



Trading places

Mayer Brown JSM's **Kenny Wong** describes Hong Kong's efforts to promote IP trading in an open, transparent and reliable platform

Intellectual property rights are now well recognised as the most important assets of many of the world's largest and most powerful companies. According to a study by Ocean Tomo LLC, the implied intangible asset value of the Standard & Poor 500 in 2010 reached 80% compared to less than 20% in 1975¹, a significant portion of which is represented by patented technology. Besides patents, there is mounting evidence of the importance of the US copyright industries' contribution to US jobs, wages, economic growth and international competitiveness. In 2010, sales of US copyright products in overseas markets amounted to US\$134bn, far more than sectors such as aircraft, autos and agriculture². In addition to patents and copyright, many studies reveal the substantial value of trademarks. In the 2011 Best Global Brands report by Interbrand, Coca Cola has remained the top brand for the past 10 years and the mark alone is valued over US\$70bn.

In 2011, IP-intensive industries in the US accounted for approximately 74% of US total exports rising to US\$1 trillion³. No wonder intellectual property now often determines the market dominance, sustainability and continuing profitability of a business.

The Chinese government also realises the power of intellectual property as an essential strategic resource for sustainable development and has announced its plans to transform China from a manufacturing-based economy into a knowledge-based economy.

Through the National Intellectual Property Strategy formulated in June 2008, China aims to become a country with a high level of creation, utilisation, protection, and administration of IP rights by 2020.

As an IP forerunner in the region, Hong Kong does not lag behind this transformation. The Hong Kong government has long recognised the cultural and creative industries and the innovation and technology industry to be two of the six pillar industries where Hong Kong enjoys clear advantages for further development⁴. Since its establishment, the Innovation & Technology Fund in Hong Kong has supported over 2,500 projects with total funding of over US\$750m. In 2011, the operation of the fund was improved to enhance support for R&D projects with commercialisation potential.

While efforts are made and initiatives introduced, many agree that the challenge is not about creation and innovation, but making the new ideas industrially and commercially viable. The question is how to provide solutions which the market needs and to make them available. For those enterprises, particularly small and medium-sized enterprises, which may lack the resources to support their own R&D or to find partners or investors to do so, but wish to transform themselves and to enhance their competitiveness through IP. How and where can they gain knowledge or access to suitable IP, which may be available for sale or licensing.

IP trading in the form of the buying, selling and licensing of IP rights is not new. Yet, due to the high degree of customisation, complexity and diversity of IP rights, these are often carried out in one-to-one transactions with tailor-made terms. To commercialise IP and to accelerate the pace of transformation to a knowledge-based economy, there is a growing need to have an open, transparent and reliable platform which encourages and permits many-to-many transactions.

Since last year, the Intellectual Property Department of the Hong Kong Government (IPD) has robustly promoted and advocated the idea of enhancing Hong Kong as an IP trading hub for Greater China, if not Asia. While Hong Kong is well positioned, it is not without competition.

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Besides Hong Kong, Singapore, Beijing and Shanghai also expressed interest in becoming the region's centre. Meanwhile, on the Chinese mainland, more than 40 IP exchange centres are said to be providing business-matching and valuation of patents services, although it seems they are only at an early stage.

To become an IP hub, Hong Kong enjoys many advantages. It is one of the innovation and creative leaders in the region and is a services-driven economy. It is the world's largest IPO market by fund-raising size and the largest venture capital centre in Asia, with easy access to equity financing and the potential infrastructure for IP trading. Its strong rule of law, reliable intellectual property regime, simple and low tax system, no foreign exchange control and bilingual, experienced IP professions place it well above any competing Chinese cities. Perhaps the real major competitor is Singapore. Yet, riding on the increasing IP trading activities in Asia, particularly on the Chinese mainland, Hong Kong enjoys a strategic and geographical advantage. In fact, Hong Kong already exported US\$1.1bn in technology to Mainland China in 2010.⁵

Given the passion IPD has demonstrated in IP trading, many in Hong Kong have hoped that the Hong Kong government, and perhaps IPD, would set up and run the IP trading platform. Yet, IPD explains that its role is only to raise various sectors' awareness of the trend of IP trading and how those sectors can play their respective roles in realising the outcomes⁶. Two operations set up by private funding with a view to providing IP trading or IP exchange services have finally emerged. It is not clear at this stage what those services will encompass.

On the one hand, there is a model set up by the Danish Patent and Trademark Office (DPTO) called IP Marketplace. It is an online platform that allows its registered users to offer patents, utility models, trademarks and designs for sale or for licensing; users can also list a technology that they would like to buy or become licensed to use. The platform serves as a “meeting” place for prospective buyers, sellers, licensors and licensees and DPTO can provide ancillary services such as state of the art, clearance and validity searches, intelligence tracking reporting to its users. DPTO also maintains and posts a list of advisors who may assist the parties with due diligence, valuation and legal

services. Yet, DPTO does not assume any responsibility with regard to any information posted on the IP Marketplace. Not surprisingly, all liability as to contents, the accuracy or completeness of any information is disclaimed. The trading remains solely a matter between the owner of the IP right and the buyer or licensee.

On the other hand, a far bolder and perhaps revolutionary approach is undertaken by the Intellectual Property Exchange International Inc (IPXI) in Chicago, which describes itself as the world's first financial exchange that facilitates non-exclusive licensing and trading of intellectual property rights, with market-based pricing and standardised terms. It introduces the concept of an initial offering and subsequent trading in a secondary market of Unit License Rights (ULR) contracts, which allows patent owners to license selected technology in a non-discriminatory manner through standard form licences on publicly disclosed terms. Each ULR contract gives the buyer the right to use a pre-established unit of IP, for example, the right to make and/or sell to an established quantity of products covered by the patents in question. Hence, such ULR contracts transform private licensing of technology into tradable products.

In May this year, IPXI published its rulebook that governs how the exchange will work⁷. This rulebook addresses operational processes such as patent quality vetting, market eligibility, consumption reporting as well as the creation of the selection committee, which is responsible for overseeing the process of evaluating proposed patent offerings for listing on the exchange as ULR contracts in order to give the marketplace confidence in the quality of such patents.

It is reported that IPXI members have grown from six in December 2011 to 27 in May this year. Among them, the founding members commit to list IP on the exchange within 12 months of the signing of the Founding Membership Agreement. IPXI says it has received commitments to list ULR contracts having an aggregate targeted market value in excess of US\$500m, is in the process of evaluating many additional submissions of IP portfolios for ULR offerings and expects to open for business later in the year.

Evidently, everyone awaits with great interest the commencement of ULR trading and the impact it will have on IP trading worldwide. Meanwhile, it is most likely that other IP trading centres will tread more conservatively to provide open trading platforms for prospective IP traders to meet and negotiate their own terms.

Footnotes

1. Ocean Tomo's annual study of intangible asset market value – 2010.
2. International Intellectual Property Alliance, news release, November 2, 2011.
3. see www.uschamber.com/ip.
4. The six industries are cultural and creative industries, medical services, education services, innovation and technology, testing and certification services and environmental industries.
5. HK eyes regional IP trading hub role - Secretary for Commerce & Economic Development Gregory So, February 23, 2012.
6. http://www.ipd.gov.hk/eng/IP_trading.htm.
7. www.ipxi.com/media/newsreleases/Intellectual-Property-Exchange-International-Announces-Exchange-Rules.

Author

Kenny Wong has received over 70 recognitions as one of Hong Kong's leading IP practitioners since 1997 and has served for many years on the IP Committee of the Law Society of Hong Kong. Besides his private practice, he lectures and writes extensively on IP and IT subjects. Last year, he published the second edition of his book *Intellectual Property Law & Practice in Hong Kong*.