

相同，一样，但又不尽相同 SAME, SAME BUT DIFFERENT



模仿可能是最真诚的崇拜模式，但中国是版权、商标权和专利侵权的恐怖之地。

Imitation may well be the sincerest form of flattery, but China can be a snake pit of copyright, trademark and patent infringement.



On January 18 the internet went dark. In an unprecedented act of collaborative protest, an eclectic range of online publications and institutions took action against the two headed demon of legislation that was due to pass through the US Congress later on that week. Wikipedia shut down its English pages for 24 hours as did the news aggregator, Reddit, for twelve. Wired's front page was heavily redacted and WordPress, Greenpeace, the Mozilla Foundation and Reporters Without Borders, along with countless others, all blacked out their front pages to bring attention to the Stop online Piracy Act (SOPA) and the Protect IP Act (PIPA). This legislation, the protestors claimed, would break the internet, causing untold damage to the founding principles upon which it is built: free speech and the unfettered dissemination of information.

right now: what to do about copyright and the protection of intellectual property.

And that brings us to China. In a joke map doing the rounds on social networks recently, a roughly American shaped chunk of land is described as containing 'Jesus and guns.' Europe is explained as where 'art' comes from and hailing from China, 'stuff; much of it fake.' Whilst it is certainly true that much of the stuff consumed in the west, everything from consumer electronics and trainers to high speed trains and industrial plant, are manufactured here, it is also true that much of the billion dollar industry of counterfeits also originates in the Middle Kingdom.

If you've been here a while, you almost certainly own, or have owned, something fake you bought in China. A quick

1月18日互联网失色了。空前的协作抗议行为，在线刊物和机构采取行动反对两大主要立法。这两大立法于那周晚些时候通过美国国会表决。维基关闭英文网页24小时，作为新闻聚合网站Reddit关闭12小时。科技新闻网站Wired主页大变样，WordPress、绿色和平、智谋基金会、无国界记者及其他无数网站，都关闭了他们的主页，以引起人们对于禁止网络盗版法案(SOPA)和保护知识产权法案(PIPA)的关注。示威者声称，立法会破坏互联网，对互联网建立的基本原则一言论自由和信息传播自由，引起无尽的伤害。

但是本篇文章并非讨论这些事情，笔者之所以在此提及此事是因为，禁止网络盗版法案(SOPA)和保护知识产权法案(PIPA)是立法工具，本文所涉及的无休止邪恶战斗的一半来源于此。禁止网络盗版法案(SOPA)和保

包括Ibanez贝司吉他、阿迪达斯运动服、阿玛尼外套、路易·威登和普拉达手袋。所有这些都比在西方零售店的售价便宜很多。也许对消费者来说不是坏事，但是对于花费数以百万不断建立和开发产品的版权所有者来说，从冒牌货的销售中得不到一分钱。

但是假冒产品在中国大规模生产，仅是故事的一半。去年，西方媒体大肆宣传在云南省昆明市发现大量假冒苹果商店，却鲜有提及大量的假冒宜家商场。同样，双环汽车制造商宣传新出车型，一款既像宝马X5又像奔驰Smart。回到我们居住的城市青岛，腾飞汽车新推出的婚车，如同1961年劳斯莱斯幻影的副本。

你可能会想，这还蛮有趣的。所以如果中国向奢侈品市场进军，售价低廉些；貌似共赢，对吧？对于假冒的手袋和手表来说，看似不假。虽然普拉代表律师告诉红星，这是与假货的斗争，“每月约有

So what if China is tapping in to a market for luxury goods and offering them at less than luxurious prices; nobody gets hurt, right?

But this article is not about of either of those things, and I mention them here only because both SOPA and PIPA were legislative vehicles that were largely brought into existence by one half of the unholy battle that this article will discuss: SOPA and PIPA were the fruits of millions of dollars worth of lobbying by copyright holders looking for a way to suppress access in the United States to what they believe to be - and often have case for calling - copyright infringing material hosted outside the country. That the legislation would allow top level DNS suppression of such material - without a court endorsed burden of proof - that could affect seriously ordinary users' online experiences was, in the eyes of Sony, EMI and Warner Brothers et al, merely collateral damage. Mainly as a result of public outcry fomented by this high profile online protest, the legislation has been canned - for now - but the action did throw a, albeit darkened, spotlight on one of the most important - on and offline - discussions currently taking place in the world

straw poll in the office threw up everything from an Ibanez bass guitar and Adidas sportswear, to an Armani jacket and handbags from Louis Vuitton and Prada. All of them look the part, but are sold for considerably less than their western retail price. Good for consumers maybe, but for the copyright holders, those that have spent the millions creating and developing these products over time, not a penny from the sale of these fakes ends up in their coffers to fund future development.

But counterfeit goods, mass produced in factories the length and breadth of China, are only half the story. Last year, the western press was up in arms over a string of fake Apple stores discovered in Kunming in the Southern province of Yunnan, but less widely reported was fake Ikea store discovered in the same city. Similarly, the automotive producer Shuanghuan made headlines by producing new cars that looked uncannily like the BMW X5 and Mercedes' Smart car. Closer to home, Qingdao Soar Automobile recently unveiled their new

假如中国向奢侈品市场进军，售价更加低廉；便能获得共赢，是否正确

护知识产权法案(PIPA)将带来百万美元的收益，绝对值得游说版权所有人寻找一个途径来压制美国的访问，时常有案件传唤，侵犯版权的材料在国外出现。该立法将允许通过配置DNS来控制此类素材-未经法院批准的举证责任-这将严重影响普通用户的在线体验，在索尼、EMI、华纳兄弟等看来，仅是附属性的损害。主要是煽动起来的高调网上抗议引起的舆论哗然，立法已定-现在-但是此起诉确实在线上 and 线下，全球范围内引起热烈讨论：对于版权和知识产权保护该做些什么？

中国也有这类问题。最近一个笑话地图巡礼了社交网络，一个大体美国形状的土地被描述为容纳了“耶稣和枪支”，欧洲解释为“艺术”源泉和来自中国的欢呼（东西多是假的）。西方消费的东西，从消费类电子产品和培训到高速列车和工业厂房都在这里生产，这是不争的事实。其实，上亿的工业仿制品也源于此。

如果你在中国待段时间，你一定拥有或者曾经有过产自这里的假冒产品。在办公室来场快速民意测试，

四万起关于在阿里巴巴和淘宝所出售假货的诉讼”，诉讼费可不是笔小数目。但是如果版权、专利和商标侵权在损害企业和扼杀竞争，该怎么办？

一月Wired网站上，英国企业家James Dyson爵士认为，中国需要有足够的知识产权保护-或者现在看来还明显不足-这不仅通过窃取创新损害到外商投资企业，而且还危害着中国的下一轮发展热潮。中英商务贸易协会的Harry告诉红星，Dyson眼中的中国，“不再想被看成是世界工厂。而希望靠发明、专利、创新思想而闻名世界。”但是“中国知识产权法律建立上的失败，正渐渐破坏真正的进展。”

详细介绍公司在中国的专利、版权和商标侵权诉讼，Dyson透露所涉及的费用和后果。“积极保护专利对战胜竞争对手很重要，同时也是保护我们自己在研发上的投资。”整个过程是令人沮丧和昂贵的；我们在令人已经花费了150万美元。”对于年轻的发明家和创业者，抄袭专利是一个潜在的毁灭性事业状态。

再看一下美国国际贸易委员会的报告，美国知识产权密集型企业在2009年中国的业绩

'wedding car,' a carbon copy of a 1961 Rolls Royce Phantom.

All good fun, you might be thinking. So what if China is tapping in to a market for luxury goods and offering them at less than luxurious prices; nobody gets hurt, right? That might be partly true in the case of counterfeit bags and watches, though a lawyer representing Prada



told REDSTAR that its battle with fakes – “about 40,000 actions a month against those offering fakes on Alibaba and Taobao” – is costing them a small fortune. But what about when copyright, patent and trademark infringement is damaging businesses and stifling competition?

Writing in Wired in January, British entrepreneur Sir James Dyson argued that adequate IPR protection in China - or rather, the apparent lack thereof – is not only harming foreign businesses through the theft of their innovations, but is also risking China's next wave of development. Echoing what Harry Jiang of the China-Britain Business Council told REDSTAR, Dyson says that China, “no longer wants to be seen as the workshop of the world. It wants to become the world leader in invention, patents and ideas.” But “China's failure to keep its intellectual property law up to speed threatens to undermine its genuine progress.”

Detailing his company's patent, copyright and trademark infringement actions in China, Dyson reveals the costs involved and the consequences of leaving fakes unchecked. “Aggressively protecting patents is essential to conserve an edge over competitors and to protect our investment in research and development. It's frustrating and costly; we've spent over \$1.5 million in China alone battling rip-offs.” For young inventors and

start-ups, having your patents plagiarised is a potentially ruinous state of affairs.

Looking at the bigger picture, The US International Trade Commission reported that US IP-intensive firms operating in China reported losses of approximately \$48.2 billion in sales, royalties, or license fees due to IP infringement in China in 2009. More spe-

cifically, for software leviathan Microsoft, the Chinese and the US markets are comparable. There were 75 million PC shipments in the US for 2010 and 68 million in China, but here, where the company estimates that as much as 78% of its PC software is pirated - versus 20% in the US - Microsoft makes the same revenue as it does in the Netherlands (population 16 million).

Dyson says too that the authorities know that real profits come from developing world class technology rather than simply manufacturing others' ideas and that “the commitment to doing so dwarfs efforts elsewhere.” Indeed, according to media reports, the country's leaders are looking to increase the amount of GDP they spend on R&D to 2.5% and double the number of patents they grant by 2015. “Home grown invention is a good thing,” Dyson says, “and Chinese companies expect patents to be enforced around the world. The problem is that the protection isn't reciprocated.”

This view is commonly held by those that regularly come up against Chinese imitators, but it is not universal. Beata Suwala is an IP Expert at the Beijing based China IPR SME Helpdesk. Funded by the EU, the helpdesk supports EU SMEs “to both protect and enforce their Intellectual Property Rights in, or relating to China.” Suwala told REDSTAR that many of the IPR issues that non Chinese

报告上看, 由于知识产权侵权在销售额和特许权使用费上, 约损失482亿元。更具体地说, 微软软件, 中国和美国市场相媲美。2010年美国出货750万, 中国出货680万, 但是微软公司估计中国78%的PC软件为盗版, 而美国仅有20% - 微软在中国的收入与仅有1600万人口的荷兰一样。

Dyson说, 中国政府也深知, 真正的利润来自研发世界一流科技而非简单复制别人的想法, 并认为, “这样做的承诺在某方面相形见绌。”事实上, 据媒体报道, 该国领导人正寻求增加GDP在研发费用上的份额至2.5%, 以及至2015年授权专利数翻一番。“自我研发是件好事”Dyson认为“中国公司希望版权在世界各地可以得到保护。问题是保护不是互换的。”

这个观点通常是由那些定期对中国效仿者提出的, 但并不具备普遍性。Beata Suwala是中国知识产权中小企业服务平台的知识产权专家。该组织由欧盟资助, 帮助欧盟中小企业的“在中国境内”和与中国有关的知识产权的保护和执行。”Suwala告诉笔者, 非中国企业遇到的知识产权问题“并非是中国知识产权体系的问题。很多问题是由于公司没有完全遵守相关法律法规而引起的。”她说, 如



果公司不能充分完全正确符合中国所有法律法规, “涉及到知识产权纠纷时, 就不能得到很好的保护。”

还有重要一点, Suwala说道, 在2012年, 立法已经可以切实保护国外专利和商标, 而且“与欧美此类立法相同”。但是版权另当别论, 中国立法同欧美立法在“发现方面”有所不足。这就是公司声援哀叹中国知

识产权保护的原因吗?

发现是欧美法院强制被告知识产权侵权透露关于涉及侵权的销售和合同细节。作为证明侵权案件的证据, 这点很重要。所有侵权实际上是包含在被告公司的业务模式和做法中的(可能有多个公司在制造、销售中与某种争议产品有关)。中国境外, 如果法院立案, 相关文件必须透露; 在中国, 需要原告举证。

Suwala说道, 发现过程“真的很困难, 公司要斗争以保护他们的业务, 移交文件可能影响将来的业务发展。”事实上, Suwala描述了“侵权调查”整个行业, 不断努力获得证据来证明侵权案件。一旦获得证据, 中国法院同世界各地的其他法院一样着手受理。Dyson对此信心不足, 且指出专利制度中的不平等。“Dyson在过去三年一直等待专利批准, 总感觉中国企业不断插队申请。外国能从严格知识产权制度受益, 但是也无法完全杜绝此类犯罪。中国代表坚持快速调查专利侵权。我们的经验是相反的。”

那么, 真实的故事该是什么? 是如Suwala所说的有效的保护了知识产权, 还是为中国利益当局对知识产权盗窃睁一只眼闭一只眼? 可能两者兼有。在中国肯定有

基于商标或者专利侵权而发展起来的企业, 体系的建立又可掩盖这种行为。但是保护制度确实存在, 如果你的公司足够警觉并按相关法律法规办事, 是会受到相应保护的。如同中国其他地方一样, 这也是有技巧的, 那就是在开始之前确切知道所需是什么。

firms come across “are not necessarily the fault of the IPR system here; many problems are caused because companies do not, or have not, followed all the regulations to the letter of the law.” She says that unless a company is properly - and fully - compliant to all China’s regulations, “they often will find that they are not protected when it comes to an IPR dispute.”

On a more positive note, Suwala says that in 2012, the legislation is in place to properly protect foreign patents and trademarks and is “largely akin to legislation found in Europe or the US.” Copyrights however are “another matter” however, and Chinese legislation lacks the “discovery aspect’ of its EU or US equivalents.” Is this the reason that companies so vocally bemoan Chinese IPR protection?

Discovery is the process by which EU or US courts will force accused IPR infringers

to reveal details of their sales and contracts pertaining to the alleged infringement. This is of critical importance to proving an infringement case as the proof of infringement, and who all the infringers actually are (there may be more than one company involved in the manufacture and distribution of a single disputed product) is contained within the business model and practices of the accused company. Outside of China, if the court is convinced that there is a case to be heard, it will force the documentation to be revealed; in China, it is down to the plaintiff to discover the evidence themselves.

Suwala says that this discovery is “really difficult as companies will fight to protect their business and handing over this documentation could damage their future operation.” Indeed, Suwala describes an entire industry for “infringement investigators” that ply their trade trying to gain the evidence required to prove an infringement case. “Once gathered however, Chinese courts will - and do - enforce the laws that are in



parity to elsewhere in the world.” Dyson is less convinced, and describes inequality in the patent system. “Dyson has been waiting three years for our patents to be approved as Chinese companies seemingly jump the queue. The country benefits from strict intellectual property rules abroad, but fails to sufficiently police its own offenders at home. Chinese representatives have insisted there are ways to fast track a patent when an infringement occurs. Our experience is to the contrary.”

So what is the real story? Is China effectively policed and IPR protections guaranteed as Suwala maintains, or is it a wild west of

IP theft that goes unchecked by authorities looking to protect Chinese interests? It is probably both. Certainly there are nefarious businesses in China built upon trademark or patent infringement, and the system is not set up so as to making proving an infringement easy or straight forward. But the protection does exist and if your company is aware of and follows the letter of all the laws pertaining to your business, it will keep the imitators in check. The trick appears to be, as with everything else in China, is to know what is required before you start.