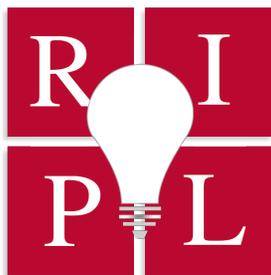


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REVIEW OF INTELLECTUAL PROPERTY LAW



IS THE EMPEROR STILL FAR AWAY? CENTRALIZATION, PROFESSIONALIZATION, AND UNIFORMITY IN CHINA'S INTELLECTUAL PROPERTY REFORMS

WILLIAM WEIGHTMAN

ABSTRACT

As China's rapid economic growth continues to slow, the Chinese Communist Party now seeks to promote innovation as the engine of future development. With this new economic agenda, reforms to China's intellectual property rights (IPR) regime have emerged as a key policy domain as China attempts to build market-supporting institutions and improve law enforcement capabilities. By reviewing the legal frameworks supporting specific judicial reforms and through non-randomized, semi-structured field interviews with lawyers, IP officials, and industry representatives, this article analyzes how China's evolving legal institutions are increasing central control in the IP adjudication process, building judicial professionalism, and ensuring uniformity in case outcomes in line with the demands of its economic transition. The question of how IP rights are enforced in China is of interest not only to those who want to understand how IP protections have developed in China, but also to those who wish to analyze the role that law and the courts play in structuring central-local relations and implementing institutional reform in a historically fragmented authoritarian system. Although China's IPR regime is far from perfect, these reforms are indicative of a major initiative to improve IP protections, nurture domestic innovation, and increase the role of China's judicial system in efficiently resolving disputes.

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I. INTRODUCTION

China is at a crossroads. Over the last four decades, it has experienced one of the most rapid economic expansions in world history as the Chinese Communist Party (CCP) successfully transitioned the country from an agrarian, centrally planned communist regime to an industrial, market-oriented authoritarian state. China achieved this economic success largely by allowing a constant flow of labor to migrate from the countryside to the new industrial sector in the cities, making massive capital investments, and pursuing a series of market-oriented institutional reforms that allowed for entrepreneurship domestically and economic integration with the world.¹ However, this development model has become increasingly unsustainable and growth has continued to slow. Given these structural economic conditions, the CCP now seeks to promote innovation as the engine of future growth. With this new economic agenda, reforms to China's intellectual property rights (IPR) regime have emerged as a key policy domain as China attempts to build market-supporting institutions and improve law enforcement capabilities.

Since 2003, real wages in rural China have risen sharply, wages between skilled and unskilled labor have generally converged, and labor shortages have emerged in urban sectors demonstrating that China's original surplus of rural labor can no longer fuel its urban-oriented growth model.² Likewise, the global financial crisis showed the risks associated with utilizing a development model too reliant on exports to fuel growth. China's export to GDP ratio fell from its peak of 36 percent in 2006 to about 24.5 percent in 2009 mostly due to the precipitous decline in global demand for Chinese exports.³ However, as exports collapsed, the government attempted to bolster growth through investment. This caused investment gluts to emerge across the economy, most

* © 2020 William Weightman. 2017-2018 Fulbright Fellow based in Chengdu, China, Analyst at Kobre & Kim LLP. I would like to thank Professor Guo Hongling for hosting me and serving as my advisor at Southwest Jiaotong University as well as Professor Liu Xin and Wang Juan for their support on the ground. I would also like to thank Mark Jia and Beau Barnes for reviewing this article and providing insightful feedback and Orion Lewis for his guidance and support throughout the research process. Finally, I would like to thank the editors of the *UIC Review of Intellectual Property Law* for their time and effort publishing this piece. This research was funded by the U.S. Department of State Fulbright Research Grant. All views and mistakes are my own.

¹ See Shang-Jin Wei, Zhuan Xie & Xiaobo Zhang, *China's Transition to a More Innovative Economy: Progress and Challenges*, in CHINA'S NEW SOURCES OF ECONOMIC GROWTH: HUMAN CAPITAL, INNOVATION AND TECHNOLOGICAL CHANGE 174 (Ligang Song et al. eds., 2d ed. 2017).

² See Xiaobo Zhang, Jin Yang & Shenglin Wang, *China Has Reached the Lewis Turning Point*, 22 CHINA ECON. REV. 542, 542-543 (2011); see also Fang Cai & Yang Du, *Wage Increases, Wage Convergence, and the Lewis Turning Point in China*, 22 CHINA ECON. REV. 601, 602 (2011).

³ WORLD BANK, *World Bank National Accounts Data, Exports of Goods and Services (% of GDP)*, <https://data.worldbank.org/indicator/NE.EXP.GNFS.ZS?end=2017&locations=CN&start=1960&view=chart> (last visited Feb. 9, 2020).

notably in real estate,⁴ infrastructure,⁵ and industrial capacity.⁶ Between 2007 and 2012, during the peak of the global financial crisis, China's debt-to-GDP ratio increased by 56 percentage points.⁷

It is in this rapidly changing macroeconomic environment that China's leadership has turned to innovation as the foundation for continued growth that will help China avoid the "middle income trap" and become a global economic leader in the twenty-first century.⁸ The most notable example of this goal was outlined in the 13th Five-Year Plan, where the CCP set a target of having 60 percent of China's economic growth come from innovation by 2020.⁹ However, even with these ambitious policy targets, central dictates are rarely effective if they are not made within an institutional environment that allows them to be properly implemented.¹⁰

⁴ See Edward Glaeser et al., *A Real Estate Boom with Chinese Characteristics*, 31 J. ECON. PERSP. 93, 93-94 (2017) (conducting a statistical review of China's real estate boom and the investment glut that has emerged); see also Dinny McMahon, *China's Ghost Cities and Their Multi-billion Dollar Debt are Raising Concerns*, AUSTL. FIN. REV. (Apr. 6, 2018), <https://www.afr.com/news/world/asia/chinas-ghost-cities-and-their-multibilliondollar-debt-20180404-h0ybjz> (analyzing the "ghost city" phenomenon in China).

⁵ See Atif Ansar et al., *Does Infrastructure Investment Lead to Economic Growth or Economic Fragility? Evidence from China*, 32 OXFORD REV. ECON. POL'Y 360, 385 (2016) (finding that China's "poorly managed infrastructure investments are a main explanation of surfacing economic and financial problems").

⁶ See USHA C. V. HALEY & GEORGE T. HALEY, *SUBSIDIES TO CHINESE INDUSTRY: STATE CAPITALISM, BUSINESS STRATEGY, AND TRADE POLICY* xvii (2013) (finding that a major cause of China's industrial overcapacity is due to the fact that 30 percent of industrial output in China received some form of government subsidy, including cheap land and credit, discounted power costs, and tax breaks).

⁷ Kenneth Ho et al., *The China Credit Conundrum: Risks, Paths and Implications*, GOLDMAN SACHS PORTFOLIO STRATEGY RESEARCH (July 2013), http://pg.jrj.com.cn/acc/Res/CN_RES/INVEST/2013/7/26/f9ab5c5e-8a91-4250-b9c6-e045d31459c2.pdf.

⁸ At the 19th Party Congress, Xi Jinping noted that "[i]nnovation is the primary driving force behind development; it is the strategic underpinning for building a modernized economy." Xi Jinping, General Secretary, CCP, *Annual Report to the 19th National Congress of the Chinese Communist Party: Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era* (Oct. 18, 2017), http://www.xinhuanet.com/english/download/Xi_Jinping's_report_at_19th_CPC_National_Congress.pdf.

⁹ See Shisanwu Guojia Keji Chuangxin Guihua (十三五国家科技创新规划) [13th Five-Year Plan on National Science and Technology Innovation] (promulgated by the St. Council, July 28, 2016), ST. COUNCIL, July 28, 2016, http://www.gov.cn/gongbao/content/2016/content_5103134.htm.

¹⁰ See Tucker Van Aken & Orion A. Lewis, *The Political Economy of Noncompliance in China: The Case of Industrial Energy Policy*, 24 J. CONTEMP. CHINA 798, 800 (2015) (examining how industrial energy intensity reduction policy compliance is determined by the regulatory autonomy, regulatory capacity, and economic interests of local provincial governments); ELIZABETH ECONOMY, *THE RIVER RUNS BLACK: THE ENVIRONMENTAL CHALLENGE TO CHINA'S FUTURE* 110 (2004) (noting that local governments consider social, political, and economic conditions when determining industrial regulatory policy and may have interests in not implementing central policy); Genia Kostka & Jonas Nahm, *Central-Local Relations: Recentralization and Environmental Governance in China*, 231 CHINA Q. 567, 570 (2017) (noting that even when the central government pays closer attention to the enforcement of environmental regulations, compliance is far from uniform and there is a large degree of regional variation across China).

There is a large literature arguing that effective legal institutions are essential for good economic outcomes.¹¹ In terms of promoting innovation, a country's IPR regime is one of the most important of those institutions.¹² An effective IPR regime is essential for ensuring that creators are able to reap the benefits of their work while simultaneously promoting the dissemination of new knowledge.¹³ Although these are both important goals, there is a fundamental contradiction between them. If an IPR regime is too strong, it could limit the economic benefits of innovation by preventing the dissemination of knowledge and result in monopolistic behavior by IP holders.¹⁴ If, on the other hand, an IPR regime is too weak, it could reduce innovation by failing to protect the intellectual works of creators and result in misappropriation by those who did not bear the costs of production.¹⁵

China has long been considered to be a country with weak formal institutions.¹⁶ This is particularly true in the case of its IPR regime, which is frequently maligned for rampant infringement and its inadequate enforcement mechanisms.¹⁷ However, in recent years, China has engaged proactively in building formal market-supporting institutions to ensure that IP policies are effectively enforced. By reviewing the legal frameworks around judicial reforms and through non-randomized, semi-structured field interviews with lawyers, IP officials, and industry representatives, this article describes how China's evolving legal institutions are increasing central control of the IPR regime, building judicial professionalism, and ensuring uniformity in case outcomes.¹⁸ These developments have enabled China to strengthen its IPR regime in

¹¹ See generally DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (1990) (analyzing how institutions and institutional change affect the performance of economies); Rafael La Porta et al., *Law and Finance*, 106 *J. POL. ECON.* 1113 (1998) (demonstrating how different legal institutions impact investor rights and corporate governance); Daron Acemoglu, Simon Johnson & James A. Robinson, *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 *AMERICAN ECON. REV.* 1369 (2001) (using variation in European settler mortality to analyze how different institutions impact current income per capita at the national level).

¹² See Stanley M. Besen & Leo J. Raskind, *An Introduction to the Law and Economics of Intellectual Property*, 5 *J. ECON. PERSP.* 3, 5 (1991).

¹³ Keith E. Maskus, *Intellectual Property Rights and Economic Development*, 32 *CASE W. RES. J. INT'L L.* 471, 473 (2000).

¹⁴ *Id.* at 474.

¹⁵ *Id.*

¹⁶ See, e.g., Franklin Allen, Jun Qian & Meijun Qian, *Law, Finance, and Economic Growth in China*, 77 *J. FIN. ECON.* 57 (2005) (arguing that despite China's weak formal legal rules and its underdeveloped financial system, informal norms and mechanisms play an important role in supporting growth); see also Yang Yao & Linda Yueh, *Law, Finance, and Economic Growth in China: An Introduction*, 37 *WORLD DEV.* 753, 760 (2009) (contending that the effectiveness of laws in fostering growth is related to the underlying institutional arrangements in an economy); Hongbin Li et al., *Political Connections, Financing and Firm Performance: Evidence from Chinese Private Firms*, 87 *J. DEV. ECON.* 283, 284 (2008) (finding that political connections in China affect firm performance through a number of mechanisms that are related to China's weak institutional environment).

¹⁷ See, e.g., Maskus, *supra* note 13, at 480 (noting how rampant trademark infringement negatively impacted the brand reputation of Chinese enterprises); Lina Wang, *Intellectual Property Protection in China*, 36 *INT'L INFO. & LIBRARY REV.* 253 (2004); James S. Ang, Chaopeng Wu & Yingmei Cheng, *Does Enforcement of Intellectual Property Rights Matter in China? Evidence from Financing and Investment Choices in the High-Tech Industry*, 96 *REV. ECON. & STAT.* 332 (2014) (noting that while China has uniform national IP laws, there are significant differences across provinces in terms of local enforcement).

¹⁸ In order to conduct interviews for this research, I relied on personal networks to obtain initial interviews, with additional interviews produced using the snowball sampling method. See, e.g., Nissim

line with the demands of its economic transition. Although China's IPR regime is far from perfect, these reforms are indicative of a major initiative to improve IP protections, nurture domestic innovation, and increase the role of China's judicial system in efficiently resolving disputes.

This article proceeds as follows: section II reviews some of the key explanations for the current state of IPR enforcement in China, focusing on economic materialist and cultural idealist explanations. Specifically, it examines how China's domestic institution building enables its IPR regime to align economic materialist interests with institutional implementation. Section III provides a brief overview of the historical development of China's IPR regime and examines some of the literature on central-local relations in China's governance institutions. This section also examines the development of legality and the reliance on law as a source sociopolitical legitimacy in China. Section IV describes some of the key judicial reforms China has undertaken to strengthen its IPR regime and centralize control of the system. It specifically focuses on how increasing central control, building judicial professionalism, and ensuring uniformity in case outcomes has bridged the gap between China's economic needs and the successful implementation of institutional reform. Finally, section V concludes with the implications of this study for China's legal development and the role of its IPR regime in meeting the necessities of its economic transition.

II. EXPLANATIONS FOR CHINA'S IPR REGIME

There is a large theoretical literature providing potential explanations for the current state of IPR enforcement in China. In general, these can be broken down into economic materialist explanations, which focus on how economic structure and social organization impact IPR regimes, and cultural idealist explanations, which look to the philosophical underpinnings and cultural values of societies to explain IPR regimes.

The economic materialist explanations for changes in IPR regimes posit that IPR regimes are largely structured by domestic economic interests and international pressures.¹⁹ Because China's early economic development relied on the mass

Cohen & Tamar Arieli, *Field Research in Conflict Environments: Methodological Challenges and Snowball Sampling*, 48 J. PEACE RES. 423–435 (2011) (noting the utility of using the snowball sampling method in areas “characterized by less than optimal research conditions where other methodologies are not applicable,” especially in conflict environments, among sensitive populations, and even in authoritarian regimes). Additionally, this article includes a full list of interviewees (n=23) contacted over the course of the research in table 4 of the Appendix, but identities have been anonymized to incentivize the candidness of the answers and as a part of the ethics review for this research. Citations to interview responses uses the coding provided in table 4. For example, CD-0525182L, indicates that the interview was conducted in Chengdu, on May 25, 2018, was the second interview conducted that day, and was with a lawyer.

¹⁹ See Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS-PLUS ERA*, 193 (Daniel Gervais, ed., 2007) (outlining the role of an internal push and external pressure in China's development of IP laws) [hereinafter Yu, *Intellectual Property*]; Mike W Peng et al., *An Institution-Based View of Global IPR History*, 48 J. INT'L BUS. STUD. 893, 902 (2017) (arguing that as economies develop, “inventive capacity, wider diffusion of innovations, and demands for high-quality products emerge” and domestic stakeholders' interests shift to align with building a stronger IPR regime).

production of cheap goods for foreign markets, creating and enforcing a strict IPR regime was neither profitable nor desirable.²⁰ However, as the economy developed and the economic structure began to have a higher proportion of IP-intensive industries, domestic demand for stronger IP protections increased and local stakeholders emerged who have an interest in enforcing a stronger IPR regime. In China, there has been a simultaneous push from the government to align China's IPR regime with its national modernization goals as well as local industry stakeholders who want to take advantage of stronger protections.²¹

Additionally, international pressures can also have a major impact on the formation of the intellectual property laws that make up the institutional foundation of an IPR regime.²² Throughout the 1980s and 1990s, lobbying by U.S. companies mobilized the U.S. government to threaten China with sanctions, consider not renewing China's most-favored-nation status, and to oppose China's entry into the World Trade Organization (WTO).²³ Even after China's WTO accession, one of the main drivers of the current trade war between the U.S. and China has been the perception that China lacks strong IP protections and maintains a policy of forced technology transfers.²⁴ Advanced economies have long pressured China to increase IP protections for foreign firms and have been somewhat successful at shaping IP laws.

Nevertheless, despite the fact that sustained international pressures have shaped China's IP laws, these pressures have had little direct impact on enforcement, which requires the support of local stakeholders to improve outcomes. Indeed, as Andrew Mertha found in his study of the role of external pressure on China's IPR enforcement regime, it has been sustained pressure from inside China that has caused enforcement efforts to increase. This is especially true when "foreign pressure and official policy come into conflict with local incentives" because local incentive structures often win out.²⁵ Even so, it is still important to recognize that it was in response to pressure from the United States and in preparation for accession to the WTO that China revamped important aspects of the legal framework for its intellectual property system.²⁶

While economic materialist explanations focus on the impact of economic structure and political organization, cultural idealist explanations seek to explain the development of IPR regimes in terms of the cultural legacies and philosophical

²⁰ This developmental reality is in no way unique to China. As Peng et al. note, "Switzerland rejected patent laws until 1888. Denmark had not enacted a patent law until 1894. The Netherlands rescinded patent laws between 1869 and 1912, after a political victory of the free trade movement in an effort to encourage technological imitation." Peng, *supra* note 19, at 898.

²¹ See Yu, *Intellectual Property*, *supra* note 19, at 180-182, for a detailed examination of the role of the software industry in pushing for stronger domestic IP reforms. This view has also been supported by interviews with industry representatives for this research. Interview CD-0615182I said that all major players in the industry rely heavily on IP and push for stronger IP protections as a key part of their business strategy.

²² See Yu, *Intellectual Property*, *supra* note 19, at 174.

²³ *Id.* at 186.

²⁴ OFFICE OF THE U.S. TRADE REPRESENTATIVE, FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLITICS, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 (Mar. 22, 2018), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/march/section-301-report-chinas-acts>.

²⁵ ANDREW MERTHA, THE POLITICS OF PIRACY: INTELLECTUAL PROPERTY IN CONTEMPORARY CHINA 4 (2005).

²⁶ *Id.*

underpinnings of society. In the case of China, these explanations largely focus on Confucianism and political culture as the main cause of China's weak IPR regime.²⁷

The argument that Confucianism and China's traditional culture have prevented it from developing indigenous institutions around intellectual property is based on several core Confucian tenets. First, Confucian philosophy required that knowledge of the past belong to all Chinese people.²⁸ Because an understanding of the past is the key to self-cultivation, granting intellectual property rights, which would allow a select few to monopolize these needed materials, contradicted traditional Chinese moral standards.²⁹ Second, copying and imitation were considered necessary aspects of demonstrating respect for one's ancestors and essential to signaling filial piety, moral cultivation, and even for achieving extrinsic success through the national civil service exams.³⁰ Finally, these arguments emphasize that Confucian society places a higher value on the collective than the individual and thus the Chinese did not develop a notion of individual rights, especially as it relates to creativity.³¹

These explanations, however, contain a number of important weaknesses. Given that past cultural values and philosophical systems are largely fixed, cultural idealist explanations cannot explain the evolution or change in IPR regimes. If China's weak IPR regime is predicated on its Confucian culture, then the only way for China to develop a stronger IPR regime is to eliminate the influence of Confucian values on Chinese society. However, few would argue that China has eradicated the impact of Confucian philosophy on Chinese society and yet, as this article discusses below, China has experienced dramatic improvements to its IPR regime. In addition to failing to explain the positive trends in China's improving IP protections today, cultural idealist explanations also fail to explain the strong IPR regimes in other Confucian societies

²⁷ See, e.g., WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 19-29 (1995) (discussing how Confucian culture militated against intellectual property reforms); Jessica Gisclair, *The Dissonance between Culture and Intellectual Property in China*, 30 SE. REV. ASIAN STUD. 182-187 (2008) (arguing that a cultural perspective of Confucian doctrine is reflected in China's modern view of intellectual property among CCP members). *But see* Wei Shi, *Cultural Perplexity in Intellectual Property: Is Stealing a Book an Elegant Offense*, 32 N.C. J. INT'L L. & COM. REG. 1, 2-3 n.2 (2006) (providing a more expansive list of the literature criticizing Confucian philosophy as the root of China's IPR enforcement problem); Ken Shao, *Chinese Culture and Intellectual Property: Let's Realise We Have Been Misguided*, 4 WIPO J. 103 (2012) (criticizing cultural explanations for their misrepresentation of Chinese culture's view of creativity and knowledge creation); *see also* Geoffery T. Willard, *An Examination of China's Emerging Intellectual Property Regime: Historical Underpinnings, the Current System and Prospects for the Future*, 6 IND. INT'L & COMP L. REV. 411, 417 (1996) (arguing that the cultural and political legacies impact modern IP rights in China and "rights consciousness" must be instilled in the Chinese people and ingrained in their legal institutions"); Alan Zimmerman, *Contending with Chinese Counterfeits: Culture, Growth, and Management Responses*, 56 BUS. HORIZONS 141, 142 (2013) (arguing that "Chinese political culture did not lend itself to the concept of IP ownership").

²⁸ See ALFORD, *supra* note 27, at 26.

²⁹ See Patrick H. Hu, *"Mickey Mouse" in China: Legal and Cultural Implications in Protecting U.S. Copyrights*, 14 B.U. INT'L L.J. 81, 88 (1996).

³⁰ See Peter K. Yu, *The Second Coming of Intellectual Property Rights in China*, OCCASIONAL PAPERS IN INTELLECTUAL PROPERTY FROM BENJAMIN N. CARDOZO SCHOOL OF LAW, YESHIVA UNIVERSITY, 17 (2002) [hereinafter Yu, *Second Coming*].

³¹ *Id.*

like Singapore, Japan, and South Korea, which consistently rank among the top in the world in terms of innovation and IP protection.³²

While the economic materialist explanations have clear explanatory power, one shortcoming is that they do not fully explain the processes that underlie the evolution of IPR institutions and how these economic forces mobilize to meet the demands of changing economic conditions. The under-theorization of the processes that link these two variables is an important gap in the literature that needs to be addressed. This article seeks to expand on this aspect of the literature by explaining how domestic institution building enables IPR regimes to align economic interests with institutional implementation. Specifically, this article examines how increasing central control, building judicial professionalism, and ensuring uniformity in case outcomes have enabled China to strengthen its IPR regime in line with the demands of its economic transition. As economic development increases and demand for domestic IP protections increases, intervening factors mediate the ability of IP institutions to adapt to the changing environment. However, before we can examine these processes, it is important to first understand the historical evolution of China's IPR regime and the role that its decentralized institutional environment play in the implementation of reform.

III. IPR ENFORCEMENT AND CENTRAL-LOCAL RELATIONS

A. *The Historical Evolution of China's IPR Regime*

History matters not only because we can learn from it but also because it shapes the way institutions evolve.³³ Thus, to a large extent, China's current IPR regime is shaped by its historical laws, jurisprudence, and legal enforcement mechanisms. First, it is important to recognize that compared to developed western countries, China's IPR regime is relatively young.³⁴ The legal institution of intellectual property in the modern sense was not introduced in China until the early twentieth century when colonial powers used commercial treaties to force China to adopt them.³⁵ In 1903, the United States used its superior economic and military might to force China to sign the

³² See GLOBAL INNOVATION INDEX 2019: CREATING HEALTHY LIVES—THE FUTURE OF MEDICAL INNOVATION xxii (Soumitra Dutta, Bruno Lanvin & Sacha Wunsch-Vincent, eds., 12th ed. 2018) <https://www.globalinnovationindex.org/home> (last visited Feb. 10, 2020) (placing Singapore, Japan, and South Korea as global leaders in innovation); Mei Pugatch & David Torstensson, *Inspiring Tomorrow: International IP Index*, U.S. CHAMBER OF COMMERCE GLOBAL INNOVATION POLICY CENTER (7th ed. 2019), <https://www.theglobalipcenter.com/ipindex2020-chart/> (last visited Feb. 10, 2020) (placing Japan, South Korea, and Singapore as global leaders in IP protection and enforcement).

³³ See NORTH, *supra* note 11, at vii.

³⁴ See Can Huang, "Recent Development of the Intellectual Property Rights System in China and Challenges Ahead," 13 MGMT. & ORG. REV. 39, 40 (2017) (noting that compared with "industrialized countries, such as Italy, the U.K., and the U.S., which have several centuries of history of developing IPR protection, China has a young IPR system and only four decades of experience with using and protecting IPR").

³⁵ See Raymond M. Gabriel, *The Patent Revolution: Proposed Reforms in Chinese Intellectual Property Law, Policy, and Practice are the Latest Step to Bolster Patent Protection in China*, 9 ASIAN-PACIFIC L. & POL'Y J. 324, 326 (2011).

Treaty Between the United States and China for the Extension of the Commercial Relations Between Them, which sought to protect United States trademarks, patents, and copyrights from Chinese infringement.³⁶ Despite the fact that pursuant to this treaty China proceeded to introduce substantive copyright (1910), patent (1912), and trademark (1923) laws, implementation was difficult and the laws were rarely enforced.³⁷ During the republican era (1912-1949), the Nationalist Party attempted to reintroduce intellectual property protections, however, the decades of war, famine, and revolution did not make a supportive institutional environment for legal reform.³⁸

When the CCP came to power in 1949, they embarked on their agenda to construct a socialist command economy. This required eliminating private property in all its forms—including intellectual property. Indeed, in Maoist China “the very notion of privately owned monopolies or exclusive rights in the use of expressions, ideas and names became meaningless.”³⁹ In addition to dismantling private property, Mao’s revolution also proceeded to dismantle courts and administrative bureaucracies. During the Anti-Rightist Campaign of 1957-1958, which was launched in response to the strong criticisms of the Party raised by the Hundred Flowers Movement, the CCP was able to use mass mobilization to assume the dominant role in law enforcement and supplant the courts.⁴⁰ Furthermore, during the Cultural Revolution, Mao’s instruction to the Red Guards to “smash the police, procuratorate, and courts” (砸烂公检法) played an important role in purging the legal system of institutional power and ensuring that what remained of the judicial system was responsive to the political demands of the Party.⁴¹

Despite the failed attempts to transplant intellectual property laws in China through commercial treaties during the imperial and republican periods and after the legal tumult wrought by the Maoist regime, China began to lay the foundation for its modern IPR regime around 1978 when Deng Xiaoping ushered in the era of reform and opening. Although still a socialist economy, these IP laws were justified through the idea that China needed to build an IPR regime to achieve its national economic modernization and development goals.⁴² This allowed reform-minded leaders to push through IP laws despite conservative opposition and build a framework for IP protection around China’s national economic interest. Indeed, as Peter Yu notes, “economic modernization provided the needed ‘social planning’ justification for a new intellectual property system. Since then, intellectual property reforms have been

³⁶ See Peter K. Yu, *The Transplant and Transformation of Intellectual Property Laws in China*, in GOVERNANCE OF INTELLECTUAL PROPERTY RIGHTS IN CHINA AND EUROPE, 20, 21 (Nari Lee, Niklas Bruun & Li Mingde, eds., 2015); see also Treaty Between the United States and China for the Extension of the Commercial Relations Between Them, China-U.S. Oct. 8, 1903 6 U.S.T. 695.

³⁷ See Yu, *Second Coming*, supra note 30, at 21.

³⁸ *Id.*

³⁹ PETER FENG, INTELLECTUAL PROPERTY IN CHINA 3 (1997).

⁴⁰ See Shao-Chuan Leng, *Criminal Justice in Post-Mao China: Some Preliminary Observations*, 73 J. CRIM. L. & CRIMINOLOGY 204, 205 (1982); Shao-Chuan Leng, *The Role of Law in the People’s Republic of China as Reflecting Mao Tse-Tung’s Influence*, 68 J. CRIM. L. & CRIMINOLOGY 356, 358-359 (1977).

⁴¹ *Id.*

⁴² Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle*, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS-PLUS ERA 193 (Daniel Gervais, ed., 2007).

linked to the country's rapid economic development and have benefited from the push for continuous economic reforms."⁴³

Even though it is possible that stronger intellectual property protections might be unnecessary for promoting economic growth in developing countries, "the claim that stronger intellectual property protection would promote economic development provided the needed internal push for intellectual property reforms in the first decade and a half following the reopening of the Chinese market to foreign trade."⁴⁴ This internal push would become increasingly important as the Chinese economy continued to develop and local stakeholders' interests aligned with building a stronger IPR regime to protect their innovations.⁴⁵

B. Central-Local Relations and China's Legal Institutions

Today, the problem is not that China does not have the laws to protect intellectual property. As seen in table 1 and table 2, China has enacted domestic laws and acceded to international treaties that put its IPR regime's legal foundation on par with most industrialized nations. As many have noted, the problem lies in enforcement.⁴⁶ The enforcement problem largely tracks with China's fragmented and decentralized political system, which creates ample space for local noncompliance. This intractable problem has been a central concern in Chinese governance for centuries. Indeed, the ability of local governments to circumvent central dictates is aptly characterized by the classical proverb that "heaven is high and the emperor is far away" (天高皇帝远). While it is true that China has always attempted to keep a highly centralized grip on political power, the reform era saw the CCP attempt to use this fragmented structure to its advantage by pursuing fiscal and administrative decentralization in order to stimulate competition and economic growth among the provinces.⁴⁷ This institutional environment—variously characterized in the literature as regionally decentralized

⁴³ *Id.* at 191.

⁴⁴ *Id.* at 193.

⁴⁵ *Id.*

⁴⁶ See Ang, Wu & Cheng, *supra* note 17, at 333; Yu, *Intellectual Property*, *supra* note 19, at 174; Nathan W. Snyder, *Putting Numbers to Feelings: Intellectual Property Rights Enforcement in China's Courts—Evidence from Zhejiang Province Trademark Infringement Cases 2004-2009*, 10 NW. J. TECH. & INTELL. PROP. 349, 349 (2012).

⁴⁷ See Hongbin Cai & Daniel Treisman, *Did Government Decentralization Cause China's Economic Miracle?*, 58 WORLD POL. 505, 507-508 (2006) (distinguishing between administrative, political, and fiscal decentralization). Administrative decentralization refers to the devolution of central authority to subnational governments to make certain policy decisions subject to review and possible veto from above. Political decentralization is used to describe the phenomenon where subnational governments have the right to make certain policy decisions independent from higher-level political authorities and/or when subnational officials are chosen by local residents rather than by higher-level officials. Finally, Fiscal decentralization is defined as the process through which government revenues and expenditures are allocated across different levels of government, with local revenue and expenditures taking up a larger share of the total government budget. China's decentralized authoritarianism has embraced administrative and fiscal decentralization while keeping a highly centralized political system. This has important implications for China's economic development as well as its ability to implement policy at the local level.

authoritarianism,⁴⁸ decentralized experimentation,⁴⁹ and fragmented authoritarianism⁵⁰—means that while the central government sets the agenda and creates political objectives, they still rely on the localities to implement and enforce them.⁵¹ As Van Aken and Lewis demonstrate in their study of energy intensity reduction policy, this fragmented and decentralized institutional framework creates space for local regulatory autonomy and local noncompliance with central directives.⁵²

In addition to its implications for regulatory policies, this framework also applies to China's legal institutions. Despite the fact that the CCP has begun promoting the idea of “socialist rule of law” (社会主义法治) and “governing the country with law” (依法治国)⁵³ as a method for creating the semblance of rule by law in the judiciary, in many ways China's judges “are more like bureaucratic actors or civil servants within a tightly party-controlled hierarchy than independent adjudicators.”⁵⁴ This fits squarely within China's bureaucratic and socialist traditions as well as its instrumentalist view of law as a tool for achieving substantive objectives like social stability and harmony.⁵⁵ This lack of judicial independence has caused local courts to become beholden to the economic policy interests of local party and state officials. As a result of the fiscal and administrative decentralization promoted during the reform era, local governments had a clear economic interest in protecting local firms and state-owned enterprises as the base of their political and economic power.⁵⁶ Because judges are selected by local CCP officials, appointed by local people's congresses and supervised by local CCP political and legal affairs committees (政法委员会), it is quite easy for local officials to pressure courts to provide favorable rulings for and impede enforcement against local economic champions.⁵⁷

⁴⁸ See Chenggang Xu, *The Fundamental Institutions of China's Reforms and Development*, 49 J. ECON. LITERATURE 1079, 1082 (2011).

⁴⁹ See Sebastian Heilmann, *From Local Experiments to National Policy: The Origins of China's Distinctive Policy Process*, 59 CHINA J. 1, 1 (2008).

⁵⁰ See Kenneth Lieberthal & David M. Lampton, *Introduction: The “Fragmented Authoritarianism” Model and its Limitations*, in BUREAUCRACY, POLITICS, AND DECISION MAKING IN POST-MAO CHINA 9 (Kenneth Lieberthal & David M. Lampton, eds., 1992).

⁵¹ Van Aken & Lewis, *supra* note 10, at 799-800.

⁵² *Id.* at 799-803.

⁵³ These terms gained wide support by the 4th Plenary Session of the 18th CCP Central Committee. See Zhongguo Gongchandang Di Shiba Miao Zhongyang Weiyuanhui Di Si Ci Quanti Huiyi Gongbao (中国共产党第十八届中央委员会第四次全体会议公报) [Communique of the 4th Plenary Session of the 18th CCP Central Committee] (adopted Oct. 23, 2014), CCP CENT. COMM., Oct. 23, 2014, <http://epc.people.com.cn/n/2014/1023/c64094-25896724.html>; see also Susan Trevaskes, *A Law Unto Itself: Chinese Communist Party Leadership and Yifa Zhiguo in the Xi Era*, 44 MOD. CHINA 347, 348 (2018) (noting that in the Xi Jinping era, “yifa zhiguo is predominantly about fortifying and legitimizing the CCP's leadership through law over state institutions”).

⁵⁴ Margaret Woo, *Court Reform with Chinese Characteristics*, 27 WASH. INT'L L. J. 241, 244 (2017).

⁵⁵ *Id.* at 242. See also Shao-Chuan Leng, *The Role of Law in the People's Republic of China as Reflecting Mao Tse-Tung's Influence*, 68 J. CRIM. L. & CRIMINOLOGY 356, 373 (1977) (concluding that Maoist philosophy heavily influenced China's use of law as “an instrument of social engineering”); Benjamin L. Liebman, *A Return to Populist Legality? Historical Legacies and Legal Reform*, in MAO'S INVISIBLE HAND: THE POLITICAL FOUNDATIONS OF ADAPTIVE GOVERNANCE IN CHINA 165 (Sebastian Heilmann & Elizabeth J. Perry eds., 2011) (noting that an instrumentalist approach to law continues to dominate during the reform era as a tool for CCP policy).

⁵⁶ See Woo, *supra* note 54, at 250.

⁵⁷ See Nari Lee & Liguang Zhang, *Specialized IP Courts in China - Judicial Governance of Intellectual Property Rights*, 48 INT'L REV. INTELL. PROP. & COMPETITION L. 900, 910 (2017).

Importantly, The Supreme People's Court's First Five-Year Court Reform Program (1999-2003) not only emphasized the importance of counteracting local judicial protectionism, but also emphasized that the lack of professionalization in the judiciary, the lack of judicial independence caused by the bureaucratic management structure, and the lack of financial support for courts to carry out their core functions are major problems in China's judicial system.⁵⁸ These issues have been and continue to be major obstacles in enforcing laws in China in general and IP laws in particular.

From ensuring regulatory compliance in environmental policy to rooting out local protectionism in the judiciary, local autonomy and noncompliance have posed some of the greatest challenges for the central government in terms of policy implementation. Since taking office in 2012, however, General Secretary Xi Jinping has made great efforts to recentralize fiscal and administrative powers to ensure compliance with and enforcement of central directives.⁵⁹ Importantly, General Secretary Xi has promoted a centralized policymaking process known as "top-level design" (顶层设计) to guide reforms during his tenure.⁶⁰ As Stepan observes, although this process "may help correct past distortions caused by uneven policy implementation and resource distribution, it also risks to stifle innovation and to decrease effective governance."⁶¹ Furthermore, Xi's anti-corruption campaign has grown more powerful under the National Supervisory Commission, a new agency that expands the anti-corruption campaign's scope from weeding out corruption exclusively in the CCP to fighting corruption in both the Party *and* the state.⁶² This has enabled the CCP's central leadership to institutionalize oversight and administrative control over local officials into state governance. Despite frequently being considered a detriment to China's innovation ecosystem⁶³ and a hindrance to achieving its development goals in the administrative policy literature, increased central control over IP adjudication has created benefits for IP enforcement and policy compliance without the corresponding cost of ineffective governance.

⁵⁸ Zuigao Renmin Fayuan Guanyu Yinfa 《Renmin Fayuan Wunian Gaige Gangyao》 de Tongzhi (最高人民法院关于印发《人民法院五年改革纲要》的通知) [Notice of the Supreme People's Court on Printing Distributing the Outline of the Five-Year Reform of the People's Court], (adopted by the Sup. People's Ct., Oct. 20, 1999) SUP. PEOPLE'S CT., <https://www.chinacourt.org/article/detail/2013/04/id/941425.shtml>. Despite identifying the core problems, reforms to address them have largely been ineffective. See, e.g., Qianfan Zhang, *Judicial Reform in China: An Overview*, in CHINA'S SOCIALIST RULE OF LAW REFORMS UNDER XI JINPING 17-29 (John Garrick & Yan Chang Bennett eds., 2016).

⁵⁹ Jessica C. Teets, Reza Hasmath & Orion A. Lewis, *The Incentive to Innovate? The Behavior of Local Policymakers in China*, 22 J. CHINESE POL. SCI. 505, 505 (2017); Kostka & Nahm, *supra* note 10, at 567.

⁶⁰ Barry Naughton, *Leadership Transition and the "Top-Level Design" of Economic Reform*, 37 CHINA LEADERSHIP MONITOR 1, 2 (Apr. 30, 2012).

⁶¹ Matthias Stepan, *What Does Xi Jinping's Top-Down Leadership Mean for Innovation in China?*, CHINAFILE (Oct. 25, 2016), <http://www.chinafile.com/conversation/what-does-xi-jinpings-top-down-leadership-mean-innovation-china>.

⁶² See William Weightman, *Xi Cracks down on Local Governments' Compliance and Creativity*, E. ASIA F. (June 14, 2018), <http://www.eastasiaforum.org/2018/06/14/xi-cracks-down-on-local-governments-compliance-and-creativity/>.

⁶³ Regina M. Abrami, William C. Kirby & F. Warren McFarlan, *Why China Can't Innovate*, 92 HARV. BUS. REV. 107, 107-111 (2014).

C. Legality in China's Judicial Reforms

While most studies in the policy literature have emphasized the importance of central-local relations in China's administrative state, these processes also have clear applications for China's legal institutions more broadly as well as its IPR regime in particular. A large part of the literature on the role of law in China's political system note that, although China had largely pursued a strategy of enhancing judicial and legal mechanisms for dispute resolution in the 1980s and 1990s, China has made a "turn against law" during the twenty-first century.⁶⁴ Some have used Xi Jinping's recentralization of administrative power and abolishment of presidential term limits as a clear indicator that China's resurgent authoritarianism is destroying the political and legal norms that formed the foundations for its remarkable growth and stability over the last four decades.⁶⁵

However, recent scholarship has argued that, contrary to the common perspective on legality in Chinese politics, China's recentralization of administrative bureaucracies does not represent a turn against law, but rather a turn *towards* law necessitated by emerging governance imperatives.⁶⁶ As Zhang and Ginsburg observe, there is an inherent tradeoff between allowing for a certain degree of local autonomy in a decentralized administrative system (*i.e.* de-facto federalism) and ensuring centralized rule through rigorous law enforcement.⁶⁷ This dichotomy takes on new significance in the Xi Jinping era, where increasing centralization has required that the Chinese state pursue a strategy of enhancing central control through legal reform and bureaucratization.⁶⁸ China's recent pursuit of centralization and legalization represents a new strategy to address the challenges of governing a large and populous country, manage the unique issues of a rapidly changing post-communist political economy, and adapt institutions to achieve the increasing sociopolitical legitimacy granted to law and legal institutions in China today.⁶⁹

The nature of IP reform provides an interesting case with which to examine these trends in China's use of law in governance. Many of China's IP judicial reforms have centered on the goals of increasing uniformity, efficiency, and professionalism through the process of centralization. While these reforms clearly fall within the CCP's policy objective of protecting IP rights in order to boost domestic innovation, it does not follow that increasing centralization represents a turn against law in the terms discussed above. Indeed, much of the recent scholarship on the use of law and judicial institutions

⁶⁴ See Carl Minzner, *China's Turn Against Law*, 59 AM. J. COMP. L. 935, 937-38 (2011) (noting that China's turn against law is "tied to a politicized rejection of many legal reforms advanced in the 1980s and 1990s" as well as "a top-down authoritarian political reaction to growing levels of social protest and conflict in the Chinese system"). For an in-depth review of the strand of the literature arguing that China has taken a turn against law, see Taisu Zhang & Tom Ginsburg, *Legality in Contemporary Chinese Politics*, 59 VA. J. INT'L L. 307 (2019).

⁶⁵ See, e.g., CARL F. MINZNER, *END OF AN ERA: HOW CHINA'S AUTHORITARIAN REVIVAL IS UNDERMINING ITS RISE* (2018).

⁶⁶ Zhang & Ginsburg, *supra* note 64.

⁶⁷ *Id.* at n. 1.

⁶⁸ *Id.*

⁶⁹ *Id.*

in authoritarian regimes demonstrates the important role they play.⁷⁰ Based on the case of IP judicial reform in China, which will be discussed in the next section, it is clear that China hopes to achieve the CCP leadership's policy goals by relying more heavily on the legitimizing forces of legality rather than turning against it.

IV. CENTRALIZATION, PROFESSIONALIZATION, AND UNIFORMITY

Since releasing the Outline of the National Intellectual Property Strategy (“National IP Strategy”) in 2008, China has made important progress on building its capacity to “create, utilize, protect and administer its intellectual property system.”⁷¹ In fact, in recent years China has seen an explosion in IP filings and litigation. In 2017 China received over 1.38 million invention patent applications (up 14.2 percent year-on-year)⁷² and registered over 5.7 million trademarks, (up 55.7 percent year-on-year).⁷³ Furthermore, litigation has become an increasingly used dispute resolution mechanism. Between 2009 and 2017, Chinese courts saw their IP caseloads increase by almost 675 percent with civil (figure 1) and copyright (figure 2) cases being the main drivers.⁷⁴ In 2017 alone, Chinese courts heard over 191,223 first instance patent, trademark, and copyright cases. For comparison, United States courts heard only 11,561 cases total in the same year.⁷⁵ Following the National IP Strategy's call for the “judicial protection of IPR to play a leading role,” China has engaged in several judicial reforms to centralize authority, create case uniformity, and build professionalism within the IP adjudication system. This section will address a number of important IP reforms, examine how they create a greater level of central control over the IPR regime, and explain how they strengthen IP protections across the country.

A. Creation of Specialized IP Courts

One of China's biggest challenges is maintaining central control over competing regional interests. In terms of IP law, it is ensuring that local courts rule fairly and professionally according to law. In order to achieve this, China has attempted to centralize adjudicative power into specialized IP courts and tribunals. The main

⁷⁰ See, e.g., Peter H. Solomon, *Courts and Judges in Authoritarian Regimes*, 60 *WORLD POL.* 122 (2007); *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* (Tom Ginsburg & Tamir Moustafa eds., 2008).

⁷¹ Guojia Zhishi Chanquan Zhanlüe Gangyao (国家知识产权战略纲要) [Outline of the National Intellectual Property Strategy] (promulgated by the St. Council June 5, 2008, effective June 25, 2008), ST. COUNCIL, June 5, 2008, <http://www.wipo.int/wipolex/en/details.jsp?id=859>.

⁷² Xin Wang, *SIPO: Invention Patent Applications Surge in 2017*, *CHINA DAILY* (Jan. 11, 2018), http://www.chinadaily.com.cn/cndy/2018-01/11/content_35479464.

⁷³ Chengcheng, *China's Trademark Applications Hit Record High in 2017*, *XINHUA* (Jan. 31, 2018), http://www.xinhuanet.com/english/2018-01/20/c_136911172.

⁷⁴ For comparison, overall court cases only increased 80 percent between 2009 and 2016. See Zhongguo Fayuan Zhishi Chanquan Sifa Baohu Zhuangkuang (中国法院知识产权司法保护状况) [White Paper on the Status of the Judicial Protection of Intellectual Property Rights in Chinese Courts] (various years) SUP. PEOPLE'S CT., <http://www.court.gov.cn/zixun-xiangqing-153242.html>.

⁷⁵ Brian Howard, *Lex Machina Q4 2017 End of the Year Litigation Update*, *LEX MACHINA* (Jan. 16, 2018), <https://lexmachina.com/lex-machina-q4-litigation-update/>.

motivation for these reforms is to fight local protectionism by taking cases out of local jurisdiction while simultaneously increasing the technical ability and professionalism of judges in the IP adjudication system.⁷⁶ Many lawyers acknowledged that while protectionism is still prevalent in local courts, it is far less prevalent at higher levels as the judges are of a much higher caliber.⁷⁷ This fact has also been supported quantitatively. Long and Wang found that in China, plaintiffs litigating IP cases in their hometown are significantly more likely to win, however, when cases are appealed to the higher courts (*i.e.* to the provincial level), plaintiff location no longer has a significant effect on case outcome.⁷⁸

In response to these problems, the National People's Congress promulgated a decision to create three specialized IP courts in August 2014⁷⁹ and the Supreme People's Court (SPC) issued provisions providing additional regulatory guidance on court jurisdiction in October 2014.⁸⁰ One of the main concerns when establishing specialized IP courts—especially in developing countries—is that the cost of starting and operating them will outweigh the economic benefit of litigating IP cases.⁸¹ Thus, in order to maximize the practical effect of these new IP courts, China focused reforms on geographies with high IP caseloads in large urban centers along China's coast. Importantly, before these reforms were implemented, by 2010, courts in Beijing, Shanghai, and Guangzhou already received over half of all IP cases filed in China.⁸²

In terms of their structure, these specialized IP courts sit at the intermediate court level⁸³ and have first instance jurisdiction over all technically complex civil and administrative IP cases (including patents, new plant varieties, integrated circuit layout designs, trade secrets, and computer software).⁸⁴ They also have first instance

⁷⁶ Interview CD-0621181L.

⁷⁷ Interviews CD-0525182L, BJ-0419182L, CD-0619181L, and CD-0629182U.

⁷⁸ See Cheryl Xiaoning Long & Jun Wang, *Judicial Local Protectionism in China: An Empirical Study of IP Cases*, 42 INT'L REV. L. & ECON. 48, 58-59 (2015).

⁷⁹ Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Zai Beijing, Shanghai, Guangzhou Sheli Zhishi Chanquan Fayuan de Jueding (全国人民代表大会常务委员会关于在北京、上海、广州设立知识产权法院的决定) [Decision of the Standing Committee of the National People's Congress on the Establishment of Intellectual Property Courts in Beijing, Shanghai and Guangzhou] (promulgated by the Standing Comm. Nat'l People's Cong.) (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2014), STANDING COMM. NAT'L PEOPLE'S CONG., Aug. 31, 2014, http://www.npc.gov.cn/npc/xinwen/2014-09/01/content_1877042.htm.

⁸⁰ Zuigao Remin Fayuan Guanyu Beijing, Shanghai, Guangzhou Zhishi Chanquan Fayuan Anjian Guanxia de Guiding (最高人民法院关于北京、上海、广州知识产权法院案件管辖的规定) [Provisions of the Supreme People's Court on the Jurisdiction of Cases of Intellectual Property Courts in Beijing, Shanghai, and Guangzhou] (promulgated by the Sup. People's Ct., Oct. 27, 2014, effective Nov. 3, 2014), SUP. PEOPLE'S CT., Oct. 31, 2014, <https://www.chinacourt.org/law/detail/2014/10/id/147980> [hereinafter SPC Jurisdiction Provisions].

⁸¹ See Xavier Seuba, Christophe Geiger, & Linhua Lu, *The Evaluation and Modernisation of the Legal Framework for the Enforcement of Intellectual Property Rights*, CTR. INT'L INTELL. PROP., Research Paper no. 2016-02, (2016).

⁸² See Lee & Zhang, *supra* note 57, at 910.

⁸³ China's judiciary has four levels: Basic People's Courts at the county/district level, Intermediate People's Courts at the prefecture level, Higher People's Courts at the provincial level, and the Supreme People's Court at the national level. The court of first instance is the trial court and the court of second instance is the court of appeal *and* the court of last instance. However, cases deemed to have errors can apply for a retrial at the next level. Additionally, IP cases are filed in jurisdictions where the defendant resides or where the act of infringement occurred.

⁸⁴ SPC Jurisdiction Provisions, *supra* note 80, at art. 1.

jurisdiction over well-known trademarks⁸⁵ and deal with all other IP cases upon appeal from the basic people's courts in their province.⁸⁶ In terms of administrative law, the Beijing IP Court also has special, first-instance jurisdiction over administrative appeals brought against decisions issued by administrative IP adjudication bodies.⁸⁷

In order to further centralize adjudicative authority in the specialized IP courts, the SPC also determined that all of the intermediate people's courts in Beijing, Shanghai, and Guangdong could no longer accept civil and administrative IP cases and must grant jurisdiction to the specialized IP court even if the case would normally fall under their jurisdiction in other circumstances.⁸⁸ Appeals from the IP courts were initially handled by the provincial-level higher people's court within the same geographic jurisdiction, however, this has changed due to the founding of a National IP Appellate Tribunal within the SPC, which will be discussed further below.⁸⁹

The specialized IP courts have been very successful at implementing changes to substantive rules and procedures with a major impact on IP adjudication in China. In 2016, the Beijing IP Court ruled in favor of Watchdata System Co., Ltd. and ordered Hengbao Co., Ltd. to pay 49 million RMB in damages for a patent infringement plus an additional 1 million RMB in legal fees (for a total of approximately US \$7.2 million)—the highest penalty ever issued by a one of the newly created IP courts and the third highest ever in China for IP infringement.⁹⁰ This case was not only noteworthy for the large damage award, but also for the way in which the Beijing IP Court actually gathered sales data to estimate damages. While most courts rely on statutory damage amounts to determine awards due to the lack of a formal discovery process in China, the Beijing IP Court identified actual sales data for the infringing products gathered from 15 banks and the defendant's suppliers.

These evidentiary challenges have been further strengthened by decisions from the Shanghai IP Court. Because China does not have a formal process of discovery, the burden to provide evidence of infringement falls on the plaintiff.⁹¹ In the Beijing IP Court case, the court was able to obtain the data needed to calculate damages, however, one danger that remains is that defendants may attempt to destroy or hide

⁸⁵ See *Zhongguo Renmin Gonghe Guo Shangbiao Fa* (中华人民共和国商标法) [Trademark Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 22, 1982, effective Feb. 28, 1983, amended Aug. 30, 2013), art. 14, STANDING COMM. NAT'L PEOPLE'S CONG., <https://wipolex.wipo.int/en/legislation/details/13198> (stating that factors used for establishing a well-known mark include the "(1) reputation of the mark to the relevant public; (2) time for continued use of the mark; (3) consecutive time, extent and geographical area of advertisement of the mark; (4) records of protection of the mark as a well-known mark; and (5) any other factors relevant to the reputation of the mark").

⁸⁶ SPC Jurisdiction Provisions, *supra* note 80, at art. 1.

⁸⁷ *Id.* at art. 5.

⁸⁸ *Id.* at art. 3.

⁸⁹ *Id.* at art. 7.

⁹⁰ Beijing Woji Shuju Xitong Youxian Gongsi, Hengbao Gufen Youxian Gongsi Faming Zhuanli Qinquan Anjian (北京握奇数据系统有限公司诉恒宝股份有限公司发明专利侵权案件) [Beijing Watchdata Data Systems Co. Ltd. v. Hengbao Co., Ltd. Invention Patent Infringement Case] BEIJING INTELL. PROP. CT., Dec. 12, 2016, <https://v1.iphouse.cn/cases/detail/303194.html>; see also Zhang Zhao, *Beijing Court Hands Down Highest Ever Compensation Order*, XINHUA (Dec. 14, 2016), http://www.chinadaily.com.cn/cndy/2016-12/14/content_27661840.htm

⁹¹ Elizabeth Fahey & Zhirong Tao, *The Pretrial Discovery Process in Civil Cases: A Comparison of Evidence Discovery Between China and the United States*, 37 B.C. INT'L & COMP. L. REV. 281, 281–82 (2014).

evidence. The Shanghai IP Court heard a request for evidence preservation from U.S.-based Adobe Inc. and Autodesk Systems Inc. against Shanghai-based Ablues Design Exhibition Co., Ltd.⁹² The American companies argued that the defendant had copied and commercially used their software without authorization. The Shanghai IP Court ruled in favor of the plaintiffs and ordered technical experts to preserve evidence on almost 400 computers in the Ablues offices. Importantly, this intervention enabled Adobe and Autodesk to preserve evidence that would be crucial to proving the infringement.

In addition to the changes in the methods for calculating damage awards and preserving evidence, the IP courts have also taken important steps to prevent harm to IP holders by issuing interim injunctions. As many lawyers practicing IP law in China noted, while it is common to get injunctions as a form of relief at the end of the case, preliminary and interim injunctions are incredibly rare.⁹³ The Guangzhou IP Court has taken an important step of granting an interim injunction to Blizzard Entertainment against Chengdu Qiyou and ReKoo for allegedly distributing and promoting an infringing copy of World of Warcraft.⁹⁴ In order to secure the interim injunction, the plaintiffs offered a 10 million RMB cash guarantee. The specialized IP courts have prioritized providing injunctive relief in IP disputes, especially given that it is an important remedy that has been underutilized as a whole in China.

B. Creation of the Specialized IP Tribunals

After the successful implementation of the specialized IP courts, the SPC has further centralized adjudication authority by introducing 18 specialized IP tribunals across the country since 2017 (table 3). Although these tribunals are administratively a part of the intermediate people's court in their city, they have cross-regional and exclusive subject matter jurisdiction over IP cases—similar to the IP courts established in 2014. Provinces with only one IP tribunal, such as the Chengdu IP Tribunal in Sichuan, have cross-regional jurisdiction over the entire province while provinces with multiple IP tribunals split jurisdiction based on prefecture. For example, Jiangsu has two IP tribunals: one in Nanjing and one in Suzhou. The Nanjing IP Tribunal has jurisdiction over nine prefecture-level regions while the Suzhou IP Tribunal has jurisdiction over four prefecture-level regions (table 3). Additionally, because Guangdong already has the Guangzhou IP Court, Shenzhen is the only city with an IP tribunal that does not have cross-regional jurisdiction and only hears cases in its prefecture. Finally, the IP tribunals have their own tribunal building physically separate from their respective intermediate court. Many believe that these tribunals

⁹² Anli 11: Shenqingren Outeke Gongsi, Aoduobi Gongsi Shenqing Suqian Zhengjuquan Anjian (案例 11: 申请人欧特克公司、奥多比公司申请诉前证据保全案) [Case 11: Autodesk, Adobe Apply for Pretrial Evidence Preservation] SUP. PEOPLE'S CT. Sept. 9, 2015, <http://www.court.gov.cn/zixun-xiangqing-15370.html>.

⁹³ Interviews CD-0619181L, SH-0407181L, and CD-0629182U.

⁹⁴ Anli 14: Baoxue Yule Youxian Gongsi, Shanghai Wang Zhi Yi Wangluo Keji Fazhan Youxian Gongsi Shenqing Linshi Jinling (案例 14: 暴雪娱乐有限公司、上海网之易网络科技发展有限公司申请临时禁令) [Case 14: Blizzard Entertainment Co., Ltd., Shanghai EaseNet Network Technology Development Co., Ltd. Apply for Interim Injunction] SUP. PEOPLE'S CT., Sept. 9, 2015, <http://www.court.gov.cn/zixun-xiangqing-15370.html>.

are being set up with separate facilities with the intent of expanding them into full-fledged IP courts in the future.⁹⁵

Importantly, the expansion of the IP courts and tribunals has already achieved broad coverage of IP litigation. As seen in table 3, three IP courts and 20 IP tribunals have been established in 18 provinces across the country. While IP caseloads are not equally distributed across geographies, these courts and tribunals now cover over 90 percent of IP cases filed in 2017.⁹⁶ This, in and of itself, is a major change in the way IP cases are litigated in China.

In addition to case coverage, the expansion of the IP courts and tribunals have centralized adjudicative powers. Take for example the number of courts with jurisdiction over patent cases, which are frequently the most technically complex IP cases. According to SPC provisions published in 2015, all patent dispute cases are brought to the intermediate people's court of the provincial capital or to other intermediate people's courts designated by the SPC.⁹⁷ Since the expansion of IP tribunals, the number of intermediate courts with jurisdiction over patent cases has decreased by 55 percent.⁹⁸ Effectively, by creating specialized IP courts and tribunals with cross-regional jurisdiction over important IP cases, China has centralized IP adjudication authority in specialized judicial bodies while stripping local courts of their authority to influence case outcome.⁹⁹

In addition to creating these new institutions to address the shifting needs of China's economic reforms, China has also attempted to increase the level of professionalism in the IP adjudication process. In order to accomplish this goal, the SPC issued Guiding Opinions on Selecting and Appointing Judges for Intellectual Property Courts.¹⁰⁰ This Opinion set out the rules for selecting judges for the specialized IP courts and tribunals. Importantly, these legal bodies must draw from

⁹⁵ See, e.g., Chengdu Zhishi Chanquan Shenpanting Kai Shen Kua Quyu Jizhong Guanxia Hou Di Yi An (成都知识产权审判庭开庭跨区域集中管辖后第一案) [Chengdu IP Tribunal tried its first case of cross regional centralized jurisdiction], SICHUAN DAILY (Mar. 1, 2017), epaper.scdaily.cn/shtml/scr/b/20170301/156156.shtml (quoting Yang Yongmei, President of the Chengdu IP Tribunal saying “[t]he Tribunal will gradually consolidate 16 posts, laying the foundation for the establishment of the Chengdu Intellectual Property Court in the future”).

⁹⁶ This number was calculated using a search for the number of IP decisions by province in 2017 on the SPC's online judgment website: wenshu.court.gov.cn.

⁹⁷ Zuigao Renmin Fayuan Guanyu Shenli Zhuanli Jiufen Anjian Shiyong Falü Wenti de Ruogan Guiding (最高人民法院关于审理专利纠纷案件适用法律问题的若干规定) [Several Provisions of the Supreme People's Court on Issues concerning the Application of Law in the Trial of Cases on Patent Disputes] (promulgated by the Sup. People's Ct., June 19, 2001, revised Oct. 21, 2015, effective Feb. 21, 2015), <http://www.sipo.gov.cn/zcfg/zcfgflfg/flfgzl/zlsfjs/1020171.htm>.

⁹⁸ Prior to the IP tribunal reforms in 2017, there were 82 intermediate people's courts with first-instance jurisdiction over patent cases. See Wang Hai, Zuigao Renmin Fayuan Zhiding de Juyou Zhuanli Jiufen Di Yi Shen Anjian Guanxiaquan de Fayuan (最高人民法院指定的具有专利纠纷第一审案件管辖权的法院) [Courts Designated Jurisdiction Over First-Instance Patent Dispute Cases by the Supreme People's Court], SINA (Aug. 11, 2014), http://blog.sina.com.cn/s/blog_6cd41f290102uyty.html. After adding the 18 IP tribunals, there were only 46 courts with jurisdiction.

⁹⁹ Interviews SH-0407181L and CD-0523181L.

¹⁰⁰ Zhishi Chanquan Fayuan Faguan Xuanren Gongzuo Zhidao Yijian (Shixing) (知识产权法院法官选任工作指导意见 (试行)) [Notice of the Supreme People's Court on Issuing the Guiding Opinions on Selecting and Appointing Judges for Intellectual Property Right Courts (for Trial Implementation)], (promulgated by the Sup. People's Ct., Oct. 28, 2014), <https://www.chinacourt.org/article/detail/2014/11/id/1474356.shtml>.

experienced judges at the intermediate court level.¹⁰¹ The IP courts require that judges have level four senior judge status (四级高级法官任职资格), more than 6 years of relevant trial work experience with IP cases, a minimum of a bachelor's degree in law, and a strong ability to preside over trials and write court judgments.¹⁰² While many still believe that China's judges lack a sufficient education, survey research has found that the vast majority of judges in China already have a bachelor's degree or above.¹⁰³ Although this is much better than before, the specialized IP courts have even more highly educated judges. In 2015, 91 percent of judges at the Beijing IP Court had at least a master's degree in law.¹⁰⁴ This is similarly true for the IP tribunals. All of the judges appointed to the Nanjing IP Tribunal have a master's degree or above in addition to having over 10 years' experience adjudicating IP cases.¹⁰⁵ Even most of the judges at the Chengdu IP Tribunal have master's degrees, despite the fact that Sichuan does not have as strong of an IP litigation system as other provinces with tribunals. The high levels of education and experience required of IP judges in the courts and tribunals has raised the level of professionalism within the court and given more confidence to litigants that their cases will be handled fairly and efficiently.¹⁰⁶

C. Creation of the SPC IP Appellate Tribunal

There has long been significant discussion of establishing an IP appellate court with national subject matter jurisdiction over IP cases in China (similar to the U.S. Court of Appeals for the Federal Circuit).¹⁰⁷ Many high-ranking officials have indicated that this is a top priority. Tao Kaiyuan, the Vice President and the Chief Justice in charge of IP cases at the Supreme People's Court,¹⁰⁸ Han Xiaowu, a member of the Standing Committee of the National People's Congress,¹⁰⁹ and Zhang Qin, a

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Hu Changming (胡昌明), *Zhongguo Faguan Zhiye Manyidu Kaocha — Yi 2660 Fen Wenjuan Wei Yangben de Fenxi* (中国法官职业满意度考察—以 2660 份问卷为样本的分析) [A Survey of Career Satisfaction of Judges in China — An Analysis of a 2660 Judge Sample], 4 *Zhongguo Falü Pinglun* (中国法律评论) [CHINA L. REV.], 194, 194-206 (2015) (noting that according to the survey data, 97.85 percent of judges have a bachelors or above (with 33.05 percent have a master's degree and 1.32 percent having a PhD)).

¹⁰⁴ Beijing Zhishi Chanquan Fayuan Yuanzhang Su Chi Fabu Beijing Zhishi Chanquan Fayuan Gongzuo Yunxing Qingkuang (北京知识产权法院院长宿迟发布北京知识产权法院工作运行情况) [Beijing IP Court President Su Chi Releases the Beijing IP Court Work Report] SUP. PEOPLE'S CT. (Sept. 9, 2015), <http://www.court.gov.cn/zixun-xiangqing-15367.html>.

¹⁰⁵ Nanjing Zhishi Chanquan Fating Guapai Chenglile, Daodi You Shenme Zhineng? (南京知识产权法庭挂牌成立了, 到底有什么职能?) [The Nanjing IP Tribunal Was Established, What Functions Does It Have?], ZHICHANLI (Jan. 20, 2017), <http://news.zhichanli.cn/article/3394.html>.

¹⁰⁶ Interviews CD-0612182I, CD-0615182I, and CD-0615181I.

¹⁰⁷ Danny Friedmann, *IP in China Closer to Common Law System for the Sake of Uniformity*, 12 *J. INTELL. PROP. L. & PRAC.* 621, 621–22. (2017).

¹⁰⁸ Liu Ziyang (刘子阳), *Zuigao Fa Tansuo Jianli Zhishi Chanquan Shangsu Fayuan* (最高法探索建立知识产权上诉法院) [The Supreme People's Court Explores Establishing an Intellectual Property Appellate Court], LEGAL DAILY (Dec. 20, 2016), <http://ip.people.com.cn/n1/2016/1220/c136655-28962191.html>.

¹⁰⁹ Hu Yongping (胡永平), Han Xiaowu Weiyuan: Jianyi Zai Woguo Sheli Zhishi Chanquan Shangsu Fayuan (韩晓武委员: 建议在我国设立知识产权上诉法院) [Committee Member Han Xiaowu:

member of the Chinese People's Political Consultative Conference and former vice-chairman of the Chinese Association for Science and Technology¹¹⁰ have all publicly voiced support for the creation of an IP appellate court.

Finally, on January 1, 2019, the SPC established an appellate-level intellectual property tribunal to handle appeals against first-instance decisions and rulings for infringement and ownership disputes, reexamination and invalidation disputes, and judicial review decisions for administrative rulings made by government departments.¹¹¹ The Tribunal also has subject matter jurisdiction over invention and utility model patents, new plant varieties, integrated circuit layout designs, technical secrets, computer software, and antitrust disputes appealed from all higher people's courts, specialized IP courts, and intermediate people's courts.¹¹²

Importantly, the SPC IP Tribunal will continue the process of judicial centralization and increase case uniformity. Prior to the establishment of the SPC IP Tribunal, IP cases were heard at the prefecture-level intermediate people's court and could be appealed to the provincial-level higher people's court. While creating the specialized IP courts and tribunals at the intermediate court level has helped improve the judicial system's ability to manage IP caseloads, this structure could still lead to splits in how the law is being applied in different provinces as well as the opportunity for forum shopping as certain courts are known to rule more favorably for either plaintiffs or defendants.¹¹³ With the new SPC IP Appellate Tribunal in place, the disparate decisions of provincial-level higher people's courts will be centralized at the national level. This system will also promote uniformity in case outcomes as all IP appeals cases—regardless of geography—are brought to the national level. While the court is still new and untested, the structure of the body will likely further centralize IP adjudication powers, increase case uniformity, and promote greater specialization among the judges that rule on IP cases.

D. Technical Investigators and Expert Assessors

In addition to reforms targeted at the judicial system itself, other recent reforms have also introduced technical investigators (技术调查官) to the IP courts and expert assessors (专家型人民陪审员) to the IP tribunals in order to improve the technical fact finding abilities of China's IPR regime. Because of the technical complexity of IP cases, even judges with scientific or technical backgrounds might not have the requisite

Proposal to Establish National IP Appellate Court], CHINA.ORG.CN (Sept. 1, 2017), http://www.china.com.cn/news/txt/2017-09/01/content_41514812.htm.

¹¹⁰ Xinying Dou, Chengli Zhishi Chanquan Shangsu Fayuan Tongyi Falü Shiyong Biaozhun—Fang Quanguo Zhengxie Weiyuan, Zhongguo Kexie Yuan Fu Zhuxi Zhang Qin (成立知识产权上诉法院统一法律适用标准—访全国政协委员、中国科协原副主席张勤) [Establishing an IP Appellate Court to Unify Legal Standards—an Interview with CPPCC Member and Former Vice Chairman of China Association for Science and Technology, Zhang Qin], CHINA INTELL. PROP. NEWS (Mar. 21, 2018), http://www.iprchn.com/cipnews/news_content.aspx?newsId=106705.

¹¹¹ Zuigao Renmin Fayuan Guanyu Zhishi Chanquan Fating Ruogan Wenti de Guiding (最高人民法院关于知识产权法庭若干问题的规定) [Provisions of the Supreme People's Court Regarding Several Issues with the IP Tribunal], (promulgated by the Sup. People's Ct., Dec. 27, 2018, effective Jan. 1, 2019), SUP. PEOPLE'S CT., Dec. 28, 2018, <http://www.court.gov.cn/zixun-xiangqing-137481.html>.

¹¹² *Id.*

¹¹³ Interviews CD-0523181L and CD-0629181U.

subject matter expertise for a case. Historically, China has relied on a system similar to the United States where litigants bring in expert witnesses to discuss the technical facts of the case. However, because each side brings their own expert witnesses, judges frequently do not get a clear, impartial understanding of the technical facts in a case. According to one former American expert witness, there is an immense pressure to fudge the facts or cast them in the best light possible to achieve the result one party desires.¹¹⁴ One lawyer noted that the expert witnesses brought in by litigants frequently do more to obfuscate the judgment of judges than clarify the facts.¹¹⁵

In order to overcome this difficulty, the SPC promulgated the Interim Provisions on Several Issues Concerning the Participation of Technical Investigators in Intellectual Property Courts in Litigation Activities.¹¹⁶ These Provisions create an office within the court to manage technical investigators and states that technical investigators can be assigned to any technically complex civil and administrative cases involving patents, new plant varieties, integrated circuit layout designs, technical trade secrets, computer software.¹¹⁷ In terms of transparency, the provisions also proscribe that any case in which a technical investigator is involved must have their name listed on court proceedings and all parties must be notified within three days pursuant to the relevant sections of the Civil Procedure Law and/or the Administrative Procedure Law.¹¹⁸

The courts have begun recruiting experts and scholars from universities, industry groups, and administrative agencies with the technical knowledge to help establish facts in court. These technical investigators function as the “technical translators, technical assistants, technical staffs” of the judges.¹¹⁹ As a technical expert to the judge, technical investigators have access to case files, attend court proceedings, can question the parties, and implement evidence preservation orders for the court (as seen in the Autodesk and Adobe case). At the end of the trial, the technical investigator may submit a technical review opinion (技术审查意见书) to the court in order to assist judges with laying out the facts so the judge can properly apply the law.

Overall the system has been very effective. After just one year of implementing the technical investigator system, the Beijing IP Court had a total of 25 technical investigators (including 8 exchange technical investigators and 17 part-time technical investigators) participating in the identification of technical facts in cases.¹²⁰ In total,

¹¹⁴ Interview CD-0605181U.

¹¹⁵ Interview BJ-0419181L.

¹¹⁶ Zuigao Renmin Fayuan Guanyu Zhishi Chanquan Fayuan Jishu Diaocha Guan Canyu Susong Huodong Ruogan Wenti de Zhanhang Guiding (最高人民法院关于知识产权法院技术调查官参与诉讼活动若干问题的暂行规定) [Interim Provisions on Several Issues Concerning the Participation of Technical Investigators in Intellectual Property Courts in Litigation Activities] (promulgated by the Sup. People's Ct., Dec. 31, 2014), SUP. PEOPLE'S CT., Dec. 31, 2014, <http://www.chinaiplaw.cn/index.php?id=504> [hereinafter SPC Interim Provisions].

¹¹⁷ *Id.* at art. 1 and art. 2.

¹¹⁸ *Id.* at art. 3 and art. 4.

¹¹⁹ Beijing Zhishi Chanquan Fayuan: Zhi Chan Zhuanyehua Shenpan de “chi pangxie ren” (北京知识产权法院：知产专业化审判的“吃螃蟹人”) [Beijing Intellectual Property Court: “Daring Innovation” in the Specialized Trial of Intellectual Property], XINHUA (Jan. 4, 2019), http://www.xinhuanet.com/legal/2019-01/04/c_1210030173.htm

¹²⁰ Beijing Zhishi Chanquan Fayuan Yinru Jishu Diaocha Guan Zhidu Yi Zhounian Jie'an Lü Tisheng 87% (北京知识产权法院引入技术调查官制度一周年结案率提升 87%) [After the First Year Anniversary of the Introduction of the Technical Investigator System by the Beijing Intellectual

technical investigators participated in 250 cases, made 128 court appearances, and assisted with 14 preservation and inspection investigations.¹²¹ The technical investigators provided 122 consultations and wrote a total of 110 technical review opinions.¹²² After the introduction of technical investigators to the Beijing IP Court, the closing rate for technically complicated cases increased 87 percent over the previous year.¹²³

At the same time, mechanisms exist to prevent bias from entering the process. While there is general agreement that technical investigators are fairly neutral in their opinions, if a party believes a technical investigator lacks objectivity in the case, their attorneys can file a motion to have the judge remove the technical investigator from the case.¹²⁴

Although less expansive than the technical expert system in the IP courts, the expert assessors that participate in IP tribunal cases similarly provide technical support to judges in cases with technically complex fact patterns. The technical assessors are usually on loan to the court from the relevant administrative agencies such as the Chinese National Intellectual Property Administration (formerly the State Intellectual Property Office) for patent and trademark cases. For example, the Wuhan IP Tribunal consulted with the State Intellectual Property Office's Hubei Center for Patent Review to hire five senior patent examiners to participate in trials as experts.¹²⁵ The Chengdu IP Tribunal has adopted a two judge and one technical assessor model similar to the IP courts to help assist judges with the technical facts of their cases. These reforms have strengthened the fact-finding capabilities of the courts and tribunals and have increased the level of professionalism and fairness of trials in China's IPR regime.

E. SPC Guiding Case System

The creation of specialized IP courts and tribunals and the introduction of technical experts and assessors to proceedings have contributed dramatically to the centralization of IP adjudication authority while simultaneously strengthening the technical ability of the judicial system to rule on cases in a professional way. However, ensuring that lower courts rule in ways that support the center's policy direction has been difficult given China's unique legal development. In common law systems like the United States, courts follow the principle of *stare decisis* that binds lower courts to higher court decisions and creates case law through court decisions. China, on the other hand, is a civil law country where statutory law reigns supreme and judges are

Property Court, the Case Closing Rate Increased by 87%], (Nov. 11, 2016), <http://www.chinaiprlaw.cn/index.php?id=4471>.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Interview SH-0407181L; *see also* SPC Interim Provisions, *supra* note 116, at art. 5.

¹²⁵ Li Yizhong (李亦中), Wuhan Zhishi Chanquan Shenpanting Tuixing Minshi Xingshi Xingzheng "Sanshenheyi" Moshi (武汉知识产权审判庭推行民事刑事行政“三审合一”模式) [Wuhan IP Tribunal promotes the "three-in-one" model of civil, criminal, and administrative cases], *Changjiang Ribao* (长江日报) [CHANGJIANG DAILY] (Feb. 23, 2017), <http://news.cjn.cn/sywh/201702/t2966414.htm>.

supposed to “apply, not make, the law.”¹²⁶ This means that Chinese courts do not have this judicial mechanism at their disposal. In order to overcome this institutional constraint, the SPC issued provisions establishing the guiding case system (GCS) (案例指导制度) in order “to summarize adjudication experiences, unify the application of law, enhance adjudication quality, and safeguard judicial impartiality.”¹²⁷ The SPC selects and publishes guiding cases (指导性案例) that lower courts must take into account when adjudicating similar cases. As of the June 27, 2018 release, the SPC has issued 96 guiding cases, 21 of which are related to IP cases. In many ways the GCS shares a similar logic with common law precedent. The GCS seeks to promote uniformity and predictability in the legal system as well as enhance the ability of courts to effectively handle legislative ambiguity.¹²⁸

Nevertheless, the GCS differs from common law precedent in a number of substantive ways. Importantly, the intent of the GCS is simply to guide judicial interpretation, not bind decisions. As Gechlik, Zhang, and Huang note:

Article 7 of the Provisions provides that courts in China merely “should,” rather than “must,” “refer to” GCs [guiding cases] when adjudicating similar cases. The lack of expressions stating that judges are obligated to follow and cite GCs reflects the SPC’s concern that, because of the unclear legal status of GCs, these cases cannot be binding.¹²⁹

In addition to the intent of the GCS, its institutional structure also makes it quite different from common law systems. First, the guiding cases themselves are not sources of law. Judicial decisions still must be firmly rooted in statutory law. Second, although judges at all levels can write and submit cases to be included in the GCS, it is far more centralized than the decentralized lawmaking powers of common law judges. *Stare decisis* is characterized as a decentralized and localized method of jurisprudence while the GCS is centralized in the hands of the SPC. Finally, guiding cases do not emerge organically like precedents in common law systems; they are heavily edited by the SPC and “top-down selectors abstract holdings out of cases and rewrite the facts and reasoning in a much more centralized process of judicial policymaking.”¹³⁰

Some have noted that the guiding cases have not been widely cited in judicial decisions since its implementation. For example, between 2014 and 2015, Stanford researchers found only 181 references in court decisions citing guiding cases and

¹²⁶ Woo, *supra* note 54, at 260.

¹²⁷ Zuigao Renmin Fayuan Guanyu Anli Zhidao Gongzuo de Guiding (最高人民法院关于案例指导工作的规定) [Provisions of the Supreme People’s Court Concerning Work on Case Guidance] (promulgated by the Adjudication Comm. of the Sup. People’s Ct., Nov. 15, 2010, effective Nov. 26, 2010), CHINA GUIDING CASES PROJECT, <http://cgc.law.stanford.edu/guiding-cases-rules/20101126-english/>.

¹²⁸ Mark Jia, Note, *Chinese Common Law? Guiding Cases and Judicial Reform*, 129 HARV. L. REV. 2213, 2232 (2016).

¹²⁹ Mei Gechlik, Chenchen Zhang, and Li Huang, *China’s Case Guidance System: Application and Lessons Learned (Part I)*, STAN. L. SCH. CHINA GUIDING CASES PROJECT (Mar. 1, 2018), <http://cgc.law.stanford.edu/guiding-cases-surveys>.

¹³⁰ Jia, *supra* note 128, at 2232.

Peking University found only 241.¹³¹ Only half of all guiding cases were cited at all with around 42 percent of those cited referencing a single guiding case (#24) regarding traffic accidents. Lawyers that work on IP cases consider the low citation rate to be primarily due to two factors: (1) because there is no clear standard for determining what cases are to be considered similar cases that require citation, judges frequently decide not to cite a case and (2) because there is no enforcement mechanism to ensure that judges are citing cases, many decide not to cite out of bureaucratic inertia.¹³²

However, it is important to note that even if judges are not widely citing guiding cases, it does not mean that the system itself is wholly ineffective. Indeed, “judges have frequently opted to engage in implicit, or ‘hidden’ application by invoking the ‘spirit’ of a guiding case without directly citing it.”¹³³ In fact, it seems that many judges are aware of the GCS and consider it, even if they do not cite them explicitly in their judicial rulings. According to survey data from Stanford Law School’s China Guiding Cases Project, in 2013 roughly 38.9 percent of judges considered guiding cases while adjudicating cases, however, in 2014 that number increased by 15.4 percentage points to 54.3 percent.¹³⁴ While this is good progress, it also demonstrates the bureaucratic inertia that makes institutional reform in China challenging. Even as Beijing attempts to centralize guidance over lower courts and ensure compliance with central directives through the GCS, implementation can still be slow.

Although these trends demonstrate that judicial reforms are moving in the right direction, the GCS has had a more significant impact on how lawyers litigate cases. One analysis demonstrated that lawyers are three times more likely to refer to guiding cases in their submissions and oral arguments than judges.¹³⁵ Many lawyers in the IP system believe that the guiding cases are useful persuasive tools in IP litigation.¹³⁶ One lawyer said that because of the role that being overturned on appeal plays in judicial promotion, judges are disinclined to rule against persuasive uses of guiding cases even if they don’t explicitly cite them. The lawyer believed that “if judges are not following the logic of the guiding cases, they better have a good reason.”¹³⁷

The main objective of the GCS is to strengthen central control over lower courts by selecting cases that support central directives and unify rulings by limiting the amount of discretion individual judges have in deciding cases. In IP cases, where technical complexity and the rapid growth of dockets have made it difficult to ensure consistent rulings in line with the CCP’s policy agenda, the Beijing IP Court has piloted the use of case law with positive results. In April 2015, the SPC established the IP Case Guidance and Research Base at the Beijing IP Court.¹³⁸ The primary

¹³¹ Jeremy Daum, *The Curious Case of China’s Guiding Cases System*, CHINA L. TRANSLATE (Feb. 21, 2017), <https://www.chinalawtranslate.com/the-curious-case-of-chinas-guiding-cases-system/?lang=en>.

¹³² Interviews BJ-0419181L, CD-0525181L, CD-0525182L, and CD-0619181L.

¹³³ Jia, *supra* note 128, at 2226-27.

¹³⁴ Mei Gechlik, Dimitri Philips, & Oma Lee, *Survey of Judges in China (2013-2014)*, STAN. L. SCH. CHINA GUIDING CASES PROJECT (Aug. 2014), <http://cgc.law.stanford.edu/guiding-cases-surveys/>.

¹³⁵ Mei Gechlik, Minmin Zhang, and Liyi Ye, *Cumulative Analysis of All Subsequent Cases Referring to Guiding Cases in China (2014 Q1-2015 Q4)*, STAN. L. SCH. CHINA GUIDING CASES PROJECT, (Jan. 2016), <http://cgc.law.stanford.edu/guidingcases-surveys/>.

¹³⁶ Interviews SH-0407181L, BJ-0419182L, and CQ-0623181L.

¹³⁷ Interview CD-0525181L.

¹³⁸ Zuigao Renmin Fayuan Zhishi Chanquan Anjian Shenpan Gongzuo Zongshu (最高人民法院知识产权案件审判工作综述) [Summary of the Trial Work of Intellectual Property Cases of the Supreme

responsibility of the Base is to compile IP guiding cases, promote the use of guiding cases in IP litigation, and serve as an IP case guidance service center for the rest of the country.¹³⁹ The Base also serves as an experimental point for implementing an IP guiding case system. In many ways, it has been more successful than the national GCS because it has several procedural issues and provided clear definitions of how the system should function. These reforms have been outlined in two important policy documents: the Procedural Guidelines for Applying Precedents in IP Trials (Draft) and the Norms for Uniformity of Advocacy, Trial and Ruling of the Beijing IP Court (Draft), however, they are still not publicly available.¹⁴⁰

Judges Jiang Huiying and Yang Yi, who are directly working on the IP guiding case reform at the Beijing IP Court, have publicly discussed some of the provisions and how they will further unify IP case rulings.¹⁴¹ First, the system is meant to supplement statutory law through the principle of “law is primary, cases are supplementary” (法律为主、案例为辅).¹⁴² The goal of precedent in IP cases is not to create law, but rather to explain the law where it is unclear, supplement the law where the law conflicts, and create rules for when the law does not clearly specify how a ruling should be made.¹⁴³ Although precedent will not be *de jure* binding, it will be *de facto* binding because if a case outcome differs from a similar case, litigants may use this as grounds for appeal or retrial. Second, article seven of the provisions specifically outlines how precedent for IP guiding cases will function. This nine-tiered ranking starts with SPC guiding cases and works its way down to basic-level courts: SPC guiding cases, SPC annual cases, other SPC cases, Higher People’s Court model cases, Higher People’s Court reference cases, other prior cases from Higher People’s Courts, Intermediate People’s Court precedent, Basic People’s Court precedent, and “extraterritorial” precedent.¹⁴⁴ Third, in stark contrast to how Chinese judicial opinions are usually written, judges in the Beijing IP Court are required to include a larger and clearer discussion of substantive facts, applicable laws, and any precedents with bearing on the case while also paring down sections with less relevance to the ruling. For example, recent research has shown that court opinions from the Beijing IP Court are 40-50 percent shorter than the decisions of more traditional IP tribunals, even though the Beijing IP Court deals with some of the most technically complicated cases in China.¹⁴⁵ This is a significant development that increases the utility of case rulings and also indicates a growing professionalism among IP judges. Finally, the Beijing IP Court is building a

People’s Court], PEOPLE’S CT. DAILY (Feb. 29, 2016), <http://www.court.gov.cn/zixun-xiangqing-16892.html>.

¹³⁹ *Id.*

¹⁴⁰ Susan Finder, *China’s Evolving Case Law System in Practice*, 9 TSINGHUA L. REV., 245, 251 (2017).

¹⁴¹ Jiang Huiying (蒋惠岭) & Yang Yi (杨奕), Beijing Zhishi Chanquan Fayuan: Yi Xianli Panjue Zhidao Shenpan Gongzuo Zhidu de Chuanxin Shijian (北京知识产权法院: 以先例判决指导审判工作制度的创新实践) [Beijing IP Court: Innovative Practice of Guiding the Judicial Work System with Precedent Judgment], LEGAL DAILY (Apr. 6, 2016), http://www.legaldaily.com.cn/fxjy/content/2016-04/06/content_6554635.htm.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Finder, *supra* note 140, at 250.

¹⁴⁵ Max Goldberg, *Enclave of Ingenuity: The Plan and Promise of the Beijing Intellectual Property Court* 42 (May 19, 2017) (B.A. Thesis, Yale University), https://elischolar.library.yale.edu/ceas_student_work/4.

database system for guiding cases as a resource for judges, lawyers, and scholars, making it easier to find and reference guiding cases.

The most recent statistics show that from March 2015 to October 2016, the Beijing IP Court cited guiding cases 168 times, of the litigants cited 121 and the judges cited 47.¹⁴⁶ In 117 of these guiding cases citations, the judges followed them while the other 51 were disregarded due to difference in facts.¹⁴⁷ The total number of cases with guiding case citations totaled 279.¹⁴⁸ While this number remains small in comparison to the Court's overall caseload, the program is still relatively new. However, due to the program's success, the IP guiding case system is also already set to expand nationwide at some point in the near future.¹⁴⁹

The pilot IP guiding case system is an important development for IP law and has several advantages over the national GCS. The reforms clarify the hierarchy of the precedent system, establish mechanisms for selecting and citing case law, and provide rules for when judges should follow or disregard guiding case "precedent" in a trial. The reforms simultaneously accomplish the two main tasks of IP reform in China, namely it strengthens central control by limiting the discretion of lower courts who are bound by the centrally selected IP guiding cases while also strengthening the overall professional quality of judicial decisions because judges are forced to rule consistently based on *de facto* binding precedent, clearly articulate the facts, and provide sound legal reasoning for their decisions. This system simultaneously centralizes authority and improves uniformity and quality of IP adjudication.

V. CONCLUSION

This article examines the reforms China has pursued to centralize judicial authority, build judicial professionalism, and create case uniformity within the IP adjudication system. Policymakers have recognized that the underlying drivers of growth must transition from agricultural and industrial production to a more sustainable and innovative service sector. While China has long been viewed as the "world's factory," home to low-quality manufactured goods and technologies copied from abroad, as its economy has rapidly expanded, so has its innovative capabilities. Many of its domestic firms are already global leaders in their fields and, as a result, China has demonstrated serious resolve to create an effective domestic IPR regime to protect its national economic interests.

By creating specialized IP courts, tribunals, and a national appellate tribunal, introducing technical investigators and expert assessors to court proceedings, and promulgating a guiding case system, China has both centralized IP adjudication powers and also created a stronger national IPR enforcement regime. This process has important implications for how China understands the role of law and the courts in structuring society, mediating the competing centripetal forces of central control and

¹⁴⁶ Su Chi (宿迟), Beijing Zhischi Chanquan Fayuan Liang Zhounian Gongzuo Qingkuang Baogao (北京知识产权法院两周年工作情况报告) [The Beijing IP Court's Second Anniversary Work Report] (Jan. 10, 2017), <http://www.cpahklt.com/cn/info.aspx?n=20170119084747040064>.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Jiang & Yang, *supra* note 141.

local autonomy, and how economic materialist interests impact institutional implementation. These issues are particularly interesting as they provide a valuable case study with which to examine the changing conception of legality in contemporary Chinese society.

This article also outlines important reforms that have significant practical applications for addressing what China's IP reforms means for China's future. The judicial reforms discussed above have ensured that the central leadership's objective of strengthening IP enforcement is being achieved at the local level. There are now fewer opportunities for local judicial protectionism to influence case outcome and the specialized courts and tribunals have increased the uniformity and efficiency of proceedings. Similarly, these institutional changes have also ensured that judges and the courts can rule on the technically complex cases that come before them while also increasing their levels of uniformity and professionalism through stronger fact-finding capabilities and more precise mechanisms to guide interpretation of the law. Although there is certainly room for further improvement, China has clearly already made significant progress in strengthening its IPR regime to meet the demands of its economic transition.

VI. APPENDIX

A. Table 1. China's Major Domestic Intellectual Property Laws

Law	Date of Entry into Force	Amendments	Type of Intellectual Property Protection
Trademark Law	Mar. 1, 1983	Feb. 22, 1993 Oct. 27, 2001 Aug. 30, 2013	Protects brands
Patent Law	Apr. 1, 1985	Sept. 4, 1992 Aug. 25, 2000 Dec. 27, 2008	Protects innovations and designs
Copyright Law	June 1, 1991	Oct. 27, 2001 Apr. 1, 2010	Protects works of authorship
Anti-unfair Competition Law	Dec. 1, 1993	Nov. 4, 2017	Protects trade secrets
Regulations on the Protection of New Varieties of Plants	Mar. 1, 1997	Mar. 1, 2013	Protects new varieties of plants
Regulations on the Protection of Layout-Designs of Integrated Circuits	Oct. 1, 2001	—	Protects the layout-designs of integrated circuits

Source: WIPO Lex.

B. Table 2. Major Intellectual Property Treaties to which China has Acceded

Treaty	Date of Accession	Contents
Paris Convention for the Protection of Industrial Property	Mar. 19, 1985	Provides protection of IP and sets forth provisions for national treatment, priority right, and common rules.
Madrid Agreement Concerning the International Registration of Marks	Oct. 4, 1989	Provides a unified procedure for registering international trademarks
Berne Convention for the Protection of Literary and Artistic Works	Oct. 15, 1992	Provides protection for copyright by mandating national treatment, registration-free copyright, and minimum standards/exclusive rights of authorization
Patent Cooperation Treaty	Jan. 1, 1994	Provides a unified procedure for establishing a filing date for international patent applications
Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)	Dec. 11, 2001	Introduces comprehensive standard IP rights, enforcement, and dispute resolution procedures into the international trading system

Source: WIPO Lex.

C. Table 3. Specialized IP Courts and Tribunals with Cross-Regional Jurisdiction

IP Court or Tribunal	Date Established	Territorial Jurisdiction	Jurisdiction Type
Beijing IP Court	Nov. 6, 2014	Beijing Municipality	Specialized IP Court with provincial jurisdiction
Guangzhou IP Court	Dec. 16, 2014	Guangdong Province	Specialized IP Court with provincial jurisdiction
Shanghai IP Court	Dec. 28, 2014	Shanghai Municipality	Specialized IP Court with provincial jurisdiction
Chengdu IP Tribunal	Jan. 9, 2017	Sichuan Province	Specialized IP Tribunal with cross-regional jurisdiction over entire province
Nanjing IP Tribunal	Jan. 19, 2017	Nine prefectures in Jiangsu Province: Nanjing, Zhenjiang, Yangzhou, Taizhou, Yancheng, Huai'an, Suqian, Xuzhou, and Lianyungang	Specialized IP Tribunal with cross-regional jurisdiction over part of a province
Suzhou IP Tribunal	Jan. 19, 2017	Four prefectures in Jiangsu Province: Suzhou, Wuxi, Changzhou, and Nantong	Specialized IP Tribunal with cross-regional jurisdiction over part of a province
Wuhan IP Tribunal	Feb. 22, 2017	Hubei Province	Specialized IP Tribunal with cross-regional jurisdiction over entire province
Hefei IP Tribunal	Aug. 30, 2017	Anhui Province	Specialized IP Tribunal with cross-regional jurisdiction over entire province
Hangzhou IP Tribunal	Sept. 8, 2017	Six prefectures in Zhejiang Province: Hangzhou, Jiaxing,	Specialized IP Tribunal with cross-regional jurisdiction

		Huzhou, Jinhua, Quzhou, and Lishui	over part of a province
Ningbo IP Tribunal	Sept. 8, 2017	Five prefectures in Zhejiang Province: Ningbo, Wenzhou, Shaoxing, Taizhou, and Zhoushan	Specialized IP Tribunal with cross-regional jurisdiction over part of a province
Fuzhou IP Tribunal	Sept. 28, 2017	Five prefectures in Fujian Province: Fuzhou, Putian, Sanming, Nanping, Ningde	Specialized IP Tribunal with cross-regional jurisdiction over entire province
Jinan IP Tribunal	Sept. 28, 2017	11 prefectures in Shandong Province: Jinan, Zibo, Zaozhuang, Jining, Tai'an, Laiwu, Binzhou, Dezhou, Liaocheng, Liyi, and Heze	Specialized IP Tribunal with cross-regional jurisdiction over part of a province
Qingdao IP Tribunal	Sept. 30, 2017	Six prefectures in Shandong Province: Qingdao, Dongying, Yantai, Weifang, Weihai, and Rizhao	Specialized IP Tribunal with cross-regional jurisdiction over part of a province
Shenzhen IP Tribunal	Dec. 26, 2017	Shenzhen Municipality	Specialized IP Tribunal <i>without</i> cross-regional jurisdiction
Xi'an IP Tribunal	Feb. 24, 2018	Shaanxi Province	Specialized IP Tribunal with cross-regional jurisdiction over entire province
Tianjin IP Tribunal	Mar. 1, 2018	Tianjin Municipality	Specialized IP Tribunal with cross-regional jurisdiction over entire province
Changsha IP Tribunal	Mar. 1, 2018	Hunan Province	Specialized IP Tribunal with cross-regional jurisdiction over entire province

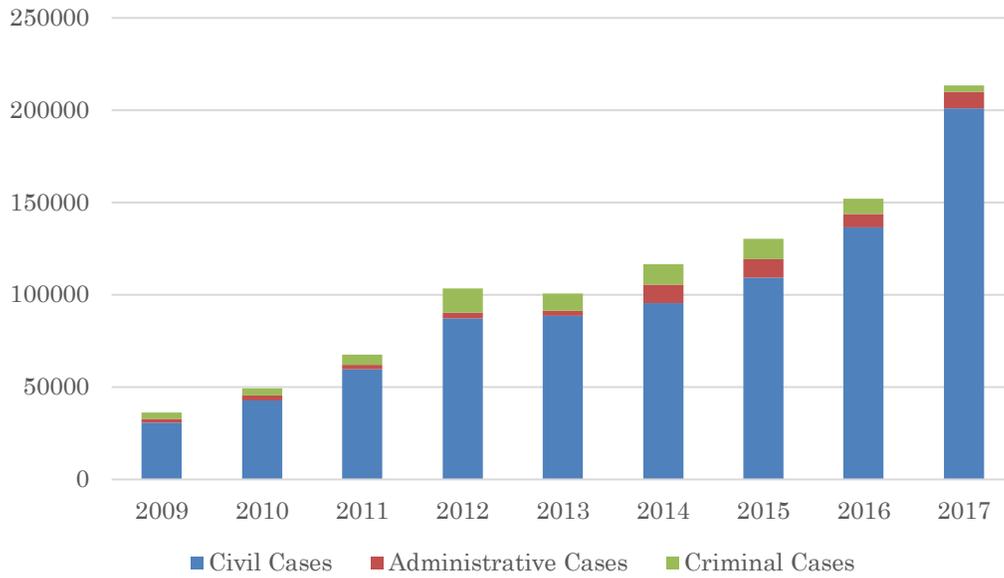
Zhengzhou IP Tribunal	Mar. 2, 2018	Henan Province	Specialized IP Tribunal with cross-regional jurisdiction over entire province
Nanchang IP Tribunal	July 5, 2018	Jiangxi Province	Specialized IP Tribunal with cross-regional jurisdiction over entire province
Changchun IP Tribunal	Dec. 26, 2018	Jilin Province	Specialized IP Tribunal with cross-regional jurisdiction over entire province
Lanzhou IP Tribunal	Jan. 5, 2019	Gansu Province	Specialized IP Tribunal with cross-regional jurisdiction over entire province
IP Appellate Tribunal (Supreme People's Court)	Jan. 1, 2019	National Level	--
Xiamen IP Tribunal	Sept. 5, 2019	Four prefectures in Fujian Province: Xiamen, Zhangzhou, Quanzhou, and Longyan	Specialized IP Tribunal with cross-regional jurisdiction over part of a province
Haikou IP Tribunal	Sept. 26, 2019	Hainan Province	Specialized IP Tribunal with cross-regional jurisdiction over entire province
Urumqi IP Tribunal	Proposed but not yet established	Xinjiang Province	Specialized IP Tribunal with cross-regional jurisdiction over entire province

Source: Author's compilation.

D. Table 4. List of Interviews

Date	Location	Affiliation	Position	Interview Code
03/16/2018	Chengdu, Sichuan	University	Professor	CD-0316181L
04/07/2018	Shanghai, Shanghai	Law Firm	IP Lawyer	SH-0407181L
04/19/2018	Beijing, Beijing	Law Firm	IP Lawyer	BJ-0419181L
04/19/2018	Beijing, Beijing	Law Firm	IP Lawyer	BJ-0419182L
05/23/2018	Chengdu, Sichuan	Law Firm	IP Lawyer	CD-0523181L
05/25/2018	Chengdu, Sichuan	Law Firm	IP Lawyer	CD-0525181L
05/25/2018	Chengdu, Sichuan	Law Firm	IP Lawyer	CD-0525182L
06/05/2018	Chengdu, Sichuan	University	Former Technical Expert Witness	CD-0605181U
06/06/2018	Chengdu, Sichuan	Industry	Entrepreneur	CD-0606181I
06/06/2018	Chengdu, Sichuan	Industry	Entrepreneur	CD-0606182I
06/06/2018	Chengdu, Sichuan	Industry	Entrepreneur	CD-0606183I
06/08/2018	Chengdu, Sichuan	Law Firm	IP Lawyer	CD-0608181L
06/12/2018	Chengdu, Sichuan	Industry	Art	CD-0612181I
06/12/2018	Chengdu, Sichuan	Industry	Music	CD-0612182I
06/15/2018	Chengdu, Sichuan	Industry	Technology	CD-0615181I
06/15/2018	Chengdu, Sichuan	Industry	Telecom	CD-0615182I
06/19/2018	Chengdu, Sichuan	Law Firm	IP Lawyer	CD-0619181L
06/21/2018	Chengdu, Sichuan	Law Firm	IP Lawyer	CD-0621181L
06/23/2018	Chongqing, Chongqing	Law Firm	IP Lawyer	CQ-0623181L
06/23/2018	Chongqing, Chongqing	Judicial System	Official	CQ-0623182O
06/23/2018	Chongqing, Chongqing	Administrative Organ	Official	CQ-0623183O
06/29/2018	Chengdu, Sichuan	University	Professor	CD-0629181U
06/29/2018	Chengdu, Sichuan	University	Professor	CD-0629182U

E. Figure 1. First Instance IP Cases by Type of Case.



F. Figure 2. First Instance Civil IP Cases by IP Type

