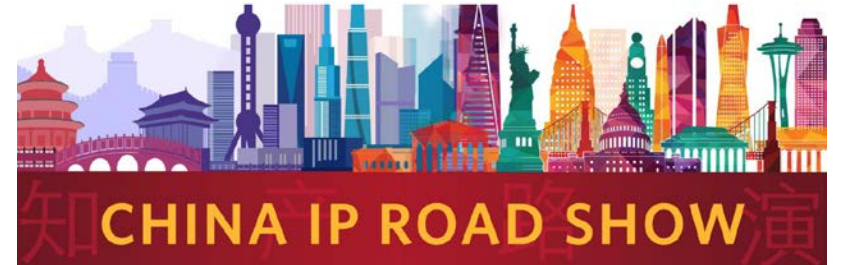


Criminal Enforcement in China



Louisville, KY: July 25, 2018
Iowa City, IA: August 28, 2018
Kansas City, MO: August 30, 2018

By Amy Hsiao
Partner at **Swanson & Bratschun**
July and August 2018
China IP Roadshow with USPTO

Enforcement







Overview – Dual System

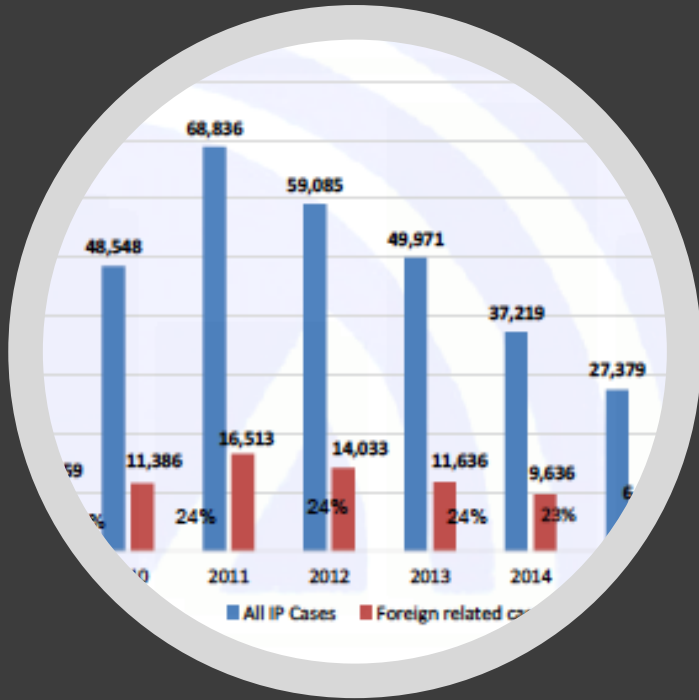
The Court System



The Administrative System

Main Administrative Authorities in TM Protection

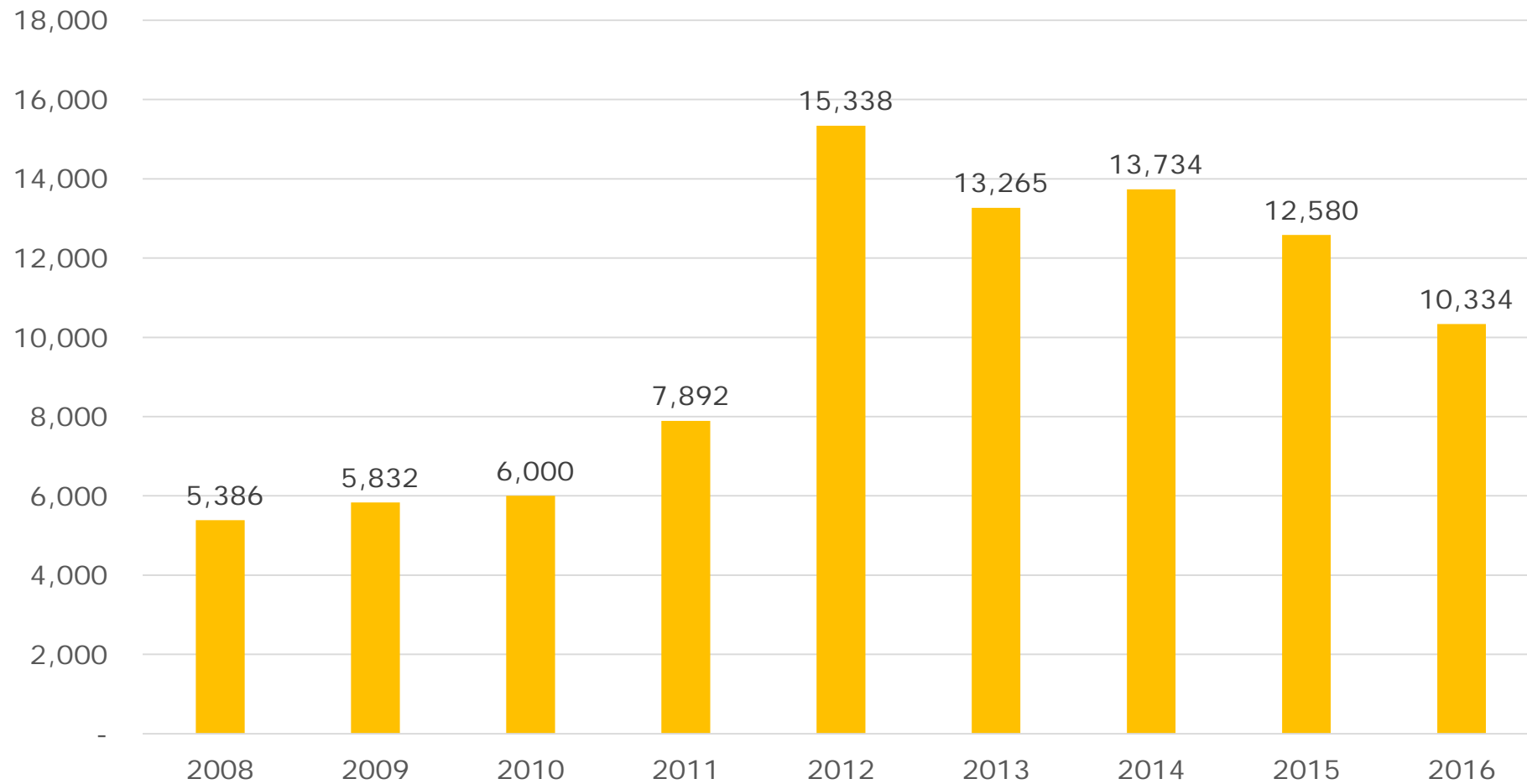
Authorities	Duty	Main Legal Basis
AIC Administration of Industry and Commerce	<ul style="list-style-type: none"> • TM infringement and unfair competition activities in manufacturer, distribution and advertising • Assisting the infringer in transportation, storage and money transfer • Many other compliance issue business 	<ul style="list-style-type: none"> • Trademark law • Anti-unfair competition law 
TSB Technology Supervision Bureau	<ul style="list-style-type: none"> • False labeling regarding identity, address and origin • Product defect and quality issue • Compliance issue regarding mandatory national or industrial standards 	<ul style="list-style-type: none"> • Product quality law 
Customs	<ul style="list-style-type: none"> • Importation and exportation of goods infringing other's TM registration in China • Recordation of TM registrations at GAC 	<ul style="list-style-type: none"> • Regulations of customs IP protection 
PSB Public Security Bureau	<ul style="list-style-type: none"> • Counterfeiting activities reaching the criminal threshold 	<ul style="list-style-type: none"> • Criminal law 



AIC --- Pros and Cons

Now The Criminal Part

Sentenced Criminals for IP Violations (in China)



According to “Prosecution Daily” (Beijing) 法制日报

In 2016:

- Arrested over 3797 people (in connection with 2251 IP criminal cases)
- Prosecuted 7059 people (in connection with 3863 cases)

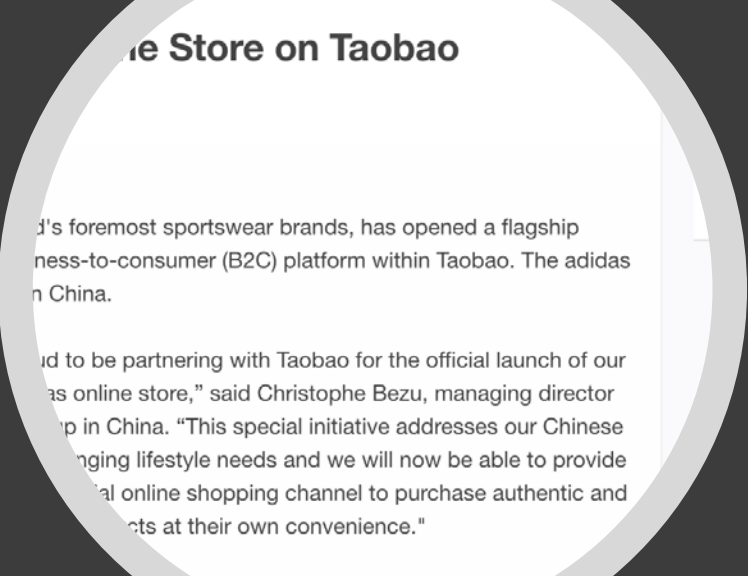
In 2017:

- Arrested over **4272** people (in connection with 2510 IP criminal cases)
- Prosecuted **6809** people (in connection with 3674 cases)
- Arrested over 3975 people, **93.1%** of overall arrests (in crimes related to **counterfeiting** of registered trademarks, include: selling, manufacturing, transporting and storing)
- Prosecuted over 6468 people, **95%** of overall prosecutions (in crimes related to **counterfeiting** of registered trademarks, include: selling, manufacturing, transporting and storing)

**Where are the most likely
places to start?**



AIC Raid Action



Online Takedown



Customs

HOW?

PSB

- Report to PSB directly
- PSB discovers it during its own investigation
- AIC / Court Action → PSB

AIC

- Report to AIC
- Threshold met
- Convert to Criminal Action

Alibaba

- Either initiated by brand owner or Alibaba itself
- Big data support

Customs

- Very fast timeline
- Need letter

Court

- Fewer Cases

**What are the
relevant laws?**

Article 213 of the Criminal Law

《中华人民共和国刑法》第二百一十三条规定，未经注册商标所有人许可，在同一种商品上使用与其注册商标相同的商标，情节严重的，处三年以下有期徒刑，并处或者单处罚金；情节特别严重的，处三年以上七年以下有期徒刑，并处罚金。

Essentially, this means...

Anyone who uses an identical mark on identical registered products without authorization is punishable with imprisonment/detention up to three years with a fine or imposed fine (for serious cases) and punishable with imprisonment/detention over three but under seven years with a fine (for extreme cases).

Article 213 of the Criminal Law

《最高人民法院公安部关于公安机关管辖的刑事案件立案追诉标准的规定（二）》第六十九条规定：
[假冒注册商标案(刑法第二百一十三条)]未经注册商标所有人许可，在同一种商品上使用与其注册
相同的商标，涉嫌下列情形之一的，应予立案追诉：

- (一)非法经营数额在五万元以上或者违法所得数额在三万元以上；
- (二)假冒两种以上注册商标，非法经营数额在五万元以上或者违法所得数额在二万元以上的；

Essentially, this means...

Where anyone uses a trademark identical with a registered trademark in respect of the same goods without the authorization, a criminal case shall be established so long as the followings are met:

(1) The illegal revenue is more than 50,000 yuan, or the illegal income is more than 30,000 yuan;

(2) counterfeiting more than two kinds of the registered trademark: the illegal revenue is more than 30,000 yuan or the amount of illegal income is more than 20,000 yuan;

Article 214 of the Criminal Law

第七十条 [销售假冒注册商标的商品案(刑法第二百一十四条)]销售明知是假冒注册商标的商品，涉嫌下列情形之一的，应予立案追诉：

- (一) 销售金额在五万元以上的；
- (二) 尚未销售，货值金额在十五万元
- (三) 销售金额不满五万元，但已销售

Essentially, this means...

Anyone knowingly sells commodities bearing counterfeit registered trademarks, a criminal case shall be established once the followings are met:

- (1) The sales amount is more than 50,000 yuan;
- (2) The value of unsold commodities is more than 150,000 yuan; or
- (3) the sales amount is less than 50,000 yuan, but the sum of the value of sold commodities and the value of unsold commodities is more than 150,000 yuan

Bottom line is:

- Sales revenue > **\$8,000 (USD)**
- Inventory value > **\$24,000 (USD)**
- However, infringers don't keep accurate books. Most of the time inventory found on the spot.
- Sample purchase helps.
- **Question** --- how to determine value?

Article 12

(Interpretation by Supreme People's Court on IP Criminal Cases)

- 《最高人民法院、最高人民检察院关于办理侵犯知识产权刑事案件具体应用法律若干问题的解释》第十二条规定，本解释所称“**非法经营数额**”，是指行为人在实施侵犯知识产权行为过程中，制造、储存、运输、销售侵权产品的价值。已销售的侵权产品的价值，按照实际销售的价格计算。制造、储存、运输和未销售的侵权产品的价值，按照标价或者已经查清的侵权产品的实际销售平均价格计算。侵权产品没有标价或者无法查清其实际销售价格的，按照被侵权产品的市场中间价格计算。

- The term “**illegal business operation**” refers to the manufacturing, storing, transporting and selling of counterfeit goods that infringed upon intellectual property rights. The values of the **sold counterfeit** goods are calculated based on the **actual** sale prices. Whereas the value of manufactured, stored, transported and unsold counterfeit goods are calculated based on the **listed prices** or the **average** of the actual sale prices of the goods found. In the event that the actual prices cannot be determined, the prices shall be calculated base on the sale prices of similar counterfeit goods **on the market**.

The difference between 3 cents and 7 cents. Local PSB logistics value

YiWu Razor Blade Example

Source: Business Insider (<http://www.businessinsider.com/yiwu-china-largest-wholesale-market-2011-10>)

Pros and Cons



Biggest Advantage

- No discovery
- AIC --- ok to check bank accounts but difficult
- PSB --- can check bank account, find electronic transaction record; work with eCommerce platforms or customs
- **EXAMPLE:** warehouse
- **EXAMPLE:** distributor

Biggest Drawback

- Difficult to meet threshold
- Infringers on high alert
- No specific timeline
- **Average time line** for PSB vs. AIC
- **Average cost** for PSB vs. AIC
- PSB (9 months)--- PSB (arrest; 3 months)(12 months; others) → prosecutor's office (if already arrest, 6 months; if not, 12 months) → court action (2 months)



Some Encouraging Developments...

Top Case #2 - Fake SAMSUNG Case

Enforcement breakthrough for CRIMINAL prosecutions in China



2017 Top Enforcement Cases

◎北京市工商局海淀分局

查处侵犯海贼王及图[↑]商标专用权案

事人北京乐汇天下科技有限公司在多家手机软件运营

Fine imposed through 2017 trademark enforcement cases: roughly US \$70 million

One of the highest fine imposed: US \$882,000

◎江苏省淮安市清江浦区市场监管局

查处侵犯五粮液等注册商标专用权案

◎上海市闵行区市场监管局

查处侵犯伯尔梅特BERMAD注册[↑]商标专用权案

于2014年至2016年从正常销售渠道采购价格相

◎福建省厦门市市场监管局

◎湖南省衡山县多部门协作

查处侵犯佑惑等注册商标专用权案

查处侵犯纪梵希等注册商标专用权案

缉私局转来的案源线索后，于2016年10月21日在被举报地点

公安局沙泉派出所民警在检查中发现曹俦涉嫌非法加工

Source:

http://home.saic.gov.cn/sbj/sbjg/201804/t20180426_273944.html

Summary


Institution/Entity	Responsibilities	Cause of action	Pros and Cons
Administration of Industry and Commerce (AIC)	Manufacture, distribution and sale of counterfeit goods	Trademark Infringement	Quick and effective. But limited influences.
The General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ)	Product quality control. Storage of counterfeit goods.	Poor quality, Unfair Competition	Quick and effective. But limited influences.
Police (PSB)	Criminal	Severe intentional trademark infringement	Imprisonment. But high requirements on evidences and investigation.
Customs	Export and import of counterfeit goods.	Trademark Infringement	An efficient gate keeper for exportation. But limited scope.



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Thank you.