Specialized IP Courts in China - Judicial Governance of Intellectual Property Rights

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Abstract

At the end of 2014, China introduced new specialist intellectual property (IP) courts. Although China had IP tribunals within the People's Courts, the reform to establish separate IP courts was touted as a significant step in establishing the rule of law in the governance of IPRs in China. This is not surprising considering that an independent judiciary is central to the rule of law. This institution affirms and enforces private rights, as well as providing necessary impartiality to the process of decision making among the peer institutions.

China has recently undergone several legislative reforms which amend substantive IP law. It is not surprising that this was followed up with both administrative and judicial reforms. Introducing a specialized court with exclusive jurisdictions will likely affect the other institutions with similar competences, e.g. general courts or administrative tribunals. Institutional choices significantly affect the outcome of decision making because the processes of decision making differs and will involve different stake holders. Often, institutions move together and a change in one of them is likely to cause a change in another, even without explicit efforts to affect such changes. Therefore, any institutional reform project needs to reflect measures to contain or coordinate unintended consequences or impacts on other institutions resulting from such changes.

This paper places Chinese specialized courts in the global context. We will first describe the function of a specialized IP court from the comparative institutional perspective. Next, we place the Chinese specialized IP courts in the context of the national administration-driven IP strategy to highlight the Chinese characteristics. In its analysis, this paper explores whether the perspective of institutional comparison may be applied to Chinese institutional reforms. It also argues that the rationale for introducing specialized IP courts in China may be more than merely improving technological competence and concentration of expertise of the court; it signals a step toward independent judicial decision making, towards the establishment of the rule of law and market oriented decision making.

Key Words

Specialized IP Court, China, IP, Institutional comparison, rule of law

1. Introduction

Governance of creative and innovative resources through intellectual property rights (IPRs) requires multiple interdependent institutions coordinating and channeling decisions on the use and allocation of resources. As IPRs are fundamentally private rights, the rights can only be fully operational if both the market for goods embodying IP and the markets for the exchange of the rights themselves are in place without much interferences from the regulators. Moreover, as IPRs are created by the law, the legislature delineating the scope of rights and the administrators that examine and grant the rights are crucial parts of the institutional foundation of the IPR system. Additionally, an independent and neutral judiciary that impartially reviews administrative decisions and enforces private rights plays a crucial role in the efficient governance through IPRs.

These institutions are interdependent. Thus, reform in one area necessarily affects the functioning of the others. At the end of 2014, China introduced new specialist intellectual property (IP) courts.[1] Although China had IP tribunals within the People's Courts,[2] the judicial reform to establish separate IP courts was touted as the significant step in embedding the rule of law in the governance of IPRs in China.[3] This is not surprising considering that an independent judiciary is the central institution for rule of law. Such an institution affirms and enforces private rights and provides necessary impartiality to the process of decision making among the peer institutions.[4]

Understanding judicial reform as part of a bigger institutional reform in China requires institutional comparison.[5] China has recently undergone several legislative reforms which have amended substantive IP law.[6] It is not surprising that this was followed by reforms in both the administrative and the judicial branches. Introducing a specialized court with exclusive jurisdictions is likely to affect institutions that have similar competence to decide on matters, such as general courts or administrative tribunals. An institutional choice significantly affects the outcome of decision making because the processes of decision making by each institution differs and each institution also involves different stake holders. Often, institutions move together and a change in one is likely to cause change in another, even without explicit effort to affect such changes.[7] Therefore, any institutional reform project needs to include measures to contain or coordinate unintended consequences or impacts on other institutions resulting from such changes.

To place Chinese specialized courts in the global context, this paper will first describe the function of a specialized IP court from the comparative institutional perspective. Next, we place the Chinese specialized IP courts in the context of the national administration-driven IP strategy to highlight the Chinese characteristics. In its analysis, this paper explores whether the perspective of institutional comparison may be applied to Chinese institutional reforms. It also argues that the rationale for introducing specialized IP courts in China may be more than technological competence and concentration of expertise – it may improve the efficiency and uniformity of IP adjudication and independent adjudication, although limited in subject matters and scope.

2. Specialized IP Courts in the Institutions of IPR Governance

2.1. Rule of Law and Institutional Comparison

Discourses on Chinese legal reforms are often characterized by a discussion of the rule of law which has been imbued with a distinctively European or American perspective.[8] As well as legislative reforms, institutional reforms are an important element of the rule of law. Founded on the three pillars of stability, clarity and certainty, the rule of law projects an image of objectivity of ruling – 'government by law and not by men.'[9] Thus, the rule of law highlights the importance of fundamental institutions that articulate, apply and practice law. However, 'what law is, can be, or ought to be is determined by the character of those institutions that make,

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[1] National People's Congress of China 2014, Supreme People's Court of China 2014. See also, Li 2014, p. 303-317.
[2] It has been reported that by the end of 2013, there have been 410 tribunals established within courts, in every high court and in many intermediate courts. See Li, 2014 p. 304. See for general structure of Chinese courts, Chen 2016, p 179-195.
[3] See Li 2016b p 304-306.
[4] Raz 1979 p. 210-219.
[5] Bakardjieva-Engelbrekt 2007, p65. North 1990.
[6] Li 2016a p.65
[7] Komesar 1994, p. 23
[8] Ruskola 2013
[9] Raz, 1979 p. 212

interpret, and enforce law.'[10] As the decision of which institution is relevant crucially affects 'the reality that the decision of who decides is really a decision of what decides,' any proponent of rule of law inevitably needs to compare institutions of decision making.[11]

Governance of IP under the rule of law calls for a correct calibration of decision-making competences among the institutions, as well as in the market. The IP system, as a property institution, operates with multiple interdependent social institutions. For example, a patent right is granted through the process of negotiation between the administrative organization that acts on behalf of the public and private individuals, based on a document entirely prepared by private individuals. The conditions for the grants and the mandate of this administrative organization are defined in the law, while technologically-complex patent claims define the scope of the right. Once granted, IP allows for decision making by individuals through the market. Thus, governance of IPR calls for the interaction of the market with three distinctive groups of decision-making processes, i.e. those of the political (including the legislative and administrative) and the adjudicative.[12] The adjudicative decision-making process is fundamentally made through the court, while the market process is operating through transactions between and among the market actors.[13]

These institutions have separate functions but are interdependent. Their interdependence makes the process of decision making by a single institution imperfect on its own. The legislature provides the law, which forms the frame for the interactions of the institutions and private persons, but is dependent on the administrative agencies to operationalize what it provides.[14] The administration includes various independent and executive agencies, including ministries which may act as the hosting agencies for intellectual property offices and competition authorities which set and implement policies.

Institutions are also imperfect in the sense that various participants are likely to influence the decision-making processes. The most obvious example of such an attempt comes from interest groups. Further, the political process suffers from biases inherent in the system of representative democracy. In technologically complex areas, such as patent law, the legislative process is often criticized as slow and reactionary.[15] Due to the diverse technological reality, it is criticized that 'the legislative process is simply ill-equipped to address this institutional diversity and convolution.'[16] In contrast, an administrative state rests on 'the key assumption that government officials armed with technical expertise and acting in good faith to advance the public interest can systematically outperform any system of limited government whose major function was to support and protect market institutions.'[17]

Comparatively, the administration which is formed by the executive branch of a government may be able to act rather nimbly in response to complex facts utilizing their technical expertise. However, it may suffer from the problem of agency and specialist capture, even when they are independent and somewhat insulated from direct control of the government.[18] The problem of checks and balances for the administration may seem even more evident in a country with a strong government, such as China, or in integrated and yet incomplete governance project, such as the European Union. Furthermore, a market process, where transactions are the only proxy for the decision-making process, suffers from the imperfection of various sorts, including opportunism, free-riding, hold-outs and hold ups, which result in inefficient underproduction, not to mention doubtful commensurability of values.[19] In summary, when institutions are compared, their interdependence and the need to maintain balance among these institutional competence is highlighted.

2.2. IP law and Decision Making at the Court

When institutions are compared, judicial decision making seems neutral, less prone to the biases and capture of the political processes of the legislation and administration,[20] and representative of the rule of law. At the same time, courts are often requested to make or interpret the law using the facts of the disputes at hand. As a result, they are likely to respond to the technological facts more quickly than the legislative. In comparison to the opportunism of the self-interested actors, and the contestability of the market, courts seem to provide

[10] Komesar 1994, p. 3

[11] See also for similar insights expressed in Buchanan 1989, p. 59

[12] Komesar 1994, p.23

[13] Tamura 2008 p. 11-20. (in Japanese). Bakardjieva-Engelbrekt 2007 p 71. See also, Rai, 2003 p. 1039

[14] See however, sceptical view on the role and function of the administrative agencies in the US Constitution, Epstein 2008 p. 491

[15] In an earlier work of the co-author, Lee has examined the dilemma of keeping legislation general enough not to be outdated and yet specific enough to form binding rule with the lens of 'technological neutrality' principle in the TRIPs agreement. See Lee 2016 p. 362-363

[16] See comparison of legislation and common law by Nard 2010, p.99

[17] Epstein,2008, p. 492-493.

[18] Datla and Revesz, 2013, Komesar 1004 p. 82-97, Rai 2003.

[19] Radin 1993 p 56 See also Radin, 1996

[20] Komesar 1994 p. 149-150. Nard 2010 p. 101

neutrality and impartiality. Courts, when insulated from undue outside interferences, are independent from biases to which political processes are often subject.

Independent courts thus play a central role in the classic understanding of the rule of law.[21] It is often claimed that courts will either apply clear and well-articulated rules or standards, provide authoritative interpretations, or make law to fill the gaps in the law.[22] While, formally, courts in civil law countries do not make law, courts and judicially-crafted norms form an important part of the evolution of IP law. Although statutory definition and grants of rights are important sources of authorities, doctrines created by courts have dominated IP law.[23] IP law tends to include open clauses and technologically-neutral statutory expression. Such generality of regulation is demanded by the nature of IP law as the regulation of technology has to deal with obsolescence over time. One frequently employed legislative technique is to include open or general norms to future-proof the text of the law.[24] As a result, courts are often given the task of creating specific meanings. In common law countries, a courts' discovery of law is almost expected, although the scope may vary.[25] One result of the tendency to rely on courts to articulate specific meanings of general law norms is the potential for judicial activism. In the EU, this has been a source of controversy where the structure of referral of questions about the interpretation of EU law leads to the CJEU actively making the law and creating autonomous EU IP norms.[26]

In China, which is a civil law country, such tendencies may be limited, yet the courts are still called to interpret general text of laws. Chinese courts are supposed to be law-applying institution rather than forums for making law.[27] Nonetheless, in the early days, IP laws in China were usually very general and simple, and as many provisions failed to provide details, courts were often called to fill the gaps. Chinese courts have also been active in creating precedents in which IP rights are extended to cover broader subject matters or grant stronger protections than were explicitly provided in the formal IP rules. Such tendencies were more notable when the interpretation involved complicated technological facts.[28] Furthermore, courts have been pioneers in solving many legal problems that could not be settled by the direct interpretation of the existing IP law.[29] Chinese courts are known to have engaged in a form of judicial globalization by using foreign doctrines, out of pragmatic need, to decide on hard cases, thus transplanting legal concepts and rules.[30] Judges who have received education abroad have also been contributing to such tendency. Once pioneering decisions have been made, many are later incorporated into legislation by amendments or become formalized as quasi-legal judicial interpretations issued by the Supreme People's Court.

When institutions are compared, the core function of courts is to settle disputes, but courts are not the only forum for formal dispute settlements.[31] In addition to alternative dispute settlements, administrative agencies are also, rarely, involved in the settlement of disputes. This is done through enforcement of rights on certain subject matters engaging in ex officio actions,[32] including border measures and criminal sanctions.[33] However, other than in these areas, active administrative enforcement of IPRs is seen as an exception rather than as the norm. China is one such notable exception. Chinese IP law empowers both the courts and

[21] Raz 1979 p. 212-219. Komesar criticizes this as it puts undue importance to the court which then defer to the political process, facing complexity of the facts, Komesar 1994 p.165-173.

[22] For the discussion on rules versus standards in the law, see Schlag 1985. See also Kaplow, 1992.

[23] Menell 2013 p. 63-88. See also Liddell and Waibel 2016.

[24] See however, how this effort to future proof the law is impossible. See Moses 2007.

[25] See generally, Lemos (2013), p. 89-106, on the presence of 'common law statutes' in the US which invite courts to make law.

[26] For example, harmonization of standard of originality in copyright in EU seems to be entirely based on case law of the CJEU and its interpretation of copyright directives, often characterized as judicial activism, Rosati 2013. The trend is noticed in the landmark decisions on originality such as Infopaq, FAPL, Painer and subsequent cases. Similar trend is also noticed in trademark law where the court seemed to create a notion of new function of trademark, which is an expression that is not visible in the trademark regulation or directive. L'Oréal decision. See for commentary on such tendency of the EU court, Kur, Bently and Ohly, 2009.

[27] See for a general description of courts among the institutions in China, Chen 2016.

[28] Guangxi Broadcasting Newspaper Office v. Guanxi Coal Mine Worker's Newspaper Office on TV List Right Dispute, 1996

[29] Taoyi v. Beijing Municipal Subway Foundation Engineering Company on Patent Ownership Dispute, Supreme People's Court Gazette 1992, Hong Kong Meiyi Metal Products Factory v. Board of Patent Appeals of Patent Office on 'Idler Clamp Door' invention Patent Dispute Appeal, 1992. DuPont v. Beijing Guowang Information Co., Ltd. on Domain Name Infringement Dispute in Computer Network, 2002

[30] In patent law, for example, doctrine of equivalents is one such example that are now found in various jurisdictions. Similarly, in cases with complex facts (technological, that are litigated in various countries, courts have a tendency to informally harmonize their practices. See Lee and Li 2016

[31] de Werra 2016

[32] For example, TRIPs agreement Article 58

[33] For example, TRIPs Agreement Article 61

administrative agencies to enforce IPR against infringement.[34] This aspect make institutional balance of administration and court unique in IPR enforcement.

Additionally, courts also perform a judicial review over administrative acts.[35] This division of powers with checks and balances among the institutions seems to be different in China. There, administrative agencies are seen to be at a peer position with the court in the enforcement of IPR, as well as having a peer position with the legislative, as explored below.

2.3. Specialized Courts and IP disputes

IP disputes are often factually complex. One crucial challenge for courts is to make sure that the scope of the dispute and the competence of the court, including that of its judges, are aligned. IP disputes with technologically-complex facts often raise questions on the competence of judges, as well as of generalist courts. The technologically-complex facts, as well as legal doctrines that are tied to the correct comprehension of facts, often provide justification for the claim that IPR disputes should be entrusted with 'specialist' judges and/or courts.[36] Arguably, to rule on IPR disputes, judges are often required to understand the technologically-complex subject matters. In principle, finding and applying the law should not be so fact dependent. However, there are many doctrines of IP which are heavy with elements dependent on facts. For example, in patent infringement litigation, the initial questions on whether there is a valid right to be protected and what its scope is requires knowledge into the technological facts. As a result, interpreting the law may require a technologically-knowledgeable decision maker. Such an observation seems to justify the need to create specialized courts with technologically-competent judges as opposed to simply using general courts. This argument was used to support the creation of the Unified Patent Court (UPC) in Europe instead of merely relying on the CJEU.[37]

Recent institutional reforms, either introducing specialized courts or concentrating forums, seem to confirm the need for specialization. In Asia, as well as in Europe, specialist courts seem to be the trend, either at the level of first instance, to ensure the specialist competence of the court, or at the appellate level, to allow for forum centralization and uniform application of the law.[38] In Asia, specialist courts have existed, for example, in Japan[39] and Korea[40] for some time. In the Europe Union, the UPC is currently being created, in addition to community trademark and design courts envisaged in the new regulations.[41] In Member States of the EU, specialized courts are found in Germany[42] and, to an extent, in the UK.[43] As a model for forum centralization at

[34] See for example, Patent Law of the People's Republic of China Patent Act art 3 & 60-61, 63-64 on patent counterfeiting, Copyright Act, art 7 & art. 48, Trademark law, art 2 & art 60-62. See comment, Li 2014 pp. 143-157. For a general description, see Nie 2006 pp. 217-226. See also Chen 2016 pp. 802-810 Dimitrov 2009 pp. 115-145.

[35] See for example, what are allowed for the member states as provided in the TRIPs agreement Art 41 et seq.

[36] See for example, Pegram 2000. See also Rai 2002. In contrast, on the danger of specialist court, Rifkind 1951.

[37] Regulation (EU) 1257/2012 (2012) Implementing enhanced cooperation in the area of the creation of unitary patent protection, Published OJEU L361/1-8, UPR; Regulation (EU) 1260/2012, Implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the application translation arrangement, Published OJEU L361/89-92; Agreement on a Unified Patent Court, Document no. 16351/12. (11 Jan. 2013)

[38] See generally, de Werra et al. 2016 pp. 22, reporting such trends in Austria, China, Finland, and Russia.

[39] The IP High Court was created as a result of implementing the Basic Law on Intellectual Property (2003) in 2005, after several years of attempts at subject matter forum centralization with exclusive subject matter jurisdiction in the division at the district court and high courts (Tokyo and Osaka). Tokyo high court (some subject matters) and IP High Court each have exclusive jurisdiction on IP matters by virtue of the Article 6(3) of the Code of Civil Procedure, and Article 2(1) of the Law for Establishing the IP High Court. IP High Court is the court of first instance on all appeals against the decision of JPO.

[40] Korea has general patent court in 1998. Article 3(1) of the Court Organization Act. The court has exclusive jurisdictions on limited subject matters of validity, as designated by Article 186(1) of the Patent Act, Article 75 of the Design Act, Article 86(2) of the Trademark Act, and other first instance proceedings such as Article 105 of the Seed Industry Act. The Patent Court has exclusive jurisdiction over all cancellation appeals from diverse decisions rendered by Intellectual Property Tribunal of KIPO.

[41] For community trademark and design court, Article 95 Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (codified version) (Text with EEA relevance) and Article 80 of the Council Regulation (EC) No 6/2002 of 12 December 2001on Community designs (OJ EC No L 3 of 5.1.2002, p. 1).

[42] Germany has the Federal Patent Court, (Bundespatentgericht) since 1961 based on the Article 96 (1) of the Basic Law for the Federal Republic of Germany. The court has jurisdictions for rulings on appeals against decisions of the German Patent and Trade Mark Office and actions for the declaration of nullity of German patents and of those European patents in Germany.

[43] UK has a patent court and IP Enterprises court and the court is specialist in its subject matters, but the judges on the patent court are said to be generalist as they would be hearing on non/IP matters. By combining the specialist courts with judges who are also exposed to general cases, the specialist court in the UK seem to avoid the problems of the bias of the specialist court.

the appellate level, the Court of Appeals for Federal Circuit (CAFC) in the US are in place.[44]

A specialized court is not always positively viewed. One of the biggest concerns is whether a specialist court, insulated from the perspective of the generalists, would indeed be neutral in its decision making. When the CAFC was introduced in the US, it produced much debate, with a prediction that it would result in decisions with a pro-patent bias.[45] Similarly, the EU patent package for the creation of the UPC has generated many criticisms, both substantively and procedurally.[46] Internationally, the role of the judiciary is not harmonized and it is left to individual nations to decide how judicial systems which enforce IPRs should be formed. Even the agreement that sets a global minimum standard for the enforcement of IP (the TRIPs agreement) clearly states that members are free to determine the method of implementation.[47] Furthermore, Art. 41.5 makes it clear that WTO member states are not obliged to introduce a separate judicial body in addition to the existing general law enforcement.[48] Thus, unless Member States have other treaty-based obligations that restrict this freedom, TRIPs does not require an introduction of specialized IP tribunals or courts.

As the judiciary is one of the interdependent institutions governing IP, introduction of changes in one of the institutions through system reform would likely affect the operations of other institutions.[49] However, it is indeed possible that decision making by the specialist courts may lead to capture, serving the expert epistemic community.[50] Judicial reform also needs to consider the dynamic between the administration and the courts, and to what extent deference may be paid to administrative agencies that may have expertise on facts. At the same time, there may be an undeniable unifying impact of a specialized court with exclusive jurisdiction as it channels complex cases to expert or specialist judges. Such concentration may be particularly welcome if resources are limited and if the adjudication in the generalist courts has resulted in fragmented divergences. The Chinese example of the new specialized IP court may be placed in this context.

Specialized IP court may have different meaning in China. The very fact that IPRs govern resources empowers private entities to participate in the process of governance. As IP governs a resource's uses, the institutions that have traditionally been considered a part of the political system of governance, but the market also functions as governing institution. IPR, then, becomes an instrument of governance as it allows regulation through individuals and entrepreneurs. As noted by Montgomery, 'IP law becomes to represent the point of contact between mechanism of governance (coercive power of formal law) and the technic of self-regulation.'[51] Against this, a national IP strategy encouraging IPR acquisitions is a further instances of governance where decision making is ultimately channelled to the market and the courts. When IPRs are used as a means of regulating entrepreneurial activities,[52] an independent judiciary plays an important role. As the court would be the place where private market participants neutrally settle their disputes so that they can govern their actions through IPRs, it also enables private governance. Thus, creation of specialize court strengthens the position of the court among the similar institutions and becomes an important step to realise such private governance through IP.

3. Specialized IP Courts in China and Judicial Governance

3.1 Judicial decision making in China and Judicial Governance

Chinese courts are seen as having a lot of discretion in ruling over IPR disputes. Historically, IP laws in China have been transplanted without much context and, as a result, it was claimed that there is a discrepancy between the law in the book and the societal and industry demands.[53] Some claimed that the notion of IP itself may be alien to, and thus unsuitable in, China.[54] The transplantation of the law left many gaps in the formal rules. As formal rules were inadequate, law-making competence had to be shared by the court and the legislative process. Courts particularly took the role as a law maker in fields where rapid technological developments created many challenges for the general IP rules. The Chinese courts were called to manage the possible tension

[44] Court of Appeals for Federal Circuit is the specialized court as it has exclusive jurisdiction over patent matters on appeal but it also has other subject matter jurisdiction.

[45] See Posner 1982. Since its creation, the court was heavily criticized for a pro patent bias in its ruling. Dreyfuss 1989, Nard and Duffy 2007

[46] See a commentary on the background of the agreement, Ullrich 2012, pp. 243–294. See also Petersen et al. 2015.

[47] TRIPs agreement, article 1 paragraph 1 states:

> 'Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.'

[48] TRIPs agreement article 41.5

[49] Komesar 1994

[50] See for example, Pedraza-Farina 2015 p. 89

[51] Montgomery 2010 p. 13. See also Dean 2010

[52] Zhang 2016 pp. 189-212, See also, Prud'Homme 2016 pp. 13-74

[53] See for example, Yu 2016, pp. 20-42

[54] See also Alford 1995, Pang 2012

and interactions between the formal IP rules and individualized justice in the context of the local cultures, customs and economic interests.

The discretion of courts and judges has led to the divergent local application of IP rules. First, the level of economic development in different regions of China varies greatly. It is reasonable that each region has different preferences regarding the protection of IPRs. Many provincial high courts have issued guidelines or opinions for interpreting and applying IP law to guide the lower-level courts in the territory, helping them to interpret and apply law in IPR cases. The content of these guidelines or opinions on the same issue could be different from region to region. For example, the patent law, trademark law and copyright law provide for statutory damages. As to the base unit for calculating damages, the Beijing High People's Court's guideline defines that the damage shall be calculated based on each work in terms of copyright infringement,[55] while the Jiangsu High People's Court's guideline defines that the damage shall be calculated based on each right infringed.[56] There are also many other discrepancies within the court guidelines. When it comes to practice, many discrepancies could even be magnified. In addition to differentiated regional policy, another factor is, as Liu Sida indicated, that the operation of Chinese courts is influenced by administrative hierarchal systems.[57]

In China, the court is not independent. Theoretically, courts are 'required to exercise independent adjudication in accordance with the law, and are guaranteed freedom from interference by administrative bodies, social organisations and individuals.'[58] Independence and accountability of judicial decision making is crucial in judicial governance. However, the court is considered a bureaucratic organ with a clear administrative hierarchy, which is similar or identical to corresponding administrative bodies.[59] It is hard for the court and judge to resist the influence of the administration.

Furthermore, administrative control over the courts is not uniform either. China is a country with complex decentralized and heterogeneous groups of political influence.[60] Officials within the courts with different levels of hierarchy and power may exert influence in a specific case. The political party, local administrative bodies and other entities may exert influence as well.[61] Judges are typically selected by the local CCP authority and appointed by local congress.[62] The CCP officials may exercise direct or indirect influence in individual cases through the Political-Legal Committees at each level of government. The budget for each court is determined and allocated by the local government where the court sits. Local governments are able to exert influence on judges in judicial decisions in order to protect local industries or litigants. Hence, a judge may rule in favour of local litigants by either intentionally taking jurisdiction over such cases and issuing rulings favourable to local litigants or impeding enforcement of the decisions detrimental to local litigants[63] As a result, various commentators noted the strong presence of local protectionism in adjudication in general and in the enforcement of intellectual property rights in China.[64]

Moreover, both IP laws and general policy considerations have a significant influence on judges and a courts' discretion. When a judge makes a judicial decision, he usually faces a complicated situation in which he does not only apply law as benchmark, but he is also guided by political and judicial policies.[65] Adjudication of IP laws, considering the political elements, to achieve results consistent with a particular public policy or ideology was referred by some commentators as the court's having ideological discretion.[66] One example is that the Supreme Court issued a document titled 'Opinions of the Supreme People's Court on trials of IPR shall serve the overall interests under the current economic situation' on 21 April 2009.[67] The Supreme People's Court requires all the lower courts to follow this document's guidance in IP trials. The purpose of the document is stated as:

> in fully implementing the main ideas of the "two Congresses," and carrying out national IPR strategy, to make the IPR trials serve the overall interest of an effective response to the international financial crisis

[55] See Article 10 of Beijing Municipal Higher People's Court Guidance on the Determination of Copyright Infringement Liability for Damages.

[56] See Article15 of Jiangsu Provincial Higher People's Court's Guidance on the Determination of Fixed Amount of Damage for Intellectual Property Infringement.

[57] Liu 2005. See also Chen 2011 pp. 208-212

[58] Chen 2011 p. 190, stating that there is a theoretical possibility of independence, citing the Article 126 of the 1982 Constitution of China.

[59] Chen 2011 pp. 173-191

[60] See Yu 2013

[61] Liu 2005 p.38

[62] Chen 2011 pp. 191-195

[63] Woo 1999 p.591

[64] See for example, Tao 2007 p.109, See also Thomas 2007 pp. 94-100.

[65] Kong 2008, p.26

[66] Woo 1999 p.586

[67] Fafa 2009

and promoting steady and rapid economic development, to make a more positive contribution to maintaining growth, people's livelihood and stability.[68]

The document requires the courts to strike a subtle balance between conforming to legal requirements and following state policies. For example, Sec. 14 of this document provides guidelines for the granting of a preliminary injunction before the plaintiff files a suit. The section requires that the preliminary injunction should be granted with caution and the court should strike a balance between effectively enjoining infringement and maintaining the normal operation of an alleged infringing enterprise.[69] Another example demonstrates how judicial policy may direct judges to apply law when determining the burden of proof and the amount of damages, therefore functioning as a tool to enhance the level of protection. With respect to the damage rewarded for IPR holders in infringement cases, where IP law provides for the damage for infringement, the judicial policies may guide the method of calculating damages.[70]

In sum, despite various institutional reforms, the presence of the broad interpretative possibility, coupled with the administrative and political interference on the adjudication, have led to an observation that judicial enforcement of IPRs in China is inadequate and there is a disparity in what are provided in the legislation and what are enforced in practice.[71] For example, Chen noted that there are no shortage of law and regulations on IP protection, nor lack of efforts to enforce the law, and yet, the problem of enforcement seem to persist.[72] Likewise, Yu noted that even in the positive example where there is a strong political will for enforcement, such as the case of Beijing Olympics mark, the problem of counterfeiting persisted resulting from the diversity and complex heterogeneity in China.[73]

3.2. Motivations to establish IP courts in China

1) A step in Implementing National IPR Strategy

With the deepening of economic globalization, especially the knowledge economy, Chinese authorities have paid attention to the economic development driven by innovation. Facing weak growth in the traditional economy and the economic downturn, China put IPRs in the core position of the national development strategy. In June 2008, China's State Council published the Outline of the National Intellectual Property Strategy, which provided a roadmap for how China plans to become one of the world's most innovative countries by 2020.[74] The IP Strategy committed the government to taking measures to improve its IP regime. This must be done in accordance with its ambitious industrial and technology policies, focusing the protection, utilization and management of IP, as well as its creation. Among others, there have been series of institutional reforms and the government has put the improvement of the judicial system as a key reform goal and the establishment of IP courts has become one part of the reform.[75]

2) The IP Court as the first mover in judicial reform

In order to understand the background of the establishment of IP courts, we need put the establishment of IP courts in the context of China's judicial reform. Since 1999, the Supreme People's Court (SPC) has issued 'The Outlines for the Reform of Peoples' Courts in the Period of Five Years' every five years to deploy the national wide reforms in the judicial system. The former Chief Judge of the SPC has indicted several problems in the current judicial system. The first is the localization of judicial power, namely the formation of the people's court – the appointment and removal of judges, judicial personnel, and judicial funds are under the control of same level of local government. This situation has resulted in the localization of judicial power. The localization of judicial power has affected the realization of the two important constitutional principles of the uniformity of the legal system and the independent trials, as well as the principle of socialist rule of law. The second problem is the administrative influence on adjudication. The operation of a court is the same as of an administrative department. The courts borrow the administrative means to deal with cases, thus obliterating the characteristics of the judicial activities. In addition, some local governments ignore the essential characteristics of the judicial authority, treating the court as an administrative department and treating the judge as an administrative officer. The third problem is non-professional judges. Before the 2001 amendment to the Law of Judge, anyone that satisfied the requirements for civil servants was capable of becoming a judge. As a result, many that did not have legal education, legal experience, or even an ethical approach had become judges.[76]

[68] Ibid.
[69] Ibid.
[70] Kong 2008 p.26
[71] Ming 2012 pp. 10-14
[72] Chen 2011 pp. 291-313
[73] Yu 2013
[74] State Council of the People's Republic of China 2008
[75] Zhang 2016 pp. 189-209
[76] Xiao 2003 pp. 8-9

The former Chief Judge summarized the tasks of judicial reforms, which included a reform of the court system; a reform of the court personnel and funds governance system; a reform to establish and improve the independent trial system; a reform to improve the judicial administration system so as to improve procedure; a reform in the judicial mechanisms; and a reform in the enforcement system and mechanism to solve the difficulty in enforcement of court decisions, to strengthen the supervision of judicial activities, and to implement the Law of Judges to develop high-quality professional judges.[77]

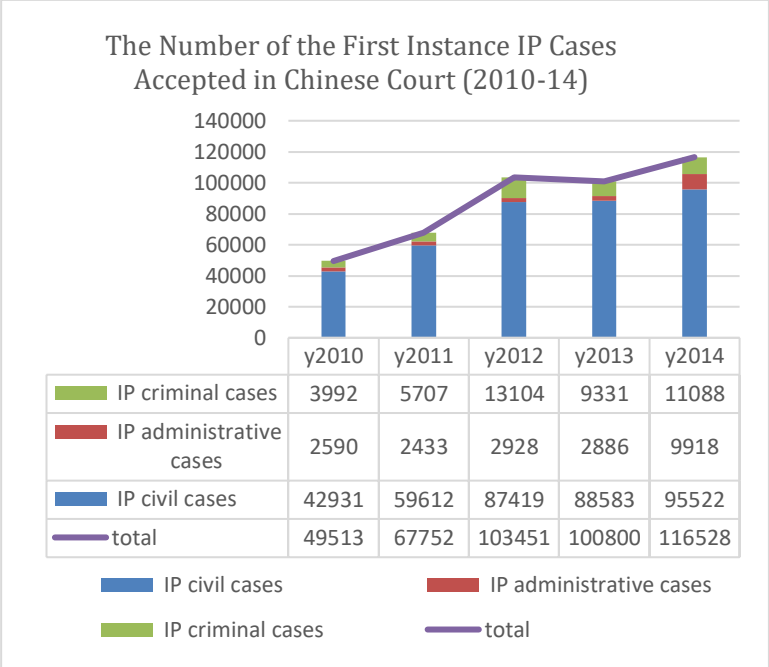
In summary, the establishment of IP courts is not simply to create new specialized courts in China to guarantee technological competence of the court and judges. It is also to implement judicial reform in China, vis a vis other institutions of decision making. As a result, the IP courts operate differently to traditional courts. Therefore, the establishment of IP courts is an attempt of implementing judicial reform. When the measures of judicial reform are successfully adopted in IP courts, it is expected that such measures may be promoted in all the courts.

3) Judicial reform and IP adjudication reform

The reform of IP adjudication system has been on the agenda for long time in China and is a part of the reform of whole judicial system. Traditionally, a court usually had a division of criminal and civil tribunals to hear different categories of cases. In 1993, the Beijing Municipal Intermediate People's court established an IP tribunal within the court to specialize in hearing IP disputes. In 1996, the SPC established an IP tribunal to hear IP disputes. Based on this Outlines, the whole judicial system was divided into three modules: civil, administrative and criminal. The IP tribunals in Chinese courts changed their name as the third civil tribunal, which specialize on adjudication of IP related civil cases.

One of the reforms has been a drive to merge three proceedings into one ('*Sanshen heyi*'). The reform of merging three proceedings into one has been implemented in some courts. The reform lets one single tribunal hear all IP cases with respect to criminal, civil and administrative law within its jurisdiction. Traditionally, the civil tribunal within a court was only supposed to hear civil disputes. Any IP criminal cases would be heard by a specialized criminal tribunal, while IP administrative cases would be heard by a specialized administrative tribunal. However, in practice, this division has caused some problems. According to the Civil Procedure Law, patent disputes shall, in principle, be heard by the intermediate courts or higher level courts. In contrast, IP related criminal cases can be heard at local courts. As a result, in a case of infringement of an IP, the civil claim will be heard by the IP tribunal in an intermediate court, while the criminal claim may be heard by the criminal tribunal in a lower level court.

Figure 1



	y2010	y2011	y2012	y2013	y2014
IP criminal cases	3992	5707	13104	9331	11088
IP administrative cases	2590	2433	2928	2886	9918
IP civil cases	42931	59612	87419	88583	95522
total	49513	67752	103451	100800	116528

[Source: The Chinese Supreme People's Court]

The decision of these different courts could be divergent, even when based on the same facts. Moreover, when a case involves the invalidity procedure in patent or trademark cases, there could be a parallel administrative proceeding at Beijing Intermediate People's court, which has exclusive jurisdiction on such

[77] Xiao 2003 pp. 9-10

cases. Consequently, based on one infringement of an IP, there could be three courts hearing the cases, resulting in inefficiency and conflicting decisions. In order to deal with this dilemma, some courts have tried to introduce a reform which merges the three proceedings into the single chamber within a court. However, the nature of such reform was experimental, not systematic. Such reform has been led by the SPC, but a systematic reform such as the establishment of IP specialized court called for authorities beyond SPC. The fact that there are pervasive foreign examples of specialized courts was seen as positively advocating the establishment of IP courts in China.[78]

One real and compelling problem of IP adjudication in favour of court specialization is the recent increase in the volume of IP disputes, as shown in the Fig. 1. The competence of the courts to hear IP cases is scattered in the courts throughout the country, with an uneven distribution of cases. By 2011, the number of intermediate courts that had jurisdiction to hear disputes over patents, new plant varieties, layout-designs of integrated circuits and well-known marks were 82, 45, 46 and 43 respectively. In addition, there were 119 local courts competent to hear IP cases. By 2010, the IP cases in Beijing, Shanghai, Shenzhen and Guangzhou took over 50% of all IP cases in China.[79] As a result, specialization of personnel was called for to improve the efficiency, and to ensure the uniformity of IP justice, the specialization of the IP judiciary, the centralization of jurisdiction and the concentration of procedures. To realize the integration of IP judicial resources, to harmonize the standards of IP protection and to provide equal protection to IPR holders, a concentrated IP court system – in other words courts that have cross regional territorial jurisdictions over IP cases – has been expected.

Specialized IP courts have been part of the national IP strategy for some time and the plan to establish the specialized courts were debated by various academics and policy makers.[80] It has been noted that the initial proposals included concentration at the appellate court level, as well as various geographical locations.[81] The 2008 Strategy already stated the need to strengthen enforcement and administration of IP and their efficiency.[82] More explicitly, it proclaims that improving the enforcement is one of its strategic goals and

> '[i]mprove the trial system for intellectual property…*Studies need to be carried out on establishing special tribunals to handle civil, administrative or criminal cases* involving intellectual property. *Studies also need to be done to reasonably centralize jurisdiction over cases involving patents or other cases of a highly technical nature.* Explore issues on setting up courts of appeal for cases involving intellectual property. Judicial organs for handling cases involving intellectual property need to be further strengthened and well-staffed to improve the handling of cases and enforcement of the law.'[83] (Emphasis added.)

Although the 2008 National IP Strategy Outline set the objective to establish IP court, there had been no development until 2014, when the NPC released the decision to establish three IP courts in Beijing, Shanghai and Guangzhou. There are several speculations as to why the proposal was pushed until 2014. First, the 2008 National IP Strategy Outline was created by the State Council, the highest administrative organ in China. Though the 2008 Outline set the target to establish an IP court, the State Council alone may only promote the idea and cannot implement it by itself. The SPC has implemented some aspect of reforms, such as 'merging three proceedings into one', but has no authority to establish IP courts, which requires a higher-level authority.

The establishment of IP courts comes from a top-down approach and was pushed forward by the highest authority in China. The Third Plenary Session of the 18th Central Committee of the Communist Party of China (CCCPC), the party's highest organ of authority, released the Decision of the CCCPC on Some Major Issues Concerning Comprehensively Deepening the Reform on 12 November 2013. On 6 June 2014, the third meeting of Central Leading Group for Comprehensively Deepening Reforms, which is composed from the highest leadership in China, approved the Plan on Establishment of IP Courts. Subsequently, the standing committee of the National People's Congress of China passed a decision to establish intellectual property courts in Beijing, Shanghai, Guangzhou on 31 August 2014.[84] The decision cleared the path for the legislation and the SPC published a judicial interpretation entitled 'Rules for the Jurisdiction of the Intellectual Property Court of Beijing, Shanghai, and Guangzhou,' which went into effect on 3 November 2011.[85] The specialized IP courts were established and have become fully operational in 2015. The three cities are selected because of the increasing number of IP disputes in these regions. By 2010, the IP cases in Beijing, Shanghai, Shenzhen and Guangzhou took over 50% of all IP cases in China.

[78] Wu 2015 pp.44-45
[79] Zhang 2013 p.30
[80] Supreme People's Court of China 2014b
[81] See Li 2016. See also Zhao and Bruun, 2016 pp. 318-336.
[82] State Council of the People's Republic of China 2008
[83] State Council of the People's Republic of China 2008 para 45.
[84] National People's Congress of China 2014
[85] Supreme People's Court of China 2014a

3.4 The De-localization of IP Courts

The establishment of these three IP courts reflects the tendency of de-localization of IP adjudication. The establishment of IP courts may concentrate most IP disputes in the country into a few specialized IP courts.The IP courts address the problem of incompatible decisions and diverging interpretation.

The SPC defines the IP court as the practitioner of the national strategy of development driven by innovation, the pioneer of the judicial reform and the path-finder for developing the judicial means in the protection of IPRs.[86] Nonetheless, the jurisdiction of specialized IP courts in China shows potential problems. To an extent, the impact of forum concentration is limited as both territorial and subject-matter jurisdiction of the IP courts are limited. The territorial jurisdiction of the courts is limited to the domicile of the seat of the court, with some cross-territorial exclusive jurisdiction in some regions. According to the Regulation, the IP courts have jurisdiction of first instance cases in the territory of its municipality on the following subjects: a) civil and administrative cases with respect to patents, new varieties of plants, layout designs of integrated circuit, technical secrets and computer software; b) administrative cases with respect to an administrative actions regarding copyrights, trademarks, unfair competitions made by a department of the State Council or a local government above county level; and c) civil cases with respect to affirmation of well-known trademarks. The IP courts are not IP appeal court and they accept and hear both the first instance disputes and appealed cases.

The IP courts' territorial jurisdiction does not cover the whole of China, but only covers the disputes occurring in its own geographic territory. Those IP disputes occurring in the area outside of these territories will still be heard by the traditional courts.[87] Nonetheless, the Guangzhou IP court's jurisdiction does not limit it to the Guangzhou municipality; rather, it has established cross-regional jurisdiction over the relevant IP dispute if it occurred in the whole Guangdong province. In addition, the Beijing IP Court has additional, exclusive jurisdiction over appeals for administrative decisions made by the Patent Office or Trademark Office concerning the grant and confirmation of IP rights, as well as over administrative decisions made by the Patent Office on compulsory licenses and associated royalties. In addition, the specialized IP Courts will hear appealed copyrights and trademarks cases challenging the judgment of lower courts in its territory. The Higher People's Courts, where the Specialized IP Courts are located, review appeals against the judgment of the specialized IP Courts. The IP courts do not exclude a competent administrative authority from executing its IP protection duties. One observation is that the Beijing and Shanghai IP courts have largely inherited the jurisdiction of their respective IP tribunals in the local intermediate people's courts and the limited jurisdiction seems to indicate the experimental nature of these IP courts. On the other hand, the cross regional jurisdiction of the Guangzhou IP court might become a model for establishing an IP court in other provinces in the future.

Indeed, at the end of 2016, the SPC decided to establish four IP tribunals in Nanjing, Suzhou, Wuhan and Chengdu – four cities that have cross-region jurisdictions over IP disputes – for a pilot trial. By February 2017, these tribunals were already in operation. The Wuhan IP tribunal has jurisdiction over the first-instance IP disputes in the whole Hubei province and the Chengdu IP tribunal has jurisdiction over first-instance IP disputes in the Sichuan Province, except those in Mianyang municipality. Other intermediate courts in these provinces will no longer accept IP cases. These IP tribunals hear not only IP civil cases but also IP administrative and criminal cases.

The establishment and operation of IP courts has several implications. First, the establishment of specialized IP courts is part of the implementation of the administration's National IP Strategy through judicial means. Furthermore, as the IP courts have consolidated the judicial resources to focus on IP adjudication, they strengthen the judicial enforcement of IP. More importantly, IP courts not only created a separate forum from former IP tribunals within general courts, but have also adopted new institutional measures to strengthen judicial decision making. They may, therefore, be seen as the pioneers of judicial reforms. The measures, such as the selection of judges, the role of the technology experts and the creation of judicial precedents, improve the impartiality and professionalism of the judiciary. These mechanisms are expected to improve the independence of the judges and the efficiency of IP adjudication, and provide uniform standards of IP protection. It is also expected that the operation of the specialized IP courts would become a model for the IP adjudication in the courts in other regions in China.

3.4 Professionalism of the IP Courts and the Judiciary

IP courts introduced a much-awaited professionalization of the judges through a new selection committee with increased impartiality. Unlike other courts, the judges in the IP courts are selected by a selection committee rather than appointed by some officials. The judges of the Beijing IP court have been selected by a

[86] Lin 2015 p. 23

[87] On November 3, 2014, the Supreme People's Court issued the Supreme People's Court's Regulations on Jurisdiction of Cases of the IP Courts in Beijing, Shanghai and Guangzhou.

judge selection committee with 13 members, made up of officials, scholars and attorneys.[88] The selection criteria includes: at least 6 years of relevant trial working experience, a bachelor's or higher degree in law, a strong capacity of leading trials and drafting judgments, and a senior judge qualification.[89] As a result, a group of highly qualified judges are appointed. For example, 25 judges (including four Chief Judges) have been appointed to the Beijing IP Court. They have an average age of 40 and 91% of them have a graduate degree. They have an average of 10 years' experience of presiding over IP cases and each heard an average of 438.5 cases per year over the last five years. One example is Judge Yushui Song, who was appointed as the Vice President of the Beijing IP Court, and has handled over 1500 cases, of which 500 were complex in nature.[90] In the Guangzhou IP court, judges are selected by the judicial selection committee of 25 members who are recommended by the local judge association, attorney association, and law association and IP research association etc.[91] The neutral selection process aims to secure the quality of adjudication by the specialized courts.

IP court judges are granted more powers and independence than before. According to the SPC, the IP courts have adopted an organizational structure with the presiding judge and collegial panel responsible for the decision and judicial accountability.[92] A judicial committee usually consists of the highest officials of a court and it traditionally had the great power in deciding a significant case, even if most members had not heard the proceedings. In contrast, IP courts grant judges more autonomous powers and all decisions will be made by the judges of the collegial panel who have taken part in the hearing. The president of the courts and the head of the tribunal will not sign any decision that they have not taken part in the hearing and, as a result, a judge does not have to consult higher level officials to make decisions.[93]

Although the judges are not required to have been technologically trained, the IP courts have introduced a system of technology experts. Many cases about patents, new plant varieties, technical secret, and integrated circuit layout designs may involve complex facts that go beyond the scope of judges' technological knowledge. The IP courts have introduced technology experts to assist judges in resolving technological questions in IP disputes. Technology experts are judicial support personnel and are not judges as such. They join the hearing proceedings and may question the parties with the permission of judges.[94] Judges may refer to the opinion of the technology experts for specific issues. While the actual efficacy of the system remains to be seen, technology experts in the IP courts aims to improve the quality and efficiency of IP adjudication.

The IP courts are also exploring the possibility of establishing a principle of precedent for its decisions. The SPC established a base for IP precedents in the Beijing IP court on 24 April 2015, aiming to establish precedents in IP cases. The Beijing IP court made a guideline for the procedure regarding compliance with and referral to directive precedents. The guideline clarifies which precedents should be followed; which precedents may be referred to; when a judge should create a precedent; how parties can submit a precedent to a court; how a judge identifies and cites a precedent; and how a precedent is compiled, collated and published.[95] As China is not a common law country, it is still quite challenging to introduce a system of precedents for IP decisions coherently, without conflicting with the rest of the judicial system in China. Nonetheless, the principle of precedents is expected to strengthen the uniformity in the application of IP law to disputes.

3.5. Rebalancing Administrative and Judicial Enforcement of IPR

One of the most important signals from the IP court is the emphasis on the judicial enforcement of IP. IP courts may redefine the relationship between the enforcement of IP by the judiciary and by the administration. In China, administrative bodies have been influential in the formation of IP norms as they can set implementing regulations for IP law statutes and can enforce IPR administratively. These implementing regulations are necessary as the texts of Chinese IP statutes are usually general in nature. During law reforms, it has been common practice to empower the State Council to make implementing regulations elaborating the provisions in the law and stipulating what is missing in the laws that are passed by the Congress. The implementing regulations have a binding effect and when a court decides relevant IP cases, it may refer to such administrative regulations. For example, in the 1984 Patent Law, Art. 68 authorizes the State Patent Office to make an implementing regulation, and in 1985, the State Patent Office issued the 'Implementing Regulation of Patent Law.' Implementing regulations may regulate a broad range of matters. For example, Art. 6 of 1984 Patent Law defined the ownership of an employment invention, but it failed to define what an employment invention is. The Implementing Regulation clarified how to determine an employment invention. Similar

[88] Su 2015 p.15
[89] See Article 4 of Supreme People's Court of China 2014c
[90] China Patents & Trademarks 2015.
[91] Lin 2015 p. 23
[92] China Patents & Trademarks 2015
[93] See Su 2015 p.16, Lin 2015 p.23. See also Li 2015 p.15
[94] Su 2015 p. 18, Lin 2015 pp.20-21
[95] See Jing 2016

examples are plentiful in copyright law, trademark law and other IP laws. As administrative bodies are allowed to enact such regulations, this practice has granted administrative bodies a power in creating IP norms.

Moreover, Chinese IP law grants administrative bodies powers to enforce the laws and discretion in their enforcement. Chinese IP laws grant the respective IP department in the government the power to prevent the infringement of IPRs and the power to impose administrative penalties on the infringers. IPR owners may petition the relevant department at the provincial or a lower level to stop the infringement and fine the infringer. This provides an alternative to litigation. Administrative enforcement is considered an effective alternative to deal with infringements of IPRs and to reduce the cost for IP owners to stop infringements. Since the 1984 Patent Law, the patent administrative authority was granted the power to issue an injunction in patent infringement cases and also had the power to determine infringements. With regard to trademark and copyright law, the administrative powers are even stronger and the administrative authority has power to investigate infringements and to punish the infringer.[96]

Administrative law-making and enforcement, however, have a critical problem of neutrality. The amendment of IP laws are usually initiated and the drafts of amendment are prepared by the relevant administrative departments. As a corollary, the power of administrative bodies tends to be enhanced and secured at every reform proposal. The strong position of the administrative bodies in making and implementing IP law makes the Chinese IP regime unique in comparison to other countries. Granting strong power to administrative bodies may be necessary for the efficient implementation of IP laws in China, where there is still large resistance to the concept of IPR as a private right. Nonetheless, the administrative power in implementing IP law has provoked some criticisms, such as the lack of transparency, inconsistency between different levels of government and different regional governments in implementing laws, insufficient training and financial resources, conflicts of interest, the tedious procedures in the government bodies and the lack of efficient cooperation between different government bodies. In this context, an efficient judiciary through an independent and specialized IP court may provide much needed balance among the institution of IPR governance in China.

The establishment of IP courts in China demonstrates the trend of judicial reform, removing the influence of the administration on judicial proceedings. Ultimately, the direction for reform seems to place the courts as a more important dispute-resolving institution rather than administrative bodies, despite the resistance from the administrative bodies. At the very least, the court appears to restrain the expansion of power of administrative body to enforce IP. Together with the trend of the de-localization of IP adjudication, establishment of IP courts clearly signals strengthening of independent adjudication.

As explored above, in China, it may be difficult to claim that the institutions – including the legislative, judicial, and administration branches, as well as the market – are at peer positions in IPR governance. In the governance of IP, which is clearly a market-based private right, private and court-based decision-making is essential. In contrast, the governance of IPR through special IP courts in China seems to raise different kinds of questions than in Europe, where there is judicial independence. Given the generality of IP law in China, re-distributing the power balance of the court and the administration seems to be of crucial importance to making sure that decision making can be impartial and that IPRs are indeed subject to judicial governance. In this context, the judicial reforms, introduced in the form of the specialized IP court in China, highlights a cautious step toward rebalancing the power to govern IPRs through courts. When a court is becoming more independent from the influences of the local power, the administrative body will have less influence on the judicial process. Further, when this happens, it may be expected that the court be able to provide important checks and balances on administrative decision making and to function as a peer institution, rather than as a subordinate institution.

4. CONCLUDING REMARKS

Development of IP law in China includes the process of transplanting legislation, as well as rejecting or modifying foreign law norms. It also includes the emergence of new norms out of local necessity. Recent IP law reforms in China, including new legislation and institutional reforms, shows that China is increasingly taking the role of norm maker. This involves attempts to govern local actors by employing deliberate techniques and strategies to make inventors and creators 'governable', as exemplified by the national IP strategy, and utilizes concrete performance measurement[97] in selected areas.

In the above, we have compared some of the decision-making institutions of IP in China so as to place Chinese specialized IP courts as an institution of IPR governance. From the comparative institutional perspective, the establishing institutions of IP – the legislation and the administration – are equally important for rule of law. A comparative institutional perspective teaches us that specialized IP courts in a country with judicial independence may suffer from bias of specialists. In contrast, specialised IP courts in China may be

[96] Article 48 of China Copyright Act 1990 amended in 2010, Article 60, 62 of China Trademark Act 1982 amended in 2013.
[97] See for example Wen et al. 2008, Li 2012 pp. 236-249. Compare, Sherman 1995 pp. 15-40

seen as a way to increase independent adjudication by declining some undue influence from the local government, the administrative hierarchy within the court.

As is made clear by the de-localization of the court, the professionalization of the selection of judges, and the establishing of a specialized IP court, China has a distinctively different motivation for the introduction of specialized IP courts than in other countries. Often, the justification comes from the competence of the judges as well as the need for forum concentration. In China, to an extent, the rhetoric of specialist courts or specialized judges to rule on the complex subject matters of IP dispute seem to be still true. However, in China, empowering courts and judicial decision making in comparison to administrative decision making and enforcement was demanded for institutional checks and balances. Rule of law calls for courts to be at a peer position with other decision-making institutions. Providing private rights and market-based decision making would call for neutral courts. The criticisms of specialist capture or pro-IP bias that have been raised in other specialized courts have not been seen in China yet. This may be because the making of IP norms by administrative bodies and the enforcement power vested with the Chinese administration means that specialized IP court seem to be motivated by the need to bring transparency and remove conflicts of interests in the decision-making processes. We observe that, other than its successful dockets of cases, it is yet too early to assess if the new IP courts would indeed positively affect the puzzles of IPR enforcement in China. However, several measures adopted by the courts – such as relatively neutral selection of judges and use of technical experts by the courts, as well as proposals for the principles of precedents in the IP cases ruled by these courts – seem to suggest that it will provide uniform interpretation of the law, as often as it is expected from specialized courts. As argued above, at the very least, a specialized IP court has a strong rhetorical impact in China as it gives a clear signal that IP rights are private rights to be adjudicated in a court by market actors and signals that governance of IPR has clearly become more market oriented in China.

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