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China's Intellectual Property Rights Framework

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1 Current issues

In the current global economic scenario, it is inevitable that a growing company will seek to have a presence in China. Companies of all sizes producing electronics, entertainment, apparel, automobiles, cosmetics, pharmaceuticals and a host of other products see China, both as a low-cost location for manufacturing and a large market for their products. But at the same time, a number of business organisations are wary of investments into China because of inconsistent protection of intellectual property rights in China. A U.S. International Trade Commission investigation found that American firms lost nearly US \$48 billion in 2009 due to poor enforcement of intellectual property rights in China (USITC, 2011). The enforcement of intellectual property rights in China is crucial to the global economy for a number of reasons. First, companies sustain revenues over a period of many years or decades through royalties from their intellectual property. This allows them to recover costs of innovation and research, and to sustain further innovation. This is particularly true for industries such as pharmaceuticals and electronics. Second, because Chinese manufacturing firms which violate intellectual property rights can manufacture identical products for lower costs – having saved the cost of research and development – and eat up the market share of legitimate products. A third reason is that when intellectual property theft occurs, the violator can rapidly capture a nascent market and export products into the market of the country of origin, costing jobs in that country. The USITC study estimated that US employment could increase by anywhere from 923,000 to 2.1 million new jobs if intellectual property laws in China were enforced more strictly. (USTIC, 2011)

2 Governing bodies

The primary concern for firms across the world is enforcement because in theory, China has some of the strongest intellectual property laws in the world. China has based its intellectual property laws on international standards such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Berne Convention for the Protection of Literary and Artistic Works. China joined the World Intellectual Property Organisation (WIPO) back in 1980, acceded to the Paris Convention for the Protection of Industrial Property in 1984 and became a member in 1985. China also acceded to the Madrid Agreement for the International Registration of Trademarks in 1989.

The National Legal Framework of China consists of a number of governing bodies, of which the three most significant ones are the NPC Standing Committee, the State Council and the SPC. The NPC Standing Committee represents the National People's Congress (NPC), and has passed important intellectual property laws such as the Copyright Law, the Patent Law and the Trademark law. It has also made a number of amendments and passed additional regulations to improve enforcement on intellectual property violations. The State Council of the People's Republic of China, headquartered in Beijing, is the nation's chief administrative authority. The State Council and various ministries, bureaus and commissions which report to it regulate the enforcement of intellectual property laws through new rules and policies and their enforcement. The Supreme People's Court (SPC) is the highest court in mainland China (China excluding Hong Kong and Macau) and contributes to the legal framework for the enforcement of intellectual property rights by issuing decrees and circulars.

These governing bodies oversee the enforcement of intellectual property regulations in China. They are enforced through government bureaus and local governing bodies. One of the most important of these is the State Intellectual Property Office of the People's Republic of China (SIPO). The Patent Office of China is part of the SIPO, and is responsible for registering and enforcing patents.

3 Patent Law

3.1 Overview

In the decades following the opening of China's economy in 1978, few patents were registered because of a general lack of awareness regarding intellectual property. Awareness was lacking not only amongst Chinese businesses, but also government agencies. For instance, although China's first intellectual property law was drafted in 1982, government officers were not trained in its enforcement until the first training program commenced in 1996 (SIPO, 2009). With increasing awareness among government agencies, policy reforms and trade negotiations with USA and the EU, the registration of patents has increased dramatically in recent years. A Thomson Reuters report showed that China became the world's top patent filer in 2011, with the Chinese government pushing for innovation and patenting in key sectors such as pharmaceuticals

and automobiles. Patent registration at the Patent Office of China (SIPO) has increased by an average of 16.7 percent annually since 2006, and it is estimated that by 2015, nearly 500,000 patents are expected to be filed by 2015 (Reuters, 2011). There are two primary drivers for this spurt. One of the reasons is that Chinese companies are increasingly turning from manufacturing contractors for western innovations to technological innovators themselves. This has led to competition between Chinese companies and a consequent increase in the protection of their innovations by filing patents. A second reason is that the government of China has now subsidised patenting, and therefore the revenues of Chinese companies benefit from filing for patents.

3.2 History

The Patent Law of the People's Republic of China was laid down in 1984. Following China's membership to the Paris Convention for the Protection of Industrial Property in 1985, the law was amended in 1992, paving the way for China's signing the Patent Cooperation Treaty (PCT) in 1994. The law has most recently been amended in 2001 to align it with the TRIPS convention (Patent Law, 2014). As with the patent laws in most countries, patents are honoured in China only if they have been filed at the CPO within a stipulated time frame.

In order to aid with the search and filing of patents, the Chinese government set up a free online patent search service called Baidu Patents in 2008. Baidu Patents is integrated with a patent database of 2.7 million Chinese patents, and is the result of collaboration between the China Patent Information Centre (CPIC), the Chinese Patent Office (CPO) and the Chinese web search portal Baidu (Baidu Patents, 2014).

3.3 Scope

Under the Patent Law of the PRC, an item can be filed for a patent as either an invention, a design or a utility. An invention is, as the name implies, a novel invention that has not previously been disclosed in China or elsewhere in the world. Aside from novelty, an invention is also judged on its inventiveness, which means a measurable improvement in its performance or features over existing technology, and its practical applicability, which is its ability to produce effective results. An invention patent is awarded for a term of

20 years. A design patent is awarded for a term of 10 years from the date of acceptance. A utility patent is filed for improvements upon existing products. Utility patents are awarded for 10 years.

3.4 Restrictions

Software cannot be patented under the Patent Law of the PRC. However, the algorithm for software may be patented as a design patent, and the software can be integrated into a hardware device and a patent filed for that. Scientific discoveries cannot be patented under Chinese law either, nor can mental techniques for solving problems. Although pharmaceuticals can be patented, methods for diagnosis or treatment of diseases cannot be patented. A company cannot file for a patent on any breed or variety of animal or plant. Subatomic particles and products of molecular transformation are similarly ineligible for patenting.

4 Copyright Law

4.1 Overview

Positive measures to enforce patenting notwithstanding, China lags behind in other aspects of intellectual property law enforcement, such as enforcing copyright. According to a global piracy study by the BSA, software piracy in China was estimated at 77% as of 2011. Although this is an improvement over the previous years, since over 92% of all software in China was pirated in 2003, China continues to have the second highest levels of copyright infringement in the world (BSA, 2012).

As mentioned earlier, China has based its intellectual property laws on international conventions such as the Berne Convention for the Protection of Literary and Artistic Works. China ratified the Berne Convention in 1992. The WIPO convention and the Paris Convention also extend protection to intellectual copyright, as does the Convention for the Protection of Producers of Phonograms against the Unauthorized Duplication of Their Phonograms, which China signed in 1993.

The State Council implemented the Copyright Law of the People's Republic of China in 1991. To strengthen its implementation, the State Council further approved the Regulations for the Implementation of the Copyright Law in 1991. The NPC Standing Committee further amended the law in 2002 (Copyright Law, 2014). Furthermore, amendments were made for the protection of computer software in 2001 and

again in 2002. In 2003, the National Copyright Administration, which is part of the SIPO, added a law for punishing infringements of copyrights, called the Implementation of Administrative Penalties in Copyright Cases.

4.2 Recent modifications

The Copyright Law has been further modified recently to extend protection to web content. An amendment called the Administrative Measures on Internet Copyright Protection has been jointly enforced by the National Copyright Administration and the Ministry of Information Industry in 2005. Article 5 of the Administrative Measures on IPC state that an Internet Service Provider (ISP) is liable for penalties for knowingly transmitting material which violates copyrights. This regulation is not applicable if the ISP transmits the content unknowingly. The copyright holder must therefore send a take-down notice to the ISP, which, if ignored, allows the ISP to be penalised proportionate to the income generated by transmitting the copyrighted content. Similarly, the provider of this content can send a counter notice to the ISP if the provider claims that the affected content is not copyrighted (NCA and MII, 2005).

4.3 Protected content

China's Copyright Law protects original works including written, oral, musical, dramatic, choreographed, photographic, artistic, cinematographic, sculptural and architectural works. The law also protects graphic design, product design, maps, software and other works protected by local laws and government or judicial regulations.

Unlike patents, a copyright holder need not apply for a copyright. Individuals and entities from all countries signatory to the international conventions mentioned earlier, or bilateral agreements with China, enjoy copyright to their creations.

Copyright holders in China maintain exclusive rights to authorship, alteration, translation, leasing, reproduction, performance, exhibition, broadcast, distribution on a network and protection against distortion. In case of an individual author, the Copyright Law protects ownership for the lifetime of the

creator and an additional period of 50 years thence. In case of entities or teams, the copyright is applicable for a period of 50 years. The right to accreditation of the creators extends till perpetuity.

4.4 Restrictions

Works of folk art and folk literature are not protected under the Copyright Law, but under other laws enacted by the State Council and local governing bodies. Laws and regulations of state organisations cannot be copyrighted, nor can other documents of legislative, administrative or judicial nature, or their translations. Copyright is not applicable to news on current events.

5 Trademark Law

5.1 Overview

The Trademark Law of the PRC lies between the Patent Law and the Copyright Law in terms of eligibility of registration. While a copyright is applicable without a need to notify government agencies about it, trademarks in China are registered in order of application. This creates a risky situation in which popular trademarks for companies which do not operate in China can be registered by someone else, simply on grounds of being the first to apply. No evidence of ownership is required prior to registration, provided the trademark is not registered already. However, being party to the Madrid Protocol, a reciprocal registration of trademarks is binding between China and other signatory countries.

The Trademark Law of the PRC was put into effect in 1982. Following this, the State Council passed Regulations on the Implementation of the Trademark Law in 1983. With further amendments in 1993, 2001 and 2002, the Trademark Law of the PRC is in line with the stipulations of the TRIPS agreement. A number of rulings and opinions stated by the SPC are also applicable to the implementation of trademark laws in China.

5.2 Scope

The Trademark Law extends protection to product trademarks, service trademarks, certification marks and collective trademarks, including three-dimensional symbols. Product and service trademarks identify goods and services, respectively. Certification marks pertain to batches of products, such as the symbol of a regulatory organisation, information about manufacture, quality certification, etc. Collective trademarks

apply to groups and associations. It is customary in China to use Chinese characters to symbolise organisations and brands, and therefore, it is a common practice to register a Chinese character in addition to trademarks applicable in other countries.

5.3 Restrictions

The Trademark Law does not allow the registration of symbols similar to China's national symbols, such as their flag, emblem, military flags or insignia or names similar to state organisations, unless this use has been approved by the regulatory bodies. Similarly, names and symbols that are similar to the names or locations of government agencies or iconic landmarks cannot be used. As per Chinese law, a trademark may not be similar to that of an international agency such as the Red Cross. Trademarks that lack distinguishing characteristics, use generic names, merely describe the contents and quantity of a product and thus lack uniqueness cannot be registered as trademarks (Trademark Law, 2014).

6 The way forward

China's system of laws and regulations, governing bodies, judicial system, regulatory authorities and state agencies provide a solid network of policies and rules to extend protection to intellectual property. A major challenge, however, is their implementation. Despite strong laws, China is lacking, though improving, in their enforcement. This particularly affects companies from the US and the EU, which have more resources to invest in China compared to emerging economies. According to the USITC report (USITC, 2011), copyright infringements cost US companies \$23.7 billion in lost revenues. 31.5% of the 5000 firms doing business in China lost revenues due to trademark infringements, including 91.6% of apparel manufacturers.

In recent years, the Government of China has taken a number of concrete measures to curb down on intellectual property crimes such as the piracy of software and games, and the copying of patented designs in the manufacturing industry. Yet, other intellectual property infringements such as movie piracy remain a major concern. The Motion Pictures Association of America's 2013 annual report highlighted China as the biggest market for counterfeited Hollywood movies. According to Powell (2007), movie piracy in China has grown to be more rampant, with DVD's of popular movies available ubiquitously on the streets and in

legally owned shops. The example of movie piracy also illustrates the complex nature of intellectual property violations. For example, movie piracy is clearly a violation of copyright laws. However, it is also a violation of trademark laws, as the logos and brands of movie titles, movie studios and distribution companies are protected under the Trademark Law of China. In China, existing movie titles can be registered by someone unconnected with production, without evidence of ownership, simply on grounds of being the first to apply. However, being party to the Madrid Protocol, a reciprocal registration of trademarks is now binding between China and other signatory countries.

In order to curtail intellectual property crimes, the government of China has entered into a number of bilateral agreements with the US and EU. The Sino-US Agreement on Intellectual Property Rights was signed in 1995. More recently, China has set up a helpdesk for companies in the EU (IPR SME Helpdesk, 2014) and signed the Joint Strategic Plan on Intellectual Property Enforcement (WhiteHouse.gov, 2010). Data released a year later showed improving partnership, seizing of counterfeited goods and improved rates of conviction on intellectual property violations. Although, as examined earlier, intellectual property crimes are rampant in China, they are rapidly falling, and steady enforcement of Chinese laws will ensure that this trend continues.

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