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PERSPECTIVE

China: a game of cooperation and competition

By Howard Miller

For three days in Beijing at the end of May, Chief Judge Randall Rader of the U.S. Court of Appeals for the Federal Circuit and six of his court colleagues, Kong Xiangjun, Chief Judge of the Intellectual Property Rights Tribunal of the Chinese Supreme People's Court and his colleagues, joined over 1,200 other Chinese judges, law professors, lawyers and students, and over a hundred U.S. lawyers in a breathtaking comparative review of U.S. and China intellectual property procedures and laws.

The driving force behind this formally titled, government approved "United States — China IP Adjudication Conference," hosted by the China Law Society, was Chief Judge Rader, who, in the interests of fairness as well as efficiency, has made a priority of outreach to other countries. While the federal circuit does not handle copyright cases, the IPR Tribunals of the Chinese courts handle all intellectual property disputes, copyright and trade secrets, as well as patents and trademarks, all of which were the subject of candid panels, simultaneously translated in Mandarin and English. The many panels included active and thoughtful participation by all the judges — from the federal circuit, Chief Judge Rader, Judge Raymond Clevenger III, Judge Richard Linn, Judge Timothy B.



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Courtesy of Howard Miller

From left, Howard B. Miller of Girardi | Keese, Kong Xiangjun, Chief Judge, Intellectual Property Rights Tribunal, Supreme People's Court, People's Republic of China, and Randall R. Rader, Chief Judge, U.S. Court of Appeals for the Federal Circuit.

Dyk, Judge Sharon Probst, Judge Kimberly A. Moore, and Judge Jimmy V. Reyna. The Chinese judges all showed remarkable familiarity with U.S. law. Many had studied for extended time in the U.S. at leading law schools with well know IP professors and programs.

The civility was not just a ritual. It was between those who know there are differences, but are com-

mitted to knowing each other and finding understandable, reasonable solutions to their challenges.

Oliver Wendell Holmes' "felt necessities of the times" were expressed by Professor Liu Chuntian, the leading Chinese intellectual on copyright issues, President of the China Intellectual Property Law Society and Dean of the School of Intellectual Property Law at the Renmin University Law School.

Professor Liu, in a central plenary address, gently but piercingly told the group that "modernity and the west are no longer synonymous."

That comment played out in discussions of comparative litigation processes. In dispute resolution the major Chinese policy focus was on cost, time, and the collateral effects on business planning of uncertainty and long delay. In China, the statute of limitations for patent infringement cases is two years; case are decided in the trial court within six months from filing, without discovery; appeals are decided within three months after the trial judgment. Chinese business leaders who spoke were complaining even about that, and calling for even more rapid resolutions.

Though the U.S. delegates and judges did their best to defend aspects of the American system, especially jury trials, there was an undercurrent of understanding that the U.S. system has become so expensive and takes so long that some adjustments need to be made. Ideas that were seriously considered by one panel included a process for early identification of disputes of law that could be resolved by very early motions for partial summary judgment, and a focus on early consideration of certain procedures that may not require extensive discovery, such as Markman claim construction hearings in the U.S.

The copyright and trademark discussions were more substantive than procedural. Discussions of the issues of secondary liability of service providers and other intermediaries for copyright infringement and other additional rights in China were "interesting," as in "may you live in interesting times." The Chinese judges and lawyers were as intimately familiar with the Digital Millennium Copyright Act and the most recent decisions

on it from the 2nd and 9th Circuits as any copyright specialist in the U.S. And the Chinese asserted analyses from every U.S. trademarks case that had upheld the rights of a new registrant in a geographic area where there had been no prior registration or use by a trademark holder from a foreign jurisdiction.

As so often happens at these conferences, the unplanned provides the dessert. My co-moderator on the main program's copyright panel, Professor Zhang Chu from the China National University of Political Science and Law, invited me to talk to his intellectual property class. Professor Zhang is also the leader in Chinese patent studies, and his 2010 book in English, "Chinese Patent, Legal System and Practice," is read around the world.

But the discussion in the class — English only, no Mandarin translation required, unusual give and take in a Chinese classroom — focused on the relationship of IP and commercialization, especially the operation in the U.S. of the Bayh-Dole Act, how it works to finance research at universities, provides incentives to patent development, and the importance of the one year grace period to file a patent after publication of research. These issues in theory were not new to the class. What they wanted was the practical

perspective of someone who had worked on issues in the U.S.

Earlier in the day, again unplanned, I was invited to meet with executives and the general counsel's office of Baidu — for well-known reasons the dominant Chinese search engine. From its campus, the architecture of the building, the discussion of business models, the knowledge of U.S. law, there was little way to know whether the meeting was in Menlo Park or Beijing.

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We are in a curious period of difference and convergence, competition and cooperation, understanding and a great risk of misunderstanding. And all this is made more interesting by different time horizons of Chinese and Western Civilization. As recently as the 18th century China was the wealthiest country in the world. For many Chinese, the 19th and 20th centuries, and the actions between the West and China, none of which they have forgotten, were just a temporary

interruption in a history in which China was always the dominant power.

Henry Kissinger, in his remarkable book "On China," contrasts the central western game of strategy, Chess, where separate pieces have known moves, the object is to kill the King, and there is a chess clock limiting the time of the moves, with the central Chinese strategic game, known throughout Japan and in the West as "Go," a game of identical intersecting lines, with undifferentiated white and black stones contesting for control of space, in which patience and position are the keys. There is no clock and no time limit. The game reflects thinking in generations rather than quarterly reports. IBM's Computer Deep Blue can defeat the world's chess champion.

There is no known computer program that can play successfully against a master of Go, and no estimate of when there might be one. Technology is important, but we are beyond technology here, working to achieve a modernity that is not just western, but achieves the goal of a developing, cooperative global legal system. We are in a game only for the human mind and heart, with all their capacity for illusion and insight, ignorance, and education, empathy and cruelty. A great deal will depend on whether we succeed.