

UNITED STATES
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Transparency and IP in China: The Arc of Making Judicial Decisions Public

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PATENT AND TRADEMARK OFFICE ®

Overview

- Publication of Cases – From IP to Everything Else
- Access to PRC-based Info, Stats, Databases
- What's next?

Publication of Cases – Early Days

- Started with IP!
 - March 10, 2006 - SPC launched *China IPR Judgements and Decisions*



Publication of Cases - Expanded

- November 2010 – SPC Regulations on People's Courts Publication of Judgements on the Internet, Launches China Judgements Online
- July 2013 – SPC Issues Interim SPC Measures
- November 2013 – SPC Amends 2010 Regulations
- August 2016 – Another amendment



Publication of Cases – Toying with Precedent

- Beijing IP Court Experiments with Case Law
- High-level Pushback?



Image © Christian Wittmann

Publication of Cases – No more?

- 2021 – A Year of Change?
- SPC Website:
www.court.gov.cn
geo-blocked as of
August 21, 2023

Not Secure – court.gov.cn

403 Forbidden

Client IP: 138.88.117.66
eventID: 1249-1700026859.989-s6czt reason:GeoBL



Publication of Cases – Provisions Deleted

- October 27, 2023 – SPC amended the *2018 Regulations on Several Issues concerning the Intellectual Property Court*



Access to IP Databases

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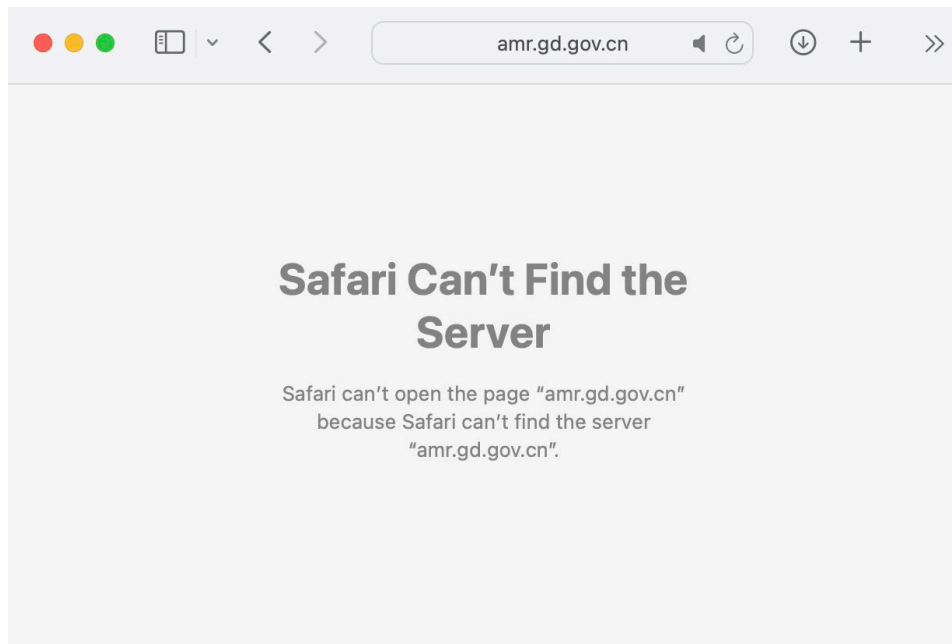
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Access, Generally...



What's Next – Legal support for Publication?

- 2012 Civil Procedure Law
- 2022 SPC Judicial Interpretation Civil Procedure Law
- *SPC Regulations on People's Courts Publication of Judgments on the Internet*



What's Next?

- Politics
- Cross-Border Data Policies
- Questions?



Transparency and Intellectual Property in China: Problems and Prospects

AUTM Webinar

Duncan Willson – USPTO

Thomas Moga - Dykema

November 21, 2023

Introduction

- Efforts continue on China's part to improve transparency
- Uneven development, no unified effort
- Local interests drive efforts, at least in part
- An example of positive movement: Abolishment of legalization requirement
- Challenges remain

Trademark

- First line of defense
- Race to the trademark office
- Bad faith registrations (something which was supposed to have been addressed based on the Phase One Agreement); examiners need more tools to identify bad faith activity.
- Lack of transparency regarding official decisions from the CTMO; should be publicized promptly.
- Lack of transparency regarding whether a consent agreement would be accepted.
- Lack of transparency when it comes to subclass/subgroup classification.

Patent

- Prosecution – procedures for accelerating unwritten
- Prosecution – availability of examiner interviews inconsistent
- Prosecution – status of patent subsidies still unclear
- Issuance – large number of poor quality patents issuing despite recent reforms in procedure; creates problems in non-infringement investigation
- Issuance – abstracts often not reflecting substance of UMPs
- Post grant – patent holders often not informed of third party submissions against them in prosecution
- Post Post grant – patent holders often not informed of the issuance of anti-suit injunctions by Chinese courts in SEP proceedings

Patent (cont'd)

- Patent linkage system (Hatch-Waxman-like “drug dispute early resolution mechanism”); directed to the resolution of resolve patent disputes at an early stage during the regulatory approval process
 - Creates linkage between an application for marketing approval for a generic drug and an innovator drug patent
 - Difficulty relates to listable products for biologics; the list of products entitled to be listed is very narrow when compared with other countries, such as the US; the listable product problem extends beyond pharmaceuticals and reaches other technologies, such as polymer patents

Patent (cont'd)

- Timing may also become a challenge; thus far all patent linkage cases have moved quickly, 4 – 5 months, largely as a result of prioritization of the cases; but there are concerns as to whether this quick pace can be sustained for later cases if priorities shift away
- First two decisions under new patent linkage system not explained, underscoring lack of transparency
- Applicants can now submit supplemental data to establish sufficiency of disclosure and/or inventive step, during examination, reexamination proceedings, and court cases
 - While promising, the rules related to post-filing may appear clear on paper but this is not necessarily the case

Copyright

- Third amendment provided some relief
- Lack of transparency has led to accusations of unfair treatment
- Copyright owners expressed concern about not being adequately protected
- Inconsistent treatment by courts of registered copyrights

Licensing

- Clearer mechanism needed to allow public scrutiny and oversight regarding terms and conditions of permitted licenses
- Maximum allowable royalty rates unclear
- Compulsory licenses
 - Terms under revised Patent Law still unclear
 - Possible new one in the works?

Conclusion

- Potential for improvement exists
- Affirmative steps need to be taken
- Will involve multiple levels, different agencies, commitment