



Year-End Special Edition

(Part A)

2014.11

On January 4, 2014, *Regulations Regarding Publication of Court Judgments on the Internet* issued by the Supreme Court took effect. Since then, we started to research the IP decisions published at the Supreme Court's official website (<http://www.court.gov.cn/zgcpwsw/>) and share our brief comments on some significant cases with our clients every month since March 2014 through NTD IP CASE EXPRESS monthly edition. What we did was well echoed by our clients, of which we are sincerely appreciative.

The year 2014 is an eventful year with many highlights in the IP area in China. At the end of the year, we prepared this year-end special edition in two issues, including five chapters involving IP policy, IP litigation procedures, patent, copyright, trademark, unfair competition and anti-monopoly. In these chapters, we will summarize the IP trends and issues of the past year, analyze the changes in the IP area with regard to legislative development and judicial policy and some typical cases. These cases¹ will be included in the corresponding parts of this Issue for your easy reference.

This special edition was made basing on our long-term legal practice and research in the Chinese IP realm, and we would like to share it with you. Your comments or suggestions will be highly appreciated.

¹ Some cases included in this special edition were shared with you in the previous editions of NTD IP EXPRESS, and many other cases are new.

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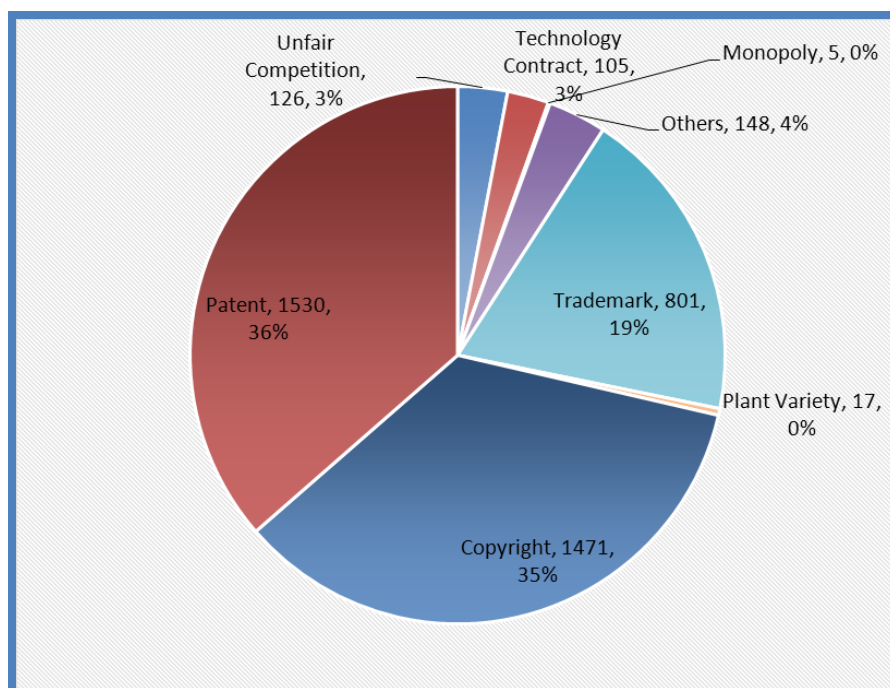
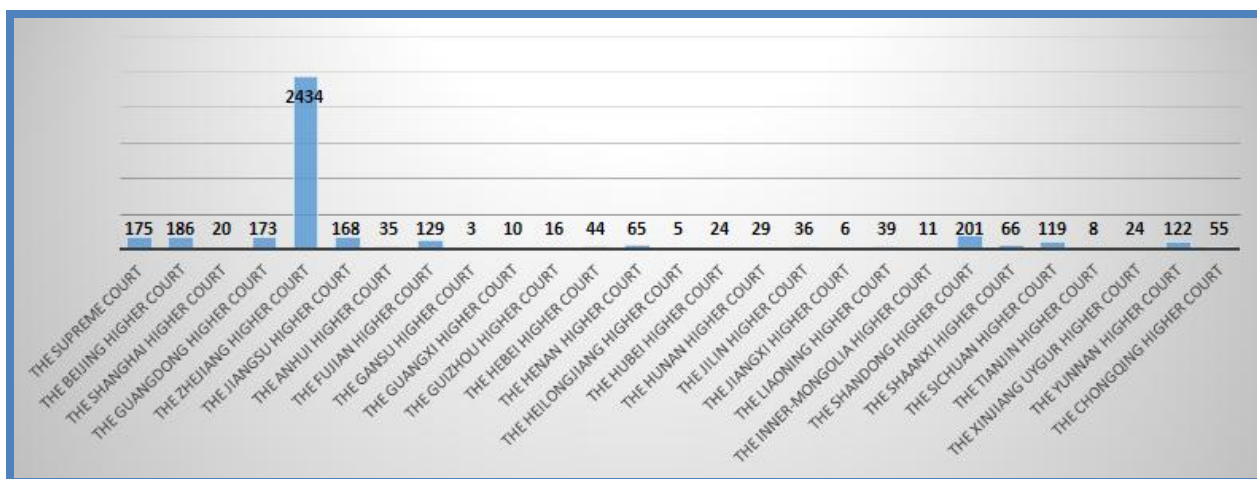
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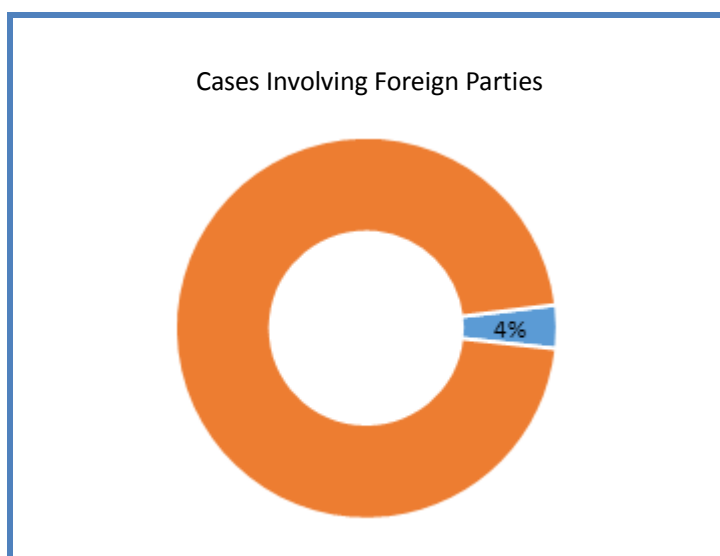
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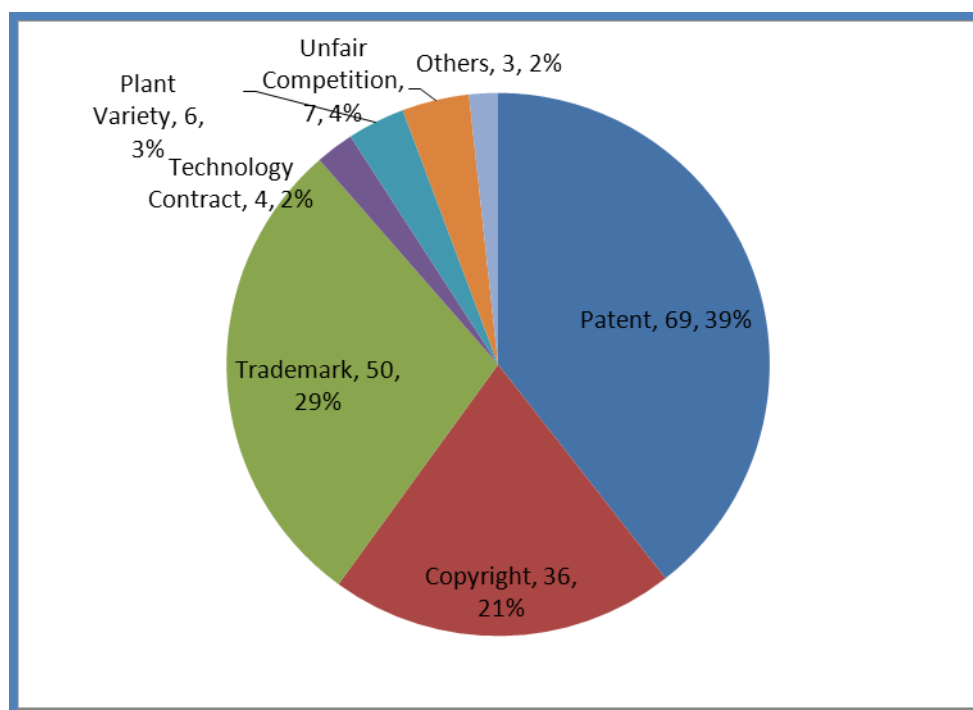
Statistics

- In 2014, about 28,000 IP decisions were published on the Supreme Court's official website (<http://www.court.gov.cn/zgcpwsw/>).
- From January to November of 2014, the Supreme Court and 32 Higher Courts published 4,203 IP decisions on this website. Of the 32 Higher Courts, the Zhejiang Higher Court published 2,434 IP decisions and ranked No. 1. The Shandong Higher Court and the Beijing Higher Court ranked No. 2 and No. 3 with 201 and 186 IP decisions respectively. 4% of the 4,203 IP decisions involved foreign parties.





- From January to November of 2014, the Supreme Court published 175 IP decisions, including 69 patent decisions, which took up the first place.



Notes:

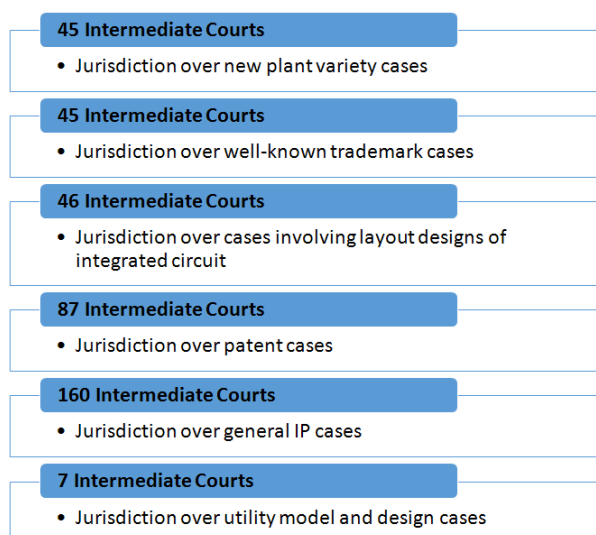
- 1) Decisions uploaded on the Internet are effective judgments and adjudications. First-instance judgments in the on-going appellant proceedings are not uploaded.
- 2) Not all enforceable judgments and adjudications issued by courts were uploaded. Cases involving trade secrets were not uploaded under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

IP Policy and Litigation Procedures

I. Establishment of IP Courts and Related Organizational Changes

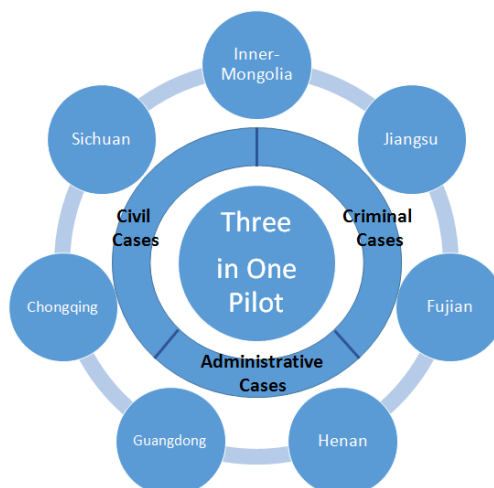
● Current IP Case Trial Mode

■ Current Judicial Jurisdiction for IP Cases



■ Optimizing Judicial Jurisdiction for IP Cases, Piloting on “Three in One” Trial Mode

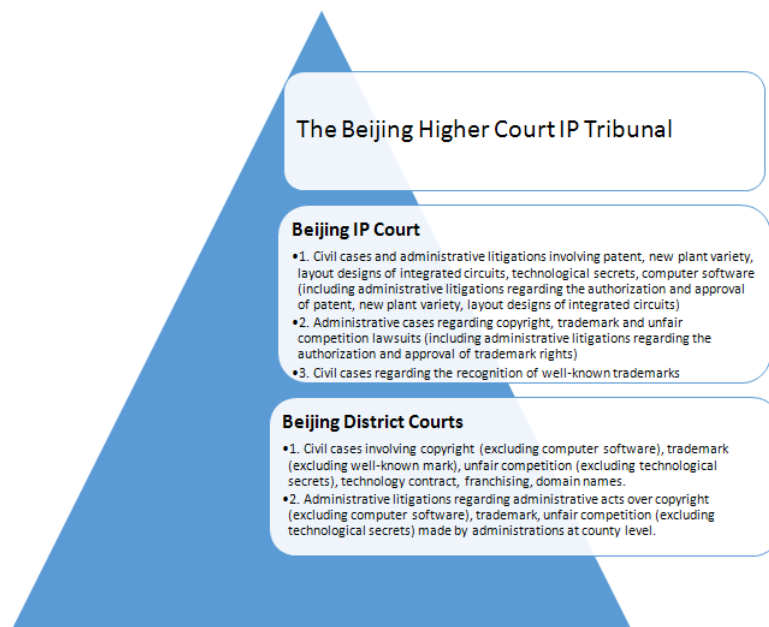
A “three in one” pilot project is now underway in 7 Higher Courts, 79 Intermediate Courts and 71 District Courts in Inner Mongolia, Jiangsu, Fujian, Henan, Guangdong, Chongqing and Sichuan.

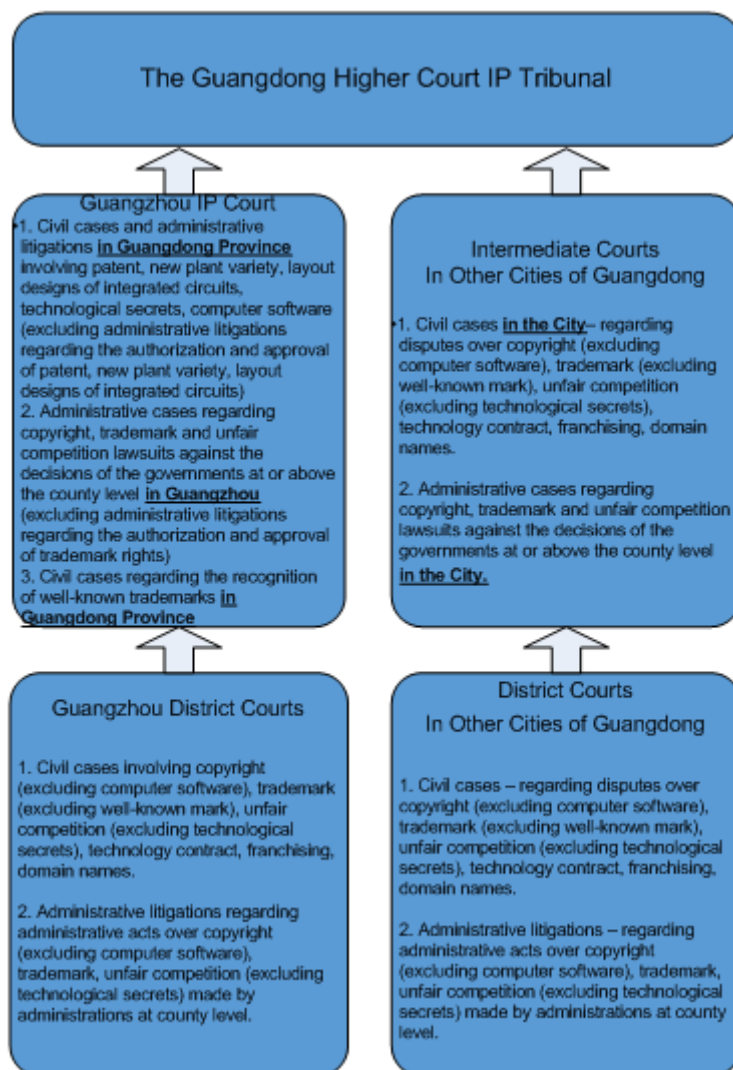
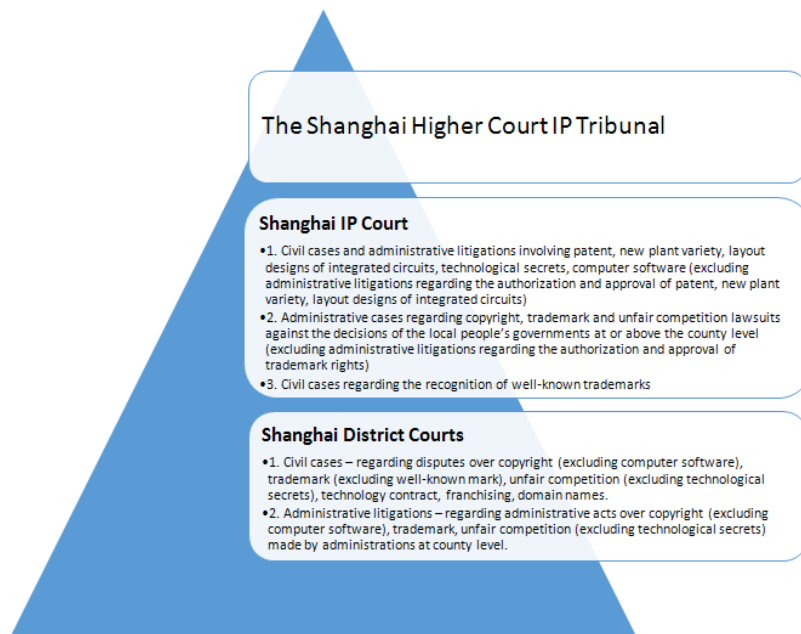


● Establishment of IP Courts

As of December 28, 2014, three IP courts, which are the Beijing IP Court, the Shanghai IP Court and the Guangzhou IP court, have been established in Beijing, Shanghai and Guangzhou respectively. The Guangzhou IP Court will have jurisdiction over all IP cases within the territory of Guangdong province. The Shanghai IP Court, the Shanghai No.3 Intermediate Court and Shanghai Procuratorate No.3 Branch will collaborate and work together, making Shanghai the first city/province in China that set up cross-district courts and procuratorates.

According to the Decision of the Standing Committee of the National People's Congress and *Provisions of the Supreme Court on Jurisdiction of IP Courts in Beijing, Shanghai and Guangzhou*, judicial jurisdiction of the three IP Courts is displayed as below:





● **Exploring Reforms of IP Administrative Authorities**

Shanghai took the lead in making an attempt to reform their IP administrative authorities. On September 26, 2014, the IP Office of Shanghai Pilot Free Trade Zone Administration Committee was officially established, and this IP Office will adopt the “three in one” mode and will be responsible for both the administrative management of patent, trademarks and copyright and the enforcement of law thereabout in the Zone except border protection of IP by the customs in the Zone. On November 16, 2014, Shanghai Pudong New District set up an IP office that will be responsible for the administrative management of patent, trademarks and copyright and the enforcement of law thereabout.

● **Establishment of Circuit Tribunals within the Supreme Court**

On December 28, 2014, the Standing Committee of the National People's Congress appointed one president and two deputy presidents for the No.1 Circuit Tribunal and the No.2 Circuit Tribunal of the Supreme Court. Xiangjun Kong, the former presiding judge of the IP Tribunal of the Supreme Court, was appointed as the deputy president of the No.1 Circuit Tribunal. The No.1 Circuit Tribunal, based in Shenzhen, will be responsible for the trial of civil and administrative cases crossing Guangdong province, Guangxi province and Hainan province. The No.2 Circuit Tribunal, based in Shenyang, will be responsible for the trial of civil and administrative cases crossing Heilongjiang province, Jilin province and Liaoning province. It is possible that in the future eight to ten more circuit tribunals will be set up in Wuhan and Shanghai, etc.

● **The Supreme Court Proposing to Set up a Higher IP Court**

On December 26, 2014, in a report, the Supreme Court proposed to set up a higher IP court at the national level to handle appeals about patent cases so as to shorten the trial time and to unify the adjudication standards. This is a new trend of reform on the IP trial mode.

II. Increasing Applications for Preliminary Injunctions

Since the implementation of the amended Civil Procedure Law on January 1, 2013, the number of IP cases involving preliminary injunctions, which previously were only adopted in IP infringement cases, has risen significantly, and preliminary injunctions were broadly adopted in trade secrets disputes and other unfair competition cases in 2014.

The case about the auction of Zhongshu Qian's letter manuscript [Case No.: (2013) Er Zhong Bao Zi No. 9727] tried by the Beijing No.2 Intermediate Court in May 2013 was the first IP case in

which a pretrial preliminary injunction was granted after the implementation of the amended Civil Procedure Law and was listed as one of the Top Ten Typical IP Cases of Year 2013 tried by the courts in Beijing.

Abbott Laboratories Trading (Shanghai) Ltd. vs. Taizhou Huang Yan Yi Long Plastics Ltd. and Beijing Yi Yang Jie Trading Ltd. [Case No.: (2013) San Zhong Min Bao Zi No.01933] tried by the Beijing No.3 Intermediate Court was the first patent case in which a pretrial preliminary injunction was granted after the implementation of the amended Civil Procedure Law. This case was listed as one of the Top Ten Innovative Cases of Year 2013 tried by the courts in Beijing. (Please refer to NTD IP CASE EXPRESS Issue No.4)

In January 2014, the Shanghai No.1 Intermediate Court approved the application of Novartis (China) Biomedical Research Ltd. for a pretrial preliminary injunction against its former employee Mr. He, prohibiting Mr. He from disclosing, using, or permitting others to use the 879 documents marked by Novartis (China) as trade secrets before the court made a ruling.

In 2014, there was also a substantial increase in the number of Internet-related cases involving applications for preliminary injunctions. Over the period from May to August of 2014, the Beijing No.1 Intermediate Court made three preliminary injunctions, all of which were in the unfair competition cases about the publication of false information by the competitors of Beijing Qihu Technology Ltd. to derogate Qihu's reputation. On November 24, 2014, NetEase Cloud Music Platform received a preliminary injunction from the Wuhan Intermediate Court, being demanded to stop broadcasting the 623 musical works suspected of being infringing and to take proper measures, including deleting, taking down or shielding the 623 musical works.

On December 23, 2014, the Standing Committee of the National People's Congress examined the Supreme Court's report addressing and rectifying the problems identified in the enforcement of the patent law. At present, the Supreme Court is actively putting forward judicial interpretations about preliminary injunctions in IP cases and has finished the fifth draft of *Interpretations on Application of Laws Relating to Preliminary Injunctions in IP and Unfair Competition Cases*, which has been published for public opinions.

III. Growing Number of Lawsuits about Non-Infringement Confirmation

Recent years witnessed a striking growth in the number of lawsuits for non-infringement confirmation, and whether an administrative action can parallel with a non-infringement confirmation lawsuit is controversial under the current judicial practice of China.

In *Xinjiang Agriculture (Group) vs. Yu Nu Si • A Ji* for Non-infringement Confirmation [Case No.: 2013 Min Shen Zi No.237] , the Supreme Court pointed out in its decision: lawsuits about confirmation of non-infringement of IP rights are intended to prevent the right holders from damaging or causing possible damage to the interests of others by misusing their IP rights. In this case, although Yu Nu Si • A Ji never sent a warning letter to Xinjiang Agriculture (Group), they filed a complaint with the local administrative authorities against the latter's use of a trademark similar to their registered trademark in respect of similar goods, and the administrative authority accepted the complaint and was about to making a decision, which triggered the instability of the interests of both sides. Thus, the requirements for filing a non-infringement confirmation lawsuit were met.

Under the judicial practice of China, quite a few courts in China hold that, once the right holder initiates legal proceedings including an administrative action, the accused infringer will have no right to bring a non-infringement confirmation lawsuit. For instance, in the trademark non-infringement confirmation lawsuit filed by Suzhou Guo Xin Group Wang Shun Exp & Imp Ltd. against Te Zhi Bicycle Parts Ltd. [Case No: (2013) Hu Yi Zhong Min Si (Shang) Zhong Zi No.1435], the second-instance court sustained the first-instance court's decision of dismissing the former's non-infringement confirmation claims since the latter had initiated an administrative action with the local customs, which was still pending. It is too early to evaluate the repercussion of the above decision by the Supreme Court until more court rulings about similar cases are available. Up to now, some Chinese courts still remain reluctant to accept non-infringement confirmation lawsuits before the administrative proceedings are concluded [Case No.: (2014) Zhu Zhong Fa Min Chu Zi No.34].

IV. Increasing Importance of Professionals and Professional Organizations in IP Lawsuits

● Introduction of Expert Auxiliaries

Article 79 of the amended Civil Procedure Law introduces the position of expert auxiliaries in a lawsuit. Namely, the parties may request the courts to notify qualified professionals to attend the court hearing to comment on the appraisers' appraisal opinions or the technical issues raised by the parties, which signals the establishment of the "dual" expert testimony system, i.e. co-existence of appraisers and expert auxiliaries in civil lawsuits. In July 2014, the Zhejiang Higher Court formulated the *Memorandum on Several Issues Concerning the Participation of Expert Auxiliaries in Civil Lawsuits*, according to which expert auxiliaries will be listed alongside the legal representatives and the attorneys in court judgments. At present, expert auxiliaries are more often involved in patent infringement lawsuits, esp. invention patent infringement lawsuits.

In the invention patent infringement lawsuit [Case No.: (2013) Hu Gao Min San (Zhi) Zhong Zi No.96] filed by Nokia Corporation against Shanghai Hua Qin Telecommunication Ltd., Nokia filed an objection to Shanghai Hua Qin Telecommunication Ltd.'s petition for the testimony of the latter's employee as its expert auxiliary. The second-instance court refused Nokia's objection, ruling that expert auxiliaries can be entrusted to appear to court to present their opinions on related technical issues as long as they possess related knowledge and expertise. Given that Chinese laws do not prohibit the parties' employees from serving as expert auxiliaries in court, it is not inappropriate to have the parties' technical employees in court to explain the technical issues since they are most familiar with such issues.

In the appeal filed by Beijing Qihu Technology Ltd. against Tencent Technology (Shenzhen) Ltd. and Shenzhen Tencent Computer System Ltd. about the latter's abuse of their market dominant position and tried by the Supreme Court [Case No.: (2013) Min San Zhong Zi No.4], both Qihu and Tencent invited expert auxiliaries to appear to court to present their opinions on issues related to the division of market, and one of the expert auxiliaries invited by Qihu was a foreigner. In the appeal, Tencent challenged the education background, the work experience and the academic achievements, etc. of Qihu's expert auxiliaries, but the Supreme Court held that examination of the expert auxiliaries' opinions shall be focused on the factual and statistic basis relied thereupon and whether the expert auxiliaries have exercised the due care and diligence required and that there is no need to set a high standard as to their education background, work experience or academic achievements.

In a recent copyright infringement lawsuit filed by Yao Qiong against Zheng Yu, Mr. Hailin Wang, a famous playwright and the standing director of the Chinese TV Playwright Working Committee, appeared in court as Yao Qiong's expert auxiliary, which attracted broad attention from the public. Eventually, Yao Qiong won the case, in which the expert auxiliary played an important role.

● **Increasing Importance of Market Survey Reports in Trademark Cases**

Over the past years, Chinese courts have been attaching more and more importance to market survey reports in trademark cases. In the copyright and trademark infringement and unfair competition dispute between Nanjing Guo Zi Lv Di Financial Center Ltd. and Jiangsu Zi Feng Lv Zhou Hotel Management Ltd. [Case No.: (2012) Ning Zhi Min Zhong Zi No.24, see NTD IP CASE EXPRESS Issue No. 4], the plaintiff produced to the court a market survey report entitled *Market Survey Report on Association of Zi Feng Building, Zi Feng Shopping Square, Lv Di*

Intercontinental Hotel and Zi Feng Lv Zhou International Conference Center prepared by Shanghai Zhi Tian Enterprise Management Consulting Ltd. based on their market survey about the association of said different users of the “Zi Feng” trademark with regard to the confusing similarity of their names, outer appearance, geographic locations and business scopes, etc. The market survey report showed that more than 60% of the consumers surveyed were misled to believe that the four entities were the same entity. The second-instance court affirmed the first-instance court’s conclusion that consumer confusion has been caused based on a comprehensive examination of the factual evidence and the market survey report with the latter as the corroborating evidence.

V. Great Importance Attached to the Difficulty in Enforcement of Court Judgments

To tackle the difficulty in the enforcement of court judgments, several amendments have been made to the Civil Procedure Law of China, and these amendments include expanding the range of the parties to assist in the enforcement of court judgments in Article 114, increasing the amount of fine on parties impeding the enforcement of court judgments in Article 115, enlarging the scope of the enforced parties’ properties that could be searched by the courts for the enforcement of the court judgments and increasing the enforcement measures in Article 242, etc. In 2014, the Supreme Court promulgated a number of judicial interpretations and policies independently or jointly with other government authorities to regulate and strengthen the enforcement of court judgments, including

- *Several Provisions of the Supreme Court on Enforcement of Proprietary Section in Criminal Judgments* [Fa Shi (2014) No.13] (2014-10-30)
- *Opinions of the Supreme Court and China Banking Regulatory Commission on Carrying out the Work of Network Enforcement Inquiry and Control and Joint Credit Punishment by the Courts and the Banking Financial Institutions* (2014-10-24)
- *Notice of the Supreme Court and the State Administration for Industry & Commerce on Strengthening the Enforcement and the Assistant Enforcement of Regulations of Information Cooperation* (2014-10-10)
- *Several Provisions of the Supreme Court on Voluntary Acceptance of Supervision of Litigious Party by the Courts in the Trial and Enforcement Activities* (2014-07-15)
- *Interpretation of the Supreme Court on Several Issues Concerning the Application of Law in Calculating the Interest on Debts for the Period of Deferred Performance in the Enforcement Work* [Fa Shi (2014) No. 8] (2014-07-07)

In addition, since the promulgation of *Several Provisions of the Supreme Court on Announcement of the List of Dishonest Entities subject to Enforcement* (Fa Shi [2013] No.17) in July 2013, the Supreme Court has set up a nationwide online platform to publish information of dishonest entities subject to enforcement and signed a cooperation memorandum with the Credit Reference Center of the People's Bank of China to include information of the dishonest entities subject to enforcement as part of the credit rating system.

On December 24, 2015, the Supreme Court launched an enforcement-commanding system. At the same time, the Enforcement-Commanding Office within the Supreme Court was also officially opened. The Supreme Court's enforcement-commanding system, vertically connecting the enforcement networks among the Chinese courts at all levels, will also connect the central government, the government authorities and the commercial banks horizontally. Judges responsible for the enforcement of court judgments at all courts from the lowest level to the Supreme Court will be able to search and control the debtors' personal and proprietary information via the system. Through the online enforcement monitoring system, a search for the bank account information of the enforced entities with over 3,000 banks nationwide will take less than one hour. On November 27, 2014, the Beijing Chaoyang District Court successfully wired out the amount of money to be enforced from the enforced party's bank account outside the enforced party's location with the information obtained through the Supreme Court's online enforcement monitoring system, making it the very first successful judicial compulsory enforcement case in China in which the online enforcement monitoring system was utilized.

VI. Accelerating Pace in the Publication of Judgments

Since early 2014, more and more measures have been taken to improve judicial openness. On January 1, 2014, *Regulations Regarding Publication of Court Judgments on the Internet* became effective, in accordance with which courts at all levels should appoint a specialized organization to publish effective court judgments on the Supreme Court's official website and should be accountable for the quality of the court judgments published.

In November 2014, the China Court Trial Process Information Publication website was opened. So far, a total of 20 provinces (municipalities or autonomous regions) have set up a uniform platform at the provincial level to publish court trial information. All courts across the country are required to publish the court trial information on this website by the end of 2015. The court trial information published on this website is classified into two kinds, one kind of information being disclosed to the parties and the attorneys, the other kind of information being available to the social public.

Additionally, the Supreme Court provides other information publication platforms, such as mobile messaging, WeChat, mobile APPs, 12368 telephone voice mail services, and electronic touch screen, etc. Many local courts also use a variety of channels to publish court trial information.

PATENT

I. Amendment of Patent Law and Formulation of Patent Judicial Interpretations

- **The fourth amendment to the Patent Law is in process.**

In January 2012, The Fourth Amendment to the Patent Law of China was officially initiated. In January 2013, the Draft Amendment to the Patent Law (draft for approval) was submitted to the State Council for examination. At present, the Draft Amendment is open for public opinions. The Draft Amendment chiefly includes such content as to impose heavier burden of proof on infringers, to embrace punitive damages for intentional infringement, to expand the administrative authorities' power to confiscating and destroying infringing products or equipments for manufacturing the infringing products and fining the infringers, to timely record and publish patent invalidation decisions, which will become effective as of the date of publication. Besides, the protection term for design patent was proposed to be prolonged to 15 years in the Draft Amendment.

- **The Second Judicial Interpretation of the Supreme Court regarding Patent Infringement is open for public opinions.**

To ensure the correct and efficient implementation of the Patent Law, to specify and unify the trial criteria of patent cases, and to timely respond to the new expectations from technological innovation for the trial of patent cases, the Supreme Court drafted *Interpretation by the Supreme Court on Some Issues Concerning the Application of Laws to the Trial of Patent Infringement Disputes (II)* (Draft open for public opinions), the second judicial interpretation on the criteria of the judgment of patent infringement, and released the *Draft* in July 2014. The Draft contains 37 articles, which relate to such important issues in juridical practice as handling of a patent infringement lawsuit when the patent at issue is obviously invalid, definition of common consumers in design patent infringement cases, determination of indirect infringement and non-infringement counterplea to exploitation of standard patent.

II. Stable Increase of Patent Administrative Cases

According to the statistics of the Beijing Higher Court, lawsuits against administrative decisions about the granting and confirmation of patents remain stable in recent years with about 6% of the administrative decisions being litigated against. In 2013, the Beijing No.1 Intermediate Court received 641 patent granting and confirmation administrative cases, among which 133 cases were patent granting cases and 508 cases were patent confirmation cases. From January to September of 2014, the Beijing No.1 Intermediate Court received 411 patent granting and confirmation cases. In 2013, the Beijing Higher Court overruled the administrative decisions made by the Patent Reexamination Board of the SIPO in 91 cases, taking up 13% of all the 694 cases tried in the first instance of the whole year.

● Patent Invalidation Case Regarding “Invention by Selection in Stainless Steel”

【Case No.: the Beijing Higher Court (2013) Gao Xing Zhong Zi No.1754】

After being selected as one of the top 10 IP Cases of the Beijing Courts and one of the Top 50 Typical IP Cases of China issued by the Supreme Court in 2013, the invalidation case *NSSC vs. the Patent Reexamination Board and Jianxin Li* concerning “invention by selection in stainless steel” represented by NTD was selected as one of the typical patent and trademark right granting and confirmation cases issued by the Beijing Higher Court in October 2014 (Please refer to NTD IP CASE EXPRESS Issue No. 3 for details).

In this case, the court explored a new way to determine the inventiveness of the technical subject involving chemical composition or mixture. The new way established by the Beijing Higher Court is that when the traditional three-step method could not be applied, the judgment of inventiveness should be based on the determination of whether an unexpected technical effect is achieved by the technical solution. Such method is an important development for the judgment of inventiveness.

III. Typical Cases about Judgment of Patent Infringement

Among the Top 50 typical IP Cases of 2013 issued by the Supreme Court, many cases are related to the new developments in the principles of the judgment of patent infringement. The following cases mainly involve the judgment of design patent infringement, infringement determination principles of a step sequence under a method patent and the limiting effects of the subject matter title on the patent protection scope, etc.

● ***Maped Corporation vs. Yangjiang Bonly Industries Ltd. and Yangjiang Ewin Knife & Scissors Ltd. regarding Design Patent Infringement***

【Case No.: The Supreme Court (2013) Min Shen Zi No.29】

The Supreme Court held that if an accused product uses a design identical or similar to a patented design and additional patterns or color design factors as well, and if these additional patterns or color design factors are only extra added design factors, the addition of these design factors will have no substantial effect on the determination of infringement (Please refer to NTD IP CASE EXPRESS Issue No. 5 for details).

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

【Case No.: The Supreme Court (2013) Min Ti Zi No. 225】

The Supreme Court held that in the determination of whether a step sequence of a process under a method patent has the definitive effect on the protection scope of the patent so as to restrict the application of the equivalent principle when the step sequence changes, the key factors to be considered is whether the steps must be carried out in a certain sequence and whether a change in that sequence will result in substantial differences in the technical function or technical effects (Please refer to NTD IP CASE EXPRESS Issue No. 7 for details).

● ***Harbin Industrial University Xinghe Industry Ltd. vs. Jiangsu Runde Pipe Industry Ltd. regarding Patent Infringement***

【Case No.: The Supreme Court (2013) Min Shen Zi No. 790】

In this case, the limiting effects of the subject matter title on the patent protection scope and the limiting effects of a preceding independent claim cited by a following independent claim were clarified. The Supreme Court ruled that the subject matter title recorded in the claims shall be taken into consideration in defining the protection scope of the claims and that the actual limiting effects of such subject matter title on the protection scope of the claims depend on what kind of effects it has exerted on the theme itself. When determining the protection scope of parallel independent claims which cite preceding independent claims, though the features of the preceding independent claims should be considered, they do not necessarily exert limiting effects on the

parallel independent claims. The actual limiting effects should be determined based on their substantial influence on the technical solution or subject matter of the parallel independent claims (Please refer to NTD IP CASE EXPRESS Issue No. 4 for details).

IV. Cases about Determination of the Amount of Compensation for Patent Infringement and Patent Royalty Rate

Regarding the amount of compensation for patent infringement and the determination of patent royalty rate, the following cases of 2014 deserve our special attention.

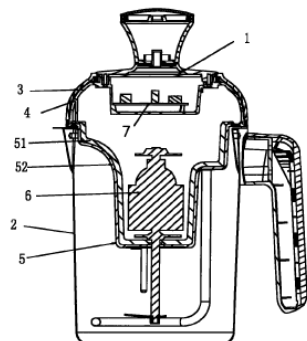
- ***GoerTek Inc. vs. Weifang Sanlian Household Electrical Appliances Ltd. and Loushi Electronics (Suzhou) Ltd. regarding Patent Infringement***

【Case No.: Weifang Intermediate Court (2013) Wei Zhi Chu Zi No. 255 and No. 256】

In April 2014, Weifang Intermediate Court made a part judgment about the two cases and ruled that an injunction be issued against the defendants and that the defendants compensate RMB37, 200, 000 to the plaintiff in each of the two cases, making the compensation paid by the defendants totaling RMB74, 400, 000 in the two cases. Patents involved in the two cases are two utility model patents of microphones. The judgment of the first instance includes (1) Weifang Sanlian Household Electrical Appliance Ltd. immediately stop selling Samsung GT-19500 cell phones installed with the infringing microphones; (2) Loushi Electronics (Suzhou) Co., Ltd. immediately stop manufacturing and selling the microphones infringing the utility model patent of GoerTek Inc.; (3) Loushi Electronics (Suzhou) Co., Ltd. compensate the plaintiff RMB74, 400, 000. What's worth attention is that the two cases both involved utility model patents, and the subject matter was only related to microphones. The plaintiff asserted that the compensation be calculated based on the loss of the patentee, which means the compensation shall be the multiplication of the number of the infringing products and the reasonable profit from each infringing product. To support their claims, the plaintiff produced a third-party auditing report to demonstrate the average profit of this product in this industry, the import and export data obtained from the customs and the manufacturing and sales records disclosed by Loushi Electronics (Suzhou) Co., Ltd. The two cases are now in the process of appeal in the Shandong Higher Court for the second instance trial.

● *Jiuyang vs. Supor* regarding Utility Model Patent Infringement

【Case No.: the Shandong Higher Court (2014) Lu Min San Zhong Zi No. 210 to No. 224】



(Patent No.: ZL200920133824.0)

Another patent infringement case with pretty high compensation being determined is *Jiuyang vs. Supor* utility model patent infringement. The case drew widespread attention because the compensation the plaintiff got at the first instance, which was RMB 5,400,000 supported by the second-instance court. Although only one utility model patent (ZL200920133824.0, “a double lower-cover soybean milk machine”) was involved, this patented utility model was exploited by the defendant in their 15 different models of soybean milk machines, which finally led to 15 second-instance judgments. In each of the 15 cases, Jiuyang claimed a compensation of RMB1,000,000, which is the maximum of the statutory damages for patent infringement, while the first-instance court decided a compensation of RMB360,000 in each case, which was affirmed by the second-instance court, making the total amount of compensation in the 15 cases reach RMB5,400,000.

● *Zhongshan Longcheng Ltd. vs. Hubei Tongbai Ltd.* regarding Design Patent Infringement

【Case No.: The Supreme Court (2013) Min Ti Zi No. 115】

In this case, the Supreme Court decided that the infringer must bear liabilities for repeated infringement after the settlement or the mediation agreement with the infringer came into effect and that the amount of compensation paid by the infringer to the infringer could be calculated based upon the compensation calculation method or the amount of compensation agreed on by both parties in the settlement or mediation agreement (Please refer to NTD IP CASE EXPRESS Issue No. 2 for details).

● *Huawei Technology Ltd. vs. InterDigital* regarding Abuse of Dominant Market Position

--- How to apply FRAND principle to determine the royalty rate of Standard-Essential Patents

【Case No.: the Guangdong Higher Court (2013) Yue Gao Fa Min San Zhong Zi No. 306】

In this case, the Guangdong Higher Court made an in-depth analysis on how to apply FRAND principle to determine the royalty rate of standard-essential patents under the framework of Chinese laws. The Guangdong Higher Court, referring to the patent royalty rate between InterDigital and Apple Inc. and the patent royalty rate between InterDigital and Samsung, and comprehensively considering the differences about the actual situations of the licenses between different parties, affirmed the judgment made by the first-instance court that InterDigital should license its standard-essential patents to Huawei at the royalty rate of 0.019% under the principle of FRAND.

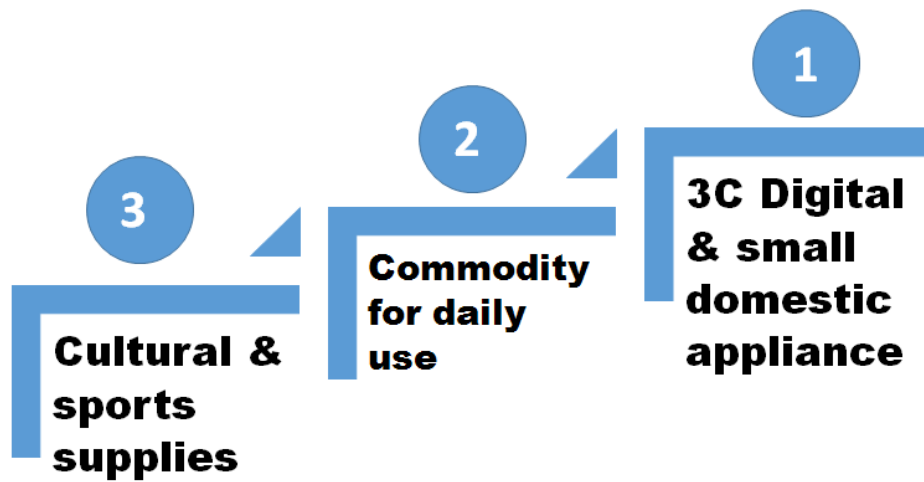
V. Patent Protection in E-Commerce

On December 19, 2014, Taobao released the *2014 Report on Joint Actions by Taobao and IP Offices*. According to the report, the collaboration between Alibaba Group and the SIPO was continuously strengthened in the year of 2014. From April to July of 2014, the IP right protection assisting centers of the provincial level and the city level of Zhejiang Province were stationed in the e-commerce platforms of Alibaba to carry out the special movement of protecting patents in the e-commerce field. In the joint IP protection actions, 343 cases, which involved 2,009 links and were about infringement of design patents, utility model patents and invention patents, were handled.

On December 15, 2014, the *Directive Opinion on Patent Protection in the Field of E-commerce*, the first one of its kind in China, was jointly issued by the Zhejiang Provincial IP Office and Alibaba Group. The directive opinion was aimed at establishing a new complaint handling mechanism for patent infringement under the e-commerce environment. In addition, the opinion made it clear to establish the daily contact system and the important cases notification system between the two sides and appoint specific persons as the daily work contacts by each side and hold joint meetings on a regular basis.

According to the statistics disclosed by Taobao, of the patent infringement disputes handled by Taobao, 74% are design patent infringement, 23% are utility model patent infringement, and 3% are invention patent infringement. Of all the industries involved in the infringement complaints, 3C digit and small household electrical appliances took the first place, commodities for daily use

took the second place, and stationery & sports supplies took the third place. Statistics from other resources showed that by the end of September 2014, there had been 1,137 brand holders having had IP cooperation with Alibaba.



COPYRIGHT

The year 2014 was an extraordinary year when numerous copyright disputes happened, some of which were very important cases or involved hot issues, such as the copyright dispute about the *Headlines of Today of news APP*, the piracy of QvodPlayer, the infringement caused by Tudou broadcasting *A Bite of China* without authorization, and the copyright infringement dispute between a famous Taiwan novelist Yao Qiong and a screenwriter Zheng Yu of the Mainland China. In this year, while [copyright protection on the Internet](#) was still a hot issue, another round of rapid development of Internet, especially mobile Internet, confronted us with unavoidable legal issues triggered by technological innovation.

I. Accelerating the Process of the Formulation and the Amendment of Copyright Law and Regulations.

The Third Amendment to the Copyright Law of China is in process, and the Draft Amendment, involving amendments to a wide range of aspects, such as the object of copyright, the content of copyright, the attribution of copyright, the liability of Internet Service Providers (ISP) and damages, etc. was open for public opinions and attracted extensive attention.

In the meantime, some regulations and judicial interpretations by the Supreme Court were promulgated so as to gradually perfect the legislation about copyright and to meet the requirements for copyright protection under the Internet environment.

- *Regulations on the Protection of Folk Literary and Artistic Works (exposure draft)* were issued.
- *The Method of Payment of Consideration for Using Literary Works*, which regulated the standards and methods for the payment of consideration for using literary works, was jointly issued by the China Copyright Office and the National Development and Reform Commission.
- *Regulations by the Supreme Court on the Application of Laws in the Trial of Civil Cases Involving Infringement of Personal Rights by Using Information Network* clearly defined the determination of whether the ISPs “know” the infringement and the determination of the ISPs’ faults in reproducing works published elsewhere through we-media and the degree thereof, which will make the fight against piracy under the environment of new media more powerful.

II. Copyright Disputes about Network Videos Taking up a Large Part of the Copyright Cases.

In the first half of 2014, the courts around the country accepted 29,546 copyright civil cases, taking up 62% of the IP cases accepted. The number of copyright cases involving Internet network, esp. disputes about the right to broadcast information on the Internet network, has been increasing rapidly. In 2014, copyright disputes about network videos took up a large part of the network copyright cases tried by the courts, and films and TV dramas became the chief targets of copyright infringement on the Internet network. Copyright disputes between Video websites or between video websites and Internet boxes were numerous.

- ***CNTV vs. Tudou Website regarding Reproduction of A Bite of China***

CNTV believed that Tudou severely infringed their network broadcasting right to the documentary *A Bite of China* by providing the online video-on-demand service for the documentary on their website during its hit period without getting CNTV's authorization and sued Tudou. The first-instance court decided that Tudou compensate CNTV RMB 248,000, which was sustained by the second-instance court.

- ***LeTV vs. Fengxing Website regarding Unauthorized Broadcast of "I Am A Singer"***

In July 2014, with regards the dispute about Fengxing infringing LeTV's exclusive network broadcasting right by broadcasting a TV program called "*I Am A Singer*" *Season II*, the Beijing Haidian District Court made the first-instance judgment that Fengxing stop the infringement and compensate LeTV RMB 500,000. It was said that *I Am A Singer Season II* was played on LeTV for over 1,500,000,000 times.

- ***Youku vs. Storm Codec regarding Infringement of Youku's Exclusive Network Broadcasting Right***

Youku owned the exclusive network broadcasting right to the five films and TV dramas at issue, including *The Bandage of Love*, but Storm Codec broadcasted the five works at issue at their Client without Youku's permission, which infringed Youku's copyright. The Beijing Shijingshan District Court ruled that Storm Codec's infringement be established and that Storm Codec compensate Youku RMB 292,000. It was said that Youku also preserved evidence of Storm Codec's infringement of their exclusive network broadcasting right to other over 60 films and TV drama and would bring court actions against Storm Codec successively.

- ***LeTV vs. MI Box regarding Copyright Infringement***

In July 2014, LeTV won the lawsuit against MI Box for their unauthorized broadcasting of LeTV's 10 video works, and the Beijing Haidian District Court ruled that MI Box compensate LeTV RMB 150,000.

III. New Problems about the Determination of Copyright Infringement and the Protection of Copyright on the Internet Network Caused by Technological Innovations

The copyright dispute about “*Headlines of Today*” triggered a heated discussion among the public about whether “transcoding” or “deep linking” constitute infringement, and whether the communication of copyrighted works on the newly emerging social communication networks, such as MicroBlog and WeChat, etc., and the broadcasting of published works elsewhere on we-media constitute copyright are hot issues, too. These new problems brought by technological innovations demand prompt solution. Judging from the current Internet network copyright cases, such issues as the uploading of digital works, digital libraries, the reproducing of works published elsewhere, the caching, the linking, the search engines, and P2P software and technical measures are controversial issues presently.

● ***Headlines of Today* Copyright Disputes**

In June 2014, the China Copyright Office carried out an investigation of *Headlines of Today* and believed that the transcoding and deep linking acts of *Headlines of Today* infringed the copyright owner’s network broadcasting right to their works. Afterwards, apart from making active rectifications, *Headlines of Today* removed all the infringing works rapidly and communicated with the media about getting the license to use the works for considerations. This was a good example about the involvement of administrative authorities in copyright disputes.

● **The First WeChat Copyright Infringement Dispute in Guangdong Province**

In this case, it was determined that reproducing works published elsewhere on the WeChat public platform constituted infringement. On September 2, 2014, the Zhongshan No.1 Intermediate Court made the first-instance judgment about the first WeChat copyright dispute in Guangdong Province. The court adjudicated that the defendant Zhongshan Storm Technology Company’s reproduction of the plaintiff’s copyrighted works on their WeChat public platform without permission infringed the plaintiff’s copyright and ruled that the defendant make a public apology to the plaintiff and compensate plaintiff the economic loss. The defendant filed an appeal, and the case is now under the second trial.

● **Video Websites Providing Deep Linking Service Constituting Infringement.**

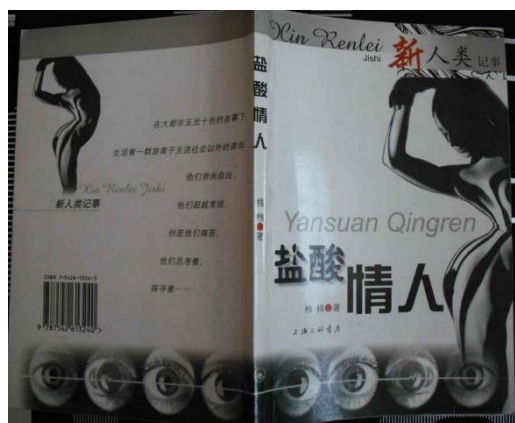
Bilibili Hikaru, a video website operated by Hangzhou Huandian Technology Company, provided online video-on-demand service for the film *American Dreams in China* without authorization. Recently, the Shanghai No. 1 Intermediate Court sustained the first-instance judgment that Hangzhou Huandian Technology Company compensate the copyright owner, Beijing Film Marketing Branch of Chinese Film Ltd., RMB 100,000.

In this case, the defendant argued that their website did not provide video uploading service and that the video at issue was at a link uploaded to their website from other websites by their users, so, as an ISP, they should not bear liabilities according to the “Safe Harbor” principle. It was found during the court trial that the video at issue was from Sina Video and was not stored in Bilibili Hikaru’s server. The court held that the service provided by the defendant was far beyond the linking service to which the “Safe Harbor” principle should be applied. Namely, the defendant did not just help their users locate information but could make them watch the videos on their website directly. Judging from the result that the users could watch the video at issue on the defendant’s website directly, not via the interfaces of other websites, the defendant’s website actually replaced the linked website to broadcast the video at issue, which constituted copyright infringement.

● **Shen Wang vs. Google**

【Case No.: the Beijing Higher Court (2013) Gao Min Zhong Zi No.1221】

- Determination of reasonable use
- One of the Top Ten Innovative IP Cases of 2013 tried by Chinese courts



This case was the first case about a writer suing Google regarding copyright infringement by the latter’s digital library in China. In both the first-instance judgment and the second-instance judgment, what reasonable use is was probed and elaborated in depth, which played a guiding role in the determination of reasonable use and the burden of proof in copyright infringement on the Internet network. In principle, unauthorized reproduction of a work shall be deemed as infringement unless legally provided otherwise, and the accused infringer should bear the burden of proof, proving that its use of the work is reasonable use. If the accused infringer fails to prove this, its use should be constructively regarded as infringement. If reasonable use is proved, the reproduction of the work specifically for the use of it shall also be judged. Even though the use is reasonable, the reproduction may constitute infringement.

IV. Determination of the ISP's Liabilities

The amended *Regulations on the Protection of Information Network Broadcasting Right*, promulgated in 2013, defined the safe harbor provisions for ISPs. These provisions were made to balance the interest of right owners, the ISPs and the public. In practice, determination of the ISP's faults in the infringement shall be based on an accurate consideration of the characteristics and the reality of the information network environment. More and more cases told us that the ISPs could not be completely exempted from the liabilities they should bear by the "Safe Harbor" provisions.

● *Beijing Zhong Qing Wen vs. Baidu for Copyright Infringement*

【Case No.: the Beijing Higher Court (2014) Gao Min Zhong Zi No.2045】



In August 2013, Beijing Zhong Qing Wen Media Company sued Baidu against their unauthorized providing of their copyrighted book *English Learning Diary of Koala Xiaowu* through the Baidu Library to the Internet users. Baidu argued that Baidu Library was an information-storing space and that the book at issue was uploaded into the server of Baidu Library by the users. Thus, it just provided the information-storing space to the users and shall be exempted from the compensation liabilities according to the "Safe Harbor" principle since it took down the book at issue immediately after receiving the copyright owner's takedown notice.

With regards Baidu's aforementioned arguments, the court held that the "Safe Harbor" principle applied to the ISPs for providing information-storing space does not mean that the ISP is obligated to stop the infringement only after they receive the right owner's takedown notice. The ISPs are obligated to duly review the uploaded work when the reading and the downloading of it has reached certain degree. Failing to do this, the ISPs may be held liable as contributory infringers for their subjective faults.

The Beijing No.1 Intermediate Court decided that Baidu be liable as a contributory infringer and compensate Beijing Zhong Qing Wen RMB 400,000. Both Beijing Zhong Qing Wen and Baidu were not satisfied with the first-instance judgment and filed an appeal with the Beijing Higher Court, which held that the first-instance court's determination of Baidu's contributory infringement was well grounded and affirmed the original judgment.

V. Strengthening Administrative and Judicial Protection of Copyright

In June 2014, the Shenzhen Market Supervision Bureau announced the grounds on which QvodPlayer was fined RMB 260,000,000. The Shenzhen Market Supervision Bureau preliminarily determined that QvodPlayer broadcasted such TV dramas and entertainment TV programs as “*Life of A Hot Mama*” and “*Beijing Love Story*”, etc. on the Internet network without permission and obtained illegal profits of RMB 86,716,000 thereby. According to the law, QvodPlayer was fined three times of its illegal profits, namely, RMB 260, 000, 000.

In the year of 2014, the China Copyright Office, the National Internet Information Office, and the Ministry of Industry and Information and the Ministry of Public Security jointly launched a special project called “Sword Net 2014” to crack down on copyright infringement and piracy on the Internet. Through this special project, numerous copyright infringement and piracy cases were handled. Most of the cases involved administrative penalties, and some even involved criminal penalties. For example, a Mr. Wang in Shanghai was convicted of copyright infringement offences for selling piratical ISO Standards on the Internet. The Shanghai “Sheshou Website” was fined RMB 100,000 and ordered to close the website for infringing the copyright to some film and TV works and captions.

Judicial protection of copyright was strengthened, too. For example, in the case regarding infringement of the copyright to the novel entitled *Immortality*, the court decided that the defendant compensate the plaintiff RMB 3,000,000, which is the largest amount of compensation so far in China regarding infringement of the copyright to one single work. In the case where Ku Wo Music Website reproduced Xuan Ting Company’s copyrighted novels into audio books, the court adjudicated that Ku Wo compensate Xuan Ting Company over RMB 440,000. In addition, in the case that Yao Qiong sued Zheng Yu and four other defendants for copyright infringement, the Beijing No.3 Intermediate Court publicly adjudicated that the five defendants jointly compensate Yao Qiong RMB 5,000,000.

● ***Shanghai Xuan Ting Entertainment Information Technology Ltd. vs. Beijing Huan Xiang Zong Heng Network Technology Ltd. regarding Infringement of the Network Broadcasting Right.***

【Case No.: the Shanghai No.2 Intermediate Court (2013) Hu Er Zhong Min Wu (Zhi) Chu Zi No.191】



In this case, the court adjudicated the compensation of RMB 3,000,000, which is the largest amount of compensation so far regarding infringement of the information network broadcasting right to a single work in China. Speaking of compensation, in general, if the actual loss of the right owners or the illegal profits of the infringers can not be ascertained, the statutory compensation, which will not be more than RMB 500,000 generally, will be decided by the court at their discretion. In this case, the first-instance court decided a compensation that is far more than the highest statutory compensation by chiefly referring to the revenue-sharing of RMB 1,730,000 the defendant received from the third parties as evidenced by the plaintiff and comprehensively considering the evidence submitted, the economic value of the work *Immortality* at issue, the degree of social influence and public concern, the manners of the defendant's infringement, the duration of infringement and the consequence of infringement, etc., and by adopting the standard of preponderant evidence. On September 29, 2014, the Shanghai Higher Court made a final decision, affirming the original judgment, which indicated that the judicial authorities' determination and efforts to strengthen the protection of copyright and provided good reference for using the rule of preponderant evidence to claim for damages in the future as well.

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