

**Chinese Trademark Law and the Judicial Protection of Trademark Rights**  
Chief Justice Kong Xiangjun, IP Tribunal, Trial Committee of the Supreme  
People's Court of the PRC, Speech February 3, 2011

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## 1. Chinese Trademark legislation and Judicial Interpretations

On August 22, 1982 China passed the "Trademark Law." This statute was amended on February 22, 1993 and October 27, 2001. Right now regulators and agencies are working on a third amendment, but the process has not reached the legislative stage.

Based on the TM Law, China's State Council—the highest administrative body of PRC—issued ordinance on the implementation of TM Law. This State Council ordinance is the basis on which administrative agencies and courts implement TM law. The ordinance currently in effect is the "PRC TM Law Implementation Ordinance," from August 3, 2002.

Legislation in China tends to be broad and principle-based; in practice the statutes often require further interpretation by the enforcing entities. According to Chinese law, the Supreme People's Court (SPC) has the power to interpret the law via Judicial Interpretations. Judicial Interpretations are intended as practical guides to judges for interpreting and applying laws; they are not limited to holdings derived from the facts of a particular case. These Judicial Interpretations are binding on all lower courts. Failure by a court to follow the standards established in Judicial Interpretations constitutes legal error.

The SPC has issued a series of Judicial Interpretations explaining the applicability of the TM Law. Since the 2001 Amendment, the SPC has issued numerous Judicial Interpretations addressing issues including: the standard for finding TM infringement, proof and calculation of damages, protection of "famous marks," and conflicts in trademark and trade name rights. These Judicial Interpretations form the basis on which Courts try TM cases.

In conclusion, to understand how TM law works in China, one must understand China's Judicial Interpretations, which are often more operative than individual holdings.

## 2. Protection of TM rights in China: Overview

TM protection in China is a two-track system, administrative and judicial. The two tracks are in process of being unified/are unified under the SPC. Administrative protection comes from agencies like the State Agency for Industry and Commerce. Judicial protection comes from different level courts trying TM cases.

China protects both registered and unregistered marks. A TM holder who wants to register must apply to China's Trade Mark Office (TMO). If granted, the holder gains exclusive right to use the registered mark. This exclusive right enjoys legal protection nationwide. An unregistered mark which meets certain legal thresholds on usage and influence may also enjoy legal protection.

Chinese courts try civil, criminal, and administrative TM cases. Civil cases are most common and arise from infringement actions. Administrative cases usually come in the form of judicial review on appeals from TMO decisions on the grant/invalidation of marks.

The scope of TM protection in China is quite broad. I will speak about some areas of interest, and welcome discussion from the panelists and questions from the audience.

As previously mentioned, civil litigation is the most popular approach to protecting TM rights. I shall briefly cover civil procedure and the court system in China.

### 3. Courts and Civil Litigation in China

Unlike the United States' state and federal court systems, China has a single, unitary court system. There are four levels of courts: Primary courts, intermediate courts, high courts, and the SPC. Chinese courts contain tribunals—typically civil, administrative, and criminal—which try their respective types of cases. There are of course instances of overlap. For example, I head the IP Tribunal (also known as the Third Civil Tribunal). We not only try all IP civil cases but also the IP administrative cases.

Chinese civil litigation operates on a two-strike system. Losers get one appeal; once a case has been tried by two courts the appeal court's decision becomes final with force of law, and the prevailing party can apply to have the court enforce the judgment.

A party which loses its appeal can apply for retrial to the next highest court. The court reviews the application. If the court decides that the court of first instance made an error in fact or in law, it may grant cert (in which case it becomes the court of third instance) or remand to the court of first instance (or another court on the same level). The retrial judgment may overturn the final judgment by the appeal court.

Unlike the U.S., all four levels of Chinese Courts can be the court of first instance if certain requirements are met. According to Chinese Civil Procedure and the SPC's judicial interpretation, the requirement for a court acting as the court of first instance depends on the case's complexity and the amount in controversy;

the SPC has established the required amount for each level of court. While under law the SPC could act as the court of first instance, this rarely happens in practice.

Not all Chinese primary courts have jurisdiction over IP-related cases. To have jurisdiction, primary courts require permission from the SPC. Currently, the SPC has granted jurisdiction in IP cases to 103 out of more than 3000 primary courts in the country. These are mostly located in more developed areas. Intermediate courts usually serve as the court of first instance. Some especially important IP cases are tried in the first instance by High (Provincial-level) Courts.

My court, the SPC's IP Tribunal, typically tries appeal cases (second instance) and those applied for retrial (third instance). We try about 10 appeal cases and 300-400 retrial cases per year.

#### 4. Number of IP cases in China

IP cases in China have grown by about 40% each year for the past three years. In 2010, courts processed more than 40,000 original civil IP cases (excluding appeals and retrials). About half of these were copyright cases. There were 6-7000 trademark and patent cases, respectively, and the remainder made up of unfair competition, anti-monopoly, etc.

Out these cases about 5% involved foreign parties. Most of these have foreign corporations as plaintiffs, but the number of cases where foreign corporations are defendants is rising as well.

These trends show that China is taking IP protection seriously. Chinese corporations are increasingly conscious of protecting their IP. China protects IP not only to attract foreign investment and commerce, but in response to domestic demand. That is to say, China's development has reached the stage where IP protection is a necessity. IP violations impede China's development, and so we must protect IP.

#### 5. How Chinese courts try IP cases

Chinese courts have specialized IP tribunals with dedicated IP judges. I lead the IP Tribunal of the SPC, which has seventeen judges plus staff.

When Chinese courts try IP cases we usually have a panel of three judges. One directs the case and other two participate in deliberations. In especially important or difficult IP cases five, even seven judges may sit on the panel. In trial, each judge has equal powers; when there is dissent majority rules. Unlike the U.S., the dissenting opinion(s) are not included in the verdict.

## 6. Recent Developments in Chinese TM law

The number of TM applications have increased dramatically in recent years. With this comes more TM disputes. Efforts to refine TM law and the TM system are attracting more attention in China. I will touch on some of the hot topics.

One is to simplify the process of TM registration. The current TMO review process is imperfect, leading to lengthy and complex reviews, which in turn lengthens the application process. This also affects resolution of conflicts which arise during TM applications, hence the call for reduction and streamlining of registration procedures.

Another is increasing deterrence against bad faith mark registrations. These cases typically take the form of the defendant registering a TM in different product category once the original TM achieves a certain level of fame.

Finally, there is a move to increase protection of registered marks by improving payment and raising the amount statutory damages.