

## A Synopsis of Intellectual Property Protection in China

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**I** first became involved in Chinese intellectual property rights more than ten years ago, when I visited China to discuss the protection of computer software with the Chinese Ministry of Machinery and Electrical Equipment, and it has been a most interesting period for me since then as a lawyer practicing in international intellectual property law. In 1980, China submitted its application for admission to the World Intellectual Property Organization (WIPO), and became a member state as of June 3, 1980. Thereafter, China adopted laws to protect trademarks in 1982, patents in 1985, and then copyrights in 1986 through 1990. On the international front, China became a party to the Madrid Agreement for the International Registration of Trademarks in 1989 (which the United States is still considering but to which it has not yet become a party). China became a party to the Berne Convention for the Protection of Literary and Artistic Works, the world's most widely accepted copyright convention, in 1992. It became a member of the WIPO's Patent Cooperation Treaty in 1994. All of this occurred in an incredibly short period of time, which, according to WIPO, is totally unparalleled in the history of intellectual property protection.

Unfortunately, adopting laws and becoming a party to treaties has no meaning unless the people of China willingly comply with such strictures and the proper mechanisms are put in place to enforce them. Indeed, not long after China took the steps previously described, the U.S., primarily at the urging of the audiovisual and computer industries (which have lost billions of dollars in revenues as a result of China's failure to enforce its own laws), decided to take action by having the U.S. Trade Representative initiate the famous Section 301 proceeding. This resulted in the 1992 Memorandum of Understanding between the two countries. However, disappointed with China's efforts to comply with this Memorandum of Understanding, the U.S. Trade Representative initiated a second Section 301 proceeding, and issued an order imposing punitive tariffs on China.

On February 26, 1995, prior to the implementation of the Section 301 order, the U.S. and China signed a Letter of Understanding between the countries concerning protection of intellectual property rights. Having been involved with Section 301 proceedings since they were first employed against Brazil in the mid 1980's, and in light of my subsequent experience as a U.S. Trade Advisor, I am glad the Section 301 order against China was never implemented, because it would have forced China to retaliate, and we would have had a trade war of unprecedented scale, not to mention that we would have returned Sino-U.S. trade relations to the level of the Cold War era.

As part of the 1992 Memorandum of Understanding between the U.S. and China, China agreed to and has accomplished the following:

1. It established specialized intellectual property courts to hear intellectual property cases. Many people in this country would like to see such courts established here as well, but such courts have only succeeded in the U.S. in the patent area, and only at the appellate level at that.
2. Its Supreme Court issued a circular instructing lower courts to address intellectual property cases expeditiously.

Under the 1995 Letter of Understanding, the Chinese State Council prepared an Intellectual Property Enforcement Action Plan for immediate implementation. The Action Plan is a detailed, 22-page plan which reached impressive milestones and even adopted some measures unprecedented in the U.S. The most notable items are described below. For audiovisual products and computer software, China will specifically:

1. Require a person or company to obtain a business permit and license before operating any business related to audiovisual products or computer software. The permit will allow the permit-holder to reproduce or distribute only specific titles. The permit and license can be revoked for repeat offenses in the area of intellectual property rights.
2. Begin comprehensive inspections and investigations of establishments which publish, reproduce, distribute or operate audiovisual products or computer software.
3. Require retailers to maintain an accurate inventory of their audiovisual products and computer software and to update the inventory regularly.
4. Require applicants for permits and licenses to pass examinations on intellectual property rights.

By requiring business permits and licenses for the operation of businesses related to audiovisual products and computer software, China has made these businesses subject to a level of governmental regulation which the U.S. reserves only for alcohol, drugs and firearms. For a country as huge as China, implementing and enforcing such regulations is a formidable task.

One additional requirement for computer software businesses under the Action Plan which may deserve mention is that all such public, private, and not-for-profit entities must establish a budget to purchase legitimate software. Given the level of illegal software use in China, it will be a very costly proposal for governmental entities to comply with this requirement overnight.

In the areas of customs law and practice, the Action Plan brings Chinese law into line with U.S. law, taking such measures as establishing a central recordation system. Indeed, the new Chinese customs power to destroy any

goods seized is only matched at this time by U.S. law.

Under the Action Plan, China also agreed to establish a Copyright Verification System. Under this system, all manufacturers of CDs and CD-ROMs will be issued a unique identifier which must be imprinted on all manufactured copies. All businesses with contracts involving foreign audiovisual products or computer software in the CD-ROM format must register their contracts with the proper governmental authorities. China will not issue permits to reproduce or distribute such products without first obtaining verification of the authenticity of the contracts for them with the relevant trade associations. This in effect transforms trade associations into quasi-governmental agencies, which calls into question both the appropriateness of compelling copyright owners to join an association with which they may not want to associate, as well as the likely effectiveness of the trade associations themselves.

To enforce these myriad measures unprecedented even in the U.S., the Chinese State Council has established a Working Conference on Intellectual Property Rights (WCIPR) to centrally organize and coordinate protection of all intellectual property rights throughout the country. The WCIPR has taken the further step of creating an office within the State Science & Technology Commission to administer WCIPR affairs. In addition, all governmental authorities with power over intellectual property are now required to participate in enforcement task forces.

I am very optimistic that China will now enforce its intellectual property laws. I only wish that this did not have to happen under pressure from the U.S. Unless China begins to sincerely protect intellectual property law, it will not be able to create the intellectual property that is indispensable to the advance of any country's industrial development.

Without the proper intellectual property protection, the talented software programmers and artists will not have the incentive to create, and China will always be relegated to copying other nations' works of authorship. If China does not become serious about such protection, its great authors, artists, inventors, and software engineers will leave China for countries which do protect and value intellectual property.

China now has a system to protect intellectual property which is probably unmatched by any nation, including the U.S. It is time to register your patent, trademark, copyright and patent with the proper Chinese authorities. It is also time to begin enforcing the rights that you might have given up in the past. There will be disappointments along the way, I am sure, but nothing happens overnight. It took the U.S. a lot longer to reach its current level of maturity. In fact, we did not become a party to the Berne Convention until 1993, and we have yet to become a party to the Madrid Agreement. :)