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Guide to Using Customs to Protect your IPR in China

CHINA IPR
SME HELPDESK

For free, confidential, business-focused IPR advice within three working days E-mail: question@china-iprhelpdesk.eu
1. Introduction

Do you sell products to China? Do you source products from China? For most European small and medium sized enterprises doing business in or with China, in particular for those focus on products rather than service, importing or exporting goods to China is the most fundamental section of their business operation. Therefore, protecting intellectual property rights (IPR) through Chinese customs at the boarders is the key to the success of your overall IP protection in China. In fact, custom seizures can be a valuable tool to use to protect and enforce IPR.

In 2019, the China Customs seized a total of 46.78 million IPR-infringing goods. Of the total seized IPR-infringing goods, 32.06 million items involved foreign IPR, accounting for 68.5% of the total seized goods national wide. The Customs crackdown has protected 573 intellectual property rights covering 38 nations and regions, including some of the EU Member States.

The Regulations of the People’s Republic of China on Customs Protection of Intellectual Property Rights (the Customs IP Regulations) prohibit the export and import of products from/to China that infringe IPR. Whereas most countries’ customs only examine imported goods, China differs in that its customs also examine goods destined for exportation. The majority of IP infringing goods detained by Customs relate to exports. China Customs have the authority to protect IPR by detaining suspected infringing goods, confiscating infringing goods and imposing fines on infringers. If the infringement of IPR exceeds a certain threshold, then the customs authorities will also arrange for criminal proceedings to be brought against the infringing party.

2. Recordal of IPR with GACC

The Customs IP Regulations state that IPR can be recorded with the General Administration of Customs (GACC) located in Beijing. By filing the online registration, IPR holders notify the GACC of the legal status of their IPRs, the conditions of relevant goods, the legal use of their IPRs and information about suspected import and export of infringing goods. Whereas not compulsory, it is beneficial for a company moving goods in and out of China to record IP rights at the GACC, in order to apply to local customs for enforcement proceedings.

2.1 Why to record your IP with the Customs?

Both having and not having a recordal of IPR with the GACC could make a big difference for IPR holders in protecting and enforcing their rights. Firstly, if IPRs are registered with customs, then customs have the power to detain, at will, any suspected infringing consignment of goods, carry out investigations into such goods and dispose of any infringing goods, for instance, by destroying or auctioning. Secondly, local customs offices are more pro-active when your IPRs are recorded with the GACC, mainly because the recordal provides customs officials with easy access to internal IP databases and makes it easier for them to determine whether goods passing through the customs are genuine or counterfeit. Thirdly, recordal of IPRs also facilitates the process of commencing customs enforcement proceedings, so that IPR holders have less economic burden with a recordal in terms of providing guarantee deposit upon requesting a detention. Without an IP recordal, the IPR holder must provide a guarantee equivalent to the value of the goods for which he/she applies, however a maximum of RMB 100,000 (approximately EUR 12,557) is enough for a similar request based on an IP recordal. Lastly, recordal of IP with the GACC may act as a deterrent for infringers as they will face administrative penalties.

Given that the recordal of IP rights with the GACC is inexpensive and straightforward, recording your IP rights with the GACC is recommended by the China IPR SME Helpdesk experts.
2.2 How to do the recordal?

What types of IPRs are accepted for recordal?

The types of IP rights that can be recorded with the GACC include: trade marks (excluding service trade marks) registered directly with the Trade Mark Office of the CNIPA, internationally registered trade marks (excluding service trade marks) filed with the World Intellectual Property Organisation (WIPO) and extended to China, patents (including invention, utility model and design patents) granted by the National Intellectual Property Administration (CNIPA) and copyrights including their related rights held by the citizens or organisations of member countries of the Berne Convention for the Protection of Literary and Artistic Works. However, in practice, evidence of copyright is required and the easiest way to prove ownership is by voluntarily registering copyright in China.

Note that independent applications need to be filed for separate IP rights. In the case of trade marks, for example, holders must submit a separate application for customs recordal for each trade mark in each class.

Who can file the recordal?

Only IPR holders can apply for recordal of IPR with the GACC, which refers to the trade mark registrant, patentee, copyright holders and copyright-related right holders. Licensed IPR users shall not apply for IP recordal in their own names, but they may apply through the commission of the IPR holders as their agent. Right holders outside Mainland China must entrust a natural person, legal entity or organisation (e.g. an office set up inside China of the overseas right holder) within the territory of China to apply for the recordal with GACC.

What materials are needed for the recordal?

The whole filing process can be done using the online registration system (http://202.127.48.148/) developed by the GACC. To record your IP, you must prepare:

a) The Identification certificate of the right holder and a Chinese translation if the original is in foreign language;

b) An e-copy of IP Certificate (e.g. trade mark certificate, patent certificate, copyright registration or other document justifying copyright etc.);

c) Information regarding related licenses; photos of the goods and their packaging

d) An e-copy of power of attorney in the name of the agent responsible for the registration process, if one is used;

As an IP right holder, you can also register and update information about legal users whom you entrust to use the IP rights, for instance manufacturer, distributor or co-owner in what products and as well alter the using periods.

Since 1 November 2015, the GACC has ceased charging the registration fee of 800 RMB.

Within 30 working days of receipt of the online application, the GACC will make a decision on whether to approve the recordal and will inform the applicant in writing of their decision. If the GACC approves the submission, the recordal of IP is valid for the duration of the IP right or for a maximum period of ten years.

For more details on filing a recordal of IPR with GACC please refer to the guide “How to Record IPR with the Customs”.

3. Enforcement at the trade fair: be pro-active, not reactive

There are generally two ways of commencing customs enforcement proceedings;

a) detention on request for non pre-recorded IPRs;

b) detention ex-officio for pre-recorded IPRs.

3.1 Detention on Request

The Detention on request refers to the measures taken by the customs authorities to detain the goods that are suspected of infringement at the request of an IPR holder when such goods are being imported or exported.

IP right holders who suspect that infringing goods are to pass through the customs, may file an application with the local customs office at the place of entry or exit of the infringing goods. The application usually includes:

- The IPR holder’s name, registered place or nationality, etc.;
- The IPR’s name, content and relevant information;
- The name of the consignee or consignor of the suspected infringing goods;
- The names, specifications, etc. of the suspected infringing goods;
- The possible port, time, means of transport, etc. regarding the entry or exit of the suspected infringing goods.

The IPR holder shall also submit to the customs authorities sufficient evidence about obvious infringement. Such evidence shall be enough to prove the following facts:

- The goods that the holder requests the Customs to detain are to be imported or exported;
- Any trade marks or works that infringe on the holder’s exclusive right to use the trade mark or if any patents held by the holder have been exercised on the goods without authorization.

The rights holder is required to provide the local customs office with a guarantee deposit equivalent to the value of the goods involved. This payment is usually made in the form of bank transfer or cash payment, and should be within the time limit prescribed by the customs. Under the Protection on Request procedure, an IPR holder cannot apply for the general bond.

Once the GACC or local customs authorities detain the suspected infringing goods, they will inform the IPR holder of the goods’ name, quantity, value, name of the consignee or consignor, date of import or export declaration, date of detainment, etc. in writing, and, meanwhile, they shall provide the detainment decision and a detainment receipt on the consignee or consignor. Upon customs approval, both sides (i.e. explicit the two sides, claimant and alleged infringer; IPR owner and consignor/ consignee?) can check the detained goods.

Next, the IPR holder shall file a request to the People’s Court to order the ceasing of infringement or apply to the court for property preservation in accordance with the relevant laws. If such an order from the People’s Court is issued to the customs within 20 working days from the detention date, then the customs shall assist, however if the right holder fails to provide the customs with such an order, then they will release the goods.

The IPR holder shall pay the fees incurred for warehousing, storage, etc. after the goods are detained by the Customs. This amount can also be deducted from the guarantee. The remainder of the guarantee will be refunded to the IPR holder, or in another scenario made available to the consignor/consignee due to an improper application; this would then be deducted to compensate the consignor/consignee.

This option is available to rights holders who have not registered their IP with the customs, however, in 2019, it was estimated that only less than 5% of customs detentions in China occurred based on detention on request procedure. The process is quicker, easier and more likely to be resolved successfully if the rights are already registered with the customs.
3.2 Detention of goods Ex-Officio

The Ex Officio Protection refers to the measures that are undertaken by the Customs, such as the detaining of goods and imposing of penalties, if they find any imported/exported goods that may be suspected of infringing IP rights. It is important to note that this enforcement route is only available for rights holders who have registered their IP with the customs.

If the customs authorities suspect that goods infringe IP rights, they will request that the consignee or consignor make a declaration regarding the status of such goods and the IP rights in question. If a declaration is not provided, the authorities will suspend the release of the goods and will immediately notify the IP rights holder. The right holder must act within three working days of notification, in order to file an application to detain the goods or, in the reverse scenario, request no detention with a written justification.

The right holder needs to provide a different level of guarantee depending on the value of the goods involved. The deposit calculation rule is:

<table>
<thead>
<tr>
<th>Value of the goods</th>
<th>Guarantee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than RMB 20,000 (approximately EUR 3,000)</td>
<td>Equivalent value of the goods</td>
</tr>
<tr>
<td>Between RMB 20,000 to RMB 200,000 (approximately EUR 30,000)</td>
<td>Equivalent to 50% of the value of the goods (minimum RMB 20,000)</td>
</tr>
<tr>
<td>More than RMB 200,000</td>
<td>RMB 100,000 (approximately EUR 15,000)</td>
</tr>
</tbody>
</table>

In the case of trade marks, for rights holders, a general bond is also applicable under certain circumstances.

Given the short deadline, if a guarantee is made by bank transfer from an overseas account, the local customs authorities usually accept an advance copy of the bank transfer slip as preliminary evidence of timely submission of the guarantee.
The Customs shall, within 30 working days after the detainment of the suspected infringing goods, conduct the investigation and verification as to whether the goods infringe right holder’s IPR or not. During the process of investigation, the Customs may request the IPR authorities to express their advisory opinions. The IPR holder and the consignee or consignor shall cooperate with the Customs’ investigation. The customs authorities will make a final decision as to whether the goods infringe any IP Rights within a period of 30 days. Custom authorities will then decide whether to detain and dispose the goods, for instance, to hand them over to relevant public organisations for public welfare, or to transfer the goods to the IPR holder if he is willing to purchase them. Alternatively, customs authorities may, sell them by auction after eliminating their infringing features, or destroy them if the infringing features of the goods cannot be eliminated.

Customs authorities can also fine the consignee or consignor up to 30% of the value of the goods. If the value of the infringement exceeds limits stipulated in the PRC Criminal Law, the customs authorities will transfer the case to the police and the judiciary that decide on the prosecution at criminal level.

The customs authorities will inform the IP rights holder about their final decision and return any security payment made, after deducting expenses (such as for warehousing, destruction of the goods in question, or for losses incurred to the consignee or consignor due to improper application for action).

4. **Take-away Messages**

**Take-away Messages**

The purpose of recording your IP rights at customs in China is to stop the export or import of infringing products and thereby preventing counterfeit versions of your goods from entering the international market. Recordal gives customs the ability to intercede autonomously if they believe this might happen.

Recordal of IP rights has, in the past, resulted in a number of encouraging results. However, in order for customs authorities to make proper and quick decisions when checking goods passing the borders, IP holders should maintain close contact with the customs. It is particularly important that you provide the customs authorities with a comprehensive description of your products, including pictures and samples (which you should retain), so that the customs authorities can easily recognise counterfeit goods. Customs authorities are also generally willing to attend ‘training’ meetings with representatives of IP rights holders to allow the best chance of limiting infringing products from crossing through customs in China.

Note that in the case you have not registered your trade mark in China, someone else may register it in bad faith, record the trade mark with the customs and legitimately block the export of your goods from China or import of your goods to China. Thus, it is always important to register your trade mark in China before starting business activities in China.
5. Related Links

One-Stop Service for IPR Customs Enforcement:

General Administration of Customs in China – Online IPR Registration System:

China IPR SME Helpdesk Guide – How to Record IPR with Customs in China:
https://www.china-iprhelpdesk.eu/sites/all/docs/publications/v8_How_to_record_your_IP.pdf
The China IPR SME Helpdesk provides free, confidential, business-focused advice relating to China IPR to European Small and Medium Enterprises (SMEs).

**HELPLINE** 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 three 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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*The language offer will depend on the specific service and experts’ availability.

If you have any queries on how to protect your Intellectual Property in China contact our Helpdesk service:

If you want more information on additional free services offered by the Helpdesk contact the coordination team:

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