



China IPR News for U.S. Industry January 27, 2009

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PATENTS

1. Large-Exposure Patent-Infringement Case Concerning Environment Protection Industry Appealed to Supreme People's Court: Three parties in a long-running patent-infringement suit have appealed to the Supreme People's Court, a matter with potential exposure of more than seven million U.S. dollars. In 2001, Wuhan Jingyuan Environment Project Co., Ltd. filed suit against Japan FKK and Huayang Electricity in Fujian People's High Court, claiming that the two defendants had infringed upon Jingyuan's invention patent on processing machines. Jingyuan demanded damages totaling RMB 76,000,000 (approximately USD \$11,111,000). In May 2008, the Fujian People's High Court held for Jingyuan, awarding the company damages in the amount of RMB 50,612,400

(approximately USD \$7,400,000), and retroactively calculating a patent-license fee of RMB 240,000 (approximately USD \$35,087) per machine per year. All three parties have appealed the judgment to the Supreme People's Court. (Source: *China IP News*, November 12, 2008.)

2. Opinions Solicited on Genetic Resource Provisions of Patent Law Amendments in Yunnan Province:

In December 2008, representatives from the State Intellectual Property Office, the Legal Affairs Office of the State Council, the Ministry of Environmental Protection, and the Ministry of Agriculture conducted seminars in Yunnan Province, soliciting opinions concerning genetic resource protection in revisions of the Patent Law and its Implementing Regulations. During the meetings, participants opined that the provisions should be practical and easily applied. They also agreed that the provisions should be beneficial in implementing principles of the Convention on Biological Diversity, and in managing genetic resources. (Source: http://www.sipo.gov.cn/sipo2008/dtxx/gn/2008/200812/t20081209_429429.html, December 9, 2008.)

3. SIPO Opens Patent-Application Receiving Office in Anhui Province:

On December 17, 2008, the State Intellectual Property Office (SIPO) opened yet another patent-application receiving office. Currently, there are 25 patent-application receiving offices in different provinces throughout China, all designed to make filing applications more convenient. (Source: http://www.ahipo.gov.cn/News_Show.asp?NewsID=1070, December 3, 2008.)

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4. Authority Shift: General Administration of Press and Publication (GAPP) Takes Lead in Copyright Legislation Drafting and Reconsidering Administrative Copyright Decisions:

The State Council has issued a decision (called a "San Ding") affecting the statutory functions, internal structure, and staffing of the General Administration of Press and Publication (GAPP). Henceforth, GAPP's Laws and Regulations Department will be responsible for drafting copyright-related legislation, a function that the Legal Affairs Division of the Copyright Department of the National Copyright Administration of China previously performed. This means that the GAPP will be drafting the amendments to the Copyright Law as well as other related legislation.

Additionally, GAPP's Laws and Regulations Department now has authority to reconsider administrative copyright decisions. According to Deputy Director General Yu Cike, the department is drafting the legislative plan for 2009, which calls for strengthening copyright legislation. (Source: *China Press and Publishing Journal*, December 4, 2008, Page 2.)

ENFORCEMENT

5. Shanghai Court Awards Diageo RMB 1.25 Million in Damages from Anti-Unfair Competition Case:

The Shanghai No. 2 Intermediate Court has awarded RMB 1.25 million (approximately USD \$183,000) to Diageo, stemming from an anti-unfair competition case. Diageo had accused defendant, Shanghai Blueblood Wine Co., Ltd., of continuing to copy its trade dress for Johnny Walker® Black Label Whisky, even after the Shanghai Administration of Industry and Commerce repeatedly had executed administrative enforcement actions in December 2006 and September 2007. Originally, Diageo had requested damages of RMB 2 million (approximately USD \$292,000), but it could provide neither the necessary evidence of its losses nor the exact profits of the defendant. According to Chinese law, statutory damages should not exceed RMB 500,000 (approximately USD \$73,100). However, Diageo was able to prove that the profits of Blueblood were in excess of the statutory amount. Accordingly, the Shanghai No. 2 Intermediate Court calculated the damages based on the number of infringing bottles seized multiplied by the average profit margin in China's liquor industry, which totaled RMB 1.25 million. (Source: *China IP News*, December 5, 2008, Page 1.)

6. Less Than 5% of IPR Infringement Cases Handled by Chinese Culture Agencies Are Referred for Criminal Prosecution in Third Quarter of 2008:

On November 27, 2008, the Ministry of Culture reported that its administrative agencies and enforcement detachments handled 2,386 IPR infringement cases in the third quarter of 2008. Slightly more than 100 of those cases, or 4.2%, were referred for criminal investigation and prosecution. The 2,386 IPR infringement cases account for 12.6% of more than 19,000 cases for which the Ministry of Culture was responsible in the third quarter of 2008. (Source: *China IP News*, December 3, 2008, Page 1.)

7. Henan Province Court Institutes Procedures for Evidentiary Investigation and Collection:

More often than not, legal practitioners and parties involved in IPR cases have had to contend with problems in evidentiary investigation and collection. To address this issue, the Henan Provincial High People's Court has instituted procedures allowing attorneys an orderly a system of investigation and collection of evidence. Lawyers may request that the

court issue an investigation order when a party in a civil suit cannot obtain relevant evidence. The order authorizes the lawyer to collect evidence from relevant individuals and entities, such as the Administration for Industry and Commerce, banks, and companies. An attorney's evidentiary collection from an investigation order will carry the same weight as any evidence that a judge might accrue. However, investigation orders will be issued only under certain circumstances. Before the order can be issued, the lawyer must supply the court with the cause of action and the facts concerning the case, the location and the subject matter of the investigation, and the proposed expiration date of the investigation order. Currently, this system is in use only with the IPR Tribunal of the Henan Provincial High People's Court. Reportedly, tests of a similar system also have been tried in cities such as Shanghai and Shenzhen. Supposedly, the Intermediate People's Court of Wuhan just completed research on such a system, and is drafting implementation rules. (Source: *China IP News*, November 21, 2008, Page 2; and December 3, 2008, Page 2.)

8. Shanghai High Court Outlines Events of "IPR Judicial Protection Action Month":

On November 26, 2008, Ying Xinlong, the Deputy Director of the Shanghai High Court, presented the results of "IPR Judicial Protection Action Month" (November 4 to 26, 2008). Other events that day included roundtables to solicit opinions on IPR judicial protection, the publishing of thirty IPR case decisions, and the pronouncement of judgment in several IPR cases. Additionally, the District Court of Yangpu and the Shanghai No. 2 Intermediate Court conducted hearings which were broadcast live via the internet. The Shanghai High Court also promulgated its "Opinions on Implementing the Outline of National IP Strategy," emphasizing the goals of decreasing the cost of IP protection while increasing the penalties for infringement.

Deputy Director Ying emphasized the court's work in improving the specialized adjudication system for IPR matters, and accentuated the model of combining civil, administrative, and criminal cases into one tribunal. The Shanghai High Court had drafted "Rules on Several Issues in IPR Tribunals of District-Level Courts Hearing IPR Civil, Administrative, and Criminal Cases." Like the District Courts of Pudong, Huangpu, and Yangpu, the District Court of Luwan will be the fourth district-level court which has an IPR tribunal, following approval from the Supreme People's Court. (Source: PTO Shanghai Office.)

9. 2008 Court Statistics Concerning IPR in China:

In late November 2008, Xi Xiaoming, the Vice President of the Supreme People's Court, released IPR protection data for the period from January to October 2008. Chinese courts heard

20,806 IPR civil cases of first instance, a 36.9% increase over the same period last year, while 3,251 IPR civil cases of second instance were accepted, a 49.5% increase from the previous year. To deal with this increasing demand, the Supreme People's Court conferred many new courts with jurisdiction over IPR matters: 71 new courts to handle patent issues; 38 new courts to deal with new varieties of plants; and 43 new tribunals to hear disputes concerning the layout designs of integrated circuits. Vice President Xi also stated that there are now 61 basic-level courts with jurisdiction over IPR civil cases. Noting an increasing diversity of IPR issues, he observed that civil IPR cases from this period included special marks, domain names, company names, and IPR agency and monopoly issues. (Source: http://news.ipr.gov.cn/ipr/news/info/Article.jsp?a_no=253485&col_no=1016&dir=200812, December 1, 2008.)

GENERAL IPR NEWS

10. Chongqing Court Designated to Hear IPR Matters: As of October 1, 2008, the Chongqing Higher People's Court has designated the People's Court of Yuzhong District as the first preliminary court in western China empowered to hear IPR cases. This district-level court can serve as the Court of First Instance for civil cases related to IPR with values in contention totaling less than RMB 3 million (approximately USD \$439,000), excepting patents, matters involving plant varieties, and layout designs of integrated circuits. The court is likely to explore the feasibility of conducting trials which combine civil, criminal, and administrative IPR cases. According to statistics, thus far, there are 9 intermediate courts and 14 preliminary courts in China, which concurrently accept civil, criminal, and administrative IPR matters. (Source: <http://www.jtj.cqyz.gov.cn/web1/info/view.asp?newsid=27485>, and http://news.ipr.gov.cn/ipr/nes/info/Article.jsp?a_no=254122&col_no=1016&dir=200812.)

11. IPR Issues at October 2008 Session of Canton Trade Fair: At the venerable Canton Trade Fair (now known as the China Import and Export Fair) in October 2008, products with "self-reliant IPR" fared better than the rest. [Comment: "Self-reliant IPR" is a term referring to intellectual property rights which are created as part of the current Chinese national policy to promote locally developed technology ("indigenous innovation") and brands.] For the first time, export/import associations were responsible for IPR protection. The Fair's IPR complaint center received 645 complaints involving 911 entities, 495 of which were determined to be infringing upon the intellectual property rights of others. (Source: *China IP News*, November 19, 2008; and "Press Release [at] the Conclusion of the 104th Session of the China Import and Export Fair," November 6, 2008,

<http://www.cantonfair.org.cn/en/info/news/detail.aspx?id=14688>.)

12. Guangzhou Government Promulgates IPR Protection Regulations for 2010 Asian Games:

The People's Government of Guangzhou has approved regulations for protecting the IPR of the Asian Games, to be held in 2010 in the city. These regulations contain twenty articles which address the following: 1.) define the IPR of the Asian Games and acts infringing those rights; 2.) identify the mission of administrative agencies to curtail or prevent IPR infringement; 3.) establish an inter-agency coordination system and a "first-called, first-responsible" response mechanism; 4.) outline a method of dispute resolution; and 5.) stipulate enforcement actions and legal consequences of infringement. (Source: *China IP News*, November 26, 2008.)

UPCOMING EVENTS

Webinar on Thursday, February 5, 2009 at 3:30pm-4:30pm EST - What Does the Third Amendment to China's Patent Law Mean to You?: The third amendment to China's patent law was passed on December 27, 2008. The law will go into effect on October 1, 2009. Please join Benjamin Bai, partner in Jones Day's Houston and Shanghai offices, in discussing recent amendments to the patent law, including expanding the scope of compulsory licensing, double patenting and the disclosure of genetic resources.

Webinar on Monday, February 9, 2009 at 1:00pm-2:00pm EST - Recording your Intellectual Property Rights with Customs: Many SMEs have registered their trademarks in China. However, they have yet to record such registrations with Chinese Customs. Please join us as Johnny Xie, Head of International Exchange Department of the Shanghai Customs College, walks us through the steps on how to record with the General Administration of Customs and the steps that Chinese Customs takes in seizing goods suspected of being infringing. After Mr. Xie's presentation, Janelle Gordon, Attorney-Advisor at the U.S. Customs & Border Protection, will explain the recordation process in the US.

Webinar on Tuesday, February 17, 2009 at 1:00pm-2:00pm EST - Practical Tips on Supervising IPR Law Suits in China: There are many considerations for US companies before they file suit in China to enforce their intellectual property rights. Picking the right local counsel is just one. Please join us as Dave Yeskey, Director of the Legal Department at Microchip Technology Inc., describes the lessons he has learned in supervising civil litigation in China. This webinar is more interactive than usual as Mr. Yeskey is willing to answer

questions from other business people and in-house counsel who have not worked in China.

The programs are free. Only a phone line and a computer with an Internet connection are necessary.

To register for one or all of the February programs, please send your contact information and the list of webinars you wish to attend to

ChinaIPR@mail.doc.gov. Registration confirmation and dial-in/log-in instructions will be sent to you before the program. To learn more about the webinar series, please go to http://www.stopfakes.gov/events/china_webinar_series.asp
