China's Emerging Patent Law: The Policy, The Law, The Bar, The Courts, the Academy

The Policy March 12, 2004 was the 20th anniversary of the first Chinese Patent Law, hence the title of this panel. But the history of the Chinese patent system goes back quite a bit further, at least to 1979, the year US-China diplomatic relations were established, and to Third plenary Session of the Eleventh Chinese Communist Party Central Committee, which set out China's trajectory toward the "Four Modernizations" industry, agriculture, national defence and science and technology.

> "The Implementation of the patent law and the establishment of a modern patent system is a major reform in China aiming at encouraging invention-creation, advancing science and technology, and promoting international exchanges of technology for speeding up the construction of socialist modernization." Hu Mingzheng

Arpad Bogsch noted that the Chinese patent law was "under preparation for 5 years" Vice Minister for S&T visits WIPO in May 1979 Chinese Patent Office set up in the State Commission for Science and Technology in January 1980, and transferred to the State Economic Commission in 1981. Branch in Shanghai, local offices in Shenyang, Changsha and Jinan, and SAIC offices in the provinces.

The Patent Law

Adopted at the 4th Session of the Standing Committee of the Sixth National People's Congress on 12 March, 1984, came into effect on April 1, 1985. From the beginning protection for inventions, utility models and industrial designs were integrated in 51 of the 69 articles
Art. 25 no protection for pharmaceutical products and chemical compounds
Art 51 obligation to work the patent in China

Paris Convention acceded to Paris Convention on 19 March 1985

1992 Amendments Amended for the first time by the Decision Regarding the Revision of the Patent Law of the People's Republic of China, adopted at the 27th Session of the Standing Committee of the Seventh National People's Congress on 4 September 1992, allowing for subject matter protection for chemical compositions and pharmaceutical products. Overshadowed by trademark counterfeiting and copyright piracy issues

Patent Cooperation Treaty CHINA JOINED PCT IN JANUARY 1994

WTO Amended for the second time by the Decision Regarding the Revision of the Patent Law of the People's Republic of China, adopted at the 17th Session of the Standing Committee of the Ninth National People's Congress on August 25, 2000, in preparation for China's entry into the WTO.

TRIPS (China joins WTO and TRIPS in December 2001)

2001 amendments Patents
In 2001, the major changes in patent law and practice in China included the implementation of the amended Patent Law, new legislation to protect integrated circuit layout designs, improvement in administrative and judicial protection of patent rights, and simplified administrative procedures for technology import and export.

A. THE IMPLEMENTATION OF AMENDED PATENT LAW

The Patent Law, which was amended on August 25, 2000, took effect on July 1, 2001, together with the Implementation Rules for Patent Law.

Preliminary injunction To comply with TRIPs, The patent right holder and the interested party may apply for a court order to cease the infringement acts before actually filing infringement claims if any delay to stop the acts is likely to cause irreparable harm to legitimate patent rights. The Supreme People's Court issued a detailed judicial interpretation to implement the preliminary injunction. The applicant must provide security at the time of application for the injunction order. The courts are required to make a decision within forty-eight hours. If the infringement claim is not filed within fifteen days after the injunction, the injunction order will expire.

Burden of proof Under the new Patent Law, if a party uses or sells patent-infringing products without knowing that they are infringing products, the seller or user has the burden to prove that the product comes from a legitimate source. Otherwise, it will be liable for the infringement.

Statutory damages The amendments to the Patent Law (1) provide that if the infringement damage is difficult to determine, the court may impose statutory damages, which can be a multiple of patent royalties; (2) remove the revocation procedures in patent application and streamlines the invalidation procedure as the only available way to challenge the validity of patent rights;

Supreme Court Rules In July 2003 The Supreme People's Court's "Draft Scheme for Solving Problems concerning Patent Infringement disputes" were issued. The Supreme Court rules, while informal and never actually adopted, have gone through several revisions with notice and comment. The concept of judicial interpretation is controversial in Chinese law because no cases have precedential effect, but seminars continue to be held for judges to understand what's in the rules.

The Bar and Professionalization of Patent Attorneys

As early as 1973, even then in the throes of the cultural revolution, representatives of CCPIT first visited WIPO. Ren Jianxin, then head of CCPIT, went on in 1983 to join the Supreme People's Court. CCPIT also became the core Chinese group for China's AIPPI established in 1982 and LES .

CPA HK established in March 1984 as joint venture of CCPIT, Patent Agency established in June 1984 as conduit for patent applications, legal counsel, facilitating settlement of disputes (FETAC) Shanghai Patent Agency

Number of patent firms approved for dealing with foreign clients increases to 16 by 2003, but fees charged are still regulated by the courts.

The Courts and Professionalization of Judges

in 1984, there were 29 high courts (second instance in patent cases), 340 intermediate people's courts (first instance in patent cases) and 2,800district courts Now there have been established specialized Intellectual Property Chambers such as the Third Civil Division of Supreme People's Court (Jinag Zhipei) and the Fifth Civil Division of the Beijing Intermediate Court

Statistics IP cases in trial and appeal cts, 9271 cases filed (increase 18.8%) and 8978 resolved in 2003 (increase 25.3%) (spxx295) Copyright cases most numerous followed by trademarks. It appears that patent infringement cases are very few. Shandong's courts heard 524 IP cases.

ADMINISTRATIVE PROTECTION OF PATENT RIGHTS

Administrative protection has been and will continue to be a special feature of Chinese intellectual property enforcement, through the local offices of the State Administration of Industry and Commerce. The State IP Office requires the local patent administrative authorities to report major patent cases within their jurisdictions and issues rules for administrative enforcement. The SAIC's work through local patent administrative authorities in the provinces, handling and mediating patent disputes, and investigating and prosecuting patent passing-off activities.

1. Handling Patent Infringement Disputes

The Patent Administrative Enforcement Rules issued in 2001 require that the patent administrative authority assign three or more persons to handle every patent infringement dispute.If the patent administrative authority determines that the patent infringement occurred, it may (a) order the infringer to stop the infringement activities, (b) destroy the equipment for manufacturing the infringing products, and (c) take measures to prevent the products in stock from being sold, used or entry into market in any way. Parallel proceedings can take place in the administrative offices and the People's Court.

JUDICIAL REMEDIES FOR PATENT INFRINGEMENT

Chinese Supreme People's Court issued numerous notices and judicial interpretations, such as 2001 Issues Concerning the Application of Law to Pre- litigation Injunctions to Cease Patent Infringement Activities, and Questions Concerning the Application of Law to Handle Patent Disputes Cases Several Provisions (Patent Trial Interpretation) to implement the changes in Patent Law. The Patent Trial Interpretation covers both civil disputes and administrative cases that challenge the administrative decisions of SIPO and/or local patent administrative authorities. In addition, Supreme People's Court issued

Several Provisions Regarding Civil Litigation Evidence (Civil Evidence Rules), which is unprecedented in Chinese legal history and will have an effect on patent infringement civil cases regarding the collection, admission, exchange, and proving power of evidences. Finally, Beijing's Highest People's Court issued Opinions on Several Problems in Determining Patent Infringement (trial), which stipulate the principles of claim construction, doctrine of equivalents, prosecution history estoppel, etc., which might be important for future application throughout the country.

The Patent Trial Interpretation stipulates detail standards to determine the proper jurisdiction and further specifies the conditions and procedures to stay the infringement trial when defendant initiate invalidation proceedings at SIPO.

One important improvement regarding the conflict of different types of intellectual property rights is that the Patent Trial Interpretation recognizes the principle to protect prior rights, meaning that if patent rights are obtained by infringing the prior obtained trademark rights, copyrights, enterprise name rights, image rights, rights of using special packaging for well-known products or trade dress rights, etc., the patent right will not be protected. [reverse of US federal-state and federal-federal preemption??]

The Patent Trial Interpretation further specifies the methods to calculate infringement damages as follows: (1) the loss of patent right holder may be calculated by multiplying the amount of decreased sale because of the infringement with reasonable profit of single patented product. If the amount of decreased sale is hard to be determined, the total amount of infringing products on the market may be used instead; (2) the profit gained by infringer may be calculated by multiplying the total amount of infringing products with reasonable profit of single infringing product; (3) if the loss incurred by the patent right holder or profit gained by the patent infringer is difficult to be determined, and there is patent license royalty can be used as reference, the court may decide the damages as one to three time of reasonable royalties. If there is no royalty for reference or the royalty is obviously unreasonable, the court may determine the damages between RMB 5000 to RMB 300,000 and shall not exceed RMB 500,000 in any case, and (4) the court may calculate into damages the reasonable expenses paid by the patent right holder to investigate and stop the infringement. Finally, the Patent Trial Interpretation stipulates that the court shall take a complete review of the cases; even the patent administrative authority has made a decision on infringement or non-infringement.

LICENSING AND TECHNOLOGY TRANSFER

The Chinese legal regime regarding international technology transfer has gradually evolved from a beforehand approval system to an afterward registration one. In 2001, the State Council promulgated PRC Technology Import- Export Administrative Regulations (Technology Import-Export Regulations) and MOFTEC issued new Administrative Rules for Technology Import-Export Contract Registration (Technology Import-Export Rules), which replaced the old ones.

establishment of special IP programs at Tsinghua, Peking, Wuhan, and Zhongshan universities. Faculty exchanges and cooperation. CHIPSI – innovative program with Chinese and American law students in classes together taught by both US and Chinese professors, approved by the ABA.