

Which way to go? The pros and cons of the two-track System

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In China's patent system, there are two available routes for enforcing a patent. This is the so-called two-track system in which a patent owner, when encountering infringement of its patent, can opt to file a complaint with a local government body responsible for patent administration matters in the area (usually named a local intellectual property office). Otherwise, it can file a lawsuit with a court of justice.

These two options are commonly known as administrative route and judicial route, respectively. With the judicial route, remedies such as an injunction and damages are available to the infringed party, while with the administrative route the relevant government body can mediate on, but not directly grant, damages to the infringed party. However, injunctions can also be ordered.

This system has been established since April 1, 1985, when the Chinese patent law came into force. In recent years, however, there have been lively debates within the Chinese IP community on the pros and cons of the two routes. The focus of these discussions is whether the administrative route or judicial route should play a dominant role in patent enforcement.

Those standing on the administrative side assert that the administrative route has the advantages of promptness and low cost and therefore better meets the needs of many patent owners for efficient, economical enforcement, compared to the judicial route.

Those on the judicial side, however, believe that because a patent right is private, a dispute over patent infringement is civil in nature and should be resolved by courts of justice following codified legal procedure, instead of administrative bodies. This is the practice of most countries in the world with a patent system.

During the annual assembly of China's National People's Congress in early March 2016, Tao Kaiyuan, vice president of China's Supreme People's Court, made explicit remarks on supporting the idea of giving the dominant role to the judicial route rather than the administrative route. According to her, optimum results will be returned by using civil legal actions as major channels for patent protection, in order to overcome the problems existing in the current system. She even proposed that all disputes over patent infringement be handled through the judicial channel and never go to an administrative body.

Considering that Tao is the chief judge in the Supreme Court responsible for overseeing IP trials, it is believed that her remarks represent the mainstream views of China's judicial circle.

Patent law changes

The background of Tao's remarks is that China is in the process of amending its patent law for the fourth time and a draft amendment has been prepared by the State Intellectual Property Office (SIPO), China's top patent administration body, and the State Council has put the draft on its official website for public comments.

In its draft amendment, SIPO has proposed to strengthen the administrative route by, for example, empowering the local government that is handling infringement cases to actively collect evidence of infringement. This proposal, according to the SIPO, is in response to complaints it has received from industries about difficulties encountered when trying to enforce patents through courts, such as problems with collecting evidence, lengthy legal proceedings and high costs. These difficulties could be alleviated if patent owners choose the administrative route.

The draft has received criticism from IP practitioners as well as judges of the courts. They believe that, after nearly 30 years of practice, it is now time to get away from the administrative route, which violates basic legal principles. However, SIPO is obviously favouring the other route.

The draft amendment has yet to be submitted to the Standing Committee of the National People's Congress (SCNPC), China's top legislative body, for its review, before being passed into formal law. It is expected that further debate will go on during the SCNPC's review process, which is expected to happen in a year or two. For now, it is hard to predict who will win the debate.

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