

January 2012

China's Current Intellectual Property Plan, Policies & Practices

Hope Shimabuku

Mark Cohen

Recommended Citation

Hope Shimabuku & Mark Cohen, *China's Current Intellectual Property Plan, Policies & Practices*, 15 SMU SCI. & TECH. L. REV. 17 (2012)

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Science and Technology Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

China's Current Intellectual Property Plan, Policies & Practices

Moderator:

Hope Shimabuku, Research in Motion (RIM)

Speaker:

Mark Cohen

*Visiting Professor Fordham Law School;
Former Director, International Intellectual Property
at Microsoft Corporation;
Senior Intellectual Property Attaché at the U.S. Embassy in Beijing*

INTRODUCTION BY PROFESSOR XUAN-THAO NGUYEN, SMU DEDMAN SCHOOL OF LAW:

PROFESSOR NGUYEN: Good morning. Welcome to SMU Dedman School of Law. The law school and the Center for American International Law are the proud co-organizers for this symposium.

Why did we decide to focus on intellectual property (IP) in China now? As a law professor in the United States, I have been frustrated for so many years by the media failing to report major changes in China with respect to intellectual-property innovations and policies. The reports that I have seen over the years have mainly focused on the negative aspects of China. I decided that it is time to change that with a symposium that looks to both the present and the future.

Today you will hear and see quantitative data about IP litigation in China that will surprise you. You will hear about specialized intellectual-property departments in the Chinese court system—from the local level to the Supreme Court. You will also hear about the speed of litigation and disposition of Chinese IP cases, and it will surprise you.

But for me, as a law professor, the quantitative numbers are not enough. I prefer to look at the qualitative information as well. For the past 20 years, I have been reading China's court decisions, which you can now view online at www.ChinaLawInfo.com. From these decisions, I have learned that there are major changes happening. You can see from these decisions that Chinese individuals and companies highly value intellectual property, and that they use the judicial process to adjudicate their rights.

There is something else fascinating: in China, when you bring IP litigation, in addition to damages and injunctions, you can get a court-ordered apology meant to eliminate the ill effects of infringement.¹ I went through

-
1. Remedies in Chinese intellectual-property cases include injunctions, compensatory damages, statutory damages or defendant's profit, reasonable-cost award, and court-ordered apology. PETER GANEA & THOMAS PATTLACH, *INTELLECTUAL PROPERTY LAW IN CHINA* 311-16 (Christopher Heath ed., 2005); *see also* Copyright Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, effective June 1, 1991) (amended 2001) *LAWINFOCHINA available at* <http://english.sipo.gov.cn/laws/>

several public apologies in Chinese daily newspapers with a student assistant who translated them into English to show you the following examples.² As you can see from the examples below, the apologies usually follow a formula where the defendant admits the wrong-doing, admits that the plaintiff owns the intellectual property in question, and finally apologizes and promises not to infringe on intellectual property again. The following apology was published by *Xinhou Daily* in relation to an international patent infringement:

We copied, produced and sold the patented products . . . which were invented by Mr. Shen Cunzheng. These acts have been determined by Nanjing Intermediate People's Court as infringement on his patent rights. Thus, we follow the court's order to stop these infringing acts immediately, compensate for his loss, and apologize publicly in the newspaper to eliminate the adverse effects of those acts. We hereby sincerely apologize to Mr. Shen Cunzheng

relatedlaws/200804/t20080416_380362.html (Article 46 of China Copyright Law ("ceasing the infringement, eliminating its ill effects, making an apology, and compensating for damages"); Article 48 of China Copyright Law (provides for compensatory damages, statutory damages of 500,000 yuan, defendant's profits, and reasonable costs)); *Hebei Sanhe Fucheng Cattle Group Co. v. Kunming Branch of Harbin Fucheng Catering Co.* (Higher People's Ct. of Yunnan Province April 5, 2007) (LAWINFOCHINA) (intentional trademark-infringement case where court awarded an injunction, compensatory damages in the amount of 200,000 yuan, reasonable-cost award, and a court-ordered apology to be made within 10 days after judgment in the Kunming Daily Newspaper); *Tianjin Goubuli Group Co. v. Tianfengyuan Rest. of Jinan Daguan Yuan Shopping Ctr.* (Higher People's Ct. of Shandong Province October 10, 2007) (LawInfoChina) (finding no intentional use of trademark and ordering injunction without damages or public apology); *Founder Co., Red Mansion Inst. v. Gaoshu Tianli Co., Gaoshu Co.* (No. 1 Interm. People's Court of Beijing Municipality Dec. 20, 2001), *rev'd* (Higher People's Ct. of Beijing Municipality July 15, 2002), *rev'd* (Sup. People's Ct. Mar. 7 2007) (LAWINFOCHINA) (all three decisions are contained within the same opinion released by the Sup. People's Ct.) (finding unauthorized software copying and distribution and awarding an injunction, 600,000 yuan in economic losses, 407,250 yuan in investigation and evidence-collection costs, and a public apology in COMPUTER WORLD); *Ding Xiaochun v. Nantong Educ. Bureau and Jjiangsu Fine Arts Publ'g House* (Interm. People's Ct. of Nantong City Dec. 19, 2002) (LAWINFOCHINA) (finding no "textbook exemption" where defendant published books containing photojournalist's photograph without his permission and awarding an injunction, damages for economic loss, and a public apology to be published within 15 days or reimbursement of plaintiffs for cost of publishing public apology).

2. See, e.g. BEIJING EVENING NEWS, CHINA THEATER NEWS, ECONOMIC DAILY (China), GANGZHOU EVENING NEWSPAPER (China), MOTOR CYCLE TRADE PAPERS (China), SOUTH DAILY (China), XINHUA DAILY (China), and ZHEJIANG LEGAL DAILY (China).

and guarantee that there will be no such infringing acts in the future.³

The following are examples of public apologies in trademark-infringement cases:

My name is Yu Lijin (ID: 33082519690718451X). I arbitrarily made use of the trademark "Su Jia Ai Hoa" without authorization of trademark registrant Su Aihua, which infringes her exclusive rights to use the trademark. Therefore, I hereby state my profound apology to trademark registrant Ms. Hu and guarantee that I will not use the trademark "Su Jia Ai Hoa" without the authorization in the future.⁴

According to the civil judgment from Tianjin Supreme Court, we state as follows: [w]hile reporting the 2009 and 2010 "National Catalog of manufacturers and products for Automobile, Civil refitted car and Motorcycle," we used "Linhai-Yamaha" as the engines' trademark, on the types of GT125T, GT125T-A, GT125T-B and GT505T-A Gang Tian Motorcycles, which has been determined as infringement on the trademark of Yamaha Motor Co., Ltd in the above-mentioned judgment. Our subordinate enterprises including: Tianjin Gang Tian Motorcycle Co., Ltd; Tianjin Gang Tian Engine Co., Ltd.; Tianjin Gang Tian Motorcycle Sales Co., Ltd.; and Tianjin Gang Tian Automobiles Sales Co., Ltd., used "Linhai-Yamaha" as the engine's trademark on the above-mentioned types as infringement on the trademark of Yamaha Motor Co., Ltd in the above-mentioned paper of judgment. The 37 Gang Tian GT126-6 type motorcycles, produced by our subordinate enterprise Tianjin Gang Tian Engine Co., Ltd., used the logo "Vision." This behavior has also been determined as infringement on the trademark of Yamaha Motor Co., Ltd in the above-mentioned paper of judgment. The GT50T-A type Gang Tian motorcycles, also produced by our subordinate enterprise Tianjin Gang Tian Engine Co., Ltd., were attached with the mark "Engine licensed by Yamaha" at the front and rear. This expression has also been determined as infringement on the trademark of Yamaha Motor Co., Ltd in the above-mentioned paper of judgment. We hereby apologize to Yamaha Motor Co., Ltd for these trademark infringements. And we have already modified the contents related to the "Linhai-Yamaha" engines in "National Catalog of Manufacturers and products for Automobile, Civil refitted car and Motorcycle."

3. XINHUA DAILY (China) Jan. 22, 1989, Xuan-Thao Nguyen trans.

4. ZHEJIANG LEGAL DAILY (China) Mar. 26, 2010, Xuan-Thao Nguyen trans.

Furthermore, we guarantee that we will not have those or similar infringing acts in the future.⁵

The following are examples of public apologies in copyright-infringement cases:

Mr. Ma Shaobo, one of the founders of our Theatre, while working in the leading position in the past years, devoted much time and efforts in organizing the rehearsal of many high-quality plays, and participating writing of several plays including “Bai Mao”, “Chu Chu Mao Lu” and “Man Jiang Hong.” When we were compiling and printing the memorial album to celebrate the 40th anniversary, we didn’t put his signature on the three plays (we didn’t acknowledge his authorship on the three plays), which severely infringes his copyright. We sincerely accepted the judgment of Beijing No. 1 Intermediate People’s Court and the final judgment of Beijing Supreme Court on 8/15/2000, and decided to correct these mistakes. First, the documents, files, and the certifying materials based on these documents that related to Mr. Ma Shaobo, we released in the past shall all become invalid. Second, we put his signature in the memorial album on those three plays. Third, we hereby state apologies to Mr. Ma Shaobo, and guarantee that we will earnestly respect the writer’s copyright in the future performance and publication.⁶

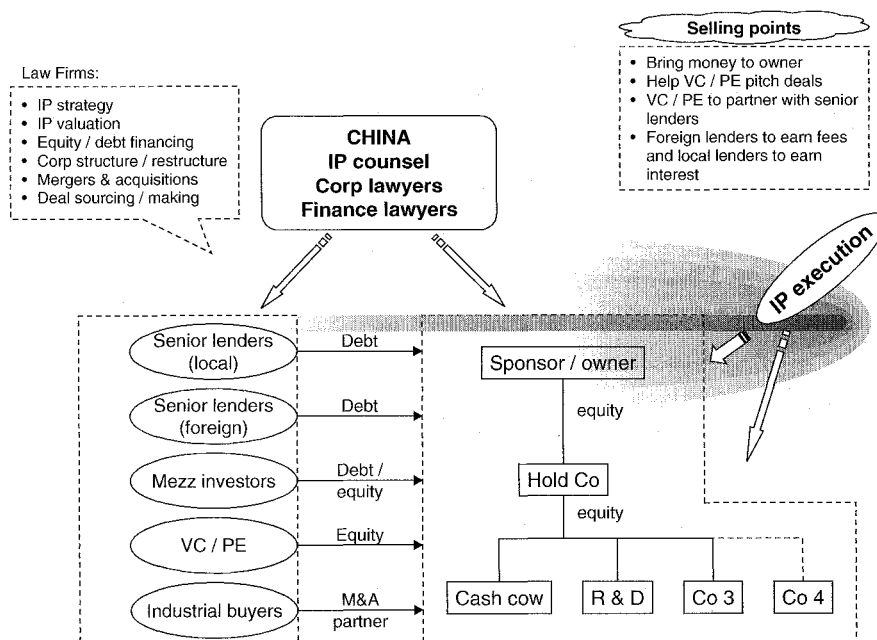
Our News Channel broadcasted the Tea Lead Picking opera without the authorization of the copyright owner Mr. Liu Zhiwen and Mr. Wang Mingyang, which infringes their copyright. Therefore, we hereby state apologies to Mr. Liu Zhiwen and Mr. Wang Mingyang.⁷

The following is an example of a public apology in an unfair-competition case:

We intentionally concealed the facts that our No. 02360149.3 design patent has already been declared void while being interviewed by media, in the process of settling unfair competition disputes between Guangzhou Hua Cheng Pharmaceutical Factory, Guangzhou Hua Cheng Pharmacy Co., Ltd, and our company, which impairs these companies’ commercial reputations. Therefore, we hereby profoundly apologize to them.⁸

-
5. MOTORCYCLE JOURNAL, page 59, April 2003 by Tianjin Gang Tian Group.
 6. CHINESE THEATRE (China) Aug. 23, 2000, Xuan-Thao Nguyen trans.
 7. GANGZHOU EVENING NEWSPAPER, Feb. 8, 2008, Xuan-Thao Nguyen trans.
 8. SOUTH DAILY (China), Apr. 14, 2009, Xuan-Thao Nguyen trans.

The following diagram demonstrates what is happening in Chinese intellectual property right now. As the planning committee for this symposium has anticipated, we have much to learn.



The diagram above is not about IP infringement, but about what is going on in China now. An attorney practicing in China prepared the information presented here. The diagram illustrates the use of IP as collateral and security in financing. There are profound changes going on in China, which is the reason for this symposium. Today, you will hear from judges, law professors, and lawyers who are all from China. I have decided to focus on bringing people to SMU who are experts in China. The impetus behind today's symposium is about hearing from those who are on the ground.

Before I conclude, I want to mention that this event could not have been held without the incredible work of the planning committee. I would like to thank David McCombs from Haynes and Boone, LLP who worked with me from the very beginning. I would also like to thank Lisa Evert from Hitchcock Evert LLP. Ms. Evert is a fearless leader and the president of the IP Inn of Court here in Dallas, and she has worked with me extensively over the last few months on this symposium. Hope Shimabuku also is a member of the planning committee, along with Zunxuan "Digger" Chen from Locke Lord Bissell and Liddell LLP, and Wei Wei Jeang from Andrews Kurth LLP. The planning committee spent an enormous amount of time putting this symposium together. Thank you so much for working with me. The students from the *SMU Science & Technology Law Review*, under the leadership of Ben West and Margaret Friess, put in so much hard work. Thank you to all of the students for your hard work. Most of all, we could not have made this such a

success without the perfectionism and professionalism of Rebekah Bell, who worked tirelessly to put this symposium together. Thank you all for your hard work.

Without further ado, I want to introduce Ms. Hope Shimabuku, who will introduce the keynote speaker, Mark Cohen. Ms. Shimabuku is a graduate of SMU Dedman School of Law, and she graduated from the University of Texas with an engineering degree. She currently serves as senior counsel in the patent and standards group at Research In Motion, the company that makes the BlackBerry cell phone. Ms. Shimabuku is a dynamic, young, star lawyer here in Dallas. I have worked with her on many committees. She is a leader not only in the Asian-American bar community, the intellectual bar community, but also in the Dallas and the State of Texas bar communities. Ms. Shimabuku does this all fearlessly. Every time I call her asking for her expertise, she is always willing to help; for that I owe her. Ms. Shimabuku has done a lot of work with Judge Randall Ray Rader from the Federal Circuit as well. She will now introduce Mr. Cohen.

MS. SHIMABUKU: Thank you, Professor Nguyen, for that very generous introduction. It is with great pleasure that I introduce you to our first speaker of the day, Mr. Mark Cohen. Mr. Cohen recently joined Fordham Law School as a visiting professor in 2011. Prior to this, he has held a number of notable positions, including serving as: the Director of International Intellectual Property for Microsoft Corporation; the Of Counsel in Jones Day's Beijing office; the senior intellectual property attaché at the U.S. Embassy in Beijing; and an attorney advisor in the Office of International Relations at the United States Patent and Trademark Office (USPTO). In total, he has nearly 30 years in public, private, academic, and in-house experience in intellectual-property-rights issues in China.

The programs Mr. Cohen established while at the U.S. Embassy in Beijing became models for engagement on IP worldwide. He has trained, lectured, and debated Chinese IP- and competition-law matters before hundreds of thousands of Chinese citizens, officials, and businesses from the U.S., Europe, Japan, and other countries. Most recently, Mr. Cohen co-authored the book, *Anti-Monopoly Law and Practice in China*.⁹ He has written and published extensively on Chinese IP law and was a contributor and co-editor of *Chinese Intellectual Property Law and Practice*.¹⁰

Mr. Cohen holds a J.D. from Columbia University, an M.A. from the University of Wisconsin in Chinese language and literature, and a B.A. from the State University of New York at Albany in Chinese Studies. He speaks and reads fluently in Chinese, and is admitted to practice law in the District of Columbia. Please help me welcome Mr. Mark Cohen.

9. H. STEPHEN HARRIS, JR. ET. AL., *ANTI-MONOPOLY LAW AND PRACTICE IN CHINA* (Kluwer Law International, 2011).

10. MARK A. COHEN, ET. AL., *CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE* (Oxford University Press, 1999).

MR. COHEN: Thank you to Xuan-Thao Nguyen, Hope Shimabuku, Dean Attanasio, and my friends from China, for a wonderful beginning and for the gracious hospitality today. There are a lot of IP issues out there, and we cannot cover all the issues fairly and exhaustively in forty-five minutes.

I have found the best way to manage limited time is to adjust my presentations based on the audience. When we talk about IP issues in China, some people are mostly concerned about hard IP issues—patents in particular. Others are concerned with soft IP issues, like trademarks and copyrights, or the substantive right itself. Still others are concerned about what the law provides in terms of patentability, patent prosecution, trademark prosecution, or copyright issues. Everyone is concerned about enforcement issues. Everyone should also be concerned with trade secrets because trade secrets impact every aspect of a commercial transaction. There are certainly issues worth talking about in the trade-secret context.

There is a lot of misunderstanding about IP issues in China. My presentation may overwhelm you a little bit with empirical data. I tend to think that this is a fact-starved area in the U.S., where people react more on impressions and emotions than on concrete data. Increasingly, there is a lot of data to digest and analyze.

When we talk about IP issues in China, many people think there are no problems in China. They think this mainly because the Chinese basically implemented most of their clear legislative World Trade Organization commitments. In fact, they implement many Trade-Related Aspects of Intellectual Property Rights (TRIPS) commitments as well.

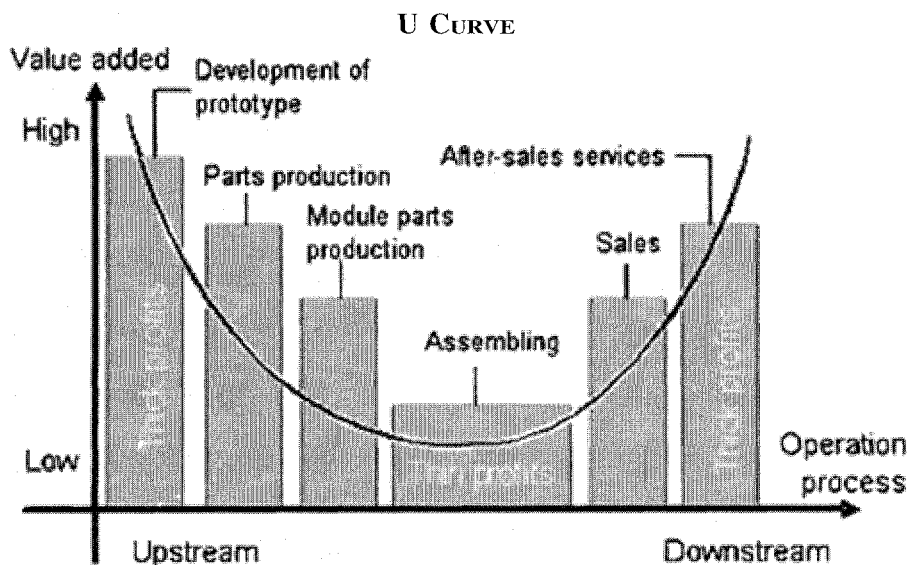
When we talk about problems in China, most people identify enforcement as a major issue. A few people think that this problem is historical or cultural, or that there is something in Chinese society that does not want to protect IP. Many people also think that enforcement issues are related to the Rule of Law. They assume that China just does not have the legal tradition that we have in the U.S.—such as the independence of the judiciary and the required transparency, proportionality, and predictability of the courts—relating to the Rule of Law. People tend to believe that enforcement issues are related to the ability of a socialist society to protect property rights as well. Some think that China's problems are no different from those in the rest of the world, while others see the Internet or public-health issues as major challenges to enforcement in China. For me personally, there are a number of other explanations, but I consider all these approaches in a given day.

To provide you with a very brief historical overview, we must look back to William Alford, an Associate Dean at Harvard Law School, who wrote a seminal book called *To Steal a Book is an Elegant Offense* in 1995.¹¹ Mr. Alford wrote that the most important factor that addresses the lack of adequate IP protection in China is the lack of an adequate political culture for

11. WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CIVILIZATION* (Stanford University Press 1995).

intellectual property.¹² Mr. Alford went through a historical analysis to reach this conclusion, which was a very interesting observation for that time.

Just recently, I found a patent for an improved nutcracker that a citizen of the emperor of China obtained in 1908 at the USPTO. Someone in 1908, a citizen of the emperor of China, had an idea to patent an invention. So how much of this is related to political or cultural issues? As recently as 2004, Wen Jiabao—the sixth (and current) Premier and Party Secretary of the State Council of the People's Republic of China—said the future competition of the world is intellectual property.¹³ For those of us who frequently travel to China, the cultural excuses—the lack of knowledge and understanding of the Chinese legal system and of the IP system generally—carry less and less weight. China is deeply interested in IP. Sometimes we might wonder why China is interested, but I think one of the basic reasons is that being interested in IP is in China's economic interest.



China sees itself as a factory to the world. The real value in manufacturing a product is really in the design or in the distribution and branding of the product. The Chinese want to capture more of that, and properly so. IP really is in China's long-term interest, particularly as labor costs have increased, and China has to meet more sophisticated competition.

I am going to focus mostly on patent trends, but I will also touch on some soft IP issues in comparison. The first issue we must deal with when focusing on IP challenges in China is the argument that China will not pro-

12. *Id.* at 119.

13. MARK BLAXILL & RALPH ECKARDT, *THE INVISIBLE EDGE: TAKING YOUR STRATEGY TO THE NEXT LEVEL USING INTELLECTUAL PROPERTY* 227 (2009).

tect IP until it has IP of its own to protect. However, if you look in certain areas like utility-model patents, where China is the largest patent office in the world, 99.4% of those patents are obtained by Chinese applicants.¹⁴ So if we expect China to predominantly own a right, what are they supposed to be at, 99.9%? Similarly, looking at design patents, 97.1% of the patents are owned by Chinese applicants. Also, invention patents—a stronger indicator of innovation—belong to predominately Chinese applicants.¹⁵

The total number of patents that the State Intellectual Property Office of the People's Republic of China (SIPO) has granted is predominately foreign, but those numbers are beginning to shift. In fact, to a degree this scenario is replicated in other rights such as trademarks, where the overwhelming majority are applied for, and granted to, Chinese applicants. Even more obscure rights like plant variety or breeder rights are granted predominately to the Chinese. So one thing we have to realize is that the IP environment in China is primarily oriented towards China developing its own innovation capacities. The system is not set up for foreigners. Foreigners are consumers of the system, but most of the activities are China-oriented and have been for some time. In fact, the numbers continue to grow. For example, the number of applications submitted to the patent office grew by about 40% in the first half of 2011.¹⁶

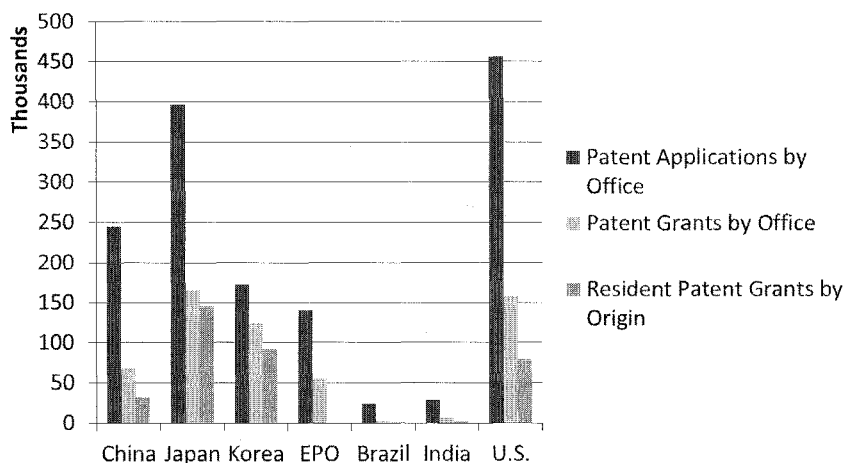
By almost any indicator, China will be the largest patent office in terms of filings in the world by 2014. And this could possibly happen perhaps even in the next several months, with respect to certain categories like utility-model patents and design patents, which are the most active. As for invention patents, it is likely to surpass the USPTO in the very near future. What is also interesting is that compared to other developing world countries like Brazil, Russia, and India, China grants a much higher incidence of resident patents. The amount of Chinese patents granted to Chinese residents continues to increase as well. Thus, China's patenting landscape does not correspond to most of the developing world. In fact, China is increasingly approaching that of the developed world, at least in terms of patent applications to resident inventors.

14. *Applications for Three Kinds of Patents Received from Home and Abroad*, SIPO.GOV.CN, http://english.sipo.gov.cn/statistics/gnwsznb/2010/201101/t20110125_570592.html (last visited Nov. 22, 2011).

15. *Id.*

16. *Chinese Patent Filings Soar in the First Half*, INTELLECTUAL PROPERTY PROTECTION IN CHINA (July 25, 2011, 12:12 PM), available at http://www.chinaipr.gov.cn/newsarticle/news/government/201107/1240879_1.html.

A SHIFTING BALANCE ON INVENTION PATENTS



As I mentioned earlier, China is the largest utility-model office in the world. When comparing China, Korea, and Germany, there is a huge difference. China had about 180,000 filings in 2007 alone—the numbers have grown even more with the economic crisis—compared to about 20,000 in Korea and Germany.¹⁷

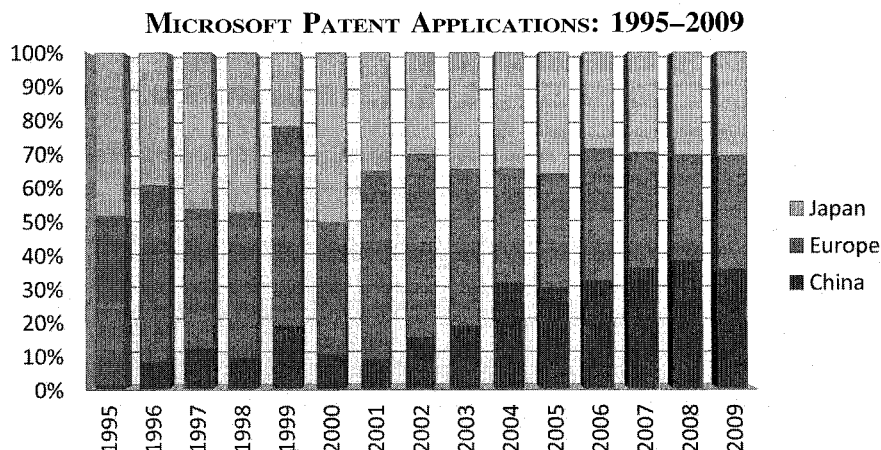
Corporate America, like my former employer Microsoft, usually looks at the three big patent offices outside the U.S.: Japan, Europe, and China. The numbers for China have been growing steadily, though, when compared to the other countries. A lot of patent applications are coming out of budgets for Europe and Japan, and consequently, China has increasingly become a must-file jurisdiction for patents.

SIPO has been able to make remarkable achievements in an era in which patent offices throughout the world are facing major crises in hiring and retaining employees, in dealing with increasingly complex patents with multiple claims and sophisticated technologies, and in retaining the right people. In 2009, 9% of SIPO's staff had their doctorate degree, 70% had a master's degree, and 21% had a bachelor's degree.¹⁸ This rapid hiring increase demonstrates that SIPO has done a remarkable job of handling an increasingly complex environment. This accomplishment is the envy of some of the other patent offices in the world.

The following information is what the USPTO patents looked like at a glance compared to SIPO. The number of examiners in the USPTO was

17. WORLD INTELLECTUAL PROPERTY ORGANIZATION, WORLD INTELLECTUAL PROPERTY INDICATORS, 47 (2009), available at http://www.wipo.int/export/sites/www/ipstats/cn/statistics/patents/pdf/wipo_pub_941.pdf.

18. STATE INTELLECTUAL PROPERTY OFFICE OF THE PEOPLE'S REPUBLIC OF CHINA, ANNUAL REPORT 48 (2009), available at http://english.sipo.gov.cn/laws/annualreports/AnnualReport2009/201008/t20100813_531316.html.



Microsoft China Portfolio	Total
Granted/Allowed	940/253
Pending	2,018
TOTAL	3,211

about 6,000,¹⁹ and SIPO employs around that same level. The USPTO's backlog was 703,000 patents, while the first office action was 26.5 months.²⁰ Invention patents in 2010 were around 391,000 patents for SIPO,²¹ while the USPTO had around 490,000.²² As for the amount of grants, the USPTO still grants about twice that of SIPO. However, the examination period is 24.2 months for SIPO,²³ while the USPTO is 34 months.²⁴ A lot of people com-

19. UNITED STATES PATENT AND TRADEMARK OFFICE, PERFORMANCE AND ACCOUNTABILITY REPORT, 9 (2010), *available at* <http://www.uspto.gov/about/stratplan/ar/2010/USPTOFY2010PAR.pdf>.
20. UNITED STATES PATENT AND TRADEMARK OFFICE, PERFORMANCE AND ACCOUNTABILITY REPORT, 12, 18 (2010), *available at* <http://www.uspto.gov/about/stratplan/ar/2010/USPTOFY2010PAR.pdf>.
21. STATE INTELLECTUAL PROPERTY OFFICE OF THE PEOPLE'S REPUBLIC OF CHINA, ANNUAL REPORT 37 (2009), *available at* http://english.sipo.gov.cn/laws/annualreports/AnnualReport2009/201008/t20100813_531316.html.
22. UNITED STATES PATENT AND TRADEMARK OFFICE, PERFORMANCE AND ACCOUNTABILITY REPORT, 125 (2010), *available at* <http://www.uspto.gov/about/stratplan/ar/2010/USPTOFY2010PAR.pdf>.
23. STATE INTELLECTUAL PROPERTY OFFICE OF THE PEOPLE'S REPUBLIC OF CHINA, ANNUAL REPORT 45 (2010), *available at* <http://english.sipo.gov.cn/laws/annualreports/2010/201104/P020110420372588586402.pdf>.
24. UNITED STATES PATENT AND TRADEMARK OFFICE, PERFORMANCE AND ACCOUNTABILITY REPORT, 125 (2010), *available at* <http://www.uspto.gov/about/stratplan/ar/2010/USPTOFY2010PAR.pdf>.

plain about the U.S.'s patent efficiency. People used to complain a lot about China's patent efficiency, but the fact is that China is doing a pretty good job moving applications through the process.

If SIPO Commissioner Tian Lipu were speaking today, he would most likely say that China has been doing a lot of quantitative work, but that the quality is not there, and that China has to improve the quality and commercial value of its patents. There are a number of factors to consider when looking at patent quality in China. I tend to look at the role of nonmarket factors in innovation. For example, I look at the presence of subsidies or quotas as factors that impede patent quality and lead to patenting activity that is not related to commercial goals. Whether patents are commercialized or licensed is also important. The type of patents filed is equally important, especially as China tends to discount invention patents, which look like U.S. utility patents. Rather, China tends to favor invention patents and discount utility-model and design patents. Other factors I consider are whether the patents are filed overseas, the field of use, the numbers of claims, the abandonment rates, and the number validations. I also look at service versus non service inventions, which are inventions made by the employee of a company. I also consider the citation rates, which are used in the U.S. but unfortunately are not available for reviewing Chinese patenting activity in general.

SUBSIDIES

Managing Intellectual Property conducted a survey that showed 78% of major Chinese companies receive subsidies for patent filings.²⁵ The major factor leading to lower-quality patents, perhaps, is that people file patents in order to get a subsidy, and there are many horror stories that result from this. But increasingly, larger Chinese companies are turning to higher-quality invention patents. Here are two quotes by Chinese in-house counsel on that issue from the Managing Intellectual Property survey:

For important technology we file an invention patent. The decision is made by our technology administrative committee. But we don't really apply for utility model patents now. Out of our over 80 patents in China, 35 are utility models. Of the 20 patents we have pending in China, the majority are invention patents.²⁶

[T]here used to be strategy of filing both and obtaining a utility model first. . . . But we rarely consider this because over 95% of our patents are inventions.²⁷

25. Peter Ollier and Janice Qu, *China's Global IP Plans Revealed*, MANAGING INTELLECTUAL PROPERTY, at 44 (Nov. 2010).

26. Ollier, *supra* note 25, at 50-51 (quoting Daisy Fang, IP Engineer, Airsys).

27. Ollier, *supra* note 25, at 50-51 (quoting Wang Qi, China Resources Electronics).

The single most striking factor affecting Chinese innovation in a given year is the season—autumn. If the system was totally market oriented, without the patent-application processing quotas to fill that both China and the U.S. have, then you would see a steady filing rate. But in fact from August to December of 2009, the rate of patent applications jumped up dramatically.²⁸ This happens because bureaucrats have quotas to fill and companies have mandates they want to fulfill. So companies pressure their engineers, which causes the numbers to go up dramatically in all types of patents. This was the situation in 2010 when there was a dramatic increase from August to the end of December.²⁹

The number of service and non-service patents granted to foreigners by the Chinese Patent Office has increased dramatically.³⁰ The patent office tries to show that there is improving quality, so they want to grant more patents to employees of companies to show that in fact they are narrowing the gap. This is not, in my view, a reflection of a true market orientation towards patenting; it is problematic. It also suggests that if you are a Chinese inventor, a good time to apply is towards the end of the year, since you are more likely to have your patent reviewed quickly.

Patent quality, however, is way up, and data from 2002 to 2008 illustrates that.³¹ In a report done by John Orcutt, a professor at the University of New Hampshire, it was established that some of the leading Chinese companies, like Huawei, a sponsor of this program, have increasingly moved their patents to higher quality invention patents and that this patenting activity has a corresponding improvement in Chinese research institutions like Tsinghua University, Zhejiang University, and some of the other leading Chinese institutions.³² Therefore, the patent quality is increasing for the leading segments of the population.

Another big difference between the U.S. and China is the number of individual inventors. It is well known that the U.S. prides itself on its legacy of individual inventors, like Thomas Edison, Edwin Land, Clarence Birdseye, et cetera. However, the incidence of individual inventors in China is much higher than that of the U.S. In 2006, individual inventors constituted

28. See *Statistics*, STATE INTELLECTUAL PROPERTY OFFICE OF THE P.R.C., <http://english.sipo.gov.cn/statistics/> (last visited Nov. 22, 2011).

29. See *Statistics*, *supra* note 28.

30. See *Statistics*, STATE INTELLECTUAL PROPERTY OFFICE OF THE P.R.C., <http://english.sipo.gov.cn/statistics/> (last visited Nov. 22, 2011).

31. See *Statistics*, STATE INTELLECTUAL PROPERTY OFFICE OF THE P.R.C., <http://english.sipo.gov.cn/statistics/> (last visited Nov. 22, 2011).

32. JOHN L. ORCUTT & HONG SHEN, *SHAPING CHINA'S INNOVATION FUTURE: UNIVERSITY TECHNOLOGY TRANSFER IN TRANSITION* 255 (2011).

about 7% of USPTO patent applicants.³³ In China in the same year, out of all non-service patents (which are filed by the employee of a company), invention patents were 20.5%, design patents were 62%, and utility-model patents were 62%.³⁴ This is a significantly higher incidence of individuals patenting. If you made a rough equivalence between these two legal definitions of independent inventors versus non-service inventors, then a very different landscape than you might expect appears. A lot of people tend to think of the Chinese IP environment as quantitatively dominated by state-owned enterprises. In fact, there is a very significant presence of small and individual inventors.

There is an increasing concern about patent trolls, or patent cockroaches, as they sometimes are called in Chinese. I have included an example of a low-quality design patent below. As you might be able to tell, the patent is for a battery.

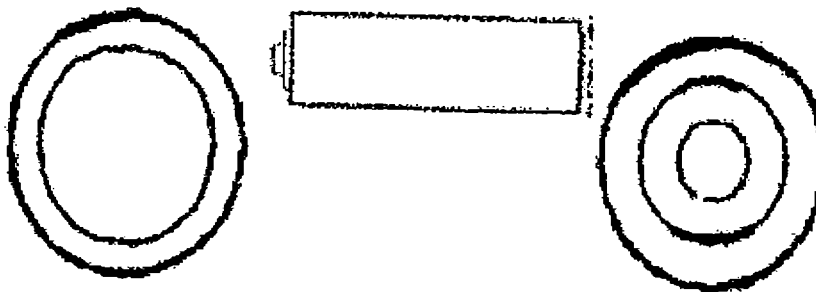


图1 样品图一

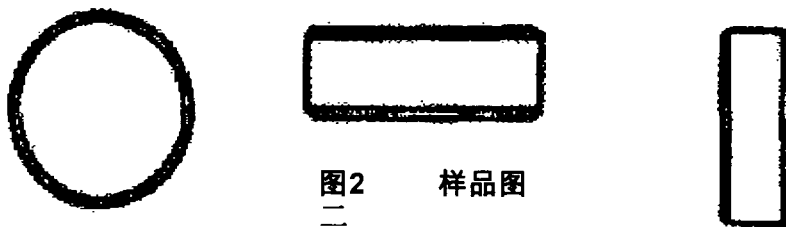


图2 样品图二

Since design patents and utility model-patents are not examined, they can be asserted for anti-competitive purposes with very little downside risk. Furthermore, while foreigners tend to maintain their utility-model patents, the Chinese tend to not maintain these patents, and by the fifth or sixth year,

33. U.S. PATENT AND TRADEMARK OFFICE, PATENTING ORGANIZATIONS, http://www.uspto.gov/web/offices/ac/ido/oeip/taf/topo_06.htm#PartA1_2b (last visited Nov. 22, 2011).

34. STATE INTELLECTUAL PROPERTY OFFICE OF THE PEOPLE'S REPUBLIC OF CHINA, ANNUAL REPORT 45 (2006), available at <http://english.sipo.gov.cn/laws/annual-reports/ndbg2006/200804/P020080416559309499794.pdf>.

only about one-fourth or one-fifth of these patents are still being maintained by the Chinese. This is mainly because in China you receive a grant or a subsidy for the patent application, but there is no grant or a subsidy for maintaining the patents. Therefore, you have some very interesting statistical data about how patents are maintained.

ABUSIVE PATENT LITIGATION

In one case, a fellow invented a design patent for a woven bamboo mattress, bordered by cloth strips.³⁵ The tatami mat probably goes back to the Tong Dynasty, approximately 1,300 years ago in China. An individual secured a patent on this mat, recorded his rights with Chinese customs—which will detain goods that infringe on export—and then brought litigation to seize hundreds of containers.³⁶ The patent was ultimately invalidated.³⁷ A competitor brought a case for malicious litigation, but since the case could not have retroactive effect, he received minimal compensation.³⁸ This is the problem of an environment that has become too heavy with low-quality patents. There are real risks, including risks for foreigners, of abusive litigation, with very little to compensate you if you are being sued. In fact, several multinational companies—despite having “higher-quality” portfolios—tend to be litigation adverse, but they are still concerned about being sued within China for these types of cases.

ENFORCEMENT TRENDS

China has the most civil intellectual-property-rights (IPR) litigation of any country in the world today, surpassing the U.S. China's IPR litigation is particularly dominated by copyright cases, which totaled approximately 25,000 cases in 2010.³⁹ The amount of patent cases was also high, with 6,000 cases.⁴⁰ The IP courts also handle antitrust cases and unfair-competition cases, which are numerous as well. Foreigners, however, are a very small part of that docket. Foreigners like to think of themselves as being very important and litigating a lot; but in 2010, 1,300 cases out of 42,000 were brought by foreigners—only about 3%.⁴¹ Thus, foreigners are not a signifi-

35. Tao Xinliang, *Case Study: Liability for Counter-Damages against Misuse of Patent Infringement Litigation*, CHINA PATENTS & TRADEMARKS No. 2, 2008, at 8, available at <http://www.cpt.cn/uploadfiles/20100316133049516.pdf>.

36. *See id.* at 9.

37. *Id.* at 9.

38. *Id.*

39. *White Paper of Intellectual Property Protection by Chinese Courts in 2010*, at 3, CHINA PATENT AGENT (H.K.), available at <http://www.cpahkltd.com/UploadFiles/20110509082512655.pdf>.

40. *Id.*

41. *Id.*

cant factor in Chinese litigation. In fact, many major U.S. companies would not even account for a rounding error in Chinese civil IPR litigation.

At the same time, the way China views its civil IPR docket is really a remarkable accomplishment. China has a system of IP courts throughout the country from the basic level all the way up to the Supreme Court level. The total number of civil IPR cases accepted by the first-instance courts for the past five years is 64,625, accounting for only 0.29% of the total civil cases in the same period. This is a very small percentage of all the civil litigation going on in a country of 1.4 billion people.⁴² The fact that China would invest so much in creating a civil IPR judicial system and in having well-trained, specialized IPR judges is a remarkable sign of dedication to developing an effective IP system.

So how does the U.S. compare with China in terms of number of cases filed? The U.S. reports its statistical data on a fiscal-year basis, which is measured from October to October, while China reports its data based on the measurement of the normal calendar year. In 2010, China had about 6,000 patent cases, while the U.S. only had about 2,000.⁴³ As for trademark cases, China had about 9,000 cases, while the U.S. only had about 3,000.⁴⁴ Thus, China had significantly more patent and trademark cases. As for copyright cases, China now has more copyright cases per capita than the U.S. It is very rare, in economic terms, that we can say China has more per capita than the U.S. In fact, China now has more copyright cases—about ten times as many as the U.S. docket.⁴⁵ This is really a remarkable number and a real explosion in civil IPR cases.

In patents and in invalidations, utility models and especially designs, especially, dominate, as demonstrated by the administrative appeals from patent-validity decisions of the Chinese Patent Office. But reversal rates—or change rates, as the Chinese like to call them—of decisions from SIPO have actually progressively dropped. Eight or nine years ago, about 30% of all cases on appeal were reversed or adjusted by the courts from the Chinese Patent Office. That number is now down to about 3%. In fact, the data shows that in 2010, despite rapidly increasing civil IPR litigation, there was a 17% drop in appeals from the Chinese Patent Office. This drop suggests any number of problems, perhaps even involving the independence of the court in

42. Kenneth Rapoza, *China Sticking With 'One Child' Policy*, FORBES.COM (Oct. 30, 2011, 11:11 PM), <http://www.forbes.com/sites/kenrapoza/2011/10/30/china-sticking-with-one-child-policy/>.

43. See U.S. COURTS, JUDICIAL BUSINESS 2010, Table C-11, *Intellectual Property Cases, Securities/Commodities/Exchange Cases, and Bankruptcy Appeals Filed, Terminated, and Pending During the 12-Month Period Ending September 30, 2010*, available at <http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness2010.aspx>.

44. *Id.*

45. *Id.*

patent matters. At the same time, there was a rapid increase in appeals of trademark decisions in the courts.

DAMAGES

In general, Chinese court cases take a short period of time, legal fees are lower, and the likelihood of getting an injunction is probably greater across all rights: patents, trademarks, and copyrights. Yet the ability to enforce an injunction is problematic and damages in general are quite low.

If I was going to leave you with one impression, the one thing I would like to underscore is that China is not a monolith. Rights vary in the degree to which they are protected based on where you are located, the type of enforcement mechanisms you are using—there is a vast administrative mechanism that does not provide compensation but can give you an administrative order to stop infringement—and the court, even the personality of the judge. These facts should not surprise anybody, but for some reason sometimes people are surprised in China. Foreigners tend to bring suit in Beijing or Shanghai even though it is not necessarily true that Beijing awards the highest damages, is the fastest, or is the most competent in all areas. You can find cases based on statistical data where certain other jurisdictions may be slower to decide a case, but award higher damages, or maybe have a higher injunction ratio.

Before you bring and consider the consequences of a case, you really need to do the empirical research. There is a lot of data to consider. To get snapshot views of what the courts are doing, you can go to www.ciela.cn and get raw statistical data for free. If you want back-office support for what you are doing, the underlying cases are also available at this site for a fee. Of the 1,197 design-infringement cases in China from 2006 to 2009, 81.5% involved an injunction.⁴⁶ The average damages awarded reached a high of about 70,000 Renminbi (RMB) in 2008, which is about \$10,000.⁴⁷ That is not likely to be adequate compensation. There were 5,203 copyright-infringement cases in that time period, and they had an injunction rate of 79.5%, similar to that of design cases.⁴⁸ The average damages awarded in copyright-infringement cases were fairly low, with a high of about 40,000 RMB in 2006.⁴⁹ There were around 630 reported utility-model patent cases from 2006 to 2009.⁵⁰ These cases resulted in higher compensation—with up to 80,000 RMB in average compensation—but had a slightly lower injunction rate of 73.5%.⁵¹ Out of 383 invention patent cases, the injunction rate was lower at

46. CIELA – IP CHINA LITIGATION ANALYSIS (last visited Mar. 21, 2011), www.ciela.cn.

47. *Id.*

48. *Id.*

49. *Id.*

50. CIELA, *supra* note 46.

51. *Id.*

71.5%.⁵² This data is very interesting because we think of invention patents as more valuable, but there is a 10% less likelihood of getting an injunction compared to design infringement cases. However, damages in invention cases were higher, ranging up to about 1,500,000 RMB.⁵³

In industries such as Dallas, where utility-model patents may be available, and particularly where corporate patent-application budgets are stretched, it may be a very useful alternative to file for a utility-model patent. Certainly, it is a lot better than having no patent. The utility-model patent is cheap, and it can be used in the semiconductor sector. In fact, most U.S. applications for utility-model patents tend to relate to electrical devices. However, at least one car company, Ford, is a major user of the Chinese utility-model patent system. These types of patents are something worth considering, particularly in tough budgetary times.

If you look at how enforcement functions in China, it is really a market, like it is anywhere else in the world. In the U.S., smartphone sales dramatically increased from 2004 to 2010, with only 15.8 million sold in 2004, and almost 19 times that amount, 296.6 million, sold in 2010.⁵⁴ However, the amount of U.S. patent-infringement filings for mobile handsets has only grown by about four times in that same period, with 26 cases filed in 2004, and only 97 cases filed in 2010.⁵⁵ The relationship between the smartphone market and infringement cases is really not that different in China. The market really does significantly affect litigation. Probably the more significant difference between China and the U.S. is that there is still not a lot of widely available data because not all courts are transparent, and the Chinese market does not function quite as well as the U.S. market.

One famous smartphone case involved the Apple iPhone and Meizu M8.⁵⁶ Meizu M8 is commonly referred to as the Shanzhaiji mountain-stronghold, knockoff counterfeiter of smartphones. The Chinese Patent Office stepped in and ordered Meizu to stop producing. The culture of counterfeiting in China and the phenomenon of “mountain-stronghold” counterfeiters is a whole topic of discussion by itself. Some people possess a certain attraction to the rebelliousness of counterfeiting activities. One of my favorite so-called mountain-stronghold cases involved a farmer who made a counterfeit panda by painting his dog black and white. Thus, there are all kinds of mountain-stronghold cases, not only strictly IP; although, you could argue that was a case of genetic-resource counterfeiting.

52. *Id.*

53. *Id.*

54. Ben Crair, *Phone Fight!*, NEWSWEEK, Apr. 11, 2011, at 27, available at <http://www.thedailybeast.com/newsweek/2011/04/03/phone-fight.html>.

55. *Id.*

56. See *Apple Goes After Meizu*, MOBILE INTERNET (Oct. 12, 2010), <http://www.mobilenetx.com/apple-news/apple-goes-after-meizu.html> (last visited Nov. 23, 2011).

PATENT DISTRIBUTION TRENDS

Interestingly, geographers and political scientists have been collecting a large amount of data about IPR acquisition and enforcement in order to look at trends by province and the factors affecting those particular trends. If you look at where China is going in terms of acquisition of rights, you will see a close relationship between the more developed markets having greater patents per capita.⁵⁷ The relationship between where the banks are making capital available for startups and patenting activities in China is a reaction to the market—particularly in Southern China, where some of the companies and research institutions tend to be more market oriented.

Patenting activity in China, as in the U.S., varies. This should come as no great surprise, since the U.S. is not a monolith either. China has a new five-year plan with a goal of 3.3 patents per 10,000 people. Achieving this goal would make China look like Ohio, which had 3.3 patents per 10,000 people in 2010. Vermont has the most patents per capita in the U.S., Washington state has the most for any big state, and Ohio is somewhere in the middle. Dallas is very different from Marshall, and New Jersey is very different from the Silicon Valley. Go to New Jersey if you want to talk farm and biotechnology, and if you want to talk about the information-technology sector, you should be down in Sunnyvale. There are radically different approaches towards patenting in different regions, many of which well exceed the U.S. average.

Similarly, distribution of cases varies greatly as well. Copyright cases in the U.S. are widely distributed, with concentrations in California and New York. China is no different. Guangzhou, Tianjin, Beijing, Shanghai, Shandong, and Fujian are all major provinces for copyright litigation. Copyright litigation may be different in concentration than trademark and patents. In the U.S., I think we have a little bit of a non-market orientation towards patent litigation where certain district court judges tend to entertain those types of cases. But in general, enforcement resources do vary by locality.

China has one distinguishing aspect which, depending on your perspective, could be good or bad: the Chinese government localities tend to take a view of one size fits all. There is a national patent office, a local patent office, a national IP court—the Supreme People's Court—and a local IP court. There are also local trademark offices and copyright offices. There is no province saying: "I am not going to have a patent office," because the national government requires them. The reality is that some of those offices are much busier than others. Because of this, when a particular remedy—like a preliminary injunction, evidence, or asset preservation—is desired, while the right to that remedy is afforded under China's patent, trademark, and copy-

57. See Aoife Hanley, Wan-Hsin Liu & Andrea Vaona, *Have Chinese Innovators (and Banks) Finally Grown Up?*, Vox (Mar. 24, 2011), <http://www.voxeu.org/index.php?q=node/6272>.

right infringement laws, you are much better off going to a court that is not busy if you have to file at the end of the year.

The bottom line is that judicial resources are involved, and some dockets are not as busy. If you go to Beijing where the dockets have been mushrooming, the courts will probably say, "I am just too busy to do this, and I have to complete all the motions before the end of this year." Therefore, looking at how busy a court is and at the hospitality of that environment toward the kinds of rights you are trying to secure and protect is really important in making litigation strategies. It is not monolithic. It has to be broken down and based on whatever your needs are.

We have seen hugely skyrocketing judgments in some of the patent cases. The *Schneider* case in particular, which I believe may be the largest civil judgment of any kind in China, awarded 330 million RMB in damages, which was about \$40 million dollars at the time.⁵⁸ That case involved a utility-model patent and a foreign defendant that lost the case. A global cross-license rose out of that settlement on appeal. There have been some other cases with large judgments such as *CEPT v. FKK & Huayang*, an invention-patent case brought by a Chinese company against a U.S. subsidiary of a Taiwanese company doing business in China. In that case, 50.61 million RMB in damages were awarded.⁵⁹ A similar amount of damages was awarded in a case against Samsung.⁶⁰ Although there have been some large judgments awarded to foreign plaintiffs, most of these cases involve a Chinese plaintiff against a foreign defendant.⁶¹

In the past, people asked why they should bother protecting IP in China when China has no IP laws. Now, most foreign lawyers and businesses are increasingly aware that there are also defensive concerns and risks, and so they are moving forward to protect their IP rights in China. Most foreigners are not that concerned about apologies, but I think they can actually be a good thing. In certain cases, it is rare to get an apology in China, and the distribution of apologies is unclear. In fact, I found it very hard to find a single case involving pharmaceutical patent infringement where the plaintiff was awarded an apology by the court.

58. See *Real and Present Danger: Patent Litigation in China*, LAW360, PORTFOLIO MEDIA, (June 10, 2009), http://www.jonesday.com/files/Publication/fccal1b80-f7a0-4c54-bf2e-4b7a58e9bf2a/Presentation/PublicationAttachment/9a49a6e3-5046-4e46-9bba-5f563e58e46a/Real_%26_Present_Danger_of_Patent_Litigation_in_China_-_IPLaw360_-_June_10,_2009%5B1%5D.pdf (last visited Nov. 23, 2011).

59. See *CEPT Prevails in 8-Year Legal Saga*, INTELLECTUAL PROPERTY PROTECTION IN CHINA, (Feb. 26, 2010), http://www.chinaipr.gov.cn/casesarticle/cases/caseothers/201002/616526_1.html (last visited Nov. 23, 2011).

60. See LAW360, PORTFOLIO MEDIA, *supra* note 58.

61. See *e.g.*, *Neoplan v. Zhongwei*; *Strix v. Zhejiang Jiatai & Leqing Fada*; *Zhengzhou Top v. Tailong Co.*

Another point to keep in mind here is that the IP environment is a complex market. If you look at it in market terms, you see that China is not a monolith. You see that weaknesses in the Chinese environment tend to drive litigation overseas. There is an incredibly active U.S. docket with 337 cases involving Chinese respondents. This docket, to a degree, reflects foreign-company frustrations with the ability to enforce injunctions or to protect their own market, et cetera.⁶² All things being equal, I think most companies would rather deter goods at the source than have to deal with protecting their markets.

Similarly, China has a very complex domestic environment. There are competing administrative agencies that have overlapping authority: the State Food and Drug Administration for counterfeit pharmaceuticals, the Trademark Office for counterfeit pharmaceuticals, the Quality Supervision Administration for defective products, and the trademark office that handles counterfeit products. The result is a very complex environment with competing agencies that functions somewhat as an inefficient market.

There have been relatively fewer trademark cases in civil enforcement compared to copyright cases. This is probably because there are 20 people at a national level dealing with copyright issues in China, as compared to about 400,000 people throughout the country dealing with trademark and other issues in the State Administration for Industry and Commerce.⁶³ As a result, this vast administrative system brings people out of the civil system to use the administrative system because it is cheaper and more efficient. Therefore, a person doing business in China should look at things strategically in order to use the system effectively and reduce frustrations.

FUTURE OF CHINESE IP LAW

If you could look into the future, I think you would see that there is going to continue to be a large quantity of lower-quality patents overhanging into the market, an increasing migration of Chinese companies into higher-quality patents and increasing patent litigation—although not as much as copyright. There will be continued availability of injunctive relief with some increase in damages, difficulties in invalidating patents, and few deterrents for frivolous litigation. A common denominator exists for Chinese companies and multinationals: an increasingly complex environment for IP enforcement. Sometimes, there is too much government intervention in the market, and there is a need for closer cooperation between industry and the private sector, as well as between governments.

62. U.S. INT'L TRADE COMM'N, INTELLECTUAL PROPERTY INFRINGEMENT AND OTHER UNFAIR ACTS, *available at* http://www.usitc.gov/intellectual_property/.

63. *See generally* MARTIN DIMITROV, *PIRACY AND THE STATE: THE POLITICS OF INTELLECTUAL PROPERTY RIGHTS IN CHINA* (Cambridge University Press 2009); *See* ANDREW C. MERTHA, *THE POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA* (Cornell University Press 2005).

Foreigners should not overstate their importance quantitatively; they are very important qualitatively to the Chinese environment. The domestic-litigation environment will become increasingly important for multinationals, and China is increasingly becoming a forum for transnational IP litigation in multiple areas. The Chinese IP environment cannot be neglected. For governments, while counterfeiting and piracy are unresolved, important issues, I think the future is really about innovation and technology. There will be friction in these areas, but there are also multiple areas for cooperation between patent offices, companies, the private sector, and research institutions. I think for that reason, conferences like this and a mutual understanding become more important each day.

QUESTIONS AND ANSWERS

AUDIENCE QUESTION: You mentioned that the China Patent Office enforced IP rights in the mountain-stronghold cases. Was this enforcement the result of people initiating litigation? Does initiating litigation provide people with another mechanism to get their IP rights enforced?

MR. COHEN: The administrative system in China is vast. There are actually various forms of alternative dispute resolution, if that is what you want to call administrative enforcement. Each administration has a set of rules and regulations as an alternative to civil enforcement. In the mountain-stronghold case I referenced, I think Apple complained to the Chinese Patent Office, who then stepped in to try to resolve the matter directly. I think without actually filing a formal complaint, Apple said: "We have a problem with this company," and they asked the patent office to step in to avoid embarrassment.

The Chinese Patent Office, in terms of patent administrative cases, is not really that actively involved with foreigners because most of those cases tend to involve simpler designs and utility-model patents. I think most foreigners have invention patents, which are more technologically sophisticated, and they tend to feel more comfortable with the courts. For that reason, administrative system is not as active.

The administrative system can be cheap and effective if the goal is deterrence rather than compensation. The reality for most companies, not just those using the administrative system in China, is that damages are so low that an injunction is usually the end game; so the administrative system does offer something. One limitation of administrative orders is that they are confined to the locality where they are issued, whereas a civil court can issue a global, nationwide injunction.

AUDIENCE QUESTION: Can you also comment on patent-transaction activities, like people buying or selling patents, and whether it is common practice in China?

MR. COHEN: The risk of Non-Practicing Entity (NPE) litigation in China is a topic arising with greater frequency. There certainly have been a number of domestic cases, and there have been several cases where Chinese NPEs sued multinationals. What is shocking to me—and I do not have the

full answer to it, but some of my Chinese colleagues might—is why there is not a higher incidence of NPE litigation. If you look at the numbers of individual inventors, or non-service inventors, in China, and you look at the rapid growth in patenting activity, you would actually expect, if China were like the U.S., for China to have a very active NPE docket. I suspect that courts are pushing off a lot of the lower-quality cases. There are patent aggregators, some of which are known here in the U.S., that actively try to acquire Chinese patents.

I think another reason why there is not a higher incidence of NPE litigation is that, unlike the U.S., in terms of the deterrent remedies, China has nothing like the *Walker Process* doctrine.⁶⁴ There is no recognition that a frivolously asserted patent that you know is invalid will possibly result in an antitrust or other type of patent-misuse claim.⁶⁵ In reality, patent law itself provides a certain remedy for the frivolous assertion of patent litigation. But the remedies seem to be lower than those afforded in general, frivolous civil litigation under Chinese law.

If you want to look at the issue in greater detail, there is a chapter in my book on antimonopoly law which talks about how even though China enacted very comprehensive antimonopoly laws, it did not look at the frivolous assertion of patent rights or whether there should be a more appropriate remedy under China's patent law.⁶⁶ The Chinese Patent Office looked at and reviewed the possibility of revising the patent law to include more appropriate remedies, and the Supreme Court also considered it when advising the legislators on revising the patent law. But ultimately, the remedies were very few. It is shocking that there are not more cases.

AUDIENCE QUESTION: Are you aware of any higher-education institutions in the United States that focus on the subject of Chinese IP law?

MR. COHEN: There is a fellow at Washington University, Wei Luo, who is putting together a list of all the classes in Chinese law offered in the United States. Amongst those universities, those offering classes on Chinese IP law are scarce. I am teaching a class right now at Fordham, there is one at John Marshall, and that may be it. There are certainly people teaching Chinese law and, frankly, the number of students I have at Fordham is not huge. Students tend to gravitate more towards the core classes, and I actually have a lot of Chinese students. I would have hoped for a lot more American students in my classes. I think in the long run this is going to be much more important. So it is certainly an area where there needs to be more academic activity for lots of reasons.

64. See generally *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965).

65. William C. Holmes, *Fraud or Other Inequitable Conduct as a Basis for Antitrust Liability*, 1 HOLMES, INTEL. PROP. & ANTITRUST L. § 15:3 (2011).

66. See H. STEPHEN HARRIS, JR. ET. AL., *ANTI-MONOPOLY LAW AND PRACTICE IN CHINA* (Kluwer Law International, 2011).

