

U.S.-China Trade Deal Promises Better Intellectual Property Protection for U.S. Businesses in China

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On January 15, 2020, the U.S. and China signed Phase One of the Economic and Trade Agreement Between the Government of the United States of American and the Government of the People's Republic of China (the "U.S.-China Trade Deal"), which is set to go into force on February 14, 2020.

As a nod to the importance of U.S. intellectual property protection in China, the first two chapters of the U.S.-China Trade Deal focus solely on U.S. intellectual property protection and enforcement in China, as well as the avoidance of forced technology transfers. China's obligations are spelled out in some detail and cover a wide range of topics, including trade secret, patent, trademark, piracy and counterfeiting, among other topics. In exchange, the U.S. largely must merely affirm that it already has similar protection and enforcement mechanisms in place.

With the onus falling mostly on China to adopt and implement new laws and procedures to protect U.S. intellectual property, China has agreed, in the following areas, to at least:

Trade Secret

- Expand the scope of what qualifies for trade secret protection to include confidential business information, which is broadly defined;
- Expand the scope of what acts constitute misappropriation to include electronic intrusions, breaches, and other unauthorized disclosures;
- Allow for criminal prosecution of willful trade secret misappropriation, regardless of a business' actual damages, while, at the same time, prohibiting disclosure of trade secrets by government officials tasked with prosecution; and
- Adopt burden shifting procedures, as well as penalties to deter future trade secret misappropriation.

Patents

- Provide patent term extensions to compensate for unreasonable delays in patent examination or regulatory approval.

Trademark

- Adopt procedures to protect against bad faith trademark registrations/trademark squatting; and
- Ensure just and transparent opposition and cancellation procedures to respect prior trademark rights.

Pirated and Counterfeit Products

On e-Commerce Platforms:

- Require that e-commerce businesses adopt and effectively implement notice and take down procedures to combat infringement; and
- Penalize e-commerce businesses by (among other actions) revoking their operating license for repeated failures to curb sales of pirated or counterfeit goods.

Being Manufactured, Distributed, or Exported from China:

- Stop the manufacture and distribution of pirated and counterfeit products, by, among other actions, seizing and destroying such products and all implements used to create such products;
- Hire, train, and significantly increase the number of border officials trained to inspect for pirated and counterfeit products; and
- Ensure that all government officials use only licensed software.

In addition to the above promises, China has agreed that it will not “force or pressure” a U.S. business to transfer its key technology in exchange for market access or a license to operate in China, or in relation to any other investment activities in China.

While Phase One paints China’s obligations in broad strokes, the U.S.-China Trade Deal specifies that, within thirty working days from January 15, 2020, China will circulate an Action Plan. The Action Plan will detail the precise measures China will take to implement its obligations as well as the date by which each measure will go into effect. The Action Plan will therefore provide even further guidance regarding all of the protection and enforcement mechanisms that will be available for U.S. intellectual property holders in China.

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