



IPR: The state of intellectual property rights protection, challenges and opportunities in Taiwan.

Protecting IPR

In considering the importance of getting intellectual property rights (IPR) protections “right” here in Taiwan, one has to first consider why Taiwan is important in the big picture. Taiwan punches way above its own weight in the technology world yet gets short shrift in the global media, whether one counts by the number of company patent filings and registrations at the US Patent & Trademark Office, the high-tech industries in which its companies exert a major role, or even its massive scale of investment (technological, managerial and monetary) into the huge economy of the People’s Republic of China (PRC).

Most people don’t realise that Taiwan is consistently No. 5 in the world in patent filings and registrations into the US Patent & Trademark Office, after the US (which attracts great scientific minds from around the world), Japan, Germany and South Korea. While it is hard to generalise the strength and quality of a nation’s patent filings, the larger picture in terms of licensing, patent holdings by major technology companies, and offshore litigation indicates that Taiwan is a heavyweight by any measure in the global technology market.

The high-tech industries in which Taiwan plays a major role are central to the future of work and entertainment around the world. Between the semiconductor industry and Taiwan’s vast reach into nearly all aspects of electronic-goods production in the PRC, the Taiwanese affect is truly massive. It’s widely estimated that well over 70% of all electronic products made within the PRC and about 15% of the overall PRC export economy is the product of Taiwanese investment of money, managerial expertise and technology. As many European companies have already discovered, doing business in Taiwan often means that they are doing business in the PRC. Without knowing it, they have already stepped into the shark tank.

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Major Challenges and Opportunities

There has been some great progress in certain areas of Taiwan's IPR-enforcement environment. Prior to WTO accession on January 1, 2002, there was no good common vocabulary for reaching a true understanding with Taiwan officials. Taiwan was on the American US Trade Representative's "Watch List" for offering poor IP protections, mostly because of the central role that Taiwan played in those days in the huge amount of optical-media (CDs, VCDs, DVDs and CD-ROMs) products filled with pirated software, movies and music. With WTO accession, there was a better framework for discussing serious problems that had plagued foreign trademark, copyright and patent holders. However, with many of the easier problems somewhat resolved or lessened, there remain many new challenges and opportunities at an entirely different level of sophistication.

1. The IP Court and some worrying statistics

Generally, patent holders don't like to litigate their bad patents, given that litigation may open up a weak patent to invalidation, many rights holders chose to play their stronger cards rather than open up their weaker ones to potential decimation. So it is therefore puzzling that statistics recently presented by an IP Court judge indicate that patent litigants only have a 9.35% chance of success in the IP Court. Even Japan, which currently faces heavy condemnation for its patent infringement success rates of 20%, is far higher. The patent infringement litigation success rates in the US are about 75% for jury trials and 40% for

bench trials. In Germany, the patent litigation success rate is about 35%. So why the extremely low success rate in Taiwan? In recent years, there have been concerns about a seemingly very high IP Court patent-invalidation rate (the rate at which patents asserted in infringement litigation are invalidated) and a very low preservation-of-evidence rate (the rate of approvals by the IP Court of requests for court intervention to prevent destruction of evidence by a counterparty).

If patents are invalidated, then the patent infringement cases related to those patents are dead in the water. And questions have been raised by some academics, lawyers and industry members about the determinations, by which patented technologies considered "valid" in other countries are then considered "invalid" as soon as they are in litigation in Taiwan. Again, normally patent rights holders primarily litigate their stronger patents, not their weaker ones.

However when courts do not take steps to prevent the hiding or destruction of evidence by defendants, there is a serious problem for European rights holders who routinely face situations where the local defendant has all the data about the infringement (manufacturing figures, sales figures, profit margins, etc.) hidden away. In many cases, the only way to obtain such information about the existence or scope of an infringement would be to have the court's assistance—otherwise, the expectation would be for rights holders to collect information through private investigatory methods that might constitute industrial espionage. Local Taiwanese defendants know they

can take advantage of this trend in the courts—in multijurisdictional cases against Taiwan defendants, European companies commonly find that Taiwan companies will readily provide to US and European courts documents that they will claim in front of Taiwan judges are unavailable because they were "destroyed" or "don't exist". Sadly, these claims from defendants are routinely accepted in Taiwan courts even though they amount to the equivalent of "the dog ate my homework" excuses from young students.

A major source of the problem appears to be the failure of the Taiwan government to give the IP Court adequate resources to do its job. The court has a massive workload and very few judges and staff to handle it. If the court had more judges, clerks, and technical staff it could be much better equipped to handle both evidence requests and patent validity arguments. As one of the most important technology jurisdictions in the world, it is absolutely essential for Taiwan to get its IP Court right and to ensure that parties get a high quality of justice. When valid patents are found "invalid" and when plaintiffs are given no legal way to confirm the basic facts of an infringement, there needs to be a reassessment.

2. Patent Law amendments and compulsory licensing guidelines

After several years of circulating in draft form, amendments to the Patent Law have finally been passed by Taiwan's Legislative Yuan: the enforcement rules have not been issued yet, and so the new amendments are not yet in force. One of the major changes involves the rules for compulsory

licensing, which has been a sticking point between Taiwan and Europe that had taken the two to the brink of WTO's dispute-resolution procedures.

The issue of compulsory licensing is often ignored—after all, it normally concerns the situations where a government in time of war or disease decides that the life-and-death protection of its citizens trump the normal rules about not interfering in the granting of patent licenses. In other words, unless one of the Four Horsemen of the Apocalypse is visiting, compulsory licenses are extremely rare. While the newly passed Patent Law amendments are generally viewed favourably, they will need some further guidelines to help decrease the likelihood of past practices in which the Taiwan government took hard compulsory licensing measures to benefit local industry against a global European technology company. The newly passed law is still ambiguous on some key points.

3. Additional considerations

Bizarre Tests:

Other key concerns include bizarre “tests” used by many prosecutors and judges in criminal trademark-infringement cases that are supposedly testing the skill of the IPR rights holder to tell the difference between genuine and fake goods. Faulty in logic, the tests often rely upon samples of supposedly “genuine” products supplied by the defendant. If the trademark owner's representative identifies as fake one of the defendant-supplied “genuine” products, the prosecutors and judges accept that as “proof” that the representative



doesn't really know the product. In a recent case involving products so bad in quality that the word “New York” was misspelled as “New York,” the court has been accepting arguments about how the trademark holder's own expert is no good because he “only spent less than 5 minutes” looking at the counterfeit goods. This line of argumentation seems odd to me, as a true expert capable of Malcolm Gladwell's “Blink”-style thin slicing of data really doesn't need 5 minutes once he sees “New York” on a shirt.

Information and Money

It was mentioned earlier that it had become a concern that the overburdened IP Court was only rarely ever allowing any preservation of evidence in cases. However, the overall effect within the criminal courts, civil courts and FTC of not collecting good information from local parties in litigation and accepting bad excuses has created a direct impact upon the calculation of damages at the end of a case even if the rights holder manages to prove the infringement happened. When courts accept impossible excuses such as “we lost all of our bank records and so did our bank”,

it creates an environment where facts move from being objective truths into subjective guesses.

Conclusion:

Taiwan is one of the most important technology jurisdictions in the world, and in keeping with its own status as a major producer of intellectual properties, there is a huge opportunity available for Taiwan to tackle some of these problems. A cleaner and improved Taiwan legal environment for protecting IPR doesn't hurt Taiwan's competitiveness in the global market, as there's a greater local need for fairness among Taiwanese technology companies that matches the need of European companies. Ideally, with laws and courts that are tougher on infringers and better for rights holders, a solid deterrent can be achieved making Taiwan an attractive place for technology investment, joint R&D programmes and other opportunities to compete within the region and globe as a destination for the best technologies. ■

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