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1. IPR and enforcement in China

The intellectual property rights (IPR) available in China are similar to those available in Europe. The registered rights available are invention patents, utility patents, design patents and trade marks. Copyright can also be recorded. There are unregistered rights derived from the law on trade secrets and unfair competition but these are difficult to rely on and it is therefore advised that rights owners register their IP with the relevant authorities. For a summary of Chinese IPR please refer to the China IPR SME Helpdesk at: www.chinaiprhelpdesk.eu/en/publications.

As always, the first step is to register the IP rights that your company wishes to protect. Then put in place procedures to monitor trade fairs, online sellers, and any other areas where infringing products might be sold or marketed.

Assuming you have registered your IP and found it being infringed then you will want to enforce it. How will you find it being infringed? Your customers might tell you about competing products, you might find infringements for sale on the internet, you might see infringing products at a trade fair. You should follow-up this type of tip-off by for example hiring law firms or private investigators operating in accordance with Chinese law in order to gather more information about the company marketing the product: is it a big company; what is its production capacity; how long has it been in the market; to whom does it sell; is it operating at its registered address? Once you have gathered sufficient information and decided to take action then there are a few options, as explained below.

2. Essential to do's before you start the enforcement proceedings

Find company information

If you find out that your intellectual property in China has been infringed (your product or trade mark, patent, copyright etc. has been copied) how can you start to research the infringer?

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Information on companies registered in China is often publicly available and can be accessed via the electronic database of each local Administration of Industry and Commerce (AIC): <http://gsxt.saic.gov.cn>. This search can reveal, amongst other details, if the company is an officially registered company in China, who can legally represent the company and sign contracts on behalf of the company, what the business scope of the company is, and where the company is located.

The guide on how to do this search step-by-step is published on the website of the China IPR SME Helpdesk, available for download at: http://www.china-iprhelpdesk.eu/sites/all/docs/publications/How_to_search_for_company_information.pdf.

We highly advise you to consult law firms or Chinese due diligence experts for a due diligence in accordance with Chinese law of the Chinese company you want to interact with.

Before you start any official action: collect evidence!

In China, evidence obtained by yourself that could serve as proof of infringement does not count as allowed evidence under Chinese law. Only evidence that is notarised by a Chinese notary public will generally be allowed by Chinese courts, and other administrations. Therefore, make sure that when you find an infringement, you first obtain notarised proof of the infringement by use of a Chinese notary public.

Trade fairs, for example, can also be a platform for obtaining evidence of IP infringement. For detailed information on this process, consult the China IPR SME Helpdesk guide "How to Collect Effective Evidence at Trade Fairs", available for download at: http://www.china-iprhelpdesk.eu/sites/all/docs/publications/v6_How_to_collect_effective_evidence_at_trade_fairs_online.pdf



3. Enforcement proceedings

There are six main enforcement options in China: negotiations, administrative actions, civil litigation, criminal sanctions, customs seizures and notice and take down procedures.

a) Negotiations

Often forgotten, but quite handy, can be the tactic of negotiations. This option could save a lot of money if the main goal is to get the infringer to stop infringing. It is crucial that the evidence of the infringement is already secured at the stage when your company will engage with a Chinese company by negotiations or other means. If the evidence is not secured, and the alleged infringer will receive a mail or an appropriate cease-and-desist letter from you with regard to the infringement, the infringer might be inclined to continue the infringement in another way. After notifying him or her it will be very difficult in that case without evidence to commence any later action against the Chinese company as evidence collection will be made a lot harder for you.

When it is clear to the Chinese company you have notarised proof of the infringement you can get the infringer to reach a settlement with you. Naturally, licensing your IP at this point might be an option to stop the infringement and turn it to a source of revenue for your company, in the event that you find it beneficial to let the previously infringing company use your IP in return for financial compensation via licensing. SMEs often are not eager to go through the enforcement system of administrative enforcement or civil litigation of their IP rights and neither is the infringer. Reaching a settlement through negotiations is a good way to save time and money. Be sure to communicate with the infringer in Chinese, as letters in English and contact in English often do not bring sufficient results.

b) Administrative actions

The key Chinese administrative bodies are the Intellectual Property Offices (IPOs) for patent cases, the Administrations for Industry and Commerce (AICs) for trademark cases, the Copyright Office for copyright cases, and the Quality and Technical Supervision Bureaus (QTSBs) (local divisions of the Administration for Quality Supervision Inspection and Quarantine) for goods breaching quality or safety standards. These are empowered to take certain actions against companies infringing intellectual property rights. These bodies between them have the power to:

- Raid defendants' premises and to seize and destroy infringing items;
- Impose injunctions to force the infringing party to desist; and
- Levy fines on the infringing party for TM infringement, copyright infringement and counterfeiting patent certificates, (but not patent infringement).

Administrative bodies offer a relatively fast and cost-effective way to deal with trade mark and copyright infringements and to gather evidence for patent infringements. They are generally comfortable when dealing with trade mark cases because it is usually an easy matter for the AIC officials to compare the trade mark with the counterfeit or allegedly infringing product and decide whether there is infringement, as well as simple copyright cases. However, administrative bodies are less confident when it comes to analysing the scope of protection

of a patent and the infringement thereof. The main use of an administrative action in a patent infringement case or complicated copyright case is to obtain evidence.

In the event that a right holder cannot collect sufficient evidence to pursue administrative or civil action against an infringer, it may still be possible to apply to QTSB to impound the infringing goods on the grounds of breaching quality or safety standards. QTSB is not a body typically associated with intellectual property disputes but it can be deployed as a useful tool for impounding infringing products in the absence of any other alternative.

A right holder wishing to file an administrative action will need to instruct a lawyer to file evidence about the existence and ownership of the right (i.e. the IPR certificate and identification of right holder, plus Powers of Attorney to enable the lawyer to act) as well as evidence of the infringement (how strong the evidence must be varies from province to province and city to city; it might simply be an investigator's report but it might be a sample purchase witnessed by a notary public). Your lawyer will provide further details if you decide to pursue this type of action.

A simple trade mark, copyright or QTSB administrative action lodged with a local administrative body would likely last between three and six months and cost RMB 20,000-50,000.

An application to an IPO to obtain evidence in relation to the infringement of a design patent would cost in the region of RMB 30,000-80,000, with a civil action to follow. For invention patents, this cost can be higher depending on the specifics of the patent.

c) Using customs to halt exports and gather evidence

While practice, as ever, varies across China, many Chinese customs authorities will proactively enforce trade marks registered with them. However, generally they will not do the same for patents nor copyright and therefore patent/copyright owners wishing to have infringing goods seized by customs must inform the customs officers of the precise details of each shipment to be seized (including the container number). In practice, obtaining this information entails extensive use of law firms or private investigators operating in accordance with Chinese law.

If product is seized and the claimant wishes to pursue legal action then it must pay a bond equal to the value of the goods seized. The defendant may then pay a counter-bond of an equal amount in order to have the goods released.

Goods seized by customs are strong evidence of extensive infringement. This means that even though customs release the infringing goods on payment of a counter-bond, claimants can use the evidence to claim a high damages award. Further, the damages award will be paid out of any counter-bond posted by the defendant, thereby mitigating the risk of non-payment.

For additional details on Customs protection and enforcement, please consult the China IPR SME Helpdesk "Guide to Using Customs to Protect Your IPR in China" which is available for download at: www.china-iprhelpdesk.eu/docs/publications/Customs.pdf.

d) Online infringements – use of notice and take down procedure

According to Chinese law, internet platforms are liable for intellectual property infringement if they are notified of the infringement and do not take down the links to the infringing websites. This is a so-called Notice- and Take Down procedure in which the IP right holder asks the internet platform to take down the infringing links on their platform. The big internet platforms in China have a special policy in place for these Notice and Take Down actions. Generally the following needs to be provided for a Notice and Take Down Action:

- the proof that the complainer is the right holder of the IPR,
- the links to the infringing products, and
- the business license/certificate of the company.

Notice and take down procedures are a very cheap and efficient way to take down online infringements as it this action can be completed by yourself. Your own company staff can check the internet platforms and others to locate infringements, and when infringements are being found send notice and take down requests to these platforms. Often after a site has been taken down, a new site pops back up. Therefore, it is crucial to keep locating these websites and taking them down.

Please find a guide on the above topic on our website: How to Remove Counterfeit Goods from E-Commerce Sites in China

e) Civil litigation

Civil litigation is equivalent to a court case in Europe. The usual remedies sought are injunctions, damages, delivery up and destruction (of tools/products). A civil action will generally take six to 12 months from the issuance of proceedings until handing down of the judgment.

When proving infringement on intellectual property, it is usually easiest to obtain evidence of sale or offer for sale with regard to the infringing product, but even this is not entirely straightforward because Chinese courts require this type of evidence of infringement to be given by a notary public. In practice, this means that the purchase of, or offer for sale of, the allegedly infringing item must be witnessed by a notary public who then certifies that the particular unit was purchased from, or offered for sale by, the particular entity. This type of sample purchase, or witness of an offer for sale, only proves that one sample was sold, or offered, and so may not be sufficient to persuade a court to grant a worthwhile damages award. An Evidence Preservation Order (EPO) may be used to obtain evidence of manufacture.

An EPO is an action in which the court will seal and/or take photographs of infringing articles at the defendant's premises. The court is also empowered to take copies of all accounts, invoices and other commercial documents found at the defendant's premises. Of course, many potential defendants are alert to this possibility and do not keep accounts at their factories. The EPO is therefore most useful for gathering the photographic and/or sealed evidence of mass manufacture. A bond of between RMB 20,000-1million to the court might be payable, depending upon the size of the claim and the requirements of that particular court.

Once evidence of infringement has been obtained, either

by way of a sample purchase or an EPO, then the main proceedings can be commenced. The conventional rules apply on jurisdiction and the defendant must therefore be sued either in the place where the tort (a civil wrong i.e. an infringement) was committed, or in its home city or province. If the home province of the defendant is known to have an inexperienced court system then it is best to try to ensure that the sample purchase is completed in another jurisdiction with IP Courts (Beijing, Shanghai or Guangzhou). These three cities have specialised courts that are the competent courts with regard to intellectual property cases in these three cities.

Once the right owner has gathered sufficient evidence, it might also consider applying for an Asset Preservation Order (APO). This is an action in which the court will freeze bank accounts and/or other assets of the defendant. This tactic is most likely to be employed when the claimant has sustained or will sustain significant losses due to the infringement and there is a risk of difficulty enforcing a favourable judgment. Again, the court may require the payment of a bond commensurate with the level of damages claimed. Then bond will remain in the court account until the legal action (including any appeal) is complete.

Once the right holder has gathered sufficient evidence, seized/frozen assets of the defendant and built a strong case for infringement, then the matter will proceed to a brief trial. The trial is usually preceded and followed by settlement negotiations mediated by the judge. If no settlement can be agreed then the judge will retire to consider his decision and will hand down a judgment in due course.

Preliminary injunctions in case of trade secret infringement

If you fear your trade secret might become disclosed because of sudden actions of an employee, or other contract partner, you can start a trade secret misappropriation action on Anti-Unfair Competition Law for preliminary injunction and damages. A preliminary injunction with regard to trade secrets means that you ask the court to order that somebody will be prohibited from disclosing, using or allowing others to use the trade secret. Such an action can be necessary as, according to Chinese Anti-Unfair Competition Law, a trade secret must be non-public, competitive information that is actively being kept secret by its holder, and thus cannot be disclosed to the public. That such an action actually can work in China is proven by the Shanghai No. 1 Intermediate Court that prohibited a (former) researcher from a USA pharmaceutical company from disclosing, using or allowing others to use the trade secrets (Eli Lilly vs Huang). It is therefore recommended to use it when your trade secret is in danger of getting out to the public.

This enforcement option is only available for trade secrets, because if a trade secret becomes public, it cannot be protected anymore, resulting in the need for preliminary injunctions. With other types of IP, such as trade marks for example, the other enforcement options listed in this guides are available.

f) Criminal sanctions

Criminal sanctions are only used in relation to patents where the counterfeiting of the patent certificates themselves has taken place. Such actions are rare; criminal proceedings are more common in relation to trade mark and copyright infringements.

With regard to trade marks criminal procedures could be started when certain thresholds are met in case of manufacturing or with knowledge selling of counterfeits, or in case of forging or selling unauthorised representations of a trade mark.

With regard to copyright, criminal procedures could be started in case of several copyright infringement where several thresholds have been met. For trade mark and copyright infringement, in case certain thresholds are met, imprisonment and monetary fines can be given.

There are three methods of bringing criminal sanctions:

- IP owner reports to the Public Security Bureau (PSB);
- an administrative agency transfers its case to a criminal agency when it comes to suspect the damage inflicted by the defendant exceeds certain thresholds; or
- A trade mark owner can choose to file a criminal lawsuit with the court known as a private prosecution.

The first two approaches are common whilst the final approach is less so because claimants have no compulsory powers to obtain evidence, unlike the authorities.

The PSB has sole discretion on whether to accept a criminal case both when it has been reported by an IP owner or transferred from an administrative agency. If the PSB accepts the case then it will begin proceedings by collecting evidence. Once it has sufficient evidence then the PSB will pass the case to the prosecution agency which assesses whether the case may proceed to trial or not.

The prosecution agency presents the case at trial. The Court will decide liability and the appropriate sentence. Punishment may include imprisonment of up to seven years and/or penalties. It is important to bear in mind that the IP owner cannot recover damages through this process, but of course a favourable ruling would be a valuable deterrent to potential future infringers.



4. Enforcing a judgment

If the defendant does not comply with the terms of the court judgment or a court endorsed settlement then the claimant should apply to court to enforce the judgment. In these circumstances it will benefit the claimant greatly if it had obtained an APO earlier in proceedings because the damages award will be paid out of the preserved assets.

If the claimant did not obtain an APO then the claimant should, following its own investigations, inform the court of the approximate value of the defendant's assets. If there are sufficient funds in the defendant's bank account then the court can seize that to satisfy the terms of the judgment or settlement. If there are insufficient funds in the bank account then the court can order the assets of the defendant to be sold by auction.

As in any jurisdiction, there is no guarantee that a defendant will have assets of sufficient value to cover the entire damages award. A prudent tactic is for the claimant to negotiate a realistic settlement with the defendant based on its knowledge of the value of the defendant's assets.

Case Study 1: A typical infringement action

Once an infringer has been identified, commonly via a website advertisement or at a trade fair, law firms or private investigators operating in accordance with Chinese law can be instructed to conduct an initial investigation into the infringer. A typical investigative report takes one to three weeks to complete and will provide information about the infringing acts and products, and further information relating to the corporate and individual identities of the suspected infringers. It is essential that the correct company is identified prior to commencing legal proceedings, although this can be challenging when dealing with complex group company structures and/or shadow companies. The manufacturing entity should be the focus of the litigation.

Once the investigative report has been completed, the decision as to which type of action should be taken against the infringer (civil or administrative or, very rarely, criminal) must be made. This will depend on the following factors:

- 1) the nature of the infringing act and what type of intellectual property right it relates to;
- 2) the strength of the evidence of infringement obtainable;
- 3) whether the infringer has engaged in any other activities related to the infringing act (for example, registration of a 'copycat' patent).

When preparing for a civil action, it should be borne in mind that documentary evidence (for example, a copy of a website showing infringing goods for sale) must be notarised, and documents from overseas (for example the claimant's power of attorney to its Chinese counsel) must be notarised and legalised. Any evidence which is not notarised might not be taken into account by a Chinese judge, and therefore evidence such as witness statements, attorneys' statements and investigative agents' reports often don't carry much weight in Chinese courts.

The ideal list of primary evidence of infringing activity is as follows:

- 1) a sample purchase with an official receipt. This should have been conducted at the infringer's registered place of business by the investigative agent and witnessed by a notary public, although an online purchase witnessed by a notary can also be used; and
- 2) if the infringing goods are being advertised on the internet, then notarised copies of those websites showing the offers of sale should be provided.

It is also advisable to make a (non-notarised) sample purchase of an infringing article in the fortnight before trial. Defendants often claim at trial that their infringing activity was not profitable and/or that it has ceased but a recent sample purchase can show to the judge that this is not true. As noted above, many judges will give little weight to non-notarised evidence and so this tactic is not always successful, but is nonetheless recommended as an added precaution.

Claimants can apply for the usual remedies including, in particular, an injunction, delivery and or destruction of products, and damages. Damages can be calculated based on the defendant's profits, the IP owner's loss, a reasonable royalty rate or statutory damages. If claiming an account of the defendant's profits the claimant must provide evidence of the defendant's profit from the infringing activity. However, private Chinese companies are generally not required to keep accounting records and there is no legal requirement for the parties to disclose their records during legal proceedings. Obtaining financial evidence therefore poses a significant challenge. If claiming compensation for its own loss then the claimant must disclose its own profits – something most claimants are reluctant to do. If the claimant can provide a license contract for their IP rights or other proof of their contribution to a license fee, then the court can use this to determine a reasonable royalty. In the absence of any of the above the judge can award statutory damages of up to RMB 3,000,000 (approximately EUR 440,000) for trademark infringement, although the average award is significantly lower.

Claimants may apply for APOs and/or EPOs in the early stages of civil proceedings. APOs are used to seize assets in order to ensure that any damages awarded are paid. APOs can also be used to seize infringing goods in order to prevent an infringer from being able to carry out its business whilst waiting for the legal proceedings to be completed. EPOs are used to obtain evidence of infringement over and above the initial sample purchase.

In some circumstances a claimant may wish to apply for an interim injunction. Interim injunctions are available in theory if a right holder can provide evidence of actual or imminent infringement which will cause irreparable harm if left unchecked. However, the courts can be reluctant to grant injunctions because of the loss that can potentially be caused to a defendant's business. Such loss is difficult to quantify

and it is therefore deemed difficult to calculate and secure an appropriate bond from the applicant. As interim injunctions have been granted by Chinese courts, it is recommended to try and obtain them if deemed necessary.

When evidence has been gathered and exchanged the matter will go to trial. The judge will try to broker a settlement before the trial, and usually after the trial as well. If no settlement can be reached then judgment can usually be expected within a couple of months of the hearing. Once judgment has been given, domestic parties have 15 days (international parties have 30 days) from the date on which they received the judgment to appeal the decision, should they so wish. A party wanting to appeal must submit a petition outlining the basis of their appeal. Chinese courts rarely accept new evidence at the appeal stage unless special circumstances apply and the parties were unable to procure the evidence at the original trial. It will usually take three to six months from the date of the petition for an appeal decision to be handed down.

At first instance, a judgment takes effect after 15 days if no application for appeal has been made (or 30 days where international parties are concerned). An appeal decision is effective upon receipt. However, in either case, a further application may be made to enforce a judgment if the defendant does not voluntarily comply. Timeframes for the enforcement of Chinese judgments vary between courts. In the event that an infringer does not heed the restrictions placed on them by a judgment, the claimant must complain once again to the court.

The time to trial might be extended if the defendant files an invalidation action against the patent alleged to be infringed. All patent invalidation applications are heard by the State Intellectual Property Office (SIPO) rather than the courts and usually concurrent infringement proceedings will be stayed until an invalidation action has been completed. Whether or not proceedings will be stayed generally depends on the intellectual property right in question. For example, an invention patent is considered to be a more stable right than a utility model patent and therefore if the former is challenged then there is less chance of the proceedings being stayed.

Case study 2: shadow companies

A typical issue faced by right holders in China is the existence of what is known as a shadow company. A shadow company can provide a cover name for a Chinese manufacturing company. If company X makes shoes that look a little like, say, Adidas shoes then X might incorporate a shadow company called 'Adidas Hong Kong'. The shadow company then issues a 'license' and/or a 'letter of authorisation' to X's mainland China-based manufacturer, which then claims to be licensed by or authorised by Adidas Hong Kong. That license or authorisation will protect the manufacturer from raids by the AIC because the AIC, as discussed above, is not sufficiently sophisticated to deal with anything but the simplest of cases. This means that the right holder must go to court to enforce its rights, which takes more time and costs more money than an AIC action. So the shadow companies benefit the manufacturer by a) permitting it to give the impression that it is licensed by a famous brand name (and thereby increase sales), and b) buying it time to continue infringing while waiting for legal proceedings. A third benefit for the manufacturer is that the

Chinese court has no jurisdiction to dissolve the foreign shadow company, so the rights holder has to spend further resources bringing an action abroad to dissolve the shadow company. If the right holder faces financial restrictions when seeking to protect its rights, it should concentrate its litigation on the manufacturing entity by going to a Chinese court only and not worry about trying to close the shadow company as well as that might be more costly with regard to litigation. If there are no financial restraints, then a court action should be started in Mainland China, whilst at the same time in Hong Kong an action should be brought to dissolve the company. A second use of the shadow company is to break the chain of notarised evidence. In this case, the shadow company acts as the front office for the Chinese manufacturer. Orders are placed with the shadow company in, for example, Hong Kong but the orders are actually fulfilled by the manufacturer on the mainland. There is no traceable link between the mainland company and the Hong Kong front, nor is there any documentary evidence passing between the Hong Kong company and the China mainland company. This makes it very difficult to prove that the infringing products bought from the Hong Kong shadow company are in fact manufactured by the mainland China manufacturers. One way around this is to hire an investigator who will go to the mainland factory itself to make a sample purchase. The investigator will then obtain an invoice from the manufacturer, rather than buying product through the shadow company.

Case study 3: combining administrative and civil actions for trade mark infringement

It is possible to combine administrative actions with civil litigation.

If you come across infringing products you will need to gather some evidence in the form of a sample purchase with an official receipt. You should then instruct your lawyers to file an administrative action with the competent local AIC, at the same time as filing a civil action for trade mark infringement.

Administrative actions are often quicker and cheaper than civil litigation. A successful AIC action can result in an injunction, destruction of any infringing products found by the AIC and fines of 1) up to five times the illegal revenue, or 2) up to RMB 250,000 if the illegal revenue cannot be calculated (the fine will be calculated based on the revenue the infringing party made from using the trade mark). This ruling can then be used as evidence in a civil trade mark case. However, if you intend to use the AIC case as evidence in a trade mark infringement civil action it is important to make the evidence gathered from the AIC claim as detailed as possible, noting product numbers, price, quantities and retaining any exhibits used. It should be noted that a successful AIC ruling may not be enough to prevent further infringement, and the right holder will not receive any damages from such an action. In order to prevent future infringement and recover its losses, the right holder should follow up the AIC action with civil litigation.

Once the administrative action has succeeded, the trade mark lawsuit should be fairly straightforward. The courts will give weight to the AIC ruling, and the claimant can choose to add further evidence to the civil claim (e.g. more recent notarised purchases). Typical damages awards in trade mark cases vary, up to a statutory damages limit of RMB 3,000,000.



Take away messages

1. Register your intellectual property rights. Unless you have registered your rights you have almost no recourse in China.
2. Be vigilant. Patrol trade fairs and surf the various b2b and b2c websites (such as Alibaba and Taobao) on the lookout for infringing articles.
3. When you identify infringement, enforce your rights. If you build a reputation for being reactive, and if needed litigious, then companies will be less likely to infringe your rights in future. The resources required to achieve such a reputation very much depend on the extent of the infringement.
4. Build your case carefully. Ensure that you are taking action against the right company in the right form.

11. Related Links and Additional information

State Intellectual Property Office (SIPO)

<http://www.english.sipo.gov.cn>

Administration of Industry and Commerce (AIC)

<http://gsxt.saic.gov.cn/>

China IPR SME Helpdesk Resources

How to search for basic company information

http://www.china-iprhelpdesk.eu/sites/all/docs/publications/How_to_search_for_company_information.pdf

How to Collect Effective Evidence at Trade Fairs

http://www.china-iprhelpdesk.eu/sites/all/docs/publications/v6_How_to_collect_effective_evidence_at_trade_fairs_online.pdf

Guide to Using Customs to Protect Your IPR in China

www.china-iprhelpdesk.eu/docs/publications/Customs.pdf

How to Remove Counterfeit Goods from E-Commerce Sites in China

http://www.china-iprhelpdesk.eu/sites/all/docs/publications/China_IPR_Guide_on_How_to_Remove_Counterfeit_Goods_from_E-Commerce_Sites_in_China.pdf

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