

# Progressing IP Protection

## 将知识产权保护进行到底

The Swiss Federal Institute of Intellectual Property (IPI) is the federal government's centre of competence for all issues concerning patent and trademark protection, indications of source, design protection and copyright. It is also responsible for preparing all legislation in these areas, and acts on behalf of Switzerland within international organizations and with other countries.

**The Bridge** speaks to Felix Addor, IPI's Deputy Director General and Head of the Delegation of Switzerland on the bilateral dialogue with China on all issues relating to intellectual property.

by **Mark Andrews**

### How does IPI view China's current situation with regard to protecting IP?

Compared to other transition countries, China has relatively modern IP legislation. Big challenges remain with enforcement, although cooperation between rights holders and authorities has improved. China's political leaders attribute importance to IP and consider it a means to move towards an innovation-based economy. China recognises that encouraging innovation requires improved protection and enforcement of IP rights as a precondition for economic actors to invest in innovative technology sectors. The Sino-Swiss Free Trade Agreement (FTA) was the first ever FTA where China willingly included substantive IP provisions beyond the WTO minimum standard.

Developing an R&D-based and IP-intensive industry in China won't happen overnight. In their short to mid-term strategy on IP, the Chinese authorities will have to find the right balance between competing interests.

### In what ways has China improved IP protection in recent years?

China's accession to the WTO and its Agreement on Trade-Related Aspects of Intellectual Property Rights in 2001 constituted a paradigm shift with regard to modernization of its IP legislation. Since then, China has constantly been updating its IP legislation. 2013's revised Trademark Law contains a number of improvements that have the potential to prevent



瑞士联邦知识产权研究所 (IPI) 是瑞士联邦政府的所有有关专利和商标保护, 原产地保护, 设计保护和版权说明的权威机构。IPI 还负责准备上述领域的所有立法工作, 并在国际组织和其他国家代表瑞士采取行动。

《桥》杂志采访了 IPI 副总监暨瑞中双边对话代表团团长 Felix Addor, 谈及了有关知识产权保护的方方面面。

作者: **Mark Andrews**

### 请中国目前在知识产权保护这方面怎么样了?

相对于其他在发展中面临着巨变的国家, 中国拥有相对现代的知识产权保护法律法规。虽然中国在与知识产权人与机构的合作层面有所提升, 但在法律执行层面仍面临着巨大的挑战。中国的政治领袖看重知识产权保护, 并认为这是建设创新型经济体的重要一步。中国当局认识到要提高创新创造性的先决条件是要提升对知识产权的保护和相关的执法力度。在《中瑞贸易协定》中,

bad faith registrations. Currently the Patent Law is undergoing its fourth revision and promises to increase damages for patent infringements. This year the China Food and Drug Administration (CFDA) proposed comprehensive reform of the regulatory environment, which may result in some improvements regarding the protection of test data for pharmaceutical products.

With respect to the enforcement of IP rights, the establishment of specialized IP courts in Beijing, Shanghai and Guangzhou also represent an important step forward.

### What are the key remaining problem areas and what action does the Institute believe China needs to take to address them?

Enforcement of IP rights remains the most important area requiring significant effort. Consistency of judgments and the expertise of judges vary considerably between the various provinces as well as the competent authorities. The establishment of three specialized IP courts is a first step. Increasing the number of judges, and specialised courts, along with creating an appellate court specialised in IP is also needed. Tackling the challenges of enforcing IP rights also implies strengthening the overall coherence within and between the administrative, civil and criminal enforcement systems, as well as strengthening the expertise and independence of authorities in charge of implementation.

With trademarks, bad faith registrations remain a big concern. A solution could be to render a more flexible system of registration for subclasses. Broadening the scope of well-known trademark protection and facilitating the grant of such a status are also important for potential investors in China.

Although we see steadily growing numbers of patents their quality remains a concern. Issues also arise around IP ownership for technological improvements. Here, change in the regulations for technology import and export would benefit China in the long run for it to become an attractive market for local innovation.

### What are the implications of the revised 'Swissness' law in the Chinese market and for Swiss companies operating here?

The new 'Swissness' legislation aims at better protecting indications that refer to the Swiss origin of goods or services.

Chinese trademark law prohibits registration of signs containing a country name or flag, except if the state concerned agrees. However, registration of the same sign in Switzerland is deemed as an agreement by China. Consequently, if Swiss companies want to register their trademark as containing 'Swissness' elements a previous registration in Switzerland facilitates registration in China, provided that companies respect the Swissness legislation.

To fight abuse of 'Swissness' in Chinese trademark registrations, the IPI has monitored registry since 2010. To date, IPI has lodged 369 oppositions, and have so far won 94 and lost 23 cases. Systematic monitoring has therefore proven to be a useful way of combating abusive registrations. The IPI closely cooperates with trade associations to share information on problematic cases as well as to coordinate filing oppositions.

### Can you outline IPI's involvement with Chinese raids on counterfeiters and how effective they are?

The local Administrations for Industry and Commerce (AICs) can act against misleading use of signs and designations referring to Switzerland.

In 2016 we ran a first test case in cooperation with the Chongqing AIC.

中方首次同意在 WTO 协议规定的最低标准外添加关于知识产权的相关保护条例。

在中国发展起以研发为基础、重视知识产权保护的工业不可能一蹴而就。对于在中短期发展战略中涉及知识产权的部分，中方仍需要在各方利益中寻找一个合适的平衡点。

### 中国最近几年在知识产权保护方面有哪些提高？

中国加入 WTO 之际，于 2001 年颁布的与贸易有关的知识产权协议标志着其知识产权立法现代化。此后，中国不断更新对知识产权的立法。2013 年修订的“商标法”包含了一些针对恶意注册的改进措施。目前“专利法”正在进行第四次修改，并承诺增加专利侵权的损害赔偿。今年中国食品药品监督管理局（CFDA）提出对监管环境进行全面改革，对药品检测数据的保护有所改进。在知识产权执法方面，在北京、上海、广州设立专门的知识产权法院也标志着一个重要的进步。

### 贵机构认为中国在知识产权保护领域最亟待解决的问题是什么？

如何保证知识产权保护的落实是最重要的、需尽全力去保障落实的一个方面。各省各主管部门之间判决处罚的内容和法官的专业程度在不同的省份有非常大的区别，建立三个专门的知识产权法庭是第一步。还需要增加法官人数和专门法院的数量，并设立专门受理知识产权案件的上诉法院。迎接知识产权执法的挑战也意味着加强行政，民事和刑事执法体系整体一致性，加强主管执行机构的专门知识和独立性。

恶意注册商标仍然是一个很大的问题。解决方案可能是为子类提供更灵活的注册系统。扩大知名商标保护范围，这对中国潜在投资者也很重要。

虽然我们看到专利数量不断增加，但其质量依然令人担忧。关于技术改进的知识产权所有权也出现问题。在这方面，技术进出口管理规定的变化将有利于中国长期成为吸引当地创新的市场。

### 修订后的知识产权保护法对中国市场和来华经营的瑞士公司有何启示？

新的法案旨在更好地保护来自瑞士的商品或服务。

中华人民共和国商标法禁止注册含有国名或国旗的标志，除非有关国家同意。然而，注册瑞士相关的标志符合瑞中双方的协议。因此，如果瑞士公司希望将其含有瑞士元素的商标在中国注册，只要以前在瑞士注册过的便可在中国注册。

为了打击中国商标注册中滥用“瑞士元素”，IPI 自 2010 年以来一直在监督商标登记。到目前为止，IPI 已经提出了 369 件有争议的案例，迄今已经 94 次胜，23 次败。因此，系统监测被证明是打击滥用注册的有用途径。IPI 与各大贸易协会密切合作，分享有关案件的信息，提出异议并调解。

### 您能否概述 IPI 参与中国对假冒伪劣者的打击行动以及其有效性？

地方工商局可以针对错误使用瑞士标志和暗示等行为采取行动。

This case concerned backpacks, suitcases and wallets, using the Swiss cross and the designation 'Swiss' although they were not Swiss products. As a result, Chongqing AIC withdrew 500 products from the market. The IPI is planning further such measures, in complementarity to action by companies.

### Is there anything that the Institute can do to help a Swiss company whose IP has been infringed in China?

Such companies need themselves to seek remedy within the Chinese justice system. Where there is an apparent discrimination or violation of international obligations, Swiss authorities may, however, raise issues with the Chinese authorities.

Switzerland and China have engaged in a broad bilateral dialogue on all aspects of IP since 2007. Within this context, we regularly organize industry roundtables with participation by authorities competent for IP issues. These events are open to Swiss and Chinese companies and trade associations from all sectors, and are designed to enable them to directly ask questions and present concerns to the responsible authorities.

The IPI works closely with the Swiss embassy and the Consulates General in China, as well as other authorities in Bern such as the State Secretariat for Economic Affairs. Should a Swiss company encounter any issues, it can contact IPI or any of these authorities.

### What is your main advice to Swiss companies to avoid having problems in China?

I cannot emphasize enough how important it is to protect your IP rights in China before even entering the Chinese market. It is also worth exploring whether in addition, industrial property can be protected in China under the copyright system. I also advise companies to keep detailed records of all of their activities, such as sales or advertising. In the case of a conflict, such documentation is needed to prove earlier use.

In the area of trademarks, companies need to be aware of the specificities of the Chinese sub-class system. When referring to a specific class heading in the Nice classification, the mirror description in China will only cover a few sub-classes and not necessarily all of the products or services listed in the Nice classification. An inaccurate or too-narrow description of goods or services risks jeopardizing enforcement. Seeking the advice of a competent Chinese trademark lawyer is indispensable, particularly if a company intends to first register a trademark in Switzerland, and then extend it to China through the Madrid system. Trusted legal advice is in any case a must. IPI's advice cannot replace this.

### What impact has e-commerce had on the IP issue in China?

E-commerce has accelerated the pace of transactions and increased the availability of information, while blurring territorial borders - thereby increasing the risks of IP abuse.

While e-commerce platforms have implemented tools to assist rights holders, fake goods sellers use techniques to circumvent them and often hop from one platform to another when there is a crackdown. This makes intervention by rights holders complex and labour intensive. We recently met with Alibaba to discuss how monitoring tools and procedures for take-downs can be streamlined and made more user-friendly.

Rapid technological developments represent a challenge for regulation by state authorities. From my point of view, the issue of the liability of platforms is key. The existing legal framework in China already contains some norms regarding liabilities of platforms. I hope that their scope

2016年，我们与重庆工商局合作开展了第一个尝试性的联合打击行动。这个案例涉及在背包、手提箱和钱包等不是瑞士制造的产品上面滥用瑞士十字架和“瑞士”字样。结果重庆工商局从市场上清除了500种产品。IPI正在进一步规划这些措施和行动。

### 如果瑞士公司在中国受到侵权，IPI会如何提供帮助？

这些公司需要在中国司法制度中寻求补救。但如果存在明显的歧视或违反国际责任，瑞士当局可能会出面向中国当局提出质询。

自2007年以来，瑞士和中国就知识产权各方面进行了广泛的双边对话。在这个大背景下，我们定期组织有关知识产权问题的机构参与行业圆桌会议。这些活动向瑞士和中国各公司以及所有行业的行业协会开放，旨在让他们直接向当局提出问题和忧虑。

IPI与瑞士大使馆和驻中国总领事馆以及伯尔尼省的其他当局密切合作，例如国家经济事务秘书处。如果瑞士公司遇到任何问题，可以联系IPI或任何上述权力机构。

### 瑞士企业要想避免在中国遇上麻烦的话，您的建议是什么？

我认为对瑞士企业来说，在中国重视保护自身的知识产权是极其重要的，即使是在进入中国市场前也一样。另外值得一试的是，在中国的版权制度下，是否可以争取到更多的权利。我也建议公司保留所有活动的详细记录，如销售或广告。在发生冲突的情况下，这些文档记录需被提供来证明以前的使用情况。

在商标使用方面，企业需要了解中国商标分类制度的特点。当提到在Nice TM分类中的特定类别的商品时，中国的镜像描述将仅涵盖几个子类，而不一定是Nice TM中列出的所有产品或服务。货物或服务的不准确或过狭义的描述可能会危及对打擦边球使用商标的情况执行判决。寻求中国商标法专业律师的意见是不可或缺的，特别是如果一家公司打算首先在瑞士注册商标，然后通过马德里体系扩展到中国。

### 电子商务对中国的知识产权问题有什么影响？

电子商务加速了交易的步伐，增加了信息的可用性，同时模糊了领域边界，从而增加了知识产权滥用的风险。

虽然电子商务平台已经实施了帮助知识产权持有者的维权工具，但假冒商品卖家采用技术来规避这些工具，并且经常在受到打压处罚时从一个电商平台之间跳跃到另一个电商平台。这使维权执法干预愈加困难和耗费人力物力。我们最近会见了阿里巴巴集团，讨论了针对该问题应该采取何种监控工具、过程应如何简化，并且如何让用户体验更加友好。

技术进步快速发展是对国家和相关机构（建立与之匹配的规范）的挑战。我认为，电商平台的尽责是解决问题的关键。中国现有的法律框架已经包含了有关平台的责任。我希望中国正在起草的“电子商务法”中明确和全面地阐明其职责范围和相关的违法监控问题。○