

# Entering the Dragon - Intellectual Property Rights in China

By Blair Hesp

'Man Bites Dog' was how one American journalist described the first major patent infringement action taken by a Chinese company against an American company. With a population of over 1 billion people China is potentially the single biggest marketplace in the world, but it is also regarded by many as the wild wild west of intellectual property (IP).

One of the biggest, and most publicized, concerns about intellectual property in China is the inability to enforce intellectual property rights and the lack of real deterrents when it comes to penalties. Indeed many companies would consider fines of \$US625-37,500 (maximum \$US62,500) as being a drop in the bucket when compared to the product development costs and the potential returns in the Chinese market alone. Although, it should be noted that current draft changes to Chinese patent legislation intend to raise the levels of fines to up to three-times the profits made by infringers. The resulting general perception when it comes to IP in China is "Why bother, my invention will be copied within seconds of arriving on the market and there is no meaningful enforcement of IP rights in China." While in the past this could be considered a valid point of view, it is worthwhile taking an in-depth look at the history of IP protection in China and the forces driving the current Chinese crackdown on IP infringement.

Firstly, it is not well known that the Chinese patent office only came into existence in 1984. Compare this with the Statute of Monopolies of 1623 of Great Britain (which is still referred to in the current New Zealand Patents Act 1953), and you begin to gain an understanding that intellectual property is a rather new concept to the Chinese. In addition, all inventions and ideas developed by an entity in a communist state were considered to belong to the country and were to be used to the benefit of all citizens of the state. Under this philosophy, private intellectual property rights and protection were not too long ago considered to be a truly foreign concept to the Chinese.

However, with accession to the World Trade Organisation (WTO) in 2001 and a rapidly developing economy the Chinese are awakening to the economic reality that meaningful intellectual property protection and enforcement is essential for the growth and development of China. While there may be a perception that foreign institutions are bullying China into taking this line, Chinese companies themselves are coming under the threat of counterfeiters in their own country destroying their competitive advantage and stifling growth.

Intellectual property infringement and enforcement issues are something that will be weighed up by any chemist looking to gain protection for a new compound internationally, and many will ask "Do you bother with China?" The answer is "yes". Firstly, the current state of intellectual property in China in some respects still reflects the

past, and will not truly reflect the future. For example, patents covering pharmaceutically active compounds were not patentable in China until 1992. Subsequently, many of the well known drugs developed in the 70's and 80's were made generically in China because they were never patented there. At the same time, fears of a lack of enforcement resulted in many companies choosing not to file patents in China, and this impression has certainly not been helped by the recent events surrounding the granting, revocation and reinstatement of Pfizer's Viagra™ patent in China.

Secondly, a patent lasts for 20 years. Twenty years is a long time, and if we look back to 1986 the Chinese patent office had only been open for business for two years. As China takes further measures to align with international standards it is most likely that over the next 20 years substantially more effective IP protection will be available in China. Therefore, the consequences of not obtaining IP protection in China now will most likely be amplified in the future.

Thirdly, many big pharmaceutical companies are setting up their own manufacturing capability in China to tackle this market. This is seen by many as an endorsement of the Chinese market and intellectual property regimes that are in place.

With a burgeoning middle class and impressive growth prospects, the Chinese market has become too big to ignore when it comes to IP protection, and likewise China's IP enforcement issues have become too significant for the Chinese government to ignore. Accordingly, positive developments are occurring in the Chinese IP environment, and it would be prudent for any inventor with an eye to the future to secure IP protection in China.

A reminder: if you have any queries regarding patents, or indeed any form of intellectual property, please direct them to:

Patent Proze  
Baldwins  
PO Box 852, Wellington  
Email: [email@baldwins.com](mailto:email@baldwins.com)



*Blair Hesp of Baldwins specialises in chemistry and biotechnology patents. Blair joined Baldwins in 2006. He has a PhD in pharmacology from the University of Otago as well as a NZDipBus with a management focus. Blair is currently studying towards a law degree and registration as a patent attorney.*