Enforcement of Intellectual Property Protection in China

Xin Zhang

I. Legal Authorities

A. Domestic Legislation

China functions under a civil law system. Intellectual property rights (IPR) are constitutionally protected. In accordance with the Constitution, the State Council has promulgated other departmental laws that protect intellectual property rights including the Patent Law, the Copyright Law, the Trademark Law, the Countering Unfair Competition Law, the Regulations on the Protection of new Varieties of Plants, etc. Relevant administrative departments also have enacted regulations and rules that protect intellectual property rights. (See Table 1: List of China’s Current Laws, Administrative Regulations and Department Rules Regarding Intellectual Property Rights). In addition, some of China’s civil laws, criminal laws, foreign trade laws and judicial interpretations issued by the Supreme People’s Court or the Supreme People’s Procuratorate also include special regulations about IPR protection.

B. International Treaties

China’s début on the international arena of the intellectual property (IP) protection dates back to 1980, when it joined the World Intellectual Property Organization (WIPO), and demonstrated its intention to meet international standards of IP protection. Since then, China has acceded one after the other to the major international conventions and


**Table 1: List of China’s Current Laws, Administrative Regulations and Department Rules Regarding Intellectual Property Rights**

<table>
<thead>
<tr>
<th>Law/Regulation Title</th>
<th>Effective Date</th>
<th>Amendment Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Copyright Law of the People’s Republic of China</td>
<td>June 1, 1991</td>
<td>October 27, 2001</td>
</tr>
<tr>
<td>Rules for Pesticide Administration</td>
<td>May 8, 1997</td>
<td>November 26, 2001</td>
</tr>
<tr>
<td>Regulations on the Protection of New Varieties of Plants</td>
<td>October 1, 1997</td>
<td></td>
</tr>
<tr>
<td>Regulations on the Protection of Layout-Design of Integrated Circuits</td>
<td>October 1, 2001</td>
<td></td>
</tr>
<tr>
<td>Regulations on Computer Software Protection</td>
<td>January 1, 2002</td>
<td></td>
</tr>
<tr>
<td>Management Regulations of Audio and Video Products</td>
<td>February 1, 2002</td>
<td></td>
</tr>
<tr>
<td>Regulations on Protection of the Olympic Symbols</td>
<td>April 1, 2002</td>
<td></td>
</tr>
<tr>
<td>Implementing Regulations on the Copyright Law</td>
<td>September 15, 2002</td>
<td></td>
</tr>
<tr>
<td>Regulations for the Implementation of Drug Administration Law</td>
<td>September 15, 2002</td>
<td></td>
</tr>
<tr>
<td>Regulations on the Customs Protection of Intellectual Property</td>
<td>March 1, 2004</td>
<td></td>
</tr>
<tr>
<td>Regulations on Administration of Veterinary Drugs</td>
<td>November 1, 2004</td>
<td></td>
</tr>
<tr>
<td>Interpretations by the Supreme People’s Court and the Supreme People’s Precedent on Several Issues of Criminal Cases of Infringing Intellectual Property</td>
<td>December 22, 2004</td>
<td></td>
</tr>
<tr>
<td>Regulations on the Copyright Collective Administration</td>
<td>March 1, 2005</td>
<td></td>
</tr>
<tr>
<td>Implementation Rules for the Regulations Regarding the Protection of New Varieties of Plants(Agriculture Part)</td>
<td>June 15, 1999</td>
<td></td>
</tr>
<tr>
<td>Implementation Rules for the Regulations Regarding the Protection of New Varieties of Plants(Forestry Part)</td>
<td>August 10, 1999</td>
<td></td>
</tr>
<tr>
<td>Implementation Rules for the Regulations on Integrated Circuits Design Protection</td>
<td>October 1, 2001</td>
<td></td>
</tr>
<tr>
<td>Management Measures of Wholesale, Retail, and Rent of Audiovisual Production</td>
<td>April 10, 2002</td>
<td></td>
</tr>
<tr>
<td>Management Measures of Audiovisual Production Import</td>
<td>June 1, 2002</td>
<td></td>
</tr>
<tr>
<td>Provisions for Identification and Protection of Well-Known Trademarks</td>
<td>June 1, 2003</td>
<td></td>
</tr>
<tr>
<td>Procedures for the Registration and Administration of Collective Marks and Certification Marks</td>
<td>June 1, 2003</td>
<td></td>
</tr>
<tr>
<td>Measures on Compulsory Licensing of Patents</td>
<td>July 15, 2003</td>
<td></td>
</tr>
<tr>
<td>Measures for the Enforcement of Copyright Administrative Penalty</td>
<td>September 1, 2003</td>
<td></td>
</tr>
<tr>
<td>Measures for the Implementation of Regulations Governing Customs Protection of Intellectual Property</td>
<td>July 1, 2004</td>
<td></td>
</tr>
</tbody>
</table>
II. Current Situation of China’s Enforcement on Intellectual Property Rights Protection

As gradual improvements are made in the legal system on IPR protection, China has shifted its focus from legislation to law enforcement. A unique two-way parallel IPR Protection mode has been established, namely, administrative and judicial protection. If an infringed party wishes to take action, in compliance with the laws, regulations or rules, the infringed party can take their case through the courts or through an administrative agency. In practice, administrative resources have proved to be more effective because of the relative expertise of officials and their ability to conduct raid actions with little warning. Court proceedings are time-consuming and generally offer very little in the way of compensation.

A. Administrative Protection

China has developed a network of agencies and offices at both national and local levels to administer and enforce protections for intellectual property rights.

1. Patent Protection

The State Intellectual Property Office (SIPO), a governmental ministry under the State Council, is responsible for patent work and comprehensive coordination of the foreign-related affairs in the field of intellectual property. In addition, Intellectual

---

INFORMATION OFFICE OF CHINA’S STATE COUNCIL, WHITE PAPER ON NEW PROGRESS IN CHINA’S PROTECTION OF INTELLECTUAL PROPERTY RIGHTS (2005).

Id.


Id.

MINISTRY OF COMMERCE, Supra note 3.
Property Offices (IPOs) are established at the local levels in China. From April 1985 to the end of 2004, SIPO handled 2,284,925 patent applications, among which, about 18% were submitted by foreign applicants. SIPO has granted 1,255,499 patents by the end of 2004, among which, about 13% were submitted by foreign applicants.

In recent years, patent administration departments at all levels have strengthened administrative enforcement and have launched crackdowns on infringements of patent rights, in particular, the patent rights of food and pharmaceuticals. In August 2004, SIPO issued the “Work program in Strengthening Enforcement of the Laws on Intellectual Property Rights and Launching a Special Law Enforcement Campaign.” By the end of the year, local offices had checked 10,251 industrial venues and examined 2,081,537 commodity items. Among the 12,058 patent infringement cases handled by the local agents by the end of 2004, more than 86% have been resolved.

2. Trademark Protection

For trademark and service mark matters, two offices under the State Administration for Industry and Commerce (SAIC) administer registrations and disputes: the Trademark Office and the Trademark Review and the Adjudication Board. Passing off of registered trademarks, which is considered as an act of unfair competition, is dealt with by the Fair Trade Bureau of the SAIC. Administrations for Industry and Commerce (AICs) are established at the local levels in China and mark-holders can request AIC to conduct raid

---

INFORMATION OFFICE OF CHINA’S STATE COUNCIL, Supra note 5.

Id.

Id.

Id.

Id.
actions, after being presented proof of trademark ownership and the infringing activities. The power of the AICs are clearly specified in the PRC IP laws, giving the authorities the right to enter premises, seize accounts and records, seal and destroy goods and impose fines. The AICs are also empowered to award compensation after considering the severity of infringement.

In handling cases involving objections and disputes over ownership of trademarks as well as trademark management, SAIC has certified and offered protection to 153 well-known trademarks in 2004, 28 of which were brand-names of foreign enterprises. In 2004, in accordance with the unified plan and arrangement of the State Council on IPR protection and that of the SAIC on the protection of the right to exclusive use of registered trademarks, administrative organs of industry and commerce at all levels across China launched three special campaigns that focus on the protection of well-known and foreign-related trademarks, and on dealing with infringements of trademarks of food and medicine. The statistics show that in 2004, administrative organs across China investigated and dealt with 51,851 law-violation cases involving trademarks, among which, 5,494 concerned foreign trade marks, a 1.6 fold increase over that in 2003.

3. Copyrights Protection


YU, Supra note 15.

Id.

INFORMATION OFFICE OF CHINA’S STATE COUNCIL, Supra note 5.

Id.
For copyright matters, the State Copyright Bureau (SCB) is in charge of the nationwide administration of copyrights, including copyrights belonging to foreigners. Like the IPOs and AICs, there are also copyrights offices at local levels in China. The PRC Copyright Law requires foreign complainants to file their complaints with the SCB at the central level in Beijing via an authorized agent, regardless of where the infringement has taken place.

Because of the severity of the copyrights violations, China’s copyright administrative management departments have maintained the pressure on copyright infringement and piracy, meanwhile increased cooperation with other government departments, such as the National Office of Rectification and Standardization of Market Economic Order (NORSMEO) under the Ministry of Commerce, the customs authorities, the Ministry of Public Security, the Procuratorate, the Press and Publications Bureau and the Ministry of Culture. In 2004, they accepted 9,691 cases of infringement, resolved 9,497 of them and imposed administrative sanctions on the infringers in 7,986 cases. In the same year, 555,368 occasions of inspecting on audio-video business were conducted around the country. The SCB confiscated 154 million illegal copies of audio-video works. SCB destroyed another 63.35 million illegal copies of such products during the first quarter of 2005.

4. Protection on New Plant Varieties


Id.

Id.

Id.

Id.
The Office of Protection of New Varieties of Plants was created at the State Forestry Administration, and the Reexamination Board for New Varieties of Plants has been set up at the Ministry of Agriculture.

By the end of 2004, the Ministry of Agriculture had handled 2,046 applications for plant variety rights. The State Forestry had handled another 205 applications, among which 64 were from foreign countries.

With regard to the protection of new varieties of plants, enforcement started experimentally in 2001 in 12 selected provinces and municipalities, and gradually spread across the country. By the end of 2004, seventeen provinces, autonomous regions, and municipalities had handled 863 cases of infringement of new agricultural plant variety rights and of faking new agricultural plant varieties.

B. Judicial Protection

The highest Court in China is the Supreme People’s Court. The Higher Level People’s Court - of which there are 32, one for each province, autonomous region (e.g. Tibet), and municipalities directly under the central government (e.g. Shanghai) – is the next level below the Supreme People’s Court. Below theses are Intermediate Level People’s Courts, numbering 402 at the end of 2001, which sit below the provincial level in prefectures, provincially administered cities, and within centrally-administered cities. At the lowest level are the Primary (Basic Level) People’s Courts, more than 3000 in number by the end of 2001. These primary courts are set up in prefectures, cities at prefecture level, autonomous prefectures, banners, city districts and in places as needed.

---

Information Office of China’s State Council, Supra note 5.

Id.
These courts may set up a number of people’s tribunals in light of local conditions, which number 10,392 currently.

The most common remedies for a party seeking judicial protection for IPR in a civil court will be temporary or permanent injunctions and monetary damages. In other cases seeking judicial protection for the IPR, the party pleads a criminal infringement of the IPR. Section 7 of the Criminal Law of the People Republic of China defines the crime of IP infringement. Section 7, as amended, became effective in October 1997. This section includes eight articles, from Article 213 to 220.

Article 213 and 215 regulate trademark violations. According to these articles, one shall be sentenced to a fixed term of imprisonment or detention, and/or a fine when “the circumstances are serious” or “exceptionally serious.”

Article 214 provides that knowingly selling or passing off products in large monetary amount should result in a fixed term imprisonment and a fine.

Article 216 says that passing off other's patent product, when the circumstance is serious, shall be sentenced to a fixed term of imprisonment and/or a fine.

Article 217 and 218 regulate copyright violations. Violators shall be sentenced to fixed term imprisonment and/or be sentenced to a fine where “the amount of illegal income is relatively large.”

Article 219 protects trade secrets when the infringement meets a level of “serious losses” or “extremely serious consequences” to the proprietor.


WU, Supra note 7.
Article 220 provides that if a work unit commits any of the offenses of infringing intellectual property, the work unit shall be sentenced to a fine and the main persons directly responsible for the work unit and other directly responsible persons shall be punished in accordance with the provision of the Criminal Law.

The Supreme People's Court has paid attention to IP protection by establishing an IP chamber in October 1996. Moreover, thirty-one Higher People’s Courts have established special IP trial chambers. Intermediate People's Courts in a number of cities have taken similar action. In certain Primary People’s Courts, within high-tech economic development zones, specialized IP trial chambers exist, focusing on the IP cases and disputes about technology transfer contracts.

In order to achieve a higher level of judicial protection for intellectual property rights, the Intermediate People's Courts have become the first instance court for civil IP cases in areas without a specialized IP trail chamber. In 2004, courts around the country decided 8332 civil IPR-related cases of the first instance and 385 criminal cases of the first instance.

To correctly apply laws and make law enforcement standards coherent and based on its experience in handling IPR-related cases, the Supreme People’s Court has formulated a series of IPR-related law application principles and relevant judicial interpretations. The most recent is the “Interpretation of Several Issues Regarding Specific Law Application
in Handling Criminal Cases of Intellectual Property Rights Infringement,” jointly promulgated by the Supreme People’s Court and the Supreme People’s Procuratorate in December 2004. This publication properly reduced the condemnation standards for the crimes of IPR infringement (strictly in accordance with the provisions of the Criminal Law and in light of China’s actual conditions and judicial reality), increased the applicability of the relevant provisions of the Criminal Law, and provided a concrete applicable legal basis for handling criminal cases of IPR infringement.

III. Existing Problems in the Enforcement

The past two decades have witnessed tremendous efforts put both by the Chinese government to protect IPR. China has achieved a noticeable improvement in IPR protection. On the other hand, the same statistics that have proven the improvement also indicate that the IPR infringement is a very serious problem in China. Scholars and Government officials have noted various factors that contribute to the problem.

A. Economic considerations and Public awareness

There is historical precedent for developing countries to “borrow” from other countries’ technologies, and there are several concerns rendering them reluctant to give intellectual property (IP) to its full protection. One concern is that the expensive technology transfer fees to the technology-exporting countries will ultimately result in a


INFORMATION OFFICE OF CHINA’S STATE COUNCIL, Supra note 5.

lack of funds to develop its own domestic technological infrastructure. Rigid IP protection also has a tendency to create monopolies in developing economies where the market is commonly less competitive, thus undermining the effective development of domestic innovations. More importantly, the cost of implementing protective IP regimes is extremely burdensome on less developed countries as it requires extensive legislation, institutional development, training and enforcement. As a result, many people in the developing countries, including Chinese, find it more desirable to copy certain types of technology rather than impose a strict regime of IP protection.

Therefore, it is important for the Chinese government to help its people to understand that strong IP protections will encourage economic development by 1) promoting domestic innovation by protecting the development of nascent technology; (2) preventing brain drain by ensuring innovators are rewarded for their effort; and (3) fostering technology transfers, such as foreign direct investments, licensing, and imports. In addition, it is important for the Chinese people to be aware that piracy may be desirable in the short term but it does not support absorption of technology. The Chinese people must realize that piracy potentially results in long-term losses through decreased transfers of advanced technology and the inability of the technology transfer recipient (the Chinese) to innovate on technology.

B. Overlapped Agencies and Fragmentary Legislations

Id.

Id.

Id. at 169.

SCHIAPPACASSE, Supra, n.1 at 167.

Id.
During the past 20 years, China has already enacted a large number of Laws, Regulations and Rules. However, according to ZHANG Chu, a law professor at the China University of Politics and Law, these domestic laws are complicated and confusing. Some laws conflict directly, in part, with others. Therefore, Professor Zhang suggests a uniform and concise code to provide the public with necessary information about the legal rights and remedies.

Another explanation for the continuing widespread IPR infringement in China is its lack of a central enforcement agency. Diluted power and overlapping jurisdiction between agencies impedes effective IPR enforcement. LV Wei, Deputy of the Technology and Economic Department of the State Council Research and Development Center, pointed out that the functions of the different law enforcement agencies are currently overlapping, wasting precious public resources. Meanwhile, she also pointed out that the categorical division of the authorities of each agency inevitably results in confusion about the practical law enforcement process.

Fortunately, the Chinese Government has realized some of the problems. In order to enhance the coordination of the law enforcement agencies and the cooperation between the administrative and judicial branches of the government on IP matters, in May 2004, the State Council established the National Workgroup Office for Intellectual Property Protection. The Workgroup consists of leaders from the Ministry of Public Security, the Ministry of Information Industry, the Ministry of Commerce, the General Administration


FAN, Supra at 42.
of Customs, SAIC, the General Administration of Quality and Technical Supervision, NCA, the State Food and Drug Administration, SIPO, the Office of Legislative Affairs of the State Council, the Supreme People’s Court, the Supreme People’s Procuratorate. Vice-Premier WU Yi heads the Workgroup. However, a Workgroup is far from enough to protect both foreign and the domestic investors. China still has a long way to go in enforcement and faces heavy tasks in IPR protection.