中國知識產權案件的審理與裁判

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引言

新中國成立以後，知識產權第一次在法律中獲得承認，是在1979年7月通過並實施的《中外合資經營企業法》中。此後，《商標法》(1982年8月)、《專利法》(1984年3月)、《著作權法》(1990年9月)先後頒佈，知識產權始獲得全面保護。

1993年，北京市法院率先在中、高級人民法院設立知識產權審判庭。隨後，上海、天津、廣東、江蘇等地法院也設立專門審理知識產權案件的審判庭。在民事審判格局的改革中，最近，最高人民法院將從1993年起建立的知識產權庭更名為民三庭，指定其專門受理知識產權民事案件，而涉及知識產權的行政案件和刑事案件，則分別由行政庭和刑庭受理。

建國以來第一次全國審判方式改革工作會議在1996年7月召開。1998年6月，《最高人民法院關於民事經濟審判方式改革問題的若干規定》(以下稱《若干規定》)出臺。1999年10月，最高人民法院又頒佈了《人民法院五年改革的綱要》(以下稱《五年綱要》)。

近幾年中國的民事審判方式改革主要集中在以下四個方面：一是堅持公開審理；二是強化庭審功能；三是強化當事人的舉證責任；四是強化合議庭和獨任法官的職責。

本文將結合最高人民法院關於民事審判方式改革的司法解釋，及地方人民法院審理知識產權案件的文件，對中國知識產權案件的審理與裁判進行介紹、分析和評論，提出自己的意見和建議。

一、知識產權審判：從立案到結案

1. 立案

同任何一類民事案件一樣，知識產權案件的當事人到人民法院起訴，求得糾紛的解決，都得首先經過立案這一步驟。立案是訴訟成立首要的和必不可少的。

從人民法院這一方面看，它在接到當事人的起訴以後，就要對該起訴是否立案予以審查。這種審查除了要審查它是否符合《民事訴訟法》的有關規定以外，還要審查它是否符合最高人民法院關於知識產權案件管轄的規定，以及地方高級人民法院根據《民事訴訟法》和最高人民法院的有關規定，及所轄地區情況，就案件級別管轄問題作出的具體規定。一般而言，凡專利權、商標權案件及版權糾紛案件由中級以上人民法院受理。

除了根據案件的類別及訴訟標的數額而定的級別管轄以外，還有地域管轄的規定。根據《民事訴訟法》，對於因侵權引起的民事糾紛案件，由侵權行為地或者被告住所地的人民法院管轄。根據最高人民法院《關於適用民事訴訟法若干問題的意見》第29條，侵權行為地包括侵權行為實施地及侵權行為結果發生地。侵權結果發生地，應當理解為侵權行為直接產生的事實結果發生地。

對於針對銷售侵權物品起訴的案件，如果原告對銷售者不起訴，僅對製造者起訴，製造地與銷售地又不一致的，應由製造地(通常即為被告所在地)法院管轄；如果在侵權物品銷售地以製造者與銷售者為共同被告起訴時，侵權物品銷售地法院有管轄權。

2. 舉證

立案以後，當事人對自己提出的主張，有責任提供證據。這也是在舉證責任上的"誰主張，誰舉證"原則。對此，《若干規定》和《五年綱要》也作出規定。《若干規定》在強化當事人舉證責任的同時，規定了人民法院應當告知當事人圍繞自己的主張提供證據的責任，界定了人民法院調查收集證據的範圍以及人民法院調查後未能收集到證據的法律後果承擔問題。

2001年4月1日起施行的最高人民法院《關於民事訴訟證據的若干規定》第四條規定，因新產品製造方法發明專利引起的專利侵權訴訟，被告負舉證責任。

3. 庭前準備

庭前準備工作主要內容是，在開庭前讓雙方當事人徹底明瞭自己的訴訟權利和義務，充分交換證據，嚴格限制合議庭成員和獨任審判員庭前單獨接觸一方當事人及其訴訟代理人。

實踐中，北京、上海等地的知識產權審判庭在開庭前一般均召集當事人召開庭前會議，或者預備庭。在法官的主持下，確認證據交換的情況，確定雙方爭議的焦點，確定被告方是否反訴，確定出庭的證人及開庭日期等。

4. 庭審

《若干規定》對庭審調查規定得十分詳細，從原告宣讀訴狀始，至質證完畢，分八個步驟。《若干規定》還規定，法庭調查結束前，審判長應當就法庭調查認定的事實和當事人爭議的問題進行歸納總結。審判人員應當引導當事人圍繞爭議焦點進行。法庭辯論時，審判人員不得就案件性質、是非責任發表意見，不得與當事人辯論。

這些規定，實際上把審判人員置於獨立於訴辯雙方，僅僅對庭審程序進行調度和控制的"聽審員"及"程序裁判員"的位置。

5. 證據的審核和認定

《若干規定》對證據的審核認定問題做出9條規定。在一定意義上可以說這是以司法解釋的形式，確立了我國民事審判的基本證據規則。

證據的審核和認定一般是在庭審過程中完成的。根據《若干規定》，經過庭審質證的證據，能夠當即認定的，應當當即認定。這對承審法官的專業素質提出了較高的要求：在舉證和質證之後，很快做出判斷：對於有關證據，予以認定或不予認定。

在知識產權案件審判中，當事人的舉證一般數量較多，情況較複雜，對承審法官素質的要求就要更高一些。有人指出，《若干規定》關於證據審核和認定的規定，其中個別條款在一定程序上賦予了法官自由心證的權利。這個條款對於調動法官的積極性或許有一些幫助。

6. 合議

《人民法院組織法》第10條第1款規定，"人民法院審判案件，實行合議制"。《若干規定》第31條規定："合議庭組成人員必須共同參加對案件的審理，對案件的事實、證據、性質、責任、適用法律以及處理結果等共同負責。"《五年綱要》第20條規定："在審判長選任制度全面推行的基礎上，做到除合議庭依法提請院長提交審判委員會討論決定的重大疑難案件外，其他案件一律由合議庭審理並做出裁判，院、庭長不得個人改變合議庭的決定"。

從最高人民法院的這兩份文件看，文件起草者顯然認識到了合議過程及合議庭的作用，甚至隱約地讓人感覺到目前在合議過程及尊重合議庭作出的裁判方面存在着嚴重問題。

在中國知識產權審判實踐中，合議庭一般由3人或者5人組成。通常情況下，一個案件由法院指定一名審判員，承辦案件的審理及裁判工作。在該案件的審判過程中，還需要配備另外兩名（如果是三人合議庭的話）審判員和一名書記員。結案報告及判決書一般是由承辦人完成的，但在庭審前及庭審後，承辦人必須召集其他合議庭成員對案件進行集體討論，拿出意見（這個意見的形成一般用投票的形式，按少數服從多數原則確定），這也就是所謂"合議"。

在有些情況下，這種"合議"只是一種形式，集體討論變成承辦人一人唱獨角戲，其他合議庭成員只是附和他的意見。最高人民法院的文件既然已賦予合議庭如此重要的職能，卻未能對合議的工作形式及合議庭組成人員的職責做出規定，這不能不使人產生疑問：如何避免"合議"流於形式，由承辦人一人做出判決，其公正性是否有充分的保證？

7. 裁判文書撰寫

《五年綱要》第13條規定："加快裁判文書的改革步伐，提高裁判文書的質量。改革的重點是加強對質證中有爭議證據的分析、認證，增強判決的說理性；通過裁判文書，不僅記錄裁判過程，而且公開裁判理由，使裁判文書成為向社會公衆展示司法公正形象的載體，進行法制教育的生動教材"。

裁判文書是有關當事人預期的一個結果，也是案件從立案始至結案的最後一個步驟。在經過一系列司法程序之後，承審法官需要有這樣一份載體記錄裁判過程，表明其裁判意見。借助一紙裁判文書，當事人的爭議被一個外在的有拘束力的決定止息了。《五年綱要》對裁判文書強調了兩點，一是要說理，二是要有社會意義。

二、判決書的背後

1. 判決書的功能

目前對我國法院的司法判決書的主要批評是，判決書公式化，判決理由過於簡單，缺少法律論證和推理。這種批評無疑是對的，但它只涉及問題的表層，而未揭示問題的實質。如果每一個訴訟當事人對所得到的裁判結果都感到滿意或者基本滿意，那麼誰還在乎承載這結果的形式呢。

由此引出的問題是，判決書是寫給誰的，它的功能是什麼？

一個案件呈遞到法院，多數情況下都是由當事人選擇的。裁判結果直接涉及當事人的利益。因此，作為"當執裁判"的法官，他首先要考慮的乃是如何及時、公正、有效地解決糾紛，對當事人負責。這樣說並不是要求法官在做出裁判時僅考慮當事人，僅局限於案件本身，而是說，當事人是第一位的，法制教育及其他社會功能是第二位的。

2. 裁判文書缺少論理的症結

筆者無意否認我國法院的司法裁判文書存在的問題。雖然訴訟當事人所預期的主要是結果，即"判決如下"的內容，但"本院認為"後面的事實認定、理由陳述及法律適用也並非可有可無。我國司法裁判文書存在的主要問

題就在這裡。

學者對此的看法是，我國法官的法律素質普遍較低，缺乏理論思維的能力，因此無法撰寫出高質量的司法判決。為解決這個問題，法學家們做出了各種努力。最高人民法院也頒佈了若干可資借鑒的裁判文書樣本。一些法院還選編出版了若干"知識產權優秀裁判文書"。這些努力收到了一定效果。尤其在知識產權審判領域，面對諸如網絡版權糾紛、鏈接問題及域名爭議，在法律無明文規定的情況下，承審法官通過縝密的論證及推理，做出了令人信服的公正的裁決。

但問題依舊存在着。有人指出，解決我國司法判決書存在的"病症"，重要的是要創造一個制度和一個制度環境，使得絕大多數法官有動力撰寫理由充足、論說充分的司法判決書，從而產生出相當數量的（不是偶爾的、少數的）優秀的判決書。

這樣的制度是什麼呢？英美法遵循先例的原則為出色的判決的產生提供了制度保障和激勵機制。社會的異質化程度也是一個重大的制度制約因素。在我國，法院和法官在社會中的地位比歐陸法院和法官在它們社會中的地位要低，它們往往受到來自各種形式的干預和干擾。因此，在我國，司法審判獨立是判決書質量提高的一個重要的儘管不是唯一的前提條件。

學者的上述分析有其深刻的一面，但是，究竟什麼是我們開出的"藥方"呢？

3. 過程比結果更重要

筆者贊成這種觀點：司法判決書的撰寫是司法制度中的一個重要因素，但並非唯一的因素，甚至不是最重要的因素。

學者們習慣於借助閱讀判決書來瞭解司法活動的進程，有時，判決書也成為學者們據以對法律實施狀況、當事人權利受保護水平甚至承審法官的業務水平和道德標準做出評判的依據。裁判文書的份量被大大提升了。其實，裁決文書遠沒有那麼沉重，儘管對於當事人來說，一紙文書可能就意味着一切。

在中國現行司法體制及對該體制有着相當多干擾的制度環境下，裁判文書對於學術研究的價值被大大降低了，它的社會功能也絕沒有想象的那麼大。原因仍然是，撰寫裁判文書的法官法律知識水平本來就不高，即使一些很有想法、素質較高的法官想把裁判文書寫得漂亮，他們的這種想法或者才華也往往會被各種"干擾因素"淹沒掉。

因此我們不能僅僅把目光盯在裁判文書上。裁判文書的問題在多數情況下不是撰寫者的過錯。絕對不是。如果我們更多地關注整個裁判過程的話，就可能得到同樣的結論。

三、建議：强化合議制度

在對中國民事審判、包括知識產權審判進行全程描述之後，在指出裁判背後的"干擾因素"之後，能夠有怎樣的建設性意見呢？筆者的建議是：強化合議制度。

《若干規定》專門有一節談加強合議庭和獨任審判員職責問題。顯然，國家最高審判機關也意識到加強合議庭制度建設問題。規定要求，"合議庭組成人員必須共同參加對案件的審理，對案件的事實、證據、性質、責任、適用法律以及處理結果等共同負責"。那麼，如何"共同審理"、"共同負責"？如果避免合議流於形式，避免由承辦人一人說了算的情形發生？我們能否借鑒英美法國家司法審判中的"合議"形式，即所有參與案件審理的法官均獨立地對案件發表意見，並把這種意見反映在判決書中？

"共同審理"、"共同負責"意味着每一個合議庭成員都要對案件發表意見。這種意見不應當是對承辦人的附和。而要避免附和，這種意見就必須是書面的和獨立的。我們目前尚不能指望法院能夠公開"干擾因素"，但我們可以而且應當要求法院在必要時提供合議庭成員的書面意見，如果這種意見目前尚難全部在裁判文書中反映出來的話。

這樣做的好處是顯而易見的：至少能夠促使審判人員認真審理案件，對當事人負責，同時也對自己負責，在一定程度上減少乃至杜絕"先定後審"、"庭審流於形式"的弊端。"干擾因素"雖然可能仍在相當長一段時間裡起作用，但强化合議制度至少可以讓有關人瞭解到合議庭成員的真實裁判意見，以及讓審判人員在其行使司法裁判權時有一個獨立地表達自己觀點的機會。

當法官的裁判意見可以獨立地負責任地表達的時候，"干擾因素"是不是相應地就會受到抑制，乃至逐漸地失去其作用呢？希望如此。

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本文原載於周林主編《知識產權案件的審理與裁判》一書，刊出時有刪節。

Trial and Judgement of IPR Cases in China

Zhou Lin

Introduction

It was in the Chinese-Foreign Joint Venture Law enacted and implemented in July 1979 that the intellectual property right was introduced for the first time in the Chinese law since the founding of the People's Republic of China. After that, the Trademark Law as of August 1982, the Patent Law as of March 1984 and the Copyright Law as of September 1990 were passed, and only since then has the country seen a comprehensive protection of the intellectual property rights.

In 1993, Beijing was the first to have set up the intellectual property tribunals in its intermediate and higher people's courts. Later, Municipalities and provinces like Shanghai, Tianjin, Guangdong and Jiangsu followed suit. In the reform of civil court trial, the intellectual property tribunals set up after 1993 were renamed the third civil tribunals devoted to the trial of IPR-related civil cases, and the IPR-related administrative and criminal cases were accepted and heard by the administrative and criminal tribunals respectively.

The first national working conference on court trial reform after the founding of the PRC was held in July 1996. In June 1998, the Several Provisions of the Supreme People's Court on the Reform of Court Trial of Civil and Economic Cases (hereinafter called as the the Provisions) were issued. In October 1999, the Supreme People's Court issued the Five-year Program on the Reform of the People's Courts (the Five-year Program for short).

In recent years, the reform on court trial of civil cases in China has mainly focused on the following four aspects: adhering to open hearings; strengthening the function of court hearings; intensifying the interested parties' burden of proof and reinforcing the functions and responsibilities of the collegiate court system and the independent judge system.

This article will be giving an account and analysis of, and comment on, the court trial of IPR cases in China and put forward this writer's own opinions and proposals in the light of judicial interpretations of the Supreme People's Court on the reform of court trial of civil cases and documents of the local people's courts on court trial of IPR cases.

I. Trial of an IPR Case: from Putting It on File to Winding It up

1. Putting a Case on File

Like any other category of civil cases, the interested parties of IPR cases who bring lawsuits to the people's court for resolution of disputes must first go through the procedure of putting their cases on file, which is necessary for legal proceedings to follow.

The people's court, having received an interested party's bill of complaint or oral prosecution shall examine whether the prosecution should be put on file. In addition, the court will examine whether this prosecution conforms to the relevant provisions of the Civil Procedure Law. Such examination also involves determining whether it conforms to the stipulations of the Supreme People's Court on jurisdiction of IPR cases and specific regulations formulated by local higher people's courts on jurisdiction of cases in accordance with the Civil Procedure Law and the relevant provisions of the Supreme People's Court and the practical situation of the regions under their jurisdiction. Generally speaking, all patent and trademark cases and cases of disputes over copyright shall be accepted and heard by the intermediate people's courts or the courts above.

Apart from the level of jurisdiction determined on the basis of the type of a case and amount of the subject matter thereof, there are also regulations on regional jurisdiction. According to the Civil Procedure Law, cases of civil dispute arising from infringement shall be under the jurisdiction of the people's court of the place where the infringement occurs or where the defendant has a domicile. According to Article 29 of the Opinions of the Supreme People's Court on Several Issues on Applying the Civil Procedure Law, the place where the infringement takes place include the place where the infringement takes place and the place where the consequence of the infringement occurs. The place where the consequence of the infringement occurs shall be interpreted as the place where the actual consequence directly caused by the infringement arises.

As to the case of a party accused of selling infringing objects, if the plaintiff only sues the manufacturer, but not the seller, and the place where the infringing objects are manufactured is not the same as that where they are sold, it

shall be under the jurisdiction of the court of the place where the infringing objects are manufactured (usually the place where the defendant has its domicile). If the plaintiff sues the manufacturer as well as the seller in the place where the infringing objects are sold, the court of the place where the infringing objects are sold shall have jurisdiction.

2. Evidence Adduction

After a case is put on file, the interested party thereof is responsible for adducing evidence to support his claim. This follows the principle "one who claims must also furnish evidence." Provisions along the line are set forth in the Several Provisions and the Five-year Program. When reinforcing the party's burden of proof, Several Provisions stipulates that, the people's court shall inform the party of the burden of proof with regard to his claim, define the scope of the people's court investigating and collecting evidence and the issue of bearing the legal consequences in case the people's court fails to obtain the evidence after investigation.

3. Pre-trial Preparations

Pre-trial preparations are made to enable both parties to have a thorough knowledge of their procedural rights and obligations before the court hearing, to fully exchange evidence and strictly prevent members of the collegial penal or an independent judge from making personal contact with a party or his deputy before court hearing.

In practice, the intellectual property tribunals in some municipalities, such as Beijing and Shanghai, usually hold a meeting or a preparatory hearing with the parties before hearing a case. In presiding over the preparatory hearing, the judge shall confirm the evidence exchanged, identify the key issues of dispute between the two parties, make sure whether the defendant makes a counterclaim and determine the witnesses in court and the date on which the court sits.

4. Court Hearing

The Several Provisions stipulate in detail the court investigation, which consists of eight steps from the plaintiff reading the bill of complaint to the end of cross-examination of evidence. The Several Provisions also provide that, before the court investigation is over, the presiding judge should sum up the facts ascertained in the court investigation and the issues of the dispute between the parties. Judges shall lead the parties to center on the key issues of the dispute. In the course of the court defence, they should not express opinions as to the nature of the case and liabilities of the parties, nor debate with the parties.

These stipulations place the judges in the position of "listener" and "judge for the procedure". He is, in fact, independent from the two parties and solely manages and controls the hearing procedure.

5. Evidence Verification and Admissibility

The Several Provisions set forth nine provisions on the verification and admissibility of evidence established in the light of the basic principles of evidence in our civil judgement. These provisions have, in a sense, been in the form of judicial interpretation.

Usually, evidence verification and admissibility are completed in the course of court hearing. According to the Several Provisions, if the evidence cross-examined before court can be directly ascertained, it should be ascertained immediately. This poses relatively high requirements on the judges of the trial, that is, they are to make a quick judgement after the evidence is furnished and cross-examined to make sure whether the relevant evidence is admissible.

In the court trial of IPR cases, interested parties usually furnish considerable amount of evidence, and the cases are relatively complicated, which pose even higher requirements on the judges undertaking the trial. Some point out that a few clauses of the Several Provisions for evidence verification and admissibility have empowered the judges to make free evaluation of evidence to some extent. These clauses may be of some help in bringing the initiative of the judges into play.

6. Collegiate Panel

Article 10 (1) of the Organic Law of the People's Courts of the People's Republic of China provides that "the people's court shall adopt the collegiate court system in hearing and adjudicating cases". Article 31 of the Several Provisions stipulates that "the members of a collegial panel shall jointly participate in the trial of a case, and be jointly responsible for the facts, evidence, nature, liability, application of law, and outcome thereof." Article 20 of the Five-year Program stipulates that "on the basis of the comprehensive adoption of the system for selecting the presiding judge, except for cases of vital importance and great difficulty in which the collegial panel request, according to law, the president of the court to submit them to the Adjudication Board to discuss and determine, all other cases shall be tried and judged by a collegial panel, and the president himself of the court or tribunal shall not change the decision of the collegial panel."

As is seen from the two documents of the Supreme People's Court, the drafters of the documents have obviously realized the role of the process of the collegial trial and the collegial panel, and from this people feel that at present there exist serious problems in the procedure of the collegial trial and in respecting judgement made by the collegial panel.

In the practice of trying IPR cases in China, a collegial panel is normally composed of three or five judges. Usually, the court appoints a judge to undertake the trial and judgement of a case. In the course of the trial thereof, two more judges (if it is a three-person panel) and

a secretary must also be provided. The report on closing a case and the judgement are usually completed by the chief judge. But before and after the hearing, he must call together the other members of the collegial panel to collectively discuss the case and work out an opinion (the opinion is usually worked out by vote and is concluded in accordance with the principle that the minority shall be subordinate to the majority). This is the process of the so-called "collegial trial".

Under some circumstances, such "collegial trial" is only a form as the collective discussion turns into a monodrama by the head judge as the other members of the collegial panel simply echo his opinion. The Supreme People's Court has in its documents entrusted the collegial panel with the important function, but failed to set out provisions regarding the working method of the collegial panel and functions and responsibilities of the members of the collegial panel. People would doubt how to avoid "collegial trial" which is merely a form, and how to fully ensure the justice of the judgement made solely by the chief judge himself.

7. Preparing Judgement Instruments

Article 13 of the Five-year Program stipulates that "the pace of reform of judgement instruments shall be accelerated, and the quality of judgement instruments improved. The focal point of the reform is to intensify the analysis and ascertainment of disputed evidence in the procedure of evidence cross-examination, and make judgement more pervasive. Judgement instruments are used not only to record the process of judgement, but also to make public the reasons for which the judgement has been made, so as to make the judgement instrument a proof of the image of just judicial system to the public and true-to-fact teaching materials for legal education."

The judgement instruments are the result expected by relevant parties, and the last step of a case from being put on file to the winding up. Having gone through a series of judicial procedures, the judge undertaking the trial needs such a proof recording the course of the judgement to render his judgement. With the help of a judgment instrument, a dispute of the parties is finalized by a binding decision. The Five-year Program emphasizes two points on judgement instruments: they should be based on reason and have social significance.

II. What Behind a Judgement

1. Function of Written Judgement

At present, the main criticism of the judicial judgement of the courts in China are that the judgement is formalistic, and the reasons of the judgement are simplistic, lacking legal attestment and reasoning. Such criticism is undoubtedly justifiable, but it only scratches the surface of the problem, and does not endeavor to dig deeper into the essence of the problem. If every party is satisfied, or basically satisfied, with a judgement, who will mind the form in which the decision is to be given?

The questions arising from this are: for whom the judgement is written and what its function is.

Bringing a case to court is usually the choice of a party. The result of the judgement relates directly to the interests of the parties involved. Therefore, as a "judge on duty", what he should firstly consider is how to resolve the dispute promptly, impartially and effectively, and be responsible to the parties. This does not mean that the judge is required to consider the parties only and be limited to the case itself when making a judgement, but that the parties are the first to be considered, while legal education and other social functions come second.

2. Causes of Judgement Instruments Lacking Reasoning

It is not this writer's intention to deny the problems with the judicial judgement instruments of the courts in China. Although what the parties expect most is the result, that is, the contents of "the judgement as follows", the ascertainment of the facts, statement of reasons and application of law following "the court considers", are also indispensable. This is where the main problems in judicial judgment instruments lie in.

It is held by the legal experts that the judges are generally not proficient in legal terms, and some of them lack the ability to do theoretic thinking, so they cannot write quality judicial judgements. To solve this problem, jurists have made various efforts. The Supreme People's Court has issued several judicial judgements as the model texts. Some courts have published books, such as Excellent Judicial Judgements of IPR Cases. These efforts have been effective to a certain degree. In particular, in the field of trial of IPR cases, just as in the book Judicial Judgements, readers will see, facing disputes as arising from computer network, copyright, linkage and domain names under the circumstance where there are no express provisions set forth in the law, that the judges have made convincing and just judgements by meticulous attestation and reasoning.

However, problems still exist. Some point out that, in order to rectify the "defects" in judicial judgements in China, it is important to create a system and a good systematic environment in which most judges are motivated to write judicial judgements based on adequate reasoning, so that they can produce a considerable number of (not occasional or quite a few) excellent judgements.

What is such a system? The doctrine of stare decisis in common law sets out the requirement of this system and the intense encouragement to produce well thought-out judgements. Besides, the extent of heterogeneity of the society is also a major restricting factor of this system. In

China, the status of the courts and judges in the society is lower than that of their European counterparts, and they are frequently met with all kinds of obstructions. For this matter, independence of judicial trial in China is an important, if not the only prerequisite, to improve the quality of the court judgements.

The above-mentioned analysis by scholars is profound in some aspects, but what is the exact "prescription" we should work out?

3. Process Is More Important Than Result

This writer is for the point that writing judicial judgements is one of the important elements in the judicial system, but not the only one, nor the most important one.

Scholars are accustomed to getting to know a process of judicial activity by reading the judgement thereof. Sometimes, judgement instruments also serve as the basis on which scholars look at the application of law, level of protection of the rights of the parties involved, and even the professional level on which and moral standards by which the judges hear cases. Judgement instruments are becoming more and more important. In fact, they are by no means so important though a judgement instrument may mean everything for parties concerned.

Under the existing judicial system and the system environment under considerable obstructions in China, the value of judgement instruments for academic research has been greatly reduced, and its social function is by no means so influential as imagined for the reason that judges who write judgement instruments are not rich in legal knowledge. Even if some judges have good ideas and wish to write good judgment instruments, their ideas or proficiency are frequently drowned by various "obstructive factors".

Therefore, we should not pay attention only to judgment instruments. The problems within judgement instruments are not the writers' faults in most cases. Obsolutely not. If we pay more attention to the entire process of judgement, we may draw the same conclusion.

III. Proposal: Strengthening the Collegiate Court System

After giving an overview of the entire process of civil trial, including that of IPR cases in China, and having pointed out the "obstructions" behind court judgements, what constructive opinion can be raised? This writer would like to suggest strengthening the collegiate court system.

One section of the Several Provisions is devoted to strengthening the functions and responsibilities of the collegial panel and independent judges. It is obvious that the supreme judicial organ of China has realized the importance of strengthening the construction of the collegiate court system. "Members of the collegial panel must jointly participate in the trial of cases and be jointly responsible for the facts, evidence, nature, liability, application of law and result of thereof". Then, how to "jointly conduct court trial" and "be jointly responsible"? How can we avoid the collegial trial becoming a mere form and the head judge deciding everything? Can we draw on the "collegial" mechanism of judicial trial in common law countries, that is, all judges who participate in the trial of a case express their opinion on a case independently, and make their opinion reflected in the judgement instruments?

"Joint trial" and "being jointly responsible" mean that each member of the collegial panel should express his opinion on the case. Their opinions should not echo the head judge, but avoid duplication or echoing. Such opinions must be in writing and be the expression of independent ideas.

At present, it is still difficult to expect that the court make public the "obstructive factors," but we may, and should, require that the court provide written opinions of the members of a collegial panel when necessary, if such opinions are difficult to be fully reflected in a judgement instrument.

The benefit of doing so is obvious: the judges are at least urged to carefully try a case, to be responsible to the parties involved, to themselves as well, and to reduce, to a certain extent, and eliminate the defects of "adjudication first and court trial second" and "court trial that is something only in form." Perhaps the "obstructive factors" will go on to play a role for a long time in the future. However, a strengthened collegiate court system can at least enable people concerned to know the real opinions of the members of the panel, and enable the judges to have a chance to independently express their own views when exercising the right of judicial judgement.

Will the "obstructive factors" be restricted and even gradually lose their role as the judges' judicial opinions are expressed independently and responsibly? This is the hope of this writer.

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