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Apologies as Intellectual Property Remedies: Lessons from China

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It is a frequent refrain that “the world is shrinking.” In this same vein, the global influence of China is clearly rising. Chinese businesses are becoming more prominent in the global market, and as such, the influence and effect of Chinese law is likewise gaining in import. Chinese intellectual property law is no different.

One notable aspect of Chinese intellectual property law is the availability of apology as a remedy. Despite a culture that places a high value on apology, and considerable legal scholarship and precedent regarding apology as remedy, many in the United States scoff at the notion of introducing apology as a remedy in U.S. intellectual property law. There are, however, limits to the effectiveness of injunctions and damages (currently the predominant remedies in U.S. intellectual property law), and tangible benefits to apology. This Article uses Chinese intellectual property law as an example and addresses the limits of the current U.S. intellectual property regime, as well as the potential benefits of a change. The Article concludes that it is time for the United States to learn from beyond its boundaries in order to provide just recourse in intellectual property disputes.
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Apologies as Intellectual Property Remedies: Lessons from China

XUAN-THAO NGUYEN

I. INTRODUCTION

American culture values apology. Parents instill in youngsters the importance of apology and the need to apologize in a timely and sincere manner when an offense is committed. Americans routinely apologize for their own misconduct. Apologies are heard, and read about, daily. In recent years, athletes with a visible brand-image, corporate officers of global companies, and politicians with national statures have publicly apologized for their misconduct. It is safe to conclude, therefore, that apology is almost as familiar to Americans as apple pie. Yet whenever I inform my students, colleagues, lawyers, and other Americans about China's embrace of apology as a remedy in litigation, the responses are strikingly dismissive and consistent: apology is "culturally Chinese," and making an apology is "what Chinese people do."

This Article assesses apology as a remedy in intellectual property law. The Article observes a growing recognition of the roles apologies play in law. Legal scholars began the process with influential legal scholarship on apology in 1986, initiating a wealth of scholarship development in the field.¹ John Haley's Implications of Apology implored legal scholars to realize the importance of looking beyond our boundaries to learn what others have done or are doing, in an effort to reach our own goals of justice.² Haley then suggested that the field has much to learn from Japan

¹ See, e.g., Hiroshi Wagatsuma & Arthur Rosett, The Implications of Apology: Law and Culture in Japan and the United States, 20 LAW & SOC'Y REV. 461, 461 (1986) (discussing the role of apology in the formal resolution of legal disputes in America and Japan); see also infra Section III.A.
about the role of apologies in law. This Article looks beyond our boundaries and suggests that there is much to learn from China about apologies in intellectual property law.

In the past five years, both quantitative and qualitative data indicate that the New China has accelerated its acceptance of intellectual property rights as valuable assets. Chinese businesses rely on trademarks as indispensable reputational sources for their goods and services, and they protect their rights by utilizing the legal system to fight against infringing conduct committed by other Chinese businesses. In addition to trademark infringement cases, Chinese businesses bring infringement suits to protect their corporate intangible assets relating to copyrights and patents. Yearly, tens of thousands of suits relating to intellectual property rights are filed by Chinese businesses against other businesses in China. Statistically, in the last few years, there have been more intellectual property litigation cases filed annually in China than in the United States. Among the remedies sought by Chinese intellectual property owners are apologies from the wrongdoers. Both injunctions and damages are available and routinely obtained by the prevailing Chinese intellectual property owners. In addition to these remedies, the prevailing owners frequently avail themselves of the statutorily available apology remedy as well.

What roles do apologies have in law, specifically intellectual property law? What can one learn from China with respect to remedies in intellectual property law? In the age of globalization America cannot afford to dismiss the New China: what happens in China matters in the United States. There is much to learn beyond our borders, and the United States cannot ignore apologies as remedies in Chinese intellectual property law by simplistically labeling apologies as inherently Chinese cultural behavior. It is time to reflect on whether apologies as remedies should be

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3 Id. at 504.
4 "New China" is used in this Article to refer to China as a nation undergoing a recent and significant rise in global power and importance. See also David E. Sanger, Three Faces of the New China, N.Y. TIMES, Sept. 26, 2010, at WK1.
7 See J. Benjamin Bai et al., What Multinational Companies Need to Know About Patent Invalidation and Patent Litigation in China, 5 NW. J. TECH & INTELL. PROP. 449, 450 (2007) ("[B]oth patent invalidation and patent litigation will become an important part of the business strategies for multinational companies operating in China.").
8 Id. at 449 n.1.
9 Nguyen, supra note 5, at 775.
10 See infra Part V.
11 Id.
considered in the United States. At the very least, Americans should be aware of what roles apologies play in Chinese intellectual property law as U.S. companies may find themselves ordered to apologize to Chinese companies in intellectual property disputes in China.

Part II of this Article observes apology as normative behavior in American culture. Contrary to the view of apology as inherently Chinese, Part II establishes that American culture fully embraces apology, from the school playground to the hallowed halls of Congress, from Wall Street to the courtroom, and from private settings to public YouTube clips.

Legal scholars, legislators, and judges all recognize the importance of apologies in law. Part III traces the history of the development of apology scholarship, with a rich beginning marked by a collection of articles published in Law & Society Review in 1986 on the implications of apology in Japan and in the United States. The robust body of legal scholarship on apology demonstrates that apology as a legal remedy is an accepted norm. Significantly, apologies have moved beyond the theoretical stratosphere, and into statutes and case law as jurisdictions across the United States have come to recognize the benefits of apologies. States have enacted statutes codifying acceptance of apologetic gestures and protecting those gestures from being considered as evidence against the apologizing person. Part III also identifies and discusses how courts have treated apologies as remedies in a range of different types of cases.

With respect to remedies available under U.S. intellectual property law, Part IV assesses the current state of injunctive relief and damages. Though strong property rights have long been touted as the hallmark of U.S. intellectual property law, injunctive relief sought by intellectual property owners is no longer automatically available once the owners prevail in an infringement suit. Recent landmark Supreme Court decisions, and subsequent adherence to these precedents by lower courts, have substantially weakened the strong property rights embedded in the power of injunctive relief. Damages are also difficult to obtain by prevailing owners in intellectual property suits due to the difficulty of proving losses caused by specific infringing conduct. The current state of injunctive relief and damages in intellectual property law should serve as a catalyst to look beyond American borders in order to learn what other nations are doing with respect to remedies, specifically apologies as remedies in intellectual property law.

Part V focuses on the roles of apologies in China’s intellectual property law. An examination of China’s anti-competition, trademark, and copyright statutes reveals the various remedies available—including injunction, damages, and apologies. Contextualizing the roles of apologies, Part V studies legal opinions issued by Chinese courts. The circumstances in a case, the extent of the infringing conduct, and the harm incurred by the intellectual property owner all dictate whether apologies
are warranted in addition to injunctive relief and damages.

After looking in a broader perspective at China’s intellectual property law, and its remedies, Part VI suggests that the United States should likewise be more open to apologies as remedies in certain types of intellectual property infringement cases—particularly those involving reputational harms caused by trademark and copyright infringements. Part VI argues that there is already some support in U.S. intellectual property case law, as seen through reported decisions wherein the parties settled their disputes with apologies and the court was not hostile to apologetic remedies.

Reflecting on the role of apologies in American daily life, and in the legal system, and looking outwardly to China with its inclusion of apologetic justice, the Article concludes that apologies may serve as additional remedies in intellectual property law in the United States.

II. AMERICAN CULTURE AND APOLOGIES

American culture fully embraces apology as a practice of remorse and repentance offered by wrongdoers, and as a conciliatory step to assist the victimized recipients of apologies in their healing. On any given day in American culture the phrase “I’m sorry” is common. Parents teach their children at a young age to say the ubiquitous phrase when they take away toys from a friend without permission, hit a playmate, or hurt a friend’s feelings. Preschool and elementary school teachers ingrain in the youngsters the social norms of apology whenever they commit an offense in the classroom or on the playground. Beyond familial and school settings, adults use “I’m sorry” in personal apologies, to make amends in our daily lives, and to improve interactions and relationships with people in social circles and in the workplace.

Likewise, Americans are no strangers to hearing public apologies. Politicians often offer public apologies when their conduct destroys the public trust. Eliot Spitzer, the former governor of New York, held a press conference apologizing to his family and the people of New York for his links to a prostitution ring. Mark Sanford, the governor of South Carolina, made a public apology to his family and supporters, and later apologized to his cabinet, after he mysteriously disappeared from South Carolina to Argentina for extramarital purposes while using state resources.

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14 Jim Rutenberg & Shaila Dewan, Back at Work, Governor Puts Apology on Agenda, N.Y. TIMES, June 27, 2009, at A12.
Major political figures and heads of nations have also made public apologies on behalf of their constituents for the grave injustices inflicted on other ethnic groups. Tony Blair, then Prime Minister of Great Britain, apologized to Ireland for the Potato Famine which killed more than a million Irish people. The Japanese government issued a formal apology for its use of other Asian women as "comfort women," or sex slaves, during World War II. The U.S. Congress, after a long tortuous history of slavery, apologized to African-Americans for 246 years of institutional slavery and the subsequent Jim Crow laws that systematically discriminated against African-Americans in every facet of their lives.

Americans need only turn on the television or look at YouTube to watch apologies from public figures like international golf superstar Tiger Woods. In a somber voice, Woods spoke about the pain his extramarital affairs brought upon his family, friends, and fans. World religious figures, such as Pope Benedict, have issued letters of apology as well. After the global scandal of sexual abuse committed by predatory Catholic priests exploded, Pope Benedict apologized in an eight-page pastoral letter to Irish Catholics for the "sinful and criminal" sexual abuse of thousands of children across a span of decades. Similarly, corporate officers offer public apologies. The 2008 financial collapse ruined the world economy and shattered many people's lives. Lloyd Blankfein, chief executive of Goldman Sachs, offered an apology for his firm's activities leading to the financial crisis.

Because of the omnipresence of apology in U.S. society, Americans can immediately detect whether an apology is genuine. For example, one of the worst environmental catastrophes in United States history occurred on April 20, 2010—the BP oil spill. Months later, and only after the corporate image of BP had been significantly tarnished, Tony Hayward, chief executive officer of BP, apologized for the Gulf Coast oil spill.

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15 For a list of political apologies for major figures, see Graham G. Dodds, Political Apologies: Chronological List, UPENN.EDU (Jan. 23, 2003), http://www.upenn.edu/pnc/politicalapologies.html.
21 Christine Harper & Matt Townsend, Blankfein Apologizes for Goldman Sachs Role in Crisis, BLOOMBERG (Nov. 17, 2009), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aeVjwqKKreEw ("We participated in things that were clearly wrong and have reason to regret . . . We apologize.").
disaster.\textsuperscript{22} Hayward's "I am sorry" and "I am very sorry" hit the airwaves and the print media in major daily newspapers, including the New York Times, the Wall Street Journal, USA Today, and the Washington Post on June 3, 2010.\textsuperscript{23} Perhaps the beleaguered BP executives understood that because previous efforts failed to address the mounting anger of Americans, a public apology was worthwhile. But the apology was too late and woefully insincere.\textsuperscript{24}

It is commonly understood that certain circumstances warrant court-ordered apologies. For example, a Colorado judge ordered the driver responsible for a car crash that killed a University of Colorado track star to take out a full-page apology in the campus newspaper.\textsuperscript{25} The entire campus was mourning; the public apology made by the driver served to acknowledge the loss felt by the community and helped ease the community's pain. By making the apology public, the driver felt the desired humiliation, while acknowledging the harm he had inflicted on the victim and the public. Likewise, a court in Tuscaloosa, Alabama ordered a District Attorney to write an apology letter for his conduct in a 1998 political race: the district attorney illegally used his opponent's criminal background information in the race.\textsuperscript{26} Another judge ordered a police officer to apologize to a defense attorney after removing paperwork from her file during a criminal sentencing hearing.\textsuperscript{27} When two teens repeatedly pulled pranks yelling "Fire in the hole!" while hurling a thirty-two ounce cup of soda and ice at a fast food restaurant worker and then fleeing, the court ordered the teens to post an apology video on YouTube.\textsuperscript{28}

Given the prevalent use of apologies in the United States, many


\textsuperscript{23} Id. ("The Gulf spill is a tragedy that never should have happened. . . . BP has taken full responsibility for cleaning up the spill in the Gulf. . . . We've helped organize the largest environmental response in this country's history. More than 2 million feet of boom, 30 planes and over 1,300 boats are working to protect the shoreline. Where oil reaches the shore, thousands of people are ready to clean it up. We will honor all legitimate claims. And our cleanup efforts will not come at any cost to taxpayers. To those affected and your families, I am deeply sorry. The Gulf is home for thousands of BP's employees and we all feel the impact. To all the volunteers and for the strong support of the government, thank you. We know it is our responsibility to keep you informed. And do everything we can so this never happens again. We will get this done. We will make this right.").

\textsuperscript{24} Id. (reporting that despite the apology campaign to polish BP's tarnished image, "marketing experts aren't so sure anything will help just yet—not with thousands of gallons of oil still gushing out of the ruptured BP well").


\textsuperscript{26} Kevin Bowen, Smith Must Write Letter of Apology, TUSCALOOSA NEWS, Feb. 9, 2001, at A1.

\textsuperscript{27} JJ Hensley, Officer Told To Apologize for Taking Lawyer's Notes, ARIZONA REPUBLIC, Nov. 19, 2009, at B1.

\textsuperscript{28} Keyonna Summers, Judge Orders Teens to Post Apology on YouTube, USA TODAY (June 8, 2008), http://www.usatoday.com/tech/webguide/internetlife/2008-06-08-youtube_n.htm. The apology video also included images of the teens face down being handcuffed on the hood of a car. Id.
commentators have long asserted that "public apologies are ubiquitous in American culture" and a "fully protected apology is both good business and consistent with U.S. cultural values." Indeed, numerous empirical studies have examined the role of apologies. One found that ninety-eight percent of civil medical malpractice claimants desire apologies.30

III. APOLOGIES AS REMEDIES IN THE UNITED STATES

A. Apology Legal Scholarship

In the last two decades, apology legal scholarship has become increasingly robust. Legal scholars have focused on the implications of apologies, such as whether an apology is an appropriate remedy in criminal and civil suits,31 whether an apology can right historic wrongs,32 and whether in specific types of cases a sincere apology33 should be included.34

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29 See Michael B. Runnels, Apologies All Around: Advocating Federal Protection for the Full Apology in Civil Cases, 46 SAN DIEGO L. REV. 137, 160 (2009) ("Growing evidence suggests that the fully protected apology is both good business and consistent with U.S. cultural values."); Brent T. White, Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy, 91 CORNELL L. REV. 1261, 1266 (2006) (examining the prevalent use of public apologies in the United States and arguing that "public apologies are ubiquitous in American culture"); Rachel Zimmerman, Medical Contrition: Doctors' New Tool to Fight Lawsuits: Saying 'I'm Sorry', WALL ST. J., May 18, 2004, at A1 ("When a medical mishap turned Linda Kenney's routine ankle surgery into a chilling brush with death, the family quickly paid a visit to a lawyer's office. A jury, the family suspected, would likely show little mercy to the anesthesiologist, Frederick van Pelt, who inadvertently injected a painkilling drug in the wrong place, causing Ms. Kenney's heart to stop. To restart it, doctors ... sliced into her chest and cracked open her rib cage. ... But then, Dr. van Pelt broke with convention. Against the hospital's advice, he wrote Ms. Kenney a personal letter saying he was 'deeply saddened' by her suffering. Later, over coffee at a suburban diner, he apologized for the terrible accident. 'I found out he was a real person,' Ms. Kenny says. 'He made an effort to seek me out and say he was sorry I suffered.' Moved by the doctor's contrition, Ms. Kenney dropped her plans to sue.").

30 White, supra note 29, at 1271 (stating that thirty-seven percent of claimants "wouldn't have filed suit had the doctor fully explained [the situation] and offered an apology to begin with").

31 See, e.g., Stephanos Bibas & Richard A. Bierschbach, Essay, Integrating Remorse and Apology into Criminal Procedure, 114 YALE L.J. 85, 87-100 (2004) (examining defendants' remorse and apology and recommending means to include such conduct into existing criminal procedure); Daniel W. Shuman, The Role of Apology in Tort Law, 83 JUDICATURE 180, 180-81 (2000) (analyzing the function of apology in tort cases and examining whether tort law should encourage apology).

32 See ALFRED L. BROPHY, REPARATIONS: PRO & CON 11 (2006) (suggesting that some injuries "may be best repaired by study of the past injustice and by apology" and apologies can "be part of a meaningful program of repair and reconciliation").

33 Martha Minow describes a sincere apology as one where "the apologizer assumes a position of vulnerability before not only the victims but also the larger community." MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 114 (1998). Further, "[t]o apologize is to declare voluntarily that one has no excuse, defense, justification, or explanation for an action. ... Any diversion from accepting responsibility is not an apology. ... Full acceptance of responsibility by the wrongdoer is the hallmark of an apology." Id. at 114–15. Similarly, Jeffrie G. Murphy wrote that a sincere apology requires "remorseful acceptance of responsibility for one's wrongful and harmful actions, the repudiation of the aspects of one’s character that generated the actions, the resolve to do one’s best to extirpate those aspects of one’s character, and the resolve to atone or make amends ... ." Jeffrie G. Murphy,
Scholars often note the moral dimension of apology in society, and ponder whether apology is effective and whether apology's moral aspects would remain intact when it is utilized in the legal regime.

Looking back, a 1986 article in *Law & Society Review* opened a new beginning for apology legal scholarship. Hiroshi Wagatsuma and Arthur Rosett discussed the implications of apology by comparing the role of apology in Japan and the United States. In the same issue, John O. Haley noted in his comment that apology scholarship finally received the attention it deserved with the publication of Wagatsuma and Rosett's article. He praised the article for providing a broader view on the implications of apology. Haley emphasized the parallels between Japan and the United States on the use of apology, and argued that scholars should conduct further inquiries on the role of apology in the U.S. legal system.

As an example, Haley explained how the University Hospital in Seattle, Washington included apologies as part of an early intervention program to avoid medical malpractice litigation when a doctor is responsible for unsatisfactory results of a treatment.

In the immediately subsequent years, scholars devoted substantial...
efforts to developing scholarship on apology. They explored the consequences of advising clients to apologize; they also examined how apology can serve as an effective tool in law reform. For instance, Daniel W. Shuman discussed the role of apology in tort law and reform, noting that, as the tort system is subject to attack for being both too costly and inefficient, a way to reshape the tort system would be to encourage apology for tortious conduct. Specifically, Shuman argued that tort law should grant apology broader protection from admissibility in determining a defendant’s liability. As an apology for a tort has healing effects that monetary damages alone cannot provide, apology as a remedy may reduce damages for the wrongs. Accordingly, Shuman opined, tort law should recognize the potential therapeutic impact of apology by allowing apology in the damages phase to mitigate damages for intangible losses. Indeed, by embracing what Shuman proposed in the medical malpractice field, scholars advocate a shift from an adversary approach to a restorative justice framework, with apology playing a key role in healing for patients, doctors, and the community.

Naturally, the substantial growth in apology scholarship is strong in the criminal law area, particularly in restorative justice and victims’ rights movements. Notable scholars such as Stephanos Bibas and Richard A. 46


41 See Shuman, supra note 31, at 180 ("An apology has the potential to help people who have suffered serious emotional harm through the wrongdoing of others in ways that monetary damages alone cannot.").

42 Id. at 181.

43 Id. at 189.

44 See id. (recognizing that an apology may be a more effective form of restoration for the claimant than money).

45 Lee Taft, Apology and Medical Mistake: Opportunity or Foil?, 14 ANNALS HEALTH L. 55, 59 (2005) (exploring the “healing possibilities of apology in the face of medical mistake” and asserting that “authentic expression of remorse should be given voice, not only because morally and ethically it is the right thing to do, but also because it is potentially spiritually healing for both the patient and the physician”); Jonathan Todres, Toward Healing and Restoration for All: Reframing Medical Malpractice Reform, 39 CONN. L. REV. 667, 710–12 (2006) (identifying the benefits of the restorative model to reform medical malpractice and discussing apology and emotional restoration for both patients and doctors).

Bierschbach detailed the prevalent and proper use of apology in American life and provided rationale for the inclusion of apology in criminal law.\footnote{Bibas \& Bierschbach, supra note 31, at 87 (stating that remorse and apology should be incorporated into the criminal arena since victims of crimes have greater wounds and need the most healing).} They proposed ways in which to integrate apology into criminal procedures. For instance, they examined at what state of the criminal process apology should be integrated.\footnote{Id. at 128–35 (evaluating the incorporation of apology from the beginning of the criminal process through mediation).} Although there are difficulties in implementing apology into the criminal justice system, they noted that apology has become more common in other areas of the law, such as corporate wrongdoings, and therefore criminal law should remove roadblocks and provide opportunities for apology to occur.\footnote{Id. at 145–47 (examining the costs and difficulties of implementing remorse and apology).}

Likewise, in the area of alternative dispute resolution, scholars have explored the role of apology in mediation,\footnote{See Max Bolstad, Learning from Japan: The Case for Increased Use of Apology in Mediation, 48 CLEV. ST. L. REV. 545, 546 (2000) (comparing the uses and effects of apology in the United States and Japan in mediation); Jennifer Gerarda Brown, The Role of Apology in Negotiation, 87 MARQ. L. REV. 665, 666 (2004) (examining the purposes of apology in criminal, civil cases, and alternative disputes).} negotiation, and conflict resolutions.\footnote{See Donna L. Pavlick, Apology and Mediation: The Horse and Carriage of the Twenty-First Century, 18 OHIO ST. J. ON DISP. RESOL. 829, 865–66 (2003) (stating that mediation rather than litigation is the appropriate forum for apology); Deborah L. Levi, Note, The Role of Apology in Mediation, 72 N.Y.U. L. REV. 1165, 1168, 1172–75 (1997) (creating a vocabulary for discussing apology for use in analyzing the potential of apology in dispute resolution).} They recognized that apology is a better fit in alternative dispute resolution than in the adversarial system, and that the use of apology in these areas yields many benefits.\footnote{Bolstad, supra note 51, at 569–71 (discussing apology benefits in mediation cases); Brown, supra note 51, at 667–68 (noting how apology is used in other areas of law and articulating benefits of apology in alternative disputes).} Some scholars suggested a place for sincere apology in mediation disputes before litigation.\footnote{See, e.g., Pavlick, supra note 50, at 830–31 (discussing mediation as a forum for dispute settlement).} Consequently, they advocated for an increased use of apology in all dispute
resolution.\textsuperscript{54}

Some scholars took an additional step, suggesting court-ordered apology as a remedy in cases involving defamation\textsuperscript{55} and civil rights.\textsuperscript{56} In the reparations context, numerous scholars have examined the role of institutions\textsuperscript{57} or governments in making apologies as a healing measure for mass injustice—such as slavery\textsuperscript{58} or Japanese internment.\textsuperscript{59} Some shared the view that a sincere apology is more valuable and meaningful to victims than money.\textsuperscript{60}

As apology scholarship evolved into a more mature and collective inquiry, scholars provided empirical data on the use of apology in settlements\textsuperscript{61} and negotiations.\textsuperscript{62} They tested the value of apology and suggested that sincere and substantive apology may improve the level of trust between parties in a negotiation situation.\textsuperscript{63} They applied

\textsuperscript{54} See, e.g., Bolstad, supra note 51, at 578 (stating that the benefits of apology in dispute resolution are underutilized in American society and advocating for its increased use in the forum of mediation); Brown, supra note 51, at 667–68 (noting how apology is used in multiple legal dispute resolution forums); Deborah Levi, \textit{Why Not Just Apologize? How to Say You’re Sorry in ADR}, 18 ALTS. TO HIGH COST LITIG. 147, 163 (2000) (exploring the factors that contribute to the practicability of a meaningful apology); Carl D. Schneider, \textit{What It Means to Be Sorry: The Power of Apology in Mediation}, 17 MEDIATION Q. 265, 274 (2000) (discussing the place for apology in American law).


\textsuperscript{56} See, e.g., White, supra note 29, at 1265 (proposing “that civil rights plaintiffs in lawsuits against government defendants should be entitled to pursue court-ordered apologies as an equitable remedy”).


\textsuperscript{58} ROY L. BROOKS, \textit{ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS} 142–43 (2004) (providing a compelling moral theory of reparations relying on apology and asserting that “atonement—apology and reparation—plus forgiveness leads to racial reconciliation”).


\textsuperscript{60} BROPHY, supra note 32, at 11 (“[A] sincere apology may be more valuable and meaningful to some victims than money.”).


\textsuperscript{63} See Russell Korobkin & Chris Guthrie, \textit{Psychological Barriers to Litigation Settlement: An Experimental Approach}, 93 MICH. L. REV. 107, 147–50 (1994) (discussing equity-seeking experiments
They extended apology as part of a solution after providing a feminist critique of the problems in evidence law. Some noted that victims of spousal abuse and physician negligence are often more inclined to forgive and accept apology. Moreover, scholars began systematically to evaluate apologies tailored toward legal solutions, and critically examined the pros and cons of legislating apology. Some scholars raised their concerns about the subversion of apology as it may be abused through commodification.

In recent years, apology became recognized as “important” in American culture and law. Between 1986 and 2009, thirty-five states encouraged apologies by enacting statutes designed to provide evidentiary protection for apologetic expressions. Empirical studies on apology reveal that protected apologies will foster settlement between adversarial testing the value of apology and concluding that “[p]erhaps a more sincere or more substantive apology could restore equity to [a harmed] relationship”.

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64 Erin Ann O’Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121, 1148 (2002) (“Biochemical and physiological changes combined with the individual’s developmental and environmental history affect the emotional state or feelings that shape behavior surrounding apology and forgiveness.”).


68 See Cohen, supra note 35, at 819–24 (presenting the pros and cons of legislation concerning the admissibility of apologies as proof of fault in civil cases).

69 Taft, supra note 35, at 1156 (stating that a truly repentant offender admits his wrongdoing and accepts the consequences of his offense rather than distancing himself from those consequences).

Moreover, court-ordered apologies have been accepted as promoting psychological healing and social justice, restoring social equilibrium, and serving as an inducement for changed behavior.\footnote{See Robbennolt, supra note 61, at 491 ("Only the full, responsibility-accepting apology increased the likelihood that the offer would be accepted."); Jennifer K. Robbennolt, What We Know and Don’t Know About the Role of Apologies in Resolving Health Care Disputes, 21 GA. ST. U. L. REV. 1009, 1015–21 (2005) (reviewing empirical studies relating to apology in the context of medical malpractice cases).}  

B. Apology in Statutes, Decisional Law, and Practice—A Brief Survey

1. Statutes

Apologies have moved from the arena of theoretical scholarship to hard law. Recognizing the benefits of apologies, many states have protected the conduct by enacting and codifying acceptance of apologetic gestures and statements into statutes.\footnote{White, supra note 29, at 1273–92 (illustrating the benefits of court-ordered apologies in the civil rights context).} For example, Florida’s relevant statute provides:

> The portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident and made to that person or to the family of that person shall be inadmissible as evidence in a civil action.\footnote{See supra note 70 (listing relevant statutes).}

Under this statute, an apologetic gesture or statement will be protected from being considered as evidence against the apologizing person.  

Similarly, under Ohio’s statute on the use of a defendant’s statement in a medical liability action, statements, gestures, or conduct expressing apology made by a health care provider to an alleged victim are “inadmissible as evidence of an admission of liability or as evidence of an admission against interest.”\footnote{FLA. STA. § 90.4026(2). The statute also provides that “[a] statement of fault, however, which is part of, or in addition to, any of the above shall be admissible pursuant to this section.” Id.} Defendants generally request that the court not admit the apology into evidence.\footnote{OHIO REV. CODE ANN. § 2317.43(A).}

Oregon’s statute explicitly states that any expression of regret or apology made by a person licensed by the Oregon Medical Board or on behalf of that person does not constitute an admission of liability for that
The protection covers an apology that is made in writing, orally, or by conduct. Further, the statute prohibits the examination by deposition "or otherwise in any civil or administrative proceeding, including any arbitration or mediation proceeding, with respect to an expression of regret or apology" made by a person licensed by the Oregon Medical Board or on behalf of that person.

The statutes above are among the thirty-five state statutes designed to encourage and protect apology. The first state that extended protection for apology was Massachusetts; the catalyst for the adoption of the statute was the fatal accident of a legislator's daughter, as recounted by apology scholar Lee Taft:

In the 1970s a Massachusetts legislator's daughter was killed while riding her bicycle. The driver who struck her never apologized. Her father, a state senator, was angry that the driver had not expressed contrition. He was told that the driver dared not risk apologizing, because it could have constituted an admission in the litigation surrounding the girl's death. Upon his retirement, the senator and his successor presented the legislature with a bill designed to create a "safe harbor" for would-be apologizors.

Overall, state statutes encourage parties to make apologies or gestures of sympathy and compassion as warranted under the circumstances, without fear of subsequent liability through admission. The statutes are specifically indicative of the positive influences of apology in healing patients and reducing the high cost associated with medical malpractice litigation.

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77 OR. REV. STAT. § 677.082 (2009) (“(1) For the purposes of any civil action against a person licensed by the Oregon Medical Board, any expression of regret or apology made by or on behalf of the person, including an expression of regret or apology that is made in writing, orally or by conduct, does not constitute an admission of liability for any purpose. (2) A person who is licensed by the Oregon Medical Board, or any other person who makes an expression of regret or apology on behalf of a person who is licensed by the Oregon Medical Board, may not be examined by deposition or otherwise in any civil or administrative proceeding, including any arbitration or mediation proceeding, with respect to an expression of regret or apology made by or on behalf of the person, including expressions of regret or apology that are made in writing, orally or by conduct.”).

78 Id.

79 Id.

80 Runnels, supra note 29, at 151.

81 Taft, supra note 35, at 1151.

82 See Valerie B. Hedrick, Comment, The Medical Malpractice Crisis: Bandaging Oregon's Wounded System and Protecting Physicians, 43 WILAMETTE L. REV. 363, 392 (2007) (noting how apology statutes indicate the changing perspective on physician apologies and that apology "provides a means to reduce the exorbitant amounts required to settle and defend against malpractice disputes");
2. Courts and Apologies

Commentators have noted numerous cases where courts have ordered defendants to apologize for their reprehensible conduct. For example, a court in Ohio ordered corporate polluters to write letters of apology for their environmental crime of contaminating the groundwater with carcinogenic chemicals and to publish newspaper advertisements describing their polluting conduct. A Texas court ordered a teenager who vandalized schools to apologize to the students at those schools. A court in Alabama ordered the district attorney in Tuscaloosa to write a letter of apology for illegally using his opponent's criminal background information in a 1998 political race. Of course, if the defendant fails to heed the court's apology order, there are consequences. For example, a defendant who failed to apologize as a condition of probation was ordered to attend "empathy training" by a court in New Hampshire.

A search of electronic legal databases on decisional law regarding apology reveals that courts have adopted a wide range of approaches. Some courts rejected apologies while others welcomed them. At one end of the spectrum, courts believed that, under the adversary system, the law "is not usually concerned with procuring apologies to make morally right a legal wrong done to the plaintiff." For example, in Woodruff, a gender discrimination and retaliation case, the district court ruled that monetary damages alone could not remedy the injury caused by the defendant's reprehensible conduct. Accordingly, the district court ordered the defendant to apologize to the plaintiff. On appeal, the Sixth Circuit held that the district court exceeded its equitable power when it ordered the defendant to apologize. The court reasoned that the order was for the purpose of "righting moral wrongs," and that the apology would not provide any remedy to the plaintiff "for which the damages imposed have not already accounted." Similarly, in some racial and sexual harassment

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see also Zimmerman, supra note 29, at A1 (describing the impact of a physician's apology letter on the patient's decision not to bring an action against the doctor).


Latif, supra note 67, at 296–97.

Bowen, supra note 26, at A1.

White, supra note 29, at 1269 (describing the event and court order and citing Alan J. Keays, Court: Man Must Work on Empathy Issues, RUTLAND HERALD, May 17, 2005, at B1).

Woodruff v. Ohman, 29 F. App'x 337, 346 (6th Cir. 2002); see id. (holding that the court exceeded its equitable power when it ordered the defendant to apologize); see also McKee v. Turner, 491 F.2d 1106, 1107 (9th Cir. 1974) (opining that the courts "are not commissioned to run around getting apologies" in a case where the plaintiff only requested an apology).

cases, courts found that apologies are insufficient to rectify the taint of discrimination and therefore fail to serve the purposes of Title VII.\textsuperscript{89}

In an older case, a plaintiff brought an action against a U.S. Attorney for sending an allegedly defamatory letter to the chief judge for the District of Oregon. The plaintiff changed the prayer of relief from monetary damages to an apology, and the Ninth Circuit dismissed the case as \textit{de minimis} for failing to present a justiciable controversy.\textsuperscript{90} The Ninth Circuit stated, "we are not commissioned to run around getting apologies."\textsuperscript{91}

Similarly, in a discrimination case in which a cemetery refused to bury the remains of an individual on the basis of race, the Pennsylvania Supreme Court reversed a lower court's order requiring the cemetery to issue a public letter of apology to the widow of the deceased.\textsuperscript{92} The court determined that a letter of apology would be superfluous in light of the previously required advertisement proclaiming that the cemetery no longer adhered to its "all-Caucasian policy."\textsuperscript{93} A concurring justice in that case further explained that ordering a public apology is beyond the reach of government, characterizing it as ordering an expression of emotion, and that doing so is to "advocate tyranny."\textsuperscript{94}

Some courts articulated First Amendment concerns which precluded them from ordering apology as a remedy. For instance, in Griffith v. Smith, the plaintiff's attorney failed to conduct a reasonable pre-filing inquiry and faced sanctions.\textsuperscript{95} The defendant requested that an appropriate sanction should include attorney's fees, costs, and an apology.\textsuperscript{96} The court...
awarded the defendant monetary compensation, but declined to issue an order for apology, reasoning that the First Amendment "protects both the right to speak and the right to remain silent."  

On the other hand, courts have upheld apologies as remedies in cases involving perjury, wrongful discharge of employment, First Amendment violations, and attorney disciplinary actions, among others.  Courts have also accepted apologies as mitigating factors in assessing damages. In a Ninth Circuit perjury case in which a condition of probation required the defendants to publish an apology, the defendants challenged the lower court's order under the First Amendment right to refrain from speaking. The Ninth Circuit upheld the apology requirement as reasonably serving the purpose of rehabilitation.

Likewise, in a wrongful discharge case in which the defendant appealed a trial court's grant of the plaintiff's request for equitable relief in the form of a public apology, the First Circuit upheld the relief on the grounds that the defendant failed to file the appropriate post-trial written objection. Similarly, in a case regarding whether a school administration could order a student to apologize for his disruptive behavior, the court found that requiring an apology was not a violation of the First Amendment and was "well within the ambit of an institution's balanced 'comprehensive authority.'” Additionally, in an attorney disciplinary action, the magistrate judge ordered the attorney to write apology letters to certain judges and a court clerk as part of the requirements to permit the attorney to return to practice.

With respect to apologies as a mitigating factor in assessing appropriateness of remedies, several courts have recognized meaningful apologies and accepted them as an important mitigating factor. For example, in a bankruptcy case in which a creditor violated the discharge injunction, the creditor's issuance of an apology was held to be a mitigating factor. Similarly, in a libel case, a federal district court

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97 Id. (citing In re Imperial Diner, Inc. v. State Human Rights Appeal Bd., 417 N.E.2d 525, 529 (N.Y. 1980) (Meyer, J., dissenting) (relying on the First Amendment and criticizing the majority for upholding the order of apology)).
98 See infra notes 99–106 and accompanying text.
99 United States v. Clark, 918 F.2d 843, 847–48 (9th Cir. 1990).
100 Id. at 848 (“It is almost axiomatic that the first step toward rehabilitation of an offender is the offender's recognition that he was at fault.”) (citing Gollaher v. United States, 419 F.2d 520, 530 (9th Cir. 1969)).
applied Texas law and held that public apologies are "relevant to mitigation of damages." Finally, in several attorney disciplinary cases, the courts considered, and weighed heavily, the attorney's apology in determining whether a suspension was appropriate and in determining the proper duration of such suspensions.

IV. U.S. INTELLECTUAL PROPERTY LAW AND REMEDIES

Federal intellectual property law in the United States is as old as the country itself. The members of the Constitutional Convention included the Patent and Copyright Clause in the Constitution, and Congress passed various federal statutes protecting intellectual property in 1790 during the First Session of Congress.

Intellectual property generally refers to patents, copyrights, trademarks, and trade secrets. A patent is a grant issued by the United States Patent Office for an invention satisfying statutory requirements of patentable subject matter, utility, novelty, non-obviousness, and enablement. A patent lasts twenty years from the date of filing the

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106 Ginzberg v. Statewide Grievance Comm., No. CV 950550507, 1995 WL 781406, at *2 (Conn. Super. Ct. Dec. 13, 1995) ("[A]lthough the plaintiff's remark was unquestionably disrespectful, his immediate and repeated abject apologies took the sting out of the insult and should have sufficed to put the matter permanently to rest. ... A prompt and unconditional apology, such as occurred here, is as much a part of the attorney's conduct to be reviewed as is the offense. And it should be a significant mitigating factor in judging the seriousness of the offense."); In re Discipline of Getty, 401 N.W.2d 668, 671 (Minn. 1987) (declining to suspend the attorney from practice upon noting that the attorney has made numerous apologies since the disciplinary proceedings have been brought against him and "appears to realize the error of his ways and has the will to correct them"); Disciplinary Counsel v. Roberts, 881 N.E.2d 1236, 1240 (Ohio 2008) (accepting, as a mitigating factor, the attorney's willingness to "accept responsibility for his mistakes, as shown by his often repeated apologies, [which] persuades us that he will not repeat his misconduct").

107 See Paul J. Heald & Suzanna Sherry, Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress, 2000 U. ILL. L. REV. 1119, 1148–49 (reviewing all records relating to the inclusion of the Patent and Copyright Clause in the Constitution, and concluding that James Madison and Charles Pinckney were "primary forces behind the addition of the Clause" and that the Clause was unanimously adopted without recorded debate).

108 Act of Apr. 10, 1790, ch. 7, 1 Stat. 109 (first patent statute); Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (1790) (first copyright statute); see also Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 347 (1908) (noting the first copyright act was passed by the first session of congress in 1790); Don E. Tomlinson & Christopher R. Harris, Free-Lance Photojournalism in a Digital World: Copyright, Lanham Act and Droit Moral Considerations Plus a Sui Generis Solution, 45 FED. COMM. L.J. 1, 12 (1992) (providing an account of the early history of copyright statutes).

A copyright is a bundle of exclusive rights to reproduce, prepare derivative works, distribute, publicly perform, and publicly display a work of authorship that meets the threshold of originality requirement and is expressed in a tangible medium. The term of copyright protection is the life of the natural author plus seventy years. If the work of authorship is a work made for hire, the entity author's copyright will last for ninety-five years from registration, or one hundred and twenty years from creation. For trademarks, federal law allows owners of a valid trademark the exclusive right to use the trademark against junior users of trademarks that may cause a likelihood of consumer confusion. When the owner of a trademark abandons its trademark by non-use, coupled with the intention not to resume use, trademark protection ceases. Also, if the trademark owner allows the trademark to become a generic term, protection is no longer available, as the generic
A trade secret refers to the information, formula, or process, not known by the public, that is capable of deriving independent economic means. A trade secret owner has the right to bring a misappropriation claim against others for the use of improper means to obtain the trade secrets. A trade secret loses its legal protection when it is no longer a secret.

Unlike real property, intellectual property protection is a mixture of property and liability rules. Accordingly, remedies for intellectual property infringement reflect the byproduct of the mixed regime. The

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116 Section 45 of the Lanham Act, 15 U.S.C. § 1127, defines abandonment of a trademark. Specifically,

[a] mark shall be deemed to be “abandoned” when either of the following occurs:

(1) When its use has been discontinued with intent not to resume such use. Intent not to resume may be inferred from circumstances. Nonuse for 3 consecutive years shall be prima facie evidence of abandonment. “Use” of a mark means the bona fide use of such mark made in the ordinary course of trade, and not made merely to reserve a right in a mark.

(2) When any course of conduct of the owner, including acts of omission as well as commission, causes the mark to become the generic name for the goods or services on or in connection with which it is used or otherwise to lose its significance as a mark. Purchaser motivation shall not be a test for determining abandonment under this paragraph.

Id.

117 See Elizabeth A. Rowe, Contributory Negligence, Technology, and Trade Secrets, 17 GEO. MASON L. REV. 1, 5 (2009) (“A trade secret can be any information of value used in one’s business that has been kept secret and provides an economic advantage over competitors.”).

118 See Elizabeth A. Rowe, Trade Secret Litigation and Free Speech: Is It Time to Restrain the Plaintiffs?, 50 B.C. L. REV. 1425, 1429–30 (2009) (discussing the typical trade secret misappropriation case and the law to protect trade secrets against misappropriation in order to promote fair competition); see also Brooks W. Taylor, Comment, You Can’t Say That! Enjoining Publication of Trade Secrets Despite the First Amendment, 9 COMP. L. REV. & TECH. J. 393, 394–95 (2005) (explaining the importance of trade secret protection to companies in the marketplace).


121 Dane S. Ciolino, Reconsidering Restitution in Copyright, 48 EMORY L.J. 1, 47–48 (1999) (noting that copyright remedies are provided under both property rules and liability rules, and that the “property-like” statutory provisions include “those permitting injunctive relief and the supercompensatory disgorgement and destruction remedies” while the “liability rule” statutory provisions “authorize the use of copyrighted works without prior bargaining with the entitlement holder” such as compulsory licensing).
two most common and prominent remedies for intellectual property infringement are injunctions and damages.\textsuperscript{122}

A. Injunction as Remedy

Injunctive relief in intellectual property law has its roots in real property rules. Under a normative property rights regime, the owner of real property has the right to exclude others from the property.\textsuperscript{123} The owner can expect the courts to protect the property from present and future interference by issuing an injunction against those trespassing on the land or interfering with the owner’s enjoyment of his or her land.\textsuperscript{124} Injunctive relief in real property law permeates intangible property law.\textsuperscript{125} Extending the normative property rights regime to intellectual property law, the owner of intellectual property has the right to use the intellectual property. Conversely, the infringer has no right to use or continue to use the intellectual property even after the infringer pays damages caused by unauthorized use. The intellectual property owner is entitled to an injunction against the infringer as a matter of course.\textsuperscript{126}

Injunctive relief is powerful. For example, owners of trademarks, copyrights, trade secrets, and patents, or parties with proper standing, routinely seek judicial assistance in obtaining an injunction against


\textsuperscript{124} Shyamkrishna Balganesh, \textit{Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions,} 31 \textit{HARV. J.L. & PUB. POL’Y} 593, 598 (2008) (emphasizing the right to exclude in property law is “a remedial attribute related to the automatic availability of injunctive relief for interferences with an owner’s use and enjoyment of her property”).

\textsuperscript{125} See Dariush Keyhani, \textit{Permanent Injunctions in Patent Cases,} 6 \textit{BUFF. INTELL. PROP. L.J.} 1, 9 (2008) (“Just the same as real property owners may exclude others from entering their property, but are not forced to rent a vacant property at any price, a patent grants the right to exclude others from entering their property and creates no obligation to sell or license (akin to rent) that property.”); see also Alan Devlin, \textit{Indeterminism and the Property-Patent Equation,} 28 \textit{YALE L. & POL’Y REV.} 61, 68 (2009) (noting that the parallels between real property and intellectual property have led to the conclusion that “the law should provide the holders of each with inviolable exclusive rights, the breach of which gives rise to automatic injunctive relief”). Injunctive relief, but not automatic injunctive relief, however, is available in patent infringement cases. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 390 (2006).

\textsuperscript{126} Richard A. Epstein, \textit{The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary,} 62 \textit{STAN. L. REV.} 455, 488 (2010) (recognizing that the Federal Circuit had a strong preference for injunctive relief in patent cases and that the preference came from “the definition of property as the right to exclude,” and that patent law provides an “exclusive right to inventors to make, use and vend their invention”) (internal quotation marks omitted).
Both intellectual property statutes and decisional law vest courts with the power to grant an injunction in accordance with the principles of equity to prevent violation of intellectual property rights on such terms as the court deems reasonable. In patent infringement, if an injunction is obtained, infringers must halt all marketing, selling, offering to sell, importing, or manufacturing of products based on the patent in suit. If the injunction is imminent, the mere threat of injunction is often serious enough to force the infringer to negotiate, compromise, or accept the conditions set forth by the intellectual property owners.

In both trademark and copyright infringement cases, the plaintiff must demonstrate probable success on the merits of the case to obtain a preliminary injunction. For example, in a trademark case the plaintiff must establish that the defendant’s use of the trademark is likely to cause consumer confusion.

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127 Fischer, supra note 122, at 557–58 (noting that the normative view of damages remedies is that they are not as powerful as injunctive remedies because damages remedies empower third parties to violate rights and pay damages, whereas injunctive remedies provide the right-holder the power to prevent others from using the right without the holder’s consent).


129 See, e.g., Fujifilm Corp. v. Benun, 605 F.3d 1366, 1368–69 (Fed. Cir. 2010) (affirming the district court’s decision holding the defendants in contempt of a preliminary order enjoining importation of infringing cameras in violation of the plaintiff’s patent). In trade secret cases, injunctions may continue for an additional period of time, even after the trade secret has ceased to exist, “in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.” UNIF. TRADE SECRETS ACT § 2 (trade secret injunction).

130 See Jennifer Kahauloalio Gregory, Comment, The Troll Next Door, 6 J. MARSHALL REV. INTELL. PROP. L. 292, 293 (2007) (“Companies are compelled to pay the fees because injunctions can have extremely severe economic consequences and can significantly damage reputations.”).

131 See First Brands Corp. v. Fred Meyer, Inc., 809 F.2d 1378, 1381 (9th Cir. 1987) (“[A] party must demonstrate either (1) a combination of probable success on the merits and the possibility of irreparable injury if relief is not granted, or (2) the existence of serious questions going to the merits and that the balance of hardships tips sharply in its favor.”); see also Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 877 (9th Cir. 2009) (finding that the lower court, considering the likelihood of success on the merits at preliminary injunction, “correctly held that to be liable for trademark infringement, someone must (1) use in commerce (2) any word, false designation of origin, false or misleading description, or representation of fact, which (3) is likely to cause confusion or misrepresents the characteristics of his or another person’s goods or services”). The court properly cited the factors listed in AMF Inc. v. Sleekcraft Boats, 599 F.2d 341, 348–49 (9th Cir. 1979), to determine the likelihood of confusion for the Wobenzym mark.

132 See Marlyn Nutraceuticals, 571 F.3d at 877 (holding that the lower court had properly cited the factors in Sleekcraft, 599 F.2d at 348–49, to determine the likelihood of confusion for the trademark at issue. The Sleekcraft court articulated eight non-exhaustive factors relevant to a determination of likelihood of confusion. These include:

1. strength of the mark; 2. proximity of the goods; 3. similarity of the marks; 4. evidence of actual confusion; 5. marketing channels used; 6. type of goods and the degree of care likely to be exercised by the purchaser; 7. defendant’s intent in selecting the mark; and 8. likelihood of expansion of the product lines.
merits, it will probably succeed on the likelihood of consumer confusion test. Seeking the preliminary injunction before trial is imperative. The harm is irreparable, as the trademark owner has no ability to control the nature and quality of the defendant’s goods, and it is “virtually impossible to ascertain the precise economic consequences” of the harm to the reputation and goodwill of a trademark. The continuing distribution and sales of the defendant’s goods affixed by the infringing mark will corrode the goodwill and reputation of the plaintiff’s mark while the litigation is unfolding. Accordingly, some courts have presumed irreparable harm if the trademark owner can demonstrate the likelihood of success on the merits. Other courts, however, have declined to extend the presumption of irreparable harm.

Copyright owners have also enjoyed the presumption of irreparable harm, but the presumption has been called into question in recent years in both copyright and trademark infringements. The presumption rests on judicial recognition of the short life of a copyrighted work in the marketplace, which will often “last only until the next fad”, therefore,

Id.

133 Abbott Labs. v. Mead Johnson & Co., 971 F.2d 6, 16 (7th Cir. 1992).

134 Int’l Kennel Club of Chicago, Inc. v. Mighty Star, Inc., 846 F.2d 1079, 1092 (7th Cir. 1988) (recognizing that the “most corrosive and irreparable harm attributable to trademark infringement is the inability of the victim to control the nature and quality of the defendants’ goods. Even if the infringer’s products are of high quality, the plaintiff can properly insist that its reputation should not be imperiled by the acts of another.”) (quoting Processed Plastic Co. v. Warner Commc’ns, Inc., 675 F.2d 852, 858 (7th Cir. 1982)).

135 See, e.g., El Pollo Loco, Inc. v. Hashim, 316 F.3d 1032, 1038 (9th Cir. 2003) (“In a trademark infringement claim, irreparable injury may be presumed from a showing of likelihood of success on the merits.”) (quoting GoTo.Com, Inc. v. Walt Disney Co., 202 F.3d 1199, 1205 n.4 (9th Cir. 2000)); Eli Lilly & Co. v. Natural Answers, Inc., 233 F.3d 456, 469 (7th Cir. 2000) (“Irreparable harm is generally presumed in cases of trademark infringement and dilution.”), Processed Plastic Co., 675 F.2d at 858 (“This and many other Courts have often recognized that the damages occasioned by trademark infringement are by their very nature irreparable and not susceptible of adequate measurement for remedy at law.”); see also Time Warner Cable, Inc. v. DirecTV Inc., 497 F.3d 144, 151–54 (2d Cir. 2007) (applying a presumption of irreparable harm in a false comparative advertising claim under the Lanham Act for trademarks).

136 See, e.g., N. Am. Med. Corp. v. Axiom Worldwide Inc., 522 F.3d 1211, 1227–28 (11th Cir. 2008) (ruling that the four-factor analysis for granting an injunction, regardless of whether permanent or preliminary injunction is sought, must be evaluated by courts as the Lanham Act is similar to the Patent Acts, which grants federal courts the power to grant injunctions, according to the principles of equity and upon such terms as the court may deem reasonable).

137 W. Publ’g Co. v. Mead Data Cent., Inc., 799 F.2d 1219, 1229 (8th Cir. 1986) (applying the general rule that in copyright infringement cases “a showing of a prima facie case raises a presumption of irreparable harm” at preliminary injunction); see also Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1254 (3d Cir. 1983) (same); Novelty Textile Mills, Inc. v. Joan Fabrics Corp., 558 F.2d 1096, 1094 (2d Cir. 1977) (same).

138 See Salinger v. Colting, 607 F.3d 68, 74–75 (2d Cir. 2010) (holding that the traditionally used presumption standard has been abrogated by eBay).

139 Concrete Mach. Co. v. Classic Lawn Ornaments, Inc. 843 F.2d 600, 611 (1st Cir. 1988) (“The popular demand for a new literary, musical, sculptural or other ‘work of authorship,’ often may last
the commercial value of the copyrighted work may evaporate by the time
the litigation concludes. Without the presumption of irreparable harm at
the preliminary injunction stage, the copyright owner will not be able to
build name recognition for its work during the entire litigation due to the
infringer’s ongoing conduct. The success finally obtained at the
conclusion of the long litigation would be rendered meaningless, as the
public did not know the true author behind the work. Moreover, when
courts presume irreparable harm to the copyright owner after the owner
successfully establishes the likelihood of success in the copyright
infringement claims on the merits, the public interest is served by the
issuance of a preliminary injunction.

Likewise, in trade secret misappropriation cases, injunctive relief is
available to the owner to prevent the defendant’s continued use of the
misappropriated trade secrets. This enables them to manufacture goods
and directly compete with the owner in the marketplace, without which the
defendant could not compete. Injunction serves to right competitive

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140 See id. at 611 (“The ultimate commercial success of an ‘artist’ often depends on name
recognition and reputation with the value and popularity of each succeeding work depending upon the
‘name’ established through commercial exploitation of preceding works. This can be true whether the
‘artist’ creates musical compositions, video games, or concrete statues. Any ultimate success in a
lawsuit could have little effect on public perception of who the true creator was.”).

141 Apple Computer, 714 F.2d at 1254–55 (reversing the lower court’s finding of no irreparable
harm, and stating that “the public interest underlying the copyright law requires a presumption of
irreparable harm” because “Congress has elected to grant certain exclusive rights to the owner of a
copyright in a protected work, it is virtually axiomatic that the public interest can only be served by
upholding copyright protections and, correspondingly, preventing the misappropriation of the skills,
creative energies, and resources which are invested in the protected work”). In trademark infringement
cases, courts also find that public interest dictates trademarks be protected against use causing the
likelihood of consumer confusion. See Borinquen Biscuit Corp. v. M.V. Trading Corp., 443 F.3d 112,
115 (1st Cir. 2006) (“[A]s a matter of public policy, trademarks should be protected against infringing
uses.”).

142 For example, under the Illinois Trade Secrets Act, 765 ILL. COMP. STAT. ANN. 1065/3 (West
2009), the law provides for the issuance of injunctions to prohibit actual or threatened misappropriation
of a trade secret. Also, Illinois law presumes irreparable harm because such harm would occur in the
absence of injunctive relief if trade secrets are misappropriated. See Jano Justice Sys., Inc. v. Burton,
2d 688, 700 (N.D. Ill. 2004).

143 Illustratively, in Contour Design, Inc. v. Chance Mold Steel Co., the court found that the
defendant, EKTouch, had misappropriated the plaintiff’s trade secrets and that if the defendant began
marketing its ERGO Roller to customers, it would injure the plaintiff’s “existing relationships with its
customers, who (as has already happened in one documented instance) may well view the ERGO
Roller as a superior and cheaper alternative to [plaintiff’s] existing product line.” No. 09-cv-451-JL,
The public interest generally favors fair competition in the marketplace; it thus dictates the issuance of an injunction against the misappropriation of trade secrets to "reinforce the public policy of commercial morality." Injunctive relief—the shining example of the U.S. property rules regime for addressing wrongs suffered by intellectual property owners—exists on the recognition that wrongs cannot readily be righted by monetary damages. In recent years, however, intellectual property owners have faced a new hurdle in obtaining injunctive relief to right wrongs. The Supreme Court, in eBay Inc. v. MercExchange, L.L.C., overturned the Federal Circuit's long-standing rule on automatic injunctive relief upon a finding of infringement. Consequently, intellectual property owners cannot obtain injunctive relief as a matter of course; they must instead satisfy a four-factor test to show whether the injunctive relief is warranted. Accordingly, irreparable harm is not presumed; therefore, injunctive relief is no longer automatic. In other words, injunctive relief is not readily available in patent, copyright, and trademark infringement cases, even if the intellectual property owner has successfully established infringement by the defendants.

B. Damages as Remedy

In general, damages are available to a prevailing plaintiff at trial if the

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144 Section 2(a) of the Uniform Trade Secrets Act authorizes an injunction "to eliminate commercial advantage that otherwise would be derived from the misappropriation." N.H. Rev. Stat. Ann. § 350-B:2 (2010).


148 Salinger v. Colting, 607 F.3d 68, 74–75 (2d Cir. 2010) ("We hold that, although the District Court applied our Circuit's longstanding standard for preliminary injunctions in copyright cases, our Circuit's standard is inconsistent with the 'test historically employed by courts of equity' and has, therefore, been abrogated by eBay . . . ."); N. Am. Med. Corp. v. Axiom Worldwide, Inc., 522 F.3d 1211, 1228 (11th Cir. 2008) ("[W]e decline to express any further opinion with respect to the effect of eBay on this case. For example, we decline to decide whether the district court was correct in its holding that the nature of the trademark infringement gives rise to a presumption of irreparable injury. In other words, we decline to address whether such a presumption is the equivalent of the categorical rules rejected by the Court in eBay."); cf. David H. Bernstein & Andrew Gilden, No Trolls Barred: Trademark Injunctions After eBay, 99 TRADEMARK REP. 1037, 1038 (2009) (arguing that the Supreme Court's eBay decision "should not be used to eviscerate the normal presumption of irreparable harm that attaches upon a showing of liability in trademark cases").
plaintiff can prove direct injury caused by the infringement, and any lost profits the plaintiff would have earned but for the infringement.\textsuperscript{149} A damages award, however, constitutes only compensation for the injured plaintiff, not a penalty against the defendant.\textsuperscript{150} Obtaining a damages award at trial is generally a complex and costly task.\textsuperscript{151} The burden is on the owner to prove the damages caused by a defendant’s infringing conduct.\textsuperscript{152} The owner must establish damages with reasonable certainty, and have a reasonable basis for computing damages.\textsuperscript{153}

In trademark infringement cases, the owners often do not pursue damages at trial, even if they prevailed at the preliminary injunction or summary judgment stage. For instance, in trademark infringement cases, the trademark owners often realize early in the litigation that proving damages is a very difficult task.\textsuperscript{154} Though the defendant’s use of the mark causes a likelihood of consumer confusion between the defendant’s products and the plaintiff’s products, the confusion does not necessarily translate into a noticeable reduction in the sales volume of the plaintiff’s products even though the harm to the plaintiff’s reputation is already done.\textsuperscript{155} The harm occurs because the plaintiff continues to advertise its 

\textsuperscript{149} With respect to damages relief in a trademark infringement case, the federal trademark statute provides that a trademark owner is entitled to recover defendant’s profits, actual damages sustained by the plaintiff, and costs of the action. 15 U.S.C. § 1117 (2006). The statute dictates that the court, in determining the appropriate monetary remedies, must be mindful of principles of equity. The court may increase the actual damages, but not exceed three times the original amount. \textit{Id.}

\textsuperscript{150} Whether or not an accounting of the infringer’s profits is available as part of a damages award, courts only allow the accounting if the infringement was “willfully calculated to exploit the advantage of an established mark.” Lindy Pen Co., Inc. v. Bic Pen Corp. 982 F.2d 1400, 1405 (9th Cir. 1993). This language is occasionally, but mistakenly, attributed to Playboy Enters., Inc. v. Baccarat Clothing Co., 692 F.2d 1272 (9th Cir. 1982). \textit{Lindy Pen} makes this mistake; however, \textit{Playboy} does support this proposition even if it is not stated in the precise words quoted above.

\textsuperscript{151} Dennis S. Corgill, \textit{Measuring the Gains of Trademark Infringement}, 65 \textit{FORDHAM L. REV.} 1909, 1913–15 (1997); see also Epstein, \textit{supra} note 126, at 489 (stating the common view that damages are speculative in complex intellectual property cases and contain a risk of the infringers under-compensating the intellectual property holders).

\textsuperscript{152} See, e.g., Zelinski v. Columbia 300, Inc., 335 F.3d 633, 639 (7th Cir. 2003) (holding that “[t]o recover damages, [the plaintiff] must show that the [defendant’s] violation caused actual confusion among [plaintiff’s] customers and, as a result, [the plaintiff] suffered actual injury”) (citing Web Printing Controls Co. v. Oxy-Dry Corp., 906 F.2d 1202, 1205 (7th Cir. 1990)).

\textsuperscript{153} Eastman Kodak Co. of N.Y. v. S. Photo Materials Co., 273 U.S. 359, 379 (1927).


\textsuperscript{155} See Bernstein & Gilden, \textit{supra} note 148, at 1059 (“[I]n trademark cases . . . proving damages is ‘notoriously difficult . . .’.‘”) (citation omitted); K. J. Greene, \textit{Motion Picture Copyright Infringement and the Presumption of Irreparable Harm: Toward a Reevaluation of the Standard for Preliminary Injunctive Relief}, 31 \textit{RUTGERS L.J.} 173, 196 (1999) (“[C]onsumer confusion is difficult to redress by money damages . . .”); J. Thomas McCarthy, \textit{Are Preliminary Injunctions Against Trademark Infringement Getting Harder to Achieve?}, 14 \textit{INTELL. PROP. L. BULL.} 1, 4–5 (2009) (“Damage to business reputation and good will is inherently ‘irreparable’ [and that means] trying to use dollars to ‘compensate’ after the fact for damage to business goodwill and reputation cannot constitute fair or full compensation.”) (citations omitted); Bryan M. Otake, \textit{The Continuing Viability of the Deterrence
products, expending efforts on marketing and sales, while the defendant is using a mark that is causing a likelihood of consumer confusion. Consequently, with the poor prospect of obtaining damages at trial, trademark owners prevailing at the preliminary injunction stage often settle out of court. As observed by Thomas McCarthy, "getting a preliminary injunction means that the trademark owner will immediately receive just about all the relief it would be entitled to even after a win on the merits at trial." Out-of-court settlements prevent wasted time, efforts, and resources associated with going to trial.

The few trademark owners who decide to proceed to trial face an additional, significant burden. Even if they succeed in obtaining a jury verdict on liability, proving damages can be yet another difficult challenge. For example, in Lindy Pen v. Bic Pen, the plaintiff spent thirteen years, from 1980 to 1993, in litigation to obtain damages. In that case, the plaintiff owned the trademark "Auditor's" for its ballpoint pens used by accountants and auditors. The defendant adopted "Auditor's Fine Point" for the sale and marketing of its ballpoint pens. "[T]he district court determined that there was a likelihood of confusion in the telephone order market [for the pens]..." Though infringement existed, the district court found that the plaintiff did not have sufficient proof of actual damages in the form of lost profits. Also, the district court found, with respect to actual damages, that the plaintiff "did not isolate its own [Auditor's] telephone order sales from total pen sales" for Auditors and, consequently, the plaintiff's calculations for damages

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*Rationale in Trademark Infringement Accountings*, 5 UCLA ENT. L. REV. 221, 229–30 (1998) (indicating that it is “difficult for a trademark holder to procure sufficient evidence” to establish the harm done to the plaintiff’s business and recover monetary damages).

156 Bernstein & Gilden, *supra* note 148, at 1059 (asserting that “[t]he harm from trademark infringement is thus usually irreparable because the trademark owner’s loss of perpetual exclusivity and control flows directly from the unauthorized, unlicensed use. An award of monetary damages alone fails to address these fundamental trademark interests.”).


158 David S. Almeling, *The Infringement-Plus-Equity Model: A Better Way to Award Monetary Relief in Trademark Cases*, 14 J. INTELL. PROP. L. 205, 211 (2007) (“As a practical matter, the tenuous, market-based gains of trademark infringement are difficult to establish with the requisite degree of certainty necessary for legal damages ...”).

159 *982 F.2d 1400* (9th Cir. 1993).

160 See *id.* at 1403 (noting that the first dispute over trademark was back in 1965, and fifteen years later, in 1980, the present case was brought against the same defendant).

161 *Id.*

162 *Id.* (noting, as well, that Bic had conducted research on other parties’ usage of the term “Auditor’s” in their marketing materials).

163 *Id.* at 1404.

164 *Id.* at 1407 (“Damages are typically measured by any direct injury which a plaintiff can prove, as well as any lost profits which the plaintiff would have earned but for the infringement.”) (citation omitted). The Ninth Circuit affirmed the district court’s refusal to award damages related to lost profits because the infringement was not willful. *Id.* at 1406.
"contained items in which no likelihood of confusion existed . . ." 165 The plaintiff’s separation of Auditor’s pen sales from total pen sales was deemed deficient. 166 After thirteen years of costly litigation, the plaintiff did not obtain any damages for the defendant’s trademark infringement. 167

In some cases, owners may rely on the loss of license fees due to the unauthorized use of the intellectual property by the defendant. For example, in M.D. Mark, Inc. v. Kerr-McGee Corp., 168 the Tenth Circuit upheld the jury verdict of damages against the defendants for misappropriation of the plaintiff’s trade secrets. 169 The plaintiff presented evidence at trial of how the amount had been calculated, reflecting the going rate of licensing for the trade secret in typical license arrangements between the plaintiff and others, including the defendant. 170 As part of the evidence for proving damages, the plaintiffs relied on experts to establish the going rate and to illustrate hypothetical license arrangements. 171

Recognizing the difficulty in proving actual damages, 172 copyright law provides statutory damages to a copyright owner who prevails at trial. 173 An infringing defendant faces statutory damages of $30,000 per infringed work for unintentional copyright infringement, and up to $150,000 per infringed work for willful copyright infringement. 174 The plaintiff may select statutory damages and thereby avoid the difficulty of proving actual

165 Id. at 1407-08.
166 Id. at 1408-09.
167 Courts have long recognized that proof of actual damages is often difficult, but may permit damages awards based on defendant’s profits on the theory of unjust enrichment. See, e.g., Bandag, Inc. v. Al Bolser’s Tire Stores, Inc., 750 F.2d 903, 918-21 (Fed. Cir. 1984) (vacating a district court’s award of damages in part because no actual damage could be shown). The court in Lindy Pen held that the plaintiff failed to present evidence “of sales of the Bic’s ‘Auditor’s Fine Point’ in the infringing [telephone order] market.” Lindy Pen, 982 F.2d at 1408. The court declined to accept Lindy’s assertion that “division of Bic’s sales into the telephone submarket ‘[was] impossible from Bic’s records since Bic never separated its pens according to telephone sales.”’ Id.
168 565 F.3d 753 (10th Cir. 2009).
169 Id. at 762-63, 766-67 (10th Cir. 2009) (holding that the district court did not abuse its discretion in denying the defendant Kerr-McGee’s motion for remittitur or new trial due to excessive damages).
170 Id. at 766-67 (ruling that the damages based on the going rate for licenses to use seismic data “justify[y] the jury’s $25,266,381 damage award”).
171 Id. at 767. In this case, a geophysicist testified as the plaintiff’s expert “in the area of custom and practice in the licensing of seismic data” for the damages calculation. Id.
172 “Actual damages” is defined under the copyright statute to include loss to the copyright holder plus additional profits made by the infringer. 17 U.S.C. § 504(b) (2006).
173 The prevailing copyright owner may elect either actual damages or statutory damages. Id. § 504(c)(1). Section 504(a) provides: “(a) In General.—Except as otherwise provided by this title, an infringer of copyright is liable for either—(1) the copyright owner’s actual damages and any additional profits of the infringer, as provided by subsection (b); or (2) statutory damages, as provided by subsection (c).”
174 Id. §§ 504(c)(1)-(2) (“In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $150,000.”).
harm caused by the defendant's infringing conduct, though the plaintiff may collect an insignificant amount.\textsuperscript{175}

The diminishing power of an injunction is evident. Injunctive relief is no longer automatic for the prevailing intellectual property owner under current law. Moreover, the difficulty of proving and obtaining damages may serve as a catalyst to look beyond the borders of the United States to learn what other nations are doing with respect to remedies, specifically apologies as remedies in intellectual property law.

V. APOLOGIES AS REMEDIES IN CHINA'S INTELLECTUAL PROPERTY LAW

A. Apologies in Trademark Unfair Competition Cases

China's anti-competition statute prohibits conduct such as passing off a registered trademark or use of a mark similar to a famous or well-known trademark that misleads consumers.\textsuperscript{176} When a defendant intentionally infringes on a trademark or violates the anti-competition law in bad faith, the court will then apply Article 56 of the Trademark Law to determine the amount of compensatory damages,\textsuperscript{177} or statutory damages in cases where damages are difficult to ascertain.\textsuperscript{178} In addition to damages, a reasonable cost award is available to the trademark owner under the anti-unfair

\textsuperscript{175} \textit{Id.} § 504(c)(1) ("[T]he copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work . . . a sum of not . . . more than $30,000 . . . ").

\textsuperscript{176} Anti-Unfair Competition Law (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 2, 1993, effective Sept. 2, 1993) (China). Article 5 of China's Anti-Competition Law includes certain acts as unfair and damaging to competitors: "1. to feign the others' registered trade mark; 2. to use the specific name, package, decoration of the famous or noted commodities, or use a similar name, package, decoration of the famous or noted commodities, which may confuse consumers distinguishing the commodities [from] the famous or noted commodities . . . ." \textit{Id.} art. 5. \textit{See} Hebei Sanhe Fucheng Cattle Group Co. v. Kunming Branch of Harbin Fucheng Catering Co. (Higher People's Ct. of Yunnan Province Apr. 5, 2007) (China).


The amount of compensation for infringement upon the right to the exclusive use of a trademark shall be the proceeds obtained from the infringement during the period of infringement, or the losses suffered by the infringement due to the infringement during the period of being infringed, including the reasonable expenses paid by the infringed to stop the infringing acts.

\textsuperscript{178} Trademark Law (China), art. 56 ("If it is difficult to determine the proceeds obtained from the infringement referred to in the preceding paragraph, or it is difficult to determine the losses suffered by the infringement due to the infringement, the people's court shall determine a compensation of 500,000 yuan or less according to the circumstances of the infringing acts.").
The court will also consider whether an apology should be ordered.

Illustratively, Hebei Sanhe Fucheng Cattle Group Co. v. Kunming Branch of Harbin Fucheng Catering Co., demonstrates the different types of available remedies in China—particularly apologies. In that case, the plaintiff—owner of a registered, well-known brand, “Fucheng” (known for hotpot restaurants)—brought a trademark infringement and unfair competition action against the defendant. The defendant used marks incorporating the characters for “Fucheng” in association with its own hotpot restaurants. The plaintiff lost in the local people’s court—the court of the first instance—and appealed the judgment to the higher court.

The Higher People’s Court of Yunnan Province noted that the plaintiff’s trademark “Fucheng” is a well-known brand of hotpot restaurants and has been in continuous use for many years throughout China. The defendant had full knowledge of the reputation of the plaintiff’s trademark, as the defendant had long-term business contacts with the plaintiff prior to opening its own hotpot restaurants. The defendant’s use of the name and decoration were similar to the plaintiff’s trademark and decoration. Accordingly, the defendant “had the intent of unfair competition against the principle of good faith,” and “the subjective intention to confuse the origin of service.” In its judgment entered on April 5, 2007, the court ordered the defendant to make a public apology in the Kunming daily newspaper within ten days after the judgment “to eliminate the bad effect of infringement,” in addition to immediately stopping use of the trademark at issue and paying a monetary sum of 200,000 yuan for the plaintiff’s economic losses.

When a defendant’s infringing conduct is not deliberate or in bad faith, the court will not order compensatory damages and public apology. For example, in Tianjin Goubuli Group Co. v. Tianfengyuan Restaurant of

179 Anti-Unfair Competition Law (China), art. 20 (“Manager shall bear the responsibility for compensating the damage made by damager to the damaged party under the violation of this Law. Amount of compensation shall be equivalent to the profit made by the damager during its damaging, if it is difficult to measure the amount of damage; and it shall compensate the reasonable cost to the damaged party who has paid the cost to investigate the activities of unfair competition made by damager.”).

180 Hebei Sanhe Fucheng Cattle Group Co. v. Kunming Branch of Harbin Fucheng Catering Co. (Higher People’s Ct. of Yunnan Province Apr. 5, 2007) (China).

181 Id.

182 Id. (the lower court, the Intermediate People’s Court of Kunming City, rendered its decision on November 24, 2006).

183 Id.

184 Id.

185 Id.

186 Id.
Jinan Daguanyuan Shopping Center, the defendant used the plaintiff’s registered service mark “Goubuli” for its dumpling products. The plaintiff obtained registration for the “Goubuli” trademark in 1994, but the defendant had previously used the same name in the 1940s. The court found that, because the defendant had used the Chinese character for “Goubuli” for its dumplings since 1940, the defendant did not intentionally use the “Goubuli” characters for market competition even after the service mark owned by the plaintiff was registered and determined as well-known. The court ordered the defendant to cease the use of the three characters of “Goubuli” for its products and advertisements, but neither compensatory damages nor a public apology were available, as the infringement was not in bad faith.

B. Apologies in Copyright Infringement Cases

Article 46 of China’s Copyright Law provides that anyone who commits copyright infringement must “bear the civil liability for such remedies as ceasing the infringing act, eliminating the effects of the act, (1) publishing a work without the permission from the copyright owner; (2) publishing a work of joint authorship as a work created solely by oneself, without the permission from the other co-authors; (3) having his name mentioned in connection with a work created by another, in order to seek personal fame and gain, where he has not taken part in the creation of the work; (4) distorting a work created by another; (5) plagiarizing the works of others; (6) exploiting a work by means of exhibition, making cinematographic productions or a means similar to cinematographic productions, or by means of adaptation, translation, annotation, etc. without the permission from the copyright owner, unless otherwise provided in this Law; (7) exploiting a work of another without paying the remuneration; (8) without the permission from the copyright owner or oblige related to the copyright of a cinematographic work or a work created in a way similar to cinematography, computer software, sound recordings or video recordings, leasing his work or sound recordings or video recordings, except where otherwise provided in this Law; (9) without permission from a publisher, exploiting the format design of his published book or periodical; (10) without the permission of the performer, broadcasting or publicly transmitting his live performance or recording his performance; (11) committing other acts of infringement upon copyright and upon other rights related to copyright.
making a public apology or compensating for damages . . . .” In other words, injunctive relief, apology, and damages are available to the prevailing copyright owner. With respect to damages, Article 48 of the Chinese Copyright Law authorizes compensatory damages to the prevailing plaintiff for the plaintiff’s actual loss, or awards damages to the plaintiff in the amount of the defendant’s illegal gains as well as the plaintiff’s reasonable costs. If actual loss or illegal gains cannot be ascertained, the maximum statutory damage award is 500,000 yuan.

An analysis of Founder Co., Red Mansion Institute v. Gaoshu Tianli Co., Gaoshu Co. is instructive as to how Chinese courts have applied the relevant articles of the Chinese Copyright Law. In Founder Co., the court ordered an apology as a remedy, in addition to injunction, damages, and costs. On September 3, 2001, the plaintiffs brought a copyright infringement action against the defendants for reproducing and distributing the Founder RIP and Founder Wenhe software without authorization, in violation of China’s Copyright Law. Upon reviewing the evidence of the illegal distribution and sales of the plaintiffs’ software by the defendants all over China, on December 20, 2001, the Beijing No. 1 Intermediate Court ordered the defendants to stop the infringing acts—namely reproducing and selling the plaintiffs’ software—to make an apology to the plaintiffs by publishing an announcement in Computer World, to pay 600,000 yuan in economic losses to the plaintiffs, and to reimburse the plaintiffs in the amount of 407,250 yuan for investigation, evidence collection, and other costs. The defendants appealed to the Beijing Higher Court.

The Beijing Higher Court reversed the lower court’s decision with respect to the damages. The Higher Court reasoned that the tactics employed by the plaintiffs to obtain evidence of illegal reproduction and distribution of the copyrighted software against the defendants violated the principle of fairness, and that such conduct may potentially “destroy the normal market order.” Specifically, the plaintiffs’ employees used fake names and contacted the defendants pretending to purchase pirated Founder software. The Higher Court condemned the plaintiffs’ method of

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192 Id.
193 Id. art. 48.
194 Id.
196 Id.
197 Id.
198 Id. (appealed to the Higher People’s Ct. of Beijing Municipality, which rendered its decision on July 15, 2002).
199 Id.
collecting the evidence of infringement. Accordingly, the Higher Court reduced the damages award to 130,000 yuan for plaintiffs’ economic loss, and awarded no compensation for investigation and evidence collection costs.\(^{200}\) The plaintiffs appealed the decision to the Supreme People’s Court.\(^{201}\) The Supreme People’s Court reversed the Higher Court’s decision, reinstating the damages awarded by the court of first instance. The Supreme People’s Court held that the method employed by the plaintiffs to collect evidence of illegal reproduction and distribution of their software was legal and effective, and “the facts proven with the obtained evidence shall be used as the basis for determining the case.”\(^{202}\) That meant the plaintiffs’ collection of evidence was neither in violation of the fairness principle, nor did it destroy the normal market order. The Supreme People’s Court also affirmed the ruling on the injunction and apology.\(^{203}\) The defendant was ordered to make a public apology to the plaintiffs by “publishing an announcement on Computer World, with the necessary expenses” to be borne by the defendants.\(^{204}\)

Similarly, in Ding Xiaochun v. Nantong Education Bureau and Jiangsu Fine Arts Publishing House, the plaintiff, a photographer, brought a copyright infringement action against the defendants.\(^{205}\) In that case, Mr. Ding, a photographer with the Nantong Daily, took a picture of his wife and child selecting and purchasing a lantern on the street. The photograph was published in the Nantong Daily. A year later, the defendants published books containing the plaintiff’s photograph without permission, and then republished the books again in 2002. The Intermediate People’s Court of Nantong found that the photograph was a work of original expression protected under Chinese Copyright Law.\(^{206}\) On the issue of authorship and ownership, the court held that Mr. Ding, the photojournalist for the Nantong Daily, was the owner and author of the copyright of the photograph.\(^{207}\) The court rejected the defendant Jiangsu Fine Arts Publishing House’s defense of the textbook exemption because the

\(^{200}\) Id.

\(^{201}\) Id. (appealed to the Sup. People’s Court, which rendered its decision March 7, 2006).

\(^{202}\) Id.

\(^{203}\) Id.; see also Stephanie M. Greene, Protecting Well-Known Marks in China: Challenges for Foreign Mark Holders, 45 Am. Bus. L.J. 371, 371–72 (2008) (noting that the Shanghai Second Intermediate People’s Court ordered the defendants in a trademark infringement action brought by Nike to make a public apology for the infringing conduct, in addition to damages and an injunction ruling in Nike’s favor).


\(^{206}\) Id.

\(^{207}\) Id.
defendant’s art book was not an official teaching book that qualified for copyright infringement exemption.\(^{208}\) The court held that the defendant’s conduct in publishing the photograph without the consent of the author, failing to attribute authorship of the photograph, failing to pay the author any remuneration, and altering the title of the photograph “constituted an infringement” upon the copyright of the photograph.\(^{209}\)

The court ordered the defendant, Jiangsu Fine Arts Publishing House, to cease the infringement, make a formal apology, and compensate the plaintiff for his economic loss. Specifically, on December 19, 2002, the court ordered the defendant to “publish an announcement to apologize to Ding Xiaochun” within fifteen days of the judgment.\(^{210}\) Furthermore, the court ruled that “the content of the announcement shall be examined and approved by the Intermediate People’s Court of Nantong City.”\(^{211}\) The court also stated that, in the event that the defendant, Jiangsu Fine Arts Publishing House, failed to make the apology within the time limit, “Ding Xiaochun may publish the announcement of apology in *Nantong Daily* in the name of Jiangsu Fine Arts Publishing House, the content of the announcement shall also be examined and approved by” the court, and the “expenses shall be undertaken by Jiangsu Fine Arts Publishing House.”\(^{212}\)

C. Apologies in Patent Infringement Cases

While apologies as remedies are available in trademark, unfair competition, and copyright infringement cases, the same remedy is not always afforded in patent infringement cases. In 2005 China’s highest court, the Supreme People’s Court, addressed whether “the liability-bearing method of making an apology applies” to patent infringement in *Renda Building Materials Factory v. Xinyi Co.*\(^{213}\) Upon finding infringement, the appellate court, the Liaoning Higher Court, ordered the defendant Xinyi Company to make an apology to the patent holder. The Supreme People’s Court overturned the appellate court’s finding of infringement. With respect to apology as a remedy, the Supreme People’s Court held that “[m]aking an apology is mainly a way of bearing the liability for damaging the aggrieved party’s personal interests or commercial credit standing. While patent right is mainly a kind of property interest, hence this method generally does not apply to cases on

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\(^{208}\) *Id.*

\(^{209}\) *Id.*

\(^{210}\) *Id.*

\(^{211}\) *Id.*

\(^{212}\) *Id.*

\(^{213}\) *Renda Bldg. Materials Factory v. Xinyi Co. (Interm. People’s Ct. of Dalian City, Liaoning Province Feb. 20, 2002), overruled by (Sup. People’s Ct. Aug. 22, 2005) (China) (both decisions are contained within the same opinion issued by the Sup. People’s Ct).*
dispute over patent infringement. In other words, apology is not available in patent infringement cases because a patent right is a property right, and apology as a method of accepting liability is only available to the personal interests of the aggrieved party. The Supreme People's Court did not preclude an apology as a remedy in all patent infringement cases. The Court noted that the appellate court had ordered the defendant to make an apology before the court had all of the evidence proving that the defendant's conduct caused heavy losses to the plaintiff's commercial credit standing. The Supreme People's Court concluded that the appellate court's order was therefore "inappropriate."

Apology was ordered, however, as a remedy in a case where the court found the defendant guilty of patent infringement. In *Institute of Organic Chemistry of Chengdu Under the Chinese Academy of Sciences v. Chengdu Zhengda Electric Apparatus Factory*, the patentee brought a patent infringement action against the defendant, Zhengda, for manufacturing and selling air re-purifiers in violation of plaintiff's three patents: the "purifier of duplication machine ozone," the "purifier of room air," and "a kind of low-noise impeller of the centrifugal blower fan." The Higher People's Court of Sichuan Province affirmed the lower court's infringement finding only with respect to "a kind of low-noise impeller of the centrifugal blower fan" patent. The Higher People's Court, accordingly, reduced the damage award from 150,000 yuan to 50,000 yuan. The Court accepted the infringement finding, and the finding that the defendant knew the impellers used in the metal blower fans in the Zhengda re-purifiers were the same as those contained in the plaintiff's relevant patent. The defendant nevertheless manufactured and sold the infringing product for several years. The Court upheld the lower court's order with respect to making an apology. Specifically, the defendant, Zhengda Factory, was instructed to make public apologies to the plaintiff in three publications, *China Patent*, *Sichuan Daily*, and *Chengdu Evening Paper*, for the purpose of "clearing up ill effects."
VI. APOLOGIES AS REMEDIES IN U.S. INTELLECTUAL PROPERTY LAW AND PRACTICE

U.S. intellectual property owners rely on injunctions and damages as common statutory remedies, as discussed in Part IV. Apologies as remedies are not part of the relevant statutes for patents, copyrights, trademarks, or trade secrets. The absence of apology as a statutory remedy is consistent with the long-held suspicious view towards apologetic justice in U.S. law. This absence, however, should not hinder a desire for internal and external examination. Internally, any U.S. case law involving apologies in intellectual property might be examined, and, externally—that is, outside U.S. borders—Americans might endeavor to learn what others have done or are doing so as to fulfill our own goals of justice.220

Looking domestically, there are several intellectual property cases where the parties settled their disputes with apologies. For example, in Scandinavia Belting Co. v. Asbestos & Rubber Works of America, Inc.,221 the plaintiff brought a suit against the defendant for trademark infringement and unfair competition based on the defendant’s adoption and usage of the “Scandinavia” trademark in connection with the sales of belting.222 The Second Circuit addressed an important threshold question of whether the plaintiff owned the “Scandinavia” trademark based on the exclusive use of the trademark in commerce.223 The plaintiff offered evidence of exclusive use, and the plaintiff’s manager presented notable testimony. Asked “whether he had ever heard of anyone who prior to the defendant had undertaken to dispute his title to the mark ‘Scandinavia,’”224 the manager recounted only one instance in which an unauthorized company had used the plaintiff’s trademark. Specifically, the manager stated that in 1908, Osgood, Sayen Company had used the name “Scandinavia” without permission, and when “the attention of the Osgood, Sayen Company was called to their use of the trademark, they apologized, said it was a mistake, and discontinued it.”225 The testimony of the plaintiff’s manager, among other evidence, supported the court’s finding that the plaintiff had the exclusive right to the trademark through exclusive

220 See Haley, supra note 2, at 504–07 (discussing the importance of looking beyond American borders, in this case to Japan, to see how apology might play a role in achieving justice).
221 257 F. 937 (2d Cir. 1919).
222 Id. at 961 (indicating that the lower court held that the defendant committed unfair competition when it sold “in interstate commerce, and under the name ‘Scandinavian’ belting”).
223 Id. at 957 (“The question then becomes important, whether this use of the word ‘Scandinavia’ in the United States as a trade-mark for 10 years prior to the passage of the act was an exclusive use.”).
224 Id. at 958.
225 Id. (emphasis added).
Scandinavia Belting demonstrates that in some cases, parties can settle trademark infringement disputes out of court through an apology for the unauthorized use of a trademark, and a subsequent cessation of the use of the trademark. That is, the trademark owner sought and obtained justice for the infringement in large part through an apology.

Likewise, in an older trademark cancellation proceeding, Model Brassiere Co. v. Bromley-Shepard Co., the parties had attempted to settle their dispute with an apology. Specifically, the petitioner, prior to seeking the cancellation of the registered trademark on the grounds of descriptiveness, apologized to the trademark owner and promised not to use the trademark. The petitioner, however, continued to use the trademark because it was descriptive of the products and subsequently sought cancellation of the trademark registration. The Court of Custom and Patent Appeals affirmed a petition to cancel a registered trademark on the ground of descriptiveness.

Additionally, in Flake v. Greensboro News Co., an older case involving the use of a recording artist’s photograph by a bakery without her permission, the artist sued the bakery for use of the newspaper advertisement. The artist also included the newspaper among the defendants. The defendants immediately desisted from use of the photograph, claiming that the use was a mistake, and apologized to the plaintiff. Accordingly, the Supreme Court of North Carolina held that the

226 Id. at 958 ("We must therefore hold that as the plaintiff is the 'owner' of the trade-mark . . . it is entitled to protection thereunder as a valid trade-mark, without regard to whether it was or not valid at the common law, and prior to its registration.").

227 49 F.2d 482 (C.C.P.A. 1931).

228 Id. at 484-86.

229 Id. at 485-86 (noting that trademark registrant asserted an affirmative defense “that petitioner for cancellation upon registrant’s request agreed to discontinue using the word Ensemble in violation of registrant’s trade mark rights evidenced by the certificate of registration herein sought to be canceled, and that petitioner, when it subsequently made some further use of the word Ensemble in violation of registrant’s said rights apologized to registrant claiming that said use was inadvertent and would not be repeated”).

230 Id. at 486 (“[T]he record sufficiently shows that [petitioner] was a proper party in interest to file a petition” to cancel the registered trademark on the ground of descriptiveness because “[a]s long as the word ‘Ensemble’ is a registered trade-mark, it is a threat, not only against the party who manufactures and sells merchandise like that of the parties to this suit, but to all who buy of them for the purpose of resale"). Under current trademark law, descriptiveness is no longer a ground for cancellation of trademark registration. See 15 U.S.C. § 1064(3) (2006) (“A petition to cancel registration of a mark . . . [may] be filed . . . at any time if the registered mark becomes the generic name for the goods or services, or a portion thereof, for which it is registered, or is functional, or has been abandoned, or its registration was obtained fraudulently . . . ”).

231 Model Brassiere Co., 49 F.2d at 487 (affirming the Commissioner’s decision for cancellation of the registered trademark).


233 Id. at 57.
plaintiff would only be entitled to a judgment for nominal damages.\textsuperscript{234}

The above cases, at the very least, demonstrate that American owners of intellectual property rights—who are also parties to infringement disputes involving trademarks and copyrights where reputation, goodwill, and personal interests are of concern—have exhibited normative cultural values favoring apology. The wrongdoers apologized for using a trademark or photograph without permission, and the recipients accepted their apologies. In addition, the courts involved were not hostile to apologies. In fact, their decisions reflected the beneficial role of apologies—as in \textit{Flake v. Greensboro News Co.}, where the court granted only nominal damages, and in \textit{Model Brassiere Co. v. Bromley-Shepard Co.}, where the court affirmed the petitioner’s cancellation of the registered trademark.

VII. CONCLUSION

Twenty-five years ago, John Haley wrote his influential article \textit{Implications of Apology}, which implored Americans to learn from Japan. Since then, legal scholarship on apology has flourished and propelled new legislation acknowledging the importance of apology and protecting apologetic gestures. In this new century China has become a major force, and, in the globally-connected economy, what happens in China matters in the United States. In trademark and copyright infringement cases, Chinese law recognizes the universal norm of apology and incorporates it as a form of remedy—in addition to injunctive relief and damages.\textsuperscript{235} Americans should not summarily dismiss apology as a potential addition to the remedies available in U.S. intellectual property disputes. Given the weakening effect of injunctive relief, which is no longer granted as a matter of course in patent cases, and its impact on copyright and trademark infringement jurisprudence, it is imperative for the United States to learn

\textsuperscript{234} Id. at 64 (“Upon the present record, from it appears that said photograph was used by mistake and without malice and that the defendants immediately desisted from the use thereof upon the discovery of the mistake and made due apology therefor, the plaintiff would be entitled to a judgment for nominal damages only.”).

\textsuperscript{235} For a collection of other cases where Chinese courts ordered apologies, see Marisa Anne Pagnattaro, \textit{The Google Challenge}: \textit{Enforcement of Noncompete and Trade Secret Agreements for Employees Working in China}, 44 AM. BUS. L.J. 603, 624–32 (2007) (detailing trade secrets misappropriation cases and apologies ordered by Chinese courts). For detailed accounts of specific cases, see Anne S.Y. Cheung, \textit{A Study of Cyber-Violence and Internet Service Providers’ Liability: Lessons from China}, 18 PAC. RIM L. & POL’Y J. 323, 330–31 (2009) (reporting that a Nanjing Court ruled in favor of the plaintiff in a defamation case against an internet site and ordered the defendant “to delete all defamatory posting[s], issue a public apology on its website for ten days, and pay damages of RMB1000”); Hayden Opie, \textit{Survey: A Global Perspective on the Most Important Cases Affecting the Sports Industry}, 16 VILL. SPORTS & ENT. L.J. 99, 114–15 (discussing the action brought by Olympic gold medalist Liu Xian against several defendants for misappropriating his image and violating his right of publicity and the court’s order that the defendants make a formal apology and pay damages).
from beyond its borders, envisioning just recourse for the person or entities suffering reputational harm.