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Apologies as Intellectual Property Remedies: Lessons from China

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Apologies as Intellectual Property Remedies: Lessons from China

XUAN-THAO NGUYEN

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

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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.

² See John O. Haley, Comment, *The Implications of Apology*, 20 LAW & SOC'Y REV. 499, 504-05 (1986) (discussing the role of apology in both Japan and the United States).

about the role of apologies in law.³ 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 China⁴ has accelerated its acceptance of intellectual property rights as valuable assets.⁵ 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.⁶ In addition to trademark infringement cases, Chinese businesses bring infringement suits to protect their corporate intangible assets relating to copyrights and patents.⁷ Yearly, tens of thousands of suits relating to intellectual property rights are filed by Chinese businesses against other businesses in China.⁸ Statistically, in the last few years, there have been more intellectual property litigation cases filed annually in China than in the United States.⁹ Among the remedies sought by Chinese intellectual property owners are apologies from the wrongdoers.¹⁰ Both injunctions and damages are available and routinely obtained by the prevailing Chinese intellectual property owners.¹¹ 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

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.

⁵ See Xuan-Thao Nguyen, *The China We Hardly Know: Revealing the New China's Intellectual Property Regime*, 55 ST. LOUIS U. L.J. 773, 774-76 (2011).

⁶ *Intellectual Property Rights: Trademark*, U.S. EMBASSY BEIJING, CHINA, <http://beijing.usembassy-china.org.cn/iptrade.html> (last visited Oct. 20, 2011).

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.¹² Mark Sanford, the governor of South Carolina, made a public apology to his family and supporters,¹³ and later apologized to his cabinet, after he mysteriously disappeared from South Carolina to Argentina for extramarital purposes while using state resources.¹⁴

¹² *N.Y. Governor Apologizes After Prostitution Link*, MSNBC.COM (Mar. 10, 2008), <http://www.msnbc.msn.com/id/23561606/#.Tp2M1euhCsl>.

¹³ *South Carolina Gov. Sanford Admits Extramarital Affair*, CNNPOLITICS.COM (June 24, 2009), <http://www.cnn.com/2009/POLITICS/06/24/south.carolina.governor/index.html>.

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.¹⁵ Tony Blair, then Prime Minister of Great Britain, apologized to Ireland for the Potato Famine which killed more than a million Irish people.¹⁶ The Japanese government issued a formal apology for its use of other Asian women as “comfort women,” or sex slaves, during World War II.¹⁷ 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.¹⁸

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.¹⁹ 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.²⁰ 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.²¹

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

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>.

¹⁶ Kathy Marks, *Blair Issues Apology for Irish Potato Famine*, INDEPENDENT, June 2, 1997, at 2.

¹⁷ *The Comfort Women Issue*, EMBASSY OF JAPAN IN THE U.S., <http://www.us.emb-japan.go.jp/english/html/cwl.htm> (last visited Nov. 18, 2011).

¹⁸ *Congress Apologizes for Slavery, Jim Crow*, NPR (July 30, 2008), <http://www.npr.org/templates/story/story.php?storyId=93059465>; see also Krissah Thompson, *Senate Backs Apology for Slavery; Resolution Specifies That It Cannot Be Used in Reparations Cases*, WASH. POST, June 19, 2009, at A5.

¹⁹ Paul Vitello, *I Apologize. No, Really, I'm Serious, I . . .*, N.Y. TIMES, Feb. 21, 2010, at WK2.

²⁰ Editorial, *The Pope and the Pedophilia Scandal*, N.Y. TIMES, Mar. 25, 2010, at A30; Rachel Donadio, *Pope Offers Apology, but No Punishment, for Clergy's Abuse in Ireland*, N.Y. TIMES, Mar. 21, 2010, at A6.

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=aeV9jwqKKrEw> (“We participated in things that were clearly wrong and have reason to regret. . . . We apologize.”).

disaster.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, 2010.²³ 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.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.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.²⁶ Another judge ordered a police officer to apologize to a defense attorney after removing paperwork from her file during a criminal sentencing hearing.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.²⁸

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

²² CNN Wire Staff, *BP Apology Campaign Begins Airing*, CNN.COM (June 3, 2010), <http://www.cnn.com/2010/US/06/02/oil.spill.bp.apology/index.html>.

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.").

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").

²⁵ John C. Ensslin, *Judge Orders Apology Ad in Vehicular Homicide*, GAZETTE.COM (Feb. 19, 2010), <http://www.gazette.com/articles/judge-94456-apology-colorado.html>.

²⁶ Kevin Bowen, *Smith Must Write Letter of Apology*, TUSCALOOSA NEWS, Feb. 9, 2001, at A1.

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

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.”²⁹ 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

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. Kenney 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, “[to] 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.³⁵

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.³⁶ 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.³⁷ 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.³⁸ 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.³⁹

In the immediately subsequent years, scholars devoted substantial

Repentance, Punishment, and Mercy, in *REPENTANCE: A COMPARATIVE PERSPECTIVE* 143, 147 (Amitai Etzioni & David E. Carney eds., 1997); see also Stephen P. Garvey, *Punishment as Atonement*, 46 *UCLA L. REV.* 1801, 1815 (1999) (describing how apology constitutes "the wrongdoer's public expression of his repentance, whereby he openly acknowledges his wrongdoing and simultaneously disowns it").

³⁴ See Mark A. Hall, *Can You Trust a Doctor You Can't Sue?*, 54 *DEPAUL L. REV.* 303, 309 (2005) ("Research reveals that, often, what injured patients most desire are candid acknowledgements of medical errors, a sincere apology that conveys genuine remorse, and constructive steps toward corrective actions."); Michael B. Rainey et al., *Characterized by Conciliation: Here's How Business Can Use Apology to Diffuse Litigation*, 26 *ALTS. TO HIGH COST LITIG.* 131, 132 (2008) ("Literature suggests the top three reasons for patients or their family members filing suit are (1) a lack of explanation of what happened, (2) the perception that no one takes responsibility for their actions, and (3) the demand that someone take measures to mitigate the offensive situation.").

³⁵ See Jonathan R. Cohen, *Legislating Apology: The Pros and Cons*, 70 *U. CIN. L. REV.* 819, 871–72 (2002) (providing a comprehensive analysis of the reasons for and against having laws allowing the inclusion of apology as a remedy); Lee Taft, Essay, *Apology Subverted: The Commodification of Apology*, 109 *YALE L.J.* 1135, 1146–49 (2000) (warning that apology is frequently commodified in the legal arena and advocating in favor of "traditional evidentiary rules construing apologies as admissions because such rules are important protectors of the moral dimension of apologetic discourse").

³⁶ Wagatsuma & Rosett, *supra* note 1, at 461. Subsequently, the Wagatsuma and Rosett article has been hailed as "influential" in apology literature. See White, *supra* note 29, at 1273 (noting that Wagatsuma and Rosett identified the failure of the American legal system to encourage apologies in cases where healing cannot be achieved by monetary compensation alone).

³⁷ Haley, *supra* note 2, at 499–500, 504–06 (applauding Wagatsuma and Rosett for their thoughtful analysis of the apology phenomenon in Japanese culture and law, and arguing that there is much to learn from Japan on the implications of apology in addressing medical malpractice and criminal cases in the United States).

³⁸ *Id.* at 505 (stating that in both the United States and Japan the apology is a critically important behavioral determinant).

³⁹ *Id.* at 505–06.

efforts to developing scholarship on apology. They explored the consequences of advising clients to apologize;⁴⁰ 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.⁴¹ Specifically, Shuman argued that tort law should grant apology broader protection from admissibility in determining a defendant's liability.⁴² 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.⁴³ 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.⁴⁴ 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.⁴⁵

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

⁴⁰ Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1014, 1023–30 (1999) (analyzing the consequences of advising clients to apologize).

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).

⁴⁶ See, e.g., Cheryl G. Bader, “Forgive Me Victim for I Have Sinned”: *Why Repentance and the Criminal Justice System Do Not Mix—A Lesson from Jewish Law*, 31 FORDHAM URB. L.J. 69, 70–71 (2003) (critiquing the Georgia Justice Project’s use of confessions in criminal adjudication and contrasting it with the Jewish legal system); Margareth Etienne & Jennifer K. Robbenolt, *Apologies and Plea Bargaining*, 91 MARQ. L. REV. 295, 301 (2007) (examining the role of apologies in plea bargaining and plea negotiations); Stephen P. Garvey, *Restorative Justice, Punishment, and Atonement*, 2003 UTAH L. REV. 303, 303 (arguing that punishment of the offender is essential to restorative justice); Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1698 (1992) (“[B]y apologizing, we deny the diminishment of the victim, and our relative elevation, expressed by our wrongful action.”); Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 293–94 (discussing genuine

Bierschbach detailed the prevalent and proper use of apology in American life and provided rationale for the inclusion of apology in criminal law.⁴⁷ 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.⁴⁸ 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.⁴⁹

Likewise, in the area of alternative dispute resolution, scholars have explored the role of apology in mediation,⁵⁰ negotiation, and conflict resolutions.⁵¹ 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.⁵² Some scholars suggested a place for sincere apology in mediation disputes before litigation.⁵³ Consequently, they advocated for an increased use of apology in all dispute

remorse by the offender as the second stage of a successful restorative justice process); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1912–13 (1991) (discussing the use of shaming in white colonial America); Jeffrie G. Murphy, *Remorse, Apology, and Mercy*, 4 OHIO ST. J. CRIM. L. 423, 429 (2007) (examining apology and remorse in the context of sentencing and clemency decisions); Jeffrie G. Murphy, *Well Excuse Me!—Remorse, Apology, and Criminal Sentencing*, 38 ARIZ. ST. L.J. 371, 372 (2006) (exploring the relationship between apology and the states of remorse and guilt); Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167, 190 tbl.7, 191 fig.7 (reviewing four studies of offenders' apologies and the likelihood of forgiveness in restorative justice); Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 15 (examining restorative justice as compared to conventional justice).

⁴⁷ 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).

⁴⁸ *Id.* at 128–35 (evaluating the incorporation of apology from the beginning of the criminal process through mediation).

⁴⁹ *Id.* at 145–47 (examining the costs and difficulties of implementing remorse and apology).

⁵⁰ 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).

⁵¹ 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).

⁵² 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).

⁵³ See, e.g., Pavlick, *supra* note 50, at 830–31 (discussing mediation as a forum for dispute settlement).

resolution.⁵⁴

Some scholars took an additional step, suggesting court-ordered apology as a remedy in cases involving defamation⁵⁵ and civil rights.⁵⁶ In the reparations context, numerous scholars have examined the role of institutions⁵⁷ or governments in making apologies as a healing measure for mass injustice—such as slavery⁵⁸ or Japanese internment.⁵⁹ Some shared the view that a sincere apology is more valuable and meaningful to victims than money.⁶⁰

As apology scholarship evolved into a more mature and collective inquiry, scholars provided empirical data on the use of apology in settlements⁶¹ and negotiations.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.⁶³ They applied

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, *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, *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).

⁵⁵ See, e.g., Dai-Kwon Choi, *Freedom of Conscience and the Court-Ordered Apology for Defamatory Remarks*, 8 CARDOZO J. INT'L & COMP. L. 205, 205 (2000) (stating that Korean case law often suggests court-ordered publication of apology as a proper remedial measure for defamation).

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”).

⁵⁷ Adjoa Artis Aiyetoro, *Truth Matters: A Call for the American Bar Association to Acknowledge Its Past and Make Reparations to African Descendants*, 18 GEO. MASON U. C.R. L.J. 51, 93 (2007) (“[R]eparations scholars and activists have called for an apology for slavery and Jim Crow . . .”).

⁵⁸ ROY L. BROOKS, 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”).

⁵⁹ See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 363–68 (1987) (discussing how Japanese-Americans have organized a movement to obtain compensation for their internment, a constitutional violation, during World War II); Eric K. Yamamoto et al., *Essay, American Racial Justice on Trial—Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269, 1275–77 (2003) (discussing the formal presidential apology given to Japanese-American survivors of World War II internment camps through the Civil Liberties Act of 1988).

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

⁶¹ See, e.g., Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 484–91 (2003) (discussing empirical evidence of the effect of apologies on legal settlement decision-making).

⁶² See, e.g., Jennifer K. Robbennolt, *Attorneys, Apologies, and Settlement Negotiation*, 13 HARV. NEGOT. L. REV. 349, 350–51 (2008) (emphasizing psychological responses of both claimants and attorneys to apologies and how apologies influence negotiations).

⁶³ See Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 147–50 (1994) (discussing equity-seeking experiments

evolutionary economic and biologic explanations to apology.⁶⁴ They extended apology as part of a solution after providing a feminist critique of the problems in evidence law.⁶⁵ Some noted that victims of spousal abuse and physician negligence are often more inclined to forgive and accept apology.⁶⁶ Moreover, scholars began systematically to evaluate apologies tailored toward legal solutions,⁶⁷ and critically examined the pros and cons of legislating apology.⁶⁸ Some scholars raised their concerns about the subversion of apology as it may be abused through commodification.⁶⁹

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.⁷⁰ 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”).

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.”).

⁶⁵ Aviva Orenstein, *Apology Excepted: Incorporating a Feminist Analysis into Evidence Policy Where You Would Least Expect It*, 28 SW. U. L. REV. 221, 223 (1999) (proposing a new evidence rule that would except apologies by party-opponents from admission at trial).

⁶⁶ Erin Ann O’Hara, *Apology and Thick Trust: What Spouse Abusers and Negligent Doctors Might Have in Common*, 79 CHI.-KENT L. REV. 1055, 1082–84 (2004) (comparing excessive forgiveness among domestic violence victims and victims of negligent doctors).

⁶⁷ Elizabeth Latif, Note, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions*, 81 B.U. L. REV. 289, 302 (2001) (examining the various criticism of apologies tailored toward legal solutions).

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).

⁷⁰ Runnels, *supra* note 29, at 151–57 (discussing how thirty-five states between 1986 and 2009 enacted statutes that encourage apologies). The statutes include: ARIZ. REV. STAT. ANN. § 12-2605 (Supp. 2011) (West); CAL. EVID. CODE § 1160(a) (West 2009); COLO. REV. STAT. § 13-25-135(1) (2011); CONN. GEN. STAT. § 52-184d(b) (2011); DEL. CODE ANN. tit. 10, § 4318(b) (Supp. 2010); FLA. STAT. § 90.4026(2) (2011); GA. CODE ANN. § 24-3-37.1 (Supp. 2010); HAW. REV. STAT. § 626-1 (Supp. 2009); IDAHO CODE ANN. § 9-207(1) (2010); 735 ILL. COMP. STAT. ANN. 5/8-1901(b) (West Supp. 2011); IND. CODE ANN. § 34-43.5-1-4 (LexisNexis 2008); IOWA CODE § 622.31 (Supp. 2011); LA. REV. STAT. ANN. § 13:3715.5 (2006); ME. REV. STAT. tit. 24, § 2907(2) (Supp. 2010); MD. CODE ANN., CTS. & JUD. PROC. § 10-920 (LexisNexis 2006); MASS. GEN. LAWS ch. 233, § 23D (2000); MO. REV. STAT. § 538.229 (2008); MONT. CODE ANN. § 26-1-814 (2009); NEB. REV. STAT. § 27-1201(1) (2008); N.H. REV. STAT. ANN. § 507-E:4 (2009); N.C. GEN. STAT. § 8C-1, Rule 413 (2007); OHIO REV. CODE ANN. § 2317.43(A) (LexisNexis 2010); OKLA. STAT. tit. 63, § 1-1708.1H(A) (Supp. 2011); OR. REV. STAT. § 677.082 (2009); S.C. CODE ANN. § 19-1-190(B) (Supp. 2010); S.D. CODIFIED LAWS § 19-12-14 (Supp. 2011); TEX. CIV. PRAC. & REM. CODE ANN. § 18.061 (West 2008); UTAH CODE ANN. § 78B-3-422(2) (LexisNexis 2008); VT. STAT. ANN. tit. 12, § 1912 (Supp. 2010); VA. CODE ANN. § 8.01-52.1 (2007); WASH. REV. CODE § 5.64.010(2) (2009); W. VA. CODE § 55-7-11a(b)(1) (2008); WYO. STAT. ANN. § 1-1-130(a) (2011); TENN. R. EVID. 409.1(a) (2003); H.B. 1333, 60th Leg., Reg. Sess. (N.D. 2007). Runnels, *supra* note 28, at 151 n.70.

parties.⁷¹ 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.⁷²

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.⁷³ 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.⁷⁴

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."⁷⁵ Defendants generally request that the court not admit the apology into evidence.⁷⁶

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

⁷¹ 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).

⁷² White, *supra* note 29, at 1273–92 (illustrating the benefits of court-ordered apologies in the civil rights context).

⁷³ See *supra* note 70 (listing relevant statutes).

⁷⁴ 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.*

⁷⁵ OHIO REV. CODE ANN. § 2317.43(A).

⁷⁶ Hill v. St. Onge, No. 2:06-cv-329, 2009 WL 2833145, at *1 (S.D. Ohio Sept. 1, 2009) (granting the defendant's motion in limine, prohibiting testimony concerning statements or gestures of apology attributed to defendant doctors).

person.⁷⁷ The protection covers an apology that is made in writing, orally, or by conduct.⁷⁸ 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.⁷⁹

The statutes above are among the thirty-five state statutes designed to encourage and protect apology.⁸⁰ 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 apologizers [sic].⁸¹

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 law litigation.⁸²

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 WILLAMETTE 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.⁸³ A Texas court ordered a teenager who vandalized schools to apologize to the students at those schools.⁸⁴ 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.⁸⁵ 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.⁸⁶

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."⁸⁷ 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."⁸⁸ Similarly, in some racial and sexual harassment

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).

⁸³ Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 367 (1999) (citing Richard Phillips, *Shame as a Deterrent*, CHI. TRIB., July 27, 1988, at C20).

⁸⁴ Latif, *supra* note 67, at 296-97.

⁸⁵ Bowen, *supra* note 26, at A1.

⁸⁶ 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).

⁸⁷ *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).

⁸⁸ *Woodruff*, 29 F. App'x at 346; see also *Griffith v. Smith*, No. LT-460-2, 1993 WL 945995, at *13 (Va. Cir. Ct. Mar. 4, 1993) (rejecting an apology for filing a frivolous law suit as "post-hoc

cases, courts found that apologies are insufficient to rectify the taint of discrimination and therefore fail to serve the purposes of Title VII.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 *de minimis* for failing to present a justiciable controversy.⁹⁰ The Ninth Circuit stated, “we are not commissioned to run around getting apologies.”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.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 polic[y].”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.”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.⁹⁵ The defendant requested that an appropriate sanction should include attorney’s fees, costs, and an apology.⁹⁶ The court

rationalizations” and imposing sanction by ordering counsel for the plaintiff to pay \$5000 to the defendants).

⁸⁹ *George-Sexton v. Lewis*, No. 06-6120-CV-W-HFS, 2009 WL 804070, at *9–10 (W.D. Mo. Mar. 25, 2009) (noting “an apology, in and of itself, was insufficient” because Title VII requires “more than a mere request to refrain from discriminatory conduct”) (citing *Davis v. Tri-State Mack Distributors, Inc.*, 981 F.2d 340, 343–44 (8th Cir. 1992)). In *George-Sexton*, the sole owner of a business entity that employed plaintiff was the sexual harasser, in referring to the defendant’s apology, the court wrote, “it is difficult to discern if defendant’s apology and assurances were adequate to alleviate any taint of discriminatory conduct because plaintiff resigned.” *Id.*; see also *Canady v. Wal-Mart Stores, Inc.*, 452 F.3d 1020, 1021 (8th Cir. 2006) (holding that apologies were meaningless when preceded and followed by racial epithets).

⁹⁰ *McKee*, 491 F.2d at 1107.

⁹¹ *Id.*; see also *Tackett v. KRIV-TV*, Civ. A. No. H-93-3699, 1994 WL 591637, at *2 (S.D. Tex. May 5, 1994) (denying, in a case involving libel and slander claims, equitable relief in the form of a retraction or public apology, stating that the only relief for defamation is damages); *Frederick v. Shaw*, No. CIV. A. 92-0592, 1994 WL 57213, at *19 (E.D. Pa. Feb. 18, 1994) (holding in a defamation case that the plaintiff’s request for an apology “finds no support in the law” and that the appropriate remedy under Pennsylvania law for defamation is damages, not apology).

⁹² *Pa. Human Relations Comm’n v. Alto-Reste Park Cemetery Ass’n*, 306 A.2d 881, 890 (Pa. 1973).

⁹³ *Id.* (internal quotation marks omitted).

⁹⁴ *Id.* at 891 (Pomeroy, J., concurring).

⁹⁵ *Griffith*, 1993 WL 945995, at *13.

⁹⁶ *Id.*

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.”⁹⁷

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.⁹⁸ 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.⁹⁹ The Ninth Circuit upheld the apology requirement as reasonably serving the purpose of rehabilitation.¹⁰⁰

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.¹⁰¹ 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.’”¹⁰² 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.¹⁰³

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.¹⁰⁴ Similarly, in a libel case, a federal district court

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. 1968)).

¹⁰¹ *Desjardins v. Van Buren Cmty. Hosp.*, 969 F.2d 1280, 1282 (1st Cir. 1992).

¹⁰² *Kicklighter v. Evans Cnty. Sch. Dist.*, 968 F. Supp. 712, 719 (S.D. Ga. 1997); see also *In re Imperial Diner, Inc.*, 417 N.E.2d at 529 (Meyer, J., dissenting) (refusing to consider the question of whether the lower court’s order of a public apology violated the First Amendment).

¹⁰³ *In re R. Michael Moity, Jr.*, Misc. No. 07-0001, 2008 WL 104209, at *11 (W.D. La. Jan. 9, 2008).

¹⁰⁴ *In re Lafferty*, 229 B.R. 707, 714 (Bankr. N.D. Ohio 1998).

applied Texas law and held that public apologies are “relevant to mitigation of damages.”¹⁰⁵ 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.¹⁰⁶

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,¹⁰⁷ and Congress passed various federal statutes protecting intellectual property in 1790 during the First Session of Congress.¹⁰⁸

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.¹⁰⁹ A patent lasts twenty years from the date of filing the

¹⁰⁵ Nowak v. Am. W. Airlines, No. 1:08-CV-613, 2008 WL 4966054, at *2–3 (E.D. Tex. Nov. 18, 2008) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 73.003(a)(3) (West 2008) (“Public apologies are relevant to mitigation of damages in state actions for libel.”)).

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).

¹⁰⁹ See *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 736 (2002) (noting that an invention must be useful, novel, not obvious, and enabling in order to be issued as a patent); *Diamond v. Chakrabarty*, 447 U.S. 303, 313 (1980) (interpreting Section 101 of the patent statute and holding that living things are patentable subject matter); see also 35 U.S.C. § 101 (2006) (“Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or

patent application.¹¹⁰ 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.¹¹¹ The term of copyright protection is the life of the natural author plus seventy years.¹¹² 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.¹¹³ 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.¹¹⁴ When the owner of a trademark abandons its trademark by non-use, coupled with the intention not to resume use, trademark protection ceases.¹¹⁵ Also, if the trademark owner allows the trademark to become a generic term, protection is no longer available, as the generic

any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.”).

¹¹⁰ *Wyeth v. Kappos*, 591 F.3d 1364, 1366 (Fed. Cir. 2010) (noting that in 1994, Congress changed the term of a patent from seventeen years from issuance date to twenty years from filing date); see also Uruguay Round Agreements Act, Pub. L. No. 103-465, § 532, 108 Stat. 4809, 4984 (1994) (establishing, in public law form, that the patent term shall be for twenty years from the date on which the patent application was filed).

¹¹¹ See *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 495 (2001) (stating that the Copyright Act of 1976 reframed copyright as a bundle of discrete “exclusive rights”); see also Whitney Broussard, *The Promise and Peril of Collective Licensing*, 17 J. INTELL. PROP. L. 21, 25 n.9 (2009) (noting that copyright is a bundle of exclusive rights as enumerated in 17 U.S.C. § 106). With the arrival of the Internet, Congress passed new legislation to protect copyright owners from widespread online copyright infringement. See Lateef Mtima, *Whom the Gods Would Destroy: Why Congress Prioritized Copyright Protection over Internet Privacy in Passing the Digital Millennium Copyright Act*, 61 RUTGERS L. REV. 627, 645-46 (2009).

¹¹² *Eldred v. Ashcroft*, 537 U.S. 186, 189 (2003) (affirming the constitutionality of the copyright extension of twenty years for a total term of life of the author plus seventy years); see also 17 U.S.C. § 302(a) (“Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author’s death.”).

¹¹³ *Eldred*, 537 U.S. at 196; see also 17 U.S.C. § 302(c).

¹¹⁴ See *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 117 (2004); Danielle Conway-Jones, *Remedying Trademark Infringement: The Role of Bad Faith in Awarding an Accounting of Defendant’s Profits*, 42 SANTA CLARA L. REV. 863, 872 (2002) (“Trademark infringement does not depend upon the use of identical words, nor whether they are so similar that a person looking at one would be deceived into the belief that it was the other. Infringement exists if one adopts a trade name or a trademark, so like another in form, spelling, or sound that one with an unclear recollection of the real trademark is likely to become confused or misled.”).

¹¹⁵ See Christopher T. Micheletti, *Preventing Loss of Trademark Rights: Quantitative and Qualitative Assessments of “Use” and Their Impact on Abandonment Determinations*, 94 TRADEMARK REP. 634, 634-35 (2004) (discussing how protective trademark rights derive from the actual use of the trademark for commercial purposes); see also *Silverman v. CBS Inc.*, 870 F.2d 40, 45-47 (2d Cir. 1989) (holding abandonment of the Amos & Andy trademark based on twenty-one years of nonuse, despite the trademark holder’s intent to resume use if “the social climate become[s] more hospitable”).

term is free to all for usage.¹¹⁶ A trade secret refers to the information, formula, or process, not known by the public, that is capable of deriving independent economic means.¹¹⁷ 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.¹¹⁸ A trade secret loses its legal protection when it is no longer a secret.¹¹⁹

Unlike real property, intellectual property protection is a mixture of property and liability rules.¹²⁰ Accordingly, remedies for intellectual property infringement reflect the byproduct of the mixed regime.¹²¹ The

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).

¹¹⁹ See, e.g., Andrew Beckerman-Rodau, *The Choice Between Patent Protection and Trade Secret Protection: A Legal Business Decision*, 84 J. PAT. & TRADEMARK OFF. SOC’Y 371, 377–80 (2002) (explaining the legal life of a trade secret and reasons for companies to seek trade secret protection instead of patents).

¹²⁰ Erez Shaham & Noam Sher, *A Purchaser of a Product v. An Owner of Stolen Intellectual Property: The Revival of the Accession Rule*, 28 WHITTIER L. REV. 319, 353–54 (2006) (discussing the “property rule,” which allows intellectual property holders to recover the assets, and the “liability rule,” which affords intellectual property owners compensation for the infringement).

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.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.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.¹²⁴ Injunctive relief in real property law permeates intangible property law.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.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

¹²² James M. Fischer, *What Hath eBay v. MercExchange Wrought?*, 14 LEWIS & CLARK L. REV. 555, 557–58 (2010) (recognizing the traditional identification of injunction with “property rules” and damages with “liability rules” in intellectual property remedies cases).

¹²³ Thomas W. Merrill, Essay, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) (advocating that the “right to exclude” is the “*sine qua non*” of property); see generally David L. Callies & J. David Breemer, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 WASH. U. J.L. & POL’Y 39 (2000) (reviewing case law on the “right to exclude” as a fundamental right in ownership of land).

¹²⁴ Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 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”).

¹²⁵ See Dariush Keyhani, *Permanent Injunctions in Patent Cases*, 6 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, *Indeterminism and the Property-Patent Equation*, 28 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).

¹²⁶ Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 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).

infringers.¹²⁷ 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.¹²⁸ 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.¹²⁹ 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.¹³⁰

In both trademark and copyright infringement cases, the plaintiff must demonstrate probable success on the merits of the case to obtain a preliminary injunction.¹³¹ For example, in a trademark case the plaintiff must establish that the defendant's use of the trademark is likely to cause consumer confusion.¹³² The plaintiff must convince the court that, on the

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).

¹²⁸ See 35 U.S.C. § 283 (2006) (patent injunction); 15 U.S.C. § 1116(a) (trademark injunction); 17 U.S.C. § 502 (copyright injunction); UNIF. TRADE SECRETS ACT § 2 (1985) (trade secret injunction).

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 Kahaulelio 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.¹³³ 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.¹³⁴ Accordingly, some courts have presumed irreparable harm if the trademark owner can demonstrate the likelihood of success on the merits.¹³⁵ Other courts, however, have declined to extend the presumption of irreparable harm.¹³⁶

Copyright owners have also enjoyed the presumption of irreparable harm,¹³⁷ but the presumption has been called into question in recent years in both copyright and trademark infringements.¹³⁸ 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";¹³⁹ 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 1090, 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.¹⁴⁰ 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.¹⁴¹

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.¹⁴² This enables them to manufacture goods and directly compete with the owner in the marketplace, without which the defendant could not compete.¹⁴³ Injunction serves to right competitive

only until the next fad. . . . In such situations, the commercial value of the copyright owner's tangible expression, appropriated by an infringer, may be lost by the time litigation on the claim is complete.") (internal citations omitted).

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*, 636 F. Supp. 2d 763, 767 (C.D. Ill. 2009); *Computer Assocs. Int'l v. Quest Software, Inc.*, 333 F. Supp. 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, 2010 WL 174315, at *4 (D.N.H. Jan. 14, 2010).

wrongs.¹⁴⁴ 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.”¹⁴⁵

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.¹⁴⁶ 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.¹⁴⁷ In other words, injunctive relief is not readily available in patent, copyright, and trademark infringement cases,¹⁴⁸ 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

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).

¹⁴⁵ *Gen. Elec. Co. v. Sung*, 843 F. Supp. 776, 778 (D. Mass. 1994) (issuing injunction to prevent the defendants’ use of plaintiff’s trade secrets, which the defendants misappropriated).

¹⁴⁶ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391–93 (2006).

¹⁴⁷ See generally *Bushnell, Inc. v. Brunton Co.*, 673 F. Supp. 2d 1241, 1260 (D. Kan. 2009) (holding that a presumption of irreparable harm may not be invoked post *eBay*); *Tiber Labs., LLC v. Hawthorn Pharm., Inc.*, 527 F. Supp. 2d 1373, 1380 (N.D. Ga. 2007) (same). But cf. *Powell v. Home Depot U.S.A., Inc.*, No. 07-80435-CIV, 2009 WL 3855174, at *12–14 (S.D. Fla. Nov. 17, 2009) (applying presumption of irreparable harm); *Eisai Co. v. Teva Pharms. USA Inc.*, Civ. Nos. 05-5727 (HAA)(ES), 07-5489(HAA)(ES), 2008 WL 1722098, at *10–11 (D.N.J. Mar. 28, 2008) (finding presumption of irreparable harm for preliminary injunctions in patent infringement actions post *eBay*).

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.¹⁴⁹ A damages award, however, constitutes only compensation for the injured plaintiff, not a penalty against the defendant.¹⁵⁰ Obtaining a damages award at trial is generally a complex and costly task.¹⁵¹ The burden is on the owner to prove the damages caused by a defendant's infringing conduct.¹⁵² The owner must establish damages with reasonable certainty, and have a reasonable basis for computing damages.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.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.¹⁵⁵ The harm occurs because the plaintiff continues to advertise its

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. *Id.*

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). *Lindy Pen* makes this mistake; however, *Playboy* does support this proposition even if it is not stated in the precise words quoted above.

¹⁵¹ Dennis S. Corgill, *Measuring the Gains of Trademark Infringement*, 65 FORDHAM L. REV. 1909, 1913–15 (1997); see also Epstein, *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).

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)).

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

¹⁵⁴ JANE C. GINSBURG ET AL., *TRADEMARK AND UNFAIR COMPETITION LAW: CASES AND MATERIALS* 917 (4th ed. 2007).

¹⁵⁵ See Bernstein & Gilden, *supra* note 148, at 1059 ("[I]n trademark cases . . . proving damages is 'notoriously difficult . . .'" (citation omitted); K. J. Greene, *Motion Picture Copyright Infringement and the Presumption of Irreparable Harm: Toward a Reevaluation of the Standard for Preliminary Injunctive Relief*, 31 RUTGERS L.J. 173, 196 (1999) ("[C]onsumer confusion is difficult to redress by money damages . . ."); J. Thomas McCarthy, *Are Preliminary Injunctions Against Trademark Infringement Getting Harder to Achieve?*, 14 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, *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.¹⁵⁶ 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.”¹⁵⁷ 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.¹⁵⁸ For example, in *Lindy Pen v. Bic Pen*,¹⁵⁹ the plaintiff spent thirteen years, from 1980 to 1993, in litigation to obtain damages.¹⁶⁰ In that case, the plaintiff owned the trademark “Auditor’s” for its ballpoint pens used by accountants and auditors.¹⁶¹ The defendant adopted “Auditor’s Fine Point” for the sale and marketing of its ballpoint pens.¹⁶² “[T]he district court determined that there was a likelihood of confusion in the telephone order market [for the pens]”¹⁶³ Though infringement existed, the district court found that the plaintiff did not have sufficient proof of actual damages in the form of lost profits.¹⁶⁴ 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

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.”).

¹⁵⁷ McCarthy, *supra* note 155, at 1.

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 "justif[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.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.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,¹⁷⁷ or statutory damages in cases where damages are difficult to ascertain.¹⁷⁸ In addition to damages, a reasonable cost award is available to the trademark owner under the anti-unfair

¹⁷⁵ *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 . . .").

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 . . ." *Id.* art. 5. 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).

¹⁷⁷ Trademark Law (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 2001, effective Mar. 1, 1983) (amended 1993 and 2001) (China). Article 56 of China's Trademark Law prescribes that:

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.

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.").

competition statute.¹⁷⁹ 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.¹⁸⁰ 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.¹⁸¹ The plaintiff lost in the local people’s court—the court of the first instance—and appealed the judgment to the higher court.¹⁸²

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.¹⁸³ 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.¹⁸⁴ 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.”¹⁸⁵ 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.¹⁸⁶

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 Daguan Yuan Shopping Center, the defendant used the plaintiff's registered service mark "Goubuli" for its dumpling products.¹⁸⁷ 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.¹⁸⁸ The court ordered the defendant to cease the use of the three characters of "Goubuli" for its products and advertisements,¹⁸⁹ but neither compensatory damages nor a public apology were available, as the infringement was not in bad faith.¹⁹⁰

B. Apologies in Copyright Infringement Cases

Article 46 of China's Copyright Law provides that anyone who commits copyright infringement¹⁹¹ must "bear the civil liability for such remedies as ceasing the infringing act, eliminating the effects of the act,

¹⁸⁷ *Tianjin Goubuli Group Co. v. Tianfengyuan Rest. of Jinan Daguan Yuan Shopping Ctr.* (Higher People's Ct. of Shandong Province Oct. 10, 2007) (China).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*; see also *Nanjing Xuezhong Caiying Co. v. Shanghai Xuezhong Caiying Co.* (Interm. People's Ct. of Nanjing Municipality May 30, 2005) (China) (noting that the trademark owner failed to provide evidence to prove that its "commercial credit has been injured," therefore, the plaintiff's request for an apology was denied).

¹⁹¹ Copyright Law, art. 46 (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 2001, effective June 1, 1991) (amended 2001) (China). Article 46 states that prohibited infringing tort conduct includes:

- (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”¹⁹² 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.¹⁹³ If actual loss or illegal gains cannot be ascertained, the maximum statutory damage award is 500,000 yuan.¹⁹⁴

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.¹⁹⁵ 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.¹⁹⁶ 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.¹⁹⁷ The defendants appealed to the Beijing Higher Court.¹⁹⁸

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.”¹⁹⁹ 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

¹⁹² *Id.*

¹⁹³ *Id.* art. 48.

¹⁹⁴ *Id.*

¹⁹⁵ *Founder Co., Red Mansion Inst. v. Gaoshu Tianli Co., Gaoshu Co.* (No. 1 Interm. People’s Ct. of Beijing Municipality Dec. 20, 2001), *rev’d*, (Higher People’s Ct. of Beijing Municipality July 15, 2002), *rev’d*, (Sup. People’s Ct. Mar. 7, 2007) (China) (all three decisions are contained in the opinion released by the Sup. People’s Ct.).

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).

²⁰⁴ *Founder Co., Red Mansion Inst. v. Gaoshu Tianli Co., Gaoshu Co.* (No. 1 Interm. People's Ct. of Beijing Municipality Dec. 20, 2001), *rev'd*, (Higher People's Ct. of Beijing Municipality July 15, 2002), *rev'd*, (Sup. People's Ct. Mar. 7, 2007) (China).

²⁰⁵ *Ding Xiaochun v. Nantong Educ. Bureau and Jiangsu Fine Arts Publ'g House* (Interm. People's Ct. of Nantong City Dec. 19, 2002) (China).

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

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.”²¹⁴ 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*.²¹⁵ The Supreme People’s Court concluded that the appellate court’s order was therefore “inappropriate.”²¹⁶

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.”²¹⁷ 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.²¹⁸ 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.”²¹⁹

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Inst. of Organic Chemistry of Chengdu Under the Chinese Acad. of Scis. v. Chengdu Zhengda Elec. Apparatus Factory* (Interm. People’s Ct. of Chengdu City June 29, 1999), *aff’d* (Higher People’s Ct. of Sichuan Province Apr. 5, 2000) (China) (the two decisions are contained within the same opinion issued by the Higher People’s Ct. of Sichuan Province).

²¹⁸ *Id.*

²¹⁹ *Id.*

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).

use of the trademark.²²⁶

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.*,²²⁷ the parties had attempted to settle their dispute with an apology.²²⁸ 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.²²⁹ The petitioner, however, continued to use the trademark because it was descriptive of the products and subsequently sought cancellation of the trademark registration.²³⁰ The Court of Custom and Patent Appeals affirmed a petition to cancel a registered trademark on the ground of descriptiveness.²³¹

Additionally, in *Flake v. Greensboro News Co.*,²³² 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.²³³ 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).

²³² 195 S.E. 55 (N.C. 1938).

²³³ *Id.* at 57.

plaintiff would only be entitled to a judgment for nominal damages.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 *Flake v. Greensboro News Co.*, where the court granted only nominal damages, and in *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 *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.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

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.”).

²³⁵ For a collection of other cases where Chinese courts ordered apologies, see Marisa Anne Pagnattaro, “The Google Challenge”: *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, *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, *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.