
China's seismic shift in IP

Ian Harvey

The prevailing view of China's attitude to intellectual property (IP) is that it is a home to piracy with a disregard for legal enforcement of IP rights. The truth is that the Chinese government's understanding of IP has passed a tipping point over recent years.

The misunderstanding outside China arises because most foreign observers look at the still imperfect state of patent enforcement in China and miss the profound changes that have taken place over the past 20 years. China, contrary to popular perception, has made very good progress. It took 30-40 years for Japan, Korea and Taiwan to get to the same point.

In reality, China is on the verge of becoming a major generator of technology and IP. It is creating a tidal wave of patents that is likely to wash over the US and Europe's shores in the next two decades, enabling China to dominate significant technology areas. This stems from the recognition inside China, largely missed by foreign observers, of the fundamental importance of IP to economic growth as well as the natural creativity and inventiveness of the Chinese.

Chinese companies and universities have begun to realise that if they can invent the next generation of high definition television, or mobile phones, they could be significant players in setting global standards. Having also patented these technologies globally, they can then decide whom to license. These patents are beginning to be filed now and their effect will become visible as technologies mature – perhaps 5 to 10 years in the case of high technology or 10 to 15 years for pharmaceuticals.

High quality IP laws

China introduced its first IP laws in the mid-1980s, to become compliant with the international Berne and Paris IP treaties. Since then it has passed further updating laws so that, today, its IP laws are of a high quality by global standards. It recently made a further revision of its patent law after consulting widely internationally on the draft.

Domestic patent applications have been growing at 25 to 40 per cent a year. For the first time in 2008, the 229,000 "invention" applications by domestic applicants in China exceeded the 225,000 comparable "utility" patents in the US by US applicants. Chinese universities now file almost four times the number of patents in China (about 45,000 a year) as US universities do in the US (10,000). This is over 20 times the number filed in the UK by British universities.

IP "rights" for foreigners are generally of good quality, reasonable cost and timely. Patents issued to foreigners by the Chinese Patent Office have usually been well "examined" by their best patent examiners. The 20-year lifetime cost (\$20k to \$50k) of a Chinese patent is about 10 per cent of the total cost of patents for the G8 countries.

Although problems remain, enforcement of IP in China has improved substantially and continues to improve. It is quite possible to get a patent or trademark enforced through the Chinese court or

administrative systems. Indeed, many foreign companies have successfully litigated against products that infringed their patents or trademarks.

In 2004, there were more patent litigation cases filed in China (2550) than in any other country, including the USA. Over 98% of these litigation cases involved only Chinese parties. Chinese companies today are acting as though their IP is important, is worth defending and that their judicial system is worth using.

In the 2 per cent of patent litigation cases brought by foreigners in China, it appears that 90 per cent are decided by the courts in favour of the foreign patent holder – compared with perhaps 30-40 per cent in front of a jury in the USA.

Western failures

When western companies do encounter problems with IP in China, this is often the result of self-inflicted wounds. Here is a short list of the most common failures:

- Not registering rights in China – you cannot protect what you do not register
- Inadequate understanding of the market place
- Limited or non-existent on-the-ground IP expertise
- No delegation and too slow – referring everything back to head office takes too long for China's fast moving legal and enforcement system
- "We mustn't sue – it would annoy the government" – this is far from the truth

Many "complaints" about the IP system in China are made by senior executives who do not understand IP, nor the mistakes their own companies have made in creating the problems. Complaints about "poor IP enforcement" carry no weight if companies fail to use the legal measures that are open to them.

There are many examples of foreign companies that have been successful in China. Philips, for example, has a profitable €7b business with 35 companies, 15 research centres and 20,000 employees in China. About 15 per cent of its inventions now come from China and it is planning for 50 per cent. The company already has four IP centres in China and supports "IP academies" in three universities.

Constructive engagement

The EU's approach, with "constructive engagement" and practical support, will both help China and in the long term will establish good relations in a country where long term relationships are important. The Obama Administration now appears to be moving the US towards a similar more constructive engagement. Most companies that operate successfully in IP-based businesses in China see the recent shift of the EU towards a more aggressive posture on IP as not helpful.

So what is Europe's response to the changes in China? Generally inadequate so far, although there are wide variations. In corporate UK, for example, China is not taken seriously except by a small number of large companies. British companies in aggregate file fewer patents in China than Dutch or Swiss ones, one quarter those of Korean companies and one fifth those of German companies. This is perverse, given that the UK leads EU investment in China and is one of the largest recipients of

Chinese inward investment. Interestingly, however, the UK leads these countries in brands registered in China.

Growing stature

For politicians and policymakers, China's growing stature in the IP marketplace reinforces the importance of turning Europe into a knowledge-based economy with technologies protected through strong, inexpensive patents in global markets. In particular, both the UK and the EU need to have greater focus for developing IP policy. Unless they do so, Europe will be beaten at its own knowledge-based game.

China is both a threat and an opportunity for western business. The threat is that its strong manufacturing base will increasingly draw on its own technology, to the detriment of foreign business. The opportunities are that this technology is accessible to us and that China is a huge market where patent protection is beginning to be as important as in any developed country. Chinese companies and universities are generally eager to collaborate and are looking actively for partners. This window of opportunity may close as Chinese companies and universities develop their own expertise.

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