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**PROTECTING
INTELLECTUAL
PROPERTY
RIGHTS IN
CHINESE COURTS:
An Analysis of
Recent Patent
Judgments**

Mei Y. Gechlik

China Program



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INTRODUCTION

Since China joined the World Trade Organization (WTO) in December 2001, the country's commitment to abiding by the global body's rules has captured the attention of businesses and policy makers in the United States. Such attention is likely to grow because the Democrats are expected to use their regained power in Congress to toughen their stance on China trade issues, including intellectual property protection.

Much of the discussion of China's intellectual property protection has focused on the *infringement* of patents, copyrights, and trademarks. Though the magnitude of the problem warrants the focus, businesses and policy makers should know that problems pertaining to intellectual property could emerge before infringement happens. The controversial invalidation of Pfizer's Viagra patent by the Patent Reexamination Board (PRB) of China's State Intellectual Property Office (SIPO) is a good example to illustrate this point.¹ Although the PRB's decision was recently revoked by the First Intermediate People's Court in Beijing (FIPC), the final outcome remains uncertain. An appeal is to be heard by the High People's Court in Beijing (HPC).² A further appeal to the Supreme People's Court, China's highest appellant court, while unusual, is still possible.

Regardless of the final result, this case has aroused concern about an otherwise important but little known area of Chinese law—the judicial review of PRB decisions—and its effectiveness in protecting patent rights in China.³ The judicial review of PRB decisions covers those decisions made during *reexamination* (*fushen*) and *invalidation* (*wuxiao*) proceedings. When a party's application for a patent is rejected by China's Patent Office, the party may request that the PRB *reexamine* the Patent Office's decision. When a party believes that a granted patent does not conform to the Patent Law, the party may invoke the *invalidation* proceeding to request that the PRB declare the patent invalid in whole or in part. In practice, this often—but not necessarily—happens when a patent holder brings a civil lawsuit against another party for infringing upon his or her patent rights. The defendant may rebut by claiming that the patent itself was invalid in the first place.⁴

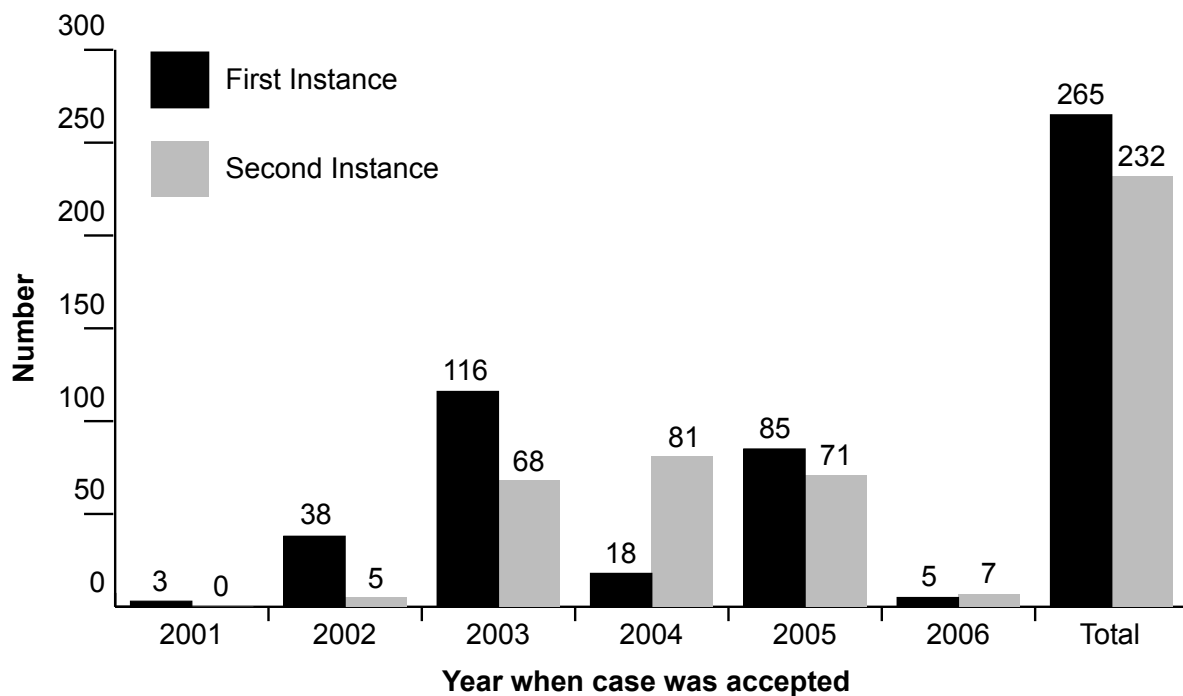
Decisions made during these proceedings are subject to judicial review. In most cases, the FIPC and HPC are the first-instance and second-instance courts. In theory, these cases can be further appealed to the Supreme People's Court. In practice, this rarely happens.⁵ For some cases that courts consider to be “major and complex” (*zhongda yinan*), the HPC and the Supreme People's Court could be the first-instance and second-instance courts, respectively.

A few issues about judicial review of PRB decisions are worth considering. What percentage of all judicially reviewed PRB decisions was reversed by courts? Do courts succumb to the administrative agency's pressure to uphold its decisions, a common problem in China's judicial review system?⁶ What is the impact of legal representation on the “losing rate”? Does this avenue provide aggrieved parties with an inexpensive and efficient means to protect their patent rights? To what extent do non–Mainland Chinese parties such as foreign parties and parties from Hong Kong and Taiwan use this avenue? How likely is it that these parties win these cases? Are there significant trends in the process that U.S. businesses and policy makers can learn to strengthen patent rights protection in China?

To answer these questions, this paper analyzes all “judicial review of PRB decisions” judgments posted by Beijing courts on their website, *Beijing Fayuan Wang* (Beijing Court Net). On November 1, 2003, the HPC announced that starting from that date, all intellectual property judgments, including those concerning the judicial review of PRB decisions, delivered by courts in Beijing would be posted on their website.⁷ The announcement emphasized that the Beijing courts had taken the unprecedented step in the Chinese legal system to publish every intellectual property judgment, “regardless of its nature, possible impact, and quality.” It also pledged to publish these judgments within a month after they are rendered.

This research was launched immediately after the announcement. As of June 2006, 536 judgments had been posted on the website. Of these judgments, 47 were duplicates of judgments posted earlier and 7 are multiple-case judgments in which the courts ruled on two or three related cases in one single judgment. After eliminating the duplicates and counting every case decided in a multiple-case judgment as one case, the total number of cases analyzed in this research is 497, of which 265 are first-instance cases decided by the FIPC. The remaining 232 cases are second-instance or appeal cases decided by the HPC. Figure 1 shows the distribution of these cases, with the year indicating when a case was accepted by the FIPC or the HPC.

Figure 1. Number of Cases Posted and Analyzed



A comparison of the number of cases posted on the website with China’s official data shows that the Beijing courts have yet to honor their pledge to publish all their intellectual property judgments. For example, China’s SIPO reported that the FIPC and the HPC decided a total number of 592 and 485 first-instance and second-instance patent judicial review cases in 2004 and 2005, respectively.⁸ These 1,077 cases alone outnumber all the judgments posted on the website.

The failure of the Beijing courts to publish all intellectual property cases may lead one to suspect that the posted cases were carefully selected to shed a favorable light on these courts. Although a conclusive answer cannot be offered, the fact that many posted judgments have typographical errors and obvious missing data (such as the date of the judgment) seems to negate such suspicion. Yet, this study must be read with the above limitation in mind. Given that information regarding Chinese court management of patent judicial review cases remains scarce and that the posted judgments account for approximately a third of all such judgments rendered during the same period,⁹ this study, despite these limitations, still provides useful insights into an important but inadequately understood area of Chinese law.

ANALYSIS

This section answers the following six questions identified in the introduction.

What Percentage of All Judicially Reviewed Patent Reexamination Board Decisions Was Reversed by Courts?

Because the Chinese courts have yet to honor their promise to make all judicially reviewed PRB decisions available, the above question must be modified to: Of those judicially reviewed PRB decisions analyzed in this study, what percentage was reversed by courts?

Three of the 265 first-instance cases analyzed involve the judicial review of PRB *reexamination* decisions. In each of these three cases, the plaintiff was the party whose patent application was rejected by the Patent Office. During the reexamination proceeding, the PRB upheld the Patent Office's decision. The FIPC finally ruled against the plaintiffs to uphold the PRB's decisions.

The remaining 262 cases involve the judicial review of PRB *invalidation* decisions. There are primarily two scenarios in these cases. In the first scenario, the plaintiff was the patent holder whose patent was declared invalid in whole or in part by the PRB during the invalidation proceeding. The party who invoked the invalidation proceeding to challenge the validity of the patent was named the "third party" (*disanren*) of the court case. In the second scenario, the PRB decided in the invalidation proceeding to uphold the validity of the patent holder's patent. Dissatisfied with this decision, the party who challenged the validity of the patent sought the court to review the board's decision. This party was therefore the plaintiff of the court case, whereas the patent holder was the "third party" (*disanren*).

In 74 percent of these 262 cases, the FIPC upheld the PRB's decision because the evidence relied upon by the PRB was conclusive, the PRB's application of relevant laws and regulations was correct, and the PRB complied with relevant legal procedures. In the remaining 26 percent of these cases, the court revoked the PRB's decision on the grounds of inadequacy of essential evidence, incorrect application of laws and regulations, or violation of legal procedures. In some of these cases, the court also remanded the case to the PRB for another decision.

In sum, based on the analysis of these 265 cases, the rate of reversing PRB decisions by the FIPC is 26 percent. This figure is close to China's official statistics. In 2005, the HPC reported that in all different types of judicial review cases handled by the courts in Beijing in recent years, the rate of reversing an administrative agency's decision ranges from 17 to 24 percent.¹⁰

Of the 232 second-instance cases analyzed, three cases are related to a judicial review of PRB's *reexamination* decisions. In two of these three cases, the FIPC upheld the PRB's decision to support the Patent Office's rejection of the plaintiffs' patent applications. On appeal, the HPC upheld the FIPC's ruling. The issue of the third case was similar, except that the FIPC revoked the PRB's decision to support the Patent Office's rejection of the plaintiff's patent application. But the HPC reversed this ruling to uphold the PRB's decision.

The remaining 229 appeal cases involve the judicial review of PRB *invalidation* decisions. Any party to the case who is dissatisfied with the FIPC ruling can appeal to the HPC. In 80.3 percent of these 229 cases, the HPC dismissed the appeal to uphold the FIPC's ruling. In only 19.7 percent of these cases did the HPC allow the appeal.

Overall, in 70.3 percent of these 232 appeal cases, the PRB's reexamination and invalidation decisions were upheld after the case had gone through the first-instance and second-instance processes. In the remaining 29.7 percent of these cases, the PRB's decisions were either reversed by the FIPC (and the HPC subsequently supported this ruling) or the HPC (to reverse the FIPC's ruling that upheld the PRB's decision).

Do Courts Succumb to the Patent Reexamination Board's Pressure to Uphold Its Decisions?

In China, government officials and academics often refer to the "losing rate" of defendant agencies in administration litigation (that is, judicial review) to discuss the extent that the law is respected by officials and, by extension, Communist Party members, because most officials are these members.¹¹ The term "losing rate," though not defined, primarily covers the rate at which one of three outcomes occurs: (1) plaintiffs withdraw their administrative cases from the courts after the defendant agencies agree to change the challenged administrative acts; (2) the courts decide to revoke or change the challenged administrative acts; and (3) the courts order defendant agencies to act, that is, implement their legal obligations.¹²

In the judicial review of the PRB's decisions, the first and third of these outcomes are rare. Unlike administrative agencies at the basic level of the Chinese government structure, the PRB, an agency of the central government, rarely "fails to act." It is also rare for the PRB to change its decisions informally so that a party finds it unnecessary to continue the lawsuit and thus withdraws the judicial review case. Therefore, in this type of judicial review, the losing rate mainly covers the second outcome—a reversal of the PRB's decisions, which, as found in the preceding section, is 26 percent.

Is this losing rate low or high? Comparisons with other jurisdictions could be misleading because their legal cultures are very different from China's. Compared with the 35 percent average losing rate of defendant agencies in China as a whole, this is lower.¹³ When the losing rate of a certain defendant agency or of agencies in a certain geographical area is lower than the national average, it is often interpreted in China as a sign of either one of two opposite situations: (1) that the concerned officials show *more* respect for the law than their counterparts in the country as a whole and, therefore, courts are more likely to find their administrative acts lawful; or (2) that the concerned officials, due to various reasons such as their poorer qualifications and training of law, show *less* respect for the law than their counterparts in the country and they, therefore, are more likely to pressure the courts to rule in favor of them.

Which of the two explanations prevails requires deeper understanding of the legal and political environments in which the concerned judicial review is practiced. In the context of the judicial review of administrative acts made by lower-level governments of less developed localities, the second explanation is often found to prevail. This stems from a major problem in China's judicial review system. Local courts, especially basic-level courts, are susceptible to local government's interference to rule in favor of local administrative agencies' decisions. Their susceptibility to such interference is largely due to local government's control over the financial and personnel arrangements of local courts and local officials' inadequate respect for and understanding of the law.¹⁴

By contrast, in more developed cities such as Shanghai, the first explanation—local officials' greater respect for the law—was found to prevail in explaining the overall 20 percent losing rate of Shanghai's defendant agencies. Interviewed experts attributed Shanghai agencies' lower than national average losing rate to the fact that the city's officials and Communist Party members demonstrate greater respect for the law, compared with their counterparts in other parts of the nation.¹⁵ This, in turn, is largely due to their better qualifications and training. As a result, these officials and party members are less likely to interfere with courts and are more likely to make lawful administrative acts that are subsequently upheld by courts.¹⁶

Against this backdrop, the lower than national average losing rate of the PRB should prompt readers to wonder whether the PRB may have pressured the FIPC and the HPC to uphold its decisions. It is generally recognized that officials in the central government, such as those in the PRB, due to their better qualifications and training, show more respect for the law than officials in lower-level governments.¹⁷ Those FIPC and HPC judges who handle intellectual property cases are also generally considered to be of better quality than average judges in the country.¹⁸ These two factors, together with the fact that the PRB is not part of the Beijing municipal government that controls the financial and personnel arrangements of the city's courts, suggest that the FIPC and HPC are less likely to suffer from interference.

Considering the international community's concern about the competency of Chinese judges, more discussion of the topic is necessary. In the past, many Chinese judges were military veterans who never received any legal training. But recent years have seen impressive improvements. China has approximately 300,000 judges and other court employees.¹⁹ Slightly more than 90,000 judges, representing approximately 43 percent of all 210,000-odd judges, have attained at least a bachelor's degree. Only about 4,000 judges (2 percent of all judges) have master's or doctoral degrees.²⁰

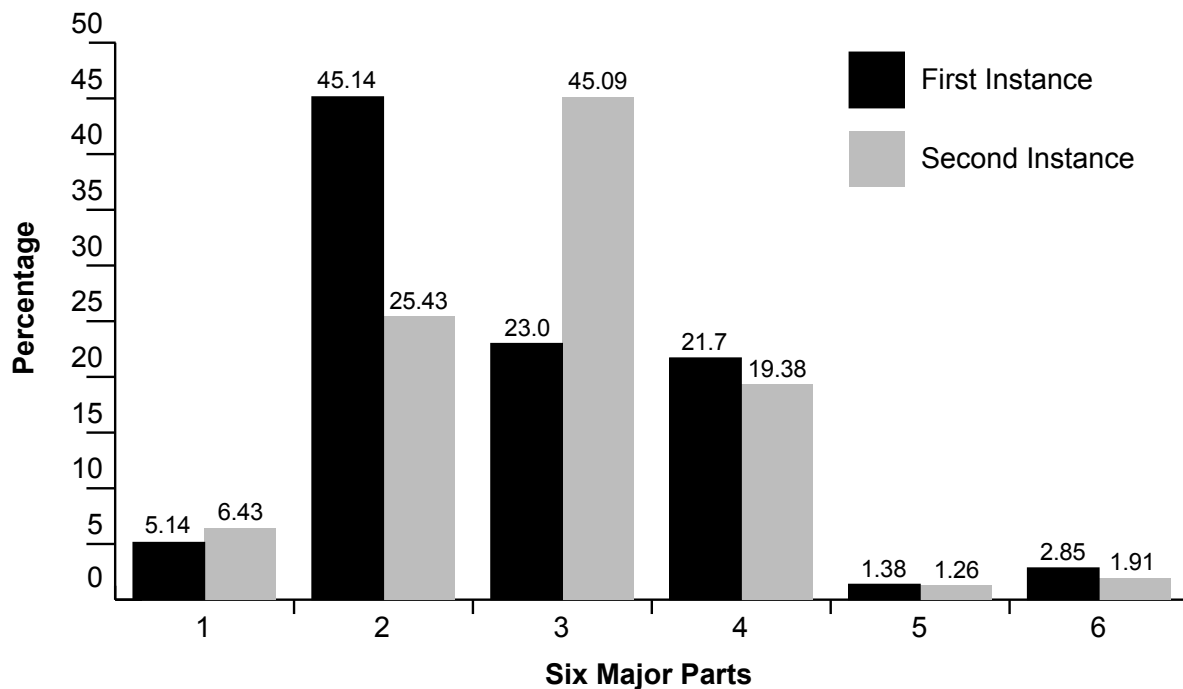
In major cities such as Shanghai, the improvement is even more obvious. Approximately 87 percent of all judges in Shanghai have attained at least a bachelor's degree, although not necessarily in the field of law. Of this group, about 8 percent have master's or doctoral degrees.²¹ The better qualifications and higher competency of Shanghai judges are linked to the city's prosperity. With adequate resources, Shanghai can offer attractive employment packages to lure top candidates from all around the country to apply for positions in its courts. The city can also organize intensive training for incumbent judges.

Complete data about the qualifications of judges who handle "judicial review of PRB decisions" cases are not available. But given that they are judges of Beijing, China's capital city, which, like Shanghai, can recruit the best candidates to serve on the bench and that these judges are assigned to handle an important type of cases, these judges are likely to be of better quality than average judges in China. Anecdotal evidence given by lawyers handling this type of case confirms this point of view.

So does the analysis of judgments of the 497 cases studied in this research. Contrary to conventional views about Chinese judgments being very short and lacking reason, all the judgments analyzed in this research are quite long, structured, and reasoned. On average, a first-instance judgment has about 6,830 Chinese characters and an appeal judgment has 5,650.

Each of these judgments primarily consists of six parts: (1) the names and addresses of the parties and their legal representatives; (2) the legal process that the case has gone through, as well as the parties' claims or response and their supporting reasons; (3) the facts and evidence found and verified by the court; (4) the reasons and legal bases of the court's decision; (5) a summary of the court's decision; and (6) a statement that specifies which party or parties should pay the court fee and the parties' right to appeal if the case is a first-instance case. Figure 2 shows that, on average, parts 2, 3, and 4 account for 90 percent of the entire length of these judgments. Part 4, the reasoning, accounts for a fifth of the length of these judgments. Compared with other Chinese judgments, these judgments provide clearer references to legal provisions and their application to the case in dispute.

Figure 2. Percentage Accounted for by Each Part of Judgment



Put together, the above discussion suggests that the FIPC and HPC are less likely to suffer from interference because both officials and judges concerned in this type of judicial review cases are of better quality than the average officials and judges in the country. Therefore, interference should not be the main cause of the PRB's lower than national average losing rate.

Could the main cause be the bribery of judges, considering that this has been a major problem in China?²² Field research involving extensive interviews with local judges, lawyers, professors, and litigants finds that bribery of judges is not a major problem in judicial review. This explanation is rooted in the nature of judicial review cases. Plaintiffs are private parties, and they dare not bribe

judges to rule against powerful defendant agencies. Defendant agencies need not bribe judges to rule against plaintiffs. If they want to change the result, these agencies can always resort to interference, instead of bribery. By contrast, civil litigation is different because both parties are private legal entities and bribery appears to have been more serious. A study of Shanghai judicial review judges adds another explanation. These judges are less likely to accept bribes because, compared with the average judges in the nation, they enjoy better pay and social status and thus value their jobs more and are likely less tempted to take this risk.

Concrete evidence concerning whether bribery of judges handling “judicial review of PRB decisions” is the real cause of the PRB’s lower losing rate is not available. But given that the PRB need not bribe judicial review judges and that Beijing judges, like their counterparts in Shanghai, enjoy better pay and social status, it is submitted that the bribery of judges is unlikely to be the main cause of the PRB’s lower than average losing rate.

Two factors are probably the main causes. First, PRB officials have more respect for the law than do average officials in the country and, therefore, courts are more ready to find their administrative acts lawful. The second factor is judicial deference to the PRB. In many developed jurisdictions such as the United States, judges focus on the legality of administrative decisions and may defer to administrative agencies because these agencies have a better understanding of the technical areas in which the agencies specialize. Judicial deference has taken root in China. For example, at a meeting on patent adjudication in China held in 2003, the Supreme People’s Court emphasized judicial deference to the PRB in handling patent judicial review cases.²³

The conclusion that the FIPC and HPC are less likely to suffer from interference must not be misinterpreted to mean that there is no interference. Given the current political structure in China and the fact that courts are ultimately “under the leadership of the Chinese Communist Party,” party members and officials can, if they want, easily step in to interfere with the judiciary.

For this reason, the very existence of an adjudication committee in each court has been controversial. Every adjudication committee is responsible for, among other things, making the final decisions on “major and complex” cases handled by its courts. Members of the committee include the president and vice presidents of the court as well as chief judges of the court’s various divisions, such as criminal, administrative, and civil divisions. But adjudication committees are themselves under the supervision of the Chinese Communist Party’s political-legal committees at corresponding levels. These political-legal committees are led by senior party members who also serve as leaders of administrative agencies at corresponding levels. This decision-making mechanism allows officials and party members to easily interfere with the judicial process. The problem is exacerbated by the lack of a clear definition of the term “major and complex.”

What is most intriguing is that a mechanism that flies in the face of the rule of law could sometimes be a guardian of justice. For example, when a court handles a WTO-related case such as the judicial review of the PRB’s decision that involves a multinational company that can command wide media attention, the adjudication committee and the corresponding Chinese Communist Party’s political-legal committee are likely to consider the negative impact on China should the judgment be seen as unfair. For this reason, they usually strive to handle this type of “major and complex” case with care to ensure that rulings are in accordance with the law. Such “good interference” has led some pragmatic scholars in China to support the gradual, instead of immediate, abolition of adjudication committees.

To sum up, whereas the existence of adjudication committees may open a door for interference in the judicial review of PRB decisions, these committees may play a role in safeguarding justice. Pfizer's recent success in having the court revoke the PRB's decision that invalidated the Viagra patent is likely an example of such "good interference." Immediately after the PRB's decision, China's intellectual rights protection was under attack. The rise in global attention to the final outcome of the case likely led the court to classify the case as "major and complex" and prompted the adjudication committee and the corresponding political-legal committee to handle it with exceptional care. Because the case has already gone through the scrutiny of this legal-political mechanism, it is speculated that the forthcoming appeal will be dismissed.

What Is the Impact of Legal Representation on the "Losing Rate"?

An interesting observation is that in only 84 (31.7 percent) of the 265 first-instance cases and 65 (28 percent) of the 232 appeal cases were the plaintiffs and appellants represented by lawyers. The other plaintiffs and appellants either conducted proceedings by themselves or were represented by nonlawyers.

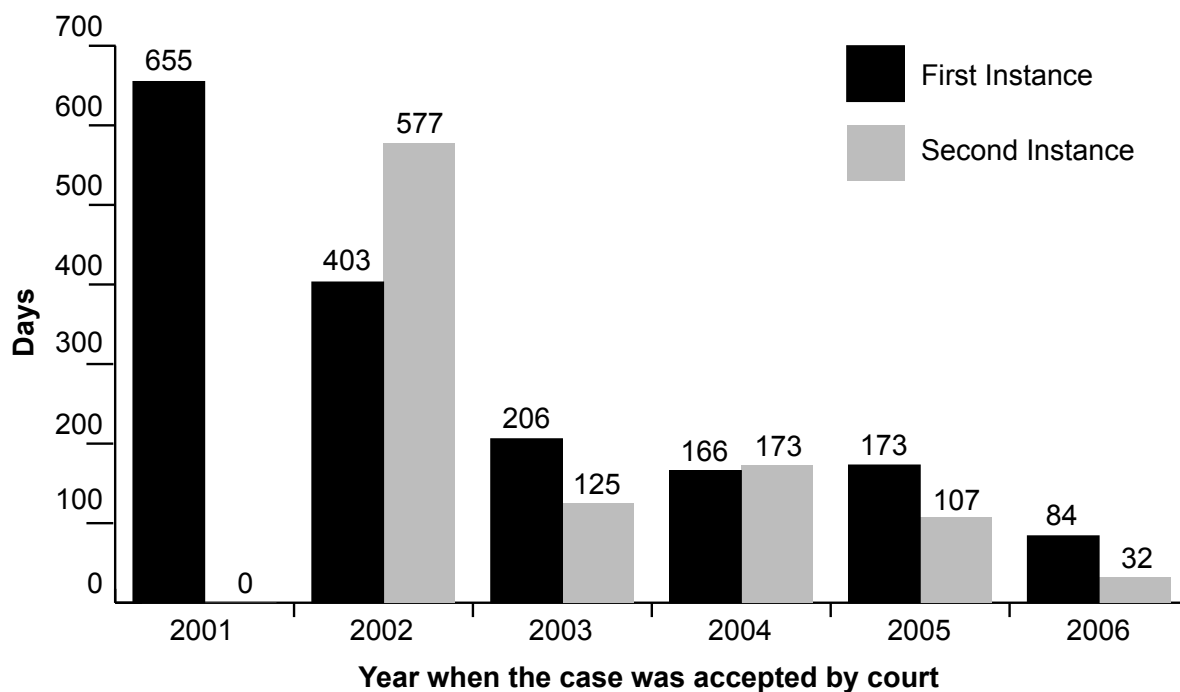
It is unclear why these parties would prefer not to have lawyers handle their cases. Considering that 70 percent of plaintiffs are companies and that approximately 13 percent and 56 percent of the appellants are, respectively, the PRB and companies, the inadequacy of financial resources to hire an attorney is unlikely to be the main reason. The main reason is believed to be that many litigants still lack confidence in Chinese lawyers to handle highly technical cases such as patent rights.

The lack of legal representation seems to have affected the outcome of these cases. Of the first-instance cases in which plaintiffs were not represented by lawyers, 76 percent of those plaintiffs lost their cases. Of those cases in which plaintiffs were represented by lawyers, 69 percent of those plaintiffs failed to win. In appeal cases, the losing rate of appellants who were not represented by lawyers is 84 percent, compared with 71 percent for appellants who hired lawyers.²⁴

Does This Avenue Provide Aggrieved Parties with an Inexpensive and Efficient Means to Protect Their Patent Rights?

The court charges a fee of 1,000 renminbi (about \$125) to handle a first-instance or an appeal patent judicial review case. The fee is generally paid by the losing party.

With respect to the efficiency of this avenue, figure 3 shows that the average number of days taken by the FIPC and the HPC to complete a first-instance and an appeal case has been reduced over the past several years. For cases that were accepted by courts in 2006, it respectively only took the FIPC and the HPC an average of 84 days and 32 days to finish handling a first-instance and an appeal case. For those cases accepted in 2005, the respective durations were 173 and 107 days. In this study, only five first-instance and seven appeal cases were accepted in 2006. Because of this small sample, the 2005 figures may provide a more accurate benchmark. Based on the 2005 figures and the fact that FIPC decisions can be appealed to the HPC within 15 days from the date the FIPC judgment is served on parties in China (30 days for foreign parties), it takes about 300 days (ten months) for a party to go through the first- and second-instance processes.

Figure 3. Time Taken to Complete the Judicial Process

The efficient handling of cases, especially the judicial review of PRB invalidation decisions, is generally welcomed. Unlike many other jurisdictions where invalidity and infringement issues are handled in the same proceedings by the same court, China has a split system. Infringement issues are heard by courts, but invalidity issues must be handled by the PRB prior to judicial review. In practice, this means that when a patent holder brings a civil lawsuit against another party for infringing upon his patent rights, the defendant may invoke the invalidation proceeding to challenge the validity of the patent. In this case, the court that handles the civil lawsuit *may* suspend it until the PRB's invalidation proceeding and the subsequent judicial review process are completed.

But the problem lies in the fact that courts are not obligated to suspend all the civil lawsuits. If the patent is an invention patent, courts are less likely to stay the infringement lawsuit on the grounds that invention patents have been substantively examined by the SIPO during the application process. The chance for the PRB to declare it invalid and thus affect the outcome of the civil lawsuit is lower. If the patent in dispute is a utility model patent or a design patent, courts are more likely to stay the infringement lawsuit because these two types of patents have not been substantively examined by SIPO during the application process. A utility model patent usually refers to an inventive step that is minor compared with inventions. For this reason, the protection period of a utility model is only ten years, as opposed to twenty years for inventions. A design patent is granted to a creator over the designs, such as new shapes, patterns, and colors, and the protection period lasts for ten years.²⁵

The possible coexistence of infringement and invalidation (and subsequent judicial review) actions makes the amount of time taken to complete the latter process a crucial issue. If the invalidation (and subsequent judicial review) process is slower than the infringement lawsuit, an undesirable situation may occur. This is best explained by a hypothetical example. In a civil (infringement) lawsuit, A sues B for infringing upon A's patent rights. B defends by claiming that A's patent was invalid in

the first place. Because any challenge of the validity of a patent must be handled by the PRB via the “invalidation proceeding,” B has to invoke such a proceeding.

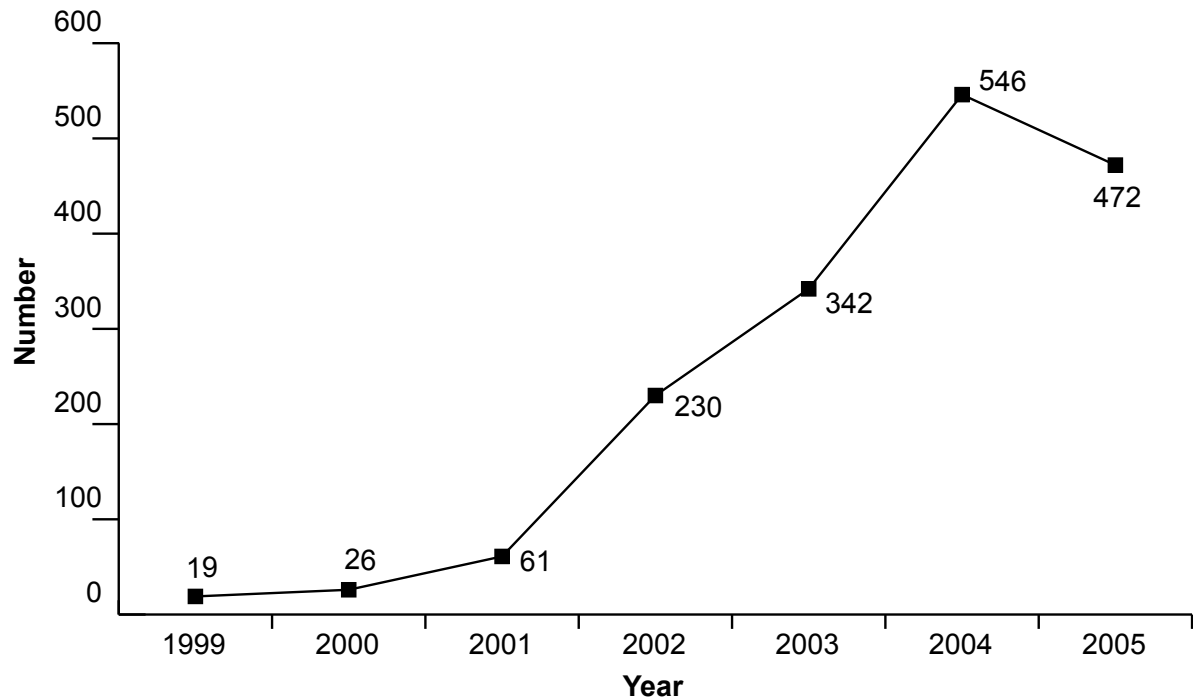
If the judges of the civil lawsuit stay the proceeding, everything will work smoothly. The PRB first makes a decision as to whether or not A’s patent is valid. Once the decision is made, the dissatisfied party, be it A or B, may take the case to court to review the PRB’s decision. The whole validity issue will be settled before the civil lawsuit judgment is delivered. If the judicial review proceedings ultimately decide that A’s patent is valid (or invalid), the judges in the civil lawsuit can rule that B’s defense does not (or does) stand.

But if the judges of the civil (infringement) lawsuit do not stay the proceeding, an undesirable situation may occur. The judges of the civil lawsuit may deliver their judgment *before* the judicial review process is completed. They may rule against B for violating A’s patent, even though in subsequent judicial review proceedings, B successfully challenges the validity of A’s patent. The invalidation decision does not have any retroactive effect on prior court rulings.²⁶

A first-instance infringement lawsuit that is not suspended usually lasts for a period ranging from six to eighteen months.²⁷ The ability of the FIPC and the HPC to complete the judicial review of PRB invalidation decisions in about 10 months is thus a good sign. This helps to reduce the chance that the undesirable situation occurs.

In short, this avenue provides aggrieved parties with an inexpensive and a fairly efficient means to protect their patent rights. But a word of caution must be added. Efficiency must not be pursued by the FIPC and the HPC at the expense of quality. Official statistics show that the total number of this type of patent judicial review case has increased (despite a slight drop in 2005) (figure 4).²⁸ This trend has aroused concerns about whether the two courts have enough human and financial resources to handle more cases of this type in the future, given that the Beijing courts need to spare resources to handle other types of cases that have also increased significantly.²⁹ In 2003, Jiang Zhipei, the leading Supreme People’s Court judge who oversees intellectual property litigation in China, openly acknowledged that the FIPC was facing enormous pressure to handle such a heavy caseload.³⁰ In 2005, he pointed out that inadequate resources had hampered China’s intellectual property protection system.³¹

Figure 4. Number of First- and Second-Instance Cases Accepted by the FIPC and HPC



To What Extent Do Non–Mainland Chinese Parties Use This Avenue?

Only 36 (13.6 percent) of the 265 first-instance cases and 17 (7.3 percent) of the 232 appeal cases were brought by non–Mainland Chinese parties. Figures 5 and 6 show the distribution of these cases. (The “other places” referred to in the two figures include Australia, Canada, France, Germany, Ireland, Luxembourg, Sweden, Switzerland, and the British Virgin Islands.)

Figure 5. Number and Percentage of First-Instance Cases Where Plaintiffs Are Not from Mainland China

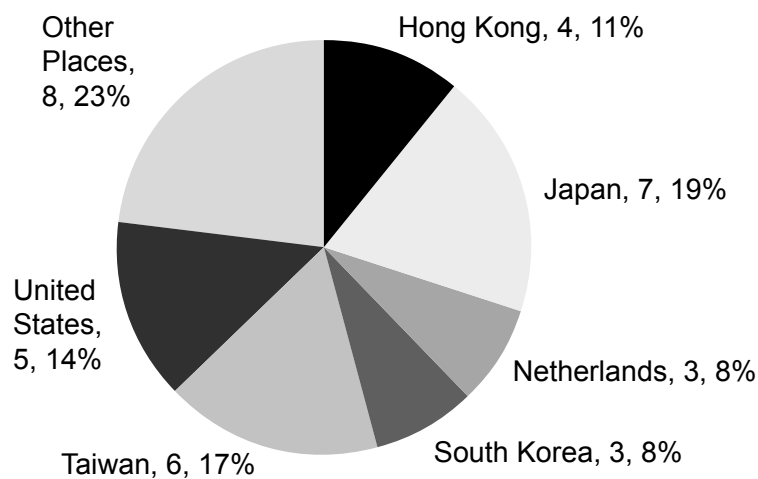
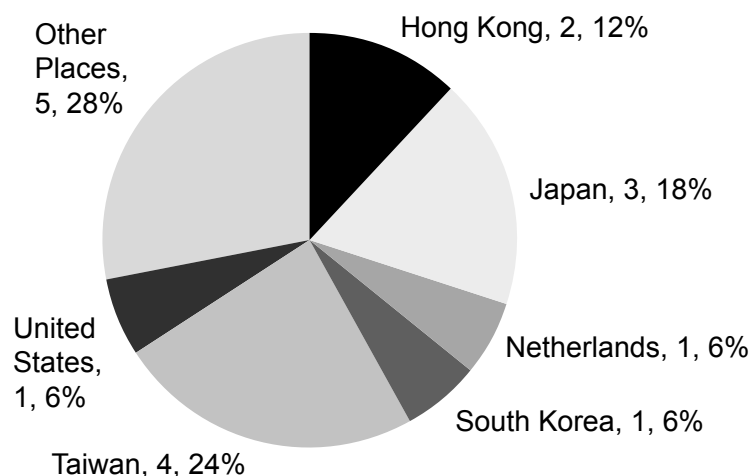


Figure 6. Number and Percentage of Appeal Cases Where Appellants Are Not from Mainland China



The number of first-instance and appeal cases brought by parties from Japan (10) and Taiwan (10) is the highest, followed by those brought by parties from Hong Kong (6) and the United States (6). This distribution is quite consistent with the percentage of Chinese patents that patent applicants from these places have obtained in China. From 1985 to 2005, China has granted 317,957 patents to applicants outside Mainland China. The number of patents obtained by applicants from Taiwan, Japan, the United States, and Hong Kong are among the highest (table 1).

Table 1. Total Number of Patents Granted to Applicants outside Mainland China, 1985–2005

Economy	Number of Patents Granted	Percentage of Total Granted to Non–Mainland Chinese Parties
Germany	17,890	5.63
Hong Kong	14,290	4.49
Japan	80,568	25.34
Netherlands	6,471	2.04
South Korea	13,717	4.31
Taiwan	98,950	31.12
United States	43,205	13.59
Others	42,866	13.48
Total	317,957	100

But the total number of first-instance and appeal cases brought by non–Mainland Chinese parties (53, 11 percent), compared with those brought by Mainland Chinese parties (444, 89 percent), is quite small. Given that patents obtained by applicants outside Mainland China account for 22 percent of all patents granted by the Chinese authorities from 1985 to 2005 (table 2), one would expect to see a higher percentage of cases brought by parties from these places. Why is this not the case?

Table 2. Total Number of Patents Granted by China, 1985–2005

Place	Number of Patents Obtained	Percentage of Total Granted
Mainland China	1,151,545	78.36
Outside Mainland China	317,957	21.64
Total	1,469,502	100

One possible explanation is that the cases analyzed in this study, as mentioned at the beginning, might not be sufficiently representative to present a more accurate picture. Another explanation is that non–Mainland Chinese parties are less ready to resort to the judicial enforcement of intellectual property rights. It was reported that only 268 (2 percent) of 13,424 intellectual property infringement cases accepted by the courts in China in 2005 were brought by foreign parties.³² Some experts attributed this situation to these companies' unfamiliarity with Chinese law and a lack of confidence in the Chinese court system.³³ On the low percentage of intellectual property infringement cases brought by foreign parties, Jiang Zhipei, the leading Supreme People's Court judge, commented that these companies often only complained to the media and their own politicians and urged them to take their complaints to the Chinese courts.³⁴

How Likely Are Non–Mainland Chinese Parties to Win?

In the 36 first-instance cases brought by non–Mainland Chinese parties, 13 plaintiffs were represented by lawyers and 23 were not. The respective numbers for first-instance cases brought by Mainland Chinese parties are 71 and 158 (table 3).

Table 3. First-Instance Cases

Parties	Cases	Cases with Legal Representation	Cases without Legal Representation
Parties from Mainland China	229	71	158
Other Parties	36	13	23

Of all the 229 first-instance cases in which plaintiffs were Mainland Chinese parties, 74.7 percent of those plaintiffs lost their cases. Of all the 36 first-instance cases in which plaintiffs were non–Mainland Chinese parties, 66.7 percent of those plaintiffs failed to win. The losing rate of Mainland Chinese parties appears to be higher than that of non–Mainland Chinese parties, regardless of whether those plaintiffs were represented by lawyers (figure 7).

Figure 7. First-Instance Cases: Losing Rate

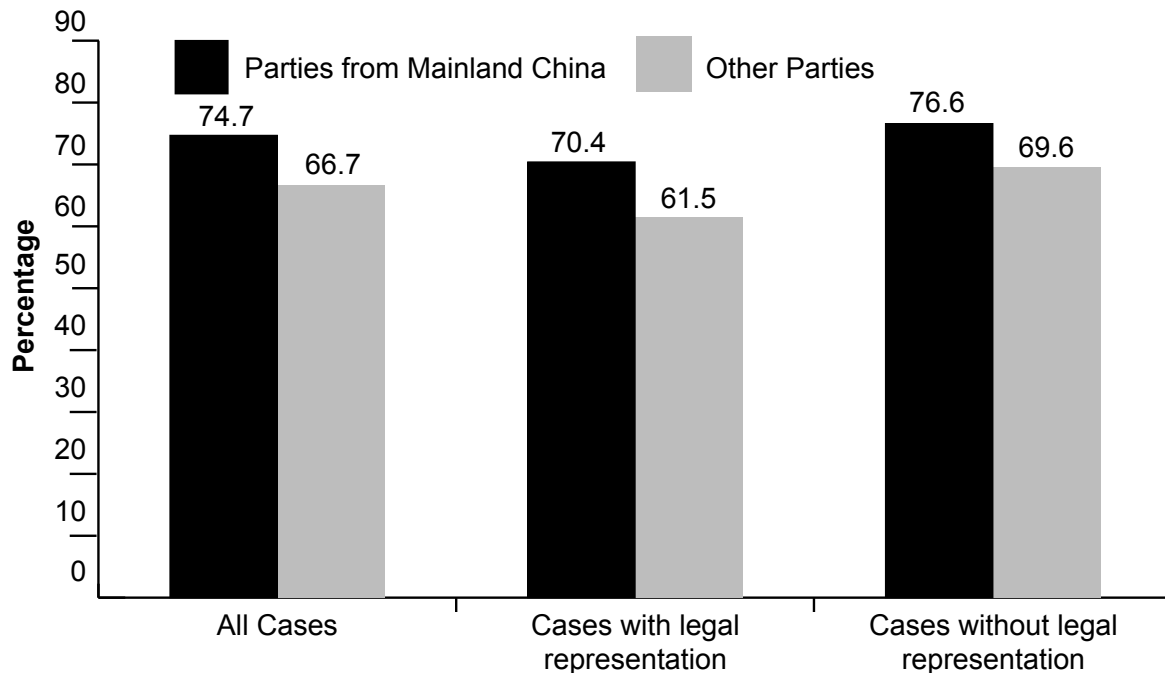
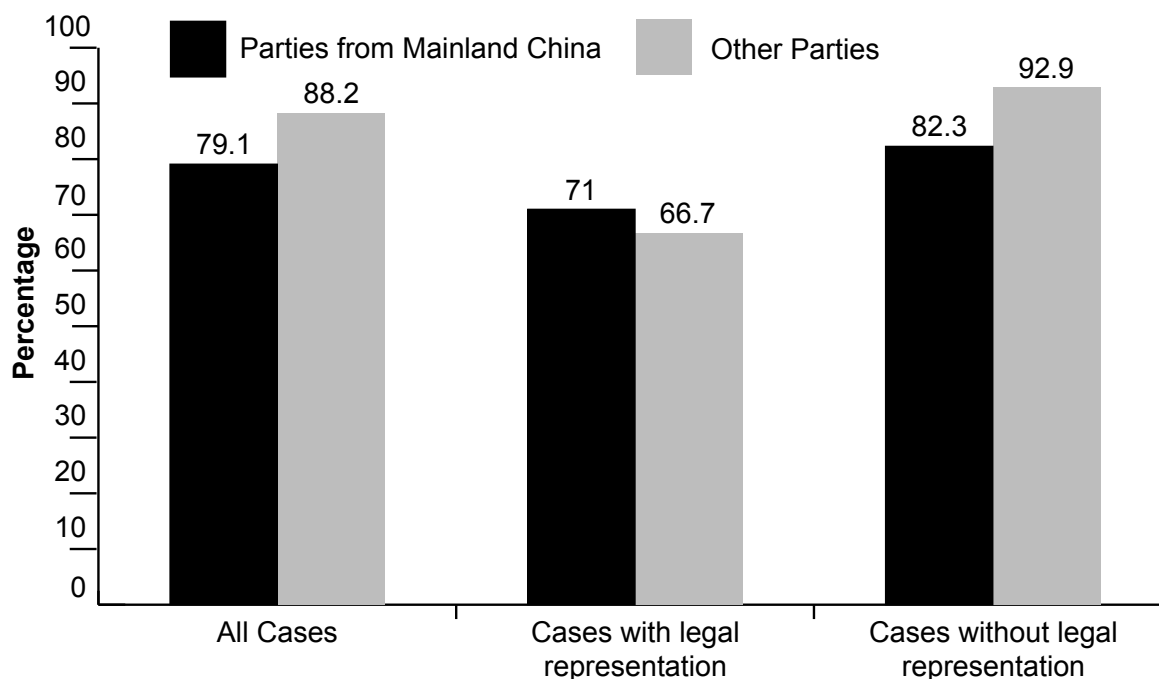


Table 4 and figure 8 summarize similar analysis of second-instance cases. Because only 17 second-instance cases were brought by non–Mainland Chinese parties (3 with legal representation and 14 without), the data generated from such a small sample are unlikely to be representative and must be read with caution. This may explain the lack of a consistent pattern in the comparison of the losing rate of Mainland Chinese parties with that of non–Mainland Chinese parties (figure 8).

Table 4. Second-Instance Cases

Parties	Cases	Cases with Lawyers' Representation	Cases without Lawyers' Representation
Parties from Mainland China	215	62	153
Other Parties	17	3	14

Figure 8. Appeal Cases: Losing Rate

Figures 7 and 8 do, however, show a consistent pattern in the impact of legal representation on the losing rate. Regardless of where the plaintiffs and appellants are from, these parties have a lower losing rate when they are represented by lawyers. This gives further support to the above observation that legal representation seems to increase the odds of a successful judicial review.

RECOMMENDATIONS

This study shows that the rate of reversing the PRB's decisions by the FIPC is 26 percent and that the chance for a PRB decision to remain intact after going through the first and second instances is 70.3 percent. One possible reason for the PRB's lower than national average losing rate is that PRB officials have greater respect for the law than do average officials in China and are thus more likely to make lawful administrative acts that are subsequently upheld by courts. Another possible reason is the deference of the FIPC and the HPC to the PRB. The better quality of PRB officials, the ability of FIPC and HPC judges to follow legal standards as reflected in the relatively structured and reasoned judgments of the analyzed cases, and the fact that the PRB does not control the financial and personnel arrangements of the two courts give support to the argument that interference from the PRB should not be the main cause of the PRB's lower losing rate.

The study also shows that the judicial review of the PRB's decisions is an inexpensive and a fairly efficient avenue for aggrieved parties to protect their patent rights. The court only charges \$125 to handle a case, and it takes only about ten months to complete the first-instance and appeal processes. Nonetheless, this mechanism has been underused by non-Mainland Chinese parties. Only 36 (13.6 percent) of the 265 first-instance cases and 17 (7.3 percent) of the 232 appeal cases were brought by

these parties. A plausible explanation is that these parties do not have adequate knowledge about and confidence in China's judicial enforcement of intellectual property rights.

Three other findings are worth noting. First, non–Mainland Chinese parties appear to have a lower losing rate (66.7 percent) than Mainland Chinese parties (74.7 percent). Second, legal representation appears to have increased the chance that the plaintiffs and appellants would succeed in the judicial process. Finally, a majority of the plaintiffs (68.3 percent) and the appellants (72 percent) in the 497 cases analyzed were not represented by lawyers.

In light of these findings, U.S. businesses should take the following three steps to protect their inventions or designs in China.

First, U.S. businesses should more readily resort to the judicial review of PRB decisions to protect their patent rights and have attorneys handle their cases. Of the 497 cases analyzed in this study, only 6 were brought by U.S. parties (5 companies and 1 individual). U.S. parties usually have the perception that foreign parties cannot win in Chinese courts and agencies.³⁵ Pfizer's success in winning the Viagra case and the finding that non–Mainland Chinese parties of the cases analyzed here have a slightly lower losing rate than their counterparts in Mainland China suggest the need to reconsider such a perception.

In none of the six cases brought by U.S. parties were the plaintiffs or appellants represented by lawyers. Instead, they were represented by patent agents registered in Hong Kong or Beijing. U.S. businesses should have more confidence in the competency of Chinese lawyers. At present, over 70 percent of China's 154,000 practicing lawyers have bachelor's degrees. Of these lawyers, approximately 10 percent have advanced degrees such as master's and doctorates.³⁶ Further, an increasing number of Chinese attorneys return to China after rigorous legal training in developed jurisdictions such as the United States. Finally, this study shows that the service provided by Chinese attorneys appears to have a positive impact on the outcome of a patent judicial review case. All these factors suggest that U.S. businesses can more readily seek Chinese legal representation.

Second, U.S. businesses should apply for Chinese patents including, if possible, invention, utility model, and design patents. To enjoy the protection of the judicial review of PRB decisions, U.S. parties must, in the first place, apply for Chinese patents. The judicial review of PRB decisions only covers the PRB's reexamination and invalidation decisions. As explained at the beginning of this paper, the PRB is responsible for reexamining the Patent Office's decision to reject an inventor's patent application and deciding whether or not a granted patent be declared invalid. Both scenarios require the inventor to apply for a Chinese patent.

From 1985 to 2005, the United States (43,205) ranked second behind Japan (80,568) in the total number of patents obtained in China (see table 1). This is mainly because U.S. parties filed fewer Chinese patent applications (120,254) than their Japanese counterparts (185,697),³⁷ even though the former have consistently submitted more international patent applications under the Patent Cooperation Treaty than have companies from other countries. A major reason for this problem is that many U.S. parties do not know that China has a first-to-file system, instead of a first-to-invent system. The failure of U.S. parties to file for Chinese patents opens a door for patent violations. Potential infringers in China often carefully review information disclosed by U.S. parties in their U.S. patent filings. Upon adding slight modifications to the original design, these infringers file for Chinese patents.³⁸

U.S. parties should, wherever applicable, apply for utility model and design patents at the same time they apply for invention patents. It takes a long time for the Chinese authorities to approve an invention patent. The quicker issuance of the utility model and design patents allows these parties to fill any possible loophole that could be used by potential infringers.³⁹

Third, U.S. businesses should deepen their understanding of the Chinese patent protection mechanism and direct their concerns about the process to the Chinese government. As discussed in the above analysis, one reason that few “judicial review of PRB decisions” cases are brought by foreign parties is these parties’ inadequate understanding of and lack of confidence in this mechanism. It would thus be helpful if U.S. businesses could deepen their understanding of this mechanism and direct their concerns about the process to the Chinese government.

To this end, at least two channels are available. The first is China’s intellectual property ombudsman, an official in China’s embassy in Washington who is appointed to serve as a contact person for small and medium-sized companies that have questions about intellectual property rights enforcement in China.⁴⁰ The second is the Business Communication Session of China’s SIPO, which allows representatives of foreign companies to have face-to-face discussion with SIPO officials on intellectual property rights issues. The first session was held in May 2006. It was reported that a session will be held every six months.⁴¹

In addition, both U.S. businesses and U.S. policy makers should take the following two steps.

First, U.S. businesses and U.S. policy makers should urge China to honor its pledge to publish all intellectual property judgments. A complete set of these cases will generate more reliable findings, from which interested parties inside and outside China can draw useful lessons to improve China’s intellectual property protection system. In March 2006, the Supreme People’s Court announced that the Chinese Intellectual Property Judgments website (www.ipr.chinacourt.org) had been launched to allow any interested parties to search for the country’s intellectual property judgments. It remains unclear whether the website contains all intellectual property judgments rendered in China.⁴²

Second, U.S. businesses and U.S. policy makers should call on China to devote more resources to the judicial review of PRB decisions so as to further improve the efficiency and quality of the process. From 1993 to 2004, the caseload of the Beijing courts increased from approximately 70,000 to more than 300,000 but the number of judges increased by less than 100.⁴³ Even Judge Jiang Zhipei acknowledged the inadequate resource problem and pointed out that he himself had to share one assistant with the seven other Supreme People’s Court judges who handle intellectual property cases.⁴⁴ A survey conducted by China’s official newspaper found that the increasing number of minor mistakes found in Chinese judgments could be attributed to judges’ heavy workloads.⁴⁵ In fact, numerous minor mistakes are found in the judgments of the 497 analyzed cases. This suggests that the inadequacy of resources is a real concern.

A further improvement in the efficiency of the judicial review of the PRB decision-making process can ensure that judges who preside over a patent infringement proceeding know the outcome of the judicial review and can thus better handle the infringement case without suspending it.⁴⁶

CONCLUDING THOUGHTS

In January 2006, President Hu Jintao vowed to turn China into an “innovative country” by 2020.⁴⁷ In the National Guideline on Medium- and Long-Term Program for Science and Technology Development (2006–2020), China’s State Council pointed out that China sets, among others, this goal: “By 2020, ... the number of patents granted to Chinese nationals and the introduction of their academic essays are expected to rank among the first five in the world.”⁴⁸

To attain this goal, China must improve the patent protection system to protect the thriving domestic business community’s inventions. But at issue is that many local companies are cautious about enhancing technological innovation because, as reported in China’s official sources, they find that the current legal system cannot fully protect their research and development achievements.⁴⁹ A bad consequence is that 99 percent of Chinese companies have never applied for patents.⁵⁰

The steps recommended above are, therefore, not only beneficial to U.S. parties but also consistent with China’s goals. These common interests would make the negotiations over patent rights improvements easier. Whenever China’s commitment to strengthening intellectual property rights is in doubt, the Chinese authorities should be reminded that one important determinant of a country’s economic development and its leading status in the world is its competency to develop advanced technologies.

NOTES

- ¹ See, e.g., Samson Yu and Ying Zhang, “Lessons from the Viagra Case,” *Managing Intellectual Property*, February 1, 2005.
- ² See “12 China Drug Makers Sue Pfizer on Viagra Patent Right,” *SinoCast*, June 21, 2006.
- ³ See, e.g., “China & Hong Kong: Recent Developments in Intellectual Property,” *Mondaq Business Briefing*, March 7, 2006.
- ⁴ For more discussion of invalidation proceedings, see, e.g., Gary Zhang and Hongxia Gu, “Patent Invalidation,” *Managing Intellectual Property*, February 1, 2005; Benjamin Bai and Helen Cheng, “Are Your Chinese Patents at Risk?” *Intellectual Property Today*, January 2005.
- ⁵ For example, *Xu Wenqing v. Patent Re-examination Board* (September 2005) is the first patent invalidation case that was heard by the Supreme People’s Court after it was handled by the First Intermediate People’s Court and the High People’s Court in Beijing. For a detailed discussion of this case, see Zha Zheng, “Patent Invalidity Visited by Supreme People’s Court,” *China Law & Practice*, February 1, 2006.
- ⁶ See, e.g., Mei Ying Gechlik, “Judicial Reform in China: Lessons from Shanghai,” 19 *Columbia Journal of Asian Law* 97 (2005); Veron Mei-Ying Hung, “China’s WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform,” 52 *American Journal of Comparative Law* 77 (2004).
- ⁷ See Zhang Xuecong, “Intellectual Property Judgments Can Be Searched on the Net,” *Zhongguo Fayuan Wang* (Chinese Court Net), November 1, 2003, available at www.chinacourt.org.
- ⁸ See State Intellectual Property Office, *Annual Report 2004* and *Annual Report 2005*, available at www.sipo.gov.cn.
- ⁹ From 2001 to 2005, the First Intermediate People’s Court and the High People’s Court in Beijing decided a total number of 1,574 first-instance and second-instance cases. See State Intellectual Property Office, *Annual Report, 2001–2005*, available at www.sipo.gov.cn.
- ¹⁰ See Wan Xingya, “Beijing’s ‘Citizens Suing Officials’ Cases Surge, 22 Ministries and Committees of the State Council Have Been Defendants,” *Zhongguo Fayuan Wang*, September 13, 2003, available at www.chinacourt.org.
- ¹¹ See, e.g., “Chinese Chief Justice Notes ‘Remarkable Progress’ in Human Rights,” *BBC Monitoring International Reports*, February 22, 2005; Zhang Guoqiang, “The Number of ‘Citizens Suing Officials’ Cases in Liaoning Is One of the Greatest in the Country,” *Fazhi Ribao* (Legal Daily), April 3, 2004.
- ¹² See Gechlik, “Judicial Reform in China,” *supra* note 6, at 109.
- ¹³ See *ibid.*; *China Law Yearbook*, 1994–2004.
- ¹⁴ See Gechlik, “Judicial Reform in China,” *supra* note 6 and Hung, “China’s WTO Commitment,” *supra* note 6.
- ¹⁵ Interviews in Beijing, Shanghai, Boston, and Washington, March 14–December 12, 2003, and November 1–10, 2004.
- ¹⁶ See Gechlik, “Judicial Reform in China,” *supra* note 6, at 100–114.
- ¹⁷ See, e.g., “China: A Consistent Commitment to the Rule of Intellectual Property and Corporate Law—Part I,” *Metropolitan Corporate Counsel*, June 2006.
- ¹⁸ *Ibid.*
- ¹⁹ See *China Law Yearbook*, 2003, 155.
- ²⁰ See “China’s Supreme People’s Court Announces Stricter Standards for Judges,” *BBC Monitoring International Reports*, October 27, 2003; *Supreme People’s Court Report*, 2003; Guo Hengzhong, “Famous Scholars Become Court Presidents: The Number of Judges with Master’s or Doctoral Degrees Is Close to 4,000,” *Fazhi Ribao*, May 25, 2005; Wang Doudou, “Qualifications of Our Country’s Judges and Prosecutors Have Greatly Improved,” *Fazhi Ribao*, July 18, 2005.
- ²¹ See *Shanghai High Court Report*, 2005. Of 5,200-odd judges and other court employees in Shanghai, 4,268 (81.4 percent) have attained at least the bachelor’s degree level. In fact, 334 of them have master’s degrees and 18 have doctorates. See “Judges Must Have at Least 60 Hours of Training Every Year,” *Shanghai Morning Post*, December 10, 2004.
- ²² See Gechlik, “Judicial Reform in China,” *supra* note 6, 129–132; and Hung, “China’s WTO Commitment,” *supra* note 6, 105–108.
- ²³ See Jiang Zhipei, “Concluding Speech Delivered at the Roundtable Meeting on Patent Adjudication in China,” *Zhongguo Fayuan Wang*, November 19, 2003, available at chinacourt.org.

- ²⁴ See also *infra* text under the heading titled “How likely are non-Mainland Chinese parties to win?”
- ²⁵ See, e.g., Benjamin Bai, Peter Wang, and Helen Cheng, “Patent Litigation in Chinese Courts,” *Intellectual Property Today*, November 2005; Connie Carnabuci and Peter Yuen, “China: Patent Protection,” *Managing Intellectual Property*, July 1, 2005; and Deli Yang and Peter Clarke, “Globalization and Intellectual Property in China,” *Technovation*, May 2005.
- ²⁶ See Zhang and Gu, “Patent Invalidation,” *supra* note 4.
- ²⁷ See Bai, Wang, and Cheng, “Patent Litigation,” *supra* note 25.
- ²⁸ See, e.g., Liu Yumin and Ma Jun, “Prominent Success of Beijing Courts’ Intellectual Property Administrative Cases,” *Zhongguo Fayuan Wang*, April 19, 2006, available at chinacourt.org (reporting continued increase in the total number of judicial review of PRB decision cases accepted by the courts in early 2006).
- ²⁹ See, e.g., Patrick Coyne and Ningling Wang, “United States: Accentuating China’s IP Positives,” *Mondaq Business Briefing*, August 10, 2006; Li Jinhong, “Chinese Courts Strengthen Civil Judicial Protection of Intellectual Property,” *Zhongguo Fayuan Wang*, March 10, 2006, available at chinacourt.org; Li Shan, “Beijing ‘Citizens Suing Officials’ Cases Have Increased 10-Fold in 10 Years, Most Defendants Are Ministries and Commissions of the Central People’s Government,” *Zhongguo Fayuan Wang*, May 11, 2005, available at chinacourt.org; Zhao Fengpeng and Li Kanle, “Beijing Has Handled 4,647 Intellectual Property Cases,” *Zhongguo Fayuan Wang*, January 21, 2004.
- ³⁰ See Jiang Zhipei, “Concluding Speech,” *supra* note 23.
- ³¹ See Chris Buckley, “Chinese Antipiracy Laws Take Root Slowly,” *International Herald Tribune*, October 5, 2005.
- ³² See Tony Chen and Helen Cheng, “China: How to Protect Pharmaceutical Products in China with or without a Patent,” *Mondaq Business Briefing*, April 20, 2006.
- ³³ *Ibid.* See also “Leading Figures Discuss How to Succeed and What Needs to Change in the Country; Roundtable: Enforcement in China,” *Managing Intellectual Property*, April 1, 2005; “Protecting Intellectual Property in China—Part II,” *Metropolitan Corporate Counsel*, June 2006.
- ³⁴ See Buckley, “Chinese Antipiracy Laws,” *supra* note 31.
- ³⁵ See Bai and Cheng, “Are Your Chinese Patents At Risk?” *supra* note 4.
- ³⁶ See Yu Nayang, “The Country Has More Than 150,000 Lawyers, More Than 70 percent Have Bachelor’s Degrees,” *Fazhi Ribao*, July 11, 2006.
- ³⁷ See State Intellectual Property Office, *Annual Report 2004* and *Annual Report 2005*, available at www.sipo.gov.cn.
- ³⁸ See, e.g., Chen and Cheng, “China: How to Protect Pharmaceutical Products,” *supra* note 32; “Protection of IP on China: A Work in Process,” *Metropolitan Corporate Counsel*, December 2005.
- ³⁹ See “Protection of IP on China: A Work in Process.” See also Karen E. Klein, “China’s Intellectual Property Thicket,” *Business Week*, April 27, 2006; Lei Wu, “Getting Your IP Strategy Right,” *Managing Intellectual Property*, February 1, 2005.
- ⁴⁰ See “Industry Says Jury Still Out on Usefulness of China’s IP Ombudsman,” *Inside US-China Trade*, May 24, 2006.
- ⁴¹ See “Chinese, Foreign Delegates Start Talks on IPR,” *Financial Times*, June 2, 2006.
- ⁴² See Wang Doudou, “Courts Launched Intellectual Property Judgment Website,” *Fazhi Ribao*, March 11, 2006.
- ⁴³ See Chen Pingzhong, “A Survey on the Working Conditions of Current Chinese Judges,” *Fazhi Ribao*, July 12, 2006.
- ⁴⁴ See Buckley, “Chinese Antipiracy Laws,” *supra* note 31.
- ⁴⁵ See Chen Pingzhong, “Survey on the Working Conditions,” *supra* note 43.
- ⁴⁶ *Ibid.* Also see Zhang and Gu, “Patent Invalidation,” *supra* note 4.
- ⁴⁷ See Yu Zheng, “China’s 15-Year Goal: Establish an Innovative Country by 2020,” *Fayuan Wang*, January 10, 2006, available at www.chinacourt.org.
- ⁴⁸ “China Maps Out Plan for Science Development,” *China Daily*, February 9, 2006.
- ⁴⁹ See “IPR Protection Helps Boost Innovation,” *China Daily*, November 26, 2005.
- ⁵⁰ See “Only 0.03 Per Cent of Chinese Enterprises Own Patented Technologies,” *BBC Monitoring Asia Pacific—Political*, January 2, 2006.

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