



CONFCOMMERCIO

PUSHING THE STRING

Why the US Strategy for Improving China's IPR Enforcement can't Work

by

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As China is rapidly becoming more influential globally, the relationship between the US and China has become very complex, with many conflicts over economic and political issues, in many cases due to our lack of real understanding of the other side. For example, on the issue of intellectual property rights, we often use our more than 200 years of experience and knowledge to evaluate China's two decades of progress. In particular, the United States' policy of exerting maximum pressure on the Chinese to improve their intellectual property rights (IPR) enforcement has obvious and massive flaws that force us to ask why we are engaged in such a dubious effort. There are four major flaws in our approach to IPR in China:

First, China's bureaucracy is highly decentralized in fact – more like the EU than the US. Pushing on the officials at the top has little or no lasting effect on the local enforcement offices. Second, China's IPR laws are at or above global standards, but the vast majority of Chinese citizens, for very good reasons, do not support or obey these laws. Declaring almost everyone in China to be a criminal won't solve the problem. Third, most Chinese firms do not yet see the economic benefits of investing in IP creation, protection, and commercialization and so are unsympathetic to IPR enforcement. And fourth, external pressure to bludgeon the people of China into not buying or making counterfeits is not an effective mechanism for introducing a change in widely held attitudes and behaviors.

Aggressively Negative

Everywhere in the media, we hear loud voices advocating a harsh and uncompromising approach to the problem of IPR enforcement in China. For example, Congressman Peter DeFazio recently wrote a letter to President Bush that typifies the attitude of many U.S. Politicians, and business leaders. In it he said,

"Previous Chinese promises have proven meaningless. The time for talk is over. The time for enforceable action, through the WTO or our own trade laws is now. U.S. jobs are at stake. It is simply not good enough to allow the status quo to continue or to tell U.S. small businesses that they're on their own. China must be held accountable for its rampant violations of the intellectual property rights of American companies." (Congressman Peter DeFazio House website 11/16/2005).

As result of this attitude, the US is the only country that has taken China to the WTO on a trade dispute, and the US has filed more anti-dumping suits against Chinese products than against any other country in the world. But is this strident and uncooperative approach really productive? I believe it is not.

Centralized Negotiations vs. Decentralized Control

The Chinese government's IPR administration system is highly decentralized and there is no "chain of command" between the leaders in Beijing and the local offices tasked with IPR enforcement.

The structure of China central government that negotiates with the US Trade Representative Rob Portman is literally disconnected from the local office that is responsible for actual enforcement. For example, provincial governments have their own bureaus of Culture (for copyrights), Commerce (for trademarks) and Science (for patents) and provide the budgets, the personnel, and set operational goals and priorities. Other than a sense of collegial fraternity, there isn't much connection between the provincial IPR offices and the central government office responsible for IPR in Beijing. And then again at the municipal level, the Mayor oversees his or her own bureaus, allocating resources and managing performance quite independently from the direct control of central and provincial governments. This pattern is repeated at the two sub-municipal levels, with each level acting as an insulator from policies that originate in Beijing. This cannot be changed overnight.

Then who has the real control over IPR enforcement in China? The real control over behaviors and attitudes regarding IPR is in the hands of 1.3 billion individual Chinese citizens who see IPR from a very, very different perspective than does corporate America.

Punishing Majority won't work

The most fundamental reason that "pushing the string" cannot work in improving IP enforcement is that no matter what level of penalties are legislated, ordinary citizens in China will not stop buying counterfeit goods for at least three reasons:

- 1) they believe it is in their economic interests to, for example, buy an illegal DVD with a cost equal to 5 hours work rather than a licensed version with a cost equal to 320 hours of work,
- 2) Traditional cultural philosophy considers all knowledge to be a public good, belonging to all. The traditional Chinese education is centered on copying the works of earlier scholars, not on creating new work, and
- 3) the IPR issue is widely seen as a tool used by foreign governments to hold onto an unfair advantage and keep the Chinese people down in an echo of the imperialism and gunboat diplomacy of the past

During prohibition we learned about the difficulties involved in criminalizing the behavior of the majority. But that experiment pales beside the massive effort underway today to criminalize the culture and behavior of the citizens of China. China is not a democratic nation, so it is possible to enact laws that virtually everyone disagrees with, but even “big brother” can’t watch everyone all of the time. The only way to change IPR enforcement in China is through education, beginning with opinion leaders and then extending to all levels of Chinese society, not through punishment.

No Stake in the IP game

Yet another reason why the US policy of top down pressure won’t work is because Chinese business people do not believe that they have any stake in the US-China IPR controversy. The average Multinational Company (MNC) engages in extensive R&D, IP driven mergers and acquisitions, in-licensing for production, out-licensing for revenue, IP inventories and mapping, IP based joint ventures, offensive and defensive IP strategies, and may participate in IP standards groups or patent pools. For the MNC’s employees, shareholders, and the communities they are part of, Intellectual Property is critically important.

By contrast, the average Chinese company makes a product with just enough R&D to create or copy an attractive product design under a local or “borrowed” brand name. It creates and owns very little world-class intellectual property and sees IP protection as largely irrelevant. Only about 3 out of every 10,000 Chinese firms have registered any IP at all. (China Daily 12/27/2005) IP doesn’t seem to visibly create jobs or elevate living standards, enhance investment returns, or generate tax revenues. Although this industrial age view that IP is irrelevant is not correct in the current global knowledge economy, nonetheless it is widely held in China. Punishing the Chinese would create a tidal wave of resentment and anger.

Ownership of the Problem

Another problem in improving IPR enforcement in China is the issue of what is seen as outside meddling in Chinese affairs. Imagine that the European government wanted the U.S. to reduce or eliminate greenhouse gas pollution, that the Chinese government wanted the U.S. to stop distribution and sales of pornography, or that Arab governments wanted the U.S. to close down our massive gambling industry – subjects that are very dear to the hearts of all three. How could criminalize the behavior of a large fraction of American citizens ever accomplish anything more than building resentment against “foreign interference” in our private national business? No, if we

were devising a plan to change our own national behavior, one that had any chance of working, it would involve domestic “ownership” of the problem, a lot of education, and a gradual shifting of public opinion over time.

Chinese generally like Americans, but they do not appreciate American arrogance and disrespect. China will be an important part of the US’s future, either as a loyal friend or as a suspicious competitor; it is up to us to decide which.

Educational “pull” vs. Enforcement “push”

Recently, in his “top to bottom review” of US-China trade relations, US Trade Representative Robert Portman said, “As a mature trading partner, China should be held accountable for its actions and required to live up to its responsibilities, including enforcing intellectual property rights, allowing market forces to drive economic development and opening its markets. We will use all options available to meet this challenge.” He is backing this up by publicly soliciting evidence to bring another complaint to the World Trade Organization.

This aggressively negative US strategy of pushing harder and harder on the trade negotiations “string” can not and will not succeed. We need to ask ourselves why we have adopted such an obviously flawed policy and what we can do to ensure that China becomes a valued friend and ally in a future that promises many daunting challenges.

The best avenue, and probably the only one, for improving this difficult situation over time is educating and engaging Chinese legislators, judges, policy makers, scholars and business people in a discussion on why stronger IPR enforcement is in China’s best interests. A positive strategy of “pull”, that supports extensive education at all levels of Chinese society on the importance of innovation and intellectual property would not cause a harmful backlash, and just might succeed.

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