

# PATENT LITIGATION IN CHINA

SECOND EDITION

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## INTRODUCTION

### 1.1 Intellectual Property Rights in China

The author first studied intellectual property law at Fudan University in Shanghai, the People's Republic of China (PRC or China), in 1989. At that time, there were no courses on intellectual property (IP); only a short section of the course on civil law was devoted to intellectual property. At the time, studying the enforcement of intellectual property rights in China was more theoretical than practical. **1.1.1**

In 1993, I started working as an intellectual property paralegal based in Hong Kong. At that time, I handled the filing of some patents in China but no patent litigation. During the 1990s, most of the work of intellectual property practitioners in China revolved around anti-counterfeiting with some general advice on patent law. **1.1.2**

As China's economy grew, more and more foreign companies invested in higher technology production in China, and the filing of patents increased substantially. After China joined the World Trade Organization (WTO) in 2001, there was a further marked increase in filings. From about 2003, we also started to see foreign and domestic companies become more and more involved in patent litigation. From 2005 to 2010 when I was based in China, the majority of my practice was devoted to handling patent litigation matters in China, including a number of cases involving cross-border patent disputes. Since moving to Hong Kong to practice as a barrister I have continued to advise clients on patent issues in China. There are more and more patent cases that are raising ever more complex issues, including the impact of competition law on the enforcement of intellectual property rights. **1.1.3**

China is now the world's second largest economy, behind the United States (US).<sup>1</sup> Many foreign companies have no choice but to invest in and transfer technology to China. Increasingly, they have to rely on the Chinese legal system to protect their rights. **1.1.4**

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<sup>1</sup> World Economic Outlook Database, International Monetary Fund, 2009.

- 1.1.5** A number of problems remain in the Chinese legal system, including that law is not above politics; the state owns many large enterprises, and, local protectionism can be strong. Each of these problems is discussed briefly at the end of this chapter.
- 1.1.6** Nevertheless, the Chinese legal system has over the last 20-plus years improved with the growth of the economy. The official policy of the Chinese government is to protect intellectual property rights so as to encourage domestic innovation and move the economy away from the current ‘world’s factory’ model whereby foreign products are made in China to be exported elsewhere. Since publication of the first edition of this book, it has been a case of ‘two steps forward and two steps backwards’. On the plus side, in 2014 there were two welcome advances in the protection of IP rights, namely the establishment of specialist IP Courts in Beijing, Shanghai, and Guangdong Province and the publication of a second draft Judicial Interpretation on the handling of patent cases that has clarified a large number of issues that arise in patent litigation. On the minus side, first, the Patent Re-examination Board and courts have taken an even tougher stance on the validity of patents, invalidating many patents due either to lack of support or obviousness over common general knowledge. Second, the Anti-Monopoly Law appears to have become a ‘weapon’ for Chinese authorities to level the IP playing field for Chinese companies. The word ‘weapon’ is not my choice of word; it was used in an article published on the official website of the Guangdong Higher People’s Court.<sup>2</sup>
- 1.1.7** This growth of ‘IP Nationalism’, which I commented on briefly in the first edition of this book, is a very worrying trend. It comes from a belief that China originally allowed foreigners to register too many patents in China early on and gave too great a protection to them. The thinking goes that for Chinese companies to grow and compete, they must be given space to innovate without bumping into foreign patents. The Chinese government is no longer concerned that weakened IP protection will discourage investment. They believe, probably correctly, that the lure of the ever-growing Chinese market is too much for foreign companies to give up. The long-term question to be answered is, will it be good for Chinese companies? Protectionism generally results in a weakening of industry, not a strengthening of it. While national champions may do well, smaller companies may be stuck with products that they can only sell in the Chinese market, because as soon as they export they will be sued for infringement.

## 1.2 The Scope of this Book

- 1.2.1** This book is intended to provide non-Chinese patent practitioners and others interested in the Chinese patent system an overview of the patent enforcement system so

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<sup>2</sup> See Chapter 16.

as to allow them to understand the steps that need to be taken to protect or defend their rights.

This book is not a substitute for obtaining legal advice. Although this caveat is always included in texts on legal subjects, it is particularly important that legal advice be obtained in relation to patent matters in China. Laws and regulations can change very quickly, and local rules and practices can make a big difference to whether a case can be brought or defended successfully. **1.2.2**

### 1.3 History of Patent Law in China

The concept of intellectual property rights, particularly patent rights, is relatively new in China. Traditionally, no domestic intellectual property laws existed. It was not until the late 19th century, when Chinese scholars began to travel and study abroad, and bring ideas back from the West, that palpable notions of intellectual property rights began to be formulated in China. This intellectual development culminated in 1898 when several ordinances relating to intellectual property, including the *Awarding Procedures for Manufacturing Craftsmanship*, were issued by the government of the Qing Dynasty. **1.3.1**

This legislation became the first in Chinese history that recognized the rights of inventors; the protection it afforded lasted for a period of between 10 and 50 years. However, after a brief period, the protection of this legislation and all other patent protection vanished, as China fractured and came under the control of warlords in the post-Qing dynasty period. No patent laws were enacted throughout the period of national turbulence that lasted from World War I through the civil war between the Communist and Nationalist forces, and the initial stages of socialism in China that led to the Cultural Revolution. During the Cultural Revolution almost all economic laws were repealed and there was limited protection of economic rights, let alone patent rights. **1.3.2**

### 1.4 Modern Patent Law

After the Cultural Revolution, China entered a period of 'reform and opening', which included the development of a market economy as part of the socialist economy. It was recognized that a market economy necessitates a legal system that can protect economic rights, and so steps were taken to create such a system. A new court system was established, and numerous laws, including the General Principles of Civil Law, a mini civil code, and a Civil Procedure Law were enacted. **1.4.1**

It was also recognized that to create a market economy, it is necessary to be able to register and protect intellectual property. The first Patent Law was passed in 1984 **1.4.2**

by the National People's Congress and came into force in 1985. The Patent Law was subsequently amended in 1992, 2000, and 2008, with the third set of amendments coming into force in October 2009.

- 1.4.3** Trade mark, copyright, and unfair competition laws were also enacted.

## 1.5 Patents in China

- 1.5.1** According to the official State Intellectual Property Office (SIPO) of the People's Republic of China (Chinese Patent Office) 2014 Statistics, a total of 2,361,243 patent applications were filed in China during 2014, a 100 per cent increase over 2010. Of these, 928,177 were invention patent application. Foreigners submitted 127,042 of the invention patent applications, while domestic applications accounted for 801,135 of the total.<sup>3</sup>
- 1.5.2** In 2014, China ranked third in the world for the number of patent applications made through the Patent Cooperation Treaty (PCT) behind the United States and Japan.<sup>4</sup> Two Chinese companies, Huawei Technologies Co and ZTE Corporation Ltd, were first and third on the list of top PCT filers (Qualcomm Inc of the United States was second).
- 1.5.3** This increase in filings reflects the Chinese government's National Intellectual Property Rights Strategy released in 2008 (National IPR Strategy), which outlined the plan for the development of China's intellectual property rights law in China up to 2020. The document made clear that the Chinese government understands that the race for patent technology is a priority for governments worldwide, and that patents relating to sectors such as advanced energy, modern agriculture, space flight, and environmental resources will support the development of China's high-technology industry.<sup>5</sup> Furthermore, it is understood that China has to accept international standards regarding patents and must actively participate in their formulation.<sup>6</sup> Moreover, the document states that China's official policy includes encouraging employees to make inventions,<sup>7</sup> and managing the relationship between patent protection and public interest.<sup>8</sup>

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<sup>3</sup> See <[http://www.sipo.gov.cn/sipo\\_English/statistics/for\\_detailed\\_statistics](http://www.sipo.gov.cn/sipo_English/statistics/for_detailed_statistics)>.

<sup>4</sup> WIPO, Top PCT Applicants, 2014. WIPO Press Room 'Telecoms Firms Lead WIPO International Patent Filings'.

<sup>5</sup> 2008 National Intellectual Property Rights Strategy, Article 16.

<sup>6</sup> 2008 National Intellectual Property Rights Strategy, Article 17.

<sup>7</sup> 2008 National Intellectual Property Rights Strategy, Article 18.

<sup>8</sup> 2008 National Intellectual Property Rights Strategy, Article 20.

## 1.6 Weaknesses in the Chinese Patent System

The Chinese legal system is still in a developmental stage and deficiencies remain in both the legal system itself and the enforcement of IP rights. Problems likely to be encountered include local protectionism, poorly trained and inexperienced judges, and, in some cases, corruption. **1.6.1**

### Political aspects of bringing a case

China is a one-party state, and the government and the party retain an ability to influence the legal system.<sup>9</sup> There have been strong efforts to develop a neutral legal system, whereby cases are decided solely on merit as determined by the law. I purposefully use the word *neutral* and not *independent* because, despite Article 126 of the Chinese Constitution, which provides that courts should exercise judicial power independently, there has never been a genuine policy in China to develop a truly independent judiciary. Although this question goes beyond the scope of this book, a truly independent judiciary would conflict with the ‘leadership of the communist party’ enshrined in the four cardinal principles set out in the Preamble of the Constitution, and the socialist rule prescribed in Article 2 of the Constitution. **1.6.2**

Nevertheless, the legal system has improved substantially, particularly in larger cities in recent years. For example, in Shanghai and Beijing, judges of the IP courts are well educated and professional; there is little corruption, and political influence is only apparent in the most important of cases. The opening of specialized IP courts in Shanghai, Beijing, and Guangdong Province mentioned above should also help the enforcement of IP rights. **1.6.3**

### Government ownership

Lawsuits brought against infringers where the alleged infringer is a state-owned enterprise can be especially problematic. State-owned enterprises usually have close relationships with local governments at the place where the enterprises are located. If the IP owner has operations at the same location, filing a suit against the infringer may seriously undermine the IP owner’s relationship with the local government. Therefore, the IP owner should carefully consider all the potential risks before filing a suit against an infringer that is owned by the government. **1.6.4**

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<sup>9</sup> See the discussion on the judiciary in Chapter 3, ‘Introduction to China’s Administrative and Judicial Patent Systems’.

### Local protectionism

- 1.6.5** A patentee also needs to consider the economic consequences of filing a lawsuit. An infringer may, for example, launch a media campaign against the IP owner, inciting nationalistic sentiments (should the plaintiff be a foreign organization). In large cities, this is usually not a serious concern. In smaller cities, however, the local government will have strong incentives to protect any opposing party that is a large employer of workers, and/or a large source of tax revenue. Courts, law enforcement agencies, and administrative bodies in the area where the state-owned enterprise is located may refuse to cooperate fully with the court particularly where the plaintiff is seeking to use legal or administrative processes to gather evidence or enforce a judgment. This makes it more difficult for the IP owner to not only win the case, but also enforce any judgments handed down by the courts.

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