

1-1-2009

## Comprehensive Strengthening of Intellectual Property Adjudication Will Provide Powerful Judicial Guarantees for Constructing an Innovation-Based Country and Harmonious Society

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### Recommended Citation

Cao Jianming & Josef Rawert, Translation, *Comprehensive Strengthening of Intellectual Property Adjudication Will Provide Powerful Judicial Guarantees for Constructing an Innovation-Based Country and Harmonious Society*, 18 Pac. Rim L & Pol'y J. 97 (2009).  
Available at: <https://digitalcommons.law.uw.edu/wilj/vol18/iss1/4>

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# COMPREHENSIVE STRENGTHENING OF INTELLECTUAL PROPERTY ADJUDICATION WILL PROVIDE POWERFUL JUDICIAL GUARANTEES FOR CONSTRUCTING AN INNOVATION-BASED COUNTRY AND HARMONIOUS SOCIETY

Written by Cao Jianming<sup>†</sup>

Translated by Josef Rawert\*

*Translator's Note:* Multinational corporations and other foreigners bringing foreign direct investment to China have been willing to operate at a loss and risk having their intellectual property rights ("IPR") infringed without recourse to effective legal protection, because they see a pay-off in the long run. As market reforms deepen and China's economy continues to develop, so too will the power of judicial protection of IPR strengthen, the argument goes. This long-term outlook expects acceptable levels of legal protections for IPR to emerge and that significant competitive advantage will be enjoyed by those firmly established in Chinese markets when that happens. But what is the current state of intellectual property ("IP") protection in China? How are political and social forces influencing judicial reform, and to what effect?

In the following article, former Vice-President of the Supreme People's Court of China, Cao Jianming, addresses these questions, acknowledging problems while affirming the gradual progress that has been made. The article itself is an embodiment of one trend of gradual improvement of judicial enforcement of IPR—regular training for the judges across the country engaged in the specialized work of IP adjudication. His article is based on a speech he gave at a January 2007 symposium on IP adjudication in Wuxi, Jiangsu Province, China. Cao gave his remarks after the fifth anniversary of China's accession to the WTO, no doubt finding it an opportune time to reflect on China's progress. China's membership in the WTO brought with it reforms supporting increased IPR protection—a multitude of laws and regulations were repealed, reviewed, revised, and created to conform to the WTO's GATT-TRIPS requirements. Cao explains some specific improvements provided to IPR protection by Supreme People's Court ("SPC") "Interpretations"—regulatory documents issued by the SPC that have binding effect on the adjudicatory work of all courts. He also notes the significant improvement in transparency that results from the publication of IP cases across the country on a single website. Cao summarizes the key tasks ahead for the judiciary, though, significantly, he does not discuss reform of its fundamentally weak institutional structure.

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<sup>†</sup> Procurator-General, Supreme People's Procuratorate (2008), former Vice-President, Supreme People's Court (1999—2008). Published in the journal *Science-Technology & Law* (Ke ji yu fa lu), February 2007, this article summarizes Justice Cao's talk given January 18, 2007 at the Symposium on the Work of the Nation's Courts in Intellectual Property Adjudication in Wuxi, Jiangsu Province, PRC. See Cao Jianming, *Quan mian jia qiang zhi shi chan quan shen pan gong zuo wei jian she chuang xin xing guojia he gou jian he xie she hui ti gong qiang you li de si fa bao zhang* [Comprehensive Strengthening Intellectual Property Adjudication Will Provide Powerful Judicial Guarantees for Constructing an Innovation-based Country and Building a Harmonious Society], 66.2 *Ke ji yu fa lu* [Science-Technology & Law] 3 (2007).

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The title of Cao's article reflects two forces that are shaping Chinese society and the work of the judiciary. First, the title refers to China becoming an "innovation-based" country. Independent innovation is a fundamental developmental goal China has set for itself as a means to climb up the value chain in the global economy. China seeks to reduce the patent licensing fees it must pay to foreign IPR holders by providing its factories with indigenous IPR. Second, the title refers to China becoming a "harmonious society." This reflects President Hu Jintao's guiding doctrine, a response to the widening gap between the rich and the poor that accompanied the Communist Party's previous focus on "promoting all-out economic growth."<sup>1</sup>

On January 26, 2006, China's Communist Party Central Committee and its State Council issued the "Decision about Implementing the Outline of the Scientific and Technological Plan and Enhancing Independent Innovation Capacity."<sup>2</sup> On February 9, 2006, China's State Council officially published the referenced "Outline,"<sup>3</sup> which explains China's strategy to develop its science and technology through the year 2020. These documents emphasize a multi-pronged approach to encouraging independent innovation capabilities. One aspect of this approach is proper IP management, which includes strong enforcement of IP rights connected to such independent innovations.

Shortly before Cao wrote this article, the Communist Party, at the last of its plenary sessions of its 16th Central Committee, officially endorsed the doctrine of "harmonious development."<sup>4</sup> Cao explains that as society enters the information age, IP plays an increasingly important role in economic and social interaction. Disputes, sure to arise, must be dealt with fairly and effectively to promote trust in social and economic relationships. It stands to reason that as IP takes on a central role in society, many disputes will concern IP rights.

Foreign and domestic businesses alike will be glad to see Cao addressing some key problems in IPR enforcement head on. Such problems include a plaintiff's inability to attain full compensation, to secure temporary injunctions even when he has a likelihood of succeeding on the merits, and to seek further judicial relief when infringement continues after a trial. Cao also addresses the problem of effectively presenting complex technology-laden facts to a judge with no technical training and suggests methods for judges to increase the efficiency of their trials.

One tool the SPC has at its disposal for improving IPR protection is the SPC Interpretation ("*jie shi*"). The SPC is not allowed to "interpret" laws—that function is constitutionally reserved for the National People's Congress Standing Committee—but it is allowed to "explain" to the lower courts how the law should be applied. In reality, these interpretations often have substantive legal effect, shaping actors' behavior outside of the court.<sup>5</sup> Cao explains some improvements in IP law embodied in recent

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<sup>1</sup> Maureen Fan, *China's Party Leadership Declares New Priority: 'Harmonious Society'; Doctrine Proposed by President Hu Formally Endorsed*, WASH. POST (Wash., D.C.), Oct. 12, 2006, at A18.

<sup>2</sup> Zhong gong zhong yang guo wu yuan guan yu shi shi ke ji gui hua gang yao zeng qiang zi zhu chuang xin neng li de jue ding [Cent. Comm. of the Communist Party and State Council Decision About Implementing the Outline of the Scientific and Technological Plan and Enhancing Independent Innovation Capacity] (promulgated by the Central Comm. of the Communist Party of China and the State Council. Jan. 26, 2006, effective Jan. 26, 2006) LAWINFOCHINA (P.R.C.).

<sup>3</sup> Guo jia zhong chang qi ke xue he ji shu fa zhan gui hua gang yao (2006—2020 nian) [National Mid- to Long-term Science and Technology Development Plan Outline 2006—2020] (promulgated by the State Council Feb. 9, 2006, effective Feb. 9, 2006) LAWINFOCHINA (P.R.C.).

<sup>4</sup> See Fan, *supra* note 1.

<sup>5</sup> See Susan Finder, *The Supreme People's Court of the People's Republic of China*, 7 J. CHINESE L. 145, 167-68 (1993) ("In 'official opinions' the Court often establishes new legal rules and sometimes contradicts [National People's Congress] legislation."). The Supreme People's Court [hereinafter SPC] issues several types of official documents, and the difference between an "opinion" and an "interpretation" is often unclear; Finder's observation could apply to both. See discussion *infra* note 25.

Interpretations on unfair competition and trade secrets, trademarks, new plant varieties, and internet-based copyright.

Cao's article presents an overview of IP enforcement issues currently in play in China. While it contains much typical praise for current Party policies, it also reflects the judiciary's earnest response to fundamental political and social trends. The policy of independent innovation provides new incentives for the judiciary to strengthen IPR enforcement. On the other hand, judges' pay, promotion and benefits are still linked to local governments focused on local economic interests. Local governments are thus often tempted to encourage judicial outcomes in conflict with national laws, such as labor or environmental laws. Without fundamental structural reform addressing this local protectionism, improvement in enforcement is likely to continue to take place only incrementally.

## I. NEW DEVELOPMENTS AND ESSENTIAL EXPERIENCE GAINED IN IP ADJUDICATION

China's intellectual property ("IP") adjudication work is at a historic new point of departure. It has been a full five years since China entered the World Trade Organization ("WTO"). From entering the WTO to establishing the innovation-based country strategy, these five years have been an uncommon period of great development for IP rights adjudication. Courts at every level have been closely following the overall work of the Party and the country and earnestly carrying out all aspects of IP rights adjudication. They have been giving full play to the functional role of adjudication, trying all types of IP cases in accordance with the law, appropriately regulating relationships among IP rights holders, and cracking down hard on illegal behavior that infringes IP rights. These courts have been effectively upholding the legal rights of IP owners as well as the common social good. They have been continuously increasing the strength of legal protection for IP rights and actively promoting the progress of science and technology, brand creation, and cultural enrichment. They've made important contributions to the field of IP rights in China and have provided timely and effective judicial safeguards for the construction of an innovation-based country and the establishment of a harmonious society.

In the five years of 2002 to 2006, the regional courts across the country all together accepted and resolved, respectively, 54,321 and 52,437 trial-level IP rights civil actions. Compared to the previous five-year period of 1997 to 2001, there was a 145.92% and 141.99% increase, respectively, and an average yearly rate of increase of 17.06% and 19.29%. Among those accepted, 12,883 were patent cases, at a average yearly rate of increase of 11.32%; 7,261 were trademark cases, at an average annual increase rate of 37.42%; and 20,396 were copyright cases, at an average annual increase rate of 33.07%. Of those accepted, 4,370 were technology contract cases, at an average annual decrease rate of 15.22%; 6,730 were unfair competition

cases, at an average annual decrease rate of 2.18%; and 2,681 were other IP cases, at an average annual increase rate of 32.92%. There were a total of 13,170 and 12,700 appellate cases accepted and resolved, respectively, with an average annual increase rate of 8.93% and 9.55%. The scope of IP adjudication has broadened significantly. In addition to cases involving pre-trial temporary measures, internet copyright and domain names, recognition of well-known trademarks, and new plant varieties, there are those involving integrated circuit design, people's literature, geographical designations, determination of non-infringement, franchise contracts, antitrust, and other disputes. The sustained, broad increase in IP cases and the continuous expansion of the domain of adjudication not only reflect the fast development of IP protection in China, but also reflect our society's strong need for and full trust in judicial protection of IP rights.

In 2006, courts across the country saw a steady increase in the number of IP cases adjudicated. Regional courts accepted and resolved, respectively, 14,219 and 14,056 IP civil trial cases, a comparative increase of 5.92% and 4.95%. Among them, 3,196 and 3,227 patent cases were accepted and resolved, respectively,<sup>6</sup> as were 2,521 and 2,378 trademark cases, 5,719 and 5,751 copyright cases, 681 and 668 technology contract cases, 1,256 and 1,188 unfair competition cases, and 846 and 844 other IP cases. In total, regional courts accepted and resolved 2,686 and 2,652 IP civil appellate cases, a comparative decrease of 13.74% and 12.07%. The IP litigation system further improved: two judicial interpretations concerning the adjudication of unfair competition and new plant variety infringement cases<sup>7</sup> were established and a judicial interpretation for internet copyright cases was created.

Over the past five years, courts at every level creatively developed the work of IP adjudication, reaching a new level. They formed an IP-rights judicial protection system that was able to basically respond to the nation's developmental needs and withstand the trials of entering the WTO and the post-entrance transitional period. There were some successful experiences that are worthy of popularizing.

The timely establishment and implementation of IP judicial interpretations and judicial policies ameliorated standards of judicial protection for IP. In order to accommodate the requirements of WTO entry and adjudicatory work, based on continuous investigation of adjudicatory

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<sup>6</sup> *Translator's Note:* The fact that more cases were resolved than were accepted in 2006 is likely due to the resolution of cases left over from the previous year.

<sup>7</sup> *Translator's Note:* There is evidence that these interpretations are improving the quality of IP adjudication. See discussion of the Sun Valley County Seed Company Case *infra* note 27.

patterns and summarizing adjudicatory experience, and through deep research and broadly and openly seeking public opinion, since 2001 the Supreme Court altogether created or revised eighteen IP adjudication interpretations. These interpretations cover patents, trademarks, copyright, new plant varieties, integrated circuit design, technology agreements, unfair competition, computer network domain names, IP crime, preliminary injunctions, IP asset preservation, and jurisdiction and division of responsibility. By means of responses to various lower court inquiries and other guiding documents, the Court also clarified questions covering the acceptance and management of determination of non-infringement suits and special licensing agreement disputes. It has clarified questions covering such issues as the resolution of jurisdictional disputes, suits to enjoin patent infringement, unnecessary stipulations in infringement judgments, close-resemblance trademarks and their proper use, and expository requirements for well-known trademark determinations. The Court, in accordance with the law, clarified specific judicial principles and standards governing IP protection and timely resolved some relatively prominent problems in the application of law, thereby improving the IP lawsuit system.

The strengthening of adjudicatory power and improvement of adjudicatory mechanisms improved the ability to accommodate situational requirements.<sup>8</sup> In accordance with the new conditions of IP protection and new requirements for the development of IP adjudication, the scope of court jurisdiction should be expanded over time. The adjudicatory framework should be improved and the vitality of IP adjudication should be strengthened. Currently the intermediate courts with jurisdiction over patents, new plant varieties, and integrated circuit design cases number 62, 38, and 43, respectively. Also, in accordance with need, 17 trial-level courts have been approved to adjudicate some IP civil cases; this composition is relatively reasonable. The courts' adjudicatory strength has clearly matured and strengthened.

The strengthening of litigation as a means of redress and civil sanctions has increased the judicial protective power for IP. Every level of court has actively and in accordance with the law cautiously employed temporary measures to timely deter infringing behavior and ensure the realization of right holders' legal rights. Between 2002 and October 2006, courts across the country accepted 430 requests for pre-trial temporary injunctions and resolved 425, with a rate of support from actual rulings of

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<sup>8</sup> *Translator's Note*: "Situational requirements" (*xing shi ren wu*) refers to general developments in society, such as the governmental policies of providing more support for basic scientific research, ensuring scientific and technological innovations can be brought to market, and fostering international relationships.

83.17%. They accepted 642 requests for pre-trial evidence preservation and resolved 607 of them, with a rate of support from actual rulings of 92.67%. They accepted 218 requests for pre-trial asset preservation and resolved 208, with a rate of support from actual rulings of 96.07%. A majority of requests for pre-trial temporary measures are ruled upon within 48 hours, ensuring the timeliness of the measures taken. Looking at temporary measures taken at the beginning or in the middle of litigation, using the period of November 2005 to October 2006 as an example, courts across the country accepted the following requests at the beginning or in the middle of litigation: 67 temporary injunction requests, resolving 69 (including older cases), with a rate of support from actual rulings of 91.67%; 1032 evidence-preservation requests, resolving 953, with a rate of support from actual rulings of 96.60%; and 560 asset-preservation requests, resolving 494, with a rate of support from actual rulings of 95.25%. In carrying out the principle of full compensation for IP infringement damages, courts have in accordance with the law increased the strength of damage rulings; the compensation amounts assessed in the rulings have been steadily increasing, and in some cases courts have granted the maximum damages allowed by law. Civil sanctions for infringement have been given in accordance with the law when circumstances warrant. The strategy of promoting famous brands has been carried out through judicial recognition of well-known trademarks and protection of famous products. From 2002 to October 2006, local courts across the country have collectively recognized 187 well-known trademarks.

Focusing on the quality and results of adjudication raised the level of IP protection in the courts. Courts at all levels are properly applying procedural and substantive law, continuously raising the quality and efficiency of the adjudication of IP cases. The resolution rate of civil IP cases at the trial-court level rose from 72.82% in 2002, to 78.36% in 2006; the appeal rate fell from 49.42% in 2002, to 40.67%; the rate of reversal and return to the trial court fell from 23.90% in 2002 to 14.52% in 2006; the review rate fell from 1.00% in 2002 to 0.27% in 2006. As for focusing on mediation and endeavoring to combine court rulings with mediation to resolve disputes and close cases, the average rate of settling cases out of court at the trial-court level for civil IP cases across the country between 2002 and 2006 was relatively high at 52.57%, resulting in good effects on society.<sup>9</sup>

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<sup>9</sup> *Translator's Note:* This sentence combines two sentences in the original language for the sake of clarity.

Courts at every level also put great emphasis on the openness and transparency of adjudication, raising public confidence in the judicial process. While maintaining open-door court proceedings<sup>10</sup> in accordance with the law, courts are also timely and openly announcing effective court decisions<sup>11</sup> and publicizing adjudication information to the public through the media, websites and other publications. The website “China IP court decision network,”<sup>12</sup> which formally opened March 10, 2006, provides a common platform for courts across the country to publicize their effective IP judicial rulings. It has also become an important window for understanding the state of China’s IP judicial protection, both domestically and internationally.

## II. THE FUNCTION OF GIVING FULL PLAY TO IP ADJUDICATION IN THE COURSE OF BUILDING AN INNOVATION-BASED COUNTRY AND CONSTRUCTING A HARMONIOUS SOCIALIST SOCIETY

IP adjudication in China is currently facing an unprecedented landscape embodying a period of new and important opportunities for development.

### A. *Strengthening IP Adjudication Is Necessary to Insure the Realization of the Innovation-based Country Strategy*

The 5th Plenary Session of the 16th Central Committee of the Communist Party indicated that strengthening independent innovation should be our national strategy, and that we should work toward building an innovation-based country. The Central Committee of the Communist Party of China and the State Council’s “Decision about Implementing the Outline of the Scientific and Technological Plan and Enhancing Independent Innovation Capacity” has further clarified the strategic goal of constructing an innovation-based country. It further indicated that through fifteen years of effort toward this goal we should enable China to enter the ranks of innovative countries by the year 2020. The 6th Plenary Session of the 16th

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<sup>10</sup> *Translator’s Note:* In 2007, the court implemented a system of opening its doors to the public during IP trials, inviting members of the National People’s Congress, relevant trade association members, and even representatives of foreign enterprises and governments to important trials. This system is currently expanding across the country. See Pei Hong, *Jin nian wo guo jiang jin yi bu wan shan he tong yi zhi shi chan quan si fa bao hu biao zhun (xia)* [This Year China Will Further Perfect and Unify Standards for IP Protection Adjudication (last pt.)] (May 29, 2007) <http://ipr.chinacourt.org/public/detail.php?id=644> (interviewing the head of the Supreme People’s Court IP Tribunal, Jiang Zhipei).

<sup>11</sup> *Translator’s Note:* Effective court decisions are final decisions not subject to appeal.

<sup>12</sup> *Translator’s Note:* The site’s web address is <http://ipr.chinacourt.org>.



Central Committee emphasized that one goal and an important task in constructing a harmonious socialist society is to invigorate innovation across the entire country and build an innovation-based country. Building an innovation-based country and walking the path of independent innovation with Chinese characteristics has become a momentous strategic act and a long-term, arduous task. It is an act whereby China will comprehensively implement a scientific-development outlook and create a new phase in the construction of socialist modernization.

The IP legal system is an important systemic guarantor for building an innovation-based country. General Secretary Hu Jintao clearly pointed out that enhancing the construction of China's IP system and energetically improving the ability to create, manage, apply, and protect IP are urgent needs in our efforts to strengthen China's capability of independent innovation and build an innovation-based country.<sup>13</sup> Further, they are urgently needed for completing our socialist market economy, standardizing market order, and establishing a society of trust; they are urgently needed for strengthening the competitiveness of our enterprises and improving our national core competitiveness. An enhanced IP system with a greater ability to create, manage, apply, and protect IP is also urgently needed to expand openness to the outside world and realize mutual benefit and achievement. We must increase our vigor in IP protection, improve the national IP system, fully construct the legal regime for IP protection, strengthen adjudicatory and enforcement work in IP protection, and in accordance with the law severely crack down on all types of IP infringement activity. Judicial IP protection is an important aspect of IP protection; it carries the special responsibility of encouraging innovation, balancing IP rights and duties, preserving the balance of interests in the IP arena,<sup>14</sup> and strictly enforcing the

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<sup>13</sup> *Translator's Note:* The core of China's plan to become an innovation-based country is outlined in "The National Program 2006-2020 for the Development of Science and Technology in the Medium and Long Term." Guo jia zhong chang qi ke xue he ji shu fa zhan gui hua gang yao (2006—2020 nian) [The National Program 2006-2020 for the Development of Science and Technology in the Medium and Long Term] (promulgated by the State Council Feb. 9, 2006, effective Feb. 9, 2006) CHINALAWINFO (P.R.C.). This Program is the first medium- and long-range technology plan under China's new socialist market economy. According to Premier Wen Jiabao, it embodies the following goals: 1) develop energy conservation and environmental protection technologies; 2) improve core technologies and indigenous intellectual property in manufacturing and information technology; 3) develop biotechnology industries; 4) enhance space and marine technologies; and 5) improve basic research. *Innovation*, "Motive Power for Development", Yang Lei ed., Jan. 11, 2006, [http://www.gov.cn/english/2006-01/11/content\\_220696.htm](http://www.gov.cn/english/2006-01/11/content_220696.htm). For a full analysis of this program, see Sylvia Schwaag Sergere & Magnus Breidne, *China's Fifteen-Year Plan for Science and Technology: An Assessment*, 1 *Asia Pol'y* 135 (July 2007), available at [http://www.nbr.org/publications/asia\\_policy/AP4/AP4%20Sergere\\_Breidne%20RN.pdf](http://www.nbr.org/publications/asia_policy/AP4/AP4%20Sergere_Breidne%20RN.pdf).

<sup>14</sup> *Translator's Note:* Indeed, in a recent SPC Opinion discussing judicial support for developing independent innovation, discussed *infra* Part III, the SPC introduced the principle of achieving this balance with a two-tiered level of judicial protection for technical IP rights. Technical IP rights, such as patents,

rule of law. Judicial IP protection has a foundational place in the national comprehensive IP legal enforcement and protection regime—it plays a guiding role. There is no doubt the question of how to best bring into play the courts' IP adjudication role in implementing the strategy of building an innovation-based country is laid out before us as a long-term, momentous judicial task.

*B. Strengthening IP Adjudication Is Needed to Increase China's Openness to the Outside World and Guarantee China's Peaceful Development*

China is still a developing country. The progression of reform is at a critical juncture. On the whole, there still exists a rather great disparity between our level of science and technology and industrial development and that of developed countries; our international competitiveness is still not strong, and we will face the pressures of the developed countries' economic, scientific and technological, and other advantages for a long period. Intellectual property is the collective embodiment and means to spur growth of our national core competitiveness; it is daily becoming an important arena and basic tool in international competition and gamesmanship.<sup>15</sup> In China's current foreign relations, IP protection has already become a standard strategic topic. On the one hand, the international community has given high recognition of the remarkable achievements China has made in IP protection. On the other hand, some developed countries have frequently pressured and questioned us on many aspects of our IP protection. Their focus has shifted from the issue of establishing laws to that of enforcing laws; it has shifted from individual laws more toward layers in the system, from individualistic application of pressure to united activity. International contention in the IP arena is becoming more and more vehement. The contradictions that exist between the late-comer status of China, as a developing country, on the economic and technology front and the high

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software, new plant varieties, and integrated circuits, will be "reasonably and moderately" (*he li shi du*) protected, while in order to stimulate independent innovation, technical IP rights based on "key core technologies" of indigenous origin that promote significant economic growth will receive heightened protection (*jia da bao hu li du*). Opinions of the Supreme People's Court on Comprehensively Strengthening the Trial Work Involving Intellectual Property Rights to Provide Judicial Safeguard for the Constitution of an Innovative Country (promulgated by the Sup. People's Ct. Jan. 11, 2007, effective Jan. 11, 2007), art. 8, translated in LAWINFOCHINA (P.R.C.).

IP owners may find this distinction in tension with China's WTO-TRIPS requirement to provide foreigners national treatment.

<sup>15</sup> *Translator's Note:* The term "gamesmanship" (*bo yi*) references the application of game theory to analyze political and economic relationships among actors in domestic and international settings.

standards of international IP protection as led by the developed countries cannot be resolved in a short period of time; disputes involving foreign IP will necessarily continue to exist for a relatively long time and will continuously be a hot issue in international relations. Effective IP protection has already become an important aspect of developing foreign relations, creating a positive external environment, and ensuring China's peaceful development.

In recent years, the number of cases involving foreign IP rights adjudicated in China's courts has markedly increased. Between 2002 and 2006, courts across the country in total have tried 931 trial-court civil cases involving foreign IP, with an average annual rate of increase of 48.29%. In 2006, 353 cases were tried, an increase of 52.16% over the previous year. Also, according to recent initial statistics, the number of civil trial-court IP cases accepted and tried across the country that involve foreign-invested "three-funded enterprises"<sup>16</sup> has already reached 533 and 308 respectively; in the same period only 207 civil trial-court cases involving foreign IP were tried. It can be seen that cases involving "three-funded enterprises," which have similar foreign elements, in terms of their numbers already account for a good proportion. Following the trend of globalization and the end of the post-WTO entry transition period, China will promote comprehensive, multi-layered, wide-ranging opening to the outside world with an even more active posture. All locals are focusing heavily on bringing in advanced technologies and upgrading levels of industry and independent innovation. We can predict that in the wake of such developments foreign IP disputes will continue to increase; the level of complexity of these disputes will also further increase. Under complex international and domestic conditions, we are facing the important and pressing task of determining how to use open and efficient IP adjudication to establish China's judicial IP protection and positive international image.

### C. *Strengthening IP Adjudication Is Needed for Innovation in the IP System*

Following the implementation of the strategy of building an innovation-based economy, China's national IP strategy is being mapped out with great anticipation and with the hopeful prospect of implementation in the near future. The Standing Committee of the National People's Congress a few days ago approved China's entry into two internet-related international

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<sup>16</sup> *Translator's Note:* These three types of foreign-funded enterprises (*san zi qi ye*) are sino-foreign joint ventures, sino-foreign cooperative enterprises, and foreign wholly-owned enterprises.

treaties: the World Intellectual Property Organization (“WIPO”) Copyright Treaty and the WIPO Performances and Phonograms Treaty.<sup>17</sup> Foundational IP laws such as patent law and trademark law are currently once again undergoing revision. The framing of laws and regulations closely connected with IP such as antitrust law, trade secret protection law, and folk art and literature protection provisions have already moved onto the agenda of important affairs. All of this indicates China’s IP system is undergoing new, comprehensive innovation. In the wake of the new system’s gradual establishment and completion, the IP adjudicatory work of the People’s Courts will play a new role on a new system platform. We must meet the new challenges, adapt to new requirements, study new laws, and research new problems. We must enable our IP adjudication abilities to reach new standards and the level of adjudication to reach new heights.

*D. Strengthening IP Adjudication Is Needed to Construct a Harmonious Socialist Society*

Starting with the overall composition of the undertaking to build socialism with Chinese characteristics and fully building a “moderately prosperous” society, the 6th Plenary Session of the 16th Central Committee of the Communist Party made resolutions regarding several huge issues concerning constructing a harmonious socialist society; it put forth the great strategic tasks for building a harmonious socialist society. There is a very close relationship between the adjudicatory work of the People’s Courts and the building of a harmonious society; the Courts’ work has a direct influence on the progress of a harmonious society and is an important force in ensuring the construction of a harmonious society. In this era of the knowledge economy and the information society, IP is an important property

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<sup>17</sup> *Translator’s Note:* China acceded to these two treaties in March, 2007; they became effective June 9, 2007. WIPO, Contracting Parties > WCT > China > Details, [http://www.wipo.int/treaties/en/Remarks.jsp?cnty\\_id=1989C](http://www.wipo.int/treaties/en/Remarks.jsp?cnty_id=1989C) (last visited Apr. 24, 2008); WIPO, Contracting Parties > WPPT > China > Details, [http://www.wipo.int/treaties/en/Remarks.jsp?cnty\\_id=1990C](http://www.wipo.int/treaties/en/Remarks.jsp?cnty_id=1990C) (last visited Apr. 24, 2008). Copyrights and the related rights of performers and phonogram creators are already covered under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which China adopted in 2001 upon WTO accession. See Agreement on Trade Related Aspects of Intellectual Property, Part II § 1, art. 9–14, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197; Decision of the Standing Committee of the National People’s Congress on China’s Accession to the World Trade Organization (promulgated by the Standing Comm. Nat’l People’s Cong., Nov. 9, 2001, effective Nov. 9, 2001), translated in LAWINFOCHINA (P.R.C.). However, these treaties, known as the “internet treaties,” serve to update TRIPS, ensuring that protections are effective in a digital environment by adding “anti-circumvention”/anti-hacking provisions and provisions prohibiting the deletion of “rights management information.” International Bureau of WIPO, *The Advantages of Adherence to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)*, 3, 10, [www.wipo.int/copyright/en/activities/wct\\_wppt/pdf/advantages\\_wct\\_wppt.pdf](http://www.wipo.int/copyright/en/activities/wct_wppt/pdf/advantages_wct_wppt.pdf) (last visited Feb. 16, 2008).

right; its status and role increases markedly day by day. Social relations concerning IP rights are becoming more and more complicated, disputes arising from IP issues are increasing daily, and the IP adjudication needs of the people are growing daily. Under the new conditions of building a harmonious society, further strengthening IP adjudication has an extremely important significance for timely and effectively resolving social contradictions, protecting the legal rights of parties, promoting the construction of a framework of social trust, protecting economic order in the markets, ensuring fair competition, advancing social harmony, and preserving the general prospects for the stability of reform development.

The guiding idea and main task behind IP adjudication for now and for a time to come is to continue under the guidance of Deng Xiaoping Theory and the important “three represents” thought,<sup>18</sup> to fully implement a scientific-development view, to persevere under the working goals of “fair administration of the law, singularly for the people” and “fair and efficient,” to comprehensively strengthen IP adjudication, and to give full play to our adjudicatory role in protecting intellectual property, empowering independent innovation, and protecting fair competition. We must enable IP judicial protection to permeate the entire process of IP creation, management, and application. We must provide strong judicial guarantees for the implementation of the national IP strategy, and for building an innovation-based country and constructing a harmonious socialist society. We must endeavor to construct a fair, highly efficient, and authoritative IP adjudication environment.

### III. THE ROLE OF IP ADJUDICATION IN THE PROCESS OF BUILDING AN INNOVATION-BASED COUNTRY AND CONSTRUCTING A HARMONIOUS SOCIALIST SOCIETY

A few days ago, the Supreme People’s Court issued its “Opinion concerning provision of judicial guarantees for building an innovation-based

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<sup>18</sup> *Translator’s Note:* The “important ‘three represents’ thought” (*san ge dai biao zhong yao si xiang*) is former president Jiang Zemin’s contribution to China’s tradition of socialist thought. Enshrined in China’s 1982 Constitution during the fourth round of amendments in 2004, the “three represents” refer to advanced productive forces, advanced culture, and the interests of the majority of the Chinese people represented by the Communist Party. This theory serves to open up the Communist Party to capitalists and entrepreneurs. See M. Ulric Killion, *Chinese Regionalism and the 2004 Asean-China Accord: The WTO and Legalized Trade Distortion*, 31 N.C. J. Int’l L. & Com. Reg. 1, 28 (2005) (citing Barbara Foley, *From Situational Dialectics to Pseudo-Dialectics: Mao, Jiang, and Capitalist Transition* (2002), <http://clogic.eserver.org/2002/foley.html>).

country through comprehensively strengthening IP adjudication,”<sup>19</sup> which provided a series of tasks and specific measures for comprehensively strengthening IP adjudication. This document provides guiding principles for IP adjudication for today and for the near future.

A. *Further Carry Out the Principle of Full Compensation*

In strict accordance to the stipulations of law, regulations, and judicial interpretations, let the rights holder’s loss receive full reparation, and let reasonable costs of preserving one’s rights be fully reimbursed. Courts should make appropriate use of stipulated damage reimbursement measures and avoid simplified application of legally prescribed reimbursement methods. Courts should, in accordance with the law, appropriately reduce the burden of proof for right-holder reimbursement. In cases where the quantity of infringing products can be proved or where the amount of reduction in the right-holder’s sales resulting from the infringing activity can be proved, courts should strive to calculate damages by determining a reasonable interest rate. When the specific amount of infringement damages or the benefits derived from infringement are difficult to prove but the evidence proves that the amount is clearly greater than the maximum damages allowable under the law, the legally determined reimbursement rate calculation method should not be used; rather, the evidence of the entire case should be taken together and a reimbursement amount exceeding 500,000 Yuan [approximately \$70,000 USD] should be reasonably determined.<sup>20</sup> When determining compensation liability according to a legally prescribed

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<sup>19</sup> *Translator’s Note:* See *supra* note 14. Note that the translation of the title of this SPC “opinion” in the main text here is different than the translation of the title cited in note 14.

<sup>20</sup> *Translator’s Note:* Where actual damages or illegal gains are difficult to determine in copyright or trademark cases, compensation is limited by law to 500,000 Yuan (approximately \$70,000 USD). *Zhu zuo quan fa* [Copyright Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 7, 1990, effective Jun. 1, 1991) (rev. Oct. 27, 2001), art. 48, LAWINFOCHINA (P.R.C.); *Shang biao fa* [Trademark Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 23, 1982, effective Mar. 1, 1983) (rev. Jul. 1, 1993 and Oct. 27, 2001), art. 56, LAWINFOCHINA (P.R.C.). The spirit of this SPC Opinion is being applied. In a November 2007 decision, the Changsha Intermediate People’s Court awarded the foreign plaintiff in a trademark/unfair competition suit the full amount of compensation requested. Volkswagen of Germany sued a Chinese company for promoting and selling engine oil using the Volkswagen name and trademarks. The court noted that despite Volkswagen’s lack of evidence as to its actual losses and the lack of evidence needed to calculate defendant’s actual profits, the evidence obtained via plaintiff’s evidence preservation request provided sufficient information to infer “profits clearly in excess of 500,000 Yuan.” The court, therefore, awarded the requested compensation of 800,000 Yuan (approximately \$112,000 USD), which included expenses incurred in prosecuting the case. Collection of the debt will be difficult, however, because the defendant failed to appear in court and was likely nowhere to be found. *Volkswagen Automobile Co. v. Changchun Volkswagen Lubricating Oil LLC & China Universe Restaurant, China IPR Judgments & Decisions* (Hunan Province Changsha Interm. People’s Ct., Sept. 13, 2007), [http://ipr.chinacourt.org/public/detail\\_sfws.php?id=11841](http://ipr.chinacourt.org/public/detail_sfws.php?id=11841).

compensation method or other method that requires consideration of specific calculation factors, courts can consider the magnitude of the parties' misbehavior in fixing the appropriate compensation liability. In cases of intentional infringement, "passing off," piracy, and other such serious infringing activity, in addition to assigning civil liability to the infringer in accordance with the law, courts may also assign civil punitive damages in light of the specific circumstances and in accordance with the law, ensuring the infringer is severely penalized in accordance with the law.

*B. Give Attention to the Use of Temporary Measures in Accordance with the Law*

A court must ensure that rulings are issued within the legal time limitations and are immediately followed by performance. It must correctly understand the material conditions under which it may take pre-trial temporary measures; as for temporary injunctions, the court's evaluation must give weight to the likelihood that the accused party is infringing. Further, the court must consider the injunction's effectiveness during the lawsuit, the conditions concerning harm suffered, and the public interest. As for pre-trial evidence preservation, along with the likelihood of infringement the court should give much weight to evidential hazards and the applicant's ability to collect evidence. A court must scientifically and rationally determine assurance requirements; in temporary injunction cases, after an initial assurance amount has been determined and measures taken, an additional assurance amount may be added by agreement of the parties or by a timely determination of the court based on the facts of the case. As for cases requiring assurances for the preservation of evidence, assurance amounts should usually not exceed the value of the item preserved and the relevant fees to be paid.

*C. Make Appropriate Use of Civil Liability for Stopping Infringement in Accordance with the Law*

When the evidence shows that the infringer has already stopped the infringing activity prior to or during the lawsuit, it is sufficient to note this while explicating the facts; a court need not order cessation of infringement in the main body of the ruling. When in some lawsuits there exists exceptional infringing activity, a court may, in accordance with the specific facts of the case, rationally balance the interests of the parties and also the interests of the general public; it may consider the costs and feasibility of implementation. When implementing an order to cease infringement would

lead to clearly unreasonable results or harm the public interest, a court may appropriately increase the compensation liability of the infringer rather than order the cessation of the relevant selling or use. When an order to stop infringing has been made and implementation steps have been taken but the infringer continues his infringing behavior, the rights holder may in accordance with the law sue once again to pursue civil liability as to the new behavior. Upon judicial determination that the infringer is continuing the activity previously deemed an infringement, the court should, in accordance with the actual facts, make a non-compliance ruling and coordinate with public security and the procurator to pursue criminal liability.

*D. Appropriately Manage the Issue of Determining Facts Concerning Specialized Technology*

Courts should give full play to the role of the people's assessors;<sup>21</sup> in light of the highly specialized nature of IP adjudication, courts should actively promote the adjudicatory method of "random selection" of assessors from among specialized experts. Courts should focus on selection and use of peoples' assessors, ensuring they carry out their duties efficiently and in accordance with the law. Courts should encourage their proactive and enthusiastic attitude toward participating in the adjudication, and should give full play to their unique role in resolving technical problems and their positive role in mediating cases. Courts should carry forth judicial democracy, promote judicial fairness, strengthen judicial supervision, and increase judicial authority. Courts should place importance on the expert witness system, actively supporting the parties in retaining experts with specialized knowledge to serve as expert witnesses in the court and explain the nature of specialized issues; the process should not have time restrictions.

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<sup>21</sup> *Translator's Note:* In the phrase "people's assessors" (*ren min pei shen yuan*), the phrase "*pei shen yuan*" means "one who accompanies the trial" and describes both jurors in the common law system and assessors in the civil law system. China's civil law assessor system, based on the German model, had utilized lay "judges" that sit with professional judges on a co-equal basis, enjoying the right to question witnesses and ask for evidence. Di Jiang, *Judicial Reform in China: New regulations for a Lay Assessor System*, 9 Pac. Rim L. & Pol'y J. 569, 570, 582-83 (2000). The SPC has advocated for a more vigorous use of the assessor system, which had been ill-defined, undeveloped, and harmed further by the Cultural Revolution (1966-1976). Foundation for Reform of Assessor Function Set, CHINA DAILY, Dec. 4, 1998, available from LEXISNEXIS. The assessor system was revived following the promulgation of the Decision of the Standing Committee of the National People's Congress Regarding Perfecting the System of People's Assessors (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2004, effective May 1, 2005), translated in LAWINFOCHINA (P.R.C.), and the Opinion on the Work of Appointing, Training and Appraising People's Assessors (promulgated by the Sup. People's Ct. and the Ministry of Just., Dec. 13, 2004, effective Dec. 13, 2004), translated in LAWINFOCHINA (P.R.C.).



### E. *Further Improve Efficiency in Trying Cases*

Courts must strengthen their awareness of time constraints and efficiency; they must adopt a variety of measures to prevent case backlogs and under the premise of ensuring fairness endeavor to raise efficiency. Courts must investigate, decide, and suspend lawsuits in strict accordance with the law; they must work hard to shorten the adjudicatory period for IP cases, especially patent cases. Cases in which a conclusion of non-infringement can be reached need not wait for a ruling from the administrative rights-determination process; such cases need not be suspended.<sup>22</sup> Courts should pay attention to combining the progression of the administrative rights-determination process in evaluating the stability of the rights involved in the case,<sup>23</sup> and timely resuming adjudication of the infringement case. But, courts should not allow an administrative review decision that has not yet taken effect to directly serve as a basis for adjudication. In investigating case-suspension assurances and the actors' rights-arrangement framework, when rights stability is difficult to determine, if the rights holder is willing to provide a valid assurance then the case need not be suspended. Alternatively, courts may decide not to suspend a lawsuit if the parties reach agreement as to the method of calculating their possible benefits and losses. Cases involving foreign IP should also, barring any special circumstances, receive timely adjudication.

## IV. SEVERAL SPECIFIC ISSUES IN CURRENT IP ADJUDICATION

### A. *Trying Unfair Competition Cases*

The "Supreme People's Court Interpretation of Several Issues Concerning the Application of Law in Adjudicating Unfair Competition" ("Interpretation") was issued in the last few days. This is the first important judicial interpretation concerning the adjudication of unfair competition

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<sup>22</sup> *Translator's Note*: China has a dual system of rights enforcement which consists of parallel methods of administrative and judicial enforcement. Kristie Thomas, *The fight against piracy: working within the administrative enforcement system in China*, in INTELLECTUAL PROPERTY AND TRIPS COMPLIANCE IN CHINA, 86, 86 (Paul Torremans, Hailing Shan, Johan Erauw eds., Edward Elgar Publishing, 2007). China's State Council has made tighter cooperation between enforcement coordinating agencies, administrative enforcement bodies, public security and judicial authorities a key aspect of the development of its IP protection plan. GENERAL OFFICE OF THE STATE COUNCIL, OUTLINE OF IPR PROTECTION ACTIONS (2006-2007), [http://www.ipr.gov.cn/ipr/en/info/print.jsp?a\\_no=4049&col\\_no=102&dir=200605](http://www.ipr.gov.cn/ipr/en/info/print.jsp?a_no=4049&col_no=102&dir=200605).

<sup>23</sup> *Translator's Note*: Stability of rights refers to situations where the validity of a party's IP rights is subject to dispute. The court may need to await rights verification from an administrative organ such as the patent or copyright office.

issued by the Supreme Court. Its purpose is to resolve some rather prominent issues with the application of law in the course of actual adjudication. The Interpretation explicates some important legal demarcations for adjudicating IP cases involving “passing off,” false advertising, trade secrets, commercial tarnishment, and the like. Appropriate implementation of this Interpretation has important significance for standardizing market order, maintaining fair competition, and protecting intellectual property. As for the protection of trade names, packaging, and trade dress for famous products, the Interpretation stipulates that public recognition within a certain market is sufficient to meet the requirement of “famous”; nation-wide recognition is not required. However, the protection of famous products will not be limited to the region of recognition; the nature of the behavior will be considered. Any malicious copying, even that which is outside the region in which the famous product is recognized, could constitute unfair competition by “passing off” famous products. Good-faith use will not be prosecuted, but in accordance with standard market order, next-in-line users can be required to add a differentiating mark. The Interpretation stipulates that for enterprise name protection, an enterprise’s name that has been legally registered and recorded should receive protection when the enterprise has been established within China’s national borders, is established in the domestic enterprise name registration management system and is in actual use, and is further carrying out its international obligations regarding manufacturer name protection under the Paris Convention. As for the protection of foreign enterprise names, it is not required that they have already been registered and recorded in China, but they should be required to have already been in commercial use in China.<sup>24</sup>

The Interpretation establishes the basic nature of “inducing misunderstanding”; it delineates several categories of special false advertising and lays out regulations governing the adjudicatory standards covering misleading false advertising. At the same time, the Interpretation excludes “relying on clear exaggeration to advertise products, while not

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<sup>24</sup> *Translator’s Note:* In the Volkswagen trademark infringement case discussed *supra* note 20, the court relied on this latest unfair competition Interpretation in finding Volkswagen’s name to be an enterprise name that had been infringed upon. See Interpretation on Some Issues Concerning the Application of Law in the Trial of Civil Cases Involving Unfair Competition (promulgated by the Sup. People’s Ct. Jan. 11, 2007, effective Feb. 1, 2007), art. 6, translated in LAWINFOCHINA (P.R.C.). It also cited this interpretation in justifying its damages award, even though the letter of the law might have required limiting damages to 500,000 Yuan, given the inability to calculate defendant’s actual proceeds. See *id.* at art. 17. Likely, the court was following the dictates of the SPC’s opinion discussing innovation, *supra* note 14, at art. 13 (noting that in order to implement the principle of full compensation, the obligee’s burden of proof should be lightened, and where there is evidence of many instances of infringement over time, the infringement may be deemed continuous and compensation granted accordingly).

actually creating confusion among the relevant public.” This is consistent with the realities of economic life and social interaction, is in conformity with the intention behind the law of unfair competition, and is aligned with international practice.

In the spirit of strengthening the protection of trade secrets and optimizing conditions for innovation and investment, the Interpretation has explained the conditions necessary for the establishment and specific recognition of trade secrets. It has also created regulations governing several special problems arising in the adjudication of trade secret cases. The requirement of “not known to the public,” that is, the secrecy requirement, should at the same time include the two conditions of “not generally known” and “not easy to obtain.” This is in accord with the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights. Because trade secret rights exist through their holder’s own protective actions, the rights holder does not have an exclusionary, monopoly right; the Interpretation stipulates that obtaining others’ secrets through independent invention or reverse engineering does not constitute infringement. In trade secret protection, recognition of customer lists is complex; the Interpretation clarifies relevant recognition standards. It also gives consideration to the special status of lawyers, doctors, and similar professionals: they often obtain customers based on customer trust in their personal ability and moral character. Furthermore, they are very mobile. From the point of view of fairness, previous customers are allowed to continue professional relations with them.

Based on the principle of “the accuser must produce evidence,” the Interpretation stipulates that the plaintiff has the burden of proof concerning the possession of a trade secret, the similarity of the two parties’ information, and the inappropriate methods used by the defendant. As for whether a trade secret exists, the plaintiff’s burden of proof can be met under normal circumstances if he or she produces an embodiment of the trade secret, its specific content, its commercial value, and measures taken to ensure its secrecy. Trade secrets have no time limitations; as long as secrecy exists, protection should be available, and an infringer should incur civil liability requiring the cessation of his harmful behavior. But, courts should also consider the balance of interests between the rights holder and the general public. Borrowing some methods from abroad, courts should be allowed to make reasonable determinations as to the time when the harmful behavior must stop, in accordance with different trade-secret infringement situations. When a trade secret loses its secret status as a result of the infringing behavior, courts may not determine compensation liability by

simply using a set compensation method; they must determine compensation based on the commercial value of the secret and the specific circumstances of the case.

### B. *Trying new Plant Variety Infringement Cases*

The “Supreme People’s Court Regulations on the Application of Law in Adjudicating Cases Concerning Disputes Over New Plant Variety Rights Infringement” have in the past few days been formally issued. This is an important act of the Supreme Court for providing judicial guarantees for the construction of a new socialist countryside. Relevant courts, especially courts with the jurisdiction over new plant varieties, must earnestly study and carry out these regulations. They must appropriately and adequately adjudicate this type of agricultural case so as to maintain social harmony in the countryside.

The Interpretation [sic]<sup>25</sup> stipulates two types of new plant variety infringement behavior and establishes standards of judgment.<sup>26</sup> The

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<sup>25</sup> *Translator’s Note:* The title of this legal document employs the word “regulations” (*gui ding*), but Cao refers to the document as an “interpretation” (*jie shi*). This implies that there is often no substantive difference between judicial regulations, interpretations, explanations, notices, and the like. See Finder, *supra* note 5, 166 et. seq. (explaining the different types of documents issued by the SPC and noting the lack of consistent terminology). Proclamations of the SPC have a binding effect on lower courts but don’t have the status of laws, which are created by the National People’s Congress (“NPC”) or its Standing Committee. XIAN FA art. 62, § 3, art. 67, § 2 (1982) (P.R.C.). The Constitution assigns the function of interpreting the laws exclusively to the NPC Standing Committee. *Id.* art. 67, § 4. However, the NPC Standing Committee delegated the task of interpreting “specific application of the laws” to the SPC. Resolution of the Standing Committee of the National People’s Congress Providing an Improved Interpretation of the Law (promulgated by the Standing Comm. Nat’l People’s Cong., June 10, 1981, effective June 10, 1981), translated in LAWINFOCHINA (P.R.C.). In practice, these interpretations often provide substantive law and have influence outside the court. Finder, *supra* note 5, at 165, 166. The SPC has been active in generating IP interpretations to supplement NPC laws and State Council regulations, as Cao Jianming discussed in his article, *supra* Part I, ¶ 4. Such activism may help shape the actual contours of the law, increasing the prominence of the judiciary’s role in defining legal frameworks. See Finder, *supra* note 5, at 171 (noting “court-made law” is expanding and Party officials are usually not involved in its drafting).

<sup>26</sup> *Translator’s Note:* One standard of judgment is quite straight forward; it simply directs a court to “affirm the infringement” of rights when the law is broken. This interpretation clarifies new plant variety administrative regulations (*tiao li*). Zhi wu xin pin zhong bao hu tiao li [New Plant Variety Protection Regulations] (promulgated by the State Council Mar. 20, 1997, effective Oct. 1, 1997) CHINALAWINFO (P.R.C.). Those regulations stipulate that a plant variety rights holder has exclusive, independent rights in the plant variety and commercial exploitation by others is not allowed without authorization of the rights holder. *Id.* art. 6. This interpretation reiterates this language, adding only that courts “shall affirm the infringement” of rights. Interpretation of the Supreme People’s Court on Some Issues Concerning the Application of Law in the Trial of Cases Involving the Disputes over Infringement upon the Rights of New Plant Varieties (promulgated by the Sup. People’s Ct., Jan. 12, 2007, effective Feb. 1, 2007), art. 2, translated in LAWINFOCHINA (P.R.C.). This elementary clarification indicates that there had been a lack of rigor in finding infringement where there had been commercial exploitation by third parties; it also indicates that the SPC is working to guide the lower courts to more rigorous enforcement of the law.

judgment standards for plant variety rights infringement are different in some respects as compared with patent infringement judgment standards because the conditions and forms for granting rights are not the same; there are some issues that still await further exploration and summarization.

One issue concerns the appraisal institution and appraisal method. Currently, the problem of determining the appraisal institution and method in adjudicating new plant variety infringement cases is rather pronounced.<sup>27</sup> As for appraisal institutions, when the relevant national department has not clearly issued a directory of judicial appraisal institutions for new plant varieties, a professional institute or a specialist with appropriate technical qualifications for examining plant varieties may provide appraisal. Appraisal may also be carried out by a relevant agriculture-and-forestry breeding and examining expert provided by an appraisal institute with IP adjudication appraisal ability. However, in any case, the appraiser must carry out the appraisal in accordance with the relevant judicial appraisal procedures and regulations. According to the basic principle of "parties first negotiate, and if negotiation fails the court will appoint," as established by the civil trial evidence regulations, the court may appoint an appraisal institution. The court should appoint a specialized examination institution having the appropriate technical qualifications and levels of proficiency from among those recommended by the relevant agricultural or forestry administrative department.

As for the appraisal method, currently the appraisal methods for new plant variety differentiation cases in the main consist of either field observation and comparison or laboratory testing. The latter includes gene fingerprint mapping (DNA), the isozyme marker technique, and seed storage protein fingerprint mapping. Field observation and comparison is generally considered the most fundamental. But, because laboratory testing has the advantage of being quicker, more convenient, and cheaper, DNA testing is

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<sup>27</sup> *Translator's Note:* There is evidence that this Interpretation has helped resolve this problem. The Sun Valley County Seed Co. case, decided December 27, 2007, relied heavily on the interpretation in resolving the case. A research institute granted exclusive commercial rights for one year in its patented corn hybrid to a group of four companies. These companies sued a third party for selling their seed under a different name. Defendant argued that there was a lack of documentation as to the methodology and qualifications of the appraisal institute. Noting that there were not yet promulgated specific regulations regarding the qualifications of appraisers, the court relied on this interpretation to affirm the court's choice of appraiser and its methods. Additionally, it relied on the interpretation to affirm the four plaintiffs had standing to bring suit, to affirm defendant's selling of the hybrid seeds was an infringement, and to calculate damages. Henan Agricultural Science Institute Grain Division Science and Technology LLC et. al. v. Sun Valley County Seed Company, China IPR Judgments & Decisions (Shandong High People's Court, IP Tribunal, Dec. 27, 2007) (relying on articles 1, 2, 3, 4, and 6 of the New Plant Variety Interpretation in justifying its decision), [http://ipr.chinacourt.org/public/detail\\_sfws.php?id=13874](http://ipr.chinacourt.org/public/detail_sfws.php?id=13874).

usually used in practice. The degree of accuracy of the appraisal conclusions reached by way of different appraisal methods may be somewhat different, but generally the determinations are consistent. If there is a contradiction in the determinations, courts should abide by the standard regulations of evidence determination: after cross-examination determine their evidentiary weight in accordance with the law.

A second issue involves temporary measures. The reproduction materials of new plant varieties are easy to steal; the production process is also very complicated and the profit margins are relatively large. Infringing activity has very strong seasonal and regional characteristics. When there are no obligations under international treaties or domestic regulations, even though courts may not order pre-trial temporary injunctions or pre-trial evidence preservation in new plant variety cases, they should in the course of the suit actively take relevant measures to make practical guarantees that the rights holder timely receives needed judicial relief. If during the lawsuit the rights holder petitions for a cease-and-desist order or for evidence preservation, a ruling may be given.

A third issue involves the disposition of infringing product. Courts should avoid wasting resources and should safeguard stability in the countryside while also preventing the proliferation of the infringing product. They should not simply mechanically apply the standard method of destruction of the infringing product; unless another product may be planted after the eradication, courts should work to avoid the sacrifice of a growing season due to destruction of a young crop or a field going fallow. Peasant substitute propagation does constitute infringement because it exceeds the scope of cultivation for personal use, but simply ordering a peasant to accept compensatory liability could lead to a series of negative problems; further, the true source of infringement and the biggest beneficiary is the one entrusting the planting. In accordance with the principle of fault-based responsibility for infringement damages, when a farmer in actuality did not know he was infringing his liability may be excused.

New plant variety cases are of a very specialized quality and relevant adjudicatory work has been underway for only a short time; there will be many new problems encountered in the course of practice. Courts across the country—especially those with a relative concentration of cases—must attach great importance to this new adjudicatory realm. They must strengthen investigation and research, unceasingly summarize their experiences, and timely put forth their relevant suggestions concerning this work.

C. *Judicial Determination of Well-Known Trademarks*

Well-known trademarks have a marked influence on our economy, our society, and our daily lives; the recognition of well-known trademarks is a topic of great concern for relevant industries and all circles of society. In recent years, courts across the land have recognized a good number of well-known trademarks and protected the well-known trademark owners' legal rights, resulting in a favorable societal effect. Of course, a few new situations—new problems—have emerged over the course of adjudicating well-known trademark recognition. These problems require further research and standardization; judicial standards need to be refined and unified; the law needs to be correctly applied.

Courts must grasp the proper guidance for determining well-known trademarks. The determination of “well-known trademark” status for trademarks reaching a degree of fame is only a prerequisite fact for bestowing special legal protection; it is a factual determination. Deviating from a determination of the facts of the case in accordance with the established law to pursue honorary titles, the effectiveness of advertising, and other commercial valuations would cause a change in the well-known trademark determination system. It would give rise to a series of unhealthy effects and negative influences. Courts at every level must accurately understand the original meaning of the established law when determining well-known trademarks; they must grasp the correct direction and ensure the correctness and public acceptance of judicial determinations. They must guide and protect the healthy development of the well-known trademark determination system and earnestly safeguard the positive image of the people's court in making legal determinations of well-known trademarks.

Courts must strengthen their focus on strict application of the law in judicial determination of well-known trademarks. First, courts must grasp the scope of judicial determination of well-known trademarks. A determination of a well-known trademark must have support in the text of the law—it must be based on trademark law and the relevant judicial interpretations. A court may only determine a well-known trademark in adjudication of cases involving protection of registered well-known trademarks across categories, requests to enjoin infringement of unregistered well-known trademarks, and trademark infringement and unfair competition civil disputes relating to domain name and well-known trademark conflicts. Courts must carry out a strict investigation in accordance with the law of whether the parties have a trademark infringement dispute and make sure that case adjudication requires the

determination of a well-known trademark. Courts may not make determinations of well-known trademarks when the case is outside the scope of a determination or if the plaintiff fails to make a prima facie case, even if a determination is within the scope of the infringement complaint. Second, courts must maintain the principles of passive determination and case-by-case determination. Determining a well-known trademark must occur after the plaintiff has already alleged a clear interpretation of the facts as a basis for suing the defendant for infringement; the court may not rely on its own authority to independently make a determination. A determination made would only be binding as to the disposition of the particular case. Third, courts must reasonably determine the scope of protection for well-known trademarks. As for the scope of protection for well-known trademarks across categories, courts should make reasonable determinations based on the specific situation of the case; they should consider factors such as the trademark's degree of fame and distinctiveness and the misleading consequences of the defendant's behavior. Protection cannot turn into unprincipled protection covering all categories. Unregistered trademarks seeking determination as well-known should first conform to the regulations of the trademark law governing the requirements of trademark creation.

Courts must strengthen their focus on the facts governing judicial determination of well-known trademarks. First, courts should be strict in determining whether a true dispute exists. An adjudicating court should conscientiously verify the defendant's status and relevant behavior; it should prevent sedulous efforts to create disputes for the purpose of gaining well-known trademark status. Second, courts should correctly apply determination standards for well-known trademarks. Article 14 of the trademark law stipulates the relevant factors to be considered when determining a well-known trademark. When a court determines a well-known trademark, it must proceed according to the facts of the case and carry out a comprehensive examination as to whether the request to designate a trademark well-known is in accord with legal requirements; it should avoid isolated, one-sided considerations of the relevant factors. A recognized well-known trademark at the very least should have a relatively high degree of market recognition in most regions in the domestic market; it should be familiar to the relevant public. Courts may appropriately lighten a party's burden of producing evidence when its trademark's degree of recognition has truly reached universal recognition. Third, courts should carry out a case-by-case examination in accordance with the law for trademarks that have already been designated as well-known. If parties dispute over a trademark that has been determined well-known by an



administrative supervising body or by a court, they should produce relevant evidence; further, the court should evaluate and determine in accordance with the law whether the trademark conforms to well-known trademark qualifications.

Courts must strengthen supervision and guidance for determining well-known trademarks. Courts must strictly carry out the system of filing and recordation for well-known trademark recognition. The court granting recognition should timely and in accordance with relevant regulations provide a record for review by the Supreme Court after the judgment goes into effect. Every higher-level court must take up the responsibility of providing overall guidance for well-known mark recognition and supervision of specific cases. They must conscientiously research, compile, and timely report on problems and situations that arise. They must rectify improper ways of doing things in strict accordance with the law and avoid deviations in work. As for cases where disputes were intentionally created to obtain well-known trademark recognition, those cases that can be discovered should be treated according to Article 102 of the Civil Procedure Law,<sup>28</sup> which governs harmful litigation behavior, and previous rulings and recognition of well-known trademark status should be withdrawn in accordance with the law.

#### *D. Adjudicating MTV and Internet Copyright Disputes*

In recent years there have been rather numerous lawsuits involving music television copyright, and relevant authorities had split on music television-related legal questions. In the wake of adjudicatory progress and the deepening of knowledge, every level of court has gradually reached a common understanding of some basic issues. Regarding the legal attributes of music television, delineation should be carried out according to copyright law's works demarcation standards. Works possessing originality belong to works created in a manner similar to movies, while those without originality belong to music and video recordings. Therefore, as to music television that constitutes a work, unless there is a special agreement, the lyrics' author may still assert his or her rights directly against a user broadcasting the work commercially. Determination of damages should be based on a comprehensive consideration of each and every consideration factor, and the fee standards set by the copyright collective management organization must

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<sup>28</sup> *Translator's Note:* A litigation participant who falsely accuses another may be fined or detained. Civil Procedure Law (promulgated by the Nat'l People's Cong. Standing Comm. April 9, 1991, effective April 9, 1991) (rev. Oct. 28, 2007), art. 102, § 4, *translated in* LAWINFOCHINA (P.R.C.).

be considered in setting a reasonable remedy. The general spirit is that the determination of damages must be appropriate to the situation; there should not be too wide a gap between different places in the same time period.

Copyright cases involving internet transmissions have increased rather quickly in recent days; they have a large influence on society. Courts should appropriately adjudicate such cases in strict accordance with copyright law, internet transmission rights protection regulations and the newly revised judicial interpretation for internet copyright cases, as well as the regulations of the two international treaties governing the internet recently ratified by China. For all cases clearly regulated by internet transmission rights protection regulations, those regulations should be applied. For those cases not clearly covered by the regulations, the stipulations of the current judicial interpretation should be applied. Events occurring after the implementation of the transmission rights protection regulations should be dealt with according to copyright law and the rules of the transmission rights protection regulations. Legally sanctioned permission rights for republication are limited to republication among newspapers and periodicals and shall not reach network publication anymore.