

I. Introduction

Intellectual property is an important component of California's economy as the state is an international leader in many industries including: film, recording, fashion, pharmaceutical, and high technology. California's inventors received a quarter of all domestic patents, more than the next four innovative states combined.¹ California's economy loses \$34 billion a year due to piracy and counterfeiting.² Therefore, it is in the economy's interest to fight both these transnational issues. The biggest news items regarding intellectual property rights (IPR) are Asia's infringements, legislation, and international treaties.

II. IPR in Asia

China has had persistent problems in IPR despite promises to end violations and infringements. Beijing has made many bilateral commitments over the years but the problems still persist. In fact, the value of unlicensed software doubled from \$3.6 billion in 2004 to \$7.6 billion in 2009.³ During May 2011's Strategic Economic Dialogue between the U.S. and China the latter made promises on IPR improvement but it is questionable whether those will translate into real action.

One source of problems of IPR violations in China is the country's policy of indigenous innovation. The official goal of this policy is to encourage domestic innovation through co-innovation and re-innovation based on the assimilation of imported technologies. Simply, if firms want to access the government procurement market the technology has to come from domestic firms. Its purpose was to favor home-grown firms over foreign ones. However, the policy is intent on extracting foreign technology as the price of doing business in China. Doing

¹ California Chamber of Commerce. (2009, September 15). CalChamber Urges Support of Funding to Enforce Federal Anti-Counterfeiting Act

² Ibid

³ Voice of America. (2011, May 8). Piracy of computer software in China costs U.S. businesses billions of dollars annually

business in China required the cost of surrendering valuable technical know-how, trade secrets, and technology to Chinese domestic firms. Many businesses see China's policy as a blueprint for technology theft.

To have successful diplomacy with China on this issue the U.S. should understand where the Chinese government is coming from on this. Beijing's intent for indigenous innovation is to improve its fledgling industries. Chinese manufacturers still have to pay a large royalty fee to foreign firms that patent components of units.⁴ The country still remains relatively poor and cannot compete against global leaders. However, this policy cannot succeed in the long-run. This is not the atmosphere of investment that will make a country draw investors. Eventually, it will drive away research firms and lose its profitability. The U.S.' advantage in negotiating with China on this policy is that the latter is approaching the "issue of technological leadership from a position of weakness, not strength."⁵ Like previous statements, China has promised to remove this policy but what is important is whether or how Beijing implements its decision.

III. Legislation

A major piece of patent reform legislation in Congress is the America Invents Act. The new system would move the U.S. patent system away from first-to-invent to first-to-file. This system will synchronize the U.S. with most other patent offices around the world. The House and Senate passed different versions of the bill which need to be reconciled before a final vote is taken. The two chambers differ in two main areas. The first is inter partes review. Both allow third parties to challenge patents after they have been granted through a new inter partes review. However, the House version retains the current "substantial new question of patentability" threshold standard for starting reviews. On the other side, the Senate version forbids the United

⁴ Levy, Dr. Philip. (2011, March 9). China's Indigenous Innovation Policy and U.S. Interests. Testimony given at House Committee on Foreign Affairs. American Enterprise Institute

⁵ Ibid

States Patent and Trademark Office director from allowing an inter partes review unless it is determines there is a “reasonable likelihood that the petitioner would prevail with respect to at least one of the claims challenged in the petition.”⁶ The second difference is the opening up of prior usage rights. The Senate version maintains the current law which limits prior usage rights to business methods. However, the House wants to expand prior usage to all patents. Critics of the House version comes from small businesses in life sciences and other fields who are more likely to keep trade secrets rather than risk obtaining a patent lest they find themselves unable to fight against a potential infringer.

Most likely the bill will become law and when it does it will head to the Supreme Court. Opponents of bill point to history and other court opinions that go against the bill’s patent filing system change. For example, citing Chief Justice Roberts’ decision in a June 6, 2011 patent case, “since 1790 the patent law has operated on the premise that rights in an invention belong to the inventor”⁷ renders the first-to-file clause illegal. Also, opponents warn that Chinese hackers could steal R&D information and become the first to file. Lastly, small business advocates argue the bill would harm independent inventors. The first-to-invent provision allows inventors to disclose secrets to potential investors without fear of losing potential patent rights. Thus, inventors fear that intellectual property may be stolen from them and would lack the ability to fight the issue in court.

IV. International Treaties

The Anti-Counterfeiting Trade Agreement (ACTA) is a multilateral agreement for the purpose of enforcing global IPR standards. Negotiations are still on-going and countries may join voluntarily. The current participants are Australia, Canada, EU, Japan, Mexico, Morocco,

⁶ Office of Representative Lamar Smith. (2011, June 21) HR 1249

⁷ Rios, Sandy. (2011, June 6). The Patent Truth. The Hill

New Zealand, South Korea, Singapore, Switzerland, and the U.S. The agreement creates a new international legal framework having its own governing body outside the World Trade Organization, World Intellectual Property Organization, and the United Nations. The scope of the agreement includes counterfeit goods, generic medicines and copyright infringement on the Internet. Its mission is to deepen international cooperation and to promote strong enforcement practices. Unlike other agreements that raise IPR standards, ACTA increases enforcement and creates procedures for stopping piracy and counterfeiting. ACTA focuses on focus on commercially-oriented counterfeiting and piracy. Once an agreement is reached it will be up to each participant to vote upon it. Unfortunately, the Mexican Senate voted down the agreement. The ACTA is awaiting final vote from the other participants' domestic processes.

V. Conclusion

Intellectual property underpins California's economic growth and therefore it is important to ensure IPR is protected globally. IPR is not merely a domestic issue but a transnational one. One of the largest concentrations of IPR violations remain in China and intensive multilateral work will be required to get it to practice global IPR standards. The America Invents Act in Congress will eventually need to be changed as it may conflict with Supreme Court rulings. Congress should also consult more with small businesses that will be affected by the bill. ACTA is a good idea but will only be more effective if more countries join. Countries that have strong adherence to IPR are less likely to violate it. However, countries such as India and China, which are major sources of copyright infringements and piracy, will reject such proposals. Different multilateral measures need to be taken to prevent continual violations on IPR around the world.