



INTELLECTUAL PROPERTY

INTELLECTUAL PROPERTY IN CHINA - THE RESULTS

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INCREASE IN THE REGISTRATION OF PATENTS, TRADEMARKS AND PROPERTY PROTECTED BY COPYRIGHT

The various plans and the range of measures included in them that have been described have produced practical results, particularly an increase in the applications for registration of patents, trademarks and protection by copyright, specifically for property such as software.

In terms of applications for **patents registered** in 2011, China came in first place above the USA and Japan.

Indeed, patent registration applications in China demonstrated rapid growth with a total of 1 633 000 applications. Furthermore, processes of examination and conclusion of patents by the SIPO (State Intellectual Property Office) maintained constant growth: 271 202 invention patents, 443 676 utility model patents and 502 828 patents for industrial designs were subjected to substantive examination, with an annual growth of 14.3 %, 14.6% and 14.2%, respectively.

At the same time, in 2011 the Chinese administrative authorities dealt with a total of 3017 cases on patents, with an annual growth of 65.5%.

SIPO statistics reveal that there were 2 740 000 patents valid in 2012 and this represents growth of 23.6% in relation to the previous year and includes 697 000 new inventions, with a growth of 23.4% with reference to 2011, 1 121 000 valid utility models and 922,000 valid designs. 351 000 inventions came out of continental China and this represent 50.4% of the total. In 2012, there were 2.37 patents for every 10 000 inhabitants of continental China .

For trademarks, 2011 saw a total of 1 416 785 applications for registration in China representing growth of 32.14% on an annual basis. This volume of registration applications was no less than double the level for 2008 and this led to China being classified in first place in the world for the 10th consecutive year. In 2011 there were 42 270 applications for registration of international trademarks of which 2149 were presented by China, placing it seventh in the world in the area.

1) China's Intellectual Property Protection in 2011, available at http://www.cipnews.com.cn/showArticle_syzk.asp?ArticleId=23701 and International IP Law Firms – Connecting International IP Firms with China, Hurrymedia, 2012 edition, pp. 74 a 76
2) Beijing promises to increase this number to 3.3 patents for every 10 000 by 2016. In Le Monde, 2 October 2012 issue, "éco&entreprise" section, p. 5.

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In addition to this, in 2011 the administration organisations for commerce and industry (AICs), investigated and settled 79 021 cases of infringements of registered trademarks demonstrating an annual growth of 41.02%.

As to the subject of copyright, it is worth noting the revision of the Copyright Law in 2011, after 20 years of pressure from all sectors of society for it to be amended in order to adapt it to the economic and social transformation and the growing competition on the area of intellectual property. This revision has revealed itself to be particularly auspicious and so there is great expectation as to its results. The three main reasons singled out as justification for the need for this revision were (1) the limitations of the law arising from the fact that it was published on the context of a planned economy; (2) the fact that the system for copyright that was in force showed little capacity to adapt to the development of new technologies and the widespread use of the Internet and, finally, (3) the fact that China is facing the continuous evolution of the rules of international protection of copyright in parallel with the expansion of economic globalisation.

In this respect, we should also note that in 2011 the volume of copyrighted software has reached the total of 109 300, which represents annual growth of 33.4%.

THE GROWING NUMBER OF COURT CASES AND DECISIONS

The various plans and all the measures included in them, which have been described, have produced practical results, particularly and perhaps essentially, an exponential increase in the number of intellectual property disputes brought before the Chinese courts .

In fact, according to the president of the Supreme People's Court himself, the judgment of intellectual property cases is increasingly important as the economy grows and society modernises.

Although this reality is not yet fully recognised by foreign academics, the truth is that, according to the official data of the Supreme People's Court, the panorama of intellectual property in Chinese courts at the end of 2011, was very positive:

The local courts accepted 59 612 new cases, 38.86% more than in 2010 and 5707 criminal case related to intellectual property, 42.96% more than in 2010. The number of complex cases and new cases also increased as did cases involving foreign parties. The number of situations in which the legal rules revealed themselves to be too generic also increased and, to this extent, the Chinese courts had no choice other than not to determine the law, defining its limits.

The stimulus to "innovation" mentioned above has led to a growing demand to protect the innovations of the respective owners and this, in turn, has resulted in an increase in the number of cases on **patents**. The increase in the presence of

foreign parties involved in disputes, trials and judgments on patents has attracted more international attention.

Indeed, more than just settling disputes, the courts have demonstrated that they have an essential role in solidifying and determining the law: in reality, when it comes to patents, the Supreme People's Court has issued a set of rules and guidelines for the implementation of the 2008 Patents Law. These rules determine, for example, the way in which the losses suffered by the injured party (and, in particular, the losses resulting from the infringement of the rights of the holder of a patent), material which is not addressed in the said law.

At the same time, as a result of the growing awareness on the part of companies of the need to create and protect their own trademarks, yet another of the measures included in the plans referred to above, the number of cases on the attribution and validation of **trademarks** has increased considerably.

Disputes related to **copyright** have also increased continually as a result of the flourishing of creative industries. Indeed, in 2011 cases on copyright represented half the total volume of cases related to intellectual property and cases related to the Internet are the most prominent.

As regards unfair competition, the application of the general principles contained in the "Anti-Unfair Competition Law" has increased and behaviour that was previously accepted as lawful has begun to be challenged with the entry into force of the "Anti-Monopoly Law". The courts have even accepted "test cases", in which the proceedings were issued not to decide on real private interests but rather to test or challenge the limits of the law. These cases have received a great deal of attention from the Chinese public.

3) Case law on intellectual property issues in Chinese courts is available at www.lawinfochina.com, a site with translations into English of laws, case law and other Chinese legal information.

4) White paper on the protection of intellectual property by the Chinese courts in 2011, 20 April 2012, available at <http://www.lawinfochina.com/Display.aspx?id=90&lib=dbref&subject=1&keyTitle=chinese courts&keyCTitle=>

5) "Quantitative studies on the most recent case of infringements of copyright, trademarks and patents reveal that China has turned into a litigious society and that there are more trends in intellectual property rights have not yet been recognised in academic literature or in the popular press", XUANG-THAO NGUYEN, "The China We Hardly Know: Revealing the New China's Intellectual Property Regime", Saint Louis University Law Journal, p. 1, available at http://slu.edu/Documents/law/Law%20Journal/Archives/Nguyen_Article.pdf. (free translation).

6) White paper on the protection of intellectual property by the Chinese courts in 2011, 20 April 2012, op. cit.

7) Chinese Intellectual Property and Technology Laws, op. cit. pp. 3-4.

The Chinese courts have demonstrated a reluctance to grant interim injunctions and instead tend to order payment of compensation. This makes China into an unattractive forum for giant international patent holders who use interim injunctions as a means of getting money from companies that manufacture their products.

Following a principle of "Mediation as a Priority and Combination of Mediation and Judgment" in the context of dispute resolution, the courts have tried to consider these two factors and have conceived a dispute resolution mechanism that combines both in and out of court processes. They have promoted "Big Mediation" (from the Chinese word *tiaojie*) which includes "mediation of the people", administrative mediation and judicial mediation.

In fact, mediation seems to be a very effective tool in the resolution of disputes in China: in 2011, 72.72% of the cases related to aspects of intellectual property before the first instance courts were withdrawn after mediation at a rate 4.13% higher than in 2010.

Despite this extremely positive situation for intellectual property in the Chinese legal system, some academic writers have noted a flagrant absence of foreign holders of intellectual property rights as litigants before the Chinese courts.

This absence is perhaps even more intriguing if we remember that foreign holders of intellectual property have systematically criticised the infringement of these rights that occur in China.

Xuang-Thao Nguyen suggests that this phenomenon may be explained by the already long-standing and persistent assumptions in relation to Chinese intellectual property piracy, and it is these assumptions that prevent the international community, above all the western world and the United States in particular, from recognising the recent drastic changes that have taken place in China in respect of the enforcement by the courts of intellectual property rights.

There are also academic writers who note, with some surprise, the paradox of the absence of litigation in China over patents related to smartphones, in contradiction with what happens in the rest of the world, when that country is, apparently, an ideal battlefield in this area given the size of the Chinese market (probably the largest in the world) and its potential in the field of this type of technology.

Singled out as the possible causes of this phenomenon are the still relatively underdeveloped character of the Chinese patents system, only established in around 1985; lack of trust or lack of familiarity

that international companies feel in relation to the China's legal system, also because the Chinese courts have demonstrated a reluctance to grant interim injunctions and instead tend to order payment of compensation. This makes China into an unattractive forum for giant international patent holders who use interim injunctions as a means of getting money from companies that manufacture their products. For some countries, another disincentive to bringing legal proceedings in China may be the threat of becoming the target of other actions in foreign countries. Indeed, as some recent cases on patents related to mobile phones have demonstrated, when a company that is well-positioned in the market is confronted with legal proceedings, it frequently responds by bringing an action in another jurisdiction and this situation is particularly tricky for Chinese companies which, in the main, have limited patent portfolios.

However, the same academic writers predict that the reasons for this "inactivity" may not last much longer bearing in mind that, with the recent evolution, Chinese companies are increasingly becoming tough competitors for the installed patent actors. Indeed, the explosion of the number of patents being registered in China and in the applications for registration of foreign patents undertaken by Chinese companies may mean that this country is "arming for war".

8) XUANG-THAO NGUYEN, "The China We Hardly Know: Revealing the New China's Intellectual Property Regime", Saint Louis University Law Journal, available at http://slu.edu/Documents/Law/Law%20Journal/Archives/Nguyen_Article.pdf, p. 1.

9) *Id.*, p. 6

10) NICHOLAS FOX, WILLIAM CORBETT (Simmons & Simmons LLP) and SIMON XU (Fangda Partners), "China: the next front in global patent wars?" Intellectual Property Magazine, March 2012, pp. 23 and 24.

11) *Ibid.*

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"Portuguese Law Firm of the Year"
Chambers European Excellence Awards, 2009, 2012



"Iberian Law Firm of the Year"
The Lawyer European Awards, 2012



"6th Most Innovative Law Firm in
Continental Europe"
Financial Times - Innovative Lawyers Awards, 2011, 2012

