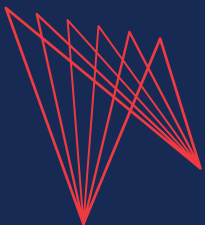




INTELLECTUAL PROPERTY RIGHTS CHALLENGES FACING FOREIGN AND CANADIAN COMPANIES IN CHINA: SURVEY RESULTS AND ANALYSIS



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I. EXECUTIVE SUMMARY

China's intellectual property (IP) regime continues to present major challenges for foreign companies despite recent improvements. While much has been published on intellectual property rights (IPR) issues in China, little information is available on what specific IPR issues Canadian businesses tend to experience in their engagement with China.

To fill this gap, the Asia Pacific Foundation of Canada (APF Canada) conducted a survey of 229 Canadian companies asking them about their experience with IPR infringement in China. The survey found that:

- Although only a small percentage of Canadian companies have encountered IPR violations within the past five years, Canadian businesses continue to perceive China's intellectual property rules and practices as one of the top barriers to doing business in China.
 - Canadian companies tend to perceive Shanghai as being less problematic in terms of IPR issues compared to other locations.
 - No direct correlation exists between company size and the perception of IPR as a barrier.
 - Companies with more experience in China, as opposed to those with less experience, tend to indicate that fear of IP infringement is less of a barrier to doing business.
 - Trade secrets and industrial designs are more vulnerable to IP infringement than other types of intellectual property.
 - More Canadian companies from the manufacturing sector report instances of IPR violations than companies from any other sector.
 - Chinese competitors as opposed to other types of infringers, such as suppliers or former employees, are more likely to be responsible for IPR infringement.
 - While registering IP and signing non-disclosure agreements are popular strategies used by all types of companies, large enterprises are more likely to engage in employee training as a strategy to discourage IPR infringement. Small- and medium-sized enterprises (SMEs) are more likely to limit knowledge to a small group of people as a trade secret protection strategy.
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II. INTRODUCTION

IPR infringement affects the profitability of foreign enterprises operating in China when sales of products and technologies are undercut by competitors' lower-cost, illegally produced imitations. As a result, enterprises operating in the Chinese market frequently devote considerable time and human resources to pre-empting and defending against IPR theft. In some cases, the perceived risk of IP theft has led companies to avoid the Chinese market altogether.

Canadian companies in particular consistently identify weak and irregular enforcement of IPR rules and regulations as a barrier to doing business. A 2012 survey of Canadian businesses engaged in China found that Canadian businesses considered IPR issues to be their top challenge, while concerns with inconsistent interpretation of regulations/laws in China and weak dispute settlement mechanisms trailed close behind.¹ Accordingly, this project was commissioned to provide an up to date analysis of the scope of the problem and describe some of the more successful strategies that companies have adopted to address the IP challenge.

The project was conducted in two phases. In the first phase of the project, APF Canada conducted an extensive literature review that drew on Canadian, Chinese, and international publications and summarized major IPR issues that foreign companies are facing in China. Phase One also presented key insights provided by practitioners, IP lawyers, and Canadian company representatives with substantial experience dealing with IP issues in China. Phase One revealed that Canadian businesses are not alone in their concerns about IP protection in China, yet little literature is available on IPR issues and concerns specific to Canadian companies and their IPR experiences in China.²

In the second phase of the project, APF Canada conducted a survey of Canadian companies that are active or interested in the Chinese market. Several sources were used to identify the sample of companies:

- Members and contacts of the Canada China Business Council and the Canadian Chamber of Commerce (Shanghai office);
- Clients of Canadian federal and provincial trade offices located in or dealing with China; and
- Business subscribers in APF Canada's database.

Survey results are highlighted in this report.

While the two phases of the project differed in method, they both seek to provide an up to date analysis of the scope of the problem and describe some of the more successful strategies that companies have adopted to address IP challenges. Together, Phases One and Two of the project endeavor to help Canadian companies better understand the nature of the IP threat in China with a view to helping companies design and implement effective IPR strategies.

¹ Asia Pacific Foundation of Canada, "Canadian Businesses in China Survey 2012," accessed July 14, 2014, http://www.asiapacific.ca/sites/default/files/filefield/ca_business_in_china_2012_final.pdf.

² Please find the report from Phase One, "Intellectual Property Rights Challenges Facing Foreign and Canadian Companies in China: A Survey of the Literature," included along with the submission of this report.

III. PROJECT OBJECTIVES

The goal of this project is to enhance Canada's understanding of intellectual property rights in China, focusing on the IPR challenges faced by Canadian companies operating in China. The project identifies the major IPR challenges facing Canadian companies in China and highlights the ways that companies have been able to successfully navigate China's changing IPR environment.

The project examined the following key issues:

1. IPR-related challenges encountered by foreign and Canadian enterprises in China;
2. The causes of IPR challenges; and
3. Best practices for mitigating or eliminating these challenges.

IV. SUMMARY OF KEY FINDINGS FROM REPORT 1, “INTELLECTUAL PROPERTY RIGHTS CHALLENGES FACING FOREIGN AND CANADIAN COMPANIES IN CHINA: A SURVEY OF LITERATURE”

Our survey of the literature presented in Report 1 revealed the following:³

- China’s IPR regime has improved rapidly in recent years, yet challenges remain.
China is now considered to be a highly IP litigious country and is the top patent filer in the world. Despite improvements, patent examination procedures remain inconsistent with authorities granting a high number of low-quality patents. Domestic companies developing their own technology are increasingly pressuring policymakers to improve China’s IP rules and practices. Rapid changes in China’s IPR regime require companies to remain vigilant and adaptable to meet new demands.
- Canadian companies engaged in China rated IP rules and practices as their top concern in 2012.
While companies from the United States and the European Union reported human resources issues and inconsistent enforcement of laws and regulations as their top concern, Canadian companies indicated that IPR rules and practices were their top business challenges. This item was followed by inconsistent interpretation of regulations/laws and weak dispute settlement mechanisms.⁴
- Many Canadian businesses are SMEs and many Canadian companies have only recently begun engaging China.
55% of Canadian businesses responding to a 2012 APF Canada survey had 10 years or less of doing business in China.⁵ Most (58%) respondents to the same survey of Canadian companies engaged in China were small and medium enterprises with gross global revenues under C\$10 million.⁶
- Canadian practitioners suggest that the IPR challenges that Canadian companies encounter in China are not different from those of other foreign companies.
While Canadian companies engaged in China reported that IPR issues were a major challenge, and other foreign companies have reported that IPR issues present less of a challenge, Canadian practitioners involved in IPR noted that challenges faced by Canadian companies differed little from those of other foreign companies. Differences in perception of Canadian companies’ capabilities to protect their IPR may be explained by company size and experience. Larger companies tend to have more resources readily available to better overcome IPR challenges, and companies that have operated for a longer period of time in the Chinese context are likely to have adopted mitigation strategies.
- Inadequate efforts have been undertaken to study what challenges IPR issues in China are to Canadian companies specifically.
Canadian companies’ business with China constitutes a small fraction of the total foreign investment flowing

³ “Report 1” refers to the report completed in the first phase of this project titled “Intellectual Property Rights Challenges Facing Foreign and Canadian Companies in China: A Survey of Literature.” For ease of reference, a copy of the report is included with this submission.

⁴ See Asia Pacific Foundation of Canada, “Canadian Businesses in China Survey 2012,” http://www.asiapacific.ca/sites/default/files/filefield/ca_business_in_china_2012_final.pdf, 18.

⁵ Ibid, 9.

⁶ Ibid, 11.

into China, and consequently the great majority of literature on international trade and investment in China, as well as literature on IPR issues resulting from such international business transactions, focuses on the experiences of non-Canadian firms. Relatively few articles have been published on Canadian companies' experiences with IPR challenges in China.

Other key findings relate to challenges stemming from differences in types of IPR and legal protection available for these IP types:

- Copyright infringement of foreign companies' material is widespread in China.
Copyright applies to a wide variety of content that has recently become digitally available. With the advent of the Internet, mass production, and greater availability of mobile phones and computers in China access to Chinese and foreign firms' copyrighted materials has become cheap, convenient, difficult to prevent, and has led to widespread infringement.
- Foreign companies have had difficulty benefiting from China's trademark law.
Chinese infringers of trademarks may use identical or confusingly similar trademarks belonging to foreign companies before such companies even enter China. Because China's trademark law uses a first-to-file system, trademark "squatting" often occurs. This prevents the original owner of a trademark from successfully registering a trademark because an infringer has already registered it.
- China's laws on trade secrets are weaker and less developed than Chinese laws on patents, trademarks, and copyrights.
China's rules and regulations on trade secrets are scattered across a series of laws and regulations rather than being collected under a single trade secrets law (e.g. the US Uniform Trade Secrets Act). These piecemeal laws create confusion for foreign companies in their efforts to protect against trade secret misappropriation.⁷ While other types of IP are protected under corresponding laws (e.g. the Patent Law of the People's Republic of China establishes the law for invention patents, utility model patents, and design patents to accommodate the various interests of potential patent-holders), no single trade secret law exists to protect holders of trade secrets. Because trade secrets are not commonly registered like other forms of IP (e.g. patents), enforcement issues often arise when infringement occurs because of the high evidentiary burden to prove that a trade secret exists, the lack of experience Chinese officials and courts have in handling trade secret infringement cases, and the reluctance officials often have in taking on complex cases.⁸
- China recently introduced indigenous innovation policies that present novel challenges to foreign companies.
Introduced in 2006, China's indigenous innovation policies have affected practices relating to government procurement bids, technology transfer, and the establishment of domestic technical standards. These policies attempt to subsidize certain industries and pressure foreign companies into transferring IP to domestic companies. New requirements for technology transfer and joint ventures between Chinese and foreign companies result in greater costs of protecting IP as foreign companies face greater risks of theft of trade secrets and other types of IP infringement.

⁷ See Ryan Ong, "Trade Secret Enforcement in China: Options and Obstacles," China Business Review, January 1, 2013, accessed August 21, 2014, <http://www.chinabusinessreview.com/trade-secret-enforcement-in-china-options-and-obstacles/>.

⁸ Ibid.

The sources and reasons for IPR infringement and strategies to cope with IPR infringement were also highlighted in Report 1:

- Institutional, technological, and cultural factors collectively contribute to problems in enforcing adequate IPR protection in China.
Fragmentation between local and central government bureaucracies and courts hinders adequate implementation of IP law. Conflicting goals between central and local governments, lack of resources, and corruption all impede IPR protection. Widespread use of the Internet has led to increased sales of counterfeit goods, greater difficulty in identifying legitimate vendors, and convenient, cheap access to copyrighted materials. Low manufacturing costs and increased mobility of manufacturing processes have led to more profitable counterfeiting. Cultural factors have also contributed to lax IPR enforcement, as Confucianism did not historically perceive knowledge as a form of private property, and Maoist thought generally discouraged the protection of IPR.
- Various options may be sought to provide remedies for IPR infringement and deter counterfeiting, although foreign companies often find that the damages awarded for infringement are insufficient.
Administrative means of remedying IPR infringement tend to be expeditious and inexpensive, but are not seen as effective in securing adequate compensation for damages. While judicial means of resolving an IP dispute allow victims of infringement to secure damages, this method of securing remedies is typically more expensive and lengthier, and damages received are often less than the actual expenses incurred from the infringement. Recordation of IPR with Chinese customs can help restrict trade of counterfeit goods.
- A variety of strategies and resources should be considered by foreign companies as they design IPR protection strategies that best suit their needs.
A single strategy or success case will not serve as a model for all foreign companies looking to protect their IP in China. A number of strategies should be considered, including: Registering IP, incorporating IP-protection clauses in contracts, encouraging de facto secrecy, training and educating employees, cultivating mutually dependent business relationships with domestic partners, establishing relationships and networks with Chinese government agencies, and actively seeking assistance from foreign governments.

V. FOREIGN AND CANADIAN COMPANIES' EXPERIENCE PROTECTING IP IN CHINA

Canadian and other foreign companies in China have adopted diverse strategies to protect their intellectual property. Some companies have been successful in protecting their IP, others less so. Our case study research and interviews revealed four key strategies that have been successfully employed by foreign companies: Seeking legal recourse, cultivating networks and relationships (*guanxi*) with local government agencies and their officials, turning to Chinese partners for assistance in pursuing IP cases, and limiting access to technology by allowing partners to only see a small piece of the technological picture. The following sections discuss instances in which legal and non-legal strategies have been used to successfully protect IPR.

A. CASES HIGHLIGHTING SUCCESSFUL LEGAL STRATEGIES TO PROTECT IPR

A New Benchmark for Remedies and Successful IPR Protection: Eli Lilly v. Meng

A review of recent cases shows that foreign companies have achieved some success in seeking remediation through the Chinese legal system. Identified by China's Supreme People's Court as one of the eight most important intellectual property cases in 2013, *Eli Lilly v. Meng* established a new standard for trade secrets by introducing unprecedented remedies.⁹ In January 2013, Huang Mengwei (Meng), an employee of Eli Lilly China Research and Development (Eli Lilly) downloaded and transferred to his personal electronic device 21 confidential business documents from the company's server without authorization. Meng refused to delete these files upon the request of Eli Lilly and resigned from the company. As a result, Eli Lilly filed a lawsuit against Meng in the Shanghai First Intermediate People's Court. In August 2013, the court ruled that Meng's actions amounted to a misappropriation of trade secrets and approved the request of Eli Lilly to issue an injunction prohibiting Meng from further circulating the documents. The court also awarded damages amounting to RMB 120,000 (C\$20,814) to the company.¹⁰

The ruling of the court carried great significance, as it was the first time that an injunction was ordered to prevent the dissemination of trade secrets. Prior to the August 2013 ruling, the implications of revisions made to the Civil Procedure Law in August 2012 remained unclear, as courts remained unsure about whether newly expanded abilities to grant injunctions also applied to trade secret misappropriation. This ruling, however, suggests that China's courts and legislators are prepared to take steps to improve the law on trade secrets that is often criticized as being weak and fragmented.¹¹

Nonetheless, the long-term implications of the Eli Lilly case remain uncertain. Although heralded as a landmark case, it is unclear whether it sets a precedent for issuing injunctive relief in future trade secret lawsuits or whether it represents a jurisprudential anomaly.¹²

⁹ Hao Nan, Court Hands Down Milestone Ruling on Trade Secrets, China Daily, August 14, 2013, accessed July 4, 2014, http://usa.chinadaily.com.cn/epaper/2013-08/14/content_16893667.htm.

¹⁰ Yunting You, First China Trade Secret Litigation Injunction Ends in Favor of Eli Lilly and Company, Bridge IP Law Commentary, May 8, 2014, accessed July 4, 2014, <http://www.chinaiplawyer.com/first-china-trade-secret-litigation-injunction-ends-favor-eli-lilly-company/>.

¹¹ For an overview of challenges presented by China's trade secret law, see US-China Business Council, "Recommendations for Strengthening Trade Secret Protection in China," September 2013, 2, accessed August 8, 2014, <https://www.uschina.org/sites/default/files/2013.09%20USCBC%20Recommendations%20for%20Strengthening%20Trade%20Secret%20Protection%20in%20China.pdf>.

¹² Zhang Ke, Eli Lilly and Company and Eli Lilly (China) Research and Development Company, Ltd. v. Huang Mengwei, China Law Update, Tsinghua China Law Review, Volume 6, Number 1 (Fall 2013), 144; Richard Grams, Allan Goldner, Lianzhong

While it remains unclear how the decision on *Eli Lilly v. Meng* may affect future case law, the case is clearly useful in highlighting strategies that companies can take to protect their trade secrets. First, Eli Lilly asked Meng at the start of his employment to sign a non-disclosure agreement as part of his employment contract, legally obliging Meng to refrain from disclosing any confidential information relating to Eli Lilly's marketing and sales strategies. The company clearly established that this information constituted a trade secret, which is particularly important. Without this prior identification, legal action cannot be initiated. Second, Eli Lilly carefully monitored employees' access to confidential information, allowing the company to ascertain that Meng had violated the terms of his non-disclosure agreement. Lastly, Eli Lilly prevented further damage by making known the company's willingness to litigate against infringers. Aside from preventing infringers from further disclosing confidential information, aggressively pursuing infringers also sends a warning message to potential infringers targeting a company's IP.¹³

Exceeding Statutory Maximums for Damages: BMW and Shiji Baochi

BMW also has a strong record of successfully protecting its IP through the Chinese legal system. BMW won a lawsuit against Century Baoma in 2009 when the Hunan Higher People's Court determined that Century Baoma infringed upon BMW's trademark by establishing 300 "MBWL Lifestyle" stores after BMW opened a number of "BMW Lifestyle" stores selling BMW-branded garments and accessories. Because Century Baoma's profits could not be determined, the court ordered the infringer to pay BMW the maximum award of RMB 500,000 (C\$86,567).¹⁴

In 2013, BMW (Chinese name Baoma) won another lawsuit against Guangzhou Shiji Baochi Clothing Co. Ltd (Shiji Baochi). Shiji Baochi sold garments and automobile accessories with the sign "Feng Baoma Feng" together with a confusingly similar logo (see Figure 1: Comparing BMW's Trademark and Feng Baoma Feng's Logo). It also used the company name 德国世纪宝马集团股份有限公司 (Germany Shiji Baoma Co. Ltd) in its product labels, website and other advertising materials.¹⁵ The court ruled that Shiji Baochi's actions constituted trademark infringement and unfair competition and violated acceptable business ethics. Consequently, Shiji Baochi was ordered to pay a fine of RMB 100,000 (C\$17,314) and damages of RMB 2 million (C\$346,288), an amount far exceeding the statutory maximum compensation for trademark infringement (RMB 500,000 (C\$86,567)). BMW's success can be traced, in part, to its ability to provide evidence that Shiji Baochi's profits exceeded the statutory maximum. Evidence of huge benefits, the infringer's malicious intent, and the extensive length of time during which the infringement occurred resulted in a ruling in BMW's favour, with the court awarding BMW considerable damages.¹⁶

Pan, Benesch Attorneys at Law, Preliminary Injunctions Now Available for Enforcement of Trade Secrets, China Bulletin, November 2013, accessed July 4, 2014, http://www.beneschlaw.com/files/Publication/b48746e9-0417-4176-b4f1-f7475347f866/Presentation/PublicationAttachment/9c969a47-5cec-4a4c-9aa4-0c2b81d84ee4/ChinaBulletin_TradeSecrets_111513.pdf.

¹³ Richard Grams, Allan Goldner, Lianzhong Pan, Benesch Attorneys at Law, Preliminary Injunctions Now Available for Enforcement of Trade Secrets, China Bulletin, November 2013.

¹⁴ MWE China Law Offices, "Top Ten Chinese Intellectual Property Cases of 2009," August 2010, accessed February 28, 2014, http://www.mwe.com/info/news/wp_c0810a.pdf, 3.

¹⁵ Zhang Ke, BMW Co. v. Guangzhou Shiji Baochi Clothing Co., Ltd, China Law Update, Tsinghua China Law Review, Volume 6, Number 1 (Fall 2013), 145-146;

¹⁶ 宝马诉广州世纪宝驰侵害商标权及不正当竞争案 - 中国法院网, October 22, 2013, accessed July 4, 2014, <http://www.chinacourt.org/article/detail/2013/10/id/1110815.shtml>.

Figure 1: Comparing BMW's Trademark and Feng Baoma Feng's Logo



BMW's Trademark



Infringing Feng Baoma Feng Logo

B. NON-LEGAL STRATEGIES USED TO PROTECT IPR

Aside from achieving success in protecting IP against infringement through judicial means, Canadian and other foreign companies have also been successful in pursuing non-legal strategies. Interviews with Canadian practitioners and company representatives highlighted a number of non-legal strategies that have been commonly used.¹⁷

The cultivation of networks and relationships (*guanxi*) with local government agencies and their officials was an effective strategy for a Canadian company in China's Shandong province that had its trade secrets stolen by a former employee who went on to blackmail the company. The former employee threatened to sell the trade secret to the company's competitor if the company did not pay RMB 1 million (C\$173,111). Initial attempts to seek help from the local police were futile. After the company called the office of the governor of Shandong, the local police proactively contacted the Canadian company to set up a sting operation, leading to the arrest of the former employee.¹⁸

¹⁷ "Intellectual Property Rights Challenges Facing Foreign and Canadian Companies in China: A Survey of Literature." For the convenience of the reader, a few cases involving Canadian examples are reiterated here.

¹⁸ Discussions during an executive roundtable hosted by the Asia Pacific Foundation of Canada, March 2014.

Key Points: Successful Legal Strategies Used to Protect IPR

- Recent cases suggest that foreign companies have enjoyed some success through legal remediation.
- *Eli Lilly v. Meng* provides one example in which unprecedented remedies, including high damages and an injunction, were awarded in favor of the foreign company.
- In *Eli Lilly v. Meng*, Eli Lilly adopted strategies that allowed them to prove that trade secret theft had occurred, including:
 - (1) Requiring a non-disclosure agreement from employees;
 - (2) Carefully monitoring employees' access to confidential information; and
 - (3) Making known the company's willingness to litigate.
- BMW's successful 2013 action against Shiji Baochi awarded BMW damages far in excess of the statutory limit for trademark infringement.
- Evidence of an infringer's profits resulting from infringement, malicious intent, and duration of infringement may all factor into calculating damages.
- As novel cases are brought to court, courts award novel remedies.

Other Canadian companies also found it beneficial to cultivate mutually dependent business relationships with local Chinese partners. A Quebec-based energy company that entered China found that a Chinese partner was able to help it enforce protection for its IP. The company was manufacturing its motors not only for the Chinese market but also for global distribution. Noting that IP infringement would harm domestic profits and the potential to expand internationally, the Chinese partner refrained from infringing the Canadian company's IP and helped protect the company from infringement by other parties.¹⁹ For SMEs with limited experience in the Chinese market, this is a particularly important strategy.²⁰

The importance of using other technological measures was also highlighted in APF Canada's interviews. Information fragmentation limits a partner's access to technology by allowing access only to a small piece of the technological picture. A Canadian company representative reported the use of such methods in protecting the company's IP. In manufacturing the company's electronic equipment, different contractors were asked to manufacture different parts of the final product, and the key technology was kept separate from the rest of the components. Through this practice, Chinese partners were not able to access all the technologies and techniques required to reproduce the final product. The company representative further added that instead of patenting the final product, which would require substantial disclosure of important know-how, his company instead patented all techniques and components that could possibly serve as a technological pathway to reproducing the final product.²¹ Another technological measure adopted by this Canadian company included adding confusing features to the company's products. These features are included solely to confuse potential infringers who may assume that the features serve an actual function.²²

¹⁹ Interviews of Canadian practitioners and company representatives, February--April 2014.

²⁰ Victor Tsao, "Protecting Your IP", Presentation conducted during the 2014 China Business Workshop, Canada-China Business Council, June 2, 2014, Surrey, British Columbia; Interviews of Canadian practitioners and company representatives, February--April 2014.

²¹ Interviews of Canadian practitioners and company representatives, February--April 2014.

²² Ibid.

Key Points: Successful Non-Legal Strategies Used to Protect IPR

- Canadian practitioners and company representatives have noted the efficacy of three particular non-legal strategies:
 - (1) Cultivation of networks and relationships (guanxi) with local government agencies and officials can lead to more proactive enforcement against infringers.
 - (2) Cultivating mutually dependent business relationships with local Chinese partners provides Chinese businesses with the incentive to protect against infringement.
 - (3) Technological measures, such as fragmenting information to prevent a partner from understanding the technological “big picture” of a product, and adding features to confuse potential infringers also help safeguard against IP infringement.

VI. ANALYSIS AND CRITIQUE OF KEY FINDINGS FROM THE CANADIAN BUSINESS IN CHINA SURVEY 2014

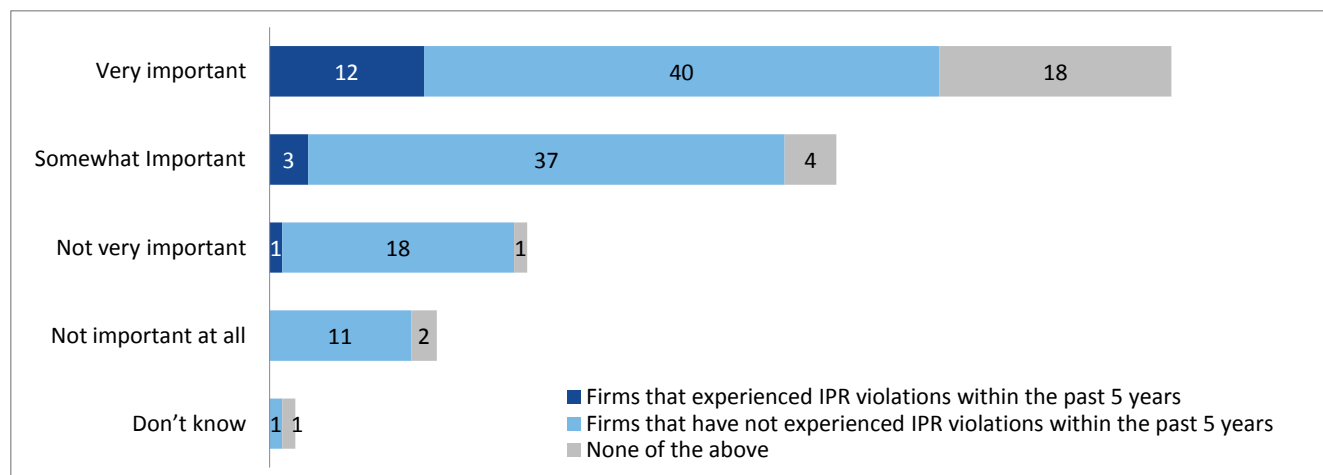
In order to supplement information provided by a literature review and consultations with experts, APF Canada drafted a series of survey questions on IPR for inclusion in its biannual Canadian Business in China survey in 2014. A total of 229 companies were surveyed using methods similar to those used in APF Canada's surveys of Canadian Businesses in China in 2010 and 2012. Members of the Canada-China Business Council and Canadian businesses drawn from Industry Canada's public database were surveyed online with a questionnaire on these companies' business dealings with China. A section of the survey was dedicated to inquiring about these companies' experiences with IPR in China, and data collected from IPR responses was cross tabulated with other information collected from the survey (e.g. sector, company size, location, extent of experience in China). APF Canada also drew on earlier findings from surveys published in 2010 and 2012, which, while focused on economic engagement between Canadian business and China, also touched on IPR issues.²³ Analysis of the 2014 survey data on Canadian companies' IPR experience is provided below and considered, when relevant, with the findings of the literature review and insights from interviews conducted with practitioners.

A. NATURE AND SOURCES OF INTELLECTUAL PROPERTY INFRINGEMENT

Importance of Intellectual Property

A majority of 2014 survey respondents responded that intellectual property is either very important or somewhat important to their business (see Figure 2: Extent to which IPR protection and enforcement is important to overall business). Among companies that encountered IPR violations, all aspects of intellectual property (including industrial designs, utility models, invention patents, copyrights, trademarks, and trade secrets) were rated as very important by the majority of the respondents.

²³ In these surveys, respondents were asked to identify and rate specific obstacles that were particularly problematic. Variation in methodologies used in the 2010, 2012, and 2014 surveys may have affected the comparability of these surveys, but referring to rankings of cited problems, particularly how IP's role in engaging China has changed from 2010 to 2014, provides perspective on how the role of IP has changed as business challenges shift for Canadian companies engaging China.

Figure 2: Extent to which IPR protection and enforcement is important to overall business²⁴

n=149

Q15. To what degree is intellectual property rights protection and enforcement important or not important to your overall business? Q17. In the past five years, has your firm experienced any intellectual property rights violations attributable to Chinese entities or individuals?

Source: 2014 Canadian Businesses in China survey

Types of Infringement

The 2014 survey results show that of all types of intellectual property infringed, 61% of respondents reported that their industrial designs were stolen, while 50% had their trade secrets misappropriated (see Figure 3: Types of IPR infringements experienced). This result contrasts with interviews with experts who stated that trademarks or copyrights are the most commonly infringed IP. However, it also comes as no surprise that trade secrets are one of the most commonly infringed types of intellectual property, but are rarely identified as such by IP experts. Cases of trade secret misappropriation are typically harder to document and calculate, as many instances are not reported due to problems associated with providing evidence of misappropriation in court. Furthermore, companies often refrain from reporting trade secret thefts because companies fear that reporting a trade secret theft may result in further disclosure of the trade secret, and companies often do not want to notify competitors that secrets have been stolen or that a breach has occurred.²⁵

The high number of occurrences of trade secret misappropriation also aligns with the views of other foreign companies in China. For example, a 2013 survey of American companies in China indicated that 40% of the respondents perceived trade secret misappropriation as their most serious IP concern.²⁶

²⁴ Note that “n” indicates the sample size for each chart. This figure varies because different charts required information from different survey questions, and some respondents refrained from answering certain questions, often preventing cross tabulation across responses from all respondents.

A total of 16 firms indicated that they had experienced IPR violations within the past 5 years, 107 indicated that they hadn’t, and 26 indicated “None of the above.”

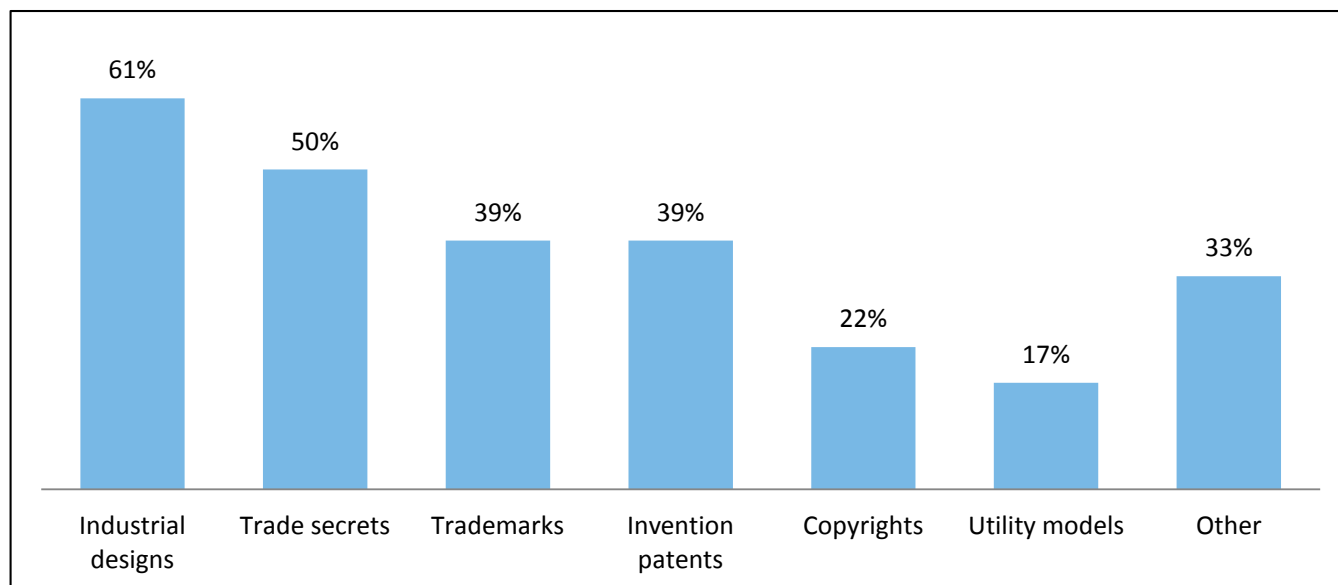
“None of the above” was included for participants that either did not have IPR or for which the question was not otherwise relevant.

²⁵ J. Benjamin Bai and Guoping Da, “Strategies for Trade Secrets Protection in China,” Northwestern University School of Law 9, no. 7 (Spring 2011): 354.

²⁶ US-China Business Council, “Recommendations for Strengthening Trade Secret Protection in China,” September 2013, 2,

Although relatively few companies indicated that they had experienced IPR theft within the past five years, infringement occurred across multiple types of IP, with industrial designs suffering from infringement more than any other IP type.

Figure 3: Types of IPR infringements experienced



n=47

Q18. Which of the following types of intellectual property rights infringements, if any, did your firm encounter over the past five years in doing business in China? Please select all that apply.

Source: 2014 Canadian Businesses in China survey.

Infringement by Sector

Despite the small sample size of companies that reported encountering IPR violations over the past five years, it is possible to identify variation of infringement across sectors. Of the companies that reported instances of violations, most companies (31%) belonged to the manufacturing sector, followed by companies from the mining, quarrying, and oil and gas extraction sectors, and enterprises offering professional, scientific, and technical services.

Figure 4: Top Sectors Reporting IPR Infringement

Sector	Percentage of companies reporting violations
Manufacturing	31%
Mining, quarrying, and oil and gas extraction	19%
Professional, scientific, and technical services	19%

n=149

Q2. Which of the following best reflect your company's sector?

Q17. In the past five years, has your firm experienced any intellectual property rights violations attributable to Chinese entities or individuals?

Infringement and Fraud

In the 2014 survey, respondents were asked for their perception of changing business risks in China during the past year. Comments from 7% of respondents stated that a greater risk of employee fraud is a problem.

Of companies that experienced IPR violations during the past five years, 25% believe that there is a greater risk of employee fraud during the last year, while only 1% of companies that did not encounter IPR violations perceived employee fraud as an increasing problem. These results are consistent with the fact that employees are often responsible for IPR infringement.

Figure 5: IPR Violations and Employee Fraud

Were IPR violations encountered during the past five years?	Was employee fraud perceived as a greater risk during the last year?	
	No	Yes
No	104 respondents (99%)	1 respondent (1%)
Yes	12 respondents (75%)	4 respondents (25%)

n=121

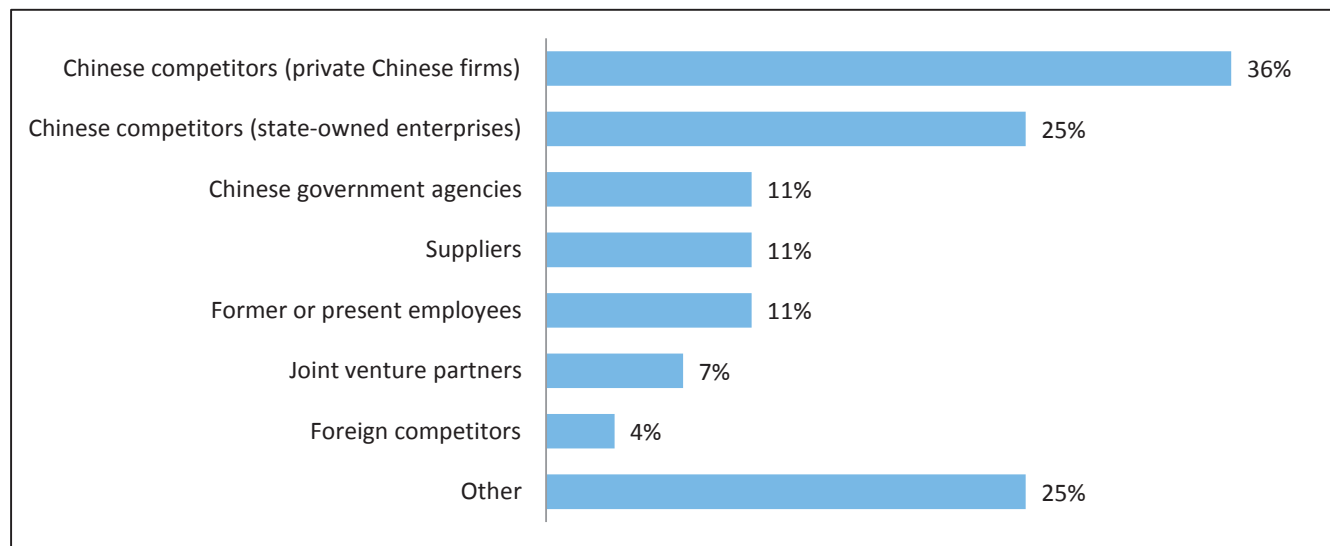
Q17. In the past five years, has your firm experienced any intellectual property rights violations attributable to Chinese entities or individuals?

Q12. In what ways, if any, do you feel the business risk environment has changed for Canadian businesses in China in the last year? Please select all that apply.

Sources of Infringement

Survey participants stated that Chinese competitors most commonly illegally seize IP. Private Chinese companies account for 36% of the infringements encountered by foreign companies, while competing Chinese SOEs account for 25% (see Figure 6: Sources of IPR infringement in China). The lower percentage (11%) of respondents attributing IPR infringement to Chinese government agencies may be a partial result of recent changes in China's IPR landscape, with Chinese government agencies increasingly seeking to adhere to IPR rules and legislation. For example, the Chinese central government announced in May 2011 that it had successfully achieved its goals of software legalization among its offices, and a similar process has been implemented at the provincial level.²⁷

²⁷ Office of the United States Trade Representative, "2013 Special 301 Report," accessed March 17, 2014, <http://www.ustr.gov/about-us/press-office/reports-and-publications/2013/2013-special-301-report>.

Figure 6: Sources of IPR infringement²⁸

n=28

Q19. Who has been the source of the intellectual property rights infringement in China? Please select all that apply.

Key Points: Successful Legal Strategies Used to Protect IPR by Canadian Companies in 2014

- A majority of surveyed Canadian companies engaging China indicated that IPR was either very important or somewhat important to their business.
- Industrial designs and trade secrets were the types of IP most often affected by IPR infringement.
- IPR infringement affected the manufacturing sector more than any other sector, followed by mining, quarrying, and oil and gas extraction and professional, scientific, and technical services.
- Companies that did not experience IPR infringement also generally did not experience employee fraud.
- Companies reported that Chinese competitors are more often responsible for IPR infringement than any other sources of infringement.

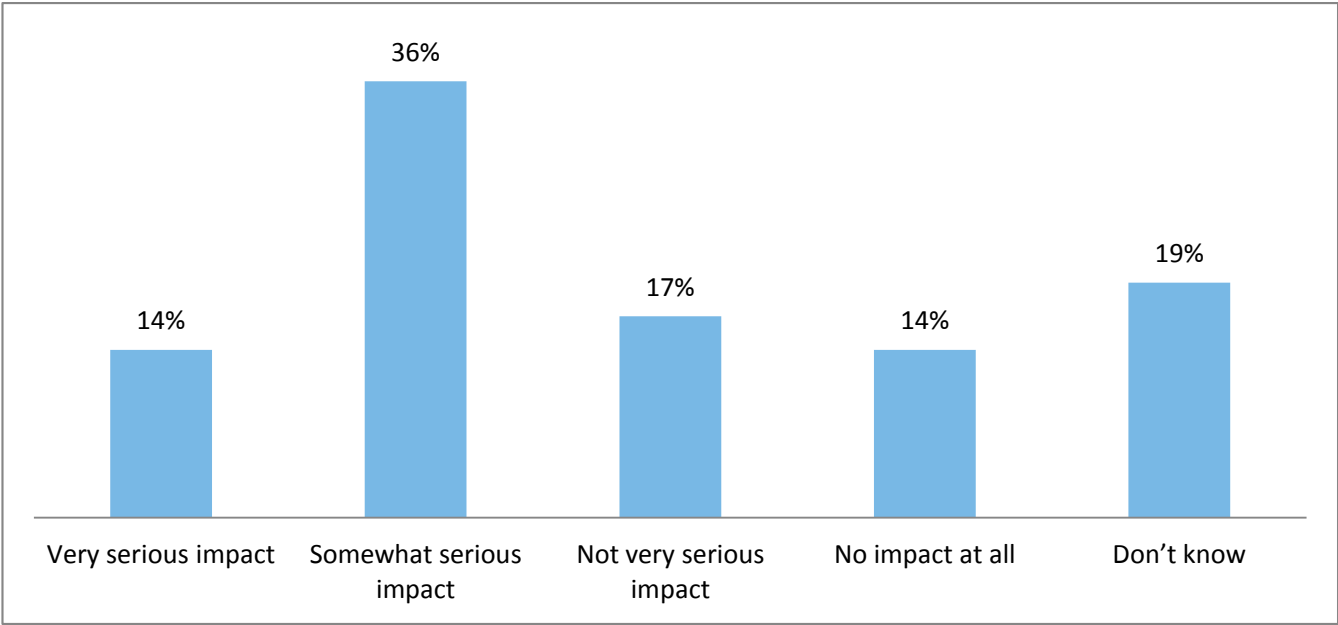
²⁸ Given the small sample size (28) of Figure 6, analysts should consider further inquiry into identifying sources of IPR infringement rather than drawing conclusions and developing policy from this chart alone.

B. FINANCIAL IMPACT OF INFRINGEMENT

Damage Caused by IPR Infringement

Damage caused by IPR infringement and the associated costs of remedying damage caused by infringement are often a major concern for companies encountering IPR violations (see Figure 7: Extent of impact of IPR infringement on business). In the 2014 survey, 36% of companies that encountered IPR violations reported somewhat serious damage, while 17% believed that the impact on their businesses was not very serious, 14% responded that the damage was very serious, and another 14% reported that there was no impact at all on their businesses.

Figure 7: Extent of impact of IPR infringement on business

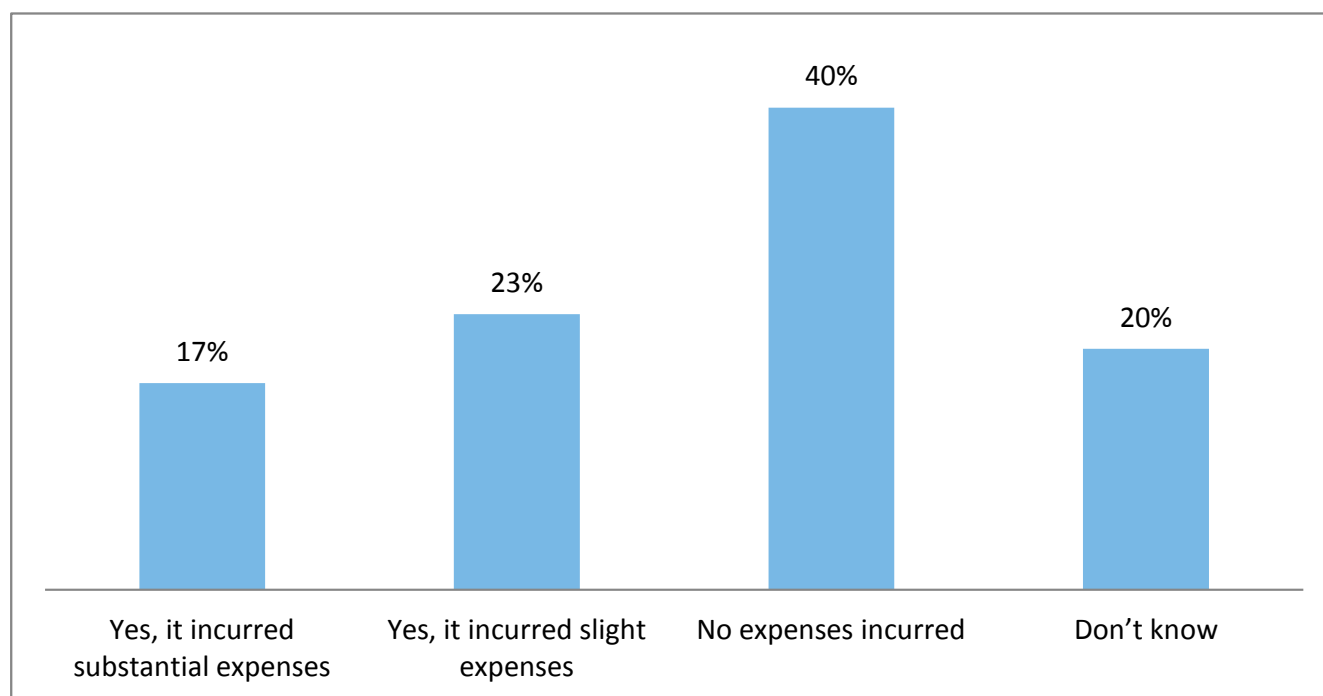


n=36

Q21. How much of an impact, if any, did intellectual property rights infringements in China have on your business?

Expenses Incurred to Protect IPR

Costs are often associated with remedies addressing IPR infringement (see Figure 8: Expenses incurred to address IPR infringement). In the 2014 survey, 40% of respondents reported that they did not incur any expenses, while 23% incurred slight expenses, and 17% incurred substantial expenses. Companies that incurred expenses from IPR violations reported that they were very seriously or somewhat seriously impacted by IPR infringement. Companies that reported that IPR infringement had no impact on their businesses also reported that no expenses were incurred because of such infringement.

Figure 8: Expenses incurred to address IPR infringement

n=35

Q22. Has your firm incurred expenses to address the infringement of its intellectual property rights in China?

Infringement and Profitability

Despite damage caused by IPR infringement and the associated expenses required to address these infringements, the 2014 survey showed that an absolute majority of the companies that encountered IPR infringement within the past five years still considered their businesses in or with China profitable in 2013 (or their most recent business year). The majority of respondents characterized their company's financial performance as profitable, followed in descending order by break-even, very profitable, or suffered a loss. This trend is similar to companies that have not encountered IPR violations within the past five years, where the majority of respondents characterize their company's activities as profitable, followed in descending order by break-even and very profitable.

However, several caveats should be made to avoid portraying a scenario that is unrealistically optimistic. First, it must be noted that the sample of companies that encountered IPR infringement is limited in size. Second, the target sample of this survey is not entirely valid for measuring forgone revenues because it includes responses from companies that fear IPR infringement but have turned down the opportunity to enter China. The 2014 survey targeted companies with businesses in or with China or businesses that are very interested in entering the market, but there is a certain degree of self-elimination among companies that ultimately decide to enter China. As a number of experts noted during our interviews, some companies avoid the Chinese market altogether and focus on North America when they lack the confidence or resources to perform well in China.²⁹

²⁹ Interviews of Canadian practitioners and company representatives, February-April 2014.

Key Points: Financial Impact of Infringement

- 50% of companies that experienced IPR infringement indicated that the infringement had a very serious or somewhat serious impact on these companies' business.
- 40% of companies noted that no expenses were incurred to address IPR infringement.
- Businesses that suffered from IPR infringement within the past five years still reported that their businesses in China were profitable in their most recent business year.

C. STRATEGIES TO PROTECT INTELLECTUAL PROPERTY

Efficacy of Strategies by Companies' IP Experiences in the Past Five Years

Figure 9: Best strategies for addressing IPR issues



n=115

Q24. In your firm's experience, which of the following strategies, if any, have been the most effective when addressing intellectual property rights in China? Please select all that apply.

When asked which IPR protection strategies were most effective, the majority of Canadian businesses indicated that registering their intellectual property proved to be particularly effective, followed closely by signing nondisclosure agreements and contracts. This confirms statements made by lawyers specializing in IP that registering IP with local authorities is one of the most effective strategies that a company can pursue.³⁰ While the data presented in Figure 9: Best strategies for addressing IPR issues indicates that companies find nondisclosure agreements and contracts to be particularly effective, a review of available literature does not indicate the relative efficacy of this strategy compared to others.³¹

³⁰ Brandy Baker, "Protecting Your Intellectual Property in China," Presentation conducted during the Intellectual Property Protection in China Seminar, Department of Foreign Affairs, Trade and Development, February 28, 2014, Vancouver, British Columbia.

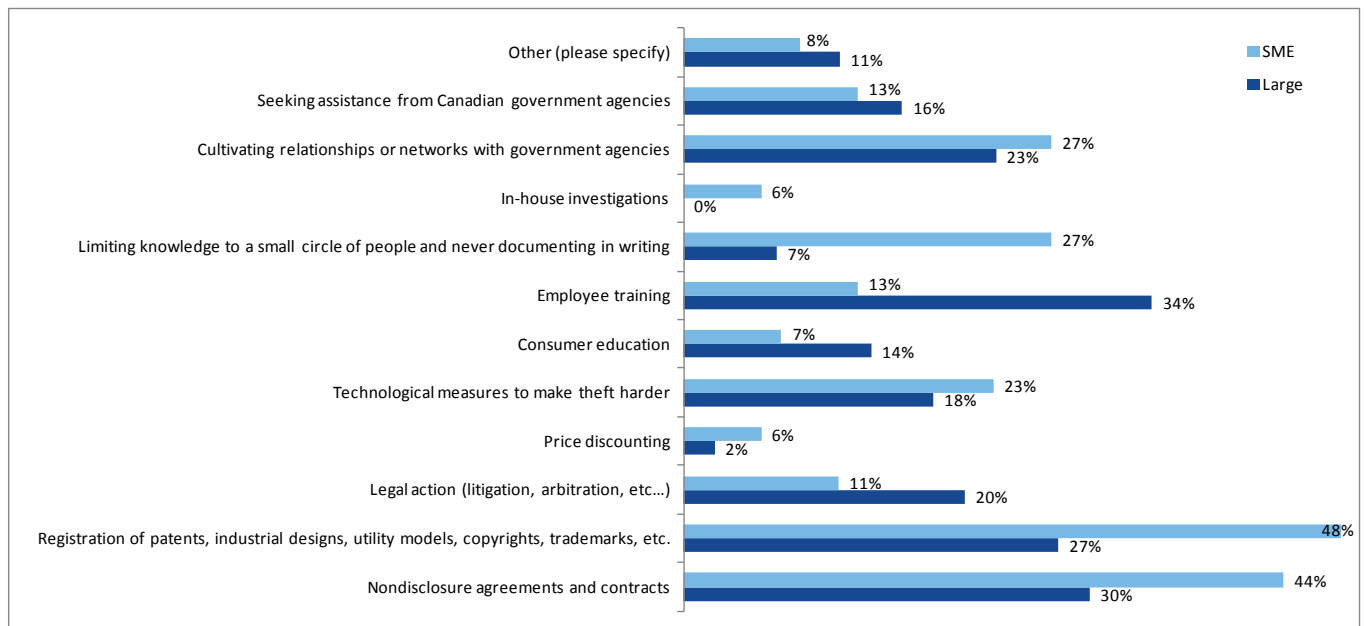
³¹ The use of other measures (for example, seeking assistance from Canadian government agencies or cultivating relation-

A further breakdown of strategies pursued according to company size illustrates additional significant findings (see Figure 10: IPR Protection Strategy by Company Size). While registering IP and signing non-disclosure agreements are popular strategies among both SMEs and large enterprises, the results show that large enterprises are more likely to engage in employee training as a strategy to discourage IPR infringement. While 34% of large enterprises adopt employee training as a strategy, only 13% of SMEs do so. On the other hand, SMEs are more likely to limit knowledge to a small group of people. Only 7% of large enterprises apply this strategy, while 27% of SMEs try to limit knowledge as a strategy for protecting IP. Because large enterprises employ more employees, it is logical to expect that limiting knowledge would present practical difficulties.

Policymakers should note that several of these strategies require involvement from either the Chinese or Canadian government. In helping firms register their IP in China, for example, the Canadian government could provide assistance in providing information on registering IP to companies that have little experience with IPR issues in China. The European Union, for example, already provides such services to EU SMEs.³² As many companies found cultivating relationships or networks with government agencies to be particularly effective, Canadian policymakers may wish to facilitate, where possible, the cultivation of such relationships between Canadian businesses and Chinese government agencies. While few companies indicated that seeking assistance from Canadian government agencies was an effective strategy relative to other adopted strategies, this may stem from unawareness of these agencies' ability or availability to help Canadian businesses. If Canadian policymakers wish to assist Canadian businesses with their IPR issues in China, these policymakers should ensure that Canadian businesses are aware that the Canadian government can be of assistance and that the Canadian government is also able to assist Canadian businesses.

ships or networks with Chinese government agencies) may also boost the general efficacy of IPR protection for Canadian firms. Because many firms responding to the 2014 survey are still relatively new to the Chinese market, having established their China operations within the past ten years, it is likely that many of these firms have not yet had the opportunity to experiment with different strategies. As noted in Report 1, the de facto power of government agencies can be of use to foreign companies when such a company establishes itself as an old friend of a local agency. Similarly, information fragmentation has also been shown to be effective in protecting IP as noted by Canadian practitioners and company representatives. So long as doing so remains cost-effective, Canadian firms would be wise to experiment with employing various strategies and remain flexible in implementing these strategies if one or two strategies do not effectively protect IPR.

³² See, for example, "China IPR SME HelpDesk" at <http://www.china-iprhelpdesk.eu/en>.

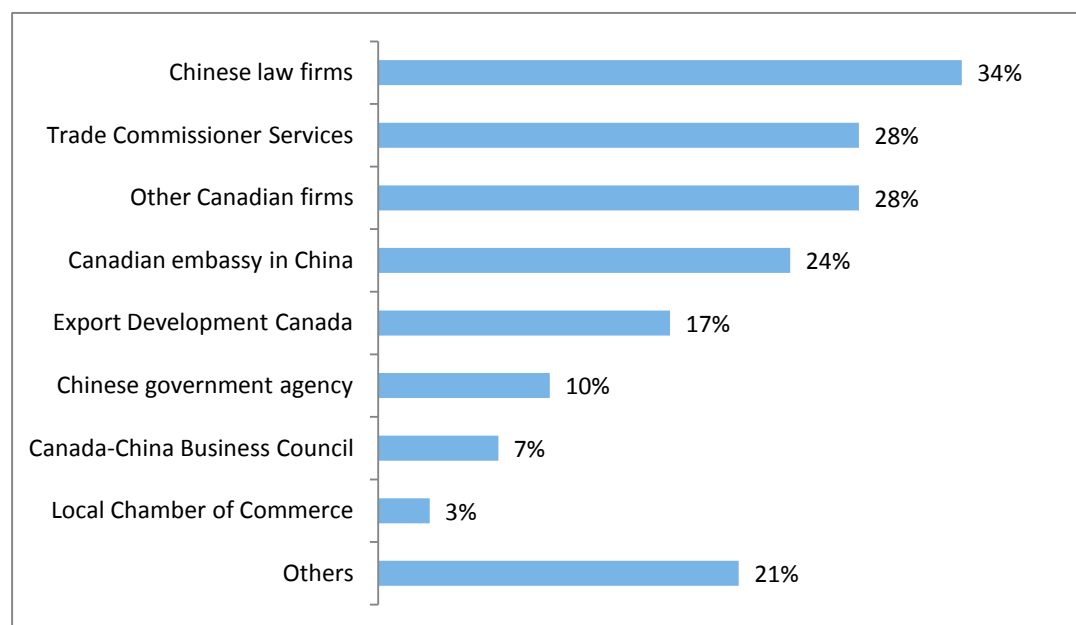
Figure 10: IPR Protection Strategy by Firm Size

n=115

Q24. In your firm's experience, which of the following strategies, if any, have been the most effective when addressing intellectual property rights in China? Please select all that apply.

Q4. How many people does your company employ globally?

Resources Consulted to Deal with IPR Infringement

Figure 11: Resources used to deal with infringement

n=29

Q23. What resources, if any, did you consult when dealing with intellectual property rights infringements in China? Please select all that apply.

Of the Canadian companies that consulted resources to deal with IPR infringement occurring in the past five years, more companies (34%) turned to Chinese law companies for assistance than any other resource. Canadian businesses also turned to other Canadian companies (28%) and Trade Commissioner Services (28%) for assistance.

Key Points: Strategies to Protect Intellectual Property

- Surveyed companies found that registration of IP was the most effective IPR protection strategy, followed closely by use of nondisclosure agreements and contracts.
- Large enterprises found registration of IP and nondisclosure agreements and contracts to be their most effective strategy, while SMEs found that employee training and nondisclosure agreements and contracts were the most effective IPR protection strategies.
- Companies consulted Chinese law firms more than any other resource to deal with IPR infringement.

D. IPR AS A CHALLENGE: THE IMPACT OF COMPANY LOCATION, SIZE, AND EXPERIENCE IN 2014

IPR as a Barrier by Company Location

Of 148 respondents, 94 (64%) indicated that they have business activities in Beijing, followed by 86 (58%) in Shanghai, 59 (40%) in Hong Kong, and 54 (36%) in Guangdong. These four regions represent the major locations of Canadian business activity in China, constituting 62% of the locations where Canadian business activities take place.³³ Respondents scored the extent that IPR challenges presented a barrier to doing business on a scale from one to seven, with one indicating a minor barrier and seven indicating a major barrier. Companies with operations in Shanghai noted that IPR was not as much of a barrier in Shanghai compared to Beijing, Hong Kong, and Guangdong, where IPR challenges presented a greater barrier to doing business. Companies with activities in these locations indicated similar scores for IPR challenges, ranging between 4.250 and 4.357. Interestingly, little variation across other variables (e.g. company size and location).

Figure 12: Mean Scores of IPR as a Barrier by Location

Location	Number of Companies	Mean Score of IPR as a Barrier
Shanghai	63	3.968
Beijing	70	4.357
Hong Kong	44	4.25
Guangdong	40	4.325

n=217

Q9. In which location(s) of China are your company's major business activities taking place? Please select all that apply.

Q27. When you think about laws and law enforcement, to what degree are each of the following an obstacle to doing business in China? Please rate each one on a 7-point scale where 1 means you think it is only a minor barrier, and 7 means you think it is a major barrier.

IPR as a Barrier by Company Size

Of the 129 Canadian companies that identified IPR as a barrier to doing business, 79 are small and medium enterprises (fewer than 500 employees) and 50 are large enterprises (more than 500 employees). A breakdown of these enterprises according to their perception of IPR as a barrier suggests that there is no direct relationship between company size and the perception of IPR as an obstacle. Similar numbers of SMEs (25%) and large enterprises (28%) perceive IPR as a minor barrier, while 54% of SMEs and 62% of large enterprises perceive IPR as a major barrier.

³³ Minor locations where Canadian businesses are active include Shandong (21 respondents, 14%), Tianjin (18 respondents, 12%), and Jiangsu (15 respondents, 10%).

Figure 13: Mean Scores of IPR as a Minor or Major Barrier by Company Size

Company Size	IPR as a Minor Barrier	IPR as a Major Barrier	Don't Know
Small and Medium Enterprises	25% (20)	54% (43)	20% (16)
Large Enterprises	28% (14)	62% (31)	10% (5)

n=129

Q4. How many people does your company employ globally?

Q27. When you think about laws and law enforcement, to what degree are each of the following an obstacle to doing business in China? Please rate each one on a 7-point scale where 1 means you think it is only a minor barrier, and 7 means you think it is a major barrier.

IPR as a Barrier by Extent of Experience in China

Canadian companies surveyed vary in the extent of their experience engaging China. The majority of Canadian companies engaging China are newcomers, with 51% of respondents indicating that they began doing business in China within the past ten years. Of 138 respondents indicating when they began engaging China, 100 ranked IPR as a challenge on a scale from one to seven. Companies with more experience in China tended to indicate that IP was less of a barrier to doing business in China than companies with less experience.

Figure 14: Mean Scores of IPR as a Barrier by Extent of Experience in China

Experience in China	Number of Companies	Mean Score of IPR as a Barrier
2010--2014	29% (29)	4.41
2000--2009	37% (37)	4.38
Pre--2000	34% (34)	4.06

n=100

Q7. What year did your company start doing business in/with China? (e.g. 2006)

Q27. When you think about laws and law enforcement, to what degree are each of the following an obstacle to doing business in China? Please rate each one on a 7-point scale where 1 means you think it is only a minor barrier, and 7 means you think it is a major barrier.

Key Points: IPR as a Challenge - The Impact of Company Locations, Size, and Experience in 2014

- Companies based in Shanghai generally reported that IPR was less of a barrier, while companies in Beijing, Hong Kong, and Guangdong indicated that IPR challenges presented more or less the same barrier in these locations.
- A breakdown of companies by size suggests that there is no direct relationship between company size and the perception of IPR as an obstacle.
- Companies with more experience in China generally indicated that IPR issues presented less of a barrier to doing business in China.

E. INTELLECTUAL PROPERTY AS A BARRIER FACING CANADIAN BUSINESSES ENGAGING CHINA

IPR Issues Compared with Other Challenges

Canadian businesses responding to the 2010 APF Canada survey, Canadian Businesses in China 2010: Survey of Constraints and Opportunities, ranked IPR as the eighth greatest challenge faced by Canadian businesses in China. They identified inconsistent regulatory interpretation as the greatest barrier encountered by Canadian businesses.³⁴ In 2012, respondents ranked IPR as the top barrier for Canadian companies engaging China.³⁵ Respondents ranked IPR fourth in the 2014 survey.³⁶ Although the 2010, 2012 and 2014 surveys used different rankings and survey methodologies, the survey results cumulatively suggest that although IPR has dropped in rank, it continues to present an important challenge to Canadian companies doing business in China.

Figure 15: 2012 Survey Results – Top Five Issues

2012 Rank	Issue	Mean (1-7)	% rated as major challenge (6 and 7)
1	Intellectual property rules and practices in China	4.93	51%
2	Inconsistent interpretation of regulations/laws in China	4.77	45%
3	Weak dispute settlement mechanism	4.55	41%
4	Lengthy/complicated certification	4.47	36%
5	Chinese tariffs and other border barriers	4.26	38%

³⁴ Please note that this section in the 2010 survey differed from the analogous sections in the 2012 and 2014 surveys. A greater number of questions were asked in the 2010 survey, covering a broader range of topics. Still, it is worth noting that inconsistent regulatory interpretation was placed as a top challenge across all surveys. The 2010 Survey asked “How significant are the following constraints?” in relation to specific categories (for example, competition and market conditions, infrastructure). Participants indicated whether each of 42 listed “constraints” qualified as “No Problem” (1), a “Problem” (2), or a “Major Problem” (3). For more detailed information on the data, see Section 4: Major Constraints Facing Canadian Businesses in China in the 2010 survey. Accessible online at: http://www.asiapacific.ca/sites/default/files/filefield/asia_pacific_foundation_survey_2010_fnl_english_web_0.pdf, 14-18.

³⁵ The 2012 survey asked “To what degree do you think each of the following issues is a major or minor barrier to your business in China, and something Canadian negotiators should pay particular attention to in negotiating any free trade agreement with China?” Participants rated each of 20 listed “issues” on a 7-point scale, with seven denoting a major barrier and one denoting a minor barrier. Participants were also invited to suggest additional barriers under “Other.” For more information, see Section 4: Major Constraints Facing Canadian Businesses in the China Market in the 2012 survey. Accessible online at: http://www.asiapacific.ca/sites/default/files/filefield/ca_business_in_china_2012_final.pdf, 1619.

³⁶ The 2014 survey asked “To what degree is each of the following an obstacle to doing business in China?” in relation to specific categories (tariffs and borders, regulations, laws and law enforcement) and also more generally. Participants rated each of 19 listed issues on a 7-point scale, with seven denoting a major barrier and one denoting a minor barrier. Participants were also invited to suggest additional barriers under “Other.” The 2014 survey results are included with this report.

Figure 16: 2014 Survey Results – Top Five Issues

2014 Rank	Issue	% rated as major	
		Mean (1-7)	challenge (6 and 7)
1	Inconsistent interpretation of regulations/laws in China	4.73	40%
2	Weak dispute settlement mechanism (inefficient legal system)	4.46	35%
3	Lengthy and complicated certification	4.46	32%
4	Intellectual property rules and practices in China	4.33	31%
5	Restrictions on currency conversion	4.28	28%

n= 131

Q27. When you think about laws and law enforcement, to what degree are each of the following an obstacle to doing business in China? Please rate each one on a 7-point scale where 1 means you think it is only a minor barrier, and 7 means you think it is a major barrier.

Analysis of the above data reveals a number of noteworthy trends relating to how specific issues have evolved from 2010 to 2014 in Canadian businesses' dealings with China.

First, inconsistent implementation, interpretation, and enforcement of laws and regulations remain highly problematic for a number of countries' businesses. "Inconsistent interpretation of regulations/laws in China" was cited as the top issue in 2010 and 2014 and the second most problematic issue in 2012 for Canadian businesses. This is consistent with a number of surveys of German, American, Swiss, and European Union companies. In 2010, American businesses cited "Inconsistent regulatory interpretation" as their top problem and European Union businesses cited "Discretionary enforcement of laws and regulations" as their top problem.³⁷ Interestingly, Canadian companies did not indicate that IPR issues were among their top five business challenges in 2010, but then indicated that IP rules and practices was their top business challenge in 2012. IPR issues were a top problem for German and EU companies in 2010, but by 2012 IP issues were no longer among the top five business issues for these company types. These shifts seem to indicate that the challenges posed by conducting business in China continue to change rapidly.

³⁷ Asia Pacific Foundation of Canada, "Canadian Businesses in China Survey 2012," http://www.asiapacific.ca/sites/default/files/filefield/ca_business_in_china_2012_final.pdf, 18.

Figure 17: Top Five Business Challenges for Canadian, US, British, German, and EU Companies³⁸

	2010	2012
Canadian Company	1. Inconsistent regulatory interpretation	1. Intellectual property rules and practices
	2. Pollution/Air quality	2. Inconsistent interpretation of regulations/laws
	3. Bureaucracy	3. Weak dispute settlement mechanism
	4. Enforcing contracts	4. Lengthy/complicated certification
	5. Transparency	5. Chinese tariffs and other border barriers
US Company	1. Inconsistent regulatory interpretation	1. Management-level human resources constraints
	2. Management-level human resources constraints	2. Inconsistent regulatory interpretation/Unclear laws
	3. Obtaining required licenses	3. Non-management level human resources constraints
	4. National protectionism	4. Obtaining required licenses
	5. Bureaucracy	5. Corruption
British Company	1. Retention of high qualified staff	1. Global economic slow down
	2. Availability of qualified staff	2. Increased Chinese competition
	3. Transparency of laws and regulations	3. Labor costs
	4. Legal and regulatory systems themselves	4. Inconsistent regulatory interpretation
	5. Staff remuneration/pay levels	5. Increased bureaucracy
German Company	1. Protection of intellectual property rights	1. Finding qualified staff
	2. Availability of qualified human resources	2. Increased labor costs
	3. Legal security & compliance with business terms	3. Retaining qualified staff
	4. Bureaucracy & authorities	4. Bureaucracy/Administration
	5. Corruption	5. Corruption
EU Company	1. Discretionary enforcement of laws and regulations	1. Unequal implementation of the law and the laws themselves
	2. Registration processes	2. Over-reliance upon fixed asset investment and exports
	3. IPR protection	3. Failing to move up the value chain
	4. Visa and work permit practice	4. Slow development of service industry
	5. Local implementation of national standards	5. Decline in labor supply

³⁸ Table adopted from Asia Pacific Foundation of Canada, "Canadian Businesses in China Survey 2012," http://www.asiapacific.ca/sites/default/files/filefield/ca_business_in_china_2012_final.pdf, 18.

Still, IPR issues continue to pose problems to foreign companies – their position relative to other challenges does not necessarily indicate that the challenges they pose have lessened. Many foreign companies still find that inadequate institutions exist to prevent IPR from being infringed or that insufficient damages will be awarded to sufficiently compensate for whatever expenses are incurred from infringement.³⁹ As noted in the American Chamber of Commerce’s 2013-2014 China Business Report, IPR infringement remains the seventh greatest concern for US businesses, with Rising Costs, Human Resources Constraints, and Domestic Competition as the top three challenges for US companies.⁴⁰ European businesses, similarly, have recently indicated that IPR protection is no longer as great of a concern as it was in the past relative to other concerns, citing the Chinese Economic Slowdown, Rising Labor Costs, and Attracting & Retaining Talent as the top business challenges of 2014.⁴¹ As a regulatory challenge as well, IPR no longer ranks among the top three challenges faced by EU companies, as indicated in the figure below.

Figure 18: Top Regulatory Challenges in China According to EU Businesses, 2005-2013⁴²

Rank of Obstacle	2005	2007	2009	2011	2013
1	Government regulation / transparency	Discretionary law enforcement	Discretionary law enforcement	Discretionary law enforcement	Unpredictable legislative environment
2	IPR protection	Registration processes	Registration processes	Lack of coordination among regulators	Discretionary law enforcement
3	Licenses / Quotas	Local implementation of national standards	IPR protection	Local implementation of national standards	Administrative issues

Canadian companies, however, continue to cite IPR and inconsistent interpretation of laws and regulations as major challenges to doing business with China.

In 2012 and 2014, the inconsistent interpretation of regulations/laws in China and weak dispute settlement mechanisms remained among Canadian companies’ top three problems cited. Interestingly, intellectual property rules and practices dropped from the top ranked challenge (mean: 4.93) in 2012 to the fourth most challenging problem (mean: 4.33) in 2014. In 2012, 51% of respondents indicated that IP presented a major challenge, while only 31% indicated this in 2014. Identification of “Inconsistent interpretation of regulations/laws” as a major challenge remained steady in the last two surveys: this challenge received a mean score of 4.77 in 2012 and 4.73 in 2014, becoming 2014’s top ranking challenge.

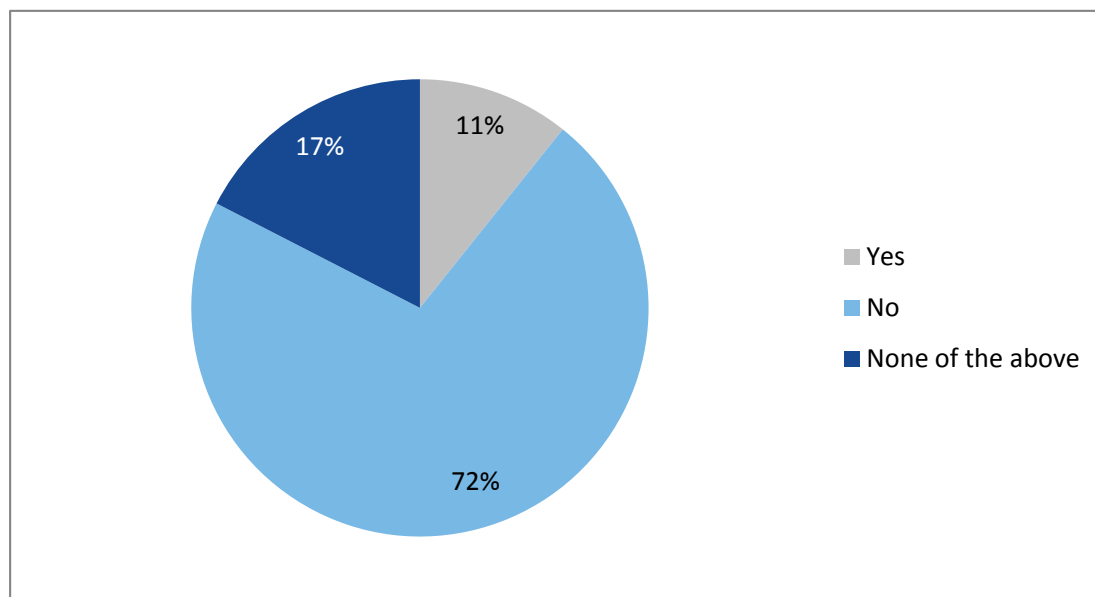
The mean score of each of the top five challenges shared between 2012 and 2014 (specifically, all challenges except “Chinese tariffs and other border barriers” and “Restrictions on currency conversion”) decreased from 2012 to 2014. Similarly, the percentage of respondents rating these issues as a major challenge (responding with a score of 6 or 7) also decreased in all shared categories from 2012 to 2014. Most notably, respondents ranking “IP rules and practices in China” as a major challenge dropped from 51% in 2012 to 31% in 2014.

³⁹ See Chun-Hsien Chen, “Explaining Different Enforcement Rates of Intellectual Property Protection in the United States, Taiwan, and the People’s Republic of China,” *Tulane Journal of Technology & Intellectual Property*, no. 10 (2011): 462.

⁴⁰ American Chamber of Commerce in Shanghai, “China Business Report 2013-2014,” <http://www.amcham-shanghai.org/ftpuploadfiles/Website/CBR/2013-2014-China-Business-Report.pdf>, 18.

⁴¹ European Union Chamber of Commerce in China, “European Business in China: Business Confidence Survey 2014,” <http://www.eubusiness.com/regions/china/confidence-14/>, 15.

⁴² *Ibid*, 31.

Figure 19: Companies that have experienced IPR violations attributable to Chinese entities or individuals

n=149

Q17. In the past five years, has your firm experienced any intellectual property rights violations attributable to Chinese entities or individuals?

When Canadian businesses were surveyed on whether they had encountered intellectual property rights violations by Chinese entities and individuals within the past five years, an absolute majority of 72% replied “no” to the question, while 11% claimed that they had encountered violations within the past five years. These results are surprising in light of data indicating that intellectual property rules and practices were ranked as one of the top obstacles to doing business in China (ranked as fourth with a mean of 4.33) in 2014. This disparity is especially striking considering the responses of the subset of respondents who had not encountered IPR violations attributed to Chinese entities within the past five years. Among this subset of respondents, 46% still considered China’s intellectual property rules and practices as a significant barrier to doing business (rank of 4, 5, 6, or 7).

Among respondents currently without businesses in China but interested in the market, the fear of IPR infringement is still considered as one of the top obstacles to developing their businesses in China (ranked fourth of twelve obstacles). The top-ranked obstacle within this category—“Difficulty finding the right Chinese partner”—also has indirect implications for companies seeking to protect their IPR (see Box 1). For SMEs with limited resources, experts have recommended the establishment of partnerships with local Chinese partners who can help their Canadian counterparts to enforce IPR protection.⁴³

⁴³ Victor Tsao, “Protecting Your IP”, Presentation conducted during the 2014 China Business Workshop, *Canada-China Business Council*, June 2, 2014, Surrey, British Columbia.

Box 1. Which of the following, if any, are obstacles to developing your business in China?
(Question addressed to companies without businesses in China but interested in the market)

Top Five Responses:

1. Difficulty finding the right Chinese partner
2. Language/cultural barriers (tied)
3. Regulatory barriers (tied)
4. Fear of intellectual property rights infringement
5. Inadequate market information
6. Not a priority for senior management

Fear of IPR infringement is reported to be slightly less of an obstacle to further expansion of businesses already established in China (see Box 2). This may be partially a function of a company's experience in China. Businesses already with a presence or established business ties in China are more familiar with IPR practices and available remedies in China, whereas companies interested in the market may lack in-depth knowledge of the market and familiarity with available solutions. Fears may be based on perception, media coverage, and anecdotes.

Box 2. Which of the following, if any, are obstacles to the expansion of your business in China?
(Question addressed to companies doing business in/with China)

Top Five Responses:

1. Regulatory barriers
2. Language/cultural barriers
3. Intensive competition
4. Difficulty finding the right Chinese partner
5. Fear of intellectual property rights infringement

Overall, the results seem to point to a disparity between actual violations encountered and the belief that IPR is a significant barrier to doing business in China. This disparity may be the result of two factors. First, there may be a discrepancy between reality based on actual experience and the perception of IPR as a barrier. As one Canadian practitioner noted, cases of companies successfully protecting their IP in China are not widely publicized, whereas negative experiences are often covered extensively by the media.⁴⁴ Second, because relevant survey questions focused on IPR violations during the past five years, it is possible that companies are learning how to protect their IP in China as they gain exposure to the market. Companies with more experience in China have had more time to develop IPR protection strategies (see section V: Foreign and Canadian Companies' Experience Protecting IP in China). For some companies, it is possible that instances of infringement occurred before this five-year period rather than within it.

⁴⁴ Ibid.

Key Points: Intellectual Property as a Barrier Facing Canadian Businesses Engaging China

- In 2012, Canadian companies indicated that IP rules and practices in China were their greatest barrier to doing business in China. In 2014, however, IP issues were the fourth greatest challenge, with inconsistent interpretation of regulations and laws in China posing the greatest barrier to doing business.
- For other foreign firms engaging China, IPR has generally not posed significant challenges, as IP did not factor into the top five business challenges of US, British, German, and EU companies engaging China in 2012.
- The majority of Canadian businesses did not experience IPR violations attributable to Chinese entities or individuals in 2014.
- In 2014, difficulty finding suitable Chinese partners, language and cultural barriers, and regulatory barriers posed the greatest obstacles to Canadian companies interested in entering China, but lacking established business there. For companies already doing business in China, regulatory barriers, language and cultural barriers, and intensive competition formed the greatest obstacles to expansion.

VII. ANALYSIS OF DATA IN CONSIDERATION OF THE LITERATURE SURVEY

Phase One of this project conducted an extensive survey of available literature to provide understanding of Canadian and foreign companies' experiences with IPR in China. The literature survey concluded that most Canadian businesses engaging China are SMEs, which was reflected in the survey, as the majority of respondents (61%) had less than 500 employees. The literature survey also noted that most Canadian companies are relatively new to China's market, with a majority of companies (29%) indicating that they had less than five years of experience in China.

Key differences also emerge between the analysis drawn from the survey data in this report and the conclusions reached in Phase One's survey of the literature. As noted in Subsection E of Section VI of this report, Canadian companies in 2012 found IPR to be their top challenge to doing business in China, while businesses from other countries generally did not find IPR to be as salient of an issue in their business engagements with China. As indicated in Figure 15 and Figure 16 of this report, IP rules and practices in China was rated as the fourth most pressing challenge in 2014, down from its place as the top issue for Canadian businesses in 2012. Several possible explanations may offer insight on this development. The report from Phase One notes that while IPR issues pose challenges for Canadian and foreign firms engaging China, China's legal and regulatory system to protect IPR has greatly improved in recent years.⁴⁵ Canadian firms in 2012 may have failed to appreciate these improvements, whether in practice or perception, instead recognizing these improvements in IPR regulation in 2014.

Similarly, Canadian practitioners noted in Phase One's report that IPR challenges Canadian companies encounter in China are not different from experiences of other foreign companies, yet differences in perception, explained by relative lack of experience and company size, may explain why Canadian companies cite IPR as a challenge to doing business in China more than other foreign companies engaging China.⁴⁶ Indeed, if 42% of companies had five years or less of experience in dealing with China in 2014, then these companies were likely to be even less experienced in their dealings with China in 2012. The experience gained by Canadian companies that have spent more time in China in 2014 rather than 2012 would also explain why Canadian companies found IP rules and practices, inconsistent interpretation of regulations and laws in China, weak dispute settlement mechanisms, and lengthy/complicated certification to all be less problematic in 2014 compared to 2012 (compare Figure and Figure 16). With more experience, Canadian companies have probably become more confident in dealing with China's IPR regime and other business challenges.

The literature survey from Phase One suggested that SMEs typically do not have the same resources as larger companies (e.g. in-house legal counsel), and are consequently less able to contend with IPR challenges. Figure 13 of this report, which explores perception of IPR as a barrier in relation to company size, shows that there is no direct connection between company size and perception of IPR as a barrier, challenging the suggestion made in the literature survey.

Finally, policymakers should note that Canadian companies that have not yet established businesses in China may indeed slightly skew data on the extent to which IPR poses a barrier to conducting business in China. In the 2012 APF Canada Survey on Canadian businesses in China, 20% of respondents had no current business with China,

⁴⁵ See Asia Pacific Foundation of Canada, "Intellectual Property Rights Challenges Facing Foreign and Canadian Companies in China: A Survey of Literature," 7-8.

⁴⁶ Ibid, 10.

but were interested in the market.⁴⁷ In Box 1 and Box 2 of this report, Canadian companies that did not have any businesses established in the market but were interested in engaging China found that fear of IPR infringement was their fourth greatest concern, while companies already established in China found fear of IPR infringement to be their fifth greatest concern. While these differences may seem slight, they reflect statements made by practitioners in the literature survey of Phase One, which indicated that representatives of Canadian businesses often perceive IPR challenges to be greater than they actually are in practice.⁴⁸ Policymakers should consider the validity of concerns of companies lacking experience in China versus those with established businesses in China to determine whether perception of barriers or actual experiences with barriers to business are influencing business behavior.

⁴⁷ See Asia Pacific Foundation of Canada, "Canadian Businesses in China Survey 2012," http://www.asiapacific.ca/sites/default/files/filefield/ca_business_in_china_2012_final.pdf, 8.

⁴⁸ Asia Pacific Foundation of Canada, "Intellectual Property Rights Challenges Facing Foreign and Canadian Companies in China: A Survey of Literature," 10-11.

VIII. CONCLUSION

The challenge of protecting intellectual property rights remains a significant barrier for Canadian businesses already present in China and companies contemplating engaging China. Phase One of this study, which draws from literature, interviews, and survey data, highlights how Canadian businesses and foreign companies have coped with IPR challenges in China.

Canadian companies indicated in 2012 that IPR issues were their top challenge to doing business in China, while in 2014 IPR issues were no longer as great a concern for Canadian businesses relative to other challenges.⁴⁹ Overall, survey respondents indicated that a variety of strategies to protect IPR have proven useful. China's legal regime to protect and enforce IPR has improved substantially in past years, and recent reports of foreign companies' favourable experiences in protecting their IP in China suggest that China's reputation for failing to protect foreign companies' IP may change.

Still, China's IP rules and practices present significant barriers to Canadian companies and foreign companies alike. Relative to the small number of publicized IPR success stories, many instances of IP infringement go unreported, undetected or unpublicized, and actual expenses incurred from such infringement are often difficult to calculate and to recover in court.

Canadian companies engaging China should consider that their intellectual property rights are exposed to significant risk in China, and that successfully protecting IPR in China will very likely require Canadian companies to develop and employ IPR protection strategies differing from those they use in Canada or in other jurisdictions. Successful development of these strategies to meet the idiosyncratic needs of individual businesses requires knowledge of the resources and methods available to protect IP, and experimentation and research to determine what combination of strategies best meets a company's needs. Given the importance of IP to Canadian companies with existing ties to China and companies interested in the market, Canadian businesses should weigh their IPR protection options carefully before entering China or pursuing further expansion in China.

Analysis of China's IPR regime must also highlight the reality that the Chinese political, legal and regulatory environments are fragmented in more ways than most foreign actors can imagine or comprehend. Local politics and courts can affect implementation of IP policy as much as central government directives. IP law is enforced with varying degrees of success depending on location and the dependability of local actors. Rather than perceiving China as a monolithic entity, stakeholders should note that government entities in some areas in China will be able to provide better protection for IPR than similar entities in other locations.

Given the diversity of companies' IPR needs and the means of protecting IPR throughout China, no single success story will provide a prescriptive guide for Canadian companies engaging China. A company's ability to protect its IP depends on factors such as its size, products and services, internal policies, previous experience, and objectives for engaging China; its industry sector; and other considerations.

Literature on Canadian and foreign companies' experience with IPR in China provides a general understanding of the challenges IPR issues in China pose to foreign companies. This survey provides greater, more up-to-date context on IPR issues Canadian companies face. Yet neither Phase One nor Phase Two, alone or in conjunction, can provide a general remedy to aid all Canadian companies with their IPR issues in China. Generally, IPR seems to increasingly pose less of a problem to Canadian companies as these companies gain more experience in dealing

⁴⁹ Asia Pacific Foundation of Canada, "Canadian Businesses in China Survey 2012," http://www.asiapacific.ca/sites/default/files/filefield/ca_business_in_china_2012_final.pdf, 18.

with China's legal and regulatory framework on IPR, and as China's IPR laws and regulations continue to improve. If policymakers find it necessary to provide aid to help protect Canadian businesses' IPR in China, then policymakers should draw on the experiences of companies discussed in this project while also identifying the idiosyncratic needs of each business.

As this research indicates, policymakers who are designing strategies to help Canadian companies with their IPR issues should draw on the lessons learned from the private sector and recognize that no single policy will assist all Canadian businesses. Rather, a group of measures adapted to the size, nature, and experience of companies operating in China should be adopted.
