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The Newest IP Threat in China: IP Hijacking (Part 1 of 2)



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This is the first of a two-part series of articles relating to IP protection in China.

INTRODUCTION

MOST PEOPLE ARE AWARE that China is a hotbed of counterfeiting activity. Literally everything, from clothing to electronics to automobiles, can be copied in China. Many corporations have taken steps to protect their products and services from the flood of counterfeits being made in China and then exported around the world.

However, there is a new danger today, potentially even more threatening than counterfeiting. The newest threat is IP hijacking, which refers to a company (or individual) registering IP rights in China that it does not rightfully own. While counterfeiters can tarnish a company's reputation and/or hurt sales of legitimate products, IP can go even further. Using China's legal system—in effect, home-field advantage—counterfeiters can close off a market of 1.4 billion people by

taking enforcement action against the rightful owner for IP infringement.

THE RISE IN IP HIJACKING

Due to international pressure, China has increasingly focused on protection of IP rights. Most people familiar with China agree that the overall legal environment in China for IP protection has markedly improved since China's accession to the WTO in 2002.

IP protection is currently a hot topic in China. China's leaders are determined to lead the Chinese economy from a manufacturing based economy to an "innovation-driven" economy. This obviously requires a strong IP protection system. Nearly every day in China, one can find news stories about IP rights—from announcements of new IP protection initiatives, to stories of big IP verdicts, both domestic and abroad. The sides of buses are plastered with signs exhorting the Chinese people to respect IP rights, and phone numbers for IP hotlines to report counterfeiting activities.

Ironically, IP hijacking is one (unintended) result of the Chinese government's focus on IP protection. Similar to the early days of the Internet, when domain name hijacking was rampant, Chinese entities now have a "gold rush" mentality, registering IP rights wherever and whenever possible.

Taking patents as an example, from 1985–2005 all Chinese and foreign applicants obtained about 1.5 million patents in China. However, *just in 2006 and 2007*, all Chinese and foreign applicants applied for nearly 1.3 million patents, with nearly 620,000 granted in the same timeframe. Of the 1.3 million patents applied for in 2006 and 2007,



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over 80% were filed by Chinese entities. From 2006 to 2007, patent applications filed by Chinese entities jumped by nearly 25%; in contrast, patent applications filed in China by foreign entities only increased by about 4%.

Looking at trademarks, from 1979–2001, all Chinese and foreign applicants filed nearly 2.1 million applications. However, from 2002 to 2006, the number of applications filed by all Chinese and foreign applicants was more than 2.7 million. In other words, in just 5 years, more trademark applications were filed than in the previous 20-plus years. Of the 2.7 million applications filed between 2002 and 2006, *nearly 90%* were filed by Chinese entities.

Chinese companies are increasingly paying attention to IP rights and protection. Given the two stories described in the next section, you should too.

THE DANGERS OF IP HIJACKING: TWO CASE STUDIES

This section will examine two cases—widely considered to be the “worst case” examples of IP hijacking in China. The first case is an example of patent hijacking; the second is an example of trademark hijacking.

Patent Hijacking in China: *Chint v. Schneider*

In September 2007, the Wenzhou Intermediate People’s Court issued a 334.8 million RMB judgment (approximately US\$44 million) against French Schneider Electric and its Chinese sales agent for infringement of a utility model patent. This judgment is 175 times higher than the highest reported verdict for utility model infringement in China.

Schneider claims that this case is an example of IP hijacking. Schneider believes that it invented and obtained an invention patent in France on the disputed technology first. Schneider alleges that, because utility models in China are not substantively examined by the Patent Office, plaintiff Chint obtained a utility model patent on the disputed technology by copying Schneider’s technology.

Schneider filed an invalidation action against Chint’s utility model patent before the Patent Review and Adjudication Board, citing as prior art the following: (1) Schneider’s prior French patent; (2) posters disclosing the disputed technology in China prior to Chint’s application; and (3) evidence of sale of products bearing the disputed technology in China prior to Chint’s application. The validity of Chint’s utility model patent was upheld. The Wenzhou Court then issued the verdict.

The verdict represents Schneider’s entire profits in China from sale of products incorporating the disputed technology for the last 2 years. Schneider now is appealing both the rejection of its

invalidation action, as well as the judgment issued by the Wenzhou Court (to the Zhejiang Province Higher People’s Court).

Trademark Hijacking in China: *“G2000” v. “2000”*

In late 2007, the Hangzhou Intermediate People’s Court ordered Generation 2000 clothing stores—a famous Hong Kong brand sold all over China—to pay RMB 20 million (US\$2.8 million) in damages to a Chinese individual, who registered the mark “2000.” This is one of the highest reported verdicts for a trademark infringement case in China.

Generation 2000 first registered the “G2000” trademark in China in late 1992. This Class 25 (clothing, footwear, headgear) trademark had been previously declared a well-known trademark in China. A Chinese individual registered the “2000” trademark in 1997—5 years after Generation 2000—in Class 25 for “socks, gloves, scarves, veils, mantillas, ties, belts and waistbands”. The Chinese Trademark Office views these goods as dissimilar, because they fall into different subclasses in Class 25.

Generation 2000 attempted to invalidate the “2000” trademark, but failed. Between 2000 and 2006, Guangzhou and Beijing authorities raided “G2000” stores for products—including socks, gloves, and ties—that infringed the “2000” trademark. The Chinese individual also sued Generation 2000 for trademark infringement.

Though the basis of the Hangzhou Court’s decision is currently unknown, it awarded RMB 20 million to the individual plaintiff, which is 40 times higher than statutory damages (currently set at RMB 500,000). Generation 2000 appealed to the Zhejiang Higher People’s Court. The first hearing on the appeal was heard on April 29, 2008; the appeal currently is pending.

CONCLUSION

IP hijacking is a real and present danger in China. The next article in this two-part series will provide recommendations on how to avoid IP hijacking in the first place, and what to do if you discover that your IP rights have been hijacked in China. ■

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