

The State Council Sets up the IR Tasks for 2013

What China will do against IPR infringement and the manufacture and distribution of Fake and Shoddy Goods

“Campaigns”, which sometimes are referred to with specific names, are a regular feature of China’s way of enforcing the law. Usually, the notice announcing the launch of a campaign states the date when it will start and the date when it will terminate. It has been suggested in the past that China could abandon such method of “fixed time campaigns” because, indirectly, it sent a message to the counterfeiters that enforcement between campaigns might be less effective and that they could enjoy some sort of a break.

The last campaign started in October 2010 and was due to terminate in March 2011. However, it was prolonged once for 3 months, until June 2011. Its results were analysed in the form of statistics showing the large number of cases handles and persons prosecuted and punished. It was said by some stakeholders that, afterwards, counterfeiter’s activities resumed “with a vengeance”...

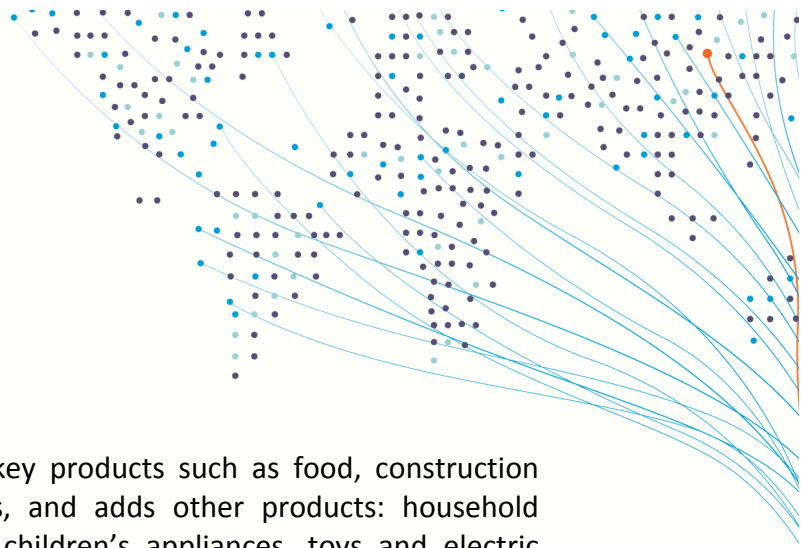
Besides the abovementioned “campaigns”, the State Council has been publishing, since 2011, on a yearly basis, Opinions or Notices, explaining what are the tasks of the enforcement agencies in their efforts to crack down on IPR violations. The last one is dated May 17, 2013, and is called the “2013 major Tasks for the Nationwide Crackdown on IPR infringements and the Manufacture and Distribution of Fake and Shoddy Goods”..

The content is quite similar to those of 2011 and 2012. There seems, however, to be some new ideas, in particular to the collection of evidence by the enforcement agencies (see part 4 below).

The notice is composed of five parts : (1) fake and shoddy goods (2) IPR infringement, (3) criminal cases, (4) “*promotion of a long-term effective mechanism*”, and (5) “*strengthening the fundamental work*”.

(1) Fake and shoddy goods

The first two sub-paragraphs are focused on agricultural products and products for human consumption. The notice also refers to the “sword” campaign, currently run by the Administration for Quality Supervision and Inspection and



Quarantine (AQSIQ), which concerns key products such as food, construction material and automobile components, and adds other products: household electrical appliances, mobile phones, children's appliances, toys and electric tools.

A special mention to the action of importing and exporting (especially to Africa), through postal and courier services, of substandard products, on the act of forging fake certificates of Inspection and Quarantine and on online activities (construction of a data base, of online sellers, checking the real-name registration of sellers etc..)

(2) IPR infringements

For trademarks, the Notice makes a special mention in favour of well-known trademarks and foreign trademarks, and proposes a few new approaches, such as joint actions of "screening" and "trial in advance" (no explanation is given).

For copyright, the Notice refers to the "Sword Net" campaign jointly launched by the National Copyright Administration, the Ministry of Public Security and the Ministry of Industry and Information Technology, which shall be continued. A paragraph concerns the need to have all administrations and SOES use exclusively genuine copyrighted softwares.

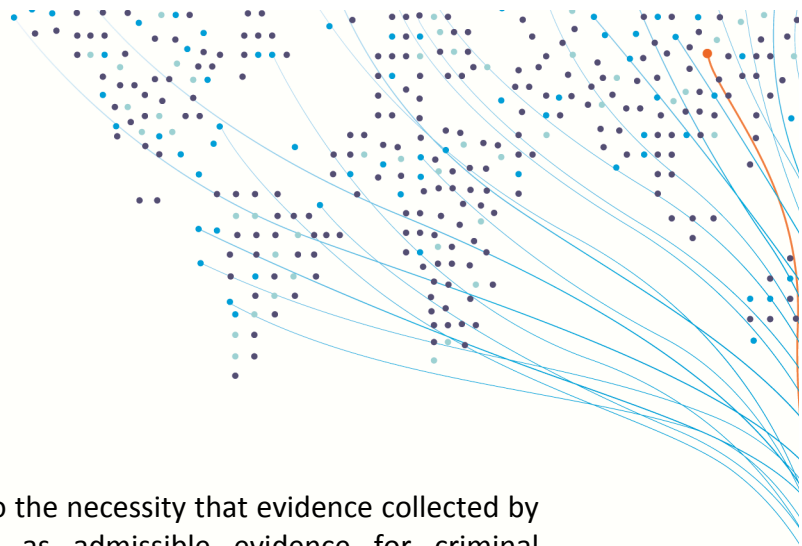
Regarding patents, the focus is on products of interest for the daily life of people, "major programmes" and other matters involving foreign elements.

(3) Criminal procedures

The chapter states, in general terms, that the current work (investigations, prosecutions etc.) should be strengthened, with special focus on criminal activities "harming innovative development, endangering the domestic demand, employment, people's lives and health, food security, and also an interesting reference to the need to investigate and prosecute "umbrellas" provided by officials in favour of counterfeiters.

(4) Long term effective mechanism

The tasks include the work on the various law revisions : "Trademark Law" (with reference to the Implementing Rules, to be also revised), "Copyright Law", "Patent Law", "Seed law", "Food Safety Law", and "Anti-Unfair Competition Law".



Of particular interest is the reference to the necessity that evidence collected by the administration should be listed as admissible evidence for criminal prosecution and identification process in infringing and counterfeiting cases. The Notice also refers to “exploration of the establishment of result-sharing mechanism” and “promotion of the incubation technological outcomes”, without details or explanation.

In another paragraph concerning the necessary collaboration between administrative and criminal enforcement agencies, the Notice lists the various ways in which administrations and police should cooperate : by exchanging information about the cases, statistics, clues. Here, the Notice makes comments about the “evidence conversion”¹, the possibility to transfer cases online, the “online opening” and supervision of cases and information sharing platform.

The Notice insists on the necessity to evaluate the “overall crackdown performance”, which should include a “special supervision campaign on case transfer and processing”.

Among the tasks for the year 2013, the Notice lists the promulgation of regulations on the disclosure (to the public) of infringement cases by the administrative authorities, and announcing that a full inspection of such disclosure shall be made by the end of 2013.

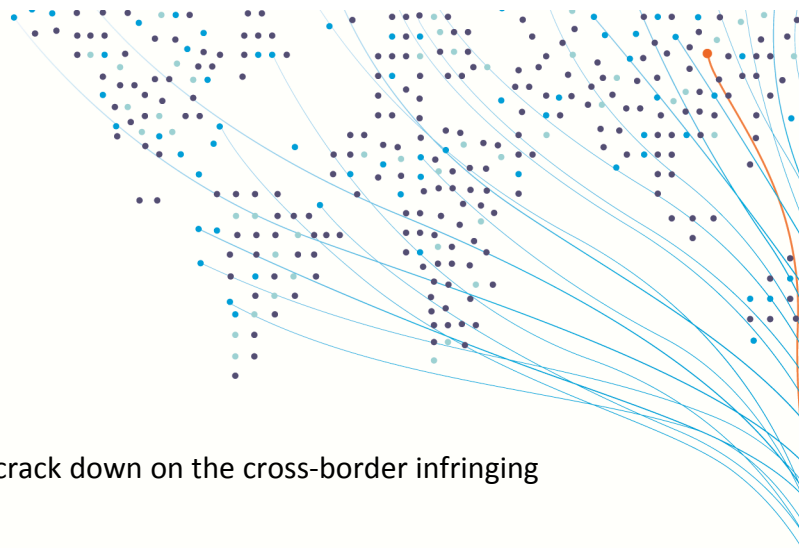
The Notice also provides for the creation of a “credibility system”, with “social sharing of quality credibility information”, as well as the releasing of blacklists.

(5) Strengthening fundamental work

In a rather straightforward way, the Notice stresses the need to “shape public opinion” and “create a positive public opinion”, in order to draw “high international attention”, through communications programmes such as “IPR Week Programme” and the release of “IPR Protection White Paper”.

Finally, the Notice underlines the importance of promoting international cooperation, with developed countries like US, Japan and Europe, as well as

¹ This concept of “Evidence conversion”, which might mean: mutual recognition from administrative to judicial and vice versa is not new. It was already in the 2012 Notice of the State Council.



nations of emerging markets, so as to “crack down on the cross-border infringing and counterfeiting criminal actions”.

Comments :

Amid the usual style of this kind of announcement, it is possible to identify areas of special interest, where either (i) more **research** and progress could be made in the directions mentioned, or (ii) that could serve as a good argument in a **debate** currently pending in China about whether an **OEM** can be considered as an infringer.

Research

(1) The “**Evidence Conversion**” concept : to the extent that this term does refer to the possibility for the Judicial Authorities (civil, criminal, including the Prosecutor and the Police) to recognise as valid evidence collected by the Administrative enforcement agencies (and vice versa) it remains necessary to create a unified system for the collection of evidence of an infringement act, that would make it automatically admissible before any enforcement authority, be it administrative, judicial or criminal. This seems to be what the Notices of 2011 and 2012 are describing, but without going as far as explaining how to do it.

(2) In the “**appraisal system**”, to measure the performance of the enforcement agencies, it would be extremely useful to include basic information as to what products, what quantities (have been seized) in each case, and more importantly, what penalty (fine, damages, prison etc;..) have been imposed on the infringer. This would allow obtaining a real vision of the level of deterrence achieved by the enforcement actions.

OEM :

It appears that the need for international cooperation to crack down on acts of import *and* export (of fake or counterfeit goods), implies that the arguments put forward by those who consider that exporting infringing goods (the OEM theory) are not committing an infringement in China and should not be sued, is not a valid argument.

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20 June 2013