



Inside China's IP Market: a Guide

2024

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The Beijing Measure: whether data should be a registered and protected form of intellectual property in China

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Summary

CORE CONTENT OF BEIJING MEASURES

EXPLORING THE CONTROVERSIAL ISSUES OF THE DATA INTELLECTUAL PROPERTY
REGISTRATION SYSTEM OF CURRENT CONCERN THROUGH THE BEIJING MEASURES

On 12 May 2023, the Beijing Municipal Intellectual Property Office issued the 'Beijing Municipality Measures for the Registration and Administration of Data Intellectual Property (Trial) (Draft for Comments)' (the Beijing Measures), which aim to regulate data intellectual property registration behaviour within the administrative jurisdiction of Beijing. Following Shenzhen, the Zhejiang province and the Jiangsu province, Beijing is another region to have enacted data intellectual property registration-related legal documents. The Beijing Measures not only respond to the requirements in the 'Opinions on Constructing a Basic System of Data and Better Utilising Data Factors' (the Twenty Data Policies) issued by the State Council in December 2022, which called for the establishment of a data property rights system and the exploration of new methods for data property rights registration, but also represent Beijing's efforts as a pilot area for national data intellectual property work in exploring the implementation of the data intellectual property registration system.

This article starts with the Beijing Measures, while taking into account local documents such as the 'Shenzhen Interim Measures for the Registration and Administration of Data Intellectual Property' (the Shenzhen Measures), the 'Zhejiang Province Measures for the Registration of Data Intellectual Property (Trial)' (the Zhejiang Measures) and the 'Jiangsu Province Rules for the Registration and Administration of Data Intellectual Property (Trial)' (the Jiangsu Rules). The aim is to further sort out and explore controversial issues in the data intellectual property registration system within the industry that have attracted attention.

CORE CONTENT OF BEIJING MEASURES

The Beijing Measures consist of five chapters, including general provisions, registration content, registration procedures, management and supervision, and supplementary provisions. After sorting out and comparing the data intellectual property registration management measures and rules of Shenzhen, the Zhejiang province and the Jiangsu province, we believe that companies should pay attention to the following points.

COORDINATION AND ADMINISTRATION OF DATA INTELLECTUAL PROPERTY REGISTRATION IN BEIJING

According to Article 4 of the Beijing Measures, the Beijing Intellectual Property Office is the authority responsible for the management of data intellectual property registration, which is essentially the same as in the Zhejiang and Jiangsu provinces. The fact that the management of data intellectual property in Beijing is led by the Intellectual Property Office indicates that Beijing relies on the intellectual property protection system for the management and protection of data property rights. Beijing views data processors as the main applicants for registration, and data products are included in the scope of intellectual property protection as the objects of protection. This is what Hu Wenhui, the Deputy Commissioner of the China National Intellectual Property Administration (CNIPA), introduced at a press conference of the Chinese State Council Information Office: "CNIPA currently regards data processors as the main subjects of protection and regards datasets that have undergone processing according to certain rules and are in an undisclosed state as the objects of protection. Through registration, data processors are granted certain rights." This reflects the data property rights management and protection model promoted by the CNIPA. This model of management and protection is different from the one used in Shenzhen, where the Development and Reform Commission is the main coordinating department and established a registration system for the circulation value of data elements and dividing data property rights into three categories via the classification and confirmation of data rights.

DATA INTELLECTUAL PROPERTY REGISTRATION BELONGS TO REGISTRATION IN TERMS OF OWNERSHIP

The mechanism for protecting data rights and interests by confirming data intellectual property rights through the intellectual property protection system is registration in terms of their ownership.

THE SUBJECT FOR REGISTRATION IS THE DATA HOLDER AND PROCESSOR

Article 2 of the Beijing Measures expand the registration subject to include data holders and processors. Based on the characteristics of data intellectual property protection, the expansion of the registration subject directly leads to the expansion of the scope of data objects included in the registration protection. As a result, more data can be registered and traded, increasing the possibility of registration for confirming rights, as well as circulation and trade.

EMPHASIZING THE COMMERCIAL VALUE OF DATA AND ITS UNDISCLOSED STATUS IN TERMS OF OBJECTS OF REGISTRATION

The data intellectual property registration system is established to encourage data circulation, guide data transactions and maximise and safeguard data assets. Therefore, it is of practical significance to emphasise the commercial value of registered data to guide companies in considering whether to register data with a purpose-oriented approach. In addition, many companies view their undisclosed data as their core competitive resources and invest heavily in collecting, processing and presenting this data, making it an essential data asset with high significance for rights confirmation and registration protection. This point is often confirmed by courts in judicial cases, such as the Weibo v Today's Headlines case. In judicial practice, the courts also tend to grant companies the right to disclose data. Therefore, registering and confirming important data assets in an undisclosed state is beneficial for companies to obtain protection and relief when facing infringement, and also for companies to benefit from data resource circulation.

REQUIREMENTS FOR DATA INTELLECTUAL PROPERTY REGISTRATION

According to Article 9 of the Beijing Measures, data intellectual property registration requires that the data has been certified or notarised and that there is no dispute over ownership. The data registration authority does not provide substantive examination of data ownership confirmation.

DOWNPLAY DATA OWNERSHIP AND EMPHASISE DATA USAGE RIGHTS

The Beijing Measures specify that data holders and processors are the registered objects. Any data holder or user who obtains data usage rights through legal regulations or contract agreements in various links of data circulation has the right to register data intellectual property rights. Based on Article 13, the holder of the data intellectual property registration certificate has the right to process and use the data and gain profits. In addition, Article 15 specifies that data intellectual property rights can be traded, pledged and licensed, and provides a registration and filing system for changes. Moreover, when the applicant unit undergoes mergers, divisions, dissolution or bankruptcy, or when the natural person applicant dies, changes to registration can also be made. This series of measures promotes and safeguards the circulation and use of data as a property right in the market.

EXPLORING THE CONTROVERSIAL ISSUES OF THE DATA INTELLECTUAL PROPERTY REGISTRATION SYSTEM OF CURRENT CONCERN THROUGH THE BEIJING MEASURES

ISSUES RELATED TO THE NATURE OF DATA RIGHTS

There have long been disputes in both theory and judicial practice over the nature of data rights, which related to what kind of legal rights can be utilised to protect data resources. In practice, when data assets are infringed upon, companies usually seek judicial relief by claiming unfair competition (such as in the Weibo Vision Technology v Chuangrui Technology unfair competition case and the Hantao v Baidu unfair competition case), or by treating databases as copyrighted works or trade secrets, and filing lawsuits for copyright infringement (such as in the Hantao v Sohu copyright dispute case and the Quzhou Wanlian v Zhou Huimin trade secret infringement case) or for trade secret infringement (such as in the Quzhou Wanlian v Jinan White Rabbit trade secret infringement case). Precedents have been established where companies have successfully obtained court confirmation using the claim of unfair competition, which has been more widely applied and received greater attention from regulatory authorities. The Anti-unfair Competition Law of the People's Republic of China (Draft Amendment for Comments) released by the State Administration for Market Regulation in November 2022 establishes in Article 18 that the market regulatory department has the power to impose administrative penalties on enterprises that disclose, transfer or use other operators' business data obtained by unfair means, resulting in substantive substitution of related products and services, as a response to this issue.

Judicial relief for data rights focuses on behaviour regulation, and the establishment of data rights is often completed through effective judgments. When exploring pre-emptive defence mechanisms against infringement of data rights outside of the judicial process, the Twenty Data Policies proposed a new approach to data rights identification and property registration. However, the construction of data rights identification and storage registration mechanisms involves issues related to the nature of data rights and the choice of protection models, which has led to ongoing theoretical disputes. These theoretical disputes have resulted in different legislative choices for data rights protection systems, with the main approaches being ownership (property rights) protection, intellectual property protection, creditor protection and new rights protection. This has given rise to two different approaches and directions for constructing data property rights: after the Twenty Data Policies, the National Development and Reform Commission (NDRC) has focused on the new property rights approach, emphasising the rights of all participants in the entire process of data collection, acquisition, processing, use, transaction and application, and classified rights to establish registration systems suitable for each stage of circulation. This approach has led to the establishment of the 'three rights separation' of data resource ownership, data processing and use rights, and data product operation rights, which will be implemented through the January 2023 policy document 'Accelerating the Construction of China's Unique Basic Data System to Promote the Development Dividend of Digital Economy Shared by All People'. The Shenzhen Measures are the initial results of exploring this approach, which focused on two registration objects: data resources and data results. It confirms three types of rights, namely data resource ownership, data processing and use rights, and data product operation rights, and carries out registration for initial registrations, as well as permits, transfers, changes, cancellations, objections, etc, ultimately resulting in the issuance of data resource registration certificates, data resource licensing certificates and data product registration certificates.

The Beijing Measures, Zhejiang Measures and Jiangsu Measures rely on the intellectual property protection approach and apply the intellectual property protection model, which focuses on data processors and registers their rights, bringing data into the scope of intellectual property protection.

ISSUES RELATED TO THE MECHANISM OF EXAMINATION AND REGISTRATION

When registering data property rights, there has been a long-standing controversy over whether the registering agency should conduct substantive examination or examination of forms. Currently, the registration rules in four regions all require the registering agency to conduct formal examination and have an obligation to review the completeness and legality of the application materials. In particular, the Beijing Method refers to the Copyright Law and protects data as a kind of intellectual property. In the field of copyright, voluntary registration is adopted and substantive examination is not conducted. Similarly, data intellectual property registration is also based on formal examination.

However, the choice of registration system depends on the legislative orientation and the purpose of protecting registration rights. Data property registration aims to improve the data disclosure system and promote the flow of data and ensure the security of data transactions. Therefore, when selecting examination standards, both transaction security and efficiency should be considered. At the same time, considering that data products have high technical requirements, whether it is necessary to examine the authenticity of the data, the legality of the source and the compliance of the data content and processing, and whether the examining boundaries of the registering agency will change, still needs to be addressed by relevant laws and regulations. The Shenzhen Method entrusts the obligation of substantive examination to a third-party agency, referring to the 'Provisions of the Supreme People's Court on Several Issues concerning the Trial of Cases by Internet Courts', which requires evidence to be authenticated through designated technical means or evidence preservation platforms. This may indicate a similar trend in the future development of substantive examination of data property rights. In terms of the legality of data sources and the compliance of data content and processing, a legal team may be used to provide examination opinions in conjunction with technical personnel.

ISSUES RELATED TO THE EFFECTIVENESS AND FUNCTION OF DATA PROPERTY RIGHTS REGISTRATION

As mentioned earlier, the Beijing Measures emphasise granting data holders and processors intellectual property certificates similar to those given for traditional forms of intellectual property, while downplaying data ownership and emphasising data usage rights, to protect the interests of data holders and processors in terms of using and profiting from data processing (Article 13). Through data property registration and other measures such as extension and alteration registration, the Beijing Measures also protect the security of transactions and promote the flow and exchange of data. In many articles, the Beijing Measures encourage the development and use of data, promote the flow of data and realise the commercial value of data.

Furthermore, according to the Beijing Measures, data property registration certificates will also be actively used in administrative law enforcement and judicial trials in the future, fully demonstrating their evidentiary value. This is in line with the goal and purpose of the structural separation of data property rights led by the NDRC.

In the article 'Accelerating the Construction of China's Characteristic Data Basic System and Promoting the Sharing of Digital Economic Development Dividends', the NDRC emphasises the importance of building a data property rights registration system to strengthen data usage rights, activate data product operation rights and encourage the development and use of data, promote the orderly circulation of data, guide data transactions and unleash the value of data elements. This is consistent with the goal of the Twenty Data Policies to promote the structural separation and orderly circulation of data property rights as a new type of rights and production factor, and may become the development direction of the future data property rights system.

Currently, the Shenzhen Measures aim to promote the opening and flow of data and the development and utilisation of data. Data property rights registration certificates and licences obtained can be used in data transactions, accounting and other businesses, and in the future, data can also be used as a production factor for enterprise asset accounting and financing mortgages, as well as an important basis for dispute arbitration (Article 6 and Article 8, Clause 6).

In December 2022, Shenzhen city issued intellectual property data registration certificates to the first batch of enterprises that applied for data property rights registration, including Shenzhen Qianhai Data Services Co, Ltd, and Guangdong Kunyu Shuju Technology Co, Ltd. This marks an important step forward in the pilot work of data intellectual property registration, which solves the problem of unclear ownership of data and improves the current situation where enterprise data resources 'cannot be traded' or 'dare not be traded'. Currently, Shenzhen city and Zhejiang province have established data intellectual property registration systems, and more regions will establish similar systems in the future. Through more detailed legislation, they will actively promote the application of intellectual property registration certificates and their use in judicial evidence recognition, allowing data intellectual property certificates to be used in enterprise operations and data market transactions.



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