

USCBC Intellectual Property Rights Review and Recommendations

May 2013

Executive Summary

- China has made considerable progress in recent years in its efforts to boost innovation and intellectual property (IP), with an improved legal and regulatory framework, stronger efforts to enforce intellectual property rights (IPR), an expanding body of registered IP, and the growth of corporate research and development (R&D) activities.
- While domestic and foreign stakeholders recognize the value of these achievements, both remain concerned about their ability to protect their IPR. Many companies view IPR protection as an important priority for their operations in China.
- Stronger IPR enforcement could have a significant positive impact on the Chinese economy, and would boost domestic industry development, spur innovation, strengthen Chinese companies, and promote the interests of Chinese consumers.
- Based on regular communication with its members, the US-China Business Council (USCBC) has compiled a list of priority areas and suggestions to further strengthen Chinese government efforts to improve IPR protection.
- USCBC's top concern remains that penalties imposed during IPR enforcement proceedings do not provide a sufficient deterrent to IPR infringement, and that existing value-based criminal thresholds effectively limit the number of criminal cases.
- Other priorities include further expanding the work of the State Council Leading Group on Combating IPR Infringement and Sales of Counterfeit Goods, increasing enforcement resources, ensuring equal treatment for foreign and domestic firms, addressing uneven enforcement of IPR, increasing enforcement of Internet-related IPR, and boosting trade secret protection.

Introduction

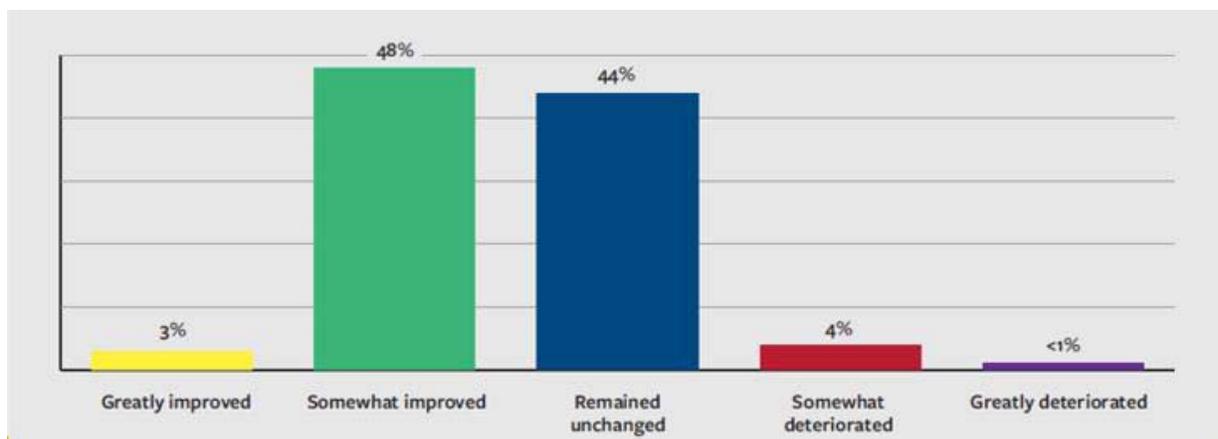
China has made considerable progress in recent years in its efforts to boost innovation and intellectual property (IP), with an improved legal and regulatory framework, stronger efforts to enforce intellectual property rights (IPR), an expanding body of registered IP, and the growth of corporate research and development (R&D) activities. The US-China Business Council (USCBC) and its members recognize these achievements as important steps towards China's goal of building a robust environment for creating and protecting intellectual property in China. Such efforts are also directly in line with important Chinese framework documents like the [12th Five-Year Plan \(2011-15\)](#) and the [National IPR Strategy](#).

China Has Made Incremental Progress in Legal, Enforcement Environments

Chinese government agencies have made improvements to China's legal and regulatory framework for IPR protection. For example, the Chinese government in recent years has actively sought to revise many of its core IP laws—including the Patent, Trademark, and Copyright Laws—to reflect emerging IP issues and evolving regulatory practices, and has drafted many other regulations, notices, and judicial interpretations that provide important clarification for regulators and industry representatives. These revisions have provided important opportunities for recommendations and feedback that improve the system of laws and regulations that govern IPR.

USCBC and its member companies also appreciate the Chinese government's efforts to improve IPR enforcement. *More than half (51 percent) of member companies surveyed in 2012* noted some progress on IP protection in the previous year (see Chart 1). China's 2010-2011 IPR enforcement campaign provided a notable example of this progress, in which greater attention to intellectual property at all levels of government delivered measurable results for many companies. USCBC applauds the Chinese government's efforts to institutionalize enforcement by creating the State Council Leading Group on Combating IPR Infringement and Sales of Counterfeit Goods to continue this work.

Chart 1: Over the past year, China's protection of IPR has...



Source: US-China Business Council 2012 China Business Environment Survey Results

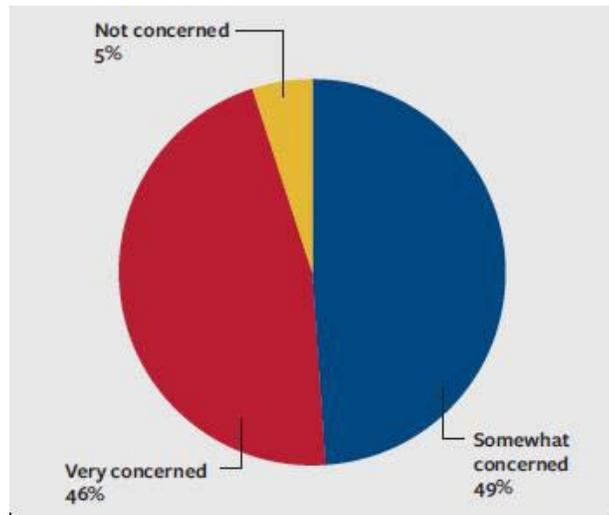
These efforts have yielded some positive results. For example, China's invention patent filings have skyrocketed. In 2011, China's State Intellectual Property Office (SIPO) received more than 526,000 invention patent applications and—for the first time—surpassed the United States as the world's largest filing destination. The number of invention patents filed in China has only grown since then. Official Chinese statistics in January 2013 predicted that overall 2012 spending on R&D would exceed RMB 1 trillion (\$160.8 billion), and Chinese companies increasingly rank among global leaders in important IP-intensive sectors.

IPR Protection Remains a Priority for Chinese, Foreign Companies

Despite such progress, enterprises – both Chinese and foreign – remain concerned about their ability to protect IP. Chinese companies are now more active than ever before in applying for patents at home and abroad, developing and commercializing new technologies, innovating new branded products, and developing movies and cultural products – all of which require IP that must be

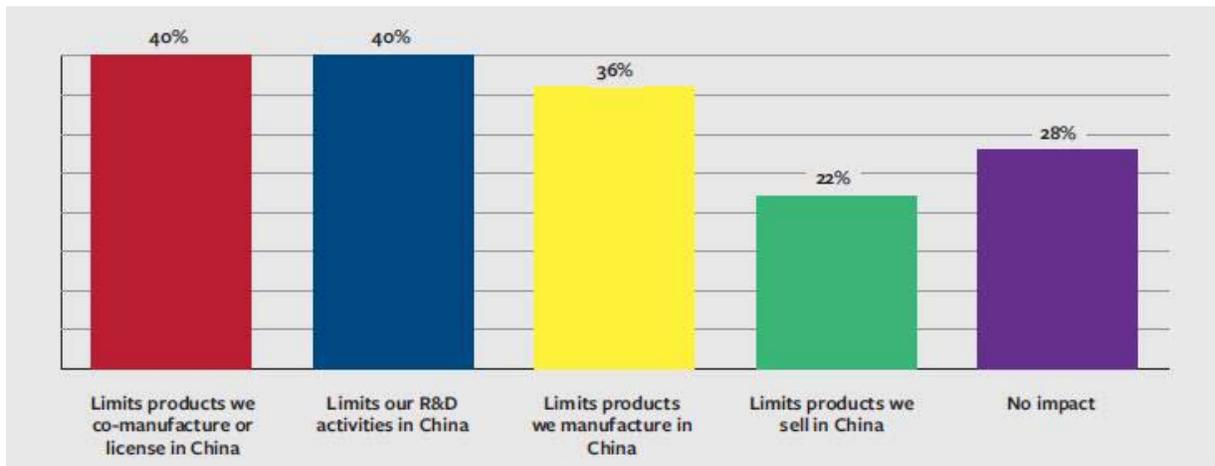
protected. A 2013 survey of more than 1,100 Chinese and foreign businesses conducted by the China Europe International Business School showed that 64 percent of Chinese businesses believed that IP is “important” or “very important” to their business. In addition, IPR protection has ranked among the top 10 challenges facing USCBC members each year since 2003 – ranking fifth in 2012. In that same survey, 95 percent of companies said they were either “very concerned” or “somewhat concerned” about intellectual property rights protection (see Chart 2).

Chart 2: Level of concern about IP enforcement



Source: US-China Business Council 2012 China Business Environment Survey Results

Chart 3: Impact of China’s level of IP enforcement on activities undertaken in China



Source: US-China Business Council 2012 China Business Environment Survey Results

Strengthening IPR Protection Would Greatly Benefit the Chinese Economy

Stronger IPR enforcement will benefit domestic industry development, support Chinese companies, and promote the interests of Chinese consumers. Ongoing IPR infringement harms both Chinese and foreign companies in a number of important ways. First, it limits their growth and development by limiting the economic benefits they derive from their present products and technologies. Both Chinese and foreign companies are negatively impacted by IPR infringement: well-known domestic companies such as ZTE, Moutai, Sany, and Baidu, as well as influential Chinese authors and sports figures, have all been involved in high-profile IPR infringement cases over the last year.

Ongoing infringement creates disincentives for companies to develop and commercialize further technology in China, thus hindering the Chinese government's stated goal of promoting innovation. For example, IPR infringement narrows the types of products and technologies that US companies are willing and able to research, manufacture, and sell in the China market. In [USCBC's 2012 member company survey](#), for example, at least one-third of companies surveyed indicated that China's level of IPR enforcement limits the types of products they are willing to co-manufacture or license in China (40 percent), the R&D that they conduct (40 percent), and the types of products they manufacture (36 percent) (see Chart 3). Such concerns about the level of IPR infringement lead foreign companies to avoid bringing many high-technology products and technologies to China.

These factors limit the products and technologies that Chinese consumers and businesses can access. This ultimately slows the development of many technology-driven industries, slowing economic growth and job creation in key sectors. These policies thus work counter to government goals for integrating advanced technology and improving innovation, and to government efforts to promote technology-incentive sectors such as China's strategic and emerging industries.

Further steps to improve China's intellectual property environment would promote the growth and success of enterprises in China and around the world. USCBC research illustrates the need to address IPR infringement and the value of continued reforms at both the national and local levels to tackle and prevent IPR infringement. While some of the reforms that would address these challenges are specific to one set of problems or one type of intellectual property, other recommendations cut across specific types of IP to address broader structural issues that limit the development of China's IPR environment.

USCBC IPR Recommendations

USCBC is pleased to present suggestions designed to further strengthen Chinese government efforts to improve IPR protection. These recommendations are based on detailed USCBC conversations with member companies about their experience protecting IPR in China. We hope that this document is useful for both US and PRC stakeholders in discussions on IPR and related issues.

Although USCBC and its member companies have an interest in all types of IP protection, our members' priority concerns are focused in a few specific areas, such as penalties and damages for IPR infringement and enforcement efforts of the State Council Leading Group on Combating IPR Infringement and Sales of Counterfeit Goods.

Addressing Penalties and Damages for IPR Infringement

Our member companies' top concern remains that penalties imposed during IPR enforcement proceedings do not provide a sufficient disincentive to IPR infringement. Specifically, administrative penalties levied against infringers are often too low to deter infringement and are sometimes viewed by the infringer as the cost of doing business. Moreover, existing value-based thresholds to determine potential criminal penalties are too high and effectively limit the number of criminal cases that appear each year by eliminating the option of criminal penalties for many cases.

USCBC and its members applaud statements by senior Chinese leaders at the 2012 US-China Strategic and Economic Dialogue confirming that they are studying criminal liability for IPR infringement as a positive step. We encourage relevant Chinese government agencies to accelerate this process and to engage US companies along with other stakeholders as they consider potential revisions to the PRC Criminal Law and other laws and regulations.

To improve China's system to deter IPR infringement, USCBC recommends that relevant Chinese government agencies:

- Eliminate value-based thresholds laid out in the Supreme People's Court 2004 judicial interpretation that counterfeit goods must meet to qualify for criminal prosecution, replacing them with a system that applies criminal penalties for commercial-scale infringement in line with World Trade Organization (WTO) practices.
- Increase the effective level of penalties for IPR infringement – both judicial damages and administrative penalties for trademark and copyright infringement – by instituting statutory minimums and raising or eliminating the statutory maximums on fines and damages. In addition, encourage local regulators and judicial officials to levy fines that will serve as more effective deterrents and reward those who do so.
- Revise existing standards for calculating the value of infringing goods so that penalties are based on the market value of the infringed goods (i.e. what the original goods would sell for in the same marketplace), not the market value of the infringing goods (i.e. what the counterfeit goods would sell for in the marketplace).

Expanding the Scope and Efforts of the State Council's IPR-Focused Leading Group

USCBC and its members appreciate the establishment and ongoing work of the State Council Leading Group on Combating IPR Infringement and Sales of Counterfeit Goods and view it as a positive sign of the Chinese government's commitment to progress on these issues. To further strengthen and expand its efforts to coordinate a robust government effort to protect IPR, USCBC suggests that the Leading Group:

- Actively and visibly coordinate the IP-related efforts of various government agencies through regular releases of work plans, public meetings, and other means.
- Expand its efforts beyond counterfeiting to more actively address protection of other types of IPR, including patents, copyrights, and trade secrets, and to address emerging IPR issues such as compulsory licensing.
- Foster frequent collaboration between the Leading Group, its supporting office housed in the Ministry of Commerce, and US government and industry stakeholders to discuss progress on IP enforcement and emerging IP-related issues, such as hosting quarterly or biannual meetings with groups of stakeholders and open communication channels for smaller group meetings.

Other Priority Issues

USCBC suggests that Chinese government agencies may consider other important topics, such as:

Cross-Cutting Areas

- Enforcement resources: Equip regulators, enforcement agencies, and courts at all levels to enforce IPR by significantly increasing resources (both funding and personnel) for local administrative agencies that investigate IPR infringement, particularly of trademarks and copyrights; establishing benchmarks for IP protection in regular performance evaluations of relevant government officials; and conducting regular, targeted professional training for IPR personnel at all levels of government.
- Equal treatment for foreign and domestic firms: Promote a fair and open landscape for innovation and IPR by setting and implementing regulations and policies in IPR-related areas (such as standards, taxation, R&D, and government procurement) that treat foreign-invested enterprises (FIEs) equally with their domestic private and state-owned enterprises, to ensure that all IPR holders – foreign and domestic – receive equal legal protection for their IPR.

- Uneven enforcement: Encourage consistent IPR enforcement across regions and jurisdictions by providing clearer guidance to local government agencies and fostering increased communication between central and local government agencies, including information sharing and dialogue between provincial and local IPR regulators to share experiences and best practices.
- Transparency in drafting laws and regulations: Actively engage with foreign and domestic stakeholders in revising IP-related laws and regulations, including both core IP laws such as the Patent, Trademark, and Copyright Laws and regulations such as the Measures for the Compulsory Licensing of Patents and the Provisional Administrative Measures for National Standards Involving Patents. Release such laws and regulations for multiple rounds of public comment for at least 30 days, if not 60 or 90 days. Such transparency will promote better, more widely accepted regulatory outcomes.

Specific Areas of IPR Protection

- Internet-based IPR infringement: Increase enforcement of Internet-related IPR by drafting new regulations relevant to Internet-related trademarks and copyrights to cover issues such as use of trademarks on websites, trademark-related aspects of domain name registration, and use of websites as platforms for counterfeit and pirated products. In addition, boost resources and attention to monitoring and investigating Internet sales and distribution of infringing products.
- Trade secret protection: Expand government efforts to address trade secrets concerns, including expanding efforts by the State Council Leading Group on Combating IPR Infringement and Sales of Counterfeit Goods to enforce trade secrets in China, strengthening regulatory protections by drafting a unified Trade Secrets Law, and broadening judicial protections by addressing evidentiary concerns related to potential trade secrets cases.
- Inventor remuneration: Further revise the draft Regulations on Service Inventions in close consultation with all stakeholders, including foreign businesses, to ensure that efforts to boost innovation do not create significant administrative burdens for companies with active patent portfolios or drive up compensation costs above international norms.
- Regulatory data protection: Draft and enforce measures that require government officials to keep confidential all technology and IPR gathered during regulatory reviews and product approvals, with concrete penalties when such penalties for those who violate the measures. Relevant types of IPR include trade secrets, formulas, test data, and product information.
- Software legalization: Promote the use of legal software, as agreed by China and the United States in multiple high-level dialogues, through fully implementing existing policies and regulations focused on boosting use of legal software, increasing funding to government agencies to purchase legal software, auditing use of legal software by government agencies, publishing the results of those audits broadly, and actively promoting the use of legal, licensed software in state-owned enterprises and private companies via various means, including software asset management programs.
- Counterfeiting tools: Revise existing laws and regulations, such as the Criminal and Trademark Laws, to mandate that infringing goods – and the equipment used to produce them – be destroyed upon seizure and not be permitted to re-enter the marketplace under any circumstances.
- Copyright barriers: Remove market access and distribution barriers for legitimate copyrighted products, such as imported feature films and television programs, to better meet domestic demand with legitimate products as opposed to pirated ones.

USCBC is happy to engage further with government officials and other stakeholders to provide more detailed suggestions on specific IPR areas, including IPR infringement, trademarks, trade secrets, and judicial enforcement.