

## NEW PRIVATE LAW? INTELLECTUAL PROPERTY “COMMON-LAW PRECEDENTS” IN CHINA

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China has established a dynamic legal system by using guiding cases to improve adjudicative consistency. The guiding cases are *de facto* binding as “common-law precedents” and the only binding cases in China. In China’s dynamic legal system, the intellectual property (IP) legal mechanism and the legal rationales for adjudicating IP disputes are notably influenced by the U.S. On the one hand, some amendments to the IP statutes of China are coercive and in response to actions and criticisms by developed countries, especially the U.S. On the other hand, the IP judicial precedents that are selected, compiled, and published by the Supreme People’s Court (SPC) reflect the voluntary development of the IP regimes and the enforcement of the IP statutes in China. The IP regimes in China are on a path being inherently consistent with U.S. IP laws. In the U.S., IP laws are mainly considered as private law, but they do involve some public law characteristics, as shown by the intervention of legislators and the development of statutory interpretation by the courts. These public law characteristics do not transform IP laws into public law, but they evoke the concept of New Private Law in modern IP laws.

This study reviews all the twenty-two IP guiding cases (*i.e.*, patent, copyright, trademark, anti-unfair competition, anti-monopoly) in China and compares them with corresponding judicial precedents in the U.S. I urge that Chinese IP guiding cases are not conventional private or public law, rather are considered to be New Private Law. The IP guiding cases follow public policies to be part of governance and, as a result, show their own influence on policymakers and legislators. Consistent with the concerns of American IP holders, these guiding cases show that Chinese courts are instructed to be conservative in awarding both damages and injunctions. It shows that the courts function as a gatekeeper and consider IP quality to prevent over-rewarding IP holders either through the judicial system itself or the market when government agencies liberally or incautiously granted the IP rights. For trademark and unfair competition cases, public apologies are instructed to be expansively given by the courts to substitute economic damages for IP holders. Moreover, the IP guiding cases suggest that the SPC and Chinese judges are inclined towards a utilitarian and realistic/pragmatic judicial philosophy rather than a formalistic approach in their statutory interpretation.

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## INTRODUCTION

The US-China trade war has been a topic undergoing intense public attention since June 2018.<sup>1</sup> A large proportion of the negotiations between the two countries focus on intellectual property (IP) protection.<sup>2</sup> President Trump complains about the “alleged IP theft” in China<sup>3</sup> and “enjoyed bipartisan support.”<sup>4</sup> Responding to his concerns over IP protection, Standing Committee of the National People’s Congress proposed amendments to the Trademark Law and the Anti-Unfair Competition Law in April 2019 and quickly approved these amendments in three days.<sup>5</sup> This is not the first time that China reforms its IP statutes under the trade pressures from the U.S.<sup>6</sup> However, neither the earlier reforms nor the recent two amendments conclusively wipe off Trump’s allegations of IP theft, including but not limited to the issues of counterfeiting, trade secret misappropriations, and IP infringement.<sup>7</sup>

It is a misunderstanding that a reform of the IP statutes can entirely solve these issues of IP protection in China. The problem that makes the owners of intellectual property rights (IPRs) in the U.S. anxious is whether they can secure and enforce their IPRs in China. Even though China’s IP laws have been reformed several times to broaden the scope of protection and

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<sup>1</sup> See generally Greg Ip, *The Trade Wars of 2018: An Alternate History*, WALL ST. J., June 10, 2018, <https://www.wsj.com/articles/the-trade-wars-of-2018-an-alternate-history-1528672886>; Ana Swanson, *Trump’s Trade War With China Is Officially Underway*, N.Y. TIMES, July 5, 2018, <https://www.nytimes.com/2018/07/05/business/china-us-trade-war-trump-tariffs.html>.

<sup>2</sup> Lingling Wei & Bob Davis, U.S., China Close In on Trade Deal, WALL ST. J., Mar. 3, 2019, <https://www.wsj.com/articles/u-s-china-close-in-on-trade-deal-11551641540> (“U.S. Trade Representative Robert Lighthizer said the provisions involving protecting intellectual property total nearly 30 pages out of a working document of more than 100 pages.”).

<sup>3</sup> Grant Clark, *What Is Intellectual Property, and Does China Steal It?* WASHINGTON POST, Jan. 21, 2019, [https://www.washingtonpost.com/business/what-is-intellectual-property-and-does-china-steal-it/2019/01/21/180c3a9e-1d64-11e9-a759-2b8541bbbe20\\_story.html?utm\\_term=.e18875d581d5](https://www.washingtonpost.com/business/what-is-intellectual-property-and-does-china-steal-it/2019/01/21/180c3a9e-1d64-11e9-a759-2b8541bbbe20_story.html?utm_term=.e18875d581d5); But see Interview by Stuart Varney with Max Baucus, the 11th U.S. Ambassador to China (June 18, 2019) (arguing that “IP theft” has been in past tense and the situation of IP protection in China is in a situation much better than the old days).

<sup>4</sup> Vivian Salama, *Trump Sees China Trade Deal “When the Time Is Right,”* WALL ST. J., May 14, 2019, <https://www.wsj.com/articles/trump-sees-china-trade-deal-when-the-time-is-right-11557839937>.

<sup>5</sup> Statement on the Drafted Amendments to Eight Laws (Construction of the P.R.C. and Other Laws, etc.) (promulgated by the Nat’l People’s Congress Constitution & Laws Comm., April 20, 2019) (China); Anti-Unfair Competition Law (promulgated by the Standing Comm. Nat’l People’s Cong., Sep. 2, 1993, effective Dec. 1, 1993) Apr. 23, 2019 (China); Trademark Law (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 23, 1982, effective Mar. 1, 1983) Apr. 23, 2019 (China).

<sup>6</sup> See *infra* Part I. Section A.2.

<sup>7</sup> See Dennis C. Blair & Keith Alexander, *China’s Intellectual Property Theft Must Stop*, N.Y. TIMES, Aug. 15, 2017, <https://www.nytimes.com/2017/08/15/opinion/china-us-intellectual-property-trump.html> (“Intellectual-property theft covers a wide spectrum: counterfeiting American fashion designs, pirating movies and video games, patent infringement and stealing proprietary technology and software.”).

confirm that the IPR holders are entitled to property rights in China, excessive government intervention and weak IP enforcement are constantly criticized.<sup>8</sup> The weak but increasingly strengthened IP enforcement reflects an inconsistency between the intent and the purpose of the IP laws. When the legislative intent is to respond to the concerns over owning property rights by the inventors or IP holders from the U.S. and other developed countries, the legislative purpose is to promote domestic innovation and economic growth. This inconsistency is not unfamiliar to the U.S. lawyers and legal scholars, who have realized that their current precedential laws are not sufficient to construe statutory laws.<sup>9</sup> Therefore, it is not enough to understand the issues and status of IP protection in China through the text of the statutes. China’s judicial precedents about IP issues should also be explored to understand how the courts apply the statutes and how IPRs are enforced through the judicial system.

It is a misunderstanding, again, about China’s judicial system that there are no “common-law precedents” or “judicial precedents.”<sup>10</sup> China attempts to create a dynamic legal system with cases, so a guiding case system was recently created in 2010.<sup>11</sup> The Supreme People’s Court (SPC) has published 112 guiding cases, which were adjudicated by the SPC or inferior courts.<sup>12</sup> The SPC selects and compiles the guiding cases that are representative, influential, and with complex and new issues as supplements of statutory law to instruct judges and eliminate adjudicative inconsistency.<sup>13</sup> The SPC judges claim that the guiding cases are “*de facto* binding,”<sup>14</sup> so they are considered as “common-law precedents” or “judicial precedents.” Among

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<sup>8</sup> See Joseph A. Massey, *The Emperor Is Far away: China's Enforcement of Intellectual Property Rights Protection 1986-2006*, 7 CHI. J. INT'L L. 231, 231 (2006) (pointing out that the problems in IP protection are rooted in the central government’s policies and conducts).

<sup>9</sup> See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 437 (1989) (criticizing formalism in which agencies fail to interpret statutes based on the text of statutes and precedents).

<sup>10</sup> Judges agree that the guiding cases are binding previous court decisions as precedents, but scholars always argue that guiding cases are not common-law precedents. *But see* Mo Zhang, *Pushing the Envelope: Application of Guiding Cases in Chinese Courts and Development of Case Law in China*, 26 PAC. RIM L. & POL’Y J. 269, 269 (2017) (“China is known as a civil law country where the judges do not have law-making power and the courts generally do not follow precedent.”); *See* Mark Jia, *Chinese Common Law? Guiding Cases and Judicial Reform*, 129 HARV. L. REV. 2213, 2231-2233 (2016) (arguing that guiding cases are more civil than common).

<sup>11</sup> Provisions of the Supreme People’s Court Concerning Work on Case Guidance (promulgated by Adjudication Comm. Sup. People’s Ct., Nov. 15, 2010, effective Nov. 26, 2010) June 12, 2015 (China).

<sup>12</sup> Notice of the Supreme People’s Court on Issuing the First Set of Guiding Cases (promulgated by Sup. People’s Ct., effective Dec. 20, 2011) Dec. 20, 2011 (China).

<sup>13</sup> *See infra* Part I. Section B.3.

<sup>14</sup> Guo Feng Jr., *The Compilation and Application of China’s Guiding Cases*, STAN. L. SCHOOL: CHINA GUIDING CASES PROJECT (Jan. 27, 2017), <https://cgc.law.stanford.edu/commentaries/18-guo-feng/> (“[Guiding cases] are of authoritative, normative, exemplary, and uniformly applicable nature. They are *de facto* binding.”).

the 112 guiding cases, there are twenty-two of the guiding cases referring to IP issues.<sup>15</sup>

Reviewing these IP guiding cases has two values. First, the IP guiding cases are a form of IP policies, supplementing other IP policies enacted by the central government.<sup>16</sup> The selection of the guiding cases reveals the bona fide legislative purpose of the central government, which is under the coat of “strengthening IP protection.” As the central government encourages innovation and entrepreneurship, the proportion of IP guiding cases to all legal issues increases, and the proportion of patent guiding cases to all IP guiding cases increases. However, the SPC almost stopped publishing any IP guiding cases after IP issues raised political tensions with the U.S. in 2018.<sup>17</sup> Moreover, the compilation of the guiding cases shows how the SPC instructs the inferior courts to interpret IP statutes, enforce IPRs, and coexist with the government.<sup>18</sup>

The second value to review the IP guiding cases is that these IP guiding cases allow lawyers and legal scholars to take a closer look at how Chinese courts enforce the IPRs as the SPC expects. There are U.S. scholars who realize that IP laws are not conventional private law referring to property rights because the U.S. legislators and IP statutes do address policy concerns and public welfare concerns.<sup>19</sup> There are ongoing debates among them: Are IPRs private rights or a license or privilege received from the government and are IP laws private or public law? Some scholars, such as Smith, argue that patent law and copyright law can be implemented under public law rationales.<sup>20</sup> Some other scholars, such as Sichelman and Mossoff, argue that the U.S. IP laws, especially the patent law, are still private law in a broad-sense under the theories of New Private Law.<sup>21</sup> New Private Law suggests

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<sup>15</sup> See *Report of the Supreme People’s Court on Judicial Use of the Intellectual Property Guiding Cases*, PEKING U. INFORMATION WEBSITE, (April 9, 2018), <http://weekly.pkulaw.cn/Admin/Content/Static/f63a5a0c-7bc4-4029-8cf8-7117e23b7e4b.html>.

<sup>16</sup> See, e.g., CHERYL XIAONING LONG & JUN WANG, *Evaluating Patent Promotion Policies in China: Consequences for Patent Quantity and Quality*, ECONOMIC IMPACTS OF INTELLECTUAL PROPERTY-CONDITIONED GOVERNMENT INCENTIVES 235, 235–57 (2016) (introducing that the government designs various subsidy policies to induce patent applications).

<sup>17</sup> The SPC did not include any IP guiding cases in its publication of the guiding cases in June 2018. Among the twenty guiding cases published in 2018 and 2019, there was only one patent guiding case.

<sup>18</sup> See *infra* Part I. Section B.4.

<sup>19</sup> See e.g., Greg Reilly, *Congress’s Power to Define Patent Rights* (May 6, 2019), <http://www.law.msu.edu/ipic/workshop/2019/papers/reilly-power-patent-rights.pdf> (showing historical evidence that the U.S. courts are identical to Congress on patent issues, so it is regulatory that patents are treated as property rights or a policy tool to concern the public welfare).

<sup>20</sup> Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742 (Jun. 2007) (suggesting trademark and unfair competition are more like private law, but copyright and patent are more like public law).

<sup>21</sup> See generally Ted Sichelman, *Purging Patent Law of “Private Law” Remedies*, 92 TEXAS L. REV. 517 (2014) (criticizing that patent law cannot constitute conventional

that the courts are pragmatic to protect the interest of IP owners with considerations of the public interest and in cooperation with the government agencies.<sup>22</sup> Therefore, it is essential for this article to be the first paper systematically reviewing all the twenty-two IP guiding cases and exploring those same questions raised by U.S. legal scholars in the circumstance in China.

The IP guiding cases suggest that it is plausible to use New Private Law theories to explain IP laws in China due to the legislative purpose of benefiting the public welfare and the interactions between the judicial system and the government, which is similar as how the theories explain the U.S. IP laws.<sup>23</sup> Assigning injunctions to IP holders may only be formed over substance for IPRs, especially for patents.<sup>24</sup> The purpose of benefiting inventors to spur innovation is not a question dealt much by the judicial system, as suggested by the embedded design of the remedies in the guiding cases. Instead, it is a question turned over to the State Intellectual Property Office of China/China National Intellectual Property Administration” (SIPO/CNIPA),<sup>25</sup> the National Copyright Administration of China (NCAC), other government agencies, and the market. These government agencies issue various types of IPRs. The IPRs could be subsidized or funded by the government at different levels and simultaneously rewarded from the market.

When reviewing the IP guiding cases, this article follows the rationale of utilitarianism, which is to maximize the utilities of the parties on disputes and maximize the social welfare, to explain the judicial reasoning on IP issues in China. Part I introduces the trend of strengthening IP protection in China, which is a process from external to internal and needs “common-law precedents.” This part profiles the twenty-two guiding cases and explains the mechanism of the guiding case system. Part II takes the U.S. IP regime as a template to review the utilitarian theories of New Private Law in the approach of judicial system and government intervention. Part III overviews the guiding cases by comparing them with the U.S. IP laws and applies the utilitarian theories to evaluate the economic efficiency of IP laws and litigations shown in the IP guiding cases. Part IV reviews what subjects the courts adjudicating the guiding cases deferred to the government on IP issues and what the degree of the deference is. Part V is the implications, discussing the potential effect of the guiding cases on the judicial system and the

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private law but arguing that patent law is still within the scope of private law rather than public law); Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent “Privilege” in Historical Context*, 92 CORNELL L. REV. 953 (2007).

<sup>22</sup> See, e.g., Sichelman, *supra* note 21, at 524 (arguing the reward function of patents benefits the society as a whole).

<sup>23</sup> See *infra* Part III & IV.

<sup>24</sup> See *infra* Part III. Sec. B.2.

<sup>25</sup> The SIPO was renamed to China National Intellectual Property Administration (CNIPA) on 28 August 2018. *China: SIPO has been renamed to CNIPA*, EUROPEAN PATENT OFFICE, <https://www.epo.org/searching-for-patents/helpful-resources/asian/asia-updates/2018/20180905.html> (last visited June 24, 2019). In this article, “SIPO” refers to this government agency before the name change and “CNIPA” refers to it after the name change.

government based on a presumption that they are considered as “common-law” precedents.

## I. STRENGTHENING IP PROTECTION IN CHINA

Chinese IP laws and policies are frequently changing in the past 40 years.<sup>26</sup> At the beginning of the change, the reason was entirely exogenous that international treaties and the U.S. forced China to strengthen its IP protection. As the economy is growing, China has recognized the importance of IPRs and IP protection on innovation and economic growth. Both the central government and local governments consciously promulgate various policies and establish different mechanisms to stimulate the number of IPRs and to enhance IP enforcement. Section A in this part introduces the exogenous reasons for China to strengthen its IP protection. Section B introduces guiding cases as an instrument to improve IP protection under endogenous concerns.

### A. Exogenous Effects

Even though China has IP laws for a long history,<sup>27</sup> the modern IP regime has been established in the early 90s but was not seriously enforced until the recent ten years.<sup>28</sup> The IP regime keeps being reformed to strengthen IP protection. The amendments were first mainly transplanted from other countries for qualifying the membership requirements of the World Trade Organization (WTO) and for alleviating the concerns of the U.S., which frequently posed imminent threats of a trade war against China to improve its IP protection.<sup>29</sup>

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<sup>26</sup> See, e.g., Geoffrey T. Willard, *An Examination of China's Emerging Intellectual Property Regime: Historical Underpinnings, the Current System and Prospects for the Future*, 6 IND. INT'L & COMP. L. REV. 411, 422-427 (1996) (noting that law was amended or firstly enacted in the 1980s or the early 1990s to address the concerns over the protection of patents, copyrights, trademarks, and software); Naigen Zhang, *Intellectual Property Law Enforcement in China: Trade Issues, Policies and Practice*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 63, 73 (1997) (introducing that patent law, copyright law, and unfair competition law were implemented in the 1980s and the late 1990s in China under the trade pressure from the U.S.).

<sup>27</sup> See Willard, *supra* note 26, at 413-415 (showing that trademark law's concept appeared in China in the 1730s, but patent law and copyright law have shown up about 100 years).

<sup>28</sup> STATE INTELLECTUAL PROPERTY OFFICE OF THE P.R.C., THE KEY EXPLANATION OF THE NATIONAL IP CAREER DEVELOPMENT IN THE “TWELFTH FIVE-YEAR” PLAN (suggesting that local governments were pushed by the central government to strengthen IP protection).

<sup>29</sup> See *A Keynote Speech Delivered by Xi Jinping when Attending the Opening Ceremony of the First China International Import Expo*, XINHUANET (Nov. 5, 2018, 13:57 PM), [http://www.xinhuanet.com/world/2018-11/05/c\\_1123665163.htm](http://www.xinhuanet.com/world/2018-11/05/c_1123665163.htm) (predicting that a phase result of the 2018 US-China trade war suggests that China will adopt punitive damages in the IP regime very soon for responding the U.S. concerns of “IP theft”); He Xingqiang, *Disputes of Intellectual Property between China and the U.S. Since China Joined the WTO*,

## 1. Structuring an IP Regime under TRIPS

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) stipulates the minimum standards of IP protection and applies to all WTO members.<sup>30</sup> In the protocol on the accession to the WTO, China promised to comply with the TRIPS Agreement as other WTO members.<sup>31</sup> Under TRIPS, China and other member countries must establish a judicial system or administrative manners to protect IPRs.<sup>32</sup> These countries agree to apply national treatment to other members’ individuals or legal entities.<sup>33</sup> However, in the early stage of harmonizing IP laws as other developed countries, it was inevitable that the IP regime implementing TRIPS provided more enormous privileges to developed countries than domestic people in China.<sup>34</sup>

Without the TRIPS Agreement, on one side, developing countries would not have incentives to protect IPRs. They do not have many domestic inventions or creations that demand compensation through IP protection. For lack of pioneer inventors, the developing countries expect to be free riders of the inventions disclosed from the developed countries, enjoying the valuable knowledge in the public domain.<sup>35</sup> On the contrary, the level of IP protection required under TRIPS increased the transaction costs of innovation in the market of the developing countries.<sup>36</sup> Due to IP protection, the cost of knowledge is not free, and the bargaining costs in the market increase.<sup>37</sup> As

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2 U.S. STUD. 48, 48 (2008); Jiwen Chen, *Better Patent Law for International Commitment – The Amendment of Chinese Patent Law*, 2 RICH. J. GLOBAL L. & BUS. 61, 61 (2001); Massey, *supra* note 8, at 231; Rachel T. Wu, *Awaking the Sleeping Dragon: The Evolving Chinese Patent Law and Its Implications for Pharmaceutical Patents*, 34 FORDHAM INT’L L.J. 549, 549 (2011).

<sup>30</sup> Agreement on Trade Related Intellectual Property Rights, Apr. 15, 1994, 33 I.L.M. 1125 [hereinafter TRIPS Agreement] Art. 1.3; J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection under the TRIPS Component of the WTO Agreement*, 29 THE INT’L LAWYER 345, 345-346 (1995).

<sup>31</sup> The World Trade Organization, Accession of the People's Republic of China, WT/L/432 (Nov. 23, 2001).

<sup>32</sup> TRIPS Agreement art. 63.

<sup>33</sup> TRIPS Agreement art. 1.3.

<sup>34</sup> WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION*, 71-71 (1995) (explaining that foreigners would receive higher legal privilege than local Chinese because of the stage of economic development in China).

<sup>35</sup> See generally J.H. Reichman, *From Free Riders to Fair Followers: Global Competition Under the TRIPS Agreement*, 29 INT’L L. & POLITICS 11 (1996).

<sup>36</sup> See SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* 8 (2003).

<sup>37</sup> *Id.*; Joseph E. Stiglitz, *Economic Foundations of Intellectual Property Rights*, 57 DUKE L.J. 1693, 1694 (2008) (“TRIPS might make access to knowledge more difficult—and thus make closing the knowledge gap, and development more generally, more difficult...TRIPS attempted (successfully) to restrict access to generic medicines, putting these drugs out of the financial reach of most in the developing countries.”).



a result, IPRs increase the burden of the consumers to be consequently a tragedy for the developing countries.

On the other side, inventors from developed countries would not have incentives to enter the markets of developing countries for lacking any exclusive rights over their inventions.<sup>38</sup> Inventors are vulnerable in front of counterfeiting, piracy, and patent infringement in a country having weak IP protection.<sup>39</sup> China produces and exports mass counterfeit and pirated goods to the world,<sup>40</sup> which deters the trade of high-tech products exported from developed countries.<sup>41</sup> Forcing China and other member countries to establish a forceful IP regime, the TRIPS provisions guide them to exchange their markets with the high-tech products.<sup>42</sup>

Compared to the TRIPS Agreement, other international agreements or treaties with respect to IP that China had signed are limited to induce China to implement solid IP protection. For instance, before joining the WTO in 2001<sup>43</sup> under the administration of Deng Xiaoping to initiate international trade with other countries and the administration after him,<sup>44</sup> China signed the Berne Convention in 1992 of providing copyright protection,<sup>45</sup> the Paris Convention in 1985 for protecting patent protection and trademark

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<sup>38</sup> Stiglitz, *supra* note 37, at 1696 (“The [IP regime’s] intent is to provide incentives to innovate by allowing innovators to restrict the use of the knowledge they produce by allowing the imposition of charges on the use of that knowledge, thereby obtaining a return on their investment.”).

<sup>39</sup> See, e.g., Bryan Mercurio, *The Protection and Enforcement of Intellectual Property in China since Accession to the WTO: Progress and Retreat*, Chinese Perspectives, 24 (March 30, 2012), <http://journals.openedition.org/chinaperspectives/5795> (discussing harms of counterfeiting, piracy, and patent infringement in exports of innovative products from the U.S.).

<sup>40</sup> See, e.g., *id.* (showing the data that China is the primary producer of counterfeit and pirated goods in the U.S.). See, e.g., Karsten Olsen, *Counterfeiting and Piracy: Measurement Issues: Background report for the WIPO/OECD Expert Meeting on Measurement and Statistical Issues Geneva, 17-18 October 2005*, <http://www.oecd.org/sti/ind/35651123.pdf> (last visited April 12, 2019) (showing the statistics that pirated software produced in China resulted in over 2.5 billion U.S. dollars loss in trade between 2003 and 2004, higher than the loss caused by other countries).

<sup>41</sup> See e.g., Daniel C. K. Chow, *Counterfeiting in the People’s Republic of China*, 78 WASH. U. L. Q. 1, 11-12 (2000) (explaining that brand holders worry if counterfeiting in China harms their global brands so as to avoid entering the Chinese market).

<sup>42</sup> See J.H. Reichman, *supra* note 30, at 346-347 (introducing that a rationale of TRIPS is an exchange between high-tech products and market access to developing countries).

<sup>43</sup> World Trade Organization, *Accession of the People’s Republic of China*, WT/L/432 (Nov. 23, 2001).

<sup>44</sup> See Willard, *supra* note 26, at 420-421 (noting that President Deng Xiaoping pushed the economic development with reformed international trade policies).

<sup>45</sup> World Intellectual Property Organization, *Berne Notification No. 140: Berne Convention for the Protection of Literary and Artistic Works - Accession by the People’s Republic of China* (July 15, 1992).

protection,<sup>46</sup> and the WIPO Convention in 1980 for joining the WIPO.<sup>47</sup> The WIPO in *prima facie* is the institution bringing the issues of unfair competition and monopoly to China and other developing countries under the category of IP. The WIPO manipulates that “intellectual property shall include the rights relating to...protection against unfair competition”<sup>48</sup> and developing countries can take the benefit to moderate intrusive monopoly power owned by the inventors from the developed countries.<sup>49</sup> However, the developing countries have weak bargaining power in the TRIPS Agreement and limited power to influence back to the developed countries.<sup>50</sup> From their perspective, the benefits cannot offset the overall costs that they agreed to bear.<sup>51</sup> Thus, when the developed countries started providing copyright protection to software in the 1980s, the forced developing countries, including China, were reluctant to enforce strong protection to software copyrights.<sup>52</sup>

More importantly, the WTO can force countries to strengthen judicial or administrative procedures to enforce the TRIPS Agreement at the country level.<sup>53</sup> Those individual treaties do not have a dispute resolution mechanism to enforce the implementation of the treaties like TRIPS, which initiates dispute resolution procedures through the WTO’s dispute settlement procedures.<sup>54</sup> After China joined the WTO, there is gradually an increasing

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<sup>46</sup> World Intellectual Property Organization, *Paris Notification No. 114: Paris Convention for the Protection of Industrial Property - Accession by the People's Republic of China* (Dec. 19, 1984).

<sup>47</sup> World Intellectual Property Organization, *China's IP Journey*, WIPO Magazine (Dec. 2010), [https://www.wipo.int/wipo\\_magazine/en/2010/06/article\\_0010.html](https://www.wipo.int/wipo_magazine/en/2010/06/article_0010.html) (indicating that China joined WIPO in June 1980). *See also*, Zhang, *supra* note 26, at 73 (noting that China signed the Convention Establishing the WIPO in 1980).

<sup>48</sup> Convention Establishing the World Intellectual Property Organization art.2, July 14, 1967, 21 U.S.T. 1770, 828 U.N.T.S. 3 (July 14, 1967).

<sup>49</sup> SELL, *supra* note 36, at 13.

<sup>50</sup> The “Proposal Regarding Developing Countries to the Berne Convention for the Protection of Literary and Artistic Works in 1967,” the treaties about copyrights to benefit the developing countries, was only adopted by developing countries. *See* Eric Schwartz, *An Overview of the International Treatment of Exceptions*, in PIJIP RESEARCH PAPER, 9-10 (2014); Zheng Chengsi, *What Intellectual Property Strategies Does China Need?*, ECON. INFO. DAILY, April 17, 2004, <http://www.china.com.cn/chinese/OP-c/547545.htm>.

<sup>51</sup> *See* Schwartz *supra* note 50, at 1&13.

<sup>52</sup> Carlos Primo Braga, *Pharmaceuticals and Chemicals; Information; The Audio, Video, and Publishing Industries*, in STRENGTHENING PROTECTION OF INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES: A SURVEY OF THE LITERATURE 47, 52-57 (1990) (introducing the history of how many developing countries gradually accepted software protection after the developed countries first introduced copyright protection for software programs).

<sup>53</sup> *See* J. G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT 233-236 (4th, 2005) (introducing the strong effect of the Dispute Settlement Understanding and other the WTO provisions on national level’s law and judicial or other procedures).

<sup>54</sup> TRIPS Agreement art. 63-64; *See* Leah Granger, *Explaining the Broad-Based Support for WTO Adjudication*, 24 BERKELEY J. INT’L L. 521, 524 (2006) (suggesting that the WTO’s dispute settlement system could cure the failures of the General Agreement on Tariffs and Trade (GATT) dispute settlement system). The dispute settlement system of GATT can be treated as a predecessor of WTO’s dispute settlement system. *See* Kennan J.

number of IP disputes against China filed by the U.S. through the WTO after the first three years.<sup>55</sup>

## 2. Trade Pressures from the U.S.

The TRIPS Agreement is merely the shell of the instrument of forcing China to strengthen its IP protection. The core of the instrument is the constant trade or political pressures from the U.S. The amendments of IP laws in China that followed the requirements of the TRIPS Agreement were shaped to a regime similar to the U.S. because even though TRIPS was administered by WTO, it was bargained by a U.S.-based Intellectual Property Committee (IPC).<sup>56</sup> Having those U.S. members in the IPC, the U.S. employed TRIPS as a trade-based strategy to expand the market power of its domestic controllers of capital and technologies and serve their interests, even though some scholars argue that the ideas in TRIPS indeed contribute to the global welfare.<sup>57</sup>

The U.S. is one of the markets in the world impaired by counterfeit, pirated, or patent infringing goods from China pre- and post-TRIPS enforcement.<sup>58</sup> In the late 1980s, the U.S. had a rapidly increasing trade deficit with China, some reasons of which were counterfeiting and piracy issues in China.<sup>59</sup> The high trade deficit incentivized the U.S. to negotiate and sign four bilateral agreements on strengthening IP protection with China before China joined the WTO.<sup>60</sup> These agreements were successfully

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Castel-Fodor, *Providing a Release Valve: The U.S.-China Experience with the WTO Dispute Settlement System*, 64 CASE W. RES. L. REV. 201, 207 (2013) ("The [Dispute Settlement Body] was designed to remedy a number of the weaknesses and failures of its predecessor, the General Agreement on Tariffs and Trade's (GATT) dispute settlement system.").

<sup>55</sup> See, e.g., Donald P. Harris, *The Honeymoon Is Over: The U.S.-China WTO Intellectual Property Complaint*, 32 FORDHAM INT'L J. 96, 113-119 (2008) (analyzing the complaints that the U.S. filed against China in the WTO); Castel-Fodor, *supra* note 54, at 211-215 (introducing that the first three years were no disputes filed against China and more disputes were gradually accumulated as time was going).

<sup>56</sup> SELL, *supra* note 36, at 13 (introducing the components of the IPC, which involved thirteen large U.S. companies).

<sup>57</sup> Jessica D. Liman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 280-281 (1989); Keith Maskus, *Normative Concerns in the International Protection of Intellectual Property Rights*, 14 WORLD ECON. 403 (1991); Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265, 267-271 (1977); Mark A. Lemley, *The Economics of Improving in Intellectual Property Law*, 75 TEXAS L. REV. 989, 1004 (1997).

<sup>58</sup> See, e.g., Bryan Mercurio, *The Protection and Enforcement of Intellectual Property in China since Accession to the WTO: Progress and Retreat*, Chinese Perspectives 24 (March 30, 2012), <http://journals.openedition.org/chin perspectives/5795>.

<sup>59</sup> See Massey, *supra* note 8, at 233 ("US industry losses from Chinese intellectual property piracy mounted ominously, and access to the Chinese market remained difficult, further reinforcing the concern that China might become a new threat to American business and technology.").

<sup>60</sup> See *id.*, at 232-235 (discussing the process of the negotiations for the four bilateral IPR agreements in 1989, 1992, 1995, and 1996).

achieved by giving China pressures on Sec. 301 actions or investigations empowered by the Office of the United States Trade Representative (USTR), challenges on China’s path joining the WTO, and threats of punitive tariffs.<sup>61</sup> However, after joining the WTO, the concerns over counterfeiting, piracy, and patent infringement were not only remaining but also increasing for years.<sup>62</sup> According to the reports from the OECD, for instance, mainland China exported an increased number of counterfeit products to Europe during 2011 and 2012.<sup>63</sup> Besides the counterfeit products worth about tens of millions of dollars annually seized by the China Custom, the U.S. seized \$205 million counterfeit products at suggested retail price in 2009,<sup>64</sup> which increased to \$953.2 million on average between 2011 and 2014.<sup>65</sup>

Regardless of how China implements or agrees to implement the TRIPS Agreement and other agreements with the U.S. to revise IP statutes for strengthening IP protection, the government of China was passive to enforce the statutory laws for economic reasons.<sup>66</sup> On the interests of inventors, IPRs are exclusive rights to prevent others from using the right owner’s inventions, creations, or marks (*i.e.*, property rule and reward theory), or expect others to license their IPRs (*i.e.*, liability rule and prospect theory) so as to incentivize individuals or entities to invent or create further.<sup>67</sup> However, the local public interest in the U.S. and other developed countries

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<sup>61</sup> See Harris, *supra* note 55, at 106-107 (discussing the pressures that the U.S. gave to China in the negotiations of the 1992 and 1995 agreements on IP protection between the U.S. and China).

<sup>62</sup> Two third of counterfeit products were exported by mainland China between 2007 and 2014. See UNITED NATIONS OFFICE ON DRUGS AND CRIME, THE GLOBALIZATION OF CRIME: A TRANSNATIONAL ORGANIZED CRIME THREAT ASSESSMENT, 177 (2010) (“In 2008, the World Customs Organization, reporting on data collected from 121 countries, found that 65% of the total of counterfeit shipments detected departed from mainland China”). See also GLOBAL INTELLECTUAL PROPERTY CENTER – U.S. CHAMBERS OF COMMERCE, MEASURING THE MAGNITUDE OF GLOBAL COUNTERFEITING CREATION OF A CONTEMPORARY GLOBAL MEASURE OF PHYSICAL COUNTERFEITING, 3 (2016) (noting that 72% counterfeit products seized in the U.S. the E.U. and Japan were exported by China between 2010 and 2014).

<sup>63</sup> The Organization for Economic Co-operation and Development is abbreviated as OECD. See OECD/EUIPO, TRADE IN COUNTERFEIT AND PIRATED GOODS: MAPPING THE ECONOMIC IMPACT, 109 (2016).

<sup>64</sup> UNITED NATIONS OFFICE ON DRUGS AND CRIME, THE GLOBALIZATION OF CRIME: A TRANSNATIONAL ORGANIZED CRIME THREAT ASSESSMENT, 176-177 (2010).

<sup>65</sup> GLOBAL INTELLECTUAL PROPERTY CENTER – U.S. CHAMBERS OF COMMERCE, MEASURING THE MAGNITUDE OF GLOBAL COUNTERFEITING CREATION OF A CONTEMPORARY GLOBAL MEASURE OF PHYSICAL COUNTERFEITING, 16 (2016). The number decreased to \$616.88 million in 2016 and \$554.63 million in 2017, Homeland Security, *Intellectual Property Rights Seizure Statistics Fiscal Year 2017*, 14, <https://www.cbp.gov/sites/default/files/assets/documents/2018-Feb/trade-fy2017-ipr-seizures.pdf> (last visited Apr. 13, 2019).

<sup>66</sup> See Massey, *supra* note 8, at 235-236 (emphasizing that the main problem of IP protection in China after TRIPS is law enforcement).

<sup>67</sup> Adam Mossoff, *Exclusion and Exclusive Use in Patent Law*, 22 HARV. J.L. & TECH. 1, 7 (2009); Stacey L. Dogan & Mark Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 Hous. L. Rev. 777, 778 (2004).

cannot represent the global public welfare and could even conflict to the public interest of developing countries.<sup>68</sup> For instance, the amendments of the Chinese IP statutes in the early 1990s to follow the design of the U.S. regime<sup>69</sup> did not serve the public interest of China because of the increased transaction costs, but rather served the interest-group of the inventors from the developed countries, such as the U.S. and Japan. Recalling U.S. copyright history in the 18th and early 19th centuries, the federal system also enforced weak copyright protection for its static inefficiency, similarly as those developing countries.<sup>70</sup> Static inefficiency is a problem that most countries have to face in their different stages of economic development.<sup>71</sup>

Therefore, U.S. scholars and political negotiators heavily criticize Chinese IP policies and the judicial system for IP law enforcement after the TRIPS enforcement because they have noticed that the IP issues on counterfeiting, piracy, and patent infringement remained after China amended its statutes according to the international agreements and treaties. Before the TRIPS enforcement, the negotiations on IP protection between the U.S. and China were forcing and instructing China to construct an IP regime.<sup>72</sup> After the TRIPS enforcement for a long time, scholars just point out that there was no enforcement.<sup>73</sup> Massey notices that the problem of weak IP protection in China was that Chinese IP policies conflicted with the U.S. interests.<sup>74</sup> Harris and other scholars expect that further negotiations on IP protection between the U.S. and China should address judicial enforcement.<sup>75</sup>

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<sup>68</sup> See generally Stiglitz, *supra* note 37 (explaining the intent of IP protection and its conflicts with the interest of the developing countries in innovation, health problems, and economic growth).

<sup>69</sup> He Xingqiang, *supra* note 29, at 51; Massey, *supra* note 8, at 234-236.

<sup>70</sup> LAWRENCE W. FRIEDMAN, *A HISTORY OF AMERICAN LAW 187-188* (3rd ed. 2005).

<sup>71</sup> Knowledge is indicated as a public good in terms of static inefficiency. Stiglitz, *supra* note 37, at 1699 (explaining the theory of static inefficiency); DANIEL C.K. CHOW & EDWARD LEE, *INTERNATIONAL INTELLECTUAL PROPERTY: PROBLEMS, CASES, AND MATERIALS*, 777 (noting that commercial piracy appears in most countries when they reach a certain stage of economic development and the U.S. was the leading pirate nation of the day in the 19th century).

<sup>72</sup> See, e.g., Massey, *supra* note 8, at 233 (indicating that the primary goal in the 1986 negotiation between the U.S. and China was to ask China to establish the legal foundations for IP protection and to join international IP protection treaties, such as Berne Convention).

<sup>73</sup> Bryan Mercurio, *The Protection and Enforcement of Intellectual Property in China since Accession to the WTO: Progress and Retreat*, Chinese Perspectives, 25-26 (March 30, 2012), <http://journals.openedition.org/chin perspectives/5795> (“The enforcement of [IP] laws and regulations... is lacking.”).

<sup>74</sup> E.g., Massey, *supra* note 8, at 233 (criticizing that piracy issues were tolerated for government procurement).

<sup>75</sup> See Harris, *supra* note 55, at 100 (expecting a solution to the IP protection problems that the U.S. could acquire extra-judicial concessions from China through WTO negotiations); DORIS E. LONG & ANTHONY D'AMATO, *A COURSEBOOK IN INTERNATIONAL INTELLECTUAL PROPERTY* 578 (2000) (highlighting the problem of judicial enforcement issue of IP protection in China).

### *B. Internalize IPRs through the Guiding Cases*

As the market and technology are developing in China, the Chinese government has realized that the static inefficiency of IPRs is not that problematic. Moreover, the inducement cost of IPRs<sup>76</sup> and the increased transaction costs for the increased number of monopoly rights<sup>77</sup> were overestimated because China increasingly enjoys the welfare brought by IPRs. The nature of IPRs or the intent to protect IPRs is not necessary to create barriers to prevent further innovation.<sup>78</sup> For inducing domestic innovation through IPRs, the government started designing policies to spur domestic IP applications and registrations in the late 1990s and early 2000s.<sup>79</sup> Meanwhile, Chinese IP laws were voluntarily further amended to strengthen IP protection since the early 2000s.<sup>80</sup> The interest group benefited from solid IP protection turns to be domestic inventors in addition to the pioneer inventors from the developed countries when China has the highest patent filings and is emerging as an essential originator of patent activities in recent years.<sup>81</sup> On its path strengthening IP protection, the IP guiding cases are one of the instruments to internalize IPRs in the judicial mechanism. This section overviews the background of the guiding case system and introduces the importance of the guiding cases to the IP legal regimes (*i.e.*, courts and the government).

#### 1. A Demand for Precedential Law in the IP Regime

The IP law system composed of statutes was limited dynamic in China. The system is increasingly dynamic because the IP statutes are frequently amended and supplemented by an increasing number of judicial interpretations.<sup>82</sup> Moreover, the national IP regulations followed by the

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<sup>76</sup> See Stiglitz, *supra* note 37, at 1699.

<sup>77</sup> Overprivatization increases transaction costs in the market and results in inefficiency. See generally Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968); Michael Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Market*, 111 *HARV. L. REV.* 621 (1998).

<sup>78</sup> See Linda R. Cohen & Roger G. Noll, *Intellectual Property, Antitrust and the New Economy*, 62 *U. PITT. L. REV.* 453, 462 (2001).

<sup>79</sup> The earliest and trial patent subsidy policy was implemented by Shanghai government in 1999. Beijing government implemented similar policies in 2003. See, e.g., Runhua Wang & Jay Kesan, *How Do Patent Subsidies Drive Patenting by SMEs?* 6 (2019). See generally Dang Jianwei & Kazuyuki Motohashi, *Patent Statistics: A Good Indicator for Innovation in China? Patent Subsidy Program Impacts on Patent Quality*, 35 *CHINA ECON. REV.* 137 (2015) (introducing the success and failures of the patent subsidy regime in encouraging patent applications).

<sup>80</sup> See Chen, *supra* note 29, at 61; Wu, *supra* note 29, at 551; Massey, *supra* note 8, at 237.

<sup>81</sup> See WIPO, *WORLD INTELLECTUAL PROPERTY INDICATORS* (2015).

<sup>82</sup> For example, there are four volumes of judicial interpretations to deal with patent infringement and preliminary injunctions for patent infringement, released by the SPC between 2015 and 2016. Moreover, Patent Law is recently amended in 2018. Song Yan, *State Council Executive Meeting Has Set These Three Major Events on Today*, CHINA GOV. (Dec.



courts are frequently adjusted. Chinese judges, including the SPC judges, are in deference to the Communist Party.<sup>83</sup> The central government of the Communist Party makes Five-Year Plans approved by the National People’s Congress (NPC). The idea of IP protection was initially raised in the Eighth Five-Year Plan (1991-1995)<sup>84</sup> when China was under the pressure of international trade from the U.S. and the WTO. The following Five-Year Plans strengthen this idea and provide more details on strengthening IP protection.<sup>85</sup>

China has an imminent demand for an economically efficient IP law system due to the increasing number of IP disputes.<sup>86</sup> Without any judicial precedents to guide the courts, the limited dynamic regulatory mechanism aggravates adjudicative inconsistency.<sup>87</sup> Both the eligibility of IPRs and the enforcement of IPRs share the same legal sources of statutes, judicial interpretations, and regulations. These legal sources are too vague to promote the settlements of IP disputes efficiently.<sup>88</sup> The guiding case system was established to prepare for implementing the potential Twelve Five-Year Plan (2011-2015)<sup>89</sup> and could be a tool to improve both judicial and administrative efficiency in IP.

## 2. The Guiding Case System

The guiding case system was established in 2010, and the compilation of guiding cases is a process of referral, selection, and complication, led by the SPC and participated by the whole society.<sup>90</sup> All levels of courts can

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5, 2018, 22:29 PM), [http://www.gov.cn/guowuyuan/2018-12/05/content\\_5346097.htm](http://www.gov.cn/guowuyuan/2018-12/05/content_5346097.htm).

<sup>83</sup> See Jia, *supra* note 10, at 2216; Bjorn Ahl, *Retaining Judicial Professionalism: The New Case Guiding Mechanism of the Supreme People’s Court*, 217 CHINA Q. 121, 124-125 (2014).

<sup>84</sup> Outline of the Eighth-Five-Year Plan for the National Economic and Social Development of the People’s Republic of China (promulgated by the 1991 Nat’l People’s Cong.) (China).

<sup>85</sup> *I.e.*, The Ninth-Five-Year Plan of the People’s Republic of China on National Economy and Social Development and Outlines of Objectives in Perspective of the Year 2010 (promulgated by the 1996 Nat’l People’s Cong.) (China) (stating that counterfeiting is entitled to criminal sanctions).

<sup>86</sup> Brian J. Love, *Patent Litigation in China: Protecting Rights or the Local Economy?* 18 VANDERBILT J. ENT. & TECH. L. 713 (2015-2016) (showing the data that the proportion of the patents involved in disputes is increasing in China).

<sup>87</sup> See *supra* Section I.B.2.

<sup>88</sup> See *id.*; See also Huang Yaying, *Preliminary Review of the Problems of Constructing the Case Guidance System in China*, 1 COMPARATIVE LEGAL STUDIES 2, 7 (2012) (criticizing the vagueness of statutory law in China); R.C. VAN CAENEGEM, *THE BIRTH OF THE ENGLISH COMMON LAW* (1973).

<sup>89</sup> Gao Tao & Cao Shouye, *Adhere to the Concept of Active Justice and Exploring the Case Guidance System*, PEOPLE’S COURT NEWS, Dec. 29, 2010, at 08; See also Introduction to the Outline of the 12th Five Year (promulgated by the 11th Nat’l People’s Cong., Mar. 2011) (China).

<sup>90</sup> Provisions of the Supreme People’s Court Concerning Work on Case Guidance (promulgated by Adjudication Comm. Sup. People’s Ct., Nov. 15, 2010, effective Nov. 26, 2010) June 12, 2015 (China); The first set of guiding cases were published in 2011. Notice

directly or indirectly refer cases that are adjudicated by them to the SPC.<sup>91</sup> Moreover, lawyers, scholars, delegates of all levels of People’s Congress, and people who are curious about law and law enforcement are eligible to refer cases to the courts for further referrals.<sup>92</sup> After the Case Guidance Office of the SPC reviews and comments on the guiding case candidates from itself or the inferior courts, the Judicial Committee of the SPC will discuss the guiding case candidates and confirm that some of these case candidates are selected as guiding cases, which will be compiled and published by the SPC in its announcements.<sup>93</sup> Guiding cases, in principle, are selected among representative cases that are with widespread attention from the society, dealing with complex or new issues that could involve vague or ambiguous statutes and judicial interpretations promulgated by the SPC or the SPP (Supreme People’s Procuratorate).<sup>94</sup> The conditions for selected guiding cases, in detail, include: “(1) the subject matter is of broad concern to the public; (2) the relevant legislation provides only general principles; (3) it is of a typical nature; (4) the case is difficult, complicated or new; and (5) other cases have a guiding effect.”<sup>95</sup>

These conditions make the guiding case system similar to judicial precedents in a common-law system. In the development of principles for statutory interpretation, the U.S. judicial experience suggests that social needs and changes in societal conditions are more important than history and policies.<sup>96</sup> Similar to how a common-law system benefits from “the justice value of the evolutive perspective” in statutory interpretation,<sup>97</sup> the guiding case system is a mechanism to appreciate the value of justice against obscure and antiquated statutes.<sup>98</sup> Moreover, it is also charged with a common-law function of “solving new problems.”<sup>99</sup> Based on those selection conditions and the characteristics of common-law precedents, IP cases were frequently

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of the Supreme People’s Court on Issuing the First Set of Guiding Cases (promulgated by Sup. People’s Ct., effective Dec. 20, 2011) Dec. 20, 2011(China).

<sup>91</sup> The High People’s Courts and Military Courts can directly submit cases to the SPC. Inferior courts can submit cases to the High People’s Courts level-by-level and the High People’s Courts will select among the cases and submit to the SPC. *See id.*

<sup>92</sup> *See* Huang Yaying, *supra* note 88, at 5 (introducing the procedures for selecting guiding cases).

<sup>93</sup> Zhou Daoluan, *Establishing the Case Guidance System Suiting China’s Own National Conditions*, 4 J. OF XIANGTAN U. PHIL. & SOC. SCI. 28 (2013).

<sup>94</sup> Provisions of the Supreme People’s Court Concerning Work on Case Guidance (promulgated by Adjudication Comm. Sup. People’s Ct., Nov. 15, 2010, effective Nov. 26, 2010) June 12, 2015, art. 2 (China); *See* Huang Yaying, *supra* note 88, at 4-5.

<sup>95</sup> Jiang Xiaoyi & Shao Ling, *The Guiding Case System in China*, 1 CHINA LEGAL SCI. 106, 117 (2013).

<sup>96</sup> William N. Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1494 (1987).

<sup>97</sup> *Id.*

<sup>98</sup> Statutory laws reflect public opinion, social function, and state interest in the past. *See* Thomas Mackay Cooper, *The Common and the Civil Law-A Scot’s View*, 63 HARV. L. REV. 468, 474 (1950).

<sup>99</sup> Frank H. Easterbrook, *Statute’s Domains*, 50 U. CHI. L. REV. 533, 545 (1983).



selected and compiled as guiding cases since the guiding case system was established in 2010.<sup>100</sup>

### 3. The Purpose of Guidance

One main problem that China’s guiding case system is designed to solve is adjudicative inconsistency.<sup>101</sup> The root cause of adjudicative inconsistency in China is that statutory laws are sketchy.<sup>102</sup> Even though judges have broad statutory discretion in this mechanism,<sup>103</sup> it is nevertheless deficient that the SPC supplements statutory law with judicial interpretation, drafted in abstract norms.<sup>104</sup> The deficiency and vagueness of statutory law result in diverse court decisions.<sup>105</sup> Therefore, Chinese scholars and judges acknowledge many benefits of adopting guiding cases and the guiding case system, such as bridging gaps and resolving conflicts in statutory law,<sup>106</sup> decreasing litigations, and formalizing norms of judicial conducts into the courts and society.<sup>107</sup> Guiding cases as an information source for Chinese judges and government agencies at least can function as a useful tool to decrease the costs of statutory interpretation.<sup>108</sup>

Before the guiding case system was established, the SPC had provided judicial interpretations.<sup>109</sup> The term of judicial interpretation is applied in a broad sense, including but not limited to any opinions, explanations, or other documents that the SPC or SPP promulgates to specify

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<sup>100</sup> Notice of the Supreme People’s Court on Issuing the First Set of Guiding Cases (promulgated by Sup. People’s Ct., effective Dec. 20, 2011) Dec. 20, 2011 (China).

<sup>101</sup> See Kang Weimin Jr., *Self-Perfection of the Judiciary with Socialism in Chinese Characteristics*, 8 LAW APPLICATION 2 (2011).

<sup>102</sup> Huang Yaying, *supra* note 88, at 7.

<sup>103</sup> Hu Yunteng & Yu Tongzhi, *The Studies on the Key Complex and Arguable Problems of the Case Guidance System*, 6 LEGAL STUDIES 3, 18 (2008); Zhang Zhiming, *The Basic Understanding of Establishing a Case Guidance System in China*, LEGAL DAILY, Jan. 5, 2011, at 87.

<sup>104</sup> *See id.*

<sup>105</sup> *See id.*; See also Kang Weimin Jr., *supra* note 101, at 3-5 (explaining the function of guiding cases to guidance inferior courts).

<sup>106</sup> *Id.*; See Jia, *supra* note 10, at 2231; Jinting Deng, *A Functional Analysis of China’s Guiding Cases*, 14 CHINA INT’L. J. 1, at 6 (2016); Zhang Qi, *On the Necessity and Legitimacy of Transforming China Case Guiding System to Judicial Precedent System*, 5 COMPARATIVE LEGAL STUDIES 131, at 133 (2017).

<sup>107</sup> See Zhang Qi, *supra* note 106, at 143 (listing several expected goals of the judicial system achieved by guiding cases); See also Bao Yu, *Correctly Understand and Enlarge the Effects of the Case Guidance System with Chinese Characteristics*, 13 PEOPLE’S JUDICATURE 54 (2011).

<sup>108</sup> Precedents are a useful source of information to decrease judicial costs in statutory interpretation. See Easterbrook, *supra* note 99, at 551; See also Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHICAGO L. REV. 263, 274 (Spring, 1982).

<sup>109</sup> Organic Law of the People’s Courts (promulgated by the Nat’l People’s Cong., July 1, 1979, effective Jan. 1, 2007) 2006 STANDING COMM. NAT’L PEOPLE’S CONG. art 33 (China).

rules.<sup>110</sup> They are induced by particular cases and can be broadly “binding” to “all similar cases.”<sup>111</sup> These judicial interpretations are distinguished from the judicial interpretations in France, which are made for concrete cases or specific issues and restrictedly applied.<sup>112</sup> The accumulated judicial interpretations are an information source for legislators, so some statutes, such as the Criminal Law, the Civil Law, the Economic Contract, and the Trademark Law, have been promulgated or modified indirectly under the impact of judicial interpretations and the particular cases inducing the judicial interpretations.<sup>113</sup>

As a type of legal document edited and provided by the SPC, guiding cases can be treated as judicial interpretations in a broad sense.<sup>114</sup> First, the SPC requires that Chinese courts “shall refer to guiding cases in the adjudication of similar cases” when the guiding case system was established.<sup>115</sup> The SPC released detailed rules, regulating that “when adjudicating a similar case, [courts at any level] should quote the Guiding Case as a reason for its adjudication.”<sup>116</sup> Judge Guo Feng in the SPC’s Case Guidance Office explains that guiding cases are “*de facto* binding.”<sup>117</sup> Second, the SPC believes that the guiding cases are concrete to instruct all the courts uniformly.<sup>118</sup> Chinese courts at any level mandatorily train judges to learn, understand, and apply the guiding cases.<sup>119</sup>

#### 4. The Compilation of the IP Guiding Cases

Among the 112 guiding cases in total, twenty-two guiding cases (19.64%) dealt with IP-related issues as innovation and IP is increasingly

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<sup>110</sup> See Chenguang Wang, *Law-Making Functions of the Chinese Courts: Judicial Activism in a Country of Rapid Social Changes*, 4 FRONT. L. CHINA 524, 537-544 (2006).

<sup>111</sup> *Id.* at 535.

<sup>112</sup> See JEAN CARBONNIER, *Authorities in Civil Law: France, the Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions*, in THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND IN MIXED JURISDICTIONS 96, 98 (Joseph Dainow eds., 1974).

<sup>113</sup> This is expectation proposed by many Chinese scholars. See Hong Hao, *A Study on Creative Judicial Civil Legal Interpretations*, 6 CHINA LEGAL SCIENCE 121 (2005); Zhou Daoluan, *A Discussion of the Work of Judicial Interpretation in New China*, 5 L. APPLICATION 7 (1994); Wu Yingzi, *On the Abnormal Functioning of Civil Procedural Law*, 4 CHINA LEGAL SCI. 144 (2007).

<sup>114</sup> Wang, *supra* note 110, at 537-544.

<sup>115</sup> Notice of the Supreme People's Court on Issuing the Provisions on Case Guidance (promulgated by the Sup. People's Ct., Nov. 15, 2010, Nov. 15, 2010) 2010, art. 9 (China).

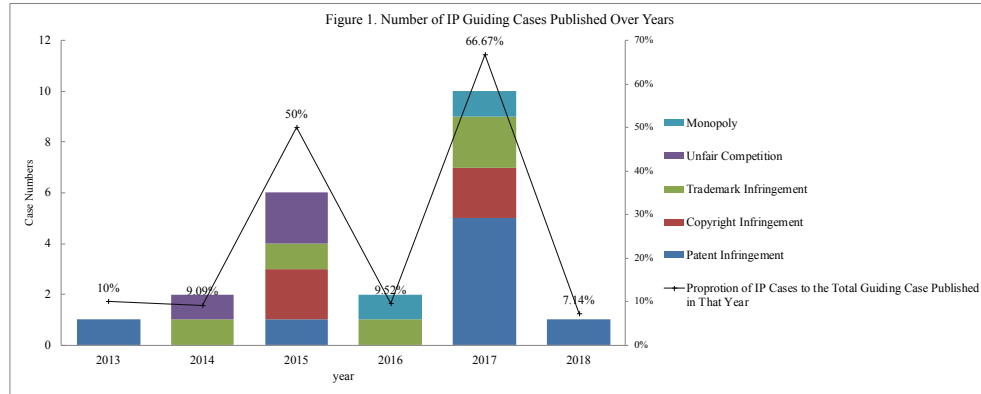
<sup>116</sup> Detailed Rules for the Implementation of the Provisions of the Supreme People's Court on Case Guidance (promulgated by the Adjudication Comm. Sup. People's Ct., April 27) 2015, art. 10 (China).

<sup>117</sup> Guo Feng Jr., *supra* note 14.

<sup>118</sup> See Kang Weimin Jr., *supra* note 101, at 3.

<sup>119</sup> See Fengping Gao, *China's Guiding Cases System as the Instrument to Improve China's Case Guidance System, Which Includes Both Guiding Cases and Typical Cases*, 43 INT'L J. LEGAL INFO. 230, 235 (2017) (introducing how guiding cases are instructive in the mandatory training process).

critical to the economic development and business activities in China.<sup>120</sup> Figure 1 presents the timeline of the number and categories of IP guiding cases published between 2013 and 2018 and the proportion of the IP guiding cases to the total number of guiding cases published in each year.



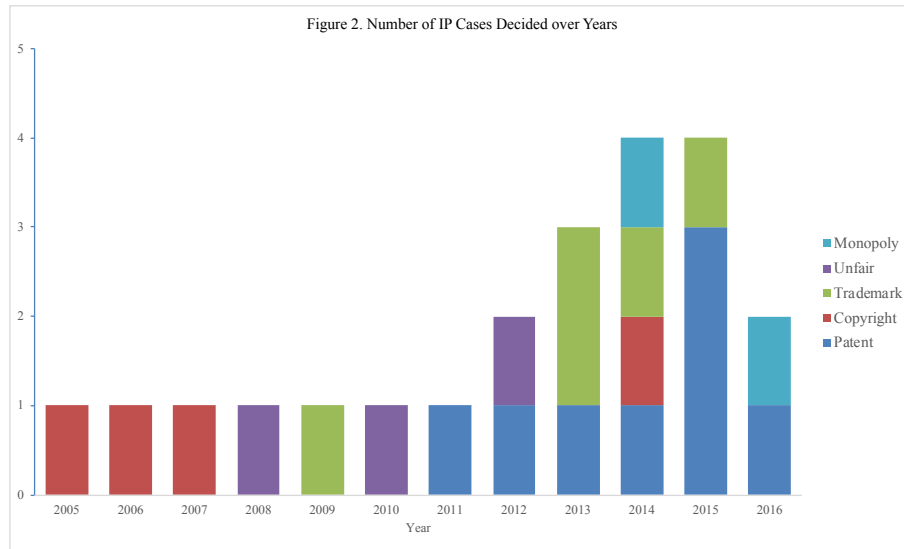
While the SPC published the first series of guiding cases in 2011, the first IP guiding case, a dispute over patent infringement, was not published until 2013, taking 10% of the total guiding cases published in 2013. Between 2014 and 2017, the SPC published at least two IP guiding cases in each year, taking about at least 9.09% of the total guiding cases published in the ongoing year. This number of publishing guiding cases raised to a maximum of ten in 2017 when 66.67% of the most recently published guiding cases were about IP issues, but decreased to a minimum of one in 2018.

The SPC steadily published one to two trademark guiding cases every year between 2014 and 2017. So was the publication frequency for the guiding cases on unfair competition or monopoly issues. However, patent or copyright guiding cases were not flatly published. The most published IP guiding cases are patent cases, taking 36.36% of the total IP guiding cases. After the first patent guiding case was published in 2013, the second patent guiding case was published in 2015, and the rest six patent guiding cases were not published until 2017. On copyright issues, the SPC only published two guiding cases in 2015 and another two guiding cases in 2017. The twenty-two IP guiding cases were selected among the cases decided between 2005 and 2016. The SPC adjudicated 45.45% of the twenty-two IP guiding cases. The High People's Courts adjudicated 45.82% of the guiding cases. The Intermediate People's Courts adjudicated only 8.6% of the guiding cases.<sup>121</sup>

<sup>120</sup> *Report of the Supreme People's Court on Judicial Use of the Intellectual Property Guiding Cases*, PEKING U. INFO. WEBSITE (April 9, 2018), <http://weekly.pkulaw.cn/Admin/Content/Static/f63a5a0c-7bc4-4029-8cf8-7117e23b7e4b.html>.

<sup>121</sup> China in general has four levels of courts, the SPC, the High People's Courts, the Intermediate People's Courts, and Basic People's Courts, (in a hierarchy from high to low). See Civil Procedure Law (promulgated by the Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991) art. 2 (2007) (China) (regulating on jurisdictions).

U.S. lawyers should be interested in these IP guiding cases, especially patent guiding cases,<sup>122</sup> since statutes govern both the IP laws in China and the U.S. and the U.S. Supreme Court are more frequent to interpret IP statutes compared to the SPC. During 2011 to 2018, the U.S. Supreme Court has decided forty-four IP cases, one time more than the number of the IP guiding cases published by the SPC. Same as China, the most IP cases decided by the U.S. Supreme Court are patent cases, but its proportion over the total decided IP cases is higher than China. Thirty of those cases (68.18%) are patent cases.



The decision timeline for the guiding cases and the composition of their legal issues are presented in Figure 2. 68.18% of the cases were decided between 2012 and 2016, covering seven of the eight patent cases and four of the five trademark cases. While the Anti-Monopoly Law was enacted in 2007,<sup>123</sup> the decision of the first monopoly guiding case was constructed in 2014. The three guiding cases addressing unfair competition issues were decided in 2008, 2010, and 2012.

## 5. Enforcement of IP Guiding Cases through Appellate System Reforms

When the policies are toward strengthening IP protection, the IP guiding cases consistent with these policies are significant for enforcing IPRs in the judicial system.<sup>124</sup> Under the policies, China's judicial system induced

<sup>122</sup> Since China does not have plant patents, plant varieties are categorized as plant patents at here for statistical purposes. If a case involves both claims of trademark infringement and unfair competition, it is categorized as trademark infringement for statistical purposes.

<sup>123</sup> P.R.C. Anti-Monopoly Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) Aug. 30, 2007 (China).

<sup>124</sup> See Eskridge, *supra* note 96, at 1511 (arguing that policies can influence statutory interpretation by the courts).

some reforms in its appellate system to strengthen the enforcement of the IP guiding cases because the appellate courts function to solve the inconsistency of the law or adjudication.<sup>125</sup> As a result, the SPC has stronger power in determining IP issues and applying the IP guiding cases.

The reforms of the appellate system for IP cases were both direct and indirect. First, the appellate system for adjudicating IP cases was directly reformed to be centralized to further involve the SPC in 2019.<sup>126</sup> The SPC then becomes the only appellate court for the cases of patents, trade secrets, monopoly, and other areas which require specialized knowledge.<sup>127</sup> Second, the appellate system was indirectly reformed through the reform of the courts’ original jurisdiction. The courts, in general, having original jurisdiction to hear IP cases for the first time, are the Basic People’s Courts.<sup>128</sup> The courts at one or two levels higher than them can hear these IP cases in an appellate review or a new trial.<sup>129</sup> In 2010, the Intermediate People’s Courts and the High People’s Courts were given original jurisdiction to hear some IP cases in which the amount of controversy achieves 5 million yuan (roughly 0.7 million US dollars) or at least one party is a foreign individual or company.<sup>130</sup> In 2012, the original jurisdiction over patent cases was clarified and given to some particular Basic People’s Courts and Intermediate People’s Courts.<sup>131</sup> In 2014, the IP Courts were established in Beijing, Shanghai, and Shenzhen,<sup>132</sup> having original jurisdiction over most types of IP cases, superseding the domestic Intermediate People’s Courts.<sup>133</sup> The SPC is two

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<sup>125</sup> Colin S. Diver, *Statutory Interpretation in the Administrative State*, 3 U. PENN. L. REV. 549, 586 (Mar. 1986); Posner, *supra* note 108, at 274.

<sup>126</sup> The Decision of the Standing Committee of the National People’s Congress on Several Issues concerning Judicial Procedures for Patent and Other Intellectual Property Cases (promulgated by the Standing Comm. Nat’l People’s Cong. effective Jan. 1, 2019) Oct. 26, 2018 (China).

<sup>127</sup> *Id.*

<sup>128</sup> Civil Procedure (promulgated by the Nat’l People’s Cong., April 9, 1991) art. 17 (China) (amended in 2012).

<sup>129</sup> *Id.* art. 164 & 199.

<sup>130</sup> Notice of the Supreme People’s Court on Adjusting the Standards for the Jurisdiction of Local People’s Courts at Different Levels over Intellectual Property Rights Civil Cases of the First Instance] (promulgated by Sup. People’s Ct., effective Feb. 1, 2010) 2010, art. 2 (China).

<sup>131</sup> Interpretation of the Supreme People’s Court of Several Issues concerning the Enforcement Procedures in the Application of the Civil Procedure Law of the People’s Republic of China (promulgated by Sup. People’s Ct., Nov. 3, 2008, effective Jan. 1, 2009) (China). Most of the courts assigned the authority of original jurisdiction over patent cases are Intermediate People’s courts. See also Zhou Qiang Jr., *A Statement of the Proposal for the Problems about the Opinions on Patent Litigation Procedural*, THE NAT’L PEOPLE’S CONG. (Oct. 26, 2018, 16:12 PM), [http://www.npc.gov.cn/npc/xinwen/2018-10/26/content\\_2064131.htm](http://www.npc.gov.cn/npc/xinwen/2018-10/26/content_2064131.htm).

<sup>132</sup> Zhou Qiang Jr., *Report of the Supreme People’s Court on the Work of Intellectual Property Courts*, THE NAT’L PEOPLE’S CONG (Aug. 29, 2018, 17:10 PM), [http://www.npc.gov.cn/npc/xinwen/2017-08/29/content\\_2027585.htm](http://www.npc.gov.cn/npc/xinwen/2017-08/29/content_2027585.htm).

<sup>133</sup> The Decision of the Standing Committee of the National People’s Congress on Establishing Intellectual Property Right Courts in Beijing, Shanghai and Guangzhou (promulgated by the Standing Comm. Nat’l People’s Cong., effective Aug. 31, 2014) Aug.

levels higher than the Intermediate People’s Courts and the IP Courts, so the reforms of original jurisdiction over IP cases can bring more IP cases before the SPC.<sup>134</sup>

Uniformity is a reasonable expectation of centralization.<sup>135</sup> As a result of those direct and indirect reforms of the IP appellate system, the IP guiding cases are *de facto* binding.<sup>136</sup> Otherwise, if the IP Courts or other Intermediate People’s Courts ignore and reverse the IP guiding cases, the SPC in principle will correct their decisions as consistent as the guiding cases in a new trial or an appellate review under its appellate jurisdiction. Accordingly, the IP guiding cases can be recognized as members of the pedigree of judicial precedents.

## 6. Enforcement through Government Agencies

Similar to the courts, the government agencies of China are persistently trained to understand statutory laws and the legislative intent in the statutes.<sup>137</sup> First, the government has heavy law enforcement duties.<sup>138</sup> In the approach of IP, the China Custom, SIPO, National Copyright Administration of the P.R.C. (NCAC), and State Administration for Market Regulation hear more IP disputes than the courts because these government agencies can quickly react to the requests by the owners of IPRs to seize infringing products on the market.<sup>139</sup> Second, the guiding cases can be

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31, 2014 (China).

<sup>134</sup> By 2019, the SPC has designated twenty IP Courtrooms in Intermediate People’s Courts to excise original jurisdiction over IP issues. *See Favorites! A Review of IP Courts/Courtrooms in China*, [http://www.iprdaily.cn/news\\_21824.html](http://www.iprdaily.cn/news_21824.html) (last visited June 21, 2019).

<sup>135</sup> Craig Allen Nard & John F. Duffy, *Rethinking Patent Law’s Uniformity Principle*, 101 NW. L. REV. 1619, 1627 (2007).

<sup>136</sup> *See* Jia, *supra* note 10 (translating “canzhao” as “refer” as Stanford China Guiding Cases Project).

<sup>137</sup> Diver, *supra* note 125, at 578. An explanation is provided by an interview with a Chinese government servant with 30 years of work experience. In China, the government, solely under the administration of the Communist Party, is the legislators making regulations under the instruction of the central government, so it understands legislative intent of statutes as good as courts. The government is also policymakers and the enactors of the policies, so it has enough information to interpret both statutory laws and regulations. The government at each level from central to county sets legislative affairs offices to implement laws and regulations and the review if the laws are legitimate, functioning as judicial review. The primary job or responsibility of government servants is to learn and arrange others to acquire law and policies. Moreover, the government is also monitored by the public under the Administrative Law.

<sup>138</sup> Constitutional Law (promulgated by the Nat’l People’ Cong, Dec. 4, 1982, effective Mar. 11, 2018) 2018, art. 89 (China).

<sup>139</sup> In 2015, SIPO heard 35,844 patent disputes and there were 13,087 patent cases brought before the courts. *2015 Data Analysis of Enforcement Cases of Intellectual Property System* (Jan. 18, 2016), <http://www.sipo.gov.cn/zscqgz/1101020.htm>; Liu Jing, *The Supreme Court Published Cases about Intellectual Property Protection*, PEOPLE’S COURT NEWS, April 22, 2016, at 01; *Ten Typical Cases of Cracking Down on Patent Infringement and Counterfeiting in 2017* (last visited Dec. 7, 2018),

treated as a policy source to guide the government agencies or as a legal tool to provide stronger authorities to the agencies. If so, guiding cases as a mechanism to decrease the agency costs in IP enforcement can decrease both the costs of statutory interpretation by the courts and the administrative costs borne by the government agencies.<sup>140</sup>

Meanwhile, the government agencies of China are the enactors of regulations with authority, and they can influence the judicial system.<sup>141</sup> Social communities have stronger impacts on statutory interpretation, compared to history or politics.<sup>142</sup> Government agencies have closer connections with social communities in their work and are more policy-sensitive than courts.<sup>143</sup>

The U.S. experience supports this argument. In the U.S., where both the courts and the administrative agencies serve Congress, the government has more knowledge about the policies than the courts.<sup>144</sup> Therefore, it is not surprising to see that the U.S. IP regime, which supports and relies on the development of technology and economy, provides increasingly strong authorities to the administrative agencies. The U.S. International Trade Commission (ITC) has independent authority to investigate IP-related issues and interpret IP statutes.<sup>145</sup> The Patent Trial and Appeal Board (PTAB) under the administration of the USPTO were assigned more duties and power in the U.S. Supreme Court’s review about patentability.<sup>146</sup> The U.S. Congress also authorizes the Trademark Trial and Appeal Board (TTAB) to percussively determine on trademark validities.<sup>147</sup> The U.S. courts adjudicate or interpret statutes in deference to the agencies to decrease the costs of IP enforcement.<sup>148</sup> Correspondingly, the guiding cases are a

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<http://www.sipo.gov.cn/docs/20180720095834656234.pdf>; 2017 *Ten Typical Cases of Trademark Infringement*, SIPO, (April 27, 2018), <http://www.sipo.gov.cn/mtsd/1123787.htm>; 2017 *Review of China's Copyright Development and Hot Issues*, NCAC (Jan. 2, 2018), <http://www.ncac.gov.cn/chinacopyright/contents/555/357836.html>.

<sup>140</sup> Posner, *supra* note 108, at 290.

<sup>141</sup> Constitutional Law (promulgated by the Nat’l People’s Cong, Dec. 4, 1982, effective Mar. 11, 2018) 2018, art. 89, 90, 99, 100 (China).

<sup>142</sup> Eskridge, *supra* note 96, at 1549.

<sup>143</sup> Posner, *supra* note 108, at 274.

<sup>144</sup> *Id.*; RICHARD A. POSNER, REFLECTIONS ON JUDGING 36 (2013); Diver, *supra* note 125, at 578.

<sup>145</sup> 19 U.S.C. §1337; See also William P. Atkins & Justin A. Pan, *An Updated Primer on Procedures and Rules in 337 Investigations at the U.S. International Trade Commission*, 18 U. BAL. INTELL. PROP. L.J. 105 (2010).

<sup>146</sup> SAS Institute Inc. v. Iancu, 138 S. Ct. 1348 (2018); Oil States Energy Services, LLC v. Greene’s Energy Group, 138 S. Ct. 1365 (2018).

<sup>147</sup> B & B Hardware, Inc. v. Hargis Industries, Inc., 135 S.Ct. 1293, 1305 (2015) (“Congress presumptively intends that an agency’s determination (there, a state agency) has preclusive effect.”).

<sup>148</sup> The Federal Circuit’s decisions are a source to learn how the U.S. judicial system adopts statutory interpretation by government agencies. See e.g., Paul R. Gugliuzza & Mark A. Lemley, *Can a Court Change the Law by Saying Nothing?*, 71 VAND. L. REV. 765 (2017) (reviewing all the Federal Circuit’s decisions over Sec. 101 issue to explore how the Federal Circuit explains the statute based on Supreme Courts’ precedents and the PTO’s application of the statute and the precedents).

reasonable source to review the intervention degree of the government agencies in statutory interpretation that the Chinese judicial system embraces.

## II. IPRS AS PRIVATE PROPERTY UNDER “NEW PRIVATE LAW”

What the legislative intent and purpose of IP laws are and whether IP laws are applied as private law are controversial debates for centuries.<sup>149</sup> These debates are tied to the economic rationales of IP laws and IP regulations.<sup>150</sup> The economic rationale in the bond between China’s IP statutes and the IP guiding cases is not crystal clear in the Chinese literature because the application of law and economics is at an early stage in China. This part reviews that bond (between statutes and case laws) in the U.S. IP regime, which is observed by China to follow. The review facilitates to understand and predict the process of internalizing IPRS with the IP guiding cases in China.

One challenge of the review to be tackled is to incorporate the U.S. dynamic judicial customs of statutory interpretation and legislation into the normative foundations behind the case laws. In the U.S., federal statutes govern IP issues.<sup>151</sup> The interpretation of the IP statutes in substance is controversial on the predominance of the court decisions in IP and the predominant interests in the legislative intent.<sup>152</sup> The “New Private Law” theories alleviate that challenge to some extent, so it is borrowed by this comparative article to explain the guiding cases.

There are two dichotomies between public and private law. One dichotomy refers to utilities or interests. Public law respects for public welfare, and private law respects for personal interests.<sup>153</sup> In other words, public law directly maximizes public welfare or maximizes the public welfare through maximizing individual utilities.<sup>154</sup> Private law maximizes individual utilities, but it recognizes that personal interests are not “subordinated” to the public welfare.<sup>155</sup> The other dichotomy between public and private law refers

<sup>149</sup> See Oskar Liivak, *Private Law and the Future of Patents*, 30 HAR. J.L. & TECH. 33, 35 (2017); John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HAR. L. REV. 1640, 1640 (2012); Sichelman, *supra* note 21; Henry E. Smith, *IP and the New Private Law*, 30 HARV. J. L. & TECH. 1 (2017).

<sup>150</sup> Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 336 (1974).

<sup>151</sup> CHARLES E.F. RICKETT & GRAEME W. AUSTIN, *INTERNATIONAL INTELLECTUAL PROPERTY AND THE COMMON LAW WORLD* 2 (2000).

<sup>152</sup> See Ted Sichelman, *Patents, Prizes, and Property*, 30 HARV. J.L. & TECH. 279, 280 (2017); Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1873 (2007); Smith, *supra* note 20, at 1757; Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2004).

<sup>153</sup> See 1 THE DIGEST OF JUSTINIAN §2 (Alan Watson ed., 1998), *quoted* note 1 in Alain Supiot, *The Public-Private Relation in the Context of Today’s Refeudalization*, 11 INT’L J. CONST. L. 129, 129 (2013).

<sup>154</sup> See Supiot, *supra* note 153, at 131 (using the Soviet Union and Marxism as examples to interpret an extreme case of public law).

<sup>155</sup> See *id.* (introducing that private law cuts the nexus between private utilities and the general good).



to relationships. Under this dichotomy, public law refers to vertical relationships between the government and individuals or other private groups, and private law refers to horizontal relationships between groups that can be individuals, private organizations, things, and the government that is treated as horizontal with individuals or private organizations.<sup>156</sup> Due to the conflicts and overlaps between public and private law under the two dichotomies, the literature of “New Private Law” arose in recent years discusses around the concepts of public interest and social welfare.<sup>157</sup> “New Private Law” is between public and private law and defines private parties’ rights and responsibilities adjusted by law or courts, or directly intervened by the government for public interest or social welfare.<sup>158</sup>

This part introduces the utilitarian theories of “New Private Law” and takes the U.S. template from two approaches to discuss the balance of IP law between public and private law. The first approach is utilitarianism in the judicial system. The second approach is utilitarianism with government intervention, which is also heavily addressed in another theory of “New Private Law” – pragmatism.<sup>159</sup>

#### A. Courts: IP Laws as New Private Law

The U.S. IP laws were developed around private law, dealing with the rights and duties of private parties.<sup>160</sup> The courts and scholars always use property, contract, and tort theories to explain IP doctrines.<sup>161</sup> Patents were undoubtedly treated as constitutional private property rights by courts in the 19th century.<sup>162</sup> Some statutes (*e.g.*, Copyright Act) were bargained by the

<sup>156</sup> See Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 478-479, n.46 (1988) (“Public law was concerned with federalism, separation of powers, and rights against the state. Private law concerned relations among citizens.”); Michel Rosenfeld, *Rethinking the Boundaries Between Public Law and Private Law for the Twenty First Century: An Introduction*, 11 INT’L J. CONST. L. 125, 125-126 (2013).

<sup>157</sup> See Sichelman, *supra* note 21; See also Smith, *supra* note 149.

<sup>158</sup> Liivak, *supra* note 149, at 35; Goldberg, *supra* note 149, at 1640.

<sup>159</sup> Pragmatism deploys practical legal reasoning and distinguishes law and politics. However, critical legal reasoning, which opposes practical legal reasoning, criticizes political intervention in law. This research avoids this argument between practical legal reasoning and critical legal reasoning. See Stanley Fish, *Almost Pragmatism: Richard Posner’s Jurisprudence*, 57 U. CHI. L. REV. 1447, 1457 (1990) (arguing that pragmatism’s nature is political but named with apolitical terms, such as “fairness, equality, and what justice requires”); William N. Eskridge & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 780 (comparing new public law and critical legal studies).

<sup>160</sup> Goldberg, *supra* note 149, at 1640; But see Reilly, *supra* note 19, at 7 & 24-25 (“The ‘property’ conception of patent rights only slowly emerged, coming to prominence by the 1820s.”); Herbert Hovenkamp, *The Emergence of Classical American Patent Law*, 58 ARIZONA L. REV. 263, 267 (2016) (arguing the early patent law in the U.S. before 1820 was political for driving economic growth, rather than concentrating on private rights).

<sup>161</sup> Mossoff, *supra* note 67, at 50; Liivak, *supra* note 149, at 35; McKenna, *supra* note 152; Lemley, *supra* note 152, at 1035.

<sup>162</sup> Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents under the Taking Clause*, 87 BOSTON L. REV. 689, 700-711 (2007)

industry representatives for their interest.<sup>163</sup> The award or compensation of exclusive rights for IP enforced through the courts seems in private law for the interest of the private parties who own or pursue the exclusive rights.<sup>164</sup>

In practice, those statutes bargained by the industry representatives in the legislative history, however, have small impacts on IP enforcement by the courts.<sup>165</sup> The importance of legislative intent and legislative history is debilitated by “ascertain statute meaning,” and the statutes are usually applied for the public interest.<sup>166</sup> As a reflection, there were many complaints from the private parties about their short of compensation and incentivization from the judicial system.<sup>167</sup> The reason is that the statutory language of IP laws is complex and sometimes technical to be interpreted, and the courts adopt the utilitarian principle to maximize the public interest.<sup>168</sup>

The economic theories of public interest and interest group supplement the taxonomy of public and private law to understand the intent and purpose of IP laws and regulations. Utilitarianism, which guides the common law adjudication, can refer to maximizing either the public interest or the interest of particular private parties.<sup>169</sup> The efficiency under the “public-interest” theory is defined in the utilitarian terms referring to the public welfare.<sup>170</sup> The legislative intent of public law is mainly to either directly adjust the public interest or adjust special interest of particular interest groups for the public interest.<sup>171</sup> The public interest is not necessarily inconsistent with or adverse to the interest of individuals, but instead promotes their interest in general. By contrast, when the efficiency refers to maximizing the interest of particular groups (*i.e.*, “group-interest” theory), a narrow-sense efficiency between two private parties drops into the scope of conventional private law.<sup>172</sup> This limitation in practice is of little importance

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(discussing how the Taking Clause was applicable on a doctrinal base and in nineteenth century cases between the government and private parties).

<sup>163</sup> See, e.g., Jessica D. Litman, *Copyright Legislation and Technical Change*, 68 OR. L. REV. 275 (1989) (discussing arguments delivered by industry representatives in the legislative history of the Copyright Act).

<sup>164</sup> See Randy E. Barnett, *Forward: Four Sense of the Public Law-Private Law Distribution*, 9 HARV. J.L. & PUB. POL’Y 268 (1986); Sichelman, *supra* note 152, at 280; McKenna, *supra* note 152, at 1873; Smith, *supra* note 20, at 1757.

<sup>165</sup> Sunstein, *supra* note 9, at 429.

<sup>166</sup> *Id.*

<sup>167</sup> Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987); Litman, *supra* note 163; Richard Adelstein & Steven Perez, *The Competition of Technologies in Markets for Ideas: Copyright and Fair Use in Evolutionary Perspective*, 5 INT’L REV. L. & ECON. 209 (1985).

<sup>168</sup> See Litman, *supra* note 163; See also McKenna, *supra* note 152.

<sup>169</sup> Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979); Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980).

<sup>170</sup> *Id.* at 265.

<sup>171</sup> Posner, *supra* note 150, at 336 (mentioning a way of improving competition in the market through some particular private parties).

<sup>172</sup> Under the “interest-group” theory, the efficiency that overlaps with the social welfare is to redistribute the social welfare and benefit particular interest groups when the

when those two types of interests are associated because the wealth of particular private parties can contribute to the public interest.<sup>173</sup> The law giving IPRs to particular private parties and protecting the IPRs can benefit the public interest in a direct way by reducing consumers’ search costs or in an indirect way by spurring competition and innovation.<sup>174</sup>

Under IP laws, the utility, interest, or wealth of individuals or private entities does not irreversibly contribute to the public welfare but connects in series with the public welfare and flows back to them.<sup>175</sup> For example, the court opinions in the 19th century that considered trademarks as property rights narrowly enforced trademarks against their competitors.<sup>176</sup> Under the modern trademark law, the courts still limit the trademark rights the private interests (*i.e.*, a mark’s selling power),<sup>177</sup> but enforce broader trademark rights for protecting consumers and reducing the search costs of consumers.<sup>178</sup> Besides this legislative intent for the public interest, as a result of the diversity in adjudication and statutory interpretation by the courts, particular interest groups (*i.e.*, leading firms) can entrench their market power and diminish competition, interfering with the public interest.<sup>179</sup> Nevertheless, this connection or conflicts between public and private interests could be an efficiency issue of law, regardless of the legislative intent or purpose.<sup>180</sup>

From a utilitarian perspective, common law is economically efficient, which can be visually observed by the increase of settlements.<sup>181</sup> There are

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law or courts maximize these groups’ utility. See Posner, *supra* note 108, at 266.

<sup>173</sup> But see Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 193 (1986) (arguing an impossibility to achieve the social optimum through benefiting particular private groups).

<sup>174</sup> See Stacy L. Dogan & Mark A. Lemley, *A Search-Costs Theory of Limiting Doctrines in Trademark Law*, 97 TRADEMARK REPORTER 1223, 1223-1224 (2007) (discussing the balance of strong trademark rights on the market competition); But see Posner, *supra* note 173, at 193 (criticizing that competition between the benefited groups cannot result the society optimum).

<sup>175</sup> See Stephen A. Smith, *The Normativity of Private Law*, 31 OXFORD J. LEGAL STUD. 215, 216 (2011) (“[U]tilitarians believe private law should promote behavior that maximizes social utility or welfare.”).

<sup>176</sup> McKenna, *supra* note 152, at 1848.

<sup>177</sup> *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003); Dogan & Lemley, *supra* note 67, at 790.

<sup>178</sup> David S. Welkowitz, *The Supreme Court and Trademark law in the New Millennium*, 30 WILLIAM MITCHELL L. REV. 1659 (2004); McKenna, *supra* note 152, at 1848; William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265 (1987).

<sup>179</sup> Dogan & Lemley, *supra* note 174, at 1224.

<sup>180</sup> See *id.*

<sup>181</sup> See generally POSNER, *ECONOMIC ANALYSIS OF LAW* (1973) (raising the argument that common law is efficient); See Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 52-53 (1977) (deducing the economic efficiency of common law, argued by Richard Posner, exists in an evolutionary mechanism to maximize utilities of the parties).

common-law precedents to determine the eligibility of IPRs (*e.g.*, *Alice*),<sup>182</sup> with no harm to the strength of IPR enforcement.<sup>183</sup> There are also other precedents (*e.g.*, *WesternGeco*) especially addressing the issues of IPR enforcement.<sup>184</sup> The lower courts learn the statutory interpretation from the precedents, including its broad-sense utilitarian legal thinking to maximize the public welfare.<sup>185</sup> The USPTO also defers to the courts in statutory interpretation.<sup>186</sup> Moreover, there is empirical evidence that U.S. patent disputes have a high settlement rate,<sup>187</sup> especially when the proportion of patents involved in disputes is increasing.<sup>188</sup> This empirical evidence suggests that the legal system has achieved economic efficiency.

Courts, however, cannot always be utilitarian to increase efficiency and maximize the utilities of the parties when enforcing IP laws because the utility of private parties or the legal issue could be hybrid with the public welfare. Instead, the court should concern all useful factors in reality, rather than select either private law or public law theories, which is a pragmatic and predominant idea agreed by New Private Law scholars.<sup>189</sup>

### *B. New Private Law for Increased Government Intervention*

Due to the government intervention, such as the USPTO, the customs, or other agencies providing government funding based on IPRs, the dominant IP theories are gradually not compatible with private law in both theory and practice.<sup>190</sup> On the one hand, the rationale of IPRs to reward or compensate inventors or market leaders is accepted by the USPTO when it defers to precedential cases from the courts.<sup>191</sup> On the other hand, in theory, the government intervention to reward and promote innovation and creation and protect consumers through granting patents, trademarks, and copyrights is a utilitarian idea.<sup>192</sup> In practice, the USPTO determines the eligibility of

<sup>182</sup> *Alice Corp. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014).

<sup>183</sup> See Cohen & Noll, *supra* note 78, at 470.

<sup>184</sup> *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2137 (2018).

<sup>185</sup> *E.g.*, *DDR Holdings, LLC v. Hotels.com, L.P.*, 773 F.3d 1245 (Fed. Cir. 2014).

<sup>186</sup> *Nard & Duffy*, *supra* note 135, at 1641.

<sup>187</sup> See Christopher Anthony Cotropia et al., *Progression and Workload in Civil Litigation: An Empirical Analysis of Patent Disputes* (Sep. 8, 2017), University of Illinois College of Law Legal Studies Research Paper No. 17-37, <https://ssrn.com/abstract=3021903>; James Bessen & Michael J. Meurer, *Lessons for Patent Policy from Empirical Research on Patent Litigation*, 9 LEWIS & CLARK L. REV. 1, 67-68 (2004).

<sup>188</sup> See Jay P. Kesan & Gwendolyn G. Ball, *How Are Patent Cases Resolved? An Empirical Examination of the Adjudication and Settlement of Patent Disputes*, 84 WASH. U. L. REV. 237, 257 (2006).

<sup>189</sup> Goldberg, *supra* note 149, at 1652.

<sup>190</sup> See Sichelman, *supra* note 21; Liivak, *supra* note 149, at 35; Sichelman, *supra* note 152.

<sup>191</sup> *Nard & Duffy*, *supra* note 135, at 1641.

<sup>192</sup> See Mark A. Lemley, *Taking the Regulatory Nature of IP Seriously*, 92 TEX. L. REV. 107 (2014); Liivak, *supra* note 149, at 35; Sichelman, *supra* note 152, at 280; Smith, *supra* note 149, at 5; Smith, *supra* note 20, at 1757; Barnett, *supra* note 164; McKenna, *supra* note 152, at 1873.

patents and trademarks and is also the party representing the public interest against private parties in the litigations over patent validity issues.<sup>193</sup>

The USPTO intervenes in private rights both in procedure and substance. The intervention in judicial procedure shows in the establishment of the PTAB, which is to invalid granted patents and affiliated with the USPTO. In *Oil States Energy Services*, even though the U.S. Supreme Court does not suggest that “patents are not property for purposes of the Due Process Clause or the Takings Clause,” it recognizes the constitutionality of the PTAB, suggesting a preference that patents could be considered as public rights which can be deprived by the government under the public-right doctrine.<sup>194</sup> Increased government intervention in substantive law shows in the 2019 USPTO Guidance, in which the USPTO further interpreted the scope of patentable subject matters because of the vagueness of *Alice*.<sup>195</sup> Even though the interpretation of 35 U.S.C. §101 by USPTO implements *Alice*, the Federal Circuit refused to implement the guidance.<sup>196</sup> However, the USPTO’s interpretation of §101 inevitably affects the judicial system through its decisions on patent examination and the PTAB.

The procedural and substantive intervention by the government is interconnected. This interconnection contributes to a result that the IP statutes gradually have stronger and broader effects than the judicial precedents,<sup>197</sup> suggesting that the overall system is pragmatic for having superficial fairness of law and courts without political biases.<sup>198</sup> Moreover, the history of the U.S. law, a mixed of statutes and Anglo-American common-law doctrines, also suggests that the common law by itself is inefficient.<sup>199</sup> Scholars who criticize the economic efficiency of the common law believe that statutes can optimize economic inefficiency.<sup>200</sup> Five years after *Alice*, a bill to clarify the statute §101 has been proposed under the efforts of the USPTO and the

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<sup>193</sup> See Megan Belle, *Patent Law as Public Law*, 20 GEO. MASON. L. REV. 41 (2012).

<sup>194</sup> *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 138 S. Ct. 1365 (2018).

<sup>195</sup> 2019 Revised Patent Subject Matter Eligibility Guidance, 84 Fed. Reg. 50 (Jan. 7, 2019); *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014).

<sup>196</sup> *Cleveland Clinic Foundation v. True Health Diagnostics LLC*, No. 1:17-cv-00198-LMBIDD, at 13 (Fed. Cir. Apr. 1, 2019) (“While we greatly respect the PTO’s expertise on all matters relating to patentability, including patent eligibility, we are not bound by its guidance.”).

<sup>197</sup> Smith, *supra* note 20, at 1808; James MacCauley Landis, *Statutes and the Sources of Law*, 2 HARV. J. ON LEGIS. 7, 16 (1965).

<sup>198</sup> See Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 4-5 (1998) (introducing the concept of legal pragmatism and distinguishing it from positivism).

<sup>199</sup> Wes Parsons, *The Inefficient Common Law*, 92 YALE. L.J. 862 (1983) (arguing that reckless and non-reckless common law is inefficient).

<sup>200</sup> *Id.* at 885-887 (suggesting codification can cure the inefficiency of common law).

industry,<sup>201</sup> which complains its vagueness and harm for innovation.<sup>202</sup> If the statute will be successfully revised, the Supreme Court’s decision is an interim law in the refinement of statutes, which is a situation similar to the guiding cases and judicial interpretations in China.

### III. ECONOMIC EFFICIENCY OF THE IP GUIDING CASES

The root of the Chinese IP regime was transplanted from the U.S. and the IP laws of China in some extent reflects similar development patterns and concerns as the U.S. This part unveils how the SPC and the courts that adjudicated the IP guiding cases incorporate the utilitarian theories of “New Private Law.” Precisely, this part compares the IP guiding cases with the U.S. IP laws and explores the economic rationales in the bond between the Chinese IP statutes and the IP guiding cases.

Transaction costs always exist as disparities between marginal private interests and social returns.<sup>203</sup> In theory, courts apply property rules when the transaction costs are low and apply liability rules when the transaction costs are high.<sup>204</sup> Liability rule made by courts to interpret statutes should be efficient to decrease the high transaction costs both between the existing parties and the potential parties and increase the public welfare.<sup>205</sup> According to these theories, the efficiency of the IP rules made by courts is reflected by how the courts assigned IPRs, determined the scope of property rights, and allocated liabilities when applying the statutes to enforce IPRs. In this order, this part discusses the economic efficiency of the IP guiding cases.

#### A. Subject Matter and Scope of IP Protection

The guiding cases heavily ruled on subject matter issues of IP protection, but those courts did not invalidate the IPRs that should not have been granted by the government agencies. Seven IP guiding cases directly

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<sup>201</sup> See Sens. Tillis and Coons and Reps. Collins, Johnson, and Stivers Release Section 101 Patent Reform Framework, HANKJOHNSON (Apr. 18, 2019), <https://hankjohnson.house.gov/media-center/press-releases/sens-tillis-and-coons-and-reps-collins-johnson-and-stivers-release>; See Draft Outline of Section 101 Reform, <https://www.tillis.senate.gov/services/files/3491a23f-09c3-4f4a-9a93-71292704c5b1> (last visited June 19, 2019).

<sup>202</sup> See Joanna Brougner & Konstantin M. Linnik, *Patents or Patients: Who Loses?* 32 NATURE BIOTECHNOLOGY, 877, 880 (2014) (arguing that some inventors may prefer trade secrets to patents for the uncertainties created by *Alice*); *Alice Corp. Pty. Ltd.*, 134 S. Ct.; But see Mark A. Lemley et al., *Life After Bilski*, 63 STAN. L. REV. 1315, 1331 (2011) (expecting a competitive market to promote innovation for higher requirements of patents).

<sup>203</sup> See Stiglitz, *supra* note 37, at 1707.

<sup>204</sup> See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (discussing the efficiency of application of property rules and liability rules).

<sup>205</sup> Parsons, *supra* note 199, at 864-883 (arguing that liability rule is efficiency, but the efficiency is defective without statutes).

involve a subject matter issue of IP protection.<sup>206</sup> Three of these cases deal with copyright law, and the other four deal with trademark law or anti-unfair competition law. Instead of challenging the validity of the IPRs, these seven guiding cases merely discuss the eligibility of IPRs.

### 1. Trademark and Unfair Competition

“Trademark is a direct outgrowth from unfair competition,”<sup>207</sup> so the consideration of the protection for trademarks is not necessarily distinguished from the protection for unfair competition.<sup>208</sup> In the four guiding cases about trademark or unfair competition, the courts confirmed the legal protection for (1) the enterprise names that function as trade names known by the public,<sup>209</sup> (2) the packaging and decorations of well-known goods,<sup>210</sup> and (3) the time-honored brands.<sup>211</sup> By contrast, the courts refused to protect generic names with regional characteristics regardless of a trademark that is registered and attached to the names.<sup>212</sup> In these cases, the courts disguised the protection for some particular interest groups from registered trademarks or the trademarks used in commerce.

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<sup>206</sup> China Youth Travel Serv. v. Nat’l Youth Int’l Travel Serv., 2014 Sup. People’s Ct. Guiding Case 29 (Tianjin High People’s Ct. 2012) (China) [hereinafter N.29 Guiding Case]; Lujin Indus. Co., Ltd. v. Lujin Crafts Co., Ltd., 2015 Sup. People’s Ct. Guiding Case 46 (Shandong High People’s Ct. 2009) (China) [hereinafter N.46 Guiding Case]; Ferrero Int’l S.A. v. Montresor Food Co., Ltd., 2015 Sup. People’s Ct. Guiding Case 47 (Tianjin High People’s Ct. 2005) (China) [hereinafter N.47 Guiding Case]; Jingdiao Tech. Co., Ltd. v. Naiky Elec. Tech. Co., Ltd., 2015 Sup. People’s Ct. Guiding Case 48 (Shanghai High People’s Ct. 2006) (China) [hereinafter N.48 Guiding Case]; Hong v. Wufufang Food Co., Ltd., 2017 Sup. People’s Ct. Guiding Case 80 (Guizhou Intermediate People’s Ct. 2015) (China) [hereinafter N.80 Guiding Case]; Zhang v. Lei, 2017 Sup. People’s Ct. Guiding Case 81 (Sup. People’s Ct. 2014) (China) [hereinafter N.81 Guiding Case]; Chengdu Tongdefu Hechuan Peach Slices Co., Ltd. v. Chongqing Hechuan Tongdefu Peach Slices Co., Ltd., 2016 Sup. People’s Ct. Guiding Case 58 (Chongqing High People’s Ct. 2013) (China) [hereinafter N.58 Guiding Case].

<sup>207</sup> Smith, *supra* note 20, at 1754.

<sup>208</sup> The P.R.C. Anti-Unfair Competition Law of 1993 merges the rules for unfair competition issues and monopoly issues. The provisions on monopoly were independently formulated by the Anti-Monopoly Law enacted in 2007 to strengthen the enforcement of anti-monopoly. See Wang Xianlin, *The Collaboration and Perfection of the Enactment of Anti-Monopoly Law and China Competition Legal Regime*, 2 J. OF EAST CHINA U. OF POLITICAL SCI. & L. 117 (2008); Li Mingde, *Anti-Unfair Competition Law Should Show the Essence of Intellectual Property Laws*, ECON. INFO. DAILY, Sep. 12, 2017, <http://finance.sina.com.cn/roll/2017-09-12/doc-ifykuftz6294114.shtml>; P.R.C. Anti-Monopoly Law (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 30, 2007, effective Aug. 1, 2008) Aug. 30, 2007 (China); Xiao Shaoqiong, *No Conflicts between Anti-Monopoly and Intellectual Property Protection*, 46 CHINA ECON. WEEKLY 2 (2005).

<sup>209</sup> N.29 Guiding Case.

<sup>210</sup> N.47 Guiding Case.

<sup>211</sup> N.58 Guiding Case.

<sup>212</sup> N.46 Guiding Case.

In *Youth Travel Serv. v. Nat’l Youth Int’l Travel Serv.*<sup>213</sup> and *Ferrero Int’l S.A. v. Montresor Food Co., Ltd.*,<sup>214</sup> a goal of the courts was to help consumers identify the goods and not be confused.<sup>215</sup> This goal was utilitarian to promote the public welfare. Selecting these cases to be guiding cases by the SPC may achieve economic efficiency. In *Ferrero*, the court did not accept the argument from the defendant, Montresor, that the consumers can recognize the correct goods through their price or quality.<sup>216</sup> Ferrero is an internationally famous brand of chocolates but is an unregistered trademark in China. Montresor chocolates’ packaging and decorations are similar to Ferrero chocolates, but its chocolates are cheaper and with lower quality than Ferrero. The court explained that the overall packaging and decorations of Ferrero chocolates are unique and distinctive, irrelevant to the functionality of the goods.<sup>217</sup>

This utilitarian court decision in *Ferrero*, which shows a superficial view of public law, however, does not suggest economic efficiency as assumed or an end of the discussion of public or private interest in trademark or unfair competition issues.<sup>218</sup> These issues were more often litigated in front of the courts, even though there may not be a balance between the public welfare and trademark owners’ rights as addressed in *Youth Travel Serv.* and *Ferrero*.<sup>219</sup> Moreover, this balance is controversially argued in other cases after the guiding cases were published. *Ferrero* has only been cited once by a court in an administrative dispute since it was selected to be a guiding case.<sup>220</sup> It was not cited in a series of similar civil litigations between Japan’s Muji and Beijing Mujihome.<sup>221</sup> These two parties have similar designs for many goods, decoration of stores, and business names. In one of the disputes between them, the Beijing High People’s Court considered the degree of knowledge outside China in its determination of unfair competition, similar to the rules in *Ferrero*.<sup>222</sup> The disputes between the two companies lasted long, which made Beijing Mujihome increasingly famous. According to the adjusted and dynamic balance of the public knowledge on between the two brands, the degree of knowledge between the two brands in the market is not a critical issue recognized by other courts. In a later case, the Beijing IP Court holds that only Beijing Mujihome and its allies can use the Chinese characters of the trademark of Japan’s Muji for some bedding goods because Beijing Mujihome and its allies are the trademark owner or the licensees of the

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<sup>213</sup> N.29 Guiding Case.

<sup>214</sup> N.47 Guiding Case.

<sup>215</sup> See Landes & Posner, *supra* note 178, at 271.

<sup>216</sup> N.47 Guiding Case.

<sup>217</sup> *Id.*

<sup>218</sup> See *id.*

<sup>219</sup> *Id.*; N.29 Guiding Case.

<sup>220</sup> Shuicui Fang Food Co., Ltd. v. Chengdu Admin. for Indus. and Commerce et al. (Sichuan Chengdu Intermediate People’s Ct. 2017) (China).

<sup>221</sup> Beijing Miantian Textile Co., Ltd. et al. v. Muji Co., Ltd. et al. (Beijing Intell. Prop. Ct. 2015) (China).

<sup>222</sup> Beijing Muji Inv. Co., Ltd. v. Muji Co., Ltd. et al. (Beijing High People’s Ct. 2017) (China).



trademark in China.<sup>223</sup> A bias of localism of this case may not exist suggested by empirical evidence.<sup>224</sup>

Both these disputes between Beijing Mijihom and Japan’s Muji and the guiding cases suggest that the courts are looking for a balance between protecting consumers and protecting trademark owners. On the one hand, the court opinions in the guiding cases of *Youth Travel Serv.*,<sup>225</sup> *Ferrero*<sup>226</sup> and *Chengdu Tongdefu Hechuan Peach Slices Co., Ltd. v. Chongqing Hechuan Tongdefu Peach Slices Co., Ltd.*<sup>227</sup> addressed both the interest of companies and consumers, when interpreting the statutory language of the Anti-Unfair Competition Law.<sup>228</sup> Even though the statutes are applied as tort-like or property-like depending on whether the injured party holds a trademark, the regime is not perfectly consistent to Smith’s theory that trademark law and unfair competition law are private law.<sup>229</sup> The guiding cases rule that the reputation of companies, which has been created by their expenditures on advertisement over time, is eligible to the protection under the Anti-Unfair Competition Law even though they do not have any registered trademarks.<sup>230</sup> From a utilitarian perspective, the purpose of the rule is to both compensate the companies’ marketing expenditures and reduce the search costs of consumers whom the reputation benefits.<sup>231</sup> The legislative intent and purpose of protecting the public welfare are inherited when the Anti-Unfair Competition Law was amended in 2017.<sup>232</sup> In this recent amendment, avoiding to confuse consumers is further strengthened and added as a catch-all provision.<sup>233</sup>

On the other hand, free riders of the trade owners’ reputation are allowed in particular circumstances.<sup>234</sup> It suggests that the Trademark Law cannot be an efficient private law because trademark owners’ interest can be

<sup>223</sup> *Beijing Miantian Textile Co., Ltd. et al.* (Beijing Intell. Prop. Ct.).

<sup>224</sup> See Love, *supra* note 86.

<sup>225</sup> N.29 Guiding Case.

<sup>226</sup> N.47 Guiding Case.

<sup>227</sup> N.58 Guiding Case.

<sup>228</sup> Anti-Unfair Competition Law (promulgated by the Standing Comm. Nat’l People’s Cong., Sep. 2, 1993, effective Dec. 1, 1993) 1993, art. 5.2 & 9 (China).

<sup>229</sup> Smith, *supra* note 20.

<sup>230</sup> N.29 Guiding Case; N.58 Guiding Case; N.47 Guiding Case.

<sup>231</sup> See Landes & Posner, *supra* note 178.

<sup>232</sup> Anti-Unfair Competition Law (promulgated by the Standing Comm. Nat’l People’s Cong., Sep. 2, 1993, effective Jan. 1, 2018) 2017, art. 6, §4 (China) (“Operators shall abide by the principle of voluntariness, equality, impartiality, honesty and good faith, and also adhere to public commercial moral in their business transactions.”).

<sup>233</sup> *Id.* (“[B]usinesses cannot engage in other acts of confusion sufficient to mislead a person into thinking that the goods of one business (defendant) is that of another business (plaintiff) or has a particular connection with another business (plaintiff).”); Fandy Ip & Michelle Leung, *Important Update: China’s Anti-Unfair Competition Law*, VIVIEN CHAN & CO. NEWS. ISSUE 2 (Jan. 2018), <http://www.vcclawservices.com/sources/publications/2018issue2.pdf>.

<sup>234</sup> E.g., N.46 Guiding Case; *Beijing Miantian Textile Co., Ltd. et al. v. Muji Co., Ltd. et al.* (Beijing Intell. Prop. Ct. 2015).

redistributed to the public for free.<sup>235</sup> For instance, in *Lujin Indus. Co., Ltd. v. Lujin Crafts Co., Ltd.*, the court held that the registered trademark of “Lujin” is not entitled to trademark protection because it has been recognized as a generic name of Shandong folk handmade cotton textile and an intangible cultural heritage.<sup>236</sup> The court explained that “Lujin” had been in the public domain as a generic name before it was registered as a trademark because its value is contributed by “the public,” rather than merely the trademark owner. It is also a generic name known by “the public” for a producing process for brocade. The rule that generic names are not entitled to trademark protection is consistent with the U.S. trademark law.<sup>237</sup>

Inconsistency, however, exists in the test to determine what constitutes a generic name. The rationale of determining generic names in *Lujin* is opposite to a recent opinion from the U.S. Court of Appeals for the Ninth Circuit. The court in *Elliott v. Google, Inc* determined that Google is not a generic term, even though the term of Google is “universally used to describe the act of internet searching.”<sup>238</sup> The court explained that “the mere fact that the public sometimes uses a trademark as the name for a unique product does not immediately render the mark generic.”<sup>239</sup> Compared to the Ninth Circuit, the court of *Lujin* and the SPC ruled a narrower test for “the public.”<sup>240</sup> For determining the generic name of goods with regional characteristics, “the public” refers to a niche market, “the people in a specific producing area and the relevant group of people, rather than the general people in the country.”<sup>241</sup> Moreover, this use of the narrow “public” can intervene in the enforcement of trademark rights in China, suggesting stronger public interest and weaker private interest in the legal thinking of China’s courts and jurisprudence compared to the U.S. courts. As a guiding case, *Lujin* also shows that Chinese courts and the SPC are conservatively balancing the dual-goal of the Trademark Law and the Anti-Unfair Competition Law on compensating the interest of companies and reducing research costs of consumers.<sup>242</sup>

Even though *Lujin* and *Elliott* are divergent on determining generic names,<sup>243</sup> these two cases show at least two consistent characteristics between the two countries’ legal systems. First, statutory interpretation is a dynamic tool for economic development and cultural development.<sup>244</sup> Second, the goal of strengthening IPRs is to improve innovation and

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<sup>235</sup> Barnett, *supra* note 164.

<sup>236</sup> N.46 Guiding Case. Shangdong is a province of China.

<sup>237</sup> See *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 8-15 (1976) (excluding generic terms from the scope of trademark protection).

<sup>238</sup> *Elliott v. Google, Inc.*, 860 F.3d 1151, 1155 (2017).

<sup>239</sup> *Id.*

<sup>240</sup> N.46 Guiding Case.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*; *Elliott*, 860 F.3d at 1155.

<sup>244</sup> See Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 20 (1936).

economic growth.<sup>245</sup> The dynamic process to use that tool and realize the goal varies not only between countries but also inside each country due to the limitations of utilitarianism, under which efficiency can be either considered as public efficiency or only between private parties.<sup>246</sup> What a unique purpose of the guiding cases for IPRs in China, such as *Lujin* (but not limited to the issues of trademark or unfair competition), is to stabilize the society and increase the economic growth.<sup>247</sup> This is also a political concern of the Communist Party in its administration, the foundation of which is utilitarian concerns about the public welfare and economic growth of the country. The Trademark Law was amended in 2019 to require use in commerce in trademark registration and enforcement, which is consistent with the U.S. trademark law but inconsistent with part of the rules in *Ferrero*.<sup>248</sup> Due to the utilitarian legislative purpose to resume the trade relationship between the two countries, the inconsistency between *Ferrero* and the amended statutes is not necessary to suggest that *Ferrero* is either economically efficient or inefficient.

## 2. Copyright

In order to form a competitive economy, patents and copyrights function to cure the market failure created by the free riders of innovation or creation.<sup>249</sup> This economic rationale is reflected in three copyright guiding cases, in which the courts determined the scope or subject matter issues of copyright protection.<sup>250</sup> On the one hand, the guiding cases conservatively interpret the statutes for determining an optimal scope of copyright protection and maximizing the public interest. On the other hand, the statutes are like the U.S. copyright law to provide copyright protection for rewarding creation.<sup>251</sup>

The guiding case of *Zhang v. Lei* clarifies the elements for determining a work’s copyright eligibility when the statutory language does not explicitly address these elements.<sup>252</sup> The court denied copyright protection for lack of originality and the low quality of creation.<sup>253</sup> The parties disputed over whether the Lei’s drama script infringed the copyright

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<sup>245</sup> See Daniel Gervais, *Of Clusters and Assumptions: Innovation as Part of a Full TRIPS Implementation*, 77 FORDHAM L. REV. 2353, 2337 (2009).

<sup>246</sup> Posner, *Utilitarianism, Economics, and Legal Theory*, *supra* note 169; Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, *supra* note 169.

<sup>247</sup> Zhang Qi, *supra* note 106, at 143; See Kang Weimin Jr., *supra* note 101, at 3 (arguing the importance of guiding cases to society stability and unity of the nation).

<sup>248</sup> N.47 Guiding Case.

<sup>249</sup> E.g., Dogan & Lemley, *supra* note 174, at 1231 & 1239.

<sup>250</sup> N.48 Guiding Case; N.80 Guiding Case; N.81 Guiding Case.

<sup>251</sup> See William W. III. Fisher, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1700 (1988); See also Smith, *supra* note 20; Lemley, *supra* note 152, at 1055-1058 (discussing the economic incentives to boost IP applications).

<sup>252</sup> N.81 Guiding Case.

<sup>253</sup> *Id.*

of Zhang’s novel.<sup>254</sup> The court excluded the mainline theme and the overall sequence of clues in a literary work, created on the same historical theme (about streamlining and reorganization of cavalry units in the mid-1980s), from copyright protection because they were within the scope of ideas and public wealth. The court explained that the raw material for creation dropped in the public domain due to lack of originality, distinguished from the expression of thoughts or emotion.<sup>255</sup> Moreover, the court also excluded creative ideas, materials, the information in the public domain, creation forms, necessary scenes, and unique or limited expression forms from copyright protection because they are not original expression.<sup>256</sup> The rule and reasoning in *Zhang* are similar as the Second Circuit of the U.S. Court of Appeals, which excludes the information in the public domain (*i.e.*, use of alphabets) from original creations in copyright enforcement.<sup>257</sup> Therefore, the legal question in *Zhang* has not been argued much in the scholarship or the U.S. case laws because it has been considered as “a universal truth about art,” not controversial or problematic in copyright for a long time.<sup>258</sup>

Other requirements for copyright eligibility in China are more conservative than the U.S., shown in *Jingdiao Tech. Co., Ltd. v. Naiky Elec. Tech. Co., Ltd.*<sup>259</sup> The software under the dispute functions to encrypt ENG files and prevent circumvention of the accused software and decryption of the ENG files. The defendant, Naiky, decrypted ENG files, so its users can read Jingdiao’s ENG files without Jingdiao’s software. The court ruled that ENG files are copyright ineligible because the nature of the files is data and circumventing the software outputting the data and saving the data in a particular format do not constitute copyright infringement.<sup>260</sup> The court reasoned that Naiky’s circumvention will not infringe the literal elements of the software, which are under copyright protection, and copyright rights do not cover the expansion of the competitive edge from software to machines. One the one hand, it is the same that the U.S. copyright law only protects literal elements of software<sup>261</sup> but does not protect functional parts of a work.<sup>262</sup> On the other hand, circumvention in the U.S. is treated opposite to *Jingdiao*.<sup>263</sup> Circumvention in the U.S. could be argued around the defense of fair use on the ground of copyright, rather than an affirmative right of

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<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> The court states that original expression under copyright protection should be the expression of thoughts or emotion.

<sup>257</sup> *Boisson v. Banian, Ltd.*, 273 F.3d 262 (2001).

<sup>258</sup> See James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CAL. L. REV. 1413, 1464 (1992).

<sup>259</sup> N.48 Guiding Case.

<sup>260</sup> *Id.* Naiky does not raise an argument of reverse engineering, which is a fair use defense in copyright infringement. It only argues that copying ENG files by decryption does not constitute copyright infringement.

<sup>261</sup> *Computer Associates Intern., Inc. v. Altai, Inc.*, 982 F.2d 693 (1992).

<sup>262</sup> *Pivot Point Intern., Inc. v. Charlene Products, Inc.*, 372 F.3d 913 (2004) (ruling that useful parts are copyright ineligible).

<sup>263</sup> N.48 Guiding Case.

use.<sup>264</sup> It is clearly prevented by the Digital Millennium Copyright Act (“DMCA”).<sup>265</sup> Overall, *Jingdiao* does not necessarily result in weak incentives for innovators in the software industry.<sup>266</sup> Programmers consider the output data as complementary products of the copyrighted software, so they are rewarded for their software from copyright protection rather than for their complementary products that automatically come with the software.<sup>267</sup>

The conservative protection, as shown in *Zhang*<sup>268</sup> and *Jingdiao*,<sup>269</sup> may send signals to the inferior courts to control copyright quality. These two guiding cases also suggest an underlying idea of preventing overprotection of copyrights and leaving the door open for follow-on creators,<sup>270</sup> even though *Jingdiao*, excluding functional elements of software from copyright protection, does not claim that they should pursue protection and exclusive rights under patent law as the 7th Circuit of the U.S. Court of Appeals.<sup>271</sup> A conservative definition of the subject matter or scope of copyright protection does not harm, but promotes innovation and creation,<sup>272</sup> which is supplemented by another guiding case, *Hong v. Wufufang Food Co., Ltd.*<sup>273</sup> In *Hong*, the court ruled that follow-on creators are not only free to use the material in the public domain but also can be awarded copyrights for the originality in their derivative works.<sup>274</sup> In the design of a copyright regime, when instructing the inferior courts and the market to restrict the scope of copyright protection, narrowing the eligibility of copyright can be brighter and more efficient than providing a fair use test like the U.S. regime, which creates high transaction costs.<sup>275</sup>

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<sup>264</sup> Michael P. Matesky II, *The Digital Millennium Copyright Act and Non-Infringing Use: Can Mandatory Labeling of Digital Media Products Keep the Sky from Falling*, 80 CHI.-KENT L. REV. 515, 516-520 (2005).

<sup>265</sup> 17 U.S.C. §1201 (a)(1)(A).

<sup>266</sup> N.48 Guiding Case.

<sup>267</sup> See Peter Menell, *Tailoring Legal Protection for Computer Software*, 39 STAN. L. REV. 1329, 1343-1344 (1986).

<sup>268</sup> N.81 Guiding Case.

<sup>269</sup> N.48 Guiding Case.

<sup>270</sup> Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 1015-1017 (1990).

<sup>271</sup> N.48 Guiding Case; *Pivot Point Intern., Inc. v. Charlene Products, Inc.*, 372 F.3d 913, 934 (2004) (“[O]ther possible legal protections for Pivot Point’s intellectual property—design patent, trademark, trade dress, and state unfair competition law—are available to address [the copyright eligibility of the utilitarian functions of the products]. Copyright does not protect functional products.”).

<sup>272</sup> See MARIO CIMOLI ET AL., *Innovation, Technical Change, and Patents in the Development Process: A Long-Term View*, INTELLECTUAL PROPERTY RIGHTS: LEGAL AND ECONOMIC CHALLENGES FOR DEVELOPMENT 79 (Mario Cimoli et al. eds., 2014) (suggesting the extension of patentable subject matters has negative potential effects on the future rate of innovation).

<sup>273</sup> N.80 Guiding Case.

<sup>274</sup> *Id.*

<sup>275</sup> See Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 30 J. COPYRIGHT SOC’Y U.S.A. 253, 271-287 (1983) (discussing the efficiency problem of the fair use doctrine); See also Posner, *supra* note 108, at 290.

### 3. Patent and Plant Variety

When the literature complains that the U.S. patent regime is inevitably overrewarded,<sup>276</sup> Chinese courts are instructed to function as a gatekeeper to prevent IP owners from being overrewarded after they received the rights or privileges from the government. There are six of eight patent guiding cases ruling on patent eligibility, the protection scope of patents or plant varieties, or their enforceability.<sup>277</sup>

In *Siruiman Fine Chemicals Co., Ltd. v. Kengzi Water Supply Co., Ltd.*, even though the plaintiff was entitled to the patent right, the court emphasized that it cannot enforce the patent in two situations.<sup>278</sup> One is, if the accused party produced, sold, or imported the accused products before the utility patent application is granted, the subsequent use, the promised sale, or the sale of the products by the accused party without the permission of the utility patent owner is not deemed as patent infringement.<sup>279</sup> This rule was deduced from the statutory language.<sup>280</sup> Under this rule, the court and the SPC denied the value of patent applications before the SIPO grants the patent applications. The court redistributed the rights of patent owners to follow-on innovators.<sup>281</sup> The other situation that a patent cannot be enforced is that the prior users, whose use is earlier than the filing date of the patent application, can produce the same products or use the same methods as not infringing the patent after the patent is issued due to the gap in the language of the Patent

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<sup>276</sup> Mark A. Lemley & Carl Shapiro, *Reply: Patent Holdup and Royalty Stacking*, 85 TEXAS L. REV. 2163, 2166 (2007) (explaining that a patent holder is overrewarded than its contribution to the society when other parties independently achieve the same or a similar invention at roughly the same time).

<sup>277</sup> *Siruiman Fine Chemicals Co., Ltd. v. Kengzi Water Supply Co., Ltd.*, 2013 Sup. People’s Ct. Guiding Case 20 (Sup. People’s Ct. 2011) (China) [hereinafter N.20 Guiding Case]; *Bai v. Nanxun Goods Mktg. Serv. Center*, 2015 Sup. People’s Ct. Guiding Case 55 (Sup. People’s Ct. 2012) (China) [hereinafter N.55 Guiding Case]; *Eli Lilly & Co. v. Watson Pharm. Co., Ltd.*, 2017 Sup. People’s Ct. Guiding Case 84 (Sup. People’s Ct. 2016) (China) [hereinafter N.84 Guiding Case]; *Xianfeng Seeds Co., Ltd. v. Nongfeng Seeds Co., Ltd.*, 2018 Sup. People’s Ct. Guiding Case 100 (Sup. People’s Ct. 2015) (China) [hereinafter N.100 Guiding Case]; *Grohe AG v. Jianlong Sanitary Ware Co., Ltd.*, 2017 Sup. People’s Ct. Guiding Case 85 (Sup. People’s Ct. 2015) (China) [hereinafter N.85 Guiding Case]; *Jinhai Seed Indus. Co., Ltd. v. Fukai Agric. Sci. & Tech. Co., Ltd.*, 2017 Sup. People’s Ct. Guiding Case 92 (Gansu High People’s Ct. 2013) (China) [hereinafter N.92 Guiding Case].

<sup>278</sup> N.20 Guiding Case.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* (“Comprehensively considering the aforementioned provisions, the Patent Law stipulates that the applicant may demand an entity or individual who exploits the invention after the invention patent application is published but before the patent is granted (*i.e.*, within the provisional protection period for patents) pay an appropriate fee; that is, [the applicant] has the right to request payment of provisional protection period royalties for invention patents. However, the applicant, with regard to acts exploiting the invention within the provisional protection period for patents, does not have the right to request that the exploitation cease. Therefore, exploiting related inventions within the provisional protection period for invention patents is not a type of act prohibited by the Patent Law.”).

<sup>281</sup> *Id.*

Law.<sup>282</sup> The court valued patents by tolerating the prior users and encouraged inventors to file patent applications early.

In another three guiding cases, the courts denied enforcing patent rights when the patent claims are vague<sup>283</sup> and provide multiple tests for showing how the accused technologies are not similar to the patented products or process to avoid a patent infringement.<sup>284</sup> These guiding cases, including the discussed *Siruiman*,<sup>285</sup> show how the SPC guides the inferior courts to conservatively apply property rules under the public interest theory in patent litigations, to promote innovation<sup>286</sup> and to protect innovators in general. This idea to nourish follow-on innovators is utilitarian, rather than to achieve Pareto optimality.<sup>287</sup> Pareto optimality tolerates or even ignores an imbalance between pioneer innovators and follow-on innovators when maximizing the public interest and improving innovation.<sup>288</sup> Pareto optimality is against the philosophy of morality inherited from the Chinese history of governance.<sup>289</sup> It is also against the original attention of patents for inventors, which is a tradeoff between receiving limited exclusive protection and disclosing the invention in the public domain for reducing the innovation costs of other individuals or entities.<sup>290</sup> If the patent law with the public power and a utilitarian legislative intent to maximize the social wealth sometimes is unrequited when the benefited private parties for IPRs diminish

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<sup>282</sup> *Id.* (“[T]he aforementioned subsequent acts of exploitation cannot be determined to constitute infringements merely because the Patent Law does not have clear provisions.”).

<sup>283</sup> N.55 Guiding Case.

<sup>284</sup> N.84 Guiding Case (distinguishing the accused process through a compound which is a combination of the compound used in the patented process and a Benzyl so as to be distinguished from the patented process and citing Several Provisions of the Supreme People’s Court on Issues Concerning Applicable Laws to the Trial of Patent Controversies); Several Provisions of the Supreme People’s Court on Issues Concerning Applicable Laws to the Trial of Patent Controversies (promulgated by Sup. People’s Ct., effective July 1, 2001) 2001, art. 17 (China) (“Article 17. The equal characteristics mean the characteristics that use similar means, realize similar functions and achieve similar effects as the technological characteristics indicated in the claims, and that the ordinary technological personnel of this field may think out without creative work.”); N.100 Guiding Case (ruling that if the DNA fingerprinting test shows equality or similarities between a granted plant variety and an accused propagating material, the allegedly infringing party shall be allowed to provide a DUS test, for distinctness, uniformity, and stability, to show distinctness and the failure of similarities so as to prove there is no infringement of a plant variety).

<sup>285</sup> N.20 Guiding Case.

<sup>286</sup> See Sichelman, *supra* note 21.

<sup>287</sup> Posner criticizes that Pareto optimality is impractical and fits utilitarianism with Pareto improvement. See Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, *supra* note 169, at 488-491 (“Pareto superiority is the principle that one allocation of resources is superior to another if at least one person is better off under the first allocation than under the second and no one is worse off.”).

<sup>288</sup> See VINCENT J. TARASCIO, PARETO’S METHODOLOGICAL APPROACH TO ECONOMICS: A STUDY IN THE HISTORY OF SOME SCIENTIFIC ASPECTS OF ECONOMIC THOUGHT 79-84 (1968), cited by *id.* at 488, n. 6.

<sup>289</sup> See *supra* Section I.A.

<sup>290</sup> *E.g.*, see Gervais, *supra* note 245.

competition and innovation, this outcome is against the utilitarian legislative intent.<sup>291</sup>

### *B. Property Rules and Liability Rules*

Efficient rules minimize the number of litigations and litigation costs and maximize the social wealth. When transaction costs are low, a court applies property rules, assigning property rights to a party, which can efficiently allocate the property rights.<sup>292</sup> According to the property rules, even though the transaction costs increase after the court assigns the property rights, the (potential) opposing parties can still negotiate a deal by themselves. When transaction costs are high, the court applies liability rules, not assigning the property rights but only assigning liabilities to a party.<sup>293</sup> Otherwise, the opposing parties will never have a deal. This section discusses how the ruling courts applied and the SPC instructs the inferior courts to apply property rules and liability rules when the ruling courts assigned the burden of proof and remedies in the guiding cases.

#### 1. Balance of the Burden of Proof

The SPC rules on the burden of proof in five of the twenty-two IP guiding cases.<sup>294</sup> The plaintiffs in the two patent guiding cases carry a relatively stronger burden of proof compared to the plaintiffs in the copyright guiding case. In *Grohe AG v. Jianlong Sanitary Ware Co., Ltd.*, the court ruled that the patentee of a design patent has the burden of proof in the determination of the design features that he asserts.<sup>295</sup> In *Eli Lilly & Co. v. Watson Pharm. Co.*, the court ruled that the patentee of a utility patent has the burden to present the technology accused patent infringing.<sup>296</sup> By contrast, the court in *Shi v. Huaren Elec. Info. Co., Ltd.* ruled that the defendant bears the liability for copyright infringement if he refuses to provide the accused software’s source code without proper reasons when the plaintiff has difficulties on introducing the evidence and exploring the source code.<sup>297</sup> The rest two guiding cases discuss the burden of proof by clarifying the tests for determining the infringement of plant varieties.

<sup>291</sup> See Goldberg, *supra* note 149, at 1640.

<sup>292</sup> See generally Calabresi & Melamed, *supra* note 204.

<sup>293</sup> See generally *id.*

<sup>294</sup> *Shi v. Huaren Elec. Info. Co., Ltd.*, 2015 Sup. People’s Ct. Guiding Case 49 (Jiangsu High People’s Ct. 2006) (China) [hereinafter N.49 Guiding Case]; N.84 Guiding Case; N.85 Guiding Case; N.92 Guiding Case; N.100 Guiding Case.

<sup>295</sup> N.85 Guiding Case (“With respect to the determination of design features, the patentee should prove the design features that he asserts.”).

<sup>296</sup> N.84 Guiding Case (“In a patent infringement dispute over a drug preparation method, [the court] should, in the absence of other, contrary evidence, presume that the allegedly infringing drug’s technical process filed with drug supervision departments is the actual technical process for the preparation of the drug.”).

<sup>297</sup> N.49 Guiding Case (“Where a defendant refuses to provide the source program or the object program of the allegedly infringing software, and, due to technical limitations,



With respect to patents, the SPC actively reduces transaction costs when the value of the patents on dispute is high but reluctantly reduces transaction costs when the patents are relatively not valuable for lack of innovation. The value of design patents on average is lower than utility patents and the owners of utility patents in the pharmaceutical industry value property rights of their patents more than other patent owners, such as the owners of manufacturing patents or software patents. Moreover, the SPC concerns litigation costs. The litigation costs of a dispute over utility patents, which may need expert testimony,<sup>298</sup> are higher than the litigation costs of a dispute over design patents, in which the court applied an ordinary observer test for the functionality of the design patents.<sup>299</sup> In the guiding case about design patent infringement, *Grohe*, the court did not address economic efficiency in its evidentially rule.

The court in *Grohe* made an evidentiary rule, the plaintiff bears the burden of proving the patent infringement.<sup>300</sup> The court made this rule by following “whoever asserts must prove,”<sup>301</sup> rather than citing Article 64 of the Civil Procedure Law,<sup>302</sup> but the two laws are consistent. Partially consistent with this rule in *Grohe*, on the contrary, the SPC in *Eli Lilly* shows an intent to decrease the transaction costs.<sup>303</sup> In *Eli Lilly*, the trial court ruled against the defendant for patent infringement when the actual accused process of producing the drug had not been explored.<sup>304</sup> The SPC reversed it but did not rule against the plaintiff for lacking the evidence. Instead, the SPC ruled that the burden of finding the authentic accused process is switched from the plaintiff to the court when the plaintiff fails to explore the actual accused process from its records that the defendant filed with the government,

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the object program cannot be read directly from the allegedly infringing product, if the design defects of the plaintiff’s software and [those of] the defendant’s software are basically the same and the defendant has no proper reason for refusing to provide the source program or the object program of his software for direct comparison, [the court] may, in consideration of the plaintiff’s objective difficulty in adducing evidence, determine that the plaintiff’s software and the defendant’s software are substantively the same and that the defendant bears the liability for infringement.”).

<sup>298</sup> N.84 Guiding Case (“[A court] may ascertain complex technical facts, including the technical process for the preparation of the allegedly infringing drug, by comprehensively using multiple means, including consultations with technical investigators, expert auxiliaries, and judicial appraisal as well as technology experts.”).

<sup>299</sup> N.85 Guiding Case (“The determination of functional design features hinges on whether the design, in the eyes of a general consumer of the product bearing the exterior design, is settled on solely [on the basis of] specific functions and there is no need to consider whether the design has aesthetic appeal.”) .

<sup>300</sup> N.85 Guiding Case. (“According to the evidentiary rule ‘whoever asserts must prove’, the patentee should prove the design features that he asserts.”).

<sup>301</sup> *Id.*

<sup>302</sup> Civil Procedure Law (promulgated by the Nat’l People’s Cong., Apr. 9, 1991, effective Apr. 9, 1991) art. 64 (2007) (China) (“It is the duty of a party to an action to provide evidence in support of his allegations.”).

<sup>303</sup> N.84 Guiding Case.

<sup>304</sup> *Id.*

reducing the transaction costs between the parties.<sup>305</sup> Even though Article 64 of the Civil Procedure Law addresses this rule,<sup>306</sup> this guiding case functions to narrow the discretion of judges in adjudicating the cases of the infringement of process patents for drugs.<sup>307</sup>

With respect to software copyrights, *Shi* suggests an efficient liability rule to reduce litigation costs for both the parties and the court.<sup>308</sup> Building technical barriers to the accused source code and the testimony needs costs on the defendant’s side. By contrast, hurdling the barriers adds costs on the plaintiff’s side. Under *Shi*, the accused infringer of a software copyright had choices to either disclose the source code for the similarity comparison between his code and the copyrighted code in the testimony or to bear a negative consequence on him.<sup>309</sup> This rule in *Shi* does not wholly relieve plaintiffs’ burden of proof as a matter of law but reduces the search costs of copyright holders. Under this court rule, the parties disputing over copyright infringement should be more likely to settle when the obstacles in the similarity comparison. Moreover, the costs of hurdling the technical barriers can be internalized by the defendant at zero cost, and the defendants are disincentivized to invest in adding the technical barriers for preventing copyright holders from exploring the defendants’ intentional infringing behaviors. Indirectly, intentional infringers of copyrights may get deterred from building technical barriers to the testimony for the unilaterally increased costs and risks in the disputes over copyright infringement.

With respect to plant varieties, the SPC clarifies the test for determining infringement of plant varieties in *Jinhai Seed Indus. Co., Ltd. v. Fukai Agric. Sci. & Tech. Co., Ltd.*<sup>310</sup> The dominant test of the similarity between varieties that the courts adopted was the DNA Fingerprinting Method, which is quick and cheap.<sup>311</sup> If the test suggests that the protected variety and the accused variety are similar, the courts allowed the defendant to prove the failure of the similarities through a test for distinctness, uniformity, and stability (DUS test). For efficiency with respect to litigation

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<sup>305</sup> *Id.* (“Where there is evidence to prove that the filed technical process of the allegedly infringing drug is not authentic, [the court] should fully review evidence, including technical sources, production procedures, batch production records, filed documents, etc. of the allegedly infringing drug, to determine, in accordance with law, the actual technical process for the preparation of the allegedly infringing drug.”).

<sup>306</sup> Civil Procedure Law (promulgated by the Nat’l People’s Cong., Apr. 9, 1991, effective Apr. 9, 1991) art. 64 (2007) (China) (“If, for objective reasons, a party and his agent ad litem are unable to collect the evidence by themselves or if the people’s court considers the evidence necessary for the trial of the case, the people’s court shall investigate and collect it.”)

<sup>307</sup> N.84 Guiding Case.

<sup>308</sup> N.49 Guiding Case.

<sup>309</sup> *Id.*

<sup>310</sup> N.92 Guiding Case; N.100 Guiding Case.

<sup>311</sup> N.100 Guiding Case. (“As a method for indoor genotypic identification, the DNA fingerprinting was economical, convenient, free from environmental influences, time efficient, and conducive to protecting the interests of right holders in a timely manner. It was also able to improve the efficiency of screening similar varieties and evaluating distinctness and was most used in practice to verify the veracity and uniformity of varieties.”).

costs, the courts and the SPC did not place the burden of showing similarity under the DUS test on the plaintiff. When there are costs of preventing infringements on the plaintiff’s side, the rules reduce the plaintiff’s litigation costs and show strong protection for the right holders. The strong property rules are efficient when the rules balance the burden of proof between the two parties.

## 2. Remedies for IPRs

Injunctions are property rules, and compulsory licenses and damages are liability rules.<sup>312</sup> In nine of the twenty-two IP guiding cases, the courts provided injunctive relief. The courts of twelve of the guiding cases provided monetary damages, and the court of the only criminal guiding case gave both criminal sanctions and monetary sanctions. These courts did not identically assign injunctions and monetary damages. For example, in *Tianlong Seed Tech. Co., Ltd. v. Xunong Seed Tech. Co., Ltd.*, where each side of the opposing parties owns a patent of each parent plant, the court gave compulsory licenses of the two patents to each other and asked the plaintiff to pay the defendant a lead-time compensation.<sup>313</sup> Moreover, in *Tongdefu*, the prevailed party of unfair competition did not receive any damages but only received an injunctive relief and a public apology.<sup>314</sup> This part reviews the results and the compensation given by the courts in the guiding cases and explores the economic rationales behind these cases, which sends signals to the inferior courts and the market.

### a. Low Remedies and High Sanction

The IP guiding cases show that the Chinese courts assign relatively low damages.<sup>315</sup> In the twelve guiding cases where the courts provided monetary damages, the average compensation for copyright infringement was 89,600 RMB (about \$12,800). The average compensation for trademark infringement or unfair competition was 0.18 million RMB (about \$25,407). The compensation for each guiding case about plant varieties was 0.5 million RMB (about \$71,429) and the only prevailed patent owner among the other five patent cases received 0.2 million RMB (about \$66,667) in compensation.

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<sup>312</sup> See Calabresi & Melamed, *supra* note 204.

<sup>313</sup> *Tianlong Seed Tech. Co., Ltd. v. Xunong Seed Tech. Co., Ltd.*, 2017 Sup. People’s Ct. Guiding Case 86 (Jiangsu High People’s Ct. 2013) (China) [hereinafter N.86 Guiding Case].

<sup>314</sup> N.58 Guiding Case.

<sup>315</sup> Christopher A. Cotropia et al., *Endogenous Litigation Costs: An Empirical Analysis of Patent Disputes*, 15 (Dec. 15, 2016) (finding that the average award for patent attorney fees was about \$1.2 million), <http://www.kylerozema.com/2016-12-14%20Endogenous%20Litigation%20Costs.pdf>; Michael J. Mazzeo et al., *Do NPEs Matter? Non-Practicing Entities and Patent Litigation Outcomes*, 9 J. COMPETITION L. & ECON. 879 (2013) (showing that NPEs on average received about \$80 of remedies for patents and non-NPEs on average received about \$30 of remedies for patents in 2011).

Compared to all these civil cases, the criminal defendants paid the most, a fine of 1.8 million RMB (about \$0.3 million). All these numbers of damages or fines were lower than the damages awarded by the U.S. courts,<sup>316</sup> but do not necessarily suggest that the courts systematically undercompensate IP holders.<sup>317</sup>

The dominant remedy for IP owners in the U.S. is reasonable royalties and actual damages.<sup>318</sup> Without similar tests as *Georgia-Pacific* for reasonable royalties<sup>319</sup> and *Panduit* for lost profits<sup>320</sup> in the IP statutes of China, it is a challenging question for Chinese courts to award remedies to IP owners.<sup>321</sup> The guiding cases may fill the gaps as of how those U.S. cases instruct other courts in the world to calculate damages for IP owners. For example, the plaintiffs of *Hong* asked for damages of 0.2 million RMB for copyright infringement.<sup>322</sup> The court awarded 0.1 million RMB to the plaintiffs.<sup>323</sup> The court adopted a method to determine “reasonable royalties” for individual IP owners, based on the current level of economic growth and the living standard of the people in Guizhou province, where both parties resided.<sup>324</sup>

“Reasonable royalties” for companies, however, are not necessarily higher than this method compensating individuals. In *Jinhai*, a case of plant variety infringement, the court awarded 0.5 million RMB as a lead-time compensation to the plaintiff after estimating the quantity of infringing plant varieties and the duration of the infringement.<sup>325</sup> By dividing the remedies by the duration of the infringement, three years, the remedies for the plaintiff’s plant variety were less than the remedies for Hong’s copyright.<sup>326</sup>

Therefore, these two guiding cases together do not suggest that the SPC highly awards patents for innovation or their social value in technology.<sup>327</sup> “The goal of patent remedies is properly to ensure that patent owners are compensated for any unauthorized uses made by others,”<sup>328</sup>

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<sup>316</sup> Cotropia et al., *supra* note 315, at 15; Mazzeo et al., *supra* note 315 (showing that NPEs on average received about \$80 of remedies for patents and non-NPEs on average received about \$30 of remedies for patents in 2011).

<sup>317</sup> But see Sichelman, *supra* note 21, at 564.

<sup>318</sup> See Michael J. Mazzeo et al., *Explaining the “Unpredictable”: An Empirical Analysis of U.S. Patent Infringement Awards*, 35 INT’L REV. L. & ECO 58, 66 (2013).

<sup>319</sup> *Georgia-Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970).

<sup>320</sup> *Panduit Corp. v. Stahl Bros. Fibre Works*, 575 F.2d 1152 (1978).

<sup>321</sup> IWNcomm

*Co., Ltd. v. Sony Mobile Communications (China) Co. Ltd.* (Beijing Intell. Prop. Ct. 2017) (China).

<sup>322</sup> N.80 Guiding Case.

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> N.92 Guiding Case.

<sup>326</sup> *Id.*; N.80 Guiding Case.

<sup>327</sup> See Sichelman, *supra* note 21, at 533 (suggesting that remedies for patent owners should be able to induce their innovation incentives, which could be made more than whole.)

<sup>328</sup> Lemley & Shapiro, *supra* note 276, at 2171.

rather than to reward patent holders in addition to the exclusive rights. Conservative ex-post remedies given by courts can avoid systematic overcompensation, which is the critics broadly received by the U.S. IP regime.<sup>329</sup> It is especially critical when the SIPO and the NCAC are munificent to issue patents, trademarks, and copyrights.<sup>330</sup>

Overall, the IP guiding cases suggest that the SPC and some inferior courts prefer “actual damages” to “reasonable royalties.” The parties expect courts to apply limited “reasonable royalties” when they cannot prove both the loss of the plaintiff and the profits received by the defendant for the infringement.<sup>331</sup> Moreover, the “actual damages” may neither mean lost profits as *Panduit*<sup>332</sup> nor be definitely higher than “reasonable royalties.”<sup>333</sup> In *Jiayikao Home Appliances Co., Ltd. v. Jinshide Indus.*, the only expenses spending on patent infringement that the plaintiff could prove were the expenses on collecting evidence for the direct infringement and the contributory infringement by the two defendants, which were 85,000 RMB (about \$12,143).<sup>334</sup> Besides the remedies of 0.15 million RMB (about \$0.21 million) paid by the direct infringer to cover these expenses, the court asked the contributory infringer who was an ISP to pay another 0.05 million RMB (about \$7,143) to the plaintiff according to the Tort Law.<sup>335</sup> Another way to read these remedies is that besides the fully covered “actual damages” on collecting evidence, the “reasonable royalties” for the plaintiff were 65,000 RMB (about \$9,286) from the direct infringer and 0.05 million RMB from the contributory infringer, which was 115,000 RMB (about \$16,429) in total. However, this number (0.02%) is still much lower than the remedies of 480 million RMB (about \$68.57 million) requested by the plaintiff.

Therefore, even though the court adjudicating *Jiayikao* reasoned under the Tort Law,<sup>336</sup> the “reasonable royalties” paid by infringers,

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<sup>329</sup> *Id.* (“[A] patent holder who captures more in profits than it contributes socially is overrewarded.”).

<sup>330</sup> See Zhen Lei et al., *Are Chinese Patent Applications Politically Driven?* (last visited Dec. 7, 2018), <https://www.oecd.org/site/stipatents/4-3-Lei-Sun-Wright.pdf>.

<sup>331</sup> N.80 Guiding Case.

<sup>332</sup> *Panduit Corp. v. Stahl Bros. Fibre Works*, 575 F.2d 1152 (1978).

<sup>333</sup> Lost profits are usually higher than reasonable royalties given by the U.S. courts. *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538 (1995).

<sup>334</sup> *Jiayikao Home Appliances Co., Ltd. v. Jinshide Indus.*, 2017 Sup. People’s Ct. Guiding Case 83 (Zhejiang High People’s Ct. 2015) (China) [hereinafter N.83 Guiding Case].

<sup>335</sup> “Where a network user commits a tort through the network services, the victim of the tort shall be entitled to notify the network service provider to take such necessary measures as deletion, block or disconnection. If, after being notified, the network service provider fails to take necessary measures in a timely manner, it shall be jointly and severally liable for any additional harm with the network user; Where a network service provider knows that a network user is infringing upon a civil right or interest of another person through its network services, and fails to take necessary measures, it shall be jointly and severally liable for any additional harm with the network user.” *Id.*; Tort Law (promulgated by the Standing Comm. Nat’l People’s Cong., Dec 26, 2009, effective July. 1, 2010) 2009, art. 36 (China) (“Article 36 A network user or network service provider who infringes upon the civil right or interest of another person through network shall assume the tort liability.”).

<sup>336</sup> N.83 Guiding Case.

especially by the contributory infringer, have little intention to remedy the harmed private party, but rather function as sanctions and provide a terrifying effect on the potential infringers because the IP statutes do not clearly address the potential infringers’ liabilities at that time.<sup>337</sup> This guiding case suggests that Chinese courts are guided to interpret the Patent Law more like a public law to protect the interest of innovators or patent holders, rather than to reward individual patentees in money.<sup>338</sup> The guiding cases suggest a terrifying effect which is arguably weak in general. In *People v. Guo*, the only criminal guiding case, after the defendants’ Taobao shop (online) generated an income of 20 million RMB (about \$2.9 million) and was profited 2 million RMB (about \$0.3 million) from selling counterfeiting products, the defendants were fined 1.8 million RMB and placed on felony probation by the court.<sup>339</sup> In other words, when they were rehabilitated, they were still entitled to 0.2 million RMB of the illegal profits from counterfeiting, even though their fines were much higher than how much other IP infringers in the guiding cases paid. However, if utilitarians take reputation account to wealth,<sup>340</sup> the terrifying effect is not weak due to the felony given by the court.<sup>341</sup>

Besides the sanctions given to the defendant’s side, an equitable remedy of reputation is also applied to the plaintiff’s side by the courts.<sup>342</sup> In *Youth Travel Serv.*<sup>343</sup> and *Lan v. SUREMOOV Auto Maint. & Repair Serv. Co., Ltd.*,<sup>344</sup> the facts were similar that the plaintiffs’ trademarks or tradenames were infringed. The plaintiffs in *Lan* were awarded 80,000 RMB<sup>345</sup> (about \$11,429) and the plaintiff in *Youth Travel Serv.* was awarded 30,000 RMB (about \$4,286) plus a public apology.<sup>346</sup> Because IP owners, especially trademark owners, consider reputation as a utility, a relatively low

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<sup>337</sup> See Posner, *supra* note 108, at 278-279; See also William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975).

<sup>338</sup> See also Landes & Posner, *supra* note 337, at 877.

<sup>339</sup> State v. Guo, 2017 Sup. People’s Ct. Guiding Case 87 (Jiangsu Suqian Intermediate People’s Ct. 2015) (China) [hereinafter N.87 Guiding Case].

<sup>340</sup> See Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135, 1157 (2000) (“When the performer of apology is protected from the consequences of the performance through carefully crafted statements and legislative directives, the moral thrust of apology is lost.”).

<sup>341</sup> N.87 Guiding Case.

<sup>342</sup> General Principles Of the Civil Law Of the People's Republic Of China (promulgated by Standing Comm. Nat’l People’s Cong., Aug. 27, 2009, effective Aug. 27, 2009) Art.134 (China) (been effective on Jan.1, 1987 and amended in 2009); Brent T. White, *Say You’re Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, (2006) (“Countries in which court-ordered apologies are a civil legal remedy include at least China, Japan, Indonesia, Ukraine, Korea, and the Czech Republic.”).

<sup>343</sup> N.29 Guiding Case.

<sup>344</sup> Lan v. SUREMOOV Auto Maint. & Repair Serv. Co., Ltd., 2014 Sup. People’s Ct. Guiding Case 30 (Tianjin High People’s Ct. 2013) (China) [hereinafter N.30 Guiding Case].

<sup>345</sup> *Id.*

<sup>346</sup> N.29 Guiding Case.

monetary remedy and a court-ordered public apology for them do not necessarily suggest undercompensation, but also not raise the problem of overcompensation. This technique may also help judges in other jurisdictions interpret IP statutes when the law is implemented between public law and private law, and the legislative intent is in between the public-interest theory and the theory of interest-group.<sup>347</sup>

## b. Injunctions

Regardless of whether IPRs are considered as negative rights to exclude others from using them<sup>348</sup> or positive rights to grant their owners to make, use, or sell inventions or creations,<sup>349</sup> they are treated as property rights.<sup>350</sup> This opinion is recognized in both the U.S. and China. After clarifying the entitlement of property rights under the Coase Theorem,<sup>351</sup> common-law courts including the U.S. courts apply either (1) a property rule and give equitable relief, or (2) a liability rule and award enhanced statutory remedies/attorney fees to protect the property owners from any further infringement of their property rights.<sup>352</sup> In the U.S., injunctions and damages for IP infringement are coded in the statutes of each individual IP laws.<sup>353</sup> Compared to the conservative remedies awarded in China, U.S. courts are utilitarian in general concerning the delicate parties and compensating IP owners’ pecuniary loss or actual damages for the infringement.<sup>354</sup> On the contrary, U.S. courts set high thresholds for injunctive relief and are more conservative to award injunctions to IP owners than Chinese courts.<sup>355</sup> The

<sup>347</sup> See, e.g., Posner, *supra* note 108, at 277; See also Jennifer K. Robbennolt et al., *Symbolism and Incommensurability in Civil Sanctions: Decision Makers as Goal Managers*, 68 BROOK. L. REV. 1121, 1147 (2003) (noting that the U.S. system does not have court-ordered apologies as a civil remedy).

<sup>348</sup> DONALD S. CHISUM ET AL., *PRINCIPLES OF PATENT LAW* 4 (3rd ed. 2004); KIMBERLY PACE MOORE ET AL., *PATENT LITIGATION AND STRATEGY* 3 (1st ed. 1999); THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY* 163 (2007).

<sup>349</sup> Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 32 (1913); Mossoff, *supra* note 67.

<sup>350</sup> See Mossoff, *supra* note 67, at 45-50; 35 U.S.C. § 261.

<sup>351</sup> See R. H. Coase, *The Problem of Social Cost*, 3 J.L. & E. 1 (1960) (arguing that efficient laws should be able to decrease the transaction cost).

<sup>352</sup> See Calabresi & Melamed, *supra* note 204.

<sup>353</sup> E.g., 35 U.S.C. §§ 283, 284; 17 U.S.C. § 502.

<sup>354</sup> *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2137 (2018); *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 507 (1964); *Coupe v. Royer*, 155 U.S. 565, 582 (1895) (“At law the plaintiff is entitled to recover, as damages, compensation for the pecuniary loss he has suffered from the infringement...As the case in hand is one at law, it is not necessary to pursue the subject of the extent of the equitable remedy.”); *GM Corp. v. Devex Corp.*, 461 U.S. 648, 655 (1983) (emphasizing “Congress’ overriding purpose of affording patent owners complete compensation”); See generally Andrew Gilden, *Copyright’s Market Gibberish*, WASH. L. REV. (forthcoming 2019) (listing case examples that the courts refuse to compensate any losses other than pecuniary loss in copyright cases).

<sup>355</sup> See *Ebay Inc. v. MercXchange, L.L.C.*, 126 S.Ct. 1837 (2006) (setting a strict standard for giving injunctive relief).

hardest requirement for acquiring injunctive relief is to show “irreparable injury.”<sup>356</sup>

Compared to the conservative injunctions given by U.S. courts,<sup>357</sup> Chinese courts commonly award permanent injunctions.<sup>358</sup> When considering reputation as an interest, it is reasonable to understand why property rules, rather than liability rules, are predominant in China. For example, in *Tongdefu*, the prevailing plaintiff only asked for an injunctive relief and a public apology for infringing its trade name, but zero remedies, so the court only awarded a permanent injunction to the plaintiff.<sup>359</sup> Instead of guiding the courts to increase statutory remedies as the U.S., the guiding cases expect Chinese courts to confirm the value of IPRs by awarding permanent injunctions to IPR holders.<sup>360</sup> Then, the market determines the economic value of the IPRs. The burden of generating rewards from IPRs is not on the courts, but rather on the IP owners to promote innovation and competitive abilities.

IP owners have more information about the value of their IPRs than the courts, so they are adequate and in a better bargaining position to negotiate with the potential licensees if their IPRs are strong and valuable after the property rights are affirmed by the court.<sup>361</sup> In *Lan*, the court empathized that a violation of administrative licensing laws or regulations by exceeding the legitimate business scope of a company does not negatively affect the company to enforce its IPRs.<sup>362</sup> It suggests an incentive to protect property rights and the private interest, similar to what Justice Holmes suggested that it is a solecism to limit rights by wrongs.<sup>363</sup>

Moreover, injunctions or property rules do not necessarily result in inefficiency. The law may tolerate efficient infringements in a short-term.<sup>364</sup>

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<sup>356</sup> *Id.*

<sup>357</sup> After reviewing 218 district court decisions on permanent injunctions in patent cases from May 2006 through December 2013, Holte & Christopher show that a request of permanent was rejected by district courts in 34% of the appealed patent litigations. 24% of the approved permanent injunctions stayed after the cases were appealed in the Federal Circuit. See Ryan T. Holte & Christopher B. Seaman, *Patent Injunctions on Appeal: An Empirical Study of the Federal Circuit’s Application of eBay*, 92 WASH. L. REV. 145 (2017) (empirically finding that the U.S. district courts inclined to use liability rules and the Federal Circuit prefer property rules than the district courts).

<sup>358</sup> 50% of the civil IP guiding cases were given permanent injunctions, regardless of the verdict.

<sup>359</sup> N.58 Guiding Case.

<sup>360</sup> See *supra* Section III. B. 50% of the civil IP guiding cases were given permanent injunctions; But see, Wang Yiyin, *The State Council Passed the Proposing Amendment to the Patent Law to Substantially Increase the Amount of Infringement Compensation*, CAIXIN (Dec. 5, 2018, 19:42 PM) <http://china.caixin.com/2018-12-05/101355964.html> (introducing that the patent law was amended in 2019 to highly increase statutory remedies for patent infringement).

<sup>361</sup> See Calabresi & Melamed, *supra* note 204.

<sup>362</sup> N.30 Guiding Case.

<sup>363</sup> *Id.*; 232 U.S.C § 340 (1914); Boyle, *supra* note 258, at 1459-1460.

<sup>364</sup> Sichelman, *supra* note 21, at 571 (introducing that efficient infringement could happen when the consumer deadweight loss is significant, resulting in “substantial duplicated



After being forbidden by a permanent injunction, the infringers have a second chance to decide either to license the IPRs from their owners or to realize the same goal through other technical manners. Alternative technologies are a tool to justify the market failure created by any strong property rights when the switching costs are not high.<sup>365</sup> Therefore, an efficient use of injunctions do not provide overcompensation to IP owners<sup>366</sup> and may also rectify the overcompensation provided by SIPO when the SIPO flexibly issues IP rights.<sup>367</sup> This logic may mean more to China than to the U.S. in statutory interpretation. The provisions of individual IP laws of China only address preliminary injunctions.<sup>368</sup> General relief manners, including both injunctive relief and statutory relief, are coded in the Civil Law.<sup>369</sup>

Under the rules in *Siruiman*, however, during the period of temporary protection between patent application publication and a granted patent, injunctive relief shall not be awarded; reasonable remedies could be supported contingent upon if there is no legitimate source of use provided by the accused infringer.<sup>370</sup> This guiding case suggests that the legitimate source can be another independent inventor.<sup>371</sup> The ruling court restrictively applied a property rule for a patent through injunctive relief and undermined patent holdup if the contribution of the patent to the society regarding to innovation is limited.<sup>372</sup>

### c. Compulsory License

By selecting and compiling the guiding cases, the SPC generally instructs the inferior courts to consider the public interest beyond property

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cost during the pre-invention R&D process,” or creating “transaction costs far in excess of the value of the invention”).

<sup>365</sup> The justification may not be very difficult to be realized in China where the SIPO is liberal to protect IPRs (e.g., utility models). However, this is difficult to the U.S. High switching costs are usually high (e.g., network externalities) for finding substitutes of patented components. See Runhua Wang, *Utility Models Revisited: The Case of Investing in China*, *Timely Tech* (Nov. 6, 2015), <http://illinoisjltp.com/timelytech/utility-models-revisited-the-case-of-investing-in-china/>; *But see* Stiglitz, *supra* note 37, at 1705; Sichelman, *supra* note 21, at 522.

<sup>366</sup> See Lemley & Shapiro, *supra* note 276, at 2166 & 2171; *But see* Sichelman, *supra* note 21, at 571.

<sup>367</sup> There is a vast literature suggesting that the quality of the patents issued by the SIPO is low. Moreover, the utility model system does not have a substantive examination to control the invention quality in China. See, e.g., Zhen Lei et al., *supra* note 330.

<sup>368</sup> Patent Law (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 12, 1985, effective April. 1, 1985) 2009, art. 66 (China).

<sup>369</sup> General Principles of the Civil Law of the People’s Republic of China (promulgated by Standing Comm. Nat’l People’s Cong., Aug. 27, 2009, effective Aug. 27, 2009) art.134 (China) (been effective on Jan.1, 1987 and amended in 2009).

<sup>370</sup> N.20 Guiding Case.

<sup>371</sup> *Id.*

<sup>372</sup> See Lemley & Shapiro, *supra* note 276, at 2166 (arguing that a patent holder’s contribution to the society shall not include the scope which other parties independently achieve at roughly the same time).

rights. Commonly giving injunctions is not conflicted with the utility of the public interest, which can be adjusted by a compulsory license. Giving a compulsory license overturns a premise of private law that private groups should be awarded damages from wrongdoers for their inflictions.<sup>373</sup> Indeed, this premise by itself is not entirely identical to its legislative purpose to promote innovation.<sup>374</sup>

In *Tianlong*, each side of the opposing parties holds a patent for a single sex of a hybrid rice.<sup>375</sup> The trial court and appellate court awarded injunction relief to each party, 0.5 million RMB (about \$71,429) to the plaintiff, and 2 million RMB (about \$285,714) to the defendant. However, the parties could not approach to a cross-license because of the 1.5 million difference in the statutory relief. The Jiangsu High People’s Court finally awarded a compulsory license to each other for “preserving social and public interest, safeguarding national food security, promoting transformations for applications of the new plant variety, and ensuring the continued production of the widely planted new variety.”<sup>376</sup> The court also awarded 0.5 million for the defendant as a lead-time compensation because the failure of producing the rice undermines the implementation of the national food security strategy and harms the public interest.<sup>377</sup>

#### IV. GOVERNMENT’S ROLE IN ADJUDICATION

What is the role of the government in IP disputes and the adjudication of IP issues? The rationale of the design of the Chinese IP regime is that the government and the judicial system simultaneously supplement and correct each other. This idea will be criticized, for sure, as lacking judicial independence.<sup>378</sup> However, the deference to government decisions or interpretations of the law is not radical. The deference could be similar to how the current U.S. precedents defer to lawyers or to the knowledge of experts.<sup>379</sup>

The IP judicial precedents are windows to observe the deference. There are two main functions that the government serves or is deferred to in IP issues besides its administrative responsibilities to enforce IPRs by seizing infringing products. The first function is to determine the eligibility of IP protection. The second function is to provide testimony standards and expert

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<sup>373</sup> See ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 143 (1995) (introducing private law premises).

<sup>374</sup> Sichelman, *supra* note 21, at 517-518.

<sup>375</sup> N.86 Guiding Case.

<sup>376</sup> *Id.*

<sup>377</sup> *Id.*

<sup>378</sup> *E.g.*, Justice Gorsuch argued a problem of judicial independence in dissent when the PTAB administrative agents are allowed to determine patent validity issues. *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*, 138 S. Ct. 1365 (2018).

<sup>379</sup> See FRANCIS LIBER, *5 CLASSICS IN LEGAL HISTORY: LEGAL AND POLITICAL HERMENEUTICS* 202 (1970) (arguing that precedents are lawyers’ law and there are biases behind them).

evidence as a conventional civil-law system requires.<sup>380</sup> This part discusses how these two functions affect the nature of IP laws under the New Private Law concerns.

### A. Deference to Administrative Agencies on IP Eligibility

There are two guiding cases showing that government agencies, rather than courts, are the primary entity to invalidate IPRs in China. In *Wang v. Ellassay Fashion Co., Ltd.*<sup>381</sup> and *Bai v. Nanxun Goods Mktg. Serv. Center*,<sup>382</sup> the courts did not invalidate the trademark owned by Wang and the utility model (a type of patent in China) owned by Bai, even though they are not enforceable for their defects in the eligibility of IPRs under the Trademark Law and the Patent Law.<sup>383</sup> The court determined that the claim of Bai’s utility model results in an unclear scope of protection.<sup>384</sup> Without a similar provision as the Due Process Clause or the Takings Clause in the U.S. Constitution,<sup>385</sup> this court directly turned the validity issue to the SIPO.<sup>386</sup> These two cases do not directly suggest that trademarks and patents are not private property rights rather public rights, but merely suggest the strong government power in the deliberation of the courts.

The government agencies are commonly necessary for the determination on IPR validity when the IPR owners file an application or register the right with them.<sup>387</sup> The administrative costs on IPR issuance or registration are fixed to the public. The rule of the deference to the government agencies reduces the litigation costs and the overall transaction costs to resolve IP disputes. It is also efficient to consistently implement

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<sup>380</sup> See Zheng Yu, *Discussion About Learning from The Common-Law Expert Testimony Mechanism in China*, 48 CROSS-STRAIT LEGAL SCI. 106, 109 (2011) (introducing that it is traditional and common in a civil law system that the government functions as a mechanism to give evidentiary advice).

<sup>381</sup> *Wang v. Ellassay Fashion Co., Ltd.*, 2017 Sup. People’s Ct. Guiding Case 82 (Sup. People’s Ct. 2014) (China) [hereinafter N.82 Guiding Case].

<sup>382</sup> N.55 Guiding Case.

<sup>383</sup> Trademark Law (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 23, 1982, effective Mar. 1, 1983) 2013, art. 32 (China) (“Article 32. No applicant for trademark application may infringe upon another person’s existing prior rights, nor may he, by illegitimate means, rush to register a trademark that is already in use by another person and has certain influence.”); Patent Law (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 12, 1985, effective April. 1, 1985) 2009, art. 26 (China) (“Article 26 When a person intends to apply for an invention or utility model patent, he shall submit ... a written claim. ... The written claim shall, based on the written description, contain a clear and concise definition of the proposed scope of patent protection.”).

<sup>384</sup> N.55 Guiding Case.

<sup>385</sup> U.S. Const. amend. V; U.S. Const. amend. XIV. §1.

<sup>386</sup> TRADEMARK EXAMINATION AND THE EXAMINATION STANDARDS, STATE ADMIN. INDUS. & COM., art. 2.1, 3.1, 4.1, 5.1 (Dec. 2016).

<sup>387</sup> See, e.g., *B & B Hardware, Inc. v. Hargis Industries, Inc.*, 135 S.Ct. 1293, 1299 (2015) (“[W]e hold that a court should give preclusive effect to TTAB decisions if the ordinary elements of issue preclusion are met.”).

policies in a judicial system which respects the government agencies’ decisions.<sup>388</sup>

### *B. Provide Evidence and Testimony Standards*

The deference to the government is suggested by the guiding cases through an evidentiary source directly from the government or an expert testimony relied on assessments by the government. For example, in *Eli Lilly*, the defendant used its communication records with National Medical Products Administration and Beijing Health Bureau (*i.e.*, approval of new drugs) as evidence to show how its accused process was different from the patented process.<sup>389</sup> The accused process had been recorded with this government department.<sup>390</sup> Because some trade secrets were involved in the process, the recorded process was different from the actual accused process, which was proved and argued by the plaintiff.<sup>391</sup>

For improving adjudication efficiency, the SPC emphasized the importance of the records with the government in the language of the compiled guiding case: if there is no evidence to the contrary, the recorded process with the government shall be presumed as the actual process.<sup>392</sup> Otherwise, other documents that have been recorded with the government are required to show the actual process.<sup>393</sup> This rule recalls the trademark registration system in the U.S.: even though registration with the USPTO is not required for owning a trademark, the registration has evidentiary advantages to establish *prima facie* evidence of trademark validity.<sup>394</sup> Evidentiary advantages of having records with government agencies are more obvious in China than the U.S. This is because without a jury system like the U.S., Chinese judges and people’s assessors determine both issues of law and facts. Therefore, the government can be increasingly influential in affecting the issues of facts after *Eli Lilly*.<sup>395</sup>

The government can also be increasingly powerful on affecting the issues of law through the judicial system. In *Shi v. Huaren Elec. Info. Co., Ltd.*, a case of copyright infringement, the court relied on expert testimony

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<sup>388</sup> See *U.S. v. Utah Const. & Min. Co.*, 384 U.S. 394, 422 (1966) (“When an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.”).

<sup>389</sup> N.84 Guiding Case.

<sup>390</sup> *Id.*

<sup>391</sup> *Id.*

<sup>392</sup> *Id.*

<sup>393</sup> *Id.*

<sup>394</sup> Registration on the Principal Register suggests presumptions of validity.

Registration on the Supplemental Register plus five years continuous use of the mark also provide *prima facie* evidence of distinctiveness, suggesting validity. SBUBHA GHOSH ET AL., *INTELLECTUAL PROPERTY: PRIVATE RIGHTS, THE PUBLIC INTEREST, AND THE REGULATION OF CREATIVE ACTIVITY* 562 (3rd, 2016); 15 USCS § 1052.

<sup>395</sup> N.84 Guiding Case.

for substantial similarity.<sup>396</sup> Chinese courts usually apply a two-step test regarding copyright infringement issues, namely, having access and showing substantial similarity.<sup>397</sup> This two-step test is transplanted and consistent with the U.S. copyright law because the statutory language does not address this two-step test.<sup>398</sup> Without a consideration of having access, the infringement was only determined based on the test of showing substantial similarity in *Shi*.<sup>399</sup>

Both the court and the government contributed to the test of substantial similarity in *Shi*.<sup>400</sup> The court added two elements to the elements addressed in the expert testimony in its judicial reasoning. The two elements are (1) the same user guides and (2) the same exterior and layout of the installers of the software program.<sup>401</sup> However, these two elements were not the key to substantial similarity regarding to a question of law. The testimony committee of Copyright Protection Center of China (CPCC), which is a state-owned enterprise under the administration of the NCAC, was the expert ordered by the court.<sup>402</sup> The CPCC assessed that the copyrighted software and the accused software had some identical deficiencies in the software systems and the two software programs shared common characteristics of operation.<sup>403</sup> These two elements become the key in the legal question of substantial similarity and have been emphasized by the SPC in its compilation of the guiding case.<sup>404</sup>

The SPC expects to broaden the application of the above four elements in the test of substantial similarity by the inferior courts, even though the court of *Shi* expected the CPCC or the NCAC to merely play a critical role in determining substantial similarity regarding to a question of facts.<sup>405</sup> Therefore, the CPCC and the NCAC will inevitably play critical roles in adjudicating both issues of facts and law besides the direct functions of the two government agencies to administer the market. Similarly, the guiding cases, *Jinha*<sup>406</sup> and *Xianfeng Seeds Co., Ltd. v. Nongfeng Seeds Co., Ltd.*,<sup>407</sup> emphasize that the dominant test to determine the similarities between plant varieties relies on an industry standard that is made by the P.R.C. Ministry of Agriculture and Rural Affairs.<sup>408</sup> The other test for

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<sup>396</sup> N.49 Guiding Case.

<sup>397</sup> See generally Wu Handong, *Discussing the Infringement Test for ‘Substantial Similarity Plus Access*, 8 L. 63 (2015); Chen Jinchuan, *Discussing the Rules of ‘Access Plus Substantial Similarity*, 97 CHINA COPYRIGHT 28 (2018).

<sup>398</sup> See Wu Handong, *supra* note 397, at 63.

<sup>399</sup> N.49 Guiding Case.

<sup>400</sup> *Id.*

<sup>401</sup> *Id.*

<sup>402</sup> *Id.*

<sup>403</sup> *Id.*

<sup>404</sup> *Id.*

<sup>405</sup> *Id.*

<sup>406</sup> N.92 Guiding Case.

<sup>407</sup> N.100 Guiding Case.

<sup>408</sup> Testing and Determination Standard of the DNA Fingerprinting Method for the Appraisal of Maize Varieties (promulgated by the Ministry of Agriculture and Rural Affairs,

similarities allowed by the two guiding cases, the DUS test, is what the government agencies adopt when they review the applications of plant varieties.<sup>409</sup>

The deference to the government on testimony and testimony standards in these three cases does not necessarily lead to a doubt about judicial independence<sup>410</sup> but suggests a similar trend of the dynamic development of statutory interpretation as a common-law country. Judges are not omnipotent in most countries. More sources should be open to them, including the guiding cases, the deference to the testimony from government agencies, and some agency interpretations, which may help them efficiently find solutions.<sup>411</sup> In the case of the U.S., Congress authorizes the Food and Drug Administration (FDA) to make standards controlling the industry to protect public health.<sup>412</sup> Meanwhile, the FDA is also required to regulate more details (*i.e.*, the quantity of aflatoxin) by the U.S. Supreme Court<sup>413</sup> and the courts also defer to the agency interpretations of the law.<sup>414</sup> Even though the Federal Circuit refuses to apply the USPTO’s guidance for patent examination when determining the Sec. 101 issues,<sup>415</sup> there is a trend that legislators will amend Sec. 101 based on the detailed guidance.<sup>416</sup> In China, the government is legislators and have more responsibilities and stronger power than the U.S. government.<sup>417</sup>

## V. GUIDING AS “COMMON-LAW PRECEDENTS”

IP laws are an area showing a strong reflection of New Private Law and pragmatism in the legal reasoning: the nature of IP laws as private law or public law is dynamically obscure. The modern U.S. IP regime is teetering on the boundary between public and private law,<sup>418</sup> whereas TRIPS

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Sept. 4, 2007, effective Dec. 1, 2007) NY/T 1432-2007(China).

<sup>409</sup> N.100 Guiding Case (“The core primers (loci) used in DNA fingerprinting did not necessarily correlate with the characteristics under the DUS test, and the approval authorities for new plant variety rights conducted a substantive examination of the distinctness, uniformity and stability of applied varieties based on growing trials and DUS tests.”).

<sup>410</sup> RENE DAVID & JOHN BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* 447-448 (1968); Wang, *supra* note 110, at 529; Jiang Qibo, *The Responsible Officer Principle of the Supreme People’s Court: Completely Strengthening the Value Foundation of Judicial Interpretation*, Xinhuanet (Sep. 19, 2018, 7:29 AM), [http://www.xinhuanet.com/2018-09/19/c\\_1123450361.htm](http://www.xinhuanet.com/2018-09/19/c_1123450361.htm).

<sup>411</sup> See Easterbrook, *supra* note 99, at 551.

<sup>412</sup> 21 USCS § 346 (2018).

<sup>413</sup> *Young v. Comty. Nutrition Inst.*, 476 U.S. 974 (1986).

<sup>414</sup> Sunstein, *supra* note 9, at 465.

<sup>415</sup> See *Cleveland Clinic Foundation v. True Health Diagnostics LLC*, No. 1:17-cv-00198-LMBIDD, at \*13 (Fed. Cir. Apr. 1, 2019); 2019 Revised Patent Subject Matter Eligibility Guidance, 84 Fed. Reg. 50 (Jan. 7, 2019).

<sup>416</sup> See *Draft Outline of Section 101 Reform*, *supra* note 201.

<sup>417</sup> Constitutional Law (promulgated by the Nat’l People’ Cong, Dec. 4, 1982, effective Mar. 11, 2018) 2018, art. 89, 90, 99, 100 (China).

<sup>418</sup> See Boyle, Boyle, *supra* note 258, at 1436-1500.

encourages other developing countries to dodge communism, in which knowledge is treated as public good creating inevitable problems of free riders.<sup>419</sup> Rather than communism, China is a developing country with a single governing party, the Communist Party, embracing socialism with a partially free-market economy.<sup>420</sup> The government heavily intervenes its market, so China is sound like a country with many public laws. However, the IP guiding cases suggest that IP laws in China should be enforced as “New Private Law” under the guidance of the guiding cases, rather than enforced either as conventional public law or as conventional private law. This part discusses why this article argues that China tries IP laws as “New Private Law” with a presumption that the IP guiding cases can be treated as “common-law precedents.”

#### A. The Presumption of “Common-Law Precedents”

Even though a presumption that the IP guiding cases can be treated as “common-law precedents” is controversial in the literature,<sup>421</sup> it can be established by a comparison with the U.S. In the U.S., what is unique in statutory interpretation for IP laws is the strengthened discretion in adjudication and statutory interpretation when the courts consider both common-law precedents and statutory laws, notwithstanding the U.S. Supreme Court claimed to strictly follow the 19th-century IP precedents.<sup>422</sup> After *Alice Corp. v. CLS Bank Int’l* was decided by the U.S. Supreme Court, the Federal Circuit invalidated most asserted patents for the reason that the subject matters of the patents are patent-ineligible.<sup>423</sup> The increased invalidations do not simply suggest that the Federal Circuit provides limited exclusive rights to software for the public interest or narrowly enforces software patents as property rights because most of its invalidity decisions were issued without precedential value.<sup>424</sup> The selection of the statutory interpretations to be non-precedential based on the legal rationales behind the opinions of the Federal Circuit after *Alice* recalls the selection of the guiding

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<sup>419</sup> See CHRISTOPHER HEATH & ANSELM KAMPERMAN SANDERS, *INTELLECTUAL PROPERTY & FREE TRADE AGREEMENTS* 5 (2007).

<sup>420</sup> Cheng Yinghong, *Socialism of China: The Terminator of International Communism*, MODERN CHINA STUD. (2009), <https://www.modernchinastudies.org/us/issues/past-issues/105-mcs-2009-issue-3/1103-2012-01-05-15-35-41.html>.

<sup>421</sup> See *supra* note 10.

<sup>422</sup> E.g., *Quanta Computer v. LG Electronics*, 128 S. Ct. 2109 (2008); Mossoff, *supra* note 67, at 53.

<sup>423</sup> 134 S. Ct. 2347 (2014); Jasper L. Tran, *Software Patents: A One-Year Review of Alice v. CLS Bank*, 97 J. PAT. & TRADEMARK OFF. SOC’Y 532 (2015).

<sup>424</sup> See Belle, *supra* note 193 (arguing patent validity disputes should be categorized as public law litigation); Gugliuzza & Lemley, *supra* note 148, at 765 (showing most of the decisions that found the asserted patents to be invalid were issued under Rule 36); Mossoff, *supra* note 67, at 51; Mossoff, *supra* note 21, at 998-1001.

cases in China, *de facto* binding and guiding the inferior courts in statutory interpretation.<sup>425</sup>

The IP guiding cases suggest “common-law” style judicial reasoning.<sup>426</sup> In six of the twenty-two IP guiding cases, the courts adopted legal principles.<sup>427</sup> Besides the three cases involving claims of unfair competition, in which the language of the Anti Unfair-Competition Law directly uses the legal principles,<sup>428</sup> the courts applied legal principles to reason both instances and rules.<sup>429</sup> This way of law application is distinguished from the use of conventional legal principles in civil law countries.<sup>430</sup> When reasoning the rules, the guiding cases can function as “common-law precedents” to reason back to the principles and be recognized as precedents.<sup>431</sup> The rationales for New Private Law, such as utilitarianism to maximize parties’ utilities or the public welfare and pragmatism to concern reality and various other legal principles, are also the legal principles embodied in the guiding cases. Broadly applying the legal principles in the guiding cases may cure inefficiency in filing IPR applications and enforcing IPRs.

### B. Guide the Judicial System

Even though most IP guiding cases were adjudicated realistically,<sup>432</sup> this mechanism does not conflict much to the U.S. mechanism in terms of pragmatism. Under the guiding cases, a positive reward for IPRs should be determined by the market, policymakers, or government agencies that

<sup>425</sup> See *supra* Section I. B. 2.

<sup>426</sup> But see Jia, *supra* note 10, at 2234.

<sup>427</sup> N.83 Guiding Case; N.49 Guiding Case; N.30 Guiding Case; Baidu Netcom Sci. & Tech. Co., Ltd. v. Qsun Network Technique Co., Ltd., 2015 Sup. People’s Ct. Guiding Case 45 (Shandong High People’s Ct. 2010) (China) [hereinafter N.45 Guiding Case]; N.58 Guiding Case; N.82 Guiding Case.

<sup>428</sup> N.30 Guiding Case; N.45 Guiding Case; N.82 Guiding Case; Anti-Unfair Competition Law (promulgated by the Standing Comm. Nat’l People’s Cong., Sep. 2, 1993, effective Jan. 1, 2018) 2017, art. 2 (China) (“Operators shall abide by the principle of voluntariness, equality, impartiality, honesty and good faith, and also adhere to public commercial moral in their business transactions.”).

<sup>429</sup> N.83 Guiding Case; N.49 Guiding Case; N.58 Guiding Case.

<sup>430</sup> Cooper, *supra* note 98, 471 (introducing that civil law systems apply legal principles to reason instances rather than rules).

<sup>431</sup> *Id.*; Stone, *supra* note 244, at 6; Joseph Dainow, *The Civil Law and the Common Law*, 15 AM. J. COMP. L. 419, 425 (1966-1967); But see Zhang, *supra* note 10, at 305 (defining guiding cases as cases with Chinese characteristics rather than “common-law cases” despite of the common characteristics shared by them).

<sup>432</sup> See e.g., N.49 Guiding Case and the context about this guiding case in Part III. Sec. A.2.; N.84 Guiding Case and the context about this guiding case in Part IV. Sec. A. In this case, the court and the SPC had an intent to decrease the transaction costs in litigations; But see N.85 Guiding Case and the context discussing this guiding case in Part III. Sec. B.1. Under realism, the law is like an efficient tool of governance and can be reshaped for the public interest or the interest of particular private groups. See Posner, *supra* note 173, at 184.



enacting the policies. The courts adjudicating the guiding cases were both formalistic to some extent, literally interpreting statutes, and realistic to some extent, concerning economic reasons in statutory interpretations and legal reasoning.<sup>433</sup> For example, the SPC suggests a balance of efficiency and fairness (*i.e.*, property rights) in the selection of the test for infringement of plant varieties by selecting, compiling, and publishing *Jinhai*<sup>434</sup> and *Xianfeng*<sup>435</sup> as guiding cases. Moreover, *Siruiman* suggests a pragmatic idea of adopting the England common-law principle, “everything which is not forbidden is allowed,”<sup>436</sup> even though it means the opposite, formalistic, to a common-law court.<sup>437</sup> This guiding case also suggests that the court and the SPC are more convinced that the nature of the Patent Law is private law.<sup>438</sup>

The IP guiding cases are a tool to adjust inefficient IP laws through law enforcement in the judicial system. In IP enforcement, judges are exposed to the same legal principles but come out with different opinions if the statutory language, other than Anti Unfair-Competition Law, does not indicate the legal principles. In three of the six guiding cases that do not involve any claims of unfair competition, the SPC or a High People’s Court reversed the inferior court’s opinion.<sup>439</sup> The reverse by the superior courts may suggest that the law enforcement, statutory interpretation, or adoption of legal principles is inefficient.<sup>440</sup>

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<sup>433</sup> *E.g.*, N.20 Guiding Case and the context about this guiding case in Part III. Sec. A.3. One possibility is that the judges are realistic to concern policy reasons that the patent regime should function to spur innovation. Another possibility is that the patent statutes are realistically written to address both the concerns from other developed countries, chiefly the U.S., and the degree of technical innovation and economic development in China. On the one hand, developed countries with more pioneer inventors and advanced inventions push China to strengthen IP protection by treaties or political pressures. On the other hand, the Patent Law has not addressed strong patent protection in its language because most domestic inventors in China are follow-on inventors and need pioneer inventors to tolerate them when learning from the pioneer inventors’ published inventions through the patent system.

<sup>434</sup> N.92 Guiding Case.

<sup>435</sup> N.100 Guiding Case.

<sup>436</sup> N.20 Guiding Case.

<sup>437</sup> Sir John Laws, *Beyond Rights*, 23 OXFORD J. LEGAL STUD. 265, 273 (2003) (“I have a right to do something if I have no obligation not to do it—reflects the general principle of the common law, that for the individual citizen, everything that is not forbidden is allowed.”); Neal Troum, *The Problem with Class Arbitration*, 38 VT. L. REV. 419, 430, n. 70 (2013) (“In England, everything which is not forbidden is allowed, while in Germany, the opposite applies so everything which is not allowed is forbidden.”).

<sup>438</sup> See Eskridge & Peller, *supra* note 159, at 711 (suggesting the foundation of common law is private law).

<sup>439</sup> N.82 Guiding Case; N.49 Guiding Case; N.83 Guiding Case. The statutory language of Anti Unfair-Competition Law addresses legal principles. Anti-Unfair Competition Law (promulgated by the Standing Comm. Nat’l People’s Cong., Sep. 2, 1993, effective Jan. 1, 2018) 2017, art. 6, §4 (China) (“Operators shall abide by the principle of voluntariness, equality, impartiality, honesty and good faith, ...”).

<sup>440</sup> See generally Gugliuzza & Lemley, *supra* note 148 (showing a similar situation in the U.S.).

Moreover, the IP guiding cases may adjust inefficient IP laws more broadly because the influence of the inefficient IP laws could be broader than merely on IP cases. For instance, in the facts of *Baidu Netcom Sci. & Tech. Co., Ltd. v. Qsun Network Technique Co., Ltd.*, a guiding case about unfair competition, the defendant Qsun forcibly implanted advertisements on the search result pages of Baidu to the internet users in Tsingdao (a city in Shandong province) through the Tsingdao subsidiary of China Unicom, which is a state-owned enterprise and exclusively provides the service of network access.<sup>441</sup> Baidu prevailed in this case under the principles of “free will, equality, fairness, and good faith” within the court for both protecting its goodwill and not confusing the web users, who are the “consumers” of the advertisements provided by Baidu.<sup>442</sup> However, Baidu, the largest search engine in China, is notorious for misleading advertisements.<sup>443</sup> The idea of not confusing the web users was not shown in *Tian v. Baidu Netcom Sci. and Tech. Co., Ltd.*,<sup>444</sup> a case before Baidu was selected as a guiding case. The court did not direct a verdict for the consumer, Tian. He was defrauded by a third party for its misguiding advertisement designed by Baidu.<sup>445</sup> This court did not consider the “gatekeeper function” of an internet service provider (ISP) in trademark law at all,<sup>446</sup> which was addressed by *Jiayikao*, a guiding case published later on.<sup>447</sup> Therefore, after having the guiding cases as a legal source, the public interest of protecting consumers and reducing consumers’ search costs should be further protected in China.<sup>448</sup> This prediction is reasonable because the courts have not pondered much on utilitarianism and the efficiency of the law as other legal systems do.<sup>449</sup>

### C. Guide the CNIPA in Issuing IPRs

The market efficiency of IPRs can be improved when the guiding cases are implemented by the government agencies, such as the CNIPA and the NCAC that issue the IPRs. The arguable IPRs that result in an increasing number of IP disputes could be created when these government agencies provide IPRs to private parties without a broad-sense utilitarian

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<sup>441</sup> N.45 Guiding Case.

<sup>442</sup> *Id.*; Anti-Unfair Competition Law (promulgated by the Standing Comm. Nat’l People’s Cong., Sep. 2, 1993, effective Jan. 1, 2018) 2017, art. 5-15 (China).

<sup>443</sup> *CCTV Exposure Baidu Reproduces Medical Promotion Event*, YIMAITONG (Sep. 9, 2018), [http://news.medlive.cn/all/info-news/show-148568\\_97.html](http://news.medlive.cn/all/info-news/show-148568_97.html).

<sup>444</sup> *Tian v. Baidu Netcom Sci. and Tech. Co., Ltd.* (Beijing 1st Intermediate People’s Ct. 2014) (China).

<sup>445</sup> *Id.*

<sup>446</sup> *Id.*; Dogan & Lemley, *supra* note 67, at 805.

<sup>447</sup> N.83 Guiding Case.

<sup>448</sup> Landes & Posner, *supra* note 178.

<sup>449</sup> See, e.g., Posner, *Utilitarianism, Economics, and Legal Theory*, *supra* note 169; Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, *supra* note 169.

consideration.<sup>450</sup> A utilitarian concern to maximize the public welfare is instructed by the legal principles involved in the guiding cases.

For instance, in the trademark guiding case, *Wang v. Ellassay Fashion Co., Ltd.*, the SPC did not enter a judgment for the trademark owner, Wang, because he registered and enforced trademarks in bad faith.<sup>451</sup> The registered trademarks were the Ellassay’s trade name known by the public.<sup>452</sup> The SIPO recently has a will to control the trademarks filed in bad faith through the substantive examination.<sup>453</sup> However, the substantive examination only requires a narrowly-applied good faith principle, which was not publicly disclosed until 2016 and has resulted in many bad faith registrations as Wang’s trademarks, even though the substantive examination does address a similar issue of Wang’s trademarks.<sup>454</sup> More harmfully, the public are incentivized by government subsidies or grants to apply for as many IPRs as they can, inevitably being contrary to the legal principles and creating inefficiency.<sup>455</sup>

#### D. Guide the Local Government in IPR Enforcement

IP holders in China can enforce their IPRs through the government, especially the local governments. The government agencies can be proper to enact and implement the law.<sup>456</sup> However, if the guiding cases are not broadly recognized as a legal source to be implemented by the government and the language of statutes does not mention the legal principles incorporated by the guiding cases, the government overlooks the legal principles when solving IP disputes.

The isolated government does not necessarily generate an IP regime with the public welfare in general because the particular agencies to enforce the law are at the county- or city-level, which are heavily intervened by the local government.<sup>457</sup> Particular interest groups, rather than the public interest, are confined to geographies or industries. The servants of the local governments pursue a high economic growth in every five years for their career development.<sup>458</sup> Under their intervention, there must be both some

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<sup>450</sup> See Rober P. Merges, *As Many as Six Impossible Patent Before Breakfast: Property Rights for Business Concepts and Patent System Reform*, 14 BERKELEY TECH. L.K. 577 (1991) (arguing that a simple registration system of patents is inefficient and high-quality patents are less likely involved in litigations).

<sup>451</sup> N.82 Guiding Case.

<sup>452</sup> *Id.*

<sup>453</sup> *The Procedure of Trademark Substantive Examination*, People.cn (June 27, 2018, 8:43 AM), <http://ip.people.com.cn/n1/2018/0627/c179663-30090130.html>.

<sup>454</sup> TRADEMARK EXAMINATION AND THE EXAMINATION STANDARDS, STATE ADMIN. INDUS. & COM., art. 2.1, 3.1, 4.1, 5.1 (Dec. 2016).

<sup>455</sup> See Merges, *supra* note 140; Wang & Kesan, *supra* note 79; Zhen Lei et al., *supra* note 330.

<sup>456</sup> See *supra* Section II.C.1.

<sup>457</sup> The lower levels of State Administration of Industry and Commerce enforce trademark rights are under the administration of the government at the same level.

<sup>458</sup> Leadership changes every five years on every key position based on

cities producing IPRs to be competitive in the market (e.g., Beijing) and some other cities concentrating on IP infringement to be free riders of others’ innovation, creation, or the market power (e.g., Dongguan, Yiwu<sup>459</sup>), even though the governments of all these cities implement the same legal sources of statutes. Within the former type of cities, the government power is sometimes unrequited when the private parties benefited from IPRs diminish competition.<sup>460</sup>

Because of the government intervention, it is oversimplified to analogy IPRs to conventional property rights or conclude that IP laws are enforced as private law in China.<sup>461</sup> Private property rights did not exist in the history of China, and utilitarianism in law only referred to maximize the public interest or the interest of the government or emperor, rather than to maximize the private interest of anybody.<sup>462</sup> Thus, when the government is increasingly strengthening the protection of private property rights, as equally significant as public property rights, the government is dealing with a hybrid utility of the public interest and the interest of individuals, which is within the scope of concerns by New Private Law scholars.<sup>463</sup>

## CONCLUSION

Overall, the judicial system of China increasingly treats Intellectual Property Rights (IPRs) as property rights, but IP laws are not instructed to be applied as conventional private law by the Supreme People’s Court (SPC) and the IP guiding cases. The SPC has increasingly stronger power over IP disputes with the IP guiding cases and the reform of the judicial system of IP. The IP guiding cases can be viewed as common-law/judicial precedents to assist with statutory interpretation. The IP guiding cases also send critical signals to judges, government agencies, legislators, and the market. The legal rationales behind the signals can be understood through the insights from utilitarianism, which is similar to the adjudication of IP disputes in the U.S. The SPC selecting and compiling the guiding cases leans towards utilitarianism but pragmatism and concerns the public interest in statutory

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performance evaluation.

<sup>459</sup> Daniel C. Fleming, *Counterfeiting in China*, 10 U. PA. EAST ASIA L. REV. 14, 15-18 (introducing that the economy of Yiwu grows based on counterfeiting businesses).

<sup>460</sup> See Wang & Kesan, *supra* note 79; Zhen Lei et al., *supra* note 330.

<sup>461</sup> But see Liu Chuntian & Deng Xuanyu, *A Legal Analysis of Commercial Secrets*, 3 JURIST 106 (2004) (arguing trade secrets should be considered as personal property in China).

<sup>462</sup> See Mo Zhang, *From Public to Private: The Newly Enacted Chinese Property Law and the Protection of Property Rights in China*, 5 BERKELEY BUS. L.J. 317, 323-325 (2008); XU ZHONGMIN & REN QIANG, CHINESE LEGAL SPIRIT 9-10 (1965).

<sup>463</sup> Opinions of the CPC Central Committee and the State Council on Improving the Property Rights Protection System and Lawfully Protecting Property Rights [http://www.xinhuanet.com/politics/2016-11/27/c\\_1119999035.htm](http://www.xinhuanet.com/politics/2016-11/27/c_1119999035.htm); Jing Long & Jiang Bixin, *Give Full Play to the Role of Administrative Trial Function and Effectively Strengthen the Judicial System of Property Rights*, THE SPC, (2016-12-10 16:54 PM ), <http://www.court.gov.cn/zixun-xiangqing-32551.html>.

interpretation on IP issues. From these perspectives, the reward function of IPRs should be realized through the market and the government, rather than Chinese courts. Instead, the courts are instructed to function as a gatekeeper and consider IPRs’ quality to prevent over-rewarding IPR owners.

The IP guiding cases, in theory, are economically efficient to reduce litigation costs and administrative costs. In adjudication, they have not been often cited by the inferior courts. What the efficiency of the IP guiding cases is or how they are effectively binding is an empirical question waited to be further explored. However, the IP guiding cases are instructive and insightful. Their efficiency in the legal system to maximize the public welfare has been shown by the changes of statutory law drawn from the guiding cases. Legislators have adopted the rules in two IP guiding cases to balance property rights of IPR owners, liabilities of third parties, and the public welfare. The proposed Fourth Amendment of the Patent Law adds a new provision, addressing the key opinion in *Jiayikao* that ISPs have a statutory duty to take down the alleged products of patent infringement.<sup>464</sup> Moreover, legislators have addressed the rule of *Wang* in the Fifth Amendment of the Trademark Law, which prohibits filing trademark registrations and litigations in bad faith.<sup>465</sup>

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<sup>464</sup> Wang Yiyin, *supra* note 360; N.83 Guiding Case.

<sup>465</sup> N.82 Guiding Case; Trademark Law (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 23, 1982, effective Mar. 1, 1983) 2019, art. 4.1 & 68.4 (China).

## APPENDIX

Case N.	Case Name	Publish Year	Decision Year	Decision Court	Issue Category
N. 20 Guiding Case	Siruiman Fine Chemicals Co., Ltd. v. Kengzi Water Supply Co., Ltd.	2013	2011	SPC	Patent
N. 29 Guiding Case	China Youth Travel Serv. v. Nat'l Youth Int'l Travel Serv.	2014	2012	Tianjin High People's Ct.	Unfair Competition /Piss off
N. 30 Guiding Case	Lan v. Tianjin SUREMOOV Auto Maint. & Repair Serv. Co., Ltd	2014	2013	Tianjin High People's Ct.	Trademark & Unfair Competition
N. 45 Guiding Case	Baidu Netcom Sci. & Tech. Co., Ltd. v. Qsun Network Technique Co., Ltd.	2015	2010	Shandong High People's Ct.	Unfair Competition
N. 46 Guiding Case	Lujin Indus. Co., Ltd. v. Lujin Crafts Co., Ltd.	2015	2009	Shandong High People's Ct.	Trademark & Unfair Competition
N. 47 Guiding Case	Ferrero Int'l S.A. v. Montresor Food Co., Ltd.	2015	2008	Tianjin High People's Ct.	Unfair Competition
N. 48 Guiding Case	Jingdiao Tech. Co., Ltd. v. Naiky Elec. Tech. Co., Ltd.	2015	2006	Shanghai High People's Ct.	Copyright
N. 49 Guiding Case	Shi v. Huaren Elec. Info. Co., Ltd.	2015	2007	Jiangsu High People's Ct.	Copyright
N. 55 Guiding Case	Bai v. Nanxun Goods Mktg. Serv. Center	2015	2012	SPC	Patent

N. 58 Guiding Case	Chengdu Tongdefu Hechuan Peach Slices Co., Ltd. v. Chongqing Tongdefu Peach Slices Co., Ltd.	2016	2013	Chongqing High People’s Ct.	Trademark & Unfair Competition
N. 78 Guiding Case	Qihu Tech. Co., Ltd. v. Tencent Tech. Co., Ltd.	2016	2014	SPC	Anti- Monopoly
N. 79 Guiding Case	Wu v. Broadcast & TV Network Intermediary Co., Ltd.	2017	2016	SPC	Anti- Monopoly
N. 80 Guiding Case	Hong v. Wufufang Food Co., Ltd.	2017	2005	Guizhou Intermediate People’s Ct.	Copyright
N. 81 Guiding Case	Zhang v. Lei	2017	2014	Sup. People’s Ct.	Copyright
N. 82 Guiding Case	Wang v. Ellassay Fashion Co., Ltd.	2017	2014	Sup. People’s Ct.	Trademark
N. 83 Guiding Case	Jiayikao Home Appliances Co., Ltd. v. Jinshide Indus.	2017	2015	Zhejiang High People’s Ct.	Patent
N. 84 Guiding Case	Eli Lilly & Co. v. Watson Pharm. Co., Ltd.	2017	2016	SPC	Patent
N. 85 Guiding Case	Grohe AG v. Jianlong Sanitary Ware Co., Ltd.	2017	2015	SPC	Patent
N. 86 Guiding Case	Tianlong Seed Tech. Co., Ltd. v. Xunong Seed Tech. Co., Ltd.	2017	2013	Jiangsu High People’s Ct.	Plant Variety

N. 87 Guiding Case	State v. Guo	2017	2015	Jiangsu Suqian Intermediate People’s Ct.	Trademark
N. 92 Guiding Case	Jinhai Seed Indus. Co., Ltd. v. Fukai Agric. Sci. & Tech. Co., Ltd.	2017	2014	Gansu High People’s Ct.	Plant Variety
N. 100 Guiding Case	Xianfeng Seeds Co., Ltd. v. Nongfeng Seeds Co., Ltd.	2018	2015	SPC	Plant Variety