

OPINION

Yes, China Does Protect Intellectual Property

[Business Asia]

BY BENJAMIN BAI

China often gets a bad rap for its failures to protect intellectual property rights—from knock-offs of luxury handbags to copies of music and videos. Google cited an alleged theft of its intellectual property as one reason for its decision last month to consider pulling out of China. Yet the picture isn't as bleak as you might think. The key is for foreign businesses to understand how IP protection works in China and to take better advantage of the protections that exist.

Among the most common misperceptions is the notion that patents are useless in China. In reality, patent law is a booming area. The Chinese Patent Office issued more than 580,000 patents in 2009, up 41% from a year earlier. New patent applications grew to 947,000 in 2009 from 252,000 in 2002. The Chinese Patent Office is now the third-busiest patent authority in the world, after Japan and the United States. Meanwhile, China surpassed the U.S. in 2008 to become the most litigious country in the world for IP disputes—with 24,406 suits filed, a 4.6-time increase over 2001. That compares to about 8,000 in the U.S. in 2009.

Yet foreign companies are leaving themselves out of this legal progress. Only about 10% of those patent applications were filed by foreign companies, and a foreign company was one of the parties in less than 5% of IP lawsuits filed in 2008.

This is partly because they believe the Chinese legal system will favor local companies in litigation with foreign competitors. Certainly the largest patent-infringement damages award in China's history, in 2007, saw French company Schneider Electric ordered to pay around \$48.5 million to Chint Group, a Chinese company, for infringing a Chinese

Multinational companies just need to take better advantage of opportunities to defend their patents.

patent on a low-voltage circuit breaker. The suit settled for around \$24 million in April 2009 as the appeal was underway. In 2008, another court hit Samsung with damages of \$7.4 million for infringing a mobile phone patent held by Holley Communications.

But foreign companies can also win in Chinese courts. Neoplan, a German bus company, won an award of \$3 million in January

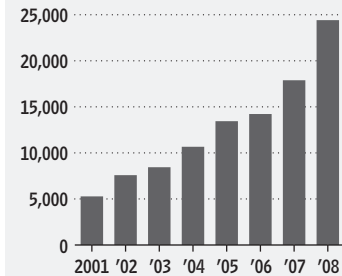
2009 against two Chinese companies for their infringement of its design patent on buses. This case represents the largest infringement damages award ever obtained by a foreign company in China and compares well to the average patent infringement damages award of less than \$50,000. Last month, a Beijing court ordered two Chinese companies to pay a combined \$1.3 million in damages to a British manufacturer of electric kettle components.

Anecdotal evidence suggests the recent win rate for multinational companies in IP suits in China has been greater than 50%. In some cities the win rate exceeds 90%. While it may be premature to declare victory based on these statistics, they do suggest that it is a mistake to assume that multinational companies cannot win IP suits in China.

Foreign companies just need to know how to take advantage of these trends. Too many have made the mistake of not applying for patents and trademarks in China. Foreign patents and trademarks are not enforceable in China, just as Chinese patents and trademarks are not enforceable in the United States. Multinationals also should be willing to enforce their Chinese IP rights against infringers. Litigation success requires more than a mere willingness to sue. An in-depth

Taking It to Court

IP infringement suits filed in China, 2001-2008



Source: Supreme People's Court

understanding of the Chinese judicial system and relevant legal doctrines and an ability to maneuver through the intricacies of law and politics in China are essential for foreign companies enforcing IP rights there.

Multinationals also can benefit from several positive IP trends within China. One is a growing emphasis by policy makers on building a functional intellectual property regime. The State Council in 2008 released a new "Outline of the National Intellectual Property Strategy" that acknowledges that robust IP protection is a critical component of an innovation-driven economy. China's patent law was amended for the third time last year to bring it further in line with international standards. China also is reform-

ing the judicial system in response to the increasing number and complexity of IP suits, clarifying venue rules and considering establishing courts of appeal for IP cases.

China now has a domestic constituency for improved IP enforcement: its own innovative companies. For instance, Huawei Technologies Co. Ltd., a Shenzhen-based telecoms company, filed the most Patent Cooperation Treaty applications (which lay the groundwork for patent applications in other countries) in 2008, according to statistics published by the World Intellectual Property Organization—beating Panasonic, Phillips, Toyota and other multinational companies that used to hold the top spot. Chinese companies like Huawei benefit from strong IP protection, too, and could help pressure policy makers to strength the IP regime more broadly.

While certain problems remain in Chinese intellectual property protection, multinational companies should operate under the assumption that China protects IP and aggressively build an IP portfolio there. Learning how to work within the system is more effective than merely wishing the system were better.

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