

Policy Interpretation of Several Opinions of the State Council on Accelerating the Construction of IP Power under New Situations

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On 18 December 2015, the State Council released Several Opinions on Accelerating the Construction of IP Power under New Situations (hereinafter referred to as the Several Opinions) endorsed by Chinese Premier Li Keqiang. The Several Opinions put forward a series of new policies and new initiatives directed to focal issues, key points and cruxes, which will surely boost a scientific development of IP industry. It can be said that the release and promulgation of the Several Opinions mark a new era for construction of China into an IP power.

I. Background and significance

China has made significant progress in the field of IP since the implementation of national IP strategies as of 2008. Studies showed that IP - related comprehensive strength of China rises up to No. 9 from No. 19 on a global scale. In 2015, invention filings in China exceeded one million for the first time, amounting to 110.2 million, enabling China to retain the No.1 position for five consecutive years. China remained top 1 in terms of the number of trademark registrations and reached a historical level in terms of patent filings of new varieties of agricultural plants and forestry plants. China becomes a veritable IP power in the world, and the world's second-largest economy with its human resources in science and technology and R&D funding on top of the ranking. There have emerged more and more enterprises with IP-related advantages that are highly competitive in global markets. After more than 30 years of development, China has preliminarily established an IP legal system that is in line with international rules and covers a wide

variety. China has already developed related systems as a foundation that prepares it to leap forward from a big country to an IP power. Meanwhile, we have to admit that there is still a big gap between China and major world IP powers.

First, China is a big country but not a powerful one in terms of IP with an advantage in quantity, rather than quality, of patents, which is seen in the following aspects: few core patents with more technological content and market value, few patents that form an effective layout, few famous brands and few copyrighted products having world-wide influence, little brand value, and relatively low cultural creativity and less value-added design services. The number of patents granted overseas to Chinese enterprises per year amounts to more than 10,000, and the number of patents filed by Chinese enterprises to the United States, Japan and European Union simultaneously (the number of tri-lateral patents) accounts for less than one eighth of patent filings in the United States or less than one ninth of those in Japan. Domestic invention patents are maintained valid for six years on average, whereas foreign patents entering into China are maintained valid for 9.4 years on average. In the Top 100 Brands in the world, only five brands from China ranked within the list. IP - related conversion amount and rate remain at a low level. Statistics demonstrated that the average amount of money contracted to be paid for licensing patents as recorded in China is about RMB 500,000, and less than 30% of patents granted to domestic universities is exploited in practice. There is a big gap between China and the IP powers in the world in terms of the contribution rate made by the IP-intensive industries to the national economy. The IP-related international trade deficit grows on

a year-by-year basis. In the past years from 2003 to 2014, it rose from USD 3.44 billion to USD 21.97 billion and has become the main reason for service trade deficit. Comparatively speaking, the amount of IP-related trade exports of the United States, the European Union and Japan in 2012 reached up to USD 252.831 billion, which made up of 87.3% of the global export volume.

Second, the enforcement of IPR laws is not rigorous such that infringement is likely to occur frequently, which may greatly affect the people's enthusiasm for innovation and business startups. Even though the efforts put into IPR judicial protection and administrative enforcement of IP laws have been significantly increased, there still exists great disparity between the actual effect and social expectation, and infringement occurs very often. In particular, with the development of e-commerce and modern logistics, infringing conducts are characterized by such new features as chaining, networking and complexity. Concealment and complexity of infringing conducts are highlighted. The *status quo* of IP industry, that is, "easy to infringe but hard to enforce", has an impact on the passion of both enterprises and inventors for innovation. "Hard to enforce" is mainly embodied in difficulty in evidence production, low damages award and difficulty in enforcement of rights. Statistical sampling indicates that the damages awarded in patent infringement cases in China amounts to about RMB 150,000, whereas that figure goes high up to more than USD 5 million in the United States. The Satisfaction Investigation on the Situations of Recent Three-year National IPR Protection demonstrated that the issues that arouse the most concern and are the most dissatisfying are severe infringement and insufficient damages award. As indicated in the Examination Report on Enforcement of the Patent Law released by the National People's Congress Standing Committee, the examination team of law enforcement held talks in Zhejiang Province with twelve enterprises, as well as six universities and R&D institutions in 2014, wherein eleven enterprises and five universities and R&D institutions opined that the IPR protection was weak, which was felt most acutely by the small and medium sized enterprises.

Third, Chinese enterprises are facing higher and higher intellectual property risk when "going out". By the end of 2014, China has been the country that was subject to most Section 337 Investigations involving patent infringement launched by the United States with the highest amount of money involved for thirteen years in the run. In 2013, nine-

teen countries and regions initiated 92 trade remedy investigations against China, which was an increase of 17.9% as compared with that of the year 2012. By the end of 2013, China has been the country that is subject to most anti-dumping investigations for consecutive eighteen years and the one that is subject to most countervailing investigations for consecutive eight years.

To tackle the above issues and to change China from a big country to a powerful one in the IP field, it is urgent to improve an innovation mechanism to strengthen protection and application of IP rights. The utmost significance of the Several Opinions lies in addressing tough issues through deepening reform, invigorating innovation and creativity and quickening the construction of China into a powerful IP country, which stimulates creativity by the IP system, protects and encourages mass entrepreneurship and innovation, and boosts the economic growth at a medium or high speed and the industries to a medium or high level.

II. Basic reasoning

The Several Opinions puts emphasis on deepening the reform of intellectual property system, further improving the IP mechanism, invigorating innovation and creativity through simplified administration and decentralization, which safeguards the basic function of the IP system to stimulate creativity, provides advantageous conditions for nurturing new growth momentum and new international competitive advantages, and enhances the construction of China into a powerful IP country.

It is put forward in the Several Opinions that in the light of the principles of "persistence in strategic guidance, reform and innovation, market orientation and overall consideration", efforts shall be made to carry out national IP strategies, deepen the reform in the key IP areas, encourage and inspire mass entrepreneurship and innovation, and provide powerful supports for implementing innovation-driven development strategies, wherein the primary objectives of building China into a powerful country in the IP field are to support the implementation of innovation-driven development strategies and the "Belt and Road" incentive. Pursuant to requirements of these national strategies, we must foster and boost our abilities in creation, application, protection and management of IP rights, further implement IP strategies, improve IP quality, change China from a big country into a powerful country in the IP field, simplify the multiple IP

fields to high-quality ones, initiate a new round of high-level opening up, and stimulate the economy into a sustainable and healthy development. Meanwhile, the IP industry in the phase of development is still facing some obstacles due to institutional obstacles. The obstacles that constrain the development of the IP industry must be broken down, reforms shall be made to build up innovative systems and mechanisms, and innovative reforms shall be pushed forward. The IP system with Chinese characteristics attaches importance to knowledge- and value-oriented distribution system, and plays an active role in stimulating innovations, promoting reasonable sharing of innovative achievements, boosting the quality and efficiency of enterprises, and facilitating industrial transformation and upgrading. In addition, the relation between market and government shall be dealt with correctly, the market is of a decisive role in the allocation of innovative resources, the principal and leading status of enterprises in innovation must be strengthened, and innovative elements shall be deployed for the sake of reasonable flow and efficient allocation. The fair and just, open and transparent legal environment and market environment under the protection of IP will be constructed with the support of IP policies, with the help of public services, under the supervision of the market and on the premise of decentralization, integration of centralization and decentralization, and service optimization. "Two overall planning" shall be achieved: one is to integrate international and domestic innovative resources, strengthen global cooperation in opening-up and innovation, actively participate in and promote the making and improvement of international IP rules, construct a fair and reasonable international economic order, create conditions that are conducive to the competitors' participation in the international market, and achieve quality imports and quality exports for the sake of win-win; the other is to raise the comprehensive IP strengths at different areas in China to develop some IP leading areas and create new IP advantages so as to prepare China for its participation in the international market.

It is put forward in the Several Opinions that by the end of 2020, the reforms in the key IP fields and essential links will have made decisive achievements, and the IP right grant and validation system and the law enforcement protection system will have been further improved, so as to substantially establish a system with clear right delimitation, rational division of labour, responsibility with compatible rights, high efficiency and legal guarantee, boost the abili-

ties in creation, application, protection, management of IP rights, optimize the environment of entrepreneurship and innovation, gradually form new IP advantages in the international competition, basically modernize the IP management system and capabilities, build up a batch of powerful IP provinces and cities so as to strengthen the position of China as a powerful IP country in all aspects and seek to build China into a world-class IP power with Chinese characteristics.

III. Missions and measures

The Several Opinions deploy policies and measures to promote the reform of IP management systems, implement strict protection of IP rights, boost the creation and use of IP rights, strengthen IP overseas layout, risk prevention and control in key industries, strengthen and deepen the reform in the IP field, solve the tough issues in the IP field and accelerate the construction of China into an IP power.

1. To promote the reform of IP management systems

Chinese IP management system has been formed and still in use as required by the reform and opening-up policies. The SIPO and relevant IP sectors coordinate closely to work together for better achievements in the IP field. In particular, after the promulgation of Outline of the National IP Strategies in 2008, the State Council approved of the establishment of the inter-ministerial joint conference for implementation of the national IP strategies to be responsible for implementing strategies with overall planning. Since then, the inter-ministerial joint conference has played an utmost role in promoting implementation of IP strategies at different areas and various sectors, which has achieved remarkable results. Meanwhile, with the implementation of innovation-driven development strategies and the deepening of the opening-up economy, the existent systems and mechanisms have acted as disincentives to further improvement of administrative efficiency and law enforcement and have been unfavourable to the decrease in costs spent by enterprises, and it is difficult for the governmental departments to work together to perform their duties in social IP management, market supervision and public services, which cannot meet the needs for development any longer. For these reasons, "to deepen the reform in the IP field" was clearly deployed at the fifth plenary session of the 18th CPC Central Committee. It can be said that it is irresistible and imperative to reform the IP-related systems and mechanisms.

As the IP fields are of greater variety and the situations

get more complicated, it is urgent to further improve the inter-ministerial joint conference mechanism so as to accelerate the construction of China into a powerful IP country. In future, the leader of the State Council will take the position of the convener such that IP-related work can be coordinated at a higher level. On the other hand, it is also mentioned in the Several Opinions that studies and exploration on the reform of the IP management system will be conducted actively, and local authorities will be authorized to conduct IP pilot reforms and local authorities with favourable conditions are encouraged to launch comprehensive IP management trial projects, in such a way to foster unified management and comprehensive law enforcement of various IP rights, which provides a solid foundation and experience for further IP reform.

Major policies formulated to promote the reform of IP management systems also include the establishment of the IP evaluation system for important economic activities, which is an important system innovation for the sake of scientific IPR management. The IP evaluation system is intended to make a comprehensive analysis and judgement based on IP competition intelligence while in consideration of many factors such as industrial development, market competition and political environment, in order to assess, check and prove the feasibility, potential risk, market value and implementing modes of economic activities, and accordingly provide rational countermeasures and suggestions, which provide advice and reference for the governments and enterprises to make economic, scientific and technological activities. IP analysis and evaluation is a way prevailing in lots of developed countries as it can significantly enhance innovative benefits, reduce investment and innovation risks, and provide effective support to enterprises for making the reasonable IP layout in the market and to the government for formulating scientific policies. At present, the level of making decisions related to major economic, scientific and technological activities is still relatively low, and IP-related information does not give full play to decision making. Due to lack of IP assessment or insufficient IP assessment, some projects after implementation will soon get involved in IP disputes. Many economic, scientific and technological and trade projects, as well as talent recruitment projects, come to a failure, or even result in great loss owing to IP disputes. From 2011 to 2015, SIPO had embarked on IP assessment on a national scale. It has been found that in practice, IP assessment plays a significant role in economic, scientific

and technological activities because the R&D efficiency in major projects has been greatly raised, the risks of technology introduction are effectively prevented, scientific policies related to such projects as conversion of scientific and technological achievements are well supported and the import of scientific and technological talents is backed up. As a result, it is necessary to further improve the policies related to IP assessment and set up an IP assessment system so as to apply the same to major economic, and scientific and technological activities in China.

Major policies formulated to promote the reform of IP management systems also include improvement of IP service industry and social organization management. In China, the IP service industry is expected to be further opened up and the means to supervise the IP service industry are far from enough. Pursuant to the current provisions, the stakeholders or partners of patent agencies must be qualified patent attorneys, or in other words, legal persons or non-patent attorneys cannot become the stakeholders of patent agencies, which restrict the development of IP agency industry to some extent. The disorderly competition is a key factor that constrains the development of the IP service industry. The 2012 Report on the National IP Service Industry revealed that among the main difficulties that IP agencies encounter during operation, the market competition ranked No.2 with a percentage of 42.8. In this regard, it is necessary to broaden the admission standards for the IP service industry, and reinforce the means to supervise the IP service industry by the society and optimize the environment of the IP service industry through strengthening the disclosure of the licensing information of patent and trademark practitioners. To enhance the opening-up degree, it is put forward in the Several Opinions that the patent agency industry shall be opened up more widely, the restrictive conditions for the stakeholders or partners of patent agencies shall be broadened, and a pilot program of "one industry, several associations" shall be carried out tentatively for the IP service industry. To reinforce the supervision of the IP industry by the society, it is put forward in the Several Opinions that the licensing information disclosure system shall be further improved so as to timely disclose information related to, e.g., credit evaluation of IP agencies and practitioners. At the same time, for the copyright collective management organization, it is put forward in the Several Opinions that charging fees of the copyright collective management organization must be standardized, and the revenue distri-

bution system shall be improved to enable copyright holders to benefit more from licensing.

2. To strictly implement IP protection

Great importance has been attached to IP protection in China. With the thorough implementation of national IP strategies, increasing efforts have been made to strengthen administrative law enforcement related to protection of IP rights, and judicial efficiency has been increased constantly. Especially since the deployment of the mass entrepreneurship and innovation initiative called on by the Central Committee and the State Council, more efforts have been made to protect IP rights and the effect thereof turns out to be better and better. From January to October of 2015, the total number of patent administrative cases amounted to 21355, which was an increase of 57.9% over the same period last year. The IP courts located in Beijing, Shanghai and Guangzhou, from the establishment thereof to 20 August 2015, accepted 10795 IP-related cases with 4160 concluded. Meanwhile, IP infringements are prone to occur frequently in the ever-emerging innovation and entrepreneurship upsurge and fierce market competition.

For stricter protection of IP rights, the Chinese institutional advantages shall be brought into full play to improve the IP protection modes which have two routes of administrative law enforcement and judicial protection that are mutually complementary to each other and organically linked up. The two routes of administrative law enforcement and judicial protection in the IP field are the important characteristics of IP protection in China. The advantages of IP administrative law enforcement, such as promptness, convenience and professionalism, shall be fully utilized to make the administrative law enforcement and judicial protection complementary to each other. Meanwhile, it is of great significance to actively explore and improve legal systems and optimize related operational mechanisms so as to make the administrative law enforcement and judicial protection better linked up in terms of evidence admissibility, fact finding and law application standards.

IP infringing conducts must be punished more severely and cracked down on relentlessly according to law, which can be achieved in the following three aspects. First is to solve the issue of "low damages" actively. Every means is tried to push the amendments to the laws to make them improved and raise the upper limit of statutory damages for IP infringement, and as for malicious infringement of aggravated nature, punitive damages may be required and the in-

fringer must pay reasonable expenses actually incurred. Second is to enhance the effect of IP administrative law enforcement. Measures shall be taken to promote the disclosure of information related to administrative IP infringement cases and to improve the fast IP right safeguarding mechanism. The customs shall strictly enforce the laws to strengthen the protection of IP rights. More efforts shall be put to protect IP rights at international exhibitions and in e-commerce activities. Third is to strengthen the international cooperation in the aspect of the protection of IP rights. It is important to enforce the laws jointly with relevant international organizations and foreign law enforcement departments and cooperate with them to protect IP rights judicially, in hope of making China into an important place to resolve international IP disputes and constructing an open and innovative environment with powerful international competitiveness.

IP crimes, especially chained and industrialized IP criminal networks, shall be cracked down on with ever-increasing efforts. The Central Committee and the State Council released the Several Opinions on the deepening of the institutional reform and the accelerated implementation of innovation-driven development strategies, which indicate that studies shall be conducted on how to lower the threshold at which wrongdoers will be prosecuted for criminal liabilities. As regards various infringement and counterfeiting crimes that endanger the public's health and safety and hinder the innovation-driven development, the effective routes to deter IP crimes and the necessary measures to maintain a good IP environment are to increase the means to investigate crimes, crack down on crimes aggressively, and combat IP infringement crimes according to law. Thus, the Several Opinions emphasize that IP crimes, especially chained and industrialized IP criminal networks, shall be cracked down on relentlessly according to law. Meanwhile, it is further required that IP administrative law enforcement and criminal justice should be linked up and suspected criminal cases should be transferred smoothly. In view of the tendency that the number of IP cases involving foreign interests grows increasingly, the Several Opinions require that international cooperation in criminal law enforcement should be strengthened to further improve the law enforcement regime for cases involving foreign interests and increase the efforts to handle IP cases involving foreign interests; and attention shall be paid to cooperating with international organizations and other nations to crack down on IP-related crimes and exchange more details of cases and intelli-

gence information.

The demand for the protection of IP innovative achievements in new industries and new fields shall be satisfied. Cyber IP infringement renders the issue of “difficulty in evidence production” more severe, and the development of new technologies and new industries related to the internet poses new challenges to the protection of IP rights. All the countries in the world are working hard to actively explore “the IP ways to satisfy the demands” for the protection of new technologies and new industries. To this end, the Several Opinions provide the following suggestion: one is to enhance the efficiency of cyber IP law enforcement and the capability of pre-warning and prevention in the aspect of law enforcement. More efforts shall be made to enforce the IP laws in the field of e-commerce. Meanwhile, information technologies, such as big data, cloud computation and internet of things, shall be utilized to protect the IP rights of cyber innovations and R&D achievements and increase the capability of pre-warning and prevention. Second is to strengthen the protection of innovative achievements obtained in new industries and new fields. Studies shall be conducted on how to improve a commercial IP protection system, and it is necessary to conduct more studies on the rules for protecting IP rights in such fields as internet, e-commerce and big data so as to improve relevant laws and regulations for making IP policies characterized by mass creation, mass outsourcing, mass support and crowd funding.

3. To promote the creation and application of IP rights

China ranked No. 1 in the world in terms of the invention filings and trademark filings. However, there still exist some serious issues, for example, the patented technologies are of relatively low quality and utilized with less profits. Thus, for better creation and application of IP rights, the Several Opinions suggest that the IP examination and registration mechanism shall be further improved by realizing online registration, e-application and paperless examination and approval, as well as accelerating the construction of world-class patent examination offices; the service invention system should be improved to protect the rights and interests of service inventors; the patent licensing system should be reformed so as to facilitate the expansion of patents by means of licensing; the IP trading platform should be set up to boost the integrated development of “internet+ IP”; IP-intensive industries should be developed to speed up the booming of advanced manufacturing businesses; the added value and international influence of IP should be

raised by increasing the quality of patents and creating batches of core patents; the enterprises should be encouraged to make overseas equity investment by means of IP rights; and IP-related information should be disclosed for utilization, and the IP public service platform should be set up so as to have access to patent information free of charge or at a low cost.

The service invention system should be improved. Service inventions mainly refer to the invention - creations achieved by a person in execution of the tasks of the entity to which he belongs, or mainly by using the material and technical means of the entity. A reasonable service invention system needs to balance the rights and interests of the service inventor and the entity in an effective manner. On the one hand, the entity is encouraged and guided to establish and improve a service invention management system that clearly sets forth provisions related to an invention report, division of rights and responsibilities, reward and remuneration, and dispute resolution according to law. On the other hand, the ratio of profits awarded to backbone teams and primary inventors shall be increased so as to safeguard the rights and interests of the service inventors. In 2015, the SIPO, together with the Ministry of Science and Technology, drafted the Draft Regulations of Service Inventions, which have been submitted to the legal affairs office of the State Council for review.

The patent licensing system should be reformed. It was indicated in the examination report on patent law enforcement made by the Standing Committee of the National People's Congress that less than 30% of patents granted to domestic universities were exploited in practice in 2012, and the state-owned R&D institutions and colleges or universities that provide higher education are facing both policy and system obstacles when converting patents. Quick transference and conversion of patents, and expansion of patented technologies by means of licensing are important prerequisites for building China into a powerful IP country at a faster pace. The main aim to reform the patent licensing system is to expand patents by means of licensing. First, studies shall be conducted on how to establish the License of Right system for patents. The License of Right system for patents means that a patent holder can submit a statement for the license of right on his own initiatives, indicating his licensing will and promising everyone an equal licensing opportunity, under which circumstances unified standards can be followed for licensing activities. It will reduce the

costs incurred for negotiations between licensors and patent holders and meanwhile accelerate the conversion of IP. This provision is fully embodied in the Fourth Amendments to the Patent Law. Second, it is necessary to improve the procedures for initiating, examining and approving, and implementing compulsory licensing of patents. The entities such as colleges and universities, and R&D institutions, shall be encouraged to support their staff and college students to start up their businesses by licensing patents free of charge.

IP-related information should be disclosed for utilization. At present, the public data sources in the field of IP in China are criticized due to fewer types of data, inconsistent data standards, untimely updating, unstable service provision, lack of unified data disclosure platform. The online IP public service platforms are disperse and not user-friendly. For these reasons, it is clarified in the Several Opinions that patent data information resources shall be accessible and shared so as to promote the utilization of big data; patent information shall be disclosed so as to set up an IP information disclosure system with the support of a fiscal assistance project, and every means shall be made to accelerate the implementation of a listed company IP information disclosure system, standardize the procedures for collecting IP information and the content of the collected IP information, and improve the IP licensing information recording and announcement system so as to publicize the patent examination process timely; and the IP information public service platform shall be established to disclose the basic information, such as patents, trademarks, copyrights, integrated circuit layout designs, new plant varieties and geographical indications free of charge or at a lower cost, and the IP information public service platform is accessible through the Internet at a wider range of service centres to expand the IP information public service network.

4. To enhance the level of the international cooperation in the IP field

To build China into a powerful IP country is not only a domestic strategic program, but also an international strategic planning. To achieve this aim, it is urgent to strengthen IP diplomacy, enhance the international cooperation in the IP field, actively participate in and promote the making and improvement of international IP rules, construct a fair and reasonable international economic order, and strengthen global cooperation in opening-up and innovation. In view that the enterprises that “go out” are facing increasing IP-

related risks, the Several Opinions suggest that measures shall be taken to make overseas IP layout planning for key industries and expand overseas IP layout channels, to establish a patent-navigated industry development mechanism, implement patent-navigated projects in terms of industry planning and business operation and plot a patent navigation map showing relevant countries and regions that support the development of Chinese industries, to boost the integration of Chinese industries into the global industrial chain, value chain and innovation chain, and stimulate enterprises, scientific and technological institutions and colleges and universities of higher education to cooperate together to deploy overseas IP layouts. Meanwhile, improvement shall be made on the overseas IP risk pre-warning system so as to increase our capabilities in IP risk prevention and control abroad and provide more support in the protection of IP rights abroad. The enterprises shall be encouraged to set up an IP analysis and assessment mechanism to make an assessment on IP risks in the aspects of talent import, international exhibitions, and the import and export of products and technologies.

On the one hand, measures shall be taken to strengthen the overseas IP layout planning for key industries. It is indicated in the Several Opinions that measures shall be taken to make overseas IP layout planning for key industries and expand overseas IP layout channels, and improvement shall be made on the overseas IP risk pre-warning system so as to increase our capabilities in IP risk prevention and control abroad and provide more support in the protection of IP rights abroad. It is also mentioned in the Several Opinions that efforts shall be made to make fair and reasonable international IP rules to strengthen the international IP cooperation, give more assistance to developing countries in the IP field, expand IP diplomatic channels and foster the internationalization of IP service.

The Several Opinions require that SIPO should fulfil its responsibilities as the office serving the inter-ministerial joint conference for implementation of the national IP strategies, so as to facilitate close cooperation between various sectors and work hard with the support of relevant sectors to make solutions and corresponding policies in consideration of actual situations, guide, supervise and inspect the implementation of relevant policies and measures, and manage to make every measure be carried out effectively. ■

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