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In this edition, we scanned all the IP-related judgments and adjudications published at the Supreme Court's official website (<http://www.court.gov.cn/zgcpwsw/>) in March 2015, worked out the statistics based on all the IP-related judgments and adjudications published by the Supreme Court and the 32 Higher Courts, and shared with you our comments on some significant cases.



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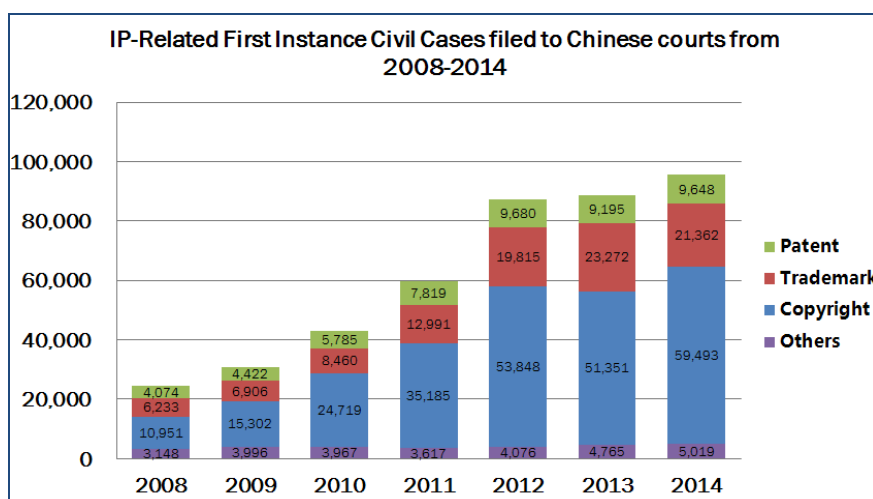
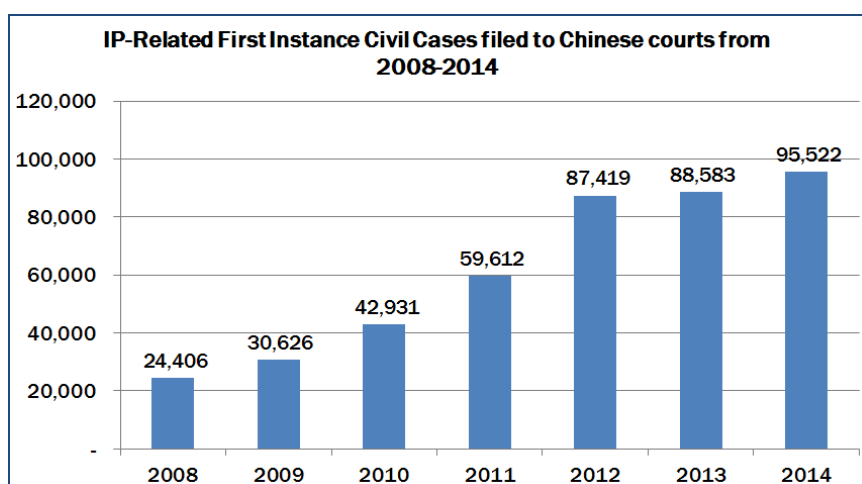
## I. Statistics

### Summary of IP Litigations by Chinese Courts in 2014

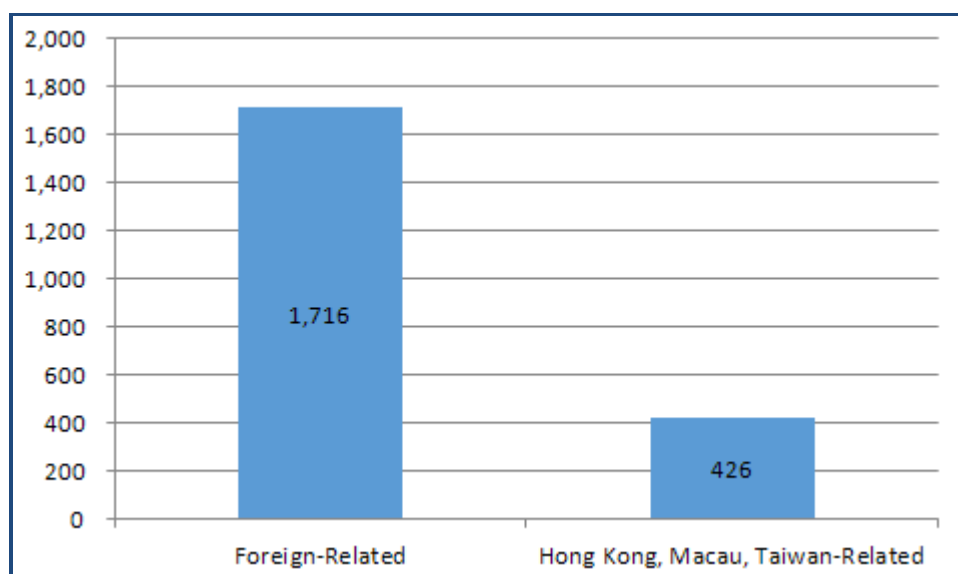
#### (Part A)

- In 2014, Chinese courts accepted and concluded a total number of 133,863 IP cases and 127,129 IP cases respectively, and the respective year on year increases were 19.52% and 10.82%.
- IP Civil Cases:

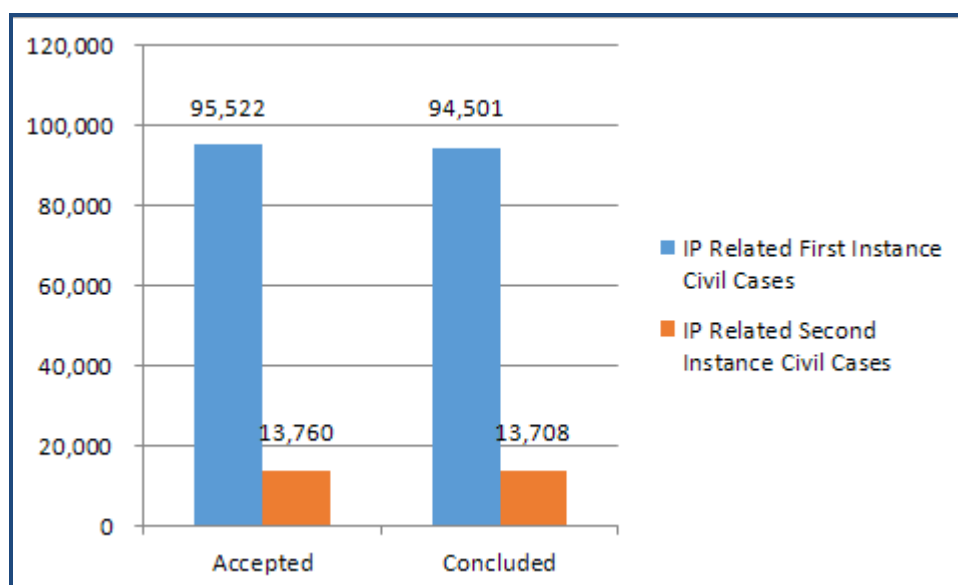
In 2014, the number of first instance civil intellectual property cases accepted and concluded by local courts was 95,522 and 94,501 respectively, and the respective year on year increases were 7.83% and 7.04%.



With respect to first instance civil intellectual property cases, local courts concluded 1,716 foreign-related cases, 0.11% more than last year; and concluded 426 cases involving parties either from Hong Kong, Macau or Taiwan, 11.8% less than last year.



In 2014, local courts accepted and concluded 13,760 and 13,708 IP-related second instance civil cases respectively, and the respective year on year increases were 15.08% and 18.65%.



Source: *Intellectual Property Judicial Protection by Chinese Courts in 2014* issued by the Supreme Court

## II. Comments on Typical Cases

### Patent

#### *Beijing Yadong Biopharmaceutical Co. Ltd. vs. the Patent Reexamination Board*

- Administrative Retrial of Patent Invalidation Case
- The Supreme Court [Case No.: (2013) Zhi Xing Zi No. 77]
- This case was selected as one of Top 10 IP Cases by Chinese Courts in 2014

#### Rule:

**Those technical contributions that are not recorded in the specification can't be the basis for seeking patent protection;**

**Technical effect of an invention is a key factor when evaluating inventive step. When judging whether there exists an unexpected technical effect, factors such as the characteristic of the technical field the patent belongs to, particularly the predictability of the technical effect and technical clues in prior arts should be brought into comprehensive consideration.**

**Determination of the distinguishing technical feature should be based on the technical features recorded in claims.**

#### Remarks:

Beijing Yadong Biopharmaceutical Co. Ltd. is the patentee of Chinese patent for invention No.ZL200510000429.1. Against this patent, Shandong Huayang Pharmaceutical Co. Ltd. filed an invalidation request. Examination Decision No. 15409 made by the Patent Reexamination Board invalidated the patent entirely due to lack of inventive step. Yadong Biopharmaceutical appealed against the decision by initiating administrative litigation proceeding. The Beijing No. 1 Intermediate Court deemed that according to the counterevidence No. 4 submitted by the patentee, the total effective rate of the granule defined by the captioned patent was 95.70%, while the total effective rate of the tablet in evidence 1 was 89.32%, so claim 1 of the captioned patent had significant progress compared with evidence 1. The Beijing No. 1 Intermediate supported the patentee and the Patent Reexamination Board appealed against the judgment. While the second instance judgment made by the Beijing Higher Court overturned the first instance judgment and upheld the Examination Decision No. 15409. Yadong Biopharmaceutical Co. Ltd. dissatisfied with the judgment and applied for a retrial proceeding.

The Supreme Court held that:

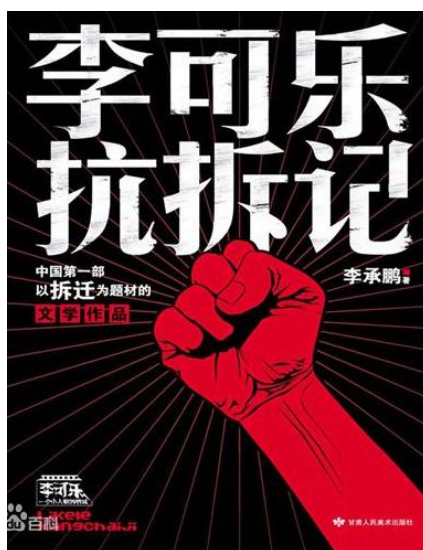
1. Under the condition that the counterevidence No.4 didn't disclose the specific measuring method of the total effective rate, it was impossible to determine that the total effective rates of the counterevidence No.4 and the captioned patent were measured under the condition of the same effect and quantity and by the same measuring method. The aforementioned comparative data can't testify whether the captioned patent had significant progress in clinical curative effects.
2. Even if the aforementioned comparative data was accepted, due to the reason that decompression drying step was omitted during the preparation of the granule defined by the captioned patent, the effect to the active components of drugs was reduced accordingly, those skilled in the arts can reasonably expect that the omission of the decompression drying step can improve the overall effective rate of drugs, while the patentee failed to provide evidences testifying that the technical effect was beyond the reasonable expectation of those skilled in the arts. Thus, the change in the technical effect can be reasonably expected by those skilled in the art, and conclusion that the captioned patent possessed unexpected technical effect can't be drawn. So the petition for retrial was rejected.
3. The Supreme People's Court also specified that determination of the distinguishing technical features between claims and the closest prior art should be based on the technical features recorded in claims, and one by one comparison should be made between the technical features recorded in claims and those disclosed by the closest prior art and those technical features that were not recorded in claims shall not be considered and thus it was impossible for them to be regarded as the distinguishing technical features. In this case, those skilled in the art can't get that the technical solution seeking protection was to improve the extract content of salvianolic acid b and such content was related to the technical problem solved by the captioned patent. Therefore, it was not supported by the Supreme Court that Yadong Biopharmaceutical Co. Ltd. regarded the content of salvianolic acid b as the distinguishing technical feature.

This case also reminds patentees of the fact that during the invalidation process, although patentees can demonstrate the technical effect of a patent by submitting comparative test data, attention shall be paid that the comparative data obtained can only be accepted by the Patent Reexamination Board and courts when the test method used is identical with that in the captioned patent. Besides, even if the patentee deems that the technical effect of the captioned patent is improved compared with prior arts, further explanation that such change in technical effect is unexpected by those skilled in the arts is also required.

Copyright

[Li Chengpeng vs. Apple Inc. et.al](#)

- Dispute of copyright Infringement with regard to Network Dissemination
- The Beijing Higher Court [Case No.: (2013) Gao Min Zhong Zi No. 2080]
- This case was selected as one of the Top 10 IP Cases by Beijing Courts in 2014



**Rules:**

1. Where internet service provider (ISP) obtains economic benefits directly from works, performances, audio or video recordings provided by internet users, it shall be identified that ISP bears relatively higher duty of care for internet users' acts infringing the right of information on network dissemination.
2. Different from ISP that generally provide information storage space as stipulated in Article 22 of *Regulation on the Protection of the Right to Network Dissemination of Information*, ISP with strong capabilities in managing and controlling internet content provider and the contents of messages shall not be exempted from liability for damages.

**Remarks:**

The plaintiff is the author of a book with 300 thousand characters. After becoming aware that his book could be downloaded with payment from AppStore under Apple Inc.'s iTunes software, the

plaintiff initiated a lawsuit based on the alleged copyright against Apple Inc., iTunes S.a.r.l. and the developer of the infringing electronic book.

Although Apple Inc. claimed that iTunes S.a.r.l. was the actual manager of the AppStore application platform, the available evidence showed that iTunes S.a.r.l. only charged and settled relevant fees with the end users in Mainland China. In contrast, Apple Inc. not only created the business mode of AppStore and developed the AppStore platform, but also concluded a serial of agreements with developers of applications (the third parties). Apple Inc. had a strong capability in managing and controlling the platform, application developers and their applications, which enabled Apple Inc. to select and distribute the applications of the third-party developers. Therefore, Apple Inc. should be identified as the actual manager of the AppStore platform undertaking legal liability for the internet platform service provided by AppStore.

Besides, in this case Apple Inc. obtained direct profits by download charges and should bear relatively higher duty of care for applications provided by the AppStore platform. However, Apple Inc. did not perform its duty of care appropriately and provided technical support by should having known the developer's infringing act. Therefore, contributory infringement was established and Apple Inc. was subject to corresponding legal liabilities.

#### Trademark

### [Guangzhou Guda Plastics Processing & Packaging Co., Ltd vs. TRAB, Watson Enterprises Limited](#)

- [Dispute in relation to Trademark Cancellation Review](#)
- [The Supreme Court \[Case No.: \(2014\) Xing Ti Zi No. 30\]](#)

#### Rule:

**In administrative proceedings of trademark cancellation review and its follow-up legal proceedings, in terms of evidence of trademark use submitted by trademark registrant, such factors as actual circumstances of company's business, habits of using the trademark, differences of ways in using trademark should be taken into full consideration, and the evidence with strong effect of proving could be admissible.**

#### Remarks:

On Jan. 4, 1995, Guangzhou Guda Plastics Processing & Packaging Co., Ltd (hereinafter as "Guangzhou Guda Company") filed No. 896256 "mine & device" trademark (hereinafter as "disputed mark") with CTMO and was granted for registration on Nov. 14, 1996. The disputed

mark was designated on goods in Class 16, such as industrial paper, paperboard and prints. On March 19, 2000, Watson Company filed a cancellation petition against the disputed mark on the excuse of 3-year-no-use.

The focal issue in the dispute is the admissibility of the evidence of trademark use.

TRAB, the Beijing No. 1 Intermediate Court and the Beijing Higher Court both ruled that the evidence submitted by Guangzhou Guda Company was not adequate to prove that the disputed mark was used in commercial activities during the period from March 19, 2000 to March 18, 2003. The Supreme Court fully considered and examined all the evidence of trademark use, such as the VAT invoices submitted in the administrative proceeding, the advertisements, delivery orders supplemented in the first-instance legal proceeding. In absence of contrary evidence, the Supreme Court admitted two publications in 2002 submitted by Guangzhou Guda and recognized the authenticity of the advertisements of “Mine stationery” in the two publications. Although the main readers of the two publications may be businessmen outside Mainland China, this evidence could prove that Guangzhou Guda Company actually used the disputed mark in commercial activities in 2002.

In this case, the Supreme Court particularly pointed out that in administrative proceedings of trademark cancellation review and the follow-up legal proceedings, in terms of evidence of trademark use submitted by trademark registrant, factors such as actual circumstances of company’s business, habits of using the trademark, differences of ways in using trademark should be taken into full consideration. The evidence is admissible if they reach the degree of high probability of proof, not necessarily for certain and excluding all reasonable speculations.

Finally, the Supreme Court determined that Guangzhou Guda Company truly and continuously had used the disputed mark from March 19, 2000 to March 18, 2003 and maintained the registration of the trademark in retrieval.

## **Anti-Monopoly**

### ***Lou Binqlin vs. Beijing Aquatic Products Wholesale Industry Association***

- **Regarding the dispute of monopoly**
- **The Beijing Higher Court [Case No.: (2013) Gao Min Zhong Zi No. 4325]**
- **This case was selected as one of the Top 50 Typical IP Cases by Chinese Courts in 2014 and one of the Top 10 IP Innovation Cases by Beijing Courts in 2014**





**Rule:**

**The monopolizing conducts, such as agreement of fixed price or price adjustment, by business operators in market competition should be prohibited.**

**Remarks:**

This is the first court case involving horizontal monopoly agreement in China.

The issue is whether the Aquatic Products Association coordinated its members to reach an agreement on fixed price or price adjustment as well as whether Articles 1 & 2 of the Regulations on the Rewards and Punishment Regulations issued by the Association formed monopoly agreement. After examination, the court ruled as follows:

Firstly, the Association was composed of 31 entities or organizational members engaged in selling seafood. All the members sold identical or similar products with competitive relations, which fell into the category of competitive business operators as stipulated in Article 13 of the Anti-Monopoly Law.

Secondly, the Association organized and coordinated members to discuss for reaching a fixed price or price adjustment agreement many times and imposed fines on members that broke the rules of the Association to sell scallops at discount. The above acts were intended to avoid internal competitions among members with competitive relations, boycott competitions from non-membership operators against the members and affect the normal price fluctuation. These conducts also increased the sales profits in order to obtain the returned profit from the Zhang Zidao Island, which objectively exerted the effects of eliminating and limiting competitions. Therefore, the Association's above acts belonged to reaching a fixed price or price adjustment monopoly agreement.

Moreover, the Association prohibited members to sell whole Zhang Zidao Island scallops to non-members in the markets where the members were located. This was aimed to fix and control the price and damaged the interests of consumers, which had the effects of eliminating and limiting competition as well. Therefore, the above acts also fell into the category of reaching a fixed price or price adjustment monopoly agreement.

Finally, in the rewards and punishment regulations of the manual of the Association, Article 1 stipulated the provision of prohibiting unfair competition among members and breaking the set price to sell scallops at discount and Article 2 stipulated the provision of prohibiting members to sell whole Zhang Zidao Island scallops to non-members in the markets where the members were located. The above provisions were provisions of fixing product price, which violated the compulsory regulation of Article 13.1 of the Anti-Monopoly Law and should be rendered void.

### **III. NTD Case Selection**

#### ***Bayer Co., LTD vs. Luohe Guanghui Pharmaceutical Co., LTD and Zhaohongtao***

- **Dispute Regarding Trademark Infringement and Unfair Competition**
- **The Henan Province Zhengzhou Intermediate Court [Case No.: (2013) Zheng Zhi Min Chu Zi No.5]**
- **This case was selected as one of the Top 10 Typical IP Cases by Henan Courts in 2014**

Luohe Guanghui Pharmaceutical Co., LTD, founded on April 22, 2008, was a company mainly engaged in veterinary drug. At the time of its establishment, it was initially called as Luohe Bayer Pharmaceutical Co., LTD. Luohe Guanghui Company also registered some domain name incorporating Bayer and the similar mark, such as <bayer.cn>, <lhbaier.com> and so on, and used the marks aforementioned on its products, brochures, websites and business place, such as “拜耳”, “拜耳药业”, “BAYER”, “BAIER” and so on. Zhao Hongtao was the sole shareholder of Luohe Guanghui Pharmaceutical Co., LTD.

Entrusted by Bayer Co., LTD, we NTD team developed a proper litigation strategy after making a comprehensive analysis of the case. We filed a lawsuit with the Zhengzhou Intermediate People's Court in Henan province in December 2012 against Luohe Guanghui Company and Zhao Hongtao. Our claims were that the defendant should stop the act of trademark infringement and unfair competition and compensate the losses that Bayer suffered. After court hearing, the court decided that the conduct by Luohe Guanghui Company infringed upon the right of plaintiff in relation to the registered trademarks: “BAYER”, “拜耳” and “BAYER with cross pattern mark”. Moreover, the court held that Luohe Guanghui Company took a free ride of the good reputation of the trade name “拜耳” with obvious subjective malignity, which was not in conformity with the principle of good faith and credibility and constituted an act of unfair competition. The court made a decision that Luohe Guanghui Company should stop the act of trademark infringement and unfair competition, and compensate Bayer's economic losses as well as reasonable expense amounting to RMB 100,000.

The two defendants then appealed to the Henan Higher Court. Finally, the disputing parties reached a settlement in the conciliation conducted by the Henan Higher Court. The settlement agreement aggravated the liabilities of the shareholders, managers in Luohe Guanghui Company as well as their relatives if they or the company engage in infringement activities again, which provided future protection for Bayer.

It is noteworthy that the mark “拜耳” was protected as trademark as well as trade name in this case. Court of first instance provided two forms of protection for plaintiff against the defendant about registering the mark “拜耳” as its trade name. One path was protecting the mark “拜耳” as a trademark according to Articles 1.1 & 1.3 of *the Interpretation of the Supreme People’s Court on the Application of Law in the Case of the Civil Trademark Disputes*. The court suggested that “拜耳” was the registered trademark of plaintiff, Luohe Guanghui Company used “拜耳” as its trade name and highlighted this mark without the authorization of plaintiff, which infringed the exclusive right of plaintiff over its registered trademark. The other way was protecting the mark “拜耳” as a well-known trade name according to Article 5.3 of *the Anti-unfair Competition Law*. The court determined that “拜耳” was the well-known trade name of plaintiff, and the act of Luohe Guanghui company constituted unfair competition.

In conclusion, the two protection forms focus on different points. The trademark protection mode requires use of the mark similar to or identical with the prior registered trademark, then the court determines whether there is infringement or not according to the theory of confusion. The trade name protection mode puts forwards a strict criterion. It requires firstly that the defendant is the business competitor of plaintiff. Secondly, it demands that the defendant is aware of the prior well-known trade name. Then the court determines whether there is unfair competition or not according to the theory of confusion.

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**-The End-**