1. INTRODUCTION

China's rapidly expanding consumer market creates both opportunities and challenges for European businesses in creative industries. Ideas and designs are the lifeblood of creative businesses and infringement can be particularly costly and damaging. However, creative ideas and designs that are not adequately protected often fall victim to infringement by potential Chinese clients or Chinese competitors.

This guide addresses the Intellectual Property (IP) issues often faced by creative businesses in various sub-sectors of the creative industry in China including in architectural design, product design, graphic design, web-design, brand design, photography and cinematography, writing, etc. The most common types of IP important to creative businesses are:

- Copyrights
- Industrial designs
- Trade secrets

2. COPYRIGHT

As in Europe, copyright in China arises automatically upon the creation of a copyrightable work. Copyrightable works include architectural or engineering drawings, works of fine art, applied art, literary works, music or sound recordings, dramatic or cinematic works, compilations, software, etc. It is important to remember that copyright protects only the expression of an idea, not the idea itself.

China also allows you to voluntarily register your copyright. Copyright registration in China is inexpensive, easy, and generally recommended. However, if your copyright is not registered or you do not plan on registering it, it is important to keep evidence of creation and ownership so that you can prove your ownership of the copyright. Always indicating the author's name, date of creation, and using the © symbol on the work (including on all drafts) are simple steps you can take. Having a copy of your work notarised by a Chinese notary is also an easy and relatively inexpensive way to establish admissible evidence of creation and authorship. “Poor man’s copyright”, which refers to the practice of sealing and mailing a copy of the work to yourself to establish evidence of the date of creation, authorship, and the work itself is not as reliable as a notarisation because its authenticity can be challenged in court.

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When creating works for others or commissioning others to create works for you, make sure that your contract clearly states who owns the copyright to the
works. Unlike in many other countries, in China, the commissioned party owns the copyright to the works unless the contract states otherwise.

In addition to using copyright as a form of protection, because copyright arises so easily, it is also equally important to make sure you do not infringe upon another’s copyright such as when using someone else’s work in your own work. For example, this can happen when you use someone else’s photograph on the Internet without permission in your project proposal. It is important to obtain the permission of the copyright owner when using someone else’s work.

Unlike in many other countries, in China, the scope of protection of the copyright in a two-dimensional drawing does not extend to three-dimensional applications. For example, copyright in a two-dimensional architectural design does not extend to the actual building based on the design. To fill in this gap in protection, your contract should clearly state that the copyright of any three-dimensional applications based on your two-dimensional designs belong to you.

3. INDUSTRIAL DESIGNS

Industrial designs protect the aesthetic features (shape, pattern, colour) of industrial products. Industrial designs are protected as design patents in China and must be registered. Designs registered in a foreign country do not enjoy protection in China. To qualify for protection, a design cannot be an existing design and must be sufficiently distinguishable from other designs. Currently, it takes approximately 9 months to 1 year to obtain a design patent in China. A design patent gives you the exclusive right to use or allow others to use your design in China for 10 years.

You cannot register an existing design, including your own existing design, which means you have 6 months from the date you first publicly use the design, publish the design or apply for a design patent to file an international patent application. Therefore, it is strongly recommended that you consider whether or not you wish to seek design patent protection for your design before you publicly use or publish it.

In some cases, if an industrial design exhibits a high-degree of creativity and its aesthetic elements can exist separately from the functional features of the design, it can also be protected as a copyrightable work. For example, a design for a lamp with a statue base enjoys copyright protection as to the statute base. It is important to know whether or not your design can be protected as a work of applied art so that you can take proper measures to protect it. Most industrial designs do not enjoy copyright protection as works of applied art and can only be protected as industrial designs.

4. TRADE SECRETS

In China, a trade secret is any non-public information of commercial value that is treated as confidential. Trade secrets include undisclosed designs, sketches, concepts, models, project proposals, customer lists, supplier lists, price lists, contractual terms, business operational methods, contact lists, internal emails, business strategy or initiatives, negotiations, etc. However, trade secrets protection is lost as soon as the information becomes public. Measures to ensure confidentiality include the use of confidentiality agreements tied to disclosure, non-disclosure agreements with employees, use of passwords, and marking of documents as confidential.
Guide to IPR Protection in China for the Creative Industries

3D design. This right gives you the exclusive right to use or sell the design for a maximum of 20 years from the date of registration. It is important to know whether or not your design can be protected as a copyrightable work. For example, a design with a creative and aesthetic function can be protected as a copyrightable work. In some cases, if an industrial design exhibits a high degree of creativity and its aesthetic elements can exist in the form of a drawing or model, it can also be protected as a copyrightable work. However, it is important to make sure you do not infringe upon existing copyrights. Despite copyright protection as to the statute base, it is important to obtain the permission of the copyright owner when using someone else’s work.

In addition to using copyright as a form of protection, there are other means, such as non-disclosure agreements, use of confidentiality agreements tied to disclosure, and proper measures for IP you will not register. Most cases involving the theft of trade secrets involve former employees or potential clients. It is important that you require all employees to sign an employment agreement with non-disclosure provisions and, if necessary, non-compete provisions. It is also important that you limit access to certain valuable information to only certain employees with a need to know and to conduct exit interviews.

Preventative operating measures can go a long way in ensuring that your IP is protected. It is important to have a plan in place to determine which IP you will register and to take proper measures for IP you will not register.

5. PREVENTATIVE MEASURES FOR IP PROTECTION

Although there are effective legal and administrative remedies for IP infringement in China, cost-effective protection of creative ideas and designs in China generally requires a combination of knowledge, prevention and business savvy. Preventative strategies for the protection of IP generally include:

- Registration of IP
- Contractual protection
- Preventative operating measures

Registration of IP
Your IP is most protected when properly registered. Industrial designs, invention patents, utility models, and trademarks all be registered for them to be protected in China. Although copyrights do not need to be registered, this is useful in the event you need to enforce your copyrights. It is important to have a plan in place to determine which IP you will register and to take proper measures for IP you will not register.

Contractual protection
In addition to or in lieu of registered IP rights, you can protect your IP contractually by ensuring that your contract clearly stipulates the ownership of the IP and contains proper confidentiality provisions. However, contractual protection only is available once negotiations have matured to a point where a contract can be negotiated. In lieu of a full contract, insist on having a confidentiality agreement before.

Preventative operating measures
Finally, business savvy and employing preventative operating measures can go a long way in ensuring that your IP is protected. It is important to draw a line prior to negotiations on how far you are willing to skirt on IP protections so that you know when to walk away from a potential business opportunity. Protecting your IP may require you to forgo certain opportunities. This may be extremely difficult, particularly for small creative businesses, but a potential client who is not willing to recognise your desire to protect your IP is also the client who is most likely to steal your IP or not pay you for your work.

MEETING TIPS

Often in the early preliminary stages or at the bid soliciting stage, potential clients will insist that you submit full conceptual designs and three-dimensional renderings. In such circumstances, it is understandable to insist on confidentiality measures. It is at this point where registering your IP and thoroughly documenting the transfer of documents is critical. Although circumstances will vary in each instance, you may also wish to try to:

- Meet your potential clients face-to-face to get a feeling of their professionalism and to develop a personal relationship.
- Show them only preliminary sketches of ideas.
- Ask for payment upfront or in increments based on performance targets.
- Seek references from colleagues or acquaintances.
- Ask them to visit you at your business premises to be shown your full conceptual designs or three-dimensional renderings.
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.

For more information please contact the Helpdesk:

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TAKE-AWAY MESSAGE

Though seemingly daunting, with a few simple preventative steps and appropriate registration of rights, your creative work can be adequately protected in China.

- Make sure your creative works are properly registered as copyrights, industrial designs, invention patents, utility models and trademarks, and always use the © symbol when they are reproduced.
- Use confidentiality agreements before negotiations start or documents are transferred, and ensure all subsequent contracts contain non-disclosure provisions or non-compete provisions, clearly stipulating ownership of IP.
- Conduct exit interviews with employees, and limit access to valuable information to only certain employees with a need to know by using passwords and marking documents as confidential.

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