

8.3 Protection Against Intellectual Property Rights Infringement

China's intellectual property legislation stipulates that infringement of intellectual property rights (IPRs) are dealt with by administrative procedures and legal proceedings. In terms of civil liabilities, the infringer may be ordered to stop the infringing act, eradicate the damage done, make public apologies or compensate for damages. In terms of administrative measures and criminal liabilities, they include warnings, orders to stop the infringing act, confiscation of unlawful gains, fines, and compensation for damages.

When an IPR infringement dispute arises, the interested parties may resort to mediation. If mediation is not a preferred option, or mediation has failed, or one of the interested parties refuses to abide by the outcome of mediation, legal proceedings may be instituted with the people's court. The interested parties may also request the relevant administrative authorities for actions.

8.3.1 Legal Proceedings

When an IPR infringement dispute arises, the infringed party may institute legal proceedings directly with the people's court at the place of the infringer's domicile or where the infringing act takes place.

Under China's current judicial system, intermediate people's courts are courts of first instance for patent infringement cases. Civil cases involving copyright are dealt with by people's courts at above intermediate level. High people's courts can, based on the actual circumstances in the districts under their respective jurisdiction, assign people's courts at lower levels to handle first hearings of civil cases involving copyright disputes.

If an interested party finds that due to emergency circumstances any delay to stop the infringing act may cause irreparable damages to his legitimate rights, he may, before instituting legal proceedings, request the people's court to freeze the assets of the infringer.

In handling IPR infringement cases, the people's court will see to it that the infringer, if convicted, is made to bear civil liabilities for the infringing act. Where the case is so serious as to constitute a crime, the infringer will be prosecuted for his criminal liabilities.

8.3.2 Administrative Procedures

China currently adopts a dual-track system for IPR protection under which the interested parties may seek to resolve IPR-related disputes through administrative procedures or legal proceedings. When an IPR infringement dispute arises, the interested party may request the relevant administrative authorities at county-level and above at the place of the infringer's domicile or where the infringing act takes place to handle the case.

It should be noted that under China's *Patent Law* and *Trademark Law*, foreign enterprises are required to appoint designated agents to handle matters related to patents and trademarks. This also applies to the handling of disputes involving infringements, which means that the designated agent should make the request for settlement of the dispute on behalf of the interested party.

(a) Information and Proof to be Submitted

In making a request for the administrative authorities to handle an infringement dispute, the interested party should submit a written request, proof of his right, and evidence of the infringing act. If an agent is appointed to submit the request, an authorisation letter should also be furnished.

For cases involving the protection of trademarks under the grace period for renewal, the complainant should provide proof of application for renewal.

(b) Processing by Administrative Authorities

The administrative authorities responsible for handling copyright disputes will make a decision whether a complaint

will be processed within 15 days upon receipt of the request and inform the applicant of its decision. A written explanation will be given to the applicant if the decision is negative.

The administrative authorities responsible for handling patent disputes will, after examining a request, make a decision whether the complaint will be processed within seven days upon receipt of the request. If the decision is negative, the applicant will be given a written explanation within seven days.

(c) Calculation of Compensation

The competent administrative authorities may order the infringer to pay for damages based on the request of the applicant.

The amount of compensation for infringing a copyright is calculated according to the direct damages caused by the infringement and reasonable fees incurred by the copyright holder in investigating and stopping the infringing act.

The amount of compensation for infringing a trademark is calculated based on the proceeds derived by the infringer through the infringement during the infringement period or the damages suffered by the infringed party during the infringement period.

The amount of compensation for infringing a patent is calculated according to the damages suffered by the patentee or the proceeds derived by the infringer through the infringement. Where it is difficult to determine the damages suffered by the patentee or the proceeds derived by the infringer, the amount of royalty for the patent may be used as the base for calculation.

(d) Dissatisfaction with Administrative Punishment Decisions

- Instituting administrative proceedings

Where an interested party is dissatisfied with the administrative punishment decision made by the

administrative authorities, he may, within three months from receipt of the notification of the decision, institute administrative proceedings with the people's court in the place where the administrative authorities are located. If no proceedings are instituted and the decision is not performed at the expiration of the specified period, the administrative authorities may request the people's court for compulsory execution thereof.

- Instituting administrative reconsideration

Where an interested party is dissatisfied with the administrative punishment decision, he may, within 15 days from receipt of the notification of the decision, apply to the local people's government or the administrative authorities at a higher level for reconsideration of the decision. In this case, the interested party should submit a written request for reconsideration.

The authorities concerned should decide within 10 days whether to handle the case. If positive, a decision on the reconsideration should be made within two months from receipt of the application for reconsideration. If the interested party is dissatisfied with the decision on the reconsideration, he may, within 15 days from receipt of the notification of the decision, institute administrative proceedings with the people's court. If no proceedings are instituted and the decision is not performed at the expiration of the specified period, the administrative authorities concerned may request the people's court for compulsory execution thereof.

Upon the request of the complainant, the industry and commerce administration departments may register and keep or seal and keep the evidence submitted, and may request the complainant to provide the corresponding guarantee according to law.

If, in the process of investigating infringement cases, there is any case found to be so serious as to constitute

a crime, the administrative authorities concerned should refer it to the judicial organ.

8.3.3 Disputes over Intellectual Property Contracts

When a dispute over an intellectual property contract arises, the interested parties may resort to mediation. If mediation is not a preferred option, or mediation has failed, or one of the interested parties refuses to abide by the outcome of mediation, legal proceedings may be instituted with the people's court at the place of the defendant's domicile or where the contract is executed.

In addition to the above options, disputes over intellectual property contracts may also be resolved in accordance with the provisions for arbitration stipulated in the contract or with any subsequent supplemental written arbitration agreement reached. In these cases, application should be made to an arbitration organ for arbitration. For patent contracts, application should be made to economic contract arbitration organs or technical contract arbitration organs. For copyright contracts, application should be made to the Copyright Contract Arbitration Committee.

The interested parties should abide by the ruling of arbitration. If one of the parties fails to comply with the decision, the other party may apply to the people's court for compulsory execution thereof. If the people's court handling the case finds that the format of the arbitration ruling does not conform to the law, it may refuse to order its execution. In such circumstances, the interested party may take the contract dispute case to the people's court for litigation.