

# Intellectual Property Rights as an Engine of Economic Innovation in China's Five-Year Plans

## —Vaulting Ambitions and Towering Challenges—

George Chan\*

Steve Chao\*\*

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중국에서 운영되는 브랜드 소유자에게 위조는 계속해서 문제가 되어 왔으나, 중국의 지식 재산권 집행에 대한 개선 인식은 부족한 경향이 있다. 사실 지식 재산권(IPR)은 혁신의 핵심 동력이고, 지식 기반 경제의 토대인 만큼 중국에서 적용되고 주장되는 빈도가 늘고 있다. 중국 정부는 지식 재산권 집행 및 위조 방지 개선에 상당한 자원과 관심을 집중하면서, 지식 재산권에 기반을 둔 현대식의 경제 체계 수립이라는 목표를 실현하기를 희망한다. 이 글은 13차 5개년 계획과 13번째 5개년 국가 지식 재산권 보호 및 사용 계획이 특히 IPR을 통해 중국 경제에 미치는 영향에 대해 다룬다.

**[주제어]** 경제, 지식 재산(IP), 지식 재산권(IPR), 중국, 5개년 계획, 5개년 IP 계획, 지식 재산권법, 법률, 혁신, 특허, 저작권, 상표, 개혁

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\* Partner and Head of the Simmons & Simmons Beijing Intellectual Property Agency

\*\* Associate and IP Trademarks Executive at the Simmons & Simmons Beijing Intellectual Property Agency

## I. Introduction

Intellectual property (IP) protection has played key role in China's economic reform since the 1970's, when China first initiated its open-door policy. Since then, China has undergone significant IP rights (IPR) reforms, both in its national IPR system and its international treaty memberships (e.g. the *Convention establishing the World Intellectual Property Organization*, *Paris Convention for the Protection of Industry Property*, and the *Berne Convention for the Protection of Literary Works*). As China continues to transition towards a knowledge-based economy, innovation has increasingly become an engine of economic growth and innovation, and, accordingly, more attention has been paid to IPRs. China's *13th Five-Year Plan for Economic And Social Development of The People's Republic of China (2016-2020)* (the "13<sup>th</sup> Five-Year Plan")<sup>1)</sup> emphasizes technological innovation as the cornerstone of China's economic and social development strategy, and in particular devotes special attention to IPRs as a means to foster and protect innovation.

Accordingly, the State Council also released the *13<sup>th</sup> Five-Year National Intellectual Property Protection and Use Plan* (the "IP Plan") to provide specific goals to strengthen the protection and utilization of IPRs in China during the period of the 13<sup>th</sup> Five-Year Plan.<sup>2)</sup> In this article, we will discuss China's goal of reforming its IP system, particularly in view of its growing dependence on IP for its future economic development.

## II. Ties Between the Economy and IP

Given that innovation and economic growth are inextricably linked, it should come as no surprise that IPR law reforms have often come in conjunction with changes to China's

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1) *The 13th Five-Year Plan for Economic And Social Development of The People's Republic of China (2016-2020)*, National People's Congress, March 2016, available at <<http://en.ndrc.gov.cn/newsrelease/201612/P020161207645765233498.pdf>>, last visited March 22, 2017.

2) AFD China Intellectual Property Law Office, *China Issues Plan to Develop Intellectual Property*, Lexology, January 23, 2017, available at <<http://www.lexology.com/library/detail.aspx?g=47433c35-5601-43d2-896e-205a461c60d7>>, last visited March 23, 2017.

foreign trade policy. As discussed in a joint research project led by the World Intellectual Property Organization (WIPO), most IPR law reforms have generally been driven by external pressures for strengthened IPR protection, with the main motivation for change being benefit to the national economy.<sup>3)</sup> As an example, in the early 1990s, China amended the both the *Patent Law of the People's Republic of China* (the "Patent Law") and the *Trademark Law of the People's Republic of China* (the "Trademark Law") in support of its attempt to accede to General Agreement on Trade and Tariffs (GATT). These same laws were revised again in the early 2000s to further China's bid to enter the World Trade Organization (WTO). Accordingly, a pattern has developed in which domestic reforms intended to bring China's IPR laws in line with its international obligations, such as the *WTO Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS), have often heralded China's joining of international IPR treaties or similar reforms to its foreign trade policy.

In the early 2000's, China began developing new policy frameworks based on "building an innovation-oriented nation" in hopes of transitioning from an economy based on labour-intensive manufacturing towards one based on high-tech and higher value-added industries. Prior to the release of the IP Plan, the CCP Central Committee and State Council released the *Guidelines for China's Innovation-Driven Development Model* (the "Innovation Guidelines"), which set the following goals for the Chinese economy to become innovation-driven: become an innovation nation by 2020, an international innovation leader by 2030, and a world powerhouse of scientific and technological innovation by 2050.<sup>4)</sup>

China's investment in innovation certainly suggests that such goal is achievable. For instance, China's investment in research and development (R&D) is estimated to have reached RMB 1.54 trillion (approximately USD 223 billion) in 2016, which equals 2.1 percent of China's GDP. Last year's Chinese R&D expenditure increased by an estimated 9%, with the value of technology transactions in China estimated to amount to over RMB 1.14 trillion.<sup>5)</sup>

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3) Huaiwen He, Ping Zhang, *Impact of the Intellectual Property System on Economic Growth*, WIPO – JPO – UNU Joint Research Project, available at

<[http://www.wipo.int/export/sites/www/about-ip/en/studies/pdf/wipo\\_unu\\_07\\_china.pdf](http://www.wipo.int/export/sites/www/about-ip/en/studies/pdf/wipo_unu_07_china.pdf)>, last visited March 23, 2017.

4) Katherina Koleski, *The 13th Five-Year Plan*, US-China Economic and Security Review Commission – Staff Research Report, February 14, 2017, available at

<<https://www.uscc.gov/sites/default/files/Research/The%2013th%20Five-Year%20Plan.pdf>>, last visited March 24, 2017.

5) *China's R&D Spending Estimated to Reach 2.1 Pct of GDP in 2016*, January 13, 2017, available at

Additionally, the government has set aside RMB 1.4 billion (approximately USD 200 million) for local patent operations, resulting in the establishment of over 1,700 IPR enterprises.

### III. The IP Plan

On January 16, 2017, the State Council released the IP Plan to provide a policy framework to improve the protection and enforcement of IPRs for the 13<sup>th</sup> Five-Year Plan period, 2016-2020.

The IP Plan is aimed at improving the legal environment, enhancing the market value, and strengthening the management of IPRs in China. The IP Plan acknowledges the success of past IPR reforms, specifically noting the significant improvement in innovation evidenced by China's over 117,000 international patent application submissions under the *Patent Cooperation Treaty* (PCT) from 2011-2015, an increase of 2.2 times relative to the preceding five years. Furthermore, a notable aspect of the IP Plan is its willingness to study newly emerging fields, such as e-commerce and Internet Plus,<sup>6)</sup> which will help integrate high-tech sectors of the economy with traditional sectors.

Recent WIPO statistics<sup>7)</sup> show that China's massive efforts to increase innovation have led to it becoming a top IP producer worldwide:

- In 2015, China had over 1.5 million active patents, more than doubling its share since 2010;
- China accounted for 38.1% of the world's patent application filings in 2015;
- From 2014 to 2015, the world's patent application filings increased by 7.8% (roughly 208,000 additional filings) with China accounting for 84% of the increase;

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<<http://www.chinaipr.gov.cn/article/centralgovernment/201701/1900390.html>>, last visited March 22, 2017.

6) *China releases plan on IPR protection, application*, General Office of the State Council, January 13, 2017, available at <[http://english.gov.cn/policies/latest\\_releases/2017/01/13/content\\_281475540821300.htm](http://english.gov.cn/policies/latest_releases/2017/01/13/content_281475540821300.htm)>, last visited March 23, 2017.

7) *WIPO IP Facts and Figures 2016*, World Intellectual Property Organization, available at <[http://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_943\\_2016.pdf](http://www.wipo.int/edocs/pubdocs/en/wipo_pub_943_2016.pdf)>, last visited March 22, 2017.

- In 2015, China's State Intellectual Property Office (SIPO) became the first office to receive over a million patent applications in a single year, receiving almost as much as Japan, the Republic of Korea, and the United States combined;
- China processed more than 2 million new copyright registrations in 2016:
  - Copyright registrations for works and software totaled 1,599,597 and 497,774, respectively;
- In 2016, China had 10.3 million active trademarks – more than any other country;
- China accounted for 33.5% of the world's trademark filings in 2015.

Building on China's recent IP momentum, the IP Plan establishes several metrics to further drive the development of IPRs. For instance the IP Plan sets several IPR protection and utilization goals<sup>8)</sup> to be achieved during the 13<sup>th</sup> Five-Year Plan period, including:

- doubling China's invention patent ownership rate from 6 per 10,000 people in 2015 to 12 per 10,000 people in 2020;
- increasing the number of PCT patent applications to 60,000;
- increasing the total number of plant variety patent applications 25,000;
- increasing the number of copyright registrations to 2.2 million;
- increasing the amount of pledged IP financing will increase to RMB 180 billion;
- increasing the number of computer software copyright registrations to 440,000;
- achieving a yield of 0.7 invention patents per every RMB 100 million in revenue generated by manufacturing enterprises above a designated size;
- doubling IP royalties earned abroad to reach USD 10 billion;
- achieving a 20% IP service industry average annual revenue growth rate; and
- increasing public satisfaction with IP protection to 80%.

Despite the ambitious nature of the above goals, it should be noted that they may become

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8) *Indexes of IP Protection and Utilization in the 13th Five-year Plan Period*, State Intellectual Property Office of the P.R.C., January 25, 2017, available at [http://english.sipo.gov.cn/specialtopic/number/201701/t20170125\\_1308117.html](http://english.sipo.gov.cn/specialtopic/number/201701/t20170125_1308117.html), last visited March 23, 2017.

problematic in so far as they potentially incentivize quantity of growth instead of quality of growth. The IP Plan purports to transform China from a “big” IP country into a “strong” IP country, an idea stemming from a policy document previously issued by the State Council on July 18, 2016, the *Opinion of the State Council on Accelerating the Construction of Intellectual Property Powers for China as an Intellectual Property Strong Country under the New Situation – Division of Tasks* (the “Opinion”).<sup>9)</sup> However, it may be difficult to achieve these monumental metrics while still maintaining the quality and utility of the IPRs granted.

The *Opinion* identified several of the challenges that China faces as it transforms itself into a “strong” IP country, namely the need for high IPR quality not just quantity, inadequate IPR protection, and pervasive infringement, all of which significantly impact the ability of the Chinese industry to innovate. The IP Plan responds to these challenges by setting IP goals such as enhancing the level of IP protection, strengthening regional development, reducing the turnaround time for granting and contesting of IPRs, refining the system for patents, well-known trademarks, and copyright, improving administrative enforcement, and promoting open international IPR cooperation.

In achieving these goals, a balance needs to be struck between intervening enough to implement needed reforms but without creating a dependence on government direction or subsidization of innovation or otherwise disrupting the organic private sector dynamics that foster innovation. Damien Ma, a fellow at the Paulson Institute, notes that the Chinese government needs to build the necessary institutional capital for innovation “by strengthening its legal regimes for intellectual property protection, supporting universities that promote entrepreneurship, and allowing failure and nonconformity.”<sup>10)</sup> Thus, once such reforms are made and the necessary policy foundation for innovation has been laid, the best course of action will be to take a “hands-off” approach that allows the private sector to build on this foundation and construct an edifice of quality innovation and growth.

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9) *Notice of the General Office of the State Council on Issuing the Program for the Division of the Key Tasks of the Several Opinions of the State Council on Building a Powerful Intellectual Property Nation under New Conditions*, General Office of the State Council, July 8, 2016, available at <[http://www.gov.cn/zhengce/content/2016-07/18/content\\_5092397.htm](http://www.gov.cn/zhengce/content/2016-07/18/content_5092397.htm)>, last visited March 23, 2017.

10) Koleski, *supra* note 6.

## IV. Enforcement Difficulties

As China's IP system has developed and improved, the number of IPR holders has risen, and the number of litigation and enforcement cases has increased commensurately. For instance, the previous Five-Year Plan (i.e. 2011-2015) saw over 87,000 administrative patent infringement cases, 322,000 cases of trademark infringement and trade secret misappropriation, sale of low quality counterfeits and other forms of infringement, and 35,000 cases of copyright infringement.<sup>11)</sup> According to a judicial IPR white paper, China's courts heard over 134,000 IPR cases in 2014, a 20% increase over the previous year. Thus there will be a need to ensure that IPRs can be adequately enforced such that obtaining IPRs is worth the cost.

While significant improvements have been made to the IP system, IPR holders, both domestic and foreign, continue to face many obstacles to IPR enforcement that inhibit innovation. For instance, a report issued by the United State International Trade Committee on the effect of IP infringement in China on the US economy stated that "significant structural and institutional impediments undermine effective IPR enforcement in China. These include a lack of coordination among government agencies, insufficient resources for enforcement, local protectionism, and a lack of judicial independence."<sup>12)</sup> Domestically, poor patent right protection and recurring infringements, in addition to the inherent covert nature of infringement practices, have led to high costs, low compensation, and significant difficulties in adducing evidence during enforcement. As such, while over 30% of patent holders in China have encountered infringement disputes, due to a loss of trust in patent system and the weak protection it provides, only 10% of those holders seen to take action.<sup>13)</sup>

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11) *Interpretation of four key points of the Indexes of IP Protection and Utilization in the 13th Five-year Plan Period*, Xinhua News Agency, January 18, 2017, available at

<[http://www.gov.cn/zhengce/2017-01/18/content\\_5160758.htm](http://www.gov.cn/zhengce/2017-01/18/content_5160758.htm)>, last visited March 23, 2017.

12) *China: Intellectual property infringement, indigenous innovation policies, and frameworks for measuring the effects on the U.S. economy*, US International Trade Commission, November 2010, available at

<<http://www.usitc.gov/publications/332/pub4199.pdf>>, last visited April 18, 2017.

13) *Problems of Enforcement of Patent Law in China and its Ongoing Fourth Amendment*, Ying Zhan, July 15, 2014, available at <[http://nopr.niscair.res.in/bitstream/123456789/29289/1/JIPR%2019\(4\)%20266-271.pdf](http://nopr.niscair.res.in/bitstream/123456789/29289/1/JIPR%2019(4)%20266-271.pdf)>, last visited April 18, 2017.

In response, the IP Plan calls for improvements to the quality of China's IP System and underscores the need to improve compensation and reduce the costs of safeguarding IP. For instance, the IP Plan has called for the implementation of a civil "punishment compensation system" to deter habitual infringers and other IP malefactors. Such a system would allow courts to impose punitive damages in addition to compensation for economic loss and reasonable expenses. The rationale of the punishment compensation system is that this increased liability would exert a deterrent effect strong enough to significantly reduce recidivism. The IP Plan also contemplates stiffer penalties for bad-faith infringement, a particularly notorious area in China.

Ultimately, making IP protection more economical would make China a more desirable jurisdiction for foreign IPR holders to protect their rights, while also making IP protection more attainable for domestic IPR holders. In January 2017, the Shanghai IP Administration set up a transaction center to assist with the monetization of IPRs and offer discounted services to small and medium-sized enterprises. In particular, the transaction center will help support IPR evaluation, transfer quotation, transaction authentication, settlement, trusteeship registration, and financing.<sup>14)</sup>

It should be noted that the IP Plan mentioned, for the first time, that intentional infringement, including patent infringement, may become part of the proposed Social Credit System, a proposed Chinese government initiative whereby every citizen would be assigned a rating based on their economic and social status. The knowledge that IP infringement would have the potential to produce long-term detrimental effects on one's life could be a significant deterrent to infringement.

The need to improve the enforcement of IPRs has been vocalized at all levels, with the Supreme People's Court even circulating a memo calling for tougher punishments on IPR violations.<sup>15)</sup> As well, the government is beginning to address the increased demand for enforcement. In 2014, special IP courts were established in Beijing, Guangzhou, and Shanghai for the specific purpose of adjudicating IP disputes. Additionally, over the past five years,

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14) *Shanghai opens IP rights transaction center*, Xinhua News Agency, January 13, 2017, available at <[http://www.china.org.cn/business/2017-01/13/content\\_40100382.htm](http://www.china.org.cn/business/2017-01/13/content_40100382.htm)>, last visited April 18, 2017.

15) *China makes plans for stronger IPR protection*, Xinhua News Agency, January 19, 2017, available at <[http://www.chinadaily.com.cn/business/2017-01/19/content\\_27999737.htm](http://www.chinadaily.com.cn/business/2017-01/19/content_27999737.htm)>, last visited March 23, 2017.

China has passed over 14 IP regulations and signed 171 cooperation agreements with 63 various countries, regions, and international organizations.

## V. Administrative and Judicial Cooperation

The IP Plan has focused on the need to strengthen the two avenues of protection: administrative enforcement and judicial protection. Beyond simply strengthening each avenue separately, the IP Plan aims to improve the connection and cooperation between these two avenues by advancing collaboration between different departments, disciplines and regions.

The IP Plan provided a number of recommendations on how to improve IP quality that warrant serious consideration. One example is the establishment of a mechanism to assign IP commissioners to help guide the evolution of China's IP system. These IP commissioners would have specific areas of responsibility and could provide additional guidance in the policy making, administration, and regulation of IP.<sup>16)</sup>

SIPO also issued an announcement that it will establish IPR protection centers for certain key industries. Such centers would offer services such as accelerated examinations, accelerated determination of rights, administrative enforcement, arbitration, and mediation.<sup>17)</sup> These protection centers will also act to help improve the connection between the administrative and judicial system.

## VI. Reforms to the IP Administration

In November of 2016, the State Council released the *Guiding Opinions on Accelerating the Construction of a Strong Intellectual Property Rights City* (the "Guiding Opinions"),<sup>18)</sup>

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16) Eleanora Rosati, *New National IP Strategic Action Plan in China*, The IPKat, February 3, 2017, available at <<http://ipkitten.blogspot.hk/2017/02/new-national-ip-strategic-action-plan.html>>, last visited March 23, 2017.

17) *SIPO will promote the coordinative efforts in protecting IP in different industries*, NTD Intellectual Property Attorneys, December 6, 2016, available at <<http://www.chinantd.com/en-newsshow.asp?id=1897>>, last visited March 22, 2017.

18) *Guiding Opinions on Accelerating the Building of Power Intellectual Property Right Cities*, General Office of the

which proposed the creation of a pilot program to address the inefficiencies inherent in the current segmented system in which multiple governmental departments are separately involved in IP governance without any binding oversight.<sup>19)</sup> For instance, SIPO currently handles patents, while the State Administration for Industry and Commerce (SAIC) handles trademarks, and the National Copyright Administration (NCA) handles copyright. Thus, the pilot program aims to ensure stronger IP protection and improve government efficiency by providing specific cities with comprehensive IP administration in the form of an integrated enforcement team.

The importance of this pilot program was evidenced at a “two sessions” meeting attended by deputies of the National People’s Congress and members of the National Committee of the Chinese People’s Political Consultative Conference, China’s top legislative and political advisory bodies, respectively. At this meeting, a call for a comprehensive IP administration was made, specifically in regards to the pilot program. Furthermore, Premier Li Keqiang also mentioned the pilot program in his annual Government Work Report as a means to improve IP creation, protection and usage.

To ensure the highest likelihood of success of the pilot program, the State Council has been vetting the first cohort of pilot cities. The Guiding Opinions stipulates that the chosen cities should demonstrate “innovative flair, an accelerated pace of economic transformation and marked progress in IP-driven development.”<sup>20)</sup> As a testament to the keen interest that the pilot program has elicited, the State Council is currently working with SIPO, SAIC, and NCA, along with other government agencies to ensure the question is thoroughly considered.

An additional benefit of a more centralized, comprehensive IP administration will be the gradual correction of regional disparities in the adjudication of IP cases. Certain jurisdictions within China have become highly sought after for their preferential treatment (of either plaintiffs or defendants, as the case may be), and a more unified approach to the administration of IP issues will help balance the workload and provide fair treatment irrespective of location.

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State Council, November 9, 2016, available at <<http://hk.lexiscn.com/law/law-english-1-2966303-T.html>>, last visited April 18, 2017.

19) *Administrative, Judicial Reforms for IP System*, China Daily, March 9, 2017, available at <<http://www.chinaipr.gov.cn/article/centralgovernment/201703/1902632.html>>, last visited March 22, 2017.

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## VII. Conclusion

While it remains to be seen whether the IP Plan will yield results that are commensurate with its vaulting ambitions, there is no doubt that China has already become one of the world's IP powerhouses. As China continues to enact IP reforms, its laws and regulations continue to converge with the international standards and the Chinese economy has benefited considerably as a result. Nonetheless, the IP Plan is only a plan and a great deal of work remains to overcome the towering challenges that stand in the way of realizing its goals.

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[ Abstract ]

## **Intellectual Property Rights as an Engine of Economic Innovation in China's Five-Year Plans** –Vaulting Ambitions and Towering Challenges–

George Chan\*

Steve Chao\*\*

While counterfeiting continues to be a problem for brand owners operating in China, there tends to be a lack of appreciation towards the improvements made to the enforcement of intellectual property rights in China. In fact, intellectual Property Rights (IPR) are applied for and asserted with increasing frequency in China, where they are becoming a key driver of innovation and a foundation for a knowledge based economy. With the Chinese Government focusing significant resources and attention to improving IP enforcement and anti-counterfeiting, it hopes to realize its goal of establishing a modern economy based on IP rights. This article delves into the impacts of the 13<sup>th</sup> Five-Year Plan and the subsequent 13<sup>th</sup> Five-Year National Intellectual Property Protection and Use Plan on the Chinese economy, in particular through IPRs. Furthermore, this article discusses how the Five-Year Plans provide insight into the Chinese government's goals and uses of IPRs to drive technological innovation.

**[Key Words]** Economy, Intellectual Property (IP), Intellectual Property Rights (IPR), China, Five-Year Plan, 5 Year Plan, Five-Year IP Plan, 5 Year IP Plan, IP Enforcement, Enforcement, Innovation, Patents, Copyrights, Trademarks, Reform

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\* Partner and Head of the Simmons & Simmons Beijing Intellectual Property Agency

\*\* Associate and IP Trademarks Executive at the Simmons & Simmons Beijing Intellectual Property Agency