

Fordham Law School

FLASH: The Fordham Law Archive of Scholarship and History

29th Annual Intellectual Property Law & Policy
Conference (2022)

Fordham Intellectual Property Law Institute

4-22-2022 6:30 AM

Kickoff Session. What Will China's IP System Look Like in 5 Years?

He Jing

Michael-Yu Ding

Guobin Cui

Zheng Ning Ms

Yang Ming

See next page for additional authors

Follow this and additional works at: https://ir.lawnet.fordham.edu/ipli_conf_29th_2022



Part of the [Intellectual Property Law Commons](#)

Authors

He Jing, Michael-Yu Ding, Guobin Cui, Zheng Ning Ms, Yang Ming, and Chi Xu

Kickoff Session

Emily C. & John E. Hansen Intellectual Property Institute

**TWENTY-NINTH ANNUAL CONFERENCE
INTERNATIONAL INTELLECTUAL PROPERTY
LAW & POLICY**

Friday, April 22, 2022 – 6:30 am.

**KICKOFF SESSION: WHAT WILL CHINA'S IP SYSTEM LOOK LIKE
IN 5 YEARS?**

Moderator:

He Jing

Gen Law Firm, Beijing

Speakers:

Michael-Yu Ding

Quality Brands Protection Committee, Beijing

How Multinational Companies Look at China's IP Policy Today?

Guobin Cui

Tsinghua University School of Law, Beijing

Latest Development in Pharmaceutical Patent Invalidation Cases in China

Zheng Ning Ms

Communication University of China, Beijing

China's Online Protection of Music and Movies

Yang Ming

Peking University Law School, Beijing

Streaming Platforms' Copyright Control and Its Regulation

Chi Xu

Smooore Technology Limited, Shenzhen

How a China-Based Global Firm Designs and Executes IP Strategy

* * *

Kickoff Session

HE JING: Again, thank you all our audience for being with us this. This is very early hour especially for our American friends, for friends in the United States. I'm assuming some of our audiences are from Europe. This will be a better time for our European colleagues.

So, our panel, our sunrise session, the topic is about what it will look like in China in five years for our IP system. I'm very honored to have my fellow friends and colleagues to get together have this session. I will skip the detail, the introduction about the speakers. You can find it in the online materials for the bio. Michael-Yu Ding is from QBPC, the Quality Brand Protection Committee. He's a chairman. QBPC is arguably the most active, the most influential IP association in China comprising most of the multinational companies.

Professor Guobin is a professor from Tsinghua University. Also, one of my classmates [laughs] in college. A real honor. Professor Zheng Ning from-- well, I think from China Communications Community-- Communication Committee over China.

Professor Yang Ming from the Peking University. Cheney is from a Smore. One of the largest e-cigarette companies in the world. First of all, I will just-- Let's kick off session by inviting Michael to give us his remarks about what's the view about China IP system from prospective of multinational companies. Michael, please.

MICHAEL-YU DING: Sure. Thank you, Jing. Also, thank you for this opportunity to share with all the audience about some of the views in the eyes of the multinational companies, especially on behalf of QBPC I would say. Today, I will talk about three points.

The first one, quite a lot of our members from multinational company are concerned like about a pathways phase trademark application, like country activities in China enforcement. What's the trend in the next five years? I always take as optimistic, for example, the bad phase trademark application. So, in the past three days, QBPC actually hosted a top-ten case election campaign. So, I learned quite a lot from our members a good successful case against the fake bad pathways applications as well as the fake of country products. For example, not just fire opposition before trademark office. Even the trade office rejects the opposition. The right owners still have a chance to appear before like waiting IP court. A very interesting case like.

American company, they fight quite a lot of opposition against the pathway's applicant. They spent quite a lot of legal fees. They initiated a legal-- a civil litigation against the pathway's applicant as well as their trademark agent for damage to claim the attorney feedback. All this kind of-- From the administrative process or civil litigation, I think that is the-- in the good trend, right trend to fight against the pathway's application-- trademark application.

For anti-country perspective, I deem also that very positive, because no matter from a criminal procedure or from administrative enforcement like a market regulation department or through Chinese customs, they had quite a lot of successful cases. Of course, the precondition is the brand owners have a

Kickoff Session

legitimate right in registering in china. Also, you have a strong team who can manage the case. Of course, you need to engage the professional firm like Chi Xu team to handle cases to support the brand owners that for sure.

For the next five years why, I think that optimistic is because I think China economic will be more driven by innovation and brands. This is not just a multinational company's expectation but also that the domestic company need this kind of a healthy IP business environment. So, this is the first topic. The second one is about path patent quality versus patent quantity. According to the past 10 years' data statistics-- Every year, a patent application number increase so quickly. So quite a lot of concern about this quality of the patent application especially for UTT model. I also deem that in the next five years, no matter from a country perspective, from government perspective, from the industry perspective will pay more attention in the quality instead of quantity.

For example, according to CNIPA, the Patent Office, they have a plan to discontinue or eliminate this kind of incentive program for kind of the patent applications, and even more important in the eyes I think in the multinational company, because this kind of huge patent applications, they're very difficult for a real innovative company to do FTO in the R&D process. This actually is not encouraged innovation. It's somewhat become a hurdle of innovation. So, Because I just mentioned the China's economic is to be more innovation-driven or brand-driven, I think that really IP owners will use the system in the right way so multinational company will definitely see that optimistic about trend.

The last point I will mention a little bit but I think some other panelists will also touch the point, trade secret protection. The good thing with the-- According to the revised unfair competition note, if the civil litigation for the trade secret misappropriation, the burden of the proof will shift a little bit to the defendant. So, this gives more chance or opportunity for the IT owner to enforce their trade secret in China's civil litigation. I think that's good trend. If we're talking about next five years, again, when more and more industry both multinational, domestic industry invest R&D in China, trade secret protection become more and more important for them.

So, this is not just pressure from outside of China. It's an internal requirement or expectation. So, because this is innovation-driven, I deem that the trade secret protection, the whole legal framework will continue to be improved and the enforcement of a judicial process will become more in favor of the IP owners. So, I think that's all, Jing. The third point I will not share with the audience.

HE JING: Thank you, Michael. You probably-- You saved us some time for our discussions. You have five minutes for remarks. I will actually throw you some questions okay. I sound sometimes actually sensitive. [laughs] Now, when you talked about R&D, you talked about multinational companies. You did mention multinational companies to do more and more R&D so our trade secrets will become more important. But we heard that in China because of the geopolitical contentions, because of the "rivalry" or outcompete or these geopolitical talks, there's deep worries that there are some-- "There are

Kickoff Session

increasing-- a decoupling or some attempts of decoupling between the US and China."

Their worry is that they'll be coming on the technology side. So, if that argument has -- that observation has some validity, that might mean that a multinational has less "new" IP. [chuckles] Of course, a multinational has a lot of old IPs to enforce. Do you have anything you want to share about that? Your view about that, the increasing R&D or flat or declining?

MICHAEL-YU DING: Yes, sure. Maybe I may touch a little bit about the company I'm working on. I work in ABB. I'm leading the IP operations for ABB Asia. So, I will say that because-- Two things. One is China market continue to increase or have a demanding. For multinational company because the local market expectation, so it'd be better to put more R&D resources to meet the customer expectation. Otherwise, you cannot have a good-- a competitive position in the market. So that's a marketing bond. I think one aspect.

The other is because in the past 20 years because the local R&D capability continued, improved, so we have a really good talent engineering pool in China. And also, they have been engaged deeply in both national and global R&D activities. So, they can continue to contribute their kind of talent to the global research project. From these two aspects, in my view, I'm still optimistic, you know, even with considering the kind of global political situation, as well as COVID-19 situation. I think that optimistic that R&D world will continue to be an investment to be continued. For example, as I mentioned I worked in ABB, we opened a new kind of robotics manufacturing in Shanghai Tang Chong. So, this deemed to be ABB invest around \$1 billion RMB in Tang Chong for the new factory.

This new factory is not just a factory, but also including the R&D function. This factory to added to the robotics manufacturing [unintelligible 00:10:58] robotics manufacturing robotics. It's very fancy. Just from my observation in the QBPC perspective, as well as [unintelligible 00:11:09] perspective, I'm still thinking this is a right trend for the R&D investment in China, but of course, when business want to invest more money for R&D China, the IP protection is a key question they always ask. Not just the patent system, but also trade secret, yeah.

HE JING: Thank you. Thank you, Michael. In today's world, it's so good to have some good news coming.

MICHAEL-YU DING: Yes.

HE JING: Being optimistic, okay. Any other panelists have questions for Michael?

MICHAEL-YU DING: If I still have some time, I will share with you. In the past-

HE JING: Yes, please.

MICHAEL-YU DING: -three days in the QBPC platform we reviewed and nominated 75 successful cases among our members in China. Including criminal case, including civil litigation, including administrative case. Majority of the cases, like the brand protection, we also have a case raised by our members is the trade secret litigation [unintelligible 00:12:18] they win the case. And The

Kickoff Session

burden of the proof shift to the defendant. They don't need to prove this trade secret is secret. The shifted to that party to prove how they develop their software. They're very encouraged. And also, for a design pattern to be protected by authorities. And important,

The real interesting case, I think, is our member Apple. They have a kind of electric brand, so the iPhone. Is iPod the [unintelligible 00:12:57] They collect the iPhone; they will display Apple. The copycats, they didn't have any logo on the hardware, but if they link to your iPhone, it will display the Apple logo. Whether this deemed as a trademark infringement, eventually is supported, I think, by the police it's a civil-- Is a criminal case. So, among this different kind of cases, I'm really impressed about how hard work has been done by various Chinese IP authorities, or judicial judges. And of course, hard work by our brand owners, IP owners.

So, in general, I'm really optimistic about the whole IP business being viable in China, but of course, there are still room to be improved. We need to be patient. We need to be concrete issues to be raised with certain authorities instead of just a complaint.

HE JING: Thank you, Michael. Yesterday when I was speaking at the other session with some really honorable judges, we have-- I actually made a point that China has the infrastructure ready for the IP valuation, or IP values to be realized. Like highways or high-speed trains get ready. It's not really up to who will be taking advantage of it. Okay Thank you, Michael. We'll move to our next speaker; Professor Guobin. Guobin, please

GUOBIN CHUI: Thank you. I prepared slides. Now can you see my slides?

HE JING: Yes, very good.

GUOBIN CHUI: Great. Thank you, Jing for your introduction, and also, I thank the organizer Fordham Law for you giving me this kind of opportunity. I'm very happy to be with you. Today I prepare actually two parts. The first one about a very expensive and relatively technical issue about the rules on post-filing data submission under the Chinese patent law. I will talk about the recent development of the latest revision of Chinese patent examination guidelines and relevant judicial practice. Then, if we have time during our discussion, we're going to talk about the major developments on the Chinese IP law in the next five years.

That's our, That's my plan. The first one, the very technical one, the patent law issue. Actually, I think is well known that the patent applicants often submit post-filing data, right to prove the defects on utility, or inventiveness or other requirement under the patent law. Actually, in China the patent office has been accepting all kinds of post-filing data. I think the rule is there, but probably the problem is the standard in practice is relatively rigid, so it makes a lot of this kind of pharma companies not that happy. Into 2020 in the Chinese patent office revised its own patent examination guidelines.

Why the patent office revised these guidelines? We're here. We need to mention the background a little bit. In 2020 China and the US conclude a phase one agreement through the trade war. According the article 1.10, the Chinese agreed, Chinese government agreed that China shall permit pharmaceutical, or

Kickoff Session

patent applicants to rely on this kind of post-filing data to prove the sufficiency of disclosure or inventive steps, something like that. Actually, I think this kind of-- At that time this kind of requirement actually is consistent with the Chinese patent examination guidelines, or the existing rules.

I think the problem is the details or the specific practice in the practice. Right here I show you the latest revision of the patent examination guidelines. In the past, I think the Chinese patent examination simply declared that this kind of post-filing data is acceptable, but they don't make it clear what kind of standards should be applied. In 2020 they revised this kind of standard, but they still have this kind of very general statement saying that the examiner should accept this kind of post-filing data. If the technical effects could be proved by the data could be obtained by the skilled person from the patent application disclosed.

That means they still follow the traditional standard, but what makes the real improvement is the two examples, the patent office added into the examination. The first example, say example one about a chemical compound. The example one say, if the protection claim is a compound A, if the specification has disclosed the preparation examples of the compound, and then discuss the technical effect that the compound could be reduced, or lowering the blood pressure. And also, the method to do this kind of measuring. If the specification discusses the technical effect, and there's a method to measure the effect.

And then the applicant will be allowed to submit this kind of post-filing data. That's a, the first one tells the examiners if these two elements has been disclosed, and then later on the post-filing data acceptable. The second one, example two, it's also a pretty interesting pharma drug example. Here the specification has discussed the general formula one, formula of the compound and its preparation method. And then the the structure of the specific compound. Also, they disclose the anti-tumor effects, and they even have discussed the range of the effect, right here the specific result.

And then the applicants. The applicant is allowed to submit data to prove the inventiveness of this claim. This summary of the data showing that this compound has a much better effect than the compound of comparative here in the specific data. So, the patent office gives us the two kinds of examples showing what kind of situation data submission is acceptable, but in general, I think these are two examples are relatively conservative because they require the applicant to disclose the technical, and effect, and also the method to do this kind of test. They even require you to discuss the brand of this kind of technical effect.

Why the patent office chooses this kind of two very conservative example? I think probably the patent office will want to avoid any kind of dispute or controversy, so they choose the most-- I think the reliable example of safe system example. That doesn't mean in practice they always needed to match this kind of standard. And this the revision of the patent examination-- I'm sorry, I need to look at the time. I cannot find. How many minutes left? I cannot find the--

HE JING: You just have your seven minutes.

GUOBIN CHUI: Already? [unintelligible 00:21:42]

HE JING: You just talk about something very technical. It's very important and technical.

Kickoff Session

GUOBIN CHUI: I'll show you the latest development at the Chinese supreme court. Recently the SPC also adopt a new implementing rule on the post-filing data submission, and also come up with a very important judicial case. It's AstraZeneca versus the SIPO. In this case, the applicant also only disclose that this kind of drug has surprisingly high metabolic stability and bioavailability, but the applicants does not discuss any kind of data to support this kind of statement. Then later on the applicants want to submit this kind of new experimental data to prove the claim effect. Then the supreme court needs to determine whether this kind of data should be accepted.

HE JING: Guobin, I'll probably just stop you here actually. I think probably it's valuable to use a little bit more time just to get your view about maybe the trend. I think you are-- What you are doing is-- What you are talking about relevant to a pharmaceutical IP, which is very crucial, very crucial. I think the entire industry [unintelligible 00:23:05] looking at this. We know there's some good news, right? The AstraZeneca is generally viewed positively, but what's your view about the-- How the things are going when it comes to pharmaceutical IP in China? Patent linkage. We just got one, the first decision coming out, which is against the originator. So, what's your general view about pharmaceutical IP protection in China?

GUOBIN CHUI: I think the general tendency is pretty clear, that China amends a lot of the patent law rules, and also relevant pharmaceutical industry regulations to strengthen the patent protection for this kind of drugs. For example, in 2020 the new patent law has a patent term extension rule for delayed patent examination, and also for the delay in the procedure of the CFDA new drug approval. The first one that allows the patent owner to extend their term. The second one we just launched as a new patent-linked system, and the third one we have now is improving the data exclusivity rules for pharmaceutical drugs.

I think now the trend is definitely moving in favor of the pharma companies. Another example as I just discussed the post-filing data submission issue is to also be in favor of the patent applicants. In the future we probably will see the pharmaceutical company treating this kind of patent more seriously, and [unintelligible 00:24:47] wants this kind of unification. You want more unification.

HE JING: What's your prediction about the PT, the patent term adjustment? I think we're, I think industry are waiting for the regulations to come out, like the patent implementing regulations. The big argument is a global new, and local new standard, the new drug definition because the new drug "will be entitled to the patent term adjustments." The controversy is, will China adopt the global new [unintelligible 00:25:28] local new [unintelligible 00:25:31] Do you have any predictions for that?

GUOBIN CHUI: Actually, personally I was invited to participate in some discussion by the regulators in the past. I agree with you that it's really a very hard and controversial issue. Now they are still working on this. It's hard to predict whether they will adopt a completely global new and local new. I guess they may probably a little bit pro this global new approach, rather than a completely local

Kickoff Session

one. The but still we still don't know what [unintelligible 00:26:05] would be the exact result.

HE JING: Thank you. Guobin, you still have a few minutes. Any other things you want to discuss?

GUOBIN CHUI: Okay, Actually, in addition to the technical submission, the technical one, the patent and the post-filing data submission issue. I also would like to talk about general issue, which would be the major developments under the Chinese law and IP law in the coming five years. I think the first one maybe worth mentioning is the reform, or overhaul, of the internet service providers liability rules. As we all know, China has a very thriving internet industry. And also, as the Europe where China also feels the need to reform its own ISP liability rules. In the past China and the EU also-- I think accept or follow the US safe hub rule, but now we think that it's not work very well.

Probably China will do a very, I think, radical reform to this kind of rule. In general, I guess, the most important one is imposing some kind of duty of co-pilot filtering on content sharing sites, just like what the European has done. The first one about the reform of internet service provider is liability. I think that's very important. The second one may be China will enact a new regime on enterprise data sets protection to protect this kind of-- Some kind of publicly accessible data, like the Google Maps, or Google search, or Yelp that's the consumer reviews. This kind of publicly available data.

Also, this kind of protection whether this kind of protection is justifiable, and still in dispute. A lot of government agency has showed interest in pushing for this kind of legislation. So, I guess in the coming five years the world will see China have this kind of new legislation on this kind of data sets protection. Very important one.

HE JING: Wow. That would be very-- Major, major change, the data sets, the data protection.

GUOBIN CHUI: Yes.

HE JING: Thank you Professor Goubin [unintelligible 00:28:47] We'll come back to you. We can save some more questions for you when we have some time for everyone.

GUOBIN CHUI: Yes, later on. Yes, later on if you have more time, we can discuss some of the details. Now I watch the world closely.

HE JING: Thank you. Now professor Zheng Ning. Professor Zheng Ning [unintelligible 00:29:11]

ZHENG NING MS: Hi. Can you hear me?

HE JING: Yes, very good.

ZHENG NING MS: Okay, Today I'd like to share with you the IP protection during the Beijing Winter Olympics. Beijing has become the world's first city to host both the summer and winter Olympics. And The Chinese government took very effective measures to protect IP rights during Beijing Winter Olympics. How did China make it? I'd like to analyze it in four aspects, legislation, administrative protection, judicial protection, and the law popularization.

Kickoff Session

First, we amend the legislation. You know China promulgated the regulation on the protection of Olympic symbols in 2002 which played an important role in the 2008 Beijing Summer Olympics. In 2018, Chinese government revised the regulation to include the relevant symbols of Winter Olympics Games and Paralympic Games. Under this regulation, no one may use the Olympic symbols for commercial purposes without official permission and the term of protection can be last for 10 years.

Secondly, Chinese government established a comprehensive administrative protection mechanism. Chinese regulatory authorities have played very important and positive role in IP protection. For example, China National Intellectual Property Administration and the State Administration of Market Regulation issued the special action plan for the administration of, the protection of IP rights of Olympic symbols.

Also, the National Copyright Administration together with China Media Group released the copyright protection plan for the Olympics and established an anti-piracy working group together with other six departments. They use the following three specific methods. Number one, notice and registration. China National Intellectual Property Administration issued a notice that Olympic symbols, patent applications and the trademark applications submitted by the Beijing organizing committee for the 2022 Winter Olympics games were protected.

Also, it rejected hundreds of malicious sweating of trademarks related to the games such as Bing Dwen Dwen and a famous athlete Eileen Gu. The National Copyright Administration has opened a green channel for winter Olympic copyright registration and protection to provide fast and convenient services for the related copyright works and announced the early warning list of copyright protection of the key works.

Number two, combating the infringement. China established an emergency mechanism for IP protection which can timely find clues, share information, and punish the IP infringements. Most cases involve the use of Olympic symbols on products, advertising or on the website without official permission, and they can delete infringement links as soon as four minutes. Number three. to strengthen the duty of online platforms. Under the guidance of the agency's online platforms deleted tens of thousands of infringement links after receiving notice. They do it actively. People working in [unintelligible 00:33:24] some friends working there, were very, very busy during that period.

Thirdly, I will talk about judicial protection. As we know, most cases were dealt by administrative agencies, so during the Winter Olympic Games, a case of producing and selling pirated winter Olympic mascots was swiftly investigated and heard in Beijing court and became the first criminal case in China involving copyright infringement of the mascot. The infringer was sentenced to a year's imprisonment and a fine.

Finally, to strengthen the popularization of IP law, so all the relevant agencies have continued to popularize IP knowledge in many ways like short videos, animation picture books, cartoons which were very effective. There was the time that the mascot, Bing Dwen Dwen, became very popular and it was

Kickoff Session

difficult to buy it. So The public began to create Bing Dwen Dwen in their own ways like painting, handwork, snowman, food, and so on but very quickly the agencies, the court, and the media taught the public which one is infringement and which one is fair use.

I can give you another example. Some communities in Shenzhen City panted Bing Dwen Dwen on the stickers as a prize for the people who have finished the [unintelligible 00:35:02] test. One citizen thought it was an infringement without the official permission and reported to the Beijing Winter Games organizing committee and got an affirmative response. So, in conclusion, the IP protection of Beijing Winter Olympic Games is all around strict and special which has a long-term impact on the improvement of IP protection in China in next five years. It is a lasting Olympic legacy. That's all. Thank you.

HE JING: Thank you. Thank you, Professor Zheng. You're right on time. It's a very good summary of what has been completed with Olympics. I just asked the first question then my other panelist, you know, ask you. You mentioned a shorter video. As far as I know, the last two years the corporate infringement, the piracy on the short video in the major China's social media is a huge issue. Anything you want to talk about that? Do you think that can be stopped?

ZHENG NING MS: it has become a hot issue in China and yesterday I just participated in two conferences talking about how to deal with it. The problem is it's not only about infringement of the copyright but also, how to authorize, how to get the authorization of the right holders. The short video and the creators, they want to get the permission of the right holders in an effective way and in an economic way.

But you know the gap between the long video and the short video is still big, so it's difficult for them to get a deal. So Maybe I think it's time for the agency, the copyright bureau, to become, to deal with this case. Maybe is a problem. Another one is about the collective management organization, but in China, we are amending the regulation on the collective copyright organization. How to make this group more transparent, so we are looking forward to it. Okay.

HE JING: Yes, Fordham Conference always have, I think, a panel about a collective management, I think. I don't know whether they have the same topic this year but it's always ongoing, actually. Other questions. Any questions from other panelists for Professor Zheng Ning.

GUOBIN CHUI: I have a question. Okay. My turn, right?

HE JING: Yes, we hear you.

GUOBIN CHUI: Okay.

HE JING: What's your question?

GUOBIN CHUI: I think the topic very interesting. I'm just wondering whether the ISP itself could play any role in reduce or fighting against this kind of piracy. Do you have any kind of suggestion for ISP?

HE JING: You mean short video?

ZHENG NING MS: ISP?

GUOBIN CHUI: Yes.

ZHENG NING MS: Yes so, another debate is about the duty of ISP, right. There is some voice that they have to enhance the duty of ISP, but technically and

Kickoff Session

sometimes it is not accessible and not very easy for them to delete and found the information previously. So, there is a lot of talk about this. In my opinion, I think we have to-- Back to the safe harbor rule. [chuckles] Maybe it should be reformed alright, but if you looking at EU's rule, there are a lot of restrictions on the the the duty of the ISP.

But In China, many scholars think we have to learn from the EU [laughs] and without looking at the restrictions. And in the long run, I think this problem is a problem of the Cultural Industry Development and the copyright of the right holders, so we have to We have to balance, of course, okay. We have not to focus more on the copyright but ignore the development of cultural industry. You know In China, the short videos, the number of users and the coverage has already surpassed the long video. The long video has not get profits till now.

MICHAEL-YU DING: It seems to me you are not interested in the European idea that require the ISP; the content sharing sites to seeking for license for their users. Right? It's possible-

ZHENG NING MS: Yes.

MICHAEL-YU DING: -for us to require a TikTok or other content-sharing website to seek license from the holders for their users?

ZHENG NING MS: Pardon. I beg your pardon.

MICHAEL-YU DING: My question is whether it's a good idea to-- It seems to me you don't like the European idea that content sharing sites should seeking for copyright license for their users' activity, right?

ZHENG NING MS: Yes.

MICHAEL-YU DING: Okay, I see.

HE JING: Actually, in the music side that I know, the collective managements, the society now seeking compulsory licensing for platforms. So, if that becomes true, it'll be something quite a major for music. [laughs]

ZHENG NING MS: Music industry, we just have a conference talking about that. Many scholars criticized the collective management organization in music industry.

HE JING: They speak privately for the platform.

ZHENG NING MS: For the transparency and-

HE JING: I know.

ZHENG NING MS: -and other issues.

HE JING: Thank you, Professor Zheng Ning. Now, we move to-

ZHENG NING MS: Thank you.

HE JING: -Professor Yang Ming. I know Professor Yang prepared something very intriguing about anti-trust in that IP. [laughs]

YANG MING: Many thanks for Jing. Thanks for your introduction. Hi, good evening. I think in China it's evening. It is my great pleasure to have the chance to participate this discussion. As Jing introduced just now, my introduction is based on my observation and the research about the recent development of China's platform economy especially related to the enforcement of anti-monopoly law.

People probably already have observed that China's anti-monopoly practice related to platform economy is very active during the recent years.

Kickoff Session

Maybe two or three years. Very recently. Chinese government has continuously issued anti-monopoly practice-- sorry, policies and the guidelines applied to platform economy. The issue arising from the vertical integration of platforms is the focus. Today, I want to talk about three points about this issue very briefly. The first of all is data-driven competition motivates streaming platforms to take vertical integration strategies.

The data-driven competition is the nature of the platform economy, I think. This is the start point of the research or observation in this field. In the era of platform economy, the sense of the market subject, business activities is still searching an emerging consumer. Platform economy is a new economy model that relies on digital technology to carry out transactions and other business. In the data-driven competition, the platform with stronger data capability is more likely to gain competitive advantage.

Then by means of algorithm expression, data concentration can influence the market structure and lead to the consequence of the market concentration. Now Compared with the traditional business model, data utilization becomes the inevitable trend of the platform economy. This is very important, especially true for the ad-supported platforms. You know Actually, most of their profits comes from the advertisements. The competition for information matching efficiency has led to the rise of the number of dominant platforms.

And The strategy of vertical integration is the increasingly favored one taken by these platforms to eliminate competition. From China's competition, legal practice in recent years, copyright is a very important tool for contents delivery platforms to implement vertical integration strategy. The streaming platform try to take copyright control strategy to dominate the downstream markets of derivative utilization of copyrighted works which are called after-sale markets in economics.

This phenomenon is the specific performance of winner takes all in the domain of copyright. Second point I want to introduce is the effect of the eliminating competition caused by vertical integration strategies is difficult to be tested via traditional welfare analysis. Free internet products or services have brought great challenges to the market power test of the platform under monopoly. How network effects play a role in market power is based further deep thinking.

For copyright control platforms, those market power tests test the methods such as market concentration, barriers to entry neural index in the traditional analysis of under monopoly regulations are difficult to be applied directly in the era of platform economy. Therefore, under the traditional welfare analysis framework, it's difficult to draw a clear conclusion that vertical integration has the effects of eliminating competition or not. Competition policy for the platform economy deals with complex environments.

On the one hand, social welfare should increase when technological innovation creates entirely new demands based on the prior copyrighted works. But on the other hand, we should think deeply whether the new welfare brought by the new demands created by technological innovation should all belong to the copyright holder. In order not to inhibit further technological innovation, we need

Kickoff Session

the competition policies that favor new entrants. The last point is-- I want to introduce is the regulation on vertical integration is aimed to achieve the dual value goals of promoting competition and maximizing the utility of a copyright.

There is nothing inherently wrong with taking the strategies of the copyright control to maximize the right holder's profits [sound-cut] to control market and eliminate competition must be adjusted under anti-monopoly law. In view of the shortcomings of the traditional analysis framework, it's necessary to introduce the crackdown of promoting effective competition into the traditional analysis framework so as to form a binary analysis framework together with welfare standard. Whereby anti-monopoly regulation can go beyond static efficiency with more concerns about dynamic efficiency so that in terms of the platform's application of copyright, we can achieve the dual purpose of encouraging competition and maximizing copyright's utility. That's my introduction. Thanks.

HE JING: Thank you, Professor Yang. I actually asked you-- I want to ask you about something about the upstream vertical integration. You talked about the downstream. I'm more interested about the artist issue. We know that some of the major platform-- online platform, music online platform, they all now have their own studios, their own artists, tech companies. Then now one of the biggest complaints is that a lot of the most popular or the ranking or the billboard on their platforms they only show the songs of their own artists.

So, there's a big concern about-- From the independent labels. They basically said, "Well, we have no chance. All the popular songs will be picked that from your own artist. The platform artist." So, what do you think about that? Would that be an antitrust violation?

YANG MING: Of course. Just now, I mainly talk about the influence by the cardboard control strategy to the downstream industries. And The issue you mentioned is about the effect about the upstream industries. But in my view, the problem that affects upstream is not as severe as the influenced you downstream industry. As you just mentioned that maybe the music platform to build his own company to just to create his own coverage works and transmit his own works. And maybe the individual and-- I'm sorry, independent musicians cannot have the chance to transmit their works. I think maybe this problem is not very big, I think, because it is the, how do you say? The competition between the artists will not be very influenced by the concentrations.

But The copyright control strategy their influence to the downstream industry will be more serious. Like, you know, why this problem happened in recent years? Because many cover holders want to enter into the downstream markets, like developer on a game. They want to go to the live broadcasting markets. And then they apply this cardboard control strategy and want to takes all the downstreaming platforms. So, I think it is very different from the relation between the copyrights-- The creators and the platforms, I think it's different-- [crosstalk]

HE JING: Platform wants to do it all from artists. The platform and to the derivatives of all these works, okay. Everything.

Kickoff Session

YANG MING: Yes. I agree with it but the problem in upstream industry is not a very new issue, you know. Actually, nearly about 100 years ago that this problem had been already happened in the field of film industry. Actually, there are many cases in Los Angeles, you know. That's the big market in the field of the film industry. Somebody brings the case to the court that the Guild want to take the famous actors and the dominant markets. The client then wins the case and the judge said that, "okay, The Sherman Act should be applied to this market, to this film industry." So, I don't think this is a big problem, but in these days, the vertical integration strategy-- Actually the Chinese government gave up a very severe reflection to the market but get many criticize. Many people criticized China's attitude to this vertical integration strategy.

HE JING: Do you predicting or comment we are going to have some antitrust enforcement in the next five years against this vertical integration. What's the prediction?

YANG MING: Yes, of course. Actually, I've got some news. They say, MR will be very strong in-- I'm not sure in five years but at least the three years, you know.

HE JING: Wow.

YANG MING: [unintelligible 00:54:57] now actually is doing the research of the anti-monopoly regulation by field or industry, hoping to gradually explore effective methods to analyzing the effects of the competition in this field, you know. We will see it very soon.

HE JING: Thank you, Professor Yang. I actually noted the professor [unintelligible 00:55:21], one of the big names in anti-trust world is also in our audience. Maybe Professor [unintelligible 00:55:30] we can have a [crosstalk]--

YANG MING: I find the professions in this kind of--

HE JING: Okay. Thank you, Professor Yang. Now, we move to Cheney. Cheney, used to be the in-house counsel with IBM. Now he's now in charge of the global IP in one of the leading global firms in China [unintelligible 00:55:52]. Cheney, will you please.

CHI XU: Thank you, Jing. Many thanks to your arrangement of our session and so happy to join this discussion with you during this epidemic time. And I think it is a very good opportunity for us to exchange our ideas. As Jing, you just mentioned, I've been working for IBM for about 12 years. And I've been with this Chinese company for one half a year, and I do experience a lot of things of Chinese firms. Their efforts to coming into the competition, global competition.

A very fierce competition in IP area. And This is a very challenging work but also it is very exciting work, it is for me. So today the first point I would like to share with you is about my feeling regarding the wakening trend. The trend of wakening of our territory, territory of our patent right. You know Based on our regional standing of patent right, if I apply for a patent and get a patent granted in a country, that pattern is only effective in that particular country, right.

We have seen a lot of cases in the United States and other countries supporting that. For example, a US patentee can enforce their patent rights against oversea manufacturer, enforcing that patent right in another country even though

Kickoff Session

that manufacturer does not run any business in the United States or manufacturer or selling any product in the United States. So Based upon this kind of situation, we need to change our strategy and a patent portfolio planning method in Chinese companies.

In the past, if a Chinese company, they decided that they will not run business in the United States, they only manufacture products and export the product into the United States. They don't need to worry about patent litigation in the United States, but the things has been changed. A lot of Chinese companies, including Smoore has been setting great importance on the global patent portfolio planning overseas.

We need to consider where our products need to be outport, exported into. So, we apply for patents in United States, we apply for patent applications in Japan, in Korea, in European and a lot of countries. And This is a very significant change for a lot of Chinese companies. So, another thing I would like to share with you that, a lot of Chinese companies they bring about litigations in US, in European. And They are enforcing their patent rights overseas.

During this time, I see quite different from US multinational companies. For example, IBM or other multinational companies in Europe or United States. They have hired a lot of people in another country. For example, IBM China, they hire a lot of people, Chinese people, in that country. So, they can be very familiar with Chinese culture and they do a lot of good things by localization. And They can communicate with Chinese government, they can communicate with Chinese court.

They understand the China patent law and that they understand the China patent enforcement but for a lot of Chinese companies they are not. They hire a lot of Chinese Americans in America for example but they don't hire a lot of regional Americans in America. So, it's a very big challenge for Chinese companies to be very familiar with US patent law or US patent litigation. So that big challenge has reflected in the result of patent litigation overseas. so, I think it's a very important thing for China companies to set importance to be more localized in overseas countries and so that we can perform better in handling a very complex US patent litigation or European patent litigation.

And Another thing is that we see some problems when China companies, when they decided to enforce their patent rights in oversea countries. Most of the Chinese companies they are worried about the cost, litigation fee. And The attorney fee is very high compared to the China patent litigation. so, the number one criteria for the company to select the lawyer or law firm is cost, who is cheaper who is better? So that's not correct. I think based on my understanding, especially for the US not only the district court case or the ITC case, the most important thing is that the experience of the lawyer, the experience of the law firm.

Does a lawyer have a lot of experience in handling the same type of the cases in the United States or in the Europe or in the same domain? Technical domain is mostly important thing. Of course, the cost is also very important but we need to consider according to the US legal system evidence discovery will take a lot of money. That's quite different from China. You need to get prepared

Kickoff Session

for the money in the discovery procedures and this is quite different from China. Regarding the choice of the litigation court abroad, I think you also need to consider where is your major market, right and whether you choose a district court enforcement or ITC enforcement.

If you want the injunction as soon as possible instead of the damage you need to choose an ITC case if you can prove your domestic industry in the United States. That is another very difficult point and you want a lot of money instead of injunction, maybe you need to choose a district court case because ITC case will not award you any damage if it is only injunction, a preclusion order. Something like that.

HE JING: Okay. Cheney, you are not actually litigating the US court, right?

CHI XU: I'm not. So, it's kind of It's a challenge for us. I think it's very important for me to select a very good US lawyer that can help the company to do the litigation.

HE JING: In the audience we have probably have a few. I think they're welcome to contact you. We probably get a little bit jump into the discussion time. I know our session going to end think 7:45 our time, so we still have around 8 or 10 minutes some of those times are yours. But I think, Maybe I'd let Michael ask a question. I think Michael and you are getting along. We really know each other in the [unintelligible 01:04:04] now you are representing a China-based global firm. Michael you're still working for ABB, do you have any question for Cheney?

MICHAEL-YU DING: Yes. Thank you. Thank you, Jing. Actually, I did have a question for Cheney. Also, can you hear me?

HE JING: Yes.

MICHAEL-YU DING: Cheney my question is with your multinational working background so you understand IP is how important to IBM. Then now you're working in a Chinese firm, a Chinese company. I would like to listen to your view how the Chinese company the business leaders deem IP value to them.

CHI XU: You know IBM and Smoore they are in quite different area. Smoore is in the traditional like a manufacturer of the e-cigarette product or e-vaporization product. I think in this kind of area patent will be very crucial for the company's product to be sold to our clients. It's very crucial unlike the ICT companies. IBM is in the ICT companies. So, IBM seldom suffered to one patent or two patents. IBM is more focusing on a patent portfolio, right but for Smoore or other companies like other manufacturers in China, they will see every patent very important. So, we do a lot of patent risk analysis, FTO analysis before every product coming into the market.

That is very important. If you don't do that, your product will be seized. Our boss they said great importance on patent work. A lot of business leaders in our company they can talk about novelty, inventiveness of patent right that cannot be imagined in other companies, in that area. So, I think it's a very interesting thing here.

MICHAEL-YU DING: so, Jing I have a follow-up question maybe for Cheney is business leaders deemed IP as an investment or has a cost?

Kickoff Session

CHI XU: I think business leaders theme IP as an investment for patent.

HE JING: Well, no wonder Cheney picked this company as a new career. [crosstalk] That's why they hired Cheney away from IBM. So, we still have a little bit of time. I noticed there's two questions post by our audience. Guobin, do you want to answer the first one? I think John from MSD asked you about the high rate of invalidation.

GUOBIN CUI: Okay, Thank you, Professor Todaro. I think the question. Recently, I did not know the statics about the rates of invalidation for pharmaceutical patents but I do read a lot of this individual cases on pharmaceutical patents. For me, I think probably quite a lot factors contribute to this kind of phenomenon. Maybe the first one in China have a pretty rigid rule for post-filing data submission as I just discussed a moment ago. So, it's pretty difficult for the applicants to convince the examiners or the judges to accept their data. So, you probably make it easier for the public to challenge the patents or the applications.

The second one maybe China have a very ambiguous rule on determining inventiveness. So, we don't have an effective rule to restrict the examiner's discretionary power when determining inventiveness. For example, it could be easily combined to prioritize or easily apply so-called the common knowledge to invalidate a patent. So that probably also helps explain why we have a relatively higher rate. The third one may be in China in many cases I do see a lot of very poor quality of this pharmaceutical patent for some traditional Chinese medicine patents and also some Chinese companies.

Even, Also, some foreign companies has fabricated some data and submit a very poor application. So, it's not a surprise. I think it's not a surprise to see this kind of plan has been embedded through this kind of humanization process. As to the future tendency or what will happen in the next five years, I think it's difficult to predict. Even we already reformed some rules. We also implement so-called the [unintelligible 01:09:48] or other system, this kind of system will encourage more litigation, so more people probably want to challenge the patents in the future. Probably combine all the elements together they're hard to produce, whether the rates of invalidation will be lowered, or will increase. We don't know, okay. Thank you.

HE JING: Thank you, Professor Cui. I think for John, I think the one thing is probably still relatively challenging for a major pharmaceutical company to defend their patent here. Especially in front of the CNIPA, but now I think the Supreme Court IP Report, it's really standing-- It's getting more active. So, there are cases that we see the Supreme Court now reversing the decision in CNIPA. The pharmaceutical patents are always a very special area. So, I think, hopefully, in the next five years-- Well, hopefully it does not take so much long we will see some of the changes, okay. Professor Zheng Ning, do you want to answer the question from Carlo? Now [unintelligible 01:11:07] it's probably--

ZHENG NING MS: Thank you for Carlo's question. Thank you for your--

HE JING: Professor, you probably want to read the questions. I can read the question quickly because I think audience cannot see the question. Could China consider also some code of a conduct, for instance in Germany or other

Kickoff Session

countries, ISP are collaborating with representatives of right holder to find a good balanced solution and platform responsibility?

ZHENG NING MS: Yes, it's an option. A very good suggestion. And We are trying to do that. And We believe that negotiation and co-operation is better than the battle. You know There has already a lot of cases filed by the long video companies to the short video companies, and they ask for a very high penalty compensation, right. The problem is, there are too many cases in Chinese court, so it will not be very quick to deal with these cases. And the judicial standard judgments sometimes in different courts has different standards because the fair use rule you know, it's-- Sometimes it's not easy to explain, and different people's minds they have different explanation.

So, we are thinking about maybe we should have some self-discipline first to make people know that which kind of cases circumstances are typical infringement, and people cannot do this without the permission of the right holders. And some very big cases we have to let the court-- Let the judge to decide, okay. Thank you for your suggestion.

HE JING: Thank you, Professor Zheng Ning. Professor Yang Ming, or Professor Guobin, anything you want to add about this? The ISP is relevant to online platform as well?

GUOBIN CUI: Professor Yang first.

YANG MING: No, you please, you please. This topic is, I just want to say something.

GUOBIN CUI: Okay. I think that suggestion is very interesting. Now personally I'm working for the Chinese corporate copyright office to prepare a dropped regulation on the protection of internet copyright. Here we are considering whether we should adopt the European approach a little bit in the future, but probably the answer is no. I think in the past Europe, and China, and the US both all have the similar safe harbor rule. Later on, in 2019 European abolish-- I think basically abolish the safe harbor rule. Now they require ISP to do more, even sometimes treating ISP as a direct infringer. So, they require ISP to seeking [unintelligible 01:14:16] for copyright license for their user's activity. I think China probably will still keep the general framework of safe harbor rule, like that in the United States, but probably will increase the duty of care for the ISP a little bit. I guess the most important one, as I just mentioned, probably also will require if the ISP want to get the protection of safe harbor rule, you need to do more. When you receive a notice from the copyright owner, and then you should apply some technical measures, like including the filter matters to make sure the infringing content, in the future, will not be repeatedly uploaded by your users. This kind of rule we call them notice and stay down, something like that. So, we will increase the duty of care, but we still keep this kind of safe harbor rule, probably, and this new kind of framework. I think the ISP will be more willing to collaborate with the right holders to locate the infringing activities. Yeah, I think probably that's the tendency. China probably will stay between US and Europe. [unintelligible 01:15:36]

HE JING: Okay, thank you. We have one more minute. We have one more minute. I'll just invite all of our colleagues here just to give one sentence, okay to

Kickoff Session

say what you are most excited about? This one thing you're excited about in the next five years about China IP? What is the one thing you want to see they will be really excited in the next five years for the China IP, okay? So, Michael, do you want to start first?

MICHAEL-YU DING: Yes, sure. I expect more high-level trade secret protection, but ensure the good global communication as well as best to practice hearing and construct comments back to China's system.

HE JING: Okay so, trade secrets, okay build the trust. Cheney? You're mute.

CHI XU: I think working in the IP area in China is the most exciting thing for me. Better IP, better future for us.

HE JING: Okay, good. Professor Zheng Ning.

ZHENG NING MS: Okay, I want to say that after the Winter Olympic Games, not only the top spots events IP rights can be protected very well in China, but also the ordinary events, companies and individuals IP rights can get better protection. Thank you.

HE JING: Okay, awesome. Professor Yang Ming? What is the one thing you're most excited about?

YANG MING: And because of the development of the technology, especially the algorithm, I think our judge will face more and more big challenges, so I hope our courts can accept, or study, more things about methodology. That's the right way to deal with the challenges. That's the big hope that I have.

HE JING: Okay, thank you. Now Goubin?

GUOBIN CUI: I hope the China will overhaul its internet copyright system, and find a certain way for the next generation of internet industry. Which should be more efficient than the very conservative US safe harbor rule, and also the too radical European approach.

HE JING: Okay, what I want is to actually see the the national IP court will be established with like 100 judges, our judges work too hard. They need a more head account in the RSAFC. Okay, I think our time is up. I really, really thank each of my friends, my colleagues, for this panel. Thank you for participating and then sharing your wonderful comments, your insights. I also want to thank the staff Courtney and Matt for putting together this. I thank all our audience for being-- For your patience, your listening, your time, especially for our friends in the US in the very early hours. And so, after this, I'll invite all of us, maybe, to have a little break and then moving on to other sessions for the forum conference. Thank you.

YANG MING: Thank you.