

Is China Still Open for Business?

Indigenous Innovation and Other Policies: A Discussion

中国商业是否继续开放？ 自主创新及其他方针政策

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简介 - Introduction

- **July 2010** - U.S. Chamber of Commerce Report
“China’s Drive for ‘Indigenous Innovation’”
“Simply put: Soviet planning cannot replicate Silicon Valley.”
- **September 2010** — European Chamber of Commerce In China
“European Business in China Position Paper 2010/2011”
“Less protectionism, more fairness in trade and investment”

简介 - Introduction

CONCERNS:

- government procurement in the IT sector
- standard setting in telecoms
- compulsory licensing
- utility model patents
- amended Patent Law
- new Anti-Monopoly Law
- IP enforcement

简介 - Introduction

“As a result, the plan is considered by many international technology companies to be a blueprint for technology theft on a scale the world has never seen before.” U.S. Chamber Report

- How might your company's plans for China be affected?
- What are the policies and laws behind these concerns?
- What are other companies doing?

简介 - Introduction

Format:

- Interactive Discussion
- List of Topics prepared for discussion in handout
- Power point has summary of issues on the enumerated topics

简介- Introduction

Things to remember:

1. Constitutional Structure: Officially a “Unitary State”
BUT - 山高皇帝远 – The mountains are high and the Emperor is far away
2. Constitutional amendment 1999 -**依法治国** –
“rule of law” or “rule by law”
About 2005 started to post court decisions online – now hundreds of thousands
<http://bjgy.chinacourt.org/cpws/?LocationID=0901020000>
<http://ipr.chinacourt.org/>
3. Reform and Opening Up (**改革开放**) is not a direct process:
4. **摸着石头过河** - to cross the river by feeling for the stones

自主创新 – Indigenous Innovation

2006 – State Council – *Guiding Principles for Mid-to-Long Term Scientific and Technological Development*

- Promoted “indigenous innovation” through government procurement
- Proposed govt departments set up systems for the authentication of products and create list

- Ministry of Science and Technology (“MOST”), NDRC, Ministry of Finance issued:

Methods for determining the National “Indigenous Innovation of Products (Trial)

自主创新 – Indigenous Innovation

November 2009

Explanatory Report:

- Only concerns computers, telecommunication installations, modern office equipment, software, new energy and energy saving products
- “(2) A product's IP rights and the condition of rights and interests are clear. Products have 'indigenous innovation' IP rights when: the applying enterprise, through technological innovation, owns IP rights according to Chinese law or is a **Chinese enterprise**, state-run institution or citizen who has IP rights or IP usage rights which are not restricted by foreign institutions or individuals.
- (3) The product possesses its own trademark, namely the applying institution has the proprietary rights to the product's registered trademark. The products' marketing trademark must have be registered in China, and can not be restricted by related foreign products.

自主创新 – Indigenous Innovation

April 10, 2010 - MOST, NDRC, Ministry of Finance

*2010 Notification Regarding the Development of
Determining “Indigenous Innovation” Products
(Consultation Draft)* 关于开展2010年国家自主创新商品认定工作的通知(征求意见稿)

2. The applying institution legally enjoys the undisputed domestic IP rights or the right of use for the product through its own technological innovation or the permission of another institution.
3. The applying institution legally holds the exclusive rights or right of use to the products registered trademark in China.

自主创新 – Indigenous Innovation

- What is a Chinese enterprise?
 - Technically any corporation incorporated in China:
 - Wholly-Owned Foreign Enterprise
 - Foreign Equity Joint Venture Enterprise
 - Foreign Co-operative Joint Venture Enterprise

自主创新 – Indigenous Innovation

- One Explanation:

- Historically foreign IP owners kept their IP ownership offshore because of fears about IP protection – and often also for tax reasons

- Now advised to transfer ownership of IP rights to their Chinese entity.

- Products to be considered Made in China if 50% of product's added value produced in China (new)

自主创新 – Indigenous Innovation

- If you pay taxes on the IP in China – you receive Chinese treatment in procurement
- Financial Times (London) April 30, 2010

“China’s ‘meanness’ is an exaggeration”

<http://www.ft.com/cms/s/0/3dd75816-541f-11df-b75d-00144feab49a.html>

标准制定 - Standard Setting

标准化法 (Standardization Law) 1988

- November 2, 2009 – Standardization Commission (SAC) issued draft Interim Regulations on formulating Standards that include Patents for consultation (涉及专利的国家标准制修订管理规定 (暂行) (征求意见稿))
- January 28, 2010 – SAC and AQISQ – jointly issued draft Disposal Rules for the Inclusion of Patents in National Standards (国家标准涉及专利的处置规则)

标准制定 - Standard Setting

- These are rules of the agencies and bind them only, may be guidance for SIPO at best with respect to a compulsory license
- Interim Regulations require disclosure of patents during standardization, Disposal Rules include pending patents

标准制定 - Standard Setting

- Disposal Rules – unlike the Interim Regulations - if a patent is involved in a standard, owner should do one of:
 - Grant a royalty free non-discriminatory license;
 - Grant the public a license on a fair and non-discriminatory basis
 - Do neither, in which case the technology will be excluded from the standard.

标准制定 - Standard Setting

- Disposal Rules
 - Unlike the Interim Regulations – no disclosure requirement on the general public – must be involved in the process

The differences between the two rules suggest that comments were listened to.

反垄断法 – Anti-Monopoly Law

Article 55 – This Law does not apply to action taken by undertakings to protect their legitimate intellectual property rights in accordance with the intellectual property laws and regulations;

however, this Law does apply to action taken by undertakings that **eliminates or restricts competition** by **abusing** intellectual property rights.

知识产权的滥用 – What is an Abuse?

Existing Guidelines:

Interpretation of the Supreme People's Court concerning some issues on the Application of Law in the Trial of Cases on Disputes over Technology Contracts – December 16, 2004

Article 10 – illegal monopolization and impairing technological progress

1. restricting one party from undertaking new research and development on the technology; requiring non-reciprocal grant-backs or sole-ownership of jointly developed IP

知识产权的滥用 – What is an Abuse?

2. restricting a party from obtaining similar technology from other origins

3. impeding one party's exploitation of the market

4. requiring the licensee to also acquire raw materials and other items from the licensor

5. unreasonably restricting the source of raw materials and other items

6. prohibiting the licensee from making objections as to the validity of the IP

反垄断法 – Anti-Monopoly Law

- Mergers – June 2010 – 140 filings
 - only five approved with conditions – all foreign (now 6)
 - only one blocked (Coca-Cola/ Huiyuan Juice)
 - Estimated that 69% of filings are from foreign corporations

反壟斷法 – Anti-Monopoly Law

National Security Review –

Article 31 With respect to mergers and acquisitions of domestic enterprises or participation by other means in concentrations of undertakings by foreign capital which impact national security, a national security review shall be conducted in accordance with relevant regulations of the State in addition to the concentration of undertakings review conducted in accordance with this Law.

新专利法 – New Patent Law

Three issues:

1. Higher patentability standards
2. Security review for inventions completed in China
3. Revised compulsory licensing scheme

新专利法 – New Patent Law

Higher Standards:

1. Prior art definition broadened
2. Substantial changes to design application requirements, including a new novelty standard

新专利法 – New Patent Law

Security Review for filing outside China

- Prior to October 1, 2009 the Patent Law required that patents for inventions made in China by a Chinese individual or entity be first applied for in China
- In practice foreign entities in China transferred inventions to a foreign affiliate to avoid this rule
- So the law was amended to replace the old requirement with a confidentiality review – if application is to be first filed outside of China but the invention is completed in China, SIPO must review for national security or public interest issues

新专利法 – New Patent Law

Security Review for filing outside China

- USPTO – reviews patents and imposes secrecy orders where it would be detrimental to national security - *The Invention Secrecy Act of 1951, 35 USC §§181-188*
- Whenever publication or disclosure by the grant of a patent on an invention in which the Government has a property interest might in the opinion of the head of the interested Government agency, be detrimental to the national security, the Commissioner upon being so notified shall order that the invention be kept secret and shall withhold the grant of a patent therefor under the conditions set forth hereinafter.

新专利法 – New Patent Law

Compulsory Licensing

Article 48:

- where the patentee, after the expiration of three years from the grant of the patent right and of the expiration of four years from the filing date of patent application, **has not exploited or has not sufficiently exploited its or his patent without any justified reason;**
- To eliminate or reduce disadvantageous effect to competition, where the patentee's exercise of the patent right is determined according to relevant laws as **monopolistic act.**

新专利法 – New Patent Law

Compulsory Licensing

Article 49

- Where a **national emergency** or any extraordinary state of affairs occurs, or where the public interest so requires, the Patent Administration Department Under the State Council may grant a compulsory license to exploit the patent for invention or utility model.

Article 50

- For the sake of the **public health**, the Patent Administration Department Under the State Council may grant a compulsory license to manufacture and export a medication which has been granted patent rights in China to the countries or areas stipulated by relevant international treaties, which the People's Republic of China affiliated.

新专利法 – New Patent Law

Compulsory Licensing - Article 51

- Where the invention or utility model for which the patent right has been granted involves **important technical advance of considerable economic significance in relation to another invention or utility model** for which a patent right has been granted earlier and the exploitation of the later invention or utility model depends on the exploitation of the earlier invention or utility model, the Patent Administration Department Under the State Council may, upon the request of the later patentee, grant a compulsory license to exploit the earlier invention or utility model.
- Where, according to the preceding paragraph, a compulsory license is granted, the Patent Administration Department Under the State Council may, upon the **request of the earlier patentee, also grant a compulsory license to exploit the later invention or utility model.**

新专利法 – New Patent Law

Compulsory Licensing

- Implements treaty requirements that a compulsory license be for the supply of the domestic market (except for Articles 48(2) monopolistic abuse and 50 pharmaceuticals for export)
- Although provisions have existed since 2001 – none have been granted

知识产权的维权 – IP Enforcement

- Many foreigners believe that their intellectual property cannot be protected in China
- Consequently they are reluctant to register their IP rights in China,
- or even to do business in the PRC

知识产权的维权 – IP Enforcement

- China has IP laws that meet international standards ; the Chinese courts do enforce IP rights, and particularly IP rights held by foreign parties
- The PRC does have a “wild west” economy, and enforcement can be a double-edged sword for MNCs
- To a large extent the threat to IP from counterfeiters can be managed and controlled

知识产权的维权 – IP Enforcement

“... a tumultuous period in which the rigid hierarchies of colonial times finally dissolved, replaced by the more fluid social order of a democratic commercial society. Self-fashioning and self-advancement slowly became a viable way of life...”

Stephen Mihm, *A Nation of Counterfeiters*, p.24

知识产权的维权 – IP Enforcement

Lego Case - 英特莱格公司 (INTERLEGO. AG) v. 可高 (天津) 玩具有限公司, Beijing 2002

Lego was successful under design patent and copyright law

Beijing Higher People's Court stated:

可高公司的产品确有抄袭之嫌，但同时也应看到英特莱格公司的上述玩具积木块艺术创作程度确实不是很高，与典型的实用艺术作品在艺术创作程度上尚有一定差距，一审法院出于平衡利益关系的考虑，作出上述认定是合理的，本院予以支持。

(While the Kegao Company's products really have the smell of plagiarism, we should also consider that the level of artistic creation in the English Interlego Company's products is not really very high and there is a certain disparity between it and typical practical works of art. The court of first instance struck a reasonable balance of the interests and we will support it.)

知识产权的维权 – IP Enforcement



知识产权的维权 – IP Enforcement



知识产权的维权 – IP Enforcement



知识产权的维权 – IP Enforcement

Three commonly cited estimates of U.S. industry losses due to counterfeiting have been sourced to U.S. agencies, but cannot be substantiated or traced back to an underlying data source or methodology

<http://www.gao.gov/new.items/d10423.pdf>

人民币被高估了吗？ - Is the Yuan Over-valued?

IMF – July 27, 2010

- yuan is "substantially undervalued"

Robert Mundell – June 21, 2010 - Father of the Euro – Supply side Professor of Economics at Columbia – Nobel Prize laureate in Economics

- It's wrong for the U.S. to force China to destabilize the renminbi, I myself don't think it's a good idea

企业所得税法 - Tax Issues

- Until 2008, foreign investors could unilaterally enjoy a standard of five years income tax breaks for investments – now gone
- A dividend tax was also introduced in 2008 that required foreign investors to part with an additional 10 percent of tax on profits

企业所得税法 – Tax Issues

- Previously China wanted to attract foreign investment – so foreign corporations were treated better than domestic corporations
- As the strength of the domestic economy has increased – 2008 amendments to Corporate Tax law intended to provide equal treatment

劳动合同法 – Labor Contract Law

- came into effect January 1, 2008
- Converts many from fixed term contracts to indefinite contracts
- Limits overtime
- Sets minimum wages
- Sets minimum termination pay

劳动合同法 – Labor Contract Law

The new law "will definitely raise our costs," said Edmund Ding, a spokesman for Hon Hai Precision Industry

The government "is making the most concerted effort to protect workers rights is China," said Auret van Heerden, head of Fair Labor Association in Geneva

加密政策 - Encryption Policies

August 2010

- Government ordered major companies to limit the use of foreign computer security technology
- Government says for security reasons
- Others say to bolster local technology – WTO complaint to come?

总结 - In Summary

胡锦涛 – Hu Jintao 2010-06-08

科技创新推动创造更多社会财富，为促进社会和谐充实物质基础。

Promote scientific and technological innovation to create more social wealth, in order to enrich the material basis for social harmony.

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