Teaming Up to Fight Product Piracy

A lot is happening in the world’s most populous country. So much, in fact, that old certainties, clichés and preconceptions are no longer very fitting for the changes we are seeing in China. In 2010, the OECD expects that China will overtake Germany as the world’s leading exporter. The development of the legal system has accelerated tremendously, and it is not even approaching completion. Of course, the Olympic Games in Beijing recently also showed us the shortcomings, the lack of any real human and civil rights. But the country is changing.

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The People’s Republic of China is adapting its standards for intellectual property protection to those in the West. The initial stages are immensely difficult, and product and trademark piracy continue their advance. But the development can no longer be halted, and Peter Ganea and his colleagues in the Asian department of the Max Planck Institute for Intellectual Property, Competition and Tax Law in Munich are keeping a critical eye on it.

Hardly anyone in Germany knows that the PRC has been hammering out a legal framework for the protection of intellectual property for nearly 30 years already. Researchers from the Max Planck Institute for Intellectual Property, Competition and Tax Law have been supporting this process almost from day one. “The first Chinese guest researchers came to Munich more than 25 years ago,” says Peter Ganea, head of the institute’s Asian department, explaining how support for the Chinese in setting up copyright law began. “Today, we find many former guest researchers in high positions in China.” The President of the State Intellectual Property Office, for example, or the Vice-Head of the copyright office – all of them conducted research at the Max Planck Institute many years ago. And all of them took the knowledge they acquired in Munich back home with them.

The interest in protecting intellectual property is related to China’s change in leadership, when reformer Deng Xiaoping rose to power in 1978. From then on, progressive laws, especially those designed to protect intellectual property, were to ensure China’s economic advancement. “They served to attract foreign investments,” says Ganea. In 1982, China enacted a trademark law, followed two years later by its patent law. In 1990, a copyright law was added, and three years later, the law against unfair competition.

In a second wave of legislation, China revised all of its standards in 2000 and 2001, and finally, acceded to the WTO. “Even Western commentators find that China’s patent, copyright and trademark legislation is substantially complete,” says Ganea.

Chinese Courts Dispense Justice

But enacting statutes isn’t everything. Despite the change, China still has a reputation for being a counterfeiter’s paradise, due to the fact that European companies still regularly experience astonishing surprises in China. In 1997, for example, the Swedish furniture giant Ikea found that a Chinese company had secured the domain name ikea.com.cn – even though Ikea had already protected its trademark in China years earlier. “This example clearly demonstrates that proactively registering protective rights in China is no guarantee that one won’t fall victim to trademark and product piracy,” says Andrea Wechsler, whose work focuses on Chinese intellectual property law at the Max Planck Institute.

Fakes, not originals: Sneakers are among the goods favored by product and label pirates. China does, however, already have laws protecting intellectual property.
At least the oriental adventure had a happy end for IKEA: the Swedes won the case against the domain thief before the Second District Court in Beijing. And so the story of the discount furniture maker also serves as proof that, contrary to popular opinion, it is no longer impossible for foreign companies to assert their rights in Chinese courts.

To enforce one’s intellectual property against counterfeiters, one can either go directly to the court, or one can solicit the help of the authorities. After all, just like courts, specialized agencies at the local level can order the cessation of infringement activities, confiscate pirated products and even impose fines. According to Peter Ganea, the dual enforcement by courts and authorities can be explained by the fact that the Chinese courts are still in the process of developing. The administration, on the other hand, traditionally plays a stronger role.

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In such cases, companies may have an experience similar to that of motorcycle manufacturer KTM. The Austrian company wanted to launch its business on the Chinese market, but failed to register its trade name ("KTM China") was already protected by a Chinese company Kungtao Motorcycle. After all, just like courts, specialized agencies at the local level can order the cessation of infringement activities, confiscate pirated products and even impose fines. According to Peter Ganea, the dual enforcement by courts and authorities can be explained by the fact that the Chinese courts are still in the process of developing. The administration, on the other hand, traditionally plays a stronger role.

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In the late 1970s, China gradually began to reform and to open up the market economy, but without challenging the Communist party’s claim to power. That’s why independent courts continued to be frowned upon. “But there is currently a discussion in China,” says Ganea, “about scalarizing the Middle Kingdom with motorcycles – with the support of effective trademark rights. KTM Austria retreated. Now it sells only bicycles in China.”

"Timely filing of applications for intellectual property rights is the foundation of any IP protection strategy," says Andrea Wechsler. In her research at the Munich-based Max Planck Institute, the Ph.D. student focuses on the question of the extent to which it is economically viable, from a welfare economics point of view, for developing and emerging countries – such as China – to introduce intellectual property rights. It is not always the emerging countries themselves that profit from these rights. Quite often, the rights give extensive power to Western companies.

While intellectual property can be used by any number of people simultaneously – consider, for example, listening to a piece of music – using material property (such as infrastructure) naturally limits the possibilities for others to use it. This fundamental difference explains why intellectual property must be protected by special monopoly rights. But what happens when these rights prevent developing and emerging countries from using a (perhaps vitally important) invention? It is precisely this question that sparked a heated dispute between the World Trade Organization and industrialized nations, in the matter of pharmaceutical patents. “When licensing fees are so high that many consumers in emerging countries can’t afford certain products, then those consumers are effectively excluded from consumption,” explains Wechsler. In the case of, for example, a drug against HIV, the consequences can be fatal, as most patents in this field are owned by Western pharmaceutical companies.

So intellectual property rights are not necessarily a viable undertaking for developing and emerging countries. Respecting the intellectual property rights of Western companies means paying licensing fees. And these are often beyond the financial means of many Chinese companies,” says Wechsler. So these protective rights have an unpleasant side effect in emerging countries: they may hamper innovation in the domestic industry.

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practically comes to a standstill are not desired. In the West, if two companies merge that, together, would dominate the market, the antitrust authority would step in. This is now also possible in China: since August 1, following more than ten years of preparation, the PRC has an antitrust law.

For Rupprecht Podszun, there is a certain piquancy in China’s introduction of an antitrust law. “Suddenly,” says the antitrust law expert, “this fundamental law of market economics applies in China” – a country that is formally socialist. An antitrust law requires, in a way that jurisdiction to various authorities, similar to the patent system.

**TRADITIONAL CARTELS CARRY ON UNINTERRUPTED**

Whereas, in Germany, only the Federal Cartel Office makes decisions, foreign companies in China will soon have to deal with the National Development and Reform Commission (NDRC), the State Administration of Industry and Commerce (SAIC) and the Ministry of Commerce (MOFCOM). This is hardly likely to speed up antitrust proceedings. Experts also fear that differing standards in the three authorities could cause confusion. But they don’t expect the antitrust law to be implemented practically in the near future. “Indonesia has already had its antitrust law for eight years,” points out Podszun, “but is only now taking on the cases for which the rules and regulations were created.” In any case, China will first have to undergo large-scale privatization of all of its state-owned enterprises. “Then,” suspects Podszun, “things will really get interesting, competition-wise.” So foreign companies would do well to moderate their expectations for the time being, says the Max Planck researcher. Also because successful antitrust cases are more likely to be seen in modern, less-established industries, such as telecommunications. The situation will probably be very different in traditional industries. “China’s agriculture and food industry is full of hundreds of pricing agreements that are actually illegal!” says Podszun. If a foreign supermarket chain aims to break up these monopolies, which have been established over the course of many generations, the Chinese authorities are hardly likely to be of any assistance. “Of course the government will not intervene there, as doing so would mean taking on the entire country. The social disturbances would be too great if foreign supermarket chains were to shake up the local markets.”

All the same, the antitrust authorities already have their first cases: the guardians of Chinese competition have set their sights on illegal pricing agreements in the ramen industry. In Germany, it would be a cut-and-dry case, and quickly checked off the list. In China, the antitrust watchdogs must now prove themselves. And change is never easy.

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**M A X P L A N C K R E S E A R C H 4 / 2 0 0 8**

Chinese inspectors with German training crack down on product piracy. Tian Lipu and Jürgen Schade, the presidents of the competent authorities, set their seal on it in 2006.