

China Vows to Further Consolidate IP Protection Measures

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Patent and ITC Litigation

The General Office of the CPC Central Committee and the General Office of the State Council of China jointly published *Opinions on Strengthening Intellectual Property Protection* (“Opinion”) on November 24, 2019, with the purpose of effectively deterring the occurrence of IP infringement by 2020. The *Opinion* provides specific and concrete guidelines to strengthen IP protection and addresses a series of long-standing issues in IP litigation that frequently prevents right holders from enforcing their rights. These issues include difficulty in obtaining evidence, length of proceedings, high litigation cost, and low monetary damages. This is a clear effort to move China forward as a more friendly judicial and business environment for IP right holders, including international companies with IP interests in China.

Several key measures mentioned in the *Opinion* strengthen IP right holders’ interests, for instance: 1) increasing penalties for infringement and counterfeiting activities, including strengthening criminal punishment, 2) improving evidence standards, for example, formulating judicial interpretations for rules of evidence for civil IP litigation and unifying trial standards among administrative, civil and criminal cases, 3) strengthening law enforcement, and 4) improving protection measures for emerging industries and business fields, for example, exploring how to establish a pharmaceutical patent linkage system.

Below are some highlights from the *Opinion* relevant to IP dispute resolution that may particularly interest international companies having IP concerns in China.

- Emphasis on protecting trade secrets

The *Opinion* states that China will explore how to strengthen effective protection of trade secrets, confidential business information, and related source code. Notably, China’s top leadership has not only realized that the trade secret issues have become an important aspect of IP protection, but also recognized that apart from other IP rights, measures for trade secret issues should be specially considered and further enhanced. For this reason, we believe that international companies facing trade secret misappropriation threats in China may reasonably expect a better judicial environment in the future.

- Enhanced penalties against infringers in civil, criminal and administrative enforcement proceedings

The *Opinion* states that China will increase the monetary damages to be awarded to IP right holders and raise the cap of statutory damages so as to ensure that the IP right holders are reasonably compensated, for example, consistent with the latest draft Patent Law's proposal to increase the cap of the statutory damages from RMB ¥ 1 million to RMB ¥ 5 million.¹ The increase of such cap is critical because although compensation higher than the statutory damages can be awarded if there is adequate evidence supporting the claimed compensation, collection of relevant evidence is sometimes difficult in China due to the lack of U.S.-style discovery. As a result, statutory damages are fairly frequently adopted by the Chinese courts as the best measure of damages. Also, to deter willful infringement, the *Opinion* emphasizes that China will introduce a punitive damage scheme for patent and copyright disputes, similar to the recently effective rule for trademark disputes.² A possible punitive damage scheme was reflected in the latest draft amendment to China's Patent Law published on January 4, 2019, which proposed to award a multiple of punitive damages up to five times in cases of willful infringement.³ The *Opinion* also confirms that China, to effectively combat IP-related crimes, will lower the standards required for IP infringement to be considered criminal and enhance the criminal penalties thereof. Lastly, the *Opinion* states that China will enhance the penalties against infringers in administrative enforcement proceedings.

- A more uniform, effective and efficient IP litigation mechanism

A major step towards a uniform IP protection environment came with the Supreme People's Court formally establishing an appellate tribunal with nationwide jurisdiction over patent and other complex technical cases in late 2018, whose function is similar to the Court of Appeals for the Federal Circuit of the U.S.⁴ The *Opinion* once again emphasizes that China will improve the appellate mechanism for IP cases. To mitigate the challenges imposed by civil procedure rules for evidence collection in China, which sometimes prevent otherwise meritorious claims by IP right holders from meeting their burden of proof, the *Opinion* encourages adoption of new technologies and methods for evidence collection. Also, the *Opinion* reiterates the importance of the role of technical investigating officers, who are appointed by the court, but play an important role similar to technology expert witnesses in U.S. litigation by assisting the judge to understand the specific technical issues in a given IP litigation. It is believed that China's top authorities are expressing a supportive and cooperative attitude towards those significant changes to the IP judicial system.

¹ To learn more about China's proposed change, please refer to [China's Draft Patent Law Includes Important Enhancements to Patent-Owner's Rights](#).

² The latest *Trademark Law of China*, came into effect since November 2019, provides a five-fold damages for willful infringement and increases the cap of the statutory damages from RMB ¥ 3 million to RMB ¥ 5 million.

³ To learn more about China's proposed change, please refer to [China's Draft Patent Law Includes Important Enhancements to Patent-Owner's Rights](#).

⁴ To learn more about China's IP appellate court, please refer to [China Issues Rules to Establish Appellate Court with Nationwide Jurisdiction Over Patent and Other Complex Technical Cases](#).

- Reemphasis of China's patent linkage system

China's pharmaceutical patent linkage system was first proposed by the Food and Drug Administration (now renamed the National Medical Products Administration) in 2017, which bears some significant similarities to the U.S. Abbreviated New Drug Application (also known as "ANDA") and includes a patent challenge scheme that may encourage generic drug makers to seek to invalidate patents protecting equivalent brand drugs. It is widely believed that once established, this system will shift the landscape of China's pharmaceutical industry. While some observers had considered the patent linkage system would have been further along in the past two years, the *Opinion* has re-emphasized the importance of this system. This confirms that the top authorities' support for this program is strong and firm, so we would expect that corresponding law-making/policy-making progress will be expedited in the near future, and international drug innovators with practice in China are highly recommended to remain abreast of further updates.

In addition to these high-level guidelines, we believe that corresponding implementing rules and regulations with further concrete provisions will also issue to stipulate how to enforce the measures mentioned in the *Opinion*. International companies with IP interests in China are recommended to keep updated on relevant legislation progress and to take into account the possibility of a streamlined process for IP enforcement in China in the future.

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