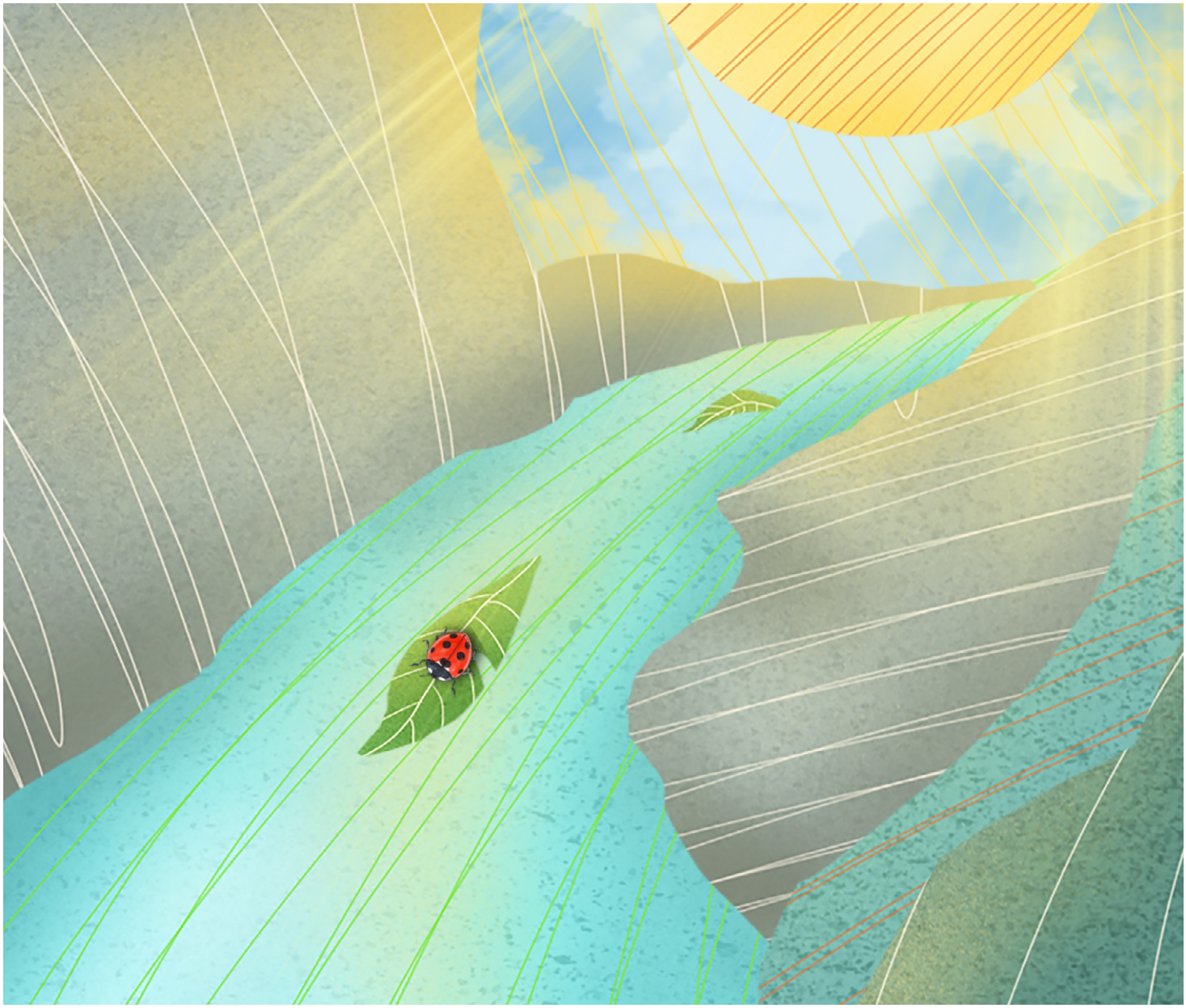
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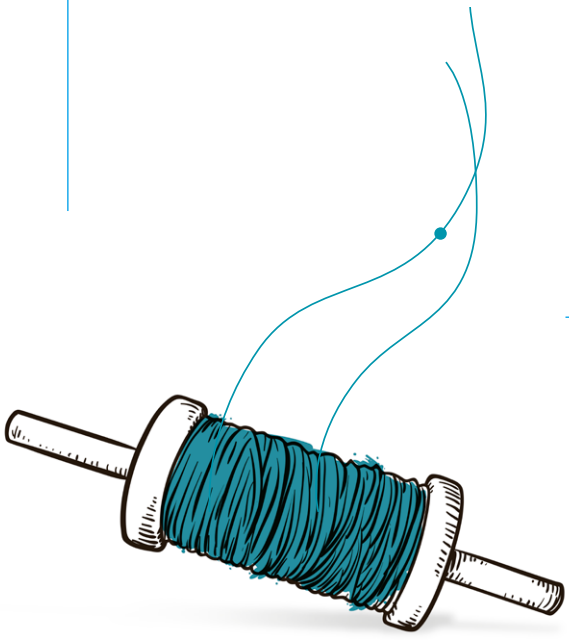
Newsletter

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China achieved stable improvement in intellectual property in 2019

On January 14, 2020, China National Intellectual Property Administration (CNIPA) released the 2019 statistics on patent, trademark, GI (Geographical indication) and IC layout design.

Patents

In 2019, 1.401 million patent applications for invention were filed with CNIPA, and 453,000 invention patents were granted. Besides the concluded 1.023 million patent applications for invention, 1.981 million patent applications for utility model and 744,000 patent applications for design were concluded. The Chinese telecom giant Huawei Technology Co., Ltd. obtained 4,510 patents for invention, holding the first place among all Chinese firms (excluding Hong Kong, Macao and Taiwan firms), followed by Sinopec and OPPO.

Ranking	Applicants	Number
1	Huawei Technology Co., Ltd.	4510
2	China Petroleum & Chemical Corporation	2883
3	Guangdong OPPO Mobile Telecommunications Co., ltd	2614
4	BOE Technology Group Co., Ltd.	2393
5	Tencent Technology (Shenzhen) Co., Ltd	2146
6	Zhuhai Gree Electric Appliances, Inc.	1739
7	Lenovo (Beijing) Limited	1706
8	ZTE Corporation	1472
9	Vivo Mobile Communication Co., Ltd	1388
10	PetroChina Co Ltd.	985

▲ Top 10 Chinese firms in terms of granted patent inventions

Ranking	Provinces (municipalities)	Number
1	Beijing	132.0
2	Shanghai	53.5
3	Jiangsu	30.2
4	Zhejiang	28.0
5	Guangdong	26.1
6	Tianjin	22.3
7	Shannxi	12.0
8	Anhui	11.8
9	Fujian	11.1
10	Chongqing	10.5

By the end of 2019, the number of invention patents owned by every 10,000 people reached 13.3, completing in advance the goals set in the 13th Five-Year Plan. The top three provinces (municipalities) with the largest number of invention patents per 10,000 people were Beijing (132.0), Shanghai (53.5) and Jiangsu (30.2).

◀

Top 10 provinces (municipalities) with the largest number of invention patents per 10,000 people

Ranking	Provinces (municipalities)	Number
1	Guangdong	24,700
2	Beijing	7,200
3	Jiangsu	6,600
4	Shanghai	3,200
5	Zhejiang	3,000
6	Shandong	2,900
7	Hubei	2,100

CNIPA accepted 61,000 PCT patent applications (so called “international patent applications”) in 2019, with 10.4% year-on-year growth. 57,000 of the PCT patent applications were from Chinese entities or individuals. The top three provinces (municipalities) for PCT patent applications were Guangdong (24,700), Beijing (7,200) and Jiangsu (6,600).

◀

Provinces (municipalities) with more than 1,000 pct international patent applications

Trademarks

The number of trademark applications filed with CNIPA in 2019 was 7.837 million, and 6.406 million trademarks were registered. By the end of 2019, the total number of registered trademarks had reached 25.219 million, with a year-on-year increase of 28.9%.

In 2019, totally 8.253 million trademark applications were concluded, and the average pendency of examination had been reduced to 4.5 months.

Others

In 2019, the total value of import and export of IP royalties reached 37 billion U.S. dollars. The total amount of patent and trademark pledge financing reached 151.5 billion yuan, with a year-on-year increase of 23.8%.

In 2019, the number of incoming patent applications for invention filed with CNIPA had reached 157,000, the number of incoming trademark applications filed with CNIPA had reached 255,000. The number of incoming patent and trademark applications in China continued to increase, which fully demonstrates the confidence and vitality of foreign investment in China.

Intellectual property is playing a more and more important role in building a sound and stable environment for business development and modernization of the country. The government persists in improving the quality and efficiency of IP examination. The pendency for high-value patent applications shrunk to 17.3 months and the average pendency for trademark applications was curtailed to 4.5 months in 2019. User satisfaction index on patent examination quality reached 84.8. The government spares no efforts to build a fair and prosperous business environment, to establish a higher level of IP protection system, making the intellectual property rights as the driving force of innovation and economic development.

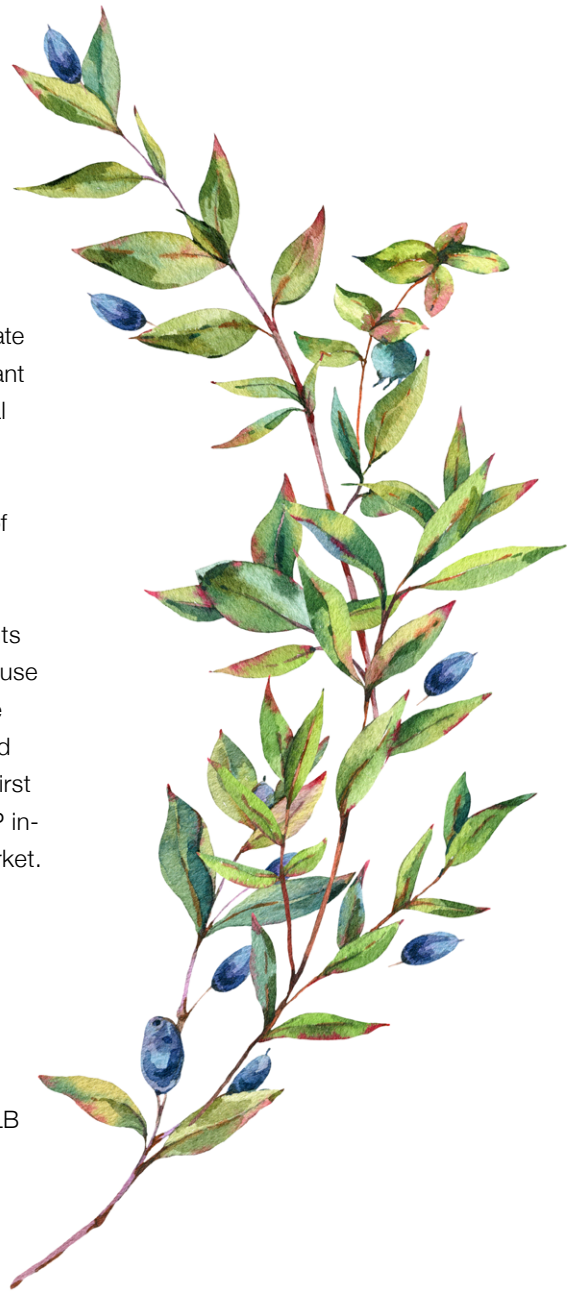
The IP tribunal of the Supreme People's Court (SPC) issued the judgment of "infringement dispute case involving multi-agent implemented method patent in the field of network communication"

On December 10, 2019, the IP Tribunal of the SPC announced the judgement of the appeal case filed by Tenda Co., Ltd., regarding the dispute of infringement of an invention patent right. In this case, the SPC established the following principle for the infringement judgment of multi-agent implemented method patent.

If the alleged infringer solidifies the substantive content of the patent method in a sued infringing product for production or business purpose, and such act or the result of the act plays an irreplaceable substantive role in the full coverage of technical features in the claim of the patent, that is, the end user can naturally reproduce the process of the patent method when using the sued infringing product normally, it shall be recognized that the alleged infringer has implemented the patent method and infringed the rights of the patentee. The judgment of this case attracted wide attention in the IP community. Because the standard of "irreplaceable substantive role" proposed in the judgement extends the interpretation of the all elements rule that has been used for many years, which makes one can fall into patent protection scope just because its technical scheme has "irreplaceable substantive role" for other parties, even if it does not implement all steps of the method patent. Besides, the theory of "solidification of the substantive content of patent method" extends the infringement of method patent potential to the manufacture and sale of products. Under this standard, the manufacture and sale of hardware having the function of directly implementing patent method by hardware manufacturer will constitute the direct infringement rather than an indirect infringement of a method patent. The judgment in this case is a major innovation for the infringement judgment of multi-agent implementation method patent and even for the infringement judgment of general method patent, and reflects the value orientation of seeking substantive protection of intellectual property in China's IP judicial practice.



CCPIT exclusively sponsors the ranking of 2020 ALB China Top 15 IP In-house Counsels



High-level intellectual property with high quality and high efficiency is an important support for the improvement of enterprise innovation capability, outputs of innovation outcomes, and realization of commercial values. Enhancing the awareness of intellectual property protection and promoting the intellectual property transformation and upgrading are fundamental to the development of enterprises.

With the continuous launching of innovation outcomes in the market, the corporate intellectual property sector is becoming more comprehensive and more complex. In-house counsels specialized in intellectual property are not only proficient in intellectual property related laws, policies and practices, but also familiar with corporate intellectual property risks and the composition of intellectual assets, and have an in-depth understanding of the strategic corporate IP objectives. They play a very important role in preventing corporate intellectual property risks, maximizing the value of corporate intellectual property, and enhancing the core competitiveness of enterprises.

Asian Legal Business ("ALB") presents the 2020 ALB China Top 15 IP In-house Counsels in an attempt to showcase the best 15 IP in-house counsels and their outstanding works. This is the first time ALB focuses on the standout IP in-house counsels in Chinese legal market. The results will be published in ALB China's March 2020 issue.

The ranking of **2020 ALB China Top 15 IP In-House Counsels** is exclusively sponsored by CCPIT Patent and Trademark Law Office. ALB research team conduct the research independently.



Patent protection in China: from filing to enforcement

By Xiaofang Li and Ji Liu

How do you get a patent in your jurisdiction?

There are three categories of patent in China – invention, utility model and design. Only invention patents must pass substantive examination prior to grant.

Each type offers different protection. Invention and utility model patents provide protection from others manufacturing, using, offering to sell, selling or importing the patented products. Invention patents prevent others from using the patented method or using, offering to sell, selling or importing the products that are developed directly through the use of this method. With regard to design patents, the owners may prevent others from manufacturing, offering to sell, selling or importing the products.

All patent applications must first satisfy the following criteria for subject matter eligibility:

- An invention patent application must be directed to a new product or process of a technical nature.
- A utility model application must be limited to a product's shape, structure or a combination thereof. Protection for a process or unknown type of material should be sought under an invention patent rather than a utility model patent.
- A design application must be directed to a new aesthetic industrial design



of a product's shape, pattern or a combination thereof, or a pattern or shape combined with a colour.

The practical utility aspect requires that the invention or utility model be reproducible and can provide beneficial effects.

The disclosure and enablement requirements demand that an invention or utility model be described in a manner that is sufficiently clear and complete so as to enable an ordinary person in the art to carry it out.

The absolute novelty bar applies in China. This means that an invention or utility model must not be part of any prior art in this country or abroad and must not have been described in any patent application previously filed there (or Patent Cooperation Treaty application nationalised in this jurisdiction) and later published.

'Inventiveness' implies that an invention or utility model must have prominent substantive features (for an invention) or substantive features (for a utility model) compared to the state of the art and must represent considerable progress (for an invention) or progress (for a utility model). For a design patent, it must not be a prior design or conflict with any legal rights obtained by other parties before the filing date. Further, it must be significantly different from a prior design or a combination of prior design features.

For an invention or utility model, the claims must:

- be supported by the description;
- contain all essential technical features for solving the technical problem; and
- be definite and concise.

The application – process and costs

Invention patents must pass substantive examination. Usually, the China National IP Administration (CNIPA) issues one or more office actions prior to allowance. If this rejects an application, the applicant can request the Re-examination and Invalidation Department (previously the Patent Re-examination Board) review the case. Its decisions are appealable to the court. Utility model and design patents are granted without substantive examination.

On average, it takes 22 months from the start of the substantive examination for an invention patent application to be allowed. Thus, the applicant may expect to obtain an invention patent three to four years after filing. It may take four to eight months from filing for the grant of a utility model application or a design application. In addition, it takes one to three months from the issuance of notice of allowance to issuance of notice of grant for a patent.

The official fees for an invention patent include the:

- filing fee – RMB950;
- examination fee – RMB2,500; and
- re-examination fee – RMB1,000, if any.

Those for a utility model include the:
- filing fee – RMB500; and



• re-examination fee – RMB300, if any.

And those for a design patent include the:

• filing fee – RMB500; and
• re-examination fee – RMB300, if any.

If an invention patent application is around 5,000 words in English, the total cost is around $6,000 from filing to grant, including official fees, attorneys' fees and translation fees. A utility model or design application will cost between $1,000 and $1,500.

Technology-based considerations (eg, software and pharmaceuticals)

For software-related inventions, CNIPA allows the following four types of subject matter for claims:

• method;
• products including hardware elements;
• products including software elements in form of means and function; and
• computer-readable mediums that include instructions.

Programmes and computer programs are not allowed. CNIPA relaxed the requirements for inventions relating to business rules in April 2017. If an invention includes both business rules and technical features, it will not be rejected directly on the ground that it relates to business rules. CNIPA mainly focuses on the novelty and inventiveness of the software-related inventions. For such inventions, CNIPA appears to be more sympathetic than the USPTO.

For pharmaceutical-related inventions, applicants should be careful about the requirement on the disclosure of experimental data within the application as originally filed. Post-filing data to prove a technical effect that cannot be derivable from the original disclosure (ie, a new technical effect) would not be accepted in the assessment of both inventiveness and enablement. This criterion is provided for in the Guidelines for Examination and affirmed by many court decisions.

What are the major administrative procedures in your jurisdiction?

Appealing patent office decisions

During prosecution, if an application is rejected by CNIPA, the applicant may request CNIPA's Re-examination and Invalidation Department to review the case. The decision made by that department is appealable to the Beijing IP Court at first instance and the IP tribunal of the Supreme People's Court at second instance.

Third-party challenges – oppositions and invalidations

CNIPA used to have opposition proceedings (like the EPO), but later abolished it. A patent can be declared invalid through the "inter parties" invalidation proceeding before the Re-examination and Invalidation Department only. Any entity or individual may initiate an invalidation procedure with that department at any time after grant of a patent. Usually an oral proceeding is held in the invalidation procedure. Although the patentee may amend the patent claims before the oral proceeding in response to the invalidation request, only very limited claim amendment manners are allowed. Any patent right that has been declared invalid will be deemed to be non-existent from the beginning. Like the re-examination decision, the invalidation decision is appealable to the court.

Administrative enforcement options

A patent owner can request that the administrative authority for patent affairs handle a patent infringement dispute. It may then obtain a permanent injunction through the administrative authority, although this cannot award damages. The decision made by this authority is appealable to the intermediate people's court that has jurisdiction over it at first instance and to the IP tribunal of the Supreme People's Court at second instance.



How are patents enforced through the courts?

A court action may be the most effective route for a patent owner to enforce its rights in China. By filing a lawsuit before the competent court, the patent owner may obtain the remedies of a preliminary or permanent injunction and damages.

Key forums and their composition (judge versus jury trials)

In this jurisdiction, the questions relating to both fact and law are examined by the collegiate bench, which consists of three or seven members, usually judges and sometimes juries. In the instance that a jury is present, it acts as a judge. In some cases relating to complicated technical issues, there may be one additional technical investigation officer in the bench to help the judges to understand the technical features of the case.

Trial flow – discovery, trial, witnesses, timing, cost

There is no discovery procedure in China. The burden of proof is normally on the person who makes the claim. However, when a patent relates to a method for delivering a new product, the burden of proof shifts to the defendant to prove that the method it uses is different from the patented method, if the owner can prove that the alleged infringer is creating exactly the same new product. In addition, with regard to supplying evidence (eg, damage evidence), the account books and the materials relating to the infringing acts are mainly in the hands of the alleged infringer. So, if the patent owner has provided initial evidence with regard to the benefits gained by the infringer, the court can order that the alleged infringer surrender the account books and relevant materials. Should it refuse without cogent reason, the court may determine the damages by reference to the patent owner's evidence.

A court hearing is scheduled once submissions from the plaintiff, defendant and third party (if any) have been exchanged. Various categories of evidence could be used during trial, including but not limited to documentary evidence, material evidence and declaration of expert witness, among others. When a declaration is used, usually the expert witness who made the declaration attends the hearing and is cross-examined by the opposite parties.

According to the laws and judicial interpretations, the first-instance case should be concluded within six months for civil cases and three months for administrative cases, in which time limits can be extended once or twice by the permission of the superior court. However, many cases have been delayed due to a huge backlog in the courts. In addition, no time limit is set if foreign entities or individuals are involved in the lawsuits.

The cost involved in court trial varies greatly depending on the amount being claimed and attorney fees – it is hard to provide even a rough estimate.

Legal doctrines, available remedies, appeals process

The doctrine of equivalents is applicable in China. A feature will be regarded as an equivalent feature if it is not:

- literally the same as a feature in the patented claim, but is implemented by substantially the same means and realises substantially the same function and effect; and
- easily conceived without requiring creative labour from a person skilled in the art.

However, the courts of China recognise prosecution history estoppel and the disclosure dedication rule. With regard to the former, the patent owner is precluded from invoking the doctrine of equivalents to recapture the content ceded by amendment during prosecution that was intended to differentiate the invention from the prior art. In the latter, subject matter that is disclosed in the description but not

claimed in the patent falls in the public realm.

In addition, according to the judicial interpretations of the Supreme People's Court, a claim should be construed upon considering the patent's prosecution history, which includes written materials submitted by the applicant or patentee in the process of patent examination, re-examination and invalidation, CNIPA's examination opinions, meeting records and oral hearing minutes, among others. The prosecution history of the divisional application or parent application, and sometimes other Chinese applications from the same patent family, could also be considered when construing a claim.

According to the laws and judicial interpretations, the second-instance case should be concluded even more quickly than the first. Other provisions on time limits are similar to those of the first instance.

How are patents commercialised in your jurisdiction?

Patent working requirements, pharma-specific rules

According to the patent law, compulsory licences can be issued upon request from others if the patent owner has failed to practice the invention after a certain period of time from grant.

In addition, the government can issue compulsory licences to eligible local pharmaceuticals to produce generic versions of a patented drug during state emergencies, unusual circumstances or in the public interest. In addition, local pharmaceutical companies can also apply to export these drugs to other countries under the treaties that China has joined. However, no compulsory licence has been ever issued in China so far.

Laws and rules applicable to licensing (including FRAND)

The Chinese Patent Law does not provide for any other forms of licensing other than the compulsory one discussed above. However, the draft fourth amendments to the Patent Law, which are being deliberated by the Standing Committee of the National People's Congress, adds rules about open licensing. With regard to this, the patentee may declare its willingness to license another entity to explore its patent. This entity can obtain a licence upon notifying the patentee and paying the licensing fee.

The court may also use FRAND terms in deciding the licensing fee for SEPs relating to telecommunication. For example, the court may consider rules such as total control, anti-hold up and anti-royalty stacking. A recent court decision issued by the Nanjing Intermediate Court used a top-down method for computing the FRAND licensing fee. In this case, the formula for determining the licensing fee for SEPs in China is that the licensing fee for a single family of patents in China is equal to the industry cumulative fee of the standard in China and multiplied by the contribution ratio of the single family of patents.

Inventor remuneration issues

According to Article 6 of the Patent Law, with regard to service inventions, the right to apply for a patent belongs to the entity. After the application is approved, the entity is the patentee. An 'invention' can be defined as the service invention, under the condition that it is made by a person in execution of the tasks of the entity to which he belongs or made by him mainly by using the material and technical means of the entity.

Pursuant to Article 16 of the Patent Law, the entity that is granted a patent right gives to the inventor of a service invention a reward and, upon exploitation of the patented invention, pays the inventor a reasonable remuneration based on the extent of spreading and application and the economic benefits yielded. The manner and amount of remuneration is further explained in Rules 76, 77 and 78 of the modified Implementing Regulations of the Patent Law. In addition, the company policy or the employment contract regarding the remuneration prevails over the statutory remuneration.

Recent development on patent divided infringement in China —— a breakthrough to all elements rule?

By Xiao Jin



Divided infringement has been a hot topic in patent infringement litigation for last several years. Massive researches and lots of discussions have been made on this topic. Typical theory and practice both require in the divided infringement there be one party, typically the end user, who implements all elements of one claim although the behavior of this party may be controlled or directed by a so-called "real infringer" who manufactures and/or sells the products.

A recent well-known case of divided infringement is Sony vs. Iwncomm [The Beijing Higher People's Court, 2017 Civil IP Final No. 454]. The Beijing Higher People's Court repeated the long-term attitude the court adopted toward the divided infringement in its sentence. That is, any divided infringement must be based on a direct infringement, i.e., there must be one single party implementing all the features of one claim. Since Sony's mobile phone only carried out a part of functions described by the Iwncomm's claim, Sony is not liable for manufacturing and selling the accused mobile phone. On the other hand, also based on the all elements rule the court held that Sony must test the mobile phone before selling, which implemented the whole patented method of Iwncomm. Iwncomm thus was awarded the damages for the test activities of Sony. According to this case, it appears that the patentee at best may expect a similar verdict if its claims involve interactions by multiple parties while the accused product only provides a part of features of the claims.

A recent sentence of the People's Supreme Court [The People's Supreme Court, 2019, Civil IP Final No. 147] of China makes significant changes to this requirement, which is even a breakthrough to the all elements rule.

The case relates to a simple access method for the network operator portal web site. As its name suggests, the patented technical solution provides

a simple access method for portal network. In past, a user must input a complete domain name or IP address to access the portal website, for example, www.google.com. Obviously, this is not convenient for the user because he must remember the full name of the domain or IP address. An improved solution later arose with which the user may access the portal server by inputting whatever he is familiar or even some customized numbers, such as “google” or “123”. According to this solution, the broadband access server (BAS) replaces the HTTP packet represented by the user’s customized input with the address of the portal server. Then, the BAS sends this address to portal sever, receives the redirect instruction from the server (redirect) and process the feedback so that the user can establish the connection with the portal server.

A further improvement was made by the inventor of the case. The inventor found that since the purpose of the whole process is to get a redirection packet, it is not necessary to let the real portal sever and BAS to handle the transaction. A virtual sever set in the router is enough to generate and feedback the redirection instruction to the end user so that the user may access the portal server.

The access method can be illustrated by the following figures.

At steps 2 and 3 of Fig.2, it can be seen that both the request sent at step 1 is received and necessary redirection instruction at step 3 is generated by a virtual server, instead of the portal

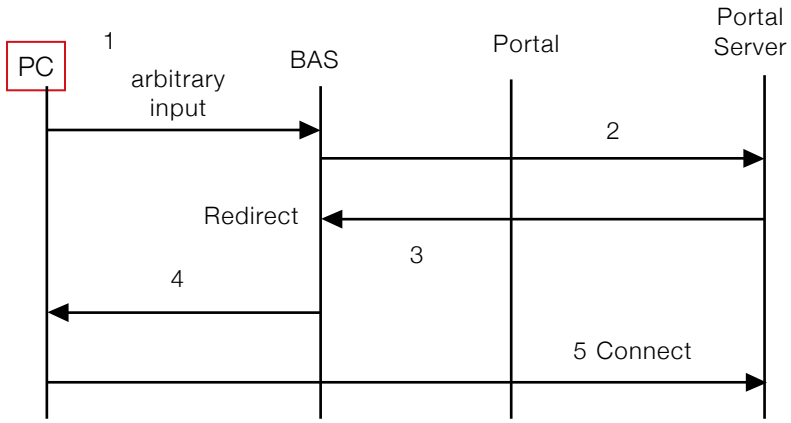


Fig.1 Prior Art

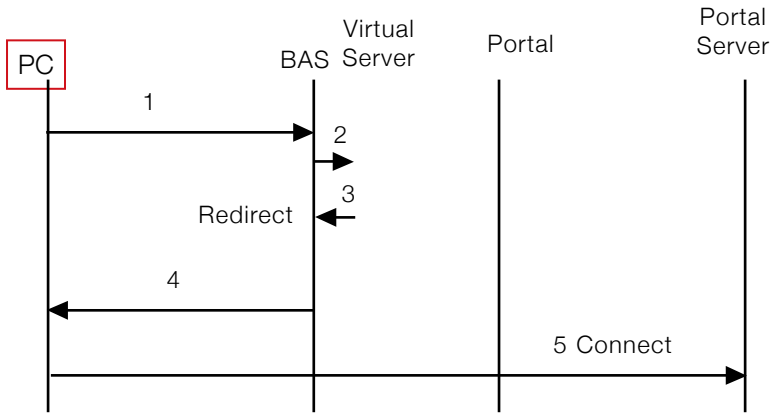


Fig.2 Patented Method

server, so that the communication overheads of steps 2 and 3 of the prior art caused by the physical connections can be eliminated.

The infringing product is a router which carries out the redirect functions shown in steps 2 and 3 and part of functions shown in steps 1, 4 and 5. However, as shown and highlighted in red, the patent requires the user’s computer to initiate the connection at step 1 and to finish the final connection with the portal server at step 5. Even worse when describing step 5, claim 1 recites “the browser of the portal user device automatically initiating the connection with the real portal server upon receiving the redirect packet”. These steps clearly make the patented method a multi-party

process which is carried out by not only the infringing product, the router, but also the user's computer.

Since the accused infringing product is a router , it definitely does not contain the feature of "the browser of the portal user device automatically initiating the connection with the real portal server upon receiving the redirect packet". According to all elements rule and our traditional practice of divided infringement, the patentee at best may expect a verdict supporting the claims about the test activity of the router by the defendant and cannot get any compensation from the activities of manufacturing and selling the router.

Now, our practice might be significantly changed by this Supreme Court case which establishes a "substantive solidification" and "natural reproduction" standard for the divided infringement occurred in the field of communication and Internet technologies.

In this case, the Supreme Court set up in the sentence that the defendant should be liable for infringement, not only including test but also manufacturing and selling activities, if he solidifies in the infringing product the substance of the patent method for the purpose of production and operation and if the act or the result of the act plays an irreplaceable substantial role in the comprehensive coverage of the technical features of the patent claim (that is, if the user can naturally reproduce the process of the patented method when the alleged infringing product is used normally) [Same with 2].

Turning to the defendant's router, when a user has the accused device connected with an ordinary computer with Internet access capabilities in a normal network environment, he can fulfill the patented method without any other special device or any other special network conditions. Second, the distinctive feature of the patent method is the virtual web server with redirection function. The evidence shows that the defendant's router also has this virtual web server providing the mandatory redirection function. Therefore, the accused router is irreplaceable in infringing the patented method. In short, the Supreme Court holds the defendant is liable for the infringement because its router solidified the substantive portion and played an irreplaceable role in implementation of the patented method so that the end user may naturally reproduce the method without any special device or effort.

This is a breakthrough to the all elements rule according to Chinese Patent Law because the defendant's router, although solidifying the distinctive virtual server of the patent therein, does not contain any user device browser as claimed. In other words, even if the accused infringing product does not contain each and every claim element of the patented method, it is believed "infringing" the patent through manufacturing and selling the product.

The Supreme Court explains the reason of its verdict. The Supreme Court holds the patented technology in the case belongs to the field of network communication, which has the characteristics of interconnection, information sharing and multi-party collaboration. The characteristics mean that most types of inventions in this field are method patents and often can only be written as a method patent that requires the participation of multiple parties. On the surface, the end user is the infringer of the patent method, but in essence the patent method has been solidified in the infringing product during manufacture and will be naturally reproduced and mechanically reenacted by the end user in normal use after distribution. Therefore, it should be determined that the behaviors of the defendant to manufacture and sell the infringing product directly lead to the implementation of the patented method by the end user [Same with 2].

The Supreme Court also explains the reason why they bring a breakthrough to the all elements rule in this case. As stated, the defendant substantively solidified the patented method in its router and the router naturally reproduced the patented technology when being used by the end user. If according to the all elements rule, like presented above in Sony vs. Iwncomm, the plaintiff can only be awarded the damages caused by the test activities of the defendant, which is believed insufficient to protect the patentee's intellectual property. Therefore, the Supreme Court in this case made the verdict that the defendant should

compensate the plaintiff the damages caused by manufacture and sells.

Although China is not in a case law system, it is obvious that this verdict made by the Supreme Court will significantly impact our practice in the future, especially in the field of internet communication.

First, the Supreme Court shows the strength and determination of IP protection through this case, considering that this is one of three cases carefully picked up and announced by the Supreme Court to the public after the jurisdiction of second instance of the IP technology cases went to the Supreme Court earlier this year. The owners of internet communication patents are likely to benefit from this case because their damage claims based on manufacture and sells are possible to be supported, not limiting to the test activity, in the future. In this case, the Supreme Court made a big step forward from Sony vs. Iwncomm and set up the "substantive solidification" and "natural reproduction" standard which means the infringer is possible to be responsible for his product when the product uses the substance of the patent invention.

Second, the Supreme Court shows flexibility in patent infringement litigation by considering the specific technical field. One important reason the Supreme Court made the verdict in favor of the patentee is that the characteristics of the patent technical field, for example, multi-party collaboration and interaction, along with the drafting pattern thereof have been carefully considered so that the "substantive solidification" and "natural reproduction" standard is established for this technology field.

Finally, it is foreseeable that this judgement would lead to extensive discussions on the divided infringement. The center of the discussions could be that the verdict brings a real breakthrough to the traditional all elements rule required in divided infringement. There is not a single party implementing all the elements of the patentee's claims in this case, neither the end user's computer, nor the router. Moreover, although the Supreme Court emphasizes the specific technical field throughout its judgement, no exception has been enacted in our patent law or law interpretation that patents in a specific technical field can be above the all elements rule. Meanwhile, the Supreme Court fails to explain the legal basis for the "substantive solidification" and "natural reproduction" standard created in its verdict. Furthermore, the standard "substantive solidification" seems to advocate a trend to determine the protection scope of the claims based on the spirit of the invention instead of our long-term attitude of claim interpretation, i.e., based on the words of the claims in combination of the description. This might bring lots of uncertainties because the patent technologies could be extremely complicated and the court has to determine which part of one claim is the "substance" of the patent and which is not before starting an infringement trial, regardless how and what those carefully chosen claim words describe in the claims.

It is interested to see how our practice could be affected by this case and if the "substantive solidification" and "natural reproduction" standard could become a part of our patent law. May it mean Chinese patent practice will lean toward the central definition principle by focusing on the "substance" of the patented invention? We will see the consequences in the future.



Trademark protection in China: legislative framework and causes of action

By Aimin Huo



Trademark law, rules and regulations

China has a comprehensive and integrated legal framework for trademark protection based on domestic legislation as well as international IP treaties and conventions. The Trademark Law and its Implementing Regulations are the primary sources of law on trademark protection. The Trademark Law entered into force in 1983 and has been amended in 1993, 2001, 2013 and 2019. The most recent amendments (23 April 2019) took effect from 1 November 2019. The key purpose of the recent amendments is to enhance trademark protection with new prohibitions to more effectively curb bad-faith filing and provide harsher penalties for trademark infringement.

In addition to the Trademark Law, the domestic laws, rules and regulations on trademark protection across the administrative, civil and criminal spheres include:

- the Civil Law;
- the Tort Law;
- the Criminal Law;
- the Copyright Law;
- the Anti-unfair Competition Law;
- the E-commerce Law;
- judicial policy, interpretations and guidelines issued by the Supreme Court on issues such as jurisdiction, application of laws, conflicts of rights, preliminary injunctions and evidence preservation, among other things, in trademark-related administrative, civil or criminal litigation;
- rules, regulations or guidelines on trademark protection issued by the competent authorities (eg, the Chinese National Intellectual Property Administration (CNIPA), the State Administration for Market Regulation (SAMR), the General Administration of Customs, the Ministry of Public Security and the Supreme People's Procuratorate);
- guiding cases or referential cases published by the Supreme Court; and
- referential cases published by local High Courts, among others.

In the recent Trademark Law amendments, statutory damages have been increased to Rmb5

million (approximately $700,000) from Rmb3 million (approximately $420,000) and the punitive damages for grave trademark infringement has been raised from three to five times the damages assessed in light of one of the following factors:

- actual losses of the trademark rights holder;
- profits of the infringer; or
- a reasonable multiple of the relevant trademark licence fees when it is difficult to determine the rights holder's losses or the infringer's profits.

On 23 April 2019, the Anti-unfair Competition Law was amended, the second amendment since its enactment in 1993 and the first in 2017. The amended Anti-unfair Competition Law features trade secret protection and increased fines and damages for acts of unfair competition, increasing statutory damages for such acts which, among other things, violate IP rights, from Rmb3 million (approximately $420,000) to Rmb5 million (approximately $700,000).

Trademark litigation acts as much more of a deterrent if it can hold the individuals (ie, the masterminds of the infringement, the legal representatives or shareholders of the companies committing the infringing acts) liable for trademark infringement. In recent years, the China's courts have rendered verdicts that have held company legal representatives or shareholders liable jointly or severally for acts of infringement perpetrated by their companies to prevent sophisticated infringers from abusing the independent legal person status of the company or the limited liabilities of shareholders to evade trademark infringement penalties.

In **Exxon Mobil**, Zhang Zhimin (the legal representative of Beijing Beinong Guoxin Technology Development Co Ltd) and his daughter, Zhang Dandan, were sued as co-defendants for their part in the infringement regarding use of the trademark MOBIL (in both English and Chinese) on pesticides and fertilisers. The appellate court affirmed the trial court verdict and ordered the four defendants to pay damages of Rmb3 million to Exxon Mobil.

Causes of action

Trademark litigation falls into the following categories in terms of applicable laws, procedures, nature and objectives:

- administrative litigation:
  - judicial review of decisions or rulings on official refusal, opposition, invalidation and non-use cancellation, among others, rendered by the CNIPA;
  - judicial review of other trademark-related specific administrative acts carried out by the CNIPA and the SAMR; and
  - judicial review of decisions or rulings on trademark infringement rendered by the local market regulation administration; and

- civil litigation:
  - trademark infringement litigation;
  - motion for a non-infringement



declaratory judgment;
- trademark transfer contract dispute;
- trademark licensing contract dispute;
- trademark agency contract dispute;
- motion for preliminary injunction;
- motion for pre-trial asset preservation in a trademark dispute;
- motion for pre-trial evidence preservation in a trademark dispute;
- cases involving damage liability arising from erroneous motion for preliminary injunction; and
- other trademark-related disputes.

The rights holder may initiate the following actions for trademark protection for unregistered trademarks:

- seeking well-known trademark recognition to stop the infringing trademark use on similar goods or services;
- filing unfair competition litigation to stop the infringing trademark use, as the Anti-unfair Competition Law prohibits use of influential product names, trade dress, trade names, institutional names, personal names (including pen names, stage names and translated names) and distinctive elements in domain names owned by others that are likely to cause confusion; and
- filing copyright litigation if the unregistered trademark is subject to copyright protection.

If recognised as a well-known trademark, the registered trademark can help the rights holder to stop the use of the infringing trademark on dissimilar goods or services.

Criminal litigation

The following acts carry criminal liabilities:

- passing off registered trademarks, namely unauthorised use of trademarks identical or confusingly similar to the registered trademarks;
- selling goods using counterfeit registered trademarks; and
- illegally manufacturing the labels of others' registered trademarks or selling such illegally manufactured labels.

Criminal litigation is usually filed by procuratorates after the Public Security Bureau (PSB) (ie, the police) has completed the criminal investigations and handed over the files and evidence to the procuratorates. The PSB may open criminal investigations on its own initiative or in response to complaints filed by the rights holders or after the cases have been handed over to them by the Market Regulation Administration. The rights holder may file a complaint to the local PSB, requesting it to commence a criminal investigation. While criminal litigation is pending, the rights holders may consider filing an incidental civil litigation aimed at claiming damages.

Alternative dispute resolution

Mediation and arbitration

Trademark disputes can be resolved through mediation in civil litigation in China. If the plaintiffs and defendants agree to mediate a settlement agreement, the court may act as



mediator or direct the parties to work with the court-designated external mediators or mediation centres. Heavy and increasing caseloads have put the courts under severe strain. The Supreme Court has been urging the courts to rely on alternative dispute resolution mechanisms to deliver quality and efficiency in IP protection.

Arbitration serves to resolve civil trademark disputes, provided that the parties agree in writing to the arbitration.

Mediation and arbitration are generally not employed in trademark administrative and criminal litigations unless the rights holder files an incidental civil litigation in a combined criminal-civil proceeding and the parties choose to mediate a settlement agreement on the civil claims over damages.

Litigation venue and formats

The courts in China have four levels of hierarchy:

- Basic people's courts (ie, the people's courts at district or county level):
  - Such courts have no jurisdiction as first-instance courts over trademark-related litigation unless designated by the Supreme People's Court.
  - Intermediate people's courts, including the specialised IP courts in Beijing, Shanghai and Guangzhou:
  - Each city has at least one Intermediate People's Court, which are first-instance courts over civil trademark litigations. Cases involving well-known trademark recognition can only be accepted by an Intermediate People's Court in the capital of a province or autonomous region, by the IP courts or courts otherwise designated by the Supreme People's Court.
  - The Beijing IP Court has exclusive jurisdiction over all first-instance administrative litigation on judicial review of decisions or rulings on official refusal, opposition, invalidation and non-use cancellation, among other things, rendered by the CNIPA and its judgments can be appealed to the Beijing High People's Court.

- High people's courts in each province and autonomous region which are directly governed municipalities (eg, Beijing, Shanghai, Tianjin and Chongqing):
  - Such courts are the first-instance courts hearing civil cases with the claimed damages reaching the threshold set by the Supreme People's Court or having socio-legal impact on their jurisdiction. They also hear appeals of first-instance judgments of intermediate people's courts and retrials of cases heard by intermediate people's courts, either at first or second instance.

- The Supreme People's Court:
  - The Supreme People's Court rarely hears first-instance cases. It hears appeals of first-instance judgments by high people's courts and (most often) retrials of cases heard by high people's courts,



either at first or second instance. The IP Tribunal of Supreme People's Court has exclusive jurisdiction over appeals from courts all over China regarding technology-related cases.

Some basic people's courts and intermediate people's courts have cross-region jurisdiction over IP-related cases according to the Supreme People's Court guidelines.

Forum shopping

Forum shopping is not available for administrative litigation.

Courts at the defendants' domicile, locations of occurrence of the infringing acts and/or where the infringing products are stored, seized or detained by administrative authorities (eg, the Market Regulation Administration, the Customs Office or the PSB) have territorial jurisdiction over infringement cases. Locations of occurrence of the trademark infringing acts are where infringing acts or the outcomes of infringing acts take place.

Specialised IP courts and IP tribunals have more expertise and experience in handling IP disputes. Courts in more economically developed provinces and areas (eg, Zhejiang and Jiangsu) are more pro-intellectual property and tend to grant higher damages. It is recommended that the plaintiff file the trademark litigation at the specialised IP courts or IP tribunals.

It is also an effective strategy to identify all the players involved in the trademark infringement (eg, the mastermind of the infringing acts, the owner or licensor of the infringing trademark, the manufacturer, the distributor, the warehouse landlord and the internet service provider (ISP)) and select the court most preferred by the plaintiff to file the litigation.

Internet courts in Beijing, Hangzhou and Guangzhou have jurisdiction over disputes arising from online infringement and transactions. Almost all proceedings (including filing complaints and evidence, service and even trials) at the internet courts are conducted online for the convenience of all parties involved in the trials.

The Supreme Court's opinion is that only the courts at the defendants' domicile or the location of the server of the e-commerce trading platform (ie, the ISP) have jurisdiction over litigation against the internet-based trademark infringement.

Jury versus bench

In China, trademark litigations are usually heard by a collegiate bench of three (most frequently) or five members. At the trial court, the collegiate bench may comprise judges only, or judges together with one or two people's jurors. People's jurors are not included in a collegiate bench at the appellate courts.

Damages and remedies

Available remedies

The following remedies are available in trademark infringement litigation:

- injunction (both interim and permanent);
- damages (including punitive damages); and
- public apologies or declarations aimed at undoing the negative affect of the infringing acts.

Damages for trademark infringement are calculated with reference to one of the following factors:

- actual losses of the rights holder;
- profits of the infringer; or
- a reasonable multiple of the relevant trademark licence fees when it is difficult to determine the rights holder's losses or the infringer's profits.

The Supreme Court has directed the courts to use market value as a benchmark for determining damages in IP litigation and award punitive damages to ensure that the damages in total are commensurate with the market value of the IP rights in dispute.

In light of the present practice and trend for the courts to award substantial damages of millions of renminbi, the rights holder should consider adjusting its IP protection strategy and rely more on litigation to obtain stronger protection in China. Meanwhile, the legitimate brand owners should also be more cautious in trademark use in order to avoid trademark infringement suits and the ensuing large damages.

Injunctive relief



Injunctive relief can be an interim injunction or permanent injunction. Interim injunctions are difficult to obtain. When granting an interim injunction, the court will consider the following factors:

- the plaintiff's likelihood of prevailing on the merits;
- a demonstration of irreparable injury to the plaintiff if relief is not granted;
- the threatened injury to the plaintiff is demonstrated to outweigh or equal whatever damages the proposed injunction may cause the defendant;
- the balance of interest and hardships between the plaintiff and defendant;
- whether the injunction may harm public interest; and
- whether the plaintiff has posted a bond.

Evidencing the case

Investigations and first steps

Investigations are necessary and can be vital for formulating a trademark litigation strategy and tactics, as well as building a stronger case against the defendants. Investigations are conducted for numerous reasons, including:

- collecting facts and evidence to support the litigation;
- spotting the strength and weakness of both the plaintiffs and defendants; and
- formulating the trademark litigation strategy and tactics, including:
  - identifying the business pattern of the trademark infringers and all players involved in the infringement;
  - determining the defendants to be sued and the court where to file the litigation;
  - setting the objectives of the litigation;
  - taking precautionary steps before the litigation so as to anticipate and fend off the litigation-triggered counter-attacks from the defendants; and
  - adopting a well-balanced litigation strategy.

Legal counsel should always be closely involved throughout the investigations when working with internal investigators or external professional investigators by offering input into the investigation plan and overseeing investigations to ensure that evidence obtained complies with the rules of evidence in terms of subjectivity, legality and relevance. Relevant and particularly important and key evidence (eg, infringing goods, websites and transaction documents) must be notarised, as notarised evidence is viewed as having more probative strength than non-notarised evidence. It is important for legal counsel to review and ensure the legality of the evidence obtained during the investigations because evidence procured through dubious or illegal means, as trap orders or entrapment, may be excluded or result in compromising the litigation.

Survey evidence

Survey evidence is not mandatory. It is often challenged for being untruthful, unscientific biased and/or manipulative. In practice, survey evidence has been filed with the court in hard cases for reference purposes. The Supreme Court has accepted survey reports as evidence in retrial cases. The referential value of survey evidence for the judges to determine cases should not be ignored.

Use of expert witnesses

Expert witnesses are permitted in trademark litigation cases and are often engaged to provide expert opinions on difficult or controversial issues, especially in cases of first impression. Sometimes, courts may also host seminars or request experts to submit opinions for consideration. Economic experts



can also be helpful in ascertaining payable damages. Expert opinions may not be cited by the judges; however, the referential value for the judges to determine the cases should not be underestimated.

Available defences

The following defences can be raised when facing trademark infringement charges:

- no trademark infringement;
- no likelihood of confusion because there are no similarities in terms of trademarks *per se* or the goods and/or services;
- the plaintiff's trademark is invalid or to be declared invalid due to its non-compliance with the Trademark Law;
- legitimate use;
- fair use;
- prior trademark use;
- legitimate product source and no knowledge of trademark infringement;
- prior rights use (eg, use of prior trade names, copyrights or design rights);
- authorised or licensed use;
- exhaustion of trademark rights;
- laches and/or loss of statutory limitations;
- no infringement in original equipment manufacturer (OEM) cases where all the OEM products are exported only to a foreign country or region and the mark used on the goods is owned or duly registered by the party, which has ordered the OEM products, in the destined country or region;
- safe harbour for ISPs;
- lack of standing to sue or be sued;
- lack of jurisdiction; and
- unclean hands and/or abuse of rights.

In retrials as guiding cases, the Supreme Court has dismissed trademark infringement lawsuits on the grounds that the cited trademarks were registered by the plaintiff in bad faith and trademark infringement litigations were filed in bad faith against legitimate trademark users, meaning that such litigations are an abuse of rights.

Appeals process

A domestic party may file an appeal within 15 days of receipt of a first-instance judgment, while a foreign party may file an appeal within 30 days. Parties may still file new and supplementary supplement evidence to the appellate court.

The appellate court will review both factual and legal issues. It usually takes six to eight months for the appellate court to render its judgment, which is then final and effective.

The plaintiffs or defendants may apply for a re-trial of effective judgments within six months of the effective date. The upper courts will review and decide whether to accept the re-trial applications. For a re-trial application to be accepted, it usually requires new and substantial evidence that could overturn the effective judgment or clear mistakes in procedural issues, factual findings or application of law.

In rare circumstances, the people's procuratorates have powers to supervise adjudication of civil cases and may do so *ex officio* or by request.

Any party can appeal before a higher-level court if dissatisfied with a trial court judgment or certain other decisions such as the court's refusal to accept the case, a rejection of a trademark filing or an objection to jurisdiction. The time limit for appealing a trial court judgment is 15 days for a domestic party or 30 days for a foreign party. Other trial court decisions must be appealed within 10 days for a domestic party or 30 days for a foreign party.

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Evaluating the treatment of geographical indications in China

By Gang Hu

China and the United States, as the world's two most important economic entities with a GDP of more than 10 trillion US dollars, have finally reached the first phase of the Sino US Economic and Trade Agreement (hereinafter referred to as the "Sino-US Agreement") on January 15, 2020, which eases the haze of world economic development and boosts the confidence of market investors. The first chapter of the Sino US agreement focuses on "intellectual property rights", which not only shows the important position of this issue in the Sino US economic and trade negotiations, but also shows that both countries attach great importance to the protection of intellectual property rights and can continue to expand and deepen cooperation under the common interests of both sides.

In terms of intellectual property protection, the Sino-US Agreement further divides it into five parts: (1) the protection of trade secrets, (2) the patent link of pharmaceuticals, (3) the protection of geographical indications, (4) the treatment of malicious rush to register trademarks, and (5) the law enforcement and rights protection of counterfeit products. Among them, the protection of geographical indications is one of the most interesting aspects.

In particular, the relevant contents may cause disputes in the future international coordination of geographical indication protection rules, which has attracted special attention.

According to the Sino-US Agreement, the Parties shall ensure full transparency and procedural fairness with respect to the protection of geographical indications, including: 1) safeguards for generic terms (also known as common names); 2) respect for prior trademark rights; 3) clear procedures to allow for opposition and cancellation; and 4) fair market access for exports of a Party relying on trademarks or the use of generic terms.

As for the protection of generic terms, the key point is the accurate identification of them. In 2017, Article 10 of “Provisions on Several Issues concerning the Trial of Administrative Cases involving Trademark Authorization and Confirmation” issued by the Supreme People's Court of China stipulates that in principle, the recognition of the generic term shall be based on the general knowledge of the relevant public nationwide, and in particular, on the common appellation in the relevant market. However, the recognition rules of generic terms in the Sino-US Agreement are obviously more detailed and stricter than the above provisions. In particular, it is emphasized that in determining whether a name is a generic term in China, the factors to be considered shall also include "whether the good in question is imported into China, in significant quantities, from a place other than the territory identified in the application or petition, and in a way that will not mislead the public about its place of origin, and whether those imported goods are named by the term". Obviously, the US side hopes to rely on some objective criteria when determining the generic term. However, it is worth exploring whether the above objective standards have legitimacy and rationality from the perspective of a third party, to truly become a widely accepted universal standard.

Regarding respect for the prior trademark rights, it should be noted that the State Intellectual Property Office of China revised “the Measures for the Protection of Foreign Geographical Indication Products” (hereinafter referred to as the "Measures") on November 27, 2019. Article 5 of the new Measures stipulates the objects to be protected by geographical indication products in China, and additionally adds the provisions that the geographical indication products to be protected shall not conflict with other prior rights. Among them, the so-called "other prior rights" naturally include trademark rights. This means that for new protected geographical indications abroad, if their obligees seek to obtain extended protection in China, they will experience more rigorous examination than before, and the difficulty of obtaining rights will increase.

As for the opposition and cancellation of the geographical indication products, articles 12 to 16 and articles 33 to 35 of the above Measures stipulate the relevant procedures respectively, so the form has met the provisions of the Sino-US Agreement. In addition, article 16 of the Measures also clearly stipulates that the application for review may be filed if the decision on opposition of geographical indication is not satisfied. However, it should be noted that the opposition review decision is final. Therefore, the examination procedures for opposition, opposition review and cancellation of geographical indications are all set up in the State Intellectual Property Office, which does not need to accept judicial review, so as to speed up the efficiency and authority of administrative examination of the application for registration of geographical indications.

With regard to fair market access, the US is concerned about the possible negative impact

of agreements on geographical indication protection signed between China and other international regions. More directly, "EU-China Agreement on cooperation on and protection of geographical indications" (hereinafter referred to as the China-EU Agreement) reached on November 4, 2019 should not hinder the export of US goods and services using trademarks and generic terms to the Chinese market. According to the published text of the China-EU Agreement, the agreement contains only 14 articles, but in fact, it sets a quite high level of protection requirements and rules for geographical indications. In the appendix of the statement, 275 geographical indication products (175 of these will be added by China and the EU as planned four years after the agreement comes into force), with regional characteristics that need to be protected by each other are also included. It should be noted that the Sino-US Agreement requires that if a part of the composite name that requires protection of geographical indications is a generic term, it shall not be protected. Although the geographical indication products listed in the China-EU agreement meet the definition of geographical indication regulated by TRIPs, they may not meet the requirements by the Sino-US agreement. For example, the Greek most famous dairy products and iconic food feta. According to the provisions of the China-EU agreement, after the end of the transition period (eight years after the entry into force of the agreement), the term "feta" will not be used in the people's Republic of China as a generic term for cheese. Therefore, whether there will be conflicts in practice and how to carry out the specific operation of the above agreements and the contents of the respective obligations in the agreements need to be further observed and clarified.

Since China joined the Paris Convention for the Protection of Industrial Property in March 1985, it has started to protect geographical indications at home and abroad. For example, the first geographical indication product to apply for registration and protection in China is Florida Citrus from the United States. As the foreword of the Sino-US Agreement states "China recognizes the importance of establishing and implementing a comprehensive legal system of intellectual property protection and enforcement as it transforms from a major intellectual property consumer to a major intellectual property producer. " For a country with a long history, vast territory, complex landform and climate, China does not lack qualified



geographical indication products.

In China, the former General Administration of Quality Supervision, Inspection and Qurantine of China is responsible for the protection of geographical indication products as a special protection system, while the Trademark Office of the State Administration for Industry and Commerce is responsible for the protection of geographical indication trademarks, both of which have been in operation for nearly 20 years. It should be said that the protection concepts of the two systems are obviously different. The protection of geographical indication products emphasizes the objective causal relationship between product quality, characteristics and origin conditions, while the protection of geographical indication trademark tends to protect the regional reputation of the mark. The two protection modes complement each other in practice. In the latest reform of government institutions in China, the functions and powers of the protection of geographical indication products and geographical indication trademarks are centralized to the State Intellectual Property Office, which provides a precondition for the integration of geographical indication protection. According to official statistics, by the end of 2019, 2385 geographical indication products and 5324 registered trademarks have been approved in China. Of course, most of them are owned by Chinese obligees.



Quantity itself is a kind of quality. The fact that such a large number of geographical indication products and/or geographical indications are seeking to be protected and registered means, on the one hand, geographical indications can bring real or potential huge commercial benefits to economic entities, on the other hand, China can become as important as Europe and the United States in the protection of geographical indications, a sensitive and important issue of intellectual property rights, but more important independent and balanced power. On several occasions, the Chinese government has vowed to continue to be committed to maintaining the rule-based free trade system, jointly building an open world economy and promoting economic globalization. Therefore, it is not in China's own interest to protect geographical indications improperly if it limits competition and leads to more trade barriers. In order to avoid being trapped in the dilemma of being bound by bilateral agreements between China and the United States as well as China and the EU, China also needs to take more active and positive actions in consideration of maintaining the general pattern of global free trade rules. For the protection of geographical indications, especially for the reasonable scope of protection, China should put forward its own compromise, which is helpful to bridge the differences. In the world market, we need to advocate a more rational, pragmatic and intelligent attitude and way to look at the real needs and expectations of consumers, and continue to promote the formation of a more balanced and reasonable scheme and criteria for geographical indication protection that can be basically accepted by all parties.

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