

Time to take the gloves off

Rather than shy away from the courts, foreign firms should be proactive in protecting their IP

Recently Netac, a Shenzhen-based manufacturer of computer flash memory products, has taken action in a US federal court against an American competitor for patent infringement. This is an interesting turn of events given that it is usually foreign investors in China screaming about IPR infringement.

Many China experts and lawyers believe that we will see a spate of Chinese suits in US, European and even Australian courts as some Chinese companies see legal action as a good way to frustrate competitors and simultaneously raise their own profiles in both foreign and local markets.

Sue someone and the media will report it – it's a Barnum & Bailey approach to public relations.

However, while Chinese firms going global have started to assert their rights more aggressively in foreign courts, foreign companies operating in China still err towards a softly-softly approach for fear of offending the authorities and being locked out of the world's fastest growing market.

But it is high time foreign companies took off the gloves and came out swinging.

In China, foreign companies have numerous reasons for avoiding the courts, including concerns about the lack of transparency in the Chinese legal system and fear of raising the ire of government officials. The concern is that too often the rule of law is held subservient to China's culture of personal connections and relationships.

Glorious failures

There is a long list of foreign companies that have lost or withdrawn what legal experts have considered to be strong IPR cases, the likes of Toyota and GM among them. These are believed to be just the tip of the iceberg – only known because of their high profile names or because of the valiant fight they put up.

While these concerns are not without foundation matters are slowly improving. China is migrating to a society based on institutional relationships rather than personal connections and the government's new focus on innovation and creativity suggests a shift in attitude.

Indeed, Premier Wen Jiabao has made a number of encouraging statements relating to IPR, acknowledging past deficiencies and flagging the importance of change.

If, as Wen said in September, "China's IPR protection effort will carry the full force of steel, and

it will definitely not be something that is soft as bean curd," surely it is time for foreign companies to take stronger action to protect their interests.

More significant than the rhetoric though is the results. Earlier this year Starbucks was able to win a high profile case against a Shanghai coffee chain using a similar Chinese name and a very similar logo. Even though the case was heard in Shanghai, the court ruled in favor of Starbucks, saying it had a right to its Chinese name and to the design of its logo.

But this case aside, personal connections and local politics still do too often stand in the way of justice and due process, forcing foreign companies to find ways to skirt *guanxi* (relationships) and obtain some transparency in legal proceedings.

Neutral territory

One way is to make sure a law suit is brought in a legal jurisdiction outside the regional base of the Chinese company. Taking a company to court in its home city is not a wise move in China; getting the case heard in Beijing or Shanghai is often better. Many legal firms, both foreign and local, are adept at ensuring cases are heard in neutral jurisdictions.

Another tactic is to use the media. Historically, foreign companies taking legal action in China have been reticent to engage the local media as they believe, quite rightly, that it will likely take the side of the local company being sued, irrespective of the merits of the case.

The way around that is to simultaneously engage the China-based foreign media in order to generate international news coverage.

This means it is possible to obtain at least some balanced coverage in the domestic press as well.

But more importantly, overseas media coverage will be reported back to Beijing via China's global network of embassies, consulates and internal news reporting organs.

For example, Xinhua, apart from running its news wire service, also prepares classified briefing papers and cables for senior government officials.

In short, there is an alternative for foreign companies to surrendering their hard-earned innovations to the pirates. Foreign companies can take a stand and obtain legal redress provided they take a strategic approach.

As Sun Tzu reminds us: "Those skilled in war bring the enemy to the field of battle and are not brought there by him". ♦

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