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# The nature of the Chinese IPR administrative enforcement system

Salomé Lachat\*, Daniel Lachat\*\*

**Abstract.** *Assessing IPR enforcement systems is usually performed by comparison of the results achieved, ie the importance of infringement and the damages got by right holders. Coming back to the fundamentals of the procedural systems eases the in-depth understanding of the issues, and helps in identifying the distinctive features of the Chinese system. Moreover, objective immediate improvements can be proposed. In line with this view, this paper shows the difficulties met by foreigners in understanding the Chinese IPR enforcement system. It suggests switching slowly to court enforcement with the aim of homogenising the enforcement system.*

**Key words:** *China; Enforcement; Jurisdiction; Legal tradition; Procedure; TRIPS.*

**Résumé.** *L'évaluation des systèmes assurant le respect des droits de PI est usuellement effectuée en comparant les résultats obtenus, à savoir l'importance de la contrefaçon et les compensations reçues par les titulaires des droits. Un retour aux fondamentaux des systèmes procéduraux facilite la compréhension en profondeur de la matière et l'identification des spécificités du système chinois. De plus, des améliorations objectives et immédiates sont proposées. Dans cette vue, les difficultés de compréhension du système chinois visant au respect des droits de propriété intellectuelle par les étrangers sont présentées. Il est proposé de glisser lentement vers une judiciarisation du système pour accroître son homogénéité*

**Mots-clefs :** *Chine ; Respect du droit ; Juridiction ; Tradition juridique ; Procédure ; ADPIC*

The saying goes “*No offence without law*”. It should be amended and become “*No offence without law and enforcement*”. The quality of a law is assessed through its enforcement. The Chinese system for enforcing IPR (intellectual and industrial property right) is often criticised by foreigners. Main reasons are its lack of efficiency due to its fragmentation, and the scarce skilled human resources. Some comments consider that China interprets its TRIPS commitments as a ceiling rather than a floor.

The Western tradition of “negotiating before signing” is described in the Vienna Convention on the law of treaties (23 May 1969). Its article 26 — *Pacta sunt servanda* — states that treaties are binding and must be performed in good faith. Article 31 repeats it. It is contrary to “*Realpolitik*”<sup>1</sup> that proposes “*signing before negotiating*”<sup>2</sup>. China is often described meeting only formally its TRIPS commitments<sup>3</sup>. However, the issue might be partly due to misunderstandings because several long-standing legal traditions co-exist among the partners of China.

Comparative analyses ask for independent studies of legal systems with their own categories. States had to upgrade their legal system because they freely committed to meet the TRIPS stipulations to become WTO Member States. These latter TRIPS stipulations that are a floor, follow a middle way between a common law tradition and a romano-germanic law tradition. Hence, com-

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<sup>1</sup> August-Ludwig von Rochau (1810-1873) coined the term, following Klemens von Metternich's lead in finding ways to balance the power of European empires.

<sup>2</sup> An example is given by the letter relative to the second sentence of article 63-3 of TRIPS, dated 20 January 2006, sent by P. Allgeier (US Ambassador to WTO) to Sun Zhenyu (RPC Ambassador to WTO).

<sup>3</sup> TRIPS formal commitments were met when China became a WTO member. Some WTO members like the USA consider that China has not developed and implemented an effective system of IPR enforcement, as required by TRIPS. Refer to: 2005 Report to Congress on China's WTO compliance prepared pursuant to section 421 of the US — China Relations Act of 2000.

parative analysis may be performed with the instruments used in relation with these legal traditions<sup>4</sup>.

Accordingly, the present paper aims at explaining the influence of legal traditions when looking at China's efforts to meet its TRIPS commitments pertaining to enforcement. Jurisdiction of the *fora*, ie the places where enforcement disputes are heard and decided according to law<sup>5</sup>, will be distinguished from procedures.

## I. Jurisdictions

Traditionally, fighting against counterfeiting and piracy is a private issue. Right holders are the only beneficiaries because their exclusive right may be confirmed by the *forum*, and remedies can be claimed. However, organised crime is presently involved in counterfeiting and piracy because it is less risky than other crimes like drug trade, and brings higher returns. This calls for a strong involvement of the State. Tracing the origin of fake products becomes a key issue that can only be solved by the State that ought to fight against crime.

Accordingly, there is a need for involving the State in infringement disputes without substituting it to the right holder and the alleged infringer. It is also necessary to find a balance between their interests through an adequate positioning of the initial *forum* of which the dispute solutions should be efficiently enforced.

### a) Involving the State

Out of organised crime cases, right holders may choose to sue the alleged infringer before a civil (or commercial) *forum*<sup>6</sup> or before a criminal *forum*. For example, article 61 of TRIPS<sup>7</sup> asks for criminal procedures for trademark and copyright infringement, while 17 EU Member States have included criminal remedies in relation with patent infringement, 19 EU Member States did the same for industrial design infringement. Civil procedures are always available<sup>8</sup>. This implies that different procedures (ie accusatory and inquisitory) are followed because besides civil proceedings the State is involved in case of criminal proceedings. Two legal techniques may be called for. The procedure may be either inquisitorial or accusatory.

In most of the Western States, a jurisdictional tier is in charge of IPR enforcement. It means that a *forum* is to be selected by the right holder among a number of possible *fora*, which are geographically spread over the territory of the State. Possible *fora* are belonging to the same jurisdictional tier. China is in line with this rule. Specialised sections of People's Courts are handling enforcement disputes<sup>9</sup>. The Supreme People's Court supervises some 30 "Higher People's Courts" that, in turn, may review dispute solutions (rulings) made by around 400 "Intermediate People's Courts".

<sup>4</sup> For a critic of the universalist understanding in comparing legal systems, refer to : L.-J. Constantinesco, *Traité de droit comparé*, t. I, LGDJ, Paris, 1972, pp 10-45.

<sup>5</sup> S. Gilis, *Law dictionary*, Baron, Woodbury, New york, 1975, p. 86.

<sup>6</sup> The choice between civil proceedings and administrative proceedings is not obvious because IPR are granted by administrative bodies and hence should be prosecuted before administrative courts. The 1844 French patent law gave jurisdiction to the civil courts : P. Roubier, *Le droit de la propriété industrielle*, t. II, Sirey, Paris, 1954, pp 338-339 ; H. Allart, *Traité théorique et pratique des brevets d'invention*, Rousseau, Paris, 1911, p. 119, n° 117, p. 329, n° 383, note 6, p. 44, n° 549 bis (Juridictions exceptionnelles). The 1791 French patent law gave jurisdiction to the administration. The German legal system was fragmented until the 1876 Civil procedure code. The 1877 German patent law like the 1891 German patent law gave jurisdiction on enforcement to the civil courts because such courts existed in all of the States. Reviewing the decisions of the German Patent office was with the Patent office court, and appeal with the Empire Supreme court in Leipzig.

<sup>7</sup> Please for comments on TRIPS refer to: D. Gervais, *The TRIPS agreement, Drafting history and analysis Thomson*, London, 2003 ; G. Dutfiel *et al.*, *Intellectual property rights : Implications for development*, UNCTAD, Geneva, 2003; P. Roffe *et al.*, *TRIPS and development, Resource book*, ICTSD-UNCTAD; Geneva, 2003.

<sup>8</sup> P. Ranjard *et al.*, *The legislation protecting intellectual property rights and its enforcement in the EU and the RPC, A comparative study*, EU-China trade project, Beijing, 2005.

<sup>9</sup> Presently, it is the case of the Supreme People's Court with its n°3 section, of 14 Higher People's Courts, and of 30 Intermediate People's Courts. It is accepted since the USA established a specialised jurisdiction (the US Court of Appeals for the Federal Circuit, which combined the functions of the US Court of Customs and patent appeals and the US Court of claims) in the 1980's that IPR enforcement was strengthened. Report to: P. Roffe *et al.*, *TRIPS and development, Resource book*, Part IV, *Enforcement, acquisition, and maintenance of rights*, ICTSD-UNCTAD; Geneva, 2003, page 13, note 54.

Provincial administrations may also handle enforcement disputes. The issue is that judicial enforcement and administrative enforcement do not follow the same procedural rules. Moreover, they do not belong to the same jurisdictional order within a legal system.

### **1. Inquisitorial technique**

According to the inquisitorial technique, judges who bear the burden of proof direct the proceedings. It means that they must investigate the facts. Where an authority is given the power (if not the duty) to question the right holder and the alleged infringer to substantiate its ruling, it is an inquisitorial technique<sup>10</sup>. Judges do not open proceedings without having good reasons to believe that there is an infringement. It means that the right holder must bring a minimal evidence of the alleged infringement. In turn, judges decide if the minimal evidence may be accepted to ground further investigation. This technique is used in China by Administrative enforcement authorities. Two-third of all enforcement disputes are handled by these latter authorities.

This inquisitorial technique is mostly used in continental Europe for administrative and criminal cases. It is worth noticing that there is a strong tendency to refrain from using the inquisitorial technique in criminal cases.

TRIPS does not give any recommendation about the use of an accusatory technique. However, article 42-1 of TRIPS indicates that parties should be allowed to present all relevant evidence like with an accusatory technique. Some measures like the *ex officio* measures foreseen by article 58 of TRIPS do imply an inquisitorial procedure. In principle, these measures are to be taken upon the initiative of the competent authorities without a request by the right holder or another interested party. TRIPS dictates a framework for such measures, where they exist. It indicates the conditions under which these measures meet TRIPS requirements.

### **2. Accusatory technique**

According to the accusatory technique, the right holder opens the proceedings with a writ of summons, which commands the alleged infringer to enter an appearance before a *forum* having jurisdiction on the facts that are described in the writ, and the claims of the right holder. The burden of proof is with the right holder with the exception of subject matter pertaining to patented processes, which falls under article 34 of TRIPS<sup>11</sup>. Judges consider the arguments of both the right holder and of the alleged infringer without further investigation.

This accusatory technique is mainly used in civil and commercial issues on the ground that it is to the plaintiff to prove the merits of the case, to bear the cost, and to receive the damages paid by the infringer. This technique is used by the Chinese People's Courts where handling an Enforcement dispute. Reviewing the granting decision of an IPR (either opposition or invalidity) is always made according to an accusatory technique because either documents that were not identified by the Granting Office or arguments showing that the law was wrongly applied by the Granting Office, are to be considered. Some countries like the USA are using an accusatory technique for criminal cases. It is not usual to change the procedural technique, *ie* to switch from an inquisitorial technique to an accusatory technique or *vice-versa*, when reviewing a case<sup>12</sup>.

*Ex parte* provisional measures organised by article 50 of TRIPS are a means to lessen difficulties bound to the burden of proof. The judge authorises the right holder to acquire relevant evidence in regard of the alleged infringement, including the right — usually reserved to the police — to penetrate private premises<sup>13</sup>. The interests of the right holder and of the alleged infringer are balanced through a procedure that brings the accusatory procedure close to an inquisitorial procedure.

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<sup>10</sup> For example, article 55 of the Chinese trademark law.

<sup>11</sup> Transposed with article 57-2 of the Chinese Patent Law.

<sup>12</sup> However, in Germany, at the beginning of the XX<sup>th</sup> Century, reviewing of enforcement cases was exclusively with the Empire Supreme court in Leipzig. The usual reviewing courts of the States (for example, Bavaria) had no reviewing jurisdiction for enforcement cases.

<sup>13</sup> The 1791 French patent law organised a procedure called « *saisie-contrefaçon* » which was adopted by the English courts under the name of « *Anton Piller order* » in 1976 (*Anton Piller KG v. Manufacturing Processes Limited*). Eventually, this technique was acclimated by other common law jurisdictions.

The accusatory technique makes difficult for local authorities to steer judges towards dispute solutions in line with the local “provincial protectionism” because steered solutions are highlighted. To the arguments of the right holder respond the arguments of the alleged infringer and *vice-versa*. The judge arbitrates between the litigants and is supervised by them. Contrarily to the accusatory technique, the inquisitorial technique may help forgetting some relevant issues.

## **b) Enforcing dispute solutions**

A *forum* may make enforcement dispute solutions that are to be put in force. However, the parties may not be pleased with the outcomes that should either be executed, or contested within a certain time span, or become executory through *exequatur*. This time span is limited in order to limit the legal uncertainty in relation with enforcement disputes.

Two ways of contesting an enforcement dispute solution may be contemplated: either to complain to a superior court of an alleged injustice; or not to execute it. This means that the necessary characteristics of the initial enforcement dispute solution are to be analysed to assess whether it may lead to a review.

### **1) Executory decisions**

Usually, procedural rules provide that a dispute solution made by an authority is executory because the authority that provided with it is empowered to do so. The authority may affix the executory formula to its decision.

The Chinese system tries to avoid conflicts. The material proof of a conflict is within the injunction of executing what is foreseen by the decision, *ie* stop to infringe, and possibly pay damages. If the alleged infringer agrees to stop the infringement, there was no enforcement dispute, but only a misunderstanding.

According to the above point of view, Chinese laws provide that the agreement is to be confirmed by a court and not by the authority that helped to reach an agreement<sup>14</sup>. In other words, the executory formula is with the Court belonging to another jurisdictional order than the authority, which has made the decision. Like in Western legal systems, mediator rulings need an *exequatur* to be enforced<sup>15</sup>. A further step can be made: if there is no executory formula, there is a proposal for a dispute solution but no judgement. Another step is that it may neither be necessary to write down the proposed dispute solution, nor to publish it. This is accepted by article 41-3 of TRIPS.

### **2) Review**

Right holders or alleged infringers may consider that the dispute solution is wrong. Minutes of the meetings before the first *forum* do not need to be available to enable the second *forum* to invalidate the dispute solution. If there are no minutes, the issue is whether the second *forum* may be accepted as recourse in line with article 41-4 of TRIPS, or is to be considered as an initial enforcement dispute.

The initial enforcement dispute may use a first procedural technique, *eg* an inquisitorial technique because it is organised before an administrative authority or before a criminal court. The second *forum* must be a “judicial” *forum*, and rather use an accusatory technique according to article 42-4

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<sup>14</sup> Refer to: Article 57-1 of the Chinese patent and industrial design law, which states “*the administrative authority for patents affairs may approach the People’s Court for compulsory execution*”; Article 31-1 of the Chinese law on integrated circuits states “*The intellectual property administration department may apply to the people’s Court for compulsory enforcement*”; Article 53 of the Chinese trademark law states “*Where the infringer neither brings a suit at the expiration of the time limit [for review] nor complies with the decision, the administrative department for industry and commerce may request to the People’s Court to enforce its decision*”.

<sup>15</sup> L. Cadet, *Droit judiciaire privé*, Litec, Paris, 1998, p. 626, n° 1476.

of TRIPS. The issue is whether proof of infringement accumulated by the first *forum* may be presented to the second *forum*.

According to article 45 of TRIPS, the *forum* should be able to order the infringer to pay the right holder damages. This is a *conditio sine qua non* for an enforcement *forum* to be recognised as an initial *forum*, be it administrative or judicial according to article 49 of TRIPS.

### **3) TRIPS teachings**

TRIPS sets the conditions to be met by a *forum* to be recognised as an IPR enforcement *forum*. The four conditions are: (1) to have jurisdiction on enforcement disputes; (2) to have the right to order the infringer to stop the infringement and to pay damages to the right holder; (3) to order executory enforcement dispute solutions; and (4) to submit the dispute solution for review to another *forum*. Accordingly, the question might rise whether the Chinese IPR Administrative enforcement system meets the TRIPS requirements.

The initial *forum* and the reviewing *forum* may belong to different jurisdictional orders, *eg* an administrative order and a judicial order. They may also follow different techniques like an inquisitory or an accusatory technique. It means that very little upgrade may be necessary to fulfil TRIPS commitments.

## **II. Procedures**

Several procedures may be organised for enforcing IPR. Western States have introduced for historical reasons monistic enforcement systems, while the Chinese enforcement system will be deemed dualistic. In both cases, if prosecution may be civil or criminal, most of the cases are of civil nature because there is no reason for the State to be involved in a dispute pertaining to private interests. The mere fact that the State grants exclusive rights according to industrial and intellectual property laws does not mean that it undertakes any guarantee about the exclusive right. It pledges only to open *fora* having jurisdiction on disputes pertaining to IPR and guarantees that the proceedings will follow standardised rules leading to similar solutions.

### **a. Western monistic enforcement systems**

Western enforcement systems are taking into account that enforcement proceedings are undertaken to the sole advantage of the right holder. The historical background may partly provide for explanation.

#### **1) Historical background**

In most of the Western States or States having introduced a western-like judicial organisation, courts are dealing with disputes related to industrial and intellectual property. It means that according to the theory of separation of powers, enforcing the law is a duty of the judicial. It is assumed that there is a division of labour among governmental organisations in the exercise of their functions: legislators legislate, administrators execute, and the courts adjudicate<sup>16</sup>. The Patent office grants patents, possibly after checking the patentability, and the courts are in charge of enforcement, *ie* of infringement cases. The same occurs for the Trademark office, and for any other granting authority.

Before the turning of the XIX<sup>th</sup> Century, there were only a score of new granted rights every year. Modern IPR are born with the first industrial revolution and their number increased drastically. The numerical revolution has changed the orders of magnitude. The issue was to organise a *forum*,

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<sup>16</sup> M. de Montaigne (1533-1592) in its "Essays" first described the theory of separation of powers. All Western constitutions are written according to this theory. The judicial role under separation of powers is described by R. Scigliano, *The Courts, a reader in the judicial process*, Little, Brown & Co, Boston, 1962.

which had the skills for applying the law. That was not the organisation that granted the IPR. This was achieved by giving jurisdiction to the courts for both validity and infringement. Nobody thought of administrative courts because they did not exist yet. It should also be remembered that until the German patent law of 1877, no European State had a specific *forum* for contesting the validity of a patent. Later, Germany extended this specific jurisdiction to trademarks and industrial models. It was never the case in England or France.

Presently, there is a trend to concentrate cases on some specialised courts having jurisdiction for both validity and infringement. It is accepted that there cannot be any substitution of an administrative authority to a court because a concept of governance has been introduced according to which an authority taking a decision (eg granting an IPR) cannot decide on its validity. This was made clear in 1961 when the German Patent office internal reviewing court became the Federal Patent Court<sup>17</sup>.

## 2) Right holders' behaviour

Westerners are confident in courts. Independence of courts and quality of dispute solutions is a recurring political issue. "Local protectionism" is feared, and is fought back by limiting the number of *fora*. The latter becomes a long way away from the infringer.

Going to court is the usual way to solve a dispute between private interests. As much as possible the State is kept at bay. However, copyright and neighbouring right holders boost a new trend. They are represented by collective management societies that are lobbying for a stronger involvement of the State in IPR enforcement. One of the reasons is that the number of infringements has drastically increased with the modern media. Accordingly, they try to transfer the enforcement costs on the State (*ie* the community, which endures a collective punishment through paying the cost involved by the enforcement proceedings).

It is worth noticing that right holders are sometimes trying to involve the State in enforcement matters in order to have a stronger position when negotiating with the alleged infringer. It means that they try to leave the cost of the legal action to the State.

## b. The Chinese dualistic system

The Chinese IPR enforcement system is dualistic. Administrative enforcement and judicial enforcement are competing. The right holder may sue the alleged infringer either before an Administrative enforcement authority, or before courts. A contested administrative dispute solution may not be enforced because the right holder has decided to sue the alleged infringer before a court. It is not an appeal but the use of the right of having a court ruling in infringement disputes.

Chinese understanding of the role of the law is different to that of Europe, where law guarantees a formal equality. The image of a blindfolded statue of justice is surprising to Chinese people looking for decisions taken according to the merits of the parties, and at a lesser degree to the merits of the case. In Europe, *fora* have to rule according to the law, and if the law is unclear or incomplete to propose their understanding of the law. In China, the aim is to accept some concessions in order to get some advantages elsewhere<sup>18</sup>.

Historically, Chinese are living with tradition, not according to law. This may lead to the absence of law and *fora*<sup>19</sup>. Many foreign investments considered the lack of an efficient industrial or intellectual property system an issue as interesting as low labour cost. A high percentage of Chinese exports is made by Western controlled enterprises operating in China<sup>20</sup> that cannot tell they are not aware of

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<sup>17</sup> The German constitution (*Grundgesetz = Fundamental law*) was modified in 1961 and accordingly the nature of the Patent office internal court that kept the same jurisdiction.

<sup>18</sup> J. Escarra (1885-1955), *Le droit chinois, aperçu historique*, 1936, scanned for "Les classiques des sciences sociales", Montreal, p. 17, <http://classiques.uqac.ca>.

<sup>19</sup> R. David, *Les grands systèmes de droit contemporains*, Dalloz, Paris, 1973, p. 545.

<sup>20</sup> *Top 500 importers & exporters unveiled*, China daily, 17 July 2006: "The majority of the listed importers and exporters, of which over 60 percent are foreign-invested enterprises, are located in the coastal areas of East China".

industrial or intellectual property. Many infringements directed to the interior market are not prosecuted because the right holders do not identify them.

### **1) Substantial role of mediation**

According to legend, the Miao barbarian tribe twenty-three Centuries ago invented law (*fa*). Eventually, the Miao were exterminated. It means that law is a foreign *item* and that courts are nasty. Mediation is promoted because it helps in recovering a balance between the right holder and the infringer. Furthermore, it is easier to undertake mediation where there is no risk of subsequent reformation than to give an opinion on paper. It is worth noticing that Chinese enterprises presently do not hesitate to go to court in foreign countries.

Even presently, mediation is preferred to action at law. Only Eastern coastal Chinese, more exposed to the foreign world, show a trend to go to courts to solve enforcement disputes.

### **2) Administrative enforcement**

When improving the industrial and intellectual legal framework to meet its TRIPS commitments, the Chinese government underestimated the pressure of the other WTO Member States. It created a fragmented<sup>21</sup> system taking into account the decentralised organisational structure of the present Chinese State. Opposition did not surge out from enterprises and business circles but of existing administrative departments that lobbied to keep their sources of revenue. For example, CTMO could not be inserted in a greater Chinese IP organisation because it is a source of revenue for SAIC. Local decentralised administrations wanted to keep the right to decide on infringement cases because fines are a means to increase the available budget<sup>22</sup>.

Chinese scholars<sup>23</sup> describe the present administrative enforcement system as “*quasi-judicial*”. It issues orders to stop infringement but cannot decide on damages. Decisions of the administrative enforcement activities are not executory by themselves. Hence, administrative enforcement is not an initial *forum* according to TRIPS, which sets its own rules. It receives non-binding advices from the upper tier industrial and intellectual property organisations (SIPO, CTMO, AQSIQ, and NCAC). The fragmented nature and the opacity of the administrative enforcement system cannot convince Westerners of the independence of the provincial administrative enforcement authorities.

However, to Western eyes the main issue is the poor governance showed by the administrative enforcement authorities that may show “provincial protectionism”.

Recourse to an inquisitorial technique is very favourable to private interests because the cost of the legal action is borne by the State that takes over the burden of proof if conclusive elements are presented. The aim of right holders in a vast majority of cases is not to get damages but to stop the infringement, and to negotiate with the former infringer a licence. The issue is not weak damages but strong freezing orders. Accordingly, damages should not be kept low because they are a good deterrent against potential infringers if high enough to destroy their balance sheet.

### **3) Judicial enforcement**

Analysing the administrative enforcement procedure shows that it follows an inquisitorial technique contrarily to courts that follow an accusatory technique where the burden of the proof is a crucial issue. The cost of securing proof is an important issue because damages may not balance the

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<sup>21</sup> Documentation giving a complete list of Chinese authorities dealing with IPR and their functions is not readily available. Existing documents are contradicting each other. Please refer to: OECD *Promoting IPR policy enforcement in China, Summary of OECD – China dialogues on intellectual property rights policy and enforcement*, OECD, Paris, 2005, Chart A1, page 46; A. Mertha, *The politics of piracy*, Cornell University, London, 2005, China's copyright piracy, Fig. 4.2, page 146, China's anti-counterfeiting bureaucracies, Fig. 5.3., page 191.

<sup>22</sup> A. Mertha, *The politics of piracy, Intellectual property in contemporary China*, Cornell University Press, London, 2005, p. 112.

<sup>23</sup> Lin Ma & Zhiyuan Xiao, *Die Zuständigkeit für Patentstreitigkeiten in China*, GRUR int., 2006, pp 28-35.



latter cost. The issue is of economic nature because the intangible assets written in the right holders' balance sheet are smelting away.

If the court system is not sized to process a large number of cases, it may try to escape overload through giving irrational rulings or through avoiding publishing jurisprudence<sup>24</sup>. Therefore, jurisprudence cannot access to any status because the Chinese legal system is a civil law-like system and not a common law system<sup>25</sup>, and lawyer without any example of dispute solutions are not encouraging their clients to elect a path without legal certainty. Another technique is to increase the apparent deterrence through increased cost of the legal suit for the right holder and the alleged infringer, and damages paid by the infringer. Some countries that are innovation followers have fully mastered these techniques leading to a weak enforcement system although industrial and intellectual property laws are meeting international standards.

Counterfeiting and piracy are booming businesses. It means that if courts are involved in accusatory proceedings they will soon be overwhelmed by the number of pending cases. Article 41-4 of TRIPS provides that parties to a proceeding shall have the opportunity for review, which in fact often doubles the number of pending cases. The possibility to review administrative enforcement solutions before courts is surprising because proceedings developed following an inquisitorial technique are reviewed using an accusatory technique, *ie* because the proceedings did not develop within a single jurisdictional sub-system. Judges' skills are not identical.

Moreover, the interest of law firms is to complicate the legal action in order to increase their invoices. Accusatory techniques ask for more lawyer work than inquisitorial techniques.

## Facit

"Administrative enforcement *versus* judicial enforcement" is not a case designed for law school training. The issue is to provide Chinese and foreign enterprises with an efficient enforcement system meeting their needs. Today, China is not anymore a less developed country although some less developed areas still exist. This means that some enterprises deserve a sophisticated enforcement system, while others may not be ripe for it.

If the saying goes "*No offence without law and enforcement*", a dualistic enforcement system may be an efficient way of solving infringement disputes. Changing the balance between administrative enforcement and judicial enforcement may be possible through an increased attractiveness of court enforcement. For example, courts may have exclusive jurisdiction if the value of alleged infringing goods is superior to a given threshold. It means also that judges' skills should be improved though adequate training. Nevertheless, it may be efficient to increase the standing of the administrative enforcement from a "quasi-jurisdictional" status to a "jurisdictional" status through giving administrative enforcement authorities the right to order damages.

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<sup>24</sup> In France, from 1790 to 1804, courts were not allowed to interpret the law. In case of doubt, there was the possibility of a prejudicial interpretation request (*référé législatif*) to the People representative assembly. Report to: F. Ranieri, *Styles judiciaires dans l'histoire européenne: modèles divergents ou traditions communes ?* Les cahiers de l'IHEJ, n°2, October 1994, p. 15 ; Y.-L. Hufteau, *Le référé législatif et les pouvoirs du juge dans le silence de la loi*, PUF, Paris, 1965.

<sup>25</sup> American lawyers criticise both the English system where the judge is bound by its own jurisprudence and the French system where the judge cannot create a binding jurisprudence. Refer to: J. Dawson, *The oracles of the law*, University of Michigan, Ann Arbor, 1968.