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In this edition, we scanned all IP related judgments and adjudications published in August, 2014 at the Supreme Court's official website (<http://www.court.gov.cn/zgcpwsw/>); worked out the statistics based on all the IP related judgments and adjudications published by the Supreme Court and the 32 High Courts, and selected some significant cases with our comments to share with you.

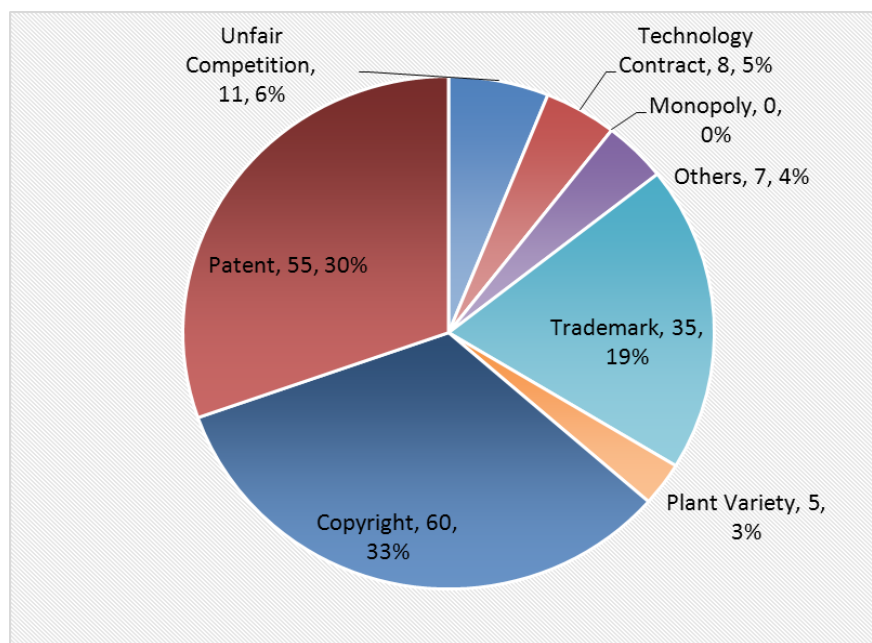
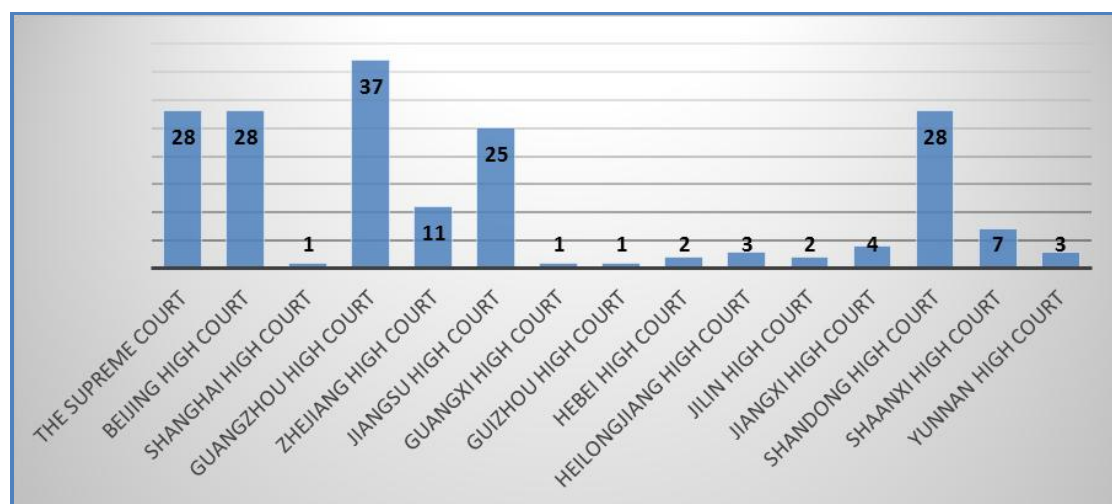


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## I. Statistics

- In August, 2014, the Supreme Court and the 32 High Courts published 181 IP decisions in China. The Guangdong High Court ranked No. 1 (37) and the Supreme Court, the Beijing High Court and the Shandong High Court all took second place with 28 decisions.

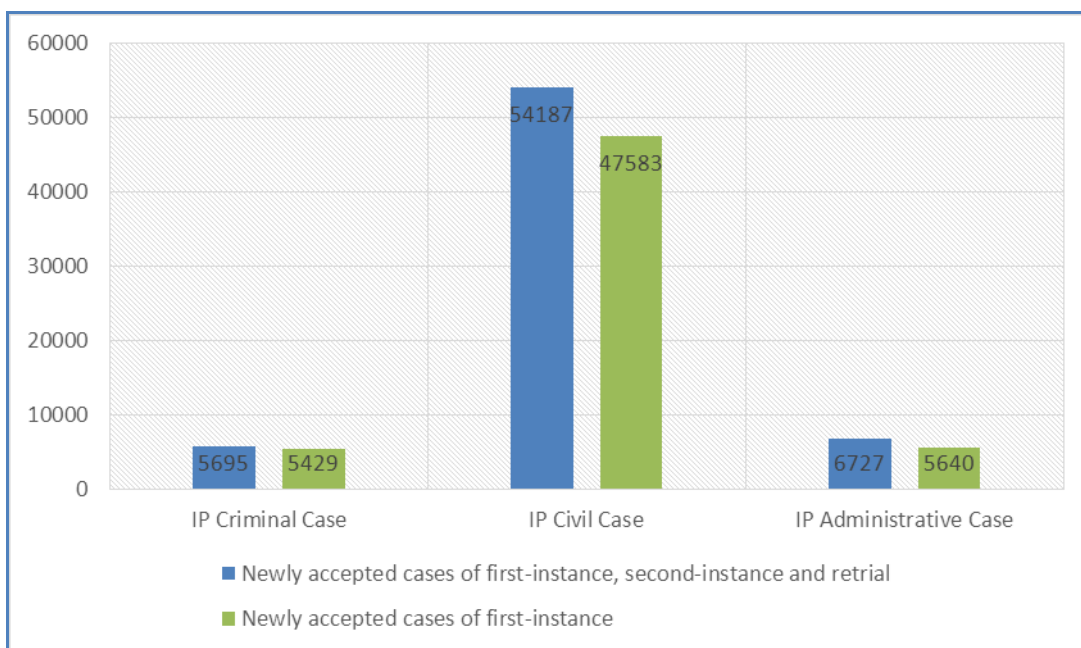


### Notes:

- 1) Decisions uploaded on the Internet are effective judgments and adjudications. First-instance judgments in the on-going appellant proceedings are not uploaded.
- 2) Not all enforceable judgments and adjudications issued by courts are uploaded. Cases involving trade secrets are not uploaded under the Exception rule of the Supreme Court Regulations. Also, some courts have not uploaded judgments and adjudications so far due to technical incapability.

## Overview of IP Lawsuits filed in the First Half of 2014

- In the first half of 2014, the number of intellectual property cases (first-instance; second-instance and retrial) accepted by local courts was **66,609**, 13.29% more than the same period in 2013, including the following:
  - Number of IP criminal cases: **5,695**, 22.68% more compared with the year before;
  - Number of IP civil cases (including unfair-competition): **54,187**, 3.89% rise compared with the year before;
  - Number of IP administrative cases: **6,727**, 2.37 times more than the figure in the same period in 2013.
  
- In the first half of 2014, local courts accepted a total number of **58,652 IP cases at the first-instance level**:
  - The number of IP criminal cases was **5,429**, including **2,759** intellectual property infringement cases and **2,351** cases involving infringement of registered trademarks;
  - The number of IP civil cases (including **694** unfair-competition cases) was **47,583**, rising by 3.94% compared with a year earlier; with **29,546** copyright cases ranked **Top 1**, 5.8% up from the same period in 2013.
  - The number of IP administrative cases was **5,640**, 4.58 times more than that in the same period in 2013.

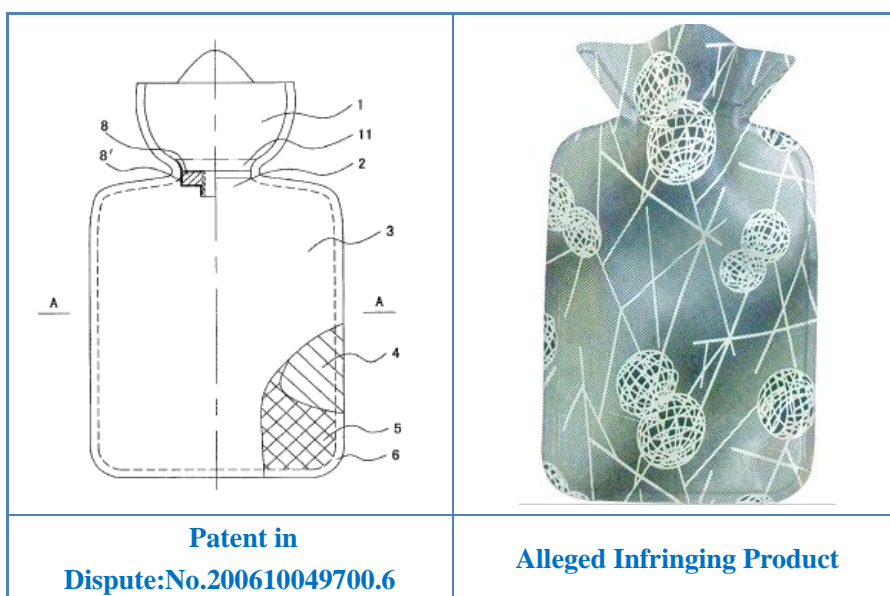


## II. Comments on Typical Cases

### Patent

*Chen Shundi vs. Zhejiang Lesheros Household Articles Co., Ltd., He Jianhua, Wen Shidan* regarding Invention Patent Infringement Dispute

- The Supreme Court Civil Judgment (2013) Min Ti Zi No. 225
  - Liaoning High Court Civil Judgment (2011) Liao Min San Zhong Zi No. 27
  - Shenyang Intermediate Court Civil Judgment (2010) Shen Zhong Min Si Chu Zi No. 389
- ✓ 2013 Chinese Courts Top 50 Typical IP Cases



### Rule:

In determining whether a step sequence of a process under a patent has the definitive effect on the extent of protection of the patent right so as to restrict the application of the equivalent principle when the step sequence changes, the main factor to be considered is whether the steps must be carried out in a certain sequence and whether a change in that sequence results in substantive differences in the technical function or technical effect.

### Remarks:

The plaintiff is the patentee of the patent for an invention entitled “Method for Processing Fabric and Plastic Hot-water Bag.” The plaintiff believes that the fabric and plastic hot-water bags produced and sold by the defendant infringes on his patent rights, and instituted legal proceedings in the court to stop the infringing act and seek compensation for the economic losses. In the first and second instances, the Court held for the plaintiff. But, the Supreme Court, after having

scrutinized the two prior judgments revoked the trial and appellant judgments, and rejected the claims by the plaintiff.

There are many legal issues in the case that are worth being researched and studied. For example:

First, it needs to be determined whether or not the step sequence of the process claim has the definitive effect on the technical solution of the claim. The step sequence in a process invention should not be construed as limiting the claims. If the description and drawings clearly disclose that the technical effect, as revealed by the invention, can be achieved without obeying the step sequence, or it can be concluded by way of the combination of the common knowledge in the art that the technical effect as shown in the invention also can be achieved without obeying the step sequence or the sequence of some steps.

Second, it must relate to the specific application of the dedication rule. Determination of the dedication rule in construing the claims is an output for executing the benefits measurement for the protective function and public function of the patent. Such technical solutions described in the description but not in the claims of the patent shall be excluded from the extent of protection of the claims.

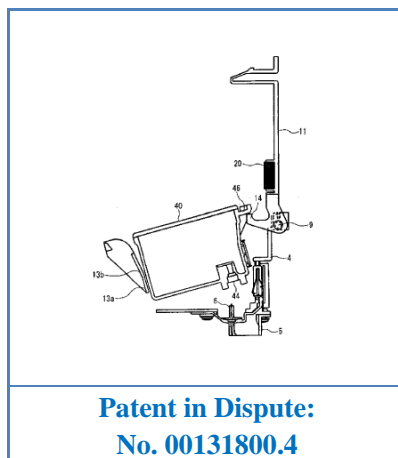
Third, it concerns judging the equivalent technical features. Both the “hollow cotton soft mat” in the accused patent and the “heat preservation layer” in the claims are arranged between the inner and outer layers of the fabric and plastic hot-water bag, but the length of the former is equivalent to half the inner and outer layers, while the latter isolates the inner and outer layers entirely. Although the court submits that there exists differences between them in terms of the heat preservation and anti-scalding levels, both of them can achieve the same technical effect, and thus are deemed to be equivalent technical features.

Fourth, it relates to the issue of determining the liability of the infringer while entrusting the third party to produce some components. The defendant protested that the components of the accused product are produced by the third party. However, the court insisted on that, although the components were not produced by the defendant himself, the defendant provided the sample and entrusted the third party to make the production according to the requirements, and thus the defendant also should bear the corresponding liability due to the caused legal consequences.

Fifth, the legal differences between the exploitation fee for the temporary protection term of the patent and the compensation fee for the damage caused by the infringement. The decision of the court makes it clear that the exploitation fee for the temporary protection term of the patent belongs to a type of proper economic compensation, and is legally different from the compensation fee for the damage caused by the infringement of the patent right without the consent of the patentee. Thus, they cannot be simultaneously claimed in the same proceeding, but are allowable in separate proceedings.

***Seiko Epson Corporation vs. Patent Re-examination Board, Zheng Yali etc regarding Invention Patent Invalidation Retrial Dispute***

- The Supreme Court Administrative Adjudication (2010) Zhi Xing Zi No. 53-1
- ✓ 2013 Chinese Courts Top 50 Typical IP Cases
- ✓ Selected as Typical Case in *Annual Report of IP Cases by the Supreme Court (2013)*



**Rule:**

In determining whether the amendments to the application documents go beyond the scope disclosed in the initial description and claims, the comments as stated by the applicant, under the normal conditions, can only be used as a reference for understanding the meanings of the description and claims, rather than being used as the decisive basis. If the comments, as stated, extend beyond the scope disclosed in the initial description and claims, the reference function will disappear completely, and the description or the claims cannot be construed by making reference to these comments.

**Remarks:**

The present case by the Supreme Court involved the unusual second-time re-examination for the SEIKO ink cartridge dispute. The third party in the proceeding appealed to the Supreme Court against the ruling from the first re-examination decision based on the allegation that the ruling made by the second instance court that “the amendment to the storage means is in conformity with the provisions of Article 33 of the Patent Law” was incorrect. The Supreme Court made a decision on November, 2011 asserting that the amendment to the storage means did not go beyond the scope of the initial disclosure, and thus rejected the request for re-examination. The current re-examination was appealed by SEIKO EPSON, claiming that the original decision that the amendment to the memory means goes beyond the scope of the initial disclosure was incorrect. The focus still related to the understanding of Article 33 of the Patent Law.

First, the Supreme Court confirmed that the re-examination of the Decision of Invalidation was only directed to the re-examination reasons raised by the applicant, and was not the comprehensive examination for the legitimacy of the Decision. So, the re-examination was based on the different reasons and was not a repeated examination. Second, it was made clear that the applicant could not enjoy the benefit of the trust protection because the amendments were accepted by the examiner during the granting process. Finally, the Decision made it clear the first time the consistency and differences between the methods of construing the claims during the confirmation procedure for granting the patent and during the patent civil infringing procedure. That is, during the confirmation procedure of granting the patent, the comments as stated by the applicant, under the normal conditions, can only be used as references for understanding the meanings of the description and claims. In the patent infringement procedure, the extent of the protection of the patent were normally construed in a limited and narrow manner, according to the comments as stated when explaining the extent of protection of the claims.

During the examination process of the case, the applicant introduced the new term “memory means” in the divisional application on its own initiative, but did not make a specific definition in the description. The technical content designated by that term could not be determined according to the initial application, nor could it be derived by one skilled in the art directly and unambiguously from the content described in the initial description and claims. Thus, the amendment to the “memory means” acts against the provisions of Article 33 of the Patent Law amended on 1992.

## Copyright

*Tsuburaya Productions Co., Ltd and Shanghai Yuangu Co., Ltd vs. Sompote Saengduenchai, Chaiyo Productions Co., Ltd, Guangzhou Books Center and Shanghai Audio & Video Publishing House regarding copyright infringement dispute retrial*

- The Supreme People’s Court Civil Ruling (2011) Min Shen Zi No.259
- ✓ Selected as 2013 Chinese Courts Top 10 IP Case



**Rule:**

**When judging whether an authentication report issued by a foreign authentication institution should be adopted it should be examined in accordance with relevant Chinese law.**

**Remarks:**

On September 30, 2005 Sompote and Chaiyo Productions Company filed a civil lawsuit with the Guangzhou Intermediate People's Court against Tsuburaya Productions Company, Shanghai Yuangu Company, the Guangzhou Books Center and the Shanghai Audio & Video Publishing House on the ground of copyright infringement, requesting the court to order the four defendants to stop infringing immediately, issue a public apology and provide compensation for the economic loss.

The claims made by Sompote and Chaiyo Productions Company were based on the following evidence: 1) The contract of March 4, 1976 (namely the "**1976 Contract**"), which granted the president of Chaiyo Productions Company, Sompote, exclusive rights to 9 Ultraman works, indefinitely, in areas outside Japan. 2) A "Letter of Apology" dated July 23, 1996, which once again mentioned that Sompote obtained exclusive rights via the "1976 Contract," and apologized for Tsuburaya Productions Company authorizing the rights to others. In addition, Tsuburaya Productions Company filed a copyright declaratory suit in Japan in 2001. According to the judgments made by the Tokyo District Court, the Tokyo High Court and the Japanese Supreme Court, the "1976 Contract" was confirmed real and effective, and held that Sompote holds the exclusive rights to the Ultraman works outside of Japan. Tsuburaya Productions Company's other claims were rejected by the courts. Tsuburaya Productions Company filed a lawsuit against Sompote, Chaiyo Productions Company, the Guangzhou Books Center and the Shanghai Audio & Video Publishing House in Thailand on the ground of copyright infringement. On April 4, 2000, Thailand Central Court of International Trade and Intellectual Property found the "1976 Contract" real and effective, and held that Tsuburaya Productions Company should compensate Sompote under counterclaim. Tsuburaya Productions Company instituted an appeal. The Thailand Supreme Court adopted the authentication opinion issued by the Document Verification Committee composed of 7 experts who were specialized in inspecting documents and counterfeits and were appointed by the Director of Evidence Inspection Department of Thailand Policy Headquarters. On February 5, 2008, the Thailand Supreme Court made the final judgment, which did not confirm the effectiveness of the "1976 Contract" and supported Tsuburaya Productions Company's claims.

The first instance of the Guangzhou Intermediate Court ruled that the authenticity of the "1976 Contract" could not be confirmed and rejected the claims made by Sompote and Chaiyo Productions Company. Sompote and Chaiyo Productions Company filed the appeal. The second instance court, the Guangdong High Court, held that, the facts confirmed in the judgments made by the Japanese and the Thai Courts could not be used for the basis of ascertaining the facts of this case due to the reason that the effectiveness of the Japanese and Thai's judgments had not been



recognized by the Chinese court through Chinese civil procedure, so the judgments had no legal force or binding effect in China. There was a lack of a legal basis for the court of first instance to recognize Thailand’s authentication conclusion directly. The court of second instance found the “1976 Contract” real and effective, revoked the judgment made by the court of first instance, and supported part of the claims made by Sompote and Chaiyo Productions Company. Tsuburaya Productions Company and Shanghai Yuangu Company applied for a retrial afterwards. The Supreme People’s Court rejected the application for retrial after examination.

This case is an infringement action. The issue is whether Sompote and Chaiyo Productions Company are entitled to the relevant copyrights, which is mainly involved in the judgment of the authenticity of the “1976 Contract.” The Japanese Supreme Court and the Thailand Supreme Court made opposite judgments on this matter, which makes this case very typical. The Supreme People’s Court clarified in this case that issues should be examined in accordance with relevant Chinese law when judging whether an authentication report issued by a foreign authentication institution should be adopted.

The Supreme Court rejected the applications for recognition and enforcement of foreign verdicts raised by Tsuburaya Productions Company and Shanghai Yuangu Company in the retrial, and clarified that according to the relevant regulations of Civil Procedure Law, such application should be raised to the competent intermediate court for examination.

**Trademark**

**KAI PING WEI SHI DA Seasoning Co., Ltd vs. TRAB regarding Trademark Cancellation Dispute**

- Beijing High People’s Court Administrative Judgment (2012) Gao Xing Zhong Zi No.1750
- ✓ 2013 Chinese Courts Top 10 Innovative IP Cases



**Rules:**

When a 3D symbol is displayed as product packaging, the relevant public will perceive it as product packaging and not a trademark. In this sense, the 3D symbol does not have the inherent distinctiveness required for a trademark. The key to determine if the symbol has acquired distinctiveness (secondary meaning) will largely depend on the level of its fame, which should be high enough with the public so that general consumers can associate the 3D symbol exclusively with the provider of the goods.

**Remarks:**

The central issue of this case is whether the square shape of the brown bottle that Nestlé has extensively used since its design in 1886 and registered as a 3D trademark in 2005 possesses the inherent distinctiveness or acquires the distinctiveness for a trademark as provided in Article 11 of Trademark Law of China.

The first instance court held that when a 3D symbol is displayed as product packaging, the relevant public will perceive it as product packaging and not a trademark. In this sense, the 3D symbol does not have the inherent distinctiveness as required for a trademark. The key component to determine if the 3D symbol has acquired distinctiveness (secondary meaning) largely depends on the level of its fame, which should be high enough among the public to associate the 3D symbol exclusively with the provider of the goods. And the criteria in proving its fame are as high as proving a well-known trademark. In the present case, since Nestlé failed to provide sufficient evidence of high fame of its 3D symbol, the first instance court ruled that the shape of Nestlé's square brown bottle does not possess the distinctiveness as required for a trademark and therefore its registration of the symbol as a 3D trademark should be cancelled.

The second instance court sustained the first instance court's ruling, further elaborating that the available evidence shows seasoning producers in China began using the disputed square brown bottle as packages from 1983, much earlier than Nestlé's filing of the 3D trademark in 2002 and also earlier than Nestlé's actual use of the shape for the bottle in China. Because the disputed shape of the bottle have been used by many manufacturers in China as product packages over a long period of time, it has become a common shape of containers and packages among soy-sauce producers in China. In this situation, even if Nestlé has put the 3D symbol into commercial use, it can hardly acquire the distinctiveness as required for a trademark through such use.

## Unfair Competition

*Maxim's Caterers Limited vs. Liang Jiachao, Guangzhou Migo Restaurant Management Co., Ltd.*  
regarding Trademark Infringement and Unfair Competition Dispute

- Guangzhou Intermediate Court Civil Judgment (2013) Sui Zhong Fa Zhi Min Zhong Zi No. 929
- Guangzhou Tianhe District Court Civil Judgment (2012) Sui Tian Fa Zhi Min Chu Zi No.41
- ✓ 2013 Guangzhou Courts Top 10 IP Cases



### Rule:

**Providing service as a purchasing agent on the Internet does not infringe a trademark right. But if there is a false declaration of activity on the purchasing website, it constitutes unfair competition.**

### Remarks:

The dispute in this case was whether purchasing on somebody's behalf on the internet constitutes infringement of a trademark and unfair competition. This issue is a good reference for similar cases in future trial practice.

The plaintiff, Maxim's Caterers Limited is a famous Hong Kong company, owning the registered trademark No.999786 for “美心” (Chinese characters for “Maxim”) in respect of cakes and moon cakes, and so forth, in Class 30. The defendant, Liang Jiachao and his wholly-owned proprietorship enterprise, Migo Company, made an advertisement on its company website and also on its Taobao shop (web shop), claiming that they acted as agent for various brands of cakes. The brands contained “Maxim Cakes” and “Hong Kong Maxim.” Meanwhile, the website listed the sales process: 1) Customers sending orders online; 2) the staff of the defendant placing orders and purchasing cakes at stores of the relevant brands near the customers; 3) delivering the cakes to the addresses as provided by the customers. The plaintiff filed the lawsuit claiming that the two defendant's actions constitute trademark infringement and unfair competition in false advertisement.

The first instance court held that the essence of the business mode of the aforesaid website is to purchase on somebody's behalf. Usually, if the products they purchase on somebody's behalf are genuine products, the information (product name and trademarks) identifying the source of the

product cannot be changed. Therefore, it would not constitute trademark infringement in this situation. However, the plaintiff and the defendant have a close competitive relationship and since the advertisement on the defendant's website included "Maxim Cakes" and "Hong Kong Maxim" as its special brand was falsely declared, the aforesaid behavior of the defendant will mislead the public that an agency relationship or other cooperative relationship may exist between the plaintiff and the defendant. The court held that the defendant's acts constitute unfair competition regarding false declaration. Then the first instance court ruled that the two defendants should delete the character "美心" on the website advertisements and also issue an announcement to eliminate any adverse effects. Furthermore, the court awarded 30,000 RMB damages to cover the plaintiff's economic losses and reasonable expenses for the proceeding. The two defendants appealed afterwards, but the court of second instance affirmed the trial judgment.

### III. NTD Case Selection

*Parker Intangibles LLC vs. TRAB, Dai Junhuan* regarding Trademark  
Opposition Review Administrative Retrial Dispute

NTD Representing Parker  
Won the Supreme Court  
Retrial Case

- The Supreme Court Administrative Judgment (2014) Xing Ti Zi No. 9



**Rule:** In terms of seeking legal protection for the prior rights of a trade name, in accordance with the first half of Article 31 of the Trademark Law (2001), against a later applied trademark, it is required that a) the prior trade name acquires a certain reputation among the relevant public in China; b) the registration and use of the disputed mark is prone to get the relevant public confused and c) it will harm the interests of the existing prior rights of the trade name owner.

While judging the protection scope of prior rights of a trade name, it is not advisable to compare products of a prior trade name owner rigidly with the ones in *the Classification Table of Similar Goods and Services*. On the contrary, it is recommended to combine the evidence submitted by the prior trade name owner and take into account of various factors, such as functions, usages, marketing channels and the scope of the products. In addition, the bona fide principle should also be considered in protecting the prior rights of a trade name. If the bad faith of the later trademark applicant is explicit, the burden of proof taken by the prior trade name owner will be lessened.

Remarks: In this case, Parker Appliance Company took over Hannifin Company by a merger in 1954 and established Parker Hannifin Corporation (hereinafter referred to as “**Parker Hannifin**”). From 1996 to 1999, Parker Hannifin established subsidiaries successfully in Hong Kong, Shanghai, Wuxi and other places, managing a variety of products in 60 categories, e.g. fluid connector, rubber and thermoplastic hoses, O ring, sealing, hydraulic joint and pneumatic connector. After decades of development, high pressure hoses and sealing manufactured in China by Parker Hannifin have been highly recognized by the Chinese market. On September 8, 2014, Dai Junhuan applied the “派克汉尼汾 **PARKERHANNIFIN**” trademark with the Chinese Trademark Office under No. 4259661(hereinafter referred to as “**the Opposed Mark**”), designated in goods of Class 17, such as stuffing rings, PVC hose tube, plastic film for agricultural use, scupper hose, flexible tubes, not of metal, rubber hose, etc. Parker Intangibles LLC (hereinafter referred to as “**Parker Company**”), subsidiary of Parker Hannifin, filed the opposition claiming that the opposed mark infringed the prior rights of a trade name of Parker Hannifin. However, both CTMO and TRAB ruled on the approval of the registration of the opposed mark. Hence, Parker Company filed for litigation against TRAB and Dai Junhuan with the court. The first instance court (the Beijing No. 1 Intermediate Court) held that the products of a hydraulic component, a pneumatic component, a fluid connector, a sealing and instrument, etc, managed by Parker Hannifin Motion & Control (Shanghai) Co., Ltd. belong to Class 7, which is not similar to the designated goods of the opposed mark in Class 17. Therefore, the registration of the opposed mark is not likely to cause confusion among relevant public and will not harm the interests of the prior trade name owner. The second instance court (the Beijing High Court) also deems that the prior trade name of this case did not acquire a reputation in the same or similar industry as the designated goods by the opposed mark. After retrial, the Supreme Court confirmed that the trade name of “派克汉尼汾 (Parker Hannifin)” has acquired a reputation in mainland China and the opposed mark infringes the prior rights of trade name of the plaintiff’s parent company.

While judging if the opposed mark infringes the prior rights of a trade name, the court should always consider if the designated goods of the opposed mark are identical or similar to or relevant to the goods that the fame of the prior trade name has been built up. And it should not make a rigid judgment only on whether the goods managed by the trade name right holder are in the same category with the designated goods by the opposed mark. Both similarity and relevancy of the two shall be taken into account as well, that is to say, comprehensively considering if the two are similar or relevant with each other in function, usage, production unit, sales channel, customers, etc., so as to protect the rights and interests of the trade name owner effectively.

The following two misunderstandings should be avoided: (1) Identifying identical or similar goods based on *the Classification Table of Similar Goods and Services* (hereinafter referred to as “**the Classification Table**”). The first instance court came to the conclusion that it was not likely to cause confusion only based on that the designated goods of the opposed mark and the products managed by the trade name owner were defined in different classes in the Classification Table, which is obviously inappropriate. The Supreme Court corrected it upon the similarity issue. Although Parker Hannifin and its affiliated companies’ fame are counted on the products of a hydraulic component, a pneumatic component, a fluid component and sealing, etc., the designated

goods of the opposed mark in stuffing rings, hydraulic hose, rubber hose, etc. have explicit similarities with part of the products manufactured and managed in China by Parker Hannifin and its affiliated companies. Under such circumstances, the approval for registration of the opposed mark will be easily prone to cause confusion among consumers and thus harm the trade name rights of Parker Hannifin. (2) Separate from the application areas of products and the business scope of the trade name owner and only identify the category from the literal meaning of a product so as to make comparison on categories. The first instance court decided that the product of sealing manufactured and sold by Parker Hannifin and its affiliated companies fell into Class 7 based on the Classification Table. As a matter of fact, this was caused due to a failure in taking into full account the business scope of the trade name owner. The evidence submitted by the plaintiff, such as sales invoices, business registration certificates, is sufficient to illustrate that Parker Hannifin and its affiliated companies produce and sell not only the mechanical products in Class 7, but also the non-metal products in Class 17. In practice, multiple operations of modern enterprise and cross-penetration of each industry has promoted most enterprises across many fields, not to mention large multinational corporations like Parker Hannifin. Therefore, identification of a product's category should take all factors into consideration, such as function, application area, consumption patterns of the product, rather than the literal meaning of the product. In such a way, people will be able to avoid coming to the wrong conclusion by pure literal judgment and comparison. The ruling made by the Supreme Court demonstrates a broader perspective in this issue.

Furthermore, a third party's bad faith should be considered in judging whether the opposed mark infringes the prior rights of trade name. The bad faith of the third party makes great difference in identifying reputation and confusion. When the third party is acting with express subjective malice, the burden of proof for the reputation of the prior trade name should be lessened and in case of bad faith, it is more easily to cause confusion among relevant public. The subjective status of the third party could reflect if it/he violates the principle of good faith and the principle of good faith must also be taken into account in the application of Article 31 of the Trademark Law (2001). There are many symptoms for bad faith, specifically in this case, such as: 1) Parker Hannifin is the combination for two companies' names with relatively high distinctiveness. After advertisement and promotion, “派克汉尼汾” has become the corresponding Chinese transliteration with “Parker Hannifin.” As the opposed mark is completely identical with the above trade name, it is hard to be defined as coincidence. 2) The industry in which the third party conducts business is closely related to the products manufactured and managed by Parker Hannifin and its affiliated companies, therefore, the third party must know the high public awareness of the trade name of 派克汉尼汾 (Parker Hannifin). The Supreme Court confirmed the above points based on the evidence submitted by the attorneys of Parker Hannifin and ruled finally that the third party had obvious bad faith in hitchhiking the goodwill of Parker Hannifin's and its affiliated companies' trade name.

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