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IP in China:

Where Do we Stand and Where Are we Going?

Prof. Jacques de Werra

University of Geneva School of Law



**UNIVERSITÉ
DE GENÈVE**

SCHOOL OF LAW

Outline

- I. China and the TRIPS
- II. Landmark cases
- III. China's IP Agenda
- IV. Beyond IP enforcement
- V. The Future

China and the TRIPS

China and the TRIPS

Does China comply with the TRIPS requirements ?

- n Art. 41 para. 1: « Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, [...] »
- n Art. 41 para. 5: « It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. [...] »

China and the TRIPS

- n « Hardball approach » : WTO disputes between the US and China (April 10, 2007):
 - China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights (WTO case DS 362)
 - China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (WTO case DS 363)

China and the TRIPS

Structural difficulties

- n Double track enforcement system: administrative / judiciary
- n Multiple governmental agencies & locations
- n IP registration backlog (HR!) ☹ art. 62 para. 2 TRIPS (?)

Excessive formalities

- n Obligation to provide notarized documents for enforcement purposes (at trade fairs) ☹ art. 41 para. 2 TRIPS (?)

China and the TRIPS

n « Softball approach »:

<http://www.ipr2.org/>

6 sectors:

- LEGAL FRAMEWORK
- CAPACITY BUILDING
- ACCESS TO INFORMATION
- ENFORCEMENT
- SUPPORT TO RIGHT HOLDERS
- TRADEMARKS & DESIGNS (OHIM)



China and the TRIPS



n **China IPR SME Helpdesk**

<http://www.china-iprhelpdesk.eu>

- Free information, first-line advice and training support to European SMEs to protect and enforce their IPR in China

Landmark cases

Landmark cases

- n The Silk Market case
- n The Schneider / Chint case
- n The Yamaha / Zhejiang Huatian
- n The IFPI / Baidu - Yahoo China cases
- n The Danone / Wahaha case

China's IP Agenda

China's IP Agenda

Policy promoting scientific innovation

- n « Hu Jintao said innovative development of science and technology is a top priority for the nation. He encouraged stronger innovation in major projects to master core technology and increase the ownership of intellectual property rights » (June 24, 2008)
- n Move from « made in China » to « created in China »

China's IP Agenda

China's Action Plan on IPR Protection 2008

(March 18, 2008)

- n 1. Legislation / 2. Enforcement / 3. Trials / 4. « Institution Building » / 5. Publicity / 6. Training & education / 7. International exchange & cooperation / 8. Promotion of « Enterprise IPR Protection » / 9. Services to rights owners / 10. « Plan for special research »

China's IP Agenda



Compendium of China National
Intellectual Property Strategy Issued

China National IP Strategy Compendium (June 5, 2008)

- n **Goal:** « construct China into a country with comparatively higher level of intellectual property right (IPR) creation, utilization, protection and administration by 2020 »
- n **Method:** Revision of IPR substantive legislation & enforcement regulations / abuse of IPR / educational programs (awareness raising / IPR culture)

Beyond IP enforcement

Beyond IP enforcement

Hurdles affecting the protection of IPRs

- n Substantive (non IP) law (A)
- n Regulatory constraints (B)
- n Dispute resolution methods (C)

Beyond IP enforcement

(A) Substantive law

- n Protection of IP in employment relationships (new labor contract law as of January 1, 2008)
- n Protection of pharmaceutical test data (art. 39 para. 3 TRIPS)

Beyond IP enforcement

(B) Regulatory constraints

- n « Forced transfer of technology » / « induced transfer » (\Rightarrow « IP leakage »):
 - Governmental approval: Obligation to disclose IP (trade secrets) in order to obtain regulatory approval for a product or for building a plant
 - Corporate structure: regulatory obligation to enter into a JV with a local partner
- n Regulatory hurdles to the import / export of IP rights (technology import / export regulations)

Beyond IP enforcement

(C) Efficient IP Dispute resolution methods

- n Specialized IP courts
- n Specialized IP arbitration centers:
 - Xiamen IP arbitration center (April 2007)
- n Enforceability of foreign arbitral awards (under the 1958 New York Convention)?

Recommendation made to « avoid choosing a foreign arbitration institution »

The Future

The Future

Tomorrow ?

- n The Olympic Games
 - « Ambush marketing »
 - Customs seizure actions



The Future

The next Big Thing (?): the abuse of IP rights

IP / antitrust interface

New Antitrust Law (August 1, 2008)

- n « [...] the provisions of this law are applicable to the case where a Business Operator abuses its intellectual property rights in order to prevent or restrict competition »
- n Potential action of Chinese competitors against Microsoft under the new Law ? (denial by SIPO on June 19, 2008)

The Future

IP / antitrust interface (cont'd)

- n Art. 329 PRC Contract Law: a technology contract is ineffective if it illegally monopolizes the technology, impedes technological advances, or hampers other parties' technological creation

The Future

IP & technical standards

- n Example: standards for third generation (3G) wireless technology for which China has committed to accord technology-neutral treatment to different 3G standards

The Future

The last word...

« Problems do exist in IPR protection in China, and U.S. restrictions on export of high technology to China on grounds of IPR protection is understandable to a certain extent, Wang said.

But both sides will miss a golden opportunity for development, and not contribute to narrowing China's trade surplus with the U.S. and boosting bilateral economic ties if they begin to trade in high technology only when China solves all IPR problems »

Wang Oishan, Vice Premier PRC (June 19, 2008)