

Title: "Intellectual Property Rights - Avoid turning Chinese suppliers into future competitor & prevent US competitors from hijacking the China supply chain you have pioneered."

China's legal system is still coming into its own, evolving out of a communist system which has only recently taken issues of Intellectual Property Rights (IPR) seriously. China also has a world class production base at favorable pricing. Combine this with a rapidly growing economy and changing society where many are willing to do whatever is necessary to make a buck, and the resulting China marketplace (from a security standpoint) is full of indiscretions ranging from innocent reverse engineering to blatant knock-offs. Piracy of many copyrighted materials is widespread, and is widely noted in many western business publications that feature material about China. What has not been such a hot topic in the press but far more important for buyers in China is that the companies exploiting this situation are generally not Chinese manufacturers but rather unscrupulous North American competitors that will take your designs and "knock them off" in China. It is very much a pull rather than push infusion of Chinese products both legitimate and otherwise into the N. American marketplace. Luckily, there are safety measures than can offer protection from danger on both sides of the Pacific.

- It is a good idea to sign a letter of confidentiality/exclusivity. However, even with a signed document in place, confirmation of wrongdoing and enforcement are both difficult. Therefore, don't rely solely on a legal document. There are additional precautions that should be followed:
- Own the tooling outright. Any funny business and tooling is extracted from vendor.
- If there is sensitive information on the product or its packaging that you do not wish to disclose to the supplier for security reasons, then you may consider having a third-party assembly center like PassageMaker's Dongguan facility conduct final assembly/ packaging. This way, branding, bar coding and even they buyer's name can be kept secure.
- Trademark your brand in China, even if there are no plans to sell the products in the PRC. Having done this, the court system is on your side should you face infringement by a supplier. From our experience, the Chinese court system generally favors the foreign party in these cases as China wants to show the world that they are living up to WTO commitments. But you have to play by the Chinese trademark system and that means having your brand registered in advance as China is a "first to register" rather than "first to market" system. Luckily, registration is inexpensive and straightforward. (contact PassageMaker at info@psschina.com to be put in touch with local a law firm for IPR protection and enforcement)
- Have buyer's representatives frequently visit production site to keep an eye on the situation.

Evolution

To strengthen protection of IPR, crack down on infringement crime and maintain

economic order the Supreme People's Court of China promulgated the "Interpretations on Concrete Application of Laws in Handling Criminal Cases of Infringing Intellectual Property" (hereinafter referred to as Interpretations) in December of 2004.

The Interpretations give detailed and definite stipulations regarding the standard for concrete application of criminal responsibility for intellectual property crimes, lower the threshold of penal punishment for intellectual property, expand the range of penal protection in intellectual property, determine terminologies concerned, thus resolve difficult issues of law application by local enforcement, and enhance the maneuverability of relevant articles in the Criminal Law.

During the process of drafting, the judiciary organs solicited opinions of pertinent local and overseas organization such as the EU Commission, U.S. Film Association, China American Chamber of Commerce, and U.S. Information Industry Organization. Attention was given to the opinions of the relevant countries and multinationals, which had never occurred previously in such drafting process.

Enforcement

There are two parallel approaches adopted in the enforcement of IPR protection in China, namely, administrative and judicial measures. In case of the infringement, the right holder may either file a lawsuit or apply to competent authorities for administrative measures.

Administrative Measures

Protecting IPR through administrative means is an important feature of the enforcement of IPR protection in China. According to the Patent Law, the relevant authorities under the State Council or local governments can establish a patent administration organ. To effectively implement the Copyright Law, the National Copyright Administration is set up at China's central level and local administrations in this regard can also be found in various provinces, municipalities and autonomous regions, and even in relatively big cities. Pursuant to the provisions of the Trademark Law, trademark is managed with the principles of registration at central level and administration by local organs. Trademark management organs are included in the administrations for industry and commerce at various levels from state, province, city (prefecture) to county. In addition, China General Administration of Customs set up a Border Protection Division for IP protection in June 1995 and all the local customs administrations also designated the teams and contact persons responsible for IPR protection within their own areas.

Therefore, the right holder can protect his or her rights through the above administrative approaches in addition to judiciary means. As for acts infringing IPR, the right holder can complain to the competent administrative authorities and the above authorities can also investigate and handle cases in light of their duties. During this process, they can seal up, sequester infringed goods and take such remedies as order of stopping infringement and fines. On account of its rapid crackdown on infringement and low cost, administrative measures are very popular with right holders.

Judicial Measures

As far as the judiciary aspect is concerned, special judicial tribunals for IP cases have been established at courts at all levels in China. During the process of litigation, a court can take such temporary measures as preservation of evidence or property. In case of torts, the people's court, in accordance with the law, can not only order a tort-feasor to undertake such civil liabilities as infringement cessation, negative influence elimination, apology, and loss compensation, but also give him or her such punishments as illegal income confiscation, fines, and detention. In the event of an intellectual property crime, an intellectual property wrongdoer will be given a penal punishment in accordance with the law. As prescribed by the Criminal Law of the People's Republic of China, a criminal in this regard can be sentenced to a seven-year imprisonment as maximum penalty.

Feel free to contact the authors PassageMaker at info@psschina.com for more information on trademark/ brand registration, IPR protection/ enforcement. As a policy, PassageMaker does not accept referral fees from our legal partners. Helping our clients find the right direction for finance, legal, shipping and due diligence is paramount.

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