

New Private Law? Intellectual Property "Common-Law Precedents" in China

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China has established a dynamic legal system by using “guiding cases” in order to improve adjudicative consistency. The guiding cases are de facto binding as common law “precedents.” In China’s dynamic legal system, the intellectual property (IP) legal mechanism and the legal thinking about IP are notably influenced by the U.S. On the one hand, some amendments to Chinese IP statutes are coercive and in response to actions and criticisms by developed countries, especially the U.S. On the other hand, the IP precedents that are selected, compiled, and published by the Supreme People’s Court (SPC) reflect the voluntary development of IP regimes and the enforcement of the IP statutes in China. These IP regimes are on a path of being inherently consistent with modern U.S. IP law. In the U.S., IP laws are mainly considered to be private law, but they do involve some public law characteristics, as shown by the intervention of legislators and the development of statutory interpretation by the courts. These public law characteristics do not transform IP laws into public law, but they evoke the concept of new private law in modern IP law.

This study reviews all the twenty-two IP precedents (i.e., patent, copyright, trademark, anti-unfair competition, anti-monopoly) in China and compares them with the development of U.S. case law. I urge that Chinese IP precedents are not conventional private law as in IP common law, rather are considered to be new private law. The IP precedents follow public policies to be part of governance and, as a result, show their own influence on policymakers and legislators. Consistent with the concerns of U.S. IP holders, these precedents show that Chinese courts are instructed to be conservative in awarding both damages and injunctions under their IP laws. It shows that the Chinese courts function as a gatekeeper and consider IP quality to prevent over-rewarding IP holders either from the market or when their rights are enforced in situations where government agencies liberally or incautiously granted the IP rights. For trademark and unfair competition cases, public apologies are instructed to be expansively given by the courts to substitute economic damages for IP holders. Moreover, compared to U.S. case law and U.S. judicial decisions, these IP precedents demonstrate that the SPC and Chinese judges favor a utilitarian and pragmatic judicial philosophy, as opposed to a formalistic approach in their statutory interpretation.