What Bothers Innovation in China: Is It Only a Question of Counterfeits?

by

Yajie Zhao*

* Doctoral candidate/LL.M of European Intellectual Property. University of Helsinki, Faculty of Law.

Nordic Journal of Commercial Law
Issue 2014#2

Abstract

Starting with a comparison of litigation data between Western litigants and Chinese officials on both public and private level, this article stands in the shoes of the foreign intellectual property (IP) right holders asking why a sound made by western society resonates so differently in China? This is done through the eyes of the Chinese adjudicators and the system as a whole: where, how long and with what results. It briefly lists various characteristics of each litigation phase that foreign IP right holders will confront, when choosing the Chinese judiciary (private litigation) to enforce their IP rights, especially patents. Insum, this article offers a picture, from the perspective of aprivate party, of procedural peculiarities of Chinese courts, the time limit system and compensation rules. Even though the Chinese government, at the federal level, is workiing very hard to introduce a positive image relating to private enforcement of IP rights, this article emphasizes that the negative attitude towards foreign right holders, , is caused by a normative chain effect. It is neither only about law nor only about policy.

1 Introduction

Counterfeit goods, i.e. illegal copies of trademarked goods, remains a controversial issue worldwide. However, debate on the issue is remarkably different in the Eastern and Western world. The unique encounter of counterfeits and innovations in the Chinese market has become a distinctive phenomenon. This phenomenon reveals very well when contrasting data published in the West and in China.

From the Chinese perspective, carrying the stigma of the world biggest maker of counterfeits, yet the Chinese government claims that it is successfully fighting counterfeits of all kinds at all levels. At the -administrative level, the problem of counterfeits has gathered attention of the Chinese authorities for a long time. For example, according to data published by the Ministry of Public Security of China, , Chinese officials carried out 15 000 anti-counterfeiting cases, cracked down on 212 criminal gangs involving a total value of RMB 870 million (approximately $10million) from January to May in 2012. [1] A shy estimate for the year of 2012, China removed counterfeits with a value around $25 million from the market. However, at the judicial level, not counting administrative anti-counterfeit cases, the amount of IP-related civil trials is not large. According to the 2012 Supreme People's Court (SPC) report to the People's Congress on the work of the IPR trial courts, , there were 226 753 IP cases handled by the People's courts in total, and among which 208 653 were concluded (2008-2012).[2]

The data published in the West tells another story. Taking 2012 as an example, the conflict is obvious. According to data published by the European Commission, China remains the country where most of the suspected IPR infringing goods originateand accounted for 77.09% of the total value of all counterfeit goods in the EU in 2012. [3]Data published by the U.S. Customs and Borders Protection states that: in Fiscal Year 2012, there were 22,848 intellectual property rights seizures with a manufacturer's suggested retail value of $1.26 billion. Goods from China accounted for 72% of the total manufacturer's suggested retail value for all IPR

[1] Ministry of Public Security of China.
"全球反假冒机构向公安部经济犯罪侦查局颁发2012年度执法部门最高贡献奖(Global Anti-counterfeiting Group awards the Chinese Ministry of Public Security for its greatest contribution for anti-counterfieting acts in 2012)." Accessed May 2, 2014. http://www.mps.gov.cn/n16/n1237/n1342/n803715/3328221.html.

[2]王胜俊. 最高人民法院关于知识产权审判工作情况的报告—
2012年12月25日在第十一届全国人民代表大会常务委员会第三十次会议上 (Wang Shengjun, Supreme People's Court, Report to the People's Congress on the Work of the IPR Trials of 2012).
http://www.npc.gov.cn/npc/xinwen/2013-01/06/content_1750233.htm.

[3] Report on EU Customs Enforcement of Intellectual Property Rights Results at the EU Border 2012. Taxation and Customs Union of European Commission. Accessed May 2, 2014. http://ec.europa.eu/taxation_customs/resources/documents/customs/customs_controls/counterfeit_piracy/statistics/2013_ipr_statistics_en.pdf.

seizures.[4] When comparing the data on IP counterfeits thatare captured inside China and at the Western borders, despite Chinese declarations of intensive anti-counterfeit actions, the data indicates that counterfeits in China is rampant. Compared to the share amount of counterfeits, IP-related trials with a foreign party, not counting administrative anti-counterfeit cases, are actually very rare.. Data published by the SPC shows that between 2008 and 2012, there were a total of 5670 foreign-related IP trials in Chinese courts.[5]

Even though China has been labeled as a country of imitations, China is trying very hard to be a country of innovations. China has set a strategic goal to be an innovative country by 2020. Indeed, China is already a significant market for innovations. According to data published by the State Intellectual Property Office (SIPO), by the end of 2013, the number of effective domestic and foreign patents that are authorized by the SIPO is 1,034,000, measuring a growth of 12.8% compared to 2012. Not including Hong Kong, Macao and Taiwan, there are 4 patents for every 10 000 Chinese. This rate is 0.7 patents higher than the 3.3 patent possession goal stated in the Twelfth Five-Year Plan for National Economic and Social Development of China. Companies have 352,000 valid patents. Universities have 116,000 patents, and research institutions own 47,000 patents. Excluding Hong Kong, Macao and Taiwan, the top five regions with effective domestic patents are Guangdong (95,000), Beijing (85000), Jiangsu (62,000), Shanghai (48,000) and Zhejiang (43000).[6]

Coincidentally, before China had listed the top five innovative regions, Dahman, a western scholar had spotted at least five major wholesale distribution markets for counterfeit goods in China: Nansantiao Market in Shijia Zhuang in Hebei Province; Linyi Market in Linyi, Shandong Province; Hanzhen Jie in Wuhan City, Hubei Province; China Small Commodities City in Yiwu City, Zhejiang Province; and Wuai Market in Shenyang, Liaoning Province.[7] These five counterfeit-intense regions are either geographically within the radiation circle of the top innovative regions or even inside the same province. When counterfeits encounter innovations, the problem of counterfeiting does not only take away market shares of private

[4] Fact Sheet of Intellectual Property Rights. U.S Customs and Border Protection. Accessed May 2, 2014. http://www.cbp.gov/sites/default/files/documents/ipr_fact_sheet_2.pdf.

[5]王胜俊. 最高人民法院关于知识产权审判工作情况的报告—
2012年12月25日在第十一届全国人民代表大会常务委员会第三十次会议上 (Wang Shengjun, Supreme People's Court, Report to the People's Congress on the Work of the IPR Trials of 2012). http://www.npc.gov.cn/npc/xinwen/2013-01/06/content_1750233.htm.

[6] State Intellectual Property Office of the People's Republic of China.
"知识产权局：我国平均每万人拥有4件发明专利(SIPO: Each 10000 Chinese Own 4 Pieces of Innovation Patents)." Accessed January 17, 2014. http://www.gov.cn/jrzg/2014-01/17/content_2569164.htm.

[7] Dahman, Samir B. "Protecting Your IP Rights in China: An Overview of the Process." Entrepreneurial Business Law Journal 1 (2006): 63.

companies, it is estimated that 15% to 20% of all products by well-known brandsin China are counterfeits.[8]

At the federal level, China is very optimistic about achieving the set goal of an innovation-centered country. Although China offers both administrative as well as judicial remedies, right holders still have no confidence in the IP enforcement system. Foreign right holders discover that it is very easy to buy a counterfeit item at a cheap price in China, but it costs a lot of time and money to enforce registered rights. Some non-Chinese litigants even claim that intellectual property protection does not exist in China, since the country's legal system does not offer any sufficient remedies or private IP right enforcement in courts.

With the conflicting sounds from the Western and Chinese side in mind, thisarticle will step into the shoes of foreign right holders and take an insider's view from the perspective of Chinese adjudicators working within the civil court system as a whole. .

2 Courts of China for IPR

Generally speaking, Chinese courts have been divided according to the national administrative and geographical divisions of government. The level of the court follows from the level of its local government.[9]

China has one Supreme People's Court (SPC), 32 higher courts, 409 intermediate courts and 3117 basic courts. [10]According to the Court Organization Law (COL), Chinese courts are divided in three categories: (1) Various levels of the local courts, which are the Higher People's Courts, Intermediate Courts, and Basic People's Courts; (2) Military Courts and other specialized courts; and (3) the SPC. COL states the jurisdiction of the courts at each level and also stipulates the administrative relationship among them.

The basic people's courtshandle the first instance of civil and criminal trials, unless otherwise stipulated by law. Basic People's Courts can request to transfer accepted cases to the Intermediate Court, if necessary. Apart from handling first instance cases, the Basic People's Courts have jurisdiction over civil disputes that do not require a trial and minor criminal cases.[11]

[8] Dahman, Samir B. "Protecting Your IP Rights in China: An Overview of the Process." Entrepreneurial Business Law Journal 1 (2006): 63.

[9] Shao, Wei. Patent Litigation Practices In Mainland China. Taiwan Ministry Of Economic Affaris, Intellectual Property Office, 2011.

[10] The Superme People's Court of China. "人民法院简介（Introduction of the People's Courts)." Accessed May 2, 2014. http://www.court.gov.cn/jgsz/rmfyjj/.

[11] Art. 20, Art. 21 of the COL.

Currently, basic courts have no jurisdiction over patent infringement cases. However, based on the regional development and the ability of the courts, with the SPC's authorization, certain basic courts can have jurisdiction on contract issues, which involve patent matters. The SPC has also authorized a few courts have jurisdiction for infringement cases of utility models and designs. Since 2009, the SPC has authorized Yiwu Court of Zhejiang Provience, Kunshan Court of Jiangsu and Haidian Regional Court of Beijing to conduct, at first instance, civil trials regarding utility model patents and designs.

The intermediate courts hear cases at first instance, if the laws and/or regulations decree so. Intermediate courts also have jurisdiction over cases, which are transferred from the basic courts, and hearsappeals and protest cases regarding the basic courts judgments. According to the trial supervision procedure, protest cases from the People's Procuratorate are also within the jurisdiction of the intermediate courts. Courts at this level can request to transfer accepted cases to higher courts, if necessary. [12]

Intermediate courts are the first instance for patent infringement proceedings. Intermediate Courts are situated in the capital cities of the provinces, the autonomous regions, and the municipalities directly under the control of the central government.[13]

Art. 27 COL regulates that the Higher People's Courts handle the first instance of trials, if the laws and/or regulations decree so. Higher courts also have jurisdiction over the cases, which are transferred from the intermediate courts, as well as appeals and protest cases regarding the intermediate court's judgments. According to the trial supervision procedure, protest cases from the People's Procuratorate are also within the jurisdiction of the higher courts. Court at this level cannot request to transfer accepted cases to a higher level, which would be the SPC.

Art. 29 COL cements the role of the SPC at the highest level of the court system and its supervising power regarding the work of the lower courts. Based on Art. 31 COL, the SPC handles the first instance of trials, if the laws and/or regulations decree so, or if the SPC considers it necessary. Its jurisdiction also covers appeals and protest cases regarding the higher courts' and special courts' judgments. According to the trial supervision procedure, protest cases from the Supreme People's Procuratorate are also under the jurisdiction of the higher courts. Art. 32 of the COL regulates that the SPC interprets the application of laws. For complicated patent cases or cases which claim large amounts of compensation, the first instance of the trial will be heard at the level of the higher courts or even the SPC.

With the booming development of the Chinese market, the number of IP cases is growing. The cases are getting more and more complicated and specialized. According to SPC's annual report

[12] Art. 22 of the COL.

[13] Duncan, Jeffrey M., Michelle A. Sherwood, and Yuanlin Shen. "Comparison between the Judicial and Administrative Routes to Enforce Intellectual Property Rights in China. A." John Marshall Review of Intellectual Property Law 7 (2008 2007): [i].

2013, there were 114 075 IP cases at first and second instances in 2013.[14] The Chinese State Council in its 12-year strategy from 2008 outlines that: "*We should improve the trial system for intellectual property-related cases, optimize the allocation of judicial resources and simplify remedy procedures. We should consider setting up special tribunals to accept civil, administrative or criminal cases involving intellectual property.*" [15]

Under the current administration «three-in-one» pilot courts that handle civil, administrative and criminal IP cases within existing courts have been established in different provinces. By the end of 2013 7 higher courts, 79 intermediate courts and 71 basic courts had the three-in-one IP bench. [16] So far, however, the practice differs from one province to another, but the main practices follow one of five models:

(1) The Pudong Model (or also known as Shanghai Model): is a trial model, which unifies all civil, administrative, and criminal IP cases into one specialized tribunal under a basic people's court.

(2) The Nanshan Model (or known as Shenzhen Model): is a trial model that the civil, administrative and criminal IP cases are still respectively under the jurisdiction of each original tribunal. But it requires a collegial panel that is consisted of IP judges from civil, administrative and criminal tribunals.

(3) The Fujian Model: is unifying civil and administrative IP cases into one tribunal, criminal IP cases still separately heard in criminal court. In practice, Fuzhou Intermediate People's Court, and Quanzhou Intermediate People's Court hears the first instance of IP civil and administrative cases, and the Higher Court in Fujian hears the second instance.

(4) The Wuhan Model: is hearing the first instance of civil, administrative and criminal IP cases inside the qualified basic courts. And the second instance will be heard in its intermediate courts.

(5) The Chongqing Model: is the model that, unless otherwise specified, the first instance of the three types of IP cases will be heard in the qualified regional court, Yiyu District Court. Meanwhile, it requires the collegial panel, for the administrative or criminal IP cases, shall be consisted with IP judges from civil, administrative and criminal tribunals or/and people's assessors. The second instance will be heard at Chamber No.3 of the Chongqing Fifth Intermediate People's. For the second instance of administrative or criminal IP cases, the

[14] 2013年中国法院知识产权司法保护状况(Chinese Courts' Judicial Protection Status of Intellectual Property 2013) , April 25, 2014. http://www.chinacourt.org/article/detail/2014/04/id/1283299.shtml.

[15] The State Council. Notice of the State Council on Issuing the Outline of the National Intellectual Property Strategy, 2008. Para 45.

[16]易继明. "为什么要设立知识产权法院." 人民法院报, (Yi Jiming, Why establish IP court, People's Court News), June 18, 2014.

collegial panel shall jointly consist of IP judges from civil, administrative and criminal tribunals. The Chamber No.3 of the Higher People's Court of Chongqing has the authority of supervision and guidance.

On 31 August 2014, the Standing Committee of the National People's Congress of China published a decision on the establishment of intellectual property court in Beijing, Shanghai, Guangzhou (the Decision).[17]According to the Art. 3 and Art.4 of the Decision, IP courts are intermediate courts. The IP courts are under the supervision of the SPC and the High People's Court of its region. [18]

As a legislative matter, it is still being discussed, which level the IP court shall be at and how it shall be organized. This does not only recquire an administrative decision, but also an update of the current legislation in COL. Moreover, there also exists a legislative gap for the basis of the 'three-in-one' model. [19]

Meanwhile, the jurisdiction of IP courts so far is strictly limited to Beijing, Shanghai and Guangzhou, even though it is possible to develop these courts into circuit courts, which would have jurisdiction in other provinces. It means the current 'three-in-one' model is maintained in some jurisdictions, and so are the general rules in undeveloped provinces, which employ none of the mentioned models of IP tribunals.

Will the SPC will keep on authorizing qualified regional courts to have jurisdiction over patent cases the same way it did in 2009 or establish more IP courts as in Beijing, Shanghai and Guangzhou in the future? Based on Art.7 of the Decision, the establishment of IP courts in China is still an experiment and the implementation of the Decision will be reported to the standing committee after three years. So far, there is no clear national-wide picture on what the IP enforcement landscape will look like yet. It also remains unclear how the different regional practices will be unified nationally.

According to Art. 1 of the Decision, the IP courts may be arranged differently in Beijing, Shanghai and Guangzhou based on the types and number of IP cases. Details of organization will be decided by the SPC.

According to the State Council's strategy in 2008, the legal reform shall be possibly completed nationally in 2020.[20] The first IP tribunal was established in China in 1993, and so far China

[17]全国人民代表大会常务委员会关于在北京、上海、广州设立知识产权法院的决定(Standing Committee of the National People's Congress Decision on the Establishment of Intellectual Property Court in Beijing, Shanghai, Guangzhou), 2014. http://npc.people.com.cn/n/2014/0901/c14576-25581035.html.

[18] Art.5 of the decision.

[19]胡淑珠. "论知识产权法院（法庭）的建立—对我过知识产权审判体制改革的理性思考."(Hu Shuzhu, Discussions On the Establishment of IP Court) 知识产权(Intellectual Property) , no. 2010年第4期 (n.d.): 37.

[20] The State Council. Notice of the State Council on Issuing the Outline of the National Intellectual Property Strategy, 2008.

has established more than 420 IP tribunals within intermediate and basic courts.[21] All things considered, and although it still takes time to see a clear picture of the IP courts, the development of the Chinese IP legal system is very fast.

The fast development is a positive sound from the state level.. The SPC states in its annual report: "*We are keenly aware that there are still many problems and difficulties in the work of the people's courts. First, some cases are judged with unfairness and inefficiency, which harms the benefits of the parties involved and judicial credibility. Second, it remains difficult for case —filing, litigation and judgment enforcement in some people's courts, with a gap in meeting people's judicial requirements. Third, more efforts are needed to improve the system and mechanism guaranteeing people's courts to independently and fairly exercise the judicial power according to the law. Fourth, some courts are under heavy administrative management, which affects the quality and efficiency of trials. Fifth, some court officials are under heavy impacts of bureaucracy and special privilege, resulting in irregular and crude judicial acts, indifference, insolence, prevarication, deliberately creating obstacles, and extortion to concerned parties. Some even commit illegalities for personal gains, pervert justice for a bribe, to the discontent of the public. Sixth, people's courts experienced heavy workload with the sustainable growth of caseloads. Some people's courts have more cases but fewer staff, with serious brain drains and unreasonable personnel structure. Some people's courts in the western region, remote and border areas, and ethnic minority areas need further improve working conditions.*"[22]

For private parties, the non-unified practice and fast changes lead to different levels of protection from one province to another. Will it enhance the already existing problem of varying geographical protection? I carried out face-to-face interviews in various domestic businesses inside China in the summer of 2013. The results show that for those who enforced their patent rights through the judicial process, the right holders all more or less experienced the variances in geographical protection in a way or other. In extreme cases, one interviewee even commented that running patent cases is a competition about networks. In practice, the fast development at governmental level could lead to a lack of predictability and even more serious forum shopping concerns, which reduces the sufficiency and efficiency of judicial remedies.

Moreover, because of the problems relating to the current court system in combination with rampant counterfeiting, Chinese right holders prefer to sue foreign actors instead of (Chinese) makers of counterfeits, due to the fact that foreign parties are relatively clearer targets. That

[21]袁定波. "最高法解密知产法院因何选中北上广."(Yuan Dingbo, The Supreme People's Court of China Decrypts Reasons of Establishing the Intellectual Property Courts in Beijing, Shanghai and Guangzhou) 法制日报(Legal Daily), August 27, 2014. http://epaper.legaldaily.com.cn/fzrb/content/20140827/Articel05006GN.htm.

[22] Zhou, Qiang. Report on the Work of the Supreme People's Court (2013-2014). SPC official report delivered for the Second Session of the Twelfth National People's Congress. Supreme People's Court, March 10, 2014. http://www.china.org.cn/china/2014-05/08/content_32331522.htm.

local business strategy also experiences a relatively better rate of enforcement of the judgments.The judgments can also be used as negotiation support for later business.

3 The Time Limit System

Chinese law regulates a time limit for civil trials. If the parties are Chinese citizens or legal entities, the first instance of a civil case shall be completed within six months. The second instance of a civil case shall be completed within three months. In practice, courts are allowed to prolong the processing time on various legal grounds. For example, for patent cases, the processing time for both first and second trials is, on average, around a year.[23]

According to Art. 270 of the Chinese Civil Procedure Law, foreign related civil cases have been excluded from the time limit system. Hence, foreign related IP cases are excluded from the time limit system as well. If one of the parties is not Chinese, then there will be no time limit for the processing time.

The official reason why all foreign related cases are excluded from the time limit system is because foreign related cases are more complicated than normal civil cases. Judges may have limited knowledge or information of the related subject matter. Having a limited period for such trials cannot be supported for judges to have a clear view of the facts of the case. It is reasonable to exclude those trials in order to ensure procedural and substantial justice for non-Chinese parties.

According to Art. 20 and 21 of the SPC Supervisions on Strictly Executing The Time Limit System, the time limit system has been treated as a matter of court management and shall be supervised by the court itself. This provision leaves its implementation to the discretion of judges. Unfortunately, Chinese law does not offer any means for the parties to safeguard that judges deal with cases actively. The exclusion made by Art. 270 of the Civil Procedural Law leaves a gray area and it is used as a legal umbrella for some judges to mishandle cases. For example, foreign IP right holders, although they are holding valid Chinese trademarks or patents, often find themselves running cases for years.Likewise, foreign defendants may also find themselves running cases for years just because of its foreign elements.

Back in1991 the limited information at hand and the lack of expertise are what distinguished normal civil cases from foreign-related civil cases. However, with improved information sources in China and the extended knowledge of judges, is this separation still necessary? Especially for IP cases, does the exclusion still make sense? Although foreign related cases can take longer than normal cases in practice, it should not be used as a reason for the court to extend the processing time for IP cases further.

[23] Art.135, Civil Procedural Law of China.

Moreover, there are some other circumstances that will notcount towards the time limit of trials. According to the Supervisions of the Supreme Court on Strictly Execute The Time Limit System, periods that shall not be counted into the time limit of trials are times caused by:

1) announcement and identification,
2) argument on jurisdiction,
3) professional audit, evaluation and liquidation of the subject matter,
4) suspension of proceedings or enforcement;
5) restart of proceedings or enforcement;
6) settlement of the enforcement between parties or suspension of enforcement due to property assurance;
7) suspension based on the higher court's decision; and
8) auction, sale , seizure and detention.

The time limit system does not offer legal means for parties to safeguard that judges actively process cases and the supervision is limited to the court itself and under the control of its higher level court.

At this moment, the time limit system for foreign-related IP cases is not actually a normative issue, but more a court management problem. Judges are encouraged to implement judicial powers actively and efficiently to offer a solid base for both procedural and substantial justice. However, there exists no guarantee of actual implementation for private parties in reality.

The general practice of exclusion leads to difficulties for foreign right holders in enforcing their patent rights inside China and offers an unfair opportunity for local business to occupy the market in bad faith. Although foreign right holders hold equal rights to Chinese right holders to enforce their legal IP rights, the endless trials and great case costs create a bad impression of Chinese IP protection. Moreover, the exclusion from the time limit system, becomes a haven for counterfeits. The slow proceeding offers time for counterfeit manufactures to transfer their copied goods to other formats or brands.

4 Amount for Compensation

Another claim often presented by right holders, is that: the Chinese legal system does not offer sufficient remedies or recovery of costs for IP right enforcement. This is primarily because: (1) the administrative procedure doesn't offer any compensation for damage, and (2) in addition to the long running court trials, the amount of compensation is very limited. So far, Chinese

courts only award compensation for direct damages. There is no evidentiary discovery system in China.[24]

The Chinese Patent Law doess not include set statutory civil remedies for patent infringements. Art. 65 of the Patent Law regulatescompensation as follows: '*the amount of compensation for patent right infringement shall be determined according to the patentee's actual losses caused by the infringement. If it is hard to determine the actual losses, the amount of compensation maybe determined according to the benefits acquired by the infringer through the infringement. If it is hard to determine the losses of the patentee or the benefit acquired by the infringer, the amount of compensation may be determined according to reasonably multiplied amount of the royalties of that patent. The amount of compensation shall include the reasonable expenses paid by the patentee for putting an end to the infringement. If the losses of the patentee, benefits of the infringer, or royalties of the patent are all hard to determine, the people's court may, on the basis of the factors such as the type of patent right, nature of the infringement, and seriousness of the case, determine the amount of compensation within the range from 10,000 to 1,000,000 yuan.*'

Art. 65 of the Patent Law does not clearly indicate what kind of losses are actual losses. The related interpretations published by the SPC in 2001 and 2009 have no clear definition either. In theory, although Art. 65 spells out a few legal references on calculating the amount, the deciding court has discretion to utilize any established method on calculating the amount of compensation.[25] However, in practice, many judges are avoiding the new method for calculating compensation (Art. 65) and using conservative methods instead. [26]

Art. 20(3) of the *SPC Interpretations Concerning The Application Of Law In The Trial Of Patent Infringement Dispute Cases (2001)* concerns the benefits acquired by the infringer through the infringement. It is indicated that such benefits could be divided into operating profit and sales profit. In real cases, judges are counting such profit based on the audit report of accountants. This method of interpretation has divided the infringers into two categories. The first group consists of the general infringers and the other group consists of infringers from the infringement industry. For the general infringer, the benefits acquired by the infringer through the infringement are normally calculated based on the operating profits. For the infringers from the infringement industry, the calculation will be based on the sales profits.

[24] Dahman, Samir B. "Protecting Your IP Rights in China: An Overview of the Process." Entrepreneurial Business Law Journal 1 (2006): 63. See also Duncan, Jeffrey M., Michelle A. Sherwood, and Yuanlin Shen. "Comparison between the Judicial and Administrative Routes to Enforce Intellectual Property Rights in China. A." John Marshall Review of Intellectual Property Law 7 (2008 2007): [i].

[25] ibid

[26] Shao, Wei. Patent Litigation Practices In Mainland China. Taiwan Ministry Of Economic Affaris, Intellectual Property Office, 2011. p233.

However, the SPC's interpretation does not clearly define an 'infringer from infringement industry'. In real cases, if the infringers conduct other business apart from business based on patent infringement, then such infringers are only general infringers.[27]

Art. 21 of the SPC *Interpretations Concerning The Application Of Law In The Trial Of Patent Infringement Dispute Cases (2001)* also includes guidance on the reasonably multiplied amount of the royalties of the infringedpatent. The reasonably multiplied amount is regulated to 1-3 times of the royalties. The interpretation does not detail standards on how to apply such levels in real cases, so judges have discretion in applying this interpretation.[28] Some commentators claim that the interpretation actually introduces punitive damages, which is presently being discussed. [29]

Since 2011 recent discussions on patent law amendment, which concentrates on improving patent protection, has recognized that the current compensation system is not sufficient to prevent malicious infringements and repeated infringements. Most likely, China will soon implement punitive compensation in its new patent law. The courts can award compensation up to 3 times of actual damages. If a right holder can prove the infringement plot, scale and consequences of the damage, then it is possible for the right holder to get punitive damages. Such claim may also require that the right holder prove that the infringement is carried out (with malicious) intent, e.g., the infringer conducts repeated infringements and has already been held liable for infringement once in similar circumstances.[30]

Art. 65 of the Patent Law also regulates statutory compensation, which applies when the losses of the patentee, benefits of the infringer, or royalties of the patent are all difficult to determine. However, in reality, the courts still ask the right holders to prove the damages, but employ a relatively low requirement of the strength of the evidence. It means that th right holders do not need to prove a specific amount of damages. Moreover, as revealed by studies from patent agents, the Chinese courts are, nevertheless, applying statutory compensation in most patent cases.

[27] Shao, Wei. Patent Litigation Practices In Mainland China. Taiwan Ministry Of Economic Affaris, Intellectual Property Office, 2011.

[28] SPC (2005) Civil Chamber 3, No.1 Judgment.

[29] See Zhang GuangLiang, Civil Remedy of Intellectual Property Infringement, China Law Press 2003, p154. See also, Cui Guobing, Patent Law Theories and Cases, Peking University Press 2012, p731.

[30] Hong, Wang. "Chinese Patent Law Amendment Ongoing and Punitive Damages Could Be Possible." Legal Evening News, May 7, 2014.

In practice, maximum statutory damages are often requestedbecause the plaintiff frequently finds it difficult to prove the amount of plaintiffs' losses, defendant's benefits, or license fees or royalties.[31]

Despite the complex, yet limited compensation, so far, right holders have a heavy burden of proof. They need not only present evidence of ownership and validity of the claimed right, as well as, evidence showing the infringement of that right, but right holders must also present evidence to support the amount of the claimed compensation. [32]Although large compensation awards are possible, it may still take a long while before the situation gets easier. It has been claimed that 'the Chinese judicial system seems overly cumbersome and under-compensatory in resolving cases of IP infringement. Thus, the majority of IP rights owners settle for simply stopping infringement and swallowing the losses or writing off lost profits.' [33]

5 Conclusion: Imitation or Innovation?

China as a developing country is facing a juncture in IP protection. After joining the World Trade Organization (WTO), China reformed its IP regime to adjust its market to the global market. On the other hand, IP protection also involves public interests that impact its economic reforms as well as social welfare. [34] There is no doubt that imitation supports technological growth and development in the short run. However, it raises the cost of conducting business in China and also discourages domestic innovation, which are a long-term drivers of economic growth.[35] The Chinese government obviously wants to transform Chinese industry from labor-intensive to technology and capital-intensive markets. The aims of the Chinese IP strategy 2020 is "establishing a comprehensive IP system," "promoting creation and

[31] Duncan, Jeffrey M., Michelle A. Sherwood, and Yuanlin Shen. "Comparison between the Judicial and Administrative Routes to Enforce Intellectual Property Rights in China. A." John Marshall Review of Intellectual Property Law 7 (2008 2007): [i]. See also Shao, Wei. Patent Litigation Practices In Mainland China. Taiwan Ministry Of Economic Affaris, Intellectual Property Office, 2011. p233.

[32] Duncan, Jeffrey M., Michelle A. Sherwood, and Yuanlin Shen. "Comparison between the Judicial and Administrative Routes to Enforce Intellectual Property Rights in China. A." John Marshall Review of Intellectual Property Law 7 (2008 2007): [i].

[33] Dahman, Samir B. "Protecting Your IP Rights in China: An Overview of the Process." Entrepreneurial Business Law Journal 1 (2006): 63.

[34] Liu, Wenqi. "Intellectual Property Protection Related to Technology in China." Technological Forecasting and Social Change 72, no. 3. Managing Emerging Technologies in Asia (March 2005): 339–48. doi:10.1016/j.techfore.2004.08.009.

[35] Gregory K., Leonard, and Stiroh Lauren J. Economic Approaches to Intellectual Property: Policy,Litigation and Management. THOMSON/WEST, 2006.p11.403

utilization of IP," "enhancing IP protection," "preventing abuse of IP rights," and "fostering a culture for IP rights" are well-aligned with this overall economic strategy.[36]

After all, the current problem is not only a matter of law or policy at the government level. The promises of short-term gain, coupled with political as well as economic concernns keep on sacrificing the effectiveness of law.[37] Despite the the different levels of development in different regions, achieving stronger protection for IP will require a massive administrative effort of judicial implementation and enforcement. It will raise the cost of labor shifting within the industry,[38] and may also widen the gap between well-developed and developing regions.

Moreover, it will raise the prices of goodsas well as the costs for domestic technological development. The infringements occur in many types of Chinese enterprises, e.g., (1) individually-owned enterprises, (2) Hong Kong invested companies, (3) state-owned enterprises, (4) trading companies, (5) import and export companies, and (6) domestic wholesalers and retailers.[39] The practical market reality is more complicated, and the compromise between law, policy and other considerations is very difficult one to make. Although it is clear that the degree of IP protection is closely related to the level of technological development, and the openness of markets, China still has a long way to go. [40]

It is worth mentioning that the concept of counterfeit is not unambiguous. A one-size-fits-all solution at the government level may no longer be sufficient. Indeed, for simple cases, the Chinese government can carry out efficient actions at the administrative level. Incomplicated cases, such as those involving technology or pharmaceutical patents, it may not be easy to decide, which product is counterfeit without technical expertise, and the mass administrative action procedure may be unsuitable. Civil trials may also lack both legal and technical expertise in addition to other inefficiencies of operation.

Despite future difficulties and current problems, the agenda set by the Chinese government is promising. In the latest annual report of the SPC, strengthening IPR adjudication was

[36] State Councile of People's Republic of China. National Intellectual Property Strategy Outline, June 5, 2008. http://www.gov.cn/gongbao/content/2008/content_1018942.htm.

[37] Liu, Wenqi. "Intellectual Property Protection Related to Technology in China." Technological Forecasting and Social Change 72, no. 3. Managing Emerging Technologies in Asia (March 2005): 339–48. doi:10.1016/j.techfore.2004.08.009. See also, Gregory K., Leonard, and Stiroh Lauren J. Economic Approaches to Intellectual Property: Policy,Litigation and Management. THOMSON/WEST, 2006. P11.404.

[38] Gregory K., Leonard, and Stiroh Lauren J. Economic Approaches to Intellectual Property: Policy,Litigation and Management. THOMSON/WEST, 2006. P11.405.

[39] Dahman, Samir B. "Protecting Your IP Rights in China: An Overview of the Process." Entrepreneurial Business Law Journal 1 (2006): 63.

[40] J. Ginarte, W. Park, Determinants of patent rights: a cross-national study, Res. Policy (1997) 283 – 301. See also, Liu, Wenqi. "Intellectual Property Protection Related to Technology in China." Technological Forecasting and Social Change 72, no. 3. Managing Emerging Technologies in Asia (March 2005): 339–48. doi:10.1016/j.techfore.2004.08.009.

emphasized at the Twelfth National People's Congress "*The people's courts protected the patent rights, copyrights and trademark rights according to law, intensified judicial protection of Internet intellectual properties rights, cracked down unfair competition and monopoly according to law, to maintain a sound market environment for fair competition, and to promote the construction of the national innovation system. The people's courts at various levels concluded 100,000 cases of first instance on intellectual properties. The courts were also actively involved in the specific action of cracking down on infringement of intellectual properties, and manufacturing and selling of counterfeit goods, published white paper and typical cases on judicial protection of intellectual properties, and established a sound image of China in judicial protection of intellectual properties.*"[41]

On the other hand, to a country such as China, where people are used to imported technology, have a weak awareness of IP protection in general, and have various and easy access to low-cost imitations in the market, there is still a long way to go in establishing consumer awareness of the importance of IP protection in China. All efforts of the government of China cannot alone solve the real problems on the grass root market. Stronger IP protection in practice requires more than just policy and law. The Western predictions may remain until comprehensive legal reform is carried out throughoutthe central and local government , including access to the judiciary in civil litigation.

[41] Zhou, Qiang. Report on the Work of the Supreme People's Court(2013-2014). SPC official report delivered for the Second Session of the Twelfth National People's Congress. Supreme People's Court, March 10, 2014. http://www.china.org.cn/china/2014-05/08/content_32331522.htm.