Spring 2006

Judicial Copyright Enforcement in China: Shaping World Opinion on TRIPS Compliance

Robert Slate

Follow this and additional works at: https://scholarship.law.unc.edu/ncilj

Recommended Citation
Available at: https://scholarship.law.unc.edu/ncilj/vol31/iss3/2

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Journal of International Law by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
Judicial Copyright Enforcement in China: Shaping World Opinion on TRIPS Compliance

Cover Page Footnote
International Law; Commercial Law; Law

This article is available in North Carolina Journal of International Law: https://scholarship.law.unc.edu/ncilj/vol31/iss3/2
Judicial Copyright Enforcement in China: Shaping World Opinion on TRIPS Compliance

*Robert Slatet*

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Introduction</td>
<td>666</td>
</tr>
<tr>
<td>II. TRIPS Implementation in China as Context for Website Analysis</td>
<td>669</td>
</tr>
<tr>
<td>A. Website Overview</td>
<td>669</td>
</tr>
<tr>
<td>B. Domestic Law and TRIPS</td>
<td>671</td>
</tr>
<tr>
<td>C. Articles 41 and 61: Criminalizing and Deterring Infringement</td>
<td>672</td>
</tr>
<tr>
<td>III. China’s IPR Court System</td>
<td>676</td>
</tr>
<tr>
<td>A. The Role of the Supreme People’s Court Within the Polity</td>
<td>676</td>
</tr>
<tr>
<td>B. Four-Tiered Court System</td>
<td>677</td>
</tr>
<tr>
<td>C. IPR Tribunals</td>
<td>679</td>
</tr>
<tr>
<td>D. Judicial Interpretation</td>
<td>682</td>
</tr>
<tr>
<td>E. Judicial Enforcement</td>
<td>684</td>
</tr>
<tr>
<td>IV. Analysis of the Website Judicial Protection of IPR in China</td>
<td>687</td>
</tr>
<tr>
<td>A. Introduction</td>
<td>687</td>
</tr>
<tr>
<td>B. Methodology</td>
<td>690</td>
</tr>
<tr>
<td>C. Results</td>
<td>691</td>
</tr>
<tr>
<td>D. Discussion</td>
<td>694</td>
</tr>
<tr>
<td>V. Conclusion</td>
<td>700</td>
</tr>
</tbody>
</table>

† Note on orthography and translation: The author employed the Pinyin system throughout the text when referring to Chinese proper names and words. The author translated excerpts from Chinese books and articles, unless otherwise indicated.
I. Introduction

Chinese magistrates of the past and judges of the present have recognized the importance of using technology to influence public opinion. Magistrates during China’s Ming Dynasty (1368-1644) embraced the use of xylographic\(^2\) printing technology as a way to publish texts conveying information to influence the people and to impart the correct image of magisterial rule.\(^3\) Similarly, China’s modern-day intellectual property rights (IPR) judges utilize Internet technology to set up official and “personal” websites to ensure that official views, new laws, and regulations reach public discourse. The use of Internet technology also helps project a positive image of the judiciary to the public. Since China joined the World Trade Organization (WTO) in December 2001, the Chinese government has attempted to harness the Internet\(^4\) to improve IPR court legitimacy and to shape the international opinion of China’s compliance with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)\(^5\)

---

1. This is a traditional Chinese proverb (Li fa bu ke bu yan, xing fa bu ke bu shu). REV. W. SCARBOROUGH, A COLLECTION OF CHINESE PROVERBS 331 (1926).

2. Xylography, or block printing, is “[a] mode of printing by laying paper, vellum, or the like, on the inked surface of a carved block, originally of wood . . . and rubbing with a brush or other instrument . . . . The art has been practiced in China and Japan for many centuries and was common in Europe during the 15th century, both before and after the invention of typography.” WEBSTER’S NEW INTERNATIONAL DICTIONARY 290 (2d ed. 1953).


5. Agreement on Trade Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marakesh Agreement Establishing the World Trade Organization, Annex 1C,
enforcement provisions and China Protocol implementation requirements.\(^6\)

This article analyzes—from a descriptive and rhetorical perspective—the personal website of Jiang Zhipei (蒋志培), a sitting Chief Justice of the IPR Tribunal of the Supreme People’s Court (SPC). The goal is to explore how Jiang uses the website—the first of its kind in China\(^7\) and unprecedented by both Chinese and U.S. standards—to disseminate information to the public, and illustrate his attempts to positively influence public opinion on China’s compliance with the enforcement provisions of TRIPS. To this end, this article evaluates the copyright enforcement–related material presented on the Chinese and English versions of the website.

Jiang uses the website to convey information to the public that portrays judicial IPR protection in a positive light and mitigate the impact of negative publicity regarding China’s non-compliance with TRIPS provisions. Just as the government seeks to use the Internet to change the public’s negative impression of the Communist Party of China’s (CPC) as being secretive and inattentive to citizens’ concerns,\(^8\) it also seeks to enhance the


\(^6\) The China Protocol is China’s accession terms to the WTO, which required greater obligations than expected from other WTO member countries in such areas as transparency and market access. Karen Halverson, China's WTO Accession: Economic, Legal, and Political Implications, 27 B.C. INT’L & COMP. L. REV. 319, 326 (2004). Some of the requirements include: transparency, impartiality, and judicial review. See id. at 326-28 (including a full discussion of the China Protocol for WTO ascension); see also U.S. TRADE REPRESENTATIVE, 2005 TRADE POL’Y AGENDA & 2004 ANN. REP. OF THE PRESIDENT OF THE U.S. ON THE TRADE AGREEMENTS PROGRAM at 208, http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_Trade_Policy_Agenda/asset_upload_file454_7319.pdf (asserting that transparency is the foundation of WTO compliance; “[h]owever, many other ministries and agencies have made less than impressive efforts to improve their transparency. As a result, China’s regulatory regimes continue to suffer from systemic opacity, frustrating efforts of foreign—and domestic—businesses to achieve the potential benefits of China’s WTO accession.”).


\(^8\) See generally Randy Kluver & Chen Yang, Communist.gov: The Sixteenth Party Congress and Cyber-transparency (May 2003) (unpublished presentation, Global
public view of IPR courts’ transparency, legitimacy, and effectiveness. If China is attempting to use the website to influence public opinion on TRIPS compliance, one would expect to see content suggesting that China is either in compliance with TRIPS, or some explanation as to why China cannot meet certain TRIPS provisions.

A content analysis of the website suggests Judge Jiang seeks to persuade the public that China’s judicial enforcement of copyright is effective, court decision-making on IPR matters is more transparent than before, and China’s compliance with TRIPS is “increasingly complete.”9 A descriptive and rhetorical analysis of the website suggests high-ranking, politically influential IPR judges support the creation of laws that comply with TRIPS, but lean toward applying them in a “forgiving” manner that meets China’s economic realities—that is, TRIPS “with Chinese characteristics.”10 Understanding this phenomenon is important because these preeminent judges have a political, professional, and moral influence over IPR courts, and the judiciary is becoming increasingly influential in IPR law-making and enforcement activities.11

Section II of this paper provides context for analyzing Judge Jiang’s website by examining China’s harmonization of domestic law with TRIPS and TRIPS enforcement provisions—specifically,
Articles 41 and 61. Section III provides an overview of the structure, internal organization, procedures, and operation of the judicial system to illustrate the growing importance of courts in protecting IPR in China, as well as discusses judicial enforcement in practice. Section IV analyzes the website, and Section V concludes the paper.

II. TRIPS Implementation in China as Context for Website Analysis

A. Website Overview

By the end of the 1990s, the government of the People’s Republic of China (PRC) realized that e-government (dianzi zhengfu) could be employed to improve government efficiency and promote economic growth. In 1999, the PRC launched the “Government Online” project (zhengfu shangwang), encouraging government offices to establish their own websites. According to the World Bank, e-government offers greater government transparency, provides better government services to the populace, improves government management efficiency, and empowers citizens by giving them access to information. This, in turn, can reduce official corruption, enhance convenience, increase revenue growth, and decrease costs—all of which are of major importance to PRC leaders. In July 2004, the China Internet Network

---

12 TRIPS, supra note 5, arts. 41 & 61.

13 See RANDALL PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW 283 (2002) (asserting that because of the pace of IPR reform and the variation of courts throughout China, many studies on the judiciary only touch briefly on the IPR court system and are largely out-of-date).


15 Id.


17 Definition of E-Government, supra note 16.
Information Center (CNNIC) promulgated its semi-annual report, which found that the total number of government domain names registered under "cn" had reached 13,963; the total number of "www" websites with "gov.cn" domain names totaled 12,332.18

Since the initiation of the "Government Online" project, many low- and high-level PRC courts have established their own websites. The vast majority are listed as "official" websites and provide laws, regulations, legal news, and analysis. Judge Jiang's website, *Judicial Protection of IPR in China*, is unique because it is allegedly "personal" and the first of its kind in China.20 Jiang not only posts Chinese intellectual property laws and regulations on the website, but also personally responds to public questions posted on the website in English and Chinese.

Jiang allegedly established the website to improve public knowledge of IPR protection in China. The website seeks to accomplish this goal by providing legal professionals with access to China's latest intellectual property laws and regulations, judicial interpretations, trial news, case analysis, research articles, foreign intellectual law theories, and Court and IPR judges' perspectives on IPR law in China.21 According to an introduction to the English version of the website, which first appeared on the website in mid-to-late 2004, the website "could be a practical way [for readers] to understand the points of view of [SPC and IPR judges]."22

While the government has enacted new laws and launched anti-corruption and piracy campaigns that continue to have marginal success in combating the problems in judicial enforcement, Jiang advocates more long-term solutions, such as better educating the public on IPR matters by disseminating information over the Internet. Jiang views IPR as the engine of

---

19 The addresses are: http://www.chinaiprlaw.com/english/default.htm (English version of Jiang's page) and http://www.chinaiprlaw.cn (Chinese version).
20 *Jiang: Questions and Answers, supra* note 7, at 1.
22 *Id.*
swift and violent development of the "knowledge economy" and believes everyone should accept that IPR laws and regulations protect people's legitimate rights and interests.\footnote{Jiang: Questions and Answers, supra note 7, at 1.} According to Jiang's new IPR handbook—which contains documents Jiang selected from his personal website\footnote{Id.}—the following are all true of IPR enforcement in China: China is still perfecting IPR laws and regulations, IPR litigation is problematic, society's legal consciousness is extremely weak, people do not know how to use the law as a defensive weapon, and many litigants fall into traps during disputes from which they cannot extricate themselves.\footnote{Id.}

The editor of Jiang's book—Jiang's son, Jiang Ling—argues China should continue to strengthen universal legal education by using various methods to disseminate to the public important laws on IPR protection, legal thinking, and methods.\footnote{Id.} Jiang Zhipei's hope is that his book and website will help people experiencing difficulties in the IPR field in China.\footnote{Id.}

\textbf{B. Domestic Law and TRIPS}

Under the WTO framework, the enforcement of TRIPS relies on its harmonization with domestic laws and external WTO oversight.\footnote{Qingjiang Kong, Enforcement of WTO Agreements in China: Illusion or Reality?, in China and the World Trading System 133 (Deborah Z. Cass, Brett G. Williams, & George Barker eds., Cambridge Univ. Press 2003).} As a WTO member, China is required to ensure that sub-national organizations comply with TRIPS.\footnote{Id.} China is also a party to the Vienna Convention on the Law of Treaties, Article 26 of which precludes a WTO member from invoking domestic law to justify non-compliance with international obligations.\footnote{Id. at 134.}

Under current Chinese civil law, domestic law still plays a primary role in deciding cases that involve matters covered by domestic law and TRIPS.\footnote{See id. at 139-40.} The provisions of the General
Principles of Civil Law (1984) and the Beijing Municipal HPC Answers to Several Questions Relating to Application of Law to Foreign-Related Civil IP Cases ("Answers") suggest TRIPS only applies when it is inconsistent with domestic law. The PRC Constitution does not address the legal status of international treaties in domestic law. However, Article 142 of the General Principles of Civil Law provides that 'if any international treaty concluded or acceded to by the People’s Republic of China contains provisions differing from those in the civil laws of the People’s Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones in which the People’s Republic of China has announced reservations.'

In 2004, the Beijing Municipal HPC released Several Questions Relating to Application of Law to Foreign-Related Civil IP Cases, which refers to Article 142 of the Civil Law in the context of trying foreign-related civil IPR cases:

[I]n trying foreign-related civil IP cases, the international treaties, such as the Paris Convention and the Berne Convention, have the effect of direct application . . . when it is necessary to apply a law to the trial of a civil IP case, if the Chinese law and an international treaty contain the same provisions, only the provisions of the Chinese law needs to apply. Where the Chinese law and the Paris Convention and the Berne Convention have set forth different provisions, the provisions of the Paris Convention and the Berne Convention can be directly referred to as the framework of reference for making judgments, unless the provisions are ones on which the People’s Republic of China has announced reservations.

According to the Beijing HPC’s Answers, China is only required to implement TRIPS by making or revising national laws, and does not have to directly apply TRIPS provisions in making judgments.

C. Articles 41 and 61: Criminalizing and Deterring

---


33 Id.

34 Id.
Infringement

When China joined the WTO in December 2001, it agreed to accept all aspects of TRIPS\textsuperscript{35} and adhere to the China Protocol implementation requirements.\textsuperscript{36} Today, China's legal framework for implementing rules and regulations largely complies with TRIPS on its face.\textsuperscript{37} However, China's law is not in compliance with the requirements of Articles 41 and 61 of TRIPS.\textsuperscript{38} Article 41 stipulates that TRIPS members must provide enforcement procedures in domestic laws that allow "effective action against any act of infringement of intellectual property."\textsuperscript{39} According to Article 61, TRIPS members "shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale."\textsuperscript{40} However, China's current laws do not offer enforcement procedures that, in practice, deter further infringement, criminalize all wilful copyright piracy on a commercial scale (such as end user software piracy and online infringement by non-profit organizations), or give specific criminal deterrent remedies.\textsuperscript{41}

While the SPC promulgated a long-anticipated criminal law amendment in December 2004, its potential effectiveness rests

\textsuperscript{35} See TRIPS, supra note 5.
\textsuperscript{38} Letter from Eric H. Smith, President International Intellectual Property Alliance (IIPA), to Ms. Sybia Harrison, Special Assistant to the Section 301 Committee, Office of the U.S. Trade Representative, China: Request for Public Comment on Out-of-Cycle Review of the People's Republic of China 13, Feb. 9, 2005, http://www.iipa.com/rbc/2005/CN\textsuperscript{A}\%202005\_Feb9\_PRC\_OCR\_Submission.pdf [hereinafter China: Request for Public Comment]. The IIPA is "a private-sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials." Id. IIPA's six-member associations "represent over 1,300 U.S. companies producing and distributing materials protected by copyright laws throughout the world." Id.
\textsuperscript{39} TRIPS, supra note 5, art. 41 §1.
\textsuperscript{40} TRIPS, supra note 5, art. 61.
\textsuperscript{41} See China: Request for Public Comment, supra note 38, at 13.
with Chinese authorities’ political will to fully apply. The copyright piracy rate of physical copyright products in China ranges from 85 to 95 percent, depending on the copyright industry—business software, motion picture, entertainment software, book publishing, or recording—and product format (e.g., 95 percent DVD piracy rate in China), which has cost U.S. copyright industries an estimated $2.5 billion in lost revenue in 2004 and approximately $2.4 billion in 2005. In addition, the U.S. copyright community considers Chinese Internet piracy a significant concern and regulations governing online copyright enforcement in China remain inadequate and unclear.

In December 2004, the SPC and Supreme People’s Procuratorate promulgated the judicial interpretation Several Issues of Concrete Application of Laws in Handling Criminal Cases of Infringing Intellectual Property, which significantly lowered the threshold for criminal piracy in some areas and made limited overall improvements to the criminal law. Under Article 5 of the interpretation, copyright infringers who operate illegal businesses for profit and earn more than 30,000 Renminbi (RMB) from infringement activity could face three years imprisonment, fines, or a combination of both. However, this threshold must be enforced to deter criminal activity.

According to the IIPA, although China often publicizes the seizure and destruction of counterfeit products, the same cannot be said for prosecution or deterrent fines for piracy. The recording industry, in its “business confidential submission” to the U.S.
Trade Representative, stated that it is not aware of any criminal prosecutions for piracy involving recording industry products.\textsuperscript{49} According to the motion picture industry, China decided nineteen criminal cases of piracy in Beijing in 2002, with reported jail terms of six months to six years.\textsuperscript{50} Of the thirty cases lodged in Beijing and Shanghai in 2003, only three were reportedly filed under the criminal piracy provisions of Article 218 of the Criminal Law.\textsuperscript{51} The other twenty-seven cases were brought under the censorship and pornography provisions under Article 225 of the Criminal Law.\textsuperscript{52}

While Chinese government representatives have informed the IIPA that there have been other criminal convictions under the criminal piracy provisions, IIPA has been unable to confirm these convictions.\textsuperscript{53} The recording industry emphasizes that the Public Security Bureau is not convicting operators of underground optical disk (OD) factories, as action can only be taken under Chinese criminal law.\textsuperscript{54}

Civil litigation in China has been more effective at deterrence than the criminal and administrative systems.\textsuperscript{55} The recording industry filed over 235 legal suits against factories for counterfeiting products from 2002 to 2005, and recovered an estimated $1.9 million in damages.\textsuperscript{56} However, civil litigation often leads to small settlements that do not cover the costs associated with litigation and damages.\textsuperscript{57} In fact, most monetary awards only average approximately 30 percent of litigation costs and fall well short of covering damages—the largest settlements against factories that produced millions of pirated music compact disks ranged from $72,494 to $96,657.\textsuperscript{58}

\textsuperscript{49} Id. at 17.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} See China: Request for Public Comment, supra note 38, at 17.
\textsuperscript{53} See id. at 17-18.
\textsuperscript{54} Id. at 18.
\textsuperscript{55} Id. at 19.
\textsuperscript{56} Id.
\textsuperscript{57} See China: Request for Public Comment, supra note 38, at 19.
\textsuperscript{58} Id.
III. China’s IPR Court System

A. The Role of the Supreme People’s Court Within the Polity

The courts play an important role in IPR protection, as evidenced by the increasing number of people who file IPR infringement cases in court. From January 1996 to June 1998, for example, the people’s courts accepted 9,531 IPR civil cases. From 1999 to 2000, the courts heard 36,504 IPR cases of first instance and decided 36,088 cases, 4,486 of which dealt with copyright claims. The average increase of IPR cases ranges from 10% to 20% annually. Under China’s Constitution, however, the judiciary remains institutionally weak and dependent on the legislative and executive branches of the government; therefore, the courts cannot conduct judicial review or strike down executive directives or laws enacted by the legislature as unconstitutional.

Unlike the court system of the United States, the SPC is not independent of the legislative or executive branches of the government. The National People’s Congress (NPC) is China’s legislative body and is its highest body of state power, while the Standing Committee (NPCSC) is its permanent organ. The NPC and the NPCSC control the state’s legislative power. The NPC specifically: (1) interprets the Constitution and supervises its implementation; (2) interprets the law, repeals administrative and local regulations that contravene the Constitution and law; and (3) supervises the work of administrative and judicial organs and the implementation of the national economic plan and budget. The

61 Id. at 126.
63 Id. art. 58.
NPC also elects, and holds the power to remove, the President of the SPC.65

B. Four-Tiered Court System

The PRC’s judicial system includes courts of general jurisdiction and special courts. At all levels, the PRC courts are, for the most part, similarly structured. The courts are now divided into administrative and substantive divisions, such as criminal, administrative, civil, judicial supervision, and intellectual property divisions.66 Most intermediate courts contain enforcement, petition, and appeals divisions.67

The overall court system consists of four tiers: the SPC (zuigao renmin fayuan), High People’s Court (gaoji renmin fayuan) (HPC), Intermediate People’s Court (zhongji renmin fayuan) (IPC), and Primary People’s Court (jiceng renmin fayuan) (PPC).68 The SPC issues judicial interpretations and guidelines to lower courts and, depending on the circumstances, tries cases directly and on appeal.69 The courts do not follow a doctrine of stare decisis, and generally are not bound by legal interpretations of higher courts. However, some higher courts, such as the Beijing Higher People’s Court, have persuasive authority over lower courts.70

The SPC, China’s highest judicial body, is responsible for supervising the judicial administration and adjudication of lower people’s courts, interpreting the law, trying cases of first and second instances, reviewing death penalty judgments and decisions, hearing appeals from lower people’s courts, reviewing protests filed by the Supreme People’s Procuratorate (SPP),

66 PEERENBOOM, supra note 13, at 283.
70 Id.
participating in certain legislative matters, and providing judicial interpretations on application of the law.\textsuperscript{71}

The HPCs handle cases of first impression in their specific jurisdictions, review lower level appeals, and hear pleadings by people's procuratorates,\textsuperscript{72} as well as hand down legislative clarifications and guidelines that are binding on the lower courts.\textsuperscript{73} A total of thirty-one HPCs, having supervisory jurisdiction over all lower court cases, are located in China's provinces, autonomous regions, and municipalities.\textsuperscript{74} HPC IPR tribunals maintain jurisdiction over cases involving IPR disputes.\textsuperscript{75}

In 2000, the SPC strengthened the enforcement power of HPCs over lower courts by issuing \textit{Regulations of the Supreme People's Court Concerning Several Issues Related to the Unified Administration of Enforcement Work by the Higher People's Courts} (adopted on January 14, 2000).\textsuperscript{76} The regulations allow HPCs to criticize lower courts that do not follow their instructions and to suggest disciplinary sanctions in extreme cases.\textsuperscript{77}

The IPCs, like HPCs, try cases in their specific jurisdictions. IPCs also hear cases on appeal from lower courts; occasionally, the SPC instructs IPCs on what cases they should try.\textsuperscript{78} By June 2001, 346 IPCs were operating in the prefectures and municipalities of their specific provinces, supervising juridical responsibilities of the PPCs.\textsuperscript{79}

The PPCs have geographic jurisdiction over counties, county-

\textsuperscript{71} Judicial Protection of IPR in China, \textit{supra} note 68.

\textsuperscript{72} Clark, \textit{supra} note 69, at 27.

\textsuperscript{73} Judicial Protection of IPR in China, \textit{supra} note 68.

\textsuperscript{74} \textit{Id.}

\textsuperscript{75} The Sichuan IPR Tribunal hears cases involving copyright, patent, trademark disputes, and other IPR-related interests. A Brief Introduction to Intellectual Property Rights Tribunal of Sichuan Higher People's Court, http://www.chinaiprlaw.com/english/courts/sichuan.htm.


\textsuperscript{77} \textit{Id.}

\textsuperscript{78} Clark, \textit{supra} note 69, at 27.

\textsuperscript{79} Judicial Protection of IPR in China, \textit{supra} note 68.
level cities, autonomous counties, banners, and districts. In June 2001, a total of 3,135 PPCs handled criminal, civil, and administrative cases and supervised the people’s mediation committees. In practice, the lower courts have occasionally assumed responsibilities for which they lack authority, such as issuing judicial interpretations.

C. IPR Tribunals

IPR tribunals—also known as third civil tribunals—are responsible for hearing IPR-related civil cases, whereas criminal and administrative tribunals are responsible for trying IPR-related criminal and administrative disputes, respectively. Previously, in those courts that did not have separate intellectual property divisions, the civil divisions were to handle copyright infringement cases, while the economic divisions were to hear patent and trademark infringement cases. However, the SPC recently folded the economic division into the civil division, which the SPC divided into four sections. Section Three is designated for intellectual property of the civil division, which specifically handles copyright, patent, and trademark infringement cases. Court jurisdiction to hear an IPR case, with the exception of the SPC, is based on the geographic location of the defendant or the place the infringement occurred. Except in extraordinary circumstances, the Intermediate People’s Court or a higher level of court examine IPR cases.

In November 1996, the SPC established the SPC IPR Tribunal to hear important IP cases and supervise the lower

---

80 Id.
81 Id.
83 Zhou Lin, Trial and Judgment of IPR Cases in China, 3 CHINA PATENTS & TRADEMARKS 1, 6 (2002).
84 Finder, supra note 67, at 260.
85 PEERENBOOM, supra note 13, at 284.
86 See Clark, supra note 69, at 27.
87 Luo, supra note 60, at 127.
88 The SPC IPR Tribunal consists of the following eight judges, numbered in order of rank: (1) Jiang Zhipei, trial adjudicative committee commissioner and presiding judge;
court's handling of IPR cases. Beijing first set up IPR tribunals in its IPCs and HPCs in 1993. Afterwards, the SPC encouraged lower courts that hear numerous IPR cases to consider establishing specialized intellectual property divisions. The following IPR courts have since been created: Beijing (HPCs and IPCs), Sichuan (HPC), Tianjin (IPCs), Shenzhen (IPCs), Shanghai (HPCs, IPCs, and some PPCs), Guangzhou (IPCs), Hainan (HPCs), Jiangsu (HPCs), Fujian (HPCs), Shantou, Zuhai, Xiamen and the Shinan District in Qingdao. Since 1997, Shanghai has established several basic courts; the Shanghai Pudong New District Court became the first "grass-roots" court to be launched with an IPR tribunal. Fujian, Tianjin, and Sichuan founded

(2) Luo Dongchuan, vice-presiding judge; (3) Dong Tianping, chief judge; (4) Wang Yongchan, chief judge; (5) Yu Xiaobai, judge who holds an LLM; (6) Duan Lihong, judge who holds an LLM; (7) He Zhonglin, judge who holds an LLM; and (8) Xia Lijun, judge who holds an LLM. China’s Intellectual Property Law website, http://www.chinaiprlaw.com.


90 Zhou, supra note 83, at 6. The degree of IPC expertise on IPR issues varies widely depending on location. IPCs in major cities that are heavily involved in international trade, such as Beijing and Shanghai, tend to have more experience in handling IPR matters than IPCs located in more rural areas.

Legal experts regard the Beijing First Intermediate People’s Court (BFIPC) as having the most experience nationwide in dealing with IP matters, particularly cases involving complex technology, in part because the Patent Office Re-Examination Board, the PRC Patent Office, and the PRC Trademark Office fall within its jurisdiction. It therefore governs IPR administrative disputes concerning patent grants, trademark examination, and invalidation or cancellation of patents. The Beijing Higher People’s Court has also built a relatively deep knowledge of IP rights law from handling BFIPC’s appellate cases.

Clark, supra note 69, at 27.

91 Finder, supra note 82, at 260.


93 Luo, supra note 60, at 126.

94 Finder, supra note 82, at 260.

their HPC IPR tribunals to handle the increasing number of IPR cases in their jurisdictions and to promote economic reform and growth.98

As in other civil cases, plaintiffs with IPR-related claims must file their claims with the local people’s court.99 The court will determine whether to put the case on file depending on whether it meets applicable provisions of the Civil Procedure Law, as well as specific SPC and respective HPC stipulations regarding the jurisdiction of IPR cases.100 Generally speaking, IPCs or higher courts primarily try IPR cases, except for special situations in which the local HPC authorizes a local PPC to try specific types of IPR cases.101 If the court puts the claim on file, the pleading party must produce evidence supporting the claim.102 Some IPR tribunals, such as those in Beijing and Shanghai, normally convene a pre-trial meeting or preparatory hearing with the disputants before trying the case.103

A plaintiff can also bring administrative action against an IPR  

96 The Fujian and Tianjin IPR tribunals purport to: (1) guarantee the legal rights of all parties in legal proceedings; (2) adhere to the laws and regulations of the PRC, except in cases involving Hong Kong, Macao, or Taiwan; (3) guarantee all parties equal protection under the law; and (4) ensure legality, fairness, and efficiency in trying cases in a manner that would best serve society. Chinaiprlaw.com, A Brief Introduction to Intellectual Property Trial Chamber of Fujian Higher People's Court, http://www.chinaiprlaw.com/english/courts/fujian.htm.

97 The Sichuan tribunal purports to: (1) handle cases in strict compliance with procedural law and related judicial interpretation of China; (2) provide all parties, Chinese and foreigners, equal protection under the law; (3) hear cases legally, impartially, and in a timely fashion to best serve society. Chinaiprlaw.com, A Brief Introduction to Intellectual Property Rights Tribunal of Sichuan Higher People's Court, http://www.chinaiprlaw.com/english/courts/sichuan.htm.


100 Id.

101 Luo, supra note 60, at 127.

102 Zhou, supra note 83, at 7.

103 Id. ("In presiding over the preparatory hearing, the judge shall confirm the evidence exchanged, identify the key issues of dispute between the two parties, make sure whether the defendant makes a counterclaim and determine the witnesses in court and the date on which the court sits.")
violator by filing a claim with the State Administration of Industry and Commerce (SAIC) for trademarks, the Intellectual Property Offices for patents, or the National Copyright Administration for copyrights. Enforcing IPR via administrative action is much faster and cheaper than doing so through the civil courts; administrative organs have a lower threshold for admissible evidence than civil courts. However, civil courts are better equipped to handle ambiguous and complex IPR cases, and a favorable outcome is more likely to discourage others from infringement.

D. Judicial Interpretation

Some preeminent Chinese legal practitioners and scholars agree that the SPC's power to interpret national laws through judicial interpretation, one of four forms of legal interpretation in the People's Republic of China (PRC), is extremely limited. However, the SPC continues to promulgate ultra vires interpretations that resemble legislation. The SPC can only interpret laws promulgated by the NPCSC and is not authorized to interpret administrative or local rules and regulations. While judicial interpretation has become an increasingly important source of law, it remains the weakest form of legal interpretation in the PRC, having both a limited legal status and inconsistent legal applicability.

According to Chen Zhidong, an East China University Professor of Politics and Law, a review of Chinese law journals shows that judicial interpretation is inextricably linked to

104 See Clark, supra note 69, at 25.
105 Id.
106 Id.
110 Li Wei, supra note 107, at 87.
Comprehensive IPR legal knowledge and experience are required to interpret IPR laws, therefore making it difficult for the NPCSC to answer inquiries dealing with interpretation of contentious, complicated, and time-sensitive issues—such as online copyright protection—when it only meets for one week every two months. The NPCSC has experienced difficulty in the following: enacting timely and detailed legislation that adequately addresses important online copyright protection issues; requiring the SPC to promulgate many judicial interpretations; and in interpreting IPR law, where such judicial interpretation has arguably gained greater legal status and more consistent legal applicability. According to Cao Jianming, SPC Vice President, from 2000 to present, the SPC has issued twenty-five judicial interpretations and documents concerning IPR matters.

Zheng Chengsi, Director and Professor of the Intellectual Property Center of the Chinese Academy of Social Sciences (CAS), attests to the fact that the Chinese legislature relies on IPR experts to draft legislation. In January 2002, the Chinese legislature appointed Zheng chief drafter of a volume on IPR to be incorporated into the Chinese civil code. Zheng referenced a number of international treaties, such as TRIPS, the World Intellectual Property Organization Copyright Treaty (1996), the Paris Convention for the Protection of Industrial Property (1967), and the Berne Convention for the Protection of Literary and Artistic Works (1971), to develop the draft volume. Article 1 of the draft volume, for example, states “intellectual property rights are private rights,” which Zheng borrowed from the introduction

---

111 Li conducted an interview with Chin on June 22, 1995. Id.
112 Cai, supra note 108, at 41.
113 Li Wei, supra note 107, at 87.
116 Id.
117 Id. at 8-9.
of the TRIPS agreement.\textsuperscript{118}

While creating an independent judiciary within the constitutional framework would strengthen the ability of IPR courts to enforce their own judgments, it would relinquish the power of the CPC and the NPC to supervise the courts.\textsuperscript{119} However, the CPC has yet to call for such fundamental political or constitutional reforms.\textsuperscript{120} Some members of the NPC argue that the judiciary suffers from severe corruption, which necessitates continued NPC supervision of the courts. At the same time, the failure of the NPCSC to interpret the law as stipulated in the Constitution has allowed the SPC to fill a legal void\textsuperscript{121} and issue numerous IP-related \textit{ultra vires} judicial interpretations. The NPCSC does not have the legal expertise or resources to handle the technologically and legally complex IP issues, such as online copyright infringement. However, the legislative and executive organs retain the authority to interpret any statute and replace its interpretation with the SPC judicial interpretations.\textsuperscript{122}

\textbf{E. Judicial Enforcement}

In response to international pressure, the PRC government has taken steps to show China intends to improve IPR enforcement. On April 21, 2004, after the completion of the U.S.-China Joint Commission on Commerce and Trade (JCCT), Chinese Vice Premier Wu Yi agreed to prosecute those who infringe copyrights, criminalize online infringement regardless of the motive, base the threshold of infringing items on their legitimate market value, improve market access and distribution of U.S.-copyrighted products, and become a signatory to all important World Intellectual Property Organization (WIPO) Internet treaties when practicable.\textsuperscript{123}

\begin{itemize}
\item \textsuperscript{118} Id. at 9.
\item \textsuperscript{119} PEERENBOOM, supra note 12, at 329.
\item \textsuperscript{120} Jianfu Chen, Mission Impossible: Judicial Efforts to Enforce Civil Judgments and Rulings in China, in \textsc{Implementation of Law in the People's Republic of China} 108 (Jianfu Chen, Yuwen Li & Jan Michiel Otto eds., Kluwer Law Int'l 2002).
\item \textsuperscript{121} PEERENBOOM, supra note 12, at 317.
\item \textsuperscript{122} See Li Wei, supra note 109, at 110-11.
\end{itemize}
Since it joined the WTO, China has enacted many laws that are fair and equitable laws on their face, but the true test will be whether China implements and applies them in an impartial, predictable, independent, and fair manner. In China, as in the United States, the courts’ enforcement of its decisions and rulings is a significant aspect of implementation; however, Chinese judicial enforcement is extremely weak in practice.\(^{124}\) Consider the results of Deli Yang’s survey:

Based on the author’s survey on 51 MNEs from the UK and USA, 69% of the companies have encountered problems with related IP organizations in China with respect to inconsistency in IP applications and registrations, administrative protection and judicial enforcement. Moreover, over 50% of the companies had been the victim of extensive counterfeiting and infringement. These multinational companies, to different extents, opined that China had established a relatively adequate legal framework, but insufficient judicial enforcement appeared to be of a significant concern with 89% of the companies stressing the importance of reinforcing (IPR) in China.\(^{125}\)

Recognizing the seriousness of this shortcoming, the Chinese government has taken the following steps to improve its implementation efforts: revised the Civil Procedure Law (1991); revised the Criminal Procedure Law (1996); the SPC issued Provisions on Certain Issues Concerning the People’s Court Enforcement Work (Trial Implementation) in 1998; the SPC declared 1999 the ‘Year for the Enforcement [of Judicial Judgments and Rulings]’; CPC Central Committee issued Document Number 11 (1999), Notice of the Central Committee of the Communist Party of China on Transmitting the Report of the Party Committee of the Supreme People’s Court on Resolving Certain Problems Causing ‘Enforcement Difficulties’ Facing the Court.\(^{126}\)

Chinese judges often have difficulty enforcing civil and criminal judgments. In fact, the SPC has frequently addressed the

---

\(^{124}\) Jianfu Chen, supra note 117, at 85-86.


\(^{126}\) Chen, supra note 117, at 86.
problem in its annual reports to the NPC. Although Beijing courts enforced 90 percent of all judgments made by Beijing courts from 2003 to 2006, the problem is far more serious nationwide. In March 2004, Ge Xingjun, chief of the SPC’s Judgment Enforcement Division, stated that the nationwide enforcement rates for civil judgments in the HPCs, IPCs and PPCs were 40, 50 and 60 percent, respectively. In 2002, a Shandong judge claimed that the enforcement rate was 30 percent in the economically underdeveloped areas of China.

Widespread judicial corruption, local protectionism, public distrust of judges, and limited understanding of IPR matters remain major obstacles to improving judicial enforcement of copyright laws. Many judges accept gifts and bribes from plaintiffs and defendants. In 2004, China convicted thirteen Wuhan City Intermediate People’s Court judges, two vice-presidents, and some deputy presiding judges for accepting more than $480,000 in bribes. According to SPC President Xiao Yang, in 1998 Chinese courts meted out 1,654 administrative discipline punishments, 637 CPC discipline punishments, and 221 criminal punishments for violation of laws or discipline in 1998. David Murphy of the *Far Eastern Economic Review* writes: “Today, courts remain ineffectual because local judges are literally in the pocket of local governments, which pay their wages and routinely influence decisions. Most people have little chance of a

---

127 *Id.* at 87.


130 *Id.*

131 Yuwen Li, *Court Reform in China: Problems, Progress and Prospects, in Implementation of Law in the People’s Republic of China* 57 (Jianfu Chen, Yuwen Li, & Jan Michiel Otto eds., Kluwer Law Int’l 2002). “Enjoying good meals and other entertainment has become so common that it has led to the unhealthy practice of most parties involved in lawsuits investing heavily in establishing a personal relationship with the judge, or bribing him, rather than concentrating on collecting evidence . . . .” *See id.*


fair hearing against anyone with government connections." Some legal scholars contend that judicial corruption is so serious that it has hurt judicial impartiality and the reputation of the government, and it has undermined judicial enforcement as well.\textsuperscript{135}

IV. Analysis of the Judicial Protection of IPR in China Website

A. Introduction

Jiang set up the website, both English and Chinese versions, sometime in 1999.\textsuperscript{136} Since 2004, Jiang replaced the old Chinese version of the website with a more sophisticated, attractive, informative, timely, and equally interactive website. The result has been a website that has received 958,690 hits since January 13, 2006.\textsuperscript{137} The English and Chinese versions of the website provide a convenient way for English and Chinese speaking lawyers, students, judges, and government officials to view IPR material and current Chinese judges’ perspectives regarding current IPR law and judicial interpretations. In addition, the website includes numerous articles expounding Jiang’s views on the most recent judicial interpretations of IPR legislation.\textsuperscript{138}

While the website briefing states Chinese judges established the website, Jiang personally registered the website and appears to manage its overall content.\textsuperscript{139} One wonders why he emphasizes that the website is “personal” on the English version—the old Chinese version contains no such introductory briefing.\textsuperscript{140} Jiang could have created the “briefing” to shape world opinion on the issue of judicial transparency or reduce his “loss of face” for what some English readers might perceive as an inadequate website. In fact, the “briefing” of the English version of the website points out

\begin{itemize}
\item \textsuperscript{134} David Murphy, \textit{When Courts Don’t Work}, 40 FAR E. ECON. R. 26 (2004).
\item \textsuperscript{135} Yuwen Li, \textit{Court Reform in China: Problems, Progress and Prospects, in IMPLEMENTATION OF LAW IN THE PEOPLE’S REPUBLIC OF CHINA} 58 (Jianfu Chen, Yuwen Li & Jan Michiel Otto eds., Kluwer Law Int’l 2002).
\item \textsuperscript{136} JIANG: QUESTIONS AND ANSWERS, supra note 7, at 4.
\item \textsuperscript{137} Judicial Protection of IPR in China, http://chinaiprlaw.cn/.
\item \textsuperscript{139} Id.
\item \textsuperscript{140} Id.
\end{itemize}
that, as the website is a "personal" one, the information it provides "is not very extensive;" however, it should be noted that the English version contains much less information than the old and new Chinese versions of the website. Given Jiang's important position and stature, and the sophistication of the new Chinese website, it would be difficult for him to continue to effectively respond to emails and manage the website without some professional assistance.

The fact that Jiang declares the website as "personal" prevent him from posting information without government approval. Indeed, Chinese websites are highly censored by the Ministry of Public Security. Under Article 5 of the Computer Information Network and Internet Security Protection and Management Regulations (1997), the PRC government absolutely forbids the posting of any information that is either contrary to the fundamental principles of PRC laws and regulations, or considered confidential or harmful to the reputation and interests of the government on the Internet. Despite the unstated "official" nature of the website and its regulation by the government, it has been relatively successful at informing as well as influencing public perception.

Comparatively speaking, the English and Chinese versions of the website reveal different orientations towards the presumed target audiences of each version. The Chinese version of the website—which presumably targets mainland and overseas Chinese—is far more detailed, better organized, and graphically appealing than the English version, which presumably targets Americans and other non-Chinese speaking audiences. The Chinese version contains most of the information the English

---

141 Id.


145 Id.
version does, such as all of the questions from English readers posted in English. The Chinese version offers a number of links that the English version does not, including: lower courts, other government agencies, updated daily IPR news, and the latest and most detailed reports on IPR issues.

The English version provides links to new content, an introduction to Judge Jiang and the importance of the website, selected photographs of court members, laws of other countries, and letters from readers. In the "Law" section, the website maintains many of the main Chinese IPR laws and judicial interpretations, but it is not kept up-to-date. For example, the last judicial interpretation that was posted on the website was Interpretation by the SPC in Handling Criminal Cases of Infringing Intellectual Property (January 1, 2005). There is also a "Court" section, which details the organization, functions, and powers of the courts. There is a "Judgments" section that provides SPC and lower court cases. All of the cases listed are at least two years old. The following are selected articles posted in the "Trial News" section:

Continuous Improvement of Judicial Protection for Intellectual Property Rights in China (04/14/2005); China Strengthens IPR Protection (04/04/2005); 1,710 IPR Violations Handled Since 2000 (01/24/2005); IPR Violators Now Major Criminals (01/24/2005); IPR Violators Could Be Jailed up to 7 Years (01/18/2005); Recent Developments of Patent Enforcement in China (4)—A Comprehensive Legal Framework at Work (01/18/2005); China Needs to Be More Savvy on Intellectual Property: Top Judge (05/16/2004); Courts More Cognizant of IPR (04/29/2004); China Courts Are Working Actively and IPR Cases are Increasing Recently (7/24/2003); China's Progress in

147 Id.

B. Methodology

This article employs content analysis, from a descriptive and rhetorical perspective, as the method of analysis for this study. This is because content analysis is reality-based, commonly regarded as a “stable” and useful Internet communications research technique. This could potentially provide greater insight into the state use of the Internet in China to shape public opinion. As defined by Berelson and Lazarfeld, content analysis is a method of research that objectively, quantitatively, and systematically examines the content of communication. According to Krippendorf, using the content analysis enables the researcher to draw “replicable and valid inferences from data to their context.”

This article employed the techniques presented in the McMillan study to conduct a content analysis of the Chinese and English versions of the website. McMillan’s study analyzes the myriad of techniques researchers use to conduct Internet content analysis and the unique challenges associated with content analysis in the dynamic Internet environment. McMillan presents five primary steps for conducting a content analysis of websites: (1) develop hypotheses and research questions; (2) select a sample size; (3) define categories and details of data collection; (4) train coders and ensure reliability of coding; and (5) analyze and interpret data collected during the coding process.

The hypothesis is that China is attempting to use the Internet to

155 See id. at 81.
156 Id.
157 Id.
158 See id. at 81-82.
159 Id.
influence public opinion on TRIPS compliance. The research question is whether Chinese government websites contain content that suggest China is either in compliance with TRIPS or explain why China cannot meet certain TRIPS provisions. After conducting numerous offline and online searches in Chinese and English on China’s TRIPS compliance, the author chose to use Jiang’s website as the sample size or unit of analysis because of its unique nature and Chinese and English website versions. The author not only examined the homepages of the both versions of the website, but also conducted a detailed search of the Chinese and English pages of both the websites to reveal information related to the purpose of the study. In addition, the author chose to use both English and Chinese search engines to find websites that met criteria related to the purpose of the study. To lessen the potential research problems associated with changing website content, the author periodically searched the website from August 2004 to July 2005. The content categories used were associated with the aim of the study. After collecting the information, the author analyzed and interpreted it.

The sample size of the study is its greatest limitation. Future research that incorporates a greater number of sampling of IPR-related personal and government websites could provide a tremendous value to legal scholars and practitioners.

C. Results

A round table discussion that appeared on the new Chinese version of the website in February 2005 shows the website’s growing sophistication in meeting the detractors of Chinese criminal enforcement and judicial transparency efforts head-on. Emma Barraclough, the Asia Editor of Managing Intellectual Property in China, moderated a discussion among the following individuals on whether the new guidelines China is drafting will base thresholds for criminal sanctions against copyright pirates on the value of genuine products: Judge Jiang Zhipei; Professor

160 See http://www.chinaipr.com and http://www.chinaiprlaw.cn, respectively.
161 See McMillian, supra note 150, at 81-82.
162 Id.
Zheng Chengsi, Director of the Intellectual Property Center at the China Academy of Social Sciences and a WIPO and CIETAC arbitrator and member of the National Congress Law Committee; James Hayes, a U.S. patent attorney, co-chair of the American Chamber of Commerce—PRC's Intellectual Property Forum, and partner of Beijing based IPR firm Tee & Howe; Wen Xikai, Deputy Director General of the Law & Treaty Department of the State Intellectual Property Office; and Shi Xiaomei, a patent attorney and member of the board of directors of China Patent Agent (Hong Kong).\textsuperscript{164}

Comments by some of the Chinese participants posted on the site give the impression of greater judicial transparency and are illustrative of how Jiang's website attempts to inform and shape public opinion in the direction of China's judicial enforcement efforts against copyright piracy and TRIPS compliance.\textsuperscript{165} Below are the important comments appearing on the website:

\textbf{Jiang Zhipei:} It is not about whether people would like to protect intellectual property or not. It is more about how many people we are going to send to prison. And about how you can protect IP when China is experiencing such dramatic economic development. Westerners often like to address problems directly whereas in China people are more likely to talk about abstract concepts or the background of the issue. \ldots China is still a developing country. Although a lot of big cities are very developed, there are still many places where people don't have enough to eat and there is a big imbalance in terms of economic development and people's lives in China as a whole. There are more urgent issues to be addressed than IP protection. \ldots To be frank, counterfeiting is very serious in China. It's not only a direct problem of IP infringement. The infringement has also damaged the social order and even taken innocent people's lives. \ldots As a judge in civil cases and also as an expert in IP issues I welcome the issue and enforcement of the judicial interpretation—it will do a lot to help stop infringement. But on the other hand, we cannot expect too much from this, because it can't solve all our problems. I think more efforts should be made in the investigation and appeal stages. We must send criminals into court. Each year the total number of civil,
administrative and criminal cases relating to IP comes to about 15,000 cases in China. At the same time, other cases amount to between 5 million and 6 million each year. Chinese judges have been waiting for a long time to see those criminals sentenced. We never complain about the number of IP cases. And I hope that foreign—and Chinese—businesses can do more work to help send those criminals to court. I think more effort could be made on investigation work. And of course, more education in society about IP infringement issues would help too.\textsuperscript{166}

\textbf{Zheng Chengsi:} In China, jail is mainly for drug smuggling and robbbing and killing people. Many scholars would think it was very stupid to put someone into jail for IP infringement. For example, if someone downloads a film illegally from the Internet in the US—it may be more damaging to the company than copying discs and selling them—but do you put those people in jail? I think our problem is the enforcement is far from adequate—it can’t punish the infringers economically. Some people aren’t afraid of going to jail—they perhaps have some \textit{guanxi} (personal connections) and can get released the next day. Although we have promised to strengthen criminal sanctions I don’t think it is a good way. I don’t think it’s an effective way. If you can punish them economically—to close down their businesses, that would be more effective. That’s the critical point.\textsuperscript{167}

There are other indications that suggest Jiang uses the website to influence perceptions of his readers on China’s TRIPS compliance. For instance, during the first week of September 2004, the Chinese government promulgated its plans to launch a major campaign—spearheaded by Chinese Vice Premier Wu Yi—to curb intellectual property abuse in China.\textsuperscript{168} Soon afterwards, Jiang placed Wu Yi’s photo on the first page of his new Chinese website.\textsuperscript{169} The website also discussed the results of meetings and


\textsuperscript{169} See \textit{China Will Increase the Intellectual Property Rights Protection Dynamics} (Zhongguo Jiang Jiada Zhishi Chanquan Baohu Lidu), http://www.chinaiprlaw.cn/
conferences where Wu Yi delivered comments on the state of IPR protection in China.\textsuperscript{170} On September 15, 2004, the site posted news from *Zhishi Chanquan Bao* (Intellectual Property Rights Daily), which discussed the results of a conference Wu Yi convened regarding investment and intellectual property rights protection in China.\textsuperscript{171} Wu Yi stated that the Chinese government would increase the dynamics of property rights protection in China, and—starting in September of this year—will use one year’s time to examine the scope of intellectual property protection activities.\textsuperscript{172}

\textbf{D. Discussion}

The CPC’s new policy initiatives suggest that it is fighting to keep itself relevant in the information age. In September 2004, the CPC held the Fourth CPC Plenum of the 16th CPC Central Committee, where a policy document was adopted that addressed the CPC’s urgent need to enhance its ability to govern and survive.\textsuperscript{173} The document warns that the CPC’s ruling status will collapse unless the CPC takes appropriate action, such as building an economy with strong legal underpinnings.\textsuperscript{174} Many Chinese officials and scholars recognize that IPR protection must play a much greater role in China to develop such an economy, which includes meeting its WTO implementation commitments.\textsuperscript{175} Shen Rengen, a deputy director of the PRC National Copyright Association (NCA), said promoting IPR enforcement in China could lead to efficiency, foreign trade and investment, national reunification, and cultural propaganda.\textsuperscript{176}

\textsuperscript{170} Id.


\textsuperscript{172} See id.


\textsuperscript{174} Id.


\textsuperscript{176} See Ling Li, *The Sky Is High and the Emperor Is Far Away: The Enforcement of
In fact, since June 2004, China’s State Intellectual Property Office (SIPO) has been developing a national IPR strategy to meet mid- and long-term economic growth targets. According to Hu Angang, Director of the Research Center for National Situations, “the national IPR strategy should be focused on the principle of boosting the economy through technology, creating wealth and increasing people’s welfare.” Judge Jiang, who is helping to develop the strategy, stressed that the strategy should incorporate strong administrative, civil, and criminal IPR enforcement.

Jiang’s website is a part of China’s IPR strategy. As mentioned, Jiang is helping to shape the development of China’s IPR strategy, and his website supports China’s short-term and long-term goals and objectives: use the website to show the world that its IPR judicial work is becoming more transparent and shape public opinion regarding China’s level of judicial enforcement and TRIPS compliance. The website provides valuable information on the judicial protection of IPR in China, and has become well-known among individuals following Chinese IPR issues. A number of scholarly books, Chinese law firms, and government websites refer people to the website. The fact that Jiang replaced the old Chinese version of the website in late 2004—

---

177 IPR Strategy to Define Government’s Role, CHINA DAILY, June 14, 2004, http://www.china.org.cn/english/government/98148.htm. In 1999, the PRC promulgated the Report on Intellectual Property Rights Protection, which provided the following five reasons to protect IPR in China: (1) to build a socialist market economy; (2) to establish rule by law; (3) to promote scientific and technological innovation; (4) to foster reform and transparency of government policy; and (5) for the development of spiritual civilization. Id.

178 Id. Some Chinese scholars and government officials, such as Niu Wenyuan, a researcher at the Chinese Academy of Sciences (CAS), believe China should make IPR its primary national strategy. Id.

179 Id. Some Chinese officials, such as Lu Wei of the Development Research Center of the State Council’s Technical Economics Department, argue the national IPR strategy should take into account China’s status as a developing country, and “not aim too high, but set the standards required by the WTO.” Id.


181 The editors of Chinese Intellectual Property Law and Practice, as early as 1999 when the book was published, referred readers to Jiang’s website in the appendix of the book. See CHINESE INTELLECTUAL PROPERTY LAW AND PRACTICE, supra note 67, at 466.
likely managed with the assistance of colleagues or a professional website manager—suggests the website was well received by the public and the government.\footnote{\url{http://www.chinaiprlaw.cn}}

The Chinese have skillfully used the press prior to official negotiations in the past to publicly establish an agenda and shape public perceptions to strengthen its negotiating position.\footnote{Richard H. Solomon, \textit{Chinese Negotiating Behavior: Pursuing Interests Through ‘Old Friends’} 116 (USIP Press 1999).} Now, the same is done via official and unofficial government websites. The Chinese make a clear distinction among PRC-controlled Hong Kong newspapers (\textit{Da Gong Daily} and \textit{Xin Wan Daily}), unofficial newspapers (\textit{Wen Hui Daily} and \textit{Guang Ming Ri Daily}), and authoritative political newspapers such as \textit{Ren Min Ri Bao} (\textit{People's Daily})—they often use unofficial media to intensify the tone on topics under negotiation to highlight the limits of China's position and maintain the option of altering its negotiations.\footnote{\textit{Id.} at 121.} In Chinese negotiating parlance, Jiang’s website discussions and explanations of judicial interpretations are unofficial but on-the-record comments on IPR issues that China would like its foreign counterparts to consider. However, Jiang’s comments do not reflect a formal government position that can be used by a foreign party in IPR negotiations.\footnote{\textit{Id.} at 129.} Due to difficulty creating effective lines of communication with Western legislative officials,\footnote{\textit{Id.} at 189.} the NPC could be using the website as an unofficial means to help inform Western legislators on China’s position on IPR matters.

There are indications that the NPC monitors and approves of the content and goals of the website. For example, Wenjie Fu, former Deputy Director of the NPCSC, and now a member of the Standing Committee’s Secretary Bureau, General Office, posted the following email on the website addressed to Jiang Zhipei:

\begin{quote}
HI, Mr. Jiang:

I really enjoy what you have achieved especially this website. It is a media introducing your knowledge and wisdom to the public. This way appears very common in the USA, but in China this is a rare case. When I was in Minnesota University
two years ago, I understood that a thinker should use the Internet if he want[s] [sic] to maximize his voice. Now you have exercised an idea which still stays in my mind. I should regard you as my teacher.

Sincerely,

Wenjie Fu

It is notable that the Fu’s posting was in English, which could suggest that he not only approves of the website, but also wants to influence English users of the website. On the other hand, he could be writing in English because its use allows him more freedom to express himself and flatter Zhang, who also speaks English.

While Fu’s posting suggests the NPC monitors the content of the website, it does not mean that the NPC directs what information will be posted on the website. Given Zhang’s distinguished professional reputation and preeminence in the judicial protection of IPR in China, along with his wide guanxi (personal connections) network and familiarity with the U.S. legal system through his overseas experience in America, the PRC probably gives him a certain degree of discretion with regards to the information he posts on the website.

The English version of the website primarily targets Americans and provides a unique purpose. It is meant to convey that the Chinese judiciary is becoming more transparent and predictable with regards to IPR matters. Additionally, its purpose is to emphasize the unprecedented nature of the website, and that the government is giving senior IPR judges more independence. For example, Jiang posted his explanations of an ultra vires judicial interpretation, titled How to Comprehend and Apply the Judicial Interpretation of the Supreme Court Regarding Copyright Disputes in the Internet Environment, on the English and Chinese versions of the website. Although such explanations of judicial interpretation are not binding on the courts, they provide lower

---

187 E-mail from Fu Wenjie, member of the Standing Committee’s Secretary Bureau, General Office, to Jiang Zhipei, Chief Justice, IPR Tribunal, http://www.chinaiprlaw.com/english/letters/letter15.htm.


189 Jiang, supra note 9.
court judges and legal practitioners with guidance on how to comprehend the new interpretations and apply them. Jiang’s explanation of this judicial interpretation gives the impression of greater transparency because he discusses the factors the grand justices of the Adjudicatory Committee of the SPC took into consideration when they made this stipulation for this judicial interpretation. This appears to go beyond the government preference for secrecy when it makes decisions on judicial matters.

China’s accession to the WTO and requirement to fulfill WTO IPR-related commitments made judicial protection of IPR a top priority. However, the complexity of the IPR legal regime and rapid technological and social change has made it impossible for the NPC to promulgate sufficiently detailed and sophisticated legislation, specifically with regard to online copyright infringement. Therefore, the NPC has been forced to increasingly rely on the judiciary’s IPR specialists to draft judicial interpretations and explain them to the courts and the public. The court has not filled a power vacuum, but gained additional power in what Randall Peerenboom describes as a “semi-structured space.”

This phenomenon is illustrated in How to Comprehend

---

190 Id. According to Jiang, the SPC took the following factors into consideration:

1. Clause 2 of Article 32 in the Law of Copyright states, works of a certain nature may be reprinted without obtaining the consent under the condition that rewards are paid and the copyright owners are indicated; 2. The most fundamental theory for establishing the Law of Copyright is the “balance theory” for copyright owners and the public to obtain rights and interests of information, and this is the legal theory foundation for making such judicial interpretations; 3. In the part of the Internet service providers, the special function of their websites have the same function as newspapers and magazines, are all media for spreading information products such as works, and their legal status shall be the same; 4. The range of works touched upon by the decision is quite limited, besides, the copyright owners of these works may obtain sufficient protection by the Law of Copyright through indicating “reprinting is not allowed”; 5. In judicial practices, this mechanism can reduce Internet copyright disputes to a large extent; at least it can reduce disputes such as just for obtaining permits. This mitigates the burden of the litigants, also saves the resources of the court; most importantly, this judicial interpretation may temporize the development of the fast-growing information network and the lawyers may also resolve this issue without resorting to litigation.

Id.

191 PEERENBOOM, supra note 69, at 129.
and Apply the Judicial Interpretation of the Supreme Court Regarding Copyright Disputes in the Internet Environment:

According to the stipulations in Article 58 of the Law of Copyright, the State Council will work out the protection methods for Internet dissemination right otherwise. But it takes time for the drafting and publication of such protection methods. In order to ensure the consistency of laws applied in the handling of Internet copyright dispute cases by the people's court, before the publication of relevant administrative regulations, after due modifications are made, the present judicial interpretation will still be applied strictly. In the meantime, we must continue to summarize the experiences in justice practices in order to put forward constructive advices to the law-making organs.\(^{192}\)

A theme that appears throughout Jiang's writing, and in _How to Comprehend and Apply the Judicial Interpretation of the Supreme Court Regarding Copyright Disputes in the Internet Environment_, is the "balance theory" of judicial enforcement. According to Jiang, "balance theory" is fundamental copyright law and making judicial interpretations that balance the rights and interests of copyright owners and the public's right to information.\(^{193}\) Jiang argues that a balance between the two is necessary in the context of online copyright matters.\(^{194}\)

Jiang suggests judges use the "balance theory" in their application of judicial discretion to administer justice. Every legal system in the world attempts to find a balance between human discretion and the formal rule of law; that is, the balance between the impartial administration of law and regulations, fair procedures, and consistent law enforcement are prerequisites to delivering justice.\(^{195}\) By statutes enacted by the NPC, through general rules promulgated by the Court, and by judicial interpretations that guide the lower courts, the PRC prescribes the procedures by which Chinese citizens may bring claims before the

---

192 Jiang, _supra_ note 9 (emphasis added).
193 _Id._
194 _Id._
people’s courts and by which law practitioners must operate in the people’s courts. While the PRC has strengthened its procedural rules to ensure that litigation will be handled in an impartial, orderly, and efficient fashion, they, in many respects, systematize informality in adjudication.\textsuperscript{196}

Margaret Woo argues that the Chinese have traditionally disdained resorting to litigation to handle disputes.\textsuperscript{197} Similarly, Chinese judges prefer to make decisions based on the facts and circumstances of a particular case rather than handing down rulings based on a rigid application of the law. In the eyes of some Chinese judges, such an informal approach leads to more harmonious and utilitarian results\textsuperscript{198}; however, this will not necessarily lead to more criminal prosecutions for copyright piracy, especially when senior judges do not necessarily favor this approach.

V. Conclusion

The analysis of the website suggests high-ranking, politically influential IPR judges support the creation of laws that comply with TRIPS, but lean toward applying them in a “forgiving” manner that meets China’s economic realities—that is, TRIPS “with Chinese characteristics.” Understanding this phenomenon is important because these preeminent judges have a political, professional and moral influence over IPR courts, and the judiciary is becoming increasingly influential in IPR law-making and enforcement activities.\textsuperscript{199}

The writing of this paper illustrates that Jiang’s comments are reaching Western law students and practitioners. At the same time, his website could positively influence some Western legislators’ perception of China’s commitment to comply with TRIPS in the short-term, possibly slightly deflecting pressure and condemnation from some circles. Over the long-term, Jiang’s website may have more of an impact domestically by disseminating important information and educating people about IPR law. The

\textsuperscript{196} Id. at 163.

\textsuperscript{197} Id. at 168.

\textsuperscript{198} Id.

\textsuperscript{199} Jiang, The People’s Court Judicial Protection of Copyright in the Internet Environment, supra note 9.
China's TRIPS compliance rests on the extent to which the government develops the political will to enforce the new laws. As long as China thinks it is in its best interest politically, economically and strategically not to fully comply with TRIPS and the China protocol, the world should not expect rapid improvement in China's protection of foreign IPR in China. Arthur Kroeber, managing editor of the *China Economic Quarterly*, argues that China will steal as much as it can until it can produce its own technology and has no incentive to enforce IPR laws. On the other hand, China's development of an IPR strategy suggests that it intends to do more to protect its domestic firms to encourage innovation and the development of indigenous technologies. Japanese, Korean, European, and U.S. firms are registering greater numbers of patents in China—despite being fully aware of China's poor IPR enforcement record—suggesting that some companies find registering in China could provide a competitive advantage over other companies. Some members of Japanese companies think China could change from an IPR pariah to an IPR powerhouse in twenty years—off-the-record Japanese comments indicate the change could occur in five to ten years.

Continued international pressure and China's growing reliance on the courts, combined with the growing influence of high-ranking IPR judges and preeminent legal scholars after WTO accession and increased judge professionalism, could gradually raise the image and stature of IPR courts and judges. This would ultimately pave the way for legal reform that increases judicial authority and IPR enforcement.

---


202 *Id.*