

INFLUENCING THE EVOLVING IP SYSTEM AND LAW  
OF CHINA THROUGH INTERNATIONAL OUTREACH

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*No individual U.S. judge has influenced the evolving IP system and law of China through international outreach more than Chief Judge Rader of the Federal Circuit. Through tireless efforts, he has made an indelible footprint in the history of Chinese IP law as a judge, a professor, and an author. Chief Judge Rader has garnered rock-star status in China through dedication and commitment to contribute to, and to be a part of, China's IP system and law. He has secured a legendary standing and will be long remembered by the Chinese IP community as an ambassador of IP and judicial goodwill.*

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## INTRODUCTION

Undoubtedly, Chief Judge Randall R. Rader of the U.S. Court of Appeals for the Federal Circuit (CAFC) is the most well-known U.S. jurist in China's intellectual property (IP) community. Recognized as one of the world's 50 most influential people in IP by the *Managing Intellectual Property* magazine,<sup>1</sup> Chief Judge Rader has garnered rock-star status in China through dedication and commitment to contributing to, and to being a part of, China's evolving IP system and law. Chief Judge Rader firmly believes in bringing together judiciaries of the two nations to strengthen IP protection and enforcement.

During more than two decades of distinguished service at the CAFC, Chief Judge Rader has led and hosted dozens of IP delegations to and from China to increase understanding of the importance of innovation and to promote strong IP laws and systems. Serving as a judicial ambassador of IP in China, he has forged strong relationships with the highest levels of IP leaders in China, including those at the Supreme People's Court of the People's Republic of China and the State Intellectual Property Office (SIPO). Through his extensive and tireless efforts, Chief Judge Rader has made an indelible footprint in the history of Chinese IP law as a judge, a professor, and an author.

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<sup>1</sup> *Meet the 50 most influential people in IP*, MANAGING INTELL. PROP., July/August 2010, at 28.

## I. BRIEF BACKGROUND ON CHINESE IP LAW

China has a relatively nascent IP system. Concomitant with China's open-door policy to promote foreign trade, China started recognizing and providing IP protection in 1979.<sup>2</sup> Since that time, China has undergone a sea of change. A year later, in 1980, China joined the World Intellectual Property Organization (WIPO) and, a few years later, in 1985, joined the Paris Convention for the Protection of Industrial Property Rights.<sup>3</sup> In 1994, China joined the Patent Cooperation Treaty (PCT) and, in 2001, joined the World Trade Organization and ratified the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).<sup>4</sup> Along with rapid internalization came China's first patent law in 1985, now in its Third Amendment.<sup>5</sup> Significantly, SIPO was established in 1980.<sup>6</sup>

In the last two decades, China has made great efforts to improve and strengthen its IP systems through laws and policies. China engaged in exchanges and cooperation with the United States and other countries regarding IP.<sup>7</sup> Since 2003, China and the United States have annually held round-table conferences on IP rights and protection and have reached agreement on many IP-related issues.<sup>8</sup> SIPO issued statistics that the number of new patent applications filed in 2011 exceeded 1.6 million.<sup>9</sup> That far

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<sup>2</sup> *A Brief Introduction on Chinese Patent Law System and History*, CHINA COM. L. FIRM (Jan. 20, 2011, 11:24 AM), <http://www.chinalawfirms.cn/practice-areas/intellectual-property/ip-protection/802-a-brief-introduction-on-chinese-patent-law-system-and-history.html>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Wenting Cheng, *Third Revision Of Patent Law In China*, INTELL. PROP. WATCH (Sept. 8, 2009, 3:13 PM), <http://www.ip-watch.org/2009/09/08/third-revision-of-patent-law-in-china/>.

<sup>6</sup> ST. INTELL. PROP. OFF., <http://english.sipo.gov.cn/> (last visited May 3, 2012).

<sup>7</sup> *Improvements for Chinese Patent and Other IP Protections*, CHINA COM. L. FIRM (Jan. 20, 2011, 11:21 AM), <http://www.chinalawfirms.cn/practice-areas/intellectual-property/ip-protection/801-improvements-for-chinese-patent-and-other-ip-protections.html>.

<sup>8</sup> *Id.*

<sup>9</sup> *Tian: Patents Crucial Issue in Today's Global Landscape*, ST. INTELL.

eclipses filing levels at any patent office in the world, including that of the United States.

## II. CONTRIBUTIONS AS A JUDGE

As a judge, Chief Judge Rader has significantly impacted China through judicial decisions and international outreach. That impact is felt from the highest levels of leaders in Chinese IP courts to law students in training to become future leaders in China. Chief Justice Kong Xiangjun of the IP Tribunal of the Supreme People's Court of China stated the following when asked to comment on Chief Judge Rader's contributions to the Chinese IP system and law:

The patent judicial system of the United States is highly developed. For a long period of time, the communication and cooperation with American courts in the field of patents have been highly valued by Chinese courts. And our courts pay much attention to the developments of U.S. patent judicial system. The CAFC is the most crucial judicial institution for patent cases in the United States, and its Chief Judge Rader is an important organizer and participant of Sino-America patent judicial systems' exchange activities in recent years. He has visited and given speeches to the Supreme People's Court of China several times. In addition, he has been invited to attend some international IP seminars hosted by the Supreme People's Court of China and to exchange ideas with local judges. Through Chief Judge Rader's introduction, Chinese judges have gained information about the concepts, current trends, and significant cases regarding patent protection in a timely manner and had opportunities to learn from some beneficial practices used in American courts. His intellect, erudition, and vigor

deeply impressed Chinese judges. I have known Chief Judge Rader for many years, and we have forged a profound friendship. Both my colleagues and I believe that Chief Judge Rader is an important ambassador in promoting communication between these two great countries and [that] he has played a significant role in promoting the development of judicial patent protection in China. I sincerely hope that Chief Judge Rader and the CAFC will continue to conduct in-depth exchanges with China in the patent field, and look forward to our everlasting friendship!<sup>10</sup>

As Chief Justice Kong so eloquently stated, China pays close attention to the development of U.S. patent case law. Key decisions of the CAFC are the subject of frequent discussion in China, and Chief Judge Rader's opinions attract wide attention.

A classic example is the CAFC's decision in *In re Bilski*,<sup>11</sup> in which Chief Judge Rader wrote a dissenting opinion, later cited with approval in the U.S. Supreme Court decision. That case and the issue of statutory subject matter generated great interest and much debate in the Chinese IP community. Chinese legal practitioners and academics have written commentaries on the *Bilski* case with wide-ranging views. For example, Chinese patent practitioners have opined on China's own treatment of business-method patents:

As a nation relatively lagging behind in the IPR field, China should intensify its research on business method patent theory and legislation, and study of cases in the area, draw on the experience of the developed countries, such as the U.S., Japan and European countries, learn from their lessons, work out a precise and reasonable line of demarcation of the scope of patent eligibility of business method

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<sup>10</sup> Honorable Kong Xiangjun, Chief Justice, IP Tribunal, Supreme People's Court of the People's Republic of China (February 6, 2012).

<sup>11</sup> 545 F.3d 943 (Fed. Cir. 2008) (en banc).

patent, and, in the meantime, enrich and refine the relevant rules and procedure of examination. . . .<sup>12</sup>

The record number of amicus briefs submitted in the *Bilski* case before the U.S. Supreme Court—more than 60—also made a strong impression on Chinese lawyers. Another Chinese patent practitioner contemplated an amicus curiae system for China and stated that:

although we currently do not yet have the conditions to develop [an] amicus curiae [system], when we all pay attention, especially, when those powerful forces advocating the administration of justice for the masses truly recognize [the amicus curiae system], who can say an amicus curiae system in China could not rise to the occasion?''<sup>13</sup>

Similarly, in *AT&T v. Microsoft*,<sup>14</sup> Chief Judge Rader wrote a dissenting opinion later adopted by the U.S. Supreme Court addressing extraterritorial enforcement of U.S. patents. The question presented was whether Microsoft's liability extends to computers made in another country when loaded with Windows software copied abroad, in this case China, from a master disk sent from the United States. At a judicial education program involving a group of 25 high-ranking judges from across China visiting the United States, Chief Judge Rader asked the Chinese judges to cast votes on whether infringement occurred when Microsoft mailed the disk overseas or whether infringement occurred each time a copy was made in China from the master disk, with most Chinese judges indicating the latter.<sup>15</sup> When Chief Judge Rader stated that the U.S. Supreme court ruled differently and agreed with the

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<sup>12</sup> Steve Song & Guowei Liu, *Patent Eligibility of Business Method in China from US Perspective*, 1 CHINA PATENTS & TRADEMARKS 54, at 59.

<sup>13</sup> Xu Yang, *The Bilski Case in the Eyes of Chinese Lawyers*, TAHOTA L. FIRM (Feb. 3, 2010, 11:06 AM, Original in Chinese), [http://www.tahota-lawyer.com/epaper\\_content.asp?id=1655](http://www.tahota-lawyer.com/epaper_content.asp?id=1655).

<sup>14</sup> 414 F.3d 1366 (Fed. Cir. 2005).

<sup>15</sup> Jeff Jeffrey, *Federal Circuit Judge Rader Offers Chinese Judges a Primer in IP Law*, THE BLT: THE BLOG OF LEGAL TIMES (Apr. 15, 2012, 11:39 AM), <http://legaltimes.typepad.com/blt/2009/09/federal-circuit-judge-rader-offers-chinese-judges-a-primer-in-ip-law.html>.

CAFC's dissent, not naming himself, Chinese judges reacted with surprise.<sup>16</sup> Chief Judge Rader explained that if AT&T wanted to block infringement of its patent abroad, AT&T should obtain foreign patents.<sup>17</sup>

In addition to influencing Chinese judges and laws through landmark decisions, Chief Judge Rader willingly shares his knowledge of U.S. IP law and practice. Chief Judge Rader is well-recognized in China as a leading authority on U.S. IP law. In 2004, a delegation of Chinese IP judges organized by the Supreme People's Court of China attended a seminar on IP protection in Washington, D.C.<sup>18</sup> The seminar covered a wide variety of IP litigation topics, including evidence disclosure, expert witnesses, management of confidential information, drafting of judgments, and appeals.<sup>19</sup> During the seminar, Chief Judge Rader openly shared his experience of the litigation process, including the need to handle and understand highly complex technical issues to construe claim terms and to make ultimate determinations on infringement and validity.<sup>20</sup>

Chief Judge Rader's international judicial exchange also took place in China. In late July 2007, for example, he participated in a meeting at the Supreme People's Court of China with a group of leading IP authorities, including the then-Commissioner of the Trial Committee and Chief Justice of the Third Civil Trial Chamber (Intellectual Property Right Trial Chamber) of the Supreme People's Court of China, Mr. Zhipei Jiang, to exchange opinions on patent law legislation and adjudication.<sup>21</sup> Chief Judge Rader inquired about patent law reform in China and shared his views with the Chinese judges on the law-making processes,

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Intellectual Property Litigation in the U.S.*, XI'AN JIAOTONG UNIV. (Mar. 10, 2012, Original in Chinese), <http://xjtust.edu.cn/ziliao/show.php?bid=7&listid=1495>.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Memo for a Meeting Two Years Ago between Chinese and U.S. Judges*, JUDICIAL PROT. OF IPR IN CHINA (July 28, 2009, 8:59 AM, Original in Chinese), <http://www.chinaiprlaw.cn /file/2009072815470.html>.

statute of limitations in patent law, and patent infringement issues under Chinese and U.S. laws.<sup>22</sup> At the conclusion of the meeting, Justice Jiang expressed his thanks to Chief Judge Rader: “We are very glad that U.S. judges and Chinese judges can meet together to discuss professional and legal issues.”<sup>23</sup>

A month later at the U.S. Patent and Trademark Office (USPTO), Chief Judge Rader conducted another IPR forum roundtable discussion with Chinese judges and Chinese R&D-based Pharmaceutical Association in China.<sup>24</sup> During the discussion, Chief Judge Rader recounted his discussions with Chinese judges on patent law reform in China, including the need for higher levels of damages, increasing the two-year statute of limitations, and the possibility of promulgating Chinese law similar to the Hatch-Waxman Act, which he helped draft while serving as counsel to the Senate Judiciary Committee.<sup>25</sup>

Chief Judge Rader brings the judiciaries of China and the United States closer through active bridge-building. In his presentations to Chinese judges and patent professionals, he discusses U.S. IP law and the importance of IP to a country’s economy, and he encourages a robust and comprehensive Chinese IP system. In his presentations to U.S. judges and patent professionals, Chief Judge Rader explains efforts that China has made in improving IP protection and affirms the progress achieved. In a recent presentation at the William Mitchell College of Law in 2011 discussing the most pressing issues in IP law, Chief Judge Rader commented that “Chinese judges are incredibly sophisticated in their understanding of the law, and . . . they are making great progress in implementing intellectual property reforms.”<sup>26</sup> Chief Judge Rader further explained the reason why he

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *IPR Forum Roundtable with Federal Circuit Judge Rader*, THE AM. CHAMBER OF COM., PEOPLE’S REPUBLIC OF CHINA, <http://www.amcham-china.org.cn/amcham/show/news.php?Id=496&f=1&PHPSESSID=cfd71f52bfb99> (last visited Apr. 3, 2012).

<sup>25</sup> *Id.*

<sup>26</sup> Randall R. Rader, *Transcript: The Honorable Judge Randall R. Rader, Chief Judge for the Court of Appeals for the Federal Circuit: The Most Pressing Issues in IP Law Today*, 2 CYBARIS: AN INTELL. PROP. L. REV. 1, 6 (2011).

has made so many trips to China for outreach to Chinese judges: “If we are not invested in influencing their decision making, how can we expect them to improve?”<sup>27</sup> He also mentioned that China has surpassed Japan and Korea to become the second largest patent-application filer in the USPTO in 2010.<sup>28</sup> While recognizing past challenges, Chief Judge Rader shared his “hopes for improvements and hope[s] to be part of the process that makes that happen.”<sup>29</sup> At the 2011 E.D. Texas judicial conference, Chief Judge Rader also advocated the need for an international standard of judicial performance.<sup>30</sup>

Through outreach to the Chinese judiciary, both in China and the United States, Chief Judge Rader is helping to foster better understanding of U.S. IP laws and systems and to shape the development of Chinese IP laws and systems. His exemplary efforts have made him a well-recognized and a much-appreciated American jurist in China.

### III. CONTRIBUTIONS AS A PROFESSOR

Chief Judge Rader prizes the title “Professor Rader.” As a professor, he has taught numerous courses on patent law and other advanced IP topics around the globe. A long-time professor at many top U.S. law schools, he is recognized as an accomplished teacher and an exemplary educator. For instance, students twice elected Chief Judge Rader for the Distinguished Teaching Award at The George Washington University Law School.

Chief Judge Rader has extended his passion for teaching to Asia. In China alone, he has garnered distinction as a visiting professor and as an honorary professor at a half-dozen prestigious Chinese universities. As early as the mid-1990s, Chief Judge Rader

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 9.

<sup>29</sup> *Id.*

<sup>30</sup> Randall R. Rader, Speech at the E.D. Texas Judicial Conference: The State of Patent Litigation (Sept. 27, 2011) (transcript available at <http://memberconnections.com/olc/filelib/LVFC/cpages/9008/Library/The%20State%20of%20Patent%20Litigation%20w%20Ediscovery%20Model%20Order.pdf>).

had been named an honorary professor at Shanghai University and taught U.S. IP law at both Shanghai University and Beijing University.<sup>31</sup> At Beijing University, Chief Judge Rader was instrumental in establishing the Institute for International Intellectual Property at Peking University (IIPP).<sup>32</sup>

In June 2009, Tongji University in Shanghai named Chief Judge Rader as a visiting professor.<sup>33</sup> The University Vice President, Yongsheng Li, who attended the title-granting ceremony in the law school, stated that Chief Judge Rader could serve as a bridge to promote mutual understanding between Tongji University and universities in the United States in the field of law.<sup>34</sup> After the ceremony, Chief Judge Rader lectured on U.S. IP law. At the students' request, he also explained how to analyze patent claims using a vivid multimedia lecture.<sup>35</sup> He emphasized the importance of context in interpreting a claim term "by explaining the word 'cut' in five different contexts."<sup>36</sup> Throughout the lecture, Chief Judge Rader said that great lawyers are an essential part of a robust and comprehensive legal system, and hoped that each of the students present would become a great lawyer in the future.<sup>37</sup> As a lecture attendee commented, the "lecture will arouse thousands of student[s] of our country to [ ]

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<sup>31</sup> Randall R. Rader, *Intellectual Property Protection in China*, INTELL. PROP. PRAC. GROUP NEWSL., Vol. 1, Issue 1, Fall 1996 (Federalist Society, Washington, DC) <http://www.fed-soc.org/publications/detail/intellectual-property-protection-in-china>.

<sup>32</sup> *Symposium on "Opportunity and Challenge of Intellectual Property in New Economy Era,"* EU-CHINA PROJECT ON THE PROTECTION OF INTELL. PROP. RIGHTS (Dec. 17, 2008) [http://www.ipr2.org/index.php?view=article&catid=107%3Acapacity-building&id=768%3Asymposium-on-qopportunity-and-challenge-of-intellectual-property-in-new-economy-era&option=com\\_content&Itemid=112](http://www.ipr2.org/index.php?view=article&catid=107%3Acapacity-building&id=768%3Asymposium-on-qopportunity-and-challenge-of-intellectual-property-in-new-economy-era&option=com_content&Itemid=112).

<sup>33</sup> *The University Named Judge Randall Rader Visiting Professor*, TONGJI UNIV. (June 5, 2009, 3:31 PM, Original in Chinese), <http://www.tongji-uni.com/newsshow.aspx?sn=1474>.

<sup>34</sup> *Id.*

<sup>35</sup> Michael Ni, *A Lecture Given by Judge Rader of U.S. Court of Appeals for the Federal Circuit*, GLOBAL IPRS RES. CENTER (July 6, 2009, 9:30 AM), <http://www.giprs.org/node/493>.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

research [ ] intellectual property rights [ ] and widen their vision and open their mind[s]. . . .”<sup>38</sup>

Chief Judge Rader was also named an honorary professor at East China University of Political Science and Law in April 2011.<sup>39</sup> After the title-granting ceremony, Chief Judge Rader conducted an impressive presentation on IP protection and its relationship to industry development and national interest.<sup>40</sup> The presentation was enthusiastically welcomed by students and professors.<sup>41</sup>

Chief Judge Rader generates high praise whenever he speaks. The following reaction captures wide-felt sentiments of the Chinese audience: “He was articulate and had a moderate speaking pace. His speech was smooth, full of lingering charm, and sounded like a beautiful ballad. There was no esoteric content in his speech, which was based on vivid examples and was very persuasive.”<sup>42</sup>

As a professor, not only has Chief Judge Rader taught patent law to countless students of diverse backgrounds, experience, and geography, but he has also made a lasting impact in Chinese IP law by planting seeds of IP knowledge and philosophy to present and future IP leaders of China. A unique combination of intellect, judicial experience, and a love of teaching, naturally causes people to rave about his lectures and presentations.

#### IV. CONTRIBUTIONS AS AN AUTHOR

In addition to advancing IP protection as a judge and a professor, Chief Judge Rader has authored many books and articles. Notably, he has coauthored the most widely used textbook

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<sup>38</sup> *Id.*

<sup>39</sup> *Title-granting Ceremony for Chief Judge Rader and His Presentation*, IP SCH. (April 8, 2011, 9:01 AM, Original in Chinese), <http://www.ipschool.net/college/Articles-512.htm>.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Weijun Zhu, *Meeting the Best Presenter of This Year in International Conference*, Z.F. TRANS. (June 29, 2007, 11:03 AM, Original in Chinese), <http://www.zftrans.com/bbs/read.php?tid=12703> (on file with the Washington Journal of Law, Technology & Arts).

on U.S. patent law, *Cases and Materials on Patent Law* (Thomson/West 2009), and *Patent Law in a Nutshell* (Thomson/West 2007), the latter translated into Chinese and Japanese.

As early as 1996, Chief Judge Rader published articles on Chinese IP, such as one entitled *Intellectual Property Protection in China*.<sup>43</sup> In that article, Chief Judge Rader acknowledged that “China recognized the significance of intellectual property as early as the Tang Dynasty,” but noted that “[i]n recent history, China’s lagging intellectual property protection has obstructed its efforts to profit from participation in the international marketplace.”<sup>44</sup> Chief Judge Rader affirmed China’s following efforts in improving IP protections, including China’s joining WIPO and the enactment of the first modern trademark law, patent law, and copyright law in the 1980s. But, as noted by Chief Judge Rader, “[w]ith workable laws in place, China faces the serious challenge of learning to enforce these laws in a culture with little tradition of private property or exclusive rights. At best, Chinese enforcement of intellectual property rights remains uneven.”<sup>45</sup>

At that time, Chief Judge Rader indicated that “[t]he real source of the obstacle to enforcement of international standards for intellectual property springs from the absence of a broad understanding within the Chinese legal community of the basic concepts of individual private property and the right to exclude.”<sup>46</sup> He further suggested that “[b]efore China captures the full vision of intellectual property law enforcement, China as a whole must understand the benefits of incentives for innovation and creation.”<sup>47</sup>

Chief Judge Rader concludes the article by placing his trust in China’s improving IP protection:

From the perspective of history, China has always

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<sup>43</sup> INTELL. PROP. PRAC. GROUP NEWSL, Vol. 1, Issue 1, Fall 1996 (Federalist Society, Washington, DC), <http://www.fed-soc.org/publications/detail/intellectual-property-protection-in-china>.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

been a world leader in science and the arts. With time and education, China's current leaders—both local and national—are grasping that their desire to recapture their historical leadership in the modern world requires intellectual property protections. Thus, with time, China will no doubt commit more resources to achieving international standards in intellectual property enforcement.<sup>48</sup>

Indeed, Chief Judge Rader has been a part of the process to improve and develop China's IP law for many years.

In a more recent publication, Chief Judge Rader indicated that the “ongoing transformation of the law of Chinese trade secret protection is remarkable.”<sup>49</sup> He explained that “the protection and maintenance of trade secrets has become increasingly important with the remarkable transformation of China's economy, particularly as companies from the world migrate to China to take advantage of China's unique manufacturing capacities and sophisticated scientific and technical infrastructure.”<sup>50</sup> Through his writing, Chief Judge Rader has contributed, and will continue to contribute, to the development and strengthening of China's IP laws and system.

#### CONCLUSION

It is through his capacity as a judge, a professor, and an author that Chief Judge Rader has made invaluable contributions to Chinese IP law and the IP system. Chief Judge Rader has secured a legendary standing and will be long remembered by the Chinese IP community for his tireless efforts as an ambassador of IP and judicial goodwill.

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<sup>48</sup> *Id.*

<sup>49</sup> CATHERINE SUN, CHINA TRADE SECRET PROTECTION: PRACTICE AND STRATEGY (2010).

<sup>50</sup> *Id.*

