

China has much to gain from increased protection of Intellectual Property (IP). Niall Lawless Chartered Information Systems Engineer, Chartered Arbitrator and Mediator explains why and outlines some ways to deal with problems in commercial IP flow.

As part of its accession to the World Trade Organisation (WTO), in 1999 China signed up to responsibilities under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), which sets out common international rules in respect of the minimum levels of protection WTO members should enjoy.

Software is protected by copyright law and it is estimated that in 2004 for every two dollars of software legally purchased one dollar was stolen. Although more software is pirated in the European Union than in Asia Pacific Region it is estimated that in 2004 in China 90%; in UK 27% and in USA 21% of software was stolen equating to a loss in USA of \$6,645M, in China of \$3,565M and UK of \$1,963M.

Some say that because of its Confucian past; with emphasis on community rather than individual, China lacks a tradition of respecting and protecting intellectual property. However after China agreed to TRIPS it quickly modified its three major IP laws dealing with patent, copyright and trademark and a consequence of this was that in its 2004 summary the Office of the United States Trade Representative said *'in the IPR area, China has made significant improvement to its framework of laws and regulations, but the lack of IPR enforcement remains a major challenge'*

Over the last two years China has made major efforts to move focus from legislation to enforcement and it has just published a detailed two year action plan to increase both the administrative and judicial effort to protect IP rights. It will establish IP rights infringement services centres in 50 cities and because much power is distributed Beijing has told local leaders they will be held accountable for failures to deal with IP rights infringement.

China understands that public copyright awareness is not strong and has taken action to improve this. For example, making one week in April every year a time for emphasising the importance of IP rights protection through public interest advertising using all media available including newspapers, magazines, television, radio and internet.

It would be wrong to view these actions solely or in the main as designed to appease its trading partners. China does not need to do this and has a much more important interest in having proper order in a genuinely policed software industry. Copyright industry production value contributes more than 6% to China gross domestic product and between 2003 and 2006, five hundred thousand new software related jobs were created, half by local suppliers and half by international suppliers. China Civil Court statistics show that reality in China is that 95% of IP rights infringement disputes are between Chinese entities. It is commonly held economic theory that strength in domestic markets is a pre requisite to success in overseas markets and understandably China will encourage domestic software innovation creating jobs, generating taxes, wealth for companies and individuals and economic growth.

Chinese businesses have responded to the 'Go Global' 走出去 (zǒu chūqu) challenge and it is easy to imagine a future where China's rise in commodity manufacturing is accompanied with increased prowess in science and technological innovation. China's Lenovo Group Limited's purchase of IBM's personal computer business transformed it into the world's third largest PC manufacturer and Huawei Technologies Company Limited and ZTE Corporation compete for and win substantial international telecommunications contracts.

Today there are about 200 million Chinese students learning English (for comparison about 24,000 US students are learning Chinese) and China already has a substantial English language capability. It is without doubt this increased proficiency will allow for the competent development of software in English and China will not only export software and software based products it will compete with India for providing offshore IT and software support services.

Commercial dispute resolution systems

In China most IP rights disputes between contracting parties are settled through mediation and arbitration is more common than litigation.

Mediation

Because it is flexible and simple, mediation is common in China. The goal of mediation is settlement of disputes through compromise. Over 70% of mediated disputes are resolved; with the benefit of acting as mediator in over 50 disputes I believe that there are two main reasons for this.

The first is that mediation facilitates real communication; this requires not only listening and speaking but also understanding. The second is that through the mediation process the mediator is able to work with the parties privately, having access to confidential information. This is often the only time someone can assess if a zone for compromise and agreement exists and guide the parties towards it.

Mediators do not give the parties advice or make decisions for them. However, competent mediators will have dispute resolution experience and be able to use technical and commercial expertise to engage the parties in early 'reality testing', exploring the strengths and weaknesses of their position. The mediator should help the parties examine interests and needs; negotiate the settlement agreement and define a relationship which is mutually satisfactory and which meets their standards of fairness.

Mediation is often effective in commercial disputes because in working out the settlement terms the parties can be creative and go beyond the strict terms of any legal contract involved. Compared to other methods of resolving disputes mediation offers the benefits of speed, privacy, flexibility and cost saving. It's not a formal process and the parties have personal control.

Arbitration

Arbitration is particularly valuable in IT and IP rights disputes and is most often chosen because confidentiality can be preserved. It should be more informal, flexible and cost effective than litigation and arbitrators may be selected for their special skills to suit the particular dispute.

It has been said that arbitration is litigation in the private sector, but it is much more. In domestic disputes arbitration has unique advantages but if the parties come from different jurisdictions it is without equal. Arbitration awards can be enforced across jurisdictional boundaries and there is less opportunity to appeal the decision.

Arbitration under Chinese Law is different in many important respects to arbitration under UK Law. One of which is that the China Arbitration Law only permits institutional arbitration and not ad hoc arbitration for arbitrations which take place in China; this means that the arbitration must be supported by an arbitration commission. Also there are limitations on the appointment of arbitrator. An IP rights dispute may be submitted for arbitration to a copyright arbitration body under a written agreement concluded by the parties or under the arbitration clause in the contract.

Litigation

The WTO does not provide guidance as to how member countries should support the parties in an IP rights dispute and in China these are dealt with through a unique administration system complimenting the civil or criminal courts. China through the copyright administration department provides an organisation independent of the parties to administer and defend the copyright system, to settle disputes, to investigate and prosecute copyright infringement cases, and to protect the interests of China society. Once authorised by the IP rights owner the copyright administration department has an obligation to investigate and may decide upon administrative penalties such as confiscating unlawful income and imposing a fine or where the circumstances warrant confiscate material and tools used in the infringement and if there has been criminal activity set in motion criminal proceedings. The copyright administration department can levy administrative penalties but cannot award civil or criminal damages. Any party who is not satisfied with an administrative penalty may within three months of the copyright administration department's decision initiate civil proceedings in the Peoples Court. Unusually under China's Copyright Law the burden of proof lies with the alleged infringer, if they cannot demonstrate that their reproduction or use of the software was authorised they bear legal responsibility.

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CEDR – helping business work

Based in the UK the Centre for Effective Dispute Resolution (CEDR) seeks to encourage and develop mediation and other cost-effective dispute resolution and prevention techniques in commercial and public-sector disputes and civil litigation. Recognising the importance of British Chinese trading relationships it has recently created an alliance with the China Council for the Promotion of International Trade (CCPIT) Conciliation Center.

CCPIT has 43 offices in China and is the permanent conciliation institution in China, which, independently and impartially resolves commercial disputes by way of conciliation

Over the next two years CEDR and CCPIT will work together to establish a UK China Business Mediation Centre in Beijing and London, serving the interests of British and Chinese businesses by offering an alternative to costly arbitration or court proceedings, the aim is that CEDR and its CCPIT partners will jointly administer the Centre.

Niall Lawless is an experienced international IT and IP rights disputes arbitrator and is a CEDR and CIArb accredited mediator. He is undertaking a part time PhD at the University of International Business and Economics, in Beijing, China. (www.arbitrari.com).