



OFFICE FOR HARMONIZATION IN THE INTERNAL MARKET  
(TRADE MARKS AND DESIGNS)

Observatory

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**Country Guide China 2013**

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## Quality Criteria (to be used by reviewers)

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## 1. Introduction

This guide is written to provide basic assistance to intellectual property (IP) rights holders and their advisers, on the IP protection and enforcement system in China.

The guide is intended to provide simple guidelines on how rights holders can protect their IP assets and what to do if their rights are infringed.

## 2. Background

The Chinese economy expanded rapidly in recent years and it is well placed to enjoy a fourth decade of rapid catch-up and improving living standards. China is the “C” in BRICs. It has become an economic powerhouse. In a longer run perspective China has now overtaken the EURO area and is on course to become the world’s largest economy around 2016<sup>1</sup>.

From 2001, when China joined the World Trade Organisation (WTO) it has made a great effort in order to comply with its accession commitments, such as liberalising trade sectors, adapting laws and lowering tariffs.

China is a signatory to:

- The Paris Convention – which means that someone from another signatory state can apply for a patent or trade mark and expect the same rights as a national rights holder

[http://www.wipo.int/treaties/en/ip/paris/trtdocs\\_wo020.html](http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html)

- The Patent Cooperation Treaty - which allows someone to get a set of patent applications, in different countries, through a single application

<http://www.wipo.int/pct/en/texts/articles/atoc.htm>

- The Madrid Protocol – which allows for international registration of trade marks

<http://www.wipo.int/madrid/en/>

- UPOV Convention – the International Union for the Protection of New Varieties of Plants

[http://upov.int/upovlex/en/upov\\_convention.html](http://upov.int/upovlex/en/upov_convention.html)

- The Berne Convention – which ensures that parties to the convention, give equal recognition to copyright holders from other convention member states and other acts related to copyrights:

[http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html)

Further in the copyright field China is a Member of the following treaties:

- WIPO Copyright Treaty:  
[http://www.wipo.int/treaties/en/ip/wct/trtdocs\\_wo033.html](http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html)
- WIPO Performances and Phonograms Treaty, with the exception of the provisions of Article 15(1):  
[http://www.wipo.int/treaties/en/ip/wppt/trtdocs\\_wo034.html](http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html)

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Organization for Economic Co-Operation and Development; Economic Surveys China, March 2013:

<http://www.oecd.org/economy/china-2013.htm>

- Beijing Treaty on Audiovisual Performances – signed, not yet in force:  
[http://www.wipo.int/treaties/en/text.jsp?file\\_id=295837](http://www.wipo.int/treaties/en/text.jsp?file_id=295837)

Finally, China has been a member of the World Trade Organisation (WTO) since 2001 and is a signatory to the TRIPS Agreement.

<http://www.wto.org/>

[http://www.wto.org/english/tratop\\_e/trips\\_e/trips\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/trips_e.htm)

### 3. China's Legal Framework

As from WTO accession China has begun a comprehensive revision of its laws and regulations in relation to IPR. The IPR revision process continues and currently a number of regulations have been revised, including: Copyright Law, Trade Mark Law and Patent Law. In summary, the most important legislation available in English is outlined below<sup>2</sup>:

- Trademarks Law:  
[http://www.saic.gov.cn/sbjEnglish/flfg1\\_1/flfg/201012/t20101227\\_103092.html](http://www.saic.gov.cn/sbjEnglish/flfg1_1/flfg/201012/t20101227_103092.html) (under revision).  
The new Trademark Law (2013 Amendment) will be effective from May 1<sup>st</sup>, 2014 and the Implementing Regulations of the Trademark Law are currently being revised.
- Copyright Law  
[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=186569](http://www.wipo.int/wipolex/en/text.jsp?file_id=186569) (currently under revision)
- Digital piracy regulation comprises of the following acts:
  - Tort Law of the People's Republic of China of 2010:  
<http://www.wipo.int/wipolex/en/details.jsp?id=6596>
  - Regulation on the Protection of the Right to Network Dissemination of Information of 2006: <http://www.wipo.int/wipolex/en/details.jsp?id=6471>
  -
- China Internet Domain Names Regulation:  
[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=182419](http://www.wipo.int/wipolex/en/text.jsp?file_id=182419)
- Patent Law (including: invention patents, utility models and design patents):  
[http://english.sipo.gov.cn/laws/lawsregulations/201101/t20110119\\_566244.html](http://english.sipo.gov.cn/laws/lawsregulations/201101/t20110119_566244.html) (under revision)
- Anti-Unfair competition Law:  
[http://english.sipo.gov.cn/laws/relatedlaws/200804/t20080416\\_380359.html](http://english.sipo.gov.cn/laws/relatedlaws/200804/t20080416_380359.html)
- Geographical Indication Law:  
Provisions on the Protection of Geographical Indication Products:  
[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=181517](http://www.wipo.int/wipolex/en/text.jsp?file_id=181517)  
Measures for the Administration of Geographical Indications of Agricultural Products:  
[http://www.wipo.int/wipolex/en/text.jsp?file\\_id=182476](http://www.wipo.int/wipolex/en/text.jsp?file_id=182476)
- Plant Varieties Protection Law:  
<http://www.upov.org/export/sites/upov/en/publications/npvlaws/china/china.pdf>
- Civil procedure Law: <http://www.china.org.cn/english/government/207343.htm>
- Contract Law: [http://english.sipo.gov.cn/laws/relatedlaws/200804/t20080416\\_380360.html](http://english.sipo.gov.cn/laws/relatedlaws/200804/t20080416_380360.html)

<sup>2</sup> For English speaking users the most comprehensive repository on WIPO website:

<http://www.wipo.int/wipolex/en/profile.jsp?code=CN#a1>

- Customs Law: <http://english.customs.gov.cn/publish/portal191/tab47812/info391083.htm>
- Consumer Protection Act: [http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/14/content\\_21917139.htm](http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/14/content_21917139.htm)

#### 4. How to protect your IPR through registration (patent, trademark, designs, others)

IP rights registration is delegated to different specialised administrations as presented below together with the links to the practical and comprehensive guides on protection strategies:

Type of right	Authority responsible	Further information
Invention patent	State Intellectual Property Office (SIPO): <a href="http://english.sipo.gov.cn/laws/">http://english.sipo.gov.cn/laws/</a>	China IPR SME Helpdesk guide: <a href="http://www.china-iprhelpdesk.eu/docs/publications/China_IPR_Guide-Guide_to_Patent_Protection_in_China_EN-2013.pdf">http://www.china-iprhelpdesk.eu/docs/publications/China_IPR_Guide-Guide_to_Patent_Protection_in_China_EN-2013.pdf</a>
Utility models		
Design patent		
Semiconductor		
Trade mark	China Trade Mark Office (CTMO): <a href="http://www.saic.gov.cn/sbjEnglish/">http://www.saic.gov.cn/sbjEnglish/</a>	China IPR SME Helpdesk guide: <a href="http://www.china-iprhelpdesk.eu/docs/publications/China_IPR_Guide-Guide_to_Trade_Mark_Protection_in_China_EN-2013.pdf">http://www.china-iprhelpdesk.eu/docs/publications/China_IPR_Guide-Guide_to_Trade_Mark_Protection_in_China_EN-2013.pdf</a>
Copyright	National Copyright Administration (NCAC): <a href="http://www.ncac.gov.cn/">http://www.ncac.gov.cn/</a>	China IPR SME Helpdesk guide: <a href="http://www.china-iprhelpdesk.eu/docs/publications/EN_Copyright_guide_Aug_2010.pdf">http://www.china-iprhelpdesk.eu/docs/publications/EN_Copyright_guide_Aug_2010.pdf</a>
Domain name	China Internet Network Information Center (CNNIC): <a href="http://www1.cnnic.cn/index.htm">http://www1.cnnic.cn/index.htm</a>	China IPR SME Helpdesk guide: <a href="http://www.china-iprhelpdesk.eu/docs/publications/EN_IPR_Guide-Protection_of_Online_IPR_in_China_June-2012.pdf">http://www.china-iprhelpdesk.eu/docs/publications/EN_IPR_Guide-Protection_of_Online_IPR_in_China_June-2012.pdf</a>
Geographical indication (GI)	Ministry of Agriculture (MOA): <a href="http://english.agri.gov.cn/">http://english.agri.gov.cn/</a>  General Administration of Quality Supervision, Inspection and Quarantine of PRC (AQSIQ): <a href="http://english.aqsiq.gov.cn/">http://english.aqsiq.gov.cn/</a>  CTMO (for protection under collective and certification marks)	IPR2: Q&A Manual: China Legislation on Geographical Indications Registration in China: <a href="http://www.ipr2.org/storage/Q&amp;A_Manual_Chinese_legislation_on_GIs1012.pdf">http://www.ipr2.org/storage/Q&amp;A_Manual_Chinese_legislation_on_GIs1012.pdf</a>  It is necessary to mention that up to date the protection of geographical indication (GI) has not been fully regulated and in particular the specific measures on protection of the foreign GIs have not yet been adopted. AQSIQ however has gradually recognized certain foreign GIs, and in particular 10 European GIs have been now protected in China as a result of the European Commission and AQSIQ "10 plus 10" project. For more information please check: <a href="http://europa.eu/rapid/press-release_IP-12-1297_en.htm">http://europa.eu/rapid/press-release_IP-12-1297_en.htm</a> In practice however the collective or certification trademarks protection offered by the CTMO to protect GI is available to use by the foreign companies.
Plant variety (PVR)	Ministry of Agriculture (MOA):	The Information Network of China Plant Varieties Protection: <a href="http://www.cnvpv.com/english/">http://www.cnvpv.com/english/</a>

	<a href="http://english.agri.gov.cn/">http://english.agri.gov.cn/</a> State Forestry Administration (SFA): <a href="http://english.forestry.gov.cn/web/index.do">http://english.forestry.gov.cn/web/index.do</a>	
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The above mentioned legislation allows foreign holders to register and protect their intellectual property in China in the form of patent rights (invention patent; utility model; design patent) trade marks; copyrights; domain names; and plant varieties and in limited scope for geographical indications

The indicated IP rights can be filed directly with the relevant office or sent by post. On-line filing has been developed and is fully operational for trade marks, domain names and copyrights. Applications must be filed in Chinese and the legal representation is required for all individuals and companies without origin or habitual place of residence in China.

The access to the databases of the registered IP in China is publicly available. SIPO allows for full search in the databases in Chinese as well as for a basic search (basic information and abstract) in English for patents and utility models. At present there is no English search tool available for designs. Nevertheless, the Intellectual Property Publishing House<sup>3</sup>, (the subordinate to the SIPO) offers search reports including patents, utility models and designs in English against payment of a fee. CTMO database provides for free of charge online search tool available in English for basic search only and in Chinese for more advanced searches. For copyright recordation search, a simple online system at Copyright Protection Center of China (CPCC) under NCA has been provided, however, only in Chinese. CNNIC provides for a search tool for the registered domains in English. The databases of the GIs and PVRs are available only in Chinese.

More information on China IPR can be found following the links:

- IPR2: <http://www.ipr2.org/>
- China IPR SME Helpdesk: <http://www.china-iprhelpdesk.eu/es>
- UK-China IP Webpage: <https://www.gov.uk/government/case-studies/uk-china-cooperation-on-intellectual-property>
- China-Britain Business Council (CBBC) IP Webinars: [http://www.cbcc.org/what\\_we\\_do/events/webinars#ipseries](http://www.cbcc.org/what_we_do/events/webinars#ipseries)

## 5. Enforcement

### Background

The Chinese IPR enforcement regime relies on a three-strand<sup>4</sup> approach comprising civil, criminal and administrative protection. IP owners should decide on one right strand or combination thereof on the basis on the determination of the following factors:

- Who is the infringer
- Scope and scale of infringement
- Type of infringed goods/services

It is worth mention at this stage that enforcement will be more difficult in case of intellectual property which does not require registration in China (such as unregistered copyright). IP enforcement should be currently understood by foreign right holders as an on-going strategy<sup>5</sup> rather than a single action.

<sup>3</sup> <http://www.ipph.cn/en/AboutUs/>

<sup>4</sup> UKIPO and UKTI Intellectual Property Rights Primer in China: <http://www.ipo.gov.uk/ipr-guide-china.pdf>

<sup>5</sup> China IPR SME Helpdesk, Understanding IP: <http://www.china-iprhelpdesk.eu/en/getting-started/understanding-ip>

## 5.1 Civil enforcement

Over the years Chinese courts have become increasingly involved in disputes over IP rights. The 2011 statistics<sup>6</sup> show that there have been 57.068 closed IP litigations in China, among which only 1.296 actions involved foreign party.

The plaintiff in the civil action will be obliged to present the evidence upon filing the complaint. This is because the “discovery proceedings” are not available and IPR owners need to verify the identity of infringers and secure the evidence (webpage/purchase/phone notarizations, trace the source) on their own bearing the costs involved and only afterwards civil action before the competent court can be initiated.

In the course of litigation the foreign right holders have also noted the following difficulties. Preliminary injunctions in practice are difficult to obtain. The hearing is very much formalized and lengthy due to burdensome and costly legalization and notarization requirements. Calculation of damages is hard to get accepted by the court – it is either the right owner’s loss due to the infringement, or infringer’s illicit gain– or statutory damages. Furthermore the predictability of the outcome of the litigation is rather low, what in combination with inadequate damages awarded, makes the civil enforcement still not popular among foreign IP holders.

### 5.1.2 On-line infringements

The growing popularity of the internet and the e-commerce in China gives IPR infringers opportunity to channel counterfeits and copyright infringing contents and to reach significantly more recipients comparing to traditional channels in a relatively safe way. Copycat websites are also a common practice of today’s IPR infringers in China.

Fighting on-line IPR infringements for the legitimate right holders is challenging due to several problems described below.

In case of on-line sale, although most of the popular e-commerce sites in China provide for the automatic “take down notice”, these however have been adopted by the ISPs on their discretionary conditions. It is therefore difficult for the legitimate right holder to effectively monitor the sale of counterfeits on e-commerce sites and to successfully remove the infringing listings. For example, it is up to the ISP to determine the similarity of the trade marks.

Additionally, once the legitimate right holder finds IPR infringing content on internet site or the whole copycat website, he will still not be able to determine the identity of the infringer. This is because on-line infringers tend to use “nick names” rather than full names and not to disclose any precise contact details. The ISPs in turn, who possess the information in this respect, are not obliged to disclose the identity and warehouse of the infringer, resulting any enforcement action to be substantially baulked.

For more information on how to proceed with take down notice please check the guide: [http://www.china-iprhelpdesk.eu/docs/publications/China\\_IPR\\_Guide\\_on\\_How\\_to\\_Remove\\_Counterfeit\\_Goods\\_from\\_E-Commerce\\_Sites\\_in\\_China.pdf](http://www.china-iprhelpdesk.eu/docs/publications/China_IPR_Guide_on_How_to_Remove_Counterfeit_Goods_from_E-Commerce_Sites_in_China.pdf)

## 5.2 Criminal enforcement

Criminal enforcement is in the jurisdiction of the Ministry of Public Security (MPS), People’s Procurators and relevant courts.

Different infringement thresholds have been established for IP rights, however the criminal strand is in principal reserved for large-scale and repeating infringements.

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<sup>6</sup> The China IPR Portal: <http://chinaipr.com/2012/10/18/foreign-ip-litigation-in-china-how-important-is-it/>  
Country Guide China.docx



The criminal route is available only for the IPR infringement relating to copycat cases. In particular, in the trade mark infringement, the criminal enforcement is only applied to the identical trademarks over identical goods instead of similar ones which are allowed under the administrative/judicial jurisdiction.

### 5.3 Administrative enforcement

A number of government bodies have jurisdiction over IP infringements, these include among others:

- local IP office (SIPO) for patent infringements
- Administration for Industry and Commerce (AIC) for trade mark, trade secrets and other unfair competition and trade infringements,
- Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) for IP infringements with product quality issues,
- National Copyright Administration (or the Copyright Bureau) (NCA) for copyright infringements,

The proceedings before the local government authorities are initiated upon complaint and prove effective in straightforward cases. These are also relatively fast and cost effective. Administrative authorities conducts raids at the infringers' premises and if they decide that an infringement occurred officials from the relevant body may order the following remedies:

- Seizure and destruction of goods;
- Fine;
- Withdrawal of business license;

No compensation for the infringing action may be awarded in the course of administrative enforcement. Cases which exceed threshold should be transferred to the Public Security Bureau (PSB) for criminal investigation, however transfer of cases between the authorities proves to be not effective<sup>7</sup>.

### 5.4 Special enforcement

#### 5.4.1 Customs enforcement

Customs regulations in China provides for monitoring for IPR infringing products upon import and export. Customs enforcement can be obtained either administratively via the General Administration of Customs and judicially via People's court depending of the nature of the seizure of the infringing suspected goods. When the required threshold of the infringing action is reached it is also possible to proceed through the PSB for criminal cases.

Right holders of Chinese registered IPR, in particular patent rights, trade marks and copyrights may request the Customs to stop the particular suspected shipment or may *ex antes* register their China IPR with the Customs for the period of the validity of the IPR, which is a recommended solution. Application can be filed on-line followed with the original application sent by post. Once the goods are seized the rights owner will have 3 days to confirm if the goods are genuine or not. If a seizure is made a cash bond may be required, or the rights owner can also organize a general bond for the whole year.

If a decision is taken that the goods are illicit, administrative penalties can be imposed on the consignee and/or consignor and the goods can be: destroyed, de-branded and donated to welfare, purchased by the company or de-branded and auctioned. If the threshold of the infringing goods meets the criminal offence level the case should be directed to the MPS (should be directed to the local PSB). The details on the Customs enforcement in China can be found following the link: [http://www.ipr2.org/storage/Customs\\_in\\_China-EN-100914-3.1801.pdf](http://www.ipr2.org/storage/Customs_in_China-EN-100914-3.1801.pdf)

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<sup>7</sup> Commission Staff Working Documents, Report on the protection and enforcement of intellectual property rights in third countries, [http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc\\_150789.pdf](http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150789.pdf)

#### **5.4.2 Trade fairs enforcement**

The organizers of trade fairs in China lasting 3 or more days are obliged to set up an IP Protection Center in order to provide the legitimate right holders a possibility to file a complaint against encountered IP infringement and eventually to remove the infringing goods from the fair. The IP Officers from the local governments are delegated to the IP Protection Center for the duration of the trade fair.

Apart from removing of the infringing goods, trade fairs are in practice used to collect evidence of infringement which later can be used in enforcement action.

More information on IP protection during trade fair can be found in the China IPR SME Helpdesk guide: *IP Strategy for European SMEs at Trade Fairs in China*: [http://www.china-iprhelpdesk.eu/docs/publications/tf\\_handbook.pdf](http://www.china-iprhelpdesk.eu/docs/publications/tf_handbook.pdf)

#### **6. Weak points in IPR enforcement legislation, administration systems etc.**

According to DG Trade of the European Commission, China remains the main concern of EU companies, as evidenced by both the comments provided by respondents to the DG Trade survey and the fact that 73% of all suspect (imported) goods detained at EU borders in 2011 and not released came from China (without mentioning the significant damages reported by European companies due to Chinese counterfeit goods found on the Chinese or other non-European markets).

The improvements recently introduced have not kept pace with the scale of infringements, especially regarding online piracy and fake markets. The improvements that had been observed during the "*Special Campaign*" are under threat because the efforts of Chinese authorities has somewhat decreased, in particular at provincial level, after the end of this initiative. The situation is also due to the fact that access to the Chinese judicial system remains difficult in practice, because of burdensome and costly legalisation and notarization requirements, the lack of an effective preliminary injunction system, and the inadequacy of the damages awarded. It is also reported that criminal sanctions are still difficult to obtain. Moreover, the willingness of authorities to take effective action is at times – although improving – affected by a lack of effective cooperation between involved authorities, by insufficient training of the staff involved, and by a very low level of public awareness regarding IPR. A more recent worrying development is a noted increase in cases involving the theft of trade secrets in China, as well as cases of trade secret theft that occur outside China for the benefit of Chinese entities, combined with difficulties in gaining appropriate remedies through Chinese courts in such cases .

To an important extent the weaknesses of IPR enforcement in China are also due to the very unequal picture that exists between the provinces and cities. In the most advanced provinces or cities like Beijing or Shanghai the standards of the courts are reasonably good and improving while in other cities this is not yet the case. Moreover, the lack of independence of the judicial system in China creates additional burden to EU companies, locals are often favoured in opposition to foreigners, in particular in cases involving strategic industries or state-owned enterprises.

#### **7. Basic Advice**

Contact the China IPR SME Helpdesk. In any event:

- Protect and monitor your IP in China even if you operate only on the small scale in Europe;
- Protect your IP rights including copyrights through registration and record them with Customs;
- Assess the risks of the market and make preparations;
- Monitor the market and IP rights applied for in China;

- React to infringement. Engage lawyers and enforcement as quickly as possible and take appropriate action;
- IPR enforcement in China can be an on-going scenario and should be understood as a cost of doing business;

## **8. Statistics**

- Statistics on registration of IPRs can be found at:  
[http://www.wipo.int/ipstats/en/statistics/country\\_profile/countries/cn.html](http://www.wipo.int/ipstats/en/statistics/country_profile/countries/cn.html)

## **9. Further Information on IPR in China**

- European Union delegation in China: [http://eeas.europa.eu/delegations/china/index\\_en.htm](http://eeas.europa.eu/delegations/china/index_en.htm)
- Commission Staff Working Documents, Report on the protection and enforcement of intellectual property rights in third countries,  
[http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc\\_150789.pdf](http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150789.pdf)
- Strategy for the Enforcement of Intellectual Property in Third Countries, European Commission, DG Trade, [http://trade.ec.europa.eu/doclib/docs/2005/april/tradoc\\_122636.pdf](http://trade.ec.europa.eu/doclib/docs/2005/april/tradoc_122636.pdf)
- Report on EU customs enforcement of intellectual property rights, Results at EU border 2012, European Commission, Directorate General for Tax and DG TAXUD:  
[http://ec.europa.eu/taxation\\_customs/resources/documents/customs/customs\\_controls/counterfeit\\_piracy/statistics/2013\\_ipr\\_statistics\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/customs/customs_controls/counterfeit_piracy/statistics/2013_ipr_statistics_en.pdf)
- UKIPO and UKTI Intellectual Property Rights Primer in China: <http://www.ipo.gov.uk/ipr-guide-china.pdf>