

Understanding Judicial Patent Enforcement in China

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I. Introduction: A change of perspective

... virtually all top Chinese officials are trained as engineers. In the words of [former] Intel CEO Barrett, “they get it,” they understand the linkages of technology development to manufacturing, university, and infrastructure “eco-systems.”¹

There is a disconnect between the academic appraisals of China’s Intellectual Property System (IPS) and the pace at which Multinational Companies (MNCs) are commencing research operations in China. The consensus among academic analysts is that the content of the Chinese Intellectual Property (IP) laws meets or exceeds the standards of protection China is obligated to provide under TRIPS Agreement², but enforcement remains inadequate and ineffective because the Chinese government does not take enforcement seriously³. The net effect, according to the academic analysts, is that MNCs have been reluctant to invest in China fearing the loss of valuable IP⁴. Yet, as evidenced by the estimated 980 MNCs with R&D operations in

China, China is attracting a significant amount of R&D investment⁵.

As an example, in March 2007 the current Intel President and CEO, Paul S. Otellini, announced Intel’s plans to invest US\$2.5 billion to build a microchip fabrication plant in Dalian China⁶. According to The New York Times Intel has only seven other microchip fabrication plants of comparable sophistication in the world. China’s People’s Daily reported that in order to help staff this new facility Intel has partnered with local government and Dalian University to organise training and curriculum development⁷, adding a transfer of expertise to the investment.

Between 2000 and 2005 Matsushita (the parent company of Panasonic) launched more new R&D operations in China than it did at home in Japan⁸. The benefits of these and similar investments are already being realised as operations in China have taken the lead in R&D in a number of high-technology sectors⁹. Moreover, the R&D investments have not been restricted to the high-technology industry sectors. A number of global automakers have recently started R&D

operations in China, with none other than American stalwart General Motors as the most aggressive in transferring technology to China¹⁰. Plus, familiar names in the pharmaceutical industry, such as Johnson & Johnson and Novartis, have also made significant R&D investments in China¹¹. And after the United States, China is now the second largest state sponsor of R&D, having allocated US \$136 billion for research in 2007¹². As a percentage of GDP China's R&D investment is expected to rise from 1.34% in 2005 to 2.5% by 2020¹³.

Despite the influx of significant R&D investments, a review of the academic literature reveals a lot of cynicism about the adequacy of China's IPS¹⁴. The explanation for this dichotomy is that the previous work has been based on an overly inclusive analytical framework, which has created misleading characterizations about how effectively industrial innovation can be protected by patent in China. In other words, the analysis of the patent system that is available is based on a wholesale analysis of the entire Chinese IPS, leaving the details of China's patent enforcement system under-researched¹⁵. As such, there are a number of deficiencies in the previous work that need to be addressed before moving forward in this area.

The deficiencies in the previous work include the following. First, as already noted, previous evaluations of China's patent enforcement system have been subsumed in a wholesale analysis of the entire Chinese IPS. This may be the most significant flaw in the previous work because it is at the root of many of the other deficiencies identified. Second, the efficacy of patent enforcement in China has been discounted based on speculation arising from problems encountered in trademark and copyright enforcement¹⁶. Third, the previous work has neglected the inherent institutional structure and division of labor created to procure and enforce the different types of IP rights¹⁷. Fourth, the previous work has failed to adequately explain aspects of China's dual track patent enforcement system¹⁸. Fifth, the previous work has analyzed China's judicial patent enforcement track from a common law perspective¹⁹ and overlooked law creation within the Chinese judiciary²⁰. Sixth, there is a conspicuous lack of empirical evidence supporting the allegations of local protectionism by the judiciary²¹.

This paper aims to address these deficiencies and provide a first step towards a comprehensive analysis of the patent enforcement system in China. Pursuant to these goals, the guidelines prescribed by Pitman B. Potter for ex-

amining the development of institutional competency within China's legal system are followed²². According to Potter the four primary factors to examine when evaluating the development of institutional competency include: institutional purpose, geographic location, institutional orientation and cohesion. In addressing the broader aims of this paper these four factors are evaluated in order to gauge the level of institutional competency within China's patent enforcement system. It is worth noting at the outset that the Chinese patent enforcement system does not mirror the US system, which relies on the development of the common law for effective patent enforcement. Thus, it is necessary to evaluate the Chinese system without applying common law standards in order to understand how the institutional competency required for effective patent enforcement is developing²³.

The remainder of this paper is structured as follows. Section II introduces practical and theoretical arguments for why patent enforcement should be evaluated separately in China. Section III reviews China's economic incentives to provide effective patent enforcement as a way to develop and entrench comparative advantages. Section IV describes the organization and operation of the Chinese patent enforcement system, the sources of law, and the law creation function of the judiciary. Section V provides concluding remarks and suggests for future work.

II. Focusing on judicial patent enforcement in China

The previous analysis of China's patent enforcement system that is available is based on a wholesale analysis of the entire Chinese IPS in which trademark and copyright violations are the underlying focus. As a result, the conclusions drawn regarding patent enforcement are misleading. This section provides a preliminary explanation for distinguishing judicial patent enforcement from the enforcement of other IP rights in China in regard to subject matter, the underlying patent policy and current enforcement trends in China.

1. Subject matter

The categorization of IP rights is based on the subject matter protected, and this categorization is codified in the TRIPS agreement signaling global acceptance in the matter. With the sole and limited exception of trade-secret law only the patent right provides meaningful protection for industrial innovation. Trademark and copyright laws do not protect in-

dustrial innovation. While it is acknowledged that copyright is sometimes relied upon to protect the source or object code of software²⁴, one must remember that innovative functionality implemented in source or object code is not protected by copyright protection²⁵.

The co-mingled analysis of the different IP rights employed in the previous work has confused the function of patent protection with other IP rights. Consequently, China critics - such as Peter K. Yu and Daniel Chow - have spun ongoing problems encountered with trademark and copyright enforcement into a general discussion of weak IP protection that discounts patent protection for industrial innovation in China.

2. The bargain

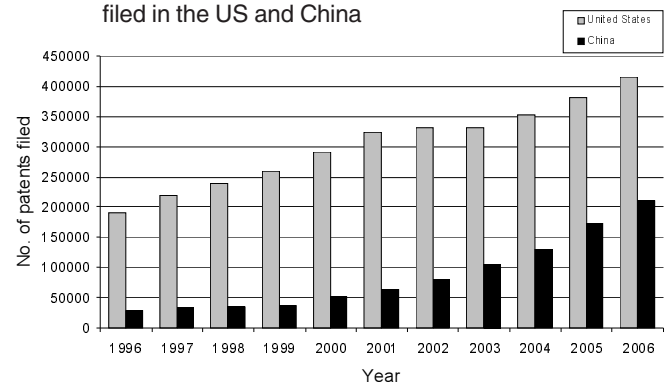
Yifeng Sun argues that China's patent system is more orientated towards the diffusion of technologies than other patent systems²⁶. It is difficult to understand how Sun arrived at this conclusion, since China has not done anything to modify the universally understood patent bargain. The patent bargain is not a modern concept and can be traced back to England, prior to the Statute of Monopolies 1623, when Crown rewarded an inventor with a limited monopoly in exchange for complete and enabling public disclosure of a new invention²⁷.

This bargain does not form the basis for other IP rights and is offered to encourage broader economic activity created by the diffusion of useful information, which inventors may not otherwise have a motivation to share. However, due to globalization the patent bargain has evolved into a bargain between the patentee and the collection of market economy countries, in which the patentee bears the burden of securing concurrent patent rights around the world. The current difficulty is that each state can only grant a patent right enforceable within its borders, but the public is the global public unconstrained by the territoriality of a patent right conferred by any one state. This is significant because there are valuable innovations being disclosed to the global public for which patent protection in China (and other countries) has not been sought.

Consider the discrepancy between patent filings in the United States and China from 1996 to 2006 shown in Chart No. 1²⁸. By a substantial margin, the United States continues to lead China in the number of equivalent patent applications filed annually. The margin indicates that there are a substantial number of inventions for which patent protection has been sought in the United States but not in China. The onus

for reducing the margin is on patentees that are not yet filing patent applications in China and not the Chinese government.

Chart 1: Patent applications filed in the US and China

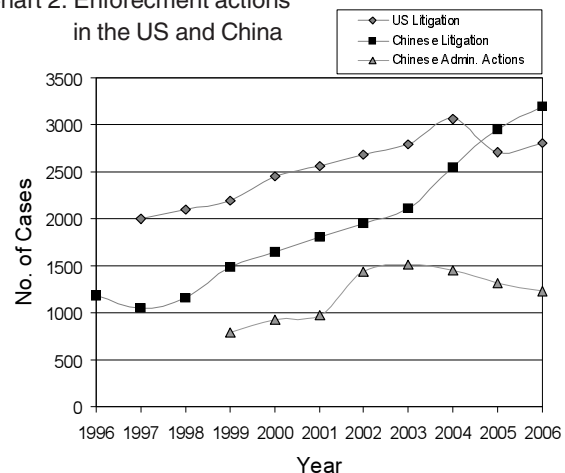


3. Enforcement and the numbers

A critical flaw in the previous work is the assumption that the adjudication of patent disputes is primarily handled by administrative authorities as it is for trademark and copyright disputes. On the contrary, patent disputes are primarily handled in the judicial system due to the technical complexity of the subject matter.

Chart No. 2 shows the number of patent disputes handled annually in the first instance in US District courts, Chinese Courts (at various levels) and by local administrative authorities in China between 2000 and 2006²⁹. Even at its peak in 2003, the number of patent disputes handled by local administrative authorities has always been less than the number handled by Chinese courts. Notably, the current amount of patent litigation in United States and China is about equal despite the significantly lower number patent applications filed annually in China.

Chart 2: Enforcement actions in the US and China



Moreover, what is often missing from the discussion concerning IP enforcement in China is the responsibility of the right-holder to investigate and initiate private enforcement. As is the case in the United States, the patent holder bears the burden of acquiring knowledge of infringing activities and pursuing alleged infringers through the most effective avenues. Surprisingly, while there were 3196 patent dispute cases in the first instance in 2006, less than 5% of those cases involved foreign patent holders³⁰. This extraordinarily small percentage of foreign litigants involved in patent disputes suggests that foreign patent holders have a long way to go to acquire the market knowledge necessary to enforce their patent rights in China.

III. China's economic need for effective judicial patent enforcement

Potter observed that China's legal institutions operate to fulfill policy created by the government and legal reform has been driven primarily by a quest for economic growth³¹. In particular, China's leaders have acknowledged that increased domestic innovation is critical to sustained economic growth³². From this perspective, efficacy of the judicial patent enforcement is reflected by the common purpose between legal processes and aspects of national economic policy designed to encourage greater levels of innovation.

China is currently in a transitional phase in which the government is trying desperately to avoid having its labor force trapped on the world's factory floor. Robyn Meredith points out that many of China's most profitable business activities are currently owned by foreigners and the bulk of foreign investment has been directed towards low value-added manufacturing³³. It is estimated that for every US \$100 of Chinese exports, only about US\$10 of value is added in China, which translates to about 2% of the retail value of the finished goods³⁴. Critics have charged that China's response to this issue has been to neglect its obligations under the TRIPS Agreement so that China's domestic industry can develop the imitative capacity required to move up the value chain³⁵. However, this allegation ignores the economic incentives that China must provide in order to attract R&D investments from MNCs; and, contradicts the acknowledgment that China has arrived at a stage where patent protection is necessary to foster domestic growth by protecting the products of Chinese innovation in China and abroad³⁶.

The framework of the Product Cycle Theory is useful for understanding China's economic incentives for providing effective judicial patent enforcement³⁷. Taken as a whole, the stages of the product cycle form what has been termed the "value chain", in which earlier stages are considered more valuable due to their traditionally fatter profit margins and the prestige of the types of work involved. When the theory was first introduced by Harvard Business School Professor Raymond Vernon in the 1960's, developed countries enjoyed a clear comparative advantage in the early stages of product development over developing countries. In that simple state of affairs quasi-rents could be earned by companies in the early stages of the product cycle where innovations largely originate³⁸. In later stages those rents are dissipated as stage-specific comparative advantages belong to developing countries using standardized technology.

The theory does not explain the intermediate stages transitional countries (such as China and India) find themselves in because it relies on a number of assumptions that reflect a static view of world affairs³⁹. First, it assumes that a developing country will never "catch-up" in terms of innovative capacity. As evidenced by the recent history of Japan and Korea, developing countries can move up the value chain and disrupt the status quo in global trade. The subsequent changes in global trade are often accompanied by vague allegations of unfairness, which Columbia University Professor Jagdish Bhagwati remarks are "reflective of the psychological mood of a nation losing hegemony in the world economy"⁴⁰.

Second, the theory is predicated on the acceptability of unrestricted foreign ownership and investment⁴¹. The stifling effects of unrestricted foreign ownership accrue when foreign-owned companies only transfer standardized technology to the developing country⁴². As a result, training and re-investment are minimized, thereby stunting the development of innovative capacity required to move up the value chain past the point of "fastest copier".

The downsides of the Product Cycle Theory have been countered by countries such as Japan and Korea, and now China, by encouraging foreign companies to transfer technology as a condition for investment⁴³. The Chinese leadership is also implementing a national IP strategy that includes bolstering the effectiveness of judicial patent enforcement to encourage technology transfer from foreign companies and provide domestic stakeholders with the positive incentive to acquire and enforce patent rights⁴⁴.

Despite these signals to the contrary, Chow maintains that China is not motivated to provide effective patent enforcement so that Chinese industry can move up the value chain faster⁴⁵, and not simultaneously suffer short-term economic losses caused by effective patent protection⁴⁶. The attraction of Foreign Direct Investment (FDI) is thus attributed to other location advantages that supposedly compensate for ineffective patent protection⁴⁷. This hypothesis may help explain the inflow of FDI directed towards low-technology or labor intensive manufacturing sectors. However, these other location factors would have to be extraordinary to adequately explain why a knowledge-based company would be willing to undermine its future competitiveness by moving R&D into China and enriching the local workforce without adequate patent protection.

Additionally, dismissing China's patent enforcement system as ineffective is often supported by allegations of local protectionism from local administrative agencies, which has admittedly been a problem for trademark and copyright enforcement⁴⁸. Local administrative authorities are said to favor local producers of counterfeit or pirated merchandise (covered by trademark and copyright protection) because they are significant employers and tax payers. Again, however, patent disputes are primarily handled in the judicial system. Local protectionism in the judicial system runs counter to the goals of attracting foreign R&D investment and building a knowledge-based economy. In particular, local protectionism can create a paradox in patent enforcement that can retard China's broader development plans when a dominant local employer is a foreign company. If the influence of the foreign company is misused locally, it could severely limit positive spill-over effects by undermining the development of the local workforce and creating a high barrier to entry for other local would-be producers in the same industry. This is a bad result for China and the foreign company, since both have an interest in developing a local talent pool from which both workers can be drawn and new firms created to support the operations of the larger company.

This is not to rule out the possibility of local protectionism in the Chinese judiciary. But if local protectionism does exist it must be demonstrated by an empirical analysis similar to the evaluation carried out on decisions from US District Courts⁴⁹. In a related empirical study Yang demonstrated that domestic and foreign invention patent applications have approximately equal grant lags in China, but domestic applications are more likely to grant than foreign applications⁵⁰.

Yang also points out that similar biases exist with respect to patent grants in the United Kingdom, United States and Germany⁵¹.

From a practical perspective, an alternative explanation for these discrepancies is that patent applicants are self-selecting the scope and jurisdiction they choose to procure patent protection in, in a rational cost-sensitive decision making process. It is possible that at least a portion of applicants are more likely to make amendments and restrict the scope of the claims in their home country in order to have their patents issue, while the same applicants are more likely to give up on their corresponding foreign applications when they encounter a threshold level of resistance from a foreign patent office.

IV. The patent enforcement system in China: structure & operation

"It doesn't matter if the cat is black or white so long as it catches mice."⁵²

The misleading characterizations about the efficacy of China's judicial patent enforcement system emerge, in part, from overlooking the organizational structure and operation of the enforcement mechanisms and from an insistence on evaluating the system from a common law perspective⁵³. This section describes the organization and operation of the Chinese patent enforcement system, the sources of law, and the law creation function of the judiciary.

An evaluation of the organizational structure and operation of the judicial patent enforcement system will aid in an understanding of institutional competency as it is affected by the factors of institutional purpose, orientation, geographic location and cohesion. In particular, evaluating the organizational structure and operation provides insight into two questions. The first question is whether geographic disparities negatively affect judicial patent enforcement in the same way they have affected administrative enforcement in trademark and copyright disputes. The second question is to what extent do the practices within the system (i.e. the operation) contribute or detract from institutional competency.

Previous studies have suggested that China's diversity and immense population have ingrained a culture of tenuous relations between the central authorities and the dispersed local authorities, in which the local authorities operate in their own interests and sometimes simply ignore mandates of the

central authorities⁵⁴. Consequently, according to the previous work, effective IP enforcement is hindered by local protectionism. However, the problem of local protectionism in judicial patent enforcement may not be as prevalent as it is in the other areas of IP enforcement because judicial enforcement is highly centralized.

Thus, in order to answer the first question consideration should be given as to whether or not this centralized structure is sufficient to overcome the alleged tendencies towards local protectionism. But in that respect, the judiciary cannot be evaluated as a homogeneous entity that is independent of the administrative bodies. As far as patent disputes are concerned, the judiciary is organized both so that it is highly centralized under the guidance of the Supreme People's Court and so that it can function cooperatively with centralized administrative bodies in Beijing. Unfortunately, in the previous work, the latter feature has led to confusion between the aspects of the administrative and the judicial tracks that form China's dual track system⁵⁵.

The remainder of this section provides some insight into the answers of the two aforementioned questions and is structured as follows. First, the patent system is identified within the Chinese IPS. Second, a brief description of the dual track patent enforcement system is provided before focusing specifically on the judicial patent enforcement system. Third, the sources of the law and the role of the judiciary in creating law relevant to patent enforcement are discussed.

1. Distinguishing the patent system within the Chinese IPS

The Chinese IPS includes a web of administrative and judicial bodies that each has specialized tasks based on a predetermined division of labor or function. The result is an organizational structure that is much different from the combination of the United States Patent and Trademark Office (USPTO) and the Federal Court System in the United States. Despite the organizational complexity, the combination of the interrelated bodies that form the Chinese patent system should be evaluated in isolation from other parts of the Chinese IPS.

Before focusing on the Chinese patent system, a brief review of the organization of the US patent system is instructive in terms of providing a comparator. In the United States the USPTO and the Federal Court System are completely independent entities. With respect to patent procurement and maintenance, the USPTO serves to accept and examine

patent applications, adjudicate interference proceedings⁵⁶, and re-examine issued patents upon request⁵⁷. But even so far as inter parte interference and reexamination proceedings are concerned the adjudicative function of the USPTO is quite limited and not required for effective enforcement. In contrast, the Federal Court has a purely adjudicative role and can overturn determinations made by USPTO examiners and the Patent Appeal Board within the USPTO. For example, the Federal Court can invalidate a patent and otherwise affect a patent right conferred ex post facto without the involvement of the USPTO⁵⁸.

In China, the ultimate source of authority is the National People's Congress (NPC)⁵⁹. In accordance with Article 3 of the Chinese Constitution⁶⁰, three primary administrative bodies exist under the NPC to administer the government⁶¹. First, there is the State Council which operates as the executive branch of the government. Second, there is Supreme People's Procuratorate which operates as the state prosecutor and supervisor of the law. Finally, the judiciary is embodied in the Supreme People's Court⁶². The Supreme People's Court is responsible for a number of functions beyond adjudication, including law making, interpreting laws, and the supervision and administration of lower courts⁶³. The adjudicative arm of the Supreme People's Court is embodied in the Judicial Affairs System⁶⁴ - the relevant aspects of which are described in the next subsection.

Various bodies within the Chinese IPS are included under the authority of the State Council or the Supreme People's Court but not both. Under the umbrella of the State Council there are respective independent administrative agencies responsible for handling patents, trademarks, copyrights and domain names. The State Intellectual Property Office (SIPO) is primarily responsible for the procurement and review of patents, and to a limited extent the enforcement of patent rights. The State Administration for Industry and Commerce (SAIC) is responsible for trademark matters. The National Copyright Administration (NCA) handles copyright matters, and the CIETAC handles domain name disputes. Each of these agencies is independent from the others and each is responsible for overseeing the administrative enforcement track for the respective type of IP right it has been created for. Disputes that are first handled in the administrative track can be appealed to the judiciary depending on the circumstances for each type of IP right. For example, either party in a dispute can appeal to the courts if there is a deadlock or to review administrative decisions where a bias is sus-

pected⁶⁵.

In the judicial system, under the authority of the Supreme People's Court, the manner in which various IP disputes are handled depends on the type of IP right at issue⁶⁶. Only patent disputes over infringement go directly to specialized IP tribunals that exist within the judicial system. All other IP disputes - including trademark and copyright disputes - can be handled by civil dispute tribunals in the judicial system⁶⁷. The IP tribunals are described in more detail below with reference to the structure and operation of the courts and the relevant administrative agency involved in judicial patent disputes.

2. Administrative and judicial patent enforcement

China has a dual track patent enforcement system. The administrative patent enforcement track is administered by local authorities situated throughout the country. The judicial patent enforcement system is also geographically spread across the country, but its operation is highly centralized and designed to work with the Patent Reexamination Board (PRB) in Beijing - an administrative body under the SIPO.

Together Articles 11 and 57 of the Chinese Patent Law define infringement of a patent right as the unauthorized exploitation of the patent right⁶⁸. In accordance with Article 57, if infringement is occurring (or is suspected), the patentee or any interested party may commence legal proceedings in court or request the local authorities for patent matters - the local Intellectual Property Office (IPO) - to handle the matter⁶⁹. For an administrative action, if the local IPO considers the alleged infringement to be well founded, they are empowered to order the infringement to stop immediately. The local IPO may also mediate a settlement if the parties voluntarily submit to mediation⁷⁰. If a settlement is not reached in mediation or if corruption of the mediation process is suspected, either party involved may file a lawsuit.

The limitations of the administrative patent enforcement track are best understood as compared to administrative enforcement for trademark matters. Concerning trademark matters, the SAIC is based in Beijing and the local administrative authorities (the "AICs"⁷¹) under the SAIC's control have been established throughout the country. The AICs are responsible for local law enforcement with respect to trademarks and unfair competition, business registration, and supervision of the local market⁷². For patent matters, IPOs have also established throughout the country. However, unlike the AICs that are under the authority of the SAIC (an administrative body), the IPOs are associated with the judicial system,

not the SIPO.

The IPOs are provided as an alternative to the court for patent dispute resolution, but the powers of the IPOs are far less than those of the AICs⁷³. For example, a local IPO cannot decide damages⁷⁴ and is typically only useful in stopping clear acts of patent infringement, as would be the case with design patent infringement. In cases where the technology at issue is complex and where damages are sought, recourse to the courts is generally the only option⁷⁵. Additionally, an IPO may need to petition the court for compulsory execution of its orders⁷⁶.

Turning to the judicial patent enforcement track, Articles 2 and 12 of the Organic Law of the People's Court creates a judicial system of "four tiers and two trials"⁷⁷. That is, the judiciary is organized in four tiers, with the Supreme People's Court at the top followed by the Higher People's Courts, the Intermediate People's Courts, and the Basic (or District) level courts underneath in descending order. Presently there are over 3000 Basic Level courts, over 400 Intermediate People's Courts and 50 Higher Courts⁷⁸. The judicial system is further organized so that there is a three tier court system - consisting of a Higher People's Court, Intermediate People's Courts and Basic level courts - for each province, autonomous region, special economic zone, major open city and municipality under the control of the central authority⁷⁹. Only a small fraction of these courts are authorized to hear patent dispute cases. The "two trial" rule of Article 12 specifies that the parties are typically allowed only one appeal between them. Despite this rule, the Supreme People's Court reserves the right to review cases of national interest⁸⁰.

A further division of judicial labor exists within each tier as well. Specifically, there are various tribunals created to adjudicate specific types of cases. For example, at the highest level the Judicial Affairs System within the Supreme People's Court includes, inter alia, a criminal tribunal, a civil dispute tribunal, an administrative dispute tribunal and an IP Tribunal⁸¹. Each tribunal has a respective director, and currently, the director of the IP Tribunal is also the Chief Justice of the Supreme People's Court⁸².

The IP tribunals were created and remain closely monitored by the Supreme People's Court because patent dispute cases generally involve relatively new law and complex technical subject matter. It was felt that a centralized organizational structure would help unify judicial standards and concentrate the accumulation of trial experience for patent disputes⁸³. In practice, the IP tribunals have emerged as the

only forums in which judicial patent disputes involving infringement can be heard⁸⁴.

Generally, only the Higher People's Courts and select Intermediate People's Courts have IP tribunals. Currently, all 50 Higher Courts and only 49 Intermediate Courts have the requisite IP tribunal to hear patent dispute cases⁸⁵. There are limited exceptions at the basic level in China's largest cities. The Supreme People's Court has authorized IP Tribunals for only 14 basic level courts amongst the over 3000⁸⁶ throughout the country and these basic level tribunals are only empowered to adjudicate trademark and copyright cases. Patent disputes over infringement must commence at the intermediate level or above⁸⁷. By comparison, in the US there are 98 US District Courts and 13 Courts of Appeal at the Federal level that hear patent disputes⁸⁸. However, none of the US District Courts or the Courts of Appeal are specialized to the extent that they only hear IP cases.

Even with the specialized forums for patent disputes, the Chinese judicial power over patents is limited compared to the United States. The most significant limitation is that the court is not allowed to invalidate a patent. The power to invalidate a patent falls within the authority of the Patent Review Board (PRB) within the SIPO in Beijing⁸⁹. This further centralizes the authority over patent dispute cases and may mitigate negative effects of forum shopping.

Forum shopping occurs when either a plaintiff or a suspicious soon-to-be defendant files a lawsuit or motion for declaratory judgment (e.g. for non-infringement) in a jurisdiction that is considered friendly to their respective side of the dispute. In the United States, the often cited example is the US District Court for the Eastern District of Texas, which statistics show is a patentee friendly forum⁹⁰. In China, the allegation is more often that the defendant's home jurisdiction (domicile) will tend to be favorable for the defendant. According to Article 29 of the Civil Procedure Law of the PRC⁹¹, patent infringement cases fall under the jurisdiction of the court in the defendant's domicile or where the infringing activities have occurred. This may present a dilemma for a plaintiff hoping to assert patent claims against a defendant. The defendant may seek a declaratory judgment in the defendant's home jurisdiction hoping to benefit from alleged local protectionism before the plaintiff commences an action in an unbiased jurisdiction or a jurisdiction where the plaintiff can benefit from alleged local protectionism⁹².

Nevertheless, if local protectionism in a particular judicial unit is suspected, the plaintiff may shift the presiding ju-

risdiction by drawing the defendant out of her domicile. This can be done by inducing the defendant to sell or use the infringing product outside of her domicile, and preferably either into the plaintiff's domicile (within China) or into one of the larger cities. For instance, in the larger cities, such as Shanghai or Beijing, the IP tribunals have become increasingly sophisticated and are highly unlikely to play favorites given the multitude of companies that operate in these cities, the number of patent disputes before the courts and the inherent visibility of the courts in these cities⁹³.

Additionally, since the judiciary is not permitted to invalidate a patent, a stay is likely to be granted for reexamination of the patent by the PRB if it requested⁹⁴. This can be advantageous for either party if they suspect any type of favoritism in a particular jurisdiction. The PRB is located in Beijing as a part of the SIPO and ultimately under the authority of the State Council. According to a retired Chief Examiner from the PRB, Tiejun Tang, the PRB is especially cognizant of the need to be impartial in patent disputes, and given that the PRB is in Beijing this impartiality is reinforced by the PRB's proximity to the central authorities⁹⁵. If the patent is invalidated by the PRB, the patent is deemed to never have existed⁹⁶. On the other hand, if the patent is upheld the opinion provided by the PRB typically includes a detailed explanation of the factual determinations concerning the technical features recited in the claims considered in light of the prior art. The factual determinations made by the PRB are given substantial weight by the court and form the basis of the claim construction relied upon to answer questions of infringement when they are available⁹⁷. In view of the PRB's role, diverting part of the litigation through Beijing by requesting reexamination may reduce the ability for courts outside of Beijing to engage in local protectionism, since those courts will be bound by factual determinations made by the PRB.

Decisions by the PRB can be appealed to the court⁹⁸. However, the PRB is the defendant in such an action and it is not possible for the PRB to be drawn out of its domicile (the Haidian District in Beijing) - which, in fact, enhances fairness in the system. The grounds for appealing a PRB decision are limited to an allegation that the PRB did not correctly apply the law, and in particular, that the PRB did not precisely follow the Guidelines for Examination in making its determination. Appeals based on the assertion that the factual determinations are incorrect are rarely successful⁹⁹. The Chinese courts pay a great deal of deference to factual determinations on technical issues made by the PRB because the

PRB is considered to have the technical expertise that the courts do not. In fact, Chief Justice (Retired) Zhang explained that judges from all over the country often seek the guidance of PRB staff to help them understand technically complex patent subject matter.

This reliance on administrative expertise has been criticized by those partial to common law systems who argue that common law systems have judicial checks and balances which ensures better adjudication¹⁰⁰. However, those familiar with claim construction in the United States will appreciate that the idea of judicial checks and balances for ensuring better adjudication is often far fetched given the approach taken by the Court of Appeal. The Court of Appeal does not pay any deference to factual determinations made by US District Court judges because claim construction is reviewed *de novo*¹⁰¹. It seems almost silly that factual determinations made by US District Court judges after hearing days, if not weeks, of evidence should be completely disregarded by the judges in the Courts of Appeal. Moreover, none of the courts in the United States are under any obligation to pay deference to the determinations made by the USPTO.

Nevertheless, in view of some of the shared problems, performance of the US system provides a good benchmark for grounding expectations for the performance of the Chinese system. Bob Cote and Rodger Sadler evaluated a number of statistics showing significant discrepancies among US District Courts¹⁰². Of particular relevance are the statistics that show where patents cases are filed, the patent owner win/loss ratio in jury trials, docket speed and the potential for summary judgment. Their analysis showed that in the Eastern District of Texas the patent owner won in a jury trial over 90% of the time, while in the Western District of Wisconsin, the Central District of California and the District of Delaware the patentee's corresponding win rates were about 50%, 67% and 71%, respectively¹⁰³. The Eastern District of Texas provided similar advantages to the patent owner in the areas of docket speed and the potential for summary judgment¹⁰⁴. Cote and Sadler argue that these factors affect where patent cases are filed within the United States. For example, they note that the Eastern District of Texas has experienced a 355% increase in the number of patent cases filed in its jurisdiction, while the Western District of Wisconsin, the Central District of California and the District of Delaware experienced corresponding changes of +10%, -6% and -17%, during the same period¹⁰⁵.

It is difficult to pinpoint what a particular win/loss ratio

should be in any court. But it is not unreasonable to suppose that the win/loss ratios for patent cases should be about the same throughout the United States. The aforementioned statistics do not indicate that the US judicial patent enforcement is necessarily worse than the Chinese judicial patent enforcement system or that the Chinese system is even yet on par with the US system. These numbers do suggest that even in the world's most developed economy there are inconsistencies within the judicial patent enforcement system that rational defendants and plaintiffs try to exploit. This should serve to put any discrepancies in China's judicial enforcement system in perspective. From that perspective, one reason that foreign companies may have a problem with effective patent enforcement in China is that they are unfamiliar with local inconsistencies that are required to mount an effective patent enforcement action. By contrast, local patent holders who dominate the patent litigation scene apparently have this knowledge and use the judicial enforcement track.

Furthermore, China does not share the Anglo-American binding faith in the ability of a lay jury to decide technical issues¹⁰⁶. China has also openly recognized the limitations of judges to make factual determinations in patent disputes involving complex technical issues, and has in turn created four methods to deal with the problem.

First, is the creation of the IP tribunals discussed above. A part of the trial experience the judges in the IP Tribunals gain inherently includes becoming familiar with technical issues. It is expected that the judges in the IP Tribunals will learn about technical issues and how technical problems are solved by hearing more cases. Second, the court is permitted to call on expert witnesses to serve as court consultants that are independent of the disputing parties. In fact, the court is permitted to call either technical experts or legal experts to comment on specific technical or legal issues without making determinations on the merits of the case¹⁰⁷. Third, the court can entrust technical experts or related institutes to provide independent verification of specific technical issues¹⁰⁸. The court has the discretion to decide if independent verification is necessary and which institute is responsible. The parties to the dispute also have the option to request independent verification and can negotiate the selection of the verifying institute, which must ultimately be approved by the court¹⁰⁹.

Finally, there is the seldom used option of expert jurors¹¹⁰. An expert juror participates in the adjudication pro-

cess along with a judge for cases at the first instance only. The expert juror is typically a senior member of the PRB and is required to work in an IP Tribunal under the direction of a judge for one to two years before being permitted to serve as an expert juror¹¹¹. Because the expert juror is selected from the ranks of the PRB the individual will unquestionably have a technical background matched to the technical area the patent in suit falls within.

3. Sources and development of patent law

In this section the sources of law that affect the enforcement of patent rights are considered. The six sources of law in order of weighted importance are: i) the Patent Law; ii) the Implementing Regulations; iii) the Guidelines for Examination created by the SIPO; iv) Judicial Interpretations; v) Opinions (guidance) from the Higher Courts; and, vi) Legal theories. The first three sources of law largely originate from the executive branch of the government under the authority of the State Council, while the latter three sources are provided by the judicial system under the authority of the Supreme People's Court. The latter three sources are vital to the operation of the judicial patent enforcement track but the previous work has not taken them into account. As such, key information has not been evaluated.

Recall that the NPC is considered the ultimate source of authority in China. As such, the NPC is primarily responsible for enacting laws, such as the Patent Law. The creation of the law occurs in committees established by the State Council and often the Supreme People's Court is involved in drafting and reviewing proposed laws before they are enacted. This process reflects the dominant political ideology in China which holds that there should be a consensus between the executive powers and the judicial powers of government¹¹².

The Implementing Regulations accompany the Patent Law. As in the West regulations are structured so that they can be changed without a substantial overhaul to the law that they are associated with. China's Implementing Regulations are similar to the Patent Rules¹¹³ in the United States in that they prescribe how particular articles of the Patent Law shall be carried out. In China, the State Council and the SIPO coordinate to make changes to the Implementing Regulations as required.

The Guidelines for Examination are created by the SIPO. The corresponding text in the United States is the Manual of Patent Examining Procedures (MPEP). While the MPEP contains references to case law and Examiners in the USPTO are required to follow the MPEP when examining

patents, the MPEP does not have the weight of law. In contrast, the Guidelines for Examination created by the SIPO do have the weight of law. The Guidelines for Examination provide detailed explanations for how patent applications are examined and the criteria for patentability. Accordingly, when Chinese courts consider appeals from PRB decisions, the court is looking to determine if the PRB has correctly applied the Guidelines for Examination without calling into question the factual determinations of the PRB, absent of a clear error of fact.

Moreover, the centralized organizational structure of the judicial system has created a command-style judiciary in which the Supreme People's Court maintains a substantial amount of control over the lower tiers. Some of this control is delegated to the Higher People's Courts, which in turn closely monitor the lower courts. The effects of this top down approach are amplified in the IP Tribunals across the country. As a result, when new issues are revealed in patent dispute cases, lower courts have a tendency to request guidance from higher courts to ensure that the decisions made conform to policy objectives. This has attracted some criticism from those that believe China should foster a system in which there is more judicial independence¹¹⁴. These criticisms often ignore, especially for patent matters, the positions of the Supreme People's Court in the government and the practical reality of administering a judicial system in a country as large as China. In China, since there is only one judicial system a concern is the need to ensure uniformity of judicial practice across the entire country.

In order to deal with this problem, the judicial system in China is very restrictive about where in the judicial system law can be created. Only the Supreme People's Court can create law and those laws take the form of judicial interpretations that further explain how the courts are to interpret and apply the law¹¹⁵. The purpose of judicial interpretations are to fill in the holes left by the Patent Law, the Implementing Regulations and the Guidelines for Examination.

As far as patent matters are concerned, judicial interpretations are not issued by fiat. Instead they are developed by consensus with feedback collected from the Higher People's Courts and the profession. A review of influential cases also aids in the development of the judicial interpretations. For example, there is currently a working document circulating within the profession that is the basis for an upcoming judicial interpretation for patent matters¹¹⁶. Specifically, the working document covers topics including claim construc-

tion principles, the doctrine of equivalents and a defence unique to China, known as the prior art defence.

Another source of law emerging from the Chinese judiciary are the Opinions of the Higher People's Courts. Strictly speaking, according to chief Justice (Retired) Zhang the Opinions of the Higher People's Courts do not even have the weight of soft law. Nevertheless, the Opinions often carry implicit persuasive weight in lower courts and within the profession as they serve as a barometer for measuring progress in judicial thinking. The Opinions are typically written by Higher Courts. For example, the Beijing Higher People's Court is considered to be an authority on patent matters because of the number of patent disputes heard in its jurisdiction, including appeals from PRB decisions. An Opinion issued by the Beijing Higher People's Court in 2001 forms a significant part of the working document mentioned above¹¹⁷.

Finally, legal theories are also sources of law in China. They are used in places where there are clear holes in the combination of the codified law, judicial interpretations and Opinions. Effectively, lower courts have very limited recourse to legal theories. However, the legal theories have been useful in patent enforcement. Notably, legal theory has been used to justify the introduction of the doctrine of equivalents as an aid in determining patent infringement in China. The use of the doctrine of equivalents was later affirmed by both the Beijing Higher People's Court and by the Supreme People's Court.

As a replacement for judicial interpretations and Opinions, some have argued that China should adopt a common law system¹¹⁸. For example, Qi Zhang has proposed a system in which case law is an official source of law secondary to statutes. According to the proposal, the courts would be bound by case law and should cite case law in judgments according to the principles of *stare decisis*. He argues that such a system is necessary for governing a country according to the rule of law and for allowing the law to evolve.

The rule of law has many elements. In the West it is often defined to include a restriction on government power. In theory, in China law and power are not considered opposites¹¹⁹. The political reality is that the courts exist under the leadership of the Chinese Communist Party¹²⁰, and there is an ongoing debate as to whether or not China will ever have true judicial independence¹²¹. Some have suggested that this has rendered the court a mere instrument of the Chinese Communist Party¹²², which calls into question the importance of the rule of law in China¹²³. The decisions considered to arrive

at this position have been inherently political and were selected to expose the limits of the rule of law in China¹²⁴. Despite these extreme examples of the courts towing the Party line in cases having an inherent political context, it is frequently affirmed that the Party does not become directly involved in individual cases¹²⁵.

As a comparison, it would be difficult to argue that the US Court system is not politically active also. Various Courts, including the present US Supreme Court, have been criticized for political biases in their decisions. This, in turn, has led to a political circus around the appointment of new Supreme Court Justices in the United States, and the critique that political positions in the United States (and other Western countries) are increasingly legitimized through legal processes in a way that undermines democratic political ideals¹²⁶. The point is that even if China's judiciary tows the Party line in inherently political cases, that does not show that patent disputes cannot be adjudicated fairly. In fact, it may actually aid judicial patent enforcement in view of the motivation to provide effective judicial patent enforcement discussed in Section III.

Arguably it is not necessary for lower courts to provide legal reasoning. In common law courts, legal reasoning is provided when the court deviates from the precedents. In essence the state of the common law is always open for fresh interpretation. There are outstanding legal questions to be determined and the questions often go unanswered until there is a case before the court that requires such questions to be answered based on a factual situation. This has produced frustration in the profession in regard to the doctrines of claim construction in the United States¹²⁷. With reference to the popular criticism of the en banc decision in *Phillips v. AWH Corp.*¹²⁸, even when the court recognizes the questions and stirs the profession into a frenzy there is no guarantee that the Court will actually answer the outstanding questions of law. It should not be a surprise then that the majority of appeals of US District Court decisions are related to claim construction, since it appears that the Court of Appeal and District Courts are approaching the issue from very different angles.

Also, it is simply not true that the case law does not play a part in the formation of the law in China (my notes. 18). The goal of deciding cases consistently is not the exclusive territory of common-law systems and it can be met in more than one way. The Chinese judicial system takes advantage of the benefits of case law, without the drawbacks, by distilling

the principles from jurisprudential cases and Opinions of the Higher Courts into judicial interpretations that the lower courts are bound to follow. The common law drawback avoided is that lower courts do not have the power to reason their way out of the guidance in the judicial interpretations issued by the Supreme People's Court.

In contrast, consider the history leading up to the KSR¹²⁹ decision in the United States. In most cases the Court of Appeal of the Federal Circuit is the last stop in the judicial process in a patent dispute. The US Supreme Court does not review cases frequently enough to ensure that the Federal Circuit has not veered off track and is following past precedents. When the Court does opt to review a case, as in KSR, it is because the Federal Circuit has veered so far away from the past precedents for such a long time that it has effectively changed the profession's understanding of the law. Specifically, in the KSR decision the Court relied on a line of cases starting from 1950 which suggested that a person having ordinary skill in the art has an ordinary level of innovative capacity¹³⁰. Yet, over the years the Court of Appeal has consistently ignored the guidance of the US Supreme Court and have maintained that the person having ordinary skill in the art is completely devoid of any level of innovative capacity. The KSR decision of 2007 effectively changed the standard for non-obviousness as understood by the profession which followed the guidance of the Court of Appeal. The Chinese system is structured so that something like this cannot happen.

V. Conclusion

This paper focused on the Chinese patent enforcement system in order to rectify misleading characterizations, from the previous work, about how effectively industrial innovation can be protected by patent in China. As such, there are a number of characterizations that can be accurately made about the Chinese patent enforcement system. First, the preferred avenue for patent enforcement in China is judicial enforcement, which is the opposite of what was presumed in the previous work by analyzing enforcement of IP rights in China from a wholesale perspective. Second, the judicial patent enforcement track in China is highly centralized and under the direct authority of the Supreme People's Court. Accordingly, if local protectionism exists in the judiciary it must be demonstrated by an empirical analysis of decisions from IP Tribunals set up within the judiciary to hear patent

disputes. Given the differences between administrative enforcement of other IP rights and patent rights in China, it is not safe to assume that problems outside of the judiciary are prevalent within the judiciary. Finally, despite the fact that China has a civil law system, the judiciary in fact participates in the creation of law. The role of Supreme People's Court in law creation extends from writing and reviewing draft laws to issuing judicial interpretations of enacted laws. The judicial interpretations not only fill in the holes of the statute law, but they also serve as repositories for principles distilled from the case law and practical aspects of applying the law to new situations. Moreover, the judicial interpretations are created in a process that involves the lower courts and the profession without giving free rein to the lower courts to veer away from the guidance provided by the government and the Supreme People's Courts. In turn, while the law develops under some restraint, it nevertheless develops in a manner analogous to the development of the common law.

In view of the fresh perspective on the Chinese patent system provided in this paper there are numerous opportunities to move forward and further scrutinize the operations and product of the judicial patent enforcement system. In particular, there are two areas that need further exploration. First, it would be useful to compare the Chinese doctrines of claim construction with those in other countries - most importantly the United States given its dominant position in the world economy. Second, as noted a number of times throughout this paper, an empirical analysis of decisions from IP Tribunals through China may reveal the extent to which the judiciary indulges in local protectionism. ■

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¹Clyde Prestowitz, *Three Billion New Capitalists* (New York: Basic Books, 2005) at 142 [Prestowitz]. Also: "In China, Engineers Rule" *IEEE Spectrum* (June 2005) at 30.

²For example, see: Kong Qingjiang, *WTO, Internationalization, and the Intellectual Property Rights Regime in China*, (Singapore: Marshall Cavendish Academic, 2005) at 4, 15, 45 [Qingjiang]. Also: Daniel Chow, "Why China Does Not Take Commercial Piracy Seriously" (2006) 32 *Ohio NU L Rev* 203 [Chow] at 212, note 49. "TRIPS" is the acronym for "Trade Related aspects of IP Rights".

³For example see: a) Robert Bejesky, "Investing in the Dragon: Managing the Patent Versus Trade Secret Protection Decision for the Multinational Corporation in China" (2004) 11 *Tulsa J. Comp. & Int'l L.* 437, 461 [Bejesky]; b) Peter K. Yu, "Intellectual Property, Economic Development and the China Puzzle" (2007) *Legal Studies Research Paper Series* (Research Paper No. 04-23), online: SSRN <<http://ssrn.com/abstract=978301>> [China Puzzle] at 8; and c) Pitman B. Potter, "Legal Reform in China: Institutions, Culture, and Selective Adaptation" (2005) *American Bar Foundation* (0897-6546/04/2902-465) at 469 [Potter].

⁴Bejesky, *supra* note 3 at 461. Also: Cynthia Smith, "A Practical Guide to Chinese Patent Law" (2005) 29:2 *Seton Hall Leg. J.* 643 [Smith].

⁵Rebecca Catching and Anurag Viswanath, "Can China and India Move up the Value Chain?" *Far Eastern Economic Review* (July/August 2007), online: *Far Eastern Economic Review* <www.feer.com> [Value Chain].

⁶David Barbosa, "Intel to Build Advanced Chip-Making Plant in China" *The New York Times* (27 March 2007). Also: a) "Intel to Help Set UP Dalian Training Base", *People's Daily* (28 March 2007) [Training Base]; and, b) "What Benefits will Intel's Plant have for Dalian?" *People's Daily Articles* (29 March 2007) [Benefits], online: *People's Daily* <<http://english.peopledaily.cn>>.

⁷*Ibid.*

⁸Tekla S. Perry, "Digital TV's 100-Meter Dash: China's Huge TV Industry Faces a 2008 Deadline" and "Matsushita: First Through the Looking Glass" *IEEE Spectrum* (June 2005) at 46, 49-50 [Perry].

⁹Chow, *supra* note 3 at 208. Oded Shenkar, *The Chinese Century: The Rising Chinese Economy and Its Impact on the Global Economy, The Balance of Power, and Your Job* (Philadelphia: Wharton School Publishing, 2004) at 146 [Shenkar]. Perry, *ibid.* at 46.

¹⁰Keith Bradsher, "GM to Build Hybrid Research Center in China" *The New York Times* (29 October 2007).

¹¹See online: *Foreign Direct Investment Magazine Online* <<http://www.fdimagazine.com>>.

¹²"In R&D, China is No. 2" *The Motley Fool* (17 January 2007), online: *Fool.com* <<http://www.fool.com>>.

¹³Value Chain, *supra* note 5.

¹⁴Potter, *supra* note 3 at 470.

¹⁵For example, see: Bejesky, *supra* note 3 at 455. Bejesky states that "the administrative method of enforcement is the more prevalent process of attaining relief in China".

¹⁶Chow, *supra* note 2. Bejesky, Potter and Yu, *supra* note 3. Also see: Deli Yang, "Intellectual Property System in China: A Study of Grant Lags and Ratios" (2007) 10:1 *World J. of IP* 22 [Yang].

¹⁷Andrew Evans, "Taming the Counterfeit Dragon: The WTO, TRIPS and the Chinese Amendments to Intellectual Property Laws" (2003) 31 *Ga. J. Int'l & Comp. L.* 587, 592 [Evans].

¹⁸Smith, *supra* note 4 at 656-657.

¹⁹Qingjiang, *supra* note 2 at 47-49. Yu, *supra* note 3 at 41. Smith, *supra* note 4 at 656-657. Also see: Zhongqi Zhou, "Judicial Protection of Patent Rights" (2004) *Managing Intellectual Property: China IP Focus* 43 at 46 [Zhou]; and, Patrick Coyne and Ningling Wang, "Accentuating China's IP Positives" (2006) *Managing Intellectual Property: China IP Focus* 15 at 18 [Coyne].

²⁰Zhou and Coyne, *ibid.*

²¹Daniel Chow, *The Legal System of the People's Republic of China* (New York: West Group Publishing, 2003) at 439-441. Also see: Benjamin Bai et al., "Forum Shopping comes to China" (2006) *Managing Intellectual Property: China IP Focus* 41 [Forum Shopping].

²²Potter, *supra* note 3 at 470, 474.

²³Randall P. Peerenboom, *China's Long March toward the Rule of Law* (New York: Cambridge University Press, 2002).

²⁴For example, see: China's Copyright Law, Article 3(8) and TRIPS, Article 10(1).

²⁵The Copyright Law of the United States (Chapter 1) ?i 102 (b): "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, ..." Also see: TRIPS, Article 9 (2): "Copyright protection shall extend to expression and not to idea, procedures, methods of operation or mathematical concepts as such."

²⁶Yifan Sun, "Determinants of Foreign Patents in China" (2003) 25 *World Patent Information* 27 at 36.

²⁷See: *Ipswich Clothworkers' Case* (1614), 78 E.R. 147 (Eng. K.B.).

²⁸Patent filing statistics from SIPO <<http://www.sipo.gov.cn>> and the USPTO <<http://www.uspto.gov>>.

²⁹Chinese statistics were provided by the SIPO. Judicial statistics from 2000-2002 had to be requested from SIPO. For US statistics: see *Fiscal Year Reports* available online: <<http://www.uscourts.gov>>.

³⁰Statistics reported by the SIPO, online: <<http://www.sipo.gov.cn>>.

³¹Potter, *supra* note 3 at 472.

³²Xuemin Chen & Xiaguang Yan, "Intellectual Property in 2005" (2006) *Managing Intellectual Property: China IP Focus*. In 2006, President Hu

Jintao reaffirmed this position stating that “Independent innovation will be the core of national competitiveness.”

³³Robyn Meredith, *The Elephant & The Dragon* (New York: W.W. Norton & Company, Inc., 2007) at 67-68.

³⁴Anne Stevenson-Yang and Ken DeWoskin, “China Destroys the IP Paradigm” *Far Eastern Economic Review* (March 2005), online: *Far Eastern Economic Review* <<http://www.feer.com>> [IP Paradigm].

³⁵*Ibid.*

³⁶*Supra* note 34. Also see: Donald C. Clark, “China’s Legal System and the WTO: Prospects for Compliance” (2003) 2 *Wash. U. Global Stud. L. Rev.* 97, 98. “... part of the whole point of China’s joining the WTO ... was to add foreign pressure to existing domestic pressure to reform.”

³⁷Raymond Vernon, “International Investment and International Trade in the Product Cycle” (1966) 80 *Quarterly Journal of Economics* 190. Raymond, Vernon, “The Product Cycle Hypothesis in the New International Economic Environment” (1979) 41 *Oxford Bulletin of Economic Statistics* 255.

³⁸Micheal J. Trebilcock and Robert Howse, *The Regulation of International Trade*, 3d ed. (New York: Routledge, 2005) at 5 [Trebilcock & Howse].

³⁹*Ibid.* at 486.

⁴⁰Jagdish Bhagwati, *Protectionism* (Cambridge MA: MIT Press, 1988) at 50 and 68.

⁴¹Trebilcock & Howse, *supra* note 38 at 486.

⁴²*Supra* note 10.

⁴³*Supra* note 6.

⁴⁴Qingjiang, *supra* note 2. See: Chapters 8 & 9.

⁴⁵Chow, *supra* note 2 at 212-216.

⁴⁶China Puzzle, *supra* note 3 at 11-12.

⁴⁷China Puzzle, *supra* note 3 at 20.

⁴⁸Chow, *supra* note 2.

⁴⁹Paul M. Janicke and LiLan Ren, “Who Wins Patent Infringement Cases” (2006) 34:1 *AIPLA Q.J.* 1.

⁵⁰Yang, *supra* note 16 at 35, 41.

⁵¹Yang, *supra* note 16 at 47.

⁵²William R. Doener, “The Comeback Comrade” *Time* (6 January 1986) at 42.

⁵³See: Chow, *supra* note 2 at 205-207; Yu, *supra* note 3 at 41; and IP Paradigm, *supra* note 34.

⁵⁴Yu, *supra* note 3.

⁵⁵Smith, *supra* note 4.

⁵⁶35 USC §135.

⁵⁷35 USC §302.

⁵⁸35 USC §282. A defence of invalidity can be pleaded on a number of grounds.

⁵⁹Ronald C. Brown, *Understanding Chinese Courts and Legal Process: Law with Chinese Characteristics* (Cambridge MA: Kluwer Law International, 1997) at 31 [Brown].

⁶⁰Constitution of the People’s Republic of China, Article 3.

⁶¹Brown, *supra* note 59 at 31-33.

⁶²Constitution of the People’s Republic of China, Article 124, establishes the Supreme People’s Court.

⁶³Brown, *supra* note 59 at 37.

⁶⁴Brown, *supra* note 59 at 40.

⁶⁵Brown, *supra* note 59 at 23. Also see: Arbitration Law, Article 58 and Patent Law, Article 57.

⁶⁶Judge Li Jian, “China Hones its Civil Litigation Rules”, (2006) *Managing Intellectual Property: China IP Focus*.

⁶⁷Zhou, *supra* note 19.

⁶⁸Patent Law, Articles 11 and 57.

⁶⁹Smith, *supra* note 4 at 656.

⁷⁰Civil Procedure Law, Article 16. Also see: Brown, *supra* note 79 at 22-24 (on mediation and arbitration).

⁷¹AIC: Administration of Industry and Commerce

⁷²Jay Sha, “Making the Most of Administrative Actions” (2006) *Managing Intellectual Property: China IP Focus*.

⁷³*Ibid.*

⁷⁴Patent Law, Article 57. Mediation of damages is voluntary.

⁷⁵Xiaoguang Yang & Xuemin Chen, “Administrative Actions Can Aid Enforcement” (2004) *Managing Intellectual Property: China IP Focus*.

⁷⁶Patent Law, Article 57.

⁷⁷Organic Law, Articles. 2 and 12. Article 12.

⁷⁸Interview of Chief Justice (Retired) Zhang (25 August, 2007) with the author in Beijing [Zhang Interview].

⁷⁹Brown, *supra* note 59 at 36.

⁸⁰Zhang Interview, *supra* note 78.

⁸¹Brown, *supra* note 59 at 35-40.

⁸²Zhang Interview, *supra* note 78. The Chief Justice for the SPC’s IP Tribunal is Chief Justice Jiang Zhipei.

⁸³Zhang Interview, *supra* note 78. Also see: *Supra* note 66.

⁸⁴Zhou, *supra* note 19 at 43.

⁸⁵Zhang Interview, *supra* note 78.

⁸⁶*Supra* note 66.

⁸⁷*Ibid.* “According to statistics, 90% of IP cases are heard by intermediate courts at first instance.” Also: Zhang Interview, *supra* note 78.

⁸⁸Lexis Courtlink.

⁸⁹Patent Law, Articles 45-47.

⁹⁰*Supra* note 28.

⁹¹Civil Procedure Law of the PRC, Article 29. Also see: Justice Cheng Yong-Shun (of the Supreme People’s Court), “Juridical Protection of

Intellectual Property in China.” 9 Duke J. of Comp. & Int’l L. 267.

⁹²Forum Shopping, supra note 21.

⁹³Zhang Interview, supra note 78.

⁹⁴Judicial Interpretations, Interview with Chief Justice (Retired) Zhang

⁹⁵Interview of retired Chief Examiner of the PRB Teijun Tang (22 August, 2007) with the author in Beijing [Tang Interview].

⁹⁶Patent Law, Article 47.

⁹⁷Zhang Interview, supra note 78.

⁹⁸Patent Law, Article 46.

⁹⁹Zhang Interview, supra note 78.

¹⁰⁰Coyne, supra note 19.

¹⁰¹See: Phillips v. AWH Corp., 376 F.3d 1382, 1383 (Fed. Cir. 2004).

¹⁰²Bob Cote and Rodger Sadler, “Survival Strategies in the new IP Economy” Managing Intellectual Property (June 2006). Effective patent protection for industrial innovation is a competitive business tool that can be used to capture and defend markets, outflank rivals, and increase market value and revenue.

¹⁰³Ibid.

¹⁰⁴Ibid.

¹⁰⁵Ibid.

¹⁰⁶Coyne, supra note 19.

¹⁰⁷Zhou, supra note 19 at 45.

¹⁰⁸Ibid.

¹⁰⁹Supra note 66 at 13.

¹¹⁰Zhang Interview, supra note 78.

¹¹¹Ibid.

¹¹²Nanping Liu, Opinions of The Supreme People’s Court: Judicial Interpretation in China (Hong Kong: Sweet & Maxwell Asia, 1997) at 205.

¹¹³US Patent Rules (US 37 CFR).

¹¹⁴Liu, supra note 112. Also see: Qi Zhang, “A Comparative Study on Case Law (Excerpt)” (2002) Comparative Law Study Series No. 4 (Originally published in Chinese) [Case Law Comparison].

¹¹⁵Zhang Interview, supra note 78.

¹¹⁶Provisions on Several Issues Concerning Examination of Patent Infringement Disputes (Conference Discussion Version, 2003), online: <<http://www.chinaiprlaw.cn/file/200310272463.html>>. The problem for English speaking observers is that it is difficult to get the latest versions of documents like this one because they are not always translated into English.

¹¹⁷Opinion of the Beijing Higher People’s Court, “Opinions on Several Issues Relating to Patent Infringement Establishment (For Trial Implementation)” (2003), online: <<http://www.chinaiprlaw.com/fgrt/fgrt80.htm>>.

¹¹⁸Case Law Comparison, supra note 114.

¹¹⁹Liu, supra note 112.

¹²⁰See: a) Potter, supra note 3; b) Brown, supra note 79; and c) Liu supra note 112.

¹²¹Supra note 23.

¹²²Liu, supra note 112.

¹²³George O. White III, “Navigating the Culture of Malaise: Foreign Direct Investment Dispute Resolution in the PRC” (2003) 5 Transactions: Tenn. J. Bus. L. 70.

¹²⁴Liu, supra note 112.

¹²⁵Brown, supra note 59 at 33.

¹²⁶Micheal Mandel, The Charter of Rights and the Legalization of Politics in Canada (Toronto: Thompson Educational Publishing, 1994) at 5-10.

¹²⁷See: Andrew S. Brown, “Amgen v. HMR: A Case for Deference in Claim Construction” (2007) 20:2 Harv. J.L. Tech 479.

¹²⁸Supra note 101.

¹²⁹KSR v. Teleflex, 550 U.S. ___, 127 S. Ct. 1727 (2007). Also see: Joseph Scott Miller, “Remixing Obviousness” (2007). Electronic copy available online: <<http://ssrn.com/abstract=1002454>>

¹³⁰See: a) Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp., 340 U. S. 147, 152 (1950); b) United States v. Adams, 383 U.S. 39, 40 (1966); c) Anderson’s-Black Rock, Inc. v. Pavement Salvage Co., 396 U.S. 57 (1969); and d) Sakraida v. AG Pro, Inc., 425 U. S. 273 (1976).

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