



## INTELLECTUAL PROPERTY

# INTELLECTUAL PROPERTY IN CHINA

The levels of counterfeiting in China keep on growing and the production, distribution and sale of counterfeit products represents a colossal industry which is becoming increasingly sophisticated year after year. Yet, despite all this, it goes largely unpunished.

Foreign thinking about intellectual property in China is traditional and undoubtedly linked to the ideas of infringement and a lack of regulation. Firstly, the levels of counterfeiting in China keep on growing and the production, distribution and sale of counterfeit products represents a colossal industry which is becoming increasingly sophisticated year after year. Yet, despite all this, it goes largely unpunished. Secondly, the mentality that although copying is not right, it is not a really serious problem seems to have taken root in China. In fact, it is well known that over recent years China has seen strong economic growth and, in this context it has happened to become far easier for those involved in this economic development “to copy their neighbour’s idea”...

However, since the 1980s and, above all, since its entry into the World Trade Organization in 2001, China has been intensively developing the regulation of intellectual property, both on a legislative and an institutional level, as we will see in more detail below. It is highly

probable that this development, which has intensified over recent decades, has arisen from the need felt by the Chinese authorities to be a player in the global capitalist economy.

In parallel with this rapid growth in regulation of intellectual property in China, it is interesting to note that the Chinese legal system is unique in the world, with its remote origins in the philosophy of Confucius and, more recently, mixed with influences from Japanese and German law. There is a complex mixture of different branches of the law – civil, criminal and administrative – and the particular Chinese approach of “one country, two systems” that results from the autonomy of the legal systems in the special administrative regions of Hong Kong and Macao, which also means that laws and the way of legislating in China, are at the very least, one of a kind.

1) On average, more than 20% of all products sold in the Chinese market are counterfeit. See Quarles & Brady LLP, China Law Update, September 2009, available at <http://www.quarles.com/china-law-update-09-11-2009/>. A considerable proportion of counterfeit products in China are for domestic brands such as the beer “Tsingtao”, and they frequently represent a threat in terms of public health. HAROLD THIBAUT, “La longue marche de la Chine de la contrefaçon à l’innovation”, *Le Monde*, issues of 2 October 2012, “éco&entreprise” section, p. 4.

2) For example, according to a study by the United States International Trade Commission entitled “China: Effects of Intellectual Property Infringement and indigenous Innovation Policies on the U.S. Economy” and published in May 2011 (available at <http://www.usitc.gov/publications/332/pub4226.pdf>) it is estimated that 79% of the software installed on Chinese computers in 2009 was not purchased.

3) According to European Union statistics, in 2011, of the 114.7 million Chinese articles seized by European customs, only 12.5 % of the perpetrators were brought to justice. In the *Le Monde* issue of 2 October 2012, “éco&entreprise” section p. 5.

4) EMMANUEL MERIL, interview with the newspaper *Le Monde*, issue of 2 October 2012, “éco&entreprise” section, p. 4.

5) Chinese Intellectual Property and Technology Laws, edited by Rohan Kariyawan, Edward Elgar, 2011, p. 1.

China has adopted a national strategy of investing in development based on “innovation” rather than “imitation”, in a clear demonstration that China no longer wants to be the cheap “workshop” for revolutionary products (such as the iPod or the iPad).

## THE MEDIUM TO LONG TERM PLAN FOR SCIENTIFIC AND TECHNOLOGICAL DEVELOPMENT (2006)

In 2006, the Chinese Government announced the entry into force of its Medium to Long Term Plan for Scientific and Technological Development to be implemented over the next 15 years. In general terms, the plan proposes that the total cost of research and development should reach 2.5% of the Chinese GDP and establishes objectives, to be achieved by 2020, in the context of the creation and fostering of intellectual property, specifically in the areas of trademarks and patents.

The guidelines for this programme, presented by the Chinese Government in February 2006, establish auspicious targets including:

- The hope that in 2020, progress in science and technology will contribute at least 60% to the development of the country;
- China’s external dependence in respect of technology should fall to a value of around 30% or lower;
- The number of patents granted to Chinese companies or citizens and the

introduction of the respective academic studies should be classified among the top 5 in the world;

■ In 2020, China should have developed a set of cutting edge technologies in sectors such as biology, the information industry or advanced technology for product manufacturing;

■ During the implementation of the Plan, China will develop a national system for intellectual property, creating an environment of respect for intellectual property rights, awakening the conscience of the population in general to the importance of its protection.

Furthermore, in accordance with the above guidelines, in the in the first 15 years that the Programme is in force, China will give priority to technological development in 11 main sectors such as energies and water resources, as a way of resolving certain problems that are strangling the social and economic development of the country. Thus, it is interesting to see the concern of the Chinese Government in associating scientific and technological progress with socio-economic development or, at least, its awareness of the need to promote this concerted growth.

Finally, with respect to the Medium to Long Term Plan, it is clear that the set of measures it proposes have the promotion of innovation as their essential objective. These policies called “indigenous innovation - the 2006 Plan is responsible for the introduction of the first of these - have raised a great deal of interest and some controversy: by means of these and other measures referred to below, China has adopted a national strategy of investing in development based on “innovation” rather than “imitation”, in a clear demonstration that China no longer wants to be the cheap “workshop” for revolutionary products (such as the iPod or the iPad) that were designed in foreign countries .

This policy of innovation, even though it is often seen as being a bold one, raises many questions that are analysed below, particularly in the area of patents as these are the main tools for the protection of innovation.

## THE NATIONAL INTELLECTUAL PROPERTY STRATEGY (2008)

If doubts remained as to the importance of intellectual property to the full implementation of the objectives of the Plan for Scientific and Technological Development, they would have disappeared two years later with the presentation of the National Intellectual Property Strategy, which essentially calls for exponential growth in protection, guarantees and execution of intellectual property rights, an objective which must also be met in full by 2020.

The main indicators used in the Strategy in respect of gauging the degree of development and success reached are:

- 1) The annual number of invention patents granted to Chinese applicants;
- 2) The number of applications for foreign patents presented by applicants that have Chinese nationality; and
- 3) The proportion of the GDP that the value of the essential copyright sectors represents.

The Strategy indicates specific “tasks” to be carried out in the various relevant areas of intellectual property including,

### 1. Patents

■ Create specific plans bearing in mind the strategic needs of the country in sectors such as biology, medicine, information, new materials, advanced manufacturing techniques, new energies, oceanography, environmental protection, modern agriculture or modern transport, so as to obtain a group of patents in these

6) Information available at the official website of the Chinese Government, [http://www.gov.cn/english/2006-02/09/content\\_184426.htm](http://www.gov.cn/english/2006-02/09/content_184426.htm).

7) “When Innovation, Too, Is Made in China”, The New York Times, article by Steve Lohr, 1 January 2011, available at [http://www.nytimes.com/2011/01/02/business/02unboxed.html?\\_r=1&pagewanted=print&](http://www.nytimes.com/2011/01/02/business/02unboxed.html?_r=1&pagewanted=print&).

8) Information available at the official site of the Chinese Government, [http://english.gov.cn/2008-06/21/content\\_1023471.htm](http://english.gov.cn/2008-06/21/content_1023471.htm).

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Promote a balance between the needs to protect patents, on the one hand, and the public interest, on the other, specifically by means of the correct use of the exceptional rules, to ensure that the public is able to obtain the necessary products and services in time and in sufficient quantity, if there is a situation of general crisis.

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technological areas that are essential to support the development of the new Chinese technological industries;

- Improve the process for examining patents, specifically their quality in order, above all, to avoid irregular applications for patent registration;

- Promote a balance between the needs to protect patents, on the one hand, and the public interest, on the other, specifically by means of the correct use of the exceptional rules, to ensure that the public is able to obtain the necessary products and services in time and in sufficient quantity, if there is a situation of general crisis.

## 2. Trademarks

- Adopt measures to fight aggressively against counterfeiting and other infringements, so as to maintain loyal and fair competition in the market;

- Support companies and encourage them to use their own trademarks, to improve the reputation of these trademarks and to apply for international registration, so as to make it easier for China to participate in the international market;

- Promote the full use of trademarks in the industrialisation of agriculture;

- As mentioned for patents, priority is given to the efficiency of the examination process, alerting to the need to shorten its duration and increase the quality of the process, by encouraging respect for the rules of the market.

## 3. Copyright

- There is a clear concern to support and foster the creation of works that display specific Chinese characteristics;

- Promote the role of the organisations for collective management of copyright, of industrial associations, agencies and other intermediary organisations, in the process of commercialisation of copyright;

- Fight piracy energetically with a special focus on large scale production and the sale and distribution of pirated products;

- Adopt measures that make it possible to face the challenges that the development of the Internet and other technologies represent for the protection of copyright and consider the need, on the one hand, to protect copyright and, on the other, to publicise the information in general.

## 4. Trade Secrecy

- Severe punishment under the law for the theft of trade secrets; consideration of the need to protect trade secrets, on the one hand, and freedom of choice of profession, on the other.

## 5. Intellectual property in Specific Areas

- Develop a system of protection of geographic indications;

- Strengthen the protection, development and use of genetic resource (genome) systems, so as to avoid their loss and consider the interests of the need to protect such resources, on the one hand, and to develop and use them, on the other;

- Establish a robust system of protection of the knowledge of the traditions, supporting their collection and transfer, so as to foster the development of the same;

## 6. Intellectual property Rights related to National Defence

- The Strategy reveals a particular concern with the protection of any intellectual rights that may be relevant to national defence by promoting the establishment of a mechanism for administration and coordination of all intellectual property in this situation, with a particular focus on the resolution of essential questions such as the ownership and distribution of the resources, the compensation due for the actual use and exploitation of technologies in case of emergency.

## THE NATIONAL PATENT DEVELOPMENT STRATEGY (2011-2020)

Presented in November 2010, this strategy was conceived precisely to implement the National Intellectual Property Strategy, fostering Chinese capacity to create, use, protect and administer patents.

Despite the fact that the Strategy set out a plan of action to be implemented by 2020, it also establishes a set of targets to be reached within a shorter time period of 5 years, by 2015:

- The system for patents will be developed on the basis of the said policy of "innovation": a mechanism will be established for the administration of patents "with Chinese characteristics" that is capable of responding to the demands of economic and social development;

- The capacity to create patents will be developed to a great extent so that the annual number of applications for invention patents, utility models and designs reaches 2 million;

9) Available at <http://graphics8.nytimes.com/packages/pdf/business/SIPONatPatentDevStrategy.pdf>.

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- The capacity to examine and approve patents will be strengthened: the average period to examine an invention patent will be reduced to around 22 months and in the case of utility model patents or designs to around 3 months;

- The protection of patents will be developed specifically by means of training focused on this issue and by boosting the efficiency of the fight against infringements;

- The level of service for patents will improve significantly by means of the establishment of a system of information on patents in which public and commercial services will provide mutual support to be developed jointly;

- The training of "talents" for the administration of patents and application of the law in order to respond to the demands of socioeconomic development and patents in China;

- Progress will be made in making the public in general aware of the importance of patents, a culture of intellectual property will be introduced which respects knowledge, advocates innovation and puts the emphasis on honesty and respect for the law;

- International cooperation and exchange in the area of patents will be developed so as to create an external environment that is favourable to the development of patents in China.

This measures have already produced significant results, in the areas of (i) patents (the number of applications for registration has increased exponentially), (ii) trademarks (with an increase in the number of registrations but also the number of situations in which the infringements of the rights conferred by the trademark were actually investigated and dealt with) and (iii) copyright (in 2011, the new Copyright Law was published, and it is expected to have a significant impact, particularly in terms of the fight against piracy).

9) Available at <http://graphics8.nytimes.com/packages/pdf/business/SIPONatPatentDevStrategy.pdf>.

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