

# An evidence-based approach

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Big data have already spread into our life in many ways. We are targeted with all sorts of goods and services based on our modes of consumption, fitness and even the education of our children. In such an environment, it is worth considering how big data can serve IP protection.

Years of experience in IP protection in China tell us that it can be supported by big data in the following ways:

## **Practical guidance**

A database of accumulated cases, established with big data, can provide rights owners with practical guidance in designing strategies and action plans for IP protection. Through analysis we can obtain a great deal of information, including the regional shift in the infringement of a specific industry or brand, the background of the infringers, the level of infringement of a specific brand, and techniques.

We can then understand the way the number of infringements changes over quarters or years and the change in the approach of the infringements. Beside these, rights owners can have their legal rights and interests secured in a dynamic market by calibrating actions on IP protection in a more effective way with the latest analysis of ever-changing information.

## **Internet enforcement**

Big data help to combat infringement online. China is home to some of the most blistering e-commerce ecosystems in the world. Here, the largest-ever e-commerce platforms enjoy impressive growth rates and connect to a gigantic number of consumers. E-commerce steps up the efficiency in trading goods, but it also paves the way for distributing infringing products in cyber market places. Behind the internet's veil, infringers hide their identity from enforcement authorities and rights owners. Even if enforcement works to some extent by notice and takedown actions against infringing listings, offline products and manufacturing facilities remain intact. This is obviously an unacceptable situation for rights owners.

While the internet brings problems from one side, it offers solutions from the other, acting as a double-edged sword. The more transactions of infringing goods on e-commerce platforms, the more traces they leave for enforcers to track. With the availability of such a large sample of transaction data and systematic analysis of cash flows and logistics flows, enforcement

authorities and rights owners can identify the true infringers. They can also connect seemingly unrelated online retailers to a related counterfeiting operation, or offline individuals based thousands of miles away to one online shop.

Such analysis supports authorities and rights owners in digging out the network of infringers, allowing effective and comprehensive crackdowns. If analysed and obtained properly, the transaction data can even be accepted as evidence by the Supreme People's Procuratorate and the courts in the prosecution and hearing of infringement cases. There are quite a few successful precedents in which relevant digital evidence we provided was adopted by courts to support cases.

### **Efficient protection**

It is always challenging to measure how successful an IP protection strategy is. Senior management in business or governmental organisations are always the key factors in understanding whether the money spent on IP protection was used wisely. It is no longer the case that with marketing or branding activities, people can conduct extensive and expensive market surveys or consumer interviews to acquire information concerning consumers' perception and market share. It is impossible to have interviews with infringers to know whether they are 'satisfied' with the actions taken by IP owners.

Big data could provide IP owners with clear measurements on the efficiency of their IP protection strategies. Parties could assess data from IP owners' databases: analysing the rates of repeated offences; comparing ratios among various market sectors; examining the penetration rate among various distribution channels; assessing various infringement risk levels for products or services categories; and even comparing the ratio of infringement of between competitors' IP.

The data would offer a way to measure whether the strategies and the implementations could match the brand strategies designed at the beginning. If the data are positive, they could show what the successful strategic elements are. If they are negative, they could show what improvements or modifications could be made in the next period. After many rounds of reviews and measurements, the strategies could be fine-tuned to reach a more advanced stage.

### **Beyond IP**

Analysis of infringement data, besides protecting IP, can be of service to the overall development of a brand or production techniques. Even if the infringing products are the main problem for brands' reputation, in the market where they are sold they can usually provide useful data, such as customer behaviour and goods perception analysis. They can become a

complementary reference to improve the marketing strategies and techniques for the brand itself. It could even be a chance for businesses to find a new niche market.

For these reasons, various choices will become available for marketing and research and development (R&D) departments to further promote their brands and invigorate R&D. Successful marketing and R&D operations can further develop the IP that we strive to protect.

We must ensure that we exploit big data in a legal and legitimate way, especially when it concerns a large number of consumers engaged in e-commerce transactions. We then have to ensure that it is available only for necessary case dealings, to the exact staff in charge in the administrative and enforcement department, and to representatives assisting with the proceedings on behalf of the rights owner. Any private consumer information should not be disclosed in any way.

Legal and legitimate use and analysis of big data can be used to support rights owners wishing to secure their IP. Let us embrace the era of big data with open arms.

#### **Bio**

Zhang Xu is a founding partner of HongFangLaw. He has been practising IP in China since 1996. He has experience in complicated IP disputes, including administrative and criminal enforcement. He can be contacted at: [xu.zhang@hongfanglaw.com](mailto:xu.zhang@hongfanglaw.com)