

The Confusion and Correction of the Technical Investigator System

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Abstract

State Intellectual Property Office of China (SIPOC) issued the *Provisions on the Participation of Technical Investigation Officers in Administrative Decisions on Patent and IC Layout Design Infringement Disputes (Provisional)* in 2021, which is a further improvement of the refined technical investigation officer system, but the “multiple selective” type of service and the “one-person court appearance” model are obvious drawbacks. The disadvantages of the “multi-selective” mode of service and “one person in court” are obvious, and the mode of service of the technical investigator is worth exploring. Should optimize the number of technical investigators in court and the establishment of “full-time driven by part-time” with the mechanism, change the full confidentiality and objectivity of the technical investigation opinions for moderate disclosure, limiting the participation of expert jurors in the first trial of difficult technical facts, with the conflict of rank rules, refining the new rules to identify the problem of difficult cases of opinion attributes.

Keywords: technical investigating officer, technical investigating opinion, provisional regulations, technical facts

1. Introduction

The lack of knowledge in the field of technical facts of judges and the problem of long delays in litigation has created the establishment of the technical investigator system in China, for the shortcomings of judges in the field of professionalism, the technical investigator system from the legislative intent to make up well. Since 2014, China's technical investigator system in the implementation phase gradually mature, but there is still room for improvement,

especially in the conflict between the rights of the parties and the judge. The problem of uneven efficacy due to the multi-selective selection and sole court settings, the public's low credibility in the face of absolute confidentiality of technical investigation opinions, the introduction of the technical investigator system composed of the “four-in-one” mechanism has repeatedly conflicted with the new rules for technical investigators in difficult cases by expert advice issued by the secondary opinion of the property is not determined. Famous

Justice Cardozo: “The law is like a journey, it must be prepared for tomorrow, it must have the principle of growth”. This article is based on the above-mentioned confusion and proposes possible corrective measures, with a view to eliminating the shortcomings and making the establishment of technical investigators meet society’s expectations for judicial efficiency and professionalism, and to maximize the combined effect of judicial resources. (Lei Chen, 2017) The confusion of the technical investigator system in the intellectual property courts is the subject of this article, and the selection, establishment, and articulation of the technical investigator system are the main aspects of this article.

2. Confusion in the Implementation of the Technical Investigation Officer System

2.1 “Multi-Selective” Selection and “One Person in Court” Settings Lead to Uneven Effectiveness

The criteria for the selection and appearance of technical investigation officers are pivotal to the functional effectiveness of the system. The Provisional Regulations 2021 refine the sources and selection of technical investigation officers, and list some organizations as the scope of selection. The State Intellectual Property Office and the local patent administrative authorities manage the construction of national and local technical investigation officers (pools) respectively. For any system to be most effective, it is necessary to make the various provisions have harmony with each other. As early as 2019, the Trial Provisions have clearly pointed out the condition of needing more than 5 years of work experience in the relevant field, but the 2021 Provisional Provisions have not made a refined and unified implementation standard for the basic issue of selection criteria for technical investigation officers, so the current technical investigation officer system in China The first problem with the current technical investigation officer system is the ambiguity of the selection criteria. (Changchao Li, 2017) The vagueness of the selection criteria has led to a wide variation in the implementation of the selection rules by the major courts, from the four IP courts (Beijing, Shanghai, Guangzhou, and Hainan) to the various IP courts. One of the Trial Rules clearly states that more than five years of experience is required, but this is not the case in practice. For example, one of the selection requirements for the Shanghai Intellectual Property Court is more than 5 years of experience in the relevant technical field, while the selection requirements

issued by the Zhengzhou Intellectual Property Court in Henan Province only require more than 3 years of experience in the relevant technical field, which is obviously one of the selection requirements issued by the Nanjing Intermediate People’s Court is having received systematic education and training in the relevant technical field, and having a technical title of intermediate level or above in the technical field. (Jun Yi & Qing Li, 2017) In addition, the current role of part-time technical investigators in court practice is not sufficient. On the one hand, the main reason based on the disadvantages of part-time itself is that the state of part-time is prone to other matters outside of this, compared with full-time part-time prone to conflicts of service. This also explains a common phenomenon in the courts, and it is difficult to identify the appropriate and ready to participate in technical investigations; at the same time, our country for the technical investigators to appear in court are taken “one person to appear” model, “one person model” conclusion has undeniable, based on the diversity, novelty and complexity of technical facts, there will be a blind spot of knowledge will inevitably occur in its field of absolute attributes of the technical investigator, technical facts are broadly divided into two categories of simple and complex, the former “one-person model” can be easier to deal with, and to arrive at a more accurate opinion. The latter “one-person model” results in a review opinion that can easily cause the parties to challenge. It is noteworthy that in Germany, where the technical judge system is implemented, there are usually three technical judges in the full court, (Huajun Liu, 2012) which is worthy of study in China.

2.2 Technical Investigation Opinions into the Public “Difficult to Be Satisfied” Dilemma

Technical investigation opinion as the most outstanding contribution of the technical investigation officer, but in the court except for the judge no one knows, not only the fact that the parties have a difficult psychology, the fact that the technical investigation officer’s investigation report also has the possibility of error. The technical investigation opinion is completely closed to the public is stipulated in the 2019 introduction of “certain provisions”. Although the additional changes than the previous “temporary provisions” after a five-year transition period, but this provision is still controversial. When a judge in the face of

the unknown technical field, but also to serve the “shall not refuse to adjudicate” rule, the judge is in a dilemma, at this time the technical investigation officer’s technical investigation opinions become his only “straw”. This “lifeline” is defined as non-disclosure. This seems to be a collegial court and other internal communication of the fact that the “grass”, the provision shows that the technical investigation opinion it does not accept the parties to the questioning, access to the interpretation of the technical investigation opinion, it will not have an impact on the judge’s free new evidence, the interpretation is like a fairy tale “the emperor’s New clothes” like, even if not legal professionals, the law has the most simple faith in the people can obviously feel the investigation has become an important part of the litigation information. In this rule, national legislation has different provisions, Japan and South Korea’s practice is not to disclose, Taiwan’s practice is part of the public, theoretical and practical arguments. (Zhijian Yao & Fanghui Liu, 2019) Various issues, theoretical controversy, practical application is not yet mature.

2.3 The “Four-In-One” Mechanism Is Prone to Articulation Conflicts

Before the technical investigation officer system, China already exists by the judicial appraisal, expert support person and expert jurors composed of the “trinity” pattern. (Xiuqing Yang, 2020) The problem of conflict between each other in practice is still unresolved, and now join the technical investigator system and form a “four-in-one” pattern, the judicial technical support staff revised to trial support staff is considered a major highlight of the “provisions”, but not the interface between the judicial appraisal, expert support personnel, expert jurors and other personnel Synergistic relationship between the implementation of the rules, the interface between the problem is worthy of concern.

Judicial appraisal institutions in China for many years, with a wide range of technical fields, more mature advantages, but along with the irregular identification process, false identification of events, identification is not as absolutely authoritative as in the past, especially the application of a party, will lead to extreme distrust of the other party, certain identification with serious interests and even judges can not be convinced. The system of expert supporters comes from Article 79 of China’s Civil Procedure

Law, which stipulates that parties may apply to the people’s court to notify people with specialized knowledge to appear in court to give professional opinions, (Liuting Ling, 2017) but because the expert supporters hired by the parties have obvious interest inclination, it is difficult for their published opinions to be credited by the judges. (Lingyan Zhang & Yanjun Liu, 2020) The most different from the first two is the expert juror system. Although expert jurors are different from technical investigators, they are related to technical facts. Based on the trial status of expert jurors and the source of their selection, they may not have sufficient knowledge of certain specialized fields and may conflict with technical investigation opinions, but expert jurors can participate in the deliberations and thus increase the objectivity of the decision. Compared with the first two, the influence of expert jurors on technical investigation opinions is the most direct and effective, and needs to be refined.

3. The Technical Investigation Officer System to Correct the Confusion of the Path to Choose

3.1 Increase the Number of Technical Investigation Officers While Establishing the Principle of “Full-Time to Drive Part-Time”

First, strengthen the implementation of the “Trial Rules” on the selection criteria of technical investigators, while the requirements of the “Trial Rules” should be synchronized, the details of which are more detailed, to make up for the current dilemma of the State Intellectual Property Office “2021 Interim Provisions” is not mentioned, to correct the inconsistency of the courts on the conditions for the selection of technical investigators, to improve the credibility of technical investigators.

Second, increase the number of technical investigators in court. Most of the current IP courts have assigned a technical investigator to participate in the technical fact-finding of cases. (Min Yi & Zefei Hu, 2020) The biggest drawback of the “one-person model” is the lack of authority of the technical investigation opinion, which causes the parties to disagree with the outcome of the decision, and increases the number of second instance procedures and wastes judicial resources, which is completely contrary to the original intention of the technical investigation officer system to improve trial efficiency. Therefore, I suggest adding the clause “the judge according to the degree of difficulty

of the case, depending on the circumstances to determine the number of technical investigators, the default is one person to appear in court, when the technical investigator found that the technical facts are difficult to propose an increase in the deployment of technical investigators". German model of two to three people effectively improve the degree of recognition of technical facts worth learning from us, not only to enhance the overall credibility of the judiciary, but also to reduce the chances of encountering technical blind spots and improve the degree of authority of technical review opinions.

Finally, the establishment of the principle of "full-time driven by part-time". According to the different characteristics of full-time, part-time types of technical investigators, to complement the strengths and weaknesses so as to establish the "full-time with part-time" principle. Full-time technical investigators serve in the court for a long time for technical skills, professionalism has a significant role in the accumulation of experience and review the ability to improve the stability of part-time technical investigators can not reach the speed of full-time technical investigators is to drive part-time technical investigators to form a coordinated development, with the key to efficient team, to make up for the disadvantages of full-time technical investigators in the narrower range of technical areas, complementary part-time technical investigators in the writing of professional instruments and legal process knowledge weaknesses, so the adoption of multiple court system technical investigator system at the same time, the full organic integration of part-time and full-time technical investigators. Specifically with at least one full-time technical investigator, the rest of the use of part-time technical investigators, the advantages of the accumulated experience of full-time technical investigators, business skills and high quality at the same time, to achieve full-time and part-time technical investigators to complement each other's strengths and weaknesses, to fully demonstrate the technical investigators in the technical facts of the trial to help create a harmonious atmosphere of advice, so that judges and parties more convinced.

3.2 To Increase the Application of Moderate Disclosure of Technical Investigation of the Provisions of the Opinion

The emergence of surprise decisions is not only

among the parties, the judge may also become a real surprise judge, the impact of judicial credibility often begins with the parties to the decision is not convinced, the "provisions" of the technical investigation of the opinion of the complete non-disclosure of this phenomenon, leading to an increase in the probability of appeal, leading to a second trial and also reduces the efficiency of the judicial process. If the "provisions" to add this clause "if the parties to the technical investigation officer's interpretation of the existence of significant doubt, you can apply to the judge to disclose the technical investigation opinion, the judge according to the complexity of the case and the reasons for the parties to the request, that should be disclosed, you can disclose part of the technical investigation opinion" may not be a good idea. Action. So moderate public, because the content of the technical investigation is often composed of two parts, respectively, is related to the objectivity of the public domain information and conclusions or the case related to the evidence material and by the technical investigator based on the formation of a specific case judgmental conclusions. The former content for the parties may understand the extent of the technical investigator more clearly than the technical investigator, the technical investigator is not perfect, the technical investigation is the same, the absolute hidden absolute disbelief, the technical investigation of the moderate public opinion can effectively alleviate the conflict. From a side perspective, the moderate disclosure of the parties to the inner doubts has the effect of release, the possibility of expectation for the case to win or lose with the debate gradually become clear, the technical facts of the features involved, whether the scope of rights fall into the objective understanding of the parties to the heart of the conviction of the technical investigation is a happy ending.

3.3 Clarify the "Four in One" Conflict Effectiveness Rank Application Rules

Expert jurors should not interfere too much with the technical fact-finding area, and it is good to limit expert jurors to participate in first instance IPR cases with strong technical facts. However, we can add a clause that "expert jurors shall not participate in major and complex technical cases heard by the Supreme Court of Intellectual Property throughout the country". This will not only maintain the rank of legal effect, but also solve the problem of conflict between technical

investigation opinions and expert jurors.

Secondly, the rules of ranking of expert opinions and technical investigation opinions should be increased. If there is a conflict with the identification or expert support person's recommendation, the existing provisions also have no clear rank properties, according to the parties to win the psychology will continue to require re-identification or technical investigation opinions re-made endless dilemma. At this point should be clear in the "provisions" when several technical investigators unified views, if the identification and technical investigation of the obvious conflict of opinion, the effectiveness of the latter priority. Make it clear that the expert support person can only be used as a judge in the technical investigation after hearing the opinion of reference. Expert support person based on the bias of the system, the characteristics of the service for a party, its views are difficult to be credited by the judge, the author believes that it is more suitable as a supplementary note.

Dedicated technical investigators of the type of establishment leads to its neutrality and objectivity than part-time technical investigators, the interests of the weaker tendency to be verified in the full-time technical investigators, for the review of the results of the guarantee has an important supporting role. Therefore, as an insider feature, the full-time technical investigator's opinion for the judge, the parties are more reliable, so when the full-time technical investigator with the part-time technical investigator consists of a multi-person technical investigator's opinion and the judicial appraisal report or expert support person recommendations conflict, but also provide for the priority of technical investigation opinions.

In addition, refine the "2021 Interim Provisions" when the technical investigator is difficult to determine the secondary advice to experts: should be defined as a technical investigation opinion rather than expert support person opinion. "2021 Interim Provisions" Article 6 provides that the technical investigator is difficult to choose the premise that experts can be consulted to make the opinion, the use of technical investigators difficult to decide after the hiring of expert advice should be defined as a technical investigation rather than expert support person opinion, not only to avoid the aforementioned conflict of rank, but also more in line with the original intention of the technical

investigator case provisions: to assist judges to more accurately find the disputed facts, to make a decision.

4. Conclusion

Although the technical investigation officer system belongs to a young system rooted in China, it has already produced an inestimable and useful supplement to the trial of technical fact cases and to make up for the lack of professional and technical knowledge of judges. As the system is accompanied by the real needs of technical factual trials and intellectual property courts have been established under the background of a new system, from the initial borrowing of foreign systems and technical experience to the integration of China's real national conditions to explore the development, so there are not full of law, the system rules are not complete, the system is not appropriate and the diversity of practice problems, this paper to the technical investigator's perspective, from the technical investigator system judicial operation. This paper, from the perspective of the technical investigator, from the judicial operation of the technical investigator system based on the analysis of the real situation, to explore the most practical system operation issues, the technical investigator system in China to improve the legal provisions of the refinement of supplementary research, and hope that the technical investigator system in future cases in trial practice have been enlightened.

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