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The Impact of the European Union's Policy Towards China's Intellectual Property Regime

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Abstract

This article evaluates the effectiveness of two major European Union technical assistance programmes, IPR2 and IP Key, in shaping China's regional intellectual property (IP) enforcement. It argues that although technical assistance programmes have been effective in influencing the national IP legal framework, it has been less successful in assisting regional policy enforcement. This is primarily the result of divergent economic priorities at the sub-national level. The article further assesses potential priorities for future IP technical assistance.

Keywords

Intellectual property, policy enforcement, IPR2, IP Key, China, European Union

Introduction

The European Union (EU) and China are two of the world's largest economies and in the past decade have become deeply integrated in a complex web of commercial and financial transactions. In fact, China is now the EU's second largest trading partner, and the EU is China's largest partner, with bilateral trade in goods reaching €428.1b in 2013 (European Commission, 2014a). Nevertheless, infringement of intellectual property (IP) rights remains the EU's primary concern in China and has become a major trade irritant, making the control of IP one of the highest profile topics in EU–China relations.

Despite the fact that IP laws have been acknowledged and protected in China since it joined the World Intellectual Property Office in 1980, and the nation's legal framework covering trademarks,

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copyrights and patents has been extensively reformed in line with global requirements – informed by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) administered by the World Trade Organization (WTO), which it joined in 2001 (Brandt and Rawski, 2008) – violations of IP are common.¹ In 2012, the EU suggested that China was responsible for 64 percent of counterfeits seized at European borders, with products for daily use and those potentially dangerous to consumers' health and safety accounting for 28.6 percent. That same year, four out of every five European businesses operating in China rated the nation's enforcement of IP laws and regulations as 'inadequate' (European Commission, 2014b).

Enforcing IP rights outside the EU – especially in China given the large volume of trade – is important to the EU since fake goods destroy EU exporters' sales and undermine European brand value; while violating patents weakens European indigenous innovation, thus making European companies unable to develop their businesses on an equitable basis. Intellectual property is now considered to be 'one of the most valuable and powerful assets of a growing global economy' and patent laws secure returns on innovation, which, in turn, is 'thought to be crucial to the long-run growth potential of an economy' (Yueh, 2009: 304). Although the less developed and less innovating regions in China may not benefit from stronger IP protection in the short term, the desire to create a knowledge-driven, and technologically-innovative economy has become crucial in China's current national development strategy. For instance, in the 12th Five-Year Plan (2011–2015), China outlined plans to become a scientifically advanced nation by 2020, with its own distinctive technological know-how. Accompanying this aspiration, Chinese innovating companies urgently need to protect their IP, as many infringements are committed domestically, thus dis-incentivizing Chinese companies from innovating further.

China and the EU have complementary but different interests in IP rights protection and their enforcement. In this vein, the EU has progressively built cooperation with China on IP through technical assistance, viz. three major cooperation programmes: IPR1 (1999–2004), IPR2 (2007–2011) and IP Key (from 2013). This article broadly evaluates the effectiveness of the latter two cooperation programmes in shaping China's IP enforcement. The article sets the context for this analysis by briefly discussing the attempted transfer of norms to China via the EU's technical assistance programmes, and outlines the role of IP in economic development. Both items are central to understand why we currently witness regional variations in the enforcement of IP. Finally, the article will discuss how IPR2 and IP Key have been implemented, offers suggestions why these two major programmes have not properly factored regional conditions and constraints, and the subsequent consequences of this misstep.

Context

The ontological basis behind IPR2 and IP Key is a long-term view that the transfer of norms will take place when an actor (the EU in this case) diffuses its norms (to China) through the exchange of goods, trade, aid and technical assistance (Manners, 2002). In practical terms, the EU technical assistance on IP to China carries a certain set of EU-specific norms and standards, as well as financial rewards combined with the threats of economic sanctions (Wyzycka and Hasmath, 2016). Although it is difficult to analytically dissect which IP policy reforms are derived solely from the EU's initiatives, and which are home grown in China, it can be argued with greater certainty that the EU technical assistance programmes have been the most utilized soft power instrument in shaping Europe's influence on Chinese IP policy.

Of course, we cannot assume that the transfer of EU norms to China is automatically beneficial to China. The interests of technology-exporting high-income nations and the interests of technology-importing and/or lower income nations differ substantially with respect to patents, trademarks

and copyrights. In assessing the gains and losses from importing EU norms it is important to remember that China, despite its future high-technology goals, has substantially different interests than the EU. European Union norms, in this context, are primarily in the interest of large EU-based international enterprises, and are disputed even within the EU. There is a clear tension between businesses that gain rents from IP and the governments that represent them, and the businesses whose competitive advantage is in copying and their governments (see Drahos, 2009).

Complicating matters – and what makes the Chinese case relatively unique – is the way in which political decisions are implemented in the nation. China is an authoritarian and state corporatist regime, but it is significantly decentralized (Hsu and Hasmath, 2013). These characteristics may appear contradictory. As Landry (2008) elaborates, since China is a unitary, one-party regime one would expect it to be a highly centralized nation, but the level of its decentralization is in fact similar to a federal democracy. Decentralization policies, justified mainly by economic efficiency, allow the local governments to achieve control over a large number of policy areas (Mertha, 2005a, 2005b), with accompanying local policy experimentation (see Hasmath, 2014). Since economic development between the different regions in China is exceptionally varied across the regions (Naughton, 2007) it leads to the uneven implementation of central-level policies at the local level.

From another standpoint, China's IP situation is similar to other developing nations. Broadly speaking, developed nations see IP as a necessary tool to foster further innovation, while developing nations see IP as constraining the distribution of information, which consequently restrains their economic development. Like other developing nations such as Brazil and India, China seeks to expand the diffusion of technology and knowledge to keep pace with developed nations. Intellectual property protection has thus become a source of contention between developed and developing nations. Industrialized nations and advanced economies have the greatest interest in protecting their IP and innovation since their economic competitiveness relies in particular on innovation, creativity and brand exclusivity. As proof: in 2010 EU IP-intensive industries accounted for 26 percent of all jobs (35 percent of jobs with indirect IP involvement) and for 39 percent of total EU economic activity, whereas 90 percent of EU exports were derived from IP intensive industries (European Patent Office and Office for Harmonisation in the Internal Market, 2013).² At the same time, less-developed nations such as China have a tendency to turn a blind eye to IP infringements to achieve certain economic goals and are therefore concerned that stronger IP protection may impede the pace of their economic development (Schiappacasse, 2004).

Suffice to say, the concern among all actors involved is legitimate and is reinforced by endogenous growth theories that delineate how investment in innovation and knowledge (e.g. subsidies in research and development activities) can significantly contribute to economic growth and development (see the seminal works of Arrow (1962) and Romer (1986)). There is some correlation between the level of IP protection and a nation's level of economic development. More precisely, the correlation between economic development and IP protection differs in developed (innovating) and developing (imitating) nations, with IP rights positively affecting the innovation rate in developed nations, but negatively impacting the innovation in developing nations (see Falvey et al., 2006a, 2006b; Ginarte and Park, 1997; Gould and Gruben, 1996; Schneider, 2005). Hence, China – as a developing nation that has recently relied on counterfeiting as a form of economic activity – may not immediately benefit from stronger IP, and this awareness may, in turn, explain China's reluctance to enforce implementation of all of its IP obligations at present.

One China, but varying regional disparities

What is most striking about IP in China is the disparity in regional enforcement, which may be explained by the structure of China's economy characterized by uneven regional development and

large income disparities.³ The provinces along the southeast coast (Pearl River Delta), east coast (Lower Yangtze River) and near the Bohai Gulf (Beijing-Tianjin-Liaoning) are the wealthiest and most industrialized, whereas the interior regions in the hinterland are less developed. The poorest provinces (e.g. Tibet, Qinghai, Ningxia and Hainan) contribute barely 0.5 percent to the total GDP, while the wealthy provinces (e.g. Guangdong, Jiangsu and Shandong) contribute more than 10 percent.

China's wide economic disparities have resulted in strong regional differences in IP protection. Firms in China's developed coastal regions tend to be more active in using and protecting their IP, while the less developed hinterland regions rely more on IP infringement as a form of economic activity and are therefore reluctant to strengthen their IP protection. Analysing the Chinese case, Maskus et al. (1998) suggest that there are strong positive correlations between GDP and patent applications per capita as well as GDP and trademark applications, of 0.61 and 0.81 respectively, with richer provinces applying for more patents and trademarks per person than poor provinces, developing more products and being innovative, thereby raising regional economic growth. This potentially leads to interregional disputes over IP infringement and enforcement. Consequently, looking at the way in which the IP relationship has been evolving at the sub-national level, it is clear that regional differences abound and the determinants of IP are associated with varying economic factors.

After nearly three and a half decades of rapid economic growth and substantial structural reform, the Chinese economy is increasingly utilizing advanced technologies, and society is slowly shifting toward higher-quality goods and services while companies are increasingly emphasizing brand-name recognition, reputation for quality and product innovation. In such an environment, IP protection is an important prerequisite for further economic development and, at the national level, the Chinese central government seems to be finally recognizing the need for an effective IP system. Chinese enterprises also have a growing awareness that access to foreign technologies is dependent on the effective enforcement of IP rights.⁴ Thus, significant economic interests are emerging in favour of a stronger IP rights system and China has recently experienced relatively large increases in innovative activity. Between 2003 and 2012, China saw a 900 percent increase in domestic patent applications.⁵ In comparison, the US, which owns the largest amount of IP in the world, experienced a 7 percent decline in patent applications between 2003 and 2012 (Reuters, 2014).⁶ The extraordinary increase in the number of patents filed has grown exponentially alongside national incomes (Yueh, 2009). It seems, therefore, that China is one such developing nation that could profit from stronger IP protection, with its effects of encouraging domestic innovation as well as increasing technology diffusion from advanced nations (Breitwieser and Foster, 2012).

The less-developed regions of China such as Hainan, Gansu, Yunnan or Heilongjiang are concerned that the various costs associated with imposing an IP regime, such as institutional and administrative costs, costs of judicial actions, infrastructure, rent seeking, ineffective duplication of investment in research and development (e.g. patent races), lack of funds to develop any IP or insufficient revenue generated by domestic IP, could burden their regional economies, leading them to being negatively and disproportionately affected by increased IP protection (Maskus, 2000). Since IP can result in potential economic damages – especially in China's developing regions – the system needs to be strengthened within a coherent and comprehensive set of policy initiatives that optimizes IP's effectiveness in different regions factoring their level of economic development.

Current state of intellectual property enforcement in China

Despite the existing IP regulations and central government's commitment to tackle the problem of IP infringements, enforcement measures to date have been insufficient to act as an effective

deterrent (see Lin and Connor, 2008) and enforcement levels differ among the regions in China (see Alford, 1995; Dimitrov, 2009; Massey, 2006). The factors that undermine the enforcement of central level policies at local level in China include decentralization of the Chinese state, administrative rank and relative power of the provincial governments, weak judicial enforcement, subordination of the courts, under-resourced enforcement agencies, widespread corruption and a different understanding of IP infringement.

Although few authoritarian regimes are inclined to decentralize, as suggested earlier, it transpires that China is one of the most decentralized nations in the world. Chinese administration distinguishes between two types of political relationships: one based on binding orders, the other on non-binding instructions. Since most of the bureaucratic system (*xitong*) operates under non-binding orders of decentralized leadership relations as a means of ensuring sensitivity to local conditions when implementing policies, China's political system remains largely decentralized. Consequently, it is the bureaucratic apparatus that decides whether power is exercised vertically or horizontally and where given decisions are enforced.

Moreover, every unit within China's political system has an administrative rank, with provincial bureaucracies having the same rank as central government ministries (Lawrence and Martin, 2013). The ranks influence interaction between the agencies and, because entities of equal rank cannot release binding orders to each other, they distort the political system to attain effective inter-agency coordination, often undermining lines of authority. Therefore, 'all things being equal, the lower the rank, the less likely the administrative unit will be able to enforce a given policy' (Mertha, 2007: 4). In practice, ministries have trouble forcing provinces to implement policies that the provincial authorities may see as compromising their interests.

In terms of the court system, the Chinese government relies excessively on administrative IP enforcement instead of judicial enforcement. Since IP and other commercial cases are perceived as being civil in nature and not criminal offenses, administrative enforcement agencies are reluctant to hand over cases for criminal prosecution and it is estimated that only 1 percent of IP cases are dealt with judicially in China. Also, because administrative enforcement imposes inadequately small fines on IP infringers, it may not be an appropriate deterrent.

Furthermore, the courts in China remain under the control of the Communist Party of China (CPC) and are subsumed under the jurisdictions of local governments. Although the CPC has provided strong verbal support for the rule of law, the Party continues to hold its members above the law, and judicial authorities cannot investigate without the Party's agreement. The Party does not allow judicial independence and insists that Party Commissions of Politics and Law oversee the work of the police, prosecutor's office and courts, and the commissions are empowered to intervene in the Party's interest, thereby further undermining the authority of the law. China's judicial system is therefore not independent (Alford, 1995), resulting in low confidence in the judicial system and an inability to enforce decisions. The courts often cannot compel other agencies to enforce judgements, and, if a company is found guilty of IP infringement in one province, it can be difficult to deliver and execute the court's verdict in another region. Local governments, which control the finances upon which courts depend, may often choose to ignore or set aside court rulings that conflict with their economic goals or other priorities, and biased local courts may favour local firms over outsiders (Mertha, 2007).

Chinese administrative units, and the courts, are invariably short of money and must make difficult decisions regarding which responsibilities of the political directives issued from above to fulfil and which to ignore. As explained earlier, implementation priorities vary from region to region, but the most important almost always include tax extraction, economic development and reducing poverty. Scarcity of resources therefore seems to be an important reason for the lax enforcement of IP, and has even worsened due to increased pressure on the regions to find their

own sources of income, thereby pursuing a policy of growth at any cost. Although a law has been promulgated to indicate provincial performance not only by economic growth but also the extent to which IP is protected, the GDP factor is still considered far more important than IP protection. Hence, powerful political institutions may sometimes have interests in developing certain industry sectors that collide with IP protection; fearing the impact on the local economy, local officials are reluctant to take action to enforce IP regulations, and may hide the counterfeiting production lines elsewhere (see Bergsten et al., 2009). We can thus assume that China's ultimate goal is innovation and production, not IP, and enforcing and interpreting certain IP criteria is subordinated to serving internal Chinese objectives and will always favour Chinese policy.

Local protectionism and widespread corruption also impact negatively on IP protection. People working in the public sector are poorly paid, and if judges' salaries are too low it pushes them towards corruption. It seems that local officials may even collaborate with IP infringers, which would explain how billions of dollars' worth of goods bypass customs at local ports and are shipped abroad.

Finally, many Chinese industries are insufficiently developed in order to produce high-end, high-value, high-tech products on their own. Business involved in IP infringement may thus seem attractive: it involves virtually no advertising costs; consumers still purchase the products; the materials used are cheaper as they are of poorer quality; and there is a high profit margin. In addition, the acceptance of IP by businesses and citizens often seems deficient. If a person buys a fake DVD, or illegally downloads a film or song from the Internet, it is a form of property theft, but this concept is still poorly understood by the average Chinese consumer. Consequently, enforcing the protection of IP is particularly difficult in China without appropriate education.

Overall, China's IP policy and stance seem to be carefully calibrated to capture short- and medium-term internal interests versus long-term domestic objectives. In wanting to become 'number one in the world' in research and development by 2020, and to move up the technology ladder by promoting indigenous innovation capacities, China seems to be well aware that IP protection is crucial to achieve this medium- to long-term objective. At the same time, and in the short to medium term, China knows that technology transfer both through legal means (e.g. joint ventures and other partnerships) and illegal channels (e.g. theft of trade secrets or insufficient protection of confidential information provided for bidding purposes, in certification or standardization processes) and imitation of foreign trademarks and patents may help to accelerate the achievement of long-term economic development based on innovation and new technology. Correspondingly, the fight against counterfeited products and unauthorized copies follows the same logic. As long as these practices, particularly when pursued on an industrial scale, can guarantee social stability through revenues and employment in some provinces, local governments will carefully calibrate enforcement actions with the imperative of maintaining a stable labour market.

Consequently, China's stance vis-à-vis its trade partners reflects the ambiguity that a genuine interest and effort to continuously improve its IP environment is combined with a varying degree of tolerance for actions normally considered illegal according to IP legislation. Concepts like social cohesiveness, inclusiveness and coexistence are regularly invoked in judicial decisions, interpretations and opinions to provide a justification for the non-application of key IP legal principles in cases where foreign and domestic companies compete in the Chinese market for similar trademarks or patents.

Impact of EU technical assistance

Given China's political and administrative decentralization, the diversity in economic development across the regions, and the resulting difficulties in enforcing national-level policies at the

sub-national level, it is worth querying the location for the idea of EU norms transfer through technical assistance. It appears that this potential norms transfer, via EU–China cooperation programmes pertaining to IP, has benefited the legal framework at the national level and positively influenced the Chinese government’s attitude toward IP and innovation-led growth, but it has not fully penetrated through to local levels of governance.

In order to assist China with developing its IP legal framework and policy implementation processes, the EU has progressively built cooperation with China on IP (Kaminski, 2009). The EU can convey its concerns on IP-related matters through a number of channels. For example, from 2004, EU–China IP dialogue in the form of structured annual talks on IP have been held between the Ministry of Commerce’s (MOFCOM) Director General and the Directorate-General for Trade (DG TRADE)’s Director in Brussels and Beijing. This has allowed both sides to exchange information on multilateral and bilateral IP matters and national legislation and practices, to identify deficiencies and make suggestions for improvement (European Commission, 2013). In 2005, to build on these talks with more focused technical discussions, the EU–China IP Working Group, held twice a year between the MOFCOM Deputy Director General and DG TRADE Head of Unit, was created, which involves industry and other right holders. The EU has also set up an informational service – China IPR Helpdesk – to help European small- and medium-sized enterprises protect and enforce their IP rights in China. These projects were supported primarily by the EU’s technical assistance to China in the form of IPR1, IPR2 and IP Key, which have been the flagship programmes of the EU’s technical and legal co-operation with China and are considered to have been one of the most effective tools in influencing China’s IP legal system (Zhang et al., 2011).

The first-round European IP rights technical assistance programme, Project on the Protection of Intellectual Property Rights (IPR1), which ran between 1999 and 2004, successfully promoted IP protection in the Chinese legislation to broadly align its legal system with international standards and assist in fulfilling its TRIPS obligations. When the IPR1 programme was designed, China was in the process of pursuing WTO membership. For this reason, the IPR1 programme concentrated on making the IP laws compliant with the WTO accession requirements. IPR1 was, then, mostly concerned with: (1) legislation, which involved creating and improving the Chinese legal framework of IP rights laws and regulations including all aspects of criminal, patent, trademark and copyright law as well as geographical indications and civil and administrative procedures; and (2) capacity building, which targeted building the actual technical and human resources capacity in those administrative and legal institutions that are involved in IP rights protection in China.

In 2007, the EC and China jointly launched the second Project on the Protection of Intellectual Property Rights (IPR2). Building on the success of IPR1, IPR2 focused on the implementation of the law and enforcement, in order to develop legal procedures and internal systems of civil, criminal and administrative procedures of IP rights enforcement across the regions and jurisdictions. It further covered legal issues aimed at improving the Chinese legal framework with respect to IP laws, capacity building, access to information (especially for the users of IP and administration officials), training, and specific areas such as administrative and criminal procedures, civil procedures and support for right holders.

IPR2 ended in 2011 and was considered relatively successful by both Chinese and EU stakeholders. Arguably, it provided China with a better understanding of the significance of promoting IP protection for technological development and, in the words of the European Commission, it has ‘raised the importance of IP issues within its domestic political agenda’ (European Commission, 2013: 3). From a detailed analysis compiled by domestic Chinese lawyers, it appears that the EU–China IPR2 programme contributed greatly to the ‘expertise and mentality of the people’ who work directly on IP enforcement in China (Zhang et al., 2011). The training conducted through IPR2 seemingly expanded the views of enforcement officials and enhanced their capability to deal with

actual cases. It is also reported to have had a positive impact on the IP-related rule-making processes in terms of transparency and openness. Following the project, Chinese courts and authorities have been producing a greater number of statutory-type rules, judicial interpretations and implementation guidelines. The contacts and determination that are being built up out of the EU–China IPR2 project provide European companies and associations with opportunities to be involved in the legislative process and to contribute to the establishment of a pro-IP environment in China. The project was highly appraised by the European and Chinese sides and acclaimed as a ‘success’ for EU–China co-operation on the protection and enforcement of intellectual property rights (IP Key, 2016). It must therefore be acknowledged that since accession to the WTO, China has made enormous progress in a relatively short time; it has adopted many tenets of the EU approach on IP matters, which has likewise received positive feedback from industry. In this manner, the IPR2 initiative is an example of a successful capacity-building programme through which EU IP priorities and EU best practice are promoted across China. The 2007–2011 IPR2 project can thus be seen as a useful example of norm transfer and of a strategic engagement in EU–China international relations.

Following the success of EU soft power in the context of its technical assistance project, IPR2, and because IP rights continue to play an immensely important role in EU–China trade, from 2013 technical assistance activities between the EU and China came under the auspices of a new project, A Key to Sustainable Competitiveness (IP Key). IP Key has been devised to tackle both the enduring issues that need greater consideration and support, e.g. enforcement and policing mechanisms, as well as the less well understood policy framework that drives the whole ‘environment within which foreign technology holders operate and can be successful in China’, like indigenous innovation (European Commission, 2013: 2). It is important to note that no Financing Agreement has been signed with China and IP Key is funded solely by the EU, which is why it should not be deemed a bilateral project. Judging from this, even though the EU and China have agreed to strengthen their IP cooperation through jointly implementing activities of mutual interest, the objective of IP Key is partnership rather than development and it is focused more on securing the EU’s strategic interests. Viewed in a different light, given the fact that the IP Key project is unilaterally financed by the EU without Chinese financial contributions akin to previous projects, it may suggest that China perceives it has already achieved most of its objectives with the previous technical assistance programmes and is largely satisfied with their outcomes. In other words, the IP Key is designed to help the European industry more and execute appropriate law enforcement in China, rather than reform the Chinese legal system.

The EU’s main interest in IP protection in China now includes having a level playing field. The EU wants to be sure that when a European company enters China’s supposedly open market, it can operate on a fair basis and expect equal regulatory treatment in terms of IP protections. The EU therefore expects both the national and provincial governments to have a neutral role when a foreign company seeks to develop its activity in China, whatever the sector, and that all companies should be treated equally in terms of IP. Therefore, the EU, through IP Key, ‘focuses on the need to intervene in the field of IP protection in China for the benefit of the European industry’ (European Commission, 2013: 2). The switch of focus onto primarily securing EU interests and on defending the EU economy is probably due to the fact that the Chinese have already gained a lot from the two previous programmes and no longer need to be ‘educated’ as much, as IPR1 and IPR2 were designed to support China’s needs. Selecting the new activities and type and topic of cooperation should, therefore, be ultimately profitable for the EU. IP Key seems to be a good transition for this since it supports both mutual and EU interests, but it can be expected that in subsequent programmes EU interests will take further precedence.

Probably the greatest achievement of the EU’s norms transfer to China is that there seems to be an increasingly positive attitude at the central level of Chinese administration, in particular

MOFCOM, towards IP. China has acknowledged that IP protection is the key to becoming an innovating economy. This has helped the EU to progress on cooperation issues with its Chinese counterpart and has led to positive developments for European companies operating in China (European Commission, 2014b). For example, at the last EU–China Summit 2013 both European and Chinese leaders reiterated the importance of IP in bilateral trade relations (European Union, 2013). This has been consolidated in the EU–China 2020 Strategic Agenda for Cooperation, which clearly specifies the need to reinforce the Intellectual Property Dialogue mechanism so as to ‘strengthen cooperation for combating counterfeiting’ and the unauthorized use of IP as well as to make ‘full use of the new technical cooperation programme in that regard’ (European Union, 2014). In addition, during the Summit, a series of agreements were signed, in particular the ‘Administrative Agreement for Intellectual Property Cooperation’, which corresponds to the IP KEY programme. On the Chinese side, a political declaration was published following the Third Plenary Session of the 18th CPC Central Committee (November 2013), which supports and reinforces trade and IP in general. China’s latest policy paper on the EU recognizes the need to improve and ‘intensify bilateral cooperation and multilateral coordination between respective customs authorities on IP rights enforcement... [and] encourage broader exchanges on intellectual property rights and technical standards and continue to raise the level of China–EU cooperation on IP’ (Ministry of Foreign Affairs of the People’s Republic of China, 2014).

Regardless of the national-level transformation and positive attitude, much remains to be done at sub-central level since there is a long-standing discrepancy between the central and provincial level in terms of efficient enforcement (European Commission, 2014b). Despite the positive signs and Beijing’s ongoing efforts, EU industries continue to consider IP as an issue of major concern for the healthy development of their businesses in China, being particularly worried about issues related to the copying of their technology and unauthorized use of IP in general. As the rule of law in China is subordinate to political decisions, serious concerns remain in terms of the system’s procedural aspects: the specific competence of judges at local level; the general problem of corruption; and the poor quality of patents for inventions.⁷ This is consistent with the findings in this article, which has identified major impediments to local-level policy implementation. Therefore, with regards to the ongoing struggle for actual enforcement of the policies at local level and regional disparity in enforcement, it appears that the EU’s norm transfer has failed to penetrate through to the local levels of governance. Even though the technical assistance programmes have met with a mutual level of appreciation and have been extremely successful in assisting IP policy at the national level in China, they do not seem to have solved the sub-national enforcement problems.

Considering the lax enforcement at local level, regional enforcement would be the next priority and the EU’s main focus because it is harmful to European industry. Even though IP Key was not designed specifically to promote IP at the local level, fostering provincial-level enforcement could be one of its most important outcomes for the EU. As demonstrated above, the most important topics that the EU will potentially have to investigate in terms of enforcement are the role of administration, the judges’ capacity and the interplay with central authority and, in terms of the legislative arena, the link between central and local authorities. It is fundamental to have good judges and administration knowing the importance of IP, and to have good guidelines for the courts on enforcement. However, in some provinces, especially the less-developed hinterland regions, the level of enforcement is so low, and the local authorities are so autonomous, that the EU will have to start the technical assistance process from scratch by establishing capacity-building activities.

Some efforts have already been made to tackle the problem of local-level enforcement. In August 2013 the first decentralized local-level sessions of the IP Working Group were held in Beijing, Shanghai and Guangzhou and efforts were continued in 2015 in other cities (European

Commission, 2014b). The discussions explore cooperation that could be articulated with the MOFCOM Permanent Structure using the new IP KEY programme. In December 2012 a new civil procedural law was adopted and criminal enforcement was further explored in 2014 (European Commission, 2014b). To address this issue further, the EU Directorate-General for Taxation and Customs Union (DG TAXUD) and China have agreed to continue their Intellectual Property Rights Action Plan, whose main objectives are to strengthen cooperation between customs and business, increase intelligence sharing on IP-related seizures and also improve coordination between the customs and police in China.

We must remember, however, that not all of these positive developments at the national level may be the result of EU technical assistance and capacity building initiatives; they may also directly overlap with China's own interest in fostering sustainable economic development and promoting innovation-led growth. The EU's technical assistance framework intersects with Chinese priorities and facilitates the development of EU capacity to empower others. China, with its objective to become an innovative economy by 2020, as outlined in the 12th Five Year Plan, is moving towards higher-level technology and innovation capacity, and so it is also in China's interest to protect its own IP. With time, as China's innovations grow, the EU's interests will probably increasingly intersect with China's interests to protect IP, making the cooperation more effective. Hence, the positive developments may not be only led by the EU's influence per se, but also by China's internal policy to develop indigenous innovation.

The EU should therefore not overestimate its power of influence. At the same time, however, the technical cooperation programmes have at least been successful in making China aware of the importance of IP, and the very fact that it is willing to cooperate is a sign of progress. The EU also needs this cooperation on IP as it helps preserve EU interests. Therefore, enforcement at the local level should be the next priority and the EU's main focus. Here onwards, the EU will have to put greater effort into the less-developed hinterland regions in China, where IP protection is lagging behind. It is a challenging task, as it seems that a strong IP legal framework and its enforcement always have to be in line with Chinese local priorities and, although the Chinese want to make progress, they will only move at their own speed, carefully calibrating their economic objectives.

Conclusions

China's rapid economic development and its accession to the WTO in 2001 has been the spur for major reforms of its IP laws, a process that began in the 1980s, when such laws were barely recognizable. Since then China has introduced legislation covering every aspect of IP protection. There is a difference, however, between having appropriate laws and achieving their effective enforcement. The IP area is complex, and the bureaucratic mechanism responsible for enforcing IP in China, particularly at local level, is equally convoluted. Although China's one-party system may seem to give Beijing absolute control over all levels of government, the capital's ability to unilaterally enforce its will throughout China is, in fact, very limited. This is mainly due to the fact that the Chinese political system is highly decentralized and gives local governments a wide measure of autonomy. Local governments, which have their own economic priorities, choose to enforce the IP laws only selectively, as they fear strong IP protection will threaten their social and economic stability. Therefore, despite the central government's efforts to reduce the level of IP infringement, there is significant disparity in regional policy enforcement. These political and administrative contextual factors are relatively unique to China's institutional environment. Yet, the EU-China case of IP development can be instructive for other developing nations seeking to expand the diffusion of technology and knowledge to catch up with developed nations; with the caveat that

importing EU norms – which are designed primarily for EU nations and companies – may not be fully beneficial to China and/or any other developing nations with divergent norms.

While the European economy seems to increasingly rely on IP as a fundamental value, in the fight for global IP protection, China is now a key battleground, with IP being a ‘cornerstone of innovative growth’ as well as a ‘significant area of emphasis in EU–China relations’ (EU–China Trade Project, 2014). Frustrated by large financial losses due to IP theft in China, the EU has established long-term cooperation and dialogue on IP with China, attempting to transfer its IP norms to China through technical assistance programmes. Suffice to say, norms transfers through technical assistance has become a defining characteristic of the bilateral trade relations between the EU and China. China has gradually come to recognize the importance of IP protection and the need to improve its indigenous innovation. Further, its increasingly positive attitude towards IP has helped the EU advance its cooperation with China and led to positive developments for European companies. China has published political declarations supporting and reinforcing trade and IP, while China’s EU policy papers recognize the need to improve and intensify bilateral cooperation and multilateral coordination on IP enforcement between respective customs authorities, encourage broader exchanges, develop technical standards and continue to raise the level of EU–China cooperation on IP. These positive outcomes of the cooperation suggest that the EU technical assistance programmes, in particular IPR2 and IP Key, have been some of the most effective tools in influencing China’s IP legal system.

However, although the external pressure of EU normative power has succeeded in getting Beijing to promulgate satisfactory IP-related laws and regulations, the actual enforcement of IP falls short within the domain of China’s complex bureaucracies and local government officials. The EU’s efforts have been unsuccessful in addressing the enforcement problem at local level, mainly due to the centre-local disconnect in Chinese administration, frequent subordination of the rule of law to political decisions and overarching economic priorities, especially in the less-developed regions. In order to foster the enforcement of IP at local level, and extend the reach of the EU’s normative power, the EU needs to understand the shortcomings of law enforcement and the complexity of the sub-national administrative and legal systems in China. A more successful EU strategy may thus require a process to verify implementation at all government levels, which, in turn, may require the EU to deepen its reach into Chinese provinces and cultivate political relationships outside China’s relatively rich regions.

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Notes

1. The TRIPS Agreement emphasizes three main aspects: (1) a minimum standard of IP protection, (2) domestic procedures and remedies for the enforcement of IP rights, and (3) dispute settlements between WTO members with respect to fulfilling TRIPS obligations. The Agreement applies to all WTO members, including China. Of interest is the fact that TRIPS does not require WTO members to implement identical rules on IP protection, beyond the minimum standard provision. This means that member nations have the freedom to determine the appropriate regulations for implementing IP protection within

their own legal framework. This practice is potentially one of the main sources for varying IP protection outcomes between nations.

2. The OECD estimates international trade in counterfeits was worth US\$250b in 2007. Other sources claim the losses are closer to US\$650b a year and that 2.5 million jobs are lost due to counterfeiting and the unauthorized use of IP in G20 nations (see Schiappacasse, 2004).
3. Borrowing from Hasmath and Hsu's (2014: 950) work on state–society engagement in China, one can hypothesize a 'strategic ignorance' argument for regional variances in IP enforcement. Namely, the inconsistency between central and local government policies towards IP protection may not only be a question of lacking enforcement options (of the central government) at the local level, but to a certain degree can be attributed to the strategic choice of the central government to be deliberately ignorant of IP infringements at the local level.
4. While flows of foreign direct investment into China have been large, developed nations and managers of foreign enterprises are reluctant to locate research and development facilities in China and may transfer older technology to China (at least five years behind the frontier) for fear of misappropriation and patent infringement (see Maskus and Fink, 2005).
5. Increases in patent applications could be a direct result of improved effectiveness of IP protection. If IP protection is limited, companies tend to turn to other ways of protecting their intellectual property (e.g. non-disclosure). Improvements in IP protection might have induced some companies to turn to patents for IP protection.
6. Even if the starting levels in the US and China differ significantly, comparing percentage increases and decreases of patent applications rather than providing absolute numbers can be advantageous, as other components such as population size are unmatched and difficult to compare in absolute terms.
7. It has been reported by the European Union Chamber of Commerce in China (EUCCC) that patent quality is in fact weak and therefore the actual strength of China's innovation seems overhyped (see Prud'homme, 2012). A special Task Force on Patent Quality has identified that the causes of the poor quality of patents is due to inadequate interactions among legislative, administrative and judicial institutions as well as the inability of enterprises to apply the patent system (see European Commission, 2014b).

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