

Intellectual Property Rights Primer for China

A Guide for UK Companies

Hunter Rodwell Consulting
in partnership with Rouse & Co. International

Fast track to the world ^{UK}

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Rouse & Co. International, which has contributed legal and technical advice for the guides in this series, is a global intellectual property consultancy, providing the full range of IP services to many of the world's major IP owners. It operates from 17 offices in 11 countries worldwide and is regularly ranked among the leading IP practices in the jurisdictions in which it operates. Its wide range of IP professionals includes commercial and dispute resolution lawyers, mediators, patent and trade mark attorneys, researchers and specialist IP investigators. www.iprights.com



UK Trade & Investment is the government organisation that helps UK-based companies succeed in an increasingly global economy. Our range of expert services is tailored to the needs of individual businesses, enabling them to maximise their international success by providing them with knowledge, advice and practical support.

UK Trade & Investment also helps overseas companies bring high quality investment to the UK's vibrant economy: the UK is acknowledged as Europe's best place from which to succeed in global business. We provide support and advice to investors at all stages of their business decision-making. UK Trade & Investment offers expertise and contacts through a network of international specialists throughout the UK and in British Embassies and other diplomatic offices around the world.

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The **UK Intellectual Property Office** is an Executive Agency of the Department of Innovation, Universities and Skills (DIUS). It was previously known as the Patent Office and has been in existence since 1852. UK-IPO is the official government body responsible for establishing and maintaining the national framework of intellectual property rights. These include Patents, Trade Marks, Designs and Copyright.

The UK Intellectual Property Office is also responsible for raising awareness of IP across the UK, helping businesses make the most of their IP and be better prepared to compete in national and international markets. UK-IPO offers chargeable search and advisory services to help business and publicly-funded bodies take decisions about intellectual property – because we know that IP can offer both an opportunity and a threat.

For further information please visit www.ipo.gov.uk or telephone +44 (0)1633 813930.

Also in this series
Intellectual Property Rights Primers for:

Brazil

India

Korea

Vietnam

WELCOME TO THE INTELLECTUAL PROPERTY RIGHTS PRIMER FOR CHINA

THIS IS ONE OF A SERIES OF GUIDES BEING PUBLISHED BY THE UK INTELLECTUAL PROPERTY OFFICE AND UK TRADE & INVESTMENT TO HELP BRITISH COMPANIES IN THE MAJOR MARKETS AROUND THE WORLD WHERE THEY ARE LIKELY TO MEET PROBLEMS IN OBTAINING, PROTECTING AND ENFORCING THEIR INTELLECTUAL PROPERTY RIGHTS.

Why China?

Many companies are finding the loss of control over their products to counterfeiting and other forms of intellectual property rights (IPR) abuse originating in China is having a serious impact on their business in China and in other markets. In a recent study 40 per cent of smaller companies in the EU said they believed China was the major source of IPR infringement. However, to put this in perspective, the second highest category they mentioned was other companies in their own home markets.

How should a company prepare to do business in risky markets where significant IPR problems exist? Some companies become so worried and risk-averse that they adopt a stay-at-home attitude, avoiding potentially lucrative markets such as China. Others choose to ignore the problem altogether: after all, plenty of companies which do business there do not suffer any IPR infringements.

As with so many business decisions, a balanced view is essential. But in order to put the issues into their context a company's managers must first understand the concepts of IPR as applied to unfamiliar markets. They must then make a risk assessment, based on a range of factors including the vulnerability of the company and its products or services in those markets, the amount of affordable help available and the experience of other firms already there. Only then can they decide whether doing business there is worth the risks involved.

Is this guide for you?

The content is pitched mainly at the managers of the business, rather than its lawyers, because we recognise that most smaller businesses do not have an in-house legal team, while the use of an external law firm tends to be limited by cost. However this guide is deliberately referred to as a 'primer' and we are not suggesting that it can, or should, replace the services of IP lawyers or other professionals such as patent attorneys: there will be times when it is essential to seek the advice of experts.

A company's intellectual property portfolio may be its most valuable asset. We believe it is sensible for the managers of the business to make themselves familiar with the concepts of IP and understand how the IP rights owned by their business will be affected in overseas markets. This knowledge can save the company a great deal of money through knowing what to look out for, taking timely self-help avoidance measures, appreciating when the experts should be consulted – and being able to communicate knowledgeably with them.

Not just for exporters

The guides in this series all deal with overseas markets but they are not aimed exclusively at exporters. Being involved in other types of business activity abroad also requires a good working knowledge of the local IPR environment. A company may conduct manufacturing or sourcing overseas without exporting at all; but its

intellectual property rights may be just as vulnerable as a counterpart that is exporting its products or services from its UK base.

Even companies that are not involved in overseas markets can still become the victims of IPR abuse abroad. Any product may be copied or otherwise infringed by perpetrators far away. This may not be of immediate concern to the UK-based business – until the counterfeiters start exporting their illicit goods to the UK or Europe. Such companies need to understand their position in relation to the law in the countries where the abuse originates if they are to take action successfully.

This guide should therefore be useful for managers of companies of all types, whatever their geographical span. And we hope that interested people generally, familiar or not with IPR in the UK or China, may find it a valuable addition to the existing body of information on the subject.

How this guide is organised

We start by examining the basic principles of intellectual property and rights, based on the laws that apply in the UK. We go on to deal with the European and global dimensions, discussing the ways that international treaties and arrangements affect UK rights owners. The next section deals with China: its international IPR memberships, its laws and how practices compare with those of the UK. Finally we look at the operation of IPR in China, with information and advice on preparation, protection, enforcement and the law. The appendices contain aides-mémoire covering the registration of IP in the UK, EU and worldwide, enforcement options and a comparison of the main IP rights conditions in the UK and China.

Hyperlinks are used to direct readers to more comprehensive information in the Reference section and from there to the Internet. From the Index, click on a heading to go straight to a chosen subject, while clicking on '[index]' moves you to the Index and '[return]' takes you back to your previous place in the text.

Currency: a conversion rate of £1 to 14 Chinese Yuan (usually referred to as rénminbì – 'people's currency' – and abbreviated as RMB) is used in this guide.

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1. INTELLECTUAL PROPERTY RIGHTS BASICS

1.1 OVERVIEW

Q. How exactly are intellectual property and IP rights defined? [index]

Someone who is responsible for a 'creation of the intellect' such as an inventor, author or originator creates intellectual property (IP). Like tangible property, their creation has a value and, as with all property, it needs to be protected. Intellectual property rights (IPR) give them this protection, as well as helping them exploit and control their IP. Such a person is known as a 'rights owner' or 'rights holder'.

intellectual property definitions

Q. How do I know whether I have IP? [index]

The main criterion, for all forms of IP, is whether you have been responsible for creating something novel or innovative, representing progress over what went before. The definitions vary depending on whether it is a creation in the artistic or literary fields (protected by a copyright), a new technology (patent), a product's shape or appearance (design right) or a sign to distinguish your product or service from others (trade mark) – but the principle is the same: rights cannot be granted over anything mundane or generic, or which currently exists, is already in the public domain or is owned by someone else.

do you possess IP?

novelty is the crucial test..

However, if what you created was made in company time then the chances are that your employer will be entitled to own the rights to it. Whether it is owned by you or your company, intellectual property needs protection. Apart from with copyright and certain other rights that are already protected by law and do not have to be registered – 'unregistered rights' – this means you will need to apply to register the creation and, if successful, obtain 'registered rights'; otherwise there will be no protection and others will be free to exploit your ideas and efforts.

forms of intellectual property

Registered rights have to be applied for and granted by the government. In Britain the UK-IPO is responsible for granting all registrations. There is an extensive UK-IPO website to help you.

→ *the UK Intellectual Property Office*

Q. Which are the registered and unregistered IP rights? [index]

Registered IP rights consist of patents, registered trade marks and registered design rights. In the unregistered category are copyright, (unregistered) design rights, common law trade marks, database rights and protection for know-how under laws dealing with confidential information and trade secrets.

registered and unregistered rights

There are also rights covering plant varieties, geographical indications and the design of integrated circuits, as well as protection against 'passing off' under fair trade legislation.

Q. How do the main types of IPR differ? [index]

the definitions below are based on UK law

Copyright [index]

As we have seen, this is an inherent right (which means it is not applied for) protecting creative works such as books, music, plays, films and broadcasts. Copyright protection occurs automatically once the work has first been recorded in some way, such as by printing.

copyright: protects creative works such as books, music and films

Its relevance to works in the artistic, literary and media sectors is well known but copyright also covers industrial items such as a product's instruction manual as well as its technical drawings.

The period of validity of a copyright varies depending on the type of work. For dramatic, artistic or literary works the protection period in the UK is 70 years following the author's death, while for broadcasts and sound recordings protection lasts 50 years after first broadcast.

→ *UK-IPO: on copyright*

Patents [index]

Patents, a form of registered IPR, are used to protect technological inventions including processes. Although a patent doesn't automatically allow a rights owner to make or sell the item (since a product's manufacture and distribution must conform to prevailing regulations) it does protect the rights owner by preventing others from exploiting or copying the IP, so it is sometimes called a 'negative right'.

patents: protection for rights associated with technology and processes

A patent gives the inventor a monopoly right over the product and also allows him or her to license it for others to make and sell, in return for the payment of royalties. It is essential to apply for a patent early on in the process of the development of a new product or process since – in addition to the possibility of someone else copying it – a technology that is already in the public domain will not be registrable.

→ *UK-IPO: on patents*

essential to apply early

Obtaining a patent normally involves retaining a patent attorney to draft and file a patent application. To be eligible for patent protection your invention must be new and inventive and must not be of an excluded type. A search of worldwide patent databases will be made by the national Patent Office to find out if anyone has already filed a patent or disclosed a scientific article for the same technology. If not, and if the new product is deemed to be 'novel and inventive' (that is, not just a re-working of an existing idea), then the patent may be granted and the invention is protected from unauthorised use. In the UK this can take up to four and a half years; however the process can be significantly accelerated if examination work has already been conducted at another intellectual property office.

how to go about applying for a patent

As in most countries, a UK patent is valid for up to 20 years. To maintain it, fees must be paid annually after the fifth year.

→ *renewal of patents and other IP rights*

Design Rights [index]

Design rights, as we have seen, consist of both registered and unregistered forms. The distinctions between what exactly may be protected by each, and the relative levels of protection, are complex. Expert advice is needed to choose which is appropriate.

The more common type is the registered design, covering the appearance (that is, the shape or pattern) of a product or its packaging, as well as typefaces and graphics. To be registered in the UK a design must be distinctive and novel – it should not ‘remind an informed person of an existing design’ – as well as meeting other detailed criteria.

Whilst there are costs involved in obtaining registered design rights (compared with relying on unregistered design rights, which are free) this form of IPR can be treated in the same way as patents – for example, by rights owners exploiting their IP through licensing – and it provides a good level of protection. A registered design right lasts for up to 25 years in the UK and must be renewed every five years.

design rights: for the appearance of an object; rights may be registered or unregistered

designs must be novel to qualify

→ *UK-IPO: on design rights*

Trade Marks [index]

Registered trade mark rights protect the signs used to identify a company’s products or services, distinguishing them from those owned by other businesses. Brand names and logos are perhaps the most familiar form of trade marks, but elements like a product’s colour or shape, or even a piece of music or (at least, in theory) a smell associated with it, can be registered as trade marks. You can also register a slogan, logo or domain name.

Various criteria are used to decide whether a distinctive sign is registrable. The use of a generic term, for example, would not be allowed as everyone should be free to use it, while those which merely ‘designate the kind, quality, quantity, intended purpose, value, geographical origin...’ of the goods or service are disallowed as insufficiently distinctive. However if it can be shown that an otherwise mundane feature associated with a product (for example its colour) has become distinctively connected with the product, it may be allowed.

Registration, normally using the services of a trade mark attorney, consists of filing an application with UK-IPO’s Trade mark Registry, followed by a search and examination. Before a trade mark is granted it is advertised in the UK Trade Marks Journal and can be opposed. A renewal fee is payable every ten years. A registered trade mark will remain valid indefinitely if the rights owner continues to use and renew it. Goods are classified for registration purposes under the 45 class headings of the ‘International (Nice) Classification of Goods and Services for the Purposes of the Registration of Marks’.

Another type is the unregistered or common law trade mark. As with unregistered design rights, this form of protection is not frequently used as it has less force and relies on the common law offence of ‘passing off’ for protection. The ‘™’ device indicates that a trade mark is subject to this type of rights, whereas a registered trade mark can use the ‘®’ symbol.

The term ‘word mark’ is applied to a form of trade mark based solely on a typographic treatment of a piece of text that provides a recognised identity and branding.

trade marks: signs to identify products or services

→ *UK-IPO: on trade marks*

distinctiveness is an important criterion

→ *new rules for notifying trade mark owners about applications for similar marks*

→ *Nice classification system*

unregistered trade marks: free but less effective

word marks

Other Rights [index]

The IP rights set out above are the major ones that most companies require. There are also specific provisions for the following:

- **Domain Names.** Ownership rights for domain names may be defended as a reflection of the content involved, for example under trade mark, copyright and passing-off laws. → [domain names](#)
- **Geographical Indications (GI).** This form of rights, part of the UK Trade mark Act, protects the identity of goods whose characteristics are attributable to their geographical origin. → [geographical indications](#)
- **Plant Varieties.** Rights covering all plant genera and species are available under the Plant Varieties Act 1997. → [plant varieties](#)
- **Semiconductor Topographies.** Rights over the designs of the layouts of semiconductors are protected as unregistered design rights in the UK. → [semiconductors](#)
- **Software.** The patenting of computer software is a problem area, depending on interpretation of the much-discussed ruling by the European Patent Office (EPO) that 'computer programs as such' are not patentable. → [European rules for software IP](#)

Q. The term 'industrial property' is sometimes used. How does this differ from 'intellectual property'? [index]

The following quotation from the World Intellectual Property Organization (WIPO), a Geneva-based United Nations agency with 184 member nations, explains this distinction and summarises the paragraphs above:

'Intellectual property refers to creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce.'

'Intellectual property is divided into two categories: Industrial property, which includes inventions (patents), trade marks, industrial designs, and geographic indications of source; and Copyright, which includes literary and artistic works such as novels, poems and plays, films, musical works, artistic works such as drawings, paintings, photographs and sculptures, and architectural designs.'

A summary of registration procedures in the UK is provided in Appendix A.

→ [WIPO](#)

['industrial property' defined](#)

→ [UK registration procedures](#)

1.2 INTERNATIONAL CONSIDERATIONS

Q. Do these rights apply internationally? [index]

Member nations of the World Trade Organisation (WTO) are committed to include an agreed scope of IPR protection in their national laws. These requirements, akin to 'minimum standards', are set out in the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, which was negotiated in 1994. TRIPS also specifies procedures for associated matters such as IPR enforcement and dispute resolution.

→ *WTO*

→ *TRIPS*

This means that if you are doing business in countries that are members of the WTO you will find a degree of similarity between local IPR laws and those in force in the UK. In theory at least, the same can be said of the local enforcement and dispute resolution procedures and practices. (Few major trading nations are not included: there are now more than 150 WTO members. An important exception is the Russian Federation, which currently has observer status).

→ *WTO membership*

Whilst this enhances international IPR protection and makes it simpler for rights owners to understand what to expect in other countries, the existence of universal minimum standards does not mean IP rights held in one country will be valid in others. It is a common and potentially dangerous misconception amongst some rights holders that their domestic IP rights automatically extend worldwide. In fact – with certain exceptions and beneficial reciprocal arrangements arising from international treaties – many IP rights must be registered for specific, designated countries. This limitation is known as territoriality.

territoriality: essential to know which rights apply internationally

Q. What are the exceptions and reciprocal arrangements? [index]

These include copyright and other IP rights that are recognised under supranational laws, treaties and extensions. There are also international agreements making it easier for rights owners to achieve recognition for their rights abroad by allowing a single registration to apply more widely within a group of contracting states, or by streamlining search and application procedures.

Copyright [index]

Copyright regulations are governed by the Berne Convention, established in 1886, and (now less important) the Universal Copyright Convention (UCC), set up as an alternative to the Berne Convention. As we have seen, WTO members are bound by TRIPS; this, in turn, means they accept the Berne Convention, which covers most trading nations: there are 163 Berne Convention signatories. However in certain countries it is advisable – and in some cases, standard practice – to make a 'recordal' even of copyright to enhance protection by ensuring its prompt and trouble-free recognition.

→ *Berne Convention*

There are several systems to harmonise intellectual property rights in the EU, just as there are in Benelux and other trading blocks such as NAFTA. It is important to know whether a particular form of IP rights applies automatically to a number of territories – 'unitary' rights – or only in those territories for which it has been specifically registered. Unitary rights enjoy the same protection across a group of states without the need to apply for the rights individually in each.

definition of 'unitary' rights

Community Trade mark [index]

The Community Trade mark (CTM) system, which operates alongside the national trade mark systems of EU countries, is unitary – so a single registration in one of the EU member states confers trade mark protection rights throughout the EU. CTM applications are administered by the EU's Office for Harmonisation in the Internal Market (OHIM) in Alicante.

→ [the Community Trade Mark: a unitary right within the EU](#)

Madrid Protocol [index]

The Madrid System for the International Registration of Marks ('the Madrid Protocol'), operated by WIPO, is another unitary system for trade marks. An application filed in the UK means it will be recognised as an application in other countries that have also signed up to the Madrid Protocol, as designated in the application. ('The Madrid Union' currently consists of more than 70 individual nations plus the EU and the Russian Federation).

→ [the Madrid Protocol and Madrid Union membership](#)

Local trade mark authorities are allowed to challenge the filing but if they do not do so within 18 months the trade mark receives the same protection as if locally registered. In 2004 the European Community joined the Madrid Protocol, which allows a Community Trade mark to be used as the basis of an application for trade mark registrations under the Madrid Protocol.

[18 months to challenge a filing](#)

European Patent Convention [index]

There has long been pressure within the EU for a system for patents along similar lines to the Community Trade mark but so far negotiations have failed to achieve this. The European Patent Convention (EPC), with more than 30 contracting EU and other European nations, does not confer unitary protection and falls well short of being a 'community patent'; but it does provide useful assistance for European companies registering patents. Harmonised procedures allow you to make a single application, via the European Patent Office (EPO), for as many of the EPC countries as you need to cover. However the patents granted can then only be enforced individually, on a national basis.

→ [EPC explanation and text](#)

Patent Cooperation Treaty [index]

Similarly, an application under the 1970 Patent Cooperation Treaty (PCT), operated by WIPO, does not lead to an 'international patent' but is a streamlined procedure allowing an application for a patent in a single language to apply simultaneously in any of the more than 130 PCT contracting countries ('The PCT Union'). The process involves an 'international phase' application followed by a search to assess whether an invention is capable of being patented in the designated territories. Once this has been decided, applications may be made in the individual countries, in the 'national phase', according to local rules and procedures.

→ [further information on the PCT and its membership](#)

The main advantages of making a PCT application are that it buys extra time (about 18 months) and cuts costs by reducing duplication, helping you avoid territories where the chances of obtaining a patent are low. For the UK, the European Patent Office performs the international searches under the PCT system.

Registered Community Design [index]

A Registered Community Design (RCD) offers unitary protection throughout all the EU member states, based on a single application to OHIM, the administering authority. It lasts for up to 25 years, in a series of five-year periods.

Unregistered community designs are weaker and offer less protection than RCDs. However they may be useful in certain industries where it is not feasible to apply to register an RCD, for example in textiles.

→ *the RCD: unitary protection in the EU*

→ *unregistered community designs*

Hague Agreement [index]

Further protection for design rights is available to signatories of the Hague Agreement, administered by WIPO, which allows the protection of designs in multiple countries through a single filing in one language. As with the Madrid System, there is the possibility of refusal by national design rights authorities. There are 48 contracting states, including the European Community.

In 2007 the European Commission passed legislation linking the RCD and Hague Agreement systems. This enables companies in EU countries that have not individually signed up to the Geneva Act of the Hague Agreement to extend the coverage of an RCD into the 23 Hague Agreement states. The EC acceded to the Geneva Act on 1 January 2008.

→ *Hague Agreement and linking of the RCD*

Paris Convention [index]

The most important provision of this long-standing intellectual property treaty, dating from 1883 and now administered by WIPO, is the establishment of 'priority rights' for patent, design and trade mark applicants in respective signatory states.

This system allows applicants in one country to gain protection for their IP in another. The date of filing in the first country is counted as the effective date of filing in a second country, as long as the second filing occurs within a set period: six months for trade marks and designs; a year for patents and utility models.

→ *Paris Convention*

international 'priority rights' for patents, designs and trade marks

Rights Extensions [index]

In addition to the arrangements set out above, British companies can benefit from extensions of their IP rights in more than 40 current and former Commonwealth nations and territories.

A summary of international treaties and registration procedures is provided in Appendix B.

→ *extensions of IP rights for UK firms*

→ *international treaties and procedures*

2. CHINA

2.1 IPR OVERVIEW

Q. Which principal international IPR organisations and agreements does China belong to? [index]

Berne Convention (copyright) – since 1992

Hague Agreement/Geneva Act (designs) – non-member

Madrid Protocol (trade marks) – since 1995 (Madrid Agreement – since 1989)

Paris Convention (priority rights) – since 1985

Patent Cooperation Treaty (patents) – since 1994

WTO/TRIPS (IPR in general) – since 2001

China's membership of international IPR-related organisations

Q. How does China compare with the West in terms of the protection of IPR? [index]

China's rapid economic development, leading to its accession to the WTO in 2001, has been the spur for major reforms of its IPR laws. This process began in the 1980s, when there were few recognisable IPR laws. Since then China has introduced legislation covering every aspect of the protection of intellectual property. Most Western lawyers find the resulting body of law comprehensive, systematic and wholly familiar.

→ *China's economic growth in recent years*

Q. We constantly hear about problems of IPR protection in China. If the laws are fine, what is the problem? [index]

There is a difference between having adequate laws and achieving their effective enforcement; in other words, it is a question of theory and practice. Few people doing business in China would deny the extent of China's IPR enforcement shortcomings; but at the same time most believe the Chinese authorities are in earnest in trying to improve matters and some experts are convinced that real progress is being made.

adequate laws aren't everything....

The sheer scale of China's growth, as her economy expands vigorously (at around 10 per cent a year), brings bad as well as good consequences. Illegal economic activities like counterfeiting and other forms of IPR infringement have been a familiar repercussion of many nations' economic development: for example, copyrights owned by Charles Dickens suffered wholesale infringement in 19th-Century America. In China's case the changes have been particularly rapid: from third world backwater to one of the world's leading economies in 25 years. This, in part, accounts for the severity of the problem.

Chinese IPR problems in perspective

Q. So should we be concerned about the IPR situation in China? [index]

Yes, we should. The remarks above are intended to explain, rather than play down, the current level of IPR abuse. Companies doing business in, or with, China need to be aware of the potential risks to their IPR; but they should not be deterred by it.

Q. Is this just a foreigner's problem? [index]

No, it affects rights owners of all kinds. It is estimated that about 95 per cent of IPR cases in China are brought by Chinese businesses. Given the Chinese preference for out-of-court dispute resolution, which receives little publicity, this is may be an underestimate.

not just a foreigner's problem

2.2 CHINA'S IPR LAWS AND PROCEDURES

Q. What are China's IPR laws and how do they compare with the UK's? [index]

As we have seen in International Considerations above, as a WTO member China is required to establish and maintain laws whose effect is in line with the 'minimum standards' laid down by TRIPS. Consequently there are few major practical differences between China's laws and those of other developed countries, although there are plenty of differences in their detail. The legal framework of each of the main forms of IPR in China is summarised below. (Note: if you are looking for information on design rights you should refer to the section on patents, as designs are grouped with patent legislation in China).

Copyright [index]

China signed up to the Berne Convention in 1992. Copyright legislation is based on China's 1990 Copyright Law, amended in 2001, and the Copyright Implementing Regulations of 2002. The scope of the law is similar to national provisions elsewhere. It covers literary, dramatic, artistic and musical works, films and sound recordings, as well as computer programs, Internet content and even SMS messages. The law provides for the eligibility of works by foreigners in accordance with the Berne Convention.

→ *China's Copyright Law*

→ *copyright protection for foreigners*

In China the law governing copyright related to a work created during an individual's employment differs from that in many other jurisdictions: the employee, not the employer, owns the copyright. However there are limitations on the employee's use of the copyright, including the employer's 'priority right to exploit the work within the scope of its professional activities'.

→ *employers' and employees' rights*

The effective period for copyright protection is (in general) for the life of the author plus 50 years. However, as in the UK, the term depends on the type of work in question. For film or photographic, televisual and audiovisual works – or if the 'author' is a corporation – the term is 50 years from first publication, similar to the UK's (see 1.1 above).

copyright effective periods

There is no requirement to register copyright in China since the Berne Convention states specifically that copyrights need not be registered. However it is advisable to register your copyright so that you can prove ownership in any dispute or court case. This may prove very expensive and some lawyers recommend, as a more practical option, filing only after the discovery of an infringement. Expert advice should be sought on this point in individual cases.

advisable to register copyright in China

register only when necessary?

Registration is made with the National Copyright Administration (NCA), the authority responsible for the administration and enforcement of copyright and related issues in China.

→ *NCA*

Patents, Utility Models and Design Rights [index]

China's Patent Law deals with the protection of rights over technological inventions, as in the UK, but it also covers utility models and designs (also known as 'design patents'). The Patent Law dates from 2000, amending legislation from 1984 and 1992.

It should be noted that further amendments and revisions, drawn up in 2006 and 2008, are still in draft form and have not yet been adopted. When in force, these revisions will make significant changes to the principles governing (amongst other areas) filing requirements for inventions created in China and the use of patent agents.

Utility models, sometimes referred to as 'minor patents', are available in many countries, including France and Italy as well as China. Protection for utility models is similar to that for 'full' or 'invention' patents and the patentability rules for both types are based on three elements: *'Any invention or utility model... must possess novelty, inventiveness and practical applicability'* (Article 22).

While the 'novelty' and 'practical applicability' criteria are the same for invention and utility model patents, the 'inventiveness' requirements differ, making the grant of utility models less demanding. A further difference is that invention patents give protection for a maximum of twenty years, utility models for ten, each subject to the payment of annual fees.

More foreign companies should consider applying for utility model rights in China – assuming their technology qualifies (processes are excluded). One reason for the comparatively small number of patents filed in China by British firms (less than a third the number filed by German or Korean companies, according to the IP Institute) is a lack of familiarity with the concept and advantages of utility models – a type of patent available in both Germany and Korea. It is estimated that only about 15 per cent of all patents filed by foreigners in China are utility models.

It may be a good idea to apply to register a product as a utility model if an invention patent is not attainable. It may also be an advantage to apply for a utility model following a patent application as this could mean that you gain protection after (typically) one year pending the grant of the invention patent, which typically takes three to five years (up to six years in difficult cases). Once an invention patent is granted you may choose for it to replace the utility model patent.

Under China's Patent Law *'Where two or more applicants file applications for patent for the identical invention-creation, the patent right shall be granted to the applicant whose application was filed first.'* This is similar to UK law but different from practice in the US, where 'first to invent' is the critical test.

However in accordance with the Paris Convention (see above), as in other countries the law allows for applicants for invention and utility model patents filing in China to 'enjoy a right of priority' if they have already applied for a patent for the same item overseas within the previous year. For this to take effect a declaration must be made at the time of filing in China and a copy of the original application must be lodged with the authorities within three months.

→ *China's Patent Law*

some amendments have yet to be adopted

differences between invention and utility model patents

maximum effective periods

few UK companies opt for utility models

advantages of a utility model patent

'first to file' criterion

'right of priority'

As in the UK, when an invention is created by an employee *'in execution of the tasks of the entity to which he belongs'* the entity becomes the patentee. Chinese law provides a useful distinction from personal inventions by calling this type a 'service invention'. It should be noted that in China there is a 'claw-back' provision under which, subject to certain conditions, a former employer has a right to claim ownership of any patent issued in respect of an invention made by a former employee within one year of his or her departure. This may even apply to inventions that were initiated during an employee's time with a former employer but not completed until after the previous employment.

business inventions vest in the business

one-year 'claw back' when an employee leaves

Designs are covered by the Chinese Patent Law. As in other countries, this form of rights deals with the shape or other visible attributes of a product and applications must be novel. (But note that the amendments to the Patent Law – as yet unadopted – referred to above will alter the 'novelty' test for designs. Legal advice will invariably be needed on this point).

design patents

new novelty tests

The law's design rights provisions are similar to those for utility models, with protection for a maximum of ten years. The 'right of priority' for previous filings of designs overseas requires filing in China within six months.

ten-year protection

China has been a signatory to the Patent Cooperation Treaty since 1994. This means that foreign patent-holders can assess the possibility of obtaining a patent (but not a design patent) before embarking on the 'national phase' of the application within China – at the end of which, if the patent is granted, they will have the same protection as any other patentee in China.

China and the PCT

The authority responsible for all aspects of patents is the State Intellectual Property Office (SIPO), which also handles the registration of semiconductor layout designs. SIPO reported that in 2006 it handled more than 573,000 applications for the three types of patent, ie inventions, utility models and designs. The licensing of patents to other businesses is provided for under the Patent Law. Such agreements must be registered with SIPO, which must also approve the assignment of patent rights to foreigners.

→ *SIPO*

licensing and assignment of patents

Another provision of the draft revisions to the Patent Law referred to above is a change to the regulations covering the use of patent agents. Under the current rules, foreigners filing patents in China and Chinese applicants who wish to file for a patent abroad must use agencies appointed by SIPO. The proposed revisions would allow both these categories of applicants to use any patent agency that is legally established.

freedom to use any licensed patent agent

Trade Marks [index]

The Chinese Trademark Law dates from 1982, with amendments in 1993 and 2001 and Implementing Regulations in 2002. A revised law (Trademark Law 2008) is to be implemented shortly. The system operates in a similar way to the UK's, giving protection for designs, symbols, colours (with single-colour protection under the new law) or other devices used to identify a company's

→ *China's Trademark Law and revision*

products or services. As in the UK, tests of registrability cover issues such as generic terms, geographical names and distinctive features.

China's membership of the Madrid Protocol (see above) provides a unitary method of reciprocal trade mark registration for UK companies, with registration based on either a national UK trade mark or a Community Trade Mark. The owner of a Chinese trade mark is entitled to use the term 'registered trade mark' or certain other symbols including '®' and the Chinese-character equivalent 注 (zhù) within a circle.

Chinese law prohibits the use or registration of any trade mark for identical or similar goods that is a *'reproduction, imitation or translation of another person's trade mark not registered in China and likely to cause confusion'*. In the case of non-identical or dissimilar goods the law bans the imitation of the *'well-known mark of another person that has been registered in China, misleads the public and is likely to create prejudice to the interests of the well-known mark registrant'*. (Note: advice should be sought from a professional firm on the definitions of what constitutes 'similar' and 'dissimilar' in China as these distinctions are complex; and it may be advisable to register other sub-classes for defensive purposes).

The Nike case of 1995 is an example of how this principle has been applied in China. The *'Provisions on the Determination and Protection of Well-known Marks'* of 2003 clarify the law, defining a well-known mark as one that *'is widely known to the relevant sectors of the public and enjoys a relatively high reputation in China'*. However recognition of 'well-known trade mark status' among foreign brands is rare.

If there are two or more applicants for *'identical or similar trade marks for the same or similar goods'* the one that was registered first prevails, as in the UK. Regulations about the 'right of priority' for those applying in China for trade marks for which applications have already been made overseas are similar to those for patents, in accordance with international practice. This right applies to *'the same trade mark for identical goods'* and the prior registration must be no more than six months beforehand.

Registration by foreign firms under the Madrid Protocol takes about 18 months, while a direct registration using the Chinese domestic system will usually take two and a half to three and a half years – and in some cases up to four years. A trade mark is valid for ten years, after which it may be renewed indefinitely for further ten-year periods. If it is not renewed there is a six-month grace period, after which it is cancelled. A trade mark must continue to be used to remain in force. Application for cancellation may be made *'where the use of the registered trade mark has ceased for three consecutive years'*. The registrant then has two months to explain the situation or provide evidence of use.

A problem with registration in China is that a rights owner's 'generally authorised agent' or representative is allowed to register his principal's trade mark. This leads to 'pre-emptive registrations', which are common. However the Trademark Law allows for an objection by the principal in such cases to cause the application to fail.

The trade mark authority in China is the Trademark Office, operating under the State Administration for Industry and Commerce. SAIC has wide-ranging market regulation and competition supervisory roles including trade mark registration,

unitary registration under the Madrid Protocol

→ *protection for well known marks*

'similar' and 'dissimilar' marks

→ *case study: Nike*

'first to register' principle

'right of priority'

renewal for ten-year periods

cancellation for non-use

beware – an agent can register your trade mark

→ *SAIC*

administration and enforcement. In 2006 the Trademark Office handled more than 760,000 registration applications, of which just under 100,000 were by foreign companies – most of which used the Madrid Protocol to file. China is ranked number eight in the world in terms of trade mark applications under this system.

Customs Recordal [index]

A trade mark owner may register (or ‘make a recordal of’) his trade mark with China Customs (also known as the General Administration of Customs or GAC). This allows the local Customs offices to check and intercept infringing goods being imported or exported, either at their own initiative or following an alert by the rights owner. In practice, it is hard for a rights owner to identify a particular container or to know when a suspect shipment is about to enter or leave China, so he must usually rely on Customs to protect his rights at the border. It is advisable to register one’s IP rights with GAC in case such action is needed.

→ [China Customs](#)

The willingness of Customs to intercept fakes on export is an example of good practice shared by relatively few other nations. The more common forms of IP rights (copyright, patents and trade marks) may, in theory, be recorded with China Customs; however in practice the complexities of copyright or patent infringements are likely to be beyond their technical expertise and trade marks are the usual form of IP that is registered.

→ [more on recordals](#)

Recordal helps Customs to distinguish genuine goods from fakes when seizures are made, so it pays to maintain an up-to-date record with the local Customs office, although their database is not large. Applying for a recordal is generally done through a lawyer or local attorney and costs about £50 for the official fee, plus a lawyer’s fee.

[recordal fees](#)

Anti-Unfair Competition Law [index]

This law, which was promulgated in 1993 (and which became effective in 2007): *‘is drawn up in order to safeguard the healthy development of the socialist market economy, encourage and protect fair market competition, prohibit unfair competition, [and] safeguard the legal rights and interests of managers’*. The Fair Trade Bureau, operating under SAIC, is responsible for enforcement actions, such as raids, under this law.

→ [Anti Unfair Competition Law](#)

There are provisions forbidding practices such as false advertising, slander and revealing trade secrets. The law also protects rights owners against the infringement of trade marks: it is an offence to *‘feign the others registered trade mark’*, but unregistered trade marks receive protection only if they are well known – in which case they are protected solely against identical or similar goods or services (ie, it is still possible to apply a well-known, unregistered brand’s name to a different type of product). This contrasts with the position for registered trade marks, which are protected against products or services that are dissimilar. This means that it is advisable to register even a well-known mark in China.

[advisable to register even well-known marks](#)

As we have seen, this position differs from that in the UK: under English Common Law (for example) there is a degree of protection for unregistered trade marks, even if they are not well known.

Q. How do trade names differ from trade marks in China? [index]

Trade names that are not registered trade marks per se are covered by the Chinese Anti-Unfair Competition Law rather than the Trademark Law. Chinese practice, with its distinction between trade names, and names used as trade marks – to the extent that each is governed by a different area of the law – differs from practice in the UK, where trade names are synonymous with trade marks.

A trade name can be opposed and an action brought for its misuse in China if there is a conflicting prior right in one of the following forms: a registered trade mark (under the Trademark Law); a foreign company name used for business in China (under the Anti-Unfair Competition Law); or a famous product name (again, under the Anti-Unfair Competition Law). Well-Known Trade Mark status confers a more robust set of protections.

This is viewed as an imprecise area of Chinese law, with the possibility of confusion – as can be seen from following the link to an extract from an official article intended to clarify the differences between the two.

→ [trade names](#)

The use of Chinese characters as trade marks or trade names introduces another layer of complexity. In Chinese there are usually several (often many) ways of representing the same sound in written form, using different characters. This means a rights owner may register a particular set of characters as a trade mark (perhaps to represent the sound values of a Western product name) only to find that an infringer is attempting to pass off a fake product using characters of a wholly different appearance – which nonetheless sound the same and therefore suggest the same name.

[Chinese-character trade marks/trade names](#)

The confusion need not be a malicious attempt at passing off, as in the celebrated Pfizer case. The Chinese media invented ‘Wei Ge’ as a name for Viagra (meaning ‘powerful brother’) before Pfizer itself came up with a Chinese name for it. A Chinese company then registered the name Wei Ge as a trade mark before Pfizer, resulting in years of litigation with Pfizer finally losing the case as it had no rights to the ‘Wei Ge’ trade mark. See also the Starbucks v. XingBaKe case.

[the naming of Viagra in Chinese](#)

→ [Starbucks v. XingBaKe case](#)

As these examples suggest, the registration of Chinese-character marks and names is a difficult area and expert – invariably, Chinese – advice will be needed.

How IP Rights Parameters in the UK and China Compare

A comparison between the main features of IP rights in the UK and China, relating to timescales and the basic costs for the official processes of registering the rights, is provided in Appendix D.

→ [UK & Chinese IP rights compared](#)

2.3 PREPARATION

Q. What steps should a company take to avoid problems? [index]

The most important step is adequate preparation. This means taking advice from those who are knowledgeable about IPR in China, consulting publications and websites and referring to the many sources of assistance that are aimed specifically at companies doing business in China. ‘Many of these are listed in *Where to Get Help in China* below.’

[preparation is the key](#)

It is also sensible to make a special assessment of the risks in China to the intellectual property owned by the business. This is particularly important if you feel your IP is potentially at risk from infringers, if other companies in similar areas of business have had problems, or if you have previously been exposed to IP infringement in other territories. Such a risk assessment might include:

- Performing due diligence checks on the various organisations and individuals with which you intend to have dealings in China.
- Seeking professional advice from lawyers and other firms that are experienced in advising on IPR in China, as well as local diplomatic posts and the offices of the British Chambers and the China-Britain Business Council.
- Being prepared to be streetwise in response to streetwise infringers. They, too, will take legal advice and try to identify any gaps in the IP rights portfolios of established companies. In China there is no concept of ‘contempt of court’ or other notions of professional misconduct, so expect lawyers for the other side to pursue any weakness. Coupled with cautious judges and complex procedures, this means that cases often fail. In this environment it is axiomatic that contracts must be clear and well-drafted, and compliance with them must continue to be monitored.
- Talking to other companies which are already doing business of the same type in China or operating in the same location.
- Consulting your current agents, distributors, suppliers and others who are knowledgeable about local conditions for the goods or services in question.
- Checking with a trade mark or patent attorney to see whether there have been previous registrations of your own marks, or other IP, in China. Any prior registrations are bound to cause difficulties and putting matters straight might be expensive or, at worst, unachievable. Create and register a Chinese-language trade mark, including any obvious abbreviations.

While this is by no means a comprehensive list of the types of people and organisations you might consult, it offers some ideas on how to go about assessing the vulnerability of your IP. Such risks are a part of the overall risk assessment you will need to make when embarking on a new project overseas.

Above all, it is important to develop within your company an attitude of being true to normal instincts and sticking to familiar business methods. IPR infringement goes hand in hand with other corrupt practices, so it is essential that those new to the market are not beguiled by requests to ‘do things differently’. One occasionally encounters starry-eyed Westerners who insist that ‘contracts are unnecessary in China as relationships are the key’. While good relationships are an important part of doing business there (as they are almost everywhere else!) this notion will only remain valid until there is a serious dispute – when it behoves one to have a cast-iron contract to fall back on.

There is much that is mysterious and intriguing about China but, as a fully signed-up WTO member, this does not (or should not) include the way Chinese companies do business. In short, there is no place for a ‘when in Rome...’ attitude to questionable or deficient business practices – in China or elsewhere. Supportive local representation will be a key element in protecting your interests and avoiding problems of this kind.

make an IP risk assessment

due diligence is possible in China

infringers have lawyers too...

... so draft strong contracts

stick to your normal business instincts

when in Shanghai...

... act normally and hire good people

Q. Who should take responsibility for a company's IPR protection? [index]

The simple answer is: everyone. Many companies depend on the integrity of their IP, often one of their most valuable assets, for their livelihood. So this subject should be given proper attention by the management and staff, as well as those with whom the company has relationships in other companies.

IP protection depends on everyone in the business

It may be sensible for a manager to be nominated who will have particular responsibilities for aspects such as understanding what constitutes the IP owned by the business, which sources of assistance and information are available and how to set up measures to protect IP rights. In companies with legal departments a legally-trained manager would be the obvious choice; but in an SME without the benefit of an in-house legal team this role could still be adequately performed by a manager with sufficient interest, commitment and training.

consider appointing a manager with specific responsibility for IP

2.4 OPERATING IPR IN CHINA

Q. How does one go about registering IP rights in China? [index]

As we have seen, there are a number of possible situations:

- For copyright, no registration is required but registering copyrights with the authorities is advisable.
- For patents (including inventions, utility models and patent designs) individual registrations must ultimately be made in China, but for rights other than industrial designs the search process is eased, and extra time gained, by applying under the terms of the Patent Cooperation Treaty.
- For trade marks, the options are registration within China or use of the Madrid Protocol to gain unitary rights under national or Community Trade Mark registration systems; in the case of well-known brands, there is protection under the Anti-Unfair Competition Law – even if unregistered – but this is a complex area of law.
- 'Priority rights' under the Paris Convention assist in the local registration of trade marks, designs and patents by allowing rights previously registered elsewhere to become effective in China, if filed within a time limit.

situations that affect registration

Many UK patent and trade mark attorneys – and most of the larger law firms – offer services that cover China through corresponding or associate arrangements. Foreign law firms are not allowed to practice Chinese laws direct; they can only do so by 'entrusting' Chinese law firms. Chinese law stipulates that a foreign entity must use an 'organisation designated by the State' to act as its agent for the registration of trade marks or patents. The term 'foreign entity' means those 'having no habitual residence or business office in China'.

how foreigners register their IP

Registration of IP rights is essential in China (and advisable for copyright and well-known trade marks). As in the UK, if you do not register your rights you will not be able to enforce them.

registration is essential

Enforcement

Q. It is said that enforcing your IP rights in China is almost impossible. Is this so? [index]

That way of thinking is outmoded but the situation is far from ideal for foreign rights owners. One difficulty is the range of choices to be made, for example between an action via the administrative authorities or taking a case to court (as discussed below) and by the number of different organisations involved in IP enforcement. The backlog of IP registrations, too, is inherently unhealthy. As is the case in many other indicators of this country's astounding economic growth, China is a victim of its own success and the authorities are struggling to find sufficient skilled examiners to keep up with the massive demand for domestic and international IP registrations. Meanwhile the sheer volume of infringements in China also creates problems, as the following statistic, reported in the *'International Herald Tribune'*, demonstrates:

'Wei Bin, editor of the Writers' Publishing House, which investigates book piracy, said that his group's last survey, in 2001, showed that as many as 30 to 40 per cent of the books on sale in China may be pirated.'

But if you are prepared to understand the various options, take the advice of experts and get to know the local representatives of the appropriate administrative bodies the task of enforcing your rights will not seem so daunting.

rights enforcement is achievable in China

Q. Is enforcing my IP rights worthwhile? [index]

Some companies operating in China make the calculation that it will cost less to turn a blind eye to the abuse of their IPR than to fight. In a few cases this may work, but it is seldom a viable long-term strategy. (The textiles industry is an exception: many clothing companies creating new lines twice a year find it impossible, for reasons of registration timescales as well as cost, to register all their designs; however the rapid pace of innovation in this industry is, to an extent, its own defence).

Above all, failing to take action shows the infringers they can get away with it: and there are many instances where a product is counterfeited more than once. Even if a company does not care about counterfeits in the domestic Chinese market, fake goods may be exported in large volumes. These may turn up in markets that are more important to the rights owner than China.

textile companies may have particular problems

failing to protect your rights sends out the wrong message to criminals

Q. What are the steps in IP rights enforcement? [index]

There are important choices to be made in enforcing your rights in China. The main options include administrative action, customs seizure and civil litigation, while the State may prosecute offenders under the criminal law.

Before involving the authorities it is worth considering less formal steps, as one would in the UK. Not all infringement is deliberate and not all infringers are aware of the gravity of what they are doing. It may save money and effort to start by sending a lawyer's 'cease and desist' letter to an infringer, threatening resolute action. This may, however, be inadvisable in some cases: when, for instance, it warns a determined counterfeiter of impending action, giving him time to remove his stock in advance of a raid.

precursors to formal enforcement action

You should also bear in mind that negotiation and mediation are very much a part of the Chinese business psyche. Many IPR cases are solved through dispute resolution, either before or after going to court. Indeed it is by no means unknown for a rights owner to negotiate with an infringer to purchase the relevant trade mark – or even the business as a whole – rather than to sue him.

mediation can work too

Administrative Actions [index]

The Chinese authorities responsible for the various forms of intellectual property rights are summarised below, together with links to a description of each organisation's activities and responsibilities and, where available, statistics on their recent activities:

- Copyright – National Copyright Administration (NCA).
- Patents – State Intellectual Property Office (SIPO).
- Trade Marks – The Trademark Office of the State Administration for Industry and Commerce (SAIC) and its subsidiary organisations, the local AICs.
- Customs – The General Administration of Customs (GCA).
- Quality – General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ).

go to [index] for individual entries on these organisations

→ *AQSIQ*

NCA, SIPO and SAIC are responsible for the enforcement of distinct areas of IPR, with offices at national, provincial/municipal and local levels. As its names suggests, the State Intellectual Property Office was intended to be responsible for IPR issues generally. However this is not the case and one of the major barriers for rights owners attempting to enforce their rights in China is the plethora of different authorities, each national organisation echoed by subsidiary offices at the provincial and local levels, that must be involved.

The General Administration of Quality Supervision, Inspection & Quarantine (AQSIQ) is responsible, under the Product Quality Law, for the policing of quality standards and inferior goods in general. This organisation becomes involved in IPR cases that are related to quality and health & safety, especially those concerning passing off and counterfeits, and seizes fakes and goods with improper labelling compliance. AQSIQ was created following the merger, in 2001, of the Administration for Entry-Exit Inspection and Quarantine (CIQ) and the State Quality and Technical Supervision Bureau (QTSB). (Note: the older and more familiar name 'Quality and Technology Supervision Bureau' – or just 'TSB' – is still used at provincial and municipal level by organisations operating under AQSIQ).

AQSIQ's IPR enforcement role

'TSB' name still used by local quality bureaux

The AICs have a specific role in relation to trade mark infringements (counterfeits and look-alikes) and abuses under the Anti-Unfair Competition Law. The powers of search and seizure of the AICs and AQSIQ are similar. However involving AQSIQ allows you to dispense with a trade mark agent and approach the organisation direct, whereas foreign firms taking action through the AICs are required to do so via an agent.

first steps in enforcement

In the event of infringement – and having decided to go down the 'administrative' route – the first step is to file a complaint with the local office of the appropriate administrative organisation. It is advisable to do this via a law firm or agent as it is essential to be able to convince the AIC that the products infringe your rights and that there is production (or a stock) of infringing

administrative offices' initiatives

products at the premises. Trained professionals acting on your behalf have a better chance of achieving this as the officials tend to prefer to deal with them – and knowing the officials personally will also help.

patent and copyright cases may be too complex for the administrative authorities

In trade mark cases quick action may result, with raids, seizures, orders to halt the infringement, fines, the destruction of counterfeit items and the confiscation of machinery used to produce fakes. An increasing number of such actions are taken at the initiative of the administrative offices themselves, especially where a local market or trade fair has become an embarrassment by earning itself a poor reputation for IPR abuse.

Counterfeiting cases are often straightforward, especially where the infringement itself is unambiguous. For those involving patents and copyrights, however, the administrative authorities' enforcement powers are less clear-cut, there is often much greater complexity and the pace can be slow in the event of disputed cases. The administrative bodies may therefore be unwilling to act, preferring to see a contentious case go to court. It has been noted that NCA, for example, tends to recommend the courts as it is under-resourced to handle large numbers of administrative enforcement cases.

pros & cons of administrative action

Whereas the administrative procedures may be comparatively fast and inexpensive, their disadvantages include the need for the rights owner to collect evidence in order to trigger a raid, the low level of penalties, the lack of compensation and the lack of title over seized goods by the rights owner: the AIC is responsible for the goods until their destruction. The US Trade Representative's Report to Congress on China's WTO Compliance noted in December 2006: *'China suffers from chronic over-reliance on toothless administrative enforcement and underutilization of criminal remedies... administrative fines are too low to provide a deterrent, and as a result, infringers continue to consider administrative seizures and fines as a cost of doing business.'*

→ *USTR Report to Congress*

Customs Seizures [index]

China Customs has responsibilities spanning most forms of IPR, including a records system (see above). And, as has already been noted, the customs system in China is unusual for its ability to intercept fakes on export as well as import. As with customs administrations worldwide, China Customs relies on the intelligence it receives about illegal shipments. You can help them by passing on the names of known counterfeiters, routes and the details of genuine goods.

need to keep Customs informed

When they seize suspect goods the Customs authorities contact the relevant IP owners or their local representatives (provided the IP in question has been registered with the GAC) who must confirm within three working days whether or not a violation has taken place and post a bond. Because of this short response time it is essential for rights owners to have a procedure in place for their designated agents or local business unit to handle payments of the bonds. These arrangements should not be left until a seizure has taken place, as the goods will normally be released once the three-day period has elapsed if the bond is not paid.

procedures following seizure of goods

If the cargo is illicit Customs may destroy it or may sell the counterfeit goods and fine an offender. There is also the option for the rights owner to purchase the consignment, or the goods may be donated to charity. Serious cases are handed on to the Public Security Bureau (PSB) for Criminal Law prosecution.

→ *PSB*

Actions Under the Civil Law [index]

If a rights holder decides not to take administrative action – or if the administrative authorities escalate matters to the courts – an action may be started under China’s Civil Law, in the IP Tribunals based in the Intermediate People’s Courts (in medium-sized cities) and Higher People’s Courts (provincial cities). (Note that in exceptionally serious cases the authorities will refer cases direct to the criminal law authorities; although such action cannot result in the award of damages, the rights owner can still pursue litigation in the civil courts with a view to recovering damages).

→ *civil litigation in China*

pros & cons of civil litigation

There are several advantages in taking this course, including the deterrent effect of a high-profile court case – which may be magnified by effective PR activities – and the potential for the award of damages. Where they cannot be assessed, a discretionary amount may be awarded to the plaintiff, with a limit of RMB500,000 (approximately £36,000). However civil cases usually mean a longer timescale (generally a maximum of 12 months, not including an appeal by the defendant and any application for the invalidation of the right in question) and greater bureaucracy, leading to higher costs than for administrative enforcement actions. If the defendant chooses to challenge the plaintiff’s case and technical argument ensues – usually in trade mark and patent cases – the delays and extra costs could be much greater. However a case won by the plaintiff in such circumstances will invariably strengthen his position.

fighting cases may be time-consuming...

... but ultimately worthwhile

Other problems include the burden of proof, in most situations, being placed squarely on the plaintiff, with Chinese courts far more cautious than those in (for example) the UK about the evidence they will admit, and the lack of enforcement penalties if a defendant breaches a court injunction or fails to comply with a court ruling, such as the payment of damages. Compensation (ie the costs associated with bringing the case) may also be awarded but are likely to be conservatively estimated. Since they never exceed RMB50,000 (about £3,600) the plaintiff’s costs are unlikely to be met in full.

Actions Under the Criminal Law [index]

The first step is the involvement of the PSB (see above). For the PSB to accept a case – or initiate a case itself – and criminal prosecution to occur there are financial thresholds related to the level of counterfeit sales. Trade mark infringement can lead to prison sentences of up to seven years, with sentences based on the value of the sales of the infringing goods.

→ *China’s Criminal Law*

The problem of the criminal law prosecution thresholds being too high was addressed by China’s Supreme Court in 2004 and again in 2007, when the distinction between the threshold applying to individual infringers and the much higher trigger levels for the criminal prosecution of businesses was removed and the thresholds for businesses and individuals alike was set at RMB50,000 (approximately £3,600). The threshold is lowered by 40 per cent if a factory is counterfeiting more than one brand. Longer prison sentences (3-7 years) are awarded if the defendant is found to have produced more than RMB250,000 (about £18,000) worth of goods. However most defendants sentenced to less than three years’ imprisonment in China’s courts receive suspended sentences, although there is considerable pressure for the courts to be less lenient.

the decision to prosecute depends on the scale of the offence

thresholds were lowered in 2007

Such calculations may seem arcane but they illustrate that – as is to be expected – much sterner penalties are available under the Criminal Law than under

→ *Case: European spirits brands*

administrative processes or civil litigation. The ‘European Spirits Brands’ case shows that sentences for IPR abuse can be severe.

Choosing Which Action to Take

Q. How should I choose which of these actions to take? [index]

This is a crucial question for rights owners operating in (or into) China. As we have seen, in very large, clear-cut cases of outright infringement a Criminal Law prosecution may be possible. While this would be the best option in terms of deterrent effect (and, not least, physical prevention: as it is said, ‘*you can’t produce counterfeits from behind prison walls*’) persuading the PSB to act in marginal cases is notoriously difficult. So, too, is the estimation of the all-important value of the infringement, which is necessary to trigger a criminal prosecution: few counterfeiters willingly make their financial records available to the authorities.

*criminal prosecution:
effective deterrence*

Thus the usual choice is between administrative action and civil litigation. As we have seen in the discussion of the pros and cons of each type of enforcement, in simple terms the arguments are:

*methods of enforcement
compared*

- Administrative action: cheaper, faster but less effective; probably inappropriate in complex cases such as copyright and patent infringements but routine for trade mark infringement and counterfeiting.
- Civil litigation: more expensive and with a longer timescale but can impose compensation as well as penalties, allowing (some) enforcement costs to be recovered; can have a significant deterrent effect.

*civil litigation is now often
the best option*

The choice for SMEs used to be limited on grounds of cost, time and hassle so that it was customary to suggest administrative action to smaller companies by default. However in recent years – as the IP Tribunals operating within the Intermediate Courts have become more accessible, efficient and reliable – it has become usual for lawyers and other IPR professionals in China to recommend court action. Meanwhile, in addition to their ineffectiveness, there remain doubts over the integrity of local administrative offices in some regions of China; there is also the possibility that their decisions may be overruled by the courts.

A summary of enforcement options (not specific to China) and their pros and cons is provided in Appendix C.

→ *enforcement options*

Self-Help Measures

Q. Should I be reconciled to taking formal action to protect my IP? [index]

The best method of protection is avoidance, rather than expecting to initiate cases against infringers. Avoidance means taking measures that lessen the likelihood of infringement. We have covered many of these under Preparation above: getting good advice, doing risk assessment, checking IP rights registrations, performing due diligence checks, filing your applications as soon as possible, giving your intellectual property the management attention it deserves as a key element of the business and – most important – remaining true to normal business instincts, wherever you are.

*prevention is better than
cure...*

There are also some particular self-help considerations for companies operating in risky territories:

- **Design:** make it harder for infringers to reverse-engineer your product.
- **Staff:** hire honest people, have effective IPR-related clauses in employment contracts, educate employees about IPR protection and require them to safeguard the IP assets of the business.
- **Documents and equipment:** institute sound physical protection and destruction methods for drawings, tooling, samples, machinery and so on.
- **Packaging:** make sure there are no 'leakages' of packaging that might be used by counterfeiters to pass off fake product in real packages.
- **Production over-runs:** police them to ensure that genuine product is not being sold under a different name.
- **Relationships:** the contacts you have with local authorities can make all the difference in helping to defend your IPR and – if a problem occurs – obtaining swift and effective action.

self-help measures that can help you avoid IPR infringement problems – hence the need to take enforcement action

Top Tips for IPR Protection in China [index]

- Stick to your normal business instincts
- Prevention is better than cure – and cheaper
- Assess the risks of the market and make preparations
- Seek advice but take self-help measures to protect your IPR
- Make sure everyone in your business values its IP
- Register your IP rights – even copyright
- Forge good relationships with organisations that can help you
- If action is necessary, be resolute but consider mediation first
- Once beyond mediation, civil litigation has a much more potent deterrent effect than administrative enforcement
- If you don't show that you value your IP, who else will?

ten tips for success

Where to get help in China [index]

Many of the links in this guide give details of organisations that can assist in various situations. In addition, the following organisations can provide advice on IPR in China (see Reference section for Internet addresses):

- UK diplomatic posts: Embassy in Beijing and Consulates-General in Shanghai, Guangzhou, Chongqing and Hong Kong. The posts cannot intervene with Chinese legal or administrative processes but they may be able to keep a watching brief when cases are brought to the Chinese courts, or lobby on your behalf if progress is slow.
- British Chambers of Commerce: Beijing, Shanghai, Guangzhou, Hong Kong, Chengdu and Wuhan. BritCham branches organise IPR-related events and their members include local UK lawyers as well as companies that have direct experience of IPR issues.
- China-Britain Business Council (head office in London): Beijing, Shanghai, Hangzhou, Chengdu, Nanjing, Qingdao, Shenyang, Shenzhen and Wuhan. CBBC has a long history and an unrivalled reputation in China and maintains valuable relationships with local Chinese authorities and British businesses.
- European Commission – China IPR SME Helpdesk: A Directorate-General Enterprise & Industry initiative targeting European SMEs to provide free information, training and first-line advice about protecting and enforcing IPR in China.
- Quality Brands Protection Committee: The QBPC, representing a number of international brands, is based in Beijing. Its mission is ‘to work co-operatively with the Chinese Central and local governments, local industry, and other organisations to make positive contributions to intellectual property protection in the People’s Republic of China.’
- See a website listing local law firms in China in the Reference section.

→ [where to get help](#)

→ [UK diplomatic posts](#)

→ [BritCham](#)

→ [CBBC](#)

→ [EC SME Helpdesk](#)

→ [QBPC](#)

→ [law firms](#)

3. FEEDBACK

If you have any comments about what you have read in this guide we would welcome your feedback.

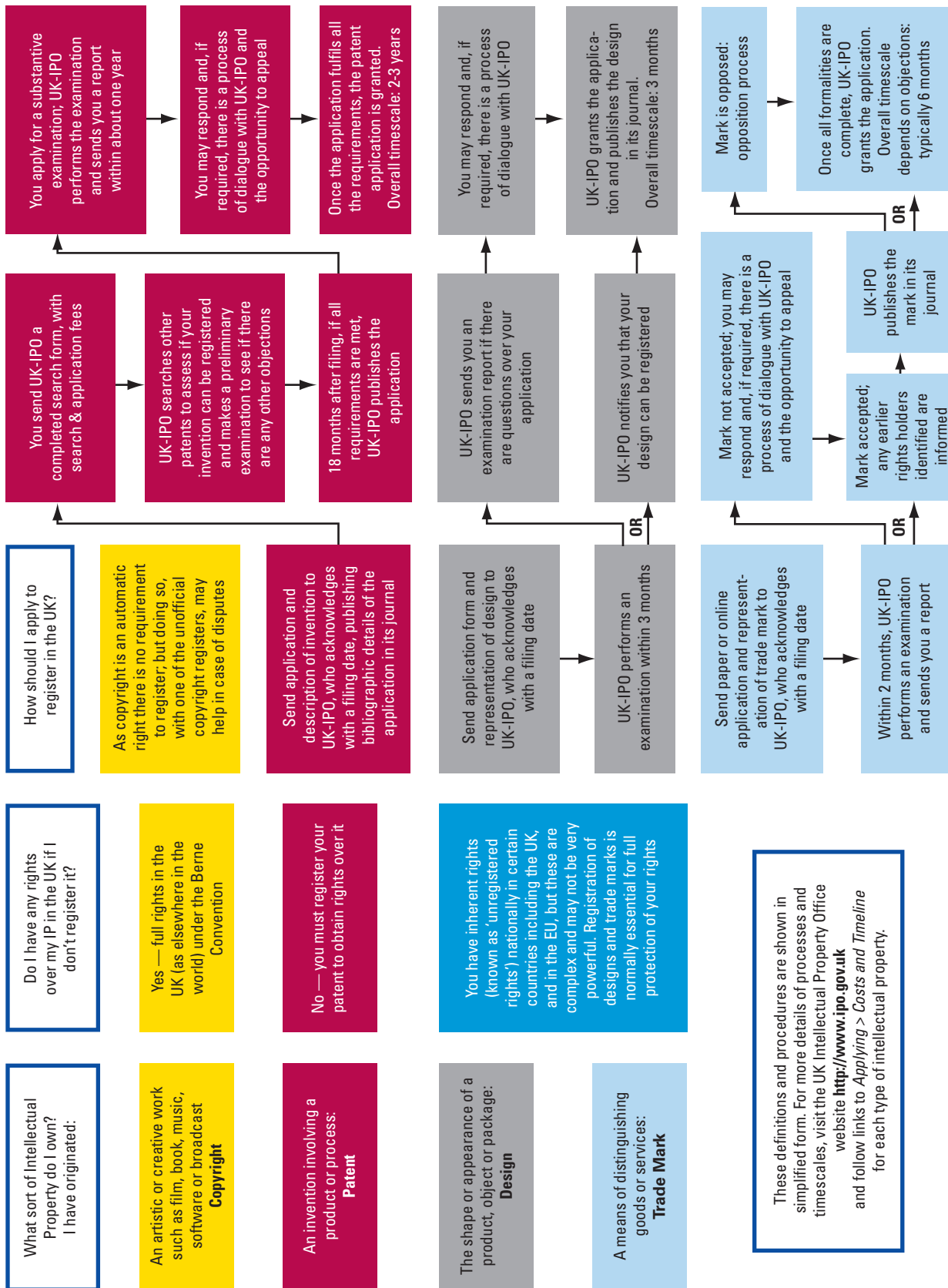
[feedback](#)

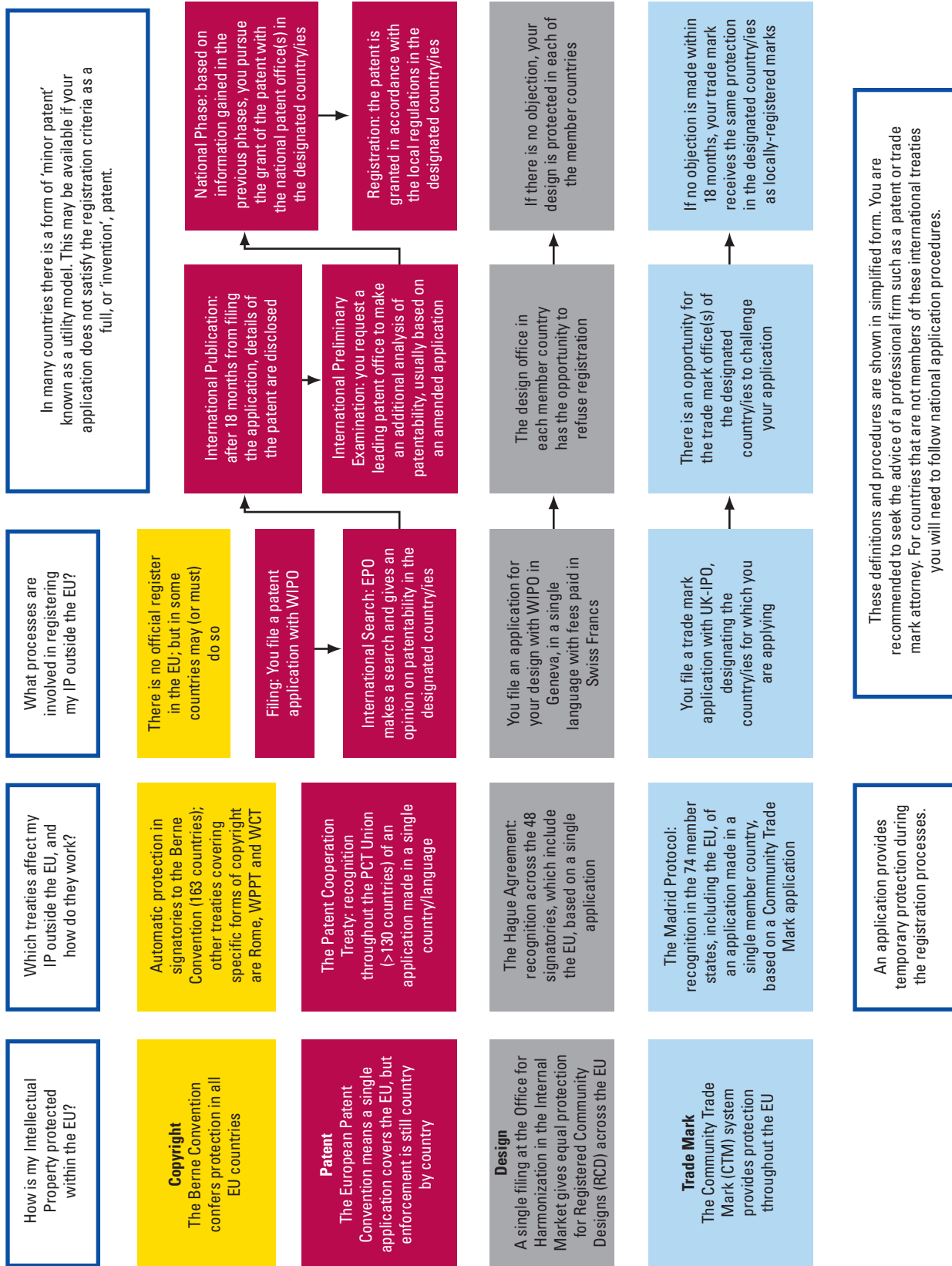
Please take a few minutes to complete our survey by clicking here. [Start survey](#)
Your opinions and suggestions will help us ensure that the IPR Primers are relevant to your needs.

Disclaimer

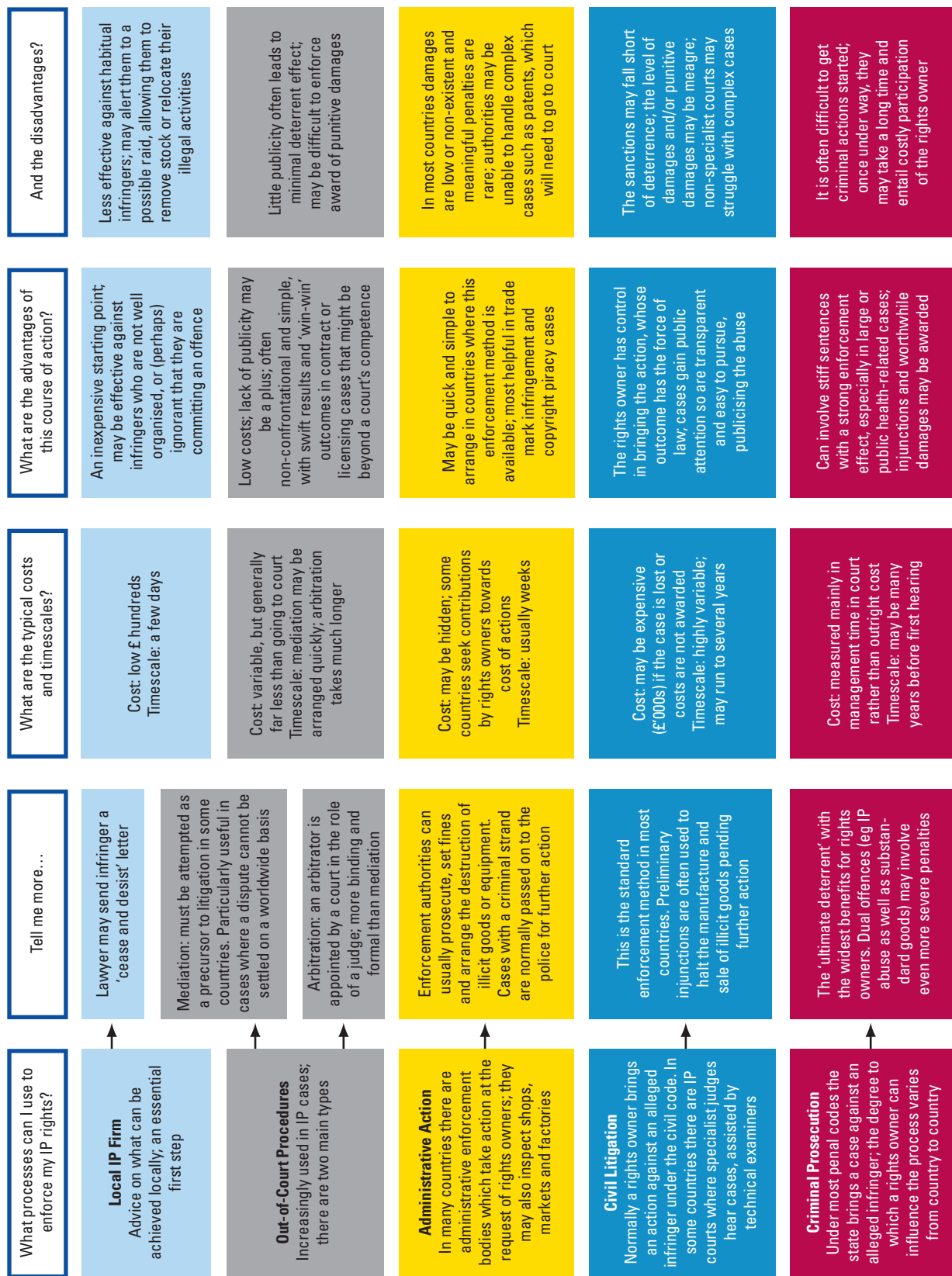
This guide contains only a summary of IPR issues. It is not intended as a substitute for the advice of professionals such as lawyers and attorneys. You should always seek expert guidance before taking decisions that may affect your IP rights, in China or elsewhere.

[the small print...](#)





APPENDIX C : RIGHTS ENFORCEMENT AIDE-MEMOIRE [RETURN] [INDEX]



APPENDIX D : CHINA/UK IP RIGHTS COMPARISON [RETURN] [INDEX]

Country/Form of IP Right	Maximum Initial Term from filing date; for copyright, from author's death (eg literary work)	Cost typical official fees, excluding legal representation	Time to Register typical period, from filing date	Extension Periods total = max extension term + initial term	Notes
UK					
Copyright	70 yrs	–	–	none	term depends on type of work
Patent	4 yrs	£200	2 - 3 yrs	16 x 1 yr (total 20 yrs)	renewal on an escalating scale
Design	5 yrs	£60	3 mths	4 x 5 yrs (total 25 yrs)	cost for first design
Trade Mark	10 yrs	£200	6 mths	10 yrs (unlimited)	
China					
Copyright	50 yrs	£20 – £140+	4 - 5 mths	none	approximate costs for recordal; new rates expected soon
Patent	Invention	£250	3 - 6 yrs	none	fee for application and examination
	Utility Model	£36	12 - 15 mths	none	
Industrial Design	10 yrs	£36	8 - 15 mths	none	
Trade Mark	10 yrs	£70	30 - 42 mths	10 yrs (unlimited)	validity from date of grant

European spirits brands (criminal prosecution of counterfeiters) [return] [index]

In 2005 more than 190,000 counterfeit items copying the brand credentials of a famous Scotch whisky and a Cognac brand were seized from two production sites and a storage facility in Zhongshan, Guangdong Province. This was the culmination of a three-month investigation by the International Federation of Spirits Producers (IFSP) in liaison with local police. As a result of the raids ten people were arrested and the brand owners pressed for their criminal prosecution.

Seven of the defendants were subsequently found guilty. The principal offender was sentenced to seven years' imprisonment and fined RMB400,000 (approximately £29,000) for manufacturing and selling 4,000 bottles of spirits worth RMB240,000 (£17,000) between 2004 and 2005. Five others each received sentences of one to three years and individual fines of RMB100,000. The landlord of the premises being used for counterfeiting was also found guilty and placed on probation for three years.

This case illustrates how heavy sentences can be imposed on counterfeiters once the financial thresholds that allow prosecution under the Criminal Law have been reached. It also demonstrates the importance of rights owners maintaining good relationships with the local enforcement authorities.

Source: brand holder

Nike International v. Campomar (protection for a well-known mark) [return] [index]

In 1986 Campomar sought Nike's support in developing Nike-branded perfumes and cosmetics but Nike refused and warned Campomar not to undertake the project. In 1988 Campomar filed an application for the Nike mark, which was allowed by the Chinese Trademark Review & Adjudication Board (TRAB). Nike then petitioned the TRAB to cancel Campomar's registration based on Article 6bis of the Paris Convention (*'..These [refusal or cancellation] provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well-known mark or an imitation liable to create confusion therewith..'*) and on various provisions of the Chinese unfair competition and trade mark laws.

Campomar claimed their registration for the Nike mark gave them the exclusive right to use the mark in respect of perfumes and essential oils: although the Nike mark was well-known for footwear, this did not give Nike any rights in the Nike mark in respect of perfumes.

The TRAB held that, as a result of Nike's continuous and concerted efforts for many years, their Nike mark had become well-known among the Chinese public, that the goods of Campomar and Nike were used by consumers in their daily lives and that the public was likely to be confused as to the origin of Nike perfumes. It was further held that Campomar's perfumes were not well-known, that their action constituted unfair competition and that it would cause 'unhealthy social influences'. Campomar's registration was cancelled in a final decision issued by the TRAB in September 1995.

Based on a report by Ladas & Parry LLP, who comment: *'We believe that this is a significant decision since the TRAB extended protection to a well-known mark in China beyond the goods with which it is ordinarily associated.'*

Starbucks v. XingBaKe (trade mark/trade name infringement) [return] [index]

In 2005 the Shanghai No 2 Intermediate People's Court found in favour of the US company Starbucks, which had sued XingBaKe Café Corp over the use of the trade name 'Shanghai XingBaKe'. Starbucks claimed that the use of this name was likely to mislead customers and cause confusion. The court awarded damages of RMB500,000 (about £36,000) to Starbucks and ordered the defendant to stop using the XingBaKe name and cease imitating the Starbucks design of coffee houses, ruling that this was 'illegitimate competition'.

The similarity of the name arises because 'xing' is the Chinese character for 'star', while the characters 'ba-ke' were used phonetically to represent 'bucks'. XingBaKe claimed that its name was registered in China in 2000, before Starbucks' application, while Starbucks maintained that its own trade mark was registered in China in 1996.

Source: various

APPENDIX F : REFERENCES [INDEX]

1 CHINESE IPR REFERENCES [INDEX]

Organisations [return]

AQSIQ (quality standards) [return] [index]

General Administration of Quality Supervision, Inspection and Quarantine
9 Madian Donglu
Haidian Qu
Beijing
People's Republic of China 100088

Tel: 86-10-82260001/82261600

Fax: 86-10-82260011/82260012

<http://english.aqsiq.gov.cn/>

'AQSIQ is... in charge of national quality, metrology, entry-exit commodity inspection, entry-exit health quarantine, entry-exit animal and plant quarantine, import-export food safety, certification and accreditation, standardization, as well as administrative law enforcement.'

For more on AQSIQ's role in standards generally, see The China Business Review's article Navigating China's Standards Regime:

<http://www.chinabusinessreview.com/public/0305/weeks.html>

China Customs or GAC [return] [index]

China Customs
6 Jianguomenwai DaJie
Tianhe Qu
Beijing
People's Republic of China 100730

Tel: 86-10-6519-5243 or 6519-5399

Fax: 86-10-6519-5394

<http://www.customs.gov.cn/YWStaticPage/3972/c4538048.htm>

SIPO's 'Report on China's Intellectual Property Protection in 2006' states

'Local customs offices and public security organs co-operated closely and investigated a parcel of large and influential cases, such as the illegal assembly case of 'Motorola' and 'Philips' used mobile phones, the counterfeit case of branded sports shoes like Nike, Adidas, Puma, and so on...'

'Customs offices throughout the country investigated a sum of 2,473 import and export IP infringement goods cases... the quantity of infringement goods reached nearly 200 million, and the value of involved goods was over RMB200 million [approximately £14 million].'

More detailed statistics and descriptions of China Customs activities are provided on the Customs website under 'Work Annals'.

National Working Group For Intellectual Property Rights Protection [index]

As the outline below explains, this group brings together the main IPR-related agencies. The website contains a wealth of useful information, including details of local administrative offices under the national IPR bodies.

'In order to further strengthen the leadership of IPR protection undertaking, Chinese government has decided to set up the National Working Group for Intellectual Property Rights Protection. The Working Group is led by Vice Premier Wu Yi and constituted by seventeen members who are in charge of IPR-related agencies... [listed]

'The main task of the National Working Group is to be responsible for leading the national IPR protection work as a whole, promoting the construction of IPR laws and regulations, setting up the trans-departmental co-ordination mechanism of IPR law enforcement, dealing with the linkage of administrative law enforcement and criminal justice, and improving the IPR awareness of the general public.'

<http://english.ipr.gov.cn/en/index.shtml>

NCA (copyright) [return] [index]

National Copyright Administration
85 Dongsì Nan Dajie
Beijing
People's Republic of China 100703

Tel: 86-10-6512-7869 or 6527-6930

Fax: 86-10-6512-7875

<http://www.ncac.gov.cn> (Chinese only)

NCA administers and enforces copyright laws, as well as investigating infringements, overseeing copyright matters nationwide and internationally (including arbitration issues), and supervising the local copyright administrative authorities.

SIPO reports the following statistics for copyright-related cases in 2006:

'10,559 cases were received... 98 per cent [of which] were resolved by various levels of copyright administrative authorities across the country. Of [these] 8,524 were resolved with administrative punishment, 1,585 were resolved with settlement agreement, and 235 were transferred to judicial authorities... More than 73 million... pirated products were confiscated [of which] more than 18 million were pirated books, about 1.1 million were pirated periodical magazines, 48 million were pirated audio-video products, 2.01 million were pirated electronic publications, 3.79 million were pirated software discs, and 240,000 were other kinds.'

PSB [return] [index]

Public Security Bureau (PSB)
14 DongchangAn DaJie
Beijing
People's Republic of China 100741

Tel: 86-10-6520-2114

Email: 110@mps.gov.cn

<http://www.mps.gov.cn>

Bird & Bird (article by William Law): *'The Public Security Bureau (PSB) investigates all criminal matters. The internal division of the PSB in charge of handling trade mark crime is called the Economic Criminal Investigation Department (ECID). The division in charge of handling product quality and copyright crime is the Public Order Department (POD). In a few cities, the function of the POD has been merged with that of the ECID.'*

Summary at an MPS/US trade delegation meeting, 2005: *'The Ministry of Public Security is the principal Chinese police authority. MPS oversees China's police force responsible for cracking down and prosecuting IPR crimes and counterfeit activities in China. The Economic Crime Investigation Department focuses on trade mark violations and works closely with Administration for Industry and Commerce (AIC) and State Food Drug Administration (SFDA)... a major focus of their efforts [is] on pharmaceuticals...'*

SAIC (trade marks) [return] [index]

State Administration for Industry and Commerce
Trademark Office
8 Sanlihe DongLu
Xicheng Qu
Beijing
People's Republic of China 100820

Tel: 86-10-6801-3447

Fax: 86-10-6801-0463

<http://www.saic.gov.cn>

dfa@saic.gov.cn

In addition to purely IPR duties, SAIC and its local offices (AICs) are charged with regulating unfair competition regulations. The responsibilities of the Trademark Office under SAIC are as follows:

'Formulating regulations on trade mark registration and administration; registering trade marks nationwide; ruling on opposition to trade mark application; revoking registered trade marks; investigating cases of trade mark infringements and fakes and imposing penalties; guiding local AICs on trade mark issues and assisting them in the administrative review of trade mark infringement cases; filing of trade mark licensing agreements, regulating trade mark printing, recognising and protecting well-known trade marks and supervising trade mark agencies; collecting and filing trade mark information; implementing international trade mark treaties and agreements within China and conducting international exchanges and co-operative activities related to trade marks.'

SIPO's Report on China's Intellectual Property Protection in 2006 describes the following trade mark-related activities and outcomes:

'[The SAIC] intensified the supervision and management over commodity wholesale markets in Beijing, Shanghai, Guangdong, Zhejiang [and] investigated and disposed and even banned a large number of illegal operators. [Local AIC administrations] actively explored a long-term mechanism to control trade mark infringement. 164 markets in Beijing implemented the 'trade mark authorisation management system.' Luohu commercial market in Shenzhen imposed the 'one strike, you are out' system on traders selling counterfeit goods.

'In 2006, all levels of administrations of industry and commerce across the country supervised and dealt with a series of serious trade mark related cases which were abominable in nature... 50,534 trade mark violation related cases covering different categories were investigated... of these cases, 9,562 were foreigner-related, an increase of 41.24 per cent over 2005. About 30.36 million... trade mark violation related marks were seized and destroyed and [there were fines totalling] RMB398 million [approximately £28 million]; 252 cases and 263 involved persons were transferred to the judicial system for criminal liabilities...'

SIPO (patents) [return] [index]

State Intellectual Property Office
No 6 XituchengLu
Haidian Qu
PO Box 8020
Beijing
People's Republic of China 100088

Tel: 86-10-6209-3268

Fax: 86-10-6201-9615

http://www.sipo.gov.cn/sipo_English/

SIPO's responsibilities:

'Drafting proposals and amendments for patent legislation; examining patent applications for invention, utility model and design; granting patents; dealing with requests for re-examination and invalidation; examining applications for registration of layout designs of integrated circuits; co-ordinating and harmonizing international affairs in IP field; administering nationwide patent affairs; instructing local government agencies in the administrative enforcement of the patent law.'

Report on China's Intellectual Property Protection in 2006

This report, published by SIPO and quoted above, is an exhaustive and generally up-beat account of the previous year's IPR activities in China:

http://english.ipr.gov.cn/ipr/en/info/Article.jsp?a_no=81228&col_no=102&dir=200706

The following patent-related cases were recorded in 2006:

'...the patent administration departments at provincial levels across the country accepted 1,227 patent infringement cases... They also dealt with 33 cases of unauthorised use of others' patents and 933 cases of patent counterfeits... Local patent administration departments... checked 7,780 commercial establishments and 2,968,249 pieces of goods.'

SIPO's IP Manual contains useful information about IPR in both a global and a Chinese context:

http://www.sipo.gov.cn/sipo_English/specialtopic/IPManual/index.htm

Laws and Procedures [index]

Administrative Enforcement [return] [index]

Administrative Procedure Law of The People's Republic of China:

<http://en.chinacourt.org/public/detail.php?id=2695>

Extract from the US Trade Representative's 'Report to Congress on China's WTO Compliance':

'Inadequate IPR enforcement is one of China's greatest shortcomings as a trading partner. Rights holders report that enforcement efforts, particularly at the local level, are hampered by poor co-ordination among Chinese Government ministries and agencies, local protectionism and corruption, high thresholds for initiating investigations and prosecuting criminal cases, lack of training, and inadequate and non-transparent processes.'

'Most of all, China suffers from chronic over-reliance on toothless administrative enforcement and underutilisation of criminal remedies. China's own 2004 data showed that it channeled more than 99 per cent of copyright and trade mark cases into its administrative systems and turned less than one per cent of cases over to the police. The trade mark and copyright industries continue to point out that administrative fines are too low to provide a deterrent, and as a result, infringers continue to consider administrative seizures and fines as a cost of doing business.'

'In 2005, the United States pressed China to address its over-reliance on administrative enforcement... China agreed to increase the number of criminal prosecutions for IPR violations relative to the total number of IPR administrative cases.

'Unfortunately, there has been no sign yet of a significant shift in emphasis toward criminal enforcement. China's reported absolute numbers of criminal cases have risen, but China has not publicised corresponding administrative statistics that would reveal a shift. On the contrary, according to a trade mark industry submission, officials of China's State Administration for Industry and Commerce recently indicated that the number of trade mark cases transferred to the police during 2005 was expected to be less than 0.3 per cent of the total. Right holders continued to express dissatisfaction with the number and substance of investigations, prosecutions, and convictions last year by local police.'

The USTR report in full

Anti-Unfair Competition Law [return] [index]

Text of law from the Supreme Court's Chinacourt site:

<http://en.chinacourt.org/public/detail.php?id=3306>

Alibaba.com's *'Judicial Interpretation On The Anti-Unfair Competition Law'*:

http://resources.alibaba.com/article/47060/judicial_interpretation_on_the_anti_unfair_competition_law_.htm

Civil Litigation [return] [index]

Civil Procedure Law of The People's Republic of China:

<http://en.chinacourt.org/public/detail.php?id=2694>

Note Article 5: *'Foreign nationals, stateless persons, foreign enterprises and organizations that institute or respond to prosecutions in the people's courts shall have the same litigation rights and obligations as citizens, legal persons and other organizations of the People's Republic of China.'*

Rouse & Co.'s comprehensive *'China – a Brief Introduction to Civil Litigation'*:

http://www.iprights.com/assets/pdf/CN_civillitigation.pdf

Copyright Law of 2001 [return] [index]

<http://www.chinaiprlaw.com/english/laws/laws10.htm>

and 2002 Implementing Regulations

<http://www.chinaiprlaw.com/english/laws/laws13.htm>

Copyright and Employers'/Employees' Rights in China [return] [index]

'A work created by a citizen in the fulfilment of tasks assigned to him by a legal entity or other organization shall be deemed to be a work created in the course of employment. The copyright in such work shall be enjoyed by the author, subject to the provisions of the second paragraph of this Article, provided that the legal entity or other organization shall have a priority right to exploit the work within the scope of its professional activities. During the two years after the completion of the work, the author shall not, without the consent of the legal entity or other organization, authorize a third party to exploit the work in the same way as the legal entity or other organization does.' (Article 16)

http://english.ipr.gov.cn/ipr/en/info/Article.jsp?a_no=81228&col_no=102&dir=200706

Copyright Protection for Foreigners in China [return] [index]

From China's 1990 Copyright Law

'Any work of a foreigner published outside the territory of the People's Republic of China which is eligible to enjoy copyright under an agreement concluded between the country to which the foreigner belongs and China, or under an international treaty to which both countries are party, shall be protected in accordance with this Law.'

Criminal Law [return] [index]

Criminal Procedure Law of The People's Republic of China:

<http://en.chinacourt.org/public/detail.php?id=2693>

'Lectric Law Library's People's Republic Of China's Criminal Justice System'

<http://www.lectlaw.com/files/int10.htm>

William Law's article *'Protecting brands in China: a Practical Approach'*, published in the April-June 2007 issue of PLC Cross-border Quarterly, is a useful guide to the whole area of IPR enforcement in China. Article in full:

http://www.twobirds.com/english/publications/articles/Protecting_brands_China.cfm

Customs Recordal [return] [index]

For procedures, timescales and costs for trade marks and other forms of IPR see:

http://www.liu-shen.com/english/customs_en.asp and

http://www.honban.com.cn/ArticlesPackages/Chinese_Customs_Law.htm

Domain Names Registration [index]

Domain name registration in China:

www.cnnic.net.cn

Designs [index]

For laws see Trade Marks

Geographical Indications [return] [index]

GIs are protected under the Trademark Law. As at mid-2007 251 items were included. This site contains information on the GI protection system in China:

http://english.ipr.gov.cn/ipr/en/info/Article.jsp?a_no=89588&col_no=925&dir=200706

Olympics Symbols [index]

A special campaign has been launched to check that goods related to the 2008 Beijing Olympics do not infringe the Exclusive Rights of Olympics Symbols:

http://www.sipo.gov.cn/sipo_English/specialtopic/IPManual/200708/t20070801_192162.htm

Patent Law, 2000 [return] [index]

<http://www.chinaiprlaw.com/english/laws/laws4.htm>

Trade Mark Law, 2001 [return] [index]

<http://www.chinaiprlaw.com/english/laws/laws11.htm>

and Regulations for the Implementation of the Trademark Law, 2002:

<http://www.china.org.cn/english/DAT/214797.htm>

Third Amendment of Trademark Law

'On 23 August 2007 China celebrated 25 years of Trade Mark Law in China. In those 25 years China has established a modern trade mark protection system and the number of registered trade marks has increased rapidly. By the end of 2006, the total number of applications reached 5 million, and 2.8 million trade marks have been registered. This is more than any other country in the world.

'To accelerate economic development, The Trademark Office of State Administration for Industry and Commerce is currently amending the Trade Mark Law for the third time. It is hoped that the changes will simplify the application procedure and shorten the period for trade mark registration and dispute resolution. The revision is a high priority on this year's legislative agenda of the State Council.'

Source: China Daily 24 August 07

Trade Names [return] [index]

The following explanation is taken from the National Working Group for IPR Protection's 2006 article *'What is the distinction between trade mark and trade name?'*:

'In China, trade mark is under the protection of Trademark Law, while trade name is under the provisions on protecting name rights of enterprises as legal persons in General Principles of the Civil Law... It is allowed by Trademark Law, Company Law and Regulations for Controlling the Registration of Enterprises as Legal Persons that the enterprise registers its trade name as its trade mark, or vice versa, that is, trade mark and trade name may be actually the same or part of the other.'

The article in full:

http://english.ipr.gov.cn/ipr/en/info/Article.jsp?a_no=9400&col_no=220&dir=200608

See also the Starbucks Case. For further examples and commentary on the counterfeiting of trade marks and trade names see Ladas & Parry LLP's article *'Enforcement of Rights in Trademarks and Trade Names in the People's Republic of China'*:

<http://www.ladas.com/BULLETINS/2006/ChinaTMEnforcement.shtml>

Well-Known Marks [return] [index]

Provisions on the Determination and Protection of Well-known Marks:

http://english.ipr.gov.cn/ipr/en/info/Article.jsp?a_no=2160&col_no=119&dir=200603

2 GENERAL AND INTERNATIONAL REFERENCES

Collection of Laws for Electronic Access (CLEA) [index]

This excellent site, operated by the World Intellectual Property Organization (WIPO) is *'a unique electronic database providing easy access to intellectual property legislation from a wide range of countries and regions as well as to treaties on intellectual property. It is an invaluable information resource made available by WIPO free of charge to all interested parties, including researchers, legal professionals, policy-makers, students and administrators.'*

<http://www.wipo.int/clea/en/index.jsp>

Copyright

Berne Convention [return] [index]

UK Copyright Service's article *'International copyright law – The Berne Convention'*:

http://www.copyrightservice.co.uk/copyright/p08_berne_convention

Copyright in the UK [return] [index]

UK-IPO:

<http://www.ipo.gov.uk/copy.htm>

Copyright Licensing Agency (CLA) [index]

Based in the UK, CLA licenses the copying of published extracts. Its website provides practical information on many aspects of copyright:

<http://www.cla.co.uk/>

Designs

Designs in the UK [return] [index]

UK-IPO:

<http://www.ipo.gov.uk/design.htm>

Unregistered Community Designs [return] [index]

Patent and trade mark attorney Hindle Lowther's explanation:

<http://www.hindlelowther.com/design11.htm>

International IPR Organisations, Systems and Treaties

Community Trade Marks (CTM) [return] [index]

CTM resource site of the Office for the Harmonization of the Internal Market (OHIM):

<http://oami.europa.eu/en/mark/default.htm>

Overview by ipr.co.uk:

http://www.ipr.co.uk/IP_conventions/community_trade_marks.html

UK-IPO:

<http://www.ipo.gov.uk/abroad/abroad-tmeurope.htm>

European Patent Convention (EPC) [return] [index]

European Patent Office site for EPC:

<http://www.epo.org/patents/law/legal-texts/epc.html>

Text of the Convention:

<http://www.european-patent-office.org/legal/epc/e/contents.html>

Hague Agreement [return] [index]

WIPO datasheet '*Hague System for the International Registration of Industrial Designs*' with link to list of parties to the agreement:

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

UK-IPO site on linking of Hague Agreement and Registered Community Design:

<http://www.ipo.gov.uk/policy/policy-issues/policy-issues-designs/policy-issues-designs-protection.htm>

and European Commission press release on the same subject:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/1691&format=HTML&aged=0&language=EN&guiLanguage=en>

International Anti-Counterfeiting Coalition (IACC) [index]

<http://www.iacc.org/contact.php>

International Intellectual Property Institute (IPI) [index]

<http://iipi.org/>

Madrid Protocol [return] [index]

WIPO's introduction '*Madrid System for the International Registration of Marks*':

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

UK-IPO:

<http://www.ipo.gov.uk/abroad/abroad-tmworld.htm>

List of Madrid Protocol registrations on Institute of Trade Mark Attorneys site:

<http://www.itma.org.uk/trade-marks/6b-protocol.htm>

Outlaw-Com's guide to '*Registering a Trade Mark through the Madrid Protocol (international application)*':

<http://www.out-law.com/page-376>

Paris Convention [return] [index]

WIPO's '*Summary of the Paris Convention for the Protection of Industrial Property*':

http://www.wipo.int/treaties/en/ip/paris/summary_paris.html

Patent Cooperation Treaty (PCT) [return] [index]

WIPO's PCT Resources site:

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

UK-IPO:

<http://www.ipo.gov.uk/abroad/abroad-patentworld/abroad-pct.htm>

Mewburn Ellis LLP's succinct explanation and list of members:

http://www.mewburn.com/downloads/PCT_Members_States_as_at_01Jun07_-_June_2007.pdf

Registered Community Design (RCD) [return] [index] See also Hague Agreement

UK-IPO:

<http://www.ipo.gov.uk/design/d-applying/d-should/d-should-abroad/d-should-abroad-eu.htm>

Rights Extensions [return] [index]

These are listed on the UK-IPO website, with descriptions of the rules and conditions for the extension of protection for the various UK and EU IP rights:

<http://www.ipo.gov.uk/abroad/abroad-extend.htm>

TRIPS [return] [index]

Trade-Related Aspects of Intellectual Property Rights:

http://www.wto.org/english/tratop_e/trips_e/trips_e.htm

UK-IPO:

<http://www.ipo.gov.uk/policy/policy-issues/policy-issues-trips.htm>

World Intellectual Property Organization (WIPO) [return] [index]

Website gateway to a copious source of IPR information:

<http://www.wipo.int/portal/index.html.en>

World Trade Organization (WTO) [return] [index]

WTO's home page:

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

List of WTO members: [return]

http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm

Miscellaneous

Books [index]

The China Dream

'The Elusive Quest for the Last Great Untapped Market on Earth' by Joe Studwell

ISBN 1861979487 published June 2005

http://www.profilebooks.co.uk/title.php?titleissue_id=305

The Chinese Business Puzzle

'How to Work More Effectively with Chinese Cultures' by Andrew Williamson

ISBN 1857038827 published August 2003

<http://www.howtobooks.co.uk/display.asp?K=9781857038828&taub=Andrew%20Williamson&m=1&dc=2>

China Intellectual Property Challenges and Solutions

'An Essential Business Guide' by Rebecca Ordish & Alan Adcock

ISBN 0470822759 to be published March 2008

The Handbook of European Intellectual Property Management

'Developing, Managing and Protecting Your Company's Intellectual Property'

by Adam Jolly ISBN 9780749449889 published July 2007

<http://www.kogan-page.co.uk/bookdetails.aspx?ISBN=9780749449889>

Intellectual Property and Trips Compliance in China

'Chinese and European Perspectives (New Horizons in Intellectual Property)'

by Paul Torremans, Hailing Shan and Johan Erauw

ISBN 1845428757 published June 2007

http://www.e-elgar-law.com/Bookentry_contents.lasso?id=4200

Knockoff: the Deadly Trade in Counterfeit Goods

'The True Story of the World's Fastest Growing Crime Wave' by Tim Phillips

ISBN: 9780749443795 published December 2005

<http://www.koganpage.com/bookdetails.aspx?ISBN=0749443790>

One Billion Customers

'Lessons From the Front Lines of Doing Business in China' by James McGregor

ISBN 0743258398 published October 2005

<http://www.onebillioncustomers.com/>

Pirates in the Middle Kingdom

'The Art of Trademark War' by Tan Loke Khoon

ISBN 9789626612330 published August 2004

http://www.smlawpub.com.hk/products/prod_spec.asp?cvalue=a19a52a116&ProdId=829

The Politics of Piracy

'Intellectual Property in Contemporary China' by Andrew C. Mertha

ISBN 0801443644 published September 2005

http://www.cornellpress.cornell.edu/cup_detail.taf?ti_id=4334

The following review of the book above contributes some valuable insights about the problems of administrative enforcement and IPR in China generally:

<http://ip-updates.blogspot.com/2005/09/politics-of-piracy-in-china.html>

China's Economic Growth [return] [index]

China's GDP is growing by 9.5 per cent a year. This figure covers the developed industrial and coastal regions as well as the less-developed rural and Western regions; districts of some of the larger cities report a startling annual GDP growth rate of 30 per cent or more.

For further information see:

<http://www.chinability.com/index.html>

Speech by the British Ambassador, Sir William Ehrman, at Peking University's School of Economics in November 2006 on *'China's Economic Development'*:

www.uk.cn/bj/index.asp?menu_id=327&artid=2140&q=economic%20growth

For a wide-ranging source of information on China see the Central Intelligence Agency's World Factbook:

<https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html>

Enforcement of Intellectual Property Rights in the UK [index]

Kirkland & Ellis International LLP on the system in England and Wales:

http://www.buildingipvalue.com/n_eu/279_283.htm

Intellectual Property Explained ('My IP'), UK-IPO 2007 [index]

A guide covering IPR for UK companies, together with advice on protection and the steps that would-be rights holders should take:

<http://www.ipo.gov.uk/myip.pdf>

IP protection – alibaba.com's best practice tips:

http://resources.alibaba.com/article/4117/IP_protection_best_practice_tips.htm

Renewal of IP Rights [return] [index]

UK-IPO:

<http://www.ipo.gov.uk/manage/manage-renew.htm>

Reports [index]

China-Britain Business Council, 2008: IPR Guidelines

http://www.cbcc.org/initiatives/ipr_forum/index.html

European Commission – DG Enterprise and Industry, 2007: *'Effects of Counterfeiting on EU SMEs and a Review of Various Public and Private IPR Enforcement Initiatives and Resources'*

(see in particular Appendix C: Interview Report – China Practitioners)

http://ec.europa.eu/enterprise/enterprise_policy/industry/doc/Counterfeiting_Main%20Report_Final.pdf

European Commission – DG Trade, 2006: *'Competition and Partnership: A Policy for EU-China Trade and Investment'* (with link to report to the Council and the European Parliament: *'EU – China: Closer Partners, Growing Responsibilities'*)

http://ec.europa.eu/trade/issues/bilateral/countries/china/global_europe_china_en.htm

European Commission – EU-China Trade Project, 2005: *'The Legislation Protecting Intellectual Property Rights and its Enforcement in the European Union and the People's Republic of China: A Comparative Study'*
http://www.euchinawto.org/index.php?option=com_content&task=view&id=74&Itemid=50&lang=eeu

HM Treasury, 2006: *'Gowers Review of Intellectual Property'*
http://www.hm-treasury.gov.uk/media/6/E/pbr06_gowers_report_755.pdf

OECD, 2007: *'The Economic Impact of Counterfeiting and Piracy (Executive Summary)'*
<http://www.oecd.org/dataoecd/11/38/38704571.pdf>

US Trade Representative, 2006: *'Report to Congress on China's WTO Compliance'* [return]
http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/2006_Special_301_Review/asset_upload_file353_9337.pdf

UK-IPO website [return] [index]

Guidance on all aspects of IPR in the UK, Europe and worldwide:
<http://www.ipo.gov.uk/home.htm>

Patents

Chartered Institute of Patent Attorneys (CIPA) [index]

The CIPA site offers a wide range of advice on patents, international news and articles, together with a search facility for UK-based and international patent attorneys, searchable by region:
<http://www.cipa.org.uk/pages/home>

Patents in the UK [return] [index]

UK-IPO :
<http://www.ipo.gov.uk/patent.htm>

Software Patents [return] [index]

The European Patent Office does not *'grant patents for computer programs or computer-implemented business methods that make no technical contribution. Programs for computers as such are excluded from patentability [unless they have] the potential to cause a 'further technical effect' which must go beyond the inherent technical interactions between hardware and software.'*

See EPO regulations on this subject:

<http://www.epo.org/focus/issues/computer-implemented-inventions.html>

and Ius Mentis's article *'Software Patents under the European Patent Convention'*:
<http://www.iusmentis.com/patents/software/epc/>

Trade Marks [index]

Changes in UK Trade Mark Registration Procedures [return] [index]

Reddy & Grose's description of how existing owners of trade marks are to be consulted when UK-IPO receives applications for similar marks:

<http://www.reddie.co.uk/content/view/119/49/>

Domain Names [return] [index]

The following links provide guidance on:

- domain names in the context of IP law:
http://www.waterfrontpartnership.com/ip/d_domain_names.htm
- choosing and registering a domain name:
<http://www.nominet.org.uk/registrants/register/choose/>
- legal rights relating to domain names:
<http://www.nominet.org.uk/disputes/drs/rights/>
- domain name disputes:
<http://www.out-law.com/page-5700>

Geographical Indications [return] [index]

UK-IPO's notes on GI and links to further information:

<http://www.ipo.gov.uk/patent/p-applying/p-should/p-should-otherprotect/p-should-otherprotect-geographic.htm>

Institute of Trade Mark Attorneys (ITMA) [index]

This site provides a compendium of information on trade marks, including definitions, costs, tips on registration, FAQs and listings of ITMA members, sorted by UK region:

<http://www.itma.org.uk/intro/index.htm>

Nice Classification System [return] [index]

'The countries party to the Nice Agreement constitute a Special Union within the framework of the Paris Union for the Protection of Industrial Property. They have adopted and apply the Nice Classification for the purposes of the registration of marks.'

Class definitions:

<http://www.wipo.int/classifications/fulltext/nice8/enmain.htm>

Plant Varieties [return] [index]

DEFRA's 'Guide to the Plant Varieties Act 1997':

<http://www.defra.gov.uk/planth/pvs/guides/pvsact-20050317.pdf>

Semiconductor Topographies [return] [index]

The Design Right (Semiconductor Topographies) Regulations 1989:

http://www.opsi.gov.uk/SI/si1989/Uksi_19891100_en_1.htm

Trade Marks in the UK [return] [index]

UK-IPO:

<http://www.ipo.gov.uk/tm.htm>

Where to get help in China

British Chambers of Commerce [return] [index]

'The British Chamber of Commerce in China is an independent, not-for-profit membership-based organisation providing connectivity for British Business in China.'

<http://www.pek.britcham.org/>

British Embassy and Consulates-General [return] [index]

'UK Trade & Investment is the Government organisation that helps UK-based companies succeed in an increasingly global economy and supports them entering the Chinese market. Its range of expert services are tailored to the needs of individual businesses to maximise their international success. UKTI also seeks to improve the conditions for trade and investment in China through its contacts with the Chinese government.'

<http://www.uk.cn/bj/index.asp>

China-Britain Business Council [return] [index]

'CBBC is the UK's leading organisation helping British companies do business in China. We deliver a range of practical, cost-effective services to British companies wishing to export goods and services to, invest in, or establish manufacturing under licence arrangements with China.'

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

EC China IPR SME Helpdesk [return] [index]

'The China IPR SME Helpdesk introduces European SMEs to the knowledge and business tools required to develop the value of their intellectual property rights and to manage related risks. The Helpdesk provides free information, first-line advice and training support to European SMEs to protect and enforce their IPR in China. The Helpdesk's services are free and are offered in its offices by appointment, through telephone and online enquiry points; there will also be a range of practical training tools available in web-based forms and through training workshops in Europe and China.'

<http://www.china-iprhelpdesk.eu/>

Quality Brands Protection Committee [return] [index]

'The QBPC is comprised of more than 160 multinational companies concerned with the impact of counterfeiting and membership continues to grow. QBPC member companies represent more than US\$70 billion investment in China, with hundreds of thousands of employment opportunities directly or indirectly created in China.'

<http://www.qbpc.org.cn/>

Local Law Firms [return] [index]

<http://www.chambersandpartners.com/Asia/resultseditorial.aspx?cid=24&pid=34&solbar=1&groupype=1>

UK Trade & Investment is the Government organisation that helps UK-based companies succeed in an increasingly global economy. Its range of expert services are tailored to the needs of individual businesses to maximise their international success. We provide companies with knowledge, advice and practical support.

UK Trade & Investment also helps overseas companies bring high quality investment to the UK's vibrant economy – acknowledged as Europe's best place from which to succeed in global business. We provide support and advice to investors at all stages of their business decision making.

UK Trade & Investment offers expertise and contacts through a network of international specialists throughout the UK, and in British Embassies and other diplomatic offices around the world.

For further information please visit www.uktradeinvest.gov.uk or telephone +44 (0)20 7215 8000.

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Published June 2008 by UK Trade & Investment
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URN 08/983