

Innovation and Intellectual Property in China

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China has joined the ranks of nations promoting economic growth through innovation. To protect such innovation the patent regime is being reassessed and tightened. China, a relative latecomer to the construction of Intellectual Property (IP) law is both learning from the experiences of other countries and is innovating itself. This can be seen clearly in three examples.

New independent utility model and design law

The first example of Chinese innovation involves the decision to concentrate on protecting their most important inventions, rather than just any invention which may subsequently prove to be inadequate or trivial. This strategy can be seen clearly in current attempts to enact a new independent utility model and design law:

In Article 42 of the Patent Law of China:

- “invention” refers to a technical solution to a product, a process or improvement
- “utility model” is defined as a technical solution that impacts on the shape, structure, or combination of a product for practical usage.
- “design” means any new type of design involving shape, pattern, colour or combination in a product which has an aesthetic nature to it and which can be used industrially.

The major problem of the current Patent Law is that it does not examine utility and design models as rigorously as other patents, especially in the area of novelty, creativity and industrial applicability. The new special utility model and design law aims to focus only on truly innovative developments.

There are currently two views of how to produce such a law among scholars, judges, lawyers and officials:

- one perspective is that there should be two separate laws to protect utility model and design. Utility models have special law to protect them in, for example, France, Germany and the UK, but there is no such law in the United States.

- The other view proposes that the design should be plucked out of the patent law and protected by a special law that makes it clear the design refers to aesthetics, rather than to technology — otherwise the type of innovation being examined will be confusing as aesthetics should not be confused with technological innovation.

This will be the third time that China has amended its patent law since its enactment in March 1984, and other countries will take note of the outcome as it may effect the interpretation of their own patent law.

Updating copyright law

The right of communication through information networks is an area of increasing legislation in China, particularly in relation to Chinese Copyright Law, where there are many competing interests.

In the field of performing arts it is usually native Chinese artists who lose out: many of these artists are also popular in the rest of East Asia, but are inadequately protected by existing provision in Chinese Copyright Law. The new digital age, which is injecting such great innovation into content, brings significant problems. A main point of contention that needs addressing by new regulation is whether the internet service provider of a website should bear the burden of proving whether questionable materials it contains have been infringed or not.

Under the new draft Protection of Right of Communication through Information Networks law, copyright owners will be allowed to prevail if they can prove that:

- a) internet service providers had the ability to understand that they were hosting infringed materials, and
- b) they failed to take the necessary steps to rid the website of them.

As usual the devil will be in the detail and many excuses will be offered, for example a service provider may claim that they did not know that the infringing material appeared on their website. Even as the new regulation is being drafted, competing interest groups such as performing artists associations, the Internet industry and major record labels are all airing opposing views of the proposed new legislation.

Some existing legislation and rulings will also influence this debate:

- Article 130 in the Chinese General Principles of the Civil Law stipulates clearly that if two or more persons jointly infringe another person's rights, causing damage, they will both bear liability.

- Article 5 of the Interpretations of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Cases in Relation to Copyright Disputes over Computer Networks (first issued in June 2001 and revised in October 2003) points to joint liability for the content service providers who hold actual knowledge of the infringing activities of users.

The main problem with all this current legislation is that it does not make clear what "actual knowledge" means. Therefore, the State Council is drafting a new regulation entitled the Regulation on Protection of Right of Communication through Information Networks to clarify the above mentioned issues.

Anti-trust law

A third area of innovation and IP in China concerns anti-trust law.

The United States was a leader in introducing anti-trust law in East Asian countries, but is now backing away from anti-monopolistic legislation as the idea of "whoever has the expertise to dominate the market deserves to do so" prevails.

In contrast China is looking to anti-trust law to protect its IP. It is especially considering the European example, where anti-trust law is quite strongly legislated. The case of Microsoft exemplifies this point. In Europe, Microsoft has been taken to task for having the media player software as an automatic part of its Windows operating system package. This practice works against European manufacturers of media players who cannot compete with such monopolization of their market. Consequently the European Union has now barred all new Microsoft packages from including the media player.

Microsoft has allowed China to use Microsoft Windows without paying the necessary license fees, and this unusual arrangement seems to have the blessing of both Bill Gates and President Hu. This could mean either that Microsoft is not enforcing its IP because:

- it sees China as a potential market for its other products, or that
- it is worried that China could potentially use its emerging anti-trust legislation to clamp down on companies such as Microsoft.

The noteworthy point here however, is that while the United States is relaxing its anti-trust laws allowing the most successful companies the right to dominate the market, China is turning to anti-

trust law to protect its IP and monopolization of its market, so its own native produced products have a chance to flourish.

About the author

The Centre for Japanese and East Asian Studies, of which Prof. Ruth Taplin is Director, won Exporter of the Year in Partnership in Trading/Pathfinder for the UK in the year 2000. She received her doctorate from the London School of Economics and is the author/editor of 14 books and over 200 articles. The most recent are, *Exploiting Patent Rights and a New Climate for Innovation in Japan* (London: Intellectual Property Institute 2003); *Valuing Intellectual Property in Japan, Britain and the United States* (London RoutledgeCurzon:2004); *Risk Management and Innovation in Japan Britain and the United States and Japanese Telecommunications Market and Policy in Transition* (London:Routledge/Curzon 2005, 2006). A further book *Innovation and Business Partnering in Japan, Europe and the United States*, will be published by Routledge in October 2006.

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