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David Kappos,
Under Secretary of Commerce for Intellectual Property and
Director of the United States Patent and Trademark Office
P.O Box 1450
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September 27, 2012

Dear Mr. Kappos,

It is my pleasure to receive your letter of September 9, 2012, providing concrete comments and suggestion on the newly proposed amendments to the third amendment of China's Patent Law.

I have been of the opinion that it is necessary, and more importantly, useful, to consider various opinions from the general public, industries and international counterparts when making revision to the patent law. This will facilitate SIPO to take different perspectives and identify key issues, so as to find optimal and balanced solutions.

At the same time, SIPO has always been taking the identification of practical issues in operation as the most fundamental and significant aspect for revising the law. Therefore, we focused more on the result of frontline investigations and the voice of patent holders, especially the SMEs, aiming to gain an integrated and precise understanding of the status quo, as well as the problems, of patent protection. Taking this opportunity, I would like to share with you some of my opinions on the revision, based on our investigation results.

1. Background and Objectives

As the patent system is established to protect and promote innovation, ensuring effective patent protection is crucial for a patent system to play the aforementioned role. And Therefore, the improvements to the patent system should build on actual facts of patent protection.

Considerable progress has been made on China's patent system since its

establishment three decades ago. Nevertheless, due to the relatively short time period of IP system, less-developed market economy, and the fact that the public awareness on IP is unsatisfactorily low, patent infringement remain as a serious problem, especially vicious infringements, such as willful infringements, group infringements, and repeated infringements, are being found frequently. Outstanding difficulties in terms of patent enforcement include evidence collecting, long period, high cost, and low remedy, etc. In the process of the special campaign – “*Crack Down the IP Infringements and Manufacture and Sale of Counterfeiting Goods*”, and the investigating and researching, many patent holders, particularly the SMEs, have been strongly calling on strengthening patent protection.

Therefore, the newly proposed revision is a response to the calls and demands of the patent holders, with a mission to strengthen patent protection, offer timely and effective protection for innovation outcome, give innovators more confidence in patent system.

2. Leading Role of IP Judicial Protection

The worry on the possibility that the revision will strengthen administrative enforcement and weaken judicial enforcement might be unnecessary, I have to say.

First of all, the major objective of this revision is to strengthen patent protection, neither singly intensifying administrative enforcement nor weakening judicial protection. In fact, it is to enhance and improve judicial enforcement system, so as to further bring into play the leading role of judicial protection. For example, in the proposal, we suggest the addition of a provision to the current Article 61 of Patent Law, to further intensify the power of People’s Courts of evidence collecting, i.e., “*in patent infringement litigation, upon request from plaintiff or his/her legal agent, People’s Courts shall investigate and collect infringement-related evidences such as products, account books and materials held by the accused infringer. Where the accused infringer does not provide the evidence or transfers, forges or destroys the evidence, People’s Court shall take compulsory measures to stop such action of obstructions of civil actions in accordance with the law. Where it constitutes a crime, the accused infringer will be held criminally responsible*”. This provision is the equivalent of the “discovery” procedure in the US litigation system. This additional provision might help to ease the plaintiff’s burden of proof in patent infringement litigation, and thus to make the patent holders more confident in the judicial enforcement system. We are of the opinion that such an amendment will further bring into play the leading role of judicial enforcement of patent rights, while complying with the *National Intellectual Property Strategy*. In addition, “punitive damages” in the

proposed amendment will be applied first in judicial decisions.

Secondly, when it goes to the interaction between the administrative protection and the judicial one, the latter plays a leading role as well. Since administrative enforcement is an optional procedure, rather than a procedural prerequisite, the party could choose whichever means to take when involved in patent infringement disputes. In particular, if the party refuses to accept the decision made by the administrative authorities, he/she could file a lawsuit to the court, which reflects the monitoring and leading role of the court.

Thirdly, according to our statistics, judicial enforcement of patent does play a leading role in practice. In 2011, local courts nationwide tried 7,819 patent disputes cases of first instance, while local IP administrations received 1,313 patent disputes. This is to say, in that year, over 80% patent civil disputes were solved by judicial means.

3. Patent Administrative Enforcement

I do believe that the construction of a country's legal system should be rooted in its political, economical, cultural, historical and many other elements. In China, the adoption of binary approach of administrative enforcement and judicial proceedings is in accordance with the current national economic and social needs, and is also a concrete manifestation of cultural and historical tradition in the legal system. In 1985, when China's Patent Law was implemented, the patent protection system of combining administrative enforcement and judicial proceedings was established, due to the fact that civil litigations were not well developed at that time, and it was impossible to solve all patent disputes through litigation means. Over 20 years' practice has proved that the patent protection system of combining administrative enforcement and judicial proceedings is effective.

Also, a good system is not enough; we need a strong implementation of the system. In this process of implementation, the capacity building of law enforcement officers is extremely important. We have been making great efforts in strengthening the trainings of patent administrative enforcement officers, and have cultivated a large group of administrative enforcement officers who have both legal and technical backgrounds, and are qualified to handle patent disputes. In the past three decades, the national patent administrative system has handled more than a third of infringement cases.

As you also know, that patent administrative enforcement does not exist only in China. Countries with advanced and matured judicial system have also adopted administrative enforcement system to handle patent infringement disputes, *e.g.* the United States International Trade Commission (ITC). ITC

has a strong enforcement jurisdiction: it handles foreign-related intellectual property infringement disputes outside of judicial channels. In Germany, police officers are entitled to seize alleged patent infringement products. Also in UK, the Intellectual Property Office can handle patent infringement disputes upon request.

China have been fully aware of the importance of a unified criteria of law enforcement around the country, as well as the importance of preventing local protectionism, since the very beginning of the establishment of administrative enforcement system. In this respect, apart from the principles and regulations stipulated in the “*Patent Law*” and the “*Implementing Regulations of the Patent Law*”, SIPO has also formulated the “*Patent Administrative Enforcement Measures*” and the “*Patent Administrative Enforcement Manual*”. With these enforcement instruments and tables, we have unified and standardized the nationwide patent administrative enforcement either from the substantive or the procedural aspects. Moreover, when the local IP offices may encounter difficult situations, they could ask for directions and supports from SIPO. According to the provisions of the *Patent Law* and the *Administrative Enforcement Law*, when the local IP offices are handling patent disputes, they are under the supervision of judicial review procedures, namely, litigants can bring an administrative lawsuit to the People’s Court if they refuse to accept the decisions of the local IP offices. Therefore, I do not think it is necessary to worry about the negative effect that the local protectionism might have on the strengthened administrative enforcement.

Furthermore, SIPO attaches great importance to the enhancement of the transparency of the administrative enforcement, as well as the importance of ensuring its openness, fairness and impartiality. As early as in 2001, SIPO formulated the “*Patent Administrative Enforcement Measures*” to regulate the nationwide patent administrative enforcement. The Measures was revised in 2011, based on the *Patent Law*, the *Implementing Regulations* and the practice. According to the Article 17 of the Measures, when handling infringement disputes, local IP office shall make written decisions, stating parties’ situations, case facts, the decision and its reasons and basis, as well as the approaches and time limits to bring administrative lawsuit if the parties do not accept the decision, with an exception when the parties have reached a mediation agreement or the claimants have withdrawn requests. Enforcement instrument tables issued by SIPO contain service of notice and delivery receipt of the decision. Therefore, unless the parties have reached a mediation agreement or the claimants have withdrawn requests, the local IP offices will make written decisions and have them delivered to both parties. If there may be any cases that the local IP offices do not act in accordance with the aforementioned provisions, SIPO will look into it seriously.

4. Equal protection for Chinese and foreign patent right holders

With regard to the low percentage of civil cases brought by foreign patent holders in patent infringement disputes in China (“with fewer than 5% of the civil cases brought by foreigners”) mentioned in your letter, as a matter of fact, we do not have that number, and is interested on how the data was collected. One thing which we are quite sure here is that patent holders in China, Chinese or foreign, enjoy equal protection and the same unimpeded pathway in seeking relief once they are involved in patent infringement disputes. And a direct reason for the unidentified low percentage is perhaps that foreigners have fewer patents in China than their Chinese counterparts. By the end of 2011, China’s domestic right holders had obtained 2.3 million patents, accounting for 84.1% in the overall 2.73 million valid patents in China.

In a sample survey we conducted in the middle and eastern areas of China, we find a fact that although very few foreigners acted as defendants in patent infringement disputes, they had a higher chance of winning lawsuits than the average whether they filed the lawsuits or acted as defendants. A total of 800 lawsuits, namely 200 lawsuits each from Guangdong Province, Jiangsu Province, Shanghai, and 100 lawsuits each from Henan Province and Sichuan Province, were reviewed in the survey. Of these samples, foreigners seldom acted as defendants, with a lower percentage of the total. Shanghai stands out as with a higher number of cases with foreigners as the defendants (22 cases). Meanwhile, of these 22 cases, the foreign defendants take a higher chance of winning, referring to 59.1%, compared to the average of 52.2%. In design infringement lawsuits, Guangdong Province has 6 cases, and foreign plaintiffs won the lawsuits in all of these 6 cases. The same also happened in Henan Province where there were only 4 such cases with foreign plaintiffs. In Shanghai, 7 of the 9 foreign plaintiffs lawsuits won the case, with a 77.8% chance of winning, higher than the average (58.3%).

5. Scope and transparency of researches and surveys for patent amendments

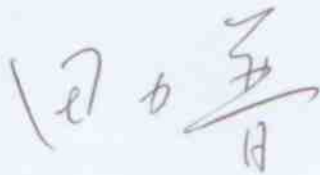
For a better preparation of the amendment, SIPO has conducted an extensive field research since this February, but not only in Zhejiang. We also went to Hunan Province, Guangdong Province and other places, including Beijing, to collect the comments and suggestion of industries, academic experts, patent agencies and enforcement authorities. Due to the time constraint, we were not able to go province by province, and had to ask local IP offices in all the provinces, autonomous regions and municipality cities to carry out researches and surveys, so as to solicit opinions from all walks of life. By the end of the research, as stated in the explanatory notes of the proposed amendment, we have collected research reports with typical cases from 30 provinces in China. Therefore, our research is not solely carried out in Wenzhou and Hangzhou.

As I would like to ensure you that the current patent amendment stays in line with the convention of approaching of consulting the public in an open and transparent manner. On the bases of the aforementioned researches and consultations, on August 10, 2012, SIPO put on its official website the amendment proposal, make it open for public consultation for one month. So far, we have received 55 feedbacks from the public, 16 of them from foreign enterprises, government agencies and industry associations. We are currently sorting them out for further discussion and study.

Indeed, SIPO is very delighted to convene meetings or seminars with USPTO, or EPO, JPO, etc. And I am very much looking forward to meeting you during the forthcoming WIPO General Assemblies, to have a further discussion on this topic.

With best regards,

Sincerely yours,

Handwritten signature in black ink, appearing to be 'TIAN Lipu'.

TIAN Lipu
Commissioner