Dean Kellye Testey

Well good afternoon everyone I’m Kellye Testey the Dean of the Law School and it’s a great pleasure to be with you this afternoon and to have the honor and privilege of introducing Judge Kong to you. He is the chief judge of the Intellectual Property Tribunal of the Supreme People’s court, or the SPC as it’s often abbreviated, for the People’s Republic of China. I want to let you know that, that intellectual property tribunal is officially called the Third Civil Tribunal under the SPC and as the chief judge there, Judge Kong is the highest ranking judicial officer on intellectual property in China. He took this current position in August of 2009. He was nominated by the president of SPC and then was approved by the national People’s Commerce Standing Committee it’s national legislature at its tenth session according to the constitution. Before his current position, he served as a senior judge as vice-chief of the tribunal and vice-chief of the SPC’s administrative litigation tribunal since 2001. I want to let you know too, that Judge Kong’s background is that he was born in the Shangdong Province not far, as I understand it from Confucius’s home town. And he has a very distinguished academic record with an LLB from Eastern China University of Law and Political Science, an LLM and PhD from the Chinese University of Law and Political Science in Beijing and also did post doctorate work at the People’s University of China in Beijing. I enjoyed a wonderful discussion this morning with Judge Kong where we talked a lot about our partnership and collaboration and ways that we can work together in the area of intellectual property. It was just a delight to be with him, to hear his ideas and perspectives and to join together to continue the important exploration of this important area of law. We very much look forward to that, we have a wonderful judge, and wonderful scholar with us today. So it is with great pleasure, a great honor, thank you for being here Judge Kong and now to introduce you. Thank you very much.

Judge Kong

Good afternoon everybody. I’m very delighted to visit UW Law School. This is a very famous university and a long time ago I have heard this law school is excellent. Today I also learned the intellectual properties study here is very special and very strong in comparative law perspective. In this afternoon I would like to introduce briefly the law system in China and introduce the intellectual law protection. As you may know or not know the Chinese legal system, because the Chinese government system is not federal it is one unified system, so we have only one set of courts, not federal and state. And our court system is different from any country. They have four levels of courts, although many other countries have three levels. The four levels of court are the basic court, intermediate court, high court, and the supreme court.

According to our procedure law two incidents is a final incident. If the party is unhappy
with the decision from the first incident court, they have appeal from the second incident court. After the decision from the second incident court it is final and it is enforced. We have very detailed rule about which level of court could be the first incident court it is according to the issue in the case the disputed amount of damage and other issues. According to those standards if the incident is basic court, the second incidents court will be intermediate court. If the first incident court is intermediate court, the second incident will be the high court. If the first incident is the high court, the second incident will be the supreme court.

The standard about the disputed amount and the nature of the case and also decide the first incident, those decisions are made by the first instant court. For example the intellectual property cases usually, most of the intellectual properties go to intermediate court for first instant. For some cases, whichever, extraordinary big disputed amount, the high people’s court will be first instant. There are some basic courts with the approval from Supreme People’s Court can take intellectual property cases, at this moment there are 103. In China both first and second instant courts are deciding both the federal and legal issues this is another difference because I know in many countries, the second instant court only decide legal issues not federal issues. Including Supreme People’s Court, Supreme People’s Court can also decide on federal issues. There internal structure of Chinese court system is more similar to European Court system and is different from the US court. As the Dean mentioned, I’m working for Intellectual Property Tribunal which is the tribunal handles IP cases. Besides IP tribunal, they also have other tribunals in Supreme People’s Court. In general, they have three categories of tribunals, one is civil, another one is criminal and the third one is administrative law. In some situations they are overlap among the tribunals. For example the IP Tribunal and the Administrative Tribunal can have some overlap like the Administrative Tribunal can also handle some IP cases.

In each tribunal when they are working on one case, they will establish a panel of judges. Usually the panel includes three judges if it is very important case, the number of judges could be five or even seven. In the year before last year, there was very important patent case, they had five judges to work on that.

In China they also have a very special jury which is very different from the American jury. The rule is in first instant, there could be some jurors join the panel to decide the cases the jurors are appointed by the local People’s Congress. For example in some types of cases if it involves some technical federal issues the court will recommend some technical experts to People’s Congress, the People’s Congress appoints them as jurors then they can participate in the decision. Special jurors join a panel together with judges they have exactly equal power as judges, they have equal power to vote and they can also discuss legal and federal issues so everything is exactly like judges. So in intellectual property cases they have those technical experts to help in resolving a technical issue, that is how they understand technical issues. In some cases other than IP cases, sometimes the jurors are well respected people or someone is famous. This makes it easier for the decision to be accepted by people.

The IP protection in China is closely related to the development of legal system. As you may know in 1980s that is the time China started to work on the IP system. For example the treatment law comes out in 1982, in 1984 they issued patent law, and in 1990s they issued copyright law. The background of this change is during that time, China was starting to open up and started to establish market orientate economic, so they had the amount to protect IP rights so they use legislation as the approach. Because China started to open up we want to attract foreign investment, we also want them to bring their technology to China.
and to produce innovation in China, so we need to protect IP rights and other rights.

From 1980s to now it has been thirty years there are a lot of changes in the economic and technology, according there are also a lot of changes in IP law. Until now each office of IP legislation has been revised for at least three times. Especially around 2000 because China joined the WTO there was a system mandate prevalent to IP legislations. Now that all our IP system is relatively complete. Many of the Chinese legislation are IP are based on the requirement of international treaties and some of them based on negotiation with other countries. As a result are the same, are similar to IP law in other countries. After legislation the issue become enforcement. Because China needed to establish an enforcement system in very short time, so they come up with special measures of enforcement. For example one very special respect of the enforcement system in China is it is double check, which is we have traditional enforcement and administrative enforcement. The IP owners can complain to administrative agency and the administrative authority can punish infringing actions. The IP owners can also litigate in courts to ask for injunction or damage. According to the current decision of China, [24:51 inaudible], and the leading role of the judicial system in IP protection.

About the judicial system of IP protection I remember it is around 16 or 17 years ago, they started to establish IP tribunal and they started to train IP judges.I think this is another difference from the United States. In most federal courts, the judges can handle all kinds of cases, maybe they have personal interest or specialty but they are not specialized in IP but of course I know there is a very specialized appellate court. The specialized IP tribunals and the specialized IP judges are also very special in China. The IP judges in China usually have a comparatively special education background and after twenty years practice they can [27:37 inaudible] progress, so in IP case adjudication it is relatively mature. And those IP judges deals all kind of IP cases including patent, copyright, trademark, unfair competition and also anti-trust.

Because China had a rapid pace of economic and technology code development and also enforcement of IP protection so the IP owners in china have a stronger sense of IP protection as a result of IP cases have had a significant increasement. In recent four or five years, the number of IP cases increased by thirty or forty percentage every year. In last year the number of IP cases is forty-thousand which is increased more than thirty-six percentage from 2009. Among those cases there are about five percent of cases have at least one party from a foreign country. According to the amount and of the percentage, they can say most IP cases in China are deal with the dispute among Chinese companies. That means China has a strong domestic demand to protect IP rights because its economic and technical development. The Chinese government is very determined in IP protection. Because they know if they don’t protect IP this will hurt our own innovation and our own economic development. Among those cases, copyright have the biggest number which is around fifty percentage. And half of their copyright cases involves the issue about protecting copyrights in the Internet age. Among those cases, the trademark and patent cases are around six and seven thousand. No matter how many amendments made to legislation, the purveying in legislation are always general and the effect in each case is complex. There are a lot of changes in economy and technology so the judges always need to consider the specific situation and the new changes when they settle case. As a result the Chinese judges always pay attention to the new trends in the international IP field. Like the case law and the theories, they pay attention to both of them. As I know according to the copyright issues on internet and also patent issues, trademark issues, many countries are facing common challenges that is why it is important to understand each other and learn from each other.
The IP Tribunal in Supreme People’s court, where I work it is a specialized tribunal to handle IP cases. We also have our own special [inaudible] we have two kinds of responsibilities. One kind of IP cases we handle, is if a party is unhappy with their high court’s decision they either appeal to the Supreme People’s Court either request Supreme people court according to the provision procedure. The number of these cases was around four hundred in last year. We have seventeen judges in our tribunal. Beside the judges, we also have some clerks and other supporting staff. We have another responsibility which is very different from the US court, they also make judicial interpretations. As I know the US court always interpreted the law in cases, they don’t make general interpretation. In China the Supreme People’s Court can make general interpretation which can apply to all cases. Those interpretations are also made in the format of provision which is very similar format to the legislation statue provisions. All those interpretations are enforced by all courts across the country. If a court failed to implement the judicial interpretation that would be an error of law.

The IP tribunal where I work has the responsibility to draft the judicial interpretation in IP field, after they finish the draft, they submit the draft to the judicial committee of Supreme People’s Court, the judicial committee will approve the judicial interpretation and then it is enforceable. In those years, we had make a lot of effort in developing judicial interpretation in IP law and also unfair competition law. Those judicial interpretations become very important and a concrete source of law for the judges to decide the cases. I’d like to stop my presentation here and I would like to take questions from the audience.

Audience 1

Before starting the questions I’d like to thank Amy Peng Zhe she is a PhD candidate working with me. And she did a really excellent translation because I often needed to do translation, you reminded me a long time ago of when I went to Japan with my Doctor-father professor Chisum, I did a lot of translation and in front of a big audience, this is a big task, but you did a wonderful job.

Audience 2 in Chinese

[Question in Chinese]

Dr. Kong

The vast majority of cases we handle involves the IP infringement it is extremely rare for us to go to other cases such as tort. But in the case when other legal issues arise within the IP infringement the judges have the right and authority to make the decision on all aspects of law that’s involved.

Audience 3

I’m going to ask a question in Chinese then in English. My question is related to yours, so Judge Kong said initially Chinese court is specialized in IP but later on, as you said, there is some actual in reality some case related, so this makes no sense for the related case distributed to the different tribunal so they combine them so right now in some city some high court for the trial, so I’m asking Judge to explain that.
**Judge Kong**

Since all administrative case, civil case, criminal case are related to intellectual property and are intellectual property cases. So in the Supreme Court, the IP Tribunal only responsible for the administered case and civil case. And also there is some other local courts IP Tribunal can try these three types of cases simultaneously. That’s what the Justice Hu said to you, when to try this three types of cases together. There are about five higher courts, IP Tribunal can try these three types of cases together and four key courts IP tribunal can try these three types of cases together and about twenty intermediate courts can try these three types of cases.

**Audience 4**

I have one question, you mentioned that IP owners can litigate in Chinese court to get both injunction and damages. I’m wondering which is more important because some countries, the court may put a focus on preliminary injunction rather than damages I’m not sure about Chinese court.

**Judge Kong**

The court paid equal attention to the injunction and damage issues but most of the litigants, most of the plaintiffs are more concerned about injunction. The recent trend, however, is that damage issue has grown more and more important and the amounts of damage being rewarded have witnessed significant increase. So from tens of thousands, to hundreds of thousands to millions of renminbi, that is the trend that’s going. Quite a few cases have netted tens of millions or even hundreds of millions of yuan over the past years. A record was set by [50:30 inaudible] Province, a court sentenced a damage of over three hundred million yuan, as damage in a patent infringement case. Upon appeal both sides settled and the final amount of settlement is one hundred fifty yuan. The Supreme Court have take notice and increasing willing to use increase significant amounts of damage as a tool to enforce IP right. The Supreme Court would like to see the right of litigant the ost of maintaining IP right is increased, the punishment for infringement is increased.

**Audience 5**

I have a question for the foreign interest related cases. I will ask both in Chinese and in English. My question is as you mentioned just now, one hundred and three courts can have jurisdiction over IP cases and seventy-one courts have jurisdiction over patent cases. But I noticed that most of the case, the foreign interest related cases the win rate of a foreign party is really, really high sometimes ridiculously high, roughly they are over sixty percent, seventy, eighty, ninety, and sometimes even one hundred percent win rate especially in Hunan Province and I saw a report of Judge Yung Hai of People’s court, they dealt over two hundred cases, IP related cases, in 2008 and the win rate of a foreign party is over ninety-nine percent and my question is whether there is an inclination or some implied rules for the courts when they deal in foreign interest related cases?

My second question is, since the win rate is really high and what about the rate of implement? Thank you, thank you for my long question, thank you.

**Judge Kong**
As to the winning rate, there’s no official statistics in China currently regarding the winning rates, probably the data you have is the local data. Secondly the plaintiffs winning rates is extraordinarily high in all kinds of cases. Because most of the cases, when the plaintiffs sue the defendant, the plaintiff already had enough evidence, without the evidence, they plaintiff would not sue the defendant in court, probably. So therefore, when the plaintiff happens to be a foreigner, they of course have a high win rate. It is possible that in certain cases the local court wants to emphasize their effort in protecting Intellectual Property law so they might accept it or take a certain restricted statistics from certain years that’s maybe the reason underlying the statistics you have mentioned. For example, last year the Beijing intermediate court publicised with great fanfare ten significant cases of Intellectual property law involving foreign countries. Although it sounds like a big deal, but the ten cases only constitute a small, small percentage of IP cases that the Beijing courts had jurisdiction for. Chinese judges adhere strictly to law they would never change the standard in pursuit of some policy or some statistical numbers. It is my personal experience that there isn’t a great to the state of enforcement some cases can not be enforced because the defendant has filed for bankruptcy or no longer have sufficient to cover but generally speaking IP enforcement enjoys a good reputation. This is partly because when the case was decided the enforcement has been on the agenda from the beginning and great details have been implemented to make sure there will be sufficient enforcement in the end. Just another point, a couple of years ago, the vast majority of plaintiffs in IP cases were foreign countries. But we’ve witnesses a vast increase of Chinese companies as plaintiffs suing foreign companies in IP issues. In fact the case we mentioned that set up the record of compensation the 115 million yuan, the plaintiff is a Chinese company and the defendant is a French company Schneid. Chinese companies owned increasingly significant amounts and are more and more willing to enforce their IP rights. It reflects the underlying close interaction and interdependence of Chinese economy with world economy. Thank you.

Audience 6

Judge, again, as a member of the faculty I want to thank you for being here it’s been really nice to have you here. My question is a short one and in the interest of saving time I will ask it only in English. Is there any public enforcement of Intellectual Property rights in China? We have in the United States as you may know a variety of private and public enforcement mechanisms and anti-trust in other places. Is there a public enforcement process or are we left strictly with private companies being able to sue when their rights are affected?

Dr. Kong

As I just said the double track system in China, the administrative branch where we enforce the intellectual property to the infringer to issue fine and punishment. Currently, regarding the big infringement in various places, locations and they want to go to the government and seek administrative remedy. And in those cases where the infringement issue is difficult to decide, the administrative branch want the plaintiff to go to the courts rather than administrative office.

Dean Kellye Testey

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