1. Introduction

China’s textile industry is both an opportunity and threat to European businesses. It is a major market for those supplying production technologies and a key supply base for textiles and finished goods. However, foreign technologies and brands that are not adequately protected often fall victim to infringement by Chinese competitors.

This guide addresses IP issues across subsectors of the textile industry, including textile machinery, yarns and specialty fabrics, finished fabrics and brand apparel & accessories. The areas of IP most relevant to the above sectors will be discussed, as well as smaller IP issues specifically affecting makers of brand apparel & accessories. The most commonly encountered types of IP in the textile industry are:

1. Patents
2. Trade marks
3. Copyrights
4. Transfer of Technology
5. Trade Secrets

2. Patents

Patents must be registered in China; a patent registered overseas is not enforceable in China. China applies an “absolute novelty” standard for patents, meaning that the patented product or invention should not have been disclosed anywhere in the world before the patent registration application, subject to 12 months “Convention Priority” in certain countries. Patents may be filed directly in China or through the Patent Cooperation Treaty system.

It may take approximately 24-36 months for an invention patent application to be examined and up to five years to be granted.

In addition to patents for inventions, China recognises utility model and design patents. These types of patents do not undergo a substantial examination, and as long as they are filed in the correct form, they are issued automatically. Utility models cover minor innovations, which may not be sufficiently inventive to receive invention patent protection. They are usually granted within 12 months of application and last for ten years.

Design patents cover the exterior, ornamental design of products. Like utility models, they are also granted within eight to ten months and last for ten years. It should be noted that the process of protecting designs in China is different from that of Europe, where designs are covered by design rights. In China, designs are best protected by design patents and in some cases, by copyrights.
Textile Machinery

Patents are only valid in the countries that they are registered in, and only patents registered in China are enforceable. Companies that manufacture textile machinery apply for patent protection in China not only because China is a market to sell machinery but also to defend against potential infringers who manufacture infringed technology that is exported to other markets outside China.

Competitors often copy the design and shape of the machinery and its components and mislead customers to believe that the machinery has the same functions or quality as the original, often resulting in losses in sales for the original European manufacturer.

Finished Fabrics

The pattern of apparels can be protected through design patents.

Since 1 October 2009, the Chinese Patent Law has enabled designers to register two or more similar designs (up to ten) for the same product within one application. However, these applications are not available for different designs, making them unfeasible for designers that have a very large turnover of new designs.

Furthermore, design patent applications may take 8-12 months to be granted protection, which is often too long to protect fast-moving seasonal designs.

The advantage of a design patent is that it is relatively easy to enforce, and simply owning a design patent may be enough to deter others from infringing your designs.

For more information about patents in China, please refer to the Helpdesk’s Patent and Trademark Protection in China guide.

3. Trade Marks

Trade marks provide protection against use of identical or similar marks on similar goods. China uses the ‘first-to-file’ system, meaning that companies may lose legal protection in China and take the risk of infringing others’ trademark if the same or similar mark has already been registered in China by someone else. It currently takes two-three years from application to registration of a trademark in China, providing no opposition is filed against the application upon publication.

Because China uses the ‘first-to-file’ system, it is common for unscrupulous parties to register other’s trade marks first. It can be a difficult and expensive process to cancel, oppose or buy back a trademark that has already been registered. It is not uncommon that import agents or distributors register trade marks on behalf of the principal. It is recommended that the trademark is either registered in the name of the principal or transferred back to the principal to avoid later disputes.

In addition to registering the trademark in the original language, it is advisable to register a distinctive Chinese language trademark, even if this is not the primary mark used. Without a well-promoted Chinese mark, the market may create a Chinese nickname for a product, and this nickname may be registered by...
unscrupulous parties to exploit the reputation of your brand.

Enforcement of trade marks

Trademark infringement can be dealt with through an administrative action by the Administration for Industry and Commerce (AIC) or through civil proceedings in the People’s Courts. There are also criminal sanctions for trademark infringement, although this only applies if the trademark is exactly copied or if the scale of the infringement is large.

Textile Machinery

Although it is uncommon to find completely counterfeit machinery, replacement parts may be copied. If your company’s spare parts or packaging bearing your trademark, it is important to register this trademark in China as soon as possible.

There is no national trade name registry in China. Trade names are registered locally, within districts. It is not uncommon to find distributors or agents providing maintenance services for branded machinery or equipment and using the brand as a registered trade name without authorisation. Trade names that conflict with prior trade marks can be cancelled. Trade marks should be registered even if you are manufacturing but not selling in China.

Yarns and Specialty Fabrics

Trade marks should be registered even if you are manufacturing but not selling in China. China is a first-to-file jurisdiction; therefore, producers of yarns and fabrics who own valuable brand names are recommended to register names and/or logos as trade marks in China as soon as possible to protect your trademark. The process of cancelling, opposing or buying back your trademark is often a more difficult and costlier than simply registering your trademark.

Finished Fabrics

A distinctive fabric design may be protected as a trademark if it has become distinctive through long use (for example, the “Burberry” check design is a registered trademark in China). However, such examples are rare and protection of patterns as a trademark is uncommon.

For more information about trade marks in China, please refer to the Helpdesk’s Patent and Trademark Protection in China guide.

4. Copyrights

Copyrights are granted automatically, although China does allow voluntary registration.

Copyright registration will be accepted as evidence of copyright ownership in the event that you wish to enforce your copyright against an infringer and greatly reduces the preparation of evidence.

Administrative enforcement of copyright is possible through the National Copyright Administration, although the local administrative authorities tend to focus on enforcement of pirated software and media products. Where the infringement is not literal (i.e., not an exact copy), it is more suitable to bring cases to the People’s Court.

If the copyright is not registered, it is important to keep dated records of the first creation of the work so that the date of creation and ownership of the copyright can be proven.

Textile Machinery

A critical component in textile manufacturing technology may be operating software and technical manuals to operate and/or maintain machinery. Such materials are automatically protected in China as works of copyright. However, it is recommended that companies register the copyright to prove ownership in case of infringement.

In some cases where machinery has been copied by a competitor through reverse engineering and it is not protected by invention, utility or design patents, the only recourse that the original manufacturer may have is to claim copyright infringement of software or operating manuals. This only addresses the copying of the software and manuals but does not protect the design of the machinery itself.
Finished Fabrics

Apparel designs may also be protected as works of copyright. Copyright protection is granted automatically on creation of a work, allowing a design to enjoy double protection through a design patent and copyright.

Having a registered copyright in China is a convenient way to show evidence of ownership. You can also record a series of works under one copyright application, for example, all the same designs in one season.

However, it should be noted that copyright can be more complicated to enforce compared to a design patent. Therefore, the fact that no registration process is required to enjoy copyright protection should be balanced against a greater cost of actually enforcing the right if infringed, compared to a design patent.

Makers of Brand Apparel and Other Accessories

Apart from the protection of their designs, apparel companies can also use copyright to protect their catalogues, brochures and websites.

5. Transfer of Technology

When manufacturing in China, either directly or through a third party (supplier, joint-venture partner), companies will often import their technology from Europe and appoint agents or distributors who assemble, install and service the equipment.

In order to avoid loss of important assets or even loss of markets, know-how transfers and technology transfers should be accompanied by contracts with licensees, suppliers, employees, sub-contractors, etc., covering the scope of each party’s rights and obligations, as well as the geographic restraints, time scopes, confidentiality and non-competition issues. However, technology transfer contracts are subject to rules to prevent restrictive and uncompetitive practices. Companies licensing technologies to Chinese entities in the form of technical solutions or services should comply with China’s technology transfer regulations. For more information about China’s technology transfer regulations, please refer to the Helpdesk’s Technology Transfer to China guide.

6. Trade Secrets

In some cases, products or processes are protected as trade secrets instead of patents. Some companies may even prefer to protect their product or their processes as trade secrets (or a combination of patents and trade secrets). Trade secret protection is particularly common for processes, making it difficult or impossible for a competitor to discover the process through reverse engineering.

China defines a trade secret as valuable information that is not publicly known, and the owner has taken steps to keep it secret. The owner of the secret must take his/her own measures to keep the information secret. Trade secrets are only violated when another party has taken information that was explicitly kept confidential.

It is important to note that reverse engineering (i.e., disassembling a machine or product to learn how it is made) is a common practice in China. Only a product or process granted with a patent may be protected from reverse engineering. Should a competitor discover the secret information through his/her own reverse engineering efforts, it is not considered an act of infringement.

Trade secrets are often lost by owners failing to isolate the secret information. In many cases, it is the owner’s employees who pass the information to others. Therefore, companies with trade secrets should pay particular attention to protecting trade secrets within the organisation and ensure that there is a clear process in place. In the event that information is
leaked, having records of the measures taken in order to protect the trade secret is important in providing concrete evidence that the information was intended to be confidential. Therefore, in order to preserve a trade secret, the owner should identify exactly what information constitutes the “secret” and take steps to isolate it. Within the organisation, there may be physical barriers such as passwords or contractual barriers such as strict confidentiality clauses in contracts for employees or any licensees who have access to the secret.

It is also essential to require any potential partner in China to sign a Non-Disclosure Agreement (NDA) before revealing any commercial or technical information. Although NDAs are recognised by China’s courts, its most valuable function is often to signal to your potential partner that you are serious about protecting your IPR. China’s Labour Contract Law allows restriction for departing employees in key positions to work for a competitor for up to one year, although reasonable remuneration should be provided.

In case of unauthorised disclosure or unauthorised use of information regarded as trade secret, both administrative action through the Administration of Industry and Commerce (AIC) and judicial enforcement through the People’s Courts are available. However, given the complexity of trade secret infringement cases and the high value of the information, cases are normally handled by the People’s Courts. There are also criminal sanctions for trade secret infringement if the monetary value of the theft is particularly high.

7. Additional IP Issues for Makers of Brand Apparel & Accessories

Due to China’s large market, extensive production within the country and alarming rates of counterfeiting activities, brand apparel manufactures face specific IPR challenges in addition to the overarching IP issues discussed above.

1) Dealing with Local and Overseas Distribution Channels

It is important for brand apparel makers to monitor the sales channels of their products in China to ensure there is no improper use of their IP by channel partners. Ideally, terms of use should be included in distribution contracts, which should stipulate the permitted scope of use and what actions should be taken to remove all use if contracts are terminated.

If your brand has a reputation in the China market, you should be prepared for counterfeit or look-alike goods to appear in the market, or unauthorised use of your brand by retailers. China provides for quick and simple remedies for trademark infringement and acts of unfair competition through the administrative enforcement system. Nevertheless, you may encounter numerous problems and it is important to set aside sufficient resources to deal with these and ensure that all channel partners and competitors are aware that you are protecting your brand. As long as a brand is successful, it will regularly be a target for imitators and you should be prepared for brand protection to be an ongoing effort.

2) Anti-Unfair Competition Law

Apart from direct copying of a trademark, unscrupulous competitors may sell products with similar marks or designs, but not identical. Although the marks or designs may not be similar enough to be considered trademark infringement, such imitations may be dealt with through the Chinese Anti-Unfair Competition Law.

The Anti-Unfair Competition Law may also be used when someone has used your brand without authorisation at retail outlets or other products for which you do not have a trademark registration.

3) Control of Suppliers - Preventing Leakage of New Designs or Products from Factories

When dealing with manufacturers, distributors or retailers, the trademark owner should include clauses about the scope of their permitted use of trademark(s) in the contracts. This is especially important where you are using contract manufacturers in China. Contracts should include:

- Whether sub-contracting is allowed, and if so, sub-contractors should be disclosed if they are handling branded components, labels or packaging.
- Dealing with reject or over-run products. It is common for factories to sell products through the “back door” and the contracts should be clear about how these are dealt with.
- The contract should require that the supplier implements procedures to keep new designs secret. It is common for new designs to be “leaked” to other factories.
- On termination, all excess products, CAD files, etc., should be returned.
Apart from the written contracts with its suppliers, a brand apparel maker should also regularly monitor compliance.

4) Dealing with Online Sellers and Exporters

Any successful brand may also face numerous challenges in China with infringement online, including:

- Companies selling counterfeit goods online in China or overseas. This may be through C2C platforms such as eBay or B2B platforms such as Alibaba. There may be a very large number of such sellers. Fortunately, major trading sites in China have a complaints system and will quickly remove infringing items when notified. For stand-alone websites, a warning letter to the site operator or ISP may be effective.

- Local companies may register identical or similar domain names to your company or brand. For national level domains, there is a simple administrative procedure to recover pirate domain names.

- Should a website feature infringing content, you may be able to take action through the local Administration of Industry and Commerce (AIC) for trademark infringement or unfair competition, or complain to the site operator or ISP directly.

For a well-known brand, the volume of such cases can be significant, and it is important to prioritise. In many cases, the online seller may be a small trader or individual, and a warning letter may be sufficient. However, for larger companies, simply removing the infringing activity online will not stop their business and you may need to follow up with action against them offline. For more information about online IPR protection, please refer to the Helpdesk’s Protection of Online IPR in China guide.

5) China Customs

You may also find that products infringing your IPR are exported from China into overseas markets, even if you do not manufacture or sell products in China. It is recommended that you record your IPR with the Chinese Customs, who have a good track record in discovering and stopping infringing products at the border.

The recordal process is relatively simple, effective and nationwide, and can usually be completed within a month. Customs will often discover infringing shipments themselves, but it is recommended that you provide Customs with training at target ports to familiarise them with your products. You are required to identify suspect shipments within three days and pay a bond to indemnify Customs against an erroneous seizure, so it is important that you have a procedure in place in advance to handle any reports.

It is generally simpler for Customs to identify and detain trademark infringing goods, as this can be done using Customs’ own administrative procedure. For copyright and patents, you are required to bring an action in the People’s Courts to order Customs to detain the infringing goods, as Customs is not able to determine infringement. For more information about customs in China, please refer to the Helpdesk’s Guide to Using Customs to Protect Your IPR in China.

SME Case Studies

Case Study 1: Textile Machinery

A European company S that sells advanced knitting machinery to manufacturers in China discovered that a local competitor was selling a competing product that copied the dimensions, exterior covering and even the colours of the original. In addition, the local competitor’s brochures and website copied pictures, diagrams and product specifications of the original product, even though the local product did not meet the same performance specifications.

The sales agent of company S in China complained that customers were misled into believing that the much lower priced local product offered the same quality as the original. The European company did not have any patents registered in China, and the competitor was not using the European trademark. Since China does not have any law preventing slavish imitation of designs, the European company could only rely on claims of copyright infringement on their brochure artwork and infringement of the Anti-Unfair Competition Law in relation to the false claims on the brochure. To avoid the costs of litigation in the courts, the company engaged a local law firm to send a warning letter to the competitor, followed up with a phone call. As a result, the competitor changed the photographs and some of the contents of the brochure, but there was no legal basis to force them to change the appearance of their product.

In this case, company S was unable to take enforcement action to address the infringement as it had not registered its rights. If the company had owned a design patent, S would have been able to more effectively enforce its rights against the local company, save both time and money, and protect its reputation in the China market. This example serves as a cautionary tale that product design and exterior shape should be protected in China by registering a design patent.
SME Case Studies

Case Study 2: Finished Fabrics
A European company R had developed a type of accessory that greatly improved the appearance of finished apparel. Company R had earned a leading position to the extent that apparel buyers often demanded this product be used in the apparel they sourced. The product was covered by a patent in some countries but protected only by a trademark registration in China. Company R’s trademark was used as a hang tag on the finished garment to indicate that their product was used in the garment. Since the original product was essential for many apparel suppliers in China, local competitors began to offer a competing product. Company R did not have any legal rights to prevent competitors copying the product itself, but it was able to take action against accessory suppliers and apparel manufacturers who used the original brand tag on their apparel without actually buying company R’s product. Company R took administrative action for trademark infringement through the Administration of Industry & Commerce (AIC) and also publicised the actions in industry press, which appeared to have an effect.

However, a local competitor registered the Chinese nickname of company R’s product as a trademark, allowing the competitor to use company R’s name legally. Company R was then forced to pursue cancellation of the trademark through the Chinese Trademark Office procedure, which is a lengthy and uncertain process. Company R could have further protected its IP by registering not only its official name, but also its translated Chinese name and any other nicknames that the product was referred to as in the China market. The process and cost of registering multiple trade marks are generally more manageable than cancelling, opposing or buying back a trademark.

Case Study 3: Brand Apparel and Accessories
A small European company, D, designed and manufactured its own brand of apparel and bags sold in Europe but manufactured in China. Although its brand was not internationally famous, the company found that competitors overseas and in China regularly sold exact copies of its apparel and bags.

Although company D was able to take action against distributors in Europe, it wanted to also stop the competitors in China and initially felt this would be too difficult. Company D consulted a local law firm. Since company D had too many new designs each year to register design patents, it decided to register just a few of its designs as design patents, and protect the rest through copyright. Since a design patent is relatively easy to enforce, company D was able to use its patent rights to threaten action against competitors that copied those designs. Company D took action mainly through action against manufacturers and traders at trade fairs, sending warning letters and demanding removal of infringing designs on websites. It was able to claim copyright infringement as a ‘back-up’ on other designs that were not registered as a design patent.

These actions resulted in a noticeable drop in the number of copies, as competitors either avoided copying company D’s products altogether or changed the products so that they were no longer identical. As a result, company D now includes a design patent registration in China into its product development process for nearly all its new designs. Company D’s proactive steps to protect its designs in China were successful in deterring exact replicas of its products, even when it chose not to register every single one of their designs. Often, infringing activities can be curbed by taking proactive actions that send the message that a company takes IPR seriously and considers protecting its IP assets an integral part of its business.

Take-Away Messages

- Identify and register your rights as patents, trade marks and copyrights; not only to protect your rights when selling or manufacturing in China, but also to prevent infringers from exporting counterfeits to international markets.
- Ensure contracts with any third party (supplier, distributor, partner etc.) stipulate how your intellectual property may be used. Be prepared to check that your contractual provisions are being followed.
- Monitor the market, especially if you are a maker of brand apparel and accessories. The more successful your brand is, the greater chance it has of being targeted by imitators.
- Set aside sufficient resources to deal with enforcement; but always remember that early registration of your rights can be used as evidence of ownership and is a cost-effective and efficient way to deter infringers.
The China IPR SME Helpdesk provides free, confidential, business-focused advice relating to China IPR to European Small and Medium Enterprises (SMEs).

Helpdesk Enquiry Service: Submit further questions to the Helpdesk via phone, email (question@china-iprhelpdesk.eu) or in person and receive free and confidential first-line advice within seven working days from a China IP expert.

Training: The Helpdesk arranges training on China IPR protection and enforcement across Europe and China, tailored to the needs of SMEs.

Materials: Helpdesk business-focused guides and training materials on China IPR issues are all downloadable from the online portal.

Online Services: Our multi-lingual online portal (www.china-iprhelpdesk.eu) provides easy access to Helpdesk guides, case studies, E-learning modules, event information and webinars.

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