IP Dialogue China-Switzerland

10th Meeting of the IPR Working Group (MofCom)

8th Meeting CNIPA-IPI

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Technical Questions and Answers for Swiss Industry

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Answers reported below are based on oral responses of Chinese experts, as understood through interpretation into English. These answers cannot be relied upon for any legal proceedings.

I. Patent-related Issues

I.1. 4th Patent Law Amendment

Answer CNIPA

During the CNIPA industry roundtable, CNIPA explained that the Standing Committee of the National People's Congress (NPC) had published the draft Patent Law for comment at the beginning of 2019.

Usually, the legislative process entails two or three reviews by the NPC until a law is released. The next step now is the second review by the Standing Committee of the NPC.

The draft contains namely:

- An extension of the duration of design protection to 15 years (currently 10)
- A five times increase of punitive damages
- The introduction of a pilot-project regarding patent-term compensation

Answer Commission on Legislative Affairs of the National People's Congress (CLA-NPC)

The CLA-NPC informed that the timetable for the revision of the Patent Law has not yet been set. If there is a third review, there will be another round of public consultation.

Answer MofCom

MofCom summarised that there are two possible scenarios at this stage:

- either the Patent Law is finalised after the upcoming second review by the Standing Committee of the NPC,
- or the Patent Law is sent into a 3rd round, which would entail another round of public comment.

I.2. Patent-Term Compensation

Question Switzerland

Patent-term compensation (PTC) has been a regular topic of our exchanges during the last years, in particular with CNIPA. As you are aware, we believe that PTC is a useful tool to allow for the extension of patents for medical products for a reasonable period, in order to compensate for the time used to obtain market approval. PTC fosters innovation in the pharmaceutical market in the long run, and we thus very much welcome that PTC is now being introduced in China.

We would be interested in learning about the status of work and the next steps, including any opportunities for providing comments.

Regarding the content of what is currently being envisaged, based on the information contained in the latest draft revised patent law, we have the following comments and questions:

Firstly, we are unsure as to whether PTC will apply to biologics, given that the term "innovative drugs" used in the draft patent law corresponds to category V.I of the chemical drugs categorisation, and that we are not aware of a corresponding categorisation for biological drugs. We believe it would be very useful if PTC would apply to both chemical as well as

biological drugs, which are the future of medical products for the pharma sector in China as well as other countries. Clarifying this point would send a positive signal to the biologics industry, which represents an important part of the pharma sector and where incentives for innovation are thus crucial for the future development of innovative drugs.

Second, we would like to share some concerns regarding the requirement of simultaneous application in China as well as abroad. Such a provision would constitute an issue for all companies that intend to apply for market authorisation in various countries. This goes not only for foreign companies, but also Chinese ones who likely also intend to increasingly extend their business to other countries. As for foreign companies, if they are faced with an obligation to choose through such a provision, they may well see themselves obliged to opt for a big market where they have already established business instead of the Chinese one. We hear this form various Swiss companies, in particular also mid-sized ones who conduct cutting edge pharma R&D. Such a provision could regrettably but effectively deter them from entering the Chinese market.

Thirdly, regarding the calculation of the PTC, we would be interested in learning how the duration will be calculated. In Switzerland, PTC duration is calculated as the period from the patent filing date until the first market authorisation, minus five years. Much like China, we have fixed the maximum duration of the extension at 5 years.

Finally, we would be interested in what kind of transitional measures are planned to ensure a smooth transition from the current to the new regime.

Answer CNIPA

During the CNIPA Industry Roundtable, CNIPA explained that they are currently analysing how the PTC should be set up in detail, for instance regarding what kind of drugs need an extended period of protection, and what kind of patents will need to receive special attention.

Answer NMPA

NMPA referred to CNIPA's competency for this subject matter.

Commission of Legislative Affairs of the National People's Congress (CLA-NPC)

The CLA-NPC representative said that specific suggestions regarding PTC can still be submitted by Swiss authorities. He also acknowledged contributions made by Swiss companies.

I.3. Novelty Assessment in Utility Models

During the CNIPA Industry Roundtable, CNIPA explained that utility models have many features that may all contribute to explaining the increase the number of applications. Subsidies might only be one factor. The increase of utility model applications is also a sign of a marked increase in innovation activities in China, especially by SMEs. Since there is no substantive examination, a utility model is granted quickly, which is usually in the interest of SMEs.

Regarding the assessment of novelty, CNIPA examiners rely on a computer assisted system to provide similar applications from a global database. There is no in-depth search made for inventive step. The novelty requirement is the same for patents and utility models, while the inventive step threshold is set deliberately lower for utility models than for patents.

CNIPA has taken many measures to enhance the quality of utility models. It may take some time for these measures to show results.

Finally, it should be kept in mind that a utility model only provides for limited rights. If a utility model is brought to a court, the holder has to provide a mandatory search report. If a search report or a stability report of a utility model is requested, the patentee has a two-month response period as per the examination guidelines. The establishment of such a report does not include any kind of hearing process or participation from the patentee. Obvious mistakes in the stability report will be corrected by CNIPA ex officio. Requests for corrections can be made within a two-month period. A team of three examiners decides on its merit.

(see also “Subsidies for IP-filings “)

I.4. Prioritised Patent Examination (PPE) for foreign applicants

Asked during the CNIPA Industry Roundtable about PPE for foreign applicants apart from PPH, CNIPA explained that PPE was extended in 2017 from substantial examination to re-examination and invalidation, for both domestic and foreign applicants. Substantial examination of an invention patent can be concluded within one year, re-examination in seven months and invalidation in five months.

For foreign applicants, the request for PPE has to be made to the authority of the province where they have a subsidiary or another business contact. Should a foreign applicant not have an address, the address of the legal representative in China can be used.

Applicants should be careful to provide timely responses to CNIPA, given that PPE is a very fast process (two months for invention patents).

II. Design-relates Issues

II.1. Deferment of Design Publications

During the CNIPA Industry Roundtable, CNIPA explained that there are no plans to introduce deferred publication. Yet, the draft revised patent examination guidelines foresee the possibility to ask for delayed examination at the time of application, that is, for delaying it for either one, two or three years. It is to be noted that this draft has not yet been approved.

II.2. Expedited Design Examination

CNIPA explained during the CNIPA Industry Roundtable that it sees no need for introducing an accelerated design examination, given that the average time until grant is only four months. With the prioritised patent examination that was introduced 2017, it is now possible to request prioritised examination for all types of patents (including designs) in specific technical areas and in all cases of infringement or unauthorised use (redardless of technical area).

For foreign applicants, the request for prioritised examination has to be made to the authority of the province where they have a subsidiary or another business contact. Should a foreign applicant not have an address, the address of the legal representative in China can be used.

Applicants should be careful to provide timely responses to CNIPA, given that prioritised patent examination is a very fast process (15 days for designs).

II.3. Disclosure Grace Period for Designs

During the CNIPA Industry Roundtable, CNIPA explained that if a design is in the public, it is not covered by a grace period. CNIPA expressed concerns about risks if a grace period was introduced for utility models, since it would be difficult for CNIPA to reject later applications. Regarding designs, CNIPA said they understand the point for a grace period in this area and will take this remark into account in the next revision of the regulations.

II.4. Bad-faith Design Filings

CNIPA emphasised during the CNIPA Industry Roundtable that they focus on quality in their examination of designs, for instance by refusing applications for well-known designs that are filed by other companies. CNIPA also uses a AI tool to push relevant materials to the examiner, including pre-search reports. Finally, they extensively train their examiners.

III. Trademark-related Issues

Companies who have presented concrete cases during the industry roundtable and wish to ask written follow up questions can send them to IPI until 25th October 2019.

III.1. Registration of Trademarks containing State flags, emblems and names

Question Switzerland

The topic of the registration of trademarks that contain a State flag, emblem or name, such as the Swiss Cross, "Swiss" or "Switzerland", was regularly discussed in our meetings in past years. Over the past year, we have noted that CNIPA's examiners systematically refuse marks containing such protected signs. This practice allows IPI to subsequently issue authorisations to the attention of CNIPA only for those companies that are allowed under Swiss law to use such signs. This practice allows us to exclude from trademark protection for such signs companies that have no connection with Switzerland and to allow Swiss companies to benefit from Swissness abroad. We are very grateful to CNIPA for having implemented the outcome of our bilateral MoU discussions so thoroughly and timely. As a result, the procedures for registration of trademarks involving Swiss State Emblems and name in China and the cooperation among our offices in this respect stand today as a shining example of how such issues should be treated worldwide.

We would like to warmly thank CNIPA for all its efforts in this respect and wish to enquire whether from CNIPA's side, there are further points that would need to be clarified to facilitate the work of its examiners.

Answer CNIPA

CNIPA confirmed that when they receive applications for such marks, they systematically request the applicant to provide a written consent by the Swiss government. This regards marks containing the Swiss Cross and the country name. This requirement is now also part of CNIPA's examination guidelines.

III.2. Registration of trademarks containing names of Federal States

Question Switzerland

A related matter are emblems and names of Federal States. As you are aware, Switzerland is a federal country composed of 26 Federal States, some of which are also geographical names that are well-known, like Zurich, Geneva or Basel. We noticed that trademarks containing such names are refused based on art. 10(ii), art. 10(i)(2), art. 10(i)(7) and/or art. 10(i)(8) of the PRC Trademark Law, and sometimes accepted. Could you kindly provide us an overview on the considerations and legal basis that guide CNIPA's treatment of such trademarks?

Answer CNIPA

CNIPA explained that article 10(ii) covers names of federal states and cities, which shall not be registered as trademarks. This provision may also apply in cases where these names are used in combination with other elements.

IV. Regulatory issues relating to marketing authorisations for pharmaceuticals

IV.1. Regulatory Data Protection for Medical Products

Question Switzerland

Switzerland follows with great interest the ongoing reforms relating to regulatory data protection (RDP). We very much welcome the efforts by Chinese authorities to enhance RDP, with a view to foster an environment conducive for bringing innovative drugs to the market and to Chinese patients. The Draft Pharmaceutical Data Exclusivity Implementing Rules of April 2018 constitute an important step in this direction and implement some of the pending provisions in the China-Switzerland Free Trade Agreement, which entered into force in July 2014.

We very much welcome plans to introduce RDP for biological drugs. In relation to our FTA, it will be important that the minimum duration of 6 years RDP will be guaranteed in all cases, regardless of where market approval is sought first and in which country clinical test data was produced, and that this minimum duration will also apply to vaccines. In this context, we would thus kindly ask you to:

- Elaborate on how the minimum duration of 6 years RDP will be ensured in all cases, including those where market approval in China is sought later than in other countries and where clinical data produced overseas is submitted to NMPA;
- Confirm that vaccines can benefit from enhanced RDP.

Regarding the data eligible for RDP, the abovementioned Draft Implementing Measures explicitly limit RDP to data relating to the effectiveness of a drug, while excluding data regarding safety. In this respect, we would point out that inclusion of safety data is important to encourage companies to do their utmost to protect patients, and that our FTA covers all kinds of data submitted to the market approval authorities.

With respect to improved drugs, we would find it important that such drugs, for example with new indications or compound drugs, will be able to benefit from RDP. We are unsure as to what is envisaged by Chinese authorities in this respect and would kindly ask for some clarifications in this respect.

Regarding the implementation of the new RDP regime, it will be important to ensure non-discrimination of drugs that have been approved or are in a late stage of the pipeline, as compared to drugs approved under the new regime, which will benefit from longer RDP. What kind of transitional measures are planned in this respect?

Finally, we would be interested in an update regarding the process of ongoing reforms relating to RDP, including timelines for adoption.

Answer NMPA

NMPA explained that they had received 500 inputs in the public consultation held on the implementing regulations of April 2018 and informed that the majority of them supported the direction of the reform. Yet he also pointed to comments of some stakeholders that were critical about a longer RDP, including concerns over drug prices. NMPA is currently in the process of evaluating the inputs received and assured that the process of RDP reform will not be slowed down; the major policy direction has been laid out by the State Council and will be followed. In this respect, NMPA also informed that RDP is contained in the draft provisions on the implementation of the Drug Administration Law (scheduled to come into force on 01.12.2019).

Regarding more specific aspects, NMPA explained the following:

- NMPA confirmed that RDP will be available for biologics, specifying that this will be the case for therapeutically products, but not for vaccines. N.B. During the industry roundtable, NMPA mentioned that "in a next step, they will agree with all stakeholders on a duration of RDP for biologics", which seemed to suggest that the 12 years originally foreseen might be revisited. Asked whether the China-Switzerland FTA can be applied earlier to Swiss companies, the representative indicated to have to check with his hierarchy.
- Regarding safety data, NMPA informed that RDP will not be available, but only cover data on efficacy. NMPA pointed to the fact that there is no specific obligation under TRIPS to provide for RDP for safety data. Also, NMPA considers that the cost for safety tests is relatively low, which is why the possibility of obtaining RDP for such data is not a main issue. Finally, out of public interest considerations, NMPA does not wish for drug safety studies the results of which are already known to be repeated, since this would increase costs of a drug.
- Clinical trial data from overseas will also be protected in China, following China's accession to the International Council for Harmonisation of Technical Requirements for Pharmaceuticals for Human Use (ICH) this year, as long as this data is in conformity with Chinese regulations. Answering a question as to whether test data from overseas will receive the full RDP duration, i.e. as when tests are conducted in China, NMPA replied that whether or not a medicine gets RDP depends on whether or not it receives a market authorisation in China. The overseas data needs to fulfil the purposes of entering the Chinese market and needs to be inspected by Chinese authorities. On a related note, NMPA pointed out that certain overseas projects produced data that were not up to Chinese standards and underscored that RDP can be obtained only when such projects fulfil Chinese requirements.
- Simultaneous application: NMPA informed that if a drug has entered a foreign market a long time ago, it will not enjoy RDP in China, since the Chinese market evolves rapidly. NMPA underlined that if the time period between market entry in Switzerland and in China is "reasonably short", then RDP will be available.
- Orphan drugs & drugs for rare diseases: NMPA confirmed that RDP will be available for these categories of drugs.

NMPA underlined that the current reform does not represent a retraction from the RDP article in the FTA China-Switzerland and is open to receiving comments from Swiss companies and Swiss authorities regarding this reform. NMPA repeated this invitation for comments during the MofCom Industry Roundtable, while asking companies to indicate specific problems and reasons therefore.

Regarding the current situation, and asked about the concrete procedures to obtain RDP for chemical drugs, NMPA explained during the MofCom Industry Roundtable that China is committed to grant six years of protection, even though the provisions of 2002 had never been formally implemented. The representative promised to take to his hierarchy the wish to elaborate provisional measures that would set out the procedure to obtain RDP.

At the industry roundtable, NMPA informed that they are setting up a website in English.

MofCom

In a separate subsequent meeting with MofCom only, Swiss authorities raised concerns with the fact that certain aspects envisaged under the reform are not compatible with the provisions of the FTA China-Switzerland. These regard on the one hand aspects in terms of the availability of RDP (safety data, vaccines), and on the other hand the duration of RDP, which needs to be 6 years at the minimum, regardless of whether a medical product has been brought to the market in another country already or of where test data is produced. MofCom took note.

IV.2. Patent Linkage

Question Switzerland

We would be interested in an update regarding plans announced by Chinese authorities with respect to the introduction of a patent linkage system.

Answer NMPA

NMPA called the introduction of a linkage system a "central reform". The representative underlined that it involves adjustments to both the Patent Law and NMPA's approval procedures, which entails a division of labour among various authorities. He said that previously, CNIPA, the Courts and NMPA have held discussions on this issue and that work on details was still ongoing. In concluding, NMPA said that introduction of a linkage system "is the general direction".

During the MofCom industry roundtable, NMPA informed that linkage is not part of the measures that will implement the Drug Administration Law. When asked whether article 19 of the Drug Registration Regulations[1] will still be applied, the representative denied that this provision will be implemented. This against the backdrop that no relevant provision had been integrated in the revised Patent Law and that the Bolar Exemption did not distinguish between different types of products. Implementing the said provisions at this point in time would thus create legal risks, given that regulations are subordinate to the Patent Law. NMPA pointed out that in case of infringement, a lawsuit can be introduced, while underlying the need for the whole system to be coherent.

Answer CNIPA

During the CNIPA industry roundtable, CNIPA referred to circular 42 that says that the "introduction of a linkage system shall be explored". CNIPA pointed to the various interests of different stakeholders, the impact on public health and the need to find a balanced solution. In this context, CNIPA said that patents were just playing a supporting role, and thus CNIPA was supporting the work of NMPA, giving to understand that the latter was the lead agency. Asked whether relevant provisions will be included in the Patent Law, CNIPA answered that the Patent Law is currently under review in the Standing Committee of the National People's Congress (NPC). Whether such provisions will be added is thus a decision on the NPC.

IV.3. Review of clinical trials in relation to human genetic resources and IP-sharing

Answer MOST

During the MofCom industry roundtable, MOST answered several questions in relation to the review MOST conducts of clinical trials, which, in the case of a foreign company, need to be realised together with a local hospital. Questions included namely why only foreign companies are subject to such a review, how this was in conformity with the Foreign Investment Law and how it was determined that IP-sharing arrangements were considered to be "unreasonable".

MOST explained that the applicable regulations seek to protect Chinese human genetic resources in the context of international cooperation and thus only apply to foreign companies. The regulations apply to human genetic resources (material) as well as human genetic information (data). The MOST supervision applies to both, foreign as well as domestic companies; if the latter engage in international cooperation, the regulations apply to them as

[1] *DRR, article 19: « For a drug patented in China, applicants other than the patentee may submit the application for registration two years prior to the expiry date of the patent. The State Food and Drug Administration shall review the drug application in accordance with the Measures, and after the expiry date of the patent, check and issue the drug approval number, Import Drug License or a Pharmaceutical Product License if the application conforms with the Measures."*

well. Yet MOST only reviews cases that involve international cooperation, not domestic clinical trials. There are no compulsory rules as to *how* IP must be shared with the local partner, yet IP sharing is considered reasonable if it corresponds to the share of each partner in clinical trials. Finally, MOST pointed out that the said regulations were still new and that more detailed measures will be prepared.

Answer MofCom

Regarding compatibility with the Foreign Investment Law, and namely its article 22, MofCom explained that further evaluations will be necessary to see whether there are contradictions, taking into account that human genetic resources have their own characteristics.

V. Plant Variety Protection (PVP)

V.1. Implementation Free-Trade Agreement China-Switzerland regarding PVP

Comment by Switzerland

As you are aware, annex IX of our FTA contains a list of six genera/species that needed priority study by China in view of their inclusion in its domestic list of protectable varieties. We have discussed this point during the 9th IP Working Group meeting, and are very glad that since, Pelargonium (天竺葵) has been included on China's list of protectable varieties. All six genera/species contained in annex IX are thus now protectable, which we warmly welcome.

VI. Enforcement Issues

VI.1. New IP Appellate Tribunal

Question Switzerland

We have learned with great interest of the creation of the SPC IP Court and the start of its operations on 1st January 2019. This is a most welcome development, which we trust will greatly enhance effective enforcement of intellectual property rights. In this context, we would appreciate if you could kindly provide an overview of the SPC IP Court's jurisdiction. We would also be interested in learning how the SPC IP Court plans to handle the large number of cases that it will likely have to treat. Finally, with regard to staffing of the new SPC IP Court, we assume that it will have enlisted qualified staff from various lower-level instances, such as Courts or the former PRB and TRAB. In this respect, we would be interested in hearing what measures are taken to avoid that a judge treats cases that he/she had handled as a member of the lower level instance.

Answer Supreme People's Court (SPC)

The SPC explained that the new IP Tribunal's competency extends to the following:

- Civil trials of second instance for invention patents, utility models, PVP, integrated circuits, software, trade secrets, monopolies and trademarks.
- Administrative trials of second instance regarding the validity of invention patents, utility models, designs, PVP and integrated circuits.
- Administrative trials of second instance regarding administrative sanctions relating to invention patents, PVP, integrated circuits, trade secrets and monopolies.
- Other cases as stipulated by a Judicial Interpretation.

Regarding the case handling, the SPC referred to endeavours to enhance resource allocation, to commit a higher number of SPC judges, to strengthen teambuilding in staff, to recur to recruiting from lower courts and universities, and to use technological means to enhance productivity. In addition, complex and simpler cases should be systematically distinguished.

In relation to the prevention of conflicts of interest, the SPC underlined that the rules applied to the IP Tribunal are stricter than similar mechanisms under Chinese law. If a judge was involved in a case in the first instance, he/she cannot deal with the case in the second instance. Also, judges on secondment from lower courts cannot deal with cases where their institution was involved in the lower instance.

VI.2. Judicial Enforcement of Patent Rights

Question Switzerland

We have discussed the importance of timely preliminary injunctions for patent infringements with the SPC and CNIPA over the past years and have been following recent developments with great interest. As you are aware, it is key that right holders have a reasonable chance for obtaining a timely preliminary injunction against imminent infringement and offering for sale of an infringing product. We welcome the Judicial Interpretation (JI) of 1 January 2019 "Provisions of The Supreme People's Court on Several Issues Concerning the Application of Laws in Adjudication of Action Preservation Cases Involving IP Disputes". It provides helpful guidance on substantive and procedural rules for preliminary injunctions, and we receive positive feedback from Swiss companies in this respect.

Firstly, we would be interested in the next step, after a right holder has obtained a preliminary injunction. The aforementioned JI stipulates that if the applicant for a preliminary injunction fails to file a patent infringement lawsuit or to apply for arbitration within 30 days after a preliminary injunction is granted, the preliminary injunction request will be lifted. According to our reading, article 60 of the Patent Law allows for a main action only against actual infringement but not imminent infringement. If this is correct, it would seem impossible for a right holder, who has obtained a preliminary injunction, to initiate a main action against imminent infringement in order to maintain the preliminary injunction until the patent infringement dispute is resolved.

Secondly, irreparable harm is a key consideration in granting a preliminary injunction. We hear from Swiss companies that in practice, it seems still very challenging to convince the courts of irreparable harm. The burden of proof on the patentee seems to be very high when it comes to demonstrate the market share loss, especially before actual selling of the infringing product occurs.

Against the backdrop of these considerations, we would be interested in learning how the recent JI plays together with other legal instruments to ensure that a right holder can obtain a timely and effective injunction against imminent infringement and offer for sale of an infringing product. This possibility is in particular critical to the pharmaceutical industry, since commercial launch of an infringing product, even in the form of offering for sale, may cause significant harm to the innovative drug maker, which cannot be fully recouped by awarded damages.

Answer SPC

The SPC informed about the new Judicial Interpretation of 01.01.2019 and confirmed the 30 days deadline after grant of a preliminary injunction for introducing a main action. Article 6 of the Judicial Interpretation stipulates that six situations can be treated as urgent circumstances. The key here is that a situation needs to be so urgent that damage is irreparable (article 10 of the Judicial Interpretation). For example, the commercialisation of goods already labelled with an infringing trademark can by stopped by a preliminary injunction. Regarding the preliminary injunctions in the area of patents, offering for sale is also taken into consideration.

Commission of Legislative Affairs des National People's Congress (CLA-NPC)

The representative of the CLA-NPC explained that in his view, the first issue arises from the interpretation of the expression "exploitation of a patent" in article 60 of the Patent Law. He explained that article 11 of the Patent Law defines exploitation of a patent as including "manufacturing a product". Therefore, he was of the view that a main action following the grant of a preliminary injunction before market entry should be possible under the current law, given that manufacturing occurs before offering for sale.

VI.3. Online Sale of Counterfeits

Question Switzerland

In the past years, we have had discussions with the Enforcement Bureau of Competition of former SAIC and the IPR Leading Group, and have also met several times with Alibaba, to take up issues around IP enforcement in E-commerce. We are happy to report that Swiss companies observe progress with the functioning of Alibaba's take-down procedures. Companies also inform us that significant issues remain, however, with other platforms that are involved in E-commerce transactions. For instance, while take-down as such works with platforms such as YUPOO, proactive measures should be taken by all platforms. Some in addition have very long response times (DHGate) or do not answer at all (DIYtrade.com). In the case of social media operators (WeChat, Weibo), blocking action should not merely regard specific pages, but accounts should be blocked in case of repeated infringement.

In this respect, we would be interested in hearing in to what extent platforms that do not constitute E-commerce platforms in the strict sense, as for example photo-sites and social media, are subject to the new E-commerce law, and how the issue of counterfeits can be addressed in these cases.

With regards to the new e-commerce law, we would also be interested in learning whether there will be any guidelines or implementing regulations, or any other published authoritative documents, such as circulars on governing the e-commerce sector, aimed at clarifying under what circumstances what kind of platforms can be held liable in relation to counterfeiting.

Commission of Legislative Affairs des National People's Congress (CLA-NPC)

The CLA-NPC explained that operators of online activities not falling under the E-commerce Law are covered by tort liability law. The relevant provisions under tort liability of the civil code are currently still under review.

Answer State Administration for Market Regulation (SAMR)

The SAMR representative added that in addition to tort liability law, trademark law is also applicable.

SAMR informed that SAMR is not authorized to block accounts of counterfeit sellers, yet they can request to disable links to counterfeits.

Regarding non-e-commerce actors, SAMR informed that there is an order number 2 of SAMR that applies to authorities above the county level.

Further regulations are currently in elaboration by SAMR, namely measures for supervising online transactions. The SAMR representative expressed his hope that these measures will become available very soon. They will include more detailed regulations regarding such platforms.

VI.4. Administrative IP Enforcement after Institutional Reform

Question Switzerland

We would be interested in a general overview regarding the impact of recent and ongoing reforms (State Council Institutional Reform and merger of local AICs and IPOs) on administrative IP enforcement at the local and provincial levels.

In addition, we would be interested to learn whether the reforms imply that local and provincial enforcement authorities will have increased and comprehensive access to central databases, such as for instance trademark or patent filing documentation that is not available publicly. And how is administrative enforcement regarding geographical indications now organised?

Answer SAMR

SAMR informed that after its establishment in April 2018, a special team for integrated enforcement had been formed. This team will also handle administrative enforcement of trademarks and GIs and is in charge of formulating regulations, coordinating actions at the interprovincial level and overseeing major cases.

Responding to a question, SAMR specified that its competency extends to GIs covered under the ex-AQSIQ and the trademark system. GIs registered under the system of the Ministry of Agriculture are, however, regulated in a different legal basis and there is therefore no basis for action for SAMR for such GIs.

VI.5. Role of the Social Credit System in IP Enforcement

Question Switzerland

We have heard that the "social credit system" may be used for purposes of sanctioning and preventing IP infringement and would be interested in learning more about these plans. Will this new tool also be used to address the sale of counterfeits on markets, for instance street markets where the sale of fake goods such as watches is frequent?

Answer SAMR

SAMR underscored that the social credit system will produce positive effects on IP protection. SAMR is indeed establishing a nation-wide system that will cover companies and make their records public, such that anyone can check illegal acts of companies. There is a blacklist regarding acts of serious IP infringement, and if a company is on this blacklist, its social credit score will be seriously affected. This means that it might not get market entry as smoothly as other companies.

Buying counterfeit goods will not fall under this system, which is targeted at companies, not consumers. The National Commission for Development and Reform is parallel working on a social credit system covering individuals, yet SAMR is not aware of whether this system will cover IP infringement of not.

VI.6. Border Measures at Export

Question Switzerland

We would be interested in learning how China's customs authorities proceed in terms of focussing their controls regarding exports of counterfeits, including on how they conduct risk analysis and whether there is a possibility for IP right holders to provide helpful information to continuously update risk analysis.

To help focussing their controls, Swiss customs authorities undertake an IT-based risk analysis, which can be continuously adapted. They keep regular contact with IP right holders who have registered their rights with customs. This allows for integrating on an ongoing basis information from right-holders, such as presumed senders/recipients of counterfeits, which can be added to the risk analysis.

[company Pamp explicitly mentioned orally]

General Administration of Customs (GAC)

Generally speaking, GAC conducts targeted special enforcement campaigns that take nationwide action at all levels of customs. They also work with SAMR on special actions and

campaigns. Cooperation in specific regions is also key to prevent infringing action from shifting from one customs authority to another. Finally, GAC also works with the Ministry of Public Security in major infringement cases.

GAC uses smart and digitalized information systems that include information on the status of IP protection. There is a filing system for IP protection with GAC, which includes the status regarding specific goods. This system is currently being upgraded to become paperless. For risk analysis, GAC uses big data, mathematical models and expert panels to analyse risks for IPR infringement. GAC has set up a working group for dealing with cross-border e-commerce and collects evidence from all channels, including evidence provided by right holders.

International cooperation is also being expanded. Currently, GAC works with the EU, the USA, Russia, the Republic of Korea and Japan, as well as with the World Customs Organisation and Interpol.

A company can send specific information to GAC if it has successfully registered its IP rights with GAC, that is, its application has been approved and included in GAC records. The company can report either to GAC or to local customs where its import-export takes place mainly. The GAC representative underlined that the company needs to provide solid evidence of infringement.

By 06.09.2019, GAC had a total of approximately 49’500 registrations, 961 of which from Swiss companies. The GAC representative encouraged companies to provide relevant information.

VI.7. Judicial Enforcement in Software Cases

Question Switzerland

We would be interested in learning more about judicial enforcement in software cases and have in particular the following questions.

Is source code as evidence treated differently in copyright-related or in patent-related infringement cases?

Under which circumstances does the source code in a copyright-related or a patent-related infringement procedure have to be disclosed by the alleged infringer? And where is the threshold of plausible proof for the court to order a disclosure?

Is it customary to entrust the examination of source code to an independent technically competent fiduciary third party or does the court appoint a competent technological investigation officer?

How is the source code treated when it is considered as a trade secret by either party in a dispute?

Answer Supreme People’s Court (SPC)

Regarding the first question, the SPC explained that for preservation as a piece of evidence, source code will be inspected in both patent and copyright cases. The efficacy of inspection is determined by the scope of protection. In copyright, it will be compared bit by bit, since under this framework, the source code is an “expression”. Patent protection in turn covers the creative idea. Hence the claimed technical features will contribute in deciding what is protected.

In relation to disclosure of a source code, the SPC explained that a computer programme is defined as source code and its target programme. If the defendant publishes the source code, the burden of proof is on the plaintiff. If the source code is difficult to obtain, the plaintiff can request evidence preservation. The court can order a defendant to disclose its source code. Regarding copyright, it must be proven that the document is the same or at least very similar. For patent cases, the target programme must include similar parts or run on the same platform.

Regarding assessment by a third party, the SPC informed that this is possible, usually in form of an expert witness accessing the source code.

Finally, in case trade secrets are involved, a trial closed to the public may be requested. Additionally, non-disclosure agreements may be signed. Trade secrets can be dealt with in a separate trial.

VII. Cross-cutting Issues

VII.1. Technology Import-Export Regulations

Question Switzerland

As you are aware, we have repeatedly discussed together certain aspects of the Technology Import-Export Regulations in the past. We understand that namely the following provisions have been deleted from the Regulations in March 2019:

1) The provision stating that where the receiving party to a technology import contract infringes another person's lawful rights and interests by using the technology supplied by the supplying party, the supplying party shall bear the liability therefore.

2) The provision stating that within the term of validity of a contract for technology import, an achievement made in improving the technology concerned belongs to the party making the improvement.

We would kindly ask you to confirm whether this is correct, and to indicate how both aspects, i.e. 1) infringement of the technology-receiving party of a third person's rights and 2) ownership of improvements made during the validity of the contract, are handled now.

Answer MofCom

MofCom confirmed that the above is correct, that is that both parties to a technology import contract can agree as they please on liability, in line with Contract Law. The same applies to the ownership of improvements, which can also be freely agreed by parties, in line with article 354 of the Contract Law.

VII.2. Subsidies for IP-Filings

Answer MofCom

During the MofCom industry roundtable, when the point was raised that incentivising policies can have an effect to flood IP registers, MofCom answered that subsidies for utility models had been to some extent abused, which was of course not the goal of the policy. Now, Chinese authorities push innovation. MofCom promised to send this feedback to MOST and other concerned authorities.

(see also "Novelty assessment in utility models")