The Enforcement of Intellectual Property Rights in China
- Institutional Challenges

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Introduction

- Thanks to Melbourne and Monash Law Schools
- What question? IP laws on books vs. Law in practice, how and why
- A brief introduction to history of Chinese IP protection
- A brief introduction to Chinese IP enforcement mechanism: two models
- IP Civil procedures and remedies
- Institutional issues
  A. judiciary independence
  B. impartiality and competence
Civil Procedures and Remedies

- Introduction
  - plaintiff, defendant; the sources of laws (esp. Judicial Interpretations issued by the SPC); pre-trial preparation; process of the civil trial by the first instance court; preparing judgment; issuing judgment;
  - The infringing activities (see Art. 46, Art. 47 of the Copyright Law (2001), Art. 52 of the Trademark Law (2001), etc.
- Causes of actions
  - jurisdiction: jurisdiction by forum level and the territorial jurisdiction;
  - collegiate panel (or deliberation);
- burden of proof
- Damages: loss suffered or profit earned, statutory compensation, reasonable cost
- Appellant and supervisory procedures
The number of IPRs cases (ownership, infringement and others) accepted and concluded by the first instance courts in China (1989-2003)

<table>
<thead>
<tr>
<th>Year</th>
<th>Cases accepted</th>
<th>Cases concluded</th>
<th>Mediation/ratio</th>
<th>Judgment/ratio</th>
<th>Reject/ratio</th>
<th>Withdrawal/ratio</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003</td>
<td>6983</td>
<td>6860</td>
<td>856/12.4</td>
<td>2929/42.7</td>
<td>184/2.6</td>
<td>2533/32.3</td>
<td>358</td>
</tr>
<tr>
<td>2002</td>
<td>6201</td>
<td>5649</td>
<td>692/12</td>
<td>2514/44.5</td>
<td>234/3.8</td>
<td>1893/30.5</td>
<td>316</td>
</tr>
<tr>
<td>2001</td>
<td>1749</td>
<td>1664</td>
<td>221/13</td>
<td>770/46.3</td>
<td>40/2.3</td>
<td>486/28.8</td>
<td>147</td>
</tr>
<tr>
<td>2000</td>
<td>1496</td>
<td>1534</td>
<td>243/15.8</td>
<td>685/44.6</td>
<td>55/3.7</td>
<td>452/30.2</td>
<td>99</td>
</tr>
<tr>
<td>1999</td>
<td>1247</td>
<td>1098</td>
<td>180/16.4</td>
<td>474/43.2</td>
<td>27/2.2</td>
<td>339/27.2</td>
<td>78</td>
</tr>
<tr>
<td>1998</td>
<td>1048</td>
<td>1074</td>
<td>245/22.8</td>
<td>488/45.4</td>
<td>16/1.5</td>
<td>244/23.3</td>
<td>81</td>
</tr>
<tr>
<td>1997</td>
<td>1237</td>
<td>1332</td>
<td>432/32.4</td>
<td>436/32.7</td>
<td>Court Ruling 436</td>
<td>Transferring 28</td>
<td>N/A</td>
</tr>
<tr>
<td>1996</td>
<td>1036</td>
<td>979</td>
<td>342/34.9</td>
<td>381/38.9</td>
<td>Court Ruling 239</td>
<td>Transferring 17</td>
<td>N/A</td>
</tr>
<tr>
<td>1995</td>
<td>882</td>
<td>883</td>
<td>346/39.1</td>
<td>277/31.4</td>
<td>Court ruling 245</td>
<td>Transferring 15</td>
<td>N/A</td>
</tr>
<tr>
<td>1994</td>
<td>625</td>
<td>516</td>
<td>204/39.5</td>
<td>147/28.5</td>
<td>Court ruling 139</td>
<td>Transferring 26</td>
<td>N/A</td>
</tr>
<tr>
<td>1993</td>
<td>543</td>
<td>548</td>
<td>206/37.6</td>
<td>179/32.7</td>
<td>Court ruling 148</td>
<td>Transferring 15</td>
<td>N/A</td>
</tr>
<tr>
<td>1992</td>
<td>612</td>
<td>578</td>
<td>352/60.9</td>
<td>97/16.8</td>
<td>N/A</td>
<td>N/A</td>
<td>129</td>
</tr>
<tr>
<td>1991</td>
<td>435</td>
<td>421</td>
<td>175/41.6</td>
<td>134/31.8 (including court ruling)</td>
<td>N/A</td>
<td>N/A</td>
<td>112</td>
</tr>
<tr>
<td>1990</td>
<td>301</td>
<td>275</td>
<td>119/43.3</td>
<td>87/31.6</td>
<td>N/A</td>
<td>N/A</td>
<td>70</td>
</tr>
<tr>
<td>1989</td>
<td>376</td>
<td>289</td>
<td>137/47.4</td>
<td>58/20.1</td>
<td>N/A</td>
<td>N/A</td>
<td>94</td>
</tr>
</tbody>
</table>
## Comparision of the number of IP cases dealt with by China’s IP administrative authorities with that of People’s Courts (2000 – 2003)

<table>
<thead>
<tr>
<th>Year Institutions</th>
<th>2003</th>
<th>2002</th>
<th>2001</th>
<th>2000</th>
</tr>
</thead>
<tbody>
<tr>
<td>Court</td>
<td>6983/6860</td>
<td>6201/5649</td>
<td>1749/1664</td>
<td>1496/1534</td>
</tr>
<tr>
<td>SACIC</td>
<td>26488/26023</td>
<td>26488/26023</td>
<td>22813/21960</td>
<td>22001/11313</td>
</tr>
<tr>
<td>SCA</td>
<td>23013/22429</td>
<td>6408/6107</td>
<td>4420/4306</td>
<td>2457/2277</td>
</tr>
<tr>
<td>PAA</td>
<td>1517/1237 (D)</td>
<td>1442/1291 (D), 1679/177 (P.C.)</td>
<td>977/888 (D), 413/N/A (P.C.)</td>
<td>802/718 (D), (P.C.) N/A</td>
</tr>
<tr>
<td>Percentage (%)</td>
<td>11.6/12</td>
<td>14.6/14.4</td>
<td>6/N/A</td>
<td>N/A</td>
</tr>
</tbody>
</table>
Judicial Independence

- Introduction: judicial independence principle (separations of powers and checks and balances)
- Chinese “independent adjudication” vs. “judicial independence”

A. Introduction: the principles of “unity of discussion and action” (yixing heyi) and the supremacy of the People’s Congress (the legislative organ).

1. Judicial power is not a rival of legislative power but a subsidiary to the legislative power, the judicial institutions (mainly the judiciary) are accountable to the People’s Congress; the People’s Congress can exercise supervisory power over the judiciary.

2. China’s courts cannot review abstract administrative legislative acts, not mentioning constitutional review of legislative acts, in spite of their judicial reviews of the prescribed specific administrative acts.

3. It is the people’s courts as a whole rather than individual judges exercise adjudicative power independently. When exercising the adjudicative power, the principle of democratic centralism will be adopted. In practice, the directors of the divisions, presidents or vice presidents of the courts, and the adjudication committees may exercise the adjudicative power.
Judicial Independence

B. Judiciary activities are subjected to the political leadership of the Communist Party of China (the CCP).

C. Inter-courts relationship: supervisory relationship between the upper level courts and lower level courts, in practice, in order to avoid “wrong cases” and disciplinary sanctions, the lower level courts, where the case is complicated or difficult, usually go to upper level courts to seek an instruction (qingshi); the upper level courts will give a reply to the request (pifu);

D. The “de facto supervision”: The local courts have to rely on local governments for their human resources, finance and other logistics support. The illegal interferences of local governments.

E. The re-trial procedures and the principle “seeking truth from facts” (shishi qiushi); impacts on insecure finality of judicial judgment.
Judicial Independence

- Reform
  A. IP trial divisions or No. Third Civil Division;
  B. Chinese courts adopt collegiate panel system in adjudication of IP cases. The SPC Several Stipulations on Reform of Civil and Economic Adjudications (1998) clarified that “the collegiate panel members must jointly adjudicate cases, jointly hold responsibility for the facts, evidence, nature, liabilities, law application and judgment of the cases”.
  C. The Five-Year Program of the Supreme People’s Court on Reform of the People’s Courts (1999) prescribe “in accordance with the system of selection of chair-judge, all cases must decided by collegiate panel, except for those very difficult and complex cases which will be determined by Adjudication Commission where suggested by president of the courts and proposed by the collegiate panel.” “The democratic centralism principle will be adopted during the collegiate panel deliberation and the judgment will be prepared based on the views of majority judges.”
  D. But it seems that the SPC is also increasingly emphasizing guidance, coordination and control (see Article 20 of the Several Opinions Relating to trial of IP Cases under the Current Economic Circumstances, the SPC issued on April 21, 2009).
Impartiality and Competence

- The impartiality of China’s judiciary may suffer. Without judicial independence, or the independence of judges. Chinese judges may be susceptible to various pressures;
- Judges corruption: on the other hand, Chinese judges may enjoy a variety of discretionary adjudicative power, without some effective checks and balances, judges may abuse of their powers due to corruptions (sifa fubai);
- The professionalism of Chinese judges may become another serious concern, some judges lack necessary and adequate legal competence to correctly deal with cases. According to a statistic, of all cases tried by the second instance courts, only 49% (2002) and 49% (2003) of civil cases tried by the first instance courts were upheld. Of those re-tried cases, the situation is more serious, only 34% (2002) and 33% (2003) of civil cases, 36% (2002) and 41% (2003) of administrative cases, 45% (2002), 42% (2003) of criminal cases were upheld. Chinese judges are encountering public confidence crisis.
Summary

- The instrumental, utilitarian and authoritarian attitude have been adopted by some Chinese reformers towards the concepts of rights and law. They took the rights and law as the forms but infused with Chinese values or ideals, either Confucianism or Communism or others as their substance (zhongxue weiti, xixue weiyong).
- Rights and law were not independent, universal principles. Rights and law were justified through their potential contributions to social goals, particularly achieving a strong State;
- The State is the only authority from where the rights and law come from. Rights and law are conceived not independent of the State, individual persons cannot use rights and law to challenge the State power;
- Chinese conceptions of both rights and law were based on the presumption of an unification, where the rights represent an internal unification of individual, collective, national and fundamental interests, law informs an unity between the Party’s will, the State interests and the will of people’s.
- All these conceptions may be different from the western concept of the rule of law, the principles of separations of powers, checks and balances, and judiciary independence.
Conclusions and Looking-Forward

- Many progresses but challenges
- The unity presumption may be flawed
- The evolution of Chinese civilizations and dilemma of culture determinism (or cultural relativism)
- Development of the market economy and knowledge-based economy
- Globalization and China’s entering into international community
- New theories on rights and law and a rule of law in China?
Thanks

Q&A