

It's not all doom and gloom in China; someone please tell the USTR

The US continues to talk tough on China and intellectual property. Speaking in early March after a series of meetings with Chinese officials, James Mendenhall, general counsel for the Office of the US Trade Representative, would not rule out a formal complaint to the World Trade Organisation over continued violations of American IP rights. "What's really needed is a substantial reform of the entire approach China takes to this issue. The bottom line is the problem isn't being solved," he told an audience of American business leaders. "The administration will not shy away from bringing a case against China if warranted."

Leaving aside the seeming unwillingness of the Bush administration to use the WTO in IP cases (between 1996 and 2001, the US filed more than a dozen IP-related complaints; since then it has brought just two), it never does a US politician any harm to be heard to play hardball with the Chinese. But there is a long way to travel from tough talking to actually taking any action; and it seems pretty clear that Mendenhall, like other figures in the US government, understands this. Because having raised the spectre of the WTO, he then went on to explain that nothing could happen without the co-operation of US business. "We need to be able to come to the table armed with facts," he said, before urging industry to put aside fears of retaliation, and to come up with evidence and information relating to IP rights violations in the country. Which is where the whole US strategy seems to hit a brick wall.

With more companies than ever seeking to move into the Chinese market, it is hard to see

many lining up to help present a case against what promises to be a source of increasing opportunities over the coming years. It is no great secret that many foreign corporations are concerned about continued widespread copyright and trademark violations in China, but getting them to say it in public is far from straightforward, not when the potential rewards for being in the country are so great.

Growing investment

If China really were the IP wilderness that is so often portrayed by the Bush administration, it is hard to believe that investment in the country would be as great as it is now. Indeed, some companies are willing to take considerable risks with their brands in order to ensure they get a piece of the action. Most recently, Google, the company that does no evil, felt that a strong presence on the Chinese mainland was worth the almost universal opprobrium it received for its decision to modify its search engine in China to comply with local rules about what Chinese citizens can and cannot access on the internet (see also *IAM* 14, page 4 to 6).

In any case, the situation in China is not quite as black and white as is often thought. While it remains the case that trademark and copyright owners are likely to come up against major counterfeiting and piracy problems at some stage, for patent owners the picture is far less threatening. Ironically, one indication of this is the April 2005 Section 301 Report of the Office of the US Trade Representative. Although it names China as a Priority Foreign Country – the highest category in terms of the environment for

Invention patent applications in China, 1998-2004

	Total	Domestic	Foreign
Accumulated total	503,288	247,067	256,221
Rate of increase (%)	23.9%	29.8%	19.4%
1998	35,960	13,726	22,234
	6.8%	8.0%	6.1%
1999	36,694	15,596	21,098
	2.0%	13.6%	-5.1%
2000	51,747	25,346	26,401
	41.0%	62.5%	25.1%
2001	63,204	30,038	33,166
	22.1%	18.5%	25.6%
2002	80,232	39,806	40,426
	26.9%	32.5%	21.9%
2003	105,318	56,769	48,549
	31.3%	42.6%	20.1%
2004	130,133	65,786	64,347
	23.6%	15.9%	32.5%

Source: Chinese State Intellectual Property Office

infringement of rights – only two paragraphs of the nine pages the Report dedicates to China refer to patents: a narrow scope of patentable subject matter makes patents for transgenic plants and animals virtually unobtainable; while the lack of clarity in laws concerning generic drugs is contributing to the continued growth of counterfeit medicines. Nothing else in the Chinese patent system, which has only recently celebrated its 20th birthday, is worthy of comment.

Quick development

When it is remembered that in the early 1980s there was no patent law in China, the strides that the country has made since then are remarkable. In just two decades an infrastructure has been developed that saw a total of 173,327 patent applications filed during 2005, with 53,305 issued; although something like only 1% of Chinese businesses

have any kind patent protection – which gives an indication of just how big things could become in the country (the backlogs at offices such as the USPTO, JPO and EPO may well be considered comparatively insignificant in years to come).

Leading the way among foreign applicants are companies from the US and Japan. In certain sectors, overseas companies are by far the biggest applicants. According to statistics relating to 2004, for example, companies from developed countries made 93% of applications relating to electronic transmission; 91% in mobile telecommunications; 90% in audio and visual technologies; 85% in semiconductors; 69% in pharmaceuticals; and 60% in computing technologies.

Of course, there is not much point in owning a patent if it

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cannot be properly protected. But here again the signs are encouraging. When it comes to enforcement, China operates a dual system, with both courts and patent administrative bodies able to hear cases. Despite some drawbacks – such as the non-availability of preliminary injunctive relief or damages – the latter continue to be the most favoured option, as they are relatively quick and uncomplicated. During 2004, local patent administration bodies accepted 1,455 cases involving patent disputes and 1,215 of them were resolved. The general consensus seems to be that if a patent is sufficiently well drafted it will have a good chance of being enforced, although defendants have become much more sophisticated in presenting their cases.

Reasons to be cheerful

All of which indicates that there are at least some reasons to be optimistic if you are an IP owner in China. Of course, problems do remain – there are understandable worries that the

	Accumulated number	85-2000	2001	2002	2003	2004
Total	410,567	193,567	37,800	47,087	57,249	74,864
CH (Switzerland)	12,080	6,832	1,020	1,110	1,374	1,744
DE (Germany)	36,176	18,268	3,454	4,015	4,522	5,917
FR (France)	16,474	8,615	1,881	1,932	1,941	2,465
GB (United Kingdom)	10,877	6,224	913	1,025	1,314	1,401
IT (Italy)	6,210	3,156	495	627	765	1,167
JP (Japan)	149,476	62,780	13,736	18,275	24,241	30,444
KR (Korea)	29,075	11,276	2,498	3,626	5,015	6,660
NL (The Netherlands)	13,977	6,097	1,397	2,147	1,376	2,960
SE (Sweden)	6,978	3,466	967	952	694	899
US (United States)	99,859	52,445	8,994	10,012	12,221	16,187

Source: Chinese State Intellectual Property Office

country is too protective of local concerns, particularly state-owned industries, when it comes to patenting; and Chinese companies overseas continue to be subject to a high level of legal action for patent infringement (the US's International Trade Commission, for example, hears more cases against Chinese companies than those from any other country). But these are all manageable problems and do not indicate endemic malaise.

No-one should underplay the very serious difficulties

trademark and copyright holders face in China. But nor should these troubles obscure the fact that in the patent field China is no better or worse than many other countries. The USTR is right to condemn continued high levels of counterfeiting and piracy, it is wrong to remain relatively silent about the huge strides that China has taken in other areas. By painting too bleak a picture, it may be that the US government is deterring some businesses from setting up there or – more importantly – sending out a message that

there is no point in taking IP seriously in China because there is nothing you can do to protect it; something that is demonstrably not the case.

When it comes down to it, the fact is that all companies have a choice as to whether they want to be in China or not. In order to make that choice they need more than rhetoric, they need the real facts. It could be time for the USTR to recognise this and change its approach. Maybe, just maybe, being constructive could yield some positive results.