Discussion on IP Judicial Institution, Judges and Ways to Hear IP Cases

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Ever since the reform and opening to the outside world, China has made tremendous achievements in the judicial protection of the intellectual property rights (IPR), and the judicial protection plays the major role in the IPR protection. However, the judicial protection of the IPR is still insufficient in some aspects under the new situation in China, and there is much room for improvement in the construction of the IP judicial institution, improvement of the training and professional quality of IP judges, and inheritance and innovation of ways IP cases are heard. The author will present his views on these issues from the perspective of the new situation of the IP judicial protection in China.

I. IP Judicial institution: quantity and demands

In August 1993, the Beijing Higher People's Court and the Intermediate People's Courts took the lead in setting up IP tribunals in China, and in October 1996, the Supreme People's Court did the same. To date, IP tribunals have been set up in all higher people's courts, most intermediate people's courts, and some grassroots people's courts. By October 2008, 298 separate IP tribunals and 84 special IP panels had been set up within the local court system around China.[1]

The preceding data show that by October 2008, alto-

gether 383 IP tribunals/panels had been set up in the courts around the nation.[2] In the recent two years, grassroots courts have set up their respective IP tribunals rashly.[3] To date, about 400 such institutions have been set up in the courts in China. Of all the main countries in the world, China is a country which has the largest number of specialised IP judicial institutions. In 2010, the courts in China received 41,718 IP-related civil cases, and each of these specialised IP tribunals/panels received only a little more than 100 such cases on the average.

It is known to all that IP cases received by the IP tribunals/panels are very unevenly distributed in China, some receiving a few cases while some several thousands. For example, the IP Tribunal of the Beijing No.1 Intermediate People's Court received nearly 3,600 IP cases in 2010, about 70% of which were cases involving patent right and trademark right affirmation. On the average, each judge in the court handled over 140 cases in the year, being under tremendously heavy pressure. The quality and efficiency with which these patent right and trademark right affirmation cases are heard have a bearing not only on the interests of the interested parties involved in the cases, but also on the possibility to achieve the goal of the patent and the trademark legislation in China. For that reason, how to establish IP judicial institutions to serve as a strong guarantee for the trial of cases of the type is an extremely important issue. Setting up courts devoted to the trial of cases of patent right and trademark right affirmation is not a bad choice to make. Besides, there is the problem of inconsistency of the standards by which similar cases are heard by different courts in the judicial practice in China. To solve the problem, scholars suggested many years ago setting up an IP court of appeal. It is also clearly stated in the Outline of the IP Strategy issued by the Chinese Government in 2008 that possibility to establish an IP court of appeal would be explored. However, while the voice calling for the establishment of courts to hear IPR affirmation cases and the IP court of appeal has been high in recently years, to date, relevant studies and investigations are yet to be initiated, and establishment of the court of appeal will not happen in the foreseeable future.

As a result, despite a large number of the IP tribunals/panels in China, the matter of setting up a specialised IP court to address the issues now facing the judicial protection of IPR in China is yet to be put on the agenda, and the work along the line in China lags far behind countries like the U.S.A. and Japan.

II. IP judges: quantity and professional quality

China has a large contingent of IP judges. By October 2008, there had been 2,126 judges devoted to the trial of IP cases in the courts around the country.[4]

In recent two decades, specialised judicial trial of IP cases has made it possible for the growth of a large number of judges who excel in the IP laws and practice. But, as a whole, the judges in China are relatively less proficient in professional terms, and cannot meet the demand imposed on them by the development of the era we are now in. For this author, the following subjective and objective factors have impeded the improvement of the professional quality of the IP judges in China.

First, IP judges of many courts in China have an insufficient number of IP cases on hand. If all the IP civil cases received in the year 2010 had been evenly distributed among the 2000-odd IP judges, each of them would have received less than 20 such cases. Worse still, the number of IP cases received by the IP judges of some IP tribunals is below the average. Obviously, the cases are too few to give the judges a chance to become proficient in the IP-related judicial practice.

Second, the cases heard by many judges, especially IP judges from grassroots courts, are quite limited in terms of the type of cases. In China, the level of jurisdiction of the IP tribunals is determined in terms of the type and the amount of subject matter involved in such cases. As for the types of such cases, the grassroots courts, except quite a few, have no jurisdiction over patent cases. As for the subject matter-based jurisdiction, different standards are adopted for grassroots courts within which IP tribunals are set up. The amount of the subject matter involved in IP cases under the jurisdiction of some courts is so low that their judges seldom have chance to deal with difficult and complicated cases. For example a grassroots people's court in Beijing has the jurisdiction over cases involving the amount of subject matter at or below RMB 10 million yuan, but the people's court in the Hefei City's Hi-tech Development Zone only has the jurisdiction over cases involving the subject matter at the amount of or below RMB 50,000 yuan.[5] Limited by the type and the amount of subject matter of cases, IP tribunals of grassroots courts in China can only hear a certain type of cases, which makes it difficult for the judges in these courts to be involved in hearing other categories of IP cases. For instance, an IP

judge of a grassroots court handled 100 cases in a year, of which 90 were those involving network copyright, and 50 of the 90 cases were "cases in string", that is, cases in which the plaintiffs and defendants were the same parties. To achieve the goal of specialised trial, some IP tribunals in the same intermediate people's courts and even higher people's courts set up different groups or panels, within their court system, such as patent trial group, copyright trial group or trademark trial group, etc. to hear a particular category of cases. While this practice makes it possible for the judges to be more professionally proficient in a particular field, and improve the efficiency of court trial, it is not good for judges to gain experience from hearing other types of cases, and inhibit them from improving their comprehensive professional quality.

Third, some judges do not attach importance to accumulating professional experience in their daily work, nor do they pay sufficient attention to the study of new laws and regulations. A judge's work is a knowledge and experience intensive profession, and accumulation of professional knowledge is vital. But some judges, under the pressure of their workload, pay no attention to or have no time to attend to gaining and updating their professional knowledge. For example, as for accumulating professional knowledge, a few judges are even not familiar with some of the essential provisions of the Patent Law. As for updating their professional knowledge, a few cannot keep up with the latest developments in the laws and regulations in China. For example, regarding suit for disclamatory judgment, the Supreme People's Court have clearly provided for, in its judicial interpretations, the conditions to be met for accepting cases of the type[6], but some judges seem to have never noticed them. In a case, the party that was warned or interested party, when not going through the formality to urge the rightholder to send written notice, directly filed a lawsuit for disclamatory judgment in the people's court, and the court accepted it, and made its decision on non-infringement.

III. Ways of adjudicating IP cases: inheritance and innovation

Since the introduction of specialised trial of IP cases in China, many courts have been active in making exploration and innovation in ways to hear cases of the nature, and their efforts made along the line have ensured the quality and efficiency of the trial of IP cases, and made contribution to the improved civil procedure and system in China. For example, in the early 1990s, the rules and standards introduced by the IP tribunals within the Beijing court system, such as evidence exchange rules, established time limit for evidence adduction, the panel system for handle all IP cases, and requirement for losing defendants to pay for plaintiffs' reasonable lawyer's fees, all have provided experience for us to improve the civil procedure and system in China and for the amendment to the IP-related laws.

Today when the IP protection becomes an international endeavour and more important than ever before, it is crucial to pass down the practice-tested ways of trial of IP case. With the soaring of the number of IP cases, judges' workload has considerable increased, some effective rules and standards, such as the panel system, are not constantly observed. This seems to help improve the efficiency of the trial of some cases in a short run, but it will certainly have adverse impact on the quality and judicial authority of the adjudication of cases in the long run.

Additionally, to cope with the new situation that has occurred in the trial of IP cases, IP tribunals and judges should attach more importance to the innovation of the ways IP cases are heard. Innovation is by no means swallow, without internalisation, practices of some other jurisdictions; rather it is to draw on the other advanced legal regimes in connection with the procedure, system and laws in China. For this writer, in the field of trial of IPR affirmation and infringement cases, the people's courts are required to draw on others' experience, and make their own innovation.

The number of IPR affirmation cases has increased from about 70 in 2001 to 2,500 in 2010, and the time for court trial of most such cases has been reduced from half a day to one whole day in the past to about one hour or even half an hour. How to pinpoint the issue of dispute in a case in such short time requires wisdom and innovative thinking on the part of judges and their listening to what all parties have to say; In preparing a judgment, it also demands innovation made by the judges as to how to precisely recapture the points presented in administrative adjudications or decisions, highlight issues of dispute involved, present the reasoning made in the court decision without substantially copying from administrative adjudications or decisions in order to improve the efficiency and quality of prepared judgments.

The way IPR infringement cases, especially those involving a lot of evidence and serious dispute, are heard also needs to be innovated. For example, phase-by-phase ad-

duction of evidence may be introduced on a tentative basis in evidence adduction by interested parties. If possible, a party may be required to first present evidence of infringement or non-infringement, and the evidence is cross-examined before court; then he or it is required to furnish evidence relating to civil liabilities, so as to make it possible for interested parties to produce more relevant evidence, which help them to have an overall judgment of where the lawsuit is heading for, and is conducive for them to settle their disputes and for the improvement of the efficiency of the court trial.

All matters, such as establishment of special IP tribunals, quality of the judges, and inheritance and innovation of the court trial, have something to do with the judges, the single most important factor in the judicial system. Efforts should be made to duly set up the IP trial institution, paying attention to finding solutions to practical problems without simply seeking the number of IP tribunals; pro-actively taking measures, improving the overall quality of the IP judges, without pursuing the number of cases handled by the judges; comprehensively inherit practice-tested ways of IP trail, adapting to the changed situation, and making innovation without staying idle on the level of the system, will bring the judicial protection of IPR to a higher level in China. ■

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[1] See the Present Situation of Judicial Protection of IPR in China (2009) issued by the Supreme People's Court in April 2010, at www. court.gov.cn.

[2] Namely, all the IP tribunals/panels of the local courts together with the IP tribunal of the Supreme People's Court.

[3] According to the statistics in the Supreme People's Court's Notice on Publishing the Standards for the First-instance Trial of IP Civil Cases by the Grassroots Courts (No. Fafa 6/2010) issued on 28 January 2010, by January 2010, 92 grassroots courts had set up their IP tribunals.

[4] Supra note 1.

[5] Supra note 3

[6] Article 18 of the Supreme People's Court's Interpretation of Several Issues Relating to Application of Law to Trial of Patent Infringement Cases.