IPKey

The use of jurisprudence in civil procedures in France, Germany and China

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DRAFT SUMMARY AND CONCLUSION

Ten years ago, if a Chinese lawyer wished to cite a precedent in order to support his case before a People's Court, the court would refuse and say: "We are not a case law country". The term "case law country" refers to Common Law countries - such as the United Kingdom and the United States - where a large part of the law is made by judges. The judicial practice has changed since then, and Chinese courts are paying more and more attention to their past decisions in their judicial decision-making. Other "non-case law countries", such as France and Germany, have a long experience (more than two hundred years) in using case law. It is, therefore, interesting to compare how they define and organise the role of "jurisprudence" with China's recent evolution in this regard.

This paper is based on three separate studies commissioned by the IP Key Project.

Dr. Sen Sam Li, a senior partner at Beijing Wanhuida Law Firm drafted a *"Report on the Development of Case law in China"*; Professor Michel Vivant, Agrégé des Facultés de Droit, Professor at the Law School of the Political Sciences School of Paris, Processor at the European Centre of Intellectual Property and Consultant at Dentons Paris Law Firm, drafted a study on "*The Role of Jurisprudence in France";* and Tobias Malte Müller, *PhD,* a German and Italian qualified attorney, partner at Munich Wirsing Hass Zoller Law Firm, drafted a study on *"The use of jurisprudence in civil procedures in Germany"*.

The Terms of Reference proposed by IP Key to the experts were to focus on the following topics: *(1)* the case law publication mechanism, *(2)* how litigating parties may invoke precedents in court, *(3)* the binding or non-binding force of precedents, *(4)* the influence of foreign cases and the role of international tribunals, *(5)* the specific situation of intellectual property.

This paper proposes a brief summary of the experts' findings on each of the above topics.

I. Publication mechanism

Using case law in court would be almost impossible if court's decisions were not available to the public. The three countries of reference organise this publication in different ways.

Germany

German courts publish their decisions online on their own websites, accessible free of charge. Some of the Federal States provide centralized websites. And access to German jurisprudence is also available through commercial German and international data-bases, through legal reviews and law journals and through legal commentaries, providing an analysis of the relevant statues and a systematic legal analysis of relevant case law together with the publication references.

However, as Dr.Tobias Malte Müller notes, Germany does not currently have a public centralised website with a performing search engine permitting systematic case law searches free of charge.

France

All French courts do not systematically publish their decisions online. However, almost all the Supreme Court (Cour de Cassation), a large number of Court of Appeal decisions, and some selected first instance judgments are uploaded to data bases and accessible online. Besides, jurisprudence is easily available in specialised gazettes. The selection of cases is made by the publishers of these gazettes, some of them covering all aspects of the law, others specialised. Besides, codes (civil code, commercial code, etc.) do not only contain the full text of the law and of relevant regulations, they also provide, below each article of the law, a list of judgments, the essential part of which is summarized in a few words together with their publication references in one or several gazettes. The full text of the judgments is published in the gazettes, usually with a commentary written by an academic or a lawyer. And in each of these commentaries, one can find references to other judgments and their respective publication references, and so forth.

Finally, concerning Intellectual Property, all the judgments made by French courts since 1844 (the first patent law) are accessible on the data base of the Institut National de la Propriété Industrielle (the French trade mark and patent office).

China

Sam Li's study reveals that China recognized the importance of cases at a very early stage. The Supreme People's Court started to pay attention to this issue as early as 1956, and progressively developed the system of selecting cases in order to guide the adjudicating work of the judges. Besides issuing document called *Interpretations, Provisions, Opinions,* which contain direct instructions to the courts on how to apply the law in specific situations, the Supreme Court selects and publishes cases for instructive purposes. In 1985, the Court created the *Gazette,* which was first published quarterly, then bimonthly and now monthly. This system of publishing cases was

formally defined in a *Provision on Case Guidance* (November 26, 2010), which distinguishes "general cases" from "guiding cases".

For general cases the Court has other ways than its Gazette to publish selected cases such as its annual reports which contains dozens of cases, or the *Ten Intellectual Property Cases,* or the *fifty Model Cases of Intellectual Property.*

Since January 1, 2014, all judgments made by all people's courts must be available online on the court's websites. According to a survey, some provinces comply with this rule more than others. "Guiding cases" follow a different process of selecting, examining and issuing. Sam Li explains the different standards of selection and the full procedure of issuance by the SPC Adjudication Committee. So far, 52 such guiding cases have been released.

II. Citing cases in court

Germany

Taking the example of intellectual property cases, Dr. Tobias Malte Müller notes that *parties are required to perform a deep analysis of relevant precedents* and expose the relevant case-law in support of their respective position. Judges generally quote precedents, and it is not unusual that they cite in their judgments entire passages originating from precedents submitted by the parties, concluding that they share the view held in such precedent.

France

Conducting a "jurisprudence search" prior to submitting a claim or a defence is one of the major practices taught in law school. All lawyers, without exception, cite precedents in their arguments submitted to the court. If the judgments cited are published, they may simply indicate the publication reference (but usually they provide a photocopy of the judgment and of its commentaries). It is also possible to cite and provide copies of unpublished judgments obtained in prior similar cases.

China

As noted by Sam Li, *"good judges pay attention to similarly decided cases".* A study was conducted by Sichuan Higher People's Court and Sichuan University showing that 43.23% of surveyed judges believe that they need to respond to the parties when they cite cases in support of their arguments, 22.38% believe they may respond, 33.94%

believe they will not respond but will review the cited cases, and only 0.44% judges believe they will neither respond to the party nor review the cited cases.

III. Influence of precedents

Germany

In Germany, precedents do not bind courts, and consequently, courts may not only dissent from their own precedents, but also from precedents issued by other courts. This is the principle, but there is one exception: a decision issued by the Federal Constitutional Court is binding on all German courts.

Dr. Tobias Malte Müller describes how the German system avoids contradictory decisions when issues of a special importance need to be decided. For instance, when a Federal Supreme Court wishes to dissent from the opinion of another Federal Supreme Court, on an "abstract question", if the other Court intends to maintain its opinion, the case is referred to a so called Joint Chamber of the Federal Supreme Court. Likewise, if a Chamber of a Federal Supreme Court intends to dissent from a decision already made by another Chamber of the same court, the issue is referred to the "Great Senate" of the Court, who will render a binding decision on the point of law at issue.

In fact, even if "non-binding" is the principle and if - apart from the exception above – judges are free not to follow the decisions already made by others on identical or similar cases, they rarely do so, and when they do, they state their reasons. Therefore, the relevance of precedents is of particular importance in the field of intellectual property law.

Dr. Tobias Malte Müller further explains the concept of *"customary law"*, which is reached when *"settle case-law"* achieves such a level of consolidation that is recognized as a "doctrine" systematically applied by all courts. This is the case of the "*positive breach of contract or duty*", which was established in the early 1900s and was finally included in the German Civil Code in 2002.

France

Professor Michel Vivant describes, with a great deal of examples, the creative work of the courts who apply the language of the law to concrete circumstances that, with the passing of time, could not have been envisaged by the drafters of the law. The "non-binding" rule has only one exception: when after an Appeal Court decision has been

rescinded by the Supreme Court (Cour de Cassation) and referred to another Appeal Court, the second Appeal Court still refuses to follow the indications given by the Supreme Court, then, the case is reviewed again by the Supreme Court and its decision becomes binding on the (third) Appeal Court who will have to issue a final judgment. This, of course, is extremely rare.

In practice, case-law has a very strong influence on the decisions of the judges (however, judges do not comment on, nor cite, in their judgments, the decisions of other courts). Of course, the higher the level of the precedent cited, the higher the influence. Yet, Professor Vivant insists on the freedom of the judges, and describes the manner in which various levels of jurisdiction progressively elaborate, like in a dialogue, a harmonious and predictable interpretation of the law. This French judicial practice is quite similar to the German, and professor Vivant provides the example of the *"liability for things",* which was "created "by the judges in the same way as the German courts created the "*positive breach of contract or duty*".

Another characteristic feature of the case law made by judges can be found in the *"framework concepts"*, such as public order, good faith, interest of the family etc. The definition of such concepts was left for the courts to build, on the basis of practical situation that they had to adjudicate. Now, a large number of judgments dealing with such concepts gives a good understanding of they are made of.

China

China follows the same basic principle which is that precedents are not binding. And it is interesting to see that, for some important cases, the courts refer the issues to an Adjudication Committee, in a way that can be compared to the German "Great Senate" system.

However, in China case law does have an influence, but such influence comes from the Supreme People's Court. Sam Li explains how the Supreme Court, besides issuing formal "Interpretations" of the law which are binding, also gives direct recommendations to the lower courts through its "Opinions", and indirect recommendations by publishing list of cases that it selects each year.

In practice, even if in theory, selected cases are only for recommendations purposes and formally not binding, the lower courts tend to comply.

In addition, "guiding cases" recommended by the SPC divisions, by members of the National People's Congress, members of the Chinese People's Political Consultative Conference, and lawyers, are reviewed and adopted by the SPC Adjudication

Committee, and have a binding effect. In adjudicating similar cases, courts are required to consult the guiding cases, and if such cases are cited by the parties, the court must respond.

IV. Influence of cases and the role of international tribunals

Both Germany and France, being Member States of the European Union, have to apply the system of questions submitted to the Court of Justice of the European Union (CJEU). In these proceedings, the CJEU does not adjudicate cases directly, but when a national court needs to apply a European regulation, it may become necessary to ask the CJEU to provide an interpretation of such regulation. In such case, the interpretation so provided by the CJEU must be followed by the national court.

Dr. Tobias Malte Müller indicates that in Germany, national courts do not hesitate to quote precedents originating from national courts of other Member States (in the "Adword-cases", the German Federal High Court discussed precedents issued by the Supreme Courts of Austria and France, and in another instance, the German Federal High Court discussed a decision issued by the High Court of Justice of England and Wales (Chancery Division) and share the view taken by that court.

V. Specific situation of intellectual property

Most of the examples concerning the role of international jurisdictions and foreign tribunals cited by Dr. Tobias Malte Müller and Prof. Michel Vivant related to intellectual property cases.

Conclusion

After reviewing the three studies drafted by Dr. Tobias Malte Müller, Prof. Michel Vivant and Sam Li, it is possible to draw some conclusions.

- The three countries attach great importance to the role of jurisprudence. Of course, the two European countries have a long experience, but China has rapidly evolved and developed the concept over the recent years.

- Yet, there are significant differences between the two European countries and China :
    - In Germany and France, the influence of case law depends on the number of cases and on the stability of the solutions established by such cases. Solutions come from the judgments made at the base,

which are progressively adopted, modified, corrected by the higher levels of jurisdiction, under the control of the Supreme Courts. Therefore, it may be said (like in Prof. Michel Vivant's paper) that *"the jurisprudence is a common elaboration of legal rules under the control of the higher courts).*

- In China, the authority of case law is based on choices made by the Supreme Court (or at the Provincial level, by the People's High Courts) from its own judgments. This is a "top to bottom" rather than a "bottom to top" system.

- The above difference is not without consequence. It touches upon the possibility for a lower court to "ignore" a direction indicated by a higher court, in a similar case. For example in France, as described by Prof. Michel Vivant about the copyright qualification of fragrances, it is quite possible that lower courts decide to insist on their point of view, by refining the reasoning of their judgments, until a final consensus might be found. Could lower Chinese courts decide to resist a interpretation of the law made by the Supreme Court, even if they do not share the analysis? It is not expected, but it seems that it is not impossible, as illustrated by the Pretul case mentioned below.

The PRETUL case is be particularly interesting: it was recently adjudicated by the SPC (26 November, 2015), on retrial of judgments made by the Ningbo Intermediate Court and the Zhejiang High Court. The first instance and second instance courts had decided that when goods are made in China, bearing a trade mark applied without the consent of the trade mark owner (this was an "OEM" situation where the purchaser was a Mexican company, which owned the trade mark in Mexico but not in China), the goods are infringing and the shipment may be stopped at the border by the Customs. The SPC analysed the situation differently and found that, since the goods are not to be sold in China, the trade mark is not "used" in the sense of Article 48 of the law ("to indicate the origin of the goods"). This decision immediately raised disagreeing opinions, and concern about the possibility, in the future, for legitimate trade mark owners to protect their rights against the export of counterfeit goods.

Would the lower courts decide to resist?

On December 18, 2015, the Jiangsu High Court the Jiangsu High Court rendered a decision in an OEM export case, overturning the non-infringement judgment made by the Changshu Intermediate Court and finding that the OEM manufacturer's act constituted trade mark infringement. The reason: the exporter did not fulfil its reasonable duty of care. The Court did not follow the "non-use" analysis proposed

by the SPC, and preferred to look into the good or bad faith of the defendant, to decide whether infringement was committed. Such approach, based on circumstances, is certainly less radical than the SPC interpretation. Yet, it is still arguable since, according to the Trade mark Law, whether an act of infringement is committed is irrelevant of the intentions (good or bad) of the infringer. Only the liability if the infringer can be affected by his good or bad faith.

Alternative solutions have been therefore proposed, such as switching the examination of the good faith or bad faith, from the defendant to the *plaintiff*: if the trade mark is found to have been filed or to be used in bad faith, the case could be dismissed and the goods free to go.

In Europe, such solutions could be established case after case by lower courts, under control of the higher courts, and it is quite possible that in the end, a practical solution accepted by all, a "stable jurisprudence", could be established.

Can this happen in China?

ANNEX I: France

By Michel Vivant [1]

1.- General approach.

The question of the role of jurisprudence is a very important one which must be examined in a very concrete perspective. Indeed although French law, as continental law, is not a "Judge made law" and although it is true that the rule of precedent does not exist in the French system, the role of jurisprudence is crucial. Positive law cannot be understood without taking into account jurisprudence and, in Law Schools, students study case law as well as written acts. Case law is an essential component of the "legal order".

This paper will try to explain how case law is such an essential component, firstly by reference to the general situation (i.e. Civil Law, Commercial Law, etc.) **(I),** then, with a special focus Intellectual Property **(II)**, and finally, by reviewing the influence of European Law and of the European judge: the European Court of Justice **(III)**.

I. Role of jurisprudence : general situation

2.- Theory: the judge "mouth" of the Law?- Montesquieu, a well-known French philosopher of the 18th century, said that judges must be "the mouth that pronounces the words of the law"[2].

And, in traditional academic law books, it is usual, even until today, to find a formula saying that "jurisprudence is not a source of law". But it is a very formalistic assertion.

Immediately after that, in the same books, it is specified that law (in the narrow meaning of the word) can be only understood through jurisprudence.

And even the most conservative authors present jurisprudence as an "authority". Academics and practitioners agree that the law (the written acts) can be understood only through its interpretation given by the judges.

It is significant that there is in France a very important practice of "annotated codes" (Civil Code, Commercial Code, Consumer Code, Penal Code, Fiscal Code, Intellectual Property Code obviously, etc.). These codes contain all the different acts (laws, decrees, regulations…) which are related to a field of the Law (civil law, commercial

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[2] In the narrow meaning of written acts.

law etc.…). Below each article of the law, there is a selection usually made by an academic, of the most important judgements rendered in relation to the said article, very briefly summarised by a few words, followed by the reference to their publication. Those codes are present in all the offices of ministers, officials, academics, lawyers… and judges themselves.

Any practitioner wanting to analyse a specific topic of the law will find, at first glance, a set of case law listed in the Code, and will then be able to find the full text of each judgement in legal gazette (there are several special legal gazettes that regularly publish the texts of judgments). In addition, the practitioner will be able to read comments and opinions written by law professors, explaining the impact of the decision.

During the procedure (written pleadings and arguments) leading to the hearing, and at the hearing, the attorneys of the litigants are free to cite, comment upon and debate over all the case law that they may have found in their research, in order to support their claims and/or defence.

3.- Practice: enlightening the law.- In fact, judges are there in order to "say the law" ("*dire le droit*"), which means
- not to repeat the words of the written acts,
- but, in less technical vocabulary but more precise words, to say what the law is or to state how the law must be understood in a concrete situation.

The judges are expected, to "throw light" on the different acts.

- Indeed, the provisions of the law are necessarily general and cannot envisage all the particular situations that everyday life reveals.

Sometimes realities evolve with the passage of time and jurisprudence has to adjust the way the language of the law needs to be construed. For instance, in the old French law dating from the 19th century (the law is different today), divorce was mainly possible in case of "serious insult" ("*injure grave*") from a spouse against the other. At the end of the 19th century, these words were understood in the full sense of the words. But progressively the wording of the law was felt as maladjusted to the evolution of social habits. As a consequence, jurisprudence gave progressively a weakened meaning to such words "serious insult". An "out-of-place, or improper" behaviour, without a nature of real "insult", was considered sufficient by the judges to grant a divorce, echoing the feeling of the society.

It was not necessary to change the wording of the Law. Everybody understand now, by looking at Case law, that the words "serious insult" actually mean "improper behaviour".

In other cases, the necessity to interpret the law is not due to the passage of time. It is simply due to the fact that the law cannot envisage all circumstances, and therefore, needs to be interpreted when an unforeseen circumstance occurs. For instance, a provision in the French Civil Code states that an individual, who is under the influence of a mental disorder, can be nevertheless deemed responsible (i.e., liable to bear the civil liability to repair the damage that he may have caused to a third party). The provision is clear. But what about a person who is suffering from a heart attack? Can this be assimilated to a "mental disorder"? The judge is the best placed to answer this question[3].

- Sometimes, the legal provision includes a contradiction.

Article 1122 of the French Civil Code is a good example of such a situation. The purpose of this text is to define the notion of violence, in the legal sense of the word, which can deprive of validity a contract. But, in the first paragraph, the text states that it is something which is suitable to impress a “reasonable person” (so an abstract character) but the second paragraph states that must be taken into account the age, sex and condition of the persons (and so considers a concrete character). In the absence of a legal change, only the judges could make a choice[4].

- Sometimes, the judges go much further than just interpreting the meaning of a word in the law. When faced with entirely new situations, unforeseeable at the time when the law was enacted, the courts have been able to solve legal disputes, still based on the strict wording of the law, but through a very "creative" interpretation of its terms. Article 1384 of the French Civil Code is a good example.

The original Civil Code adopted in 1804, organized a fault-based liability: Articles 1382 (civil liability to repair a damage caused by fault) and 1383 (civil liability to repair a damage resulting from negligence). Article 1384, added the concept of civil liability to repair damage caused by children, employees, students, inasmuch as they are under the authority of a person. Article 1385 extended such civil liability to damages causes by an animal, under control of a person, even if such animal as run away. Finally, Article 1986 provided for the liability to repair damages caused by collapsing buildings, if the collapsing is due to a lack of maintenance or a default in the construction.

[3] In this case, the answer of the jurisprudence was negative.
[4] They preferred to uphold the second paragraph.

All these circumstances of liability were introduced by a few words, Article 1384, which did not carry any independent sense at the time, but which became, with the passing of time, a wide field of interpretation by the judges : these were the words " *(repair the damages caused by) the things that are under the custody (of a person)..;*" What things ? The law did not say anything. These words *"the things under custody"* were only meant to introduce the examples (children, employees, students, animals and building).

At the end of the 19th century, with the development of the use of machines and correlatively the development of specific risks not necessarily linked to a fault, the Courts "discovered" (it is the expression usually used) these few words in Article 1384. (the "things") and created an entire system of liability for damages caused by a thing (a machine, a car, a simple object etc.) even where no fault or negligence can be found. In these few words of introduction ("things" relating to people, animal and buildings), the Courts found a sufficient basis to build their legal system (in 1804 the Legislator had not envisaged accidents caused by cars…) The meaning given to Article 1384 of Civil Code is, obviously, not the meaning that the legislator had in mind, but nevertheless, the wording of the law remained unchanged since 1804.

4.- An organized system.- But a mistake must be avoided. One could feel that the judge can do what he wants and "rewrite" (using a word that I have used before) the text of the law arbitrarily.

The reality is that the judge cannot do that.

First, the judge only interprets the law when there is good reason: logic, social for doing so.

But above all France is not in a system of pure "equity" (a term used in Common Law countries). The existence of jurisprudence implies a strict judiciary organization with a strict hierarchical principle which limits the freedom of the judges.

Indisputably, the French judge is not bound by the rule of precedent which does not exist as such in the French system. He has great freedom to decide in each case what he feels is right, in accordance with the law.

However, this freedom is kept under controlled by two "tools": the appeal ("*appel*") and the appeal to the "Supreme Court" [Court of Cassation][5] ("*pourvoi en cassation*").

[5] The exact name of the Court is "*Cour de cassation*".

Above the court of first instance, there are two additional levels of jurisdiction which prevent any arbitrary decision and any kind of personal free drift. With the appeal, the litigant can get the case judged again by a Court of Appeal. With the "pourvoi", the litigant can further submit the case to the Supreme Court for an ultimate verification that the law has been correctly applied to the facts.

- The Court of Appeal can decide to overrule and reverse the solution given by the Court of first instance if it believes that it was not the correct solution. Of course, the Court of first instance, when adjudicating a later identical or similar case, may still maintain the same attitude that it adopted in the previous first instance judgement. But, as it can be easily understood, it will only maintain its initial opinion that if it considers that there are strong reasons to do so.

- The "pourvoi" to the Court of Cassation is more specific and its scope is limited: the Court of Cassation is not a third degree of jurisdiction. The Court does not retry the case and does not re-examine the facts. It only verifies whether the law has been applied correctly to the facts, as found by the Court of Appeal. The core cause of "cassation" (invalidation of the decision of the Court of Appeal) is significantly named “violation of the law”[6]. The Court of Cassation defines the “correct line”, by validating or invalidating the decision made by the Court of Appeal.

Here too, it is true that the Courts of Appeal are not bound, at least at a first stage, by the decisions of the Court of Cassation. If the Court of Cassation annuls the decision of a Court of Appeal, it must transfer the case to another Court of Appeal (not the same one). This other Court of Appeal may decide to resist (we will see below concrete examples of such an attitude in the field of IP law). But, firstly, this is extremely rare: usually, the second Court of Appeal follows the solution indicated by the Supreme Court. And secondly, even if the second Court of Appeal decides to resist and sticks to the initial solution defined by the first Court of Appeal, there is a mechanism that provides for the ending of such a back and forth procedure. If the second Court of appeal does resist and maintain the initial decision, the case can be referred again to the Supreme Court, which still make a second decision, and if the second Court of Appeal judgement is invalidated (again), the case will be transferred again, to a third Court of Appeal, with possibility for the latter, to resist. This time, the opinion of the Supreme Court has to be followed.

Of course, it is a long process and it can be analysed as a cumbersome mechanism.

[6] See also below No. 7.

On the other hand, it is a very flexible mechanism which

- preserves the freedom of the judges
- allows an evolution through a progressive *common understanding* of the questions raised
- and is placed under the high authority of the Court of Cassation which has the last word.

There is no room for fanciful interpretation or local interpretation[7]. Judges contribute to the understanding of the law, they give a concrete meaning to the often very general provisions of the law, they refine the notions… under the high authority of the Court of Cassation.

Certainly, one question may: does this system give excessive power to the judges? This leads to an important observation.

5. - A possibility of reaction. - Jurisprudence can clarify, make explicit, concretize law and all this is perfectly legitimate. But we have also seen that sometimes jurisprudence creates new rules and, in a certain manner, “rewrites” the law and that can be seen as illegitimate. Firstly, judges cannot make decisions that mean the exact opposite of what is written in the law ("black" versus "white"). Secondly, the Legislator always has the possibility to adopt a new law in order to redirect the solution given by the Courts. If the Legislator does not do that, it is because he agrees this solution.

The above explanation concerning Article 1384 of the Civil Code is a good example[8]. It is indisputable that this article, in the mind of the Legislator of 1804 did not mean what the Courts declare today. And yet, with regard to the liability “for things” which was developed by the Courts, for more than a century, the Legislator did not feel the need to “redirect” the jurisprudence. In other words, the Legislator "validated" the jurisprudence. On the other hand, when it seemed necessary, in 1985, to have specific solutions for the liability linked to traffic accidents, the Legislator decided to adopt completely new rules, separate from the traditional liability law (Article 1384) and consequently from the jurisprudence linked to this law.

6.- Furthermore: resorting to framework notions.- The legislator has the last say but the role of the judges is so deeply recognized that the Legislator may even go one step farther, and resort deliberately to the technique of “framework concepts”, entrusting the judges to implement such concepts by “grasping the irreducible diversity of situations”. These concepts are vague: public order good faith, interest of the family etc. but they are endowed with a strong power of evocation and carry a "suggestive

[7] For instance, cases from Paris against cases from Lyon!
[8] See above No. 3.

value". The Legislator knows that the diversity of concrete situations is such that it is impossible, and pointless, to provide in advance for any detailed circumstance corresponding to such concept. It is for the judge to do this, on a case-by-case basis, with complete freedom, but nevertheless within the spirit of the law.

7. - Conclusion. - In light of the foregoing, it is clear that jurisprudence and legislation are deeply interlinked. In France, the judge is considered, not as a static "mouth of the law", but as an active player who participates in the "building" of the law system. The use of framework notions is even an example of a kind of deliberate delegation of power by the legislator.

But it is clear also that all this system is *not built on the rule of precedent* that French law ignores.

All the system is built on the idea that the role of jurisprudence is to complete and to achieve the work of the legislator, considering that the legal rule is necessarily abstract while its application implies an analysis of concrete situations. In this perspective, *the judicial system aims to the elaboration of a common understanding of the legal rules*. So, even though judgements made by a court of a certain level are not binding on other courts (like in the Common Law rule of precedent) , the "community" of judges is able to draw from the judgements of their colleagues common solutions helping to solve the same kind of problems in an harmonious and predictable way.

And this last point is especially important for the possible litigants and for the whole system because this means security and predictability.

Jurisprudence has an undeniable real and positive authority that everyone – judges, the Legislator, practitioners, academics – recognizes and takes into consideration.

II. Role of jurisprudence: the specific situation of IP Law

8. - A similar issue. - In Intellectual Property Law role of Jurisprudence is the same way as in other common fields of the law: the principles are the same and the practice too.

This means that,

- jurisprudence contributes to the elaboration of legal answers
- this is done under the control of the Supreme Court
- "framework concepts" are a crucial tool in this field;
- there is a certain degree of cooperation between the judges and the Legislator.

9.- How jurisprudence provides legal answers.- Here, as in the common fields of the law, judges are asked to provide concrete answers based on the general provisions of the law, to refine concepts, sometimes to give solutions *ex nihilo*….

For example, in the field of patent law, the judge had to define the concept of contributory infringement, an issue about which the French law is not precise. Direct infringement is better defined. The question arose, in France, as in other countries, whether it was possible to bring a law suit for infringement when the means used by the alleged infringer are only equivalent to the patented means, and not exactly the same. The courts replied positively, and on several occasions, provided a definition of what are “equivalent means".

Furthermore, in the case of licence contracts, the role of jurisprudence is impressive. There is almost nothing in the IP Code and all the rules governing licensing of IP rights have been progressively established through case law.

10.- The control of the Court of Cassation.

The influence of case law is based on its stability. Jurisprudence becomes stable when judgements of lower courts are more and more confirmed by judgements of higher courts. Everything starts with the ability to convince the judges at the higher level (Courts of Appeal for the judges of the Court of first instance and Supreme Court for the Courts of Appeal). This shows that the system is not built on arbitrariness and/or on one precedent selected in an authoritarian way. Jurisprudence is the result of a consensus.

The example below shows that the Courts may decide to resist the opinion of the Supreme Court. All the Courts of first instance and the Courts of Appeal decided that the fragrance of a perfume could be considered as a "work" in the meaning of copyright but the Court of Cassation repeatedly decided the contrary and annulled the decisions of the Courts of Appeal. As an academic, I believe that the different Courts had good reasons to rule as they did. But this is not the question here. The pertinent conclusion in the view of the present paper is that today, it is not possible for the lower courts to impose a solution against the opinion of the Supreme Court. But it

must be added that, by repeatedly developing their arguments and reasons, the lower courts might well eventually convince the Supreme Court to change its opinion.. It all depends on the arguments used. This can be viewed as a kind of dialog between the judges.

11.- The importance of the framework concepts.- The use of framework concepts appertains to another kind of dialog: between the judges and the Legislator..

For example, in copyright law, certain key words such as "work or "originality" are framework concepts. Likewise, "merit", "private use", family circle", "normal exploitation", "equitable remuneration"… are open concepts without real content if the judge does not give them a content through their judgements in concrete cases.

There are also many examples outside the field of copyright: in patent law, words like "non-obviousness" or "skilled person" belong to this category of framework concepts. Same thing for trade mark law with, for instance, terms like "distinctive character" or "good faith".

Two examples:

- Patent / Skilled person

The Court of Cassation (Court of Cassation, commercial division, 17 Oct. 1995) states that the skilled person is “the one who has a normal knowledge of the technology involved and is able with only his personal knowledge to imagine the solution of the problem that the invention aims to resolve”

- Trade marks / Fraudulent application

The Court of Cassation states (Court of Cassation, commercial division, 25 Apr. 2006) that, taking into consideration the principle “*fraus omnia corrumpit ("fraud corrupts everything)*”, “the application of a mark is fraudulent when it is done with the intent to deprive somebody of a sign which is a necessity for his activity”

This shows that a large part of IP Law in France is, if not a judge made law, at least for a large part a law “shaped” by jurisprudence. Questions as important as patentability or "copyrightability" depend on the interpretations given by the judges.

But once again, the system allows the judges to interpret these general concepts and apply them to concrete circumstances, precisely because it does not allow “fanciful” solutions. And aims at a common interpretation, a common understanding.

12. - Legislator and judges. - It must be added that the Legislator has always the possibility to pass a new law in order to change the solution given by the Courts.

Actually, this is extremely rare. As a matter of fact there have been many new laws, mostly inspired by European directives, but, there has not been, in my view, any law passed in France against the solutions given by the courts. This would tend to show that the role of jurisprudence is considered as fully satisfactory.

13. - Conclusion on IP Law. - Jurisprudence and case law are very present in the IP Law landscape. And naturally we can renew the conclusions given previously.

Once again, this cannot be explained by *the rule of precedent* what French law ignores.

But, as I noted before, *the French judicial system aims to the elaboration of a common understanding of the legal rules* and the result is obviously the same thing in the field of IP Law. Jurisprudence gives common solutions for the same kind of problems. These solutions are not binding for the different judges but they are led to subscribe to the given solutions. This ensures at the same time flexibility, security and predictability.

III. European Case Law

14. - An important place for the jurisprudence. - At the European level, jurisprudence also plays a crucial role.

European case law – from the European Court of Justice (ECJ) – gives answers that cannot be found in the written acts published by the European institutions.

For instance

- Trade marks / Functions of the trade marks

▪ ECJ, 18 June 2009, Case C-487/07, L'Oréal v. Bellure: "The[] functions [of the trade mark] include not only the essential function of the trade mark, which is to guarantee to consumers the origin of the goods or services, but also its other functions, in particular that of guaranteeing the quality of the goods or services in question and those of communication, investment or advertising"

▪ ECJ, 22 Sept. 2011, Case C-323/09, Interflora Inc.: "In addition to its function of indicating origin and, as the case may be, its advertising function, a trade mark may also be used by its proprietor to acquire or preserve a reputation capable of attracting consumers and retaining their loyalty"

See also below.

What it more, sometimes case laws preceded written acts (directives or regulations). For instance, the "theory" of the exhaustion of the rights, which changed drastically the "old European Intellectual Property", was inspired by German practice, was then adopted by the ECJ, and then imposed at the European level. It is only later that this idea of exhaustion became a component of all the European acts and subsequently of the different national laws.
It is not exaggerated to say that, in some cases, the jurisprudence of the ECJ had a direct impact on how national judges interpreted the law. Very concretely, the analysis of what constitute an infringing practice in the field of trade marks has been completely changed in France by the approach adopted by the ECJ that the national judges are obliged to follow.

In the past, a "rough" reproduction of a sign constitutive of a trade mark was analysed by the French Courts as an infringement.

- But the ECJ limited the ambit of the trade mark right, stating that "the exercise of that right must […] be reserved to cases in which a third party's use of the sign affects or is liable to affect the functions of the trade mark" (ECJ 12 Nov. 2002, Case C-206/01, *Arsenal Football Club*; see also above).

- Consequently, the French Courts now follow the same approach and reuse the formulations of the ECJ; for instance, the Court of Paris stated, in a judgement of 2010, Sept. the 15th, that the owner of the trade mark can bring a legal action when the use by a third party "affects or is liable to affect the functions of the trade mark".

So, national judges base their own decision on the interpretation given by the ECJ of directives or regulations enacted by the European Institutions.

This being said, those answers, given by the ECJ, sometimes are open to questioning. The ECJ decisions offer guidelines for the national judges but these judges have room for completing, specifying the decision of the ECJ and so participate to the final elaboration of the legal solution.

The case law about originality, in the field of copyright, are a good example of such a situation.

- In a very important decision *Infopaq*, the ECJ stated that "copyright […] is liable to apply only in relation to a subject-matter *which is original in the sense that it is its author's own intellectual creation*" (ECJ, 16 July 2009, Case C-5/08) – which has been understood as an "objectification" of the notion.

- But, for instance, in a later case *Eva-Maria Painer*, the ECJ said, about a "portrait photograph", that this photograph can be protected by copyright "if […] such photograph is an intellectual creation of the author reflecting his personality and expressing his free and creative choices in the production of that photograph" (ECJ, 1st Dec. 2011, Case C-145/10). The Court does not quote only the "intellectual creation of the author" but put also the stress on the "personality" of the author (which is in line with the personalist approach of an important part of the Continental judges).

- So, now, it is national (European) judges' turn to state and to decide between "intellectual creation", touch of personality or, more, expression of choices.

15. - An initiative of the European Observatory on Infringements of Intellectual Property Rights. - A last word: it is interesting to observe that, in convergence with the French practice of the annotated codes[9], the OHIM and the EU Observatory on Infringements of IP Rights manage a project of publication of a book especially dedicated to the case law of the ECJ and of the different Member States related to the fight against infringement[10]. That clearly proves that, for the whole Europe, i.e. with countries of Common Law which refer to the rule of precedent and countries of Continental Law which ignore that rule, the jurisprudence is a major instrument of understanding and/or of building of the "legal field".

General conclusion

Judges are unquestionably major players in the elaboration of the legal rule(s).

The aim of the jurisprudence, at the French level (as at the level of the European Union), is, by an adaptation of the general provisions of the written acts to concrete situations, to give common solutions for the same kind of problems – what is a guarantee of security. These solutions are not normally binding for the different judges but the judges are led to subscribe to the given solutions. The judicial system, with its hierarchical organization, leads to that. Conversely, when the national judges are theoretically bound by the decisions of the ECJ, this one gives enough freedom to those judges with the result that they can contribute to the common task.

▶ Maybe, the role of the jurisprudence can be defined as a reasoned activity of common elaboration of legal rules under the control of the higher Courts (Court of Cassation and European Court of Justice).

[9] See above No. 2.
[10] Headed by M. Vivant.

ANNEX II: The use of jurisprudence in civil procedures in Germany

Tobias Malte Müller[11], *PhD, Mag. iur.*

I. Legal framework applicable in Germany

1. National legal framework in Germany

(1) Under the German legal system, in particular Art. 97 paragraph 1 of the German fundamental law[12], judges are as a rule only bound by the law. Precedents are not considered as being case-"law". Therefore, the rule established under German law is that precedents do not bind the courts. Consequently, courts may not only dissent from their own precedents but also from precedents issued by other German courts, including the five Federal Supreme Courts, i.e. the Federal High Court of Justice[13], the Federal Labour Court[14], the Federal Administrative Court[15], the Federal Fiscal Court[16] and the Federal Social Court[17].

There is however one exception to the above principle: Decisions issued by the Federal Constitutional Court are binding on all German courts and administrative organs as well as on all federal and regional constitutional institutions[18].

(2) Furthermore, a court may under specific circumstances be obliged to refer a case pending before it to a specific other judicial organ for a decision.

This is for instance the case if one of the above mentioned five Federal Supreme Courts wishes to dissent from a precedent on an abstract question of law previously decided by another of the Federal Supreme Courts. Under such circumstances the case needs to be referred to the so called Joint Chamber of the Federal Supreme Courts[19] that has been created according to Art. 95 paragraph 3 of the German fundamental law[20] in order to preserve the consistency of the Federal Supreme Courts' jurisprudence. This Joint Chamber of the Federal Supreme Courts, composed of judges belonging to each of the five Federal Supreme Courts, will decide on this question of

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[12] The German fundamental law („*Grundgesetz*") is the constitutional law of the Federal Republic of Germany. Art. 97 para. 1 reads as follows: *„Judges shall be independent and subject only to the law"*.

[13] *„Bundesgerichtshof"*, i.e. the highest national instance in civil and criminal matters.

[14] *„Bundesarbeitsgericht"*, i.e. the highest national instance in labour matters.

[15] *„Bundesverwaltungsgericht"*, i.e. the highest national instance in administrative matters.

[16] *„Bundesfinanzhof",* i.e. the highest national instance in tax matters.

[17] *„Bundessozialgericht"*, i.e. the highest national instance in social matters.

[18] See Section 31 para. 1 of the Law on the Federal Constitutional Court (*„Bundesverfassungsgerichtsgesetz"*) that reads as follows: *„The Constitutional Court's decisions are binding on federal and regional constitutional institutions as well as on all courts and public authorities".*

[19] *„Gemeinsamer Senat der obersten Gerichtshöfe des Bundes"*.

[20] Art. 95 para. 3 of the German fundamental law (*„Grundgesetz"*) reads as follows: *„A Joint Chamber of the courts specified in paragraph (1) of this Article shall be established to preserve the uniformity of decisions. Details shall be regulated by a federal law"*.

law. Thus, the Joint Chamber of the Federal Supreme Courts decided in the year 2000[21] that in order to meet a given term a party may validly submit its written pleadings[22] to the court through so called computer-fax with the attorney's merely scanned signature. It is, however, to be noted that since its creation in 1968[23] only a few singular cases concerning the jurisdiction of all five Federal Supreme Courts have been brought before the Joint Chamber of the Federal Supreme Courts.

Furthermore, the five German Federal Supreme Courts dispose each of a so called "Great Senate"[24]. In case one of the Chambers of a Federal Supreme Court intends to decide a question of law in a different way than another Chamber of the same Federal Supreme Court did in a prior case, this question of law has to be referred to the "Great Senate" of that Federal Supreme Court for a binding ruling on that question of law under the condition that the Chamber having ruled first on this question confirms that it wishes to uphold its original answer to this question of law. As an example relating to the sector of Intellectual property the following case[25] decided by the Federal High Court of Justice's Great Senate and dating back to the year 2005 is reported: The background of this case is that the First and the Tenth Senate of the Federal High Court of Justice dissented on the question whether or not an unjustified warning letter for alleged trade mark infringement sent be a trade mark holder to a recipient is to be judged under law of torts as a tortious offence against the recipient's established and exercised business enterprise or under the unfair competition act. This distinction makes a great difference under German law, since in the event the parties are no competitors on the market the German unfair competition act does not apply. Therefore under such circumstances only law of torts would remain applicable in order to satisfy the recipient. The Great Senate of the Federal High Court of Justice finally shared the view of its Tenth Senate and ruled that such behaviour is to be judged under the law of torts as a tortious offence with the result that the recipient is as a rule entitled to claim damages caused by the unjustified warning letter also in the event there should not exist any competitive relationship between the parties.

(3) As a matter of fact, however, decisions of the appellate courts, especially the Federal Supreme Courts, do have a considerable leading effect on judges subsequently dealing with comparable other cases. In order to achieve a certain degree of legal certainty and peace under the law as well as in order to respect the principle of equal treatment when applying the law (so-called *"settled case-law"*), it is rather rare in

[21] See order issued by the Joint Chamber of the Federal Supreme Courts dated 5 April 2000, case no. GmS-OGB 1/98.
[22] *„bestimmende Schriftsätze".*
[23] See Law of 19 June 1968 (*„Gesetz zur Wahrung der Einheitlichkeit der Rechtsprechung der obersten Gerichtshöfe des Bundes"*).
[24] *„Großer Senat".*
[25] Decision issued by the Great Senate of the German Federal Supreme Court dated 15 July 2005 (case no. GSZ 1/04) published in MarkenR 2005, p. 404 – *Verwarnung aus Kennzeichenrecht II.*

German practice that a court will openly dissent from a relevant precedent without giving any reason for its dissenting opinion.

This is even the more the case in those legal areas that are only partially governed by statutory law. One example is the area of industrial and labour disputes. In this area the role of precedents and landmark cases is even more important.

(4) In singular cases, *settled case-law* may even achieve such a level of consolidation in German practice that it is recognized as being *"customary law"* or *"common law"*[26]. This has been the case for example for the so-called doctrine *"positive breach of contract or duty"*[27]. Under this doctrine applied by the German courts the obligee was entitled to claim damages from its obligor in case the latter, while fulfilling his main obligations free of defect, culpably breached further accessory duties or obligations, such as obligations of care, and thereby creates a damage to the obligee. A typical case of application of this doctrine would be if, for instance, a customer has lunch in a restaurant. Once the customer finished his proper meal the waiter spills coffee on the customer's suit while cleaning the table. In this case the food served to the customer was free of defects but a damage was caused to him be breaching a duty of care. Under the doctrine of *"positive breach of contract or duty"* the restaurant will be liable for the damages caused to the customer, i.e. cleaning of the customer's suit. German courts accepted this doctrine since the early 1900s and it has finally been included in the German Civil Code through creating a new Sect. 280 paragraph 1 in the year 2002.

2. EU-framework with relevance in Germany

The binding force of court precedents is to be assessed differently when it comes to decisions issued by the Court of Justice of the European Union (CJEU).

(1) The EU-legislation in the field of civil law and also intellectual property is mainly based on so called *secondary EU legislation*, in particular *Regulations*, which are directly and simultaneously enforceable in the EU-Member States without requiring any national legal act of transposition, and *Directives*, which are also binding upon the EU-Member States as to their content but need to be transposed – as a rule – into domestic law by a national legal act of transposition to be issued by the Member States' legislator/authorities within the national legislative framework.

If a court in one of the EU-Member States in a case pending before it has any doubts as to the interpretation of its own national law as to its accordance with such *secondary EU legislation*, it may refer the case to the CJEU for a preliminary ruling pursuant to article 267 TFEU (Treaty on the Functioning of the European Union). For this purpose

[26] *„Gewohnheitsrecht".*
[27] *„Positive Vertragsverletzung".*

the national court has to submit to the CJEU all of its questions on the interpretation of that *secondary EU legislation* that it deems necessary to be answered by the CJEU in order to enable it (the national court) to give its own judgment. Where any such preliminary questions are raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the CJEU.

The CJEU's preliminary rulings are binding for the referring court and all other courts called to decide on the question of law that has been answered in the CJEU's preliminary ruling. Besides the above, the CJEU's decision has no formal legally binding character for other courts deciding on same or similar cases. Nevertheless, in legal practice the CJEU's decisions have far-reaching impacts on decision-making practice by national courts in the EU-Member States.

(2) This mechanism of so called *preliminary rulings* is of particular relevance in the sector of Intellectual Property since part of the EU-Member States' national law in this field, in particular trade mark and design law as well as parts of copy right law, is based on *secondary EU legislation*[28].

An example for such a preliminary ruling issued by the CJEU is a case referred to it by the German Federal High Court of Justice in a trade mark infringement case related to one of the most discussed topics in European trade mark law in the past years, i.e. the so called "Adwords"-cases. In that case, the German Federal High Court of Justice had to decide on whether or not the use of third party's trade marks by unauthorised economic operators as a keywords within a paid referencing internet service (like Google's "AdWord-Programme") constitutes use of that trade mark which may be prevented by the trade mark owner under EU trade mark provisions or national trade mark law. In its case the German Federal High Court of Justice referred the question to the CJEU for a preliminary ruling[29], if the reservation by an economic operator of a keyword triggering, in the case of a request using an identical word, the display of an advert linked to a site operated by that operator in order to offer for sale goods or services, and which reproduces a trade mark registered by a third party in order to designate identical goods or services, without the authorisation of the proprietor of that trade mark, constitutes an infringement of that trade mark.

[28] Such as Council Regulation (EC) No 207/2009 Of 26 February 2009 on the Community Trade Mark, Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the Laws of the Member States relating to Trade Marks (both legislative texts have recently been amended and the new EU Trade Mark Directive and Regulation will be published in the Official Journal of the European Union on 24 December 2015), Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs or Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs.

[29] German Federal High Court of Justice, order dated 21 January 2009 (case no. I ZR 125/07 – *Bananabay II*) published in GRUR 2009, p. 498.

National European Courts have been divided on this question. Just to give a few examples, while the Paris Court of Appeal found both the advertiser and Google guilty of trade mark infringement[30] the German Federal High Court of Justice took a different view and found in a comparable case that no trade mark infringement had occurred[31]. The legal confusion that ensued from these different positions resulted in the Supreme Courts of five EU Member States asking the CJEU for guidance and referring questions for preliminary rulings. Following these requests, the Court of Justice of the European Union rendered five landmark decisions since 2010, i. e. the decision in the above case referred to the CJEU by the German Federal High Court of Justice (Case C-91/09 – *Bananabay*) and additionally in the Joined Cases C-236/08, C-236/08 and C-238/08 – *Google France and others* (referred to the CJEU by the French High Court); C-278/08 – *BergSpechte others* (referred to the CJEU by the Austrian High Court); Case C-558/08 – *Portakabin*/*Primakabin others* (referred to the CJEU by the Dutch High Court) and Case C-323/09 – *Interflora Inc*. *others* (referred to the CJEU by the Chancery Division of the High Court of England and Wales). The guidance given by the CJEU in these five cases with regard to the advertiser's liability for such keyword advertising could be summed up as follows: The use by an advertiser of a sign which is identical or similar to a trade mark may infringe that mark where the advert does not allow the average web user - or allows the user only with difficulty - to determine whether the goods or services referred to in the advert originate from the trade mark owner, from an economically connected undertaking or from an unrelated third party (in particular, from the advertiser). Whether or not this is the case, so the CJEU, must be assessed by the respective national court on a case-by-case basis.

These Adword-cases are a striking example showing the mechanism of the CJEU setting binding general guidelines on the interpretation of *secondary EU legislation* for the national courts in particular in the sector of intellectual property law.

II. Examples in the field of IP in Germany

(1) In Germany the relevance of precedents is of particular importance in the field of intellectual property law where Courts are generally to decide on a case by case-basis and the solution adopted in each case very much depends on the concrete circumstances of that case. This particular relevance of precedents in IP-cases is reflected by the fact that German judges generally quote precedents they deem relevant for their decisions in order to support their findings. It is not unusual that in particular lower courts quote a set of relevant decisions and even entire text passages originating from precedents concluding that they share the view held in this precedent.

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[30] Cour d'Appel de Paris (4th Division, Section B), decision dated 1 February 2008 (case no. 06/13884 – *GIFAM v Google France*), published in IIC 2008, p. 999).
[31] German Federal High Court of Justice, judgement dated 22 January 2009 (case no. I ZR 139/07 – *Beta Layout*), published in NJW 2009, p. 2384.

Parties in IP disputes are therefore required to perform a deep analysis of relevant precedents and expose the relevant cases in support of their respective position to the judges called to decide on case at issue. This is of outmost importance, if there is already a precedent (in particular a precedent issued by the same court or even the relevant appeal court) on a specific point of law that is relevant for the case at issue.

A good example is the question of whether or not the trade mark on which an infringement case is based has a well-known character or an enhanced degree of distinctiveness. If precedents adjudging this trade mark such a well-known character or enhanced degree of distinctiveness exist and are presented to the court, the judge called to decide on this issue again, is most likely to refer to these precedents in support of this view on this question of law[32].

(2) In this context it is particularly interesting to note that the German Federal High Court of Justice does also quote precedents originating from Courts of other EU-Member States.

Reference is again made by way of example to the so called Adword-cases, which have already been introduced above. Since 2010 national courts and apply the CJEU's guidance resulting from the five CJEU cases on keyword advertising quoted above. This topic is still regularly in issue before national courts in the EU Member States and the perusal of these national cases reported from the Member States demonstrates that national decisions do not always seem to be coherent in applying the CJEU's guidance. The German Federal High Court of Justice took some of these precedents into account by referring not only to the relevant CJEU-precedents but also to further precedents originating from Courts in other EU-Member States. In fact the German Federal High Court of Justice in one of its rulings[33] discussed two precedents issued respectively by the Supreme Courts of Austria (*österreichischer Oberster Gerichtshof*) and France (*Cour de Cassation*). In another judgement[34] the German Federal High Court of Justice discussed a decision issued by the High Court of Justice for England and Wales (Chancery Division) and shared the view taken by that court.

[32] See by way of example the order issued by the German Federal Patent Court on 16 February 2005 (case no. 29 W (pat) 286/02 – *BULL CAP*) published in BeckRS 2009, 00491where the court referred at point 2.3 to precedents issued by the Hamburg Court of Appeal and the German Federal Patent Court itself confirming the well-known character of the trade mark in question.
[33] See decision issued by the German Federal Supreme Court dated 13 December 2012 (case no. I ZR 217/10 – *MOST-Pralinen*) published in GRUR 2013, p. 290 quoting and discussing at points 32 and 33 amongst others two decisions issued respectively by the Austrian and the French Supreme Court.
[34] German Federal Supreme Court, judgement dated 27 June 2013 (case no. I ZR 53/12 – *Fleurop*) published in GRUR 2014, p. 182 at point 34.

As far as can be seen, all German courts called to decide on Adwords-cases since the series of CJEU-rulings base their decisions on these precedents by the CJEU and the German Federal High Court of Justice in order to substantiate their reasoning[35].

The above decisions are a good example of how national German courts – including the German Federal High Court of Justice – apply the general guidelines set by the CJEU on a case-by-case basis in their daily work by quoting relevant precedents issued by the CJEU and additionally the interpretation made of those CJEU-rulings not only by German courts but also by courts of other EU-Member States.

III. Court decision publication mechanism in Germany

Currently many German court decisions are published online. In particular the Federal Courts, such as the Federal Patent Court[36], which deals with administrative (not civil enforcement) patent, utility model, trade mark and design cases, or by the German Federal High Court of Justice[37] host their own websites where the respective decisions are available free of charge.

Some of the 16 German Federal States, such as Bavaria[38] or North Rhine-Westphalia[39], provide centralized websites with access to the jurisprudence issued by their respective courts.

Finally, access to German jurisprudence is provided through commercial German and international online databases (such as *beck-online*, *Jurion* and *IP darts*), regularly published legal reviews (such as *Neue Juristische Wochenschrift* or, more specifically for the sector of intellectual property *Gewerblicher Rechtsschutz und Urheberrecht* [GRUR] or *Markenrecht*) as well as through so called legal "Commentaries" to the relevant statutes such as the German Patent Act or Trade mark Act. These commentaries, that are regularly updated, provide an explanation of the single articles of the Act in question together with a systematic legal analysis of relevant case law and the indications where the decision quoted can be found.

However, currently no official public centralized website exists in Germany, where decisions are published and accessible free of charge. Additionally, the official and public websites provided by the courts or the German Federal States do not dispose of

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[35] See for instance Hamburg Court of Appeal, judgement dated 22 January 2015 (case no. 5 U 271/11 – *partnership*) published in GRUR-RR 2015, p. 282; Frankfurt Court of Appeal, judgement dated 10 April 2014 (case no. 6 U 272/10 – *Beate Uhse II*) published in GRUR-RR 2014, p. 245; German Federal Supreme Court, judgement dated 27 June 2013 (case no. I ZR 53/12 – *Fleurop*) published in GRUR 2014, p. 182.

[36] http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/list.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288

[37] http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/list.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288

[38] http://www.gesetze-bayern.de/jportal/portal/page/bsbayprod.psml?st=ent

[39] http://www.justiz.nrw.de/Bibliothek/nrwe2/index.php

high performing search engines permitting systematic case-law searches. These databases often classify the decisions merely by date, case number, court etc. and only relate to the decisions of that specific court or that specific federal state providing the database. Consequently, a systematic search in view of a specific legal problem is difficult with these databases.

ANNEX III: Report on the Development of Case Law in China

S. Sam Li[40], PH.D. J.D.

China's modern legal system develops largely upon the civil law tradition. Its primary source of law is statutory rather than case law. Decided cases generally are not binding.[41] This general rule, however, does not mean cases play no role in Chinese court decisions. This report describes China's case system and explains the role cases are playing in Chinese court decisions. The report has three parts: 1) historical development in China's case system, 2) publication of cases and their use, and 3) the guiding case system. The indication is strong that a robust exploration in the use of cases is underway.

I. Historical development

In spite of the statutory nature of China's legal system, since the founding of the People's Republic in 1949, attentions have been paid to cases decided. Even before the start of the reform in recent decades, courts recognized the importance of cases.[42] In 1956, the National Judicial Adjudicating Work Session[43] proposed to identify and compile cases for the purpose of guiding adjudicating work. In December 1962, the Supreme People's Court ("SPC") promulgated *Provisions Regarding the Works of the People's Courts* and required that the SPC "draw lessons from past adjudicating experiences and select cases to guide the adjudicating works." In the late 1970s, the SPC issued nine cases to guide the courts at all levels to remedy the injustices occurred during the Cultural Revolution. In May 1985, the SPC Gazette began to publish a compilation of cases.

The reform to transform China from a centrally planned economy into a market economy started in the late seventies. A liberalized Chinese economy demands an increasingly important role of law and courts in commercial and social activities. Along with this social and economic development, millions of cases are decided by about three thousands courts in China each year. The number of cases decided by Chinese courts is numerous. Taking cases involving intellectual property rights ("IPR") as an example, China decides about one hundred thousand IPR cases per year, around ten thousand of which are patent cases. This number is larger than any country in the

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[41] For a general discussion, see Nanping Liu, *Legal Precedents with Chinese Characteristics: Published Cases in the Gazette of the Supreme People's Court*, 5 J. Chinese L. 107 (1991).

[42] Zhou Qiang, the President of the Supreme People's Court ("SPC"), Preface for China Case Guidance: Utilizing Cases for Guidance and Promoting the Uniformity and Correctness of the Application of Law (*发挥案例指导作用 促进法律统一正确实施*, *《中国案例指导》*序言), available at: http://www.court.gov.cn/zixun-xiangqing-13007.html

[43] The official name in Chinese "全国司法审判工作会议"

world.

The enormity of cases and the huge number of courts involved in these decisions necessitates a system that can apply the law uniformly with good quality. To this end, the SPC has been active in issuing judicial interpretations of the laws and policies in guiding court decisions, organizing trainings for judges, and holding judicial conferences. The SPC naturally also considers the role cases can play.

In 1999, in the SPC's *Five-Years Reform Framework of the People's Court*, the Court stated that it shall "select and edit model cases to guide the lower courts in similar cases."[44] In 2005, in the SPC's *Second Five-Years Reform Framework of the People's Court,* the Court announced that it would "establish and improve the case guiding system."[45] On November 26, 2010, the SPC reached a milestone for using cases in judicial decisions by promulgating the *Provisions on Case Guidance ("Case Provision")*, giving for the first time a clear instruction on using cases in adjudication albeit the cases to be used are limited to the "guiding cases, " which are selected according to the *Case Provision*.[46]

Based on the development of China's case system discussed above, the report below treats the cases in two categories, the cases in general, which may or may not be consulted by courts informally in making decisions, and the guiding cases, which are still small in number but are formally required to be considered by courts where they apply. We will divide the discussion below into two parts, beginning with the cases in general and then the system of guiding cases, which is a more recent occurrence.

II. Cases in General

A. Cases Internally Circulated for Guidance

The SPC and certain lower courts have been designating certain cases as "model cases" and circulating them internally for the purpose of guiding decisions, research, and education for many years.[47] Before 1985, the SPC circulated these cases within the court system at irregular intervals with notes or comments.[48] There was no uniform format or official procedure for their circulation. One example is the Court's circulation

[44] SPC Issue No.: Fa Fa(1999) No. 28, the full text in Chinese is available at: http://www.ccl.cn/llb/llbShow!findSourceById.do?id=33

[45] SPC Issue No.: Fa Fa(2005) No. 18, the full text in Chinese is available at: *http://www.hicourt.gov.cn/law/show.asp?fileno=15996.*

[46] SPC Issue No.: Fa Fa(2010) No. 51, available in Chinese at: http://www.law-lib.com/law/law_view.asp?id=342688

[47] See, Zhou Daoluan, *The Historical Development of China Case System* [J], The Application of Law, 2004(5):6 (周道鸾. *中国案例制度的历史发展[J]*. 《法律适用》,2004(5):6)
In addition, there is no definition for these cases by any authorities. Since all these cases are compiled by the courts, this article refers to these cases as "Compiled Cases".

[48] See, Zhou Daoluan, *The Historical Development of China Case System* [J], The Application of Law, 2004(5):4 (周道鸾. *中国案例制度的历史发展[J]*. 《法律适用》,2004(5):4)

of nine cases in the late 1970s for guiding lower courts for redress injustices inflicted during the Cultural Revolution.[49]

B. Publication of Select Cases

In 1985, the SPC created the *Gazette of the Supreme People's Court of the People's Republic of China* ("Gazette") in an effort to meet the policy of the Chinese Communist Party (the "Party") that required "big issues shall be known and discussed by the public." The SPC publishes certain cases in the Gazette and is the first public channel for accessing court decisions.[50] Heralded by the publication of cases in the Gazette, the Court, its various divisions for civil, criminal, administrative, and commercial matters and certain provincial courts also started to publish selected cases.

The publications are scattered in places and their availability varies. The Gazette cases from 1985 and on are available to the public.[51] The Gazette was published quarterly from 1985-1999, bimonthly from 1999-2004, and then monthly after 2004. By 2008, the Gazette had published 731 cases in total. Cases involving IPR had received their share of attention from the start. Among the 731 cases, 98 were IPR cases.[52]

The Court and its divisions also publish in places other than the Gazette. For example, since 2008, the SPC publishes an annual report on IPR cases.[53] Each year, dozens of cases are included.[54] From 2010, the SPC also annually announces the year's *Ten Intellectual Property Right Cases*[55] and *Fifty Model Cases of Intellectual Property*.[56,57]

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[49] See, supra note 3

[50] See, Zhou Daoluan, *The Historical Development of China Case System* [J], The Application of Law, 2004(5):2-8 (周道鸾. *中国案例制度的历史发展[J]*. 《法律适用》,2004(5):2-8)

[51] See, Ding Haihu, *The Empirical Survey and Enlightenment to "The Case Publication System" of our country,* Contemporary Law Review, Volume No.22, No.4, Total No.130. (丁海湖, *我国"案例公布制度"的实证考察及其启示*, 《当代法学》第 22 卷第 4 期(总第 130 期).

[52] See, Yuan Xiuting, *The Practice and Assessment to China Case Guidance System —Study on the Intellectual Property Case in <Supreme People's Court Bulletin>*, Studies in Law and Business, 2009(2) (袁秀挺, *我国案例指导制度的实践运作及其评析——以〈最高人民法院公报〉中的知识产权案例为对象*》，《法商研究》2009 年第 2 期); see Yang Jianjun, *The Changes of Selecting and Compiling Civil Cases in < Supreme People's Court Gazette >*, Modern Law Science, 2010(4). (杨建军, *〈最高人民法院公报〉选编民事案例的变化*, 《现代法学》2010 年第 4 期)

[53] The Annual Report of the Supreme People's Court Cases Related to Intellectual Property Rights (《最高人民法院知识产权案件年度报告》)

[54] See, the preface of the 5th edition of *The Guidance of the Supreme People's Court Cases Related to Intellectual Property Rights,* China Legal Publishing House (《*最高人民法院知识产权审判案例指导*》，中国法治出版社)

[55] The official name in Chinese "*十大知识产权案件*"

[56] The official name in Chinese "*50 件知识产权经典案例*"

[57] See, the cases of 2010, Fa Ban (2011) No. 85, available in Chinese at: http://www.law-lib.com/law/law_view.asp?id=346420
The cases of 2011, Fa Ban (2012) No. 91, available in Chinese at: http://www.law-lib.com/law/law_view.asp?id=381353
The cases of 2012, Fa Ban (2013) No. 44, available in Chinese at:

The SPC's Institute of Law Application of China also frequently publishes *Selected Cases of People's Court* in book format from 1992,[58] organizing the cases into six categories: civil, criminal, economic, maritime, intellectual property and administrative cases.[59] Certain divisions of the SPC have published cases in their respective fields since 1999.[60] For example, the Criminal Divisions of the SPC publish criminal cases on the *Criminal Trial Reference*;[61] and the Administrative Division publishes administrative cases on the *Administrative Enforcement and Administrative Trial*.[62]

Provincial courts also publish cases for providing guidance in their own jurisdictions. For example, Sichuan Higher People's Court publishes cases on *Sichuan Trial* (*《四川审判》*), which is a journal released bimonthly.[63] Jiangsu Higher People's Court has published more than 800 cases on <*Gazette*>(*《公报》*)or <*Cases For Reference*> (*《参阅案例》*) as of March 2015.[64] Chengdu Intermediate People's Court published 10 cases for consumer protection on March 14, 2015.[65]

C. Publishing All Cases

After a comprehensive feasibility study, the SPC took a critical step forward in deciding to make all cases available to the public from January 1, 2014. In its judicial interpretation, the *Provisions of the Supreme People's Court on the Issuance of Decisions on the Internet by the People's Courts* (effective January 1, 2014), SPC required that "an effective judicial document of a people's court should be issued on the Internet."[66] For this purpose, the SPC set up an official website, www.court.gov.cn, for courts at all levels to submit their decisions that become effective.

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http://www.lijingao.com/cacnew/201304/2465087334.htm
The cases of 2013, Fa Ban (2014) No. 37, available in Chinese at:
http://www.fengxiaoqingip.com/jieshi/zscqsfjs/20150303/10196.html
The cases of 2014, Fa Ban (2015) No. 55, available in Chinese at:
http://www.law-lib.com/law/law_view.asp?id=496006

[58] *Case Anthology of People's Court (《人民法院案例选》)*See, all published editions are listed at:
http://www.court.gov.cn/yyfx/yyfxyj/alyj/rmfyalx/

[59] See, the content of the 1st edition of 2014 of the book at:
http://www.court.gov.cn/yyfx/yyfxyj/alyj/rmfyalx/201410/t20141023_198664.html

[60] See, the preface for *the Criminal Trial Reference* (total No.83), Law Press. China (《*刑事审判参考*（总第 83 集）》序言，法律出版社)

[61] *Criminal Trial Reference (《刑事审判参考》)"*

[62] See, Executive Law Enforcement and Adjudication, 2014(2), total No.64, China Legal Publishing House (《*行政执法与行政审判*》（2014 年第 2 集）（总第 64 集），中国法制出版社)

[63] See, the contents of the journals at: http://www.cqvip.com/QK/82516X/

[64] See, the news report, *Jiangsu Higher People's Court issued more than 800 model cases*, available in Chinese at: http://www.chinacourt.org/article/detail/2015/03/id/1572792.shtml

[65] See, the news report, *Chengdu Intermediate People's Court issued 10 cases for consumer protection*, available in Chinese at: http://sc.people.com.cn/n/2015/0314/c345509-24157997.html

[66] See, the full text of the provision in Chinese at:
http://www.chinacourt.org/article/detail/2013/11/id/1152212.shtml

Publishing cases is a commendable effort in light of the many courts that are involved. In response to the SPC directive, courts noticeably stepped up their efforts in publishing cases on the Internet but have yet to literally comply with the requirement. According to a survey by a national newspaper, compliance varies among the courts.[67] Sampling three provinces, Liaoning, Henan, and Guangdong, a survey shows that Guangdong and Henan were complying better than Liaoning. All intermediate courts of Henan and all intermediate courts of Guangdong, except Heyuan Intermediate People's Court, submitted their cases, but 6 out of 17 intermediate courts of Liaoning failed to submit any case. It is also not clear if cases decided in 2014 would be made available on the Internet.

D. Use of Cases

From circulating cases within the court system to requiring publication of all cases, the objective is clear -- past decisions should have a bearing on future cases. The question is how. The Court appears to struggle with how much the extent of past decisions should have a direct impact on pending cases.

For the select cases published on the SPC Gazette, which thus far are the most influential group of cases, the Court provides accompanying notes and comments that describe the relevant facts, summarize the judgment, and elaborate the significance of the case. The cases apparently are intended for instructive purposes.[68] The Court made this intention explicit on some issues of Gazette. For example, between 1985 and 1986, the SPC Adjudication Committee *(最高人民法院院审判委员会)* stated that the published decisions "can be references for all courts."[69] Moreover, between 1994 and 1999, every issue of the Gazette stated that "all judicial interpretation and cases of this Gazette have been discussed and adopted by the SPC Adjudication Committee."[70] The statement however is mysteriously missing from Gazette published after 1999.[71]

The statement from the Adjudication Committee is significant because the committee is the body that enacts judicial interpretations, which are binding on courts. It is not clear in a formal sense if the fact that the cases published have been discussed and adopted by the committee would be on par with judicial interpretations in legal authority. There appears to be certain formality requirements for judicial

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[67] See, the news report, *Supreme People's Court requires all decisions should be published on internet*, available in Chinese at: http://zqb.cyol.com/html/2014-03/19/nw.D110000zgqnb_20140319_1-07.htm

[68] See for examples, the preface of the 5th edition of *The Guidance of the Supreme People's Court Cases Related to Intellectual Property Rights,* China Legal Publishing House (《*最高人民法院知识产权审判案例指导*》第五辑，中国法制出版社)

[69] See, supra 11; And,
the example(Attachment 1), a case published on the 4th Gazette of 1985 - *华枝熙等与华宁熙等遗产继承案*.

[70] See, supra 11. The content of Gazette can be found on the paper edition of the Gazette.

[71] *Id.*

interpretations. They need to be "made in four forms, namely, 'interpretation,' 'provision,' 'reply' and 'decision'."[72] In practice, the Gazette cases are not treated as binding authorities. Neither are cases selectively published by the SPC, the SPC divisions and local courts.

For lack of clear authority and instruction, use of cases in legal practice are still varied and opaque. Nevertheless, increasing attention is being paid to cases. Generally, they are influential for the understanding of the law, more so for select cases in their respective field of specialty or jurisdiction. For example, the SPC's select IP cases often are the subject of conference topics and studied by judges and practitioners. In the court room, judges become more receptive to relevant cases submitted by parties informally. Some even ask parties to search for cases on a point of law. Judges are now more inclined to listen to arguments based on cases as opposed to ten years ago. Then, typically a judge will quickly refute such argument by stating that "we are not a case law country!"

Regardless of what transparently happens in courtrooms and despite no requirement to consult cases,[73] it is a common understanding that good judges pay attention to similarly decided cases. Cases do affect judicial decisions. A study conducted by Sichuan Higher People's Court and Sichuan University shows that 43.23% of surveyed judges believe they need to respond to the parties when they cite cases in support of their arguments, 22. 38% of judges believe they may respond to the party, 33. 94% of judges believe they will not respond to the party but will review the cited cases, and only 0.44% judges believe they will neither respond to the party nor review the cited cases.[74]

III. Guiding Cases

The decision to develop a guiding case system reflects a breakthrough in the Court's

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[72] See, the translation of the Article 6 of *Provisions of the Supreme People's Procuratorate on the Judicial Interpretation Work* :
Judicial interpretations may be made in four forms, namely, "interpretation", "provision", "reply" and "decision".
Judicial interpretations on the specific application of a certain law in the trial work or the application of law in the trial of the cases of a certain category or a certain kind of problems shall be made in the form of "interpretation".
Judicial interpretations on the formulation of the norms or opinions which are necessary for the trial work on the basis of legislation spirit shall be made in the form of "provision".
Judicial interpretations on the requests for instructions on the specific application of law in the trial work by the higher people's courts or the Military Court of the PLA shall be made in the form of "Reply".
The amendment or abolishment of judicial interpretations shall be made in the form of "decision".

[73] See, Hu Yunteng, *several issues regarding the case guidance system*, available in Chinese at: http://epaper.gmw.cn/gmrb/html/2014-01/29/nw.D110000gmrb_20140129_2-16.htm

[74] See, the 8th chart, *the Development and Improvement of Case Guidance System with Chinese Characteristic,* Sichuan Higher People's Court Sichuan University Cooperated Study Group (*中国特色案例指导制度的发展与完善*,四川省高级人民法院四川大学联合课题组)

approach for using cases in judicial decision-making. The *Case Provision* requires that all courts shall consult guiding cases as a reference when adjudicating similar cases. *Case Provision* includes ten articles prescribing what constitutes guiding cases and their authority.

A. Selecting and Publishing Guiding Cases

The *Case Provisions* prescribes the process for selecting, examining, and issuing the guiding cases. The standards for selecting guiding cases are provided in Article 2 of the *Case Provisions*. Only decisions in force are eligible. They are to be evaluated by the following criteria: 1) broad social attention; 2) relate to provisions that are general and principle in nature; 3) representative; 4) involve complex or novel issues; and 5) other guiding significance. A wide spectrum of the legal community could participate in the selection provided by submitting candidate cases. The SPC divisions, courts, members of the National People's Congress ("NPC"), members of the Chinese People's Political Consultative Conference ("CPPCC"), lawyers, and others may recommend cases.[75] The SPC set up a guiding case office for receiving and reviewing the recommended cases. Then, it will formulate its opinions and provide the recommended cases for review and adoption by the SPC Adjudication Committee.[76]

A guiding case is not necessarily the entire decision of the selected case. The selected case is subject to editing for its guiding significance. The reported guiding case may include a title, key words, summary of the judgment, relevant legal provisions, basic facts, the judgment, and reasoning.[77] The guiding case office is responsible for

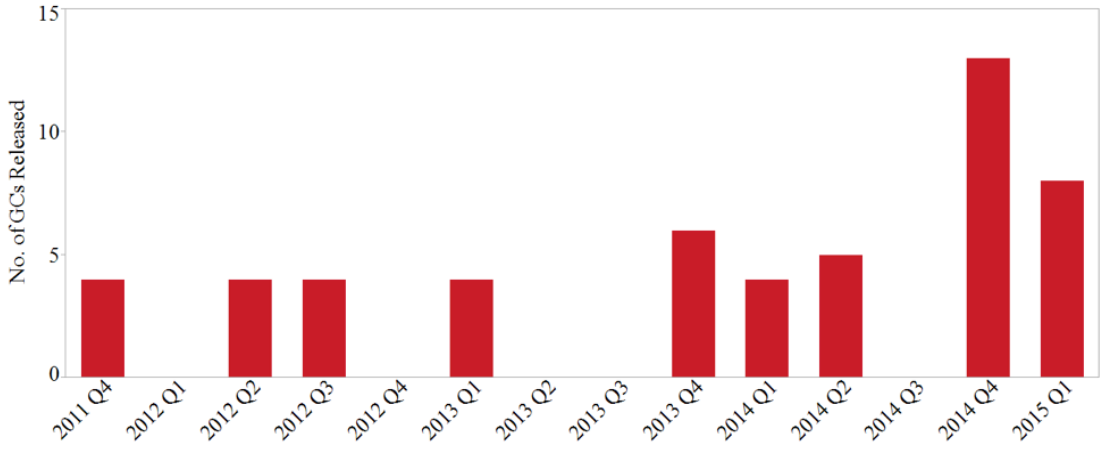
[75] Article 4 provides "where any trial division of the Supreme People's Court deems that a valid judgment rendered by this Court or the local people's court at any level complies with Article 2 of these Provisions, the trial division may recommend such a judgment to the Case Guidance Office.
Where a higher people's court or the Military Court of the People's Liberation Army deems that a valid judgment of this Court or a people's court within its jurisdiction complies with Article 2 of these Provisions, upon deliberation and decision of the Judicial Committee of this Court, it may recommend such a judgment to the Case Guidance Office of the Supreme People's Court.
Where an intermediate people's court or a basic people's court deems that any of its valid judgment complies with Article 2 of these Provisions, upon deliberation and decision of the Judicial Committee of this Court, it shall report to the higher people's courts level by level, and suggest that the higher people's court recommend such a judgment to the Case Guidance Office of the Supreme People's Court."
Article 5 provides "Where a NPC member, CPPCC member, expert, scholar, lawyer, or any other person from the general public concerned about trial or enforcement by the people's court, deems that a valid judgment of a people's court complies with Article 2 of these Provisions, the said person may recommend the judgment to the original people's court that rendered the valid judgment."

[76] Article 6 provides "the Case Guidance Office shall put forward examination opinions on recommended cases in a timely manner. Where cases comply with Article 2 of these Provisions, the Case Guidance Office shall request that the president, or the vice-president in-charge, submit the cases to the Judicial Committee of the Supreme People's Court for deliberation and decision-making."

[77] Article 3 of the *Detailed Rules for the Implementation of the Provisions of the Supreme People's Court on Case Guidance* provides "A guiding case shall consist of a title, key words, key points of judgment,

publishing the guiding cases.

Since the *Case Provision* came into force in 2010, SPC has issued 52 guiding cases.[78] They are released in ten batches. The last batch, containing eight cases, was released in April 2015.[79] The chart below summarizes the case releases.[80] These 52 cases cover a variety of laws and regulations.[81] IPR and anti-unfair competition cases, which are grouped together, comprise 7 of the 52.



B. Use of Guiding Cases

Guiding cases are the first kind of cases that are given clear authority. They are different from other published cases in several aspects. Guiding cases are legally defined. They are subject to a particular selecting and adopting process, much like judicial interpretations, and they have clear authority.[82] In adjudicating similar cases, courts are required to consult guiding cases. Furthermore, if guiding cases are cited by parties, courts must respond. If guiding cases are consulted, courts shall cite them in explaining their reasons for a decision.[83]

Courts have started citing guiding cases in their decisions. But such decisions are small in number at present probably because there are only a few guiding cases compared

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relevant legal provisions, basic facts, results of the judgment, judgment's reasoning, and notes including the names of the judges in the effective judgment, among others."

[78] See, the SPC's notice Fa (2015) No. 85, available in Chinese at: http://www.court.gov.cn/shenpan-xiangqing-14240.html

[79] *Id.*

[80] Cited from CGCP Project of Stanford University, available at: https://cgc.law.stanford.edu/guiding-cases-analytics/issue-4/

[81] *Id.*

[82] See, Hu Yunteng, several issues regarding the case guidance system, available in Chinese at: http://epaper.gmw.cn/gmrb/html/2014-01/29/nw.D110000gmrb_20140129_2-16.htm

[83] Article 11 of the *Detailed Rules*

with the enormous number of cases that courts are deciding every year.[84] One example is the case of *Feng Lielan v. Xue Chaoqing* decided by Anhui Yangshan County People's Court on August 14, 2015. The case involves a traffic accident, which led to the death of a person of old age after 134 days. A medical report assessed that the accident contributed 50% to the cause of the death. The plaintiff requested the defendant to pay full compensation for the death, citing Guiding Case #24 to support its claim. The court agreed that full compensation should be paid. The court however provided additional reasons for its decision, distinguishing the case at hand from that of Guiding Case #24. In its opinion, the other 50% contribution to the death are old age and poor health, which are not legal causes. Therefore, full compensation should be paid irrespective of the directives of Guiding Case #24.[85]

The same Guiding Case #24 was cited in another case *Li Chuantao v. Ji Yongzhen*. The case involves an issue in which the court of first and second instances disagreed. The defendant petitioned the SPC for review of the second instance decision by Shangqiu Intermediate People's Court on November 5th, 2014, ordering the defendant to pay full compensation for the death of the plaintiff in spite of a medical report determining that the traffic accident, for which the defendant is responsible, only contributed 40-60% of the death. The defendant contended that the court of second instance applied Guiding Case #24 in error. The SPC affirmed the judgment below. It also stated that Guiding Case #24 has reference value for cases of the same kind and was similar to the case at issue. Thus, a decision could be made in accordance with the guiding case.

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From the foregoing overview of the development of China's case law system, it is clear that Chinese courts are progressively paying more attention to their past decisions in judicial decision-making. Over the years, China has published selected cases for the purpose of better judicial decisions. In 2014, China made the decision to publish all cases. Cases in fact affect judicial decisions. China's guiding case system represents a new approach that gives definitive authority to cases and uses them in judicial decisions. This apparently is not the end point of development but rather a starting point of further exploration. With an exemplary use of guiding cases and availability of all cases, the impact of cases on judicial decision is quickly evolving. As if to indicate there is more to come, the SPC recently established a research center at the Beijing IPR Court for the study of case usage in judicial decisions. It is fair to predict

[84] See, Liu Zuoxiang, *The latest Developments and Problems of China Case Guidance System*, Oriental Law, 2015(3) (刘作翔, *中国案例指导制度的最新进展及其问题*,《东方法学》2015 第 3 期)
[85] See, attachment 2, the decision of the court, (2015) DangMinYiChuZi No.01361 ((2015)砀民一初字第 01361 号)

that better use of cases can enhance the predictability of the law and the credibility and authority of the courts and contribute the China's rule of law.

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