural regions, is a start to improving enforcement effectiveness. There is increasing support for foreign luxury brands, particularly from the rising middle class.²⁹⁵ However, the Chinese middle class resides mostly in small cities,²⁹⁶ whereas counterfeiting is common in rural areas.²⁹⁷ As such, the government needs to focus its efforts on changing perceptions about IP law within these rural areas. Local officials in these areas favor counterfeiters because of the benefits that they provide to the local economy.²⁹⁸ To these officials, the local interests are more important than the interests of the individual rights holders—usually a foreign company.²⁹⁹ These views lead officials to believe that underenforcing rights is acceptable.³⁰⁰ Instead, the government must promote the understanding that counterfeits hurt societal interests, even local

289. *See supra* Part I.A.

290. *See supra* Part I.A.

291. *See* Liu, *supra* note 124, at 147 (“The Chinese government voluntarily transplanted Western law, including IP laws.”).

292. *See supra* Part I.A.

293. *See supra* Part I.A.

294. Liu, *supra* note 124, at 149 (“[I]ndigenous culture and social norms play a crucial role in explaining why transplanted IP laws were ignored and marginalized by both the public and enforcement agencies for decades after their introduction into China.”).

295. *See supra* notes 226–29 and accompanying text.

296. *See supra* notes 226–29 and accompanying text.

297. *See supra* notes 103–04 and accompanying text.

298. *See supra* Part III.A.

299. *See supra* notes 274–75 and accompanying text.

300. *See supra* notes 274–75 and accompanying text.

ones, and that protecting IP rights help the nation. Doing so would encourage local officials to confiscate counterfeit products and penalize infringers.³⁰¹

Government practices during the 2008 Olympics in Beijing can serve as a guide for improving such attitudes. China's IP enforcement efforts to protect the trademarks associated with the Olympics were highly publicized, which helped educate Chinese citizens about the importance of IP rights.³⁰² As a result, fake Olympic merchandise was uncommon in China and almost nonexistent in Beijing.³⁰³ China reformed citizens' attitudes towards IP rights using education campaigns, media assistance, and celebrity endorsements.³⁰⁴ Education campaigns informed citizens about the value that IP enforcement brings to the Chinese economy.³⁰⁵

The education campaign reached Chinese citizens at a local level. Local business owners were encouraged to pledge to refrain from producing Olympics-themed counterfeits.³⁰⁶ The Chinese government also recruited volunteers to collect evidence against infringers.³⁰⁷ The government framed participation in the pledge and collection of evidence as fulfilling one's social responsibility to ensure that the Olympics adequately represented China's success.³⁰⁸ This framework led citizens to believe that Olympics-themed counterfeits were "an offense against the glory of the Chinese people."³⁰⁹

While this government practice during the Olympics can serve as a model, there are three major distinctions between the Olympics and counterfeit cosmetics that the government must overcome. First, the government used the national excitement of the games to inform citizens of their social responsibility to honor the Olympics trademarks.³¹⁰ This was the first time China was hosting the Olympics, and many of the citizens were excited about the opportunity.³¹¹ Unlike the Olympics, there is no national excitement over fixing counterfeit cosmetics. The government utilized the excitement of the Olympics to *swiftly* enforce the importance of IP rights because the nation was working on a specific timeline.³¹²

Here, education campaigns can still be successful in curtailing counterfeit cosmetics, albeit at a slower pace than during the Olympics. There is no truncated timeline for combatting counterfeit cosmetics. But even if there is no national excitement, Chinese citizens have been increasingly interested in

301. See *supra* notes 274–75 and accompanying text.

302. See Chang, *supra* note 171, at 788–89.

303. McGill, *supra* note 23, at 21.

304. Chang, *supra* note 171, at 789.

305. See McGill, *supra* note 23, at 22.

306. *Id.* at 21.

307. *Id.*

308. *Id.*

309. *Id.* at 22.

310. *Id.* at 21.

311. See *id.* at 18.

312. Stacey H. Wang, Comment, *Great Olympics, New China: Intellectual Property Enforcement Steps Up to the Mark*, 27 LOY. L.A. INT'L & COMP. L. REV. 291, 311 (2005) (explaining that China was awarded the 2008 Olympics contract in 2001 and the Olympics licensing program officially began in 2004, which gave the nation only a few years to prepare).

luxury cosmetics,³¹³ and the government can utilize this interest to educate them about the harms of counterfeits. As with the Olympics, using celebrity endorsements and media outlets can attract the attention of the rising middle class, who appreciate luxury.³¹⁴ These methods could teach them about the harms of counterfeit cosmetics and dissuade this population from purchasing even high-end counterfeits.³¹⁵

Another distinction is that the Olympics are episodic occurrences, whereas combatting counterfeit cosmetics is an ongoing process. With episodic events, people may be more willing to restrict their activities for the sake of China's success. It may be difficult to maintain ongoing support for authentic, foreign companies.³¹⁶ Instead, China must focus on long-term education campaigns, primarily teaching younger citizens about the importance of IP rights.³¹⁷ Unlike the brief enforcement period during the 2008 Olympics, enforcement against counterfeit cosmetics must be long-term.

Chinese citizens viewed the Olympics as a reflection of their nation's success—and they believed that infringement of Olympics trademarks reflected poorly on their nation.³¹⁸ Infringers usually produce counterfeits of foreign goods that they believe reflect foreign success.³¹⁹ Proponents of *shan zhai* support counterfeiting because it takes success away from foreign companies and brings success to China.³²⁰ While this distinction is a big hurdle to overcome, the success of protecting the Olympics trademarks shows that citizens are willing to respect foreign organizations that help the nation's economy.³²¹ There is growing support for foreign luxury companies,³²² but the government needs to improve support for foreign companies among rural citizens. The education campaigns could focus on teaching rural citizens that foreign organizations can help their economy, like the Olympics did.

Finally, with China playing host to the 2022 Winter Olympics, the national government can improve on its IP enforcement efforts seen during the 2008 Olympics. China can use these efforts as a guide to correct its ongoing issues with counterfeit cosmetics. In preparation for the 2022 Olympics, China amended its Regulation on the Protection of Olympic Symbols to account for

313. See *supra* notes 227–29 and accompanying text.

314. See *supra* note 228 and accompanying text.

315. See *supra* note 257 and accompanying text.

316. Chang, *supra* note 171, at 790 (“Building stadiums is no problem . . . but raising people’s quality and civilization is not something we can do in one or two months, or even one or two years.” (quoting Calum Macleod, *China Wants Olympians to See Its Best Behavior*, USA TODAY (Feb. 8, 2006, 9:32 PM), http://usatoday30.usatoday.com/news/world/2006-02-08-china-manners_x.htm?POE=NEWSIVA [<https://perma.cc/6PH9-5GDJ>])).

317. *Id.* at 785 (“With such strong cultural values, it will take nothing less than essentially starting from scratch for China to eradicate counterfeiting.”).

318. McGill, *supra* note 23, at 21–22.

319. *Id.* at 21.

320. See *supra* note 22 and accompanying text.

321. The International Olympic Committee, a foreign organization, owns the Olympics trademarks. Wang, *supra* note 312, at 300.

322. See *supra* note 227 and accompanying text.

changes since the 2008 Olympics.³²³ Among other revisions, the regulation increased punishments for IP infringement, defined the protection period for the Olympic symbols, and simplified the process for rights holders to validate their symbols.³²⁴ These revisions clear up ambiguities in the 2008 regulation; for example, the new regulation defined the protection period as ten years and stipulates a rights renewal process.³²⁵ These amendments were adopted to better protect the 2022 Olympics IP in comparison with the 2008 Olympics—and China can use these improved enforcement efforts as a resource to guide efforts to tackle counterfeit cosmetics.

Changing citizens' attitudes about IP rights is a serious endeavor. But if China wants to effectively tackle the counterfeiting problem, education campaigns would be a strong start.

C. *Changing Perceptions Will Improve Penalties and Fines*

Promoting anticounterfeiting sentiments will improve current and future enforcement methods. The government can also adopt stronger enforcement methods to combat counterfeiters and discipline local officials. The government should provide strict mandates to local administrators.³²⁶ Holding officials accountable when they fail to report trademark infringement in favor of local interests will improve the success of raids³²⁷ and possibly lead to increased litigation and prosecution. The fragmented nature of China's IP system³²⁸ makes it difficult for the national government to ensure that local officials are conducting proper investigations. The central government cannot carry out raids without local assistance³²⁹—and it cannot oversee each local official's raids. Due to fragmentation, even if the national government currently held local officials liable for improper raids *de jure*, the national government could not enforce this liability *de facto*.³³⁰

However, if overall sentiments were improved, officials would feel pressure from their constituents to properly conduct raids.³³¹ Like with the Olympics, the local business owners who helped gather evidence against counterfeiters could also supply evidence of local corruption as well.³³² When rural citizens no longer see counterfeiting as a benefit to Chinese society, local officials will face a real risk of punishment for corruption. Similarly, if their constituents no longer feel that counterfeiting helps their

323. Press Release, Beijing Org. Comm. for the 2022 Olympic & Paralympic Winter Games, Amended Regulations on Olympic Symbols a Big Step Forward for China's Sports and Intellectual Property Legislation (Sept. 13, 2018), <https://www.beijing2022.cn/a/20180913/060192.htm> [<https://perma.cc/5E5N-9PND>].

324. *Id.*

325. *Id.*

326. See McGill, *supra* note 23, at 26.

327. *Id.*

328. See *supra* note 92 and accompanying text.

329. See *supra* note 273 and accompanying text.

330. Despite the national agencies' authority to enforce IP rights, their dependence on local officials allow those officials to fake results. See *supra* notes 273–74 and accompanying text.

331. Chang, *supra* note 171, at 790.

332. See *supra* note 306 and accompanying text.

local economy, the officials will lose a major incentive to underenforce IP rights, as their corruption will no longer be in line with societal interests.³³³

Changing public perception will also improve current enforcement methods without the need to amend current statutes. China's Olympics trademark law was virtually identical to the existing national trademark law.³³⁴ The language of the Olympics law provided the same enforcement techniques.³³⁵ Yet enforcement rates were drastically different. With the Olympics, fixed penalties deterred potential counterfeiters.³³⁶ Instead of penalties calculated based on the price of the counterfeits, officials calculated the penalties using the price on the authentic version. Basing penalties on price of the authentic version resulted in higher penalties every time.³³⁷ Even with the difference in penalties, however, enforcement depended on local officials and judges. Without improving the attitudes about IP laws, local authorities will not properly enforce penalties, even if the Chinese government mandates higher penalties.

In sum, China must overcome centuries of anti-IP sentiment. Culturally, citizens prioritize their own local interests over the interests of foreign companies, which enables the production of counterfeits. To correct this issue, China must change its citizens' perceptions about the importance of IP regulation. The government successfully reduced counterfeits during the Olympics and can use those methods to help develop a long-term solution to stop counterfeit cosmetics. Only then will enforcement methods be effective.

CONCLUSION

The cosmetics industry is growing, making it a prime target for Chinese counterfeits. As a burgeoning economic power, China has sought to tackle its counterfeiting problem and demonstrate to the world that it is serious about IP laws. China has been increasing its efforts in IP enforcement, which has led some to believe that it will soon have a strong IP regime. However, research indicates that counterfeit cosmetics remain popular—even among Chinese citizens—and demand for these counterfeits has led to increased supply. Current enforcement methods place much of the responsibility on consumers, businesses, and local governments and only address the counterfeits once they have been produced. Instead, the Chinese government must assume the bulk of the responsibility by introducing preventative measures supplemented by penalties and punishments. China's success at stamping out counterfeit goods during the 2008 Olympics and subsequent efforts for the 2022 Olympics can help to illuminate a path forward.

333. *See supra* notes 274–75 and accompanying text.

334. McGill, *supra* note 23, at 23.

335. *See id.* at 24.

336. *Id.*

337. *Id.*