IP Strategies for EU ‘Cleantech’ SMEs in China

1. Clean technology opportunities in China

China is the fastest growing market for wind and nuclear power generation, and is investing heavily in exploring alternative, renewable means of addressing its immense energy needs. With a large potential cleantech market, and strong government support for the development and adoption of new clean technologies, China presents great opportunities for European cleantech SMEs.

However, as the market becomes increasingly competitive, it becomes even more essential to strategically manage, protect and leverage your IP. Not understanding how IP fits into the overall strategy of your business in China can lead to missed opportunities and significantly weaken competitiveness. In this guide we discuss some useful strategies used by cleantech companies in China to monetise, risk assess, and protect IP. Further information on IP protection in technology transfers can be found in other China IPR SME Helpdesk materials (see the ‘Related Links’ section at the end of this guide).

2. Is bringing technology to China to access the Chinese market worth the IP risk?

China’s large cleantech market potential means that cleantech businesses cannot risk losing a strategic foothold in China by waiting to act. Cleantech businesses that choose to start working with China need to understand that while good execution, effective management, and access to financing is critical to maintaining a competitive advantage, protecting good technology is also equally critical. Although technology transfer can be structured in a way that minimises IP risk, additional preparation and measures directed at the IP environment in China need to be considered by cleantech businesses with China aspirations.

3. What does it mean to have an IP strategy?

The cleantech industry is diverse to the point of being difficult to define, and, not surprisingly, IP strategies will differ markedly for different cleantech businesses. How IP fits into the overall business strategy will depend on whether the business is a start-up or a growth business, and also whether the technology itself is new and untested in the market, or mature and off-patent (technology that is no longer protected by patent). Different businesses will use IP to achieve different business objectives, e.g. maximise revenue-generation by monetising their IP portfolio through licensing, increasing opportunities for partnerships and cross-licensing, or barring new entrants into the market.

For example, a manufacturer of wind turbine components might consider...
focusing efforts and resources towards obtaining patent protection of component designs because infringement by counterfeit components can be easily demonstrated and proven in court. They may then also focus on budgeting sufficiently for enforcement campaigns to actively identify counterfeiters. On the other hand, a cleantech business that has developed a biomass on-site power generation system for livestock farms, and is looking to license the technology to farms across China, may want to obtain patent protection and explore ways to ‘black box’ (i.e. to withhold or keep secret) key parts of the technology. This could be done by supplying specialised equipment or by having a trusted contractor perform the installation because the technology will need to be taught and practiced by the licensee.

A well-articulated and comprehensive IP strategy will help a cleantech business answer questions such as:

- ‘How does IP help my business achieve its goals?’
- ‘To whom can I give certain information about my business and inventions?’
- ‘How much should I spend to develop my patent portfolio?’
- ‘Should I obtain a patent to new technology that is not part of my core business?’
- ‘Should I protect an invention as a patent (registered) or as a trade secret (unregistered)?’
- ‘What IP should I choose to license and what IP should I sell?’
- ‘Should I sue my competitor for infringing my IP?’

Developing an IP strategy

Developing an IP strategy requires interfacing with all parts of your business, including operational leaders, legal advisors, and development teams. As a first step, cleantech businesses should conduct an IP audit (see the ‘Related Links’ section at the end of this guide) by identifying and cataloguing IP the business owns. The next step is to link every piece of IP with a revenue stream, product, development goal, risk and/or strategic target. A close look at the market and competitors should be conducted. Core technology should be identified, and strategies should be developed on how best to exploit it. The business should then look at how it is capturing and managing IP, and whether additional steps need to be taken to secure and protect it (including resolving ownership issues and reviewing policies related to the notification of the creation of inventions to the employer by the inventor, and the rewards for the creation of patentable inventions). Internal policies for protecting trade secrets and confidential information, and for dealing with third parties should also be developed.

Developing an IP strategy is an involved process that can be hard for cleantech SMEs to devote resources to. One helpful strategy is to start small. Make a list or spreadsheet of the IP the business has and add to it over time. Slowly expand on this list, drawing connections to relevant parts of the business.

4. Building a valuable cleantech patent portfolio

Patent protection is perhaps the most common form of IP protection in the cleantech space. This is because many clean technologies are capital-intensive and take a long time to achieve market acceptance, especially for those that are currently too expensive to be commercially viable. As a result, cleantech investors often demand patent protection as a way of securing monopoly profits to achieve expected returns. Having a cleantech patent portfolio can bring other tangible business benefits such as stability, credibility, increased valuation, access to investment and financing, availability of defensive patent strategies (i.e. the strategy of filing patents directed at using them primarily to block competitors from using similar technology), opportunities for partnerships and/or cross-licensing, etc. Being able to leverage exclusive rights can influence strategic decisions and the direction of investment. Thus, for many cleantech businesses, investing in the development of a valuable patent portfolio can be a smart move if it is directed at achieving specific business objectives.

How to build a valuable cleantech patent portfolio

Building a quality patent portfolio requires properly incentivising development teams, keeping open lines of communications between legal advisors and development teams, implementing disclosure policies, and providing trainings within the company to raise awareness of patentable inventions to improve disclosures and help capture new inventions. Because new inventions that become publicly known, i.e. in a publication (including the inventor’s own publication), will no longer be patentable, it is critical to ensure that development teams periodically disclose inventions to IP managers, maintain the secrecy of inventions, and do not inadvertently disclose information about new technologies to people outside the business, before a patent application is filed. Cleantech SMEs also need to consider the possibility that employees in China make improvements to their technologies; this is therefore essential to have the right contractual provisions in place for creator-employees’ conducting research and development within the company. Further information on managing improvements made to technology in China can be found in other China IPR SME Helpdesk materials (see the ‘Related Links’).
section at the end of this guide).

What to protect

Cleantech businesses will need to decide whether to protect inventions as patents or keep them as trade secrets and know-how. Inventions that are protected by patents become public knowledge, which can allow competitors to refine, design-around, or re-invent the technology so that it can no longer be protected by the patent. Cleantech inventions with a commercial shelf-life of significantly longer than 20 years should be considered for trade secret protection, but only if the business is confident in its capacity to protect its trade secrets (i.e. has sufficient know-how, IPR, IT, HR and legal resources directed at trade secret and confidential information security).

In some respects, patents filed for a product can be prioritised over patents filed for methods or processes that cannot be readily distinguishable in a product. This is because it is easier to enforce a patent when it can be identified in a product than it is to enforce a patent for a method or process as this would involve determining and proving whether a product was created using that particular method or process. However, methods or processes with broad applicability are suitable for patent protection and can be very valuable.

Managing budget

Building a valuable cleantech patent portfolio requires devoting a substantial amount of financial and management resources. ‘Shot gun’ approaches (i.e. setting a target number of patents and allocating a certain amount of money for each patent) to filing and prosecuting patents are attractive to businesses with limited budgets, but fail to deliver quality patents more often than they succeed. Rather, new inventions need to be qualitatively evaluated on their merits to determine how much of a business’ limited resources need to be devoted to ‘prior art’ searches*, drafting of claims*, and the filing and prosecution of the application so that a strong patent is obtained.

When to file

A trickier question facing cleantech businesses is when to file for a patent. When a new invention is developed, it can often be difficult to predict the direction in which the technology will develop, as well as shifts in market trends. Filing too early may result in a patent that is not directed at how the technology is developing several years later. However, filing too late can risk someone else filing a patent for the same invention, or risk losing patentability if the secrecy of the invention is somehow lost. Businesses will often need to assess these questions on a case-by-case basis for different patents. This issue is even more important in China which is a ‘first-to-file’ system, making it easier for other parties to block you from using your own IP in China by registering your IP assets before you. It is also important to note that the registration process can be very lengthy, and your patents can only be protected in China once the registration has been completed. Breaking up the invention into several broad and specific patent applications may be possible and can be considered either initially or as a divisional application*. Alternatively, consider whether combining invention patents* with utility models* can be used to provide additional flexibility.

Review and adjust

It is often easy to feel that the job is done once a patent has been granted. However, in an industry where technologies develop and market trends shift rapidly, periodically reviewing the patent portfolio can instruct a cleantech business on what adjustments need to be made and help them answer questions such as:

- ‘Do the patent claims* reflect the current state of the technology and the market trends?’
- ‘Do I need to be more specific when claiming so that I can better use the patents to block my competitors?’

Don’t forget about utility models

Although some clean technologies are cutting-edge, many are based on technology that has been in existence for many years (so-called ‘legacy technology’). As a result, the cleantech space in many areas is characterised by incremental innovation and a convergence of existing technologies. It is important to recognise that such new technologies can be protected, either with an invention patent or as a utility model patent, and should not be overlooked by development teams as insignificant innovations.

China differs from many Western jurisdictions by providing patent protection for utility models, which protects the shape, structure, or the combination of shape and structure of a physical product (methods and compositions can only be protected by invention patent) for a term of 10 years (compared to 20 years for invention patents). Obtaining a utility model patent, sometimes colloquially called ‘mini-inventions’, requires a lesser degree of ‘inventiveness’ (i.e. the degree of innovation over known technology) than needed to obtain an invention patent. Utility models are inexpensive and quick to obtain, on average within 9-12 months, and are well suited to protecting products with shorter product life-spans.

Utility models are often viewed as a weak form of IPR because utility model applications are not substantially examined for patentability, and are often discounted by foreign businesses because they are unfamiliar with them. However, Chinese businesses
have been taking advantage of utility model patents in vast numbers for years and have successfully used them to block foreign competitors and obtain huge pay-outs. In the well-known Chint vs. Schneider case, the Chinese company was able to settle the case for USD 23 million using a utility model. Combining utility models with invention patents can also be a smart way to deal with clean technology based on legacy technology.

Further information on patent filing and enforcement can be found in other China IPR SME Helpdesk materials (see the ‘Related Links’ section at the end of this guide).

5. Agreements, dealing with partners, and preparing technology for transfer

Protecting IP while having to deal with contractors, partners, regulatory authorities, and a host of other parties is a constant challenge for cleantech businesses. In addition to patents, the source of many cleantech business’ competitive advantage often is in the form of know-how, trade secrets, and confidential information which need to be protected contractually. Non-Disclosure Agreements (NDAs) are widely recognised by Chinese courts and should be used in every business dealing with a third party, no matter how big or small, including in contract manufacturing arrangements. Thorough documentation and requiring strict procedures when disclosing and receiving confidential information are equally important because they will be essential when seeking to enforce the NDA in case something goes wrong.

Cleantech and high-technology businesses in China use a variety of strategies to protect their IP when transferring it to China, including ‘black box’*, compartmentalisation, custom-fit components, role-segregation, and diversified sourcing strategies. Further information on IP protection in technology transfers and on protecting trade secrets can be found in other China IPR SME Helpdesk materials (see the ‘Related Links’ section at the end of this guide).

6. Trade marks and branding

Trade marks are important in the cleantech space because of the unique role public perception plays in the adoption of new technologies and the direction of government policy. A strong brand can be instrumental in winning government procurement contracts and government approvals. Like in Europe, China is a first-to-file trade mark jurisdiction, which means that the business or individual who files to register a trade mark first is granted an exclusive right to use it, unless a special case applies such as if the trade mark is already a well-known trade mark. It is important to consider that Chinese consumers often find a Chinese name of a foreign trade mark much easier to pronounce and remember. A Chinese version of a foreign mark can be a transliteration or a translation, or the company can develop a distinctive Chinese mark. In addition, IP hijacking extends to Chinese language versions of foreign brand names. It is therefore highly recommended that companies register a Chinese version of their foreign language marks. Further information on trade mark filing and enforcement strategies can be found in other China IPR SME Helpdesk materials (see the ‘Related Links’ section at the end of this guide).

7. Licensing and sale of IP

Licensing and sale of IP can be a potentially lucrative source of cash flow for cleantech businesses with high-value IP. Many small and medium-sized cleantech businesses are interested in licensing technology within their own industry. However, the decision to monetise IP through licensing or sale is one that must be taken only after careful consideration of a number of important factors. Patent licensing broadly falls into two categories – ‘carrot’ and ‘stick’ licensing, explained below.

‘Carrot’-licensing

This refers to a license taken on voluntarily by the target licensee without the need for the patent owner to sue. Cleantech businesses with good technology that meets pressing needs will be able to find local partners and licensees because they provide solutions in niche areas that Chinese companies cannot deliver by themselves. A large part of getting potential licensees to the negotiating table is to be able to demonstrate strong rights to a credible technology that requires specific know-how to fully realise. A cleantech business can be successful with this approach when a patent license is coupled with a license to the cleantech business’ know-how related to implementing or practicing the technology.

Another way to initiate a licensing negotiation is to hold an auction. This can be done by sending a letter to a number of potential target licensee’s simultaneously or to the target licensee’s competitor. The letter should be carefully crafted by a lawyer in order to avoid exposure to a lawsuit for declaratory judgment, which is a lawsuit brought by the letter recipient asking a court to declare that the recipient is not using and infringing rights to the relevant technology. Licensing negotiations should be conducted under a Non-Disclosure Agreement (NDA) that contains a promise by the target licensee not to file for a declaratory judgment during the negotiations.

Remember: Businesses seeking to license should have a sufficient budget to engage in litigation and licensing negotiations if necessary.

Free Business Tools to Manage your IPR in China
When trying to decide whether to sell IP, it is important to recognise that a potential purchaser may see different value in the IP than the seller, simply because it has a different business focus. Because of this, it can be a good idea to engage an outside consultant to determine the value of the IP before the decision is made to sell. One way to hedge against the possibility of ‘seller’s remorse’ (i.e. later regretting having made the sale) is to couple a sale with a grant-back license. In this arrangement, the buying party grants a license to the selling party to use the technology. In this way, the selling party has the right to continue to use the technology after the sale. However, it is best to try to negotiate the right to sub-license as part of the grant-back, in order to keep as many options available. Further information on IP protection in technology transfers can be found in other China IPR SME Helpdesk materials (see the ‘Related Links’ section at the end of this guide).

Take-Away Messages

European cleantech SMEs need to be proactive in understanding and taking measures to minimise IP risk when doing business in China. Often SMEs get caught up in fast-moving deal opportunities and do not adequately address critical IP issues. SMEs can avoid incremental losses to competitiveness through IP loss by thinking strategically about IP, and should follow these guidelines:

- Develop a comprehensive and well-articulated IP strategy that is directed towards achieving business goals.
- Think strategically about developing a valuable cleantech patent portfolio and devote sufficient resources so that strong patents are obtained.
- Carefully consider how licensing fits within the overall business strategy and direct sufficient resources towards obtaining strong IP rights to support licensing initiatives.
- Compartmentalise or ‘black box’ the technology and establish control points to ensure that no single party can practice the complete technology and keep critical, core technology or components separate.
- Develop a working knowledge of IP so that considerations of IP risk can inform business decisions.
- Always use non-disclosure agreements (NDAs) with third parties, affiliates, and employees.
- Obtain registered IP rights (patents, copyrights, trade marks, etc.) in China prior to transfer.

‘Stick’-licensing

‘Stick’-licensing is not the preferred option for licensors but may sometimes be necessary, and comes about when a third party is already using a technology without a license from the owner of the IP, thereby infringing the owner’s rights. Businesses pursue litigation to compel the payment of royalties from the third party by demonstrating that the technology is covered by their own IP, that the IP is valid, and that the business is willing to sue and enforce its IP rights. Often target licensees will not seriously consider paying royalties until this can be demonstrated; in short, very often one must sue or threaten to sue. However, putting IP to the test in litigation can be risky. In all cases, the validity of the IP will be challenged, and if lost and invalidated, the business may never be able to recoup its investment and may lose a key piece of its competitiveness. For this reason, many businesses do not choose to license their core IP unless they are confident in the strength of their IP or have other means of ensuring their continued competitiveness. Businesses seeking to license should also have a sufficient budget to engage in litigation and licensing negotiations if necessary.

The end-game of pursuing a patent litigation is almost always a license. Often a business may succeed in getting a target licensee’s attention simply by filing a complaint and then reaching a settlement through negotiations without having to go through the expense and burden of a trial. Patent litigation can be expensive, but litigation in China is much faster and significantly less expensive than litigation in Western jurisdictions. Despite this, these cost-savings are still limited in China, because most of the expense in patent litigation (>50%) in China is incurred before the filing of the complaint. Even though a business should expect to go the distance if it intends to file a lawsuit, keeping in communication with the potential target licensee early and frequently can be a good way to increase the chances of a settlement.

Sale of IP

A cleantech business will often develop IP that may eventually fall outside its core operations but that other businesses may be interested in acquiring. When IP is no longer attached to a product or a core aspect of the business, it may be worthwhile to sell the IP through an assignment to avoid the carrying costs associated with keeping the IP in the portfolio. One benefit of a sale versus a license is that in a sale, a business can obtain immediate cash flow, whereas in a license, royalties typically take at least 2-3 years to materialise when the product hits the market.

When a business expects to go the distance if it intends to file a lawsuit, it is best to try to negotiate the right to sub-license as part of the grant-back, in order to keep as many options available. Further information on IP protection in technology transfers can be found in other China IPR SME Helpdesk materials (see the ‘Related Links’ section at the end of this guide).

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- Obtain registered IP rights (patents, copyrights, trade marks, etc.) in China prior to transfer.
SME Case Study

Investors of Perpetual Motion, a small German company specialising in the manufacture of intelligent drives that reduce energy usage of industrial machinery by more than 80%, are pushing to have the company enter the Chinese market. Perpetual Motion owns several patents covering drive designs in China, but most of the precise engineering processes needed to manufacture the drives at a commercially acceptable cost are in the form of know-how. In addition, Perpetual Motion uses special software to control and improve the efficiency of the intelligent drives.

Looking quickly to obtain cash flow to cover upcoming financing needs, Perpetual Motion chooses to explore licensing the technology to industrial machinery manufacturers in China. After meeting with several manufacturers, Guangdong Green Machinery Co., Ltd. (GGM) expresses interest in obtaining an exclusive license. Perpetual Motion agrees and the parties sign a Non-Disclosure Agreement (NDA). As part of the arrangement, Perpetual Motion proposes to grant an exclusive license to GGM for Perpetual Motion's patents and know-how in China. During negotiations, GGM conducts due diligence on Perpetual Motion's patents. However, negotiations stall when the parties cannot agree on royalties.

Undeterred, Perpetual Motion then decides to seek a Chinese partner to sell its products in China. They find Mr. Liang, who owns Zhejiang Components Co., Ltd. (ZCC), a small components manufacturing company. Mr. Liang used to be an engineer and has an overseas education, and ZCC owns some patents for certain manufacturing processes. Perpetual Motion and ZCC enter into a Non-Disclosure Agreement (NDA) and a manufacturing services agreement. Mr. Liang agrees to manufacture the intelligent drives to customer specifications. Perpetual Motion decides to keep design-to-fit work in Germany, and Mr. Liang agrees to set up a secure area in his factory. As part of the arrangement, Perpetual Motion sets up secure file servers from which Mr. Liang can access sensitive documents related to the precise engineering processes needed to manufacture the intelligent drives. Perpetual Motion also secures several technical managers to the factory to train authorised employees on the manufacturing processes. Each of the employees also signs a confidentiality agreement and an agreement not to compete. Employees are provided with know-how training only on specific processes they will work on.

Later, after a successful 6 months, Mr. Liang informs Perpetual Motion that GGM is offering similar lower priced intelligent drives but which do not achieve the same energy savings as Perpetual Motion's intelligent drives. After further investigations, Perpetual Motion suspects GGM is infringing its drive design patents. Although Perpetual Motion has the resources to engage in litigation, Perpetual Motion decides not to sue GGM and risk having its patents invalidated. Perpetual Motion instead uses the resources which would have been used in the litigation to reinvest in research and development. Six months later, Perpetual Motion develops a new manufacturing process that further reduces the cost of manufacturing the intelligent drives and new software which further improves the efficiency of the intelligent drives.

IP Lessons:

• Develop an IP strategy for the medium to long-term, and determine how IP will fit into the overall business strategy in China.
• It can be difficult to secure a license and royalties from a potential licensee unless it can be clearly demonstrated that non-patented know-how is essential to making the product commercially viable.
• The decision to sue and enforce IP involves considering the strength of the patents, the resources necessary to pursue litigation through to its conclusion and defend likely invalidation actions against the patents, and protecting the core aspects of the business' competitive advantage.
• Use non-disclosure agreements (NDAs).
• Document and use specific policies and procedures when disclosing sensitive proprietary information.
• Look for good partners that do not have direct competing interests and who are likely to respect IP.
**Guide Glossary**

*Prior art* search – ‘Prior art’ refers to disclosures of the patented invention in publications at least prior to the application date of the patent, that may refute the novelty and/or inventiveness of the invention for patent. Since an invention must be novel and inventive to be patentable, a prior art search is typically conducted either by a patentee or a person seeking to challenge the validity of the patent to determine whether a patent will be upheld as valid if challenged, either in an patent invalidation proceeding or in the course of a patent infringement litigation.

**Drafting of patent claims** – ‘Patent claims’ refers to language used in patents to define the scope of the patent. Patent claims define the parameters of inventions that are includable or excludable from the patent monopoly. Patent claims are usually drafted by a patent attorney, as the words used to draft the claims are critical in determining how broad or narrow the scope of protection of the patent is.

**Divisional application** – This refers to the procedure permitted in certain jurisdictions of splitting a patent application which discloses more than one distinct invention into several patent applications, each disclosing a distinct invention sufficient for patentability under the patent laws of the jurisdiction.

**Invention patents** – An invention patent is a patent that typically covers any new, inventive, and useful method, process, machine, article of manufacture, or composition of matter, although the subject matter patentable as an invention patent varies between jurisdictions.

**Utility Models** – This refers to a sub-set of patents in some jurisdictions for inventions that have a lower degree of inventiveness than is required for invention patents. The subject matter patentable as a utility model varies between jurisdictions, and may exclude methods and compositions. A utility model often has a shorter term of protection than an invention patent.

*Black box* strategy – This is any strategy used in the transfer of technology whereby the party receiving the technology is prevented from knowing certain critical aspects required to practice the technology, which may include delivering stand-alone components necessary to practice the technology, but without disclosing how such stand-alone components work or are made.

Creator-employees – Creator employees generally refers to employees who create creative works or invent inventions for their employer at the employer’s instruction or as part of the employee’s scope of employment, often using the financial and material resources of the employer.

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**Related Resources on the China IPR SME Helpdesk Website** ([www.china-iprhelpdesk.eu](http://www.china-iprhelpdesk.eu))

1. **Clean Technology**:
   - Helpdesk webinar ‘IPR Protection in China for European SMEs in Clean Technology Industries’

2. **Technology Transfer**:
   - Helpdesk guide ‘Technology Transfer to China: Guidance for Businesses’
   - Helpdesk webinar ‘IPR Protection for Technology Transfer to China’

3. **Managing Improvements Made to Technology in China**:
   - Helpdesk guide ‘Using Contracts to Protect your IPR in China’
   - Helpdesk guide ‘Protecting IPR when Conducting R&D in China’

4. **IP Audits**:
   - Getting Started: Assess your IP

5. **Patents and Trade Marks**:
   - Helpdesk guide ‘Patent and Trade Mark Protection in China’
   - Helpdesk newsletter article ‘Focus on Chinese Utility Model Patents (Overview)’
   - Helpdesk newsletter article ‘Focus on Choosing your Trade Mark Name in China’

6. **Trade Secrets**:
   - Helpdesk guide ‘Guide to Protecting your Trade Secrets in China’
The China IPR SME Helpdesk provides free, confidential, business-focused advice relating to China IPR to European Small and Medium Enterprises (SMEs).

**Helpdesk Enquiry Service:** Submit further questions to the Helpdesk via phone, email (question@china-iprhelpdesk.eu) or in person and receive free and confidential first-line advice within seven working days from a China IP expert.

**Training:** The Helpdesk arranges training on China IPR protection and enforcement across Europe and China, tailored to the needs of SMEs.

**Materials:** Helpdesk business-focused guides and training materials on China IPR issues are all downloadable from the online portal.

**Online Services:** Our multi-lingual online portal (www.china-iprhelpdesk.eu) provides easy access to Helpdesk guides, case studies, E-learning modules, event information and webinars.

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