

Made in China: How Chinese Counterfeits are Creating a National Security Nightmare for the United States

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INTRODUCTION

China's long and sordid history of corruption and ineffectual enforcement in the field of intellectual property has been extensively documented.¹ With respect to the theft of intellectual property rights, Myron A. Brilliant, vice president for Asia at the U.S. Chamber of Commerce, declared China public enemy number one,² and the chairman of LVMH Moët Hennessy Louis Vuitton, Bernard Arnault, has somberly reflected that China is an especially big headache.³ China is the world's principal platform of production and export in the counterfeit trade.⁴ In 2008, eighty-one people across the United States died as a result of a Chinese-made counterfeit version of the drug heparin.⁵ In 2005, 69% of infringing goods seized at the U.S. border were made in China.⁶ Their total value was \$87.2 million.⁷ China's share of infringing goods seized at the border is ten times greater than that of any other U.S.

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¹ See Amy M. Bunker, *Deadly Dose: Counterfeit Pharmaceuticals, Intellectual Property and Human Health*, 89 J. PAT. & TRADEMARK OFF. SOC'Y 493 (2007); Jane K. Winn & Song Yuping, *Can China Promote Electronic Commerce Through Law Reform? Some Preliminary Case Study Evidence*, 20 COLUM. J. ASIAN L. 415, 446 (2007); Walt Bogdanich & Jake Hooker, *From China to Panama, a Trail of Poisoned Medicine*, N.Y. TIMES, May 6, 2007, at 1.

² Elizabeth Becker, *Chamber of Commerce Asks U.S. to Crack Down on Chinese Copyright Violations*, N.Y. TIMES, Feb. 10, 2005, at C3 [hereinafter Becker, *Chamber of Commerce*].

³ Andrew Yeh, *Investing in China: The Complex Trade in Luxury Fakes*, FIN. TIMES OF ASIA, Apr. 19, 2006, at 10.

⁴ *Id.*

⁵ Editorial, *The Frightening Heparin Case*, N.Y. TIMES, Apr. 28, 2008, at A22 [hereinafter *Heparin Case*]; Gardiner Harris, *U.S. Identifies Tainted Heparin in 11 Countries*, N.Y. TIMES, Apr. 22, 2008, at A1 [hereinafter Harris, *Tainted Heparin*].

⁶ U.S. TRADE REPRESENTATIVE, 2006 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 78 (2006), available at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/asset_upload_file688_10223.pdf. [hereinafter USTR REPORT].

⁷ *Id.*

trading partner.⁸ Chinese crime groups play a key role in this smuggling enterprise.⁹

The economic impact of intellectual property theft on American businesses has been laboriously documented¹⁰ and is estimated to be approximately \$250 billion annually.¹¹ However, the national security threat posed by this deluge of counterfeits, especially those from China, remains largely overlooked.

This Note employs a broad definition of national security. In the Immigration and Nationality Act (“INA”), national security is defined as “national defense, foreign relations, or economic interests of the United States.”¹² While economic interests are not traditionally included in definitions of national security, it is significant in light of the danger counterfeits pose to the U.S. Congress also has recognized this broad interpretation of national security. For example, when drafting the statute that created the Committee on Foreign Investment in the United States (“CFIUS”), Congress chose not to define the term national security. Though CFIUS is tasked with reviewing the national security implications of Foreign Direct Investment in the United States,¹³ the Committee purposefully left the meaning of national security undefined so that the term could be interpreted broadly.

This Note exposes the failures of the executive branch to address and monitor national security threats caused by the Chinese counterfeit industry, as well as the weakness of the statutory tools in addressing this problem. This Note recommends several statutory changes aimed at monitoring and addressing the national security threats posed by counterfeit goods. The general provisions which facilitate U.S.-China relations should provide for strict and

⁸ *Id.*

⁹ Julia Preston, *U.S. Charges 51 with Chinatown Smuggling*, N.Y. TIMES, Nov. 13, 2004, at B2.

¹⁰ *See generally* U.S. Dep’t of Commerce, <http://www.stopfakes.gov> (last visited Oct. 20, 2008) (chronicling seminars, news and reports concerning infringement issues).

¹¹ Carlos M. Gutierrez, U.S. Sec’y of Commerce, Remarks at AdvaMed Annual Conference in Washington, D.C. (Oct. 2, 2007), *available at* http://www.commerce.gov/NewsRoom/SecretarySpeeches/PROD01_004164.

¹² Jennifer Chacon, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 29 CONN. L. REV. 1827, 1830 (2007).

¹³ *See infra* notes 224–28 and accompanying text.

detailed monitoring of China's enforcement of its intellectual property laws. Potential national security threats caused by counterfeits should be analyzed in the § 6951 reports to Congress,¹⁴ and in hearings before the United States–China Economic and Security Review Commission. Finally, Congress should make use of the Committee on Foreign Investment in the United States to monitor threats posed by intellectual property theft.

Section I highlights the four areas of national security left vulnerable by a failure to address the trade in counterfeits stemming from China: consumer safety, economic safety, the financing of criminal organizations and terror groups and the proliferation of sensitive technologies. Section II discusses China's response to the production of counterfeits within its borders, and its history of enforcement of intellectual property laws. Finally, Section III offers prescriptions.

I. FOUR AREAS OF U.S. NATIONAL SECURITY LEFT VULNERABLE BY CHINA'S TRADE IN COUNTERFEITS

The United States faces a deluge of counterfeit products, the majority of which come from China. It is estimated that since 2003 about two-thirds of intellectual property–related seizures at the U.S. border have been goods made in China.¹⁵ Consumer safety, economic safety, the financing of criminal organizations or terrorist groups and the transfer of sensitive technology to foreign groups are four areas in which U.S. national security can be compromised by counterfeits.

A. *Consumer Safety*

Counterfeit goods pose an enormous risk to consumers, with the latest incident of counterfeit drugs leading to the death of eighty-one Americans.¹⁶ While the term national security is not

¹⁴ See, e.g., USTR REPORT, *supra* note 6. The § 6951 report to Congress is a report established by 22 U.S.C. § 6951 (2006), which mandates the United States Trade Representative to report annually to Congress on China's compliance with its WTO commitments.

¹⁵ Yeh, *supra* note 3.

¹⁶ *Heparin Case*, *supra* note 5.

employed in a traditional manner when discussing consumer safety, it still falls within the broader understanding of national security under economic interests. Perhaps one reason that consumer safety has been overlooked in determining national security threats is because the traditional definition of national security is not broad enough.

The 2007 counterfeit toothpaste scare is a powerful illustration of how the security of consumers is put in jeopardy because of Chinese counterfeits.¹⁷ The danger posed by the counterfeit toothpaste was discovered when fifty-one-year-old Eduardo Arias of Panama City noticed that a tube of toothpaste at the drug store was prominently marked with “diethylene glycol” (“DEG”).¹⁸ He alerted the authorities. DEG had caused several deaths in the country earlier in the year.¹⁹ DEG is a sweet-tasting yet toxic substitute for glycerin.²⁰ And while glycerin is a common ingredient in medicine, food and household products,²¹ DEG, a central nervous system depressant and a kidney and liver toxin,²² poses a serious risk of injury, especially in children.²³ The tainted toothpaste was manufactured in China²⁴ and incorrectly labeled Colgate.²⁵ Some shipments of this toothpaste were detained at the U.S. border and analyzed by the FDA.²⁶ But the toothpaste found its way to prisoners in U.S. jails and wealthy patrons in high-end hotels.²⁷ It was used by the mentally disabled, troubled youths and patients in

¹⁷ Walt Bogdanich, *The Everyman Who Exposed Tainted Toothpaste*, N.Y. TIMES, Oct. 1, 2007, at A1 [hereinafter Bogdanich].

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Press Release, U.S. Food & Drug Admin., Urgent Voluntary Nationwide Recall of Toothpaste (June 8, 2007), available at http://www.fda.gov/oc/po/firmrecalls/goldcity06_07.html [hereinafter FDA Recall].

²³ U.S. FOOD & DRUG ADMIN., FDA ADVISES CONSUMERS TO AVOID TOOTHPASTE FROM CHINA CONTAINING HARMFUL CHEMICAL (June 1, 2007) [hereinafter FDA ADVISES].

²⁴ *Id.*

²⁵ Kristin Graham, *Is China's Growth Counterfeit?*, MOTLEY FOOL, Aug. 6, 2007, <http://www.fool.com/investing/international/2007/08/06/is-chinas-growth-counterfeit.aspx>.

²⁶ FDA ADVISES, *supra* note 23.

²⁷ Bogdanich, *supra* note 17.

hospitals.²⁸ It eventually reached thirty-four countries, including the United States, Vietnam, Kenya, Nigeria and Canada.²⁹ The damage done by counterfeits does not discriminate.

China's first response was to defend the manufacturers who used DEG. China stated that the substance was used as a thickening agent in toothpaste and caused no health problems among Chinese consumers.³⁰ Dora Akunyili, who runs Nigeria's National Agency for Food and Drug Administration and Control,³¹ ridiculed the Chinese response, remarking, "They should apologize to the world, and not say that it is not dangerous."³² Still, even worse was yet to come: tainted medicines from China were already slipping across U.S. borders, and these medicines, unlike the toothpaste, were fatal.

Leroy Hubley lost his wife and son within a few weeks of each other; both were poisoned by counterfeit drugs. His loved ones had a genetic kidney disease that required constant dialysis and a medicine known as heparin.³³ They unknowingly received Chinese-made heparin that was tainted with a cheap chemical substitute.³⁴ Hubley was not the only one to suffer such a loss. During 2007 and 2008, eighty-one people across the United States were killed by tainted Chinese-made heparin.³⁵ The heparin, a common blood thinner often given to dialysis patients, was tainted with chemicals that are known to cause a severe decrease in blood pressure or an allergic reaction.³⁶ It was manufactured by Changzhou SPL, a Chinese subsidiary of Scientific Protein Laboratories,³⁷ and shipped to eleven countries—Australia, Canada, China, Denmark,

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ See NFDAC Nigeria, <http://www.nafdacnigeria.org/dg.html> (last visited Oct. 20, 2008).

³² Bogdanich, *supra* note 17.

³³ Gardiner Harris, *F.D.A. Says Drug Contamination May Have Been Deliberate*, N.Y. TIMES, Apr. 30, 2008, at A11 [hereinafter Harris, *Contamination*].

³⁴ *Id.*

³⁵ See *Heparin Case*, *supra* note 5.

³⁶ U.S. FOOD & DRUG ADMIN., BAXTER'S MULTIPLE-DOSE VIAL HEPARIN LINKED TO SEVERE ALLERGIC REACTIONS (Feb. 11, 2008); see also *Heparin Case*, *supra* note 5; Harris, *Contamination*, *supra* note 33; Harris, *Tainted Heparin*, *supra* note 5.

³⁷ Harris, *Contamination*, *supra* note 33.

France, Germany, Italy, Japan, the Netherlands, New Zealand and the United States.³⁸

The deadly contaminant was identified as oversulfated chondroitin sulfate, a cheap chemical substitute for heparin.³⁹ Heparin costs \$900 a pound, but oversulfated chondroitin sulfate costs a mere \$9 a pound,⁴⁰ figures FDA Commissioner Andrew C. von Eschenbach surely had in mind when he referred to the contaminated drugs as a product of “economic fraud.”⁴¹ The fact that the cheap chemical substitute was involved pointed to involvement by Chinese counterfeiters;⁴² however, while China admitted that the tainted heparin originated in its factories, it denied that the medicine had caused any deaths.⁴³ David G. Strunce, CEO of Scientific Protein Laboratories, testified before a Senate subcommittee that he was stopped by Chinese authorities when he tried to find the original source of the contaminated drugs.⁴⁴ And so, only months after the counterfeit toothpaste scare, another cheap chemical substitute from China arrived to pose a serious health risk to consumers.⁴⁵ Though the counterfeit toothpaste did not cause any deaths, the tainted heparin led to eighty-one fatalities. Could these be the first instances in an endless wave of potentially deadly counterfeit products?

Dangerous counterfeits are not a recent development. Manufacturing firms are creating dangerous chemical imitations of pharmaceuticals made to look like Lipitor.⁴⁶ In 2002, New York authorities broke up a fake Viagra distribution ring originating in China.⁴⁷ The products were a perfect imitation of the real thing, and even pharmacists could not discern between fake and real

³⁸ Harris, *Tainted Heparin*, *supra* note 5.

³⁹ *Id.*; see Walt Bogdanich, *Heparin Is Now Suspected in 62 Fatalities Across U.S.*, N.Y. TIMES, Apr. 10, 2008, at A17 [hereinafter Bogdanich, *Heparin Suspected*].

⁴⁰ Harris, *Contamination*, *supra* note 33.

⁴¹ *See id.*

⁴² Bogdanich, *Heparin Suspected*, *supra* note 39.

⁴³ Harris, *Contamination*, *supra* note 33; Harris, *Tainted Heparin*, *supra* note 5.

⁴⁴ Harris, *Contamination*, *supra* note 33.

⁴⁵ *See supra* notes 16–27 and accompanying text.

⁴⁶ Graham, *supra* note 25.

⁴⁷ Natasha Wong, *Counterfeit Medicine: Is It Curing China?*, 5 ASIAN-PAC. L. & POL'Y J. 155, 180 (2004).

pills.⁴⁸ Since 2000, FDA investigations of counterfeit drugs have increased by over 20%.⁴⁹ Consumer danger does not stop at toiletries and prescription drugs. In Los Angeles, buyers can find counterfeit brake pads, aircraft parts, cough syrup and even baby formula.⁵⁰

B. Economic Safety

The INA definition of national security and the broad interpretation of national security granted by CFIUS support an interpretation of the term⁵¹ that places high value on protecting the economic interests of the United States. Counterfeits affect the U.S. economy in two main ways. First, counterfeit currency imported into the United States, and possibly laundered through Chinese assets, lowers the confidence in the U.S. dollar. Second, as counterfeit products harm consumers, the resulting scandals tarnish the reputation of corporations whose names were falsely placed on the good.

1. Confidence in the U.S. Money Supply is Weakened

In 2006, FBI agents, acting on a tip, discovered nearly flawless counterfeit one hundred-dollar bills in false-bottomed compartments of shipping containers entering the U.S. from China.⁵² These so-called “supernotes” are believed to be manufactured in North Korea, though the containers originated in China.⁵³ Millions of dollars in fake currency have already been seized.⁵⁴ A senior government official stated that the counterfeit currency could breed

⁴⁸ Graham, *supra* note 25.

⁴⁹ *New Initiatives Take on Counterfeit Pharmaceuticals*, INT’L CHAMBER OF COM., Aug. 8, 2003, <http://www.iccwbo.org/icccbic/index.html>.

⁵⁰ *Counterfeit Goods: Easy Cash for Criminals and Terrorists: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 109th Cong. 11 (2005) [hereinafter *Counterfeit Goods Hearing*], available at <http://bulk.resource.org/gpo.gov/hearings/109s/21823.pdf>. Investigative Consultants is a licensed private investigation firm based in Southern California that specializes in investigating counterfeit goods. *See id.* at 1; Investigative Consultants, <http://www.investigativeconsultants.com/html/home.html> (last visited Oct. 15, 2008).

⁵¹ *See supra* note 12 and *infra* notes 225–28.

⁵² Stephen Mihm, *No Ordinary Counterfeit*, N.Y. TIMES, July 23, 2006, at 636.

⁵³ *Id.*

⁵⁴ *See id.*

mistrust in the dollar because it is very difficult to tell the notes apart from the real thing.⁵⁵ The same senior official stated that under international law, the traffic in counterfeit currency could be interpreted as a hostile act against another state.⁵⁶

A year before the supernotes were discovered, North Korea was involved in a counterfeiting incident in Macau, a special administrative region controlled by China. In September 2005, U.S. law enforcement personnel shut down a major North Korean money-laundering operation taking place through Macau-based Banco Delta Asia.⁵⁷ When asked if China was also being investigated in the operation, a U.S. Treasury spokesperson refused to comment.⁵⁸ A source reported that following the shutdown, North Korea moved their assets to a Chinese State-owned bank in the Zhuhai Special Economic Zone adjacent to Macau.⁵⁹

2. Confidence in U.S. Products Is Weakened

Corporations troll the globe for cheap labor to lower costs and increase profits.⁶⁰ For this reason, much manufacturing has been outsourced to China.⁶¹ However, this outsourcing could cost the corporation the success of its brand names.⁶² For example, during the counterfeit toothpaste scare, some of the products containing DEG were found to be sold under the names Colgate and Sensodyne.⁶³ Counterfeit Colgate toothpaste containing DEG was found in discount stores in New York, New Jersey, Pennsylvania and Maryland.⁶⁴ Other corporations, such as Gold City Enterprise

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ John Tkacik, *Is China Complicit in North Korean Currency Counterfeiting?*, HERITAGE FOUND., Apr. 20, 2006, <http://www.heritage.org/Research/AsiaandthePacific/wm1046.cfm>.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See, e.g., Pete Engardio et al., *The Future of Outsourcing*, BUS. WEEK, Jan. 30, 2006, at 50.

⁶¹ See Traci Purdum & John Teresko, *Smart Outsourcing*, INDUSTRY WEEK, Oct. 1, 2004, at 71.

⁶² Graham, *supra* note 25.

⁶³ Bogdanich, *supra* note 17.

⁶⁴ Press Release, U.S. Food & Drug Admin., Counterfeit Colgate Toothpaste Found (June 14, 2007), available at http://www.fda.gov/oc/po/firmrecalls/colgate06_07.html.

and MainStar America, were forced to institute nationwide recalls of their products.⁶⁵ Sensodyne tracked the counterfeit toothpaste to a factory in the Shejiang Province in China, which was thereafter shut down by regulators.⁶⁶

C. Financing of Criminal Organizations and Terror Groups

A critical part of protecting America from terror groups and criminal organizations is to end their funding.⁶⁷ As government authorities have cracked down on terror-financing schemes involving banks and charities, terror groups have turned to a trade in counterfeit consumer goods.⁶⁸ Insistent vendors on the sidewalks of metropolises, offering the seemingly innocuous faux Prada handbags or Hello Kitty T-shirts may be part of a larger terrorist-funding operation linked to groups such as Hezbollah or Hamas.⁶⁹ Interpol has confirmed that the worldwide counterfeit trade has become a low-cost, high-return enterprise favored by terrorist organizations such as Hezbollah.⁷⁰ What makes this trade particularly attractive is that the penalties and risks of getting caught are low, while the moneymaking potential is enormous.⁷¹ Even when caught, the criminals are likely to only receive probation, whereas

⁶⁵ FDA Recall, *supra* note 22; Press Release, U.S. Food & Drug Admin., MainStar America, LLC Issues Urgent Voluntary Nationwide Recall of Toothpaste (June 13, 2007), available at http://www.fda.gov/oc/po/firmrecalls/mainstar06_07.html. Among the recalled products were Shir Fresh Mint Fluoride and Dr. Cool Toothpaste. *Id.*

⁶⁶ Bogdanich, *supra* note 17.

⁶⁷ See, e.g., Juan C. Zarate, Deputy Assistant Sec'y, U.S. Dep't of the Treasury, Keynote Address at the Ninth Annual American Express Anti-Money Laundering Conference (June 23, 2004), available at <http://www.ustreas.gov/press/releases/js1754.htm>.

⁶⁸ Lara Jakes Jordan, *Knockoff Profits May Support Terror*, ORLANDO SENTINEL, May 26, 2005, at A5; see also *Counterfeit Goods Hearing*, *supra* note 50, at 2 (statement of Sen. Susan M. Collins, Chairman, S. Comm. on Homeland Sec. and Governmental Affairs).

⁶⁹ Jordan, *supra* note 68; Yeh, *supra* note 3.

⁷⁰ Yeh, *supra* note 3; *Chinese Fakes Cost Firms Trillions: Exports of Counterfeit Japanese Goods to Middle East on the Rise*, DAILY YOMIURI, Jan. 5, 2007, at 2 [hereinafter DAILY YOMIURI]. Testifying before Congress in 2003, the Secretary General of Interpol confirmed that piracy of goods has become a preferred fundraising method for terrorist organizations, and he mentioned groups such as Hezbollah, Chechen rebels and al Qaeda. *Counterfeit Goods Hearing*, *supra* note 50, at 2 (statement of Sen. Susan M. Collins, Chairman, S. Comm. on Homeland Sec. and Governmental Affairs).

⁷¹ See *Counterfeit Goods Hearing*, *supra* note 50, at 3 (statement of Sen. Joe Lieberman).

if they were selling drugs instead, they would go to jail.⁷² Chinese counterfeits specifically are exported through Middle Eastern countries.⁷³ To combat Chinese counterfeits of Japanese goods, Japanese firms have hired investigators.⁷⁴ Among their finds were 35,000 counterfeit Nissan sparkplugs in the United Arab Emirates.⁷⁵

In hearings before the U.S. Senate, Senator Lieberman recognized the importance of approaching counterfeits from a national security perspective.⁷⁶ He cited an unclassified FBI document which revealed that Hezbollah used the sale of counterfeit goods to raise cash in the United States.⁷⁷ Senator Susan Collins pointed out that it does not take a large sum of money to carry out devastating terrorist attacks.⁷⁸ The Senator used the example of the 9/11 attacks, which is estimated to have cost only \$500,000.⁷⁹ The 1993 bombing attack on the World Trade Center only cost an estimated \$10,000.⁸⁰ Shortly after the bombing the FBI investigated whether profits made through the sale of counterfeit T-shirts were used to finance the attack.⁸¹ These relatively modest sums could easily be raised by such organizations through the sale of counterfeit goods.⁸² In Los Angeles, for example, when officers entered a home to serve an intellectual property right (“IPR”) warrant, they found a chilling scene. Small Hezbollah flags decorated the suspect’s bedroom, which was also adorned with a portrait of Hassan Nasrallah, the leader of Hezbollah.⁸³ The home contained dozens of tapes with Nasrallah’s speeches, and a locket with two pictures,

⁷² *Counterfeit Goods Hearing*, *supra* note 50, at 13 (statement of Kris Buckner, President, Investigative Consultants).

⁷³ DAILY YOMIURI, *supra* note 70.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *See Counterfeit Goods Hearing*, *supra* note 50, at 3 (statement of Sen. Joe Lieberman).

⁷⁷ *Id.*

⁷⁸ *Counterfeit Goods Hearing*, *supra* note 50, at 3 (statement of Sen. Susan M. Collins, Chairman, S. Comm. on Homeland Sec. and Governmental Affairs).

⁷⁹ *Id.*

⁸⁰ Larry Light, *Why Counterfeit Goods May Kill*, BUS. WEEK, Sept. 2, 1996, at 6.

⁸¹ *Id.*

⁸² *See id.*

⁸³ *Counterfeit Goods Hearing*, *supra* note 50, at 8 (statement of John C. Stedman, Lieutenant, County of Los Angeles Sheriff’s Department).

one of the suspect and one of Nasrallah.⁸⁴ During the search, the suspect's wife stated that they love Nasrallah because "he protects us from Jews."⁸⁵

D. Proliferation of Sensitive Technology

The Business Software Alliance ("BSA")⁸⁶ estimates that 92% of business software in China is pirated.⁸⁷ This trade leads to a decrease in value of American brands and can weaken confidence in U.S. products.⁸⁸ More dangerous, though, is the piracy of software that can be used for military purposes.⁸⁹

⁸⁴ *Id.*

⁸⁵ *Id.* The Los Angeles Sheriff's Department shares a very close relationship with the Los Angeles Joint Terrorism Task Force because IPR warrants so often lead to evidence of possible terrorism. This information relating to terrorist financing is passed on from the Sheriff's Department to the Task Force. *Id.*

⁸⁶ The BSA is respected as the foremost organization dedicated to promoting a safe and legal digital world. It often serves as the voice for its many members, which include Adobe, Apple, Autodesk, Avid, Bentley Systems, Borland, CNC Software/Mastercam, McAfee, Microsoft, PTC, SolidWorks, Sybase, Symantec, The MathWorks and UGS. The goals of the BSA are to promote technology innovation through education and policy initiatives, as well as to promote copyright protection, cyber security, trade and e-commerce. See BSA, About BSA & Members, <http://www.bsa.org/country/BSA%20and%20Members.aspx> (last visited Oct. 20, 2008). The BSA has been known to bring suits on behalf of its members against companies found to have unlicensed software on their computer. See Press Release, BSA, BSA Conducts Record Global Anti-Piracy Enforcement Action (Sept. 18, 2007), available at <http://www.bsa.org/country/News%20and%20Events/News%20Archives/en/2007/en-09182007-globalsettlement.aspx>. The BSA estimates that 35% of software installed on personal computers worldwide is pirated, equaling approximately \$40 billion in global losses to companies. BSA, 2007 Global Piracy Study, <http://w3.bsa.org/globalstudy> (last visited Oct. 20, 2008). In 2006, 55% of software installed on personal computers in the Asia Pacific region was pirated. See *id.*

⁸⁷ See Press Release, BSA, Major Study Finds 53 Percent of Software in Use in Asia Pacific Region Is Pirated (July 7, 2003) (on file with author), available at <http://w3.bsa.org/asia-eng/press/newsreleases/Major-Study-Finds-53-Percent-of-Software-in-Use-in-Asia-Pacific-Region-is-Pirated.cfm>.

⁸⁸ See, e.g., ORG. FOR ECON. CO-OPERATION & DEV., THE ECONOMIC IMPACT OF COUNTERFEITING AND PIRACY: EXECUTIVE SUMMARY 18 (2007), available at <http://www.oecd.org/dataoecd/13/12/38707619.pdf>.

⁸⁹ See John Schwartz, *Black Market for Software Is Sidestepping Export Controls*, N.Y. TIMES, Dec. 2, 2002, at C1.

Intelligent Light is an engineering company that creates software so powerful that it is bound by export controls.⁹⁰ Before the Internet became the company's primary software distribution mechanism, its president would receive letters, handwritten and bearing stamps from Iraq, which read, "We have heard of your beautiful software. . . . We would like to buy it."⁹¹ Since the advent of the Internet, these letters have stopped arriving. Despite export controls, bootlegged copies of Intelligent Light's software have been found to be sold over the Internet by Chinese "entrepreneurs" for two hundred dollars apiece.⁹² A popular business method for software pirates is to use Internet auction sites to sell their illicit goods.⁹³

The Internet has facilitated the emergence of a black market for powerful scientific and engineering software.⁹⁴ Encryption technology, for example, in hardware or software form, helps scramble computer data such as e-mail or database information, to keep it private.⁹⁵ The proliferation of encryption technology was deemed such a serious risk to national security that the Clinton administration tried to limit its exportation.⁹⁶ Exportation of this technology remains heavily controlled through the Arms Export Control Act of 1976⁹⁷ and the International Trade in Arms Regulations ("ITAR").⁹⁸ Indeed, cryptographic software is specifically listed on the ITAR munitions list.⁹⁹ Export licensing and export controls

⁹⁰ See *id.* Intelligent Light is based out of Lyndhurst, N.J. and creates software for computational fluid dynamics. See *id.*; FieldView: About Intelligent Light, <http://www.ilight.com/about.php> (last visited Oct. 20, 2008).

⁹¹ See Schwartz, *supra* note 89. The President of Intelligent Light is Jeanne L. Mara. *Id.*

⁹² *Id.*

⁹³ BSA, *Internet Software Piracy Fact Sheet*, <http://w3.bsa.org/ireland/antipiracy/upload/Internet-Piracy-Factsheet.pdf> (last visited Oct. 20, 2008).

⁹⁴ See Schwartz, *supra* note 89.

⁹⁵ BSA, *Electronic Signatures*, <http://www.bsa.org/country/Public%20Policy/Security/Related%20Issues/Electronic%20Signatures.aspx> (last visited Oct. 20, 2008).

⁹⁶ See Schwartz, *supra* note 89.

⁹⁷ 22 U.S.C. § 2778 (2006).

⁹⁸ Stuart Schwartzstein, *Export Controls on Encryption Technology*, 16 SAIS REV. 13, 15 (1996), available at http://muse.jhu.edu/journals/sais_review/v016/16.1schwartzstein.html.

⁹⁹ *Id.*

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were a major tool for preventing proliferation; however, with the prevalence of Internet piracy, these controls have become moot.¹⁰⁰

Despite encryption technology's strict regulations, there are even more serious technologies being proliferated.¹⁰¹ Software powerful enough to design missiles and nuclear reactors, or predict the path of a cloud of anthrax spores, is being readily proliferated.¹⁰² A Justice Department official confirmed that software used to model the fuel flow in a fighter jet is being sold on the World Wide Web.¹⁰³ With a simple wire transfer, such software can slip past national barriers with great ease.¹⁰⁴

II. CHINA'S ENFORCEMENT OF INTELLECTUAL PROPERTY LAWS HAS BEEN WEAK

A. *China Has Clashed with the U.S. in the Past over the Weak Enforcement of Intellectual Property Rights*

China has failed to aggressively enforce intellectual property rights and combat the counterfeit and piracy epidemic in its nation.¹⁰⁵ The United States and China have clashed over the issue of counterfeit materials for over a decade.¹⁰⁶ For example, in 1995 the Chinese Government refused to shut down twenty-nine factories which illegally produced approximately seventy million copies of American films and software every year.¹⁰⁷ Fed up with the rampant piracy, the Clinton administration threatened to block China's effort to join the World Trade Organization ("WTO").¹⁰⁸

¹⁰⁰ See Schwartz, *supra* note 89.

¹⁰¹ See *id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ See *id.*

¹⁰⁵ See *id.*

¹⁰⁶ See, e.g., Seth Faison, *U.S.-China Talks over Piracy Fail*, N.Y. TIMES, May 15, 1996, at A1; David Lague, *U.S. Presses Chinese on Piracy*, INT'L HERALD TRIB., Nov. 14, 2006, at 15.

¹⁰⁷ David Sanger, *U.S. Threatens \$2.8 Billion of Tariffs on China Exports*, N.Y. TIMES, Jan. 1, 1995, at 14.

¹⁰⁸ See *id.*

Today, major intellectual property enforcement issues in China have yet to be resolved, and in 2007 the United States filed a formal WTO piracy complaint against China. The United States sought to establish a dispute settlement panel focused on the enforcement of copyrights and trademarks and cited serious deficiencies in China's legal regime.¹⁰⁹ In part, the complaint is directed at China's high quantitative threshold of infringement that must be met before prosecution proceedings can be launched. Distributors of counterfeit goods who operate below the thresholds can do so without fear of criminal liability.¹¹⁰ These thresholds effectively function as safe harbor provisions.¹¹¹ Further, if Chinese authorities discover counterfeit goods, they will release the goods back into the stream of commerce once the fake label is removed.¹¹² This contravenes WTO rules, which state that the goods should be kept out of the marketplace.¹¹³ Lastly, the complaint discusses the Chinese practice of not offering copyright protection for works that have yet to receive censorship approval.¹¹⁴ While legal distributors cannot sell the works, pirates have no such qualms.¹¹⁵ It is critical that copyright protection for new works be immediately granted.

It is important to note that the issue of national security is not brought up in the complaint.¹¹⁶ While the WTO is an organization specifically directed at trade between nations, this omission is a reflection of the overall U.S. deficiency in addressing the national security dangers posed by counterfeit goods.

¹⁰⁹ Press Release, Office of the U.S. Trade Rep., United States Requests WTO Panel in Case Challenging Deficiencies in China's Intellectual Property Rights Laws (Aug. 13, 2007) (on file with author), available at http://www.ustr.gov/Document_Library/Press_Releases/2007/August/United_States_Requests_WTO_Panel_in_Case_Challenging_Deficiencies_in_Chinas_Intellectual_Property_Rights_Laws.html.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *See id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *See id.*

¹¹⁶ *See id.*

B. Chinese Legal Efforts in Combating Intellectual Property Theft

In the last few years, China has made several efforts to pass laws and enter into agreements that protect intellectual property. For example, the Clinton Administration reached multiple agreements with China aimed at ending the counterfeiting of tapes, movies and compact disks.¹¹⁷

In anticipation of joining the WTO, China first joined the World Intellectual Property Organization, and acceded to its IP treaties,¹¹⁸ including the Paris Convention, dealing with patents and trademarks;¹¹⁹ the Madrid Agreement, concerning the registration of trademarks;¹²⁰ the Treaty on Intellectual Property in Respect of Integrated Circuits, protecting layout-design;¹²¹ and the Berne Convention, pertaining to copyrights.¹²² High contracting parties to the treaties are bound to enforce them through the implementation of domestic laws throughout their territory. China became a member of the WTO on December 11, 2001, after fifteen years of negotiations.¹²³

The agreements do not end there. On April 21, 2004, the Bush administration, during a day-long trade meeting, received several concessions from the Chinese government.¹²⁴ Among them was China's agreement to increase the range of activities that are subject to criminal penalties for intellectual property violations. These new penalties would apply to the import, export, storage as well as the distribution of pirated and counterfeit products.¹²⁵ More recently, after the counterfeit toothpaste crisis, the Chinese

¹¹⁷ Elizabeth Becker, *China Agrees to Postpone Wireless Plan*, N.Y. TIMES, Apr. 22, 2004, at C1 [hereinafter Becker, *China Agrees*].

¹¹⁸ Kate Colpitts Hunter, *Here There Be Pirates: How China is Meeting its IP Enforcement Obligations Under TRIPS*, 8 SAN DIEGO INT'L L.J. 523, 532 (2007).

¹¹⁹ Paris Convention for the Protection of Industrial Property arts. 1, 6bis, Mar. 20, 1883, *revised*, July 14, 1967, 21 U.S.T. 1538, T.I.A.S. No. 6903, 828 U.N.T.S. 305.

¹²⁰ Madrid Agreement Concerning the International Registration of Marks art. 1, Apr. 14, 1891, *revised*, July 14, 1967, 828 U.N.T.S. 389.

¹²¹ World Intellectual Property Organization (WIPO) Treaty on Intellectual Property in Respect of Integrated Circuits art. 2, May 26, 1989, 28 I.L.M. 1477.

¹²² World Intellectual Property Organization (WIPO) Copyright Treaty pmb., Dec. 20, 1996, 36 I.L.M. 65, 1997 WL 79494.

¹²³ Hunter, *supra* note 118, at 533.

¹²⁴ Becker, *China Agrees*, *supra* note 117.

¹²⁵ *Id.*

government promised to reform their regulatory system for food, medicine and consumer products.¹²⁶

C. *Obstacles to Intellectual Property Enforcement in China*

China has a long history of corruption and ineffectual enforcement in the field of intellectual property, and a widespread culture of industrial counterfeiting and fraud.¹²⁷ China's citizens suffer most from China's counterfeit industry.¹²⁸ Leaders of China's State Food and Drug Administration have admitted that their pharmaceutical market is awash in fake and deadly drugs.¹²⁹ China's markets are flooded with fake antibiotics, vaccines, drugs for erectile dysfunction¹³⁰ and blood products.¹³¹ Even medicine aimed at strengthening the immune system has been counterfeited and sold as authentic.¹³² The total cost in human lives of this broken system cannot be estimated, even by the Chinese government;¹³³ however, in 2001, the Shenzhen Evening News, a government-controlled newspaper, estimated that 192,000 people died in China that year because of fake pharmaceutical products.¹³⁴

There are endless illustrations of the pervasive counterfeit problem in China. Among them are plastic bottles refilled with tap water and sold as mineral water,¹³⁵ and the numerous derivative Harry Potter books with titles like "Harry Potter and the Big Funnel," and "Rich Dad, Poor Dad and Harry Potter."¹³⁶ In fact, in

¹²⁶ Bogdanich, *supra* note 17.

¹²⁷ Peter Allgeier, U.S. Ambassador to the WTO, Office of the U.S. Trade Rep., Statement on Trade Policy Review of China given in Geneva, Switz. (Apr. 19, 2006), available at http://www.ustr.gov/Document_Library/Press_Releases/2006/April/Trade_Policy_Review_of_China_Statement_by_Ambassador_Peter_Allgeier_printer.html.

¹²⁸ See David Barboza, *A Chinese Reformer Betrays His Cause, and Pays*, N.Y. TIMES, July 13, 2007, at A1.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Howard French, *China's Economic Revival Is Minted in Counterfeit*, INT'L HERALD TRIB., Aug. 4, 2007, at 2.

¹³² Barboza, *supra* note 128.

¹³³ *Id.*

¹³⁴ Peter Goodman, *China's Killer Headache: Fake Pharmaceuticals*, WASH. POST, Aug. 30, 2002, at A1.

¹³⁵ French, *supra* note 131.

¹³⁶ *Id.*

China there are more copies of fake Harry Potter books than real ones.¹³⁷

China faces considerable hurdles in enforcing the many intellectual property laws and agreements it has enacted. Chief among them are corrupt officials. The accusations of widespread local corruption in China are not new. In 1995, while twenty-nine factories in southern China were busy churning out illegal copies of American videotapes and software, Chinese central government officials were bemoaning their lack of influence in the region.¹³⁸ The officials stated that they had too little control over the region to put an end to this piracy.¹³⁹ Rejecting the Chinese argument as preposterous, the U.S. stated that China faces a “failure of will . . . not a failure of ability,” when it comes to enforcement of copyright laws.¹⁴⁰ As evidence for this statement, the U.S. pointed out that many of the counterfeiting enterprises were in fact run by central government officials and were closely tied to local and national political leaders.¹⁴¹ If so, corrupt Chinese officials would have no incentive to enforce the copyright laws that would tighten their spigot of profits from pirated goods. In 2006, Ambassador Peter Allgeier stated clearly that local corruption is one of the main factors that contribute to widespread intellectual property theft.¹⁴² And when the FBI conducted a study of Chinese criminal enterprises, it cited corruption at a local level as an important factor in smuggling of counterfeit and pirated goods.¹⁴³

However, in hearings before Congress, a commissioner of the U.S.-China Economic Security and Review Commission pointed out that despite rampant copyright infringement, China’s Olympic

¹³⁷ *Id.*

¹³⁸ Sanger, *supra* note 107, at 14. Piracy was so widespread even as far back as 1995 that pirated copies of the videotape of Disney’s *The Lion King* were being distributed in China before the tape was even released in the United States. *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Allgeier, *supra* note 127.

¹⁴³ See Ning-Ning Mahlmann, *Chinese Criminal Enterprises*, in ASIAN CRIMINAL ENTERPRISE PROGRAM OVERVIEW: A STUDY OF CURRENT FBI ASIAN CRIMINAL ENTERPRISE INVESTIGATIONS IN THE UNITED STATES (1999).

mascot had yet to be counterfeited.¹⁴⁴ He implied that China can in fact enforce its intellectual property laws, if it so chooses.¹⁴⁵ Today, the production of counterfeits is primarily concentrated in China's southern provinces.¹⁴⁶ Guangdong, for example, has become the world's primary source of luxury fakes, such as clothing, handbags and watches.¹⁴⁷

Institutionalized corruption led to the greatest food and drug scandal in China and the execution of one of its top officials. Zheng Xiaoyu was once China's most powerful regulator and the creator of its Food and Drug Administration.¹⁴⁸ Intent on improving standards in China's pharmaceutical industry, the newly created agency cracked down on fake drugs and illegal factories.¹⁴⁹ However, while the U.S. Food and Drug Administration approves about 140 new drugs each year, Mr. Zheng's agency approved over 150,000 during his eight-year tenure.¹⁵⁰ This high approval rate was a consequence of Mr. Zheng receiving more than \$850,000 in gifts and bribes from pharmaceutical companies seeking special favors.¹⁵¹ The Supreme People's Court found Mr. Zheng guilty of accepting bribes, and on July 5, 2007, Mr. Zheng was executed.¹⁵² Other efforts to combat corruption have been less brutal. China has sought to improve judges' salaries and create clear rules regarding gift-giving.¹⁵³ Still, there is a large market for counterfeits in China, particularly because the Chinese government limits the

¹⁴⁴ See *China's Proliferation and the Impact on Trade Policy on Defense Industries in the United States and China: Hearing Before the U.S.-China Econ. & Sec. Review Comm'n*, 110th Cong. 19 (2007) [hereinafter *Proliferation*] (statement of Michael R. Wessel, Comm'r, U.S.-China Econ. & Sec. Review Comm'n), available at http://www.uscc.gov/hearings/2007hearings/transcripts/july_12_13/july_12_13_07_trans.pdf.

¹⁴⁵ See *id.*

¹⁴⁶ Yeh, *supra* note 3.

¹⁴⁷ *Id.*

¹⁴⁸ Barboza, *supra* note 128.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* Indeed, when fake drugs and illegal factories are discovered, corrupt local officials often try to protect companies in their area from punishment. See *id.*

¹⁵² *Id.*

¹⁵³ Hunter, *supra* note 118, at 544.

importation of legitimate recordings and movies; this leaves a huge gap in demand, which is primarily filled with counterfeit goods.¹⁵⁴

Some scholars have hypothesized that another problem with enforcement lies in the Chinese intellectual property legal system itself, which places emphasis on compromise and harmony, inclining it toward mediation and arbitration.¹⁵⁵ Such a system is ill-suited for the strong litigation that is necessary to enforce and defend intellectual property rights in a market economy.¹⁵⁶

Among other legal problems with enforcement is China's very high threshold for criminal prosecution of intellectual property violations.¹⁵⁷ The infringement has to be on a very large scale in order for the government authorities to bring criminal charges.¹⁵⁸ This effectively creates "safe harbor" provisions for criminals.¹⁵⁹ In addition, communism decimated the legal profession in China.¹⁶⁰ The legal system now faces long delays due to a shortage of qualified legal personnel able to take on intellectual property cases.¹⁶¹

D. China's Response when Attacked on Intellectual Property Issues

When faced with accusations regarding its counterfeit industry, China does not usually respond constructively. Instead of addressing the main problem, China historically goes on the attack. For example, in reaction to the United States' 1995 threat of \$2.8 billion in sanctions for China's refusal to close down twenty-nine piracy factories, China immediately threatened to take counter-retaliatory measures.¹⁶² In its response, China threatened, among

¹⁵⁴ Becker, *Chamber of Commerce*, *supra* note 2 ("By limiting the import of legitimate recordings, the Chinese government leaves a demand 'that is currently primarily met by Chinese pirates.'" (quoting Neil Turkewitz, executive vice president of the Recording Industry Association of America)).

¹⁵⁵ Hunter, *supra* note 118, at 528–29.

¹⁵⁶ *Id.* at 530.

¹⁵⁷ USTR REPORT, *supra* note 6, at 74.

¹⁵⁸ *Id.* at 78.

¹⁵⁹ *Id.*

¹⁶⁰ Hunter, *supra* note 118, at 542.

¹⁶¹ *Id.*

¹⁶² Sanger, *supra* note 107.

other things, that it would hold up applications of American companies to set up businesses in China and would suspend talks with American automobile manufacturers over joint ventures.¹⁶³ There was no suggestion of constructive dialogue or talks.

Indeed, when faced with crises over goods produced in China, the Chinese government typically takes an offensive stance. China's response to manufacturing criticism during the summer of 2007, when Mattel recalled twenty million toys manufactured in China,¹⁶⁴ is particularly illustrative. Part of the recall was due to excessive lead in the toys.¹⁶⁵ In an August 14th conference call, Mattel laid the blame for the recall on a Chinese subcontractor who had violated Mattel's policies by using paint from non-authorized third party suppliers. Robert Eckert, the chairman and CEO of Mattel, elaborated on these accusations in his testimony before the Senate Committee on Appropriations,¹⁶⁶ in which he stated that the vendors were not just careless, but also in some cases were deliberate in avoiding the requirements.¹⁶⁷ On September 21, 2007, Thomas A. Debrowski, Mattel's executive vice president for worldwide operation, met with Li Changjiang, the head of China's General Administration of Quality Supervision, Inspection and Quarantine.¹⁶⁸ Mr. Li pointed out that a large part of Mattel's profits comes from factories in China, and that China's cooperation should be valued.¹⁶⁹ Indeed, 65% of Mattel's toys are manufactured in China.¹⁷⁰ Mr. Debrowski apologized to China for any harm caused to the reputation of Chinese manufacturers by the recalls.¹⁷¹ Dara O'Rourke, an associate professor at the University of California, Berkeley, speculated that Mattel is committed to operating its factories in China and does not want to jeopardize its manufacturing operation.¹⁷² Mr. Debrowski's apology was made

¹⁶³ *Id.*

¹⁶⁴ Graham, *supra* note 25; Louise Story, *An Apology in China from Mattel*, N.Y. TIMES, Sept. 22, 2007, at C1.

¹⁶⁵ Graham, *supra* note 25; Story, *supra* note 164.

¹⁶⁶ Graham, *supra* note 25.

¹⁶⁷ *Id.* at 3.

¹⁶⁸ Story, *supra* note 164.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

to appease Chinese manufacturers. It came despite the fact that millions of toys were in fact contaminated by lead.¹⁷³ Given what is publicly known, it appears that Mattel gave in to pressure from the Chinese government.

What these responses make clear is that the United States cannot rely on China to self-regulate or take actions weighty enough to deal with the problem of counterfeits. There should be better U.S. mechanisms in place to manage this problem.

III. THE UNITED STATES SHOULD MAKE BETTER USE OF ITS AVAILABLE STATUTORY TOOLS IN ADDRESSING THE NATIONAL SECURITY THREAT POSED BY CHINA'S WEAK INTELLECTUAL PROPERTY ENFORCEMENT

Congress and the executive branch should implement key statutory changes to monitor and address the national security threats posed by counterfeit goods. First, the general provisions which facilitate U.S.-China relations should provide for strict monitoring of China's enforcement of its intellectual property laws. U.S. officials should also address the national security threats that develop because of counterfeits in the § 6951 reports and in U.S.-China Economic and Security Review Commission reports and hearings. Finally, CFIUS was created to identify potential national security threats. Congress should make use of the Commission in monitoring the threats posed by intellectual property theft.

A. *Congress Should Strengthen and Clarify the General Provisions of Title 22 Chapter 77—United States-China Relations*

The United States Code Title 22 Chapter 77¹⁷⁴ lays out the statutory provisions for monitoring and enforcing U.S.-China relations, as well as the commissions responsible for oversight. It is the principal statutory vehicle for regulating foreign relations be-

¹⁷³ See *id.* (reporting that approximately 2.6 million toys were recalled due to lead paint being used).

¹⁷⁴ 22 U.S.C §§ 6901–03, 6911–13, 6931, 6941–43, 6951, 6961–65, 6981–84, 6991, 7001–02 (2006).

tween the two states. Congress should strengthen these provisions to specifically address intellectual property and its connection to national security.

Congressional findings in this section address the trade in goods between the two nations and the increasing trade deficit.¹⁷⁵ However, despite the ever-growing market in pirated and counterfeit goods from China, Congress does not address this fact. The problem of intellectual property theft is so serious and pervasive that it should be among the general congressional findings on U.S.-China relations in § 6901. Its inclusion would serve as a signal to the Executive, who implements the statutory provisions, that it is an area that Congress deems serious enough to be addressed. Just as Congress deplores China's violations of human rights, religious freedom and worker rights,¹⁷⁶ it should deplore the intellectual property violations which gravely affect U.S. national security.

In § 6902 the United States does seek to "pursue effective enforcement of trade-related and other international commitments by foreign governments."¹⁷⁷ The IP agreements signed by China could fall into the trade-related category. However, the wording is overbroad, and intellectual property is not mentioned at all, much less the relationship between U.S. national security and IP. Indeed, the primary objective of this section is to monitor human rights.¹⁷⁸

Congress calls for "an annual review . . . of the compliance by the People's Republic of China with its terms of accession to the WTO."¹⁷⁹ China has enacted the intellectual property treaties called for under the WTO agreement,¹⁸⁰ but enforcement has been problematic, as was previously discussed. It is very important that Congress clarify the meaning of the word "compliance."¹⁸¹ The word is not defined in § 6903, where the definitions for Chapter 77—U.S.-China Relations can be found. Does "compliance" refer to China's enactment of the appropriate laws, to their enforcement

¹⁷⁵ 22 U.S.C. § 6901(4)–(5).

¹⁷⁶ *Id.* § 6901(12).

¹⁷⁷ *Id.* § 6902(2).

¹⁷⁸ *Id.* § 6902(5).

¹⁷⁹ *Id.* § 6931.

¹⁸⁰ *See supra* notes 119–22 and accompanying text.

¹⁸¹ 22 U.S.C. § 6931.

or to both? A clarification is especially needed for this section because it deals specifically with the monitoring and enforcement of China's WTO commitments. It should be made clear to China that at all times it will be monitored not just on the proper enactment of these laws, but also on their enforcement. China, besides acceding to the intellectual property treaties, also joined several other relevant trade treaties as part of its WTO commitments. Considering the importance of intellectual property and the dangers that counterfeit goods can pose to U.S. national security, this section should also specifically mention the monitoring of intellectual property commitments, so that "WTO commitments" is not mistaken to mean exclusively, or principally, trade commitments. The vague language of the section leaves little chance that national security will be addressed when these provisions are implemented.

The meaning of "compliance" is expanded in §§ 6941 to 6943. Section 6941 deals with the congressional findings regarding compliance with trade agreements.¹⁸² The section reads, in relevant part, "The United States Government must continue to be vigilant in monitoring and enforcing the compliance by our trading partners with trade agreements in order for United States businesses, work-

¹⁸² *Id.* § 6941. The Congress finds as follows:

- (1) The opening of world markets through the elimination of tariff and nontariff barriers has contributed to a 56-percent increase in exports of United States goods and services since 1992.
- (2) Such export expansion, along with an increase in trade generally, has helped fuel the longest economic expansion in United States history.
- (3) The United States Government must continue to be vigilant in monitoring and enforcing compliance by our trading partners with trade agreements in order for United States businesses, workers, and farmers to continue to benefit from the opportunities created by market-opening trade agreements.
- (4) The People's Republic of China, as part of its accession to the World Trade Organization, has committed to eliminating significant trade barriers in the agricultural, services, and manufacturing sectors that, if realized, would provide considerable opportunities for United States farmers, businesses, and workers.
- (5) For these opportunities to be fully realized, the United States Government must effectively monitor and enforce its rights under the agreements on the accession of the People's Republic of China to the WTO.

Id.

ers, and farmers to continue to benefit from the opportunities created by market-opening trade agreements.”¹⁸³ Whether “compliance” here should be read as enactment of laws, enforcement of laws or both is again unclear. A clue about the intention of these sections can be found in the immediately following paragraph, which states that China “has committed to eliminating significant trade barriers . . . that, if realized, would provide considerable opportunities for United States farmers, businesses, and workers.”¹⁸⁴ Read together, these two sections seem to be geared primarily toward trade barriers, and “compliance” would most likely mean China’s elimination of trade barriers through enactment of laws. There is no mention of enforcing intellectual property laws. Businesses and workers would benefit tremendously from clear congressional statutory statements on combating the theft of intellectual property.

While the language in § 6941(3) and § 6941(5) could be used as a tool in demanding China’s enforcement of its intellectual property laws, it would be a stretch to state that Congress enacted these sections in response to counterfeits from China affecting U.S. interests and national security. And therein lies the problem. A crisis as serious as that caused by Chinese counterfeits pouring into the United States needs clear words and clearer actions. These are lacking in the United States Code.

Statutorily, there is a prohibition on the importation of products from China created by forced or prison labor.¹⁸⁵ There is no comparable prohibition on the importation of products created with child or slave labor, which is in fact how many counterfeit goods are produced.¹⁸⁶

Section 6943 laboriously sets aside money every fiscal year for monitoring China’s compliance with its WTO commitments and

¹⁸³ *Id.* § 6941(3).

¹⁸⁴ *Id.* § 6941(4).

¹⁸⁵ *Id.* §§ 6941–65.

¹⁸⁶ *See* South East Asia Investigations into Social and Humanitarian Activities (SISHA), SISHA NEWSL., Aug. 2007, available at http://www.sisha.org/newsletter/newsletter_august.pdf (“The counterfeit goods trade relies upon exploitation of mostly poor and mostly young labor in developing countries to produce the copied merchandise.”).

international trade obligations.¹⁸⁷ Indeed, under § 6951, an annual report on compliance has to be submitted to Congress. However, there is no explicit provision that intellectual property needs to be a major part of this report, much less that the report needs to address the national security implications of intellectual property theft.

B. There is a Failure on the Part of the Executive to Monitor the Potential National Security Threats Caused by China's Intellectual Property Violations Through the 22 U.S.C. § 6951 Report to Congress

The Executive is mandated to provide, on a yearly basis, a report to Congress addressing China's compliance with its WTO obligations.¹⁸⁸ In the past this report has thoroughly addressed the Chinese service industry and the import and export regulations, but has put little focus on intellectual property enforcement and no focus whatsoever on the national security implications of intellectual property theft. In the 2006 Report to Congress on China's WTO Compliance, national security is not mentioned even once.¹⁸⁹

In 2006, the report clearly stated that its focus is on trade concerns and that it "does not provide an exhaustive analysis of the many areas in which China's WTO compliance efforts have or have not . . . satisfied particular commitments."¹⁹⁰ One such area that lacks exhaustive analysis is intellectual property, to which a mere 8 out of 109 pages is dedicated. The report has opportunities to address the intellectual property issue at greater length, but misses them. According to a new Chinese development policy, foreign investors in the steel industry have to possess proprietary technology or intellectual property, but foreign investors are not allowed to have a controlling share in the industry.¹⁹¹ Therefore the technology requirement becomes a de facto intellectual property transfer.¹⁹² The report's conclusion on this issue is that the

¹⁸⁷ 22 U.S.C. § 6943(b)(1).

¹⁸⁸ *Id.* § 6951.

¹⁸⁹ See USTR REPORT, *supra* note 6.

¹⁹⁰ *Id.* at 1.

¹⁹¹ *Id.* at 56.

¹⁹² *Id.*

policy contravenes WTO protectionism standards.¹⁹³ The report fails to analyze the U.S. national security implications of these technology transfers. The destination of the intellectual property of a heavily regulated and strategic industry should be of great concern to the U.S.; the report misses a key opportunity to discuss it.

The report states that China has little success in enforcing its intellectual property laws;¹⁹⁴ however, specific problems with enforcement do not receive an in-depth discussion. Most of the discussion centers on the actions that the U.S. has taken to urge China to strengthen enforcement, including round table meetings, and IPR working groups,¹⁹⁵ and IPR laws enacted by China.¹⁹⁶ The only specific enforcement problem addressed is the faulty Chinese criminal prosecution system, which has such a high bar for infringement that it creates de facto “safe harbor” provisions for criminals.¹⁹⁷ In only one line of the report is corruption mentioned as a factor in the counterfeit goods trade.¹⁹⁸ The report does not expand on corruption at all and offers no discussion or data on how widespread the problem really is.

Further, the report discusses only the most innocuous infringing goods. The report mentions the piracy of operating system software,¹⁹⁹ music and movies.²⁰⁰ The piracy of controlled technology is not mentioned at all, and of course, a look into the national implications of this piracy is also missing. The serious health risk posed by counterfeit pharmaceuticals is touched on in only one line, without further elaboration.²⁰¹ Despite claiming to have figures on counterfeit goods made in China and seized at U.S. borders, the report does not mention what portion of these goods are fake drugs.²⁰² Overall, the report fails to address specific

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 70.

¹⁹⁵ *Id.* at 77.

¹⁹⁶ *Id.* at 70.

¹⁹⁷ *Id.* at 78.

¹⁹⁸ *Id.* at 71.

¹⁹⁹ *Id.* at 74.

²⁰⁰ *Id.* at 76.

²⁰¹ *Id.* at 75.

²⁰² *See id.* at 78.

threats posed by counterfeit Chinese goods and specific obstacles in the enforcement of these laws in China.

C. Congress Should Strengthen the Provisions of 22 U.S.C. § 7002—U.S.-China Economic and Security Review Commission to Address Intellectual Property

In 2000 Congress created the U.S.-China Economic and Security Review Commission (“USCC”).²⁰³ The USCC is tasked with monitoring, investigating and reporting to Congress on “the national security implications of the bilateral trade and economic relationship between the United States and the People’s Republic of China.”²⁰⁴ National security problems caused by counterfeit goods from China would certainly fall under this mandate. And so, this commission would be an ideal vehicle to conduct a thorough analysis of the effect that counterfeit goods have on national security.

The USCC is also mandated to submit an annual report to Congress.²⁰⁵ The minimum contents of this report reveal the focus of this commission. At a minimum the report has to contain: a discussion of China’s trade, transfer and acquisition of military systems, or systems which could be used for military purposes;²⁰⁶ China’s intentions in pursuing military competition or actions;²⁰⁷ the effects of China’s currency manipulations;²⁰⁸ actions taken by China in the context of the WTO;²⁰⁹ China’s patterns of investment;²¹⁰ and whether or not the trade surplus enhances China’s military budget.²¹¹ Intellectual property considerations are not mentioned at all in the mandate.

²⁰³ 22 U.S.C. § 7002 (2006). The USCC was created on October 30, 2000, through the Floyd D. Spence National Defense Authorization Act for 2001, sec. 1238, available at <http://www.uscc.gov/about/overview.php>.

²⁰⁴ 22 U.S.C. § 7002(b)(2).

²⁰⁵ *Id.* § 7002(c)(1).

²⁰⁶ *Id.* § 7002(c)(2)(A)–(C).

²⁰⁷ *Id.* § 7002(c)(2)(E)–(F).

²⁰⁸ *Id.* § 7002(c)(2)(F).

²⁰⁹ *Id.* § 7002(c)(2)(G).

²¹⁰ *Id.* § 7002(c)(2)(H).

²¹¹ *Id.* § 7002(c)(2)(I).

It is no small wonder that in the USCC's 2007 Report to Congress, intellectual property is only mentioned seven times.²¹² This is so despite the fact that the USCC listed counterfeiting and piracy as one of the eight factors that serve as major drivers of China's economy²¹³ and as a major contributor to the growing U.S. trade deficit with China.²¹⁴ The effects of intellectual property violations on the field of national security are not discussed at all in the final report. When the Commission does briefly discuss intellectual property, it is only to mention that Chinese businesses have been actively seeking Hong Kong as their legal jurisdiction because it provides better legal protection and enforcement of IP rights than mainland China.²¹⁵ This silence is ironic because the USCC's report to Congress already must address national security issues relating to China because it must report on China's military advances.²¹⁶ A brief yearly analysis of the effects of counterfeits from China would not only fall under the letter of the law,²¹⁷ but also under its spirit of ensuring the security of the United States. The USCC seems trapped by a narrow and traditional definition of national security, which focuses primarily on military threats. The national security threats posed by intellectual property violations are not as obvious, but they should be included in the future considerations of national security.

Finally, the recommendations of the report are perhaps the greatest disappointment of the document. The recommendations do not mention intellectual property at all.²¹⁸ Considering the depth of knowledge and experience of the panel, the USCC should have offered something more useful than just recommending that the U.S. urge Chinese officials to be as forthcoming as possible to "prevent . . . anxieties [from] swell[ing] into adversarial inclination[s]."²¹⁹

²¹² See U.S.-CHINA ECON. & SEC. REVIEW COMM'N, 2007 REPORT TO CONGRESS, June 1, 2007 [hereinafter USCC REPORT], available at http://www.uscc.gov/annual_report/2007/annual_report_full_07.pdf.

²¹³ *Id.* at 2.

²¹⁴ *Id.*

²¹⁵ USCC REPORT, *supra* note 212, at 19.

²¹⁶ See *supra* notes 206–07 and accompanying text.

²¹⁷ See *supra* note 209.

²¹⁸ USCC REPORT, *supra* note 212, at 5–6.

²¹⁹ *Id.* at 5.

Oddly enough, the USCC seems to be perfectly aware of the national security implications of piracy and counterfeits. In July of 2007, the USCC held hearings on China's proliferation of sensitive technology.²²⁰ Representative Duncan Hunter discussed a 2006 Institute for Defense Analysis report which found that Chinese companies advertise their reverse engineering capabilities aimed at recovering "sensitive data and intellectual property."²²¹ The report goes on to mention that several Pentagon projects have been affected by counterfeit microelectronics from China. A panel later discussed the importance of assessing the Department of Defense programs and microchips that could be put at risk by intellectual property theft.²²²

While the USCC did not directly address China's lackadaisical enforcement of copyrights in its hearings, Commissioner Michael Wessel did point out that despite the rampant copyright infringement taking place in China, the Olympic mascot has yet to be counterfeited,²²³ thereby coyly implying that China can in fact enforce copyrights if it so chooses. But hints and implications are not appropriate to congressional reviews. Clear statements are needed. These scattered references cannot form a compelling basis for addressing the threat that intellectual property violations by China pose to U.S. national security.

*D. The Committee on Foreign Investment in the United States
Should be Used to Analyze the Potential National Security
Threats Caused by Intellectual Property Violations*

1. What is CFIUS?

The Committee on Foreign Investment in the United States ("CFIUS") is an interagency committee chaired by the Secretary of Treasury and tasked with reviewing Foreign Direct Investment ("FDI")²²⁴ in the United States. The Committee must "determine

²²⁰ *Proliferation, supra* note 144.

²²¹ *Id.* at 103–04.

²²² *Id.* at 120–22.

²²³ *Id.* at 19.

²²⁴ Ilene Knable Gotts, Leon Greenfield & Perry Lange, *Is Your Cross-Border Deal the Next National Security Lightning Rod?*, 16 BUS. L. TODAY 31 (2007).

the effects of [an FDI] transaction on the national security of the United States.”²²⁵ FDI covers “any merger, acquisition, or takeover that is proposed or pending . . . by or with any foreign power which could result in foreign control of any person engaged in interstate commerce in the United States.”²²⁶ If CFIUS finds that the transaction “could result in the control of any person engaged in interstate commerce in the United States by a foreign government or an entity controlled or acting on behalf of a foreign government,²²⁷ the Committee conducts an investigation.²²⁸

Parties generally file a voluntary written notice in which they must particularly identify any sensitive technologies or information that the entity possesses.²²⁹ This is prudent for two reasons. First, review may be unilaterally initiated by the President or the Committee.²³⁰ Second, the law empowers CFIUS to dissolve a merger or acquisition at any time in the future if a filing has not been made, regardless of whether or not the acquisition or merger is complete.²³¹

If the President finds that there is credible evidence that the foreign entity seeking control might take actions that threaten the national security of the United States,²³² and no other laws can provide adequate and appropriate authority for the President to deal with this matter,²³³ he may “suspend or prohibit any covered transaction that threatens to impair the national security of the United States.”²³⁴ The President’s choice to suspend or prohibit a transaction is not subject to judicial review.²³⁵

Several of the factors that CFIUS takes into account for national security requirements can be applied in the field of intellec-

²²⁵ 50 U.S.C. app. § 2170(b)(1)(A)(i) (2006).

²²⁶ *Id.* § 2170(a)(3).

²²⁷ *Id.* § 2170(a)(4).

²²⁸ *Id.* § 2170(b)(1)(B). Even when these investigations allow a deal to go through, they have generally proven to be fatal to an investment deal. *See, e.g.,* Gotts et al., *supra* note 224.

²²⁹ 50 U.S.C. app. § 2170(b)(1)(C)(i); Gotts et al., *supra* note 224.

²³⁰ 50 U.S.C. app. § 2170(b)(1)(D).

²³¹ *Id.* § 2170(d)(3).

²³² *Id.* § 2170(d)(4)(A).

²³³ *Id.* § 2170(d)(4)(B).

²³⁴ *Id.* § 2170(d)(1).

²³⁵ *Id.* § 2170(e).

tual property. For example, the Commission may review the potential effect of the proposed transaction on the sale of military goods or technology.²³⁶ This covers instances where a foreign nation's lack of intellectual property protection can lead to the proliferation of technological secrets. Factor five of a CFIUS review takes into consideration the effect that the proposed transaction would have on United States technological leadership,²³⁷ while factor seven takes into consideration the potential national security implications of critical U.S. technologies.²³⁸ Indeed, CFIUS, as a matter of course, is particularly interested in transactions in which the U.S. entity has export-controlled technology, or technologies critical to national defense.²³⁹

CFIUS emerged from obscurity in February 2006, when it scrutinized and approved Dubai Port World's acquisition of U.S. port leases.²⁴⁰ Under the deal, Dubai Port World, a company controlled by the government of the United Arab Emirates, was to be contracted to manage six American ports.²⁴¹ In response to the uproar caused by CFIUS's approval, Dubai Port World formally asked the U.S. government to conduct a full forty-five-day investigation.²⁴² Although this investigation also approved the transaction, the deal later collapsed in the face of enormous public outcry and opposition.²⁴³

2. The Executive Should Make Better Use of CFIUS in Reviewing the National Security Implications of Intellectual Property Theft

By scrutinizing foreign investment deals for national security threats, CFIUS is in a great position to monitor the intellectual

²³⁶ *Id.* § 2170(f)(4).

²³⁷ *Id.* § 2170(f)(5).

²³⁸ *Id.* § 2170(f)(7).

²³⁹ Gotts et al., *supra* note 224.

²⁴⁰ *Id.*

²⁴¹ Sheryl Stolberg, *How a Business Deal Became a Big Liability for Republicans in Congress*, N.Y. TIMES, Feb. 27, 2006, at A14.

²⁴² David Sanger, *Dubai Deal Will Undergo Deeper Inquiry into Security*, N.Y. TIMES, Feb. 27, 2006, at A15.

²⁴³ Jim Rutenberg, *Bush Set to Approve Takeover of 9 Military Plants by Dubai*, N.Y. TIMES, Apr. 28, 2006, at A20.

property trends of various nations as well as the national security implications of those trends. If a foreign entity is known to offer weak IP protection of sensitive technologies, then CFIUS can stop the acquisition from taking place and monitor the trend of intellectual property protection in that nation. CFIUS is taking a more prominent role in the national security debate. The FDI transactions notified for national security review in 2006 more than doubled over the 2004 level to 113 transactions.²⁴⁴ Also, in 2006, a total of seven forty-five-day investigations were launched, which was as many as had been initiated in the prior five years combined.²⁴⁵

In light of Representative Duncan's statement²⁴⁶ before the USCC, which indicated that Chinese companies advertise their reverse engineering capabilities, it is not surprising that CFIUS would hear alarm bells when faced with deals that could pour protected U.S. technologies into the underground counterfeit bazaar.

Past CFIUS reviews show that the Committee is in a prime position to flag FDI deals with foreign entities that do not give adequate protection to intellectual property. In 2005 Lenovo of China made a bid to buy IBM's personal computer business.²⁴⁷ CFIUS investigated the deal because of a potential for industrial espionage and the risk that transferred technology would be used for military purposes.²⁴⁸ Among the technologies which were at risk were battery, encryption and product integration, all of which could be used to advance China's military capabilities.²⁴⁹ CFIUS also launched a forty-five-day investigation in 2003 when Hutchison Whampoa Ltd. made a bid for telecommunications giant Global Crossing.²⁵⁰ Hutchison Whampoa was commonly known to have ties to the Chinese military.²⁵¹

²⁴⁴ Gotts et al., *supra* note 224.

²⁴⁵ *Id.*

²⁴⁶ See *supra* note 221 and accompanying text.

²⁴⁷ Steve Lohr, *Is I.B.M.'s Lenovo Proposal a Threat to National Security?*, N.Y. TIMES, Jan. 31, 2005, at C6.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ Gotts et al., *supra* note 224.

²⁵¹ *Id.*

Besides the Dubai Port World deal, the largest CFIUS firestorm was triggered in 2005 when the Chinese firm CNOOC made a bid for the U.S. oil firm Unocal.²⁵² The deal primarily raised fears over energy security.²⁵³ The critical components of Unocal were its crude oil reserves, located in Southeast Asia, and the technology used in certain blends of gasoline.²⁵⁴ The argument over the deal became so heated that Congress passed several resolutions declaring that the acquisition would threaten U.S. national security.²⁵⁵ Congress went so far as to threaten to use its Article I power to regulate commerce with foreign nations to block the deal.²⁵⁶ Although these investigations proved fatal to the acquisitions, all still received the green light from CFIUS. In only one case did the President exercise his power to block a deal: a 1990 acquisition of a U.S. aerospace manufacturer by a Chinese firm.²⁵⁷

What this history of investigations makes clear is that serious anxieties exist in matters of national security, especially when China is involved.²⁵⁸ Congress should extend the mandate of CFIUS and use its resources to monitor the national security implications of intellectual property theft.

CONCLUSION

The illusion that the trade in counterfeits is a victimless crime—that at worst harms wealthy CEOs in the luxury goods or entertainment industries²⁵⁹—is far from the truth. Chinese intellectual property theft leads to dangerous drugs, fake currency, a

²⁵² *Id.*

²⁵³ Steve Lohr, *Who's Afraid of China Inc.?*, N.Y. TIMES, July 24, 2005, at 31 [hereinafter Lohr, *Who's Afraid*].

²⁵⁴ Gotts et al., *supra* note 224.

²⁵⁵ Lohr, *Who's Afraid*, *supra* note 253, at 31. The outcry was so universal that Representative Richard Pombo's resolution passed 398 to 15. Investors in CNOOC were also opposed to the deal. Investment bank William Blair & Company sold its \$160 million stake in CNOOC over fears that the company's moves were directed too much by the Chinese government, and not a sense of capitalism and profit. *Id.*

²⁵⁶ *See id.*

²⁵⁷ Gotts et al., *supra* note 224.

²⁵⁸ Lohr, *Who's Afraid*, *supra* note 253.

²⁵⁹ *See Counterfeit Goods Hearing*, *supra* note 50, at 2–3 (statement of Sen. Susan M. Collins, Chairman, S. Comm. on Homeland Sec. and Governmental Affairs).

distrust of American products, the financing of criminal organizations and the proliferation of sensitive technologies. These counterfeit goods pose a direct national security threat to the United States. This threat may have been overlooked in part because of a narrow, traditional definition of national security. In several instances, however, Congress has allowed for a broad interpretation of national security to give the U.S. maximum protection.

Congress and the Executive should implement several statutory changes aimed at monitoring and addressing the national security threats posed by counterfeit goods from China. The general provisions which facilitate U.S.-China relations should provide for strict and detailed monitoring of China's enforcement of its intellectual property laws. Potential national security threats caused by counterfeits should be analyzed in § 6951 reports to Congress and hearings before the U.S.-China Economic and Security Review Commission. Finally, Congress should make use of the Committee on Foreign Investment in the United States to monitor threats posed by intellectual property theft.