

**RECOMMENDED REVISIONS TO CHINA'S LAWS AND REGULATIONS RELATED
TO THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS****August 2006**

Introduction

The US-China Business Council (USCBC) has a long history of cooperation with PRC government departments, organizations, and companies in developing mutually beneficial commercial relations. Since USCBC's founding 33 years ago, China has grown rapidly to become the third largest trade partner of the United States. The United States is now China's largest trading partner, and US companies have invested \$50 billion in nearly 45,000 foreign-invested enterprises. The two economies are becoming more integrated, with tremendous opportunities to further expand cooperation.

The rapid development of such a significant and complex trade relationship naturally brings issues that the two sides need to work together to resolve. Intellectual property rights (IPR) protection in China is currently one of the major issues gaining attention in the bilateral relationship. In a 2005 survey of our membership, the need for improved IPR protection is cited as the top issue impacting our member companies' businesses in China.

This issue is important not only to US and foreign companies, however. It is also important for China's own economic development. China's government leadership recognizes that stronger IPR protection is needed for healthy trade relations and the advancement of China's own innovation capabilities and technological development. As a result, the central government has paid great attention to the IPR issue.

The PRC State Council released the 2006 Action Plan on IPR Protection on March 14, which describes many steps China will take this year to further improve IPR protection. One part of the plan is to revise laws and regulations related to IPR protection.

USCBC supports the PRC government's efforts to continue to improve the legal framework for IPR protection. To assist in this effort, USCBC has undertaken a review of China's IPR legal framework to see what areas may need improvements to further strengthen IPR protection to benefit Chinese and foreign technology owners. The list below, though not comprehensive, summarizes our review and offers suggested improvements to some laws and regulations.

China has made great strides in developing an IPR legal framework since opening to the outside world. The objective of this paper is to offer recommendations that would lead to the further improvement of IPR protection for Chinese and foreign companies, foster the development of mutually beneficial commercial relations, and continue to support China's economic growth.

RECOMMENDED IMPROVEMENTS TO CHINA’S IPR LAWS AND REGULATIONS

INTERPRETATION BY THE SUPREME PEOPLE’S COURT AND SUPREME PEOPLE’S PROCURATORATE ON SEVERAL ISSUES OF CONCRETE APPLICATION OF LAWS IN HANDLING CRIMINAL CASES INVOLVING INTELLECTUAL PROPERTY (DECEMBER 22, 2004)	
EXISTING	SUGGESTED MODIFICATION
The Judicial Interpretation includes thresholds for determining copyright, trademark and patent criminal violations.	Eliminate thresholds for criminal violations, and define criminal violations as infringing activities that occur on a “commercial scale.” Revise Criminal Code Articles 214, 217, and 218 accordingly.
Articles 5 and 6 specify that violations must have been made with the purpose of making profits.	Eliminate the requirement that copyright offenders be proven to have acted with profit-making motive. Replace with language that adjudicates cases based on inflicted harm.
No provisions stipulating the treatment of unauthorized rental, broadcast, and exhibition of software, film, sound recordings, and other works.	Confirm that unauthorized rental, broadcast, and exhibition of software, film, sound recordings, and other works may be transferred for criminal prosecution.
N.A.	<p><u>Suggested additions:</u></p> <p>Make repeat offenders subject to automatic criminal liability.</p> <p>In cases where no sales transaction occurs or no sales records exist, make criminal penalties applicable based on value of inventory, using the victim’s price.</p> <p>Include presumptions of knowledge for landlords on intellectual property (IP) crimes, including counterfeiting trademarks, pirating copyrighted material, or providing production technology.</p> <p>Restrict access for violators to raw materials and other ancillary services like electricity, in accordance with international practice.</p> <p>Confirm that criminal liability applies to end-users of infringed software.</p>

PRC CRIMINAL CODE	
EXISTING	SUGGESTED MODIFICATION
Part I, Chapter 4, Section 1, Article 64 requires that illegally obtained property be recovered or restitution and compensation paid.	Include provision that property used in the commission of a crime shall be confiscated and destroyed.
Part II, Chapter 3, Section 2, Article 214 does not specify that exports constitute a type of sale.	Include the export, rental, and possession of counterfeit trademark goods as types of sale under Article 214.
Part II, Chapter 3, Section 2, Articles 217 and 218 specify that violators must have acted “for the purpose of reaping profits.”	Eliminate the requirement that copyright offenders be proven to have acted with profit-making motive. Replace with requirement that offenders be proven to have inflicted harm.
Part II, Chapter 3, Section 2, Article 218 sets the threshold for the crime of knowingly selling pirated copyright works at RMB 100,000 and sets the threshold for knowingly selling counterfeit trademark goods at RMB 50,000.	Remove all value thresholds for criminalizing trademark and copyright violations and define violations as infringing activities that occur on a “commercial scale.” Criminalize end use of pirated copyright works or counterfeit trademark goods, including unauthorized rental, broadcast, or exhibition of software, film, sound recordings, or other works.
Part II, Chapter 3, Section 2, Article 219 limits punishment for violating commercial secrets to those who cause “significant loss.”	Eliminate “significant loss” threshold for violations.
N.A.	<u>Suggested addition:</u> Subject violators with repeat offenses to stronger penalties.

PRC CRIMINAL PROCEDURE LAW	
EXISTING	SUGGESTED MODIFICATION
Part II, Chapter II details the standards for criminal investigations. Article 83 indicates that cases are filed and investigations conducted “upon discovering criminal facts or criminal suspects.”	Allow public security bureaus (PSBs) to initiate investigations based on prima facie evidence of probable cause so that assets may be frozen before raids are conducted.
N.A.	<p><u>Suggested addition:</u></p> <p>Revise the Opinion on Promptly Transferring Suspected Criminal Cases during Administrative Investigation, issued by the Supreme People’s Procuratorate, Ministry of Public Security (MPS), Ministry of Supervision, and Leading Group on National Rectification and Standardization of Market Order, and the Interim Rules on Strengthening Cooperation between PSBs and Customs in IPR Enforcement, issued by the General Administration of Customs (GAC) and MPS, to clarify PSB obligations to file cases and initiate investigations based upon reasonable suspicion of crime.</p>

PRC IMPLEMENTING REGULATIONS TO THE TRADEMARK LAW	
EXISTING	SUGGESTED MODIFICATION
Chapter VII, Article 52 sets the maximum fine for violations of trademarks at three times the illegal revenues or, when revenues cannot be calculated, at less than RMB 100,000.	<p>A minimum fine that is sufficient to deter future infringements should be specified to remove the infringer’s monetary incentive.</p> <p>Include punitive damages sufficient to deter future infringements.</p>
N.A.	<p><u>Suggested additions:</u></p> <p>Require violators to pay for storage and destruction costs for counterfeit goods.</p> <p>Mandate that counterfeit merchandise be destroyed.</p>

IMPLEMENTING MEASURES ON THE PRC CUSTOMS IPR PROTECTION RULES	
EXISTING	SUGGESTED MODIFICATION
Chapter 3, Article 15 requires brand owners to post a bond to request Customs to seize possible infringing goods. Once Customs seizes the goods, Chapter 4, Article 27 requires brand owners to get an order from a people's court to sustain the validity of the seizure, which requires a second bond with the people's court.	Mandate the transfer of bonds from Customs to people's courts so that two bonds are not required.
Chapter 4, Article 26 gives Customs 30 working days to report to IP owners with the findings of their investigations.	Provide IP owners with immediate access to information on counterfeiting cases gathered by Customs.
Chapter 4, Article 27 stipulates the conditions for transferring cases from Customs to people's courts.	<p>Include presumptions of knowledge in the transfer rules that include individuals who would have reasonable grounds to know IPR violations are occurring.</p> <p>Stipulate that if counterfeit labels are not <u>on</u> the products but being shipped <u>with</u> products, the products can be seized as well.</p> <p>Make trading companies liable for counterfeit products shipped using their permits or under their names.</p> <p>Require import/export companies to make public information on destination and purchaser/receiver of counterfeit shipments.</p> <p>Create a system to monitor counterfeiters involved in previous Customs seizures and list their names publicly. Require future shipments from the same counterfeiters to undergo Customs auditing for a specified period of time.</p>
Chapter 4, Article 29 allows travelers to carry a "reasonable amount of counterfeit or pirated goods for personal use."	This provision should be deleted—no counterfeit or pirated goods should be allowed to be used or carried under the law.
N.A.	<p><u>Suggested additions:</u></p> <p>Apply presumption of knowledge and criminal procedures to factory suppliers and trading companies that export counterfeit and pirated goods.</p> <p>Give Customs power to impose fines that are sufficient to deter future infringements on exporters of counterfeit and pirated products.</p>