Commentary on China's New Patent and Trademark Laws, A

L. Mark Wu-Ohlson
ARTICLES

A Commentary on China’s New Patent and Trademark Laws

L. Mark Wu-Ohlson*

I. INTRODUCTION

In anticipation of the formulation of a patent and trademark law by the legislative organs of the People’s Republic of China (“PRC”), attention in Chinese legal literature has frequently focused in recent years on the function of patent and trademark laws in China’s Marxist economy. To a large extent, these recent writings focus on the paradox of incorporating into a socialist legal system laws which grant to individuals exclusive ownership rights to intellectual property. The manner in which this paradox is resolved will no doubt mold the future of industrial property law in China. Hence, consideration of the theoretical perspectives which antedated and probably influenced the formulation of the new patent and trademark laws is perhaps the most instructive indication we have at

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present of the scope of rights and obligations accorded under the new laws.

A. The Effect of the Doctrinal Shift to Moderation on Attitudes toward Patent and Trademark Law

During the Cultural Revolution, the Gang of Four and their followers implemented a policy of extreme equalitarianism in the economic sector. It was their objective to accelerate China's movement toward what Marx termed "a higher phase of communist society" in which society could "inscribe on its banner: From each according to his ability, to each according to his need!" Material incentive to production was anathema. In a pure state of communism, ideological and spiritual incentive would suffice. The existence of patent and trademark laws in their granting of property rights in, or remuneration for, an invention or trademark was particularly repugnant to this equalitarian sensibility. As a result, during the Cultural Revolution, neither China's Regulations Concerning Awards for Inventions nor the Regulations Governing the Control of Trademarks were effectively enforced.2

In 1975 the moderates, led by Deng Xiaoping, reappeared in public life to assert an ideological attack on what they deemed the excessive equalitarianism and lack of regard for economic development of the Gang of Four. In their view, China remains far from attaining Marx's "higher phase of communist society." Although the unequal right afforded capitalists in a capitalist society to control the means of production has been eliminated, "equal right," the right of the individual laborer to receive "back from society exactly what he gives to it," remains as a form of "bourgeois right."3 Drafted under the aegis of Deng Xiaoping in 1975, a document entitled "Some Problems in the Acceleration of Industrial Development" pronounced that,

[[t]he restriction of bourgeois right can never be performed in isolation from the material conditions and spiritual conditions at the current stage . . . [W]e cannot deny distribution according to one's work, reject necessary differences and practice equalitarianism. Equalitarianism is not only impossible at present but also impracticable in the future.4

This perspective on the role of "bourgeois right" has become the spring-

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3 Marx, supra note 1, at 530.

board for introducing industrial property laws providing for the protection of individual property rights into the program of the "four modernizations." To make these laws ideologically tenable it would only be necessary to incorporate somehow the provision for property rights into the Marxist lexicon of "distribution according to work."

Two additional elements of the economic vitalization program which have molded the new regime of industrial property law were introduced in 1975: the importance of law to maintaining efficient economic organization and the need for the absorption of foreign technology. The former was set forth to counter the widespread disregard for economic regulations which had prevailed during the Cultural Revolution. Only a comprehensive set of well enforced economic regulations, it was argued, could govern economic relationships efficiently. The principle of everyone "eating out of the same pot of rice" ("Chi da guo fan")—equal distribution of products without an accounting of labor contributed—had resulted in economic disaster. The latter element, a mainstay of the modernization program, has particularly influenced new attitudes toward patent and trademark law; there is a growing awareness that these laws will serve as a conduit for technology transfer from, and commerce with, the capitalist world.

B. The Rule of Law: Institutions Concerned with the Drafting, Promulgation and Enforcement of Industrial Property Laws

It is evident that the PRC has begun the work of establishing an institutional framework which will ensure the perpetuation of its new regime of economic laws. The Center for Research of Economic Laws (Jingji Fagui Yanjiu Zhongxin) was recently established to reform and improve the content of the PRC's economic laws. It serves as a research organ of the departments of the State Council which are currently drafting and revising an extensive range of economic laws. The new Patent and Trademark Laws of the PRC are largely the product of the

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6 See supra note 4, at 92-93.
9 Trademark Law of the People's Republic of China, RENMIN RIBAO (People's Daily), Aug. 27,
To ensure effective implementation of its new economic laws, the PRC intends to establish a specialized judiciary to adjudicate claims which arise under the economic laws. Whether these courts will have jurisdiction to adjudicate appeals of the decisions of the patent and trademark authorities is not entirely clear. Under the new patent and trademark Laws, the People's Courts have primary and appellate jurisdiction in a number of instances. As the economic court system develops, it would be logical to transfer this judicial function to the economic courts.

II. PATENT LAW

A. Historical Background

In the early 1950's the PRC promulgated its first laws concerned with the protection of the proprietary rights of an inventor in his invention. Under the Provisional Regulations Concerning the Protection of the Invention Right and the Patent Right and the Provisional Regulations on Awards for Inventions, Technical Improvements and Rationalization Proposals Relating to Production an inventor was given the alternative of taking a certificate of invention or a patent. A patent granted the patentee the right to exclusive use of a patented invention while a certificate entitled its holder to certain monetary and honorific awards. On choosing the later option, the property right in the invention


10 Supra note 7, at 593-94.

11 Special economic courts have been established in several regions of China, the most well documented of these being the Economic Court of Chongqing. The procedure in Chongqing for bringing a claim under one of the economic laws is as follows: First, the claim is brought to the administrative department designated to administer matters related to the law concerned. That department then attempts to resolve the dispute. If, however, the claim is particularly important, or the losing party refuses to abide by the department's decision, the case is referred to the Chongqing Economic Court. Procedures similar to those in Chongqing are to be implemented throughout China as new economic courts are established. LECTURE OUTLINE FOR LEGAL PROPAGANDA AND EDUCATION (Fazhi Xuanjiaoban Jiangshou Tigang) 252 (1979).

12 PRC Patent Law, supra note 8; PRC Trademark Law, arts. 36, 39, supra note 9.


devolved to the State.\textsuperscript{16}

The 1963 Regulations Concerning Awards for Inventions\textsuperscript{17} and Regulations Concerning Awards for Technical Improvements\textsuperscript{18} replaced the 1950 Regulations. It appears that there are two practical reasons for the repeal of the 1950 law: it lacked specificity and applied only to individuals, containing no specific provisions relating to collective and national industries which had become the two major sectors of the economy.\textsuperscript{19} By 1963 Mao Zedong's drive to communalize agriculture and organize major industries into state run enterprises had by and large been completed. The concept of granting property rights in inventions to individuals had become ideologically untenable as the following editorial which accompanied the publication of the 1963 Regulations indicates:

In the old society the use and development of various inventions and technical improvements were limited and sometimes rejected. In the socialist society, no one forbids others to study and use the experience of advanced workers. In contrast to the old society advanced workers are encouraged to play their role and the masses of workers are urged to study and use the advanced workers' experience, because the interests of socialist society conform to those of the advanced workers. Therefore it is not necessary for us to regard the inventions and technical improvements of a certain individual or a certain unit as personal property which derives "protection." In our country the possibility of the exploiting class monopolizing techniques has been completely eliminated.\textsuperscript{20}

The ideological impetus behind the 1963 Regulations was to eradicate the sediment of bourgeois property rights which today's regime insists must be recognized and protected. The 1963 Regulations were revised and repromulgated on December 28, 1978.\textsuperscript{21} The modifications made reflect a concern for ensuring that the monetary awards for inventions accrue to the individual or individuals responsible for the invention.\textsuperscript{22} The Regulations Concerning Awards for Technical Improvements were


\textsuperscript{22} \textit{Id.}, art. 8.
repromulgated without revision in November 1978.23

With the implementation of the four modernizations, it was evident that these Regulations would be insufficient to nurture absorption of advanced technology from abroad and the development of a technological infrastructure in China. Hence, beginning in 1980, there has appeared in Chinese legal and economic journals a heated discussion of what is to be done to meet the perceived need for new laws which will encourage technological innovation. The writers are unanimous in their verdict that China needs a patent law extending a proprietary interest in an invention or technological innovation to the party responsible for its creation.24

On the one hand, it is perceived that only the grant of proprietary rights in inventions under a patent law and concomitant penalties for patent infringement can provide foreigners with the assurance that their rights in technology patentable in their own countries will be safe within China’s borders.25 Of particular significance in this regard, China can hardly hope to see foreigners contributing patents to Chinese-foreign joint ventures, as is provided for under the Law of the People’s Republic of China on Joint Ventures,26 unless those patents receive protection from infringement under Chinese law. Furthermore, without a Chinese patent law, the pledge contained in the Agreement on Trade Relations between the United States of America and the People’s Republic of China27 stipulating reciprocity of patent protection under the laws of the respective countries is meaningless.28 The adoption of a patent law, argue the proponents of increased foreign trade, is the trigger to expanded technology transfer within this infrastructure of foreign trade laws and agreements.29

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23 Duan, supra note 2, at 39.
25 Zheng, supra note 19, at 27.
28 The United States, which requires reciprocity of patent protection for U.S. citizens in the country of a foreign national seeking a U.S. patent, has extended patent protection in the United States to Chinese nationals under the principles set forth at article IV of the Trade Agreement between the United States and the People’s Republic of China. Likewise, article 18 of the PRC Patent Law provides that applications by foreign individuals, enterprises or organizations shall be treated under the Patent Law in accordance with an International Treaty to which both China and the country of the foreign applicant are signatories “or on the basis of the principal of reciprocity.”
29 Duan, supra note 2, at 28.
Of even greater importance is the impact over the long term which a patent law will have on the development of indigenous Chinese invention and technological advancement. The Regulations concerning Awards for Inventions have failed to promote the flow of technological information between industrial manufacturing collectives and research organizations; these organizations have been unwilling in many cases to permit the use by others of their inventions because they are not assured adequate compensation if their inventions are found to be capable of industrial utilization by other such entities. A patent law is thus the means of assuring Chinese research units and inventors that they will be remunerated by others who use their inventions in accordance with the terms of a licensing agreement. The establishment of a market for the domestic transfer of technology in this manner furthermore remedies the inefficient and imprudent use of technology. Under a system of patent licensing, patented inventions assume a market price reflecting the work which went into an invention's development and its value to the economy; “adopting a patent system is precisely to use economic methods to manage scientific and technological achievements.”

Finally, the Chinese appreciate the value of a patent system in protecting Chinese inventions from expropriation by foreign concerns. While at present the technological level of Chinese inventions pales in comparison with that of industrialized nations, China is convinced that it will catch up. When it does, the advantages of reciprocal patent protection for Chinese nationals in foreign countries will be of great importance; if China is without a patent law, countries which require reciprocity of patent protection for its own citizens in the country of a foreign patent applicant would not extend the protection of their patent law to Chinese nationals.

With a view to remedying these shortcomings in China's technological advancement, the Patent Law of the People's Republic of China was adopted at the Fourth Session of the Standing Committee of the Sixth National People’s Congress on March 12, 1984 and will go into effect on April 1, 1985. Unlike the new trademark law, it does not by its provisions repeal provisions of other laws dealing with inventions and

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30 Lu, supra note 24.
31 Id.
32 Shen, supra note 2, at 28.
33 DUAN, supra note 2, at 43.
34 PRC Patent Law, supra note 8.
35 PRC Patent Law, supra note 8, art. 69.
36 See infra text accompanying notes 182-83.
technology. Accordingly, the Regulations Concerning Awards for Inventions and the Regulations Concerning Awards for Technical Improvements would appear to remain in full force and effect.


While adoption of a patent system has been unanimously favored among China’s legal scholars and foreign trade experts, significant opposition on ideological grounds remains. The opposition advocates that the traditional capitalist formulation of the patent right as the exclusive monopolistic right of the patentee to exploit a patented invention for a term of years is fundamentally repugnant to Marxist economic theory. In order to make a patent system ideologically acceptable to China, the advocates of China’s patent law have attempted to rebut the opposition’s view by explaining how the patent right is reconcilable with Marxist theory.

The starting point of this explanation is to show that the function of patent law, even in capitalist countries, is actually to discourage monopolistic control of technology. The prospect of eligibility for a patent is an incentive to those responsible for new inventions to publicize their knowledge with the assurance that it will not be appropriated without payment of just compensation. In the absence of a patent system, it is argued, more absolute control over technological information is maintained by inventors and research organizations due to the threat of appropriation without compensation, than where a patent system exists.

To emphasize the ultimately anti-monopolistic nature of patent law, one writer notes that in many capitalist countries, like the United States, strong antitrust and patent laws coexist. The evil of patent law in capitalist countries is not inherent in the nature of law, but rather is due to

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37 See PRC Trademark Law, supra note 9, art. 43.
38 There is a fundamental conceptual difference between the Regulations Concerning Awards for Inventions and the PRC Patent Law. Article 4 of the Regulations Concerning Awards for Inventions provides that ownership of all inventions belongs to the State. In contrast, article 11 of the PRC Patent Law grants to the patentee an exclusive right to use a patented invention, utility model or design. That the PRC Patent Law is denominated as a law and not a regulation and that it was promulgated subsequent in time to the Regulations Concerning Awards for Inventions would tend to leave little doubt that the concept of ownership embodied in the PRC Patent Law will control. See infra note 182.
39 See Lu, supra note 24.
40 Id. at 21.
41 Dong, supra note 24.
42 Wang & Xia, supra note 24.
the inordinate concentration of wealth and, consequently, the means of production (including patents), in the hands of a few industrial corporations. In capitalist countries, inventors are exploited like other workers by capitalists who derive excess profits from the exercise of their patent rights. The possession of these rights is attributable not to their own work or ability, but to the genius of their employee inventors.\textsuperscript{43}

After disposing of the notion that patent law is inherently capitalistic, advocates of a patent system are faced with incorporating the right of a patentee to exploit a patented invention to his or its own economic advantage into the lexicon of Marxist economic theory. The first aspect of the analysis addresses the proceeds of a patent, whether revenues from the sale of patented goods or royalties from licensing, which a patentee enjoys. The patent right is:

a form of compensation to the inventor for the labor spent in inventive activity. This type of theory of compensation for labor does not reflect the capitalist mentality of profit-before-anything and gaining from the toil of others. In a certain sense it may be said that it [the patent right] objectively can reflect our socialist principle of distribution according to labor.\textsuperscript{44}

The advocates of a patent system contend that at China's current stage of communism, compensation for labor should be in accordance with its economic value to society; one has "equal right" to get back from society what one gives in the form of labor.\textsuperscript{45} The value assigned to a particular type of labor depends on its level of difficulty and complexity. Labor spent in creating an invention is characterized as highly complex, of great value to society, and therefore entitles an inventor to the substantial reward of eligibility for a patent.\textsuperscript{46} A patent system "balances the rights and obligations of the people and those of the inventor," rewarding the individual inventor, or the collective for which he works, for meeting his obligation to society of advancing China's state of technology.\textsuperscript{47}

The second aspect of the analysis defines the nature of the patent right to be granted under China's patent law. The exclusive right provided for under Chinese patent law "should not be the same as in a capitalistic country; it should be a relative right, not an absolute one."\textsuperscript{48} In most advanced capitalist countries, only in rare instances are conditions placed upon a patentee's exercise of his patent right, as where the underlying invention bore on national security and therefore may become sub-

\begin{thebibliography}{99}
\item \textsuperscript{43} Id.
\item \textsuperscript{44} Dong, \textit{supra} note 24, at 20.
\item \textsuperscript{45} Id. at 23.
\item \textsuperscript{46} Id.
\item \textsuperscript{47} Id. at 20.
\item \textsuperscript{48} Id. at 23.
\end{thebibliography}
ject to government requisition. A much higher level of social obligation will accompany the enjoyment of a patent right in China, and in this sense the right is relative; not only is the patentee obligated to work the patent, but the government may grant a compulsory license to a party who exhibits a need to make use of the patented technology.49

C. Discussion of Significant Provisions of the New Patent Law


a. Distinctions between Economic Entities Subject to the Provisions of the New Patent Law

Article 6 of the new patent law lists the following entities as eligible to apply for patents: entities under ownership by the whole people, entities under collective ownership, foreign enterprises, Chinese-foreign joint venture enterprises and individuals.50 It is necessary to distinguish between these types of entities because of the differing treatment which they receive under various provisions of the new patent law.

An entity under ownership by the whole people, the state-run enterprise, will no doubt stand at the forefront of China’s industrialization program. State-run enterprises comprise China’s major heavy industries such as transportation, mining, major steel production and ship building.51 While these enterprises have been given a greater degree of responsibility for self-management over the past few years, they remain directly subordinate to state administrative organs.52 The state supplies these industries with funds for capital investment and in many respects oversees their operations.53 In contrast, entities under collective ownership comprise the largest sector of the Chinese economy.54 Most of the agrarian sector has been organized into a system of agricultural cooperatives as have medium-sized light industries and handicraft enterprises.55 Unlike entities under ownership by the whole people, collectives are generally answerable to state administrative organs only for meeting their quotas imposed under the economic plans and complying with regulations promulgated by the central government and the administrative organs responsible for regulating the particular sector of the economy within

49 P.R.C Patent Law, supra note 8, art. 53.
50 P.R.C Patent Law, supra note 8, art. 6.
52 Id.
53 Id.
54 Id.
55 Id.
which a collective operates. The other entities mentioned in the law need little explanation: Chinese-foreign joint venture enterprises are enterprises organized under the Law of the People's Republic of China on Joint Ventures and foreign enterprises are enterprises wholly owned by nationals of foreign countries.

b. Types of Patents

Three different types of patents may be granted under the new patent law: invention patents, utility model patents and design patents. Nowhere in the law, however, are the three types of patents defined or distinguished. Article 22 simply provides that "[a]ny invention or utility model for which patent right may be granted must possess novelty, inventiveness and practical applicability." The definitions of "novelty, inventiveness and practical applicability," contained in article 22, generally comport with the understanding of those terms under patent systems worldwide. The only requirement for a design to be patentable is that it be novel.

It is evident from the terms of article 22 that the distinction between an invention-creation worthy of an invention patent and one worthy of a utility model patent is ambiguous. Novelty, inventiveness and practical applicability are required for both types, which begs the question of wherein lies the difference between the two? An invention patent is clearly the preferable of the two; the duration of an invention patent is 15 years from the filing date of the application, while the duration of a utility model patent or a design patent is 5 years from the filing date with the possibility of renewal for an additional 3 years. Accordingly, the technical standard of inventiveness for an invention patent will no doubt be substantially higher than for a utility model patent. Furthermore, a utility model is just that—a model in concrete form; a process or method

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56 Id.
57 Joint Venture Law, supra note 26.
58 See, e.g., Measures of the Administration of Industry Commerce Regarding the Control of Registration of Long-Term Representative Offices of Foreign Enterprises, reprinted in EAST ASIAN EXECUTIVE REPORTS, May 1983, at 24.
59 PRC Patent Law, supra note 8, arts. 22, 23.
60 Id., art. 22.
62 PRC Patent Law, supra note 8, art. 23.
63 The term "invention-creation" is used throughout the New Patent Law to designate inventions, utility models and designs which are the subject matter of a patent or patent applications.
64 PRC Patent Law, supra note 8, art. 45.
65 Id.
66 Taiwan’s Patent Law, like that of the Patent Law of the People’s Republic of China, distin-
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therefore would be patentable as an invention patent only.67

It may be anticipated that the forthcoming Implementing Regulations68 to the new patent law will contain standards for differentiating between creations worthy of an invention patent and those worthy of a utility model patent. Further, it is likely a method of downgrading an application for an invention patent to a utility model patent will be provided. Downgrading would allow a patent applicant to convert an application for an invention patent to a utility model application upon notification by the Patent Office that the application for invention patent has failed substantive examination.69

c. Patentable Items

Article 25 of the new patent law contains a list of items for which patents may not be obtained.70 In addition, article 4 essentially grants the State broad discretion in regulating patent applications for inventions-creations which relate "to the security or other vital interests of the state" and are therefore "required to be kept secret."71 While this provision could be used to prevent foreigners from obtaining patents for advanced technology which, for example, may have military application, it is doubtful that article 4 was aimed at constraining the patenting of foreign technology. It would be only to China's interest to permit the broadest dissemination of advanced Western technology. Rather, article 5 would appear to have been formulated to prevent foreigners from learning of Chinese inventions which bear upon national security. In a similar vein, article 5 prohibits the extension of patent rights for inventions detrimental to morality or the public interest.72

d. Assignment and Licensing of Patents in General

Both the right to apply for a patent and the patent right are assignable under the new patent law.73 The assignment of either of these rights by foreign entities or individuals to others in China would appear to be
unrestricted, subject to the requirement that a written contract of assignment be "registered with and announced by the Patent Office."\textsuperscript{74} In contrast, all assignments by Chinese entities to foreigners must be approved "by the competent department concerned of the State Council."\textsuperscript{75} The absence of a specific designation of which department of the State Council will in fact be responsible for patent right assignments will no doubt bare the morass of Chinese bureaucracy to any foreigner seeking assignment of a Chinese patent.

The tight control which the State exercises under the new patent law over the primary source of Chinese invention—entities under ownership by the whole people—is exhibited in the requirement that assignments held by such entities be approved "by the competent authority at the higher level."\textsuperscript{76} On the other hand, approval is apparently not required for assignments where the prospective assignor is either a Chinese collective or individual and the prospective assignee is not a foreigner or foreign enterprise.

A provision concerning treatment of Chinese-foreign joint venture enterprises as parties to assignments of patents is conspicuously absent from article 10. If, under article 10, Chinese-foreign joint venture enterprises are considered to be Chinese, then any assignment of a patent from such an entity to a foreign company or individual would require governmental approval. The resolution of this ambiguity in article 10 either by promulgation of a regulation under the forthcoming Implementing Regulations or by adopting a consistent policy in practice will be of particular importance as joint ventures grow and establish their own research and development departments capable of producing patentable inventions.

Unlike patent assignment, patent licensing under the new patent law is purely a matter of contract essentially free of government regulation.\textsuperscript{77} The licensor, moreover, is assured under article 12 that a licensee is not authorized to relicense the licensed technology to third parties; to do so would clearly subject the licensee as well as the third party to an action for patent infringement.\textsuperscript{78}

\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} Id. As is the the case with the designation of most authorities under the PRC Patent Law, the meaning of "competent authority at the higher level" is nowhere defined. It is worth noting that the "competent department concerned" has jurisdiction over entities under ownership of the whole people with respect to compulsory licensing under article 14. What distinction, if any, exists between a "competent authority at the higher level" and a "competent department concerned" is impossible to discern.
\textsuperscript{77} PRC Patent Law, supra note 8, art. 12.
\textsuperscript{78} Id.
e. Authorities with Jurisdiction over Patent Related Matters:
   Procedural Concerns

A Patent Office has been established which is responsible for the examination of applications for patents, requests for compulsory licenses and the adjudication of the amount of fees to be paid to licensors by licensees in cases of compulsory licensing. A Patent Reexamination Board acts as an appellate body which has discretion upon the timely request of a patent applicant to review the decision of the Patent Office rejecting an application. The Patent Reexamination Board also has primary jurisdiction to rule upon requests for invalidation of a registered patent under article 48.

Certain administrative departments of the State Council, nebulously designated as "competent departments concerned" are authorized to initiate compulsory licensing of patents owned by certain classes of patentees and are responsible for authorizing the assignment of Chinese patents to foreigners and foreign entities. It may be surmised that the "competent department concerned" with jurisdiction over an entity under ownership by the whole people would be the administrative organ of the central government directly responsible for administering the particular entity. The jurisdiction of such departments over Chinese collective entities and individuals is less clear as a result of the relatively indirect control which the government exercises over them. Apparently, to ensure that compulsory licensing of a collective's or individual's patent is not arbitrarily ordered by a department lacking the competence or jurisdiction to make such a decision, the "competent department concerned must solicit final approval of the State Council." Whether the State Council will conduct any type of hearing on such a solicitation is not addressed in the new patent law.

Another area of ambiguity concerns the jurisdiction of "the administrative authority for patent affairs" to "handle" actions for patent in-
The new patent law clarifies neither the administrative department nor the governmental level (e.g. central government, provincial government or municipal government) of this "authority". Perhaps it was the intent of the drafters of the law, by broadly defining the jurisdiction of administrative units over infringement matters, to allow the administrative organ most familiar with patent and trademark affairs in a particular locale to assume jurisdiction. Nevertheless, unless the Implementing Regulations more clearly delineate the authority before which an action for infringement may be brought, the effectiveness of administrative authorities to enforce the new patent law may be severely impaired.

The parties to an administrative proceeding have the right to institute legal proceedings in the People's Court within three months after receiving notification of the following administrative decisions: a refusal of the Patent Reexamination Board to hear a request for reexamination of an application for an invention patent; a ruling of the Patent Reexamination Board on a petition for invalidation of a patent; a ruling of the Patent Office setting the fee to be paid a compulsory licensor; a ruling of the Patent Office ordering compulsory licensing of a patent; and a ruling of an "administrative authority for patent affairs" on an infringement complaint.

In addition, the People's Court has coextensive primary jurisdiction with the "administrative authority for patent affairs" to hear infringement actions. This bifurcation of primary jurisdiction over infringement actions may have been created as the practical resolution to confusion over which administrative organ in a particular locale is the "administrative authority for patent affairs." Where no such authority has been designated in a particular locale, the complainant may either attempt to find an administrative office with jurisdiction to hear the matter or, in the alternative, simply bring the action before the local People's Court. To bring an infringement action before the People's Court in the first instance, however, would preclude the prospect of obtaining a second hearing in the matter; only after a ruling by an administrative authority may the same action be brought to the People's Court for a second hearing.

89 Id., art. 60.
90 Id., art. 43.
91 Id., art. 49.
92 Id., art. 58.
93 Id.
94 Id., art. 60.
95 Id.
It is significant that the new patent law does not limit the People's Courts' scope of review of administrative decisions. The Chinese text of the Law evinces an intent that the People's Court have broad discretion in hearing patent related matters after administrative remedies have been exhausted.\footnote{The Chinese term \textit{qi su} is translated as "institute legal proceedings" in the English version of the PRC Patent Law. That is an accurate translation because \textit{qi su} does not connote appeal or request for appeal of the lower tribunal's decision as would the Chinese term \textit{shang su}.} Hence, it would appear that the People's Court has discretion to hear a dispute \textit{de novo} in disregard of an administrative body's factual findings.


a. The Primacy of the Collective

During the formulation and drafting of the new patent law, Chinese authorities on patent law attempted to discourage the prospect that the new patent law would nurture a generation of Chinese Edisons—a class of entrepreneurial inventors. Looking to patent systems in other industrializing communist nations, one writer explained that the "enterprise patent systems"\footnote{Dong, \textit{supra} note 24, at 23.} implemented in Yugoslavia and Rumania "are not completely like the system implemented in capitalist countries which grant a monopoly to the individual, but rather look to the enterprise as the focus of the patent system."\footnote{\textit{Id.}} Hence, where an invention is made by an individual in the course of, or relating to his employment by an enterprise or collective, "the enterprise has the right of priority in the manufacture, use and sale of the products of such an invention."\footnote{\textit{Id.}}

This concern for placing the collective enterprise, not the individual, at the center of the patent system is reflected in the provision contained in article 6 of the new patent law that "[f]or a service invention-creation made by a person in execution of the tasks of the entity to which he belongs or made by him mainly using material means of the entity, the right to apply for a patent belongs to the entity."\footnote{PRC Patent Law, \textit{supra} note 8, art. 6.} There can be little doubt that the Chinese intend to broadly interpret the phrase "made by him mainly by using the material means of the entity."\footnote{See Dong, \textit{supra} note 24, at 23.} If that phrase were read to mean merely that the collective owns the patent right to an invention made in the course of an employee's or worker's employment, the so-called "right of priority" of the collective enterprise would be indistinguishable from the right that companies in capitalist countries en-
joy with respect to inventions made by their employees in the course of employment.\textsuperscript{102}

To begin with, the control of research and development funding and equipment—"material means"—is essentially subject to government monopoly in China. As the major corporations in industrialized countries own the laboratories and research centers, only the Chinese government and entities under ownership by the whole people possess the means to support substantial research and development projects. The salary of the average Chinese engineer or technician, by contrast, is hardly sufficient to support independent research and invention. Therefore, the forthcoming Implementing Regulations should clarify and further define the rights of entities and individuals under article 6. In this respect, the Implementing Regulation should follow the Yugoslav patent law, which was closely studied by the Chinese in the course of their formulation of the new patent law.\textsuperscript{103} The Yugoslav law stipulates that inventions made "within six months from the date of termination of the employment relationship between the inventor and the organization and being in direct connection with the inventor's past work in the organization belong to the organization."\textsuperscript{104}

While the terms of article 6 favor the entity, article 7 assures the individual that the collective may not prevent him from applying for a so-called "non-service invention-creation."\textsuperscript{105} Thus, where an individual and an entity apply for a patent relating to the same invention, it is the responsibility of the Patent Office to adjudicate the threshold question of which applicant has the right to apply.

b. Access to Inventions: Compulsory Licensing and Use Requirements

Access to and use of patented information by parties showing a need therefor is another essential feature of the "enterprise patent system." During the formulation of China's new patent law it was suggested by one writer that in a socialist country, "[a] monopoly [over a patented

\textsuperscript{102} Id.
\textsuperscript{103} Id.
\textsuperscript{105} Throughout the PRC Patent Law a distinction is made between "service inventions-creations" and "non-service inventions-creations." "Service inventions-creations" are those which are "made by a person in the execution of the tasks of the entity to which he belongs or made by him mainly by using the material means of the entity" under article 6. "Non-service inventions-creations" are those which do not fall within the terms of article 6—inventions made solely by the means and efforts of individuals.
invention] is not allowed, as a patentee has the obligation to extend his patent to others and does not have the right to refuse use of the patent to others.\textsuperscript{106} This general philosophy has been implemented in the compulsory licensing provisions of the new patent law.

As noted above, under article 14 the administrative departments concerned may \textit{sua sponte} initiate patent licensing of outstanding patented inventions. Only entities under ownership by the whole people, Chinese entities under collective ownership and Chinese individuals are subject to the terms of article 14.\textsuperscript{107} Hence, foreign enterprises and individuals and Chinese-foreign joint venture enterprises are safe from the prospect of government initiated compulsory licensing. The threshold at which cause may be found by the appropriate administrative department to compulsorily license a patent held by an entity under ownership by the whole people is significantly lower than is the case where a patent is held by a Chinese collective entity or individual: an “important” (\textit{zhong yao}) invention held by an entity under ownership by the whole people may be licensed at the initiation of the government.\textsuperscript{108} In contrast, a patent owned by a collective or individual may be compulsorily licensed only where the patent is “of great significance (\textit{zhong da yiyi}) to the interests of the State or the public interest . . . in need of spreading and application.”\textsuperscript{109} Once the decision has been made to license a patent under article 14, the fee to be paid by the “exploiting entity” (licensee) is determined in accordance with the prescriptions of the State.\textsuperscript{110} The Implementing Regulations will no doubt tell whether the “prescriptions of the State” will take the form of a specific fee schedule or whether the setting of fees will be left to the discretion of the nebulous “competent authorities”.

The terminology used in article 14 makes it clear, moreover, that only the patentee of an invention is subject to its provisions. Article 6 defines the “patentee” as the “owner of the patent right and the holder of the patent right,”\textsuperscript{111} and only the holder or owner of patent rights are subject to article 14.\textsuperscript{112} It is reasonable therefore to construe that a patent in the hands of a licensee is not subject to compulsory licensing; the government must look to the patentee. Consequently, if a patentee is a foreign entity or individual or a Chinese-foreign joint venture which has

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\textsuperscript{106} Dong, \textit{supra} note 24, at 23.
\textsuperscript{107} PRC Patent Law, \textit{supra} note 8, art. 14.
\textsuperscript{108} \textit{Id.}
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} \textit{Id.}
\textsuperscript{111} \textit{Id.}, art. 6.
\textsuperscript{112} \textit{Id.}, art. 14.
\end{flushright}
licensed a patent to a Chinese entity or individual, the underlying patent may not be subject to compulsory licensing under the terms of article 14.

Articles 51 through 58 address circumstances under which a compulsory license may be requested by a prospective licensee. A patentee in China will be obligated to work or practice a patent by manufacturing the invention, utility model or design or by using the patented process. This obligation may be fulfilled instead by the patentee's assignee or licensee. Thus, mere importation of a patented product will not constitute working a patent. If an invention or utility model is not worked for a period of three consecutive years, then upon request an entity that the patent office deems qualified to work the patent may be granted a compulsory license to "exploit" the invention or utility model. Apparently, individuals will not be permitted to apply for a compulsory license based upon failure of the patentee to work a patent, because article 52 grants the right to so apply exclusively to entities (dan wei).

A second grounds for requesting compulsory licensing exists where the patentee of an invention or utility model can show that an invention or utility model patented prior in time is necessary for the working or "exploitation" of the applicant's newer patented invention or utility model. Under such circumstances, the patentee of the newer patent may request that the Patent Office grant a compulsory license to the patentee of the older invention to practice the older patent.

The new patent law stipulates several conditions to the granting of a compulsory license on either of the aforementioned grounds. First, the party seeking a compulsory license must show that attempts have been made to conclude a license agreement with the patentee "on reasonable terms." Secondly, after a compulsory license has been granted, a reasonable fee is to be agreed upon by the parties. If the parties cannot reach an agreement, then a reasonable fee is adjudicated by the Patent Office.

The manner in which the compulsory licensing provisions of the new patent law are implemented will be of fundamental concern to foreign companies involved in technology transfer to China. For example,

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113 Id., art. 51.
114 Id.
115 Id., art. 52.
116 Id.
117 Id., art. 53.
118 Id.
119 Id., art. 54.
120 Id., art. 57.
121 Id., art. 58.
article 53, allowing for compulsory licensing of patented technology which is necessary for the development and practicing of more advanced utility models and inventions, could be used to promote the adaptation of Western technology to Chinese inventions. By granting compulsory licenses of imported technology to Chinese enterprises, the Chinese would have more immediate access to the advanced foreign technology. The greater likelihood, however, is that the Chinese will apply article 53 very sparingly to foreign technology; the pragmatists presently in power surely realize that such a heavy handed application of article 53 would result in great reluctance on the part of foreigners to patent their inventions in China.

3. Application and Examination Procedures: Incentives for Early Introduction of New Technology into the Public Domain

a. Examination Subsequent to Publication

The patent application and examination procedures established under China's new patent law are intended to encourage early publication of new technological information. To this end, a first-to-file system of determining priority among applicants for patents of the same invention-creation has been adopted. By giving priority to the first applicant to file an application for a patent, individual inventors and the entities for which they work will have a strong incentive to file an application for a patent as soon as possible after an invention-creation has been perfected. Patent applicants who are foreign individuals or enterprises enjoy an exemption from this rule where they have filed an application for patent of an invention-creation in a foreign country before an application for a design patent.

In such cases, the date of filing in the foreign country serves as the constructive filing date in China so long as application is made in China within twelve months of the foreign filing date in the case of application for patent of an invention or utility model, and within 6 months of the foreign filing date in the case of an application for a design patent. In order for a foreign individual or enterprise to preserve the priority of the foreign filing date, article 30 requires that a written declaration be made of the earlier foreign filing date at the time of the Chinese application. Further, a certified copy of the foreigner's application must be filed with

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122 Id., art. 59.
123 Id., art. 29.
124 Id.
125 Id., art. 30.
the Patent Office within 3 months of filing the Chinese application. Failure to comply with these procedural requirements for establishing the foreign filing date as the constructive Chinese filing date results in loss of priority.

The new patent law establishes a system of early publication and subsequent examination to further accelerate the availability of technological information as well as to lighten the burden on the Patent Office of conducting examination of spurious applications for invention patents. Under this system, the process of application for an invention patent is in two stages. First, preliminary examination occurs within 18 months of application. Upon completion of preliminary examination, the application is published by the Patent Office. The new patent law does not indicate what aspects of the application the Patent Office will review during preliminary examination. Preliminary examination is, however, the extent of Patent Office examination of applications for utility model and design patents which would tend to indicate that it consists of more than mere examination of the application to determine whether the formal requirements of the law have been met.

An applicant for an invention patent is required to request examination of the application "as to substance" within three years of the date upon which the original application for patent is filed. If no timely request is made, the application is considered withdrawn. At the time substantive examination is requested, the applicant must supply to the Patent Office "reference materials"—ancillary materials explaining the invention. In lieu of this requirement, foreigners who have previously applied for patent of their invention in a foreign country must supply the patent office with materials relating to the examination by the foreign patent examiners. If, after substantive examination, the Patent Office deems the application to not be in conformity with provisions of the new patent law, it notifies the applicant who may amend the application or submit objections to the Patent Office.

Under this two step system of examination, there will obviously be a considerable lapse of time between initial publication of the application

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126 Id.
127 Id.
128 Id., art. 34.
129 Id.
130 Id., art. 40.
131 Id., art. 35.
132 Id.
133 Id., art. 36.
134 Id.
135 Id., art. 37.
for an invention patent and completion of substantive examination. In the interim, the patent application will be of public record and accessible in the possible form of a Patent Office patent gazette or reporter. Yet until substantive examination is completed and issuance of patent to the applicant announced, the applicant has no right to exclusive use of the invention and consequently no right to prevent others from using the invention. Article 13 was apparently adopted to remedy this situation by providing that “[a]fter the publication of the application for a patent for invention, the applicant may require the entity or individual exploiting the invention to pay an appropriate fee.” It is inexplicable, however, why this right to a fee accrues to the applicant after publication of the application. If, after substantive examination, it were deemed by the Patent Office that the invention were not patentable, the applicant would have no exclusive right to the invention and would not be entitled to require that others pay a fee for the use of the invention. Yet as it stands, an applicant for an invention patent could request that a fee be paid for the use of an invention between the publication and ultimate rejection of the application. A more common sense, although clearly not literal, reading of article 13 would be that the patentee of an invention may demand a fee for the use of the invention by others between the time of publication of the application and announcement of the grant of the patent right pursuant to article 44.

b. Opposition and Invalidation Procedures

After an application for a utility model or design patent passes preliminary examination and after an application for an invention patent passes substantive examination, the decision approving the application is announced by the Patent Office. Petitions opposing the grant of a patent right may be filed “by any person” with the Patent Office within three months of this announcement of patent. If no opposition petitions are filed, or all opposition petitions fail, the patent right is granted and a certificate is issued to the applicant and registered with the Patent Office.

136 Nowhere in the PRC Patent Law is it expressly stated that a reporter or gazette will be published by the Patent Office. It may therefore be anticipated that the Implementing Regulations will provide for such a publication by the Patent Office.
137 PRC Patent Law, supra note 8, art. 13.
138 Id., art. 39, 40.
139 The reason for allowing opposition to registration by “any person” rather than just by “interested parties” may be to promote enforcement of the prohibition of the patenting of certain inventions-creations which are contrary to the public interest under article 5.
140 PRC Patent Law, supra note 8, art. 41.
141 Id., art. 44.
After the registration of a patent, any "interested party"\footnote{What precisely is meant by "interested party" is nowhere set forth in the PRC Patent Law. It is reasonable to infer that "interested party" is used to indicate that licensees, assignees and devisees of a patent right share the same rights as the patentee.} may bring an action before the Patent Reexamination Board requesting invalidation of the patent on the grounds that the "patent right is not in conformity with the provisions of this Law."\footnote{PRC Patent Law, \textit{supra} note 8, art. 48.} The new patent law nowhere indicates, however, the scope of inquiry of the Patent Reexamination Board relating to invalidation proceedings. If the grounds for bringing an action for invalidation are essentially the same as for filing a petition opposing the issuance of a patent, the three month statute of limitations for filing an opposition petition\footnote{\textit{Id.}, art. 41.} would be meaningless; if a party failed to file an opposition petition in a timely manner, that party could then bring an action for invalidation subsequent to issuance of the patent. Likewise, the new patent law provides for no statute of limitations setting a time limit on the filing of a request for invalidation of a patent. To avoid the prospect of such broad ranging subject matter jurisdiction, it is likely that the Patent Reexamination Board's scope of inquiry with respect to invalidation petitions will be restricted under the forthcoming Implementing Regulations.\footnote{Under the Patent Law of Taiwan, which likewise allows for invalidation of patents after issuance, an action for invalidation may be founded only on particular enumerated grounds and may not be found on the same grounds as a prior opposition petition filed by the parties seeking invalidation. \textit{Yun, supra} note 66, at 71, 85-86; \textit{Compare PRC Patent Law, supra} note 8, arts. 60, 61.}


The unauthorized manufacture or sale of a patent or patented product constitutes patent infringement under article 11 of the law.\footnote{PRC Patent Law, \textit{supra} note 8, art. 11.} Actions exempted from this proscription, including the unknowing use or resale of a patented product, are enumerated at article 62.\footnote{\textit{Id.}, art. 62.} A two year statute of limitations running from the date a patentee or interested party "obtains or should have obtained knowledge of the infringing act" applies to the institution of "legal proceedings concerning the infringement of patent right."\footnote{\textit{Id.}, art. 61. Under article 60 of the PRC Patent Law, a party seeking remedy for infringement may either "institute legal proceedings in the People's Court" or "request the administrative authority for patent affairs" to handle the matter. Article 61's two year statute of limitations, however, applies only to "instituting legal proceedings." Because a request to the "administrative authority for patent affairs" is not considered the institution of legal proceedings, article 61's statute of limita-}
tion of the infringing act and compensatory damages. In addition, article 63 provides that a criminal prosecution under article 127 of the criminal law may be initiated against an infringer "where any person passes off the patent of another person." The Chinese term jia mao, translated in the new patent law as "passes off," implies knowledge or intent. An allegation of intentional infringement would therefore appear to be an essential element of a complainant's case for criminal patent infringement.

5. Awards For Inventions and Technical Improvements

a. Awards for Inventions under the New Patent Law

Article 16 of the new patent law states:

The competent departments concerned of the State Council and the people's governments of provinces, autonomous regions or municipalities directly under the Central Government have the power to decide, in accordance with the State plan, that any entity under ownership by the whole people that is within their system or directly under their administration and that holds the patent right to an important invention-creation is to allow designated entities to exploit that invention-creation and the exploiting entity shall, according to the prescriptions of the State, pay a fee for exploitation to the entity holding the patent right.

Any patent of a Chinese individual or entity under collective ownership, which is of great significance to the interests of the State or to public interest, and is in need of spreading and application, may, after approval by the State Council at the solicitation of the competent department concerned, be treated alike by making reference to the provisions of the preceding paragraph.

The initial award, given upon the granting of a patent to an entity, would appear to be in the discretion of the entity. The latter award, however, will likely be granted by governmental authorities in accordance with the Regulations Concerning Awards for Inventions which provides a schedule of awards based upon an invention's utility.

The awards which may be granted for inventions under the Regulations are divided into four categories: an invention certificate, a medal and 10,000 yuan are awarded for an invention falling into the top categories apparently does not apply to actions for infringement brought before administrative authorities.

Id., art. 60.


Id., art. 8, art. 63.

Id., art. 16.
Inventions are categorized in accordance with their value in industrial utilization. After an award is made to an entity, article 8 of the Regulations requires that the enterprise in turn divide the award "among members [of the entity] according to their respective contributions."

The administrative system for the examination of applications for awards is extremely decentralized. When an award is sought, in most cases the invention must be reported to the scientific commission where the applicant is located. The only exception to this general rule is that the China Scientific and Technical Association and the various national academic societies may report inventions directly to the State Council.

After an invention has been reported, "the provincial, municipal or autonomous regional scientific commissions and the responsible departments of the State Council should promptly organize examination of the inventions reported and those meeting the provisions in Article 2 should be graded for rewards and reported on [sic] the State Scientific Commission."

Upon approval of a report by the local examining commission or, in the case of inventions made by national academic societies, the examining commission of the State Council, the State Scientific Commission determines the category of award the inventor is to receive. Thus, substantive examination of an invention's merit is conducted at the local level, with recommendations issued to the State Scientific Commission for final approval.

b. The Regulations on Awards for Rationalization Proposals and Technical Renovations and Regulations Concerning Awards in Scientific Fields

Technical improvements which do not meet the requirements to be considered for awards as inventions may still be eligible for awards under the Regulations on Awards for Rationalization Proposals and Technical Renovations. Awards are obtainable for improvements made in all

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153 Regulations on Rewards for Inventions, supra note 21, art. 6.
154 Id.
155 Id., art. 8.
156 Id., art. 5.
157 Id.
158 Id.
sectors of the economy, from improvements made in technological processes to working tools.\textsuperscript{160} Awards are divided into four categories and are based upon the estimated value of "economic results."\textsuperscript{161} Again, under these Regulations, the agencies authorized to examine technical improvements are decentralized and vary depending upon the work of the unit which has utilized the improvement.\textsuperscript{162}

Finally, discoveries made in many fields of science are not subject to the regulations governing awards for inventions and technical improvements regulations and are not covered under the new patent law. In order to encourage scientists in their work, there are several regulations in effect like the recently enacted Regulations for Natural Sciences Prizes providing for monetary awards to scientists.\textsuperscript{163}

III. TRADEMARK LAW

A. Historical Background

In 1950 the Provisional Regulations Concerning the Registration of Trademarks\textsuperscript{164} were enacted. The provisions of these regulations aimed primarily at protecting the registrant’s right to exclusive use of a mark from infringement.\textsuperscript{165} At a time in China when capitalists were allowed to continue operating their private enterprises, a trademark under the 1950 law was viewed as the means for a business enterprise to distinguish and market its products.\textsuperscript{166} After the collectivization of industry in the late 1950s, the marketing function of trademarks was attenuated. By and large the profit motive in effective product marketing had yielded to the demands of a command economy. Hence, the 1963 Regulations Concerning the Control of Trademarks\textsuperscript{167} ("1963 Regulations") did away with any reference to the "exclusive right" of a trademark registrant to the use of his trademark. After 1963 the sole function of a trademark was to signify to consumers a product's certified standard of quality. The

\textsuperscript{160} Id., art. 3.
\textsuperscript{161} Id., art. 6.
\textsuperscript{162} Id., art. 11, 12.
\textsuperscript{163} Regulations for Natural Sciences Prizes, 24 FOREIGN BROADCAST INFORMATION SERVICE CHINA REPORT-SCIENCE AND TECHNOLOGY 1 (1979).
\textsuperscript{164} Provisional Regulations of Aug. 28, 1950, Concerning the Registrations of Trademarks, 1 FLHB 528.
\textsuperscript{165} Hsia & Haun, supra note 15, at 746.
\textsuperscript{166} David, Trademark Protection in the PRC, 9 DEN. J. INT’L L. & POL. 217, 218 (1980).
\textsuperscript{167} Regulations of Apr. 10, 1963, Concerning the Control of Trademarks, 13 FGHB 192 [hereinafter cited as 1963 Trademark Regulations]. For English translation see Offner, Trademark Quality Control and Compulsory Registration Requirements in the People’s Republic of China, CURRENT INTERNATIONAL LEGAL ASPECTS OF LICENSING AND INTELLECTUAL PROPERTY 434-36 (Brookhart, Leach, Tobot ed. 1980).
central characteristics of the 1963 Regulations were: that 1) all trademarks used were required to be registered\textsuperscript{168} and, 2) under the Implementing Rules of these regulations,\textsuperscript{169} each application for registration was accompanied by a certified claim stipulating the quality of the products upon which the trademark was to be used.\textsuperscript{170} If, after registration, the commodities registered for use under a trademark fell below the certified level of quality, the trademark became subject to cancellation.\textsuperscript{171}

The reemphasis on economic productivity of the early 1980s gave rise to a critical analysis of the effectiveness of China's trademark regulations. A 1981 article in the Chinese law journal \textit{Faxue Yanjiu} (Legal Research) indicated that the 1963 Regulations had been largely unsuccessful in promoting quality control due to the low incidence of use of registered trademarks by enterprises.\textsuperscript{172} According to a recent survey, only twenty nine percent of the products coming from the city of Haerbin (Harbin) bore registered trademarks, and use of registered trademarks in Shanghai, Beijing and Tianjin proved likewise to be infrequent.\textsuperscript{173} Moreover, among those enterprises which use trademarks, a large proportion have failed to apply for registration.\textsuperscript{174}

The failure of the 1963 Regulations is attributable primarily to three economic factors which have had a deleterious effect on the implementation of trademark law. The first, as one might expect, is the leftism of the Gang of Four. The Gang of Four allegedly put ideology ahead of production, causing manufacturing in many sectors of the economy to come to a standstill. Under such circumstances many old and respected trademarks fell into disuse\textsuperscript{175} and enterprises generally neglected to maintain their trademarks. In some cases, when a certain brand of commodity was not successful in the market place, the manufacturer simply would try his luck with a new label bearing a different (usually unregistered) trademark on the same commodity.\textsuperscript{176} Secondly, throughout the years of radical leftism, the supply of many commodities fell far short of demand. With commodities in short supply, trademarks were ignored in the market place; consumers did not have the luxury to pick and choose between

\textsuperscript{168} 1963 Trademark Regulations, \textit{supra} note 167, art. 2.
\textsuperscript{170} 1963 Implementing Rules, \textit{supra} note 169, art. 3.
\textsuperscript{171} 1963 Trademark Regulations, \textit{supra} note 167, art. 11(i).
\textsuperscript{172} \textit{Id.}
\textsuperscript{174} \textit{Id.}
\textsuperscript{175} \textit{Id.}
\textsuperscript{176} \textit{Id.}
competing brands. Finally, until just recently, the sale of most commodities has been administered by central authorities under a quota system. As long as an enterprise met the production quota for a particular commodity, generally irrespective of product quality, the production unit was assured payment: the unbreakable "iron rice bowl." The success of a product, which might have been enhanced by the reputation of its trademark, was of virtually no economic consequence to the manufacturer.

The root causes of the failure of the 1963 Regulations are being eliminated, according to legal authorities in China, by allowing a higher degree of enterprise autonomy. Under the new system of "using economic methods to manage the economy," each enterprise will be responsible for marketing its own products and will be allowed to retain a larger proportion of profit. Moreover, the realignment of the Chinese economy has given trademarks a new function not encompassed by the 1963 Regulations. The incentive for manufacturing units to increase sales and profits has given rise to a proprietary interest in trademarks as a means to develop consumer demand for their products in the market place. A further impetus to change in China's trademark system has been the policy of encouraging foreign investment in China. No doubt, the absence of trademark protection would be a substantial hindrance to the willingness of foreign enterprises to export to China. Against this background of the incapacity of the 1963 Regulations to promote domestic product competition and foreign export to China, a new Trademark Law was adopted.

The Trademark Law of the People's Republic of China, promulgated by the Standing Committee of the National Peoples Congress in August 1982, went into effect on March 1, 1983. By its provisions its supplants the Regulations Governing the Control of Trademarks as well as other provisions concerning the control of trademarks which conflict

177 Id.
178 Id.
179 Id.
180 Zheng, supra note 19, at 28.
181 PRC Trademark Law, supra note 8.
182 The promulgation of the new trademark provisions as a law (fa) and not as a regulation (tiaoli), is an indication that the new trademark system will enjoy a higher degree of permanency than its predecessors. In the recent pamphlet published in the People's Republic of China entitled What are Decrees, Regulations, Orders, Precedents and Legal Interpretations (1980), it is pointed out that the usual procedures for establishing a law is to first promulgate a regulation covering the subject matter sought to be regulated on an essentially experimental basis. After a period of trial and revision, a law is promulgated in the place of the regulation as an expression of the final intent of the legislature. It is evident that precisely this process was followed in the case of the new PRC Trademark Law. Id. at 10.
with the provisions of the 1983 Law.\textsuperscript{183} A set of Detailed Implementing Rules ("new Implementing Rules") that supersede the 1963 Implementing Rules, went into effect on March 10, 1983.\textsuperscript{184} The only element of the 1963 regime of trademark law which apparently remains in effect is the commodity classification table appended to the 1963 Regulations Governing the Control of Trademarks. Both the 1983 new trademark law and the Implementing Rules refer to a commodity classification table, although no new table has been devised to supplant the 1963 classification system.

B. Provisions of the New Trademark Law

1. General Principles

It is evident that the general principles set forth in chapter 1 of the new trademark law depart substantially in many respects from those of the 1963 Regulations. Foremost among the differences is the prominent role which trademark law is to play in protecting "the right to exclusive use of trademark."\textsuperscript{185} Under article 3, a trademark registrant is to enjoy "the right to exclusive use of a trademark and receives legal protection." The 1963 Regulations contained no such provision relating to the right to exclusive use, leaving a trademark registrant virtually unprotected against infringement.\textsuperscript{186} The addition of this protective feature reflects the intention of the current regime to encourage brand competition and put an end to the indiscriminate use of marks which flawed the old system.

The decentralization of economic enterprise and the limited revival of private enterprise, hallmarks of the current regime's economic policies, have had an evident impact on the formulation of those provisions of the 1983 trademark law which relate to registration of trademarks. On the one hand, the types of economic entities eligible to register trademarks have been expanded.\textsuperscript{187} Now, in addition to enterprises, "institutions and individual industrialists or merchants" may apply for registration of trademarks to be used upon commodities which they

\textsuperscript{183} PRC Trademark Law, supra note 8, art. 43.
\textsuperscript{185} PRC Trademark Law, supra note 9, art. 1.
\textsuperscript{187} 1963 Implementing Rules, supra note 169, art. 2.
"produce, manufacture, process, select or distribute." By so expanding the scope of businesses eligible for registration, the Chinese openly advocate extending to government-run and private enterprises alike the protection against trademark infringement which trademark registration provides.

In a similar vein, the recent emergence of small scale, private enterprise in the PRC has led to the abolition of universal compulsory registration of trademarks. It was recognized by the draftsmen of the new trademark law that required registration places an onerous administrative burden and expense on small enterprises limited in locale and clientele. As Ren Zhonglin, Director of the General Administration of Industry and Commerce recently noted:

[F]ollowing the development of the specialist commodity economy, the change of the economic structure and the expansion of autonomy in the enterprises, it became increasingly obvious that these administrative methods enforcing the registration of all trademarks, the “cutting with one knife” way of doing things was not helping to arouse the inherent enthusiasm in the enterprises, nor to raise economic effectiveness and to develop commodity production. Moreover, in the case of commune production teams or small street enterprises whose production is unsteady and who temporarily use a trademark for small items of commodities produced locally and sold locally, it appears not necessary to insist on having them apply for registration.

Under the new system, registration is compulsory only where a trademark is sought to be used upon a commodity which the government has designated must bear a registered trademark before it may be marketed. The commodities so stipulated will be relatively small in number and of a nature “closely linked with the national economy and the people’s livelihood.” Under article 4 of the new Implementing Rules, for example, pharmaceuticals have been stipulated as such a commodity. To date, no other commodities have been so stipulated. Violation of the compulsory registration provision carries stringent penalties to be enforced by the local departments of the Administration of Industry and Commerce, ranging from prohibition on sale of the commodities in question to imposition of fines up to 1,000 renminbi.

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188 PRC Trademark Law, supra note 9, art. 4.
189 The General Administration of Industry and Commerce is the organ of the State Council responsible for enforcing the PRC’s new Trademark Law. See PRC Trademark Law, art. 2, supra note 9.
190 Zhonglin Address, supra note 186, at 6.
191 PRC Trademark Law, supra note 9, art. 5.
192 Zhonglin Address, supra note 186, at 6.
193 Implementing Rules, supra note 184, art. 4.
194 Id., art. 22.
The quality control function of trademarks has been retained in the new trademark Law. Article 6 provides that “users of trademarks shall bear responsibility for the quality of trademarked commodities” and that “departments of the administration of industry and commerce at the various levels shall, through trademark control, supervise the quality of commodities and stop conduct that deceives consumers.”

Where trademarked commodities are represented to consumers to be of a higher quality than they actually are, the Administration of Industry and Commerce at the level “where the commodities circulated” is authorized to publish notice of the fraud and impose fines of up to 2,000 renminbi. Considerable discretion in meting out punishment for consumer fraud involving a registered trademark is vested in the local administrative organs. In relatively minor cases “criticism education” and rectification may be ordered, while in the most serious cases, in addition to the levying of fines, the matter may be reported to the Trademark Bureau which may order revocation of the mark. With respect to unregistered trademarks, the local departments of the Administration of Industry and Commerce are empowered to issue injunctions and levy fines of up to 2,000 renminbi for consumer fraud caused by the sale of qualitatively inferior commodities bearing unregistered marks, the representation of unregistered trademarks as registered, and violations of the provisions of article 8 of the new trademark law.

Conspicuous by its absence from both the 1983 trademark law and its Implementing Rules is the requirement contained in article 3 of the superceded 1963 Implementing Rules that there be filed a certificate stipulating the quality of commodities on which a registered trademark is to be used. Without certification it will be difficult for trademark authorities to determine objectively whether the quality of a particular com-

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195 Id. art. 6.
196 Article 19 does not strictly limit the supervision of quality control to the local bureaus of the Administration of Industry and Commerce, but states that quality supervision shall be primarily conducted by the bureaus in the locales where the commodities are marketed. Id.
197 PRC Trademark Law, supra note 9, art. 31.
198 Implementing Rules, supra note 184, art. 21(2).
199 Id., art. 21(1).
200 PRC Trademark Law, supra note 9, art. 31; Implementing Rules, supra note 184, art. 21(2).
201 PRC Trademark Law, supra note 13; art. 34; Implementing Rules, supra note 184, art. 23.
202 Implementing Rules, supra note 184, arts. 21(2), 23.
203 Article 8 of the Implementing Rules, supra note 184 provides that: “Those (commodities) using registered trademarks shall be marked with the four (Chinese) characters "Regis-
tered Trademark" or marked with the symbols ® or ©.”
204 Article 8 of the PRC Trademark Law, supra note 9, lists those words and figures which may not be used in trademarks.
205 1963 Implementing Rules, supra note 169, art. 3.
modity bearing a registered trademark has been misrepresented to consumers. Under the old system, trademark authorities apply the specific standard of quality certified by the trademark registrant to each particular trademarked commodity marketed. The new system would seem to portend application of a much more general standard in consumer fraud cases; registrants will be liable only if their trademarked commodities are so qualitatively inferior—so "rough and slipshod"—that, judged by the standard of quality generally maintained in that line of goods, their sale to consumers constitutes fraud.

2. The Lettering and Device of Trademarks

Article 7 of the new trademark law is substantially identical to article 4 of the 1963 Regulations in requiring that the device and wording of a trademark be easy to distinguish. The only significant addition to the terms of old article 4 is the requirement that registered trademarks bear the Chinese characters for "Registered Trademark" (Zhuce Shangbiao) or a "symbol of registration."

3. Administrative Authorities: The Trademark Bureau and the Trademark Review Committee

A Trademark Bureau and a Trademark Review Committee have been established under the General Administration of Industry and Commerce. The final examination and publication of trademarks, as well as hearing and ruling on opposition petitions, is within the exclusive jurisdiction of the Trademark Bureau. Reexamination by the Trademark Review Committee of the decision of the Trademark Bureau on an application for registration or on an opposition petition may be applied for within fifteen days after the date on which the applying party receives notification of the Trademark Bureau decision.

In particular, the Trademark Bureau is responsible, under article 30, for regulating several aspects of trademark use. Where a trademark registrant has failed to follow the required procedures for altering the device

206 1963 Trademark Regulations, supra note 167, art. 11(6); 1963 Implementing Rules, supra note 169, art. 3.
207 PRC Trademark Law, supra note 9, arts. 31, 34(3).
208 Id., art. 7.
209 Id.
210 Id., arts. 2, 20.
211 Id., arts. 16, 22.
212 Id., arts. 21, 22.
or wording of a trademark,\textsuperscript{213} for changing a trademark registrant’s name or address,\textsuperscript{214} or for assigning a trademark,\textsuperscript{215} the “local departments of the Administration of Industry and Commerce are to advise the trademark registrant to rectify” the situation.\textsuperscript{216} If the registrant does not then comply with the stipulated procedures, the case is “to be reported to the Trademark Bureau for handling.”\textsuperscript{217} After receiving such a report, the Trademark Bureau is to order that appropriate procedures be followed or, in the alternative, order revocation of the mark in question.\textsuperscript{218} The local departments of the Administration of Industry and Commerce are likewise responsible for reporting to the Trademark Bureau cases where a trademark has not been used for a period in excess of three consecutive years so that the Trademark Bureau may revoke such marks.\textsuperscript{219} The PRC takes a rather broad view of trademark use; the use of a mark not only on products to be sold, but also in advertising publicity or in exhibitions, constitutes use.\textsuperscript{220}

In one respect, the subject matter jurisdiction of the Trademark Review Committee under chapter 5 is ambiguous. Article 27 provides that “where there is a dispute about an already registered trademark, application for a ruling may be made to the Trademark Review Committee within one year from the date of the registration . . . of the trademark in question.”\textsuperscript{221} But the text of the new trademark law does not enumerate precisely upon what type of dispute a ruling may be obtained. It is highly doubtful, however, that a ruling could be obtained on any of the matters set forth in articles 30 through 34 because primary jurisdiction over those matters is expressly delegated to the Trademark Bureau or the local departments of the Administration of Industry and Commerce. It therefore appears that article 27 was included in the new trademark Law to provide for relief where a trademark has been improperly registered by the Trademark Bureau. By means of comparison, the Trademark Law of Taiwan provides an instructive insight into the function of the PRC’s Trademark Review Committee. The Trademark Law of Taiwan contains a section bearing a heading (P’ing Ting—Appraisal and Ruling) which is similar in meaning to the Chinese legal terminology used in the

\begin{itemize}
\item \textsuperscript{213} Under article 14 of the PRC Trademark Law, supra note 9, a new application for registration must be filed whenever “the words or figures” of a registered trademark are changed.
\item \textsuperscript{214} Implementing Rules, supra note 184, arts. 7, 16.
\item \textsuperscript{215} Id., arts. 14, 16.
\item \textsuperscript{216} Id., art. 20.
\item \textsuperscript{217} Id.
\item \textsuperscript{218} PRC Trademark Law, supra note 9, art. 30.
\item \textsuperscript{219} Id.; Implementing Rules, supra note 184, art. 20.
\item \textsuperscript{220} Implementing Rules, supra note 184, art. 20.
\item \textsuperscript{221} PRC Trademark Law, supra note 9, art. 27.
\end{itemize}
heading to chapter 5 of the PRC Law (Cai Ding). While the Taiwan provisions are broader in scope than chapter 5, the enumeration of matters subject to review under the Taiwan Law supports the notion that chapter 5 provides a second chance to parties wishing to oppose a registered mark. Among the matters on which a ruling may be requested under the Taiwan law are the following: 1) alleged failure of a trademark to meet the requirements of distinctiveness and clarity; \(^{222}\) 2) alleged registration of a trademark in disregard of the rules “governing determination of priority”; \(^{223}\) and 3) alleged registration of a mark in disregard of the rule that application for registration of a mark which has been cancelled may not be filed within a stipulated period of time following denial of registration. \(^{224}\) Since adjudication of these and other related issues is not provided for in any other section of the new trademark law, the most reasonable interpretation of article 27 is that it empowers the Trademark Review Committee to rule on any matter concerning a registered mark which could have been raised during opposition proceedings.

4. Registration Procedures

The preliminary examination of applications for trademark registration is conducted by the local departments of the Administration of Industry and Commerce. \(^{225}\) Article 16 of the new Implementing Rules states that after examination, the local organs are to “transmit” applications, apparently to the central Trademark Bureau, for further examination and decision. \(^{226}\) It is not explicit whether the local organs are empowered to reject applications. In light of other provisions of the new Implementing Rules and the new trademark law which indicate that the Trademark Bureau is to rule on applications for trademark registration, the authority of the local administrative departments would appear to be limited to passing their recommendations on to the central Trademark Bureau. \(^{227}\)

As under the 1963 Regulations, the class(es) of commodities and the specific commodities within such class(es) on which a trademark applicant seeks to have a trademark registered for use must be enumerated in the application for registration. \(^{228}\) The distinguishing characteristic of


\(^{223}\) Id.

\(^{224}\) Id.

\(^{225}\) Implementing Rules, supra note 184, art. 16.

\(^{226}\) Id.

\(^{227}\) PRC Trademark Law, supra note 9; art. 2; Implementing Rules, supra note 184, art. 9.

\(^{228}\) PRC Trademark Law, supra note 9, art. 11.
the Chinese requirement regarding enumeration of commodities is that, unlike the registration provisions of the trademark laws of many countries, stipulation of a class or classes of commodities does not suffice to register the mark for all of the particular commodities within such a class or classes. Rather, each specific type of commodity for which registration is sought must be enumerated. If the registrant of a trademark wishes to enjoy the right to exclusive use of his trademark on commodities other than those stipulated in the initial application, he must file a new application for registration of the trademark for use on those additional commodities.

A hybrid method of determining the priority of applications for registration and of combining characteristics of the “first-to-file” method with those of the “first-to-use” method is established under article 18. The general rule is that when two or more applications for registration of identical or similar trademarks for use on identical or similar commodities are filed, the application with the earliest filing date will have priority in preliminary examination and approval. The filing date is the date on which the Trademark Bureau receives a complete set of application documents. Under circumstances where the Bureau receives similar or identical applications on the same day, however, the trademark which was used first will have priority. Applicants claiming priority on the grounds of first use must submit proof to the Trademark Bureau. Obviously, this system does not take into account that situation where applications for a number of similar or identical marks, none of which have been used, are filed on the same day. In such cases, the new Implementing Rules provide that discussions shall be conducted by the parties and, if there is no resolution within thirty days, the Trademark Bureau shall make a ruling. The need for such discussions and rulings may prove more acute than it first appears; any commodities stipulated for compulsory trademark registration under article 5 of the new trademark law cannot lawfully be marketed prior to trademark registration.

The PRC has done away with the practice which prevailed under the 1963 Regulations of publishing a trademark once only, after approval of registration had been granted. In its place a system of dual publication comporting with international practices has been instituted. After a

\[229 \text{Id., art. 12.}
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\[230 \text{Id., art. 18.}
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\[231 \text{Implementing Rules, supra note 184, art. 5.}
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\[232 \text{PRC Trademark Law, supra note 9, art. 11.}
\]
\[233 \text{Implementing Rules, supra note 184, art. 5.}
\]
\[234 \text{Id.}
\]
\[235 \text{PRC Trademark Law, supra note 9, art. 16.}
\]
mark has been approved and published, opposition to registration may be lodged by anyone. 236 When an opposition has been filed, the Trademark Bureau conducts a hearing on the opposition petition during which each party presents its version of the facts relevant to the petition and the reasons why registration of the mark in question should or should not be granted. 237 The most common grounds for opposition are no doubt the same as those factors considered on preliminary examination by the Trademark Bureau (e.g., similarity to other marks and contravention of the provisions of article 8). If, after publication, either no opposition is filed, or all filed oppositions have failed, the trademark is registered. 238

5. Term of Validity

The new trademark law has codified the ten year durational term for trademarks 239 which, although not expressly provided for, was the general practice under the 1963 Regulations. 240 Applications for continuation of registration may be made within six months of expiration of a mark’s registration. The Trademark Bureau, furthermore, has discretion to allow applications for continuation which are filed within six months after expiration. 241 In the case of trademarks registered prior to the effective date of the new law, the durational term originally stipulated will remain effective. 242 Where no durational term was stipulated for a particular mark, its durational term will begin to run from the effective date of the new trademark law. 243

6. Provisions Relating to Trademark Infringement

Clauses 1 and 2 of article 38 of the new trademark law specify that unauthorized use of a trademark on the “same type of commodity (as the trademark is registered for use on) or a similar commodity” as well as “unauthorized manufacture or sale of another’s registered trademark sign” constitute infringement. 244 The final clause, clause 3, is a “catch-all” which classifies as an infringement any other activity which impinges upon one’s right to exclusive use of a trademark. 245

236 Id., art. 19.
237 Id., art. 22.
238 Id., art. 19.
239 Id., art. 23.
240 David, supra note 166, art. 221.
241 PRC Trademark Law, supra note 9, art. 24.
242 Implementing Rules, supra note 184, art. 32.
243 Id.
244 PRC Trademark Law, supra note 9, art. 38.
245 Id.
Articles 39 and 40 provide for sanctions to be applied against trademark infringers. The Administration of Industry and Commerce at the county level and above is empowered to enjoin infringement, compensate the infringed party for losses and, in serious cases, levy fines\textsuperscript{246} in amounts up to 5,000 renminbi.\textsuperscript{247} Two alternative measures of compensatory damages are provided for: “the profit gained by the infringer during the period of infringement as a result of the infringement or the losses suffered during the period of infringement by the person whose rights have been infringed upon. . . .”\textsuperscript{248} If either party takes issue with the decision of the Administration of Industry and Commerce, suit must be brought in a People’s Court within fifteen days of receiving notification.\textsuperscript{249} If such a suit is not instituted, then “the relevant department of that administration of industry and commerce is to apply to the People’s Court for compulsory execution.”\textsuperscript{250} In cases where registered trademarks have been counterfeited, including cases of unauthorized manufacture or sale of unregistered trademarks, fines of up to 5,000 renminbi may be levied by the local departments of the Administration of Industry and Commerce\textsuperscript{251} and criminal prosecutions may be instituted by the infringed party by directly “making complaints and accusations to the procuratorial organs.”\textsuperscript{252}

A set of procedures for instituting an infringement action, which otherwise would have been fairly clear, is clouded by the language of the final paragraph of article 39 of the new trademark law: “Where the exclusive right to use the registered trademark is infringed, the party whose right is infringed may institute proceedings directly with the People’s Court.”\textsuperscript{253} Concurrent jurisdiction of the Administration of Industry and Commerce and the People’s Courts may have been created simply to allow for convenience of bringing suit for infringement. In certain areas it may be burdensome to bring an action at the county level Administration of Industry and Commerce due to the distance between the residence of the infringed party and the offices where the action must be instituted. In such cases, it would be considerably more convenient to institute an action in the local People’s Courts. An alternative explana-

\textsuperscript{246} Id., art. 39; Implementing Rules, supra note 184, art. 24.
\textsuperscript{247} Implementing Rules, supra note 184, art. 24.
\textsuperscript{248} PRC Trademark Law, supra note 9, art. 39.
\textsuperscript{249} Id.; Implementing Rules, supra note 184, art. 25.
\textsuperscript{250} Id.
\textsuperscript{251} PRC Trademark Law, supra note 9, art. 40; Implementing Rules, supra note 184, art. 24.
\textsuperscript{252} PRC Trademark Law, supra note 9; art. 40; Implementing Rules art. 26, supra note 184, art. 26.
\textsuperscript{253} PRC Trademark Law, supra note 9, art. 39.
tion is that the last paragraph of article 39 was inserted in anticipation of the system of economic courts. If that is the case, where economic courts have been established, the procedure in an infringement case may be first to seek resolution of the dispute in a relatively informal manner by petitioning the Administration of Industry of Commerce. If such informal proceedings fail, formal suit may then be brought in the People’s (economic) Courts. Whatever the reason may be, extending jurisdiction over trademark infringement actions to both administrative and judicial authorities gives rise to considerable uncertainty concerning the manner in which the two authorities will adjudicate infringement actions. Absent some mechanism for coordinating the procedures and legal precedents followed by the People’s Courts and the Administration of Industry and Commerce, shared jurisdiction could result in each body developing its own separate legal standards and precedents to be applied to the adjudication of infringement actions.

Despite this jurisdictional ambiguity, the infringement provisions of articles 38, 39 and 40 of the new trademark law and their supplementing provisions in the Implementing Rules, if well enforced, will prove an incentive for Chinese enterprises to register their marks. Under the old system, a trademark registrant was helpless to prevent others from infringing a trademark. Moreover, from an economic standpoint, trademark infringement generally did not impinge upon the economic well being of a manufacturing enterprise operating under the quota system of production. In contrast, with the recent appearance of enterprise autonomy and a “socialist commodity economy” there is a great deal to gain from the good reputation of a trademark: higher sales mean a greater percentage of profits for the particular manufacturing enterprise. Now, with the opportunity to obtain a monopoly on a reputable trademark, and thereby a competitive advantage over enterprises manufacturing similar commodities, it is inevitable that China will experience a flurry of both domestic and foreign trademark registration in the near future.

7. Assignment and Licensing

The 1983 new trademark law, like the 1963 Regulations, provides that registered trademarks may be assigned, subject to Trademark Bureau approval. The local departments of the Administration of Industry and Commerce conduct preliminary examination of applications for assignment of trademarks and “transmit” the results of their examina-

254 See LECTURE OUTLINE FOR LEGAL PROPAGANDA AND EDUCATION, supra note 11.
255 PRC Trademark Law, supra note 9, art. 25.
tions to the Trademark Bureau. As a condition to assignment, the assignor is required to guarantee to the Trademark Bureau the quality of the commodities upon which the assigned mark is to be used. This requirement of quality guarantee is an anomaly because, as noted above, the new trademark law does not require the trademark registrant to submit a certification of quality at the time of registration. Hence, there is apparently no certification of quality against which the quality of commodities bearing assigned trademarks is to be measured.

Licensing of trademarks is authorized under the provisions of article 26 of the new trademark law. Like a trademark assignee, the licensee is to guarantee in the licensing agreement the quality of the products on which the licensed trademark is to be used. The validity of a licensing agreement, unlike a trademark assignment, is not conditioned on Trademark Bureau approval, although a report of a licensing agreement must be submitted to the Trademark Bureau and to the local department(s) of the Administration of Industry and Commerce where the parties to the licensing agreement are located. Moreover, after a trademark has been licensed, the licensor remains responsible for supervising the quality of the licensee's commodities. One can infer from this requirement that, if there is a significant decline in the quality of the licensee's products, the registration of the mark will be subject to revocation. In light of the minimal governmental involvement in trademark licensing agreements, however, it would appear that the licensee's guarantee of quality will operate exclusively as a contractual obligation of the licensee to the licensor, making the agreement voidable by the licensor if there is a decline in the quality of the licensee's goods. Because the licensor remains ultimately responsible for quality of goods on which the trademark is used, it makes sense that he have some means of supervising the quality of products bearing a licensed trademark.

8. Provisions Relating to Foreigners and Foreign Trademarks

The new trademark law, by expressly embracing the principle of reciprocity in accepting and processing trademark registration applications of foreigners whose own country permits Chinese nationals to apply for trade registration codifies the practice of the last decade. It also

256 Implementing Rules, supra note 184, art. 16.
257 PRC Trademark Law, supra note 9, art. 26.
258 Id.
259 Id.; Implementing Rules, supra note 184, art. 18.
260 PRC Trademark Law, supra note 9, art. 26.
261 PRC Trademark Law, supra note 9, art. 9.
states that trademarks of citizens of signatories of bilateral trademark agreements with China, as well as signatories of international agreements on trademarks of which China is also a signatory will be allowed to register their marks in China.\textsuperscript{263}

The excision of the prohibition of trademarks which incorporate foreign words which existed under the 1963 Regulations is of great significance.\textsuperscript{264} Since the appearance in China of Western advertisements bearing primarily English words, it would appear that the prohibition against foreign language marks was not in fact enforced. The new change nevertheless will add considerable flexibility to the marketing of commodities produced by foreign-Chinese joint enterprises and bearing foreign trademarks. Another provision which was not enforced where foreign trademarks were involved was article 11(3) of the 1963 Regulations which provided for revocation of a mark not used for a period of one year.\textsuperscript{265} The new trademark law is silent as to whether the longer three year disuse rule will be applied to foreigners. Because the longer period would prove no doubt to be a considerably less onerous restriction than the old one year regulation, it may very well be applied to foreign marks.

As has been the practice in the past, the China Council for the Promotion of International Trade will serve as the exclusive agent of foreigners in trademark related matters.\textsuperscript{266} Each application for trademark registration, extension of registration, or assignment of trademark submitted by a foreigner must be accompanied by a Power of Attorney.\textsuperscript{267} Moreover, all communications relating to trademarks are required to be conducted in the Chinese language and, if application documents are in a foreign language, a copy of their Chinese translation must simultaneously be submitted.\textsuperscript{268}

IV. CONCLUSION

A revolutionary expansion in the property rights conferred on individuals and enterprises is the foundation of the new regime of Chinese industrial property law. The terminology utilized in the new patent and trademark laws reflect an engraving of capitalist concepts of property

\textsuperscript{263} PRC Trademark Law, supra note 8, art. 9. The author has been informed by a research associate at the East-West Center China Law Project that the PRC has acceded to the World Intellectual Property Organization (WIPO).
\textsuperscript{264} 1963 Trademark Regulations, supra note 167, art. 5.
\textsuperscript{265} Theroux, supra note 262, at 223.
\textsuperscript{266} PRC Trademark Law, supra note 9, art. 10; Implementing Rules, supra note 184, art. 29.
\textsuperscript{267} Implementing Rules, supra note 184, art. 30.
\textsuperscript{268} Id., art. 31.
rights onto China’s nascent “socialist commodity economy.” The scope of the rights accorded nevertheless remain considerably narrower than under the industrial property laws of the West. This is particularly evident under the new patent law. The thin line between socialist obligation and individual incentive is drawn with compulsory licensing provisions; it is in the government’s discretion to require that important inventions are made available as the needs of socialist construction dictate. Yet to ensure that socialist obligation does not suffocate technology transfer from industrialized capitalist countries, foreign patents are, for example, exempt from compulsory licensing.

As is the case with the entire Chinese legal system, the survival of the new industrial property laws hinges on politics. If Deng Xiaoping’s program succeeds, it may be anticipated that, within the bounds of Marxist economics, a fairly expansive reading of industrial property rights will be countenanced. If, on the other hand, the leftists are able to significantly reassert their influence, spiritual and ideological incentives will play a more important role and the threshold at which social obligation subsumes individual right will be much lower. Whichever route China takes, it is evident that only if one keeps in mind the ideological consensus of the times, and the limits placed on property rights in Marxist economic theory, will China’s new patent and trademark laws be capable of meaningful interpretation.
Chapter I
General Provisions

Article 1. This Law is enacted to protect patent rights for inventions-creations, to encourage invention-creation to foster the spreading and application of inventions-creations and to promote the development of science and technology for meeting the needs of the construction of socialist modernization.

Article 2. In this Law, "inventions-creations" means inventions, utility models and designs.

Article 3. The Patent Office of the People's Republic of China receives and examines patent applications and grants patent rights for inventions-creations that conform with the provisions of this Law.

Article 4. Where the invention-creation for which a patent is applied for relates to the security or other vital interests of the State and is required to be kept secret, the application shall be treated in accordance with the relevant prescriptions of the State.

Article 5. No patent right shall be granted for any invention-creation that is contrary to the laws of the State or social morality or that is detrimental to public interest.

Article 6. For a service invention-creation made by a person in execution of the tasks of the entity to which he belongs or made by him mainly by using the material means of the entity, the right to apply for a patent belongs to the entity. For any non-service invention-creation, the
right to apply for a patent belongs to the inventor or creator. After the application is approved, if it was filed by an entity under ownership by the whole people, the patent right shall be held by the entity; if it was filed by an entity under collective ownership or by an individual, the patent right shall be owned by the entity or individual.

For a service invention-creation made by any staff member or worker of a foreign enterprise, or of a Chinese-foreign joint venture enterprise, located in China, the right to apply for a patent belongs to the enterprise. For any non-service invention-creation, the right to apply for a patent belongs to the inventor or creator. After the application is approved, the patent right shall be owned by the enterprise or the individual that applied for it. The owner of the patent right and the holder of the patent right are referred to as “patentee.”

Article 7. No entity or individual shall prevent the inventor or creator from filing an application for a patent for a non-service invention-creation.

Article 8. For an invention-creation made in co-operation by two or more entities or made by an entity in execution of a commission for research or designing given to it by another entity, the right to apply for a patent belongs, unless otherwise agreed upon, to the entity which made, or to the entities which jointly made, the invention-creation. After the application is approved, the patent right shall be owned or held by the entity or entities that applied for it.

Article 9. Where two or more applicants file applications for patent for the identical invention-creation, the patent right shall be granted to the applicant whose application was filed first.

Article 10. The right to apply for a patent and the patent right may be assigned.

Any assignment, by an entity under ownership by the whole people, of the right to apply for a patent, or of the patent right, must be approved by the competent authority at the higher level.

Any assignment, by a Chinese entity or individual, of the right to apply for a patent, or of the patent right, to a foreigner must be approved by the competent department concerned of the State Council.

Where the right to apply for a patent or the patent right is assigned, the parties must conclude a written contract, which will come into force after it is registered with and announced by the Patent Office.

Article 11. After the grant of the patent right for an invention or utility model, except as provided for in Article 14 of this Law, no entity or individual may, without the authorization of the patentee, exploit the
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After the grant of the patent right for a design, no entity or individual may, without the authorization of the patentee, exploit the patent, that is, make or sell the product, incorporating the patented design, for production or business purposes.

Article 12. Any entity or individual exploiting the patent of another must, except as provided for in Article 14 of this Law, conclude with the patentee a written license contract for exploitation and pay the patentee a fee for the exploitation of the patent. The licensee has no right to authorize any entity or individual, other than that referred to in the contract for exploitation, to exploit the patent.

Article 13. After the publication of the application for a patent for invention, the applicant may require the entity or individual exploiting the invention to pay an appropriate fee.

Article 14. The competent departments concerned of the State Council and the people's governments of provinces, autonomous regions or municipalities directly under the Central Government have the power to decide, in accordance with the State plan, that any entity under ownership by the whole people that is within their system or directly under their administration and that holds the patent right to an important invention-creation is to allow designated entities to exploit that invention-creation; and the exploiting entity shall, according to the prescriptions of the State, pay a fee for exploitation to the entity holding the patent right.

Any patent of a Chinese individual or entity under collective ownership, which is of great significance to the interests of the State or to public interest, and is in need of spreading and application, may, after approval by the State Council at the solicitation of the competent department concerned, be treated alike by making reference to the provisions of the preceding paragraph.

Article 15. The patentee has the right to affix a patent marking and to indicate the number of the patent on the patented product or on the packing of that product.

Article 16. The entity owning or holding the patent right shall award the inventor or creator of a service invention-creation a reward and, upon exploitation of the patented invention-creation, shall award the inventor or creator a reward based on the extent of spreading and application and the economic benefits yielded.

Article 17. The inventor or creator has the right to be named as such in the patent document.

Article 18. Where any foreigner, foreign enterprise or other for-
eign organization having no habitual residence or business office in China files an application for a patent in China, the application shall be treated under this Law in accordance with any agreement concluded between the country to which the applicant belongs and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of reciprocity.

Article 19. Where any foreigner, foreign enterprise or other foreign organization having no habitual residence or business office in China applies for a patent, or has other patent matters to attend to, in China, he or it shall appoint a patent agency designated by the State Council of the People’s Republic of China to act as his or its agent.

Where any Chinese entity or individual applies for a patent or has other patent matters to attend to in the country, it or he may appoint a patent agency to act as its or his agent.

Article 20. Where any Chinese entity or individual intends to file an application in a foreign country for a patent for invention-creation made in the country, it or he shall file first an application for patent with the Patent Office and, with the sanction of the competent department concerned of the State Council, shall appoint a patent agency as designated by the State Council to act as its or his agent.

Article 21. Until the publication or announcement of the application for a patent, staff members of the Patent Office and persons involved have the duty to keep its content secret.

Chapter II

Requirements for Grant of Patent Right

Article 22. Any invention or utility model for which patent right may be granted must possess novelty, inventiveness and practical applicability.

Novelty means that, before the date of filing, no identical invention or utility model has been publicly disclosed in publications in the country or abroad or has been publicly used or made known to the public by any other means in the country, nor has any other person filed previously with the Patent Office an application which described the identical invention or utility model and was published after the said date of filing.

Inventiveness means that, as compared with the technology existing before the date of filing, the invention has prominent substantive features and represents a notable progress and that the utility model has substantive features and represents progress.
Practical applicability means that the invention or utility model can be made or used and can produce effective results.

Article 23. Any design for which patent right may be granted must not be identical with or similar to any design which, before the date of filing, has been publicly disclosed in publications in the country or abroad or has been publicly used in the country.

Article 24. An invention-creation for which a patent is applied for does not lose its novelty where, within six months before the date of filing, one of the following events occurred:

(1) where it was first exhibited at an international exhibition sponsored or recognized by the Chinese Government;
(2) where it was first made public at a prescribed academic or technological meeting;
(3) where it was disclosed by any person without the consent of the applicant.

Article 25. For any of the following, no patent right shall be granted:

(1) scientific discoveries;
(2) rules and methods for mental activities;
(3) methods for the diagnosis or for the treatment of diseases;
(4) food, beverages and flavorings;
(5) pharmaceutical products and substances obtained by means of a chemical process;
(6) animal and plant varieties;
(7) substances obtained by means of nuclear transformation;

For processes used in producing products referred to in items (4) to (6) of the preceding paragraph, patent right may be granted in accordance with the provisions of this Law.

Chapter III
Application for Patent

Article 26. Where an application for a patent for invention or utility model is filed, a request, a description and its abstract, and claims shall be submitted.

The request shall state the title of the invention or utility model, the name of the inventor or creator, the name and the address of the applicant and other related matters.

The description shall set forth the invention or utility model in a manner sufficiently clear and complete so as to enable a person skilled in the relevant field of technology to carry it out; where necessary, drawings
are required. The abstract shall state briefly the main technical points of
the invention or utility model.

The claims shall be supported by the description and shall state the
extent of the patent protection asked for.

**Article 27.** Where an application for a patent for design is filed, a
request, drawings or photographs of the designs shall be submitted, and
the product incorporating the design and the class to which that product
belongs shall be indicated.

**Article 28.** The date on which the Patent Office receives the appli-
cation shall be the date of filing. If the application is sent by mail, the
date of mailing indicated by the postmark shall be the date of filing.

**Article 29.** Where any foreign applicant files an application in
China within 12 months from the date on which he or it first filed in a
foreign country an application for a patent for the same invention or
utility model, or within six months from the date on which he or it first
filed in a foreign country an application for a patent for the same design,
his or its being, in accordance with any agreement concluded between the
country to which he or it belongs and China, or in accordance with any
international treaty to which both countries are party, or on the basis of
the principle of mutual recognition of the right of priority, enjoy a right
of priority, that is, the date on which the application was first filed in the
foreign country shall be regarded as the date of filing.

Where the applicant claims a right of priority and where one of the
events listed in Article 24 of this Law occurred, the period of the right of
priority shall be counted from the date on which the event occurred.

**Article 30.** Any applicant who claims the right of priority shall
make a written declaration when the application is filed, indicating the
date of filing of the earlier application in the foreign country and the
country in which that application was filed, and submit, within three
months, a copy of that application document, certified by the competent
authority of that country; if the applicant fails to make the written decla-
ration or to meet the time limit for submitting the document, the claim to
the right of priority shall be deemed not to have been made.

**Article 31.** An application for a patent for invention or utility
model shall be limited to one invention or utility model. Two or more
inventions or utility models belonging to a single general inventive con-
cept may be filed as one application.

An application for a patent for design shall be limited to one design
incorporated in one product. Two or more designs which are incorpo-
rated in products belonging to the same class and are sold or used in sets
may be filed as one application.
Article 32. An applicant may withdraw his or its application for a patent at any time before the patent right is granted.

Article 33. An applicant may amend his or its application for a patent, but may not go beyond the scope of the disclosure contained in the initial description.

CHAPTER IV

Examination and Approval of Application for a Patent

Article 34. Where, after receiving an application for a patent for invention, the Patent Office, upon preliminary examination, finds the application to be in conformity with the requirements of this Law, it shall publish the application within 18 months from the date of filing. Upon the request of the applicant, the Patent Office may publish the application earlier.

Article 35. Upon the request of the applicant for a patent for invention, made at any time within three years from the date of filing, the Patent Office will proceed to examine the application as to its substance. If, without any justified reason, the applicant fails to meet the time limit for requesting examination as to substance, the application shall be deemed to have been withdrawn.

The Patent Office may, on its own initiative, proceed to examine any application for a patent for invention as to substance when it deems it necessary.

Article 36. When the applicant for a patent for invention requests examination as to substance, he or it shall furnish pre-filing date reference materials concerning the invention.

The applicant for a patent for invention who has filed in a foreign country an application for a patent for the same invention shall, at the time of requesting examination as to substance, furnish documents concerning any search made for the purpose of examining that application, or concerning the results of any examination made, in that country. If, without any justified reason, the said documents are not furnished, the application shall be deemed to have been withdrawn.

Article 37. Where the Patent Office, after it has made the examination as to substance of the application for a patent for invention, finds that the application is not in conformity with the provisions of this Law, it shall notify the applicant and request him or it to submit, within a specified time limit, his or its observations or to amend the application. If, without any justified reason, the time limit for making reponse is not met, the application shall be deemed to have been withdrawn.
Article 38. Where, after the applicant has made the observations or amendments, the Patent Office finds that the application for a patent for invention is still not in conformity with the provisions of this Law, the application shall be rejected.

Article 39. Where it is found after examination as to substance that there is no cause for rejection of the application for a patent for invention, the Patent Office shall make a decision, announce it and notify the applicant.

Article 40. Where, after receiving the application for a patent for utility model or design, the Patent Office finds upon preliminary examination that the application is in conformity with the requirements of this Law, it shall not proceed to examine it as to substance but shall immediately make an announcement and notify the applicant.

Article 41. Within three months from the date of the announcement of the application for a patent, any person may, in accordance with the provisions of this Law, file with the Patent Office an opposition to that application. The Patent Office shall send a copy of the opposition to the applicant, to which the applicant shall respond in writing within three months from the date of its receipt; if, without any justified reason, the time limit for making the written response is not met, the application shall be deemed to have been withdrawn.

Article 42. Where, after examination, the Patent Office finds that the opposition is justified, it shall make a decision to reject the application and notify the opponent and the applicant.

Article 43. The Patent Office shall set up a Patent Re-examination Board. Where the applicant is not satisfied with the decision of the Patent Office rejecting the application, he or it may, within three months from the date of receipt of the notification, request the Patent Re-examination Board to make a re-examination. The Patent Re-examination Board shall, after re-examination, make a decision and notify the applicant.

Where the applicant for a patent for invention is not satisfied with the decision of the Patent Re-examination Board rejecting the request for re-examination, he or it may, within three months from the date of receipt of the notification, institute legal proceedings in the people's court.

The decision of the Patent Re-examination Board in respect of any request by the applicant for re-examination concerning a utility model or design is final.

Article 44. Where no opposition to the application for a patent is filed or where, after its examination, the opposition is found unjustified,
the Patent Office shall make a decision to grant the patent right, issue the patent certificate, and register and announce the relevant matters.

CHAPTER V

Duration, Cessation and Invalidation of Patent Right

Article 45. The duration of patent right for inventions shall be 15 years counted from the date of filing.

The duration of patent right for utility models or designs shall be five years counted from the date of filing. Before the expiration of the said term, the patentee may apply for a renewal for three years.

Where the patentee enjoys a right of priority, the duration of the patent right shall be counted from the date on which the application was filed in China.

Article 46. The patentee shall pay an annual fee beginning with the year in which the patent right was granted.

Article 47. In any of the following cases, the patent right shall cease before the expiration of its duration:

1. Where an annual fee is not paid as prescribed;

2. Where the patentee abandons his or its patent right by a written declaration.

Any cessation of the patent right shall be registered and announced by the Patent Office.

Article 48. Where, after the grant of the patent right, any entity or individual considers that the grant of the said patent right is not in conformity with the provisions of this Law, it or he may request the Patent Re-examination Board to declare the patent right invalid.

Article 49. The Patent Re-examination Board shall examine the request for invalidation of the patent right, make a decision and notify the person who made the request and the patentee. The decision declaring the patent right invalid shall be registered and announced by the Patent Office.

Where any party is not satisfied with the decision of the Patent Re-examination Board declaring the patent right for invention invalid or upholding the patent right for invention, such party may, within three months from receipt of the notification of the decision, institute legal proceedings in the people's court.

The decision of the Patent Re-examination Board in respect of a request to declare invalid the patent right for utility model or design is final.
Article 50. Any patent right which has been declared invalid shall be deemed to be non-existent from the beginning.

CHAPTER VI

Compulsory License for Exploitation of the Patent

Article 51. The patentee himself or itself has the obligation to make the patented product, or to use the patented process, in China, or otherwise to authorize other persons to make the patented product, or to use the patented process, in China.

Article 52. Where the patentee of an invention or utility model fails, without any justified reason by the expiration of three years from the date of the grant of the patent right, to fulfill the obligation set forth in Article 51, the Patent Office may, upon the request of an entity which is qualified to exploit the invention or utility model, grant a compulsory license to exploit the patent.

Article 53. Where the invention or utility model for which the patent right was granted is technically more advanced than another invention or utility model for which a patent right has been granted earlier and the exploitation of the later invention or utility model depends on the exploitation of the earlier invention or utility model, the Patent Office may, upon the request of the later patentee, grant a compulsory license to exploit the earlier invention or utility model.

Where, according to the preceding paragraph, a compulsory license is granted, the Patent Office may, upon the request of the earlier patentee, also grant a compulsory license to exploit the later invention or utility model.

Article 54. The entity or individual requesting, in accordance with the provisions of this Law, a compulsory license for exploitation shall furnish proof that it or he has not been able to conclude with the patentee a license contract for exploitation on reasonable terms.

Article 55. The decision made by the Patent Office granting a compulsory license for exploitation shall be registered and announced.

Article 56. Any entity or individual that is granted a compulsory license for exploitation shall not have an exclusive right to exploit and shall not have the right to authorize exploitation by any others.

Article 57. The entity or individual that is granted a compulsory license for exploitation shall pay to the patentee a reasonable exploitation fee, the amount of which shall be fixed by both parties in consultations. Where the parties fail to reach an agreement, the Patent Office shall adjudicate.
Article 58. Where the patentee is not satisfied with the decision of the Patent Office granting a compulsory license for exploitation or with the adjudication regarding the exploitation fee payable for exploitation, he or it may, within three months from the receipt of the notification, institute legal proceedings in the people's court.

CHAPTER VII
Protection of Patent Rights

Article 59. The extent of protection of the patent right for invention or utility model shall be determined by the terms of the claims. The description and the appended drawings may be used to interpret the claims.

The extent of protection of the patent right for design shall be determined by the product incorporating the patented design as shown in the drawings or photographs.

Article 60. For any exploitation of the patent, without the authorization of the patentee, constituting an infringing act, the patentee or any interested party may request the administrative authority for patent affairs to handle the matter or may directly institute legal proceedings in the people's court. The administrative authority for patent affairs handling the matter shall have the power to order the infringer to stop the infringing act and to compensate for the damage. Any party dissatisfied may, within three months from the receipt of the notification, institute legal proceedings in the people's court. If such proceedings are not instituted within the time limit and if the order is not complied with, the administrative authority for patent affairs may approach the people's court for compulsory execution.

When any infringement dispute arises, if the patent for invention is a process for the manufacture of a product, any entity or individual manufacturing the identical product shall furnish proof of the process used in the manufacture of its or his product.

Article 61. Prescription for instituting legal proceedings concerning the infringement of patent right is two years counted from the date on which the patentee or any interested party obtains or should have obtained knowledge of the infringing act.

Article 62. None of the following shall be deemed an infringement of the patent right:

(1) Where, after the sale of a patented product that was made by the patentee or with the authorization of the patentee, any other person uses or sells that product;
(2) Where any person uses or sells a patented product not knowing that it was made and sold without the authorization of the patentee;

(3) Where, before the date of filing of the application for patent, any person who has already made the same product, used the same process, or made necessary preparations for its making or using, continues to make or use it within the original scope only;

(4) Where any foreign means of transport which temporarily passes through the territory, territorial waters or territorial airspace of China uses the patent concerned, in accordance with any agreement concluded between the country to which the foreign means of transport belongs and China, or in accordance with any international treaty to which both countries are party, or on the basis of the principle of reciprocity, for its own needs in its devices and installations;

(5) Where any person uses the patent concerned solely for the purposes of scientific research and experimentation.

**Article 63.** Where any person passes off the patent of another person, such passing off shall be treated in accordance with Article 60 of this Law. If the circumstances are serious, any person directly responsible shall be prosecuted for his criminal liability, by applying mutatis mutandis Article 127 of the Criminal Law.

**Article 64.** Where any person, in violation of the provisions of Article 20 of this Law, unauthorizedly files in a foreign country an application for a patent that divulges an important secret of the State, he shall be subject to disciplinary sanction by the entity to which he belongs or by the competent authority concerned at the higher level. If the circumstances are serious, he shall be prosecuted for his criminal liability according to the Law.

**Article 65.** Where any person usurps the right of an inventor or creator to apply for a patent for a non-service invention-creation, or usurps any other right or interest of an inventor or creator prescribed by this Law, he shall be subject to disciplinary sanction by the entity to which he belongs or by the competent authority at the higher level.

**Article 66.** Where any staff member of the Patent Office, or any staff member concerned of the State, acts wrongfully out of personal considerations or commits fraudulent acts, he shall be subject to disciplinary sanction by the Patent Office or the competent authority concerned. If the circumstances are serious, he shall be prosecuted, for his criminal liability, by applying mutatis mutandis Article 188 of the Criminal Law.
CHAPTER VIII
Supplementary Provisions

Article 67. Any application for a patent filed with, and any other proceedings before, the Patent Office shall be subject to the payment of a fee as prescribed.

Article 68. The Implementing Regulations of this Law shall be drawn up by the Patent Office and shall enter into force after approval by the State Council.

Article 69. This Law shall enter into force on April 1, 1985.

(Translated by the Patent Office of the People’s Republic of China. In case of discrepancy, the original version in Chinese shall prevail).
Appendix B

Trademark Law of the People's Republic of China

Promulgated by the Standing Committee of the National People's Congress on August 23, 1982, and effective March 1, 1983.

CHAPTER I

General Principles

Article 1. This law is specially formulated to strengthen the supervision of trademarks, protect the right to use a specific trademark, urge producers to ensure product quality and maintain the reputation of the trademark so as to protect the consumers' interests, and promote the development of socialist commodity economy.

Article 2. The trademark bureau of the industrial and commercial administrative departments under the State Council is in charge of the registration and supervision of trademarks of the country.

Article 3. A trademark approved by the trademark bureau for registration is a registered trademark. The person who registers the trademark is entitled to the right to use the specific trademark and is protected by law.

Article 4. An enterprise, institution, individual industrialist or businessman should apply for the registration of a trademark at the trademark bureau in order to obtain the right to use the specific trademark for the commodity produced, manufactured, processed, selected or sold by the enterprise, institution, industrialist or businessman.

Article 5. Applications must be submitted for the registration of trademarks of commodities designated by the state to be labeled with registered trademarks. They must not be sold in the market until registration has been approved.
Article 6. Persons using trademarks must be responsible for the quality of the commodities labeled with the trademarks. Industrial and commercial administrative departments at various levels should control commodity quality through supervision of trademarks in order to clamp down on fraudulent practices against the consumers.

Article 7. The wording and/or graphic design used for a trademark must have outstanding characteristics so that it can be easily identified. A trademark for which registration has been completed must be labeled with "registered trademark" or registered mark.

Article 8. The following wordings and designs must not be used for trademarks: (i) Wordings and designs that are identical or similar to the national name, flag, emblem, army flag and decoration of the PRC; (ii) that are identical or similar to the name, national flag, emblem and army flag of a foreign country; (iii) that are identical or similar to the flag, insignia and name of an intergovernmental international organization; (iv) that are identical or similar to the symbols of the "Red Cross" or "Red Crescent"; (v) that are the common name and common design of the commodity; (vi) that directly indicate the quality, main ingredients, efficacy, usage, weight, quantity and other features of the commodity; (vii) that discriminate against national minorities; (viii) that are exaggerated and deceptive; and (ix) that are harmful to social morality or have other harmful effects.

Article 9. A foreigner or foreign enterprise applying for the registration of a trademark in China should follow the procedures in accordance with the agreement signed between his own country and the PRC, an international treaty signed by both countries, or reciprocal principles.

Article 10. A foreigner or foreign enterprise should entrust the organization designated by the state as the agent to apply for the registration of a trademark and handle other business affairs.

CHAPTER II

The Application Of The Registration Of A Trademark

Article 11. Those applying for the registration of trademarks should submit, in accordance with the commodity classification chart, the category and the name of the commodity for which a trademark is being applied.

Article 12. Persons applying for the use of the same trademark for two different categories of commodities should submit separate applications for the registration of the trademark in accordance with the commodity classification chart.
Article 13. It is necessary to apply separately for the registration of a registered trademark to be used for other commodities of the same category.

Article 14. It is necessary to renew the application for the registration of a registered trademark whose wording or design needs to be changed.

Article 15. It is necessary to submit an application of amendment should the title or address of the registrant or other registered items need to be changed.

CHAPTER III
The Examination And Approval Of The Registration Of A Trademark

Article 16. A trademark for which registration is being applied and which meets the relevant requirements of this law will be published after preliminary examination by the trademark bureau.

Article 17. Application for the registration of a trademark which fails to meet the relevant requirements of this law or is identical or similar to a registered trademark or to a trademark having passed the preliminary examination submitted by other persons for the same or similar commodity will be rejected by the trademark bureau. The trademark will not be published.

Article 18. In the event applications are submitted by two or more applications for the registration of identical or similar trademarks for the same commodity or similar commodities, the application which is submitted first for the trademark will be given preliminary examination and published. In the event that the applications are submitted on the same day, the trademark which is in use first will be given preliminary examination and published. Other applications will be rejected and will not be published.

19. Anyone can raise an objection against a trademark which has been given the preliminary examination within three months of publication. When there is no objection, or the objection is overruled, the trademark will be approved for registration, issued with a trademark registration certificate and published. If the objection is sustained, the registration will be rejected.

Article 20. A trademark review committee set up by the industrial and commercial administrative departments under the State Council is responsible for handling disputes concerning trademarks.

Article 21. The trademark bureau should notify the applicant for registration of a trademark in writing if it has been rejected and not pub-
lished. If the applicant disagrees with the rejection, he may apply for reexamination within 15 days after he receives the notification. The trademark reviewing committee will make the final decision and notify the applicant by written notice.

**Article 22.** When an objection is raised against a trademark which has been given preliminary examination and published, the trademark bureau should listen to the facts and reasons cited by both the person who lodges the objection and the applicant and, after investigation and verification of facts, make a ruling on the case. If the person concerned disagrees with the ruling, he may apply for reexamination within 15 days after he receives the notice. The trademark reviewing committee will make the final decision and notify both the person who lodges the objection and the applicant by written notice.

**CHAPTER IV**

The Extension And Transference Of A Registered Trademark And The Permission To Use It

**Article 23.** The period of validity of a registered trademark is 10 years, starting from the day the registration is approved.

**Article 24.** Application for extension of a registered trademark should be made six months before its expiration. A six-month grace period will be given to those who fail to submit the application during the period. A registered trademark will be canceled after the application for its extension is not made during the grace period.

The validity of a registered trademark will be extended 10 years after each renewal.

Renewal of the registration will be published after the application is approved.

**Article 25.** The transferor and the transferee should jointly submit the application to the trademark bureau for the transference of a registered trademark. The transferee should guarantee the quality of the commodity using the registered trademark.

Transference of a registered trademark will be published after the application is approved.

**Article 26.** The registrant of a registered trademark may, through signing a contract permitting the use of the trademark, allow other people to use the registered trademark. The person granting permission should supervise the quality of the commodity of the person receiving permission to use the trademark. The person receiving the permission
should guarantee the quality of the commodity using the registered trademark.

It is necessary to report to the trademark bureau, for the record, the signing of a contract permitting the use of a trademark.

CHAPTER V
Ruling On Disputes Over Registered Trademarks

Article 27. When there is a dispute over a registered trademark, an application for a ruling may be submitted to the trademark reviewing committee within one year starting from the day the trademark's registration is approved.

After receiving an application for a ruling, the trademark reviewing committee should notify the party concerned to defend itself within a specified period.

Article 28. In the case of a trademark which has received a ruling after an objection has been raised prior to its registration, applying for a ruling by citing similar facts and reasons shall not be permitted.

Article 29. After making a final ruling on either sustaining or canceling the disputed registered trademark, the trademark review committee should notify the concerned party by written notice.

CHAPTER VI
Control Over The Use Of Trademarks

Article 30. When the users of registered trademarks are found to have committed one of the following acts, the trademark bureau will either order them to make a correction within a specified period or cancel their registered trademarks: (i) changing the wording, design or composition of a registered trademark without authorization; (ii) changing the name and address of the person in whose name the registered trademark is registered or changing other registered items without authorization; (iii) transferring a registered trademark to another person without authorization; (iv) not using the registered trademark for three consecutive years.

Article 31. When the user of a registered trademark is found to deceive consumers by advertising low-grade products as high-quality products, the industry and commerce administrations at various levels will, in accordance with the different circumstances, order the party concerned to make a correction. The party concerned may be warned or fined, or its registered trademark may be canceled by the trademark bureau.
Article 32. When a registered trademark is canceled or when it is not extended after expiry, the trademark bureau will not approve, within one year starting from the day it is canceled or annulled, an application for the registration of a trademark similar to or resembling the canceled one.

Article 33. Violators of the provisions contained in Article 5 of this law may be subject to a fine or may be ordered by local industry and commerce administrations to submit registration applications within a specified period.

Article 34. Users of unregistered trademarks who are found to have committed one of the following acts will be ordered by local industry and commerce administrations to stop using unregistered trademarks and make a correction within a specified period, or they may be notified or subject to a fine; (i) passing an unregistered trademark off as registered; (ii) violating the provisions contained in Article 8 of this law; (iii) cheating consumers by advertising low-grade products as high-quality products.

Article 35. When the party concerned is not satisfied with the trademark bureau's decision on canceling a registered trademark, it may submit an application for reexamination within 15 days after receiving the notice. The trademark reviewing committee shall make a final decision and notify the applicant by written notice.

Article 36. When the party concerned refuses to accept a decision on a fine made by a local industry and commerce administration in accordance with the provisions contained in Articles 31, 33 and 34 of this law, it may appeal to a people's court within 5 days after receiving a notice, but if it does not appeal and refuses to pay the fine after the period of 15 days, the industry and commerce administration concerned will ask the people's court to order a compulsory execution of its decision.

Chapter VII

Protection Of Registered Trademark Patents

Article 37. Patents to registered trademarks are limited to trademarks whose registration has been approved and to products whose use has been appraised and approved.

Article 38. Any one of the following acts is considered a violation of patent rights to registered trademarks: (1) using, without the permission of the owner of a registered trademark, a trademark similar to or resembling the registered trademark on a similar product or on a product of the same kind; (2) arbitrarily manufacturing or selling trademark labels
registered by another person; (3) causing other forms of damage to another person's patent right to a registered trademark.

Article 39. A person whose patent right to a registered trademark has been infringed upon in any one of the ways described in Article 38 of this law may request the industry and commerce administration at and above the county level in the area where the infringer of his right resides, to handle the case. The industry and commerce administration concerned has the right to order the infringer to immediately cease acts infringing upon other people's patent rights to a registered trademark and to compensate the person whose registered trademark patent right has been infringed upon for losses. The amount of compensation is determined by the amount of profit made by the infringer during the right-infringing period, or by the amount of losses suffered by the person whose patent right is infringed upon during the right-infringing period. In serious cases the infringer may be subject to a cash fine. When the party concerned does not agree with a decision, it may appeal to a people's court within 15 days after receiving a notice. If it does not appeal and refuses to pay the fine after a period of 15 days, the industry and commerce administration concerned will ask the people's court to order a compulsory execution of its decision.

A person whose registered trademark patent right has been infringed upon may also directly file a lawsuit with a people's court against the person who infringes upon his right.

Article 40. A person who falsifies another person's registered trademark, including arbitrarily manufacturing or selling trademark labels registered by another person, shall be asked to pay compensation and may also be subject to a cash fine. Judicial organs will prosecute according to law the person who is directly responsible.

CHAPTER VIII
Supplementary Articles

Article 41. Applicants who apply for trademark registrations and who handle other matters in connection with trademarks should pay expenses. The specific standard for the amount of fees to be paid will be set separately.

Article 42. The details on the enforcement of this law were drawn up by the State Council's administration of industry and commerce and have been submitted to the State Council for approval and implementation.

Article 43. This law will come into force on March 1, 1983. The
regulations on the control of trademarks promulgated by the State Council on April 10, 1963, will be abolished at the same time; other provisions concerning the control of trademarks that are in conflict with this law will be simultaneously annulled.

Trademarks already registered before the enforcement of this law will continue to be effective.