

COMBATING THE COUNTERFEITING WOES OF THE WINE SELLER IN CHINA

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ABSTRACT:

Wine counterfeiting in China has become an increasingly serious problem, and Chinese enforcement tactics do not seem up to the task. This Note analyzes changes the United States wants the Chinese government to make to its criminal and trademark laws in order to better combat counterfeiting offenses and comes to the conclusion that criminal deterrence can be best achieved through the liquor distribution law instead.

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I. INTRODUCTION

In 2011, over 60% of counterfeit goods seized in the United States were produced in China.¹ Sadly, knock-off goods made in China also plague the domestic Chinese market,² with counterfeit agricultural goods becoming increasingly common.³ In a recent report, the United States Trade Representative (USTR) noted that in 2012 the USTR “received lengthy submissions concerning the impact that counterfeiting [in China] was having on U.S. agricultural industries including the fruit and vegetable industry and the wine industry.”⁴ In fact, counterfeit wine is infiltrating the Chinese market at an alarming pace.⁵ The sheer volume of counterfeit wine in China makes it difficult for wine sellers to monitor the purity of their wines once the goods enter domestic Chinese commerce.⁶ Additionally, a counterfeit bottle of wine can be difficult to spot and remove from the market place.⁷ Counterfeits can be extremely devastating for a

¹ *CBP, ICE Release Report on 2011 Counterfeit Seizures*, U.S. CUSTOMS AND BORDER PROTECTION (Jan. 9, 2012), www.cbp.gov/xp/cgov/newsroom/news_releases/national/01092012.xml.

² Nick Bilton, *The Rise of the Fake Apple Store*, N.Y. TIMES, Jul. 20, 2011, <http://bits.blogs.nytimes.com/2011/07/20/the-rise-of-the-fake-apple-store>. Not only are there fake Apple products circulating in China, there are fake stores selling real merchandise as well. *See id.*

³ *See* Ambassador Ronald Kirk, United States Trade Representative, *2012 Special 301 Report 29* (Apr. 2012), available at http://www.ustr.gov/sites/default/files/2012%20Special%20301%20Report_0.pdf.

⁴ *Id.*

⁵ *See* David Pierson, *Pricey Counterfeit Labels Proliferate as China Wine Market Booms*, L.A. TIMES, Jan. 14, 2012, <http://articles.latimes.com/2012/jan/14/business/la-fi-china-counterfeit-wine-20120115>.

⁶ *See, e.g.*, Malcolm Moore, *Empty Wine Bottles Sell for £300 in China*, TELEGRAPH (Jan. 7, 2011), <http://www.telegraph.co.uk/foodanddrink/wine/8246212/Empty-wine-bottles-sell-for-300-in-China.html>. The sheer variety of wine fraud makes authenticity difficult to verify. *See id.*

⁷ *See, e.g.*, beaufortninja, *The Problem of Counterfeit Wine in China*, WANDERING AM. TRAVEL BLOG (May 14, 2012), <http://wanderingamericantravelblog.com/2012/05/14/the-problem-of-counterfeit-wine-in-china/>. Even an experienced wine-drinker may not realize he or she has purchased a counterfeit without closely scrutinizing the label. *See id.*

legitimate producer.⁸ Fake products are usually underpriced and compromise the competitiveness of legitimate producers by infringing on their market share.⁹ At the very extreme, counterfeit goods pose a threat to public health.¹⁰

For genuine wine sellers, knock-off wines are particularly dangerous in the burgeoning Chinese wine market because it is unlikely that the average consumer will be able to identify a fake.¹¹ In a sophisticated twist on the usual counterfeiting plot, counterfeiters in China obtain possession of authentic, empty wine bottles and then refill them with lower quality wines, so the consumer may not even realize he or she is drinking a knock-off.¹² The success of counterfeiting wines in this fashion has become so notorious that “a cottage industry of bottle scavengers has sprung up to serve the trade.”¹³ The reason counterfeit wines have emerged in China so suddenly and with such gusto is due to the increased desire for wine in the Chinese market.¹⁴ Unfortunately, the average wine consumer in China lacks sufficient tasting expertise to realize when he or she has been defrauded.¹⁵ Those familiar with the wine industry in China believe the rampant availability of counterfeit wines may have already blunted the burgeoning Chinese consumer’s eagerness for wine, perhaps permanently.¹⁶

However, the offense of wine counterfeiting has not gone unnoticed in China, or unpunished.¹⁷ The right to protect the quality, integrity, and identity

⁸ See Kirk, *supra* note 3, at 8.

⁹ See *id.*

¹⁰ See *id.*

¹¹ See, e.g., Pierson, *supra* note 5; see also Tessa Dunlop, *China’s Faux Bordeaux Stirs Wine Market*, REUTERS (Mar. 12, 2012, 6:58 AM), <http://www.reuters.com/article/2012/03/12/uk-china-wine-fake-idUSLNE82B01M20120312>.

¹² See Pierson, *supra* note 5.

¹³ *Id.*

¹⁴ See Dunlop, *supra* note 11. Wealthy Chinese have become increasingly partial to wine, and demand is growing steadily, as is evidenced by the increasing stock market prices of domestic wine companies. See Vey Wong, *Betting on Chinese Wines Could Bring More Cheer for Investors*, H. K. ECON. J. (Feb. 18, 2011), www.ejinsight.com/template/eng/news/jsp/detail.jsp?dnews_id=128&title_id=6750. The stock price of Chinese wine companies is outpacing those of the main corporations in China, and “[i]nvestment in wine as a commodity is surely gaining ground among China’s rich . . .” *Id.*

¹⁵ See, e.g., Dunlop, *supra* note 11; see also Pierson, *supra* note 5.

¹⁶ See Dunlop, *supra* note 11.

¹⁷ See *Setting Precedents in IP Law*, CHINA L. & PRAC., May 30, 2012, available at 2012 WLNR 12509336 (discussing Societe Civile De Chateau Lafite Rothschild’s recent civil court victory on the issue of trademark infringement against a Chinese company marketing wine under the Chinese transliteration of Lafite).

of a particular wine is recognized at the global level as an intellectual property right (IPR).¹⁸ IPRs in wine are recognized in China through trademark laws¹⁹ and are protected within China by several criminal laws.²⁰ In China, producing and/or selling fake wine in the manner described above may result in at least one criminal charge. Such charges include the crime of knowing or un-knowing trademark infringement, a crime based on forging and manufacturing or manufacturing and selling another's trademark without his or her permission, and the crime of passing-off inferior or shoddy goods.²¹ Despite the existence of these criminal provisions and a desire to actively combat IP infringement, China has failed to implement a reliable framework to prevent and punish counterfeiting.²²

Despite new attempts by the Chinese government to increase and strengthen its enforcement efforts, there has been little headway in blocking counterfeit wines.²³ As a result, enforcement of IPRs by Chinese government agencies remains an undependable way of seizing already counterfeited goods and an even more dubious means of crime prevention.²⁴ In an effort to address this shortcoming, the United States has called upon the Chinese government to increase criminal sanctions against small-time counterfeiters in order to broaden the efficacy of the current laws and to maximize criminal deterrence.²⁵ These

¹⁸ See Agreement on Trade-Related Aspects of Intellectual Property Rights art. 1(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPs].

¹⁹ See generally Trademark Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 2001, effective Dec. 1, 2001) 2001 China Law LEXIS 2005 (China) [hereinafter Trademark Law].

²⁰ See Criminal Law of the People's Republic of China, (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 28, 2002) 2002 China Law LEXIS 2261, arts. 140, 213–15 (China) [hereinafter Criminal Law].

²¹ See *id.*

²² See Kirk, *supra* note 3, at 27.

²³ See Circular of the General Office of the State Council on Releasing the Essentials of the 2012 National Drive against Intellectual Property Infringements and Production and Sale of Counterfeit and Substandard Merchandise (promulgated by the St. Council, May 15, 2012, effective May 15, 2012), 2012 China Law LEXIS 267, art. 3 (China) [hereinafter State Council Circular].

²⁴ See Kirk, *supra* note 3, at 30. Police forces in Fujian and Guandong provinces have refused to prosecute trademark counterfeiting crimes despite the fact victims presented ample evidence to support their accusations. See *id.*

²⁵ See Panel Report, *China—Measures Affecting The Protection and Enforcement of Intellectual Property Rights*, ¶ 2.2, WT/DS362/R (Jan. 26, 2009) [hereinafter IPR Panel Report], available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm.

proposed modifications are controversial,²⁶ and when coupled with current enforcement, they seem like an under-inclusive statutory change that targets only individuals who are already subject to and aware of the current Intellectual Property (IP) laws.²⁷ The changes for which the United States is advocating may indeed punish violators more severely, but they will not punish more broadly,²⁸ which is what the wine industry needs at this time.²⁹

Preventing trademark counterfeits should be preferable to punishment after-the-fact.³⁰ Therefore, this Note takes a prophylactic approach to stemming the tide of wine counterfeiting and, in an effort to better prevent and deter wine counterfeiting, this Note argues that Chinese authorities should make several substantive changes to the Chinese administrative laws that govern domestic alcohol sales. These changes would include adding more precise term definitions, as well as imposing new automatic penalties for small-scale trademark infringers. This approach will better prevent wine counterfeiting and will create the opportunity to impose severe penalties on infringers through a more automatic mechanism. Additionally, this will allow victims to side-step bungling enforcement operations and will make it easier to deter small-scale violators without requiring a court ruling on trademark infringement. Because China wants to provide better IP enforcement, these legal changes are more than just theoretical conjecture; rather, they are intended to provide perspective on acts China could take to encourage widespread respect for IPRs.

²⁶ See *id.* ¶¶ 3.1–3.3. Although China acknowledges that IPRs suffer from enforcement issues, the Chinese government continues to rebuff the specific legal changes advocated by the United States. See John Hillery & Niccolo Pantucci, *The U.S. Escalates its WTO Complaint Against China*, CTR. FOR STRATEGIC & INT’L STUDIES, 1–2 (Aug. 31, 2007), http://csis.org/files/media/isis/pubs/070831_chinawto.pdf. China maintains that the United States is trying to foist some sort of heightened standard for IPR enforcement on them, claiming it goes above and beyond what TRIPS mandates. See *id.*

²⁷ The proposed changes to the Trademark Law are intended to affect landlords who know they are renting to purveyors of counterfeit goods. See Kirk, *supra* note 3, at 30.

²⁸ See *id.*; see also IPR Panel Report, *supra* note 25, ¶ 2.2.

²⁹ See *Hennessy Wages Battle Against Fake Wine Suppliers in China*, WANT CHINA TIMES (Aug. 16, 2012, 10:25 AM), <http://www.wantchinatimes.com/news-subclass-cnt.aspx?id=20120816000015&cid=1102> [hereinafter *Hennessy*]. The civil litigation brought by Hennessy against over 600 shop owners and liquor retailers alleged to be involved in counterfeiting shows that the real threat to the liquor and wine industry is in the magnitude of the problem. See *id.*

³⁰ Going to court usually involves added costs that one might have otherwise avoided. Additionally, the remedies for a successful plaintiff in court include monetary payments for lost profits and loss of reputation in the form of goodwill. See, e.g., Dennis S. Corgill, *Measuring the Gains of Trademark Infringement*, 65 *FORDHAM L. REV.* 1909, 1923 (1997).

Part I begins by providing some background on the structure of Chinese law and its recent development. Part II discusses how wine is protected as an IPR in China and how enforcement irregularities continue to preclude any effective remedy through administrative processes. Part III provides an overview of the Chinese laws that regulate liquor, trademarks, and criminal proceedings. It will also briefly summarize the Chinese case law that concerns wine counterfeiting. Part IV describes the legal changes the United States government would like China to enact to further protect foreign IPRs. Part V analyzes why changing the Chinese civil laws that regulate liquor is a better way to achieve deterrence than changing the criminal laws. Part VI suggests new definitions for the Chinese alcohol sales law and advocates a new approach towards criminal liability through that civil law. Part VII concludes that changing the Chinese civil law that regulates liquor sales is a better way to prevent wine counterfeiting because it is prophylactic and can easily be altered to trigger automatic penalties that circumvent a cumbersome enforcement process.

II. BACKGROUND ON CHINESE LAW

A. *Chinese Law in General*

In China, the law has not traditionally been used to resolve personal disputes.³¹ The Western connotation of the word “law” tends to imply standards of individual behavior vis-à-vis other individuals and recourse through the court system when those standards are breached or violated.³² Western law developed from Roman law, which had its beginnings “in a very small and predominantly agricultural community with a weak government”³³ and was primarily focused on resolving disputes between individuals.³⁴ On the other side of the spectrum, Chinese law took formative shape in a society that was already highly centralized and heavily bureaucratic.³⁵ The national laws in China did not deal with

³¹ See William C. Jones, *Trying to Understand the Current Chinese Legal System*, in UNDERSTANDING CHINA’S LEGAL SYSTEM 7, 13 (C. Stephen Hsu ed., 2003).

³² See *id.* at 11.

³³ See *id.*

³⁴ See *id.*

³⁵ See *id.* at 12–13. The first documented body of rules and regulations in China dates back to the Tang dynasty (618–906 A.D.) sometime around the middle of the seventh century. See *id.* at 8–9. Every dynasty issued their own code, and each code was a collection of rules drawn up by the Emperor. See *id.* at 9. All rules in the code were only concerned with individual behavior when it “affect[ed] imperial policies.” *Id.* at 13.

matters of personal relations or individual rights.³⁶ Local committees at the village or town level dealt largely with the subjects that governed intra-personal relationships.³⁷

Modern Chinese civil law is written very similarly to the traditional imperial codes,³⁸ exhibiting the same tendency to shy away from formal legal process, which helps explain why IPRs are not primarily protected through civil court proceedings.³⁹ During the 20th century, under Chairman Mao's direction, the law was split into two categories: "contradictions among the people" and "contradictions against the people."⁴⁰ The former dealt with routine controversies of the every-day sort and were resolved through mediation.⁴¹ The latter category was reserved for disagreements between the Chinese people and foreigners or traitors who were viewed as enemies of China, which were resolved primarily through "legal institutions, such as formal trial proceedings."⁴² This would suggest that, historically, legal proceedings in court were negatively associated with outsiders and enemies of the state. Additionally, as a result of the Hundred Flowers Movement in 1956, the Communist Party "re-educated" many professionals, including lawyers, which greatly diminished the practicing legal community.⁴³ Several years later during the Cultural Revolution in 1966, Mao and his supporters decided the law was an elitist tool to oppress the masses and legal institutions were shut down.⁴⁴ Nevertheless, China has undergone great attempts to modernize its legal system.⁴⁵

³⁶ See *id.* at 13.

³⁷ See Jones, *supra* note 31, at 13. Therefore, there were effectively two types of law: an official version that, to some extent, served precedential and interpretive needs, and an unofficial method of settling personal disputes at the local level. See *id.* at 10–11, 13.

³⁸ *Id.* at 8, 10–11.

³⁹ See *Despite New IPR Pledges, U.S. Industry Wants China Listed as Major Violator*, INSIDE US TRADE: CHINA UPDATE, Feb. 16, 2012, available at 2011 WLNR 3256372. The International Intellectual Property Alliance partially blames China's inadequate protection of IPRs on its dogged utilization of over-burdened administrative enforcement, instead of the judiciary. See *id.*

⁴⁰ See VAI LO LO & XIAOWEN TIAN, LAW FOR FOREIGN BUSINESS AND INVESTMENT IN CHINA 2 (2009).

⁴¹ See *id.*

⁴² *Id.*

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ See *id.* at 4.

In an effort to develop a more extensive legal system, China has attempted to incorporate the concept of individual rights into its laws.⁴⁶ Legislative reforms, however, have focused primarily on the economic sector without any similar modernization of individual rights.⁴⁷ In the early 1980s, the Chinese Central Government took steps to decentralize the economy in order to encourage greater foreign direct investment (FDI) in business opportunities.⁴⁸ The government also created four Special Economic Zones and 14 Open Coastal Cities that offered tax benefits to foreign investors.⁴⁹ These economic changes and the subsequent sophistication of business transactions necessitated an increased supervision of basic individual rights.⁵⁰ Accordingly, the Central Government undertook measures to restore a more comprehensive institutional legal framework, which included the reopening of courts.⁵¹ However, most law in China is still promulgated as administrative law for use by bureaucratic, administrative agencies.⁵² Civil court rulings do not have precedential effect,⁵³ although lower courts do look to the Supreme People's Court for interpretation and guidance.⁵⁴

III. HOW TO PROTECT WINE IN CHINA

A. Wine is Protected as an IPR through Trademark Law in China

Wines are a unique type of IPR because their value, as a property right, is not derived from exclusive use but from a comparative advantage in quality, which is represented to the consumer through an indication of the region of

⁴⁶ See *Political Conditions of China*, EDUC. ABROAD, www.educationabroadnetwork.org/?id=4328 (last visited Nov. 11, 2012) [hereinafter *Political Conditions of China*].

⁴⁷ See *id.* In 1979, “when the drive to establish a functioning legal system began, more than 300 laws and regulations, most of them in the economic area, have been [sic] promulgated.” *Id.*

⁴⁸ See LO & TIAN, *supra* note 40, at 3.

⁴⁹ See *id.*

⁵⁰ See *id.* at 4.

⁵¹ See *id.* Additionally, China undertook an interesting experiment in mediation by allowing knowledgeable groups of individuals to form mediation committees, “who resolve about 90% of China's civil disputes and some minor criminal cases at no cost to the parties.” *Political Conditions of China*, *supra* note 46.

⁵² See generally Jones, *supra* note 31, at 13.

⁵³ See Kirk, *supra* note 3, at 30.

⁵⁴ See JAMES M. ZIMMERMAN, CHINA LAW DESKBOOK: A LEGAL GUIDE FOR FOREIGN-INVESTED ENTERPRISES 69–70 (3d ed. 2010).

origin on the wine bottle.⁵⁵ Most countries protect property rights in wine through some sort of registration system that focuses on providing the consumer with the correct product label and region in which the wine was produced.⁵⁶ An administrative system that focuses on brand name registration is typically associated with trademark law because a trademark gives an individual full and exclusive use of that mark.⁵⁷ Legal methods that emphasize the registration of the region of origin tend to be associated with collective registration of geographic indications (GI).⁵⁸ China maintains both a trademark system and a GI system, but foreign marks may be registered only under trademark law.⁵⁹ In China, vic-

⁵⁵ See Kevin M. Murphy, Note and Comment, *Conflict, Confusion, and Bias Under TRIPS Articles 22–24*, 19 AM. U. INT'L L. REV. 1181, 1184–86 (2004).

⁵⁶ The United States relies on federal trademark law to register wine names. See Lanham Act, 15 U.S.C. §§ 1051–1141 (2006). Federal trademark law, which is organized under the Lanham Act, regulates an individual's right to use a distinctive label in marketing a product. See *id.* § 1051(a). The Lanham Act adopts a strict liability theory regarding misrepresentation of geographic location—if a mark is misleading regarding region of origin, it may not be used. See *id.* § 1052(a). One of these marks is known as a certification mark, which represents both the quality of the wine to the consumer and indicates its geographic origin. See *id.* § 1054. The certification mark is similar to the type of registration system used in France. See Daniele Giovannucci et al., *Guide to Geographical Indications: Linking Products and Their Origins*, INT'L TRADE CTR., 1, 127 (Feb. 9, 2009), <http://www.intracen.org/Guide-to-Geographical-Indications-Linking-Products-and-their-Origins/>. France uses a special system that focuses exclusively on the quality of the wine and the region of origin, which is indicated to the consumer using an appellation of origin. See *id.* The EU classifies wines according to three quality-based categories. See *Industry Update: The New EU Wine Regulations*, SOC'Y OF WINE EDUCATORS, 1 (Jan. 13, 2011), http://www.aipla.org/2011/spring/MATERIALS/agostini_paper-NewEUWineRegs.pdf. The three categories in use today are the Protected Designation of Origin (PDO), Protected Geographical Indication (PGI), and Wines (the old table wine category). See *id.* The PDO category is easily applicable to wines with trademarked labels, or very well-known brand names. See *id.* The PGI category consists entirely of wines protected by geographical indications. See *id.* at 1–2. On the other hand, the Wines category is made up of those wines without any geographical indication. See *id.* at 1.

⁵⁷ See *About Geographical Indications: What Is a Geographical Indication?* WORLD INTELL. PROP. ORG., http://www.wipo.int/geo_indications/en/about.html (last visited Nov. 28, 2012).

⁵⁸ For instance, in the European Union “[a] single producer may be an applicant” for a protected geographical indication, but only if “the person in question is the only producer in the demarcated geographical area; and [when the applicant's area of production is surrounded by other regions protected by geographical indications] this relevant area possesses features” or characteristics which differ in a substantial or marked way. See Commission Regulation 607/2009, 2009 O.J. (L 193), 60, 63 (EC).

⁵⁹ See Regulations on the Protection of Geographical Indication Products (promulgated by the General Admin. of Quality Supervision, Inspection and Quarantine, June 7, 2005, effective July 15, 2005) 2005 China Law LEXIS 12471, art. 26 (China). “The AQSIQ shall accept the registration of foreign geographical indication products within China and perform the protec-

tims of trademark counterfeiting may bring a civil case against the counterfeiters, which may or may not result in criminal proceedings, or a victim may pursue administrative enforcement.⁶⁰

If a victim of counterfeiting pursues litigation, China is one of the few countries in the world that has specially designated IPR Courts.⁶¹ Only 6% of World Intellectual Property Organization member states have special courts to handle IP litigation.⁶² The specialized IP tribunals in China are situated within all four levels of the court system—starting with the basic people’s courts, followed by the intermediate people’s courts, the high people’s courts, and finally, at the top, the Supreme People’s Court.⁶³ Furthermore, China is the only country in the world that confers original jurisdiction on the IPR courts for civil IP suits.⁶⁴ The IPR judges in China are very highly qualified.⁶⁵ Litigation, however, can be a cumbersome and expensive process, so bringing suit against each individual infringer is not an economically viable option when one is facing hundreds of petty counterfeiters.⁶⁶

B. Why Enforcement Isn’t a Viable Strategy

One of the solutions to counterfeiting in IP cases is increased enforcement. However, even though it may not be apparent to outsiders, there is al-

tion thereof. Specific means thereof shall be formulated in separate provisions.” *Id.* However, no such provisions have, as of yet, been promulgated. *See, e.g.,* Min-Chiuan Wang, *The Asian Consciousness and Interests in Geographical Indications*, 96 TRADEMARK REP. 906, 923 (2006).

⁶⁰ *See Intellectual Property Rights: Trademark*, EMBASSY OF THE UNITED STATES: BEIJING, CHINA, <http://beijing.usembassy-china.org.cn/iptrade.html> (last visited Dec. 12, 2012).

⁶¹ *See* MARTIN K. DIMITROV, PIRACY AND THE STATE: THE POLITICS OF INTELLECTUAL PROPERTY RIGHTS IN CHINA 101 (2009).

⁶² *See id.*

⁶³ *See id.* at 101–02. Although the basic people’s courts, located at the county or district level, are not at the bottom of the judicial system, they “are at greatest risk of having unqualified judges.” *Id.* at 97–98.

⁶⁴ *See id.* at 101.

⁶⁵ *See id.* at 103. Because the judges are usually younger they “may be less ideological and dogmatic in their interpretation of the law than their older, less qualified colleagues sitting in the ordinary courts of law.” *Id.*

⁶⁶ Interestingly, Hennessy has chosen to do just this and has filed a massive counterfeiting civil litigation suit naming over 600 local liquor distributors and shop owners in an effort to create their own deterrence. *See Hennessy, supra* note 29. Hennessy does not face an easy battle; many of the defendants are fighting back. *See id.*

ready an over-abundance of IP enforcement in China.⁶⁷ China's difficulties in enforcing IPRs do not stem from a lack of resources—because there is a high volume of enforcement in China—but from a lack of *quality* enforcement mechanisms.⁶⁸ Streamlining the quality of enforcement requires unification of Chinese enforcement tactics, an effort that the Chinese government has already taken up.⁶⁹ Yet, enforcement, as it stands now, is still too uncoordinated to produce any meaningful results for the victims of wine counterfeiting.

There are too many government branches authorized to provide enforcement and not enough coordination between them, which has allowed counterfeiting to continue largely unchecked.⁷⁰ Currently, there are four separate institutional branches of government that are authorized to enforce IPRs (this style of enforcement will be referred to as agency-style enforcement or agency-enforcement),⁷¹ but there is no centralized policy about which method to use in a given situation.⁷² This lack of overarching authority in the area of IPR enforcement creates ambiguities among the various branches of government authorized to police counterfeiters.⁷³ The Chinese government has recently acknowledged as much in a Circular on IP infringement, which discusses, in detail, the desire for increased unification across government agencies empowered to enforce IPRs as well as increased transparency between these agencies.⁷⁴

Due to the absence of centralized oversight, counterfeiting has become a way of life for entire towns and villages, making the counterfeit industry incredibly difficult to eradicate through agency-style enforcement.⁷⁵ To illustrate, in order to have counterfeit goods seized by the government, victims of IPR in-

⁶⁷ See DIMITROV, *supra* note 61, at 5.

⁶⁸ See *id.*

⁶⁹ See USTR *Special 301 Report Highlights the Significant Global Challenges Facing the Copyright Industries*, INT'L INTELL. PROP. ALLIANCE, 2 (May 2, 2012), <http://www.iipa.com/pdf/IIPAReleaseOnUSTRSpecial301Report050211.pdf> [hereinafter *USTR Special 301 Report*].

⁷⁰ There are four separate institutional branches that are authorized to enforce property rights: civil courts, administrative agencies, criminal law, and customs. See DIMITROV, *supra* note 61, at 6. Within those four agencies, there are three different categories of enforcement: judicial, routine (three types), and campaign-style. See *id.* at 12. The Chinese national government itself has acknowledged that there is not enough coordination between these various branches. See State Council Circular, *supra* note 23, art. 3.

⁷¹ See DIMITROV, *supra* note 61, at 6.

⁷² See *id.* at 10.

⁷³ See *id.*

⁷⁴ See State Council Circular, *supra* note 23, art. 3.

⁷⁵ See DIMITROV, *supra* note 61, at 4.

fringement must pay independent investigators to search out the counterfeiters.⁷⁶ The investigators must then bribe official agencies to conduct raids, but the government agencies frequently sell the counterfeit goods right back to the counterfeiters.⁷⁷ The official agencies tend to develop personal relationships with certain investigatory teams, making it very difficult for an aggrieved counterfeiting victim to work with the agency of his or her choice.⁷⁸ In trademark-related cases, Chinese enforcement agencies frequently fail to eradicate the production facility that is manufacturing the counterfeit goods.⁷⁹ This is partly due to the fact that the agency receives bribes from both the counterfeiter and the victimized corporation seeking enforcement.⁸⁰ Frequently, the enforcement agencies try to keep information regarding the raid a secret from the foreign IPR holder, which further disenfranchises the counterfeiting victim.⁸¹

Another problem plaguing enforcement efforts is the uneven nature of enforcement across China. Some regions are more ready, willing, and able to enforce IPRs than others.⁸² Often this is due to FDI, a powerful force throughout China.⁸³ However, FDI is distributed unevenly across China and is typically clustered in certain regions.⁸⁴ Regions that tend to have a higher percentage of FDI in the local economy also tend to respond with more alacrity to foreign demands for IPR enforcement.⁸⁵ Nonetheless, this does not necessarily mean that the enforcement is of a better quality.⁸⁶ Furthermore, the local government

⁷⁶ See *id.* at 3.

⁷⁷ See *id.*

⁷⁸ See *id.*

⁷⁹ See *id.* at 187. Agency enforcers may require a bribe before they are willing to go after the counterfeiter's factory. See *id.*

⁸⁰ See DIMITROV, *supra* note 61, at 186.

⁸¹ See *id.* at 187. The counterfeit goods are not often seized. See *id.*

⁸² See Michael Punke, Ambassador, U.S. Permanent Representative to the WTO, Statement at Geneva: Trade Policy Review of the People's Republic of China (June 12, 2012), available at <http://geneva.usmission.gov/2012/06/12/u-s-statement-on-the-trade-policy-review-of-china/>.

⁸³ See DIMITROV, *supra* note 61, at 57. "China's record of absorption of FDI is impressive . . . Over three decades, China has been transformed from a country that was closed off to foreign capital into one of the top three recipients of FDI in the world." *Id.*

⁸⁴ See *id.* However, because data is typically gathered at the national-level, it is not always clear to what extent a particular region relies on FDI. See *id.*

⁸⁵ See *id.* The uneven distribution in China of FDI is responsible for creating this difference in enforcement. See *id.*

⁸⁶ See *id.* at 59. "[R]oughly half of China's thirty-one provinces provide no enforcement for foreign IPR." *Id.*

agencies that do provide enforcement may first require bribes,⁸⁷ which very likely presents a conflict for some American corporations because the Foreign Corrupt Practices Act (FCPA) provides only a narrow administrative exception for payments to foreign officials.⁸⁸ Therefore, the lack of regularity in enforcement across China is yet another factor that weighs against its reliability in protecting IPRs.

Agency enforcement, as it currently stands, is a vicious cycle that is too uncoordinated to provide any real benefits to wine counterfeiting victims, but the new Chinese initiatives to increase transparency and coordination are a step in the right direction.⁸⁹ Unfortunately, the USTR recently confirmed China's continued failure to properly enforce IPRs in its Special 301 Report.⁹⁰ The Report states that "[a] wide spectrum of U.S. rights holders reports serious obstacles to effective protection and enforcement of all forms of IPR in China, including . . . trademarks."⁹¹

IV. CHINESE LAWS THAT REGULATE WINE AND WINE COUNTERFEITERS

A. *Overview: Circulars—How the Chinese State Plans to Combat Counterfeiting*

On May 15, 2012, the General Office of the State Council released a Circular (State Council Circular) regarding IP infringement and the production and sale of substandard and counterfeited goods.⁹² The introductory remarks emphasize that in combating IP infringement and counterfeiting, "criminal and

⁸⁷ See *id.*

⁸⁸ See Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1(b) (2006). "[P]ayment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official" is not prohibited by the Foreign Corrupt Practices Act (FCPA). *Id.* Whether or not the payment is legal under the written laws of the country is an affirmative defense. See *id.* § 78dd-1(c). The FCPA applies to US corporations that issue securities on a national securities exchange, and their domestic concerns, and to any agent acting on their behalf. See *id.* §§ 78dd-1–78dd-3.

⁸⁹ See USTR *Special 301 Report*, *supra* note 69. Although China implemented a special campaign to combat IP infringement in 2010, it has not managed to face the problem head on, and IP infringement remains a serious concern. See *id.*; see also Kirk, *supra* note 3, at 27 (stating that China's Special IPR Enforcement Campaign had managed to produce some limited positive results in IPR protection).

⁹⁰ See Kirk, *supra* note 3, at 26.

⁹¹ *Id.*

⁹² See generally State Council Circular, *supra* note 23.

judicial enforcement must be enhanced . . . [and] relevant infrastructure must be strengthened”⁹³ The State Council Circular goes on to call for “well-targeted efforts” to enhance trademark protection.⁹⁴

To improve protection for trademarks, the State Council Circular states that “well-known trademarks and foreign-related trademarks will be given priority”⁹⁵ in the crimes of “counterfeiting registered trademarks[,] . . . [i]llegally printing & manufacturing, surprinting and selling trademarks and other logos[, and] . . . [f]raudulently copying well-known trademarks, including copying the name, packaging and decoration unique to such well-known trademarks”⁹⁶ Additionally, the State Council Circular provides for increased efforts to detect counterfeited imports and exports by increasing the frequency and intensity of investigations.⁹⁷ The investigations will target counterfeit imports and exports as well as fraudulently obtained inspection certificates and certificates of origin.⁹⁸ Depending on the interpretation of “agricultural supplies,” the following provision may prove quite important for foreign victims of wine counterfeiting in China. The State Council Circular states that enforcement efforts will be stepped up by monitoring both:

[P]roducers and distributors of agricultural supplies; closing down producers and distributors of counterfeit and substandard agricultural supplies involving infringements; intensifying the supervision and inspection of wholesale markets, entrepôts, distribution outlets, logistical distribution centers and rural peddlers of agricultural supplies; enhancing the quality and authenticity supervision and sampling of agricultural supplies; tracing and punishing the producers and distributors of counterfeit and substandard agricultural supplies; cracking down on online distribution of counterfeit and substandard agricultural supplies involving infringements.⁹⁹

Further on, the State Council Circular separately addresses counterfeit GIs.¹⁰⁰ It calls for increased “post-registration supervision of geographical indications . . . [a crack] down on the violations and offenses of falsifying and usurping geographical indications or using such indications in excess of the allowed scope,”¹⁰¹ and for heightened punishments for both counterfeiting crimes

⁹³ *Id.* preamble

⁹⁴ *Id.*

⁹⁵ *Id.* art. 1(1).

⁹⁶ *Id.*

⁹⁷ *Id.* art. 1(5).

⁹⁸ State Council Circular, *supra* note 23, art. 1(5).

⁹⁹ *Id.* art. 1(7).

¹⁰⁰ *See id.* art. 1(9).

¹⁰¹ *Id.*

and the crime of infringement on another's right to use a particular indication exclusively. This suggests that China is serious about addressing counterfeit wine.

After laying out the scope and general plan to further combat IP counterfeiting, the State Council Circular provides some mechanisms to improve how counterfeits are detected and to better deter similar offenses. The first effort is to increase the frequency of investigations by launching "quarterly targeted operations."¹⁰² The administrative enforcement agencies' transfer of cases for criminal prosecution and the police forces' acceptance of such cases will be more clearly supervised.¹⁰³ Additionally, the Chinese government is encouraging administrative agencies to coordinate with their respective criminal justice departments.¹⁰⁴

B. Trademark Law

Article 3 of the Chinese Trademark Law states that "[r]egistered trademarks refer to trademarks that have been approved and registered by the Trademark Office, including goods marks, service marks, collective marks and certification marks."¹⁰⁵ Any individual who has successfully registered a trademark "shall enjoy an exclusive right to use the trademark . . ."¹⁰⁶ The Trademark Law provides definitions for several different kinds of marks, including a collective mark and a certification mark.¹⁰⁷ A collective mark is "a mark registered in the name of a group, association, or any other organization and used in business by its members to indicate membership."¹⁰⁸ A certification mark "refers to a mark which is owned by an organization that exercises supervision over a particular product or service and which is used to indicate that third-party goods or services meet certain standards pertaining to place of origin, raw materials, mode of manufacture, quality, or other characteristics."¹⁰⁹ A GI right is more

¹⁰² See *id.* art. 2(1). Unfortunately, the term "targeted operations" is not defined in the State Council Circular. See generally *id.* Furthermore, it is unclear which agency is being directed by the State Council Circular to launch these quarterly operations. See *id.* art. 2(1). However, it appears that the general thrust is to force government agencies beneath the State Council to initiate investigations four times a year. See *id.*

¹⁰³ See *id.* art. 2(2).

¹⁰⁴ See State Council Circular, *supra* note 23, art. 3(2).

¹⁰⁵ Trademark Law, *supra* note 19, art. 3.

¹⁰⁶ *Id.*

¹⁰⁷ See *id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

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comparable to a certification mark, rather than an ordinary trademark, because both the GI and the certification mark emphasize the region of origin as opposed to a brand name.¹¹⁰

A trademark may be any type of mark, insignia, design, or number as long as it distinguishes the trademarked goods from those of another.¹¹¹ However, “foreign geographical names well-known to the public shall not be used as trademarks, except for geographical names that have other meanings or constitute part of a collective mark or certification mark.”¹¹² A mark that represents only the quality of a good may not be registered as a trademark.¹¹³ When a foreign party has not registered a trademark in China, and “a reproduction, imitation, or translation of [such mark] may cause public confusion and damage the interests of the registrant of the well-known mark,” the offending mark will not be registered as a trademark and any further use will be prohibited.¹¹⁴ Where the foreign party has registered their trademark in China, if the offending good is “different or dissimilar [and] may mislead the public and cause injury to the interests of the registrant of the well-known trademark,” that mark will also be denied registration as a trademark, and its use will be forbidden.¹¹⁵ Determining whether a mark is well-known or not depends on:

[T]he degree of public recognition of the mark in its trading areas; how long the mark has been in use; the duration and extent of advertising and publicity of the mark, and the geographical extent of the trading areas in which the mark is used; the protection of the mark as a well-known trademark, and any other reasons to suggest the mark’s fame.¹¹⁶

C. Administrative Measure on Alcohol Circulation

China’s legal regime for regulating the sale of alcoholic beverages at the national level is an administrative law promulgated by the Ministry of Commerce entitled Measures for the Administration of Liquor Circulation (Liquor

¹¹⁰ See *Fact Sheets: Types of Protection*, INT’L TRADEMARK ASS’N, <http://www.inta.org/TrademarkBasics/FactSheets/Pages/GeographicalIndicationsFactSheet.aspx> (last visited Sept. 14, 2012).

¹¹¹ Trademark Law, *supra* note 19, arts. 8–9.

¹¹² *Id.* art. 10.

¹¹³ See *id.* art. 11. This is because a mark of quality is typically associated with a GI, while a trademark is usually a brand name indicating ownership. TRIPs defines a GI to create a nexus between quality and region of origin. See TRIPs, *supra* note 18, art. 22.1.

¹¹⁴ Trademark Law, *supra* note 19, art. 13.

¹¹⁵ *Id.*

¹¹⁶ *Id.* art. 14.

Circulation).¹¹⁷ The Liquor Circulation is partly intended to protect the “interests of liquor producers, operators and consumers.”¹¹⁸ The term “liquor circulation” is defined to include “business operations like the wholesale, retail and storage and transport of liquor.”¹¹⁹ The scope of the Liquor Circulation includes anyone who “engages in any activity of liquor circulation”¹²⁰ The law requires that there be “[a] system of archival filing of operators as well as a traceability system . . . for liquor circulation.”¹²¹ Article 6 defines a liquor operator as an individual who engages in either the wholesale or retail of liquor.¹²² Within 60 days of obtaining a business license, a liquor operator must then register with the department of commerce.¹²³ The Liquor Circulation provides step-by-step procedures for how to make an archival filing and for how to register as a liquor operator as well as the duties of the department of commerce in accepting that registration.¹²⁴

In Article 12, the Liquor Circulation states that “[t]he liquor operator shall not forge, alter, rent, lend, transfer, purchase or sell or cheat for the Registration Form for Liquor Circulation Archival Filing.”¹²⁵ Article 13 provides that “[t]he relevant state standards or industrial standards shall be implemented according to law in the business operations of liquor such as wholesale, retail and storage and transport.”¹²⁶ When a liquor operator engages in the wholesale of liquor, Article 14 requires that the liquor operator fill out certain “Attached Documents” that should remain with the goods from the point at which the goods “leave the factory to the point of sales terminal.”¹²⁷ However, the Liquor Circulation fails to define the term “sales terminal.”¹²⁸ The Liquor Circulation

¹¹⁷ See generally Measures for the Administration of Liquor Circulation, (promulgated by the Ministry of Commerce, Nov. 7, 2005, effective Jan. 1, 2006) 2006 China Law Lexis 8057 (China) [hereinafter Liquor Circulation].

¹¹⁸ *Id.* art. 1.

¹¹⁹ *Id.* art. 2.

¹²⁰ *Id.* art. 3.

¹²¹ *Id.* art. 4.

¹²² See *id.* art. 6. Article 6 states that “An entity or individual that engages in the wholesale or retail of liquor (herein after referred to in general as “liquor operator”) shall, within 60 days as of acquiring a business license, make the archival filing and registration formalities in the competent department of commerce” *Id.*

¹²³ See Liquor Circulation, *supra* note 117, art. 6.

¹²⁴ See *id.* art. 7–11.

¹²⁵ *Id.* art. 12.

¹²⁶ *Id.* art. 13.

¹²⁷ *Id.* art. 14.

¹²⁸ See *id.* arts. 13–15.

does explain that the Attached Documents should contain information on the selling entity, the purchaser, the date of sale, and a description of the goods, which should include the “name, specification, place of production, batch number of production or production date, quantity and unit.”¹²⁹ Additionally, whenever a liquor operator purchases liquor, he/she must obtain a copy of the supplier’s “business license, sanitation license, production license (limited to producers), registration form,” as well as the certificate of quality inspection, the Attached Documents, and, if the liquor is imported, “the photocopy of the Sanitation Certificate of Imported Goods as well as the Examination Certificate of Imported Goods Labels as verified and issued by the state entry-exit inspection and quarantine department.”¹³⁰ Because a liquor operator may include both wholesalers and retailers, it appears that the Liquor Circulation has placed responsibility on the purchasing party to obtain the proper documentation.¹³¹

According to Article 20, it is illegal for anyone to sell, store, or transport any liquor products that are not potable or are harmful if consumed; whose name and place of production have been “forged or altered”; that violate a trademark or other IPR; or that has been tampered with, presented as a superior product, or as a genuine product when it is in fact inferior or fake.¹³² Under Article 22, the Department of Commerce may only take random samples of liquor when they have received either a tip-off or have relevant evidence.¹³³ The Department of Commerce is also supposed to implement a monitoring system for the circulation process.¹³⁴

Articles 27 through 33 address the legal liabilities of violations of certain Articles in the Liquor Circulation.¹³⁵ Relevant here are the liabilities associated with violations of Articles 6, 12, 14, 15, 20, and 22. Article 27 states that any individual who violates Article 6 may receive a warning from the Depart-

¹²⁹ Liquor Circulation, *supra* note 117, art. 14.

¹³⁰ *Id.* art. 15.

¹³¹ *See id.* art. 15.

¹³² *Id.* art. 20.

¹³³ *See id.* art. 22. Article 22 states:

The competent department of commerce shall, when carrying out supervision and administration, produce the effective certificate, and the relevant law enforcers shall be no less than 2 persons. Under circumstances where any relevant evidence is held or where any tip-off is received, the law enforcers may consult the account or take samples randomly. In the case of samples taking, the effective certificate shall be shown to the party concerned.

Id.

¹³⁴ *See id.* art. 23.

¹³⁵ *See* Liquor Circulation, *supra* note 117, arts. 27–33.

ment of Commerce accompanied by an order to correct the violation within a certain time frame.¹³⁶ If a liquor operator in violation fails to correct the violation, the Department may impose a fine on the operator of at least RMB 2,000 (roughly \$316 U.S.).¹³⁷ Any individual who violates Article 12 may be fined at least RMB 10,000 (roughly \$1,583 U.S.), depending on the circumstances.¹³⁸ If the violator's actions constitute a crime, then he or she may also be subject to corresponding criminal liabilities.¹³⁹ A violation of Articles 14 or 15 may also result in a warning with a correction period; however, if the violation is not cured within that time period, a fine of at least RMB 5,000 (roughly \$791 U.S.) may be imposed.¹⁴⁰ When Article 20 is violated, the Department of Commerce must seize the offending goods and impose a fine of at least RMB 30,000 (roughly \$4,750 U.S.) depending on the circumstances.¹⁴¹ Any party that "infringes on the rights to the exclusive use of trademark of other parties shall be transferred to the administrative department for industry and commerce for handling in accordance with the law."¹⁴² If a crime has been committed, the violator must also face criminal liability.¹⁴³ A breach of Article 22 may result in a warning, an order to cure, and, if the circumstances are serious, a fine of at least RMB 10,000 (roughly \$1,583 U.S.).¹⁴⁴

D. Criminal Law

Criminal law in China is codified in the Criminal Law of the People's Republic of China ("Chinese Criminal Law").¹⁴⁵ There are several crimes in the Chinese Criminal Law that could be triggered by wine counterfeiting. These include trademark related crimes codified in Article 213, which criminalizes counterfeiting registered trademarks; Article 214, which deals with forging a registered trademark; and Article 215, which makes it illegal to manufacture or

¹³⁶ *See id.* art. 27.

¹³⁷ *See id.*

¹³⁸ *See id.*

¹³⁹ *See id.* There are several criminal penalties for trademark infringement-related crimes. These are discussed in the following section.

¹⁴⁰ *See id.* art. 28.

¹⁴¹ *See* Liquor Circulation, *supra* note 117, art. 31.

¹⁴² *Id.*

¹⁴³ *See id.*

¹⁴⁴ *See id.* art. 32.

¹⁴⁵ *See generally* Criminal Law, *supra* note 20.

sell a registered trademark without the owner's knowledge of permission.¹⁴⁶ Article 140 sets forth the crime of passing-off fake, imitation, or shoddy goods as genuine or of a higher quality.¹⁴⁷ Whether or not an offense is deemed to be a crime or an administrative violation usually depends on the amount of money the counterfeiter made from selling fake goods.¹⁴⁸ All of the codifications of these crimes include both the elements of the crime and provisions for criminal punishment as long as the acts are of a serious nature.¹⁴⁹ For a criminal conviction to result from a violation of Articles 213 and 215, the only threshold element that needs to be met is the serious circumstances requirement,¹⁵⁰ and for Article 214, the only threshold requirement is a relatively large amount of sales.¹⁵¹

Article 213 defines the crime of trademark counterfeiting as the use, “without permission from the owner of a registered trademark . . . [of] a trademark which is identical with the registered trademark on the same kind of commodities”¹⁵² This is significant in that it does not require knowledge on the part of the infringer. However, only “if the circumstances are serious” will the offender receive a criminal punishment, be it either “imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined; if the circumstances are especially serious, the offender shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and shall also be fined.”¹⁵³ The Supreme People's Court and the Supreme People's Procuratorate have officially adopted a legally binding interpretation of the phrase “the circumstances are serious”¹⁵⁴: a finding of which depends on the amount of either the illegal business operation volume being at least RMB

¹⁴⁶ See *id.* arts. 213–15.

¹⁴⁷ See *id.* art. 140.

¹⁴⁸ Joseph Simone, *China—Anti-Counterfeiting—New Challenges and Directions*, EUR. COMTYS. TRADEMARK ASS'N, 3–4 (June 2007), http://www.ecta.org/IMG/pdf/Simone_Text_1_.pdf.

¹⁴⁹ See generally Criminal Law, *supra* note 20.

¹⁵⁰ See IPR Panel Report, *supra* note 25, ¶ 7.453. The WTO Panel determined that Articles 213, 214, and 215 have only one threshold requirement for a criminal conviction. See *id.* Criminal liability only arises “if the circumstances are serious.” *Id.* ¶¶ 7.399, 7.405.

¹⁵¹ See IPR Panel Report, *supra* note 25, ¶¶ 7.403–04, 7.456. The IPR Panel Report provides translations for the Criminal Law that have been mutually agreed upon by both China and the United States in an adversary proceeding. See *id.* ¶ 2.6. Therefore, when available, this article will rely on the IPR Panel Report quotations.

¹⁵² *Id.* ¶ 7.399.

¹⁵³ *Id.*

¹⁵⁴ *Id.* ¶¶ 7.400, 7.421–24.

50,000 (roughly \$7,868 U.S.), or the amount of illegal gains amounting to at least RMB 30,000 (roughly \$4,720 U.S.).¹⁵⁵ The judiciary has also defined “illegal business operation volume” as “the value of the infringing products manufactured, stored, transported or sold during the course of commission of the act of infringing intellectual property rights. The value of the sold infringing products shall be calculated at the actual sale price.”¹⁵⁶ The amount of illegal gains has been interpreted to mean the “amount of profit obtained.”¹⁵⁷

Article 214 differs from Article 213 in that it adds a knowing component.¹⁵⁸ If the offender “sells commodities, knowing that such commodities bear counterfeit registered trademarks, [he] shall, if *the amount of sales is relatively large*,”¹⁵⁹ be either imprisoned for a maximum period of three years or suffer “criminal detention and shall also, or shall only, be fined; if the amount of sales is huge, the offender shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and shall also be fined.”¹⁶⁰ Like Article 213, the phrase “relatively large” has been judicially interpreted to mean a sales volume of at least RMB 50,000 (roughly \$7,868 U.S.).¹⁶¹

Finally, Article 215 imposes criminal liability, if there are serious circumstances,¹⁶² on anyone who “[f]org[es] or, without [] authorization . . . makes representations of [another’s] registered trademarks, or sells representations of another[’s] . . . registered trademark that are forged or made without authorization”¹⁶³ In order for the circumstances to be serious enough to constitute a violation of Article 215, either the Article 213 illegal business volume or illegal gains must have been exceeded, or, alternatively, over 20,000 counterfeit goods must have been forged, manufactured or sold.¹⁶⁴ A violator of Article 215 may

¹⁵⁵ See *id.* ¶ 7.400. Serious circumstances may also be triggered by, “in the case of counterfeiting two or more registered trademarks, the illegal business operation volume of not less than 30,000 Yuan or the amount of illegal gains of not less than 20,000 Yuan; [or] other serious circumstances.” *Id.*

¹⁵⁶ *Id.* ¶ 7.401.

¹⁵⁷ See IPR Panel Report, *supra* note 25, ¶ 7.402.

¹⁵⁸ See Criminal Law, *supra* note 20, art. 214.

¹⁵⁹ IPR Panel Report, *supra* note 25, ¶ 7.403 (emphasis added in the original).

¹⁶⁰ *Id.* ¶ 7.403.

¹⁶¹ See *id.* ¶ 7.404.

¹⁶² See *id.* ¶ 7.405.

¹⁶³ *Id.*

¹⁶⁴ See IPR Panel Report, *supra* note 25, ¶ 7.406. Serious circumstances for Article 215 include:

(1) [F]orging or, without the authorization, making representations of the registered trademarks or selling such representations of not less than 20,000 pieces, or with the *illegal business operation volume* of not less than 50,000 Yuan,

face “imprisonment of not more than three years, criminal detention or public surveillance for the crime of illegally producing or selling illegally made representations of the registered trademark, and shall also, or shall only, be fined.”¹⁶⁵

Article 140 is structured differently than Articles 213, 214, and 215. The various criminal punishments all vary with regards to the amount of money received from selling inferior or faked products. The base crime includes “[a]ny producer or seller who mixes up or adulterates products, passes fake imitations for genuine, sells seconds at best quality price, or passes unqualified products as qualified ones”¹⁶⁶ Prison sentences range from a minimum two-year fixed term, if the illegal gains reach at least RMB 50,000 (roughly \$7,868 U.S.) to a maximum sentence of 15 years to life, if the sales reach at least RMB 2,000,000 (roughly \$314,728 U.S.).¹⁶⁷ The amount of the fine that may be imposed, however, can never be more than 200% of the amount earned from selling the counterfeit goods.¹⁶⁸

or the *amount of illegal gains* of not less than 30,000 Yuan; (2) forging or, without the authorization, making two or more kinds of representations of the registered trademarks or selling such representations of not less than 10,000 *pieces*, or with the *illegal business operation volume* of not less than 30,000 Yuan, or the *amount of illegal gains* of not less than 20,000 Yuan; (3) [or] other serious circumstances.

Id.

¹⁶⁵ *Id.* ¶ 7.405.

¹⁶⁶ Criminal Law, *supra* note 20, art. 140.

¹⁶⁷ *See id.* Article 140 states that:

[A] sale amount of not less than RMB 50,000 and less than RMB 200,000, shall be sentenced to not more than two years of fixed-term imprisonment or criminal detention and may in addition or exclusively be sentenced to a fine of not less than 50 percent but not more than 200 percent of the sale amount; when the sale amount is not less than RMB 200,000 and less than RMB 500,000, shall be sentenced to not less than two years but not more than seven years of fixed-term imprisonment and may in addition be sentenced to a fine of not less than 50 percent but not more than 200 percent of the sale amount; when the sale amount is not less than RMB 500,000 and less than RMB 2,000,000, shall be sentenced to not less than seven years of fixed-term imprisonment and may in addition be sentenced to a fine of not less than 50 percent but not more than 200 percent of the sale amount; when the sale amount is not less than RMB 2,000,000, shall be sentenced to fifteen years of fixed-term imprisonment or life imprisonment and may in addition be sentenced to a fine of not less than 50 percent but not more than 200 percent of the sale amount or confiscation of property.

Id.

¹⁶⁸ *See id.*

There are nuances that are unique to each of the above crimes, and the precise wording of each crime has proven to be quite decisive in criminal cases. Refilling wine bottles with inferior or adulterated wine may implicate several different crimes depending on the circumstances.¹⁶⁹ Refilling genuine bottles with non-original wine may constitute either trademark counterfeiting under Article 213 or the crime of producing and/or selling inferior goods under Article 140.¹⁷⁰ If the labels and corks used are also genuine, then it technically ceases to be a case of trademark infringement and instead becomes the crime of passing off shoddy goods.¹⁷¹ If the labels or corks have been replaced with fake imitations, then it is technically a case of trademark counterfeiting.¹⁷²

E. Case Law for Wine Counterfeiting Victims

Chinese courts have been expansively interpreting the definition of trademark counterfeiting to yield positive results for victims of liquor and wine counterfeiting. Perhaps one of the most illustrative examples of criminal wine trademark counterfeiting involves a case where the counterfeiter Liu Zhaolong reused genuine Scotch whisky and French cognac bottles to sell imitation products.¹⁷³ Zhaolong bought genuine empty scotch and cognac bottles and then resold those bottles with manufactured imitation liquors.¹⁷⁴ Occasionally, Zhaolong would reprint and affix fake labels when the original was beyond use.¹⁷⁵ Additionally, for the Johnny Walker bottles of scotch that Zhaolong counterfeited, he had to reproduce new caps.¹⁷⁶ Zhaolong was eventually apprehended and tried at the Beijing Daxing District People's Court.¹⁷⁷ In a progressive decision, the Beijing Court found that Zhaolong had committed the crime of trademark counterfeiting.¹⁷⁸ Zhaolong had manufactured imitation labels and caps in order to resell the liquor bottles as genuine, infringing on the trademark rights of a

¹⁶⁹ See Diana Matthias & Landy Jiang, *Insights into Criminal Convictions for Mark Counterfeiting*, CHINA L. & PRAC., Sept. 2, 2011, available at 2011 WLNR 18879827.

¹⁷⁰ See *id.*

¹⁷¹ See *id.*

¹⁷² See *id.*

¹⁷³ See *id.*

¹⁷⁴ See *id.*

¹⁷⁵ See Matthias & Jiang, *supra* note 169.

¹⁷⁶ See *id.*

¹⁷⁷ See *id.*

¹⁷⁸ See *id.*

variety of different IPR holders.¹⁷⁹ Strictly speaking, some of the labels were not identical to the genuine trademark under Article 213 of the Criminal Law or counterfeit trademarks under Article 214 because they were genuine labels.¹⁸⁰ However, key to the Beijing Court's holding was that Zhaolong sold the trademark labels without the permission of the registered owner.¹⁸¹ Additionally, the Beijing Court noted that Zhaolong also committed the crime of passing off inferior or shoddy goods under Article 140.¹⁸² Because the Beijing Court based its ruling on the notion of unauthorized sales of another's trademark, Zhaolong would have committed trademark counterfeiting even if he had used only authentic labels, bottles, and caps.¹⁸³

Another problem wine makers often encounter in Chinese litigation over trademark infringement involves the registration of English language trademark names, which are then transliterated into Chinese characters by counterfeiters.¹⁸⁴ Often, the translated name is not registered.¹⁸⁵ The famous wine producers, Societe Civile De Chateau Lafite Rothschild (Lafite), encountered this exact problem and sued a Chinese company for using the transliterated Chinese name associated with Lafite to market imitation wine.¹⁸⁶ Lafite prevailed with the court holding that "the Chinese translation corresponding to Lafite [w]as a specific name for a famous commodity," unauthorized use of which constituted trademark infringement.¹⁸⁷ The Court also held that the label was confusingly similar and constituted unfair competition.¹⁸⁸ This narrows the opportunity for legitimate businesses to market copycat products under confusingly similar brands by expanding the reach of trademark protection.¹⁸⁹

¹⁷⁹ See *id.* These included "Rémy Martin, Martell, Hennessy, Royal Salute, Chivas and Johnnie Walker." *Id.*

¹⁸⁰ See Criminal Law, *supra* note 20, arts. 213–14.

¹⁸¹ See Matthias & Jiang, *supra* note 169. This is most likely an expansive definition of Article 215 of the Criminal Law, which provides that the unauthorized sale of another's registered trademark is a crime. See Criminal Law, *supra* note 20, art. 215.

¹⁸² See Matthias & Jiang, *supra* note 169. This is because Zhaolong represented to consumers that the liquor he was selling was of a superior quality when in fact it was inferior. See *id.*

¹⁸³ See *id.*

¹⁸⁴ See *Setting Precedents in IP Law*, *supra* note 17.

¹⁸⁵ See *id.*

¹⁸⁶ See *id.*

¹⁸⁷ *Id.*

¹⁸⁸ See *id.*

¹⁸⁹ See *id.*

V. CHANGES THE UNITED STATES GOVERNMENT IS ADVOCATING

In its most recent Special 301 Report (“Report”), the USTR once again criticized China for failing to properly enforce and protect foreign IPRs.¹⁹⁰ The Report urges changes in enforcement policies, tactics, and trademark legislation.¹⁹¹ The proposed additions to the Trademark Law demonstrate that the United States has begun to look toward the civil law to further the war against domestic Chinese counterfeiters.¹⁹² However, while the United States is still advocating changes to China’s IP laws and the Criminal Law, China’s laws that prohibit counterfeit trademark goods need to penalize more broadly in order to reach routine dubious conduct. The changes the United States is suggesting still reach only a select few individuals who are not generating counterfeit products but are merely facilitating the sale of counterfeit goods.

One of the observations the Report makes is that while enforcement efforts continue to take a back seat, case law that has imposed tort-like notions of responsibility on third parties has had a more positive effect on the counterfeiting scene.¹⁹³ As enforcement efforts tend to vary from region to region, the USTR urges the Chinese national government to better “motivate provincial and local leaders to shut down infringing operations.”¹⁹⁴ Of serious concern are cases where the administrative agencies have purportedly “refused to refer [counterfeiting] cases for criminal prosecution even when thresholds are met.”¹⁹⁵ Another glaring problem continues to be the pirate markets that “serve as wholesalers for counterfeits distributed around the world.”¹⁹⁶ In the area of trademark rights, however, there appears to be a “noticeable reduction in the visibility of counterfeit goods for sale in some of the notorious physical markets.”¹⁹⁷ The USTR theorizes that this success may be due to “steps taken by national and local [Administrations for Industry and Commerce] to target landlords of physical markets as part of a wider effort to promote enforcement”¹⁹⁸ In addi-

¹⁹⁰ See Kirk, *supra* note 3, at 26.

¹⁹¹ See *id.* at 26–30.

¹⁹² See *id.* at 30.

¹⁹³ See *id.*

¹⁹⁴ *Id.* Shenzhen administrative agencies have actually “lowered the criminal case thresholds for bringing cases against optical disk pirates, and those authorities regularly transfer cases for investigation to the Public Security Bureau.” *Id.*

¹⁹⁵ *Id.* Accusations have been leveled against the administrative authorities in Guandong and Fujian. See *id.*

¹⁹⁶ Kirk, *supra* note 3, at 30.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

tion, the USTR has noted the positive effect of case law finding “landlords liable for infringement they knew or should have known was taking place on their premises.”¹⁹⁹ However, because civil court holdings are not precedential, these results are not guaranteed throughout China.²⁰⁰ In an effort to nationalize these case holdings, the United States argues that these court interpretations of the civil law should be incorporated into the forthcoming amendments of the Trademark Law.²⁰¹ The USTR Report does not, however, focus on how those changes should be introduced or what the alterations should look like.²⁰²

In August of 2007, the United States filed a formal request for a WTO Dispute Settlement proceeding with China concerning the matter of IP enforcement.²⁰³ One of the major complaints was that China had essentially decriminalized low-grossing trademark counterfeiting schemes.²⁰⁴ The United States argued that the minimum monetary thresholds that are required to trigger criminal penalties were too low for China to be in compliance with its WTO obligations under the Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPs). TRIPs requires every country to impose a criminal deterrent to willful trademark infringements that occur on a commercial scale.²⁰⁵ The United States argued that the threshold activities were the primary barrier to a successful prosecution of trademark counterfeiting.²⁰⁶ The United States began by pointing out that prosecution of even attempted counterfeiting was stymied by these requirements because “the thresholds rule out criminal liability based on evidence of *actual* infringement.”²⁰⁷ In other words, criminal liability is implicated only if there are provable monetary gains from the counterfeiting scheme, which automatically decriminalizes any counterfeiting operation that has not progressed to the sales stage.

As for how those thresholds can be met, China demonstrated that monetary amounts could be aggregated across several offenders to trigger criminal

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *See id.*

²⁰² *See* Kirk, *supra* note 3, at 26–30.

²⁰³ *See* IPR Panel Report, *supra* note 25, ¶¶ 1.1, .2.

²⁰⁴ *See generally* First Written Submission of the United States, *China—Measures Affecting The Protection and Enforcement of Intellectual Property Rights*, Annex A-2, WT/DS362/R (Jan. 26, 2009) [hereinafter First Written Submission], available at [http://www.worldtradelaw.net/reports/wtopanelsfull/china-iprights\(panel\)\(full\).pdf](http://www.worldtradelaw.net/reports/wtopanelsfull/china-iprights(panel)(full).pdf).

²⁰⁵ *See* TRIPs, *supra* note 18, art. 61; *see also* First Written Submission, *supra* note 204, ¶ 13.

²⁰⁶ *See* IPR Panel Report, *supra* note 25, ¶¶ 7.416–479.

²⁰⁷ *Id.* ¶ 7.433.

convictions.²⁰⁸ China also asserted that the crime of trademark counterfeiting was a continuing crime, and that, therefore, the criminal thresholds could be met by aggregating the value of the counterfeits over the duration of the crime.²⁰⁹ The United States acutely pointed out that under official judicial interpretations, “[a]n administrative penalty for a particular act of infringement excludes that act from the cumulative calculation of the ‘illegal business operation volume’, ‘the amount of illegal gains’, or ‘the amount of sales’ thresholds and, hence, from criminal procedures and penalties.”²¹⁰ Additionally, the illegal business operation volume is determined based on the sales price of the counterfeit, not on the market price of the genuine good.²¹¹ On the other hand, the calculation of illegal business operation volume does allow for aggregation of all an infringer’s counterfeit goods, regardless of location.²¹²

VI. WHY CHANGING THE CIVIL LAWS IS A BETTER APPROACH THAN CHANGING THE CRIMINAL LAWS

Instead of across the board increases to all criminal penalties and lowering all conviction thresholds, changes to particular civil and administrative laws allow a more tailored, industry-specific approach to counterfeit prevention. Wine sellers do not usually rely very much on a brand name to engender consumer loyalty.²¹³ Instead, they depend on the consumer’s knowledge, and the general reputation of the region of origin where the wine was produced.²¹⁴ This interesting situation differentiates wine sellers from all other kinds of trademark IPR holders. It is absolutely paramount for the wine industry to preserve its reputation, and counterfeit wine is a quick way to ruin any wine’s allure, either by degrading a brand name or muting the appeal of wines from an entire re-

²⁰⁸ See *id.* ¶ 7.444.

²⁰⁹ See *id.* ¶ 7.457.

²¹⁰ *Id.* ¶ 7.461.

²¹¹ See *id.* ¶ 7.465–68.

²¹² See IPR Panel Report, *supra* note 25, ¶ 7.464.

²¹³ See Murphy, *supra* note 55, at 1183–86.

²¹⁴ See Ulrich R. Orth et al., *Dimensions of Wine Region Equity and Their Impact on Consumer Preferences*, 14 J. PROD. & BRAND MGMT. 88, 89 (2005); see also Eric Asimov, *Argentina Opens the Tap for Malbec*, N.Y. TIMES, Apr. 27, 2010, <http://www.nytimes.com/2010/04/28/dining/reviews/28wine.html?pagewanted=all>. Argentina has managed to corner the United States market in Malbecs, creating a strong association between the Malbec grape and Argentina itself. See Asimov, *supra* note 214. Malbecs are so popular in the United States precisely because, “their consistent profile is a virtue, especially for people who do not appreciate being surprised or challenged by a wine.” *Id.*

gion.²¹⁵ Consumers may very quickly decide that a regional wine is not to their liking, and the wine industry may not be able to dispel them of their misconception.²¹⁶ Neither the consumer nor the wine-seller may even know the wine was a counterfeit.²¹⁷

Further exacerbating matters for wine imported into China, it is relatively easy for a wine counterfeiter to produce and sell fake wine because they merely have to obtain empty bottles and reuse them.²¹⁸ Often times, trademark infringers are domestic industries hoping to use the reputation of the trademark holder to help sell their own reproduced products.²¹⁹ In the domestic industry situation, the counterfeiter has to actually reproduce the goods themselves.²²⁰ The fact that the wine counterfeiter does not have to re-engineer bottles and labels may suggest that wine counterfeiting is an easier trademark offense to perpetrate. Because the troubles faced by wine sellers are slightly different than those faced by producers of other types of trademarked goods, the wine industry needs a more tailored means of protecting its goods from counterfeiters. In light of this situation, the wine industry does not need a blanket increase in all trademark counterfeiting penalties.

Instead, the best way to target the wine counterfeiting industry is to manipulate civil laws that directly regulate the wine market because the goal, as stated above, is to prevent wine counterfeiting in the most efficient way possible. This is because prevention is more easily accomplished at the administrative level, before the problem even begins. By adding to and refining the existing definitions in the Liquor Circulation, the Chinese government will help avert the production of fake wines. Effective preventative deterrence will make the wine counterfeiting market less accessible, and thereby make it less profitable for the infringer.²²¹ Eliminating the motive to commit the crime is often a better

²¹⁵ See Dunlop, *supra* note 11.

²¹⁶ See *id.*

²¹⁷ See *id.*; see also Pierson, *supra* note 5.

²¹⁸ See, e.g., Pierson, *supra* note 5; see also Dunlop, *supra* note 11.

²¹⁹ See, e.g., Shi Yu-sheng, *Trademark Infringement and Unfair Competition Case Study: Toyota Motors vs. Zhejiang Geely*, CHINA L. & PRAC., Dec. 1, 2003, available at 2003 WLNR 18365942. In the trademark infringement case that was the subject of this study, Toyota sued a new Chinese corporation for producing cars with confusingly similar logos. See *id.* The author of the study remarked that “[t]he focus of the argument in this particular case, as in other trademark cases, is whether the defendant’s logo and that of the plaintiff are similar.” *Id.*

²²⁰ See *id.*

²²¹ Many United States courts have held that effective deterrence depends on removing the monetary incentive to engage in counterfeiting in the first place. See, e.g., Otis Clapp & Son, Inc.

tactic than trying to scare future offenders with more serious criminal punishment.²²² China has been imposing tough criminal penalties since 1992,²²³ but IP infringements have not abated.²²⁴ In effect, maintaining better control over the distribution system and imposing automatic civil penalties will act as a stronger criminal deterrent than heightened criminal penalties, especially in a country still struggling with after-the-fact enforcement issues.

VII. WHAT SHOULD THOSE CHANGES BE

The Liquor Circulation could provide the perfect opportunity to impose civil liability broadly on third-party actors in the marketplace, but instead, it limits civil liability to mostly administrative violations, and what general liability it does impose is not clearly defined.²²⁵ Although there are civil liabilities built into the Liquor Circulation, those liabilities are contingent on a violation of one of the Articles in the Liquor Circulation and do not extend to conduct that is not required or proscribed by the Liquor Circulation.²²⁶ Almost all of the articles in question direct liquor operators to comply with certain administrative regulations, excluding everyone else who is not either a wholesaler or a retailer of liquor.²²⁷ Additionally, many of the Articles regulate activities in which only a liquor operator would engage, such as the permit registration.²²⁸ This means civil liability will tend to attach only to a legitimate wholesaler or retailer.

One of the most visible sources of wine counterfeiting in China comes from third parties who purchase and resell authentic empty wine bottles to counterfeiters.²²⁹ Therefore, it seems logical that the best way to prevent this kind of counterfeiting would be to impose penalties on those parties who resell empty

v. *Filmore Vitamin Co.*, 754 F.2d 738, 744 (7th Cir. 1985) (“The trial court’s primary function is to make violations of the Lanham Act unprofitable to the infringing party.”).

²²² Under the trademark provisions in the United States, courts may not impose fines that are so large as to amount to penalties, reflecting the policy judgment that damages recovered from trademark infringement should be to reduce the profitability of committing the crime. *See id.* at 744–45.

²²³ *See* Paul B. Birden, Jr., *Trademark Protection in China: Trends and Directions*, 18 *LOY. L.A. INT’L & COMP. L.J.* 431, 483–84 (1996). China has executed and imprisoned many individuals for trademark and IP infringements. *See id.*

²²⁴ *See* Kirk, *supra* note 3, at 26.

²²⁵ *See generally* Liquor Circulation, *supra* note 117.

²²⁶ *See generally id.*

²²⁷ *See generally id.*

²²⁸ *See id.* art. 6.

²²⁹ *See, e.g.*, Dunlop, *supra* note 11; *see also* Pierson, *supra* note 5.

bottles. This notion is similar to the imposition of liability on landlords who have knowledge that counterfeit merchandise is being sold on their property.²³⁰ Here, in the case of wine counterfeiting, liability should also be in the form of civil penalties, but it should be imposed through the Liquor Circulation and not the Trademark Law as advocated by the United States.²³¹ This can be accomplished by making several amendments to both the structure of the law and the definitions.

The current structure of the Liquor Circulation has a mechanism for imposing civil liability,²³² but the Liquor Circulation refers some violators to enforcement agencies when it should automatically impose civil fines.²³³ For example, a violation of Article 20 includes passing-off inferior goods as superior ones and infringing on the trademark rights of another.²³⁴ The Liquor Circulation is currently worded such that any individual who violates Article 20 may either be dealt with by the Administrative Department for Industry and Commerce, if the infringement does not amount to a crime under the Trademark law, or, by the Criminal Justice Department, if the infringement meets the criminal threshold levels.²³⁵ This civil provision for liability essentially separates the criminal wine counterfeiters from those who are dealt with through the agency enforcement system. Instead of sending non-criminal infringers to the Administrative Department for Industry and Commerce for discretionary punishment, the Liquor Circulation should automatically impose civil fines on individuals who violate any provision of Article 20, if their actions do not qualify for criminal penalties.

Another method of imposing civil liability through the Liquor Circulation would be to provide more aggressive definitions for the terms used throughout the document. This includes terms like “liquor operator,” “sales terminal,” “liquor products,” and “trademark infringement.” All of these terms are either poorly defined or not defined at all.²³⁶ For instance, it is entirely unclear if a “sales terminal” is a physical location or an expression meant to indicate the final sale of a product. Because the sales terminal is the last point at which the Attached Documents must accompany the liquor products,²³⁷ it is im-

²³⁰ See Kirk, *supra* note 3, at 30.

²³¹ See *id.*

²³² See Liquor Circulation, *supra* note 117, arts. 27–33.

²³³ See *id.* art. 20.

²³⁴ See *id.*

²³⁵ See *id.* art. 31.

²³⁶ See *id.* arts. 27–33.

²³⁷ See *id.* art. 14.

portant to know when the documentation requirement ceases. The term should be defined as the final sale to the end consumer, as opposed to a physical location or particular type of retailer. Similarly, the term “liquor products” is not defined.²³⁸ If that term is construed to include only liquor, and not the bottles, stoppers, or labels, then it will be more difficult to accumulate evidence to prove counterfeiting occurred. Therefore, “liquor products” should be defined broadly to include the liquor itself, as well as the bottle, the stopper, and the label. Violators who reuse or replicate empty wine bottles and labels would be subsumed under this definition. The term “liquor operator” should not be used at all, as it includes both wholesalers and retailers. This term should be eliminated in favor of promoting clarity and should be replaced with the actual words wholesaler or retailer, or both. Ultimately, the retailers purchase the wines, whether counterfeit or not,²³⁹ so the onus should be on them to confirm that what they are buying is not counterfeit. This can best be achieved by adding a blanket imposition of civil liability on third parties.

Curiously, trademark infringement is also not defined in the Liquor Circulation, even though Article 20 makes it illegal to “infringe on another’s exclusive trademark.”²⁴⁰ Trademark infringement should be defined liberally, in accordance with the Beijing Daxing District People’s Court’s construction of the offense, so that more conduct is made illegal by the Liquor Circulation.²⁴¹ The Beijing Court’s interpretation of trademark infringement allows for the robust application of at least the principle of Article 215 of the Criminal Law to the bottle-selling industry, if not the criminal sanctions an actual violation would entail.²⁴² Triggering Article 215 requires either an illegal business volume of over RMB 50,000 (roughly \$7,868 U.S.), illegal gains of RMB 30,000 (roughly \$4,720 U.S.), or the sale of over 20,000 counterfeit goods.²⁴³ This makes incurring criminal penalties for small time counterfeiters unlikely.²⁴⁴

Although Article 20 of the Liquor Circulation makes it illegal for anyone to infringe on a trademark, sell shoddy imitation goods, manufacture and

²³⁸ See Liquor Circulation, *supra* note 117, arts. 13–20.

²³⁹ See *Hennessy*, *supra* note 29. Hennessy brought legal action against shop owners and liquor distributors, bringing the fight to their front doors in an effort to scare counterfeiters from further infringement. See *id.*

²⁴⁰ See Liquor Circulation, *supra* note 117, art. 20.

²⁴¹ See Matthias & Jiang, *supra* note 169.

²⁴² See *id.*; see also Criminal Law, *supra* note 20, art. 215.

²⁴³ See IPR Panel Report, *supra* note 25, ¶ 7.406; see also Criminal Law, *supra* note 20, art. 215.

²⁴⁴ See *Hennessy*, *supra* note 29. Hennessy is expending much time and money to bring civil legal action against small-time shop owners and liquor suppliers in an effort to create their own deterrent effect. See *id.*

sell harmful liquor-imitation substances, or misrepresent production locations, this catches only individuals who actually do those things.²⁴⁵ Because this may not encompass all third parties who facilitate counterfeiting, the Liquor Circulation should be amended to impose civil liability through a catch-all provision. Individuals essential to the counterfeiting process may not be committing any of the above violations as defined by the Criminal Law, but it is very likely that many of them know or should know that their actions enable others to manufacture and sell counterfeit goods.²⁴⁶ Therefore, to most effectively combat wine counterfeiting, a knowledge provision should be added to the Liquor Circulation, expanding liability to parties who knew or should have known that their actions were *facilitating* Article 20 violations. To really hammer down the seriousness of this offense, liability should be imposed on as many infringing parties as possible.

A particular group of counterfeiters that should be caught under Article 215 of the Chinese Criminal Law, is currently escaping liability due to the threshold provisions. Individuals that resell authentic empty wine bottles that bear registered trademark labels should be found civilly liable, regardless of knowledge, under the Liquor Circulation law for violating Article 215 of the Criminal Law, which makes it illegal to “[f]org[e] or, without [] authorization . . . make[] representations of [another’s] registered trademarks, or sell[] representations of another[’s] . . . registered trademark that are forged or made without authorization”²⁴⁷ This is because they are selling the actual genuine bottle and label without the trademark owner’s permission. Under Chinese case law, as in Liu Zhaolong’s case, this activity could easily be considered an infringement of a registered trademark under Article 215. The Beijing Court held that even if Liu Zhaolong had sold all authentic bottles and labels he would have been committing trademark infringement.²⁴⁸ The Beijing Court essentially construed the trademark registration to include the bottle and cap in addition to the actual label.²⁴⁹ Under the Beijing Court’s holding—even though it is not precedential—there seems to be a movement toward treating these types of acts as trademark infringements.²⁵⁰ Therefore, it is not too much of a leap to find that

²⁴⁵ See Liquor Circulation, *supra* note 117, art. 20.

²⁴⁶ See *Hennessy*, *supra* note 29. The fact that Hennessy is going after local merchants who may or may not know they are selling fake goods is a significant indication that this is a problem. See *id.*

²⁴⁷ IPR Panel Report, *supra* note 25, ¶ 7.405.

²⁴⁸ See Matthias & Jiang, *supra* note 169.

²⁴⁹ See *id.*

²⁵⁰ See Frank Yu & Li Xiao, *Lessons to be Learned from Jie Bai Na Trademark Saga*, CHINA L. & PRAC., Nov. 10, 2010, available at 2010 WLNR 23709885.

these acts qualify as trademark infringement, and, precisely because the sellers cannot be held criminally liable, they should be held civilly liable. Then, if the sellers are convicted of a crime, those civil penalties may be netted out against any criminal fines they may owe. The automatic liability of these small-time counterfeiters would ease the burden on victims of wine counterfeiting from having to produce massive amounts of evidence to prove knowledge.

VIII. CONCLUSION

Counterfeit wine in China needs to be prevented more than it needs to be counteracted. The reputation of entire wine-producing regions may be at stake, not just brand names. Because the Chinese criminal law is really a means to punish those who have already transgressed,²⁵¹ it is up to the administrative law to provide a more preventative cure. Additionally, although Chinese criminal laws provide an array of sentencing options that apply to counterfeit wine, triggering those punishments for small-scale counterfeiting operations is a difficult endeavor.²⁵² Because the Liquor Circulation provides a mechanism for imposing automatic penalties on trademark infringers and because the Chinese government is trying to find a way to control rampant IPR abuses domestically, the Chinese government should consider using the Liquor Circulation as a way to police the counterfeit wine industry. By adding more specific definitions to the Liquor Circulation, the Chinese government will be able to monitor and hold small-time counterfeiters accountable for their actions, including those reselling genuine wine bottles. Additionally, having more automatic penalties that are imposed without discretion will allow victims of wine counterfeiting to avoid administrative enforcement regimes as well as massive civil litigation efforts. Instead of relying on criminal liability, these changes to the Liquor Circulation encourage a prophylactic approach by tightening and targeting the civil laws, and increase the likelihood that small time infringers will actually be penalized for their violations.

²⁵¹ See First Written Submission, *supra* note 204, arts. 38–44 (discussing how attempted counterfeiting is a difficult crime to prove because of the way the elements are written).

²⁵² See *id.*