Foreword: the recent development and current status of judicial protection of intellectual property in China

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INTRODUCTION

In recent years, Chinese courts at all levels have strengthened all aspects of their work regarding the judicial protection of intellectual property rights. These include increasing the degree of judicial protection for intellectual property rights, efficient fulfilment of judicial functions, acceptance and trial of cases in accordance with the law, strictly punishing crimes against intellectual property rights through a combination of all mechanisms of trial and enforcement measures, maintaining the order of the market economy with great resolve and creating a legal environment suitable for innovation. Significant progress has been made.

GENERAL REVIEW OF JUDICIAL PROTECTION OF INTELLECTUAL PROPERTY RIGHTS IN CHINA

The Chinese intellectual property regime has been established and has constantly been improved over the last 20 years, which coincides in time with the development of a market economy and the emergence and increase of intellectual property cases in Chinese courts. Alongside the rapid growth of the Chinese economy, especially after China's accession to the WTO and the adoption of innovation as a national strategy, the importance and urgency of protecting intellectual property rights has gained historical attention. The focus of the construction of the intellectual property legal framework has shifted from legislation to implementation. After years of efforts, China has primarily established a relevant and complete legal framework protecting

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intellectual property rights, which complies with the requirements of the WTO and is capable of meeting the needs of the nation's development. Judicial protection of intellectual property rights is an important component of such a framework for the protection of intellectual property rights. Corresponding to Chinese procedural laws which divide into civil, administrative and criminal procedural law, judicial protection of intellectual property rights in China divides into three categories: civil, administrative and criminal judicial protection with civil judicial protection as the basis. By carrying out their judicial duties in accordance with the law, Chinese courts have been effectively promoting works with respect to judicial protection of intellectual property rights, as a result of which the strength and the degree of protection has increased continuously.

Acceptance and Trial of all Types of Cases Involving Intellectual Property Rights in Accordance with the Law

Chinese courts have been resolving various disputes involving intellectual property rights and protecting the lawful rights and interests of the proprietor through trial in accordance with the law of civil disputes between equal parties over intellectual property rights. In recent years, and especially in those after China's accession to the WTO, the following characteristics of civil cases involving intellectual property rights have manifested themselves.

First, there has been a wide range of different types of cases which have involved not only all types of rights covered by TRIPs, such as patents (inventions, utility models, industrial designs), new varieties of plants, trademarks, copyright, computer software, layout designs (topographies) of integrated circuits, trade secrets, geographical indications and so on, but also new types of intellectual property such as cyber copyright, practical arts and folk literature and folk arts.

Second, the number of cases has increased dramatically. According to the statistics, in 2005, Chinese courts nationwide accepted 16 483 first instance, appeal and retrial cases concerning intellectual property, including anti-unfair competition cases, an increase of 20.66 per cent over the previous year. They disposed of 16 453 cases, which represents an increase of 29.6 per cent over the previous year.

Third, the uneven geographical allocation of cases has become apparent. Cases involving intellectual property are concentrated in economically developed areas such as Guangdong, Beijing, Jiangsu, Zhejiang, Shandong and Shanghai. Civil intellectual property cases accepted in these six provinces/municipalities have accounted for 65.38 per cent of the overall accepted intellectual property cases nationwide, and this percentage has been stable in recent years.

Fourth, the percentage of cases involving a foreign factor or that are associated with parties from Hong Kong, Macao and Taiwan has increased as a whole. There were 449 such cases in 2005, which accounts for 3.35 per cent of the intellectual property cases concluded at first instance. This represents an increase of 23.01 per cent over the previous year.

Chinese courts have been facilitating the administrative protection of intellectual property rights through the trial of administrative cases involving intellectual property, and the supervision and support of administrative measures. These administrative cases involve administrative proceedings brought against decisions of the intellectual property authority on authorization, administrative penalties and other issues. It is particularly noteworthy that lawsuits with the Patent Review Committee under the State Intellectual Property Office or the Trademark Examination Committee under the State Administration of Industry and Commerce as defendant have increased rapidly following the recent amendments to the Patent Law and Trademark Law that stipulate that such judicial judgment shall be the final decision with respect to the authorization and withholding of a patent or a trademark. That increase has levelled off only recently. In 2005, 575 administrative intellectual property cases of first instance were accepted by Chinese local courts, an increase of 9.32 per cent over the previous year, and 576 such cases have been disposed of, which represents an increase of 4.92 per cent over the previous year.

Chinese courts have been handing down criminal penalties against intellectual property infringement in breach of the criminal code and above the threshold, through trials of criminal cases involving intellectual property. In 2005, Chinese local courts accepted 3567 criminal cases of first instance involving intellectual property, an increase of 28.36 per cent over the previous year. This demonstrates that the arsenal to deal with crimes against intellectual property has been strengthened and the implementation of criminal judicial interpretations involving intellectual property has achieved obvious effects. One important reason for such a rapid increase of cases is that the Interpretation on Several Issues regarding the Implementation of Law in Trial of Criminal Cases involving Intellectual Property Infringement, enacted at the end of 2004, has lowered the threshold for an infringement to be deemed a crime, combined with the execution of the special action plan of the State Council for the protection of intellectual property.

The above-mentioned facts show that China's WTO accession has an important impact on the trial of intellectual property cases in China. Judicial protection of intellectual property has gained more trust and attention of the society with the mechanism of such protection running smoothly, and with the strength and the level of protection increasing.

The Jurisdiction of Civil Cases involving Intellectual Property has been relatively Centralised

According to the Civil Procedure Law and the relevant Judicial Interpretations enacted by the Supreme Court, civil cases involving intellectual property cases are, in principle, within the jurisdiction of courts at intermediate level or above, except for a few primary courts that are authorized by the Supreme People's Court to handle certain intellectual property cases. The underlying consideration of such an arrangement is that, since intellectual property cases are a new type of case for Chinese courts, relative concentration and centralization of jurisdiction will enable experience to be accumulated and research to be conducted. According to statistics, around 90 per cent of intellectual property cases in China have been tried at first instance by courts at intermediate level or above. Until the end of 2005, the number of Intermediate Courts with jurisdiction as the court of first instance over cases involving patents, new plant varieties and layout designs of integrated circuits has increased to 51, 37 and 43, respectively. Also, 15 primary courts that are reasonably located have been authorized to try certain intellectual property cases.

The Organization of Intellectual Property Trials has been Improved Continuously

In order to meet the demand of the development of the market economy, in order to emphasize the special and professional nature of trials of intellectual property cases and to comply with international legal rules, specialized intellectual property divisions were established within Beijing High Court and Intermediate Courts as early as 1993 and in the Supreme Court since 1996. Since then, especially after the institutional reform of the Chinese court system in 2000, specialized intellectual property divisions have flourished in Chinese courts. Almost all High Courts and Intermediate Courts located in a provincial capital or in other large cities have established special divisions dedicated to the handling of intellectual property cases. Even those courts without a special intellectual property division have a dedicated collegial panel in charge of the trial of intellectual property cases. Until now, more than 170 intellectual property divisions and more than 140 dedicated intellectual property collegial panels have been set up in Chinese courts, in which more than 1600 judges have been allocated to the trial of intellectual property cases. This has provided important guarantees for the task of dealing effectively with intellectual property cases.

MAIN MEASURES OF JUDICIAL PROTECTION FOR INTELLECTUAL PROPERTY RIGHTS IN CHINA

Equal Protection of the Legitimate Interests of both Chinese and Foreign Parties through Strict Enforcement of Domestic Laws and Implementation of International Treaties

Chinese courts have always adhered to the judicial doctrine of equal protection in trials; that is, all legitimate interests enjoyed in accordance with the law or rights granted by the law shall be protected equally, without regard to the nationality, occupation, geographic origin or financial status of the party concerned. Chinese courts have been trying to create an environment of equal judicial protection through granting foreign parties 'national treatment' in accordance with treaty obligations and by protecting their lawful interests in accordance with the law.

Granting the Right Holder and the Aggrieved Party a Full Remedy by Imposing Tough Judgment Civil Penalties and Liabilities upon the Infringer and the Party in Breach of Agreement

Chinese courts have been adhering to the doctrine of full compensation in trials of intellectual property cases: all losses caused by infringing activities, together with expenses occurred for the investigation, prevention of further infringement and appointing legal counsel, shall be included in the total sum of compensation for which the infringer will be ordered to take liability. In recent years, the amount of compensation awarded in the judgments has increased. In cases where the actual loss is hard to estimate, statutory compensation applies. In some cases a ceiling of half a million Yuan has been set for such statutory compensation, which has again strengthened the compensation for intellectual property infringement. For example, in *American Autodesk v. Beijing LongFa Construction and Decoration Company*, a case regarding the infringement of software copyright, the defendant, after having administrative penalties imposed upon him, was ordered by Beijing High Court to pay 1.49 million Yuan in compensation and 30 000 Yuan in legal expenses to the plaintiff in the law suit for civil compensation. This ruling has been widely praised by academics and the software industry alike.

In an Appropriate Manner, Ending Infringement and Effectively Preventing Further Losses to the Right Holder by Applying Provisional Measures Available in Civil Proceedings

The overall judicial doctrine of Chinese courts regarding pre-trial injunctions is that both an active and a cautious attitude shall be taken. An active attitude

means that the courts shall be active in accepting cases, rapid in their investigation, and that measures shall be taken in a timely manner. Caution means that the application for an injunction shall be examined carefully in order to prevent any detriment of the party's interest due to an improper application of such measures. As long as the application has been deemed to comply with the relevant judicial interpretations after examination, the court shall order the party against which the application has been submitted to stop the infringement. According to the statistics, in the period from the amending of three major intellectual property laws until October 2005, 90 per cent of all applications for a pre-trial injunction were supported by Chinese courts and over 95 per cent of applications for the preservation of evidence and assets were supported. This percentage is high even compared to that of developed countries and other major jurisdictions. In most cases, the parties have reached an agreement or have gone for mediation after provisional measures such as injunctions and Mareva orders were adopted by the court, which in turn facilitates the timely solution of many disputes without the need for formal litigation. This is similar to the approach and effect of handling such cases in many countries.

Strengthening the Judicial Protection of Well-known Trademarks by Identifying them in Accordance with the Law

From July 2001 to October 2005, Chinese courts identified 72 well-known trademarks in accordance with the law based upon principles of individuality, passiveness and necessity. From January to October 2005, 42 well-known trademarks were identified, of which nine belong to foreign right holders. This has demonstrated that all registered trademarks, no matter whether they belong to Chinese or to foreign right holders, will be equally identified and protected by Chinese courts in accordance with the law in order to protect the legitimate interests of both domestic and foreign proprietors. For example, in July 2001, in the *Procter & Gamble Company v. Shanghai Chen Xuan Intelligence Technology Developing Ltd* case regarding an unfair competition claim arising from the defendant's registration of a domain name, the Shanghai High Court ruled that the registered trademark 'Safeguard' (the combination of its words and graphics) should be identified as a well-known trademark and protected accordingly. This was the first case where a Chinese court judicially identified and protected a well-known trademark.

Emphasizing the Mediation Approach and Resolving Civil Disputes in a Timely Manner

In the trial of civil disputes involving intellectual property, Chinese courts have earnestly followed the guideline to 'mediate where possible, adjudicate

when necessary, combine mediation and adjudication, defuse the issue when the case is closed'. Chinese courts have put the emphasis on the establishment of the legal approach of mediation and used the mediation during trial and the settlement between the parties as important means to conclude cases. Through this approach, the independent value of mediation in resolving intellectual property disputes has been realized to a large extent, conflicts have been defused in time and social coherence has been promoted. In recent years, the rate of civil disputes involving intellectual property resolved through mediation or closed owing to the withdrawal of the charges has been maintained at around 50 per cent.

Establishing a Supervision Mechanism for High-profile Cases Involving Crimes against Intellectual Property and Strengthening the Force of Criminal Punishment

In May 2005, the Supreme Court issued the Notice on Actively Participating in the Consolidation and Regulation of the Order of Market Economy by Fulfilling Fully the Function of Adjudication. This notice requires that courts at various levels shall devote their major efforts to punishing strictly, decisively and in a timely fashion, in accordance with the law, crimes against intellectual property. If suspects of economic crimes are discovered in civil proceedings, any relevant information or material shall be transferred in time to the police or prosecutor for further investigation. Recently, the Supreme Court has issued the Notice on Strengthening the Work of Adjudicating Criminal Offences Violating Intellectual Property Rights. This notice requires once again that courts at various levels shall work closely with other relevant authorities and establish a supervision mechanism for high-profile intellectual property criminal cases, which will enable such cases to be registered, followed and supervised and crimes against intellectual property to be punished properly and rooted out decisively.

Strengthening the Work Concerning Judicial Interpretations and Improving the Litigation Regime for Intellectual Property Cases

Clarifying, in accordance with the law, detailed judicial principle and setting the standards for the judicial protection of intellectual property rights has been a major characteristic of Chinese judicial protection of intellectual property rights and an important task for the Supreme Court. In recent years, in order to meet the needs of economic and social development, the Supreme Court has adopted, in a timely manner, several judicial interpretations with respect to intellectual property rights that have effectively facilitated the completion of the Chinese intellectual property legal framework and that have achieved

positive results. After the Interpretation on Several Issues regarding the Application of Law in Handling Criminal Cases involving Infringement of Intellectual Property, Interpretation on Several Issues regarding the Application of Law in the Trial of Disputes over Technology Contracts, which was adopted in 2004, and the Reply on Relevant Issues regarding the Handling of Phonograms and Videos in Criminal Cases involving Infringement of Copyright, which was adopted in 2005, four more judicial interpretations regarding unfair competition, infringement of new plant varieties, conflict over intellectual property rights and copyright of music television have been drafted, based upon in-depth research and opinions acquired from various sources. In order to ensure the quality of the judicial interpretation, these four drafts have been published through the Internet to consult the general public. Domestic and foreign parties, by various means, have raised a lot of sincere and constructive opinions and suggestions relating to their amendment. At present, the Supreme Court is carefully studying these opinions and suggestions and, on that basis, it will amend and improve the drafts in order to submit them in due course to the Judicial Committee of the Supreme Court for discussion.

Strengthening the Professional Training of Judges and Improving the Overall Quality of Adjudication

Chinese courts have paid particular attention to the establishment of a team of professional judges who specialize in intellectual property cases, selecting distinctive talents to join the adjudication team. They have been emphasizing the need for professional training and they have been introducing new training methods. After years of adjudicating practice and professional training, a generation of intellectual property judges with concrete theoretical knowledge and practical experience has been created. The Supreme Court holds every year (or every two years) intellectual property adjudication training courses in the National Academy of Judges. Similar courses and symposiums have been run by local High Courts, which enables the training of intellectual property judges to be conducted on a nationwide basis. In addition, Chinese courts have been continuously expanding their international exchanges and cooperation in the field of intellectual property and they have actively been learning from foreign experience and from foreign approaches regarding the judicial protection of intellectual property. In March 2006, for example, the Supreme Court and the EU held the successful ‘Sino–EU Conference & Forum on Criminal Protection of Intellectual Property’ in Xiamen, China, which achieved positive results. In the future, we will further strengthen our cooperation with the EU and others and try to improve the overall quality of adjudication through research visits, professional conferences, training courses and so on.

Actively Adopting all Feasible Measures to Increase the Transparency of Judicial Protection of Intellectual Property Rights

According to the law, Chinese courts have to observe the doctrine of an open trial: that is, the court proceedings of all cases shall be accessible to parties; the judgment of all cases shall be published; and the trial proceedings of all cases shall be open to the general public audience unless otherwise required or permitted by law. The courts provide a library service for the general public with respect to legal documents. Recently, the Supreme Court has issued the Notice on the Preparation for Making Intellectual Property Judgments Available Online, which requires that High Courts shall, as far as possible, make intellectual property judgments which entered into force within their respective jurisdiction gradually available online. In fact, courts located in some relatively developed areas such as Beijing have already made their civil intellectual property judgments available online. Recently, the ‘Chinese Intellectual Property Rights Judgments Website’ (<http://ipr.chinacourt.org>) hosted by the Intellectual Property Rights Division of the Supreme Court has been opened, an effective step towards demonstrating judicial transparency. It so far contains all valid judgments, decisions and mediation documents of intellectual property cases concluded in 2005.

THE PROSPECTS FOR THE JUDICIAL PROTECTION OF INTELLECTUAL PROPERTY RIGHTS IN CHINA

In general, owing to the advance of science and technology and the emerging of a knowledge-based economy, the protection of intellectual property will increasingly become the focus of market competition and the attention of society. With the globalization of the economy and the internationalization of the intellectual property regime, the protection of intellectual property will increasingly become the key issue of international conflicts and trade relationships. At present, the protection of intellectual property rights in China has entered a new phase of development, with serious challenges as well as huge opportunities and bright prospects of development. In particular, China has adopted, as her important strategic mission, the policy of promoting an innovation-oriented nation. Intellectual property, as a stimulant for creative innovation, is closely linked to the establishment of an innovative nation. Protection of intellectual property is not only necessary for China to fulfil international obligations and to create a healthy investment environment, but it is even more necessary for China’s own development and the establishment of an innovative nation.

CONCLUSION

Although the Chinese economy has developed rapidly, China will remain a developing country for a long time. Piracy, counterfeiting and other infringements of intellectual property rights are still a serious problem in certain areas. As an important aspect of intellectual property enforcement, the status, function and task of judicial protection of intellectual property rights will become even more important, apparent and difficult with respect to domestic development and international competition. How to realize the fundamental and leading role of judicial protection in the overall protection system is a major topic for all of us. China has successfully established its regime for the protection of intellectual property rights. Although with shortcomings, this regime is working actively and creatively. China's determination to secure the protection of intellectual property rights has never changed. Her attitude towards strict punishment of criminal offences against and infringement of intellectual property rights is clear. China's stand on protecting intellectual property rights in accordance with the law is firm. At the same time, the protection of intellectual property rights is not only the task of administrative authorities and judiciaries. It also requires active participation and cooperation of the owners of intellectual property and the awareness of the general public. We hope that all right holders, including foreign enterprises and individuals, will actively protect their legitimate rights and interests and seek judicial remedies through legal procedures where necessary.

Chinese courts will fulfil even further and with even more determination their function regarding the judicial protection of intellectual property rights. They will equally protect the legitimate interests of both domestic and foreign right holders, increase the degree of protection and try to create a good environment of judicial protection for intellectual property rights, where owners protect their rights actively, courts adjudicate appropriately and fairly, and enforce their rulings effectively, and where infringement is punished without doubt or hesitation.