

Helping Hands: Using U.S. Government Tools to Address Intellectual Property Infringement in China

By Patricia L. Judd

China is a big place, and — even following its colossal Olympic debut — remains an enigmatic one. Tennesseans and others wanting to do business there may be daunted by immense language barriers and cultural differences, the incredibly complicated and opaque system of laws and regulations, and the many restrictions on foreign access to the market that remain even following China's 2001 accession to the World Trade Organization (WTO). For intellectual-property rights (IPR) owners, all of these factors are complicated further by an IPR protection system that, despite significant and repeated efforts by the Chinese government, remains largely ineffective in fighting rampant infringement.

What do you do when clients complain to you about intellectual-property infringement in China? Your clients may not have local resources useful for conducting an in-country fight. They may have no presence in China and may not know where to start. This article suggests one place to start — the U.S. government. While government-to-government action is meant to supplement and support, rather than replace, private action, your clients' issues likely are not unique, but rather symptomatic of larger issues. Mobilizing government attention to these issues can help both your clients and the government accomplish their respective missions — your clients can receive valuable advice and appropriate backing for their fight, and the government can receive helpful information to inform its efforts. It's a win/win.

The U.S. government¹ actively supports American IPR owners in efforts to gain a foothold in the Chinese market, and it has made significant resources available in this respect. In this country, the U.S. Embassies and consulates are staffed with knowledgeable professionals who are there specifically to help U.S. companies promote their wares or services in China. One example is the Foreign Commercial Service (FCS), a branch of the U.S. Department of Commerce charged with promoting U.S. exports. The FCS devotes significant time and resources to educating the American public about opportunities and obstacles to operating in the Chinese market, and it has an entire website devoted to disseminating the information it collects (<http://www.buyusa.gov/china/en/>).²

Also, China was the pioneer country for another DOC program featuring designated IPR Attaches who are dedicated full time to helping coordinate policy matters and enforcement efforts on behalf of U.S. creators and inventors (<http://www.uspto.gov/ip/global/attache/index.jsp>). These experts, who interact daily with Chinese IPR officials, provide terrific insight as to new Chinese initiatives that may affect clients, obstacles clients may face and appropriate personnel and

entities to contact within the Chinese government.

Back in Washington, the interagency team members engage in frequent IPR discussions with Chinese government counterparts. These discussions range from formal, high-level meetings to rather informal briefings among mid-level officials. Both formal and informal communications can be effective in bringing an issue to the Chinese government's attention. Two of the several ongoing formal exchanges are the Joint Commission on Commerce and Trade (JCCT) and the Strategic and Economic Dialogue (SED).

The JCCT, now in its seventeenth year but recently taking a more direct focus on IPR matters, is the result of a bilateral commitment to an ongoing discussion of commercial matters of mutual interest. Through this dialogue, the United States and China have recently tackled issues such as medical journal piracy in Chinese libraries, bad-faith registration of trademarks, and the mutual problem of burgeoning internet piracy. A recent U.S.-China Business Council document contains a helpful list of recent JCCT IPR-related commitments: http://www.uschina.org/public/documents/2010/06/jcct_commitments.pdf.

The SED (<http://www.ustreas.gov/initiatives/us-china/>) is a newer initiative, with a somewhat lesser emphasis on detailed IPR discussions but useful nonetheless for high-level discussions. While inclusion of an issue in one of these two formal exchanges usually requires extensive engagement in China first, clients should consider these dialogues as an end-goal in their government engagements.

While the JCCT and SED are perhaps the most prominent IPR-related bilateral dialogues, they are not the only ones. Also ongoing are discussions regarding two WTO disputes between the U.S. and China, perhaps of particular interest to copyright and trademark owners. The two cases, filed on the same day in 2007 and both now concluded, have the potential to affect enforcement efforts on behalf of copyright and trademark owners,³ and market access for a number of cultural goods dependent on IPR protection.⁴ China is currently implementing the WTO decisions, in each case at least in part favorable to the United States. Although space in this article does not permit full discussion of these cases, they are worth a read if you have trademark and copyright-dependent clients operating, or wishing to operate, in the Chinese market.⁵

In addition to these formal bilateral initiatives, less formal bilateral discussions abound. It is never too early or too late to alert the U.S. government to your experiences and needs, as the government can then identify an appropriate forum at which to raise the issues of concern. Weekly dialogues between the Embassy and Chinese officials, as well as official visits from Washington, pro-

vide innumerable opportunities to tee up issues of concern and begin the process of engagement with the Chinese government about your clients' needs.

So how do your clients take the first step? One obvious mechanism available to IPR owners is the annual "Special 301" process. This Congressionally-mandated report,⁶ detailing IPR protection in selected countries worldwide, forms a de facto framework for discerning IPR priorities each year. The process invites public submissions from all interested stakeholders as to the adequacy and effectiveness of intellectual-property protection for U.S. products overseas. Submissions, usually due in mid-February, result in a late April report issued by the interagency team. For a taste, here is a link to the 2010 report: <http://www.ustr.gov/about-us/press-office/reports-and-publications/2010-3>. Stakeholder reports are posted online⁷ and will likely be read by the target country's government as well as U.S. government representatives, so participating in the process is a great way to get one's issues on the table.

Also of note is the newly created Office of U.S. Intellectual Property Enforcement (<http://www.whitehouse.gov/omb/intellectualproperty/ipec/>). The Office, created by the Prioritizing Resources and Organization for Intellectual Property Act of 2008 (PRO-IP Act),⁸ is charged with developing and coordinating both domestic and international intellectual-property enforcement policy. The Office announced its first significant endeavor, the 2010 Joint Strategic Plan on Intellectual Property Enforcement, in June: (http://www.whitehouse.gov/omb/assets/intellectualproperty/intellectualproperty_strategic_plan.pdf). While not China-specific, the plan will impact U.S. government efforts on IPR enforcement worldwide, and implementation of the plan likely will create multiple opportunities for public input.

Finally, when it comes to Washington access, it is often advantageous for your clients to join forces with individuals or entities facing similar challenges. Washington is replete with trade associations primarily charged with representing a particular industry before the U.S. government.⁹ These entities are valuable sources of information to IPR owners lacking a direct Washington presence and can help in navigating the government's various IPR offices.

Even with the still apparent struggles to tackle counterfeiting and piracy in China, there has never been a better time to get in the game. U.S. government focus on the issue is high, opportunities for engagement abound, and Beijing's rise to prominence following the 2008 Olympic Games makes the market ripe for change. Encourage your clients to use the tools referenced above to join the ongoing discussion. One thing is certain — it will be a most interesting ride. **IP**

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NOTES

1. Many states also have offices that work to promote exports by local companies. Although this article covers only the U.S. government measures, Tennessee may likewise have helpful mechanisms available.

2. This agency also has a page specific to Tennesseans: <http://www.buyusa.gov/tennessee/>.

3. Panel Report, China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights, WT/DS362/R (Jan. 26, 2009).

4. Report of the Appellate Body, China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS362/R (Jan. 19, 2010).

5. A number of entities have conducted reviews of, or written summaries of, these cases. The formal U.S. government fact sheets are located here: http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file908_11061.pdf and http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file971_11063.pdf.

6. Trade Act of 1974, 19 U.S.C. § 2101, *et al.*

7. One has the option to file a separate business confidential submission.

8. Prioritizing Resources and Organization for Intellectual Property (PRO-IP) Act of 2008, Pub. L. No. 110-403, 122 Stat. 4256 (2008), 15 U.S.C. § 8101, *et al.*

9. Organizations active on IPR protection issues include the National Music Publishers Association (NMPA) (www.nmpa.org), the Association of American Publishers (AAP) (www.publishers.org), the Software and Information Industries Association (SIAA) (<http://www.siaa.net/>), the International AntiCounterfeiting Coalition (<http://www.iacc.org/>), the Business Software Alliance (www.bsa.org) and many more. There is an association for just about every industry group, including several IPR-specific organizations with which you may be more familiar, the Intellectual Property Owners Association (IPO) (www.ipo.org/), the American Intellectual Property Law Association (AIPLA) (www.aipla.org), the American Bar Association and others. On China in particular, the International Intellectual Property Alliance, a coalition of copyright-dependent industries, maintains significant information (www.iipa.com). The Quality Brands Protection Committee, a coalition largely made up of trademark-dependent industries, has a strong presence (<http://www.qbpc.org.cn/>). More generally, the U.S. Chamber of Commerce has taken an active role in IPR policymaking, especially in China (<http://www.theglobalipcenter.com/>)

❖ *Special International Issue* ❖



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