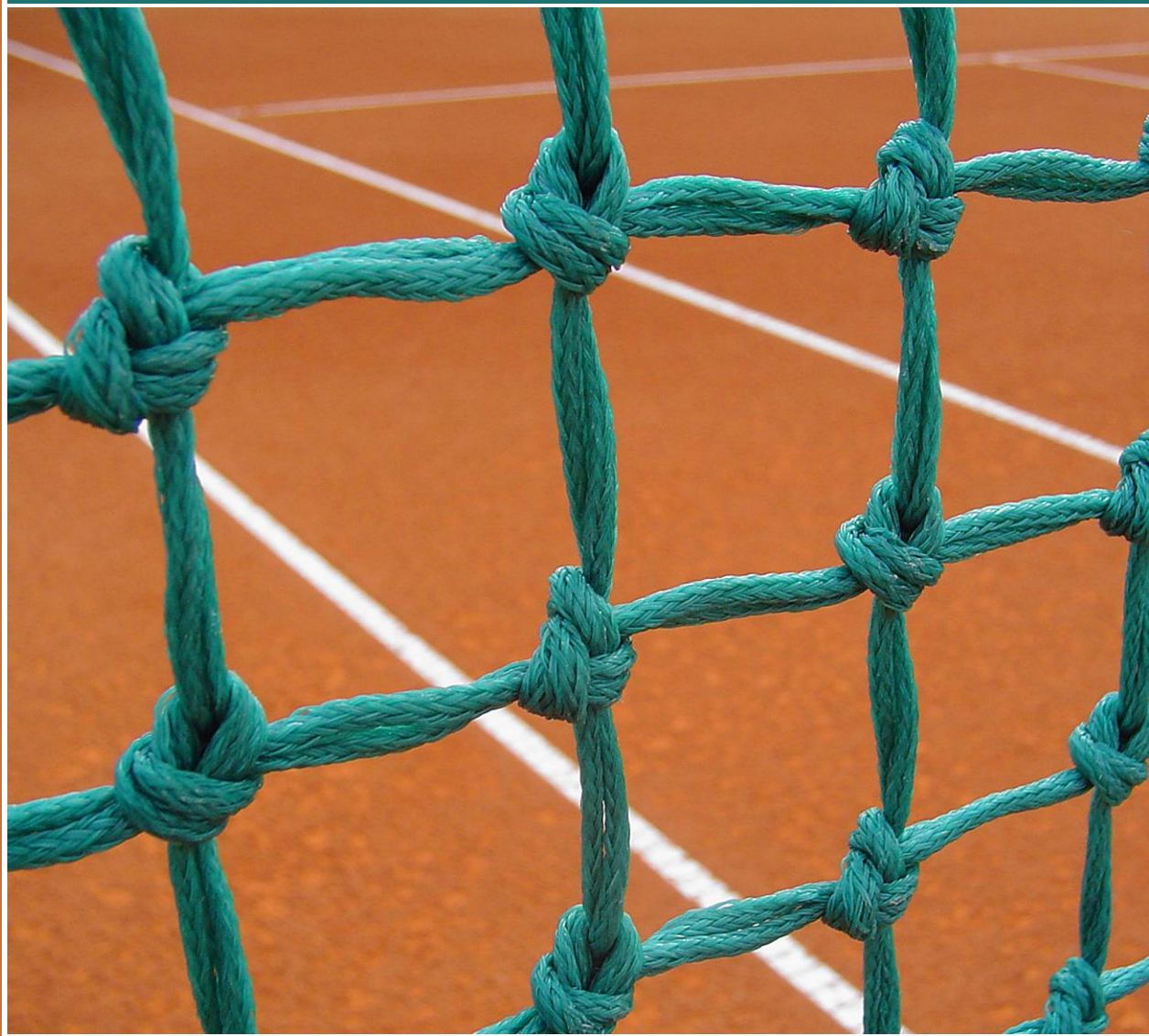


The Customs Protection of IPRs



An Instruction for Right Holders

Johnny Xie

Abstract

There is countless literature on the protection of the Intellectual Property Rights (IPRs), and the relevant research tends to proliferate as a result of globalization. As one of the ramifications, the Customs protection of the IPRs begins to attract much more public attention. What adds prominence to its significance?

First, the absolute growth of international trade volume implies more participants in the market and the increased market share of the old players. Both trends intensify the economic communication and competition, therefore, lead to the rise of IPR issues in general.

Second, the comparative advantage and the adjustment of industrial structure have strengthened the labor division among different countries, cause the concentration of manufacturing capacities toward developing countries with the developed ones trying to hold the leading edge of research, design and development. This separation helps specialization and thus improves social productivity. The side effect of separating manufacture from R&D is the potential conflicts between two separate bodies, such as the uneven profit distribution or the unauthorized production etc. Most time, the conflicts involve IPR elements.

Third, stimulated by the integration of global market and the diffusion of technology, the counterfeiting and piracy have evolved from hardly discernible trickles into overwhelming deluges. Consequently, the unlawful business poses a serious threat to the economic development, social stability, and the well-being of both people and environment.

The common feature shared by the aforementioned observations is that they all have close connection with international trade. In practice, Customs Administrations are usually charged with the powers to control the movement of imports and exports. The peculiar authority makes Customs an important force in regulating international trade and fighting cross-border crimes. Actually, the Customs protection of IPRs has been proved an effective way of interdicting the counterfeits and piratical goods at the border. More and more economic operators want to know exactly how to seek the Customs protection in practice while the border measures are gradually recognized, accepted and emphasized by the trade community. Because of the complexity of the IPR issues, the Customs protection of IPRs inevitably entails some procedural and substantive requirements, and the economic operators are expected to clearly understand these requirements to ensure a smooth functioning of the whole mechanism. Unfortunately, it is sometimes difficult for the economic operators to comprehend the abstruse provisions correctly. The need for capacity building in this regard, particularly those for the Small and Medium-sized Enterprises, is growing. In response, great efforts combining the academic, administrative and commercial elements have been taken to meet the need, and this pamphlet is one of them.

Overview

The structure of this publication consists of four parts.

First I am going to give you a very general introduction to China Customs, such as its nature, mission and involvement in IPR protection etc.

Then I will move on to the legislation of significant importance concerning the Customs protection of IPRs. China Customs like other government agencies can only exercise the powers that have been properly delegated to it. The provisions of the legislation have virtually determined the methods and domains of Customs enforcement in terms of IPR protection.

In the third part -- enforcement, by giving some cases and empirical evidence, it helps the readers understand how the legislation is transformed into actions, and what kind of challenges are encountered and what strategies are taken by the Customs in response.

The forth, also the last part, will summarize the main ideas conveyed by this pamphlet, and some policy suggestions are provided for critical reflections.

I. China Customs

1.1 Brief on China Customs

China Customs is a government agency with law enforcement power whose main responsibility is to control the movement of imports and exports. It exercises a centralized administrative structure. The General Administration of Customs, abbreviated as the GAC, located in Beijing, is the headquarters of nationwide Customs establishments. The aggregate staff number is around 50,000 including the Customs anti-smuggling police.

The missions of China Customs according to the official interpretation are designated as:

Customs Control

Revenue Collection

Combating Smuggling

Statistics Compilation

There are 16 departments in GAC, it is the department of policy and legal affairs, or more specifically the division of IPR protection, with which the IPR holders record their rights.



Please keep the contact information; this is where you are going to send your application for recordation. And you are encouraged to ask them for official answers to any questions about the Customs protection of IPRs.

The Division of IPR Protection of the
Department of Policy and Legal Affairs.
The General Administration of Customs.
#6, JianGuoMenNei Street.
Beijing, P. R. China.
Post Code: 100730
Tel: 86-10-65195489
Fax: 86-10-65195358
Email: ipr@customs.gov.cn

1.2 Engagement in IPR Protection

Before the reform and opening up when China was running a planned and controlled economy there were very few IPR cases either because the foreign products were strange to Chinese consumers or due to the low economic incentives of IPR violation. Following the opening up and the introduction of market economy, the economic communication and cooperation between China and the rest of the world were intensified. As a result of the influx of Foreign Direct Investments, foreign brands became known and even popular to local consumers. The massive newly born private businesses were keen to make profits in short-run and some of them started the counterfeiting and piracy as a lucrative way of making quick money. The IPR issues proliferate since then.

The history of China Customs' engagement in IPR protection can be traced back to 1992 when China signed a Memorandum of Understanding with the U.S. which stated that "measures should be taken at the borders to prevent the infringing goods from exportation". Following the second MOU with the U.S. the state council promulgated the "Regulations on the Customs Protection of IPRs" in 1995. The GAC formulated the "Rules for implementing the Regulations" in response. Both the Regulations and the Rules were amended in 2003. And they will be the focuses of our discussion.

In addition to the impact from individual countries like the U.S. the World Trade Organization as a multilateral trading body played a more influential role in urging China to enhance its IPR legislation and enforcement because from 1986 onward China had been striving for resuming its membership in WTO while the WTO required China to sign the TRIPS agreement as a precondition. Under the pressure from the international community, China amended its legislation, strengthened the enforcement, and raised the public awareness about IPR protection. In 2001, it signed the TRIPS agreement and joined the WTO. The substantive obligations set forth in the TRIPS agreement are now widely accepted as the standards of international IPR regime, the aforementioned regulations and rules were drafted basically in line with its spirits.

II. Legislation

Due to the intimate connection between the legislation and the TRIPS, it is relevant to make some referrals here. In TRIPS, the part 3, namely the enforcement of Intellectual Property Rights, concerns the Customs administrations the most. This Part consists of Articles 41 to 61 and is split into 5 Sections.

The first Section sets out the general obligations. The other four Sections cover civil and administrative procedures and remedies, provisional measures, special requirements related to border measures and criminal procedures.

An appreciation of these provisions will promote your understanding of the Regulations and the Rules.

As a competent authority, China Customs is vested with the powers to detect, detain and confiscate. In cooperation with other government agencies and courts of law, China Customs enforces a variety of laws and regulations, with the following ones pertaining to IPR issues.

The "Customs Law of the People's Republic of China"

The "Regulations of the People's Republic of China on Customs Protection of IPRs"

The "Rules of the Customs of the People's Republic of China for implementing the Regulations on Customs Protection of IPRs"

The "Regulations on the Protection of Olympic Symbols"

The "Regulations on the Protection of World Exposition Symbols"

The "Criminal Law of the People's Republic of China" etc.

2.1 Analysis on the “Regulations” & “Rules”

The Regulations will be analyzed in detail because it has been designed especially for the Customs protection of IPRs, and the “Rules of the Customs for implementing the Regulations” will be referred to occasionally if details make it necessary. My discussion spreads in four aspects, namely the General Provisions, The Recordation of rights, The Application for Detention & the Enforcement Modes, and the Legal liability.

2.1.1 The General Provisions

The general provisions set forth the purpose of legislation, and three elements can be derived from the definition of Customs protection of IPRs.

First is the coverage of the protection, it includes the trademarks, copyrights and patents. Different from the U.S. Customs, here the trademarks don't cover service marks or trade names, while the U.S. Customs is without power to make determinations on patent infringement.

The second one indicates that the protection is import or export related, which means the infringement should take place or exist at the import or export procedures so that the behavior is still under Customs control pursuant to its statutory and regulatory authority.

The third element stipulates that the Customs protection is entitled on condition that the IPRs are protected by China laws or regulations first. Some copyright cases in this regard involve the publications prohibited or announced illegal by Chinese government. Since they are not protected by China laws or regulations, they are excluded from the Customs protection accordingly.

The IPR holders generally have the right to seek Customs protection as well as the obligations to tell the truth, to bona fide claim their rights and report the suspect infringement.

2.1.2 The Recordation of Intellectual Property Rights

If the IPR holders intend to record their rights with the Customs, a written application shall be submitted first, which usually bears the information about the right holder, information about the right, and information about the use or infringement of the right. Evidentiary documents shall be attached if they help prove the authenticity of your claims.

Taking the trademark recordation as an example, it usually requires the following documents:

- (1) The Application for Trademark Recordation
 - (2) The identification files of the applicant
- For a natural person, it will be the photocopy of their ID card;
For a legal person, it will be the photocopy of its Certificate of Business Registration
- (3) A photocopy of the Certificate of Trademark Registration
 - (4) A photocopy of the remittance bill indicating your payment of the recordation fee
 - (5) A power of attorney in prescribed format if the IPR holder entrusts an agent to handle the application.
 - (6) The identification files of the agent if the condition in preceding paragraph exists.
 - (7) Sample of the goods and their packages, or the pictures of them.
 - (8) Evidence for infringing imports or exports.
 - (9) The licensed status of the rights, such as the contracts or the list of licensed users etc.
 - (10) Other documents required by the Customs.

Please note that documents covered from article7 to article10 are optional. And all the above mentioned documents shall be accompanied by a Chinese translation if the original ones are in foreign languages. And all the photocopies shall be marked with the words “identical to the original” and signed.

Pursuant to the regulations, only the right holders or their designated agents are eligible applicants, not the licensed users. And China Customs further stipulates in the rules that the actual applicant shall be located in mainland China, that is to be within the China Customs territory, implying that foreign IPR holders have to entrust their Chinese subsidiaries or agents to handle the application.

Because an IPR may cover a specific class or classes of products, China Customs requires the right holders to present one application for each of their rights. After receiving the complete material for application, the Customs has 30 days to decide whether to grant the recordation or to refuse the application.

If the application is refused, the Customs shall explain the reasons.

If granted, the recordation will be valid for a term of 10 years, and it is renewable for non-expired rights. The Custom has the power to revoke a granted recordation if flaws are detected in the application or the right has just expired or it has undergone significant changes such as the transfer of ownership or no longer protected by the laws or regulations.

Please note that the recordation will lapse automatically when the corresponding right expires. And the renewal application should be proposed within 6 months prior to the end of the term. A valid renewal will extend the recordation for another 10 years provided that the right itself is still valid.

After recordation, the right holders are responsible for notifying the Customs of any changes in the recordation such as the change of ownership, contact information, or the licensed users etc. within 30 days since the change takes place.

The right holders also can deregister the recordation of their own accord with proper application.

Remember: within the material that you should submit together with your application, there is a photocopy of your remittance bill. In order to speed up the process, don't forget to pay the recordation fee before you lodge the application. For each recordation, the amount is 800 RMB.

Please note that to handle the money is the responsibility of the Financial Department so your money and your application will travel to two different departments of the GAC. And the Department of Policy and Legal Affairs will confirm the receipt of your recordation fee with the Financial Department before starting processing your application.

Here is the information for bank transfer of your recordation fee. For accuracy, the original information in Chinese is pasted.

帐户名称：中华人民共和国海关总署
 帐号：0200000709014407044
 汇入地址：北京市工行王府井支行营业室

There used to be templates to assist the IPR holders in making the application in prescribed format but they soon became obsolete when the online recordation features came into being in 2005.

<http://202.127.48.151/applyrecord/>

中国海关
China Customs

知识产权海关保护备案申请系统
Recordation of Intellectual Property Rights

首页 \ 知识产权海关保护

欢迎使用“知识产权海关保护备案申请系统”。本系统可以提供“知识产权备案信息查询”和“知识产权备案申请”服务。

- 查询知识产权备案信息：可以直接在公共查询区窗口中输入需要查询的关键字，无需进行用户注册和登陆。
- 申请知识产权备案：应当首先在用户登录区进行用户登录。首次进行知识产权备案的用户，还应当进行注册。
 （注意：已经在海关总署进行了知识产权备案的用户不再允许进行新的注册）。

更新日期：2009-1-8 当前有效备案：10874 商标权备案：6389 著作权备案：484 专利权备案：4001

公共查询

申请人名称/姓名：

权利名称：

权利注册授权号：

备案权利类别：

备案内容类型：

备案号：

用户登录

帐号

密码

保存申请人编号和密码

注册

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 电话：010-65194114 邮编：100730 地址：北京市建国门内大街6号

Please type the address in your Internet Explorer and hit the enter key, you will see the page resembling the snapshot here. Useful information like the total number of the valid recordation can be read directly from it.

For example, information on the green bar shows that, by the date January 8, 2009, there are 10,874 pieces of valid recordation, among which 6,389 pieces for trademarks, 484 pieces for copyrights, and 4,001 pieces for patents respectively.

The interface is divided into two parts; the left area is for public query. As the name indicates, you don't need to be a registered user to launch a public query. You can just input the criteria like the name of the applicant, the name of the right,

or recordation number etc. and click the query button at the bottom, the system will feedback you with the latest information.

The right area is reserved for user registration and recordation process. To access the features, you need to become a registered user first. To register a user in the system is as simple as signing up a mail box service or joining some cyberspace communities on line. Just click the registration button at the bottom and follow the instruction to finish it.

If you already have an account and pass word, you can log in by typing them in the corresponding fields, subsequently you can begin your application process to record your rights online, and the operation is rather simple and straightforward, anybody with minimum computer literacy can handle it smoothly.

It seems that here the primary challenge for foreign users is the language barrier, so some translation software might be handy for locating your position and navigating to your destination.

I also want to remind you that the whole system is used free of charge. And currently only the applications in paper form together with the required documents will be deemed valid by China Customs although online application is fast and cost-efficient. So don't forget to save and print it out when you finish an application online.

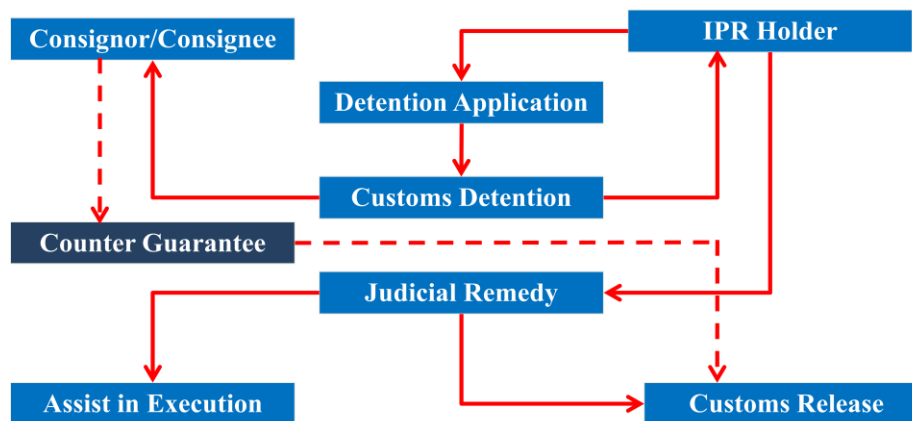
One more thing is that a recordation contact shall be designated during the application process. Ideally, in addition to coordinating the recordation matters, this person should be charged with the responsibility to communicate and cooperate with the Customs in relevant investigations. In principle, the person should be accessible to the Customs 24 hours a day and 7 days a week because nobody can tell exactly when the infringement will take place. No more than two contacts can be assigned because too many contacts usually distort the information and thus deteriorate the quality of communication or simply makes it inefficient.

2.1.3 The Application for Detention of Suspected Infringing Goods & the Enforcement Modes

Based on who initiates the cases, China Customs officially designates the two enforcement modes as enforcement upon application and enforcement ex officio respectively. For easy understanding, you can perceive the difference as who unveils the infringement first, the IPR holders or the Customs. Let's examine the two enforcement modes one by one, from simple to complex.

First we consider the mode upon application.

The Enforcement upon Application



In this mode, the whole procedure begins when an IPR holder is aware of some infringement of their rights. He/she then requests the Customs to detain the suspect goods by submitting a written application supported by evidentiary documents, which normally includes the following particulars:

- (1) The business name or name, place of registration or nationality, etc. of the IPR holder;
- (2) The description, contents and any other relevant information about the IPR;
- (3) The business name of the consignee and consignor of the suspect infringing goods;
- (4) The descriptions, specifications, etc. of the suspect infringing goods;
- (5) The possible ports of entry, time, means of transportation, etc. concerning the importation or exportation of the suspect infringing goods.

And the application shall include the number of Customs recordation where the goods are suspected to infringe a recorded right.

A guarantee in the form and amount specified by the Customs shall be provided by the IPR holder when submitting the application for detention. This is a reasonable mechanism to prevent the IPR holders from abusing their rights and properly protect the interests of importers or exporters.

The Customs may reject the application and notify the right holder in writing if it is dissatisfied with either the application or the guarantee.

If both the application and guarantee are valid, the Custom will detain the alleged goods, notify the IPR holder of the detention, and issue a notice of detention to the consignor or consignee.

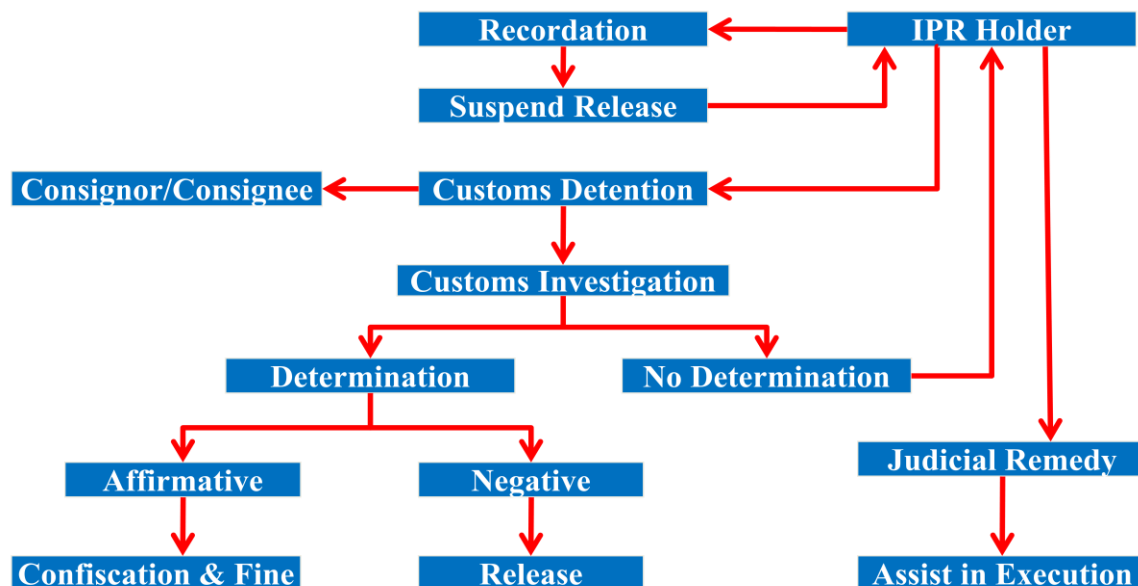
After detention, the right holder has 20 days to seek judicial remedies from the court of law. If a court decision is obtained within that period, the Customs will assist in executing the decision. If the right holder fails to obtain the judicial remedies, the Customs will simply release the goods after 20 days of detention.

In either case, the IPR holder is responsible for covering the relevant fees incurred by the detention such as the expenses of warehousing, maintenance and disposal of the goods. The IPR holder may recover the expenses from a favorable judicial decision by putting them into the cost of combating the infringement.

As we have discussed, the Customs is rather passive in the enforcement mode upon application. It simply detains the suspect goods for 20 days so that the IPR holders can buy themselves some time to seek the judicial remedies from the court of law.

You may have noticed that there is a dash line associated with the “counter guarantee”. This route means in handling the patent infringement, the Customs may release the suspect goods if the consignor or consignee believes that their goods are free of infringement and furnishes the Customs a counter guarantee equivalent to the dutiable value of the goods because the patent issue can be complex in procedures and time consuming, this approach can minimize the risk exposure of all related parties.

The Ex Officio Enforcement



In comparison, the Customs is quite active in the Ex Officio enforcement mode. As illustrated by the chart, after recordation, the Customs will automatically suspend the clearance process and notify the IPR holder in writing if signs indicate a possible infringement of the recorded right. After receiving the notice from the Customs, the IPR holder has 3 days to decide whether to put a request for detention. If they do, the application and guarantee shall be furnished the same as in previous mode. Upon the receipt of valid application and guarantee, the Customs will detain the suspect goods and issue a notice of detention to the consignor or consignee. If the IPR holder fails to respond within that period, the goods will be released.

After detention, the Customs has 30 days to conduct an investigation into the infringement and draw conclusions. If the investigation does not yield sufficient proof for the Customs to make a substantive decision on the infringement, the Customs may choose to make no determination and notify the IPR holder. Otherwise the convinced Customs will make determinations either affirmative or negative. If the investigation results in a negative determination, the goods will be released. If the determination is affirmative, the goods are subject to seizure and fines can be imposed on the wrongdoer. If the violation is so serious that the criminal procedures are involved, the case will be transferred from Customs to other competent authorities such as the Bureau of Public Security to handle.

As I have mentioned, both the Customs and the courts of law are competent authorities to handle IPR issues, the right holder therefore can seek judicial remedies parallel to their pursuit of administrative remedies. This is particularly important where the Customs makes no determination or determines unfavorably. Although the time budget for the judicial

procedures is 20 days the same as in the previous mode, the IPR holder in this mode can have a maximum of 50 days to respond if they put the 30 days of Customs investigation and the 20 days of judicial procedures together.

Here I'd like to explain the guarantee a little bit more. Two aspects, first about the forms it takes, you can either actually deposit a security with the Customs or request your deposit bank to issue a letter or guarantee. Second, about the amount of the guarantee, there are three intervals, that is, from 0 to 20,000; from 20,000 to 200,000; and above 200,000. If the value of the suspect goods is within the first interval, the guarantee is the same as the goods value; if the goods value falls in the second interval, the guarantee is 50% of the goods value but no less than 20,000; if the goods value belongs to the third interval, the guarantee will be 100,000 RMB.

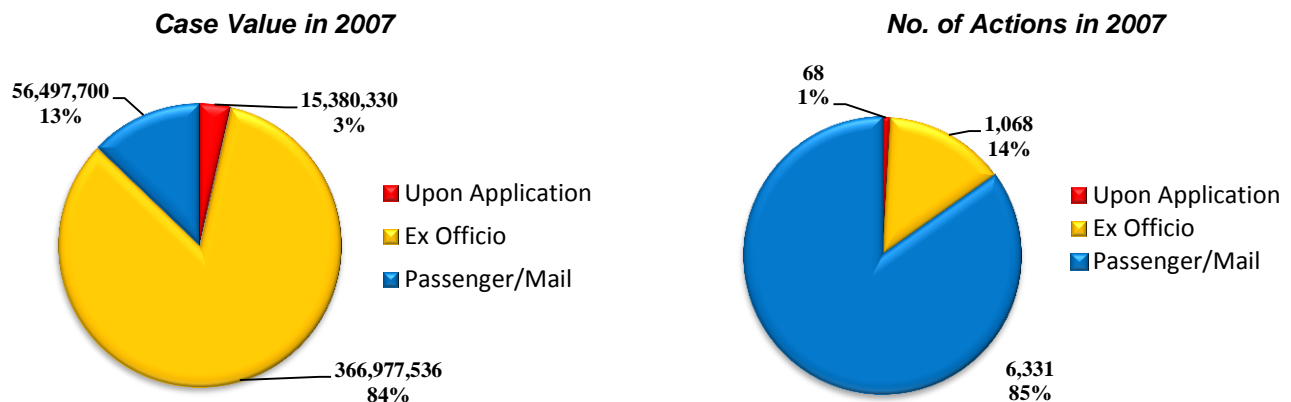
Although issuing a letter of guarantee is pretty much easier than depositing a security, it can still become frustrating for those IPR holders whose rights are frequently infringed and their frequent demand for letter of guarantee starts to bother their deposit banks. For IPR holders in such distress, the general guarantee is available upon the approval of Customs. It allows the IPR holder to request several detentions without additional guarantees in a certain period of time. The general guarantee is no less than 200,000 and will be calculated according to the expenses of detention occurred in last year. The application for general guarantee should be in prescribed format, and templates are available at the official website of China Customs.

Now we can conclude based on the discussion that there are two preconditions for Customs detention, one is the qualified application, and the other is the delivered guarantee. Both of them must be met no matter which enforcement mode is selected. And the recordation bears the following advantages:

First, by recording their rights with the Customs, the IPR holders can enjoy an extended responding time, namely from 20 days to 50 days.

Second, the recordation enables the Customs to carry out independent investigations and make substantive determinations on the infringement although the Customs may seek technical assistance from other competent authorities such as the Patent Office during the investigation.

Moreover, it gives the Customs an opportunity to acquaint its enforcement officers with the IPR knowledge so that they can be more knowledgeable and thus confident in detecting and identifying the infringement in enforcement.



The importance of recordation is further illustrated by the two charts above. The left one is a statistics on the number of enforcement actions for IPR protection taken by China Customs in 2007. As we can see, the actions initiated by IPR holders accounted for merely 1%, while the overwhelming majority of the actions were initiated by the Customs, indicating that, most often, it was the Customs who detected the infringement first, which depends undoubtedly on the recordation of IPRs. The right chart reflects the value distribution of these cases, the minority and majority pattern can also be found here. Both charts unveil the limitation and weakness of IPR holders to discover the infringement on their own as well as the significance of Customs enforcement based on the recordation of IPRs.

2.1.4 The Legal liability

After seizure, the infringing goods are initially subject to destruction. Before actually destroying them, the Customs will consider the following possibilities in order:

First, to use them for public welfare;

Second, to sell them to the IPR holders if they are willing to buy;

Third, to sell them at public auction after removing all the infringing features;

Last, if the infringing features cannot be eliminated completely, the goods are destroyed.

The Customs protection of IPRs in China is very comprehensive, it covers not only the goods in trade but also the articles carried by passengers or delivered via post services.

Any infringing articles that are not for personal use or exceed the reasonable amount are subject to confiscation. Please note that “personal use” is the dominating clause here, for articles that are not for personal use, there is no reasonable amount.

III. Enforcement

After describing the legal framework in detail, let's shift our focus from legislation to enforcement, to examine the challenges faced by the Customs in daily work and the strategies adopted by the Customs in response.

Above all, the effectiveness and efficiency of China Customs in protecting the IPRs are broadly recognized by the domestic society and the international community. For example, the Quality Brand Protection Committee, abbreviated as the QBPC, has awarded China Customs the most efficient enforcement agency continuously in past three years.

And the World Customs Organization accorded China Customs the prize of outstanding contribution to IPR protection in May, 2007.

The empirical evidence shows that the effectiveness of Customs enforcement is positively correlated with the magnitude of the resources committed to it. As illustrated in the case below, from October to December, 2007, the GAC initiated a special action named “Dragon Boat” to strike the exportation of infringing goods, particularly those destined for the European and U.S. markets. As we can see from the table, the two indicators namely the number of cases and the case value compared with the same period of last year increased 226% and 105% respectively as a result of the intensified enforcement.



Time	No. of Cases	Case Value
2006 (10-12)	739	46,221,371
2007 (10-12)	2,411	94,804,815

After reading the report, some people tend to argue that the Customs should dedicate all their resources to such an effort since they are so effective in fighting the infringement on the frontiers.

Well, exactly because of its outstanding performance, the Customs has been delegated sweeping powers of controlling the movement of imports and exports. Concomitant with the powers are the extensive responsibilities, in which the IPR protection accounts for an important but small part.

For better comprehension, let's take a look at some facts. Here are some international agreements that concern China Customs as much as the TRIPS, let alone the tremendous regional and bilateral enforcement burdens that have resulted from proliferating trade agreements.

HS Convention in 1992;

ATA Convention in 1993;

Istanbul Convention in 1993;

Convention on Containers in 1986;

Kyoto Convention as amended in 2000;

Convention on the Valuation of Goods in 2001;

WTO Agreement on Valuation in 2001.....

More concrete in details, the Shanghai Customs, one of the 41 regional Customs establishments, has to supervise daily:

more than 40,000 TEUs of import and export; more than 40,000 passengers of inbound and outbound;

more than 30,000 Customs Declarations of import and export; an officer responsible for reviewing the Declarations typically needs to examine more than 1,000 Declarations daily.

Apparently, the resources that the Customs can allot exclusively for the IPR protection are limited although great importance has been attached to the effort.



3.1 Challenges

There is no denying that the Customs has made great achievements in IPR protection, but the violation still exists in virtually every industrial sector implying that we still have a long way to go. In order to make further progress in IPR protection, the Customs has to face a lot of challenges.

For example, at the macroscopic level, the increased investments in manufacturing, logistics, inventory control, and information system lead to increased expectation for prompt and predictable Customs services, which is usually interpreted as simplified procedures and formalities, loose control and less Customs intervention in the supply chain. On the other hand, the outrageous terrorist attacks and smuggling in hazardous substances such as drugs, weapons, endangered species and ozone depleting substances etc. appeal the Customs for a more meaningful role in protecting the nation and society from the threats, which is normally interpreted as complicated procedures and formalities, tightened control and more Customs intervention in the supply chain. To satisfy the conflicting requirements at the same time, that is to catch all the contrabands without impeding the legitimate trade, the Customs needs to be both persistent and creative.

At the microscopic level, the lack of accurate and complete information has wasted lots of enforcement resources. In some cases, the Customs discovered that the suspect infringers turned out to be licensed users because the IPR holders failed to synchronize their dynamic license information with their Customs recordation.

Currently, in China Customs recordation system, more than half of the recorded rights are indigenous IPRs, but the disproportionate numbers in violation cases and Customs seizures reflect the low awareness and cooperation of indigenous IPR holders. The reasons for this observation are much more fundamental than the pure economic and legal explanations. As a country of long history, the hereditary values, traditions and culture concerning the IPR protection can be more influential in formulating the behavior of the public. The analysis of these factors is beyond the scope of this pamphlet.

In addition to the unbalanced relation between the supply and demand of the enforcement resources, another critical point I'd like to mention is the limitation of Customs authority.

Suppose there is an infringer who produces and sells the infringing goods domestically only, then most likely it has nothing to do with the Customs simply because the behavior is beyond the Customs jurisdiction. Some other government agencies such as the Administration for Industry and Commerce, are supposed to deal with it. Understanding the distribution and separation of powers among government agencies can help the IPR holders avoid either overestimating or underestimating the Customs authority, and clearly bear in mind what kinds of relief are available from China Customs.

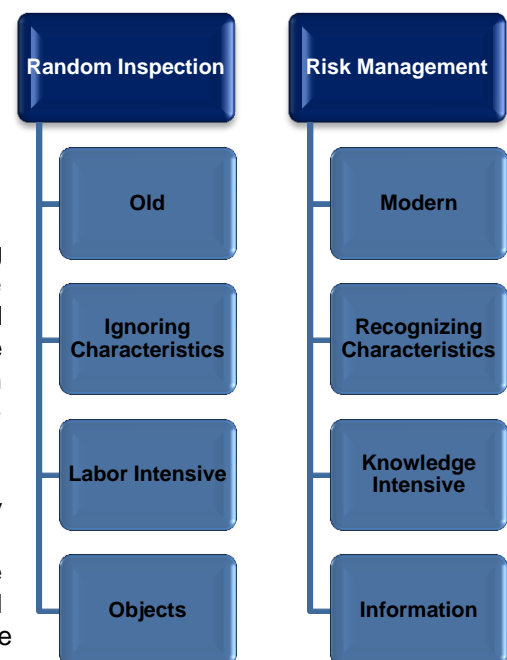
3.2 Strategies

The strategies adopted by the Customs in response may take many forms.

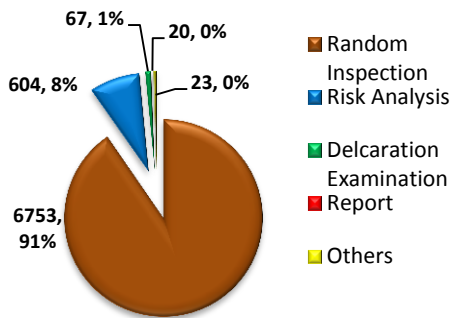
3.2.1 Process Reengineering

As we know, the random inspection is an old and concrete method of Customs control. It focuses on the physical examination of the shipments without distinguishing the differences in their characteristics. The sample rate will arbitrarily determine how many containers or passenger bags should be opened for check. The method is therefore labor intensive and costly in operation. One case in this regard is that in August 2007, Bush Administration presented the "100% Container Scanning Act", stipulating that from 2012 onward, all the containers destined for the U.S. shall be scanned and sealed before shipment at the port of departure. Concerned with the tremendous cost, most countries including EU and China oppose that initiative. We can predict that reliance solely on the random inspection to ensure the compliance will become more and more unrealistic as the trade volume keeps climbing dramatically.

In comparison, the risk management is a relatively modern approach, which recognizes the varying characteristics of the shipments, such as the country of origin, means of transportation, types of goods and the record of violation etc. Based on a set of prescribed criteria, it profiles and targets the shipments with high risk, enables the Customs to concentrate the limited enforcement resources on the high risk objects and let go the rest legitimate trade with ease. Since it heavily relies on the abstract information rather than the concrete objects, the approach is knowledge intensive and technically demanding in operation. Applications of information and communication technology such as the databases, models and various analytical tools must be used to assist the decision making.



No. of Seizures in 2007



The left chart shows that currently the random inspection still accounts for the vast majority of seizures in the field of Customs protection of IPRs and the risk management starts to gain in proportion because it has been recognized as the core process of the modernization and strategic development of China Customs.

3.2.2 Cooperation

As I have mentioned, the sound operation of risk management heavily relies on the collection and manipulation of massive information. Cooperation is thus indispensable for collecting reliable information from numerous stakeholders and becomes our second strategy.

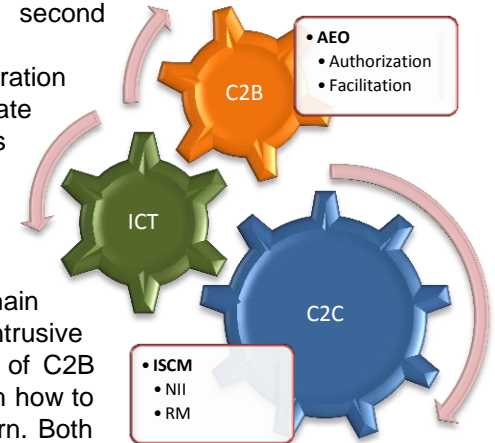
Considering what kind of cooperation should be established, the “Framework of Standards to Secure and Facilitate Global Trade”, proposed by the World Customs Organization in 2005, has elaborated on it. In fact, the two groups of cooperation, one is between Customs and Customs (named as C2C cooperation), the other is between Customs and business (named as C2B cooperation), constitute the two pillars of the whole Framework.

The fundamental concept in C2C cooperation is the Integrated Supply Chain Management, which in turn rests on the application of Risk Management, Non-intrusive Inspection technology and integrated Customs enforcement. The critical idea of C2B cooperation is the Authorized Economic Operator (abbreviated as AEO), in which how to authorize and what incentives will be available to the AEOs are of major concern. Both the C2C and C2B cooperation necessitate the incorporation of advanced Information and Communication Technology to facilitate the intensified data exchange and process within or between the parties. For example, the Website, EDI, Data Structure, the compatibility and security of different Customs Databases etc will be considered. Personally I think the ultimate purpose of the two pillars is to create some authorized supply chain. Supported by the integrated Customs control and informed compliance, shipments on the authorized chain can enjoy express, simple and safe movement. For example, a shipment going through several countries will need to declare only once to the Customs and be inspected once by the Customs while travelling from the manufacturer to the consumer.

Some reforms are taken by China Customs to align its process with the Framework, and some of them are IPR related. For example, in order to meet the requirements of AEO system, China Customs has created a new category in addition to its original classification of enterprises. A “AA” grade is added to the grades A, B, C and D, consequently there are five categories now. In the process of classification, enterprises will be assessed against many standards, and the IPR compliance is one of the criteria.

There used to be a practice of red and black name lists used by China Customs to encourage the compliance and deter the violation. But the GAC has just abandoned the practice and ceased to update the name lists because they think after the many years development, the enterprises classification system is now competent enough for a scientific management of the importers and exporters. The red names and black names can thus be assigned to their corresponding categories. It was reported recently that a black name list has been adopted especially for Customs protection of IPRs, and some of the IPR holders would like to know how to add names to it and would be delighted to do so. But, frankly speaking, it won't make any sense to discuss it here because first, the list is designed as an invisible deterrent and for Customs use only, so neither the IPR holders nor the infringers can see it or use it, it is transparent to them. Second, whether a name should be added to or removed from the list is left to the discretion of the Customs, not the IPR holders. So please focus on the recordation and be responsive when the Customs needs your help during an investigation.

Another relevant point is that since the Framework is very comprehensive in guiding the Customs practice. Its application will have extensive impact on the entire trade community, which encompasses the Small and Medium Sized Enterprises that are a vital source of job creation, export and economic development. The needs of SMEs have been carefully considered when drafting the Framework, such as the capacity building and the support for SMEs to be certified as AEOs. But the Framework tends to be a guideline and abstract, details should be added to make it applicable in practice. I think the SMEs should be encouraged to participate in this regard, to help customizing the rules of game in their local context so that they can be integrated into the world economy more easily.



3.2.3 Capacity Building

Here comes the third strategy, capacity building.

(1) Academic Education

Nobody doubts the essential functions carried out by the academic education in terms of socialization and civilization. But there are very few countries in the world like China whose Customs is directly operating an institution of higher education. In the past decades, the Shanghai Customs College has supplied China Customs with thousands of capable graduates, contributed remarkably to the modernization of Customs. The Customs protection of IPRs is an important subject for majors like Customs management and Customs law.

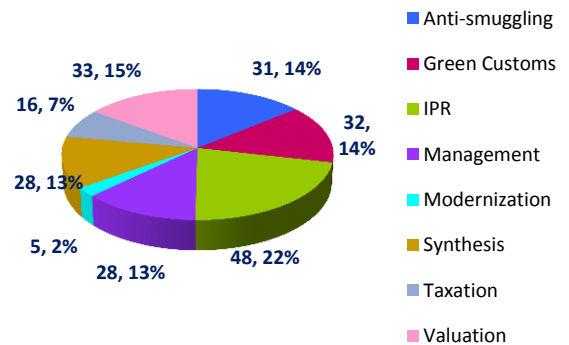
(2) Professional Training

Compared with academic education, the professional training is more specific in subject and shorter in duration. Workshops and seminars are the usual forms. Recognizing the dynamic challenges faced by the Customs, trainings on a regular basis become more and more important for helping our officers stay at the leading edge of their professions. In 2007, 3,471 Customs officers had attended and accomplished their training programs on diverse subjects at the college. Among them, there were 10 international programs involving 221 foreign Customs officers from 50 countries and regions. As the pie chart indicates, the trainings on IPR protection made up a significant portion of the international programs, showing that China Customs not only protects the IPRs in practice but also helps other Customs Administrations enhance their IPR protection by exporting techniques and ideas.

The effect of these training programs is quite inspiring. After training hundreds of foreign Customs officers in person, my experience tells me that the training never goes in single direction, the close contact and interactions between people with divert backgrounds in culture, work and education can cause profound and far reaching consequences. For example, besides the knowledge and skills learned in class, the programs have dramatically promoted the communication, understanding, and cooperation of the participants in their future work.



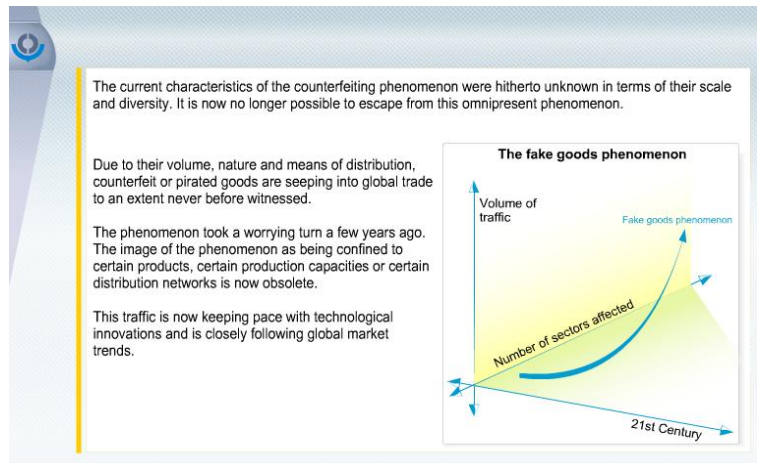
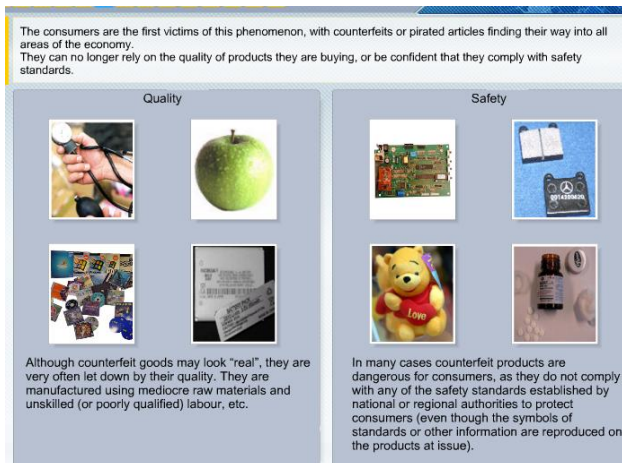
Subject Distribution



A powerful tool that should be mentioned here is the WCO's E-learning system. It is a standardized training package, in which the boring Customs knowledge is articulated by pictures, diagrams, animations and other forms of multimedia. The interactive feature makes the learning process an attractive journey; its open and customizable feature allows the tutors to localize the modules, training routes and other settings as well; it is also convenient to draw statistics from the system like the time spent by a particular trainee on a particular subject, quiz scores and other useful information about the behavior and performance of the trainees.

As the administrator of the system, I have combined the E-learning resources with all my lectures and the blended trainings proved to be more effective than ordinary slides and speech presentation.

Here two snapshots concerning the Customs protection of IPRs are captured for your reference. The left screen shows a classification of the counterfeits and the right one is an analysis on its trend.



Currently the system is only available to Customs Administrations but efforts are taken to study how the trade community can benefit from this outstanding product.

(3) Technical Assistance

Like other hot issues of international dimension, the IPR protection, particularly the border measures cannot be fulfilled effectively by any single country on its own. Because the supply chains go through multiple countries, it is not adequate for one Customs administration to convince itself of the importance, it is also necessary to acquaint its counterparts with the sense of IPR protection.

Technical assistance remains one of our priorities. Our programs have covered most countries in Asia-Pacific Area and all countries in the continent of Africa.



In the pictures above, I was lecturing respectively to Mongolia Customs officers and officers from 19 African Customs Administrations in our technical assistance programs.

IV. Conclusion

4.1 Summary

So far we have discussed the history, legislation and enforcement of the Customs IPR protection. We can conclude that the Customs is an efficient government agency who effectively protects the IPRs involved in imports and exports. By recordation, both the IPR holders and the Customs can strengthen the protection. A better understanding of both the procedural and substantive requirements can save time and money as well as the precious enforcement resources. In order to enhance its performance of IPR protection, the Customs has to face a lot of challenges and some strategies have been adopted in response.

It can also be concluded that the IPR protection is and will continue to be a hot issue as the international community is increasingly concerned with the worrisome trend and pattern of infringing trade.

In short, the IPR protection will remain an important but unfinished work of world Customs community.

4.2 Policy Suggestions

Considering the complexity and persistence of IPR protection, the participation of all related parties is then indispensable for the ultimate success. Here are some suggestions on how you can participate and help protecting your own rights.

(1) Reactive or Proactive

As the saying goes, prevention is better than correction. Measures should be taken in all possible aspects to prevent the infringement from happening. This may include an analysis of the market that you are planning to enter, or introducing internal control programs to regulate the access to IPs to seal the potential leakage, or increasing the investment in security technology to make the infringement more costly and difficult.

Because when something happens, you always have to set aside some resources to deal with it, wise people actively avoid unnecessary troubles.

(2) Tolerant or Sensitive

Some IPR holders tend to be tolerant towards the infringement of their rights. The reasons for the behavior vary from case to case. They may think the infringement is so minor that no perceivable damage can be made, or they hesitate and doubt whether it will bring negative impact on their marketing campaigns if they declare that some of the products in the market bearing their marks are counterfeits, or they merely have no idea what to do. But the truth is, for most time, the appeasing policy will change the trickles into deluges that are eventually out of control.

So remember, be sensitive and active in response, probably, your determined attitude will be deterrent enough to cease the violation.

(3) Administrative or Judicial

As I have mentioned, both the Customs and the courts of law are competent authorities to handle IPR issues. So the plaintiff generally has two routes to seek either the administrative remedies or the judicial remedies. But each of them is characterized with some strengths and weaknesses. Administrative remedies are relatively flexible in procedures and respond faster than judicial ones. But the means by which the penalties are imposed are restricted to detention, seizure, confiscation and fines. Therefore, a die-hard infringer may change the premise and start the infringement from scratch again, taking the forfeitures and fines as sort of cost of running the illegal business. In comparison, the judicial remedies can be more deterrent where the criminal charges are applicable and the wrongdoer can end up in imprisonment of up to 7 years. But the judicial route is more rigid in procedures and time consuming. In addition, the meticulous collection of evidence can frustrate some IPR holders concerned with the high cost of doing so. Before jumping into actions, the two approaches should be weighed seriously against your strategies and priorities.

(4) Unilateral or Multilateral

Government agencies play important roles in regulating your operations and protecting your rights, and this is particularly true in China. Smooth communication and trustworthy cooperation with them can facilitate all your processes, and there is no exception for IPR protection. In addition to designing how to establish and nurture the relationship, you need to define your emphasis and priority if we take the significant fragmentation and stratification of powers into consideration. For example, it is the GAC, with whom you record the right, but you rely heavily on the local Customs to actually protect it. So where is your accent? The empirical data indicate that the QBPC has awarded most of its prizes to the local rather than the central government agencies. But I think no one can be ignored, what we need is the concerted synergy rather than a biased preference.

End Notes

The author is an independent consultant and an accredited trainer of the World Customs Organization. For questions and comments, please contact Mr. Johnny at xiejiaoning@gmail.com

