



IP CASE EXPRESS



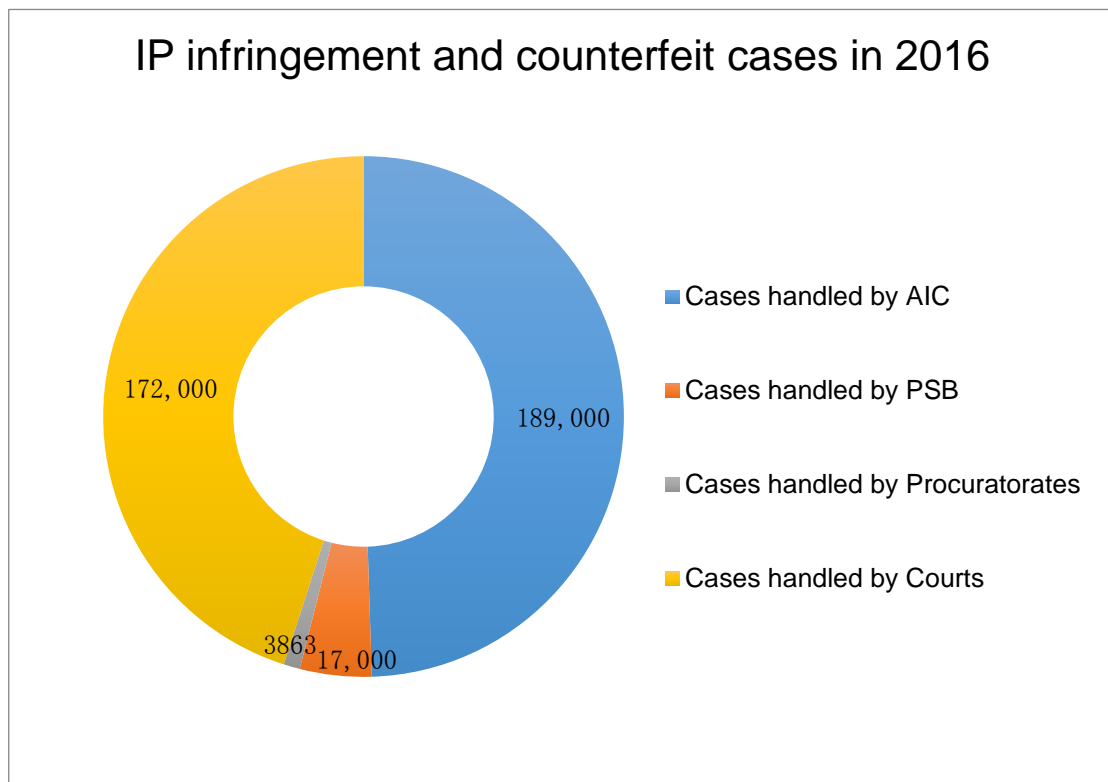
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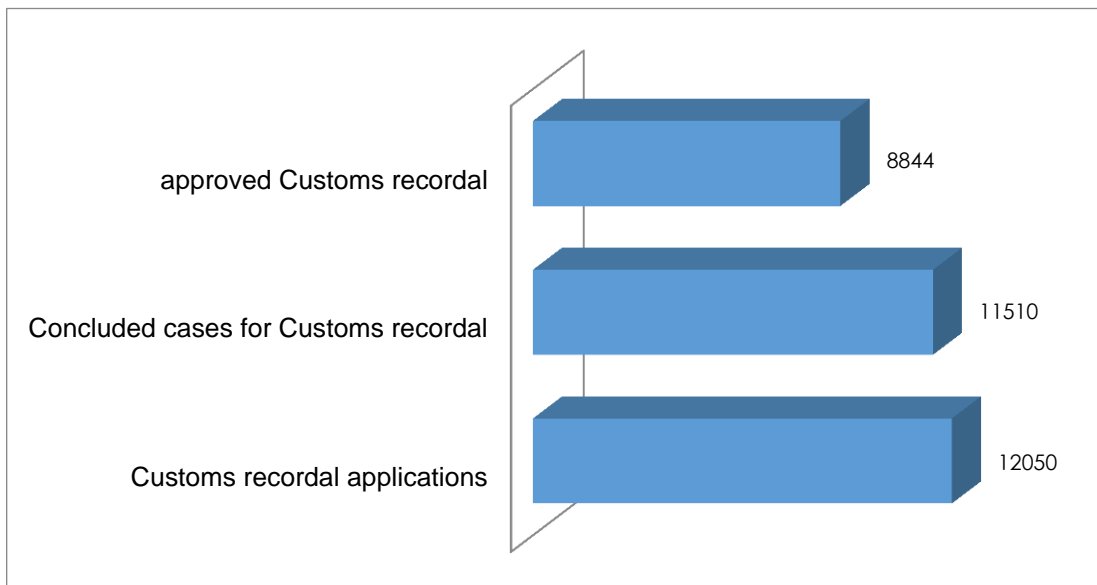
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In this edition, we browsed and analyzed IP-related court judgments and adjudications together with the key statistics recently, and we would like to share with you noteworthy statistics and our comments on some significant cases.

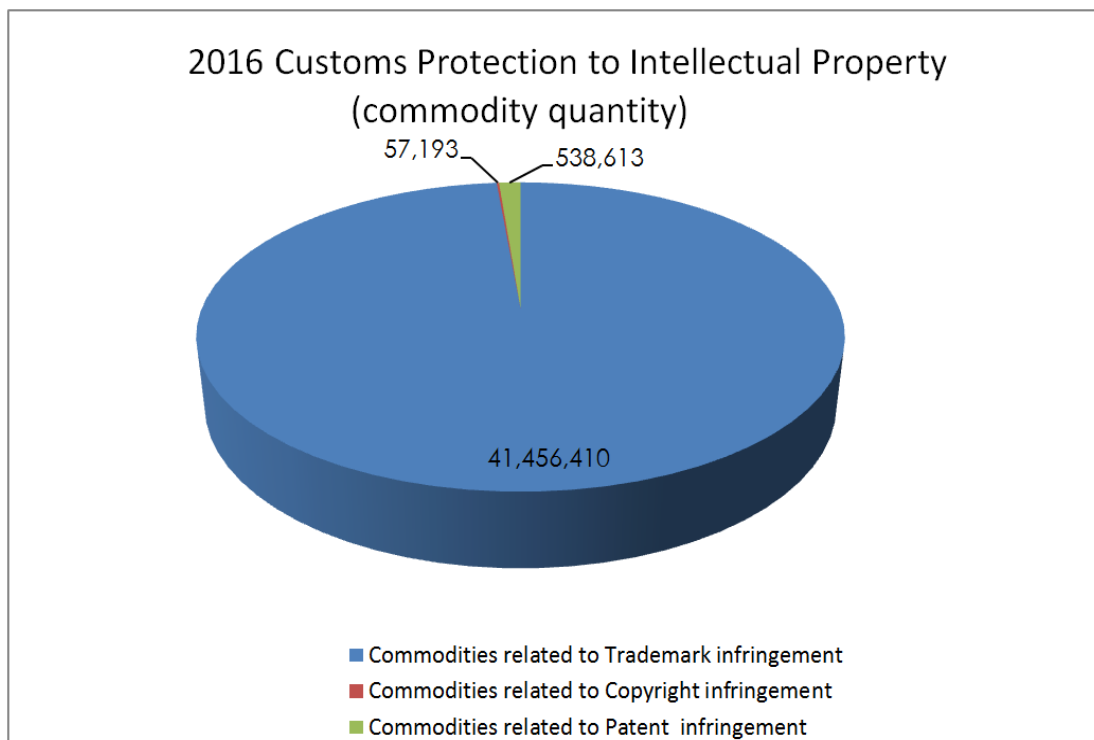
I. **Statistics**



In 2016, 189,000 cases in respect of IP infringement and counterfeit were handled by nationwide AIC (Administration for Industry and Commerce); more than 17,000 cases in respect of IP infringement and counterfeit were solved by nationwide PSB (Public Security Bureau); 3,863 criminal cases related to IP infringement were prosecuted by nationwide Procuratorates; around 170,000 IP related cases were concluded by nationwide Courts.



The applications for Customs recordal increased rapidly in 2016. The amount of case was 12,050 all year round, of which 11,510 cases were concluded and 8844 ones were approved for recordal.



Customs seizures in connection to Intellectual Property in 2016 were mainly related to trademark right, patent right and copyright. The amounts of commodities were suspected to be trademark infringement reached up to more than 41,456,400.

Source: MOC/GACC

II. Comments on Typical Cases

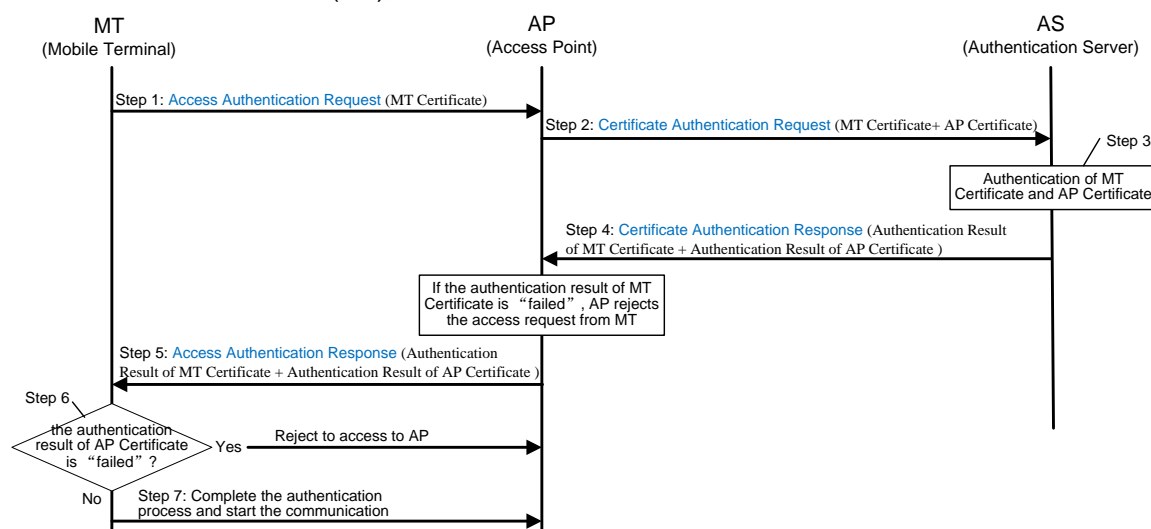
Patent

Iwncomm Technologies v. SONY

I. Involved Patent

Claim 1 of the involved patent is a [method claim](#). The seven steps contained in claim 1 are **respectively** carried out by mobile terminal (MT), wireless access point (AP), and authentication server (AS), as shown in

picture 1. Iwncomm's allegation is that Sony cell phone (i.e., mobile terminal MT) uses the technical solution defined by the method claim.



Picture 1

II. With regard to the infringing acts

1. The judgment determines that direct infringement is established. Grounds of the decision is as follows:

(1) Since the defendant SONY didn't submit quality management normative documents such as test specification for internal use etc. as required by the Court, the Court reasonably inferred that during the process of design research, production and

manufacturing, and factory inspection for the involved cell phone, SONY committed WAPI (WLAN Authentication and Privacy Infrastructure) functional test. Additionally, the Court reasonably inferred that, the defendant committed WAPI test on cell phones of all types. Since the involved patent method of the plaintiff may be

applied during the process of the WAPI test, the WAPI test act of the defendant during the process of design research, production and manufacturing, and factory inspection for the cell phones infringes the method patent of the plaintiff.

NTD believes:

(1) With regard to the problem on whether WAPI functional test is committed during the process of production and manufacturing, factory inspection

Firstly, according to the records of the court hearing disclosed in the official microblog of Beijing Intellectual Property Court, the plaintiff only claims during the court hearing that the defendant commits WAPI functional test during the process of design research, factory inspection (the plaintiff DOES NOT claim during the process of production and manufacturing). However, why does WAPI functional test during the process of “production and manufacturing” appear in the judgment?

Secondly, the judgment (page 15 paragraph 1) recites that evidence 16 submitted by the defendant is used to prove the defendant DID NOT commit WAPI functional test during production stage, why is there no comment regarding this in the judgment of the court?

Thirdly, according to the remarks of the defendant in the record script of the court hearing, there is neither AS certificate nor terminal certificate in the alleged infringing cell phone, which is not MT in claim 1; furthermore, WAPI signal and the certificate installation are both initiated by AP (rather than terminal). According to the remarks of

the defendant, it is impossible for the defendant to commit WAPI functional test during the production stage and factory inspection process, and why there is no comment regarding this point in the judgment of the court?

Fourthly, according to the remarks of the defendant in the record script of the court hearing, the alleged infringing cell phone built-in wireless network card network adapter MAC chip and the coordinately used WAPI software come from the chip manufacturer, the defendant merely hands over it after packaging to the national test center for detection, it is not necessary to implement detection before leaving factory (referring to the remarks of the defendant regarding “the second focus of arguments” in the record script of the court hearing). Regarding this point, did the defendant submit the evidence of “handing over to the national test center” for detection to the court? If relevant evidence is handed over, why is there no comment regarding this point in the judgment?

(2) With regard to the problem on whether WAPI functional test is committed during the design research stage

Firstly, the judgment (page 15 paragraph 1) recites that evidence 14 submitted by the defendant is used to prove the defendant only commits WAPI functional test on some types of products, and the test method is different from the involved patent method. If the test method of the defendant is substantially different, then the defendant probably does not implement the involved patent technical solution. And why is there no relevant comment in the judgment of the court?

Secondly, in the record script of the court hearing, the defendant argues that the defendant and the plaintiff respectively entrusted the State Radio Monitoring Center Testing Center to issue the test report, however, the test report of the defendant is different from that of the plaintiff. Does “different” herein refer to the detection methods being different? If yes, then the test method of the defendant is possibly different from the involved patent method. Why is there no relevant comment in the judgment of the court?

(3) With regard to the protection scope of method claim 1

Firstly, the judgment recites “the defendant affirms that the alleged infringing 35 types of cell phones including L39h have WAPI function, and agrees that the method step of the cell phones L50t, XM50t, S55t, L39H accessing the wireless LAN by the WAPI functional option is the same with the technical solutions of claims 1, 2, 5 and 6 of the involved patent” (referring to page 28 paragraph 2, page 29 paragraph 1 in the judgment), the statement must be mistaken. Obviously, the technical solution of involved claim 1 is accomplished by three parties of the cell phone, the access point AP and the authentication server AS; it is impossible that the method step of accessing the LAN by the alleged infringing cell phone is the same with the method of claim 1. The expression in the judgment must be inaccurate, under normal circumstances, there is no way the defendant may have the above affirmation.

Secondly, the technical solution of claim 1 in the involved patent is not exactly the same with the technical contents in standards, for example: in step 5, the access authentication response returned from the wireless access point AP to the mobile terminal MT includes the AP certificate authentication result and MT certificate authentication result; while in standards GB 15629.11-2003-XG1-2006 section 8.1.4.2.5, “access authentication response packet” includes the identity information of AE (i.e., AP) and identity information of ASUE (i.e., MT). According to the format of the public key certificate in section 8.1.3.2.1 “definition of certificate” of the standards, and the definition of “k) identity” in section 8.1.4.1.1, “certificate authentication result” (including certificate and authentication result) is different from the technical content of “identity”. For example: the format of the public key certificate includes the signature of the certificate issuer on the certificate, MT requires the corresponding private key to perform authentication, but how does MT acquire the private key? Besides, the description of the involved patent stresses that, there should be AP certificate stored or relevant information of AP acknowledged prior to MT authentication (referring to page 5/10 lines 5-6, page 9/10 lines 17-18 in the granted description of the involved patent). According to the above two examples, even if the defendant commits test on the cell phone during the design research stage, is it necessary for MT to acquire the private key or AP certificate? In other words, during the WAPI test process of the design research stage, is the technical solution of claim 1 in the involved patent executed or not?



Thirdly, the defendant as well as APPLE Inc. submitted the invalidation request regarding the involved patent. According to the disclosed invalidation decision, it seems that, between the involved patent and the standards, as for the aspect of the involved patent and the technical solution of coordination between the alleged cell phone and AP, AS, the invalidation requesters do not have the intention to make the patent holder apply the prosecution history estoppel for invalidation strategy.

The defendant claims that its AP and AS devices used for WAPI test are specialized devices of implementing the involved patent, and the devices are sold by the plaintiff legally, thus the involved patent has exhausted rights. Additionally, the defendant further claims that, the chip for implementing WAPI functions in the alleged infringing products is provided by a chip manufacturer, the defendant reasonably uses the chip after purchasing the specialized products, and thus the plaintiff has exhausted rights. Beijing Intellectual Property Court believes that, exhaustion of rights only applies to “products directly obtained in accordance with the patent method”, which means from “manufacturing method patent”. For purely “usage method patent”, exhaustion of rights DOESN'T EXIST.

NTD believes:

Guidelines For Determination Patent Infringement by Beijing Higher People's Court

According to Guidelines For Determination Patent Infringement by Beijing Higher People's Court, Article 119.4:

“(119) The use, offer for sale, sale and import of patented product or product directly obtained through the said patented process after sold by the patentee or the entity and individual permitted by the patentee shall not be deemed a patent infringement, including:

D. to use the equipment to exploit the process patent after the patentee or his licensee sells the equipment exclusively used to exploit the patented process.”

Evidence 12 in the judgment (page 14) shows the photo of the product on which AS and AS devices purchased by the defendant from the plaintiff performs detection, and “WAPI Wireless Access Point”, “Xidianjietong IWNCOMM IWNA2410” and “this sample machine is limited for use of evaluation, test and authentication, use of sales, subtenancy and other business purposes are not approved” are shown on the devices, thus the AP and AS devices for WAPI test by the defendant are devices sold by the plaintiff for specialized use of implementing the patent method. According to the above provisions of Beijing Higher People's Court, if the defendant appeals, the judgment of Beijing intellectual Property Court may not be supported by Beijing Higher People's Court.

With regard to the chip manufacturer

Although the defendant claims that the alleged infringing cell phone built-in wireless network card network adapter

MAC chip and the coordinately used WAPI software come from the chip manufacturer, and the defendant merely performs packaging, the defendant does not provide sufficient evidence to prove that the means (software and the corresponding hardware) of implementing the WAPI functions is arranged within the chip. If the defendant submits the corresponding evidence for appeal, and further claims that since the WAPI function module is in the chip, and there exists technology licensing between the chip manufacturer and the plaintiff ((Note: referring to the remarks of the defendant regarding “the fourth focus of arguments” in the record script of the court hearing, the defendant believed that there was copyright, patent or trade secret and other forms of technical cooperation between the plaintiff and the chip manufacturer; in page 23 of the judgment, in response to the " Notice of assistant in investigation and taking of evidence", Qualcomm Wireless Communication Technology (China) Co., Ltd. also admitted in a written reply that Qualcomm indeed obtained copyright and trade secret license from the plaintiff). Therefore, the defendant using the chip which has obtained technology licensing shall not infringe the patent right of the plaintiff.) Under the condition that Beijing Higher People’s Court does not support the opinion of “For purely usage method patent, exhaustion of rights doesn’t exist” of Beijing Intellectual Property Court, whether the defendant may claim exhaustion of rights for counterplead depends on the following judgment result of Beijing Higher People’s Court.

2. Whether joint infringement establishes

(1) Whether each of the parties constitutes infringement act individually

Claim 1 of the involved patent is carried out through three physical entities including mobile terminal MT, wireless access point AP, and authentication server AS. Neither the act of the alleged infringing product as MT, nor the act of AP or AS infringes the involved patent individually. Therefore, the joint infringement in terms of Article 12 of the Tort Liability Law does not establish (Principle of complete coverage).

NOTE: Tort Liability Law of the People’s Republic of China Article 12 “Where two or more persons commit torts respectively, causing the same harm, if the seriousness of liability of each tortfeasor can be determined, the tortfeasors shall assume corresponding liabilities respectively; or if the seriousness of liability of each tortfeasor is hard to be determined, the tortfeasors shall evenly assume the compensatory liability.”

(2) Act of contributory infringement

The defendant clearly knows that WAPI functional means that combination is built in the alleged infringing product, and the said combination is a device specialized for implementing the involved patent. The defendant provided the said product for others to implement the involved patent without the plaintiff’s authorization on business purpose, which constitutes the act of contributory infringement stipulated by Article 9 of the Tort Liability Law.

NOTE: Tort Liability Law of the People’s Republic of China Article 9 “One who abets or assists another person in committing a

tort shall be liable jointly and severally with the tortfeasor.”

NTD believes:

With regard to indirect infringement

According to the provision of Article 9 of Tort Liability Law of the People’s Republic of China, the premise of being liable jointly and severally with the tortfeasor because of inducement or contribution is “another person committed a tort”, that is, the indirect infringement shall be based on the premise of direct infringement. In the judgment of the present case, Beijing Intellectual Property Court believes “Generally speaking, an indirect infringement act shall be based on the existence of a direct infringement act. However, this does not mean that the patent holder should prove the other entity actually implements the direct infringement act, it is only necessary to prove the user of the alleged infringing product exploits the product in accordance with the preset means of the product, which may comprehensively cover the technical features of the patent right, as for whether the user shall bear the tort liability or not, it is not related with the establishment of the indirect infringement act.” It seems that the opinion of Beijing Intellectual Property Court is inconsistent with Article 9 of Tort Liability Law of the People’s Republic of China, and may not be supported by Beijing Higher People’s Court.

Judicial Interpretation of the Supreme People’s Court on Several Issues concerning the Application of Law in the Trial of Patent Infringement Dispute Cases (II) Article 21 “Where a party, knowing that

some products are the materials, equipment, parts, or intermediate or the like specifically dedicated to practicing a patent, without the authorization of a patent holder and for production or business purpose, provides such products to another party which has practiced an action of infringing the patent, and if the right holder alleges that the provider’s action constitutes contributory infringement as provided in Article 9 of the Tort Law, the court shall support such an allegation.”

And for this point, the book Understanding and Application of Intellectual Property Judicial Interpretations compiled by the Supreme People’s Court of the People’s Republic of China explicitly points out “it should be stressed that, an indirect infringement shall be based on the premise of a direct infringement, thus the provision of laws is expressed as ‘practicing’ an action of infringing the patent”.

III. Civil tort liability

With regard to whether an injunction is issued for the SEP or not

The involved patent is a standard essential patent, and the plaintiff has promised that it will negotiate with any applicant who would like to use the said patent about authorization and licensing. But throughout the negotiation process, the defendant insisted that the plaintiff should provide claim comparison table, which is not reasonable; since the comparison of the technical features of the claims and the technical features of the alleged infringing product is required in the claim comparison table, and the patentee’s relevant viewpoint and allegation might be involved, under

such circumstance, it is reasonable that the plaintiff requires a confidentiality agreement be reached between both parties. Based on the above two points, both parties are not able to enter the essential patent licensing negotiation process, and the fault is due to the defendant. On the basis of this, it is with facts and legal basis that the plaintiff requires the defendant to stop the infringement, for which the Court supports.

NOTE:

With regard to SEP injunction

GB15629.11-2003/XG1-2006 Information technology – telecommunications and information exchange between systems – Local and metropolitan area networks – Specific requirements -- Part 11: Wireless LAN Medium Access Control (MAC) and Physical Layer (PHY) Specifications (ISO/IEC 8802-11: 1999. MOD) (hereinafter “involved standard”) is a national compulsory standard (the involved standard is numbered in “GB”).

Judicial Interpretation of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Patent Infringement Dispute Cases (II) Article 24 “Where a recommendatory national, industrial or local standard explicitly discloses information of the patent(s) that is/are relevant to such standard, the court shall not support the accused infringer’s non-infringement defense that no authorization or license is needed from the patent holder to implement the standard.

Where a recommendatory national, industrial or local standard explicitly

disclose information of the patent(s) that is/are relevant to such standards, and when an accused infringer negotiates with the patent holder concerning the licensing terms for the patent(s), if the patent holder intentionally violates the licensing principle of fairness, reasonableness and non-discrimination promised by the patent holder when formulating the standard, and as a result, a licensing agreement for the patent at issue cannot be concluded, and if the accused infringer has not obviously erred during the negotiation; the court shall generally not support the right holder’s petition to cease the act of implementing the standards.”

Although the provision is in response to the recommendatory national, industrial or local standard, regarding the compulsory standard of the present case, Beijing Intellectual Property Court also refers to the meaning and intention of the provision, i.e., regarding SEP patent holder promising FRAND, not issuing injunction is the principle and issuing injunction is the exception. In the present case, the plaintiff submits a large amount of emails and other evidences, so as to prove the fault of the alleged infringer causes the delay of official patent licensing negotiation procedure. Therefore, Beijing Intellectual Property Court supports the claim of the holder on requesting standard implementation acts to be stopped.

(2) As for the compensation, the plaintiff submitted four patent licensing contracts with other parties in 2009 and 2012 in which it is agreed that the patent royalties is one Yuan per unit; according to Renjianzi [2016]33 issued by Telecommunications Equipment Certification Center of Ministry

of Industry and Information Technology, the quantity of the mobile phone products with Network Access License of Telecom Equipment that the defendant got from January 1, 2010 to December 31, 2014 is 2,876,391; the Court supports the plaintiff's allegation that the compensation amount be determined by three times of the royalties of the involved patent. Based on these three points, the compensation amount is determined as RMB 8,629,173 Yuan (2,876,391×3); as for reasonable expenditure, the whole amount of 474,194 is supported by invoices which the Court fully supports. Thus, the sum is RMB 9,103,367 Yuan.

NOTE:

With regard to the determination of the compensation amount

In the present case, the plaintiff claims that the licensing fee is determined on the criterion of RMB 1 yuan per unit, and claims that the compensation amount is determined by three times of the royalties. To prove the claims, the plaintiff submits the following evidences:

Four patent licensing contracts with other parties in which it is agreed that the patent royalties is one Yuan per unit.

Reports about the plaintiff and WAPI technology by website of Ministry of Industry and Information Technology,

Xinhua News Agency, website of People and other press since 2008. Awards since 2003, such as "Important Technology Invention in Information Industry" issued by the former Ministry of Information Industry in 2003 and "Patent Gold Metal in China" co-issued by World Intellectual Property Organization and State Intellectual Property Office in 2006.

The defendant believes that the four patent licensing contracts are directed to patent package, while the involved patent merely is one unit of the patent package, thus the licensing fee of RMB 1 yuan per unit is unreasonable. However, the plaintiff believes, although the patent royalty is directed to the patent package, the patents involved in the patent package are all related with WAPI technology, and the core is the involved patent. Beijing Intellectual Property Court not only supports the opinion of the plaintiff, but supports the claim "determining the compensation amount by three times of the royalties" of the plaintiff based on the consideration that the involved patent is the fundamental invention in the field of wireless LAN security, and is awarded the relevant technology metals, is included into the national standard, and fault of the defendant during the two party negotiation process.

If the plaintiff of the present case is a foreign company, then the determination of the compensation amount is even more valuable for reference.

Author: Ying WANG

Trademark

Fang Zilin v. Trademark Review and Adjudication Board

Beijing Higher People's Court Administrative Judgment (2016) Jing Xing Zhong No. 2844

Beijing Intellectual Property Court Administrative Judgment (2015) Jing Zhi Xing Chu Zi No. 913



Rules:

Article 56 of the current Trademark Law provides that the exclusive right to use a registered trademark is limited to the trademark which has been approved for registration and to the goods designated by the trademark registration. In three consecutive year non use cancellation proceedings, where a registered trademark is designated for use on several similar goods, the use of the registered trademark in connection with one of the designated goods cannot maintain the registration of the trademark in connection with other similar goods designated by the registration.

Facts:

In this case, the trademark under review was the trademark reg. no. 3191802 for “Pan Long Yun Hai in Chinese character” (Trademark in Dispute), of which Fang Zilin applied for registration on May 28, 2002. It was approved for registration on November 7, 2003, designated in respect of goods mineral water, fruit juice, grape juice, lemon juice, coke, milky tea (non-milk-based), fruit tea (alcohol-free), vegetable juice (beverage), etc. in Class 32. The term of the exclusive right to use the trademark has been extended to November 6, 2023 after renewal.

On November 21, 2011, Yunnan Pan Long Yun Hai Pharmaceutical Co., Ltd. (hereinafter referred to as “Pan Long Yun Hai Company”) raised cancellation of the Trademark in Dispute with the Trademark Office of the State Administration for Industry & Commerce (hereinafter referred to as “CTMO”) on the ground of three consecutive years of non-use. On

September 29, 2013, CTMO issued its decision on the collation application in connection with the Trademark in Dispute, finding the trademark use evidence provided by Fang

Zilin is invalid, thereby deciding to cancel the Trademark in Dispute. Fang Zilin was dissatisfied with CTMO’s decision and

applied for review with the Trademark Review and Adjudication Board (“TRAB”) on November 4, 2013, also submitted relevant evidence to prove the trademark was licensed to others during the specified period.

On December 16, 2014, TRAB made its decision Shang Ping Zi [2014] No. 100321 Reexamination Decision on Cancellation of Trademark Reg. No. 3191802 for “Pan Long Yun Hai in Chinese character” (hereinafter referred to as the “Decision at Issue”), holding the licensee of the Trademark in Dispute had put the Trademark in Dispute in actual commercial use in connection with mineral water, while fruit juice, lemon juice, etc. designated by the said trademark registration are similar to mineral water, therefore, the use of the Trademark in Dispute in connection with mineral water can be deemed the use of the same mark on such similar goods. However, the evidence submitted by Fang Zilin is insufficient to prove that the Trademark in Dispute had been used commercially in connection with beer in a valid manner, so the registration of the Trademark in Dispute in connection with beer should be revoked.

Pan Long Yun Hai Company was dissatisfied with the Decision at Issue made by TRAB and therefore filed a lawsuit, asking to revoke TRAB’s Decision at Issue. The court of the first instance found after trial that the evidence on record for this case is unable to prove the Trademark in Dispute had been commercially used in a valid manner in mainland China during the specified period. The Decision at Issue made by TRAB lacked main evidence and

flawed in application of laws, thus should be revoked. The court of the second instance upheld the judgment of the court of the first instance.

Beijing Higher People’s Court particularly pointed out in the judgment of the second instance that the exclusive right to use a registered trademark is limited to the trademark which has been approved for registration and to the goods designated by the trademark registration. It does not cover a mark similar to the registered trademark or the goods similar to the goods designated by the trademark registration. Neither the use of a registered trademark in connection with goods similar to those as designated by the trademark registration nor the use of a mark similar to the registered trademark in connection with goods identical with or similar to those as designated by the trademark registration falls within the scope of the exclusive right to use a registered trademark; and such use shall not constitute the use as defined in Trademark Law in relation to the exclusive right to use a registered trademark. Therefore, in this case, even though the Trademark in Dispute had been used commercially in a valid manner in connection with mineral water, it should not be deemed the use of the Trademark in Dispute in connection with juice, lemon juice, etc that are similar to mineral water for which the Trademark in Dispute had been used.

Remarks:

In previous cases concluded by CTMO, TRAB and Chinese courts, where a registered trademark is designated for use on several similar goods, the use of the



registered trademark in connection with one of the designated goods will maintain the registration of the trademark in connection with other similar goods designated by the registration (however, if the goods on which the registered trademark is being used is not among the designated goods, no matter whether such goods are similar to the designated goods, the registration of the trademark cannot be maintained).

In the present case, Beijing Higher People's Court adopted a different and

stricter standard. In light of relevant legislative intentions, provisions of laws and judicial policies in China, partial cancellation of the trademark registration for those goods that the registered trademark has not been put into use has certain practical significance, and may encourage trademark owners to actively use the registered trademarks and avoid waste of trademark resources.

Author: Lena Zhao

Copyright

Jinan Huaxing Architectural Design Co., Ltd. v. Huasheng Design

Institute

The Supreme Court Civil Judgment (2016)Min Zai No. 336

Shandong Higher People's Court Civil Judgment (2015) Lu Min San Zhong Zi No. 159

Shandong Jinan Intermediate People's Court Civil Judgment (2014) Ji Min San Chu Zi No. 926



Rules:

Where a new design unit affixes the name thereof to the construction design drawing for the purpose of

completing the construction task, shall not be naturally taken as the behavior of claiming authorship. The new design unit will not become the copyright owner of the involved construction design drawing due to the signature; nor could it use the construction design drawing beyond the scope of the involved project.

Facts:

In October, 2009, Jintian Company (as a developer) entered into a Construction & Engineering Design Contract with the plaintiff, entrusting the plaintiff to carry out engineering design for Jinan International Shopping Mall. In October, 2013, Jintian Company terminated the Contract with the plaintiff. On the same day, Jintian Company entered into a Construction & Engineering Design Contract with the defendant, entrusting the defendant to continue engineering design for the project and improve the working drawing according to the practical situation on the project site. The plaintiff claimed that the defendant infringed the copyright thereof by accepting the entrustment of Jintian Company, as well as copying, amending

and signing the involved graphic works of the plaintiff.

The court of the first instance ordered the defendant to stop the behaviors of infringing the copyright of the plaintiff and compensate the plaintiff for economic losses of RMB 300,000 yuan. The defendant was unsatisfied and appealed with Shandong Higher People's Court, which upheld the judgment of the first instance. The defendant was unsatisfied and applied for a retrial. Upon retrial, the Supreme People's Court held the construction design drawing belonged to works created by commission. In the absence of express agreement between Jintian Company and the plaintiff, Jintian Company could use the works for free within the specific scope of purpose as entrusted until the completion of the project construction. Jintian Company (as a developer) could separately entrust the defendant to continue to use the design drawing to participate in project construction. The defendant copied and amended the construction design drawing according to the practical construction situation, as well as issued the drawing with the signature and seal thereof for the purpose of submission for approval, acceptance, etc. in the name of the design unit, which belonged to the behaviors of performing the duties as a design unit. The behaviors should be deemed the behaviors of Jintian

Company to continue to use the construction design drawing within the scope of the specific purpose as agreed, which did not infringe the copyright of the plaintiff. Therefore, the judgments of the first instance and the second instance were revoked.

Remarks:

The courts of the first instance and the second instance have only considered the copyright of the plaintiff in the construction design drawing, while ignored the right of Jintian Company (as an entrusting party) to reasonably use the works created by commission for free within the scope of the specific purpose as agreed. Different from the creation of ordinary work, there are qualification requirements and mandatory requirements for the amendment and signature of drawings in the construction industry. As the main part of the project has been finished, it is fair and reasonable for the Supreme People's Court to hold that the behavior of Jintian Company to amend and sign the drawing as that of using the drawing for free within the scope of the specific purpose as agreed, which has considered the interests of both the copyright owner and the public.

Author: Richard Hu

Unfair Competition

Yongshengda Company v. Mr. Zheng

Zhejiang Higher People's Court Civil Judgment (2016) Zhe Min Zhong No. 719
Zhejiang Quzhou Intermediate People's Court (2016) Zhe 08 Min Chu No. 87



Rules:

(1) Article 14 of the Anti-Unfair Competition Law of the People's Republic of China has prohibited fabricating false facts in parallel with spreading false facts, with no restrictive provisions on the objects to whom false facts are spread;

(2) "False facts" refer to not only fabricated facts that do not exist, but also facts that exaggerate and distort existing facts in order to mislead the consuming public and damage the goodwill of relevant market entities.

Facts:

On September 15, 2015, Zheng, the legal Representative of Quzhou Red Sun Ceramic Machinery Co., Ltd. (hereinafter:

Quzhou Red Sun company), forwarded the negative information spread by others regarding Zhejiang Yongshengda Technology Co., Ltd. (hereinafter: Yongshengda Company) in QQ groups. On October 15, 2015, under the mediation of Donggang Police Station of Quzhou Municipal Public Security Bureau, Xu, on behalf of Yongshengda Company, entered into a settlement agreement with Zheng, who published an apologetic statement on the QQ Account. Afterwards in 2016, Zheng made adverse comments on Yongshengda Company to relevant clients through QQ groups and WeChat Account, claiming "Yongshengda Company stole product drawings", "the product quality of Yongshegnda Company was greatly different from that of Zheng's company", "the products of Yongshengda Company imitated the design of Zheng's Company", etc. The courts of the first instance and the second instance both held that the comments made by Zheng through QQ groups and WeChat account constituted business defamation, and Zheng should undertake the civil liability of stopping unfair competition acts and compensating for losses in accordance with the law. Meanwhile, the courts held the acts of Zheng did not belong to "acts of duty", and did not support Yongshengda Company's claim of bearing joint liability on the part of Quzhou Red Sun Company.

Remarks:

(1) Anti-Unfair Competition Law of the

People's Republic of China (Revised Draft for approval) intends to revise "false facts" to "false information", and intends to provide that operators shall not fabricate or spread false information, assess information in bad faith, spread incomplete or unproven information, or damage others' business goodwill and commodity reputation. In this case, the courts have defined "false facts" as including "not only fabricated facts that do not exist, but also facts that exaggerate and distort existing facts in order to mislead the consuming public and damage the goodwill of relevant market entities", which both conform to the objective reality of the market and have certain foresight.

In practice, an essential requirement in cases of infringing citizens' right of reputation and right of honor is diminishing the public evaluation of an individual. Therefore, although the defendant argued "private chat on WeChat belongs to personal speech" and "an individual enjoys the freedom of speech", according to the judgments of the courts, "freedom of speech" shall adhere to the public order and good morals, and shall not damage the legal rights and interests of others. In this case, the defendant fabricated and spread "false

facts" in bad faith, which will probably damage the legal rights and interests of the plaintiff, thereby constitute business defamation.

(3) It is somewhat a pity that the courts judged Zhang's acts belonged to "individual behaviors" and had no connection with Quzhou Red Sun Company for which Zhang acted as the legal representative. Although the involved WeChat Account was registered by the individual, the account name was "Zheng from Zhejiang Red Sun Ceramic Machinery Co., Ltd.", which could prove the acts of the individual belonged to a duty behavior. According to Article 61 of the General Rules of the Civil Law of the People's Republic of China, "When the legal representative of a legal person conducts civil activities in the name of the legal person, the legal consequences shall be borne by the legal person"; according to Article 62, "If the legal representative of a legal person causes harm to others due to performance of his duties, the legal person shall bear the civil liability." Therefore, it may be more powerful judgments to stop unfair competition acts if the courts judge that the individual and the company commit joint infringement.

Author: Tao PANG

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