



Study on the Future Opportunities and Challenges of EU-China Trade and Investment Relations

Study 12: Exploring China's IP Environment - Strategies and Policies

Study Experts:

Paul Ranjard

UNIFAB Beijing

Benoît Misonne

A project implemented by:



"This report was commissioned and financed by the Commission of the European Communities. The views expressed herein are those of the Consultant, and do not represent any official view of the Commission."

EXECUTIVE SUMMARY

China, who had been for centuries a nation of innovation and inventiveness, missed the Industrial Revolution that founded the development of western countries during the 19th century. Its socialist experience, during the most part of the 20th century deepened the technological gap between China and the developed countries. From 1978 onwards, China's felt the need to fill the gap and realised that IP protection was crucial to drive its future developments, first by attracting foreign investments. Despite all the efforts made, IP violations in the PRC have been worsening in recent years. It is important to clearly distinguish the two following issues:

Patent & Technology Secret Violations

China has increasingly resorted to policies that aim to absorb technology from foreign rights-holders for the benefit of Chinese operators. While the objectives of the Chinese authorities are perfectly understandable and welcome, the means used to achieve this end are not always legitimate. Methods are used, such as the flat refusal to pay royalties to foreign patent owners, the forced disclosure, and dissemination, of secret data or the more indirect use of government procurement practices where foreign companies are selected in the first case in order to pass their technological know-how to a JV partner and are then excluded from successive rounds.

Such questionable methods seem to be considered as fair by public opinion and even, when foreign companies try to protect their IP in China, they are sometimes described by the press as "*abusing their rights, threatening Chinese firms and their economic security*". As the Chinese media is strictly controlled by the State, this tends to indicate that these messages reflect the opinion of the Chinese government.

Foreign authorities must notify the Chinese authorities that these policies and practices do not encourage mutual progress, are harmful to both parties in the long run, and urge them to take prompt actions.

Counterfeiting of trademarks & Piracy of copyright

According to national statistics, Chinese IP owners constitute the large majority of the victims of such violations. And yet, it seems that counterfeiting of trademarks and piracy copyright are not a priority issue for the PRC.

Instead of concentrating their efforts on improving the efficiency of their action, Chinese authorities prefer to launch periodic campaigns, thus addressing the symptoms rather than curing the root cause.

China must address a series of issues to improve its IP environment, including how to increase deterrence, simplify administrative organisational structure, eradicate burdensome and discriminatory procedures for foreign right holders to enforce their rights, take measures to consolidate the political will for IPR enforcement locally, increase resources available to actors involved in registering and enforcing IPR, and increase public awareness in a strategic and systematic manner. It is essential that the Chinese authorities accept to enter constructive discussions with IP stakeholders to resolve these issues.

Policy Recommendations

1. Maintain a strategic dialogue on the IP issues identified and build a strategic agenda of recommendations and measures to be taken;
2. Closely monitor China's implementation of its IP Action Plan and other IP commitments in the form of comprehensively designed industry questionnaires and thematic studies.
3. Support China's transition by sharing experiences and best practices in the form of strategically designed cooperation activities.
4. Strengthen messages to the Chinese authorities; highlight the seriousness of the issues at stake as well as the danger and risks they pose to all businesses operating in China. Corporations may review their investment plans in China and seek business opportunities in other high-potential emerging markets;
5. Inform the industry, particularly small and medium size enterprises of the genuine risks they may face when deciding to invest their technologies into the Chinese Market by setting up an official public IP warning system;
6. Gather all evidence necessary for bringing a WTO dispute against China and sensitise the industry to the importance to provide all required data to support the case;
7. Ultimately, initiate a WTO dispute against China if it fails to respond to the final warnings.

TABLE OF CONTENTS

Executive Summary	2
1. Introduction	6
2. China's IP Environment Reviewed.....	7
2.1. Brief Historical Background	7
2.2. Regulatory Framework	8
2.3. Institutional Framework	9
3. Issues Exposed	10
3.1. Registration of IP Rights	10
3.2. Civil Litigation: Unnecessary and Discriminatory Procedural Requirements	11
3.3. The Criminal Threshold and the Lack of Deterrence	11
3.4. The Protection of Copyright and Related Rights	13
3.5. Trademarks	14
3.6. Abuse of Technology Transfer	15
3.7. Non Payment of Royalties on Essential Patents	15
4. Emerging Strategies	16
4.1. Prioritisation of Technologic Development	16
4.2. Trademarks and Copyright Enforcement	18
5. Survey Results	19
6. Future Trends.....	20
7. Recommendations.....	22
8. Summary Analysis.....	22
8.1. Context: IPR in China's Global Strategy	23
8.2. The Issues Exposed	23
8.3. Actions to Take	25
Annex 1: Actors Engaged in IP	27
Annex 2: Summary of Main Legislation.....	30
Annex 3: Intellectual Property Rights Government Structure.....	31

LIST OF FIGURES

Figure 1: Counterfeiting and piracy industries in China's coastal regions	6
Figure 2: Breakdown of the number of articles seized by origin of goods	7
Figure 3: Overview of the institutional framework	9
Figure 4: Number of trademarks and patents filed 2001-2005	10
Figure 5: Internet connection by mode of connection	14
Figure 6: Stages in China's technological learning	17
Figure 7: The spiral of technology transfer	17
Figure 8: IP Infringement - Survey Results	19
Figure 9: Relationship between FDI and IP protection	21
Figure 10: Chinese government policies and practices to achieve technological independence	25
Figure 11: Issues to be addressed to improve IP Protection	25

LIST OF TABLES

Table 1: National working group on IPR protection	27
---	----

LIST OF BOXES

Box 1: Selected Quotes from the Industry Survey Regarding IPR Infringement	19
--	----

ABBREVIATIONS

CMS	Collective Management System
ECIP	Economic Crime Investigation Department
EPO	European Patent Office
FDI	Foreign Direct Investment
FRAND	Fair Reasonable and Non-Discriminatory
GAC	General Administration of Customs
GMO	Genetically Modified Organism
ICT	Information and Communication Technology
IP	Intellectual Property
IPR	Intellectual Property Rights
JPO	Japanese Patent Office
MPS	Ministry of Public Security
NCAC	National Copyright Administration of China
OECD	Organization for Economic Cooperation and Development
PO	Patent Office
PRC	People's Republic of China
RMB	Chinese Yuan, Renminbi
SAIC	State Administration of Industry and Commerce
SIPO	State Intellectual Property Office
SOIPP	State Office of Intellectual Property Protection
SPC	Supreme People's Court
SPP	Supreme People's Procuratorate
TMO	Trade Mark Office
TRIPS	Trade Related Intellectual Property Rights
TRTA	Trade Related Technical Assistance
UNIFAB	Union des Fabricants
USPO	United States Patent and Trademark Office
WTO	World Trade Organisation

1. INTRODUCTION

For more than two decades the People's Republic of China has promulgated laws and regulations covering almost every important area relating to intellectual property rights.

China is a member of the World Intellectual Property Organization and a signatory to all major IP treaties including the agreement on Trade Related Aspects of Intellectual Property (TRIPS), the Paris Convention for the Protection of Industrial Property (Paris Convention), and the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention). All three require China to provide an equal treatment to the nationals of all signatories. China has drafted or revised all of its IPR statutes to meet these requirements.

Despite the progress made on providing comprehensive protection through judicial and administrative proceedings, IPR infringements remain rampant across the country. This can be explained by some major gaps and loopholes which continue to constitute a major obstacle within the Chinese system of IP laws and regulations, as well as a lack of systematic enforcement. Chinese legislators and enforcers communicate a clear message to the international authorities that work is being carried in this area and, statistics in hand, that major improvements have been achieved. Yet, pirates and counterfeiters do not seem to be much affected by the measures taken against them.



Figure 1: Counterfeiting and piracy industries in China's coastal regions

Although no accurate statistics exist, the counterfeiting and piracy industries in China certainly provide financial means supporting the current growth of the PRC, and may be perceived as contributing, to a certain extent, to maintaining social and economic stability. This is particularly the case of some regions in the PRC where up to half of the working population is employed by this industry, especially in the south-east of the country, e.g. Guangdong, Fujian and Zhejiang provinces.

However, these illegal activities are now increasingly moving to more remote areas such as Heilongjiang Province in the North East, and Xinjiang Province in the West, where enforcement is more difficult to implement. This recent move is both a worry and a source of satisfaction: if counterfeiters feel the need to move away, it must mean that actions do have a certain level of efficiency.

Counterfeited trademarks as well as pirated music, films and software however are nothing but the emerging part of the iceberg which represents IP infringements in the PRC. The infringement of patent rights – which in the PRC, includes rights on inventions, designs and utility models – and other trade secrets violations are harming Europe's core growth and development potential, i.e. research and development achievement, especially considering small and medium sized enterprises which rely on a limited IP portfolio and reduced means to protect their rights.

This report has the purpose of reviewing the major threats posed to European investors entering the Chinese market when it comes to China's IP environment. The roots which lie at the origin of IP infringements in China will be identified and measures to be taken by European authorities and other stakeholders to accelerate China's transition towards a healthy IP environment will be suggested. In order to do so, it is important to first depict the current system for IP registration, administration and enforcement that exist in the PRC and review current and future developments.

2. CHINA'S IP ENVIRONMENT REVIEWED

In the past five years, statistics on the number of articles seized originating from Greater China (i.e. China Mainland, Hong-Kong and Taiwan) in the EU and the US have consistently reached between 60% and 80% of total seizures (**Figure 2**), with little sign of progress.

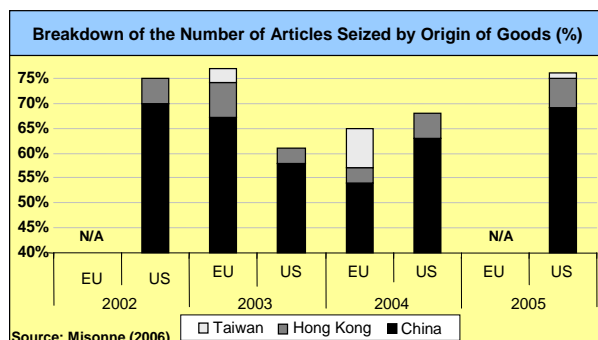


Figure 2: Breakdown of the number of articles seized by origin of goods

The threat posed to European companies by IP infringement in China goes well beyond the most visible issues of rampant counterfeiting of famous luxury brands. It extends to all industry sectors where European operators trade with China. The issue is so serious that it is leading to a systematic erosion of the value added created by European R&D investments, many of which are transferred at low cost to Chinese operators. Without decisive action, the IP problem, which threatens legitimate margins and markets of European operators in China, will start to affect their operations in third countries too. Therefore, European stakeholders urgently require effective enforcement, improvements in efficiency and deterrence and closure of the remaining legislative loopholes.

The Chinese Government, in its defence, puts forward several arguments: [1] China has developed its IP environment during 25 years only, while developed economies have implemented theirs in 200 years. [2] They believe that their achievements in such a short time are positive (e.g. member of most international IP treaties and conventions, extensive list of revisions of its IP related laws, especially since WTO accession) and that China is constantly working on improving its IP legislation and enforcement system (e.g. 2006 IP Action Plan).

2.1. Brief Historical Background

Before acceptable and appropriate solutions can be made we need to understand the historical context. A common modern stereotype is that the Chinese traditionally

lack scientific and technological ability, thereby explaining reasons why the PRC as we know it today suffers very high levels of piracy and counterfeiting. However, one can not ignore China's history of innovation, with implications has been very far reaching in the all corners of the world. The sciences of astronomy, physics, chemistry, meteorology, seismology, technology, engineering, and mathematics can trace their early origins to China. From 600 AD until 1500 AD, China was the world's most technologically advanced society.

Scholars routinely discovered scientific principles, invented new technologies, and influenced the development of human civilizations around the world. Four of these revolutionary Chinese technologies are paper, printing, the compass, and gunpowder, and are celebrated in Chinese culture as the Four Great Inventions of ancient China.² Printing and papermaking impacted record keeping and learning for Chinese society whilst gunpowder gave the Chinese a distinct advantage over their enemies, thereby changing the nature of warfare. The compass enabled trade and exploration in whole new ways. Modern Chinese, themselves, sometimes are surprised to realize that modern agriculture, shipping, astronomical observatories, decimal mathematics, paper money, umbrellas, wheelbarrows, multi-stage rockets, even brandy and whiskey, and the game of chess, all originated from China.

One question that has been the subject of debate among historians has been why China did not develop a scientific revolution and why Chinese technology fell behind that of Europe in the 19th century. Many hypotheses have been proposed ranging from the cultural to the political and economic. John K. Fairbank argues that the then Chinese political system was hostile to scientific progress. More recent historians questioned political and cultural explanations and focused more on economic causes. Mark Elvin's "high level equilibrium trap" is one well-known example of this line of thought: according to Elvin, the non-mechanized processes in agriculture and industry in China were so well developed and efficient that they out competed early mechanized processes, thus making capital investment in mechanization unprofitable. Kenneth Pomeranz argues that the easy availability of natural resources (oil) in the New World made a crucial difference in favour of western development. While the most likely explanation lies in a combination of all these factors, the fact that China did not develop an industrial revolution as Europe and America has had a significant impact on the development of China in the 20th century,

which ultimately led to the rise of the Communist regime and the creation of the People's Republic in 1949.

When the Communists came to power, the rudimentary patent system then in existence was abolished and all inventions were deemed to belong to the State³. Furthermore, China abandoned judicial enforcement during the Cultural Revolution by abolishing its system of courts and procuratorates and the Communist Party left the entire responsibility of controlling and overseeing social order to the administration. When China started re-establishing its judicial system in 1978, the public enforcement machine had built an extremely powerful system of public administration which would retain a very prominent role in the enforcement of laws and regulations. This is the context in which China's IP environment's unique features were established, explaining the reason why a parallel or dual protection mode – namely administrative and judicial protection – emerged and still exists in today's PRC. Since then, administrative measures have played a very important role for IPR protection in China. Several departments in China are assigned with the duty to protect IPR. They include primarily the State Intellectual Property Office (SIPO), the Trademark Office (TMO) under the State Administration for Industry and Commerce (SAIC), the National Copyright Administration of China (NCAC) under the General Administration of Press and Publication (GAPP).

Shortly after the national people's congress promulgated China's open door policy under Deng Xiao Ping in 1978, Chinese leaders understood how IP protection would constitute a fundamental condition to attract foreign investment and technology, which would determine China's future economic growth. The following two sections will review the regulatory and institutional framework that was set into place to construct China's IP environment.

2.2. Regulatory Framework

The historical development of China's IP environment has been shorter than quarter of a century. China's trademark and patent law came into force in 1982 and 1984 respectively, shortly after China's law on Chinese-Foreign Joint ventures of 1979. Chinese leaders realised that IPR protection would be crucial for attracting foreign investment, technology and know-how, which would ultimately drive China's future economic development. China's copyright law, which is less directly related to foreign investment and economic growth, only came into force in 1992.

Since then, China's regulatory framework has moved a long way forward as it joined or signed many major international conventions and agreements on IPR protection. Following its accession to the World Intellectual Property Organisation in 1980, China successively joined or signed more than ten international conventions, treaties, agreements and protocols, such as the Paris Convention for the Protection of Industrial Property, the Patent Cooperation Treaty, the Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure, the Locarno Agreement Establishing an International Classification for Industrial Designs, the Madrid Agreement Concerning the International Registration of Marks, the Nice Agreement Concerning the International Classification of Goods and Services for the Purpose of the Registration of Marks, the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, the Agreement on Trade-related Aspects of Intellectual Property Rights, the International Convention for the Protection of New Varieties of Plants, the Berne Convention for the Protection of Literary and Artistic Works, the Universal Copyright Convention, the Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication.

In 2001, when the PRC was admitted into the WTO, China made revisions to these laws and regulations in order to comply with the WTO's TRIPS Agreements and other international rules on IPR protection. China strengthened the judicial protection for IPR. For example, the revised PRC Trademark Law, Patent Law and Copyright Law all established the judicial review system for administrative decisions.

In 2004 China established the State IPR Protection Working Group headed by Vice-Premier of the State Council Wu Yi, responsible for planning and coordinating the work regarding IPR protection throughout the country.

To sum up, China has developed a very complete set of IP laws and IP and regulations in the past twenty years, most of which reflect foreign regulatory frameworks. However, the historical context of the development of China's IP environment differs very significantly from what exists in other countries, particularly its dual enforcement mechanism which will be further developed and presented below.

In order to better understand the core issues, it is important to give an overview of the

institutional framework of China's IP environment.

2.3. Institutional Framework

2.3.1. Registration of Intellectual Property Rights

Under the State Council, there are several administrations involved in the registration of IPR, each specialised in a different kind of right (see **Figure 3**).

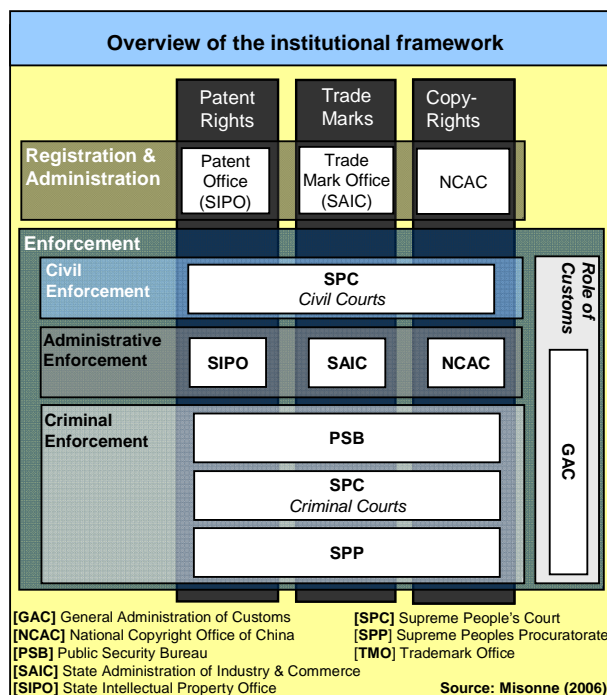


Figure 3: Overview of the institutional framework

The State Intellectual Property Office (SIPO), the Trademark Office (TMO) under the State Administration of Industry and Commerce (SAIC) as well as the National Copyright Administration of China (NCAC) are responsible for the registration of patent rights, trademark rights and copyrights respectively (prior registration of copyright is not compulsory but is a useful means of preserving evidence of authorship in case of litigation).

2.3.2. Enforcement mechanisms

The responsibility of enforcement is shared between the Courts (civil enforcement) and the Ministry of Public Security and the Procuratorate bodies (criminal enforcement), on the one hand, and the IPR administrative agencies under the State Council, as mentioned above, on the other hand. This distinction between judicial enforcement and administrative enforcement is a unique feature of the Chinese enforcement system. In addition, the General Administration of Customs (GAC) plays an increasingly

important role in detecting, investigating and stopping the international flow of infringing goods.

Civil enforcement

The judicial system is composed of one national Supreme People's Court (SPC), which not only acts as a court of appeal for cases coming from the lower levels, but also assumes a regulatory role, by issuing Judicial Interpretations that serve as guidelines for the lower courts. Under the authority of the Supreme Court are the People's Higher Courts in each Province and major cities, which have direct jurisdiction over important cases, or act as appeal courts for cases coming from the Intermediate People's Courts, at the local level.

IPR cases, initiated privately by one party against another, are dealt with by specialised sections of these courts.

The infringed party files a complaint with the competent local civil court. This could be the court where the defendant is domiciled, although any court where the infringement has effect (point of sale) also has jurisdiction for IP infringements. As infringing products or services are normally offered nationwide, the prospective plaintiff has the choice to select the most appropriate court.

Pursuant to the requirements of the TRIPS agreement, China provides for the possibility to obtain a preliminary injunction prior to trial in order to preserve evidence. As such, the seizure of a sample can be ordered upon request by a judge.

Criminal enforcement

When the conditions are met (as is explained below these the conditions are difficult to meet), the victim of an IPR infringement may file a complaint with the Public Security (Police), who investigates and may "detain" suspects. The case is then supervised and prosecuted by the Procuratorate who may decide to bring the case to the criminal section of the People's Court, usually at the intermediate level.

It is important to note that, even though the courts are placed in a vertical system (from Intermediate to Higher level, under the SPC), they are also placed under the control of the local representation of the People's Congress who supervises their work and has a direct influence on the judges' careers. This indicates that judges do not enjoy the same discretion and independence as in western countries.

Administrative enforcement

This is where China presents its most unique feature: each of the three administrations (patents, trademarks and copyright) is also in charge of enforcing the corresponding IP rights, pursuant to the provisions of the Patent Law, the Trademark Law and the Copyright Law, their respective Implementing Rules and many other regulations, issued by these administrations at the national or local levels.

Complaints are filed directly with their competent department at the local or regional level. They have the power to order to stop the infringing activities, to seize the infringing goods (and sometimes the tools), to issue a fine and organise the disposal of the goods.

Administrative actions are extensively used, and reasonably efficient, in particular for trademark counterfeiting and infringements. However, they are less efficient and less used for Patent or copyright infringements, a category of IP violations where infringed parties tend to prefer having recourse to the courts.

The Role of Customs

Customs authorities, being involved in the control of international circulation of merchandises, play an active role in the fight against counterfeiting. The rules applicable in China are similar to those available in Europe, although some differences exist. The Customs may detain merchandise upon specific request from a right holder, who can provide adequate information of a shipment, or act *ex officio*, provided however that the right holder has previously recorded its IP right with the Customs (at the national level). When merchandise is detained *ex officio*, the right holder has only three days to decide to maintain the seizure and file a complaint. When doing so, a financial bond (which can

be replaced, subject to certain conditions, by a bank guaranty) needs to be paid (according to the value of the suspicious shipment, with a maximum of 100,000 RMB).

The Chinese *ex officio* inaccurately refers to the procedure where GAC takes actions for products suspected of infringing an IP right for which a registration has been issued already. It should not be confused with the *ex officio* procedure enforced in the EU, during which EU customs take measures from their full initiative (i.e. no prior registration or notification required) when a product entering customs is suspected of infringing any IP right (the right holder has then 3 days to file a registration with customs). However, in the EU, once the right-holder has filed a registration or if such a registration has been issued previously, the right holder has ten days (extendible) to decide to maintain the seizure and file a complaint (as opposed to 3 days in China).

3. ISSUES EXPOSED

3.1. Registration of IP Rights

3.1.1. The backlog of the Trademark Office

Because the registration of IP rights must follow the pace of innovation and economic growth, it is important that registration bodies can operate both smoothly and swiftly. Yet, registration offices must keep up with quality standards, whilst assuring that the IP for which an application for registration has been filed does not yet exist. In turn, this requires the provision of appropriate time and human resources.

Over the recent years, the number of patents and trademarks filed, by national and foreigners, in China has increased dramatically (see Figure 4).

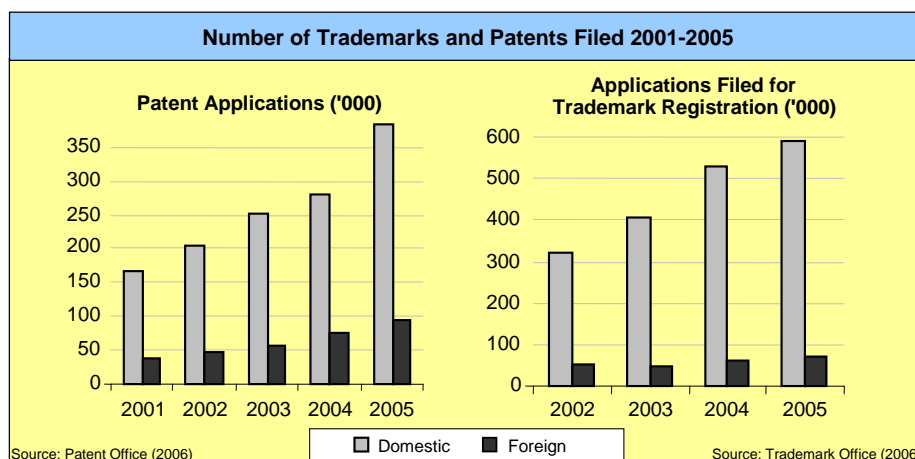


Figure 4: Number of trademarks and patents filed 2001-2005

A clear trend of prioritisation has appeared in recent years: SIPO did benefit from an important increase in its human resources, whereas the resources of the TMO have stagnated comparatively. This concentration on the patent office reflects the clear priority that has been given to technology as also expressed in China's 11th five-year plan. This issue will be further developed below. While the resulting performance for SIPO to keep up with the increasing workload deserves much merit and recognition, it is regrettable that the TMO has been left struggling with insufficient manpower.

As a consequence, and with regard to the increasing amount of labour, registration processes have progressively become slower for the TMO who not only has to cope with an increasingly huge amount of trademark applications, but also with the inevitable increasing amount of related litigation (oppositions and cancellation cases). The TMO is believed to have a backlog of over 30,000 trademark opposition cases. Given that it can only examine 3,000 cases a year, a complete opposition procedure may take 10 years to decide.

It should be noted, however, that the Chinese authorities are indirectly trying to address this issue in the recent draft revision of the Trademark Law. However, the suggested changes will not have an immediate effect and for several years at least, the backlog shall remain an extremely serious problem, raising the issue of reasonable time, as mentioned in Article 41.2 of the TRIPS agreement.

3.1.2. Lack of transparency at the SIPO

It is not unusual that inventors around the globe come about similar, if not identical ideas at different stages in time. It is important in this regard, that patent offices worldwide can share information as to which patent rights have been granted in their respective jurisdiction. It is for these reasons that many patent offices including European Patent Office (EPO), USPTO (US Patent and Trademark Office) and JPO (Japanese Patent Office) have given partial or full access to their respective registration databases. The Chinese Patent Office however does not give any reciprocal rights for these POs to access the Chinese database. This may entail the following negative consequences:

- Unnecessary and avoidable litigation about the validity of a patent for lack of novelty or inventiveness, due to the ignorance of a prior Chinese patent application or registration.

- Suspicions about possible leakage of information following the filing of a patent. Many parties may question the fundamental reason why China does not grant access to its registration database for Patent Offices across the globe. It may happen that a patent could be refused by SIPO on account of an identical or similar Chinese patent having been filed at an earlier date. The lack of transparency makes it difficult to have a clear view of what is registered as 'state-of-art' in China, before filing a patent.

3.2. Civil Litigation: Unnecessary and Discriminatory Procedural Requirements

3.2.1. Legalisation of Power of Attorney

In China, where a litigant does not have a permanent establishment in the PRC, it should provide its Chinese lawyer not only with a power of attorney, but it is requested further that such power of attorney be notarised and legalised before the Chinese Consulate in its country.

Such a requirement, unknown in Europe, is in total contradiction with the generally admitted principle of reciprocity to which China usually adheres. And actually, if one pushes the analysis further, it is equivalent to a systematic suspicion, on the part of Chinese Authorities against Chinese lawyers, who would be suspected of appearing in Court on behalf of a company without having been instructed to do so.

3.2.2. Notarisation and Legalisation of Written Evidence Originating from another Country.

This is a basic requirement provided for by the Chinese Code of Civil Procedure, which also applies to some administrative proceedings (in trademark matters). This does not exist in other countries, where the requirement for the notarisation and legalisation exists for official documents only.

It has been demonstrated clearly, during the last session of the EU/China Dialogue and Working Group, that such notarisation and legalisation abroad is nothing but a waste of time and money and does not add any evidentiary value to a document. Despite this, the Chinese Authorities refuse to even consider a modification of this rule.

3.3. The Criminal Threshold and the Lack of Deterrence

Administrative and criminal enforcement are separated by a fixed threshold, below which an infringement cannot be alleged as "serious" or involving a "relatively large quantity", as provided for in the Criminal

Code. According to a Judicial Interpretation jointly promulgated by the Supreme People's Court and the Supreme People's Procuratorate, in December 2004, this threshold is set, for most IP violations, at 50,000 RMB when carried by an individual and three times higher (150,000 RMB) for a 'work unit' (i.e. a company). Therefore, an infringement can only be punished as an administrative offence if the degree of seriousness remains below the threshold.

There is no doubt that the administrative enforcement system has the advantage of speed and limited cost, easy access, national coverage, hence an immediate efficiency. However, the powers of the administration are limited, in particular when in-depth inspection and investigation is necessary. Administrative staff may not detain infringers for interrogation, and may not force the entry of closed premises. In contrast, the advantages of a PSB action, more specifically of the IP protection division within the recently created ECID (Economic Crime Investigation Department) of the MPS (Ministry of Public Security), are obvious. The police can take tough action and they have the power to undertake effective investigations. As a result of this lack of investigative powers from administrative enforcers, it may happen that cases, that would have been proven as criminal if the public security organs had been able to act from the beginning, would easily escape a criminal penalty by remaining under the criminal threshold defined by the Supreme Court.

Worse is that, even when the threshold is obviously met, when the case has been started by an administrative agency, the *transfer* from administration to police and judicial authorities is problematic. Administrative agents are reluctant to transfer a case that offers the potential of a substantial fine, and when they do transfer the case, they insist on issuing such a fine beforehand. The police is then reluctant to continue and allocate much time and human resources on a case that has been already been handled and decided. All this is obviously to the best advantage of counterfeiters.

Actually, China is aware of the drawbacks of its dual enforcement system. China has adopted measures to increase the coordination between administrative enforcement organs, public security organs and people's procuratorates with respect to IPR protection, in the matter of *case transfers*. The number of regulations addressing this issue illustrates clearly the

nature of the problem and the quasi impossibility to solve it.

- In October 2000, the relevant departments jointly issued the "*Notice on Strengthening Cooperation and Coordination in the Work of Investigating and Dealing with Criminal Cases that Infringe Intellectual Property Rights*".
- In July 2001, the State Council promulgated the "*Regulations on the Transfer of Suspected Criminal Cases by Administrative Law Enforcement Organs*", which includes provisions on how the administrative law enforcement organs should transfer suspected criminal cases to public security organs in a timely manner.
- In March 2004, the relevant departments jointly issued the "*Opinions on Increasing Work Contacts between Administrative Law Enforcement Organs and Public Security Organs and People's Procuratorates*".
- In December 2004, the Supreme People's Court and the Supreme People's Procuratorate jointly issued an interpretation on "*Several Issues of Concrete Application of Laws on Handling Criminal Cases of Infringing Intellectual Property*" which lists new criteria where administrative enforcement bodies need to transfer a case to the judicial system.
- Finally, in March 2006, the "*Opinions Regarding Timely Transfer of Cases of Suspected Crimes in the Course of Administrative Enforcement of Law*" were issued.

The above enumeration demonstrates that, in spite of all these regulations and instructions, the transfer of cases has always been and will always remain a problem, caused by the dual public enforcement system.

Solutions exist, however, and the ECID has, in the early part of 2006, begun to propose and obtain the promulgation of joint provisional regulations where the idea of *transfer* is replaced by the concept of *cooperation* between Police and Administrative enforcement agencies. The cooperation should be implemented in the form of early exchanges of information, joint working sessions, etc. Such a new orientation is definitely positive and could bring very encouraging results, if implemented in a good spirit. As a matter of fact, there has been in the past some remarkable examples of very effective and efficient cooperation between

Police and Administration, which have led to some particularly positive cases in which public administrations and the police have shown close cooperation in seeking and treating evidence. This proves that cooperation is possible.

But the most radical solution would, of course, be for China to agree to revise its conception of the threshold and to implement a practice that would be in line with that of other European countries, i.e. who refer to such general concepts as *commercial scale* or *intention* as criteria for the criminal qualification of IPR violations.

3.4. The Protection of Copyright and Related Rights

While one may claim that copyright violation is present in many other countries, the situation in the PRC differs quite significantly. In China, copyright violation is not limited to the issues of non-payment of royalties and unlawful actions of reproducing and distribution of protected material. There are a series of issues which exacerbate the situation quite significantly.

Enforcement: Surveys carried by the industry have suggested that approximately 95% of audiovisual materials sold in China are pirate copies. Under the strong pressure of the US Government, Chinese enforcement authorities have periodically launched enforcement campaigns, the last one in August 2006.

However, rampant piracy remains among the most significant impediments to the development of China's film and television industry. The country's film piracy rate, estimated at 95 percent in 2004, is the highest in the entire Asia-Pacific region. This is partly due to lack of ability to buy the genuine product, which is caused by market access restrictions (only 20 foreign films per year). While these restrictions target foreign film suppliers and investors, they adversely affect legitimate domestic and foreign players alike, as they cannot compete with pirates who endure no censorship, pay no taxes, and bear minimal production costs.

Collective Management: Another reason lies in the fact that the national copyright management system in China is still in its infancy. A decade ago, NCAC established China's first ever Collective Management Society (CMS) in the field of music. More recently, additional initiatives in this perspective have appeared (audio-visual, photography, literary works, etc). It is interesting to note China has been supporting the collective management model, but at the

same time, has allotted very scarce resources to promote such system, hence the appearance in the market of private companies, filling the gaps left by CMS. It is paradoxical to observe that the Chinese copyright authority has expressed its plans to wipe out these private companies that have started to manage catalogues and collect royalties on behalf of foreign right holders in particular. Whilst the motives of the Chinese authorities to maintain control in this field because of its close linkage to cultural interests are perfectly legitimate, it has not yet seriously addressed the questions of CMS resources. In the mid-term, the NCAC should analyse how both public and private actors can coordinate their efforts to address the real question of copyright enforcement in a partnership where public actors would continue to supervise the work done by private actors, which would facilitate the injection of new resources in the Chinese CMS system.

All in all, it is important to note that copyrights management and its enforcement are intimately linked with each other, particularly in the PRC where copyrights registrations may become a soft condition for some local authorities to enforce these rights as it presents a tangible proof to the enforcer. The faster China will develop a collective management system, the better it will be prepared to effectively tackle the piracy issues.

Broadcasting: The newly revised copyright law has been amended to indicate the obligation, for broadcasters, to pay royalties on the use of rights (which includes foreign TV programmes, such as sports events). However, no direct negotiation can be engaged, as the Chinese broadcasters refer to guidelines and tariffs that are expected to be decided by the State Council. Those guidelines are still awaited, and in the meantime, broadcasters continue avoiding any payment.

Online Piracy: The fast growing rate of Internet access plays a huge role in the worsening of the problem. A new and alarming development has been the rise of websites, including some of China's best-known portal Baidu, offering illegal downloads. Given the global reach of these sites, some of which are operated by publicly listed companies, content owners can no longer feign ignorance. Though legal action is technically possible, China currently lacks the legal facilities to pursue such high-tech crimes. China's policymakers have recognized the need for reform within the country's media and entertainment industries. Furthermore, NCAC's new priority is to

protect works on the internet and provide guidelines for dealing with copyright piracy on the internet.⁴

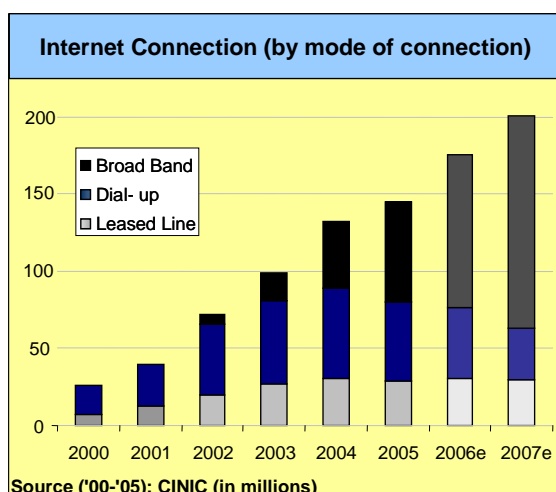


Figure 5: Internet connection by mode of connection

3.5. Trademarks

In addition to the problems linked to trademark application and registration as highlighted under 3.1.1., trademark owners have to deal with trademarks infringements essentially.

Trademark counterfeiting and infringements does not only affect luxury goods but a very wide range of products (the Quality Brand Protection Committee registered in China under the China Association of Enterprises with Foreign Investments, now regroups more that 155 enterprises covering all industrial sectors).

Mark Turnage defines counterfeiting as the "knowing duplication of a product by a party who wishes to usurp the brand or trademark of another [to] enjoy the benefits of the equity inherent in the brand without having to pay the costs of building this equity or ensuring the production of the same quality as the branded good"⁵ Therefore, virtually any company or product can be the victim of counterfeiters, including but not limited to luxury goods, commodities, toys, food and beverages, pharmaceutical products and even services. In addition to the significant impact that counterfeiters have on companies' revenues, other negative consequences of counterfeits include damaging brand equity as they generally have lower a quality standards but also have a negative impact on consumers health and safety.

Counterfeiting is not new. What is new is that the scope and scale of the problem are growing at a rate previously unknown, at bigger rates than those of GDP growth with

estimates that counterfeits represents 5 to 7% of world trade at a value of EUR 360 bn. Trademarks, as for copyrights are more inclined than patent rights to be infringed. There are a few factors that are at the origin of the exponential growth of counterfeits. They are as follows:

1. Widespread availability of technology makes counterfeiting easier. This is due to such technology as colour copiers, scanners, software and printers which make it easier, faster and cheaper for anyone to pirate near perfect replicas. On the other hand, the internet represents a global source of information for counterfeiters. Not only does it provide pirates with various data regarding products and even production methods, brands and distribution networks. "Traders use Internet chat rooms and unauthorized dealership networks to move product around the planet"⁶.
2. "Increased globalisation of world trade makes the market for counterfeited products a global one – and brands themselves are global – increasing the ease of distribution and the incentive to counterfeit"⁷. This can also be explained by more developed and integrated commerce and financial services. As world trade is about producing cheap by tracking nations' competitive advantage and distribute those internationally, the work of counterfeiters is being eased; opening them the same borders as those used by trade flows. Since companies produce in remote places to distribute and sell globally, they often lose control over their supply chain.
3. Counterfeiters take advantage of countries where legal penalties for counterfeiters [are very low] if they exist at all or where enforcement is weak. In this particular regard, China has become one of the most targeted country for counterfeiters.
4. "The influence and prevalence organised crime and terrorists in counterfeiting appears to be on the rise". This element has turned counterfeiting activities to big business and gives another very strong reason for the Chinese authorities to act.

Similarly to the case of copyrights, trademarks and trademark rights must be enforced in a more systematic way.

Enforcement campaigns have concentrated more on quantity than on the real quality of enforcement. In other words, it is felt that

the campaigns have been organised with a view to providing statistical data which are used by the Chinese Authorities as an argument to dismiss the complaints made by foreign countries about the rampant trademark infringement in China. However, it is questionable whether these campaigns have had any really deterring impact on counterfeiters. What is more, enforcement campaigns that have been carried in the past have generally been publicly announced, carrying information on the time period during which the campaign would be taking place.

3.6. Abuse of Technology Transfer

Request & Protection of Data: A particular concern amongst various industries including but not limited to ICT, pharmaceuticals, chemicals, agro-food (in particular GMOs), machinery and financial services centres on the depth of information which needs to be provided to the authorities for obtaining the authorisation to build a factory, to market a product, etc. In some cases, this information was provided to the local industry who used this data to develop similar activities.⁸

Another example relates to external panel reviews for genetically modified products. While this is standard practice in many countries, China's panel experts are not subject to the strict non-disclosure requirements of other countries, meaning they are legally free to share confidential information with local competitors.⁹

Such practices potentially expose foreign companies to IP loss if the information is shared with local industries.

Government Procurement Practices: More and more foreign companies have reported situations closely linking technology transfer to unfair government procurement practices. These situations can be summarised as follows:

1. A foreign firm submits its quotation to local authorities as a response to the call for tenders with regard to a reasonably large but initial project. Because of its technological assets and its technical expertise in this area, this company is granted this project.
2. In order to obtain the final green light to operate in China, the foreign right holder must enter into a joint-venture agreement with a Chinese partner, to whom it has to license out its technology patents (for the duration of the agreement or undetermined period of time). The JV develops and implements the project.

Once the agreement comes to an end, the foreign partner may or not decide to further develop its activities in China.

3. Once it assesses the success of the project, the authorities launch more similar project at a larger scale, which increases business perspectives for the foreign company. More calls for tender are being initiated, but when submitting its quotation, the foreign company does not any of these regardless of the higher quality of the quotation versus other firms, or even disqualified.
4. Ultimately, the former Chinese JV partner is granted the project in which he applies part of all of the transferred technologies, whether he is still licensed to so or not.

IP Theft: A common scenario of cases of alleged IP theft is described by Crowell & Moring, a U.S. law firm that specialises in IP protection:

"The foreign company enters into a JV agreement with a Chinese company to produce widgets. The company licenses the widget patents and associated trade secrets to the JV under a very tightly written set of licenses, which prohibit the JV partner from disclosing the patented technologies to anyone. All proceeds as planned for about six months of production, following which the foreign company begins to see 'knocked-off' widgets appearing in the marketplace. These ultimately are traced to a factory owned by the local JV partner, or a family relative, [etc]. Repeated efforts to enforce the licenses and IP rights, however, prove unsuccessful—the factory cannot be closed down, and while injunctions can be obtained from the courts, the foreign company ultimately resigns itself to bargaining for an 'acceptable' level of IP violations."¹⁰

3.7. Non Payment of Royalties on Essential Patents

The issue on the non-payment of royalties is a not solely a problem in the IT&T industry. It affects every single industry which owns an IP portfolio, which's use may be negotiated with other companies (licensees). It is very widely known that the infringement cases that have been mentioned above do not involve any negotiations since it consist of Chinese producers infringing or stealing the rights of others. The non-payment of royalties on the use of open standards slightly differs however. Virtually any industry that needs to address interoperability through standards may be affected (i.e. ICT, machinery, transport, etc), although the IT&T industry appears to be the principal loser on the Chinese market.

It is largely recognised in the ICT industry that standardisation is a necessity. Companies in this sector generally contribute

to setting up standards that may be used by all manufacturers. Standards are generally composed of a set of different technologies (sometimes in the hundreds), most of which may be patented. "An essential patent is a patent which is required in order to make a particular product [or] a standard.[etc] Due to this value [associated to essential patents], standardisation bodies often try to arrange licensing terms for the patent prior to incorporating it into their standard. These terms are often either fair, reasonable and non-discriminatory licenses (FRAND) or royalty-free licenses."¹¹ "Evidence suggests that Chinese authorities [have discouraged Chinese enterprises from entering into negotiations] on patent licensing agreements and pay royalty to patent owners. [This gives] Chinese companies an unfair advantage, as they are not contributing their fair share to the costs of technological progress."¹²

This results in foreign companies losing on revenue but also increasingly on market share in China and other markets as Chinese companies have started to leverage their cost advantage by exporting to South-East Asian markets, the Middle East, Latin America and increasingly to Africa. On the other hand, this issue affects China's long term developments in these sectors as it discourages R&D spending. It is important therefore that Chinese companies enter into negotiations with owners of "essential patents", acknowledging support for IPR agreements in international standards.

4. EMERGING STRATEGIES

The above enumeration of "Issues Exposed" illustrates the conclusions given at the preliminary stage, in July 2006:

- China has clearly prioritised the need to fill the technological gap with developed countries, and some of methods used cannot be tolerated. The interests at stake between EU companies and China are opposed.
- On the other hand, when China deals with Trademarks and Copyright violations, it is operating an enforcement system that has intrinsic flaws, which impair its efficiency. In this case, the interest of EU Companies and those Chinese IP owners are the same.

4.1. Prioritisation of Technologic Development

In order to attract foreign investment, the Chinese government decided to set up a series of reforms in the light of its open door policy. Those reforms consisted of various

measures that were especially aimed at liberalisation of the market, improvement of resource allocation and product distribution, setup of a legal system and the decentralisation of management, diversification of ownership and performance¹³. Nevertheless, China lacked capital to implement those changes and was determined therefore to implement a favourable policy on foreign investments. This policy had the central aim to attract foreign projects that would benefit the growth of the Chinese economy. It has always enclosed three major characteristics.¹⁴

- The first characteristic was to attract businesses from abroad by offering advantageous taxation and special administrative regulations. The only way to open its market to foreign companies by keeping some control over their activities was to gradually open locations for foreign investors and it is in this context that China successively opened its so-called special economic zones, chosen for their favourable location (i.e. densely populated area, better educated and trained labour force, reliable transportation and communication systems, improved living conditions, etc) but also establishing specific administration and fiscal conditions and low labour costs¹⁵.
- The second was that Chinese leaders wanted to keep track of business and technological developments while aiming to expedite technology transfer. Two major instruments were used to do so. The first was to control ownership by engaging foreign investors into equity and contractual joint ventures. Since its entry into WTO, China has had to gradually liberalise this area, though it is still relatively complex to open wholly foreign-owned enterprises in China since those are restricted to specific areas and must represent a step to economic development.
- Finally, China limited those preferences to strategic FDI in parallel to China's economic development strategy. This was to attract companies that would produce goods ranging in three categories: imports substitution, exports promotion and especially technological products.

These three characteristics of China's FDI policy aimed at modernising its economy by developing attractive new technologies have boosted China's growth.

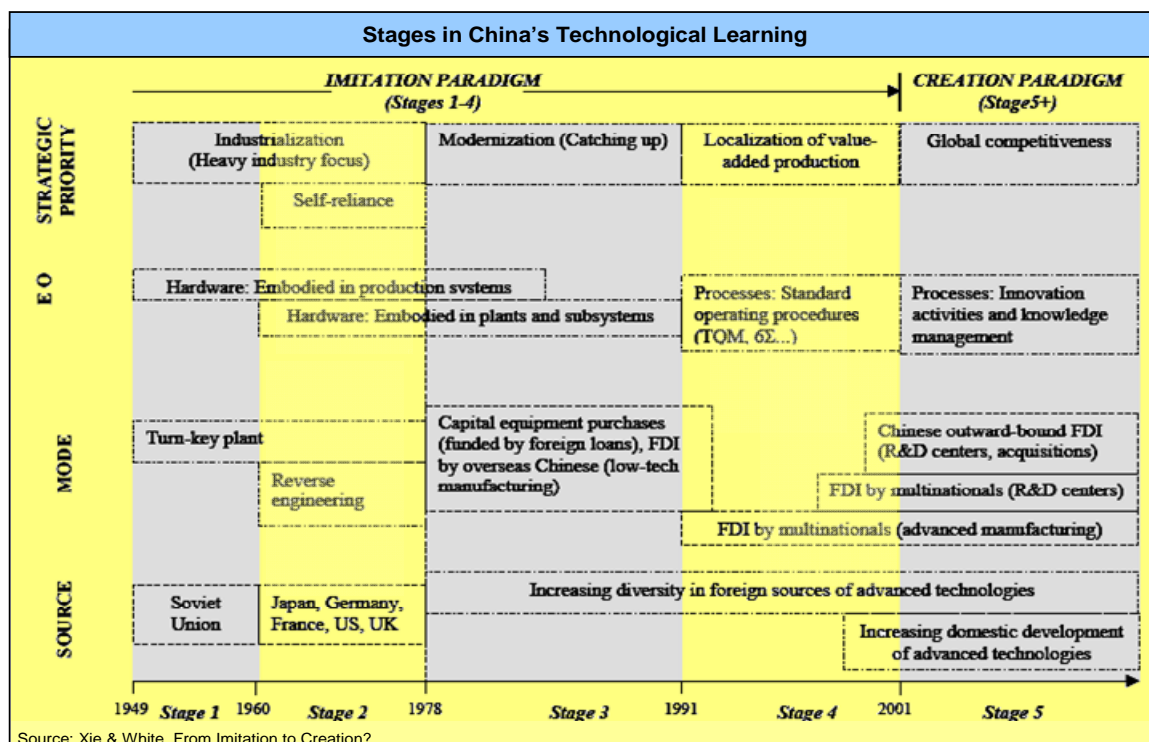


Figure 6: Stages in China's technological learning

From the eighties onward, technology imports started to fluctuate reflecting the changing foreign trade policies and reflected in the foreign exchange balances. China therefore succeeded at importing technology rather than finished goods, especially focusing at finding better ways of producing items it already manufactured. This process consistently helped at renovating and upgrading China's own factories, mines, and power stations. Other policies facilitated technology access and transfer to China's enterprises. Guided bank loans, as well as government subsidies to encourage end users to select appropriate technology¹⁶.

In his paper, "From Imitation to Creation", Steven White presents how the Chinese authorities have gradually made China move forward from the imitation paradigm to start setting strong foundations to becoming a nation of innovation, from its accession to the WTO onwards (see Figure 6)¹⁷.

In 2006, however, it is possible to say, while many of its firms and industries have succeeded spectacularly in competition within the imitation paradigm to become true innovators, many others continue to increasingly benefit from the industrial policies set by Chinese authorities. The characteristics listed above pursue the objective of supporting the development of Chinese industries that are higher up the economic value chain than the industries that make up China's current labour-intensive

base, or simply to protect less-competitive domestic industries.

This way, China has created a mechanism through which Chinese companies gain from technology transfers to acquire IP, improve the domestic capacities to increase their domestic market share and finally start exporting to third markets (see Figure 7).

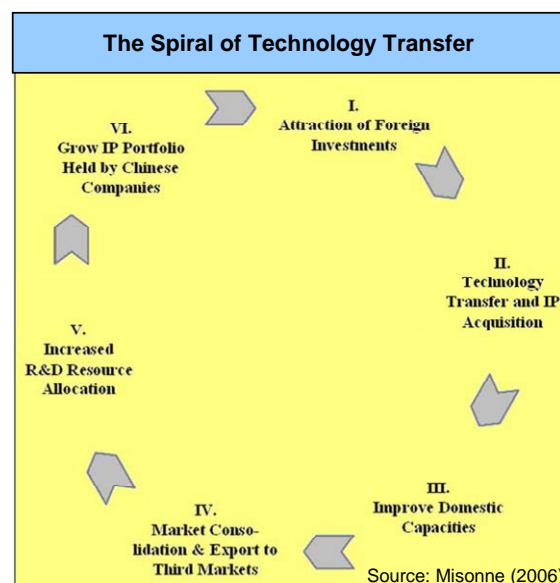


Figure 7: The spiral of technology transfer

Ultimately, the profits generated by such activities should allow domestic firms to increase their R&D activities and start developing and grow their own IP portfolio in

order to gain a strategic advantage, both by exploiting their inventions, but also by achieving more strategic positions to negotiate cross-patent licences with domestic and foreign corporations. While the motives of the Chinese authorities are legitimate, the means used to achieve them are not always legitimate.

As mentioned above, those illegitimate methods and means include:

- The flat refusal to allow Chinese companies using essential patents – especially in the IT&T field – to enter into negotiations with the owners of such patents. This attitude has no justification whatsoever.
- The various strategies used by China to obtain access to technical secrets, either by putting the disclosure of such secrets as a condition for granting an authorisation, or by imposing a Chinese partner in a JV and then closing access to new projects, once the technology has been transferred.

These questionable practices can take various forms, depending on the industrial sector concerned. In that respect, Pharmaceutical industries present an interesting example:

China's new medicine market remains underdeveloped. China is still essentially relying on the manufacture of generic medicine, i.e., products for which the patent protection has expired. Chinese R&D in pharmaceutical products is still in infancy.

This is the reason for two difficulties encountered by European companies in this field:

Patent Term Restoration: The validity of a patent is 20 years from the day it is granted. When applied to medicine, the patent applies to a certain chemical formula which needs a long period of clinical tests before it can be put on the market. Therefore, the period during which the laboratory can effectively draw revenues from the patent is less than 20 years. Patent terms restoration is extensions granted to compensate patent holders for marketing time lost while developing the product and awaiting government approval. Such a mechanism is in place in many developed countries and in a number of emerging markets and the "absence of patent term restoration provisions in China places it at a distinct disadvantage in attracting R&D investment in this area"¹⁸.

Data Exclusivity: When applying for a licence to market a new medicine, based on the result of clinical tests, the laboratory must provide numerous technical data that have been obtained during those tests. Such data are part of the intellectual property of the innovator and must be protected by secret, even though they have been disclosed to the relevant administration; In China, such protection is still not effectively implemented.

This shows that China's interest is (1), to limit the effective duration of pharmaceutical patents in order to benefit the Chinese industry focused on generic products, and (2) to spread the valuable knowledge deriving from the data obtained by foreign R&D.

What is worse is that when foreign companies resort to judicial litigation against a Chinese patent infringer, such action is described in the Chinese media as an *abuse of right*, which reveals the depth of the problem. Such controversial messages contribute to maintain a poor level of public awareness with regards to Intellectual Property, and spread the wrong impression that such issues should be viewed as a China vs. foreigners issue.

It is essential, for European companies and the Commission, to react as the danger does not only lie in within the confines of the Chinese market. Chinese companies are strongly encouraged by the Government to "go global", and are developing the aforementioned infringing activities and products in emerging markets, where the protection is less organised and guaranteed.

4.2. Trademarks and Copyright Enforcement

Based on statistics often mentioned by Jiang Zhipai, Chief Justice of the IPR Section of the Supreme People's Court, more than 90 percent of civil litigation involving trademarks and copyrights take place between Chinese actors. The problems mentioned above, and mainly the lack of deterrence, affect Chinese IP owners as much as they affect foreign investors. There is no identifiable strategy on the part of China to, wilfully and knowingly, persist in using a system that is inefficient. However, when the EU Commission tries to engage into constructive, but specific, dialogues with the relevant Chinese authorities, the result is disappointing. The official speech is, as Jiang Zhipai is often quoted:

*"it is important to look at how far [China] has come from the Cultural Revolution to now, with a complete system of laws. [...] China is moving slowly forward, but no problem can be solved in an instant."*¹⁹

The Chinese side quotes, at length, the statistics obtained from the various enforcement campaigns, thus avoiding direct technical exchanges on the structural and procedural issues. In fact, it is extremely difficult for China to change some features that are a fundamental part of its political and social organisation. Nevertheless, the recent "Dialogues" prove that without proper incentive, the problems identified will remain unchanged for a long time.

5. SURVEY RESULTS

Between May and July 2006, the Consortium implementing this project surveyed over 200 European companies with business operations in China. Industry practitioners were asked questions on a wide range of topics, including issues related to the current and future competitiveness of EU companies, market obstacles when entering the Chinese market, and policy recommendations to the European Commission²⁰. It is noteworthy to mention that with regards to market access obstacles IPR infringement was highlighted

by respondents as a problem of particular importance in each of the surveyed sectors. On this topic, participants were asked the following question:

Q: "To what extent does the infringement of IPR affect your business with China?"

The survey results in **Figure 8** show that, when compared to other sectors, respondents from the Sustainable Technologies and Services sectors regard IP infringement as an issue of highest importance to their operations. This is followed closely by the machinery and distribution sectors. Although respondents from the distribution and pharmaceuticals sectors today rate IP infringement relatively high, these two sectors expect the greatest improvements in issues related to IPR infringement. Industry practitioners from the chemicals, agricultural²¹ and construction sector report the least problems relative to other sectors. **Box 1** below provides a selection of comments from the survey.

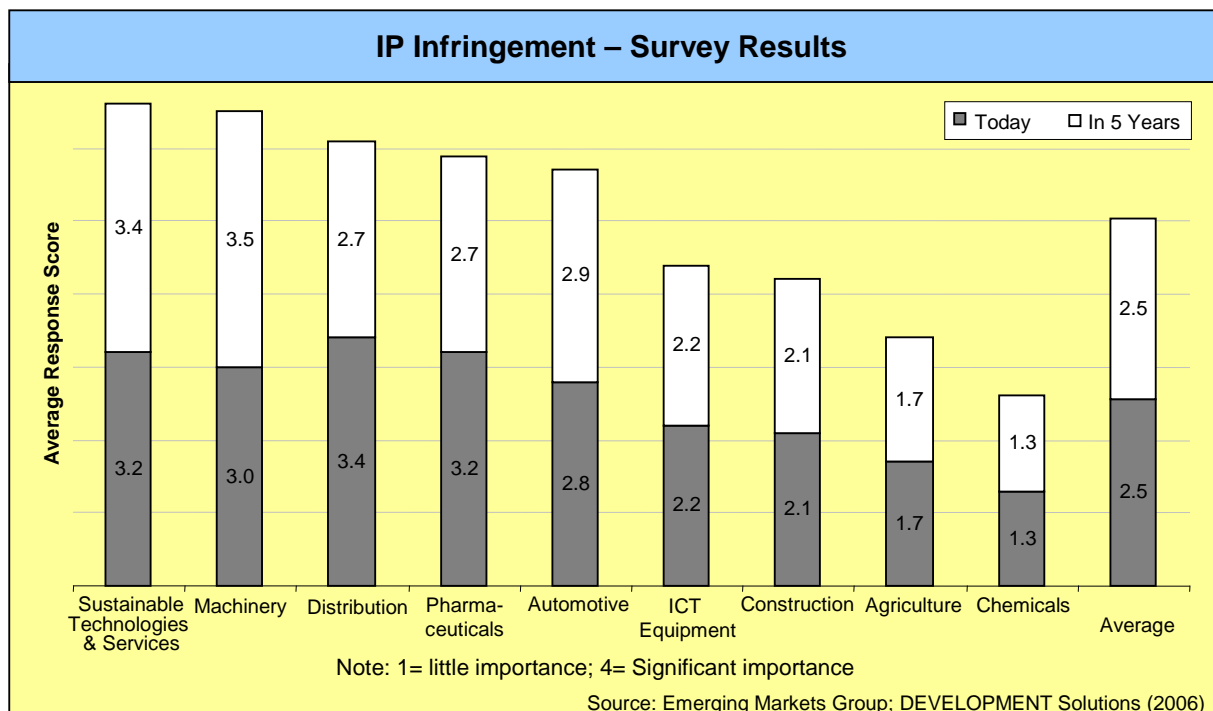


Figure 8: IP Infringement - Survey Results

Box 1: Selected Quotes from the Industry Survey Regarding IPR Infringement

Sustainable Technologies and Services (1)

"In the short-term it is true that locally developed technologies in China are generally not trusted by end-users. But when these companies are "inspired" by foreign technologies enabling them to take short-cuts, they become very price competitive. Since the design will be based on various details learned from different technology suppliers, it will be very difficult to legally counteract these copied technologies."

Sustainable Technologies and Services (2)

"Our competitors do not follow any rules when it comes to IPR. Our registered trademarks have been copied: our logo; our brochures and copied products even appear with our batch numbers on them! However, in terms of patents we believe this is an area which will be easier enforced in the future."

Machinery

“Although currently we do not face any significant IP infringement we are aware of a large number of attempts to copy our machines. 99% of machinery-related projects in China are carried out by the Chinese design institute. This design institute must be employed by Chinese customers to set the layout of the work-floor (we are not even invited to give feedback for the design). More importantly we need to hand over a full set of documentation on our equipment which outlines its specification etc. In the EU the design is handled by independent companies who are obligated to secrecy. In the EU this can be enforced, but not in China because the design institute is government affiliated. We also know that during the installation our machines have been looked into during the night when nobody is around. We expect these are the individuals affiliated to the design institute.”

Distribution

“To help the [Chinese] government fight IP infringement, we sponsor professorship in three universities on IPR issues and organise various different seminars and workshops. We also cooperate closely with customs and legal enforcement institutions. Our overall objective is to have a level playfield for multinationals and local players who observe IPR.”

Pharmaceuticals (1)

“Most of our products compound patents have expired in Germany. We do have a number of remaining process patents but there is no point trying to enforce these in China. We accept that our products will be copied in that sense, and as Chinese companies increase their absorptive capacity more and more of our products will be copied.”

Pharmaceuticals (2)

“[A five year] time frame is too short for anything serious to happen, especially in the Pharmaceuticals market. However, patenting production techniques could be an interesting development for the future.”

Automotive

“Issues related to IPR infringement are the single biggest concern for auto component companies. It is difficult to see [IPR improving] over the next 5 years. Good intentions will do little to improve this, only strong action (perhaps WTO related) might have some effect.”

Construction

“Most of our IP finds its ways out. However, we do not make strong efforts to protect our IP as there is nothing top-secret in it. It might improve Chinese competitors by giving them some insight into how we do things around here, but this still doesn't supply them with any of the skills they need to manage complex and large-scale projects.”

Agriculture

“IP-protection is the most crucial issue facing us in China. Introducing products must be thought out well behind the background of increased costs of anti-counterfeiting activities. Our main costs [from IPR infringement] come from brand-equity-loss due to low quality copies.”

6. FUTURE TRENDS

Based on this succession of arguments developed in the previous sections of this study, it is possible to establish three different scenarios for China's IP environment to develop.

- The first scenario is that respect for IP rights will develop in China as it did for Japan and the Asian Tigers such as Singapore, South Korea, Taiwan and other parts of the now developed world. According to the scenario, once China matures and becomes a true innovator itself, it will begin to protect the IPR in earnest.
- The second scenario presumes that China will need a longer time than required by other countries to improve the situation. This scenario considers different elements, including but not limited to China's development in the 20th century, its comparatively short experience in protecting IPRs, its size, the need to assess and review legislations and adapt enforcement tools accordingly. However, this scenario puts forward the idea that China will eventually move towards better IP protection.
- The third scenario suggests that China will follow its own route, with unremitting IP vulnerabilities regardless of outside pressures from Western countries and develop its ties with developing countries. However, it is important to question the sustainability of such a system. Foreign investors would rapidly start deserting the Chinese market after having lost their faith in ever seeing sustained IP protection in the PRC, and that this market would no longer be financially viable. As a direct consequence, China

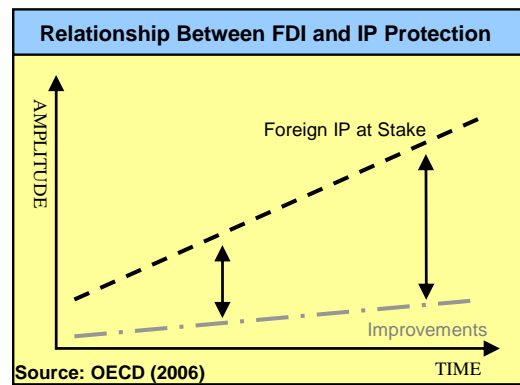
would no longer be in the position to attract and exploit foreign technologies.

This report supports the second scenario, in which China is bound to emerge as a hugely important centre of innovation, but that time will be required. This is particularly due to China's extraordinary capabilities, especially its large population. For a long time, "China will remain a place for low-cost manufacturing, [but is so populous] that [it] can do lots of things at once. [It] can keep doing the low-tech work and at the same time develop more high-tech activities."²² If Chinese authorities apply appropriate macroeconomic policies, these inextinguishable human resources will give the possibility to employ more and lower cost labour on particular research projects than would ever be possible in other countries, i.e. accelerating the pace of innovation. Effective and efficient IP protection will no longer appear as a choice but as a priority for the Chinese authorities if it wants to protect the fruit of its own policies.

In their report on "Governance in China", the OECD supports this argumentation by drawing the following conclusions on the relationship between economic growth and IP protection in developing countries. The report develops the concept that developing economies have generally seen their levels of IP protection increase at stages where the acquisition of significant technological capabilities (i.e. by attracting foreign technologies) was a necessary step, and that strength of the IPR protection system continues to increase with the nation's economic development after these have reached higher income level. Correspondingly, the report provides some evidence that trade inflows into developing countries are influenced by the strength of IPR protection (W. Lesser follows the same arguments in the "Effects of TRIPS-Mandated IPR on Economic Activities in Developing Countries, by developing an index which identifies the link between the increase/decrease of IP Protection with the level of FDI²³).

The OECD report also identifies that it is difficult to achieve the right balance for countries such as China and India (i.e. linked to the size of these economies and their inherent disparities) where some industries have the potential to benefit from such actions, whilst the associated cost for other industries as well as for consumers are potentially higher.²⁴

This report suggests that China is gradually move towards better IP protection, but that it will take longer than other countries would be ready to accept.



Source: OECD (2006)
Figure 9: Relationship between FDI and IP protection

This report supports the scenario that China is bound to emerge as a hugely important centre of innovation. This is particularly due to China's extraordinary capabilities, especially its large population. For a long time,

"China will remain a place for low-cost manufacturing, [but is so populous] that [it] can do lots of things at once. [China] can keep doing the low-tech work and at the same time develop more high-tech activities."²⁵

Furthermore, if Chinese authorities employ the right macroeconomic policies, these inextinguishable human resources will give the possibility of employing more labour on individual research projects and thereby accelerate the pace of innovation.

In this context, effective and efficient IP protection will no longer appear as a choice but as a top priority for the Chinese authorities if it wants to protect the fruit of such policies, the Chinese IP environment will need to feature all aspects necessary for effectively encouraging innovation and efficiently protecting IP achievements through a complete enforcement system.

In such a context, the short term costs of implementing sound IP protection may well appear as a trade-off when considering the losses incurred by 'sacrificing' the short term benefits that IP infringing companies and industries may bring. Even in the long run, long after the Central government may have started to take much more proactive measures to materialise the guidelines set in China's Eleventh Five Year plan, many localities may continue to cultivate the illusion that tacit policies on IP smuggling and free-riding will benefit to developing and promoting local firms and industries in China but also in new markets. This would ultimately lead to a drastic shift in the nature of technological free-riding in the sense that this would no longer be an issue opposing China versus developed nations, but much

more China and developed nations versus infringers, i.e. similarly to the situation in Trademarks, but also copyrights.

7. RECOMMENDATIONS

It becomes clear that China will take more time than the other 'dragons' before it achieves to implement efficient IP protection policies nationwide. It is impossible to anticipate the time frame in which China will develop such an IP environment, though it is clear that the longer this transition will take, the more losses will incur upon foreign investors. A series of tools and mechanisms are available for European authorities to assist and encourage the Chinese authorities to accelerate this process.

As much as corporations need to establish clear strategies for insuring the protection of their IP in China, it is of ultimate importance for European authorities to develop and implement a strategic action plan. This strategy should include three different steps: [1] dialogue and cooperation, [2] measure and assess achievements and [3] take measures.

Strategic Dialogue & Trade Related Technical Assistance (TRTA): This report has established that the IP problem in China develops around two principal axes which are [1] a series of systemic issues which have not yet benefited from sufficient or the relevant support (principally linked to the infringement of trademarks and copyrights) and policies to close the technological gap at all costs (principally linked to the acquisition of technology and the infringement of patents).

A strategic dialogue would therefore need to be structured correspondingly. On one hand, it is important to sensitise the Chinese authorities about the consequences of systemic issues on European but also Chinese business activities and on how European stakeholders can be of assistance in the form of TRTA and other means of cooperation. On the other hand European authorities have to urge Chinese authorities to review and adapt policies that are directly or indirectly harming the activities of foreign companies in the PRC and inform them of the possible consequences.

Needless to say, these cooperation activities must remain under full control of the European Commission or the administrative and technical experts entrusted by it. The planning, methodology and content of these programmes must, of course, be accepted and endorsed by the Chinese beneficiaries.

Measure Achievements: It is of the utmost importance to be able to measure the impact of such cooperation. The lack of reliable measurement tools have been felt in the past, in relation to previous cooperation programmes.

The overall results (positive and negative achievements) have to be measured on a yearly basis and could be compared against the results of other countries where the same system would be used. The final results and recommendations should be published on a yearly basis.

It is worth mentioning that Europe has agreed to finance a study and research that corresponds precisely to this need.

"Alternative Measures": Whilst the EU needs to continue supporting the transition of China's IP environment by sharing experiences and best practices in the form of strategically designed cooperation activities, it should also be ready to take measures against China if the latter does not favourably respond to the necessity to develop the right IP environment. These may adopt different forms including open and public statements from European authorities regarding the lack of progress achieved by local authorities in relation to specific industries or specific localities, and the preparation and launch of a WTO dispute settlement.

Last but not least, public private partnerships should be the ultimate tool to accelerate China's transition, in the sense that it will provide the European authorities with the necessary evidence that, eventually, might be needed to support a WTO dispute settlement.

In order to maximise the credibility of a WTO dispute threat, it is essential to let know that Europe is actively taking measures to prepare such action. This includes the collection of precise and reliable facts and data, all information that are in the books and files of all the concerned European companies. It will be, therefore, necessary to organise a procedure defining how to select actual cases, which types of information are needed, in order to prove what, and finally, how to organise and guaranty the confidentiality of the provided, whenever necessary.

8. SUMMARY ANALYSIS

Although European stakeholders recognise progress in some aspects of China's WTO performance in 2006, serious challenges remain. IPR issues continue to generate real concern for operators. While China has made noticeable improvements to its framework of

laws and regulations, the lack of effective IPR enforcement is the main problem.

In the past five years, statistics on the number of articles seized originating from Greater China (i.e. China Mainland, Hong-Kong and Taiwan) in the EU and the US have consistently reached between 60% and 80% of total seizures (**Figure 2**), with little sign of progress. The threat posed to European companies by IP infringement in China goes well beyond the most visible issues of rampant counterfeiting of famous luxury brands. It extends to all industry sectors where European operators trade with China. The issue is so serious that it is leading to a systematic erosion of the value added created by European R&D investments, many of which are transferred at low cost to Chinese operators. Without decisive action, the IP problem, which threatens legitimate margins and markets of European operators in China, will start to affect their operations in third countries too. Therefore, European stakeholders urgently require effective enforcement, improvements in efficiency and deterrence and closure of the remaining legislative loopholes.

The Chinese government does not agree with these general criticisms for two reasons. [1] China has developed its IP environment during 25 years only, while developed economies have implemented theirs in 200 years. [2] They believe that their achievements in such a short time are positive (e.g. member of most international IP treaties and conventions, extensive list of revisions of its IP related laws, especially since WTO accession, etc) and that China is constantly working on improving its IP legislation and enforcement system (e.g. 2006 IP Action Plan, etc).

We need to understand the historical context to reach acceptable and appropriate solutions.

8.1. Context: IPR in China's Global Strategy

Historically, China long been known as a nation of innovation and creativeness, counting an exhaustive list of inventions including paper, printing, gunpowder and the magnetic compass to name the most significant ones. Because of historical, cultural, economic and political factors, China did not develop a scientific revolution in the 19th century and the ultimate result was that Chinese technology started falling behind that of Europe. This significantly impacted upon the development of China in the 20th century.

From 1978 onwards (open door policy), Chinese leaders realised that IPR protection

would be crucial for attracting foreign investment, technology and know-how, which would ultimately drive China's future economic development. China's first legislation on Trademarks ('82) and Patents ('84) were promulgated soon after China's regulation on Joint Ventures came into force ('79). This illustrates that IPR legislation was essentially designed to reassure foreign investors.

Today, China is marking its interest of gaining competitiveness in the global knowledge economy by "closing the gap and achieving technological independence". The challenge is to design and adapt its IPR policies to accommodate changing needs and requirements to encourage domestic R&D, innovation, and technology diffusion. It is in this context that China is currently carrying out the latest wave of revisions of its IP related laws.

8.2. The Issues Exposed

Despite all the efforts taken to improve the situation, IP violations in the PRC have been growing in recent years. It is important to clearly distinguish the two following issues:

- a) Patent infringements and violation of technology secrets;
- b) Counterfeiting of trademarks and the piracy of works protected by copyrights, and

Patent & Technology Secret Violations

As foreign participation in many key sectors continues to grow, China has increasingly resorted to industrial policies that limit market access by non-Chinese origin goods and that aim to extract technology and IP from foreign rights-holders and support the development of Chinese industries.

A cycle has emerged in which Chinese operators gain from technology transfer and start assimilating foreign IPRs. A significant market develops in China and domestic capacity improves, whilst the market position of foreign companies is being seriously compromised with profits falling. As the market consolidates, Chinese companies increase exports to countries where they experience better margins. In turn, these businesses dispose of more capital and financial resources to re-reinvest in R&D activities and build on their IP portfolio. It is in this context that the Chinese authorities have allocated an increasing amount of financial and human resources to its patent filing system (as opposed to the limited resources allocated to trademarks and copyright administrative organs).

While the motives of the Chinese authorities are virtuous, the means used to achieve this end are not legitimate. The acquisition of foreign technology by Chinese companies, and this is where China's virtuous spiral of technology transfer becomes vicious, takes three principal forms. They can be summarised as follow:

1. Open Standards: Chinese companies obtain free and unlimited access to open standards documentation but refuse or are forbidden to pay for reasonable royalties on patents attached to the standard in question (i.e. essential patents);
2. Forced disclosure of secret data: government authorities request excessive amounts of data to be provided by foreign businesses in the form of questionnaires that must be completed prior to receiving formal authorisation to market or license their products, build a factory, etc;
3. Joint ventures & Government Procurement: government authorities initiate calls for tenders for projects which request advanced levels of technological resources. Projects are allocated to foreign companies, which must enter in a joint venture partnership or technology transfer. The Chinese JV partner benefits from its technology and technological know-how long after the project expiry. Once the project is finalised, government authorities can launch similar projects at a larger scale by assigning the Chinese JV partner.

It is worth noting that the third form slightly differs from the first two as it involves a one time payment for assimilating the technology, though agreements do not generally transfer IP rights to the Chinese JV partner.

In summary, China's strategy of avoiding costly technological transactions has helped it to progressively close the technological gap with the more developed economies. However, the policies used to acquire these technologies have caused a number of IP related litigations initiated by foreigners trying to protect their IP. These actions are described in the Chinese press as foreign companies '*abusing their rights, threatening Chinese firms and their economic security*'. As the Chinese media is a state organ, it is clear that these reflect the opinions of the Chinese government. Ultimately, these messages mould the thinking of China's society and appear to be in opposition with the message that the Chinese authorities are trying to achieve

through its general campaigns on the protection of IP.

Counterfeiting & Piracy

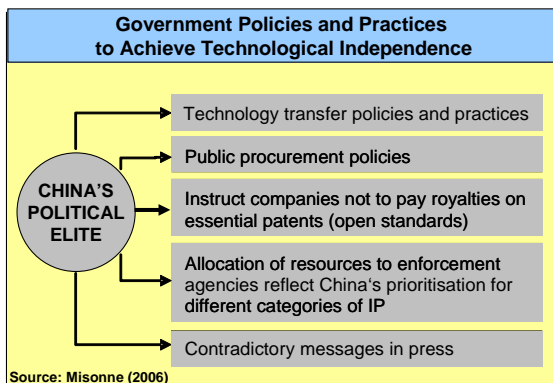
Counterfeiting (i.e. fake trademarks and names, designs, patterns, etc) affect virtually any product. Piracy on the other hand also exists in a wide variety of forms including but not limited to industrial reproduction, broadcasting and online diffusion of protected works without the authorisation of the right holder or payment of royalties.

Here again, views between Chinese and European counterparts differ considerably. Chinese enforcement officials frequently present statistical data gathered from its regular enforcement campaigns to demonstrate the benefits and progress achieved by its unique enforcement system (i.e. administrative and judicial enforcement mechanisms). International counterparts question the fact that Chinese authorities have been concentrating their efforts on curing symptoms rather than the root core. China's current regulatory and institutional framework undeniably remains at the source of many difficulties in developing and implementing a sound IP environment in the PRC. The main weaknesses are summarised below:

- Weak deterrence for IP infringers;
- Complexity of the administrative organisational structure (lack of cooperation between and within enforcement agencies, which ultimately leads to competition between agencies; lack of involvement for the right holder, etc);
- Burdensome procedures for right holders to initiate and proceed a case in courts;
- Lack of financial and human resources allocated to administrative enforcement agencies responsible for trademark (TMO and SAIC) and copyrights (NCAC);
- Regulatory framework and enforcement at the local level and local protectionism (i.e. developing economy, maintain employment, serve the interests of local consumers, etc), resulting in the discrimination of foreign rights holders.

Conclusions

Chinese authorities have deployed a set of policies and practices (see **Figure 10**) which clearly highlight China's national interest in and priority of '*achieving technological independence*' in the shortest possible time.



Source: Misonne (2006)
Figure 10: Chinese government policies and practices to achieve technological independence

These policies and practices have encouraged the ‘fierce’ acquisition of foreign technology through various strategies. These policies and practices also reveal that the counterfeiting of trademarks and piracy of works protected under copyright law have not yet become a priority in the PRC and continue to grow as a consequence of the series of issues listed above. Foreign authorities must notify the Chinese authorities that these policies and practices do not encourage mutual progress, are harmful to both parties in the long run, and urge them to take prompt actions.

8.3. Actions to Take

It is difficult to estimate how quickly China’s IP regime will become fully transparent and effective, though it is clear that foreign investors will continue to incur losses as long as this transition will is delayed.

China’s technology free-riding policies give foreign investors serious reasons to be concerned. The Chinese government has to recognise that sustainable trade can only occur in an environment that respects fair trade rules. Free-riding will only last for as long as the Chinese authorities will perceive that the benefits of these policies outweigh those of developing a sound IP environment. The European Commission should also highlight the potential risks and costs of not developing such an environment.

European industry must recognise the active role it needs to play in protecting their IP rights in China. Corporations have to design and implement investment strategies considering the risk that China may represent to their IP as well as strategically manage their IP portfolio (maintain exclusivity, license/cross-license or keep IP out of China) and assess potential gains versus losses in short, medium and long-term. The industry should enforce their IP rights by designing collective strategies and actions and initiate law suits against Chinese businesses which

infringe their rights. Finally, while considering the strengths, weaknesses, opportunities and threats of the Chinese market as opposed to other strategic locations (i.e. other emerging markets), European industry will have to consider balancing their IP risks by establishing themselves in markets which provide better IP protection.

On the other hand, China must address a series of issues which we categorise according to the level of simplicity of resolution versus the impact that their implementation would have on the general improvement of the IP environment:

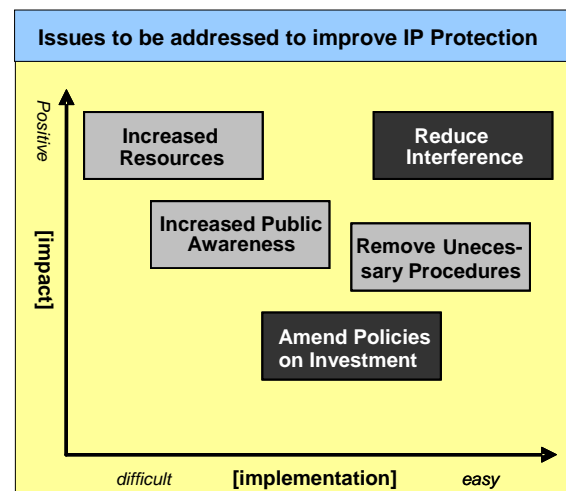


Figure 11: Issues to be addressed to improve IP Protection

- Increase deterrence (revise conditions under which a case qualifies as a crime, impose deterrent sanctions, etc);
- Simplify administrative organisational structure and address the problems they cause by concentrating efforts on the core issues rather than on symptoms (e.g. administrative and judicial authorities should cooperate rather than compete on dealing with IP infringements, right holders should be involved in the procedure of solving a case, etc);
- Eradicate burdensome and discriminatory procedures for foreign right holders to enforce their rights,
- Take measures to consolidate the political will for IPR enforcement locally;
- Increase resources available to actors involved in registering and enforcing IPR, and
- Increase public awareness in a strategic and systematic manner.

It is essential that the Chinese authorities accept to enter constructive discussions with IP stakeholders to resolve these issues and European authorities need to establish a strategic agenda in this regard.

Recommendations for DG Trade

- 1. Strategic dialogue:** Maintain a strategic dialogue on the IP issues identified and build a strategic agenda of recommendations and measures to be taken;
- 2. Monitoring:** Closely monitor China's implementation of its IP Action Plan and other IP commitments in the form of comprehensively designed industry questionnaires and thematic studies;
- 3. TRTA:** Support China's transition by sharing experiences and best practices in the form of strategically designed cooperation activities.
- 4. Warn:** Strengthen messages to the Chinese authorities; highlight the seriousness of the issues at stake as well as the danger and risks they pose to all businesses operating in China. Corporations may review their investment plans in China and seek business opportunities in other potential emerging market;
- 5. Inform the industry:** , particularly small and medium size enterprises of the genuine risks they may face when deciding to invest their technologies into the Chinese Market by setting up an official public IP warning system;
- 6. Prepare a WTO case:** Gather all evidence necessary for bringing a WTO dispute against China and sensitise the industry on the importance to provide all required data to support the case;
- 7. Initiate case:** Ultimately, initiate a WTO dispute against China if it fails to respond to the final warnings.

ANNEX 1: ACTORS ENGAGED IN IP

National Intellectual Property Working Group

In order to further strengthen the leadership of IPR protection undertaking, Chinese government has decided to set up the National Working Group on IPR protection. The Working Group is led by Vice Premier Wu Yi and constituted by thirteen members who are in charge of twelve IPR-related agencies.

The main task of the National Working Group is to be responsible for promoting the construction of laws and regulations on IPR protection, setting up trans-departmental coordination mechanism of law enforcement on IPR protection, well dealing with the linkage of administrative law enforcement and criminal justice, joint supervision on the disposal of major IPR infringement cases and instructing localities and departments on IPR protection. The provinces, autonomous regions and municipalities directly under the Central Government also have already set up their corresponding IPR protection organisations.

State Office of Intellectual Property Protection

The State Office of Intellectual Property Protection (SOIPP), set up within the Ministry of Commerce, is the daily executive agency under the National Working Group on IPR

protection. The director of SOIPP is Zhang Zhigang, who is the vice minister of the Ministry of Commerce.

The main responsibilities of SOIPP are as follows:

- Researching into and proposing the guidance, plans and policy recommendations on national IPR protection work;
- Organizing and coordinating national special campaign on IPR protection (including "IPR Protection Publicity Week" on raising public awareness) and confirming the focal tasks of it;
- Supervising the disposal of major IPR infringement cases, dealing with the letters from the masses that correlate with IPR protection;
- Setting up the communication and coordination mechanism with foreign investment enterprises and organizing the meetings regularly;
- Launching the activities of law enforcement, personnel training and education on IPR protection and conducting international exchanges and cooperation;

Table 1: National working group on IPR protection

Group Leader:	Wu Yi Vice Premier of the State Council
Members:	Zhao Yongji Vice Minister of the Ministry of Public Security Lou Qinjian Vice Minister of the Ministry of Information Industry Bo Xilai Minister of the Ministry of Commerce Zhang Zhigang Vice Minister of the Ministry of Commerce Liu Wenjie Vice Director of the Customs General Administration Wang Zhongfu Director of the State Administration for Industry and Commerce Pu Changcheng Vice Director of the General Administration of Quality Supervision, Inspection and Quarantine Yan Xiaohong Vice Director of the National Copyright Administration Zheng Xiaoyu Vice Director of the State Administration of Food and Drug Zhang Qin Vice Director of the State Intellectual Property Office Wang Yongqing Vice Director of the Legislative Affairs Office of State Council Shen Deyong Vice President of the Supreme People's Court Zhu Xiaoqing Vice Presiding Judge of the Supreme People's Procuratorate
SOIPP:	Director: Zhang Zhigang Vice Minister of the Ministry of Commerce Deputy Director: Huang Hai Assistant Minister of the Ministry of Commerce Secretary-General: Xiang Xin Deputy Secretary-General: Ma Enzhong Connection: Yu Xiao

National Copyright Administration of China
Established in 1985, the National Copyright Administration (NCAC) is the copyright administration department under the State Council responsible for the nationwide administration of copyrights. The main functions of NCAC are:

- To implement copyright law and related regulations as well as to promulgate rules in relation to copyright administration;
- To investigate and redress cases of serious infringements of copyright which are of nationwide influence or involve the interests of foreign legal persons or citizens and provide guidance for the local copyright administration departments thereon;
- To promote copyright knowledge and the training of copyright personnel.

In addition, the NCAC is the body in charge of approving the establishment of collective management societies (CMS) and to supervise and guide their work. To date, three CMS have been officially approved by the NCAC; they are:

- Music Collection Society of China (MCAC);
- Audio-Visual Copyright Association of China;
- Literary works, photographic works and fine arts Association of China

In order to promote awareness of copyright owners, the NCAC has implemented a system of voluntary registration. This system also prevents disputes over copyright ownership by providing *prima facie* evidence.

In terms of enforcement, the NCAC has also collaborated with the Press and Publication Administration in sending inspectors to be stationed at compact disc factories in order to enhance the administration of publication and reproduction of audiovisual products and electronic publications.

Trademark Office of the State Administration for Industry and Commerce

The State Administration for Industry & Commerce (SAIC) is the competent authority directly under the State Council in charge of market supervision/regulation and related law enforcement through administrative means. Its main functions are to draft and promulgate guidelines, policies, laws, rules and regulations related to the administration for industry and commerce as well as - ensuring their consistent and transparent enforcement by carrying out standard supervision. The SAIC also handles and administers the registration of enterprises

(including foreign-invested enterprises), organizations or individuals that are engaged in business activities.

The Trademark Office (TMO) under SAIC is in charge of the registration and administration of trademarks nationwide. It is specifically responsible for dealing with oppositions as well as modification, assignment, renewal, cancellation of registered trademarks.

Under TMO's guidance, local administrative authorities (AICs) shall supervise the use of trademarks and deal with infringements of the exclusive right to use a trademark *ex officio* or at the request of right-owners, with a view to protecting the legitimate rights and interests of the right-owners and consumers.

State Office of Intellectual Property Rights

The State Intellectual Property Office (SIPO) under the State Council is responsible for patent and patent related issues as well as for coordinating international affairs in the field of IP. Its main responsibilities include:

- Revising the Chinese Patent Law and its implementation regulations as well as promoting dissemination of these;
- Monitoring international IP developments, coordinate international communication, negotiation and cooperation in the field of patent;
- Formulating standards for patent infringement and patent right discretion, appointing and monitoring of institutions administering right discretion and provide guidance for local investigating and settle patent disputes
- Formulating the general plan for the education and training in intellectual property.

Entrusted by SIPO, the Patent Office (PO) is in charge of receiving, examining and granting patent applications of inventions, utility models and designs as well as examining request for reexamination, invalidation and other administrative functions given by SIPO.

Supreme Peoples Courts

The Supreme People's Court (SPC) is the highest judicial organ in China and is responsible to the NPC and its Standing Committee. Its structure comprises a judicial committee, No.1 and No. 2 Criminal Tribunals, the Civil Tribunal, the Economic Tribunal, the Administrative Tribunal, the Complaint and Appeal Tribunal and the Communication and Transportation Tribunal. The Supreme People's Court is charged with three main responsibilities:

- Trying cases that have the greatest influence in China, hearing appeals against the legal decisions of higher courts, and trying the cases the Supreme People's Court claims;
- Supervising the work of local courts and special courts at every level, overruling wrong judgments they might have made, and deciding interrogations and reviewing cases tried by the lower courts;
- Giving judicial explanations of the specific utilisation of laws in the judicial process that must be carried out nationwide.

Public Security Bureau

The Public Security Bureau (PSB), under the Ministry of Public Security (MPS) is detecting major and serious criminal cases.

Very recently, the government has set up a special IP protection division within the ECID (Economic Crime Investigation Department) of the MPS and it is expected that this will be repeated at all levels of the PSB.

Supreme People's Procuratorate

The people's procuratorates are State organs for legal supervision. The Supreme People's Procuratorate is the highest procuratorial organ. It is mainly responsible for supervising regional procuratorates and special procuratorates to perform legal supervision by law and protecting the unified and proper enforcement of State laws. The Supreme People's Procuratorate has to report its work to the National Peoples Congress and its Standing Committee, to whom it is responsible, and accept their supervision. The SPP is primarily in charge of:

- Leading the procuratorial work of regional and special procuratorates at all levels;
- Accepting and hearing cases of corruption, bribery, tort to citizen's democratic rights

and misconduct in office, and placing them on file for investigation and prosecution;

- Performing legal supervision of the judicial process of courts and investigation of criminal cases;
- Deciding arrest and prosecution concerning severe criminal cases; performing legal supervision of the trying of criminal cases;
- Lodging protests against effective but wrong judgements and rulings made by various courts to the Supreme People's Court according to law;
- Exercising legal supervision of activities conducted in prisons and reform through labor institutions;
- Providing legal explanations of the application of laws in practical procuratorial works;
- Formulating regulations and by laws concerning procuratorial works;
- Leading and administrating public procurators according to law; organizing and guiding the education and training of officials with the procuratorial departments; sponsoring negotiations with foreign procuratorial departments;
- and developing judicial assistance.

General Administration of Customs

The General Administration of Customs (GAC) is the State agency that supervises and manages all arrivals to and departures from the Customs territory of the PRC. The GAC is empowered with the mandates of controlling inward and outward means of transportation, goods, personal articles, mails and parcels, to collect customs duties and taxes, to combat smuggling, to compile customs Statistics and to transact other Customs affairs.

ANNEX 2: SUMMARY OF MAIN LEGISLATION

Patents

Patent Law, March 1984, as amended by the Decision Regarding the Revision of the Patent

- Law of the People's Republic of China, September 1992, and by the Decision Regarding the
- Revision of the Patent Law of the People's Republic of China, August 2000.

Trade Marks

Trademark Law, August 1982, as amended by the Decision of the Revision of the Trademark

- Law of the People's Republic of China, February 1993, and by the Decision of the Revision of the Trademark Law of the People's Republic of China, October 2001.

Industrial Designs

As above, under Patents.

Copyright & Related Rights

Copyright Law of the People's Republic of China, September 1990, as amended by the Decision of the Revision of the Copyright Law of the People's Republic of China, October 2001.

- Implementing Regulations of the Copyright Law of the People's Republic of China, May 1991, as amended September 2002.
- Regulations on Collective Management, March 2005.

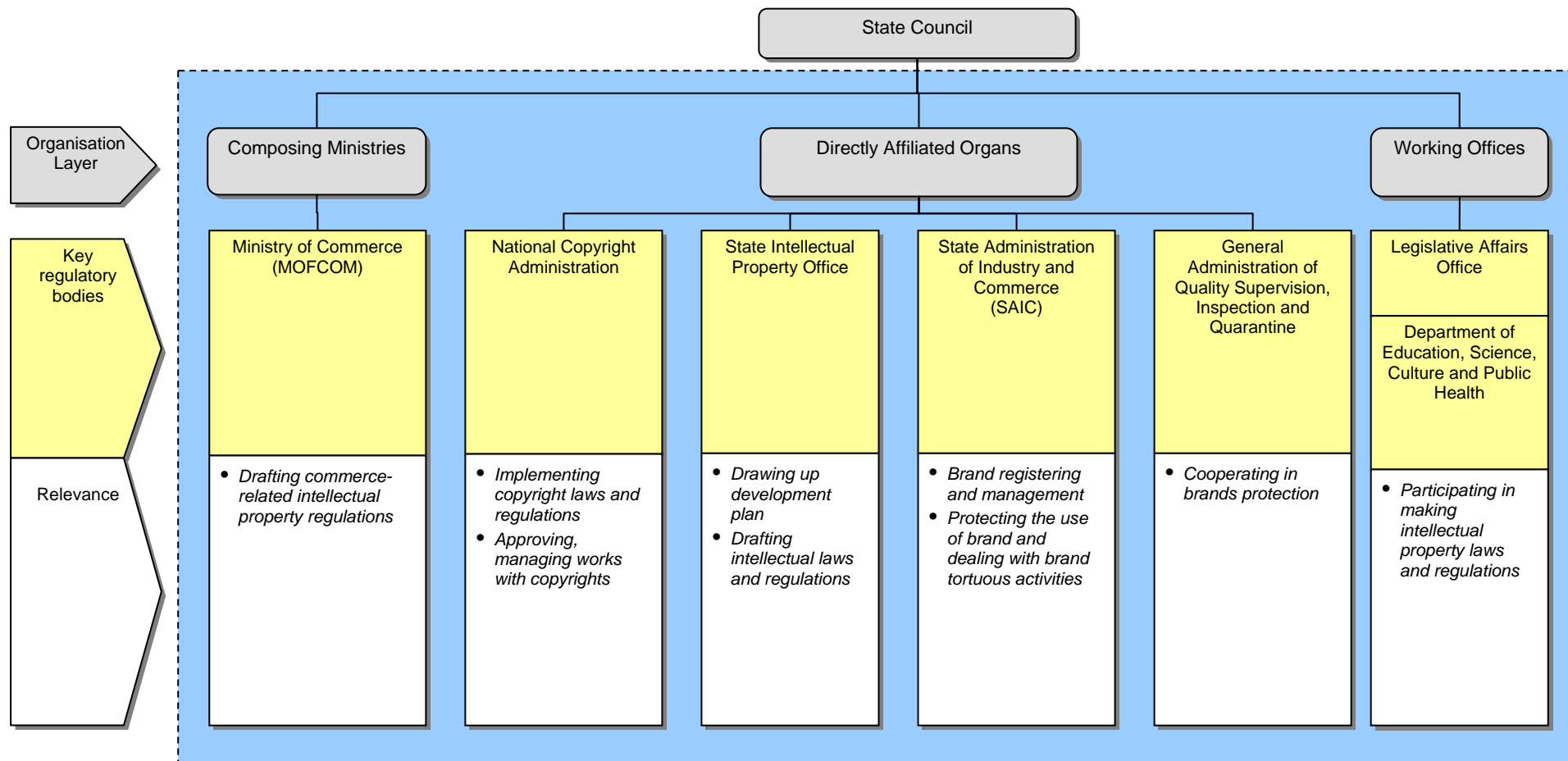
Other Country-Specific Legislation or Activities

- Unfair Competition: Law Against Unfair Competition, effective December 1993.
- Computer Programs: Regulations on Computer Software Protection, June 1991.
- Protection of Undisclosed Information: Drug Administration Law, effective July 1985 (regarding disclosure procedures

relating to marketing of pharmaceutical products).

- Layout Designs (Topographics) of Integrated Circuits: Regulation on the Protection of Layout Designs of Integrated Circuits, entered into force October 2001.
- Enforcement: Copyright Administrative Penalty, September 2003
- Plant Variety Protection: Regulation on the Protection of New Plant Varieties, March 1997
- Miscellaneous:
 - o International Copyright Treaties Implementing Rules.
 - o Patent Law of the People's Republic of China, (1984),
 - o Trademark Law of the People's Republic of China (1982),
 - o Copyright Law of the People's Republic of China (1990),
 - o Regulations on the Protection of Computer Software (2001),
 - o Regulations on the Protection of Layout Designs of Integrated Circuits (2001),
 - o Regulations on the Collective Management of Copyright (2004),
 - o Regulations on the Management of Audio-Video Products (2001),
 - o Regulations on the Protection of New Varieties of Plants (1997),
 - o Regulations on the Protection of Intellectual Property Rights by the Customs (2003),
 - o Regulations on the Protection of Special Signs (1996),
 - o Regulations on the Protection of Olympic Logos (2002).

ANNEX 3: INTELLECTUAL PROPERTY RIGHTS GOVERNMENT STRUCTURE



ENDNOTES

¹ China faces international pressure on IPR earlier than expected *in* Xinhua Online, site: http://news.xinhuanet.com/english/2006-06/20/content_4716913.htm, June 2006

² Other scientific accomplishments include early seismological detectors, matches, dry docks, sliding calipers, the double-action piston pump, cast iron, the iron plough, the multi-tube seed drill, the wheelbarrow, the suspension bridge, the parachute, natural gas as fuel, the relief map, the propeller, the crossbow, etc

³ Thinking for themselves *in* the Economist, 20 Oct 2005

⁴ Enforcement Lessons *in* Managing Intellectual Property: China IP Focus, 2006

⁵ If You Can Make It, They Can Fake It *in* Turnage et al. (2003)

⁶ China's Pirates *in* Businessweek, 5 Jun 2000

⁷ Turnage et al. (2003)

⁸ Position Paper of the EU Chamber of Commerce in China, 2005

⁹ Position Paper of the American Chamber of Commerce in China, 2006

¹⁰ Price Waterhouse Coopers, Redefining Intellectual Property Value: The Case of China, 2005

¹¹ "essential patent." Wikipedia. Wikipedia, 2005. Answers.com 26 Jun. 2006. <http://www.answers.com/topic/essential-patent>

¹² EUCCC 2005

¹³ *ibidem*

¹⁴ Determination of FDI *in* Van den Bulcke D. et al. (2003)

¹⁵ *ibidem*

¹⁶ China: Technology Transfer Policy *in* site <http://reference.allrefer.com>

¹⁷ Xie Wei, Steven White, From Imitation to Creation? The Critical Yet Uncertain Paradigm Shift for Chinese Firms *in* site <http://ged.insead.edu/fichiersti/inseadwp2004/2004-07.pdf>

¹⁸ AmCham 2006

¹⁹ Buckley, On Piracy: an Advocate for China's Progress, *in* International Herald Tribune, 1 May 2006

²⁰ The full survey results for each industry can be found in the Annexes related to each sector specific industry study (1-11). Agriculture and Financial Services were excluded from this part of the survey.

²¹ Please note that although Agriculture is listed here with a relatively low score it showed some of the largest variations in rating IP in the survey. For example, sellers of wines spirits and other beverages tended to score high in this area, while others such as meat products scored low. The low overall scores for IP are therefore in part due to the aggregated nature of this sector. The relatively low score for ICT equipment is due to this.

²² Economist, 20 Oct 2005

²³ Lesser, The Effects of TRIPS-mandated Intellectual Property Rights on Economic Activities in Developing Countries, Cornell University, 2001

²⁴ OECD, Intellectual Property Rights in China: Governance Challenges and Prospects *in* China in the Global Economy: Governance in China, 2005

²⁵ Economist, 20 Oct 2005